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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 SECURITIES AND EXCHANGE
20 COMMISSION,

21 Plaintiff,

22 v.

23 JOHN V. BIVONA; SADDLE RIVER
24 ADVISORS, LLC; SRA
25 MANAGEMENT ASSOCIATES,
26 LLC; FRANK GREGORY
27 MAZZOLA,

28 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

**ADMINISTRATIVE MOTION BY
RECEIVER KATHY BAZOIAN PHELPS
PURSUANT TO LOCAL CIVIL RULE 7-11
FOR ORDER APPROVING
EMPLOYMENT OF:**

- (1) **OXIS CAPITAL, INC. AS
VALUATION PROFESSIONAL;**
- (2) **MILLER KAPLAN ARASE,
LLC AS TAX PREPARER**

Date: No Hearing Set
Time: No Hearing Set
Judge: Edward M. Chen

1 Kathy Bazoian Phelps, the successor receiver herein (the “Receiver”), hereby files this
2 Administrative Motion for Order Approving Employment of Oxis Capital, Inc. as Valuation
3 Professional, and Miller Kaplan Arase, LLC as Tax Preparer.

4 **I. INTRODUCTION**

5 Both Oxis Capital, Inc. (“Oxis”) and Miller Kaplan Arase, LLC (“Miller Kaplan”) have
6 previously been employed in this case as professionals. As discussed in prior proceedings, it has
7 become necessary for the Receiver to obtain valuations of the estate assets as of the date of the
8 Receivership, and the Court has authorized the Receiver to do so. (Doc. No. 562.) The Receiver
9 believes the most cost-efficient and effective approach to obtain those valuations is to use the services
10 of Oxis, which previously provided valuation services in this case, and which has already completed
11 substantial valuation work of most of the securities. The Receiver also believes, based on her business
12 judgment, that the most cost-effective approach to the authorized tax work, including the filing of
13 qualified settlement funds (“QSF”), is to use Miller Kaplan, which has become very familiar with the
14 tax issues through analysis of the tax treatment proposed in the Receiver’s distribution plan. The
15 Receiver hereby moves for an Order approving her employment of (1) Oxis as the valuation
16 professional; and (2) Miller Kaplan as her accountant for tax preparation purposes, with such
17 professionals to be compensated from assets of the estate.

18 The Receiver has conferred with counsel for the Securities and Exchange Commission, the
19 SRA Investor Group, and Progresso Ventures, and is advised that they do not oppose the Motion. A
20 stipulation with all parties was deemed impractical given, among other things, entry of judgment
21 against the defendants and pending bankruptcy of defendant John Bivona. (L.R. 7-11 1(a)).

22 **II. STATEMENT OF FACTS**

23 1. The Receiver has the power and duty “to engage and employ persons in [her]
24 discretion to assist [her] in carrying out [her] duties and responsibilities hereunder, including, but not
25 limited to, accountants, attorneys, securities traders, registered representatives, financial or business
26 advisers, liquidating agents, real estate agents, forensic experts, brokers, traders, or auctioneers.”
27 Receivership Order, Doc. No. 142, Section II.F.

28 2. Pursuant to the Court’s February 7, 2019 Order, the Receiver was authorized to obtain

1 valuations of the assets of the receivership as of the date of the commencement of the receivership on
2 October 11, 2016, and to file a motion seeking approval of the employment of a valuation
3 professional, setting forth the terms of the engagement. (Doc. No. 562.)

4 3. The Receiver's duties and responsibilities depend significantly upon her ability to
5 manage and liquidate securities and to implement a complex distribution plan. The Receiver will
6 need to pay any applicable taxes and has determined the appropriate methodology for tax treatment is
7 to treat the estate as a QSF. The estate holds interests in publicly-traded companies as well as pre-
8 IPO, privately held shares. When shares are sold or distributed under the proposed plan, the Receiver
9 will need to know the tax basis for those assets to calculate any tax liability. The tax basis is
10 established as of the date of the formation of the receivership, or such other date as the assets were
11 brought into the QSF. The Receiver has determined that, in order to fulfill her duties and obligations
12 under the Receiver Order, in her discretion and business judgment, she requires the assistance of a
13 valuation expert to value certain securities in the receivership estate. Declaration of Kathy Bazoian
14 Phelps filed concurrently herewith ("Phelps Decl."), ¶ 9.

15 4. During the tenure of the former receiver, the Court approved the employment of
16 valuation expert Oxis Capital, Inc. ("Oxis") for purposes of conducting the valuation analysis set
17 forth in a *2018 1 22 Bivona Report to the Trustee FINAL w/Exhibits* delivered January 23, 2018 to the
18 former receiver, and John Yun, of the United States Securities and Exchange Commission.

19 5. Because Oxis has already performed substantial work toward valuation of securities in
20 the Receivership Estate, the Receiver proposes to retain Oxis to update its prior valuation of certain
21 securities in the Receivership assets, and to estimate the value as of October 11, 2016 of seven (7)
22 additional securities, and three (3) more securities as of January 15, 2020. Phelps Decl., ¶¶ 10-11.

23 6. In addition, the Receiver believes it may be necessary to amend the prior tax returns
24 filed by the former receiver, if appropriate, and to prepare QSF tax returns. Phelps Decl., ¶ 15.

25 7. The Court approved the Receiver's plan on a preliminary basis, subject to the
26 Receiver's motion for final approval of the Plan, and granted the Receiver's Motion for Instructions
27 on Tax Matters re Distribution Plan. (Doc. No. 562). The Court also authorized the Receiver to
28 amend prior tax returns filed by the former receiver, if necessary, obtain a taxpayer ID number for a

1 QSF, and comply with the tax reporting and paying obligations of the QSF, if any.

2 8. For reasons detailed below, the Receiver has determined that the tax professionals at
3 Miller Kaplan, who have provided analysis of tax issues associated with the Receiver's distribution
4 plan, are well-suited to perform these tasks, and seeks to employ Miller Kaplan for this purpose, and
5 to provide tax consulting in connection with tax preparation to ensure the Receiver is satisfying all of
6 her obligations under the Receiver Order. *See Phelps Decl.*, ¶ 16.

7 **III. ARGUMENT**

8 **A. The Court Has Broad Supervisory Authority to Approve Employment of the** 9 **Receiver's Professionals**

10 The express terms of the Receiver Order authorize the Receiver to employ professionals,
11 including accountants and other financial professionals. Doc. No. 142, Section II.E. The "primary
12 purpose of equity receiverships is to promote orderly and efficient administration of the estate by the
13 district court for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986).
14 District courts have broad powers to determine what is necessary for the administration and
15 supervision of an equity receivership. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th
16 Cir. 2005). Therefore, this Court has broad powers and discretion to afford the Receiver the relief she
17 requires to fulfill her obligations, including her employment and compensation of valuation
18 professional Oxis, and tax preparer, Miller Kaplan.

19 In its February 7, 2020 order, the Court authorized the Receiver to conduct the activities
20 related to the distribution plan that necessitate engagement of these professionals: (1) the
21 amendment of prior tax returns, as necessary, and the creation of the OSF; and (2) the valuation of
22 the assets of the receivership as of the time of the commencement of the receivership on October
23 11, 2016. The employment of these professionals will enable the Receiver to carry out the
24 obligations set forth in the Court's February 7, 2020 order.

25 **B. Employment of Oxis Capital is Appropriate**

26 Oxis is a financial advisory consultant and private equity investment banking firm with
27 substantial experience addressing valuation issues of the receivership assets at issue. Oxis previously
28 provided the former receiver with a detailed analysis of the securities in the Receivership Assets and

1 valuations as of October 11, 2016. Those valuations were slightly later in time than the
2 commencement of the receivership. Oxis has agreed to update its analysis to evaluate the values as of
3 the date of the petition by looking back in time to see whether the valuations were different. Oxis has
4 also agreed to value seven additional securities, including three securities not previously valued
5 because they were publicly traded as of its initial valuation, although they were not public as of the
6 petition date, as well as three additional securities as of January 15, 2020. Phelps Decl., ¶ 11. Oxis
7 has a fixed fee structure of \$35,000, with \$10,000 of that sum to be paid upon Court approval of its
8 employment, and the balance upon delivery of its written report to the Receiver. Oxis anticipates that
9 the valuation report can be prepared within 60 days of its employment. The Receiver requests
10 authority to employ Oxis on the terms set forth in Exhibit “1” attached to the Phelps Decl..

11 Oxis has requested limited indemnity from the Receiver from claims against it for its work,
12 including the reasonable cost of any attorney needed to defend it from such claims. Phelps Decl., ¶
13 13. As referenced in Paragraph 8 of the proposed engagement letter (Phelps Decl., Exhibit “1”, ¶ 8).
14 Oxis has requested the same protections as the Court extended to “Retained Personnel” in Section XII
15 of its Order of October 11, 2016 (Doc No. 142), and as previously granted by the Court’s prior Order
16 of December 1, 2017 approving the employment of Oxis. (Doc. No. 281.) Phelps Decl., ¶ 13.

17 The Receiver therefore requests authority to employ Oxis pursuant to these terms, and that the
18 Court order provides that Oxis be granted the same protections while working as a retained
19 investment banking firm as the Court extended to “Retained Personnel” in Section XII of its October
20 11, 2016 Order (Doc. No. 142), and in the Court’s prior Order approving the employment of Oxis
21 (Doc. No. 281), and that if Oxis is in need of legal defense in any action brought by any party for the
22 scope of its work in this matter, that such may be provided by the Receiver’s retention of legal
23 counsel, subject to the prior approval of the Court. Phelps Decl., ¶ 14. The Receiver requests the
24 following language be included in the Order approving this Motion:

25 Oxis Capital shall be provided the same limitation on liability that the Court has provided
26 in Section XII of its Order of October 11, 2016 (Docket No. 142) for all Retained
27 Personnel. Further, in the event any litigation is commenced against Oxis Capital relating
28 to the performance of any of its work set forth in, or implied from, its engagement letter,
the Receiver may (with the Court’s prior approval) retain legal counsel for the purpose of
defending Oxis Capital.

1 Oxis has also requested that, in order more expeditiously perform its tasks, that the Court
2 include the following language in its order to encourage cooperation in gathering information from
3 third parties employed by the pre-IPO companies in the Receivership Estate:

4 Oxis is hereby authorized to make inquiries on the Receiver's behalf of any pre-IPO
5 company issuer of securities which are part of the Receivership Estate, on any matter
6 relevant to the performance of its scope of work.

7 **C. Employment of Miller Kaplan as Tax Preparer is Appropriate**

8 The Receiver also requires the assistance of accountants in evaluating the prior tax returns
9 filed by the former receiver and to amend them if appropriate; to prepare QSF tax returns authorized
10 by the Court's February 7, 2020 Order; and to provide tax consulting in connection with tax
11 preparation. Miller Kaplan has previously been employed as the Receiver's tax advisor in this case to
12 assist in evaluating the tax consequences of a distribution plan, so the firm is extremely familiar with
13 the fact of the case and the difficult tax issues that arise from the need to sell and distribute securities.
14 The firm has vast experience in handling tax issues for receivers and is well-equipped to handle the
15 complex tax issues that may arise in this case due to significant tax penalties and the sale and transfer
16 of securities. Although the Receiver previously sought to employ Grobstein Teeple LLC and had
17 contemplated that firm would handle return preparation, the complexities that have arisen with
18 respect to the tax situation have led the Receiver to conclude that using Miller Kaplan will be a more
19 cost-effective approach to handling tax preparation. Miller Kaplan is well qualified to provide the
20 requested tax services and its qualifications have been set forth in the original application to employ
21 the firm as tax advisor. The Receiver requests authority to engage Miller Kaplan on the terms of the
22 engagement letter attached to the Phelps Decl. as Exhibit "2."

23 **IV. CONCLUSION**

24 The Receiver respectfully requests this Court approve her employment and compensation
25 of Oxis and Miller Kaplan on the terms set forth herein, and all other appropriate relief.

26 DATED: February 24, 2020

DIAMOND MCCARTHY LLP

27 By: /s/ Christopher D. Sullivan
28 Counsel for Kathy Bazoian Phelps,
Receiver