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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF CALIFORNIA

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SECURITIES AND EXCHANGE
COMMISSION,

CASE NO. 3:12-cv-2164-GPC-JMA

11

Plaintiff,

ORDER

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**GRANTING IN PART AND
DENYING IN PART INVESTORS'
MOTIONS TO INTERVENE**

13

14

v.

[ECF Nos. 1227, 1229]

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**GRANTING IN PART AND
DENYING IN PART DILLON
INVESTORS' MOTION TO
UNSEAL DOCUMENTS**

17

[ECF No. 1228]

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LOUIS V. SCHOOLER and FIRST
FINANCIAL PLANNING
CORPORATION, dba Western
Financial Planning Corporation,**GRANTING VARIOUS EX PARTE
MOTIONS**

19

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Defendants.

[ECF Nos. 1265, 1273, 1275, 1277
1293]

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Before the Court are two motions to intervene filed by two groups of investors¹ who have invested in various general partnerships that are subject to the receivership: (1) Dillon Investors' motion to intervene ("Dillon Mot."), ECF No. 1227; and (2) Aguirre Investors' motion to intervene ("Aguirre Mot."), ECF No. 1229. These motions

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¹ The "Dillon Investors" and "Aguirre Investors" (collectively "Investors") each represent over one hundred investors. *See* Dillon Mot., Ex. A, at 1 n.1; Aguirre Mot., Ex. A, at 2–3.

1 have been fully briefed. *See* Receiver Dillon Resp., ECF No. 1259; Receiver Aguirre
2 Resp., ECF No. 1260; SEC Resp., ECF No. 1266; Dillon Reply, ECF No. 1271;
3 Aguirre Reply, ECF No. 1274.

4 Also before the Court is Dillon Investors’ motion to unseal documents (“Unseal
5 Mot.”), ECF No. 1228. This motion has been fully briefed. *See* Receiver Unseal Resp.,
6 ECF No. 1261; SEC Resp., ECF No. 1266; Unseal Reply, ECF No. 1270.

7 Finally, before the Court are various *ex parte* motions, including (a) Aguirre
8 Investors’ *ex parte* motion to withdraw misstatement of fact, ECF No. 1265; (b)
9 Aguirre Investors’ *ex parte* motion for leave to file excess pages, ECF No. 1273; (c)
10 Receiver’s *ex parte* motion for leave to file supplement to court-ordered proposal
11 regarding GPs, ECF No. 1275; (d) Aguirre Investors’ *ex parte* motion for leave to file
12 opposition to SEC late joinder, ECF No. 1277; and (e) Aguirre Investors’ *ex parte*
13 motion for leave to file opposition to Receiver’s court-ordered proposal regarding GPs,
14 ECF No. 1293.

15 Having considered the parties’ submissions and the applicable law, and for the
16 reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** Investors’
17 motions to intervene; **GRANTS IN PART** and **DENIES IN PART** Dillon Investors’
18 motion to unseal; and **GRANTS** *ex parte* motions ECF Nos. 1265, 1273, 1275, 1277,
19 and 1293.

20 **BACKGROUND**

21 The facts of the case having been recited in the Court’s previous orders, the
22 Court will not reiterate them here. *See, e.g.*, ECF No. 583. In short, this is an action by
23 Plaintiff SEC against Defendants Schooler and Western Financial Planning
24 Corporation (“Western”) for violations of federal securities laws in connection with
25 Defendants’ defrauding of investors in the sale of general partnership (“GP”) units
26 which were, as a matter of law, unregistered securities. *See* ECF No. 1081.

27 On May 19, 2015, the Court granted in part and denied in part the SEC’s motion
28 for summary judgment on its fourth claim for relief, finding that Defendant had

1 engaged in the sale of unregistered securities and that the appropriate amount of
2 disgorgement was \$136,654,250, plus prejudgment interest calculated to May 19, 2015.
3 ECF No. 1074 at 25. On June 3, 2015, the Court granted in part and denied in part the
4 SEC's motion for summary judgments on its first and second claims for relief, granting
5 both causes of action as to all elements with regards to the fair market value
6 representation of the Stead property in Western's sales brochure. ECF No. 1081 at 20.

7 On January 21, 2016, the Court granted the SEC's motion for final judgment
8 against Defendant Schooler, directing (1) a permanent injunction restraining the
9 Defendant from violating federal securities laws; (2) disgorgement of \$136,654,250
10 with prejudgment interest of \$10,956,030 (for a total of \$147,610,280); and (3)
11 imposition of a civil penalty of \$1,050,000. ECF No. 1170 at 8–13.

12 On February 4, 2016, Receiver Thomas C. Hebrank ("Receiver") filed a motion
13 for an order (a) authorizing the Receiver to conduct an orderly sale of general
14 partnership properties; (b) approving the plan of distributing receivership assets; and
15 (c) approving procedures for the administration of investor claims ("Orderly Sale
16 Mot."), ECF No. 1181. These motions followed.

17 DISCUSSION

18 I. Motions to Intervene

19 Dillon Investors and Aguirre Investors move to intervene in a number of
20 different ways, including in order to (a) file complaints-in-intervention; (b) contest the
21 Receiver's previous sale recommendations with regards to a number of properties; (c)
22 vacate previous Court orders approving Receiver sale recommendations; (d) "oversee
23 and evaluate" the receivership; (e) move for an accounting or audit of the receivership;
24 (f) obtain full access to the Receiver's filings and recommendations submitted to the
25 Court; (g) obtain all books and records related to the Receiver's management of the
26 GPs and the GPs' assets; (h) release the GPs from the receivership; and (i) oppose the
27 Receiver's orderly sale plan. *See* Dillon Mot., Ex. A, at 14–15; Aguirre Mot., Ex. A,
28 at 15–16.

1 For the following reasons, the Investors' motions to intervene, ECF Nos. 1227,
2 1229, are **GRANTED** for the limited purposes of opposing the Receiver's orderly sale
3 motion, ECF No. 1181, and **DENIED** in all other respects.

4 **a. Intervention as of Right**

5 In relevant part, Federal Rule of Civil Procedure 24(a) provides:

6 On timely motion, the court must permit anyone to intervene who . . .
7 claims an interest relating to the property or transaction that is the
8 subject of the action, and is so situated that disposing of the action may
as a practical matter impair or impede the movant's ability to protect its
interest, unless existing parties adequately represent that interest.

9 Thus, there are four requirements for intervention as of right: (1) timeliness, (2) an
10 interest relating to property or transaction that is the subject of the action, (3)
11 disposition of the action may impair or impede the movant's ability to protect the
12 interest, and (4) the movant's interest is not adequately represented by existing
13 parties. *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir.
14 1996). Failure to satisfy even one of these elements prevents the applicant from
15 intervening as of right. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d
16 1297, 1302 (9th Cir. 1997).

17 Here, the second and third elements are plausibly met as to the Receiver's
18 orderly sale motion. As investors in Defendants' scheme, the Investors have an
19 interest relating to the transaction that is the subject of the action. The disposition of
20 the GPs, because it involves the winding up of the receivership and the sale of the
21 GP properties, may, as a practical matter, impair the Investors' ability to protect
22 their interests in the GP properties.

23 However, to the extent that the Investors seek to intervene in order to (a) file
24 complaints-in-intervention; (b) contest the Receiver's previous sale
25 recommendations with regards to a number of properties; (c) vacate previous Court
26 orders approving Receiver sale recommendations; (d) "oversee and evaluate" the
27 receivership; (e) move for an accounting or audit of the receivership; (f) obtain full
28 access to the Receiver's filings and recommendations submitted to the Court; (g)

1 obtain all books and records related to the Receiver's management of the GPs and
2 the GPs' assets; and (h) release the GPs from the receivership, Investors' motions
3 are untimely.

4 First, to the extent that Investors are seeking to audit the receivership,
5 examine receivership records, question the Receiver's fiscal propriety, or release the
6 GPs from the receivership, the Court has already carefully considered these issues
7 during the course of litigation. The Court first ordered the GPs to be released from
8 the receivership upon satisfaction of certain conditions on August 16, 2013. ECF
9 No. 470. Following the Court's first summary judgment order, the Court *sua sponte*
10 reconsidered the August 16, 2013 Order and directed additional briefing as to
11 whether the GPs should be kept in the receivership on July 22, 2014. On October 10
12 and October 15, 2014, an investor hearing was held and the GPs were afforded the
13 opportunity to speak. Finally, on March 4, 2015, the Court issued an Order Keeping
14 GPs Under Receivership, ECF No. 1003. In that Order, the Court took into account
15 the views of investors expressed at the hearing, as well as the numerous other
16 communications from investors received by the Court. *See id.* at 1, 4.

17 Moreover, during the course of those proceedings the Court examined
18 numerous allegations from Defendants and individual investors that the Receiver
19 was behaving unethically or irresponsibly, and found no merit in those allegations.
20 *See, e.g., id.* at 7–8. In addition, the Court has reviewed and approved the reports
21 the Receiver has provided as to expenses associated with administering the
22 receivership. *See* ECF Nos. 169, 190, 511, 637, 640, 922, 1006, 1134, 1168. Thus,
23 the Court finds Investors' efforts to re-litigate issues concerning the Receiver's
24 fiscal propriety untimely.

25 Second, to the extent that Investors seek to vacate the Court's previous orders
26 approving Receiver sale recommendations and contest the Receiver's sale
27 recommendations, the Court also finds these efforts to be untimely. Pursuant to the
28 Court's March 4, 2015 Order Keeping GPs Under Receivership, the Receiver

1 submitted a report-and-recommendation dividing the GPs into categories based on
2 their fiscal health. ECF No. 1023. After reviewing the Receiver's report-and-
3 recommendation, the Court issued an Order on May 12, 2015 adopting the
4 Receiver's recommendations in part, and directing the Receiver to take certain
5 measures to attempt to raise capital for the underwater properties and, barring
6 success, to initiate an orderly sale process for those properties. *See* ECF No. 1069.
7 The orders and motions Investors now seek to contest flow from that May 12, 2015
8 Order. *See, e.g.*, Dillon Mot., Ex. A, at 14; ECF Nos. 1085, 1168, 1191.

9 Investors provide no good reason why they did not move to intervene at the
10 time the Court approved the orderly sale process, rather than over a year later. And
11 again, the Court carefully considered the views of parties and investors as to
12 maintaining the underwater GPs when considering whether to keep the GPs under
13 receivership, and directed the Receiver to provide an opportunity for investors to
14 prevent the sale of underwater GPs by raising capital in order to enable those GPs to
15 pay their expenses. *See* ECF No. 1003 at 21; ECF No. 1069 at 3.²

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17 ² Investors also argue that the Court's Orders and the Receiver's motions should
18 be vacated for violation of 28 U.S.C. § 2001(b). Dillon Mot. 13. § 2001 provides in
relevant part,

19 (a) Any realty or interest therein sold under any order or decree of any
20 court of the United States shall be sold as a whole or in separate parcels
21 at public sale at the courthouse of the county, parish, or city in which the
22 greater part of the property is located, or upon the premises or some parcel
23 thereof located therein, as the court directs. Such sale shall be upon such
24 terms and conditions as the court directs. Property in the possession of a
25 receiver or receivers appointed by one or more district courts shall be sold
at public sale in the district wherein any such receiver was first appointed,
at the courthouse of the county, parish, or city situated therein in which
the greater part of the property in such district is located, or on the
premises or some parcel thereof located in such county, parish, or city, as
such court directs, unless the court orders the sale of the property or one
or more parcels thereof in one or more ancillary districts.

26 (b) After a hearing, of which notice to all interested parties shall be given
27 by publication or otherwise as the court directs, the court may order the
28 sale of such realty or interest or any part thereof at private sale for cash or
other consideration and upon such terms and conditions as the court
approves, if it finds that the best interests of the estate will be conserved
thereby. Before confirmation of any private sale, the court shall appoint

1 Third, to the extent that Investors are seeking a general “right to intervene,”
2 *see, e.g.*, Dillon Mot., Ex. A, at 15 (seeking “[a]n order declaring that the
3 Intervening Group has standing to oppose further recommendations and motions
4 made by Hebrank with regard to the management and/or disposition of the GPs’
5 assets; . . . to make motions in relation to the Hebrank’s management and/or
6 disposition of the GPs’ assets; . . . [and] to make recommendations regarding the
7 continuing management and/or sale of the GPs and the GPs’ assets”), the Court
8 finds such a request to be both untimely and overbroad.

9 However, to the extent that Investors seek to oppose the Receiver’s orderly
10 sale motion regarding its proposal for the disposition of receivership assets, the
11 Court finds such an intervention timely. The Receiver did not move for
12 authorization to conduct an orderly sale of the GP properties until February 4, 2016,
13 and Aguirre and Dillon Investors promptly sought to oppose on February 18, 2016,
14 ECF No. 1194, and March 22, 2016, ECF No. 1211, respectively, even though they
15 initially failed to comply with Fed. R. Civ. P. Rule 24 in filing their oppositions. *See*
16 ECF No. 1224.

18 three disinterested persons to appraise such property or different groups
19 of three appraisers each to appraise properties of different classes or
20 situated in different localities. No private sale shall be confirmed at a
21 price less than two-thirds of the appraised value. Before confirmation of
22 any private sale, the terms thereof shall be published in such newspaper
or newspapers of general circulation as the court directs at least ten days
before confirmation. The private sale shall not be confirmed if a bona fide
offer is made, under conditions prescribed by the court, which guarantees
at least a 10 per centum increase over the price offered in the private sale.

23 However, a plain reading of the statute demonstrates that no violation of § 2001(b)
24 occurs unless a sale has been made, and no sale has yet occurred in this case. The
25 Receiver has indicated that he intends to comply with the requirements of § 2001,
26 potentially by proceeding with a public sale under the provisions of § 2001(a). ECF
27 No. 1225 at 11; ECF No. 1290 at 2. Thus, the Court finds that there has not yet been a
28 private sale of property such that § 2001 was violated. (The Receiver also argues that
the parties waived § 2001 because it was not mentioned in the Court’s May 12, 2015
Order. *See* ECF No. 1225 at 8–11; ECF No. 1290 at 1–2. However, the parties did not
make an explicit waiver of § 2001 in this case. *See Huntington Nat’l Bank v. Najero,*
Inc., 2014 U.S. Dist. LEXIS 152474 (E.D. Mich. Oct. 27, 2014) (observing that
parties, but not the court itself, can waive the requirements of § 2001)).

1 The final element is whether the movant’s interest is adequately represented
2 by the existing parties. In making this determination, the Court must consider: (1)
3 whether the Receiver’s interests are such that he will “undoubtedly” make all the
4 movant’s arguments; (2) whether the Receiver is capable of and willing to make
5 such arguments; and (3) whether the movant “would offer any necessary elements to
6 the proceedings that” the Receiver would otherwise “neglect.” *Northwest Forest*
7 *Res. Council*, 82 F.3d at 838. The SEC and the Receiver argue that Investors are
8 adequately represented by the Receiver. Receiver Dillon Resp. 8; Receiver Aguirre
9 Resp. 8; SEC Resp. 12. The Investors disagree, arguing that the Receiver has not
10 demonstrated a willingness to make all of their arguments, and that they offer a
11 “necessary element[] to the proceedings” that the Receiver would otherwise
12 “neglect.” Dillon Reply 7; Aguirre Reply 10.

13 The Court finds that the Investors’ interest is not adequately represented by
14 the existing parties. The SEC and the Receiver characterize the differences of
15 opinion between the Receiver and Investors as strategic, arguing that the Receiver
16 and Investors share the same goal of maximizing the value of the GP properties to
17 allow the largest return possible to the Investors, and merely differ regarding the
18 best approach to do so. *See* SEC Resp. 12–13 (citing *S.E.C. v. TLC Investments &*
19 *Trade Co.*, 147 F. Supp. 2d 1031, 1042 (C.D. Cal. 2001) (finding investors
20 adequately represented where they shared same “ultimate goal” of maximizing
21 estate value as Receiver, but disagreed as to “strategy” of how to do so)). However,
22 other courts have found that investors were not adequately represented where the
23 existing parties have “made it clear [they] will not make all of the arguments that
24 the proposed intervenor would make.” *S.E.C. v. Navin*, 166 F.R.D. 435, 441 (N.D.
25 Cal. 1995).

26 Here, Investors propose plans for the continued management of the
27 receivership considerably at odds with the Receiver’s plans. *Compare generally*
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1 Orderly Sale Mot., *with* Dillon Sale Resp., ECF No. 1234, *and* Aguirre Sale Resp.,
2 ECF No. 1235. Given that the burden of making the show of inadequate
3 representation is “minimal,” *United States v. Stringfellow*, 783 F.2d 821, 827 (9th
4 Cir. 1986), *vacated on other grounds sub nom.*, *Stringfellow v. Concerned*
5 *Neighbors in Action*, 480 U.S. 370 (1987) (citations omitted), the Court finds that
6 Investors’ interests may not adequately be represented by the Receiver.^{3 4}

7 Accordingly, the Investors’ motions to intervene, ECF Nos. 1227, 1229, are
8 **GRANTED** for the limited purposes of opposing the Receiver’s orderly sale
9 motion, ECF No. 1181, and **DENIED** in all other respects. The Court will consider
10 Investors’ various responses to the Receiver’s orderly sale motion, *see* ECF Nos.
11 1234, 1235, 1277, 1293, in deciding the Receiver’s orderly sale motion.

12 **b. Permissive Intervention**

13 In relevant part, Federal Rule of Civil Procedure 24(b) provides:

14 On timely motion, the court may permit anyone to intervene who . . .
15 has a claim or defense that shares with the main action a common
16 question of law or fact. . . . In exercising its discretion, the court must
17 consider whether the intervention will unduly delay or prejudice the
18 adjudication of the original parties’ rights.

19 In addition, the movant must show an independent basis for federal
20 jurisdiction. *Northwest Forest Res. Council*, 82 F.3d at 839. Here, movants have
21 asserted federal securities claims so the Court has an independent basis for
22 jurisdiction over their proposed claims. In addition, undeniably their claims have
23 questions of fact and law in common with the main action.

24 ³ Nor are the Investors’ interests adequately represented by the SEC. *See TLC*
25 *Investments & Trade Co.*, 147 F. Supp. 2d at 1041 (observing that “the SEC’s interests
26 in such an action include protection of the public at large and stopping and deterring
27 future violations of the law, which differ slightly from the investors’ desire to
28 maximize their own recovery”) (citation omitted).

29 ⁴ The SEC also argues that Section 21(g) of the Securities Exchange Act of 1934,
30 15 U.S.C. § 78(u)(g), bars intervention without the SEC’s consent. SEC Resp. 19.
31 However, the Ninth Circuit has never directly addressed this issue, *see generally SEC*
32 *v. ABS Fund, LLC*, 2013 WL 3752119 (S.D. Cal. 2013), and the SEC does not oppose
33 the Investors being heard on the disposition of receivership assets. SEC Resp. 20.

1 However, for the reasons discussed *supra* in Part I.a, allowing broader
2 intervention than limited oppositions to the Receiver’s orderly sale motion would
3 unduly delay this action. Thus, the Court **DENIES** Investors’ motions for
4 permissive intervention.

5 **II. Motion to Unseal**

6 The Dillon Investors move to unseal a number of documents containing
7 offers of purchase and letters of intent to purchase filed by the Receiver pursuant to
8 the May 12, 2015 order authorizing an orderly sale process of underwater GP
9 properties. *See* Unseal Mot. 2–4 (moving to unseal ECF Nos. 826/835, 876/925,
10 988/991, 1028/1040, 1062/1089, 1072/1090, 1020/1088, 1108/1122/1120,
11 1113/1124, 1132/1136, 1159).

12 Dillon Investors argue that the sealing of the documents is in contravention to
13 28 U.S.C. §2001 and that the Investors have a compelling interest in viewing the
14 sealed documents. However, as discussed *supra* in Part I.a n.2, there has yet been no
15 violation of 28 U.S.C. §2001. The sealing of documents related to offers of
16 purchase and letters of intent does not preclude the later publication of any public or
17 private sale or independent appraisal of the GP property; instead, as the Court stated
18 in its orders approving the Receiver’s motions to seal those documents, it prevents
19 the publication of information that could harm the GPs’ ability to sell their
20 properties if publicly disclosed, or lower the eventual selling price of the property.
21 *See, e.g.*, ECF Nos. 835 (observing that “[w]here a court filing contains ‘business
22 information that might harm a litigant’s competitive standing’ the court may
23 properly deny public access” (quoting *Nixon v. Warner Commc’ns*, 435 U.S. 589,
24 598 (1978))), 924, 990, 1039, 1086, 1087.

25 Thus, the unsealing of the documents for public review could have a negative
26 impact on the GPs’ ability to maximize the value of the properties under
27 receivership. That said, the Receiver and Dillon Investors dispute whether or not the
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1 sealed documents have been provided to the Investors. *Compare* Receiver Unseal
2 Resp. 3 (stating that “the sealed documents have all been provided to Mr. Dillon and
3 Mr. Aguirre”) and Unseal Reply 1 (stating that “Timothy P. Dillon (“Dillon”) has
4 not been provided the sealed documents despite his repeated requests”). Neither the
5 SEC nor the Receiver has identified a reason why investors, as opposed to the
6 public, should not be privy to these documents. Thus, the Court **ORDERS** the
7 Receiver to provide the Investors with access to the full versions of the sealed and
8 redacted documents identified in Dillon Investors’ motion to unseal.

9 **CONCLUSION**

10 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 11 1. The Investors’ motions to intervene, ECF Nos. 1227, 1229, are **GRANTED**
12 **IN PART** and **DENIED IN PART**. The Court will permit the Investors to
13 intervene for the limited purposes of opposing the Receiver’s orderly sale
14 motion, ECF No. 1181. However, investors’ motions to intervene are
15 **DENIED** in all other respects.
- 16 2. Dillon Investors’ motion to unseal, ECF No. 1228, is **GRANTED IN PART**
17 and **DENIED IN PART**. The Court **ORDERS** the Receiver to provide the
18 Investors with access to the full versions of the sealed and redacted
19 documents identified in Dillon Investors’ motion to unseal. However, the
20 disputed documents will remain sealed to the public.
- 21 3. Aguirre Investors’ *ex parte* motion to withdraw misstatement of fact, ECF
22 No. 1265; Aguirre Investors’ *ex parte* motion for leave to file excess pages,
23 ECF No. 1273; Receiver’s *ex parte* motion for leave to file supplement to
24 court-ordered proposal regarding GPs, ECF No. 1275; Aguirre Investors’ *ex*
25 *parte* motion for leave to file opposition to SEC late joinder, ECF No. 1277;
26 and Aguirre Investors’ *ex parte* motion for leave to file opposition to
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Receiver's court-ordered proposal regarding GPs, ECF No. 1293, are
GRANTED.

4. The hearing set for Investors' motions, ECF Nos. 1227, 1228, 1229, 1293, on
May 20, 2016, is **VACATED**. All other motions set for May 20, 2016 having
been decided, the Court will solely consider the Receiver's orderly sale
motion, ECF No. 1181, at the May 20, 2016 hearing. The Dillon and Aguirre
Investors, as well as other individual investors, will have an opportunity to be
heard at the hearing.

IT IS SO ORDERED.

DATED: May 18, 2016


HON. GONZALO P. CURIEL
United States District Judge