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 10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN FRANCISCO DIVISION**

13 SECURITIES AND EXCHANGE
14 COMMISSION,

15 Plaintiff,

16 vs.

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

19 Defendants, and

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

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

**THE SRA FUNDS INVESTOR GROUP'S
ADMINISTRATIVE MOTION RE
RECEIVER'S MOTION TO EMPLOY
TAX ADVISOR AND SECURITIES
COUNSEL**

Courtroom: 5
Judge: Hon. Edward M. Chen

28 THE SRA FUNDS INVESTOR GROUP'S ADMINISTRATIVE MOTION RE RECEIVER'S
MOTION TO EMPLOY TAX ADVISOR AND SECURITIES COUNSEL

INTRODUCTION

Pursuant to Civil Local Rule 7-11, the SRA Funds Investor Group (“Investor Group”) respectfully submits this motion for administrative relief to: (1) request an order of the Court compelling the Receiver, Kathy Bazoian Phelps, to immediately turn over to counsel for the Investor Group (“Pritzker Levine”) and lodge with the Court any written materials provided by her tax advisor and securities counsel that form the basis for Ms. Phelps’ December 16, 2019 supplemental filing (Dkt. No. 538); and (2) reset the January 16, 2020 hearing date on Ms. Phelps’ pending motion (Dkt. No. 516) to provide the Investor Group with no less than three weeks from the receipt of the written materials to file a response to Ms. Phelps’ supplemental filing.

There is good cause for granting the relief sought herein. Ms. Phelps has refused to lodge with the Court or produce to Pritzker Levine the written materials provided by her tax advisor and securities counsel – the very materials on which Ms. Phelps relies for the recommended and revised distribution plan proposed and related courses of action described in her recent filing.

There is no basis for Ms. Phelps not to produce these materials to Pritzker Levine, immediately, on a confidential basis. As the Investor Group’s counsel advised Ms. Phelps in communications leading up to the Receiver’s supplemental filing, Pritzker Levine is entitled to receive, and in fact, has always previously received confidential information gathered by the Receiver and the SEC for the purposes outlined in the Receiver’s supplemental filing, pursuant to a protective order (Dkt. No. 261) and standing confidentiality agreement with the prior Receiver and the SEC. When asked that she follow that usual course here, Ms. Phelps responded that she is not bound by that court order or the parties’ standing confidentiality agreement. Instead, Ms. Phelps insisted that no materials would be shared unless and until Pritzker Levine first agreed to enter into an onerous, one-sided and unnecessary non-disclosure agreement. Ms. Phelps also apparently decided not to provide the Court with copies of these important and highly relevant materials either.

Finally, when Pritzker Levine sought the Receiver’s concurrence in this administrative motion, Ms. Phelps stated that she would oppose the relief sought. She also altered her position with

1 respect to the written tax and securities materials. Ms. Phelps now claims there is “nothing” to
2 provide the Investor Group’s counsel or lodge with the Court, since the written materials provided
3 by her tax advisor and securities counsel, even though plainly forming the basis for her latest filing,
4 are not “final” reports or opinions.

5 The Court should not countenance such conduct by the Receiver in this case. The written
6 materials provided to the Receiver by her tax advisor and securities counsel were prepared at the
7 expense of investors and directly impact the investors’ interests in the distribution plans and other
8 courses of action being proposed by the Receiver. These investors are severely prejudiced by not
9 being allowed to review, evaluate, and respond to the analyses of those tax and securities
10 professionals on which the Receiver relies for her own interpretations, conclusions and proposals.

11 For the reasons set forth below and in the accompanying Levine Declaration, this motion
12 should be granted. Ms. Phelps should be ordered to immediately turn over to Pritzker Levine, on a
13 confidential basis pursuant to the protective order and standing confidentiality agreement in place in
14 the case, and lodge with the Court, any written materials provided by her tax advisor and securities
15 counsel that form the basis for any part of the Receiver’s December 16, 2019 supplemental filing
16 (Dkt. No. 538). Furthermore, the January 16, 2020 hearing date on Ms. Phelps’ pending motion
17 (Dkt. No. 516) should be reset to provide the Investor Group with no less than three weeks from the
18 receipt of these written materials to file a response to Ms. Phelps’ supplemental filing.

19 ARGUMENT

20 On August 15, 2019, Ms. Phelps filed a motion seeking Court approval to hire a tax advisor
21 and securities counsel to provide advice with respect to the implementation of a distribution plan in
22 this case. *See* Dkt. No. 516. The Investor Group did not oppose the motion, but asked that the Court
23 instruct Ms. Phelps to obtain advice on all potential alternatives for the distribution plan, not just the
24 two options set forth in Ms. Phelps’ motion. *See* Dkt. No. 519. On October 8, 2019, the Court
25 granted Ms. Phelps’ motion to employ professionals and the Investor Group’s request that those
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1 professionals be instructed to consider all potential alternatives for the distribution plan. *See*
2 Oct. 8, 2019 Civil Minute Order (Dkt. No. 532). On October 29, 2019, the Court ordered Ms. Phelps
3 to file any updates or amendment to her motion concerning the distribution plan by November 18,
4 2019. *See* Dkt. No. 533.

5 On November 15, 2019, Ms. Phelps sought additional time to file the update to her motion,
6 informing the Court that “tax and securities counsel require additional time to complete the analysis
7 *and reports* requested by the Court at the Case Management Conference. The Receiver estimates
8 *those reports* will be prepared, and the Receiver will be prepared to file her supplemental pleadings
9 relating to the Motion for Instructions by December 16, 2019.” *See* Dkt. No. 535 at p. 2 (bold italics
10 added). The Investor Group did not oppose Ms. Phelps’ request for additional time, which was so
11 ordered by the Court. *Id.* at p. 5.

12 On December 11, 2019, Ms. Phelps informed Pritzker Levine that she was “*waiting on final*
13 *versions of both expert reports*” and requested that (i) counsel execute a non-disclosure agreement
14 so she could provide the reports to counsel, and (ii) agree that the reports could be filed with the
15 Court under seal. *See* Levine Decl., Ex. A (bold italics added). In another email later that day, Ms.
16 Phelps confirmed that she was “pfect[ly] willing to share the reports with you upon execution of an
17 agreement properly protecting them.” *Id.*, Ex. B. In response, Pritzker Levine informed Ms. Phelps
18 that the proposed non-disclosure agreement was unnecessary and onerous because there was already
19 a protective order and standing confidentiality agreement among the parties that allowed counsel to
20 receive confidential information of this nature. *Id.*, Exs. C-D, and Dkt. No. 161 (Oct. 6, 2017
21 Protective Order). Counsel also informed Ms. Phelps that without being able to see the reports,
22 counsel could not say whether they properly qualified to be filed under seal under applicable
23 Northern District case law and local rules. *See* Levine Decl., Ex. E.

24 On December 16, 2019, Ms. Phelps filed her supplemental brief. *See* Dkt. No. 538. That
25 filing makes extensive reference to and relies on the work done by the tax advisor and securities
26 counsel. Nonetheless, Ms. Phelps did not provide the underlying reports to Pritzker Levine, make a
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1 motion to file those reports with the Court under seal, or even attempt to lodge them with chambers
2 for the Court's review and consideration.

3 On December 17, 2019, Pritzker Levine advised Ms. Phelps that the Investor Group would
4 be filing this motion and asked whether she intended to oppose the relief sought in this motion. *See*
5 Levine Decl., Ex. F. In response, Ms. Phelps indicated that she would oppose the motion and
6 claimed, among other things, that the motion was unnecessary because "there is no document that is
7 a final report or opinion from either my tax advisor or securities counsel that can be provided to
8 you." *Id.*, Ex. G. Ms. Phelps also expressed concerns about potential privilege and work product
9 issues, but these concerns are misplaced because the written materials that Ms. Phelps intended to
10 provide to opposing counsel and file with the Court (until yesterday's email) cannot by definition be
11 privileged since they were always intended to be shared with outsiders and the substance of those
12 communications has been disclosed, according to Ms. Phelps, in her supplemental filing.

13 Because Ms. Phelps' current position is contrary to her prior statements to the Court and
14 counsel that reports were being prepared, deprives the Court and counsel of any ability to check the
15 basis for and accuracy of her work and representations, and lacks any substantive basis since counsel
16 already are authorized to receive confidential information, Ms. Phelps should be ordered to lodge
17 any written materials provided to her by the tax advisor and securities counsel with the Court and
18 provide copies of these materials to Pritzker Levine as well.

19 CONCLUSION

20 For all of the foregoing reasons, Ms. Phelps should be ordered to immediately turn over to
21 Pritzker Levine and lodge with the Court any written materials provided by her tax advisor and
22 securities counsel that form the basis for any part of her December 16, 2019 supplemental filing
23 (Dkt. No. 538). The January 16, 2020 hearing date on Ms. Phelps' pending motion (Dkt. No. 516)
24 should be reset to provide the Investor Group with no less than three weeks from the receipt of these
25 written materials to file a response to Ms. Phelps' supplemental filing.

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Respectfully submitted,

DATED: December 18, 2019

PRITZKER LEVINE LLP

By: /s/ Jonathan K. Levine
Jonathan K. Levine
Elizabeth C. Pritzker
Bethany Caracuzzo

Attorneys for the Investor Group