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SECURITIES AND EXCHANGE COMMISSION
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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 ASSOCIATES, 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-01386-EMC

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO INVESTOR GROUP'S OBJECTIONS TO RECEIVER'S REVISED DISTRIBUTION PLAN; SUPPORTING DECLARATION OF JOHN S. YUN

Date: June 27, 2019
Time: 1:30 pm
Courtroom: 5
Judge: Edward M. Chen

Plaintiff Securities and Exchange Commission ("Commission" or "SEC") hereby responds to objections from the SRA Investor Group to the Revised Distribution Plan proposed by the Successor Receiver, Kathy Bazoian Phelps, Esq. The Investor Group objects, first, to the Receiver's Revised Distribution Plan, which creates an Advisory Committee following an open process that allows interested persons to request consideration to serve on the Committee, and further allows the parties to comment on the candidates. ECF 487 at 13-14. Instead, the Investor Group proposes that it alone pick the members, and they particularly advocate that former insider Joshua Cilano be on the Advisory Committee. ECF 496 at 3. The Investor Group does not, however, represent all investors and should not be the sole selector of such committee members. Second, the Investor Group objects to the Receiver's Plan with respect to the $500,000 disgorgement payment made by Anne Bivona pursuant to her settlement with the SEC. ECF 496 at 3-4. The Investor Group ignores federal case precedents, which afford deference to the Commission's determination of any distribution of disgorgement collected. *See SEC v. Scherer*, 1996 U.S. Dist. LEXIS 17750, at *2 (S.D.N.Y. Nov. 29, 1996) (recognizing SEC's discretion in proposing plan to distribute disgorgement recovery).

I. The Court Should Adopt The Receiver's Advisory Committee Proposal.

Section V of the Revised Distribution Plan provides for the creation of an Advisory Committee for the Receiver to consult with. ECF 487 at 13-14. Under this Plan, the Receiver first solicits names for the Advisory Committee's members, and then consults with the Investor Group, Progresso Ventures and the Commission to try to reach agreement. *Id.* at 13. If there is no agreement regarding the Committee's members, the Receiver will provide the candidates' names to the Court and the interested parties may comment on those candidates. Ultimately, the Court will select the Committee's members only if there is no agreement. *Id.*

An open process for selection of Advisory Committee members is appropriate to ensure that all interested persons may be heard, and that concerns are vetted. In the Fall of 2017, the Commission and the former receiver, Sherwood Partners, received emails from seven investors who might be interested in serving on an advisory committee, but who are not on the list of names previously offered by, or represented by, the Investor Group. Attached Supporting Declaration of

John S. Yun ("Yun Declaration"), Exhibit 1. Under the Receiver's proposed plan, she may contact these seven investors to determine if they are still interested, along with soliciting other candidates. Additionally, because unsecured creditors have a stake in the receivership's success, there is no reason to exclude their representatives from the Committee or to prohibit Progresso Ventures from commenting on the Committee's membership.

Once the Receiver has recommended potential candidates, there is a good chance that the interested parties will agree on most of the candidates. If, however, any party is concerned that a candidate is unqualified due to potential conflicts of interests or other considerations, that party will still have the opportunity to raise its concerns to the Court for resolution. Notably, Progresso Ventures and the Commission previously objected to the fund manager role proposed by the Investor Group for Cilano because he appears to be conflicted given his role as an insider.[1]

The Investor Group incorrectly claims that the Court has already approved their preferred advisory committee candidates and structure, and rejected the Receiver's proposed process. They also, inaccurately, presume that only they can and do represent the interests of all investors; in fact, they do not, and it would therefore be unfair to permit them to foreclose other investors or creditors from input on the Committee. Although the Court indicated, in a footnote to its December 2018 Order, that Cilano could contribute his "expertise" as an advisory committee member (ECF 443 at 11, n.4), at the time the Order was issued there was no advisory committee, much less a judicial determination that the Investor Group may select the Committee's members without input or possible objections by other interested parties. The Court should therefore adopt the Receiver's Plan, as it allows for an open and fair process for selecting candidates for the Advisory Committee.

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[1] As the Commission previously demonstrated, Cilano was defendant Saddle River Advisors' most prolific fund raiser behind defendant Frank Mazzola. ECF 238 at 3-4 (describing Cilano's role at Saddle River Advisors); ECF 240 (Supporting Declaration of John S. Yun); ECF 241 (Supporting Declaration of Marc Katz). The Commission's evidence shows that Cilano received nearly $675,000 dollars in commissions while raising investor money for the scheme that is the subject of the current receivership. Cilano is thus an insider, as a former agent for defendants, and his interests are therefore not aligned with other investors. Also, he is not representative of most investors; although a Palantir Technologies investor, his gross investment was less than $10,000.

II. The SEC Funds Should Be Distributed Based on the SEC's Proposal.

The Receiver's Revised Plan properly allows the Commission to determine how to distribute or transfer the segregated disgorgement payment from Anne Bivona. ECF 487 at 16. That is consistent with the deference federal courts consistently show the Commission in deciding how to disburse disgorgement proceeds and remedy securities violations. Having ordered disgorgement from Anne Bivona, the Court may approve an SEC plan for distributing the Anne Bivona disgorgement payment. *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991); *SEC v. Certain Unknown Purchasers of Common Stock*, 817 F.2d 1018, 1020-21 (2d Cir. 1987).

Federal courts recognize that "the Commission has discretion in fashioning distribution plans for funds like the disgorgement fund in this case." *SEC v. Scherer*, *supra*, 1996 U.S. Dist. LEXIS 17750, at *2 (approving SEC plan for distributing disgorgement in a bond offering proceeding) (citing *SEC v. Certain Unknown Purchasers of Common Stock*, 817 F.2d at 1020; *SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989); *In re Drexel Burnham Lambert Group, Inc.*, 995 F.2d 1138, 1146 (2d Cir. 1993)). The SEC's judgment regarding distributions "is entitled to deference, in light of its 'experience and expertise in determining how to distribute funds.'" *In re The Reserve Fund Secs. & Derivative Lit. v. Reserve Mgmt. Co.*, 673 F. Supp. 2d 182, 195-96 (S.D.N.Y. 2009) (quoting *Official Comm. Of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006)). So long as the SEC's plan is "fair and reasonable," a federal court will defer to the SEC in approving the distribution plan. *See SEC v. Certain Unknown Purchasers*, 817 F.2d at 1021 (approving SEC's distribution plan for $7.8 million insider trading disgorgement fund to one class of injured option investors and to a second class of injured stock investors); *SEC v. Scherer*, *supra*, 1996 U.S. Dist. LEXIS 17750 at 2 (approving SEC distribution plan over investment banking firm's objection that it was also injured through mistaken refunds to customers and through bond sales to customers at below market prices). The Revised Distribution Plan is consistent with this case law by allowing the SEC to propose a distribution plan for the $500,000 disgorgement amount, subject to necessary court approval. ECF 487 at 16.

Through its objections, and without permitting the Court to consider an SEC proposal for the

funds the SEC has obtained, the Investor Group improperly suggests allocating the $500,000 the SEC collected to non-investor claimants. Because federal courts recognize the SEC's discretion to develop a distribution plan that is fair and reasonable, the Court should reject the Investor Group's premature objection, and instead permit the SEC to present its own plan for distributing these funds. *See In re Drexel Burnham Lambert Group*, 995 F.2d at 1146 (rejecting as not "ripe" a challenge to SEC distribution plan that had not been submitted to the court yet).

In light of the foregoing, the Court should overrule the Investor Group's objections to the Receiver's Revised Distribution Plan.

Dated: June 25, 2019

Respectfully submitted,

/s/ *John S. Yun*
John S. Yun
Attorneys for the Plaintiff Securities and Exchange Commission

SUPPORTING DECLARATION OF JOHN S. YUN

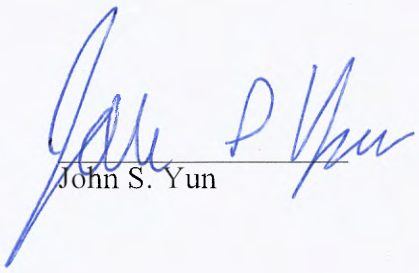
I, John S. Yun, declare:

1. I am one of the counsel of record for the plaintiff Securities and Exchange Commission ("Commission") in this proceeding. I am familiar with the pleadings in this case and am making this Declaration based upon facts within my personal knowledge, and to which I am competent to testify if called upon to do so.

2. During the Fall of 2017, Sherwood Partners informed investors that it was attempting to identify investors who might be interested in serving on an advisory committee. Investors were given an email address for Sherwood Partners and for the Commission to which they could indicate an interest in serving on such a committee. I was one of the Commission employees with access to that Commission email account for investor communications.

3. Attached to my Declaration as Exhibit 1 are true and correct copies seven investor email responses indicating an interest in serving on an advisory committee. The private email address of the individual investor has, however, been redacted to protect personally identifiable information.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in San Francisco, California on June 25, 2019.



John S. Yun

EXHIBIT 1

TO

SUPPORTING DECLARATION OF JOHN S. YUN

sec-v-bivona

From: John Bowmer <[redacted]>
Sent: Thursday, November 09, 2017 3:20 PM
To: saddleriver@shrwood.com
Cc: sec-v-bivona
Subject: Saddleriver Bankruptcy

Dear Madam or Sir,

I am in receipt of your letter dated November 1st 2017 providing an update on the case. I am an investor in Badgeville $40,000 and Jumio $81,250 in the Saddleriver funds when it went bankrupt.

I was one of the investors who provided a declaration to Marc Katz and Jessica Chan before the SEC brought the case. As you will see from my declaration I have been an investor in several other pre-IPO companies with Mazzola/Bivona entitities.

I am happy to serve on the potential advisory committee regarding plan issues

With Kind Regards,
John Bowmer

sec-v-bivona

From: Simon Collins <[redacted]>
Sent: Wednesday, November 08, 2017 6:02 AM
To: saddleriver@sherwood.com
Cc: sec-v-bivona
Subject: I am interested

I am interested in serving on the advisory committee regarding the recent plan sent to me.

Simon Collins
Commercial Director
Gaming Realms Plc

sec-v-bivona

From: Stephen Fowler <[redacted]>
Sent: Thursday, November 30, 2017 12:47 AM
To: saddleriver@shrwood.com; sec-v-bivona
Cc: 'Steve Fowler'
Subject: Letter to Investors - Case No 6-cv-01386-EMC
Attachments: Stephen Fowler - Positions.xlsx

Dear Sirs
I am writing in response to your letter to Investors, dated 1 November, regarding the above case. I am not sure exactly what information you are seeking, and I have not taken any legal advice, but I would like to use this opportunity to:

- confirm the details of the investments I had made and the distributions already received
- put on record my own thoughts regarding the distribution of funds by the receiver.

Investments and Distributions

The attached spreadsheet was sent to me in June 2016 by John Bivona, setting out (for the first time) the funds in which I had invested and their status at that time. I believe the information contained in the spreadsheet to be accurate but incomplete:

- The Series X entry shows 3 component funds highlighted in yellow, which I believe is meant to denote that the positions have been liquidated. I confirm I did receive funds for sale of positions in Flurry and Check, and a number of Box shares were transferred into a brokerage account in my name. Should you require more details of these distributions please let me know.
- In July 2016, I exchanged several emails with Susan Diamond at SRA regarding the distribution of my 870 shares in Square, also a Series X investment. There was initially a requirement for me to set up yet another brokerage account to receive these shares. This subsequently proved to be unnecessary, but by the time the process had been resolved, SRA was under receivership and as a result no such distribution was ever made to me.
- There is very little detail on the spreadsheet about the Solis Associates Fund, in which I invested $100,000 in 2011. I was given the following breakdown of component funds when I invested: Bloom Energy 19% of the fund priced at $20 PPS; Silver Spring Networks(SSNI) 15% at $11 PPS; eSolar 59% at $4.50 PPS; Miasole 7% at $10 PPS. In 2014 I received a distribution of 302 shares in SSNI. I have had no further updates regarding this fund since that time.

Proposed Distribution Plan

As I understand it, there are two aspects of the distribution plan with which I would take issue.

Firstly, the plan seems to be driven by the desire to provide a "prompt" resolution and distribution to investors, including the idea of paying investors to compensate them for the "time value of their money" invested. I realised fully at the time of investing (as should have all investors) that the nature of the investments was very high risk, and that liquidity and returns would be dependent on the IPO of the relevant company. Certainly, there was no expectation of any return based on the time value of the money invested. It was clear that such an IPO might take many years to come to fruition, and in the worst case might not happen at all, leading potentially to a complete write-off of the sums invested. Time was not of the

essence – and it would therefore be quite counter to the nature of the underlying investments in pre-IPO positions, to force liquidation of the investments prior to such an IPO. It would also most likely result in significant losses, whereas holding the positions until IPO could yet yield substantial gains. "Prompt" and "Fair" are therefore incompatible objectives for any distribution plan. I would urge the Receiver to find a way forward which allows each investment to be treated in the way most likely to yield maximum returns – and not to be driven by the need to deliver prompt returns. For example, I have a significant investment in Palantir, which hopefully will still yield a significant return if it can be held until an IPO event occurs.

Secondly, as a result of the comingling of resources, the shortfall of certain shares, and the appalling record-keeping, I understand that the distribution plan proposes pooling assets and distributing the proceeds pro-rata to investors based on their losses. I believe this would be a most unfair way to distribute proceeds! When SRA, and Felix before them, were in full sales mode, investors such as me were being offered too-good-to-miss opportunities on an almost daily basis, with the potential to take positions in many tech companies that have never been heard of since. In deciding where to invest we each had to take a view about the companies in question and allocate resources accordingly. For example, despite a very heavy sell, I declined to invest in Groupon, but made a substantial investment in Palantir. We all made decisions, more or less informed, about which stocks to invest in. Wherever possible, surely the receiver should aim to reflect the success or otherwise of our individual investment choices in its distribution plan. If Palantir proves to be a successful investment I should benefit from it – similarly if the rest of my investments in the Solis fund come to nothing, I would not expect a share of returns from companies I didn't invest in to be apportioned to me. I do understand that there appear to be losses overall as a result of diversion of funds and perhaps inadequate stock to cover investor's commitments. The total value of this loss should be calculated – and then applied pro-rata to investments based on the total value of investments in each stock/fund. So my return from Palantir, should it materialise, would be reduced, but I would nevertheless receive the majority of the uplift rather than have my returns spread among others who had not invested in Palantir.

Finally, you asked in your letter if I would be interested in serving on a potential advisory committee regarding plan issues. In principle I would be happy to, although I'm not sure what skills, knowledge or experience you are looking for. Certainly I'd be happy to discuss this further.

Please let me know if there is further information you need – or if you have any other questions.

Regards
Stephen Fowler

sec-v-bivona

From: WIlliam Jellison <[redacted]>
Sent: Monday, November 06, 2017 7:05 AM
To: saddleriver@shrwood.com; sec-v-bivona
Subject: Re: Securities and Exchange Commission v. John V. Bivona, Saddle River Advisors, LLC, et al. Case No. 16-cv-01386-EMC (N.D. Cal.)

This is in reference to your request for thoughts on the planned commingling of assets to resolve and settle investments and claims.

I am not in support of commingling these assets. When I made my investments they were for investments in specific stocks not a pool of investments. Many of these investments are worth substantially more than some of the other investments and those who invested in literally bankrupt positions should not benefit from the use of proceeds from stronger investments to settle their accounts.

Also if the Receiver pools these assets and then sells the pool in order to liquidate, they will only receive a small portion of the investments real value. This may take longer to liquidate but is in the best interest of the investors and a more equitable distribution of the true value of each investors investment.

If some investors want to liquidate let them elect to be placed in a combined pool and take a distributed share of a pre-liquidity event liquidation.

I would strongly elect to stay the course until a proper liquidation of the specific investments that I originally made.

I have been the CFO of both Dentsply International and Stryker Corportation and I would be glad to participate in a potential advisory committee if I could help in any way. My contact info is 717-487-7513 Mobil and my email is wrjellison@gmail.com.

Sincerely

William R. Jellison & Joanne S. Jellison

sec-v-bivona

From: Lavery, Paul M. <[redacted]>
Sent: Tuesday, December 05, 2017 11:54 AM
To: saddleriver@shrwood.com; sec-v-bivona
Subject: Interest in serving on an advisory committee

Dear Receiver and Staff of the SEC,

I found a November 2 email lost amid my Junk folder. I apologize for a delay in responding and expressing interest in a potential advisory committee. As an investor in multiple equities offered by Saddle River, and a reader of the documents posted to the website, I would be interested to participate in such a group. I believe my analytical and problem solving skills, as well as my desire to seek an outcome that is fair, equitable and timely, would serve the advisory board well.

Please let me know what information, if any, you would require of me to be considered for the advisory committee, and if there are any near-term next steps. I appreciate the opportunity to participate in the process.

Best,

Paul Lavery
Managing Director, Accenture
(804) 306-6003

sec-v-bivona

From: Aaron Lee <[redacted]>
Sent: Thursday, November 02, 2017 5:58 PM
To: saddleriver@shrwood.com; sec-v-bivona
Subject: Re: New file upload notification from SEC v John V. Bivona

I am one of the major individual investors in the SRA fund and read the letter and wanted to participate.

Can you set up a call?

-Aaron

On Thu, Nov 2, 2017 at 5:47 PM, Proof of Claims <poc@proofofclaims.com> wrote:

You've registered with the Receiver to receive notice regarding SEC v. John V. Bivona et al, Case No. 3:16-cv-1386. The following new documents have been added to the electronic data room and are available for download at https://www.shrwood.com/SaddleRiver.

- November 1, 2017 Letter to Investors from Receiver and SEC Staff.pdf

sec-v-bivona

From: Ken Wirt <[redacted]>
Sent: Friday, November 03, 2017 1:22 PM
To: saddleriver@shrwood.com; sec-v-bivona
Cc: Ken Wirt
Subject: Advisory Committee on Joint Plan for Distribution of Saddle River Assets

Dear SEC and Sherwood:

I would be interested in serving on an advisory committee regarding the Joint Plan for distribution of Saddle River/Bivona assets.

Kenneth R. Wirt