No. 16-56362

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,

JOSEPH M. ARDIZZONE, DAVID R. SCHWARZ, LOIS SCHWARZ,
DENNIS FRISMAN, ERIC GILBERT, AND RICK MOORE,
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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I. Why This Motion Should Be Treated as Urgent under Rule 27-3(b)

On July 27, 2016, Appellant Joseph M. Ardizzone ("Ardizzone") learned of the court-approved plan to liquidate five general partnerships ("GPs") in which he is a general partner. D.[1] 1348-4, ¶ 5. The plan proposed by the receiver, Thomas C. Hebrank ("Hebrank"), would sell all realty owned by Ardizzone's five GPs and redistribute 99% of their assets to those with no interest in the GPs. Ardizzone's declaration (D. 1348-4, ¶ 5) states he received no communication from Hebrank or his staff about the liquidation plan. He first learned of it from a fellow investor on July 27, 2016. The district court approved the plan two months earlier. D. 1304.

Ardizzone is not alone. Seven other investors state in their declarations they received no notice of the plan and had no knowledge of it until October 2016. Ds. 1396-2, 1396-3, 1396-4, 1396-5 and 1396-6. The declarations of two other investors are filed with this motion. None knew of the liquidation plan, because Hebrank sent them no notice. He only sent "notice" to investors by email. If Hebrank had no email address or an inaccurate one, he sent no notice by mail, even though he had the correct home address for 99% of investors. D. 1393-3 at 5.

Appellants estimate 48% of investors did not receive Hebrank's email notice. Another 10% who received the email did not open it, for a total of 58%. See table

[1] D. 1348-4, ¶ 5. "D." refers to the corresponding docket entry in *SEC v. Schooler*, No. 12-cv-02164 (S.D. Cal.); "D.E." refers to the corresponding docket entry in Appeal No. 16-55850. The pagination follows the page numbers as designated by CM/ECF.

on page 13 below. Hebrank claims 32% of investors did not receive his emails. Thus, between 1,100 and 2,000 investors received no notice of the liquidation plan.

But it matters little. Whatever the number, Hebrank's notice was fatally defective. He had the mailing addresses for 99% of investors and could have mailed it to all of them. Ds. 1393-3, ¶ 5 and 1396 at 4, n. 2. In the landmark case, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950), the Supreme Court held: "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Investors who received Hebrank's email "notice" were no better off. It offered no mechanism to object. Hebrank also delayed three months before he sent his email. By then, the deadline to file opposition had long passed. A notice after the "deadline has passed" is defective. *Carter v. McDonald*, 794 F.3d 1342, 1345 (Fed. Cir. 2015). The other five Appellants are in this category.

Hebrank is now executing his liquidation plan. He moved the cash from the 87 separate GP accounts into a single account in May 2016. D. 1315 at 5, ll. 10-12. On August 30, 2016, he obtained orders confirming the first two sales of GP properties. Ds. 1360 and 1361. The district court has approved Hebrank entering into contracts with brokers to sell properties worth 23.2 million of the total value of $23.8 million for all GP properties per his 2015 valuations. Ds. 1405 and 1423.

Appellants have no remedy to stop Hebrank's sales. He can obtain orders confirming sales in 28 days. Local Rule ("L.R.") 7.1.e. No investor may oppose a sale without intervening. D. 1369 at 3, n. 2. A sale can be confirmed and executed before an investor could seek a stay. Further, Appellants may not oppose a motion to confirm the sale of any other properties on the grounds that are the bases for this motion for a stay, e.g., due process or lack of jurisdiction. D. 1409 at 14.

Further, Hebrank has filed three signed Standardized Accounting Report Forms ("SFAR"), as ordered by the district court, stating his receivership has consumed $19.56 million during its first 49 months, as displayed on the table below.

Date	SFAR D. No., Page	Receipts	Expenditures	Order
9/6/2012 to 9/30/2015	1376 at 17	$19,357,854[2]	$15,539,396	1420
10/1/2015 to 12/31/2015	1376 at 20	$901,066	$1,124,436	1420
1/1/2016 to 3/31/2016	1377 at 21	$766,481	$834,145	1420
4/1/2016 to 6/30/2016	1378 at 27	$101,218	$1,078,990	1420
7/1/2016 to 9/30/2016	1422 at 21	$19,101	$985,399	Pending
	Grand Total	**$21,145,703**	**$19,562,366[3]**	

[2] This figure includes cash in the GP accounts at the outset of the receivership.

[3] In opposing a motion by Appellants seeking clarification of his expenditures, Hebrank recently stated he was counting payments "twice." D. 1394 at 3, l. 13. Appellants brought a motion seeking clarification of the “twice” counted receipts and expenditures. D. 1394. The district court denied the motion on the grounds Appellants were seeking "to intervene in order to audit the receivership and to examine the receivership records." D. 1409 at 13.

All but $337,000 of the $21.1 million came from investors or their GPs. The receipts have fallen off to almost nothing, because investors have stopped paying.

Since the $19.56 million was spent over 49 months, it averages $400,000 per month or $4.8 million per year. At this rate, it will consume investors' $23.8 million in assets (D. 1181-1 at 35) at a rate of 20% per year and exhaust all assets in 5.3 years.

For all the reasons stated above, Appellants continue to sustain irreparable harm if this Court does not issue a stay. First, the order (D. 1304) authorizes Hebrank to sell all GP realty in violation of the GP agreements. Second, the order authorizes Hebrank to distribute 99% of each GP's assets to persons who have no rights in it. e.g., the plan extinguishes Appellant Moore's rights to 200% of his original investment in Park Vegas Partners. Third, the receivership consumes investors' assets at the average rate of $400,000 per month. Fourth, these steps are taken pursuant to orders the district court lacks jurisdiction to issue. The orders also divest 3,000 investors from their interest in the GPs without due process of law.

II. How the Ardizzone and Graham Appeals Differ

One key factor distinguishes this appeal from the appeal by the 192 Graham Appellants, No. 16-55850. The Graham Appellants received notice in February 2016 of Hebrank's motion to liquidate the GPs and its hearing date. Consequently, they were able to intervene and appear at one hearing. The Ardizzone Appellants

are among 3,000 investors who received inadequate or no notice.

III. Scope of the Stay Pending Appeal

Appellants propose two alternatives to preserve the *status quo*. The Court could "stay any further execution of the receiver's liquidation plan," the relief sought before the district court (D. 1368 at 2) which the district court denied. D. 1409 at 5. Alternatively, the Court could stay the sale of any realty and direct Hebrank to maintain accounting records of his expenditures. In the latter case, the motion to expedite the appeal is critical to prevent the rapid ongoing consumption of assets.

IV. Applicable Legal Standard for 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. Hytolder*, 640 F.3d 962, 966 (9th Cir. 2011). The facts presented below satisfy each of these factors. Appellants previously applied for a stay with the district court based on *Gutierrez's* four factors (Ds. 1368-1 at 4, l.4), though their argument focused on the first ground.

V. Appellants Are Likely to Succeed on the Merits

A. District Court's Grounds for Denying Motions to Intervene and for Stay

In their motions to intervene and for a stay, the Ardizzone Appellants presented undisputed evidence they are among 3,000 investors who received no notice or defective notice of the plan to liquidate the 87 GPs (D. 1181) and its May 20, 2016, hearing date. On that basis, they sought to intervene to (1) vacate the district court's May 25, 2016, (D. 1304) order approving Hebrank's plan and (2) participate in the decision to wind up the 87 GPs which they and other investors own.

The district court's orders did not deal expressly with requirements of Fed. R. Civ. P. 24(a) in denying Appellants' motions. Appellants did not argue each point of Rule 24(a). Rather, in their motion to intervene they argued Hebrank and the SEC were bound under the doctrine of collateral estoppel by the district court's prior order (D. 1296) finding the Graham Appellants' satisfied the four-pronged test of *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996), except for the timeliness prong. D. 1348-2 at 16-17. Appellants requested the district court take judicial notice of the filings in the Graham Appellants' motion to intervene. D. 1347, ¶¶ 1-8.

On timeliness, the district court held the Graham motion was timely "for the limited purposes of opposing the Receiver's orderly sale motion." D. 1296 at 4, ll. 1-3. The order (D. 1296 at 7, ll. 9-12) explained why it was timely:

> [T]o the extent that Investors seek to oppose the Receiver's orderly sale motion regarding its proposal for the disposition of receivership assets,

> the Court finds such an intervention timely. *The Receiver did not move for authorization to conduct an orderly sale of the GP properties until February 4, 2016.* (emphasis added)

In that context, the Ardizzone Appellants argued their motion to intervene was timely, because they received no notice or defective notice. D. 1348-2 at 18-19 and 1368-1 at 9. In denying both motions, the district court held Hebrank gave Appellants adequate notice. Ds. 1359 at 2-3. The district court also clarified its basis for subject matter jurisdiction over the GPs. D. 1409 at 9, l. 13.

B. The District Court Lacks Subject Matter Jurisdiction

A lack of jurisdiction is alone sufficient to reverse the orders denying the motion to intervene (D. 1359 at 2-3) and granting the district court's May 25 order (D. 1304). In *SEC v. Am. Capital Invs*., 98 F.3d 1133, 1141 (9th Cir. 1996), this Court held "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 and affiliates.'" The court must obtain control of those assets from the defendants when the case is filed. *Id.* 2 Clark on Receivers (3d ed. 1992) § 482 at 785, § 300 at 507. The issue can be raised at any time and the Court reviews it *de novo*. *Am. Capital Invs*. 98 F.3d at 1142. The district court held three times that Defendants lacked control over the GPs when the case was filed. Ds. 44 at 4-5 and 9-10, 212 at 6, and 583 at 6.

The district court had never expressly discussed its grounds for subject matter jurisdiction before the November 29, 2016, order. D. 1409 at 9. Nor has it ever

stated or held that defendants had control of the GPs when the SEC filed its case. The Graham Appellants raised the issue (D. 1293-1 at 5, 1326 at 5, and 1331 at 6), but the district court denied each motion without addressing it. Ds. 1359 and 1361. The closest it came was its holding that Appellants lacked the standing to raise the issue. D. 1304 at 15, l. 7.

In this context, the district court's November 29 order (D. 1409 at 9, ll. 13-16) sweeps aside the confusion over the district court's basis for exercising subject matter jurisdiction over the GPs. The order states the district court "evaluated, and rejected, the arguments" that the "Court lacked subject matter jurisdiction over the General Partnerships ("GPs")" (D. 1409 at 9) in four pages of its May 25 order, D. 1304 at 13-16.

Appellants submit the district court's analysis in those four pages interpreted and applied due process standards, not subject matter jurisdiction requirements. It had previously articulated a single rule to be met before the GPs could be included in the receivership. D. 1003 at 5, ll. 14-23. That rule only included elements of due process, not subject matter jurisdiction.

This brings Appellants' analysis to a key holding in the May 25 order which they contend is reversible error. In this case, the district court relied on *In Re San Vicente Med. Partners, Ltd.*, 962 F.2d 1402 (9th Cir. 1992) in holding Hebrank could sell the GPs' realty in violation of the terms of the GP agreements. Specifically, the

district court relied on the holding in *San Vicente* that the receiver could get paid for his work, even though the partnership agreement contained no term authorizing payment for his services. On this point, the May 25 order reads: "The Ninth Circuit found that the receiver was not acting in place of the general partner, but as a court-appointed receiver, and was thus not bound by the legal relationship between APHI and San Vicente. 1408-09." D. 1304 at 14, ll. 23-26.

But reliance on *San Vicente* for this point is misplaced. It was undisputed that the district court in *San Vicente* had jurisdiction over APHI, which "controlled San Vicente and all of its property." 962 F.2d at 1407. Based on that finding, *San Vicente* held:

> This distinction is crucial to our analysis. If Orr were receiver for only APC and its property, *section 959(b)* might require Orr to assume APC's exact role and legal relationship in the limited partnership. However, Orr was appointed receiver not only for APC and *its property but for all the property controlled by APC (i.e., San Vicente's property*)(emphasis added).

Id., at 1408-1409. Consequently, the district court had subject matter jurisdiction in *San Vicente,* because it had possession and control of San Vicente and it assets. Here, the district court lacks subject matter jurisdiction, because it did not have possession and control of the GPs or their realty. It could not exercise subject matter jurisdiction because it did not obtain control over the GPs when the case was filed, because defendants did not have it to surrender. This argument is more fully presented in briefs filed by the Graham Appellants with this Court. D.Es 12 at

16, and 16 at 9-10 in Appeal No. 16-55850.

C. The District Court Erred by Failing to Apply Mullane's Mandates

Hebrank sent no notice or defective notice of his liquidation plan, motion, and hearing to 3,000 investors, including Appellants. The district court held investors received adequate notice because Hebrank (1) posted his motion to his website and (2) sent some investors email notice two weeks before the hearing. D. 1355 at 11. In their motion to intervene, Appellants argued Hebrank's "notices" failed to comply with *Mullane's* mandate that notice be "reasonably calculated" to reach investors. Ds. 1348-2 at 8-9 and 1368-1 at 11-20. Neither the SEC nor Hebrank responded. Ds. 1355 and 1358. Appellants relied on *Mullane* in their motion for a stay. D. 1368-1 at 13-14. Again, neither the SEC nor Hebrank explained how Hebrank's notices satisfied *Mullane*. Ds. 1383 and 1389. Appellants cited *Mullane* 34 times in their reply brief (D. 1396) to the SEC's opposition. Yet, the district court did not mention it once in its order denying the stay. D. 1409.

The relevant facts in *Mullane* and this case are very similar. In *Mullane*, the trial court exercised *in rem* jurisdiction over the beneficiaries' interests in express trusts. Here, the district court exercises *in rem* jurisdiction over the partners' interests in 87 GPs. Each GP holds its net assets in trust for its partners. Cal. Corp. Code § 16404(b)(1). In *Mullane*, the trustee's accounting of the trust assets bound the beneficiaries, even though he never sent it to them. Here, investors are bound

by Hebrank's plan, even though he never sent it to them. In language equally applicable here, *Mullane* held: "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318.

Mullane explained why the need for actual notice is heightened when the trustee, as a fiduciary, provides an accounting to its beneficiaries. In language equally applicable here, the Supreme Court reasoned:

> But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so.

Id. The same is true here: In the accounting of investors' assets, Hebrank becomes their adversary. He does so again when he distributes a GP funds to non-partners. And if he does not give them notice, "no one else is expected to do so."

Again, *Mullane*'s holding could have been written for this case:

> Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id. According to Hebrank, he had the mailing addresses for more than 99% of investors. D. 1393-3, ¶ 5. Hence, *Mullane* bars Hebrank from using forms of service he knew would not reach investors.

Hebrank has failed to provide 3,000 investors, including Appellants, with notice of his proposed plan, which divests them of their property rights in the GPs. To begin with, the plan to sell all the GP realty, pool the proceeds, and divvy up the

pooled funds did not even exist until February 4, 2016 (D. 1181), when it abruptly popped up with its vanilla link on Hebrank's website, at the end of five pages of other links. D. 1368-3 at 49-57.

Hebrank's February 4 motion should have warned: "Buckle up for a U-turn." Before February 4, he *asked* GPs' partners to vote whether to sell a GP property, but never got approval. D. 1396-1 at 20. After that date, he may sell GP realty over all partners' objections. Before February 4, he recommended the GPs exit the receivership if the partners voted for it. D. 203 at 10. After that date, his plan bars all GPs from exiting. Before February 4, he proposed a GP's net assets only be distributed among *its* partners. D. 852 at 16, and 21-22. After that date, Hebrank may sell each GP's realty and distributes almost 99% of the net assets to strangers. With his pre-February 2016 message, Hebrank collected millions from the GPs and investors. Ds. 1376 at 17 and 20, 1377 at 21 and 1378 at 27. His February 4 motion admitted these millions would never be paid back. D. 1181-1 at 11, ll. 11-12.

In the time it took to click a mouse, Hebrank reversed his consistent message to investors during the prior 3.5 years. For the first time, he told investors he planned to (1) sell all the GPs' assets without their consent and (2) distribute the net assets of each GP *pro rata* to all investors. Adequate notice of Hebrank's plan was therefore imperative. The district court held Hebrank gave adequate notice by (1) posting his motion on his website and (2) emailing "notice" of the motion to a

fraction of investors. D. 1359 at 3. The district court never addressed Hebrank's admission: "[M]ost investors in this case have not reviewed the reports and other important information about their GPs posted on the receivership website." D. 852 at 5. Since Hebrank had more than 99% of investors' addresses (D. 1393-3 at 5), his reasons to use "means less likely" to reach them (his website) "disappeared." *Mullane*, 339 U.S. at 318.

The website "notice" was the only "notice" Hebrank sent to between 32% and 48% of investors. After Appellants presented evidence that Hebrank lacked valid email addresses for approximately 1,000 to 1,200 investors, and named more than 1,000 of them (D. 1368-3 at 19-47), Hebrank admitted his emails fail to reach 1,082 investors. D. 1383 at 7, ll. 1-14. The investigation conducted by Appellants' counsel indicates Hebrank's emails fail to reach four categories of investors:

Email status	Number	Percentage	Evidence
No email address	571	17%	Ds. 1368-5 ¶ 6 and 1368-2 ¶ 10, Ex. 7
Erroneous email address	700	21%	Ds. 1368-5, ¶¶ 4-5 and 1393-2 ¶ 4
Unsubscribed	337	10%	D. 1383 at 7, ll. 8-9
Do not open emails	330	10%	Aguirre Decl. ¶ 4-5
Total	**1,938**	**58%**	

As stated in the table above, Hebrank's records indicate he lacked email addresses for 17% of investors and has erroneous email addresses for another 21%.

He admits another 10% have unsubscribed from his email service. D. 1383 at 7, ll. 8-9. Appellants estimate another 10% do not open Hebrank's emails. Aguirre Decl., ¶ 5. This brings the total percentage to around 58%. *Id*., ¶ 5. Inquiries of partners in seven GPs indicate more than half did not know of Hebrank's plan. D. 1393-2, at 3, ¶¶ 7-9. And of those who knew, few learned from Hebrank's "notices." *Id.*

Hebrank could easily file a proof of service, as Local Rule ("L.R.") 66.1.a.1 contemplates, stating precisely who he served. Undelivered emails trigger a notice to the sender. Hebrank uses an email service that tracks when email recipients open their emails. D. 1393-1, ¶ 5, Ex. 1. That fact is at his fingertips. He also tracks who visits his website. D. 852 at 5. In any case, Hebrank's email "notice" to investors, whether it failed to reach 32% or 58% of investors, violated the mandates of *Mullane*, since Hebrank has more than 99% of investors' addresses. Under *Mullane*, Hebrank's reasons for giving notice through "means less likely" to reach investors therefore "disappeared." 339 U.S. at 318.

Appellant Ardizzone is typical of the 32% to 48% of investors who never received Hebrank's emails. In Ardizzone's case, Hebrank's emails misspelled Ardizzone's last name. D. 1368-2 at 2. Five other investors filed declarations stating they never received a notice from Hebrank about his plan and learned about it from another investor in October 2016. Ds. 1396-2, 1396-3, 1396-3, 1396-4, 1396-5 and 1396-6. Another two investors' declarations are filed with this motion.

Hebrank waited three months after filing his February 4, 2016, motion before sending his May 6 email informing a fraction of investors about the plan and its May hearing date. That email notice failed to comply with *Mullane's* requirement that it inform investors of "an opportunity to present their objections." 339 U.S. at 314. The district court required investors to formally intervene, before they could oppose the motion (D. 1296 at 11), which was nearly impossible within Hebrank's two-week "notice." Even if investors got over that obstacle, the deadline for filing opposition passed on April 15 (D. 1124), three weeks before Hebrank sent his May 6 email. Under *Mullane*, Hebrank's email notice "must afford a reasonable time for those interested to make their appearance." 339 U.S. at 314. Notice after the "deadline has passed" is defective. *Carter v. McDonald*, 794 F.3d at 1345.

The SEC, Hebrank, and the district court have yet to address Appellants' argument that none of Hebrank's "notices" satisfy *Mullane*. Although Appellants relied on *Mullane* in their motion to intervene (D. 1348-2 at 9-10), the SEC, Hebrank, and the district court did not address *Mullane*. Ds. 1355, 1366 and 1359. Appellants relied on *Mullane* in their opening brief for a stay (D. 1368-1 at 17-18 and 29). Hebrank opposed the motion, but ignored *Mullane*. D. 1383.

The SEC cited *Taylor v. Yee*, 780 F.3d 928, 933 (9th Cir. 2015) which quotes *Mullane*, but for the wrong rule. The broad principle quoted in this case from *Mullane* comes into play when the sender lacks the recipient's address, such as the

owner of unclaimed property in *Taylor v. Yee*. *Mullane* explained: "As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing." 339 U.S. at 318. *Mullane* articulated a simpler rule when the address is known: "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id*. at 318.

In denying the motion for a stay, the district court defined the notice issue it would address: whether the "Receiver gave 'inadequate or no notice' of his 'liquidation plan' to 3,000 investors including the Ardizzone Investors." D. 1409 at 2-3. The district court failed to mention *Mullane* in denying Appellants' motion for a stay (D. 1409 at 2-3), though Appellants cited *Mullane* 39 times in two briefs. Ds. 1368 and 1396. Nor did it reconcile its prior holding that Hebrank's website and email "notices" were adequate (D. 1359 at 2-3) with *Mullane. Id.*

Instead, it cited a letter sent 44 months before the May 2016 hearing that told investors to check Hebrank's website "for further updates." Appellants' briefs before the letter argued the letter was not a "notice," because it warned of nothing, had no mechanism to object, and guided investors to a website few visited. D. 1396 at 5, l. 14 to 7, l. 2. For the few who visited the website, it was unlikely they would find the motion, since it was hidden under an unremarkable link tucked away at the end of five pages of other links. D. 1368-3 at 49-57. Indeed, the district court

seemed to concede this point. D. 1409 at 4, ll. 10-18. As discussed in the same brief (D. 1396, *Id*. at 6, ll. 9-21), *Mullane* rejected a similar contention. 339 U.S. at 318. Finally, another order required notice of a distribution plan, such as Hebrank's plan, to be sent by mail to investors (D. 170 at 3, ll. 7-8) and investors were told as much by a letter in March 2013. D. 1368-3 at 59.

And finally, Appellants address the district court's last point: "And more importantly, the Ardizzone Investors do not argue that they did not receive 'actual notice' of the Receiver's plan to conduct an orderly sale or an 'opportunity for hearing.'" D. 1409 at 4, ll. 25-27. Ardizzone's unequivocally states he "first learned" of the Hebrank's plan two months after it was approved. D. 1348-4, ¶ 5. Seven other investors say the same, i.e., they first learned from a fellow investor in October 2016. Ds. 1396-2, 1396-3, 1396-4, 1396-5 and 1396-6. See declarations of Elaine McLaughlin and John Schell filed herewith. Hebrank concedes 32% of investors received no notice and Appellants' place it at 58%.

The district court correctly states the five Appellants who received the notice arguably had "actual notice" of the hearing. But, as discussed above, it came with no mechanism to object, long after the time to file opposition had passed (for parties), and just two weeks before the hearing. No investors were even permitted to speak at the May 20 hearing.

Significantly, this issue of lack of notice affects 3,000 other investors. The SEC

argued the 3,000 "investors were strangers to each other, located nationwide." D. 685-2 at 2, ¶ 5. Investors will continue to become aware how the receivership impacts them. Those who received no notice and lose significant assets through the receivership may find counsel with new theories. In short, the lack of notice deprives this case of finality and is thus an inherent flaw in the plan. This receivership with its flawed notice to 3,000 investors is comparable to a class action that is settled and dismissed without notice to the class members. Notice brings finality. Since the notice is defective, there is no finality.

D. Denial of Intervention for Accounting Violated Appellants' Due Process

The district court's denial of investors' motion to intervene to obtain accounting records and an accounting of the GP assets violates investors' rights to due process of law. As in *Mullane*, the orders approving Hebrank's accounting of these funds bind all investors. Hebrank gives notice of his accounting by posting the reports on his website, though he knows few investors visit it. D. 852 at 5. Hebrank's notices of his accountings therefore violate *Mullane's* directive: "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318. The district court does not permit investors to object to Hebrank's accountings unless they file a formal motion to intervene. D. 1369 at 3, n. 2. Hence, it provides them no mechanism to object, a further violation of

Mullane. Finally, a meaningful plan cannot be proposed without an accurate accounting. To get that, investors must be allowed to intervene.

E. Denial of Intervention to Oppose Pooling Violated Due Process

The denial of Appellants' motion to intervene deprives them of their due process rights to oppose Hebrank's pooling of their assets based on his erroneous interpretation of the applicable case law. Appellants agree with the SEC the applicable legal principle was stated by the Supreme Court in *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). *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." The SEC tried but failed to prove such a case. Again, Appellants must be allowed to intervene.

F. Denial of Intervention to Seek Hearing Violates Due Process

The other right implicit in due process of law is the right to adequate process to present the objection. No Ninth Circuit case cited by the district court cuts deeper into property rights with less due process than this case. See: *In re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992)("San Vicente received notice at all stages of the receivership proceedings and had every opportunity to participate in the proceedings," including a bench trial); *SEC v. Am. Capital Invs.*, 98 F.3d 1133 (9th Cir. 1996)("In the case at bench, the summary proceedings actually afforded to appellants gave them full notice and opportunity to be heard at

every critical stage."); *U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984); *SEC v. Wencke*, 783 F.2d 829, 832 (9th Cir. 1986); *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007)(violation of due process on similar facts) This argument is more fully developed in the Graham Appellants' motion for a stay. D. 1316.

VI. All Other Factors Weigh in Favor of the Issuance of a Stay.

This brief addresses irreparable harm in its first section. The district court also noted Appellants may suffer irreparable harm without a stay. D. 1409 at 6, n.4.

This stay poses no hardship for other investors. It would do the opposite. Appellants seek a stay to stop the receiver from (1) divesting investors of their property rights and (2) consuming investors' $23.8 million in assets at the rate of $4.8 million a year. The vast majority of investors who have expressed their views about the receivership support Appellants' objectives in seeking a stay.

Finally, public interest weighs in favor of a stay. 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." The stay would prevent the divesture of the property rights of 3,000 investors without due process of law.

DATED: December 21, 2016 Aguirre Law, APC

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

No. 16-56362

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,

JOSEPH M. ARDIZZONE, DAVID R. SCHWARZ, LOIS SCHWARZ,
DENNIS FRISMAN, ERIC GILBERT, AND RICK MOORE,
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

DECLARATION OF GARY J. AGUIRRE IN SUPPORT OF APPELLANTS' URGENT MOTION UNDER CIRCUIT RULE 27-3(b) FOR STAY PENDING APPEAL

GARY J. AGUIRRE (Bar No. 38927)
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Attorney for Appellants
Joseph M. Ardizzone, *et al*.

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 Appellants, on whose behalf I filed the notice of appeal on this action on September 13, 2016. To the best of my knowledge, there is no dispute regarding Appellants' purchase and current ownership of interests as general partners in the 87 general partnerships ("GPs") which are the subject matter of the complaint filed by the Securities and Exchange Commission ("SEC") in this case.

3. I received the district court's order denying Appellants' application for a stay on November 29, 2016. D. 1409. Since receiving that order, I have been delayed in completing Appellants' motion for a stay pending appeal for each of the following reasons:

A. My stepfather and father-figure since age 12 passed away on December 3 in a remote area in Texas. This had immediate effects on the health of my 94-year old mother, causing me to take a one-week leave of absence from my work;

B. On November 29, 2016, I was recovering from surgery earlier in November;

C. At the same time, I was experiencing a recurring condition that affects my eyes, which, if not treated, impairs my ability to read;

D. The November 1, 2016, order of this Court in Appeal no. 16-55850 directed:

> The district court has scheduled oral argument on appellants' motion November 10, 2016. *See id.* at docket No. 1380. Accordingly, this court will address appellants' urgent motion after the pending stay motion is resolved in the district court.
>
> Within 5 days of the district court decision, appellants shall file a notice with this court and may also file an appropriate motion.

E. On December 5, 2016, I submitted a motion and declaration (D.E. 22) in Appeal No. 16-55850 requesting a one-week extension of all deadlines.

F. On returning to work, I addressed first the deadlines in the Appeal No. 16-55850 set by the Court's November 1, 2016, order, i.e., the filing of the notice due under that order and a motion in that appeal relating to the district court's order. D. 1409.

G. On December 12, 2016, I filed the Graham Appellants' Motion to File Supplemental Brief Pursuant to the Court's Order of November 1, 2016 (D.E. 24) and the Supplemental Brief for Review of the Court in Support of Appellants' Urgent Motion under Circuit Rule 27-3(B) for Stay Pending Appeal (D.E. 25).

H. I then turned to the next deadline, which was due in Appeal No. 16-55850 on December 19, 2016: the Graham Appellants' Opposition to Receiver's Motion to Expedite Appeal as to Order Approving Sale of Jamul Valley Property. I filed that opposition on December 19, 2016. D.E. 29.

I. I had also agreed to bring an unopposed motion to expedite Appeal Nos. 16-55850 and 16-5662. That brief was also filed on December 19, 2016. D.E. 28.

J. Having met existing deadlines with the Court on other motions and briefs, I then turned to this motion for a stay, which I am filing today, December 21, 2016.

4. The table below appears at page 13 of Appellants' Motion for a Stay.

Email status	**Number**	**Percentage**	**Evidence**
No email address	571	17%	Ds. 1368-5 ¶ 6 and 1368-2 ¶ 10, Ex. 7
Erroneous email address	700	21%	Ds. 1368-5, ¶¶ 4-5 and 1393-2 ¶ 4
Unsubscribed	337	10%	D. 1383 at 7, ll. 8-9
Do not open emails	330	10%	Aguirre Decl. ¶ 4-5
Total	**1,938**	**58%**	

5. The table above states my conservative estimate that approximately 10% of all investors receive emails from the receiver, Thomas C. Hebrank ("Hebrank"), but they do not open them. I base this estimate on hundreds of phone

calls, emails, surveys, and inquiries conducted by my clients. Many investors have informed me they have email accounts they no longer use or check. Other investors have advised me the emails they receive from Hebrank go to spam. Some investors have informed me they delete and do not read Hebrank's emails. I have reviewed another case, *SEC v. Global Online Direct, Inc*., 2007 U.S. Dist. LEXIS 88819 (N.D. Ga. 2007), where the receiver reported that 51% of his delivered emails were unopened by investors. This appears to confirm my 10% estimate above is in fact conservative.

Executed this 21st day of December, 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

No. 16-56362

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,

JOSEPH M. ARDIZZONE, DAVID R. SCHWARZ, LOIS SCHWARZ,
DENNIS FRISMAN, ERIC GILBERT, AND RICK MOORE,
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

DECLARATION OF ELAINE MCLAUGHLIN IN SUPPORT OF APPELLANTS' URGENT MOTION UNDER CIRCUIT RULE 27-3(b) FOR STAY PENDING APPEAL

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Attorney for Appellants
Joseph M. Ardizzone, *et al*.

I, Elaine McLaughlin, declare as follows:

1. I am an investor in Silver State Partners and Valley Vista Partners

2. I am 66 years of age.

3. I use computers to send and receive email and access the internet.

4. I have had my current email address since 2000.

5. I have had the same U.S. mail address since 1980.

6. To the best of my knowledge, I have received no emails from the receiver, Thomas C. Hebrank, ("Receiver").

7. I have not visited the Receiver's website and do not know the address.

8. Until another investor contacted me in October, I had no knowledge the Receiver had proposed a distribution plan to this Court which was approved by the Court's order of May 25, 2016.

9. I just recently learned and understand now that, per the Receiver's plan, the real estate interests owned by all the partnerships formed by Western Financial will be sold, the funds placed into "one pot" and those funds distributed to investors in all partnerships pro rata and each investor will receive approximately 13.4% of his or her investments.

10. I oppose the Receiver's proposed distribution plan. I believe only the partners owning a property should receive the proceeds of the sale of that property.

Executed this 3 day of November 2016, in Alexandria, Virginia.

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

Elaine McLaughlin

No. 16-56362

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,

JOSEPH M. ARDIZZONE, DAVID R. SCHWARZ, LOIS SCHWARZ,
DENNIS FRISMAN, ERIC GILBERT, AND RICK MOORE,
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

DECLARATION OF JOHN SCHELL IN SUPPORT OF APPELLANTS' URGENT MOTION UNDER CIRCUIT RULE 27-3(b) FOR STAY PENDING APPEAL

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Attorney for Appellants
Joseph M. Ardizzone, *et al*.

I, John Schell, declare as follows:

1. I am an investor in Silver State Partners.

2. I am 71 years of age.

3. I am familiar with the use of computers and email.

4. I have had my current email address since the summer of 2013.

5. I have had the same U.S. mail address since June 2013.

6. To the best of my recollection, I have received no U.S. mail from the receiver, Thomas C. Hebrank.

7. To the best of my recollection, I have received no email from the receiver.

8. To the best of my recollection I have never visited the receiver's website for the case.

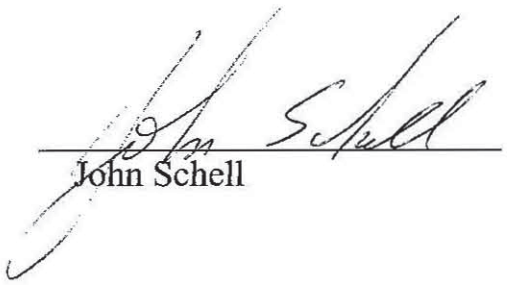
9. Until another investor contacted me in October 2016, I had no knowledge the receiver had proposed a distribution plan to this Court which was approved by the Court's order of May 25, 2016.

10. I understand now that, per the receiver's plan, the real estate interests owned by all the partnerships formed by Western Financial will be sold, the funds placed into "one pot" and those funds distributed to investors in all partnerships *pro rata* and each investor will receive approximately 13.4% of his or her investments.

11. I oppose the receiver's proposed distribution plan.

Executed this 4th day of December 2016, at Ramona CA.

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



John Schell

CERTIFICATE OF COMPLIANCE

The foregoing Motion complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because: This brief contains 5,278 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: December 21, 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 and declarations with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on December 21, 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: December 21, 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