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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 REPLY IN
 SUPPORT OF ITS OBJECTION TO
 JOSHUA CILANO’S APPOINTMENT TO
 INVESTOR ADVISORY COMMITTEE**

Date: May 13, 2020
 Time: 10:00 a.m.
 Courtroom: 5
 Judge: Edward M. Chen

PLAINTIFF'S REPLY IN SUPPORT OF OBJECTION TO CILANO APPOINTMENT

At a bare minimum, anyone serving on the Court-approved Investor Advisory Committee should be: (1) free of conflicts of interests, and (2) representative of the pool of defrauded investors. Joshua Cilano is neither. And the opposition that he jointly filed with the Investors Committee raises more questions than it answers, and underscores that Cilano is uniquely ill-suited for the Advisory Committee. The Joint Opposition minimizes the significance of the Advisory Committee, but Cilano still strives to be included. The Joint Opposition downplays Cilano's conflicts, but—highlighting the depth of these conflicts—fails to admit in a straightforward manner that the potentially huge backend fees that he seeks as a creditor would directly diminish the recovery of the investors that he seeks to represent. The Court should sustain the SEC's objection and deny Cilano a seat on the Advisory Committee.

The Joint Opposition does not resolve the conflicts created by Cilano's creditor claim for backend fees, which could easily reach six figures, depending upon the future value of Palantir Technology shares. The Joint Opposition completely ignores the Investor Committee's counsel recent objection to having unsecured creditors on the Advisory Committee. Transcript of Proceedings on January 30, 2020 (ECF 587 at 7) (stating that "It's called 'the investor advisory group,' not 'the creditor and investor [advisory group] ..."). This Court agreed that the Advisory Committee is to represent equity investors. *Id.* Cilano seeks, as a creditor, half of the backend fees supposedly owed by certain investors to the management entities. Cilano Amended Claim (ECF 572-2 at 4-10). In light of his creditor claim, Cilano cannot meet the Investor Group's or the Court's criteria for Advisory Committee membership.¹

The Joint Opposition tries to salvage Cilano's nomination by trivializing the Advisory Committee. After the Investor Group pushed for the Advisory Committee for months, the Joint Opposition now suggests that Cilano's creditor status might not matter because the Advisory Committee might not matter. ECF 600 at 2 (asserting that if the receiver does not seek its advice, the

¹ During the December 13, 2018 hearing, the Court discussed Cilano's participation on an advisory committee. Transcript at 38-39 (attached as Appendix 1). The Court assumed that Cilano would benefit from his investment, and not from management fees, while on the committee. *Id.* at 39, lines 5-7.

1 Advisory Committee might not have any role).

2 A central issue, however, is not just the Advisory Committee's role, but the Court's stamp of
3 approval upon that Committee. This Court must approve the distribution plan creating the Advisory
4 Committee and, pursuant to the receiver's request for instructions, must decide whether to appoint a
5 candidate if a dispute arises. Order Approving Procedures for Selection of Advisory Committee, ¶¶
6 4-5 (ECF 566 at 3); Receiver's Motion for Instructions (ECF 583). Although not binding with
7 respect to selecting the Advisory Committee's members, Federal Civil Procedure Rule 23(a)'s
8 provisions relating to class representatives provide helpful standards for determining whether the
9 Committee members will effectively protect the interest of equity investors. Fed. R. Civ. Proc.
10 23(a)(3), (4). Using Rule 23(a) for guidance in promoting the Advisory Committee's representation
11 of investors, this Court should consider whether a challenged candidate for the Advisory Committee
12 (i) has an actual or potential conflict of interests with the investors and (ii) is making claims in the
13 receivership that are typical of the investors represented by the Committee. *See, e.g., O'Connor v.*
14 *Uber Technologies, Inc.*, 2019 WL 1437101, 2019 U.S. Dist. LEXIS 54608 at * 16-17, 19 (N.D. Cal.
15 March 29, 2019) (approving certification of a settlement class). Cilano's nomination fails to meet
16 either standard, as he has a conflict of interest with investors and his large creditor claim makes him
17 atypical of investors.

18 Cilano's conflict of interest remains unresolved. The receivership's payment of Cilano's
19 backend fees must be through the shares or cash or some combination of the two. Because the shares
20 or cash both come from the receivership estate, any fee payment to Cilano would necessarily reduce
21 the shares or cash available for the receiver's distribution to investors. The Joint Opposition's bald
22 assertion that Cilano only seeks a "subordinated" claim for backend fees does not alleviate the
23 conflict. ECF 600 at 3.² Even if the supposedly subordinated payments to Cilano were to come from
24 the "Plan Fund," which is being created by the 30% assessment used for administrative costs and

25
26 ² Notably, Cilano offers no signed document stating that his creditor claim should receive
27 subordinated treatment. Similarly, Cilano provides no sworn declaration supporting his assertion that
28 he negotiated a tentative agreement with the receiver to resolve his unsecured creditor claim by
subordinating a claim for over \$3 million. Cilano's lack of transparency regarding his fee claim in
this receivership is another reason for rejecting his candidacy to the Advisory Committee.

1 unsecured creditor claims, any excess in the Plan Fund should be returned to investors.

2 Subordinating Cilano's creditor claim only deals with the priority of payments to him, and does not
3 change the source of Cilano's payments from the equity investors.

4 Similarly, the Joint Opposition misses the point by asserting that it is speculation to consider a
5 situation where some investors might wish to sell Palantir shares now, while Cilano might desire
6 waiting for a higher price. ECF 600 at 3. This potential scenario establishes, at a minimum, a
7 potential conflict of interest that should disqualify Cilano from the Advisory Committee.

8 As a creditor, Cilano is also dissimilar from equity investors, and should not represent them.
9 Equity investors purchased pre-IPO interests, while Cilano sold those interests. Equity investors face
10 the out-of-pocket loss of principal if a company fails or share prices decline, while Cilano does not
11 face out of pocket losses, and received an upfront brokerage commission. Equity investors must
12 surrender shares or money to cover backend fees, while Cilano is compensated from those investor
13 shares or money. Equity investors were clients of defendants and relief defendants, while Cilano was
14 the agent of defendants and relief defendants. As a result Cilano is not an appropriate candidate for
15 the Advisory Committee.³

16 For the reasons set forth above, the Court should reject the proposed Cilano's proposed
17 appointment to the Advisory Committee.

18 DATED: April 9, 2020

Respectfully submitted,

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20 /s/ John S. Yun

John S. Yun

Attorneys for Plaintiff

SECURITIES AND EXCHANGE COMMISSION

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25 ³ The Joint Opposition asserts that Cilano has important investment expertise and knowledge of the
26 SRA Funds, but does not explain what investment "expertise" is useful to the receivership. Because
27 the Receiver's task will be to implement the distribution plan, it is also not clear how Cilano's
28 knowledge of the SRA Funds is useful at this point. In any event, though not on the Advisory
Committee, Cilano may still communicate his positions as an investor and creditor claimant to the
Court and the Receiver.

APPENDIX 1

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; 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.)

San Francisco, California
Thursday, December 13, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

U.S. SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street - Suite 2600
San Francisco, CA 94104

BY: JOHN S. YUN, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: ANA M. DUB, CSR NO. 7445 RDR, CRR, CCRR, CRG, CCG
Official Reporter, U.S. District Court

1 basically, come forward to speak for the investors for the
2 better part of two years, to pursue -- to speak on their
3 behalf, he has the -- he has the support of the overwhelming
4 majority of them in terms of his ability to speak for them and
5 in this role.

6 And so, you know, the SEC may wish to continue to
7 disparage him, but the investors feel that he's providing a
8 valuable service.

9 **THE COURT:** Why wouldn't it be more appropriate for
10 him just to play a role on the advisory committee? Why does he
11 need to be anything more than the other people on the advisory
12 committee?

13 **MS. PRITZKER:** He can certainly be an advisory
14 committee member. I don't have a concern with that.

15 I mean, again, the point here was that he was going to --
16 I don't believe that, at the end of the day, his intent was to
17 get a large windfall of money out of all of this. Yes, he
18 would like to be compensated for his effort if he's providing
19 effort on behalf of the receivers- -- or the oversight officer,
20 again, subject to further order and approval of the Court; but
21 I don't think he viewed this necessarily as him, you know,
22 getting a windfall out of this.

23 And so if the Court --

24 **THE COURT:** He's not an investor, I take it, in --

25 **MS. PRITZKER:** He is an investor. He does --

1 **THE COURT:** He is an investor.

2 **MS. PRITZKER:** He has submitted a claim, which, to my
3 knowledge, has not been disallowed. He submitted a claim
4 for --

5 **THE COURT:** So why wouldn't his function be -- fill as
6 being an advisory committee member who would benefit not
7 necessarily from management fees, but from his interests?

8 **MS. PRITZKER:** I don't think we have a concern about
9 moving him up to an advisory committee role, Your Honor. I
10 just -- I think it's very important that he be here because
11 I think that he has information that is valuable to an
12 oversight committee -- to an oversight officer or to a
13 receiver.

14 **MR. YUN:** And our issue is potential conflicts. If he
15 applies to be on an advisory committee, he applies. But he
16 should be voir dired under oath before any decision is made on
17 any application by him.

18 **THE COURT:** Let me ask. The oversight -- your
19 proposed oversight officer, whether it's deemed a -- whether
20 she's deemed a receiver, whatever you want to call it, it would
21 be under the auspices of this Court; so there'd have to be some
22 relationship.

23 This is a person who's experienced, but her experience is
24 in the field of real estate primarily and real-estate-based
25 businesses. I don't see much in terms of these kinds of funds

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THE COURT: You too.

MR. YUN: See you, Your Honor.

MR. ISRAELI: Thanks, Your Honor.

THE CLERK: Court is adjourned.

(Proceedings adjourned at 4:15 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, December 19, 2018

Ana M. Dub

Ana M. Dub, CSR No. 7445, RDR, CRR, CCRR, CRG, CCG
Official Reporter, U.S. District Court