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General Partner
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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING CORPORATION, Defendants.	Case No. 12 CV 2164 GPC JMA **BRIEF OF PRODUCTION PARTNERS IN SUPPORT OF MODIFICATION OF THE PRELIMINARY INJUNCTION ORDER TO REMOVE THE REAL ESTATE GENERAL PARTNERSHIPS FROM THE RECEIVERSHIP** **Date: October 10, 2014** **Time: 1:30 p.m.** **Courtroom: 2D** **Judge: Hon. Gonzalo P. Curiel** **ORAL ARGUMENT REQUESTED**

Production Partners hereby submits this brief in favor of removing the Court-appointed receivership from them and other real estate general partnerships ("GPs") established by First Financial Planning Corporation d/b/a Western Financial Planning Corporation ("Western") and Louis V. Schooler (collectively, "Defendants"), as authorized by the Court in its July 22, 2014 order reconsidering its earlier order of August 16, 2013 (Dkt. No. 629; hereafter "Reconsideration Order").

Henrik Jonson, on behalf of Production Partners, requests to be heard in open court at the hearing scheduled for October 10, 2014, and speak on behalf of Production Partners for up to fifteen (15) minutes.

I.

ARGUMENT

The receivership in this matter should be modified to exclude the GPs. By virtue of the express language of the Partnership Agreements and Partners' Representations executed by the investor-partners, the GPs are independent entities, completely separate from the Defendants in this litigation.

The Defendants have no control over the GPs, since Defendants cannot vote, nor nullify a vote, on an action for an investment.

The GPs are perfectly capable of managing their properties and selling them for a profit. Whether or not Defendants are found liable for a violation of federal securities law is irrelevant to the issue of whether or not the GPs are to remain in the receivership.

While the Receiver and the SEC purport to act in the GPs best interest, they failed to adequately determine the investor interests. Rather, they made a factually inaccurate representation to the Court regarding the powers and abilities of the investors to run their GPs and sell their property.

The investors are adults with wherewithal to make their own investment

decisions, but the SEC and Receiver treat the GPs like children.

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A. Investor General Partners Vote 35-to-1 to Be Excluded from Receivership

On a ballot delivered to all voting-eligible GPs on whether to remain in the Receivership, the tally based on voting-unit percentage for responders is 70.826% yea and 0.012% nay. In others words, 97.2% yea and 2.8% nay (1 voter), for the 36 of 81 partners who cast a vote. A good turnout given the very short 6 week time.

The Production Partners 'yea' responders are:

1 David & Susan Lester
2 Chris & Sue Lupo
3 William & Loretta Diehl
4 Raul R Mena
5 Lori Fiori
6 Raul R Mena, IRA
7 Barbara Humphreys
8 Susan Lester, IRA
9 William V & Carol June Dascomb
10 Lori Fiori, IRA
11 Linda Bunch
12 Naomi Fortner, IRA
13 Naomi Fortner, Roth IRA
14 Barbara Humphreys, IRA
15 Linda Hudek, IRA
16 Stephen B Hudek, IRA
17 Graeme D Gow
18 William Lefler & Susan D'Vincent
19 Kim & Linda Klosterman
20 Michael & Linda Collier
21 Joseph F & Carmen M De Assis
22 Robert & Gwendolyn Tuohy
23 William V & Carol June Dascomb
24 Susan Graham
25 Sam O Takahashi
26 Henrik & Carol Jonson
27 Lawrence & Mary Ivins
28 James & DeEtta Engelken
29 James & Matilda McLaughlin
30 Jerry & Karen Patee
31 Mark & Linda Clifton
32 Indar M & Shashikala Rai
33 Roderick & Mary Grant
34 Ronald & Debra Askeland
35 Thomas J Dalba
36 Stephen B Hudek, IRA
37 John & Nancy Jurcheck
38 Roy B Warfield

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B. This Hearing for GPs Improperly Occurs Only *After* Placement into Receivership

The GPs were never polled on the issue of receivership inclusion. The SEC promised the Court in its initial filing that the GPs were to be heard prior to being GPs added to the receivership. Only now, two years later, with the GPs forced inclusion into the receivership, while the Receiver usurped control of their property, they are finally to be heard.

This hearing is flawed "due process" as the GP inclusion hearing should have occurred *before* the Court wrested property control away from GPs to a less-than caring Receiver not necessarily acting in the best interest of the investors.

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C. SEC and Receiver Made Inaccurate Factual Representations and Omissions of Fact

Prior to the July 18, 2014 hearing that led to the Reconsideration Order, Nancy Kemper, an investor in two co-tenants GPs (Horizon Partners and Rainbow Partners) that hold title to a residentially-zoned parcel in Las Vegas, obtained an offer from one of America's major real estate brokerages. CB Richard Ellis, were to list the GPs' jointly-owned parcel for sale at $2.6 million. She then circulated ballots to her fellow investors, where a majority of the investors, in both partnerships, voted to accept the brokerage offer to list the parcel for sale. Note that the Defendant did not initiate, request, nor coordinate any of this activity.

After the proper partnership ballot process the Receiver disregarded the vote and did not sign the listing agreement with CB Richard Ellis. The Court *also* then disregarded the Horizon Partners' and Rainbow Partners' vote based on the Receiver counsel's alleged fact that "the listing price is...severely overinflated" based on an "erroneous assumption that the property is zoned for commercial, as

opposed to residential, use" and because "the Receiver spoke with a listing agent who...came up with a listing price that is based on the correct assumption that this property is zoned for residential use and that closely approximates the appraisal obtained by the Receiver." Docket No. 629, 7:1-9.

The Receiver's counsel made an inaccurate factual misrepresentation and an omission of fact to the Court that resulted in the Reconsideration Order.

First, the listing price report submitted by CB Richard Ellis, and filed with the Court, correctly lists the current zoning and set the property value at $2.6 million based on the allowed uses for that zoning.

Second, the Receiver submitted no document to show the Court the process used to determine their 'listing agent's value; nor did the Receiver identify the 'listing agent' on the record or in any court filings, thus making their 'determination' unverifiable. The Court asked for no documents from Receiver's broker, nor had questions of the (unidentified) broker before issuing the Reconsideration Order. Several investors have since requested this information, the process and by whom, from the Receiver and the Court, without apparent success.

Most important, regardless of any appraised value, as the GP investors voted in favor of listing the parcel for sale, the GPs partnership agreement directs that the proposed action must be carried out.

The Receiver had *no right to overrule the majority vote* of the GPs, and to not sign, and thus nullify the listing agreement.

Receiver acted much as the suit purports the Defendant to have acted, with a unilateral decision that ignored the will of the majority, ignoring an explicit partnership contract condition.

Thus, the Reconsideration Order decision by the Court was a clear error, since it was based on wholly unreliable statements while disregarding a detailed analysis of value present in the record.

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D. Defendants Have No Control over the GPs nor the Investors; the Receiver Has More Power Over GPs than Defendants

Throughout this case the SEC and Receiver contends that Defendants "control" the GPs. The exact *opposite* is true; partnership agreements, all legal contracts, state that the GPs – the GP investors, and only the investors, control the GPs — *not* the Defendants. Per each agreement, *only* the GP investor-partners (IPs) control the GPs and participate in the control, management, and direction of the GP. Any IP can initiate action for consideration by the partnership, including distribution of information and to request a vote by the partnership. IPs can vote to replace the Signatory Partner and Partnership Administrator without cause.

While Defendants can and do own equity interests in the GPs, each partnership agreement specifically provides that Defendants, their employees, and agents *cannot* vote on any GP matter, including the sale of land. To reiterate — Defendants, on their own or by proxy, *cannot* vote on issues; and Defendants possess *no* power to veto, or refuse to honor, a vote of the voting investors.

Defendants do share in any profit of an eventual resale to developers, the same as any other investor in the property. To reiterate, Defendants do *not* singly control when the land is sold, to whom, and for how much.

Most importantly, neither the Receiver nor the SEC can exercise rights over assets that Defendants do not own and do not control. Those assets belong solely to the investor-partners, those empowered to vote.

The GP investors, by virtue of retaining control by majority vote, are true general partners, not disguised limited partners. Yet the imposition of the Receiver has stripped investor power. The investors had more ability to directly control, participate in, and influence their investment *before* the Receiver was imposed upon the GPs. This Court action turned the investors from general partners into limited

partners, now dependent upon the whim of Receiver oversight, creating a self-fulfilling prophecy, i.e., a unilateral decision maker, a 'king' of the GPs.

Therefore, the Receiver must be removed from control of the GPs.

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E. Investors GPs Have the Wherewithal to Manage Their Partnerships and Property, Including Sale for a Profit, without Receiver's Guidance or Control

In the Reconsideration Order, the Court found that the GPs should remain in the receivership because of "day-to-day operations [that] are not as simple as the Court previously thought them to be," such as Western buying out dissatisfied investors' interests, Western loaning money to GPs for funding shortfalls, the presence of a water system on GPs' property, and persons residing rent-free on GP property. Docket No. 629, 6:5-15.

These matters are 'old news', issues unsuccessfully raised by the SEC and Receiver in 2013 as they opposed Defendants' motion to release the GPs from the receivership. The Receiver admitted that the "GPs may be able to hire somebody to perform some of these functions performed by Western (and possibly survive without others)." Docket No. 206 at 3. Each GP partnership agreement shows that the investors have authority to hire others for management functions, since only the investors can vote to hire/fire the partnership secretaries (*except* Schooler/Western).

The Reconsideration Order is thus inappropriate since the Court was aware in 2013 of the GPs' regular operation when it issued its order to release the GPs from the receivership. Nothing has changed to make appropriate the continuation of an involuntary, un-consented receivership.

The investors are people from all walks of life who are each fully capable of ensuring that property taxes and insurance are paid annually and an accountant is engaged to prepare Form K-1's. Nothing different from when an individual pays, for example; income tax, a mortgage, property tax, or homeowners insurance. The

Court agreed in its earlier order to release the GPs from the Receiver. No proof has been submitted by the SEC or Receiver to demonstrate that investors are incapable of performing these simple tasks.

For the less-than a dozen GPs (of 85) that have residential tenants, a water system issue, or an eminent-domain lawsuit situation, the investors can action a vote on tenant residency, to hire a water expert, to engage an attorney, etc. These are every-day events for any property management company. Even a lawyer for that eminent-domain action (for a power plant or a road) to ensure maximum funds from a public agency, etc. is now a mundane task, with certainly dozens of specialty lawyers available.

The SEC and Receiver has provided *no* evidence that investors lacked wherewithal for these actions. For the overwhelming majority of GPs that have none of the above complexities, the operational requirements remain minimal: pay taxes, insurance, and mortgage; and issue annual tax statements.

A Receiver is typically appointed to oversee a business that is mismanaged to the point that investor funds are at significant risk of loss. That is *not* the case here.

Here, business consists of a general partnership with simple routine activity and an immovable asset that appreciates simply by proximity to nearby land that eventually becomes developed. Not much to mismanage.

The SEC and Receiver's claim that the land investments are somehow too complicated for the investors to run is simply false. They continue to ignore that these investments are in raw land. ***It's just soil.*** No farming, ranching, or mining activity takes place. No buildings to maintain, no rent to collect.

The soil waits patiently for a developer with a vision for family homes, a shopping center, or an industrial park, an access road or a rail spur, a geological resource to tap, a windmill farm or solar farm light the homes. GPs are not structured with a capability to develop land, just to sell to those who can, and do

well.

Furthermore, the Co-Tenancy Agreements by which the GPs hold fractional interests to properties do *not* undercut the investors' ability to operate the GPs and sell their property at a profit. These agreements plainly and expressly state that any individual partner in any of the co-tenant GPs can simply request a ballot to be issued, not only within his/her own GP, but for that ballot to also be issued for a vote of all the members of all the other co-tenant GPs. Dkt. No. 210-1, § 3.5.1. ***Any individual investor has the ability to force a vote to be taken by his/her GP and also all of the co-tenant GPs on any business matter relevant to the GPs.***

A simple process gives each investor direct and immediate ability to bring a business matter to a full vote with a mere request. No requirement exists that a member's GP first vote on a ballot issue request be sent to the other voters (i.e. every member be informed of the vote of every other member); nor that each GP's investors must unanimously vote yea/nay. Only that *a simple majority of the investors in each co-tenant GP* vote in favor (or disfavor) of the issue, e.g., hire fire, list, sell, etc.

Thus, contrary to Court perception in the Reconsideration Order, the Co-Tenancy Agreements do *not* require that "hundreds, if not thousands of investors, would have to communicate and collaborate before a property may, for example, be sold." Docket No. 629, 6:20-23. Only one (1) investor has to request that the co-tenant GPs be balloted, the two GP secretaries distribute ballots to investors, then each investor votes. No further coordination is necessary. To wit, the investors are fully capable of this activity without oversight, guidance, nor instruction by Defendants.

As an example of this independence — for Rainbow Partners and Horizon Partners, Ms. Kemper located a brokerage, obtained an offer to list, and then initiated the ballot process whereby the investors in both co-tenant GPs were able to

cast a yea/nay vote to list the property with that brokerage. An investor majority, in both GPs, voted in favor of the for-sale listing. Defendants were totally uninvolved with Ms. Kemper's balloting, etc., and only the Receiver's unilateral decision and subsequent failure to sign the paperwork with the brokerage prevented the property from being listed.

The SEC and the Receiver have provided no evidence that the GP investors are incapable of running their GPs, ensuring that the GP bills are paid, or making a decision when to sell their land and at what price. Therefore, the receivership over the GPs should be lifted immediately.

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F. Defendants Alleged Violations of Federal Securities Law is Irrelevant to Issue of GPs Inclusion in Receivership

The Reconsideration Order is based on the Court's decision that the GP equity interests were securities. Docket No. 619, p. 5. The SEC and Receiver further argue that the GPs should be included in the receivership to protect them from Western's possible financial failure. However, as even the SEC acknowledges, ***"the GPs are separate entities from Western."***

The GPs have no connection do the lawsuit. The SEC has accused no GP nor investors of aiding Schooler or Western to hide money or commit fraud. No GP, no investor is named as a party to the suit. Whether Defendants are found to have violated the law is unrelated to whether the GPs own land or whether the investors can run their GPs, protect their investments, or sell for a profit.

The underlying investment factors remain the same with or without the Receiver, and whether the SEC wins or loses its lawsuit – when will a buyer be motivated to purchase from the GPs and at what price? No action is needed to maintain title to the property and eventually sell to a willing buyer, a simple task that GP investors can handle their own without a Receiver.

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G. Statement of GPs Desire to be Heard in Open Court at the October 10, 2014 Hearing.

The person submitting this brief wishes to be heard in open court at the October 10, 2014 hearing.

II.

CONCLUSION

Production Partners respectfully request that this Court honor its partners' majority vote and modify the preliminary injunction order to be removed from the receivership.

DATE: September 10, 2014

Submitted with respect,

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