

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

Nos. 16-55850, 16-56362

LOUIS V. SCHOOLER and FIRST FINANCIAL  
PLANNING CORPORATION d/b/a Western  
Financial Planning Corporation,

Defendants-Appellees,

SUSAN GRAHAM, *et al.* (No. 16-55850), and  
JOSEPH M. ARDIZZONE, *et al.* (No. 16-56362),  
Proposed Intervenors,

Movants-Appellants,

THOMAS C. HEBRANK,

Receiver-Appellee.

**MOTION OF THE SECURITIES AND EXCHANGE COMMISSION  
TO CONSOLIDATE NOS. 16-55850 AND 16-56362**

The Securities and Exchange Commission hereby moves this Court to consolidate the captioned appeals in Nos. 16-55850 and 16-56362 because both appeals involve similar appellants represented by the same counsel, related factual and legal issues, and common district court orders. Counsel for the movants-

appellants, Susan Graham *et al.* in No. 16-55850 and Joseph M. Ardizzone *et al.* in No. 16-56362, has represented that his clients oppose this motion as premature. Counsel for defendants-appellees Louis V. Schooler and First Financial Planning Corporation d/b/a Western Financial Planning Corporation (“Western”) has represented that they do not oppose this motion. Counsel for the court-appointed receiver, Thomas C. Hebrank, has represented that his client supports this motion.

### **BACKGROUND**

The Commission filed this civil enforcement action on September 4, 2012, alleging that defendants Schooler and Western violated registration and antifraud provisions of the federal securities laws by offering and selling to the general public thousands of interests in 86 purported general partnerships (“GPs”) that in fact were unregistered securities in the form of investment contracts, and by making material misrepresentations in doing so. D.1.<sup>1</sup> After granting summary judgment in favor of the Commission, the district court entered final judgment against Schooler on January 21, 2016, permanently enjoining him from future violations, holding him liable for disgorgement of \$136.6 million of ill-gotten gains plus prejudgment interest, and ordering him to pay a civil penalty of \$1.05

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<sup>1</sup> “D.” refers to the corresponding docket entry in *SEC v. Schooler*, No. 12-cv-02164 (S.D. Cal.) (Curiel, J.).

million. D.1170. Schooler's appeal from the final judgment is pending before this Court as No. 16-55167.

Since almost the outset of the action, the district court has maintained a receivership over Western and the 86 GPs. D.10, 174. During that time, the court-appointed receiver has provided notice to the approximately 3,300 investors in the GPs concerning the course of the litigation, and the investors have been heard on various matters that included, for example, the district court's decision to keep the GPs under the receivership. D.1003.

In early 2016, certain groups of investors, which together comprise approximately 10 percent of all the investors, respectively engaged attorneys Gary Aguirre and Timothy Dillon to represent them in the action. Those groups of investors then filed several motions to intervene and for other relief in the post-judgment receivership proceeding, which currently remains ongoing. The district court's decisions on those motions are the subjects of the appeals in Nos. 16-55850 and 16-56362.

***Appeal No. 16-55850***

Several dozen investors represented by Mr. Aguirre filed a notice of appeal on June 14, 2016 (D.1311), followed by first and second amended notices of

appeal (D.1363, 1373), which were docketed in this Court as No. 16-55850.<sup>2</sup> The second amended notice of appeal (D.1373) states that appeal is taken from five district court orders:

- i. The order dated May 18, 2016 (D.1296), which granted these investors' motion to intervene for the limited purpose of opposing the receiver's motion for an orderly sale of GP properties, but which denied the motion to intervene in all other respects;
- ii. The order dated May 25, 2016 (D.1303), which denied these investors' motions to intervene for the purposes of seeking vacatur of prior orders approving the sales of GP properties and seeking an accounting or audit of the receivership;
- iii. The order dated May 25, 2016 (D.1304), which granted in part the receiver's motion to approve (a) an orderly sale of GP properties, (b) a "one pot" distribution plan for receivership assets, and (c) procedures for administering investor claims, and which denied these investors' motion for discovery and an evidentiary hearing.
- iv. The order dated August 30, 2016 (D.1359), which denied these investors' motion for a stay pending appeal.
- v. The order dated August 30, 2016 (D.1361), which granted the receiver's motion for approval to sell real estate known as the Jamul Valley property.

On June 22, 2016, the appellants in No. 16-55850 filed a Mediation

Questionnaire in which they stated that one of the four "main issues on appeal" is,

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<sup>2</sup> The first amended notice of appeal (D.1363) but not the second amended notice of appeal (D.1373) is noted on the docket of No. 16-55850 as having been received by this Court. The description here follows the second amended notice of appeal.

“did the court err in denying appellants’ motion to intervene.”<sup>3</sup> On June 28, 2016, the receiver filed a motion to dismiss the appeal for lack of appellate jurisdiction with respect to two district court orders, but not with respect to the district court’s rulings on intervention. The briefing schedule in the appeal has been stayed while that motion remains pending. *See* 9th Cir. R. 27-11.

***Appeal No. 16-56362***

Five investors represented by Mr. Aguirre filed a notice of appeal on September 13, 2016 (D.1367), and an amended notice of appeal (D.1374), which were docketed in this Court as No. 16-56362. The amended notice of appeal states that appeal is taken from the district court’s order dated August 30, 2016 (D.1359), which denied these investors’ motion to intervene, including intervention to challenge the previously approved distribution plan and the sale of real estate known as the Jamul Valley property. On September 27, 2016, the appellants in No. 16-36562 filed a Mediation Questionnaire in which they stated that one of the four “main issues on appeal” is, “did the court err in denying appellants’ motion to

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<sup>3</sup> The investors identified the other three issues on appeal as: “(1) were appellants necessary parties in the proceedings to dissolve the GPs; (2) were appellants’ due process rights violated by their limited participation in the proceedings to sell the GPs’ realty, pool the proceeds, and distribute the funds in violation of the GP agreements; [and] (3) did the Court err in approving a distribution plan in the absence of current and accurate financial reports of receivership receipts and disbursements and assets and liabilities.”

intervene.”<sup>4</sup> Under this Court’s briefing schedule, the opening brief in the appeal is due December 27, 2016.

### **ARGUMENT**

The appeals in Nos. 16-55850 and 16-56362 should be consolidated because both appeals involve similar appellants represented by the same counsel, related factual and legal issues, and common district court orders.

First, the appellants in both appeals are investors in the purported GPs who are represented by Mr. Aguirre. The appellees listed on this Court’s dockets of both appeals consist of the Commission, the receiver, and defendants Schooler and Western.

Second, both appeals involve related factual and legal issues and common district court orders. Specifically, both appeals challenge the district court’s orders denying the investors’ post-judgment motions to intervene. Moreover, the district court’s reasoning in denying intervention in its August 30, 2016 order (D.1359)—which is the only order challenged in No. 16-56362—expressly references its reasoning in previous orders denying intervention (D.1296, 1303)—which are challenged in No. 16-55850.<sup>5</sup> As a result, both appeals will likely turn on the same

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<sup>4</sup> The investors identified the other three issues on appeal as nearly identical to those in No. 16-55850.

<sup>5</sup> In its order dated August 30, 2016, the district court addressed “the only novel issue raised by” the pending intervention motion and then stated:

arguments for intervention that Mr. Aguirre raised below and on the same reasoning that the district court adopted to reject those arguments.

Finally, there is no reason to believe that consolidating the two appeals will prejudice any of the parties. As already noted, the briefing schedule in No. 16-55850 has been stayed pending a decision on the receiver's motion to dismiss, and the opening brief in No. 16-56362 is not due until December 27, 2016. As a result, consolidating the two appeals and setting a common briefing schedule is unlikely to delay the resolution of either appeal or to cause any other harm.<sup>6</sup> To the contrary, consolidation will decrease the costs to the parties of preparing and filing briefs and appendices and will minimize the judicial resources required for decision in both appeals.

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Second, the other arguments raised by Investors in their motion, including Investors' argument that they have been deprived of notice and the opportunity to be heard with regards to the case as a whole, have already been thoroughly considered and rejected by the Court. *See* ECF Nos. 1296, 1303, 1304.

D.1359 at 3.

<sup>6</sup> The undersigned counsel understands that the investors believe this motion is premature because the briefing schedule in No. 16-55850 has been stayed pending a decision on the receiver's motion to dismiss. But the receiver's motion to dismiss does not challenge this Court's jurisdiction to review the district court's rulings on intervention—which, as just explained, is precisely the issue common to both appeals. Filing this motion now will permit this Court to consider consolidation before it sets a new briefing schedule in No. 16-55850, thereby conserving the resources of this Court and of the parties.

## CONCLUSION

For the foregoing reasons, the appeals in Nos. 16-55850 and 16-56362 should be consolidated.

Respectfully submitted,

s/ Stephen G. Yoder

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September 2016



## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 28, 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.

s/ Stephen G. Yoder  
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Dated: September 28, 2016