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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 v.

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

20 Defendants,

21 ALEX HAUA, et al.,

22 Proposed Intervenors

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

**REPLY BRIEF IN SUPPORT OF
INTERVENING GROUP'S MOTION FOR
INTERVENTION AS A MATTER OF
RIGHT, OR, ALTERNATIVELY, FOR
PERMISSIVE INTERVENTION**

[FRCP 24]

Hearing:

Date: May 6, 2016
Time: 1:30 p.m.
Dept.: 2D
Judge: Hon. Gonzalo P. Curiel

I. INTRODUCTION

The Receiver, Thomas Hebranks' (the "Receiver") opposition to the instant motion misrepresents the Intervening Group's scope of intervention. The Intervening Group does not seek to interfere in the underlying litigation nor does the Intervening Group seek to undo previous orders issued by this Court as they relate to the underlying Schooler action. Rather, the Intervening Group seeks to oppose the contemplated wholesale liquidation of the GPs' assets and seeks have the Receiver abide by his obligations under 28 U.S.C. §2001 - which the Receiver has heretofore ignored and is currently railing against. The Intervening Investors also seek to have the Receiver comply with basic accounting standards and account for millions of dollars of investor funds that has run through his accounts in the last three and a half years. Moreover, the investors seek access to previously sealed documents filed by the Receiver and seek a voice in the management of their assets going forward. None of these requests are overly invasive and all requests are timely. Further, there is no question that the property interests of the Intervening Group are effected by the outcome of this litigation.

Finally, there is no credibility to the Receiver's contention that the Receiver will adequately protect the Intervening Group's interest. The Intervening Group and the Receiver's goals are at odds – the Receiver seeks wholesale liquidation of the Intervening Group's realty while the Intervening Group seeks to hold many of the properties and reposition others in order to maximize investor return. The Receiver also opposes any requests for accounting, refuses to comply with 28 U.S.C. §2001 and refuses to disclose sealed documents. It is surprisingly unfortunate that the Receiver does not share the Intervening Group's goals. In order to safeguard many of these investors' nest eggs, they have been forced to take action to intervene to do what the Receiver will not do for them.

II. THE INTERVENING GROUP SATISFIES ALL REQUIREMENTS TO INTERVENE AS A MATTER OF RIGHT

The Intervening Group may intervene as a matter of right because its members have an interest relating to the properties that are subject of the receivership. The Receiver seeks permission to continue to manage and sell the GPs' properties. The Intervening Group has a

1 clear interest in this process as the investors in the GPs are the only parties with a financial stake
2 in the management and sale of substantially all the assets of the GPs. The Intervening Group's
3 interests are not otherwise adequately protected. To the extent Schooler was deemed to
4 adequately protect the investors – he no longer has the investors' interest in mind once judgment
5 was entered against him.

6 The Intervening Group seeks limited intervention at the post-judgment phase of the
7 proceedings to:

- 8 1) Oppose and enjoin the Receiver's contemplated sale process, including but
9 not limited to those set forth in Dkt 1181, 1191 regarding disposition of any
10 and all of the Properties;
- 11 2) Oppose the recommendations made by the Receiver with regard to the sale
12 and/or management of the GP assets, including but not limited to those set
13 forth in Dkt 1203;
- 14 3) Oversee and evaluate the Receiver's management of the GPs and the GPs'
15 assets;
- 16 4) Obtain full access to the Receiver's filings and recommendations submitted
17 to this Court;
- 18 5) Unseal and/or unredact documents previously filed under seal or redacted
19 by the Receiver; and
- 20 6) Obtain all books and records related to the Receiver's management of the
21 GPs and the GPs' assets.

22 Intervention is permitted as "of right" when "the applicant claims an interest relating to
23 the property or transaction which is the subject of the action and the applicant is so situated that
24 the disposition of the action may as a practical matter impair or impede the applicant's ability to
25 protect that interest, unless the applicant's interest is adequately represented by existing parties."
26 Fed.R.Civ.P. Rule 24(a)(2).

27 The Ninth Circuit has adopted a four-part test to resolve applications for intervention of
28 right under Fed.R.Civ.P. 24(a)(2):

1 An order granting intervention as of right is appropriate if (1) the applicant's motion
2 is timely; (2) the applicant has asserted an interest relating to the property or
3 transaction which is the subject of the action; (3) the applicant is so situated that
4 without intervention the disposition may, as a practical matter, impair or impede its
5 ability to protect that interest; and (4) the applicant's interest is not adequately
6 represented by the existing parties.

7 *U.S. ex rel. McGough v. Covington Technologies*, 967 F.2d 1391, 1394 (9th Cir.1992) (citing
8 *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir.1986), cert. denied, 480 U.S. 946,
9 (1987)). “Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and ‘we
10 are guided primarily by practical considerations.’ ” *Id.* (quoting *United States v. Stringfellow*,
11 783 F.2d 821, 826 (9th Cir.1986) vacated on other grounds 480 U.S. 370 (1987)).

12 Here, the Intervening Group meets all criteria for intervention as a matter of right.

13 **A. The Motion to Intervene Is Timely.**

14 The Receiver concedes the motion to intervene is timely “[t]o the extent the Dillon
15 Intervenors seek to intervene in order to have the Court consider their opposition to the
16 Distribution Motion.” Opposition to Intervention pg. 5, lns. 11-12. The Receiver does not
17 consider the motion timely to the extent the Intervening Group “asks to intervene in the overall
18 case and receivership so that they may revisit an array of issues which were raised and decided
19 by the Court in earlier proceedings.” *Id.* at pg. 5, lns. 12-13.

20 The Receiver misunderstands the Intervening Group’s position as intervenors. The
21 Intervening Group does not seek to intervene with regard to every aspect of the instant litigation,
22 nor does the Intervening Group seek to intervene in matters previously decided by this Court as
23 they relate to Schooler. Indeed, the main portion of the case involving Schooler’s liability has
24 been litigated to judgment and the Intervening Group has no intention of interfering with that
25 process. Rather, the Intervening Group only seeks to intervene for limited purposes relating to
26 the management and liquidation of the GPs’ assets. The Intervening Group does not seek to
27 undue any prior orders dealing with anything other than these assets and primarily seeks to have
28 a voice in the management of the GPs’ assets going *forward*. The Intervening Group also seeks

1 an accounting of the Receiver's use of funds and the disclosure of certain documents filed under
2 seal. Such a request does not require the undoing of any prior court orders or the interference
3 with any processes previously approved by this Court. As such, the Intervening Group's motion
4 is timely.

5 **B. The Intervening Group Has a Protected Interest.**

6 An economic interest may trigger the right to intervene where it is concrete and related to
7 the underlying subject matter of the litigation. *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th
8 Cir. 2004).

9 The Receiver concedes the Intervening Group has a protected interest “[t]o the extent the
10 Dillon Intervenors seek to intervene in order to have the Court consider their opposition to the
11 Distribution Motion.” *Id.* at pg. 5, lns. 19-20. However, “[t]he Receiver does not recognize and
12 opposes any effort to intervene in the entirety of the receivership proceedings or the underlying
13 lawsuit...” *Id.* at pg. 5, lns. 22-23.

14 Again, the Receiver misunderstands the Intervening Group's position as intervenors. The
15 intervenors do not desire to intervene in every aspect of the underlying lawsuit. Rather, they
16 desire to have a voice in the management and proposed disposition of their assets. The Receiver
17 proposes a liquidation of all the GP assets and is determined to do so without accounting for the
18 millions of dollars he has received and spent and without complying with the mandatory
19 requirements of 28 U.S.C. §2001. The Intervening Group does not agree that a liquidation of all
20 the GP assets is appropriate, the Intervening Group wants transparency on the use of its monies
21 and the Intervening Group insists on the Receiver complying with the requirements of 28 U.S.C.
22 §2001. Each of these interests are squarely aligned with their protected interests.

23 **C. The Instant Action Would Impair Their Interests.**

24 The nature of the intervenor's interest and the effect that the disposition will have on its
25 ability to protect that interest are closely related factors. *Chiles v. Thornburgh*, 865 F.2d 1197,
26 1214 (11th Cir. 1989). Generally, “[i]f an absentee would be substantially affected in a practical
27 sense by the determination made in an action, he should ... be entitled to intervene.” Fed. R.
28 Civ. P. 24, Advisory Committee Notes, 1966 Amendments.

1 A judicial decision that would “as a practical matter” foreclose the would-be intervenor's
2 interest, is sufficient impairment. *Sierra Club v. United States EPA*, 995 F.2d 1478, 1486 (9th
3 Cir.1993). Here, the “investors will not be able to protect their interest in the going-concern
4 value of the assets if the receiver moves to terminate the receivership and liquidates assets.” *SEC*
5 *v. Navin*, 166 F.R.D. 435, 440 (1995) citing *United States v. Stringfellow*, 783 F.2d 821, 827 (9th
6 Cir. 1986) *vacated on other grounds* 480 U.S. 370 (1987)(if prospective intervenor seeks to
7 obtain remedies that differ from those sought by original plaintiffs, it is reasonable to conclude
8 that disposition of the litigation may impair prospective intervenor’s ability to protect its interest).

9 In *SEC v. Flight Transportation Corp.*, 699 F.2d 943, 948 (8th Cir.1983), a creditor was
10 allowed to intervene in an SEC action against a corporation seeking disgorgement to defraud
11 investors. A receiver was appointed for all of the corporation's assets and, if the assets were
12 “disgorged,” the creditor would be unable to obtain satisfaction of its claim. Thus, concluded the
13 court, its interests may potentially be foreclosed by the pending action. *Id.* at 948.

14 The Intervening Group’s interests in this action will be substantially impaired or impeded
15 if it is not allowed to intervene because (1) an immediate sale of the entirety of the GP Properties
16 would not maximize investor return as several of the properties would benefit from being held
17 and/or repositioned; and (2) the contemplated sale process is in violation of 28 U.S.C. §2001.

18 The Receiver claims the Intervening Group has been provided with “less intrusive” means
19 of voicing their concerns because the Court has allowed them to file letters and briefs in the past.
20 However, the Intervening Group did attempt to file briefs opposing the Distribution Motion,
21 requesting an accounting and requesting certain documents be unsealed. The Court denied all
22 the motions without prejudice and requested the Intervening Group file the instant motion to
23 intervene. Clearly, the investors’ concerns will not be heard absent an order permitting
24 intervention.

25 The Receiver further claims that the Intervening Group can avail themselves of a claims
26 process post liquidation and thus do not need to formally intervene. The Intervening Group
27 availing itself of the claims process post liquidation would obviously not serve the Intervening
28 Group’s purpose in opposing the liquidation itself.

1 **D. The Intervening Group’s Interests Are Not Adequately Protected.**

2 The requirement of inadequacy of representation is satisfied if the applicant shows that
3 representation of its interests may be inadequate, and the burden of making that showing is
4 minimal. *U.S. v. Stringfellow*, 783 F.2d at 827. To determine whether the interests of the would
5 be intervenor are adequately protected, the Court considers the following three factors: (1)
6 whether the interests of the present party are such that it will make **all** of the arguments the
7 intervenor would make; (2) whether the present party is capable of **and willing** to make such
8 arguments; and (3) whether the intervenor would offer **a necessary element to the proceedings**
9 **that the other parties would neglect**. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th
10 Cir.1983). “The Ninth Circuit has specifically held that the burden of making the show of
11 inadequate representation is minimal.”

12 The instant case is akin to *SEC v. Navin*, 166 F.R.D. 435 (N.D. Cal. 1995). In *Navin*, the
13 SEC filed a complaint for preliminary and permanent injunction against defendants, Jeffrey
14 Navin (“Navin”), Bus/Line Media (“BLM”), the American Mutual Holding Corp., Dennis
15 Santiago, and Michael Sims. The original complaint alleged defendants violated the federal
16 securities law by making fraudulent statements in connection with unregistered securities. The
17 securities consisted of interest in bus shelters containing advertising space. Navin sold these
18 securities through BLM. Upon judgment against the defendants, the court appointed a receiver
19 to manage the assets of BLM. The receiver and the SEC sought to liquidate BLM, distribute
20 assets and terminate the receivership. A group of intervening investors disagreed with the
21 approach. The group argued that liquidation of the assets would preclude any realization of the
22 going-concern value of the business and would impair the defrauded investors’ ability to recover
23 the money they lost as a result of the defendants’ fraudulent scheme. *Id.* The SEC opposed and
24 claimed that the receiver and the SEC adequately represented the interests of the investors and
25 the investors’ intervention would unnecessarily complicate the proceedings. The SEC further
26 stated that they would provide notice to the investors of any impending sale of assets and the
27 investors could object to sales at that time without intervening. The Court found the SEC’s
28 argument unpersuasive and found that neither the SEC nor the receiver adequately represented

1 the investors' interests because they did not agree with the investors' proposed plan. *Id.* Here,
2 the Intervening Group and the Receiver disagree as to whether to immediately sell off all the
3 properties or whether to reposition and hold certain properties for several years. The Intervening
4 Group and the Receiver further disagree about whether the Receiver's sale of realty must comply
5 with 28 U.S.C. §2001.

6 The Receiver's main opposition is with regard to the interests of the Intervening Group
7 being adequately protected by the Receiver. The Receiver claims the Intervening Group and the
8 Receiver share the same goals and only disagree as to "strategy". This is simply untrue. The
9 Intervening Group and the Receiver do not share the same goals. Unlike the investors in *SEC v.*
10 *TLC* (the case heavily relied upon by the Receiver) the Intervening Group disagrees with the
11 Receiver's goal of an "orderly sale" by liquidation of the properties. Rather, the Intervening
12 Group believes investor return would be maximized by holding certain properties for several
13 years, obtaining zoning variances for others and obtaining subdivision mapping for even others.
14 The Intervening Group would propose holding the Las Vegas properties for a period of 5-10
15 years and obtaining a rezoning of the Rainbow/Vegas Properties. See Opposition to Distribution
16 Motion (Doc. 1234) at pg. 18. With regard to the Reno properties, the Intervening Group
17 recommends zoning changes as to the Dayton III, Dayton IV and Stead I properties and further
18 recommends other properties be held for a period of one year in order to process a subdivision
19 map and/or for the completion of further development in the surrounding areas (Silver Springs
20 North, Silver Springs South and Fernley). The Receiver's goal is liquidation and obtaining the
21 best sales price in the immediate future. The Intervening Group's goal is not wholesale
22 liquidation, but rather, is the repositioning of key properties.

23 Importantly, the Receiver has no intention of complying with the requirements of 28
24 U.S.C. §2001. Compliance with the statute is not a "strategy", but a legally-mandated process
25 by which real property must be sold when in receivership. The Receiver clearly will not make
26 the Intervening Group's arguments regarding compliance with the statute.

1 Further, the Receiver opposes providing an accounting of use of funds to the investors and
2 further opposes disclosing unsealed and unredacted documents. The Receiver does not agree
3 with the Intervening Group’s goal of transparency.

4 **III. PERMISSIVE INTERVENTION**

5 In the alternative, Intervening Group should be allowed permissive intervention in this
6 action. There are three requirements for permissive intervention under Federal Rule of Civil
7 Procedure 24(b)(1): (1) “independent grounds for jurisdiction;” (2) timely application for
8 intervention; and (3) “the applicant’s claim or defense, and the main action, have a question of
9 law or a question of fact in common.” *League of United Latin Am. Citizens v. Wilson*
10 (“LULAC”), 131 F.3d 1297, 1308 (9th Cir. 1997) (citations omitted). “Even if an applicant
11 satisfies those threshold requirements, the district court has discretion to deny permissive
12 intervention.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (citations omitted); see
13 *Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977) (listing other
14 factors a district court might consider). The Court must also consider whether permissive
15 intervention “will unduly delay the main action or will unfairly prejudice the existing parties.”
16 *Donnelly*, 159 F.3d at 412.

17 This Court has subject matter jurisdiction over the claims proposed by Intervening Group
18 because it continues to have jurisdiction over the Receivership, which the Intervening Group
19 partnerships are subject to.

20 For the same reasons set forth in the discussion concerning intervention as a matter of
21 right, the motion for intervention was timely made. The claims that Intervening Group desires
22 to assert in this action share common questions of law or fact with the current issues in the action.
23 Specifically, Intervening Group seeks to modify the Receivership ordered by the Court in this
24 litigation.

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1 **IV. CONCLUSION**

2 Based on the foregoing, Intervening Group respectfully requests the Court grant its motion
3 to intervene as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure,
4 or alternatively, to intervene pursuant to Rule 24(b)(1)(B).

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7 Dated: April 29, 2016

Respectfully submitted,
DILLON GERARDI HERSHBERGER
MILLER & AHUJA, LLP

8
9 s/ Timothy P. Dillon
10 Timothy P. Dillon, Esq.
11 Attorney for ALEX HAUA, et al.
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CERTIFICATE OF SERVICE

I am employed in the County of San Diego, State of California, am over the age of 18 and not a party to the within action. My business address is DILLON GERARDI HERSHBERGER MILLER & AHUJA, LLP, 5872 Owens Avenue, Suite 200, Carlsbad, CA 92008. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing.

On April 29, 2016, I caused to be served the following documents described as:

- **REPLY BRIEF IN SUPPORT OF INTERVENING GROUP'S MOTION FOR INTERVENTION AS A MATTER OF RIGHT, OR, ALTERNATIVELY, FOR PERMISSIVE INTERVENTION**

(BY ELECTRONIC FILING) I am familiar with the United States District Court, Southern District of California's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the Court. The Court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. Under said practice, the following CM/ECF user(s) were served:

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Dated: April 29, 2016

s/ Ronnielyn Abrera
Ronnielyn Abrera