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Brandlin, Receiver

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

JUSTIN ROBERT KING; AND
ELEVATE INVESTMENTS, LLC,

Defendants,

and

SHANNON LEIGH KING,

Relief Defendant.

Case No. SACV20-02398-JVS
(DFMx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF RECEIVER, JEFFREY
E. BRANDLIN, FOR ORDER IN
AID OF RECEIVERSHIP
REGARDING (1) EMPLOYMENT
OF PROFESSIONALS (2)
DISPOSITION OF PERSONAL
PROPERTY, AND (3)
PERMISSION TO SERVE
INVESTORS BY EMAIL**

[Notice of Motion and Motion, and
Declaration of Jeffrey E. Brandlin
submitted concurrently herewith]

DATE: March 1, 2021
TIME: 10:00 a.m.
JUDGE: Hon. James V. Selna

**TO THE HONORABLE JAMES V. SELNA, UNITED STATES DISTRICT
JUDGE, AND THE PARTIES AND THEIR COUNSEL OF RECORD:**

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1 **I. INTRODUCTION**

2 In accordance with sections IX.D and F of the *Preliminary Injunction*
 3 *and Appointment of a Permanent Receiver* [Docket No. 26] (the
 4 "Receivership Order") and the law governing federal equity receiverships,
 5 Jeffrey E. Brandlin, the Court-appointed permanent receiver (the "Receiver")
 6 over Elevate Investments, LLC, and its subsidiaries and affiliates (together,
 7 "Elevate"), respectfully requests that the Court enter an order in aid of the
 8 receivership that authorizes the Receiver to employ the following
 9 professionals: (a) Smiley Wang-Ekvall, LLP, as his general receivership
 10 counsel; (b) Brandlin & Associates as his forensic accountants; (c) Coast
 11 Business Technologies for data recovery and computer imaging; and (d)
 12 Donlin Recano to design and host a website on behalf of the Receiver to
 13 provide a source of information for investors and creditors. The Receiver
 14 believes that the retention of these personnel is necessary and appropriate
 15 for the successful administration of the receivership estate (the "Estate").
 16 The Receiver also seeks authorization to abandon personal property of the
 17 Estate where the cost of administration of that personal property would
 18 exceed the anticipated benefit to the Estate. Last, because the Receiver
 19 has not located mailing addresses for the investors and potential investors
 20 but has instead only located email addresses for them, which appears to
 21 have been the primary form of contact with Elevate, the Receiver seeks
 22 authority to serve investors by email when they would otherwise be required
 23 to be served by mail.

24 25 **II. BACKGROUND FACTS**

26 **A. Procedural Background**

27 In late December 2020, the Securities and Exchange Commission (the
 28 "SEC") commenced this litigation against defendants Justin Robert King and

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1 Elevate Investments, LLC (collectively, the "Defendants") alleging violations
 2 of federal securities laws. On December 28, 2020, the Court issued an *ex*
 3 *parte* temporary restraining order freezing assets and appointing the
 4 Receiver as the temporary receiver. On January 19, 2021, and after notice
 5 and an opportunity to object, the Court issued the Receivership Order.

6 **B. The Receiver Has Shut Down Operations, Gained Control of**
 7 **Assets, and Identified Investors**

8 The afternoon that the Receiver was appointed as the temporary
 9 receiver, he went to Elevate's office in San Clemente, had the locks
 10 changed, and took possession of the computers and the books and records.
 11 Notified of the Receiver's presence by the property manager, Justin and
 12 Shannon King went to the office. The Receiver was able to get some
 13 information from Mr. King, including usernames and passwords for the
 14 computers and the iPad, the different web-based programs used by Elevate,
 15 and Elevate's Gmail account. The Receiver and his counsel then changed
 16 the passwords in order to ensure that Mr. King was no longer able to access
 17 the data or the accounts. The Receiver had the computers and other
 18 electronic data imaged and is in the process of reviewing the data that was
 19 retrieved in order to identify investors, creditors, and potential assets, and to
 20 understand how Elevate communicated with investors and solicited new
 21 investments. The Receiver has a preliminary list of actual and potential
 22 investors and has given them notice of his appointment as the permanent
 23 Receiver and directed them to a website that the Receiver has set up to
 24 provide information to investors.¹ The Receiver has also redirected
 25 Elevate's mail to the Receiver's office.

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¹ This website is at: www.donlinrecano.com/elevate

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1 The temporary restraining order identified four different accounts in the
2 name of Elevate and its affiliates that were located at two different financial
3 institutions. Concurrent with gaining control of the office, the Receiver's
4 proposed counsel gave notice to the financial institutions of his appointment
5 and the order freezing bank accounts. The Receiver also requested all
6 documents for those accounts in order to prepare a forensic accounting to
7 determine what money came into Elevate and where it went. The Receiver's
8 priority was with Elevate's account at Charles Schwab, because the account
9 held some options in derivative investments. The Receiver had a phone call
10 with representatives from Charles Schwab in order to understand the
11 investments and to determine the best way to minimize any further loss to
12 the receivership estate. The Receiver instructed Charles Schwab to sell and
13 liquidate the positions that remained and the Receiver is now in possession
14 of approximately \$1,575,000 from the Charles Schwab account. The
15 Receiver believes that this is the majority of the funds that remain. The
16 Receiver has opened a bank account for the receivership estate and
17 obtained an EIN from the IRS.

18 **C. Investor Identification and Communication**

19 Among the computer records that the Receiver obtained was a list that
20 appears to identify the investors. The Receiver is in the process of verifying
21 the investors using the bank records that are being produced to the
22 Receiver. The Receiver has also reviewed the books and records in order
23 to identify other potential investors in order to give them notice of the
24 receivership. Because it appears that most communications with investors
25 were done by e-mail, the Receiver is in the process of sending an e-mail to
26 all of the actual and potential investors to give them some initial information
27 and to direct them to the website that the Receiver established for investors
28 and creditors located at <https://www.donlinrecano.com/Elevate>.

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1 2 **III. REQUESTED RELIEF**

3 **A. The Receiver Requests Approval for the Retention of** 4 **Various Personnel to Assist Him In the Performance of His** 5 **Duties**

6 The Receiver is seeking approval for the retention of the following: (a)
 7 Smiley Wang-Ekvall, LLP, as his general receivership counsel; (b) Brandlin
 8 & Associates as his forensic accountants; (c) Coast Business Technologies
 9 for data recovery and computer imaging; and (d) Donlin Recano for website
 10 design and hosting so that the site is a source of information for investors
 11 and creditors.

12 **B. The Receiver Requests Authority to Implement Certain** 13 **Procedures for Abandoning Personal Property**

14 The Receiver seeks the Court's authority to implement certain
 15 procedures for abandoning personal property. The Receiver proposes that
 16 when, in his business judgment, the cost to administer personal property
 17 belonging to Elevate would likely exceed any benefit therefrom, the Receiver
 18 is authorized to dispose of the personal property in the manner he deems
 19 best. At present, the only personal property of which the Receiver is aware
 20 is the small amount of office furniture at Elevate's office in San Clemente.
 21 Because the cost to remove and sell that furniture would exceed the benefit
 22 to the estate, the Receiver intends to dispose of that property. However, the
 23 Receiver requests that the same authority apply to personal property that
 24 may be identified in the future.

1 **IV. LEGAL AUTHORITY**

2 **A. The Receiver's Authority to Employ Professionals and**
 3 **Dispose of Property**

4 Sections IX.D and F of the Receivership Order authorize the Receiver
 5 to engage and employ attorneys, accountants and other persons to assist
 6 the Receiver with the performance of the duties identified in the order.
 7 Section IX.A of the Receivership Order gives the Receiver control over all of
 8 Elevate's assets.

9 **B. The District Court's Power to Administer the Receivership**
 10 **and Deference to the Receiver's Business Judgment**

11 A district court's power to administer an equity receivership is quite
 12 broad. See *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *SEC v.*
 13 *Forex Asset Management, LLC*, 242 F.3d 325, 331 (5th Cir. 2001); *SEC v.*
 14 *Basic Energy & Affiliated Resources*, 273 F.3d 657, 668 (6th Cir. 2001).
 15 "The power of a district court to impose a receivership or grant other forms
 16 of ancillary relief does not in the first instance depend on a statutory grant of
 17 power from the securities laws. Rather, the authority derives from the
 18 inherent power of a court of equity to fashion effective relief." *SEC v.*
 19 *Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of
 20 equity receiverships is to promote orderly and efficient administration of the
 21 estate by the district court for the benefit of creditors." *Hardy*, 803 F.2d at
 22 1038. As the Ninth Circuit has explained:

23 A district court's power to supervise an equity
 24 receivership and to determine the appropriate action
 25 to be taken in the administration of the receivership is
 26 extremely broad. The district court has broad powers
 27 and wide discretion to determine the appropriate relief
 28 in an equity receivership. The basis for this broad
 deference to the district court's supervisory role in
 equity receiverships arises out of the fact that most

1 receiverships involve multiple parties and complex
2 transactions.

3 *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005)
4 (citations omitted).

5 In the estate administration context, courts are deferential to the
6 business judgment of bankruptcy trustees, receivers, and similar estate
7 custodians. *See, e.g., Bennett v. Williams*, 892 F.2d 822, 824 (9th Cir.
8 1989) ("[W]e are deferential to the business management decisions of a
9 bankruptcy trustee."); *Southwestern Media, Inc. v. Rau*, 708 F.2d 419, 425
10 (9th Cir. 1983) ("The decision concerning the form of . . . [estate
11 administration] . . . rested with the business judgment of the trustee.").

12 **C. The Retention of the Professionals Is Appropriate**

13 **1. The Retention of Smiley Wang-Ekvall, LLP Is in the**
14 **Best Interests of the Estate**

15 As represented to the Court in connection with the recommendation of
16 the SEC regarding the Receiver's appointment, and pursuant to sections
17 IX.D and F of the Receivership Order, the Receiver requests authority to
18 retain Smiley Wang-Ekvall, LLP as his general counsel to assist him with the
19 recovery of assets and administration of the Estate.

20 The Receiver believes that the retention of Smiley Wang-Ekvall, LLP
21 will aid the administration of the estate. The Receiver is not an attorney.
22 Smiley Wang-Ekvall, LLP has a significant amount of experience identifying
23 and recovering assets for investors and creditors in receiverships,
24 bankruptcy cases, and judgment enforcement proceedings. Because this is
25 a receivership case, it has agreed to reduce its normal hourly rates by 10%.
26 The rate sheet is attached to the Receiver's proposal. Copies of the profiles
27 of the members of the Firm who will be primarily responsible are attached to
28 the Motion as Exhibit "1." The reduced hourly rate of Kyra Andrassy, the

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1 partner who will have responsibility for this case is \$549 an hour, reduced
 2 from \$610. The reduced hourly rate of Timothy Evanston, the associate who
 3 will work with her, is \$288, reduced from \$320. They have agreed to freeze
 4 these rates for the duration of this case. Its fee applications will be
 5 submitted in accordance with the requirements of the Receivership Order
 6 and the SEC's billing guidelines.

7 **2. The Retention of Brandlin & Associates Is in the Best**
 8 **Interests of the Estate**

9 As represented to the Court in connection with the SEC's
 10 recommendation regarding the Receiver's appointment, and pursuant to
 11 sections X.D and F of the Receivership Order, the Receiver intends to utilize
 12 his firm, Brandlin & Associates ("B&A"), to assist him with fulfilling his duties
 13 and to perform a forensic accounting.

14 To the extent that B&A's retention requires Court approval, the
 15 Receiver believes its retention will aid the administration of the estate. The
 16 Receiver needs to conduct a forensic accounting in order to determine what
 17 funds came into Elevate and from what sources, and to identify how the
 18 funds were used. This will enable the Receiver to identify investors,
 19 determine the amount of their net investments, and identify potential assets
 20 and litigation targets. A copy of B&A's proposal to the SEC, which was
 21 attached to the SEC's recommendation regarding the appointment of the
 22 Receiver, is attached to the Motion as Exhibit "2." B&A will offer a 15%
 23 discount off of its standard hourly rates, and B&A's fee applications will be
 24 subject to application to the Court and compliance with the SEC's billing
 25 guidelines.

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1 **3. The Retention of Coast Business Technologies Is**
 2 **Critical to Gaining Access to Electronic Information**

3 The Receiver also requests authority to retain Coast Business
 4 Technologies ("Coast Business") to assist him with the preservation of
 5 electronic data. The Receiver took possession of a computer and an iPad at
 6 Elevate's office and also gained control of Elevate's web-based programs.
 7 In order to preserve this information, the Receiver utilized the services of
 8 Coast Business, a firm that specializes in data recovery, to image the
 9 computer and iPad, to recover data, and to provide to access to as many
 10 electronic files as possible. The Receiver believes that this information will
 11 prove critical to the administration of the Estate as it could lead to the
 12 identification of assets, investors, and other critical information. Coast
 13 Business charges \$150 an hour. The Receiver seeks authority to pay Coast
 14 Business in the ordinary course, as invoiced.

15 **4. The Employment and Compensation of Donlin Recano**
 16 **for Website Services Is Appropriate**

17 Last, the Receiver requests authority to retain Donlin Recano to
 18 develop and maintain a website for investors and creditors. The Receiver
 19 believes that the retention of Donlin Recano will help the administration of
 20 the estate because its assistance in developing and maintaining a website
 21 will help keep investors informed with accurate information regarding the
 22 Receivership Entities. For these services, Donlin Recano charges a \$75
 23 monthly fee for hosting the website and an \$95 an hour charge for the time
 24 incurred setting it up and updating it when directed to do so. The website is
 25 located at www.donlinrecano.com/Elevate. Donlin Recano will invoice the
 26 Estate on a monthly basis, and the Receiver seeks formal authority to pay its
 27 monthly invoices as they come due as an ordinary cost of the Estate. A
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1 copy of Donlin Recano's engagement agreement is attached to the Motion
2 as Exhibit "3."

3
4 **D. Authorization to Abandon Personal Property**

5 The Receiver proposes that when, in his business judgment, the cost
6 to administer personal property belonging to Elevate would likely exceed any
7 benefit therefrom, he may dispose of that property as he deems appropriate.
8 At present, the only such personal property that the Receiver believes fits
9 this category is the office furniture located in Elevate's office, which the
10 Receiver intends to abandon to the landlord. Where possible, the Receiver
11 will endeavor to donate any useful items to Goodwill or a similar
12 organization. The Receiver believes that these procedures will promote the
13 efficient administration of the estate for the benefit of investors.

14 **E. The Receiver Seeks Authority to Serve Investors and**
15 **Potential Investors by Email**

16 The Receiver has located a list of investors that contains names and
17 email addresses, but most of the investors do not have a mailing address
18 listed. Although the Receiver has located some addresses by reviewing
19 other books and records, he does not have addresses for every investor or
20 potential investor, though he does have email addresses. Based on the
21 Receiver's review of Elevate's email account, email appears to have been
22 the primary mode of communication between Elevate and the investors.
23 Accordingly, where the Receiver is required to give notice of certain actions
24 to the investors, he requests the permission of the Court to do so by email
25 and by posting on the website for the receivership. When emailing, the
26 Receiver will do so in a manner that prevents the recipients from seeing who
27 else received the email so that the privacy of investors is maintained.

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1 **V. CONCLUSION**

2 Based on the foregoing, the Receiver requests entry of an order:

3 (1) Approving the retention of Smiley Wang-Ekvall, LLP, as his
4 general counsel;

5 (2) To the extent necessary, approving the retention of Brandlin &
6 Associates as his forensic accountants;

7 (3) Approving the retention of Coast Business Technologies for data
8 recovery and computer imaging, with its fees and costs payable in the
9 ordinary course of administration of the Estate without further order of the
10 Court;

11 (4) Approving the retention of Donlin Recano to design and host a
12 receivership website to provide a source of information for investors and
13 creditors, and giving the Receiver authority to pay it in the ordinary course of
14 the administration of the Estate and without further order of the Court;

15 (5) Approving the proposed procedure for abandonment of personal
16 property assets set forth in the Motion;

17 (6) Authorizing the service of notices on investors and potential
18 investors by email and by posting on the receivership's website, unless an
19 investor opts out and notifies the Receiver that he or she elects to be served
20 only by mail and provides a mailing address to the Receiver; and

21 (7) Granting such other and further relief as the Court deems just
22 and appropriate.

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DATED: January 29, 2021

SMILEY WANG-EKVALL, LLP

By: /s/ Kyra E. Andrassy

KYRA E. ANDRASSY

TIMOTHY EVANSTON

Attorneys for Jeffrey Brandlin,
Receiver

PROOF OF SERVICE**STATE OF CALIFORNIA, COUNTY OF ORANGE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 3200 Park Center Drive, Suite 250, Costa Mesa, CA 92626.

On 1/29/2021, I served true copies of the following document(s) described as

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF RECEIVER, JEFFREY E. BRANDLIN, FOR ORDER IN AID OF RECEIVERSHIP REGARDING (1) EMPLOYMENT OF PROFESSIONALS (2) DISPOSITION OF PERSONAL PROPERTY, AND (3) PERMISSION TO SERVE INVESTORS BY EMAIL on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

(X) (BY COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")). Pursuant to United States District Court, Central District of California, Local Civil Rule 5-3, the foregoing document will be served by the court via NEF and hyperlinked to the document. On 1/29/2021, I checked the CM/ECF docket for this case and determined that the aforementioned person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated.

(X) (BY MAIL). I enclosed the document(s) in a sealed envelope or package and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Smiley Wang-Ekvall, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Costa Mesa, California.

() (BY E-MAIL). By scanning the document(s) and then e-mailing the resultant pdf to the e-mail address indicated above per agreement. Attached to this declaration is a copy of the e-mail transmission.

() (BY FACSIMILE). I caused the above-referenced documents to be transmitted to the noted addressee(s) at the fax number as stated. Attached to this declaration is a "TX Confirmation Report" confirming the status of transmission. Executed on _____, at Costa Mesa, California.

() STATE I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

(X) FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 29, 2021, at Costa Mesa, California, /s/ Lynnette Garrett

Lynnette Garrett

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