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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 SECURITIES AND EXCHANGE
COMMISSION,

15 Plaintiff,

16 vs.

17 LOUIS V. SCHOOLER and FIRST
18 FINANCIAL PLANNING
CORPORATION d/b/a WESTERN
19 FINANCIAL PLANNING
CORPORATION,

20 Defendants.
21

Case No. 12 CV 2164 GPC JMA

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
SUPPLEMENTAL RESPONSE TO
DEFENDANTS' MOTION FOR
MODIFICATION OF PRELIMINARY
INJUNCTION ORDER TO REMOVE
THOMAS C. HEBRANK AS COURT-
APPOINTED RECEIVER**

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

1 Plaintiff Securities and Exchange Commission (“SEC”) submits this supplemental
2 response in opposition to defendants’ motion for modification of preliminary injunction
3 order to remove Thomas C. Hebrank as court-appointed receiver. Defendants have yet
4 to provide any legal or factual support for their contention that the SEC and receiver are
5 barred from communicating with one another. The Court should deny the motion.

6 Defendants argue, in a conclusory manner, that because the SEC and the receiver
7 have collaborated on issues of shared interest, they must be improperly colluding against
8 defendants. *See* Dkt. 976 (Deft. Reply) at 5-6. But this is simply a manufactured
9 argument that fits into defendants’ misguided narrative; there is no substance behind
10 defendants’ assertions. They rely simply on their characterization of emails that have
11 been produced to defendants without objection by the SEC, the receiver, and the
12 receiver’s counsel. The cited emails clearly demonstrate that the SEC, the receiver, and
13 the receiver’s counsel have communicated with one another throughout this litigation.
14 But these emails do not show that there was anything improper about these
15 communications. And more importantly, they do not show that the receiver lacks
16 independence. The new emails cited by defendants in their supplemental reply brief
17 continue to show that the SEC, receiver, and receiver’s counsel communicated with one
18 another to consult on issues of shared interest. *See* Dkt. 976 at 4-10. As stated
19 previously, communication and collaboration between the SEC and the receiver on
20 matters of shared interest in SEC enforcement actions is typical.

21 Although they hold the burden on this motion, defendants also fail to cite a single
22 case suggesting that the receiver and the SEC cannot collaborate on issues of shared
23 interest. Rather, they attempt to turn the burden around and argue incorrectly that the
24 SEC and receiver have not produced any “law supporting their position that a court-
25 appointed receiver, as a neutral officer of the court, is allowed to collaborate solely with
26 one party in litigation.” But the SEC has pointed to the broad powers granted by this
27 Court to exercise all necessary powers to manage the assets of Western and the GPs.
28 Dkt. 174, at 3-5 (Section III); *see also* Dkt. 946 at 4-5. The SEC also pointed to

1 examples in which the SEC and receiver have worked together. *See* Dkt. 946 at 6
2 (*United States v. Real Property Located at 13328 and 13324 State Highway 75 North,*
3 *Blaine County, Idaho*, 89 F. 3d 551, 553 (9th Cir. 1996)) and 11-12 (*SEC v. Private*
4 *Equity Mgmt. Corp.*, 2009 WL 2019747 (C.D. Cal. July 2, 2009). Defendants simply
5 ignore these legal arguments and fail to respond to them. Instead, defendants offer
6 nothing more than inflammatory accusations and conclusions. For example, defendants
7 have argued that the SEC “orchestrated its response” to the receiver’s report and
8 recommendations (Dkt. 852). Deft. Reply at 7-8. But they provide no evidence to
9 support this naked assertion.

10 Defendants have also repeatedly stated that the receiver must be a “neutral,
11 independent” arm of the Court. Dkt. 976 (Deft. Reply) at 8. This argument also
12 misstates the law and the facts. None of the legal authority cited by defendants requires
13 the receiver to be neutral. This is an important distinction, not simply semantics. The
14 receiver must be independent, *i.e.*, free of outside control, but not neutral, *i.e.* impartial.
15 Notwithstanding defendants’ unsupported accusations, they have provided no evidence
16 showing that the receiver lacked independence or was otherwise controlled by the SEC.
17 In place of such evidence, defendants ask a rhetorical question in their brief: “why is Mr.
18 Hebrank, as a purportedly neutral arm of the Court who is not supposed to be affiliated
19 with either party, soliciting suggestions from the SEC and collaborating with the SEC on
20 which arguments to make in court filings?” Deft. Reply at 8. The SEC though actually
21 answered that question in its opposition brief. The SEC and the receiver share an
22 interest in protecting investors and their collaboration furthers those goals. *See* Dkt. 946
23 at 8-9. Defendants have no evidence, only conclusions, to demonstrate that the receiver
24 acted improperly in doing so or that his submissions to the Court were anything but the
25 result of his independent judgment. *See id.* at 9-11.

26 Although independent, the receiver is not neutral. He is charged with protecting
27 the interests of the receivership estate. In this respect he is not impartial, but rather the
28 advocate of the interests of the receivership estate and the investors. In this role, his

1 interests are aligned with those of the SEC.

2 With respect to investor harm resulting from the appointment of a new receiver,
3 defendants do not address the costs associated with installing a new receiver. They
4 simply say that removal of the receiver “may” reduce the fees and costs. This, however,
5 ignores the fact that a new receiver and counsel would, without question, need to spend
6 significant time and financial resources transitioning into the role, including reviewing
7 prior reports and filings and potentially verifying the analysis already performed by the
8 current receiver. The current receiver and his counsel need not perform this work
9 because they have already been in their roles for over two and a half years. In addition,
10 because of Western’s and some GP’s tenuous financial situation, appointing a new
11 receiver would further complicate an already complex and difficult financial situation
12 regarding the receivership estate.

13 Finally, the SEC wants to clarify misstated facts raised in defendants’
14 supplemental reply brief (Dkt. 976) concerning the SEC’s document production.
15 Defendants have incorrectly characterized the SEC’s document production as late. *See*
16 Dkt. 976 at 11-12. Defendants’ served the document request at issue on December 11,
17 2014 by mail. The SEC timely served its objections and responses to those document
18 requests on January 13, 2015. And in doing so, the SEC agreed to produce responsive
19 non-privileged documents. It did so on February 6, 2015. Defendants never complained
20 about the SEC’s timing of the document production until its supplemental reply brief. In
21 addition, defendants also claim that the SEC’s document production consisted of 16,828
22 separate files. The emails relating to the receiver though only constituted a portion of
23 these emails. The SEC’s rough estimate is that it produced approximately 500 or so
24 distinct emails sent by or to the receiver and/or his counsel. In fact, the SEC produced
25 the receiver emails to defendants on a separate disc so that defendants could easily
26 identify those emails, reducing any claimed burden to review those documents.

27 Accordingly, for the reasons stated herein and in its opposition to defendants’
28 motion for modification of preliminary injunction order to remove Thomas C. Hebrank

1 as court-appointed receiver (Dkt. 946), the SEC respectfully requests that the Court deny
2 defendants' motion.

3 Dated: February 9, 2015

Respectfully submitted,

4 /s/ Sam S. Puathasnanon

5 Sam. S. Puathasnanon

6 Lynn M. Dean

7 Sara D. Kalin

Attorneys for Plaintiff

8 Securities and Exchange Commission
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1 **PROOF OF SERVICE**

2 I am over the age of 18 years and not a party to this action. My business address is:

3 U.S. SECURITIES AND EXCHANGE COMMISSION
4 444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

5 On February 9, 2015, I caused to be served the document entitled **PLAINTIFF
6 SECURITIES AND EXCHANGE COMMISSION'S SUPPLEMENTAL
7 RESPONSE TO DEFENDANTS' MOTION FOR MODIFICATION OF
8 PRELIMINARY INJUNCTION ORDER TO REMOVE THOMAS C.
9 HEBRANK AS COURT-APPOINTED RECEIVER** on all the parties to this
action addressed as stated on the attached service list:

10 **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for
collection and mailing today following ordinary business practices. I am readily
familiar with this agency's practice for collection and processing of correspondence
for mailing; such correspondence would be deposited with the U.S. Postal Service on
the same day in the ordinary course of business.

11 **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s),
12 which I personally deposited with the U.S. Postal Service. Each such envelope was
deposited with the U.S. Postal Service at Los Angeles, California, with first class
13 postage thereon fully prepaid.

14 **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility
regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los
15 Angeles, California, with Express Mail postage paid.

16 **HAND DELIVERY:** I caused to be hand delivered each such envelope to the
office of the addressee as stated on the attached service list.

17 **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated
18 by United Parcel Service ("UPS") with delivery fees paid or provided for, which I
deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at
19 Los Angeles, California.

20 **ELECTRONIC MAIL:** By transmitting the document by electronic mail to
the electronic mail address as stated on the attached service list.

21 **E-FILING:** By causing the document to be electronically filed via the Court's
22 CM/ECF system, which effects electronic service on counsel who are registered with
the CM/ECF system.

23 **FAX:** By transmitting the document by facsimile transmission. The
24 transmission was reported as complete and without error.

25 I declare under penalty of perjury that the foregoing is true and correct.

26 Date: February 9, 2015

27 /s/ Sam S. Puathasnanon
Sam S. Puathasnanon

