RAINES FELDMAN LLP
David Castleman (State Bar No. 326812)
dcastleman@raineslaw.com
1800 Avenue of the Stars, 12th Floor
Los Angeles, California 90067
Telephone: (310) 440-4100
Facsimile: (310) 691-1367

Counsel to 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 AUTHORIZING SALE PURUSANT TO 28 U.S.C. § 2004 OF SHARES OF EVERNOTE CORPORATION AND FOR MODIFICATION OF THE DISTRIBUTION PLAN

Date: December 9, 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, 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 an Order Authorizing the Sale Pursuant to 28 U.S.C. § 2004 of Shares of Evernote Corporation and for Modification of the Distribution Plan (the "Motion").[1]

I. INTRODUCTION

The Receiver in this Motion seeks authority to liquidate the 96,108 shares of Evernote Corporation ("Evernote") beneficially owned by the receivership estate, by sale pursuant to 28 U.S.C. § 2004 of those shares for $1 per share to Equity Acquisition Company Ltd. ("EAC"). A copy of the form of the sale agreement (the "Agreement"), which is a minor modification of the form agreement provided by Evernote and has been agreed to in form by EAC and Evernote, is attached as Exhibit "1" to the Receiver's declaration filed herewith. The Receiver has performed substantial due diligence as set forth below and in her declaration, and she believes that the price obtained is fair and in the best interests of the estate. Because the sale and distribution of various securities in 2021 has resulted in a substantial taxable gain to the estate, as set forth in previous motions [Dkt Nos. 638, 657, 663], the estate will be able to realize a substantial tax benefit by liquidating Evernote in this calendar year.

Because Evernote is not yet a Successful Investment under the Distribution Plan entered in this case by Order entered on May 25, 2020 (the "Plan") [Dkt No. 613], nor is it a Failed Investment

[1] The Receiver requested shortened time for notice of this Motion due to the need for a timely close during the calendar year, and the Court agreed set to the hearing date of December 9, 2021 at 1:30 p.m. and the response deadline of December 6, 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 on the Receivership website. The Receiver has conferred with counsel for the Securities and Exchange Commission (the "SEC") and the Investor Advisory Committee (the "IAC"), who each do not oppose the Motion. Counsel for Progresso Ventures LLC has not expressed any comment or opposition in response.

under the Plan, the proposed sale of the estate's position in Evernote is a modification to the Plan. Nevertheless, the Receiver believes that the risk that Evernote will not have the liquidity event necessary to become a Successful Investment is substantial, and that the value to the estate from the Evernote shares can be maximized if liquidated when there are substantial offsetting gains. The total benefit to the estate will therefore not be finalized until the 2021 tax return is filed in 2022. The Receiver intends to make a motion at that time, after consultation with the SEC and the IAC, for a further modification of the Plan to determine how to allocate the total value contributed by Evernote, including how much, if any, should be contributed to the Plan Fund. In the interim, the Receiver proposes to hold the net proceeds from the sale in a separate bank account.

II. BACKGROUND

The estate currently holds 100,000 shares of Evernote in the name of Clear Sailing Group IV, LLC ("CSG"), a receivership entity, and those holdings have been confirmed by Evernote. *See* Phelps Decl. Ex. 2. Pursuant to the settlement between the Receiver and EAC dated as of January 6, 2020 [Dkt. No. 547-2], approved by this Court on January 15, 2020 [Dkt. No. 550] (the "EAC Settlement"), the estate is required to deliver 3,892 shares of Evernote to EAC upon the occurrence of a liquidity event that would also permit the Receiver to distribute the shares pursuant to the Plan. Because EAC has agreed to purchase these estate's remaining 96,108 shares, the transfer of all 100,000 shares from CSG to Evernote will both complete the transaction contemplated in this Motion as well as satisfy the Receiver's obligations under the EAC Settlement.

The Receiver has consulted with counsel for Evernote, who have advised on Evernote's procedures for the consummation of the contemplated transaction. Evernote has elected not to exercise its right of first refusal. Evernote requires a payment of fees and expenses (including Evernote's legal expenses) up to $5,000, and an opinion of counsel that the sale complies with SEC Rule 144, but it has otherwise consented to the transaction. The Receiver has also consulted with her securities counsel, whose engagement has previously been approved by the Court [Dkt. No. 532], and who has provided the requested opinion to Evernote.

The Receiver has consulted with her valuation experts at Oxis Capital, retained by Order dated March 9, 2020 [Dkt. No. 577], and the estate's basis for its Evernote shares is $8 per share.

The Receiver also performed a substantial amount of due diligence concerning the market price for pre-IPO shares, including consulting with multiple brokers who transact pre-IPO securities on the secondary market. None of those brokers had a record of sale in the last five years, nor did any believe they would be able to make *any* market for Evernote shares. The $1 per share offered by EAC was also more than Evernote was willing to pay for those shares under its right of first refusal.

Further, although the tax liabilities associated with the disposition of Evernote will be determined by the Receiver's tax professionals, the Receiver has been able to estimate the potential tax benefits to the estate from the contemplated transaction. The disposition of the 100,000 shares (96,108 shares by the sale and 3,892 shares pursuant to the EAC Settlement) at $1 will result in a taxable loss to the estate of approximately $700,000. At the estate's receivership effective tax rate of 42.57%, *see* 26 C.F.R. § 1-468B-2(a), the total tax savings to the estate from the Evernote loss is approximately $298,000, or nearly $3 per share in value in addition to the $1 per share. This year, the estate realized approximately $72 million in Palantir gains, $2 million in Airbnb gains, and $2 million in gains from other publicly traded securities (the final figures to be calculated by the estate's tax professionals). The Receiver completed the disposition of the publicly traded securities in 2021; the timing and value of the distribution of the three remaining pre-IPO securities (Addepar, Lookout and ZocDoc) is uncertain.

Although it is possible the estate will have offsetting gains in future years, it is not guaranteed that such gains will materialize or that they will be sufficient to maximize the value of the Evernote tax benefit. However, because the gains in 2021 far outweigh the losses in Evernote or any losses carried forward from prior tax years, consummation of the Evernote transaction in 2021 will allow the estate to realize the full tax benefit from that transaction. The total value of that transaction is approximately $4 per share, far in excess of any reasonable price the estate could expect to receive.

III. THE CONTEMPLATED TRANSACTION IS IN THE BEST INTERESTS OF THE RECEIVERSHIP ESTATE

Under 28 U.S.C. § 2004, a receiver has broad discretion to sell the personalty of the receivership estate so long as the court so orders. *See SEC v. Am. Cap. Invs., Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (approving receiver's decision to sell receivership estate property); *see also SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992) (authorizing receiver's disposal of receivership

assets). The Ninth Circuit has explained that the Court's power to approve such a sale derives from its broad equitable and supervisory powers: "It is generally conceded that a court of equity having custody and control of property has the power to order a sale of the same in its discretion. The power of sale necessarily follows the power to take possession and control of and to preserve property, resting in the sovereignty and exercised through courts of chancery, or courts having statutory power to make the sale.'" *Am. Cap. Invs.*, 98 F.3d at 1144 (quoting 2 Clar on Receivers § 582 (3d ed. 1992) (emphasis omitted)); *see also Liberte Capital Group LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (district court presiding over an equity receivership exercises the traditional, common law powers of equity and, therefore, has broad powers in fashioning relief).

The Court also has wide discretion to set the terms and procedures used to sell personal property so as to maximize the proceeds from such sales. *See U.S. v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996) (holding that district court had discretion under § 2004 to tailor requirements for selling personal property). The Court may also "make rules which are practicable as well as equitable." *See SEC v. Hardy*, 803 F.2d 1034, 1039 (9th Cir. 1986). In determining whether to approve a sale, the Court should consider the unique facts and circumstances surrounding the proposed sale, including the precarious financial condition of the assets being sold. *See, e.g.*, *Tanzer v. Huffines*, 412 F.2d 221, 222-23 (3d Cir. 1969) (approving expedited sale in absence of financial appraisal and limited notice in light of corporation's deteriorating financial condition).

Moreover, if the Court is satisfied that a proposed sale is in the best interest of the estate, it need not require that the Receiver satisfy the precise procedures set forth in 28 U.S.C. § 2001, especially if those procedures are onerous in light of the circumstances. Section 2001 requires that for the sale of real property, (i) the property may be sold in a public auction sale; or (ii) the property may be sold in a private sale, but there must be three separate appraisals conducted, the terms must be published in a circulated newspaper 10 days prior to sale, and the sale price must be no less than two-thirds of the valued price. Section 2004, on the other hand, permits the sale of personal property either in accordance with the Section 2001 real property rules, "*unless* the court orders otherwise." 28 U.S.C. § 2004 (emphasis added); *see FTC v. Consumer Defense, LLC,* 2:18-CV-30 JCM (PAL), 2019 WL 266287 *4 (D. Nev. Jan. 18, 2019) (authorizing sale of personal property using

commercially reasonable sales methods pursuant to Section 2004 after considering nature of asset and desire to preserve return for estate) (citing *SEC v. Capital Consultants, LLC,* 397 F.3d 733, 738 (9th Cir. 2005)); *FTC v. Universal Premium Services, Inc.,* 06-0849 SJO (OPx), 2006 WL 8442136 *4 (C.D. Cal. June 8, 2006) (approving sale of certain personal property and exercising discretion pursuant to § 2004 to approve alternative procedures proposed by receiver because complying with § 2001 would be "burdensome, time consuming, and expensive for the receivership estate").

The Receiver requests that the Court approve the contemplated transaction pursuant to Section 2004, without the need for compliance with 28 U.S.C. § 2001 real property rules, as in the best interests of the receivership estate. The Receiver and her counsel have spent substantial time attempting to ascertain the private market for the sale of the pre-IPO securities remaining in the estate, working with multiple brokers who specialize in these markets, and all of whom advised that there was not a readily available secondary market for Evernote shares. Obtaining appraisals of these securities, which would essentially require appraising Evernote itself, is not a practical possibility, the cost of which would far outweigh the value of the shares. The last valuation of Evernote was in mid-2015, so there is also very little publicly available valuation information about the company itself. Moreover, dispensing with the requirement that the shares be disposed of in a public auction or after a published advertisement, which might have to be done by a registered broker dealer in order to comply with the securities laws (and also does not appear to be consistent with Evernote's transfer policies), avoids the additional expense of such an auction or the need to resolve any conflict between the requirements of Section 2004 and the application of federal securities laws and regulations.

The Receiver is further satisfied that the contemplated transaction complies with applicable securities laws and regulations, and the Receiver is in the process of obtaining such an opinion from her securities counsel, a precondition imposed by Evernote for the sale to close. The sale is permissible under Section 4(a)(1) of the Securities Act of 1933. *See* 15 U.S.C. § 77d(a)(1) (exempting "transactions by any person other than an issuer, underwriter, or dealer"). The Receiver is not the issuer of Evernote shares, nor is the Receiver an underwriter within the meaning of 15 U.S.C. § 77b(a)(11) or 17 C.F.R. § 230.144 (commonly known as Rule 144), nor is the Receiver a dealer within the meaning of 15 U.S.C. § 77b(a)(12). The sale is also permissible under Section 4(a)(7) of

the Securities Act of 1933, as EAC has represented to Evernote that it is an accredited investor, *see* 15 U.S.C. § 77d(a)(7) (exempting certain transactions involving accredited investors), another precondition imposed by Evernote.

Based on the Receiver's due diligence into the potential price of Evernote, the lack of transactions in Evernote stock, and the fact that both the purchaser and the issuer are acting in good faith to allow the transaction to close in 2021 to ensure that the estate can realize the tax benefit from the sale, the Receiver believes that approval of the contemplated transaction is in the best interest of the estate. Even after costs, there is a substantial chance that any future transaction of Evernote would not be able to realize close to $4 per share in total value.

IV. CONTRIBUTION TO THE PLAN FUND AND MODIFICATION OF PLAN

The Plan contemplates a contribution of 30% of the gross investment in a security to the Plan Fund, as a precondition for distribution after such security becomes a successful investment. For Evernote, that contribution would be 30% of $1,179,964, or $353,989.20, if Evernote were to become a successful investment. As set forth above, the Receiver believes that the contemplated transaction is the best way to maximize the value of the estate's holdings in Evernote. But that does not mean that the contemplated transaction turns Evernote into a successful investment within the meaning or the equities of the Plan. Nor does that make Evernote a failed investment, as the estate will still realize value from the sale as well as the tax benefit.

At this point, the Receiver is also actively monitoring the market and communicating with the IAC and the SEC about the other three pre-IPO securities (Addepar, Lookout and ZocDoc). It is not clear at present whether those securities will become Successful Investments, will become Failed Investments, or whether it will be in the best interest of the estate to sell those securities in the private market. And at least for the contemplated transaction for Evernote, much of the value will not be finalized until 2022 when the 2021 tax return is filed.

As such, the Receiver believes the most prudent course of action is to wait until the 2021 tax return is filed, to then consult with the SEC and the IAC, and thereafter to make a motion to this Court for a modification of the Plan to govern the distribution related to sales of pre-IPO securities in the secondary market, including the equitably appropriate contribution to the Plan Fund and

whether and to what extent to allow deficiency claims.

V. CONCLUSION

The Receiver respectfully requests that the Court authorize the Receiver to close the contemplated transaction, pay all relevant fees and commissions, hold the proceeds from the Evernote sale in a separate account, discharge the estate's obligation with respect to Evernote under the EAC Settlement, and requests all other appropriate relief.

Dated: November 24, 2021

RAINES FELDMAN LLP

By: */s/ David Castleman*
David Castleman

Counsel for Receiver Kathy Bazoian Phelps