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19 **UNITED STATES DISTRICT COURT**
20 **SOUTHERN DISTRICT OF CALIFORNIA**

21 SECURITIES AND EXCHANGE
22 COMMISSION,

23 Plaintiff,

24 v.

25 LOUIS V. SCHOOLER and FIRST
26 FINANCIAL PLANNING
27 CORPORATION d/b/a WESTERN
28 FINANCIAL PLANNING
CORPORATION,

Defendants.

) Case No. 12 CV 2164 GPC JMA

) **DEFENDANTS' REPLY BRIEF IN**
) **SUPPORT OF MOTION FOR**
) **MODIFICATION OF PRELIMINARY**
) **INJUNCTION (INJUNCTION**
) **AGAINST RECEIVER'S**
) **INTERFERENCE WITH BALLOTING**
) **BY GENERAL PARTNERS AND**
) **MISLEADING WEBSITE)**

) Date: October 3, 2014

) Time: 1:30 p.m.

) Ctrm: 2D

) Judge: Hon. Gonzalo P. Curiel

1 Defendants LOUIS V. SCHOOLER (“Schooler”) and FIRST FINANCIAL
2 PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING
3 CORPORATION (“Western”) (collectively “Defendants”) respectfully submit the
4 following reply in support of Defendants’ Motion for Modification of this Court’s
5 order of October 5, 2012 (final order March 13, 2013) granting a Preliminary
6 Injunction and appointing a receiver for Western and the real estate general
7 partnerships (“GPs”) (“Motion”; Dkt. No. 661).

8 I.

9 ARGUMENT

10 Defendants have brought the Motion to ensure that the Receiver is prohibited
11 from providing misleading information to investors regarding the GPs’ hearing on
12 October 10, 2014, and from enjoining, refusing to honor the results of, interfering
13 with, or disseminating knowingly-false claims regarding, any balloting initiated by
14 the GP investors.

15 In his Opposition, the Receiver, not content with having provided knowingly-
16 misleading information on his website, now deliberately misstates information about
17 the balloting process in his opposition to the Motion, all in order to convince the
18 Court, in advance of the October 10 hearing, that the GPs’ voting and briefing is all
19 illegitimate – notwithstanding that *of the 86 GPs, 66 have filed briefs (or Notices of*
20 *Intent to Appear) in support of removing the Receiver and no GP has filed a brief*
21 *(or Notice of Intent to Appear) in support of retaining the Receiver.*¹

22
23 ¹ The only briefs filed in support of keeping the Receiver in place over the GPs were
24 from individual partners, not GPs: Scott Gessner, an investor in Gold Ridge
25 Partners, Rail Road Partners, Pine View Partners, Falcon Heights Partners, and
26 Pueblo Partners (Dkt. Nos. 762-764, 767); Joyce Genna, an investor in Falcon
27 Heights Partners and Pueblo Partners (Dkt. No. 765); and Kathleen Cavanaugh, an
28 investor in Gold Ridge Partners, Mesa View Partners, Rail Road Partners, and P-39
Aircobra Partners (Dkt. No. 766). However, majority-opinion briefs in favor of
removing the Receiver were filed by Falcon Heights, Rail Road, Gold Ridge,
Pueblo, Mesa View, and P-39 Aircobra (Dkt. Nos. 669, 701, 714, 731, 733, and

1 The Receiver faults the use of email in the balloting process, notwithstanding
2 that he sent notice of the October 10 hearing to the investors by email only – not by
3 regular mail. The Receiver complains that the balloting process was done without
4 him being notified or consulted, even though the Court’s Order of July 22, 2014
5 (Dkt. No. 629; “Reconsideration Order”) states that the GPs do not have to consult
6 with him or seek his approval for anything having to do with the writing and filing
7 of briefs.

8 Further, the Receiver’s objections to the balloting process are formalistic and
9 do not consider the practicalities of the GPs’ situation based on the Court’s
10 abbreviated time frame for voting and briefing.

11 **A. Defendants’ Arguments Can Be Considered**

12 The Receiver begins by proclaiming that Defendants’ arguments should not
13 be considered because they are made on behalf of the GPs. Dkt. No. 768, 6:16-24.
14 However, the Receiver ignores the fact that *Defendants are investors in the GPs*,
15 with the power to initiate balloting (if they so choose, although they are expressly
16 forbidden from voting on any issue they initiate) or request a distribution of
17 information to the other investors. Dkt. No. 14-1, ¶¶ 5.1.3, 5.2. If the GPs, through
18 the investors who are empowered to vote, make decisions that affect GP business
19 (such as voting on an offer to buy property, or to remove the Receiver), Defendants
20 are affected.

21 Thus, Defendants have an interest in ensuring that any action the Receiver
22 takes vis-à-vis the GPs, such as what information the Receiver posts on his website,
23 is fair and consistent with the Receiver’s fiduciary duty to the GPs. Since the
24 Receiver is posting misleading information on his website that seeks to subvert the

25
26 746), and Pine View Partners did not file a brief or Notice of Intent to Appear, either
27 in favor of removing the Receiver or retaining him; thus, Mr. Gessner, Ms. Genna,
28 and Ms. Cavanaugh are in a miniscule minority compared to the briefs in favor of
removing the Receiver.

1 GPs' balloting and briefing process, Defendants have every right to protect their
2 interests by bringing this breach of the Receiver's fiduciary duty to the Court's
3 attention through the Motion.

4 **B. The Court's Reconsideration Order Becomes Useless to the GPs**
5 **Without Balloting; The Receiver's Objections are Groundless**

6 The Receiver argues that his website information is correct because "the
7 [Reconsideration Order] says nothing about GPs balloting their investors" and
8 because "the Reconsideration Order says nothing about assessing investors for legal
9 fees." Dkt. No. 768, 7:4-8. These statements continue to show the Receiver's
10 myopia, if not outright blindness, regarding the GPs' decision-making.

11 What the Receiver chooses not to see is that *the Reconsideration Order's*
12 *stated purpose of setting a hearing for October 10, 2014 at which the GPs will be*
13 *heard necessarily requires investor balloting and, to a lesser extent, allows for the*
14 *hiring of attorneys to represent the investors.*

15 Although the Court's statements at the July 18, 2014 hearing and the
16 Reconsideration Order do not use the words "ballot" or "vote," they clearly
17 contemplate a voting process for the investors in order for the GPs to establish the
18 official majority position of each GP. As stated in the Reconsideration Order:

- 19 • "Before the Court vacates the portion of its August 16, 2013
20 Modification Order releasing the GPs from the receivership, *the GPs*
21 *shall have an opportunity to be heard.*" Dkt. No. 629, 7:27-8:1.
- 22 • "[T]he GPs will be permitted to respond to the Court's decision to keep
23 the GPs in the receivership." Dkt. No. 629, 8:3-4.
- 24 • "[T]he GPs will be permitted to provide a response to the Court's
25 decision without the response being reviewed or approved by the
26 Receiver." Dkt. No. 629, 8:5-7.
- 27 • "Each GP may file a single brief, not to exceed fifteen (15) pages, in
28 response to the Court's decision to keep the GPs in the receivership."

1 Dkt. No. 629, 8:9-10.

- 2 ● “If a GP does not wish to file a brief, but does wish to be heard in open
3 court at the October 10, 2014 hearing, *the GP shall file a notice of*
4 *intention to appear at the hearing.*” Dkt. No. 629, 8:13-15.
- 5 ● “*If an individual investor within a particular GP disagrees with his or*
6 *her GP’s official response to the Court’s decision, the individual’s*
7 *points of disagreement shall be included in a separate section of his or*
8 *her GP’s official response.*” Dkt. No. 629, 8:16-19.
- 9 ● “All official responses must include an attachment that lists the names
10 *of the individual investors that have signed on to the official response.*”
11 Dkt. No. 629, 8:21-22.

12 A GP can take action only through the concordance of its investor-partners –
13 one investor cannot unilaterally take action that binds the others. That is what
14 distinguishes a general partnership from a limited partnership, in which one general
15 partner takes action while the limited partners sit passively.

16 In order for the GPs to express a position that is contained in a brief, the GP
17 investors must necessarily vote. They have to work collectively to take action on
18 behalf of the GP as a whole. And *the sole means by which partners in a general*
19 *partnership work collectively to take action and express that action is through*
20 *balloting and voting.*

21 The GPs in this case are no different, as the plain text of the Partnership
22 Agreements provides by requiring the issuance of a ballot and a vote of the investors
23 on “any matter relevant to the business and operation” of the GP. Dkt. No. 14-1, ¶¶
24 5.1.1, 5.1.2, 5.1.3, 5.2. Certainly the continued presence of the Receiver over the
25 GPs is a “matter relevant to the business and operation” of the GP.

26 The Reconsideration Order, as shown above, speaks repeatedly of the GPs
27 taking action by filing briefs or Notices of Intent to Appear. For a GP to take action
28 by filing a brief and/or speaking at the October 10, 2014 hearing, the investors must

1 vote. Otherwise, without balloting, the GPs cannot take action and the
2 Reconsideration Order becomes a nullity.

3 In the case of the *overwhelming majority* of GPs that have filed briefs or
4 Notices of Intent to Appear in order to request that the GPs be released from
5 receivership, the process complied with the Partnership Agreement's requirements:

- 6 • An investor submitted a proposed ballot to the partnership secretary;
- 7 • The secretary distributed it to the other investors in the GP;
- 8 • The investors cast their ballots;
- 9 • A majority of ballots returned were in favor of removing the Receiver;
- 10 • A brief (or Notice of Intent to Appear) calling for the removal of the
11 Receiver was then filed.

12 With regard to the miniscule minority of investors in the GPs who cast votes
13 in favor of retaining the Receiver, their "no" vote in itself is an expression of their
14 points of disagreement with the majority opinion in favor of removing the Receiver
15 (as expressed in the GP briefs). However, at least one GP brief provided dissenting
16 opinion statements. Dkt. No. 695, pp. 10-14 (Osprey Partners brief, Part II,
17 "Dissenting Opinion").

18 Further, the issue of signing onto the GP brief is a red herring, particularly
19 when the time constraints of briefing are taken into account. The Reconsideration
20 Order was issued on July 22, 2014 and stated that all GP briefs had to be filed by
21 September 12, 2014 – just seven and a half weeks later. Allowing time for the GP
22 investors to be notified of the briefing deadlines, there was a very limited window of
23 time for each GP's investors to decide whether to request that the Receiver be
24 removed, which – as stated above – required the drafting of a ballot by a GP
25 investor, the distribution of that ballot by the partnership secretaries to the other
26 investors in the GP, time for the investors to cast their votes, the tabulation of the
27 votes by the partnership secretaries, and then once a tally had been made that
28 determined the majority opinion of those casting ballots, to have a brief or Notice of

1 Intent to Appear drafted and filed with the Court that expressed the intent of the
2 majority (or to select counsel to do the same for the investors).

3 However, the Receiver reveals his true colors when he complains of how
4 “work related to tallying the ballots has consumed the Partnership Administrators’
5 time and delayed completion of other GP tasks.” Dkt. No. 768, 5:6-8. The
6 Receiver, whose self-interest is furthered by the continuation of the Receivership, is
7 bothered by the GPs devoting their own resources to a question of great importance
8 and priority to the GP members: whether they should be able to operate freely as
9 they have all these many years and decades, at the cost of only \$100 to \$400 per
10 month for their entire administrative services, and have the ability to continue to
11 control their own affairs and make their own decisions or whether they should be
12 forced to surrender control of their business to a Receiver who has already
13 demonstrated a willingness to make significant decisions and propose drastic actions
14 (including the complete liquidation of all GP land holdings) without any
15 involvement of the investors at all.

16 The Receiver, who together with his counsel has generated fees in excess of
17 \$1 million in this matter, is bothered that those entities to whom he owes a fiduciary
18 duty (not the reverse) are using up resources he could otherwise be using. In that
19 very argument the Receiver reveals that he understands how aggravating it can be
20 when an entity (the GPs) uses his resources (the GP administrative secretaries)
21 without asking him first – so you would think he would understand how the GPs
22 feel about him taking over control of their operations these past two years. Instead
23 he argues this whole due process exercise is getting in the way of him being able to
24 do his work and generate his fees.

25 The Receiver may complain that the brief-writing and expressing of minority
26 opinions was not done in the exact precise manner stated in the Reconsideration
27 Order, but the limited time provided by the Court to the GP investors to express
28 their opinions through balloting, voting and the drafting and filing of briefs made

1 such an approach challenging to the GPs.

2 Moreover, the Receiver cannot fault the GPs for conducting the balloting and
3 voting by email. First, the Receiver himself was authorized to send notice of the
4 October 10, 2014 hearing to the investors by email – not by regular U.S. Mail. Only
5 the GP secretaries, on behalf of the GPs, actually received paper notices. Dkt. No.
6 629, 9:4-6. Also, because of the narrow time limits provided in the Reconsideration
7 Order for the GPs to decide on a stance and then file briefs or Notices of Intent to
8 Appear, distribution of ballots by email was a valuable time-saving tool.

9 The arguments advanced on behalf of the Receiver reveal that the Receiver’s
10 statements on the website were deliberately intended to manipulate the balloting and
11 briefing process for the GPs. To take the position that balloting was not
12 contemplated by the Court would require the Receiver to not understand the very
13 operational and legal structure of the entities that have been in his care these past
14 two years. If that is not the case, the only other inference to be drawn is a
15 purposeful undermining of the balloting process.

16 The Reconsideration Order clearly requires the investors to vote, because it
17 states that the GP briefs must contain a list of the investors in favor of the GPs’
18 position. The Receiver ignored this clear fact and instead of remaining the neutral
19 party in this exercise as specifically delineated by the Court, the Receiver posted
20 misleading statements directly undermining the process that was (1) set out by the
21 Court and (2) required by the documents governing the operation of the GPs.

22 **C. The Receiver Deliberately Misstates the Language of the Investors’**
23 **Ballots, Particularly With Regard to the GPs’ Decision-Making**
24 **Powers and the Hiring of Counsel**

25 The Receiver claims that the ballot that was requested by at least one investor
26 in each GP and that was circulated by the partnership secretaries “seeks to have
27 decision-making authority delegated to the purported committee and/or an
28 unidentified attorney.” Dkt. No. 768, 8:6-7. *This is a deliberate misstatement of*

1 *fact by the Receiver bordering on mendacity.*² *The plain language of the ballot –*
2 *attached as part of Exhibit A to the Opposition – does not say anything about “the*
3 *purported committee” at all or “seek[ing] to have decision-making authority*
4 *delegated to the purported committee and/or an unidentified attorney.”*

5 The ballot has two questions (Dkt. No. 768, p. 15):

- 6 1. “Request the above partnership to take the legal steps necessary to
7 remove the partnership from control of the Receiver.”
- 8 2. “Request that each investor in our general partnership agree to an
9 assessment of not more than Thirty Dollars (\$30.00) per investor to
10 enable our general partnership to retain legal services related to the
removal of the receivership.”

11 There is no reference to the “purported committee,” let alone any delegation
12 to them in the ballot.

13 The hiring of counsel is an action the GPs, like any other business entity in
14 the state of California, are able to do under their general powers, and is best
15 effectuate its statutory ability to appear in court. Cal. Corp. Code § 16307(a). The
16 GPs (through its investors) have not delegated their decision-making authority to
17 “an unidentified attorney.”

18 As to those briefs filed by counsel on the GPs’ behalf, the GPs have made the
19 decision (by voting to remove the Receiver) to have an attorney explain the decision
20 (through the filing of a brief and appearing on October 10 to speak for the GP). In
21 many if not most instances, it would be most efficacious for the GPs to hire counsel
22 to prepare and file a brief on behalf of the GP (and presumably argue on the GP’s
23 behalf on October 10) that contains the GP’s decision, and neither the
24 Reconsideration Order nor the Court’s prior orders forbid the GPs from seeking the
25 services of counsel or paying for such legal assistance. The GPs are not obligated to
26 look only for attorneys who are willing to represent them *pro bono*.

27
28 ² See Cal. Bus. & Prof. Code § 6068(d).

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II.
CONCLUSION

For the reasons stated above and in their motion, Defendants respectfully request that this Court modify the Preliminary Injunction to state that the Receiver is prohibited from enjoining, refusing to honor the results of, interfering with, or disseminating knowingly-false claims regarding, any balloting initiated by the GP investors, and order the Receiver to *immediately* correct the information on his website to read as stated in the Motion.

DATE: September 26, 2014

Respectfully submitted,

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CERTIFICATION

I hereby certify that on the 26th day of September 2014, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following counsels of record:

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