Exhibit 1

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ABS MANAGER, LLC and GEORGE CHARLES CODY PRICE,

Defendants,

ABS FUND, LLC [ARIZONA]; ABS FUND, LLC [CALIFORNIA]; CAPITAL ACCESS, LLC; CAVAN PRIVATE EQUITY HOLDINGS, LLC; and LUCKY STAR EVENTS, LLC,

Relief Defendants.

Case No. 13-CV-0319-GPC (BGS)

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO NON-PARTY PETER C. KERN'S MOTION TO INTERVENE

Date: July 19, 2013
Time: 1:30 p.m.
Location: Courtroom 2D
Hon. Gonzalo P. Curiel

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

I. INTRODUCTION

Non-party Peter C. Kern ("Kern"), an investor in the funds managed by defendants ABS Manager, LLC ("ABS Manager") and George Charles Cody Price ("Price"), seeks to intervene just so he can "attend and participate in the depositions" and "be heard by the Court in connection with the disposition of this matter." Dkt. No. 38-1 ¶ 9. However, Kern does not identify any relief he would seek from the Court, nor does he suggest that he would assert any claims or defenses. Other than a conclusory statement that he is entitled to participate in this action to protect his investments, Kern does not explain in his motion to intervene how attending depositions will protect his interests.

Plaintiff Securities and Exchange Commission (the "SEC"), therefore, asks the Court to deny Kern's motion to intervene for several reasons. As a threshold matter, Section 21(g) of the Securities Exchange Act of 1934 ("Exchange Act") bars intervention in SEC enforcement actions. Although there is a split of authority, the Ninth Circuit has never directly addressed this issue, and the rationale of those denying intervention under Section 21(g), as well as sound policy reasons to bar intervention in SEC actions, strongly weigh in favor of denying Kern's request to intervene in this action.

Kern has also failed to meet his burden of establishing the four elements required for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. Most importantly, Kern cannot establish that his interests are not adequately represented here. As Kern acknowledges in his motion, he shares the same ultimate goal with the defendants—they all want to avoid or limit the civil penalties and disgorgement to be paid by defendants. Kern points to nothing in his papers to suggest that the defendants will not actively seek to limit the amount of penalties or disgorgement that they would have to pay. There is nothing Kern can do by participating in depositions that would protect his purported interests in this action any more than defense counsel can do. Also, because he has not offered any

proposed claims, defenses or relief, he would not even be able to use any evidence he obtains in discovery to protect his interests. Moreover, Morgan Stanley has already liquidated most of defendants' assets. And any remaining assets are frozen and thus protected under the Court's April 4, 2013 preliminary injunction order ("PI Order"). *See* Dkt. No. 35. Therefore, his financial interests, what little may remain, are already protected.

In addition, Kern has failed to satisfy his burden for permissive intervention under Rule 24(b). His interests are adequately represented, and he is not asserting any claims or defenses as required by Rule 24(b). And because he proposes no claims or defenses, and seeks no relief, it is necessarily impossible for him to contend that his claims and defenses share any common questions of law or fact with the SEC's claims.

Accordingly, the SEC respectfully requests the Court to deny Kern's motion to intervene in this action.

II. PROCEDURAL BACKGROUND

The SEC filed its complaint in this action on February 8, 2013 alleging that ABS Manager and Price violated Section 17(a) of the Securities Act of 1933, Section 10(b) and Rule 10b-5 of the Exchange Act, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940. *See* Dkt. No. 1. The complaint also named as relief defendants the funds that ABS Manager and Price managed—ABS Fund, LLC (Arizona), ABS Fund, LLC (California) and Capital Access, LLC (collectively, the "Funds")—and Cavan Private Equity Holdings, LLC, and Lucky Star Events, LLC. The SEC seeks, among other things, the imposition of civil penalties against ABS Manager and Price, and disgorgement from all of the defendants and relief defendants.

On February 19, 2013, the SEC filed a motion for preliminary injunction and other relief, which the Court granted in part. The Court entered the PI Order on April 4, 2013, which among other things, instituted a freeze over the assets of ABS

Manager and the Funds. *See* Dkt. No. 35.

Defendants answered the SEC's complaint on March 11, 2013. *See* Dkt. No. 26. The parties are currently preparing to begin discovery in this action.

III. ARGUMENT

A. Section 21(g) Of The Exchange Act Bars Intervention Without The SEC's Consent

Kern's should not be allowed to intervene under Section 21(g) of the Exchange Act, which states that, unless the SEC consents, "no action for equitable relief instituted by the [SEC] pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the [SEC], even though such other actions may involve common questions of fact." *See* 15 U.S.C § 78u(g).

Several courts have held that Section 21(g) bars intervention in SEC actions. *See, e.g.*, *SEC v. Egan*, 821 F. Supp. 1274, 1275 (N.D. Ill. 1993)*; SEC v. Homa*, 2000 WL 1468726, at *2 (N.D. Ill. Sept. 29, 2000); *SEC v. Qualified Pensions*, 1998 WL 29496, at *3 (D.D.C. Jan. 16, 1998); *SEC v. Wozniak*, 1993 WL 34702, at *1 (N.D. Ill. Feb. 8, 1993). These cases rely on *dicta* in *Parklane Hosiery v. Shore*, where the Supreme Court stated that "the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired," citing Section 21(g). 439 U.S. 322, 332 n.17 (1979). While other courts, as Kern points out, have held that Section 21(g) only bars consolidation, not intervention, the Ninth Circuit has never directly addressed this issue. *See* Dkt. No. 38-1 ¶¶ 11-13 (*citing, e.g., SEC v. Flight Transportation*, 699 F.2d 943, 948 (8th Cir. 1983)).

In addition to the dicta in *Parklane Hosiery* cited in several decisions, there are persuasive policy reasons to support a conclusion that Section 21(g) bars intervention. In a concurring opinion in *Aaron v. SEC*, that was joined by Justices Brennan and Marshall, Justice Blackmun examined the legislative history of Section 21(g). 446 U.S. 680, 717 n.9 (1980). Justice Blackmun found that Congress enacted Section 21(g) "in reliance on the different purposes of

Commission enforcement proceedings and private actions." *Id.* He cited Senate Report No. 9475 (1975), which stated that "[p]rivate actions frequently will involve more parties and more issues than the Commission's enforcement action, thus greatly increasing the need for extensive pretrial discovery." *Id.*

Justice Blackmun's reasoning applies forcefully here. The differences identified by the Senate and cited by Justice Blackmun exist whether private parties seek to intervene in an SEC action or to consolidate an existing private action. Without a bar on intervention, Section 21(g) would be eviscerated. Although a private action could not be consolidated with an SEC action, private plaintiffs could simply dismiss their action and intervene in the SEC's action, effectively performing an end run around Section 21(g). For these reasons, Section 21(g) should be interpreted to bar Kern's intervention in this case.

B. Kern Does Not Meet The Requirements Of Intervention As A Matter Of Right Under Rule 24(a)(2)

Kern seeks to intervene because he claims that disposition of this action "reduces the dollars available to return to investors." Dkt. No. 38-1 ¶ 6. He wants to intervene so he can attend depositions and be heard by the Court in connection with any disposition of this matter. *See id.*, ¶¶ 8-9.

Federal Rule of Civil Procedure 24(a)(2) sets forth four requirements for intervention as of right: (1) timeliness, (2) an interest relating to the property or transaction that is the subject of the action, (3) disposition of the action may impair or impede the applicant's ability to protect the interest, and (4) the applicant's interest is not adequately represented by the existing parties. *See* FED. R. CIV. PRO 24(a)(2); *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996). The applicant bears the burden of satisfying each of these four elements. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). The failure to satisfy any one of these four elements prevents the applicant from intervening as of right. *See League of United Latin Am. Citizens v.*

Wilson ("LULAC"), 131 F.3d 1297, 1302 (9th Cir. 1997). As discussed below, Kern cannot satisfy all four elements.

1. Kern's interests are adequately represented

Kern asserts that his interests are not adequately represented by the existing parties because neither the SEC's interests nor those of Price are identical to Kern's. *See* Dkt. No. 38-1, ¶ 7. He is wrong. Kern has the same interest in this action as defendants.

In the Ninth Circuit, courts consider three factors in determining adequacy of representation: (1) whether the interest of a present party is such that it will make 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. *Arakaki v. Cayetano*, 324 F.2d 1078, 1086 (9th. Cir. 2003). Of these, the most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. *See id.* When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequate representation arises. *See id*. If an applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. *See id.*

Kern's sole interest in this action is to minimize the amount of disgorgement and penalties that the defendants pay. As he makes clear in his motion, he "has an interest in seeing that the maximum dollars are returned to investors, and not disgorged to the SEC or diminished or eliminated as a result of imposition of fines or penalties as requested by the SEC in the Complaint." Dkt. No. 38-1 ¶ 6. Therefore, Kern and defendants share the *exact same* objective. Defendants' collective answer denies most of the allegations in the SEC's Complaint, asserts numerous affirmative defenses, and prays that the SEC "take nothing and obtain no relief by reason of its Complaint." Dkt. No. 26, p. 11.

Exhibit 1

The presumption that Kern's interests are adequately represented arises specifically because he and defendants share the same interest and objective in avoiding the imposition of civil penalty and disgorgement against the defendants. *See Arakaki*, 324 F.2d at 1086; *LULAC*, 131 F.3d at 1305. Kern has not offered any evidence that defendants cannot adequately represent his interests. Indeed, defendants are actively defending themselves against the SEC's securities fraud allegations. *See LULAC*, 131 F.3d at 1305-06 (finding that defendants provided adequate representation in part because they had vigorously litigated action). He therefore cannot meet his burden of overcoming the presumption of adequate representation. *See LULAC*, 131 F.3d at 1305 (holding that proposed intervenor, who conceded that its ultimate objective was same as existing party, failed to rebut presumption of adequate representation).

Kern has failed to meet his burden to establish that defendants cannot adequately represent him. *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986) (holding that interest of intervenor would be adequately represented by existing party because the two shared a common interest and motivation "in obtaining the greatest possible recovery"); *Piedmont Paper Prods., Inc., v. American Fin. Corp.*, 89 F.R.D. 41, 44 (S.D. Ohio 1980) (finding adequacy of representation where proposed intervenor seeks "relief identical to that requested by current defendants"). His motion to intervene as of right fails for this reason alone.

2. Kern's motion to intervene is premature

Kern's motion to intervene is also not timely. He argues that his motion is timely because the parties are only now beginning the discovery process. *See* Dkt. No. 36-1 ¶ 5. However, as discussed above, his only interest in intervening concerns the payment of penalties or disgorgement by defendants in this action. *See id.* ¶¶ 6, 14. But there is nothing currently pending before the Court regarding the issues of civil penalty and disgorgement. Rather, the parties have

only started discovery in the liability phase of this case, and so it will be quite some time before issues of relief are addressed. If and when the penalty and disgorgement issues reach the Court, Kern can seek to intervene then to protect his interests. Doing so now, when the parties have not even reached the merits of the SEC's claims, would be premature.

3. Participating in discovery will not protect Kern's interests

Assuming that Kern does have a cognizable interest in the property or transactions of this action because he is an investor in the Funds (*see* Dkt. No. 38-1 ¶ 6), Kern fails to explain how his participation in discovery would allow him to protect this interest. Kern has not identified in his motion any proposed claims or defenses that he would assert in this action to protect his interest. Likewise, he has not provided a proposed pleading pursuant to Rule 24(c) that identifies any proposed claims or defenses that he would assert in this action to protect his interest.[1] Moreover, Kern does not identify any proposed relief that he would seek through his intervention. Instead, he simply makes the conclusory statement that he should be permitted to participate in the upcoming depositions because he has a large stake in the Funds. Nothing in his motion explains what purpose or goal is advanced by allowing him to participate in discovery. Indeed, if he were allowed to participate in depositions and he obtained admissible evidence, because he has not asserted any claims or defenses, he would not even be able to use that evidence in any meaningful fashion to protect his interest. Accordingly, his participation in discovery is unnecessary and serves no purpose in protecting his claimed interests in this case.

---

[1] A motion to intervene under Rule 24 must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. PRO 24(c). A court may forgive a failure to attach a pleading "where the court was otherwise apprised of the grounds for the motion." *See Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992). Here, Kern seeks to protect his interest in the Funds but does not apprise the Court of the proposed claims, defenses, or relief that would protect that interest.

4. Kern's interests are already protected

Finally, as to the last Rule 24(a) element, Kern cannot establish that this action could impair or impede his ability to protect his interests. Kern argues that adjudicating this action without him will harm his interests if the defendants are ordered to pay disgorgement and/or civil penalties. *See* Dkt. No. 38-1 ¶ 6. However, Morgan Stanley has already liquidated all of the securities owned by ABS Fund (California) and Capital Access, LLC—the funds Kern invested in. *See* Dkt. No. 28, p. 4; Dkt. No. 28.2, ¶ 7; Dkt. No. 36-1, ¶ 2. In addition, to the extent that ABS Manager or the Funds have any assets that it can use to repay investors, those assets are frozen under the Court's PI Order. *See* Dkt. No. 35, Section VII. The PI Order's asset freeze prohibits the distribution of any of the Funds' assets without Court order and, to the extent Kern is eligible for any distributions related to his investment, he can receive them under the PI Order. Therefore, Kern's financial interests are already protected by the PI Order and thus cannot be impaired by this case.

C. Kern Does Not Meet The Requirements of Permissive Intervention Under Rule 24(b)

Kern seeks permissive intervention under Rule 24(b) on the sole ground that "he holds a claim to any remaining assets of the Funds and his intervention will not delay or prejudice adjudication of this matter." Dkt. No. 38-1, p. 7. This is an insufficient basis for permissive intervention. Rule 24(b)(1)(B) states that the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). Permissive intervention is discretionary. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). In determining whether to exercise its discretion, a court may consider whether the proposed intervenor's interests are adequately represented by other parties, the legal position the intervenor seeks to advance and its probable relation to the merits of the case,

whether intervention will prolong or unduly delay the litigation, and whether the intervenor will significantly contribute to full development of the underlying factual issues. *See id.* As with intervention as of right, a party seeking permissive intervention has the burden of establishing the basis for intervening. *See Northwest Forest Res. Council*, 82 F.3d at 839.

Kern has failed to meet this burden for permissive intervention for several reasons. First, he is not proposing to assert any claim or defense as Rule 24(b) requires. Also, for this reason, he cannot satisfy his burden of showing that the SEC's claims share common questions of law and fact with his claims or defenses because he is not asserting any. Second, as discussed above, his interests are adequately represented by defendants in this action because they share the same ultimate objective. Third, he has no legal position to advance because he is not proposing that he assert any claims or defenses, or seek any relief, in this action. Fourth, allowing an investor like Kern to intervene could easily lead to more motions to intervene from other investors in the Funds. This will certainly delay the adjudication of this action. Finally, because Kern shares the same ultimate objective as defendants, it is not likely that he will significantly contribute to the development of the underlying factual issues. Accordingly, the Court should not permit Kern to intervene in this action under Rule 24(b).

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court deny Kern's motion to intervene.

Dated: May 31, 2013

Respectfully submitted,

/s/ Sam S. Puathasnanon
John W. Berry
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Securities and Exchange Commission

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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' NOTICE OF MOTION AND MOTION FOR ORDER VACATING PRIOR ORDERS APPROVING RECOMMENDATIONS OF RECEIVER TO SELL GP PROPERTIES

Date: June 3, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on June 3, 2016, at 1:30 p.m. in Courtroom 2D of the United States District Court, Southern District of California, located at 221 W. Broadway, San Diego, CA 92101, Investors[1] will, and hereby do, move this Court for an order:

---

[1] Susan Graham, Alfred L. Pipkin, Alfred L. Pipkin, IRA, Allert Boersma, Arthur V. and Kristie L. Rocco Living Trust, Arthur V. Rocco, Baldwin Family Survivors' Trust, Barbara Humphreys, IRA, Beverly & Mark Bancroft, Beverly A. Bancroft, IRA, Bruce A. Morey IRA, Bruce A. Morey, Bruce R. Hart IRA for Bruce R. Hart and Dixie L. Hart, Carol D. Summers, Carol Jonson, Catherine E. Wertz IRA, Catherine E. Wertz, Cathy Totman, IRA, Charles Bojarski, Chris Nowacki, IRA, Cindy Dufresne, Craig Lamb, Curt & Janean Johnson Family Trust, Curt & Janean Johnson, jointly, Curt Johnson, Curt Johnson, Roth IRA, Cynthia J. Clarke, D & E Macy Family Revocable Living Trust, D.F. Macy IRA, Daniel Burns, Daniel Knapp, Darla Berkel IRA, Darla Berkel, Daryl Dick, Daryl R. Mabley, David and Sandra Jones Trust, David Fife IRA, David Haack IRA, David Haack; David Karp IRA, David Kirsh, David Kirsh, Roth IRA, David Kirsh, Traditional IRA, Debra Askeland, Deidre Parkinen, Dennis Gilman, Dennis Gilman IRA, Diane Bojarski, Diane Gilman, Donna M. and Richard A. Kopenski Family Trust, Donna M. Kopenski, IRA Roth, Douglas G. Clarke, Douglas Sahlin IRA, Eben B. Rosenberger, Edith Sahlin IRA, Edward Takacs, Elizabeth Lamb, Elizabeth Q. Mabley, Eric W. Norling, Eric W. Norling, IRA, Gary Hardenburg, Gary Hardenburg, Roth IRA, Gene Fantano, George Klinke, IRA, George Trezek, Gerald Zevin, Gerald Zevin, IRA, Gwen Tuohy, Gwenmarie Hilleary, Henrik Jonson, Henrik Jonson, IRA, IDAC Family Group LLC, Iris Bernstein IRA, James J. Coyne Jr. Trust, Janice Marshall, Janice Marshall, IRA, Jason Bruce, Jeffrey Merder, IRA, Jeffrey J. Walz, Jeffrey Larsen, Jeffrey Merder, Jennifer Berta, Jim Minner, Joan Trezek, John Jenkins, John and Mary Jenkins Trust, John and Mary Jenkins Trustees, John Lukens, John Lukens, IRA, John R. Oberman, Joy A. de Beyer, Roth IRA, Joy A. de Beyer, Traditional IRA, Joy de Beyer, Juanita Bass IRA, Juanita Bass, Judith Glickman Zevin, IRA, Judith Glickman Zevin, Judy Froning, Judy Knapp, Karen Coyne, Karen J. Coyne IRA, Karen Wilhoite, Karie J. Wright, Kimberly Dankworth, Kirsh Family Trust UTD, Kristie L. Rocco, Lawrence Berkel, Lawrence Berkel, IRA, Lea Leccese, Leo Dufresne, Leo T. Dufresne Jr. IRA, Linda Baldwin IRA, Linda Clifton, Lisa A. Walz, Lloyd Logan and Ida Logan, jointly, Lloyd Logan, IRA, Loretta J. Diehl, Lynda Igawa, Marc McBride, Marcia McRae, Marilyn L. Duncan, Mark Clifton, Mary Grant, Mary J. Jenkins, IRA, Mathew Berta, Mealey Family Trust, Michael R. Wertz, Michael R. Wertz, IRA, Mildred Mealey, beneficiary of Duane Mealey IRA, Minner Trust, Monica Takacs, Monique Minner, Neil Ormonde, IRA,

1. Allowing Investors to intervene in this action for the purpose of motion;
2. Vacating the June, 17, 2015, order (Dkt. No. 1085) approving the sale of the Jamul Valley property;
3. Vacating the May 12, 2015, order (Dkt. No. 1069) setting the "orderly sale" process; and
4. Vacating the January 14, 2016, order (Dkt. No. 1168) to the extent it granted the Receiver's recommendations to (1) sell any property and (2) enter into any broker agreements to sell any property.

The portion of this motion that seeks to intervene is based on the following grounds:

1) The Court's order of April 5, 2016, (Dkt. No. 1224) denied without prejudice Investors' similar motion of April 1, 2016, (Dkt. No. 1221). In that order (Dkt. No. 1224), the Court directed Investors' counsel as follows: "The Dillon and Aguirre investors are directed to follow Fed. R. Civ. P. Rule 24 and file motions to intervene to the extent that they wish to refile any of these motions."

Nevada Ormonde, IRA, Nick Ruddick, Paul Leccese, Paul R. Sarraffe, IRA, Perryman Family Trust, Polly Yue, Prentiss Family Trust, Kenneth and Gail Prentiss Trustees, Ralph Brenner, Randall S. Ingermanson IRA, Rebecca Merder, Reeta Mohleji, Regis T. Duncan, IRA, Regis T. Duncan, Renee Norling, Richard A. Kopenski, IRA Roth, Robert Indihar, Robert Churchill Family Trust, Robert Churchill IRA, Robert H. Humphreys, Robert Indihar IRA, Robert S. Weschler, Robert Tuohy, Roderick C. Grant, Roger Hort, Roger Moucheron, Ronald Askeland, Ronald Parkinen, Ronald Scott, Ronald Scott, IRA, Salli Sammut Trust, Salli Sue Sammut Trustee, Salli Sue Sammut, IRA, Shirley Moucheron, Stephen Dankworth, Stephen Hogan, Stephen Yue, Steve P. White, IRA, Steve P. White, SEP IRA, Susan Burns, Tamara and Chris Nowacki, jointly, Tamara Nowacki, IRA, Terry Adkinson, The Knowledge Team Profit Sharing Plan, The Ormonde Family Trust, Thomas H. Panzer, Roth IRA, Thomas Herman Panzer Trust, Thomas H Panzer, Trustee, Trisha Bruce, Val Indihar, W.C. Wilhoite, W.C. Wilhoite, Roth IRA, William c. Phillips, William L. Summers, IRA, William L. Summers, William Loeber, William Nighswonger IRA, William R. Nighswonger, William R. Diehl, William R. Rattan Rev. Trust, and William V. and Carol J. Dascomb Trust.

2) Investors have a legally protectable interest in the subject matter of this action because it is comprised entirely of investors in the general partnerships that are currently within the receivership;

3) Investors' interests in this action will be substantially impaired or impeded if they are not allowed to intervene because

a) an immediate sale of the GP properties would likely not maximize investor return; and

b) the contemplated sale process was in violation of the 28 U.S.C. § 2001;

4) The existing parties do not adequately represent Investors' interests in the action;

5) The motion for intervention was timely made..

The portion of the motion that seeks to vacate the orders is brought on the grounds that each of said orders violates the mandates of 28 USC § 2001 and are therefore void.

This motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, all pleadings and papers on file in this action, and upon such other matters as may be presented to the Court at the time of the hearing.

DATED: April 11, 2016

Respectfully submitted,

By: /s/ Gary J. Aguirre

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

CASE NO.: 3:12-CV-02164-GPC-JMA

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPORT OF INVESTORS' MOTION FOR ORDER VACATING PRIOR ORDERS APPROVING RECOMMENDATIONS OF RECEIVER TO SELL GP PROPERTIES

Date: June 3, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

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I. Introduction

This motion is brought by 191 investors ("Investors")[1] in the 87 partnerships (GPs) in receivership.[2] Investors seek an order permitting them to intervene in this case and

[1] Susan Graham, Alfred L. Pipkin, Alfred L. Pipkin, IRA, Allert Boersma, Arthur V. and Kristie L. Rocco Living Trust, Arthur V. Rocco, Baldwin Family Survivors' Trust, Barbara Humphreys, IRA, Beverly & Mark Bancroft, Beverly A. Bancroft, IRA, Bruce A. Morey IRA, Bruce A. Morey, Bruce R. Hart IRA for Bruce R. Hart and Dixie L. Hart, Carol D. Summers, Carol Jonson, Catherine E. Wertz IRA, Catherine E. Wertz, Cathy Totman, IRA, Charles Bojarski, Chris Nowacki, IRA, Cindy Dufresne, Craig Lamb, Curt & Janean Johnson Family Trust, Curt & Janean Johnson, jointly, Curt Johnson, Curt Johnson, Roth IRA, Cynthia J. Clarke, D & E Macy Family Revocable Living Trust, D.F. Macy IRA, Daniel Burns, Daniel Knapp, Darla Berkel IRA, Darla Berkel, Daryl Dick, Daryl R. Mabley, David and Sandra Jones Trust, David Fife IRA, David Haack IRA, David Haack; David Karp IRA, David Kirsh, David Kirsh, Roth IRA, David Kirsh, Traditional IRA, Debra Askeland, Deidre Parkinen, Dennis Gilman, Dennis Gilman IRA, Diane Bojarski, Diane Gilman, Donna M. and Richard A. Kopenski Family Trust, Donna M. Kopenski, IRA Roth, Douglas G. Clarke, Douglas Sahlin IRA, Eben B. Rosenberger, Edith Sahlin IRA, Edward Takacs, Elizabeth Lamb, Elizabeth Q. Mabley, Eric W. Norling, Eric W. Norling, IRA, Gary Hardenburg, Gary Hardenburg, Roth IRA, Gene Fantano, George Klinke, IRA, George Trezek, Gerald Zevin, Gerald Zevin, IRA, Gwen Tuohy, Gwenmarie Hilleary, Henrik Jonson, Henrik Jonson, IRA, IDAC Family Group LLC, Iris Bernstein IRA, James J. Coyne Jr. Trust, Janice Marshall, Janice Marshall, IRA, Jason Bruce, Jeffrey Merder, IRA, Jeffrey J. Walz, Jeffrey Larsen, Jeffrey Merder, Jennifer Berta, Jim Minner, Joan Trezek, John Jenkins, John and Mary Jenkins Trust, John and Mary Jenkins Trustees, John Lukens, John Lukens, IRA, John R. Oberman, Joy A. de Beyer, Roth IRA, Joy A. de Beyer, Traditional IRA, Joy de Beyer, Juanita Bass IRA, Juanita Bass, Judith Glickman Zevin, IRA, Judith Glickman Zevin, Judy Froning, Judy Knapp, Karen Coyne, Karen J. Coyne IRA, Karen Wilhoite, Karie J. Wright, Kimberly Dankworth, Kirsh Family Trust UTD, Kristie L. Rocco, Lawrence Berkel, Lawrence Berkel, IRA, Lea Leccese, Leo Dufresne, Leo T. Dufresne Jr. IRA, Linda Baldwin IRA, Linda Clifton, Lisa A. Walz, Lloyd Logan and Ida Logan, jointly, Lloyd Logan, IRA, Loretta J. Diehl, Lynda Igawa, Marc McBride, Marcia McRae, Marilyn L. Duncan, Mark Clifton, Mary Grant, Mary J. Jenkins, IRA, Mathew Berta, Mealey Family Trust, Michael R. Wertz, Michael R. Wertz, IRA, Mildred Mealey, beneficiary of Duane Mealey IRA, Minner Trust, Monica Takacs, Monique Minner, Neil Ormonde, IRA, Nevada Ormonde, IRA, Nick Ruddick, Paul Leccese, Paul R. Sarraffe, IRA, Perryman Family Trust, Polly Yue, Prentiss Family Trust, Kenneth and Gail Prentiss Trustees, Ralph Brenner, Randall S. Ingermanson IRA, Rebecca Merder, Reeta Mohleji, Regis T. Duncan, IRA, Regis T. Duncan, Renee Norling, Richard A. Kopenski, IRA Roth, Robert

vacating three prior orders of this Court that approved the Receiver's sealed and unsealed recommendations to sell GP properties or enter into agreements with brokers to sell GP properties. Investors contend that each of these orders must be vacated on the grounds that they fail to comply with the clear and explicit mandates of 28 USC § 2001. On this ground, Investors move to vacate the following orders:

1. The June, 17, 2015, order (Dkt. No. 1085) approving the sale of the Jamul Valley property;
2. The May 12, 2015, order (Dkt. No. 1069) setting the "orderly sale" process;
3. The January 14, 2016, order (Dkt. No. 1168) to the extent it granted the Receiver's recommendations to (1) sell any property and (2) enter into any broker agreements to sell any property.

Investors filed a similar motion on April 1, 2016, (Dkt. No. 1221). The Court denied that motion without prejudice on April 5, 2016 (Dkt. No. 1224) and directed Investors' counsel as follows: "The Dillon and Aguirre investors are directed to follow Fed. R. Civ. P. Rule 24 and file motions to intervene to the extent that they wish to refile any of these motions." To comply with this order, Investors filed their motion for leave to file a complaint in intervention (Dkt. No. 1229) on April 8, 2016. The proposed

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Indihar, Robert Churchill Family Trust, Robert Churchill IRA, Robert H. Humphreys, Robert Indihar IRA, Robert S. Weschler, Robert Tuohy, Roderick C. Grant, Roger Hort, Roger Moucheron, Ronald Askeland, Ronald Parkinen, Ronald Scott, Ronald Scott, IRA, Salli Sammut Trust, Salli Sue Sammut Trustee, Salli Sue Sammut, IRA, Shirley Moucheron, Stephen Dankworth, Stephen Hogan, Stephen Yue, Steve P. White, IRA, Steve P. White, SEP IRA, Susan Burns, Tamara and Chris Nowacki, jointly, Tamara Nowacki, IRA, Terry Adkinson, The Knowledge Team Profit Sharing Plan, The Ormonde Family Trust, Thomas H. Panzer, Roth IRA, Thomas Herman Panzer Trust, Thomas H Panzer, Trustee, Trisha Bruce, Val Indihar, W.C. Wilhoite, W.C. Wilhoite, Roth IRA, William c. Phillips, William L. Summers, IRA, William L. Summers, William Loeber, William Nighswonger IRA, William R. Nighswonger, William R. Diehl, William R. Rattan Rev. Trust, and William V. and Carol J. Dascomb Trust.

[2] The Court's order of Sep. 6, 2012 (Dkt. No. 10) appointed Thomas Hebrank as the temporary receiver in this matter. The Court's order of March 13, 2013 (Dkt. No. 174) confirmed Mr. Hebrank as permanent receiver.

complaint in intervention seeks various post judgment relief including the relief sought by this motion. In order for the issues raised by this motion to be promptly resolved, Investors seek to intervene to bring this motion pursuant to Rule 24 of the Federal Rules of Civil Procedure.

Sections II and III address Investors' right to intervene for the purpose of this motion. Investors refer the Court to their April 8 motion to intervene in this matter (Dkt. No. 1229) for more extended analysis of their rights to intervene in this matter. In sections IV through VII, Investors present their argument why the Court should vacate its prior orders relating to the sales of properties owned by the GPs. These sections may be moot if the Court grant's Investors' motion to file a complaint in intervention which is scheduled for hearing on May 6, 2016.

II. Investors Are Entitled to Intervene as a Matter of Right under Fed. R. Civ. P. 24(a)(2) to Bring This Motion

A. Elements of Rule 24(a).

Rule 24(a)(2) of the Federal Rules of Civil Procedure, upon timely motion, state the Court must permit to intervene anyone who:

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

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

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

By this motion, Investors seek an order to intervene for the limited purpose of bringing this motion. The Court may grant limited intervention under Rule 24. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (U.S. 1987)(quoting with approval Advisory Committee Notes on Fed. Rule Civ. Proc. 24, "intervention of right under the amended rule [24(a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of proceedings.") See also *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1495 (9th Cir. 1995); *United States v. City of Detroit*, 712 F.3d 925, 927 (6th Cir. Mich. 2013)

B. Investors Have a Significantly Protectable Interest in This Action.

Citing *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011), this Court observed in *United States v. Ballantyne*, 2013 U.S. Dist. LEXIS 125632 (S.D. Cal. 2013), "To demonstrate a 'significant protectable interest,' an applicant 'must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue.'" The undisputable facts establish Investors have met that burden. This Court previously held the investor-partners and GPs have protectable interests in this case (Dkt. No. 809, p. 5, ll. 23-25).

C. The Disposition of This Action May Impair or Impede Investors' Ability to Protect Their Interests

The proposed complaint in intervention satisfies this element for multiple reasons. Most obviously, the February 4, 2016, Receiver's motion (Dkt. No. 1181) would liquidate each GP, and distribute almost 99% of the assets to persons who, as alleged in the proposed complaint in intervention, have no right, title, or interest in those assets. According to the Receiver, the SEC has consented to his motion.[3] No party to the case

[3] "An opposing party's failure to file an opposition to any motion may be construed as consent to the granting of the motion pursuant to Civil Local Rule 7.1(f)(3)(c)." Dkt. No. 1181, at 2, ll. 18-20.

has opposed this motion. By way of example, Investors Mary and John Jenkins invested $30,000 in Park Vegas Partners in 1983. For 33 years, they have paid off their notes and paid operational fees. According to the Receiver's projections in his February 4, 2016, memorandum (Dkt. No. 1181), the Jenkins would have received $58,200 dollars (194%) if Park Vegas Partners was dissolved in 2015 and the proceeds distributed to its partners. Under the Receiver's proposal, the Jenkins would receive approximately $4,000. The Receiver's plan will have the same effect on each Investors' interests, just as it does on the Jenkins, unless they can fully participate as parties.

D. Defendants Cannot Adequately Represent Investors in This Action

The Court found a conflict of interest between Defendants and investors. *SEC v. Schooler*, 2013 U.S. Dist. LEXIS 158538 (S.D. Cal. 2013)("Counsel for Defendants has a clear conflict of interest in representing the interests of both Defendants and the GPs because the GPs are comprised of investors alleged to have been defrauded by Defendants."). Under these circumstances, Defendants obviously cannot and have not adequately represented investors in this case.

And the record conclusively establishes Defendants have not represented, cannot represent and have no motivation to represent investors or any of the other partners in the GPs. Defendants have failed to take any position in relation to the Receiver's February 4 motion as he indeed states in that motion (Dkt. No. 1225 at 2, l. 26).

E. The Receiver Cannot Adequately Represent Investors in This Action

The Receiver's February 4 plan would distribute $4,020 (13.4%) to the Jenkins, rather than the $58,000 they would receive under the terms of the GP agreement.[4] By any measure, the Receiver has taken an adverse position to the Jenkins' financial interests. By definition, an adversary is not an adequate representative for the person on the other side of the relationship.

[4] The discrepancy is greater; because Investors' valuations are substantially higher.

F. The SEC Cannot Adequately Represent Investors in This Action

According to the Receiver, the SEC has approved his motion to sell off the properties, create a "single pot," and distribute the single pot to all investors in proportion to their total investment in all GPs.[5] In supporting the Receiver's plan, the SEC supports forfeiture of the rights of the Investors' under the GP agreements. As such, the SEC obviously cannot and does not speak on behalf of Investors.

G. Investors' Motion to Intervene Is Timely

The Ninth Circuit has consistently held that, "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," *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 *Legal Aid Soc. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. Cal. 1980), the court focused on how the change of position by the Government, as the Receiver has done here, was the event that triggered the beginning of the time period for the movants to intervene. The Ninth Circuit held:

> 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.

618 F.2d 48, 50. In this case, the necessity for Investors to bring this motion was triggered by the Receiver's 180-degree reversal on February 4, 2016.

III. In the Alternative, the Court Should Exercise Its Discretion to Permit Investors to Intervene.

Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure provides that, on timely motion, the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." *Perry v. Schwarzenegger*,

[5] *Supra,* n. 3.

630 F.3d 898, 905 (9th Cir. 2011). As discussed above, these factors weigh in favor of granting Investors permission to intervene. They raise common issues of fact and law with the various motions the Receiver has filed since February 4, 2016, to sell the GP properties and distribute the proceeds pro rata to all investor-partners.

IV. The Redacted Order of June 17, 2015 (Dkt. No. 1085) Approving the Sale of the Jamul Valley Property Must Be Vacated

This order clearly approved a private sale and thus must comply with 28 USC § 2001(b). Before approving the sale of the Jamul Valley property, the statute requires the Court to order:

1. the appointment of three disinterested persons to appraise the property;
2. the publishing of notice in a newspaper ten days before the sale;
3. a sales price at least two-thirds of the appraised value;
4. the opportunity for other bidders to make overbids 10% higher than the proposed price; and finally,
5. a hearing before the court.

None of these steps occurred before the Court issued its June 17, 2015, order (Dkt. No. 1085) approving the sale of the Jamul Valley property. Orders issued in violation of 28 USC § 2001 are void. *SEC v. Kirkland*, 2007 U.S. Dist. LEXIS 45353 (M.D. Fla. 2007)(Referring to 28 U.S.C. § 2001, "A sale made without compliance to these requirements is 'void.'"). See also: *Acadia Land Co. v. Horuff,* 110 F.2d 354, 355 (5th Cir. La. 1940)("This sale was void because the court was lacking in jurisdiction to confirm it"). Accordingly, we respectfully submit the order must be vacated.

As the SEC well knows, its receivers must also comply with 28 USC § 2001 when they propose the sale of realty. *SEC v. American Capital Invs.*, 98 F.3d 1133, 1137 (9th Cir. Cal. 1996)("The court then turned to the two-step process mandated by 28 U.S.C. § 2001 for approving the sale of receivership property—the appointment of appraisers to appraise the properties, followed by a sale confirmation hearing."). *United States v. Brewer*, 2009 U.S. Dist. LEXIS 52186 (M.D. Fla. 2009); *SEC v. Capital Cove Bancorp*

LLC, 2015 U.S. Dist. LEXIS 174856 (C.D. Cal. 2015). ("Pursuant to the provisions of 28 U.S.C. § 2001, this Court may authorize the Receiver to sell acquired assets by public sale."). The last case cited, *Capital Cove*, was prosecuted by the SEC's Los Angeles Regional Office, the same office that is prosecuting this case.

In *SEC v. T-Bar Resources* 2008 WL 4790987 (N.D. Tex. Oct. 28, 2008), the court compared and contrasted the language of 28 USC § 2001(b), applicable to realty, with 28 USC § 2004, applicable to personalty. The court first acknowledged the language in 2001(b) was mandatory:

> "[B]efore" courts may confirm such a sale, they "shall" order three appraisals. Id. Section 2001(b) then instructs that a proposed price lower than two thirds of the appraisal value may not be confirmed, id., thereby deeming such a low number as counter to the best interests of the estate. Congress thus, through the plain text of § 2001(b), exercised its judgment of what satisfies the best interests standard in consideration of the appraisal values. Courts, therefore, shall similarly not pass judgment on the best interests standard absent the benefit of the mandated appraisals.

The court then compared the strict language of 2001(b) with the more flexible language of 2004:[6]

> Reading § 2001(b) in context with its surrounding counterparts provides further proof of the mandatory nature of the three appraisals. For example, in allowing courts to order the private sale of personal property, 28 U.S.C. § 2004 informs that courts are to follow the same procedures outlined in § 2001(b), "unless the court orders otherwise." n4 Id. Congress thus considered deviating from the rigors of § 2001(b)'s procedures in relaxing the process for the sale of personalty. The absence of any such authorization in the sale of realty suggests that Congress intended the more stringent procedures to be the rule when ordering the sale of real property.

[6] The court was applying a well-recognized rule of statutory construction which was articulated as follows in *Colorado Public Interest Research Group, Inc. v. Train*, 507 F.2d 743 (10th Cir. Colo. 1974) ("[W]here a statute contains express exceptions, the courts should be exceedingly slow in implying unexpressed exceptions, lest the courts thereby thwart the legislative intent").

The path taken by the Receiver in obtaining the June 17, 2015, order (Dkt. No. 1085) failed to comply with any of the mandates of 28 USC § 2001(b). He did not move the Court for an order appointing three appraisers, publishing notice, requiring the sales price be at least two-thirds of the appraised value, allowing bidders to make overbids, and setting a hearing before the Court. Consequently, the order is void. *Kirkland*, 2007 LEXIS 45353; *Acadia,* 110 F.2d 354, 355; *T-Bar Resources* 2008 WL 4790987. Investors find no clue in any of the Receiver's moving papers, which were approved by the SEC,[7] that either the Receiver or the SEC informed the Court that court-ordered sales of realty are subject to the mandates of 28 USC § 2001.

V. The Court Order of May 12, 2015, (Dkt. No. 1069) Must Be Vacated Because It Fails to Comply with 28 USC § 2001

The Receiver contends the Court's May 12, 2015, order (Dkt. No. 1069) approved the sales of any of the 23 properties if a GP failed to contribute the necessary capital to pay the operating expenses (Dkt. No. 1203, p. 2, ll. 8-18). He also contends that the same order would allow him to sell the interest of a GP that was a co-tentant in the same property, even if the co-tenant GP was not in default.

The "orderly sale process" was described in the Receiver's Report and Recommendation Regarding Course of Action for General Partnerships of April 17, 2015 (Dkt. No. 1056). It was approved by the Court's order of May 12, 2015, (Dkt. No. 1069). Investors submit that all of the terms of the "orderly sale process" contemplate a private sale, including the following terms: the retention of a real estate broker, the submission of a specific offer to the Court, the negotiations with a specific purchaser, and the agreement

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[7] The Receiver is ordered to refrain from seeking input on his briefs from a single party. If he wishes to seek input on his briefs, he must seek input from both the SEC and Defendants. The Receiver is of course still free to not seek input from any party if he believes that to be the appropriate course of action Order Denying Defendants' Motion for Modification of Preliminary Injunction Order to Remove Thomas C. Hebrank as Court-Appointed Receiver, p. 12, ll. 16-20 (Dkt. No.1004).

on price with a specific purchaser. And, most conclusively, there is no reference to a public auction. (Dkt. No. 1056 Section III, p. 6, l. 23, p. 8, l. 2).

Again, the path taken by the Receiver in obtaining the May 12, 2015, order (Dkt. No. 1069) failed to comply with any of the five steps required by the strict language of 28 USC § 2001(b). He did not move the Court for an order appointing three appraisers, publishing notice, requiring the sales price be at least two-thirds of the appraised value, allowing bidders to make overbids, and setting a hearing before the Court. Consequently, the order is void. *Kirkland*, 2007 LEXIS 45353; *Acadia*, 110 F.2d 354, 355; *T-Bar Resources* 2008 WL 4790987. We find no clue in any of the Receiver's moving papers filed in connection with this motion that the Receiver informed the Court that court-ordered sales of realty are subject to the mandates of 28 USC § 2001.

Further, the "orderly sale process" does not meet the threshold requirement of 2001(a), because it rules out a public sale. *Bovay v. Townsend*, 78 F.2d 343, 347 (8th Cir. Ark. 1935)("The purpose of the statute which requires the sale of real estate at public auction is to give all persons interested an opportunity to bid, to the end that the property may be sold to the best advantage.")

VI. The Court's Order of January 14, 2016, (Dkt. No. 1168) Confirming Agreements with Brokers to Sell GP Properties Must Be Vacated Because It Fails to Comply 28 USC § 2001

The approval of the broker agreements by the Court's January 14, 2016, order (Dkt. No. 1168) has the same flaw as the May 12, 2015, order (Dkt. No. 1069) discussed in Section V above. The approval of the broker agreements is the first step in the Receiver's "orderly sale process" which we discussed in the last section (Dkt. No. 1056, p. 7, ll. 1-3). In his January 8, 2016, memorandum seeking the approval of these agreements, the Receiver argued: "If investors did not contribute the necessary capital, the properties would be moved to an orderly sale process." (Dkt. No. 1166, p. 1, ll, 14-16).

Again, the path taken by the Receiver in obtaining the January 14, 2016, order (Dkt. No. 1168) failed to comply with any of the five steps required by the strict language of 28 USC § 2001(b). He did not move the Court for an order appointing three appraisers, publishing notice, requiring the sales price be at least two-thirds of the appraised value, allowing bidders to make overbids, and setting a hearing before the court. Consequently, the order is void. *Kirkland*, 2007 LEXIS 45353; *Acadia,* 110 F.2d 354, 355; *T-Bar Resources* 2008 WL 4790987. We find no clue in any of the Receiver's moving papers filed in connection with this motion that the Receiver informed the Court that court-ordered sales of realty are subject to the mandates of 28 USC § 2001.

VII. The Court's Order of January 14, 2016, (Dkt. No. 1168) Must Be Vacated to the Extent It Approved the Sales of Three Properties

The operative effect of the Court's January 14, 2016, order (Dkt. No. 1168) was to approve the sale of three properties. Investors cannot identify those properties, because they are only identified in the Receiver's sealed recommendation (Dkt. No. 1159). For the same reason, Investors' argument is limited on this issue, because the terms of the recommendation remain sealed. Accordingly, Investors can only state our conclusion and refer the Court to our analysis above. On that basis, Investors contend the proposed sales fail to comply with 28 USCS § 2001 and thus must be vacated. In this regard, we again cite law related to public sales and the case law related to private sales: *Bovay*, 78 F.2d 343, 347; *Kirkland*, 2007 LEXIS 45353; *Acadia,* 110 F.2d 354, 355; *T-Bar Resources* 2008 WL 4790987.

VIII. Conclusion

For the foregoing reasons, Investors respectfully request the Court grant their Motion to Intervene for the purpose of this motion and grant the motion to vacate.

DATED: April 11, 2016

Respectfully submitted,

By: /s/ Gary J. Aguirre
GARY J. AGUIRRE
Aguirre Law, A.P.C.

gary@aguirrelawapc.com
Attorney for Investors

Exhibit 3

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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' NOTICE OF MOTION AND MOTION FOR AN ORDER DIRECTING THE RECEIVER TO PROVIDE AN ACCOUNTING OR IN THE ALTERNATIVE FOR AN AUDIT OF THE RECEIVERSHIP BY AN INDEPENDENT ACCOUNTANT

Date: June 3, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on June 3, 2016, at 1:30 p.m. in Courtroom 2D of the United States District Court, Southern District of California, located at 221 W. Broadway, San Diego, CA 92101, Investors[1] will, and hereby do, move this Court for an order:

[1] Susan Graham, Alfred L. Pipkin, Alfred L. Pipkin, IRA, Allert Boersma, Arthur V. and Kristie L. Rocco Living Trust, Arthur V. Rocco, Baldwin Family Survivors' Trust, Barbara Humphreys, IRA, Beverly & Mark Bancroft, Beverly A. Bancroft, IRA, Bruce A. Morey IRA, Bruce A. Morey, Bruce R. Hart IRA for Bruce R. Hart and Dixie L. Hart, Carol D. Summers, Carol Jonson, Catherine E. Wertz IRA, Catherine E. Wertz, Cathy Totman, IRA, Charles Bojarski, Chris Nowacki, IRA, Cindy Dufresne, Craig Lamb, Curt & Janean Johnson Family Trust, Curt & Janean Johnson, jointly, Curt Johnson, Curt Johnson, Roth IRA, Cynthia J. Clarke, D & E Macy Family Revocable Living Trust, D.F. Macy IRA, Daniel Burns, Daniel Knapp, Darla Berkel IRA, Darla Berkel, Daryl Dick, Daryl R. Mabley, David and Sandra Jones Trust, David Fife IRA, David Haack IRA, David Haack; David Karp IRA, David Kirsh, David Kirsh, Roth IRA, David Kirsh, Traditional IRA, Debra Askeland, Deidre Parkinen, Dennis Gilman, Dennis Gilman IRA, Diane Bojarski, Diane Gilman, Donna M. and Richard A. Kopenski Family Trust, Donna M. Kopenski, IRA Roth, Douglas G. Clarke, Douglas Sahlin IRA, Eben B. Rosenberger, Edith Sahlin IRA, Edward Takacs, Elizabeth Lamb, Elizabeth Q. Mabley, Eric W. Norling, Eric W. Norling, IRA, Gary Hardenburg, Gary Hardenburg, Roth IRA, Gene Fantano, George Klinke, IRA, George Trezek, Gerald Zevin, Gerald Zevin, IRA, Gwen Tuohy, Gwenmarie Hilleary, Henrik Jonson, Henrik Jonson, IRA, IDAC Family Group LLC, Iris Bernstein IRA, James J. Coyne Jr. Trust, Janice Marshall, Janice Marshall, IRA, Jason Bruce, Jeffrey Merder, IRA, Jeffrey J. Walz, Jeffrey Larsen, Jeffrey Merder, Jennifer Berta, Jim Minner, Joan Trezek, John Jenkins, John and Mary Jenkins Trust, John and Mary Jenkins Trustees, John Lukens, John Lukens, IRA, John R. Oberman, Joy A. de Beyer, Roth IRA, Joy A. de Beyer, Traditional IRA, Joy de Beyer, Juanita Bass IRA, Juanita Bass, Judith Glickman Zevin, IRA, Judith Glickman Zevin, Judy Froning, Judy Knapp, Karen Coyne, Karen J. Coyne IRA, Karen Wilhoite, Karie J. Wright, Kimberly Dankworth, Kirsh Family Trust UTD, Kristie L. Rocco, Lawrence Berkel, Lawrence Berkel, IRA, Lea Leccese, Leo Dufresne, Leo T. Dufresne Jr. IRA, Linda Baldwin IRA, Linda Clifton, Lisa A. Walz, Lloyd Logan and Ida Logan, jointly, Lloyd Logan, IRA, Loretta J. Diehl, Lynda Igawa, Marc McBride, Marcia McRae, Marilyn L. Duncan, Mark Clifton, Mary Grant, Mary J. Jenkins, IRA, Mathew Berta, Mealey Family Trust, Michael R. Wertz, Michael R. Wertz, IRA, Mildred Mealey, beneficiary of Duane Mealey IRA, Minner Trust, Monica Takacs, Monique Minner, Neil Ormonde, IRA,

A. Directing Thomas C. Hebrank, the Receiver in this matter, to provide:

1) the Court and investors with accurate and complete statements by accounting category, e.g., payroll, of his receipts and disbursements for each GP and Western for each quarter since his appointment;

2) the Court and investors with current balance sheets for each GP and Western;

3) the Court and investors with all his filings with the SEC as required or contemplated by the SEC's Billing Instructions for Receivers, including any fee applications or Standardized Fund Accounting Report ("SFAR") submitted to the SEC in connection with services in this case;

4) the Court and investors with the amount and source of the fees he has paid himself and his consultants to date;

5) the Court and investors with the amount of the fees he expects to pay himself and his consultants under his Plan;

6) the Court and investors with accurate and complete statements of the amounts currently owed on any outstanding mortgage on any realty subject to the

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Nevada Ormonde, IRA, Nick Ruddick, Paul Leccese, Paul R. Sarraffe, IRA, Perryman Family Trust, Polly Yue, Prentiss Family Trust, Kenneth and Gail Prentiss Trustees, Ralph Brenner, Randall S. Ingermanson IRA, Rebecca Merder, Reeta Mohleji, Regis T. Duncan, IRA, Regis T. Duncan, Renee Norling, Richard A. Kopenski, IRA Roth, Robert Indihar, Robert Churchill Family Trust, Robert Churchill IRA, Robert H. Humphreys, Robert Indihar IRA, Robert S. Weschler, Robert Tuohy, Roderick C. Grant, Roger Hort, Roger Moucheron, Ronald Askeland, Ronald Parkinen, Ronald Scott, Ronald Scott, IRA, Salli Sammut Trust, Salli Sue Sammut Trustee, Salli Sue Sammut, IRA, Shirley Moucheron, Stephen Dankworth, Stephen Hogan, Stephen Yue, Steve P. White, IRA, Steve P. White, SEP IRA, Susan Burns, Tamara and Chris Nowacki, jointly, Tamara Nowacki, IRA, Terry Adkinson, The Knowledge Team Profit Sharing Plan, The Ormonde Family Trust, Thomas H. Panzer, Roth IRA, Thomas Herman Panzer Trust, Thomas H Panzer, Trustee, Trisha Bruce, Val Indihar, W.C. Wilhoite, W.C. Wilhoite, Roth IRA, William c. Phillips, William L. Summers, IRA, William L. Summers, William Loeber, William Nighswonger IRA, William R. Nighswonger, William R. Diehl, William R. Rattan Rev. Trust, and William V. and Carol J. Dascomb Trust.

receivership and, where past due sums are owed, the amounts now past due including the rate of interest and/or penalties on past due amounts;

7) the Court and investors with accurate and complete statements of the amounts currently owed on any outstanding taxes on any realty subject to the receivership and, where past due sums are owed, the amount now past due including the rate of interest and/or penalties on past due amounts;

8) Investors with the books and records for the GPs and Western, including ACCPAC, QuickBooks and OPADS computer system;

9) Investors with monthly bank statements and checks for the GPs and Western which were not previously provided to Investors;

10) Investors with the financial statement Schooler provided to the Receiver pursuant to paragraph XIX of the Court's order of September 6, 2012, (Dkt. No. 10), or, in the alternative,

B. For an order an audit by an independent accounting firm appointed by the Court at the Receiver's expense.

This Motion is brought on the grounds that:

1. The receiver was appointed as a fiduciary, and , in that capacity, has a duty to maintain and produce such records upon the request of the Court or the beneficiaries of the assets entrusted to him;
2. Investors are general partners in the partnerships which the receiver possesses and controls, and in that capacity, Investors have the right to inspect and copy the partners' books and records and other financial information;
3. The Receiver has a duty to provide a final audit at the time he proposes a distribution plan; and
4. The receiver has a duty under the SEC Billing Instructions for Receivers to provide periodic statements of his receipts and disbursements and a final

statement describing in detail the cost and benefit associated with his participation in this case.

DATED: April 21, 2016

Respectfully submitted,

By: /s/ Gary J. Aguirre

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Attorney for Investors Susan Graham et al.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INVESTORS' MOTION FOR AN ORDER DIRECTING THE RECEIVER TO PROVIDE AN ACCOUNTING OR IN THE ALTERNATIVE FOR AN AUDIT OF THE RECEIVERSHIP BY AN INDEPENDENT ACCOUNTANT

Date: June 3, 2016
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

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I. Introduction

This motion is brought by 191 investors ("Investors")[1] in the 87 partnerships (GPs) in the receivership. Investors seek an order permitting them to intervene in this case to bring this motion for an accounting or, in the alternative, an audit of the receivership. Investors are cognizant that additional costs would be incurred with either. But the huge gaps and Enron-style irregularities in the Receiver's accounting for the $19 million he has received and spent must be addressed before any plan can be approved.

We cannot present a complete list of those gaps and irregularities at this time. That cannot be done until we see the Receiver's books of account, if they exist, and his bank records. That said, we present below the more significant gaps and irregularities in the Receiver's accounting practices that we have found so far:

1. The Receiver failed to submit a single report to the Court pursuant to the Securities and Exchange Commission ("SEC") mandates which required him to submit 13 reports providing 34 categories of information regarding the $19 million he has spent;
2. His Enron-style financial statements simultaneously misstate revenue and understate the receivership funds he spent by an estimated 9.5 million;
3. The Receiver has failed to disclose in his proposed distribution plan ("Plan") (Dkt. No. 1181) how much he has paid himself and his consultants, how much he expects to pay himself and his consultants, and the source of the funds to pay those fees.
4. The Receiver failed to provide in his 14 interim reports ("Reports") any accounting category for the $16.4 million of Western funds he has spent;
5. The Receiver failed to provide in his 14 Reports any accounting category for the $2.38 million of GP funds he has spent;

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

6. The Receiver has failed to provide the Court with any information of Western's debt on outstanding mortgages, so far as we can tell, since November 2014;
7. The Receiver has failed to provide the Court with any information of GPs debt to Western, so far as we can tell, since November 2014;
8. The Receiver has failed to provide any information of the liabilities of the GPs for past due taxes and defaults on mortgages;
9. The statements Receiver's counsel made to Investors' counsel that the Receiver keeps no books and records is not true, since Receive uses Western's electronic accounting system;
10. The Receiver has produced financial statements and records for the same GPs for the same accounting periods, which cannot be reconciled with each other, e.g., there are conflicting representations for the same GP for the same quarter.

For all of these reasons, Investors seek an order directing the Receiver to provide:

1. the Court and investors with accurate and complete statements by accounting category, e.g., payroll, of his receipts and disbursements for each GP and Western for each quarter since his appointment;
2. the Court and investors with current balance sheets for each GP and Western;
3. the Court and investors with all his filings with the SEC as required or contemplated by the SEC's Billing Instructions for Receivers, including any fee applications or Standardized Fund Accounting Report ("SFAR") submitted to the SEC in connection with services in this case;
4. the Court and investors with the amount and source of the fees he has paid himself and his consultants to date;
5. the Court and investors with the amount of the fees he expects to pay himself and his consultants under his Plan;
6. the Court and investors with accurate and complete statements of the amounts currently owed on any outstanding mortgage on any realty subject to the

receivership and, where past due sums are owed, the amounts now past due including the rate of interest and/or penalties on past due amounts;

7. the Court and investors with accurate and complete statements of the amounts currently owed on any outstanding taxes on any realty subject to the receivership and, where past due sums are owed, the amount now past due including the rate of interest and/or penalties on past due amounts;
8. Investors with the books and records for the GPs and Western, including ACCPAC, QuickBooks and OPADS computer system;
9. Investors with monthly bank statements and checks for the GPs and Western which were not previously provided to Investors;
10. Investors with the financial statement Schooler provided to the Receiver pursuant to paragraph XIX of the Court's order of September 6, 2012, (Dkt. No. 10).

If the Receiver is unable to provide the financial statements and records specified above, Investors believe the only viable alternative is for the Court to order an audit of the receivership by an independent accounting firm and have the Receiver pay for the cost from his own funds.

Investors filed a prior motion for an accounting on April 1, 2016, (Dkt. No. 1223). The Court denied that motion without prejudice on April 5, 2016 (Dkt. No. 1224) and directed Investors' counsel as follows: "The Dillon and Aguirre investors are directed to follow Fed. R. Civ. P. Rule 24 and file motions to intervene to the extent that they wish to refile any of these motions." To comply with this order, Investors filed their motion for leave to file a complaint in intervention on April 8, 2016 (Dkt. No. 1229). The proposed complaint in intervention seeks various post judgment relief including the relief sought by this motion. In order for the issues raised by this motion to be promptly resolved, Investors seek to bring this motion pursuant to Fed. R. Civ. P. Rule 24.

Sections II and III below address Investors' right to intervene for the purpose of this motion. Investors refer the Court to Investors' motion to intervene in this matter

(Dkt. No. 1229) for more extended analysis of their rights to intervene in this matter. These arguments may be moot if the Court grants Investors' motion to file a complaint in intervention which is scheduled for hearing on May 6, 2016. In sections III through VI, Investors present their arguments why the Court should grant the motion for an accounting or an audit.

II. Investors Are Entitled to Intervene as a Matter of Right under Fed. R. Civ. P. 24(a)(2) to Bring This Motion

A. Elements of Rule 24(a).

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

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

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

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

By this motion, Investors seek an order to intervene for the limited purpose of bringing this motion. The Court may grant limited intervention under Rule 24. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (U.S. 1987)(quoting with approval Advisory Committee Notes on Fed. Rule Civ. Proc. 24, "intervention of right under the amended rule [24(a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of proceedings.") See also *Forest Conservation Council v. United States Forest Serv.*, 66

F.3d 1489, 1495 (9th Cir. 1995); *United States v. City of Detroit*, 712 F.3d 925, 927 (6th Cir. Mich. 2013)

B. Investors Have a Significantly Protectable Interest in This Action.

Citing *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011), this court observed in United *States v. Ballantyne*, 2013 U.S. Dist. LEXIS 125632 (S.D. Cal. 2013), "To demonstrate a 'significant protectable interest,' an applicant 'must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue.'" The undisputable facts establish Investors have met that burden. This Court previously held the investor-partners and GPs have protectable interests in this case (Dkt. No. 809, p. 5, ll. 23-25).

C. The Disposition of This Action May Impair or Impede Investors' Ability to Protect Their Interests

The proposed complaint in intervention satisfies this element for multiple reasons. Most obviously, the February 4, 2016, Receiver's motion (Dkt. No. 1181) would liquidate each GP, and distribute almost 99% of the assets to persons who, as alleged in the proposed complaint in intervention, have no right, title, or interest in those assets. According to the Receiver, the SEC has consented to his motion.[2] No other party to the case has opposed this motion. By way of example, Investors Mary and John Jenkins invested $30,000 in Park Vegas Partners in 1983. For 33 years, they have paid off their notes and paid operational fees. According to the Receiver's projections in his February 4, 2016, memorandum (Dkt. No. 1181), the Jenkins would have received $58,200 dollars (194%) if Park Vegas Partners was dissolved in 2015 and the proceeds distributed to its partners. Under the Receiver's Plan, the Jenkins would receive approximately $4,000.

[2] "An opposing party's failure to file an opposition to any motion may be construed as consent to the granting of the motion pursuant to Civil Local Rule 7.1(f)(3)(c)." Dkt. No. 1181, at 2, ll. 18-20.

The Receiver's Plan will have the same effect on each Investor's interests, just as it does on the Jenkins, unless they can fully participate as parties.

D. Defendants Cannot Adequately Represent Investors in This Action

The Court found a conflict of interest between Defendants and investors. *SEC v. Schooler*, 2013 U.S. Dist. LEXIS 158538 (S.D. Cal. 2013)("Counsel for Defendants has a clear conflict of interest in representing the interests of both Defendants and the GPs because the GPs are comprised of investors alleged to have been defrauded by Defendants."). Under these circumstances, Defendants obviously cannot and have not adequately represented investors in this case.

And the record conclusively establishes Defendants have not represented, cannot represent and have no motivation to represent Investors or any of the other partners in the GPs. Defendants have failed to take any position in relation to the Receiver's February 4 motion as he indeed states in that motion (Dkt. No. 1225 at 2, l. 26).

E. The Receiver Cannot Adequately Represent Investors in This Action

The Receiver's Plan would distribute $4,020 (13.4%) to the Jenkins, rather than the $58,000 they would receive under the terms of the GP agreement.[3] By any measure, the Receiver has taken an adverse position to the Jenkins' financial interests. By definition, an adversary is not an adequate representative for the person on the other side of the relationship.

F. The SEC Cannot Adequately Represent Investors in This Action

According to the Receiver, the SEC has approved his motion to sell off the properties, create a "single pot," and distribute the single pot to all investors in proportion to their total investment in all GPs.[4] In supporting the Receiver's Plan, the SEC supports forfeiture of the rights of the Investors' under the GP agreements. As such, the SEC obviously cannot and does not speak on behalf of Investors.

G. Investors' Motion to Intervene Is Timely

[3] The discrepancy is greater; because Investors' valuations are substantially higher.
[4] Dkt. No. 1181, p. 13, ll. 1-4 and p. 25, ll. 5-11.

The Ninth Circuit has consistently held that, "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," *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 *Legal Aid Soc. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. Cal. 1980), the court focused on how the change of position by the Government, as the Receiver has done here, was the event that triggered the beginning of the time period for the Investors to intervene. The Ninth Circuit held:

> 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.

618 F.2d 48, 50. In this case, the necessity for Investors to bring this motion was triggered by the Receiver's 180-degree reversal on February 4, 2016.

III. Gaps and Irregularities in the Receiver's Financial Statements and Records

According to the Receiver, he began his receivership with $6.58 million in cash[5] plus realty now valued at $23.8 million.[6] Investors estimate that approximately $16.5 million in Western funds have passed through the Receiver's hands and around $16.4 million in GP funds did the same. The Receiver's financial reports and record keeping of these transactions appear to be a mess. Unless the Court grants this motion, no one—with the possible exception of the Receiver and his attorneys—will ever know how much he spent or received. And there is a real possibility the Receiver has kept no books or records of his cash transactions, since his attorney made that concession.[7]

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[5] Dkt. No. 80, Ex A p. 3. Ex A. See also Dkt. No. 1181, Ex. B, p. 34, Aguirre Decl. ¶ 29, Ex. 19.

[6] *Id*, Ex. A, p. 32.

[7] Whether the Receiver has maintained books and records of his transactions involving receivership assets is far from clear. The Receiver's attorney has stated the Receiver keeps no books or records for Western or the GPs, but only bank statements. Aguirre

Investors use the term "books and records" in the same way the SEC does: journals, ledgers, books of account and their computer-generated equivalents. If a public company, an investment advisor, or an investment company failed to keep books and records, each would face the wrath of the SEC: a complaint for a books and records violation if the books and records were merely incomplete or not sufficiently descriptive. See *Stillwater Liquidating LLC v. Gray (In re Gray)*, 2016 Bankr. LEXIS 804, 17-18 (Bankr. S.D.N.Y. Mar. 15, 2016)("He is akin to a cash business that maintains no records. The money comes in from somewhere and goes out to somewhere but there is no way to tell how much Gray actually received, where it came from and where it went to.")

A. The Receiver's Reports Are Grossly Incomplete and Inaccurate

Investors begin their review of the Receiver's financial reporting and record keeping from the top down. For that, the best starting point is the Receiver's interim reports ("Reports") to the Court which he also publishes in the E3 Advisors' website for investors to peruse the case.[8] Those Reports provide summaries of the receipts and disbursements on a month-to-month basis for the Western entities until the Ninth Report (Dkt. No. 759).

The Receiver provided the opening balance, closing balance, and gross receipts and disbursements for Western entities through 2014. The table below restates deposits (receipts) for the Western bank accounts in the Ninth Report for the second quarter of 2014.[9]

Bank Name	Deposits		
Account	April	May	June
Fernley I, LLC	2,876.64	3,198.64	2,876.64
P51 LLC	4,199.59	4,199.59	4,199.59

Decl. ¶ 13. On the other hand, the Receiver took possession of well-functioning computer accounting systems when the receivership took control of Western and the GPs.

[8] http://www.ethreeadvisors.com/cases/sec-v-louis-v-schooler-and-first-financial-planning-corp-dba-western-financial-planning-corp/.

[9] Receiver's Ninth Interim Report, Dkt. No. 759, Exhibit A, p. 13

Santa Fe Venture	16,014.99	16,014.99	2,497.00
SFV II, LLC	2,497.00	2,497.00	107,164.49
WFPC - Corp	116,140.38	132,208.18	107,164.49
WFPC -Business	113,846.03	113,846.03	113,846.03
WFPC - FFP	2,029.09	2,597.82	1,386.88
WSCC, LLC	203,469.42	201,879.02	199,660.44
Total WFPC Bank Accounts	461,073.14	476,441.27	447,646.06

The above table gives no hint of the source or the purpose and thus both could be improper, GP funds the Receiver was not authorized to transfer.

The table below restates the disbursements from Receiver's Ninth Report for the second quarter of 2014 for the Western bank accounts.[10]

Bank Name	**Disbursements**		
Account	**April**	**May**	**June**
Fernley I, LLC	2,800.00	3,459.00	
P51 LLC	4,403.33	4,284.64	148.10
Santa Fe Venture	60,492.85	15,022.28	
SFV II, LLC	3,296.68	478.80	
WFPC - Corp	131,462.07	155,898.58	70,157.92
WFPC -Business	113,846.03	113,846.03	113,846.03
WFPC - FFP	3,000.00	1,000.00	
WSCC, LLC	197,286.57	216,824.12	186,013.63
Total WFPC Bank Accounts	516,587.53	510,813.45	370,165.68

Again, this Report provided no information regarding any specific disbursement, e.g., to whom and for what.[11] Again, that raises the possibility the funds were transferred for an improper purpose. This is critical, because with real accounting comes real accountability. The Receiver could include a first class trip to Hawaii in his reporting

[10] *Id.*

[11] Like the Ninth Report, the Third, Fourth, and Sixth through the Eighth Reports only contain the total amounts of receipts and deposits for Western entities.

above. To the extent he reports expenses by category, there is accountability. He could still take his first class trip to Hawaii, but he commits a crime if he journals the expense as a mortgage payment.[12]

Significantly, after his Ninth Report, with no explanation,[13] the Receiver omitted the tables showing the gross amounts of his receipts and disbursements for the Western. His next five Reports thus provided no information on Western receipts and disbursements.[14] The table below shows Reports which contained the table showing Western's receipts and disbursements and, where table was present, the amount of both (rounded to the nearest thousand).

Quarter	Opening Balance	Receipts	Disbursements	Closing Balance	Interim Report
2012 Q4	127,000	*2,047,000*	*2,099,000*	75,000	Third, Dkt. No. 80
2013 Q1	121,000	*1,348,000*	*1,318,000*	151,000	Fourth, Dkt. No. 184
2013 Q2	No data	*No data*	*No data*	30,000	Fifth, Dkt. No. 481
2013 Q3	30,000	*1,010,000*	*901,000*	216,000	Sixth, Dkt. No. 517
2013 Q4	222,000	*1,502,00*	*1,576,000*	147,000	Seventh, Dkt. No. 547
2014 Q1	147,000	*1,634,576*	*1,638,000*	144,000	Eighth, Dkt. No. 596
2014 Q2	144,000	*1,385,000*	*1,398,000*	131,000	Ninth, Dkt. No. 759
2014 Q3	No data	*No data*	*No data*	No data	Tenth, Dkt. No. 1000

[12] 18 U.S.C. § 1001.

[13] Both the Ninth and Tenth Reports were silent on why the Receiver stopped providing the receipts and disbursements for the Western entities. Both contain this statement: "Attached hereto as Exhibit A is a summary of the receipts and disbursements for the Receivership Entities for the…quarter of 2014." The Ninth Report had the receipts and disbursements for the Western entities, but the Tenth did not.

[14] *Id.*

Quarter	Opening Balance	Receipts	Disbursements	Closing Balance	Interim Report
2014 Q4	No data	*No data*	*No data*	No data	Tenth, Dkt. No. 1000
2015 Q1	No data	*No data*	*No data*	No data	Eleventh, Dkt. No. 1065
2015 Q2	No data	*No data*	*No data*	No data	Twelfth, Dkt. No. 1103
2015 Q3	No data	*No data*	*No data*	No data	Thirteenth, Dkt. No. 1148
2015 Q4	No data	*No data*	*No data*	No data	Fourteenth, Dkt. No. 1189

The key facts disclosed by the above table are found in the third and fourth columns (italicized), titled "Receipts" and "Disbursements." Those two columns identify the Reports where the Receiver provided the Court with the total amount of Western cash that went through his hands in each quarter. As the table clearly reflects, he provided no data in relation to the gross receipts and disbursements for seven of the 13 quarters he has thus far reported. Further, he has not provided that data for any quarter since the second quarter of 2015. Apparently, the Receiver prefers to keep the Court and investors in the dark over how much money he is spending.

In his last reported quarter, he received $1.39 million in receipts and spent $1.40 million.[15] Through extrapolation, it appears the Receiver failed to report approximately $9.6 million in receipts and approximately $9.4 million in disbursements in his Reports to the Court.[16] From these facts, a stubborn question looks for an answer: why did the Receiver stop reporting to the Court the millions of dollars of Western receipts and disbursements passing through his hands? And where was the SEC? We address these questions in Section VI.

[15] Receiver's Ninth Report (Dkt. No. 759), Ex. A, p. 13.

[16] Our extrapolation is as follows: we left out the $2.1 million reported in Dkt. No. 80, as it appeared to be an outlier. We then averaged the receipts for the other five interim reports and did the same with the disbursements.

The Receiver also included a "Statement of Revenue and Expenses" with each of his Reports from the Third to the Fourteenth. The Ninth Report included both the statement of receipts and disbursements[17] and the "Statement of Revenue and Expenses."[18] The difference in the amounts reported by the two statements merely illustrates that both were useless in providing accurate information what the Receiver was doing with Western's cash. The deposits and disbursements only told *how much money* was being deposited and disbursed, but nothing about the categories of the expenditures, much less about individual transactions. The "Statement of Revenues and Expenses" specified the categories of revenues and expenses, but reported only a small fraction of the funds going through the Receiver's hands. Neither statement was useful. Neither created accountability for the Receiver. Both gave the impression the Receiver was providing meaningful information, when he was not.[19] Perhaps, that was the point.

By way of example, the Ninth Report provides both types of statements for April, May, and June 2014, collectively the second quarter of 2014 ("2014 Q2"). It is important to remember the Report provides no description or category for the receipts or disbursements, but it does describe by category revenues and expenses.[20]

Significantly, the receipts and disbursements are always larger numbers than revenues and expenses. By way of example, the total disbursements for 2014 Q2, rounded to the nearest thousand, was $1.397 million and the total expenses rounded to the nearest thousand, would be $358,000, a difference of $1.039 million. Since there is no description of disbursements, there is no description of the $1.039 difference. So what was this $1.039 million used for? No one knows. There is no clue in the Report how the Receiver spent these funds.

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[17] Receiver's Ninth Report (Dkt. No. 759), Ex. A, pp. 11-13.

[18] *Id*, Ex. B, p. 15.

[19] We also question whether a statement of revenue and expenses has any meaningful application to a company that has no operational income.

[20] See Dkt. No. 759, Ex. A, p. 13 and Ex. B, p. 15.

The table below shows (rounded to the nearest thousand) the Receiver's statements of (1) disbursements and receipts and (2) revenues and expenses for each accounting period. Comparisons can only be made where the Receiver provided both statements in the Report for the same accounting period. Those are in bold below.

Period	Interim Report	Receipts	Disbursements	Revenue	Expenses
Q4 2012	Third, Dkt. No. 80	**2,047,000**	**2,099,000**	**87,000**	**254,000**
Q1 2013	Fourth, Dkt. No. 184	**1,348,000**	**1,318,000**	**76,000**	**145,000**
Q2 2013	Fifth, Dkt. No. 481	No data	No data	115,000	196,000
Q3 2013	Sixth, Dkt. No. 517	**1,010,000**	**901,000**	**24,000**	**37,000**
Q4 2013	Seventh, Dkt. No. 547	1,502,000	1,576,000	No data	No data
2013	Seventh, Dkt. No. 547	No data	No data	174,000	339,000
Q1 2014	Eighth, Dkt. No. 596	**1,635,000**	**1,638,000**	**481,000**	**445,000**
Q2 2014	Ninth, Dkt. No. 759	**1,385,000**	**1,398,000**	**356,000**	**358,000**
Q3 2014	Tenth, Dkt. No. 1000	No data	No data	353, 000	405, 000
Q4 2014	Tenth, Dkt. No. 1000	No data	No data	357,000	348,000
Q1 2015	Eleventh, Dkt. No. 1065	No data	No data	353,000	337, 000
Q2 2015	Twelfth, Dkt. No. 1103	No data	No data	326,000	334,000
Q3 2015	Thirteenth, Dkt. No. 1148	No data	No data	303,000	250,000

Q4 2015	Fourteenth, Dkt. No. 1189	No data	No data	485,000	467,00

The above table reveals three important facts. First, it demonstrates receipts and disbursements were always large multiples of the revenues and expenses. Since receipts and disbursements provided no descriptive information, this means there was no descriptive information for most of the cash that went through the Receiver's hands.

Second, the amount of revenues significantly increased with the Eighth and Ninth Reports. This was not due to any increase in revenues. Rather, the Receiver improperly recognized as revenue GP note payments to Western, both entities under his control. This goes a step beyond Enron's phony recognition of revenue for doing business with its special purpose entity, Chewco.[21] The repayment of a debt does not generate revenue or gain, except for the interest portion.[22] The Receiver, a CPA, obviously knows that, since he did not treat note payments as income in his revenue and expense statements in earlier Reports.[23] The Receiver's decision to improperly treat note repayments as revenue raises the obvious question: why did he do that?

Third, the Receiver provided no receipt and disbursement data with the Tenth through the Fourteenth Reports. However, he continued his practice of posting note repayments as revenue in the revenue and expense statements in those Reports. These Reports presented income and expense as roughly in balance. Consequently, these statements were materially misleading for three reasons: (1) it is unknown how much money was coming into the receivership; (2) it is unknown how much money was being

[21] See, Aguirre, Gary J., The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?, 28 Del. J. Corp. L. 447, 455 (2003).

[22] Aguirre Decl., ¶ 21.

[23] See Third Report (Dkt. No. 80), Ex. B, p. 15; Fourth Report (Dkt. No. 184), Ex. B, p. 12; Fifth Report (Dkt. No. 481), Ex. B, p. 12; Sixth Report (Dkt. No. 517) Ex. B, p. 16; Seventh Report (Dkt. No. 547), Ex. B, pp. 19-20.

spent; and (3) the improper treatment of note payments as revenue gives the statement the appearance of a meaningful report.

One might expect the SEC to have standards for those receivers whose appointments they recommend to the courts and they do.[24] One might expect the SEC to keep a vigilant eye on how these receivers present their fee applications and report their receipts and disbursements of receivership to the court for approval. And indeed their standards are designed for them to exercise some oversight. The SEC requires receivers to submit their fee applications and SFARs to the SEC *before* they are submitted to the Court. [25]

Significantly, all receivers recommended by the SEC must sign a statement that they and other consultants they retain, including their attorneys, will comply with (1) detailed SEC procedures, billing instructions relating to how they should perform their services, record their time, and apply for fees,[26] and (2) equally detailed SEC procedures, Standardized Fund Accounting Report Civil Receivership Fund ("SFAR"), relating to their reporting of the receipts and disbursements of receivership assets to the court and the records they are supposed to keep in relation to those transactions.[27] SFAR describes exactly what information the Receiver was supposed to submit to the Court in connection with his receipts and disbursements of receivership funds. The Receiver complied with neither.

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[24] See Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission ("Instructions") and Standardized Fund accounting Report ("SFAR"), Aguirre Decl. ¶ 22, and Ex. 15. Both the instructions and SFAR are available online at https://www.sec.gov/oiealinvestor-alerts-bulletins/ib_receivers.html and https://www.sec.gov/oiea/Article/billinginstructions.pdf.

[25] The Instructions read at relevant point: "At least 30 days prior to the filing of the Application with the Court, the Applicant will provide to SEC Counsel a complete copy of the proposed Application, together with all exhibits and relevant billing information in a format to be provided by SEC staff." *Id*, Ex. 15 at 2.

[26] Instructions, *Id*, Ex. 15, pp. 1-11.

[27] SFAR, *Id*, Ex. 15, pp. 12-18.

To begin with, SFAR requires the Receiver to provide the Court with 34 separate categories of receipts and disbursements of receivership assets in a standard form with each of his fee applications.[28] The Receiver has made 13 applications for fees by the Receiver and his attorneys and thus the Receiver should have filed 13 SFAR reports. He filed none. Further, if a receiver wishes to deviate from SFAR, he or she must advice the SEC before doing so. In this regard, the first page of SFAR requires:

> Undersigned further represents that any deviation from the Billing Instructions will be described in writing and submitted to the SEC at least 30 days prior to the filing of the Application with the Receivership Court.[29]

We have asked both the SEC and the Receiver for the original application under SFAR and whether he ever submitted a request to the SEC to deviate from its requirements. Neither has responded to our request.

The Receiver's failure to provide the Court with an accurate and complete accounting is alone a ground for the Court to reject the receiver's distribution plan in *SEC v. Harris*, 2015 U.S. Dist. LEXIS 11975, 5-6 (N.D. Tex. 2015). In language equally applicable here, the court described adequacies in the financial information the receiver had provided the court:

> To illustrate, the Receiver's Motions include no itemized list of Receivership 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… Instead, her Motions vaguely identify the total assets that remain—$616,578.17 in cash, with a $64,487.18 cash bond posted in New Mexico—without clarifying the source of any of this cash.

B. The Receiver's Flip flop Whether He Keeps Books and Records

Going one level deeper, the Receiver, Thomas Hebrank, a CPA, claimed for a while he keeps no books and records of his individual transactions of receivership cash.

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[28] *Id*. Counting subparts, SFAR requires the receiver to provide 34 categories of information relating to his receipt and disbursements of receivership assets

[29] *Id*, p. 1.

Instead, he contended he filled the void with bank statements.[30] This contention appeared to be absurd. For several weeks, starting of February 25, 2016, Investors' counsel requested the Receiver to 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.[31]

On March 23, the Receiver's counsel responded with this statement:

> 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. The Receiver uses the bank statements to create an excel summary which is used by the tax preparation firm to prepare the tax returns, and was used to generate the financial summaries contained in the Information Packets and the Receiver's Reports.[32]

This made even less sense in view of the Receiver's praise of Western's accounting system for the GPs in his Forensic Accounting Report: Part One (Dkt. No. 182) ("Forensic Report"). He there praised the accuracy and reliability of the Western computer accounting system called "OPADS." His Forensic Report described in detail how the Receiver used OPADS to retrieve financial transactions down to the penny, including those between the GPs and Western.[33] The Receiver concludes with this statement about OPADS: "At the conclusion of these tests, the Receiver determined the data maintained in OPADS Accounting System and the other data sources noted above is accurate and reliable, and therefore could be used in performing the forensic

[30] Aguirre Decl. ¶ 13, Ex. 9.
[31] *Id*, ¶ 6, Ex. 3.
[32] *Id*, ¶ 13, Ex. 9.
[33] *Id*, ¶ 20, Ex. 14.

accounting."[34] When we became aware the Receiver was likely using OPADS, we asked his counsel in our letter of March 24, 2016, why he had not disclosed it: "[Ou]r 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?"[35] Once again, the Receiver refused to provide the records,[36] but implied he was using OPADS. He dropped the claim that accounting records did not exist, "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."[37]

This is nonsense. The Receiver has packed his liquidation motion (Dkt. No. 1181) with bald and unfounded conclusions regarding (1) the financial conditions of the GPs and Western and (2) the transactions between them. Further, the Receiver's Forensic Report establishes beyond any shadow of a doubt that OPADS contains the critical data that would support or refute those bald and unfounded conclusions.

Since Investors filed their motion seeking an accounting on April 1, 2016, (Dkt. No. 1223), the Receiver produced some new accounting records kept by the current GP administrator, Lincoln Property Group, from March 2015 to February 2016, except for the month of May 2015. However, the Lincoln records only show its receipts and disbursements, not those of the Receiver's. Further, Lincoln's records of receipts and disbursements cannot be reconciled with the gross receipts and disbursements in the Receiver's interim reports.[38] In sum, Lincoln's records provide information on only 11

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[34] *Id*, p. 15, ll. 14-17.
[35] *Id*, ¶ 16, Ex. 12.
[36] *Id*, ¶ 17, Ex. 13.
[37] *Id*.
[38] For example, Honey Springs Partners shows an ending balance for Dec. 2015 of $8,365 in the Receiver's Fourteenth Interim Report (Dkt. No. 1189), Ex. A, p. 10, but the Lincoln records show $4,503.04. Likewise, Clearwater Bridge Partners shows total disbursements for Dec. 2015 of $1,171 in Lincoln's records, but $4,048 in the Receiver's report. In the same vein, Lyons Valley Partners shows Dec. 2015

of the 43 months for a portion of the expenditures of the GPs, and none of the expenditures for Western entities. It is comforting to see that Lincoln does have books and records of its expenditures for the past year for the GPs. But this disclosure puts the high beam on a persistent question: why did the Receiver stop providing the Court with information Western's receipts and disbursements and why does he refuse to provide Investors with records containing that same information.

A century of authority confirms the duty of receivers to keep accurate records of their transactions, Clark's Treatise on the Law and Practice of Receivers speaks clearly to this point:

> It is a receiver's duty to keep accounts of receipts and expenditures in the shape of books and vouchers in such a manner as to furnish an intelligible and perspicuous account of his act and transactions in order that the bondholders, lien creditors and all creditors as well as the court may at any time as occasion requires, ascertain the true condition of affairs.[39]

And Clark goes on level deeper. On the duty of a receiver to keep vouchers, Clark again speaks clearly to the same point:

> Receiver's Duty to Preserve Vouchers. It is the receiver's duty to keep an accurate account of all money received and expended. Even in the absence of objections by an interested party, a court should closely scrutinize the accounts of a receiver before approving them. The correctness of the expenditures should be made to appear from something more than the statement made in the report itself. Vouchers should be demanded when any payments except petty payments are made and these vouchers preserved and filed with the receiver's report.[40]

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disbursements of $1,576 in the Receiver's report, but only $118 in the Lincoln records. Further, the beginning balance for Lyons Valley Partners in Dec. 2015 is different in each document. See Aguirre Decl. ¶ 19.

[39] Ralph Ewing Clark, Treatise on the Law and Practice of Receivers, 3d Revised Edition (1929), Section 544, at 614.

[40] *Id.*

A decision from the Delaware District, Court, *Hitner v. Diamond State Steel Co*., 207 F. 616, 622 (D. Del. 1913), a century ago speaks to the inadequate record keeping of the Receiver in this case:

> ….It goes without saying that the quarterly returns of merely receipts and disbursements were wholly inadequate to furnish the data requisite for the final settlement and adjustment of the affairs of the steel company, and could not be deemed a compliance with the obligation resting upon them as trustees to keep proper books of account and vouchers as above stated. The fact that the quarterly accounts of the receivers largely failed to specify with particularity the items or classes of items for which expenditures were made, and the items or classes of items for which moneys were received by them, rendered it all the more important that the books and vouchers, in contradistinction to the quarterly accounts, should be full, detailed and explicit.

And a century later, the courts continue to recognize the need for receivers to keep detailed accounting records of all deposits and expenditures. The Receiver's failure to provide the Court with an accurate and complete accounting was alone a ground for the court to reject the receiver's distribution plan in *SEC v. Harris*, 2015 U.S. Dist. LEXIS 11975, 5-6 (N.D. Tex. 2015). In language equally applicable here, the court described adequacies in the financial information the receiver had provided the court:

> To illustrate, the Receiver's Motions include no itemized list of Receivership 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… Instead, her Motions vaguely identify the total assets that remain—$616,578.17 in cash, with a $64,487.18 cash bond posted in New Mexico—without clarifying the source of any of this cash.

See also *Santa Barbara Channelkeeper v. Seror*, 2010 U.S. Dist. LEXIS 109978 (C.D. Cal. Oct. 14, 2010)("The Receiver shall keep detailed accounting records of all deposits to and all expenditures from the Receiver Trust Account, and shall maintain those accounting records until the expiration the receivership.")

IV. The Receiver's Plan Fails to Disclose the Amount and Source of the Funds to Pay for the Costs of the Receivership.

By our calculations, the fees for the Receiver, his attorneys, and accountants would be approximately $3.2 million by the end of 2016 if they continue at the same rate.[41] Nothing in the Receiver's proposed plan states the amount of the fees he and his consultants have accrued over the past six months, or the Receiver expects to pay himself and his consultants through the end of the receivership. Nor can we discern from his filings where the funds are going to come from.

The Plan states the GPs' realty has an approximate value of $23.84 million,[42] and it also states Western is expected to have $1.2 million in cash that will be distributed to investors.[43] There are presumably still outstanding mortgages on the properties, but that is nowhere stated in the Plan. The latest statement we could find on that debt was in a November 2014 filing) where the stated debt was $2.09 million (Dkt. No. 852, p. 33).

So, there is a mystery: where are the funds going to come from to pay the Receiver? Assuming our $3.2 million figure is accurate, approximately $2.1 million would be needed, since the Receiver's counsel stated in March the Receiver and his attorneys have only been paid $1.1 million.[44]

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[41] The Court had approved a total of $2.242 million for the period ending Sep. 30, 2015. The average monthly billing for the three years of the receivership is approximately $62,222. Since the Liquidation Motion contemplates a Dec. 31, 2016, completion date, there are 15 unbilled months, which would be $933,333, a total of $3.17 million, minus the amount paid to date, leaves approximately $2.1 million.

[42] Dkt. No. 1181, Exhibit A, p. 32.

[43] *Supra*, n. 41.

[44]

> Movants assert the Receiver and his colleagues have been paid $2.24 million. Again, this is completely false. To date, the Receiver and Allen Matkins combined have been paid $1,097,734.66, or approximately 42% of amounts approved by the Court. All amounts paid have been expressly approved by the Court and have been paid from the assets of Western.

(Dkt. No. 1195, p. 3, l. 23 to p. 4, l. 2).

Nothing in the prior fee applications helps solve this mystery. Those fee applications neglected to include statements required by the SEC's billing instructions that would have required the Receiver to state the amount of all prior fees, the amount of accrued administrative expenses, the prior amounts paid, the prior amounts unpaid, along with a certification.[45] The Receiver's failure to provide the information regarding the fees paid to consultants was one of the reasons the court in *SEC v. Harris*, 2015 U.S. Dist. LEXIS 11975 (N.D. Tex. 2015) rejected the receiver's proposed distribution plan.

V. The Receiver Has Failed to Disclose Any Facts relating to Mortgage Debt, Taxes, or Debt to Western

This debt directly affects what investors can expect to receive from the Receiver's Plan. And there is reason to believe the Receiver has not been forthcoming. For example, the Receiver states the four partnerships that own the LV Kade property "are projected to be $99,279 behind on their operating expenses by the end of 2016. Accordingly, if the property is not sold, property taxes will go unpaid and penalties and interest will accrue on the past due amounts."[46] This seems to imply the penalties will arise in the future. We checked this statement. The Receiver has not paid the taxes on this property since 2013.[47] The outstanding balance at this time is $102,196.28, including $23,295.36 for penalties and interest currently running at the 22%.[48] Since the Receiver has attributed the property a value of $8.26 million, he could easily have obtained loans at a lower interest rate if necessary to keep the taxes current. The Receiver's mismanagement runs deeper on the same property. Investors' counsel learned on April 8, 2016, that Clark County was going to deed the property in June.[49] That process was stopped when Investors' counsel sent a

[45] Aguirre Decl. ¶ 22, Ex. 15.
[46] Dkt. No. 1181, p. 5, ll. 19-25.
[47] Aguirre Dec., ¶¶ 24-25, Ex. 17.
[48] *Id*, ¶ 24-26, Exs. 17 and 18.
[49] *Id*, ¶¶ 23.

fax to Clark County informing them the property could not be deeded because of this Court's outstanding order.[50]

VI. The Receiver's Heroic Efforts to Keep Secret His Use of Western Cash

As demonstrated above, the Reports, despite their huge gaps, establish the Receiver has spent approximately $16.4 million of Westerns cash and about $2.38 million of the GPs cash, a ratio of almost seven to one. Hard facts prove the Receiver has tenaciously avoided disclosing the sources, amounts, and purposes for the $16.4 million in Western cash that went through his hands:

- Fact 1: He has never disclosed the categories of Western and the GPs receipts and disbursements even to the Court;
- Fact 2: He stopped telling the Court in the second quarter of 2014 how much Western cash was going though his hands;
- Fact 3: He created revenue-expense statements with phony revenue, thus giving a false appearance of Western's cash flow;
- Fact 4: He did not treat loan repayments as revenue in his first five Reports;
- Fact 5: He failed to disclose in his last five Reports that he received and spent $9.5 million of Western's cash;
- Fact 6: His attorney told Investors' counsel Western keeps no books;
- Fact 7: Confronted with OPADS, the Receiver's counsel admitted he was using Western's OPADS system, but claimed the accounting records were "irrelevant."

A logical inference from these facts is that the Receiver is hiding something related to his receipt and expenditure of $16.4 million. But even if he is not, these records must be released to eliminate any doubts about how he has been using receivership cash.

And those doubts exist. And they were heightened by the Receiver's failure to file any sworn statement to support his distribution plan. And they were further heightened by

[50] *Id*, ¶¶ 27-28.

the vague conclusions and misleading statements supporting his distribution plan, when concrete facts should have been presented.

One reason these accounting records must be released is to solve the mystery: how is the Receiver going to pay the outstanding and future fees for his consulting team, which we calculate to be $2.1 million? Nothing in his Plan discloses where this money is going to come from. However, he has repeatedly told investors they were not going to pay these costs. His website tells investors: "The partners have paid no fees to the Receiver and his attorneys. The Receiver and his counsel are paid from the assets of Western."[51] His Liquidation Motion, also on his website, tells investors the Court is protecting them: "[D]espite all the motions, reports, recommendations, and Court orders telling them otherwise, some investors still believe … the sale proceeds will be used to pay fees and costs of the receivership." And to this, he adds: "The Court reviews all fees and costs of the receivership to ensure all amounts requested are reasonable."[52]

A related question is whether the accelerated payments of the loans have been or would be used to pay the $2.1 million. It is clear that was not the Court's intention, since the payments by the GPs to Western were only "to ensure that the mortgages for those GPs' properties were paid" (Dkt. No. 1003).

We have studied the Reports, the fragmentary accounting records the Receiver has produced, and the Receiver's other filings, and—to the best of our ability—cannot grasp how the Receiver intends to pay $2.1 million to himself and his team.

The cash flow between the GPs and Western was not designed to create a cash cushion. It was supposed to be just enough so Western could pay the mortgages. So, if the funds were diverted to another purpose, the mortgages would go unpaid and the GPs would be out of pocket in the sum of the diverted funds. The Receiver's Fourteenth Report suggests the possibility. For 2014, the revenue and expense statements indicate

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[51] http://www.ethreeadvisors.com/cases/sec-v-louis-v-schooler-and-first-financial-planning-corp-dba-western-financial-planning-corp/.

[52] Dkt. No. 1181-1, p. 10, ll. 3-6.

the GPs note payments to Western were in the sum of approximately $1.48 million and the payments to the mortgage holders $1.171 million, a difference of $309,000. In 2015, the GPs paid $1.17 million to Western, but Western only paid $769,000 on mortgages, which suggests that some mortgages went unpaid. In 2015, the Receiver paid his team $465,000. These numbers suggest the possibility that some note payments by the GPs to Western were used to pay receivership expenses or that some mortgages went unpaid so the receivership fees could be paid. To the extent the GP payments to Western were used to pay the costs of the receivership rather than the mortgages, the GPs and their investors are paying the costs of the receivership. And the fact the investors are losing $4.8 million in cash while the Receiver's team is making fees of $3.17 million also suggests a linkage between the two.

But the fees of the Receiver's team are just part of the dark cloud hanging over this case. $19 million have gone through the Receiver's hands. There is no information how he spent most of these funds and little information about the rest. The gaps and irregularities in his accounting defy explanation in the record before this Court. We believe an accounting would best resolve these questions. It would be better for the Receiver, for investors, for the SEC, for justice itself, and the appearance of justice.

Dated: April 21, 2016

Respectfully submitted,

By: /s/ Gary J. Aguirre

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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

PROOF OF SERVICE

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

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 501 West Broadway, Suite 800, San Diego, California 92101.

On April 29, 2016, I served the within document(s) described as:

INVESTORS' REQUEST FOR JUDICIAL NOTICE TABLE OF EXHIBITS AND EXHIBITS THERETO

On the interested parties in this action **BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):** the foregoing document(s) will be served by the court via NEF and hyperlink to the document. On April 29, 2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

- Lynn M Dean - deanl@sec.gov;
- Philip H. Dyson - phildysonlaw@gmail.com;
- Edward G. Fates - tfates@allenmatkins.com;
- Eric Hougen - eric@hougenlaw.com;
- Sara D. Kalin - kalins@sec.gov;
- John W. Berry - berryj@sec.gov;
- Tim Dillon - tdillon@dghmalaw.com.

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

Executed on April 29, 2016, at San Diego, California.

/s/ Gary J. Aguirre
GARY J. AGUIRRE

Exhibit 4

Exhibit 4

GAO

Accountability • Integrity • Reliability

United States Government Accountability Office
Washington, DC 20548

April 22, 2010

The Honorable Dennis Moore
Chairman
Subcommittee on Oversight and Investigations
Committee on Financial Services
House of Representatives

Subject: *Securities and Exchange Commission: Information on Fair Fund Collections and Distributions*

Dear Mr. Chairman:

The Securities and Exchange Commission's (SEC) primary mission is to protect investors and maintain the integrity of securities markets. As a part of its responsibility to protect investors, SEC seeks to ensure that individuals who violate federal securities laws and regulations take responsibility for their misdeeds. Specifically, when individuals or firms are found to have violated securities laws, SEC may order civil monetary penalties and seek ill-gotten financial gains, or disgorgement, from the violators.[1] For its enforcement actions to be successful, SEC must have a collection and distribution program for both civil monetary penalties and disgorgement that functions effectively.

In 2002, Congress passed the Sarbanes-Oxley Act to address corporate malfeasance and restore investor confidence in the U.S. securities markets. This legislation established numerous reforms to increase investor protection, including Section 308(a), the Federal Account for Investor Restitution provision, commonly known as the Fair Fund provision. This provision allows SEC to combine civil monetary penalties and other donations to disgorgement funds for the benefit of investors who suffer losses resulting from fraud or other securities violations. Fair Funds may be created through either SEC administrative proceedings or litigation in U.S. District Court, and either SEC or the courts may administer the funds. However, SEC is responsible for general monitoring of all Fair Funds created, reinforcing the need for SEC to have an effective collection and distribution program for both civil monetary penalties and disgorgement so that additional funds collected as a result of the Fair Fund provision can benefit harmed investors. In 2007, SEC created the Office of Collections and Distribution (OCD) to manage the collection of penalties and disgorgement, including Fair Funds, and speed the process of returning funds back to harmed investors.

[1]Disgorgement is a remedy designed to deprive defendants of their ill-gotten gains derived from their illegal activities.

We have issued a number of reports on SEC's Fair Fund program and made a number of recommendations designed to help SEC improve the Fair Fund program management and internal controls.[2] For example, in 2005, we recommended that SEC ensure that management establish a procedure for consistently collecting and aggregating its Fair Fund data to assist in the monitoring and managing of the distribution of monies to harmed investors and establish measures to evaluate the timeliness and completeness of distribution efforts. In 2007, we recommended that SEC establish and implement a comprehensive plan for improving the management of the Fair Fund program, to include (1) staffing the new central Fair Fund office, defining its roles and responsibilities, and establishing relevant written procedures and (2) ensuring the consistency of and analyzing final accounting reports on completed Fair Fund plans. In 2009, we recommended that SEC, to help ensure effective and efficient operation of OCD, consider an alternative organizational structure and reporting relationship for the office. SEC generally has agreed with our recommendations. We have previously reported that SEC continues to make refinements and improvements in many areas but that some recommendations designed to further strengthen their data collection efforts remain open.

Because of your interest in ensuring that SEC effectively manages its resources and enforces compliance with securities laws and regulations, you requested that we follow up on our previous work, including updating the information on the status of Fair Funds presented in our 2007 report and SEC's progress in implementing our recommendations related to OCD. Accordingly, this study examines (1) the status of Fair Fund collections and distributions and (2) the actions that SEC has taken to address our previous recommendations regarding SEC's OCD. On March 15, 2010, we briefed staff from your office on the results of this work. This report summarizes the information provided during that briefing. (Enclosure I contains the slides used during the briefing.)

To determine the status of Fair Fund collections and distributions, we reviewed and analyzed SEC data on Fair Fund cases from 2001 through February 2010, examining funds ordered, collected, and distributed, and the judgment dates of cases. We also reviewed SEC data on funds distributed in tranches and fund distribution overseen by SEC and by the courts. According to SEC, although the Fair Fund data provided comes from sources that have not been reconciled with the other SEC data systems, it is the best available information. We used the same data source in reporting on Fair Funds in 2007 and have determined it to be sufficient for our purposes.[3] To identify the actions SEC has taken to improve the efficiency of OCD, we reviewed documentation on policies and practices for Fair Funds and examined SEC planning documentation, such as their disgorgement and Fair Fund Distribution Manual. We also interviewed SEC officials about OCD and steps taken to improve the Fair Fund distribution process.

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[2]GAO, *Securities and Exchange Commission: Greater Attention Needed to Enhance Communication and Utilization of Resources in the Division of Enforcement*, GAO-09-358 (Washington, D.C.: Mar. 31, 2009); *Securities and Exchange Commission: Additional Actions Needed to Ensure Planned Improvements Address Limitations in Enforcement Division Operation*, GAO-07-830 (Washington, D.C.: Aug. 15, 2007); and *SEC and CFTC Penalties: Continued Progress Made in Collection Efforts, but Greater SEC Management Attention Is Needed*, GAO-05-670 (Washington, D.C.: Aug. 31, 2005).

[3]GAO-07-830.

We conducted our work from December 2009 to April 2010 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions.

Summary

Since 2007, fewer Fair Funds have been established and the collection and distribution of Fair Funds have increased, but many Fair Funds continue to remain open and active for years. From 2002 through February 2010, $9.5 billion in Fair Funds were ordered, with the majority of this total ordered prior to May 2007. Since that date, only $521 million, or less than 6 percent, of total Fair Funds have been ordered. Of the $9.5 billion total Fair Funds ordered, $9.1 billion (96 percent) has been collected and $6.9 billion (76 percent) of the Funds collected has been distributed. In comparison, in 2007, only 21 percent of Fair Funds had been distributed. Although the percentage of Fair Funds distributed has increased, there are many Fair Funds that remain open and active for years. For example, our analysis of SEC data shows that of the 128 ongoing Fair Fund cases, over half have been ongoing for more than 4 years. SEC officials offered several reasons why Fair Funds remain open, including difficulties in obtaining investor information and legal objections and appeals that must be settled. To improve its management of Fair Fund cases, SEC proposed a performance metric of tracking the number of cases that have completed distribution within 2 years of the appointment of a Fund administrator.[4] However, to date, SEC has not started collecting the data in a manner necessary to track this measure.

SEC has taken steps to increase efficiency and assess Fair Fund distribution, but a number of actions that are necessary to improve tracking of distribution related information are still pending. In response to our recommendations, SEC centralized the administration of collections and distributions under OCD and subsequently eliminated the dual reporting structure that initially existed in this new office. According to SEC, the creation of OCD has allowed the opportunity to build institutional knowledge and decreased inefficiencies by developing key administrative aspects of the program. SEC officials also told us that they have implemented other operational and administrative changes that are designed to improve Fair Fund distribution. For example, SEC established a working group to share information and to coordinate between functions on distribution plans and to identify problems that may slow distribution. However, SEC officials acknowledged that Fair Fund information and data tracking still need improvement. SEC officials said they have not implemented any major improvements to Fair Fund-related data management since 2007 and that additional improvements are needed in recording

[4]According to a draft of the SEC Strategic Plan for Fiscal Years 2010-2015, the proposed performance metric would measure the percentage of Fair Fund and disgorgement fund plans that distributed the final tranche of funds to injured investors within 24 months of the order appointing the Fund administrator. SEC officials said that the date a Fund administrator was appointed is currently not tracked.

and monitoring of Fair Fund data. For instance, Fair Fund data are housed in several different databases that have not been reconciled and aggregate information on Fair Fund administrative expenses is unavailable. According to SEC officials, an extensive review of the Fair Fund program is under way, the findings of which may result in changes to workflow, procedures, and information systems. While SEC is taking steps to better capture, report, and manage the programmatic and financial impact of the collections and distribution process, it is too early to determine the impact and ultimate success of these efforts.

Agency Comments

We provided SEC with a draft of the enclosed briefing slides for review and comment prior to briefing Committee staff. SEC provided technical comments that were incorporated, where appropriate. We also provided a draft of this report to the Chairman of SEC for her review and comment. SEC provided written comments on the draft, which we have reprinted in enclosure II. In its written comments, SEC noted the upward trend in Fair Fund distribution and said that it is committed to having a timely and efficient process for making Fair Fund distributions to injured investors. SEC agreed with our finding that improvements in Fair Fund information and data tracking are necessary and said they have hired an external consultant to advise the agency in improving business processes and integrating data systems.

We are sending copies of this report to the Chairman of SEC and other interested parties. The report will be available at no charge on the GAO Web site at www.gao.gov.

If you or your staff have any questions regarding this report, please contact me at (202) 512-8678 or clowersa@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Orice Williams Brown, Director; Karen Tremba, Assistant Director; Simon Galed; Akiko Ohnuma; Omyra Ramsingh; Barbara Roesmann; and Andrew Stavisky.

Sincerely yours,

A. Nicole Clowers, Acting Director
Financial Markets and Community Investment

Enclosures - 2

Enclosure I

GAO

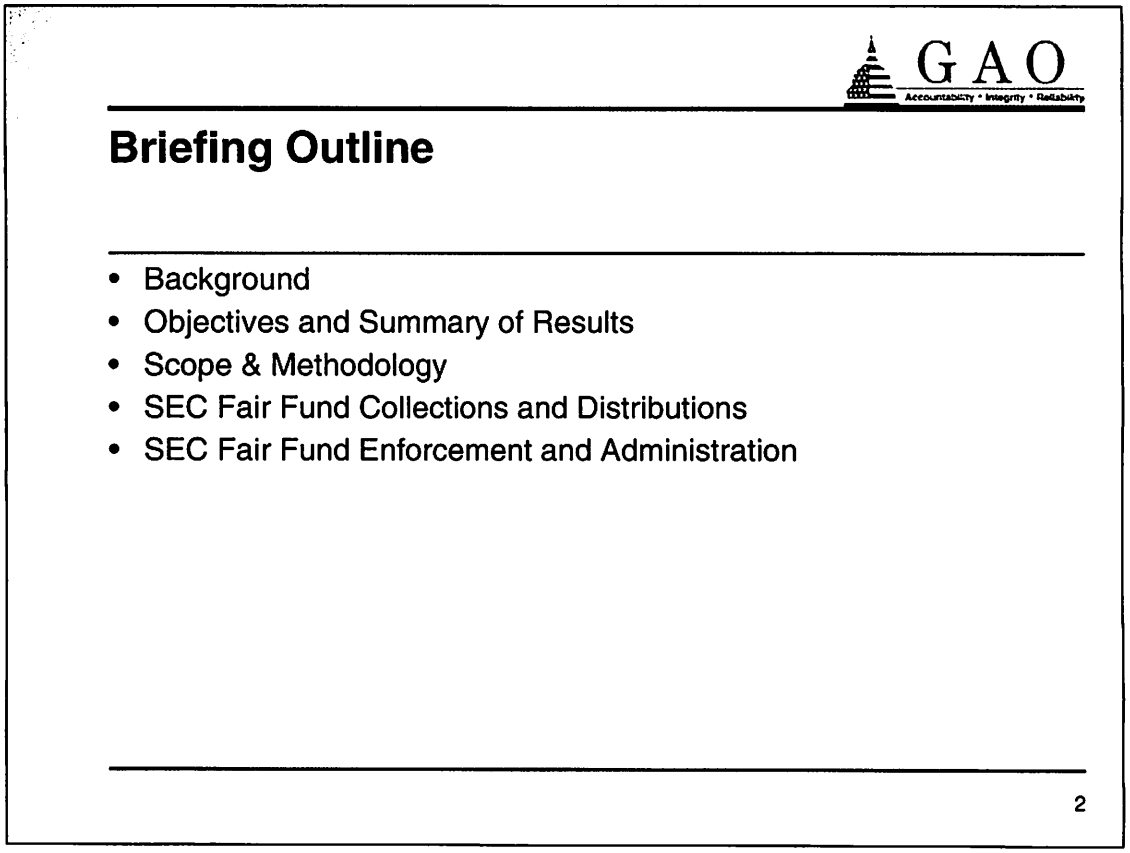
Accountability * Integrity * Reliability

Briefing to Subcommittee on Oversight and Investigations, House Committee on Financial Services

Information on Securities and Exchange Commission Fair Fund Collections and Distributions

March 15, 2010

Enclosure I


GAO
Accountability • Integrity • Reliability
Briefing Outline
• Background
• Objectives and Summary of Results
• Scope & Methodology
• SEC Fair Fund Collections and Distributions
• SEC Fair Fund Enforcement and Administration
2

Enclosure I

GAO
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Background

- SEC was created in 1934 as an independent agency with the mandate to regulate the securities markets
  - SEC's mission is to protect investors, maintain fair, honest, and efficient markets, and facilitate capital formation.
- The Fair Fund program was established under the Sarbanes-Oxley Act of 2002. The program provides for penalties to be paid for the benefit of investors who suffer losses resulting from fraud or other securities violations.
- Disgorgement deprives securities law violators of ill-gotten gains linked to their wrongdoing.

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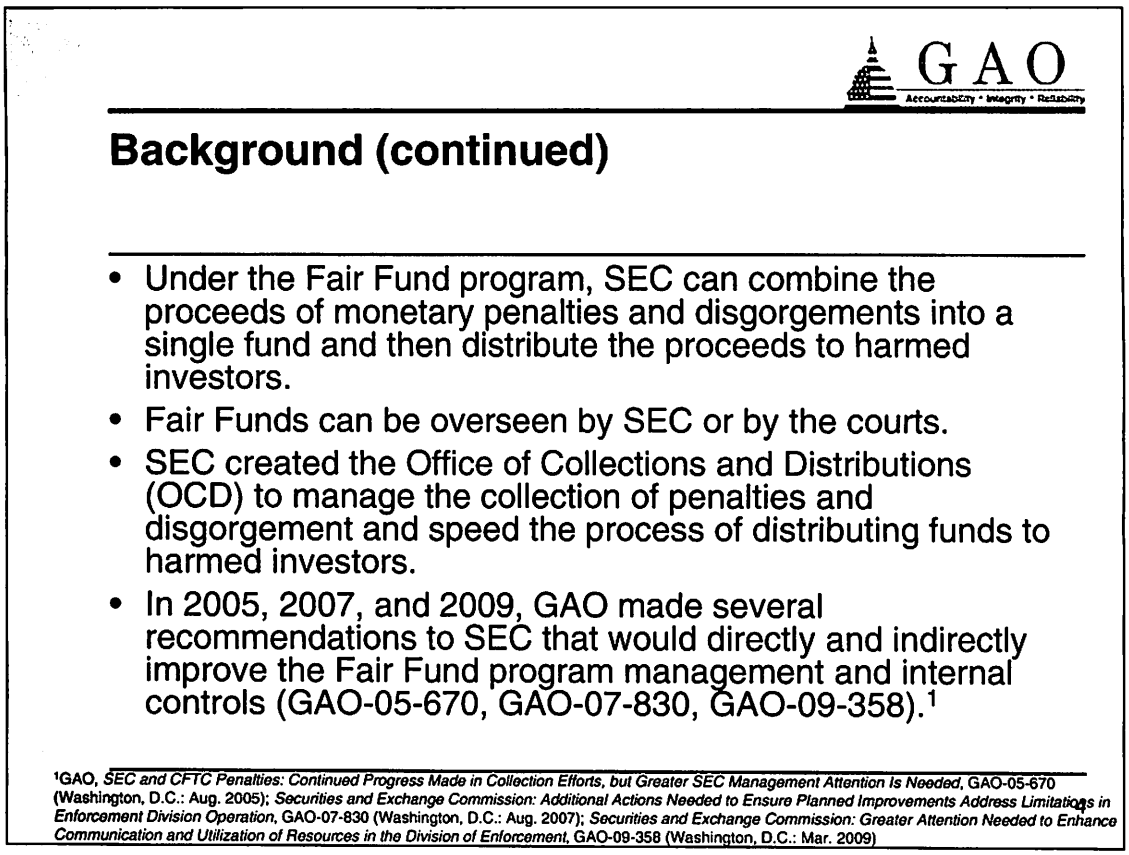
GAO
Accountability * Integrity * Reliability
Background (continued)
• Under the Fair Fund program, SEC can combine the proceeds of monetary penalties and disgorgements into a single fund and then distribute the proceeds to harmed investors.
• Fair Funds can be overseen by SEC or by the courts.
• SEC created the Office of Collections and Distributions (OCD) to manage the collection of penalties and disgorgement and speed the process of distributing funds to harmed investors.
• In 2005, 2007, and 2009, GAO made several recommendations to SEC that would directly and indirectly improve the Fair Fund program management and internal controls (GAO-05-670, GAO-07-830, GAO-09-358).[1]
[1]GAO, SEC and CFTC Penalties: Continued Progress Made in Collection Efforts, but Greater SEC Management Attention Is Needed, GAO-05-670 (Washington, D.C.: Aug. 2005); Securities and Exchange Commission: Additional Actions Needed to Ensure Planned Improvements Address Limitations in Enforcement Division Operation, GAO-07-830 (Washington, D.C.: Aug. 2007); Securities and Exchange Commission: Greater Attention Needed to Enhance Communication and Utilization of Resources in the Division of Enforcement, GAO-09-358 (Washington, D.C.: Mar. 2009)

Enclosure I

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Objectives and Summary of Results

1. What is the status of SEC Fair Fund collection and distribution?

   Since 2007, fewer Fair Funds have been established and collection and distribution of Fair Funds have increased, while many Fair Funds remain open and active for years.

2. What actions have been taken to address our previous recommendations related to the SEC Office of Collections and Distributions (OCD)?

   SEC has identified steps to increase efficiency and assess Fair Fund distribution, but a number of actions that are necessary to improve tracking of distribution related information are still pending.

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Scope & Methodology

- To determine the status of collections and distributions, we
  - reviewed and analyzed SEC data on Fair Funds created from 2001 to February 2010;
- To determine SEC actions to improve the OCD, we
  - interviewed SEC officials about steps taken to improve Fair Fund distribution; progress made in addressing outstanding GAO recommendations regarding our review of OCD's organizational structure; and
  - reviewed SEC documentation on policies and practices for Fair Fund distribution.
- Limitations:
  - According to SEC, the Fair Fund data provided is the best available information. It comes from sources that have not been fully reconciled with other SEC data systems.

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Scope & Methodology (continued)

- We conducted our work from December 2009 to March 2010 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions.

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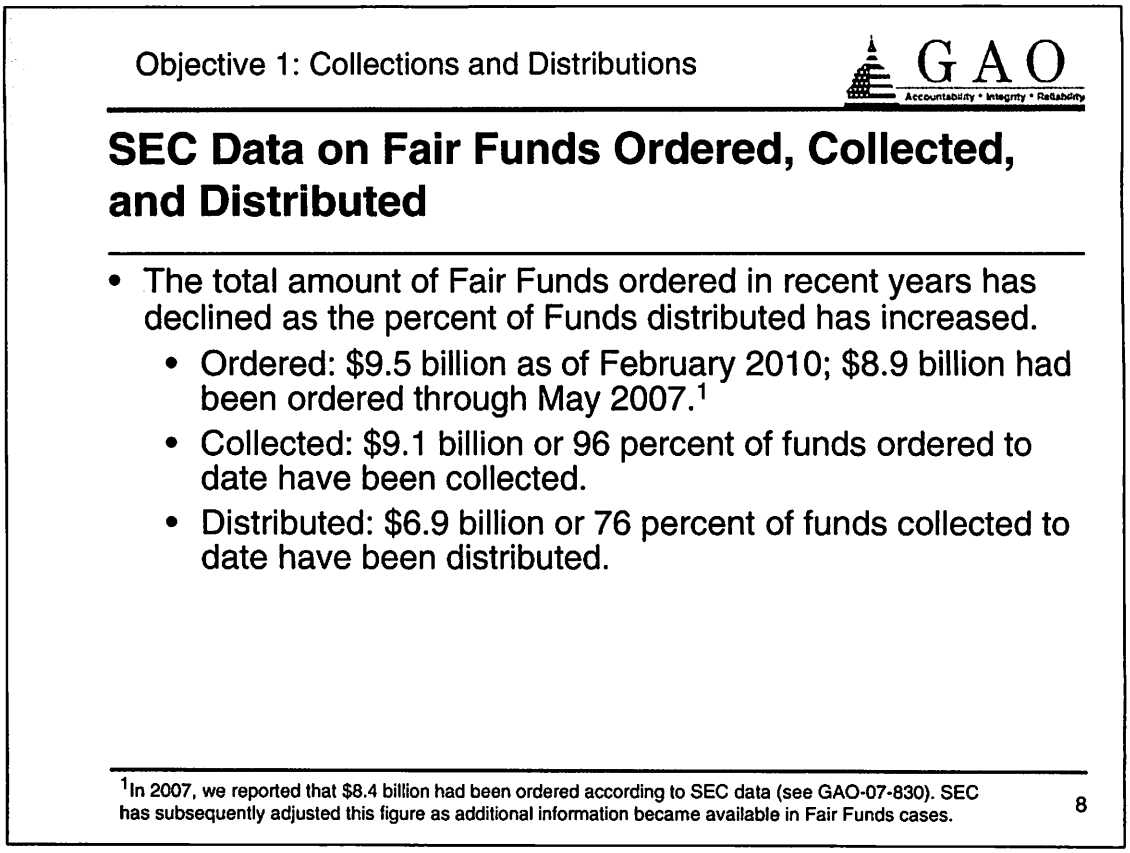
Enclosure I


Objective 1: Collections and Distributions
GAO
Accountability • Integrity • Reliability
SEC Data on Fair Funds Ordered, Collected, and Distributed
• The total amount of Fair Funds ordered in recent years has declined as the percent of Funds distributed has increased.
• Ordered: $9.5 billion as of February 2010; $8.9 billion had been ordered through May 2007.[1]
• Collected: $9.1 billion or 96 percent of funds ordered to date have been collected.
• Distributed: $6.9 billion or 76 percent of funds collected to date have been distributed.
[1]In 2007, we reported that $8.4 billion had been ordered according to SEC data (see GAO-07-830). SEC has subsequently adjusted this figure as additional information became available in Fair Funds cases.
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Enclosure I

Objective 1: Collections and Distributions

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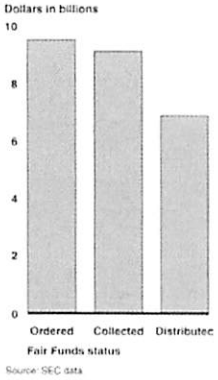
SEC Data on Fair Funds Ordered, Collected, and Distributed (continued)

- Fair Funds ordered, collected, and distributed through Feb. 2010
- Percent of ordered funds that have been collected and collected funds that have been distributed



Source: SEC data

Source: GAO analysis of SEC data.

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Enclosure I

Objective 1: Collections and Distributions

GAO
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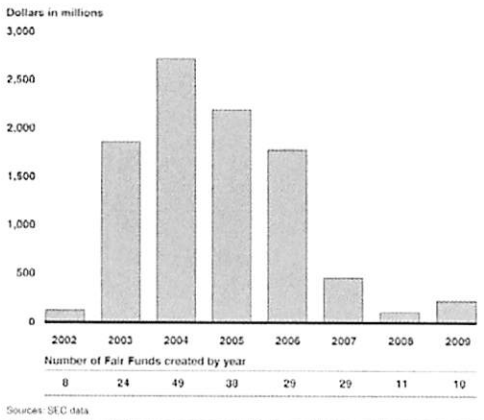
Fair Funds Established and Funds Ordered

- Fewer Fair Funds have been created in recent years and the dollar amount of funds ordered have been significantly lower after 2006.



Sources: SEC data

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Objective 1: Collections and Distributions

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The Fair Fund Distribution Rate Increased Significantly Since 2007

- In 2007, we reported that 21 percent of Fair Funds had been distributed. According to SEC, as of February 2010, 76 percent of Fair Funds collected have been distributed.[1]
- The significant increase in the percent of funds distributed could owe to the fact that the bulk of Fair Funds—also some of the largest Fair Funds—were ordered prior to 2007 and have been distributed since the 2007 GAO report.
  - Since May 2007, about $520 million or 5.5 percent of total Fair Funds have been ordered. According to SEC, recent Fund orders have been lower because
    - Fewer Fair Funds have been established since the large financial fraud cases in 2004-2005; and
    - SEC determined that Fair Funds are not appropriate for certain types of cases.

[1]The Fair Fund distribution rate in GAO-07-830 was calculated using Funds ordered. Based on input from SEC, the February 2010 distribution rate is based on Funds collected.

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Enclosure I

Objective 1: Collections and Distributions

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Improved Fair Fund Distribution

- SEC officials said the distribution rate has increased because of changes in processing Fair Funds.
  - Issues concerning tax consequences were resolved through private letter rulings from the Internal Revenue Service.
  - In 2007, SEC began distribution of Fair Funds in tiers or tranches by distributing funds to investors in steps, as harmed investors were identified.
    - SEC identified 12 Funds that are currently being distributed in tranches, amounting to $2 billion of distributed funds.
  - SEC officials believed operational and organizational changes have improved Fair Fund Distribution.

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Enclosure I

Objective 1: Collections and Distributions

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The Largest Fair Funds Were Established Before 2007

- The ten largest Fair Funds to be established through January 2010 are the same as reported in 2007.
- The ten largest Funds account for $4.3 billion, or nearly half of all funds ordered. All funds ordered in the ten largest cases have been collected.
- In the ten largest Fair Funds, 89 percent or $3.9 billion of Funds' proceeds have been distributed as of February 2010.
- Of the ten largest Fair Funds, two have completed distribution to investors (Fannie Mae and Time Warner).
- SEC often collects and distributes more monies to investors than funds ordered because the Funds proceeds' accrue interest and money is contributed to the Funds from sources other than penalties or disgorgement.

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Enclosure I

Objective 1: Collections and Distributions

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The Largest Fair Funds Were Established Before 2007 (continued)

The 10 Largest Fair Funds Orders, as of February 2010

Fair Fund	Alleged type of activity	Source	Judgment date	Total ordered and collected	Total distributed
AIG	Improper accounting and workers' compensation practices	Court	2/17/2006	$800,000,000	$843,350,000
WORLDCOM, INC.	Overstating income	Court	7/7/2003	$677,500,000	$673,444,544
Global Settlement	Research and investment banking conflicts of interest	Court	10/31/2003	$432,750,000	$377,035,532
Enron	Earnings manipulation	Court	7/30/2003	$422,995,012	$0
BANK OF AMERICA (BACAP) (MT)	Market timing trading and late trading in mutual fund	SEC	2/9/2005	$375,000,000	$212,720,199
Fannie Mae	Fraudulent accounting	Court	8/9/2006	$350,000,001	$356,128,500
INVESCO (MT)	Market timing trading in mutual funds	SEC	10/8/2004	$325,840,004	$418,127,632
Alliance Market Timing	Market timing trading in mutual funds	SEC	4/28/2005	$321,230,003	$341,982,094
Massachusetts Financial Services (MT)	Market timing trading in mutual funds	SEC	2/5/2004	$308,249,143	$312,042,489
TIME WARNER	Overstating online revenue and number of internet subscribers	Court	3/29/2005	$300,000,001	$317,000,000

Source: SEC

[1]The Enron Fair Fund has not distributed any funds to date as a result of ongoing litigation and the high number of potential claimants.

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Enclosure I

Objective 1: Collections and Distributions

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Court vs. SEC-overseen distributions

- SEC and court-overseen cases have a similar percent of funds distributed. In 2007, court-overseen Fair Funds had higher distribution rates.

Fair Funds Orders, Collections and Distribution, as of February 2010

	SEC-overseen Fair Funds	Court-overseen Fair Funds	All Fair Funds
Number of plans	73	126	199
Total amount ordered (in thousands)	$4,345,843	$5,121,205	$9,467,048
Total amount collected (in thousands)	$4,344,760	$4,779,151	$9,123,911
Total amount distributed (in thousands)	$3,264,135	$3,626,031	$6,890,166
Percent distributed	75.1	75.9	75.5
2007 percent distributed	24.9	16.4	20.9

Source: GAO analysis of SEC data.

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Enclosure I

Objective 1: Collections and Distributions

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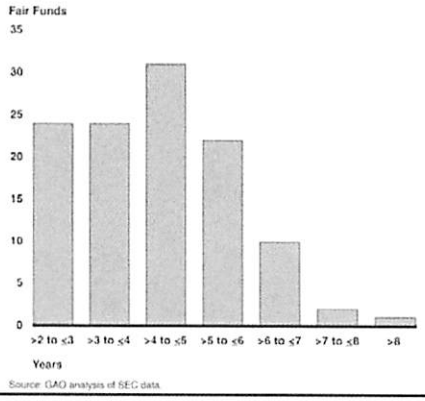
Completion of Fair Funds Cases

- SEC identified 71 Fair Funds that have completed distribution to investors and 128 cases that have not completed distribution.
- Duration of ongoing cases:



[1]Duration of Fair Funds is based on the date money was first collected. In 1 Fair Fund case, money was first collected as disgorgement prior to the establishment of Fair Funds under the Sarbanes-Oxley Act of 2002.

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Enclosure I

Objective 1: Collections and Distributions

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Completion of Fair Fund Cases

- Of the 128 Fair Fund cases that have not completed distribution, 114 have been ongoing for longer than 2 years.

Ongoing Fair Funds Orders, Collections and Distribution, as of February 2010

Duration	Fair Funds	Fair Funds ordered but not collected	Fair Funds collected but not distributed	Percent distributed
Ongoing between 2 and 3 years	24	$104,318,421	$307,193,044	19.2
Ongoing between 3 and 4 years	24	$122,787,909	$237,500,451	86.2
Ongoing between 4 and 5 years	31	$48,127,690	$897,545,933	66.8
Ongoing between 5 and 6 years	22	$40,692,486	$438,477,621	79.1
Ongoing between 6 and 7 years	10	$2,357,170	$490,991,386	62.0
Ongoing between 7 and 8 years	2	$44,000	$460,672	0.0
Ongoing for longer than 8 years	1	$51,733	$8,401,118	0.0
Total	114	$318,379,409	$2,380,570,224	70.5

Source: GAO analysis of SEC data.

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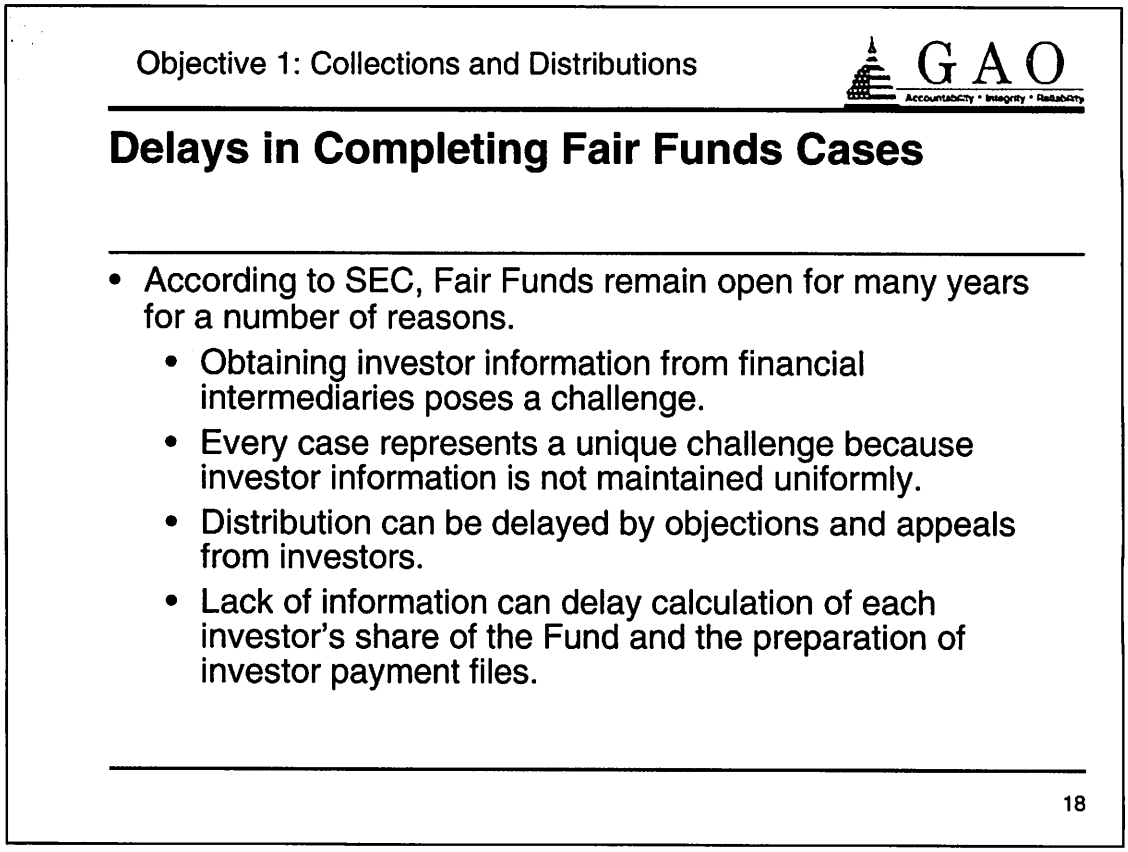
Objective 1: Collections and Distributions
GAO
Accountability * Integrity * Reliability
Delays in Completing Fair Funds Cases
• According to SEC, Fair Funds remain open for many years for a number of reasons.
• Obtaining investor information from financial intermediaries poses a challenge.
• Every case represents a unique challenge because investor information is not maintained uniformly.
• Distribution can be delayed by objections and appeals from investors.
• Lack of information can delay calculation of each investor's share of the Fund and the preparation of investor payment files.
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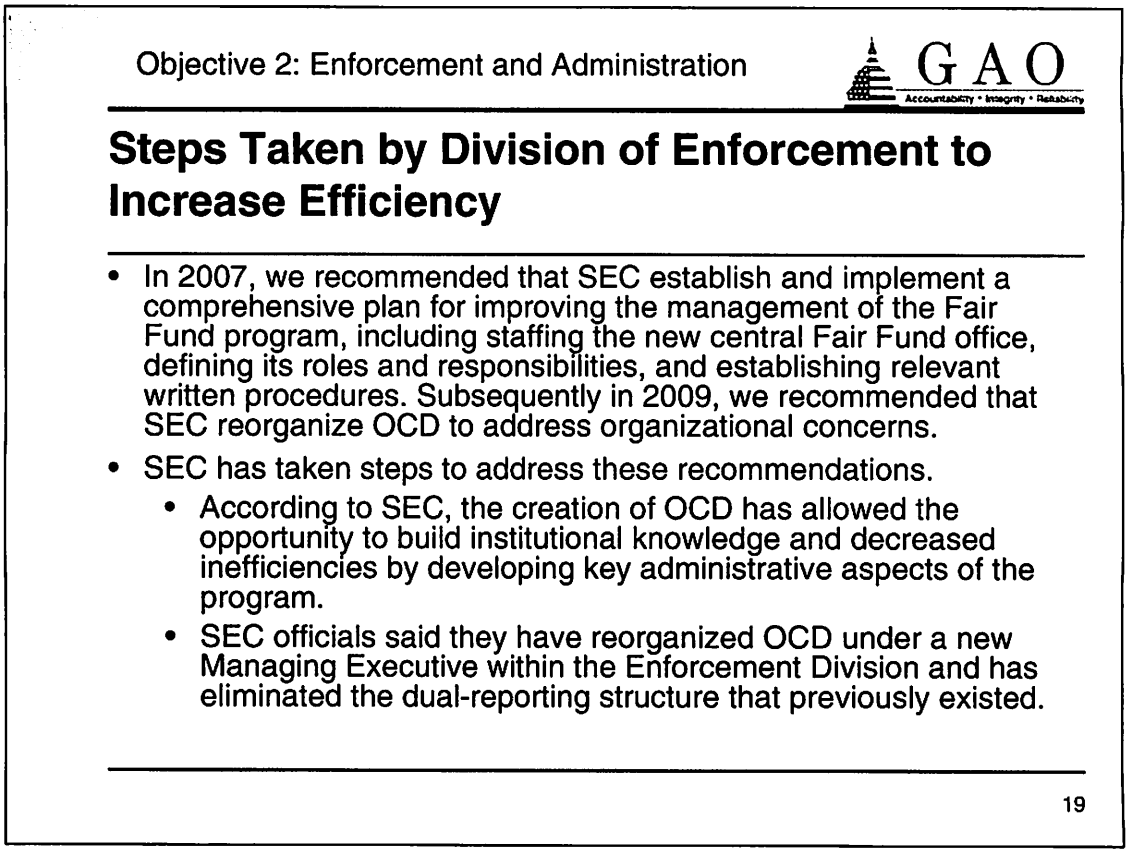
Objective 2: Enforcement and Administration
GAO
Accountability • Integrity • Reliability
Steps Taken by Division of Enforcement to Increase Efficiency
• In 2007, we recommended that SEC establish and implement a comprehensive plan for improving the management of the Fair Fund program, including staffing the new central Fair Fund office, defining its roles and responsibilities, and establishing relevant written procedures. Subsequently in 2009, we recommended that SEC reorganize OCD to address organizational concerns.
• SEC has taken steps to address these recommendations.
• According to SEC, the creation of OCD has allowed the opportunity to build institutional knowledge and decreased inefficiencies by developing key administrative aspects of the program.
• SEC officials said they have reorganized OCD under a new Managing Executive within the Enforcement Division and has eliminated the dual-reporting structure that previously existed.
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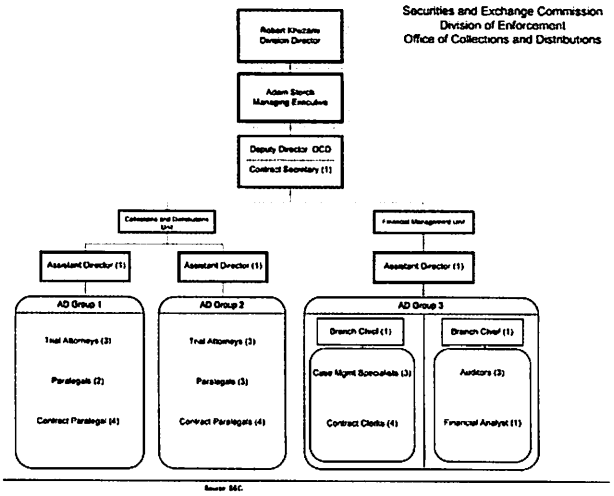
Objective 2: Enforcement and Administration

GAO
Accountability * Integrity * Reliability

SEC Officials Have Streamlined OCD's Organizational Structure



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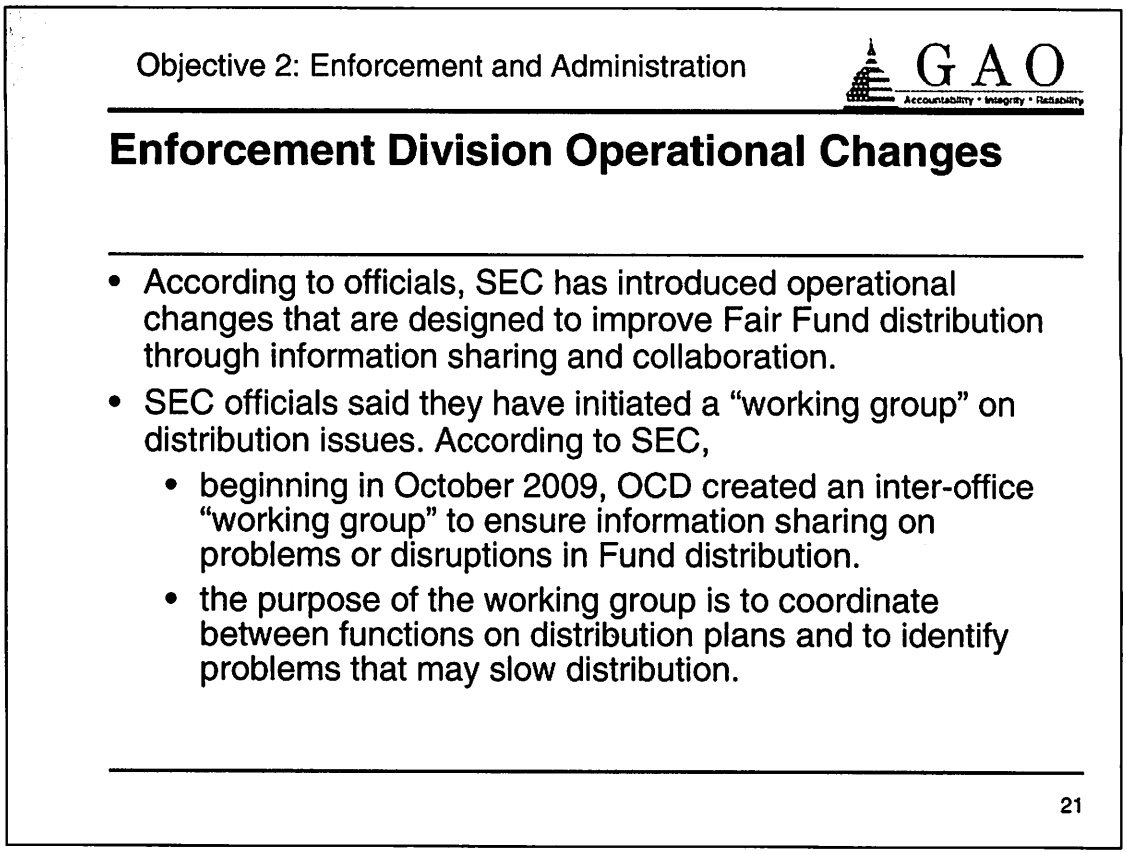
Objective 2: Enforcement and Administration
GAO
Accountability • Integrity • Reliability
Enforcement Division Operational Changes
• According to officials, SEC has introduced operational changes that are designed to improve Fair Fund distribution through information sharing and collaboration.
• SEC officials said they have initiated a "working group" on distribution issues. According to SEC,
• beginning in October 2009, OCD created an inter-office "working group" to ensure information sharing on problems or disruptions in Fund distribution.
• the purpose of the working group is to coordinate between functions on distribution plans and to identify problems that may slow distribution.
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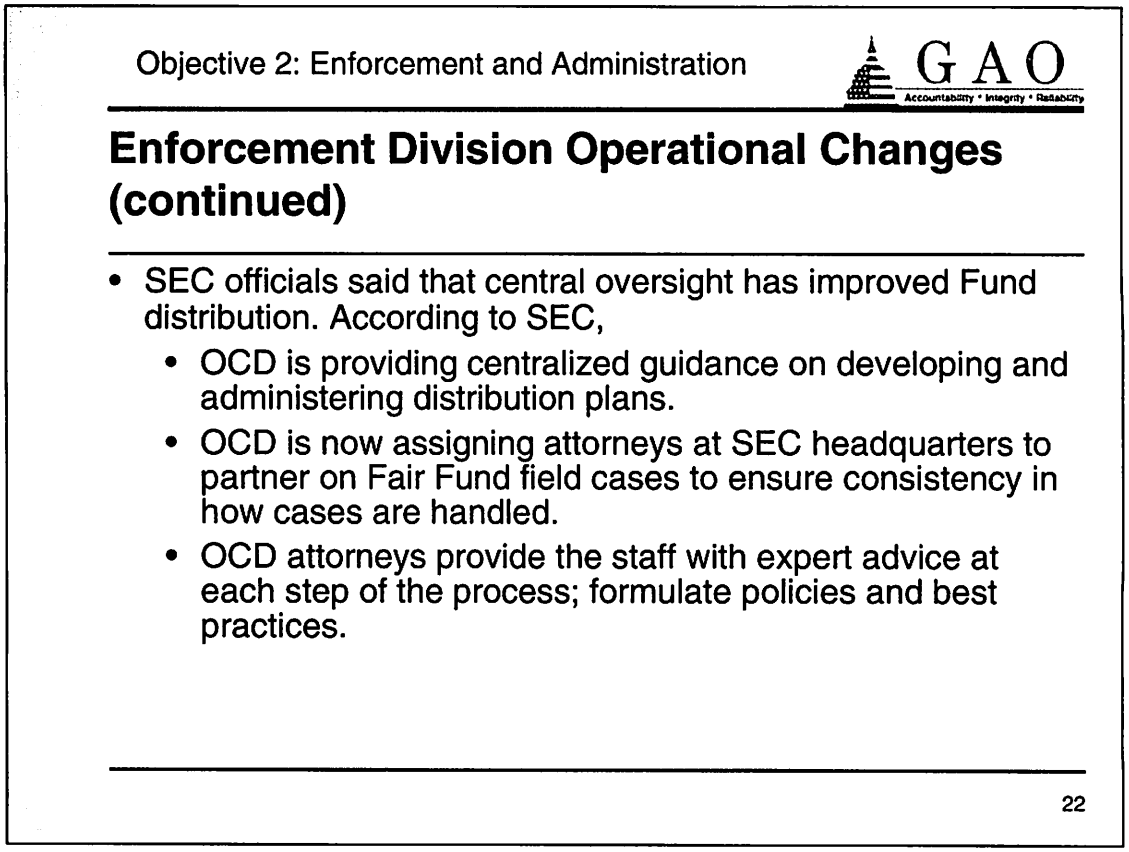
Objective 2: Enforcement and Administration
GAO
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Enforcement Division Operational Changes (continued)
• SEC officials said that central oversight has improved Fund distribution. According to SEC,
• OCD is providing centralized guidance on developing and administering distribution plans.
• OCD is now assigning attorneys at SEC headquarters to partner on Fair Fund field cases to ensure consistency in how cases are handled.
• OCD attorneys provide the staff with expert advice at each step of the process; formulate policies and best practices.
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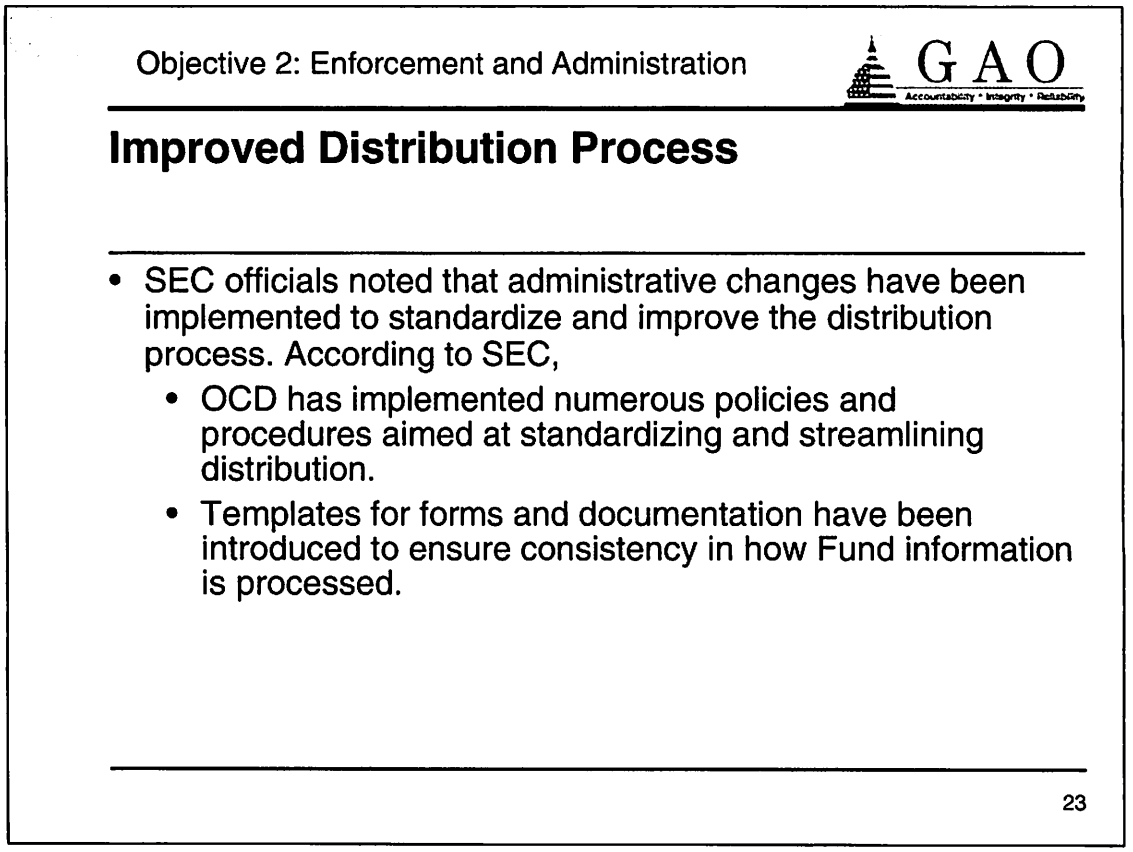
Objective 2: Enforcement and Administration
GAO
Accountability * Integrity * Reliability
Improved Distribution Process
• SEC officials noted that administrative changes have been implemented to standardize and improve the distribution process. According to SEC,
• OCD has implemented numerous policies and procedures aimed at standardizing and streamlining distribution.
• Templates for forms and documentation have been introduced to ensure consistency in how Fund information is processed.
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Enclosure I

Objective 2: Enforcement and Administration

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SEC Plans New Measure to Assess Fair Fund Distribution

- SEC proposed a performance measure to assess SEC's progress in distributing Fair Funds in its 2010-2015 Strategic Plan.[1]
- If adopted, the new metric would measure the percentage of Fair Funds that were fully distributed within 24 months of the order appointing the fund administrator.
- As shown above, many Fair Funds cases do not meet the proposed performance measure in distributing final funds to investors within 24 months. SEC officials do not believe the data provided to us was sufficient to make this determination.
- SEC officials said that currently information on Fair Funds necessary to implement the proposed performance measure is not being collected.

[1]The measure would assess the percentage of Fair Fund and disgorgement fund plans that distributed the final tranche of funds to injured investors within 24 months of the order appointing the fund administrator.

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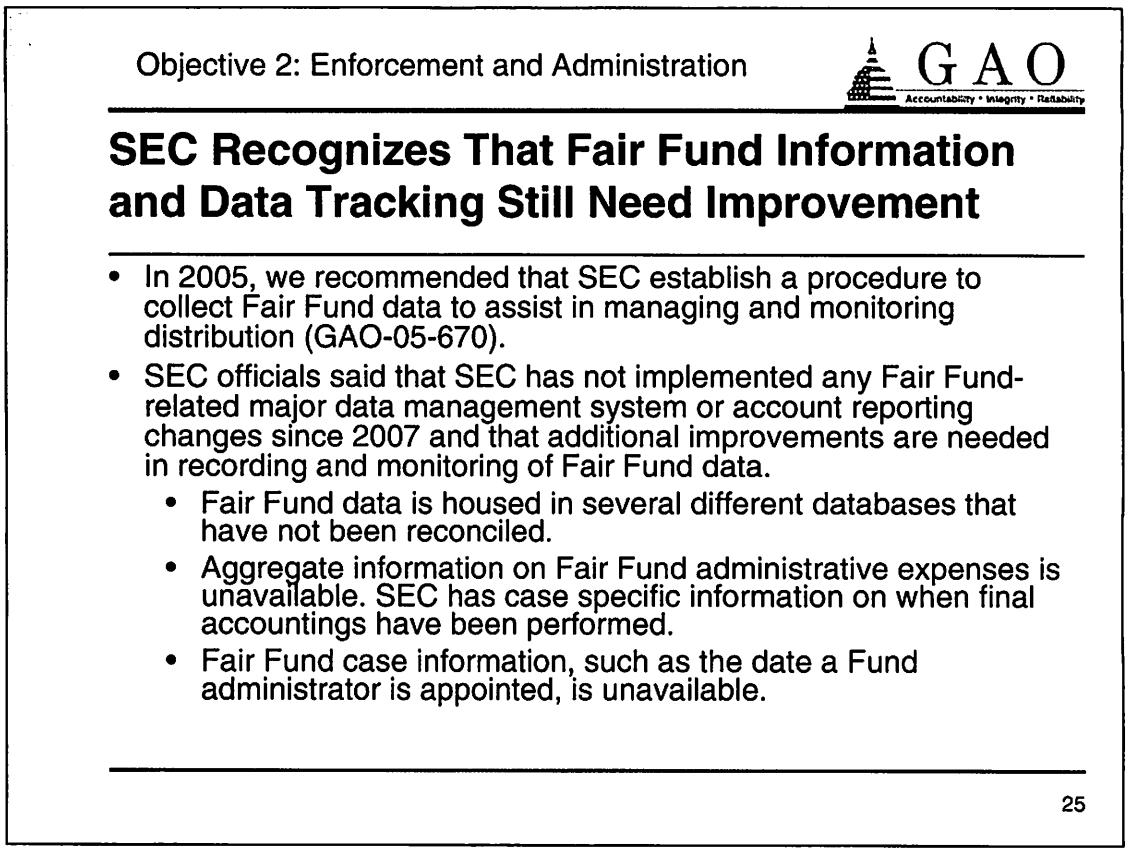
Objective 2: Enforcement and Administration
GAO
Accountability • Integrity • Reliability
SEC Recognizes That Fair Fund Information and Data Tracking Still Need Improvement
• In 2005, we recommended that SEC establish a procedure to collect Fair Fund data to assist in managing and monitoring distribution (GAO-05-670).
• SEC officials said that SEC has not implemented any Fair Fund-related major data management system or account reporting changes since 2007 and that additional improvements are needed in recording and monitoring of Fair Fund data.
• Fair Fund data is housed in several different databases that have not been reconciled.
• Aggregate information on Fair Fund administrative expenses is unavailable. SEC has case specific information on when final accountings have been performed.
• Fair Fund case information, such as the date a Fund administrator is appointed, is unavailable.
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Enclosure I

Objective 2: Enforcement and Administration

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Improvements in Tracking of Distribution Related Information Are Still Pending

- According to SEC officials, an extensive review of the program is underway, the findings of which may result in changes in workflow, procedures, and information systems.
  - SEC officials said they are in the process of hiring an external consultant to advise SEC in streamlining its business processes and integrating data systems, but the timeframe for completion is unclear.
- While SEC is beginning to take steps to better capture, report, and manage the programmatic and financial impact of the collections and distribution process, it is too early to determine the impact of these efforts.

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Enclosure II

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Division of Enforcement

Robert S Khuzami
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April 12, 2010

A. Nicole Clowers
Acting Director
Financial Markets and Community Involvement
U.S. Government Accountability Office
Washington, DC 20548

Dear Ms. Clowers:

Thank you for the opportunity to respond to the draft study prepared by the Government Accountability Office (GAO) entitled *Securities and Exchange Commission: Information on Fair Funds Collections and Distributions.*

I am pleased that the GAO noted the steps that the SEC has taken to increase efficiency, as well as the increase in distributions of Fair Funds to investors. The creation of our Office of Collections and Distributions has afforded us the opportunity to build institutional knowledge and has decreased inefficiencies by developing key administrative aspects of the program by, for example, providing centralized guidance on developing and administering distribution plans. As the study indicates, many Fair Funds remain open for a variety of reasons, including difficulties in obtaining investor information and the need to respond to legal objections and appeals from investors that must be resolved before moving forward with the distribution; nonetheless as you noted we have distributed over 76% of all Fund collected since 2002. This represents a significant upward trend and demonstrates the Commission's continuing commitment to using the Fair Fund provisions of the Sarbanes-Oxley Act of 2002 to return money to investors injured by securities law violators. SEC Enforcement actions have resulted in the return of billions of dollars to injured investors since the agency received "Fair Fund" authority in 2002. During Fiscal Year 2009, the Commission distributed approximately $2.1 billion to harmed investors from both disgorgement funds and Fair Funds, a two-fold increase in comparison with the prior fiscal year. During the first half of Fiscal Year 2010, the Commission continued to make significant distributions, totaling over $1 billion.

As GAO notes, however, that our Fair Fund information and data tracking warrant further improvement. As we discussed during GAO's study, an extensive review of the agency's tracking of disgorgement and penalties is underway, the findings of which may result in changes in workflow, procedures, and information systems. To assist in this project, the agency has hired an external consultant to advise the SEC in improving business processes and

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integrating data systems, including those related to distributions. As an important component of the SEC's investor protection mission, we are deeply committed to continuing to improve our processes to timely and efficiently make Fair Fund and disgorgement distributions to injured investors.

Thank you again for the opportunity to comment on this study. If you have any questions relating to our response, please contact me or Joan McKown at (202) 551-4933.

Sincerely,

Robert S Khuzami

cc: Joan McKown
Adam Storch
Ken Johnson
Diego Ruiz
Lynn Powalski

(250508)

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