

No. 16-55850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff – Appellee,

v.

LOUIS V. SCHOOLER; FIRST FINANCIAL PLANNING CORPORATION,
DBA Western Financial Planning Corporation,

Defendants - Appellees,

SUSAN GRAHAM, ET AL.

Intervenors - Appellants,

THOMAS C. HEBRANK,

Receiver - Appellee.

On Appeal from the United States District Court
for the Southern District of California, Case No. 3:12-cv-02164-GPC-JMA

**RECEIVER'S MOTION TO EXPEDITE APPEAL AS TO ORDER
APPROVING SALE OF JAMUL VALLEY PROPERTY**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE PARTIES' POSITIONS	2
III. STATUS OF TRANSCRIPT PREPARATION.....	4
IV. PROPOSED EXPEDITED BRIEFING SCHEDULE	5
V. FACTUAL AND PROCEDURAL BACKGROUND	5
A. Western and the GPs	6
B. Final Judgment	7
C. Receivership Proceedings	8
D. Unsolicited Offers for GP Properties	10
E. The Distribution Plan Motion	12
F. The Aguirre Investors.....	13
VI. PROCEDURAL STATUS OF APPEAL	16
VII. RELATED AGUIRRE APPEAL	17
VIII. LEGAL STANDARD	18
IX. DISCUSSION.....	18
X. CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Alaska Ctr. for the Env't v. United States Forest Serv.</i> , 189 F.3d 851 (9th Cir. Alaska 1999).....	18
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Other Authorities

Ninth Circuit Local Rule 27-12	18
Ninth Circuit Local Rule 27-12(3).....	18

Appellee Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial Planning Corporation d/b/a Western Financial Planning Corporation ("Western"), its subsidiaries and the General Partnerships listed on Schedule 1 to the Preliminary Injunction Order entered by the District Court on March 13, 2013 ("GPs" and collectively, "Receivership Entities"), submits this Motion to Expedite Appeal as to Order Approving Sale of Jamul Valley Property ("Motion").

I. INTRODUCTION

One of the District Court orders the group of investors represented by Gary Aguirre ("Aguirre Investors") have challenged is the District Court's order approving the sale of the receivership estate real property known as the Jamul Valley Property ("Jamul Valley Sale Order"). The appeal effectively prevents the District Court-approved sale from closing, and therefore threatens to impose irreparable harm on the receivership estate in that the opportunity to sell the property at a favorable price will likely be lost before the appeal is resolved. Accordingly, the appeal should be expedited as to the Jamul Valley Sale Order such that, if the order is affirmed, the sale can close.

Although the Jamul Valley Sale Order has not been stayed pending appeal, the sale cannot close because of the requirement of title insurance. Title insurance is standard for sales of real property. Very rarely do real property sales close without a title insurance policy being issued to the buyer. Here, the appeal

prevents the prospective purchaser of the property, The Nature Conservancy ("TNC"), from being able to obtain a title insurance policy. No title insurer will issue a title policy while an appeal of a receivership sale order is pending. TNC, as would virtually all prospective purchasers, requires a title policy before it will complete its purchase of the property.

This means the delay caused by the appeal threatens to do irreparable harm. The sale was approved by the District Court as being in the best interests of the receivership estate in terms of maximizing the value of the property. TNC is aware of the appeal and has agreed to wait until April 12, 2017, to close the sale. However, beyond that date, it is unknown if TNC will continue to wait or for how long. TNC's budget and priorities for purchasing property may well change. Therefore, there is a very real possibility, if not likelihood, the receivership estate will lose the opportunity to sell the Jamul Valley Property to TNC if the appeal is not expedited. Accordingly, good cause exists to expedite the appeal as to the Jamul Valley Sale Order such that it is resolved on or before April 12, 2017.

II. THE PARTIES' POSITIONS

On November 29, 2016, the Receiver's counsel received an email from counsel for the Aguirre Investors. Mr. Aguirre's email asked if the Receiver would oppose a motion to expedite the appeal if the appeal is consolidated with the other appeal filed by Mr. Aguirre on behalf of other investors (Appeal No. 16-56362).

The Receiver's counsel responded that the Receiver would not oppose such a motion. The Receiver's counsel went on to state the Receiver was planning to file this Motion to expedite the appeal of the Jamul Valley Sale Order so the opportunity to close the sale is not lost as a result of the delay caused by the appeal. The Receiver's counsel asked Mr. Aguirre to confirm that his clients would not oppose this Motion. Mr. Aguirre responded that his clients would in fact oppose this Motion because "a bifurcation of the Jamul Sale . . . would serve no purpose except to increase work for all parties and the court." The parties' email exchange is attached hereto as Exhibit A. The Receiver's counsel spoke to counsel for the Securities and Exchange Commission ("Commission") separately and was advised the Commission would not oppose this Motion.

With respect to the Aguirre Investors' argument that this Motion serves no purpose, the Receiver submits the purpose is clear – if the Court does not find sufficient grounds to expedite the entire appeal, it should nonetheless expedite the appeal as to the Jamul Valley Sale Order so as to avoid the receivership estate suffering irreparable harm from the loss of the opportunity to sell the Jamul Valley property at a favorable price (a price the Aguirre Investors' own expert has expressly endorsed and the District Court approved). The importance of preventing irreparable harm to the receivership estate (against which approximately 3,300 investors have claims) greatly outweighs the minimal cost to

the approximately 200 Aguirre Investors of filing an additional brief. Indeed, if the Aguirre Investors were concerned with costs, they would not be appealing a sale their own expert has endorsed and would not have filed numerous repetitive motions in the District Court, all of which have been denied. The District Court recently admonished counsel for the Aguirre Investors for his "repetitive lawyering" of arguments that the District Court has already considered and rejected. The District Court expressed concern about the costs imposed on the receivership estate, stating that "the repetitive and lackluster attempts to influence the Court to revisit previous orders only serve to tax the financial integrity of the receivership estate, which much spend money to oppose and respond to such attempts." Therefore, the District Court has expressly recognized the substantial costs the actions of the Aguirre Investors have already imposed on the receivership estate. Accordingly, the Aguirre Investors' concerns regarding costs of bifurcating the appeal are disingenuous at best and should be given no weight.

III. STATUS OF TRANSCRIPT PREPARATION

The transcript ordering form for this appeal was filed by the Aguirre Investors on July 14, 2016. Dkt. No. 1337. The Receiver's understanding is that the only hearing transcript that had not previously been released was released on October 17, 2016. Dkt. No. 1340. No hearings were held as to the sale of the Jamul Valley property, including as to the Receiver's under seal recommendations

regarding the TNC letter of intent (Dkt. Nos. 987, 1020), *ex parte* application for order confirming the sale (Dkt. No. 1191), or motion for approval of the sale (Dkt. No. 1310), all of which were taken under submission by the District Court without oral argument.

IV. PROPOSED EXPEDITED BRIEFING SCHEDULE

The Receiver requests that the Aguirre Investors' opening brief be due by January 15, 2017, answering briefs of the Receiver and the Commission be due by January 31, 2017, the Aguirre Investor's reply brief be due by February 10, 2017, oral argument be scheduled for a date in March 2016, and the appeal be resolved no later than April 5, 2017. This schedule will provide sufficient time to close the sale by April 12, 2017, if the order is affirmed.

V. FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2012, the Commission filed a Complaint for Violations of the Federal Securities Laws against Louis V. Schooler ("Schooler") and Western. Dkt. No. 1. On September 6, 2012, the District Court entered a Temporary Restraining Order, including the appointment of the Receiver on a temporary basis. Dkt. No. 10. On March 13, 2013, the Court entered a Preliminary Injunction Order ("PI Order"), appointing the Receiver on a permanent basis. Dkt. No. 174.

A. Western and the GPs

The Receivership Entities include Western, which is owned by Schooler, and a series of 86 General Partnerships set up by Western. Prior to the case, Western purchased various parcels of undeveloped land, set up GPs to purchase the properties, solicited investors to invest in the GPs, and then sold the properties to the GPs. The properties were marked up by Western such that the GPs purchased them from Western at prices that ranged from 109% to 1800% higher than what Western had paid for the properties. Western also encumbered some of the properties with mortgages, which remained on the properties when they were sold to the GPs. Investors were not aware of the mark ups or the mortgages.

Western made loans to the GPs so the GPs could allow their investors to finance the investments. As a result, investors owe amounts on promissory notes issued to their GPs and GPs owe amounts on promissory notes issued to Western. Investors were not aware of the promissory notes to their GPs owed to Western.

Of the funds the GPs raised from investors when the GPs were formed, approximately 93% went to Western and approximately 7% remained in the GPs' bank accounts to cover basic expenses like property taxes, property insurance premiums, administrator fees, and fees to prepare annual tax returns. When GPs exhausted the balances in their accounts, they would send bills to their investors, but some investors would not pay. When GPs were unable to pay their bills,

Western would loan the GPs money. In some cases, Western stopped collecting note payments from GPs that were unable to pay their bills. Investors were not aware of the loans Western made to the GPs or the fact that Western stopped collecting note payments from certain GPs.

B. Final Judgment

One of the main issues in the litigation was whether the GP "units" sold by Defendants to investors were securities. If the GPs operated as true general partnerships, with each investor being a general partner, then the units would not be considered securities. If, on the other hand, the GPs operated like limited partnerships, the units would be considered securities. On April 25, 2014, the District Court granted summary judgment in favor of the Commission on this issue, finding the GP units were securities. Dkt. No. 583. On May 19, 2015, the Court granted the Commission's summary judgment motion on its claim for violations of Section 5 of the Securities Act of 1933 (unregistered offer and sale of securities). Dkt. No. 1074. In finding that Defendants had engaged in the sale of unregistered securities, the District Court determined that Defendants exercised control over the GPs and investors depended on Defendants for a return on their investments, such that the GP units were investment contracts akin to limited partnership interests, and therefore securities. Dkt. Nos. 583, 629.

On June 3, 2015, the District Court granted in part and denied in part the Commission's motion for summary judgment on its first and second claims, granting both as to all elements with respect to the fair market value representation of the Stead property in Western's sales brochure. Dkt. No. 1081.

On January 21, 2016, the District Court granted the SEC's motion for final judgment against Schooler, directing (1) a permanent injunction restraining Schooler from violating federal securities laws; (2) disgorgement of \$136,654,250, with prejudgment interest of \$10,956,030 (for a total of \$147,610,280); and (3) imposition of a civil penalty of \$1,050,000 ("Final Judgment"). Dkt. No. 1170. Schooler appealed the Final Judgment. Case No. 16-55167.¹

C. Receivership Proceedings

During the course of the litigation between the Commission and Defendants, the District Court addressed numerous challenges by Defendants and various investors to the scope of the receivership, including several attempts to remove the GPs from the receivership. On March 4, 2015, the District Court entered an Order Keeping GPs Under Receivership. Dkt. No. 1003. Among other things, the District Court determined the GPs would remain in the receivership until the conclusion of the case, instructed the Receiver to file a proposed "Information

¹ The Commission filed a cross-appeal of the Final Judgment, but recently filed an unopposed motion to voluntarily dismiss its cross-appeal. Case No. 16-55414, Dkt. No. 40.

Packet" regarding the financial condition of each GP to be disseminated to investors, and instructed the Receiver to file a report and recommendation regarding the best course of action for the GPs. *Id.*

The Receiver filed the proposed Information Packet, which was approved by the District Court, and, to address the critical problem of GPs that were unable to pay their bills (including property taxes, insurance premiums, mortgage payments, and administrative costs), filed a recommendation that capital calls be issued to investors in GPs without sufficient funds to pay their operating expenses through the end of 2016. Dkt. Nos. 1023, 1056. If the capital calls failed to raise sufficient funds for the GPs to pay their 2016 operating expenses, the properties owned by those GPs would be sold. Dkt. No. 1056. The Receiver also laid out steps of the proposed "orderly sale process" for GP properties in his report and recommendation. *Id.* The Court approved the report and recommendation, with slight modifications, on May 12, 2015. Dkt. No. 1069.

The Receiver proceeded to complete the approved Information Packet for each GP, which was made available to investors via the Receiver's website, and issue capital calls to investors pursuant to the May 12, 2015 Order. The capital calls and information packets were essentially an opportunity for investors to vote with their checkbooks as to whether or not their GPs should continue to operate. Each and every capital call failed to raise the amounts necessary for the applicable

GPs to cover their 2016 operating expenses. On average, approximately 14% of the amount needed was raised, falling short by over \$1,000,000 in the aggregate. Accordingly, the Receiver began to take the steps of the approved orderly sale process for the applicable GP properties. These steps included recommending the engagement of a license real estate broker to market each property for sale.

D. Unsolicited Offers for GP Properties

With respect to unsolicited offers for GP properties received prior to the engagement of a real estate broker, the District Court instructed the Receiver to notify it of the offer and make a recommendation, filed under seal, regarding how to respond to the offer, *i.e.*, accept the offer, make a counter-offer, reject the offer, take a vote of investors, or other steps. Dkt. No. 808. The Receiver filed a series of recommendations regarding unsolicited offers and letters of intent received from prospective purchasers for GP properties. Two such recommendations were filed under seal on February 19, 2015, and March 20, 2015, respectively, and pertained to a letter of intent for the Jamul Valley Property received from TNC. Dkt. No. 987, 1020 (sealed). In response to the recommendations, the Court authorized the Receiver to negotiate a sale of the Jamul Valley Property to TNC and take all steps necessary to close the sale. Dkt. No. 1088 (sealed).

Therefore, the Receiver and TNC engaged in negotiations and entered into a purchase and sale agreement in the amount of \$520,000. While negotiations were

ongoing, the Receiver listed the property for sale on the Multiple Listing Service and LoopNet, the two primary online databases for listing real properties by real estate agents. Data from these listing services populate to many consumer facing websites, such as Realtor.com and Zillow.com. Only one inquiry came in and no offers were received.

TNC then conducted due diligence on the Jamul Valley Property, which was completed in January 2016. As the Receiver and TNC were preparing to close the sale, the title company stated that it would not issue a title policy without an order specifically approving the sale to TNC for \$520,000. Accordingly, on February 26, 2016, the Receiver filed an *ex parte* application for an order confirming the sale. Dkt. No. 1191.

The Aguirre Investors (who are discussed further below) opposed the *ex parte* application and argued, among other things, that the sale process had not complied with 28 U.S.C. § 2001. Dkt. Nos. 1194, 1219. The Receiver then submitted a proposal to address Section 2001 by publishing notice of the sale and, in the event qualified offers were received, conducting a public auction. Dkt. No. 1225. The Court accepted the Receiver's proposal and instructed the Receiver to file a noticed motion incorporating the proposed publication and auction procedures. Dkt. No. 1305. The Receiver did so, published notice of the sale as proposed, but no other offers were received. Dkt. Nos. 1310, 1324. Nevertheless,

and despite the fact that their own expert had expressly endorsed the sale to TNC, the Aguirre Investors filed a late opposition to the sale motion. Dkt. No. 1326. The sale motion was approved by the Court on August 30, 2016. Dkt. No. 1361. The Aguirre Investors appealed the Jamul Valley Sale Order on September 1, 2016, by filing an amendment to their Notice of Appeal. Dkt. No. 1363.

E. The Distribution Plan Motion

On February 4, 2016, with the Final Judgment having been entered on January 21, 2016, the Receiver filed his Motion for: (a) Authority to Conduct Orderly Sale of General Partnership Properties; (b) Approval of Plan of Distributing Receivership Assets; and (c) Approval of Procedures for the Administration of Investor Claims ("Distribution Plan Motion"). Dkt. No. 1181. The Distribution Plan Motion sought an order authorizing the Receiver to put the remaining GP properties through the orderly sale process, *i.e.*, those properties owned by GPs with sufficient funds to pay their 2016 operating expenses, which therefore did not have a failed capital call. *Id.*

The Distribution Plan Motion also sought approval of a "One Pot" or "pooling" approach to distributing receivership assets (as opposed to distributions on a GP by GP basis) and approval of a Distribution Plan consistent with the One Pot Approach. *Id.* The Distribution Plan, which was attached to the Distribution Plan Motion as Exhibit E, provided that distributions will be made only after the

District Court has entered further orders "setting the allowed amount of all Claims, and authorizing the Receiver to make interim distributions ("Approval Orders")." Dkt. No. 1181-1, Exh. E, p. 3, l. 24 – p. 4, l. 1. Finally, the Distribution Plan Motion sought approval of procedures for administering investor claims against the receivership estate and efficiently resolving disputes regarding such claims. *Id.*

F. The Aguirre Investors

In early 2016, a group of approximately 192 investors engaged attorney Gary Aguirre to represent them. A separate group of approximately 149 investors engaged attorney Timothy Dillon to represent them. These two groups became known as the Aguirre Investors and the Dillon Investors. Together they represent approximately 10% of the approximately 3,300 investors of the Receivership Entities.²

Without seeking to intervene in the case, the Aguirre Investors and Dillon Investors filed oppositions to certain applications filed by the Receiver, sought to continue the hearing on the Distribution Plan Motion, and filed motions seeking to vacate certain District Court orders and require the Receiver to provide further accounting information. Dkt. Nos. 1194, 1204, 1211, 1212, 1221, 1223. The District Court rejected these filings without prejudice and instructed the Aguirre

² The number of Aguirre Investors and, in particular, Dillon Investors grew between February 2016 and April 2016. Early during this time span, the combined groups were approximately 8% of the investors.

Investors and Dillon Investors to first file motions to intervene if they wished to refile any motions. Dkt. No. 1224.

The Aguirre Investors and Dillon Investors then filed motions to intervene, refiled their motions to vacate orders and for accounting information, and filed oppositions to the Distribution Plan Motion. Dkt. Nos. 1227, 1229, 1230, 1234, 1235, 1258. With respect to the Distribution Plan Motion, the Aguirre Investors argued that, despite all of the failed capital calls, the GP properties should not be permitted to be sold without a vote of investors in the GPs that own them and that receivership assets should be distributed on a GP by GP basis. Dkt. No. 1235. As part of their oppositions, the Aguirre Investors and Dillon Investors filed a report analyzing the values and market conditions for the GP properties prepared by Xpera Group ("Xpera Report"). Dkt. Nos. 1234-2, 1234-4, 1237, 1238.³

The District Court denied the Aguirre Investors and Dillon Investors' motions to intervene generally in the case, but allowed them to intervene for the limited purpose of opposing the Distribution Plan Motion. Dkt. No. 1296, 1303. The Aguirre Investors later appealed these orders. Dkt. No. 1311.

³ As noted above, Xpera Group expressly endorsed the sale of the Jamul Valley property to TNC in its report. Attached hereto as Exhibit B is an excerpt of the Xpera Report stating Xpera's recommendation as to the Jamul Valley property, which is to "[a]ccept the offer from the Nature Conservancy. It is a fair offer and has no brokerage commission involved." Dkt. No. 1234-2, p. 121 of 172.

The District Court held a hearing on the Distribution Plan Motion on May 20, 2016, at which Gary Aguirre and Timothy Dillon were permitted to present arguments on behalf of their respective clients. Dkt. No. 1298. On May 25, 2016, the District Court granted in part and denied in part the Distribution Plan Motion ("Distribution Plan Order"). Dkt. No. 1304. Specifically, the Distribution Plan Order (a) approves the One Pot Approach, the Distribution Plan, and the procedures for the administration of investor claims, (b) directs the Receiver to submit a proposal for a "modified orderly sale process" that incorporates the public sale requirements of 28 U.S.C. § 2001, (c) directs the Receiver to file a report and recommendation evaluating the pros and cons of the recommendations in the Xpera Report, and (d) directs the Receiver to withdraw and resubmit his Fourteenth Interim Report, and submit all future reports with a Standardized Fund Accounting Report ("SFAR"). *Id.*

The Receiver submitted his proposal for a modified orderly sale process on June 8, 2016. Dkt. No. 1309. The proposal was approved by the District Court on August 30, 2016. Dkt. No. 1359. On July 22, 2016, the Receiver moved to engage CBRE as a consultant to assist in evaluating recommendations regarding certain GP properties made by the Aguirre Investors' expert, Xpera Group. Dkt. No. 1341. The Aguirre Investors opposed the motion, which was granted by the District Court on August 30, 2016. Dkt. Nos. 1351, 1359.

VI. PROCEDURAL STATUS OF APPEAL

On June 14, 2016, the Aguirre Investors initiated this appeal by filing their Notice of Appeal listing four orders – the two orders discussed above denying broad intervention and granting limited intervention in the case, the Distribution Plan Order, and another order approving the Receiver's engagement of certain real estate brokers and a recommendation concerning an unsolicited offer for a GP property ("Broker Engagement Order"). Dkt. No. 1311. On June 21, 2016, the Aguirre Investors sought a stay pending appeal from the District Court. The motion was opposed by the Receiver and the Commission and was denied on August 30, 2016. Dkt. Nos. 1321, 1325, 1359.

On June 28, 2016, the Receiver moved this Court to dismiss the appeal as to the Distribution Plan Order and the Broker Engagement Order on the grounds that those orders are interlocutory, non-appealable orders ("Motion to Dismiss"). Appeal Dkt. No. 3. The Aguirre Investors opposed the Motion to Dismiss as to the Distribution Plan Order, but conceded that the Broker Engagement Order is not appealable. Appeal Dkt. No. 5. The Motion to Dismiss is pending.

On September 1, 2016, the Aguirre Investors filed an Amended Notice of Appeal, by which they withdrew their appeal of the Broker Engagement Order, and added to the appeal the Jamul Valley sale order (Dkt. No. 1361) and the District Court's order approving the engagement of CBRE, approving the modified orderly

sale process, and denying the Aguirre Investors' motion for stay pending appeal (Dkt. No. 1359). Dkt. No. 1363.

On September 20, 2016, after being advised by the Receiver's counsel that the portions of the District Court's order approving the engagement of CBRE and the modified orderly sale process were not appealable, the Aguirre Investors filed a Second Amended Notice of Appeal, withdrawing the appeal as to those portions of the District Court's order. Dkt No. 1373.

On September 29, 2016, the Aguirre Investors filed an "urgent" motion in this Court for a stay pending appeal ("Motion for Stay"). Appeal Dkt. No. 12. The Receiver and the Commission have opposed the Motion for Stay. Appeal Dkt. Nos. 13, 15. The Motion for Stay is pending.

VII. RELATED AGUIRRE APPEAL

On August 9, 2016, Gary Aguirre filed a motion to intervene in the District Court on behalf of six other investors ("New Aguirre Investors"). Dkt. No. 1348. The Receiver and the Commission opposed the motion, which was denied by the District Court on August 30, 2016. Dkt. No. 1359. The New Aguirre Investors appealed the order. Dkt. No. 1367 (initiating Appeal No. 16-56362).

On September 28, 2016, the Commission filed a motion to consolidate the New Aguirre Investors' appeal with this appeal. Appeal Dkt. No. 10. The Aguirre

Investors responded to the Motion to Consolidate on October 11, 2016. Appeal Dkt. No. 14. The Motion to Consolidate is pending.

VIII. LEGAL STANDARD

Ninth Circuit Rule 27-12 allows a party to file a motion for an expedited appeal. Ninth Cir. L.R. 27-12; *Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 855 (9th Cir. Alaska 1999). Such motion will be granted upon a showing of good cause, including situations where "in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot." Ninth Cir. L.R. 27-12(3).

IX. DISCUSSION

Here, the appeal threatens to impose irreparable harm on the receivership estate and the investors who are already facing devastating losses of their savings and retirement assets as a result of the Defendants' violations of federal securities laws. As discussed above, the appeal prevents the sale from closing in that the buyer, TNC, cannot obtain a title insurance policy. Therefore, if the appeal is not expedited, it is very likely that the opportunity to sell the Jamul Valley Property at a price the District Court has determined is favorable and in the best interests of the receivership estate will be lost.

In fact, the sale's advantages to the receivership estate were actually confirmed by the Aguirre Investors' own expert, Xpera Group, which expressly

endorsed the sale in its analysis of the Jamul Valley Property. Dkt. No. 1234-2, p. 121 of 172. The sale is particularly favorable in that, not only is the price at or above the estimated market value for the property, but the sale is derived from an unsolicited offer from TNC, and therefore does not involve a broker for either the Receiver or TNC. This will save the receivership estate an estimated \$31,200 to \$52,000 in broker commissions (the industry standard for broker commissions for a sale of undeveloped land being between 6% and 10% of the sale price). With their own expert having endorsed the sale, it is clear that the Aguirre Investors' purpose in filing the appeal is simply to hinder and obstruct the administration of the receivership estate.

Further, the market for the Jamul Valley Property has been fully tested. The property was listed for sale during the time in which the Receiver was negotiating terms with TNC. Once a sale price had been agreed on, notice of the auction and opportunity to bid was published pursuant to 28 U.S.C. § 2001. No other bids were received from these marketing efforts, which further confirms that the sale to TNC is a unique and favorable opportunity for the receivership estate.

Finally, TNC has agreed to wait until April 12, 2017, to close the sale and has signed an extension of the Purchase and Sale Agreement through that date. However, beyond that date, it is unknown if TNC will continue to wait or for how long. Declaration of Christopher Basilevac filed herewith, ¶¶ 6-7. TNC's budget

and priorities may well change, affecting its interest in the Jamul Valley Property versus other properties it may elect to pursue. *Id.* Accordingly, good cause exists to expedite the appeal of the sale order such that, if the order is affirmed, the opportunity to close the sale is not lost.

X. CONCLUSION

For the foregoing reasons, the Motion should be granted and the appeal as to the Jamul Valley Sale Order (Dkt. No. 1361) should be expedited such that the appeal is resolved prior to April 12, 2017.

Dated: November 30, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ Edward Fates
Edward G. Fates
Attorneys for Receiver
THOMAS C. HEBRANK

EXHIBIT A

Fates, Ted

From: Gary Aguirre <gary@aguirrelawapc.com>
Sent: Wednesday, November 30, 2016 6:28 AM
To: Fates, Ted; Phillip H. Dyson (phil@phildysonlaw.com); Zaro, David; 'kalins@sec.gov'; 'BerryJ@sec.gov'; schultzec@sec.gov; deanl@sec.gov; YODERS@SEC.GOV
Cc: Thomas Hebrank
Subject: RE: SEC v. Schooler

Mr. Fates:

I will be moving to request the appeal be accelerated, but I would oppose a bifurcation of the Jamul sale since it would serve no purpose except to increase work for all parties and the court.

Sincerely,

Gary J. Aguirre
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From: Fates, Ted [mailto:tfates@allenmatkins.com]
Sent: Tuesday, November 29, 2016 3:30 PM
To: Gary Aguirre; Phillip H. Dyson (phil@phildysonlaw.com); Zaro, David; 'kalins@sec.gov'; 'BerryJ@sec.gov'; schultzec@sec.gov; deanl@sec.gov; YODERS@SEC.GOV
Cc: Thomas Hebrank
Subject: RE: SEC v. Schooler

Mr. Aguirre,

The Receiver would not oppose a motion to expedite the consolidated appeals. In fact, the Receiver plans to file a motion to expedite the appeal as to the order approving the sale of the Jamul Valley property on the grounds that the receivership estate will be irreparably harmed if the opportunity to sell the Jamul Valley property is lost because of the delay in closing caused by the appeal. Based on your message below, I assume your clients do not oppose such motion. Please confirm.

Thank you,

Ted Fates Esq.

Partner
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CHALLENGE. OPPORTUNITY. SUCCESS.

From: Gary Aguirre [<mailto:gary@aguirrelawapc.com>]
Sent: Tuesday, November 29, 2016 3:09 PM
To: Fates, Ted <tfates@allenmatkins.com>; Phillip H. Dyson (phil@phildysonlaw.com) <phil@phildysonlaw.com>; Zaro, David <dzaro@allenmatkins.com>; 'kalins@sec.gov' <kalins@sec.gov>; 'BerryJ@sec.gov' <BerryJ@sec.gov>; schultzec@sec.gov; deanl@sec.gov; YODERS@SEC.GOV
Subject: SEC v. Schooler

Dear counsel:

In the SEC's reply brief in support of its motion to consolidate, it stated: "If this Court consolidates these two appeals, the Commission has no objection to expediting the briefing schedule and oral argument in order to minimize any delay." D. 17 at 3.

Kindly advise me at your earliest convenience whether you would oppose a motion to expedite the appeal if the appeals filed by the Ardizzone Appellants and the Graham Appellants are consolidated.

Thanks,

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EXHIBIT B



Xpera Group Suggested Strategy Jamul Valley/Bratton Valley (Honey Springs)

Based on our recent research and our knowledge of government land processing within the County, and particularly within the Mountain Empire, we suggest the following program:

Jamul Valley: Accept the offer from the Nature Conservancy. It is a fair offer and has no brokerage commission involved.

The alternative route would be to try to gain approval for a subdivision map for the property, but this would be a tortuous and expensive route, with uncertain chance for success.

Honey Springs (Bratton Valley): Place the property on the market in the same price range as the Nature Conservancy would offer and try to attract them to the property. It is unlikely to be sold to some entity other than a non-profit, as it would face the same arduous development process at Jamul Valley, but moreso because of its more rural location.

Tecate Properties

There are eleven partnerships that hold properties in the Tecate area.

Properties and Partnerships San Diego County SEC v Schooler		
Property Area	Partnership	Locale
Tecate	ABL	Tecate
Tecate	Borderland	Tecate
Tecate	Prosperity	Tecate
Tecate	Freetrade	Tecate
Tecate	Suntec	Tecate
Tecate	Via 188	Tecate
Tecate	International	Tecate
Tecate	Mex-Tec	Tecate
Tecate	Tecate South	Tecate
Tecate	Twin Plant	Tecate
Tecate	Vista Tecate	Tecate

CERTIFICATE OF COMPLIANCE

The foregoing Motion to Expedite Appeal as to Order Approving Sale of Jamul Valley Property of Appellee Thomas C. Hebrank complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 4,638 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007, in font size 14, Times New Roman.

Dated: November 30, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ Edward Fates
Edward G. Fates
Attorneys for Receiver
THOMAS C. HEBRANK

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on November 30, 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.

Dated: November 30, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ *Edward Fates*
Edward G. Fates
Attorneys for Receiver
THOMAS C. HEBRANK

No. 16-55850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff – Appellee,

v.

LOUIS V. SCHOOLER; FIRST FINANCIAL PLANNING CORPORATION,
DBA Western Financial Planning Corporation,

Defendants - Appellees,

SUSAN GRAHAM, ET AL.

Intervenors - Appellants,

THOMAS C. HEBRANK,

Receiver - Appellee.

On Appeal from the United States District Court
for the Southern District of California, Case No. 3:12-cv-02164-GPC-JMA

**DECLARATION OF CHRISTOPHER BASILEVAC IN SUPPORT OF
RECEIVER'S MOTION TO EXPEDITE APPEAL AS TO ORDER
APPROVING SALE OF JAMUL VALLEY PROPERTY**

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Attorneys for Appellee
Thomas C. Hebrank, Receiver

I, Christopher Basilevac, declare:

1. I am the Director of Land Protection, Southern California at The Nature Conservancy ("TNC"). I have been the primary point of contact at TNC for the Receiver and his staff in connection with the contemplated sale of the undeveloped real property in San Diego County known as the Jamul Valley Property.

2. This declaration is made in support of the Receiver's Motion to Expedite Appeal as to Order Approving Sale of Jamul Valley Property ("Motion"). I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify to such facts under oath.

3. On October 27, 2015, TNC and Receiver Thomas Hebrank entered into a Purchase and Sale Agreement for the undeveloped real property known as the Jamul Valley Property ("PSA"). TNC then conducted due diligence on the property. On January 11, 2016, TNC gave notice to the Receiver that it had completed its due diligence and intended to proceed with the purchase of the property subject to the terms and conditions of the PSA, including the condition that a California Land Title Association (CLTA) form policy of title insurance be issued to TNC.

4. In or around early February 2016, as the Receiver and TNC were preparing the close the sale, I learned the title company involved in the sale

transaction would not issue a title insurance policy unless there was a final and non-appealable District Court order expressly approving the sale to TNC at the specified price (\$520,000), as opposed to the existing order pre-authorizing the Receiver to negotiate and complete a sale. I spoke to Geno Rodriguez at the Receiver's office and we agreed to contact other title companies to find out if they would close the sale with the existing District Court order or would require a more specific order. As it turned out, other title companies also stated they would require a more specific order. Over the next several months, TNC and the Receiver entered into several amendments to the PSA to extend the closing date so the Receiver could obtain such an order from the court.

5. Accordingly, my understanding is that the Receiver filed an *ex parte* application seeking the more specific order confirming the sale and a group of investors opposed the application. The Receiver later filed a noticed motion for approval of the sale, which I understand was granted on August 30, 2016. The investor group then appealed the sale order.

6. In September 2016, shortly after the appeal of the sale order was filed, a colleague and I from TNC, as well as TNC's outside counsel, participated on a conference call with the Receiver, Geno Rodriguez, and the Receiver's counsel to discuss the sale and the appeal. TNC agreed to extend the closing date under the

PSA once again. Another amendment to the PSA was then executed, extending the closing date to April 12, 2017. That amendment is attached hereto as Exhibit A.

7. TNC is a non-profit, tax exempt entity that, *inter alia*, acquires land for purposes of conservation. TNC's funding and priorities for acquisitions of land in each state and region of the country change periodically. TNC remains interested in acquiring the Jamul Valley Property and closing the sale transaction, but that interest, and available funding, may well change if the sale does not close within a reasonably short period of time. TNC first expressed interest in purchasing the Jamul Valley Property in February 2015. In October 2015, the PSA was signed and within the next 3 months, TNC in good faith completed its due diligence and was ready to purchase the property but for the title insurance issue. The remainder of 2016 has been spent by the Receiver trying to get a final non-appealable court order authorizing the sale for fair market value after exposure to the market. It is my understanding that even the real estate consultant hired by the investor group has recommend sale of the Jamul Valley Property to TNC on the terms contained in the PSA. If the Receiver is not able to obtain a final and non-appealable court order for the sale within a reasonable amount of time (i.e. a matter of months, not a year), TNC will have to reevaluate the sale, the purchase price, its funding, and its priorities and decide if it is willing to wait any longer to complete the sale.

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

Executed this 30th day of November, 2016, at Omaha, Nebraska.


CHRISTOPHER BASILEVAC

EXHIBIT A

SIXTH AMENDMENT TO
PURCHASE AND SALE AGREEMENT
(FEE INTEREST)

(SAN DIEGO • LYONS VALLEY • LYONS VALLEY PARTNERS, ET AL)

This Sixth Amendment to Purchase and Sale Agreement (the "**Sixth Amendment**") is made by and between, on one hand, Thomas C. Hebrank, solely in his capacity as Court-Appointed Receiver for Lyons Valley Partners, a California general partnership, as to an undivided 1/3 interest; Jamul Meadow Partners, a California general partnership, as to an undivided 1/3 interest; and Hidden Hills Partners, a California general partnership, as to an undivided 1/3 interest (collectively, "**Seller**") and, on the other hand, The Nature Conservancy, a District of Columbia nonprofit corporation (including its successors and assigns, "**Buyer**"). This Sixth Amendment is dated as of and is effective as of October 10, 2016 (the "**Sixth Amendment Date**").

RECITALS

A. Buyer and Seller have entered into that certain Purchase and Sale Agreement dated October 27, 2015, as amended by that certain Amendment to Purchase and Sale Agreement dated December 15, 2015, as further amended by that certain Second Amendment to Purchase and Sale Agreement dated January 16, 2016, as further amended by that Third Amendment to Purchase and Sale Agreement dated February 16, 2016, as further amended by that Fourth Amendment to Purchase and Sale Agreement dated June 6, 2016, and as further amended by that Fifth Amendment to Purchase and Sale Agreement dated July 15, 2016 (collectively, as amended, the "**Original Agreement**"), pursuant to which Seller has agreed to sell to Buyer that certain real property located in San Diego County, California, and more particularly described on **Exhibit A** attached to the Original Agreement.

B. Buyer and Seller desire to amend certain provisions of the Original Agreement, as set forth below.

AGREEMENT

In consideration of the mutual covenants contained in this Sixth Amendment and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Buyer and Seller agree as follows:

1. **Defined Terms.** Each capitalized term used in this Sixth Amendment has the meaning ascribed to that term in the Original Agreement, unless otherwise expressly defined in this Sixth Amendment. As a result of this Sixth Amendment the term "**Agreement**" as used in the Original Agreement and in this Sixth Amendment will mean the Original Agreement as amended by this Sixth Amendment.

2. **Closing Date.** The Closing Date is hereby extended to April 12, 2017.

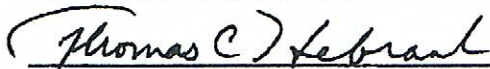
3. **No Other Modifications.** Except as expressly modified by this Sixth Amendment, the Original Agreement and all of its terms, conditions, and stipulations remain in full force and effect and unmodified.

4. **Execution.** This Sixth Amendment may be executed in multiple counterparts, and each executed counterpart of this Sixth Amendment will be deemed an original for all purposes despite the fact that not all of the parties are signatories to the same counterpart. Electronic signatures, digital signatures, and fax signatures are acceptable for this Sixth Amendment. Signed signature pages of this Sixth Amendment may be transmitted by fax, by email, or by any other electronic means, and any such signature will have the same legal effect as an original signature.

Seller and Buyer have executed this Sixth Amendment effective as of the Sixth Amendment Date.

Seller:

Thomas C. Hebrank, solely in his capacity as Court-Appointed Receiver for Lyons Valley Partners, a California general partnership, as to an undivided 1/3 interest; Jamul Meadow Partners, a California general partnership, as to an undivided 1/3 interest; and Hidden Hills Partners, a California general partnership, as to an undivided 1/3 interest



Thomas C. Hebrank

Date: 10/17/16

Buyer:

The Nature Conservancy,
a District of Columbia non-profit corporation

By: Eric Hallstein / jc

Name: Eric Hallstein

Title: Director of Conservation Investments

Date: 10/18/2016