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9 Attorneys for Receiver  
THOMAS C. HEBRANK

11 **UNITED STATES DISTRICT COURT**  
12 **SOUTHERN DISTRICT OF CALIFORNIA**

14 SECURITIES AND EXCHANGE  
COMMISSION,

15 Plaintiff,

16 v.

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

20 Defendants.

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

**RECEIVER'S OPPOSITION TO  
ARDIZZONE INVESTORS' MOTION  
(1) FOR A STAY OF ORDERS  
PENDING APPEAL, (2) TO ALTER  
OR AMEND A JUDGMENT, AND  
(3) FOR RECONSIDERATION**

Date: November 10, 2016  
Time: 1:30 p.m.  
Ctrm.: 2D  
Judge: Hon. Gonzalo P. Curiel

1 Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial  
2 Planning Corporation d/b/a Western Financial Planning Corporation ("Western"),  
3 and its subsidiaries and the General Partnerships listed on Schedule 1 to the  
4 Preliminary Injunction Order entered on March 13, 2013 (collectively,  
5 "Receivership Entities"), submits this opposition to the Ardizzone Investors'  
6 Motions (1) for a Stay of Orders Pending Appeal, (2) to Alter or Amend a  
7 Judgment, and (3) for Reconsideration.

## 8 I. INTRODUCTION

9 The next steps in the receivership should be to evaluate the Xpera Report  
10 recommendations, maximize the value of real properties through the modified  
11 orderly sale process, and return as much money as possible to investors. Everyone  
12 seems to recognize this, except the investors represented by Gary Aguirre, who have  
13 repeatedly tried to frustrate, impede, and delay the Receiver accomplishing those  
14 objectives, including repeatedly asserting the same motions and arguments the Court  
15 has rejected.

16 In their original motion to intervene, the Aguirre Investors argued their due  
17 process rights had been violated during the receivership. Dkt. No. 1229. On  
18 May 18, 2016, the Court rejected the argument and allowed them to intervene for  
19 the limited purpose of opposing the Receiver's orderly sale process/distribution plan  
20 motion (Dkt. No. 1181). Dkt. No. 1296. In opposing the Receiver's orderly sale  
21 process/distribution plan motion, the Aguirre Investors again argued the relief  
22 requested by the Receiver could not be granted because it would violate the Aguirre  
23 Investors' due process rights. Dkt. No. 1235. The Court rejected the argument on  
24 May 25, 2015. Dkt. No. 1304.

25 The Aguirre Investors then appealed the May 25, 2015 Order and filed a  
26 motion for stay pending appeal ("First Stay Motion"). Dkt. No. 1316. The First  
27 Stay Motion was largely a repetition of arguments the Aguirre Investors had made  
28

1 before, including that their due process rights had been violated. On August 30,  
2 2016, the Court denied the First Stay Motion. Dkt. No. 1359.

3 In the meantime, Mr. Aguirre filed another motion to intervene on behalf of  
4 six additional investors ("New Aguirre Investors"). Dkt. No. 1348. In their motion  
5 to intervene, the New Aguirre Investors likewise argued their due process rights had  
6 been violated. On August 30, 2016, the Court denied the New Aguirre Investors'  
7 motion to intervene, again rejecting their due process arguments. Dkt. No. 1359.  
8 The New Aguirre Investors then appealed the August 30, 2016 Order. Dkt.  
9 No. 1367.

10 The New Aguirre Investors now seek a stay pending appeal as well as  
11 reconsideration of the August 30, 2016 Order ("Second Stay Motion"). The New  
12 Aguirre Investors again argue their due process rights have been violated.  
13 Accordingly, this is at least the fifth time Mr. Aguirre has argued that investor due  
14 process rights have been violated. The Court has rejected these arguments each time  
15 and should do so again.

16 The Court should also strongly consider equitably subordinating the claims of  
17 Mr. Aguirre's clients to the claims of other investors if they persist in asserting  
18 motions and arguments the Court has already rejected, filing frivolous appeals,  
19 running up administrative expenses, and repeatedly trying to frustrate and impede  
20 the administration of the receivership estate. The expense and delay caused by the  
21 Aguirre Investors and New Aguirre Investors' actions have already caused  
22 substantial harm to the other approximately 95% of investors, who are forced to bear  
23 the vast majority of the administrative expenses and whose distributions from the  
24 receivership estate are being further delayed.

## 25 II. ARGUMENT

26 The majority of the Second Stay Motion is a repetition of arguments  
27 Mr. Aguirre has made in the past, on behalf of the Aguirre Investors or New Aguirre  
28

1 Investors and which the Court has rejected. The Receiver briefly addresses the  
2 arguments in the Second Stay Motion as follows so as to set the record straight:

- 3 • The New Aguirre Investors falsely contend that "Hebrank and the SEC  
4 are claiming investors waived their Constitutional rights to due process  
5 of law . . ." Motion, p. 11. To the contrary, the Receiver has never said  
6 investors waived any Constitutional rights. As the record makes clear,  
7 investors have been afforded due process and the Court has considered  
8 their views throughout this case.
- 9 • The New Aguirre Investors fail to explain how the Distribution Plan  
10 Motion was a "petition for the payment of dividends to creditors" under  
11 Local Rule 66.1.f.1. when it did not seek to pay any dividends or  
12 distributions to any investors or creditors and no such distributions can  
13 be made without further orders of the Court. The Receiver made this  
14 point in his opposition to their motion to intervene and they have failed  
15 to address it. *See* Dkt. No. 1355, p. 8.
- 16 • The New Aguirre Investors take the position investors have no  
17 responsibility to inform themselves about the receivership and if they  
18 cannot understand Court filings, they have been denied due process.  
19 This is simply wrong. Investors were mailed a letter in October 2012  
20 directing them to the receivership website and were instructed to check  
21 the website for updates on the case. Dkt. No. 1355-1, Exh. A.  
22 Investors were then mailed another letter in March 2013 informing  
23 them again that certain Court filings would be posted to the  
24 receivership website and explaining that they could receive these filings  
25 by mail if they sent a written request to the Receiver. Dkt. No. 1368-3,  
26 Exh. 10. If investors do not use email, it was incumbent on them to  
27 contact the Receiver and request notice by mail. If investors had not  
28 previously provided their email address and wanted to receive email

1 notices, it was incumbent on them to contact the Receiver and provide  
2 their email addresses. If investors did not understand Court filings,  
3 they could ask the Receiver to explain them, have family or friends  
4 assist them, or hire an attorney. However, investors who ignore notices  
5 they receive, fail to take simple steps to receive further notices, fail to  
6 access Court filings that are available to them on the receivership  
7 website, and fail to seek assistance with filings they do not understand,  
8 cannot legitimately claim they have been denied due process.

- 9 • This is a federal equity receivership, not a condemnation or forfeiture  
10 proceeding. The condemnation and forfeiture cases cited by the New  
11 Aguirre Investors have no bearing on this case. The New Aguirre  
12 Investors can cite no cases holding that mail notice on all investors in a  
13 federal equity receivership is required for a motion to approve  
14 procedures for selling receivership properties, a distribution  
15 methodology, or a distribution plan. This is because no such rule  
16 exists. Instead, District Courts have broad discretion in the  
17 administration of receiverships, including in determining what notices  
18 to investors and creditors are reasonable and appropriate. *SEC v.*  
19 *TLC Invs. and Trade Co.*, 147 F. Supp. 2d 1031, 1034-35 (C.D. Cal.  
20 2001) ("in keeping with the general rule that the process due varies  
21 according to the nature of the right and the type of proceedings,  
22 [citation], there are no specific standards or rules setting forth what  
23 rights investors in such proceedings have to participate. Instead,  
24 summary proceedings satisfy due process so long as there is adequate  
25 notice and opportunity to be heard."); *Mathews v. Eldridge*, 424 U.S.  
26 319, 334 (1976) (Due process as a "flexible" standard that "calls for  
27 such procedural protections as the particular situation demands[.]");  
28 *SEC v. Hardy*, 803 F.2d 1034, 1036, 1039-40 (9th Cir. 1986)

1 (approving claims procedures used by a district court in a receivership  
2 case when all claimants were given reasonable notice and opportunities  
3 to be heard at hearings). Federal equity receiverships often involve  
4 many investors and creditors, and receivership estates generally have  
5 limited resources. Accordingly, the Local Rules provide for notices to  
6 investors and creditors of certain filings, but the Court has discretion to  
7 modify the Local Rules and determine what notices are appropriate  
8 under the specific circumstances. The Court properly exercised its  
9 broad discretion and determined that notices provided to investors via  
10 email, the receivership website, and mail (if requested in writing) was  
11 reasonable and appropriate under the circumstances. The Court has  
12 already considered the New Aguirre Investors' arguments to the  
13 contrary and rejected them.

- 14 • The Receiver acknowledges his declaration filed on August 23, 2016  
15 (Dkt. No. 1355-1) was inaccurate in two minor respects: (1) the  
16 October 2012 letter to investors was mailed by his counsel instead of  
17 the former partnership administrators, and (2) the July 22, 2014 Order  
18 was not emailed to David and Lois Schwarz because the Receivership  
19 Entities' records did not contain an email address for them at that time.  
20 Considering that the relevant letters and emails were sent and received  
21 several years ago, it is not surprising the Receiver's recollection of  
22 these details might be slightly off in one or two minor ways. These  
23 errors, however, are immaterial, have no impact on whether the New  
24 Aguirre Investors were afforded due process, were not referenced  
25 anywhere in the Court's August 30, 2016 Order, and provide no basis  
26 for reconsideration.
- 27 • As usual, the New Aguirre Investors fabricate and grossly misstate the  
28 facts regarding the percentage of investors who receive email notices

1 from the Receiver. The records of the Receivership Entities, as updated  
2 during the case by the Receiver, reflect that approximately 88% of  
3 investors have provided their email address and approximately 12%  
4 have not. The Receiver uses a well-recognized outside vendor,  
5 MailChimp, to send mass emails to investors. MailChimp has reported  
6 that, of the approximately 3,385 investor email addresses the Receiver  
7 has, 3,079 (or approximately 90%) either receive an email or have  
8 unsubscribed, *i.e.*, elected not to receive emails (the number that have  
9 unsubscribed being 344). This means approximately 80% of all  
10 investors (90% of the 88% of investors who have provided their email  
11 addresses) either receive email notices or have elected not to receive  
12 email notices. Obviously, the Receiver has no control over whether  
13 people choose to provide their email address, choose to unsubscribe  
14 from receiving emails, or choose not to read emails they receive. There  
15 is no legitimate claim, however, that investors could not easily receive  
16 email notices. The Receiver has received updated contact information  
17 from investors throughout the case and regularly updates his database  
18 of investor contact information.

- 19 • The New Aguirre Investors spend 25 pages arguing who sent and  
20 received letters and emails over the last four years. Yet, they never  
21 explain what they would have done or how the outcome would have  
22 been different if every pleading filed in the case had been mailed to  
23 every investor (at tremendous expense to the receivership estate). In  
24 other words, even if due process had been violated, which it clearly has  
25 not, what would the New Aguirre Investors have argued and how  
26 would those arguments have changed the Court's rulings? The reality  
27 is nothing would have changed. Schooler and the investors voiced their  
28 views numerous times about the GPs being in the receivership. The

1 Court considered their arguments on several occasions and determined  
2 to keep the GPs in receivership. The Aguirre Investors and Dillon  
3 Investors were permitted to intervene for the purpose of opposing the  
4 orderly sale process/distribution plan motion, which they did. The  
5 Court considered their arguments and approved the modified orderly  
6 sale procedures, the One Pot Approach, and the Distribution Plan.  
7 Even if they could show they were not afforded due process, which  
8 they cannot, the New Aguirre Investors cannot show that further notice  
9 or further opportunities to voice their views would have changed the  
10 Court's rulings. There has been vocal opposition to the Receiver's  
11 proposals throughout this case, most of which has come from investors  
12 Mr. Aguirre now represents. Therefore, their arguments about who  
13 received what notices and when are entirely academic.

14 Finally, with respect to the potential subordination of claims of Mr. Aguirre's  
15 clients, the Court has the power to subordinate one claim to another if it finds "the  
16 creditor's claim, while not lacking a lawful basis, nevertheless results from  
17 inequitable behavior on the part of that creditor." *SEC v. American Board of Trade*,  
18 719 F. Supp. 186, 196 (S.D.N.Y. 1989); *Spacek v. Thomen (In re Universal*  
19 *Farming Industries*, 873 F.2d 1334, 1337 (9th Cir. 1989) (holding that equitable  
20 subordination, in the context of a bankruptcy, requires that: (1) the claimant who is  
21 to be subordinated has engaged in inequitable conduct; (2) the misconduct results in  
22 injury to competing claimants or an unfair advantage to the claimant to be  
23 subordinated; and (3) subordination is not inconsistent with bankruptcy law.").

24 Indeed, the Preliminary Injunction Order expressly stays litigation against the  
25 Receivership Entities and enjoins investors from "doing any act or thing  
26 whatsoever . . . or in any way to interfere with or harass the permanent receiver or  
27 his attorneys . . . or to interfere in any manner with the discharge of the permanent  
28 receiver's duties and responsibilities hereunder."). Dkt No. 174, Section VI, fn. 3



1 (noting that the primary purpose of the stay is to prevent interference with the  
2 Receiver's work). This provision recognizes (a) the critical importance of  
3 preserving the receivership estate for the benefit of investors, and (b) the expense  
4 that actions like those of Mr. Aguirre's clients impose on investors. Accordingly, it  
5 is within the Court's broad discretion in the supervision of this federal equity  
6 receivership to subordinate the claims of the Aguirre Investors and New Aguirre  
7 Investors as a matter of equity and in order to protect the other 95% of investors  
8 from further harm.

9 Mr. Aguirre will no doubt argue the Receiver is trying to silence the  
10 opposition, but that is not the case. The Receiver has no objection to investors  
11 voicing their views and concerns. Investors have filed letters with the Court  
12 throughout this case and have filed briefs when permitted to do so by the Court.  
13 The Receiver does not oppose investors continuing to voice their views in this  
14 manner. There is a stark contrast, however, between that and the numerous,  
15 repetitive motions and appeals filed by Mr. Aguirre's clients. Indeed, there is also a  
16 clear distinction between the actions of the Dillon Investors, who were also  
17 permitted to intervene for the purpose of opposing the orderly sale  
18 process/distribution plan motion, which they did, and those of the Aguirre Investors  
19 and New Aguirre Investors, which go well beyond voicing objections and cross over  
20 into knowingly attempting to interfere with and impede the Receiver's performance  
21 of his duties. As an example, with respect to the Court-approved sale of the Jamul  
22 Valley property (a sale that his own expert, Xpera Group, has endorsed),  
23 Mr. Aguirre is actively trying to prevent the sale from closing by contacting the  
24 buyer, The Nature Conservancy. *See* Exhibit A. These actions jeopardize the sale,  
25 which stands to generate a very good recovery from the property for the receivership  
26 estate, and therefore pose a serious threat of further harm to investors.

27 Mr. Aguirre's clients have been afforded due process and their arguments  
28 have been considered by the Court on numerous occasions. The interest of

1 maximizing the value of properties and distributions to investors must now take  
2 precedence over the efforts of Mr. Aguirre's clients to re-litigate issues, run up  
3 expenses, and impede the progress of the receivership.

4 **III. CONCLUSION**

5 WHEREFORE, the Second Stay Motion should be denied and Mr. Aguirre  
6 should be advised that further efforts to frustrate and impede the administration of  
7 the receivership, including through further appeals and stay motions in this Court or  
8 the Ninth Circuit Court of Appeals, may result in the claims of his clients being  
9 equitably subordinated to the claims of other investors.

10  
11 Dated: October 11, 2016

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

12  
13 By:           /s/ Edward Fates          

EDWARD G. FATES  
Attorneys for Receiver  
THOMAS C. HEBRANK

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**EXHIBIT INDEX**

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# EXHIBIT A

# EXHIBIT A

**AGUIRRE LAW, APC**



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

By Electronic Mail to [cdyoung@tnc.org](mailto:cdyoung@tnc.org)

September 1, 2016

Charlotte D. Young  
Chief Ethics & Compliance Officer  
The Nature Conservancy  
4245 N. Fairfax Drive  
Arlington, VA 22203

Re: Purchase of Jamul Valley property from  
receivership in *SEC v. Schooler, et al.*

Dear Ms. Young:

Out of an abundance of caution, I enclose a copy of the amended notice of appeal filed today with the U.S. District Court for the Southern District of California in the above-referenced matter. It appeals the District Court's order entered on August 30, 2016, to sell the Jamul Valley property to The Nature Conservancy. We provide you this information so The Nature Conservancy will be on notice of the contentions raised by my clients in the above matter. Please contact me if you wish any direction to any particular filings where we raise the issues stated below.

Very simply, I represent approximately 200 partners in the 87 general partnerships that are subject to the receivership in the above case. They include partners in the partnerships that own the Jamul Valley property. All have contended the District Court lacks the authority to sell the subject property, because (1) it has no subject matter jurisdiction and (2) the sale was conducted in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Consequently, we contend the order approving the sale is void.

We will be asking the Ninth Circuit Court of Appeals to issue a stay in this matter very shortly.

We provide this information to you, since we were unable to locate the contact information for the Nature Conservancy's general counsel.

Sincerely,

Gary J. Aguirre

cc (via email): Thomas C. Hebrank, CPA  
Edward Fate, Esq.

**PROOF OF SERVICE**

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 501 West Broadway, 15th Floor, San Diego, California 92101-3541.

On October 11, 2016, I served the within document(s) described as:

- **RECEIVER'S OPPOSITION TO ARDIZZONE INVESTORS' MOTION (1) FOR A STAY OF ORDERS PENDING APPEAL, (2) TO ALTER OR AMEND A JUDGMENT, AND (3) FOR RECONSIDERATION**

on interested parties in this action by:

**BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):** the foregoing document(s) will be served by the court via NEF and hyperlink to the document. On October 11, 2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

- Gary J. Aguirre - gary@aguirrelawapc.com; maria@aguirrelawapc.com
- John Willis Berry - berryj@sec.gov; LAROFiling@sec.gov
- Lynn M. Dean - deanl@sec.gov; larofiling@sec.gov; berryj@sec.gov; irwinma@sec.gov; cavallones@sec.gov
- Timothy P. Dillon - tdillon@dghmalaw.com; kramirez@dghmalaw.com; sahuja@dghmalaw.com
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- David R. Zaro - dzaro@allenmatkins.com; mdiaz@allenmatkins.com

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

Executed on October 11, 2016, at San Diego, California.

Edward G. Fates  
\_\_\_\_\_  
(Type or print name)

*/s/ Edward Fates*  
\_\_\_\_\_  
(Signature of Declarant)