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19 **UNITED STATES DISTRICT COURT**
20 **SOUTHERN DISTRICT OF CALIFORNIA**

21 SECURITIES AND EXCHANGE
22 COMMISSION,

23 Plaintiff,

24 v.

25 LOUIS V. SCHOOLER and FIRST
26 FINANCIAL PLANNING
27 CORPORATION d/b/a WESTERN
28 FINANCIAL PLANNING
CORPORATION,

Defendants.

) Case No. 12 CV 2164 GPC JMA

) **DEFENDANTS' REPLY IN SUPPORT**
) **OF MOTION FOR PARTIAL**
) **RECONSIDERATION OF ORDER**
) **APPROVING RECEIVER'S**
) **SEVENTH INTERIM REPORT**

) Date: June 13, 2014

) Time: 1:30 p.m.

) Courtroom: 2D

) Judge: Hon. Gonzalo P. Curiel

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1 Defendants LOUIS V. SCHOOLER (“Schooler”) and FIRST FINANCIAL
2 PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING
3 CORPORATION (“Western”) (collectively “Defendants”) respectfully submit the
4 following reply in support of their Motion for Partial Reconsideration of this Court’s
5 order of February 25, 2014 (“Motion”), approving the Court-appointed Receiver’s
6 Seventh Interim Report (Dkt. No. 549) (“Court’s Order”).

7 I.

8 INTRODUCTION

9 Both the SEC and the Receiver oppose Defendants’ Motion on the grounds
10 that no offers to buy Western’s lands have been made and no prior restraint has
11 occurred. However, neither opposition addresses the main issues that Defendants
12 object to: the Receiver’s listing Western’s lands for sale, and the Court’s “reminder”
13 to Schooler “that he is prohibited from interfering...with the Receiver’s
14 performance of his duties.” Dkt. No. 549, Para. 2.

15 Neither the SEC nor the Receiver acknowledge that there is no need or
16 justification to commence the liquidation of Western’s land holdings when the
17 market for undeveloped raw land remains depressed. The only people who will
18 benefit from the sale of the properties will be the Receiver and his counsel, since the
19 money would go to pay their fees; the GP investors will probably never see a cent.
20 The Receiver’s argument that a sale of the land at this time will be more beneficial
21 than “holding these properties indefinitely and paying property taxes and insurance
22 premiums” is ludicrous and ignorant of the realities of land valuation and
23 appreciation. Furthermore, there is no definition of what a “reasonable” offer would
24 be, and since the Receiver’s appraisals value the land so low, a “reasonable” offer at
25 or barely above the Receiver’s sales price would still net only pennies on the dollar.
26 Therefore, Paragraph 1 of the Order must be stricken.

27 Paragraph 2 of the Order remains troublesome, despite the SEC’s claims that
28 this Court’s clarifying comments in its order denying Defendants’ *ex parte* request

1 for an order shortening time (Dkt. No. 562) meant that Paragraph 2 did not impose a
2 prior restraint on Mr. Schooler's rights of freedom of speech. The problem with
3 Paragraph 2 is that it opens the door for the Receiver to seek judicial punishment of
4 Defendants for criticizing his administrative bungling and his purportedly-neutral
5 but actually one-sided reports (which indicate his abdication of his role as an arm of
6 this Court and his assuming the mantle of an arm of the SEC). The Receiver has
7 already hinted as much in his statement that Mr. Schooler's letters "contain
8 objectively false statements" and "discourage investors from paying" and therefore
9 this Court "could have" held Mr. Schooler in contempt for violating the Preliminary
10 Injunction by writing letters to his fellow GP investors (Dkt. No. 577, 4:6-10). This
11 squarely raises the specter described in Defendants' Motion: that Mr. Schooler
12 cannot voice his opinion or present factually-correct information to his fellow
13 investors without being hauled into court by the Receiver for contempt, under the
14 guise of this Court's "reminder" about not interfering with the Receiver. Paragraph
15 2 remains a prior restraint on Mr. Schooler's rights of freedom of speech and
16 association and must be stricken.

17 II.

18 ARGUMENT

19 A. Paragraph 1 of the Court's Order Jeopardizes Western's Property 20 Interests By Requiring That Property Be Listed for Sale And 21 Eventually Sold, At a Time When Values Have Plummeted; The 22 Prior Sales of Western's Property Are Dissimilar

23 As noted, Paragraph 1 does not provide for any halt to the sale of Western's
24 land. Under its terms, Defendants can object to a particular offer to buy, but cannot
25 stop the entire sale process. The current depressed values of the raw-land market
26 are obvious to all, yet the efficacy of selling the land at this time would not be
27 questioned.

28 ///

1 The Receiver claims that “the Court should not hesitate to approve sales of
2 Western's real properties if and when reasonable offers are received and noticed
3 motions filed.” Dkt. No. 577, 3:11-12. However, the Receiver does not attempt to
4 define a “reasonable offer.” Given the Receiver’s past conduct, any offer that
5 exceeds the Receiver’s claimed value of the properties by one cent could be
6 considered “reasonable.” The excess of discretion and lack of boundaries created by
7 Paragraph 1, coupled with the Receiver’s practice of liquidating assets to pay
8 himself (or in any event not to preserve any corpus for the GP investors whose
9 interests he claims to protect), indicates that a “fire sale” of Western’s land is
10 permitted by Paragraph 1.

11 The Receiver also asserts that “there is no evidence suggesting that holding
12 these properties indefinitely and paying property taxes and insurance premiums will
13 produce a better recovery than selling them at a fair market price now.” Dkt. No.
14 577, 3:14-16. However, the Receiver’s statement shows an astounding ignorance of
15 property appreciation. These parcels, which are undeveloped, do not have the rapid
16 appreciation potential of parcels that are developed with buildings. They, like the
17 GP-held lands, are held for the long term, to wait out the periodic dips in value. The
18 Receiver’s proposal, as authorized in Paragraph 1, circumvents the plan by pushing
19 for a sale at the bottom (or near the bottom) at a time when the Receiver’s own
20 appraisals of the properties (*see* Dkt. No. 203) show that the properties would be
21 worth pennies on the dollar, or at most maybe 20 cents. The dearth of evidence is
22 with *the Receiver’s* claim that selling the properties now would be better than
23 continuing to hold onto the land for eventual resale (as dozens of GP-held properties
24 have done for a substantial profit).

25 While the SEC points out that this Court has previously authorized the sale of
26 some of Western’s assets (Dkt. No. 578, 3:7-8), those prior sales are totally
27 dissimilar from what is proposed under Paragraph 1. It is commonly known that
28 most automobiles, such as those sold by the Receiver, depreciate in value over time,

1 while the gold coins sold by the Receiver had appreciated substantially since they
2 were purchased by Western. Dkt. No. 85-2 (listing gold coins' value at \$50,000 to
3 \$55,000); Dkt. No. 504, Ex. 17 (20 gold coins bought by Western for \$20,034); Dkt.
4 No. 481 (all coins sold for \$43,290). In contrast, the land owned by Western is to be
5 listed and sold at or near the bottom of the market. Therefore, the previous sales of
6 property by the Receiver cannot serve as an adequate benchmark for gauging the
7 potential of the proposal to list and sell the land at issue.

8 While federal courts have broad discretion to supervise an equity
9 receivership, the courts' supervisory actions must still comply with due process.
10 *SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir.
11 2001). As the Supreme Court has noted, in employing its broad equitable powers a
12 federal court must "exercise '***the least possible power adequate to the end***
13 ***proposed.***" *Spallone v. United States*, 493 U.S. 265, 280 (1990) (quoting *Anderson*
14 *v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)) (emphasis added). "Courts of equity can
15 no more disregard statutory and constitutional requirements and provisions than can
16 courts of law." *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893).

17 The primary purpose of a preliminary injunction is to preserve the status quo
18 pending determination of the action on its merits. *Chalk v. United States Dist. Ct.*
19 *Cent. Dist. Of Calif.*, 840 F.2d 701, 704 (9th Cir. 1988); *Six Clinics Holding Corp. II*
20 *v. Cafcomp Systems Inc.*, 119 F.3d 393, 400 (6th Cir. 1997). In addition, injunctions
21 that alter the status quo are "subject to a heightened scrutiny" and are not
22 appropriate unless "extreme or very serious harm will result." *Dahl v. HEM Pharm.*
23 *Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993); *Marlyn Nutraceuticals, Inc. v. Mucos*
24 *Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009).

25 Ordering the listing of Western's land holdings for sale would violate this
26 clearly established principle, permanently curtailing the status quo without any
27 showing that extreme or very serious harm would result if Western continues to own
28 land until trial. The only defense that Defendants would be able to raise would be to

1 the amount of the offer, since this Court's Order mandates listing and sale and does
2 not allow Defendants to challenge the concept of selling the land, only the proposed
3 amount. Whether the decision to sell the land at this time, in a depressed market, is
4 a good idea is an objection that Paragraph 1 of the Order forbids Defendants from
5 raising.

6 The Court's Order also contradicts the Court's direction that the purpose of
7 the receivership over Western was solely "to clarify Western's financial affairs" – a
8 step that has now been completed. Dkt. No. 59, 9:27; *see also* Dkt. Nos. 182, 504.
9 The listing of land for sale at pennies (or maybe a couple of dimes) on the dollar is
10 unnecessary for such clarification in any event.

11 There are no allegations of fraud with regard to Western's acquisition or
12 possession of the land that it kept for itself. As the Receiver acknowledged in his
13 Valuation Report, the sale of GP assets at this time would likely result in enormous
14 losses, with Western receiving only pennies on the dollar for its investments. *See*
15 Dkt. No. 203. The same would be true with regard to Western's remainder parcels.

16 The law requires the Court to "exercise 'the least power adequate to the end
17 proposed'." *Spallone*, 493 U.S. at 280. In the present case, the preservation of the
18 *status quo* does not require the drastic step of permanently depriving Western of
19 property that was intended for long-term holding and that was not retained for
20 fraudulent purposes. Because the Court has ordered that the land be sold, Western
21 will be permanently deprived of its property without its consent; the only questions
22 will be, "for how much" and "when." Western cannot block the sale; all that can be
23 done is to raise fruitless objections to the bid as too low.

24 Therefore, Paragraph 1 should be reconsidered and stricken.

25 **B. Paragraph 2 Creates a Prior Restraint by Discouraging Schooler**
26 **From Speaking Lest He Be Cited for Contempt by the Receiver**

27 Although this Court, in denying Defendants' *ex parte* application for an order
28 shortening time to hear the Motion for Reconsideration, stated that "the Court

1 merely reminded Schooler of his obligations,” Paragraph 2 of the Order still
2 constitutes a prior restraint on Schooler’s speech.

3 The specter of a prior restraint remains because of the Receiver’s opposition
4 to Defendants’ motion, in which the Receiver stated that “Mr. Schooler’s letters not
5 only contain objectively false statements, but also discourage investors from paying
6 the operational bills issued to them,” and that this Court could have held Schooler in
7 contempt for his letters to his fellow investors. Dkt. No. 577, 4:6-9.

8 It must be noted that the Receiver’s opposition is incorrect: Schooler’s letters
9 do not recommend or suggest that the GP investors refuse or fail to pay the
10 operational bills or otherwise interfere with the Receiver’s execution of his duties.
11 He merely repeats criticisms of the Receiver’s practices that are already in the
12 public record while also providing status updates to the investors, filling in the
13 Receiver’s factual omissions, and correcting the Receiver’s factual misstatements.
14 Thus, the Receiver is reading something into Schooler’s letters that is not there; he
15 interprets the letters as inciting interference.

16 In addition, importantly absent from the Receiver’s discussion of the letters
17 Schooler has sent to investors (and thus unavailable for the Court to have properly
18 considered when it issued its order) is the fact that prior letters to investors
19 encouraged investors to have their concerns heard regardless of the position the
20 investors might take – Mr. Schooler encouraged even those investors who might
21 hold positions contrary to his to be heard. Mr. Schooler also included in his letters
22 the full contact information for the Receiver and for the SEC’s counsel so that
23 investors could contact them for information so that they could make an informed
24 decision, weighing for themselves the information provided by all the parties to the
25 action. This is hardly the actions of a person interfering with the Receiver and
26 certainly not deserving of any reprimand or reminder by this Court.

27 Whether the GP investors choose to pay the operational bills, or send letters
28 to the Receiver, or do other actions that the Receiver does not like are entirely

1 within the investors' prerogatives and do not require or involve Schooler's guidance
2 or assistance. And nobody, including the Receiver and this Court, should be
3 discouraging the open and transparent communication of facts relevant to the
4 investors and the investments they hold. After all, it is the investors, not Schooler,
5 who run the GPs as voting partners. *See* Dkt. No. 14-1.

6 In any event, the Receiver's opposition implies that he would use Paragraph 2
7 as ammunition for censoring Schooler through seeking contempt orders. It was the
8 Receiver who brought Schooler's letters to the Court's attention through his Seventh
9 Interim Report; there was nothing in the Court's Order stating that the Court had
10 learned of Schooler's letters independent of the Receiver. Given the Receiver's
11 slanted presentation to the Court (noticeably leaving out the prior letters in which
12 Schooler encouraged investors regardless of their position to gather information
13 directly from the Receiver and the SEC so they can make an informed decision),
14 there is reason to fear that the Receiver would rely on Paragraph 2 to seek sanctions
15 should Schooler write any more letters to investors that disagreed with the
16 Receiver's policies.

17 As the Supreme Court noted in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539,
18 559 (1976), "The damage [of a prior restraint] can be particularly great when the
19 prior restraint falls upon the communication of news and commentary on current
20 events." Paragraph 2, by encouraging the Receiver to seek sanctions against
21 Schooler for providing an alternative source of news and commentary while
22 discouraging Schooler from communicating with his fellow investors for fear of
23 being held in contempt, creates such a prior restraint.

24 Therefore, Paragraph 2 should be reconsidered and stricken because it forbids
25 Schooler's protected speech, is not content-neutral, and is not narrowly tailored to
26 serve a significant governmental interest. The Receiver's interest "in being free
27 from public criticism of his business practices in pamphlets or leaflets" does not
28 warrant such restraints on Schooler's speech to, and association with, his fellow

1 investors. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971).

2 **III.**

3 **CONCLUSION**

4 Despite this Court's clarification and the Receiver's and SEC's statements
5 that Paragraphs 1 and 2 of the Order of February 25, 2013 pose only a hypothetical
6 risk to Defendants, the language of Paragraphs 1 and 2, and the Receiver's own
7 arguments indicate that the risk to Defendants is very real. Therefore, Defendants
8 respectfully request that this Court reconsider and strike Paragraphs 1 and 2 of the
9 Court's Order and order the Receiver not to proceed with the listing and sale of
10 Western's parcels.

11 DATE: May 9, 2014

Respectfully submitted,

12 /s/Philip H. Dyson

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CERTIFICATION

I hereby certify that on the 9th day of May 2014, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following counsels of record:

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