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6
 7 **UNITED STATES DISTRICT COURT**
 8 **NORTHERN DISTRICT OF CALIFORNIA**
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10 SECURITIES AND EXCHANGE
 COMMISSION,

11 Plaintiff,

12 v.

13 JOHN V. BIVONA; SADDLE RIVER
 14 ADVISORS, LLC; SRA
 MANAGEMENT ASSOCIATES, LLC;
 15 FRANK GREGORY MAZZOLA

16 Defendants.

) Case No. 3:16-cv-1386

) **DECLARATION OF PETER
 HARTHEIMER IN SUPPORT
 OF RECEIVER’S REPLY TO
 THE SRA INVESTOR
 GROUP’S OBJECTIONS TO
 THE JOINT DISTRIBUTION
 PLAN OF THE RECEIVER
 AND THE SEC**

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

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 20 **DECLARATION OF PETER HARTHEIMER**

21 I, Peter Hartheimer, am a Senior Vice President of Sherwood
 22 Partners Inc., Receiver (“Sherwood” or “Receiver”) for the corporate
 23 defendants and their affiliates in the above action, and in that capacity declare as
 24 follows:
 25

26 1) I have personal knowledge of the facts set forth herein and if
 27 called as a witness could testify competently thereto.
 28

1 2) Since on or about October 11, 2016, I have been tasked by
2 Sherwood with the responsibility of overseeing and coordinating the proper
3 discharge of its duties as set out in this Court's Order ("Order") of that same
4 date, appointing Sherwood as Receiver over the corporate defendant entities,
5 and their affiliates. The complete list of entities over which Sherwood has
6 been appointed as Receiver are those described by the term "Receivership
7 Assets" on page 3 of the Order. DE 142. Prior to being appointed as Receiver,
8 Sherwood's partner Michael Maily acted as Monitor in these proceedings and
9 issued four (4) reports, which are expressly incorporated herein. DE 54, 60,
10 74, and 120.

11 3.) Among other duties I have assumed in overseeing the
12 Receivership, I have personally reviewed the work of members of Sherwood's
13 staff, including (i) its attempts to reconcile the obligations of the defendants
14 and their affiliates to deliver shares of certain pre-IPO companies to investors
15 in numerous funds offered by the defendants, with the available shares, and/or
16 forward contracts representing shares, of those same companies held and
17 inventoried by the defendants and their affiliates; (ii) its attempts to find a
18 manner by which all investors in (and creditors of) the defendants' various
19 funds can be treated equally, or in any event equitably; and (iii) its attempts to
20 recover assets for the estate inclusive of the monetization of the pre-IPO and
21 post IPO shares held by the defendants' funds in order to comply with the
22 Order's various responsibilities, including paying for the cost of
23 administration of the Receivership Estate.

24 4.) In connection with the tasks set forth in Paragraph 3 above, I
25 reviewed the work of my predecessor, Michael Hogan, who with the
26 assistance of Nicolas Hernandez a representative of the Receiver, conducted
27 Sherwood's investigation of the amount of capital invested by each SRA
28 Investor in each series of SRA funds; the creditors of the Receivership

1 Defendants (mostly unsecured creditors with judgments, pending lawsuits or
2 claims concerning their claimed purchase of pre-IPO company stock); the
3 source and use of funds received from SRA Investors as reflected in the
4 corporate records and bank records of the Receivership Defendants; and the
5 payment of expenses by various Relief Defendants with funds secured from
6 other Relief Defendants.

7 5.) In connection with the preparation of this declaration, I have
8 read the Objections of the SRA Investor Group (“SRA IG”) and the
9 supporting declaration of its counsel, Mr. Jonathan Levine. These documents
10 contain errors and unfounded charges to which this declaration will respond.

11 6.) The Objections and Levine Declaration at best
12 misapprehend, or at worst misrepresent, the role of Sherwood as Independent
13 Monitor (“IM”) over the operation of the SRA Funds during the time of
14 appointment of the IM, that is, from March 25 to October 11, 2016. As the
15 Court’s Order appointing the IM states clearly and succinctly, its activities
16 were, among others, to ““review, monitor and object” to any transfer of assets
17 “not in the best interests... of investors.” See: Docket No. 91, p. 1, l. 27 to p.
18 2, l.3. “review, monitor and object” to any transfer of assets “not in the best
19 interests... of investors.” See: Dkt No. 91, p. 1, l. 27 to p. 2, l.3. F 7.) It
20 was not the duty of the IM to make day-to-day business decisions regarding
21 the operation of the SRA Funds; rather it was to assure the Court that upon
22 review, the decisions made by Defendant SRA Management Associates (“the
23 Manager”) appeared to be in the investors’ best interests. Only when
24 Sherwood was appointed as Permanent Receiver on October 11, 2016 was it
25 to make the day-to-day business decisions formerly made by the Manager.

26 8.) As the accompanying declaration of Nicolas Hernandez of
27 Sherwood makes clear, the decision to distribute the shares of Square, and the
28 amounts to be distributed to SRA Fund investors, was entirely the decision

1 and the responsibility of the Manager. Sherwood as IM reviewed the proposed
2 distribution, and not finding it to be inconsistent with the best interests of those
3 investors, did not object to the decision.

4 9.) Sherwood will, as part of its duties as Receiver, make a
5 proper determination of whether and when to seek a “claw back” of any over-
6 allotted Square shares, in consultation with its counsel and with the advance
7 approval of the Court. Determinations of whether and how to seek a claw back
8 from investors involve numerous practical and legal considerations, including
9 whether the cost of seeking such a return of funds will likely be exceeded by
10 any expected return; whether the affected investor will cooperate or force
11 expensive litigation; and whether any judgment received is or will be
12 collectible. Sherwood intends to undertake this process shortly after its
13 proposed Plan is approved, as until that occurs, there are no available funds
14 with which to employ counsel to undertake litigation if required.

15 10.) The Objections also charges Sherwood with “changing
16 course” from an opinion regarding the liquidation of the pre-IPO company
17 shares expressed during its role as IM, and its intended course of liquidation
18 of those same shares as Receiver. Again, while either misapprehending the
19 recommendation of the Receiver regarding those assets, or simply creating an
20 issue where there is none, the SRA IG does not accurately set forth the
21 proposal in the Plan regarding the disposition of assets.

22 11.) While the Plan does call for the consideration of liquidating
23 some or all of the pre-IPO company shares in order to fund the administration
24 of the Receivership Estate, pay off creditors and make *pro rata* returns to
25 investors, it does so only under the guidance of an independent investment
26 banker and with the approval of the Court. And while the Plan recommends
27 this course even if it involves liquidation prior to any of the pre-IPO
28 companies having liquidity events, or going public, it does so only with the

1 goal of best maximizing the return to investors. In short, the Plan does not
2 require or recommend the immediate and bulk sale of all the Receivership
3 Estate assets.

4 12.) The Objections also charges Sherwood with “changing
5 course” from an earlier opinion on maintaining the separateness of each of the
6 SRA Funds in any liquidation expressed during its role as IM, and its now
7 intended course of consolidating all of the assets and liabilities of the SRA
8 Funds as part of the Joint Plan it recommends with the SEC while acting as
9 Receiver. Indeed, Sherwood has had a change in its view in the best method of
10 administering the Receivership Estate for the benefit of all investors.

11 13.) Sherwood’s change in view in late 2016 and early 2017, was
12 predicated on the developing evidence by the SEC on the extensive
13 commingling of funds by the SRA Defendants, the extent of which was
14 unknown to Sherwood when it acted solely as IM. Additionally, it also was
15 unknown to Sherwood while acting as IM that as part of its later mandate to act
16 as Receiver there would be management of related non – SRA defendant
17 entities, including FMOF and NYPA funds. The Receiver would be required to
18 administer the assets and liabilities of these funds, some of which, according to
19 the SEC, suffered commingling of investments with the SRA Funds, in order
20 that the NYPA and FMOF could meet some of their earlier investor obligations
21 with funds belonging to SRA Fund investors. This dimension was unknown to
22 Sherwood when acting solely as IM.

23 14.) The Objections claims, without any support, that Sherwood
24 has utterly failed to (i) keep SRA investors apprised of the status of the SRA
25 litigation; (ii) respond to inquiries by SRA investors; and (iii) has failed to file
26 federal and state partnership tax returns for 2015 and 2016. Each of these
27 claims is without merit as shown directly below.

28 15.) Since October 2016, Sherwood had maintained an up-to-date,
dedicated website for access by SRA Fund investors to become informed

1 about the status of the SRA litigation. Members of the Sherwood team, under
2 my supervision have regularly posted updates to the litigation on that website.
3 Using a dedicated website is far less expensive than answering individual
4 SRA investor inquiries which, when uncontrolled can add tens of thousands of
5 dollars to the cost to administer the estate. For that reason among others
6 Sherwood has elected to use the dedicated website to update and inform
7 investors.

8 16.) Since October 2016, Sherwood has received several requests
9 from large investors and creditors, and/or their counsel, to which Sherwood
10 has consistently responded by arranging for in person meetings when
11 requested to do so (i.e. Telesoft) and conference calls with investors and
12 counsel (i.e. Global Generation). I am not aware of any SRA Fund investor, or
13 their counsel, whose requests for communication have not been met with
14 cooperation by Sherwood personnel. This includes communications with the
15 SRA IG counsel Mr. Levine, who prior to preparing and filing the Objections,
16 made numerous requests for conference calls and documentary information to
17 the Plaintiff SEC and the Receiver, all of which were met with prompt
18 response and the requested documentary information.

19 17. On July 20, 2017 Sherwood hosted a webinar conference call
20 open to all SRA Fund investors, in order to reach those smaller investors who
21 did not have counsel to represent them. Well prior to the call, Sherwood sent
22 out a “blast email” to all known SRA Fund investor email addresses,
23 informing them of the call, and the manner in which they could participate and
24 ask questions. Forty three (43) SRA Fund investors registered for the call, and
25 all of the questions that were submitted to Sherwood before the call for
26 response, were answered by Sherwood personnel during the call.

27 18.) As to the SRA Fund tax returns, the chief reason for their
28 current un-filed status is the complete failure of the Manager, and its former

1 tax preparers (Schwartz & Co.) to provide accurate and complete information,
2 records or copies of previous tax returns in a timely manner sufficient to
3 enable the Receiver to be in possession of complete and accurate records of
4 the Defendant entities by which to prepare the 2015 and 2016 returns.

5 Although requested to produce those records as early as November 15, 2016,
6 the Manager (John Bivona) did not provide the Receiver with complete
7 records. In a subsequent call with Bivona on December 2, 2016, Bivona
8 claimed that the missing records, which were substantial in number, were with
9 Schwartz & Co the Defendants' CPA firm and former tax preparers.

10 19.) Upon being informed by Bivona that the missing tax returns
11 were with Schwartz & Co., I contacted Ms. Maria Sanjurjo of Schwartz & Co.
12 twice, the second time on December 7, 2016 only to be told in a reply that her
13 attorney would be in contact with me. After receiving no contact for another
14 14 days, I followed up and finally on December 28, 2016 was told by John
15 Pirog of Tromello, McDonnell & Kehoe, her attorney, that the missing records
16 would be provided in the first week of January 2017. Most of the month of
17 January 2017 passed with no results in obtaining the missing records, which
18 were required to undertake the preparation of tax returns. Therefore on
19 January 26th I requested the Receiver's local counsel, Allen Kadish, to send a
20 demand letter for the missing documents.

21 20.) The Kadish demand letter produced a partial list of records.
22 Nicolas Hernandez and I thereupon contacted two (2) separate tax preparers
23 requesting proposals from them to prepare the 2015 and 2016 tax returns.
24 After a review of the proposals provided by the two firms, we determined to
25 engage one, Fineman West & Co LLP ("Fineman"), located in Los Angeles
26 CA based on the economics of its proposal. Fineman indicated when told it
27 would be selected, that with the incomplete data, incomplete records and lack
28

1 of copies of the tax returns for previous years it would be difficult to produce
2 accurate and reliable returns for the Defendant entities.

3 21.) Finally, with regard to hiring Fineman., Sherwood has been
4 unable to engage them to commence their work since they were selected due
5 to the fact that the Receivership Estate, at this time is functionally insolvent
6 and lacks funds to retain them. While the sale of the Square shares in April
7 resulted in \$1.6 million in cash, these funds cannot be used for any
8 administrative purpose (including paying the Receiver and all its counsel,
9 none of whom have been paid since the commencement of their work in
10 March 2016) until the Court rules on the proposed Plan which would free up
11 those funds for the use contemplated in the Plan, including first the cost of
12 administration.

13 22.) Prior to filing the Objections, neither the representatives of the
14 SRA IG or their counsel have asked to meet with Sherwood to discuss the
15 concerns expressed in the Objections with its handling of its Receivership
16 duties. Thus the Objections makes the charges of inaction without any basis in
17 fact to have done so, and without first asking Sherwood for any of the facts set
18 forth above by me.

19 I declare under penalty of perjury under the laws of the United
20 States of America that the forgoing is true and correct.

21 Dated: September 12th, 2017

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26 Peter Hartheimer
27 Senior Vice President , Sherwood
28 Partners Inc.