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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. JOHN V. BIVONA, et al., Defendants and Relief Defendants.	Case No. 3:16-cv-01386-EMC **JOINT REPLY BY SECURITIES AND EXCHANGE COMMISSION AND RECEIVER TO RESPONSES TO MOTIONS FOR APPROVAL OF PROPOSED JOINT DISTRIBUTION PLAN** Date: August 30, 2017 Time: 10:00 a.m. Courtroom: 5 Judge: Edward M. Chen

I. Introduction

In moving for the Court's approval of their Joint Distribution Plan, plaintiff Securities and Exchange Commission ("Commission") and the Receiver, Sherwood Partners, Inc. ("Receiver"), submitted overwhelming evidence that defendants John V. Bivona, Frank G. Mazzola, Saddle River Advisors, LLC ("Saddle River"), and SRA Management, LLC ("SRA Management") commingled investor money at the Felix Multi-Opportunity Funds I and II, LLC ("FMOF Funds"), NYPA I and II, LLC ("NYPA Funds"), SRA I, II and III, LLC ("SRA Funds"), and Clear Sailing IV and V, LLC. The Commission and the Receiver also made a *prima facie* showing of defendants' fraudulent conduct, including the misuse of investor funds in a Ponzi-like fashion to purchase shares in pre-IPO companies and the diversion of those funds to themselves. This fraud has resulted in a shortfall of shares, including those of Palantir Technologies, Inc. ("Palantir"), owed to investors and has rendered fruitless any effort to trace investors' money to their promised assets. Consolidation and the *pro rata* distribution of the receivership's assets to all investors and unsecured creditors are therefore appropriate.

Defendant John Bivona, defendant Saddle River, and relief defendant Anne Bivona submitted an opposition brief without a shred of evidentiary support sufficient to meet their burden of overcoming the Commission's *prima facie* showing. The Bivona's opposition brief, which defendant Frank Mazzola and relief defendant Michele Mazzola copied in emails to the Commission and Receiver, is a stalling tactic that should be rejected.

Investor Telesoft Ventures, Inc. ("Telesoft") also submitted opposition papers claiming that its $1,475,500 payment to Clear Sailing IV in March 2014 was not commingled or diverted by defendants to cover other obligations and therefore should not be included in any consolidation. Telesoft's opposition papers are insufficient to challenge the Commission's and the Receiver's proposed findings, and its request for further discovery should be denied.

II. Defendants' Failure to Offer Evidence Forecloses Any Due Process Objection.

Defendants make the baseless assertion that they are being denied due process unless the Court waits until the conclusion of trial to find that defendants engaged in wrongdoing. *E.g.*, Bivona Opposition at 2. In the Ninth Circuit, summary proceedings are appropriate to resolve issues

involving receiverships that were imposed "as part of the courts' equitable powers under the Securities Acts of 1933 and 1934 . . . to prevent further dissipation of defrauded investor assets." *SEC v. Wenke*, 783 F.2d 829, 836-37 (9th Cir. 1986). Summary proceedings serve to reduce the time necessary to resolve receivership disputes, decrease litigation costs, and prevent dissipation of assets. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). A district court may therefore employ summary procedures in a receivership if the "procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts." *Id.* at 1567, *discussed and followed in SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668-69 (6th Cir. 2001) (upholding determination that escrow account was receivership property after escrow holder had opportunity to present contrary evidence at district court hearings); *SEC v. Pension Fund of America L.C.*, 377 Fed. Appx 957, 961-63 (11th Cir. 2010) (upholding determination that regional sales director of fraudulent entity could not recover unpaid commissions after director had the opportunity to submit supporting evidence). This Court is therefore authorized to approve the proposed Joint Distribution Plan prior to trial so long as objecting parties were provided the opportunity to submit and be heard upon their supporting evidence. *See SEC v. Wenke*, 783 F.2d at 836-37.

Defendants John Bivona, Frank Mazzola and Saddle River, along with relief defendants Anne Bivona and Michele Mazzola, have repeatedly failed, however, to offer evidence disputing their liability. Despite the Commission's evidentiary showing of commingled assets and securities law violations in its temporary restraining order papers, defendants and relief defendants never challenged the Commission's evidence. Instead, the Bivonas merely asserted that the payments to Anne Bivona were supposed repayments of loans by her. *Compare* Docket Nos. 4 to 20 (Commission's TRO papers) *with* Docket Nos. 25 and 26 (Bivona opposition and declaration). Even though the Receiver and the Commission submitted overwhelming evidence of defendants' commingling and securities violations in the motion papers for approval of the proposed Joint Distribution Plan, Docket Nos. 196 to 201, defendants' and relief defendants' opposition papers are once again devoid of any evidence disputing their commingling of investor money and federal securities law violations. Most notably, defendants and relief defendants fail to dispute the Receiver's and Commission's evidence that the initial purchase of Palantir shares in November 2011 was accomplished through deceit and stolen

investor money and that there has been a large shortfall in Palantir shares since April 2013. *See* Docket Nos. 198 to 200 (Declarations of John Syron, Eduardo Saverin and Monica Ip, CPA). Given defendants' and relief defendants' failure to submit any evidence despite ample opportunity,[1] the Court should find that defendants commingled and misappropriated investor money, and therefore, violated the federal securities laws.

III. The Managers and Insiders Should Not Receive Fees or Distributions.

Despite the record in this case, the Bivonas and Mazzolas apparently continue to assert a right to a distribution of management fees through the various entities. But because of the pervasive fraud, the Court should determine that it would be appropriate for the Receiver (1) to terminate the management agreements with defendant SRA Management, FMOF Management, LLC and NYPA Management, LLC and the advisory agreement with defendant Saddle River Advisors and (2) exclude insiders from receiving a distribution from the Receivership.[2] *See SEC v. Pension Fund of America L.C.*, *supra*, 377 Fed. Appx at 963 (upholding plan that excluded regional sales director's claim for unpaid commissions because the commissions were derived from investor victims). The Receiver's and Commission's uncontroverted evidence establishes that defendants operated the FMOF, NYPA and SRA Funds like a Ponzi scheme whereby new investor money was used to purchase shares for other investors and was diverted to other entities or insiders. Docket Nos. 14 (Ellen Chen Declaration) and 200 (Monica Ip Declaration). Given the undisputed existence of such a massive fraud, any management fees paid to SRA Management, FMOF Management and NYPA Management were the fruits of fraudulent conduct, as would any advisory fees paid to Saddle River. Foreclosing the payment of future management and advisory fees to SRA Management, FMOF Management, NYPA Management, and Saddle River is therefore appropriate to prevent the further

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[1]The briefing schedule for this motion was stipulated to by all parties, and created a full four weeks for oppositions, to enable defendants sufficient time to respond fully.

[2] The Receiver and the Commission agree that the Joint Distribution Plan should not provide for Saddle River's dissolution or for Saddle River's potential liabilities. *See* Bivona Opposition at 3. Saddle River is not, and should not be, a part of the receivership. Nevertheless, Saddle River, like the other defendants, should not receive any distributions from the receivership.

diversion of investor assets to those entities that participated in the fraudulent scheme. *See SEC v. Pension Fund of America*, *supra*, 377 Fed. Appx at 963.

Additionally, insiders such as the Bivonas, the Mazzolas, David Jurist and Emilio DiSanluciano should not benefit from the remaining investor assets in the receivership.[3] *See SEC v. Byers* 637 F. Supp. 2d 166,184 (S.D.N.Y. 2009) (excluding insider participation in recovery); *SEC v. Enter. Trust Co.*, 2008 U.S. Dist. LEXIS 79731 at * 10, 17 (N.D. Ill. Oct 7, 2008) (upholding exclusion of former owners as being a common, least contested distribution plan feature and stating that insiders were not "innocent victims"). Insiders John Bivona, Frank Mazzola, David Jurist and Emilio DiSanluciano received over $2.5 million from the fraudulent purchase of 3.1 million Palantir shares in November 2011 using money stolen from investors Global Generation, LLC and Progresso Ventures, LLC. *See* Commission's Joint Motion for Approval of Proposed Joint Distribution Plan at 4-6 (Docket No. 197 at 7-9); Monica Ip Declaration, ¶ 17 and Exhibit 6 (Docket No. 200). Similarly, John Bivona diverted nearly $1 million in SRA investor proceeds to Anne Bivona and $1.8 million in SRA investor proceeds to Michele Mazzola. *See* Ellen Chen Declaration, ¶¶ 84-86 and Exhibits 48-50 (Docket Nos. 14 and 19-3 to 19-6). Even if they have not been personally charged with securities violations, Anne Bivona and Michele Mazzola, both of whom are relief defendants in this action, have nonetheless benefitted from misappropriated investor money due to the securities violations of a family member, John Bivona. And Anne Bivona's and Michele Mazzola's purported "ownership" of the defendant entities appears to be nothing more than an attempt to shield some of their husbands' fraudulently obtained assets; it is undisputed that neither Anne Bivona nor Michele Mazzola worked for the businesses or made any business decisions. It would therefore be inequitable for the Bivonas, the Mazzolas and other insiders to benefit from the distribution of receivership assets. *See, e.g.*, *SEC v. Byers* 637 F. Supp. 2d at184.

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[3] Mr. DiSanluciano actively participated in deceptive sales to investors such as Telesoft Ventures and received large commission payments from investor money, including the purchase and sale of Palantir shares in November 2011. Mr. Jurist was a manager of Clear Sailing and signed the checks for undisclosed payments in November 2011 using money taken from Global Generation and Progresso Ventures.

IV. Telesoft Cannot Demonstrate That Its Funds Were Not Commingled or Diverted.

Investor Telesoft makes the legally and factually incorrect request that this Court find that Telesoft's payment of $1,475,500 to Clear Sailing IV in March 2014 was not commingled with other investor money and not diverted to defendants. Telesoft Opposition at 1. Telesoft attempts unsuccessfully to show that Telesoft's money was fully segregated from the money of defrauded FMOF, NYPA and SRA Fund investors and that Telesoft's Palantir investment should therefore be excluded from the proposed *pro rata* distribution pool. *See Id.* at 3 (attempting to contrast Telesoft with investors in the funds). To establish an absence of commingling, Telesoft must, however, demonstrate that the totality of its payments were held in a segregated trust account or were not under defendants' control. *See SEC v. Credit Bancorp, LTD.*, 290 F.3d 80, 89-90 (2d Cir. 2002) (finding lack of commingling "not merely because [assets] were traceable, but because the assets had somehow been segregated in the manner of true trust accounts and/or had never been placed in the defrauder's control"). Telesoft failed to make this showing.

To dispute the commingling of its money, Telesoft relies upon a written amendment to Clear Sailing IV's operating agreement whereby Telesoft's 227,000 Palantir shares are to be assigned to an exclusive Series G of which only Telesoft will be an investor. Telesoft Opposition at 2. The existence of a Series G does not, however, establish that Telesoft's Palantir shares were segregated into a separate trust account or were controlled by an independent third party; simply assigning them a separate "Series" designation was nothing more than giving them a label. At most, Telesoft was investing in Palantir by obtaining an interest in Series G of Clear Sailing IV, while FMOF, NYPA, and SRA Fund investors were similarly investing in Palantir by obtaining interests in Series E of Clear Sailing IV. Even if assigned to Series G, Telesoft's Palantir shares – like the pre-IPO shares of the FMOF, NYPA and SRA Fund investors – were still legally owned and controlled by defendants and their affiliated company, Clear Sailing IV. Given this structure of share ownership, no investor (including Telesoft) or an independent trustee owned any specifically identified and segregated Palantir shares.

Because Clear Sailing held legal ownership of the Palantir shares and physical possession of the Palantir share certificates, defendants could use Clear Sailing to defraud investors – including

Telesoft – by purporting to sell to investors more interests in Palantir shares than Clear Sailing actually owned. In their plan approval motion papers, the Receiver and the Commission demonstrated that defendants perpetrated such a fraud upon Telesoft and the other Palantir investors. As demonstrated by forensic accountant Monica Ip, Clear Sailing IV had a significant shortfall of 340,448 Palantir shares by April 26, 2013 which has continued to at least November 2015. Monica Ip Declaration ¶¶ 18-21 and Exhibit 1 (Docket No. 200). When Telesoft wired its money on March 5, 2014 to Clear Sailing IV to purchase 227,000 Palantir shares, the total Palantir shortfall was 678,527 shares because Clear Sailing IV on that date owed 5,978,527 Palantir shares to all investors, including Telesoft, but owned only 5,300,000 Palantir shares. *Id.*, Exhibit 1.[4]

The Receiver and Commission need not dispute Telesoft's assertion that Clear Sailing misrepresented to Telesoft that Clear Sailing owned, without encumbrance, the necessary 227,000 Palantir shares. *See* Gibbs Declaration, Exhibit A at ¶ 4. This is because that is the same essential misrepresentation defendants made to the FMOF, NYPA and SRA Fund investors when defendants represented that Palantir investor money would be used to acquire an interest in Palantir shares. Telesoft is therefore a victim of defendants' fraud and the Palantir shortfall in the same fashion as the other investors in the FMOF, NYPA and SRA Funds.

Put simply, Telesoft was lied to but cannot rely on the lie to establish that its investment was segregated. In fact, the evidence demonstrates the opposite of what Telesoft claims: Its investment was comingled, just like those of other investors. In discussions between Telesoft and John Bivona and Frank Mazzola, memorialized in a Telesoft email from April 2014,[5] Bivona and Mazzola indicated that 227,000 shares of Palantir had been allocated to Telesoft and those shares were represented by a particular stock certificate, Number CSA-35. But that stock certificate, CSA-35,

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[4] Notably, on that same day, Clear Sailing would have needed $3,467,275 to purchase enough Palantir shares to cover that shortfall, but the Clear Sailing, John Bivona, NYPA and SRA bank accounts had a combined cash balance of just $858,263. *Id.*, Exhibit 3 at page 3. This meant that the Clear Sailing, John Bivona, NYPA and SRA bank accounts were $2,609,012 short of the money needed to cover the shortfall in Palantir shares.

[5] Supplemental Declaration of Monica Ip, CPA ("Supplemental Ip Declaration") ¶ 7 and Exhibit 3.

was actually issued two years earlier in February 2012, and those Palantir shares were purchased with money that other investors intended to be used for shares of Facebook and Twitter, not Palantir. Supplemental Ip Declaration ¶¶ 1-5, 7 and Exhibits 1, 4.

Moreover, the money Telesoft invested was primarily used to purchase a different – and insufficient – number of Palantir shares than what Telesoft had contracted to purchase. Supplemental Ip Declaration, ¶¶ 6-7 and Exhibits 2, 3. In reality, like the other investor victims, Telesoft's money was used, in Ponzi-like fashion, to partially and temporarily backfill some of the large Palantir shortfall that existed when Telesoft made its investment in Palantir shares.

Telesoft's assertions that its payment was not commingled or diverted are inapt in any event. The courts have treated any commingling as a sufficient basis upon which to approve a consolidated *pro rata* distribution plan. *See, e.g. SEC v. Sunwest Management*, 2009 U.S. Dist. LEXIS 93181 at *34 (D. Or. Oct. 2, 2009) (authorizing consolidated *pro rata* investor recoveries from a pool of real estate holdings); *SEC. v. Byers*, *supra*, 637 F. Supp. 2d at 178 (authorizing consolidated *pro rata* investor recoveries from a combined pool of real estate portfolios). Given the undisputed evidence that Clear Sailing IV's purchase of Palantir shares was imbued with fraudulent conduct and commingling from the outset, it is fair to conclude that Clear Sailing IV's entire portfolio is tainted. *See United States v. Garcia*, 37 F.3d 1359, 1364-65 (9th Cir. 1994) (holding that when laundered proceeds are deposited in an account, the entire account is tainted). As a result, creating a consolidated *pro rata* recovery pool would be appropriate whether or not Telesoft's particular payment was commingled or diverted. The Court should therefore reject Telesoft's objections to the proposed findings.[6]

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[6] The Court should deny Telesoft's vague request for discovery before findings are entered. Because the widespread existence of commingling and securities violations is determinative of the Court's authority to create a consolidated *pro rata* recovery pool, Telesoft's conduct of discovery regarding its particular investment cannot meaningfully impact the issues currently before the Court, and threatens wasteful delay and expense. Moreover, as with other investors, the Receiver and the Commission have informally provided information to Telesoft without a formal discovery request. In response to Telesoft's request, the Commission has already provided Telesoft with a copy of a particular stock purchase agreement, while the Receiver has offered to provide a copy of a consolidated investor list upon receipt of an appropriate confidentiality agreement. Further discovery is therefore unnecessary.

V. Conclusion

For the reasons set forth above, and in the respective motions by the Commission and by the Receiver, the Court should approve the proposed Joint Distribution Plan.

DATED: August 17, 2017

Respectfully submitted,

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