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Attorney for Investors 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

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF THE GRAHAM INVESTORS'
MOTION TO INTERVENE TO
OPPOSE, OBJECT TO AND
REQUEST CLARIFICATION OF
THE (1) SECOND REVISED 14TH
INTERIM REPORT, (2) REVISED
15TH INTERIM REPORT AND (3)
REVISED 16TH INTERIM REPORT**

Date: November 10, 2016

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

I. Introduction

This motion is brought by 192 investors ("Graham Investors")¹ in the 87 partnerships (GPs) currently in the receivership. They seek an order permitting them to intervene in this case for the purpose of filing a motion in opposition to the request by Thomas C. Hebrank ("Hebrank"), the Receiver in this matter, for approval of his (1) Second Revised 14th Interim Report (Dkt. No. 1376), (2) Revised 15th Interim Report (Dkt. No. 1377) and (3) Revised 16th Interim Report (Dkt. No. 1378). A copy of said opposition is attached as Exhibit A to the notice of motion to intervene.

II. Investors Are Entitled to Intervene as a Matter of Right under Fed. R. Civ. P. 24(a)(2) to Bring This Motion

A. Elements of Rule 24(a).

Fed. R. Civ. P. 24(a)(2) of the Federal Rules of Civil Procedure, upon timely motion, states the Court must permit to intervene anyone who:

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998), this Court noted:

The Circuit apply a four-part test to determine whether intervention as of right should be granted: (1) the applicant must assert a significantly protectable interest relating to the party or transaction that is the subject of the action; (2) the applicant's interest must be inadequately represented by the parties to the action; (3) disposition of the action without intervention may as a practical matter impair or impeded its ability to protect that interest; and (4) the applicant's motion must be timely.

By this motion, Investors seek an order to intervene for the limited purpose of bringing this motion. The Court may grant limited intervention under Rule 24.

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

1 *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (U.S. 1987)(quoting
 2 with approval Advisory Committee Notes on Fed. Rule Civ. Proc. 24, “intervention of
 3 right under the amended rule [24(a)] may be subject to appropriate conditions or
 4 restrictions responsive among other things to the requirements of efficient conduct of
 5 proceedings.”) See also *Forest Conservation Council v. United States Forest Serv.*, 66
 6 F.3d 1489, 1495 (9th Cir. 1995); *United States v. City of Detroit*, 712 F.3d 925, 927 (6th
 7 Cir. Mich. 2013)

8 **B. Investors Have a Significantly Protectable Interest in This Action.**

9 This Court has already held that the Graham Investors have a significantly
 10 protectable interest in this case. Dkt. No. 1296 at 4.

11 **C. The Disposition of This Action May Impair or Impede Investors’ Ability to**
 12 **Protect Their Interests**

13 This Court has already held that the disposition of this case may impair or impede
 14 the Graham Investors' ability to protect their interests. *Id.*

15 **D. Nor Party Adequately Represents Investors in This Action**

16 This Court has already held that no party in this action adequately represents
 17 investors. *Id.*

18 **E. Investors’ Motion to Intervene Is Timely**

19 The Ninth Circuit has consistently held that: "In analyzing timeliness, however,
 20 the focus is on the date the person attempting to intervene should have been aware his
 21 'interest[s] would no longer be protected adequately by the parties,' rather than the date
 22 the person learned of the litigation." *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir.
 23 Cal. 2013), citing *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Hebrank did not file
 24 his Second Revised 14th Interim Report (Dkt. No. 1376), the Revised 15th Interim

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1 Report (Dkt. No. 1377) and the Revised 16th Interim Report (Dkt. No. 1378) until
2 September 20, 2016. This motion is brought 14 days after that filing.

3
4 Dated: October 4, 2016

Respectfully submitted,

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6 By: /s/ Gary J. Aguirre

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9 Attorney for the Graham Investors
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Exhibit A

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**GRAHAM INVESTORS'
OPPOSITION TO, OBJECTION
TO, AND REQUEST FOR
CLARIFICATION OF THE (1)
SECOND REVISED 14TH INTERIM
REPORT, (2) REVISED 15TH
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Date: November 10, 2016

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I. Hebrank's Second Revised 14th, Revised 15th, and Revised 16th Interim Reports Failed to Comply with the Court's order Dkt. No. 1369

A. Hebrank's SFAR Reports Fail to Comply with SFAR Requirements for Line Item 8 (Miscellaneous-Other)

The Court's September 14, 2016, order found:

The Court is further dissatisfied by the fact that Receiver has failed to describe the source of income listed in Line 8 "Miscellaneous – Other*" of the SFAR reports submitted with the Fourteenth, Fifteenth, and Sixteenth Interim Reports. The billing instructions for the SFAR indicate that Line 8 includes "Amounts received from, an identified payor." Billing Instructions for Receivers in Civil Actions Commended by the U.S. Securities and Exchanges Commission ("SEC Billing Instructions"), <https://www.sec.gov/oiea/Article/billinginstructions.pdf>. Moving forward, the Court DIRECTS the Receiver to make clear, by reference to other exhibits or otherwise, the source of income in that category.

Dkt. No. 1369 at 15-16. On that basis, the order directed the receiver, Thomas C. Hebrank ("Hebrank") "to clearly indicate, by reference or otherwise, the source of accounting in Line 8 'Miscellaneous – Other*' of the SFAR attached to the Revised Fourteenth Interim Report within seven days of this order." *Id.*, at 16. Hebrank again failed to comply with the Court's order and Standardized Fund Accounting Requirements (SFAR).

Hebrank's revised reports state that the receivership entities received the amounts stated below in Line Item 8 of his filed SFAR forms:

- 1) \$12.6 million in the period from September 6, 2012, through September 30, 2015, (Dkt. No. 1376, Ex. C, at 16);
- 2) \$696,066 in the period from October 1, 2015 to December 31, 2015, (Dkt. No. 1376, Ex. C, at 19);
- 3) \$766,481 in the period from January 1, 2016 to March 31, 2016, (Dkt. No. 1377, Ex. C, at 20);

1 4) \$101,201 in the period from April 1, 2016 to June 30, 2016 (Dkt. No. 1378,
2 Ex. C, at 26).

3 The SFAR guidelines state the following information *must* be provided in response
4 to Line Item 8: "Line 8-Miscellaneous-Other: Amounts received from, an identified
5 payor."¹ In response to this requirement, Hebrank states at Line Item 8 of his SFAR form
6 that he received \$12.6 million for miscellaneous/other income for the period from
7 September 6, 2012, through September 30, 2015. Dkt. No. 1377, Ex. C, at 16. In a
8 footnote, he adds this comment: "Miscellaneous/Other income consists of investor
9 operational billing and *GP* note payments." *Id.*

10 Hebrank's response fails to comply with the SFAR instructions in two ways. First,
11 it is unclear whether he has included all of the receipts on loan repayments. His
12 liquidation motion describes two types of note payments: "investor note payments and
13 GP note payments." DKt. No. 1181-1 at 23. Hebrank's footnote only refers to one class
14 of note payments: "GP note payments." It makes no reference to "investor note
15 payments." There would seem to be two possibilities why this was omitted: Hebrank
16 failed to include investor note payments or he erroneously included both under GP note
17 payments. This should be clarified.

18 Further, there are four classes of receipts which Hebrank received as loan
19 payments:

- 20 1. Investor payments on the notes they signed in favor of their GPs;
- 21 2. Investor payments on the notes they signed in favor of Western;
- 22 3. GP payments on the notes they signed in favor of Western; and
- 23 4. GP payments on undocumented loans to Western.

24 Hebrank should clarify whether his disclosure in Line Item 8 includes one, some, or all
25 of the four different types of loan payments.

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27 ¹ See SFAR instructions available at
28 <https://www.sec.gov/oiea/Article/billinginstructions.pdf>. Last visited Oct. 4, 2016.

1 The bigger omission is Hebrank's failure to comply with the SFAR requirement
 2 that his form state the "amounts received from, an *identified payor* (emphasis added)."
 3 His response to Line Item 8 identifies no one. If the amounts were paid by individual
 4 investors to the GPs, Hebrank should state the name of the investor and the amount he or
 5 she has paid. If the amounts were paid by a GP to Western, Hebrank should state the
 6 name of the GP and the amount paid to Western.

7 Hebrank has objected in the past to providing information of this type on the
 8 grounds that it would violate the privacy rights of individual investors. There are no
 9 privacy rights among partners in the same GP, since the GP agreements which each
 10 partner signed provides access to GP accounting records. Consequently, any privacy
 11 rights among partners in the same GP has been waived. The Graham Investors include at
 12 least one partner in each GP. If Hebrank objects to filing this information as a public
 13 document in the District Court's case file, the Graham Investors stipulate that it may be
 14 filed under seal, provided an unredacted copy is served on them.

15 **B . Hebrank Failed to State the Amount of Fees and Expenses Incurred in**
 16 **Connection with the LinMar Litigation**

17 The SFAR form at line item 10e requires Hebrank to state the amounts of fees
 18 and costs incurred in third party litigation. Linmar is obviously third party litigation.
 19 Hebrank has failed to state either the attorney's fees or the litigation expenses he
 20 incurred.

21 Dated: October 4, 2016

Respectfully submitted,

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