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

12
13 SECURITIES AND EXCHANGE
14 COMMISSION,

15 Plaintiff,

16 v.

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

22 Defendants.

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

ARDIZZONE INVESTORS' *EX*
***PARTE* MOTION FOR ORDER**
(1) AUTHORIZING DELETION OF
EXHIBIT FROM COURT'S FILE
(2) AUTHORIZING RE-FILING
EXHIBIT UNDER SEAL AND
(3) CLARIFYING ORDER

Judge: Hon. Gonzalo P. Curiel
Ctrm: 2D

I. Relief Sought

By this *Ex Parte* Application, Joseph M. Ardizzone, David R. Schwarz, Lois Schwarz, Dennis Frisman, Eric Gilbert, and Rick Moore ("Ardizzone Investors") seek two types of relief. First, they seek an order *temporarily* deleting Exhibit 4 to the declaration of Gary J Aguirre filed in this case on October 25, 2016, (Dkt. No. 1396-1) and authorizing the re-filing of the same exhibit under seal.¹ Second, the Ardizzone Investors seek clarification from this Court regarding any limitations on the use of documents the receiver, Thomas C. Hebrank ("Hebrank") has widely provided to investors with no implied or express limitations on their use after the Court approved the filing of the same documents under seal.

This *ex parte* application was prompted by Hebrank's demand that "action must be taken immediately to remove Exhibit 4 to your declaration from public view." Declaration of Gary J. Aguirre filed herewith ("Aguirre Decl."), ¶ 9, Ex. 1. Hebrank claims that the filing of Exhibit 4, which the Ardizzone Investors' counsel received from one of his clients, violated the Court's May 18, 2016, order (Dkt. No. 1296), which directed Hebrank to provide copies of the records filed under seal to the "Investors."

The Ardizzone Investors strongly disagree with Hebrank's contention. Counsel for the Ardizzone Investors did not obtain Exhibit 4 from Hebrank. Rather, it was one of numerous documents counsel for the Ardizzone Investors obtained from his clients. Nothing in Exhibit 4 limits its use in any way. No order of the Court addresses, much less limits, the use of the documents which Hebrank widely distributes to investors, such as Exhibit 4. Hebrank did obtain an order allowing him to file under seal with the Court the letter of intent included in Exhibit 4. Dkt. No. 924. Seven days after he obtained this order, on January 22, 2015, Hebrank sent Exhibit 4 to 121 investors without warning of any limitations on its use. One of those investors provided Exhibit 4 to his counsel.

¹ If it is more convenient for the Court's clerk, the Aguirre Declaration could be deleted and re-filed with all exhibits, except Exhibit 4, which would be filed under seal.

1 Although the Ardizzone Investors strongly disagree with Hebrank's contentions,
2 they nonetheless propose that Exhibit 4 be withdrawn and *re-filed at this time under seal*.
3 They do so even though Hebrank's position is unsupported by fact or law. Rather, they
4 seek the temporary withdrawal of Exhibit 4 from the Court's file pending the Court's
5 clarification whether it intended any limits on the use of the documents Hebrank widely
6 distributes among investors. No such limits are expressed in the Court's orders. The
7 Ardizzone Investors have therefore submitted an order providing (1) for the withdrawal
8 of Exhibit 4 and its filing under seal and (2) for a clarification regarding the limitations
9 on the use of documents, if any, which Hebrank widely distributes to investors after he
10 obtains the Court's approval to file them under seal.

11 **II. Relevant Facts**

12 One of the clients of the Ardizzone Investors' counsel provided him with Exhibit 4
13 in response to a blanket request to all clients that they provide copies of the documents
14 they received from Hebrank since his appointment. Nothing in Exhibit 4 raised any
15 concerns that any limitations existed in relation to its use. The Ardizzone Investors refer
16 the Court to the Aguirre Declaration filed herewith for a detailed statement of the facts.

17 **III. Case Law Indicates the Documents Hebrank Sent to Investors Are Not Subject** 18 **to Any Restrictions on Their Use**

19 The Ardizzone Investors do not question the principle that documents under seal
20 which are released to their counsel pursuant to a Court order remain sealed. But that is
21 not the issue here. Their counsel did not receive Exhibit 4 from Hebrank pursuant to any
22 Court order. Instead, Exhibit 4 was delivered to him by one of his clients. As such, it
23 comes from a different lawful source and thus its use is not limited. See: *In re Grand Jury*
24 *Investigation (Lance)*, 610 F.2d 202, 217 (5th Cir. 1980)(grand jury secrecy rule "does
25 not protect from disclosure information obtained from a source other than the grand jury,
26 even if the same information is later presented to the grand jury"); and *United States v.*
27 *Eastern Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir. 1991). In this case, Hebrank claims
28

1 that the Ardizzone Investors' counsel violated the May 18, 2016, order (Dkt. No. 1296).

2 In relevant part, that order provides:

3 Dillon Investors' motion to unseal, ECF. No. 1228, is GRANTED IN PART
4 and DENIED IN PART. The court ORDERS the Receiver to provide the
5 Investors with access to the full versions of the sealed and redacted
6 documents identified in Dillon Investors' motion to unseal. However, the
7 disputed documents will remain sealed to the public.

8 Dkt. No. 1296 at 11. The Ardizzone Investors submit the limitations in this language
9 relate to the documents which were delivered to Investors pursuant to the order. It would
10 be a stretch of this language to interpret it to mean that the order was intended to limit the
11 use of documents already in investors' possession. Nothing in the Dillon Investors'
12 motion suggested that the was trying to limit the use of documents already in their clients'
13 possession. Nor does the Court order suggest that.

14 To bring a successful motion for a violation of an order, the order must be clear
15 and unambiguous. The second Circuit articulated the required proof in *Perez v. Danbury*
16 *Hosp.*, 347 F.3d 419 (2d Cir. 2003) as follows: "To establish contempt, "a movant must
17 establish that (1) the order the contemnor failed to comply with is clear and
18 unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the
19 contemnor has not diligently attempted to comply in a reasonable manner. (Citations
20 omitted)."

21 **IV. Request for Clarification of the Court's Order Granting Motions to File**
22 **Documents under Seal**

23 For the reasons stated above, the Ardizzone Investors submit the Court's May 18,
24 2016, order must be clarified. If the Court's intended the order to limit the use of records
25 *already in the possession of investors*, it should make that clear. On the other hand, if it
26 was not intended to do so, the Court should likewise make that clear. Hebrank can then
27 warn investors if they are at risk in making the documents in their possession public.
28

1 There is now a disconnect between what Hebrank believes the Court's order state
2 and what they actually state. According to Hebrank, there are limitations on what
3 investors may do with the communications relating to property sales they receive from
4 Hebrank. No such limitation appears in the text of the January 22, 2015, letter or its
5 enclosure. Exhibit 4 to Dkt. No. 1396-1. If Hebrank can threaten the Ardizzone Investors'
6 counsel with a contempt proceeding, he can also make the same threat to investors.
7 Nothing in Hebrank's letter warned investors of any limitations on the use of his letters or
8 the risk of contempt proceedings if they make the letters public. By way of example, any
9 investor could decide to create a blog and publish all of Hebrank's communications on
10 the website. Would this investor then be subject to a contempt proceeding brought by
11 Hebrank's counsel or are the contempt proceedings only aimed at counsel for the
12 Ardizzone Investors?

13 Put differently, if Hebrank intended the use of his communications in the hands of
14 investors to be limited, he should have (1) specified that in the orders he proposed to the
15 Court and (2) warn investors they could be held in contempt if they redistributed his
16 letters or made them public. This is the customary practice when records are released
17 under protective orders; they are customarily stamped with the warning their use is
18 limited. If it is this Court's intention that the use of the records should be limited, then
19 the Court's order should be clarified in that regard and Hebrank should give notice to all
20 investors of these limitations on the use of his communications.

21 **V. NOTICE OF *EX PARTE* MOTION**

22 The relief sought by this *ex parte* motion is necessitated by the email of Hebrank's
23 counsel attached as Exhibit 1 to the Declaration of Gary J. Aguirre filed herewith, which
24 states:

25 Accordingly, action must be taken immediately to remove Exhibit 4 to your
26 declaration from public view. We expect this action to be taken by noon
27 tomorrow. Please be advised that if we have not heard from you and you
28 have not sought appropriate relief from the Court by that time, the Receiver
will file an *ex parte* application to have the declaration sealed or stricken

1 from the Court's docket and will ask the Court to award sanctions in the
2 amount of all fees and costs incurred by the receivership estate to address
3 this issue.

4 The Ardizzone Investors provided notice of this motion to all counsel of record in
5 this case (See Exhibit 2 to Aguirre Declaration). Hebrank's counsel responded stating:

6 Mr. Aguirre,

7 Although it is unclear what "temporary withdrawal" means, if the relief you
8 are seeking relating to Exhibit 4 of your declaration will remove it from the
9 Court's docket and replace it with a sealed version, we have no opposition to
10 that relief, as stated in my message to you yesterday that raised this issue.

11 It is also unclear what relief you are referring to in your second paragraph
12 below, but if you intend to request again that letters of intent, offers, or other
13 information relating to negotiations with potential buyers of receivership
14 properties be unsealed or publicly filed, the Receiver will oppose such
15 request for the same reasons he did before.

16 Ted Fates Esq.

17 Exhibit 3 to Aguirre Declaration. The SEC's counsel response is attached as Exhibit 4 to
18 the Aguirre Declaration filed herewith.

19 **VI. CONCLUSION**

20 For the foregoing reasons, the Ardizzone Investors respectfully request an order
21 granting the relief sought herein.

22 DATED: October 27, 2016

23 Respectfully submitted,

24 By: /s/ Gary J. Aguirre

25 GARY J. AGUIRRE

26 Attorney for the Ardizzone Investors