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

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
APPELLANTS' MOTION FOR STAY PENDING APPEAL

EVENT BY WHICH ACTION IS NECESSARY: CLOSE OF SALES OF PROPERTIES WHICH HAVE BEEN OR WILL BE CONFIRMED ON 28-DAY OR SHORTER NOTICE

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Treatises

Local Rules

I. Why This Motion Should Be Treated as Urgent under Rule 27-3(b)

On August 30, 2016, the district court denied (Dkt. 1359) the motion by Susan Graham and 191 other partners ("Appellants") in 87 general partnerships ("GPs") for a stay of the district court's May 25 order authorizing the receiver, Thomas C. Hebrank ("Hebrank") to liquidate the 87 GPs. Dkt. 1304. Under his approved plan, Hebrank would (1) sell the 36 properties of raw land owned by the 87 GPs, (2) pool the cash from the sales into a single account, (3) transfer the cash from the GPs' 87 separate bank accounts into the same single account, and (4) distribute the cash *pro rata* to the 3,370 investors. If it stands, the May 25 order would void 87 GPs formed over 31 years to hold 36 properties for long-term appreciation.

A concrete example best illustrates how the plan operates. Mary and John Jenkins paid $30,000 for their GP interest in Park Vegas Partners in 1983. Their GP and two others bought a parcel of raw land, Las Vegas 1, from Western. The Jenkins and other partners in the three GPs paid operational costs to maintain Las Vegas 1 for 33 years. According to Hebrank's projections, the Jenkins would have received $58,200 in 2015 from their investment if the three GPs had sold Las Vegas 1, paid their debts, and distributed the remaining cash among the GP partners pursuant to the GP agreements. Dkt. 1181-1, at 41, Ex. D.[1] Under Hebrank's approved plan, the Jenkins would receive approximately $4,000.

[1] The page numbers are the ECF page numbers at the top of each document.

The sale would defeat the purpose of the Jenkins' investment. They would vote to hold Las Vegas 1 for future appreciation, if the GP agreements were operative. Their respected real estate expert opines Las Vegas 1, because of its location, will appreciate between $0.50 and $1 per square foot annually over the next decade, roughly doubling its value in five years. Dkts. 1237-1 at 32 and 1237 ¶¶ 1-32.

Hebrank has begun executing his liquidation plan. He has transferred the cash from the 87 separate GP accounts into a single bank account. Dkt. 1315 at 5. On August 30, 2016, he obtained orders confirming the first two sales of the 36 properties. Dkts. 1360 and 1361. Hebrank has entered contracts with brokers to sell the properties with the highest values: $18.2 million of the total $23.8 million per his 2015 valuations (Dkts. 1166, 1203, and 1181-1, Ex. A). He can obtain orders confirming their sales with 28-days notice. Local Rule ("L.R.") 7.1.e.

The district court has repeatedly overruled Appellants' opposition to these sales. Once an order confirms a sale, Hebrank may transfer the property. After the transfer, the sale becomes moot. For these reasons, we submit the motion should be treated as an urgent motion under Rule 27-3(b), since the sales of the properties are "events" within the meaning of that rule and the injury is irreparable.

II. SEC and Hebrank's Position

Both Hebrank's and the SEC's counsel have informed Appellants' counsel they will oppose the motion.

III. The Relief Sought

Appellants seek an order to preserve the status quo and the Court's jurisdiction. The proposed stay would have two terms. First, it would stay the sales of any of the properties. Second, it would stay Hebrank from spending receivership funds unless he (1) records each cash transaction (receipt or disbursement) in an accounting journal and (2) preserves the vouchers for each transaction. This would allow the GPs' cash accounts to be reinstated if Appellants succeed on appeal. It requires no action by Hebrank other than compliance with recognized standards that apply to his receivership. 2 Clark on Receivers (3d ed. 1992) ("Clark"), § 383 at 642-3.

IV. Grounds for a Stay

"A party seeking a stay must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in his favor, and that a stay is in the public interest." *Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). These factors are balanced on a "sliding scale," and thus the Court may order a stay if there are "serious questions" going to the merits and "the balance of hardships tips sharply in [the applicant's] favor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). The facts presented below satisfy each of these factors.

Appellants have previously applied for two stays pending appeal with the district court on the same grounds presented here. Dkts. 1316 and 1379. The

district denied the first on a single ground: "[The Court finds that Aguirre Investors [Appellants] are not likely to succeed on the merits, for the reasons explained in the Orderly Sale Order." Dkt. 1359 at 2. Given this sole ground, the analysis below focuses on the errors in the order requiring reversal. The same issues are raised by each of the five orders on appeal. The appeal of four orders (Dkts. 1296, 1303, 1304, and 1361) becomes moot if the stay is not granted.

V. Hebrank's Failure to Preserve Receivership Assets

In its *ex parte* motion, the SEC told the district court that it "should appoint a temporary receiver over Western and the entities that it controls, including the GPs…because Defendants are committing an ongoing and egregious fraud against investors." Dkt. 3-1 at 30. This is myth. Hebrank's forensic report found Western's books were "accurate and reliable. " Dkt. 182 at 19. Last year, the SEC abandoned 95% of its fraud claims. Dkt. 1137-1 at 10, n. 4.

Hebrank has exhausted rather than conserved investor assets. In response to two recent orders, Hebrank revealed he had *collected* and spent $14.2 million from investors since his appointment. Hebrank collected this money under the GP agreements, despite their status as unregistered securities. By the year's end, Hebrank will have spent $19 million of investor and GP funds and depleted GP cash from $6.5 million to $1.8 million. Dkt. 1181-1 at 6 and 37, Ex. B.

And no recovery appears likely. Hebrank doubts the SEC will get a significant recovery from Schooler. *Id*., at 11. He projects Western will contribute $1.2 million to his liquidation plan. *Id.* But the receivership fees will exceed $3 million dollars and Western's funds are tapped first to pay them. Hence, Western's net contribution to Hebrank's liquidation plan is zero.

The SEC created a rich environment for abuse. Its *ex parte* motion gave Hebrank access to $6.5 million in GP cash. Hebrank failed to file the SEC's Standardized Fund Accounting Report ("SFAR") forms requiring disclosure of his receipts and disbursements and the SEC did nothing about it, despite its oversight duty. In this way, until recently, Hebrank kept secret his collection of $14.2 million from investors. In return, Hebrank proved his worth to the SEC: he allowed the SEC to edit his filings until a district court order put a stop to it. Dkt. 1348-2 at 9-16. The SEC also disempowered investors. It got a stay restraining them from protecting themselves, e.g., a Chapter 11 filing or suing Western to cancel their debt to GPs. Dkt. 10 at 16. Further, if the SEC recovers any investor funds through its disgorgement judgment, it may deliver them to the U.S. Treasury.

VI. Appellants Are Likely to Succeed on the Merits

Hebrank's plan seizes and redistributes wealth. Like a court-appointed Robin Hood, with no legal authority, Hebrank takes from the rich and gives to the poor. Some GPs hold properties that have increased in value. Some have little value.

Others are in between. The district court held the plan to be "fair and equitable" because everyone gets something. Dkt. 1304 at 9. It uses a single metric, the amount invested, but it is not fair, equitable, just, or even legal. Hebrank labels his seizure and redistribution plan the "one pot" approach. Dkt. 1181-1 at 16.

Redistributing wealth through a federal receivership requires a legal principle tailored to facts justifying the transfer of wealth. Neither exists here. The order approving the liquidation plan (Dkt. 1304) exceeds the district court's jurisdiction and violates Appellants' due process rights. It also approves Hebrank's plan over Appellants' objection that it is based on grossly incomplete and inaccurate financial records that fail to comply with standard accounting procedures.

A. The District Court Erred in Granting Hebrank's Liquidation Motion

The order approving Hebrank's plan must be reversed for each of the following reasons: (1) the district court lacks subject matter jurisdiction over the GPs; (2) Hebrank's plan seizes and redistributes investors' property without due process of law; (3) Hebrank's "one pot" approach is unsupported by law or facts; and (4) no GP liquidation or dissolution should be approved without an accounting.

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

The district court erred in exercising subject matter jurisdiction over the GPs, because each GP is owned and controlled by innocent non-parties. As partners,

investors own 94% of the GPs[2] and hold 100% of the voting power. Dkt. 1293-3 ¶ 15 and Ex. 10. Western holds the other six percent and no voting power. The district court frequently cited *In Re San Vicente Med. Partners, Ltd.*, 962 F.2d 1402 (9th Cir. 1992), but failed to follow *San Vicente's* limits on its jurisdiction to include assets of nonparties in a federal receivership. On this issue, *San Vicente* quotes from Clark:

> It is generally conceded that a court of equity *having custody and control of property* has power to order a sale of the same in its discretion. The power of sale necessarily follows the *power to take possession and control* of and to preserve property ... (emphasis added).

San Vicente, 962 F.2d at 1406. Two paragraphs earlier, Clark states the core principle: "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. Clark also quotes *Murphy v. John Hofman Co.*, 211 U.S. 562, 569 (1909) for the same principle: "The jurisdiction in such cases arises out of the possession of the property." *Id*. at § 300 at 507.

In *SEC v. Am. Capital Invs.*, 98 F.3d 1133, 1136 (9th Cir. 1996), this Court adopted Clark's analysis in explaining the mechanism by which a receiver took possession and control of third-party assets in that case: "The Receiver was empowered under 28 U.S.C. § 754 to take possession and control of all assets 'belonging to or in the *possession or control* of [defendant] ACI and its subsidiaries

[2] According to Hebrank, Western holds a 6% interest in the GPs. Dkt. No. 852-1 at 4, Ex. A. The remaining 94% interest is held by the investors as partners.

and affiliates.'" The SEC recognized and applied the Clark, *San Vicente*, and *Am. Capital* principles to its *factual theory* when it moved *ex parte* for an order appointing Hebrank as temporary receiver. Its factual theory assumed Western—not investors—controlled the GPs as *de facto* limited partnerships. Dkt. 3-1, at 9, 10, 11, 23, 30-31. On this theory, the SEC cited *San Vicente* for the principle "a district court has the power to include the property of a non-party *limited partnership* in an SEC receivership …" Applying this principle, it argued "the partnership agreements in this case left so little power in the hands of investors that the GPs actually distributed power *as if they were limited partnerships* (emphasis added)." *Id*., at 31.

The SEC's factual theory fails, because it conflicts with the indisputable evidence. Investors hold 100% of the power to make GP decisions. The district court (Judge Burns) rejected the SEC's factual premise when it heard the SEC's motion for a preliminary injunction. The district court concluded the SEC's premise the GPs were *de facto* limited partnerships "misses the mark." Dkt. 44, at 7. He enumerated *some* of investors' powers under the GP agreements:

> The agreement gives general partners the right to access the partnership's books. It provides that a majority in interest may vote to remove the Signatory Partners. (A majority in interest must also vote to admit new partners to the partnership. All partnership decisions must be made by a majority in interest vote. "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." Partners' contact information, under the agreement, is circulated to all members. While Defendants are appointed partnership administrators under the agreement, they may be terminated, with or without cause, by a majority vote. A majority in interest may decide to terminate the partnership itself. The agreement may be amended upon the consent

> of a majority in interest of those members entitled to vote (citation to GP agreement deleted).

Since Western lacked control over the GPs, it did not transfer that control to the district court when the SEC filed its complaint. "[T]he court must have actual or constructive control over the *res* when an *in rem* forfeiture suit is initiated." *Republic Nat. Bank of Miami v. US*, 506 U.S. 80, 84 (1992). "[A] sale confirmation order issued without subject matter jurisdiction may be set aside as void, notwithstanding the absence of a stay." *Am. Capital Inv.*, 98 F.3d, at 1141 citing *Voorhees v. Jackson,* 35 U.S. 449, 477 (1836). 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." *Am. Capital Inv.*, 98 F.3d at 1141. The jurisdictional limits to the district court's power in equity receivership proceedings are issues of law and thus reviewed *de novo*. *Id*. at 1142. "An objection that a federal court lacks subject matter jurisdiction may be raised at any time..." *Oregon v. Legal Servs. Corp*., 552 F.3d 965, 968 (9th Cir. 2009). A party alleging subject matter jurisdiction—the SEC in this case—has the burden of establishing it. *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016). It failed to do so.

Appellants made the same arguments based on the same authorities in their opposition to Hebrank's plan. The district court did not reject the argument or the authorities. Instead, it held Appellants lacked standing to raise the issue. Referring to Appellants' brief (Dkt. 1235), the order approving Hebrank's plan reads:

> And while *American Capital Investments*, 98 F.3d at 1145 n.17, does cite 2 *Clark on Receivers* §§ 482, 491, for the proposition that equity receivers "can conduct a judicial sale of real property that is properly within their 'possession and control' and within the court's territorial jurisdiction, where all parties of interest have been brought before the court," *Aguirre Investors* [Graham Partners] *cite no authority to support the proposition that investors should be understood to be parties of interest. See also* Black's Law Dictionary (9th ed. 2011) (defining "party in interest" as "[a] person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome")(emphasis added).

Dkt. 1304 at 15. The district court's holding that investors do not qualify as "parties of interest" cannot be reconciled with the definition it applies. Hebrank's liquidation plan dissolves the GPs, sells their assets, pools the proceeds, and redistributes those funds *pro rata* to all investors. Every step violates the GP agreements. Applying Black's Law Dictionary's definition of "interested party," investors normally have the right to sue to enforce their GP agreements and benefit from that suit. Moreover, investors are not merely "parties of interest." As discussed below, they are partners in the GPs and thus necessary parties to any proceeding to dissolve a GP. The district court's order approving the liquidation plan must be reversed, because it lacks subject matter jurisdiction over the GPs.

2. Hebrank's Liquidation Plan Seizes and Redistributes the Partners' Funds in the GPs without Due Process of Law

An analysis of procedural due process logically begins with the adequacy of notice. And that issue raises a troubling question: Why did the district court fail to hold the hearing under L.R. 66.1 with the required notice to investors before making Hebrank's appointment permanent? One month after the SEC filed its case,

the district court's finding that Western lacked control of the GPs undercut the factual basis for its subject matter jurisdiction. The case was poised for the court to snip the thread holding the GPs in the receivership. But someone would need to connect the dots—Western's lack of control over the GPs to the lack of subject matter jurisdiction—and move the court to snip the thread. Any investor could move to snip the thread, but first they would need notice of their rights.

Local Rule 66.1 required Hebrank to initiate *two* hearings, *both* required notice to investors: one before Hebrank's appointment could be made permanent (L.R. 66.1.a.2) and the second within 30 days of that appointment to decide whether the receivership should continue. L.R. 66.1.e. Those hearings served due process and were the perfect forum to snip the thread. Neither was held, because Hebrank did not set them. He sent no notice to investors informing them of their rights. Instead, he sent investors two letters and later a postcard informing them of his appointment, but not a word about their rights to notice and a hearing. For its part, the SEC submitted an order reciting the district court's subject matter jurisdiction (Dkt. 62 at 1) and making Hebrank's appointment permanent. *Id.*

The inadequate notice persisted throughout these proceedings. In general, Hebrank used two ways to give investors "notice," knowing both were defective. First, Hebrank gave "notice" by posting filings on his website. Yet, he admitted in November 2014 that a majority of investors did not visit his website. Dkt. 852 at 5.

Hebrank also sent several email notices to investors, but again admitted he lacked or had erroneous email address for many investors. Dkts. 1348-2 at 8, 1348-3, ¶¶ 3, 4 and Exs. 1 and 2. Appellants estimate Hebrank's emails failed to reach 1,000 to 1,200 investors. Dkt. 1368-1 at 7. Hebrank has provided no data on how many investors opened his emails. In another case, Hebrank's counsel reported that 40% of investors did not open the receiver's emails. *SEC v. Global Online Direct, Inc.*, 2007 U.S. Dist. LEXIS 81803 *2 (N.D. Ga. Nov. 5, 2007).

The way Hebrank gave notice to investors of his liquidation plan speaks to his unwillingness to disclose harsh but true facts. The district court ordered him to give investors notice *by mail* of any petition to distribute "dividends" under L.R. 66.1.f.1, such as his liquidation plan. Dkt. 170 at 3. Instead, he gave "notice" in two ways which were unlikely to be read by most investors: his website and email. He posted his plan after six pages of links with this link: "Mtn for Authority to Conduct Sale of GP Props." Dkt. 1368-1 at 14 and 1368-2, ¶ 13 and Ex. 9. More than three months after Hebrank filed his liquidation motion he sent his May 6, 2016, email notice to some investors. He sent it just two weeks before the hearing. The time to file opposition had expired three weeks earlier, on April 22. Dkt. 1224 at 1. The motion was addressed to "parties," not investors, and thus required a formal notice to intervene for investors to be heard. Dkt. 1181 at 2. No investors spoke at the May 20, 2016, hearing except those represented by counsel.

Hebrank's notice fails to meet minimum notice requirements. In *Taylor v. Yee*, 780 F.3d 928 (9th Cir. 2015), this Court cited the familiar principle from *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

> The Supreme Court announced that where persons may be deprived of their property, the Due Process Clause requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

While Appellants did obtain a copy of the liquidation plan, through their counsel, Hebrank failed to serve adequate notice of his plan on 3,000 other investors.

Appellants argued a summary proceeding limited to the issues raised by Hebrank's motion, without prior discovery or access to Hebrank's accounting records, without cross examination, and without an evidentiary hearing violated their rights to due process of law. Dkts. 1235 at 7; 1274 at 16-17, and 21; 1229 at 6 and 13; 1293 at 2-3; 1293-1 at 3-6; and 1297. The district court's order overruled these objections. Dkt. 1304. In overruling Appellants' due process objections, the district court quoted from *U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 456 (9th Cir. 1984): "[T]he traditional rule is that summary proceedings are appropriate and proper to protect equity receivership assets." This rule assumes the assets are owned and controlled by the receiver, as they were in *Arizona Fuels*. *Id.*, at 458.

Those are not the facts here. Investors hold 100% of the voting rights and own 94% of the assets. *Arizona Fuels* states a receiver must file a "plenary action" where he "asks the court to determine the ultimate merits of the parties' claims to

the property" as Hebrank has done here. *Id.* This Court refined *Arizona Fuels* in *SEC v. Am. Capital Invs.*, 98 F.3d 1133, 1147 (9th Cir. 1996): "*Arizona Fuels*' exception requiring plenary proceedings applies only to third parties in possession of the property," which again are exactly the facts here.

The sliver of due process afforded investors fails to satisfy the minimum level of due process contemplated by controlling Ninth Circuit cases. In *SEC v. Wencke*, 783 F.2d 829, 836 (9th Cir. 1986), the Court offered this guidance: "[T]o determine the adequacy of a summary proceeding in a given case, courts must focus not on the form of the proceedings, but on their substance." In *SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007), the Court explained its *Wencke* holding:

> we emphasized that because deLusignan had received actual notice, participated in extensive discovery, had been deposed, and was permitted to file briefs with the court, the use of summary proceedings did not violate his due process rights.

Again in *San Vicente*, 962 F.2d at 1408, the Court noted, "San Vicente received the same notice and opportunity to be heard as it would have received as a named party to the SEC action." See also: *Am. Capital Inv.*, 98 F.3d at 1147 (nonparty claimant had "full notice and opportunity to be heard at every critical stage."); *SEC v. Wencke*, at 834 ("Throughout its proceedings, the district court treated deLusignan as if he were a party.") See also: Clark, § 344 at 604, §§ 82(c) at 127, 82(i) at 129.

Appellants objected to the district court's holding they were bound by the about 163 orders it had issued over the prior 44 months, because they were necessary

parties who had never been served or named. Dkts. 1235 at 21, 1274 at 10-11, and 1297 at 2. It is black letter law that 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); *Teitelbaum v. Wagner*, 2003 U.S. Dist. LEXIS 2481, *7-8 (SDNY 2003).

Further, failure to join investors as parties when the order binds them like a personal judgment violates their rights to due process of law. *Valley Nat. Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1336 (9th Cir. 1997). The district court distinguished *Valley Nat. Bank,* because it involved a personal judgment. Dkt. 1304 at 13-14. We disagree. Hebrank's plan operates more harshly than a personal judgment. It strips investors of their rights to decide whether and when to sell the realty the GPs own. It strips them of their property rights to the net assets of each GP when it is liquidated. Cal. Corp. Code § 16404(b)(1)(Partner winding up partnership holds assets as trustee for other partners). Upon dissolution, the GP agreements direct the sale of the assets, payment of debits, and the distribution of the net funds to the partners in proportion to their capital accounts. Dkt. 1293-3 at 56, 7.5.1(iii) (Ex. 10). Hebrank's plan seizes and redistributes those net funds to strangers in a single step. A personal judgment takes two steps: its entry and its execution. *Valley Nat. Bank* should afford Appellants the same due process rights.

On this point, Clark, § 344 at 604, instructs:

> Since the Constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law, it is hard to conceive how the state, acting through the court can absolutely divest the title to property, either real or personal, from the owner in a mere summary and/or ex parte proceedings, or interlocutory order, and vest the property in a receiver.

3. Hebrank's "One Pot" Approach Is Unsupported by Law or Facts

Putting aside the lack of jurisdiction and due process violations, the district court's order has another fatal flaw: it cites no valid legal principle warranting the seizure, sale and redistribution of the GPs' assets, such as the Jenkins' rights to $58,200 upon the dissolution of Park Vegas Partners. As support for its order, the district court borrowed Hebrank's rationale:

> that in the majority of federal equity receivership cases, receivership assets are pooled and distributed to investors on a *pro rata* basis, because in most circumstances, the similarities in the way investors were harmed outweigh the differences in the way they invested.

Dkts. 1304 at 28 and 1181-1 at 18. The district court cited the same seven cases as Hebrank did: *SEC v. Capital Consultants*, 397 F.3d 733 (9th Cir. 2005); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107 (9th Cir. 1999); *U.S. v. Real Prop. Located at 13328 and 13324 State Highway 75 N.*, 89 F.3d 551(9th Cir. 1996); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80 (2d Cir. 2002); *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325 (5th Cir. 2001); *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657 (6th Cir. 2001); *SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992). None supports Hebrank's legal principle when courts order pooling. *Topworth* presents the classic

facts where pooling is ordered: defendants "commingled investors' funds with general operating funds, and then transferred the money to Topworth's Hong Kong bank accounts, where it was promptly withdrawn." 205 F.3d at 1110.

Appellants agree with the SEC that courts have favored *pro rata* or pooling when "funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders." *Credit Bancorp*, 290 F.3d at 88-89 (*citing Cunningham v. Brown*, 265 U.S. 1, 13 (1924)). Dkt. 1232. *Cunningham* holds pro rata distribution is appropriate "when the fund with which the wrongdoer is dealing is wholly made up of the fruits of the frauds perpetrated against a myriad of victims"

Consistent with *Cunningham*, Appellants argued to the district court that no court has ordered pooling in the absence of widespread commingling, pervasive fraud or both. The district court never found commingling. Instead, it cited the SEC's contention that one case, *SEC v. Sunwest Mgmt., Inc.*, 2009 U.S. Dist. LEXIS 93181 (D. Or. Oct. 2, 2009) held: "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." Dkt. 1304 at 28. This is twice inaccurate. First, the SEC made no such statement, though it did frequently cite *Sunwest* Dkt. 1232. Second, *Sunwest* involved "massive fraud" and "extensive

commingling." *Id.,* at *20, 34-35. Nor does the case mention or apply luck or timing as factors in deciding whether to pool.

The district court borrowed seven factors (Dkt. 1304 at 28-29) from Hebrank's brief (Dkt. 1181-1 at 20-21) which purportedly show when investors' timing or luck, rather than prudence or experience, caused investors to select GPs that increased in or retained value. This theory has multiple flaws. It is supported by no evidence and Appellants objected to treating argument as evidence. Dkt. 1235 at 9. That aside, no case, *Sunwest* or any other, has ever held that luck or timing are factors in deciding whether to order pooling. It is hard to conceive of a legal principle more speculative than this one: pooling depends on whether 3,370 investors were lucky or prudent in purchasing their GP interests over 31 years.

Finally, the district court refers to two orders it believes support pooling:

> [T]he Court has already previously found that Defendants employed a common scheme, material misrepresentations were made by Defendants in connection with the marketing of the Stead property, ECF No. 1081, and that the GPs were "financially intertwined" with Western, e.g., 93% of the funds raised from investors went not towards the GP property directly, but to Western where the funds were used in a variety of ways. ECF No. 583 at 10.

Dkt. 1304 at 30. This requires a closer look at the two orders and the claims they decided. The SEC alleged defendants misstated or omitted material facts in selling the GP interests to *all 3,370 investors*, Dkt. 1, ¶¶ 34-38. The district court denied the summary judgment on all of these fraud claims. Dkt. 1081 at 20. It granted the motion "as to an offer or sale of a security" and "as to interstate commerce." *Id*.

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

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

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

Nor did the district court find commingling. It once used that term "commingling" in a tentative order (Dkt. 934 at 4), but deleted it from its final order (Dkt. 1003) when defendants pointed out no evidence supported the finding.[3] Instead, the district court used "intertwined" to mean both investors and Western held interests in the same GPs. *Id*., at 2.

In sum, the district court's approval of Hebrank's seizure and redistribution plan rests on nonexistent legal theory based on nonexistent facts. The cases cited by the district court, consistent with *Cunningham*, *supra*, have approved *pro rata*

[3] Reporter's Transcript, Jan. 23, 2015, at 8.

distributions where there is a fund "wholly made up of the fruits of the frauds perpetrated against a myriad of victims." No such fund exists here.

4. No GP Liquidation or Dissolution Should Be Approved without an Accounting

Appellants made the same contentions in opposition to the liquidation motion as they did in their motion to intervene for an accounting. See Section B.2 below.

B. The District Court Erred in Denying the Motions to Intervene

1. The District Court Erred in Denying Appellant's Motion to File a Complaint in Intervention

The proposed complaint in intervention focused on post judgment proceedings necessary to present a viable alternative plan to investors. It sought the following specific relief: (1) access to the receivership books and records; (2) an accounting of receivership receipts and disbursements; (3) proposing a viable plan based on accurate financial data, including the option for the GPs to exit the receivership; and (4) a declaratory judgment the GP agreements remain in effect. Dkt. 1229.

The district court denied the motion, except to oppose Hebrank's liquidation motion. The denial was based on one ground: timeliness. Yet, the district court held Appellant's motion *was timely* to oppose Hebrank's orderly sale motion:

> The Receiver did not move for authorization to conduct an orderly sale of the GP properties until February 4, 2016, and Aguirre and Dillon Investors promptly sought to oppose on February 18, 2016,…even though they initially failed to comply with Fed. R. Civ. P. Rule 24 in filing their oppositions.

Dkt. 1296. For the same reason, all the relief sought by the entire motion was

timely since it only sought remedies necessary to address Hebrank's abrupt and stunning change of direction embodied in his liquidation plan. Dkt. 1181.

For the first 41 months, Hebrank's words and actions told investors to expect exactly the opposite of what his liquidation plan delivered. In 2013, Hebrank advised the district court and investors how the GPs could exit the receivership:

> The Receiver sees no reason why a group of GPs that collectively own a property, if all GPs with an ownership interest in the property vote to retain their interests, should not be able to retain the property and take sole responsibility for all mortgages and expenses associated with the property.

Dkt. No. 203 at 10, ll. 23-24. Hebrank pestered investors to pay the operational fees and repay notes in the GPs in which they had invested. Here is the advice Hebrank gave investors on his website until at least April 2016:

> As your investment is an interest in a partnership that owns land, there are basic operating expenses that must be met. Typically, these would be charges for the payment of administrator salaries, insurance, property taxes and monthly and annual accounting. Additionally, there are amounts owed to Western and those are being collected as well. These amounts were typically for loans that were made by Western to the partnerships. The Court has ordered the Receiver to collect these amounts.

Dkt. 1229-1 at 11. From September 6, 2012, through June 30, 2016, Hebrank collected $14.2 million from investors in response to his pressure they were obligated to pay operational fees and the notes they signed to purchase their GP interests. Dkts. 1376 at 17 and 20; 1377 at 21, and 1378 at 27. Some paid nothing. Others paid every cent. Those who paid will get back only 13.4%.

After giving this same message for 41 months, Hebrank made a stunning reversal with his liquidation plan. It voids all GP agreements, sells all properties

and, in violation of express terms in the GP agreements, distributes almost 99% of the funds of each GP to persons who have no legal right or interest in them. After investors paid $14.2 million, Hebrank's finally tells them the payment of these sums disserves their financial interests. Dkt. 1181-1 at 25.

Every aspect of Appellant's proposed complaint in intervention focuses on remedies to deal with Hebrank's 180-degree reversal embedded in his liquidation plan. As such, the timeliness issue comes clearly within the scope of this Court's holding in *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. Cal. 2013), citing *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997):

> 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.

In *Legal Aid Soc. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980), this Court explained how the change of position by the Government, as Hebrank did here, was the event that determines the timeliness of the motion to intervene:

> We rule that the district court did not apply the correct legal standard in finding the Chamber's second motion was not a timely one and that it should have considered the motion in light of the substantially different position that had then been assumed by the Government as the principal defendant.

Likewise, in *League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1304 (9th Cir. 1997), the Court held: "[T]he crucial date in assessing the timeliness of

an intervention motion is the date that the applicant 'should have been aware [its]' interests would no longer be protected adequately by the parties."

2. The District Court Erred in Denying Appellants' Motion to Direct an Accounting and Access to Hebrank's Books of Account

Appellants' plan would allow partners in the GPs to vote whether to exit the receivership. This requires a disclosure of accurate information to investors so they can make an informed decision. In specific terms, this means a balance sheet disclosing the GPs' assets and liabilities and a receipts and disbursements statement disclosing the GPs' cash flow. Dkt. 1293-1, 7-12.

Hebrank's liquidation plan failed to provide this information. Indeed, Hebrank's financial reports to the district court were packed with errors, gaps, and accounting irregularities. Dkts. 1258-1 and 1299-1. By way of example, Hebrank failed to comply with the SEC's SFAR in filing 12 interim financial reports with the district Court. Dkt. 1304 at 24. The district court has ordered and reordered Hebrank to comply with SFAR. Dkts. 1304 and 1369 at 16. His last revised interim reports for the first 45 months of his receivership disclosed one new fact: he personally collected $14.2 million from investors. Dkts. 1376, 1377 and 1378. He plans on paying them back 13.4%.

For these reasons, Appellants brought a motion under Fed. R. Civ. P. 24 for an accounting or, in the alternative, an audit, and for access to Hebrank's accounting records. Dkt. 1258. The motion and supporting declaration described ten classes of

gaps and irregularities in Hebrank's financial reports. *Id*. and 1299. The district court denied the motion to intervene on the grounds it was untimely. Dkt 1303. For the same reasons discussed above, it was timely. Indeed, some courts have denied distribution plans where the receiver failed to present current and accurate financial reports. *SEC v. Harris* 2015 U.S. Dist. LEXIS 11975 (N.D. Tex. 2015).

VII. Appellants Will Suffer Irreparable Harm in the Absence of Relief

An irreparable injury is defined as an actual and concrete harm, or the imminent threat of an actual and concrete harm. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). The facts here clearly satisfy that requirement. Without a stay, the district court's order (Dkt. 1304) authorizes Hebrank to sell each GP's property and distribute those funds to strangers who have no right, title or interest under the GP agreement. Because of the number of investors (3,370) and their residences outside the Southern District, the proposed plan cannot be undone. Hence, the harm would be irreparable.

VIII. Balance of Equities and the Public Interest

Citing *Nken v. Holder*, 556 U.S. 418, 435 (U.S. 2009), this Court offered the following guidance on these two factors: "*Nken* explained that the last two factors of the test require us to weigh the public interest against the harm to the opposing party." *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Both of the factors weigh in favor of the stay. If there is no stay, Appellants prevail on appeal and the

case is reversed, the reversal would be meaningless since the GP realty would be sold, the proceeds pooled, and the funds distributed to 3,370 investors. On the other hand, a stay would only delay the distribution if Hebrank and the SEC prevailed. The public interest would be clearly served in this case because the facts present a clear-cut constitutional issue: have the SEC and Hebrank gone beyond the bounds of due process? In *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) this Court recognized: "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." Appellants submit the district court has gone significantly beyond any court in any case in allowing the SEC and Hebrank to seize investors' assets and redistribute them as they please with those investors only able to assert their rights through a limited form of summary proceedings. Appellants submit this case raises similar issues as *Ross*, 504 F.3d at 1141, where this Court found the third parties' rights to due process were violated by the summary proceedings allowed in that case.

DATED: September 29, 2016

Aguirre Law, APC

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

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

7. 7. United States Court of Appeals, Ninth Circuit, Case No. 16-56362

   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 6,772 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: September 29, 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 September 29, 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: September 29, 2016 Aguirre Law, APC

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