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5 *Successor Receiver*

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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

10
11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 v.

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

17 Defendants, and

18 SRA I LLC; SRA II LLC; SRA III
19 LLC; FELIX INVESTMENTS, LLC;
MICHELE J. MAZZOLA; ANNE
20 BIVONA; CLEAR SAILING GROUP
IV LLC; CLEAR SAILING GROUP V
21 LLC,

22 Relief Defendants.
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Case No. 3:16-cv-01386-EMC

**ADMINISTRATIVE MOTION BY
RECEIVER KATHY BAZOIAN PHELPS
PURSUANT TO LOCAL CIVIL RULE 7-11
FOR ORDER MODIFYING THE
DISTRIBUTION PLAN WITH RESPECT TO
CLAIMANT THE ELIV GROUP, LLC**

Date: No Hearing Set
Time: No Hearing Set
Judge: Edward M. Chen

1 Kathy Bazoian Phelps, the successor receiver herein (the “Receiver”) of SRA
 2 Management Associates, LLC, SRA I, LLC, SRA II, LLC, SRA III, LLC, Clear Sailing Group
 3 IV, LLC, Clear Sailing Group V, LLC, Felix Multi-Opportunity Fund I, LLC, Felix Multi-
 4 Opportunity Fund II, LLC, Felix Management Associates, LLC, NYPA Fund I, LLC, NYPA
 5 Fund II, LLC, NYPA Management Associates, LLC and Solis Associates Fund LLC
 6 (collectively, the “Receivership Entities” and their estates the “Receivership Estate”), hereby files
 7 this Motion for Order Modifying the Distribution Plan with respect to Claimant The ELIV Group,
 8 LLC (the “Motion”).¹

9 **I. Introduction**

10 Due to the request by Claimant The ELIV Group, LLC (“ELIV” or the “Claimant”), an
 11 investor in this proceeding, to receive its distribution in the form of cash in lieu of securities, the
 12 Receiver seeks a narrow and limited modification to the Distribution Plan with respect to ELIV’s
 13 claim.² ELIV was the investor in the entities now in Receivership. Separately, the SEC had
 14 brought an action against ELIV alleging fraud, and ELIV’s principal was charged and convicted
 15 in a criminal proceeding by the United States in the Northern District of New York. (Langan
 16 Decl. ¶¶ 2-3.) An order of restitution was entered in that case (Langan Decl. ¶ 3), and the United
 17 States Attorney’s Office for the Northern District of New York (the “NDNY USAO”) submitted a
 18 proof of claim in this case, such that any recovery will be used to satisfy the outstanding
 19 restitution obligation on behalf of the ELIV victims. (Langan Decl. ¶¶ 6-8.) Although the
 20 Distribution Plan approved the Court calls for the distribution of securities to claimants, the
 21 NDNY USAO has advised the Receiver that it is unable to receive securities into the restitution
 22 fund, and has therefore requested that the Receiver liquidate those securities that would otherwise
 23 be distributed to Claimant and distribute cash instead. (Langan Decl. ¶ 11.) Provided that such
 24 request does not have any adverse impact on the estate, the Receiver believes that distribution in

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 26 ¹ The Receiver will serve this Motion and supporting documents on all interested parties pursuant
 to Civil Local Rule 66-6, and will post the papers on the Receivership website. Any interested party
 has four days to file any opposition to or support for this motion. *See* Civil L.R. 7-11.

27 ² Attached to this Motion is a declaration from Mary Langan, Assistant United States Attorney for
 28 the Northern District of New York (the “Langan Decl.”), setting forth the basis of the request
 relating to the claim of The ELIV Group.

1 the form of cash to ELIV is appropriate and accordingly requests authority from this Court to
2 liquidate the securities that would be distributed to Claimant and distribute the net proceeds to
3 Claimant.

4 The Receiver has conferred with counsel for the Securities and Exchange Commission,
5 which does not oppose the Motion. The NDNY USAO, on behalf of Claimant, has agreed to and
6 specifically requests this course of action, which does not impact any of the other claimants in this
7 action. (*See generally* Langan Decl.) A stipulation with all parties was deemed impractical given,
8 among other things, the entry of judgment against the defendants and pending bankruptcy of
9 defendant John Bivona. (L.R. 7-11 1(a).)

10 **II. Background**

11 The Court approved the Plan in this case by Order entered on May 25, 2020 [Dkt No.
12 613]. Pursuant to the Plan, the Receiver is to distribute securities to claimants for those shares
13 that are publicly traded and free of restrictions, in addition to the other requirements of the Plan
14 such as the creation of the Plan Fund and Tax Holding Account. On July 13, 2020, the Receiver
15 filed a motion for an order approving sale and distribution of publicly traded securities pursuant to
16 the Distribution Plan [Dkt No. 617], which the Court approved on July 20, 2020 [Dkt No. 619].
17 Pursuant to that order, the Receiver was to distribute certain securities to Claimant, and requested
18 that Claimant provide account information for a brokerage account in order to transfer the
19 securities from Receiver's account to the Claimant's account. On July 13, 2020, the NDNY
20 USAO provided the Receiver with certain account information, but that account was a current
21 funds account that cannot accept securities via the Depository Trust & Clearing Corporation
22 system. On July 24, 2020, counsel for the Receiver informed the NDNY USAO that the Receiver
23 could only distribute securities to a brokerage account that could accept securities. On July 30,
24 2020, the NDNY USAO informed the Receiver that it could not accept securities and that it
25 would seek further instructions from the Department of Justice.

26 On August 25, 2020, the NDNY USAO informed the Receiver that it had consulted with
27 the Department of Justice, and requested that the Receiver sell the shares that would otherwise be
28 distributed to Claimant, such that the proceeds could be distributed to the NDNY USAO and

1 applied to the outstanding restitution obligation of Claimant. The Receiver informed the NDNY
2 USAO that the instant motion would be necessary as it would be a modification of the
3 Distribution Plan with respect to Claimant. The NDNY USAO prepared the attached Langan
4 Declaration, and the Receiver agreed to file the instant motion.

5 **III. Proposed Course of Action and Recommendation**

6 The Receiver is satisfied, based on the representations from the United States Department
7 of Justice, that the distribution of securities to Claimant pursuant to the Plan is impractical.
8 Although the Distribution Plan requires that Class 4 Investor Claims be satisfied with the
9 distribution of securities (Distribution Plan at 18-19), it does not account for the possibility that
10 the distribution of securities would be impractical for any of the claimants. The Receiver agrees
11 with the NDNY USAO and the Department of Justice that the only practical way to ensure that
12 Claimant receives a distribution on its Class 4 Investor Claim on an equitable basis to other Class
13 4 claimants is for the Receiver to sell the securities to which Claimant is otherwise entitled and
14 distribute the proceeds to Claimant.

15 The estate will be charged commissions and fees for the sale of such securities and will
16 endeavor to minimize such fees.³ The Receiver does not believe it is equitable to the estate to
17 allocate such commissions and fees to the estate generally, and therefore proposes to reduce the
18 cash distribution to Claimant by such commissions and fees. The Receiver may also determine
19 that, based on the tax consequences of such sale due to the change in the price of securities, that
20 additional taxes may be owing as a result of this proposed course of action. In such an instance,
21 the Receiver requests authority to further withhold any additional applicable taxes and to place
22 such funds in the Tax Withholding Account.

23 The Receiver has not received any other requests from investors to receive cash in lieu of
24 securities, and therefore this request remains limited to Claimant. Due the unusual circumstances

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26 ³ For future distributions, the Receiver will attempt to sell securities that would be distributed to
27 Claimant in the same transaction as securities to sell for the Tax Holding Account, especially if the
28 Receiver is able to negotiate a flat fee. That cannot be done for the securities in the first interim
distribution, as the sale of securities for the Tax Holding Account occurred before the Receiver was
requested to distribute cash in lieu of securities.

1 presented by this situation, the Receiver recommends that for Claimant only, the Receiver be
2 permitted to sell the securities that would be distributed to claimant in any distribution approved
3 by this Court and to distribute the cash proceeds, net of any applicable commissions and fees and
4 any additional amount withheld to pay applicable taxes, to Claimant on account of its Class 4
5 Investor Claim. The Receiver requests that this relief also apply to any future distributions
6 approved by this Court, including any distributions relating to Palantir Technologies Inc. or the
7 other pre-IPO shares if and when those securities may be distributed under the terms of the Plan.

8 **IV. Conclusion**

9 The Receiver respectfully requests that the Court modify the Distribution Plan with respect
10 to Claimant as set forth in this Motion, and requests all other appropriate relief.

11 DATED: September 9, 2020

By: /s/ Kathy Bazoian Phelps
Kathy Bazoian Phelps
Successor Receiver

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