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9 and FIRST FINANCIAL PLANNING CORPORATION

10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 SECURITIES AND EXCHANGE)
15 COMMISSION,)

16 Plaintiff,)

17 v.)

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

21 Defendants.)
22)

Case No. 12 CV 2164 GPC JMA

**DEFENDANTS’ OBJECTIONS TO THE
COMMISSION’S PROPOSED
PRELIMINARY INJUNCTION ORDER
AND ORDER APPOINTING THOMAS C.
HEBRANK PERMANENT RECEIVER**

23 Defendants LOUIS V. SCHOOLER (“Schooler”) and FIRST FINANCIAL PLANNING
24 CORPORATION (“Western”) (collectively “Defendants”), by and through their attorneys of
25 record, Eric J. Hougen and Philip H. Dyson, respectfully submit Defendants’ Objections to the
26 Commission’s Proposed Preliminary Injunction Order and Order Appointing Thomas C. Hebrank
27 Permanent Receiver. Defendants additionally submit a proposed Preliminary Injunction Order
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1 reflecting their proposed changes to the order submitted by the Commission.

2 Prior to the Commission submitting its proposed preliminary injunction order, counsel for
3 the Commission and counsel for Defendants met and conferred regarding various details in the
4 Commission's proposed order. The parties were able to resolve some differences. In addition,
5 prior to Defendants' filing these objections and proposed order, counsel for the Commission and
6 counsel for Defendants again met and conferred. The parties were not able to agree on these
7 remaining points of difference and the parties agreed that the competing concerns should be
8 submitted to the Court for its review.

9 **I. Once the Commission Initiates Civil Litigation, the Federal Rules of Civil**
10 **Procedure Govern the Commission's Access to Documents, Data, and other**
11 **Discoverable Information Belonging to Defendants.**

12 The Commission has taken the position, set forth in Paragraph XII of the Commission's
13 Proposed Order, that the Commission "and any other government agency" should have absolute
14 and unlimited authority to inspect and/or copy any and all records and documents belonging to any
15 of the entities in Receivership, including those of Defendant Western and even those potentially
16 not relevant to this litigation. The Commission's position violates the Federal Rules of Civil
17 Procedure ("FRCP") that govern when, how, and in what manner a civil litigant might gain access
18 to and/or copies of documents, data, and other information belonging to other parties to the civil
19 litigation.

20 Any requests for documents, data, or information belonging to Western or its subsidiaries
21 are required under the FRCP to be directed to counsel of record for Western in this matter and be
22 limited to the time frame, relevance constraints, and other limitations and controls set forth by the
23 FRCP.

24 It is well established that "[l]ike any ordinary litigant, the Government must abide by the
25 Federal Rules of Civil Procedure. [The Government] is not entitled to special consideration
26 concerning the scope of discovery, especially when it voluntarily initiates an action." *SEC v.*
27 *Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). Other courts have also found that
28 "government agencies embroiled in litigation are subject to the same discovery rules as private

1 litigants.” *SEC v. Merkin*, 283 F.R.D. 689, 696 (S.D. Fla. 2012).

2 The Commission should not be allowed to use the Receiver to go around the FRCP and the
3 well-established discovery rules that govern **all** civil litigants in Federal Court. The Commission
4 should not be allowed to turn the Receiver into an arm of the SEC. Rather, the Receiver serves as
5 an arm of the Court. *See Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1132 (D. Ariz. 2006) (court-
6 appointed-receiver in action brought by SEC “an officer of the court”) (citing *S.E.C. v. Am.*
7 *Principals Holding, Inc. (In re: San Vicente Medical Partners)*, 962 F.2d 1402, 1409 (9th Cir.
8 1991).

9 That is particularly true in the present litigation, since the Court, acting in its authority to
10 order ancillary relief, ordered a very limited purpose for the receivership. In its November 30,
11 2012 Order, this Court “conclude[d] that, while there may be no need for a receiver to marshal and
12 preserve assets from misappropriation and dissipation, a continuation of the receivership over
13 Western is needed to clarify Western’s financial affairs.” (Dkt. Doc. 59 at 9). The Court
14 explained its decision was at least in part, if not primarily, due to the fact that it had been
15 presented with “competing information” from the Commission and Defendants on several relevant
16 issues and that the receiver could assist in clarifying the true facts regarding those competing
17 narratives.

18 Notably, it is the Receiver who is to investigate and report to the Court on these issues.
19 The Receiver is not appointed for the purpose of becoming an additional arm of one party to the
20 litigation, even when that party is a powerful government agency. Rather, the receiver reports to
21 the Court and serves as a neutral investigator and manager. In its November 30, 2012 Order, the
22 Court cites the justifications for a receivership set forth in *SEC v. Wencke*, 622 F.2d 1363, 1372
23 (9th Cir. 1980). Notably absent from this list is the idea that a receivership should serve to allow
24 one party to a litigation from having to comport with the same FRCP discovery rules the other
25 parties to the same action are required to observe.

26 The third *Wencke* justification is for “the receiver to conduct an **independent**
27 investigation.” For the Receivership to serve as a discovery arm of the Commission runs counter
28 to the notion of an “independent” investigation.

1 In addition, allowing the Commission to access any and all documents would violate
2 attorney-client privileges. The Commission must still prove its case. There has not yet been a
3 trial in this matter. There is no basis in law that allows for a Defendant's attorney-client privilege
4 to be violated simply upon a plaintiff government agency demonstrating a prima facie case.

5 The Court should adopt Defendants proposed changes to Paragraph XII of the
6 Commission's Proposed Order (Paragraph XI of the Defendants' Proposed Order) to make it clear
7 that the Commission, upon initiating this litigation, must abide by the same discovery rules that all
8 civil litigants before this Court are required to observe.

9 **II. Defendants' Proposed Changes to the Commission's Proposed Order**

10 Defendants' propose the following changes to the Commission's Proposed Order,
11 presented in the order in which the edits appear in the Defendants' Proposed Order (redline
12 version) submitted to the Court herewith:

- 13 1. Page 1 – Preamble paragraphs B, C, and D – Defendants' edits more accurately follow
14 the Court's October 5, 2012 Order (Dkt. Doc. 44), where in the Court specified that its
15 basis for granting the preliminary injunction was the finding that there was "a prima
16 facie case that Defendants have violated securities laws and a reasonable likelihood
17 that their violations will be repeated." *Id.* at 22. This Court pointed out the same in its
18 November 30, 2012 Order (Dkt. Doc. 59 at 2). The Commission's language overstates
19 the carefully written orders issued by the Court in this matter.
- 20 2. Page 1 – Section I – The Commission's request for a preliminary injunction included
21 various items the Court denied in addition to what it has granted, including the
22 Commission's original request that a preliminary injunction issue with regard to the
23 fraud based causes of action. In its October 5, 2012 Order, the Court denied that
24 request.
- 25 3. Page 3 – Section IV, subparagraph A – Western and the General Partnerships only
26 occupy a portion of the premises located at 5186 Carroll Canyon Road. There are
27 other third-party tenants in the building that are not subject to the Receivership and
28 over which the Receiver has no authority. The owner of the building is also in possible

1 negotiations with new and additional tenants wholly unrelated to the entities and issues
2 in this case. Defendants' edits more accurately reflect this reality.

- 3 4. Page 4 – Section IV, subparagraph E – The Commission's language has the Receiver
4 reporting to the Commission in addition to reporting to the Court. Defendants correct
5 this error to make it clear that the Receiver is to report to the Court. Certainly the
6 parties to the litigation will receive copies of the Receiver's reports filed with the
7 Court, but that is different than ordering direct reports from the Receiver to Plaintiff.
- 8 5. Page 5 – Section IV, subparagraph J – Defendants provide language to clarify, and
9 thereby reduce confusion going forward, that the authority of the Receiver in its duties
10 will not serve to limit the ability of counsel of record to lawfully defend Western in the
11 matter before this Court.
- 12 6. Page 5 – Renumbering of Sections VII through XV of the Commission's Proposed
13 Order to Sections VI through XIV – To avoid confusion, the renumbering is not due to
14 any Section being deleted from Defendants' Proposed Order, but rather is simply
15 correcting a typographical error in the Commission's Proposed Order.
- 16 7. Pages 5-6 – Defendants' Section VII (Commission's Section VIII) – The edit to this
17 Section restores it to the original language submitted by the Commission in its Ex Parte
18 Application for the TRO (Dkt. Doc. 3) and the Temporary Restraining Order issued in
19 this matter (Dkt. Doc. 10). The Commission has indicated Schooler should be dropped
20 from the stay provision, but this is inconsistent with the Commission's statements and
21 actions. The Commission now asserts that Schooler should not be included in the stay
22 because he is not subject to the receivership. However, that does not explain why the
23 Commission thought it appropriate to include him in the stay provision of the TRO.
24 Notably, the TRO, at the Commission's request, did not include Schooler in the
25 temporary receivership as well, but did include Schooler in the stay provision.
- 26 a. Additionally, the Commission has been highly critical of prior litigation
27 settlements entered into by Defendants with former investors – referring
28 repeatedly in its pleadings to such lawful settlements as “hush money”.

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Defendants asked the Commission to agree to inclusion of Schooler to the stay provision, pointing out that with a stay in place regarding Western, that plaintiffs’ attorneys are quite likely to attempt litigation against Schooler as an individual. This will create not only additional costs to Schooler to defend additional actions, but will create confusion among the investors regarding whether they need to spend resources on counsel who can be first to file against Schooler.

b. Schooler would then be faced with the very common situation facing many persons – to spend resources defending litigation or settling litigation. With the Commission’s heightened concern and repeated pleadings with the Court to do something in reaction to Defendants’ supposed “hush money” settlements, Schooler finds it inconsistent on the part of the Commission to at this point in time not agree that it is in the public interest and the interests of the investors to not have a race for possible litigation against Schooler while this matter is pending. All relevant issues related to Western and Schooler’s relationship to Western and the real estate general partnership investments will certainly be adequately litigated by the Commission’s capable litigators on behalf of all those parties potentially affected.

c. Defendants therefore ask the Court to adopt Defendants’ proposed language (which in truth is the Commission’s original TRO language regarding the scope of the stay provision) so that there is not duplicative litigation that would waste the resources of not only Schooler, but also the court system, and possibly those investors who out of confusion believe they need to race to the courthouse to secure a claim (a claim the Commission would undoubtedly criticize and/or possibly even block, should it result in any one investor reaching a verdict or settlement ahead of the SEC’s litigation concluding).

- 1 8. Page 6 – Defendants’ Section VIII (Commission’s Section IX) – a small edit to more
2 accurately reflect the relationship of the entities listed.
- 3 9. Page 7 – Defendants’ Section IX (Commission’s Section X) – Defendants ask the court
4 to require the Receiver to submit any applications for costs and expenses no less
5 frequently than monthly. Defendants believe this will allow for more timely
6 transparency and understanding regarding the costs being incurred by the Receiver.
- 7 10. Page 7 – Defendants’ Section X (Commission’s Section XI) – The Receiver has been
8 charged with a receivership over assets valued in the tens of millions of dollars. To not
9 require any bond puts the investors interests in the General Partnerships at unnecessary
10 risk.
- 11 11. Pages 7-8 – Defendants’ Section XI (Commission’s Section XII) – see full discussion
12 above on pages 2 through 3 of this brief.
- 13 12. Page 8 – Defendants’ Section XII (Commission’s Section XIII) – a small edit to more
14 accurately reflect the relationship of the entities listed.
- 15 13. Schedule 2 – List of Accounts Subject to the Receivership – the very last entry on this
16 list is for a company named Real Asset Locators, Inc. (“RAL”). RAL should be struck
17 from this list and not included in the receivership. Pursuant to the orders issued by the
18 Court in this matter, the receivership is to extend over Western (and its subsidiaries)
19 and over the real estate general partnerships syndicated by Western. RAL is not one of
20 the real estate general partnerships. RAL is not a subsidiary of Western. RAL would
21 not even fall within the broadest definition of an affiliate of Western and/or any of its
22 subsidiaries.
 - 23 a. RAL is wholly owned by Rob Shaffer. Western has no ownership interest in
24 RAL. Schooler has no ownership interest in RAL. Schooler does serve as an
25 officer of RAL.
 - 26 b. RAL is a service provider to Western. RAL has in the past entered into
27 negotiations on behalf of Western to purchase raw land. RAL has in the past
28 purchased raw land in its name and then subsequently sold that land to Western.

- 1 c. RAL's only involvement with Western has been to assist Western in obtaining
2 raw land.
- 3 d. RAL has no role in Western's operations. RAL has no role in the real estate
4 general partnership syndicating process. RAL has no contact or communication
5 with investors investing in the real estate general partnerships.
- 6 e. RAL has no contact or communication with the General Partnerships after they
7 are syndicated.
- 8 f. The Commission claims RAL should be subject to the receivership due to its
9 involvement in providing services to Western related to Western's procurement
10 of raw land. Defendants assert that what the Commission is identifying may
11 satisfy a test for relevance related to a request for documents, but that mere
12 relevance is not the standard by which a third-party service provider with no
13 common ownership should be subjected to a full blown receivership.
- 14 g. If the Commission has a basis for subjecting this third-party to the receivership,
15 it should carry the burden of presenting those arguments in sufficient detail,
16 which it has not done so.

17 **CONCLUSION**

18 Based on the foregoing, Defendants respectfully request that this Court adopt the
19 Defendant's Proposed Preliminary Injunction Order and Order Appointing Thomas C. Hebrank
20 Permanent Receiver.

21 Respectfully submitted,

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CERTIFICATION

I hereby certify that on the 24th day of December, 2012, I submitted the foregoing via electronic mail to the Court’s chambers together with Defendants’ Proposed Preliminary Injunction Order, with the following counsels of record included on that electronic mail communication:

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_____/s/Eric Hougen_____

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