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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

RECEIVER'S OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Date: July 15, 2016
Time: 1:30 p.m.
Ctrm.: 2D
Judge: Hon. Gonzalo P. Curiel

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Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial Planning Corporation d/b/a Western Financial Planning Corporation ("Western"), and its subsidiaries and the General Partnerships listed on Schedule 1 to the Preliminary Injunction Order entered on March 13, 2013 (collectively, "Receivership Entities"), submits this opposition to the Motion for Stay Pending Appeal ("Stay Motion") filed by the investors represented by Gary Aguirre ("Aguirre Investors").

I. INTRODUCTION

The Aguirre Investors have appealed four orders of the Court:

1) The May 18, 2016 order granting in part and denying in part motions to intervene, Dkt. No. 1296 ("Limited Intervention Order");

2) The May 25, 2016 order denying motions to intervene related to motions to vacate prior orders and for an accounting, Dkt. No. 1303 ("Intervention Denial Order");

3) The May 25, 2016 order granting in part and denying in part the Receiver's motion for order (a) authorizing the Receiver to conduct an orderly sale of General Partnership properties, (b) approving plan of distribution receivership assets, and (c) approving procedures for the administration of investor claims ("Distribution Plan Motion") and denying the Aguirre Investors' *ex parte* motion to set an evidentiary hearing and discovery schedule, Dkt. No. 1304 ("Distribution Plan Order"); and

4) The May 25 2016 order approving and adopting two recommendations made by the Receiver regarding the engagement of brokers and a letter of intent for certain GP properties, Dkt. No. 1305 ("Broker/LOI Order").

The Aguirre Investors now request a stay pending appeal. The stay they request, however, is not just of the above orders, but is much broader and includes "any other motion whenever filed (1) to sell any of the 36 properties owned by the 87 general partnerships ("GPs") in the receivership, (2) to take any step in the

process of selling those properties, (3) to pool the proceeds from those sales, and (4) to redistribute those proceeds pursuant to the 'one pot' approach." Stay Motion, Dkt. No. 1316-2, p. 1. There is no basis to stay the four orders appealed from, let alone to issue a much broader stay of the entire process of selling GP properties and making distributions.

To begin with, the Distribution Plan Order and Broker/LOI Order are non-appealable interlocutory orders. Accordingly, the Receiver has moved to dismiss the appeal as to those orders. *See* Exhibit A. Even if all of the orders were appealable, however, the factors applicable to a motion for stay pending appeal weigh strongly against a stay. The Aguirre Investors have a very low likelihood of success on the appeal, they will not suffer any harm in the absence of a stay, the balance of equities tips sharply against a stay, and a stay would harm the public interest. Moreover, there is absolutely no basis for the much broader, prospective stay of all receivership activity relating to sales and distributions. Accordingly, the Stay Motion should be denied.

II. THE DISTRIBUTION PLAN ORDER

Before getting to the merits of the Stay Motion, it is important to understand the actual scope of the Distribution Plan Order. The order provides (a) the Receiver shall file a proposal regarding a modified orderly sale process that incorporates the public sale requirements in compliance with 28 USC § 2001 within 14 days; (b) the Receiver shall submit a report and recommendation with the Court within 180 days, evaluating the pros and cons of the Xpera Group's recommendations that can feasibly maximize the value of the receivership estate; (c) any newly created investor entities that seek to purchase GP properties may utilize their projected distribution amounts as a component of their bids; (d) the proposed One Pot Approach to distribution of receivership assets is approved; (e) the proposed Distribution Plan is approved; (f) the proposed procedures for the administration of investor claims are approved; and (g) the Receiver shall withdraw and refile his

Fourteenth Interim Report and submit all future reports consistent with the SEC Standardized Fund Accounting Report ("SFAR") and submit a final fee application at the conclusion of the case "describing in detail the costs and benefits associated with all litigation and other actions pursued by the receiver during the course of the receivership," as recommended by the SEC's billing instructions. Dkt. No. 1304, pp. 31-32.

The Aguirre Investors contend the Distribution Plan Order approves the sale of GP properties and distributes sale proceeds to non-partners in those GPs. Stay Motion, Dkt. No. 1316-2, p. 22. To the contrary, the Distribution Plan Order does not even approve a process for selling GP properties, which the Receiver was required to modify and present in a further proposal. Dkt. No. 1309. Properties must then go through the modified orderly sale process, including Court approval of the engagement of brokers and Court approval of ultimate sales.

Likewise, no distributions can be made under the Distribution Plan Order. The Distribution Plan specifically provides that distributions will be made only after the District Court has entered further orders "setting the allowed amount of all Claims, and authorizing the Receiver to make interim distributions ("Approval Orders")." Dkt. No. 1181, Exh. E. Accordingly, the Distribution Plan Order merely approves a methodology and plan for distributing receivership assets, subject to further orders approving sales, setting the allowed amounts of claims, and authorizing distributions.

The implication of the Distribution Plan Order is certainly that GP properties will be sold via the modified orderly sale process, either in the short term or long term depending on the circumstances, and the sale proceeds will ultimately be distributed to investors pursuant to the Distribution Plan, which incorporates the One Pot Approach. A stay pending appeal, however, stays the order appealed from until the appeal is resolved. *See Nken v. Holder*, 556 U.S. 418, 421 (2009) ("A stay does not make time stand still, but does hold a ruling in abeyance to allow an

appellate court the time necessary to review it."). A stay pending appeal does not apply to future orders the Court may or may not issue during the course of the receivership, which are not involved in the appeal. Such an order would not be a stay pending appeal, but a stay of the entire receivership, for which there is absolutely no basis.

III. LEGAL STANDARD

The party seeking a stay pending appeal bears the burden of showing its entitlement to a stay. *Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 433-44 (2009)). A court must consider four factors in determining whether to issue a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.*; *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The standard for a stay pending appeal is similar to the standard for a preliminary injunction. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Therefore, a court should apply the Ninth Circuit's "sliding scale" approach to preliminary injunctions in evaluating a request for a stay pending appeal. *See Conservation Congress v. U.S. Forest Service*, 803 F. Supp. 2d 1126, 1129 (E.D. Cal. 2011). Under the current formulation of this approach, "the elements of the preliminary injunction are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

IV. ARGUMENT

A. The Aguirre Investors Have Virtually No Likelihood of Success

The Aguirre Investors cannot show a likelihood of success in their appeal of any of the four orders. The Court properly analyzed and applied the law in each circumstance and properly exercised its broad discretion to fashion relief in federal equity receiverships.

1. The Distribution Plan Order

As noted above, the Distribution Plan Order is a non-appealable interlocutory order. *See* Exhibit A. Therefore, for the reasons discussed in the attached Motion to Dismiss, the Ninth Circuit lacks jurisdiction and the appeal as to this order is very likely to be dismissed. Even if the appeal is not dismissed, the Aguirre Investors cannot show a likelihood of success on the merits.

(a) Procedural Due Process

The Aguirre Investors' primary challenge to the Distribution Plan Order is based on procedural due process. The Aguirre Investors essentially argue the Court erred in approving the One Pot Approach and Distribution Plan without allowing them to intervene, take discovery on a myriad of issues, and conducting a trial. This argument has no merit.

In holding that summary proceedings are appropriate and proper in addressing the Aguirre Investors' objections to the Distribution Plan Motion, the Court analyzed a series of decisions from the Ninth Circuit Court of Appeals. Dkt. No. 1304, pp. 15-16, citing *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1146-47 (9th Cir. 1996); *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1407 (9th Cir. 1992); *SEC v. Wencke*, 783 F.2d 829, 836-38 (9th Cir. 1986); *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir. 1985); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 456 (9th Cir. 1984). Without question, these cases confirm that issues relating to the methodology and plan for distributing receivership assets can be decided in summary proceedings. *See also SEC v.*

Capital Consultants, LLC, 397 F.3d 733 (9th Cir. 2005) (complex federal equity receivership involving approximately $1 billion in client funds under management, disputes with several unions and pension funds, ERISA regulations, and a distribution methodology and plan approved via summary proceedings); *SEC v. Medical Capital Holdings, Inc., et al.*, C.D. Cal. Case No. 09-CV-00818-DOC-RNB, Dkt. Nos. 776, 777, 787, 790, 795, 804, 841, 844, 880 (complex federal equity receivership involving approximately $1.7 billion raised from investors, disputes with several non-investor creditors, and a distribution methodology and plan approved via summary proceedings); *SEC v. Robert Louis Carver, et al.*, C.D. Cal. Case No. 08-CV-00627-CJC-RNBx, Dkt. Nos. 123, 129, 130, 131 (complex federal equity receivership involving approximately $24 million raised from investors and a distribution methodology and plan approved via summary proceedings). As the Court properly determined, it is well-established that summary proceedings are appropriate to determine these kinds of core receivership issues. Dkt. No. 1304, pp. 15-16.

Moreover, investors have been provided with due process. Throughout the case, the Court has made extensive efforts to provide investors with notice and the opportunity to be heard. The Receiver maintains a website dedicated to the receivership, on which all filings relating to the receivership are posted. Investors were mailed a letter at the beginning of the receivership directing them to the website and explaining that the website would be used to disseminate important information throughout the receivership. Therefore, investors have ready access to all key filings that affect the receivership.

The Court has allowed investors to file numerous letters with the Court and has considered those letters in its orders on various issues, including whether GPs should be released from the receivership, whether GP properties should be listed for sale, whether the Receiver has acted properly, whether the receivership has harmed GPs, and whether the fees and costs of the Receiver and his counsel should be

approved. The Court has also allowed briefs to be filed by investors on behalf of their GPs and has considered those briefs in ruling on the above issues. *See* Dkt. No. 629. The Court held a hearing on October 10, 2014, at which it heard oral arguments from investors on these issues for several hours. Dkt. No. 790.

The Court also wanted to make sure investors received information about the case and the financial condition of their GPs. Accordingly, it had the Receiver prepare an information packet for each GP, post the information packets to the receivership website, and mail notices to investors informing them the information packets are available to review. Dkt. Nos. 1003, 1069. The Receiver has also sent numerous emails and letters to investors informing them of offers and letters of intent received for GP properties, pursuant to Court-approved recommendations. Moreover, many investors have contacted the Receiver with questions, some on multiple occasions, and the Receiver has promptly responded to those calls and emails.

Then, in connection with the Distribution Plan Motion, the Court allowed the Aguirre Investors and Dillon Investors to formally intervene for the purpose of opposing the motion. Dkt. No. 1296. The Aguirre Investors and Dillon Investors were given more than two months to prepare their oppositions, during which time the Receiver provide them with thousands of pages of appraisals, bank statements, and financial statements pursuant to their informal requests. Their oppositions were filed on April 15, 2016. Dkt. Nos. 1234, 1235. The Aguirre Investors and Dillon Investors then had another five weeks to prepare for the hearing held on May 20, 2016, at which the Court heard extensive oral argument, in particular from Mr. Aguirre. Dkt. No. 1298.

Accordingly, the Aguirre Investors' claim they have been denied due process in connection with the Court's May 25, 2016 Order, which grants in part and denies in part the Distribution Plan Motion, has no merit. They have basically had unlimited opportunities to express their views in letters and have those letters

considered by the Court. They have had multiple opportunities to submit briefs and multiple opportunities to present oral arguments at hearings. The Court has carefully considered their views in lengthy orders that specifically analyze and address arguments they have raised. They have presented a report from Xpera Group on the GP properties and the Court has instructed the Receiver to evaluate the pros and cons of the Xpera recommendations and address them in a further report and recommendation on which of the Xpera recommendations "would feasibly maximize the value of the receivership estate." Dkt. No. 1304, p. 31. In short, the Court has made every effort to allow the Aguirre Investors' views to be expressed, give their views careful consideration, and accommodate their views without unduly delaying the proceedings or increasing costs of the receivership. Accordingly, the Court's approval of the One Pot Approach and Distribution Plan afforded them due process and was entirely proper.

The Aguirre Investors contend this case is similar to *SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007), in which the use of summary proceedings was determined to violate due process. The *Ross* decision, however, has no application to this case. In *Ross*, the district court ordered third parties to disgorge funds in their possession based on a motion brought by the Receiver. Here, the Court simply determined the most fair and equitable methodology for distributing assets of the receivership estate. No claims have been asserted against any investors. The due process considerations in *Ross*, therefore, are completely inapplicable.

(b) Taking

The Aguirre Investor also challenge the Distribution Plan Order as an unlawful taking under the Fifth Amendment. They cite no cases, however, in which a receivership or even a distribution of receivership assets to investors (which has not yet been authorized here) has been determined to be a taking under the Fifth Amendment. Instead, the Aguirre Investors' taking argument is simply a stream of false and nonsensical attacks on the Court, the Commission, and the Receiver. For

example, the Aguirre Investors argue their right to recover their losses from Western has been taken from them. To the contrary, Western's assets have been put in receivership and the Aguirre Investors, like all other investors, have the right to receive distributions from the receivership estate. Accordingly, the Aguirre Investors' taking argument has no merit whatsoever.

(c) Pooling, i.e., The One Pot Approach

Finally, the Aguirre Investors challenge the Distribution Plan Order because it approves pooling of receivership assets without a finding of "pervasive fraud, pervasive commingling or both." Stay Motion, p. 12. This is wrong. First, the Aguirre Investors have cited no authority indicating the Court cannot pool the assets of the receivership estate under the circumstances present here. Second, having considered extensive evidence presented over the last three and a half years of this case, the Court made the following findings in the Distribution Plan Order:

- "This case involves an investment scheme hatched by the Defendants that organized GPs into co-tenancies" (p. 2);
- "the GPs were financially intertwined with Western in a number of ways" (p. 3);
- "all investors were victims of the same scheme" (p. 28);
- "the incomplete information available to investors and essentially fraudulent nature of Defendants' scheme means that even investors who researched the same property could have wildly disparate results" (p. 29);
- "Defendants employed a common scheme, material misrepresentations were made by Defendants in connection with the marketing of the Stead property, and that the GPs were financially intertwined with Western, e.g., 93% of the funds raised from investors went not towards the GP property directly, but to Western where the funds were used in a variety of ways" (p. 30);

- "investors were victims of the same investment scheme, and should receive the same relief" (p. 30); and
- "the One Pot Approach would produce a more equitable result for investors than the Two Tier Approach" (p. 30).

The Court also previously held that Western's sale of GP units for all the GPs was a "single, integrated offering" based on the many similarities in the GP offerings. Dkt. No. 1074, p. 8. These findings are more than sufficient to support pooling the assets of the Receivership Entities for distribution under the applicable cases cited in the Distribution Plan Order (Dkt. No. 1304, p. 28, ll. 4-11) and the Court's broad discretion to fashion equitable relief in a federal equity receivership. *Capital Consultants*, 397 F.3d at 738. Accordingly, the Court's approval of pooling of receivership estate assets was entirely proper.

2. The Limited Intervention Order and Intervention Denial Order

The Court's denial of the Aguirre Investors' motion to intervene for the purpose of arguing issues outside the Distribution Plan Motion was also entirely proper. The Court properly held the Aguirre Investors' requests to intervene to, among other things, (a) contest the Receiver's previous sale recommendations, (b) "oversee and evaluate" the receivership, (c) challenge the accounting work performed by the Receiver, (d) release GPs from the receivership, and (e) challenge the Receiver's management of the GPs or sales of GP assets were untimely and overbroad. Dkt. No. 1296, pp. 4-7. These same issues were considered by the Court, some on multiple occasions, and decided over the 44 months from September 2012 through April 2016. Many of the Aguirre Investors wrote letters to the Court, submitted briefs on behalf of their GPs, and appeared at the October 10, 2014 investor hearing to argue these issues. Schooler aggressively argued these issues as well. The Court properly determined that the Aguirre Investors' requests to

intervene to re-litigate these issues were untimely and would unnecessarily delay administration of the case. *Id.* at pp. 5, 10.

The Aguirre Investors' contend the Receiver "flip-flopped" on these issues and they did not know he disagreed with them until he filed his Distribution Plan Motion. Stay Motion, pp. 20-21. This is a transparent attempt to revise history. The issue of whether the GPs should be released from the receivership goes back to 2013, was considered again at several points in 2014, and was finally decided by the Court on March 4, 2015. Dkt. No. 1003. Although the Receiver initially believed GPs could be released if they met certain terms and conditions (including complete separation from Western), as time went on it became clear such a release would harm the GPs. Accordingly, the Receiver made it clear in 2014 that he believed the GPs should remain in the receivership. Dkt. Nos. 584, 783. The Aguirre Investors knew their position on this issue conflicted with the Receiver and many of them submitted letters and briefs and presented arguments at the October 10, 2014 hearing. It was at this time many of the Aguirre Investors formed the self-proclaimed "ad hoc committee," aligned themselves with Schooler, and initiated an email campaign attacking the Receiver. Accordingly, the Aguirre Investors knew they disagreed with the Receiver on the issue of whether the GPs should remain in the receivership in 2014.

Likewise, the Aguirre Investors' challenges to the Receiver's accounting reports go back several years. The Receiver's accounting work, both in forensic accounting reports and interim reports, goes back to 2013. The Court has considered numerous arguments from Schooler and the investors over the years about the accounting and how fees and costs of the receivership were being paid. *See e.g.,* Dkt. No. 1003, pp. 7-8. Accordingly, the Aguirre Investors' attempt to turn their challenges to the Receiver's accounting into a new issue also lack merit.

The orderly sale process was proposed on April 17, 2015, and approved on May 12, 2015. Dkt. Nos. 1056, 1069. The orderly sale process does not require a

vote of investors before sales can occur. Dkt. No. 1056. Therefore, the Aguirre Investors have known that their position that investor votes must be taken before GP properties can be sold conflicts with the Receiver since April 2015. Yet, the Aguirre Investors did not seek to intervene on any of these issues until April 2016, more than three and half years into the receivership.

The Aguirre Investors have known for a long time that they disagree with the Receiver on the issues discussed above. Their letters, briefs, oral arguments at the October 10, 2014 hearing, and correspondence to the Receiver and other investors reflect their clear anti-receivership views on these issues. Accordingly, the Court properly determined that their motions to intervene more than three and half years into the receivership as to issues outside the scope of the Distribution Plan Motion were untimely and overbroad.

3. The Broker/LOI Order

For the reasons discussed in the Receiver's Motion to Dismiss attached hereto as Exhibit A, the Broker/LOI Order is a non-appealable interlocutory order. Accordingly, the appeal of this order is very likely to be dismissed. Moreover, the Aguirre Investors have made no effort to show how the Broker/LOI Order is improper. Accordingly, they have failed to show a likelihood of success as to their appeal of the Broker/LOI Order.

B. <u>The Aguirre Investors Will Not Be Harmed</u>

The harm relevant to a motion for stay pending appeal is whether the appellant will be harmed if the order appealed from is not stayed. *See Nken v. Holder*, 556 U.S. 418, 421 (2009). The Aguirre Investors claim they will be harmed because GP properties will be sold and sale proceeds will be distributed to investors outside their GPs. As discussed above, however, no properties can be sold or distributions to investors made under the orders appealed from without several further orders. Potential harm from future orders of the Court has no bearing on the

appeal or this Stay Motion. The Aguirre Investors cannot possibly be harmed by a denial of a stay of the four orders at issue.

C. The Balance of Equities Tips Sharply Against a Stay

Investors have been waiting an extremely long time to recover what they can from their investments. There is still work to be done, but significant progress has been made. The properties have been stabilized through the pooling of assets and payment of past due obligations, a distribution methodology and specific plan for distributing receivership assets have been approved, and claims procedures have been approved. The Receiver is now in a position to propose sales of certain GPs properties through the proposed modified orderly sale process, subject to Court approval, and evaluate recommended zoning changes and other entitlement work for others. All of this work will lead to a position where the Receiver can propose and the Court can authorize actual distributions to investors.

The Aguirre Investors are about 5% of the total investors in this case. Their request for a stay would essentially cease all activity in the receivership and delay the entire process of getting to investor distributions for another 18 months or more.[1] This would be devastating to investors who have already waited so long. It would also harm investors by reducing the amount available to distribute. The Receiver and Xpera Group agree that many GP properties should be sold now. Expenses to hold these properties would necessarily be incurred until the appeal is resolved, consuming cash in the receivership estate that would otherwise be available to distribute to investors. Accordingly, the balance of equities tips sharply against a stay.

[1] The Ninth Circuit Court of Appeals' website states that, for civil appeals, oral argument is generally scheduled between 12 and 20 months after the notice of appeal is filed and decisions are generally issued between three months and a year after oral argument. *See* http://www.ca9.uscourts.gov/content/faq.php.

D. A Stay Would Harm the Public Interest

There is a strong public interest in maintaining the integrity of securities markets and in remedying violations of securities laws. This case was filed and the Receiver's appointment was sought by the Securities and Exchange Commission to remedy violations of securities laws by Defendants and provide prompt recoveries to investors harmed by such violations. As noted above, a stay would delay the process of providing a recovery to investors by 18 months or more. Investors have already been waiting more than three and half years to recover what they can from their investments. Accordingly, the public interest in promptly redressing violations of securities laws and providing recoveries to investors would be harmed by a stay.

The Aguirre Investors contend the public interest favors a stay because this case involves the violation of a constitutional right. They cannot, however, show a likelihood of success on their procedural due process or takings arguments. Accordingly, the public interest in vindicating violations of constitutional rights is not implicated here. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

V. CONCLUSION

For the foregoing reasons, the Stay Motion should be denied.

Dated: June 28, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

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

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EXHIBIT A

EXHIBIT A

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

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AS TO THIRD AND FOURTH ORDERS IN NOTICE OF APPEAL

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CORPORATE DISCLOSURE STATEMENT

(Federal Rule of Appellate Procedure 26.1)

Thomas C. Hebrank ("Receiver"), the appellee herein, is an individual acting as the court-appointed equity receiver for First Financial Planning Corporation d/b/a Western Financial Planning Corporation, its subsidiaries and the General Partnerships listed on Schedule 1 to the Preliminary Injunction Order entered by the District Court on March 13, 2013, in *Securities and Exchange Commission v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation*, United States District Court for the Southern District of California, Case Number 3:12-cv-02164-GPC-JMA. No parent corporation or any publicly held corporation owns 10% or more of stock in any of the Receivership Entities.

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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"), moves to dismiss this appeal as to the third and fourth orders in the notice of appeal on the grounds that these two orders are non-appealable interlocutory orders, and therefore the Court lacks jurisdiction to hear the appeal ("Motion").

I. INTRODUCTION

This appeal arises from an enforcement action brought by the Securities and Exchange Commission ("Commission"). On September 6, 2012, the District Court appointed the Receiver over Western and 86 GPs set up by Western. A group of GP investors represented by Gary Aguirre ("Aguirre Investors") have appealed four orders of the District Court. The first two orders deny their requests to intervene in the District Court case. The third order approves a plan of distributing receivership estate assets ("Distribution Plan"), approves procedures for the administration of investor claims, and issues other instructions to the Receiver regarding the administration of the receivership and future sales of real property assets ("Third Order"). The fourth order approves certain recommendations made by the Receiver regarding the engagement of real estate brokers and negotiations

regarding letters of intent for real properties ("Fourth Order"). The Fourth Order also denies an *ex parte* application filed by the Receiver for an order confirming a sale of real property with instructions to refile the request as a noticed motion.

The Third and Fourth Orders are non-final, non-appealable interlocutory orders. Neither order finally resolves the disposition of any receivership asset or the distribution of any receivership assets to investors. As discussed below, both orders require further District Court orders before any receivership assets can be sold or distributions can be made to investors. Accordingly, the appeal as to the Third and Fourth orders should be dismissed for lack of jurisdiction.

II. APPELLANTS' POSITION

The Receiver's counsel contacted Gary Aguirre by e-mail on June 27, 2016, stated the Receiver would be filing this Motion, and asked Mr. Aguirre to provide his clients' position on the matter. Mr. Aguirre responded that his clients will oppose the Motion.

III. FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2012, the Commission filed a Complaint for Violations of the Federal Securities Laws against Louis V. Schooler ("Schooler") and Western. Dkt. No. 1. On September 6, 2012, the District Court entered a Temporary Restraining Order, including the appointment of the Receiver on a temporary basis.

Dkt. No. 10. On March 13, 2013, the Court entered a Preliminary Injunction Order ("PI Order"), appointing the Receiver on a permanent basis. Dkt. No. 174.

A. Western and the GPs

The Receivership Entities include Western, which is owned by Schooler, and a series of 86 General Partnerships set up by Western. Prior to the commencement of the case, Western purchased various parcels of undeveloped land, set up GPs to purchase the properties, solicited investors to invest in the GPs, and then sold the properties to the GPs. The properties were marked up by Western such that the GPs purchased them from Western at prices that ranged from 109% to 1800% higher than what Western had paid for the properties. Western also encumbered some of the properties with mortgages, which remained on the properties when they were sold to the GPs. Investors were not aware of the mark ups or the mortgages.

Western made loans to the GPs so the GPs could allow their investors to finance the investments. As a result, investors owe amounts on promissory notes issued to their GPs and GPs owe amounts on promissory notes issued to Western. Investors were not aware of the promissory notes to their GPs owed to Western.

Of the funds the GPs raised from investors when the GPs were formed, approximately 93% went to Western and approximately 7% remained in the GPs' bank accounts to cover basic expenses like property taxes, property insurance

premiums, administrator fees, and fees to prepare annual tax returns. When GPs exhausted the balances in their accounts, they would send bills to their investors, but some investors would not pay. When GPs were unable to pay their bills, Western would loan the GPs money. In some cases, Western stopped collecting note payments from GPs that were unable to pay their bills. Investors were not aware of the loans Western made to the GPs or the fact that Western stopped collecting note payments from certain GPs.

B. Final Judgment

On May 19, 2015, the District Court granted in part and denied in part the Commission's motion for summary judgment on its fourth claim for relief finding that Defendants had engaged in the sale of unregistered securities and that the appropriate amount of disgorgement was $136,654,250, plus prejudgment interest calculated to May 19, 2015. Dkt. No. 1074. On June 3, 2015, the District Court granted in part and denied in part the Commission's motion for summary judgment on its first and second claims for relief, granting both causes of action as to all elements with regards to the fair market value representation of the Stead property in Western's sales brochure. Dkt. No. 1081.

On January 21, 2016, the District Court granted the SEC's motion for final judgment against Defendant Schooler, directing (1) a permanent injunction restraining the Defendant from violating federal securities laws; (2) disgorgement

of $136,654,250, with prejudgment interest of $10,956,030 (for a total of $147,610,280); and (3) imposition of a civil penalty of $1,050,000 ("Final Judgment"). Dkt. No. 1170. Schooler has appealed the Final Judgment. Case No. 16-55167.[1]

C. Receivership Proceedings

During the course of the litigation between the Commission and Defendants, the District Court addressed numerous challenges by Defendants and various investors to the scope of the receivership, including several attempts to remove the GPs from the receivership. On March 4, 2015, the District Court entered an Order Keeping GPs Under Receivership. Dkt. No. 1003. Among other things, the District Court determined the GPs would remain in the receivership until the conclusion of the case, instructed the Receiver to file a proposed "Information Packet" regarding the financial condition of each GP to be disseminated to investors, and instructed the Receiver to file a report and recommendation regarding the best course of action for the GPs. *Id.*

The Receiver filed the proposed Information Packet, which was approved by the District Court, and, to address the critical problem of GPs that were unable to

[1] The Commission filed a cross-appeal of the Final Judgment, but recently filed an unopposed motion to voluntarily dismiss its cross-appeal. Case No. 16-55414, Dkt. No. 40.

pay their bills, filed a recommendation that capital calls be issued to investors in GPs without sufficient funds to pay their operating expenses through the end of 2016. Dkt. Nos. 1023, 1056. If the capital calls failed to raise sufficient funds for the GPs to pay their 2016 operating expenses, the properties owned by those GPs would be sold. Dkt. No. 1056. The Receiver also laid out steps of the proposed "orderly sale process" for GP properties in his report and recommendation. *Id.* The Court approved the report and recommendation, with slight modifications, on May 12, 2015. Dkt. No. 1069.

The Receiver proceeded to complete the approved Information Packet for each GP, which was made available to investors via the Receiver's website, and issue capital calls to investors pursuant to the May 12, 2015 Order. Each and every capital call failed to raise the amounts necessary for the applicable GPs to cover their 2016 operating expenses. Accordingly, the Receiver began to take the steps of the approved orderly sale process for the applicable GP properties. These steps included recommending the engagement of a license real estate broker to market each property for sale. On March 7, 2016, the Receiver recommended the engagement of licensed real estate brokers for the GP properties known as Las Vegas 1, Las Vegas 2, and Tecate. Dkt. No. 1203. On May 25, 2016, the District Court approved and adopted the recommendation as part of the Fourth Order. Dkt. No. 1305.

D. Unsolicited Offers for GP Properties

With respect to unsolicited offers received for GP properties prior to the engagement of a real estate broker, the District Court instructed the Receiver to notify the District Court of the offer and make a recommendation, filed under seal, regarding how to respond to the offer, *i.e.,* accept the offer, make a counter-offer, reject the offer, take a vote of investors, or other steps. Dkt. No. 808. The Receiver filed a series of recommendations regarding unsolicited offers and letters of intent received from prospective purchasers for GP properties. One such recommendation was filed under seal on May 4, 2016, and pertained to the GP property known as Dayton IV. Dkt. No. 1281. This recommendation was approved and adopted as part of the Fourth Order. Dkt. No. 1305. Accordingly, the Fourth Order authorized the Receiver to move forward with steps to respond to the unsolicited offer for the Dayton IV property.[2]

E. The Distribution Plan Motion

On February 4, 2016, with the Final Judgment having been entered, the Receiver filed his Motion for: (a) Authority to Conduct Orderly Sale of General

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[2] The remaining parts of the Fourth Order are the District Court's approval and adoption of recommendations regarding an unsolicited letter of intent and denial of the Receiver's *ex parte* application for an order confirming the sale of a GP property known as the Jamul Valley property. The Aguirre Investors are not challenging these parts of the Fourth Order.

Partnership Properties; (b) Approval of Plan of Distributing Receivership Assets; and (c) approval of Procedures for the Administration of Investor Claims ("Distribution Plan Motion"). Dkt. No. 1181. The Distribution Plan Motion sought an order authorizing the Receiver to put the remaining GP properties through the orderly sale process, *i.e.,* those properties owned by GPs with sufficient funds to pay their 2016 operating expenses, which therefore did not have a failed capital call. *Id.*

The Distribution Plan Motion also sought approval of a "One Pot" or "pooling" approach to distributing receivership assets (as opposed to distributions on a GP by GP basis) and approval of a Distribution Plan consistent with the One Pot Approach. *Id.* The Distribution Plan, which was attached to the Distribution Plan Motion as Exhibit E, provided that distributions will be made only after the District Court has entered further orders "setting the allowed amount of all Claims, and authorizing the Receiver to make interim distributions ("Approval Orders")." Dkt. No. 1181-1, Exhibit E, p. 3, l. 24 – p. 4, l. 1. Finally, the Distribution Plan Motion sought approval of procedures for administering investor claims against the receivership estate and efficiently resolving any disputes regarding such claims. *Id.*

F. The Aguirre Investors

In early 2016, a group of approximately 192 investors engaged attorney Gary Aguirre to represent them in the case. A separate group of approximately 149 investors engaged attorney Timothy Dillon to represent them in the case. These two groups became known as the Aguirre Investors and the Dillon Investors. Together they represent approximately 10% of the approximately 3,300 investors of the Receivership Entities.[3]

Without seeking to intervene in the case, the Aguirre Investors and Dillon Investors filed oppositions to certain applications filed by the Receiver, sought to continue the hearing on the Distribution Plan Motion, and filed motions seeking to vacate certain District Court orders and require the Receiver to provide further accounting information. Dkt. Nos. 1194, 1204, 1211, 1212, 1221, 1223. The District Court rejected these filings without prejudice and instructed the Aguirre Investors and Dillon Investors to first file motions to intervene if they wished to refile any motions. Dkt. No. 1224.

The Aguirre Investors and Dillon Investors then filed motions to intervene, refiled their motions to vacate orders and for accounting information, and filed

[3] The number of Aguirre Investors and, in particular, Dillon Investors grew between February 2016 and April 2016. Early during this time span, the combined groups were approximately 8% of the investors.

oppositions to the Distribution Plan Motion. Dkt. Nos. 1227, 1229, 1230, 1234, 1235, 1258. With respect to the Distribution Plan Motion, the Aguirre Investors argued the GP properties should not be permitted to be sold without a vote of investors in the GPs that own them and that receivership assets should be distributed on a GP by GP basis. Dkt. No. 1235. As part of their oppositions, the Aguirre Investors and Dillon Investors filed a report analyzing the values and market conditions for the GP properties prepared by Xpera Group ("Xpera Report"). Dkt Nos. 1234-2, 1234-4, 1237, 1238.

The District Court denied the Aguirre Investors and Dillon Investors' motions to intervene generally in the case, but allowed them to intervene for the limited purpose of opposing the Distribution Plan Motion. Dkt. No. 1296, 1303. The orders denying broader intervention are the first and second orders in the Aguirre Investors' Notice of Appeal.

The District Court held a hearing on the Distribution Plan Motion on May 20, 2016, at which Gary Aguirre and Timothy Dillon were permitted to present arguments on behalf of their respective clients. Dkt. No. 1298. On May 25, 2016, the District Court entered the Third Order, which grants in part and denies in part the Distribution Plan Motion. Dkt. No. 1304. Specifically, the Third Order (a) approves the One Pot Approach, the Distribution Plan, and the procedures for the administration of investor claims, (b) directs the Receiver to

submit a proposal for a "modified orderly sale process" that incorporates the public sale requirements of 28 U.S.C. § 2001, (c) directs the Receiver to file a report and recommendation evaluating the pros and cons of the recommendations in the Xpera Report, and (d) directs the Receiver to withdraw and resubmit his Fourteenth Interim Report, and submit all future reports with a Standardized Fund Accounting Report ("SFAR"). *Id.*

IV. DISCUSSION

A. The Third Order Is Not Appealable

The Third Order approves the Distribution Plan, but requires further orders approving the modified orderly sale process, setting the allowed amount of all claims, and authorizing interim distributions before any distributions to investors can actually be made. Therefore, the order does not finally resolve the disposition or distribution of any receivership assets.

The Aguirre Investors have appealed the Third Order under 28 U.S.C. § 1291 and 28 U.S.C. § 1292. Notice of Appeal. p. 3. In order to be appealable under 28 U.S.C. § 1291, a judgment must be final, meaning it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003). The Third Order does not end the litigation or finally resolve any issues. Therefore, section 1291 does not apply.

Nor does section 1292 apply. The only provision of section 1292 that is potentially applicable is section 1292(a)(2), which is limited to "orders appointing receivers, or refusing to wind up receiverships, or to take steps to accomplish the purposes thereof, such as directing sale or disposals of property." 28 U.S.C. § 1292(a)(2). Section 1292(a)(2) applies only to appeals of orders appointing receivers, orders refusing to wind up receiverships, and orders refusing to take steps to wind up receiverships. *See SEC v. American Principals Holdings, Inc.*, 817 F.2d 1349, 1351 (9th Cir. 1987); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1099 (9th Cir. 2010). The Third Order does not appoint the Receiver, refuse to wind up the receivership, or refuse to take steps to wind up the receivership. To the contrary, approval of the Distribution Plan is a step, *albeit* an intermediate one, toward winding up the receivership. Therefore, section 1292(a)(2) does not apply.

B. The Fourth Order Is Not Appealable

The portions of the Fourth Order the Aguirre Investors challenge are the District Court's approval and adoption of the Receiver's recommendations to (a) engage real estate brokers for certain GP properties, and (b) respond to an unsolicited letter of intent from a potential purchaser. These are clearly interim, administrative orders regarding receivership properties. Sales of the properties at issue have not even been proposed yet.

The Fourth Order does not end the litigation on the merits, nor does it appoint the Receiver, refuse to wind up the receivership, or refuse to take steps to wind up the receivership. Therefore, sections 1291 and 1292(a)(2) do not apply.

C. The Collateral Order Doctrine Does Not Apply

Although the Aguirre Investors did not specifically reference the collateral order doctrine in their Notice of Appeal, they may argue it applies to the Third Order. This argument lacks merit, however. This Court has already rejected the same argument made in other federal equity receiverships.

For the collateral order doctrine to apply, an order must (a) conclusively determine a disputed question, (b) resolve an important question completely separate from the merits of the action, and (c) be effectively unreviewable upon appeal from a final judgment in the case. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The collateral order doctrine is narrowly construed. *Id.*

This Court addressed the collateral order doctrine in detail in the context of a federal equity receivership in *SEC v. Capital Consultants, LLC*, 453 F.3d 1166 (9th Cir. 2006). In *Capital Consultants*, two investors appealed from orders regarding their claims to assets of the receivership estate. The Court held that the collateral order doctrine did not apply, explaining:

The collateral order doctrine was designed to allow appeal from a "narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system[,] nonetheless be treated as final." Requirements of the doctrine are often described as threefold. Orders that do not dispose of the entire litigation are appealable as collateral orders if they "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." The Supreme Court has emphasized that these requirements are to be applied strictly and that only a "narrow class of decisions" satisfy them.

Strict application of the requirements is particularly important because, when a court identifies an order as an appealable, collateral one, it determines the appealability of all such orders. If courts did not apply the requirements strictly, then, the doctrine would no longer govern a "narrow class of decisions," but a broad class. Thus, we are not to consider "the chance that the litigation at hand might be speeded, or a particular injustic[e] averted, by a prompt appellate court decision" when we determine whether a particular order is an appealable, collateral one. We must take a broader view and determine if resolution of the kind of claim in question must always be immediately appealable under the collateral order doctrine.

We conclude that orders such as the district court's February 9th and August 18th orders involve the merits of the litigation. Thus, they are not collateral to the merits and are not appealable under the collateral order doctrine. To be truly collateral to the merits of the litigation, a claim or right must not be "an ingredient of the cause of action" and must therefore "not require consideration with" that cause of action. The disposition of the issue should not "affect, or [] be affected by,

decision of the merits." To determine if the claims in question are collateral to the merits of the litigation, we must determine what the merits are and what the claims are. Then, we must determine if resolution of the claims affects the merits.

Defining the "merits" of the litigation is not particularly difficult. The litigation in question is a receivership proceeding instituted by the SEC, an agency charged with protecting "the national public interest and the interest of investors." In accord with its charge, the SEC sought to place CCL into receivership after determining that it and its principals, the defendants, had violated securities laws and harmed their clients. A review of the stipulated court order reveals that the receivership had several purposes and the receiver, several different duties. In addition to investigating and pursuing claims arising from legal violations, the receiver was to locate, take control of, and preserve the company's assets. The receiver was then charged with disbursing those assets in accordance with the court's orders. Because rightful claims to assets exceed the assets available, the court, with the help of the receiver, must determine how to distribute the assets equitably. Thus, distributing CCL's assets equitably is one of the central purposes of the receivership and, correspondingly, of the SEC's litigation.

The claim the appellants asserted in this case was a claim to assets held by the receiver. Specifically, the appellants asserted a right to receive traced funds without remitting settlement funds.

If one of the primary purposes of the litigation is to determine how best to distribute CCL's assets to claimants, including the appellants, their claims clearly comprise part of the merits of the litigation. The fact that they comprise only a small piece of the merits is irrelevant. Resolution of the appellants' claims will

> directly affect the ongoing litigation. If the claims succeed, the pool of assets the receiver controls will be smaller. Accordingly, the receiver will have fewer resources to distribute to other claimants.

Capital Consultants, 453 F.3d at 1171-72 (citations omitted).

The Court disagreed with contrary decisions from the Fifth and Sixth Circuit Courts of Appeal and explained that allowing certain interlocutory orders in receiverships to be appealable as collateral orders would lead to confusion, practical problems, and extra work for parties and courts. *Id.* at 1172-73. The Court concluded:

> The practical problems that would result from categorizing orders in this context as appealable collateral orders strengthens our conviction that our decision *not* to do so is correct.

Id. at 1173.

Subsequent decisions of this Court confirm the holding of *Capital Consultants*. In *CFTC v. Forex Liquidity, LLC*, 384 Fed. Appx. 645, 2010 U.S. App. LEXIS 12562 (9th Cir. June 18, 2010), the defendant appealed an order granting the receiver's "motion for a distribution order and related administrative orders." The Court dismissed the appeal and explained:

> We do not have jurisdiction over Gray's appeal of the distribution orders. Gray acknowledges that the distribution orders do not dispose of the underlying litigation, but argues that the orders are appealable as collateral orders. "Orders that do not dispose of the

> entire litigation are appealable as collateral orders if they [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] are effectively unreviewable on appeal from a final judgment." *S.E.C. v. Capital Consultants LLC*, 453 F.3d 1166, 1171 (9th Cir. 2006) (per *curiam*) (quotations and alterations omitted). Here, first, the distribution orders at issue were merely an intermediate step, not a conclusive determination, in the disposition of the assets discussed in the orders. Second, distributing Forex's assets equitably is one of the central purposes of the receivership and, correspondingly, of the underlying action. See *id.* at 1172. Even if the distribution orders will be effectively unreviewable on appeal from the eventual final judgment in the underlying action, the orders clearly fail the first two prongs of the collateral order test and thus are not appealable as collateral orders.

Id. at *4; *see also SEC v. Tringham*, 475 Fed. Appx. 203, 2012 U.S. App. LEXIS 15689 (9th Cir. July 30, 2012) (dismissing appeal from order denying motion to release funds from ongoing federal equity receivership for lack of jurisdiction).

Here, the Third Order does not conclusively determine what amount will be distributed to investors. As discussed above, the District Court must enter further orders approving the modified orderly sale process, setting the allowed amounts of investor claims, and authorizing interim distributions before any interim distributions, let alone final distributions, to investors can be made. The Third Order is also central to the purposes of the receivership (the equitable distribution of receivership assets to investors) and therefore the underlying litigation.

Accordingly, as the Court in *Forex Liquidity* held, the Third Order clearly fails the first two prongs of the collateral order test.

V. CONCLUSION

For the reasons discussed above, this appeal should be dismissed as to the Third and Fourth Orders listed in the Notice of Appeal for lack of jurisdiction.

Dated: June 28, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

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

STATEMENT OF RELATED CASES
(9th Circuit Rule 28-2.6)

1. United States Court of Appeals, Ninth Circuit, Case No. 13-56761

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

2. United States Court of Appeals, Ninth Circuit, Case No. 13-56948

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

3. United States Court of Appeals, Ninth Circuit, Case No. 14-56313

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

4. United States Court of Appeals, Ninth Circuit, Case No. 14-56315

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

5. United States Court of Appeals, Ninth Circuit, Case No. 16-55167

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

6. United States Court of Appeals, Ninth Circuit, Case No. 16-55414

SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

CERTIFICATE OF COMPLIANCE

The foregoing Motion to Dismiss Appeal for Lack of Jurisdiction as to Third and Fourth Orders in Notice of Appeal of Appellee Thomas C. Hebrank complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 3,945 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: June 28, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: */s/ Edward Fates*
Edward G. Fates
Attorneys for Receiver
THOMAS A. SEAMAN

843529.01/SD

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 June 28, 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: June 28, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: */s/ Edward Fates*
Edward G. Fates
Attorneys for Receiver
THOMAS A. SEAMAN

843529.01/SD

PROOF OF SERVICE

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, 15th Floor, San Diego, California 92101-3541.

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

- **RECEIVER'S OPPOSITION TO MOTION FOR STAY PENDING APPEAL**

on interested parties in this action by:

☒ **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 June 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:

- Gary J. Aguirre - gary@aguirrelawapc.com; maria@aguirrelawapc.com
- John Willis Berry - berryj@sec.gov; LAROFiling@sec.gov
- Lynn M. Dean - deanl@sec.gov; larofiling@sec.gov; berryj@sec.gov; irwinma@sec.gov; cavallones@sec.gov
- Timothy P. Dillon - tdillon@dghmalaw.com; cbeal@dghmalaw.com; kramirez@dghmalaw.com; smiller@dghmalaw.com; sahuja@dghmalaw.com
- Philip H. Dyson - phildysonlaw@gmail.com; jldossegger2@yahoo.com; phdtravel@yahoo.com
- Edward G. Fates - tfates@allenmatkins.com; bcrfilings@allenmatkins.com; jholman@allenmatkins.com
- Susan Graham - gary@aguirrelawapc.com
- Eric Hougen - eric@hougenlaw.com
- Sara D. Kalin - kalins@sec.gov; chattoop@sec.gov; irwinma@sec.gov
- David R. Zaro - dzaro@allenmatkins.com; mdiaz@allenmatkins.com

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

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

Edward G. Fates	*/s/ Edward Fates*
(Type or print name)	(Signature of Declarant)

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

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AS TO THIRD AND FOURTH ORDERS IN NOTICE OF APPEAL

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Thomas C. Hebrank, Receiver

CORPORATE DISCLOSURE STATEMENT

(Federal Rule of Appellate Procedure 26.1)

Thomas C. Hebrank ("Receiver"), the appellee herein, is an individual acting as the court-appointed equity receiver for First Financial Planning Corporation d/b/a Western Financial Planning Corporation, its subsidiaries and the General Partnerships listed on Schedule 1 to the Preliminary Injunction Order entered by the District Court on March 13, 2013, in *Securities and Exchange Commission v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation*, United States District Court for the Southern District of California, Case Number 3:12-cv-02164-GPC-JMA. No parent corporation or any publicly held corporation owns 10% or more of stock in any of the Receivership Entities.

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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"), moves to dismiss this appeal as to the third and fourth orders in the notice of appeal on the grounds that these two orders are non-appealable interlocutory orders, and therefore the Court lacks jurisdiction to hear the appeal ("Motion").

I. INTRODUCTION

This appeal arises from an enforcement action brought by the Securities and Exchange Commission ("Commission"). On September 6, 2012, the District Court appointed the Receiver over Western and 86 GPs set up by Western. A group of GP investors represented by Gary Aguirre ("Aguirre Investors") have appealed four orders of the District Court. The first two orders deny their requests to intervene in the District Court case. The third order approves a plan of distributing receivership estate assets ("Distribution Plan"), approves procedures for the administration of investor claims, and issues other instructions to the Receiver regarding the administration of the receivership and future sales of real property assets ("Third Order"). The fourth order approves certain recommendations made by the Receiver regarding the engagement of real estate brokers and negotiations

regarding letters of intent for real properties ("Fourth Order"). The Fourth Order also denies an *ex parte* application filed by the Receiver for an order confirming a sale of real property with instructions to refile the request as a noticed motion.

The Third and Fourth Orders are non-final, non-appealable interlocutory orders. Neither order finally resolves the disposition of any receivership asset or the distribution of any receivership assets to investors. As discussed below, both orders require further District Court orders before any receivership assets can be sold or distributions can be made to investors. Accordingly, the appeal as to the Third and Fourth orders should be dismissed for lack of jurisdiction.

II. APPELLANTS' POSITION

The Receiver's counsel contacted Gary Aguirre by e-mail on June 27, 2016, stated the Receiver would be filing this Motion, and asked Mr. Aguirre to provide his clients' position on the matter. Mr. Aguirre responded that his clients will oppose the Motion.

III. FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2012, the Commission filed a Complaint for Violations of the Federal Securities Laws against Louis V. Schooler ("Schooler") and Western. Dkt. No. 1. On September 6, 2012, the District Court entered a Temporary Restraining Order, including the appointment of the Receiver on a temporary basis.

Dkt. No. 10. On March 13, 2013, the Court entered a Preliminary Injunction Order ("PI Order"), appointing the Receiver on a permanent basis. Dkt. No. 174.

A. Western and the GPs

The Receivership Entities include Western, which is owned by Schooler, and a series of 86 General Partnerships set up by Western. Prior to the commencement of the case, Western purchased various parcels of undeveloped land, set up GPs to purchase the properties, solicited investors to invest in the GPs, and then sold the properties to the GPs. The properties were marked up by Western such that the GPs purchased them from Western at prices that ranged from 109% to 1800% higher than what Western had paid for the properties. Western also encumbered some of the properties with mortgages, which remained on the properties when they were sold to the GPs. Investors were not aware of the mark ups or the mortgages.

Western made loans to the GPs so the GPs could allow their investors to finance the investments. As a result, investors owe amounts on promissory notes issued to their GPs and GPs owe amounts on promissory notes issued to Western. Investors were not aware of the promissory notes to their GPs owed to Western.

Of the funds the GPs raised from investors when the GPs were formed, approximately 93% went to Western and approximately 7% remained in the GPs' bank accounts to cover basic expenses like property taxes, property insurance

premiums, administrator fees, and fees to prepare annual tax returns. When GPs exhausted the balances in their accounts, they would send bills to their investors, but some investors would not pay. When GPs were unable to pay their bills, Western would loan the GPs money. In some cases, Western stopped collecting note payments from GPs that were unable to pay their bills. Investors were not aware of the loans Western made to the GPs or the fact that Western stopped collecting note payments from certain GPs.

B. Final Judgment

On May 19, 2015, the District Court granted in part and denied in part the Commission's motion for summary judgment on its fourth claim for relief finding that Defendants had engaged in the sale of unregistered securities and that the appropriate amount of disgorgement was $136,654,250, plus prejudgment interest calculated to May 19, 2015. Dkt. No. 1074. On June 3, 2015, the District Court granted in part and denied in part the Commission's motion for summary judgment on its first and second claims for relief, granting both causes of action as to all elements with regards to the fair market value representation of the Stead property in Western's sales brochure. Dkt. No. 1081.

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During the course of the litigation between the Commission and Defendants, the District Court addressed numerous challenges by Defendants and various investors to the scope of the receivership, including several attempts to remove the GPs from the receivership. On March 4, 2015, the District Court entered an Order Keeping GPs Under Receivership. Dkt. No. 1003. Among other things, the District Court determined the GPs would remain in the receivership until the conclusion of the case, instructed the Receiver to file a proposed "Information Packet" regarding the financial condition of each GP to be disseminated to investors, and instructed the Receiver to file a report and recommendation regarding the best course of action for the GPs. *Id.*

The Receiver filed the proposed Information Packet, which was approved by the District Court, and, to address the critical problem of GPs that were unable to

[1] The Commission filed a cross-appeal of the Final Judgment, but recently filed an unopposed motion to voluntarily dismiss its cross-appeal. Case No. 16-55414, Dkt. No. 40.

pay their bills, filed a recommendation that capital calls be issued to investors in GPs without sufficient funds to pay their operating expenses through the end of 2016. Dkt. Nos. 1023, 1056. If the capital calls failed to raise sufficient funds for the GPs to pay their 2016 operating expenses, the properties owned by those GPs would be sold. Dkt. No. 1056. The Receiver also laid out steps of the proposed "orderly sale process" for GP properties in his report and recommendation. *Id.* The Court approved the report and recommendation, with slight modifications, on May 12, 2015. Dkt. No. 1069.

The Receiver proceeded to complete the approved Information Packet for each GP, which was made available to investors via the Receiver's website, and issue capital calls to investors pursuant to the May 12, 2015 Order. Each and every capital call failed to raise the amounts necessary for the applicable GPs to cover their 2016 operating expenses. Accordingly, the Receiver began to take the steps of the approved orderly sale process for the applicable GP properties. These steps included recommending the engagement of a license real estate broker to market each property for sale. On March 7, 2016, the Receiver recommended the engagement of licensed real estate brokers for the GP properties known as Las Vegas 1, Las Vegas 2, and Tecate. Dkt. No. 1203. On May 25, 2016, the District Court approved and adopted the recommendation as part of the Fourth Order. Dkt. No. 1305.

D. Unsolicited Offers for GP Properties

With respect to unsolicited offers received for GP properties prior to the engagement of a real estate broker, the District Court instructed the Receiver to notify the District Court of the offer and make a recommendation, filed under seal, regarding how to respond to the offer, *i.e.,* accept the offer, make a counter-offer, reject the offer, take a vote of investors, or other steps. Dkt. No. 808. The Receiver filed a series of recommendations regarding unsolicited offers and letters of intent received from prospective purchasers for GP properties. One such recommendation was filed under seal on May 4, 2016, and pertained to the GP property known as Dayton IV. Dkt. No. 1281. This recommendation was approved and adopted as part of the Fourth Order. Dkt. No. 1305. Accordingly, the Fourth Order authorized the Receiver to move forward with steps to respond to the unsolicited offer for the Dayton IV property.[2]

E. The Distribution Plan Motion

On February 4, 2016, with the Final Judgment having been entered, the Receiver filed his Motion for: (a) Authority to Conduct Orderly Sale of General

[2] The remaining parts of the Fourth Order are the District Court's approval and adoption of recommendations regarding an unsolicited letter of intent and denial of the Receiver's *ex parte* application for an order confirming the sale of a GP property known as the Jamul Valley property. The Aguirre Investors are not challenging these parts of the Fourth Order.

Partnership Properties; (b) Approval of Plan of Distributing Receivership Assets; and (c) approval of Procedures for the Administration of Investor Claims ("Distribution Plan Motion"). Dkt. No. 1181. The Distribution Plan Motion sought an order authorizing the Receiver to put the remaining GP properties through the orderly sale process, *i.e.,* those properties owned by GPs with sufficient funds to pay their 2016 operating expenses, which therefore did not have a failed capital call. *Id.*

The Distribution Plan Motion also sought approval of a "One Pot" or "pooling" approach to distributing receivership assets (as opposed to distributions on a GP by GP basis) and approval of a Distribution Plan consistent with the One Pot Approach. *Id.* The Distribution Plan, which was attached to the Distribution Plan Motion as Exhibit E, provided that distributions will be made only after the District Court has entered further orders "setting the allowed amount of all Claims, and authorizing the Receiver to make interim distributions ("Approval Orders")." Dkt. No. 1181-1, Exhibit E, p. 3, l. 24 – p. 4, l. 1. Finally, the Distribution Plan Motion sought approval of procedures for administering investor claims against the receivership estate and efficiently resolving any disputes regarding such claims. *Id.*

F. The Aguirre Investors

In early 2016, a group of approximately 192 investors engaged attorney Gary Aguirre to represent them in the case. A separate group of approximately 149 investors engaged attorney Timothy Dillon to represent them in the case. These two groups became known as the Aguirre Investors and the Dillon Investors. Together they represent approximately 10% of the approximately 3,300 investors of the Receivership Entities.[3]

Without seeking to intervene in the case, the Aguirre Investors and Dillon Investors filed oppositions to certain applications filed by the Receiver, sought to continue the hearing on the Distribution Plan Motion, and filed motions seeking to vacate certain District Court orders and require the Receiver to provide further accounting information. Dkt. Nos. 1194, 1204, 1211, 1212, 1221, 1223. The District Court rejected these filings without prejudice and instructed the Aguirre Investors and Dillon Investors to first file motions to intervene if they wished to refile any motions. Dkt. No. 1224.

The Aguirre Investors and Dillon Investors then filed motions to intervene, refiled their motions to vacate orders and for accounting information, and filed

[3] The number of Aguirre Investors and, in particular, Dillon Investors grew between February 2016 and April 2016. Early during this time span, the combined groups were approximately 8% of the investors.

oppositions to the Distribution Plan Motion. Dkt. Nos. 1227, 1229, 1230, 1234, 1235, 1258. With respect to the Distribution Plan Motion, the Aguirre Investors argued the GP properties should not be permitted to be sold without a vote of investors in the GPs that own them and that receivership assets should be distributed on a GP by GP basis. Dkt. No. 1235. As part of their oppositions, the Aguirre Investors and Dillon Investors filed a report analyzing the values and market conditions for the GP properties prepared by Xpera Group ("Xpera Report"). Dkt Nos. 1234-2, 1234-4, 1237, 1238.

The District Court denied the Aguirre Investors and Dillon Investors' motions to intervene generally in the case, but allowed them to intervene for the limited purpose of opposing the Distribution Plan Motion. Dkt. No. 1296, 1303. The orders denying broader intervention are the first and second orders in the Aguirre Investors' Notice of Appeal.

The District Court held a hearing on the Distribution Plan Motion on May 20, 2016, at which Gary Aguirre and Timothy Dillon were permitted to present arguments on behalf of their respective clients. Dkt. No. 1298. On May 25, 2016, the District Court entered the Third Order, which grants in part and denies in part the Distribution Plan Motion. Dkt. No. 1304. Specifically, the Third Order (a) approves the One Pot Approach, the Distribution Plan, and the procedures for the administration of investor claims, (b) directs the Receiver to

submit a proposal for a "modified orderly sale process" that incorporates the public sale requirements of 28 U.S.C. § 2001, (c) directs the Receiver to file a report and recommendation evaluating the pros and cons of the recommendations in the Xpera Report, and (d) directs the Receiver to withdraw and resubmit his Fourteenth Interim Report, and submit all future reports with a Standardized Fund Accounting Report ("SFAR"). *Id.*

IV. DISCUSSION

A. The Third Order Is Not Appealable

The Third Order approves the Distribution Plan, but requires further orders approving the modified orderly sale process, setting the allowed amount of all claims, and authorizing interim distributions before any distributions to investors can actually be made. Therefore, the order does not finally resolve the disposition or distribution of any receivership assets.

The Aguirre Investors have appealed the Third Order under 28 U.S.C. § 1291 and 28 U.S.C. § 1292. Notice of Appeal. p. 3. In order to be appealable under 28 U.S.C. § 1291, a judgment must be final, meaning it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003). The Third Order does not end the litigation or finally resolve any issues. Therefore, section 1291 does not apply.

Nor does section 1292 apply. The only provision of section 1292 that is potentially applicable is section 1292(a)(2), which is limited to "orders appointing receivers, or refusing to wind up receiverships, or to take steps to accomplish the purposes thereof, such as directing sale or disposals of property." 28 U.S.C. § 1292(a)(2). Section 1292(a)(2) applies only to appeals of orders appointing receivers, orders refusing to wind up receiverships, and orders refusing to take steps to wind up receiverships. *See SEC v. American Principals Holdings, Inc.*, 817 F.2d 1349, 1351 (9th Cir. 1987); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1099 (9th Cir. 2010). The Third Order does not appoint the Receiver, refuse to wind up the receivership, or refuse to take steps to wind up the receivership. To the contrary, approval of the Distribution Plan is a step, *albeit* an intermediate one, toward winding up the receivership. Therefore, section 1292(a)(2) does not apply.

B. <u>The Fourth Order Is Not Appealable</u>

The portions of the Fourth Order the Aguirre Investors challenge are the District Court's approval and adoption of the Receiver's recommendations to (a) engage real estate brokers for certain GP properties, and (b) respond to an unsolicited letter of intent from a potential purchaser. These are clearly interim, administrative orders regarding receivership properties. Sales of the properties at issue have not even been proposed yet.

The Fourth Order does not end the litigation on the merits, nor does it appoint the Receiver, refuse to wind up the receivership, or refuse to take steps to wind up the receivership. Therefore, sections 1291 and 1292(a)(2) do not apply.

C. The Collateral Order Doctrine Does Not Apply

Although the Aguirre Investors did not specifically reference the collateral order doctrine in their Notice of Appeal, they may argue it applies to the Third Order. This argument lacks merit, however. This Court has already rejected the same argument made in other federal equity receiverships.

For the collateral order doctrine to apply, an order must (a) conclusively determine a disputed question, (b) resolve an important question completely separate from the merits of the action, and (c) be effectively unreviewable upon appeal from a final judgment in the case. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The collateral order doctrine is narrowly construed. *Id.*

This Court addressed the collateral order doctrine in detail in the context of a federal equity receivership in *SEC v. Capital Consultants, LLC*, 453 F.3d 1166 (9th Cir. 2006). In *Capital Consultants*, two investors appealed from orders regarding their claims to assets of the receivership estate. The Court held that the collateral order doctrine did not apply, explaining:

> The collateral order doctrine was designed to allow appeal from a "narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system[,] nonetheless be treated as final." Requirements of the doctrine are often described as threefold. Orders that do not dispose of the entire litigation are appealable as collateral orders if they "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." The Supreme Court has emphasized that these requirements are to be applied strictly and that only a "narrow class of decisions" satisfy them.
>
> Strict application of the requirements is particularly important because, when a court identifies an order as an appealable, collateral one, it determines the appealability of all such orders. If courts did not apply the requirements strictly, then, the doctrine would no longer govern a "narrow class of decisions," but a broad class. Thus, we are not to consider "the chance that the litigation at hand might be speeded, or a particular injustic[e] averted, by a prompt appellate court decision" when we determine whether a particular order is an appealable, collateral one. We must take a broader view and determine if resolution of the kind of claim in question must always be immediately appealable under the collateral order doctrine.
>
> We conclude that orders such as the district court's February 9th and August 18th orders involve the merits of the litigation. Thus, they are not collateral to the merits and are not appealable under the collateral order doctrine. To be truly collateral to the merits of the litigation, a claim or right must not be "an ingredient of the cause of action" and must therefore "not require consideration with" that cause of action. The disposition of the issue should not "affect, or [] be affected by,

decision of the merits." To determine if the claims in question are collateral to the merits of the litigation, we must determine what the merits are and what the claims are. Then, we must determine if resolution of the claims affects the merits.

Defining the "merits" of the litigation is not particularly difficult. The litigation in question is a receivership proceeding instituted by the SEC, an agency charged with protecting "the national public interest and the interest of investors." In accord with its charge, the SEC sought to place CCL into receivership after determining that it and its principals, the defendants, had violated securities laws and harmed their clients. A review of the stipulated court order reveals that the receivership had several purposes and the receiver, several different duties. In addition to investigating and pursuing claims arising from legal violations, the receiver was to locate, take control of, and preserve the company's assets. The receiver was then charged with disbursing those assets in accordance with the court's orders. Because rightful claims to assets exceed the assets available, the court, with the help of the receiver, must determine how to distribute the assets equitably. Thus, distributing CCL's assets equitably is one of the central purposes of the receivership and, correspondingly, of the SEC's litigation.

The claim the appellants asserted in this case was a claim to assets held by the receiver. Specifically, the appellants asserted a right to receive traced funds without remitting settlement funds.

If one of the primary purposes of the litigation is to determine how best to distribute CCL's assets to claimants, including the appellants, their claims clearly comprise part of the merits of the litigation. The fact that they comprise only a small piece of the merits is irrelevant. Resolution of the appellants' claims will

> directly affect the ongoing litigation. If the claims succeed, the pool of assets the receiver controls will be smaller. Accordingly, the receiver will have fewer resources to distribute to other claimants.

Capital Consultants, 453 F.3d at 1171-72 (citations omitted).

The Court disagreed with contrary decisions from the Fifth and Sixth Circuit Courts of Appeal and explained that allowing certain interlocutory orders in receiverships to be appealable as collateral orders would lead to confusion, practical problems, and extra work for parties and courts. *Id.* at 1172-73. The Court concluded:

> The practical problems that would result from categorizing orders in this context as appealable collateral orders strengthens our conviction that our decision *not* to do so is correct.

Id. at 1173.

Subsequent decisions of this Court confirm the holding of *Capital Consultants*. In *CFTC v. Forex Liquidity, LLC*, 384 Fed. Appx. 645, 2010 U.S. App. LEXIS 12562 (9th Cir. June 18, 2010), the defendant appealed an order granting the receiver's "motion for a distribution order and related administrative orders." The Court dismissed the appeal and explained:

> We do not have jurisdiction over Gray's appeal of the distribution orders. Gray acknowledges that the distribution orders do not dispose of the underlying litigation, but argues that the orders are appealable as collateral orders. "Orders that do not dispose of the

> entire litigation are appealable as collateral orders if they [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] are effectively unreviewable on appeal from a final judgment." *S.E.C. v. Capital Consultants LLC*, 453 F.3d 1166, 1171 (9th Cir. 2006) (per *curiam*) (quotations and alterations omitted). Here, first, the distribution orders at issue were merely an intermediate step, not a conclusive determination, in the disposition of the assets discussed in the orders. Second, distributing Forex's assets equitably is one of the central purposes of the receivership and, correspondingly, of the underlying action. See *id.* at 1172. Even if the distribution orders will be effectively unreviewable on appeal from the eventual final judgment in the underlying action, the orders clearly fail the first two prongs of the collateral order test and thus are not appealable as collateral orders.

Id. at *4; *see also SEC v. Tringham*, 475 Fed. Appx. 203, 2012 U.S. App. LEXIS 15689 (9th Cir. July 30, 2012) (dismissing appeal from order denying motion to release funds from ongoing federal equity receivership for lack of jurisdiction).

Here, the Third Order does not conclusively determine what amount will be distributed to investors. As discussed above, the District Court must enter further orders approving the modified orderly sale process, setting the allowed amounts of investor claims, and authorizing interim distributions before any interim distributions, let alone final distributions, to investors can be made. The Third Order is also central to the purposes of the receivership (the equitable distribution of receivership assets to investors) and therefore the underlying litigation.

Accordingly, as the Court in *Forex Liquidity* held, the Third Order clearly fails the first two prongs of the collateral order test.

V. CONCLUSION

For the reasons discussed above, this appeal should be dismissed as to the Third and Fourth Orders listed in the Notice of Appeal for lack of jurisdiction.

Dated: June 28, 2016

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STATEMENT OF RELATED CASES
(9th Circuit Rule 28-2.6)

1. United States Court of Appeals, Ninth Circuit, Case No. 13-56761

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

2. United States Court of Appeals, Ninth Circuit, Case No. 13-56948

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

3. United States Court of Appeals, Ninth Circuit, Case No. 14-56313

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

4. United States Court of Appeals, Ninth Circuit, Case No. 14-56315

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

5. United States Court of Appeals, Ninth Circuit, Case No. 16-55167

   SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

   Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

6. United States Court of Appeals, Ninth Circuit, Case No. 16-55414

SEC v. Louis V. Schooler; First Financial Planning Corporation, dba Western Financial Planning Corporation

Appeal from U.S. District Court for the Southern of California, San Diego, Case No. 3:12-cv-02164-GPC-JMA

CERTIFICATE OF COMPLIANCE

The foregoing Motion to Dismiss Appeal for Lack of Jurisdiction as to Third and Fourth Orders in Notice of Appeal of Appellee Thomas C. Hebrank complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 3,945 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: June 28, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: */s/ Edward Fates*
Edward G. Fates
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THOMAS A. SEAMAN

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 June 28, 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: June 28, 2016

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

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