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7 *Successor Receiver*

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

11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 v.

15 JOHN V. BIVONA; SADDLE RIVER
16 ADVISORS, LLC; SRA
17 MANAGEMENT ASSOCIATES, LLC;
18 FRANK GREGORY MAZZOLA,

19 Defendants, and

20 SRA I LLC; SRA II LLC; SRA III LLC;
21 FELIX INVESTMENTS, LLC;
22 MICHELE J. MAZZOLA; ANNE
23 BIVONA; CLEAR SAILING GROUP IV
24 LLC; CLEAR SAILING GROUP V LLC

25 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
SETTLEMENT WITH EQUITY
ACQUISITION COMPANY LTD.**

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

1 Kathy Bazoian Phelps, the successor receiver herein (the “Receiver”), hereby
2 files this Motion for Order Approving Settlement with Equity Acquisition Company
3 Ltd. (“EAC”) and Carsten Klein (“Klein”).

4 **I. Introduction**

5 The Receiver has reached a settlement with EAC that provides for an adjustment
6 in the allocation of securities as between them and the allowance of subordinated
7 claims.

8 The Receiver has conferred with counsel for the Securities and Exchange
9 Commission, who advised that it does not oppose the Motion. The Receiver also
10 conferred with counsel for the SRA Funds Investor Group and Progresso Ventures LLC
11 who each advised that they do not take a position on the Motion. A stipulation with all
12 parties was deemed impractical given, among other things, the entry of judgment
13 against the defendants and pending bankruptcy of defendant John Bivona. (L.R. 7-11
14 1(a)).

15 **II. Statement of Facts**

16 1. Pursuant to the Plaintiff Securities and Exchange Commission’s Stipulated
17 Order for Appointment of Receiver entered October 11, 2016 (“Receivership Order”),
18 Sherwood Partners was appointed as the temporary receiver over the assets of SRA
19 Management Associates, LLC, SRA I, LLC, SRA II, LLC, SRA III, LLC, SRA
20 Management Associates, Clear Sailing Group IV, LLC, Clear Sailing Group V, LLC,
21 Felix Multi-Opportunity Fund I, LLC, Felix Multi-Opportunity Fund II, LLC, Felix
22 Management Associates, LLC, NYPA Fund I, LLC, NYPA Fund II, LLC, and NYPA
23 Management Associates, LLC. The Receiver was appointed as the successor Receiver
24 by Order entered on February 28, 2019, and Solis Associates Fund as later added to the
25 receivership (collectively, the “Receivership Entities”).

26 2. EAC, Klein and the Receiver have engaged in negotiations to resolve
27 certain issues between them (the “Dispute”) in respect of:
28

- 1 a. Certain shares and/or the contractual rights to shares that are now in the
2 name of Receivership Entities but that EAC claims are beneficially owned
3 by it;
- 4 b. Certain shares and/or the contractual rights to shares that are now in the
5 name of EAC but that the Receiver claims are beneficially owned by the
6 Receivership Entities and should be property of the receivership estate in
7 the Proceedings.
- 8 c. Moneys, in respect of fees, and other matters allegedly previously settled
9 between Receivership Entities and Klein that Klein claims are owed to
10 him;
- 11 d. Moneys, in respect of share transactions and other matters allegedly
12 previously settled between Receivership Entities and EAC that EAC
13 claims are owed to it on behalf of the underlying investors for whom EAC
14 held such shares.

15 3. The Receiver has proposed a Plan of Distribution (the “Plan”) in the
16 Proceedings which is pending before the Court. The Receiver has advised EAC and
17 Klein that the Plan has not yet been approved and may or may not approved in a form
18 substantially similar to the pending Plan. EAC and its counsel have reviewed the Plan,
19 are familiar with its contents and are prepared to enter into the Settlement Agreement
20 before approval of any distribution plan.

21 4. EAC contends it has claims against the receivership estate in connection
22 with certain guarantees made to its investors, Kenneth Lacey (“Lacey”) and Alexander
23 Pisemskiy (“Pisemskiy”), and Klein contends he has a claim for earned commissions on
24 account of closed transactions with one or more of the Receivership Entities. None of
25 them have submitted a proof of claim against the Receivership Estate.

26 5. The negotiations between the Receiver, EAC and Klein of the Dispute
27 have been conducted in good faith at arm’s length and have resulted in an agreement
28 that involves the transfer of shares and/or contractual rights to shares between them, and

1 the allowance of a subordinated claim by each of EAC on behalf of its investors and
2 Klein against the receivership estate as set forth herein. The transfers of shares and
3 contractual rights are not distributions by the Receiver to Claimants or Transferors.

4 **III. Terms of Settlement Agreement**

5 Without modifying the terms of the Settlement Agreement, which are set forth in
6 full in Exhibit “1” attached hereto, the Settlement Agreement provides generally as
7 follows:

8 A. Transfer of Shares

- 9
10 1. EAC shall transfer the right title and beneficial interest in the following
11 securities, or contractual rights to shares, to the Receiver as set forth in the
12 Settlement Agreement:

13 11,125 shares of *Airbnb, Inc.*;
14 9,479 shares of *Lyft, Inc.*;
15 23,206 shares of *Pinterest, Inc.*;
16 500 shares of *Uber Technologies, Inc.*;
17 317,649 shares of *Palantir Technologies, Inc.*; and
18 1,495 shares of *ZocDoc, Inc.*

- 19 2. The Receiver shall transfer the right, title and beneficial interest in the
20 following shares, or contractual rights to shares, to EAC as set forth in the
21 Settlement Agreement:

22 33,789 shares of *Addepar, Inc.*;
23 2,349 shares of *Bloom Energy, Inc.*;
24 7,399 shares of *Cloudera, Inc.*;
25 3,892 shares of *Evernote, Corp.*; and
26 37,676 shares of *Lookout, Inc.*

- 27 3. EAC shall transfer the right title and beneficial interest in 835,000 shares
28 of ***Practice Fusion, Inc.*** to the Receiver or any payments attributable to
such 835,000 Practice Fusion shares.

- B. Allowance of Claims: The following claims shall be allowed as subordinated
claims, presently contemplated to be included in Class 5 of the Plan and to
only receive distribution following payment in full to all Allowed Claims for
administrative fees and expenses, federal and state taxes, unsecured creditor

1 claims and investor claims. Those Allowed Claims are currently described in
2 Classes 1, 2, 3 and 4 of the proposed Plan, while the subordinated claims are
3 currently in Class 5 of the proposed Plan.

- 4 a. Kenneth Lacey for \$500,000 as a subordinated claim;
5 b. Alexander Pisemskiy for \$500,000 as a subordinated claim;
6 c. Klein for \$100,000 as a subordinated claim

7 C. Releases: The Parties shall exchange mutual general releases as set forth in the
8 Agreement.

9 **IV. The Agreement is in the Best Interest of the Estate**

10 The Receiver believes in her business judgment that the Agreement is fair,
11 reasonable, and is in the best interest of the receivership estate. The Agreement provides
12 the delivery to the estate of the shares which the Receiver believes belong to the estate
13 because investor funds were used to purchase the shares. The Receiver will similarly
14 deliver shares to EAC for which it paid. Some adjustments were made in the accounting
15 due to incomplete records and offsets, but the final accounting leaves the estate in a
16 better position regarding the number of shares claimed by investors versus the number
17 of shares owned by the estate, as set forth in more detail in the Declaration of Kathy
18 Bazoian Phelps. The settlement also resolves disputed issues regarding claims of EAC
19 for two of its investors who returned shares to the Receivership Entities and who
20 received confessions of judgment in exchange. The two investors each claimed
21 \$750,000, and the Agreement reduced those claims to \$500,000 but will only allow for
22 payment or distribution on a subordinated basis, after all other claims are paid in full.
23 Similarly, the Agreement allows a subordinated claim for Klein an account of
24 commissions he is owed for past closed transactions. The Agreement reduces the claim
25 amount from approximately \$290,000 to \$100,000 to be paid on a subordinated basis,
26 only after all other claims are paid in full.

27 There are “no federal rules [that] prescribe a particular standard for approving
28 settlements in the context of an equity receivership; instead a district court has wide
discretion to determine what relief is appropriate.” *Gordon v. Dadante*, 336 F. App’x

1 540, 549 (6th Cir. 2009). Nevertheless, courts in federal receiverships often look to the
2 following factors, which pertain to compromises reached in bankruptcy actions, when
3 examining a proposed settlement: the probability of success in the litigation; the
4 difficulties, if any, to be encountered in collection; the complexity of the litigation and
5 the expense, inconvenience, and delay associated therewith; and the paramount interest
6 of creditors. *See Secs. & Exch. Comm'n v. Ruderman*, No. CV 09-02974, 2011 WL
7 5857452, at *3 (C.D. Calif. Nov. 21, 2011) (considering these factors in approving
8 receivership settlement. Because compromises are favored in bankruptcy actions, courts
9 generally give deference to a trustee's business judgment and approve settlements that
10 are negotiated in good faith and are "reasonable, fair, and equitable." *Ruderman*, 2011
11 WL 5857452, at *3.

12 The settlement is in the best interest of the receivership estate because the
13 Receiver's ability to avoid the lien released in this Agreement is subject to uncertainty.
14 *See Ruderman*, 2011 WL 5857452, at *4 (explaining uncertainty of outcome of
15 litigation "weigh[ed] heavily" in favor of approval of settlement reached by receiver).
16 While the Receiver believes that she would have been able to obtain the shares owed to
17 the estate through litigation, and would have been able to disallow the claims as they
18 were not timely filed, the Agreement avoids substantial costs and risks of litigation.
19 Additionally, the Agreement obtains for the estate approximately what would have
20 been obtained through litigation, and the subordinated claims will not impact
21 distributions to the other classes of claimants, including the investors, as those
22 subordinated claims will not receive distribution until all other claims are paid in full.
23 The Agreement avoids the uncertainty of litigation. Moreover, litigation regarding these
24 interests will be time consuming and costly, draining the assets of the estate.

25 **V. Conclusion**

26 The Receiver respectfully requests that the Court approve the Settlement
27 Agreement and requests all other appropriate relief.
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DIAMOND MCCARTHY LLP

DATED: January 9, 2019

By: /s/ Kathy Bazoian Phelps
Kathy Bazoian Phelps
Receiver