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

11
12 SECURITIES AND EXCHANGE
13 COMMISSION,

14 Plaintiff,

15 v.

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

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

**INVESTORS' REPLY
IN SUPPORT OF MOTION
FOR A STAY PENDING APPEAL**

Date: July 15, 2016

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

I. Introduction

This brief responds to the opposition by the Securities and Exchange Commission (“SEC”) and the Receiver to the motion by 192 investors (“Investors”) for a stay pending the appeal. Both the SEC’s and the Receiver’s arguments rehash their contentions in prior motions which were resolved favorably for them by the Court’s May 18, 2016, order (Dkt. No. 1296) and the Court’s three orders of May 25, 2016, Dkt. Nos. 1303, 1304, and 1305. For the most part, neither the SEC nor the Receiver addresses Investors’ arguments relating to specific errors in those orders. Consequently, Investors have little to address in either’s opposition briefs. Investors see no point in rehashing the arguments in their opening brief. Dkt. No. 1316.

There is, however, one important new fact disclosed by the Receiver in his 15th Interim Report (Dkt. No. 1319), which Investors must address. Shortly after the May 25 order (Dkt. No. 1304), the Receiver pooled the funds in the 87 GP bank accounts into one account. Dkt. No. 1319 at 4, 20-21. This could complicate the distribution of assets in the event the Ninth Circuit reverses any of the Court’s orders. We therefore address that issue in the next section.

Further, in the event the Court denies Investors’ application for a stay, we request the Court to grant a temporary stay of one week so Investors can apply to the Ninth Circuit for a stay pending the appeal. Dkt. No. 1306 at 2. The SEC and the Receiver did not object to this request in their briefs. We also address below a few other steps to clarify the record on appeal.

Finally, the Receiver argues that Investors’ request for a stay is too broad, because it seeks a stay broader than the Court’s May 25 orders. Investors seek an order which will preserve the *status quo* pending the appeal to the Ninth Circuit. This will obviate the need to burden the Court or the Ninth Circuit with repeated applications for a stay and repeated amendments to the notice of appeal. We address the options in a separate section below.

1 **II. Investors Request an Order Directing the Receiver to Maintain Accurate**
2 **Books of Account in Relation to His Receipts and Disbursements From His**
3 **Pooling of the GPs' Separate Bank Accounts Through Any Remand**

4 As stated in the Receiver's 15th Interim Report, the Receiver acted immediately to
5 pool all of the cash of the 87 GPs and Western into a single bank account. On this point,
6 the report states: "all assets of the Receivership Entities (Western and the GPs) have been
7 pooled," Dkt. No. 1319 at 4, 20-21. In the event the Ninth Circuit should reverse any of
8 the Court's orders on appeal, Investors will seek a distribution of the assets of each GP in
9 accordance with their partnership agreements, including the cash the Receiver has
10 recently pooled. This step will require an accounting of the receipts and disbursements by
11 the Receiver since he pooled those accounts last month. In this regard, we remind the
12 Court of the statement by the Receiver's attorney regarding his failure to maintain
13 "individual transactions:" "Individual transaction information would be reflected only on
14 the bank statements." Dkt. No. 1258-2 ¶ 13.

15 We therefore request the Court to direct the Receiver to maintain the books and
16 records of all receivership bank accounts, including journals and ledgers of his individual
17 transactions of the cash in the pooled account, and vouchers for those transactions. This
18 would allow the receipt and disbursement of cash in the pooled account to be traced to
19 the individual GP accounts.

20 The Receiver already has this obligation. The leading authority on receiverships, 2
21 Clark on Receivers (3d ed. 1992), speaks to the Receiver's responsibility to maintain
22 these records:

23 It is a receiver's duty to keep accounts of receipts and expenditures in the
24 shape of books and vouchers in such a manner as to furnish an intelligible
25 and perspicuous account of his act and transactions in order that the
26 bondholders, lien creditors and all creditors as well as the court may at any
time as occasion requires, ascertain the true condition of affairs.

27 *Id.*, § 383 at 642. On the duty of a receiver to keep vouchers, Clark instructs:

1 Receiver's Duty to Preserve Vouchers. It is the receiver's duty to keep an
2 accurate account of all money received and expended. Even in the absence
3 of objections by an interested party, a court should closely scrutinize the
4 accounts of a receiver before approving them. The correctness of the
5 expenditures should be made to appear from something more than the
6 statement made in the report itself. Vouchers should be demanded when any
7 payments except petty payments are made and these vouchers preserved and
8 filed with the receiver's report.

9 *Id.*, at 642-43.

10 Investors request the Court to specifically address this issue in its order relating to
11 this motion. It is Investors' intention to request the Ninth Circuit for this relief if it is not
12 granted by this Court, and thus, we would like the record clear.

13 **III. Investors Request the Court Enter Judgment against Western.**

14 The Court has entered final judgment against Defendant Louis V. Schooler based
15 on the two summary judgment orders, but not against Defendant Western. Dkt. Nos. 583
16 and 1081. The same two orders found Western had committed the same violations of the
17 securities acts as Schooler. The SEC chose to abandon its fraud claims against both
18 defendants. We understand the Court gave the SEC the option of abandoning its
19 unproven fraud claims against both defendants and the SEC elected to do so. *SEC v.*
20 *Schooler*, 2015 U.S. Dist. LEXIS 71956, 32 (S.D. Cal. June 3, 2015).

21 There is a clear policy favoring the district court's early entry of a final judgment.
22 The Advisory Committee Notes to Fed. R. Civ. P. Rule 58 states this policy:

23 Rule 58 is designed to encourage all reasonable speed in formulating and
24 entering the judgment when the case has been decided. Participation by the
25 attorneys through the submission of forms of judgment involves needless
26 expenditure of time and effort and promotes delay, except in special cases
27 where counsel's assistance can be of real value.

28 In short, the rule encourages the court to enter final judgment "with all reasonable speed
once the case has been decided...when the case has been decided." This case has been
decided. Consequently, the Court should enter the final judgment.

1 The only consideration is whether the entry of final judgment would affect the
2 ability of the Receiver to carry out the order. We believe the case law clearly
3 demonstrates receivers are empowered to carry on their duties after the entry of final
4 judgment. See: *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 954 (9th Cir. 2007)(“In
5 1999, the district court entered final judgment. The relief ordered included an injunction
6 and provisions requiring the principal defendants to disgorge specified amounts of ill-
7 gotten gains to the Receiver and pay civil penalties”); *United States v. Antiques Ltd.*
8 *P’ship*, 760 F.3d 668 (7th Cir. 2014)(“The judgment was not a final judgment, because
9 the receiver had not been appointed and thus the complete relief to which the prevailing
10 party was entitled had not been ordered”); *Lawsky v. Condor Capital Corp.*, 2015 U.S.
11 Dist. LEXIS 172615 (S.D.N.Y. Dec. 23, 2015)(“Specifically, the Final Judgment directs
12 the Receiver to ‘structure the sale of Condor's loans in a manner that ensures Stephen
13 Baron shall exercise no influence,...’”); *FTC v. Direct Benefits Group, LLC*, 2013 U.S.
14 Dist. LEXIS 172262 (M.D. Fla. Nov. 18, 2013)(“ In the Final Judgment the Court
15 provided for the continuation of the Receiver and the receivership estate.”); *FTC v.*
16 *Global Mktg. Group*, 2008 U.S. Dist. LEXIS 30456 (M.D. Fla. Mar. 21, 2008); *FTC v.*
17 *Think Achievement Corp.*, 144 F. Supp. 2d 1013 (N.D. Ind. 2000).

18 **IV. Investors Request the Court to Direct the SEC to Provide Investors with a**
19 **Copy of Any Proposed Final Judgment It Has Submitted to the Court**

20 The Court entered an order described as “Judgment and Order Granting Motion for
21 Injunctive Relief, Monetary Remedies, and Final Judgment against Defendant Louis V.
22 Schooler” on January 21, 2016, Dkt. No. 1170, and a final judgment on February 23,
23 2016. Dkt. No. 1190. Investors have twice requested the SEC to provide a copy of any
24 proposed final judgment they submitted to the Court. See Aguirre Decl. ¶ 1, Exhibit 1.
25 SEC staff did not respond to either request. Accordingly, Investors request the Court
26 allow Investors access to any proposed final judgment submitted by the SEC to the Court
27 or direct the SEC to release it to Investors’ counsel.

28

1 **V. Investors Request a One-Week Stay in the Event the Court Denies this Motion**

2 In the event the Court denies this motion, we request the Court to order a
3 temporary stay of one week to allow the orderly presentation of Investors' motion for a
4 stay to the Ninth Circuit. This would allow Investors to address among other things this
5 Court's order on the pending motion for a stay. Further, there are pending sales of both
6 the Jamul Valley and Washoe 1 properties set for hearing on July 15. Dkt. Nos. 1285 and
7 1310. We would request the temporary stay include both of those properties. In the event
8 the Court grants the motion confirming those sales, Investors intend to immediately
9 amend their notice of appeal to include those orders. Investors' request for a one-week
10 stay is consistent with Ninth Cir. R. 27-2. Appellants made this request in their stay
11 motion. Dkt. No. 1306 at 2. Neither the SEC nor the Receiver opposed this request.

12 **VI. Investors Seek a Stay No Broader or Narrower than Necessary to Preserve the**
13 ***Status Quo* so Their Claims Do Not Become Moot on Appeal**

14 The Receiver contends that Investors' motion is overly broad and that it should be
15 narrowed to the scope of the May 25, 2016, order (Dkt. No. 1304). As a practical matter,
16 the Receiver has created a conveyor belt to advance the properties to the final
17 confirmation of their sale. Investors' application for a stay requests the conveyor belt be
18 stopped.

19 Investors would hope to avoid the filing of repeated oppositions to the sales of
20 particular parcels of realty to prevent the case from becoming moot while on appeal. By
21 way of example, Investors have opposed the confirmation of the sale of the Jamul Valley
22 property and, if that motion is denied, will amend the notice of appeal to include the new
23 order. The Receiver has given every indication he will continue to advance the sales of
24 each property to a final confirmation hearing.

25 A stay of the filing of the final confirmation sales would be a sufficient remedy.
26 We are not sure the Court has jurisdiction to issue such an order. Consequently, the only
27 mechanism for preventing this case from becoming moot on appeal, other than repeated
28 motions for stays, is to seek an order stopping the conveyor belt. Investors would

1 welcome any other practical solution that would keep their claims from becoming moot
2 during the pendency of the appeal.

3 **VII. The SEC and the Receiver Refuse to Recognize the Relief Sought by Investors**
4 **Is Broadly Supported**

5 The SEC and the Receiver respectively argue that Investors speak for ten percent
6 (Dkt. No. 1325 at 2, 9) and five percent of all investors (Dkt. No. 1321 at 13, 14). They
7 also argue that the other investors would be prejudiced by the stay. Investors have
8 presented a survey to the Court which establishes that Investors' positions before this
9 Court are broadly supported. The investors who responded to the survey (1,104) stated
10 their positions as follows: 93.49% of the investors who answered want the GPs removed
11 from the receivership; 96.46% of the investors who answered want investors to decide
12 when to sell the properties; and 97.33 of the investors who answered want an accounting
13 of the receivership. Dkt. No. 1293-3 ¶ 7.

14 Both the SEC and the Receiver imply the 1,104 responses to the survey do not
15 reflect overall investor sentiment in this case. Investors have proposed two approaches to
16 the Court that would have surveyed the sentiment of all 3,300 investors. First, Investors
17 proposed that all investors in each GP be surveyed on whether they support or reject
18 Investors' proposed plan. Both the SEC and the Receiver opposed that proposal. By its
19 order of May 25, 2016, Dkt. No. 1304, the Court impliedly denied Investors' proposed
20 plan.

21 Investors also proposed a defendants' class action, which would have required a
22 notice from the Court to all investors inquiring whether they approved of Investors'
23 proposed plan. Again, the SEC and the Receiver opposed the plan. The Court denied
24 Investors' proposal.

25 Still, the SEC and the Receiver could have proposed a notice from the Court to all
26 investors which polled them on the critical issues, e.g., whether the GPs should be
27 released from the receivership. Neither the SEC nor the Receiver proposed that solution.
28

1 Instead, they argue that Investors do not speak for the larger group of investors, while
2 steadfastly opposing any inquiry which would ascertain the truth.

3 **VIII. The Receiver's Brief Before the Ninth Circuit Should Be Discarded**

4 Both the SEC and the Receiver argue the contentions made by the Receiver in his
5 motion to dismiss two of the orders on appeal. Investors will reply to that brief on July 8,
6 2016. This Court should either discard the Receiver's brief on this issue or delay its
7 decision until Investors file their brief on July 8. Significantly, the timing of the
8 Receiver's filing of its motion to strike created the opportunity for him to file his brief
9 with the Court without Investors' opposition. We also question whether it is appropriate
10 for the Court to comment on the issues which are now before the Ninth Circuit.

11 **IX. The SEC and the Receiver Failed to Address the Specific Errors Asserted in**
12 **Investors' Opening Brief and thus No Reply Is Appropriate or Necessary**

13 Investors' opening brief argues that specific terms of the Court's orders of May 25,
14 Dkt. Nos. 1303 and 1304 and May 18, Dkt. No. 1296, are in error. Dkt. No. 1316 at 3-22.
15 Neither the Receiver nor the SEC address these specific contentions. The SEC's brief
16 simply restates the contentions and case law it has previously presented to the Court.
17 Likewise, the Receiver's brief restates the case law it previously cited to the Court, but
18 fails to address any of the specific errors asserted in Investors' opening brief.
19 Accordingly, the SEC and the Receiver have offered nothing new to which Investors
20 need reply.

21 DATED: July 6, 2016

Respectfully submitted,

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23 By: /s/ Gary J. Aguirre
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25 Attorney for Movants
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