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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING CORPORATION,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INVESTORS JOSEPH M. ARDIZZONE, DAVID SCHWARZ AND LOIS SCHWARZ'S MOTION TO INTERVENE

DEMAND FOR JURY TRIAL

Date: September 6, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

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I. Introduction

Joseph M. Ardizzone ("Ardizzone"), David Schwarz and Lois Schwarz ("the Schwarzes") bring two motions in their capacities as partners in seven of the general partnerships ("GPs") that are the subject of the receivership in this action.

First they seek an order allowing them to intervene under Rule 24(a) of the Fed. R. Civ. P. for the following purposes:

1. To file the complaint in intervention ("proposed complaint") attached as Exhibit A to the notice of motion[1] under Rule 24 of the Fed. R. Civ. P. and seek the relief specified in its prayer;
2. To obtain an order vacating the Court's May 25, 2016, order (Dkt No. 1304);
3. To oppose the Receiver's motion to sell the Jamul Valley property (Dkt. No. 1310) set for hearing on September 6, 2016;
4. To join the motion of other investors seeking a stay (Dkt. No. 1316) of the Court's May 25, 2016, order (Dkt. No. 1304) set for hearing on September 6, 2016.

Ardizzone and the Schwarzes contend full intervention as parties in this case is the only mechanism to mitigate the past and ongoing violations of their due process rights by the SEC, Thomas C. Hebrank ("Hebrank"), the receiver in this case, and the orders granted on their motions. Consequently, a denial of this motion would consummate the past violations and invite future violations of all investors' rights to due process of law.

Second, Ardizzone and the Schwarzes seek an order directing Hebrank to make the books and records of each GP and Western, including the OPADS and ACCPAC accounting systems, available to the partners in each GP and their counsel, as the GP agreements expressly provide.

[1] The proposed complaint is attached as Exhibit A to the Notice of Motion and Motion filed with these moving papers.

These motions present stunning new facts of Hebrank's and the SEC's violations of investors' right to due process of law, which the Court has never addressed. To begin with, Hebrank delayed sending any communication to 3,000 partners in the 87 GPs about his proposed plan to liquidate those partnerships until the deadline to file opposition had passed. The Schwarzes are among these investors. And it gets worse. Hebrank sent no communication whatsoever about his liquidation plan to Ardizzone[2] and many other investors.

These were not the only required notices the SEC and Hebrank failed to serve on investors. In violation of Local Rule ("L.R.") 66.1.a.2, neither the SEC nor Hebrank sent notice to investors of the SEC's motion to have Hebrank appointed as the permanent receiver. Though we do not have access to its history, the rule seems designed to embed due process requirements into receivership proceedings. Consequently, the violation of the rule also implies a violation of due process. As discussed below, these notice violations are only pebbles in a larger mosaic of due process violations and other abuses which began four years ago with Hebrank's appointment as temporary receiver.

Hebrank's plan would forfeit the property rights of Ardizzone in the five GPs in which he is a partner[3] and similarly forfeit the property rights of the Schwarzes in the two GPs in which they are partners. Each GP agreement requires that GP assets, after payment of debts, be distributed to that GP's partners.[4] The plan strips investors of these explicit rights. Due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments. *Mathews v. Eldridge*, 424 U.S. 319, 332 (U.S. 1976).

The facts concerning the lack of notice is the type of issue that can be established with certainty. The SEC and Hebrank need only provide admissible evidence what notice

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[2] Declaration of Joseph M. Ardizzone filed herewith, ¶ 5.
[3] *Id.*, ¶ 1.
[4] See Ex. 10 to David Karp's declaration, Dkt. No. 1293-3 at 55, ¶ 7.5.

was sent, when it was sent, and to whom it was sent. In the event the SEC and Hebrank respond with fuzzy facts and law, we would request the Court to (1) order the Receiver to produce all its communications with investors within 15 days of any order on this motion and (2) set an evidentiary hearing on this issue within 45 days of the issuance of the order or at the Court's earliest convenience.

II. The SEC and Hebrank Have Consistently Acted Jointly in Violating Investors' Due Process and Other Rights

A. The SEC and Hebrank's Consistent Failure to Give Investors Required Notice

The SEC and Hebrank have ignored and violated mandates of the Supreme Court, the Ninth Circuit and Local Rule (L.R.) 66.1 in seizing and disposing of investors' property without giving them adequate notice of the intended forfeitures. Both failed to provide investors with two critical notices of motions that severely prejudiced investors' rights.

The most recent was Hebrank's failure to timely serve notice of his February 4, 2016, motion and liquidation plan (Dkt. No. 1181) on any of the 3,370 investors, except those represented by counsel. That motion proposed the sale of all GP realty, the pooling of all GP funds, and, in violation of the 87 GP agreements, the *pro rata* distribution of the funds among 3,370 investors. Simply put, the motion proposed that investors be stripped of all property rights under 87 enforceable GP agreements.

Despite the draconian impact of his proposed plan, it appears that Hebrank sent only one communication to investors before the May 20, 2016, hearing. It was an email.[5] Hebrank delayed sending the email until May 6, 2016, three months after he filed his plan with the Court and only two weeks before the hearing.[6] He sent the email *three weeks after the deadline* of April 15, 2016, set by the Court's April 5, 2016, order for filing opposition to the plan. Dkt. No. 1224 at 1. The Schwarzes were among the investors who

[5] See Aguirre Decl. filed herewith, ¶ 6, Ex. 3.
[6] *Id*.

received this confusing email. We can find no order of the Court permitting Hebrank to serve notice of a distribution plan on investors by email, particularly one sent three weeks after the deadline to file opposition. Nor does any order or rule permit Hebrank to serve investors with his liquidation plan by posting it to his website.

But the investors receiving the defective notice were the lucky ones. Many investors, like Ardizzone, received no notice.[7] According to Hebrank, he was unable to send emails to all investors, because, "Many investor email address [*sic*] were unavailable or were returned undeliverable."[8] The evidence available to Ardizzone and the Schwarzes' counsel suggests the number of investors who received no notice may be very high, likely in the hundreds. In any case, Hebrank has the burden to show his notice to investors complied with due process. *Gates v. City of Chicago*, 623 F.3d 389 (7th Cir. 2010).

And this issue goes beyond Hebrank's failure to give investors timely notice of his liquidation plan. By way of background, Hebrank obtained an order allowing him to substitute notice on his website for notice by U.S. mail. Dkt. No. 170 at 3. The order did not allow Hebrank to serve investors with his proposed plan by emailing it to them or posting it to his website.

Rather, the order limited the substituted service (posting to the website rather than U.S. mail) to the following: "notices of hearings related to petitions for confirmation of sales of property, receiver reports, and fee applications." *Id*. The order expressly states that Hebrank "is required to mail all other notices required by Local Rule 66.1.f." *Id*. He chose not to provide this service and thus Ardizzone received no notice and the

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[7] *Supra*, n. 5.

[8] Aguirre Decl., ¶ 3, 4, Exs. 1 and 2. In particular Hebrank's Nov. 24, 2014, Jan. 16, 2015, email state: "If you know someone that should have received this email, but didn't, please forward it to them. Many investor email address were unavailable or were returned undeliverable."

Schwarzes received defective notice of Hebrank's plan to forfeit their property rights as partners in the GPs in which they had invested.

On the record before this Court, the nonexistent and defective notices of Hebrank's February 4, 2016, motion of his proposed liquidation plan, and the May 20, 2016, hearing do not meet the minimum requirements of due process. "The most important element of due process is adequate notice." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.,* 357 F.3d 800, 804 (8th Cir. 2004). Last year, the Ninth Circuit quoted *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) for this directive, "[C]ourts must determine whether the notice given was 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Ardizzone and the Schwarzes submit that email service which was not sent to numerous investors does not meet the *Mullane* standard, since it is not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Likewise, a notice sent after the deadline for filing opposition, as Hebrank did here, does not satisfy *Mullane.* In *Carter v. McDonald*, 794 F.3d 1342, 1345 (Fed. Cir. 2015), the court cited *Mullane* for another principle that directly applies to the facts of this case, "That regulatory requirement of notice can only sensibly be construed to require that the notice to counsel be timely, which requires, at a minimum, notice before the expressly stated deadline has passed. We could hardly interpret the notice requirement any differently given the nature of 'notice.'" Consequently, even assuming *arguendo* that the Receiver's May 6 email to investors should be treated as notice, it was inadequate, because it was sent after the deadline for filing any opposition.

In all the Ninth Circuit cases this Court relied upon in finding that the proposed plan did not violate investors' due process rights (Dkt. No. 1304 at 15), those affected by the receiver's proposed plan received notice of the plan and the opportunity to object to it, before the court adopted it. See: *SEC v. Universal Financial*, 760 F.2d 1034, 1037

(9th Cir. 1985)(Following several notices to investors explaining the proposed categories and stating the category into which each investor would be placed, and over the objection of Investors, the court approved a modified categorization proposal on December 1, 1982.); *U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984)("Because Tenneco had ample notice of and opportunity to contest the Receiver's challenge to the claimed setoffs, there was no denial of due process."); *SEC v. Wencke*, 783 F.2d 829, 832 (9th Cir. 1986)("On August 19, 1983, deLusignan was served with another copy of the disgorgement application, a set of supporting documents, and a notice of a hearing to be held on the application before the magistrate/special master nineteen days later."); *In Re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992)("Because San Vicente received notice at all stages of the receivership proceedings and had every opportunity to participate in the proceedings, the fact that San Vicente was never a named party in the proceedings did not violate due process.") *SEC v. American Capital Invs*., 98 F.3d 1133 (9th Cir. 1996)("In the case at bench, the summary proceedings actually afforded to appellants gave them full notice and opportunity to be heard at every critical stage.")

Unlike the facts in the above decisions, Hebrank here either sent no notice or defective notice of his proposed liquidation plan to investors. Such notice failed to comply with *Mullane* and therefore did not comply with the due process of law requirements of the Fifth Amendment to the U.S. Constitution. An order is void if it is issued by a court in a manner inconsistent with the due process clause of the Fifth Amendment. *In Re Krueger*, 88 B.R. 238, 241 (B.A.P. 9th Cir. 1988). The Court's May 25, 2016, order was issued in a manner inconsistent with the due process clause and is therefore void.

Further, it appears neither the SEC nor Hebrank served any notice on investors of the SEC's motion for an order appointing Hebrank as the receiver in this case as required by L.R. 66.1.f. In this regard, L.R. 66.1.a.2 provides as follows:

> A permanent receiver may be appointed after notice and hearing upon an order to show cause. This order will be issued by a judge upon appointment of a temporary receiver or upon application of the plaintiff and must be served on all parties. The defendant must provide the temporary receiver (or, if there is no temporary receiver, the plaintiff) within seven (7) days a list of the defendant's creditors, and their addresses. Not less than seven (7) days before the hearing, the temporary receiver (or, if none, the plaintiff) must mail to the creditors listed the notice of the hearing, and file the proof of mailing.

None of the 200 clients represented by Aguirre Law, counsel for Ardizzone and the Schwarzes, provided a copy of any notice from the SEC or Hebrank required by Rule 66.1.a.2, despite Aguirre Law's request to all 200 clients for all such communications.[9]

As Ardizzone and the Schwarzes understand, no party disputes the status of investors as creditors in this case as that term is used in the referenced L.R. 66.1.a.2. In Hebrank's motion to be relieved of certain requirements of L.R. 66.1, he conceded that investors fell within the term "creditors" as that term is used in L.R. 66.1.a.2. Indeed, investors' potential claims against Western for violations of the securities acts qualify them as creditors. Dkt No. 75-1 at 5. L.R. 66.1.a.2 also requires Hebrank to "file the proof of mailing" of the notice on investors. Counsel for Ardizzone and the Schwarzes can find no such proof of service in the Court's file.

Hebrank did move the Court to be relieved from the notice requirements of L.R. 66.1.e and 66.1.f (Dkt. No. 75 at 4), but made no application to be relieved from L.R. 66.1.a.2. The Court granted Hebrank's motion with regards to L.R. 66.1.e. and 66.1.f (Dkt. No. 170 at 3), but the order was silent in relation to any modification of Hebrank's notice obligations under L.R. 66.1.a.2. Consequently, Hebrank simply ignored the requirement of L.R. 66.1.a.2 that he provide notice of the hearing for his permanent appointment to all investors. The notice requirements embedded in the local rules are frequently designed to provide adequate notice and compliance with the due process

[9] Aguirre Decl. ¶ 7.

clause. *In Re Cartledge, 2006 Bankr*. LEXIS 210 (Bankr. D.S.C. Feb. 15, 2006)("The local rules are designed to provide adequate notice and due process to parties affected by the extension of the stay.")

And there is another flaw that runs through all the notices Hebrank served by posting to his website. He has conceded that most investors were not reading them. Dkt. No. 852 at 2. When he first learned that, he had a duty to use reasonable efforts to make personal service on investors. This he could have done by mailing the notices to investors. We can find nothing in the Court files indicating Hebrank attempted personal service when he learned investors were not reading his reports. And Hebrank had a duty to do so. In *United States v. Ritchie*, 342 F.3d 903, 910-911 (9th Cir. 2003), the court held: "We now join these circuits in holding that, when initial personal notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice."

In any case, we have raised the issue of Hebrank's lack of notice and defective notice on investors. The burden is therefore now on Hebrank to demonstrate that he gave adequate notice to investors of his proposed plan of distribution, his appointment as permanent receiver, and other notices the Court directed him to serve on investors. *Gates v. City of Chicago*, 623 F.3d 389 (7th Cir. 2010). Accordingly, we respectfully submit the Court should order Hebrank to file a proof of service specifically describing how he served on investors the multiple notices he was required to serve.

B. The Back Scratching by the SEC and Hebrank, an Officer of the Court, Merge the Executive and Judiciary Branches to Form an Adversarial Superpower

The SEC and Hebrank, and officer of the Court,[10] have consistently aligned themselves on the motions filed in this case. Indeed, even where Hebrank has violated federal law or SEC mandates for its receivers, the SEC has remained silent or even

[10] In its March 13, 2013 order, Dkt. No. 174 at 9, n. 7, the Court pointed: "a receiver is an 'officer of the court' – not an arm of the Commission."

supported him, despite its knowledge Hebrank was breaking the rules.

As an example, the SEC approved Hebrank's 13 fee applications or remained silent, despite Hebrank's consistent violations of the SEC's Standardized Fund Accounting Report ("SFAR"), which requires the filing of a form disclosing Hebrank's receipts and disbursements of receivership cash. The SEC likewise remained silent when Hebrank filed a motion under seal for a redacted order to sell the Jamul Valley property. Both operated to conceal the proposed sale from the partners in the GPs who own the Jamul Valley property. The partners had previously declined to approve its sale. The SEC did not utter a peep. In doing so, Hebrank committed a patent violation of 28 U.S.C. § 2001. Despite its knowledge of the violation, the SEC watched silently from the sidelines as this miscarriage of justice unfolded. Only the refusal of title companies to issue a policy of title insurance stopped this miscarriage of justice. Dkt. No. 1191 at 1.

So, the obvious question arises, why was the SEC so forgiving of Hebrank's violations of SEC mandates and federal law protecting investors? This seems a most pertinent question in view of the SEC's mission "to protect investors."[11]

One answer lies in the emails between the SEC, on the one side, and Hebrank and his counsel, on the other. In this regard, we rely on the declarations filed by David L. Herman, Dkt. No. 976-1, and Phillip Dyson, Dkt. No. 860-2, and their exhibits.

One of the most telling email exchanges was from Susan McDonald, SEC appellate counsel, to Ted Fates and SEC staff Sam Puathasnanon, Sara Kalin and John Berry. Referring to Hebrank's proposed recommendations, later filed as Dkt. No. 852, McDonald states:

> I hate to have to say this but I don't think that having a property management firm or whatever sort of entity was suggested as an alternative to the receiver if GPs are released fixes the problem + endorsing that wld [*sic*] be inconsistent w/ [*sic*] and undercut the holding that the interests are securities.

Herman Decl., Dkt. No. 976-1, Ex. 38.

[11] See: https://www.sec.gov/about/whatwedo.shtml.

Eventually, Hebrank and his counsel incorporated the SEC's proposal into the liquidation plan, all the time claiming they were doing for investors.

The issue whether the GPs would be released from the receivership has been a core one in this case. The SEC and Hebrank consistently chanted the mantra that keeping them in the receivership is necessary to protect investors. Yet, investors have overwhelming pleaded with the Court (94% according to a recent survey[12]) to let them out, because the receivership is consuming their equity. And now McDonald's email proves what investors have claimed all along. This case is not about protecting their interests. Rather, this case is about the SEC pursuing its own agenda.

The exercise of control by the SEC over Hebrank repeatedly shows up in their email communications. For example, in his email of October 18, 2012, SEC counsel John Berry proposes pro-SEC edits to the draft memorandum Fates circulated earlier in the day:

> 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?

Dyson Decl., Dkt. No. 860-3, Ex. 6. Minutes later, Fates complied with the SEC's "suggestion:" "Thanks John, good thought. We will soften that language." Herman Decl., Dkt. No. 976-1, Ex. 5.

Another email tells the origin of the "one pot" approach. With her October 21, 2014, email, McDonald sent to Fates and SEC staff a "useful case" in which a "dist[rict] ct [court] approved a pro rata distribution plan…*from one pot*…(emphasis added)" Herman Decl., Dkt. No. 976-1, Ex. 36. Again, the SEC and Hebrank pretend the "one

[12] See Decl. of David Karp, Dkt. No. 1293-3, ¶¶ 6-7.

pot" approach was Hebrank's idea for a plan that would best protect all investors.

These practices resulted in the Court issuing an extraordinary directive to Hebrank: "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." Dkt. No. 1004 at 3.

We do not believe the Court's order can solve this problem. The fact the SEC expects Hebrank to modify his legal conclusions and Hebrank's willingness to do so cannot be solved by an order. The problem lies in the relationship between the two. We believe these emails demonstrate Hebrank's willingness to abdicate his independence to the SEC. Secondly, it represents a merger of what Hebrank calls his "broad equitable powers," which are confirmed in the order appointing him as permanent receiver (Dkt. No. 174), with the statutory and regulatory powers of the SEC. When the interests of both conflict with the interests of investors, the fact investors will be harmed is a virtual certainty. Our review of the fee applications by Hebrank and his counsel indicates the consultations between the SEC and Hebrank have not ceased.[13]

We must also point out that the SEC, and its Court-appointed receiver (Hebrank) coalition speaks without concern of any opposition in this case. The Court enjoined the defendants from speaking on behalf of the GPs, "because the GPs are comprised of investors alleged to have been defrauded by Defendants." Dkt. No. 511 at 8. Investors have thus far been silenced by the Court's orders denying their motion to intervene as parties in this case. Consequently, the SEC-Hebrank coalition may pursue their own agendas without concern of any voice speaking on behalf of investors. We respectfully

[13] See for example Dkt. No. 1328, Ex. A, at 11, where Ted Fates, Hebrank's counsel states as part of his fee request that on Nov. 9, 2015, he spent 0.3 hours "Discuss[ing] Thirteenth Interim Report with SEC Counsel." On Jan. 5, 2016, Fates "discuss[ed] calls from G. Aguirre and P. Prindle with Receiver and SEC counsel." Dkt. No. 1330. Ex. A, at 15. On March 30, 2016, David Zaro, co-counsel for Hebrank spent half an hour in a "call with SEC counsel re sale/stipulation and waiver issues as to 2001(b)(5)." *Id*., Ex. A at 24.

submit this is a miscarriage of justice that must be corrected.

III. Ardizzone and the Schwarzes Are Entitled to Intervene as a Matter of Right under Fed. R. Civ. P. 24(a)(2).

A. Overview

Fed. R. Civ. P. 24(a)(2) states that, upon timely motion, the Court must permit to intervene anyone who:

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

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

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

In re Novatel Wireless Sec. Litigation, No. 08-cv-1689, 2014 U.S. Dist. LEXIS 85994, at *5-6 (S.D. Cal. 2014)

The Court's May 18, 2016, order held that the motion to intervene brought by a prior group of investors, represented by the same counsel, satisfied all requirements for intervention under Fed. R. Civ. P. 24(a), except timeliness. Dkt. No. 1296 at 4-5. Ardizzone and the Schwarzes rely on the same evidence and the same law as the prior investor group to satisfy the same three elements of Fed. R. Civ. P. 24(a): protectable interest, no adequate representative, and impairment.[14] Accordingly, the SEC and

[14] Ardizzone and the Schwarzes have requested this Court to take notice of the filings by the parties in support of and opposition to Aguirre investors' motion to intervene and

Hebrank are barred from re-litigating these three issues under the doctrines of collateral estoppel and issue preclusion, *Hydranautics v. FilmTec Corp*., 204 F.3d 880, 885 (9th Cir. 2000), and law of the case, *Arizona v. California*, 460 U.S. 605, 618 (1983). We therefore focus on the timeliness issue below.

We also address another issue: no party adequately represents investors' interests. In this case, the SEC and Hebrank are not merely inadequate representatives for investors. They have merged their powers to pursue the SEC's agenda. And the power of both the SEC and Hebrank is extraordinary. The SEC has the statutory powers under the securities acts to pursue claims for violations of the securities acts. It also has unique powers to seek interim relief such asset freezes, restraining orders, and the appointments of receivers. It wraps its agenda with the mantle that its actions are designed to protect investors. For his part, Hebrank is an officer of the Court with a broad grant of judiciary powers through his appointment as permanent receiver.[15] The SEC's agenda sometimes comes into conflict with the best interests of investors who Hebrank was appointed to protect. When that occurs, as discussed below, Hebrank has relegated investors' interests to the SEC's agenda.

Likewise, Hebrank's interests also come into conflict with investors' interests, e.g., when he submits a fee application, but fails to submit a SFAR or files under seal requests to obtain redacted orders allowing him to sell GP realty in violation of 28 U.S.C. § 2001. In these situations, the SEC quietly watches from the sidelines. This back scratching has disserved investors' interests and will continue to do so, as long as investors' voices are silenced. On top of that, the Court has enjoined the only other party—the defendants—from speaking on behalf of investors' interests.[16]

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the Court's May 18, 2016, order granting in part and denying in part that motion. See Req. for Judicial Notice, Dkt. No. 1347, ¶¶ 1-8 and Exhibits 1-8.

[15] Dkt. Nos. 10 and 174.

[16] "Counsel for Defendants has a clear conflict of interest in representing the interests of both Defendants and the GPs because the GPs are comprised of investors alleged to have been defrauded by Defendants." Dkt. No. 511 at 8.

B. Ardizzone and the Schwarzes' Motion to Intervene Is Timely

With this motion, we do not re-litigate the issues raised by another group of investors in their motion to intervene (Dkt. No. 1296). That order is now on appeal for the Ninth Circuit to review. Instead, Ardizzone and the Schwarzes propose to intervene on issues that generally appear consistent with the Court's May 18, 2016, order. But there is one major caveat. We believe the SEC and Hebrank's required notices on investors throughout this case were either not served or were fatally defective. Accordingly, the scope of proposed intervention must be broad enough to mitigate the denial of due process caused by the defective and nonexistent notices.

Put differently, we assume the Court would not expect investors to act where they were entitled to notice, but received none or received defective notice. "The most important element of due process is adequate notice." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 804 (8th Cir. 2004). Absent exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 48-62 (1993).

In this case, no "exigent circumstances" existed when the Court appointed Hebrank temporary receiver and authorized him to seize the GPs and their assets. Assuming *arguendo* "exigent circumstances" existed, no justification exists for Hebrank to deny investors notice of the proceedings to appoint him permanent receiver as L.R. 66.1.a.2 required him to do.

In this case, the nonexistent and flawed notices preclude a finding of due process in connection with the Court's May 25, 2016 order (Dkt. No. 1304) approving Hebrank's liquidation plan (Dkt. No. 1181). There was no meaningful opportunity to oppose the "one tier" approach, the sale of all GP realty, the dissolution of the GPs, and the forfeiture of the partners' property rights in those GPs until the Court provided a summary proceeding on those issues by the May 20, 2016, hearing. In addition to the other flaws in that proceeding, Hebrank sent defective notice or no notice to investors,

except the 350 represented by counsel.[17] Under the case law Hebrank and the SEC cite (*Universal Financial*, 760 F.2d at 1037; *Arizona Fuels Corp.*, 739 F.2d at 459; *Wencke*, 783 F.2d at 832; *In Re San Vicente*, 962 F.2d at 1408; and *SEC v. American Capital Invs*., 98 F.3d 1133), Hebrank was obligated to give notice of his plans to all investors. Further, this notice should have been served by U.S. Mail pursuant to the Court's order of March 7, 2013, (Dkt No. 170) and L.R. 66.1

And that is merely the tip of the iceberg. As discussed above, Hebrank also failed to serve on investors any notice by mail of the SEC's motion to appoint him permanent receiver in violation of L.R. 66.1. Further, when Hebrank knew that investors were not visiting his website for the case,[18] and thus were not receiving notice, he had a duty to find an alternative form of notice. Our investigation has found that he failed to make reasonable efforts to reach investors, e.g., using the mailing addresses in his possession. Consequently, there is a major due process violation running through this case.

On these, premises, Ardizzone and the Schwarzes seek to intervene for the following purposes:

A. Vacating the Court's May 25, 2016, order (Dkt. No. 1304) on the grounds investors did not receive adequate notice;

B. Directing Hebrank to produce the GPs' books and records to investors in each GP, or their counsel pursuant to the terms of the GP agreements;

C. Permitting Ardizzone and the Schwarzes to participate in all post judgment proceedings relating to the disposition of receivership properties, the release of the GPs from the receivership, and the sale of realty owned by the GPs;

D. Directing that the partners in each GP be balloted on whether they elect to adopt Hebranks' or the investors' proposed plans for the GPs;

E. For limited discovery on issues relevant to material facts placed in issue by post-judgment proceedings;

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[17] Aguirre Decl., ¶¶ 6 and 7, Ex. 3.

[18] Dkt. No. 852, at 2.

F. An evidentiary hearing where testimony will be taken and cross examination permitted;

G. Declaring the GP agreements are valid and legally enforceable partnership agreements;

H. Vacating any order approving the Receiver's recommendations to engage real estate brokers for any property owned by any GP in the absence of proof that Hebrank served notice on investors in compliance with due process requirements;

I. Vacating any hearing date for the sale of any GP property in the absence of proof that Hebrank served notice on investors in compliance with due process requirements; and

J. Directing Hebrank to re-file his interim reports 3 through 15, in the absence of proof that Hebrank served the prior interim reports and his proposed orders on investors in compliance with due process requirements.

IV. Access to Books of Account

The Court acknowledged the SEC statement that Hebrank stepped into Western's shoes. Dkt. No. 629 at 4. Section 28 USCS § 959(b) in a sense also places Hebrank in Western's shoes. In relevant part, it provides:

> [A] trustee receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The partnership agreement for Wild Horse Partners contains typical language relating to the partners' rights to inspect the books of account. It reads: "At all reasonable times, any of the Partners shall have access to, and may inspect and copy, any of the Partnership records or books." Dkt. No. 1293-3, Ex. 10 at 46, ¶ 2.6. All of these partnerships were created under California law and specify California law as the

controlling law. Under California law, partners in a general partnership, such as Ardizzone and the Schwarzes, are entitled to access the books of account. See: Cal Corp Code § 16403*; In re Marriage of Walker*, 138 Cal. App. 4th 1408 (Cal. App. 1st Dist. 2006). Accordingly, Ardizzone and the Schwarzes' motion for access to the books of account should be granted.

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Respectfully submitted,

By: /s/ Gary J. Aguirre

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