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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

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO AGUIRRE INVESTORS' MOTION FOR A STAY PENDING APPEAL**

Dkt. No. 1316

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

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## I. INTRODUCTION

The investors represented by Gary Aguirre (the "Aguirre Investors") have filed a notice of appeal of four orders issued by this Court—two denying their requests to intervene in this action (Dkt. Nos. 1296, 1303), and two approving a distribution plan and sale of properties in the receivership estate (Dkt. Nos. 1304, 1305). *See* Dkt. No. 1311. They now move to stay the latter two orders or any other orders to sell the receivership estate properties pending their appeal. *See* Dkt. No. 1316 ("Stay Mot.").

The Securities and Exchange Commission ("SEC") opposes their motion. The Aguirre Investors make up only about 10% of the 3,400 investors in this case. A stay of the distribution and sale of estate assets would severely prejudice the other 90% of investors who are not the Aguirre Investors, who have not asked for a stay and who are waiting to receive distributions. That is particularly true since the Aguirre Investors cannot show that they are likely to prevail on any of their appeals, or that a stay would be both equitable and in the public interest—which they must do in order to obtain the stay they seek. In fact, the receiver has moved to dismiss their appeal of the two May 25, 2016 distribution and sale rulings (Dkt. Nos. 1304, 1305) because they are neither final nor interlocutory appealable orders. And even if these orders were appealable, the Ninth Circuit gives wide deference, as it should, to district courts fashioning distribution plans for receivership estates. It is highly unlikely, therefore, that the Ninth Circuit will find that this Court abused its discretion when it carefully and thoroughly considered, and then adopted, a *pro rata* distribution and sale plan. Accordingly, the Aguirre Investors' stay motion should be denied.

## II. ARGUMENT

### A. The Receiver Has Moved To Dismiss The Appeals Of Two Orders

On June 28, 2016, the receiver moved the Ninth Circuit to dismiss the Aguirre Investors' appeals of the two distribution/sale orders issued by this Court on May 25, 2016 (Dkt. Nos. 1304, 1305). *See SEC v. Schooler et al.*, Case No. 16-55850 (9th Cir.). One of the rulings (Dkt. No. 1304) approved, in part, an orderly process and

distribution plan for the estate, and the other (Dkt. No. 1305) approved the matters related to the sale of certain properties.

As the receiver makes clear in his motion to dismiss, neither is a final, appealable order under 28 U.S.C. § 1291. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) ("For purposes of § 1291, a final judgment is normally deemed not to have occurred until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *see also American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003); *FTC v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1234-35 (9th Cir. 1989) (orders issued in equity receivership proceeding that do not "finally resolve[] the parties' rights to [the receivership] assets" are not final orders).

They are also not, as the receiver argues, interlocutory orders that can be appealed under 28 U.S.C. § 1292. The two May 25th distribution/sale orders do not fit within the narrow parameters of Section 1292(a)(2)—the only arguably applicable provision—because those rulings did not appoint a receiver, or refuse to wind up the receivership or take steps to accomplish the purpose of the receivership. 28 U.S.C. § 1292(a)(2) (appealable interlocutory rulings are orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property"); *SEC v. American Principals Holdings, Inc.*, 817 F.2d 1349, 1350-51 (9th Cir. Cal. 1987) (order affirming compensation payment to receiver could not be appealed as interlocutory order because it was not an order refusing to take steps to accomplish receivership goals, and noting that to hold otherwise would open the floodgates to piecemeal appeals); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1099 (9th Cir. 2010).[1]

[1] As the receiver also notes in his motion, while some Circuits have held that distribution orders may be appealed under the "collateral order" doctrine, the Ninth Circuit has held to the contrary. *See SEC v. Capital Consultants, LLC*, 453 F.3d 1166, 1171-72 (9th Cir. 2006) (collateral order doctrine does not apply to appeal regarding investor claims to assets in federal equity receiverships because such orders

**B. The Aguirre Investors Fail To Make The Showing For A Stay**

Even if all four orders were appealable, the Aguirre Investors cannot make the showing needed to justify a stay pending their appeal. To do so, the Aguirre Investors must demonstrate that: (1) they are likely to prevail on appeal; (2) they will suffer irreparable harm absent a stay; (3) the equities favor a stay; and (4) a stay is in the public interest. *See Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009). They have failed to make that showing.

**1. The Aguirre Investors are unlikely to prevail on their appeals of the distribution/sale orders**

Given the deferential appellate review of receivership distribution orders, the Aguirre Investors are unlikely to persuade the Ninth Circuit to reverse the Court's orders establishing a distribution and sale process (Dkt. Nos. 1304, 1305). District court rulings on equity receiver sales procedures and distribution plans are reviewed under an abuse of discretion standard. *See SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 332-333 (7th Cir. 2010). This is because district courts are given broad powers "to order the sale of receivership property and fashion any distribution plan that is fair and equitable to the investors." Dkt. No. 1304 at 9 (*citing SEC v. American Capital Invests., Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998), and *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738-39 (9th Cir. 2005)); *see also Wealth Mgmt*, 628 F.3d at 332-333.

That standard of appellate review makes it unlikely that the Court's correct and careful review of the receiver's recommendation and its adoption of a *pro rata* distribution plan and sale process will be overturned by the Ninth Circuit. Indeed, appellate courts have reviewed and approved *pro rata* distribution plans when the intertwining of investments or commingling of investor funds were not near as

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do "involve the merits of the litigation").

extensive as they were here. *See, e.g., Quilling v. Trade Partners, Inc.*, 572 F.3d 293, 300-301 (6th Cir. 2009) (affirming *pro rata* distribution plan where investors had purchased interests in viatical settlements, and one investor had recorded ownership interest in specific life insurance policy); *SEC v. Forex Asset Management, LLC*, 242 F.3d 325, 331-332 (5th Cir. 2001) (affirming distribution plan that distributed $800,000 invested by one investor with the rest of the estate even though those funds were held in a discrete account); *United States v. Durham*, 86 F.3d 70, 72-73 (5th Cir. 1996) (affirming plan that distributed all funds equally on *pro rata* basis even though $70,000 of $83,000 investor funds could be traced to one investor)); *see also Wealth Mgmt.*, 628 F.3d at 323-33 (affirming *pro rata* distribution where "recoverable funds fell far short of the total assets under management, [so] . . . the more reasonable course was to distribute assets on a *pro rata* basis rather than try to trace assets to specific investors").[2]

Here, the Court has already diligently considered the arguments presented by the receiver, the SEC and several investors (including the Aguirre Investors), found the Aguirre Investors' arguments "unconvincing," and concluded that a *pro rata* distribution was the most equitable solution. Dkt. No. 1304 at 26-30. It is highly unlikely that the Ninth Circuit will find that determination an abuse of discretion.

**2. The Aguirre Investors' appeals of the intervention orders are equally meritless and unlikely to succeed**

The Aguirre Investors are also unlikely to prevail on their appeals of the two intervention rulings (Dkt. Nos. 1296, 1303). Those orders denied their requests to

[2] The Aguirre Investors continue to insist that "there was no commingling of any investors' funds." Stay Mot. at 13. That is not correct. Dkt. No. 1232 (SEC brief) at 5-6 (describing receiver's findings that more than 90% of investor funds were pooled together to pay for the expenses of Western and other general partnerships, and Court's findings that defendants' unregistered offering of partnership investments was single, "integrated" offering that was part of "single plan to finance Western's operations") (citing receiver reports (Dkt. Nos. 182, 504, 1148) and Court orders (Dkt. Nos. 1003, 1074 at 8)). The other large group of investors represented by Tim Dillon agree that commingling was extensive here. *See* Dkt. No. 1134 at 20.

intervene for various purposes, including vacating certain prior orders regarding the orderly sales process and seeking to "oversee and evaluate" the receivership and require the receiver to provide additional accounting information. *Id.* The denial of a motion to intervene as of right is reviewed *de novo*, with the exception of the timeliness prong, which is reviewed for abuse of discretion. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir.2001). The denial of a motion for permissive intervention is also reviewed under the abuse of discretion standard. *League of United Latin Am. Citizens v. Wilson ("LULAC")*, 131 F.3d 1297, 1307-08 (9th Cir.1997); *see also Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843-44 (9th Cir.2011).

Under that limited appellate review, the Aguirre Investors are unlikely to succeed in their appeals of the Court's intervention rulings. Their main contention on appeal and in their stay motion appears to be that their due process rights were violated when the Court denied their intervention motions. *See* Stay Mot. at 4-8. In particular, they argue that, for due process, the Court must adjudicate their claims and issues in "plenary," rather than summary, proceedings—that is, proceedings where they are full-fledged parties. *Id.* at 4. That is not the law in this Circuit. As the Ninth Circuit has repeatedly made clear, "[f]or the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard." *American Capital*, 98 F.3d at 1146 (*citing SEC v. Wencke*, 783 F.2d 829, 836-38 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986); *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir. 1985)); *see also SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986) ("We have repeatedly held, however, that the use of summary proceedings to determine appropriate relief in equity receiverships, as opposed to plenary proceedings under the Federal Rules, is within the jurisdictional authority of a district court.").

The Aguirre Investors' due process argument will also likely fail on appeal because they, like the other investors, have been provided with more than adequate

notice and opportunity to be heard. *See* Dkt. No. 1295 (SEC brief) at 3-4 (describing the investors' "ample notice and opportunity to be heard" in this case). For example, the Court specifically held hearings in October and December 2014 for the investors to express their views on the scope of the receivership, and at least nine Aguirre Investors personally appeared and spoke at those hearings. Dkt. No. 629 at 7; Dkt. No. 1266 at 3-4. In its ruling on that issue, the Court expressly considered letters from the investors and the investors' claims that the receiver had acted improperly, and correctly noted that it had fully "respected" the investors' due process rights. Dkt. No. 1003 at 1, 4, 6, 7-8. The Court also reviewed and approved the receiver's reports regarding the expenses the Aguirre Investors now complain of. *See* Dkt. Nos. 169, 190, 511, 637, 640, 922, 1006, 1134, 1168. And at the May 20, 2016 hearing on the distribution plan and sale process, the Court considered the Aguirre Investors' submissions and allowed them to be heard at length. *See* Dkt. Nos. 1303, 1304, 1305. All of this provided the Aguirre Investors with the necessary due process. *See CFTC v. Topworth International, Ltd*., 205 F.3d 1107, 1113-1114 (9th Cir. 1999) (rejecting investor claim that its due process rights were violated in summary proceedings because "[t]here was ample opportunity for the appellant[-investor]s in this case to file papers and two hearings were held in the district court"); *see also American Capital*, 98 F.3d at 1147 (summary proceedings gave investors "full notice and opportunity to be heard at every critical stage"); *SEC v. TLC Investments and Trade Co.*, 147 F.Supp.2d 1031, 1042 (C.D. Cal. 2001) (where investors were given rights to be heard in summary proceedings, denying intervention of investors).[3]

**3. There is no irreparable harm and the equities and public interest weigh against a stay because the appeals are meritless**

The Aguirre Investors also cannot show that they will be irreparably harmed if

[3] In addition, in order to establish a due process violation, the Aguirre Investors must make a showing of prejudice. *American Capital*, 98 F.3d at 1147. They cannot make, and have not made, that showing.

there is no stay, or that the equities or public interest support a stay, because their appeals have no merit and are likely to be rejected under the Ninth Circuit's deferential review. As a result, their appeals do not have the "serious, perhaps irreparable, consequence" to justify a stay. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (appeal as of right under § 1292 (a)(1) available only where an appeal will further the statutory purpose of "[permitting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence") (*citing Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)).

The same is true for the equities and public interest of such a stay. Because there is little likelihood that the Aguirre Investors will succeed in their meritless appeals, the equities lean heavily against a stay. The Aguirre Investors are a mere 10% of the total investors who were victims of the defendants' scheme. The other group of investors who litigated the distribution/sale orders (the "Dillon Investors") endorsed the "One Pot" approach that the Aguirre Investors now want to challenge on appeal. Those investors did so, in part, because they were frustrated that "between September of 2012 and today, nobody in this room has been paid a dollar of money for their investment." 5/20/2016 Hrg. Tr. at 23:19-25; *see also id*. 27:21-28:2 (Mr. Dillon: "[M]y group of investors advocates a pooled approach, because you are really, sort of—while we are all in agreement to maximize the value of properties, in the machinations of this, we stand somewhat with the receiver in the fact that we also advocate the one-pot approach."); Dkt. No. 1134 at 20.

Allowing a handful of investors to delay resolution of this action so that they can advance their own unique interests would prejudice those who do not seek a stay, and who have been patiently waiting for this action to conclude since 2012. *See TLC Investments*, 147 F. Supp. 2d at 1042 ("In any situation in which the pie is limited, each individual desiring a slice of that pie is, in a sense, adverse to others also wanting a slice of the pie"). That is especially true where, as is the case here, the receivership assets are insufficient to satisfy all the competing claims. The equities

instead favor treating all investors equally, rather than picking "winners" and "losers." *Wealth Mgmt.*, 628 F.3d at 327 (where a receivership lacks sufficient assets to fully repay investors and the investors' funds are commingled, a distribution plan may properly be guided by the notion that "equality is equity") (*citing Cunningham v. Brown*, 265 U.S. 1, 13 (1924)). Indeed, the Aguirre Investors openly acknowledge that they would receive windfalls from their proposed distribution plan. *See* Stay Mot. at 3. Staying the sale and distribution of receivership assets to all of the investors just so a small few can present meritless appellate arguments in an attempt to grab a bigger slice of that small pie would be grossly inequitable.

**C. The Aguirre Investors' New "Takings" Argument Is Meritless**

The Aguirre Investors also argue, for the first time, that the SEC and the receiver have somehow unlawfully "taken" their property in violation of the Fifth Amendment. *See* Stay Mot. at 9-12. It is unclear which of their appeals they believe this position supports. Regardless, it is without merit, both factually and legally.

They argue that this so-called "taking" first occurred "when the SEC obtained the September 6, 2016 [*sic*] order (Dkt. No. 10), without notice to investors, appointing a receiver to seize control and possession of the 87 GPs." Stay Mot. at 10. The Aguirre Investors then baldly claim, citing no factual support, that "much of the professional services of the Receiver's attorney were directed at assisting the SEC with the prosecution of its case," and that the SEC will "transfer to the U.S. Treasury any disgorgement of funds it obtains from Western." *Id*. Neither is true. The receiver and his counsel have filed 15 separate fee applications, all of which make it clear that he and his counsel have been working to marshal and preserve receivership assets. *See* Dkt. Nos. 63, 175, 197, 526, 566, 600, 818, 820, 961, 962, 1091, 1092, 1096, 1097, 1127, 1154, 1315, 1319. The SEC has also consistently supported the return of investor funds in this matter to investors. *See* Dkt. No. 1232 at 3-4. In addition, the SEC's judgment in this matter is against Louis Schooler, not Western, and the judgment expressly provides that any disgorgement paid by Schooler will be

distributed to investors, to the extent sufficient assets are recovered to cover the costs of a distribution. *See* Dkt. No. 1190 at 5 (SEC "shall hold the funds" in a "'Fund'" and "may propose a plan to distribution the Fund subject to the Court's approval").

Moreover, to establish an unlawful taking, the Aguirre Investors must show both a cognizable "property interest for purposes of the Fifth Amendment" and that "the governmental action at issue amounted to a compensable taking." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). This, they cannot do. As the Court of Federal Claims made clear, where "a court-appointed receiver has been given authority over property under a lawful exercise of the court's power to enforce its judgments," there can be no constitutional taking. *Johnson v. United States*, 49 Fed. Cl. 648, 655 (Fed. Cl. 2001). As the *Johnson* court further observed, an "order establishing the receiver was an order tied to the enforcement of the district court's judgment," and so the "order and appointment of the receiver fall squarely outside the takings clause." *Id.*

The same is true here. Receivers in SEC enforcement actions are appointed by courts, under their equitable powers, to effectuate the enforcement of the federal securities laws. *See, e.g., SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2nd Cir. 1972) ("we repeatedly have upheld the appointment of trustees or receivers to effectuate the purposes of the federal securities laws") (*citing SEC v. S&P National Corp.*, 360 F.2d 741, 750 (2nd Cir. 1966); *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 63 (2nd Cir. 1965); *Esbitt v. Dutch-American Mercantile Corporation*, 335 F.2d 141, 143 (2nd Cir. 1964)). As this Court has acknowledged, "[t]he appointment of a receiver is a well-established equitable remedy available to the SEC in its civil enforcement proceedings." Dkt. No. 1304 at 8 (*citing* Janvey, *An Overview of SEC Receiverships*, 38 No. 2 Securities Regulation Law Journal ART 1 (2010)). A receiver thus plays a crucial role in preventing further dissipation and misappropriation of investors' assets. *See Wencke*, 783 F.2d at 836-37 n.9. Therefore, there has been no taking by the receiver (or the SEC) because this Court's

appointment of the receiver was directly tied to its enforcement of the securities laws and the judgments entered in the case.

In addition, the Aguirre Investors' newfound takings argument will fail on appeal because the law is well-settled that the receiver does not act as a governmental entity and cannot commit a taking when property is collected and marshalled by a receiver to prevent waste and dissipation so that it can be preserved for private parties. That is the case here. The receiver has not acted as an agent of the SEC or the United States. Rather, he acts at the court's direction to preserve and distribute the assets of the estate for the benefit of creditors and investors—not the public. *See, e.g., SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 373 (5th Cir. 1982); *Manor Nursing Centers*, 458 F.2d at 1105 (*citing S&P National Corp.*, 360 F.2d at 750; *Lankenau*, 350 F.2d at 63; *Esbitt*, 335 F.2d at 143). Thus, no taking has occurred.

## III. CONCLUSION

For all the forgoing reasons, the SEC requests that the Court deny the Aguirre Investors' motions for a stay.

Dated: June 29, 2016

Respectfully submitted,

*/s/ Lynn M. Dean*
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**PROOF OF SERVICE**

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

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On June 29, 2016, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO AGUIRRE INVESTORS' MOTION FOR A STAY PENDING APPEAL** on all the parties to this action addressed as stated on the attached service list:

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☐ **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.

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

Date: June 29, 2016

*/s/ Lynn M. Dean*
Lynn M. Dean

***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 Dean, Lynn on 6/29/2016 at 5:21 PM PDT and filed on 6/29/2016
**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:** 1325

**Docket Text:**
**RESPONSE in Opposition re [1316] MOTION to Stay re [1305] Order on Motion for Order,, Order on Motion to File Documents Under Seal, [1304] Order on Motion for Miscellaneous Relief,, Order on Motion for Miscellaneous (Other 1), filed by Securities and Exchange Commission. (Dean, Lynn)**

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

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