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9
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

**GRAHAM INVESTORS' NOTICE OF
MOTION AND MOTION TO
INTERVENE TO FILE OBJECTIONS
TO RECEIVER'S REPORT AND
RECOMMENDATIONS REGARDING
XPERA REPORT
RECOMMENDATIONS**

Date: February 10, 2017

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **NOTICE IS HEREBY GIVEN** that on February 10, 2017, at 1:30 p.m. in
3 Courtroom 2D of the United States District Court, Southern District of California, located
4 at 221 W. Broadway, San Diego, CA 92101, the Graham Investors¹ ("Movants") will,
5 and hereby do, move this Court for an order allowing them to intervene in this action as a
6 matter of right pursuant to Fed. R. Civ. P. 24(a)(2). In the alternative, Movants seek the
7 Court's permission to intervene pursuant to Fed. R. Civ. P. 24(b)(1). Movants seek to
8 intervene in this case for the purpose of filing objections to the Report and
9 Recommendations Regarding Xpera Report Recommendations filed by the receiver in
10 this matter, Thomas C. Hebrank ("Hebrank"). A copy of said objections is attached hereto
11 and incorporated herein as Attachment 1.

12 The motion is brought on the grounds that Movants are entitled to intervene in this
13 action as a matter of right because (1) Movants have a legally protectable interest in this
14 action, because they are partners in the general partnerships that are currently held in the
15 receivership; (2) Movants' interests in this action will be substantially impaired or
16 impeded if they are not allowed to intervene; (3) the existing parties do not adequately
17 represent Movants' interests in the action; and (4) the motion for intervention was timely
18 made in that the Hebrank did not file his Report and Recommendations Regarding Xpera
19 Report Recommendations until November 22, 2016.

20 The Motion is based upon this Notice, the accompanying Memorandum of Points
21 and Authorities, the Objections to Report and Recommendations Regarding Xpera
22 Report Recommendations, filed herewith as Attachment 1, all pleadings and papers on

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26 _____
27 ¹ The names of the investors filing this opposition are listed in Attachment 2 filed
herewith.

1 file in this action, and upon such other matters as may be presented to the Court at the
2 time of the hearing.

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4 DATED: November 28, 2016

Respectfully submitted,

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6 By: /s/ Gary J. Aguirre

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GARY J. AGUIRRE

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Aguirre Law, A.P.C.

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gary@aguirrelawapc.com

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Attorney for Graham Investors

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18 CORPORATION d/b/a WESTERN
19 FINANCIAL PLANNING
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20 Defendants.

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

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF GRAHAM INVESTORS'
MOTION TO INTERVENE TO FILE
OBJECTIONS TO RECEIVER'S
REPORT AND
RECOMMENDATIONS
REGARDING XPERA REPORT
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1 **I. Introduction**

2 This motion is brought by 192 investors ("Graham Investors")¹ in the 87
3 partnerships ("GPs") currently in the receivership. They seek an order permitting them to
4 intervene in this case for the purpose of filing objections to the report and
5 recommendations by Thomas C. Hebrank ("Hebrank"), the Receiver in this matter,
6 regarding Xpera report recommendations. A copy of said objections is attached as
7 Attachment 1 to the notice of motion to intervene.

8 **II. Investors Are Entitled to Intervene as a Matter of Right under Fed. R. Civ. P.**
9 **24(a)(2) to Bring This Motion**

10 **A. Elements of Rule 24(a).**

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

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

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

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

25 By this motion, Investors seek an order to intervene for the limited purpose of
26 filing objections to the Report and Recommendations Regarding Xpera Report which

27 ¹ The names of the investors filing this opposition are listed in Attachment 2 filed
28 herewith.

1 Recommendations filed by the receiver in this matter, Thomas C. Hebrank. A copy of
2 said objections is attached to the Notice of Motion as Attachment 1.

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

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

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

13 **C. The Disposition of This Action May Impair or Impede Investors' Ability to**
14 **Protect Their Interests**

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

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

18 This Court has already held no party in this action adequately represents investors.
19 *Id.*

20 **E. Investors' Motion to Intervene Is Timely**

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

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1 (Dkt. No. 1405) until November 22, 2016. This motion is brought six days after that
2 filing.

3
4 Dated: November 28, 2016

Respectfully submitted,

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6 By: /s/ Gary J. Aguirre

GARY J. AGUIRRE

Aguirre Law, A.P.C.

gary@aguirrelawapc.com

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8
9 Attorney for the Graham Investors

Attachment 1

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1 The Graham Investors object to the Report and Recommendations Regarding
2 Xpera Report Recommendations ("Recommendations") filed by the Receiver, Thomas C
3 Hebrank ("Hebrank") on the following grounds:

4 1. This Court lacks subject matter jurisdiction over the 87 general partnerships
5 ("GPs"), because no party to this action had control of the GPs when this action was
6 filed. See: *SEC v. Am. Capital Invs.*, 98 F.3d 1133, 1141 (9th Cir. 1996); 2 Clark on
7 Receivers (3d ed. 1992) § 482 at 785, § 300 at 507.

8 2. Hebrank failed to serve notice on the 3,370 investors of his
9 Recommendations pursuant to Local Rule 66.1.f. His purported service of notice by
10 posting his Recommendations to his website violates the notice requirements of the Due
11 Process Clause because Hebrank knows his website "notices" fail to reach the vast
12 majority of investors, as he previously advised this Court (Dkt. No. 852 at 2) and he
13 currently possesses accurate mailing addresses for more than 99% of investors. See:
14 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950)("Where the
15 names and post-office addresses of those affected by a proceeding are at hand, the
16 reasons disappear for resort to means less likely than the mails to apprise them of its
17 pendency.")

18 3. The Recommendations state additional fees in the amount of \$257,040 will
19 be paid to new consultants and experts who have not yet been retained for "cost of
20 entitlement work." Dkt. No. 1405, Ex. A. Hebrank fails to state the projected length of
21 the receivership and amount of the professional fees that will be incurred during that
22 period for his services, the services of his attorneys, and other professionals. According
23 to recent filings, a total of \$3,045,147.29 in fees have been incurred for the 46 months
24 ending in June 30, 2016, an average of \$66,199 per month. Dkt. No. 1386 p. 9, l. 22 to p.
25 10, l. 8. The Recommendations contemplate the receivership will continue for a
26 minimum of two years, and thus, the professional fees will continue to consume the
27 assets available for distribution to investors.

1 4. The Recommendations also fail to state the additional costs the receivership
2 will incur for expenses other than professional fees. During the period from January 1,
3 2014, through the end of December 2015, Hebrank's historical and projected
4 disbursements for operating the 87 GPs were \$4,517,306. Dkt. No. 852-1, Ex. A at 4.
5 This is an average of \$188,221 per month. The extension of the receivership will
6 continue to consume the assets available for distribution to investors.

7 5. The Recommendations relied upon a report filed under seal. The report is
8 packed with conclusions based on speculation. By way of example, the Graham
9 Investors refer the Court to the valuation of \$1 million for the Fernley property stated on
10 Dkt. No. 1405, Ex. A at 12. Hebrank projects a "cost of entitlement" of \$75,000 for the
11 same property in the same exhibit. We invite the Court to review the speculative
12 statements contained in the confidential report in connection with this \$1 million
13 valuation.

14 6. The Recommendation also contemplates Hebrank will negotiate and
15 potentially enter into a joint venture with the Lansing Company to develop the Fernley
16 property. *Id.* At 6, ll. 11-13. The Recommendations fail to explain what experience
17 Hebrank has in participating in joint venture projects to develop real estate.

18 7. There is little motivation for Hebrank or Allen Matkins to expeditiously and
19 economically bring the receivership to a conclusion. The pooling of the cash has created
20 a pool of money to support the receivership's professional fees for another two to three
21 years. By selling off the properties, Hebrank can continue to generate additional funds to
22 continue to pay himself and his attorneys for years.

23 Dated: November 28, 2016

Respectfully submitted,

24
25 By: /s/ Gary J. Aguirre

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Attorney for the Graham Investors