No. 16-55850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff – Appellee,

v.

LOUIS V. SCHOOLER; FIRST FINANCIAL PLANNING CORPORATION,
DBA Western Financial Planning Corporation,

Defendants - Appellees,

SUSAN GRAHAM, ET AL.

Intervenors - Appellants,

THOMAS C. HEBRANK,

Receiver - Appellee.

On Appeal from the United States District Court
for the Southern District of California, Case No. 3:12-cv-02164-GPC-JMA

RECEIVER'S REPLY TO APPELLANTS' OPPOSITION TO MOTION TO EXPEDITE APPEAL AS TO ORDER APPROVING SALE OF JAMUL VALLEY PROPERTY

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Appellee Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial Planning Corporation d/b/a Western Financial Planning Corporation ("Western"), its subsidiaries and the General Partnerships listed on Schedule 1 to the Preliminary Injunction Order entered by the District Court on March 13, 2013 ("GPs" and collectively, "Receivership Entities"), hereby replies to the Aguirre Investors' opposition ("Opposition") to the Receiver's motion to expedite appeal as to order approving sale of Jamul Valley property ("Motion").

I. INTRODUCTION

The Aguirre Investors initially stated that they opposed the Motion because it would "increase work for all parties and the court." Having been admonished by the District Court for "repetitive lawyering" and imposing unnecessary costs on the receivership estate, the Aguirre Investors have now abandoned that argument. They now claim that expediting the appeal of the Jamul Valley Sale Order will delay resolution of the appeal. Not only in this argument remarkably hypocritical, it is based on a false premise – that the briefing of the remainder of the appeal will be suspended while the appeal as to the Jamul Valley Sale Order is resolved. To the contrary, there is no need to suspend the briefing for the remainder of the appeal. The Aguirre Investors can make all of their arguments as to the remainder of the appeal without waiting until the Court has ruled on the Jamul Valley Sale Order. Therefore, there is no reason that expediting the appeal of the Jamul Valley

Sale Order should delay the remainder of the appeal. Moreover, considering the huge delay the Aguirre Investors have already caused and the substantial costs they have already imposed on the other 95% of investors, the Aguirre Investors' arguments regarding delay should be given no weight.

The Receiver supports the appeals being consolidated and does not oppose the full consolidated appeals being expedited. However, if the Court does not find sufficient grounds to expedite the full consolidated appeals, it should expedite the appeal as to the Jamul Valley Sale Order. Once the appeal of that order is affirmed, the title company will issue a title insurance policy to the buyer and the sale can close. If the appeal is not expedited, it is likely the buyer will walk away and the opportunity to sell the property at a favorable price will be lost.

II. THE AGUIRRE INVESTORS' FALSE ACCUSATIONS AND MISREPRESENTATIONS

Before addressing the Aguirre Investors' meritless arguments regarding delay, the Receiver will address some of their false accusations and misrepresentations, which have become the hallmark of pleadings filed by both groups of investors represented by Mr. Aguirre. The Aguirre Investors have made the same misrepresentations and asserted the same frivolous arguments to the District Court many times. The District Court has flatly rejected them each time. The District Court has now admonished counsel for the Aguirre Investors for

repeating the same arguments over and over and thereby imposing substantial costs on the receivership estate. Dkt. No. 1409, p. 14. Mr. Aguirre simply ignores the District Court and continues to propagate the same lies and conspiracy theories in this Court as he has over the last 11 months in the District Court.

The false statements in the Opposition (Dkt. No. 29) and the Aguirre Investors' concurrently-filed Unopposed Motion to Expedite (Dkt. No. 28) are too numerous for the Receiver to address each one individually. However, some examples are as follows:

- One way the Aguirre Investors often misrepresent the facts is to pretend all actions they disagree with were taken unilaterally by the Receiver, despite knowing such actions were taken either by the Defendants prior to the receivership or at the express direction of the District Court. For example, the Aguirre Investors state the Receiver "continued to enforce investors' obligations to pay" and investors were "forced to pay" millions of dollars post-receivership. Dkt. No. 28, pp. 7-8. In fact, as the Aguirre Investors know, the Receiver temporarily suspended collecting payments from investors shortly after he was appointed due to concerns that having investors put more money into the investments would exacerbate their losses. Defendant Louis Schooler and many of the investors now represented by

Mr. Aguirre opposed this action. The District Court determined that ceasing collections from investors would cause the Receivership Entities to default on mortgages and property taxes while the litigation was ongoing, eroding the value of the properties. Therefore, in order to preserve the *status quo*, the District Court ordered the Receiver to resume collecting payments from investors.

- The Aguirre Investors continuously use figures regarding how much money has been collected and spent during the receivership that have been demonstrated to be wildly inaccurate. These false accounting figures and extrapolations have been raised countless times in the District Court, each has been fully addressed by the Receiver and shown to be nothing more than a mischaracterization or misrepresentation, and each has been rejected by the District Court.
- As part of their oft-repeated due process argument, the Aguirre Investors claim the Receiver suddenly reversed course from "enforcing investors' financial obligations" to proposing GP properties be sold without investor votes and sale proceeds be pooled for distribution. Dkt. No. 28, p. 8. As noted above, the premise that the Receiver unilaterally forced investors to pay during the receivership is entirely false. Moreover, since the District Court made the important

determination that Defendants violated securities laws by selling unregistered securities, the Receiver consistently advocated for keeping the GPs in the receivership and selling properties held by GPs that could not pay their operating expenses. In fact, after allowing investors to submit briefs and holding a lengthy hearing at which they were permitted to appear and argue their points, the District Court determined the GPs would remain in the receivership and, on May 12, 2015 (over a year before it approved the Distribution Plan), approved procedures for the sale of GP properties. Dkt. Nos. 1003, 1069. Those procedures did not include taking investor votes. Therefore, the accusation the Receiver "suddenly reversed himself" in February 2016 by proposing sales without investor votes has absolutely no basis in fact.

- The Aguirre Investors state the "amount of receipts has dropped off to a trickle ($19,101) for [the third quarter of 2016] because investors have stopped paying to support their GPs." Dkt. No. 28, p. 10. This is yet another knowing misrepresentation. As part of his proposal that receivership estate assets be pooled for distribution, the Receiver again proposed that collection of payments from investors cease. The Aguirre Investors even quote the language from the Receiver's

motion. Dkt. No. 28, p. 8. Accordingly, the Aguirre Investors know the Receiver stopped collecting payments from investors in May 2016 when the District Court approved the pooling proposal. Nevertheless, they attempt to deceive the Court by characterizing this as a choice by investors to stop supporting their GPs.

- Another method the Aguirre Investors often use to try and deceive the Court is to knowingly omit facts. For example, the Aguirre Investors state that during "the first nine months of 2016, Hebrank and 'other professionals' have been paid $1,135,870." Dkt. No. 28, p. 12. The Aguirre Investors intentionally fail to disclose that much of these fees and costs were approved by the District Court for prior periods dating back to 2014 and were awaiting payment. Prior to the pooling of receivership estate funds, fees and costs of the receivership were paid exclusively from the assets of Western, which was in a constant cash crisis. Once the funds were pooled, there was a common fund from which Court-approved fees and costs could be paid. Therefore, Court-approved fees and costs from prior periods could be paid. The Aguirre Investors also fail to disclose that the majority of fees and costs incurred during the two quarters of 2016 were the result of having to respond to their countless requests for documents, ex parte

applications, motions, oppositions, and false attacks. The District Court has acknowledged the substantial unnecessary costs the Aguirre Investors have imposed on the receivership estate by their repetitive lawyering of issues it has already decided. District Court, Dkt. No. 1409, p. 14. Therefore, the Aguirre Investors' complaints about costs of the receivership should be given no weight.

- The Aguirre Investors, who number 192, often claim they represent thousands of like-minded investors and tout the purported results of surveys to support this claim. Opposition, p. 7. The truth is that over the last two years, the Aguirre Investors have conducted an email campaign directed at investors, in which they have propagated a stream of false accusations and misrepresentations designed to sway investors toward their anti-Receiver, anti-District Court, and anti-SEC views. They then circulated a purported survey with language intended to enflame investors and questions designed to elicit specific responses. They presented their purported survey to the District Court on several occasions and it gave it no weight. Accordingly, the Aguirre Investors speak only for themselves and no one else.
- The Aguirre Investors state the Receiver's "disclosure statements are grossly unreliable, as he himself has admitted." Dkt. No. 28, p. 6

fn. 7. This is completely false. The Receiver has never admitted any "disclosure statements" (whatever that refers to) are unreliable. In response to the Aguirre Investors' numerous false attacks regarding the Receiver's interim reports, the Receiver has explained that Western used a convoluted system of collecting funds from investors, transferring funds between entities, and making mortgage payments. The Receiver has also explained that this system was used during the post-receivership period to maintain the *status quo* regarding the Receivership Entities' operations while the litigation was ongoing. With the Final Judgment now entered and the Distribution Plan approved, that system is no longer being used. Regardless, the Receiver's interim reports are accurate and reliable. The Aguirre Investors' mischaracterizations of the numbers in them have been fully addressed by the Receiver and rejected by the District Court.

- The Aguirre Investors contend the proposed sale of the Jamul Valley property for $520,000 is below the low end of their expert's valuation range, which was $534,000 to $581,000. They intentionally omit that the sale does not involve any real estate broker commissions, a point their expert, Xpera Group, specifically noted in its endorsement of the sale: "Accept the offer from the Nature Conservancy. ***It is a fair***

> ***offer and has no brokerage commission involved.*** The alternative route ... would be a tortuous and expensive route, with uncertain chance for success." District Court Dkt. No. 1234-2, p. 121 of 172 (emphasis added). Therefore, as the Aguirre Investors well know, the true value of the sale is between $551,200 and $570,000 (typical broker commissions for sales of undeveloped land are between 6% and 10% of the sale price). Once again, the Aguirre Investors attempt to deceive the Court by knowingly omitting key facts.

As these examples demonstrate, the Aguirre Investors misrepresent and omit facts throughout their pleadings in ways intended to deceive the Court.

III. THE AGUIRRE INVESTORS' ARGUMENT CONCERNING DELAY

To begin with, if the Aguirre Investors were truly concerned about delay, they would not have sought to reopen discovery and conduct a trial in the District Court, asked the District Court to order a new accounting or audit of the entire receivership, filed four notices of appeal (an original notice and three amendments) challenging six different orders of the District Court, sought a stay pending appeal from the District Court and this Court, and contacted the prospective purchaser of the Jamul Valley property in an effort to stop the approved sale. These are clearly not the actions of investors concerned with avoiding delay.

In reality, the Aguirre Investors are actively doing everything they can to obstruct and hinder the progress of the receivership, including raising the same objections over and over, as the District Court has observed, and filing successive appeals of orders denying their motions. Therefore, their arguments about delay are disingenuous and should be given no weight.

Moreover, the Aguirre Investors' argument regarding delay is based on a false premise – that expediting the appeal of the Jamul Valley Sale Order will suspend the briefing of the remainder of the appeal, and therefore delay resolution of the appeal. The Aguirre Investors cite no rule stating that if part of an appeal is expedited, the remainder of the appeal is suspended. The only justification the Aguirre Investors can come up with for why the remainder of the appeal should be suspended is that both the Jamul Valley Sale Order and the remainder of the appeal involve due process (because they have argued due process in opposition to virtually every motion) and they would like to know how the Court rules on the Jamul Valley Sale Order before they prepare their brief on the remainder of the appeal. This strained argument highlights the fact that the Aguirre Investors are not truly concerned about delay. There is simply no reason they cannot brief the remainder of the appeal until the Court rules on the Jamul Valley Sale Order.

IV. CONCLUSION

For the foregoing reasons, the Motion should be granted and the appeal as to the Jamul Valley Sale Order should be expedited such that the appeal is resolved prior to April 12, 2017.

Dated: December 22, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: */s/ Edward Fates*
Edward G. Fates
Attorneys for Receiver
THOMAS C. HEBRANK

CERTIFICATE OF COMPLIANCE

The foregoing Reply to Appellants' Opposition to Motion to Expedite Appeal as to Order Approving Sale of Jamul Valley Property of Appellee Thomas C. Hebrank complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 2,128 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007, in font size 14, Times New Roman.

Dated: December 22, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: */s/ Edward Fates*
Edward G. Fates
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THOMAS C. HEBRANK

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on December 22, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 22, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

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