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7 THOMAS C. HEBRANK

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 v.

14 LOUIS V. SCHOOLER and FIRST
15 FINANCIAL PLANNING
CORPORATION d/b/a WESTERN
16 FINANCIAL PLANNING
CORPORATION,

17 Defendants.
18

Case No. 3:12-cv-02164-GPC-JMA

**RECEIVER'S OPPOSITION TO
DEFENDANTS' MOTION FOR
MODIFICATION OF
PRELIMINARY INJUNCTION
ORDER TO REMOVE THOMAS C.
HEBRANK AS COURT-APPOINTED
RECEIVER [Fed. R. Civ. P. 54(b)]**

Date: February 13, 2015
Time: 1:30 p.m.
Ctrm.: 2D
Judge: Hon. Gonzalo P. Curiel

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1 Thomas C. Hebrank ("Receiver"), Court-appointed receiver for First Financial
2 Planning Corporation d/b/a Western Financial Planning Corporation ("Western"),
3 and its subsidiaries and affiliates (collectively, "Receivership Entities"), submits this
4 opposition to Defendants' Motion for Modification of Preliminary Injunction Order
5 to Remove Thomas C. Hebrank as Court-Appointed Receiver ("Motion").

6 I. INTRODUCTION

7 Throughout this case, the Receiver has acted solely as an independent agent
8 of the Court. At all times, the Receiver has taken actions necessary and appropriate
9 to preserve and protect the assets of the receivership estate and conserve such assets
10 for the benefit of investors during the pendency of this litigation. Declaration of
11 Thomas Hebrank filed herewith ("Hebrank Decl."), ¶ 2. As discussed below, the
12 Motion tries to turn the adversarial position Defendant Louis Schooler ("Schooler")
13 has taken against the Receiver on receivership issues into a bias in favor of the
14 Securities and Exchange Commission ("Commission") as to the underlying
15 litigation between the Commission and Schooler. Although the Receiver has
16 defended Schooler's numerous attacks on the receivership as necessary and
17 appropriate in carrying out his duties, the Receiver has taken no part whatsoever in
18 the underlying litigation. *Id.*

19 Schooler, as part of his litigation strategy with respect to the claims asserted
20 by the Commission, has repeatedly attacked and tried to undermine the receivership
21 at every opportunity. Schooler's strategy appears to be that if the Court agrees to
22 release the GPs from the receivership, it must conclude the GPs can run themselves
23 and, therefore, the GP units sold by Defendants are not securities (or the Ninth
24 Circuit must find the Court erred if it does not so conclude).

25 In implementing this strategy, Schooler has knowingly misrepresented the
26 facts to the Court and investors. The false representations include that the Receiver
27 is charging investors exorbitant fees, has unilaterally obtained appraisals at their
28 expense, has unilaterally settled litigation they were likely to win, has given away

1 their property, intends to fire sell their properties, has prioritized GP debts to
2 Western over GP operating expenses, and has refused to sign listing agreements,
3 thereby costing them millions in lost opportunities. Schooler has even argued (and
4 told investors) that the predicament investors are in today is the Receiver's fault. In
5 a conversation with Geno Rodriguez from the Receiver's office in August 2013,
6 Schooler stated he views the Receiver as "an adversary." Declaration of Geno
7 Rodriguez filed herewith, ¶ 2.

8 The Motion is Schooler's 14th attack on the receivership or challenge to the
9 Court's orders regarding the receivership, not including Schooler's oppositions to
10 virtually every motion and application the Receiver has filed. Dkt. Nos. 14, 21, 26,
11 34, 51, 195, 474, 495, 499, 560, 581, 644, 661. The Court has had to remind
12 Schooler not to interfere with the Receiver's performance of his duties, has observed
13 that Schooler's actions demonstrate an effort to "guide and influence the actions and
14 perceptions of investors," and has held Schooler in contempt for violating the
15 Preliminary Injunction Order. Dkt. Nos. 549, 851.

16 The endless assault of motions and false accusations directed at the Receiver
17 and actions to impede the receivership have substantially increased administrative
18 expenses, at the direct expense of the receivership estate. As discussed in the
19 Receiver's Report and Recommendation Regarding the General Partnerships ("GP
20 Report") (Dkt. No. 852), the receivership estate will be the only source of recovery
21 for many investors. Therefore, Schooler's strategy of endlessly attacking the
22 receivership harms the investors' potential recovery and is directly at odds with the
23 goal of the receivership – to preserve and protect assets for the benefit of investors.
24 Considering the vast sums Schooler paid himself and his companies from Western
25 and his refusal to return any of that money even after judgments have been entered
26 against his companies (*i.e.* the LinMar entities), it is clear Schooler cares only about
27 defeating the Commission's claims and has no regard for what investors will
28 recover.

1 Having chosen a course directly at odds with the receivership and having
2 repeatedly misrepresented the facts to the Court and investors, Schooler now
3 complains the Receiver has not communicated with him as often or to the same
4 degree as he has with the Commission. The Receiver has a duty to act in the best
5 interests of the receivership estate and conserve receivership estate resources. When
6 one party makes it clear, as Schooler has, that his intention is to make false
7 accusations, manipulate investors, undermine the objectives of the receivership, and
8 run up administrative expenses, the Receiver must take actions to protect the
9 receivership estate, including limiting interactions with that party.

10 Nevertheless, the Receiver and his counsel have treated Schooler and his
11 counsel in a professional and courteous manner throughout the case. The Receiver
12 and his counsel have provided documents and information to Schooler and his
13 counsel when such documents and information have been requested. Hebrank
14 Decl., ¶ 3. Despite their opposing positions on Schooler's numerous motions
15 attacking the receivership, the Receiver and Schooler, through their respective
16 counsel, have coordinated and consensually resolve document access, scheduling,
17 and other issues in this case and the LinMar cases. *Id.* Schooler's contention that
18 the Receiver has "withheld" information from him is yet another misrepresentation.
19 *Id.* Schooler has not identified one instance in which he requested documents or
20 information from the Receiver and such documents or information was not
21 provided, nor can he.

22 In responding to Schooler's motions attacking the receivership, the Receiver's
23 positions have often been similar to those of the Commission, whose mission is to
24 protect investors and who sought the appointment of a receiver for that purpose.
25 Accordingly, the Receiver has met and conferred with counsel for the Commission
26 regarding responses to such motions. *Id.* at ¶ 4. This does not mean, however, the
27 Receiver has taken sides in the underlying litigation between the Commission and
28 Schooler regarding the alleged violations of securities laws. He has not. At all

1 times, the Receiver has presented the facts in his reports in a plain and neutral
2 manner without regard to what claims or defenses those facts might support or
3 refute. *Id.* Schooler has never challenged the facts presented in the Receiver's
4 reports or presented any evidence indicating those facts are inaccurate.

5 To the extent the resolution of Schooler's numerous motions has been
6 adversarial and, as a result, communications between the Receiver and Schooler
7 have been limited, that is purely of Schooler's own making. Schooler's attempt to
8 turn the adversarial position he has taken vis-à-vis the Receiver into a bias has no
9 merit whatsoever and should be rejected.

10 II. THE MOTION

11 The Motion is a series of quotes from testimony and e-mails that, when put
12 into context, amount to absolutely nothing. The Receiver addresses the alleged
13 incidents of bias one by one as follows:

- 14 • On Page 6 of the Motion, Schooler notes the Receiver used the words
15 "fraudulent scheme" in his letter to the Commission prior to his
16 appointment. The Receiver knew nothing about Western, Schooler, or the
17 GPs at the time the letter was sent. When questioned about the letter
18 during his deposition, the Receiver explained it was simply a poor word
19 choice and the letter should have said "alleged" fraudulent scheme. Dkt.
20 No. 860-5, p. 6:17-21.
- 21 • On Page 7 of the Motion, Schooler notes the Commission's counsel made
22 a comment and asked a question about a sentence in the Receiver's Second
23 Report and Proposal regarding Schooler's stated intention to continue
24 funding Western. The Receiver independently reviewed the sentence and
25 decided that rather than making an assertion about Schooler's legal
26 obligations to fund Western, which were not fully known at that stage of
27 the case, it would be more accurate to say there was no mechanism in
28 place to compel him to make payments to Western. This minor edit has no

1 bearing on any issues in the litigation between the Commission and
2 Schooler.

- 3 • On Page 9 of the Motion, Schooler notes the Receiver exchanged emails
4 with the Commission about briefs in opposition to one of Schooler's
5 motions to remove the GPs from the receivership. As discussed above,
6 Schooler's strategy in repeatedly attacking the receivership put him at odds
7 with the Receiver's efforts to preserve and protect receivership estate
8 resources. The Receiver was forced to defend Schooler's attacks in
9 protecting receivership estate resources during the pendency of the
10 underlying litigation. The Receiver's position in opposing Schooler's
11 motions was generally similar to the Commission's position. The Receiver
12 and the Commission, therefore, met and conferred regarding the relevant
13 facts and arguments. There is nothing improper about such
14 communications.
- 15 • On Pages 10-12 of the Motion, Schooler contends arguments in the
16 Receiver's recent GP Report (Dkt. No. 852) were "largely researched by
17 the SEC's appellate counsel." This is completely false. What actually
18 occurred is counsel for the Commission asked to meet and confer with the
19 Receiver regarding the GP Report. On the call, counsel for the
20 Commission advocated certain positions and later sent a few follow up e-
21 mails. Hebrank Decl., ¶ 5. Notably, the positions and arguments
22 discussed in the Commission's e-mails are not included in the GP Report.
23 Dkt. No. 860-4, p. 7 (November 13, 2014 E-mail from Susan McDonald).
24 The Receiver's counsel inquired about legal authorities for one position
25 asserted by the Commission's counsel and the Commission's counsel
26 responded with references to a treatise. *Id.* The Receiver ultimately cited
27 the treatise in the GP Report, but in support of a different point than
28 counsel for the Commission had raised. The GP Report, like all of the

1 Receiver's reports, was formulated and drafted exclusively by the Receiver
2 and his counsel and reflects the Receiver's independent analysis and
3 recommendations. *Id.* In fact, the Commission's positions on the issues
4 discussed in the GP Report are very different than those of the Receiver.
5 Dkt. No. 880. Accordingly, the correspondence and Court filings reflect
6 that the Receiver considered the positions advocated by the Commission's
7 counsel, but did not incorporate any of them into the GP Report. This
8 demonstrates the Receiver has not acted as an agent of the Commission,
9 but as an independent agent of the Court.

- 10 • On Pages 12-13 of the Motion, Schooler references the same
11 communication discussed on Page 9 of the Motion and contends the
12 Receiver failed to disclose to the Court an "argument favorable to the
13 GPs." Once again, this is completely false. The communication
14 references a hypothetical argument that the GPs could file bankruptcy to
15 obtain protection from creditors. In a prior report, the Receiver had
16 discussed the possibility of a bankruptcy filing for the purpose of obtaining
17 protection from creditors. Dkt. No. 49, pp. 2-3. The Receiver noted
18 therein that a bankruptcy by Western, let alone many GP bankruptcies,
19 would consume limited resources, complicate administration of the
20 receivership, and create unnecessary jurisdictional and procedural issues.
21 *Id.* Therefore, the notion of a bankruptcy filing was disclosed to the Court
22 and all parties in a publicly-filed document. Putting the GPs into
23 bankruptcy made no sense then and makes no sense now. Only someone
24 desperately seeking ways to attack the Receiver would suggest bankruptcy
25 is an "argument favorable to the GPs."
- 26 • On Page 13 of the Motion, Schooler contends the Receiver and his counsel
27 "have engaged in sharing information and investor communications with
28 the SEC, but not with Defendants or the Court." While Schooler tries to

1 twist sharing investor e-mails into something secretive and sinister, it is
2 not. What actually occurred is counsel for the Commission, at various
3 times, asked the Receiver to share communications received from
4 investors. Hebrank Decl., ¶ 6. The Receiver had no reason not to share
5 such communications.¹ Counsel for Schooler never asked to see investor
6 communications and the Court never asked that investor e-mails be filed.
7 To the contrary, the Court's statements on the record and orders indicate its
8 wish to limit the number of investor letters. *Id.*

- 9 • On Page 14 of the Motion, Schooler quotes from an e-mail the Receiver
10 sent to counsel for the Commission at the end of the day he was appointed
11 (September 6, 2012). Schooler complains the Receiver did not provide the
12 same report to his counsel. This makes no sense. Schooler and his
13 counsel were present at Western's offices during the takeover on
14 September 6, 2012. There was no need to inform them what occurred.
15 Hebrank Decl., ¶ 7. Schooler also focuses on a sentence in which the
16 Receiver asked to have a call regarding imaging computers. The Receiver,
17 having been appointed only hours before and knowing almost nothing
18 about Western or the GPs, requested the Commission's position regarding
19 what computers and servers existed based on their investigation prior to
20 filing the Complaint. The Receiver also asked Schooler and Western's
21 employees about computers and servers to make sure nothing was missed
22 when the imaging work was performed. *Id.*
- 23 • On Pages 14-15 of the Motion, Schooler falsely states the Receiver refused
24 to answer when asked why he contacted the Commission on September 6,
25

26 ¹ To the extent Schooler argues that sharing investor emails violates the
27 Preliminary Injunction Order, he is wrong. The provision in the Preliminary
28 Injunction Order that limits the Commission's access to books and records of the
Receivership Entities applies to just that – books and records of the Receivership
Entities – not communications between investors and the Receiver about the
receivership. Dkt. No. 174, Part X.

1 2012 about imaging computers. The Receiver answered the question, as
2 the transcript reflects. Dkt. No. 860-5, 12:18-13:5. Mr. Dyson continued
3 to ask the same question multiple times in an argumentative manner and
4 the Receiver simply declined to change his answer.

- 5 • On Page 15 of the Motion, Schooler focuses on emails between counsel
6 for the Commission and the Receiver regarding the freezing of bank
7 accounts at the beginning of the case pursuant to the TRO. When asked
8 about these communications during his deposition, the Receiver explained
9 the Commission took the initial step of contacting the banks to freeze the
10 applicable accounts. Dkt. No. 860-5, 15:8-13. Naturally, there were
11 communications between counsel for the Commission and the Receiver
12 regarding the status of freezing accounts to ensure the TRO was properly
13 implemented and all applicable accounts were frozen.
- 14 • Also on Page 15 of the Motion, Schooler falsely accuses the Receiver of
15 violating the Preliminary Injunction Order by turning over images of
16 Western's computers and servers. At the time of the communications in
17 question (September 2012), the governing order was the TRO.
18 Section XVI of the TRO gave the Commission "continuing access" to the
19 "books and records and other documents" of the Receivership Entities as
20 well as "continuing access to inspect their funds, property, assets and
21 collateral, wherever located." Dkt. No. 10, p. 18. This provision remained
22 in effect until March 13, 2013, when the Preliminary Injunction Order was
23 entered. Dkt. No. 174.
- 24 • On Pages 16-17 of the Motion, Schooler falsely accuses the Receiver of
25 failing to disclose at the July 18, 2014 hearing that he had spoken to Matt
26 Lubaway, the appraiser who had performed the original 2013 appraisal on
27 the property owned by Rainbow Partners and Horizon Partners. This
28 accusation is mind-boggling, even for Schooler's standards. Page 29 of the

1 transcript for the July 18, 2014 hearing shows the Receiver's counsel
2 plainly stated, in explaining the flaws with the proposed CBRE listing
3 agreement, that "[t]he receiver went back and talked to the original
4 appraiser who provided that appraisal in 2013 . . ." July 18, 2014 Hearing
5 Transcript at 29:13-14. Mr. Lubaway of Valbridge Property Advisors was
6 the original appraiser. Dkt. No. 203-3, p. 105. The Receiver's counsel
7 went on to describe the substance of what was discussed with
8 Mr. Lubaway and why the CBRE listing agreement was based on flawed
9 assumptions and valuation methodology. July 18, 2014 Hearing
10 Transcript at 29-30.

- 11 • On Pages 18-19 of the Motion, Schooler notes the Receiver forwarded
12 four investor e-mails to counsel for the Commission, but did not forward
13 the e-mails to Schooler's counsel. As discussed above, counsel for the
14 Commission had, at various times, asked to see investor e-mails. Counsel
15 for Schooler never requested investor e-mails. Hebrank Decl., ¶ 6.
- 16 • On Page 19 of the Motion, Schooler notes the Receiver had a call with
17 counsel for the Commission to "discuss and plan" for the July 18, 2014
18 hearing. It is neither prohibited nor improper for the Receiver to confer
19 with the Commission regarding issues affecting the receivership. As
20 discussed above, Schooler chose a course directly at odds with protecting
21 the assets of the receivership estate and investors. The Receiver's position
22 in preserving and protecting the receivership estate, in this instance, was
23 similar to the position of the Commission in seeking to protect investors.
24 There is nothing improper about the Receiver and the Commission
25 conferring on issues relevant to the July 18, 2014 hearing (one of several
26 hearings to address whether the GPs would remain in the receivership),
27 nor does it suggest the Receiver has taken sides with respect to the
28

1 underlying litigation between the Commission and Schooler, which he has
2 not. Hebrank Decl., ¶ 4.

- 3 • On Pages 19-20 of the Motion, Schooler accuses the Receiver of having
4 "improper recordkeeping practices" because he does not take notes during
5 every telephone call, does not always retain such notes when he takes
6 them, and does not save every old e-mail – only those he considers
7 important. Of course, there is nothing improper about not taking notes
8 during telephone calls. Some people do and some do not. There is also
9 nothing improper about not retaining notes from telephone calls when it is
10 no longer necessary to do so. Finally, there is nothing improper about not
11 retaining e-mails that are not important to ongoing issues in the
12 receivership. IT specialists recommend deleting and purging old e-mails
13 that are no longer necessary to avoid computer delays and crashes from
14 storing excess data. Moreover, the Receiver produced three banker's
15 boxes of e-mails and attachments to Schooler's counsel. While Schooler
16 would obviously like his fishing expedition into the Receiver's e-mails to
17 consume even more time and resources than it already has, there is nothing
18 improper about deleting old e-mails.

19 In his reply, Schooler will no doubt complain the Receiver and his counsel
20 have sent fee applications, reports, and other Court filings to counsel for the
21 Commission before they have been filed. Although Schooler will try to portray this
22 as a scandal, it is not. The Commission, whose mission is to protect investors, has
23 an interest in seeing that assets of the receivership estate are preserved and protected
24 for the benefit of investors. As discussed above, Schooler has clearly demonstrated
25 he has no such interest and his intention is to impede the receivership and run up
26 administrative expenses.

27 Accordingly, the Receiver has shared information about the receivership and
28 the Receiver's proposed actions with the Commission. If the Commission provides

1 feedback on the Receiver's proposed actions, the Receiver independently considers
2 that feedback and takes the actions he believes are necessary and appropriate in
3 carrying out his Court-ordered duties. Hebrank Decl., ¶ 8. This is no different than
4 two parties to a case meeting and conferring to discuss their positions and, where
5 possible, resolve issues.

6 Based on Schooler's repeated attacks, attempts to undermine the receivership,
7 and efforts to run up administrative expenses, the Receiver determined that trying to
8 resolve issues with Schooler would not be a productive use of receivership resources
9 and would simply lead to unproductive meet and confers, further misrepresentations
10 to the Court and investors, and more baseless attacks. *Id.* at ¶ 9. Schooler's
11 14 different motions and challenges to the Court's orders addressing the
12 receivership, not to mention his oppositions to virtually every pleading the Receiver
13 has filed, confirm the Receiver made the appropriate decision in not spending
14 further resources on unproductive exchanges with Schooler and his counsel.
15 Schooler's own conduct is further confirmation – neither Schooler nor his counsel
16 have contacted the Receiver or his counsel at any time prior to filing any of their
17 numerous motions attacking the receivership or oppositions to the Receiver's filings.
18 *Id.* If Schooler believed meeting and conferring with the Receiver would be
19 productive, he would have had his counsel contact the Receiver's counsel. Instead,
20 he decided to make the Receiver his "adversary" and only communicate with the
21 Receiver when necessary.

22 III. CONCLUSION

23 After addressing each misrepresentation and false accusation in the Motion
24 one by one, the bottom line is Schooler has chosen to repeatedly attack the Receiver
25 and try to undermine the performance of his duties. In doing so, Schooler has
26 substantially increased administrative expenses of the receivership. He has waged
27 war against the Receiver on virtually every issue, repeatedly making false
28 statements to the Court and investors, and even refusing to repay amounts his

1 companies owe Western after the Court has entered judgments against them. These
2 actions harm investors. Schooler now attempts to turn the conflict he created with
3 the Receiver into a bias against him. The Court should reject this nonsense and see
4 it for what it really is – another spurious attack to undermine the Receiver's
5 performance of his duties, alarm and confuse investors, and avoid collection of the
6 judgments against his companies. Accordingly, the Receiver respectfully submits
7 the Motion should be denied.

8
9 Dated: January 23, 2015

ALLEN MATKINS LECK GAMBLE
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11 By: /s/ Ted Fates

TED FATES
Attorneys for Receiver
THOMAS C. HEBRANK

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