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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 RAIL ROAD 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**

Rail Road Partners hereby submits the following brief in favor of removing the Court-appointed receivership over them and the 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").

Stephen P. Finn on behalf of Rail Road Partners, requests to be heard in open court at the hearing scheduled for October 10, 2014, and speak on behalf of Rail Road Partners for 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. Defendants have no control whatsoever over the GPs, because they cannot vote or nullify a vote. The GPs are perfectly capable of managing their properties and selling them for a profit. Whether Defendants are found liable for any violation of federal securities law is irrelevant to the issue of whether the GPs should remain in the receivership. While the Receiver and the SEC purport to act in the best interests of the GPs, they have failed to take adequate steps to determine what the interests of the investors are, and instead have made inaccurate factual representations to the Court regarding the powers and abilities of the investors to run their GPs and sell their property. Even though the investors are adults extremely capable of making their own decisions about their investments, the SEC and Receiver treat them like children.

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A. The Hearing for the GPs Improperly Allows the GPs to be Heard Only after they are Placed in Receivership

When the SEC first filed suit, it promised the Court that the GPs would be heard before they were placed in receivership. However, it has now been two years since the GPs were placed in receivership, and only now are they being provided a hearing, during which time the Receiver has had exclusive control of their property. The GPs have never been asked whether they wanted to be in the receivership in the first place.

This hearing is not true "due process" for the GPs because the hearing should have been provided in the very beginning, before the Court took control of the GPs away from their investors and vested it in a receiver over whom the investors had no say whatsoever.

B. The Receiver Will Sell the Property At an Inopportune Time Against the Wishes of the Investors

The Receiver is planning to sell the property at a low price without considering the wishes of the investors, and without proper due diligence regarding actual property values. He is planning a fire sale. The investors stand to lose a significant portion of their investment, while being denied an opportunity to vote on whether they would like to sell, as is spelled out in the Partnership agreements. In doing so, the Receiver is not doing his job, which is to protect the investors. Instead, he is hurting us. The following section provides an example of how the Receiver has failed the Partnerships in this regard.

C. The SEC and Receiver Have 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) holding title to a residentially-zoned parcel in Las Vegas, obtained an offer

from CB Richard Ellis, one of America's major real estate brokerages, to list the GPs' jointly-owned parcel for sale at $2.6 million, then circulated ballots to her fellow investors. Most of the investors in both partnerships voted to accept the brokerage's offer to list the GPs' jointly-owned parcel for sale. None of this was initiated, requested, or coordinated by Defendants.

Even though these investors were able to initiate and conduct a balloting process, the Receiver did not sign the listing agreement with CB Richard Ellis, and the Court disregarded the Horizon Partners' and Rainbow Partners' votes on the grounds that the Receiver's counsel showed 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, which was filed with the Court, correctly listed the current zoning and explained how the property was worth $2.6 million based on the allowed uses for the zoning.

Second, the Receiver submitted no documentation to the Court explaining how the listing agent reached his/her determination, and in fact, the Receiver did not even identify the listing agent on the record or in any court filings. The Court did not ask for any documents from the Receiver's broker or ask questions of the (unidentified) broker before issuing the Reconsideration Order. Several investors have since sent letters to the Receiver and the Court asking for the identity of the broker and the documents supporting that broker's estimate of value.

More importantly, regardless of any appraised value, if the investors in a GP vote in favor of listing their land for sale, the GP's partnership agreement directs

that the proposed action be carried out. The Receiver had no right not to sign the listing agreement just because he disagreed with the majority vote.

Thus the Court's decision in the Reconsideration Order was based on wholly unreliable statements while disregarding a detailed analysis of value that was in the record, and therefore was clear error.

D. Defendants Have No Control over the GPs or the Investors; the Receiver Now Possesses More Power than Defendants Ever Did

Throughout this entire case, ever since it began, the SEC and Receiver have claimed that Defendants "control" the GPs. But Defendants do not "control" the GPs – the GP investors, and only the investors, control the GPs. Each GP's partnership agreement states that *only* the GP investor-partners control the GPs and participate in the control, management, and direction of the GP. The investor-partners can initiate matters for consideration by the partnership, including the distribution of information and requesting a vote of the partnership. The investor-partners can vote to replace the Signatory Partner and Partnership Administrator if they wish, without having to provide a reason for replacing them.

Although Defendants can and do own equity interests in the GPs, the partnership agreements specifically provides that Defendants and their employees and agents cannot vote on any general partnership matters, including the sale of land. Thus Defendants, either on their own or by proxy, cannot vote on issues. Nor do Defendants possess any power to veto or refuse to honor a vote of the voting investors. Defendants share in the profits of the eventual resale of the raw land to developers, but they do not get to control when the land is to be sold, to whom, and for how much, because of their complete lack of control through voting.

Neither the Receiver nor the SEC can exercise rights concerning assets that Defendants do not own and do not control. Those assets belong solely to the investor-partners who are 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 the investors of their powers. The investors had more ability to directly control, participate in, and influence their investment before the Receiver was imposed upon the GPs than they do now. By imposing the Receiver upon the GPs, the Court has turned the investors from general partners into limited partners dependent upon the whims of the Receiver's oversight, thereby creating a self-fulfilling prophecy.

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

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E. The Investors in the GPs Are Capable of Managing Their Partnerships and Property and Selling the Land for a Profit without the 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.

However, these matters are nothing new – the SEC and Receiver previously raised them unsuccessfully in 2013 when 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. The GPs' partnership agreements show that the investors have always had the authority to hire people to perform the management functions, because the investors (but not Schooler or Western) can vote to fire the partnership secretaries and hire new ones.

Therefore the Reconsideration Order is inappropriate because when the Court issued its order in 2013 to release the GPs from the receivership, the Court already knew what the GPs' regular operations were. Nothing has truly changed that makes the continuation of an involuntary, unconsented receivership appropriate.

The investors include people from all walks of life who are fully capable of making sure property taxes and insurance are paid each year and that an accountant is engaged to prepare Form K-1's. It's no more complicated than when the investors pay their income taxes or the mortgage, property taxes and insurance on their own houses. The Court agreed when it issued the earlier order to release the GPs from the Receiver. The SEC and Receiver have not shown that the investors are incapable of performing those tasks.

Even for the handful of GPs that have residential tenants, a water system, or an eminent-domain lawsuit are present – and less than a dozen GPs have such issues - the investors can take action by voting on whether to have tenants reside on the premises, whether to hire someone to tend to the water system, whether to hire an attorney for the lawsuit, etc. If the tenants do not vacate the premises, the GP investors can vote to hire an attorney to bring an unlawful-detainer action against the tenants. The GP investors can vote to hire a manager to run the water system, or hire a lawyer to represent them in the eminent-domain lawsuit and ensure that they get as much money as possible from the government agency that plans to take their land for a road or a power plant. The SEC and Receiver have never provided any evidence that the investors are incapable of taking such action. And for the overwhelming majority of GPs that have neither a water system nor tenants, the operational requirements remain minimal: payment of taxes, insurance, and mortgages, and issuance of tax statements.

Receivers are usually appointed to operate or manage a business when the business is being so mismanaged that investors' funds are at risk of being lost. However, when the business at issue consists of a general partnership with very

simple routine activity and an asset that sits there and appreciates in value as nearby land is developed, there's nothing to mismanage.

The SEC and Receiver claim that the land investments are somehow too complicated for the investors to run. But the SEC and Receiver continue to ignore that these investments are in raw land. ***It's dirt.*** There is no farming, ranching, or mining that takes place. There are no buildings to maintain, no rent to collect. The dirt sits there until such time as the surrounding area has developed, and then it becomes valuable to developers who want to put houses, or shopping centers, or industrial parks on it. The GPs are not established to develop their lands, and they don't develop them. That is left to the developers who eventually buy the land from the GPs.

Furthermore, the Co-Tenancy Agreements by which the GPs hold fractional interests to their properties do not undercut the investors' ability to operate the GPs and sell their property at a profit. The Co-Tenancy Agreement plainly and expressly states 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.***

It is actually a very simple process that gives each investor direct and immediate ability to bring a matter of business to a full vote upon a mere request. There is no requirement that a member's GP first vote on the issue of whether a ballot request be sent to the other co-tenant GPs, and there is no requirement that each GP's investors must unanimously vote a certain way; all that is needed is that *a simple majority of the investors in each co-tenant GP* vote in favor of selling, etc.

Contrary to what the Court believes 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. Instead, all it takes is one investor to request that the co-tenant GPs be balloted, followed by the two GP secretaries distributing the ballots to the investors, followed by the investors (on their own) voting. There is no coordination necessary, and the investors are capable of doing this without guidance or instruction by Defendants.

In the case of 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 vote on whether to list the property with that brokerage. A majority of the investors in both GPs voted in favor of listing their land for sale. Defendants had no involvement whatsoever with Ms. Kemper's balloting, and it was only the Receiver's failure to sign the paperwork with the brokerage that has prevented the property from being listed for sale.

Neither the SEC nor the Receiver has provided any evidence showing that the GP investors are incapable of running their GPs, ensuring that the GP bills are paid, or deciding when to sell their land and for how much. Therefore, the receivership over the GPs should be lifted immediately.

F. Whether Defendants Are Liable for Any Violations of Federal Securities Law is Irrelevant to Issue of Whether the GPs Should be 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 nothing to do with the lawsuit. The SEC has accused none of the GPs or investors of helping Schooler or Western hide money or commit fraud. No GP is named as a party, and no investor has been named either. Whether

Defendants are found to have violated the law has nothing to do with whether the GPs own land, or whether the investors can run their GPs, protect their investments, and sell for a profit.

The underlying factors remain the same whether the Receiver is there or not, whether the SEC wins its lawsuit – when will someone want to buy the land from the GPs, and for how much? There is nothing that needs to be done to maintain title to the property and eventually sell to another party that the GP investors can't do on their own, without the Receiver.

G. Statement the GP Wants 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

Rail Road 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 8, 2014

Respectfully submitted,

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