

1 NEWHOUSE LAW GROUP PC  
Michael R. Newhouse (BAR NO. 211204)  
2 1800 Century Park East, 6<sup>th</sup> Floor  
Los Angeles, CA 90067  
3 Telephone: (310) 684-3162  
Facsimile: (310) 694-3076  
4 Email: mnewhouse@newouselawgroup.com

5 GIRARDI | KEESE  
Thomas V. Girardi (BAR NO. 36603)  
6 Robert W. Finnerty (BAR NO. 119775)  
David N. Bigelow (BAR NO. 181528)  
7 1126 Wilshire Boulevard  
Los Angeles, CA 90017  
8 Telephone: (213) 977-0211  
Facsimile: (213) 481-1554  
9 Email: [tgirardi@girardikeese.com](mailto:tgirardi@girardikeese.com)  
[rfinnerty@girardikeese.com](mailto:rfinnerty@girardikeese.com)  
10 [dbigelow@girardikeese.com](mailto:dbigelow@girardikeese.com)

11 Special Counsel for Receiver  
WILLIAM J. HOFFMAN

12  
13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15 **WESTERN DIVISION**

16 SECURITIES AND EXCHANGE  
COMMISSION,

17 Plaintiff,

18 v.

19 NATIONWIDE AUTOMATED  
20 SYSTEMS, INC.; JOEL GILLIS; and  
EDWARD WISHNER,

21 Defendants,

22 OASIS STUDIO RENTALS, LLC;  
23 OASIS STUDIO RENTALS #2, LLC;  
and OASIS STUDIO RENTALS #3, LLC

24 Relief Defendants.  
25

Case No. CV-14-07249-SJO (FFMx)

**NOTICE OF MOTION AND  
MOTION FOR APPROVAL OF  
SETTLEMENT OF RECEIVER'S  
CLAIMS AGAINST CITY  
NATIONAL BANK, MARK SOFFA,  
BRIAN FITZWILLIAM AND BETTY  
SALEH FITZWILLIAM;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; FILED WITH  
DECLARATIONS OF MICHAEL R.  
NEWHOUSE AND WILLIAM J.  
HOFFMAN**

Date: September 10, 2018  
Time: 10:00 a.m.  
Ctrm: 10C  
Judge: Hon. S. James Otero

26 **TO ALL INTERESTED PARTIES:**

27 **PLEASE TAKE NOTICE** that on September 10, 2018, at 10:00 a.m. in  
28 Courtroom 1 of the above-entitled Court, located at 350 West 1st Street,

1 Los Angeles, California 90012, William J. Hoffman of Trigild, Inc. ("Receiver"),  
2 the Court-appointed permanent receiver for Nationwide Automated Systems, Inc.  
3 ("NASI"), Oasis Studio Rentals, LLC, Oasis Studio Rentals #2, LLC, Oasis Studio  
4 Rentals #3, LLC, and their subsidiaries and affiliates ("Receivership Entities"), will  
5 and hereby does move the Court for an order approving a settlement agreement of  
6 the Receiver's previously authorized actions in Los Angeles Superior Court against  
7 City National Bank, et al. (*Hoffman v. City National Bank, et al.*, No. BC 624542),  
8 Mark Soffa (*Hoffman v. Soffa, et al.*, No. BC 636780), and Patrick Brian Fitzwilliam  
9 and Betty Saleh Fitzwilliam (*Hoffman v. Fitzwilliam, et al.*, No. BC 659112)  
10 ("Motion").

11 This Motion is based on this Notice of Motion and Motion, the attached  
12 Memorandum of Points and Authorities, the Declaration of Michael Newhouse, the  
13 documents and pleadings already on file in this action, and upon such further oral  
14 and documentary evidence as may be presented at the time of the hearing.

15 **Procedural Requirements:** If you oppose this Motion, you are required to  
16 file your written opposition with the Office of the Clerk, United States District  
17 Court, 350 West 1st Street, Los Angeles, California 90012 and serve the same on  
18 the undersigned no later than 21 calendar days prior to the hearing.

19 IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the  
20 above date, the Court may grant the requested relief without further notice. This  
21 motion is made following a conference of counsel pursuant to Local Rule 7-3.

22  
23 Dated: July 31, 2018

NEWHOUSE LAW GROUP PC

24 By:           /s/ Michael R. Newhouse

25 MICHAEL R. NEWHOUSE  
26 Special Counsel for Receiver  
27 WILLIAM J. HOFFMAN  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Receiver seeks approval of a settlement of the Receiver's claims in Los  
4 Angeles Superior Court proceedings against City National Bank ("CNB"), et al.  
5 (*Hoffman v. City National Bank, et al.*, No. BC 624542), Mark Soffa (*Hoffman v.*  
6 *Soffa, et al.*, No. BC 636780) and Patrick Brian Fitzwilliam and Betty Saleh  
7 Fitzwilliam (*Hoffman v. Fitzwilliam, et al.*, No. BC 659112). The Soffa action also  
8 included a cross-claim against CNB. In addition to the Receiver's claims, there are  
9 multiple putative class and mass actions brought by NASI investors against CNB  
10 and Fitzwilliam, which cases have been related to the Receiver's cases and are  
11 pending before the Honorable William F. Highberger. The Receiver's proposed  
12 settlement is part of a global settlement that includes all claims in all of the related  
13 cases.

14 Pursuant to the parties' settlement agreement, a copy of which is attached to  
15 the Declaration of Michael Newhouse filed herewith<sup>1</sup>, CNB will pay \$33,000,000 in  
16 exchange for full releases of the NASI investor class and mass claims and the  
17 Receiver's claims against CNB, Patrick Brian Fitzwilliam and Betty Saleh  
18 Fitzwilliam. The \$33,000,000 will go into a class settlement fund that will be  
19 administered by the Receiver (as settlement claims administrator) and distributed to  
20 NASI investors with allowed claims who do not opt out of the class. Distributions  
21 from the class settlement fund will be made on a *pro rata* basis based on each  
22 investor/class member's allowed claims amount (i.e. net loss amount) as determined  
23 by this Court in connection with the approved claims process.

24 Separate and apart from the \$33,000,000 class settlement fund, CNB will pay  
25 \$1,000,000 to resolve Soffa's cross-claims against CNB, which requires the

26 \_\_\_\_\_  
27 <sup>1</sup> The summary of terms of the settlement agreement is provided herein for  
28 convenience and ease of reference only. To the extent there is any conflict  
between this motion and the settlement agreement, the terms of the settlement  
agreement control.

1 Receiver to release his claims against Soffa. Accordingly, \$550,000 will be paid by  
2 CNB directly to the Receiver and \$450,000 will be paid by CNB to Soffa.

3 As discussed further below, although the Receiver is releasing sizable claims  
4 against Soffa, CNB would not agree to the global settlement without a release of  
5 Soffa's cross-claims. The Receiver believes the settlement as a whole, despite the  
6 considerable discount of his claims against Soffa, is in the best interests of investors  
7 who suffered net losses from the NASI Ponzi scheme. If the Agreement is  
8 approved, after the payment of fees (up to a maximum of 30%) and costs to counsel  
9 for the plaintiffs, including the Receiver's Special Counsel, the settlement will  
10 generate approximately \$22.5 million to be distributed to investors/class members  
11 through the class settlement fund and \$550,000 to be distributed to investors with  
12 allowed claims through the receivership. This recovery will obviously also be in  
13 addition to the approximately \$36,400,000 in funds currently held by the Receiver,  
14 which, after payment of Court-approved fees and costs of the receivership, will also  
15 be distributed to net loser investors.

## 16 II. BACKGROUND FACTS

### 17 A. The Receiver's Appointment and Authority to Pursue Net Winners 18 and Proceed with State Court Claims

19 On September 17, 2014, the Securities and Exchange Commission ("SEC")  
20 filed a complaint against Defendants Nationwide Automated Systems, Inc.  
21 ("NASI"), Joel Gillis, and Edward Wishner ("SEC Action"). The SEC alleges NASI  
22 raised money from investors by selling them Automated Teller Machines ("ATMs"),  
23 leasing the ATMs back from investors, managing the ATMs for the investors, and  
24 paying the investors "rents" that were guaranteed to total at least 20% of the  
25 purchase price paid for the ATMs per year. Dkt. No. 3. In actuality, NASI did not  
26 sell any ATMs to investors, but instead fabricated and sold fictitious ATMs with  
27 fabricated serial numbers and locations. *Id.* The "rents" paid to investors who  
28 purchased fictitious ATMs, as well as referral fees paid to investors and agents,

1 were paid from the amounts raised from other investors. *Id.*

2 On September 30, 2014, the Court appointed the Receiver as temporary  
3 receiver over NASI, its subsidiaries and affiliates ("Receivership Entities"). Dkt.  
4 No. 17. On October 29, 2014, the Court entered a Preliminary Injunction Order,  
5 making the Receiver's appointment permanent. Dkt. No. 42. Among other things,  
6 the orders "authorize[], empower[] and direct[]" the Receiver to investigate, recover,  
7 and marshal for the benefit of creditors and investors of the Receivership Entities  
8 any and all assets of the receivership estate. *Id.*

9 On March 17, 2015, the Receiver moved for authority to pursue clawback  
10 claims against, among others, investors who profited from NASI's investment  
11 scheme ("Net Winners"). Dkt. No. 64. The motion ("Clawback Procedures  
12 Motion") included a request that the Receiver be authorized to settle clawback  
13 claims prior to litigation for 70% of the net profit received by each Net Winner (or  
14 75% if the Net Winner elects to pay in 12 monthly installments). *Id.* Once litigation  
15 commenced, the minimum pre-approved settlement amount would be 80% of the net  
16 profit received by each Net Winner. *Id.* On April 21, 2015, the Court granted the  
17 Clawback Procedures Motion. Dkt. No. 72.

18 On April 29, 2016 the Receiver filed under seal a Supplemental Brief in  
19 support of its Motion for Authority to pursue claims against CNB and to engage  
20 special counsel. Dkt. No. 143. In its Motion, the Receiver proposed to the Court  
21 that the Newhouse Law Group and Girardi | Keese would act as co-counsel and  
22 represent the Receiver's interests in litigation against CNB for a contingent fee of  
23 30%, a proposal to which both Newhouse and Girardi | Keese agreed. Newhouse  
24 and Girardi | Keese also recognized the 30% contingent fee would be shared with  
25 the investor class counsel and would not be in addition to the class counsel's fees. In  
26 its Supplemental filing, the Receiver recommended and requested approval of the  
27 hiring of the Newhouse Law Group and Girardi | Keese using the 30% contingent

28

1 fee arrangement.<sup>2</sup>

2 On May 3, 2016 the Court appointed the Newhouse Law Group and Girardi |  
3 Keese as special counsel to represent the Receiver in his action against City  
4 National Bank and related parties "on the engagement terms described in the  
5 Receiver's Supplemental Brief in Support of the Motion." Dkt. No. 149. (*See*,  
6 Exhibit 1 to the Declaration of Michael Newhouse).

7 **B. The Los Angeles Superior Court Litigation**

8 On June 21, 2016 special counsel for the Receiver filed an action against  
9 CNB and Brian Fitzwilliam ("Fitzwilliam") and Betty Fitzwilliam, in Los Angeles  
10 Superior Court for negligence, aiding and abetting fraud and conspiracy to commit  
11 fraud, fraudulent transfer and conversion among other claims. In 2016 a putative  
12 class action in Los Angeles Superior Court, *Nairn v. City National Bank*, BC  
13 606667, as well as a putative class action then before this Court, *Madison v. Gillis*,  
14 5:16-CV-00502 – SJO (FFMx) were also active and were in opposition to CNB. In  
15 May, 2016 CNB filed a Special Motion to Strike (an Anti-SLAPP suit) against the  
16 *Nairn* plaintiffs. While the Anti-SLAPP motion was pending, in November, 2016,  
17 the parties participated in an early mediation before the Honorable Layn R. Phillips  
18 (Ret.). The mediation was unsuccessful.

19 In March, 2017, CNB's Anti-SLAPP motion was heard and granted by Judge  
20 Highberger, effectively ending the *Nairn* litigation. In late March, 2017, counsel for  
21 *Nairn* filed a new putative class action entitled *Payne v. City National Bank*, BC  
22 655806 a case ultimately related to the cases listed herein.

23 In response to the Receiver's suit against it, CNB filed a demurrer based on  
24 the legal theory of *in pari delicto*. The motion was joined by Brian Fitzwilliam and  
25 Betty Fitzwilliam. After significant briefing, the Los Angeles County Superior  
26

---

27 <sup>2</sup> Note that there has been no agreement with other plaintiffs' counsel in the related  
28 cases, discussed above and below, about what percent contingency will be sought  
by them. But, all counsel agree, and the Settlement Agreement notes, that in no  
event will the total compensation to all counsel exceed 30%.

1 Court Judge issued a tentative Order in defendants' favor. However, following the  
2 Receiver's request, the Court permitted supplemental briefing on the issue, after  
3 which the court reversed its tentative, and adopted that reversal as its holding after  
4 extensive oral argument. As such, in May, 2017, at the subsequent lengthy oral  
5 argument, special counsel for the Receiver prevailed and the demurrer was  
6 overruled, albeit without prejudice to future potential motions on the subject.

7 Between May, 2017 and the present, CNB has filed additional Anti-SLAPP  
8 Motions against the Receiver, *Payne, Madison* and another case described below,  
9 *Allison*. The motions were joined by Brian Fitzwilliam and Betty Fitzwilliam where  
10 they were a party. Additionally, multiple other motions have been filed attacking  
11 the pleadings. The Court has indicated it may rule in each matter in a fashion  
12 similar to the *Nairn* ruling though the facts in each of the remaining actions are pled  
13 differently from *Nairn*. Each of those motions is currently in abeyance as the parties  
14 have negotiated the current proposed settlement over the last 6 months.

15 **C. The Negotiated Global Settlement Agreement for All Pending**  
16 **Actions**

17 There are six pending actions in addition to the Receiver's action against  
18 CNB. Some of them name Fitzwilliam as well.

19 1. An action entitled *Madison v. City National Bank et al.*, No. BC  
20 666719 (the "**Madison Litigation**"). The Madison Plaintiffs seek to represent a  
21 class of all Persons (defined below) who engaged in ATM sale/leaseback  
22 transactions with NASI and were Net Losers

23 2. An action entitled *Allison v. City National Bank, et al.*, No. BC 634285  
24 (the "**Allison Litigation**"). The Allison complaint sought damages sustained by the  
25 named plaintiffs by virtue of ATM sale/leaseback transactions with NASI where  
26 each such named plaintiff was alleged to be a Net Loser.

27 3. An action entitled *Payne v. City National Bank, et al.*, No. BC 655806  
28 (the "**Payne Litigation**"). The Payne Plaintiffs seek to represent a class of all

1 Persons who engaged in ATM sale/leaseback transactions with NASI and were Net  
2 Losers.

3 4. An action entitled *Wilinsky v. City National Bank, et al.*, No. 17-cv-  
4 07463 (JGK) (the "**Wilinsky Litigation**"), pending in the United States District  
5 Court for the Southern District of New York. The Wilinsky Plaintiffs sought to  
6 represent a class of all Persons residing in states other than California who engaged  
7 in ATM sale/leaseback transactions with NASI and were Net Losers.

8 5. An action entitled *Nevada Universal Pictures, Inc. v. City National*  
9 *Bank, et al.*, No. A-17-762461-C (the "**Nevada Litigation**"), pending in the 8th  
10 District Court of Nevada. The Nevada Plaintiffs sought to represent a class of all  
11 Persons residing in Nevada who engaged in ATM sale/leaseback transactions with  
12 NASI and were Net Losers.

13 6. The Sofa cross-claim against CNB (*Hoffman v. Sofa, et al.*, No. BC  
14 636780).

15 In addition, there is (a) the Receiver's action against Mark Sofa, the manager  
16 of Fuel Doctor, Inc., an entity that received substantial funding from NASI, and a  
17 former employee of NASI, and (b) the Receiver's action against Patrick Brian  
18 Fitzwilliam ("Fitzwilliam") and Betty Saleh Fitzwilliam (*Hoffman v. Fitzwilliam, et*  
19 *al* No. BC659112). Fitzwilliam was CNB's branch manager at the Woodland Hills  
20 branch and was CNB's relationship manager for NASI, Joel Gillis and Edward  
21 Wishner. Fitzwilliam was alleged to be a profiting NASI investor.

22 The Receiver has actively assisted counsel in all related litigation over the  
23 past two years by sharing its extensive database of evidence obtained from NASI's  
24 records, CNB, the FBI and the SEC.

25 After extensive on and off settlement negotiations following the initial  
26 mediation in November of 2016 with Judge Phillips, on February 2<sup>nd</sup> of this year, all  
27 of the parties to the various lawsuits participated in a second mediation, this time  
28 with the Honorable Carl West (Ret.). While settlement was not achieved on that

1 day, the parties have continued over the past five months to engage in lengthy, and  
2 almost daily, settlement negotiations amongst themselves, and with Judge West, in  
3 an effort to resolve all of class action and individual claims, in the cases listed  
4 above.

5 Following these extensive efforts over the past two years, the parties have  
6 reached a written agreement which resolves the various claims pending approval of  
7 this Court and the state Court. As noted above, the settlement agreement  
8 ("Agreement") provides that the Receiver will act as claims administrator for the  
9 class settlement fund. The total class settlement fund is \$33,000,000.00 and  
10 includes resolution of the Receiver's claims as well as all individual and class  
11 claims. (See, Agreement, attached as Exhibit 2 to the Declaration of Michael  
12 Newhouse). The Agreement acknowledges the Receiver must obtain approval of  
13 the Agreement by this Court. The Agreement states in Section 1.1:

14 "District Court Approval" means the entry of an order by the District Court in  
15 the SEC Litigation approving the Receiver entering into, and the receivership estate  
16 being bound by, this Agreement, including the release of claims by the Receiver on  
17 the terms and conditions set forth herein."

18 The Agreement also must be approved by the Los Angeles Superior Court,  
19 which will preside over the administration of the class settlement fund.  
20 Accordingly, the parties are jointly filing a motion for approval of the Agreement in  
21 the Los Angeles Superior Court concurrent with the filing of this motion.

22 **D. Mark Soffa**

23 As noted above, the settlement also provides for a full release of the  
24 Receiver's claims against Soffa and Soffa's cross-claims against CNB in exchange  
25 for the amount of \$1,000,000, of which \$550,000 will be paid by CNB directly to  
26 the Receiver and \$450,000 will be paid by CNB directly to Soffa.

27 Mark Soffa was the manager of Fuel Doctor, Inc. Fuel Doctor sold a product  
28 to be used in automobiles that claimed to increase the gas mileage for older/used

1 cars. Fuel Doctor received substantial funding from NASI, considerable amounts of  
2 which went to Soffa. Later, Soffa worked directly for NASI and received a  
3 substantial salary. The work performed by Soffa appears to have been in the nature  
4 of data entry and processing of monthly check/distribution amounts to investors.

5 On October 7, 2016, the Receiver filed an action in Los Angeles Superior  
6 Court against Soffa and related parties to recover transfers made to them by NASI  
7 both directly and indirectly through Fuel Doctor. The total amount demanded in the  
8 Complaint was \$3.08 million. Note, the Receiver's general counsel (the Allen  
9 Matkins firm), as opposed to his Special Counsel working on the CNB action,  
10 brought this action on behalf of the Receiver.

11 Soffa filed an answer to the Complaint and a cross-claim against CNB. Soffa  
12 then sought to have the action against him "related" to the Receiver's action against  
13 CNB and the investor class and mass actions against CNB, which was granted,  
14 adding the case to the other cases pending before Judge Highberger.

15 As settlement negotiations with CNB progressed, CNB made it clear that a  
16 release of Soffa's cross-claims against CNB was of critical importance to the bank.  
17 Considering the amount sought in the Receiver's Complaint against Soffa, the  
18 Receiver made it clear to all parties that the receivership estate would need to be  
19 compensated in exchange for releasing its claims against Soffa and that such  
20 compensation would not be subject to the contingent fee for the Receiver's Special  
21 Counsel and the other firms representing investors in class or mass actions.

22 Accordingly, the parties agreed that \$1 million would be paid by CNB to  
23 resolve the Soffa claims separate and apart from the class settlement fund. As  
24 discussed below, the Receiver believes the settlement as a whole, despite the  
25 considerable discount on his claims against Soffa, is in the best interests of  
26 investors. (Hoffman Declaration, ¶ 3).

27 ///

28 ///

1           **E. Fitzwilliam**

2           Patrick Brian Fitzwilliam, a/k/a Brian Fitzwilliam, is an employee of CNB  
3 and was a branch manager for multiple CNB branch locations. For a period of time  
4 Fitzwilliam was the branch manager of CNB's Woodland Hills branch where NASI  
5 banked. For a period of time while the branch manager of the Woodland Hills  
6 branch, Fitzwilliam was CNB's relationship manager for NASI Joel Gillis and  
7 Edward Wishner. Fitzwilliam and his wife, Betty Saleh Fitzwilliam, were also  
8 alleged to be investors in NASI and received a net profit on their investment in the  
9 amount of approximately \$255,000. Fitzwilliam is a named defendant some of the  
10 investor actions against CNB, as well as the Receiver's action against CNB, and the  
11 Receiver's separate clawback action against Fitzwilliam.

12           The Receiver filed his clawback action against Fitzwilliam in Los Angeles  
13 Superior Court on April 25, 2017. Fitzwilliam sought to have the case "related" to  
14 the other investor actions, which was granted, adding his case to the actions pending  
15 before Judge Highberger.

16           As the settlement negotiations with CNB progressed, CNB made it clear that  
17 a release of the Receiver's clawback claim against Fitzwilliam and his wife was  
18 critically important. Considering the relatively small amount demanded in the  
19 Receiver's Complaint (approximately \$255,000), the Receiver determined that  
20 releasing his clawback claim against Fitzwilliam in order to obtain approximately  
21 \$22.5 million to be distributed to investors with net losses through the class  
22 settlement fund was in the best interests of investors. (Hoffman Declaration, ¶ 4).

23           **F. Receiver's Work as Claims Administrator**

24           As the Claims Administrator for the global settlement, the Receiver will be  
25 responsible for the following duties:

26           a) provide Notice to the Settlement Class in accordance with the Notice  
27 Order. The Agreement provides the Notice will be mailed and provided on a  
28 dedicated website ; b) provide Release Forms to the Settlement Class in accordance

1 with the Notice Order; c) receive and catalogue all Opt-outs, i.e., those individuals  
2 who elect not to participate in the class settlement; d) receive and catalogue all  
3 Release Forms; e) make any additional mailings required under the terms of this  
4 Agreement; f) distribute payments to Participating Class Members; g) deliver by  
5 electronic form to all Settling Parties' Counsel all timely received Release Forms at  
6 least five calendar days prior to distribution of any portion of the Class Settlement  
7 Payment; h) deliver to the Bank's counsel the originals of any Release Forms  
8 received by mail by the Claims Administrator at least five calendar days prior to  
9 distribution of any of portion of the Class Settlement Payment; i) handle all  
10 accounting of the Settlement Payment and distributions; and j) otherwise assist with  
11 the administration of the Agreement. The Claims Administrator will also set up a  
12 Qualified Settlement Fund ("QSF") pursuant to IRS guidelines, set up supporting  
13 schedules for the QSF, prepare and file the Federal and State tax returns for the QSF  
14 and prepare and file the appropriate form 1099-MISC for each settlement check.

15 The Receiver will apply to the Los Angeles Superior Court for fees for  
16 Claims Administration. Under the Agreement the fees for Claims Administration  
17 are capped at \$270,000.00. All fees for Claims Administration are subject to  
18 approval by the Los Angeles Superior Court and are subject to challenge by class  
19 counsel before approval by the Los Angeles Superior Court.

20 Fees for Claims Administration in the class cases are, and will be, separate  
21 from fees for Receivership work. Receivership work will remain separate from  
22 Claims Administration and all fees for Receivership work will continue to be subject  
23 to this Court's approval. (Hoffman Declaration, ¶ 5).

24 **G. Notifications For the Proposed Settlement Class**

25 Under the terms of the Agreement and proposed orders for preliminary  
26 approval by the Los Angeles Superior Court, investors with net losses (i.e. class  
27 members) will receive notices from the claims administrator summarizing the terms  
28 of the Agreement. Investors/class members will receive a mailed long form notice

1 and a release form. A signed release form must be returned in order for the  
2 investor/class member to participate in the class. Additionally, there will be a  
3 website created for the purpose of providing both a Summary Notice and further  
4 information through Frequently Asked Questions. There will also be a toll-free  
5 telephone number included in each Notice.

6 The notices to each investor will describe the effect of joining the class  
7 settlement and also provide the means by which each may "opt-out" of the  
8 settlement. The notices will describe the effect of opting out on the investor's rights  
9 relating to any claims against Defendants. The notices will also describe the  
10 mechanism for any objection to the settlement and the dates and deadlines for  
11 submitting an opt-out form and an objection.

12 **H. Effect of Opt-Outs on Overall Settlement Amount**

13 Under the Agreement, in the event that (i) the number of investors with net  
14 losses opting out of the settlement constitutes more than 3% of the total number of  
15 investors with net losses (as determined by this Court at the conclusion of the  
16 receivership claims process) or (ii) the cumulative net losses of the investors opting  
17 out of the settlement represent more than \$3,000,000 (again, based on the investor  
18 net loss amounts determined by this Court at the conclusion of the receivership  
19 claims process), the Bank has the right to terminate the settlement in its entirety.

20 However, if there are opt-outs, but they do not reach either threshold above,  
21 then the settlement will go forward, but the amount of the Bank's \$33,00,000 class  
22 settlement payment will be reduced by 1.03 (\$34,000,000 divided by \$33,000,000)  
23 times the percentage that the cumulative net losses of opt-outs represents as a  
24 portion of all cumulative net losses of NASI investors. For example, if the  
25 cumulative net losses of investors who opt out of the settlement constitutes 2% of  
26 the total net losses of all NASI investors, the amount of the settlement class payment  
27 will be reduced by 2.06% (i.e., \$679,800). Thus, CNB would then be required to  
28 make a settlement class payment of \$32,320,200 (in addition to the \$1,000,000 that

1 must be paid to the resolve the Soffa claims).

2 **I. Claimants' Net Losses and Claims Approval**

3 On February 6, 2018, the Court approved procedures for the administration of  
4 investor claims against the receivership estate, including providing notices to  
5 investors (and locating investors who notices are returned as undeliverable<sup>3</sup>),  
6 calculating investor claims based on their net losses from their NASI investments,  
7 and resolving disputed claims either by noticed motion to the Court or, at the Court's  
8 discretion, via an abbreviated arbitration with a retired federal judge. Dkt. Nos. 247,  
9 256. The deadline for investors to dispute the Receiver's calculation of their net loss  
10 amounts was 60 days from when their claims notice was provided to them, which,  
11 for most investors (other than those for whom the Receiver did not have a valid  
12 address), means their deadline passed in May 2018.

13 Under the Settlement Agreement, each investor's allowed claim amount, as  
14 determined by this Court through the claims process, will be their net loss amount  
15 that determines their *pro rata* distribution from the class settlement fund. If there is  
16 good cause, each settlement class member will have an additional thirty (30) days  
17 from the date the class settlement notice is provided to contest the Receiver's  
18 calculation of their net loss by following the claim procedures approved by this  
19 Court. This provision was required by counsel for certain of the investor plaintiffs  
20 due to concerns that an investor might choose not to participate in the distribution  
21 from the receivership estate, but want to participate in the class settlement  
22 distribution. Therefore, it is possible, although unlikely, that additional disputes  
23 regarding investor net loss amounts could arise during the class settlement notice  
24 process.

25 There will be no distributions of class settlement funds until this Court's final  
26 approval of all allowed claim amounts, i.e. net losses. The full class settlement  
27

28 

---

<sup>3</sup> "Undeliverable" includes all USPS tracking status descriptions except "Delivered."

1 payment will be deposited into an interest-bearing Qualified Settlement Fund  
2 account in compliance with § 468B of the Internal Revenue Code and Treasury  
3 Regulations. The Qualified Settlement Fund will be separate from the receivership  
4 estate and be under the supervision of the Los Angeles Superior Court.

5 **J. Distribution of Residual Funds**

6 Under the Agreement, if, after 180 days following complete distribution to  
7 participating class members, there is money remaining in the fund that (1) has not  
8 been distributed to participating class members (i.e., uncashed checks), and (2) has  
9 not been used to pay attorneys' fees, costs, or administrative costs, then class  
10 counsel will move the Los Angeles Superior Court for an order to distribute residual  
11 funds to participating class members within 240 days following the initial  
12 distribution. However, notwithstanding the above, if the total amount of these  
13 residual funds is \$50,000 or less, the full remaining amount of residual funds shall  
14 be transferred to the receivership estate to be distributed to all holders of allowed  
15 claims in the receivership in accordance with the distribution of receivership estate  
16 funds approved by this Court.

17 **K. Contingent Fees for Special Counsel and Other Plaintiffs' Counsel**

18 As discussed above, the Settlement Agreement states that attorneys' fees  
19 requested by all counsel for the plaintiffs parties to the global settlement will be a  
20 maximum of 30% from the class settlement fund (i.e. \$33,000,000 unless reduced  
21 by opt-outs) to be allocated among counsel for all plaintiffs. A 30% contingent fee  
22 is consistent with the 30% total contingent fee originally approved by this Court in  
23 connection with the Receiver's engagement of Special Counsel. The parties will  
24 initially mediate the issue of fee allocation percentages (amongst plaintiffs' counsel)  
25 with Judge West. If the mediation is not successful, counsel will seek an order  
26 resolving the disputes from the Los Angeles Superior Court.

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

### III. DISCUSSION

A. The Court's Power to Compromise Claims

A federal equity receiver's power to compromise claims is subject to court approval. As noted by the Ninth Circuit Court of Appeals in *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986), "[a] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." With regard to settlements entered into by a federal equity receiver, the Court's supervisory role includes reviewing and approving those settlements in light of federal court policy to promote settlements before trial. See Fed. R. Civ. P. 16(c), Advisory Committee Notes.

Federal courts of equity often look to bankruptcy law for guidance in the administration of receivership estates. See *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005); *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1140 (9th Cir. 1996); *SEC v. Basic Energy & Affiliated Resources*, 273 F.3d 657, 665 (6th Cir. 2001); see also Local Civil Rule 66-8 ("a receiver shall administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy"). A bankruptcy court may approve a compromise of claims asserted by or against the estate if the compromise is "fair and equitable." *Woodson v. Fireman's Fund Insurance Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). The approval of a proposed compromise negotiated by a court appointed fiduciary "is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interest of the estate nor fair and equitable for the creditors." *In re MGS Marketing*, 111 B.R. 264, 266 67 (B.A.P. 9th Cir. 1990).

///

///

///

1 The Court has great latitude in approving compromises. In passing on the  
2 proposed compromise, the Court should consider the following:

- 3 a. The probability of success in litigation;
  - 4 b. The difficulties, if any, to be encountered in the matter of collection;
  - 5 c. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending; and
  - 6 d. The paramount interest of the creditors and a proper deference to their reasonable views in the premises.
- 7  
8 *Woodson*, 839 F.2d at 620.

9 **B. The Potential Issues Relating to Success Against CNB**

10 Here, one of the Receiver's considerations in continuing the CNB litigation is  
11 a pending state Anti-SLAPP motion against the Receiver's claims, which motion is  
12 currently in abeyance while the parties have negotiated the current Agreement.

13 While the Receiver is confident he could prevail against this motion, Judge  
14 Highberger has already granted a similar motion against a putative class action in an  
15 earlier related action and indicated at a hearing the likelihood of a similar ruling in  
16 yet another related case. Should the motion against the Receiver be granted, the  
17 Receiver would appeal the ruling but, even if successful, such an appeal would add  
18 years to the resolution of the case and would, therefore, delay compensation for the  
19 aging population of NASI net losers that the settlement is designed to help.

20 **C. Extensive Arm's Length Negotiations Produced the**  
21 **Agreement**

22 Since early February, 2018, counsel for the Receiver and the parties to the  
23 global settlement have engaged in intensive negotiations with CNB as well as with  
24 counsel for the class and mass actions. The parties have regularly consulted with  
25 Judge West who has engaged in continuous interaction with each side. Further, the  
26 Receiver's counsel, in conjunction with other plaintiffs' counsel, has reviewed  
27 each of the many drafts and iterations of the proposed Agreement and negotiated  
28 numerous changes in terms in order to protect the interests of the proposed class of

1 investors. (Hoffman Declaration, ¶ 6).

2 As a minimal condition, CNB has required the "blow" provisions relating to  
3 the maximum number of opt-outs in order to secure the final resolution of claims  
4 against CNB. Similarly, CNB has required the previously described formula for  
5 settlement reduction based on opt-outs. These formulae were negotiated by the  
6 parties to minimize the effect on participants. Even with these provisions, the  
7 Receiver and other Plaintiffs' counsel believe the total number of opt-outs will be  
8 minimal given the significant addition to each claimants' award represented by the  
9 settlement.

10 **D. The Agreement is in the Best Interests of Investors**

11 To date the Receiver has obtained for the receivership estate approximately  
12 \$39 million through the processes of clawbacks and other recoveries, funds which  
13 will, with this Court's approval, be distributed to investors with allowed claims.  
14 This proposed settlement has the potential to provide an additional approximately  
15 \$23,000,000 to investors with allowed claims, subject to the opt out provisions of  
16 the Agreement and the anticipated participation of most, if not all, of the investors  
17 with net losses. In this case, the investors with net losses and the potential class  
18 members are the same.

19 If the Agreement is approved by both this Court and the Los Angeles Superior  
20 Court, the Receiver will act as Claims Administrator under the Agreement, which  
21 will further protect the investors' interests by (a) avoiding a costly and duplicative  
22 claims process by a third-party claims administrator and (b) ensuring that as many  
23 net losers as possible have the opportunity to participate in the distribution of the  
24 class settlement fund.

25 ///

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IV. CONCLUSION**

For the foregoing reasons, the Receiver requests an order approving the Settlement Agreement.

Dated: July 31, 2018

NEWHOUSE LAW GROUP PC

By:           /s/ Michael R. Newhouse          

MICHAEL R. NEWHOUSE  
Special Counsel for Receiver  
WILLIAM J. HOFFMAN

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

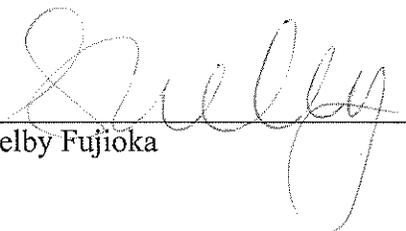
At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1126 Wilshire Boulevard, Los Angeles, CA 90017-1904.

On August 2, 2018, I served true copies of the following document(s) described as **NOTICE OF MOTION AND MOTION FOR APPROVAL OF SETTLEMENT OF RECEIVER'S CLAIMS AGAINST CITY NATIONAL BANK, MARK SOFFA, BRIAN FITZWILLIAM AND BETTY SALEH FITZWILLIAM; MEMORANDUM OF POINTS AND AUTHORITIES; FILED WITH DECLARATIONS OF MICHAEL R. NEWHOUSE AND WILLIAM J. HOFFMAN** on the interested parties in this action as follows:

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 2, 2018, at Los Angeles, California.

  
\_\_\_\_\_  
Shelby Fujioka