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

APPELLANTS' REPLY TO RECEIVER'S RESPONSE TO SUPPLEMENTAL BRIEF IN SUPPORT OF URGENT MOTION FOR STAY PENDING APPEAL

GARY J. AGUIRRE (Bar No. 38927)
AGUIRRE LAW, APC
501 W. Broadway, Ste. 800
San Diego, CA 92101
Phone: 619-400-4960
Fax: 619-501-7072
Email: gary@aguirrelawapc.com
Attorney for Appellants
Susan Graham, et al.

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I. Introduction

This brief replies to the response of the receiver, Thomas C. Hebrank ("Hebrank"), to Appellants' supplemental brief ("Supplemental Brief," D.E.[1] 25) in support of the motion for a stay. The Supplemental Brief dealt with two classes of issues: (1) the District Court's lack of jurisdiction over the GPs as one of the grounds why Appellants[2] are likely to succeed on appeal and (2) the three other factors—irreparable injury, hardship to third parties, and public interest—which this Court balances in deciding whether to issue a stay. Both the Securities and Exchange Commission ("SEC") and Hebrank make essentially the same points in arguing that the District Court has jurisdiction over the GPs. Only Hebrank argues that the other factors balanced in favor of a denial of the stay. Consequently, Appellants address the jurisdictional issues in their reply to the SEC's brief and the other balancing factors in this reply to Hebrank's opposition.

II. Argument

A. Hebrank and the SEC Now Concede by Silence Appellants Will Sustain Irreparable Harm If Their Motion for a Stay Is Not Granted

Appellants noted in their Supplemental Brief that the District Court acknowledged they will sustain irreparable harm if this motion is not granted. D. 1409 at 6, n. 4. Both Appellees have conceded the point by not addressing it.

[1] "D." refers to the corresponding docket entry in *SEC v. Schooler*, No. 12-cv-02164 (S.D. Cal.); "D.E." refers to docket entries with this Court. The pagination follows the page numbers as designated by CM/ECF.

[2] Appellants' names are listed in Attachment 1 filed herewith.

B. The Hardship Factor Balances in Favor of Granting the Stay

As he has done throughout this litigation, Hebrank counters Appellants' well documented facts demonstrating investors would be well served by a stay with groundless attacks unsupported by evidence or the record. Given these tactics, Appellants respond below to each point with concrete facts supported by the record.

Neither Appellee has responded to numerous points Appellants made in their Supplemental Brief, including the following: (1) the receivership has consumed Western's assets (Supp. Brief at 16); (2) the SEC has recovered nothing in this case (*Id*.); (3) Allen Matkins is the SEC's favorite law firm to represent receivers in California (*Id*. at 18); (4) by including the GPs in the receivership, Hebrank and Allen Matkins ensured a source of funds to pay their fees (*Id*.); (5) absent the SEC's injunction, investors could have pursued their own remedies to protect their investments (*Id*. at 19); (6) the parties stipulated to Hebrank's permanent appointment and thus avoided two noticed hearings under Local Rule 66.1 (*Id*. at 19-20); and (7) the Second and Ninth Circuits have expressed concerns about using SEC receiverships rather than bankruptcies to liquidate businesses (*Id*. at 20).

1. Hebrank's Erroneous Contention Regarding the Scope of the Fraud Proved by the SEC

Hebrank argues (D.E. 40 at 16) the following statement in the Supplemental Brief misstates the facts:

> The SEC tried to prove 100% of investors were defrauded, but could only prove one misstatement on one property, Stead, affecting 5% of investors. D. 1081 at 19-20. The SEC abandoned its fraud claims that the other 3,200 investors (95%) were defrauded. D.E. 12 at 26-27.

D.E. 25-1 at 14. The above statement is an undisputable fact based on the record.

The SEC alleged defendants misstated or omitted material facts in selling the GP interests to *all 3,370 investors*, D. 1, ¶¶ 34-38. The District Court denied the summary judgment on all of these fraud claims. D. 1081 at 20. It granted the motion "as to an offer or sale of a security" and "as to interstate commerce." *Id*.

The SEC also alleged separate fraud theories for three of the 36 properties:

> Three recent sets of offerings for three different sets of land—the Borda, Pyramid Highway, and Stead deals—illustrate Schooler's and Western's fraudulent scheme. These three deals involve ten OPs and nine individual OP offerings that raised approximately $33.7 million from as many as 1,000 investors or possibly more.

D. 1, ¶ 41. The SEC included these claims in its summary judgment motion. D. 1015-1 at 12-16. The District Court denied the motion in relation to the Borda and Pyramid properties, but found one misstatement in relation to the Stead property. D. 1081 at 20. In sum, the SEC proved *one misstatement* involving *one* of the 36 properties and four GPs. The SEC *abandoned* its claims the other 3,200 investors in 83 GPs, owning 35 of the 36 properties, purchased over the prior 31 years, were defrauded. D. 1137-1 at 10, n. 4.

2. Hebrank's Groundless Accusation that Appellants Misstated the Amount of His Fees and His Receipts and Disbursements

Hebrank claims that Appellants misstated (1) the amount of his fees and (2)

his receipts and disbursements. D.E. 40 at 16-17. Appellants exclusively rely on Hebrank's filings. He has now filed his Seventeenth Interim Fee Application, where he states he and his team have incurred the following fees for the 49 months from "the inception of the receivership through September 30, 2016":

Payee	**Fees & Costs Incurred**
Hebrank	$1,570,279.76
Allen Matkins	$1,198,353.98
Duffy	$500,689.82
Total	$3,269,323.56

D. 1433 at 6-7. This is an average $66,720 a month for that 49-month period.

Hebrank also claims Appellants misstated the amounts of his receipts and disbursements. D.E. 40 at 13-14. The Supplemental Brief stated:

> Hebrank filed three of 15 disclosure forms required of SEC sponsored receivers. He received $21.13 million, 1376 at 17-20, 1377 at 21, 1378 at 27. By the end of 2016, he will spend $19.33 million, all but $1.8 million of the GPs' cash. *Id.* and D. 1181-1 at 6. In short, the receivership has cost investors $19 million, but delivered nothing.

D.E. 25 at 14-15 (footnote omitted). Once again, Appellants rely exclusively on Hebrank's written and signed Standardized Fund Accounting Reports ("SFAR") to the District Court through September 30, 2016.[3] This table summarizes the SFARs:

Date	**SFAR D. No., Page**	**Receipts**	**Expenditures**
9/6/2012 to 9/30/2015	1376 at 17	$12,785,554	$15,539,396
10/1/2015 to 12/31/2015	1376 at 20	$901,066	$1,124,436
1/1/2016 to 3/31/2016	1377 at 21	$766,481	$834,145

[3] For the Court's convenience, a copy of Hebrank's SFARs summarized above are attached as Exhibits to the declaration of Appellants' counsel filed herewith, ¶¶ 3-7, Exhs. 1-5.

4/1/2016 to 6/30/2016	1378 at 27	$101,218	$1,078,990
7/1/2016 to 9/30/2016	1422 at 21	$19,101	$985,399
	Grand Total	**$14,573,420**	**$19,562,366**

Hebrank graphed how he depleted the cash in the GPs' accounts from $6.6 million in September 2012 to $1.8 million in December 2016. D. 1181-1 at 37.

3. Hebrank Concedes He Pressured Investors to Make Payments under the GP Agreements (Unregistered Securities), but Blames the District Court

The facts are not in dispute. Through his website, Hebrank told investors they had to pay the amounts owed under the GP agreements. D. 1229-2 at 7-8. Even more clearly, Hebrank's billings to investors included a letter telling them: "Failure to remit payment has consequences both for you and the GP as a whole. Individually, investors may be subject to the default provisions outlined in the Partnership Agreement."[4] The default provisions would allow Hebrank to seek multiple remedies against an investor. D. 1293-3 at 47 and 52-54. These were real threats.

Hebrank claims he should be excused (D.E. 40 at 18.), because he proposed a suspension of the payments in June 2013 and told the District Court "it is generally inequitable to continue collecting note payments from investors until such time as the disposition of each property has been determined." D. 203 at 15.

Hebrank misses the point. Since the GPs were unregistered securities, the

[4] Appellants have attached eight sample letters by Hebrank and the management company, Lincoln Property Company, to the declaration of their counsel filed herewith. Aguirre Decl., ¶¶ 8-15, Exs. 7-13.

debts were cancellable under § 12(a)(1) of the Securities Act of 1933. Neither the SEC nor Hebrank informed the District Court of this point, even after the District Court held the GP interests were securities in April 2014. D. 583. But even this analysis misses the core point. Whoever was responsible—the District Court, the SEC, or Hebrank—the simple truth comes to this: investors were forced to pay Hebrank millions of dollars they had no legal duty to pay. Hebrank is hardly in a position to claim that he is protecting investors by opposing a brief stay of his proposed sales until this Court decides this appeal.

4. Hebrank Cannot Deny Using Investor Payments to Fund his Receivership

Despite his protestations, Hebrank's SFARs explicitly state he collected funds from investors which flowed into his receivership. As an example, Hebrank's SFAR for the period ending on September 30, 2015, explicitly states he collected $12.66 million (line item 8) and states the source in a footnote: "investor operational billing and GP note payments." Aguirre Decl., ¶ 3, Ex. 1 at 9.

5. Hebrank's Symbiotic Relationship with the SEC

Hebrank and his counsel deny their symbiotic relationship with the SEC. They claim Appellants only offered one example how the SEC told Hebrank's counsel what to do, i.e., to reverse their position on whether the GPs could exit the receivership, because it would undermine the SEC's contention that the GP interests are securities. This, of course, was not the only such email. Here is

another example how the SEC told Hebrank's counsel how to write his briefs:

> by [*sic*] the way, is it worth being more equivocal about Schooler's obligations to continue to fund Western? in [*sic*] our papers, we just say he "probably" won't have an [*sic*] legal obligation to fund in the future.
> Ted [Fates] and Tom [Hebrank], in your report, you are a bit more absolute, saying Schooler definitely won't be required to do so. in [*sic*] the (granted, probably unlikely) event we may want to argue he is obligated on some funding need, it may be better to use softer language?

D. 860-3, Ex. 6. In any case, there was sufficient evidence for the District Court to enter this unique order:

> 2. The Receiver is ordered to refrain from seeking input on his briefs from a single party. If he wishes to seek input on his briefs, he must seek input from both the SEC and Defendants. The Receiver is of course still free to not seek input from any party if he believes that to be the appropriate course of action; and The Receiver is ordered to refrain from altering the legal conclusions in his briefs to fit the case strategy of either the SEC or Defendants. All legal conclusions must be his own.

D. 1004 at 12. Hebrank only altered his conclusions at the request of the SEC.

Hebrank also contends he was not acting as the SEC's expert witness, because the SEC did not designate him as such. Yet, he does not dispute any of the facts upon which Appellants base this statement:

> [Hebrank] provided the financial reports that were the evidentiary basis for the SEC's $136.6 million summary judgment motion on its disgorgement claim (Ds. 685-1; 685-2; and 203), which the district court granted. D. 1070. While Hebrank served as the SEC's expert witness, investors and their GPs were on the hook for his fees. D. 10 at 17, l. 23.

D.E. 25-1, at 16-17. Hebrank's contention that the SEC did not designate him as an expert witness is naïve. Hebrank was operating as a *de facto* expert witness at investors' expense. The SEC did not need to designate him.

There is one point Hebrank and Allen Matkins failed to address on this

issue: Allen Matkins has become the SEC's favorite law firm to represent receivers in SEC receivership cases in California's four districts. When Appellants filed their Supplemental Brief, Allen Matkins had represented the SEC receivers in 7 of 13 active cases in California over the past five years. D.E. 25-2, ¶ 3. Appellants updated table indicates Allen Matkins became counsel for yet another SEC-sponsored receiver, so the firm now represents the receivers in eight of the 14 active SEC receivership cases over the past five years. Aguirre Decl., ¶ 16.

This is a lucrative relationship for Allen Matkins. The obvious question arises: why does the SEC continuously arrange for Allen Matkins to be counsel of the receivers it sponsors? This case suggests the answer does not lie in the results Allen Matkins gets for investors. Hebrank has conceded the SEC has recovered nothing for investors. In essence, investors will get back a fraction of the assets that were seized from them at the beginning of the receivership. Allen Matkins's high level of cooperation with the SEC, e.g., allowing the SEC to edit its briefs, sheds light on why it is the SEC's runaway favorite law firm in California.

6. Hebrank Falsely Denies the Court Ordered Him Twice to File His SFARs

Hebrank denies the District Court twice ordered him to file SFAR reports. The first order was the May 25, 2016, order that directed Hebrank "to withdraw and resubmit Receiver's Fourteenth Interim Report, ECF No. 1189 …, consistent with the SEC Standardized Fund Accounting Report ("SFAR")." D. 1304 at 32.

The second order was the September 14, 2016, order that directed him "to withdraw…and submit…within seven days" revised SFARs for the period from the inception of the receivership through June 30, 2016. D. 1369 at 16.

7. Hebrank's Accusations about the Investor Survey Are False

Hebrank's accusations about the investor survey are absolutely false and unsupported by the record or evidence. On the other hand, Appellants submitted the declaration of David Karp, an investor and an attorney, who describes in detail how the survey was conducted. Karp's declaration: (1) identifies the investor who prepared the survey questions; (2) explains the survey was emailed to "investors in all the GP groups for which [Appellants] had an email address" (*Id*., and Ex. 1); (3) states the exact questions posed to investors and provides a copy of the survey itself (*Id*., ¶ 5, Ex. 2); (4) summarizes the results of the survey (*Id*., ¶ 6); (5) explains how the votes were adjusted for the sake of accuracy (*Id*., ¶ 7); and (6) explains the special steps that were taken to ensure that those investors known to oppose the removal of the GPs from the receivership were polled and their votes included in the survey (*Id*., ¶ 10). Hebrank's accusation some investors were excluded from the poll or received it separately is false. Karp states under oath: "Dennis Gilman…sent an email with the link to the survey to investors in all the GP groups for which [Appellants] had an email address." D. 1293-3, ¶ 4, Ex. 1.

To sum up on the hardship factor, Appellants submit the ***evidence*** before

this Court points to one conclusion: a stay would not merely serve the interests of Appellants, but the interests of all investors. Indisputably, the receivership has caused economic harm to investors. They know that, because Hebrank exhausted the GPs' funds and they have paid him millions more under the GP agreements. The only credible evidence before this Court of investor sentiment about the receivership and the remedies Appellants seek is reflected in the survey results:

Question	Total	Yes	% Yes	No	% No
1. Want GPs removed from Receivership	1045	977	93.49%	68	6.51%
2. Investors to decide when to sell GPs	1046	1009	96.46%	37	3.54%
3. Investors want an accounting	1047	1019	97.33%	28	2.67%

Consequently, the hardship factor clearly balances in favor of the stay.

C. The Public Policy Factor Balances in Favor of the Stay

Appellants submit the SEC has exceeded the boundaries of the law in multiple ways: the expanded definition of *quasi in rem* jurisdiction, procedural due process, substantive due process, lack of an accounting, and pooling of investor assets. On top of that, there are 38 decisions of the District Court that are now public on Lexis which other courts are now relying upon. The handling of this case by the Hebrank and the SEC should not become a model. Appellants respectfully submit the Court should issue the stay and expedite this appeal.

Dated: February 24, 2017

Respectfully submitted,

By: /s/ Gary J. Aguirre
GARY J. AGUIRRE
Attorney for Appellants
Susan Graham *et al.*

CERTIFICATE OF COMPLIANCE

The foregoing Reply to Receiver's Response to Supplemental Brief in Support of Urgent Motion for Stay Pending Appeal complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because: This brief contains 2,674 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: February 24, 2017

Aguirre Law, APC

By: /s/ Gary J. Aguirre
GARY J. AGUIRRE
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply, declaration and exhibits with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on February 24, 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.

DATED: February 24, 2017 Aguirre Law, APC

By: /s/ Gary J. Aguirre
GARY J. AGUIRRE
Attorney for Appellants

ATTACHMENT 1,
INTERVENORS-APPELLANTS

Susan Graham, Alfred L. Pipkin, Alfred L. Pipkin, IRA, Allert Boersma, Arthur V. and Kristie L. Rocco Living Trust, Arthur V. Rocco, Baldwin Family Survivors' Trust, Barbara Humphreys, IRA, Beverly & Mark Bancroft, Beverly A. Bancroft, IRA, Bruce A. Morey IRA, Bruce A. Morey, Bruce R. Hart IRA for Bruce R. Hart and Dixie L. Hart, Carol D. Summers, Carol Jonson, Catherine E. Wertz IRA, Catherine E. Wertz, Cathy Totman, IRA, Charles Bojarski, Chris Nowacki, IRA, Cindy Dufresne, Craig Lamb, Curt & Janean Johnson Family Trust, Curt & Janean Johnson, jointly, Curt Johnson, Curt Johnson, Roth IRA, Cynthia J. Clarke, D & E Macy Family Revocable Living Trust, D.F. Macy IRA, Daniel Burns, Daniel Knapp, Darla Berkel IRA, Darla Berkel, Daryl Dick, David and Sandra Jones Trust, David Fife IRA, David Haack IRA, David Haack, David Karp IRA, David Kirsh, David Kirsh, Roth IRA, David Kirsh, Traditional IRA, Debra Askeland, Deidre Parkinen, Dennis Gilman, Dennis Gilman IRA, Diane Bojarski, Diane Gilman, Donna M. and Richard A. Kopenski Family Trust, Donna M. Kopenski, IRA Roth, Douglas G. Clarke, Douglas Sahlin IRA, Eben B. Rosenberger, Edith Sahlin IRA, Edward Takacs, Ellen O'Brien, Elizabeth Lamb, Norling, Eric W. Norling, IRA, Gary Hardenburg, Gary Hardenburg, Roth IRA, Gene Fantano, George Klinke, IRA, George Trezek, Gerald Zevin, Gerald Zevin, IRA, Gwen Tuohy, Gwenmarie Hilleary, Henrik Jonson, Henrik Jonson, IRA, IDAC Family Group LLC, Iris Bernstein IRA, James J. Coyne Jr. Trust, Janice Marshall, Janice Marshall, IRA, Jason Bruce, Jeffrey Merder, IRA, Jeffrey J. Walz, Jeffrey Larsen, Jeffrey Merder, Jennifer Berta, Jim Minner, Joan Trezek, John Jenkins, John and Mary Jenkins Trust, John and Mary Jenkins Trustees, John Lukens, John Lukens, IRA, John R. Oberman, Joy A. de Beyer, Roth IRA, Joy A. de Beyer, Traditional IRA, Joy de Beyer, Juanita Bass IRA, Juanita Bass, Judith Glickman Zevin, IRA, Judith Glickman Zevin, Judy Knapp, Karen Coyne, Karen J. Coyne IRA, Karen Wilhoite, Karie J. Wright, Kimberly Dankworth, Kirsh Family Trust UTD, Kristie

ATTACHMENT 1,
INTERVENORS-APPELLANTS

L. Rocco, Lawrence Berkel, Lawrence Berkel, IRA, Lea Leccese, Leo Dufresne, Leo T. Dufresne Jr. IRA, Linda Baldwin IRA, Linda Clifton, Lisa A. Walz, Lloyd Logan and Ida Logan, jointly, Lloyd Logan, IRA, Lynda Igawa, Marc McBride, Marcia McRae, Marilyn L. Duncan, Mark Clifton, Mary Grant, Mary J. Jenkins, IRA, Mathew Berta, Mealey Family Trust, Michael R. Wertz, Michael R. Wertz, IRA, Mildred Mealey, beneficiary of Duane Mealey IRA, Minner Trust, Monica Takacs, Monique Minner, Neil Ormonde, IRA, Nevada Ormonde, IRA, Paul Leccese, Paul R. Sarraffe, IRA, Perryman Family Trust, Polly Yue, Prentiss Family Trust, Kenneth and Gail Prentiss Trustees, Ralph Brenner, Randall S. Ingermanson IRA, Rebecca Merder, Reeta Mohleji, Regis T. Duncan, IRA, Regis T. Duncan, Renee Norling, Richard A. Kopenski, IRA Roth, Robert Indihar, Robert Churchill Family Trust, Robert Churchill IRA, Robert H. Humphreys, Robert Indihar IRA, Robert S. Weschler, Robert Tuohy, Roderick C. Grant, Roger Hort, Roger Moucheron, Ronald Askeland, Ronald Parkinen, Ronald Scott, Ronald Scott, IRA, Salli Sammut Trust, Salli Sue Sammut Trustee, Salli Sue Sammut, IRA, Shirley Moucheron, Stephen Dankworth, Stephen Hogan, Stephen Yue, Steve P. White, IRA, Steve P. White, SEP IRA, Susan Burns, Tamara and Chris Nowacki, jointly, Tamara Nowacki, IRA, The Knowledge Team Profit Sharing Plan, The Ormonde Family Trust, Thomas H. Panzer, Roth IRA, Thomas Herman Panzer Trust, Thomas H Panzer, Trustee, Trisha Bruce, Val Indihar, W.C. Wilhoite, W.C. Wilhoite, Roth IRA, William C. Phillips, William L. Summers, IRA, William L. Summers, William Loeber, William Nighswonger IRA, William R. Nighswonger, William R. Rattan Rev. Trust, William V. and Carol J. Dascomb Trust, Carmen Slabby, Lawrance Slabby, Virginia Kelly, James S. Dolgas, Penco Engineering, Inc. Profit Sharing Pension Fund, George Jurica, and George Jurica IRA.