Gary J. Aguirre (SBN 38927)
Aguirre Law, APC
501 W. Broadway, Ste. 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072
Email: Gary@aguirrelawfirm.com

Attorney for Susan Graham *et al*.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

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

INVESTORS' OPPOSITION TO RECEIVER'S MOTION FOR AUTHORITY TO ENGAGE CBRE AS CONSULTANT

Date: September 6, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

Table of Contents

Table of Authorities

Cases

Rules

Statutes

Treatises

I. Introduction

The motion by the receiver, Thomas C. Hebrank ("Hebrank"), for an order approving his proposed expenditure of $40,000 to hire a real estate expert raises three distinct classes of issues. First, may Investors[1] intervene to oppose it? Second, would this be a reasonable use of receivership funds? Third, since the order sought by Hebrank implements the May 25, 2016, order, Investors respectfully contend the new order would be flawed for the same reasons the May 25, 2016, order (Dkt. No. 1304) is flawed. Those reasons include the lack of subject matter jurisdiction, lack of personal jurisdiction, lack of adequate notice to investors, lack of due process, and lack of any legal authority permitting to void the GP agreements. If the Ninth Circuit vacates the May 25, 2016, order, an order granting this motion would also have to be vacated. Consequently, we submit the more prudent approach would be to deny Hebrank's motion without prejudice until the Ninth Circuit acts on Investors' appeal.

It is not Investors' intention to burden this Court with a full explication of the same legal and factual contentions they have asserted in earlier briefs filed with this Court. Rather, in relation to issues raised by Investors in other briefs, they briefly raise those issues below to their appellate rights. To the extent there are any new issues, they will be presented in greater depth.

II. Investors Seek to Intervene Pursuant to the Court's May 18, 2016, Order

By its May 18, 2016, order, the Court granted Investors' motion to intervene to oppose Hebrank's liquidation motion. Dkt. No. 1296 at 11. Hebrank's current motion deals with an issue in the order granting the liquidation motion (Dkt. No. 1304) and thus falls within the scope of May 18, 2016, order. Dkt. No. 1296. The current motion deals with the execution of the order granting Hebrank's liquidation motion and thus comes within the scope of permissible intervention under the May 18 order. *Id.*

[1] The names of the investors filing this opposition are listed in Attachment 1 filed herewith.

III. Objections to the declaration of Edward G. Fates

Investors move to strike paragraph 4 of the declaration of Edward G. Fates filed on July 22, 2016, (Dkt. No. 1341-4) on the grounds that it contains conclusions, inadmissible hearsay, and violates the best evidence rule. This language reads: "Mr. Dillon was supportive of the meeting and agreed that everyone should be working toward the common goal of maximizing the value of the properties. After talking to Mr. Aguirre, however, Mr. Dillon stated he was in a difficult position because Mr. Aguirre insisted on participating in the meeting."

IV. The Proposed Expenditure of $40,000 Wastes Investors' Assets

Shortly after being retained, Gary Aguirre ("Aguirre") and Timothy Dillon ("Dillon") retained Alan Nevin ("Nevin") and Neal Singer ("Singer") through Xpera to serve as expert consultants to counsel. Aguirre selected Nevin, because he had worked with him as an expert witness in another case. Aguirre Decl. ¶ 3. Aguirre invited Dillon to share the costs for Nevin's and Singer's services and the use of their reports. *Id*.

Aguirre took the lead in working with Nevin and Singer. He drafted the contract to hire them as expert witnesses and drafted their declarations based on their input. Dillon's edits were incorporated into the contracts and the declarations. *Id*., ¶ 4.

The contract contemplated Nevin and Singer would testify at the trial that Investors requested in their motion to intervene. In this regard, the contract states "it is highly probable that the status [of Nevin and Singer] will be changed to expert witness when Client receives consultants' report." *Id*., ¶ 5.C. Both consultants became expert witnesses when their reports were submitted as evidence in this case. Investors have appealed the Court's denial of their motion to intervene, including their trial demand. Consequently, Nevin's and Singer's status as Aguirre's potential expert witnesses continues.

Hebrank argues that his efforts to retain Nevin and Singer were blocked by Aguirre. Dkt. No. 1341-1, at 1. This is nonsense. A more accurate characterization would be that Hebrank invited Aguirre to commit malpractice and he declined the offer. But

first we start with an objective statement of the facts: the actual communications rather than Hebrank's biased conclusions stated in his brief.

Aguirre learned on June 2, 2016, from Dillon that Edward Fates ("Fates"), counsel for Hebrank, had requested a meeting among Hebrank, Dillon, Nevin and Singer without Aguirre. Dillon's email reads: "The receiver would like me to assist in arranging a meeting a week or so down the road. I do not believe the receiver intends to have you present at that meeting. My guess is there is more of a perception of hostility between your group and the receiver." *Id*., ¶ 8, Ex. 2 at 13.

On the same day, Aguirre responded directly to Fates with a letter as follows:

> I have received the attached email from Mr. Dillon this morning. I understand you have requested Mr. Dillon to arrange a meeting with Alan Nevin and Neal singer, expert witnesses I have retained in this matter, without my presence. I cannot recall a prior case, either my own or any other attorney known to me in San Diego, where an attorney has requested a private meeting with opposing counsel's expert witnesses outside the presence of the counsel who retained those expert witnesses.
> If you wish to meet either Mr. Nevin or Mr. Singer, I can arrange for you to meet with either of them and me at a mutually convenient time and date, assuming you will agree to pay their hourly rate for such a meeting.

Id., at 12. Fates did not respond.

Instead, Fates tried twice more to get Dillon to arrange an interview with Aguirre's expert witnesses in his absence. *Id*., ¶ 7, Ex. 1 at 7-9. In reply, Dillon's email to Fates proposed the meeting include Aguirre and addressed Fates' putative concerns:

> The meeting with Xpera should take place. The Receiver will be adequately protected by your office. I will make efforts to keep both parties focused on the important issues of returning value to the investors. At the end of the day, we all have the investors' interest at heart. The fact that we may need to be in a room with parties we are adverse to should not distract us from the job we are all retained to do.

Id., at 8.

Fates remained inflexible. In another email, he again insisted that Aguirre be excluded from the interview of his experts by Hebrank and Fates. Fates' email to Dillon replied: "We understand you are in a difficult position, but Gary's participation in the meeting would be detrimental and counter-productive, so expending receivership estate resources *on such a meeting* would not be in the best interests of the investors as a whole (emphasis added)." *Id*., at 8. Again, Dillon replied:

> The issue is not whether I object or not to the Receiver speaking with Xpera. The issue is whether the Receiver – in carrying out his duty – is able to sit in the room with you, Xpera, Gary and me to actually make progress on a plan that returns value to the investors. Yes, the investors that Gary represent (and many of the investors that I represent) do not believe the Receiver has been watching out for their best interests. Attending this meeting would certainly assist in showing that he is considering their best interests. On the other hand, refusing to attend because of the fear it might be counter-productive only reinforces the belief that the Receiver is not taking all reasonable steps on the investors' behalf.

Id., at 7.

When Fates' efforts failed, Hebrank, again ignoring Aguirre's objections that Nevin was his expert witness, contacted Nevin directly. But this time, Hebrank expanded the scope of the proposal from a meeting or two to a supplemental report. He proposed to Nevin: "I would like to discuss with you the possible retention of Xpera directly by the receivership estate to consult on GP property sales and supplement the report." *Id*., ¶ 9, Ex. 3 at 15-16.

On the same day, Aguirre replied:

> I am happy to arrange an interview with Mr. Nevin, but as Mr. Dillon and I have advised your counsel, we will have to be present.
> Mr. Nevin would also condition the interview upon the following conditions:
> - Mr. Singer is present, since they worked together on the project (Mr. Singer could also be interviewed simultaneously or just be present if Mr. Nevin had some questions);
> - Both would be compensated at their regular hourly rates;
> - They would require a few hours to get up to speed on their reports;

> • If your counsel participates in the interview, it should proceed as a deposition.
>
> If you need to communicate with Mr. Nevin or Mr. Singer, please copy me and Mr. Dillon in the email or do it through me.

Id., at 15.

Hebrank's and Fates' efforts to interview other litigants' expert witnesses in the absence of the attorney who hired them is unprecedented. No case law or statute supports such a right. The "interviews" of expert witnesses are customarily done by depositions following procedures specified by statute (C.C.P. §§ 2034.210-2034.310) for the California courts and the Federal Rules, e.g., *Voorhees* 2), and the Local Rules for the federal courts. Aguirre was initially agreeable to an interview without a court reporter. But Fates' and Hebrank's persistent requests to exclude Aguirre from the meetings suggested that the deposition format would best protect all participants.

It is common practice for trial attorneys who retain consultants or expert witnesses to do so by contract specifying the terms of the retention. Hebrank and his attorney should know those contracts typically prohibit an expert witness from sharing his work with another litigant without the consent of the attorney who hired him. In this regard, the Xpera contract has a specific term relevant to Hebrank's and Fates' persistent efforts to interview both experts outside Aguirre's presence. It explicitly states that Nevin's and Singer's work "should not be discussed with any third party without" the attorneys' consent, "except as necessary to conduct the investigation." *Id*., ¶ 5.A. In essence, Fates and Hebrank tried directly and indirectly to persuade Nevin and Singer to breach their contract with Aguirre. This conduct has a name in tort law: interference with contractual relations. *Daniel & Francine Scinto Found. v. City of Orange*, 2016 U.S. Dist. LEXIS 102060 *22 (C.D. Cal. Aug. 3, 2016).

On the evidence before this Court, Fates' and Hebrank's proposed expenditure of $40,000 to duplicate work done by Xpera seems an unfettered example of waste. Hebrank prefers to spend $40,000 *of investors' money* to avoid the indignity of Aguirre's

presence. One must wonder whether Hebrank engages in other extravagances to avoid other inconveniences. Since he refuses to open his books, no one will ever know.

The speculation that the meeting would not be productive because of Aguirre's presence is a stunning ground for an attorney or party to make. Dkt. Nos. 1341-1 at 4 and 1341-2, ¶ 6. Aguirre has participated in many hundreds of depositions over his career without a single sanction on discovery or any other issue. Aguirre Decl. ¶ 6. And, as Dillon points out, Fates is present to defend Hebrank. Under these circumstances, Hebrank might be expected to seek a court reporter in the event of any indiscretion by Aguirre that would upset him.

Hebrank offers some details for his rationale for paying $40,000 of investors' money to avoid being in the same room with Aguirre as follows: "Considering the numerous false accusations made against the Receiver by Mr. Aguirre, which the Court characterized as essentially calling the Receiver a 'liar and fraudster' at the May 20, 2016 hearing, the Receiver knew the meeting would not be productive if Mr. Aguirre participated." Dkt. No. 1341-1 at 3-4. This is a clever, but dishonest statement. A reading of the reporter's transcript reveals Aguirre made no such statement.

Aguirre did make two concrete and indisputable statements at the hearing:

- Hebrank had conceded that he misstated receipts and disbursements for the third through the ninth interim reports by $7 million.[2]
- Hebrank learned of the misstatements after his ninth interim report, but did not inform the Court of his misstatements until May 2016.[3]

The same issue was placed in sharper focus with Investors' reply brief in support of their motion for an accounting, but the Court denied Investors' motion to file it. Dkt. No. 1303.

But this is only one of a long list of Hebrank's accounting gaps and irregularities which Investors presented as grounds for their motion to intervene to obtain an

[2] May 20, 2016, hearing Reporter's transcript at 36, ll. 1-5.
[3] *Id*., at 42, ll. 12-17

accounting of the receivership. The Court denied the motion on the grounds it was not timely. It is now on appeal.

It is also challenging to reconcile the need for a $40,000 consultant's report with the Court's comments in its May 25, 2016, order (Dkt. No. 1304). By way of example, the Court observed:

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

Dkt. No. 1304 at 16. The Court's conclusion suggests no third consultant is needed on 12 of the 23 properties. Since the Court found only minor issues exist regarding eight properties, little consultant's time should be necessary to address these issues. Hence, according to the Court's analysis, that leaves three properties where there are significant differences between the Hebrank liquidation plan (Dkt. No. 1181) and the Xpera reports. This hardly justifies the expenditure of $40,000.

V. The Court Lacks Subject Matter Jurisdiction over the GPs and Investors' Property Rights in the GPs.

Two flaws afflict the Court's exercise of subject matter jurisdiction in this case. First, the Court lacks subject matter jurisdiction over the 87 GPs and thus any order selling the GP properties is void. Second, putting aside the first flaw, the Court lacks jurisdiction over the individual investors' property rights when the GPs are dissolved.

The first flawed assumption of subject matter jurisdiction reveals itself in the Court's approval of Hebrank's proposed sale of the 36 properties of realty owned by the

87 GPs. Hebrank cannot sell what Western does not own, possess or control. Contrary to the SEC's contention, Western did not own, possess, or control the 87 GPs when the Court appointed Hebrank as receiver. Hence, all orders advancing the properties to sale are void.

A second even more flawed assumption of subject matter jurisdiction lies intertwined with the first. The Court assumed jurisdiction over the property rights of the partners in the 87 GPs. Upon the dissolution of a GP, every partnership agreement requires the assets be liquidated, the debts be paid, and all remaining funds be paid to that GPs' partners. The Court's decision to void these partnership agreements, some three decades old, and redistribute this wealth is anchored in no theory of subject matter jurisdiction. Since the Court lacks subject matter jurisdiction over the 87 GPs, any order purporting to sell or divest the GPs of their assets would be void. Likewise, since the Court lacks subject matter jurisdiction over individual partners' property rights in the GPs, it cannot rewrite the agreements to create property rights in others.

In *SEC v. Am. Capital Inv.*, 98 F.3d 1133, 1141 (9th Cir. 1996), the Ninth Circuit cited *Voorhees v. Jackson,* 35 U.S. 449, 477 (1836) for this principle: "If there is such a 'want of jurisdiction, the proceedings are void and a mere nullity, and confer no right . . . and may be rejected when collaterally drawn into question.'" Also: "An objection that a federal court lacks subject matter jurisdiction may be raised at any time, even after trial and the entry of judgment." *Oregon v. Legal Servs. Corp*., 552 F.3d 965, 968 (9th Cir. 2009). A party alleging subject matter jurisdiction—the SEC in this case—has the burden of establishing it. *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016).

There are few clues in the record of the legal or factual grounds for the Court's exercise of subject matter jurisdiction over the GPs and no clues for the exercise of the jurisdiction over the partners' property rights. A search of the SEC's complaint and its motion for the temporary and permanent appointment of the receiver yields no express statement of the grounds for the Court's exercise of subject matter jurisdiction over the

GPs, their assets, or their partners rights. Likewise, a search of the orders appointing Hebrank as temporary and permanent receiver yields no such statement.

The Court relied on broad and vague principles of law, rather than holdings, in sweeping aside Investors' objections to its exercise of power over the GPs' and investors' properties. For example, the Court cited the reliance of *SEC v. Capital Consultants*, LLC, 397 F.3d 733, 738 (9th Cir. Or. 2005) on *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978) for the principle, "The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." And a few lines later cited *SEC v. Am. Capital Inv.*, 98 F.3d 1133, 1144 (9th Cir. 1996): "The federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws." The Court relied on these cases in formulating a unique legal principle: If any property is remotely connected to an SEC case, it may be included within federal receivership, sold, and the funds redistributed in accordance with the SEC's, the receiver's, and the court's sense of fairness.

In its May 25, 2016, order, the Court quoted from *In Re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1406 (9th Cir. 1992), but failed to apply the guiding legal principle for determining whether it had subject matter jurisdiction. Investors contend this principle is contained in the quote from *San Vicente*, which in turn quotes 2 Clark on Receivers (3d ed. 1992):

> It is generally conceded that a court of equity *having custody and control of property* has power to order a sale of the same in its discretion. The power of sale necessarily follows the power to take possession and control of and to preserve property, resting in the sovereignty and exercised through courts of chancery, or courts having statutory power to make the sale (emphasis added).

The quote from *San Vicente* assumes the Court has custody and control of the GPs. In this case, that is a faulty premise. The Court does not acquire subject matter jurisdiction merely because an asset lies within the physical boundaries of the Court's

territorial jurisdiction. Rather, as *San Vicente* implies and *SEC v. Am. Capital Inv.*, 98 F.3d 1133, 1136 (9th Cir. 1996) holds, a receiver can only take possession or control of the assets in the possession and control of defendants. Indeed, in this regard, the SEC has contended that Hebrank "has merely stepped into Western's shoes." Dkt. No. 629 at 4. Likewise, the leading treatise on receivership law, 2 Clark on Receivers § 482 at 785 (3d ed. 1992) explains: "The receiver can sell only the right, title and interest of the defendant whose property has been placed in the hands of the receiver or the interest of proper parties to the cause." It also quotes *Murphy v. John Hofman Co.*, 211 US 562, 569 (1909), "The jurisdiction in such cases arises out of the possession of the property." *Id.* § 300 at 507. This principle is repeated in many different forms throughout 2 Clark on Receivers.

The Court's orders confirm its lack of subject matter jurisdiction over the GPs. The issue arose three times in connection with the issue whether the SEC had established that Western *controlled* the 87 GPs as *de facto* limited partners and thus the GPs were securities under the first *Williamson* factor, referring to *Williamson v. Tucker*, 645 F.2d 404, 418 (5th Cir. 1981). In rejecting this contention, the Court observed, "The partnership members don't necessarily have 'so little power' that they are effectively limited partners." Dkt. No. 44, at 4-5. The Court noted investors' significant powers under the GP agreements:

> The agreement gives general partners the right to access the partnership's books. It provides that a majority in interest may vote to remove the Signatory Partners. (A majority in interest must also vote to admit new partners to the partnership. All partnership decisions must be made by a majority in interest vote. "Any Partner, including Non-Voting Partners, may request a vote of the Partnership on any matter relevant to the business and operation of the Partnership." Partners' contact information, under the agreement, is circulated to all members. While Defendants are appointed partnership administrators under the agreement, they may be terminated, with or without cause, by a majority vote.

Id. at 9-10.[4]

[4] See Ex. 10 to David Karp's declaration, Dkt. No. 1293-3.

The Court reached the same conclusion in its July 1, 2013, order: "[T]he Court finds the GP agreements provide investors with sufficient legal authority to exercise power over the partnerships and 'access to important information and protection against dependence on others.'" Dkt. 212 at 6. On August 16, 2013, after reviewing the parties' contentions on the control issue, the Court ordered the GPs released from the receivership. Dkt. No. 470 at 4-27.

The Court revisited the control issue when it granted the SEC's motion that the GPs were unregistered securities. It found Western controlled the GPs *when investors bought their GP interests*. Dkt. No. 583 at 6. The Court also noted investors acquired control later: "Investors did not control these bank accounts until the Partnership Agreements, which provided for the appointment of signatory partners, became effective." *Id*. That took place a year or two after the GPs closed. *Id*. Since Western lacked control of the GPs when the Receiver was appointed, the Court did not have subject matter jurisdiction.

Second, assuming *arguendo* its possession and control over the GPs and their assets, it would merely have subject matter jurisdiction over the GPs and their assets. This would permit the Court to sell the assets if necessary to preserve their value. This seems most apparent if the assets were perishable, e.g., produce. In this case, the cash would replace the realty held by the GPs.

But the Court did not stop with a mere sale of the GP realty and substituting cash for that asset on the GP balance sheets. It took a second step. It effectively voided the GP agreements. Each agreement mandated that, upon dissolution, each GP would distribute its assets to its partners after the payment of its debts. We can find no theory articulated by the SEC, Hebrank or the Court why it had subject matter jurisdiction to rewrite the GP agreements.

VI. The Order Approving Hebrank's Plan Is Void, Because Hebrank Failed to Give Investors Adequate Notice

The SEC and Hebrank have ignored notice requirements set by Supreme Court and the Ninth Circuit cases as well as Local Rule (L.R.) 66.1 in seizing and proposing to forfeit investors' property rights. Hebrank and the SEC failed to give investors any notice or gave inadequate notice of at least three motions that severely prejudiced investors' rights.

The most recent was Hebrank's failure to timely send notice of his February 4, 2016, motion and liquidation plan (Dkt. No. 1181) on any of the 3,370 investors, except those represented by counsel. That motion proposed the sale of all GP realty, the pooling of all GP funds, and, in violation of the 87 GP agreements, the *pro rata* distribution of the funds among 3,370 investors. Simply put, the motion proposed that investors be stripped of all property rights under 87 enforceable GP agreements.

Despite the draconian impact of his proposed plan, we can find only one communication from Hebrank to investors before the May 20, 2016, hearing: his May 6, 2016, email.[5] Hebrank delayed sending the email until May 6, 2016, three months after he filed his plan with the Court and only two weeks before the hearing.[6] He sent the email *three weeks after the deadline* of April 15, 2016, set by the Court's April 5, 2016, order for filing opposition to the plan. Dkt. No. 1224 at 1. David and Lois Schwarz ("the Schwarzes") were among the investors who received this confusing email. We can find no order of the Court permitting Hebrank to serve notice of a distribution plan on investors by email, particularly one sent three weeks after the deadline to file opposition. Nor does any order or rule permit Hebrank to serve investors with his liquidation plan by posting it to his website.

But the investors receiving the defective notice were the lucky ones. Many investors, like Joseph Ardizzone ("Ardizzone"), received no notice.[7] According to Hebrank, he was unable to send emails to all investors, because, "Many investor email

[5] See Aguirre Decl. filed herewith, ¶ 13, Ex. 6.
[6] *Id*.
[7] See Declaration of Joseph Ardizzone filed herewith, ¶ 5.

address [*sic*] were unavailable or were returned undeliverable."[8] The evidence available to Ardizzone's and the Schwarzes' counsel suggests the number of investors who received no notice may be very high, likely in the hundreds. In any case, Hebrank has the burden to show his notice to investors complied with due process. *Gates v. City of Chicago*, 623 F.3d 389 (7th Cir. 2010).

And this issue goes beyond Hebrank's failure to give investors timely notice of his liquidation plan. By way of background, Hebrank obtained an order allowing him to substitute notice on his website for notice by U.S. mail. Dkt. No. 170 at 3. The order did not allow Hebrank to serve investors with his proposed plan by emailing it to them or posting it to his website.

Rather, the order limited the substituted service (posting to the website rather than U.S. mail) to the following: "notices of hearings related to petitions for confirmation of sales of property, receiver reports, and fee applications." *Id*. The order expressly states that Hebrank "is required to mail all other notices required by Local Rule 66.1.f." *Id*. He chose not to provide this service and thus Ardizzone received no notice and the Schwarzes received defective notice of Hebrank's plan to forfeit their property rights as partners in the GPs in which they had invested.

On the record before this Court, the nonexistent and defective notices of Hebrank's February 4, 2016, motion of his proposed liquidation plan, and the May 20, 2016, hearing do not meet the minimum requirements of due process. "The most important element of due process is adequate notice." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.,* 357 F.3d 800, 804 (8th Cir. 2004). Last year, the Ninth Circuit quoted *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) for this directive, "[C]ourts must determine whether the notice given was 'reasonably calculated,

[8] Aguirre Decl., ¶¶ 10 and 11, Exs. 4 and 5. In particular Hebrank's Nov. 24, 2014, Jan. 16, 2015, email state: "If you know someone that should have received this email, but didn't, please forward it to them. Many investor email address were unavailable or were returned undeliverable."

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Investors submit that email service which was not sent to numerous investors does not meet the *Mullane* standard, since it is not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Likewise, a notice sent after the deadline for filing opposition, as Hebrank did here, does not satisfy *Mullane.* In *Carter v. McDonald*, 794 F.3d 1342, 1345 (Fed. Cir. 2015), the court cited *Mullane* for another principle that directly applies to the facts of this case, "That regulatory requirement of notice can only sensibly be construed to require that the notice to counsel be timely, which requires, at a minimum, notice before the expressly stated deadline has passed. We could hardly interpret the notice requirement any differently given the nature of 'notice.'" Consequently, even assuming *arguendo* that the Receiver's May 6 email to investors should be treated as notice, it was inadequate, because it was sent after the deadline for filing any opposition.

In all the Ninth Circuit cases this Court relied upon in finding that the proposed plan did not violate investors' due process rights (Dkt. No. 1304 at 15), those affected by the receiver's proposed plan received notice of the plan and the opportunity to object to it, before the court adopted it. See: *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir. 1985)(Following several notices to investors explaining the proposed categories and stating the category into which each investor would be placed, and over the objection of Investors, the court approved a modified categorization proposal on December 1, 1982.); *U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984)("Because Tenneco had ample notice of and opportunity to contest the Receiver's challenge to the claimed setoffs, there was no denial of due process."); *SEC v. Wencke*, 783 F.2d 829, 832 (9th Cir. 1986)("On August 19, 1983, deLusignan was served with another copy of the disgorgement application, a set of supporting documents, and a notice of a hearing to be held on the application before the magistrate/special master

nineteen days later."); *In Re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992)("Because San Vicente received notice at all stages of the receivership proceedings and had every opportunity to participate in the proceedings, the fact that San Vicente was never a named party in the proceedings did not violate due process.") *SEC v. Am. Capital Invs*., 98 F.3d 1133 (9th Cir. 1996)("In the case at bench, the summary proceedings actually afforded to appellants gave them full notice and opportunity to be heard at every critical stage.")

Unlike the facts in the above decisions, Hebrank here either sent no notice or defective notice of his proposed liquidation plan to investors. Such notice failed to comply with *Mullane* and therefore did not comply with the due process of law requirements of the Fifth Amendment to the U.S. Constitution. An order is void if it is issued by a court in a manner inconsistent with the due process clause of the Fifth Amendment. *In Re Krueger*, 88 B.R. 238, 241 (B.A.P. 9th Cir. 1988). The Court's May 25, 2016, order was issued in a manner inconsistent with the due process clause and is therefore void.

Further, it appears neither the SEC nor Hebrank served any notice on investors of the SEC's motion for an order appointing Hebrank as the receiver in this case as required by L.R. 66.1.f. In this regard, L.R. 66.1.a.2 provides as follows:

> A permanent receiver may be appointed after notice and hearing upon an order to show cause. This order will be issued by a judge upon appointment of a temporary receiver or upon application of the plaintiff and must be served on all parties. The defendant must provide the temporary receiver (or, if there is no temporary receiver, the plaintiff) within seven (7) days a list of the defendant's creditors, and their addresses. Not less than seven (7) days before the hearing, the temporary receiver (or, if none, the plaintiff) must mail to the creditors listed the notice of the hearing, and file the proof of mailing.

None of the 200 clients represented by Aguirre Law provided a copy of any notice from the SEC or Hebrank required by Rule 66.1.a.2, despite Aguirre Law's request to all 200 clients for all such communications.[9]

No party has disputed investors' entitlement to notice under L.R. 66.1.a.2. In Hebrank's motion to be relieved of certain requirements under L.R. 66.1, he conceded that investors fall within the term "creditors" as that term is used in L.R. 66.1.a.2. Dkt No. 75-1 at 5. Indeed, investors' potential claims against Western for violations of the securities acts qualify them as creditors. Local Rule 66.1.a.2 also requires Hebrank to "file the proof of mailing" of the notice on investors. Investors' counsel can find no such proof of service in the Court's file.

Hebrank did move the Court to be relieved from the notice requirements of L.R. 66.1.e and 66.1.f (Dkt. No. 75 at 4), but made no application to be relieved from L.R. 66.1.a.2. The Court granted Hebrank's motion with regards to L.R. 66.1.e. and 66.1.f (Dkt. No. 170 at 3), but the order was silent in relation to any modification of Hebrank's notice obligations under L.R. 66.1.a.2. Consequently, Hebrank simply ignored the requirement of L.R. 66.1.a.2 that he provide notice of the hearing for his permanent appointment to all investors. The notice requirements embedded in the local rules are frequently designed to provide adequate notice and compliance with the due process clause. *In Re Cartledge, 2006 Bankr*. LEXIS 210 (Bankr. D.S.C. Feb. 15, 2006)("The local rules are designed to provide adequate notice and due process to parties affected by the extension of the stay.")

Finally, neither Hebrank nor the SEC served notice on any investor that the SEC had flip-flopped on how it would distribute assets it recovered from Schooler through its disgorgement claim. The Court confirmed in its March 4, 2015, order that the "SEC represents that it will seek to return any disgorgement from the SEC's sale of unregistered securities cause of action to investors." Dkt. No. 1003 at 16. Yet, the final

[9] Aguirre Decl. ¶ 14.

judgment submitted by the SEC to the Court allows SEC staff to decide whether the recovery goes to investors or to the U.S. Treasury. Aguirre Decl. ¶ 15, Ex. 7. We can find no notice by the SEC or Hebrank to investors of this key term in the final judgment.

And there is another flaw that runs through all the notices Hebrank served by posting to his website. He has conceded that most investors were not reading them. Dkt. No. 852 at 2. When he first learned that, he had a duty to use reasonable efforts to make personal service on investors. This he could have done by mailing the notices to investors. We can find nothing in the Court files indicating Hebrank attempted personal service when he learned investors were not reading his reports. And Hebrank had a duty to do so. In *U.S. v. Ritchie*, 342 F.3d 903, 910-911 (9th Cir. 2003), the court held: "We now join these circuits in holding that, when initial personal notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice."

In any case, we have raised the issue of Hebrank's lack of notice and defective notice on investors. The burden is therefore now on Hebrank to demonstrate that he gave adequate notice to investors of his proposed plan of distribution, his appointment as permanent receiver, and other notices the Court directed him to serve on investors. *Gates v. City of Chicago*, 623 F.3d 389 (7th Cir. 2010). Accordingly, we respectfully submit the Court should order Hebrank to file a proof of service specifically describing how he served on investors the multiple notices he was required to serve.

VII. Since the Order Approving Hebrank's Liquidation Plan Violates Due Process of Law, Any Order Implementing that Plan Violates Due Process

Hebrank's motion to hire CBRE as consultants implements his distribution plan approved by the Court's May 25, 2016, order. That plan proposes to sell all 36 GP properties, pool the proceeds of the sale, use the proceeds to pay receivership costs (including his fees), and then distribute the funds *pro rata* to all investors, contrary to the terms of the GP agreements. He pooled the cash of all 87 GPs with Western's cash on May 27, 2016, two days after the Court's May 25 order.

He now proposes to use $40,000 of the pooled cash to advance his liquidation plan to sell the 36 properties. Investors contend the May 25 order is void, because it was obtained in violation of investors' due process rights. Consequently, Investors contend the Court lacks the power to approve the use of investors' funds obtained through the May 25, 2016, order to advance the sale of the properties pursuant to the same order. We have addressed this point at length in several of Investors' filed with the Court.[10] Investors' opposition to the sale of the Jamul Valley property, scheduled for hearing on the same date as this motion, contains the most developed statement of that argument. Accordingly, we refer the Court to the relevant portions of that brief.[11]

DATED: August 16, 2016

Respectfully submitted,

/s/ Gary J. Aguirre
GARY J. AGUIRRE

[10] See Investors' opposition to Hebrank's liquidation plan (Dkt. No. 1235), opposition to Hebrank's court-ordered proposal regarding GPs as supplemented and proposed alternative plan (Dkt. No. 1293-1), *ex parte* motion for order setting evidentiary hearing and discovery schedule (Dkt. No. 1297), and opposition to the sale of the Jamul Valley property, Dkt. No. 1326 Sections II-VI, pp. 4-18.

[11] Dkt. No. 1326 Sections III, IV and V, pp. 4-18.

ATTACHMENT 1, INVESTORS

Susan Graham, Alfred L. Pipkin, Alfred L. Pipkin, IRA, Allert Boersma, Arthur V. and Kristie L. Rocco Living Trust, Arthur V. Rocco, Baldwin Family Survivors' Trust, Barbara Humphreys, IRA, Beverly & Mark Bancroft, Beverly A. Bancroft, IRA, Bruce A. Morey IRA, Bruce A. Morey, Bruce R. Hart IRA for Bruce R. Hart and Dixie L. Hart, Carol D. Summers, Carol Jonson, Catherine E. Wertz IRA, Catherine E. Wertz, Cathy Totman, IRA, Charles Bojarski, Chris Nowacki, IRA, Cindy Dufresne, Craig Lamb, Curt & Janean Johnson Family Trust, Curt & Janean Johnson, jointly, Curt Johnson, Curt Johnson, Roth IRA, Cynthia J. Clarke, D & E Macy Family Revocable Living Trust, D.F. Macy IRA, Daniel Burns, Daniel Knapp, Darla Berkel IRA, Darla Berkel, Daryl Dick, David and Sandra Jones Trust, David Fife IRA, David Haack IRA, David Haack, David Karp IRA, David Kirsh, David Kirsh, Roth IRA, David Kirsh, Traditional IRA, Debra Askeland, Deidre Parkinen, Dennis Gilman, Dennis Gilman IRA, Diane Bojarski, Diane Gilman, Donna M. and Richard A. Kopenski Family Trust, Donna M. Kopenski, IRA Roth, Douglas G. Clarke, Douglas Sahlin IRA, Eben B. Rosenberger, Edith Sahlin IRA, Edward Takacs, Ellen O'Brien, Elizabeth Lamb, Norling, Eric W. Norling, IRA, Gary Hardenburg, Gary Hardenburg, Roth IRA, Gene Fantano, George Klinke, IRA, George Trezek, Gerald Zevin, Gerald Zevin, IRA, Gwen Tuohy, Gwenmarie Hilleary, Henrik Jonson, Henrik Jonson, IRA, IDAC Family Group LLC, Iris Bernstein IRA, James J. Coyne Jr. Trust, Janice Marshall, Janice Marshall, IRA, Jason Bruce, Jeffrey Merder, IRA, Jeffrey J. Walz, Jeffrey Larsen, Jeffrey Merder, Jennifer Berta, Jim Minner, Joan Trezek, John Jenkins, John and Mary Jenkins Trust, John and Mary Jenkins Trustees, John Lukens, John Lukens, IRA, John R. Oberman, Joy A. de Beyer, Roth IRA, Joy A. de Beyer, Traditional IRA, Joy de Beyer, Juanita Bass IRA, Juanita Bass, Judith Glickman Zevin, IRA, Judith Glickman Zevin, Judy Knapp, Karen Coyne, Karen J. Coyne IRA, Karen Wilhoite, Karie J. Wright, Kimberly Dankworth, Kirsh Family Trust UTD, Kristie

ATTACHMENT 1, INVESTORS

L. Rocco, Lawrence Berkel, Lawrence Berkel, IRA, Lea Leccese, Leo Dufresne, Leo T. Dufresne Jr. IRA, Linda Baldwin IRA, Linda Clifton, Lisa A. Walz, Lloyd Logan and Ida Logan, jointly, Lloyd Logan, IRA, Lynda Igawa, Marc McBride, Marcia McRae, Marilyn L. Duncan, Mark Clifton, Mary Grant, Mary J. Jenkins, IRA, Mathew Berta, Mealey Family Trust, Michael R. Wertz, Michael R. Wertz, IRA, Mildred Mealey, beneficiary of Duane Mealey IRA, Minner Trust, Monica Takacs, Monique Minner, Neil Ormonde, IRA, Nevada Ormonde, IRA, Paul Leccese, Paul R. Sarraffe, IRA, Perryman Family Trust, Polly Yue, Prentiss Family Trust, Kenneth and Gail Prentiss Trustees, Ralph Brenner, Randall S. Ingermanson IRA, Rebecca Merder, Reeta Mohleji, Regis T. Duncan, IRA, Regis T. Duncan, Renee Norling, Richard A. Kopenski, IRA Roth, Robert Indihar, Robert Churchill Family Trust, Robert Churchill IRA, Robert H. Humphreys, Robert Indihar IRA, Robert S. Weschler, Robert Tuohy, Roderick C. Grant, Roger Hort, Roger Moucheron, Ronald Askeland, Ronald Parkinen, Ronald Scott, Ronald Scott, IRA, Salli Sammut Trust, Salli Sue Sammut Trustee, Salli Sue Sammut, IRA, Shirley Moucheron, Stephen Dankworth, Stephen Hogan, Stephen Yue, Steve P. White, IRA, Steve P. White, SEP IRA, Susan Burns, Tamara and Chris Nowacki, jointly, Tamara Nowacki, IRA, The Knowledge Team Profit Sharing Plan, The Ormonde Family Trust, Thomas H. Panzer, Roth IRA, Thomas Herman Panzer Trust, Thomas H Panzer, Trustee, Trisha Bruce, Val Indihar, W.C. Wilhoite, W.C. Wilhoite, Roth IRA, William C. Phillips, William L. Summers, IRA, William L. Summers, William Loeber, William Nighswonger IRA, William R. Nighswonger, William R. Rattan Rev. Trust, William V. and Carol J. Dascomb Trust, Carmen Slabby, Lawrance Slabby, Virginia Kelly, James S. Dolgas, Penco Engineering, Inc. Profit Sharing Pension Fund, George Jurica, and George Jurica IRA.

Gary J. Aguirre (SBN 38927)
Aguirre Law, APC
501 W. Broadway, Ste. 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072
Email: Gary@aguirrelawfirm.com

Attorney for Susan Graham et al.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF JOSEPH M. ARDIZZONE IN SUPPORT OF INVESTORS' OPPOSITION TO RECEIVER'S MOTION FOR AUTHORITY TO ENGAGE CBRE AS CONSULTANT

Date: September 6, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

I, Joseph M. Ardizzone, declare as follows:

1. I am a partner in (1) Eagle View Partners, one of the GPs which own the Dayton Valley IV property, (2) Hollywood Partners, one of the GPs which own the LV Kade property, (3) Honey Springs Partners, one of the GPs which own the Bratton Valley property, (4) Mesa View Partners, one of the GPs which own the Yuma II property, and (5) Twin Plant Partners, one of the GPs which own one of the Tecate properties.

2. I have been a widower, since January 2013.

3. To the best of my knowledge, I have never received an email from the Receiver.

4. I have had the same mailing address from 2012 to the present. I have received K-1 tax forms by U.S. mail from the Receiver or his accountants for the years of 2012 through 2015. While I cannot rule out the possibility that the Receiver sent other mail to me through the U.S. mail, I have no current recollection of receiving any other correspondence by mail from the Receiver and can locate none.

5. To the best of my knowledge, I have received no communication in writing or orally from the Receiver or his staff regarding his proposed plan of distribution (Dkt. No. 1181) filed with this Court on approximately February 4, 2016. I first learned of the Receiver's proposed plan of distribution when I spoke with a fellow investor on approximately July 27, 2016.

Executed this 5th day of August 2016, in San Diego, California.

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

Joseph M. Ardizzone

Gary J. Aguirre (SBN 38927)
Aguirre Law, APC
501 W. Broadway, Ste. 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072
Email: Gary@aguirrelawfirm.com

Attorney for Susan Graham *et al*.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF GARY J. AGUIRRE IN SUPPORT OF INVESTORS' OPPOSITION TO RECEIVER'S MOTION FOR AUTHORITY TO ENGAGE CBRE AS CONSULTANT

Date: September 6, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

I, Gary J. Aguirre, of San Diego, California, declare:

1. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. I am the attorney for approximately 200 investors in this matter, which are now split into two groups, the Graham investors and the Ardizzone investors.

3. I selected Alan Nevin ("Nevin") as consultant and expert witness, because Nevin had worked with me as an expert witness in another case. I invited Tim Dillon to share the costs for Nevin's and Alan Singer's services and the use of their reports.

4. I took the lead in working with Nevin and Singer, drafted the contracts to hire them as expert witnesses and drafted their declarations based on their input. Dillon's edits were incorporated into the contracts and the declarations.

5. The Xpera contract contains several terms relevant to this motion:

A. The work performed by Nevin and Singer "should not be discussed with any third party without" Aguirre's and Dillon's consent, "except as necessary to conduct the investigation."

B. Nevin and Singer would testify at the trial that Investors requested in their motion to intervene. In this regard, the contract states "it is highly probable that the status [of Nevin and Singer] will be changed to expert witness when Client receives consultants' report."

C. It states that "it is highly probable that the status [of Nevin and Singer] will be changed to expert witness when Client receives consultants' report."

6. I have participated in many hundreds of depositions over my career without a single sanction relating to discovery or any other issue.

7. A true and complete chain of the email communications between Dillon and Edward Fates between May 27 and June 16 is attached hereto as Exhibit 1 and incorporated by reference.

8. A true and correct copy of my June 2, 2016, letter to Fates with its attachment is attached hereto as Exhibit 2 and incorporated by reference.

9. A true and complete copy of my email of June 17, 2016, responding to Hebrank's email to Hebrank's email of June 16, 2016, to Nevin is attached hereto as Exhibit 3 and incorporated by reference.

10. A true and correct copy of the November 24, 2014, email sent by Hebrank's office to investors is attached hereto and incorporated by reference as Exhibit 4. The last paragraph of the email reads: "If you know someone that should have received this email, but didn't, please forward it to them. Many investor email address [*sic*] were unavailable or were returned undeliverable."

11. A true and correct copy of the January 16, 2015, email sent by Hebrank's office to investors is attached hereto and incorporated by reference as Exhibit 5. The last paragraph of the email reads: "If you know someone that should have received this email, but didn't, please forward it to them. Many investor email address [*sic*] were unavailable or were returned undeliverable."

12. Per the Court's April 5, 2016, order (Dkt. No. 1224), the last day to file opposition to the receiver's liquidation motion (Dkt. No. 1181) was April 15, 2016. Consequently, the May 6, 2016, email-notifying investors of the hearing date for the receiver's liquidation motion was sent after the deadline stated in the April 5, 2016, order.

13. I learned in the second half of July 2016 that several investors did not receive notice of the May 20, 2016, hearing until May 6, 2016, three months after Hebrank filed his February 4, 2016, motion with the Court and two weeks before the hearing. A true and correct copy of the May 6, 2016, email sent by the office of the receiver in this matter to investors is attached hereto and incorporated by reference as Exhibit 6.

14. I thereafter requested all of my clients to provide me with all of the communications with the receiver. I could find no communication from the receiver or the SEC informing investors of the hearing to appoint Hebrank as the permanent receiver, which was set for hearing January 11, 2013.

15. A true and correct copy of the SEC's email attaching the proposed final judgment against Defendant Louis V. Schooler is attached hereto as Exhibit 7 and incorporated by reference.

Executed this 16th day of August 2016, at Elche, Spain.

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

/s/ Gary J. Aguirre
GARY J. AGUIRRE

Exhibit List

Exhibit 1

Subject: FW: SEC v. Schooler
Date: Thursday, June 16, 2016 at 9:43:56 PM Central European Summer Time
From: Tim Dillon
To: Gary Aguirre

FYI.

Tim Dillon

From: Tim Dillon
Sent: Thursday, June 16, 2016 12:44 PM
To: 'Fates, Ted' <tfates@allenmatkins.com>
Subject: RE: SEC v. Schooler

Ted:

My difficult position is trying to accommodate two groups that both claim to act in the best interests of the investors. The receiver knows that, to do his job, he should work with Xpera – because they have already invested significant time into the project and have come up with projections that all of the parties are relying upon. Indeed, the Court expects the Receiver to consider Xpera's analysis in the Receiver's plan to monetize the GP assets.

The issue is not whether I object or not to the Receiver speaking with Xpera. The issue is whether the Receiver – in carrying out his duty – is able to sit in the room with you, Xpera, Gary and me to actually make progress on a plan that returns value to the investors. Yes, the investors that Gary represent (and many of the investors that I represent) do not believe the Receiver has been watching out for their best interests. Attending this meeting would certainly assist in showing that he is considering their best interests. On the other hand, refusing to attend because of the fear it might be counter-productive only reinforces the belief that the Receiver is not taking all reasonable steps on the investors' behalf.

Tim Dillon

From: Fates, Ted [mailto:tfates@allenmatkins.com]
Sent: Wednesday, June 15, 2016 9:18 AM
To: Tim Dillon <tdillon@dghmalaw.com>
Subject: RE: SEC v. Schooler

Tim,

We understand you are in a difficult position, but Gary's participation in the meeting would be detrimental and counter-productive, so expending receivership estate resources on such a meeting would not be in the best interests of the investors as a whole. Do you have an objection to us talking to Alan Nevin and Kevin Singer directly about engaging Xpera to supplement their report? As we've discussed, we would not discuss prior communications they have had with you, Gary, or your respective clients, but would simply focus on additional work necessary to supplement the existing report.

Please let me know as soon as possible.

Thank you,

Ted

From: Tim Dillon [mailto:tdillon@dghmalaw.com]
Sent: Tuesday, June 14, 2016 2:17 PM
To: Fates, Ted <tfates@allenmatkins.com>
Subject: RE: SEC v. Schooler

Ted:

I'm in a difficult position in this. Gary's group of investors and mine shared the $20,000 in costs to retain Xpera. We both met with them and discussed a number of issues related to a plan that benefits the investors.

The Receiver has taken the position that meeting with Xpera could assist him in creating a plan to benefit the investor group – we agree that he should meet with them to listen to and incorporate their knowledge. However, the Receiver will not meet with Xpera if Gary attends that meeting. Without getting to deep into the reasons, the Receiver feels Gary's presence would be detrimental.

Gary does not want the Receiver to meet with Xpera without him being there. Even though I have provided him with my assurances Xpera would focus the discussions on valuation/positioning issues, there is a trust gap Gary has with the Receiver.

The meeting with Xpera should take place. The Receiver will be adequately protected by your office. I will make efforts to keep both parties focused on the important issues of returning value to the investors. At the end of the day, we all have the investors' interest at heart. The fact that we may need to be in a room with parties we are adverse to should not distract us from the job we are all retained to do.

Tim Dillon

From: Fates, Ted [mailto:tfates@allenmatkins.com]
Sent: Tuesday, June 14, 2016 10:01 AM
To: Tim Dillon <tdillon@dghmalaw.com>
Subject: RE: SEC v. Schooler

Tim,

I am following up on our conversation on Wednesday 6/1 about setting up a meeting with Xpera and our subsequent call last week on the same subject. Please let me know as soon as possible if you are amenable to arranging the meeting as we discussed.

Thank you,

Ted

From: Tim Dillon [mailto:tdillon@dghmalaw.com]
Sent: Wednesday, June 1, 2016 3:07 AM
To: Fates, Ted <tfates@allenmatkins.com>
Subject: RE: SEC v. Schooler

Please call after 2 PM today. I need to file a closing brief with the Court and won't be able to speak before then.

Tim Dillon

From: Fates, Ted [mailto:tfates@allenmatkins.com]
Sent: Tuesday, May 31, 2016 8:41 PM
To: Tim Dillon <tdillon@dghmalaw.com>
Subject: RE: SEC v. Schooler

Hi Tim,

I got your message from this afternoon, but was out of the office. I will try to reach you tomorrow if you're planning to be in the office. Let me know.

Thanks, Ted

From: Tim Dillon [mailto:tdillon@dghmalaw.com]
Sent: Friday, May 27, 2016 4:52 AM
To: Fates, Ted

Subject: SEC v. Schooler

Ted:

I just picked up your message. I'm in trial in Orange County this week. Depending on when we let out today, I will try to reach you. Otherwise, let's speak on Tuesday.

Yours Very Truly,

Timothy P. Dillon
Dillon Gerardi Hershberger Miller & Ahuja, LLP
5872 Owens Avenue, Suite 200
Carlsbad, California 92008
Tel (858) 587-1800
tdillon@dghmalaw.com
http://www.dghmalaw.com/

Confidentiality Notice: The information contained in this electronic e-mail and any accompanying attachment(s) is intended only for the use of the intended recipient and may be confidential and/or privileged. If any reader of this communication is not the intended recipient, unauthorized use, disclosure or copying is strictly prohibited, and may be unlawful. If you have received this communication in error, please immediately notify the sender by return e-mail, and delete the original message and all copies from your system. Thank you.

Exhibit 2

AGUIRRE LAW, APC
501 W BROADWAY, SUITE 800 · SAN DIEGO CA 92101 · PHONE: 619-400-4960 · GARY@AGUIRRELAWAPC.COM

By Electronic Mail to tfates@allenmatkins.com and First Class Mail

June 2, 2016

Ted Fates, Esq.
Allen Matkins Leck Gamble Mallory & Natsis, LLP
501 West Broadway, 15th Floor
San Diego, CA 92101-3541

Re: *SEC v. Schooler*

Dear Mr. Fates:

I have received the attached email from Mr. Dillon this morning. I understand you have requested Mr. Dillon to arrange a meeting with Alan Nevin and Neal singer, expert witnesses I have retained in this matter, without my presence. I cannot recall a prior case, either my own or any other attorney known to me in San Diego, where an attorney has requested a private meeting with opposing counsel's expert witnesses outside the presence of the counsel who retained those expert witnesses.

If you wish to meet either Mr. Nevin or Mr. Singer, I can arrange for you to meet with either of them and me at a mutually convenient time and date, assuming you will agree to pay their hourly rate for such a meeting.

Very truly yours,

Gary J. Aguirre

cc (via email): Tim Dillon, Esq.

From: Tim Dillon
To: Gary Aguirre
Subject: Xpera
Date: Thursday, June 02, 2016 9:19:56 AM

Gary:

I spoke with Ted Fates yesterday regarding several post-ruling matters. During the call we discussed involving Xpera (Singer and Nevin) in the sales process. I believe they would like to have direct access in order to assist in constructing a plan to distribute the various GP properties. The receiver would like me to assist in arranging a meeting a week or so down the road. I do not believe the receiver intends to have you present at that meeting. My guess is there is more of a perception of hostility between your group and the receiver.

Ted indicated that the receiver would compensate Xpera for their time going forward. I have not inquired about having the two investor groups reimbursed for Xpera's evaluations, though I believe the amounts paid should be borne by the entire investor group – not just those that joined in the process.

Yours Very Truly,

Timothy P. Dillon
Dillon Gerardi Hershberger Miller & Ahuja, LLP
5872 Owens Avenue, Suite 200
Carlsbad, California 92008
Tel (858) 587-1800
tdillon@dghmalaw.com
http://www.dghmalaw.com/

DGHM+A DILLON GERARDI HERSHBERGER MILLER AHUJA

Exhibit 3

Subject: Western Financial Planning
Date: Friday, June 17, 2016 at 11:29:03 PM Central European Summer Time
From: Gary Aguirre
To: Thomas C. Hebrank (thebrank@ethreeadvisors.com)
CC: Ted Fates (tfates@allenmatkins.com), Tim Dillon (tdillon@dghmalaw.com), Alan Nevin (anevin@xperagroup.com), Neal L Singer (nsinger@xperagroup.com)

Dear Mr. Hebrank:

I am responding to your email below to Mr. Nevin.

I am happy to arrange an interview with Mr. Nevin, but as Mr. Dillon and I have advised your counsel, we will have to be present.

Mr. Nevin would also condition the interview upon the following conditions:

- Mr. Singer is present, since they worked together on the project (Mr. Singer could also be interviewed simultaneously or just be present if Mr. Nevin had some questions);
- Both would be compensated at their regular hourly rates;
- They would require a few hours to get up to speed on their reports;
- If your counsel participates in the interview, it should proceed as a deposition.

If you need to communicate with Mr. Nevin or Mr. Singer, please copy me and Mr. Dillon in the email or do it through me.

Thanks,

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

www.aguirrelawapc.com

---------- Forwarded message ----------
From: **Thomas Hebrank** <thebrank@ethreeadvisors.com>
Date: Thu, Jun 16, 2016 at 3:18 PM
Subject: Western Financial Planning
To: "anevin@xperagroup.com" <anevin@xperagroup.com>

Alan -

As you may know, the Court in the Western Financial case has entered an order with instructions for me to evaluate the pros and cons of the recommendations in your report. With that in mind, I would like to discuss with you the possible retention of Xpera directly by the receivership estate to consult on GP property sales and supplement the report. Please let me know your availability to discuss this matter.

Thanks - Tom

Thomas C. Hebrank, CPA, CIRA
E3 Advisors
401 West A Street, Suite 1830
San Diego, CA 92101
(619) 567-7223

Exhibit 4

From: Redacted WFP Receiver
To: Redacted
Subject: Western Financial Planning - General Partnership Financial Update
Date: Monday, November 24, 2014 7:37:42 PM

PLEASE BE ADVISED

ORDER REGARDING INVESTOR HEARING
(As modified on October 31, 2014)

The Court held hearings on October 10 and 15, 2014 as to whether the 86 General Partnerships ("GPs") should remain in or be released from the Court-ordered receivership.

On October 17, 2014, the Court entered its Order Regarding Investor Hearing. The Court later modified the briefing schedule and hearing date for the Receiver's Report and Recommendation by order entered on October 31, 2014. As required, the Receiver filed his Receiver's Report and Recommendations Regarding General Partnerships, along with his declaration on November 21, 2014.

When reviewing the Report, please pay particular attention to Exhibits A, B and C, which contain very important information about the current financial condition of each GP. Note, an enlarged version of Exhibit A that is easier to read will be added to the receivership website in the next few days. An explanation of Exhibits A, B, and C will also be posted to the receivership website in the next few days to assist investors in reviewing and interpreting the financial information provided. It is important that investors review the Report and the information in Exhibits A, B, and C – investors may soon need to cast important votes regarding what to do with the properties owned by their GPs. Understanding the current financial condition of your GP is critical to helping your GP make the best financial decision.

Many GPs have already run out or will soon run out of cash and will need to bill their investors for amounts necessary to pay their basic operating expenses – property taxes, insurance premiums, partnership administrator fees, and tax return and K-1 preparation fees. Note, GPs are not charged for any work done by the Receiver or his legal counsel. Those fees are paid exclusively from the assets of Western Financial Planning Corporation.

Finally, the Court directed that investors be informed that:

"The Court directs the Receiver to, on the same day he files the forthcoming report and recommendation, email each investor for whom he has an email address on file and publish notice to his website alerting investors as to the procedures set forth above allowing investors to comment upon the forthcoming report and recommendation."

“The Court also finds it appropriate to seek investor input regarding the Receiver’s forthcoming report and recommendation. Accordingly, the Court will allow each individual investor to submit a response to the Receiver’s report and recommendation. The Court recommends that any investors who agree with another investor’s position should file a single joint response and indicate all investors who sign on to that response rather than filing multiple individual responses. While the Court appreciates investor input, the Court notes that the investors should file joint responses if at all possible so as to avoid submitting largely identical filings as has occurred in the past. Any investor responses to the Receiver’s report and recommendation shall be filed on or before January 9, 2015. [date updated]”

The hearing on the Receiver’s Report and Recommendations Regarding General Partnership is scheduled for 1:30 PM on January 23, 2015.

More information on the Receivership can be found at the Receiver's website.

If you know someone that should have received this email, but didn't, please forward it to them. Many investor email address were unavailable or were returned undeliverable.

Update your subscription settings

Our mailing address is:
E3 Advisors, Inc.
401 W A Street
San Diego, CA 92101

Exhibit 5

Redacted

From: WFP Receiver <WFP@ethreeadvisors.com>
To: Redacted
Sent: Friday, January 16, 2015 11:59 AM
Subject: Western Financial Planning - January 23rd Hearing Schedule Update

E3 Advisors

Experienced. Efficient. Effective.

PLEASE BE ADVISED

Notice re January 23rd Hearing

Please take notice that the Court has reset the time of the January 23rd hearing from 1:30pm to 1:00pm. A full copy of the order is provided here.

More information on the Receivership can be found at the Receiver's website.

If you know someone that should have received this email, but didn't, please forward it to them. Many investor email address were unavailable or were returned undeliverable.

Update your subscription settings

Our mailing address is:
E3 Advisors, Inc.
401 W A Street
San Diego, CA 92101

Exhibit 6

From: WFP Receiver [mailto:WFP=ethreeadvisors.com@mail194.suw16.rsgsv.net] **On Behalf Of** WFP Receiver
Sent: Friday, May 06, 2016 5:17 PM
To: Redacted
Subject: WFPC Case Update and Hearing for May 20th

E3 Advisors

Experienced. Efficient. Effective.

CASE UPDATE

Rescheduled Hearing Date:

Please note that the hearing scheduled for May 6, 2016 has been rescheduled to May 20, 2016 at 1:30.

There are several matters set to be considered at this hearing, including the Receiver's motion seeking 1) Authority to Conduct Orderly Sale of General Partnership Properties; 2) Approval of Plan of Distributing Receivership Assets; and 3) Approval of Procedures for the Administration of Claims. The Motion can be found on our website.

We strongly encourage you to read this motion as it contains specific financial and other information for each property and GP. The motion also discusses two alternate plans for distributing receivership estate assets for the Court's consideration. The projected distributions investors will received under the two alternate distribution plans is provided on Exhibit D to the motion.

Two groups of investors have hired legal counsel. The primary difference between the two groups is their support for or opposition to the Receiver's proposed distribution plan. Their filings in response to the Receiver's motion (and other filings) can also be found on our website.

Thomas C. Hebrank
Court Appointed Receiver

Update your subscription settings

Want to know more about CASL? Here's the **full text of the law**. MailChimp offers **an informational page** for individuals and businesses.

*Si vous voulez en savoir plus sur la LCAP, voici **le texte intégral de la loi**. MailChimp offre **une page d'information** pour les particuliers et les entreprises.*

Thanks for your help!
Merci pour votre aide!

Our mailing address is:
E3 Advisors, Inc.
401 W A Street
San Diego, CA 92101

Exhibit 7

Subject: 12cv2164 - Proposed Final Judgment against Defendant Louis V. Schooler
Date: Friday, September 25, 2015 at 8:41:32 PM Central European Summer Time
From: Irwin, Magnolia
To: efile_curiel@casd.uscourts.gov
CC: Puathasnanon, Sam, Dean, Lynn M., Kalin, Sara, Chattoo, Pamela V., eric@hougenlaw.com, phildysonlaw@gmail.com, Fates, Ted (tfates@allenmatkins.com)

Attached please find the Word version of the proposed Final Judgment against Defendant Louis V. Schooler in connection with the above-referenced action. For the Court's convenience, we are also attaching the filed notice and memorandum. The Kalin Declaration will follow by overnight delivery which the Court should receive on Monday, September 28, 2015. Thank you.

Magnolia M. Irwin, Paralegal
U.S. Securities and Exchange Commission
Los Angeles Regional Office
444 S. Flower Street, Suite 900
Los Angeles, CA 90071
(323) 965-3960 (T)
(213) 443-1904 (F)
irwinma@sec.gov

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

FINAL JUDGMENT AGAINST DEFENDANT LOUIS V. SCHOOLER

This matter came to be heard upon the Motion of Plaintiff Securities and Exchange Commission ("Commission") for Injunctive Relief and Monetary Remedies against Defendant Louis V. Schooler ("Defendant" or "Schooler").

The Court, having entered Partial Summary Judgments against Defendant Schooler on May 19, 2015 and June 3, 2015, and having considered the Commission's Motion, the accompanying Memorandum of Points and Authorities and [Proposed] Final Judgment, and the Declaration of Sara D. Kalin, and the exhibits thereto, and other evidence and argument presented regarding the Motion, and good cause appearing, orders that the SEC's Motion for Injunctive Relief,

Monetary Remedies, and Final Judgment against Defendant Louis V. Schooler is **GRANTED**.

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

(a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

(c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or

> offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $136,654,250, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $10,956,030, for a total of $147,610,280. Defendant shall satisfy this obligation by paying $147,610,280 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center

Accounts Receivable Branch

6500 South MacArthur Boulevard

Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Louis V. Schooler as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay a civil penalty in the amount of $1,050,000 to the Securities and Exchange Commission pursuant to Section 20(d) of the Securities Act, 15 U.S.C. §77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). Defendant shall make this payment within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at

http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Louis V. Schooler as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Defendant shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

IT IS SO ORDERED.

HON. GONZALO P. CURIEL
UNITED STATES DISTRICT JUDGE

Gary J. Aguirre (SBN 38927)
Aguirre Law, APC
501 W. Broadway, Ste. 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072
Email: Gary@aguirrelawfirm.com

Attorney for Joseph M. Ardizzone, David R. Schwarz, Lois Schwarz, Dennis Frisman, Eric Gilbert, and Rick Moore.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

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

JOINDER OF INVESTORS DENNIS FRISMAN, ERIC GILBERT, RICK MOORE, JOSEPH M. ARDIZZONE, DAVID R. SCHWARZ, AND LOIS SCHWARZ IN INVESTORS' OPPOSITION TO RECEIVER'S MOTION FOR AUTHORITY TO ENGAGE CBRE AS CONSULTANT

Date: September 6, 2016
Time: 1:30 p.m.
Dept.: 2D
Judge: Hon. Gonzalo P. Curiel

Dennis Frisman, Eric Gilbert, Rick Moore, Joseph M. Ardizzone, David R. Schwarz and Lois Schwarz file this notice of joinder to and hereby join in Investors' Opposition To Receiver's Motion For Authority To Engage CBRE as Consultant (Dkt. No. 1351).

DATED: August 16, 2016

Respectfully submitted,

By: /s/ Gary J. Aguirre

GARY J. AGUIRRE
Aguirre Law, A.P.C.
gary@aguirrelawapc.com
Attorney for Investors Dennis Frisman, Eric Gilbert, Rick Moore, Joseph M. Ardizzone, David R. Schwarz and Lois Schwarz