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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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

Defendants.

Case No. 12 CV 2164 GPC JMA

SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO AGUIRRE INVESTORS' *EX PARTE* MOTION (A) FOR LEAVE TO FILE OPPOSITION AND (B) TO STRIKE BRIEF

Dkt. No. 1277

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

Plaintiff Securities and Exchange Commission ("SEC") opposes the *ex parte* request of the investors represented by Gary Aguirre (the "Aguirre Investors") to make yet another filing regarding the court-appointed receiver's motion to approve a distribution plan. *See* Dkt. No. 1277. The Aguirre Investors ask the Court to strike the SEC's response to the receiver's motion or, alternatively, seek leave to file a so-called "opposition" to the SEC's brief. The SEC opposes their *ex parte* motion for two reasons.

First, the SEC's submission was not untimely. *See* Dkt. No. 1232. The Aguirre Investors contention that it was—and that they should therefore be allowed to file a supplemental "opposition" —is illogical. The SEC's submission was filed on April 15, 2016, the same day the Aguirre Investors, and the other large group of investors who have sought to intervene (the "Dillon Investors"), filed their responses. *See* Dkt. Nos. 1234, 1235. The Aguirre Investors, however, argue that the SEC should not have been allowed to file a submission on that day since the SEC agreed with the receiver's recommended "One Pot" distribution plan. *See, e.g.*, Dkt. No. 1277 at 1 (arguing the SEC's brief was a "joinder" and should have been filed earlier).[1] But the SEC was not the only one who agreed with the receiver's plan. *See* Dkt. No. 1232 at 2-8. The Dillon Investors also expressly endorsed the receiver's "One Pot Approach." *See* Dkt. No. 1234 at 19-20.

Under the Aguirre Investors' logic, the Dillon Investors' submission was just as untimely as the SEC's submission, since both did not oppose, but instead agreed with, the receiver's distribution proposal. That makes no sense, especially since the Aguirre Investors did not seek leave to rebut the Dillon Investors' submission and, in fact, *joined* it. *See* Dkt. No. 1236 (Aguirre Investors' notice of joinder to Dillon Investors' brief). Rather, both the SEC's submission and the Dillon Investors' submission were timely. They were filed on April 15, 2016, when all of the responses to the receiver's motion proposing a distribution plan were due. *See* Dkt. No. 1224. There is, therefore, no reason to strike the SEC's timely-filed submission.

Second, the Aguirre Investors cannot show, as they must, that there is any valid reason for their proposed supplemental "opposition." *See, e.g., Johnson v. Wennes*,

[1] As has become all too common in the dozens of filings made by Mr. Aguirre, he incorrectly conflates the SEC and the receiver as if they are one and the same. *See, e.g.*, Dkt. No. 1277-1 at 1 (referring to the receiver's motion for a distribution plan as the "SEC's and the Receiver's motion," claiming the "SEC invites the Court to take pooling to a new frontier," when it is the receiver who has proposed the "One Pot Approach" that he and his clients seem to take issue with).

Civil No. 08cv1798-L(JMA), 2009 WL 1161620, *2 (S.D. Cal. April 28, 2009) (denying reconsideration of ruling striking sur-reply "[b]ecause no valid reasons was offered for the filing of a sur-reply"); *Garber v. United States*, No. 2:15-cv-05867-CAS (JPRx), 2016 WL 552656, *3 n.2 (C.D. Cal. Feb. 9, 2016) (striking plaintiff's motion that was, "in effect, an improper surreply").[2] Indeed, the Aguirre Investors' motion is predicated on a fundamental factual error—their contention that the SEC raised the issue of the defendants' "commingling" of investor funds for the first time in its submission. Indeed, the Aguirre Investors claim that the receiver "never mentioned" the issue of commingling in his motion, and never "even hinted commingling mush [*sic*] less finding any of it" in any of his interim reports. Dkt. No. 1277-1 at 1, 8. They also contend that that there was "not a sliver of evidence supporting the theory" of commingling, the "[i]nvestors' funds were never pooled," and the Court "never made such a finding." *Id*. at 6, 7.

None of that is correct. The receiver, in several interim reports, made specific findings, based on his forensic analysis and evidence, that more than 90% of investor funds were pooled together to pay for the expenses of Western and other general partnerships. And the Court relied on those findings when it found that defendants' illegal, unregistered offering of partnership investments was a single, "integrated" offering that was part of a "single plan to finance Western's operations." Dkt. No. 1074 at 8. All of this was laid out in detail in the SEC's submission. *See* Dkt. No. 1232 at 5-6 (citing receiver reports (Dkt. Nos. 182, 504, 1148) and Court orders (Dkt. Nos. 1003, 1074). And the receiver block-quoted and relied on the *exact same*

[2] The Aguirre Investors also take every opportunity in their "opposition" to argue in support of their pending motion to intervene as a party in this case, including to request that the issue of commingling be presented to a jury. *See id*. at 2-3, 10 (contending the partnerships are "necessary parties," and requesting a "jury trial"). Not only does that constitute an improper sur-reply, the distribution of equity receivership estate assets are handled by courts in summary proceedings. *E.g.*, *U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984) ("No right to a jury trial attaches to equitable proceedings in the administration of a receivership.").

passages the SEC cited from the Court's order in his motion proposing his "One Pot Approach" for the distribution of assets. *See* Dkt. No. 1181-1 at 15.

Moreover, despite what the Aguirre Investors suggest, this commingling of assets was extensive. The Aguirre Investors define "commingling" as "'depositing or recording funds in a general account without the ability to identify each specific source of funds for any expenditure.'" *Id*. at 7 (quoting 34 C.F.R. § 303.123). And that is *exactly* what the receiver concluded in his interim reports happened here. According to the receiver, for every investor dollar the defendants raised, 93 cents was sent to Western to pay its own expenses and those of other general partnerships—that is, investor money was deposited into one general account at Western, where it was pooled together to pay for its own operational expenses as well as for the expenses of other general partnerships, without any regard to which investor deposited the money. *See* Dkt. No. 1232 at 5-6 (citing receiver reports (Dkt. Nos. 182, 504, 1148)).[3]

It is this commingling of assets that the SEC believes justifies the "One Pot Approach." And the Dillon Investors appear to agree. In their response to the receiver's motion, the Dillon Investors pointed to the exact same judicial and receiver findings when they endorsed the "One Pot Approach." As the Dillon Investors explained in their submission (which, paradoxically, the Aguirre Investors joined):

> The Intervening Investors agree with the Receiver's contention that in the majority of federal equity receivership cases, receivership assets are pooled and distributed to investors on a *pro rata* basis. The Intervening Investors further agree that the distinctions between the similarly situated investors is primarily due to timing or luck and that it would be most equitable for the Court to pool the proceeds from any sale of the GP properties and to distribute said proceeds *pro rata*

[3] The Aguirre Investors argue that "commingling" is not the same as "intertwining," which is the term the Court used in its rulings. *See* Dkt. No. 1277-1 at 7. But this is what the Court said in its March 2015 ruling about those terms: "At oral argument, Defendants objected to the Court's use of the term 'commingling.' (ECF No. 949, at 8:13–17.) While the Court recognizes that commingling can have various meanings, (*see*, *e.g.*, 34 C.F.R. § 303.123), the Court simply uses the term here to assess the extent to which Western's assets are intertwined with investor assets." Dkt. No. 1003 at 2 n.1.

> amongst the investors. *This is particularly true given that 93% of all funds raised from investors went to Western and was used by Western in many ways (including to pay Louis Schooler).*

Dkt. No. 1134 at 20 (emphasis added).

Therefore, the SEC's response to the receiver's motion was timely, and should not be stricken. In addition, the SEC raised nothing new in its filing, and there is no basis for the Aguirre Investors so-called "opposition." Accordingly, the Aguirre Investors' *ex parte* application for leave to submit another filing to the Court or, alternatively, to strike the SEC's response, should be denied.

Dated: May 4, 2016

/s/ John W. Berry
John W. Berry
Lynn M. Dean
Sara D. Kalin
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Securities and Exchange Commission

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
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Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On May 4, 2016, I caused to be served the document entitled **SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO AGUIRRE INVESTORS' *EX PARTE* MOTION (A) FOR LEAVE TO FILE OPPOSITION AND (B) TO STRIKE BRIEF** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☒ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

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

Date: May 4, 2016

/s/ Sara D. Kalin
Sara D. Kalin

SEC v. Louis V. Schooler, et al.
United States District Court—Southern District of California
Case No. 12 CV 2164 GPC JMA

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Responses and Replies

3:12-cv-02164-GPC-JMA
Securities and Exchange
Commission v. Schooler et al
CASE CLOSED on 01/21/2016

APPEAL,CLOSED,ENE,SEALDC

U.S. District Court

Southern District of California

Notice of Electronic Filing

The following transaction was entered by Kalin, Sara on 5/4/2016 at 1:34 PM PDT and filed on 5/4/2016
Case Name: Securities and Exchange Commission v. Schooler et al
Case Number: 3:12-cv-02164-GPC-JMA
Filer: Securities and Exchange Commission
WARNING: CASE CLOSED on 01/21/2016
Document Number: 1278

Docket Text:
RESPONSE in Opposition re [1277] Ex Parte MOTION for Leave to File *Opposition to SEC Late Joinder SEC's Opposition to Aguirre Investors' Ex Parte Motion (A) For Leave to File Opposition and (B) To Strike Brief* filed by Securities and Exchange Commission. (Kalin, Sara)

3:12-cv-02164-GPC-JMA Notice has been electronically mailed to:

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3:12-cv-02164-GPC-JMA Electronically filed documents must be served conventionally by the filer to:

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1106146653 [Date=5/4/2016] [FileNumber=9872630-0]
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