No. 16-55850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. SECURITIES & EXCHANGE COMMISSION,
Plaintiff – Appellee,

v.

LOUIS V. SCHOOLER; FIRST FINANCIAL PLANNING CORPORATION,
DBA Western Financial Planning Corporation,
Defendants - Appellees,

SUSAN GRAHAM, ET AL.
Intervenors - Appellants,

THOMAS C. HEBRANK,
Receiver - Appellee.

On Appeal from the United States District Court
for the Southern District of California, Case No. 3:12-cv-02164-GPC-JMA

REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AS TO THIRD AND FOURTH ORDERS IN NOTICE OF APPEAL

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Appellee Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial Planning Corporation d/b/a Western Financial Planning Corporation ("Western"), its subsidiaries and the General Partnerships listed on Schedule 1 to the Preliminary Injunction Order entered by the District Court on March 13, 2013 ("GPs" and collectively, "Receivership Entities"), replies to the Aguirre Investors' opposition to the Receiver's Motion to Dismiss this appeal as to the Third and Fourth Orders in the Notice of Appeal ("Motion").

I. INTRODUCTION

The Aguirre Investors spend the majority of their opposition arguing the merits of their appeal, which are not presently before the Court. At issue here is whether the Court has jurisdiction over the Third and Fourth Orders in the Notice of Appeal. The Aguirre Investors concede there is no jurisdiction as to the Fourth Order and withdraw their appeal as to that order. With respect to the Third Order, the Aguirre Investors strain to identify a basis for appellate jurisdiction, while conceding the Third Order is one of several remaining steps toward winding up the receivership and further orders are required before any interim, let alone final, distributions to investors can be made. In fact, of the 36 properties held by the General Partnerships included in the receivership, not one has yet been sold. Each of the Aguirre Investors' arguments fail and the appeal as to the Third Order, as with the Fourth Order, should be dismissed for lack of appellate jurisdiction.

II. DISCUSSION

A. 28 U.S.C. § 1291

It is not clear on what theory the Aguirre Investors claim the Third Order is a final judgment. They concede the District Court must first determine the amounts

of investor claims and approve numerous sales of real properties before any distributions can be made. The District Court must also issue an order authorizing the Receiver to make distributions. Accordingly, there can be no reasonable dispute that the Third Order does not finally resolve the issues of property sales, investor claims, or distributions.

The Aguirre Investors cite *SEC v. Copeland*, 2016 U.S. App. LEXIS 5520 (9th Cir. March 24, 2016), in which the Court determined it had jurisdiction under 28 U.S.C. § 1291. What the Aguirre Investors fail to disclose, however, is that *Copeland* involved not just orders regarding a creditor claim and distributions, but also orders finally resolving the creditor's fraudulent transfer causes of action. *Id.* at *2 (orders appealed from included orders "finding one of Tri Tool's Uniform Fraudulent Transfer Act ("UFTA") claims time-barred" and "denying Tri Tool's second UFTA claim on the merits."). It is also not clear whether further orders were required in *Copeland* before distributions would be made, as is the case here. Accordingly, *Copeland* is inapplicable and does not transform the Third Order into a final judgment.

B. 28 U.S.C. § 1292

The Aguirre Investors next try to make the Third Order fit within Section 1292(a)(2). Having quoted a different order of the District Court which found the Distribution Plan Motion "involves the winding up of the receivership," the Aguirre Investors then contradict themselves and argue the Third Order refuses to wind up the receivership. Opposition, pp. 14-15. Their theory appears to be that if a competing plan is presented, then an order approving one plan over the other must be appealable under Section 1292(a)(2).

To begin with, the Aguirre Investors never presented an actual plan. Dkt. No. 1304, p. 11 (noting the Aguirre Investors presented only a "*concept* of a plan").

Regardless, the Aguirre Investors cite no cases supporting their theory, which on its face makes no sense. It defies logic to say an order both winds up a receivership and refuses to wind up a receivership. The reality is the Third Order is an intermediate step toward winding up the receivership, as the District Court stated. Dkt. No. 1296, p. 4. It approves a distribution methodology and procedures for the administration of investor claims. The Aguirre Investors simply disagree with the District Court's decision. The Third Order, however, cannot reasonably be characterized as refusing to wind up the receivership.

Next, the Aguirre Investors contend the Third Order falls under Section 1292(a)(1) as an order refusing to dissolve or modify an injunction. Yet, they do not identify any injunction the Third Order refuses to dissolve or modify. In fact, the Aguirre Investors never moved the District Court to dissolve or modify an injunction. Accordingly, this argument has no merit whatsoever.

C. Collateral Order Doctrine

The Aguirre Investors' last attempt at appellate jurisdiction is the collateral order doctrine. They try to sidestep the Court's in depth analysis of this issue in *SEC v. Capital Consultants, LLC*, 453 F.3d 1166, 1171-73 (9th Cir. 2006) and follow up holdings in *CFTC v. Forex Liquidity, LLC*, 384 Fed. Appx. 645, 2010 U.S. App. LEXIS 12562, *4 (9th Cir. June 18, 2010) and *SEC v. Tringham*, 475 Fed. Appx. 203, 2012 U.S. App. LEXIS 15689 (9th Cir. July 30, 2012) by arguing those decisions do not apply simply because a final judgment had not yet been entered. There is nothing in *Capital Consultants*, *Forex Liquidity*, or *Tringham*, however, indicating entry of a judgment on the SEC's claims turns all subsequent orders into appealable collateral orders. To the contrary, the Court has determined that, in a federal equity receivership, the issue of equitable distribution of receivership assets was "one of the primary purposes of the litigation" and "part

of the merits of the litigation." *Capital Consultants*, 453 F.3d at 1172. Equitable distribution of assets does not cease to be a primary purpose of the litigation simply because the Court resolves claims against the defendants. Here, the Securities and Exchange Commission's strong continuing interest in the equitable distribution of receivership assets is reflected in its ongoing active participation in proceedings before the District Court, including the Distribution Plan Motion, which it expressly supported, its opposition to motions filed by the Aguirre Investors, and its participation at the May 20, 2016 hearing. Dkt. Nos. 1214, 1232, 1266, 1278, 1291, 1295, 1298.

The Aguirre Investors cite *Legal Voice v. Stormans Inc.*, 738 F.3d 1178 (9th Cir. 2013). The *Legal Voice* decision, however, does not help them. The issue in *Legal Voice* was standing, *i.e.*, whether a non-party could appeal a collateral order after final judgment in the same manner a party could. The Court held that the non-party could appeal. *Id.* at 1183. It was undisputed, however, that the order appealed from was a collateral order.

In contrast, the issue here is whether the Third Order is a collateral order. The Court has held in *Capital Consultants*, *Forex Liquidity*, and *Tringham* that orders regarding investor claims and distributions, such as the Third Order, are not collateral orders. *Legal Voice* addresses non-party standing, an entirely separate issue, and therefore has no bearing on whether the Third Order is an appealable collateral order.

Finally, the Aguirre Investors try to distinguish *Capital Consultants*, *Forex Liquidity*, and *Tringham* on the grounds they did not involve procedural due process issues. First of all, it is not clear the appellants in *Capital Consultants*, *Forex Liquidity*, and *Tringham* did not raise due process arguments. Therefore, even the premise of the argument is questionable. Second, the Aguirre Investors

cite no cases indicating procedural due process arguments turn an otherwise interlocutory order into an appealable collateral order. Such a rule would effectively make all orders appealable if the appellant made a due process argument to the district court, which would flood the Court with appeals of interlocutory orders.

Instead, for the collateral order doctrine to apply, an order must (a) conclusively determine a disputed question, (b) resolve an important question completely separate from the merits of the action, and (c) be effectively unreviewable upon appeal from a final judgment in the case. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). As the *Capital Consultants*, *Forex Liquidity*, and *Tringham* decisions make clear, the Third Order fails the first two prongs of this test, and therefore is not an appealable collateral order.

III. CONCLUSION

For the reasons discussed above, each of the Aguirre Investors' arguments fail and this appeal should be dismissed as to the Third and Fourth Orders listed in the Notice of Appeal for lack of jurisdiction.

Dated: July 15, 2016

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CERTIFICATE OF COMPLIANCE

The foregoing Motion to Dismiss Appeal for Lack of Jurisdiction as to Third and Fourth Orders in Notice of Appeal of Appellee Thomas C. Hebrank complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 1,364 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007, in font size 14, Times New Roman.

Dated: July 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on July 15, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 15, 2016

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