UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee, v. LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING CORPORATION d/b/a Western Financial Planning Corporation, Defendants-Appellees, SUSAN GRAHAM, *et al.*, Proposed Intervenors, Movants-Appellants,	No. 16-55850
THOMAS C. HEBRANK, Receiver-Appellee.	

OPPOSITION OF THE SECURITIES AND EXCHANGE COMMISSION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

OPPOSITION OF THE SECURITIES AND EXCHANGE COMMISSION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

The Securities and Exchange Commission opposes the motion by Susan Graham, *et al.*, movants-appellants (collectively, the "Graham Investors"), for a stay of certain receivership sales pending their appeal to this Court. The motion should not be treated as urgent, given the Graham Investors' unexplained delay of 30 days in filing this motion after the district court's denial of their similar stay motion. Moreover, the Graham Investors fail to meet their burden to demonstrate the traditional criteria for a stay pending appeal, including likelihood of success on the merits and irreparable harm absent a stay. The motion should be denied.

BACKGROUND

The Commission filed this civil enforcement action on September 4, 2012, alleging that defendants Louis V. Schooler ("Schooler") and First Financial Planning Corporation d/b/a Western Financial Planning Corporation ("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.[1] Each GP contained between dozens and hundreds of investors (the purported

[1] "D." refers to the corresponding docket entry in *SEC v. Schooler*, No. 12-cv-02164 (S.D. Cal.) (Curiel, J.).

partners) and held undivided fractional interests (as cotenants with other GPs) in one of 23 real estate parcels for long-term appreciation. 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 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, the 86 GPs, and the 23 real estate parcels. D.10; D.174. During that time, the court-appointed receiver has provided notice to the over 3,300 GP investors concerning the course of the litigation, and the GP investors have been heard on various matters that included, for example, the district court's decision in March 2015 to keep the GPs under the receivership. D.1003.

In early 2016, certain groups of GP investors, which together comprise approximately 10 percent of all the GP investors, respectively engaged attorneys Gary Aguirre and Timothy Dillon to represent them in the action. Those groups of GP investors, including the Graham 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

subject of this appeal, which was filed by one group of investors represented by Mr. Aguirre. The second amended notice of appeal (D.1373)[2] states that appeal is taken from five district court orders:

i. The order dated May 18, 2016 (D.1296), which granted the Graham 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 the Graham 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," pro rata distribution plan for returning receivership assets to the GP investors, and (c) procedures for administering investor claims, and which denied the Graham Investors' motion for discovery and an evidentiary hearing;

iv. The order dated August 30, 2016 (D.1359), which denied the Graham Investors' motion for a stay pending appeal; and

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.[3]

---

[2] The investors' original notice of appeal was filed on June 14, 2016. D.1311. Their first amended notice appeal is at D.1363.

[3] The receiver has filed a motion to dismiss this appeal for lack of jurisdiction with respect to some but not all of the above district court orders. *See* Motion to Dismiss, No. 16-55850, Dkt. Entry 3, June 28, 2016. The Commission has filed a motion to consolidate this appeal with another appeal filed by another group of GP investors represented by Mr. Aguirre, No. 16-56362. *See* Motion to Consolidate, Nos. 16-55850, Dkt. Entry 10, Sept. 28, 2016. Both motions remain pending before this Court. Also, the investors in No. 16-56362 have asked the district court

The Graham Investors filed a motion asking the district court to stay certain aspects of the receivership proceedings pending this appeal. D.1316. The court denied that motion on August 30, 2016. D.1359.

ARGUMENT

The Graham Investors' motion in this Court is styled as an "urgent" motion for a stay pending appeal, which not only would stay the receiver's sales of any GP properties but also would prevent the receiver "from spending receivership funds unless he (1) records each cash transaction (receipt or disbursement) in an accounting journal and (2) preserves the vouchers for each transaction." Motion 3. The motion should be denied, for at least three reasons.

First, the stay motion should not be treated as urgent, given the Graham Investors' unexplained delay of 30 days in filing this motion after the district court's denial of their similar stay motion.

Second, the stay motion improperly seeks to impose new conditions on the receiver's expenditures of funds.

Third, the Graham Investors have failed to meet their burden to demonstrate the traditional criteria for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a

---

to stay sales of the GPs' real estate (D.1368), and the Investors in this appeal have joined that request (D.1379). That motion remains pending in the district court.

stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014).

I. The Graham Investors' unexplained delay of 30 days belies their assertion of urgency.

The Graham Investors argue that this motion should be treated as urgent under Ninth Circuit Rule 27-3(b). Motion 1-2. But they never explain why they waited until September 29, 2016, to file this motion—a delay of 30 days after the district court denied their similar stay motion on August 30, 2016. *See* D.1359. Nor do they point to any intervening events that might explain this newly asserted urgency. Accordingly, the motion should not be treated as urgent. *Cf. Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

II. The Graham Investors' stay motion improperly seeks to impose new conditions on the receiver's expenditures of funds.

As noted, the Graham Investors request that this Court grant a stay that would prevent the receiver from spending receivership funds unless he records each cash transaction in an accounting journal and also preserves the vouchers for each transaction. Motion 3. This relief would not simply suspend an order entered by the district court but would impose affirmative conditions on the receiver's expenditures of funds—and thus it is not properly characterized as a stay.

Moreover, the Graham Investors did not properly present this request to the district court because they raised it for the first time in their reply in support of their stay motion. D.1334 at 2. Not surprisingly, the district court did not expressly address this request when it denied the motion. D.1359. Even if the Graham Investors had tried to appeal from the district court's denial of such a request, this Court would lack appellate jurisdiction to review such a challenge to the routine administrative details of the receivership. *See, e.g.*, *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1170-75 (9th Cir. 2006) (applying 28 U.S.C. § 1291); *FRC v. Overseas Unltd. Agency*, 873 F.2d 1233, 1235 (9th Cir. 1989) (applying 28 U.S.C. § 1292(a)(2)). For these reasons, the requested relief should be denied.

III. The Graham Investors have not established a likelihood of success on the merits.

The Graham Investors' stay motion indicates that they challenge two district court rulings: first, the approval of the receiver's proposal to liquidate the 23 pieces of real estate and distribute the proceeds to the GP investors in "one pot," pro rata fashion, *see* Motion 5-6 (citing D.1304); and second, the denial in part of their motions to intervene, *see* Motion 20 (citing D.1296).[4] But they fail to establish a likelihood of success in seeking reversal of either ruling.

[4] The Investors have not clearly designated the district court orders they are seeking to stay, and instead they have asked this Court to "stay the sales of any of the properties." Motion 3. It is therefore unclear why they attack the merits of the district court's intervention ruling. As discussed below, the district court *granted*

A. The district court acted within its broad equitable discretion in approving the receiver's liquidation and distribution proposal.

A district court's rulings on sales procedures and distribution plans by an equity receiver are reviewed for abuse of discretion. *See, e.g.*, *SEC v. Wealth Mgt. LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010); *accord SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 609 (9th Cir. 1978) ("[I]t is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership."). In general, "a district court abuses its discretion when it makes an error of law" (a question that is reviewed *de novo*), or when its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 577 (1985)).

The Graham Investors argue that the district court abused its discretion in approving the receiver's proposal to liquidate the 23 pieces of real estate held by the GPs and to distribute the proceeds to GP investors in "one pot," pro rata fashion, for four reasons: (i) the district court lacked jurisdiction over the GPs; (ii) the Graham Investors were not given due process of law; (iii) the district court did

---

in part their motion to intervene for the limited purpose of opposing the receiver's liquidation and distribution proposal. By contrast, the district court's denial of other parts of their intervention motion as untimely has no apparent relevance to the property sales that they seek to stay. For the sake of completeness, this opposition explains below that the partial denial was within the court's discretion.

not expressly find commingling to support the "one pot" plan; and (iv) the court did not order an accounting to support the liquidation. But none of these arguments meets the Graham Investors' high burden to show that the district court abused its discretion.

1. The district court properly included the GPs in the receivership.

A district court has broad powers and wide discretion to impose an equity receivership and to grant other forms of ancillary relief; these powers derive not from a statutory grant in the first instance but rather "from the inherent power of a court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). Thus, a district court may exercise its discretion to appoint and maintain a receiver by reference to such goals as marshaling and preserving assets against dissipation, clarifying the financial affairs of the entities for the benefit of innocent investors, and the investigation and prosecution of claims on behalf of the entities. *Id.* at 1372.

In furtherance of these goals, a district court may exercise *quasi in rem* jurisdiction and include in a receivership all property in a defendant's possession or control, even if such property is owned by non-parties to the action (such as the GPs here). *SEC v. Am. Principals Holding, Inc.* (*In re San Vicente Med. Partners Ltd.*), 962 F.2d 1402, 1406-08 (9th Cir. 1992) ("*San Vicente*"). In that context, "a district court has the power to include the property of a non-party limited

partnership in an SEC receivership order as long as the non-party . . . receives actual notice and an opportunity for a hearing." *Id.* at 1408. On that basis, this Court in *San Vicente* sustained the district court's authority to include in a receivership a non-party limited partnership controlled by the named defendant (through the defendant's subsidiary, which was the general partner), and also found that the provision of notice and opportunity for a hearing to the named defendant (and its subsidiary) sufficed to provide the same to the non-party partnership as well. *Id.* at 1407-08.

The Graham Investors argue that *San Vicente* is not dispositive here because of "the indisputable evidence" that the GP investors, not defendants Schooler and Western, controlled the GPs. Motion 8. The chief evidence cited by the Graham Investors in this regard is *dicta* from the district court's preliminary injunction ruling in October 2012, in which it described the powers that the written GP agreements nominally gave investors. *Id.* (citing D.44 at 7). But the Graham Investors overlook that, in the same ruling, the district court held the Commission had made out a *prima facie* case that the GP interests were securities in the form of investment contracts, in light of defendants' involvement in selling the real estate, defendants' "pivotal operational role" with respect to the GPs, the fractional nature of the GPs' ownership of the land, and the investors' use of IRA funds to purchase the GP interests. D.44 at 21-22.

Even more important, the Graham Investors ignore the district court's grant of summary judgment to the Commission in April 2014 on its allegation that the GP interests sold to investors were investment contracts. D.583. In that latter ruling, the district court reasoned that because the written GP agreements, by their terms, were not effective until months or years after the first investment was made, they left the investors dependent on defendants' managerial control. *Id.* at 15-17. As the district court found, the co-tenancy structure of the GPs "made it effectively impossible for any single investor or GP to exercise any power over the GP's main asset—land." *Id*. at 9. Moreover, it found that "it is clear that, at the time of investing, most investors had no formal rights and powers under the [GP] Partnership Agreements." *Id*. at 16. These and other factual findings by the district court, in an order Investors ignore, are in stark contrast to their unsupported claim that "Investors hold 100% of the power to make GP decisions." Motion 8.

Thus, the district court's investment contract analysis in these two rulings (D.44 and D.583) established that the GP investors were dependent on defendants' managerial control for the success of the enterprise. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (An investment contract exists "where individuals [a]re led to invest money in a common enterprise with the expectation that they would earn a profit solely through the effectors of the promoter or of someone other than themselves."). In light of this Court's decision in *San Vicente*, the district court

properly included the GPs and their real estate in the receivership as property under the possession or control of defendants.

2. The district court respected the due process rights of the GPs and the Graham Investors.

This Court explained in *San Vicente* that when property belonging to a non-party is placed under receivership, due process will be satisfied if the non-party owner receives actual notice and an opportunity for a hearing "before any material deprivation of a property interest occur[s]." 962 F.2d at 1407-08. Although the Graham Investors raise four main complaints with respect to due process, the district court's appointment and conduct of the receivership met this standard.

First, the investors' leading argument is that the district court violated Local Rule 66.1 because it failed to give them actual notice and a hearing both prior to the receiver's permanent appointment and also upon the filing of an initial report within 30 days of that appointment. Motion 10-11. But it is undisputed that all GP investors received actual notice in October 2012, one month after the receiver's temporary appointment,[5] through a written letter sent by the receiver that informed

[5] The receiver's temporary appointment began upon the district court's entry of the TRO on September 6, 2012. D.10. The Commission requested that all GP investors be given notice of the action at that time, but the district court declined to do so because of defendants' argument, over the Commission's objection, that providing notice to all investors of the Commission's allegations would permanently damage defendants' business. *See* D.1; D.10; D.14 at 16; D.17 at 2; D.18 at 6; D.22 at 6. In its preliminary injunction decision on October 5, 2012, the district court directed that all GP investors be given notice. D.44 at 22 n.11. In

investors of the Commission's action and directed them to the receiver's website for detailed information and later updates. D.44 at 22 n.11; D.1355 at 6. The receiver's appointment was made permanent only later, in March 2013. D.174.

By that latter date, the district court had generally approved the receiver's use of his website and emails to notify the GP investors of the progress of the action, in light of the over 3,300 GP investors and the need to conserve receivership resources. D.170 at 3. Also by that time, the receiver had filed three reports (D.27; D.49; D.80), and dozens of GP investors had filed letters expressing their views to the district court (*see generally* D.77 *through* D.168). Accordingly, Local Rule 66.1 was satisfied because the GP investors received notice of the receivership and of the receiver's initial reports, and were heard through letters filed with the district court, all prior to the permanent appointment of the receiver in March 2013.

In any event, due process was satisfied here because the GP investors did not suffer a material deprivation of a property interest prior to receiving notice and an opportunity to be heard. *See also Prof'l Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994) (district courts may depart from local rules so long as "substantial rights" are not affected). Indeed, when defendants brought similar

---

any event, defendants received notice at the time the complaint was filed, and this sufficed to provide notice to the GPs by virtue of defendants' control. *See San Vicente*, 962 F.2d at 1407-08.

due process concerns to the district court's attention, the court found that "investors have not yet been denied due process because the Receiver's actions in relation to the GPs have not deprived the GPs of any material property interest." D.470 at 19. To allay such concerns, the court allowed the GP investors to file briefs and to present several hours of argument on the scope and conduct of the receivership (D.629; D.790), and it expressly took their views into account in deciding to keep the GPs under the receivership in March 2015 (D.1003 at 1, 4).

Second, the Graham Investors contend that, following the receiver's initial mailing, his later website postings and emails were insufficient to give notice of the litigation consistent with due process. Motion 11-13. But, as just explained, the district court authorized these postings and emails because of the large number of investors and the need to conserve resources. D.170 at 3. The Graham Investors thus received due process because they were given "'notice reasonably calculated, under all the circumstances,'" to apprise them of the litigation and afford them an opportunity to present objections. *Taylor v. Yee*, 780 F.3d 928, 933 (9th Cir. 2015) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The receiver followed these procedures to provide timely notice of his liquidation and distribution proposal (D.1355), and the Graham Investors' complaints about that notice (Motion 12) ring hollow given that (as discussed below) they successfully moved to intervene for the limited purpose of opposing

the proposal. *See SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1147 (9th Cir. 1996) ("[A]ppellants can prove no due process violation without showing prejudice."), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *SEC v. Wencke*, 783 F.3d 829, 837-38 (9th Cir. 1986).

Third, the Graham Investors complain about the use of summary rather than plenary proceedings to determine the liquidation and distribution of property in the receivership estate. Motion 13-15. But this Court has repeatedly instructed that summary proceedings are appropriate and proper to protect equity receivership assets. *See, e.g.*, *Am. Capital Invs.*, 98 F.3d at 1146-47; *San Vicente*, 962 F.2d at 1407; *Wencke*, 783 F.2d at 836-38. The Graham Investors' argument that plenary proceedings were required because they and not the receiver owned and controlled the GPs (Motion 12-13) is simply inconsistent with the district court's investment contract rulings, noted earlier, which specifically found that defendants—not the GP investors—controlled the GPs.

Likewise, the Graham Investors' reliance (Motion 14, 25) on this Court's disapproval of summary proceedings in *SEC v. Ross*, 504 F.3d 1130 (2007), is misplaced. In *Ross*, this Court concluded that summary proceedings did not support the entry of a disgorgement order against a non-party that was predicated on a determination that the non-party had violated the securities laws. *Id.* at 1142. Here, by contrast, the Commission has never alleged that either the GPs or the GP

investors violated the securities laws, and the district court's approval of the receiver's liquidation and distribution proposal did not turn on any such violations. For similar reasons, the Graham Investors miss the mark in analogizing this receivership proceeding to an action for a judgment against a partnership as a defendant or an action seeking to enforce such a judgment against individual partners. Motion 15-16.

Fourth, the Graham Investors are incorrect to assert that due process was violated because the receiver did not follow the terms of the GP agreements or institute a plenary proceeding for the dissolution of the GPs. Motion 10, 15. As this Court has repeatedly held, when non-party partnership assets are placed under receivership, the receiver acts as an officer of the court who exercises complete control over those assets under the common law of equity receiverships and therefore is not bound by the limitations of the partnership agreement or state partnership law. *Am. Capital Invs.*, 98 F.3d at 1143-44 (applying 28 U.S.C. § 754); *San Vicente*, 962 F.2d at 1407-09.

3. The district court acted within its broad discretion in approving the "one pot," pro rata distribution plan.

This Court has repeatedly held that a district court has broad discretion to adopt a "one pot," pro rata plan for distributing receivership assets to innocent investors. *See, e.g.*, *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir. 1999); *United States v. 13328 & 13324 State Hwy. N.*, 89 F.3d 551, 553-54

(9th Cir. 1996) ("*State Hwy*."). Such a plan is particularly appropriate where all of the investors were victims of the defendant's securities law violations and determining their individual ownership interests would be difficult, because in such situations "'equality is equity.'" *State Hwy.*, 89 F.3d at 554 (quoting *Cunningham v. Brown*, 265 U.S. 1, 13 (1924)).

The Graham Investors assert that this case is different because the Commission never showed that all GP investors were victims of defendants' securities law violations. Motion 18-19. But that is not so. The district court granted summary judgment to the Commission on its claim that defendants illegally offered and sold unregistered securities *to all the GP investors*, and it was this ruling that underlay the court's order that defendants disgorge roughly $136 million in proceeds. D.1074. Although the district court granted only partial summary judgment to the Commission with respect to its fraud allegations, it denied full summary judgment not because it found the remaining fraud allegations to be baseless but rather because it was persuaded that the issues of materiality and scienter with respect to the remaining allegations were better left for the trier of fact. D.1081. In this light, the Commission's decision not to take the remaining fraud allegations to trial but to proceed directly to final judgment against Schooler reflected a judgment about the best use of limited prosecutorial resources in light of the substantial remedies already awarded. *See* D.1137-1 at 1. But in any event,

none of the cases cited by the Graham Investors (Motion 16-20) limits a district court's equitable discretion in this regard depending on whether the securities law violations were fraud violations or registration violations.

The Graham Investors also assert that the "one pot," pro rata distribution plan is inappropriate because the district court failed to support the plan with express findings that defendants had commingled assets. Motion 17-20. But the district court's findings reflect abundant record evidence of commingling. The court previously had found that defendants' unregistered offering of investments was a single, integrated offering conducted to finance Western's operations (D.1003; D.1074 at 8), and also had found that over 90 percent of investor funds were transferred not to individual GPs but to Western, where they were used to pay for various expenses (D.1304 at 30 (citing D.583 at 10)). In other words, 93 cents of every dollar invested by an investor was pooled together and sent to Western to pay expenses that had nothing to do with that investor's investment.

Moreover, none of the decisions cited by the Graham Investors (Motion 16-20) requires that a district court use particular "commingling" language to support a "one pot," pro rata plan. In fact, other courts have approved similar distribution plans where the evidence of commingling was less extensive than here. *See*, *e.g.*, *Quilling v. Trade Partners, Inc.*, 572 F.3d 293, 300-01 (6th Cir. 2009) (affirming pro rata distribution plan where investors had purchased interests in viatical

settlements, and one investor had recorded ownership interest in specific life insurance policy); *SEC v. Forex Asset Mgt., LLC*, 242 F.3d 325, 331-32 (5th Cir. 2001) (affirming distribution plan that distributed $800,000 invested by one investor with the rest of the estate even though those funds were held in a discrete account).

As the district court recognized, "where the assets of the receivership estate are insufficient to pay its claims in full, no distribution scheme will fully satisfy all investors." D.1304 at 29. Here, the receiver has reported that he expects to distribute about $21.8 million to investors. D.1181 at 3. Under a "one pot," pro rata distribution, the receiver projects that GP investors would receive about 13.4 percent of their investments. D.1304 at 27-29. In contrast, a GP-by-GP distribution would result in wildly disparate recoveries of between 0.75 percent and 194.07 percent among the various GP investors. *Id.* Given that all of the GP investors were victims of defendants' securities law violations, and given the financially intertwined relationships between the GPs and Western (discussed at D.1304 at 21, 30), the "one pot," pro rata approach was well within the district court's broad equitable discretion.

4. The district court acted within its discretion in declining to order an accounting.

The Graham Investors further argue that the district court should have ordered an accounting of the receivership prior to approving the receiver's

liquidation and distribution proposal. Motion 20, 23-24. Here, they rely on the facts that the receiver's reports did not follow a particular accounting format and that the receiver collected money from the GP investors. *See id.* But the district court closely monitored the receiver's financial reports throughout this litigation (D.169; D.190; D.511; D.637; D.640; D.922; D.1006; D.1134; D.1168), including his reports of monies collected from GP investors (at the court's direction, *see* D.470) to cover ongoing expenses of maintaining the real estate. And the district court thoughtfully considered and rejected previous allegations by defendants and individual GP investors that the receiver was acting inappropriately. *See, e.g.*, D.1004 at 10-11; D.1296 at 5. Following final judgment, the Graham Investors sought to reopen the entire four-year receivership for a full accounting, and the district court acted well within its discretion in rejecting their request.

B. The district court acted within its discretion in rejecting the Graham Investors' motion to intervene as untimely.

Significantly, the district court *granted* the Graham Investors' motion to intervene for the limited purpose of opposing the receiver's liquidation and distribution proposal, given that the proposal had been filed relatively recently. D.1296 at 11. In that regard, the court permitted them to file briefs (D.1235; D.1277; D.1293) and to present argument through Mr. Aguirre (D.1298; D.1308).

At the same time, the district court denied as untimely the Graham Investors' motions to intervene in order to:

> (a) file complaints-in-intervention; (b) contest the Receiver's previous sale recommendations with regards to a number of properties; (c) vacate previous Court orders approving Receiver sale recommendations; (d) "oversee and evaluate" the receivership; (e) move for an accounting or audit of the receivership; (f) obtain full access to the Receiver's filings and recommendations submitted to the Court; (g) obtain all books and records related to the Receiver's management of the GPs and the GPs' assets; [and] (h) release the GPs from the receivership . . . .

D.1296 at 3, 11. The Graham Investors now present two arguments in challenge to this denial, but both arguments fail to meet their high burden to show that the district court abused its discretion in finding their request untimely. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (timeliness element is reviewed for abuse of discretion).

First, the Graham Investors contend their intervention motion was timely because they first became aware the receiver intended to liquidate rather than continue to manage the GPs' real estate only in February 2016, when he filed his liquidation and distribution proposal. Motion 20-23. But the Graham Investors do not even address, let alone refute, the district court's rationale that its March and May 2015 orders reasonably should have put them on notice, at that time, that the court and the receiver were already undertaking the orderly sale process that led to the sale recommendations in question. D.1296 at 5-6 (citing D.1003; D.1069).

Second, the Graham Investors recite the same alleged accounting deficiencies recounted above. Motion 23-24. But once again, they do not even address the district court's rationale that they should have been aware, in the

months leading up to the March 2015 order keeping the GPs in the receivership, that the court was already receiving briefs and oral argument from investors as to the administration and scope of the receivership. D.1296 at 5 (citing D.1003).

Accordingly, the district court acted within its discretion in denying in part the Graham Investors' motion to intervene.

IV. The Graham Investors have not established irreparable harm.

The Graham Investors contend that, in the absence of a stay, the sale of the GPs' real estate and the subsequent distribution of proceeds will give rise to irreparable harm. Motion 24. They contend that the liquidation of real estate will deprive them of the possible future appreciation that motivated their investment. *Id.* at 2. But any future appreciation of the real estate is at best speculative and susceptible to later quantification—and therefore not irreparable. *See Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury."); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (purely monetary injuries normally are not considered irreparable). They also contend that distribution of proceeds to GP investors across the country would be effectively impossible to unwind. Motion 24. Even if that were true, that cannot justify a blanket stay of all property sales (which necessarily precede such distribution), as the Graham Investors have requested.

V. The Graham Investors have not established that the balance of equities and the public interest support a stay.

The Graham Investors contend that the balance of equities favors a stay because a distribution of liquidation proceeds to the GP investors would be impossible to unwind if a stay is denied. Motion 24-25. But again, even if that were true, that provides no basis for a blanket stay of all property sales in advance of the distribution. And on the other side of the balance, a stay of all sales of the GPs' real estate would require the receiver to spend scarce resources from the receivership estate for maintenance and property taxes with respect to the GPs' real estate during the pendency of this appeal. That would mean even less recovery for innocent investors at the end of a securities law enforcement action that already has run four years.

The Graham Investors also assert that their constitutional claims demonstrate that the public interest favors a stay. Motion 25. But those claims are entirely without merit, for the reasons already discussed. To the contrary, the public interests in effectively remedying securities law violations and in preserving scarce receivership resources to compensate innocent investors weigh heavily against granting the stay.

CONCLUSION

For the foregoing reasons, the Graham Investors' motion for a stay pending appeal should be denied.

Respectfully submitted,

s/ Stephen G. Yoder
STEPHEN G. YODER
Senior Litigation Counsel
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040
(202) 551-4532

October 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 October 6, 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
Stephen G. Yoder
Senior Litigation Counsel
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040

Dated: October 6, 2016