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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

JOHN V. BIVONA; SADDLE RIVER ADVISORS, LLC; SRA MANAGEMENT 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

THE SRA FUNDS INVESTOR GROUP'S (1) OBJECTIONS TO JOINT DISTRIBUTION PLAN OF THE RECEIVER AND THE SEC, AND (2) PROPOSED ALTERNATIVE PLAN OF DISTRIBUTION

Date: September 28, 2017
Time: 1:30 PM
Courtroom: 5
Judge: Hon. Edward M. Chen

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I. INTRODUCTION

Pursuant to the Court's June 6, 2017 Order Setting Schedule on Motion for Distribution Order (Dkt. No. 191), the SRA Funds Investor Group (the "Investor Group") objects to the Joint Distribution Plan (Dkt. No. 196) being proposed for Court approval by the Receiver, Sherwood Partners, Inc., and plaintiff Securities and Exchange Commission ("SEC"). As discussed in detail below, the Joint Distribution Plan rests on improper assumptions regarding the nature of asserted claims against the receivership estate, unfairly favors certain claimants over others, and unreasonably harms SRA Funds investors. Importantly, the Joint Distribution Plan represents a significant departure from the original intended plan for the allocation of assets set forth in the order appointing the Receiver and from the original investment documents upon which the order appointing the Receiver was based and that, similarly, form the basis upon which investors invested in the SRA Funds.

The material errors and analytical flaws in the Joint Distribution Plan are numerous. The Joint Distribution Plan unfairly favors certain claimants over others, and will, if adopted by the Court as proposed, result in significant and avoidable financial harm to the very investors that the Receiver and the SEC are charged with protecting and purport to be protecting. The Receiver has a fiduciary duty to act with the utmost good faith and in the best interests of all SRA Funds investors. But, the Receiver's conduct in this matter, and its advocacy for a distribution plan that affirmatively and unnecessarily harms many of the SRA Funds investors, represents a breach of that fiduciary duty and should be rejected by the Court.

It is particularly notable that even though the Receiver and the SEC claim to be acting to protect the interests of the SRA Funds investors, neither the Receiver nor the SEC ever solicited input from any SRA Funds investor in the development of the Joint Distribution Plan. In fact, until the Investor Group filed its Notice of Appearance in June 2017, the Receiver studiously avoided communicating with SRA Funds investors about either the litigation or the receivership. It should not be surprising, then, that the Joint Distribution Plan, created without any investor input, has no support from any SRA Funds investor. To the contrary, the Joint Distribution Plan is affirmatively

opposed by the vast majority of SRA Funds investors, who collectively represent $41.5 million of the $53 million (or 79%) still invested in the SRA Funds. The magnitude and uniformity of the opposition to the Joint Distribution Plan is unprecedented and cannot be ignored.

The Investor Group requests that the Court exercise its equitable powers to avoid the unfairness and unnecessary harm the Joint Distribution Plan would cause. It asks that the Court reject the Receiver's and SEC's Joint Distribution Plan, and instead approve the Investor Group's Alternative Plan of Distribution described in detail below. The Investor Group's Alternative Plan of Distribution will, if approved: (i) terminate the receivership; (ii) install a new manager for the SRA Funds that will be subject to oversight by an experienced advisory committee and independent public accounting firm; and (iii) allow the SRA Funds to continue operating as originally intended so that the original investment objectives of the SRA Funds and their investors can be achieved as planned, while at the same time providing sufficient funds to pay legitimate, Court-approved monetary claims against the receivership estate.

Because the Investor Group's Alternative Plan of Distribution follows the original purpose of the SRA Funds, and allows investors to obtain the potential benefits of their investments as planned, the Alternative Plan of Distribution has the support of the vast majority of all SRA Funds investors and the entire Investor Group.

II. BACKGROUND

A. The Investor Group

The Investor Group consists of 134 individuals and entities who purchased and continue to own membership interests in one or more of the seven SRA Funds at issue in this litigation.[1] The Investor Group collectively has a significant and direct financial stake in the outcome of the pending litigation and any plan of distribution approved by the Court, with $40 million still invested in the

[1] The seven funds are SRA I LLC, SRA II LLC, SRA III LLC, NYPA Fund I LLC, NYPA Fund II LLC, Felix Multi-Opportunity Fund I LLC, and Felix Multi-Opportunity Fund II LLC.

SRA Funds. This represents 75% of the $53 million still invested in the SRA Funds.[2] *See* Declaration of Jonathan K. Levine in Support of the SRA Funds Investor Group's Objections to Joint Distribution Plan, ¶¶ 2-3.

Surprisingly, after months of investigation (at the expense of the investors), the Receiver and the SEC are unware of: (i) the total amount raised from investors by the seven SRA Funds; (ii) the total number of investors with money still invested in the SRA Funds; or (iii) the total amount still invested by such investors in the SRA Funds. Levine Decl., ¶ 5. However, based on the information available at this time, the Investor Group appears to represent a significant majority of both the remaining SRA Funds investors and the remaining money still invested in the SRA Funds. In fact, as of the date of this filing, the Investor Group is unware of any SRA Funds investor opposed to the Investor Group's Alternative Plan of Distribution.

As discussed in Part V below, if the Investor Group's Alternative Plan of Distribution is approved by the Court, SRA Funds investors have signed written commitments to advance a total of up to $5 million in new capital to pay legitimate, Court-approved monetary claims against the receivership estate. This infusion of additional investor capital will avoid the need to sell, at a significant discount, membership interests in the SRA Funds (as well as Telesoft's membership interest in Clear Sailing) that own the underlying shares of the pre-IPO companies remaining in the receivership estate at this time. Levine Decl., ¶ 4.

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[2] Telesoft Capital, LLC (TeleSoft) is not a member of the Investor Group (it is separately represented by Cooley LLP), but it supports the Investor Group's Alternative Plan of Distribution. *See* Dkt. No. 226. Telesoft did not invest in any of the SRA Funds; rather, it made a direct investment through Clear Sailing Group IV LLC ("Clear Sailing"), one of the relief defendants in this action, and has approximately $1.5 million still invested through Clear Sailing. A more detailed description of TeleSoft's investment is provided in TeleSoft's Objection to Joint Distribution Plan, filed concurrently herewith. *Id.* If Telesoft's funds are included with those of the Investor Group, the percentage of investor funds supporting the Investor Group's Alternative Plan of Distribution and opposing the Joint Distribution Plan of the Receiver and the SEC increases from 75% to 79%.

B. The SRA Funds

Each of the SRA Funds is a Delaware series limited liability company that sold membership interests to sophisticated, accredited investors pursuant to confidential private placement memoranda, limited liability company operating agreements, and subscription agreements.[3] The offering documents for each SRA Fund made clear to potential investors that investments in the SRA Funds were long-term and illiquid, with projected exits of between two and five years and returns on investments, if any, taking even longer than that. In sum, all SRA Funds investors agreed to patiently wait for years for the possibility of a profitable liquidity event.

The investment objectives of the SRA Funds were all the same – namely, to purchase shares in specified pre-IPO companies, including, for example, Dropbox, Palantir Technologies, and Square. Some of these companies, such as Square, Twitter, and Box, have since become successful, publicly traded companies. SRA Funds investors planned to make money on their investments from a "liquidity event" at one of these pre-IPO private companies, either through that company being acquired by another company, or through the company's own initial public offering. If such an event caused the shares underlying the investors' membership interests in the SRA Funds to be valued at more than what the SRA Funds paid for the pre-IPO shares, plus expenses, then the investors would receive a return on their investment. Correspondingly, if a particular company in the portfolio of an SRA Fund failed, the investors holding membership interests attached to that particular company assumed that risk, resulting in a loss of their investment.

C. The Litigation and the Receivership

In March 2016, the SEC commenced this action against defendants Saddle River Advisors, LLC ("SRA"), John Bivona, Frank Gregory Mazzola and SRA Management Associates, LLC and

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[3] Investors purchased interests in separate series within each SRA Fund; each series being a segregated investment in a specific pre-IPO private company. Any profit or loss from an investment within a particular series remains within that series and is not shared by other series within the same SRA Fund or with other SRA Funds. The SRA Funds did not provide for any commingling among them or for any averaging of successes and failures or gains and losses.

relief defendants SRA I LLC, SRA II LLC, SRA III, LLC, Michele Mazzola, Anne Bivona, Clear Sailing Group IV LLC, and Clear Sailing Group V LLC. The SEC complaint (Dkt. No. 1) alleges multiple violations of the federal securities laws in connection with the sale of membership interests in and management of the SRA Funds.

Concurrent with the filing of the complaint, the SEC moved for the appointment of an independent monitor for SRA, SRA Management Associates, SRA I LLC, SRA II LLC, SRA III, LLC, Clear Sailing Group IV LLC, and Clear Sailing Group V LLC (Dkt. No. 4). The Court granted the SEC's motion in March 2016 and appointed Michael Maidy of Sherwood Partners to serve as the Monitor (Dkt. No. 36). Mr. Maidy is the co-founder and co-managing member of Sherwood Partners, which became the Receiver in October 2016.

In May 2016, Mr. Maidy lodged his final report with the Court as the Monitor and strongly recommended **against** the proposed liquidation plan being advanced by the Receiver and the SEC today:

> Based on the Monitor's expertise and knowledge of pre-IPO technology companies, the Monitor **does not recommend** immediately attempting to liquidate the securities, **due to the potential negative impact to investors**. The underlying securities held by the Purchase Entities are illiquid and any distribution of the securities directly to individual investors is restricted (i.e. prohibited), so beneficial interests in privately held company securities would need to be sold for the benefit of investors rather than transferred directly to those investors. Further, **sales of large blocks of privately held company securities into the marketplace prior to a liquidation event (i.e. an IPO or company sale) would likely be heavily discounted**.

See Dkt. No. 74 at pp. 12-13 (emphasis added).

Later in May 2016, the Court renewed Mr. Maidy's appointment and expanded the scope of the monitorship to include NYPA Fund I LLC, NYPA Fund II LLC, Felix Multi-Opportunity Fund I LLC, and Felix Multi-Opportunity Fund II LLC, thus placing all seven of the SRA Funds under Mr. Maidy's oversight as Monitor (Dkt. No. 91).

In October 2016, at the request of the SEC, the Court appointed Sherwood Partners as Receiver and placed all of the entities that were previously under Mr. Maidy's oversight as Monitor

into receivership (the "Receivership Order") (Dkt. No. 141). Also included within the receivership estate were Felix Management Associates LLC and NYPA Management Associates LLC, the managers of certain of the SRA Funds. *Id.*

It is notable that the Court's Receivership Order requires the Receiver to follow the **original** investment objectives of the SRA Funds pursuant to which the investors made their investment decisions. *See* Dkt. No. 141 at § IX. Namely, when there is a "liquidity event," as defined in the applicable operating agreements for the SRA Funds, the Receiver is required to distribute the shares of the applicable SRA Funds portfolio company to the SRA Funds investors who purchased the membership interests in the SRA Funds that held those shares for the benefit of those particular investors. Additionally, it the Receiver seeks to sell or transfer shares of any pre-IPO companies held in any SRA Fund portfolio (i.e., prior to a "liquidity event"), any such sale or transfer requires specific Court approval.[4] The Receivership Order also requires the Receiver to develop a plan for the fair, reasonable and efficient recovery and liquidation of all remaining, recovered, and recoverable receivership property. *See id*. at § XIII.

D. The SEC Settlement

In May 2017, the SEC reached a settlement in principle with all of the defendants and relief defendants. While the specific terms of the settlement are not known at this time, it is regrettable that after spending hundreds of thousands of dollars of investors' money on a Monitor and Receiver, the settlement will not result in even $1.00 being paid back to the SRA Funds or its investors by any defendant or relief defendant. In addition, the defendants were not required by the SEC to waive their rights to any accrued management fees as a condition of settlement.

E. The Joint Distribution Plan

The Receiver and the SEC filed their motion for approval of the proposed Joint Distribution Plan in June 2017 (Dkt. Nos. 196-200). The motion alleges that defendants' commingled investor

[4] There is no record in the docket of the Receiver ever seeking approval from the Court to sell or transfer the shares of any pre-IPO company prior to a liquidity event.

funds, diverted investor funds to themselves, and violated the federal securities laws while managing the SRA Funds. What is not as clear from the motion papers, but nonetheless true, is that the actual harm suffered by SRA Funds investors is itself quite limited, and represents a small fraction of the overall amount invested in the SRA Funds.

The Investor Group and its counsel have reviewed and analyzed the motion and the Joint Distribution Plan. Based on that analysis, the Investor Group concludes that, in the end, and after months of work and hundreds of thousands of dollars billed by the Monitor and the Receiver, there is only a single company, Square, in which there is an actual share shortfall. Even in that case, the shortfall is relatively small (22,796 shares) and it was caused, in large part, by the mistaken over-allocation of 16,808 Square shares to four investors **by the Monitor itself**, not by any defendant or relief defendant. Levine Decl., ¶¶ 6-7. Netting out the Monitor's erroneous allocation, the total known share shortfall for all seven of the SRA Funds amounts to just 5,988 Square shares, which would cost less than $153,000 to cover.[5]

The Receiver and the SEC also have identified the more significant known potential liabilities of the receivership estate, but these too are limited and include two money judgments entered against certain of the SRA entities totaling about $3.75 million, and the fees and expenses of Sherwood Partners (as Monitor and Receiver) and its counsel, which likely ultimately will exceed $750,000. The questionable value of these expenditures by Sherwood Partners and its counsel is discussed further below.

Notwithstanding the limited nature of the harm suffered by the SRA Funds investors and the limited potential liabilities of the receivership estate, the Receiver and the SEC have proposed the Joint Distribution Plan, which will dramatically and negatively impact the ability of the SRA

[5] The Square shortfall caused by the Monitor would cost $428,267 to cover based on the $25.48 share closing price as of August 23, 2017. Levine Decl., ¶ 8. The remaining shortfall of 5,988 shares not caused by the Monitor's error would cost $152,574 to cover. *Id.*

Funds investors to maintain and profit from their investments in the SRA Funds as originally contemplated in the offering documents.

If the Joint Distribution Plan proposed by the Receiver and the SEC is adopted by the Court, the Receiver will:

1. Consolidate the assets and liabilities of all of the SRA entities and SRA Funds into a single account, as if the assets and liabilities derive from a single SRA Fund (which they do not) with common investors (which they are not), and ignore the reality of some successful and some unsuccessful investments by the respective SRA Funds and their investors;
2. Dissolve the SRA entities and SRA Funds;
3. Terminate the management and advisory agreements between the SRA entities and SRA Funds;
4. Hire a banker to value[6] and then sell all securities currently being held by or on behalf of the SRA Funds (including all shares of pre-IPO companies, unless there is an intervening liquidity event in any particular pre-IPO company);
5. Pay the banker a substantial (but as yet undisclosed) fee, to be borne by the SRA Funds investors;
5. Pay all of the fees and expenses of the Receiver and its counsel; and then

[6] The current estimated market value of the securities held by the SRA Funds is conspicuously absent from the Joint Distribution Plan. This makes it impossible for either the SRA Funds investors or the Court to understand the actual financial harm to investors the Joint Distribution Plan would cause, if approved.

6. Distribute funds, if any, remaining to all investors and creditors of the SRA entities and SRA Funds, regardless of the investment (and the success or failure thereof) and regardless of the applicable SRA Fund.[7]

The Receiver has acknowledged that the Joint Distribution Plan will "depart from the original intended course of allocation of assets as set forth in the Order" initially appointing the Receiver (Dkt. No. 183 at p. 10). It also materially departs from the original investment documents upon which the SRA Funds investors relied and upon which the Receivership Order was based. The flaws in the Joint Distribution Plan, and the Investor Group's specific objections to the Joint Distribution Plan are numerous, and are discussed in detail in Part IV below.

III. LEGAL ARGUMENT

The Court should exercise its authority to formulate a distribution plan that is consistent with the purposes of the receivership it is charged to oversee in this case.

The "primary purpose of equity receiverships is to promote the orderly and efficient administration of the estate by the district court for the benefit of creditors." *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court's "power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (quoting *Hardy*, 803 F.2d at 1037)) (internal quotation marks omitted). "[T]he district court has broad powers and wide discretion to determine the appropriate relieve in an equity relationship." *Id* (quoting *S.E.C. v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978)) (internal quotation marks omitted). "The basis for this broad deference… arises out of the fact that most receiverships involve multiple parties and complex transactions." *Id* (quoting *Hardy*, 803 F.2d at 1037).

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[7] As discussed in Section IV, below, the Joint Distribution Plan provides an inequitable windfall to investors who lost their SRA Funds investments due to ill-advised investor choices in poorly performing pre-IPO companies. These losses have nothing whatsoever to do with the misconduct alleged in the SEC complaint, and providing compensation for them in a distribution plan would deprive investors that currently hold valuable securities of their return on those investments.

The Court's broad, inherent supervisory power over the receivership also is necessary to enable it to "fashion [a] distribution plan that is fair and equitable to the investors." *S.E.C. v. Am. Capital Investments, Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (quoting 2 Clark on Receivers § 482 (3d ed. 1992)); *see also Capital Consultants*, 397 F.3d at 738–739. Liquidation of a receivership estate for this purpose is an option of last resort, and any such proposed liquidation must be carefully scrutinized to ensure its fairness to investors.

The Ninth Circuit has hesitated to permit a securities receiver to order liquidation, even if requested by the SEC, and instead has required that district courts consider alternative distribution proceedings that better protect investors. *Los Angeles Deed Trust & Mortgage Exchange v. S.E.C.*, 285 F.2d 162, 182 (9th Cir. 1960). Specifically, the Ninth Circuit stated:

> [A] receiver does seem required. But, we are not willing to order liquidation. That would establish perhaps generally a special additional penalty for failure to comply with [the federal securities laws] with which we are concerned and we doubt this was the contemplation of Congress. We do not hold that liquidation cannot ever be effected. Possibly some circumstances might arise which would justify such a result. And, it could even eventuate in this case, but we hold 'not now.'

Id; *see also S.E.C. v. Current Fin. Servs., Inc*., 783 F. Supp. 1441, 1445 (D.D.C. 1992) (declining S.E.C.'s request to grant the receiver authority to liquidate, and holding "[i]t would be premature at this stage to confer such broad powers.").

Similarly, in *S.E.C. v. Path America, LLC*, Case No. C-15-1350-JLR, 2016 WL 1588384 (Apr. 20, 2016), the United States District Court for the Western District of Washington declined a motion by the SEC to authorize the receiver to market and sell receivership assets, two underdeveloped commercial properties located in downtown Seattle, in order to create a common fund to reimburse investors for losses. *Path America* involved securities fraud allegations by the SEC alleging that defendants had exploited the federal EB-5 visa program and defrauded investors, predominantly Chinese nationals seeking permanent residency in the U.S., by commingling and then diverting to defendants' own personal use EB-5 investor funds that were raised specifically to build

and develop the properties as an EB-5 project. *Id*, 2016 WL 1588384 at *1. The receiver proposed that the immediate sale of the properties, on an "As-Is, Where-Is" basis, would return the highest value for the receivership estate. *Id*, at *3. Two investor groups opposed the SEC's proposal and, having secured the advice of immigration counsel, argued that their core investor purpose would best be achieved by allowing the properties to be developed in a manner and on a timeline that would enable the investors to attempt to achieve their immigration status, consistent with the EB-5 program goals. *Id*, at *7-8. The court exercised its equitable authority in favor of the two investor groups and, rather than order an immediate "As-Is, "Where-Is" liquidation sale of the properties, the court directed the receiver to solicit proposals from prospective buyers that were willing and able to pursue the investors' immigration goals and complete the EB-5 project as planned. *Id*, at *8.

Here, the Investor Group's Alternative Plan of Distribution has a much greater chance of successfully achieving the investment purpose of investors than in *Path America*. As discussed below, the Investor Group has commitments to provide sufficient funds to pay-off legitimate, Court-approved receivership debts, and to take over management of the SRA Funds by installing an experienced fund manager and advisory board that intend to manage the SRA Funds effectively, in accordance with the original offering documents, and for the benefit of all remaining investors. The Court should exercise its broad authority in favor of the Investor Group's Alternative Plan of Distribution.

IV. OBJECTIONS TO JOINT DISTRIBUTION PLAN

There are a number of significant problems with the Joint Distribution Plan, and if it is adopted by the Court as proposed by the Receiver and the SEC, most SRA Fund investors will suffer significant and avoidable financial harm. The Investor Group's specific objections to the Joint Distribution Plan are described below.

A. The Joint Distribution Plan is unnecessarily harmful to SRA Funds investors

The most obvious and significant problem with the Joint Distribution Plan is that the pre-IPO liquidation of all of the remaining securities held by the SRA Funds will result in large potential

losses for most investors -- losses that neither the Receiver nor the SEC have attempted to quantify or even estimate for the Court and for investors.

While the Receiver and the SEC are conspicuously silent on this issue in their motion, Sherwood Partners, in its capacity as the Monitor, has previously acknowledged that prematurely liquidating the securities held by the SRA Funds would result in a **heavy discount** and **deprive investors of the potential upsides from their investments**. *See* Dkt. No. 74 at pp. 12-13. What Sherwood Partners represented to the Court in May 2016 is equally applicable today. Neither the Receiver nor the SEC explain why the Court should not follow Sherwood Partners' earlier advice that the Court protect investors from substantial financial harm, or what has changed to cause the Receiver to recommend a different course of action now (other than that the Receiver apparently desires to be paid).

The Receiver and the SEC have had many months to develop their Joint Distribution Plan.[8] Their failure to provide the Court and investors with **any** information about the effect their Plan would have on investors is inexcusable, particularly here, where the Receiver has previously acknowledged that a pre-IPO sale of the shares held by the SRA Funds is likely to be "heavily discounted" and have a "potential negative impact to investors." The Receiver and the SEC plainly hope that the Court will approve their Joint Distribution Plan without this important information, and only after their Plan has been approved will the Receiver and the SEC then quantify for the Court and investors how harmful the Joint Distribution Plan really may be for investors.

In Section V, below, the Investor Group sets forth an Alternative Plan of Distribution that would avoid the significant harm to SRA Funds investors posed by the Receiver's and the SEC's Joint Plan of Distribution. Given its advantages, the Investor Group requests that the Court deny this motion, and enter the Investor Group's Alternative Plan of Distribution.

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[8] The Receivership Order required the Receiver to file its plan within 90 days of appointment (Dkt. No. 141). The Receiver did not do that. Instead, it requested and received a 90 day extension (Dkt. No. 164), and then an additional 60 day extension (Dkt. No. 172).

If the Court is not willing to enter the Investor Group's Alternative Plan of Distribution at this time, at the very least, the Court should: (i) order the Receiver and the SEC to provide the Court and investors with more definitive information about the financial impact of the Joint Distribution Plan, both net of and including all costs of the Monitor/Receiver, counsel and any investment bankers; and (ii) defer any decision on the Joint Distribution Plan until after this supplemental information has been provided and all SRA Funds investors have had an opportunity to respond.

B. The Joint Distribution Plan unfairly favors some claimants over others

A second problem with the Joint Distribution Plan is that it improperly favors certain claimants over others. It does so in two material ways.

First, the Joint Distribution Plan misconstrues the nature of certain claims against the receivership estate and, in doing so, it also erroneously overvalues those claims. One of the two money judgment creditors with a potential claim against certain receivership entities is Global Generation Group, which has a confirmed arbitration award for a money judgment of approximately $1.76 million. *See* Declaration of John Syron, Dkt. No. 198 at Ex. 5. In the Joint Distribution Plan, however, the Receiver and the SEC appear to be incorrectly proposing to treat Global Generation Group as a Palantir shareholder, rather than simply as the money judgment creditor that it is. But, Global Generation Group is not a Palantir shareholder and has not been a Palantir shareholder for many years – it elected to be a creditor and not a shareholder as far back as 2012. *Id*. at ¶ 9 (discussing Global's exercise of its Palantir share put option in October 2012). Having chosen its own legal course, the only thing that Global Generation Group is legally entitled to at this point is satisfaction of the money judgment it obtained in the arbitration. It has no legal entitlement to shares held by any of the SRA Funds.

Having incorrectly concluded that Global Generation Group may be a Palantir shareholder for the purpose of the Joint Distribution Plan, the Receiver and the SEC then compound their own error by miscalculating how many Palantir shares will be needed to satisfy Global Generation Group's money judgment using a $3 per share value for Palantir shares, since this was apparently

the value at the time Global Generation Group exercised its put option to dispose of the shares in 2012. But Palantir shares have not traded at $3 per share for years, they currently trade at more than twice that amount in the secondary market, and they are widely anticipated by industry experts to trade even higher if there is an IPO (Palantir is currently valued at in excess of $20 billion).

The suggestion to repay Global Generation Group at a $3 per share value means that the Receiver and the SEC have overvalued both Global Generation Group's claim, and the amount of shares that the Receiver would employ to satisfy that claim. In short, using a 2012 valuation to satisfy a money judgment in 2017 would result in Global Generation Group receiving an enormous windfall to the detriment of all of the other SRA Funds investors, whose legitimate claims will be reduced to satisfy that judgment. Neither the Receiver nor the SEC explain in their motion why Global Generation Group should be treated so much more favorably than all of the other SRA Funds investors, especially in view of the fact that it is not an equity holder at all.

The Receiver and the SEC also devote a large part of their motion to documenting and discussing the alleged shortfall in Palantir shares. But in truth, **there is no such shortfall**.[9] The alleged Palantir "shortfall" discussed in the Receiver's and the SEC's motion is caused entirely by the decision by the Receiver and the SEC to: (1) wrongly treat Global Generation Group as a Palantir shareholder rather than the money judgment creditor that it legally is; and (2) then apply the wrong value for Palantir shares in calculating the value of that money judgment. If Global Generation Group is not in fact entitled to any Palantir shares – and legally, it is not - there is not only **no** Palantir share shortfall, but instead the receivership estate has at least 55,000 **extra** Palantir

[9] The Receiver and the SEC also discuss in their motion potential shortfalls for certain other pre-IPO companies because some of the shares of these companies are not owned directly by the SRA Funds, but rather held in the form of forward contracts. While the Receiver and the SEC question whether these forward contracts will be honored, historically, the SRA Funds have not had any issues obtaining delivery of shares under forward contracts (which have been fully paid for in advance by the SRA Funds), and there is nothing in the record to suggest that this will be a problem in the future. The remaining forward contracts appear to be bona fide and enforceable.

shares that can be sold for the benefit of all investors to offset any legitimate money judgments that must be paid out of the receivership estate.[10]

Global Generation Group is not the only entity that will receive an improper windfall under the Joint Distribution Plan. A second error in the Joint Distribution Plan is the Receiver's and SEC's proposal to compensate certain SRA Fund investors based on the original amounts invested in certain SRA Funds, even when those investors have already lost their investments in the normal course of business and for reasons completely unrelated to the SEC case (i.e., the business failure of the pre-IPO company whose shares are held by certain of the SRA Funds). The Receiver and the SEC propose this course even though those SRA Funds, and correspondingly the investors therein, have already suffered investment losses due to the business failures of the underlying portfolio companies that the applicable SRA Funds invested in – through no fault of and for reasons completely unrelated to defendants' alleged misconduct.

For example, under the Joint Distribution Plan, an investor who originally invested $100,000 in Palantir, a valuable pre-IPO company, would have the same *pro rata* claim under the Joint Distribution Plan as an investor who originally invested $100,000 in Glam-Media, a company that went out of business a year ago. Under the original investment documents, the Glam-Media investor would not receive or be entitled to any return on his or her investment. The Joint Distribution Plan proposed by the SEC and the Receiver ignores this governing principle, and would provide value to the Glam-Media investor, while harming the Palantir investor, contrary to the investment purposes of the SRA Funds and the fundamental understanding and risk undertaken by each SRA Funds investor. The Court should not countenance such an unfair result. Each SRA

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[10] While this objection does not seek to delve into the motives behind the Receiver and the SEC's Joint Distribution Plan, it does appear that there is a need for there to be a material share shortfall somewhere to justify the Joint Distribution Plan. If, in fact, there is a surplus in Palantir shares and the only true shortfall is a modest one in Square shares (largely caused by the Receiver), this does seem to call into question not only the justification for the Joint Distribution Plan, but also the need for and expense of the Receiver. The SRA Funds investors should not be the ones who are penalized for this misguided strategy.

Fund is plainly independent of the other. They are not cross-collateralized and no SRA Fund guarantees the outcome of another.

C. The Joint Distribution Plan improperly taxes SRA Funds investors for the Receiver's mistakes

Additionally, under the Joint Distribution Plan, the Receiver fails to take any responsibility for the error of allowing more than $428,000 of Square shares to be over-distributed to four investors, and then doing nothing to try to recover those shares for the benefit of the investors to whom they really belong. The Receiver and the SEC admit that they know who the four investors are and how many excess shares each was allocated, but neither the Receiver nor the SEC have even tried to obtain the return of those shares for the receivership estate. *See* Levine Decl., ¶ 7.

The Receiver and the SEC would instead have the SRA Funds investors incur the material fiscal harm that flows from the Receiver's error. They do so, moreover, just as the Receiver and its counsel request payment in full for their claimed work, at great cost, none of which appears to have benefitted any of the SRA Fund investors.[11] The Receiver should either compensate investors for its error and failure to correct the Square share allocation problem, or fix the problem at its own expense.

D. The Joint Distribution Plan reflects the Receiver's ongoing breaches of fiduciary duty to SRA Funds investors

The motion also highlights a number of serious failures by the Receiver in fulfilling its Court-appointed fiduciary role to protect and preserve receivership assets. There is no question that the Receiver is serving as a fiduciary to both the Court and all SRA Funds investors. *See, e.g.*,

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[11] As noted above, the Receiver misallocated Square shares, has proposed a distribution plan that is harmful to and opposed by most SRA Funds investors, has not prepared or provided SRA Funds investors with necessary tax information, has not provided any updates to SRA Funds investors about the status of the litigation or the receivership, and has been generally uncommunicative with and unresponsive to inquiries by SRA Funds investors. On this record, it is unclear what the Receiver has done that the SRA Funds investors have benefitted from. The Court may wish to consider these facts when it addresses any fee application by the Receiver.

August 27, 2015 SEC Investor Bulletin: 10 Things to Know About Receivers ("A receiver has a fiduciary duty to stakeholders and the court"). As a fiduciary, the Receiver has a duty to protect, preserve and distribute appropriately the receivership's assets and to advocate to the Court a course of action that is consistent with this duty. *S.E.C. v. Schooler*, Case No. 3:12-cv-2164-GPC-JMA, 2015 WL 1510949 at *3 (S.D. Cal., March 4, 2015).

The Receiver here has not fulfilled its fiduciary duty to the SRA Funds investors. The Receiver has not prepared or provided any tax information to SRA Funds investors, has failed to provide updates to investors about the status of the litigation or the receivership, and has routinely failed to respond to investors' requests for information or assistance. In fact, it was only after the Investor Group filed its notice of appearance in this litigation and began organizing SRA Funds investors in opposition to the Receiver's stated course of action that the Receiver finally started to communicate with investors.

Also contrary to its fiduciary role, the Receiver, in managing the SRA Funds and now, in proposing a plan to liquidate those investments, has not solicited input from any SRA Funds investors about what might be in the best interests of the investors. The Receiver has proposed a distribution plan that is not only inconsistent with the original offering documents and investment objectives of the SRA Funds, but also inconsistent with what it previously recommended to the Court. The Receiver has made no effort to determine whether there is a less financially harmful way to conduct a distribution in this case, and has not even bothered to find out how much is at stake in the litigation or how much of a discount and/or loss SRA Funds investors are likely to suffer if the Joint Distribution Plan is approved and implemented. It is inconceivable that the Receiver is now proposing a distribution plan without even knowing or disclosing how much was originally invested, how much is still invested, how many investors still have interests in the SRA Funds, how much the proposed investment bankers will cost SRA Funds investors, or how much harm SRA Funds investors will suffer if the Joint Distribution Plan is approved.

The Receiver also breached its fiduciary duty to SRA Funds investors when it allowed more than $428,000 of Square shares to be misallocated to certain investors, then took no action to obtain the return of those shares, and now seeks to have the remaining SRA Funds investors pay for that mistake. While an honest allocation mistake might be understandable, if corrected, the failure of the Receiver to even try to obtain the return of the misallocated shares, and the Receiver's attempt to have the SRA Funds investors pay in full for that mistake, is inexcusable. The Receiver, or the Court in the event the Receiver fails to act, can correct that error now. It should immediately take action to recover the shares that were erroneously misallocated during the course of its receivership and management and, if it cannot, the Receiver alone should bear the expense of its management error with a corresponding reduction in its fees.

V. PROPOSED ALTERNATIVE PLAN OF DISTRIBUTION

The Investor Group requests that the Court not approve the Joint Distribution Plan and instead approve the Investor Group's Alternative Plan of Distribution set forth below. The Investor Group's Alternative Plan of Distribution, if approved, will install a new manager for the SRA Funds (with oversight by an experienced advisory committee), and allow the SRA Funds to continue operating as originally intended and originally documented so that the original investment objectives of the SRA Funds and the investors can be achieved. At the same time, legitimate, Court-approved monetary claims against the receivership estate will be paid through new money raised from investors. The details of the Investor Group's Alternative Plan of Distribution are as follows:

A. The SRA Funds will continue to operate under a new manager to allow the investment objectives of the SRA Funds and the SRA Funds investors to be met

The Investor Group proposes to have Investors Rights, LLC serve as the new manager for the SRA Funds.[12] Investors Rights was formed specifically to retain and oversee counsel to

[12] While the relevant provision is not being invoked here, all of the SRA Funds operating agreements allow for the investors of each Fund to vote to oust current management and select a

represent SRA Funds investors in this litigation and to serve as the new manager for the SRA Funds to allow the SRA Funds to continue to operate so that the investment objectives of the SRA Funds and the individual SRA Funds investors can be achieved, and the original contractual rights and obligations honored. *See* Declaration of Joshua Cilano in Support of the SRA Funds Investor Group's Objections to Joint Distribution Plan, ¶ 4.

Over the past few months, Investors Rights has organized the Investor Group and communicated with all members of the Investor Group on a regular basis. Cilano Decl., ¶ 5. Investors Rights retained counsel to represent the Investor Group, Pritzker Levine LLP, and worked with counsel to obtain information about the litigation and status of the receivership estate from the SEC and the Receiver. *Id*., ¶ 6. Finally, Investors Rights has worked with the Investor Group and counsel to develop this Alternative Plan of Distribution and to raise sufficient new money from SRA Funds investors to pay the legitimate monetary claims of the receivership estate. *Id*., ¶¶ 6-7.

The managing member of Investors Rights is Joshua Cilano, the President and founder of Capital Truth Advisors LLC, and Investors Rights. Cilano Decl., ¶ 2. Mr. Cilano has more than 17 years of experience in the securities industry. *Id*. Mr. Cilano has personally invested in one of the SRA Funds and currently serves as a consultant for numerous other investors in the SRA Funds. *Id*., ¶ 3. Mr. Cilano has the support of all of the members of the Investor Group.

As the new manager, Investors Rights will continue to operate the SRA Funds pursuant to the terms of the original operating agreements for each of the SRA Funds. Investors Rights will provide periodic reporting to all SRA Fund investors, the advisory committee, and to the Court, as appropriate. All funds provided by SRA Fund investors to satisfy claims against the receivership estate will be maintained in a bank account subject to oversight by the advisory committee, with appropriate reporting to the SEC and the Court. Cilano Decl., ¶ 8.

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new manager. *See, e.g.*, Levine Decl., Ex. A at pp. 24-25 (SRA I LLC Operating Agreement, Article VI (Removal of Manager)). Thus, the proposal of the Investor Group to replace current management and substitute a new manager that has the support of most SRA Funds investors is entirely consistent with the original operating agreements for all of the SRA Funds.

B. An advisory committee will oversee the new manager

The Investor Group has selected an experienced advisory committee to monitor and oversee Investors Rights in its management and operation of the SRA Funds. All of the members of the advisory committee are independent from Investors Rights. All members are also currently invested in one or more of the SRA Funds. The advisory committee, subject to Court approval, consists of the following SRA Funds investors:

Peter Healy, Esq. – Mr. Healy is a Senior Partner in the San Francisco office of O'Melveny & Myers LLP. He represents companies and underwriters in public offerings, private placements, and other capital market transactions. His practice also involves mergers and acquisitions, fund formation and the representation of private equity firms, hedge funds, and sovereign wealth funds in their investment activities. Mr. Healy also represents companies and institutional investors in secondary market transactions and tender offers, and he frequently advises boards of directors, independent committees, investment banks and fund sponsors in connection with various capital market, M&A and secondary market transactions.

Robert L. Brunner – Mr. Brunner is a Senior Managing Director and Global Practice Leader in the San Francisco office of FTI Consulting, a global business advisory firm. Mr. Brunner leads both the Residential Mortgage-Backed Securities Litigation practice group and FTI's Global Data & Analytics practice. He is a nationally recognized expert in the areas of collection and analysis of financial, transactional and operational data.

John Woods – Mr. Woods is a certified public accountant and currently serves as the Chief Executive Officer of A.J. Siris Products Corporation, a New Jersey-based wholesale drug and cosmetics distributor. From 1999 through 2009, Mr. Woods was the Chief Financial Officer of Tontine Associates, LLC, a multi-billion dollar hedge fund firm located in Greenwich, Connecticut.

Charles R. Pope – Mr. Pope is a certified public accountant and a founding partner of Gatto Pope & Walnick LLP, a tax and business consulting firm in San Diego, CA. Mr. Pope oversees

firm and client management, and specializes in professional athlete multi-state taxation and business advisory services.

James A.H. Hallett – Mr. Hallett is the Managing Director and Chief Investment Officer for Alternative Investment Management (Bermuda) Ltd., located in Hamilton, Bermuda. Mr. Hallett is a chartered financial analyst with years of experience in capital allocation, negotiation and structuring of investment relationships, bank and prime broker finance, treasury management, financial management and reporting, and general corporate and fiduciary management. From 2006 to 2016, Mr. Hallett was the Chairman of the National Museum of Bermuda.

C. An independent certified public accounting firm will work with the new manager to provide accounting services to the SRA Funds and manage distributions to investors

At such time as Investors Rights takes over the management of the SRA Funds pursuant to the Alternative Plan of Distribution, it will retain an independent certified public accounting firm to provide tax and accounting services to the SRA Funds. The CPA firm will verify the accuracy of all distributions of proceeds or shares resulting from a liquidity event to ensure that SRA Funds investors are receiving proper distributions.

D. Legitimate monetary claims against the receivership estate will be paid by SRA Funds investors

In order to eliminate the need for any pre-IPO shares held by the SRA Funds to be sold, SRA Funds investors have committed to provide sufficient funds to pay legitimate monetary claims against the receivership estate that have been approved by Court. As of the date of this filing, and assuming that the Alternative Plan of Distribution is approved, SRA Funds investors have committed to provide up to a total of $5 million in new capital to pay these claims, which may include (1) legitimate fees and expenses of the Receiver and its counsel, subject to any reduction by the Court and a potential offset for, among other things, errors caused by the Receiver with respect to the Square shares, (2) some portion of the Progresso Ventures money judgment, less any amounts received by Progresso Ventures from other sources, (3) some portion of the Global

Generation Group money judgment, less any amounts received by Global Generation from other sources, and (4) the remaining 5,988 share shortfall in Square shares.[13]

E. Management fees, back-end fees, and any share surpluses will be used to compensate investors and the new manager

Accrued management fees will be calculated in accordance with the original operating agreements for the SRA Funds, subject to any individual agreements originally negotiated between former SRA management and SRA Funds investors, to the extent such agreements exist and are adequately documented.

Upon the occurrence of a liquidity event of a portfolio company held in an SRA Fund, accrued management fees from inception through the date of the appointment of Investors Rights as the new manager will be used to reimburse those investors who provided new money under the Alternative Plan of Distribution to satisfy monetary claims against the receivership estate. Thereafter, any remaining accrued management fees will then be distributed to all investors on a *pro rata* basis, subject to some modest hold-back for tax return preparation and filing. Accrued management fees from the date of the appointment of Investors Rights as the new manager through the occurrence of the liquidity event will be paid to Investors Rights as compensation for its management services.

To the extent that any liquidity event of a portfolio company in an SRA Fund generates back-end fees under the original operating agreements for the SRA Funds and any individual agreements originally negotiated between former SRA management and individual SRA Funds investors, those back-end fees will be paid to Investors Rights in its capacity as the new manager of the SRA Funds.

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[13] If the amount of new capital currently committed by SRA Funds investors is insufficient to pay the legitimate claims against the receivership estate that have been approved by the Court, the Investor Group requests an opportunity to supplement their commitments to ensure that the Alternative Plan of Distribution can be approved.

If there are share surpluses, such as with respect to Palantir, the share surpluses will be used first to reimburse those investors who provided new money under the Alternative Plan of Distribution to satisfy legitimate, Court-approved monetary claims against the receivership estate. Thereafter, any remaining funds from a share surplus will then be distributed to all investors on a pro rata basis, subject to any entitlement by the new manager to a back-end fee on those shares under the original operating agreements for the SRA Funds.

F. Claims by defendants and the relief defendants for accrued management fees or back-end fees should be disallowed

All claims by defendants and the relief defendants for accrued management fees or back-end fees should be expressly disallowed by the Court.

G. The Receiver should either recover the misallocated Square shares or compensate SRA Funds investors for those shares through a reduced fee

SRA Funds investors should not suffer the financial harm resulting from Sherwood Partners' error in misallocating Square shares to certain investors or from its failure to take any steps to seek the return of the misallocated shares. The Receiver should either recover the 16,808 misallocated Square shares from the four investors who received those shares, or have its fee reduced by the value of those shares, which is approximately $428,267.

H. The receivership should be terminated and the Receiver dismissed

Upon the approval of this Alternative Plan of Distribution, the receivership should be terminated and the Receiver dismissed without recourse to the SRA Funds or any SRA Funds investors.

VI. CONCLUSION

For all of the foregoing reasons, the Investor Group respectfully requests that the Court reject the Joint Distribution Plan proposed by the Receiver and the SEC and instead adopt the Investor Group's Alternative Plan of Distribution.

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Respectfully submitted,

DATED: August 24, 2017

PRITZKER LEVINE LLP

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