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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. JOHN V. BIVONA; SADDLE RIVER ADVISORS LLC; SRA MANAGEMENT LLC; FRANK GREGORY MAZZOLA, Defendants, and SRA I LLC; SRA II LLC; SRA III LLC; FELIX INVESTMENTS, LLC; MICHELE J. MAZZOLA; ANNE BIVONA; CLEAR SAILING GROUP IV LLC; CLEAR SAILING GROUP V LLC, Relief Defendants.	Case No. 3:16-cv-1368 **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDERS, ASSET FREEZES, APPOINTMENT OF A MONITOR AND OTHER RELIEF** Date: TBD Time: TBD Judge: TBD Courtroom: TBD

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PLAINTIFF'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDERS

Plaintiff Securities and Exchange Commission ("Commission") hereby moves *ex parte*, pursuant to Local Rule 65-1, for temporary restraining orders and other preliminary relief against defendants John V. Bivona, Saddle River Advisors, LLC ("Saddle River"), SRA Management, LLC ("SRA Management"), as well as Frank Mazzola and relief defendants SRA I LLC ("SRA I"), SRA II LLC ("SRA II"), SRA III LLC ("SRA III") (together ("SRA Funds"), Felix Investments, LLC ("Felix Investments"), Michele J. Mazzola, Anne Bivona and Clear Sailing Group IV LLC and Clear Sailing Group V LLC (together, "Clear Sailing"). The Commission's motion is based upon Section 20(b) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77t(b), Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u(d), and Section 209(d) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-9(d), which authorize restraining orders and injunctions upon the Commission's proper showing.

Although the Commission's Complaint alleges violations of several provisions of the federal securities laws, the current motion only seeks temporary restraining orders prohibiting Bivona, Saddle River, and SRA Management from violating the anti-fraud provisions of the federal securities laws and from selling or purchasing securities. The Commission also seeks an independent monitor, who will review Saddle River's, SRA Management's, the SRA Funds' and Clear Sailing's financial records, transactions and operations for the purpose of identifying assets, preventing dissipations and recommending future steps. Until the independent monitor is in place, the Court should freeze those entities' assets. The Commission further seeks asset freezes against John and Anne Bivona, Frank and Michele Mazzola and Felix Investments to preserve investor assets. The Commission's Motion is supported by this brief, the Declarations of Jessica W. Chan, Ellen Chen, Oliver Krevet and John Bowmer, the pleadings on file, the [Proposed] Orders and such oral argument and other evidence that the Court may consider. Pursuant to Local Rule 65-1, the Commission has provided, or attempted to provide, notice to defendants and relief defendants of this Motion.

I. INTRODUCTION

Since October 2013, Saddle River, SRA Management, Bivona and Mazzola have raised approximately $53.4 million from investors for three Saddle River-affiliated funds, SRA I, SRA II,

and SRA III, for the promised purpose of investing in specific, non-public companies. Until mid-2014, Mazzola raised money from the SRA Funds' investors. The money raising continues, with Bivona soliciting new investments in the SRA Funds and in another, new, investment fund.

From the SRA Funds' beginning until now, Bivona fraudulently used the investors' money as a personal "slush" fund, diverting at least $9.97 million dollars of the SRA Funds' investor proceeds to other affiliated and unaffiliated entities, for excess or unrelated expenses, and to his family members and relatives. Indeed, Bivona diverted most of the misappropriated money – approximately $3.68 million – to his own wife, Anne Bivona, and to his nephew, Frank Mazzola, and his nephew's wife, Michele Mazzola. Bivona used SRA Fund money to pay about $2.3 million in expenses that Saddle River and SRA Management were responsible for paying, plus another $1.975 million in unrelated legal fees.

Additionally, in Ponzi-scheme fashion, Bivona, Saddle River and SRA Management improperly transferred about $2 million in SRA Fund investor money to affiliated, earlier, investment entities, NYPA Fund I LLC ("NYPA I"), NYPA II Fund LLC ("NYPA II") and NYPA Management Associates LLC (collectively, "NYPA Entities"). Bivona conducted this Ponzi-like scheme by also raising money from investors purportedly to purchase for their benefit the shares of a specific private company, such as Palantir Technologies, but instead diverting that investor money to purchase shares of a different private company, such as Flurry Analytics, for the benefit of other investors. Bivona, Saddle River, and SRA Management never disclosed the fraudulent diversions of investor money. Nor did they provide investors with the promised financial statements that should have revealed defendants' financial shenanigans.

Bivona's, Saddle River's and SRA Management's fraudulent diversion of the SRA Funds' offering proceeds violated the anti-fraud provisions of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Sections 206(1), (2) and (4) of the Advisers Act. Bivona, Saddle River and SRA Management continue to raise investor money and to divert investor money for unauthorized purposes. Accordingly, the Commission seeks a temporary restraining order prohibiting Bivona, Saddle River and SRA Management from violating the anti-fraud provisions of the federal securities laws. The Commission seeks a temporary restraining order that prohibits

Bivona, Saddle River and SRA Management from directly or indirectly soliciting any person to buy or sell securities.

To halt this misappropriation and preserve assets that belong to investors, the Commission also seeks an order freezing the assets of Bivona, Mazzola, their spouses and Felix Investments, all of whom received investor money to which they were not entitled. The Commission also seeks the appointment of a monitor to review, in conjunction with a short-term freeze, the bank accounts, financial records, holdings and operations of Saddle River, SRA Management, the SRA Funds and Clear Sailing (as the conduits of investor money) and to recommend future protective action. This will begin the process of unwinding the Bivona's, Saddle River's and SRA Management's improper use of investor money.

II. FACTS

Bivona Forms and Controls the SRA Funds to Raise Investor Money.

In October 2013, Bivona and his nephew, Mazzola, began selling interests in the newly-formed SRA Funds' securities to investors. Bivona controlled the SRA Funds' bank accounts and monetary transactions, while Mazzola solicited investors until mid-2014. SRA I, II and III were each formed in 2013 and 2014 as Delaware series limited liability companies, managed by SRA Management and advised by Saddle River. *E.g.*, SRA I Confidential Private Placement Memorandum dated October 1, 2013 ("SRA I PPM) at i (Chan Declaration, Exhibit M). Bivona and Mazzola established the SRA Funds to acquire shares (or sometimes an economic interest in shares) of private high technology companies, typically from the employees of such companies.

The SRA Funds' PPMs made the important representation that the shares of private companies would be held in separate "Series," so that the investor can make "a separate and distinct investment in a specific company or companies." *E.g.* SRA I PPM at 4. This representation falsely told investors the SRA Funds would use their money to acquire an interest in a particular series, which would then hold shares of a particular company at a particular acquisition price. When a "liquidity event" – such as an acquisition of the private company by another company, or an initial public offering ("IPO") of its stock – took place, the investor in the series would receive a positive return on their investments if the merger or IPO price exceeded the investor's acquisition price for the

particular series. Investors paid to obtain an interest and receive an eventual distribution only for their particular series. *Id.* at 3, 6, 10-11.

Bivona is Saddle River's president and manager and controls all of the SRA Funds', Saddle River's and SRA Management's bank accounts. Investigative Testimony of John Bivona on July 10, 2014 ("Bivona Testimony, Vol. 1") at 36:17-37:8, 249:10-23 (Chan Declaration, Exhibit K). As the adviser to the SRA Funds, Saddle River recommends investment opportunities, structures investments, and monitors investments for the SRA Funds. SRA I PPM at 7. Bivona is a practicing attorney, and Frank Mazzola's uncle. Investigative Testimony of John V. Bivona on March 19, 2015 ("Bivona Testimony, Vol. 2") at 56:5-21 (Chan Declaration, Exhibit L). Bivona formed relief defendants Clear Sailing Group IV and Clear Sailing Group V to purchase the shares (or economic interests in the shares) of the private companies in which a series of the SRA Funds invested.

Bivona, Saddle River and SRA Management Represent That Investor Money Will Only Be Used to Purchase Shares and to Pay Specified Fees.

Bivona and Mazzola, through Saddle River and SRA Management, sold membership interests in the SRA Funds to investors using "Subscription Booklets." Chan Declaration, Exhibits M, N and O. Each Booklet contained a Confidential Private Placement Memorandum ("PPM") and the Operating Agreement for the particular SRA Fund. The PPMs stated that investor proceeds would be used, as described above, to invest in a specific private company by purchasing an interest is a particular series. *E.g.*, SRA I PPM at 2-3.

The offering materials also represented that investor proceeds could be charged specified "front-end" fees (as identified in the PPMs and Operating Agreements) from the initial investment, including an "Expense Fee" to cover offering and organizational costs, the first year's annual 2% "Management fee," and a 1% to 5% fee as a "Due Diligence Fee." *E.g.*, SRA I PPM at 2. SRA Management could, however, waive any portion of its management fee for a particular investor or series. *Id.* at 9. SRA Management therefore negotiated its front-end fees with each investor and frequently waived its "front-end" fees. *See* Chen Declaration, ¶ 21. SRA Management was also permitted specified "back-end" fees at the time an SRA Fund Series made a distribution to investors, which consisted of accrued management fees (at a rate of 0.5 percent per quarter); plus a 1% to 5%

"Performance Bonus Fee"; and, a share of profits denominated as "Carried Interest," calculated as 20% of the profit earned per share [after subtracting other fees]. *Id.* at 9, 10, 11.

The SRA Funds typically purchased the private company shares (or an economic interest in the shares) for each series from employees of the private companies, in transactions by Clear Sailing. *See* SRA I PPM at 6; Bivona Testimony, Vol. 1 at 113:5-25. Bivona manages Clear Sailing IV and V. Clear Sailing Group IV Second Amended and Restated Operating Agreement ("Clear Sailing IV Operating Agreement"), Recitals and ¶ 2.6.1; Clear Sailing Group V Amended and Restated Operating Agreement ("Clear Sailing V Operating Agreement"), Recitals and ¶ 2.6.1 (Chan Declaration, Exhibits P and Q).[1] However, the Clear Sailing Operating Agreements did not authorize any additional fees or distributions to Bivona, Mazzola, Saddle River, or SRA Management. Indeed, the SRA Funds are owner-members of Clear Sailing, and upon Clear Sailing's liquidation, the SRA Funds share with other members any remaining assets. *Id.*, ¶¶ 2.5.5, 5.1.

Bivona, Saddle River and SRA Management Diverted SRA Investor Money to Other Investment Funds and for Different Investors.

Bivona, Saddle River and SRA Management have misappropriated investor money, in a Ponzi-like investment scheme, from the SRA Funds since inception. Soon after launching SRA I, Bivona diverted SRA I investor proceeds, including to other investment funds under Bivona's and Saddle River's control. Indeed, between October and December 2013, Bivona arranged for SRA I's transfers of the net amount of $1,413,300 to NYPA II, a different fund Bivona controlled for earlier investors. *See* Chen Declaration, ¶¶ 32-44 and Table 2 (Bivona is signatory on NYPA II's bank accounts); Chan Declaration, Exhibits A, B (filings stating that Bivona is a related person). For instance, on November 19, 2013, Bivona arranged for SRA I's transfer of $900,000 to NYPA II so

[1] Clear Sailing IV is a Delaware series limited liability company that was formed in August 2011, while Clear Sailing V is a Delaware series limited liability company that was formed in February 2012. The members of Clear Sailing were the investment funds managed by Saddle River, including SRA I in October 2013, SRA II in January 2014 and SRA III in July 2014. *E.g.*, Clear Sailing IV Operating Agreement at 21; Chan Declaration, Exhibits T, U and V (SRA I, II, and III Joinder Agreements). Bivona and Mazzola used Clear Sailing to purchase securities for the funds managed by Saddle River because many sellers of pre-IPO securities did not want to do business with Felix Investments or Mazzola in light of the Commission's then-pending lawsuit. Bivona Testimony, Vol. 1 at 114:1-24.

that NYPA II could purchase Palantir shares. SRA I obtained the $900,000 from SRA I investors who paid a combined total of $925,000 (between November 18 and 19, 2013) to invest in Twitter, Inc. shares. Chen Declaration, ¶¶ 33-35. Subsequently, Bivona arranged for SRA I to transfer $408,300 (between December 11 and 13, 2013) to NYPA II so that NYPA II could purchase Glam Media shares, although the vast majority of the money transferred (a total of $391,052) had been obtained from SRA I investors between December 10 and 13, 2013 for the purchase of shares of Palantir, Practice Fusion, Inc. and Jawbone. Chen Declaration, ¶¶ 36-43.

Bivona continued using the funds deposited by investors in SRA Funds for purchases of securities on behalf of other investors in other funds in 2014. On May 1, 2014, SRA II transferred $156,000 from SRA II to NYPA II to redeem a NYPA II investor's interest in Bloom Energy shares. Chen Declaration, ¶¶ 44-47. In total, from October 2013 through September 2014, Bivona, Saddle River and SRA Management diverted to the NYPA Entities the net amount of $1,772,955 from SRA I investors and $239,850 SRA II investors, for a total net diversion of $2,012,805. *Id.*, ¶ 31.

Bivona similarly misused investors' funds, in Ponzi-like fashion, to pay for the shares targeted for investments by one group of SRA Fund investors using the money of a different group of SRA Fund investors. For example, on April 3, 2014, two investors paid a combined $282,000 to SRA I to invest in a series that was to purchase Alibaba Group Holding Limited shares. Those investors' money was not used for that purpose, however, and was used instead to acquire shares of Square, Inc., for the benefit of investors in a different series. *Id.*, ¶¶ 111-12 and Exhibit 55. As a consequence, Bivona then resorted to new investors' money, in a convoluted series of money transfers between May 19 to May 28, 2014, to acquire the shares sought by the original, April 3, 2014, SRA I investors in Alibaba. *Id.*, ¶¶ 113-25 (of $658,456 in investor funds received from May 19-38, 2014, only $50,000 was actually used for the intended investments, and a portion of the remainder was used for the purchase of the Alibaba shares sought by the two April 3, 2014 SRA I investors).

In another example, during May and June 2014, the Bivona took $164,956 of investor money for Flurry shares and used that money to purchase another company's shares for different investors in Palantir and Alibaba. *Id.*, ¶ 89. Bivona then misappropriated $499,600 from other investors in late

May and June 2014 to purchase the Flurry shares owed to the first group of investors. *Id*., ¶¶ 90-108.

Bivona Misappropriated Investor Money for Himself, Mazzola, Saddle River and SRA Management.

Bivona Diverted SRA I Investor Money to Mazzola During 2013.

Besides diverting investor money to other investment funds or to purchase shares in other companies for other investors, Bivona diverted a significant amount of SRA Fund investors money to Mazzola. Thus, on October 28, 2013, Bivona arranged for SRA I to transfer $50,000 to Mazzola's personal bank account. Chen Declaration, ¶ 58 and Exhibit 33. Ten days later, on November 8, 2013, Bivona arranged for a $120,000 transfer from SRA I to Bivona's attorney trust account, and then to Mazzola's bank account. *Id.*, ¶¶ 50-54 and Exhibits 31-32. One week later, on November 14, 2013, Bivona arranged for a third transfer, of $73,773, from SRA I to Mazzola's personal bank account. *Id.*, ¶ 60 and Exhibit 35. Bivona then arranged a fourth, $120,000 transfer, on November 22, 2013, from SRA I to SRA Management, and from SRA Management to Mazzola's personal bank account. *Id.*, ¶¶ 61-63 Exhibits 36, 37. In total, Bivona misused a total of $363,773 of SRA I investor money to make the four transfers to Mazzola in this early period. *Id.*, ¶ 48.[2]

Bivona and Felix Investments Promise $1.8 Million to Mazzola in March 2014.

Bivona also misappropriated SRA Fund investor money to satisfy a payment obligation that Felix Investments, but not the SRA Funds, owed to Mazzola. On March 10, 2014, Judge Maxine M. Chesney entered a Final Judgment against Mazzola and two companies he was affiliated with, Felix Investments and Facie Libre Management Associates, LLC ("Facie Libre"), in *Securities and Exchange Commission v. Frank Mazzola, et al.*, Case No. C-12-1258-MMC. Chan Declaration, Exhibit I.[3] The Final Judgment was entered with Mazzola's and his co-defendants' consent, to settle

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[2] SRA I's Quickbooks indicate that Saddle River took the money to pay Mazzola as purported loans from SRA I because the Quickbooks show amounts owed by Saddle River, SRA Management and Bivona to SRA I on December 31, 2013. Chen Declaration, ¶ 49 and Exhibit 30. Such loans were improper because the PPMs did not disclose, much less authorize, the use of SRA I's investor money to make purported "loans" to Saddle River, SRA Management, or Mazzola. *See* Bivona Testimony, Vol. 2 at 227:25-228:4. The transfers to Mazzola were not made with allowable front-end fees because by that point, SRA Management had earned only $14,660 in front-end fees from SRA I investors. Chen Declaration, ¶ 48.

[3] The case, filed in March 2012, alleged that Mazzola and the companies engaged in fraud in

Footnote continued on next page

the Commission's fraud action, and enjoined Mazzola and the entities from further violations of the anti-fraud provisions of the federal securities laws, ordered Mazzola and Felix Investments to disgorge, jointly and severally, $240,000, and ordered Mazzola to pay a $100,000 civil penalty, and Felix Investments to pay a $160,000 civil penalty. *Id.* at 2-5.

As another component of the settlement, on March 20, 2014, the Commission entered an Order Instituting Administrative Proceedings ("OIP") against Mazzola and Felix Investments, which barred Mazzola from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal securities adviser, transfer agent or national recognized statistical rating organization for a period of three years and which censured Felix Investments. Chan Declaration, Exhibit J.[4] With Mazzola about to be barred by the Commission, Bivona had Felix Investments promise to pay $1.8 millions to Mazzola, under the guise of the "Separation Agreement and General Release" between Felix Investments and Mazzola. Chan Declaration, Exhibit W.[5]

Bivona knew at that time that Felix Investments did not have money or assets to pay Mazzola the $1.8 million. Bivona Testimony, Vol. 2 at 33:21-34:6. Bivona expected to use money from SRA I to pay the $1.8 million to Mazzola because SRA I was the only source of money from investors. *See* Bivona Testimony, Vol. 2 at 180:15-19. The SRA Funds' PPMs and Operating Agreements do not make the SRA Funds responsible for Felix Investments' purported "debt" to Mazzola under the Separation Agreement. *See* Bivona Testimony, Vol. 2 at 130:15-24 (stating that Mazzola was not entitled to payments from the SRA Funds directly). Hence, the SRA Fund money used to satisfy the

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violation of Exchange Act Section 10(b) and Rule 10b-5, Securities Act Section 17(a) and Advisers Act Section 206(4) and Rule 206(4)-8. Chan Declaration, Exhibit C. To settle the case just before trial, Mazzola and the entities consented to the final judgment. Chan Declaration, ¶¶ 4-6, Exs. D, E and F. (Consents signed January 14, 2014). In mid-February 2014, Mazzola and Felix Investments also signed Offers to settle administrative proceedings against them by the Commission. *Id.*

[4] Although imposing a three-year bar upon Mazzola, the Commission's OIP allowed him to remain associated with Felix Investments and Felix Advisors, which was an affiliated investment adviser, until August 31, 2014 "to permit the orderly, scheduled resolution of certain funds." *Id*. at 4. Felix Advisors has changed its name to Saddle River Advisors.

[5] Bivona signed the Separation Agreement on behalf of Felix Investments on March 10, 2014, the same day as the Final Judgment. Chan Declaration, Exhibits I and W. Felix Investments agreed to pay to Mazzola the $1,842,679.70 in commissions that Felix Investments supposedly owed Mazzola from March 29, 2011 through March 14, 2014. Chan Declaration Ex. W., Section II and Schedule.

Separation Agreement was necessarily misappropriated by Bivona from the SRA Funds.[6]

Bivona Diverted Nearly $800,000 to Mazzola in March 2014.

Bivona in fact stole investor money from several affiliated entities to pay Mazzola approximately $800,000 during March 2014 alone. For example, Clear Sailing made three payments to Mazzola in March, totaling $375,000. *Id.* (payment to Mazzola on March 6, 2014: $100,000; March 10, 2014: $200,000; March 21, 2014: $75,000). When Clear Sailing made the $375,000 in payments, the only money in its account were proceeds of an investor's payment for Palantir shares, plus money that had been transferred from SRA I and SRA II to Clear Sailing IV. Chen Declaration, ¶¶ 65-76 and Exhibits 38-44.

Additionally, Bivona had Saddle River make a $420,000 payment to Michele Mazzola on March 13, 2014, for which he used a $240,000 payment from SRA I to SRA Management to Saddle River, and a $250,000 payment from SRA II to SRA Management to Saddle River. Chan Declaration, Exhibit X. SRA I received the money for its payment from investors in a various private companies, while SRA II received the money for its payment primarily from investors in Palantir and Jawbone. Chen Declaration, ¶¶ 77-83 and Exhibits 45-47.[7]

Bivona Diverted Additional Unauthorized Payments for Himself and Mazzola.

In addition to the March 2014 payment to Mazzola, Bivona continued to transfer money to Frank or Michele Mazzola and continued to make payments on their behalf. By November 13, 2014, the Mazzolas had received a total of $1,789,843 in supposed satisfaction of the Separation Agreement between Felix Investments and Mazzola. Chan Declaration, Exhibit X. Of that amount, only $44,580 was paid by Felix Investments. The remaining amounts were paid by Clear Sailing, SRA Management, Saddle River and Bivona's attorney trust account. *Id.*

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[6] Felix Investments' lack of money to pay Mazzola is punctuated by its single payment of just $10,000 to Mazzola on March 25, 2014. Chan Declaration, Exhibit X.

[7] Nor can the $495,000 that the SRA Funds transferred to SRA Management be explained solely on the basis of "management fees." For the period of October 2013 through March 2014, the management fees that could be attributed to the SRA Funds by SRA Management amount to $207,631. But during this period, Mazzola was paid from the SRA Funds the $495,000 (in March 2014) plus the $363,773 (in October-November 2013) for a total $858,773; that amount thus exceeds the allowable front-end fees of $207,631 by $651,142. Chen Declaration, ¶ 64.

Over and above the $1.8 million promised to Mazzola in the Separation Agreement, Bivona diverted additional investor money to the Mazzolas. By January 2016, Bivona authorized payments totaling approximately $4.9 million for the Mazzolas. Of that $4.9 million, at least $2.68 million came from the SRA Funds. Chen Declaration, ¶ 84 and Exhibits 48-49. The $2.68 million paid by the SRA Funds for Mazzola's benefit included $604,773 to Frank Mazzola; $1.8 million to Michele Mazzola; $205,160 to third parties for the Mazzolas' benefit, including $30,913 in mortgage payments, $22,190 in tax payments, $11,938 in car loan payments and $4,944 in payments to financial institutions. *Id.*, Table 7 and Exhibits 48-49. Bivona also transferred $999,000 to his wife, Anne Bivona, from the SRA Funds' money.[8] *Id.*, ¶ 86 and Exhibit 50.

In Saddle River's accounting records, many of the payments to the Mazzolas were identified as "distributions."[9] Chen Declaration, Exhibits 60, 83. But Saddle River experienced a net loss when the payments were made, which would be inconsistent with any profit distribution. Chen Declaration, ¶ 12.[10] In fact, Bivona admittedly made purported "distributions" to Michele Mazzola because she told him that she needed some money. Bivona Testimony, Vol. 2 at 101:14-102:8.

Bivona Arranged Other Unauthorized Payments with SRA Funds' Money.

The PPMs represented that the investors' front-end fees covered all of the SRA Funds' expenses until a distribution took place. *E.g.*, SRA I PPM at 8-10 (stating that if organizing and overhead expenses exceed the "expense fee," the expenses will accrue and become payable upon disposition of interests). Even though the PPMs promised that investors would not currently pay any

[8] During the Commission's investigation into this matter, Frank and Michele Mazzola each asserted their Fifth Amendment privilege against self-incrimination in response to substantive questions about their activities.

[9] In 2013, Frank Mazzola and John Bivona named their wives as Saddle River's nominal owners. *Id.* Vol. 2 at 94:12-19, 96:2-13. Although nominal owners, Ms. Mazzola and Ms. Bivona did not contribute any money or services to Saddle River. They also do not have a management role at Saddle River or SRA Management. *Id.* Vol. 1 at 106:1-25, 126:18-127:5. The "distribution" payments to Michele Mazzola and Anne Bivona were therefore a guise for paying Frank Mazzola and John Bivona.

[10] Saddle River's income statement for 2014 reflects a net loss of $120,507.95 and its balance sheet shows a negative equity of $938,561.69. For the same year, SRA Management's income statement reflects a net loss of $539,007.91 and its balance sheet shows a negative equity of $1,060,412.91. Chen Declaration, ¶ 12 and Exhibits 1-5. Saddle River and SRA Management therefore lacked the income and equity to make profit "distributions" to the Mazzolas or the Bivonas.

expenses exceeding the front-end fees, Bivona nonetheless took money - in excess of the authorized front-end fees – from the SRA Funds to pay business expenses for Saddle River and SRA Management. From October 2013 to January 2016, SRA Management received $1,918,731 in front-end fees from the SRA Funds. Chen Declaration, ¶¶ 20-24. During that same period, SRA Management charged the SRA Funds a total of $4,225,807 in accounting and tax preparation fees, brokerage commissions, consulting fees, legal fees, overhead, payroll and rent expenses. *Id.*, ¶ 25 and Exhibit 17. These expenses exceeded the amount of SRA Management's front-end fees, which investors were told should cover all expenses, by $2,307,076. As a result, Bivona, Saddle River and SRA Management improperly took $2.3 million from the SRA Funds for their expenses. *Id.*, ¶ 26.

Additionally, Bivona arranged for the payment of an additional $1,975,499 from the SRA Funds to a law firm for legal services for Felix Investments and an unrelated project in which Mazzola was involved. *Id.*, ¶¶ 27-30 and Exhibits 18-19; Chan Declaration, ¶ 25 and Exhibits Y, Z and AA. In total, when these excess expenses, unrelated legal fees, and payments of $3.68 million to the Mazzolas and Bivonas are added together, Bivona, Saddle River and SRA Management misappropriated $7.96 million from the SRA Funds through unauthorized payments (without even taking into account the approximately $2 million net transfers from the SRA Funds to the NYPA entities). Much of this misappropriated money passed through Bivona's attorney escrow accounts. *See* Chen Declaration, Figures 3, 7, 10.

Bivona, Saddle River and SRA Management Did Not Provide Investors With Promised Financial Information.

The SRA Funds' offering materials promised investors that Bivona, Saddle River and SRA Management would maintain "proper and complete records . . . in accordance with generally accepted account principles" and provide investors with annual financial statements prepared in substantial accordance with generally accepted accounting principles and reported on by a firm of independent certified public accountants of recognized national standing. *E.g.* SRA I Operating Agreement, ¶¶ 12.1.1, 12.1.2, 12.2.1(a). The SRA Funds' investors have never received the promised annual financial statements. Bowmer Declaration, ¶ 13; Krevet Declaration, ¶ 15. Other than notations on certain checks and wire transfers, Bivona did not record the bases or sources of the

payments he arranged to the Mazzolas, nor did he maintain a separate ledger showing SRA Management's profits and distributions. Bivona Testimony, Vol. 1 at 128:16-22; Vol. 2 at 113:1-7, 143:20-23. Bivona asserts that so long as he saw a $40,000 or $50,000 balance in the bank accounts, he would transfer money for any purpose, including transferring money to Saddle River so that Saddle River could make a "distribution" to its owners – *i.e.*, the Mazzolas and Bivonas. *See Id.*, Vol. 2 at 103:23-104:14, 155:23-156:4, 239:1-240:19.

Compounding the problem of not keeping accurate ledgers, Bivona used attorney trust accounts to make payments with SRA Funds investor money. Chen Declaration, Figures 3, 7, 10. These accounts contained commingled funds, sometimes directly from investors, and were used to pay himself, the Mazzolas and third persons. Bivona Testimony, Vol. 2 at 176:18-177:18. By transferring money through his attorney trust accounts, Bivona hid the trail of payments using investor money and undermined the purpose of accurate and complete books and records.[11]

Bivona's, Saddle River's, SRA Management's Fraud Is Continuing.

To stave off a collapse, Bivona, Saddle River and SRA Management are continuing to raise and to divert investor money. In late January 2016, SRA II received $150,000 from an investor for Palantir shares. Chen Declaration, ¶ 19 and Exhibit 11. Bivona signed the documentation for this transaction. *Id.* Bivona and a Saddle River employee are also currently soliciting investors for a new fund, the Fortuna Fund. Bowmer Declaration, ¶¶ 14, 15, 22 and Exhibit 2; Krevet Declaration, ¶ 16 and Exhibit 3. From December 2015 to January 2016, Fortuna Fund recently transferred $50,000 to Saddle River, which used the money to pay expenses even though Saddle River is not the Fortuna Fund's manager. Chen Declaration, ¶ 127 and Exhibit 59; Chan Declaration, Exhibit DD. Fortuna Fund also transferred $24,500 to SRA II on January 25, 2016, which was then transferred to Clear Sailing IV. Chen Declaration, ¶ 128 and Exhibit 60. These transactions indicate that the Bivona, Saddle River and SRA Management are exploiting Fortuna Fund in the same way as the SRA Funds.

[11] The SRA Funds' Operating Agreements also represented that SRA Management will also provide investors with an annual "statement, in reasonable detail, showing the amounts received by the [Fund]" and to report the Fund's investment activities. *Id.*, ¶ 12.2.1(b). This annual statement has not been prepared. Chan Declaration, ¶ 30.

Defendants have also recently sought to liquidate personal assets acquired with investor funds. The Mazzolas have listed real estate for sale, after using investor money to pay a portion of the mortgage on the property.[12] Chan Declaration, Exhibit CC; Chen Declaration, Table 7 n. 16. Together, the bank account balances for the SRA Funds and Saddle River and SRA Management showed cash of only approximately $200,000 as of the end of January, including the $150,000 received in January from an investor.

III. LEGAL ARGUMENT

The Commission seeks a temporary restraining order against Bivona, Saddle River and SRA Management, and a freeze of the assets and certain accounts owned or in the name of John Bivona, Anne Bivona, Frank Mazzola, Michele Mazzola and Felix Investments to protect the investors' remaining assets from dissipation. Defendants' ongoing fraud and misappropriation of investor assets, if unchecked, will result in greater harm to individual investors. To limit the harm to investors' assets going forward, the Commission seeks the appointment of an independent monitor to conduct an immediate review of Saddle River's, SRA Management's, the SRA Funds and Clear Sailing accounts, financial transactions and operations.

A. Standards For TROs, Asset Freezes, and Appointment of a Monitor in SEC Enforcement Actions

"Under Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), the Commission is entitled to a preliminary injunction when it establishes the following: (1) a prima facie case of previous violations of federal securities laws, and (2) a reasonable likelihood that the wrong will be repeated." *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1196, 1199 n.2 (11th Cir. 1999). In the Ninth Circuit, the standards for granting a temporary restraining order are substantially the same as those for granting a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (Ninth Circuit's analysis for the propriety of granting a TRO and a preliminary injunctions are substantially

[12] On March 8, 2016, the listing price dropped from $1.8 million to $1.6 million for the apparent purpose of a quick sale.

identical). Finally, the Commission's enforcement actions do not require the posting of a bond. *See SEC v. Wencke*, 622 F.2d 1363, 1375 (9th Cir. 1980).

The Commission appears before the Court "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). Because of this, courts have repeatedly determined that the Commission faces a lower burden than a private civil litigant seeking a temporary restraining order. *See Unique Fin. Concepts*, 196 F.3d at 1199 n.2 ("Under 20(b) of the Securities Act of 1933, and Section 21(d) of the Securities Exchange Act of 1934, the SEC is entitled to a preliminary injunction when it establishes the following: (1) a prima facie case of previous violations of federal securities laws, and (2) a reasonable likelihood that the wrong will be repealed."); *SEC v. Schooler*, 902 F. Supp. 2d 1341, 1345 n.2 (S.D. Cal. 2012) (following *Unique Fin. Concepts* in absence of controlling Ninth Circuit precedent). Thus, where the Commission shows the probability of success on the merits, irreparable injury will be presumed. *See United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992) ("In statutory enforcement actions, where the government has met the 'probability of success' prong of the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute itself is an implied finding by Congress that violations will harm the public").

Where the Court has jurisdiction over the defendants, "the District Court has authority to order [defendants] to 'freeze' property under [their] control, whether the property be within or without the United States." *SEC v. Int'l Swiss Invs. Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990) (*citing United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) and *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363–64 (9th Cir. 1988) (en banc)). Federal courts apply a lower standard to freeze assets that may be subject to disgorgement, than to grant other forms of preliminary or temporary injunctive relief, as asset freezes are designed to maintain the *status quo*. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990) (an interlocutory freeze order is an ancillary equitable remedy, which "may be granted even in circumstances where the elements required to support a traditional SEC injunction have not been established"). Further, an asset freeze is appropriately ordered even against a non-defendant, such as a relief defendant, where the

Commission shows that the person "(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998).

Furthermore, the Court has broad discretion to appoint an equity receiver, or independent monitor, in Commission enforcement actions. *See SEC v. Wencke*, 622 F.2d 1363, 1365 (9th Cir. 1980); *See SEC v. Trabulse*, 526 F. Supp. 2d 1008, 1019 (N.D. Cal. 2007) (appointing independent monitor of disbursements and operations). Such court-appointed monitors may play a crucial role in preventing further dissipation and misappropriation of investors' assets. Such actors can be the means to achieve the "ultimate goals of SEC intervention," which are "protection of innocent shareholders and enhancement of investor confidence in the securities markets." *SEC v. Wencke*, 622 F.2d at 1372. Critical to the determination of federal courts in weighing the need for such a third-party actor are facts putting at issue the integrity of management, and thus the likelihood of future misuse of assets. As the Fifth Circuit has observed:

> The district court's exercise of its equity power in this respect is particularly necessary in instances in which the corporate defendant, through its management, has defrauded members of the investing public; in such cases, it is likely that, in the absence of the appointment of a receiver to maintain the status quo, the corporate assets will be subject to diversion and waste to the detriment of those who were induced to invest in the corporate scheme and for whose benefit, in some measure, the SEC injunctive action was brought.

SEC v. First Financial Group of Texas, 645 F.2d 429, 438 (5th Cir. 1981). *See also SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968), *aff'd* 435 F.2d 510 (2d Cir. 1970); *SEC v. Credit First Fund*, 2006 WL 4729240, at *15 (C.D. Cal. Feb. 13, 2006).

B. Bivona Engaged in a Fraudulent Scheme Through Saddle River and SRA Management

Exchange Act Section 10(b) and Rule Rule 10b-5 prohibit fraudulent schemes and deceptive devices in connection with the purchase or sale of securities. As the Ninth Circuit has described, an illegal scheme or deception may be demonstrated by "conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *Simpson v. AOL Time Warner*, 452 F.3d 1040, 1048 (9th Cir. 2006) (*vacated on other grounds*). Sections 17(a)(1) and (3) of the Securities Act similarly create scheme liability in the offer or sale of securities. 15 U.S.C. §§

77q(a)(1), (3).

Violations of Section 17(a)(1) of the Securities Act and Section 10(b), and Rule 10b-5 of the Exchange Act require proof of scienter - a "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Recklessness satisfies the scienter requirement. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc). For violations of Section 17(a)(2) and (3) of the Securities Act, however, a showing of negligence is sufficient to establish liability. *Aaron v. SEC*, 446 U.S. 680, 695-702 (1980); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997). As Saddle River's and SRA Management's principal officer, Bivona's intent should be imputed to both firms. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 (2d Cir. 1972).

Bivona and the entities he managed, including the NYPA Entities, lacked the money to buy the shares promised to investors or to cover the expenses that Saddle River and SRA Management were obligated to pay. In Ponzi scheme fashion, new investor money did not go for its intended purpose; instead, that money was diverted to keep the entire operation from collapsing from lack of money for pre-existing obligations. At the outset, Bivona, SRA Management and Saddle River used nearly $2 million that SRA Fund investors had earmarked for purchasing private company interests to cover shortfalls in the separate NYPA Entities. They also diverted investors' money that they had promised to use to buy interests in the shares of specific companies to instead buy interests for other investors in a different private company. *See* Chen Declaration, ¶¶ 89-125 (describing examples of diverting investor funds to buy shares). By diverting new investor money, Bivona, Saddle River and SRA Management misled investors into believing that their money has been properly used. *See* Krevet Declaration, ¶¶ 13-14 and Bowmer Declaration, ¶¶ 11-12 (stating that they would not have invested knowing their money would go for a different investment).

This ongoing misuse of investor money for another person's benefit constitutes the type of fraudulent scheme prohibited by Section 10(b) and Rule 10b-5 of the Exchange Act and Sections 17(a)(1) and (3) of the Securities Act. *See SEC v. Zandford*, 535 U.S. 813, 819-23 (2002) (finding scheme liability for the misappropriation of investor funds associated with the sales of securities); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1095 (calling misappropriation of investor proceeds

a "garden type" of fraud); *SEC v. Loomis*, 969 F. Supp. 2d 1226, 1237 (E.D. Cal. 2013) (acceptance of new investor money to make payments to existing investors constituted "deceptive conduct" that "went beyond mere misrepresentations"). A reasonable investor expects that his or her investment proceeds will be used in the manner promised, and for the investor's own benefit. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1094 (describing misappropriation of investor proceeds as a type of fraud). *See also SEC v. Benson*, 657 F. Supp. 1122, 1130-31 (S.D.N.Y. 1987) (misuse of proceeds for undisclosed compensation was material).

The Commission's evidence establishes that Bivona knew that he was improperly diverting investor money for other purposes. Bivona controlled all of the bank accounts, and therefore authorized all of the improper payments. Bivona Testimony, Vol. 1 at 249:10-23. Despite controlling all accounts, Bivona did not attempt to use investor money for the promised purpose, and instead transferred money to Saddle River for distributions to the Bivonas and Mazzolas as long as the accounts retained a $40,000 to $50,000 balance.[13] *Id.*, Vol 2 at 155:23-156:12, 239:1-240:19. Bivona knew that Saddle River could not take loans from the SRA Funds. *Id.*, Vol. 2 at 227:25-228:4. Even though he had the SRA Funds make purported loans to other Saddle River investment funds, Bivona could not identify any provision in the SRA Funds' PPMs authorizing such "loans." *Id.*, Vol. 2 at 228:5-18. Bivona knew that Mazzola was not entitled to direct payments from the SRA Funds, but transferred money directly from an SRA I account to Mazzola during 2013. *Id.*, Vol. 2 at 130:15-24, 176:21-178:23.

C. Bivona Made Material Misrepresentations Through Saddle River and SRA Management.

Exchange Act Section 10(b) and Rule 10b-5(b) also prohibit the making of any untrue statement of a material fact in connection with the purchase or sale of a security. Securities Act Section 17(a) makes it unlawful to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact. A fact is "material" if there is a substantial

[13] In fact, Bivona often allowed balances to drop to $2,000 or less before making unauthorized transfers from other accounts to replenish the balances. Chen Declaration, ¶¶ 91-108.

likelihood that a reasonable investor would consider it important in making an investment decision. *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Under Section 10(b) of the Exchange Act and Rule 10b-5(b), person is liable as the "maker" of a misleading or false statement if that person has "ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Grp., Inc. v. First Derivative Traders*, --- U.S. ---, 131 S. Ct. 2296, 2298 (2011). When they made written statements to investors, authorized statements, or had statements attributed to them, Bivona, Saddle River and SRA Management became the "makers" of those statements. *See Id*.

Bivona directed Saddle River employees to send Subscription Booklets to investors. The PPMs state that Saddle River and SRA Management must give their "prior written permission" for the dissemination of the PPM to potential investors. Investors with questions are directed to contact Bivona at Saddle River. *E.g.*, SRA I PPM at i, iv. These statements inform investors that Bivona, Saddle River and SRA Management authorized the making of statements in the offering materials. Bivona also counter-signed the Operating Agreements. Bivona, Saddle River and SRA Management are therefore liable under Section 10(b) of the Exchange Act and Rule 10b-5 for the offering materials' misrepresentations to investors. *See In re Stillwater Capital Partners Inc. Litig.*, 853 F. Supp. 2d 441, 460 (S.D.N.Y. 2012) (finding that officers of closely controlled entity were makers of statements); *SEC v. Greenstone Holdings, Inc.*, 2012 U.S. Dist. LEXIS 44192, at *26 (S.D.N.Y Mar. 28, 2012) (sole officer of entity was maker of statements in press release).[14]

Bivona, acting on behalf of Saddle River and SRA Management, signed the Subscription Booklets, in which the PPMs and Operating Agreements represented that the investor's money would be placed in a separate series and used only for a specific investment and "front-end" fees. In reality,

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[14] Bivona, Saddle River and SRA Management are liable under Section 17(a) for their misrepresentations. A defendant does not have to make a particular misrepresentation to be liable under Section 17(a) of the Securities Act. *SEC v. Mercury Interactive, LLC*, 2011 U.S. Dist. LEXIS 134580 at * 7-9 (N.D. Cal. Nov. 22, 2011); *SEC v. Daifotis*, 2011 U.S. Dist. LEXIS 83872 at *14-15 (N.D. Cal. Aug. 1, 2011). Because the Bivona, Saddle River and SRA Management received investor funds, they violated Section 17(a)(2) of the Securities Act. *In re Washington Public Power Supply System Securities Litigation*, 823 F.2d 1349, 1351-52 (9th Cir. 1987).

however, the investor's money was used to purchase different shares or to pay Saddle River, SRA Management, the Mazzolas and the Bivonas far more than the maximum amount of allowable fees. Defendants' misuse of investor money was material to the SRA Funds investors. *See SEC v. Benson*, *supra*, 657 F. Supp. at 1130-31; Bowmer Declaration, ¶¶ 11-12; Krevet Declaration, ¶¶ 13-14. Additionally, Bivona, Saddle River and SRA Management falsely told investors that accounting records would be maintained in accordance with generally accepted accounting principles and that investors would receive annual financial statements and reports. This misrepresentation was material because information regarding the SRA Funds' financial condition and use of investor proceeds is important to any investor. *See SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) (stating that "materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge"). Bivona acted with scienter in making these misrepresentations because, as the signatory on the Operating Agreements, he knew that investors had been told that their money could be used only for specific purposes, but he made the improper transfers anyway for unauthorized purposes. Additionally, as signatory of the Operating Agreements, Bivona knew that investors were told that the SRA Funds' books and records would be maintained properly and that annual reports would be distributed, but Bivona made no real efforts to ensure proper record keeping or the distribution of the required reports to investors.

D. Bivona, Saddle River and SRA Management Fraudulently Violated the Advisers Act.

Saddle River, SRA Management and Bivona violated their duties under the Advisers Act. As investment advisers, Saddle River, SRA Management and Bivona were prohibited, under Sections 206(1) and 206(2) of the Advisers Act, from engaging in any device, scheme, or artifice to defraud clients or prospective clients or [engaging] in any transaction, practice, or course of business that defrauds clients or prospective clients. 15 U.S.C. § 80b-6(1), (2).[16] An investment adviser is a

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[16] Section 202(a)(11) of the Advisers Act defines an "investment adviser" to include "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, ..." 15 U.S.C. § 80b-2(a)(11). The first criterion, "compensation," is met because the PPMs stated that Saddle River and SRA Management would receive specified fees from the SRA Funds' investors. E.g., SRA I PPM at 8-10. Such fees then flow to Bivona as a manager and owner. Bivona, Saddle River and SRA Management

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fiduciary, and thus has an affirmative obligation of "utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 194 (1963) (internal quotations omitted).

Additionally, Section 206(4) of the Advisers Act prohibits an investment adviser from, directly or indirectly, engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. 15 U.S.C. § 80b-6(4). Advisers Act Rule 206(4)-8(a)(1) prohibits an investment adviser to pooled investment vehicles from making an untrue statement of material fact or omitting to state a material fact necessary to make the statements made not misleading to investors or prospective investors in those pools. Rule 206(4)-8(a)(2) provides that it is a fraudulent practice for an investment adviser to a pooled investment vehicle to engage in "fraudulent, deceptive, or manipulative" conduct with respect to any investor or prospective investor in the pooled vehicle. *Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles,* Advisers Act Rel. No. 2628, 2007 SEC LEXIS 1736 (Aug. 3, 2007).[17]

Section 206(1) of the Advisers Act requires a showing of scienter, while Section 206(2) does not require proof of scienter. *SEC v. Capital Gains*, 375 U.S. at 195; *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992). Scienter is also not required to prove violations of Rule 206(4)-8(a)(1), (2); the rule reaches conduct that is negligently deceptive. Rel. No. 2628 at *23-24.

Bivona's, Saddle River's and SRA Management's diversions of the investor proceeds from an SRA Fund or series violated Sections 206(1), 206(2) and 206(4). *See SEC v. Trabulse*, 526 F. Supp. 2d at 1016-17 (adviser breaches fiduciary duty by taking investor assets under the guise of collecting

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are in the business of advising the SRA Funds because they are the "Saddle River Team" that selects private companies to invest in. E.g., SRA I PPM at 1, 4, 15. Bivona, Saddle River and SRA Management advised the SRA Funds regarding investing in, purchasing or selling securities because t shares of companies such as Alibaba are "securities" under the Advisers Act. 15 U.S.C. § 80b-2(a)(18).

[17] Each SRA Fund, as well as each Series in an SRA Fund, was a "pooled investment vehicle" because the Fund and the Series are to investments in shares or interests of particular companies. 15 U.S.C. § 77b(a)(1); 17 C.F.R. § 275.206(4)-8b (incorporating "investment company" definition from 15 U.S.C. § 80a-3(a)(1)).

management fees); *SEC v. Mannion*, 789 F. Supp. 2d 1321, 1341 (N.D. Ga. 2011) (holding that a reasonable factfinder could conclude that an adviser using fund assets for purposes other than for the benefit of the fund is material). The same conduct creating Bivona's, Saddle River's and SRA Management's liability under Section 10(b) and Rule 10b-5 of the Exchange and Section 17(a) of the Securities Act also violates Section 206(1), (2) and (4) of the Advisers Act. *E.g.*, *SEC v. Young*, 2011 U.S. Dist. LEXIS 39460 at *23-24 (E.D. Pa. April 11, 2011).

Bivona, Saddle River and SRA Management acted with scienter in diverting investor money. They knew or were reckless in not knowing that the PPMs and Operating Agreements told investors that their money would be used to invest in specific companies and to pay certain front-end fees. Bivona made no effort, however, to ensure that the money was spent as promised. Bivona merely checked the remaining balance in the bank account before disbursing money to Saddle River for "profit distributions." Bivona Testimony, Vol. 2 at 155:23-156:12, 239:1-240:19. Additionally, Bivona's payments from the SRA Funds to Michele Mazzola were not limited to instances of paying Felix Investments' obligation to Mazzola or making a distribution; Bivona made some payments to Michele Mazzola simply at her request. *Id.*, Vol. 2 at 101:20-102:8. Similarly, Bivona knew that Clear Sailings' profits belonged to the various investment funds (*Id.*, Vol. 2 at 50:24-51:3), but Bivona had Clear Sailing make direct payments to Mazzola. Bivona also knew that Saddle River should not take loans from the SRA Funds (*Id.*, Vol. 2 at 227:25-228:4), but Saddle River and SRA Management owed money to the SRA Funds according to their internal accounting records.

E. Temporary Restraining Orders Are Needed to Protect Investors.

Temporary restraining orders, followed by preliminary injunctions, are appropriate against Bivona, Saddle River and SRA Management because the Commission has demonstrated those defendants' current violations of the federal securities laws, as well as the risk of repeated illegal conduct. The Court may infer the risk of repetition from Bivona's, Saddle River's and SRA Management' past illegal conduct. [18] *See SEC v. Management Dynamics, Inc.*, *supra*, 515 F.2d at

[18] The Commission seeks preliminary relief based upon Bivona's, Saddle River's and SRA Management's fraud violations because those violations pose the greatest immediate danger to investors. The Commission also alleges violations involving non-compliance with an industry bar order, accepting compensation without being registered as a broker-dealer, and failing to sell

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807. Bivona, Saddle River and SRA Management misappropriated investor proceeds over least a two-year-long period. This recurring misconduct establishes the risk of repetition that supports preliminary relief. *See id*. SRA II continues to accept investor funds to purchase shares of private companies. Chen Declaration, ¶ 19 and Exhibit 11; Chan Declaration, Exhibit EE. Bivona is using Fortuna Fund investor money to pay Saddle River expenses. Chen Declaration, ¶ 126. Because a proper showing has been made, the Court should temporarily restrain Bivona, Saddle River and SRA Management from violating Section 10(b) and Rule 10b-5 of the Exchange Act, Section 17(a) of the Securities Act, Sections 206(1), (1) and (4) and 206(4)-8 of the Advisers Act.

In addition to restraining future violations of the securities laws, a district court may also prohibit specified conduct that threatens harm to investors. *See Trabulse*, 526 F. Supp. 2d at 1017-18 (prohibiting the defendant investment adviser from "withdrawing any money whatsoever from the [investment] fund without prior accounting to the SEC and this Court showing that the fund has made net profits to support further withdrawals"). *See also SEC v. eAdGear, Inc.*, 2014 U.S. Dist. LEXIS 170159 at *8-9 (N.D. Cal. Dec. 8, 2014) (issuing preliminary injunction against offer and sales of certain types of securities). Bivona's, Saddle River's and SRA Management's fraudulent scheme is premised upon their continuing to raise investor money for diversion to other investment funds, to purchase shares for other investors, or to pay the Bivonas and the Mazzolas. Halting this scheme in its tracks requires having the Court impose a temporary order that prohibits Bivona, Saddle River and SRA Management from directly or indirectly soliciting any person to purchase or sell any security or to engage in a security-based swap.

F. An Asset Freeze and Independent Monitor Are Necessary to Protect Investors.

As demonstrated above, Bivona illegally transferred $2.68 million from the SRA Funds to the Mazzolas or to third parties for their benefit and transferred another $999,000 to his wife, Anne. These transfers constitute ill-gotten gains that should be disgorged. Similarly, Felix Investment's $1.8 million obligation to Mazzola was nearly all paid with investor money from the SRA Funds. To

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securities with the necessary registration statement, but is not seeking emergency relief with respect to these claims at this time.

ensure that disgorgement is made, the Court should freeze the personal bank accounts in names of Frank or Michele Mazzola and of John or Anne Bivona, as well as the business account of Felix Investments. The Mazzolas have, moreover, listed their second home for sale. Chan Declaration, ¶ 27 and Exhibit CC. Because the Mazzolas probably lack sufficient money in their bank accounts to disgorge $2.68 million, the proceeds from the sale of that house should be frozen to ensure that the sales proceeds are not dissipated and remain available for disgorgement. *See Smith v. SEC*, 653 F.3d 121, 125, 128-29 (2d Cir. 2011) (upholding modification of asset freeze on home to assure preservation of value for benefit of investors).

As part of the fraudulent scheme, Bivona used "attorney escrow accounts" to commingle monies from the SRA Funds, other investment funds under his control and investor proceeds. These accounts were then used to make payments to the Mazzolas, Anne Bivona and third parties. *See* Chen Declaration, Figures 7, 10. To prevent Bivona's dissipation of investor assets, the Court should prohibit Bivona from transferring or dissipating in these accounts any money that belongs to Saddle River, SRA Management, SRA Funds, the Mazzolas, the Bivonas, or Clear Sailing.

The Court's "determination of whether to impose an asset freeze often overlaps with the determination of whether to impose a receivership." *SEC v. Schooler*, 2012 U.S. Dist. LEXIS 188994 at *12 n. 2 (S.D. Cal. Nov. 30, 2012). The primary purpose of a receivership is "to prevent further dissipation of defrauded investors' assets." *SEC v. Wencke*, 783 F.2d 829, 837 n. 9 (9th Cir. 1986). A receivership is justified when there is a need to marshal and preserve assets, clarify the financial affairs of an entity for the benefit of investors and allow the receiver to conduct an independent investigation of claims or assert potential defenses. *SEC v. Schooler*, at *11-12.

Because Bivona, Saddle River and SRA Management diverted investor money, those defendants cannot be left in charge of the SRA Funds without court-appointed supervision. In an effort to hold down costs, the Commission currently seeks an independent monitor, rather than a receiver, over the operations and assets of Saddle River, SRA Management, the SRA Funds and Clear Sailing. *See Trabulse* at 1019 (appointing monitor of investment adviser's expenses and operations) The independent monitor will have the power to examine all of the financial records, including bank statements, of Saddle River, SRA Management, the SRA Funds and Clear Sailing.

The independent monitor will review any proposed asset transfer or disposition of money, and object to any transfer or disposition that is not in the best interests of the SRA Funds' investors. Until the independent monitor has reviewed the accounting and banking records and has reviewed a proposed transfer or disposition, Saddle River, SRA Management, the SRA Funds and Clear Sailing should be prohibited from dissipating any assets through a temporary asset freeze order.

The Commission proposes that the independent monitor complete the following tasks within a 30-day period: (1) continually monitor money and asset transfers at Saddle River, SRA Management, the SRA Funds and Clear Sailing to ensure that investor assets are protected and, where appropriate, stop a transfer by submitting a written objection to the transfer; (2) conduct a preliminary accounting at Saddle River, SRA Management, the SRA Funds and Clear Sailing for the limited purpose of determining what assets the SRA Funds own and whether the SRA Funds own the shares of pre-IPO companies to which investors are entitled; (3) develop a recommendation for how to wind down the SRA Funds with minimum of investor harm. After the independent monitor submits his recommendation, the Court will decide whether to implement such plan as being the best way to maximize the investors' recovery.

G. The Court Should Order Document Preservation, Expedited Discovery and An Accounting.

To preserve documents that the Commission may later seek through discovery requests, the Commission seeks an order prohibiting defendants and relief defendants from altering, destroying, or concealing documents, including documents concerning the allegations of the Complaint or their assets, finances, or business operations. *See SEC v. Trabulse*, 526 F. Supp. 2d at 1019-20 (issuing evidence preservation order). Such documents should also be preserved for, and made available to, the independent monitor so that the monitor can complete his assignment.

The Commission seeks immediate discovery, including depositions and document discovery, from the defendants and others to obtain additional facts related to their violations. In particular, the Commission needs immediate discovery regarding the current condition of the Saddle River, SRA Management, the SRA Funds and Clear Sailing, including any transfer of assets and any diversion of money. The Commission needs expedited discovery regarding Bivona's attorney trust accounts to

determine what assets are being held for his advisery activities. The expedited discovery will include document requests and subpoenas, as well as deposition testimony, regarding the organization of the Fortuna Fund and its transfer of investor money to Saddle River and/or the SRA Funds. This expedited discovery will also include document requests, subpoenas and depositions to determine what shares and interests have been acquired by Clear Sailing. It will further include discovery into transfers of money or assets between Saddle River, SRA Management and the SRA Funds, on the one hand, and the NYPA Entities, on the other hand. Accordingly, the Court should authorize discovery before the parties' discovery conference under Rule 26(f) of the Federal Rules of Civil Procedure. *See Trabulse* at 1019-20 (issuing expedited discovery order).

The Court may order an accounting to ensure that all investor assets are located and recovered. *Id.* at 1018. Saddle River, SRA Management, the SRA Funds and Clear Sailing should therefore provide an initial accounting of their bank accounts and other assets. The Court should also order Bivona to dsclose all Saddle River, SRA Management, SRA Funds and Clear Sailing money that is in his attorney escrow accounts.

IV. CONCLUSION

The Commission has established that Bivona, Saddle River and SRA Management violated the anti-fraud provisions of the federal securities laws and threaten to engage in future violations. To protect investors, the Court should therefore grant the Commission's motion.

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Respectfully submitted,

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