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THOMAS C. HEBRANK

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

14 SECURITIES AND EXCHANGE
COMMISSION,

15 Plaintiff,

16 v.

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

20 Defendants.

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

**RECEIVER'S OPPOSITION TO
DILLON INVESTOR GROUP'S
MOTION FOR INTERVENTION AS
A MATTER OF RIGHT, OR,
ALTERNATIVELY, FOR
PERMISSIVE INTERVENTION
[Dkt. 1227]**

Date: May 6, 2016

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 the General Partnerships listed on Schedule 1 to the
4 Preliminary Injunction Order entered on March 13, 2013 (collectively,
5 "Receivership Entities"), submits this Opposition ("Opposition") to the Proposed
6 Intervenor Group's Notice of Motion for Intervention as a Matter of Right, or,
7 Alternatively, for Permissive Intervention. [Dkt. 1227] ("Dillon Intervention
8 Motion").

9 The Receiver opposes the Dillon Intervention Motion because the "Dillon
10 Intervenors" fail to meet even the modest requirements of proof called for under
11 Federal Rule of Civil Procedure 24 (a)(2) or (b)1(B). The Receiver further objects
12 to the Dillon Intervention Motion on the grounds that it seeks relief beyond that
13 afforded by Fed. R. Civ. P. 24 (a)(2) or (b)1(B) in that it reflects a de facto motion
14 for reconsideration of many of the Court's prior rulings, and seeks rights not
15 afforded under Fed. R. Civ. P. 24, including but not limited to supplanting this
16 Court's role in overseeing the Receiver's activities. If and only if the Court allows
17 intervention, (which the Receiver opposes), then intervention must be limited to the
18 Court accepting the opposition to the sole matter pending before this Court, the
19 Receiver's Motion For: (A) Authority to Conduct Orderly Sale of General
20 Properties; (B) Approval of Plan of Distributing Receivership Assets; and
21 (C) Approval of Procedures for the Administration of Investor Claims (the
22 "Receiver Distribution Motion"). See Edison Electric Institute v. Environmental
23 Protection Agency 391 F.3d 1267, 1274, (D.C. Cir. 2004) ("An intervening party
24 may join issue only on a matter that has been brought before the court by another
25 party." Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990));
26 United States v. City of Detroit 712 F.3d 925, 931-932 (6th Cir. 2013) ("Courts are
27 not faced with an all or nothing choice between grant or denial: Rule 24 also
28 provides for limited-in-scope intervention.")

I. SUMMARY OF ARGUMENT

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2 The Dillon Intervention Motion asks the Court to allow the Dillon
3 Intervenor", to intervene in this lawsuit in order to both litigate and re-litigate a
4 litany of issues. In addition to intervening to file an opposition to the only matter
5 pending before the Court, the Receiver's Distribution Motion, the Dillon Intervenor
6 seek to participate in every aspect of the lawsuit and the receivership, including
7 oversight of the Receiver. Among other things, the Dillon Intervenor ask the Court
8 to allow them to pursue reconsideration of the Court's prior orders concerning the
9 activities and management of the general partnerships in the receivership and the
10 sale of assets. If this were not enough, the Dillon Intervenor also ask the Court to
11 grant them unlimited access to all books and records held by the Receiver.

12 Nothing in Fed. R. Civ. P. 24 contemplates intervention for the purpose of
13 turning back the hands of time and revisiting decisions previously made by the
14 Court. Nor do the Dillon Intervenor point to any law to support an order allowing
15 them to assume the role of the Court in overseeing the Receiver's work.

16 It is also important to note that the Dillon Intervenor do not point to any
17 concrete reason for these demands nor do they explain how their ultimate objectives
18 and goals are any different than those of the Receiver and the Court. S.E.C. v. TLC
19 Investments, 147 F.Supp.2d 1031, 1041-1043 (C.D. Cal 2001), (where the ultimate
20 goal of the receiver and court aligns with investors, intervention is unwarranted.)
21 Here, the issues and concerns raised by the Dillon Intervenor are nothing more than
22 a "paper tiger" designed to cause fear and raise concern among investors. Virtually
23 all of the concerns voiced in the Dillon Intervention Motion concern strategy issues
24 and are based on a misreading of the Receiver's Distribution Motion and the
25 Receiver's proposals concerning sales procedures. In fact, the Dillon Intervenor
26 and the Receiver share the same ultimate goals even if there exist differences in
27 strategy. Id. at 1042. As such, intervention should be denied.

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1 rights to intervene that they seek. If intervention is permitted, which the Receiver
2 opposes, the Dillon Intervenors should be limited to the filing of their opposition to
3 the Receiver Distribution Motion.

4 In considering the Dillon Intervention Motion, the Receiver also asks that the
5 Court consider two salient facts: the Dillon Intervenors represent less than 5% of
6 the overall investors; and the cost expended by the Receiver in responding to the
7 myriad of demands made upon the Receiver by the Dillon Investors will be borne by
8 100% of the investors through a diminishment of their interests in the receivership
9 estate.

10 1. Timing.

11 To the extent the Dillon Intervenors seek to intervene in order to have the
12 Court consider their opposition to the Distribution Motion, the Dillon Intervention
13 Motion is timely. The Dillon Intervention Motion is not timely as to the balance of
14 their requests for intervention.

15 In addition to seeking the right to file an opposition to the Distribution
16 Motion, the Dillon Intervenors ask to intervene in the overall case and receivership
17 so that they may revisit an array of issues which were raised and decided by the
18 Court in earlier proceedings. In addition, they seek to intervene to become
19 overseers of the Receiver's activities.

20 The Dillon Intervenors are asking to file pleadings and be heard as to matters
21 where investors were previously invited to file letters or pleadings and appear at the
22 hearings. Throughout these proceedings the Court has allowed and encouraged
23 investors to participate in the case and the Court accepted hundreds of briefs and
24 letters in connection with each of the material matters brought before this Court.
25 There is simply no reason to allow the Dillon Intervenors to intervene for the
26 purpose of revisiting matters already rules upon by this Court.

27 For example, the Dillon Intervention Motion seeks to reconsider the motions
28 in which the Court decided to place the Receiver in control of and to manage the

1 general partnerships. Similarly, the Dillon Intervenors ask to have full access to
2 Receiver's accounting records and to oversee the Receiver's work managing the
3 GPs. The Receiver has been filing reports and accountings in this Court since the
4 inception of the case in 2012. The Reports concerned both management of the GPs
5 as well as the Receiver's accounting. The Dillon Intervenors have had full access to
6 and an opportunity to object to the Receiver's reports and accountings. If the Dillon
7 Intervenors had an issue with the Receiver's accountings during 2012, 2013, 2014
8 and 2015, then they had every opportunity to object or file a motion to intervene
9 during that 3 year period. The Dillon Intervenors' request to intervene now to have
10 access and revisit all prior accounting is untimely and entirely unsupported by any
11 evidence.

12 The Receiver and the 95% investors who are not seeking intervention will be
13 prejudiced by these untimely requests by the Dillon Intervenors. Specifically, the
14 cost associated with responding to motions and re-creating accountings will be
15 extraordinary and be borne by all investors.

16 The Dillon Intervenors fail to meet their burden of proof as to the timeliness
17 and therefore the Dillon Intervention Motion should be denied.

18 2. Protected Interests.

19 To the extent the Dillon Intervenors seek to intervene in order to have the
20 Court consider their opposition to the Distribution Motion, the Receiver recognizes
21 the interests of the general partners in addressing the amount of their claims as a
22 protected interest. The Receiver does not recognize and opposes any effort to
23 intervene in the entirety of the receivership proceedings or the underlying lawsuit, in
24 order to oversee the Receiver or to otherwise reconsider matters already ruled on by
25 this Court.

26 The Dillon Intervenors have not presented a single piece of evidence to
27 suggest that they have a protected interest at issue with regard to matters previously
28 decided by this Court or in otherwise insinuating themselves into the receivership

1 proceeding as overseers of the Receiver. Requests such as their demand to "oversee
2 and evaluate the Receiver's management of the GPs and GP's Assets" cannot be tied
3 to any specific interest of the Dillon Intervenors and they are clear matters best left
4 to this Court's discretion and oversight.

5 In fact, it is this broad and open-ended request to "oversee" which speaks
6 most clearly to the myriad of problems raised by intervention. Essentially, the
7 Dillon Intervenors seek to add an additional wholly unwarranted layer of
8 management and cost to this case. Neither the Receiver nor the Court should be
9 burdened by responding to an open-ended set of demands by the Dillon Investors.

10 3. Impairment To A Protected Interest.

11 The third prong of Fed. R. Civ. P. 24(a)(2) requires the moving party to
12 demonstrate the disposition of the pending litigation may, as a practical matter,
13 impair its right to protect its interests. Even if the underlying action would affect the
14 perspective intervenor's interests, "their interests might not be impaired if they have
15 'other means' to protect them." California ex rel. Lockyear 450 Fed.3d 442.

16 The Dillon Intervenors have simply failed to put forth any evidence that the
17 Receiver's pending Distribution Motion and the other work impairs the Dillon
18 Intervenors' ability to protect their interests. At the end of the day, the Dillon
19 Investor's sole interest in the case is a claim for money. Their claims will be
20 addressed via the claims process and ultimately a distribution of proceeds. The
21 Dillon Intervenors and all other creditors will have an opportunity to participate in
22 that process. In the interim, they have been provided less intrusive and burdensome
23 alternatives to participate in the case by this Court allowing the investors to file
24 letters and briefs with the Court. See SEC v. American Pension Services, Inc., 2015
25 U.S. Dist. LEXIS 6782 (D. Utah Jan. 20, 2015) (Movant's interests are not
26 considered impaired or impeded solely because they disagree with the receiver's
27 proposed liquidation plans, particularly where they can avail themselves of a claims
28 process); SEC v. Nadal, 2009 U.S. Dist. LEXIS 94302. (M.D. Fld. Sept. 24, 2009).

1 The Dillon Intervenors' sole basis for intervention appears to be their
2 disagreement with the Receiver's proposal to liquidate assets and distribute
3 proceeds. The ability to participate in the claims and distribution process coupled
4 with the Court's liberal acceptance of their court filings demonstrate that there is no
5 need for intervention. As such, the Dillon Investors have not met their burden of
6 proof with regard to impairment. Id.

7 4. Inadequate Representation.

8 The Dillon Intervenors have not met their burden of proof to demonstrate that
9 their interests are not adequately represented by participants in the underlying
10 action. S.E.C. v. TLC Investments 147 F.Supp.2d 1031, 1041-1042 (C.D. Cal
11 2001). More specifically, the Dillon Intervenors have not met their burden of proof
12 pursuant to the four-part test of the 9th Circuit in considering adequacy of
13 representation: (1) whether the interest of a party is such that it will undoubtedly
14 make the intervenors arguments; (2) whether the present party is capable and willing
15 to make such arguments, and (3) whether the intervenor would offer any necessary
16 elements to the proceedings that the other parties would neglect. See People of
17 California v. Tahoe Regulatory Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986).
18 "The most important factor in determining the adequacy of representation is how the
19 interests compare with the interests of existing parties." Arakaki v. Cayetano, 324
20 F.3d 1078, 1086 (9th Cir. 2003). As noted by one Court, "the adequacy of interest
21 requirement is more than a paper tiger. A party that seeks to intervene as of right
22 must produce some tangible basis to support a claim of purported inadequacy".
23 Public Service Company of New Hampshire v. Douglas Patch 136 F.3d 197, 206 (1st
24 Cir. 1998) (citing Moosehead Sanitary District v. SG Philips Corp. 610 F.2d 49, 54
25 (1st Cir. 1979)). TLC 147 F.Supp.2d at 1042.

26 Moreover, where "one of the duties of the existing parties is to represent the
27 interest of the intervenor, intervention will not be allowed unless a compelling
28 showing of inadequate representation is made." In re Christina Thompson 965 F.2d

1 1136, 1143 (1st Cir. 1992). In such circumstances, mere conclusory speculation by
2 intervenors is insufficient and "the putative intervenor must exert concrete facts
3 which demonstrate that (1) the existing representation of the putative intervenors
4 interest is inhibited by the personal interest of the existing representative, (2) the
5 existing representative and opposing party are engaged in collusive activities, or
6 (3) the existing representative has failed or refused to fulfill the fiduciary duty to
7 protect the interests asserted by the putative intervenor." Id.

8 The Dillon Intervenors fail to present any evidence to support their allegations
9 that the Receiver and this Court are not already representing or allowing for the
10 representation of the investors' interests, including that of the Dillon Intervenors.
11 The Receiver's Distribution Motion presents a detailed description of alternatives
12 concerning the treatment of the subject general partnerships and the real properties
13 associated therewith and provides the Court with alternative proposals for both the
14 sale of assets and distribution of the proceeds. [Dkt 1181 p. 9-10,12-14, 17-21].
15 Most recently, the Court ordered the Receiver to consider and provide a proposal for
16 GPs to exit the receivership [Dkt. 1224].

17 The Court has allowed investors to file hundreds of briefs and letters in this
18 case and continues to do so. The Court carefully has considered all briefs and letters
19 and specifically discussed and addressed these during court proceedings and in its
20 orders. Similarly the Receiver has received thousands of emails and letters from
21 investors that were not filed the Court throughout the course of this receivership.
22 The Receiver has both responded to, and taken into account, all such investor letters
23 and briefs.

24 The record of the Court shows that Receiver has filed and the Court has
25 approved numerous recommendations resulting in investor votes being taken on
26 offers and letters of intent for GP properties. The existing sale process provides for
27 investors to receive notice and a full opportunity to provide feedback on offers for
28 GP properties and proposed sales. See Docket numbers 1056, 1069. In fact, the

1 entire record of this case points to a full and adequate representation of the interests
2 of all investors in the GPs including the viewpoints now presented by the Dillon
3 Intervenor in their opposition to the Receiver's Distribution Motion.

4 As in the TLC case, the Dillon Intervenor merely argue that the Receiver is
5 not pursuing their preferred strategy. TLC 147 F.Supp.2d at 1042. However, there
6 is no dispute that the Receiver and investors share the same ultimate goal. Id. In
7 fact, the objectives of the parties are precisely the same; to find the most equitable
8 means of distributing the assets of the receivership estate. See SEC v. American
9 Pension Services, Inc., 2015 U.S. Dist. LEXIS 6782, at *14.

10 Indeed the arguments of the Dillon Intervenor are nothing more than a 'paper
11 tiger.' Setting aside the drama and the rhetoric and considering the actual facts, the
12 record is clear that the interests of the Dillon Intervenor as to each of the matters
13 described in the motion are already being fully and completely considered by the
14 Receiver and the Court. As such, the claims of impairment are unfounded and
15 without tangible basis in the facts presently before the Court.

16 There is no indication whatsoever that the Receiver's interests or the interests
17 of this Court administering this federal equity receivership are separate and apart
18 from the interests of the investors. While Mr. Dillon's clients, who represent less
19 than 5% of all investors, may not agree with the Receiver's proposals per se or the
20 Court's decisions, this does not suggest the Court and the Receiver are not acting in
21 the best interest of these investors. Id.

22 **B. Permissive Intervention Is Not Warranted.**

23 Rule 24 (b)(1)(B) states that the court may permit intervention by someone
24 who "has a claim or defense that shares with the main action a common question of
25 law or fact." Fed. R. Civ. P. 24 (b)(1)(B). Permissive intervention is discretionary.
26 See Spangler v. Pasadena City Bd. of Educ., 552 Fd.2d 1326, 1329 (9th Cir. 1977).
27 In determining whether to exercise its discretion, a court may consider, among other
28 things, whether the proposed intervenor's interests are adequately represented by

1 other parties, whether intervention will prolong or unduly delay litigation, and
 2 whether intervenor will significantly contribute to full development of the
 3 underlying factual issues. See Id. A party seeking permissive intervention has the
 4 burden of establishing the basis for intervening. See Citizens For Balanced Use v.
 5 Montana Wilderness Association, 647 Fd.3d 893, 897 (9th Cir. 2011).

6 The Aguirre Intervenors cannot make these required showings. As discussed
 7 above, there is no reason to believe the Receiver and this court cannot be fair and
 8 impartial in considering the claims and assertions of the Aguirre Intervenors on a
 9 fully developed factual record. See SEC v. American Pension Services, Inc., 2015
 10 U.S. Dist. LEXIS 6782, at*14 (denying intervention where movant failed to
 11 establish that their economic interests were not adequately represented by the
 12 receiver). The Aguirre Intervenors' case is premised on nothing more than an
 13 assertion that their interests are impaired because they disagree with the Receiver's
 14 proposed plan. Such assertions are simply insufficient to satisfy their burden for
 15 intervention, permissive or otherwise. SEC v. American Pension Services, Inc.
 16 2015 U.S. Dist. LEXIS 6782 (D. Utah, Jan 20, 2015).

17 III. CONCLUSION.

18 In light of the foregoing, the Receiver requests the Court to deny the Dillon
 19 Intervention Motion.

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 21 Dated: April 22, 2016

Respectfully submitted,

22 ALLEN MATKINS LECK GAMBLE
 23 MALLORY & NATSIS LLP

24 By: /s/ David R. Zaro

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 26 Attorneys for Receiver
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 515 S. Figueroa Street, 9th Floor, Los Angeles, CA 90071-3309.

On April 22, 2016, I served on the interested parties in this action the within document(s) described as:

RECEIVER'S OPPOSITION TO DILLON INVESTOR GROUP'S MOTION FOR INTERVENTION AS A MATTER OF RIGHT, OR, ALTERNATIVELY, FOR PERMISSIVE INTERVENTION [Dkt. 1227]

BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"): the foregoing document(s) will be served by the court via NEF and hyperlink to the document. On April 22, 2016, I checked the CM/ECF docket for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address indicated below:

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BY MAIL: I placed a true copy of the document in a sealed envelope or package addressed as indicated on the attached Service List on the above-mentioned date in Los Angeles, California for collection and mailing pursuant to the firm's ordinary business practice. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 22, 2016, at Los Angeles, California.

_____ David R. Zaro (Type or print name)	_____ /s/ David R. Zaro (Signature of Declarant)
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