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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
26 FIRST FINANCIAL PLANNING
27 CORPORATION d/b/a
28 WESTERN FINANCIAL
PLANNING CORPORATION,

Defendants.

Case No. 12 CV 2164 GPC JMA

**DEFENDANTS' RESPONSE TO
SEVENTH INTERIM APPLICATIONS
FOR APPROVAL AND PAYMENT OF
FEES AND COSTS (RECEIVER AND
COUNSEL)**

Date: August 8, 2014

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

1 Defendants LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING
2 CORPORATION (collectively “Defendants”) respond as follows to the Seventh
3 Interim Applications for Approval and Payment of Fees and Costs to the Court’s
4 appointed receiver, Thomas C. Hebrank, CPA (“Receiver”), and the Receiver’s
5 counsel, Allen Matkins Leck Gamble Mallory & Natsis LLP (“Receiver’s
6 Counsel”).

7 I.

8 INTRODUCTION

9 The Receiver, on behalf of himself and Receiver’s Counsel, has now filed
10 seven interim applications for payment of fees and costs involving the continued
11 receivership of Western Financial Planning Corporation (“Western”) and the real
12 estate general partnerships (“GPs”), with the seventh application covering the period
13 of January 1, 2014 through March 31, 2014.

14 The Receiver and Receiver’s Counsel purport to have incurred a total of
15 \$107,237.44 in fees and costs for work performed for those three months, with
16 \$54,433.35 in fees and \$532.32 in costs for the Receiver, and \$51,765.30 in fees and
17 \$506.47 in costs for Receiver’s Counsel. *See* Dkt. No. 602. These fees are
18 calculated after a 10% fee discount for the Receiver and Receiver’s Counsel. Dkt.
19 No. 600, 2:15-17; Dkt. No. 601, 2:10-11.

20 Defendants object to the Seventh Interim Applications on several grounds.
21 First, during the time period at issue, the Receiver, despite having available cash in
22 Western’s bank account, continued not to make payments on some of the seller-
23 financing carryback notes that Western owes to the original sellers of the GP-owned
24 properties (the “Underlying Notes”). This inaction by the Receiver also occurred
25 during the time period of the Fourth, Fifth, and Sixth Interim Applications, as
26 Defendants have previously and repeatedly brought to the Court’s attention. *See*
27 Dkt. No. 407, 17:7-21 (nonpayment of May and June 2013 installments); Dkt. No.
28 505, 4:4-6:23 (nonpayment of May, June, August, and September 2013

1 installments); Dkt. No. 520, 5:1-6:1 and Dkt. No. 520-1 (nonpayment of October
2 and November 2013 installments and noteholders' Notices of Default).

3 Therefore, the Receiver must be required to certify to the Court that all
4 Underlying Notes are current before the Court approves any portion of the Seventh
5 Fee Applications, because the Receiver did not comply with this Court's directive of
6 August 16, 2013 to make the payments on the Underlying Notes during the period
7 of October-December 2013. The Receiver had the GPs continue to pay their GP
8 note obligations to Western, but then did not use that cash to pay the corresponding
9 Underlying Note obligations.

10 The money that the GPs have paid to Western on the GP Notes has been paid
11 with the express understanding and obligation, under the all-inclusive deed of trust,
12 that Western will apply those funds directly to the corresponding Underlying Notes.
13 The Court must not allow the Receiver to divert those funds to payment of his own
14 fees. The Receiver's duty of care to the receivership entities – including Western -
15 requires that available cash be used to pay existing obligations. The Court must not
16 allow the Receiver to prioritize his fees ahead of existing secured obligations, the
17 nonpayment of which not only breaches the Receiver's duty of care to the
18 receivership entities, but puts the GPs' title interests at risk through the Receiver's
19 parasitism on Western.

20 Second, even though the Underlying Notes have purportedly been brought
21 current by the Receiver and remain current, the fees and costs to be recovered by the
22 Receiver continue to be unreasonable and excessive in light of the lack of benefit to
23 the receivership entities and the evidence that the Receiver's actions have
24 unnecessarily caused actual harm to the receivership entities. For example, the
25 Receiver's paying himself ahead of the Underlying Notes has prioritized repayment
26 of lowest-priority unsecured, non-recourse debt ahead of higher-priority secured
27 debt. The Receiver cannot be allowed to be paid for actions that are a direct breach
28 of his duty of care to the receivership entities. Therefore, Defendants request that

1 the Seventh Interim Applications be *denied*.

2 II.

3 ARGUMENT

4 A. THE FEE APPLICATION MUST NOT BE APPROVED UNLESS
5 AND UNTIL THE RECEIVER CERTIFIES THAT HE HAS
6 APPLIED ALL FUNDS RECEIVED FROM THE GPs TO THE
7 CORRESPONDING UNDERLYING NOTES

8 Beginning in late May 2013, during the time period that was the subject of the
9 Fourth Fee Application, the Receiver stopped making payments on Western's behalf
10 for the Underlying Notes. *See* Dkt. No. 407, p. 17 of 27 (listing payments not made
11 by Receiver, which were due in June and early July 2013). This trend continued
12 through the period of the Fifth, Sixth, and now Seventh Fee Applications. *See* Dkt.
13 Nos. 505, 520, 537. The money that the GPs provided to Western as payment for
14 the GPs' notes to Western, which would otherwise have been applied by Western as
15 payments on the Underlying Notes, accumulated in Western's accounts, presumably
16 as a source of funds for the Receiver and his counsel to tap as the Fee Applications
17 are granted.

18 The Receiver claimed – incorrectly -- that he did not make the payments
19 because (a) there is a limited amount of cash and (b) he needs the funds to pay
20 Western's employees and pay the other expenses associated with the proposed move
21 of Western's operations. *See* Dkt. No. 455, p. 9 of 14, ll. 7-9 (“Western does not
22 currently have enough cash to make all mortgage payments and pay its basic
23 operating expenses”).¹ To make up the alleged shortfall during the period of the
24 Sixth Fee Application, the Receiver successfully moved *ex parte* for an order to
25 collect money from the GP investors. Dkt. No. 519, 524.

26 ¹ The Receiver's statements are false because Western has only one part-time
27 employee (the GP secretaries being independent contractors) and because Schooler,
28 not Western, paid the costs associated with the move of the offices.

1 The Receiver claims that he has now “alleviated the crisis regarding mortgage
2 payments.” However, his conduct during the period of the Seventh Fee Application
3 belies this, for on February 15, 2014, Robb Schafer, the holder of several junior
4 Underlying Notes, wrote to Mr. Schooler to report that the payments for December
5 2013, January 2014, and February 2014 had not been paid. Declaration of Louis V.
6 Schooler (“Schooler Decl.”), ¶ 3.

7 Despite the discretion afforded to receivers, they are still bound by the limits
8 of the law and the duties of care owed to the receivership entities. The Receiver
9 owes a duty of care to Western and the GPs while Western and the GPs remain
10 under receivership. *Sovereign Bank v. Schwab*, 414 F.3d 450, 454 (3d Cir. 2005)
11 (“A receiver owes a fiduciary duty to the owners of the property under his care”);
12 *see also City of Chula Vista v. Gutierrez*, 207 Cal.App.4th 681, 143 Cal.Rptr.3d 689
13 (2012). When he makes the GP Note payments on behalf of the GPs, he knows the
14 GPs expect a corresponding payment from Western on the Underlying Notes, as all
15 the documents setting forth the underlying relationships require. The Receiver’s
16 diversion of those funds to other uses, such as paying his fees or his counsel’s fees
17 or covering Western’s operational expenses, is not permitted. The Receiver is
18 obligated to apply those funds to the Underlying Notes ahead of everything else.
19 The duty of care the Receiver owes to Western requires it, but he has repeatedly
20 breached that duty – and violated this Court’s orders - by causing a default on a
21 secured debt when there is available cash and no higher priority payment obligation
22 required.

23 The Receiver’s failure to pay has caused great harm to Western, the GPs, and
24 the investors. The Receiver needs to be required to present a full accounting
25 demonstrating the current payments on all Underlying Notes before any
26 consideration should be given to his pending fee applications. To date, he has not
27 provided one. Unless and until such a showing has been made, the Seventh Fee
28 Applications should be denied.

1 **B. THE FEES AND COSTS CLAIMED ARE STILL**
2 **UNREASONABLE WHEN COMPARED TO THE RESULTS**

3 Upon applying the factors of *SEC v. Fifth Avenue Coach Lines*, 364 F.Supp.
4 1220, 1222 (S.D.N.Y. 1973) to the fee applications, there are many areas in which
5 the applications fall short. There is no great complexity of problems faced, and the
6 benefit to the receivership estate is nonexistent; as stated above and at length in
7 other documents, the Receiver's continued existence is highly detrimental. *See* Dkt.
8 Nos. 195, 205, 407.

9 The problems faced were not truly complex at the beginning of the
10 receivership and have not grown more complex since. There are the same number
11 of entities, bank accounts, properties, and investors relevant to the receivership; the
12 accounts in that period remained with the same bank as before; the entities remained
13 in their common office in San Diego with common storage; and the entities
14 continued to hold only raw land with no day-to-day management required – the
15 same situation as the day the receivership began.

16 The continued receivership over Western remains unnecessary. There has
17 been no proof of fraud, money laundering, or offshoring of funds. The Receiver has
18 completed his forensic accounting of Western (*see* Dkt. Nos. 182, 504), thus
19 clarifying Western's financial affairs (*see* Dkt. No. 59). Therefore, there is no
20 reason for the Receiver to be in place at all.

21 The court is not "required to fix fees in total disregard of the fact that this
22 receivership produced a very lean harvest, that all interests suffered heavily, and that
23 the whole enterprise was not a success." *Specialty Products Co. v. Universal Indus.*
24 *Corp.*, 21 F.Supp. 92, 94 (M.D. Pa. 1937).

25 The result obtained by the Receiver is a critical factor. *SEC v. Elliott*, 953
26 F.2d 1560, 1577 (11th Cir. 1992); *United States v. Code Products Corp.*, 362 F.2d
27 669, 673 (3d Cir. 1966). Since there has been no indication as to the results
28 obtained through the Receiver's labors to date, the Receiver's work "merits an

1 'incomplete' grade" and therefore the fee application should be denied in its entirety
2 or else the award should be reduced significantly. *In re Alpha Telecom, Inc.*, 2006
3 U.S. Dist. LEXIS 79997 at *16 (D. Or. Oct. 27, 2006).

4 **III.**

5 **CONCLUSION**

6 The Seventh Application for fees and costs requested by the Receiver and
7 Receiver's Counsel should be denied. The requested fees and costs continue to be
8 unreasonable under the circumstances. There is no showing as to how the work
9 performed between January 1, 2014 and March 31, 2014 has benefitted Western (or
10 the GPs, for that matter). The actions taken by the Receiver during that period, such
11 as the continued nonpayment of the Underlying Notes held by Mr. Schafer and
12 depleting available funds for lowest priority unsecured debt when existing secured
13 debt obligations remain unpaid, have caused tangible, measurable harm to the
14 receivership entities. The Receiver should not be allowed to collect his fees when
15 he has in fact breached the duty of care he owes to the receivership entities.

16 For all of the reasons set forth above, Defendants request that the Seventh
17 Interim Applications be *denied*. In the alternative, to the extent the Court decides to
18 approve any portion of the Seventh Interim Applications, the Receiver must first be
19 required to bring the Underlying Notes current, keep them current, and pay the
20 accrued late-payment fees.

21 DATE: July 24, 2014

Respectfully submitted,

22 /s/Philip H. Dyson

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CERTIFICATION

I hereby certify that on the 24th day of July 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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