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TELESOFT CAPITAL, LLC

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

**NON-PARTY TELESOFT CAPITAL LLC'S
OBJECTION TO RECEIVER'S MOTION FOR
APPROVAL OF A CONSOLIDATED
DISTRIBUTION PLAN**

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

1 As an investing member of Clear Sailing Group IV LLC (“Clear Sailing”), one of the Relief
2 Defendants in this action, TeleSoft Capital, LLC (“TeleSoft”) objects to the Receiver’s proposed
3 Consolidated Distribution Plan (the “Plan”). For the reasons discussed in the SRA Funds Investor
4 Group’s (1) Objection to Joint Distribution Plan of the Receiver and the SEC, and (2) Proposed
5 Alternative Plan of Distribution, (filed concurrently herewith), TeleSoft agrees that the Court should
6 approve the SRA Funds Investor Group’s Proposed Alternative Plan of Distribution.

7 In addition to the reasons discussed in the SRA Funds Investor Group’s objection, TeleSoft
8 objects to the Receiver Plan as unfair and inequitable in light of TeleSoft’s contractual agreement
9 with Clear Sailing, unique investment structure in Palantir Technologies, Inc. (“Palantir”) stock *vis-à-*
10 *vis* other investors, and the undeniable ability to tie TeleSoft’s capital investment directly to the
11 purchase of 227,000 shares of Palantir stock. Accordingly, should the Court decline to approve the
12 SRA Funds Investor Group’s Proposed Alternative Plan of Distribution, the Court should still deny
13 the Receiver’s Plan –at least with respect to TeleSoft – and order the Receiver to distribute to TeleSoft
14 227,000 shares of Palantir stock, or the fair market value of such shares; or, in the alternative, order
15 the Receiver to distribute to TeleSoft the 200,000 shares of Palantir stock, or the fair market value of
16 such shares, that were purchased with \$1,022,000 of TeleSoft’s investment.

17 **I. FACTUAL BACKGROUND**

18 **A. TeleSoft’s Investment in Palantir Stock**

19 On March 3, 2014, TeleSoft entered into a Subscription Agreement with Clear Sailing.
20 Declaration of Patrick E. Gibbs (“Gibbs Decl.”), Exhibit A. Under the Subscription Agreement,
21 TeleSoft purchased an interest in the Clear Sailing Series G, which in turn held 227,000 shares of
22 Palantir Class A Common Stock (the “Shares”). *Id.* at ¶¶ 1-4. Under the terms of the agreement, the
23 Shares constitute the sole investment of Series G, and TeleSoft is the sole Series G member. *Id.* To
24 that end, contemporaneous with the Subscription Agreement, TeleSoft also entered into a Third
25 Amended Operating Agreement (the “Operating Agreement”) that created the new “Series G”, which
26 was designed to hold only Palantir stock, and TeleSoft was to be the only owner of Series G. Gibbs
27 Decl., Exhibit B. In other words, Clear Sailing created the Series G for the purpose of creating a
28 vehicle that only held Palantir stock, and in which TeleSoft is the only owner.

1 Clear Sailing made, among others, two important representations to TeleSoft under the
2 Subscription Agreement:

3 [Clear Sailing] is the record and beneficial owner of, and has valid title to, 227,000
4 shares of Class A Common Stock (the “Shares”) of Palantir Technologies Inc.
5 (“Palantir”), free and clear of any pledge, lien, security interest, encumbrance, claim or
equitable interest with respect thereto.

6 **[Clear Sailing] has allocated all of the Shares to the “Series G” Series of [Clear**
7 **Sailing] and the Shares constitute the sole investment of such Series.** Upon
8 [TeleSoft’s] purchase of the Series G Interest, [TeleSoft] shall be the sole Series G
9 **Member. No person other than [TeleSoft] and the Carried Interest Designee (to the**
extent set forth in Section 4.7.2 of the Operating Agreement) **has any legal, beneficial**
10 **or economic interest in Series G of [Clear Sailing] or in the Shares.**

Gibbs Decl., Exhibit A at ¶ 4(b), (c) (emphasis added).

11 The fact that TeleSoft was the sole Series G member was important: under the Operating
12 Agreement, members with respect to a particular series are entitled to the benefits of such series only
13 and are not entitled to share in the profits, losses, allocations or distributions of any other series. Gibbs
14 Decl., Exhibit B at ¶ 2.8(a). In other words, the assets of each series are separate, and are not subject
15 to claims based on liabilities of other series. To that end, because TeleSoft chose to invest in a vehicle
16 under which it was the only member in the series, TeleSoft ensured that the assets it was investing in
17 were completely separate from the assets – and liabilities – of the other investors.

18 **B. TeleSoft’s Investment in Clear Sailing Stands in Contrast to the Other Investors,**
19 **who Invested through Investment Funds**

20 In contrast to TeleSoft’s direct investment in Clear Sailing, other investors invested through
21 investment funds. *See, e.g.* Plaintiff Securities and Exchange Commission’s Joint Motion with the
22 Receiver for Approval of the Proposed Joint Distribution Plan (“SEC’s Motion”) at 3 (ECF Dk. No.
23 197). As Plaintiff explained, all of the other “investor transactions were pooled together at Clear
24 Sailing.” *Id.* To that end, rather than investing directly in Clear Sailing, or directly into their own
25 separate “series”, the other investors invested in investment funds, such as SRA I, and the funds in
26 turn “sold investors a percentage interest in the pre-IPO shares ‘warehoused’ at Clear Sailing, which
27 included shares of pre-IPO companies”, like Palantir. *Id.* In other words, unlike TeleSoft, which
28 owned 100 percent of the interest in the 227,000 Palantir shares allocated to Series G, the other

1 investors only purchased a percentage interest in a series that held Palantir shares. *Id.* Moreover, as
 2 Plaintiff explained, the fund investors “*should have* received a percentage interest” in a series or sub-
 3 series at Clear Sailing that held Palantir shares, and there “*should have* been accounting records”
 4 showing each of the fund investor’s shares and Clear Sailing’s share allocations. *Id.* (emphasis added).
 5 However, the funds did *not* maintain these types of records, and as a result, there is no documentation
 6 showing all of the Palantir share holdings and potential shortfalls in shares owed to the fund investors.
 7 *See id* at 4.

8 **C. A Substantial Portion of TeleSoft’s Investment Was Used Directly to Purchase**
 9 **Palantir Stock**

10 In order to purchase the Series G interest that held the Palantir Shares, TeleSoft made a capital
 11 contribution to Clear Sailing of \$1,475,500. The capital contribution assumed a valuation of Palantir
 12 of \$6.5 billion and a price per share of Palantir common stock of \$6.50. *Id.* at ¶ 20. As of June 2017,
 13 public media sources indicate that Palantir now has a valuation of \$20 billion. Gibbs Decl., Exhibit
 14 C.

15 The capital contribution of \$1,475,500 that TeleSoft made to Clear Sailing was wired to Clear
 16 Sailing’s bank account on March 5, 2014. SEC’s Motion at 10. Although Plaintiff points to the fact
 17 that a portion of the money in the bank account that TeleSoft’s capital contribution was deposited into
 18 was “diverted” to other accounts rather than being used to purchase Palantir shares (*id.*), Plaintiff fails
 19 to mention that on the same day of TeleSoft’s wire, \$1,022,000 was wired from the bank account to a
 20 seller of Palantir shares in order to purchase 200,000 shares of Palantir stock. Declaration of Ellen
 21 Chen (“Chen Decl.”), ¶ 65 (ECF, Dkt. No. 14)¹. As of the date of TeleSoft’s transfer, the bank account
 22 only had \$426, so **the \$1,022,000 wired from the bank account to the seller of Palantir share came**
 23 **directly from TeleSoft’s \$1,475,500 investment.** Chen Decl., ¶ 65.

24 **II. ARGUMENT**

25 The Court’s power to supervise and determine the appropriate action to be taken in the

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 27 ¹ As noted in the Joint Reply by Securities and Exchange Commission and Receiver to Responses to
 28 Motions for Approval of Joint Distribution Plan (ECF, Dkt. No. 218) (“Joint Reply”), the SEC
 provided TeleSoft with a copy of the stock purchase agreement memorializing the purchase of 200,000
 shares of Palantir stock with the \$1,022,000 used from TeleSoft’s investment.

1 administration of receiverships is “not limitless.” *See SEC v. Path Am., LLC*, No. C15-1350JLR, 2016
 2 U.S. Dist. LEXIS 117684, at *19 (W.D. Wash. Aug. 30, 2016). Instead, “[t]he court must carefully
 3 balance competing concerns[,] particularly when authorizing a receiver to liquidate rather than to just
 4 manager receivership assets.” *Id.*

5 **A. There is no Evidence that TeleSoft’s Investment was Commingled with other**
 6 **Funds**

7 The Receiver argues that his proposed Plan – namely, the *pro rata* distribution of the assets of
 8 the Receivership Estate – is appropriate in light of alleged commingling of funds. Receiver’s Motion
 9 for Approval of Consolidated Distribution Plan (“Receiver’s Motion”) at 7, (ECF Dk. No. 196). In
 10 their Joint Reply, the SEC and Receiver argue that, to establish an absence of commingling, Telesoft
 11 must demonstrate that the totality of its payments were held in a segregated trust account or were not
 12 under defendants’ control. Joint Reply at 5. But the case law they rely on establishes no such rule –
 13 and indeed, does not purport to establish any rule for what is required to demonstrate commingling,
 14 or a lack thereof. *See SEC v. Loewenson*, 290 F.3d 80, 89-90 (2nd Cir. 2002) (merely distinguishing
 15 certain cases that address the traceability and/or commingling of assets, but not setting forth any factors
 16 that a party must demonstrate to show commingling or a lack thereof) . Instead, commingling is
 17 defined as “putting together in one mass”. *See Commodity Futures Trading Com. v. Franklin*, 643 F.
 18 Supp. 386, 390 (W.D.Va. 1986) (citing Black’s Law Dictionary). But there is no evidence that
 19 TeleSoft’s investment was “commingled” – or “put together in one mass” – and in fact, the
 20 declarations submitted by the SEC on this issue indicate otherwise. To that end, the majority of
 21 TeleSoft’s investment – namely, \$1,022,000 of it – was not commingled with any other funds; rather,
 22 the SEC admits that it was directly used to purchase 200,000 shares of Palantir stock. *Supra* at I.C.
 23 There is no evidence that the rest of TeleSoft’s investment was commingled with other funds. Instead,
 24 all the SEC has presented is evidence that some of TeleSoft’s investment was wired from one account
 25 to another, but as the SEC specifically notes, the reason for such transfer is “unknown”. Chen Decl.
 26 ¶¶ 66-69.

27 Accordingly, the “commingling” that allegedly supports the *pro rata* distribution under the
 28 Plan is not supported by any evidence specific to TeleSoft’s investment, and should not serve as a

1 basis for TeleSoft’s distribution under the Plan.

2 **B. TeleSoft is Not “Similarly Situated” to the Other Investors Receiving**
3 **Distributions under the Plan**

4 The Receiver argues that his proposed Plan is appropriate – as opposed to a plan that attempts
5 to match specific investors with the specific shares they desire – because the investors at issue are
6 “similarly situated”. Receiver’s Motion at 22. While that may be true for the vast majority of the
7 investors at issue here, namely those that invested through the various funds, that is not true for
8 TeleSoft. *See supra* at 1.B.

9 As such, the case law that the Receiver relies on to support its Plan is irrelevant to TeleSoft’s
10 investment. To that end, the Receiver relies on the court’s holding in *Sunwest Management* that the
11 “tracing of invested funds does not yield the most equitable results, because the ability to trace funds
12 is the result of the merely fortuitous fact that certain investor funds were spent before the funds of
13 others, where the funds of investors have been shown to be substantially commingled.” Receiver’s
14 Motion at 24 (*citing SEC v. Sunwest Management, Inc.*, 2009 U.S. Dist. Lexis 93181, at *10 (D. Or.
15 Oct. 2, 2009)). But, because of differences between TeleSoft and the other investors, that holding is
16 irrelevant to TeleSoft’s investment for several reasons.

17 First, although there may be some alleged evidence of commingling of the money that came
18 in from the various fund investors (*see* SEC Motion at 8-9), the Receiver and SEC have not shown
19 any – much less “substantial” commingling – with respect to TeleSoft’s investment. *Supra* at II. A.

20 Second, the ability to “trace” TeleSoft’s funds to specific shares of Palantir stock – to the extent
21 such tracing is even necessary – is not the result of when “certain investor funds were spent.” Rather,
22 unlike the other fund investors who attempted to purchase percentage interests in series holding
23 Palantir stock, TeleSoft’s investment in Palantir shares was intentionally made through a *separate*
24 investment vehicle from those used by the fund investors. *See supra* at 1.A-B. To that end, the
25 Subscription Agreement governing TeleSoft’s investment explicitly allocates 227,000 shares of
26 Palantir stock to the series in which TeleSoft is the sole member. *Id.* at 1.A.

27 Likewise, although tracing may be required for the fund investors, tracing of TeleSoft’s
28 investment is not even necessary: unlike the fund investors for which the SEC is unable to determine

1 the number of Palantir shares owed to each individual investor, TeleSoft’s governing contract specifies
 2 precisely how many Palantir shares has been allocated to it. Accordingly, the Receiver’s concern that
 3 attempting to trace the assets and funds would be “expensive, and most likely unsuccessful due to the
 4 poor state of record keeping” (Receiver’s Motion at 24) is inapplicable to TeleSoft’s specific
 5 investment. Indeed, even if tracing of money – rather than merely looking at the specific amount of
 6 shares allocated to TeleSoft under the Subscription Agreement – was deemed necessary here, it would
 7 hardly by “expensive” and “unsuccessful”; rather, the SEC has already traced \$1,022,000 of TeleSoft’s
 8 investment directly to the purchase of 200,000 shares of Palantir stock.² *See supra* at I.C.

9 Accordingly, any similarities between investors that allegedly supports the *pro rata*
 10 distribution under the Plan are not present with respect to TeleSoft’s investment, and should not serve
 11 as a basis for TeleSoft’s distribution under the Plan.

12 III. CONCLUSION

13 For the foregoing reasons, TeleSoft objects to the Receiver’s Plan and requests that this Court
 14 deny the Plan and instead approve the SRA Funds Investor Group’s Proposed Alternative Plan.
 15 Should the Court decline to approve the Proposed Alternative Plan, TeleSoft still requests that this
 16 Court deny the Plan – at least with respect to TeleSoft – and order the Receiver to distribute to TeleSoft
 17 227,000 shares of Palantir stock, or the fair market value of such shares; or, in the alternative, order
 18 the Receiver to distribute to TeleSoft the 200,000 shares of Palantir stock, or the fair market value of
 19 such shares, that were purchased with \$1,022,000 of TeleSoft’s investment.

20 Dated: August 24, 2017

COOLEY LLP

21 By: /s/ Patrick E. Gibbs

22 Patrick E. Gibbs

23 Attorneys for Non-Party TELESOFT CAPITAL, LLC

24 _____
 25 ² In their Joint Reply, the SEC and Receiver argue that the “money TeleSoft invested was primarily
 26 used to purchase a different – and insufficient – number of Palantir shares than what TeleSoft had
 27 contracted to purchase.” Joint Reply at 7. That misses the point. TeleSoft is not arguing that it is
 28 entitled to the 200,000 shares of Palantir stock that was purchased with its own investment funds
 because those are the shares it was promised under contract; rather, TeleSoft is arguing that in the
 event it does not get the shares promised to it under contract, at the very least, it should get the 200,000
 shares that the SEC and Receiver admit are directly traceable to TeleSoft’s investment funds.