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' OPPOSITION TO MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AS TO THIRD AND FOURTHORDERS IN NOTICE OF APPEAL

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I. Introduction

On May 25, 2016, the district court issued an order (Dkt. No. 1304; "Order")[1] approving the Receiver's plan (Dkt. No. 1181-1) with few modifications. As approved, the plan impliedly voids 87 general partnerships ("GPs"), authorizes the Receiver to finalize agreements to sell properties subject to a confirmation order, authorizes the immediate pooling of all cash from 87 separate GP bank accounts into a single account, and, after the payment of receivership costs, approves the distribution of the remaining cash *pro rata* to all investors in proportion to their original investments. The 192 investors ("Appellants")[2] refer to this plan as the "Liquidation Plan," what it is in fact. And Appellants are not alone. As the district court noted, the vast majority of investors who responded to a poll support Appellants' position ("the vast majority (93.34–96.99%) of investors support removing GPs from the receivership, having investors decide when to sell GPs, and having an accounting of the receivership.") Dkt. Nos. 1304 at 11 and 1293-3.

The Receiver is moving rapidly to execute the Liquidation Plan. Since the issuance of the Order, the Receiver has consolidated the cash from 87 separate bank accounts into a single account where it was commingled with the cash of Defendant First Financial Planning Corporation d/b/a Western Financial Planning Corporation

[1] The documents referenced by docket number are also filed with the Court as exhibits 1 through 34. The declaration of appellants' counsel contains a table cross-referencing the district court docket numbers to their exhibit number.

[2] The names of the Appellants are listed in Attachment 1 filed herewith.

("Western"). Dkt. No. 1319 at 4. The first irreversible step—the confirmation on the first two sales of realty—is set for hearing before the district court on July 15, 2016. Dkt. Nos. 1285 and 1310. Appellants oppose the Receiver's motion to dismiss the appeal of the Order (Dkt. No. 1304) granting the Liquidation Motion and withdraw their appeal of the second order (Dkt. No. 1305).

The Order is appealable for multiple reasons: (1) under 28 U.S.C. § 1291 as a final order, *SEC v. Copeland*, 2016 U.S. App. LEXIS 5520 * 2 (9th Cir. 2016), (2) under 28 U.S.C. § 1292(a)(2), *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010)("refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof"), (3) as an interlocutory order under 28 U.S.C. § 1292(a)(1) (by refusing to modify an injunction), and (4) under the collateral order doctrine.

II. The Order Approving the Liquidation Plan Winds up the Receivership

The district court entered a final judgment on January 21, 2016. Dkt. No. 1170. Less than two weeks later, the Receiver filed his Liquidation Plan. The effect of the Liquidation Plan is better understood in concrete terms. Appellants Mary and John Jenkins invested $30,000 in Park Vegas Partners in 1983. For 33 years, they paid operational fees to maintain the property. According to the Receiver's projections in his Liquidation Plan, the Jenkins would receive 194% of their original investment ($58,200) if Park Vegas Partners had been sold in 2015

and the proceeds distributed to its partners. Under the Liquidation Plan, the Jenkins would receive 13% of their investment, about $4,000. Dkt. No. 1258-1 at 5.

The Receiver argued before the district court in opposition to Appellants' motion for a stay that his Liquidation Plan requires multiple interim steps. Dkt. No. 1321 at 2-3. In truth, the Order empowers the Receiver to execute his plan with a few speed bumps. No GP can exit the receivership. All GPs' cash is pooled. All GPs' properties are to be sold. The Receiver may negotiate all terms of the sales agreements, finalize a written agreement, conduct a public sale, and waive any contingencies. Dkt. No. 1309, Ex. A. He need only obtain an order confirming the sale. *Id*. He has already begun executing the plan. He has already pooled the cash of the 87 GPs with Western's cash. Dkt. No. 1319 at 4. The hearing to confirm the first two sales is set for July 15. Dkt. Nos. 1285 and 1310. In the past, the district court approved fee applications and broker agreements on *ex parte* applications.

III. An Overview of the Prejudicial Errors in the Order

To place the Receiver's motion in context, Appellants briefly state below their view of the prejudicial errors in the Order.

A. The District Court Lacks Subject Matter Jurisdiction over the GPs.

If the district court lacks jurisdiction over the GPs and their assets, any order purporting to sell or divest the GPs of their assets would be void. In *SEC v. Am. Capital Inv.*, 98 F.3d 1133, 1141 (9th Cir. 1996), this Court cited *Voorhees v.*

Jackson, 35 U.S. 449, 477 (1836) for this principle: "If there is such a 'want of jurisdiction, the proceedings are void and a mere nullity, and confer no right . . . and may be rejected when collaterally drawn into question.'" The lack of subject matter jurisdiction may be raised directly on an appeal from an order granting a motion to sell. *Am. Capital Inv.*, 98 F.3d at 1141. The existence of subject matter jurisdiction is reviewed *de novo*. *Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 554 (9th Cir. 1992).

A receiver can only take possession or control of the assets in the possession or control of defendants. *Am. Capital Inv.*, 98 F.3d at 1136; *In Re San Vicente Med. Partners Ltd*. 962 F.2d 1402, 1405 (9th Cir. 1992). The leading treatise on receivership law, 2 Clark on Receivers (3d ed. 1992), explains: "The receiver can sell only the right, title and interest of the defendant whose property has been placed in the hands of the receiver or the interest of proper parties to the cause." Clark, § 482 at 785.

The district court's orders are not merely silent on whether it has subject matter jurisdiction over the 87 GPs. They establish the lack of it. In the absence of notice to anyone (party, GP, or investor), the SEC made the bald assertion in its *ex parte* application for the appointment of a temporary receiver that Western controlled the 87 GPs, their bank accounts, and their 36 parcels of realty as if they were merely limited partners. Dkt. No. 3-1 at 15.

In October 2012, the district court rejected the SEC's contention that Western controlled the GPs as *de facto* limited partnerships:

> Defendants submitted a sample, representative partnership agreement with their emergency motion to dissolve the TRO. (*See* Doc. No. 14-1.) The agreement gives general partners the right to access the partnership's books.3 (*Id.* at ¶ 2.6.) It provides that a majority in interest may vote to remove the Signatory Partners. (*Id.* at ¶ 4.2.3.) A majority in interest must also vote to admit new partners to the partnership. (*Id.* at ¶ 4.5.) All partnership decisions must be made by a majority in interest vote. (*Id.* at ¶ 5.1.2.) "Any Partner, including Non-Voting Partners, may request a vote of the Partnership on any matter relevant to the business and operation of the Partnership." (*Id.* at ¶ 5.2.2.) Partners' contact information, under the agreement, is circulated to all members. (*Id.* at ¶ 5.4.) While Defendants are appointed partnership administrators under the agreement, they may be terminated, with or without cause, by a majority vote. (*Id.* at 7.1.4.) A majority in interest.

Dkt. No. 44 at 9-10. The district court (Judge Burns) concluded: "The partnership members don't necessarily have 'so little power' that they are effectively limited partners." *Id*., at 4-5. The district court (Judge Curiel) similarly held in July 2013:

> Therefore, the Court finds the GP agreements provide investors with sufficient legal authority to exercise power over the partnerships and "access to important information and protection against dependence on others."

Dkt. 212 at 6.

In granting the SEC's motion in April 2014 that the GPs were unregistered securities, the district court held that investors did not control the GPs *at the time they invested with Defendants*. But again acknowledged the control passed to the GPs over time: "Investors did not control these bank accounts *until the Partnership Agreements, which provided for the appointment of signatory partners, became*

effective (emphasis added)." Dkt. No. 583 at 6. The district court concluded the control passed to the GPs when the partnership agreements became effective a year or two after the GPs closed. *Id*. Since Western lacked control of the GPs in 2012, the district court lacked the subject matter jurisdiction to include them in the receivership.

B. The Orders Purport to Bind Non-Parties Including Appellants

Appellants are general partners in the 87 GPs. The Order dissolves each GP and distributes 99 percent of its assets to strangers. This has already begun: the cash in each GP bank account has been transferred and commingled with Western's cash. Dkt. No. 1319 at 4. The confirmation of the sale of the first two properties is set for July 15, 2016. Dkt. Nos. 1285 and 1310. It is well settled: general partners are necessary parties to proceedings to dissolve a general partnership. *Delta Fin. Corp. v Paul D. Comanduras & Assoc.*, 973 F.2d 301 (4th Cir. 1992); *Rudnick v. Delfino,* 140 Cal. App. 2d 260 (Cal. App. 1956). In this case, the order strips Appellants of their rights under those agreements and is thus tantamount to a personal judgment against them. Hence, their right to participate as parties is protected by the Due Process Clause. *Valley Nat. Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1336 (9th Cir. 1997); *Detrio v. United States*, 264 F.2d 658, 660 (5th Cir. 1959). On this point, Clark, § 636 at 1049, instructs:

> Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master

> or otherwise as the court in its discretion may see fit to direct. Where property in possession of a third party is claimed by the receiver, *the complainant in the receivership suit must first make such person a party by amending the bill or the receiver must proceed against him by suit in the ordinary way* (emphasis added).

C. The Order Denies the GPs and Investors Due Process.

In violation of Appellants' due process rights, the GPs and investors' property has been seized and is now being distributed to third parties. The district court granted the SEC's *ex parte* application without notice on the premise the GPs' would receive "notice and an opportunity to be heard before any of their assets are placed under the control of a permanent receiver." Dkt. No. 3-1 at 23. This did not happen. No hearing was held for more than two years.

For investors, there was even less due process. The starting point is the district court's explanation how investors received due process: "investors have been amply afforded [due process] in this case," citing "ECF Nos. 790, 794, 1234, 1235, 1277, 1293, 1298" as the basis. Order at 16. Appellants disagree and illustrate their point with the seven ECFs cited by the district court.

The first two ECFs, 790 and 794, are minute orders of a single hearing on October 10 and 14, 2014, two years after the Receiver's appointment.[3] The order setting that hearing limited the GPs' argument to one issue: "*to respond* to the Court's decision to *keep* the GPs in the receivership (emphasis added)." Dkt. No.

[3] Both minute orders are quoted in Aguirre Decl., ¶¶ 4-5.

629 at 7-9. At the time, the Receiver controlled the GPs: bank accounts, records, right to hire counsel, and investor contact information.

Investors' rights were more limited than the GPs'. Investors could submit a five-page brief, *if they disagreed with their GPs' position*. If a GP did not file a brief, an investor had no right to do so. Nor did the order authorize investors to speak at the hearing unless they spoke on behalf of a GP. *Id*.

The order directed no personal or even mail service on investors. It directed the Receiver "to disseminate this Order" by posting it on the case website, by email to investors, and mail to the GPs. *Id*., at 9. The Receiver has conceded few investors read his website posts. Dkt. No. 852, at 2, 12-13. Since the Receiver controlled the GPs, his letter-notice went to himself. This leaves email service, for which no service declaration was filed.

As a second basis for the district court's conclusion "investors have been amply afforded [due process] in this case," it expressly relied on Dkt. Nos. 1234, 1235, 1277, 1293, and 1298 as confirmation. Order at 16. Dkt. Nos. 1234, 1235, 1277 and 1293 were filings for the May 20, 2016, hearing and the fifth (Dkt. No. 1298) was a minute order the hearing occurred. The district court limited the issues Appellants could raise at the hearing to one: "opposing the Receiver's orderly sale motion, ECF No. 1181." Dkt. No. 1296 at 11. The district court's orders denied Appellants' motion for an accounting, for limited document discovery, to take

depositions, and for an evidentiary hearing where Appellants could cross-examine witnesses. Dkt. Nos. 1296, 1303, and 1304. Further, the district court held Appellants were bound by all the orders—more than 100—the district court issued since 2012, despite the fact Appellants were not parties and had never been granted a hearing. Order at 14. It also held summary proceedings were sufficient due process to strip investors of their property rights. Appellants submit summary proceedings are meaningless *when they come after the court has issued more than 100 orders which it relies on to strip Appellants of their property rights*.

These procedures do not meet the minimum level of due process contemplated by the leading treatise on receivership law, 2 Clark on Receivers (3d ed. 1992). See Clark, § 82(c) at 127; § 82(i), at 129, or the relevant Ninth Circuit decisions: *San Vicente*, 962 F.2d at 1408 ("San Vicente received the same notice and opportunity to be heard as it would have received as a named party to the SEC action."); *Am. Capital Invs.*, 98 F.3d at 1147 (nonparty claimant had "full notice and opportunity to be heard at every critical stage."); *SEC v. Wencke* 783 F.2d 829, 834 (9th Cir. 1986)("Throughout its proceedings, the district court treated deLusignan as if he were a party."); *SEC v. Universal Fin.*, 760 F.2d 1034, 1037 (9th Cir. 1985)("Because Investors cannot explain how the summary proceedings differed from the process they would have received in a plenary suit, their challenge to the district court's exercise of summary jurisdiction must fail."); and

U.S. v. Arizona Fuels Corp. 739 F.2d 455, 458 (9th Cir. 1984)(Nonparty entitled to plenary proceedings "when, for example, a receiver asks the court to determine the ultimate merits of the parties' claims to the property.") Further, the district court's holding that summary proceedings are sufficient due process in this case cannot be squared with *SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007).

D. No Legal Principle Permits the Order's Redistribution of Assets

We have argued the seizure of Appellants' assets violated their rights to due process, but there is a more fundamental issue. What legal principle empowers a court to void a partnership agreement and redistribute its assets to strangers? The appointment of a receiver is a provisional remedy, not a cause of action. *Clark v. Williard*, 292 U.S. 112, 127 (U.S. 1934). Appellants recognize the courts have pooled assets in SEC receivership cases, but that remedy should not be employed randomly on the theory that an equal distribution of wealth is inherently fairer than the one prescribed in a partnership agreement signed by all investors. The Receiver calls his plan the "one pot" approach (Dkt. No. 1181-1 at 13), which is indistinguishable from what the courts have referred to as pooling.

Appellants argued below that no court has ever ordered pooling in the absence of widespread commingling or fraud. The district court cited one case, *S.E.C. v. Sunwest Mgmt., Inc.*, No. CIV. 09-6056-HO, 2009 WL 3245879, at *9 (D. Or. Oct. 2, 2009), for the principle that "even in the absence of fraud, pooling

of assets for distribution has been approved where distinctions between similarly situated claimants are based primarily on timing or luck." Order at 28. The district court's comment was inaccurate. The case involved "massive fraud" and "extensive commingling." *SEC v. Sunwest Mgmt., Inc.*, 2009 U.S. Dist. LEXIS 93181, * 20 and 34-35 (D. Or. Oct. 2, 2009). The decision has no discussion of investors' "timing or luck." There was no finding of pervasive fraud in this case.

The SEC alleged Defendants made or omitted to state four classes of material facts in selling the GP interests to the 3,300 investors. Complaint, ¶¶ 34-37. On June 3, 2015, the district court denied the SEC's summary judgment on these claims. Dkt. No. 1081. The SEC abandoned these claims. The SEC's complaint alleged a narrower set of claims relating to 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.

Complaint, ¶ 41. The SEC included these claims in its summary judgment. Dkt. No. 1015-1 at 5-10. The district court denied the motion in relation to the alleged fraud in connection with the Borda and Pyramid properties, but found one misrepresentation in relation to the Stead property. Dkt. No. 1081 at 20. This one misrepresentation, involving one of the 36 properties, was the only fraud claim the SEC proved. It abandoned the other claims. With no citation to any order, the

Receiver's summary of facts presents the SEC's unproved and abandoned claims as if they had been proved. Receiver's Motion to Dismiss Appeal, at 3-4.

The district court never found commingling. It once used the term commingling in a tentative order (Dkt. No. 934 at 4), but deleted the language after Defendants pointed out at the hearing there was no evidence of commingling. Reporter's Transcript, Jan. 23, 2015, at 8. The district court made no finding of commingling in its March 4 order (Dkt. No. 1003) as that term is used to describe the situation where investors' funds lose their separate identity when they are placed in a stock promoter's personal account. Rather, the district court explained it had used the term in the sense of being "intertwined," i.e., both investors and Western held interests in the same GPs. *Id*., at 2.

In any case, Appellants were not parties in this action. They had no chance to oppose any motions relating to the SEC claims that Defendants committed fraud or commingled their assets. Consequently, those decisions cannot be used as basis for stripping Appellants of their property rights under the GP agreements.

E. The District Court Erred in Denying the Motion for an Accounting

The district court erred by granting the Receiver's Liquidation Motion over Appellants' objections in their opposition papers that the Receiver's financial reports to the district court were inaccurate, filled with gaps and incomplete. Dkt. No. 1235 at 8-16. The accounting was also the key first step in Appellants'

alternative plan (Dkt. No. 1293-1 at 4-5), which the district court also denied. See: *SEC v. Harris*, 2015 U.S. Dist. LEXIS 11975 (N.D. Tex. 2015) and 2 Clark on Receivers (3d ed. 1992). Each investor is a partner and thus has a right to an accounting and to inspect the partnership books. *Estate of Meyer v. Commissioner*, 503 F.2d 556 (9th Cir. 1974).

Among other things, the Receiver failed to file 13 reports required by the SEC's Standardized Fund Accounting Report ("SFAR"). Dkt. Nos. 1258-1 at 15 and 1299 at 1. The district court ordered the Receiver to refile his last interim report, the one for the last quarter of 2015. Order at 32. The Receiver filed his revised interim report which well illustrates the inadequacies of the Receiver's financial reports to the district court. Dkt. No. 1315. The Receiver states in his report he received $13.7 million during the receivership and spent $16.7 million of receivership assets from the outset of the receivership through the end of 2015. *Id*., Ex. C at 16. If one combs through the Receiver's financial reports filed with the district court, it is impossible to ascertain (1) the source and reason he received more than $10 million and (2) the recipients and reason he spent more than $12 million. Aguirre Decl., ¶ 7.

IV. This Court Has Jurisdiction of the Appeal on Multiple Grounds

The Order is a final judgment because it resolves every *disputed material* issue: (1) no GP will exit the receivership, (2) all realty will be sold, (3) all cash of

the 87 GPs is pooled and placed in a single account, (4) the expenses of the receivership will be paid from that account, and (5) all remaining funds will be distributed *pro rata* to investors. The district court described the Liquidation Plan in these words: "it involves the winding up of the receivership and the sale of the GP properties, may, as a practical matter, impair the Investors' ability to protect their interests in the GP properties." Dkt. No. 1296 at 4.

There are two remaining steps for the Receiver to wind up the receivership: (1) advance the sales of the remaining 34 properties to the point a final confirmation hearing can be set as he has done with the sales of the first two properties (Dkt. Nos. 1285 and 1310) and (2) proceed with the claims process. Every step in this procedure rests on the premise the Receiver has lawful control of the 87 GPs, may sell all of their properties, may pay the costs of the receivership from the pooled funds, and may distribute *pro rata* the funds to all investors from these pooled funds. In short, the Liquidation Plan rests on the premise the Receiver is empowered to take these steps. This appeal challenges every element of that premise.

The Order is no less a final judgment than the orders "denying Tri Tool's motion to modify the stay" and "granting Receiver's motion to distribute assets" which this Court concluded were final judgments in *SEC v. Copeland*, 2016 U.S. App. LEXIS 5520 (9th Cir. Mar. 24, 2016). As discussed below, Appellants

proposed the stay be lifted on any GP where its partners voted under the GP agreement to exit the GP and also opposed the Receiver's Liquidation Plan, which includes the distribution of assets. The district court denied Appellants' motion and granted the Receiver's. Order at 11 and 31-32.

The Receiver cites *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003) for its language that a final judgment ends "the litigation on the merits and leaves nothing for the court to do but execute the judgment." Yet, the district court has already entered a final judgment which implies there is "nothing for the court to do but execute the judgment." And that is the case here. "The purpose of the finality requirement is to avoid piecemeal appeals." *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1139 (9th Cir. Or. 2003). That is not the risk here. If the Order is not reversed, it would create piecemeal appeals: 36 appeals from the orders confirming the sales. It also raises the risk of a different harm. If the right to appeal were delayed as the Receiver proposes, any appeal could be moot.

The Receiver's brief ignores the fact there were two plans to wind up the receivership before the district court: the Receiver's and Appellants'. In choosing the Receiver's, the court issued an order refusing to windup the receivership as Appellants proposed. Hence, this Court also has jurisdiction under 28 USC § 1292(a)(2), because the Order refuses "to wind up [a] receivership or to take steps to accomplish the purposes thereof."

The district court's April 5, 2016 order (Dkt. No. 1224) directed the Receiver "to craft a proposal that would enable general partnerships ("GPs") that wish to do so to exit the receivership while maintaining control of their properties instead of having their properties sold." *Id*., at 2. In reply, the Receiver's plan barred 69 of the 87 GPs from exiting the receivership. The Receiver set conditions for the remaining 18 GPs that would make it economically unfeasible for them to exit. Dkt. Nos. 1264 and 1275.

In this void, Appellants filed an *ex parte* application requesting the district court to consider their alternative plan. 1293-1 at 5-10 Appellants first explained why "an accounting is necessary before any plan can be approved." 1293-1 at 4-5. Then, conditioned on the accounting, Appellants proposed an alternative plan. Dkt. No. 1293-1 at 5-10. The plan tracked the procedure for the approval of a plan of reorganization in a bankruptcy court: provide investors with the material facts and allow them to make the decision. Appellants also tailored their plan, to the extent possible, to the district court's conditions for a GP to exit the receivership.

Appellants' proposed plan falls within two provisions of 28 USC § 1292(a)(2). First, the plan itself is a plan "to wind up a receivership." Second, the accounting was a specifically proposed step in the process of that plan. In granting the Receiver's plan, the district court considered and refused to order Appellants' windup plan and refused to order the accounting, an express step in that plan.

Order at 11 and 23-24. For the same reason, the Order would also be appealable under 28 USC § 1292(a)(1) as an order "refusing to dissolve or modify injunctions." Appellants proposed plan contemplated a lifting of the stay.

Appellants also requested the district court to consider if the case could "more appropriately handled through the filing of Chapter 11 and, with the vote of the majority, allow a Chapter 11 to be filed." Dkt. No. 1293-1 at 9. Again, the Order rejected this option without comment. The district court's rejection of the bankruptcy option comes within the scope of a "wind up" within the meaning of § 1292(a)(2). *SEC v. Lincoln Thrift Asso.*, 577 F.2d 600, 602 (9th Cir. Ariz. 1978).

Finally, Appellants address the issue to which the Receiver devoted much of his brief: may jurisdiction may be based on the collateral order doctrine? The answer is yes. But first, we take a closer look at some factors in this case which the Court may wish to consider in applying the doctrine to this appeal.

To begin with, none of the cases the Receiver cited involved orders issued *after* the entry of the final judgment. In this context, we review the three elements of doctrine: an "order must (a) conclusively determine a disputed question, (b) resolve an important question *completely separate from the merits of the action,* and (c) *be effectively unreviewable upon appeal from a final judgment in the case*." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The italicized language implies the doctrine was developed to deal with orders issued

before the entry of final judgment. Before final judgment, the requirement that "the important question be completely separate from the merits of the action" clearly makes sense. There could be endless appeals regarding the merits of the case before final judgment. But it fails to serve that purpose after final judgment. It simply creates an appellate limbo for those orders. The third requirement—"be unreviewable upon appeal from a final judgment"—likewise makes sense for orders issued before the final judgment, but not afterwards. In sum, Appellants cannot see any judicial policy that would be served by applying all requirements of the collateral order doctrine to post final judgment orders.

Appellants also note the Court made this distinction in *Legal Voice v. Stormans Inc*., 738 F.3d 1178, 1183 (9th Cir. 2013) between pre- final judgment and post-judgment interlocutory order. The Court also distinguished *SEC v. Capital Consultants LLC*, 453 F.3d 1166 (9th Cir. 2006), the case the Receiver relies on primarily. On this point, this Court observed:

> Whether a non-party may appeal an interlocutory order after entry of final judgment is therefore an open question in this circuit. We now hold that a non-party may appeal an interlocutory order within thirty days after entry of final judgment to the same extent that a party may appeal such an order.

Legal Voice, 738 F.3d at 1183.

The facts of this case can be distinguished from those in *Legal Voice*, but not in ways that change its legal principle. The final judgment was entered on January

21, 2016, (Dkt. No. 1170) and the Order on May 25, 2016. Consequently, the period to appeal from the final judgment had expired by that date. However, Appellants submit the *Legal Voice* principle should apply and Appellants should be permitted to appeal the Order issued after final judgment was entered.

All the cases cited by the Receiver involve disputes relating to the calculation of the investors' claim under the Receiver's plan. In *Capital Consultants*, the court imposed a "remittance" to reduce the amount a claimant would receive based on an earlier distribution. This Court described the issue presented as follows: "This appeal presents the question of whether a district court's order determining the rights and liabilities of some, but not all, claimants with claims to receivership assets is a final decision under § 1291." *Capital Consultants LLC*, 453 F.3d at 1169. Likewise, in *U.S. CFTC v. Forex Liquidity LLC*, 384 Fed. Appx. 645 (9th Cir. 2010), the claimant appealed the distribution order itself: "Gray acknowledges that the distribution orders do not dispose of the underlying litigation, but argues that the orders are appealable as collateral order." *Id*. at 647. Finally, in *SEC v. Tringham*, 475 Fed. Appx. 203 (9th Cir. 2012), this Court described the appeal: "Robert Tringham appeals pro se from the district court's order denying his motion to release $24,200 in an ongoing equity receivership." *Id*., at 204. In each of these cases, the claim involved a pretrial

judgment order regarding the amount of money the claimant would receive. In each case, those orders could be appealed through a final judgment.

Those cases have nothing in common with the facts of this case. In this case, 192 investors claim their due process rights have been violated by the district court's orders voiding the GP agreements, redefining the ownership of the assets the invested in those GPs, and distributing those assets in conflict with the GP agreements. These investors seek to retake control of their properties, all raw unimproved land. They seek the right to make the decisions whether to hold the property or sell it. These rights have been stripped from them. The Receiver's plan would give 99% of the assets of each GP to strangers. Appellants should get their day in court. And that day in court begins with this Court deciding their appeal.

None of these issues can be appealed through the final judgment, because it has already been entered. The Receiver has already seized the funds from Investors' GP bank accounts and pooled and commingled them in a single account. The same process will continue as the properties are sold. Eventually, the Receiver's contention that this appeal was made too early will become a contention it was made too late and is therefore moot. That is neither due process nor justice.

DATED: July 8, 2016

Aguirre Law, APC

By: /s/ Gary J. Aguirre
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STATEMENT OF RELATED CASES
(9th Circuit Rule 28-2.6)

1. United States Court of Appeals, Ninth Circuit, Case No. 13-56761

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

2. United States Court of Appeals, Ninth Circuit, Case No. 13-56948

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

3. United States Court of Appeals, Ninth Circuit, Case No. 14-56313

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

4. United States Court of Appeals, Ninth Circuit, Case No. 14-56315

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

5. United States Court of Appeals, Ninth Circuit, Case No. 16-55167

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

6. United States Court of Appeals, Ninth Circuit, Case No. 16-55414

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

CERTIFICATE OF COMPLIANCE

The foregoing Appellants' Response to Motion to Dismiss Appeal for Lack of Jurisdiction as to Third and Fourth Orders in Notice of Appeal complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because: This brief contains 5,243 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: July 8, 2016

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 motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on July 8, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: July 8, 2016

Aguirre Law, APC

By: /s/ Gary J. Aguirre
GARY J. AGUIRRE
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