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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

INVESTORS' REPLY TO SEC'S AND RECEIVER'S OPPOSITION TO INVESTORS' MOTION TO INTERVENE

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

Table of Contents

Table of Authorities

Cases

Treatises

I. Introduction

Investors[1] believe there is one major issue before the Court: returning the assets in the receivership to investors. Investors believe Justice and the law impose two requirements on that process: (1) investors' meaningful participation and (2) disclosure of the material facts to investors.

Hundreds of Supreme Court cases have decided whether a litigant has standing depends on whether he or she is an aggrieved party. Our Justice system operates best when aggrieved parties speak through attorneys whose skills are not too mismatched. The Court cannot be expected to protect those who should be filling the empty seats in the courtroom. There are now empty seats at that table.

The Receiver fills a seat, but has no interest in the assets. The SEC fills a seat, but also has no interest in the assets. Two seats are reserved for Schooler and Western, but neither is in this fight. There is an empty seat: for the Investors who own the assets. For many, it is their retirement. If the SEC and the Receiver, with no financial interests, may distribute investors' assets over Investors' objections while their seats are empty, Lady Justice will join investors as a victim.

The 350 investors appear before the Court in two groups. Both move to intervene in this case to seek orders that would protect all 3,500 investors. We believe the two groups are adequate spokespersons for the rest. No other investor has retained counsel to appear at the scheduled hearings. We expect there will be little if any support for the Receiver or the SEC's positions at the scheduled hearings.

Both the SEC and the Receiver aggressively oppose Investors' motions. Both claim they do so to protect Investors. Both concede Investors may appear at the hearing to express their views, but not participate as parties. Both contend the Receiver would adequately represent their interests. We do not think so.

[1] The names of the investors filing this opposition are listed in Attachment 1 filed herewith.

In this case, history is prologue. Investors have experienced what it means to be represented by the Receiver. The SEC proposed his appointment in September 2012. As a condition to his appointment, the Receiver was supposed to comply with the SEC's billing instructions, maintain a cash accounting system, provide the Court with financial reports with content, and file them first with the SEC. He did none of this, while the SEC silently watched. We have asked the SEC staff for his filings and they never responded.[2] Nor did the SEC ever report the Receiver's noncompliance to the Court in any filing we can find. Instead the SEC allowed him, in violation of its mandates, to provide the Court with financial reports containing huge gaps and Enron-style irregularities. The SEC proposed the Receiver's bond be waived. Dkt. No. 3-1, at 12, 23. The SEC and the Receiver urged the Court to deny the motion allowing the GPs to exit the receivership, while both knew the Receiver's expenses were running at $62,000 a month and investors' cash was evaporating at more than $100,000 a month.

The SEC claimed the GPs had to stay in the receivership while it pursued claims for fraud and disgorgement against a defendant that now appears to be judgment-proof.[3] As cash loss approaches $5 million, the Receiver tells investors that Western has only $1.2 million for them and the collectability of the judgment against Schooler is unknown. And the GPs' true losses and financial conditions are unknown, because the Receiver failed to comply with SEC mandates, case law, and applicable accounting standards. All while the SEC silently watched. Now, before the Receiver accounts for the first $19 million, the SEC and the Receiver ask the Court to entrust him with at least $23 million more.

No viable plan can be offered or considered without a clear financial picture of the GPs and Western. None exists. The Court ordered the Receiver to craft a plan so the GPs

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[2] See Aguirre Declaration filed herewith, ¶ 20, Exs. 22 and 25.

[3] "In terms of investor recoveries, Western's assets are already in receivership and it is unknown how much will be collected from Schooler. Therefore, the primary sources of investor recoveries will likely be the assets of the Receivership Entities (the GPs and Western)." Dkt. No. 1181-1 at 8, 10-13.

could leave the receivership. He is unwilling or unable to do so and rails against complying with the Court's order. He failed to come up with any feasible alternatives for almost four years. His "orderly sale" plan was designed to fail. The Receiver told investors paying operational fees and debt payments was throwing good money after bad. Not surprisingly, they stopped paying. And when they did, the Receiver proceeded with his "orderly sale," a euphemism for "without investor's consent." This is no plan. It is a blueprint for failure.

As a consequence, Investors face an oncoming freight train. In his own defense, the Receiver tells how he warned investors the freight train was headed their way. We do not dispute that, never have. In fact, his dire warnings were part of the blueprint for failure. But the locomotive engineer should do something more than warn of the crash. He needs to find a sidetrack or let the passengers off the train. He did neither.

In the absence of any substantial authority or evidence, the SEC and the Receiver blow smoke: dense and in high volumes. Both claim Investors seek to re-litigate the past four years. We assure the Court our modest budget would run out soon if we were so foolhardy. We are not Panama declaring war on China for failing to pay the toll when its ship passed through the canal.

Our focus is surgical. And the Court decides its scope. The Court may safely assume neither the SEC nor the Receiver will shy away from pointing out any transgressions, real or otherwise. With these comments in mind, Investors will submit an order limiting the scope of their proposed intervention to post judgment issues along these lines:

1. Proposing a plan allowing the GPs to exit the receivership;
2. Seeking an order that the GP agreements remain in effect;
3. Proposing options to sell the properties, including 28 USC § 2001;
4. Proposed plan of distribution for GPs which remain in the receivership; and
5. An accounting of the receivership.

The first four subjects are tightly interwoven. The first would allow Investors propose a plan for the GPs to exit the receivership, something the Receiver is unable or unwilling to do. Assuming a majority vote in favor of the plan and the GP meet any conditions the Court sets, investors would take control of the GP. Assuming these steps occur, Investors would seek an order that the GP agreements are in full force and effect. This raises no new issue. The Receiver seeks an order on May 6 that would render the GP agreements void; the declaratory relief seeks the opposite finding.

That leads to the third prong. It is pointless for the GPs to leave the receivership if the Receiver has sold their only asset, especially at prices beneath their value. Investors claim the Receiver has not complied with 28 USC § 2001. Numerous SEC cases hold 28 USC § 2001 controls the sale of realty. Dkt. No. 1230 at 7-10. Yet, neither the SEC nor the Receiver has ever cited this statute in motions to sell GP properties. Investors set a hearing for June 3, 2016, for the Court to decide how 28 USC § 2001 will be applied to the sales in this case.

Fourth, we ask for an accounting. The Receiver's financial reports to the Court and his record keeping are packed with huge gaps and irregularities. Investors have filed a noticed motion set for hearing for June 3, 2016, seeking an accounting. It describes in detail why one is necessary. Investors have also filed a declaration with this motion describing more briefly why the Receiver's most recent efforts to defend his practices are just as misleading as his early ones.[4]

Finally, Investors seek to participate in any proceedings before the Court in relation to the proposed plan if for any reason the GPs do not exit the receivership.

II. The Receiver Has Not Disputed Investors' Status as Necessary Parties

Investors have alleged in the proposed complaint in intervention (Complaint) that they are partners in the 87 GPs and thus necessary parties, because the Receiver "plans to dissolve, liquidate and terminate, and, after which, the Receiver plans to distribute

[4] Aguirre Decl. ¶¶ 2-15, Exs. 1-22.

said GPs' assets to third parties who have no legal or equitable right to said assets (Complaint ¶¶ 12, and 13 (A) and (B))." In our opposition to the Receiver's Liquidation motion (Dkt. No. 1235), we argued this case must be stayed, because investors were not joined as necessary parties, citing both federal court and California state court decisions holding that partners are necessary parties in a proceeding to liquidate the partnerships. *Delta Financial Corp. v. Paul D. Comanduras & Assoc.*, 973 F.2d 301, 306 (4th Cir. Va. 1992); *Rudnick v. Delfino*, 140 Cal. App. 2d 260, 265 (1956). On February 4, the Receiver initiated proceedings to liquidate the 87 GPs, but has failed to serve, to the best of our knowledge, any of the investors in this case. Neither the Receiver nor SEC has responded to that argument.

III. Investors' Motion to Intervene Is Timely

The SEC and the Receiver contend Investors' motion is not timely on some issues, but concede it is timely on others. The SEC parses the issue: "If all they truly wanted to do was intervene *so they could express their views about the receiver's proposed distribution plan and the process for selling the GP properties*, then their motions might have been timely (emphasis added)." Dkt. No. 1266, at 8, 22-24. The Receiver goes one step more: he claims it would be untimely for Investors' to challenge his wholesale violations of 28 USC § 2001. Dkt. No. 1260 at 5, 5-8.

The SEC and the Receiver contend that "timely" means *early* in the context of Fed. R. Civ. P. 24. The SEC knows better. Indeed, the lead staff attorney who brings this motion knows timely means ripe, not too early and not too late. He was also the lead attorney in *SEC v. ABS Fund, LLC*, 2013 WL 3752119 (S.D. Cal. 2013), but was then arguing that timely means not too early. His brief in that case argued to this Court: "[Kern] argues that his motion is timely because the parties are only now beginning the discovery process. However, …his only interest in intervening concerns the payment of penalties or disgorgement … *But there is nothing currently pending before the Court*

regarding the issues of civil penalty and disgorgement (emphasis added)."[5] We cannot improve on the SEC's statement of this principle.

Using the SEC's logic, this motion to intervene would not be timely until this case had reached the point when the termination of the receivership was "pending" before this Court. On that point, we have clear guidance from the Court's March 4, 2015, order: "the most equitable decision is to keep all the GPs within the receivership until the conclusion of this case." Dkt. No. 1003. Given the clarity of that order, we do not believe a motion to intervene would have been proper, much less timely, until "the conclusion of the case." Had we ignored the Court's guidance, as the SEC now suggests, and brought the motion to intervene shortly after the Court's order (Dkt. No. 1003), the SEC would surely have pointed our disregard of the Court's guidance.

Nonetheless, the SEC argues this motion should have been brought in August 2015, six months before any investor had retained counsel. The SEC argues Investors' counsel was conducting informal discovery at that time. This is pure fiction. He had not been retained. He had made no decision whether to take the case. He contacted the SEC staff attorney handling this case, Sara Kalin, and asked her if there were any key orders defining the issues in the case, since the record was far too voluminous to review. She sent one order, the Court's order of March 4, 2015 (Dkt. No. 1003).[6] That order, as discussed above, made crystal clear that no motion to intervene should be filed until "the conclusion of the case." Investors' counsel had no discussion regarding discovery, formal or informal, with Ms. Kalin. As mentioned in Investors' counsel earlier declaration, he declined the case for personal reasons.[7] The notion a phone call seeking an order regarding this case somehow made a motion to intervene timely is specious.

But that is only the first of two arguments that would best be labeled as "grasping at straws." The SEC comes up with another specious theory to circumvent *Chamness v.*

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[5] See Investors' Request for Judicial notice (Dkt. No. 1272), Ex. 1, at 6, 23-28.
[6] Aguirre Decl. filed herewith, ¶ 38, Ex. 39.
[7] *Id*.

Bowen 722 F.3d 1110, 1121 (9th Cir. Cal. 2013), quoted in our first brief for this principle: "In analyzing timeliness, however, the focus is on the date the person attempting to intervene should have been aware his 'interest[s] would no longer be protected adequately by the parties,' rather than the date the person learned of the litigation.'"

The SEC contends there was an event in May 2015 when Investors should have realized they would no longer be adequately protected by the parties in this case:

> [I]n May 2015, the Court held that the offer and sale of GP interests was one, integrated offering, based, in part, on the fact that 93% of investor funds went directly to Western. *See* Dkt. No. 1074 at 7. So it is no surprise at all that the receiver's recommended distribution plan calls for a *pro rata* distribution of assets equally to all investors."

Dkt. No. 1266 at 10, 6-10. We believe this argument is worth fully embracing. Imagine a 70-year-old retired engineer who invested $30,000. The SEC would assume he spends his spare time perusing the 1,200 pleadings and 110 orders in this case. He subscribes to PACER so he misses nothing. On May 19, 2015, he reads the order issued that day. Midway through the decision, he reads, "thus the 17 C.F.R. § 230.502(a) factors, as a whole, warrant considering Western's sales of GP units for all the GPs to be a single, integrated offering." Stunned, he turns to his wife and says: "Judge Curiel found the partnerships are single, integrated offerings." His wife looks at him for a moment and then utters: "Pooling must be coming next." Not missing a beat, he replies: "Guess we better call that securities lawyer." This is the scenario the SEC postulates. And had they done that, and the securities lawyer was worth his salt, he would have said exactly what the SEC told this Court in *ABS Fund*: "there is nothing currently pending before the Court involving pooling. Call me next year when the issue may be pending."[8]

[8] *Supra*, n. 3.

IV. Investors Have a Significantly Protectable Interest in This Action

The Receiver's opposition has a section titled "protected interests" but addresses neither the law nor the facts regarding Investors' assertion they have a protectable interest. We refer the Court to our opening brief on this issue. Dkt. No. 1229-2, at 6. We also note the Court held investors have a protectable interest in this action.

V. No Party Adequately Represents Investors in This Case

The SEC and Receiver have a super-case, their *passim* case, *SEC v. TLC Invs. and Trade Co.* 147 F.Supp.2d 1031 (C.D. Cal. 2001). The SEC cites it 11 times as support for each of its three arguments why Investors should not be permitted to intervene as a matter of right. The SEC's and Receiver's broad reliance on *TLC Investments* is misplaced. *TLC Investments* held that investors seeking to intervene in that case, on comparatively weak facts, satisfied the second ("an interest relating to property or transaction that is the subject of the action") and third ("disposition of the action may impair or impede the applicant's ability to protect the interest") requirements for mandatory intervention. *Id*. On the first element (timeliness), the court noted that "Applicants have waited until several months *after* the liquidation plan and sale procedures were approved to make their motion (emphasis added)." *Id.* at 1041. The court passed over the issue without deciding it. In this case, Investors began objecting to the plan less than a month after it was proposed. Dkt. Nos. 1184, 1186, 1187, and 1194.

Turning to the fourth requirement, both the SEC and the Receiver rely on the specific holding in *TLC Invs.* 147 F.Supp.2d 1031, and cite the principles stated in *Arakaki v. Cayetano,* 324 F.2d 1078 (9th. Cir. 2003). Consequently, both arguments are flawed for the same reasons.

The SEC tells the Court, "Again, the *TLC Investments* investors made the same arguments" as the investors in this case. Dkt. No. 1266 at 12, 25-26. This is roughly 3% truth and 97 percent fiction. We have 11 reasons why the Receiver is not an adequate representative. As discussed below, 10 of the 11 do not relate to realty.

Our objection to the Receiver's procedures for handling the sale of realty has three components: (1) they violate 28 USC § 2001; (2) the Court was not informed of the statute; and (3) the Receiver concealed both from investors by his under-seal submissions. We can find no citation of 28 USC § 2001 by the Receiver until his filing on April 6, 2016, (Dkt. No. 1225) well after our motions raising the issue. Dkt. Nos. 1217, 1219, and 1221. Meanwhile, the SEC watched from the sidelines, despite numerous SEC cases applying 28 USC § 2001. Dkt. No. 1230 at 7-10.

The SEC argues that the investors in *TLC Investments* and Investors in this case made "the same arguments." The SEC gives an "example:" "the investors in *TLC Investments* 'did not agree with the 'secretive' sales procedures approved by the Court.'" *Id*. at 12-13. The SEC's statement is misleading at two levels. An "example" implies the existence of others of the same type. There were no others. The investors in *TLC Investments* made one and only one *argument* why the Receiver was not an adequate representative: the "the secretive sales procedures."

The SEC clipped the phrase "secretive sales procedure" out of a context and then created a new distorted context. In context, the sentence reads: "Applicants *make only one argument* as to why the Receiver does not adequately represent their interests: they do not agree with the 'secretive' sales procedures approved by the Court." *Id*. at 1042.

Before addressing the broader principles, we reply to the Receiver's erroneous claim that Investors must prove with evidence the Receiver is an inadequate representative. Not true. Rather, the courts "are to take well-pleaded, nonconclusory allegations in the motion to intervene as true absent sham, frivolity or other objections." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

We turn now to the principles the Court should apply. Both the Receiver and the SEC cite *Arakaki* and its three factors as the controlling authority in deciding whether a party to the litigation is an adequate representative for the person trying to intervene. Yet, neither addresses, much less applies, the three factors articulated in *Arakaki*. There the Ninth Circuit gave this guidance:

> This Court considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

As discussed below, Investors have established this factor 11 times over.

First, the Receiver cannot serve as an adequate representative for any investor, because he cannot or will not carry out the Court's order "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." Dkt. No. 1224, at 2, 2-4. Using the single tool in his kit and with his blinders in place, he can only find the exit for five of the 36 properties with a total value of $1.40 million, less that 6% of the $23.84 million, according to him, the properties are worth. This is not a response to the Court's order. It is a protest. Investors are prepared to present their own plan. No other party will. The *Arakaki* factors are satisfied. 324 F.3d at 1086.

Second, the Receiver's plan is a fire sale masquerading as an "orderly sale." He makes it very clear in his recent filings. First, in his reply to the Investor Group's motion to intervene, he argues: "In other words, the Xpera recommendations for 27 out of 36 GP properties (other than its 2016 value estimates, which can be used in considering broker list prices and evaluating offers) are essentially irrelevant due to the severely distressed state of these GPs." Dkt. No. 1262 at 4, 17-20. In short, the properties must be sold immediately below their true value, because he claims he has to pay bills. If this is not a fire sale, what is?

He has already committed himself to the fire sale and pooling. He told Lincoln Property Company ("Lincoln") "properties would be moved to the orderly sale process in situations where GPs cannot pay their basic expenses and the understanding that [Lincoln's] past due invoices would be paid from the net sale proceeds." He told the same to his tax consultants. *Id.* at 4, 1-12 and 16-20. He proposes to sell the Las Vegas 1

property for $6.150 million (Dkt. No. 1203, Ex. A) and the LV Kade property for $8.5 million (Dkt. No. 1166, Ex. B, p. 31), because there is outstanding tax liability in the amount of $48,880.77 for Las Vegas 1 and $102,196.28 for LV Kade.[9] Alan Nevin, one of the most respected real estate consultants in San Diego, believes the Las Vegas 1 property would sell now between $7.423 million and $9.764 million and the LV Kade property is worth somewhere between $8.69 million and $11.175 million. No one else can or will make this argument. Again, the *Arakaki* factors are satisfied. 324 F.3d at 1086.

Third, Nevin believes the Las Vegas 1 and LV Kade properties will appreciate between $0.5 and $1 "per square foot annually over the next decade." Dkt. No. 1234-2, at 31. And this raises another fundamental flaw in the Receiver's team. The Receiver has never hired anyone to analyze whether any of the properties have promise for significant appreciation. He merely assumes—in an evidentiary void—that none does. Obviously, no party will "undoubtedly" make this argument. No party is "capable and willing" to make this argument. Once again, the *Arakaki* factors are satisfied. 324 F.3d at 1086.

Fourth, the Receiver would strip investors, including the 197 Investors who bring this motion, of their rights under the GP agreements which are fully enforceable under California law. Each of these Investors would suffer significant financial loss if their contractual rights were voided by the Receiver. Obviously, the Receiver has committed himself to opposing any rights Investors or any other investor has under those agreements. Aside from the Investors who are seeking to intervene in this case, no one will argue that position. Consequently, the factors in *Arakaki* are established.

Fifth, the SEC and the Receiver have invited the Court to cross the Due Process boundary. Page limitations prohibit us from going into detail. Very simply, however, this has been a seizure. The SEC has placed the GPs in the evidence locker for four years. And now, the Receiver and the SEC wish to rid themselves of the evidence, since it is no

[9] See Dkt. No. 1258-2, ¶¶ 24-26, Exs. 17-18.

longer useful and inconvenient to have around. Rather than acknowledge the investors' Due Process rights, the Receiver has run a steamroller over them with the SEC directing. In this case, Due Process entitles Investors to plenary proceedings. The Receiver has failed to provide 3,500 investors with Due Process at its lowest rung, summary proceedings. As the court observed in the SEC's favorite case, *TLC Investments*, Due Process would require the Receiver to give actual notice to all investors and the opportunity to be heard. *TLC Investments*, 147 F.Supp.2d, 1034. The Receiver did not begin his liquidation proceedings until February 4, 2016. To the best of our knowledge, the Receiver has not served notice on investors of his intention to liquidate the 87 GPs other than putting his filing on his website. He has informed the Court previously that investors do not review the information posted on the receivership website. Dkt. No. 852, at 2, 12-13. Obviously, the Receiver will not make this argument on behalf of any investors. Consequently, the factors in *Arakaki* are established.

Sixth, assuming *arguendo* liquidation is necessary, the Receiver has never considered the alternative of a Chapter 11 or any other bankruptcy court. This is not an option the SEC permits. The restraining order proposed by the SEC stayed the filing of any bankruptcy proceeding, including a Chapter 11. Consequently, the Receiver has taken this case down a path which should be rarely followed, according to strongly worded decisions from the Ninth and Second Circuits. In *SEC v. Lincoln Thrift Asso.*, 577 F.2d 600 (9th Cir. 1978), the Ninth Circuit observed: "In recognition that liquidation of a corporation under a securities receivership may more properly be the subject of a bankruptcy proceeding, this Court has reversed a district court order for liquidation of a corporation in a securities receivership." See also: *TLC Invs*., 147 F.Supp.2d at 1036 ("It is only in rare cases that it is appropriate for a receiver, rather than the bankruptcy court and particularly before judgment has been entered, to liquidate, rather than manage, the assets of a receivership."); *SEC v. American Bd. of Trade, Inc*., 830 F.2d 431, 437-438 (2d Cir. N.Y. 1987)("[T]he functions undertaken by the district court in this case demonstrate the wisdom of not using a receivership as a substitute for bankruptcy." The

court directed the SEC staff member "as an officer of the court … to bring our views … to the attention of the district court before the court embarks on a liquidation through an equity receivership.").[10] Again, only Investors would even look into this option.

Seventh, the Receiver has a proclivity to violate 28 USC § 2001 in selling realty and does his best to conceal the violations from any investor client who might have the background to spot it. That statute is designed to protect owners of real estate from court-ordered sales that deprive them of the value of their property. It is especially important for the parties to comply with that statute when the owner of the realty is not a party. For the Receiver, that is an invitation for him to ignore 28 USC § 2001, because no "party" objects and thus the violation is waived. Obviously, the Receiver will not argue that he has failed to comply with 28 USC § 2001. He is vigorously defending his non-compliance. Again, the *Arakaki* factors are established.

Eighth, the Receiver has aligned himself in favor of the group of investors who would be better served by pooling against those who would not be. The Receiver's opposition proves our very point: he vehemently opposes Investors' non-pooling approach and with the same intensity embraces the other group of investors who would be better served by pooling. He argues, "Unlike the Aguirre Investors, the Dillon Investors set forth a coherent plan - approve the One Pot Approach, pool receivership assets, and sell GP properties consistent with the recommendations of Xpera Group ('Xpera')." Dkt. No. 1262 at 1, 11-13. Obviously, the Receiver cannot represent Investors under the *Arakaki* factors.

Ninth, the Receiver follows the same practice the SEC has proposed in every case where it has had a receiver appointed. It is human nature for the Receiver to try to please

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[10] See also Megan E. Smith, Comment, *SEC Receivers and the Presumption of Innocence: The problem with Parallel Proceedings in Securities Cases and the Ever Increasing Powers of the Receivers*, 11 HOUS. BUS. & TAX L.J. 1, 203-31 (2011); Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE L.J. 209 (2014)

the SEC. Displeasing its staff could cost the Receiver future appointments. An article in the American Bankruptcy Institute recognizes this as a real risk: "This result might even be prompted by the receiver's interest in future appointments from the SEC."[11] The SEC alone decides who it recommends to the courts. And the reward for pleasing the SEC is seven-figure fees, as Thomas Hebrank expects in this case.[12] And following the SEC's instructions in SEC liquidation cases can be disastrous for investors and overwhelming for the courts. *Supra*, Sixth point at 12. The SEC's track record for investors has not been a stellar one.[13] The Receiver had the SEC editing his briefs until the Court ordered him to stop that practice. Dkt. No. 1004, at 12, 16-23. For his part, the SEC has reciprocated. It has ignored the Receiver's violations of SEC mandates requiring him to submit financial statements to the Court specifying his receipts and disbursements down to the penny.[14] Again, the *Arakaki* factors are established.

Tenth, there is virtually no possibility that this case can settle with only the current parties: the SEC and the Receiver. In the absence of a settlement, the probabilities of an appeal are high, thereby extending the case. The participation by two groups of

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[11] Marcus F. Salitore, *SEC Receivers vs. Bankruptcy Trustees Liquidation by Instinct or Rule*, American Bankruptcy Institute Journal, Oct. 2003, available at http://www.abi.org/abi-journal/sec-receivers-vs-bankruptcy-trustees-liquidation-by-instinct-or-rule.

[12] Through Dec. 7, 2015, the Receiver's team had applied for almost $2.2 million in fees. From that amount, $1 million are fees for the Receiver. See interim fee applications 1 through 13.

[13]

> However, based on an analysis of SEC data, this enthusiastic rhetoric does not reflect reality. Efforts to distribute funds to harmed investors have tapered off over time, such that the vast majority of sums collected are still deposited in Treasury's General Fund. This ensures that the SEC contributes more revenue to the government than any other independent agency.

Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE L.J. 209, 211 (2014). See also Investors Request for Judicial Notice, Ex. 4, U.S. Government Accountability Office Report No. GAO-10-448R SEC Fair Fund collections and Distributions, April 22, 2010.

[14] Aguirre Decl. ¶¶ 15-20, Exs. 22-25 .

aggrieved investors—one seeking pooling and one other non-pooling—represented by attorneys seeking a pragmatic solution creates an improved environment for settlement. The Receiver is hopelessly conflicted in trying to settle this case. And we doubt the SEC would allow him to consider that possibility. He has also antagonized investors. He created the term "Schooler investors" to label those who had the foresight to speak against his receivership and claimed that was proof they were mindlessly manipulated by Schooler "into believing the receivership is harming them." Dkt. No. 852 at 2, 24-25. There is no way this case can be settled unless Investors are permitted to intervene. Again, the *Arakaki* factors are established.

Eleventh, and finally, there are the huge gaps and irregularities in the Receiver's financial statements to the Court and his record keeping. On this issue, we have filed a separate motion (Dkt. No. 1258) stating the material issues known to us at that time. We have also filed with this reply the declaration of Investors' counsel that addresses one aspect of the gaps and irregularities: gaps in the Receiver's interim reports to the Court.[15] We do not ask the Court to rule on that motion, since it is set for hearing on June 3. Rather, we request judicial notice in relation to the issue whether the Receiver can be expected to adequately represent Investors. Obviously, the Receiver is not going to bring that motion. No one will do that, but these Investors. Again, the *Arakaki* factors are established.

VI. The SEC's Own Ninth Circuit Authority Refutes Its Impairment Theory

The SEC cites *Northwest Forest Res. Council v. Glickman*, 82 F.2d 825, 836 (9th Cir. 1996) for its statement of the four factors a non-party must establish to intervene, but then ignores its third factor: "the disposition of the action may impair or impede the applicant's ability to protect the interest." The SEC nowhere applies the *Northwest Forrest* third factor to this case. Instead, it cites two Ninth Circuit cases: one does not

[15] See also Aguirre Decl. ¶¶ 2-15 and 21-37; Exs. 1-22 and 26-38.

even mention Rule 24, *CFTC v. Topworth International, Ltd*., 205 F.3d 1107 (9th Cir. 1999) and the other, *TLC Investments*, refutes the SEC's contention on impairment.

The primary question on appeal in *Topworth* was whether an investor who had participated, but not moved to intervene, had standing to appeal. The Court held he did. *Topworth*, 205 F.3d at 1112. As the defendants did here, Topworth, the corporate defendant, challenged the "summary proceedings" on behalf of non-parties as a "violation of due process." The court rejected the contention in a brief paragraph with no analysis. *Id. at* 1113. The case stands for the principle that a liquidation plan, absent other facts, does not constitute a violation of due process.

Once again, the SEC's favorite case, *TLC Investments*, lends no support to its argument. To the contrary, on comparatively weak facts, the Court in *TLC Investments* held "The disposition of the action, because it is likely to use up all remaining assets of the TLC entities, may, as a practical matter, impair the Applicants' ability to protect their interests in the property in other forums" *TLC Investments*, 147 F.Supp.2d at 1041. Investors have no rights in other forums. The Receiver is about to distribute the assets held in their GPs in violation of the GP agreements to non-partners.

The SEC's cites *TLC Investments* as authority on its impairment argument, even though the case held the opposite on the issue the SEC cited it for. This takes finesse. The SEC seizes on a passing comment in *TLC Investments* on a different factor, the *adequacy of representation*, and passes it off as if it relates to the *impairment factor*. On the adequacy of representation factor, discussed in the last section, *TLC* comments in passing on cases from other circuits holding intervention was unnecessary where "applicants may assert their claim in summary claims process." *Id*, at 1042. Two of those cases have a very simple fact pattern. In *CFTC v. Chilcott Portfolio Mgmt. Inc.*,725 F.2d 384 (10th Cir. 1984), the investor tried to sue the receiver to recover his investment; the court held he should use the claims procedure. In *CFTC v. Heritage Capital Advisory Servs. Ltd.*, 736 F.2d 384 (7th cir. 1984), the investor sought to recover his funds; the court held he could sue the receiver or file a separate action, presumably against the defendants. That option

has not been available in this case since the Court issued the stay. The issue in *SEC v. Charles Plohn & Co.* 448 F.2d 546 (2d Cir. 1971) was different. The third party was allowed to effectively intervene and fully litigate the issue that affected him. The court reasoned: "They were served with notice of motion, they were permitted to file papers, submit proof, and be heard on oral argument." *Plohn*, 448 F.2d at 549.

Finally, the Court dismissed without prejudice these Investors' motions and directed us to proceed under Fed. R. Civ. P. 24. Obviously, the path for Investors to raise the issue raised earlier is through this motion. And that is what we have done. As discussed above, we propose a surgical intervention focused on the issues where Investors need protection. Contrary to the SEC's suggestion, these Investors' rights are not currently protected. To the contrary, they are threatened by the two remaining active parties in this case.

VII. Alternatively, The Motion for Permissive Intervention Should Be Granted

The SEC and the Receiver collectively oppose Investors' permissive intervention on three grounds: (1) it raises no common fact or law with the main action; (2) Investors' "legitimate interests" are adequately represented by the Receiver; and (3) it would delay the distribution of assets. None of these contentions are true. We have fully addressed above the inadequacy of the Receiver as representative of investors.

All of the issues Investors are raising are inherently at issue as the Court proceeds with the termination of the receivership. They all relate to the procedures the Court will follow in returning the assets to investors. The Receiver argues the procedures relating to the sales of properties are an old issue. We disagree. No property has yet been sold. And any sale of the property must comply with 28 USC § 2001. The Receiver and the SEC contend the motion for an accounting involves issues already decided by this Court. The accounting must be provided to the Court before it can approve any plan of distribution. *SEC v. Harris*, 2015 U.S. Dist. LEXIS 11975, 5-6 (N.D. Tex. Feb. 2, 2015)(Plan denied until receiver provides statement of "assets and liabilities, or any other 'account [of] all monies, securities, and other properties which [have] come into her hands during the

course of her receivership." The SEC and the Receiver argue the delay would prejudice investors. It is curious a group of investors is not making the same contention. We have seen the letters written by investors to the Court recently, none by Investors, and so far, all oppose the Receiver's plan. Consequently, only the SEC and the Receiver are pressing for an early distribution. As we discussed before, we believe this is not to protect investors, but to protect themselves.

VIII. Section 21(g) of the Exchange Act Does Not Bar Investors from Intervening in This Action without the SEC's Consent

The SEC contends that Section 21(g) of the Exchange Act would bar Investors from intervening in this case, unless the SEC consents. This Court discussed the conflicts between the district courts in different circuits whether Section 21(g) barred intervention in SEC cases in *SEC v. ABS Fund, LLC* 2013 WL 3752119 (S.D. Cal. 2013). We do not believe it is necessary in this case for the Court to weigh in on which side of the split is better reasoned.

Rather, Investors submit the statute is not applicable to the post judgment proceedings in this case. As a practical matter, this case could have no effect on the SEC's enforcement proceeding. It is over. There is a final judgment. The Receiver has informed the Court his receivership is failing, because it is not conserving assets. It is losing them.

The return of the assets is now delinked from the SEC Enforcement case, if it were ever linked. Indeed, the SEC should allow the Court and the true parties in interest to decide how to return the assets to investors. As the court noted in *SEC v. Credit Bancorp, Ltd*., 194 F.R.D. 457, 468 (S.D.N.Y. 2000), "[N]othing requires the SEC to continue its participation in this action once it has obtained the relief it seeks on its discrete claims."

Nor is there any underlying policy served by barring Investors' from participating as parties in deciding what should be done with their assets. The SEC argues in its

opposition brief that the Court should consider the legislative history stated in *SEC v. Benger*, 2010 U.S. Dist. LEXIS 16545 (N.D. Ill. Feb. 23, 2010) as follows:

> The initial impetus for section 21(g) was the SEC's and Congress's concern that private litigants frequently file actions that track the Commission's enforcement cases and seek to "ride along on the Government's cases." The Commission thought this contrary to the "public interest in securing prompt relief from violations of the securities laws" and in the effective enforcement of those laws. Dkt. No. 1266, at 20.

The legislative history is on point, but provides no support for the SEC. Investors do not seek to "ride along on the Government's cases." They are vigorously trying to end a ride they had no choice in taking.

Benger also offers this insight regarding the legislative history of 21(g):

> The Senate Committee in charge of the legislation observed … involve more parties and more issues than the Commission's enforcement action, thus greatly increasing the need for extensive pretrial discovery. In particular, issues related to . . . scienter, causation, and the extent of damages, are elements not required to be demonstrated in a Commission injunctive action."

Id, 30-31. All of these issues described in *Benger* come into play when an intervenor seeks to litigate *with the SEC* against those who allegedly violated the securities acts. Investors have neither the intent nor the ability to do so. The SEC's case is over and on appeal. Even if it were reversed, we have no intent in participating in a securities fraud case. In fact, it is most likely that any course this Court takes in terminating the receivership will likely be completed before any decision is made on the pending appeal. Looking through form to substance, this case is essentially a claim by Investors to get their assets out of the receivership and, to do that, they need clarity on how much of their assets is left.

If the Court weighs in on the circuit split over 21(g), case law suggests the Ninth Circuit leans toward rejecting Section 21(g) as a bar. The only Ninth Circuit decision, *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 609 (9th Cir. 1978), as this Court noted,

"mentioned in *dicta* that intervention should possibly have been allowed." *SEC v. ABS Manager, LLC*, 2013 U.S. Dist. LEXIS 98822 (S.D. Cal. July 15, 2013). Further, "another court allowed intervention, while making no mention of Section 21(g). *SEC v. Navin*, 166 F.R.D. 435, 440 (N.D. Cal. 1995) (citing *Flight Transportation Corp.*, 699 F. 2d at 949-50)."

We find no case where 21(g) barred investors from intervening in the liquidation phase of an SEC case. For one thing, 21(g) bars "consolidation" or "coordination: with another "action." To define these three terms to include Investors' motion to intervene in this case to get their GPs released from the receivership would rewrite the text of 21(g) contrary to a basic rule of construction. See Sutherland Stat. Construction § 47.01 (5th ed. 1992)(stating that "[t]he starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure"). Nothing in the text, the context, or the legislative history would suggest the interpretation proposed by the SEC.

We did find several cases where the court permitted intervention, finding that section 21(g) did not apply: "Where, as is the case here, the primary concern behind the passage of Section 21(g) is not implicated, and given the plain language of that section, which does not prohibit intervention, the Court finds intervention is not precluded under Section 21(g)." *SEC v. Kings Real Estate Inv. Trust*, 222 F.R.D. 660, 667 (D. Kan. 2004). See also: *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 466 (S.D.N.Y. 2000).

For the foregoing reasons, Investors respectfully submit that Investors' motion to file the proposed complaint in intervention should be granted.

Dated: April 29, 2016

Respectfully submitted,

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

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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

DECLARATION OF GARY J AGUIRRE IN SUPPORT OF INVESTORS' REPLY TO SEC'S AND RECEIVER'S OPPOSITION TO INVESTORS' MOTION TO INTERVENE

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

I, Gary J. Aguirre, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. I am the attorney for 197 investors who bring this motion. Information they have provided me indicate that they have collectively invested in one or more partnerships that have ownership interests in each of the properties that are the subject of the receivership in this matter.

3. I state below a few well-established principles of accountancy. I have studied accounting at Georgetown University Law Center as part of my LL.M. program focused in part on securities regulation. In particular, my professor was David M. Estabrook, currently Associate Chief Accountant at the SEC's Division of Enforcement in Washington, DC. While staff attorney at the SEC in 2004 and 2005, I worked on accounting matters with accountants in the SEC Division of Enforcement. Since leaving the SEC in 2005, my cases have required that I continue to familiarize myself with accounting principles. I learned from Mr. Estabrook that Intermediate Accounting by Donald E. Kieso, Jerry J. Weygandt and Terry D. Warfield, is a well-respected reference book for accounting principles. I believe the discussion of accounting principles below relates to simple and fundamental principles of accounting.

4. I have attached a schedule to this declaration as Exhibit 1 (Comparison of Receipts and Disbursements ("R&D") and Revenue and Expenses ("R&E")) for Western Financial Planning Corporation ("Western") that states the total amounts of Western's R&D and R&E to the extent stated from the Receiver's third interim report (reporting the last quarter of 2012) through his fourteenth interim report (reporting the last quarter of 2015), the last interim report filed with the Court. Seven of the interim reports provide no table for R&D. The omission of that data in the interim reports is indicated in Exhibit 1 as "no data." The interim reports which provide both R&D and R&E for the same quarter appear in bold font.

5. The Receiver provided Western's R&D in tables on the last page of Exhibit A to six interim reports:

- The third for 2012Q4 (Dkt. No. 80), attached hereto as Exhibit 2;
- The fourth for 2013Q1 (Dkt. No. 184), attached hereto as Exhibit 3;
- The sixth for 2013Q3 (Dkt. No. 517), attached hereto as Exhibit 4;
- The seventh for 2013Q4 (Dkt. No. 547), attached hereto as Exhibit 5;
- The eighth for 2014Q1 (Dkt. No. 596), attached hereto as Exhibit 6; and
- The ninth for 2014Q2 (Dkt. No. 759), attached hereto as Exhibit 7.

The amount of the total of "receipts" and "disbursements" on Exhibit 1 is taken from the highlighted line on tables attached as Exhibits 2 through 7. The Receiver provided no table and no statements for R&D in his fifth (Dkt. No. 481), tenth (Dkt. No. 1000), eleventh (Dkt. No. 1065), twelfth (Dkt. No. 1103), thirteenth (Dkt. No. 1142) and the fourteenth (Dkt. No. 1189) interim reports.

6. The Receiver's tables (Exhibits 2 through 7) stating the amount of Western's R&D only state the gross amounts; there is no breakdown by category, e.g., payroll, taxes, professional fees. The table below restates the dollar amounts of Western's R&D for the last quarter of 2012 from the Receiver's third interim report (Dkt. No. 80, Ex. A, p. 3), Ex. 2.

Bank Name	9/5/12 Balance	9/5/12 to 12/21/12 Deposits	9/5/12 to 12/21/12 Disbursements	12-31/12 Balance
Fernley I, LLC	$102.86	$11,506.56	$11,600.00	$9.42
P51 LLC	$2,664.22	$15,685.57	$17,342.76	$1,007.03
Santa Fe Venture	$10,850.86	$56,988.73	$64,060.64	$3,778.95
SFV II, LLC	$4,084.04	$9,703.20	$12,416.68	$1,370.56
WFPC – Corp	$177,359.03	$550,804.75	$646,525.01	$81,638.77
WFPC– Business	($118,928.69)	$539,386.83	$502,160.19	($81,702.05)
WFPC– Payroll	$0.00	$111,369.52	$111,369.52	$0.00

Bank Name	9/5/12 Balance	9/5/12 to 12/21/12 Deposits	9/5/12 to 12/21/12 Disbursements	12-31/12 Balance
WFPC– MMKT	$847.27	$0.13	$20.0	$827.40
WFPC– Special	$222.88	$1,741.34	$0.00	$1,964.22
WFPC– FFP	$1,598.24	$9,087.05	$6,000	$4,685.29
WFPC– Las Vegas Prop Tax	$1,771.53	$0.00	$0.00	$1,771.53
WSCC, LLC	$45,334.51	$732,156.09	$721,752.82	$55,737.78
First Financial Planning	$1,450.97	$8,593.36	$6,000.00	$4,044.33
Total WFPC Bank Accounts	$127,357.72	$2,047,023.13	$2,099,247.62	$75,133.23

As is evident from the table, it provides no breakdown by category of Western's R&D for any the last quarter of 2012. The tables for the other quarters (Exhibits 3 through 7) likewise do not provide any breakdown by category of Western's R&D. In my opinion, these tables do not comply with the requirements of the SEC Billing Instructions for Receivers in Civil Actions Commenced by the SEC and SFAR. See ¶ 15 below and Exhibit 22.

7. The Receiver attached Western's R&E quarterly statements as Exhibit B to 11 interim reports: 3 through 6 and 8 through 14. The Receiver did not provide a quarterly report for 2013Q4. Those 11 quarterly statements for R&E are attached as Exhibit 8 through 18 as follows:

- Third for 2012Q4 (Dkt. No. 80), attached hereto as Exhibit 8;
- Fourth for 2013Q1 (Dkt. No. 184), attached hereto as Exhibit 9;
- Fifth for 2013Q2 (Dkt. No. 481), attached hereto as Exhibit 10;
- Sixth for 2013Q3 (Dkt. No. 517), attached hereto as Exhibit 11;
- Eighth for 2014Q1 (Dkt. No. 596) attached hereto as Exhibit 12;
- Ninth for 2014Q2 (Dkt. No. 759), attached hereto as Exhibit 13;

- Tenth for 2014Q3 and 2014Q4 (Dkt. No. 1000), attached hereto as Exhibit 14;
- Eleventh for 2015Q1 (Dkt. No. 1065), attached hereto as Exhibit 15;
- Twelfth for 2015Q2 (Dkt. No. 1103), attached hereto as Exhibit 16;
- Thirteenth for 2015Q3 (Dkt. No. 1148) attached hereto as Exhibit 17; and
- Fourteenth for 2015Q4 (Dkt. No. 1189), attached hereto as Exhibit 18.

As mentioned above, the Receiver provided no R&E statement for Western for 2013Q4 in his seventh interim report. Instead, he provided a statement of R&E "for the 12 months ending on December 31, 2013." That statement is attached hereto and incorporated by reference as Exhibit 19.

8. Western's R&E statements are broken down by category. For example, Western's R&E statement for the fourth quarter of 2012 (Ex. 8)shows the following income (revenue) as follows:

INCOME	
Interest Income	$85,474.08
Interest Income Bank Accts.	$0.06
Commissions	$1,505.64
TOTAL INCOME	**$86,976.78**

The same statement provides breakdowns for five categories of expenses, which are further broken down by subcategories. Exhibit 8. The same pattern is followed in Exhibits 9 through 11 and 19. Starting with the eighth interim report (Dkt. No. 596), the Receiver changed the format of the R&E statement and provided less detail regarding categories and subcategories. Exhibits 12-18.

9. Of the 12 interim reports (3 through 14) that contained financial statements, only five statements contained both the table showing Western's R&D (Exhibits 2-7) and the statements showing Western's R&E (Exhibits 8, 9, 11-13). The revenues and expenses table below shows the amount in dollars (Column E) and percentage (column

F) that receipts exceeded revenue where the interim reports provided the amounts for both revenues and expenses:

Column A	Column B	Column C	Column D	Column E	Column F
Period	**Interim Report**	**Receipts**	**Revenue**	**Difference in $**	**% Difference**
2012Q4	Third, Dkt. No. 80	2,047,000	87,000	1,960,000	2252%
2013Q1	Fourth, Dkt. No. 184	1,348,000	76,000	1,272,000	1673%
2013Q3	Sixth, Dkt. No. 517	1,010,000	24,000	986,000	4108%
2014Q1	Eighth, Dkt. No. 596	1,635,000	481,000	1,154,000	240%
2014Q2	Ninth, Dkt. No. 759	1,385,000	356,000	1,029,000	289%
TOTAL		**$7,425,000**	**1,024,000**	**$6,401,000**	

10. As the table above indicates, the difference between total receipts and total revenues for those quarters where data was provided for both receipts and revenues is a total of $6.4 million. This is the amount for which there is no breakdown in the interim reports regarding the sources or the nature of the receipts, whether it was for note payment, interest accrual, or any other proper or improper purpose.

11. The table below shows the amount in dollars (Column E) and percentage (Column F) that disbursements exceeded expenses where the interim reports included Western's statements for both receipts and revenues:

Column A	Column B	Column C	Column D	Column E	Column F
Period	**Interim Report**	**Disbursements**	**Expenses**	**Difference in $**	**% Difference**
Q4 2012	Third, Dkt. No. 80	2,099,000	254,000	1,845,000	726%
Q1 2013	Fourth, Dkt. No. 184	1,318,000	145,000	1,173,000	809%

Column A	Column B	Column C	Column D	Column E	Column F
Period	**Interim Report**	**Disbursements**	**Expenses**	**Difference in $**	**% Difference**
Q3 2013	Sixth, Dkt. No. 517	901,000	37,000	864,000	2335%
Q1 2014	Eighth, Dkt. No. 596	1,638,000	445,000	1,193,000	268%
Q2 2014	Ninth, Dkt. No. 759	1,398,000	358,000	1,040,000	290%
Total		**$7,354,000**	**$1,239,000**	**6,115,000**	

12. The total difference between gross disbursements and expenses is $6.115 million. This is the sum for which there is no breakdown by category in the interim reports provided to the Court indicating whether it was for payroll, mortgage payments, professional services, printing, or any other proper or improper purpose.

13. There are eight quarters for which no comparison can be made between gross receipts and revenues and between disbursements and expenses, because one of the statements is not provided in the Receiver's interim reports (2013 Q2 and Q4, 2014 Q3 and Q4, and all of 2015). If we assume (extrapolate) the amount of receipts for the missing quarters was the average of the receipts for the quarters for which that data was provided, total receipts would have been $19.341 million. If we assume (extrapolate) the amount of disbursements for the missing quarters was the average of the disbursements for the quarters for which that data was provided, total disbursements would have been $19.350 million. We attach as Exhibit 20 a table that states the total projected R&D using this process of extrapolation. It shows total receipts of $19.341 million and total disbursements of $19.350 million. Regarding R&E, the Receiver has provided the statements for 12 of the 13 quarters and they are reflected in Exhibit 20. If we assume (extrapolate) the amount of revenues for the missing quarter was the average of the receipts for the quarters for which that data was provided, total revenues would have been $3.593 million. If we assume (extrapolate) the amount of expenses for the missing

quarter was the average of the expenses for the quarters for which that data was provided, total expenses would have been $3.874 million. Using the extrapolated numbers for R&D and R&E, a comparison can be made between receipts and revenues and between disbursements and expenses. That comparison shows that receipts exceeded revenues by $15.747 million. And disbursements exceeded expenses by $15,475 million as shown in the table below. These are the sums for which the interim reports do not provide breakdown of receipts and disbursements by categories.

Total Receipts	Total Disburs.	Total Revenue	Total Expenses	Difference Receipts & Revenue	Difference Disburs. & Expenses
19,341,091	19,350,048	3,593,614	3,874,269	15,756,434	15,475,779

14. The Receiver stated receipts and disbursements for the GPs in Exhibit A to interim reports 3 through 14. Like with Western, there was no breakdown by category for R&D. It is unknown where the funds came from, for what reason, or to whom they were paid. There is no receipts and disbursement data for 2013Q2. There is no disbursement data for 2014Q3. There were no R&E statements for any quarter in the interim reports for the GPs and thus no breakdown in any quarter by category. I attach as Exhibit 21 a table reflecting the data provided by the Receiver regarding R&D for the GPs. If we assume (extrapolate) the amount of receipts for the missing quarters was the average of the disbursements for the quarters for which that data was provided, total receipts would have been $6.033 million. If we assume (extrapolate) the amount of disbursements for the missing quarter was the average of the disbursements for the quarters for which that data was provided, total disbursements would have been $8.836 million. This is the amount for which there is no breakdown in the interim reports regarding the sources or the nature of the receipts, whether it was for note payment, interest accrual, or any other proper or improper purpose.

15. In my opinion, the Receiver's reporting of the financial data to the Court in his interim reports violates the SEC standards as contained in its Billing Instructions for Receivers in Civil Actions Commenced by the SEC and SFAR, a true and correct copy of which is attached hereto and incorporated by reference as Exhibit 22. The reporting instructions are found on pages 89 through 99, and the actual form the receivers are required to prepare are included as pages 101 through 106.

16. A true and correct copy of the SEC Office of the Inspector General Report No. OIG Report No. 432, Oversight of Receivers and Distribution Agents (December 12, 2007) is attached hereto and incorporated by reference as Exhibit 23.

17. I believe the following bullet points from the OIG Report 432 relate to the issues in this case:

- Oversight of receivers can be enhanced through better reporting;
- Orders appointing receivers vary in their reporting requirements: how often and in what format.
- The Commission should but does not consistently track reporting requirements;
- Enforcement should better ensure that receivers provide periodic, formal reports describing receivers' efforts to garner assets, administrative costs incurred and the financial condition of the assets collected;
- Enforcement should request receivers to provide a final accounting of all assets collected and disbursed in a specified format;
- The Commission does not have complete or consistent records showing the amount of assets overseen by receivers;
- Enforcement staff do not receive training on how to work with and monitor receivers/distribution agents;
- Enforcement should develop written guidelines on how to manage receivers and a list of red flags;
- Enforcement should provide guidance or training to staff on receiver oversight, including:

- An explanation of the receiver's status as an independent fiduciary who has ultimate responsibility to the appointing court (not Enforcement) and how this impacts issues related to attorney/client privilege and access to records by receivers and Enforcement staff;
- How to identify excessive billings and overcharges;
- How to question or to object to excessive administrative costs;
- Whether to recommend that a receiver not be permitted to charge for the preparation of billings, expenses and other fee documentation.
- When it is appropriate for a receiver to provide the courts and Enforcement with financial statements describing the condition of assets collected;
- How to keep informed of a receiver current and planned activities, including understanding a receiver's strategies for garnering assets and ensuring that planned actions are cost-effective;
- How to draft a distribution plan or review a plan drafted by a receiver/distribution agent.

18. On March 29, 2016, I sent an email to Alistaire Bambach, Assistant Regional Director and Chief Bankruptcy Counsel, Division of Enforcement at the SEC New York office. According to her biography on the Practising Law Institute, "in her current position, Ms. Bambach…has oversight over the SEC's receivership program." My March 29 email to Ms. Bambach included the following question and comment:

> 3. Did the SEC ever implement the recommendations by the OIG in its report No. 432 referred to in my letter of March 18, 2016? If so, was there any public statement by the SEC when the report was implemented? If so, would you kindly guide me to that statement or statements?

Ms. Bambach replied to my email on March 31, 2016. This is her answer to my question above:

> With respect to question 3 below about the OIG report, the SEC staff has fully implemented the OIG's recommendations and has continued to do so.

> Consistent with the OIG's policy, there is no public statement issued when the staff has satisfied the recommendations in an OIG report.

In the same email, Ms. Bambach also states:

> Since each case differs substantially based on the assets available to fund the receivership, potential claims, the investor body, and the nature of the fraud, there is no one structure or standard that is applied in each matter. Rather, the operation of a receivership is determined on a case by case basis. Most importantly, once appointed, unless the receiver has been expressly appointed to liquidate the SEC's judgment, the receiver is the agent of the appointing court, not the SEC, and he or she can only take actions approved by the court.

A true and correct copy of my March 29, 2016, email to Ms. Bambach and her answer of March 31, 2016, is attached hereto and incorporated by reference as Exhibit 24.

19. Ms. Bambach's statement that the SEC "operation of a receivership is determined on a case by case basis," seems to conflict the following statements in the OIG report 432 (Exhibit 23), which she says was fully implemented:

- Uniformity in receivers' reporting requirements: how often and in what format.
- The Commission should but does not consistently track reporting requirements;
- Enforcement should develop written guidelines on how to manage receivers and a list of red flags;
- Enforcement staff do not receive training on how to work with and monitor receivers/distribution agents; and
- Enforcement should request that receivers provide a final accounting of all assets collected and disbursed in a specified format.

20. On April 18, 2016, I sent an email to SEC staff members John Berry, Sara Kalin, Lynn Dean and Alistaire Bambach. My email contained the following request:

> I am requesting the SEC to provide me with a signed copy of the signed statement by Thomas Hebrank as required by the attached Billing Instructions. In this regard, please note that PDF page 11 of those instructions requires the applicant for an appointment as an SEC receiver to

> date and sign a statement representing that he will comply with the attached Billing Instructions.
> I am also requesting the SEC provide me with a copy of any submittal by Mr. Hebrank requesting a deviation from the Billing Instructions. Please note the procedure specified on page 1 of the Billing Instructions in relation to any deviation from those standards. Also, I am requesting the SEC to provide any response to any such request.
> I would appreciate your prompt response.

Since I received no response, on April 19, I forwarded the same email to Alistaire Bambach and again requested the Receiver's submittals to the SEC pursuant to the billing instructions, including SFAR (Exhibit 22). I copied the other SEC staff members to whom I sent my first email. I received no response to this email either. Attached hereto and incorporated by reference as Exhibit 25 is a true and correct copy of both emails without attachment.

21. I am unable to verify from source documents the Receiver's statements of R&D and R&E for Western or R&D for the GPs, because I have not received the books and records necessary to make that analysis. I have repeatedly requested the Receiver's counsel his books and records for both Western and the 87 GPs. I have learned the accounting system in place for the GPs when the Receiver was appointed was OPADS and for Western it was ACCPAC. The Receiver has refused to provide access to either system or data (electronic or paper) from either system.

22. By my email of February 22, 2016, I requested Ted Fates, counsel for the Receiver, to produce various categories of documents including these two:

> 6. Records, e.g., journals, which indicate the amounts of payments which were accelerated on existing loans from the 87 partnerships to Western and records indicating how the Receiver used those funds;
> 7. All statements of receipts and disbursements, audited or unaudited, and balance sheets, audited or unaudited, relating to the 87 partnerships, consolidated or separate, or Western from the inception of the receivership to the present.

In his reply, Mr. Fates stated he would not produce the requested documents until I provided him with a list of my clients "including the General Partnerships in which they hold ownership units? Once we have that, we will consider your requests below and get back in touch." A true and correct copy of my email and Mr. Fates' reply is attached hereto and incorporated by reference as Exhibit 26.

23. On March 23, I again requested in my email that Mr. Fates produce the same accounting records. In his reply, Mr. Fates offered a new rationale for denying the request:

> 6. No such documents exist.
> 7. No such statements exist. However, the Receiver will provide the tax returns (not including investor K-1s) for the partnerships in which your clients have an interest from inception of the receivership. Note, the receipts and disbursements for every month from the Receiver's appointment up to and including December 2015 have been provided in the Receiver's fourteen interim reports, which are available from the Receiver's website. There is also substantial information and projections regarding receipts and disbursements included in the partnership information packets, which are available from the Receiver's website.

A true and correct copy of my email and Mr. Fates' reply is attached hereto and incorporated by reference as Exhibit 27.

24. By my email of February 25, 2016, I rephrased my request for financial records as follows:

> I also understand that neither you nor E3 Advisors have the records described in paragraphs 6 and 7 of my February 22 email. The investors seek a clear accounting of the receipts and disbursements while the Receiver had control of the partnerships in which they were invested. One among many questions raised by investors boils down to this: what did the Receiver do with the funds generated by the acceleration of the loans owed by the partnerships to Western? Were mortgages paid? Were liabilities of the partnerships paid?

> So that I obtain the necessary records to make this assessment, I will rephrase the records I am requesting into two new categories:
>
> 1. All journals, ledgers, accounts, computer-generated records, which record or reflect revenues received or disbursements made by any of the 87 partnerships identified on Attachment A from September 2012 to the present.
> 2. All journals, ledgers, accounts, computer-generated records, which record or reflect revenues received or disbursements made by Western Financial from September 2012 to the present.
>
> Since I do not know the exact way in which E3 Advisors maintained the accounting records of its receivership, I cannot define the records sought more tightly. However, to avoid any unnecessary inconvenience or expense, I am willing to discuss alternative approaches to obtaining the records, if you will provide me with an index of the accounting records maintained by E3 Advisors relating to the 87 partnerships and Western Financial.

Mr. Fates replied the next day by email:

> With regard to your remaining requests, we understand your reference to "acceleration of loans" to mean the GP payments to Western referenced on Exhibit B to the attached Ex Parte Application. The amounts these GPs paid Western were used to pay the underlying mortgages on the applicable properties. If this is not what you are asking about, please let us know. Once we have an understanding of what you're requesting, we can respond.

A true and correct copy of my email and Mr. Fates' reply is attached hereto and incorporated by reference as Exhibit 28.

25. By my email of February 29, 2016, I pointed out that Mr. Fates had ignored my request for the same records:

> You did not respond to my question whether you would produce the following records:
>
> 1. All journals, ledgers, accounts, computer-generated records, which record or reflect revenues received or disbursements made by any of the 87 partnerships identified on Attachment A from September 2012 to the present.
> 2. All journals, ledgers, accounts, computer-generated records, which record or reflect revenues received or disbursements made by Western Financial from September 2012 to the present.

A true and correct copy of my email reply is attached hereto and incorporated by reference as Exhibit 29.

26. Mr. Fates replied to my request in Exhibit 4 by his email of March 1, 2016. The part relevant to the requested financial records read:

> Further, with regard to your enumerated requests below (1 and 2) -- which you had said "boils down to this: what did the Receiver do with the funds generated by the acceleration of the loans owed by the partnerships to Western?" -- I stated in an email to you on Friday February 26th:
> With regard to your remaining requests, we understand your reference to "acceleration of loans" to mean the GP payments to Western referenced on Exhibit B to the attached Ex Parte Application. The amounts these GPs paid Western were used to pay the underlying mortgages on the applicable properties. If this is not what you are asking about, please let us know. Once we have an understanding of what you're requesting, we can respond.

A true and correct copy of Mr. Fates' email is attached hereto and incorporated by reference as Exhibit 30.

27. By his email of March 9, 2016, Mr. Fates announced he had finally decided to produce part of the requested records. His email read:

> Although we have not heard from you regarding my 2/26/16 attempt to clarify your request for financial statements, which I then repeated in my 3/1/16 email below, the Receiver has nonetheless gathered the available 2012 and 2013 financial statements for the GPs and we will provide them to you today via Dropbox. These statements were prepared by Louise Cohen, an independent contractor hired by the GPs prior to the Receiver's appointment to prepare financial statements as necessary for federal and state tax returns.
> The receipts and disbursements for the GPs for 2014 and 2015, as well as projections for 2016, are included in the information packets posted to the Receiver's website. Receipts and disbursements for Western are included in the interim reports filed by the Receiver for each quarter.

Later that day I received an email with a link to the records in Dropbox. A true and correct copy of Mr. Fates' email is attached hereto and incorporated by reference as Exhibit 31.

28. By my letter of March 14, 2016, I requested one more time, among other things:

> The general ledgers, journals and other booking and accounting records showing the receipts and disbursements since the appointment of the receiver to the present; the validity and accuracy of the projections in your February 4 memo cannot be assessed without these records;

A true and correct copy of said letter is attached hereto and incorporated by reference as Exhibit 32.

29. As a response to Exhibit 32, Mr. Fates emailed on the same day, March 14, 2016, stating:

> The Receiver has provided you with the 2012 and 2013 financial statements for all of the GPs, which were prepared by Louise Cohen, an independent contractor that the GPs had used prior to the Receiver's appointment to prepare financial statements for annual tax returns. The 2014 and 2015 receipts and disbursements, as well as 2016 projections, are included in the information packets posted to the Receiver's website. Receipts and disbursements for Western and subsidiaries are included in the Receiver's quarterly reports filed with the Court (also available from the Receiver's website). These are the documents that exist that reflect the receipts and disbursements since the appointment of the Receiver.

A true and correct copy of Mr. Fates' email is attached hereto and incorporated by reference as Exhibit 33.

30. I understood Mr. Fates' reply to be a refusal to provide the books and records for the individual transactions. I therefore tried again with my email of March 14, 2016, which reads in relevant part:

> I take your response below to be a refusal by the Receiver to open his books of account for an inspection by those whose assets he has been entrusted to protect, the investors and partners in the 87 partnerships.
> As you know, the records you refer to below display only conclusions, not individual transactions.

A true and correct copy of my email is attached hereto and incorporated by reference as Exhibit 34.

31. Mr. Fates replied to my email with his own of March 15, where he claimed he had provided "what is available as far as financial records showing the receipts and disbursements since the Receiver's appointment." His email also read:

> The documentation that is not already available from the Receiver's website – i.e. the GP financial statements for 2012 and 2013 – were promptly provided to you despite your failure to respond to my 2/26 and 3/1 emails seeking clarification of your request.
> *You have now asked for individual transactions, which was not part of your prior request for "ledgers, journals, and other booking and accounting records". Individual transaction information would be reflected only on the bank statements.* … If you are now requesting the over 3,500 bank statements for all of the GPs since the inception of the receivership, please advise accordingly.

A true and correct copy of Mr. Fates' email is attached hereto and incorporated by reference as Exhibit 34.

32. By my letter of March 17, 2016, I responded to Mr. Fates' to provide the 3,500 bank statements:

> In view of your statement that the only records relating to individual transactions are bank statements which have been posted to spreadsheets, I am requesting you to produce those records—the bank statements and the spreadsheets—from the date of Mr. Hebrank's appointment to the present. I am assuming these records are maintained electronically. Accordingly, I am requesting that you provide these records electronically by making them available to me in Dropbox as soon as possible. Kindly advise me when you expect to place them in Dropbox.

A true and correct copy of my letter of March 17, 2016, without the exhibits, which are voluminous and repetitive of these exhibits, is attached hereto and incorporated by reference as Exhibit 35.

33. As a reply to Exhibit 35, Mr. Fates sent me a letter dated March 21, 2016, where he engaged in his customary personal accusations but agreed to produce "the excel [sic] spreadsheets and over 3,500 bank statements-to you via Dropbox." A true and

correct copy of Mr. Fates' letter is attached hereto and incorporated by reference as Exhibit 36.

34. By my letter of March 24, 2016, I requested again a class of records which the Receiver had not produced:

> 1. All journals, ledgers, accounts, computer-generated records, which record or reflect revenues received or disbursements made by Western Financial from September 2012 to the present.
> 2. Our investigation has established that the Receiver has used the OPADS electronic accounting system to record individual transactions. Why did you not disclose this fact or produce the transactions stored on that system?

A true and correct copy of my letter of March 24, 2016, is attached hereto and incorporated by reference as Exhibit 37.

35. On March 24, 2016, David R. Zaro, co-counsel to the Receiver, responded to my letter with a new concession: "The Receiver did not produce the OPADS software or records because these are not relevant to the requests that you have made and the information contained in OPADS is not relevant to any pending motion." A true and correct copy of Mr. Zaro's letter of March 24, 2016, is attached hereto and incorporated by reference as Exhibit 38.

36. The bank statements produced by the Receiver are largely useless in ascertaining the financial transactions in which the Receiver has engaged or corroborating his financial projections and financial statements in his filings, including his February 4, 2016, liquidation motion proposing the sale of all properties, dissolution of the GPs, and distribution of the proceeds to investors (Dkt. No. 1181). These representations were made to investors through the E3 Advisors website for this matter.

37. On April 6, 2016, the Receiver's counsel provided me with the records kept by the current GP administrator, Lincoln Property Group ("Lincoln"). The records go from March 2015 to February 2016, except for the month of May 2015. I found that the Lincoln records could not be reconciled with the Receiver's Fourteenth Interim Report

(Receiver's 14th Report") and noted the following inconsistencies:

a. Clearwater Bridge Partners shows total disbursements for December 2015 of $1,171 in Lincoln's records, but $4,048 in the Receiver's 14th Report;

b. Lyons Valley Partners shows disbursements for December 2015 of $1,576 in the Receiver's 14th Report, but only $118 in the Lincoln records. Further, the beginning balance for Lyons Valley Partners in December 2015 is different in each document;

c. Honey Springs Partners shows an ending balance for December 2015 of $8,365 in the Receiver's 14th Report, but the Lincoln records show an ending balance of $4,503.04.

38. I contacted SEC counsel Sara Kalin by phone on August 5, 2015. I told her I had looked briefly at the case file and seen it was voluminous. To the best of my recollection, I asked her if the Court had issued any orders that were particularly relevant to the status of the case at that time. I did not discuss any informal discovery with her. I did not know enough about the case to discuss either formal or informal discovery. At that time, I was simply trying to find out what had been decided in the case to understand whether I could be of assistance to the potential clients who had contacted me. At that point, I had spoken with four or five investors and had made no decision whether I would take the case. As I stated in my declaration of February 18, 2016 (Dkt. No. 1187-1, ¶ 7), I declined to take the case for personal matters of unknown duration. I was not retained by any client until February 26 (Dkt. No. 1194-3, ¶ 9). A true and correct copy of SEC counsel Sara Kalin's email of August 5, 2015, with attachment, and my reply to it is attached hereto and incorporated by reference as Exhibit 39.

Executed this 29th day of April 2016, at San Diego, California.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

/s/ Gary J. Aguirre
GARY J. AGUIRRE

Exhibits Table of Contents