

1 KATHY BAZOIAN PHELPS (State Bar No. 155564)
2 *kphelps@diamondmccarthy.com*
3 DIAMOND MCCARTHY LLP
4 1999 Avenue of the Stars, Suite 1100
5 Los Angeles, California 90067-4402
6 Telephone: (310) 651-2997

7 *Successor Receiver*

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

11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 v.

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

20 Defendants, and

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

27 Relief Defendants.

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

**ADMINISTRATIVE MOTION BY
RECEIVER KATHY BAZOIAN PHELPS
PURSUANT TO LOCAL CIVIL RULE 7-11
FOR ORDER APPROVING
EMPLOYMENT OF:**

- 1 (1) **DIAMOND McCARTHY LLP, AS
GENERAL COUNSEL;**
- 2 (2) **GROBSTEIN TEEPLE LLC AS
ACCOUNTANTS; AND**
- 3 (3) **STRETTO AS CLAIMS AGENT**

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

28 **I. Introduction and Basis for the Motion**

On October 11, 2016, this Court entered an Order appointing Sherwood Partners Inc. (“Sherwood”) as the receiver in this case. On February 28, 2019, the Court entered its Revised Order Appointing Receiver (the “Receiver Order”) (Doc. No. 469) and appointed Kathy Bazoian Phelps as the replacement receiver (the “Receiver”). The Receiver Order authorizes the Receiver to retain professionals, including JND Corporate Restructuring, now known as Stretto, Alan

1 Kadish and Archer & Greiner as local counsel in New York, and a court-approved law firm and
2 accounting firm. The Receiver hereby moves the Court for an Order approving her employment
3 of (1) Diamond McCarthy LLP (“Diamond McCarthy”) as her general counsel; (2) Grobstein
4 Teeple, LLC (“Grobstein Teeple”) as her accountants; and (3) Stretto as her claims agent.

5 The Receiver has conferred with counsel for the Securities and Exchange Commission, for
6 the SRA Investor Group and for Progresso Ventures, and is advised that they do not oppose the
7 Motion. A stipulation with all parties was deemed impractical given, among other things, the entry
8 of judgment against the defendants and pending bankruptcy of defendant John Bivona. (L.R. 7-11
9 1(a)).

10 The Receiver has determined that, in order to perform her duties and obligations under the
11 Receiver Order, she requires the assistance of counsel and an accountant, and limited services of a
12 claims agent. The Receiver requests that this Court approve her employment and compensation of
13 Diamond McCarthy as her general counsel and as counsel to handle matters pending in New York
14 (Diamond McCarthy has a New York office),¹ Grobstein Teeple as her accountants, and Stretto
15 for the limited purposes set forth herein. This administrative motion is supported by the
16 Declarations of Kathy Bazoian Phelps, Lesley Anne Hawes and Howard B. Grobstein.

17 **II. Receiver’s Need for Counsel**

18 The Receiver’s duties and responsibilities under the Receiver Order depend significantly
19 upon her ability to manage and liquidate securities and to implement a complex distribution plan.
20 The proposed plan involves different classes of creditors, and the Receiver will need the
21 assistance of counsel to evaluate and file claims objections where necessary, advise her regarding
22 the management of the Solis Fund Associates LLC, evaluate complexities in types of claims,
23 document settlements, enforce forward contracts, assist with resolution of issues with EAC, and
24 bring litigation as may be necessary in connection with obtaining the return of stock to the estate,
25 among other legal issues as may arise.

26 Diamond McCarthy began assisting the Receiver in the weeks leading up to her

27 ¹ As reflected on the face page of this pleading, the Receiver is a member of Diamond McCarthy.
28

1 appointment so that she could formulate opinions and comments on the competing distribution
2 plans, among other things. As such, she seeks to employ Diamond McCarthy as her general
3 counsel, effective as of February 1, 2019. She believes that Diamond McCarthy's employment is
4 appropriate and in the best interests of the receivership for several reasons. Upon learning about
5 the case, it was her judgment that she needed to act quickly and seek the assistance of counsel to
6 deal with the immediate legal issues arising in connection with the competing distribution plans.
7 Diamond McCarthy acted immediately without waiting until its employment was confirmed,
8 understanding and assuming the attendant risks.

9 Attached to the Declaration of Lesley Hawes as Exhibit "1" is the resume of Diamond
10 McCarthy and biographies of the attorneys anticipated to perform the primary legal services on
11 this matter. Diamond McCarthy has agreed to reduce its rates as set forth in the Receiver's initial
12 proposal filed with the Court and will charge a maximum hourly rate for legal services of \$425.00
13 per hour. Services by Lesley Anne Hawes, a partner whose regular hourly rate is \$595, will be
14 charged at a discounted rate of \$425, the rate for services by Karen K. Diep, with a regular hourly
15 rate of \$295, will be discounted to \$265 per hour. Rates charged by two paralegals with primary
16 responsibility in the case will also be discounted as set forth in the Receiver's proposal and the
17 Hawes declaration. Hourly rates for other partners or associates at the firm who may perform
18 work on the matter will be discounted by 20% from their regular rates listed in Exhibit "2." At
19 present, the Receiver cannot yet determine the extent of the legal services that will be required but
20 anticipates limiting the use of counsel to only legal matters that require input from counsel.

21 The qualifications of Diamond McCarthy to serve as the Receiver's counsel are detailed in
22 the supporting Hawes Declaration. In summary, Ms. Hawes is a partner at Diamond McCarthy
23 with almost 18 years of experience representing receivers and trustees - including equity
24 receivers. Other members of Diamond McCarthy have experience in receivership and trustee
25 representation as well as securities matters, and Diamond McCarthy has attorneys admitted in
26 New York who will be able to handle issues arising there as needed in during the case.

27 As is appropriate in equity receivership matters, and in order to help minimize the cost to
28 the estate of the Receivership Entities, Diamond McCarthy anticipates making extensive use,

1 where appropriate, of junior associates and paralegals.

2 **III. Need for Accountants**

3 The Receiver requires the assistance of accountants to assist with tax issues that may arise
4 in the case and to prepare tax returns. There are numerous affiliated entities, each of which may
5 require tax returns. Additionally, some taxing agencies have served notices of penalties due that
6 must be addressed. The anticipated sale of securities may also give rise to tax consequences, and
7 the Receiver requires the assistance of an accountant to advise her relative to those sales and any
8 resulting tax consequences. Finally, the Receiver has been directed to manage Solis Associated
9 Fund, a non-receivership entity, and the Receiver will require tax advice relative to that Fund.

10 Grobstein Teeple is an accounting firm that specializes in fiduciary work. The firm has
11 vast experience in handling tax issues for receivers and bankruptcy trustees and is well-equipped
12 to handle the complex tax issues that may arise in this case due to significant tax penalties and the
13 sale and transfer of securities. The Receiver is mindful that the prior receiver had engaged a
14 different firm to serve as accountants and that another firm prepared 2015 and 2016 tax returns
15 dealing with the pre-receivership time periods. The Receiver has also been advised that notices of
16 tax penalties have been issued. Given the allegations and findings of fraud in this case, the
17 Receiver believes that subordination of pre-receivership tax claims and penalties may be
18 appropriate if the taxing agencies do not otherwise agree to waive the claims, and the Receiver
19 seeks the assistance of an accounting firm with specific experience in handling fraud cases run by
20 a fiduciary. Grobstein Teeple is well qualified to serve as the Receiver's forensic accountant and
21 has very deep experience in this regard. In addition to familiarity with fiduciary tax issues, the
22 firm also has substantial experience in tax accounting so will be able to assist with tax
23 calculations in connection to the sales of stock to be made by the Receiver under the terms of the
24 proposed distribution plan. Grobstein Teeple has already participated in a call with the Receiver
25 and the IRS regarding treatment of the pre-receivership tax claims.

26 Grobstein Teeple has agreed to discount its normal hourly rates by 20% for this
27 engagement. Attached to the Declaration of Howard Grobstein as Exhibit "3" are the Biographies
28 of Howard Grobstein and Kermith Boffill, as well as a resume of the firm. The firm's regular .

1 hourly rates are set forth in Exhibit “4,” which will be reduced by 20% for this case

2 **IV. Need for Claims Agent**

3 Although much of the claims work has been completed in this case, the Receiver
4 anticipates utilizing a claims agent to send out large mailings and to mail out disbursements in the
5 case. Otherwise, the Receiver anticipates tracking the claims in-house and has requested turnover
6 over of all of the claims and schedules prepared by JND.

7 JND has recently been acquired by Stretto and, as such, the Receiver seeks to employ
8 Stretto as the claims agent going forward. Stretto has agreed to honor the same rates in this case
9 previously approved by the Court under the prior Receiver. A schedule of those rates is attached
10 hereto as Exhibit “5.” The Receiver has negotiated a rate of \$350 for the transition of the
11 documents and records in JND’s possession to the Receiver, which the Receiver requests
12 authority to pay. JND’s actual charges for the transition time exceeded \$3,500. The Receiver does
13 not anticipate any further substantial time being incurred by Stretto other than time and costs
14 spent for sending out notices and disbursements as may be requested by the Receiver which will
15 be charged at the rates set forth in Exhibit “5.”

16 **V. The Court Has Broad Supervisory Authority to Approve Employment of the
17 Receiver’s Professionals**

18 The Court has broad powers to determine what is necessary for the administration and
19 supervision of an equity receivership. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738
20 (9th Cir. 2005) (“A district court’s power to supervise an equity receivership and to determine the
21 appropriate action to be taken in the administration of the receivership is extremely broad”);
22 *CFTC v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) (“This court affords ‘broad
23 deference’ to the [district] court’s supervisory role”).

24 **VI. Conclusion**

25 For these reasons, the Receiver respectfully requests that the Court approve her
26 employment of Diamond McCarthy as her general counsel, Grobstein Teeple as her accountants,
27 and Stretto as claims administrator. The Receiver requests all other appropriate relief.

28 DATED: March 18, 2019

By: /s/ Kathy Bazoian Phelps
Kathy Bazoian Phelps,
5 Receiver

RECEIVER’S ADMINISTRATIVE MOTION TO
EMPLOY PROFESSIONALS