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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

LOUIS V. SCHOOLER and FIRST
FINANCIAL PLANNING
CORPORATION, dba Western
Financial Planning Corporation,

Defendants.

CASE NO. 3:12-cv-2164-GPC-JMA

ORDER:

GRANTING IN PART AND DENYING IN PART RECEIVER’S MOTION FOR ORDER (A) AUTHORIZING THE RECEIVER TO CONDUCT AN ORDERLY SALE OF GENERAL PARTNERSHIP PROPERTIES; (B) APPROVING THE PLAN OF DISTRIBUTING RECEIVERSHIP ASSETS; AND (C) APPROVING PROCEDURES FOR THE ADMINISTRATION OF INVESTOR CLAIMS

DENYING AGUIRRE INVESTORS’ EX PARTE MOTION FOR AN ORDER SETTING EVIDENTIARY HEARING AND DISCOVERY SCHEDULE

[ECF Nos. 1181, 1297]

Before the Court is Receiver Thomas C. Hebrank’s (“Receiver”)’s motion for an order (a) authorizing the Receiver to conduct an orderly sale of general partnership (“GP”) properties; (b) approving the plan of distributing receivership assets; and (c) approving procedures for the administration of investor claims (“Rec. Mot.”), ECF No.

1 1181. This motion has been fully briefed. *See* SEC Resp., ECF No. 1232; Dillon Resp.,
2 ECF No. 1234; Aguirre Resp., ECF No. 1235; Rec. Dillon Reply, ECF No. 1262; Rec.
3 Aguirre Reply, ECF No. 1263; Receiver’s Court-Ordered Proposal Regarding GPs
4 (“Rec. CO Prop.”), ECF No. 1264; Receiver’s Supplement to Court-Ordered Proposal
5 Regarding GPs (“Rec. CO Supp.”), ECF No. 1275; Aguirre SEC Sur-reply, ECF No.
6 1277; Aguirre CO Resp., ECF No. 1293; Rec. CO Reply, ECF No. 1294. The Court has
7 also received a number of letters from individual investors concerning the Receiver’s
8 motion. *See, e.g.*, ECF Nos. 1240, 1242, 1244, 1249–1257, 1282, 1283, 1288.

9 A hearing was held on May 20, 2016. ECF No. 1298. Having considered the
10 parties’ submissions, oral argument, and the applicable law, and for the reasons that
11 follow, the Court **GRANTS IN PART** and **DENIES IN PART** the Receiver’s motion.

12 BACKGROUND

13 The facts of the case having been recited in the Court’s previous orders and the
14 Court will not reiterate all of them here. *See, e.g.*, ECF No. 583 at 3–11. However, the
15 Court will provide salient facts relating to this order. This is an enforcement action by
16 Plaintiff Securities and Exchanges Commission (“SEC”) against Defendants Schooler
17 and Western Financial Planning Corporation (“Western”) for violations of federal
18 securities laws in connection with Defendants’ defrauding of investors in the sale of
19 general partnership (“GP”) units which were, as a matter of law, unregistered securities.
20 *See* ECF No. 583 at 3–11, ECF No. 1081.

21 This case involves an investment scheme hatched by the Defendants that
22 organized GPs into co-tenancies. At least two, but typically four, GPs would end up
23 owning an undeveloped real estate that Defendants selected and bought. In one
24 instance, eleven GPs owned various parcels of one large stretch of real estate.
25 Generally, each GP held an undivided fractional interest in a parcel. Most co-tenancy
26 agreements required that all decisions about a real property be made by unanimous
27 consent of all co-tenant GPs. This structure and unanimity requirement made it
28 effectively impossible for any single investor or GP to exercise any power over the

1 GP's main asset—land.

2 In addition, the GPs were financially intertwined with Western in a number of
3 ways. First, Western borrowed roughly \$14.2 million to buy certain properties that it
4 later transferred to GPs. These loans were secured by mortgages on these properties.
5 Thus, a default by Western could result in the foreclosure of these properties.

6 Second, many investors borrowed money from Western to buy GP units.
7 Defendants structured this debt so the GPs, rather than individual investors, owed
8 Western money. That is, Defendants would lend money to the GPs to cover individual
9 investor shortfalls in exchange for promissory notes from the GPs. Some GPs also
10 owed Western additional money for loans Western made to GPs to cover operational
11 expenses. Despite the existence of these loans, Western rarely collected on them until
12 a GP's property was sold.

13 Third, Western bought and retained an equity, albeit non-voting, interest in every
14 GP. In the aggregate, these interests had a purported value of \$10 million (based on the
15 prices Defendants charged investors for their interests), but the current fair market
16 value of these interests has been estimated to be about \$1.22 million. Rec. Mot. 13.

17 Fourth, on several occasions, Schooler would cover shortfalls in Western's or
18 the GPs' expenses.

19 **A. Receivership**

20 On October 5, 2012, Judge Larry A. Burns ordered that Western and the GPs be
21 placed under a temporary federal equity receivership because the SEC had
22 demonstrated a probability of success on the merits of their enforcement action and the
23 possibility that Defendants would dissipate assets. ECF No. 10 at 1. Judge Burns'
24 Order empowered the Receiver "with full powers of an equity receiver, including, but
25 not limited to, full power over all funds, assets, collateral, premises (whether owned,
26 leased, occupied, or otherwise controlled), choses in action, books, records, papers and
27 other property belonging to, being managed by or in the possession of or control of
28 Western and its subsidiaries and affiliates, including but not limited to the [GPs] listed

1 on Schedule 1 . . .” *Id.* at 11–14.

2 On October 5, 2012, Judge Burns concluded that the SEC had made out a prima
3 facie case that the GPs were securities, that Defendants violated the securities laws, and
4 that there was a reasonable likelihood that their violations would be repeated. ECF No.
5 44 at 21–22. As a result, pursuant to Section 20(b) of the Securities Act of 1933, and
6 Section 21(d) of the Securities Exchange Act of 1934, Judge Burns issued a
7 preliminary injunction ordering that the receivership be made permanent. *Id.*

8 On October 22, 2012, the case was transferred to the Honorable Gonzalo P.
9 Curiel. ECF No. 52. During the course of the litigation, the Court considered whether
10 to continue to keep the GPs under receivership. *See* ECF No. 1003 at 2–4. On March
11 4, 2015, the Court issued an Order Keeping GPs Under Receivership. *Id.* The Court
12 first carefully examined claims allegations from Defendants and individual investors
13 that the Receiver was behaving unethically or irresponsibly, and found no merit in
14 those allegations. *Id.* at 7–8. The Court then found that, given the posture of the
15 litigation, the nature of Defendants’ alleged scheme of securities fraud, the structure
16 of the GP units, and the differences in investor opinion, the public interest in
17 maintaining the receivership estate’s assets was best served by keeping all the GPs
18 within the receivership. *See id.* at 16–20. The Court directed the Receiver to (a) provide
19 more information to investors by including a detailed list of expenses in any future bills
20 sent to investors, obtaining updated appraisals of all GP properties, and sending a
21 comprehensive informational packet to investors; and (b) file a report and
22 recommendation regarding whether liquidation was warranted for any GPs unable to
23 meet their payment obligations. *Id.* at 21–22.

24 Pursuant to that Order, on April 17, 2015, the Receiver filed a report and
25 recommendation regarding the appropriate course of action with regards to each GP in
26 light of the Court keeping the GPs in receivership. ECF No. 1056. The Receiver
27 divided the GPs into three categories (A, B, and C) based on their ability to pay their
28 expenses, including underlying mortgages as well as notes and operational loans due

1 to Western. Category A properties were able to pay their expenses; Category B
2 properties needed to raise additional capital from their investors in order to pay their
3 expenses, but the shortfall was lower than the estimated net proceeds from a sale of the
4 property; and Category C properties needed to raise additional capital from their
5 investors in order to pay their expenses, but the shortfall was greater than the estimated
6 net proceeds from a sale of the property. *Id.* at 3–6.

7 The Receiver recommended monitoring Category A properties; issuing a capital
8 call for Category B properties, and selling Category B properties if the capital call
9 failed; and selling Category C properties. *Id.* Finally, the Receiver identified two
10 underwater properties where the total amount owed on mortgages exceeded the
11 estimated net proceeds from a sale, and recommended exploring foreclosure or other
12 surrender of the properties in satisfaction of the outstanding debt. *Id.* at 6. The Receiver
13 proposed a orderly sale process for the sale of qualifying properties, which included
14 soliciting proposed listing agreements from multiple brokers, requesting Court
15 approval for engagement of a particular broker, circulating credible offers to investors
16 for input, seeking Court approval of sales to prospective purchasers, providing notice
17 of the sale motion to all investors with an interest in the property, and marketing the
18 property to potential overbidders. *Id.* at 7–8.

19 On May 12, 2015, the Court adopted in part the Receiver’s report and
20 recommendation regarding further courses of action on the GP properties. ECF No.
21 1003. The Court adopted the Receiver’s approach to Category A and B properties, but
22 directed the Receiver to issue capital calls for the Category C properties as well. *Id.* at
23 3. In addition, the Court directed the Receiver to issue capital calls for any underwater
24 property where the majority of investors indicated a desire to retain the property, and
25 pursuing surrender only where the capital call failed. *Id.*

26 In the following year, the Court has approved the Receiver’s recommendations
27 in a number of instances regarding letters of intent from prospective purchasers, the
28 engagement of brokers, and other components of the orderly sale process. *See, e.g.,*

1 ECF No. 1168. However, the Court has not yet finally approved the sale of any
2 particular GP property to a prospective purchaser. Two motions from the Receiver, to
3 approve the sale of the Jamul Valley property and the Reno Vista and Reno View
4 properties respectively, are currently pending before the Court. *See* ECF Nos. 1191,
5 1225, 1285.

6 **B. Final Judgment**

7 On May 19, 2015, the Court granted in part and denied in part the SEC’s motion
8 for summary judgment on its fourth claim for relief, finding that Defendant had
9 engaged in the sale of unregistered securities and that the appropriate amount of
10 disgorgement was \$136,654,250, plus prejudgment interest calculated to May 19, 2015.
11 ECF No. 1074 at 25. On June 3, 2015, the Court granted in part and denied in part the
12 SEC’s motion for summary judgments on its first and second claims for relief, granting
13 both causes of action as to all elements with regards to the fair market value
14 representation of the Stead property in Western’s sales brochure. ECF No. 1081 at 20.

15 On January 21, 2016, the Court granted the SEC’s motion for final judgment
16 against Defendant Schooler, directing (1) a permanent injunction restraining the
17 Defendant from violating federal securities laws; (2) disgorgement of \$136,654,250
18 with prejudgment interest of \$10,956,030 (for a total of \$147,610,280); and (3)
19 imposition of a civil penalty of \$1,050,000. ECF No. 1170 at 8–13.

20 **C. Receiver’s Motion**

21 On February 4, 2016, the Receiver filed the instant motion for an order (a)
22 authorizing the Receiver to conduct an orderly sale of general partnership (“GP”)
23 properties; (b) approving the plan of distributing receivership assets; and (c) approving
24 procedures for the administration of investor claims. Rec. Mot.

25 On April 5, 2016, the Court *sua sponte* directed the Receiver to craft an
26 additional proposal that would enable general partnerships (“GPs”) that wish to do so
27 to exit the receivership while maintaining control of their properties instead of having
28 their properties sold. ECF No. 1224 at 2. The Receiver filed that proposal on April 22,

1 2016. *See* Rec. CO Prop.; *see also* Rec. CO Supp.

2 On May 18, 2016, the Court granted the motions of two groups of investors who
3 have invested in various GPs subject to the receivership, the Dillon Investors and the
4 Aguirre Investors (collectively “Investors”),¹ to intervene for the limited purpose of
5 opposing the Receiver’s motion. ECF No. 1296; *see* Dillon Resp.; Aguirre Resp.;
6 Aguirre SEC Sur-reply; Aguirre CO Resp. The SEC has also responded to the
7 Receiver’s proposal. *See* SEC Resp. The Receiver has replied to Investors’ responses.
8 *See* Rec. Dillon Reply; Rec. Aguirre Reply; Rec. CO Reply.

9 DISCUSSION

10 I. Legal Standard

11 Section 1 of Article III of the Constitution of the United States vests the judicial
12 power of the United States in “...one supreme Court, and in such inferior Courts as the
13 Congress may from time to time ordain and establish.” Clause 1 of Section 2 of Article
14 III goes on to provide that, “(t)he judicial Power shall extend to all Cases, in Law and
15 Equity, arising under this Constitution, the Laws of the United States, and Treaties
16 made, or which shall be made, under their Authority”

17 “In pursuit of their equity powers, courts often appoint receivers as neutral third
18 parties to address issues facing the Court where . . . it does not seem reasonable to the
19 Court that either party should address such issues.” Ralph S. Janvey, *An Overview of*
20 *SEC Receiverships*, 38 No. 2 Securities Regulation Law Journal ART 1 (2010).
21 Accordingly, “the appointment of receivers in a proper case is within the scope of the
22 extraordinary powers of a Court sitting in equity.” *Id.* (quoting *Gross v. Missouri & A.*
23 *RY. Co.*, 74 F. Supp. 242, 244 (W.D. Ark. 1947)) (internal quotation marks omitted).

24 Moreover, a Court may authorize injunctive relief under Section 20(b) of the
25 Securities Act of 1933, and Section 21(d) of the Securities Exchange Act of 1934,

27 ¹ Each investor group represents over one hundred investors. *See* Dillon Resp.
28 1 n.1; Aguirre Resp., Attachment 1. Collectively, the Dillon and Aguirre Investors
comprise approximately 8% of the approximately 3300 investors in the case.

1 where “a proper showing’ has been made by the SEC that there is a reasonable
2 likelihood that the defendant is engaged or about to engage in practices that violate the
3 federal securities laws.” Janvey, *supra*, at 7 (quoting *Aviation Supply Corp. v. R.S.B.I.*
4 *Aerospace, Inc.*, 999 F.2d 314, 316–317 (8th Cir. 1993)). As the Fifth Circuit has
5 observed,

6 The appointment of a receiver is a well-established equitable remedy
7 available to the SEC in its civil enforcement proceedings for injunctive
8 relief. . . . The district court’s exercise of its equity power in this respect
9 is particularly necessary in instances in which the corporate defendant,
10 through its management, has defrauded members of the investing public;
11 in such cases, it is likely that, in the absence of the appointment of a
12 receiver to maintain the status quo, the corporate assets will be subject to
13 division and waste to the detriment of those who were induced to invest
14 in the corporate scheme and for whose benefit, in some measure, the SEC
15 injunctive action was brought.

16 *Id.* (citing *SEC v. First Fin. Group of Tex*, 645 F.2d 429, 434 (5th Cir. 1981), *aff’d*, 659
17 F.2d 660 (5th Cir. 1981).

18 The Receiver acts as an officer of the Court, and the Court is tasked with
19 supervising the equity receivership and determining the appropriate action to be taken
20 in the administration of the receivership. *Id.* Thus, “a district court’s power to supervise
21 an equity receivership and to determine the appropriate action to be taken in the
22 administration of the receivership is extremely broad.” *S.E.C. v. Capital Consultants,*
23 *LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (quoting *SEC v. Hardy*, 803 F.2d 1034, 1037
24 (9th Cir. 1986)) (internal quotation marks omitted). “[T]he district court has broad
25 powers and wide discretion to determine the appropriate relief in an equity
26 receivership.” *Id.* (quoting *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir.
27 1978) (internal quotation marks omitted). “The basis for this broad deference to the
28 district court’s supervisory role in equity receiverships arises out of the fact that most
receiverships involve multiple parties and complex transactions.” *Id.* (quoting *Hardy*,
803 F.2d at 1037) (internal quotation marks omitted).

This power to administer the receivership entails the power to order a sale of
property in receivership. As the Ninth Circuit has observed, the leading treatise on the

1 law of receiverships states:

2 It is generally conceded that a court of equity having custody and control
3 of property has power to order a sale of the same in its discretion. The
4 power of sale necessarily follows the power to take possession and control
5 of and to preserve property, resting in the sovereignty and exercised
6 through courts of chancery, or courts having statutory power to make the
7 sale.

8 *S.E.C. v. Am. Capital Investments, Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996), *abrogated*
9 *on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)
10 (quoting 2 Clark on Receivers § 482 (3d ed. 1992)).

11 Accordingly, the Court has the inherent power to order a sale of receivership
12 property and fashion any distribution plan that is fair and equitable to the investors. *Id.*;
13 *see also Capital Consultants*, 397 F.3d at 738–739.

14 **II. Parties' Positions**

15 **a. Receiver's Position**

16 The Receiver argues it is in the best interests of the receivership estate to conduct
17 an orderly sale of all the GP properties. The Receiver outlines the financial position of
18 the 23 GPs. Over the past three and a half years since the GPs were placed in
19 receivership, 14 of the 23 GP properties have not appreciated in value. Rec. Mot. 2. At
20 the same time, because the GPs must pay property taxes, insurance premiums,
21 administrator fees, tax preparation fees, and in some cases notes to Western to pay
22 underlying mortgages, and because the vast majority of investors have stopped making
23 contributions to their GPs, the balances in GP accounts have steadily declined. Rec.
24 Mot. 3. The aggregate balance in all GP accounts has declined from \$6.6 million in
25 September 2012 to approximately \$3.5 million as of December 31, 2015, and is
26 projected to be approximately \$1.8 million by the end of this year. In the Receiver's
27 words, "money is rapidly being spent to hold properties that are not measurably
28 appreciating in value." *Id.* The Receiver argues that this state of affairs "runs counter
to the fundamental purpose of a federal equity receivership, which is to maximize the
value in the receivership estate for the benefit of investors and creditors." *Id.*

1 The Receiver proposes moving all GP properties to the orderly sale process
2 approved by the Court in the May 12, 2015 for the Category B and C properties. *See*
3 *id.* at 9, Orderly Sale Process, Ex. C. The Receiver also identifies three properties,
4 Dayton IV, Santa Fe, and Yuma III, which are close to being underwater, *i.e.*, the
5 amount owed to mortgages is equal to or greater than their market value, that he
6 recommends surrendering to the lender in satisfaction of the applicable loans. Rec.
7 Mot. 11.

8 The Receiver then recommends distributing the receivership assets according to
9 one of two approaches, the “One Pot” approach or the “Two Tier” approach. *See id.* at
10 13. The Receiver favors the One Pot approach. *Id.* at 21.

11 **b. SEC’s Position**

12 The SEC supports the Receiver’s proposal for an orderly sale of the receivership
13 assets and the One Pot distribution plan. SEC Resp. 2.

14 **c. Dillon Investors’ Position**

15 Dillon and Aguirre Investors commissioned an expert report (“Xpera Report” or
16 “Report”) from a consulting group, Xpera Group (“Xpera”), that independently
17 appraised the 23 GP properties. *See* Xpera Report, Dillon Resp., Ex. 1, ECF No. 1234-
18 2. In accordance with findings of the Report, Dillon Investors argue that the Receiver
19 should take a more flexible approach than selling all of the properties now as-is: selling
20 some of the properties in parcels and pursuing zoning and other changes, and holding
21 other properties for 5-10 years in order to maximize the value of the properties. *See*
22 Dillon Resp. 2–13.

23 Dillon Investors also argue that, as a private sale of realty, the Receiver’s orderly
24 sale proposal does not comport with the requirements of 28 U.S.C. § 2001(b). *Id.* at
25 15–19.

26 Finally, Dillon Investors agree with the Receiver and the SEC that should an
27 orderly sale occur, the proceeds should be distributed to investors in accordance with
28

1 the One Pot approach. Dillon Resp. 19.

2 **d. Aguirre Investors' Position**

3 First, Aguirre Investors argue that investors, as members of GPs, are “necessary
4 parties” to the case, and that due process forbids the selling of GP properties by the
5 Receiver. Aguirre Resp. 16; Aguirre SEC Sur-reply 3; Aguirre CO Resp. 2–4.

6 Second, Aguirre Investors argue that “[n]o true plan can be submitted at this
7 time, because there is a void of critical financial information.” Aguirre CO Resp. 1.
8 However, Aguirre Investors’ “*concept* of a plan” is that following an accounting of the
9 receivership that would achieve “full disclosure” for the investors, all GPs should take
10 a vote on whether to exit the receivership. *Id.* at 1, 4–9. Aguirre Investors proffer a poll
11 purporting to show that, of 1,104 investors who responded, the vast majority
12 (93.34–96.99%) of investors support removing GPs from the receivership, having
13 investors decide when to sell GPs, and having an accounting of the receivership.
14 Aguirre CO Resp., Ex. 1, at 2.

15 Aguirre Investors support the Two Tier distribution approach. *See* Transcript of
16 May 20, 2016.

17 **e. Individual Investors' Positions**

18 The Court has received a number of letters from individual investors, some of
19 whom support the Receiver’s plan, and some of whom oppose it and wish to exit the
20 Receivership. *Compare, e.g.*, ECF Nos. 1282, 1283, *with* ECF Nos. 1249–1257. Some
21 investors disputed the accuracy of Aguirre Investors’ poll, arguing that the
22 communications from Aguirre Investors contained factual misrepresentations, did not
23 disclose the full liabilities for investors exiting the receivership, did not contact all
24 investors, and did not take into account the views of those who did not respond. *See*
25 ECF Nos. 1282, 1288; *see also* ECF No. 1282, Appendix B (attaching list of investors
26 opposing removing the GPs from the receivership).

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1 **III. Analysis**

2 **a. Whether GPs are “Necessary Parties” to the Action**

3 As a threshold matter, Aguirre Investors argue that investors, as members of
4 GPs, are “necessary parties” to the case, and that due process forbids the selling of GP
5 properties. Aguirre Resp. 16; Aguirre SEC Sur-reply 3; Aguirre CO Resp. 2–4. As a
6 result, either the case ought to be stayed, Aguirre Resp. 16, or every order issued in this
7 case since the GPs were not joined as parties is void, or all of the approximately 3,300
8 or more investors have to be joined as parties, Transcript of May 20, 2016 Hearing, or
9 the Receiver must file a defendant class action and serve all investors as members of
10 the class by mail, Aguirre SEC Sur-reply, or, as the Aguirre Investors requested in an
11 *ex parte* motion filed on the morning of the May 20, 2016 hearing, the Court must set
12 a jury trial and reopen discovery on “the factual issues that remain open in this case”
13 because the Investors have the right to “plenary participation” in the case. Aguirre Ex
14 Parte Mot. 2–4, ECF No. 1297.

15 Aguirre Investors’ argument is without merit. As set forth *supra* in Part I, “the
16 district court has broad powers and wide discretion to determine the appropriate relief
17 in an equity receivership.” *Capital Consultants, LLC*, 397 F.3d at 738 (quoting *SEC v.*
18 *Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir. 1978) (internal quotation marks
19 omitted). As the Ninth Circuit has previously stated,

20 Unless a statute in so many words, or by a necessary and inescapable
21 inference, restricts the court’s jurisdiction in equity, the full scope of that
22 jurisdiction is to be recognized and applied. “The great principles of
equity, securing complete justice, should not be yielded to light
inferences, or doubtful construction.”

23 *See Reebok Int’l v. Marnatech Enter., Inc.*, 970 F.2d 552, 561–62 (9th Cir.1992)
24 (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503, 9 L.Ed. 508 (1836)); *see also*
25 *Am. Capital Investments, Inc.*, 98 F.3d 1133, 1144. Therefore,

26 The federal courts have inherent equitable authority to issue a variety of
27 “ancillary relief” measures in actions brought by the SEC to enforce the
28 federal securities laws. This circuit has repeatedly approved imposition of
a receivership in appropriate circumstances. The power of a district court

1 to impose a receivership or grant other forms of ancillary relief does not
2 in the first instance depend on a statutory grant of power from the
3 securities laws. Rather, the authority derives from the inherent power of
4 a court of equity to fashion effective relief.

5 *In re San Vicente Med. Partners Ltd.*, 962 F.2d 1402, 1406 (9th Cir. 1992). Moreover,

6 It is generally conceded that a court of equity having custody and control
7 of property has power to order a sale of the same in its discretion. The
8 power of sale necessarily follows the power to take possession and control
9 of and to preserve property, resting in the sovereignty and exercised
10 through courts of chancery, or courts having statutory power to make the
11 sale.

12 *Id.* (quoting 2 Clark on Receivers § 482 (3d ed. 1992)).

13 None of the cases cited by Aguirre Investors support the proposition that the
14 Court lacks the authority to determine the appropriate relief in this federal equity
15 receivership.

16 First, with regards to the arguments that the investors, as members of GPs, are
17 “necessary parties,” most of the cases Aguirre Investors cite do not concern federal
18 equity receiverships or SEC enforcement actions at all. *Mathews v. Traverse (In re*
19 *Pappas)*, 1994 U.S. App. LEXIS 8881 (9th Cir. Apr. 13, 1994) (unpublished opinion),
20 *Delta Fin. Corp. v. Paul D. Comanduras & Associates*, 973 F.2d 301 (4th Cir. 1992),
21 *Rudnick v. Delfino*, 294 P.2d 983 (Cal. App. Ct. 1956) concern actions brought by
22 members of limited partnerships seeking dissolution of the partnerships. In such cases,
23 courts hold that all members of the partnership are necessary parties. *See* 1994 U.S.
24 App. LEXIS 8881; 973 F.2d at 305–06; 294 P.2d 983. *Pac. Queen Fisheries v. Symes*,
25 307 F.2d 700, 721 (9th Cir. 1962), concerned a shipowner insurance dispute where
26 three appellant-plaintiffs, as partners in a fishery that owned the fishing vessel at issue
27 in the case, were held to be “necessary parties [such that their] admissions would be
28 binding on appellant[s]” as a whole for evidentiary purposes. And *Valley Nat. Bank of*
Arizona v. A.E. Rouse & Co., 121 F.3d 1332, 1336 (9th Cir. 1997), concerned the issue
of whether legal judgments against a partnership can be enforced against partners who
were not parties to an action, and concluded that “judgment may not be entered against

1 one not a party to an action” as a matter of procedural due process. *See id.* (citing
2 *Nisenzon v. Sadowski*, 689 A.2d 1037, 1048 (R.I. 1997) (“To the extent the judgment
3 purports to bind the unnamed Park City partners in their individual capacities without
4 their having been afforded notice and an opportunity to be heard, it is void as violative
5 of their due process rights.”); *Duncan, Inc. v. Head*, 519 So.2d 1305, 1308 (Ala. 1988)
6 (“In an action on a judgment, one may not obtain relief broader than the judgment sued
7 on. The partners must have due process of law.”); *Foster Lumber Company, Inc. v.*
8 *Glad*, 303 N.W.2d 815, 816 (S.D. 1981) (“[D]ue process requires personal service on
9 a partner to bind his individual assets”); *see also Detrio v. United States*, 264 F.2d 658,
10 660 (5th Cir. 1959) (“Undoubtedly the partnership law that requires personal service
11 on a partner to bind his individual assets is required by concepts of procedural due
12 process.”). Here, there is no question of personal judgment being entered against
13 individual investors or binding the assets of individual investors.

14 Second, Aguirre Investors argue that *San Vicente*, 962 F.2d 1402 and *American*
15 *Capital Investments, Inc.*, 98 F.3d 1133, demonstrate that even if the assets of limited
16 partnerships can be sold by a receiver, the assets of general partnerships may not be so
17 sold. However, neither case supports this proposition. In *San Vincente*, San Vincente,
18 a limited partnership whose assets were under receivership due to an SEC enforcement
19 action against APHI, the general partnership that administered both San Vincente and
20 81 other partnerships and trusts, challenged a receiver’s actions in selling limited
21 partnership assets. 962 F.2d at 1404–05. San Vincente argued that the receiver did not
22 have the authority to sell the limited partnership assets because it was acting in the
23 place of APHI, which did not have such authority. *Id.* at 1408. However, the Ninth
24 Circuit found that the receiver was not acting in place of the general partner, but as a
25 court-appointed receiver, and was thus not bound by the legal relationship between
26 APHI and San Vincente. *Id.* at 1408–09. Similarly, in *American Capital Investments*,
27 the Ninth Circuit found that a receiver was acting in his capacity as a receiver, not as
28

1 a replacement for the ousted general partner, in selling limited partnership assets. 98
2 F.3d at 1145.

3 As should be readily apparent, neither case addresses the question of whether
4 general partnership assets may be sold by a receiver in the same way as limited
5 partnership assets. Both cases do, however, repeatedly affirm the “well-established”
6 powers of sale of federal equity receivers, *see id.*, and the “wide discretion” the federal
7 courts enjoy in fashioning relief, *see* 962 F.2d at 1406. And while *American Capital*
8 *Investments*, 98 F.3d at 1145 n.17, does cite 2 *Clark on Receivers* §§ 482, 491, for the
9 proposition that equity receivers “can conduct a judicial sale of real property that is
10 properly within their ‘possession and control’ and within the court’s territorial
11 jurisdiction, where all parties of interest have been brought before the court,” Aguirre
12 Investors cite no authority to support the proposition that investors should be
13 understood to be parties of interest. *See also* Black’s Law Dictionary (9th ed. 2011)
14 (defining “party in interest” as “[a] person entitled under the substantive law to enforce
15 the right sued upon and who generally, but not necessarily, benefits from the action’s
16 final outcome”).

17 Third, with respect to the due process argument, it is well-established that “the
18 traditional rule is that summary proceedings are appropriate and proper to protect
19 equity receivership assets.” *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 456
20 (9th Cir. 1984) (citations omitted) *see also Am. Capital Investments*, 98 F.3d at 1146
21 (“For the claims of nonparties to property claimed by receivers, summary proceedings
22 satisfy due process so long as there is adequate notice and opportunity to be heard.”)
23 (citing *SEC v. Wencke*, 783 F.2d 829, 836–38 (9th Cir.), *cert. denied*, 479 U.S. 818,
24 (1986); *SEC v. Universal Fin.*, 760 F.2d 1034, 1037 (9th Cir.1985)). In both *San*
25 *Vicente* and *American Capital Investments*, the Ninth Circuit found due process
26 satisfied where the partnerships had notice of the proceedings and an opportunity to be
27 heard. *See* 98 F.3d at 1147 (finding due process satisfied where “Appellants have
28

1 presented only one alternative to the district court’s comprehensive scheme—their own
2 last-minute purchase proposal, which the district court found financially dubious and
3 inattentive to the needs of creditors, [and the district court] rejected the Investors’
4 proposal only after full briefing, a hearing, and post-hearing supplemental briefing.”);
5 962 F.2d at 1407, which investors have been amply afforded in this case, *see, e.g.*, ECF
6 Nos. 790, 794, 1234, 1235, 1277, 1293, 1298.

7 Accordingly, Aguirre Investors’ *Ex Parte* Motion for an Order Setting
8 Evidentiary Hearing and Discovery Schedule, ECF No. 1297, is **DENIED**.

9 **b. Orderly Sale of GP Properties**

10 **i. Xpera Report**

11 Comparing the Receiver’s proposal and the recommendations of the Investors’
12 experts, the Court observes that there is a substantial level of agreement between the
13 two regarding how to maximize the value of the receivership estate.

14 The Xpera Report makes the following recommendations: In 12 instances, the
15 Report recommends selling the GP property now, as-is. In 2 instances, the Report
16 recommends selling the GP property now, but exploring whether to sell in bulk or in
17 individual parcels in order to maximize the selling price. In 6 instances, the Report
18 recommends taking relatively minor actions over a time frame of less than a year, such
19 as obtaining a zoning change, getting a subdivision approval, or holding a property for
20 up to 12 months pending the completion of a nearby parkway, in order to maximize the
21 selling price. In 3 instances, the Report recommends holding the GP property, either
22 indefinitely or for a period of 5-10 years, in order to maximize the selling price.
23 *See generally* Xpera Report.

24 In sum, in 20 out of 23 instances, the Xpera report accords with the Receiver’s
25 proposal in recommending either selling the property immediately (14 instances), or
26 taking relatively minor actions that would take less than a year in order to improve the
27 value of the property before selling the property (6 instances). As the Receiver points
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1 out, the Receiver’s orderly sale plan contemplates a sale process that takes a significant
2 period of time, and could incorporate Xpera’s suggestions for how to maximize the
3 value of the identified properties. Rec. Dillon Reply 2.

4 Similarly, the vast majority of Xpera’s 2016 appraisal values are in line with the
5 Receiver’s 2015 appraisal values. *See id.*, Ex. A. In 14 instances, Xpera’s 2016
6 appraisal values are similar to or only slightly higher than the Receiver’s 2015
7 appraisal values, a difference largely attributable to the year-long gap between the two
8 appraisals. In 6 instances, the difference in appraisal values is due to the increased
9 value Xpera assigns to the recommended zoning and other changes. Only in 3
10 instances, Las Vegas 1, Washoe IV, and Washoe County 5, is there a significant
11 unexplained difference in appraisal values.

12 Significantly, the Xpera Report endorses the Receiver’s recommended sale of
13 the Jamul Valley property, which has been strongly opposed by both Dillon and
14 Aguirre Investors, *compare* Xpera Report 121, *with* ECF Nos. 1227, 1230, as well as
15 the Receiver’s proposed broker and marketing time for the Sante Fe property, Xpera
16 Report 143.

17 Only in 3 instances does Xpera differ from the Receiver in recommending
18 holding a GP property for a significant length of time. The Court will examine each
19 instance in turn. First, with regards to the Tecate property, Xpera recommends holding
20 the property for an indefinite amount of time until the City of San Diego Planning
21 Department develops an overall plan for the Tecate area including water sources. Xpera
22 Report 128. However, Xpera evinces no optimism that the County will develop such
23 a plan in the foreseeable future, stating that “that process is moving very slowly,” and
24 “[a]s a result, the sale of properties in Tecate has virtually ground to a halt.” *Id.* at 128.

25 Second, with regards to the Las Vegas 1 and LV Kade properties, Xpera projects
26 that holding the properties for 5-10 years will result in a two-to-three fold increase in
27 the values of the properties due to their valuable locations. *See* Xpera Report 29–32.

28

1 As these two properties are by far the most valuable properties held by investors,²
2 Dillon Investors argue that holding these two properties for 5-10 years would
3 significantly increase the value of the receivership estate. Dillon Resp. 2, 6.

4 Xpera notes, however, that the “Las Vegas economy tends to be cyclical and
5 therefore, prices do not move upward (or downward) in a smooth pattern. It will be
6 necessary to closely track the economy to “catch” an upward wave to optimize the
7 value of the properties.” Xpera Report 33. The Receiver also points out that the Xpera
8 recommendations do not take into account that many of the GPs have unpaid expenses.
9 Rec. Dillon Resp. 4. While the Las Vegas 1 and LV Kade properties are appraised at
10 a significant value, they are also among the properties that have unpaid property taxes
11 and cannot pay their operating expenses for 2016. *Id.* The previous capital call directed
12 by the Court last year for Las Vegas 1 only raised \$11,776 of the needed \$86,850, or
13 13.56% of the necessary funds, *see* ECF No. 1203 at 1, and the capital call for LV Kade
14 only raised \$10,855 of the needed \$99,279, or 10.93% of the necessary funds, ECF No.
15 1166 at 1.

16 Having reviewed these three instances, the Court declines to direct the Receiver
17 to hold the Tecate period for an indefinite period, and the Las Vegas 1 and LV Kade
18 properties for 5-10 years, in the hope of increasing their selling prices. First, with
19 respect to the Tecate property, the Xpera Report offers no time frame and expresses no
20 optimism that San Diego County will decide on a development plan for the area such
21 that property prices in Tecate will increase in the near future. Second, with respect to
22 the Las Vegas 1 and LV Kade properties, while there is an evident potential for the
23 properties to substantially increase in value, the Xpera report also acknowledges that
24 there is significant risk in continuing to hold the properties due to the cyclical nature
25

26
27 ² Las Vegas 1 was valued by the Receiver as worth \$5,275,00 in 2015, and by
28 Xpera as worth between \$7,423,976,410 and \$9,764,410 in 2016. LV Kade was valued
by the Receiver as worth \$8,260,000 in 2015, and by Xpera as worth between
\$8,690,220 and \$11,173,140 in 2016. *See* Rec. Dillon Resp., Ex. A.

1 of the Las Vegas economy, the properties have run out of money to pay their operating
2 expenses this year, and the recent capital calls failed by a very large margin.

3 That said, the Receiver has expressed willingness to evaluate the
4 recommendations of the Xpera Report and incorporate them where feasible. Rec.
5 Dillon Reply 2. The Receiver has also pointed out that if the One Pot approach is
6 adopted, money from the overall pool could be used to pursue such measures as
7 subdivisions, zoning changes, etc. for the properties that cannot currently pay their
8 operating expenses. *Id.* at 5. Thus, the Court **DIRECTS** the Receiver to file a report
9 and recommendation evaluating the pros and cons of the Xpera Report
10 recommendations, and identifying those recommendations that would feasibly
11 maximize the value of the receivership estate.

12 **ii. 28 U.S.C. § 2001**

13 Dillon Investors argue that the Receiver's proposed Orderly Sale Process, Rec.
14 Mot., Ex. C, contemplates a private sale of realty but does not comport with the
15 requirements of 28 U.S.C. § 2001(b). Dillon Resp. 15–19. § 2001 provides in relevant
16 part,

17 (a) Any realty or interest therein sold under any order or decree of any
18 court of the United States shall be sold as a whole or in separate parcels
19 at public sale at the courthouse of the county, parish, or city in which the
20 greater part of the property is located, or upon the premises or some parcel
21 thereof located therein, as the court directs. Such sale shall be upon such
22 terms and conditions as the court directs. Property in the possession of a
23 receiver or receivers appointed by one or more district courts shall be sold
24 at public sale in the district wherein any such receiver was first appointed,
25 at the courthouse of the county, parish, or city situated therein in which
26 the greater part of the property in such district is located, or on the
27 premises or some parcel thereof located in such county, parish, or city, as
28 such court directs, unless the court orders the sale of the property or one
or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given
by publication or otherwise as the court directs, the court may order the
sale of such realty or interest or any part thereof at private sale for cash or
other consideration and upon such terms and conditions as the court
approves, if it finds that the best interests of the estate will be conserved
thereby. Before confirmation of any private sale, the court shall appoint
three disinterested persons to appraise such property or different groups
of three appraisers each to appraise properties of different classes or

1 situated in different localities. No private sale shall be confirmed at a
2 price less than two-thirds of the appraised value. Before confirmation of
3 any private sale, the terms thereof shall be published in such newspaper
4 or newspapers of general circulation as the court directs at least ten days
before confirmation. The private sale shall not be confirmed if a bona fide
offer is made, under conditions prescribed by the court, which guarantees
at least a 10 per centum increase over the price offered in the private sale.

5 The Receiver argues that the requirements for private sales under § 2001(b) are
6 “completely outdated and out of touch with the way real estate is sold in today’s
7 market,” and will result in significant costs and delay. Rec. Dillon Reply 7. Instead, the
8 Receiver proposes a modified Orderly Sale Process where, once terms of a sale have
9 been agreed on with a prospective purchaser, a public sale is conducted pursuant to the
10 terms of § 2001(a). *Id.* at 6. The Receiver has offered ECF No. 1225 at 13–14 and ECF
11 No. 1285 at 9–10 as examples of how this public sale procedure could operate in
12 conjunction with the proposed Orderly Sale Process.

13 Upon review of the Receiver’s examples, the Court finds that the Receiver’s
14 proposed public sale process would comport with the requirements of 28 U.S.C. §
15 2001. The Court **DIRECTS** the Receiver to file a Modified Orderly Sale Process
16 proposal, based on that provided in Exhibit C of the Receiver’s motion, that
17 incorporates the public sale process discussed above.

18 **iii. Whether to Allow GPs to Exit the Receivership**

19 On April 5, 2016, the Court *sua sponte* directed the Receiver to craft an
20 additional proposal that would enable general partnerships (“GPs”) that wish to do so
21 to exit the receivership while maintaining control of their properties instead of having
22 their properties sold. ECF No. 1224 at 2. The Court specified that “the proposal should
23 include: (1) a procedure by which each GP could elect whether or not to sell; (2)
24 conditions that must be met by each GP that wishes not to sell showing that the GP
25 could maintain fiscal viability going forward; (3) conditions that must be met by each
26 GP to insure fairness to those investors within GPs which wish not to sell but who
27 individually wish to exit their investment; (4) conditions that must be met by each GP
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1 to demonstrate their ability for self-governance; (5) alternatives for the disposal of
2 Western's interest in such GPs; and (6) an assessment by the Receiver of the
3 advantages and disadvantages of the proposal." *Id.*

4 The Receiver filed that proposal on April 22, 2016. *See* Rec. CO Prop.; *see also*
5 Rec. CO Supp. The Receiver points out a number of equitable and logistical problems
6 with allowing GPs to exit the receivership, but nonetheless proposes a mechanism
7 whereby the 5 GPs with sufficient cash on hand to pay their operating expenses
8 through 2016 and buy out Western's interest in the GP could vote to exit the
9 receivership. *See id.*

10 Upon review of the Receiver's proposal, the Court determines that it would be
11 both unequitable and impracticable to allow the GPs to exit the receivership at the
12 present time. In his proposal, the Receiver identifies a number of equitable and
13 logistical hurdles complicating any attempt to allow the GPs to exit the receivership.
14 First, as the Court has previously recognized, all investors have a potential interest in
15 the value of all GP properties because Western has a financial stake in each GP, and
16 all investors have potential claims against Western. ECF No. 1003 at 18–20. Moreover,
17 it would be unfair for the fees and costs of the receivership to solely be borne by the
18 non-exiting investors. Rec. CO Prop. 11. This means that it would be unfair to the non-
19 exiting investors for the exiting investors to exit the receivership without repaying
20 amounts owed to Western, buying out Western's interests in the GP, and releasing all
21 claims against Western, including claims held by investors. Rec. CO Prop. 5. It would
22 also be administratively unworkable to have exiting investors continue to hold claims
23 against Western, because the amount of investor claims in equity receiverships is
24 determined by the amount of investor losses, which cannot be determined until the GP
25 properties are sold. *Id.* at 6. Under the Receiver's estimate, only 5 GPs have the ability
26 to pay the amount necessary to exit the receivership and have cash remaining after
27 paying their 2016 Expenses.

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1 In addition, it would be unfair for investors who did *not* want to leave the
2 receivership to not be cashed out upon a GP exiting the receivership. Otherwise, those
3 investors would be subject to investments they do not want and potentially subject to
4 personal liability for debts of their GPs, a concern several investors have previously
5 expressed. *See* ECF No. 1003 at 18. Only 5 GPs could potentially cash out non-exiting
6 investors with their existing cash on hand. The Receiver points out that any alternative
7 scheme where the exiting investors individually buy out non-exiting investors would
8 be “complicated, time consuming, require a lot of oversight, and, based on the low
9 response rates to investor votes and capital calls,³ unlikely to work.” Rec. CO Prop. 9.

10 The Receiver also points out that it would be difficult to develop a mechanism
11 for insuring that an exiting GP could govern itself. As the Court has previously
12 recognized, the GPs were structured by Defendants in such a way as to make them
13 essentially ungovernable and dependent on Defendants to make decisions regarding the
14 properties. *See* ECF No. 583 at 6–10. Changing the management structure of the GPs
15 at this stage would require the Receiver to resolve difficult questions regarding “the
16 scope of [a] manager’s duties and responsibilities, reporting to investors, payment of
17 manager fees and expenses, liability for errors made, insurance, and other issues.” *Id.*
18 at 10. Moreover, it would be unfair not to obtain the consent of all exiting investors as
19 to the new management structure, and any failure to institute a successful management
20 structure could, as noted above, subject exiting investors to personal liability due to the
21 general partnership structure of the GPs. *Id.*

22 Moreover, to the extent that schemes to monitor investor buy-out and the
23 establishment of GP self-governance become administratively complex, it would be
24 unfair to non-exiting investors, because those administrative costs would be borne by
25 the entire receivership estate.

27 ³ The Receiver points out that the capital calls ordered by the Court last year
28 have raised only 18% of the funds needed. Rec. CO Reply 3.

1 Finally, the Receiver points out that the 5 GP properties that have sufficient cash
2 on hand to exit the receivership are projected to receive *less* value if they exit the
3 receivership than if they stay in the receivership and receive *pro rata* distributions
4 under the One Pot approach, even using the Xpera Report's 2016 appraised property
5 values. *See* Rec. CO Supp. 2; *id.*, Ex. A. This is because there is no correlation between
6 whether a GP property can pay its operational expenses and whether it has appreciated
7 in value. Rec. CO Prop. 8.

8 Aguirre Investors' arguments to the contrary are unpersuasive. The Aguirre
9 Investors argue that, following an accounting of the receivership, all GPs should be
10 allowed to take a vote on whether to exit the receivership. Aguirre CO Resp. 1, 4–9.
11 Aguirre Investors argue that until there has been “full disclosure,” investors cannot
12 make a well-informed decision about whether to remain in the receivership.

13 However, the Court has already previously examined numerous allegations from
14 Defendants and individual investors that the Receiver was behaving unethically or
15 irresponsibly, and found no merit in those allegations. *See, e.g.*, ECF No. 1003 at 7–8.⁴
16 The Receiver has been open with investors regarding the troubled financial status of
17 many of the GP properties.

18 Moreover, on March 4, 2015, the Court directed the Receiver to (1) begin to
19 include a detailed list of expenses in bills sent to investors; (2) obtain updated property
20 appraisals for all GP properties; and (3) provide detailed information packets to all

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22 ⁴ Indeed, at the May 20, 2016 hearing, counsel for Aguirre Investors accused the
23 Receiver of knowingly providing inaccurate financial statements to the Court and
24 investors. *See* Transcript of May 20, 2016 Hearing. Further questioning regarding these
25 accusations revealed that in the second quarter of 2014, the Receiver changed the way
26 Western's receipts and disbursements were calculated so as not to include “flow-
27 through” funds that were technically received from the GPs and then disbursed by
28 Western to creditors, but did not reflect more active financial actions on Western's part.
While the Receiver could have included a sentence in an interim report explaining this
accounting change to the Court and investors, the Receiver evidently acted in good
faith in changing the method for presenting an aspect of Western's financial status so
as to render Western's true level of financial activity in a clearer fashion. Aguirre
Investors provided no evidence supporting their assertion the Receiver knowingly or
intentionally misled the Court.

1 investors last year describing (a) the SEC’s allegations; (b) the Receiver’s findings to
2 date, including the original purchase prices of the GP properties, the funds raised by
3 Western from the GPs, how the difference between the purchase prices and the money
4 raised was spent by Western, and the results of the appraisals on the GP properties; (c)
5 the current and projected financial status of the GPs and their properties; and (d) the
6 amount and purpose of the expenses being billed to investors, the amount of billed
7 expenses that are actually paid, and what may occur if insufficient funds are raised
8 from investors to pay operational expenses. *See* ECF No. 1003 at 22; ECF No. 1023,
9 ECF No. 1069. The Court thus rejects Aguirre Investors’ argument that investors have
10 not been appropriately informed as to the status of the GP properties.

11 That said, the Court also recognizes that the Receiver’s previous fee reports to
12 the Court have not fully complied with the SEC’s recommended format for fee reports.
13 *Compare, e.g.,* Receiver’s Fourteenth Interim Report, ECF No. 1189, *with* SEC
14 Standardized Fund Accounting Report: Civil–Receivership Fund (“SFAR”), *available*
15 *at* Billing Instructions for Receivers in Civil Actions Commended by the U.S.
16 Securities and Exchanges Commission (“SEC Billing Instructions”),
17 <https://www.sec.gov/oiea/Article/billinginstructions.pdf>. The Court thus **DIRECTS**
18 the Receiver to withdraw and resubmit Receiver’s Fourteenth Interim Report, ECF No.
19 1189, and submit all future fee reports, consistent with SFAR. The Court also
20 **DIRECTS** the Receiver to submit a final fee application “describing in detail the costs
21 and benefits associated with all litigation and other actions pursued by the receiver
22 during the course of the receivership,” as recommended by the SEC. *Id.*

23 The Court also observes that Aguirre Investors have no concrete proposals to
24 resolve the equitable and logistical problems identified by the receiver. At the May 20,
25 2016 hearing, counsel for Aguirre Investors proffered the Las Vegas 1 property as an
26 example of the simplicity of allowing some GPs to exit the receivership, and stated that
27 the “only thing” keeping Las Vegas 1 in the receivership was \$100,000 in unpaid
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1 liability. Transcript of May 20, 2016 Hearing. Aguirre Investors suggested that
2 requiring investors in Las Vegas 1 to pay a mere \$212/mo for 6 months would pay this
3 liability and allow Las Vegas 1 to exit the receivership. However, this proposal
4 accounts for none of the concerns articulated by the Court in its April 5, 2016 Order
5 and also identified by the Receiver, including how the minority of investors within
6 exiting GPs who do not wish to exit the GPs would be bought out, the risk that exiting
7 investors would be exposed to personal liability to any debts incurred by the GP due
8 to the structure of the general partnership agreements, the lack of a functioning self-
9 governance mechanism for the exiting GPs, how Western's share in Las Vegas 1 would
10 be bought out, and the fairness to non-exiting GPs of bearing all the fees and costs of
11 the receivership estate.

12 Aguirre Investors argue largely that solutions to most of these problems cannot
13 be identified until there has been "full disclosure." *See* Aguirre CO Resp. at 6–8;
14 Transcript of May 20, 2016 Hearing.⁵ This is an unrealistic response to the
15 considerable risks discussed above that any administratively complex scheme would
16 both unfairly burden the receivership estate and the non-exiting investors, and risk
17 exposing the exiting investors to personal liability on behalf of their GPs. The Court
18 recognizes that in any situation where the assets of the receivership estate are
19 insufficient to pay its claims in full, a certain number of claimants will not receive their
20 desired outcome. However, for the reasons stated above, the Court finds the
21 disadvantages of allowing GPs to exit the receivership at the present time outweigh the

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23 ⁵Aguirre Investors also argue that the GP agreements contain a number of terms
24 allowing for self-governance, such as appointment of a signatory partner to make
25 various decisions and the appointment of a secretary. *Id.* at 9. However, as discussed
26 above, the existence of these terms does not mitigate the Court's earlier observation
27 that implementing a workable managerial scheme would be an extremely complex task
28 that, if executed incorrectly, could expose exiting investors to personal liability on
behalf of their GPs. Similarly, Aguirre Investors' argument that Western's interest in
the GPs could be sold as "personalty" seems to contemplate additional work required
by the Receiver in order to market and sell Western's interest in each GP. It is also
unclear how Western's interest could be sold to non-existing investors, given the nature
of the general partnership agreements.

1 advantages from the perspective of maximizing the value of the receivership estate for
2 all investors.

3 As an alternative proposal, the Receiver suggests that investors who want to
4 retain GP properties can join together, form new entities, and purchase GP properties
5 from the receivership estate. Rec. CO Prop. 12. In order to avoid forcing investors to
6 essentially “repurchase” properties, the Receiver proposes that any new investor entity
7 be permitted to include as a component of their bid the projected amount its investors
8 will receive in distributions. *Id.* at 13.

9 The Court finds that this proposal has considerable advantages when compared
10 with allowing GPs to exit the receivership in their current form. As the Receiver points
11 out, “[i]t is not at all unusual for a subset of investors in a distressed investment . . . to
12 form a new entity and purchase assets from the distressed entity.” *Id.* The new investor
13 entities could decide their management structure from scratch, and investors who wish
14 to exit their investments could simply decide not to participate in the new investor
15 entity. To the extent that the GP property is being sold below market value, the investor
16 entity would be acquiring a bargain. The receivership estate would bear no
17 administrative expenses in connection with the formation of the new receivership
18 entities. Moreover, the Receiver’s proposal that any new investor entity be permitted
19 to include as a component of their bid the projected amount its investors will receive
20 in distributions reduces the cash amount the new investor entity would have to pay to
21 purchase a GP property.

22 Accordingly, the Court **DIRECTS** the Receiver to allow any new investor
23 entities who seek to purchase GP properties through the Modified Orderly Sale Process
24 to allow the new investor entity to include as a component of its bid for a GP property
25 the projected amount its investors will receive in distributions.

26 **c. Distribution of Receivership Assets**

27 Once GP properties have gone through the sale process, sales have closed,
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1 mortgages, taxes, broker commissions, and other costs of sale have been paid, and the
2 net sale proceeds have been recovered, the Receiver proposes two possible approaches
3 for distributing the receivership assets: the “One Pot” approach and the “Two Tier”
4 approach. Under the One Pot approach,

5 [A]ll net sale proceeds from all GP properties are pooled and distributed
6 *pro rata* to all investors based on the total funds they invested in all GPs.

7 *Id.* at 13. Under the Two Tier approach,

8 [T]he net sale proceeds from the sale of each GP property go to the GPs
9 that own that property in accordance with their cotenant ownership
10 interests. The debts of each GP are then paid and the remaining net
11 proceeds are distributed directly to investors in accordance with their GP
units. The debts paid by the GPs include amounts owed to Western and
Western also receives its share of the net proceeds in accordance with the
GP units it owns. All investors then share *pro rata* in assets of Western
based on the total funds they invested in all GPs.

12 *Id.*

13 The Receiver estimates that under the One Pot approach, after outstanding fees
14 and taxes are paid, the total cash available to distribute from the sale of GP properties,
15 cash on hand in GP accounts, the sale of Western’s properties, and the recovery of
16 Western’s remaining assets, will be approximately \$21,804,826. If this amount is
17 distributed *pro rata* under the one pot approach, investors are projected to recover
18 13.40% of the amount they invested in their GPs. *Id.*

19 Under the Two Tier approach, approximately \$20,582,303 would be distributed
20 directly from GPs to their investors according to their GP units, and approximately
21 \$1,222,523 would be distributed to all investors *pro rata* from the remaining assets of
22 Western. Under this approach, the projected recoveries of investors would vary greatly,
23 from as little as 0.75% to as much as 194.07% of their investment. *See id.* at Ex. D.

24 The Receiver, the SEC, and Dillon Investors all favor the One Pot approach,
25 while Aguirre Investors favor the Two Tier approach. *See* Rec. Mot. 21; SEC Resp. 2;
26 Dillon Resp. 19–20; Aguirre Resp. 18–22; Transcript of May 20, 2016 Hearing.

27 The Receiver, the SEC, and Dillon Investors make several arguments in favor
28

1 of the One Pot approach. First, they argue that in the majority of federal equity
2 receivership cases, receivership assets are pooled and distributed to investors on a *pro*
3 *rata* basis, because in most circumstances, the similarities in the way investors were
4 harmed outweigh the differences in the way they invested. *See* Rec. Mot. 14 (citing
5 *Capital Consultants*, 397 F.3d at 750; *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107,
6 1116 (9th Cir. 1999); *United States v. Real Property Located at 13328 and 13324 State*
7 *Highway 75 N.*, 89 F.3d 551, 553–54 (9th Cir. 1996); *SEC v. Credit Bancorp, Ltd.*, 290
8 F.3d 80 (2d Cir. 2002); *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325 (5th Cir. 2001);
9 *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657 (6th Cir. 2001); *SEC v. Elliott*,
10 953 F.2d 1560 (11th Cir. 1992), *rev'd in part on other grounds*, 998 F.2d 922 (11th
11 Cir. 1993)). The Court has already previously found that the general partnership
12 agreements and co-tenancy agreements did not convey any powers to investors at the
13 time of investment, and therefore the GP units sold to investors were securities. ECF
14 No. 583 at 14–17. Since all investors were victims of the same scheme, they should be
15 entitled to the same relief. *See* Dillon Resp. 20.

16 Second, they argue that even in the absence of fraud, pooling of assets for
17 distribution has been approved where distinctions between similarly situated claimants
18 are based primarily on timing or luck. *See, e.g.*, SEC Resp. 4 (citing *S.E.C. v. Sunwest*
19 *Mgmt., Inc.*, No. CIV. 09-6056-HO, 2009 WL 3245879, at *9 (D. Or. Oct. 2, 2009)).
20 Here, they argue that while some investors evidently conducted research into their
21 investments, the material misrepresentations made by Defendants, and the concealment
22 of information such as (a) the difference between the purchase prices paid by Western
23 for the property, and the marked-up purchase prices paid by the GPs for the property
24 (which ranged from 109% to 1800%); (b) how much each cotenant GP paid for its
25 interest in the property, which increased as time went on; (c) the fact that, on average,
26 93% of the funds raised from investors went not towards the GP property directly, but
27 to Western where the funds were used in a variety of ways, including to pay Schooler
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1 and pay general Western expenses; (d) the undisclosed mortgages on some of the GP
2 properties; (e) the GP notes owed to Western as a result of some investors financing
3 their purchase of GP units and how much was owed on such notes; (f) the
4 operational/shortfall loans owed to Western because certain GPs were unable to pay
5 their operating expenses; and (g) the fact that Western stopped collecting note
6 payments from certain GPs in the total amount of approximately \$3.3 million so GP
7 shortfalls would not be detected. Rec. Mot. 17–18.

8 The Court recognizes that where the assets of the receivership estate are
9 insufficient to pay its claims in full, no distribution scheme will fully satisfy all
10 investors. That said, the Court agrees with the Receiver, the SEC, and Dillon Investors
11 that the One Pot approach is the more equitable approach. While some investors did
12 conduct research into their investments, and investors signed general partnership
13 agreements tied to specific GPs, the incomplete information available to investors and
14 the essentially fraudulent nature of Defendants’ scheme means that even investors who
15 researched the same property could have wildly disparate results under the Two Tier
16 approach depending upon which co-tenant GP they are part of.⁶ Under the Two Tier
17 approach, estimated investor recoveries would vary dramatically, between as little as
18 0.75% to as much as 194.07% of their investment, while under the One Pot approach,
19 investors would uniformly receive an estimated 13.40% recovery. *Id.* at 20–21.
20 Investors in 69 of 86 GPs are projected to receive a greater recovery under the One Pot
21 approach than under the Two Tier approach. *Id.* at 21.

22 Administrative considerations also support the One Pot approach over the Two
23 Tier approach. The Receiver has noted that pooling receivership assets would ease

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25 ⁶ For instance, the Receiver offers the example of the Jamul Valley property:
26 Under the Two Tier approach, the three GPs that co-own the property, Jamul Meadows,
27 Hidden Hills, and Lyons Valley, would receive one-third of the net sale proceeds from
28 the property. However, because Hidden Hills and Lyons Valley owe GP notes and
operation loans to Western, while Jamul Valley does not, investors in Jamul Valley
would receive an estimated \$133,023, while investors in Hidden Hills and Lyons
Valley would receive only \$7,549 and \$7,339 respectively. *See* Rec. Mot. 18–19.

1 administration of GPs in arrears with regards to their operating expenses, Rec. Mot. 22,
2 make available resources to consider the Xpera Report recommendations, Rec. Dillon
3 Reply 5, and allow the GP administrator, Lincoln Property Group, and the tax
4 accounting firm that prepares GP tax returns, Duffy Kruspodin & Company, LLP, to
5 be paid and remain as GP service providers, Rec. CO Prop. 4. All investors benefit
6 where the value of the receivership estate is increased by lower administrative costs
7 and higher selling prices for GP properties.

8 Finally, Aguirre Investors' argument that the One Pot approach is legally
9 impermissible is unconvincing. Essentially, Aguirre Investors argue that courts have
10 only pooled assets and distributed them *pro rata* where courts have found fraud or
11 commingling. *See* Aguirre Resp. 18–22. Even were that the case, the Court has already
12 previously found that Defendants employed a common scheme, material
13 misrepresentations were made by Defendants in connection with the marketing of the
14 Stead property, ECF No. 1081, and that the GPs were “financially intertwined” with
15 Western, e.g., 93% of the funds raised from investors went not towards the GP property
16 directly, but to Western where the funds were used in a variety of ways. ECF No. 583
17 at 10. But more importantly, Aguirre Investors have offered no authority denying the
18 broad authority of the Court to fashion an equitable distribution plan.

19 For the reasons stated above, the Court finds that the One Pot approach would
20 produce a more equitable result for the investors than the Two Tier approach.
21 Ultimately, investors were victims of the same investment scheme, and should receive
22 the same relief. Accordingly, the Court **APPROVES** the Receiver's recommendation
23 for a “One Pot” distribution plan of receivership assets, as well as the recommended
24 Distribution Plan attached as Exhibit E to the Receiver's motion, and the
25 accompanying proposed procedures for the administration of investor claims, set forth
26 in pages 23 to 24 of the Receiver's motion.

27 CONCLUSION

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Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. The Receiver’s motion for an order (a) authorizing the Receiver to conduct an orderly sale of general partnership (“GP”) properties; (b) approving the plan of distributing receivership assets; and (c) approving procedures for the administration of investor claims, ECF No. 1181, is **GRANTED IN PART** and **DENIED IN PART**;
2. The Court hereby **DIRECTS** the following orderly sale procedures:
 - a. Within fourteen (14) days of the issuance of this Order, the Court **DIRECTS** the Receiver to file a Modified Orderly Sale Process proposal for the Court’s approval, incorporating a public sale process consistent with the requirements of 28 U.S.C. § 2001;
 - b. Within 180 days of the issuance of this Order, the Court **DIRECTS** the Receiver to file a report and recommendation evaluating the pros and cons of the Xpera Report recommendations, and identifying those recommendations that would feasibly maximize the value of the receivership estate;
 - c. The Court **DIRECTS** the Receiver to allow any new investor entities who seek to purchase GP properties through the Modified Orderly Sale Process to allow the new investor entity to include as a component of its bid for a GP property the projected amount its investors will receive in distributions;
 - d. The Court **APPROVES** the use of the One Pot approach to distribute receivership assets;
 - e. The Court **APPROVES** the Distribution Plan attached as Rec. Mot., Ex. E, ECF No. 1181; and
 - f. The Court **APPROVES** the proposed procedures for the administration of investor claims, as set forth in Rec. Mot. 23–24, ECF No. 1181.

- 1 3. The Court **DIRECTS** the Receiver to withdraw and resubmit Receiver’s
2 Fourteenth Interim Report, ECF No. 1189, and submit all future fee reports,
3 consistent with the SEC Standardized Fund Accounting Report (“SFAR”),
4 *available at* Billing Instructions for Receivers in Civil Actions Commended by
5 the U.S. Securities and Exchanges Commission (“SEC Billing Instructions”),
6 <https://www.sec.gov/oiea/Article/billinginstructions.pdf>. The Court also
7 **DIRECTS** the Receiver to submit a final fee application “describing in detail the
8 costs and benefits associated with all litigation and other actions pursued by the
9 receiver during the course of the receivership,” as recommended by the SEC’s
10 Billing Instructions.
- 11 4. Aguirre Investors’ *Ex Parte* Motion for an Order Setting Evidentiary Hearing
12 and Discovery Schedule, ECF No. 1297, is **DENIED**.
13 **IT IS SO ORDERED.**

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