KATHY BAZOIAN PHELPS (State Bar No. 155564)
kphelps@diamondmccarthy.com
DIAMOND MCCARTHY LLP
1999 Avenue of the Stars, Suite 1100
Los Angeles, California 90067-4402
Telephone: (310) 651-2997

Successor Receiver

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. JOHN V. BIVONA; SADDLE RIVER ADVISORS, LLC; SRA MANAGEMENT ASSOCIATES, 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 **MOTION BY RECEIVER KATHY BAZOIAN PHELPS FOR ORDER:** **(1) APPROVING SALE AND DISTRIBUTION OF PALANTIR SHARES PURSUANT TO DISTRIBUTION PLAN; AND** **(2) FOR MODIFICATION OF THE DISTRIBUTION PLAN** Date: February 25, 2021 Time: 1:30 p.m. Judge: Edward M. Chen

Kathy Bazoian Phelps, the successor receiver herein (the "Receiver") of SRA Management Associates, LLC, SRA I, LLC, SRA II, LLC, SRA III, LLC, SRA Management Associates, Clear Sailing Group IV, LLC, Clear Sailing Group V, LLC, Felix Multi-Opportunity Fund I, LLC, Felix Multi-Opportunity Fund II, LLC, Felix Management Associates, LLC, NYPA Fund I, LLC, NYPA Fund II, LLC, NYPA Management Associates, LLC and Solis Associates Fund LLC (collectively, the "Receivership Entities" and their estates the "Receivership Estate"), hereby files this Motion for Order (1) Approving Sale and Distribution of Palantir Shares Pursuant to Distribution Plan; and (2) for Modification of the Distribution Plan (the "Motion").[1]

I. INTRODUCTION

The Receiver seeks authority by this Motion to: (1) make a distribution of shares of Palantir Technologies, Inc. ("Palantir") held by the Receivership to claimants; (2) sell additional Palantir shares to pay the taxes associated with the distribution and pay reasonable commissions; (3) set aside 5-15% of the Palantir shares pursuant to the Court approved Distribution Plan (the "Plan") in this case and to modify the Plan to allow the Receiver to liquidate those shares, and to retain the net proceeds after taxes and commission as an administrative reserve for potential unknown tax liability in connection with the Palantir distribution; and (4) pay all taxes arising from the sale and distribution as may be required by the federal or state taxing authorities.

On February 2, 2021, Palantir announced that it would release its fourth quarter 2020 earnings on February 16, 2021. As such, on February 18, 2021, the Receivership's 4,773,254 shares in Palantir will become unrestricted. At such time, those shares will be available for acquisition by the Receivership from the Palantir transfer agent to deposit in the Receivership's brokerage account,

[1] The Receiver requested shortened time for notice of this Motion due to the imminent expiration of the lockup period of Palantir shares, and the Court agreed set to the hearing date of February 25, 2021 at 1:30 p.m. and the response deadline of February 22, 2021. The Notice of Motion containing the hearing and response dates, the Motion, and supporting documents will be served on all interested parties pursuant to Civil Local Rule 66-6 and will be posted the papers on the Receivership website. The Receiver has conferred with counsel for the Securities and Exchange Commission and the Investor Advisory Committee, who each do not oppose the Motion, and with counsel for Progresso Ventures LLC who does not express any comment or opposition in response. A stipulation with all parties was deemed impractical given, among other things, the entry of judgment against the defendants and pending bankruptcy of defendant John Bivona. (L.R. 7-11 1(a)).

a process that can begin on February 18, 2021, but that may take a few weeks.

Pursuant to the Plan, and as set forth in detail below, the Receiver intends to make a distribution of most of the Palantir shares (after sales for taxes and commissions and a retention of a reserve) to Class 4 Palantir claimants, sell shares sufficient to fund the Tax Holding Account on account of that distribution (for known tax liabilities), and – in lieu of holding an administrative stock reserve – sell the reserved shares to create an administrative cash reserve until the final tax liabilities of the Receivership may be ascertained (i.e., for potential tax liabilities). The Receiver has consulted with her outside financial advisers who advise that, as a matter of precaution, the amount of the additional cash reserve from the reserved shares should be at least $10.2 million; however, the exact number of shares to be sold cannot be known until the day of the sale and the price of the stock on that date. The Receiver believes that the number of shares to be set aside for this purpose will likely range between 5% and 15% of the shares, which will allow for a distribution of 85% to 95% of the Palantir shares, less the number of shares that is necessary to sell to fund the Tax Holding Account and commissions with respect to known tax liabilities created as a result of this distribution. An accounting of the amount to be distributed and hypothetical distribution schedules using three hypothetical stock prices are attached to the Receiver's Declaration as Exhibits "1" – "3." These schedules are estimates only, and the actual number of shares to be distributed will vary from these schedules as the actual distributions will be tied to the actual sale price of the shares at the time of the sale and distribution.

The Receiver believes it is prudent to hold back between 5% and 15% of the remaining Palantir holdings (238,663 to 715,988 shares), to fund a new administrative cash reserve for Palantir (the "Palantir Administrative Reserve") in lieu of the Administrative Stock Reserve originally contemplated under the Plan. The Receiver proposes that such reserve, which is intended for potential tax liabilities that may not be assessed for years from now, be held in a segregated account. If there are remaining funds after any additional, but not yet assessed, tax liabilities with respect to Palantir are satisfied, and the tax liability of the Receivership has become final, then the Receiver proposes to distribute that account *pro rata* to Palantir Class 4 Claimants. This immediate liquidation of the administrative stock reserve is how the Receiver's proposal differs from the Plan approved by the Court. Such liquidation protects the administrative reserve and the Estate from future decreases in the price of Palantir stock, and as such allows the Receiver to contemplate an administrative reserve of 5-15% instead of the 25-35% originally contemplated if the Receiver were to retain stock instead of cash. Therefore, this proposed change allows Palantir Class 4 Claimants to receive more shares in this distribution now, while retaining the ability to receive the value of the administrative reserve if it is not needed to satisfy tax liabilities assessed at a later date.

The Receiver believes that this modification to the Plan is necessary because of the procedural hurdles and time delays attendant to closing a receivership case. The applicable statute of limitation period to determine tax liability for federal income taxes is generally three years. Internal Revenue Code § 6501(d) provides an 18-month prompt assessment of federal tax liabilities for a corporation in liquidation and a decedent or decedent's estate. This 18-month prompt assessment also applies to a qualified settlement fund. See Treasury Regulation § 1.468B-2. The final determination of any tax obligations for the estate will be critical to the closure of the case, and the Receiver will need to ensure that the estate holds sufficient funds to pay for an additional tax liability that might be assessed prior to the close of the assessment period. Since a receiver may be held personally liable for unpaid federal income taxes pursuant to 31 U.S.C. § 3713, it is imperative that the estate holds a reserve to fund any unanticipated tax liability. The Receiver has worked with her accountants and counsel to try to estimate any potential but unanticipated tax liabilities, which obviously cannot be done with absolute certainty, to determine an adequate reserve pending the filing of the Receivership's 2021 return and the 18-month prompt assessment period. The figures set forth in this Motion represent the Receiver's business judgment of how much is appropriate to distribute and how much is appropriate to reserve to adequately pay current tax liability and to reserve for potential unknown tax liability

II. THE RECEIVER'S PROPOSED COURSE OF ACTION

A. Distribution and Sale of Palantir Pursuant to the Plan

1. Prior Sale of Palantir Shares to Fund Plan Fund

The Court approved the Plan in this case by Order entered on May 25, 2020 [Dkt. No. 613]. Pursuant to the Plan, the Receiver is to liquidate a portion of the publicly traded securities to fund the Plan Fund and the Tax Holding Account and to sell surplus shares. The Plan also provides that the Receiver may make a distribution, in her discretion, of a portion of the Plan Fund and the remaining securities to the creditors and investors with allowed claims, respectively. The Plan provides that the Receiver may hold an Administrative Cash Reserve and an Administrative Stock Reserve to protect the estate and ensure that sufficient assets remain to satisfy all administrative and tax claims.

Prior to September 2020, the Receiver held 5,740,249 shares of Palantir. On September 4, 2020, the Receiver moved the Court for authority to sign a confidential Lock-Up Agreement sent to it by Palantir – which locked up 80% of the Receiver's shares in exchange for agreeing that remaining 20% would be freely tradeable – and to sell sufficient shares to fund the Plan Fund [Dkt. No. 622]. On September 9, 2020, this Court granted the motion [Dkt. No. 626], and the Receiver executed the Lock-Up Agreement. Palantir began public trading on September 30, 2020, and the Receiver received the estate's 1,148,049 unrestricted shares within the following few days. The total amount contributed to the Plan Fund for the Palantir investments was $9,765,512 (the "Palantir Plan Fund Amount"), and the Receiver sold 966,995 shares at a total average price of $10.2161, for gross proceeds of $9,878,904, less a reasonable commission of $24,794. The Receiver calculated the gain from the sale of the shares based on valuation information from Oxis Capital and reserved $88,598 for the Tax Holding Account as a result. The Receiver contributed the remaining $9,765,512 to the Plan Fund pursuant to the Plan. Soon thereafter, the Receiver used the bulk of that contribution to make an 80% distribution to Class 3 Claimants (Dkt. No. 631).

2. Proposed Distribution of Palantir Shares

The lock-up period for the balance of Palantir shares is set to expire on February 18, 2021, which means that the Receiver will be able on that date to begin the process of transferring the remaining 4,592,200 shares to the Receivership's brokerage account. That process is far from instantaneous and can take days or even weeks before the shares have been transferred and are available to be disposed of in the Receiver's brokerage account. The Receiver must then sign a transfer form with a wet signature for each of more than 200 investors, and her broker must make the transfers using DTC. This process is time-consuming and labor-intensive, and as such, the

Receiver cautions the Court and claimants that distribution will not be instantaneous upon the expiry of the lock-up period. Nevertheless, the Receiver is optimistic that, barring any unforeseen difficulties, she will be able to largely distribute the portion of the Palantir shares for this distribution within the month or so following delivery of the unrestricted shares to the Receiver's brokerage account. The Receiver has been gathering account information from Palantir claimants for several months. To the extent claimants have not provided complete account information to the Receiver, she will be unable to transfer their shares to them. In that regard, the Receiver requests that all Palantir claimants provide their complete brokerage account to the Receiver no later than **February 26, 2021** if they have not already done so.

The number of shares the Receiver will distribute to each claimant depends on the price of Palantir stock at the time of the sale for the Tax Holding Account in connection with the distribution to be made. Therefore, the Receiver will not know the precise number of shares that will be distributed to each claimant until that sale is made on the open market. Exhibits "1," "2," and "3" to the Receiver's Declaration contains three detailed hypothetical schedules of the investors asserting a claim for Palantir shares at three different prices: $21, $28, and $35 (Palantir closed at $27.84 as of February 16, 2021, after earnings were released). Those schedules reflect the total number of shares that would be distributed to each claimant under each of those scenarios, as well as the total value of the distribution in each scenario, and assume an administrative reserve of 5% to 15%, depending on the price.

3. Analysis of Returns to Palantir Investors

The Receiver has been tracking the value returned to investors based upon the value of the stock distributed relative to the gross amount they originally invested. This distribution to Palantir will return value to the Palantir investors in excess of the amount of the gross amount of their investments, estimated as follows:

Hypothetical Price / Admin Reserve	Initial Gross Investment	Value of Distribution	Repayment
$21 / 14%	$32,551,705	$66,934,581	206%
$28 / 11%	$32,551,705	$86,316,832	265%
$35 / 9%	$32,551,705	$105,685,895	325%

In other words, Palantir investors will have received greater than 200% of the gross amount that they invested if the price of Palantir holds at or above about $20 per share. The Receiver has compared the percentage returns for the other groups of investors and has attached a chart to her declaration as Exhibit "4." Those investor groups who received more than 100% repayments on their gross investment as calculated by the value returned to them in the form of stock will not hold a Class 5 deficiency claim, where those who have not received 100% repayments will hold deficiency claims.

4. Timing of Sale of Securities

The Receiver proposes to sell the securities necessary to fund the Tax Holding Account and administrative reserve on the open market in advance of making the distribution, which will fix the amount available to pay taxes.[2] If the price of the stock is significantly higher or lower at the time of distribution from the date of the sale for the Tax Holding Account, the Receiver may need to make adjustments. If the distribution price is substantially higher due to a stock price increase in the time lag from the sale to the distribution, the Receiver may be required to use the Palantir Administrative Reserve to fund the Tax Holding Account. If the price falls prior to distribution, the Receiver will separately account for the proceeds held on account of extra shares sold for taxes and will apply those dollars, subject to the Equitable Adjustment provisions in the Plan, to the later cash distribution to Palantir investors to reduce the tax burden on the Palantir shares due to any excess sale in the first interim distribution.

5. Payment of Estimated Taxes

At the closing price of $27.84 as of February 16, 2021, with an administrative reserve of 11%, the Receiver would need to sell 1,161,751 shares for the Tax Holding Account, but the Receiver will update her calculations based on the market conditions at the time of the sale. Because

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[2] After conferring with the IAC, the Receiver intends to sell shares for the Tax Holding Account as soon as possible once the Palantir share are received into her brokerage account (and following approval of this Motion), at the then market rate, and to thereafter distribute shares as expeditiously as possible to try to avoid any significant variance in the price between the date of sale and the dates of distribution. The dates of distribution may span several weeks or longer depending on how quickly Wells Fargo Bank processes the transfers and whether investors have provided complete and accurate account information for the transfers.

this sale and distribution is expected to create a substantial tax liability for the receivership, the Receiver has consulted with her tax advisors, and the Receiver proposes to pay up to 95% of the total net proceeds for the Tax Holding Account as a result of this distribution as an estimated payment to the Internal Revenue Service (IRS) and California Franchise Tax Board (FTB), in order to avoid any possible underpayment penalties. The Receiver expects the vast majority of the taxable events with respect to Palantir to occur in March 2021, which the Receiver is advised would necessitate estimated tax payments sometime in the Second Quarter of 2021.

B. Modification of Plan to Create Palantir Administrative Reserve

The Plan currently allows for the Receiver to set aside a percentage of the stock into an administrative stock reserve in order to pay any tax liabilities that might be assessed at a later time, but are not expected at present. If such liabilities never arise (and the Receiver has every reason to believe that her estimates of the Receivership's tax liabilities are correct), the Plan allows the Receiver to make a subsequent distribution of that stock to claimants. But, because such reserve would be held as stock and the final tax liability of the receivership could take ***years*** to determine, the value of the administrative stock reserve would be exposed to any price fluctuations in the underlying stock. Under such conditions, the Receiver would propose an administrative reserve of between 25% and 35%, leaving fewer shares to distribute. In such scenario, the Receiver would need to wait 3 years following the filing of her 2020 tax return (to be filed in the spring of 2021) for the statute to run on assessment of those taxes. She thereafter would be able to distribute the remaining Palantir shares and would then file a final tax return with an additional 18 month prompt assessment period running from that date before she could release the administrative cash reserve in the estate. The Receiver does not believe that those time delays are necessary or appropriate.

The Receiver believes that it will be more cost and time efficient to distribute more shares to Claimants now instead of holding them as an administrative reserve and to sell the stock reserve now to fix the price and the tax liability. Because the price of Palantir has risen substantially since the direct listing in 2020, the Receiver can propose a far smaller administrative reserve of 5% to 15% (but likely closer to 11-12% at current price levels), so long as the Receiver may liquidate that reserve and therefore not be exposed to price fluctuations in Palantir over the upcoming years.

Therefore, the Receiver proposes a small modification to the Plan that will allow the Receiver to hold the administrative reserve for Palantir as cash instead of stock.

In order to generate the cash for the new Palantir Administrative Reserve, the Receiver must sell the shares set aside for it, the proceeds of which shall be used to (1) fund the administrative reserve; (2) pay any known tax liabilities as a result of the sale of stock for the administrative reserve;[3] and (3) pay any associated commissions. The Receiver will work with her advisers to set the exact percentage at the time of distribution, but in no event will such percentage be higher than 15% or lower than 5%. Once the known tax liabilities and commissions are paid, the Receiver proposes to set the net amount aside in a new segregated Palantir Administrative Reserve account.

Once the Receivership's final tax liabilities are determined, the Receiver proposes that she be authorized to use the funds in the Palantir Administrative Reserve to satisfy additional tax liabilities with respect to Palantir, if any. The Receiver does not expect there to be any such liabilities but believes it necessary to be sufficiently reserved out of an abundance of caution. If any amount remains in the Palantir Administrative Reserve after the final tax liabilities of the Receivership are determined, the Receiver proposes to distribute those amounts to Class 4 Palantir Claimants as cash, *pro rata*, based on their Allowed Claims. Any such distribution schedule would be submitted to the Court for approval at that time.

III. THE RECEIVER'S PROPOSED COURSE OF ACTION IS APPROPRIATE AND IN THE BEST INTERESTS OF THE RECEIVERSHIP

The Plan provides in Section VII.A.I that the Receiver is to sell securities to create the Plan Fund and Tax Holding Account. After the shares reserved for Palantir Administrative Reserve, there will around 3 million shares (the precise number depending on the price) remaining to distribute to investors. The Receiver also recognizes that the number of shares for the Tax Holding Account is substantial, but upon consultation with tax advisers believes it is necessary to not only make that sale but also to make a substantial payment to the IRS and FTB in the Second Quarter of 2021, in order

[3] The Receiver would always have incurred the tax liability at some point; it was merely a question of when. Indeed, by selling now, the Receivership is also protected against future unfavorable changes in the tax law and even larger increases in the taxable gain.

to avoid any underpayment penalties or interest.

As such, the Allowed Shares for each investor will be reduced proportionally by: (1) the sale for the Plan Fund that was completed last year; (2) the number of shares in the Palantir Administrative Reserve; and (3) the number of shares sold to fund the Tax Holding Account and commissions on account of this distribution. The remaining Allowed Shares are, in the Receiver's judgment, ripe for distribution to claimants and the Receiver requests permission to do so. Barring any large, unexpected decrease in the share price, the value of this distribution will exceed the original investment for each claimant, eliminating any deficiency claim for the Palantir investors, not counting any future distribution of the Palantir Administrative Reserve.

Under the current Plan, the Receiver is permitted to retain an Administrative Stock Reserve. The conversion of the Administrative Stock Reserve to the Palantir Administrative Reserve is in the best interests of the Receivership because it allows the Receiver to be fully protected against any tax liabilities not yet assessed, without the risk of any future decline in the stock price of Palantir. It is also in the best interests of Class 4 Palantir Claimants, because it allows the Receiver to set a much lower percentage for the administrative reserve, therefore allowing more shares to be distributed to Claimants in this distribution. The Receiver estimates that claimants will receive 20-30% more shares in this distribution as a result of the lower administrative reserve, the exact number depending on the price at the time of distribution. And because the account will be segregated, the Receiver will still be able to deliver any remaining value of the Palantir Administrative Reserve to claimants. Moreover, because the entirety of the Receivership's position in Palantir will be disposed as a result of the modification, the Receivership will not incur the substantial administrative overhead that it would have incurred in making a second distribution of Palantir shares, potentially years from now. As such, using a cash administrative reserve for Palantir provides both the Receivership and claimants with more certainty and may allow for a speedier and more efficient conclusion to the Receivership.

IV. CONCLUSION

The Receiver respectfully requests that the Court grant the Motion and authorize the Receiver to (1) make a distribution of shares of Palantir held by the Receivership to claimants, pursuant to the Plan; (2) sell additional Palantir shares to pay the taxes associated with the distribution and to pay associated commissions, pursuant to the Plan; (3) create a Palantir Administrative Reserve using between 5% and 15% of the remaining Palantir holdings and to liquidate that reserve, pay associated taxes and commissions, and place the balance in a segregated account, as a modification to the Plan; and (4) pay estimated taxes as may be required by the federal or state taxing authorities. The Receiver requests all other appropriate relief.

DATED: February 17, 2021

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