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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  
21 MANAGEMENT ASSOCIATES,  
22 LLC; FRANK GREGORY  
23 MAZZOLA,

24 Defendants, and

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

Relief Defendants.

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

**RECEIVER'S OMNIBUS REPLY TO  
OPPOSITIONS TO MOTION FOR:**

**(1) FINAL APPROVAL OF RECEIVER'S  
PLAN OF DISTRIBUTION; AND**

**(2) FOR ORDER APPROVING FORM  
AND MANNER OF NOTICE;**

Date: May 13, 2020

Time: 10:00 a.m.

Place: Courtroom: 5

450 Golden Gate Ave  
San Francisco, CA

Judge: Edward M. Chen

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1 Kathy Bazoian Phelps, the successor Receiver herein (the “Receiver”), hereby files her  
2 Omnibus Reply to: (1) Plaintiff Securities and Exchange Commission’s Opposition to Provisions in  
3 Receiver’s Revised Distribution Plan (“SEC Opposition”); and (2) the letter Objection filed by  
4 Scott Chandler and Craig Cornelius on behalf of Saddle River Profit Opportunity investors (the  
5 “SRPO Objection”) to the Motion for (1) Final Approval of the Plan of Distribution; and (2) for  
6 Order Approving Form and Manner of Notice; and Notice of Opportunity to Serve on Investment  
7 Advisory Committee (the “Motion”).

### 8 I. INTRODUCTION

9 The Court has preliminarily approved the major components of a distribution plan in this  
10 case. The Receiver’s Motion seeks final approval of the Receiver’s Plan of Distribution, which  
11 contains modifications and updates based upon corrections and adjustments made upon agreement  
12 of the interested parties. The Receiver’s Motion noted two areas of potential dispute regarding the  
13 Plan: (1) the SEC requests that Failed Investment claims be included in the Plan; and (2) the SRA  
14 Funds Investor Group requests that the SEC take a position regarding the Anne Bivona  
15 disgorgement funds of approximately \$500,000 that are segregated and under the Receiver’s  
16 control.

17 The SEC Opposition addresses the Failed Investment claim issue, but no opposition was  
18 filed by the Investor Group. As it turns out, the SEC Opposition brings the Anne Bivona funds  
19 squarely into the discussion. As set forth below, the use of the Anne Bivona funds could fully or  
20 partially address the SEC’s concern that the Failed Investment claims are not receiving a  
21 distribution under the Plan.

22 Additionally, a group of investors with previously disallowed claims, the SRPO Investor  
23 Group, has submitted a letter objection to the Court, asking to be included in the Plan. Since SRPO  
24 is not a Receivership Entity, the Receiver does not believe she has authority to include these  
25 additional \$540,000 of unsecured claims in the Plan of distribution. They are not claims for  
26 securities, but rather are claims for a percentage of backend fees and carried interest for SRPO that  
27 SRPO would share if and when SRPO were paid such fees and entities from the Receivership  
28 Entities. SRPO did not file a claim for any such fees and interest and, even if it had, such a claim

1 would be disallowed under the terms of the Plan.

2 This Reply of the Receiver will address the issues raised by the SEC and the SRPO Investor  
3 Group to advise the Court of the facts and economic consequences of these two requests.

4 **II. THE SEC OPPOSITION AND FAILED INVESTMENT CLAIMS**

5 **A. The SEC Opposition and Proposal**

6 The SEC contends that all defrauded victims, including investors holding claims on account  
7 of Failed Investments,<sup>1</sup> should be included in the Plan. The SEC Opposition sets forth the facts and  
8 findings by this Court that the SEC argues demonstrate commingling and fraud which justifies  
9 including all victims of the fraudulent scheme, including those investors who selected investments  
10 that ultimately failed. The SEC Opposition additionally includes legal argument to support its  
11 position that Failed Investment claims should be allowed to participate in the Plan. Based on the  
12 facts and the law, the SEC believes that investors who gave their money to the Receivership  
13 Entities with the intent to invest in a particular investment that ended up failing should nevertheless  
14 be allowed a claim in the Receivership. The Court has previously stated that it does not wish to  
15 allow claims for investors who selected Failed Investments.

16 The SEC Opposition proposes the creation of a fund to pay those Failed Investment claims  
17 (the “Failed Investment Fund”) from 3 possible sources as follows:

- 18 **1. Tax Loss Proposal:** The SEC suggests that the value of tax losses generated from  
19 the failing of Jawbone, Candi Controls and Practice Fusion, which is unknown at  
20 this time, should be contributed to the Failed Investment Fund rather than remaining  
21 in the Tax Holding Account for the benefit of Class 5 claimants.
- 22 **2. Plan Fund Surplus Proposal:** The SEC suggests that a “substantial portion” of any  
23 surplus in the Plan Fund, which would mean dollars remaining after all Class 1, 2,

24 \_\_\_\_\_  
25 <sup>1</sup> The Plan defines “Failed Investment” as follows: “Failed Investment” means any of the  
26 companies in which the Receivership Entities offered investments in securities in companies which  
27 were pre-IPO, did not go public and have a liquidity event, and have failed. Those companies as of  
28 the date of this Plan are Alphcom dba Jawbone, Badgeville Inc., Candi Controls, Glam, Jumio Inc.,  
Odesk, Practice Fusion, Virtual Instruments, eSolar and Silver Springs Network. Any intended  
investment which fails to go public after approval of this Plan is intended to be included in the  
definition of Failed Investment.

1 and 3 claims had been paid in full, would be contributed to the Failed Investment  
2 Fund rather than flowing to Class 5 subordinated claims.

3 **3. Anne Bivona Fund Proposal:** The SEC states that *if* the SEC decides to contribute  
4 the Anne Bivona disgorgement funds for this purpose, which presently total  
5 approximately \$502,000, then those funds could be contributed to the Failed  
6 Investment Fund.

7 **B. The Receiver's Response to the SEC's Proposal for Failed Investment**  
8 **Claimants**

9 The Receiver is mindful that the Court has made clear its intent to exclude Failed  
10 Investment Claims from the Plan and, based on the Court's findings in this regard, the Receiver  
11 previously filed a Motion to Disallow Certain Claims, which included Failed Investment Claims.  
12 That Motion was filed by the Receiver to provide an opportunity to those claimants to challenge the  
13 Court's determination regarding Failed Investment Claims. No opposition or response was filed by  
14 any interested party to that Motion. As a result, Failed Investment Claims, among other claims,  
15 were disallowed pursuant to Order entered on June 27, 2019 [ECF No. 503].

16 The Receiver nevertheless remains open to considering the option of including the Failed  
17 Investment Claims in the Plan as is requested by the SEC, but believes that, if the Court were  
18 willing to entertain allowance and inclusion of those claims, a balance would need to be struck with  
19 the interests of the otherwise Allowed Investor Claims whose rights could be impacted if Failed  
20 Investment Claims are paid ahead of their deficiency claims. As already provided for in the Plan,  
21 the delicate balance of the interests of the unsecured creditors and investors is subject to later  
22 rebalancing in the event that the balance of the equities shifts due to the realities of the  
23 administrative costs and tax burden as they may unfold in the future. The "Equitable Adjustment"  
24 provision was added to the Plan to balance the unsecured creditors' concern that the Plan Fund will  
25 be insufficient if the administrative costs grow to large, and the Investor Group's concern that the  
26 allocation of tax burden as set forth in the Plan will be disproportionately large for the investors.

27 Adding the Failed Investment Claims into the equation offers a third dimension to the  
28 objective of equitable balancing. The Receiver defers to the discretion of the Court regarding the

1 handling of the Failed Investment Claims and sets forth the analysis below to assist the Court in  
2 analyzing the competing interests. As a possible alternative to the two current positions (i.e., Failed  
3 Investment Claims get nothing v. Failed Investment Claims get paid from a fund pursuant to the 3  
4 sources suggested by the SEC), the Receiver offers the following explanation of the consequences  
5 of, and response to, the SEC's three-part proposal for the creation of a Failed Investment Fund, as  
6 well as an explanation of the impact on the different classes of claimants:

7           **1. Tax Loss Proposal:** The Plan contemplates that the full amount of tax liability that  
8 might be paid on account of gains in the value of the securities (i.e., gains from the date of the  
9 receivership to the date of sale or distribution), will be reserved in the Tax Holding Account, which  
10 is to be generated from the sale of securities.<sup>2</sup> There may be tax losses ("Tax Losses") that could  
11 serve to mitigate the tax liability arising from either administrative claims paid in the case  
12 ("Administrative Tax Losses") or from the Failed Investments themselves ("Failed Investment Tax  
13 Losses"). So that those Tax Losses can be borne equally by the investors and creditors, the Plan  
14 contemplates that the Tax Holding Account will hold the funds generated to pay taxes, and any  
15 benefit derived from the Tax Losses will cause a surplus to be held in the Tax Holding Account.  
16 Additionally, the Plan Fund will hold funds to pay administrative and unsecured creditors based on  
17 the 30% calculation set forth in the Plan.

18           There are at least the following unknown factors that cause the consequences of the Plan to  
19 be unknown and which led to the Equitable Adjustment mechanism to be built into the Plan: (1)  
20 whether the pre-IPO shares, including Palantir, will go public and, if so, what the resulting total  
21 Plan Fund amount will be; (2) the then stock price of securities at the time for the sale and  
22 distribution of the publicly traded shares; and (3) the gross tax liability based on gain, which is  
23 presently unknown; and (4) the amount of Tax Losses that may be applicable. The mechanisms

24 \_\_\_\_\_  
25           <sup>2</sup> The Plan provides that, "The 'Tax Holding Account' means a bank account to be  
26 established by the Receiver and funded with the proceeds of the sale of securities in amount  
27 sufficient to cover the full amount of state and federal taxes that are estimated to be generated from  
28 the sale and distribution of securities for each of the Successful Investments." To be clear, the  
amount would be the potential gross amount of the taxes, exclusive of losses that might be applied  
at the time of the filing of tax returns.

1 built into the Plan are designed to spread the benefit of the Tax Losses among all of the categories  
 2 of investors in Class 4 and to afford an opportunity to equalize the liabilities for administrative  
 3 claims and tax claims among the categories of claimants. Regardless, any surplus from the Plan  
 4 Fund and Tax Holding Account are to be paid to Class 5 claimants under the current structure of  
 5 the Plan.

6 The SEC Tax Loss Proposal suggests that the portion of the funds generated in the Tax  
 7 Holding Account that are attributable to the Failed Investment Tax Losses would be paid into the  
 8 Failed Investment Fund, while the funds an account of the Administrative Tax Losses would  
 9 remain in the Tax Holding Account and be distributed according to the terms of the Plan.

10 As the Plan is written now, the total surplus in the Tax Holding Account would flow to  
 11 Class 5, which consists of the following 4 known subordinated claims plus Investor Deficiency  
 12 Claims:

13	Progresso Ventures:	\$552,936.43
14	Lacey:	\$500,000.00
15	Pisemski	\$500,000.00
16	Carsten Klein:	\$100,000.00
17	Investor Deficiency Claims	Unknown

18 This adjustment proposed by the SEC would require that Failed Investment Claims be paid  
 19 ahead of Class 5 Investors to the extent of the amount of the Failed Investment Tax Losses. While  
 20 the Receiver is not opposed to adding a sum of money on account of the losses from Failed  
 21 Investments to the Failed Investment Fund, the Tax Loss Proposal promoted by the SEC will have  
 22 the effect of paying Failed Investment Claims ahead of Class 5 claims, which include Investor  
 23 Deficiency Claims, so the Court is asked to determine whether such an outcome is deemed to be  
 24 equitable and acceptable under the circumstances.

25 **2. Plan Fund Surplus Proposal:** The SEC proposes that an undefined “substantial  
 26 portion” of any surplus in the Plan Fund be contributed to the Failed Investment Fund. This would  
 27 mean that any surplus remaining after all Class 1, 2, and 3 claims had been paid in full would be set  
 28 aside for the benefit of the Failed Investment claims. As the Plan is written now, the surplus would

1 have otherwise flowed to Class 5, including the Investor Deficiency Claims.

2 The SEC Opposition raised concerns about the nature of the subordinated claims of Lacey,  
3 Pisemski and Klein, which arose in connection with a settlement between the receivership estate  
4 and EAC. Those subordinated claims were allowed pursuant to a global settlement with EAC  
5 which provided substantial benefit to the estate, and no opposition was received to the settlement.  
6 The SEC claims that the only benefit was to the Palantir investors. In fact, the EAC provided a  
7 benefit by bringing in the following shares:

- 8 a. 11,125 shares of *Airbnb, Inc*;
- 9 b. 9,479 shares of *Lyft, Inc.*;
- 10 c. 23,206 shares of *Pinterest, Inc.*;
- 11 d. 500 shares of *Uber Technologies, Inc.*;
- 12 e. 317,649 shares of *Palantir Technologies, Inc.*; and
- 13 f. 1,495 shares of *ZocDoc, Inc*

14 There are 322 investors with allowed claims in the case. Of those, 230 are Palantir  
15 investors. Additionally, of the 322 investors, only about 50 hold claims in securities other than  
16 those obtained in connection with the EAC settlement. Therefore, the EAC settlement benefitted  
17 approximately 84.5% of the total investors with allowed claims. Additionally, the settlement is  
18 structured so that those subordinated claims only receive payment after the Class 1, 2, 3 and 4  
19 classes are paid in full or distributed shares as allowed under the Plan, so those subordinated claims  
20 are not taking anything away from the other classes. Under the SEC's Plan Fund Proposal, the  
21 Failed Investment Claims would be included in the definition of Allowed Claims and be paid ahead  
22 of the subordinated claims in Class 5.

23 While the Receiver is not opposed to the concept of allowing for payments to Failed  
24 Investment claimants, she notes that the SEC's proposal would allow for payment to Failed  
25 Investment claimants ahead of full economic reimbursement to the Allowed Investor claimants.  
26 Again, the Court is asked to determine whether such an outcome is deemed to be equitable and  
27 acceptable under the circumstances.

28 **3. Anne Bivona Fund Proposal:** If the SEC is agreeable, the Anne Bivona funds can  
be used to pay a distribution to the Failed Investment Claims. These are discretionary funds that do  
not need to be contributed to the Plan at all. However, the SEC can elect to utilize these funds to



1 offer a distribution to the Failed Investment Claimants. As noted by the SEC, the Failed Investment  
2 Claims total \$18,883,000. That would result in a 2.6% distribution to the Failed Investment  
3 Claimants. Accordingly, the Receiver supports the contribution of the Anne Bivona disgorgement  
4 funds to the Failed Investment Fund.

#### 5 **4. Surplus Funds: A Possible Alternative/Additional Source for Failed Investment** 6 **Fund**

7 The Plan provides that, “To the extent that any surplus funds remain following payment in  
8 full of Class 5 claims, those funds shall be distributed to the Investors on a *pro rata* basis using  
9 their gross investment amount.” Such payment of Surplus Funds would be paying Investors  
10 remaining cash on top of the distribution of shares and cash to them that would have equaled the  
11 amount that they originally invested with the Receivership Entities. The Receiver believes that an  
12 equitable alternative would be to contribute any such surplus funds to the Failed Investment Fund  
13 since, at that point, Investors and Creditors would have been paid in full.

14 In summary, the Receiver believes that contribution of the Anne Bivona Funds and the  
15 Surplus Funds to pay Failed Investment Claims is appropriate as those funds would not otherwise  
16 be taking anything away from the Investors or Creditors under the terms of the Plan. Whether to  
17 use surplus funds in the Tax Holding Account or the Plan Fund for the purpose of paying Failed  
18 Investment Claims is an equitable decision that could impact payment to Investors on their Investor  
19 Deficiency Claims as well as the other Subordinated Claims.

### 20 **III. THE SRPO INVESTOR GROUP OPPOSITION AND DISALLOWED CLAIMS** 21 **OF NONRECEIVERSHIP ENTITIES**

#### 22 **A. SRPO Claims Have Been Disallowed as Claims Against Non-Receivership Entities**

23 A letter objection was filed by two investors stating that they represent the interests of six  
24 investors in an entity known as Saddle River Profit Opportunity Fund (“SRPO”). As a preliminary  
25 matter and as discussed further below, the Receiver notes that the portions of these six investors’  
26 claims for securities held by the Receivership Entities (as opposed to portions of the claims  
27 attributable to SRPO investment) have been allowed under the terms of the Plan and are set forth in  
28 the Class 4 investor claim attachments to the Plan. The SRPO Objection appears intended to

1 address only the portion of each of the six claims that includes an unsecured claim for a percentage  
2 of backend fees and carried interest from SRPO, which is not a Receivership Entity.

3 Claims were filed by Investor Nos. 53, 69, 72, 139, 169, and 327 asserting claims based on  
4 investments in SRPO, among things. Each of those claims identify a claim based on a promise in  
5 connection with a 7% debt instrument payment owing when Palantir goes public and backend fees  
6 and commissions were to be paid to SRPO. That portion of those claims against SRPO has already  
7 been disallowed since SRPO is not a Receivership Entity. Each of the 6 claims, which have been  
8 redacted to protect personal identifiable information, are attached to the Declaration of Kathy  
9 Bazoian Phelps as Exhibits “1” through “6.”

10 The SRPO Objection states that their claims were somehow “reviewed and validated” by  
11 the former Receiver. The Objection further states that the Receiver listed the claims as “valid  
12 claims” and refers to an “Exhibit 2,” however, no such document was included in the letter  
13 Objection. If the SRPO Investor Group is referring to Exhibit “2” to the Declaration of Kathy  
14 Bazoian Phelps [ECF 481-1] in support of the Motion to Disallow Certain Claims [ECF 481], then  
15 the inclusion of the claims on that list identified that those claims were *objectionable*, not  
16 allowable. To the best of the Receiver’s knowledge, no one has ever advised the SRPO Investor  
17 Group that they have valid claims against the estate. The Receiver, in fact, filed a motion objecting  
18 to those claims within the first few months following her appointment.

19 Of the six SRPO claims, five of them also claim interests in particular shares held by the  
20 estate, and those portions of the claims have been allowed and are not impacted by any prior order  
21 or by the objection to the Plan. The facts relating to these claims are as follows:

- 22 1. The portions of the SRPO claims that related to an unsecured cash claim on account  
23 of a 7% debt instrument owing from SRPO, a non-receivership entity, were  
24 previously disallowed pursuant to the Order Disallowing Certain Claims, entered on  
25 June 27, 2019 [ECF 503]. The Motion to Disallow Certain Claims [ECF No. 481]  
26 offered affected parties an opportunity to object, but none of the SRPO investors did  
27 so.

- 1           2. The Motion to Disallow Certain Claim, and the Declaration of Kathy Bazoian  
2           Phelps filed concurrently therewith [ECF 481-1] specifically identified these very  
3           claims as the subject of objection, and they were each identified in Exhibit “2” to the  
4           Motion with a notation of that the Intended Investment was “7% Debt Instrument  
5           (Palantir”).
- 6           3. Of the six claimants, five of them hold Allowed Claims in Class 4 as set forth in the  
7           Plan, and only the portion of their claims relating to the non-receivership entity,  
8           SRPO, have been disallowed. These six claims are summarized as follows:

Investor I.D. No.	SRPO Disallowed Claim	Allowed Class 4 Claim
53	Yes	No
69	Yes	Yes, Classes 4A, 4J
72	Yes	Yes, Classes 4C, 4J
139	Yes	Yes, Classes 4C, 4J
169	Yes	Yes, Class 4J
327	Yes	Yes, Classes 4A, 4C, 4E, 4G, 4I, 4J

17  
18           The Receiver is unaware of a basis to modify the prior Order of the Court disallowing the  
19           SRPO portion of these claims and, therefore, believes that the Allowed portions of these claims, as  
20           set forth in the Plan is appropriate, but that the unsecured SRPO portion of the claims that have  
21           been disallowed should not participate in the Plan.

22           **B. SRPO Claims are Unsecured Claims in Backend Fees and Carried Interest that**  
23           **are Disallowed**

24           In addition to the fact that a portion of the claims of the SRPO investors have already been  
25           disallowed because they are not claims against the Receivership Entities, the underlying SRPO  
26           portions of the claims themselves are not claims for securities owned by the Receivership Entities.  
27           A review of the proofs of claims attached as Exhibit “1” through “6” reveal separate claims for a  
28           percentage of backend fees and carried interest which has not yet been realized that are supposedly

1 owed to SRPO, and which will not be realized under the terms of the Plan.

2       The Plan sets forth a distribution methodology that does not provide for the funds receiving  
3 backend fees or carried interest, so there would not even be an asset in which the SRPO claims  
4 would have an interest. The business model of SRPO is set forth in the Subscription Booklet and  
5 Term Sheet for SRPO, a copy of which is attached to the Phelps Declaration as Exhibit “7.” The  
6 investment in SRPO would have provided for payment of a percentage of the backend fees and  
7 carried interest owed to fund managers for other investments as follows:

8       The Manager will establish various series (each, a ‘Series’) of Interests (as defined  
9 below) for the purpose of making investments in the right to receive distributions  
10 based upon the profits interests and carried interest (the ‘Profits Interests’) to which  
11 certain limited liability companies that serve as management entities (the  
12 “Underlying Fund Managers’) of various venture capital and/or secondary market  
13 and other investment funds (the “Underlying Funds’) may become entitled, which  
14 Profits Interests in such Underlying Funds relate to the right of the Underlying Fund  
15 Managers to receive distributions related to the disposition by the Underlying Funds  
16 of securities of various leading seed-state, early-state, developmental-stage and  
17 later-stage private companies.

14       The Manager will establish each Series for the purpose of purchasing a right, or the  
15 portion of the right, of the Underlying Fund Managers to the Profits Interests related  
16 to a specific underlying private company. Each Series will remain segregated from  
17 each other Series. The first closing of the Fund will relate to a Series created to  
18 invest in the Underlying Fund Managers’ right to Profits Interests related to the  
19 securities of Palantir, Inc.

18       In other words, if one of the Receivership Entities were to receive backend fees or carried  
19 interest payments in connection with the Palantir investments, then the SRPO investors would be  
20 seeking a return based upon the fees and interests payments paid by the Receivership Entities to  
21 SRPO. Pursuant to the Plan, no fees or interest payments are being allowed, so SRPO would not be  
22 entitled to anything.

23       SRPO has not filed a claim in the receivership in any event so, even if SRPO were  
24 somehow owed backend fees or carried interest from the Receivership Entities, the failure to file a  
25 claim forecloses any relief.

26       Unfortunately, whether because the SRPO Objection seeks a claim based on an investment  
27 in a non- Receivership Entity that have already been disallowed, or because the claims seek  
28

1 payment from backend fees and carried interest that are not allowable in the Plan, the portions of  
2 the SRPO Investor Group's claims seeking claims for SRPO investments are disallowed and it is  
3 not appropriate to include them in the Plan. Nothing in the Plan, however, challenges the SRPO  
4 Investor Group's claims for shares held by the Receivership Entities.

5 **IV. CONCLUSION**

6 Wherefore, the Receiver respectfully requests that the Court approve the Distribution Plan  
7 on a final basis, that the Court approve the form and manner of notice of the Motion, and for all  
8 other appropriate relief.

9  
10 DATED: March 26, 2020

11 By: /s/ Kathy Bazoian Phelps  
12 Kathy Bazoian Phelps, Successor Receiver  
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