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, SUSAN GRAHAM, *et al.*, Proposed Intervenors, Movants-Appellants,	No. 16-55850
THOMAS C. HEBRANK, Receiver-Appellee.	

SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR URGENT MOTION FOR STAY PENDING APPEAL

For the reasons stated in its opposition filed on October 6, 2016, the Securities and Exchange Commission opposes the urgent motion under Circuit Rule 27-3(b) by Susan Graham, *et al.*, movants-appellants (the "Graham Investors"), for a stay pending appeal. In an order dated February 13, 2017, the Court accepted for filing a supplemental brief by the Graham Investors in support

of that stay motion, and the Commission files this response in opposition to that supplemental brief. The Commission concurs in the opposition filed on this same date by the receiver, Thomas C. Hebrank. The Commission submits this separate opposition to address two assertions made by the Graham Investors in their supplemental brief (at 8-9): first, that the district court lacks subject matter jurisdiction over the general partnerships ("GPs") involved in the receivership in this case because defendants Louis V. Schooler and First Financial Planning Corporation d/b/a Western Financial Planning Corporation (together, "defendants") did not control the GPs at the time the Commission filed its complaint against defendants for securities law violations; and second, that the GPs and their investors were deprived a hearing under Local Rule 66.1 at the start of the receivership.

First, the district court properly exercised jurisdiction over the GPs and included them in the receivership. 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*"). As this Court explained, "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. And in *San Vicente*, this Court 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). *Id.* at 1407-08.

The Graham Investors incorrectly characterize the jurisdictional issue as one of subject matter jurisdiction and argue that the district court never properly addressed its jurisdiction. But, as explained, under *San Vicente* the jurisdictional inquiry turns on the element of control. And the Commission made a *prima facie* showing of defendants' ongoing operational control of the GPs sufficient to warrant the district court's exercise of jurisdiction over the GPs at the outset of the action. D.44 at 21-22.[1] Moreover, in granting summary judgment to the Commission in April 2014, the district court concluded, among other things, that the GP agreements left investors dependent on defendants' managerial control. D.583 at 9 (finding that 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"). The district court's analysis in these two rulings established that the GPs were under the control of defendants for purposes of jurisdiction.

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

The chief evidence cited by the Graham Investors in arguing that defendants lacked control is *dicta* from the district court's preliminary injunction ruling in October 2012, in which the court described the powers that the written GP agreements nominally gave investors. Supp'l Br. 8 (citing D.44 at 7). But they overlook that, in the same ruling, the district court relied on defendants' involvement in selling the real estate, defendants' "pivotal operational role" with respect to the GPs, and the fractional nature of the GPs' ownership of the land in holding that the Commission had made out a *prima facie* case that the GP interests were securities in the form of investment contracts. D.44 at 21-22.

To the degree the Graham Investors now fault the district court for not explicitly addressing its jurisdiction when it placed the GPs under the receivership in 2012, they waived that objection by not raising it on a timely basis. *See, e.g.*, *Cargill, Inc. v. Sabine Trading & Shipping Co., Inc*., 756 F.2d 224, 230 n.2 (2d Cir. 1985) (concluding that in failing to raise a timely objection, "appellees here have waived any objection to the exercise of quasi in rem jurisdiction they may have had"); *cf. British Marine PLC v. Aavanti Shipping & Chartering Ltd.*, No. 13 Civ. 839 (BMC), 2014 WL 2475485, *9 (E.D.N.Y. June 3, 2014) ("This is a *quasi-in-rem* action in which [defendants] have consistently attacked the Court's jurisdiction at every turn . … Far from waiving any defenses, defendants have made their objections to jurisdiction clear from the very start.").

The Graham Investors did not raise any jurisdictional objections in their original motion to intervene (D.1229). Rather, as they concede, they first raised the issue in their opposition to the receiver's motion for approval of the plan to liquidate the GPs—over three years after the Commission filed its complaint in September 2012. Supp'l Br. 1 (citing D.1293-1 at 5, lines 4-8). And that opposition does little more than quote the standard set forth in *SEC v. American Capital Invs.*, 98 F.3d 1133, 1145 n.17 (9th Cir. 1996) (emphasis added in opposition). It does not expressly argue that control was lacking. The Graham Investors note that their "most complete argument on the issue" was made later, in their opposition to the receiver's motion to confirm the sale of the Jamul Valley property (Supp'l Br. 2 (citing D. 1326 at 5-18)), which was filed July 1, 2016.[2] But by waiting more than three years after the complaint was filed and the receiver was appointed, and months after they filed their initial motion to intervene, to raise the issue of control for purposes of jurisdiction, the Graham Investors waived the argument.[3]

Second, the Graham Investors erroneously assert that they were denied a noticed hearing regarding the receivership, to which they argue they were entitled

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[2] The Commission does not concede that any objection to *quasi in rem* jurisdiction was properly raised in D.1293-1 or D.1326.

[3] As noted above, the Graham Investors did not raise jurisdictional objections in their original motion to intervene, which was filed on April 8, 2016 (D. 1229).

under Local Rule 66.1. Supp'l Br. 8. But, consistent with the local rule, the GPs and their investors were afforded notice and an opportunity to be heard both prior to the receiver's permanent appointment and also upon the filing of an initial report within 30 days of that appointment. 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 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. The receiver's appointment was made permanent only later, in March 2013. D.174.

By that latter date, the district court had generally 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 receivership resources. D.170 at 3. Also by that time, the receiver had filed three reports (D.27; D.49; D.80), and dozens of GP investors had filed letters expressing their views to the district court (*see generally* D.77 *through* D.168). Thus, the GP investors received notice of the receivership and of the receiver's initial reports and were heard through letters filed with the district court, all prior to the permanent appointment of the receiver in March 2013. Local Rule 66.1 was satisfied.

Accordingly, the Graham Investors' motion for a stay pending appeal should be denied.

Respectfully submitted,

s/ Stephen G. Yoder
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February 2017

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I hereby certify as follows:

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s/ Stephen G. Yoder
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Senior Litigation Counsel
Securities and Exchange Commission

Dated: February 21, 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 February 21, 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
Senior Litigation Counsel
Securities and Exchange Commission

Dated: February 21, 2017