

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 0:21-cv-61176-AHS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**PROPERTY INCOME INVESTORS LLC,
EQUINOX HOLDINGS INC.,
PROPERTY INCOME INVESTORS 26 LLC,
PROPERTY INCOME INVESTORS 304 LLC,
PROPERTY INCOME INVESTORS 201 LLC,
PROPERTY INCOME INVESTORS 3504 LLC,
PROPERTY INCOME INVESTORS 1361 LLC,
PROPERTY INCOME INVESTORS 4020 LLC,
PROPERTY INCOME INVESTORS 9007 LLC,
PROPERTY INCOME INVESTORS 417 LLC,
PROPERTY INCOME INVESTORS 4450 LLC,
PROPERTY INCOME INVESTORS 3050 LLC,
LARRY B. BRODMAN, AND
ANTHONY NICOLSI (F/K/A ANTHONY
PELUSO)**

Defendants.

JOINT SCHEDULING REPORT

Pursuant to Federal Rule of Civil Procedure 26(f), and Southern District of Florida Local Rule 16.1(b)(2) and (b)(3), and the, the parties held a telephone conference on July 21, 2021 to develop the following written discovery plan and scheduling report and order as required by the aforementioned rules. Attending for each party were:

Plaintiff Securities and Exchange Commission: Alice Sum, Esq.

Defendant Larry R. Brodman: Kyle DeValerio, Esq.¹

Defendant Anthony Nicolosi: Mark Perry, Esq.

Receiver: Jordan Maglich, Esq.

Written Discovery Plan

General Statement:

Because Judgments of Permanent Injunction and Other Relief have been entered against Defendants Brodman and Nicolosi (DE 8 and 9, respectively), trial on liability is not needed. Pursuant to the Judgments, the Court shall determine the amounts of the disgorgement, if any, prejudgment interest thereon, and civil penalty upon motion of the Commission. These issues can be determined either on the papers or at a 1-2 day hearing. Defendants state that they are not waiving the right to have a hearing before the Court on the disgorgement issues.

The parties believe discovery will take several months, but they disagree as to exactly how much time is needed for discovery. The parties anticipate seeking written and document discovery and taking depositions. The parties have not yet determined whether they see a need for taking more than 10 depositions per side as limited by Federal Rule of Civil Procedure 30(a)(2)(A); if one or more parties seeks more than 10 depositions the parties will attempt to arrive at a stipulation to be filed with the Court. The parties do not propose any limits on written discovery at this time other than those set forth in the Federal Rules of Civil Procedure. If any party seeks additional limits or written discovery the parties will attempt to arrive at a stipulation to be filed with the Court.

(A) SEC's Position Regarding Determination of Disgorgement Amount and Discovery

The SEC believes that discovery in this case will be limited because the only issues remaining for the Court's determination are disgorgement and civil penalties, and the schedule proposed by the SEC below is commensurate with and reasonable based on this. The disgorgement amounts against Brodman and Nicolosi relate to their ill-gotten gains, monies that they put in their pockets to which they were not entitled. These amounts, including legitimate business expenses (if any/applicable) as set forth in *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020), can and should be determined independently from the Receiver's liquidation and distribution process. Even if the Court assumes that the Receiver is highly successful in her recovery of assets, Brodman and Nicolosi's entitlement, if any, to some of the recovery would be determined in the claims process, which is necessarily separate and apart from the disgorgement and civil penalty determination. If their claims are not objected to and are otherwise approved, then any such amounts potentially would be subject to garnishment. Accordingly, the discovery and case schedule should not be tied to the Receiver's liquidation and distribution process.

(B) Brodman's Position Regarding Determination of Disgorgement Amount and Discovery

Mr. Brodman voluntarily consented to the Securities and Exchange Commission's request for the appointment of a Receiver over the PII entities to liquidate the substantial real estate portfolio in

¹ Counsel has not made an appearance of record and is only assisting Mr. Brodman with Receivership transitional matters.

an orderly and equitable manner for the benefit of the investors. Indeed, at the time that Brodman turned over the PII entities and the Receiver took control of the PII entities, the PII estate contained two escrow accounts, established by Mr. Brodman for the Receiver, with more than \$1.125 million in cash and seven multi-family properties (ECF 20 at 30). Receiver should be allowed to complete her work before determining the amounts of the disgorgement, prejudgment interest thereon, and any civil penalty. In addition to legitimate business expenses allowed in *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020), Mr. Brodman was entitled to fifty percent of any profits made by the PII entities, thus the amounts recovered by the Receiver will be set off against any ill-gotten gains and proceeds. (The SEC may seek a “disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims” under 15 U.S.C. § 78u(d)(5)). These set offs will be primary evidence that Mr. Brodman will need to be able to adduce at a remedies hearing for this Court to properly set the amount of disgorgement, prejudgment interest, and civil penalties. Building this into the proposed schedule will conserve the resources of the parties and is in the interests of judicial economy to avoid multiple hearings on set offs mandated by Liu.

(C) Nicolosi’s Position Regarding Determination of Disgorgement Amount and Discovery

The Receiver should be allowed to complete her work before determining the amounts of the disgorgement, prejudgment interest thereon, and any civil penalty. In addition to legitimate business expenses allowed in *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020), the SEC may seek a “disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims” under 15 U.S.C. § 78u(d)(5)). These set offs (and other evidence) will be evidence that Mr. Nicolosi will need to be able to adduce at a remedies hearing for this Court to properly set the amount of disgorgement, prejudgment interest, and civil penalties. Building this into the proposed schedule will conserve the resources of the parties and is in the interests of judicial economy to avoid multiple hearings on set offs mandated by Liu.

The parties developed the following scheduling plan using the factors set forth in Local Rule 16.1(b)(2) and Federal Rule of Civil Procedure 26(f):

(A) The likelihood of settlement.

The parties held significant settlement discussions at the conclusion of the Commission’s investigation into this matter and prior to the Commission filing the Complaint. While the parties have differences in their view of the Commission’s entitlement to the relief requested, the parties will continue to discuss possible resolutions.

(B) The likelihood of appearance in the action of additional parties.

The parties do not anticipate the appearance of additional parties.

(C) Proposed limits on the time:

Because the parties were unable to agree on a schedule, they are separately listing their respective proposed deadlines:

	SEC’s Proposed	Defendants’ Proposed
Initial Disclosures	8/23/21	9/3/21
Select Mediator	9/13/21	4/15/22

Expert Disclosure	11/5/21	4/15/22 (Plaintiff disclosure)
Rebuttal Expert Disclosure	11/19/21	5/13/22 (Defendant disclosure)
Discovery Cutoff	12/3/21	6/10/22
Conduct Mediation	1/7/22	7/15/22
Dispositive Motions (motion for disgorgement)	1/17/22	7/22/22

(D) Proposals for the formulation and simplification of issues, including the elimination of frivolous claims or defenses, and the number and timing of motions for summary judgment or partial summary judgment.

The parties will continue to discuss the simplification of issues and paring down of any claims and defenses.

(E) The necessity or desirability of amendments to the pleadings.

The parties do not anticipate amending the pleadings at this time.

(F) Suggestions on the advisability of referring matters to a Magistrate Judge or master.

The parties believe the standard referral of discovery motions to the Magistrate is appropriate. The parties do not believe referring matters to a special master would be appropriate.

(G) Any issues about: (i) disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (ii) claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert those claims after production – whether to ask the Court to include their agreement in an order under Federal Rule of Evidence 502; and (iii) when the parties have agreed to use the ESI Checklist available on the Court’s website, matters enumerated on the ESI Checklist.

The parties agree to preserve all discoverable or potentially discoverable information within their possession, custody, or control. Whenever feasible, the parties will produce all electronically stored information (“ESI”) in bates-stamped, OCR text, or tiff format. Alternatively, if unable to produce ESI in such a manner, the parties will produce the information in the existing stored format. The parties further agree that they will maintain all relevant ESI in its original format until final resolution of this matter.

The parties have agreed that if any party inadvertently produces ESI or other documents that the producing party claims after production are privileged, the producing party will notify the opposing party promptly after learning that an inadvertent production of privileged material has occurred. *See* FRE 502. Further, the receiving party shall promptly return, sequester, or destroy the material in question, and must take reasonable steps to retrieve the information from third parties, including expert witnesses. However, the parties reserve their right to claim the disclosed information was not privileged, or that the privilege was waived, and submit the matter to the Court if an agreement cannot be reached.

(L) Any other information that might be helpful to the Court in setting the case for status or pre-trial conference.

None at this time.

August 4, 2021.

Respectfully submitted,

/s/Alice Sum

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² Larry Brodman's portion of this Joint Scheduling Report was prepared by Mr. Brodman with the assistance of counsel.

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PELUSO)**

Defendants.

SCHEDULING ORDER

The parties must comply with the following schedule:

	Deadline to serve initial disclosures
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	Deadline to select mediator
	Deadline to serve expert disclosures (Plaintiff disclosure)
	Deadline to serve rebuttal expert disclosure (Defendant disclosure)
	Discovery cutoff
	Deadline to complete mediation.
	Dispositive Motions deadline.

DONE AND ORDERED in Chamoos Fort Lauderdale, Florida this ____ day of _____, 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel of record via CM/ECF