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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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

Defendants.

Case No. 12 CV 2164 GPC JMA

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OBJECTION TO AGUIRRE INVESTORS' *EX PARTE* APPLICATION

Dkt. No. 1293

Date: May 20, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

Plaintiff Securities and Exchange Commission ("SEC") objects to the May 13, 2016 *ex parte* application filed by the investors represented by Gary Aguirre (the "Aguirre Investors"). *See* Dkt. No. 1293. With that application, the Aguirre Investors have asked for leave to file an opposition to a proposal the Court directed the receiver to file regarding the exit of general partnerships from the receivership estate. *See* Dkt. Nos. 1224 (order), 1264 (proposal), 1275 (supplement to proposal). The SEC has two objections to the application.

First, the Aguirre Investors are seeking the same relief they have already sought in two pending motions to intervene, yet their *ex parte* application does not comply with Rule 24 of the Federal Rules of Civil Procedure. On April 5, 2016, the Court dismissed several Aguirre Investor motions because they did not comply with the requirements of that rule. *See* Dkt. No. 1224 at 2. The Court gave explicit instructions for them "to follow" that rule "and file motions to intervene to the extent that they wish to refile any of these motions." *Id.* The Aguirre Investors then filed an omnibus motion to intervene on April 8, seeking intervention for their previously-filed motions, including their motion seeking an accounting by the receiver. *See* Dkt. No. 1229-1 at 4. They later filed another motion to intervene on April 22, also seeking an accounting by the receiver. *See* Dkt. No. 1258-1. And now, the Aguirre Investors have filed an *ex parte* application asking for the same relief. *See* Dkt. No. 1293-1 at 4-5 (section entitled "An Accounting Is Necessary Before Any Plan Can Be Approved"). To the extent they are seeking an accounting as proposed intervenors, then the Aguirre Investors' application fails to comply with Rule 24 and the SEC objects for the same reasons it gave in its oppositions to their other motions to intervene, which the SEC incorporates herein. *See* Dkt. Nos. 1266, 1291.

Second, in their *ex parte* application, the Aguirre Investors argue that the receiver's court-requested proposal would violate their due process rights. *See* Dkt. No. 1293-1 (proposed opposition) at 2-4.[1] The SEC fully recognizes and appreciates that investors should be permitted to express their views about issues important to them, as they have done throughout this case. But in order to do that, the Aguirre Investors do not need to be, and should not be, made parties to this enforcement

[1] The Aguirre Investors contend that the proposal would "violate[] all investors' rights to be treated as necessary parties in this case as well as their rights under the Due Process Clause to the California and U.S. Constitutions." Dkt. No. 1293-1 at 4. But they do not explain how the California constitution is implicated here, or whether it differs, if at all, from federal due process rights.

action. Rather, their concerns can be addressed, with full due process and without the need for intervention, in summary proceedings where they can voice their opinions about receivership issues in submissions to the court or at hearings. As the Ninth Circuit has repeatedly made clear, "[f]or the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard." *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1146 (9th Cir.1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998) (*citing SEC v. Wencke*, 783 F.2d 829, 836-38 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986); *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir. 1985); *see also SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986) ("We have repeatedly held, however, that the use of summary proceedings to determine appropriate relief in equity receiverships, as opposed to plenary proceedings under the Federal Rules, is within the jurisdictional authority of a district court.").[2]

There has been ample notice and opportunity to be heard in this case. For example, when the Court decided in July 2014 to reconsider whether the general partnerships should remain in the receivership estate, it concluded, following Ninth Circuit precedent, that it was "necessary to provide the GPs with an opportunity to be heard." Dkt. No. 629 at 7. The Court elected *sua sponte* to revisit its decision because it determined that the investors had depended on the defendants to manage the partnerships and that the partnership "structure made it effectively impossible for any single investor or GP to exercise any power over the GP's main asset—land." Dkt. No. 583 at 9-11. So, in hearings in October and December 2014, the Court permitted investors to be heard on whether the partnerships should remain in the

[2] In addition, in order to establish a due process violation, the Aguirre Investors must make a showing of prejudice. *American Capital*, 98 F.3d at 1147. They cannot make, and have not made, that showing.

estate. *See* Dkt. No. 1266 at 3-4. Then, when the Court issued its ruling to keep the partnerships in the estate, it specifically found, citing applicable Ninth Circuit law, that it had "respected" the investors' due process rights because it had provided them with notice and an opportunity to be heard on the issue. Dkt. No. 1003 at 6 ("Thus the Court has [the] authority to include third party property, such as the GPs, within the receivership and has respected the due process rights of the GPs.").

The Aguirre Investors ignore all of this. As they know, throughout this case, the Court has allowed investors to be heard on the critical issues regarding the receivership estate and its assets. *See* Dkt. No. 1266 at 3-4. They do not dispute that, or that the investors have been on notice of every issue that the Aguirre Investors now seek to challenge. Nor do they dispute that investors have been given multiple opportunities to raise those challenges.[3] All of this has provided the Aguirre Investors with more than sufficient due process. *See CFTC v. Topworth International, Ltd.*, 205 F.3d 1107, 1113-1114 (9th Cir. 1999) (rejecting investor claim that its due process rights were violated in summary proceedings because "[t]here was ample opportunity for the appellant[-investor]s in this case to file papers and two hearings were held in the district court"); *see also American Capital*, 98 F.3d at 1147 (summary proceedings gave investors "full notice and opportunity to be heard at every critical stage"); *SEC v. TLC Investments and Trade Co.*, 147 F.Supp.2d 1031 (C.D. Cal. 2001) (where investors were given rights to be heard in summary proceedings, denying intervention of investors).[4]

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[3] In fact, on the very issues raised in their application, the Aguirre Investors have had plenty of time to respond to the receiver's proposed distribution plan, and could have timely proposed their own alternative plan, just as the investors represented by Mr. Dillon did. Instead, the Aguirre Investors chose to wait until a week before the May 20, 2016 hearing to present a proposal in their *ex parte* application.

[4] Because the receiver's proposal would be carried out under the court's broad equity powers, the Aguirre Investors' reliance on California partnership law is inapposite. *See American Capital*, 98 F.3d at 1144 (rejecting argument by investors in partnership that court could not convey title in partnership property under California law because the partners were not parties to action); *see also SEC v. American*

Dated: May 17, 2016

/s/ John W. Berry
John W. Berry
Attorney for Plaintiff
Securities and Exchange Commission

Principals Holding, Inc. (In re San Vicente Medical Partners, Ltd.), 962 F.2d 1402, 1408 (9th Cir. 1992) ("a district court has the power to include the property of a non-party limited partnership in an SEC receivership order as long as the non-party meets the minimum contacts standard set out in *International Shoe* and receives actual notice and an opportunity for a hearing"). Also, the cases cited by the Aguirre Investors about California partnership law have no bearing here—this is not an action against them (*Valley National Bank*), and the admissibility of co-partner statements is not at issue (*Pacific Queen Fisheries*). *See* Dkt. No. 1293-1 at 2-3. In any event, given the Court's findings that the partnership interests were securities, that the investors depended entirely on the defendants to manage the partnership assets and that the investors could not effectively exercise partnership powers, it is clear the partnerships did not function as general partnerships under California law.