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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

OPPOSITION OF JOSHUA CILANO TO PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OBJECTION TO THE CREDITOR CLAIM OF JOSHUA CILANO

Date: May 13, 2020
Time: 10:00 a.m.
Courtroom: 5
Judge: Hon. Edward M. Chen

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Claimant Joshua Cilano, through undersigned counsel, hereby responds to Plaintiff Securities and Exchange Commission's objection to his receivership claims (filed February 28, 2020). The objection should be DENIED for the reasons that follow.

I. BACKGROUND

Investor- and creditor- claimant Joshua Cilano's receivership claims arise from investments he made, and backend fees for investments his clients made, in funds of the SRA Defendants.[1] Mr. Cilano, whose investment career revolves around pre-IPO technology companies in Silicon Valley, did not work for or owe fiduciary duties to the SRA Defendants.[2] But Mr. Cilano and his clients invested heavily in the SRA Defendants' funds because those entities were the sole source of pre-IPO shares of Palantir and other highly sought-after Silicon Valley companies. See accompanying Declaration of Joshua Cilano in Response to Objection of Plaintiff SEC, ¶ 11. Through a contractual arrangement, the SRA Defendants were to remit 10% of any profits Mr. Cilano's clients made in SRA investments to Alexander Capital, and Alexander Capital would then pay Mr. Cilano. See Exs. 1, 2 to Cilano Decl. Mr. Cilano's clients were and are aware of this provision, and they fully support compensating Mr. Cilano according to these agreed upon terms. Cilano Decl. ¶ 11.

Since the SEC's initiation of this action in 2016, neither Mr. Cilano nor his former employer, Alexander Capital, have been subpoenaed, deposed or investigated in this action. And when the SEC asked the Court to disallow the claims of certain defendants and insiders in 2017, neither Alexander Capital nor Mr. Cilano were included on the list. Mr. Cilano's clients, whose investments comprise around 80% of the receivership's assets, have never suggested that Mr.

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[1] The SRA Defendants include SRA Management, LLC; FMOF Management Associates, LLC ("FMOF Management"); and NYPA Management Associates, LLC ("NYPA Management"). See ECF 572, 1.

[2] Mr. Cilano worked at Alexander Capital from 2011 through October 2014. See Exh. A to Supplemental Declaration of John S. Yun in Support of Plaintiff's Joint Motion With the Receiver for Approval of the Proposed Joint Distribution Plan, ECF 240 (Sept. 28, 2017)

Cilano has behaved inequitably or that the clients' agreements to compensate Mr. Cilano should be discarded.

Despite Mr. Cilano playing no role in the conduct that gave rise to the SEC's action, Mr. Cilano's history and conduct has been fully vetted in this proceeding.[3] That is because in 2017 Mr. Cilano formed an investor's rights group to oppose the SEC's distribution plan, which would have returned only pennies on the dollar for the SRA investors. When the investors proposed an alternative distribution plan, the SEC opposed that plan, in part by arguing that Mr. Cilano's conduct disqualified him from leading that investor's rights group. The SEC did not prevail. The distribution plan Mr. Cilano championed proved to be superior in many respects for the investors and creditors in this action. The SEC thus objects to a portion of Mr. Cilano's receivership claim as a stranger to the distribution plan ultimately adopted by the Court.

In January 2018, after facilitating potentially lucrative investments in Palantir and other companies for his clients through the SRA Funds, and spending more than $300,000 of his own money to pay for representation for the investor group and its alternative distribution plan, Mr. Cilano timely filed a receivership claim as an investor in one of the subject funds. (Docket No. 572-2.) He also filed a claim for backend compensation for profitable investments his clients made in defendants' funds. (Id.) Mr. Cilano's investor claim has not been challenged by the SEC or any investor.

With respect to his claim for backend fees, none of Mr. Cilano's clients have objected to his claim for compensation. After filing his claim, Mr. Cilano contacted the receiver and verbally negotiated a compromise of his backend fee claim, which limited his recovery to $3.9 million as a subordinated claim. This represents significantly less than the value of Mr. Cilano's receivership

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[3] *See, e.g.*, Declaration of Joshua Cilano in Support of SRA Funds Investor Group's Objections to Joint Distribution Plan of the Receiver and the SEC, ECF 231 (Aug. 24, 2017); Supplemental Declaration of John S. Yun in Support of Plaintiff's Joint Motion With the Receiver for Approval of the Proposed Joint Distribution Plan, ECF 240 (Sept. 28, 2017); Declaration of Joshua Cilano in Response to Court's September 22, 2017 Order, ECF 251 (Sept. 27, 2018).

claim, and does not include any potential future unrealized backend fees in pre-IPO securities. This resolution was also contingent on all administrative and priority claims being paid first and investors and creditors being paid in full before any portion of Mr. Cilano's subordinated claim is paid.[4] Neither the receiver nor any of the SRA investors objected to Mr. Cilano's claim, and Mr. Cilano understood that his claim was to be approved, just as the receiver had approved the subordinated creditor claim of Mr. Cilano's former partner at Alexander Capital, Carsten Klein. (Docket No. 570.) At no time was Mr. Cilano informed that he had submitted insufficient proof of his claim or that his claim was otherwise invalid.

Yet on February 28, 2020, the SEC filed an objection to a portion of Mr. Cilano's receivership claim asking this Court to disallow Mr. Cilano's claim for backend compensation on the asserted grounds that he is an "insider" who is inequitably seeking to profit from defendants' fraud.[5] The SEC also objected on the grounds that Mr. Cilano's contract rights were waived by the defendants. But as explained in more detail below, the equities here favor Mr. Cilano, not the SEC, whose objection should therefore be overruled.

II. LEGAL STANDARD

The power of a district court to "supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). Among the powers courts exercise in receivership proceedings are the equitable powers to allow, subordinate or disallow receivership claims. *See United States v. Ariz. Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984). Because "a receiver appointed by a federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state," *Marshall v. York*, 254 U.S. 380, 385, 41 S.Ct. 143, 145

[4] The receiver stopped negotiating with Mr. Cilano after the SEC filed its objection.

[5] The SEC's position with respect to Mr. Cilano's claim is internally inconsistent. The SEC has not objected to Mr. Cilano's investor claim, but has objected to the backend claim. But, if Mr. Cilano were in fact an insider—he is not—then the SEC should have objected to his entire claim. That the SEC is only objecting to a portion of the claim alone defeats its objection.

(1920), a court's invocation of equity to subordinate or exclude an otherwise valid receivership claim "is an unusual remedy which should be applied only in limited circumstances." *In re Lazar,* 83 F.3d 306, 309 (9th Cir. 1996); *see also SEC v. Elliott*, 953 F.2d 1560, 1569 (11th Cir. 1992) (granting equitable relief to certain parties thwarts the overall equitable purpose of the receivership estate by skewing distributions from the receivership estate in favor of certain victims at the expense of other victims and not the expense of the entity that committed wrongdoing).

When exercising its equitable discretion, a court's deference to the views of the SEC in a receivership action is warranted in specific instances where the SEC has exhibited "impartiality" and has "sole familiarity with the relevant facts" in the case. *In re Imperial '400' National, Inc.*, 432 F.2d 232, 242 (3d Cir. 1970). Absent these circumstances, however, courts "consider the SEC views *quantum meruit*, along with all other relevant factors." *In re Alpha Telcom, Inc.*, No. CV 01-1283-PA, 2006 U.S. Dist. LEXIS 79997, at *9 (D. Or. Oct. 27, 2006) (denying SEC's request for special deference on a request for fees).

III. ARGUMENT

As a preliminary matter, the opinion of the SEC is not entitled to deference here. First, the SEC does not possess "sole familiarity with the relevant facts" in this case. The Court has access to all the relevant records that are available to the SEC and thus can render its own findings. *Cf., In re Imperial '400' National, Inc.*, 432 F.2d 232, 229 (3d Cir. 1970) (deferring to the SEC's judgement regarding appropriateness of attorney's fees where SEC had access to attorney's time sheets but court had only a total hour listing of work performed by the attorney). Second, the SEC, as the architect of the "Joint Distribution Plan" that Mr. Cilano successfully opposed, cannot reasonably be said to be impartial with regard to Mr. Cilano's claims. Finally, in proposing a distribution plan that was opposed by most investors and supported by none, and would have put investors is a materially worse position than the Alternative Plan of Distribution proposed by the investor group, the SEC has demonstrated a troubling disregard for investors'

interests. There is accordingly no reason for the Court to substitute the SEC's judgment for its own.

The SEC argues that Mr. Cilano's contractual right to compensation was extinguished by the defendants waiver of their rights under agreements between defendants and Mr. Cilano's clients. SEC Objection, 3 ("Cilano cannot logically obtain any fees from entities that are themselves precluded from receiving fees"). Putting aside the fact that Mr. Cilano is seeking fees from the receiver, not entities that are precluded from receiving fees, the SEC's argument is devoid of legal support. *See, e.g., FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) ("while a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a[n] . . . innocent entity that steps into the party's shoes").[6] The SEC further contends that Mr. Cilano is an "insider" seeking "management fees" such that equity bars his creditor claim (but not his investor claim). SEC Objection, Docket No. 572, at 3-4. But the facts show that Mr. Cilano was not an insider, and even if he was, he would still be entitled to recover here. That is because Mr. Cilano has engaged in no inequitable conduct, did not defraud his clients, and there is no other basis to deny Mr. Cilano's contractually-based compensation arising from his clients' successful investments. This is particularly true because the receiver—without objection from the SEC—has already approved the claim of Mr. Cilano's former partner from Alexander Capital, Carsten Klein. (Docket No. 570).

A. Absent any inequitable conduct by Mr. Cilano, equity provides no basis to exclude his creditor claim.

The SEC alleges that Mr. Cilano is an insider whose receivership claim should be denied because he was "involved with, or benefited from, [defendants'] fraudulent scheme." SEC

[6] *See also*, *In re Lapiana,* 909 F.2d 221, 223-24 (7th Cir.1990) (receiverships provide a procedure for enforcing entitlements "under specified terms and conditions rather than a flight of redistributive fancy," and receivership judges "are not empowered to dissolve rights in the name of equity.")

Objection, 3. In determining whether to deny a creditor's receivership claim, the touchstone of the analysis is whether the claimant has engaged in inequitable conduct to advantage himself to the disadvantage of other claimants. *Compare SEC v Total Wealth*, 2018 U.S. Dist. LEXIS 120132, at *10 (S.D. Cal. July 18, 2018) (subordinating claim where, after "careful analysis of financial records, the Receiver has credibly proven that [claimant's] misconduct conferred unfair advantage on [claimant] to the detriment of the investor clients"), *with SEC v. BIC Real Estate Dev. Corp,* 2019 U.S. Dist. LEXIS 83801, at *15-16 (S.D.N.Y. May 17, 2019) (declining to subordinate non-insider's claim based on receiver's conclusory allegation that claimant negligently overlooked defendant's misconduct), and *In re Paradigm Int'l, Inc.*, 635 F. App'x 355, 358 (9th Cir. 2015) ("BHC had the right to obtain payment under the Guaranty as a secured creditor, and there was no evidence of fraud or concealment.").[7]

While courts apply greater scrutiny to insiders[8] such as the defendant's relatives, or persons who control or owe a fiduciary duty to the defendant, the mere fact of an insider

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[7] *See also In re Fitness Holdings Int'l, Inc.*, 529 Fed. Appx. 871, 875 (9th Cir. 2013) (equitable subordination sufficiently pleaded where trustee alleged "insiders 'contrived' to benefit themselves by knowingly funneling money to themselves out of a failing company"); *SEC v. Total Wealth*, 2018 U.S. Dist. LEXIS 120132, at *10 (S.D. Cal. July 18, 2018) (receiver's "forensic accounting" and "careful analysis of financial records [had] credibly proven that [claimant's] misconduct conferred unfair advantage on [claimant] to the detriment of the investor clients.").

[8] Federal securities laws define an "insider" as someone who controls or is a fiduciary to the defendant, or "(1) any beneficial owner of more than 10% of any class of non-exempt equity security, (2) anyone who is a director of the issuer of any such security, and (3) anyone who is an officer of the issuer of any such security." *See Rubenstein v. Int'l Value Advisers, LLC*, 363 F. Supp. 3d 379, 388 (S.D.N.Y. 2019) (citing 15 U.S.C. § 78p(a)(1); *Cyganowski v. Beechwood Re Ltd. (In re Platinum-Beechwood Litig.)*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 173830, at *94 (S.D.N.Y. Oct. 7, 2019) (citing *In re Madoff Sec.*, 987 F. Supp. 2d 311, 321 (S.D.N.Y. 2013) (holding that insider exception is used "narrowly to allow only for suit [] against a fiduciary of the []corporation, not against third parties who are alleged to have aided and abetted the [] fraud, short of control by the third party" over the corporation).

Similarly, receivership courts have relied on the bankruptcy code's definition of "insider." Under the bankrupty code, if the debtor is an individual, insiders include any "(i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;"), (B) ("if the debtor is a corporation--(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general

relationship is insufficient to warrant exclusion on equitable grounds. *See SEC v Total Wealth*, 2018 U.S. Dist. LEXIS 120132, at *27 (citing *Bayer Corp. v. MascoTech, Inc. (In re Autostyle Plastics, Inc.)*, 269 F.3d 726, 731 (6th Cir. 2001)).[9] Where the claimant is an insider, "the creditor-insider must actually use its power to control to its own advantage or to the other creditors' detriment" to warrant excluding its claim. *In re AutoStyle Plastics, Inc.*, 269 F.3d at 745 (citations omitted). Additionally, where "non-insider, non-fiduciary claims are involved . . . the level of pleading and proof is elevated: gross and egregious conduct will be required before a court will equitably subordinate a claim." *In re First Alliance Mortgage Co.*, 471 F.3d at 1006.[10] Thus, for equity to bar the receivership claim of a non-insider, "fraud, spoliation or overreaching is necessary." *See SEC v Total Wealth*, 2018 U.S. Dist. LEXIS 120132, at *28 (quotation and citation omitted); *SEC v. BIC Real Estate Dev. Corp,* 2019 U.S. Dist. LEXIS 83801, at *15-16 (S.D.N.Y. May 17, 2019).

Here, other than the SEC's conclusory claim that Mr. Cilano is an insider, nothing in the extensive record of this case supports that allegation. It is undisputed that Mr. Cilano worked at Alexander Capital, not the defendants' companies. SEC Opposition Motion, ECF 572, at 4. He was not a relative, owner, officer, director, or employee of defendants; and defendants were not officers, directors or employees of his. He did not control or owe fiduciary duties to the defendants, and they did not control or owe fiduciary duties to him. As such, Mr. Cilano was a non-insider and his receivership claim could be excluded only upon a showing of "gross and egregious" conduct, such as "fraud, spoliation or overreaching." *SEC v. BIC Real Estate*, 2019 U.S. Dist. LEXIS 83801, at *15-16 (S.D.N.Y. May 17, 2019). The SEC has not even attempted to make such a showing and, indeed, cannot do so. The record here demonstrates that Mr. Cilano

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partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor" 11 U.S.C. § 101(31)(A).

sold legitimate and profitable investments to accredited investor clients, and that Mr. Cilano did nothing to advantage himself at his clients' expense. Mr. Cilano's sale of non-fraudulent and profitable investments, absent any allegations of misconduct, cannot possibly constitute the gross and egregious conduct that would militate in favor of subordinating his claims. *See SEC v BIC Real Estate*, 2019 U.S. Dist. LEXIS 83801, at *15-16 (declining to subordinate non-insider's claim based on receiver's "conclusory allegation" that claimant negligently overlooked defendant's misconduct).[11]

No authority in the SEC's objection remotely supports the outcome it seeks. In *SEC v. Byers*, 637 F. Supp. 2d 166 (S.D.N.Y. 2009), for example, the court addressed the receivership claims of principals and employees (i.e., insiders) of a Ponzi scheme, who were alleged to have engaged in inequitable conduct such as pressuring investors to roll distributions back into the Ponzi scheme rather than receiving cash payouts. *Byers*, 637 F. Supp. 2d at 173, 182-83. Similarly, in *SEC v. Enter Trust Co.,* the court barred the receivership claims of former owners who had prevented clients from withdrawing investments, engaged in speculative trading that lost millions, covered up their losses, and violated two states' laws. 2008 U.S. Dist. LEXIS 79731 at *9-10, 17 (N.D. Ill. Oct 7, 2008).[12] Only in circumstances like these do courts find that equity supports excluding a receivership claim. *See, e.g., SEC v. Pension Fund of America*, 377 Fed. Appx at 963 (11th Cir. 2010) (employee-claimant of defendants who were running a "massive and, for a time, successful fraud that bilked thousands of investors," were equitably barred from recovering commissions on "losses totaling more than $35,000,000," thereby creating the "largest single

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[11] *Cf. In re Fitness Holdings Int'l, Inc.*, 529 Fed. Appx. 871, 875 (9th Cir. 2013) (equitable subordination sufficiently pleaded where trustee alleged "insiders 'contrived' to benefit themselves by knowingly funneling money to themselves out of a failing company"); *SEC v. Total Wealth*, 2018 U.S. Dist. LEXIS 120132, at *10 (S.D. Cal. July 18, 2018) (receiver's "forensic accounting" and "careful analysis of financial records [had] credibly proven that [claimant's] misconduct conferred unfair advantage on [claimant] to the detriment of the investor clients.").

[12] No different conclusion is compelled by *SEC v. Basic Energy & Affiliated Res.*, 273 F. 3d 657, 660 (6th Cir. 2001) (precluding recovery for defendants but providing reduced recovery for employees depending on their level of involvement).

creditor of the receivership estate" in the receivership action).[13] Because Mr. Cilano engaged in no misconduct and only seeks commissions on his clients' profitable investments, none of the SEC's authorities support excluding his claim, and the SEC has not explained how or why equity would require penalizing Mr. Cilano.

Not only is the SEC's characterization of Mr. Cilano as an insider inconsistent with authority, it is also inconsistent with the SEC's prior request to exclude insiders. In 2017, the SEC asked the Court for a preliminary finding excluding receivership claims by defendants and insiders including David Jurist and Emilio DiSanluciano. (Docket No. 196). The Court granted the SEC's request, based on allegations that DiSanluciano had "actively participated in deceptive sales to investors such as Telesoft Ventures," that Jurist "was a manager of [defendant] Clear Sailing and signed the checks for undisclosed payments in November 2011 using money taken from Global Generation and Progresso Ventures," and that both men shared in over $2.5 million generated by the fraudulent purchase of shares "stolen from investors." Joint Reply by SEC and Receiver to Responses to Motion for Approval of Proposed Joint Distribution Plan, Docket No. 218, 4 (Aug. 17, 2017). In barring DiSanluciano and Jurist's receivership claims, the Court, consistent with the authority above, found that equitable principles barred the recovery of insiders who "took the business over the edge" or otherwise "violated the laws." *SEC v. Enterprise Trust Co.*, 2008 U.S. Dist. LEXIS 7931 at *10 (N.D. Ill. Oct. 7, 2008).

Unlike Messrs. Jurist and DiSanluciano, who "took the business over the edge," Mr. Cilano has fought for years to keep the investors and creditors on high ground. In the absence of any inequitable conduct, equity provides no basis to bar Mr. Cilano's creditor claim. *See, e.g., SEC v. Total Wealth Mgmt.*, No. 15-cv-226-BAS-RNB, 2018 U.S. Dist. LEXIS 120132, at *27 (S.D. Cal. July 17, 2018) (inequitable conduct is the starting point of any insider or outsider

[13] *See also SEC v. McGinn, Smith & Co.*, 98 F. Supp. 3d 506, 520 (N.D.N.Y 2015) (disallowing the receivership claims of outside brokers who had already been ordered to disgorge their commissions for violations of Sections 17(a)(2) and (3) of the Securities Act).

analysis); *SEC v. Basic Energy & Affiliated Res.,* 273 F. 3d 657, 660 (6th Cir. 2001) (precluding recovery for defendants but providing reduced recovery for employees depending on level of involvement). Thus, because Mr. Cilano never used his position, such as it was, to his advantage or the disadvantage of his investors, equity provides no basis for excluding his receivership claim, particularly where he has already offered to subordinate his claim and take a significant reduction on what is owed to him.

B. Defendants' waiver of their rights to enforce agreements with Mr. Cilano's clients do not constitute a waiver of Mr. Cilano's rights under those same agreements.

The SEC concedes that Mr. Cilano's creditor claims arise from his status as a third-party beneficiary of valid agreements formed between Mr. Cilano's accredited investor clients and the corporate defendants. SEC Objection, 4. But the Commission argues that because the defendants waived their rights to managements fees under those agreements, Mr. Cilano's "derivative" claim for "management fees" under those same agreements is barred. *Id.* The SEC did not substantiate the claim that Mr. Cilano is seeking "management fees" or cite any authority in support of its contract-based argument, which is contrary to the law. Finally, since Mr. Cilano submitted his claim on January 17, 2018, the receiver has never suggested that Mr. Cilano lacked a basis for seeking fees from the receivership. Indeed, the receiver approved the claim of Mr. Cilano's former partner at Alexander Capital, so there can be no serious doubt about Mr. Cilano's bona fides. The assertion that Mr. Cilano lacks a basis for his claims is made only by the SEC, which objected to Mr. Cilano's claim more than two years after it was filed, and falsely characterized Mr. Cilano as an "insider" seeking "management fees" that are wholly derivative of the claims of other parties. But the SEC's argument fails.

1. As a third-party beneficiary of his clients' agreements with the SRA defendants, Mr. Cilano's has a direct right to his claim, notwithstanding the defendants' misconduct or waiver.

It is black letter law that "a third party may enforce a contract where he shows that he is a member of a class of persons for whose benefit it was made." *Solid Host, NL v. Namecheap, Inc.*,

652 F. Supp. 2d 1092 (C.D. Cal. 2009). A "beneficiary's right is direct, not merely derivative, and claims and defenses of the promisor against the promisee arising out of separate transactions," e.g., a breach by the promisee after the contract is formed, "do not affect the right of the beneficiary except in accordance with the terms of the contract." *Ronay Family Ltd. P'ship v. Tweed*, 216 Cal. App. 4th 830, 840-41, 157 Cal. Rptr. 3d 680, 687-88 (2013) (citing Rest.2d Contracts, § 309, com. c, p. 460); *see also J.G.B. Enters. v. United States*, 497 F.3d 1259 (Fed. Cir. 2007) (a third party beneficiary's claims "are not derivative of [the contracting party's] rights under the contract; rather [plaintiff] is suing to enforce its own rights under the contract.") (citing Rest. (Second) of Contracts § 309(3) cmt. C).

In the present matter, Mr. Cilano's claim to 10 percent of profits of his clients' investments is undisputed by his clients, evident from defendants' transaction records, and well-established by the agreements among Mr. Cilano, his former employer, the defendants and the SRA fund investors, which, together, ensured that Mr. Cilano's interests would align with the interests of the investors. The duty to compensate a third-party beneficiary may be an "indebtedness, contractual obligation or other legally enforceable commitment owed to the third party." *Tow v. Amegy Bank N.A.*, 976 F. Supp. 2d 889, 909 (S.D. Tex. 2013). Under similar circumstances, courts routinely find a third party has standing to enforce agreements made for its benefit. See *Ronay*, *supra* (financial adviser could enforce an arbitration clause of an account agreement between the securities broker and an investor as agent of the broker and as third party beneficiary of the agreement even though the broker had become defunct and lost its right to enforce the arbitration clause under FINRA rules).

The circumstances surrounding the Members' entrance into the Operating Agreements further bolster Mr. Cilano's claim for fees. All members of the SRA funds were required to be accredited investors. As accredited investors, they understood that the broker through whom they purchased shares of the SRA funds would participate in the 20% profit share provided for in the Operating Agreements. See, e.g., SRA I Operating Agreement, ECF 9-1, § 4.7.1(b). Indeed,

there is abundant evidence that Mr. Cilano's clients knew, expected, and desired that Mr. Cilano would receive the fees he currently seeks, as Mr. Cilano's right to benefit from the "upside" of fund investments is what ensured that his interests would be aligned with their own.

2. Mr. Cilano is also entitled to recovery in quantum meruit.

"To recover in *quantum meruit*, a party need not prove the existence of a contract, but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.'" *Swafford v. IBM*, 408 F. Supp. 3d 1131, 1149 (N.D. Cal. 2019) (citations omitted)." The elements of *quantum meruit* are: (1) that the plaintiff performed certain services for the defendant, (2) their reasonable value, (3) that they were rendered at defendant's request, and (4) that they are unpaid." *Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co.*, 118 F. Supp. 2d 1002, 1005 (C.D. Cal. 2000).

Here, it is beyond doubt that Mr. Cilano rendered services to his clients as the broker who placed them in profitable investments. The value of the services Mr. Cilano provided is set by contract and is tied exclusively to the performance of the assets, not management. Moreover, the agreements among Mr. Cilano, his employer, the defendants and the SRA fund investors establish that Mr. Cilano's clients requested that Mr. Cilano render his services as a broker of investments in SRA funds and that Mr. Cilano's clients expected to pay for these services from the profits on their investments. And finally, no investor objected to Mr. Cilano's claim for backend fees. Instead, the receiver had verbally agreed to approval of $3.9 million in backend fees for Mr. Cilano before the SEC filed its pending objection. Therefore, quantum meruit provides a separate and independent basis for to recover his fee for professional services.

Finally, contrary to the SEC's suggestion, the size of Mr. Cilano's claim has no bearing on its validity. *See, e.g., In re JTS/Simms, LLC*, No. 11-07-12153 SA, 2008 Bankr. LEXIS 68, at *16 (Bankr. D.N.M. Jan. 4, 2008) (in the absence of overriding equitable considerations, approving "breathtaking" fifty-four percent backend fee struck by sophisticated parties,

competent to represent their own interests); *In re Terry Ltd. Partnership*, 27 F.3d 241, 243 (7th Cir. 1994) ("There is nothing equitable, however, in diminishing one creditor's bargained for rights in order to augment the rights bargained for by a second creditor."). As discussed above, the size of Mr. Cilano's claim relates directly to the profits earned on investments by the fund and reflects the work Mr. Cilano has done to realize the purpose of the Operating Agreements and protect the interests of his clients, despite the malfeasance of other parties.

To the extent that Mr. Cilano now has a large creditor claim, it is only because the investments Mr. Cilano facilitated for his clients performed well. Though Mr. Cilano's conduct has been scrutinized repeatedly in this action, nothing in the record suggests that Mr. Cilano engaged in any malfeasance, much less of the sort that would justify extinguishing his right to a share of the profits from the sale of fund assets.

IV. CONCLUSION

The members of the SRA funds made their investments, as all investors do, hoping to turn a profit. When the alleged actions of the fund manager put these investments at risk, Joshua Cilano acted to ensure that the members would achieve their objectives to the extent feasible. The SEC's baseless suggestion that Mr. Cilano was involved in the fund manager's "fraudulent scheme" is wholly unsubstantiated by fact. If anything, the record amply demonstrates that Mr. Cilano took aggressive remedial action to protect the interests of his clients, leaving them much better off than they otherwise would have been, and far better off than they would have been under the distribution plan proposed by the SEC. To deny Mr. Cilano the compensation that he has earned on the ipse dixet of the SEC would under these circumstances be wholly inequitable. The SEC's objection should, therefore, be denied.

DATED: March 23, 2020

/s/ Esfand Nafisi

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Esfand Nafisi, hereby certify that on March 23, 2020, I caused the foregoing opposition to Plaintiff SEC's objection to the receivership claim of creditor Joshua Cilano to be filed using the Court's CM/ECF system, thereby causing it to be served upon all registered ECF users in this action.

/s/ *Esfand Nafisi*
Esfand Nafisi