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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 SECURITIES AND EXCHANGE COMMISSION,
13 Plaintiff,
14 v.
15 JOHN V. BIVONA, et al.,
16 Defendants and Relief Defendants.

Case No. 3:16-cv-01386-EMC

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
OBJECTION TO JOSHUA CILANO'S
APPOINTMENT TO INVESTOR
ADVISORY COMMITTEE**

Date: April 7, 2020
Time: 10:30 a.m.
Courtroom: 5
Judge: Edward M. Chen

PLAINTIFF’S OBJECTION TO JOSHUA CILANO APPOINTMENT

1
2 Plaintiff Securities and Exchange Commission (“Commission” or “SEC”) hereby submits this
3 Statement in opposition to the SRA Investor Group’s nomination of Joshua Cilano to serve on the
4 court-appointed Investor Advisory Committee (“Advisory Committee”). Cilano possesses a clear
5 conflict of interest with the equity investors and is therefore an inappropriate candidate for a
6 committee that should protect the investors’ interests.

7 In May 2018, Cilano submitted an Amended Claim to the receiver. ECF 572-2 (previously
8 filed redacted copy). In the Amended Claim, Cilano sets forth an “Investor Claim” for 2,629 Palantir
9 Technologies shares that he purchased for \$9,200. Amended Claim at 5 (ECF 572-2 at 3). No
10 objection has been made to this Investor Claim. Significantly, Cilano’s Amended Claim also
11 includes a “Creditor Claim” for half of the backend fees supposedly owed by investors to SRA
12 Management, FMOF Management, or NYPA Management for the investments specified in his
13 Amended Claim. ECF 572-2 at 4-10. The SEC has filed an Objection to Cilano’s Creditor Claim,
14 and the Receiver has joined in that Objection. ECF Nos. 572 and 579. The SEC’s and Receiver’s
15 Objection is calendared for hearing on April 7, 2020.

16 Cilano’s Amended Claim for backend fees primarily relates to numerous Palantir transactions
17 that he supposedly initiated or introduced. *Id.* at 7-10. The Amended Claim also included, however,
18 backend fee claims relating to transactions in now-public Bloom Energy, Dropbox, MongoDB and
19 Square shares, as well as to transactions for the Series X and Big 10 funds and ZocDoc. Although the
20 amount of Cilano’s backend fee claims is still undetermined, it could obviously reach six figures if
21 Palantir were to have a very successful initial public offering.

22 Both the existence and sheer size of Cilano’s potential backend fee claim disqualifies him
23 from the Advisory Committee. During the most recent January 30, 2020 hearing, the SEC’s counsel
24 stated that the Advisory Committee’s membership should be open to unsecured creditors. Transcript
25 of Proceedings on January 30, 2020 (“January 30th Transcript”), pg. 53, lines 3-6 (excerpts attached
26 as Appendix 1).¹ The Investors Committee’s counsel responded that the Advisory Committee should

27 _____
28 ¹ The SEC has also previously objected to Mr. Cilano’s membership on the Advisory Committee due to his insider status.

1 be limited to equity investors: “It’s called ‘the investor advisory group,’ not ‘the creditor and
2 investor...” *Id.*, pg. 53, lines 14-15. The Court stated that the Advisory Committee’s purpose is to
3 advance the interests of equity investors when the receivership makes investment decisions: “[I]t
4 does seem to me that this is for the benefit of investors. I don’t know if we need creditors on here. . . .
5 But this is to help make investment decisions about whether to liquidate or not.” *Id.*, pg. 54, lines 7-
6 11. Accordingly, by the Investor Group’s own measure, and in keeping with the Court’s own goal of
7 having the Advisory Committee exclusively serve the interests of equity investors, Cilano’s status as
8 a creditor with a large claim should be disqualifying.

9 In any event, Cilano’s creditor claim for backend fees presents a current and irreconcilable
10 conflict of interests between him and the equity investors. This conflict of interest issue was not
11 before the Court when it originally suggested that Cilano could serve on an advisory committee,
12 rather than as a manager of the receivership entities. Cilano’s conflict of interests involves, first and
13 and foremost, the receivership’s payment of Cilano’s backend fees through either the distribution of
14 shares or the payment of cash. In either case, that distribution or payment to Cilano reduces the
15 shares or cash available for investors.

16 Second, Cilano’s financial interest in his backend fee claim far exceeds his very modest
17 financial interest in his \$9,200 Palantir investment.² This means that in determining when and
18 whether to have the receivership dispose of Palantir shares, Cilano will favor holding out for the
19 highest potential price (to maximize the carried interest component) even if the equity investors’
20 interest would be to sell some shares to reduce risk and lock in the investors’ recovery of principal.³
21 Cilano’s conflicting interest in maximizing his recovery of backend fees therefore makes it
22

23
24 ² At current prices, Cilano’s claim for carried interest on the MongoDB transaction approaches
25 \$9,000, which is nearly the amount of his Palantir investment. If Cilano also receives 50% of the
26 accrued management fees for two companies, Dropbox and Bloom Energy, that have gone public,
27 there would be another \$23,500 in backend fees that investors must surrender to Cilano.

28 ³ For example, if a private equity fund offered to buy Palantir shares immediately at the average price
of \$7.00 per share, the receiver and many investors might favor the deal to allow investors to recover
their principal, and some gains, quickly. By comparison, because Cilano owns few shares, he might
favor rejecting the offer in the hope that Palantir eventually goes public at \$10.00 or more per share
so that his creditor claim for carried interest is calculated against a larger gain.

1 | inappropriate for him to serve on an Advisory Committee that is to promote the interests of equity
2 | investors in making receivership decisions.

3 | For the reasons set forth above, the Court should reject the proposed Cilano’s proposed
4 | appointment to the Advisory Committee.

5 |

6 | DATED: March 18, 2020

Respectfully submitted,

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/s/ John S. Yun

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John S. Yun

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Attorneys for Plaintiff

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SECURITIES AND EXCHANGE COMMISSION

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Appendix 1

Excerpts from January 30, 2020 Hearing

Pages 1 - 57

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

SECURITIES AND EXCHANGE COMMISSION,)
Plaintiff)
VS.) NO. C 16-01386 EMC
JOHN V. BIVONA, et al.,) San Francisco, California
Defendants.)

Thursday, January 30, 2020

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: U.S. SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street
Suite 2800
San Francisco, California 94104
BY: JOHN S. YUN, ESQ.

For Interested Party SRA Funds Investor Group:
PRITZKER LEVINE, LLP
180 Grand Avenue
Suite 1390
Oakland, California 94612
**BY: JONATHAN K. LEVINE, ESQ.
ELIZABETH PRITZKER, ESQ.
PATRICIA SCHRAGE (Telephonic)**

Also Present: **KATHY PHELPS, Receiver**

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**
Official Reporter, U.S. District Court

1 **Thursday - January 30, 2020** **2:13 p.m.**

2 **PROCEEDINGS**

3 **THE CLERK:** Calling Civil Action 16-1386, Securities
4 and Exchange Commission versus Bivona, et al.
5 Counsel, please approach the podium and state your
6 appearances for the record.
7 **MR. YUN:** Good afternoon, Your Honor. John Yun
8 appearing on behalf of plaintiff United States Securities and
9 Exchange Commission.
10 **THE COURT:** All right. Good afternoon, Mr. Yun.
11 **MS. PHELPS:** Good afternoon, Your Honor. Kathy
12 Phelps, the Court-appointed successor receiver in this matter.
13 **THE COURT:** Good afternoon, Ms. Phelps.
14 **MS. PRITZKER:** Good day, Your Honor. Elizabeth
15 Pritzker, Pritzker Levine, on behalf of the SRA investors
16 group.
17 **THE COURT:** Good afternoon, Ms. Pritzker.
18 **MR. LEVINE:** Good afternoon, Your Honor. Jonathan
19 Levine, also for the investor group.
20 **THE COURT:** Thank you, Mr. Levine.
21 It seems to me there are -- there are arguments, if we get
22 into the weeds about whether or not there was a QSF formed upon
23 entry of this Court's order, and what it extends to. I mean, I
24 could see some argument, depending on how you read these
25 things. But the problem is there are risks attendant to taking

1 the more aggressive position.

2 That is, yes, there may be an argument. But in order to
3 pursue the argument and pursue the alternative -- which, I do
4 want to find out more about what the alternative is so I make
5 sure I understand it -- I want to point out that means -- that
6 may mean I don't know if we get a ruling or we wait until the
7 IRS makes its move and then we have to hold a certain amount of
8 funds in -- you know, it -- it's certainly not a clear path to
9 sort of ignore the QSF route. There may be a way out, but it
10 seems a little iffy to me.

11 And then we do also have the opinions of the consultants
12 that the receiver have retained indicating that -- I don't know
13 if you want to call it the more conservative or the more
14 cautious route to go is one that makes the most sense, at least
15 from a tax perspective.

16 I guess I would like to know more from both sides, that if
17 we were to go the route of the investor group, what does that
18 look like? And what would that require, and what does it take?
19 why don't you map that out for me.

20 **MR. LEVINE:** If I -- thank you, Your Honor. Let me
21 just address sort of the QSF issue first, if I may. I actually
22 think it's not complicated. And it doesn't need an SEC
23 advisory, an IRS advisory opinion.

24 As I understand, sort of big-picture, the argument of the
25 receiver, as I understand that, is that the act of creating the

1 order that the Court signs that creates the receivership
2 simultaneously creates a QSF over all the assets of that
3 receivership. That's the fundamental premise, I think, of the
4 receivership.

5 **THE COURT:** Does it effectively -- segregated, in a
6 sense, segregated the funds or put them under the jurisdiction
7 or the control of the -- the receiver?

8 **MR. LEVINE:** well, so -- well, before we get to
9 segregation, let's just take the broad principle that I think
10 is being espoused, that when Your Honor signed the order
11 creating the receivership, that automatically, as a matter of
12 law, created a qualified settlement fund over all of the assets
13 that are part of that receivership.

14 And we think that premise is fundamentally flawed. It's
15 without basis in the law or fact. All receiverships are not
16 QSFs. If that is the case, why do you need language in a
17 receivership order specifically creating a QSF over only pieces
18 of the receivership? I mean, why do you need that? It's
19 surplusage.

20 We know that there are other receiverships, including SEC
21 receiverships, in this district in which there is no QSF. It
22 is not part of the order, and no QSF has been established.

23 So the act -- and there is no authority that says:
24 Receivership equals -- if we turn it into a math equation --
25 receivership equals QSF. That is -- that proposition I just

1 **THE COURT:** I think that's fair, if we open up the
2 process.

3 **MR. YUN:** And again, this is now coming back to me,
4 the other issue we had is whether or not they had to be equity
5 investors, as opposed to an unsecured creditor also seeking
6 being in that position as well. And that was the other -- we
7 just wanted an open process, is how we now call it.

8 **MS. PHELPS:** I mean, at this point, Your Honor, it
9 seems to me we're past the hard part of the case. I'm not sure
10 how much consultation is really even required. But I'm happy
11 to talk to everyone. I respond to every email and every phone
12 call I receive, within 24 hours. And I'm happy to continue to
13 do that.

14 **MR. LEVINE:** It's called "the investor advisory
15 group," not "the creditor and investor..." I mean, the purpose
16 -- there was a specific purpose for this group, which was once
17 the plan was approved -- because obviously us being here costs
18 people money, a lot of money. For three years we've been here
19 and it's cost the investors a fortune.

20 The idea was to have a formal group so that we could step
21 out of this process, and the investors could work with the
22 receiver to implement the plan. So that's why it's a formal
23 group, it's only investors, and it's sophisticated investors
24 who are capable of doing this. And we were very careful about
25 who we picked for this, to pick a group that is comfortable

1 appearing in court, or working, whatever. That's our group.

2 Now, it's not that we're not open to new people. But our
3 goal here is for us (indicating) to step out of this process at
4 some point, and turn it over to the investors. And we want to
5 be comfortable that there is a formal group of sophisticated
6 investors who can handle that.

7 **THE COURT:** Yeah. I -- it does seem to me that this
8 is for the benefit of investors. I don't know if we need
9 creditors on here. They have a right to chime in on the plan
10 when we get the notice out. But this is to help make
11 investment decisions about whether to liquidate or not.

12 If these unsecured creditors are protected by virtue of
13 the hold-back and the formula, that's what their interest is in
14 primarily, it seems to me.

15 **MS. PHELPS:** Your Honor, I think I'm -- now I'm
16 getting a little bit concerned. I want to understand the
17 purpose of this group.

18 So we're going to approve a plan that tells me that I can
19 sell 30 percent of the investment amount to create this plan
20 fund. Is the investment group supposed to tell me: Sell
21 today; don't sell today, sell tomorrow?

22 I mean, what's the purpose of the investment group?
23 Because I'm a little confused as to why -- what they're going
24 to be consulting with me about.

25 **THE COURT:** Mr. Levine, do you --

1 **MR. LEVINE:** I mean, you know, I don't know
2 specifics. Obviously, it's advisory. It's a bunch of smart
3 people who have a lot of money at stake, who are standing ready
4 to help the receiver to maximize the returns to investors.

5 I don't know how to say it any easier. They know this
6 stuff. They're smart. They're a resource for them to use.

7 **THE COURT:** They may have some ideas about timing,
8 for instance.

9 **MR. LEVINE:** Timing, ways to sell. Just how to
10 implement -- as the receiver says, this is a very complicated
11 plan.

12 The idea was for us to be able to get out of it, and for
13 the receivers to help the receiver implement it in a way that
14 was practical, and reduce the expenses of the receivership. I
15 mean, that's the goal.

16 **THE COURT:** So to be clear, this is not a governance
17 group, this is not -- they have no veto power. It is there to
18 be a resource.

19 **MS. PHELPS:** (Nods head)

20 **THE COURT:** And I would think if major decisions are
21 to be made about timing, what to do with Palantir, or if, you
22 know, it comes to that point, they would be consulted just for
23 their views.

24 **MR. LEVINE:** And if -- and if -- I think the other
25 piece of it was if there were going to be changes or amendments

1 to the plan, that they would be advised about it. And they
2 could then decide whether they needed a lawyer or not.

3 **THE COURT:** All right. I would like to keep that
4 structure in place. However, I do want to make this a
5 democratic process. And in the end, it may be these four or
6 five people that are designated, they're the ones that
7 expressed the most interest, and I would expect them to be part
8 of this committee.

9 **MS. PHELPS:** Your Honor, do you want them to submit
10 those applications to you? Or just directly to me?

11 **THE COURT:** To you. Because I'd like you to make the
12 initial -- select a recommendation, and I will approve that
13 recommendation.

14 **MS. PHELPS:** Okay. So then, then, I will prepare an
15 order, and then we will set a hearing date -- or I will file a
16 motion and set a hearing date for final approval.

17 **THE COURT:** Yes. Yes. After --

18 **MS. PHELPS:** So once I receive the entered order,
19 then I'll prepare a notice and the plan to go out to everybody,
20 and I'll set a hearing date on that.

21 **THE COURT:** Right.

22 **MS. PHELPS:** Okay.

23 **MR. LEVINE:** Could I ask, Your Honor, maybe to avoid
24 a filing, that the receiver provide us with a draft of whatever
25 the distribution plan -- since I know it's changed, whatever

1 the receiver plans on filing, we'd like to see --

2 **MS. PHELPS:** Of course.

3 **THE COURT:** Okay.

4 **MR. LEVINE:** -- and maybe try to comment beforehand.

5 **THE COURT:** Okay.

6 **MR. LEVINE:** Otherwise we're going to have to file a

7 response.

8 **MS. PHELPS:** It's going to look like the redline

9 there, with the changes to the investor group that we just

10 discussed today. But yes, I'm happy to share that.

11 **THE COURT:** All right. So that will be the next

12 step. Do we need to set a -- I mean, you're going to set that

13 hearing date. Do we --

14 **MS. PHELPS:** I will set a hearing date when I file

15 the final motion.

16 **THE COURT:** So I don't need to set a further status.

17 That will be our next status date, I assume.

18 **MS. PHELPS:** Yes, I believe so.

19 **THE COURT:** Great. Thank you.

20 **MS. PHELPS:** Thank you very much, Your Honor.

21 **MR. LEVINE:** Thank you, Your Honor.

22 **THE COURT:** Thank you.

23 (Proceedings concluded)

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4 **CERTIFICATE OF REPORTER**

5 I, BELLE BALL, Official Reporter for the United States

6 Court, Northern District of California, hereby certify that the

7 foregoing is a correct transcript from the record of

8 proceedings in the above-entitled matter.

9

10 *Belle Ball*

11 /s/ Belle Ball

12 Belle Ball, CSR 8785, CRR, RDR

13 Monday, February 10, 2020

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