

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

DRIVE PLANNING, LLC, and
RUSSELL TODD BURKHALTER,

Defendants,

and

JACQUELINE BURKHALTER,
THE BURKHALTER RANCH
CORPORATION, DRIVE
PROPERTIES, LLC, DRIVE
GULFPORT PROPERTIES LLC,
and TBR SUPPLY HOUSE, INC.,

Relief Defendants.

Case No. 1:24-cv-03583-VMC

RECEIVER'S MOTION TO APPROVE:

(I) COMMENCEMENT OF ANCILLARY PROCEEDINGS TO RECOVER NET GAINS, COMMISSIONS, AND OTHER IMPROPER TRANSFERS TO THIRD PARTIES; (II) IMPLEMENTATION OF SETTLEMENT PROCEDURES; AND (III) CONTINGENCY FEE ARRANGEMENTS IN CERTAIN CIRCUMSTANCES, ON AN EXPEDITED BASIS TO MEET AUGUST 13, 2025 FILING DEADLINE FOR CERTAIN CLAIMS

Kenneth D. Murena, as Court-Appointed Receiver (the "Receiver") in the above-captioned action, pursuant to this Court's equitable powers in this equity

receivership case and Local Rules 5.1 and 7.1, moves the Court for entry of an order, substantially in the form of the proposed order the Receiver attaches as *Exhibit A*, approving the Receiver's: (i) commencement of ancillary proceedings to recover net gains, commissions, and other improper transfers to third parties after conferring with the SEC; (ii) implementation of settlement procedures; and (iii) engagement of court-approved counsel on contingency fee basis in certain circumstances subject to approval of SEC, before the August 13, 2025 deadline to commence certain actual fraudulent transfer claims, and in support states as follows:

OVERVIEW

Russell Todd Burkhalter, through his entity Drive Planning, LLC (“Drive Planning”), from 2020 to 2024, ran a Ponzi scheme raising approximately \$380 million from approximately 2,400 investors by, among other things, offering and accepting investments in alleged unregistered securities.

The Securities and Exchange Commission (“SEC”) brought this enforcement action (“SEC Enforcement Action”) against Mr. Burkhalter and Drive Planning and, among other things, requested the Court appoint a receiver, which the Court did in its Receivership Order.¹ The Receivership Order also created a “Receivership

¹The Court entered the Receivership Order on August 13, 2024 (“Receivership Order”). *See* ECF No. 10.

Estate” comprised of all of the assets of Drive Planning as defined in the Receivership Order.

Part of the Receiver’s duties under the Receivership Order are to administer the Receivership Estate for the benefit of Drive Planning’s investors, which includes commencing litigation through ancillary proceedings.

As with most Ponzi schemes, Drive Planning paid some of its investors more money back than they had invested (“Net Gains”). But Drive Planning paid those Net Gains to investors with other investors’ funds (rather than actual profits on their investments), making those Net Gains recoverable by the Receiver under applicable law. The Receiver, therefore, seeks authority to commence ancillary proceedings against certain investors to recover the Net Gains.

Drive Planning, to grow its Ponzi scheme, used individuals and their entities to solicit investors (“Agents”) and in exchange paid those Agents commissions from investor funds (“Commissions”). The Receiver claims the Commissions are recoverable from the Agents under applicable law because, among other reasons, the investment products were illegal unregistered securities, which were sold without good faith and proper due diligence and for no benefit to Drive Planning. The Receiver seeks to commence ancillary proceedings to recover the Commissions.

In addition to Net Gains and Commissions, Drive Planning through its principal Mr. Burkhalter transferred investor funds to third parties who had no

legitimate business relationship with Drive Planning (“Improper Third-Party Transfers”). These recipients include individuals with personal relationships to Defendant Burkhalter unrelated to the business of Drive Planning. These transfers were not made in exchange for reasonably equivalent value and did not serve any legitimate purpose of Drive Planning. The Receiver seeks authority to commence ancillary proceedings to recover these improper transfers under applicable law.

The Receiver has sent demand letters to those individual and entities who (and that) received Net Gains and/or Commissions according to Drive Planning’s books and records (“Demand Recipients”). The Receiver seeks to resolve these claims in an efficient and effective manner through out-of-court resolutions or prior to court disposition (“Settlements” or a “Settlement”) if possible. The Receiver, to facilitate Settlements, seeks to implement certain procedures (“Settlement Procedures”) that permit him to enter into and effectuate Settlements that meet certain benchmarks without notice, hearing, and (prior or subsequent) court approval to conserve resources for all parties and the Court. The Receiver crafted the Settlement Procedures with the recognized legal standard for approval of settlements in equity receivership cases as a guidepost. The Receiver describes the Settlement Procedures in detail below.

Finally, the Receiver seeks authority to potentially elect to be engaged to commence and prosecute certain ancillary proceedings to recover Net Gains,

Commissions, and/or Improper Third-Party Transfers on a contingency fee basis, subject to SEC approval, to absorb the potential risk of administrative expenses attendant to litigation for the benefit of the Receivership Estate. The Receiver seeks approval of contingency fee procedures (“Contingency Fee Procedures”) establishing the conditions for his and his counsel’s engagement should they elect to proceed on that basis in certain ancillary proceedings.

Given that the statute of limitations period for certain actual fraudulent transfer claims may be deemed to expire on August 13, 2025, the Receiver respectfully requests that the Court consider this motion on an expedited basis and enter an order granting it before that date.

MEMORANDUM OF LAW

A. The Court’s Equitable Powers to Fashion Appropriate Relief in Equity Receiverships

Courts in equity receiverships have broad equitable powers to fashion relief that is consistent with purposes of the receivership. *See SEC. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (“A district court has broad powers and wide discretion to determine relief in an equity receivership.”). Part of this relief incorporates empowering the court-appointed receiver to administer assets of the receivership estate, which includes asserting claims against third parties and settling those asserted claims.

The learned treatise on federal equity receiverships by Clark clearly makes this point:

Since the court has authority to authorize a receiver to collect assets of a corporation, it has the further authority to authorize the receiver to sue to collect the assets of the corporation. It naturally follows, as a necessary corollary of the foregoing, that the receiver has the power, when so authorized by the court, to compromise claims either for or against the receivership and whether in suit or not in suit.

3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d ed. 1959).

Further, district courts have jurisdiction over the subject matter of claims that are ancillary to the receivership and SEC enforcement actions and settlement agreements related to those ancillary claims. *SEC v. Pinnacle Dev., Partners, LLC*, No. 06 CV 2431, 2008 U.S. Dist. LEXIS 125910, at *7 (N.D. Ga. June 1, 2008) (“Because the Receiver’s claims against Kunkel are ancillary to the receivership and the SEC Enforcement Action, this Court has jurisdiction over the subject matter of the claims and the Settlement Agreement.”).

The Court, therefore, has authority to grant the Motion as it is consistent with the principal aims of this receivership and relates to commencement and settlement of ancillary proceedings, which, when filed, will be within this Court’s ancillary jurisdiction.

B. Ancillary Proceedings to Recover Net Gains, Commissions, and/or Improper Third-Party Transfers

The Receiver seeks authority to commence ancillary proceedings against those investors who received Net Gains, those Agents who received recoverable Commissions, and those third parties who received improper transfers, after consulting with SEC counsel. Given that several investors were also Agents who received Commissions but had no knowledge of the fraudulent nature or activities of Drive Planning, the Receiver proposes to combine the investment returns with the Commissions that such investor/Agents received from Drive Planning in calculating the recoverable Net Gains or Commissions to be sought in the ancillary proceedings. In the event the total amount that an investor/Agent received from Drive Planning (in the form of investment returns and Commissions) does not exceed the total amount invested, the Receiver will not pursue an ancillary proceeding against such investor/Agent.

The Receiver and his team, upon reviewing and analyzing the financial records of Drive Planning, discovered that while Drive Planning was perpetrating its Ponzi and/or fraudulent scheme, Drive Planning transferred substantial sums of investor funds to: (i) investors who received Net Gains; (ii) Agents in the form of Commissions; and (iii) third parties who had a personal relationship with Mr. Burkhalter.

The Receiver sent demand letters to the Demand Recipients and has begun to engage in discussions concerning Settlements pertaining to Net Gains, Commissions, and Improper Third-Party Transfers. But, in all likelihood, the Receiver will have to commence ancillary proceedings to prosecute claims to recover the Net Gains, Commissions, and/or Improper Third-Party Transfers and seeks approval to do so in this Motion.

1. Net Gains are Recoverable

Under well-established principles of law (including the law pertaining to fraudulent transfers and unjust enrichment), investors of a debtor later determined to constitute or operate a Ponzi scheme are not entitled to retain Net Gains (payments in excess of their investments), as those funds are considered fraudulently transferred from other investor deposits without providing legitimate value in return for the Net Gains. *See Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011) ("In the case of Ponzi schemes, the general rule is that a defrauded investor gives 'value' to the Debtor in exchange for a return of the principal amount of the investment, but not as to any payments in excess of principal."). Courts consistently hold that investors must return the Net Gains they received so that the remaining assets can be equitably distributed among defrauded investors that suffered investment losses. "The policy justification is ratable distribution of remaining assets among all the defrauded investors. The 'winners' in the Ponzi scheme, even if innocent of any fraud

themselves, should not be permitted to 'enjoy an advantage over later investors sucked into the Ponzi scheme who were not so lucky.'" *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) (quoting *In re United Energy Corp.*, 944 F.2d 589, 596 (9th Cir. 1991)).

Given the scale of the Net Gains, the Receiver estimates these ancillary proceedings have the potential to return millions of dollars to the Receivership Estate, significantly benefiting the defrauded investors.

The Receiver, therefore, seeks to commence ancillary proceedings to recover the Net Gains from investors to ensure that those who unjustly benefited from the scheme do not retain an unfair advantage over those who lost their investments.

2. Commissions are Recoverable

Drive Planning operated through a network of agents who marketed and sold Drive Planning's financial products to investors. These Agents were compensated through Commissions, which were directly tied to investor funds flowing into the scheme. Drive Planning paid tens of millions of dollars to these Agents, many of whom actively promoted Drive Planning's fraudulent investment products without conducting proper due diligence or with reckless disregard for the Ponzi-like structure of the operation.

These Commissions (paid from investor funds) constitute fraudulent transfers and unjust enrichment benefits under applicable law because they were: (i) made

with funds derived from Drive Planning's fraudulent Ponzi scheme: (ii) paid pertaining to soliciting and securing investor funds relating to illegal, unregistered securities; (iii) not received in good faith; and (iv) not paid in exchange for reasonably equivalent value to Drive Planning. *Hays v. Adam*, 512 F. Supp. 2d 1330, 1343 (N.D. Ga. 2007) (finding that commissions were derived from investor funds rather than legitimate business activities, making them subject to recovery by the receiver).

The Receiver seeks to commence ancillary proceedings to pursue claims against these Agents to recover Commissions that were improperly paid for facilitating the fraud. Moreover, many of these Agents acted as knowing or willfully blind participants in the fraud, continuing to sell Drive Planning's illegal investment products even after red flags emerged.

Given the scale of these Commissions, the Receiver estimates these ancillary proceedings have the potential to return millions of dollars to the Receivership Estate, significantly benefiting the defrauded investors.

The Receiver, therefore, seeks authority to commence ancillary proceedings to prosecute claims against Agents for recovery of the Commissions, after conferring with the SEC.

3. Improper Third-Party Transfers are Recoverable.

Drive Planning, through its principal Defendant Burkhalter, transferred investor funds to third parties who had no connection to Drive Planning's business operations. These third-party recipients include individuals and entities who (and that) received payments based on personal relationships with Defendant Burkhalter or entities involved in business ventures unrelated to Drive Planning's investment offerings. These transfers served no legitimate business purpose and were not supported by reasonably equivalent value in exchange for the funds received.

Such transfers constitute classic examples of fraudulent transfers under applicable law and are also recoverable under principles of unjust enrichment. *See Jones v. Tauber & Balser, P.C.*, 503 B.R. 162, 183 (N.D. Ga. 2013) (finding that a transfer is fraudulent if given without receiving a reasonably equivalent value in exchange for the transfer). Courts consistently hold that personal or gratuitous transfers made from Ponzi scheme proceeds are subject to clawback, particularly where the recipient had no good faith basis to believe the transfers were legitimate compensation or consideration and were not made for reasonable equivalent value.

The Receiver, therefore, seeks authority to commence ancillary proceedings to pursue recovery from these third parties. These claims are expected to target recipients of funds transferred directly from Drive Planning bank accounts containing investor funds. The recovery of these improper transfers will allow the

Receiver to further maximize the assets available for distribution to victims of the fraud.

Given the nature and extent of these improper transfers, the Receiver anticipates that these proceedings may result in substantial recoveries for the Receivership Estate and contribute meaningfully to the equitable distribution of funds to defrauded investors.

The Receiver, therefore, seeks to commence ancillary proceedings to recover the Improper Third-Party Transfers to ensure that those who unjustly benefited from Drive Planning's investor funds do not retain amounts for which they provided no reasonably equivalent value to Drive Planning.

C. Settlement Procedures

Litigation is inherently expensive and risky for both plaintiffs and defendants. Settlements prior to the commencement of litigation or prior to court disposition reduces and eliminates risk.

When considering a settlement proposed for approval by a court-appointed equity receiver, the court does not “substitute its judgment for that of counsel” but instead “[it] is called upon to be impartial and neutral, favoring neither the proponents of the settlement nor those who are opposed or absent.” *SEC v. Pinnacle Dev., Partners, LLC*, 2008 U.S. Dist. LEXIS 125910, at *8. Rather, to approve a settlement offered by a court-appointed receiver in a federal equity receivership, the

district court must find that the settlement is fair, adequate, and reasonable, and not the product of collusion between the parties. *See Sterling v. Steward*, 158 F.3d 1199, 1202-1203 (11th Cir. 1998).

To determine whether a settlement in a federal equity receivership proceeding is fair, courts in the Eleventh Circuit examine the following six fairness factors: “(1) the likelihood of success; (2) the range of possible [recovery]; (3) the point on or below the range of [recovery] at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.” *Sterling*, 158 F.3d at 1203 n.6 (adopting the six-factor test for fairness enunciated in *Bennett v. Behring Corp.*, 737 F.2d 982, 984 (11th Cir. 1984)). The Eleventh Circuit has told us that “[d]etermining the fairness of the settlement is left to the sound discretion of the trial court and [it] will not overturn the court’s decision absent a clear showing of abuse of that discretion.” *Id.* at 1202-1203.

The Receiver considered the forgoing legal standard when developing the Settlement Procedures and submits that such procedures contemplate Settlements that meet the required standard. As such, approval of the Settlement Procedures constitutes an effective approval of all such Settlements that comply with the Settlement Procedures.

The Receiver seeks to implement the following Settlement Procedures to permit him to enter into and effectuate Settlements with investors and/or Agents (each a “Settling Party”) without (prior or subsequent) notice, hearing, or court approval that meet the following conditions (“Pre-Approved Settlements”):

1. ***Pre-Approved Settlement Payment Range***: Settlement payments that are between: (i) 100% to 60% of the total amount of Net Gains, Commissions, and/or Improper Third-Party Transfers totaling \$500,000 or more dollars; (ii) 100% to 70% of the total amount of Net Gains, Commissions, and/or Improper Third-Party-Transfers totaling between \$499,999 and \$100,000; and (iii) 100% to 80% of the total amount of Net Gains, Commissions, and/or Improper Third-Party Transfers totaling between \$99,000 and \$0 are pre-approved (“Pre-Approved Settlement Range”), and such a payment shall constitute a “Settlement Payment”. *See SEC v. Creative Cap. Consortium, LLC*, No. 08-81565-CV-HURLEY/HOPKINS, 2014 U.S. Dist. LEXIS 196617, at *3 (S.D. Fla. Dec. 30, 2014) (“In its FINRA claim, Receiver sought \$5,863,960.80 from TD Ameritrade. Receiver has settled the TD Arbitration for \$1,250,000, or 21% of the amount it sought.”) (internal citations omitted); *see also SEC v. Credit Bancorp, Ltd.*, 99 Civ. 11395 (RWS), 2001 U.S. Dist. LEXIS 21717, at *6 (S.D.N.Y. Dec. 20, 2001) (“Settlement is not an exact science.”). The total amount recorded on Drive

Planning's books and records shall be the total amount from which the percentage is evaluated, unless the Demand Recipient provides the Receiver with acceptable written, third-party verifiable proof, that he/she/it actually received a lower amount.

2. *Factual or Legal Defenses:* The Receiver, in his business judgment and discretion, may deviate up to an additional 50% from the Pre-Approved Settlement Range if a Demand Recipient, either pre- or post-suit establishes through documentary evidence and/or sworn testimony the substantial likelihood of prevailing on a factual or legal defense such that the Receiver believes the claim against such Demand Recipient has a limited likelihood of success. *See SEC v. Creative Cap. Consortium, LLC*, 2014 U.S. Dist. LEXIS 196617, at *3 (“In defending the Settlement, Receiver asserts that the TD Arbitration had a limited likelihood of success. This is especially due to the uncertainty that would arise from prosecuting a FUFTA claim before an arbitration panel unfamiliar with Florida law.”).

3. *Financial Hardship:* If a Demand Recipient, either pre-suit or post-suit, represents to the Receiver that he/she/or it is financially unable to repay in full the Net Gains, Commissions, and/or Improper Third-Party Transfers (“Financial Hardship”) and they demonstrate proof of that Financial Hardship to the Receiver through provision of the financial disclosures the

Receiver requests (“Financial Disclosures”) along with a financial declaration verifying the veracity of the Financial Disclosures (“Financial Declaration” together with the Financial Disclosures “Financial Hardship Support”), the Receiver may enter into Settlements requiring Settlement Payments for less than the Pre-Approved Settlement Range, down to 0% of the amount of Net Gains, Commissions, and/or Improper Third-Party Transfers if justified by the Financial Hardship Support, in the Receiver’s business judgment and discretion.

4. *Pre-Approved Settlement Term and Default Remedies:* If the Settling Party demonstrates Financial Hardship through provision of the Financial Hardship Support to the Receiver, the Receiver may, in the exercise of his business judgment and discretion, agree to payment of the Settlement Payment over a term of up to twelve (12) months (“Pre-Approved Settlement Term”). If the Settling Party and the Receiver enter into a Settlement that provides for a term within the Pre-Approved Settlement Term, that Settlement shall contain default remedies of, at minimum, agreement: (i) that service of process for any proceeding to enforce the Settlement Agreement may be effected on Settling Party at the address set forth in the Settlement Agreement for Notice; (ii) to waiver of all defenses and affirmative defenses, other than set-off regarding to payments the Receiver actually received from Settling

Party, and to waiver of any right to a jury trial regarding enforcement of the Settlement Agreement; and (iii) to the stipulation to expedited entry of an agreed upon consent judgment for 125% of the amount of outstanding Settlement Payment (giving credit to payments the Receiver actually receives from Settling Party) in an ancillary proceeding whether dismissed as to the Settling Party and pending as to other defendants or initiated as a separate ancillary proceeding to enforce the Settlement (“Default Remedies”). The Receiver shall, prior to implementing the Default Remedies, give the defaulting Settling Party written notice pursuant to the terms of the Settlement Agreement (defined below) and seven (7) days to cure the default (“Cure Period”). If the default remains uncured after expiration of the Cure Period, the Receiver may, in his business judgment and discretion, accelerate the outstanding unpaid amount of the Settlement Payment and proceed to enforce the Default Remedies without further notice, including by seeking entry of the agreed upon consent judgment by filing a verified agreed motion for entry of consent judgment within twenty-one (21) days after expiration of the Cure Period.

5. *Pre-Approved Form Settlement Agreement:* The Pre-Approved Settlements shall be memorialized in a written settlement agreement

(“Settlement Agreement”) substantially in the form attached as *Exhibit B*, which contains the following material terms:

a. ***Settlement Payment and Term (if any)***: Description of the Settlement Payment, Settlement Term (if any) and Default Remedies (if any).

b. ***Releases***: Description of the release in favor of the Receiver, Drive Planning, and Receivership Estate and release in favor of Settling Party, with such releases to not release liability under the Settlement Agreement.

c. ***Attorneys’ Fees and Costs***: Each party shall pay their own attorneys’ fees and costs up through and including full and final consummation of the Settlement Agreement, except that the Receiver shall be entitled to recovery of attorneys’ fees and costs incurred in connection with enforcement of the Settlement Agreement.

d. ***Jurisdiction and Venue***: Consent to personal jurisdiction and venue before this Court as the sole and exclusive jurisdiction to enforce the Settlement Agreement by, among other things, implementation of the Default Remedies.

e. ***Dismissal of Claims Against Settling Party***: If the Receiver commenced an ancillary proceeding against a Settling Party

and that party fully complies with all obligations under the Settlement Agreement, the Receiver shall dismiss, with prejudice, all claims pending against Settling Party that were released in the Settlement Agreement.

f. *Miscellaneous Provisions:* The Settlement Agreement contains other miscellaneous provisions that are standard in commercial settlement agreements.

The Receiver submits that the foregoing Settlement Procedures provide for the effective and efficient resolution pre- or post-suit of claims to recover the Net Gains, Commissions, and/or Improper Third-Party Transfers on terms that meet the standard for approval of settlements in equity receivership cases.

D. Contingency Fee Procedures

The Receiver and his court-approved local counsel and lead counsel are presently engaged on an hourly basis as disclosed in the Receiver's professional retention application and as approved by court order. *See* ECF Nos. 21 and 24. The Receiver believes that certain claims against either investors or Agents to recover Net Gains, Commissions, and/or Improper Third-Party Transfers may warrant engagement of local counsel and/or lead counsel on a contingency fee basis to allow the Receivership Estate to benefit from any recovery the Receiver obtains from such

claim without the obligation to pay attorneys' fees if there ultimately is no recovery ("Contingent Litigation Claims").

The Receiver requests that this Court approve the following Contingency Fee Procedures that permit the Receiver to, in the exercise of his business judgment and discretion: (i) elect for his court-approved professionals to commence ancillary proceedings on a contingency fee basis, subject to SEC approval prior to commencing each such proceeding; or (ii) convert an otherwise hourly fee engagement pertaining to an ancillary proceeding to a contingency fee engagement, subject to SEC approval. The Receiver submits that this flexibility allows him and his professionals to evaluate potential claims and pursue them in a manner that is most economically advantageous for the Receivership Estate.

Prior approval of this discretionary process also permits the Receiver to maintain the maximum positional strength when attempting to settle or prosecute an ancillary proceeding without the adversary attempting to leverage the Receiver's counsel's fee arrangement in settlement negotiations or prosecution of the claim.

1. Contingency Fee Engagement and Payment Approval Process

If the Receiver and his court-approved counsel elect to proceed with a Contingent Litigation Claim at any stage in the litigation process (pre-suit up to the commencement of trial preparation), subject to SEC approval, such arrangement shall comply with the applicable rules governing professional conduct implemented

by the Bar of State in which the professional is licensed or that governs that professional's conduct ("Contingency Fee"). The Receiver and his court-approved counsel shall document the agreement concerning pursuing the Contingent Litigation Claim in exchange for a Contingency Fee in a separate engagement letter setting forth the terms of the engagement in a manner that complies with the applicable rules governing professional conduct implemented by the Bar of State in which the professional is licensed or that governs that professional's conduct. The Contingency Fee would be paid from any gross recovery from the Contingent Litigation Claim ("Recovery").

Before the Receiver and his counsel are paid the above-proposed Contingency Fee from any gross Recovery resulting from a Contingent Litigation Claim or other asset recovery effort related to Drive Planning, the Receiver shall file a motion with this Court seeking final allowance and payment of the Contingency Fee and any Expenses² incurred or advanced by the Receiver and/or his counsel in connection with such asset recovery efforts under the provisions set forth below.

² Expenses shall mean pre-suit expenses and post-suit expenses for, *inter alia*, expert witnesses, electronic discovery vendors, forensic information technology vendors, jury consultants, demonstrative evidence consultants, photocopying, scanning, digitizing and document imaging/coding, postage, facsimiles, long-distance telephone calls, travel, courier and other delivery services, computerized research, deposition and court reporting transcript and other fees, and videography fees and costs. No expenses will be charged to the Estate for word processing or secretarial overtime in connection with Contingent Litigation Claims or other asset recovery efforts.

Upon the Court's allowance of the Contingency Fee payment and Expenses reimbursement, the Receivership Estate shall pay the Receiver and his court-approved counsel such Contingency Fee and Expenses advanced by the Receiver and his court-approved counsel under circumstances where they elected to do so, as set forth below.

2. Payment of Expenses

The Receiver proposes that the Receivership Estate bears the costs for Expenses incurred in connection with the Receiver's prosecution of a Contingent Litigation Claim and that the Receiver be authorized to pay such Expenses as they are incurred from the funds held in the fiduciary accounts the Receiver maintains for the Receivership Estate, without further court order. Presently, the Receivership Estate possesses significant resources such that payment of Expenses is reasonable and appropriate. If, at any time, the Receivership Estate lacks sufficient resources to pay an Expense and the Receiver and/or his court-approved counsel elected to advance such Expense, such advancement would be reimbursed from the gross Recovery separate from the Contingency Fee.

3. Time Records

The Receiver understands and agrees that he and his counsel must keep accurate records of their time and the hourly legal fees incurred in connection with the Contingent Litigation Claims and other asset recovery efforts related to the

Receivership Estate, but does not propose for the purposes of the above-proposed contingency fee arrangement to keep those records in the detail required for professionals whose employment and compensation is billed on an hourly basis. If the Receiver and his counsel elect to pursue an ancillary proceeding to recover a Net Gain and/or Commission on a contingency fee basis, the entries for the time expended and legal services provided in connection with such a Contingent Litigation Claim and related asset recovery efforts will not be included in the Receiver's and his counsels' monthly billing statements for the Receivership Estate submitted with the Receiver's interim Fee Applications.

Further, the Receiver understands and agrees that he and his counsel will maintain records of the Expenses they incur in connection with their asset recovery efforts related to the Receivership Estate, including ancillary proceedings to recover Net Gains, Commissions, and/or Improper Third-Party Transfers on a contingency fee basis. Such Expenses will be separately itemized on the Receiver's and his court-approved counsels' monthly billing statements based on the particular service involved and out-of-pocket Expense incurred or advanced, in addition to Expenses incurred for general receivership, administrative, and other matters. And the Receiver and his counsel will record these Expenses in a manner and at rates that are consistent with the SEC's Billing Instructions to which the Receiver agreed prior to his appointment.

The Receiver will submit his and his counsels' records of Expenses (within monthly billing statements) with his interim Fee Application or his motions for final allowance and payment of Contingency Fees.

REQUEST FOR EXPEDITED CONSIDERATION AND RELIEF

The Receiver respectfully submits that expedited consideration of this Motion is necessary to preserve the Receivership Estate's ability to recover transfers that may soon be time-barred under applicable law. Specifically, the Georgia Uniform Fraudulent Transfers Act ("GUFTA") provides that claims for actual fraudulent transfers (*i.e.*, transfers made with actual intent to defraud a creditor) must be brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant". *See* O.C.G.A. § 18-2-79. The Receiver was appointed on August 13, 2024, and has diligently investigated Drive Planning's financial records and identified claims that may be subject to this one-year discovery rule. To avoid forfeiting valid claims due to the expiration of statutory deadlines, the Receiver respectfully requests that this Court consider the Motion on an expedited basis to ensure the timely commencement of certain ancillary proceedings prior to the August 13, 2025 deadline.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Receiver respectfully requests that the Court enter an order, substantially in the form of the proposed order attached hereto as *Exhibit A*, approving the Receiver's: (i) commencement of ancillary proceedings to recover Net Gains, Commissions, and Improper Third-Party Transfers after conferring with the SEC prior to commencing any such proceeding; (ii) implementation of the Settlement Procedures set forth herein; and (iii) engagement of court-approved counsel on contingency fee basis in certain circumstances, subject to SEC approval, as set forth in the Contingency Fee Procedures herein; and granting any such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/Russell Landy
Russell Landy, Esq.
Florida Bar No. 44417
Admitted Pro Hac Vice

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as Court-Appointed Receiver*

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CERTIFICATION OF PRE-FILING CONFERENCE

The undersigned counsel certifies that, prior to filing this motion, the Receiver conferred with counsel for the SEC, Defendant Burkhalter, and counsel for Relief Defendants, regarding the relief requested herein. Counsel for the SEC and counsel for the Relief Defendants informed undersigned counsel that they have no objections to the requested relief. Mr. Burkhalter informed undersigned counsel that he opposes the requested relief.

CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on August 5, 2025, I electronically filed the foregoing *Motion* using the CM/ECF System that will automatically send e-mail notification of such filing to all registered attorneys of record.

I further certify that I prepared this document in 14-point Times New Roman font and complied with the margin and type requirements of this Court.

Dated: August 5, 2025.

s/Russell Landy
Russell Landy, Esq.
Florida Bar No. 44417
Admitted Pro Hac Vice

EXHIBIT A

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

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[PROPOSED]

**ORDER GRANTING RECEIVER'S MOTION TO APPROVE:
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CERTAIN CIRCUMSTANCES, ON AN EXPEDITED BASIS TO MEET
AUGUST 13, 2025 FILING DEADLINE FOR CERTAIN CLAIMS**

THIS MATTER came before the Court upon the *Receiver's Motion to Approve: (I) Commencement of Ancillary Proceedings to Recover Net Gains, Commissions, and Other Improper Transfers to Third Parties; (II) Implementation of Settlement Procedures; and (III) Contingency Fee Arrangements in Certain Circumstances, on and Expedited Basis to Meet August 13, 2025 Filing Deadline for Certain Claims* [ECF No. ____] (the "Motion to Approve").¹ The Court has reviewed the Motion to Approve and noted that the SEC and Relief Defendants have no objection to the requested relief and that no objections were filed or otherwise asserted. Therefore, with the Court being duly advised in the premises, it is **ORDERED** as follows:

1. The Motion to Approve [ECF No. __] is **GRANTED**.
2. The Receiver is **AUTHORIZED** to commence ancillary proceedings against investors to recover Net Gains, against Agents to recover Commissions, and against third parties to recover improper transfers, after conferring with the SEC prior to commencing any such proceeding.
3. The Settlement Procedures are **APPROVED** and the Receiver is **AUTHORIZED** to implement them when settling demands or claims to recover Net Gains, Commissions, and/or Improper Third-Party Transfers, and to enter into

¹ All capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion to Approve [ECF No. ____].

settlement and release agreements that meet the requirements of such Settlement Procedures without further order of this Court.

4. The Contingency Fee Procedures are **APPROVED** and the Receiver is **AUTHORIZED** to implement them, subject to SEC approval, should the Receiver and his counsel elect to proceed on a contingency fee basis, when prosecuting ancillary proceedings to recover Net Gains from investors, Commissions from Agents, and/or improper transfers from third parties.

SO ORDERED this ___ day of August, 2025.

Hon. Victoria Marie Calvert
United States District Judge

EXHIBIT B

**SETTLEMENT AND RELEASE
AGREEMENT BY AND BETWEEN KENNETH D. MURENA,
AS RECEIVER OF DRIVE PLANNING, LLC AND [NAME OF SETTling PARTY]**

THIS SETTLEMENT AND RELEASE AGREEMENT (the “Agreement”) is made and entered into by and between **Kenneth D. Murena**, as Receiver (the “Receiver”) of Drive Planning, LLC (“Drive Planning”), any d/b/a, successor, affiliate, subsidiary, or other entity owned, controlled, managed, or held by, or on behalf of, or for the benefit of Drive Planning, LLC, and **[Name of Settling Party]** (the “Settling Party”) (the Receiver and Settling Party are each a “Party” and are collectively the “Parties”).

I. RECITALS

A. WHEREAS, on August 13, 2024, the Securities and Exchange Commission (“SEC”) filed a Complaint for Injunctive Relief, Civil Monetary Penalties, and Other Equitable Relief against Drive Planning, LLC and Russell Todd Burkhalter (together, the “Receivership Defendants”), alleging they operated a massive Ponzi scheme, in the United States District Court for the Northern District of Georgia (the “Receivership Court”) styled *Securities and Exchange Commission v. Drive Planning, LLC, et al.*, Case No. 1:24-cv-03583-VMC (the “SEC Action”).

B. WHEREAS, on August 13, 2024, the Court entered the Receivership Order (ECF No. 10 in the SEC Action), appointing Kenneth D. Murena, Esq., as the Receiver of Drive Planning and all assets owned by or purchased with funds derived from investors or clients of Drive Planning. The Court found that the appointment of a Receiver was necessary to marshal, preserve, and recover assets derived from fraudulent activities tied to the Defendants’ alleged Ponzi scheme. The Receiver was tasked with, *inter alia*, securing assets acquired with or otherwise traceable to investor funds, managing the Receivership Estate, and liquidating assets for the benefit of defrauded investors.

C. WHEREAS, the Receiver and his forensic accountants reviewed and analyzed the financial records of Drive Planning, including their accounting records and bank account statements and those records reveal that Settling Party received a total sum of **[\$[Insert Total Amount of Net Gains, Commissions, or Improper Third-Party Transfers]** from Drive Planning for commissions (collectively, “Transfers”).

D. WHEREAS, pursuant to the Receivership Order, on **[Insert Date of Demand Letter]**, the Receiver, through his counsel, sent a demand letter to the Settling Party seeking to recover the Transfers it had received from Drive Planning, for the benefit of its investors.

E. WHEREAS, on **[Insert Date of Response to Demand Letter]**, Settling Party responded to the Receiver’s demand letter requesting return of the Transfers.

F. WHEREAS, the Receiver does not claim any wrongdoing by Settling Party.

NOW THEREFORE, in consideration of the mutual promises and exchanges set forth

below, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, agree as follows:

II. GENERAL PROVISIONS

A. **Court Approval:** The Parties acknowledge and agree that this Agreement is subject to the approval of the SEC and the Receivership Court and, therefore, will not be binding until the Receivership Court enters an order approving this Agreement or settlement procedures proposed by the Receiver and approved by the Receivership Court that would apply to this Agreement such that this Agreement would meet the requirements of the court-approved settlement procedures (“Court Approval”).

B. **Recitals:** The Parties acknowledge and agree that the Recitals set forth hereinabove are integral terms, are true, accurate and correct and are hereby incorporated into this Agreement and are not mere surplusage.

C. **Settlement Payment:**

Single Payment: The Settling Party has agreed to and shall pay (or caused to be paid) to the Receiver **[Insert Among of Settlement Payment]** (USD) (**[\$Insert Amount of Settlement Payment]**) (the “Settlement Payment”), by wire transfer to the Receiver’s fiduciary account for the Receivership Estate using the wire instructions that the Receiver’s counsel will provide to Settling Party on or before **[Insert Date]**; *or*

Term Payment: The Settling Party has agreed to and shall pay (or caused to be paid) to the Receiver **[Insert Among of Settlement Payment]** (USD) (**[\$Insert Amount of Settlement Payment]**) (the “Settlement Payment”), in **[Insert number of months up to 12]** (#) consecutive monthly payments, in the amounts and time periods set forth below, by wire transfer to the Receiver’s fiduciary account for the Receivership Estate using the wire instructions that the Receiver’s counsel will provide to Settling Parties:

- i. ***Initial Payment:*** **[\$Insert Amount of Initial Payment]** (USD) within seven (7) days after the date this Agreement is fully executed by the Parties; and
- ii. ***Monthly Payment:*** **[\$Insert Amount of Monthly Payment]** (USD) each month following the first payment for **[Insert number of months up to 11]** (#) consecutive months, with each payment to be made within thirty (30) days after the prior payment.
- iii. ***Default Remedies:*** Settling Parties agree and stipulate: (i) that service of process for any proceeding to enforce the Settlement Agreement may be effected on Settling Party as set forth in Notice provision in the Settlement Agreement; (ii) to waiver of all defenses and affirmative defenses, other than set-off regarding to payments the Receiver actually received from Settling Party, and

to waiver of any right to a jury trial regarding enforcement of this Agreement; and (iii) to expedited entry of an agreed upon consent judgment for 125% of the amount of outstanding Settlement Payment (giving credit to payments the Receiver actually receives from Settling Party) in an ancillary proceeding whether dismissed as to the Settling Party and pending as to other defendants or initiated as a separate ancillary proceeding to enforce the Agreement (“Default Remedies”). The Receiver shall, prior to implementing the Default Remedies, give the defaulting Settling Party written notice pursuant to the terms of this Agreement and seven (7) days to cure the default (“Cure Period”). If the default remains uncured after expiration of the Cure Period, the Receiver may, in his business judgment and discretion, accelerate the outstanding unpaid amount of the Settlement Payment and proceed to enforce the Default Remedies without further notice, including by seeking entry of the agreed upon consent judgment by filing a verified agreed motion for entry of consent judgment within twenty-one (21) days after expiration of the Cure Period.

D. **Mutual Releases:** Upon the Receiver’s receipt of the full amount of the Settlement Payment in cleared funds, the Receiver, the Receivership Estate, and Drive Planning hereby do release and forever discharge Settling Party from any and all claims, manner of claims, liabilities, demands, obligations, actions, causes of action, injuries, complaints, levies, fines, charges, interest, suits, debts, indebtedness, duties, obligations, rights, damages, punitive damages, attorneys’ fees, costs, expenses and compensation of any nature whatsoever and of any kind, based on any legal, statutory or equitable theory, right of action or otherwise (whether arising under federal, state or local law or regulation, statute, or common law and whether by any federal, state or local taxing or regulatory authority or agency), foreseen or unforeseen, known or unknown, matured or unmatured, liquidated or unliquidated, absolute or contingent, accrued or not accrued, actual or potential, which the Receiver, the Receivership Estate, and/or Drive Planning, now has or which may hereafter accrue or otherwise be acquired against Settling Party related to the Transfers, regardless of whether any other information obtained by the Receiver after the date of this Agreement substantiates any additional claims or causes of action the Receiver could have brought against Settling Party related to the Transfers. For avoidance of doubt, and notwithstanding any reading of this Agreement to the contrary, these releases do not release claims the Receiver, the Receivership Estate, and/or Drive Planning have against or in connection with any other individuals and/or entities, including their insurers or reinsurers, which are not the Settling Party. Nothing in this paragraph affects the Parties’ ability to enforce the terms of this Agreement, as applicable to them.

Upon the Receiver’s receipt of the full amount of the Settlement Payment in cleared funds, Settling Party shall and hereby do release and forever discharge the Receiver, the Receivership Estate, and Drive Planning from any and all claims, manner of claims, liabilities, demands, obligations, actions, causes of action, injuries, complaints, levies, fines, charges, interest, suits, debts, indebtedness, duties, obligations, rights, damages, punitive damages, attorneys’ fees, costs, expenses and compensation of any nature whatsoever and of any kind, based on any legal, statutory

or equitable theory, right of action or otherwise (whether arising under federal, state or local law or regulation, statute, or common law and whether by any federal, state or local taxing or regulatory authority or agency), foreseen or unforeseen, known or unknown, matured or unmatured, liquidated or unliquidated, absolute or contingent, accrued or not accrued, actual or potential, which Settling Party now has or which may hereafter accrue or otherwise be acquired against the Receiver, the Receivership Estate, and/or Drive Planning related to the Transfers, regardless of whether any other information obtained by Settling Party after the date of this Agreement substantiates any additional claims or causes of action Settling Party could have brought against the Receiver, the Receivership Estate, and/or Drive Planning related to the Transfers. Nothing in this paragraph affects the Parties' ability to enforce the terms of this Agreement, as applicable to them.

E. **No Admission of Liability:** Nothing herein shall be construed as an admission of liability by Settling Party, any such liability being expressly disputed and denied, and shall never be construed as an admission(s) by Settling Party.

III. WARRANTY OF CAPACITY TO EXECUTE AGREEMENT

The Parties represent and warrant that no other person or entity has or has had any interest in the claims, demands, obligations or causes of action referred to in this Agreement; that the Receiver has the sole and exclusive right to receive sums specified in it; and that they have not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Agreement.

IV. ENTIRE AGREEMENT AND SUCCESSORS-IN-INTEREST

The Parties agree that this Agreement contains the entire agreement between the Receiver and Settling Party with regard to the matters set forth in it and shall be binding upon and inure to the benefit of their respective successors and assigns. There are no other understandings or agreements, verbal or otherwise, in relation thereto between the Parties, except as herein expressly set forth. There have been no representations not set forth herein that the Parties have relied upon when entering into this Agreement. Should any provision of this Agreement require interpretation or construction, the Parties agree that all Parties have participated in the drafting of this document and no presumption regarding construing the document against one Party shall apply.

V. PARTIES' OPPORTUNITY TO BE REPRESENTED BY COUNSEL

The Parties acknowledge that each has had the opportunity to consult with the attorney of their choice. Furthermore, each Party to this Agreement represents and warrants that they are entering into this Agreement of their own free will, without having been subjected to any form of duress or coercion of any kind.

VI. EXECUTION

This Agreement may be executed in counterparts, and such execution shall be valid and binding on the Parties. Electronic, facsimile, or PDF signatures shall be binding as originals.

VII. SEVERABILITY

In the event any provision of this Agreement is found to be invalid by any court of law, the remaining provisions of the Agreement shall remain valid and binding on the Parties.

VIII. MODIFICATION

The Parties agree that this Agreement may only be modified or amended in any respect in a writing signed by both parties. Oral modifications or amendments are expressly prohibited. Unilateral modifications or amendments are also expressly prohibited.

IX. JURISDICTION AND VENUE FOR LITIGATION OF DISPUTES

In the event of a dispute as to the interpretation, enforcement, application or violation of this Agreement, the Parties consent, understand, and agree that the United States District Court for the Northern District of Georgia, shall have exclusive jurisdiction, and be the exclusive venue, to resolve any litigation arising from or relating to this Agreement, and to award to the prevailing Party attorneys' fees and costs, as set forth below.

X. CONSTRUCTION BY STATE LAW

This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Florida to the extent state law is applicable, without giving effect to principles of conflicts of law.

XI. ATTORNEYS' FEES AND COSTS

The Parties agree that they each shall bear its own attorneys' fees and costs incurred arising from or related to the Transfers and the SEC Action, including through the date of this Agreement. The Parties further agree that the prevailing party in any litigation arising from or relating to this Agreement shall be entitled to recovery of attorneys' fees and costs from the non-prevailing party, including those incurred in bankruptcy and appellate proceedings, and the amount of attorneys' fees and costs incurred in litigating the amount of such attorneys' fees and costs.

XII. FURTHER COOPERATION

The Parties agree to further cooperate with each other and execute any additional documents that are reasonable and necessary to achieve the settlement memorialized by this Agreement.

XIII. NOTICE

The Parties agree that for notice purposes:

(a) All notices, requests and other communications to any party here under shall be in writing and shall be given by hand or by a nationally recognized overnight courier service, mailed by postage prepaid certified or registered mail, or by email, provided that in the case of email, notice must also be given by one of the other methods (which may arrive later) to the addresses below or at such other address and person as shall be designated from time to time by any party hereto, as the case may be, in a written notice by to the other parties hereto in the manner provided in this Section XIII. A notice shall be deemed to be give: (a) in the case of a hand delivery, at the time of delivery; (b) in the case of registered or certified mail, when delivered or the first attempted deliver on a business day; (c) in the case of overnight courier service upon the first attempted delivery on a business day; or in the case of email, upon delivery of such email provided that (i) such email notice was also delivered by one of the means set forth in (a), (b), or (c) above (which may arrive after such email) and (ii) the transmitting party did not receive an electronic notice of transmission failure, except that, if any of the foregoing means of delivery does not occur on a business day during normal business hours for the recipient, it shall be deemed give at the opening of business for such recipient on the next business day. A party receiving notice that does not comply with the technical requirements for notice under this Section XIII may elect to waive any deficiencies and treat the notice as having been properly give. The attorneys for the Parties are hereby authorized to sign and deliver the notice on behalf of their respective clients.

If to Kenneth D. Murena, as Receiver for Drive Planning, LLC:

Kristopher E. Pearson, Esq.
Russell Landy, Esq.
Adriana M. Pavon, Esq.
DAMIAN | VALORI | CULMO
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: (305) 371-3960
kpearson@dvcattorneys.com
rlandy@dvlpl.com
apavon@dvcattorneys.com

If to Settling Party:

[Insert Physical Address and Email Address]

XIV. WAIVER OF JURY TRIAL

EACH OF THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT ANY OF THEM MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED HEREUNDER OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT, OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONJUNCTION HEREWITH, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OR OMISSIONS OF ANY PARTY; OR ANY OTHER AGREEMENTS EXISTING BETWEEN ANY ONE OR MORE OF THE PARTIES TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT TO THE RECEIVER ENTERING INTO THIS AGREEMENT. FURTHER, SETTLING PARTY HEREBY CERTIFIES THAT NO REPRESENTATIVE OF THE RECEIVER, NOR THE RECEIVER'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE RECEIVER WOULD NOT, IN THE EVENT OF SUCH LITIGATION, SEEK TO ENFORCE THIS WAIVER OF RIGHT TO JURY TRIAL PROVISION.

AGREED TO BY:

[SETTLING PARTY]

**KENNETH D. MURENA, AS RECEIVER
FOR DRIVE PLANNING, LLC**

Signature: _____

Signature: _____

By: _____

Its: _____

Date: _____

Date: _____