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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 GOLD RIDGE 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**

Gold Ridge 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").

Gold Ridge Partners requests to be heard in open court at the hearing scheduled for October 10, 2014, with Gregory Post, Esq. to speak on behalf of Gold Ridge Partners for fifteen (15) minutes.

I.

ARGUMENT

Federal courts have broad discretion "to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership." *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986).

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.

The investors are being treated as children in a custody dispute with the Receiver serving as guardian-ad-litem, when the investors are in fact adults extremely capable of making their own decisions about their investments, including how they want to spend the money in their respective general partnership accounts.

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

At the start of this case, the SEC pointed out in its original *ex parte* TRO application: "The GPs will then have notice and an opportunity to be heard ***before*** any of their assets are placed under the control of a permanent receiver." Dkt. No. 3-1, p. 31 of 33 (emphasis added).

"[A]t a minimum [the Constitution's Due Process Clauses] require[s] that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). 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 SEC and Receiver Have Made Inaccurate Factual Representations and Omissions of Fact

In 2008 Sierra Pacific (the "utility company") proceeded to take by eminent domain approximately 480 acres of the 620 total acreage owned by four (4) general partnerships (i.e. GOLD RIDGE, SKY VIEW, GRAND VIEW and ROLLING HILLS) with each partnership holding an undivided 25% interest in the acreage as co-tenants (the "Property"). While the Court permitted the utility company's appraisal, which came in at $2.2 million dollars, to be presented to the jury, the Court only allowed one of the two appraisals the GPs submitted to be presented. The appraisal the Court allowed to be presented was the highest and best use surface appraisal that came in at $10.5 million dollars. The appraisal that the Court

disallowed as being too speculative was the subsurface appraisal for industrial gravel production which came in at between $20-30 million dollars. Ultimately, in 2010 the jury awarded the GPs $4.4 million dollars, plus court costs, plus interest.

The GPs were not satisfied with the decision, however, and voted to set aside approximately $600,000.00 to retain counsel to appeal to the Nevada Supreme Court to reconsider the monetary award because certain valuation evidence had been excluded by the trial Court (i.e. since the general partnerships also owned the underlying mineral rights for all 620 acres, the Court should have considered both the surface appraisal AND the subsurface appraisal in determining what the award should be for the taking by eminent domain). Subsequent to the appeal being filed, the Receiver was appointed to step into the shoes of the defendant Western Financial Planning and Louis V. Schooler.

The Receiver has a fiduciary duty to act and conduct business in accordance with the terms and conditions of the general partnership agreement. This he did not do. The general partnership agreement specifically requires that **"all Partnership decisions shall be made in accordance with the vote of a majority of the interests in the capital contributed to the Partnership owned by Partners entitled to vote."** Louis V. Schooler and Western Financial Planning, were specifically excluded from voting on any transaction and are specifically designated in the general partnership agreement as ***Non-voting Partners.*** As such, while they can call for a vote on an issue, they ***cannot cast a vote, cannot nullify a vote, and cannot cancel a vote on any issue.*** The role of Louis V. Schooler and Western Financial Planning was administrative only, and they had no authority whatsoever to make unilateral decisions on behalf of the general partnership. The Receiver, stepping into the shoes of Western Financial Planning and Louis V. Schooler, had no authority whatsoever to unilaterally settle with the utility company and drop the appeal. No vote of the general partners was taken by the Receiver before he acted. Instead, without notice and without a vote of the general partners being taken

requesting authorization to settle the case and drop the appeal, the Receiver proceeded to unilaterally settle the case and drop the appeal. He acted with total disregard and in direct contradiction to the wishes of the general partners who, following the procedures set forth in their general partnership agreements, had voted to set aside adequate funds to retain counsel and had already filed the appeal to the Nevada Supreme Court.

The Receiver acted far beyond the scope of his authority, failed to act in the best interests of the general partnership, violated the procedures specified in the general partnership agreement that must be met before any action is taken, ignored the decision of the general partners to appeal the case to the Nevada Supreme Court, and substantially diminished the value of each general partner's interest in the general partnership. The SEC alleges that the Receiver's appointment was necessary to protect the general partners from alleged improper actions of the defendants, but the reality is that it is the Receiver, and the actions of the Receiver alone, that has detrimentally impacted the general partnership and substantially decimated the value of the general partners' investments. Whether the Receiver thinks that the appeal is too expensive, or whether the results are too uncertain is irrelevant. The costs and risks were already evaluated and considered when the general partners voted, in accordance with the provisions set forth in their general partnership agreements, to set aside funds to retain counsel and file the appeal.

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

The SEC's entire basis for asking that the GPs be included in the receivership is the false notion that Defendants somehow "control the GPs" such that the investor-partners are unable to exercise the powers and authority provided in the documents governing the respective GPs. Dkt. No. 3-1 at 22. But Defendants do not "control" the GPs. The Partnership Agreements clearly provide that *only* the GP investor-partners control the GPs. All partners are general partners with one vote

for every unit they own, and each partner participates in the control, management, and direction of the GP. Dkt. No. 14-1, ¶ 5.1.1. The investor-partners can initiate matters for consideration by the partnership, including the distribution of information and requesting a vote of the partnership. Dkt. No. 14-1, 5.2. The investor-partners can vote to replace the Signatory Partner and Partnership Administrator. Dkt. No. 14-1, ¶¶ 4.2.3, 7.1.4.

Although Defendants can and do own equity interests in the GPs, the Partnership Agreement specifically provides that Defendants "and any and all persons or entities receiving compensation of any kind from" Defendants cannot vote on any general partnership matters, including the sale of land. Dkt. No. 14-1, ¶ 5.1.3; Dkt. No. 3-1 at 4, n. 3. 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. *Javitch v. First Union Sec.*, 315 F.3d 619, 625 (6th Cir. 2003) ("the general rule is that a receiver acquires no greater rights in property than the debtor had and, except for liens in existence at the time of the appointment, the receiver holds the property for the benefit of the general creditors under the directions of the court") (citations omitted).

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 with full authority to direct their investment into *de facto* 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.

D. 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. Dkt. No. 629, 6:5-15.

However, these matters are nothing new – the SEC and Receiver previously raised them unsuccessfully in opposition to Defendants' earlier motion to remove the GPs from receivership. Dkt. No. 207 at 3-5 (SEC opposition); Dkt. No. 206 at 3 (Receiver's opposition). 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)." Dkt. No. 206 at 3. And, in fact, the GPs have always possessed that authority in the Partnership Agreements, which authorize the investors by simple majority vote to fire the partnership secretaries and hire new ones. Dkt. No. 195-3 at 12, ¶ 7.1.4 (allowing termination of Partnership Administrator by majority vote, with or without cause). The ability to hire and fire at will was relied upon by the Ninth Circuit in a similar case to determine adequate control by investors. *Holden v. Hagopian*, 978 F.2d 1115 (9th Cir. 1992).

Therefore the Reconsideration Order is inappropriate because when the Court issued its earlier modification order in 2013 (Dkt. No. 470), 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. Less is needed to maintain and operate the GP than is required to maintain one's own home finances, and this Court has agreed. Dkt. No. 470, 25:11-17.

Even in those rare and limited cases in which residential tenants or a water system are present – matters affecting less than a half-dozen of the 86 GPs in existence, namely the partnerships for the Stead/P51 property in Reno, Nevada – 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, 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. 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 jeopardized and in danger of wrongful dissipation. However, when the business at issue consists of a general partnership with very simple routine activity and an asset whose increase in value is based on macroeconomic factors outside of the partnership's control, there is nothing to mismanage and hence nothing to justify the appointment of a receiver to protect the investors.

The securities-fraud cases invoked by the SEC in its memorandum of points and authorities in support of its TRO application (Dkt. No. 3-1) were complex business activities that had a real-estate component. The cited cases typically

involved improved property such as orange groves (*SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)), jojoba farms (*Koch v. Hankins*, 928 F.2d 1471 (9th Cir. 1991)), and apartment buildings (*McConnell v. Frank Howard Allen & Co.*, 574 F.Supp. 781 (N.D. Cal. 1983)). In those cases, there was an active business enterprise that took place on a piece of real estate, which is markedly distinct from simply owning the undeveloped real estate and leaving it alone to appreciate in value as neighboring properties are developed, as in this case. Without active management, or with mismanagement of the day-to-day operations, the investments in *Howey*, *Koch*, and *McConnell* were doomed to fail.

In contrast, the GPs in this case were established solely for investment in raw land that would be held for the long term, until such time as the surrounding area had developed. The GPs are not established to develop their lands, nor do they actually do so. Those complex activities would be done by the developers after they had bought the land from the GPs. The defined purpose, as presented in the Partnership Agreements and Partner's Representations, was for the GPs to hold the land until, in the investors' opinion, the time was right to sell.

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." Dkt. 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, as shown recently by Ms. Kemper's locating a brokerage, obtaining an offer to list, and then initiating 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.

Neither the SEC nor the Receiver, despite their best efforts (Dkt. Nos. 584, 588, 589), has provided any evidence showing that the GPs are incapable of governing themselves or deciding the appropriate time to sell their assets. Therefore, the receivership over the GPs should be lifted immediately.

E. Whether Defendants Are Liable for Any Violations of Federal Securities Law is Irrelevant

The Court's order of April 24, 2014, which *sua sponte* reconsidered its earlier decision to release the GPs from the receivership, and which led to the Reconsideration Order, was based on its finding as a matter of law that the GP equity interests were securities. Dkt. No. 583, 20:20-26. 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***." Dkt. No. 3-1, p. 23 (emphasis added). The GPs are not parties to this case; they are not and have never

been accused of collaborating with Defendants to swindle investors. They are and always have been legally-independent entities.

The financial health and legal future of Defendants has *no impact* on the financial health and future of the GPs. Whether or not Western continues to exist - whether or not the SEC obtained judgment against Defendants for any violation of the securities laws - the GPs will still own title to land. The return on their investment continues to turn on the same factors that existed the day they entered into the investment: when will a party be interested in purchasing the property from the GP, and at what price? Those are the same factors that have generated profits for past GPs; the present litigation does not change those factors. There is nothing that needs to be done to maintain title to the property and eventually sell to another party that the GPs, through their investors working in concert, cannot do on their own without the Receiver.

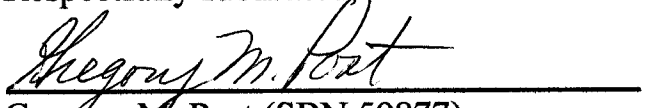
II.

CONCLUSION

Based on the foregoing, Gold Ridge 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

Respectfully submitted,



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GOLD RIDGE PARTNERS

Group - DAYTON VALLEY III - 1/4 INTEREST WITH SKY VIEW, GRAND VIEW & ROLLING HILLS

Response to Letter& Ballot - August 2014

Affirmative for Removal of Receiver

	Partner
1	Patricia M Averell
2	Indar M T Rai, IRA
3	Shelley Ann Hall, IRA
4	Lari Kacoon
5	Analee Kredel, IRA
6	Kenneth Garland, IRA
7	Richard J & Celeste F Sanders
8	Indar M & Shashikala Rai
9	Patricia M Averell, IRA
10	W. Clinton & Karen B. Wilhoite
11	Arkady Bablumyan & Susanna Petrosyan
12	Richard W & Julia A Koeneke
13	Gary L Williams, IRA
14	Tomasz M Jagielinski, IRA
15	Caleb M Rosenberger
16	Theresa J Wurl, IRA
17	Lucy Morgan & Steve LoCicero
18	John H Moore, IRA
19	David R Cox, IRA
20	Edward H & Irene Brabant