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

13 SECURITIES AND EXCHANGE
14 COMMISSION,

15 Plaintiff,

16 v.

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

22 Defendants.
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CASE NO.: 3:12-CV-02164-GPC-JMA

**MOVANTS' REPLY TO
RECEIVER'S RESPONSE TO
MOVANTS' EX PARTE MOTION
FOR ORDER:**

**(A) SETTING A HEARING ON
RECEIVER'S RECOMMENDATION
REGARDING ENGAGEMENT OF
REAL ESTATE BROKERS FOR LAS
VEGAS 1, LAS VEGAS 2, AND
TECATE PROPERTIES, AND
(B) STAYING ANY FURTHER EX
PARTE MOTIONS RELATING TO
THE SALE OF ANY PROPERTY
SUBJECT TO THE RECEIVERSHIP
IN THE ABSENCE OF GOOD
CAUSE**

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

1 Movants Terry Adkinson, Lawrence Berkel, Lawrence Berkel, IRA, Darla Berkel,
2 Mathew Berta, Allert Boersma, Charles Bojarski, Diane Bojarski, Jason Bruce, Trisha
3 Bruce, Daniel Burns, Susan Burns, Henrik Jonson, Carol Jonson, Henrik Jonson, IRA,
4 Curt & Janean Johnson Family Trust, Curt & Janean Johnson, jointly, Curt Johnson, Curt
5 Johnson, Roth IRA, Curt Johnson, Roth IRA, Stephen Dankworth, David and Sandra
6 Jones Trust, Debra Askeland, Dennis Gilman IRA, William R. Diehl, Marilyn L.
7 Duncan, Regis T. Duncan, Regis T. Duncan, IRA, Elizabeth Lamb, Judy Froning,
8 George Klinke, IRA, Mary Grant, Roderick C. Grant, Gary Hardenburg, Gary
9 Hardenburg, Roth IRA, Henrik Jonson, IRA, Stephen Hogan, Val Indihar, John
10 Jenkins, Mary J. Jenkins, IRA, Trustee, IRA, Trustee, Mary J. Jenkins, Trustee, John
11 Lukens, John Lukens, IRA, Karen J. Coyne IRA, Craig Lamb, Lea Leccese, Paul
12 Leccese, Lloyd Logan and Ida Logan, jointly, Lloyd Logan, IRA, William Loeber,
13 Loretta J. Diehl, Daryl R. Mabley, Elizabeth Q. Mabley, D & E Macy Family Revocable
14 Living Trust, Janice Marshall, Janice Marshall, IRA, Marc McBride, Marcia McRae,
15 Mealey Family Trust, Mildred Mealey, beneficiary of Duane Mealey IRA, Jeffrey
16 Merder, Jeffrey Merder, IRA, Rebecca Merder, Minner Trust, Jim Minner, Monique
17 Minner, Reeta Mohleji, Roger Moucheron, Shirley Moucheron, William R.
18 Nighswonger, Eric W. Norling, Eric W. Norling, IRA, Renee Norling, Chris Nowacki,
19 IRA, Tamara and Chris Nowacki, jointly, Tamara Nowacki, IRA, John R. Oberman Neil
20 Ormonde, IRA, Nevada Ormonde, IRA, Thomas H. Panzer, Roth IRA, Thomas
21 Herman Panzer Trust, Thomas H Panzer, Trustee, Ronald Parkinen, Deidre Parkinen,
22 Alfred L. Pipkin, Alfred L. Pipkin, IRA, Prentiss Family Trust, Kenneth and Gail Prentiss
23 Trustees, Robert Indihar, Nick Ruddick, Salli Sue Sammut, IRA, Salli Sammut Trust,
24 Salli Sue Sammut Trustee, Paul R. Sarraffe, IRA, Ronald Scott, Ronald Scott, IRA,
25 William L. Summers, IRA, Carol D. Summers, William L. Summers, Robert Tuohy,
26 Gwen Tuohy, Jeffrey J. Walz, Steve P. White, IRA, Steve P. White, SEP IRA, W.C.
27 Wilhoite, Karen Wilhoite, W.C. Wilhoite, Roth IRA, Gerald Zevin, IRA, Judith
28 Glickman Zevin, Gerald Zevin, Judith Glickman Zevin, IRA, Susan Graham, Robert

1 Churchill IRA, Robert Churchill Family Trust, Mark and Linda Clifton, Dennis and
2 Diane Gilman, John and Mary Jenkins Trustees, the Ormonde Family Trust, Ronald
3 Askeland, Douglas Sahlin IRA, Edith Sahlin IRA, George and Joan Trezek, Karen
4 Coyne, James J. Coyne Jr. Trust, David Fife IRA, Leo and Cindy Dufresne, Leo T.
5 Dufresne Jr. IRA, Darla Berkel IRA, William Nighswonger IRA, Juanita Bass, William
6 V. and Carol J. Dascomb Trust, Robert Indihar IRA, Linda Baldwin IRA, Baldwin
7 Family Survivors' Trust, Juanita Bass IRA, Matthew and Jennifer Berta, Randall S.
8 Ingermanson IRA, Kimberly Dankworth, IDAC Family Group LLC, Robert S. Weschler,
9 Karie J. Wright, D.F. Macy IRA, Stephen and Polly Yue, David Karp IRA, Iris Bernstein
10 IRA, John and Mary Jenkins Trust, Lisa A. Walz, Ralph Brenner, David Kirsh, David
11 Kirsh, Roth IRA, David Kirsh, Traditional IRA, Kirsh Family Trust UTD, The
12 Knowledge Team Profit Sharing Plan, Joy A. de Beyer, Roth IRA, Joy A. de Beyer,
13 Traditional IRA, Joy de Beyer, Michael R. Wertz, Michael R. Wertz, IRA, Catherine E.
14 Wertz, Catherine E. Wertz IRA, Jeffrey Larsen, Gene Fantano, Gwenmarie Hilleary,
15 Arthur V. Rocco, Kristie L. Rocco, and Arthur V. and Kristie L. Rocco Living Trust
16 reply to Receiver's Response to Movants' Ex Parte Motion for Order (A) Setting a
17 Hearing on Receiver's Recommendation Regarding Engagement of Real Estate Brokers
18 for Las Vegas 1, Las Vegas 2, and Tecate Properties, and (B) Staying Any Further *Ex*
19 *Parte* Motions Relating to the Sale of Any Property Subject to the Receivership in the
20 Absence of Good Cause.

21 **I. The Receiver Makes No Claim the Receivership Would Be Prejudiced.**

22 The Receiver makes no claim the receivership would suffer any prejudice if the
23 Court sets his *ex parte* motion for hearing with his related motions on April 29. Instead,
24 he reverts back to a tactic he has used before: If the facts and law do not support his
25 argument, he launches an attack on opposing counsel.

26 He claims that Movants tried to trick the Court by saying the Receiver had not
27 responded to an email when he in fact did so. This contention begins with a statement
28 contained in paragraph 5 of Movants' motion (Dkt. No. 1204), which reads: "The

1 Receiver makes no contention, much less an evidentiary showing, that he, the
2 receivership estate or any party would suffer any prejudice by the setting of this matter
3 for hearing on April 29, 2016.” This refers to Exhibit 1 as support, an email from
4 Movants’ counsel to the Receiver’s counsel, which reads:

5 I would appreciate your providing me with any information *regarding any*
6 *prejudice that would be experienced by the receivership in relation to the*
7 *Las Vegas 1, Las Vegas 2 and the Tecate properties* by continuing the
8 hearing until April 29, e.g., scheduling of foreclosure sales, fire hazards on
9 the site or any other class of prejudice you believe exists. To the extent you
10 contend there is any prejudice, would you kindly provide me with the related
11 documents as before, e.g., the notice of trustee's sale, etc.
12 *Please be very specific regarding any prejudice you assert that could be*
13 *experienced by the receivership and the supporting records that you believe*
14 *evidence that prejudice* (emphasis added).¹

15 The Receiver never sent a response to this email. We submit there are three ways
16 to reply to an email. The customary way is to click “reply” and create a chain. The
17 Receiver’s counsel did not do this. The second way is to refer to the earlier email, e.g.,
18 “This is a response to your email of ...” He did not do this. Finally, one could imply the
19 email is a response by linking the subject matter in one email to the subject matter of the
20 other. He did not do this.

21 Instead, he filed with the Court an email chain with two emails, one from Movants’
22 counsel to him and another from him to us.² Neither email addresses the prejudice

23 ¹ See Exhibit 1 to Movants’ Ex Parte Motion for Order (A) Setting a Hearing on
24 Receiver’s Recommendation Regarding Engagement of Real Estate Brokers for Las
25 Vegas 1, Las Vegas 2, and Tecate Properties, and (B) Staying Any Further *Ex Parte*
26 Motions Relating to the Sale of Any Property Subject to the Receivership in the Absence
27 of Good Cause (Dkt. No. 1204).

28 ² See Exhibit A, p. 7 to Receiver’s Response to Movants’ Ex Parte Motion for Order
(A) Setting a Hearing on Receiver’s Recommendation Regarding Engagement of Real
Estate Brokers for Las Vegas 1, Las Vegas 2, and Tecate Properties, and (B) Staying Any
Further *Ex Parte* Motions Relating to the Sale of Any Property Subject to the
Receivership in the Absence of Good Cause (Dkt. No. 1205).

1 question quoted above. Rather, both emails deal with a different subject. In our email to
2 the Receiver's counsel we requested him to withdraw his motion.³ In his email to us, he
3 declines to do so. We do not read anything in either email that addresses the prejudice
4 question quoted above. Consequently, the email chain was not attached as a response to
5 the email quoted above (Exhibit 1), because we did not consider it a response to that
6 email.

7 **II. The Receiver Misinterprets Investors' Defaults as Support for Him.**

8 The Receiver argues that the Court should assume that the 3,300 investors who
9 have not yet retained counsel support the Receiver's position, because they have stopped
10 paying the GPs' expenses. This is a giant size *non sequitur*. The Receiver does not
11 explain the causal connection between the investors' defaults on the maintenance fees
12 and his conclusion that should be interpreted as support for his position. Indeed, it would
13 be more appropriate to interpret the defaults as a loss of confidence in the receivership.

14 Indeed, at this point, it is hard to understand why anyone would still be paying fees
15 to the GPs to maintain properties. The Receiver has repeatedly advised investors they will
16 derive little benefit from doing so. In June 2013, his report to the Court, which he also
17 posted to his website, told investors he had suspended billing for the GPs, because of the
18 "bleak outlook" for their investments. He put it this way:

19 In light of the appraised values of the 23 properties and the bleak outlook for
20 investors, the Receiver recently suspended sending these bills to investors.
21 The unfortunate reality is that some investors stand to receive nothing and
22 others stand to receive a fraction of what they invested. Under these
23 circumstances, the Receiver believes it is generally inequitable to continue to
24 bill investors until such time as the disposition of each property has been
25 determined. For Separating GPs, once they have separated from the
26 receivership, they can resume billing and collecting from their investors in
27 order to pay GP expenses. *Until that time, however, investor losses should
28 not be exacerbated by continued billings. ...*

³ *Id.* p. 8.

1 *Under these circumstances, and considering the bleak outlook for most*
 2 *investors, the Receiver believes it is generally inequitable to continue*
 3 *collecting note payments from investors until such time as the disposition of*
 4 *each property has been determined* (emphasis added).⁴

5 The Receiver also told investors there would be no harm to the GPs because they
 6 were protected by the receivership:

7 As a result of suspending investor billings and collections on investor notes,
 8 some mortgage payments and property taxes that otherwise would have been
 9 paid (assuming sufficient amounts were collected from investors) will not be
 10 paid. However, this is for a short period of time and the GPs are protected
 11 from actions by creditors as long as they remain in the receivership.⁵

12 We doubt that investors forgot the Receiver's advice that paying his bills was essentially
 13 throwing good money after bad.

14 More recently, the Receiver has given investors yet another reason to stop paying
 15 the bills. They will receive no benefit for doing so. At first blush, it would seem that an
 16 investor in partnerships that own interests in properties with high values would be happy
 17 to pay the bills so the partnerships could maintain the properties. But that is not the case.
 18 According to the Receiver, even investors in partnerships that own the most valuable
 19 properties—Las Vegas 1 (\$5,275,000), Las Vegas 2 (\$1,375,000), and LV Kade
 20 (\$8,260,000)—have stopped paying the fees.⁶

21 ///

22 ⁴ Receiver's Report and Recommendations Regarding Valuation of Real Estate Assets
 23 of Receivership Entities, p. 14, ll. 8-24 (Dkt No. 203).

24 ⁵ *Id.*, p. 16 ll. 4-8.

25 ⁶ These valuations may be found at Exhibit A, p. 31 of Receiver's Notice of Motion and
 26 Motion for: (A) Authority to Conduct Orderly Sale of General Partnership Properties; (B)
 27 Approval of Plan of Distributing Receivership Assets; and (C) Approval of Procedures
 28 for the Administration of Investor Claims (Dkt. No. 1181). The Receiver has moved to
 29 sell all three properties, because investors have failed to pay his bills. See
 30 Recommendation Regarding Engagement of Real Estate Brokers for Five GP Properties,
 31 p. 2, ll. 11-14 and table at same page (Dkt. No. 1166) and Recommendation Regarding
 32 Engagement of Real Estate Brokers for Las Vegas 1, Las Vegas 2, and Tecate Properties,
 33 p. 2, ll. 10-15 and table at pages 2 and 3 (Dkt. No. 1203).

1 Why would this be? Although it seems counterintuitive, it is not. According to the
2 Receiver's formula, all investors will receive the same percentage of their original
3 investment regardless of what partnerships they invested in. Investors who own interests
4 in GPs owning Las Vegas 1, Las Vegas 2 and LV Kade would receive the same 13.54%
5 as investors in worthless properties. Indeed, investors in the most valuable properties are
6 likely to have to pay more, since the taxes on those properties are greater. Only investors
7 committed to serving the common good would continue paying the fees. Perhaps Saint
8 Thomas Aquinas and some saintly investors would still be paying. But most investors
9 would likely ask themselves a simple question: what is in it for me? The answer is
10 nothing, according to the Receiver. Consequently, only the saints are still paying.

11 **III. The *Ex Parte* Sales Process Is Now Eroding Due Process**

12 If the Receiver was allowed his way, he would have all of the properties sold
13 through the *ex parte* process before the hearing. Let us assume for a moment the Court
14 approved the sale of the Jamul property and the contracts with brokers on the Las Vegas
15 1, Las Vegas 2, and Tecate properties. These properties would bring to nine the number
16 of properties which the Receiver is in the process of trying to sell. As a practical matter,
17 the piecemeal sales process proposed by the Receiver could render meaningless the
18 hearing set for April 29.

19 Movants' counsel has now had some time to review the Court's orders—not
20 thoroughly yet—but enough to understand the Court is aware of the Due Process
21 implications of selling the properties in *ex parte* applications without the participation of
22 the investors who are also partners in the GPs under California Law. In his order of
23 August 16, 2013, the Court noted:

24 Notwithstanding the Court finds investors have not yet been denied due
25 process because the Receiver's actions in relation to the GPs have not
26 deprived the GPs of any material interest While the Receiver has
27 commissioned appraisals of 28 the GP properties and caused some GPs to
28 buy back some of Western's equity units, *investors have not been deprived*

1 *of their primary investment: the property interests 2 they acquired from*
 2 *Western (emphasis added).*⁷

3 Likewise, the Court noted in its order of July 22, 2014:

4 **Due Process**

5 In its Modification Order, the Court concluded that, because the GPs had not
 6 been deprived of a material property interest (i.e., ownership of the
 7 underlying properties), the GPs' due-process rights had not yet been
 8 infringed. Then, because the Court ruled that the GPs should be released
 9 from the receivership upon satisfaction of certain conditions, it became
 10 unnecessary to provide the GPs with an opportunity to be heard.

11 Because the Court now concludes that the GPs should remain in the
 12 receivership, the Court finds it appropriate to give the GPs—all of which
 13 already have notice of this action—an opportunity to be heard. See *In re San*
 14 *Vincente Med. Partners Ltd.*, 962 F.2d 1402, 1407 (9th Cir. 1992)⁸

15 In effect, the Receiver has begun the process of liquidating the GPs. This has major
 16 Due Process implications. It is well established that partners are necessary parties to
 17 litigation which would dissolve a partnership. *Delta Financial Corp. v. Paul D.*
 18 *Comanduras & Assoc.*, 973 F.2d 301, 306 (4th Cir. Va. 1992)([I]n a suit between certain
 19 partners over partnership assets or obligations in which the effect, as here, will be a
 20 dissolution and liquidation of the partnership, all partners are necessary parties and must
 21 be joined if feasible. . . . [T]he necessity of joining all partners to such a suit is well
 22 established.). The same rule exists in California. *Rudnick v. Delfino*, 140 Cal. App. 2d 260,
 23 265 (1956) (Quoting from Corpus Juris Secundum, "HN3 Ordinarily, all the partners are
 24 not only proper, but are also necessary parties to an action for dissolution; . . . unless all
 25 are brought into the litigation, a decree cannot be made which will finally dispose of all
 26 questions involved. . . .").

27 ⁷ Order (1) Granting in Part and Denying in Part Defendants' Motion to Modify
 28 Preliminary Injunction Order; (2) Declining to Approve Receiver's Report and
 Recommendations Regarding Valuation of Real Estate Assets of Receivership Entities;
 (3) Granting Receiver's Motion for Authority to Pursue Claims Against Linmar
 Borrowers, p. 19, line 27 to p. 20, l. 2 (Dkt. No. 470).

⁸ Order on Sua Sponte Reconsideration of August 16, 2013 Order to Release General
 Partnerships from Receivership, p. 7, ll. 14-24 (Dkt. No. 629).

1 Doing the liquidation piecemeal by *ex parte* motions is merely slicing the Due
2 Process violations into smaller pieces. In the aggregate, they still have the same Due
3 Process implications. We are stunned the Receiver cannot grasp the necessity to put these
4 sales on hold until Movants can place the substantive and procedural issues, the relevant
5 facts, and the applicable law before the Court.

6
7 DATED: March 14, 2016

Respectfully submitted,

8
9 By: /s/ Gary J. Aguirre
10 GARY J. AGUIRRE
11 Aguirre Law, A.P.C.
12 gary@aguirrelawapc.com
13 Attorney for Movants
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