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Counsel for Receiver, Kathy Bazoian Phelps

**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

**RECEIVER’S OPPOSITION TO SRA
FUNDS INVESTOR GROUP’S
ADMINISTRATIVE MOTION RE
RECEIVER’S MOTION TO EMPLOY TAX
AND SECURITIES COUNSEL**

Hearing Date: [No Hearing Set]

Time:

Location: Courtroom 5, 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

1 Kathy Bazoian Phelps, the successor receiver herein (the “Receiver”), hereby files this
2 Opposition to the SRA Funds Investor Group’s Administrative Motion to Employ Tax Advisor
3 and Securities Counsel (the “Administrative Motion”).

4 **I. Introduction**

5 The Administrative Motion seeks turnover of undefined “materials” that either do not
6 exist or are protected attorney-client communications or attorney work product. To the extent
7 “materials” refers to reports, no reports were finalized due to the Investor Group’s refusal to sign
8 a simple NDA to treat reports as expert reports. Rather, the Receiver included her lawyers’
9 analysis and authorities in her Supplement [Dkt No. 538] (the “Supplement”) as a legal
10 memorandum in lieu of filing separate reports of the tax advisor and securities counsel. No final
11 reports or opinions have been issued, as all of the necessary facts considered, analysis, and legal
12 support is included in her Supplement and therefore, has been “turned over” to the Investor
13 Group. The Administrative Motion is therefore moot. To the extent “materials” refers to protected
14 attorney-client privileged communications with her lawyers or protected attorney work product,
15 turnover of such “materials” is not appropriate and may not be compelled. No further delays are
16 necessary or appropriate, and the Investor Group is free to file any contrary authority to the
17 Supplement or analysis by its counsel and advisors that it deems appropriate pursuant to the
18 Court’s scheduling order.

19 The Receiver separately requests that the Court direct counsel for the Investor Group to
20 identify the investors who currently form the Investor Group, since the publicly filed notices of
21 representation are outdated and the Investor Group’s composition is known to have changed.
22 Counsel for the Investor Group has refused to provide that information to the Receiver to date.

23 **II. The “Reports” Have Been Presented in the Supplement**

24 The Investor Group’s Administrative Motion properly indicates that at the October 8,
25 2019 hearing, the Receiver was authorized to employ professionals consisting of a tax advisor (an
26 attorney) and securities counsel (a) “to consider all potential alternatives for the distribution
27 plan,” and (b) “to file *updates or amendments to her motion* concerning the distribution plan”
28 prior to the next hearing. Adm. Mot. 3:1-3 (emphasis added). As an officer and agent of the

1 Court, she has followed the Court's directive and has provided, through her Supplement, the
 2 information she was directed to provide. The information sought by the Investor Group, i.e., the
 3 status of the Qualified Settlement Fund and alternatives available for the Plan, is all contained in
 4 the Supplement. Contrary to the statement in the Administrative Motion that "Ms. Phelps also
 5 apparently decided not to provide the Court with copies of these important and highly relevant
 6 materials," the Receiver has provided the Court, the Investor Group, and all other interested
 7 parties with this highly relevant information and analysis in the form of the Supplement.

8 The Receiver's lawyers have advised the Receiver on the law, as lawyers do, and they
 9 assisted in the preparation of the Supplement to address the QSF issues and alternatives available
 10 based on the Plan to account for and try to minimize taxes in the liquidation and distribution of
 11 assets of the estate. The report that the Investor Group seeks regarding the QSF and other
 12 potential tax mitigation strategies has been presented to the Court, the SEC, the Investor Group,
 13 and other interested parties, in the already filed public document. There is nothing else to provide
 14 regarding the Investor Group's request for the tax and securities analysis of the QSF and
 15 alternatives to address and try to minimize tax consequences.

16 If instead the point of the Administrative Motion is to compel the Receiver to disclose her
 17 privileged communications with her lawyers and protected attorney work product, the relief
 18 sought is highly inappropriate, and the Receiver requests that the motion be denied on that basis.

19 **III. Reports Were Not Prepared Due to Investor Group Counsel's Refusal to Sign**
 20 **an NDA or Treat Reports as Expert Reports**

21 The conduct of counsel for the Investor Group leading up to the filing deadline of the
 22 Supplement necessitated the filing of the analysis by the Receiver's lawyer in a public pleading
 23 rather than the preparation of separate final reports by the tax advisor and securities counsel. The
 24 Investor Group refused to sign a nondisclosure agreement with the Receiver,¹ refused to agree to
 25 _____

26 ¹ As set forth in the exhibits attached to the Administrative Motion, and contrary to the
 27 representation that the Receiver claims "she is not bound by the court order," the Receiver
 28 repeatedly advised counsel for the Investor Group that she is not a *party* to any NDA or protective
 order signed in this case. Moreover, the previous protective order with the former receiver does not
 address this circumstance. The Receiver was willing to allow final versions of "reports" to be
 prepared by her tax advisor and securities counsel if they were treated as expert reports under an

1 treatment of such a report as an expert report,² and refused to agree to the filing of such a report
2 under seal.³

3 Therefore, the Receiver reevaluated the manner in which the information should be
4 presented to the Court and the Investor Group. The Receiver determined to file the
5 noncontroversial and well-settled legal analysis prepared by her attorneys in the form of the
6 Supplement. The Receiver chose not to engage in a court battle with the Investor Group over the
7 issue of an NDA, treatment of experts, or the filing the information under seal. Rather, the
8 Receiver chose a path seeking to mitigate ongoing fees, costs and delays in order to provide the
9 Court and the parties in the most efficient manner possible the substantive information they
10 sought in a form that could be publicly filed through the Supplement.

11 While the Receiver understands that the Investor Group’s counsel may have expected a
12 report on a tax advisor’s letterhead, counsel’s conduct has prohibited such a separate filing. The
13 Court authorized the engagement of counsel, not experts, and the Investor Group has refused to
14 treat the tax advisor and securities counsel as experts or to respect her attorney-client privilege.

15 **IV. The Attorney-Client Privilege Protects Attorney-Client Communications**

16 The Administrative Motion demands to see “any written materials provided by her tax
17 advisor and securities counsel that form the basis for Ms. Phelps December 16, 2019
18 supplemental filing (Dkt No. 538).” “Any written materials” presumably includes all of her
19 attorney-client privileged communications with her lawyer. No separate report was finalized due
20 to the Investor Group’s refusal to sign an NDA or to treat a report as an expert report and not as a

21 _____
22 (continued)

23 NDA and subject to the recognized restrictions on discovery regarding experts under F.R.Civ.P.
24 Rule 26, which restricts the scope of documents that can be requested from the expert. Counsel
never responded on that issue or acceded to her request. The NDA provided was not one-sided nor
onerous, but the Investor Group rejected any further discussion of an NDA.

25 ² As set forth in the exhibits attached to the Administrative Motion, counsel for the Investor Group
26 refused to agree that they would treat any reports as expert reports and that they would not assert a
waiver of attorney-client privilege if reports were produced. The Receiver will not agree to waive
her attorney-client privilege or attorney work product protection. *See* F.R.Civ.P. 26.

27 ³ As set forth in the exhibits attached to the Administrative Motion, counsel for the Investor Group
28 would not agree to the filing of reports under seal and insisted on seeing the reports first, but would
not sign an NDA that would permit them to see the reports when prepared.

1 waiver of attorney-client privilege. All “materials” are therefore protected communications with
2 her lawyer and will not be produced. However, the substance of the legal analysis has been
3 adopted in the Supplement filed with the Court, and there is simply no additional or different
4 substantive analysis or information that would be obtained in any event if such protected
5 communications were produced.

6 Any superfluous request for the Receiver’s attorney-client communications is highly
7 inappropriate and irrelevant. If such a request were granted, the attorney-client privilege would be
8 meaningless. Lawyers advise their clients and prepare filings with the Court. That is what
9 happened here. The Administrative Motion fails to establish any basis to disregard the attorney-
10 client privilege, particularly where there is absolutely no reason or justification provided for such
11 a request – not to mention that there is no legal basis for the request.

12 **V. Although Disappointed, Investor Group May Submit a Contrary Position**

13 The Investor Group may feel disappointed that the law and analysis detailed in the
14 Supplement did not reveal a magical solution to the tax consequences of the plan they have
15 promoted to return shares to investors. The Investor Group consists of presumably sophisticated
16 investors with access to counsel, tax advisors, and securities lawyers who now have a detailed
17 analysis of the tax circumstances of the QSF, the options the Receiver is advised are available,
18 and the tax consequences and practical impact of those alternatives. They are, of course, free to
19 brief and assert a contrary position based on an analysis by their own tax advisors, securities, and
20 other counsel if they feel there is law to support such a position. Nothing prevents the Investor
21 Group from retaining its own expert to provide a different opinion for the Court’s consideration.

22 The Investor Group is correct that the report submitted to the Court in the Supplement was
23 prepared at the expense of the investors and, in fact, at the *request* of the Investor Group. The
24 report revealed nothing new or different than was proposed in the Receiver’s Plan in June 2019,
25 though significant administrative costs and delay have been incurred to respond to the Investor
26 Group’s requests. The Receiver wishes to advance the case cost-effectively and expeditiously to
27 try to return value to the investors and creditors in the reasonably near future. The Receiver’s
28 counsel – tax, securities, and general – all support and adopt the report contained in the

1 Supplement. The Investor Group may not like what it says, but that is the report they requested.
2 The Administrative Motion is an unnecessary diversion and expenditure of estate resources.

3 **VI. Disclosure of Makeup of Investor Group is Appropriate**

4 As a separate but related matter, since her appointment in February 2019, the Receiver has
5 requested on multiple occasions that the Investor Group's counsel advise who comprises the
6 Investor Group, among other reasons, in order to streamline service in the case. As the Receiver
7 became more involved in the case, her concerns grew as to the size of the Investor Group relative
8 to other investors not represented by its counsel, as well as potential conflicts of interest. Counsel
9 for the Investor Group has consistently refused to identify its clients, referring the Receiver to
10 notices filed with the Court which Investor Group counsel admits are outdated.

11 On December 13, 2019, the Receiver again requested the identity of investors in the
12 Investor Group. Investor Group counsel stated that he would not incur the expense of going
13 through emails and correspondence to be able to identify who he represents. Though the Receiver
14 is advised representations have been made that the Investor Group makes up a majority of
15 investors (up to 85% of investors), the Receiver's analysis reveals a different understanding.
16 Assuming that no other investors have left or joined the Investor Group, it appears that the
17 Investor Group is comprised of 93 investors with allowed claims. There are presently 291 total
18 investors with allowed claims (excluding creditors Global Generation, Progresso Ventures and
19 Pradeep Sindhu). If this information has not changed, the Investor Group represents roughly 32%
20 of investors with allowed claims. The Receiver requests that the Court direct counsel for the
21 Investor Group to provide the Receiver will a current list of the investors in the Investor Group.

22 WHEREFORE, the Receiver requests that (a) the Court deny the Administrative Motion;
23 (b) order the Investor Group's counsel to identify to the Receiver the investors who make up the
24 Investor Group; and (c) grant the Receiver all other appropriate relief.

25
26 DATED: December 20, 2019

DIAMOND McCARTHY LLP

27 By: /s/ Lesley Anne Hawes
28 Lesley Anne Hawes, Attorney for Kathy Bazoian
Phelps, Successor Receiver