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, JOSEPH M. ARDIZZONE, *et al.*, Proposed Intervenors, Movants-Appellants,	No. 16-56362
THOMAS C. HEBRANK, Receiver-Appellee.	

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

The Securities and Exchange Commission opposes the motion by Joseph M. Ardizzone, *et al.*, movants-appellants (collectively, the "Ardizzone Investors"), for a stay of receivership sales pending their appeal to this Court. The motion recycles meritless points from the earlier stay motion filed in this Court (No. 16-55850) by

another group of investors represented by the same counsel.[1] Much like that earlier motion, the present stay motion fails to demonstrate any urgency or to meet the traditional criteria for a stay pending appeal, including likelihood of success on the merits and irreparable harm absent a stay. The district court properly defined the scope of the receivership to include assets under defendants' control, has provided notice reasonably calculated to apprise investors of the ongoing litigation, and has closely monitored the continuing expenses of the receivership. The stay 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.

[1] At various points (Motion 9-10, 20), the Ardizzone Investors appear to incorporate by reference certain arguments from the earlier stay motion in No. 16-55850. To the degree that this Court permits them to do so, the Commission respectfully requests permission to incorporate the rebuttal arguments from its opposition to the same earlier stay motion.

D.1.[2] Each GP contained between dozens and hundreds of investors (the purported partners) and held undivided fractional interests (as co-tenants with other GPs) in one of 23 real estate parcels. 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 2016 certain groups of GP investors, which together comprise approximately 10 percent of all the GP investors, including the Ardizzone Investors, filed several motions to intervene and for other relief in the post-judgment receivership proceeding, which currently remains ongoing. The district

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

court's decisions on those motions are the subject of this appeal, which was filed by one group of GP investors. The second amended notice of appeal (D.1426)[3] states that appeal is taken from two district court orders:

i. The order dated August 30, 2016 (D.1359), which denied the Ardizzone Investors' motion to intervene for the purpose of challenging, among other things, an earlier order 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; and

ii. The order dated November 29, 2016 (D.1409), which denied the Ardizzone Investors' motions for a stay pending appeal and to alter or amend the above order denying their motion to intervene.[4]

The Ardizzone Investors asked the district court to stay certain aspects of the receivership proceedings pending this appeal. D.1368. The court denied that motion on November 29, 2016. D.1409.

ARGUMENT

The Ardizzone Investors' motion in this Court is styled as an "urgent" motion for a stay pending appeal. Specifically, they request that this Court either

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[3] The Ardizzone Investors' original notice of appeal was filed on September 13, 2016. D.1367. Their first amended notice appeal is at D.1374.

[4] The Commission has filed a motion to consolidate this appeal with another appeal filed by another group of GP investors represented by the same attorney, No. 16-55850. *See* Motion to Consolidate, No. 16-56362, Dkt. Entry 4, Sept. 28, 2016. The Ardizzone Investors have filed a motion to expedite this appeal. *See* Motion to Expedite, No. 16-56362, Dkt. Entry 9, Dec. 20, 2016. Both motions remain pending before this Court.

"stay any further execution of the receiver's liquidation plan" or "stay the sale of any realty and direct [the receiver] to maintain accounting records of his expenditures." Motion 5. The motion should be denied because the Ardizzone Investors have failed to demonstrate any urgency or to meet 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 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 Ardizzone Investors' assertion of urgency is belied by their delay and failure to identify an event requiring expedition.

The Ardizzone Investors argue that this motion should be treated as urgent under Ninth Circuit Rule 27-3(b). Motion 1-4. But the asserted urgency of the motion is belied by the delay of over three weeks from the district court's denial of their similar stay motion on November 29, 2016 (D.1409), and their filing of this motion on December 21, 2016. *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."). Moreover, they did not give the undersigned counsel advanced notice of the motion, nor did they identify any impending sale of property that necessitates

expedition, as required by this Court's rules. *See* 9th Cir. R. 27-3(b)(1), (3). Accordingly, the motion should not be treated as urgent.

II. The Ardizzone Investors have not established a likelihood of success on the merits.

The Ardizzone Investors' stay motion challenges three aspects of the district court rulings: first, the district court's exercise of jurisdiction over the GPs and their properties; second, the adequacy of the notice to GP investors concerning the receivership proceedings; and third, the district court's denial of the motion to intervene. Motion 6-20.[5] But they fail to establish a likelihood of success on the merits of any of these three challenges.

A. The district court properly included the GPs and their property 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

[5] Although the Ardizzone Investors seek to stay only the receiver's liquidation or sale of the properties, their stay motion also attacks the denial of their motion to intervene. For the sake of completeness, this opposition explains below that the denial was within the district court's broad discretion.

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 Ardizzone Investors argue that *San Vicente* is not dispositive here because defendants Schooler and Western never controlled the GPs and their properties, as purportedly reflected in three district court decisions. Motion 7

(citing D.44; D.212; D.583). But the cited decisions do not support that proposition. The first decision was the grant of a preliminary injunction in which 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. The second decision was the denial a motion to dismiss, for the purposes of which the Commission's allegations of control by Schooler and Western were assumed to be true. D.212.

The third decision cited by the Ardizzone Investors was 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 ruling, the 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 GP investors dependent on defendants' managerial control. *Id.* at 15-17. As the 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, the district court 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.

Thus, the district court's investment contract analysis (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.

B. The district court respected the due process rights of the Ardizzone 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. Notice is sufficient if it is "'reasonably calculated, under all the circumstances,'" to apprise the non-party of the litigation and afford 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 process afforded by

the district court to the GP investors throughout this litigation easily meets these standards.

To begin with, it is undisputed that all GP investors received actual notice in October 2012, one month after the receiver's temporary appointment, through a written letter sent by the receiver that informed GP 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. By the time the receiver's appointment was made permanent in March 2013 (D.174), dozens of GP investors already had filed letters expressing their views concerning the litigation (*see generally* D.77 *through* D.168).

Also in March 2013, the district court 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 the resources of the receivership estate. D.170 at 3; D.1355-1, Ex.A; D.1359 at 3. With that approval, the receiver mailed a second letter to GP investors in March 2013 informing them again that certain filings would be posted to the receivership website and explaining that they could receive these same filings by mail if they sent a written request to the receiver. D.1368-3, Ex.10.

Indeed, when Schooler and Western raised due process concerns later in 2013, the district 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).

The Ardizzone Investors complain that the notice provided by the district court and the receiver was inadequate, and that individualized mailings of all filings to every investor were required, based on the Supreme Court's statement in *Mullane* that "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318. But the *Mullane* Court prefaced the quoted statement by acknowledging that it had "not committed itself to any formula … determining when constructive notice may be utilized," and that, to the contrary, "due regard" should be given "for the practicalities and peculiarities of the case." *Id.* at 314. Thus, the statement from *Mullane* quoted by the Ardizzone Investors rested on the Court's recognition, under the facts of that case, that notification of beneficiaries by mail was "an efficient and inexpensive means of communication" that "would not seriously burden" the trustee of a common trust fund. *Id.* at 319.

In contrast, the district court in this case determined that mailing notices of all filings to the over 3,300 GP investors would drain the limited assets of the receivership estate and, accordingly, approved the receiver's proposal to notify GP investors initially by mail and later by postings on the receiver's website. D.44 at 22 n.11; D.1355 at 6; D.1359 at 3. The Ardizzone Investors have not shown that the district court's assessment was unreasonable under the circumstances. *Cf. Mullane*, 306 U.S. at 317 ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."). Moreover, the GP investors were sent *two* mailings at the outset of the case, the latter of which expressly permitted them to request future notices by mail. D.1355 at 6; D.1368-3, Ex.10. At that point, it was incumbent upon the GP investors to alert the receiver if they wished to receive future mailings—in which case they would have been sent the very mailings they now complain were not provided.

The receiver followed the procedures approved by the district court to provide timely notice of his liquidation and distribution proposal in February 2016. D.1355. The Ardizzone Investors' contention that special notice of this proposal was required because it represented a change of course (Motion 16) is simply not true, given that the district court's earlier orders in March and May 2015 already gave reasonable notice that an orderly sale process was being pursued. D.1296 at

5-6 (citing D.1003; D.1069). Likewise, the Ardizzone Investors' assertions that "few" investors visited the receiver's website (Motion 16) and that one appellant did not receive *actual* notice (Motion 17) are beside the point. Notice may be found inadequate "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." 306 U.S. at 319. The notice here was reasonably crafted by the district court to reach the over 3,300 GP investors in light of the prohibitive costs of mailing each of them individually, and therefore the Ardizzone Investors received all the notice that was due.

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

The district court reasonably rejected the Ardizzone Investors' motion to intervene for the purpose of seeking an accounting of the receivership, challenging the receiver's liquidation and distribution plan, and seeking a hearing. D.1359 at 2-3. In so ruling, the district court determined that their arguments for intervention (except one[6]) merely repeated the arguments of other GP investors whose prior intervention motion already had been rejected as untimely. *See id.*; D.1296 at 3, 11. The Ardizzone Investors now challenge this denial but fail to meet their high burden to show that the district court abused its discretion in finding their request

[6] The district court acknowledged that the Ardizzone Investors raised one new due process argument but rejected it as meritless. D.1359 at 3.

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 district court acted within its discretion in finding untimely the Ardizzone Investors' request to intervene to seek an accounting of the receivership (Motion 18), since they effectively sought to reopen the entire four-year receivership for re-examination. *Second*, the district court also reasonably rejected as untimely their request to intervene to oppose the receiver's liquidation and distribution plan (Motion 19), since that plan had already been fully briefed and approved by the district court with participation by other GP investors who had timely intervened (D.1304; *see also* D.1235; D.1277; D.1293; D.1298; D.1308).[7] *Third*, the district court acted within its discretion in rejecting the Ardizzone

[7] The Ardizzone Investors assert that the district court should not have approved the receiver's plan for a pro rata distribution of liquidation proceeds to GP investors because the Commission had not shown that all GP investors were victims of defendants' securities law violations. Motion 19. But 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)). In particular, the district court's order that defendants Schooler and Western disgorge roughly $136 million in proceeds rested on its grant of summary judgment to the Commission on its claim that defendants illegally offered and sold unregistered securities *to all the GP investors*. D.1074.

Investors' request for an evidentiary hearing not only because they failed to specify the scope and purpose of the hearing (D.1348-2 at 17) but also because nothing prevented them from being heard by filing letters with the court, just as hundreds of other GP investors previously had done in this litigation.

IV. The Ardizzone Investors have not established irreparable harm.

The Ardizzone Investors contend that, in the absence of a stay, the sale of the GPs' properties and the pro rata distribution of proceeds to GP investors will inflict irreparable harm. Motion 4. But those asserted financial injuries are susceptible to later quantification—and therefore not irreparable. *See 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). Even if it were true that a pro rata distribution of proceeds to GP investors would be difficult to unwind, that cannot justify a blanket stay of all property sales (which necessarily precede such distribution), as the Ardizzone Investors have requested.

The Ardizzone Investors further argue that continued administrative expenses will drain the receivership estate in the absence of a stay. Motion 3-4. But the district court has 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 the ongoing expenses of maintaining the

real estate. And the district court has 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; D.1303.

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

The Ardizzone Investors contend that the balance of equities favors a stay because of the harm they will suffer if the GPs' properties are sold and if the receiver continues to incur expenses. Motion 20. But 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 GP investors at the end of a securities law enforcement action that already has run four years.

The Ardizzone Investors also assert that their constitutional claims demonstrate that the public interest favors a stay. Motion 20. But those claims are 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 GP investors weigh heavily against granting the stay.

CONCLUSION

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

Respectfully submitted,

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January 2017

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I hereby certify as follows:

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s/ Stephen G. Yoder
Stephen G. Yoder

Dated: January 5, 2017

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 January 5, 2017. 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

Dated: January 5, 2017