Gary J. Aguirre (SBN 38927)
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Tel: 619-400-4960
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Email: Gary@aguirrelawfirm.com

Attorney for Movants Susan Graham, Robert Churchill IRA, Robert Churchill Family Trust, Mark and Linda Clifton, Dennis and Diane Gilman, John and Mary Jenkins Trustees, the Ormonde Family Trust, Ronald Askeland, Douglas Sahlin IRA, Edith Sahlin IRA, George and Joan Trezek, Karen Coyne, James J. Coyne Jr. Trust, David Fife IRA, Leo and Cindy Dufresne, Leo T. Dufresne Jr. IRA, Darla Berkel IRA, William Nighswonger IRA, Juanita Bass, William V. and Carol J. Dascomb Trust, Robert Indihar IRA, Linda Baldwin IRA, Baldwin Family Survivors' Trust, Juanita Bass IRA, Matthew and Jennifer Berta, Randall S. Ingermanson IRA, Kimberly Dankworth, IDAC Family Group LLC, Robert S. Weschler, Karie J. Wright, D.F. Macy IRA, Stephen and Polly Yue, David Karp IRA, Iris Bernstein IRA, Lisa A. Walz, John and Mary Jenkins Trust

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING CORPORATION,

Defendants.

Case No.: 3:12-cv-02164-GPC-JMA

MOVANTS' REPLY AND MOTION TO STRIKE INADMISSIBLE STATEMENTS CONTAINED IN RECEIVER'S RESPONSE TO MOVANTS' *EX PARTE* MOTION FOR ORDER ALLOWING TIME TO RESPOND TO RECEIVER'S *EX PARTE* APPLICATION FOR ORDER CONFIRMING THE SALE OF THE JAMUL VALLEY PROPERTY

Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

The Receiver's counsel has submitted a four-page statement, Receiver's Response to Movants' *Ex Parte* Motion for Order Allowing Time to Respond to Receiver's *Ex Parte* Application for Order Confirming the Sale of the Jamul Valley Property (Dkt. No. 1195) ("Receiver's Response") which substitutes hyperbole for admissible evidence and law. In reviewing the files, we have seen the Receiver's counsel employed this tactic in relation to other parties (Dkt. No. 852, page 5, lines 3 through 11) It is packed with hearsay, legal conclusions, and other statements which do not comply with the rules of evidence. Much of the Receiver's argument is irrelevant from the issues presented in our earlier filing, but we address them in any case below.In our reply below, we respond to the groundless content and move to strike the inadmissible evidence.

1. The Receiver protests that Movants have falsely stated that the Court has not approved the sale of Jamul Valley property ("Property"). See Dkt. No. 1195, page 1, lines 1 through 17, and page 3, lines 1 through 5. He claims an order (Dkt. No. 1088) authorizes the sale. We strongly disagree. So do multiple title insurance companies, as discussed below. So do the rules for interpreting the meaning of a document. The order (Dkt. No. 1088) is comprised of 23 lines of text and 31 lines of redacted text. The order first recites a brief history: that the Court had ordered the Receiver "to ballot investors" in the three GPs that own the Property whether they wished to sell the Property. The vote was more in favor of holding than selling: the majority in one GP voted to hold the Property. The other two GPs did not have a majority, though one had more votes to hold the Property while the other had more votes to sell it. In sum, this text indicates the Receiver could not obtain the authority from the GPs to sell the property. Next the order has 31 redacted lines of text which tell nothing.

In the order's last paragraph, the Court states the grounds and the authority for the redactions. In the closing sentence, the Court continues the explanation why the text was redacted: "This information could hinder the Receiver's ability to negotiate and sell the property for the GPs and thus the Court concludes that compelling reasons exist to seal this order as well as the Receiver's recommendation, (ECF No. 1020)." By process of

elimination, this must be the language the Receiver relies upon. Using the textual approach, this sentence orders nothing. Using the contextual approach, this sentence explains why the Receiver's statement about the property was redacted. Consequently, neither the textual nor the contextual approach supports the Receiver's contentions. Further, multiple title companies refused to issue title insurance because there was no order approving the sale of the Property. In his Ex Parte Application (Dkt. No. 1191, p. 2, ll. 25-27), the Receiver explains that "the title company requires an order expressly confirming the sale to TNC before it will issue a title insurance policy." Also, in the Receiver's Response (Dkt. No. 1195, p. 2, ll. 24-28), the Receiver explains that "he learned of the title insurance issue in February 2016, promptly contacted other title companies to determine if they would have the same requirements, and proceeded to file the Jamul Valley *Ex Parte* once it was clear a confirming order was necessary." Most insightful: even after investors refused to approve the sale and multiple title companies demanded an order approving the sale, the Receiver chose the ex parte path, pretending to correct a clerical error. The inference is troubling. See: Comment, *SEC Receivers and the Presumption of Innocence: The Problem with Parallel Proceedings in Securities Cases and the Ever Increasing Powers of the Receivers*, 11 HOUS. BUS. & TAX L.J. 1, 203-31 (2011).

2. Next, the Receiver offers his legal conclusion that he was and is powerless to prevent penalties from accruing on unpaid taxes on the Property or abate the fire hazard that creates liability risks for the partnerships which own the property. We disagree. The Receiver has and had the power to solve these problems. We have read the SEC's, the Receiver's, and the Court's statements regarding the Court's equitable powers to authorize the Receiver to protect an asset entrusted to him. *SEC v. Schooler*, 2015 U.S. Dist. LEXIS 46871 (S.D. Cal. Mar. 4, 2015)("Ultimately, the Receiver may only take action pursuant to this Court's orders and the Receiver is tasked with preserving receivership assets, administering receivership property suitably, and assisting in any equitable distribution of those assets if appropriate.") Indeed, this is precisely the type of

action the Receiver should take to protect the estate. Even assuming *arguendo* that the Receiver lacked this authority under the original order appointing him (Dkt. No. 10, page 12, line 28 though page 15, line 6), and we doubt that, he could have applied to the Court for an order authorizing him to expend funds for these purposes. We can find no application or motion by the Receiver for this purpose. Instead, he allowed penalties to be incurred, which constitutes a waste of the estate, and a fire hazard to continue unabated, which creates liability issues. Significantly, the Receiver projected that approximately $148,000 would be available for distribution to investors in the GPs that own the Property. Under these circumstances, we can think of numerous ways, e.g., a short term loan, the Receiver could have used to prevent penalties from accruing or abate a fire hazard that could have resulted in liability. Movants also move to strike the Receiver's legal conclusion relating to his ability to pay the taxes on the Property and further move to strike his characterization of the contents of emails that he chose not to place before the Court on the grounds of the best evidence rule and the hearsay rule.

3. In relation to the communications between counsel leading up to this motion, the Receiver has submitted part of an email chain (Exhibit A to the Receiver's Response). The complete chain was included as Exhibit 1 to the Declaration of Gary Aguirre in support of this motion (Dkt. No. 1194-4, Exhibit 1, pages 8 through 11). The complete chain makes clear that Movants initially requested time to file a motion requesting that the Receiver's Ex Parte Application be set for hearing on April 29. The Receiver refused and insisted that the matter proceed on the merits. Movants then requested a period through March 14 to respond on the merits. The Receiver again refused (Dkt. No. 1194-4, Exhibit 1, pages 8 and 9).

4. Next, the Receiver protests that the filing of his *Ex Parte* Application was not done to disrupt and distract the retention of Movants' counsel on February 26, 2016. In addition to advising the Receiver in Movant Graham's motion that he expected to be retained on February 26, Movants' counsel advised the Receiver's counsel on February 22, 23 and 26, 2016, that he would not be retained until February 26. True and correct

copies of those emails are attached as Exhibit 6 hereto. Several hours before the Receiver filed his Ex Parte application, in his February 26 email, (Exhibit 6, page 1) Movants' counsel requested the following:

> Given your knowledge that two law firms are in the process of being retained in this case, I would have expected you to allow both firms sufficient time to get up to speed in this case before trying to get the Court to decide issues which will strip 100 investors of their rights to challenge the sale.
>
> I would strongly urge you to modify your order so that it is a scheduling order setting a hearing for an order to sell the Jamul property for the April 29 hearing date with the same briefing schedule previously set by the Court.

It is difficult to understand how the Receiver's counsel would not understand how filing a motion confirming the sale of the first of 23 properties on the very day Movants' retained counsel would be anything other than extremely disruptive. Movants also move to strike the Receiver's vague conclusions, hearsay, and unsworn statements relating to the subject (Dkt. No. 1195, page 2, lines 21-28).

5. The Receiver next argues that other documents in the record support his valuation of the Property. This is flat wrong. The only evidentiary support for the valuation of the Jamul property is the 2013 appraisal (Dkt. No. 203, Exhibit B, pages 79 to 81). The deficiencies in that appraisal are addressed in our earlier filing (Dkt. No. 1194 page 4, lines 3 to 11). There is nowhere in this record any *evidence* of any broker's evaluation of the Jamul property. The Receiver has not submitted—even in his response—the purported broker's valuation of the property. The only inference that can be drawn from the Receiver's failure to submit this information is that whatever it is he considers "broker's valuation" would not support his motion. We agree with his conclusion. We also move to strike under the hearsay rule, the best evidence rule, and the lack of any expert credentials the purported broker's valuation of the property.

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6. The Receiver disputes the statement that he and his colleagues have been paid $2.24 million. So let us be clear. The Receiver and his team have applied for the payment of fees and costs in the sum of $2.24 through September 30, 2015. Each of the applications by the Receiver and his team has been approved by the Court. Since we have no access to any of the Receiver's records and since he has thus far refused to produce them, we have assumed the statements have been paid. It is also clear from the Receiver's Statement of Cash Balances in GP Accounts (Dkt. 1181-1, p.34) that he has spent over $4.75 million since he was appointed. Again, it would seem he should have been able to find the cash so that the estate, which he now argues should be distributed using a "one pot approach," would not be depleted by tax penalties or civil liability for allowing an unabated fire hazard.

DATED: March 3, 2016

Respectfully submitted,

By: /s/ Gary J. Aguirre

GARY J. AGUIRRE
Aguirre Law, A.P.C.
gary@aguirrelawapc.com
Attorney for Movants

Exhibits Table of Contents

Exhibit 6

Gary Aguirre

From: Gary Aguirre
Sent: Friday, February 26, 2016 6:58 AM
To: Ted Fates (tfates@allenmatkins.com)
Cc: thebrank@ethreeadvisors.com
Subject: SEC v. Schooler

Good morning Ted:

If you proceed to file the application today, please advise the Court that the clients who are retaining me today will oppose the motion on multiple grounds: (1) the use of the ex parte procedure to sell the only asset of several partnerships affecting more than 100 partners is an improper use of this procedure; (2) your client's failure to provide the most current appraisals on the Receiver's website deprives owners of any basis for analyzing and deciding whether the sale serves their interests, (3) your attempt to sell the property on an ex parte application days before you provide opposing counsel with the relevant information, so his clients can decide whether to oppose the sale, (4) you have stated no urgency for the sale in any of your correspondence, (5) you never advised investors that you were selling the property though they voted against the sale.

Under the circumstances, your ex parte application selling the only asset of multiple partnerships affecting more than 100 investors is an improper use of the ex parte procedure and would constitute an attempt of taking property without Due Process of Law in violation of the 14th Amendment to the U.S. Comnstitution.

Given your knowledge that two law firms are in the process of being retained in this case, I would have expected you to allow both firms sufficient time to get up to speed in this case before trying to get the Court to decide issues which will strip 100 investors of their rights to challenge the sale.

I would strongly urge you to modify your order so that it is a scheduling order setting a hearing for an order to sell the Jamul property for the April 29 hearing date with the same briefing schedule previously set by the Court.

Regards,

Gary J. Aguirre
Aguirre Law, APC
501 W. Broadway, Suite 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072

www.aguirrelawapc.com

From: Fates, Ted [mailto:tfates@allenmatkins.com]
Sent: Thursday, February 25, 2016 2:33 PM

To: Gary Aguirre
Cc: Thomas C. Hebrank (thebrank@ethreeadvisors.com)
Subject: RE: SEC v. Schooler

Gary,

You have asked about the sale of the Jamul Valley property and have represented that you have clients with interests in the applicable partnerships. Accordingly, please be advised we plan to file an ex parte application for order confirming the sale of the property tomorrow. The Court has already authorized the Receiver to complete the sale, but the title company requires a confirming order before it will issue a title policy to the buyer.

Regards, Ted

From: Fates, Ted
Sent: Wednesday, February 24, 2016 11:20 AM
To: 'Gary Aguirre' <gary@aguirrelawapc.com>
Cc: Thomas C. Hebrank (thebrank@ethreeadvisors.com) <thebrank@ethreeadvisors.com>
Subject: RE: SEC v. Schooler

Gary,

You have asked for a substantial amount of documentation. Although we are willing to provide requested documents, as provided below, it is reasonable to request the names of your clients and the partnerships in which they have interests. Once we have that information, we will provide documents pertaining to the partnerships in which your clients have interests.

Your document requests are addressed one by one as follows (in the same order as they appear in your email below):

1. The requested appraisals will be provided.

2. Assuming you have one or more clients in the applicable partnerships, the requested documents concerning the sale of the Jamul Valley property will be provided. There are no other pending sales.

3. All emails between Allen Matkins and the SEC concerning the SEC v. Schooler case from December 1, 2015 to the present will be provided.

4. All emails between Mr. Hebrank (including others at E3 Advisors) and the SEC concerning the SEC v. Schooler case from December 1, 2015 to the present will be provided.

5. No such communications exist.

6. No such documents exist.

7. No such statements exist. However, the Receiver will provide the tax returns (not including investor K-1s) for the partnerships in which your clients have an interest from inception of the receivership. Note, the receipts and disbursements for every month from the Receiver's appointment up to and including December 2015 have been provided in the Receiver's fourteen interim reports, which are available from the Receiver's website. There is also substantial information and projections regarding receipts and disbursements included in the partnership information packets, which are available from the Receiver's website.

With regard to your request to schedule a deposition of the Receiver, considering the documentation to be provided as discussed above, we do not see a need to expend considerable receivership estate resources on another deposition. If

you believe another deposition is necessary, please provide a list of topics that will be covered during the deposition so we can consider them and respond.

With regard to your final question, the Receiver does not anticipate any assets in the receivership will be paid to the SEC.

Regards,

Ted Fates Esq.
Partner
Allen Matkins Leck Gamble Mallory & Natsis LLP
501 West Broadway, 15th Floor, San Diego, CA 92101-3541
(619) 233-1155 (main)
(619) 235-1527 (direct)
(619) 886-4466 (mobile)
(619) 233-1158 (fax)

Allen Matkins
CHALLENGE. OPPORTUNITY. SUCCESS.

From: Gary Aguirre [mailto:gary@aguirrelawapc.com]
Sent: Tuesday, February 23, 2016 10:15 AM
To: Fates, Ted <tfates@allenmatkins.com>
Cc: Thomas C. Hebrank (thebrank@ethreeadvisors.com) <thebrank@ethreeadvisors.com>
Subject: SEC v. Schooler

Ted:

I think you must have overlooked the first sentence of my email below (now underlined and in bold) and the statements in Susan Graham's moving papers that I expect to be retained by Friday and move expeditiously beginning on Monday February 29. Since the court granted Ms. Graham's motion based on these representations, I would hope that you would also act on them. You can assume there will be at least 90 investors with interests in partnerships owning all properties.

In view of your contention that there is some urgency in proceeding with a hearing in this matter, my email was simply intended to cooperate with you in that goal and avoid unnecessary delays. I will provide you the identities on Friday.

Please advise me by 5 p.m. tomorrow whether or not you will agree voluntarily to the schedule below. If not, I will be forced to file another *ex parte* motion seeking the requested discovery and will ask that the timetable below be incorporated into the order. I would hope we could avoid burdening Judge Curiel with another ex parte application.

Regards,

Gary J. Aguirre
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501 W. Broadway, Suite 800

San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072

www.aguirrelawapc.com

From: Fates, Ted [mailto:tfates@allenmatkins.com]
Sent: Tuesday, February 23, 2016 9:39 AM
To: Gary Aguirre
Cc: Thomas Hebrank
Subject: RE: SEC v. Schooler

Hi Gary,

Thanks for your email. Could you please provide the list of investors you represent, including the General Partnerships in which they hold ownership units? Once we have that, we will consider your requests below and get back in touch.

Thank you,

Ted

From: Gary Aguirre [mailto:gary@aguirrelawapc.com]
Sent: Monday, February 22, 2016 2:28 PM
To: Fates, Ted <tfates@allenmatkins.com>
Subject: SEC v. Schooler

Good afternoon Ted:

As you know, I expect to be retained to represent investors in the above matter by Friday, February 26. In that event, my first objective is to obtain the relevant documents from the Receiver and your office as efficiently and quickly as possible so I can as well move ahead efficiently and quickly.

Again, I hope you will cooperate with this process and resist the temptation to create unnecessary obstacles, e.g., a request that I explain why the appraisals you repeatedly cite in the Receiver's pending motion are relevant. All the documents described below are directly placed in issue by the Receiver's motion, In that light, I am requesting the rolling production of the following documents no later than March 1, beginning with the appraisals which should be immediately available:

1. All appraisals (both the 2013, 2015, or other) on the 23 properties by MAIs or broker/agents, including supporting data;
2. Sales and escrow documents relating to the pending or consummated sale of the Jamul property and any other pending sales (if you believe the production of any are subject to a court order, I would suggest that we stipulate to a proposed modification of the existing order; I am happy to work out a protective order if you believe that is necessary);
3. All emails between your firm and any employee of the SEC from December 1, 2015 to the present;

4. All emails between Mr. Hebrank/E-3 Advisors and any employee of the SEC from December 1, 2015 to the present;
5. All communications between your firm and Scott Gessner from December 1, 2015, to the present;
6. Records, e.g., journals, which indicate the amounts of payments which were accelerated on existing loans from the 87 partnerships to Western and records indicating how the Receiver used those funds;
7. All statements of receipts and disbursements, audited or unaudited, and balance sheets, audited or unaudited, relating to the 87 partnerships, consolidated or separate, or Western from the inception of the receivership to the present.

For the sake of clarity, I will object to the admission of any appraisal or reference to any appraisal in your filings and at the hearing which you do not voluntarily produce in its entirety pursuant to this request.

In addition to the request of these documents, I would like to set a deposition date for Mr. Hebrank for March 7, 2016.

Finally, does the Receiver intend to pay or allow any of the assets subject to the receivership to be used to pay any portion of the SEC judgment?

If you find any portion of this email to be unclear, be assured that I will quickly respond to any question seeking a clarification.

Regards,

Gary Aguirre
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501 W. Broadway, Suite 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072

www.aguirrelawapc.com

Confidentiality Notice: The information contained in this electronic e-mail and any accompanying

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Defendants.

Case No.: 3:12-cv-02164-GPC-JMA

PROOF OF SERVICE

Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 501 West Broadway, Suite 800, San Diego, California 92101.

On March 3, 2016, I served the within document(s) described as:

1. **MOVANTS' REPLY AND MOTION TO STRIKE INADMISSIBLE STATEMENTS CONTAINED IN RECEIVER'S RESPONSE TO MOVANTS' *EX PARTE* MOTION FOR ORDER ALLOWING TIME TO RESPOND TO RECEIVER'S *EX PARTE* APPLICATION FOR ORDER CONFIRMING THE SALE OF THE JAMUL VALLEY PROPERTY AND EXHIBIT 6 THERETO.**

On the interested parties in this action **BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):** the foregoing document(s) will be served by the court via NEF and hyperlink to the document. On March 3, 2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

- Lynn M Dean - deanl@sec.gov;
- Philip H. Dyson - phildysonlaw@gmail.com;
- Edward G. Fates - tfates@allenmatkins.com;
- Eric Hougen - eric@hougenlaw.com;
- Sara D. Kalin - kalins@sec.gov.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on March 3, 2016, at San Diego, California.

/s/ Gary J. Aguirre
GARY J. AGUIRRE