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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

14 SECURITIES AND EXCHANGE
COMMISSION,

15 Plaintiff,

16 v.

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

20 Defendants.

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

**RECEIVER'S OPPOSITION TO
AGUIRRE INVESTOR GROUP'S
MOTION TO INTERVENE
[Dkt. 1229]**

Date: May 6, 2016

Time: 1:30 p.m.

Ctrm.:2D

Judge:Hon. Gonzalo P. Curiel

1 Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial
2 Planning Corporation d/b/a Western Financial Planning Corporation ("Western"),
3 and its subsidiaries and the General Partnerships listed on Schedule 1 to the
4 Preliminary Injunction Order entered on March 13, 2013 (collectively,
5 "Receivership Entities"), submits this Opposition ("Opposition") to the Proposed
6 Intervenor's Notice of Motion and Motion to Intervene [Dkt. 1229] ("Aguirre
7 Intervention Motion").

8 The Receiver opposes the Aguirre Intervention Motion because the proposed
9 intervenors fail to meet even the modest requirements of proof called for under
10 Federal Rule of Civil Procedure 24 (a)(2) or (b)1(B). The Receiver further objects
11 to the Aguirre Intervention Motion because it seeks relief beyond that afforded by
12 Fed. R. Civ. P. 24 in that it calls for modification of the Court's Preliminary
13 Injunction Order entered March 13, 2013, reflects a de facto motion for
14 reconsideration of the Court's prior rulings, and seeks to substitute the proposed
15 intervenors ("Aguirre Intervenor") for this Court as the overseer of the Receiver.
16 If, and only if, the Court allows intervention, (which the Receiver opposes), then
17 intervention must be limited to accepting the Aguirre Intervenor's opposition to the
18 sole matter pending before this Court, the Receiver's Motion For: (A) Authority to
19 Conduct Orderly Sale of General Properties; (B) Approval of Plan of Distributing
20 Receivership Assets; and (C) Approval of Procedures for the Administration of
21 Investor Claims (the "Receiver Distribution Motion"). See Edison Electric Institute
22 v. Environmental Protection Agency 391 F.3d 1267, 1274, (D.C. Cir. 2004) ("An
23 intervening party may join issue only on a matter that has been brought before the
24 court by another party.") United States v. City of Detroit 712 F.3d 925, 931-932 (6th
25 Cir. 2013) ("Courts are not faced with an all or nothing choice between grant or
26 denial: Rule 24 also provides for limited-in-scope intervention.")

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I. SUMMARY OF ARGUMENT

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2 The Aguirre Intervention Motion seeks to modify the Preliminary Injunction
3 Order entered March 13, 2013 and allow the Aguirre Intervenors to intervene in
4 order to both litigate and re-litigate a litany of issues. In addition to intervening to
5 file an opposition to the Receiver's Distribution Motion, the Aguirre Intervenors
6 seek to participate in every aspect of the lawsuit and the receivership. Among other
7 things, the Aguirre Intervenors ask the Court to allow them to pursue
8 reconsideration of the Court's prior orders concerning the inclusion of the general
9 partnerships in the receivership, sale of assets and procedures for selling assets. If
10 this were not enough, the Aguirre Intervenors ask the Court to place them in the role
11 of overseer of the Receiver by granting them unlimited access to all books and
12 records held by the Receiver, requiring the Receiver to provide a full accounting to
13 the proposed intervenors, and requiring an audit of the receivership.

14 Nothing in Fed. R. Civ. P. 24 contemplates intervention for the purpose of
15 turning back the hands of time and revisiting decisions previously made by the
16 Court. Nor do the Aguirre Intervenors point to any law to support such a broad right
17 to intervene.

18 Moreover, the Aguirre Intervenors do not present any facts that demonstrate a
19 need or reason for these demands nor do they explain how their ultimate objectives
20 and goals are different from those of the Receiver and the Court. S.E.C. v. TLC
21 Investments 147 F.Supp.2d 1031, 1041-1043 (C.D. Cal 2001) (where the ultimate
22 goals of the receiver align with those of the proposed intervenor, a disagreement
23 regarding strategy does not meet the inadequacy of representation element of the
24 intervention test.) For example, the Aguirre Intervenors do not explain why the
25 Court's order to the Receiver to provide a proposal that would enable general
26 partnerships ("GPs") to exit the receivership, does not abrogate any need for the
27 Aguirre Intervenors to intervene in the case as to that issue. [Dkt. 1224].
28

1 The Aguirre Intervenors further assume that the substantial financial burdens
2 will be borne by 100% of investors, including the 95% of investors who have not
3 supported the Aguirre Intervenors' efforts. Setting aside the fundamental unfairness
4 of this approach, the Receiver's and this Court's resources are better used to consider
5 the Receiver Distribution Motion and realizing the shared goal of maximum value of
6 receivership assets rather than engaging in litigation with and redundant accounting
7 requests from a small group of investors. Granting the Aguirre Intervenors' Motion
8 will result in an enormous waste of time, money and Court resources. As such, the
9 Receiver requests the Court deny the Aguirre Intervention Motion.

10 II. ARGUMENT

11 A. The Aguirre Intervenors Are Not Entitled To Intervene As A 12 Matter Of Right.

13 The Ninth Circuit has generally outlined four requirements for intervention as
14 a matter of right pursuant to Fed. R. Civ. P. 24(a)(2): (1) timely file an application,
15 (2) possess a 'significantly protectable' interest relating to the property or transaction
16 that is the subject of the action, (3) be so situated that the disposition of the action
17 may as a practical matter impair or impede its ability to protect that interest, and
18 (4) be inadequately represented by the parties to the action. California ex rel.
19 Lockyear v. United States, 450 F.3d 436, 441 (9th Cir. 2006) (citing Sierra Club v.
20 E.P.A., 995 F.2d 1478, 1481 (9th Cir. 1993)). Failure to satisfy any one of the
21 requirements is fatal to the motion to intervene. Perry v. Proposition 8 Official
22 Proponents, 587 F.3d 947, 950 (9th Cir. 2009).

23 A party seeking intervention is not necessarily entitled to the right to
24 intervene in all aspects of the proceeding. Edison 391 F.3d at 1274; Detroit 712
25 F.3d at 931-932. As such, this Court has broad discretion to limit, condition or
26 place restrictions upon the Aguirre Intervenors role in these proceedings. Id. Under
27 no circumstances should the Aguirre Intervenors be afforded the broad rights to
28 intervene that they seek. If intervention is permitted, which the Receiver opposes,

1 the Aguirre Intervenors should be limited to the filing of their opposition to the
2 Receiver Distribution Motion.

3 As evidenced by the numerous filings by the Aguirre Intervenors to date, the
4 Aguirre Intervenors are engaged in litigation gamesmanship which appears to be
5 primarily directed at obtaining concessions in connection with their specific
6 interests. As such, it is important in considering the Aguirre Intervention Motion to
7 keep in mind two salient facts: the Aguirre Intervenors represent a mere 5% of the
8 overall investors; and the cost expended by the Receiver in responding to the myriad
9 of demands made upon the Receiver by the Aguirre Intervenors will be borne by
10 100% of the investors through a diminishment of their interests in the receivership
11 estate.

12 This is a federal equity receivership where this Court has the broad power of a
13 Court of equity to determine the appropriate action in the administration and
14 supervision of this equity receivership. *See SEC v. Capital Consultants, LLC*, 397
15 F.3d 733, 748 (9th Cir. 2005); *TLC* 147 F.Supp.2d at 1034-1035. The Aguirre
16 Intervenors' ask the Court to abrogate its role and allow the Aguirre Intervenors to
17 become de facto overseers of the Receiver and the receivership. Obviously, this is
18 not contemplated by Fed. R. Civ. P. 24.

19 1. Timing.

20 To the extent the Aguirre Intervenors seek to intervene to have the Court
21 consider their Opposition to the Distribution Motion, the Aguirre Intervention
22 Motion is timely. The Aguirre Intervention Motion is not timely as to the balance of
23 their requests for intervention.

24 In addition to seeking the right to file an opposition to the Distribution
25 Motion, the Aguirre Intervenors ask to intervene in the overall receivership so that
26 they may revisit a vast array of issues which were raised and decided by the Court in
27 earlier proceedings. In many cases, the Aguirre Intervenors are asking to file
28 pleadings and be heard as to matters where they previously filed letters or pleadings

1 and appeared at the hearings. Throughout these proceedings, the Court has allowed
2 and encouraged investors to participate in the case and the Court accepted hundreds
3 of briefs and letters in connection with each of the material matters brought before
4 this Court. There is simply no reason to allow the Aguirre Intervenors to intervene
5 in order to revisit such matters. For example, the Aguirre Intervention Motion seeks
6 to reconsider the motions in which the Court decided whether the general partners
7 should be part of the receivership estate and the procedures for sale of assets. The
8 Aguirre Intervenors' request to intervene to revisit these issues is untimely.

9 Similarly, the Receiver has been filing reports and accountings in this Court
10 since the inception of the case. The Aguirre Intervenors have had full access and an
11 opportunity to object to the Receiver's reports and accountings. If the Aguirre
12 Intervenors had an issue with any of the Receiver's accountings during 2012, 2013,
13 2014 and 2015, they had every opportunity to file a motion to intervene at any time
14 during that 3 year period. The Aguirre Intervenors' request to intervene to revisit all
15 prior accounting is untimely.

16 The Receiver and the 95% investors who are not seeking intervention are
17 significantly prejudiced by these untimely requests. Specifically, the cost associated
18 with open ended requests for an accounting or the retention of someone to conduct
19 an audit will be borne by all investors. The Aguirre Intervenors have failed to meet
20 their burden of proof as to timeliness and therefore the Aguirre Intervention Motion
21 should be denied.

22 2. Protected Interests.

23 To the extent the Aguirre Intervenors seek to intervene in order to have the
24 Court consider their opposition to the Distribution Motion, the Receiver recognizes
25 the interests of the general partners in addressing the amount of their claims as a
26 protected interest. The Receiver does not recognize and opposes any effort to
27 intervene in the entirety of the receivership proceedings.

28

1 The Aguirre Intervenors have not presented any evidence to suggest that they
2 have a protected interest at issue with regard to matters previously decided by this
3 Court or in otherwise insinuating themselves into every aspect of this receivership
4 proceeding.

5 This is a federal equity receivership where the Court has broad discretion and
6 powers to oversee and fashion equitable relief in connection with the Receiver and
7 the receivership. Capital Consultants, 397 F.3d at 378. Requests for an accounting
8 and an audit of the receivership cannot be tied to any specific interest of the Aguirre
9 Intervenors and fall squarely within the purview of this Court's discretion and
10 oversight.

11 As such, the Aguirre Intervenors have failed to meet their burden of proof
12 with regard to a protected interest.

13 3. Impairment To A Protected Interest.

14 The third prong of Fed. R. Civ. P. 24(a)(2) requires the moving party to
15 demonstrate the disposition of the pending litigation may, as a practical matter,
16 impair its right to protect its interests. Even if the underlying action would affect the
17 perspective intervenor's interests, however, "their interests might not be impaired if
18 they have 'other means' to protect them." California ex rel. Lockyear 450 Fed.3d
19 442.

20 The Aguirre Intervenors have simply failed to put forth any evidence that the
21 Receiver's pending Distribution Motion impairs the Aguirre Intervenors' ability to
22 protect their interests. At the end of the day, their interest solely concerns a claim
23 for money. Their claims will be addressed via the claims process and ultimately a
24 distribution of proceeds. The Aguirre Intervenors will have an opportunity to
25 participate in that process. In the interim, they have been provided less intrusive and
26 burdensome alternatives to participate by this Court, which has permitted the
27 investors to file letters and briefs with the Court. See [Dkt Nos. 1253-1257.] See
28 SEC v. American Pension Services, Inc., 2015 U.S. Dist. LEXIS 6782 (D. Utah Jan.

1 20, 2015) (Movant's interests are not considered impaired solely because they
2 disagree with the receiver's proposed liquidation plans, particularly where they can
3 avail themselves of a claims process.) SEC v. Nadal, 2009 U.S. Dist. LEXIS 94302.
4 (M.D. Fld. Sept. 24, 2009).

5 The Aguirre Intervenors' sole basis for intervention appears to be their
6 disagreement with the Receiver's proposal to liquidate assets and distribute
7 proceeds. This is not a sufficient basis to meet their burden of proof with regard to
8 impairment where they are afforded a full and meaningful opportunity to participate
9 in the matters pending before this Court. Id.

10 4. Inadequate Representation.

11 The Aguirre Intervenors have not met their burden of proof to demonstrate
12 that their interests are not adequately represented by participants in the underlying
13 action. S.E.C. v. TLC Investments 147 F.Supp.2d 1031, 1041-1042 (C.D. Cal
14 2001). More specifically, the Aguirre Intervenors have not met their burden of
15 proof pursuant to the four-part test of the 9th Circuit in considering adequacy of
16 representation: (1) whether the interest of a party is such that it will undoubtedly
17 make the intervenors arguments; (2) whether the present party is capable and willing
18 to make such arguments, and (3) whether the intervenor would offer any necessary
19 elements to the proceedings that the other parties would neglect. See People of
20 California v. Tahoe Regulatory Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986).
21 "The most important factor in determining the adequacy of representation is how the
22 interests compare with the interests of existing parties." Arakaki v. Cayetano, 324
23 F.3d 1078, 1086 (9th Cir. 2003). As noted by one Court, "the adequacy of interest
24 requirement is more than a paper tiger. A party that seeks to intervene as of right
25 must produce some tangible basis to support a claim of purported inadequacy".
26 Public Service Company of New Hampshire v. Douglas Patch 136 F.3d 197, 206 (1st
27 Cir. 1998) (citing Moosehead Sanitary District v. SG Philips Corp. 610 F.2d 49, 54
28 (1st Cir. 1979)). See also TLC, 147 F.Supp.2d at 1042.

1 Moreover, where "one of the duties of the existing parties is to represent the
2 interest of the intervenor, intervention will not be allowed unless a compelling
3 showing of inadequate representation is made." In re Christina Thompson 965 F.2d
4 1136, 1143 (1st Cir. 1992). In such circumstances, mere conclusory speculation by
5 intervenors is insufficient and "the putative intervenor must exert concrete facts
6 which demonstrate that (1) the existing representation of the putative intervenors
7 interest is inhibited by the personal interest of the existing representative, (2) the
8 existing representative and opposing party are engaged in collusive activities, or
9 (3) the existing representative has failed or refused to fulfill the fiduciary duty to
10 protect the interests asserted by the putative intervenor." Id.

11 The Aguirre Intervenors fail to present any evidence to support their
12 allegations that the Receiver and this Court are not representing or otherwise
13 allowing for the representation of the investors' interests, including that of the
14 Aguirre Intervenors. The Receiver's Distribution Motion presents a detailed
15 description of alternatives concerning the treatment of the subject general
16 partnerships and the real properties associated therewith and provides the Court with
17 alternative proposals for both the sale of assets and distribution of the proceeds.
18 Dkt 1181, pp. 9-10, 12-14, 17-21. Most recently, the Court ordered the Receiver to
19 provide a proposal for GPs to exit the receivership. [Dkt. 1224.]

20 The Court has also allowed investors to file hundreds of briefs and letters in
21 this case and continues to do so. The Court has considered all briefs and letters and
22 addressed these during court proceedings and in its orders. The record of the Court
23 shows that Receiver has filed and the Court has approved numerous
24 recommendations resulting in investor votes being taken on offers and letters of
25 intent for GP properties. The existing sale process provides for investors to receive
26 notice and a full opportunity to provide feedback on offers for GP properties and
27 proposed sales. See Docket numbers 1056, 1069. In fact, the entire record of this
28 case points to a full and adequate representation of the interests of all investors in

1 the GPs, including the viewpoints now presented by the Aguirre Intervenors in their
2 opposition to the Receiver Distribution Motion.

3 Indeed the arguments of the Aguirre Intervenors are nothing more than a
4 "paper tiger." Setting aside the drama and considering the actual facts, there is
5 simply nothing that has not already been presented by the Receiver and considered
6 by the Court. As such, the claims of impairment are unfounded and without
7 concrete basis in the facts presently before the Court. Other than rank speculation
8 on the part of the Aguirre Intervenors, there is no indication whatsoever that the
9 Receiver's interests or the interests of this Court administering this federal equity
10 receivership are separate and apart from the interests of the investors. In fact, the
11 objectives of the parties are precisely the same, to find the most equitable means of
12 distributing the assets of the Receivership Estate. See SEC v. American Pension
13 Services, Inc., 2015 U.S. Dist. LEXIS 6782, at *14; T.L.C., 147 F.Supp.2d at 1042.

14 While Mr. Aguirre's clients, who represent approximately 5% of all investors,
15 may not agree with the Receiver's strategy for achieving their shared goals, this does
16 not suggest the Court and the Receiver have not considered all of the facts and
17 issues raised by the proposed intervenors and are not pursuing the same goals as
18 these investors. Id. As in the TLC case, differences as to strategy are not sufficient
19 to show inadequate representation where the parties' goals are the same. Id. As
20 such, the Aguirre Intervenors have failed to meet their burden of proof as to the
21 issue of "adequate representation" and the Aguirre Intervention Motion should be
22 denied.

23 **B. Permissive Intervention Is Not Warranted**

24 Rule 24 (b)(1)(B) states that the court may permit intervention by someone
25 who "has a claim or defense that shares with the main action a common question of
26 law or fact." Fed. R. Civ. P. 24 (b)(1)(B). Permissive intervention is discretionary.
27 See Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977).
28 In determining whether to exercise its discretion, a court may consider, among other

1 things, whether the proposed intervenor's interests are adequately represented by
 2 other parties, whether intervention will prolong or unduly delay litigation, and
 3 whether intervenor will significantly contribute to full development of the
 4 underlying factual issues. See Id. A party seeking permissive intervention has the
 5 burden of establishing the basis for intervening. See Citizens For Balanced Use v.
 6 Montana Wilderness Association, 647 Fd.3d 893, 897 (9th Cir. 2011).

7 The Aguirre Intervenors have not made these required showings. As
 8 discussed above, there is no reason to believe the Receiver and this Court cannot be
 9 fair and impartial in considering the claims and assertions of the Aguirre Intervenors
 10 on a fully developed factual record. See SEC v. American Pension Services, Inc.,
 11 2015 U.S. Dist. LEXIS 6782, at*14 (denying intervention where movant failed to
 12 establish that their economic interests were not adequately represented by the
 13 receiver). The Aguirre Intervenors' case is premised on nothing more than an
 14 assertion that their interests are impaired because they disagree with the Receiver's
 15 proposed plan. Such assertions are simply insufficient to satisfy their burden for
 16 intervention, permissive or otherwise. SEC v. American Pension Services, Inc.
 17 2015 U.S. Dist. LEXIS 6782 (D. Utah, Jan 20, 2015).

18 For these reasons and those stated in Sections A.1. – A.4. above, the Court
 19 should exercise its discretion to deny the Aguirre Intervenors' demand for
 20 permissive intervention.

21 III. CONCLUSION.

22 In light of the foregoing, the Receiver requests the Court to deny the Aguirre
 23 Intervention Motion.

24 Dated: April 22, 2016

ALLEN MATKINS LECK GAMBLE
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25
 26 By: /s/ David R. Zaro

27 DAVID R. ZARO
 Attorneys for Receiver
 THOMAS C. HEBRANK

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 515 S. Figueroa Street, 9th Floor, Los Angeles, CA 90071-3309.

On April 22, 2016, I served on the interested parties in this action the within document(s) described as:

RECEIVER'S OPPOSITION TO AGUIRRE INVESTOR GROUP'S MOTION TO INTERVENE [Dkt. 1229]

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 April 22, 2016, I checked the CM/ECF docket for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address indicated below:

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BY MAIL: I placed a true copy of the document in a sealed envelope or package addressed as indicated on the attached Service List on the above-mentioned date in Los Angeles, California for collection and mailing pursuant to the firm's ordinary business practice. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on April 22, 2016, at Los Angeles, California.

David R. Zaro
(Type or print name)

/s/ David R. Zaro
(Signature of Declarant)