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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 SECURITIES AND EXCHANGE
16 COMMISSION,

17 Plaintiff,

18 v.

19 JOHN V. BIVONA; SADDLE RIVER
20 ADVISORS, LLC; SRA
MANAGEMENT ASSOCIATES,
21 LLC; FRANK GREGORY
MAZZOLA,

22 Defendants, and

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

27 Relief Defendants.
28

Case No. 3:16-cv-01386-EMC

**RECEIVER’S NOTICE OF MOTION AND
MOTION TO DISALLOW PURPORTED
GUARANTEE CLAIMS; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: April 7, 2020
Time: 10:30 A.M.
Location: Courtroom 5, 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102
Judge: Edward M. Chen

1 **TO ALL INTERESTED PARTIES:**

2 **PLEASE TAKE NOTICE** that on April 7, 2020, at 10:30 a.m., in Courtroom 5 of the
 3 above-entitled Court located at 450 Golden Gate Ave., San Francisco, California, a hearing will be
 4 held on the Motion of Kathy Bazoian Phelps ("Receiver"), Court-appointed permanent receiver for
 5 SRA Management Associates LLC, SRA I, LLC, SRA II, LLC, SRA III, LLC, Clear Sailing Group
 6 IV, LLC, Clear Sailing Group V, LLC, Felix Multi-Opportunity Fund I, LLC, Felix Multi-
 7 Opportunity Fund II, LLC, Felix Management Associates, LLC, NYPA Fund I, LLC, NYPA Fund
 8 II, LLC, NYPA Management Associates, LLC and Solis Associates Fund, LLC (collectively, the
 9 "Receivership Entities"), to disallow guaranty claims ("Motion").

10 The Motion seeks the disallowance of the following claims that are claims on purported
 11 guarantees relating to investments made with the Receivership Entities:

12 Claimant	Failed Investment	Amount	Proposed Relief
13 O'Leary	Practice Fusion	\$220,373.94	Disallow in Entirety
14 Hsu	Practice Fusion	\$150,000	Disallow in Entirety

15 In addition to those two specifically identified claims, the Receiver requests an order
 16 confirming that any guarantee claims are disallowed as unsecured claims in the case pursuant to the
 17 terms of the Receiver's proposed Plan of Distribution which is set for hearing concurrently
 18 herewith and that has been served on all known claimants.

19 This Motion is made on grounds that, in light of the Court's indication that Failed
 20 Investment Claims be denied in their entirety, a determination that these two claims, and any
 21 guarantee claim in connection with a Failed Investment Claim, should also be disallowed.
 22 Additionally, in light of the fraud and commingling in this case, in the Receiver's judgment, any
 23 guarantee claims in connection with Failed Investments should also be disallowed.

24 The Motion is based on the Memorandum of Points and Authorities below, and the
 25 Declaration of Kathy Bazoian Phelps filed concurrently herewith. The Motion and supporting
 26 papers are available at the Receiver's website,
 27 <http://www.diamondmccarthy.com/saddleriverreceiver>, The Receiver has discussed this Motion
 28 with counsel for the SEC, the SRA Investor Group, and Progresso Ventures and does not believe

1 that they oppose the relief requested in the Motion. The Receiver has also met and conferred with
2 O’Leary and Hsu in connection with this Motion but the parties have been unable to reach a
3 resolution, which has necessitated the filing of this Motion.

4 **Procedural Requirements:** If you oppose all or part of the relief requested in this Motion,
5 you are required to file your written opposition with the Office of the Clerk, United States District
6 Court, 450 Golden Gate Ave., San Francisco, California 94102, and serve the same on the
7 undersigned not later than fourteen (14) calendar days after service of the Motion pursuant to Local
8 Civil Rule 7-3(a).

9 IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the above date, the
10 Court may grant the requested relief without further notice.

11 WHEREFORE, the Receiver requests that the Court grant the relief requested herein, and
12 such other relief as may be appropriate under the circumstances.

13
14 DATED: March 6, 2020

15 By: /s/ Kathy Bazoian Phelps
16 Kathy Bazoian Phelps
17 Successor Receiver
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Motion seeks the disallowance of the following claims that are claims on purported
4 guarantees relating to investments in now Failed Investments:

5 Claimant	Failed Investment	Amount	Proposed Relief
6 O'Leary	Practice Fusion	\$220,373.94	Disallow in Entirety
7 Hsu	Practice Fusion	\$150,000	Disallow in Entirety

8 **II. STATEMENT OF FACTS**

9 1. The Securities and Exchange Commission (“Commission” or “SEC”) filed a complaint
10 commencing this action on March 22, 2016, and Sherwood Partners was appointed as the Independent
11 Monitor on March 25, 2016 (ECF 36).

12 2. Pursuant to the Stipulated Order for Appointment of Receiver so ordered on October 11,
13 2016 (ECF 142), the Court appointed Sherwood Partners, Inc. (the “Former Receiver”) as the Receiver
14 to take possession and control of the assets of the following entities: SRA Management Associates,
15 LLC (“SRA Management”), SRA I LLC (“SRA I”), SRA II LLC (“SRA II”), SRA III LLC (“SRA III”) (together,
16 “SRA Funds”), Clear Sailing Group IV LLC and Clear Sailing Group V LLC (together,
17 “Clear Sailing”), and third-party affiliated entities NYPA Fund I LLC (“NYPA I”), NYPA II Fund
18 LLC (“NYPA II”) (together, “NYPA Funds”) and NYPA Management Associates LLC (collectively,
19 “NYPA Entities”) and Felix Multi-Opportunity Funds I and II, LLC (“FMOF I and II”) (together,
20 “FMOF Funds”) and FMOF Management Associates, LLC (collectively, “FMOF Entities”). Pursuant
21 to the Court’s Civil Minutes entered on June 27, 2019 (ECF 503), the Solis Associates Fund LLC
22 (“Solis”) was substantively consolidated into the receivership estate. SRA Management, SRA I, SRA
23 II, SRA III, Clear Sailing, NYPA Entities, FMOF Entities and Solis are collectively referred to as the
24 “Receivership Entities”).

25 3. By Order entered on February 28, 2019, the Court appointed Kathy Bazoian
26 Phelps as the successor Receiver (the “Receiver”).

1 4. At the time of the Receiver’s appointment, the SEC and the Former Receiver, on the one
 2 hand, and the SRA Funds Investor Group (“Investor Group”), on the other hand, were promoting
 3 competing plans of distribution. At the request of the Court, the Receiver proposed a distribution plan
 4 and, at hearings on June 27, 2019, October 7, 2019 and January 30, 2020, the Court made interim
 5 findings and ruling relating to claims and plan issues. One of the issues discussed in connection with a
 6 distribution plan was the appropriateness of allowing claims in connection with Failed Investments,
 7 e.g., companies in which investors had invested that had failed to go public. The Court declined to
 8 approve a plan that provided for allowance of claims in connection with Failed Investments.
 9 Declaration of Kathy Bazoian Phelps in Support of Receiver’s Motion to Disallow Purported Guarantee
 10 Claims (“Phelps Decl.”), ¶ 3.

11 5. This Motion addresses what are believed to be the remaining claims objections in this
 12 case.¹ Phelps Decl., ¶ 4.

13 6. Based upon the Court’s prior comments and rulings, and in negotiations with the SEC,
 14 the Investor Group and Progresso Ventures, the Receiver has filed her proposed final Distribution Plan,
 15 which is set for final approval on April 7, 2020. Phelps Decl., ¶ 5. (Doc. Nos. 570-571.) The
 16 Distribution Plan provides, among other things, that certain claims will be disallowed as follows:

17 **Distribution Plan, Section II, page 3**

18 “Disallowed Claims” include claims, whether or not formally and timely filed, belonging to or
 19 asserted by or on behalf of or for (i) John V. Bivona; (ii) Frank Mazzola; (iii) Anne Bivona; (iv)
 20 Michele Mazzola; (v) David Jurist; (vi) Alice Jurist; (vii) former agents or employees of Saddle
 21 River, Felix Investments, LLC, FMOF Management Associates LLC, NYPA Management
 22 Associates LLC, SRA Management, Clear Sailing Group IV LLC, Clear Sailing Group V LLC,
 23 and the Fortuna Fund Management LLC; (viii) other insiders (including but not limited to

24
 25 ¹ The Receiver previously filed a motion to disallow certain categories of claims, including
 26 duplicate claims, claims previously disbursed, claims not against receivership entities, and
 27 late-filed claims, which motion was approved by Order entered on June 27, 2019 [Doc No.
 28 501]. The SEC has also filed objection to the claims of Michelle Mazzola and Joshua Cilano.

1 Emilio DiSanluciano) ; (ix) management fees, including any management fee claimed by
 2 Joshua Cilano; (x) inter-company claims; (xi) **any claim for the guarantee of a debt or**
 3 **financial obligation**, including for the benefit of insiders (including but not limited to John V.
 4 Bivona, Frank Mazzola, Anne Bivona, Michele Mazzola, David Jurist, and Alice Jurist, by
 5 FMOF Management, or NYPA Management or any other of the Receivership Entities); (xii)
 6 **any claim for the guarantee of a debt or financial obligation in connection with a Failed**
 7 **Investment**; (xiii) any claim that has been disallowed by an order of the Court after notice and
 8 a hearing; and (xiv) any claim that was filed with the Receiver after May 14, 2019 that has not
 9 been expressly allowed by an order of the Court after notice and a hearing. The definition of
 10 “Disallowed Claim” excludes a claim or claims filed on behalf of Fortuna Funds by Stephen
 11 Soler, unless such claim or claims are disallowed on another basis.

12 **Distribution Plan, Section II, page 4**

13 “Failed Investment” means any of the companies in which the Receivership Entities offered
 14 investments in securities in companies which were pre-IPO, did not go public and have a
 15 liquidity event, and have failed. Those companies as of the date of this Plan are Alphcom dba
 16 Jawbone, Badgeville Inc., Candi Controls, Glam, Jumio Inc., Odesk, Practice Fusion, Virtual
 17 Instruments, eSolar and Silver Springs Network . Any intended investment which fails to go
 18 public after approval of this Plan is intended to be included in the definition of Failed
 19 Investment.

20 (Doc. No. 570.)

21 7. Based upon the Court’s prior rulings in connection with a distribution plan, the Receiver
 22 believes that claims based on guarantees and, in particular, claims related to Failed Investments, should
 23 be disallowed as set forth herein. Phelps Decl., ¶ 6.

24 8. Investor Hsu filed a proof of claim form asserting a guarantee claim related to his
 25 investment in Practice Fusion, which has since failed. A copy f Hsu’s Claim is attached to the
 26 Declaration of Kathy Bazoian Phelps as Exhibit “1.” Phelps Decl., ¶ 7, Exhibit “1.”

1 9. Investor O’Leary filed a proof of claim form asserting a guarantee claim related to his
2 investment in Practice Fusion, which has since failed. A copy of O’Leary’s Claim is attached to the
3 Phelps Declaration as Exhibit “2.” Phelps Decl., ¶ 8, Exhibit “2.”

4 10. In addition to those two specifically identified claims, the Receiver requests an order
5 confirming that any guarantee claims are disallowed as unsecured claims in the case. The Notice of
6 Motion and Motion has been served on all investors who have been provided notice of the terms in the
7 Plan that guarantee claims shall be deemed disallowed claims. Phelps Decl., ¶ 10.

8 11. The Notice of Motion and Motion has been served on Hus and O’Leary. All investors
9 have previously provided notice of the terms in the Plan that guarantee claims are deemed disallowed
10 claims. Phelps Decl., ¶ 11.

11 **III. ARGUMENT**

12 Courts presiding over equity receiverships have extremely broad power to supervise the
13 receivership and promote an orderly and fair administration of receivership assets. *SEC v Hardy*, 803
14 F.2d 1034, 1038 (9th Cir.1986). "The power of a district court to impose a receivership or grant other
15 forms of ancillary relief does not in the first instance depend on a statutory grant of power from the
16 securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion
17 effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). As the appointment of a receiver
18 is authorized by the broad equitable powers of the court, any distribution of assets must also be done
19 equitably and fairly. *See SEC v. Elliot*, 953 F.2d 1560, 1570 (11th Cir. 1992).

20 The Ninth Circuit explained:

21 A district court's power to supervise an equity receivership and to determine the appropriate
22 action to be taken in the administration of the receivership is extremely broad. The district court
23 has broad powers and wide discretion to determine the appropriate relief in an equity
24 receivership. The basis for this broad deference to the district court's supervisory role in equity
25 receiverships arises out of the fact that most receiverships involve multiple parties and complex
26 transactions. A district court's decision concerning the supervision of an equitable receivership is
27 reviewed for abuse of discretion.

28 *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). (citations omitted); *see also*

1 *Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999)
 2 ("This court affords 'broad deference' to the court's supervisory role, and 'we generally uphold
 3 reasonable procedures instituted by the district court that serve th[e] purpose' of orderly and efficient
 4 administration of the receivership for the benefit of creditors."). Accordingly, the Court has broad
 5 discretion in calculating and determining the allowed amounts of claims.

6 **A. Proposed Disallowance of Guarantee Claims**

7 The Receiver requests that all guarantee claims be disallowed as unsecured claims. The Receiver
 8 specifically requests that the following known two claims that include claims based on promises of
 9 guarantees be disallowed with respect to the guarantee portion of the claim:²

10 Claimant	Failed Investment	Amount	Proposed Relief
11 O'Leary	Practice Fusion	\$220,373.94	Disallow in Entirety
12 Hsu	Practice Fusion	\$150,000	Disallow in Entirety
13 Phelps Decl., ¶¶ 7-8.			

14 The Receiver learned that a number of claims attached documentation in which John
 15 Bivona or the Receivership Entities purported to provide guarantees of repayment in the event
 16 that an entity failed. Phelps Decl., ¶ 9. The Receiver has met and conferred with other claimants
 17 who asserted a guarantee claim, and those other claimants have voluntarily withdrawn the
 18 guarantee portion of the claim. *Id.* Hsu and O'Leary are the only two other claimants with
 19 known guarantee claims who have refused to withdraw the guaranty portion of their claim. *Id.*

20 In light of the Court's indication that Failed Investment Claims be denied in their
 21 entirety, the Receiver believes that a determination that any guaranty claim in connection with a
 22 Failed Investment Claim should also be disallowed. Additionally, in light of the fraud and
 23 commingling in this case, the Receiver also believes that any guarantee claims in connection
 24 _____

25 ² The Receiver does not by this Motion seek to disallow the underlying investor claims of the
 26 claimants for shares in investments that have not yet failed to the extent that those underlying
 27 claims have not been disallowed by separate order.

