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19 and FIRST FINANCIAL PLANNING CORPORATION

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

22 **SECURITIES AND EXCHANGE**
23 **COMMISSION,**

24 **Plaintiff,**

25 **v.**

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

Defendants.

Case No. 12 CV 2164 GPC JMA

**DEFENDANTS' OPPOSITION TO
MOTION FOR AUTHORITY TO
PURSUE CLAIMS AGAINST
LINMAR BORROWERS**

Date: July 26, 2013

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

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1 Defendants LOUIS V. SCHOOLER (“Schooler”) and FIRST FINANCIAL
2 PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING
3 CORPORATION (“Western”) (collectively “Defendants”) hereby submit the
4 following opposition to the Receiver’s Motion for Authority to Pursue Claims
5 Against LinMar Borrowers.

6 I.

7 INTRODUCTION

8 The Receiver seeks to file suit against LinMar Management Inc., and various
9 LinMar-titled LLC’s (“LinMar Borrowers”) to collect funds borrowed from Western
10 by the LinMar Borrowers between 2006 and 2009. The LinMar Borrowers and their
11 activities are separate from the real estate general partnerships (“GPs”) established
12 through Western, and from Western itself.

13 The Receiver alleges that the lawsuit is necessary because the LinMar
14 Borrowers have failed to repay the loans from Western. However, the Receiver fails
15 to describe how Western will benefit from the litigation of claims against the
16 LinMar entities, particularly since *ten of the eleven loans from Western to the*
17 *LinMar Borrowers, constituting approximately 65% of the total amount due to*
18 *Western, are non-recourse loans.*

19 One of the properties owned by the LinMar Borrowers – for which Western’s
20 loan is secured by a deed of trust junior to the purchase mortgage - is currently
21 under a receivership and awaiting foreclosure. Another property owned by the
22 LinMar Borrowers has little to no equity and insufficient incoming rents, which
23 prevent or discourage potential refinancing or capital calls that could be used to
24 repay the money owed to Western. Many of the properties have substantial amounts
25 of deferred maintenance due, plus there are costs for lease commissions and tenant
26 improvements that would result as tenants leave or renegotiate new leases.

27 Under the circumstances, the Receiver’s proposed action would be wasteful
28 and produce little to no benefit to Western. As has already been explained and

1 demonstrated to the Receiver, due to the current financial condition of the LinMar
2 Borrowers any money to be recovered in litigation will not exceed what has already
3 been offered to Western in the monthly repayment plan proposed by the LinMar
4 Borrowers. In fact, bringing litigation would only serve to reduce the recovery to
5 Western by the costs of the litigation and unnecessarily delay Western's receipt of
6 payments from the LinMar Borrowers. This means that – once again – the Receiver
7 would seek to tap Western's equity interests (or sell other property held in
8 receivership, whether owned by Western or the GPs) to pay the bills.

9 The Receiver's proposed action once again demonstrates how the continued
10 existence of the Receivership provides no benefit to the entities managed by the
11 Receiver. *See* Dkt. Nos. 194, 194-1, 194-2 (Defendants' Motion for Modification of
12 Preliminary Injunction). Therefore, the Receiver's motion should be denied.

13 II.

14 BACKGROUND

15 A. The LinMar Entities

16 The LinMar Borrowers and other LinMar entities own various properties in
17 California, Oregon, and Washington. Declaration of Louis V. Schooler ("Schooler
18 Decl."), ¶¶ 6-13. Until January 2011, LinMar Management, Inc. was primarily run
19 by Schooler's partner as chief executive officer (with Schooler as president), and
20 Schooler owned a one-half interest in LinMar Management, Inc., LinMar III, LLC,
21 and LinMar IV, LLC. Schooler later acquired full ownership of LinMar
22 Management, LinMar III, LLC, and LinMar IV, LLC. *See* Schooler Decl., ¶ 3.
23 LinMar Management, Inc. is the asset manager for two of the properties owned by
24 the other LinMar Borrowers, and also is the sole member of two LLC's that own a
25 very small interest in those two properties. Schooler Decl., ¶¶ 8-12, Exh. 1.

26 All of the LinMar Borrowers are legally and administratively separate from
27 Western, with separate ownership, bank accounts, and so on. Schooler Decl., ¶¶ 14,
28 15,16. The LinMar Borrowers observe the necessary corporate and LLC formalities.

1 Schooler Decl., ¶ 17.

2 **B. Western's Loans**

3 Between April 2006 and August 2009, Western made a total of eleven loans
4 to the LinMar Borrowers, with a total of \$806,000 loaned, of which \$66,005.40 in
5 principal has been repaid. Schooler Decl., ¶¶ 18, 22. Except for one loan of
6 \$300,000 to LinMar Tacoma LLC in 2008 (plus accrued interest), all of the loans
7 were non-recourse loans. Schooler Decl., ¶¶ 19-21. The loans became due between
8 2007 and 2012. Schooler Decl., ¶ 18, Exhs. 2-12. Apart from the payments on
9 principal, the LinMar Borrowers have made no payments on the loans. Schooler
10 Decl., ¶ 22.

11 The loan to LinMar Tacoma LLC was secured by a deed of trust on the
12 property in Tacoma, Washington held by some of the LinMar Borrowers, but the
13 deed of trust is a junior lien. Schooler Decl., ¶¶ 19, 24. The incoming rent is
14 insufficient to pay the senior deed of trust, so the senior lienholder is foreclosing on
15 that property. *Id.*

16 **III.**

17 **ARGUMENT**

18 Federal courts have broad discretion “to supervise an equity receivership and
19 to determine the appropriate action to be taken in the administration of the
20 receivership.” *S.E.C. v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); see also *S.E.C.*
21 *v. Lincoln Thrift Ass’n*, 577 F.2d 600 (9th Cir. 1978) (district court has “wide
22 discretion to determine the appropriate relief in an equity receivership”). However,
23 “[a] receivership is only a means to reach some legitimate end sought through the
24 exercise of the court of equity. It is not an end in itself.” *Kelleam v. Maryland Cas.*
25 *Co.*, 312 U.S. 377, 381 (1941) (emphasis added) (quoting *Gordon v. Washington*,
26 295 U.S. 30, 37 (1935)). “Consequently, a receivership must be monitored to ensure
27 it is still serving the function for which it was created.” *S.E.C. v. Madison Real*
28 *Estate Group, LLC*, 647 F. Supp. 2d 1271, 1275 (D. Utah 2009) (citing *Gordon*, 295

1 U.S. at 37).

2 The Receiver, under the guise of his authority in the Preliminary Injunction to
3 “collect and take custody, control, possession, and charge of all...assets...of or
4 managed by Western...with full power to sue, foreclose, marshal, collect, receive”
5 (Dkt. No. 174, section III(A)), now wants to sue the LinMar Borrowers to collect on
6 the promissory notes to Western. However, although there is over \$1.2 million in
7 outstanding principal and interest on the various Western-LinMar loans, any belief
8 that collection actions will benefit Western is illusory, because of the condition of
9 the LinMar operations.

10 **A. The Receiver’s Pursuit of the LinMar Borrowers Will Incur**
11 **Needless Expense for Little or No Benefit to Western, Due to the**
12 **Lack of Equity in the LinMar Properties and the Lack of Assets for**
13 **Most of the LinMar Borrowers**

14 Except for the loan from Western to LinMar Tacoma LLC et al., all of the
15 loans from Western are non-recourse, with no security whatsoever to secure
16 payment. Schooler Decl., ¶¶ 19-21. Furthermore, all of the properties held by the
17 LinMar entities are already mortgaged. Schooler Decl., ¶ 23. The money loaned by
18 Western to LinMar Shaw LLC and LinMar Tacoma LLC was then distributed to the
19 other LLC’s that owned the properties as tenants in common, also as non-recourse
20 loans. Schooler Decl., ¶¶ 19-20.

21 The property held by the LinMar Tacoma entities is being foreclosed upon by
22 the senior lienholder, and the property is under receivership, which would make
23 collection efforts unproductive, as the Receiver admits. Schooler Decl., ¶ 24.

24 As for the property held by the LMS LLCs (as successors in interest to
25 LinMar Shaw LLC), it is in need of renovations, but insufficient rents and a lack of
26 equity result in an inability to either repay the loan from Western or pay for the
27 needed renovations. Schooler Decl., ¶¶ 25-28 (property has negative equity and
28 only 52% occupancy rate); Declaration of Scott Tonnemacher (“Tonnemacher

1 Decl.”), ¶ 5 (listing \$575,000 in deferred maintenance and \$150,000 in needed
2 tenant improvements). The weak market for Class B/C commercial properties in
3 Fresno and the lack of equity also limit the refinancing of the property. Schooler
4 Decl., ¶¶ 29-30.

5 The property held by LinMar III, LLC has some equity (less than \$600,000),
6 but a major tenant’s lease has expired and there is the chance that the major tenant
7 may vacate rather than enter into a new lease, which would result in having to spend
8 additional funds for tenant improvements, leaving little for repaying the loan from
9 Western. Schooler Decl., ¶ 31.

10 The property held by LinMar IV, LLC has approximately \$751,000 in equity,
11 but 77% of the leases are due to expire in 2013, and the property is in need of
12 \$465,000 in maintenance and there is another \$306,000 that would be spent this year
13 in lease commissions (for the renewals and new tenants) and tenant improvements
14 for renovating the suites for new tenants could be as much as \$1,060,000. Schooler
15 Decl., ¶ 32; Tonnemacher Decl., ¶ 6.

16 Furthermore, the LinMar Borrowers are themselves in poor financial
17 condition. As of the end of the first quarter of 2013, all of the LMS LLC’s holding
18 fractional interests in the property on West Shaw Avenue in Fresno have more
19 current liabilities than cash and receivables. Schooler Decl., ¶¶ 33-34, Exh. 13.
20 LinMar Management, Inc. also has more current liabilities than cash and
21 receivables. *Id.* Even though LinMar III, LLC and LinMar IV, LLC have more
22 cash and receivables than current liabilities, the net amount is less than the total
23 outstanding principal and interest on the loans from Western.

24 The graphs below illustrate the small to negative equity in the LinMar
25 Borrowers’ properties, and the shortfalls in available funds.

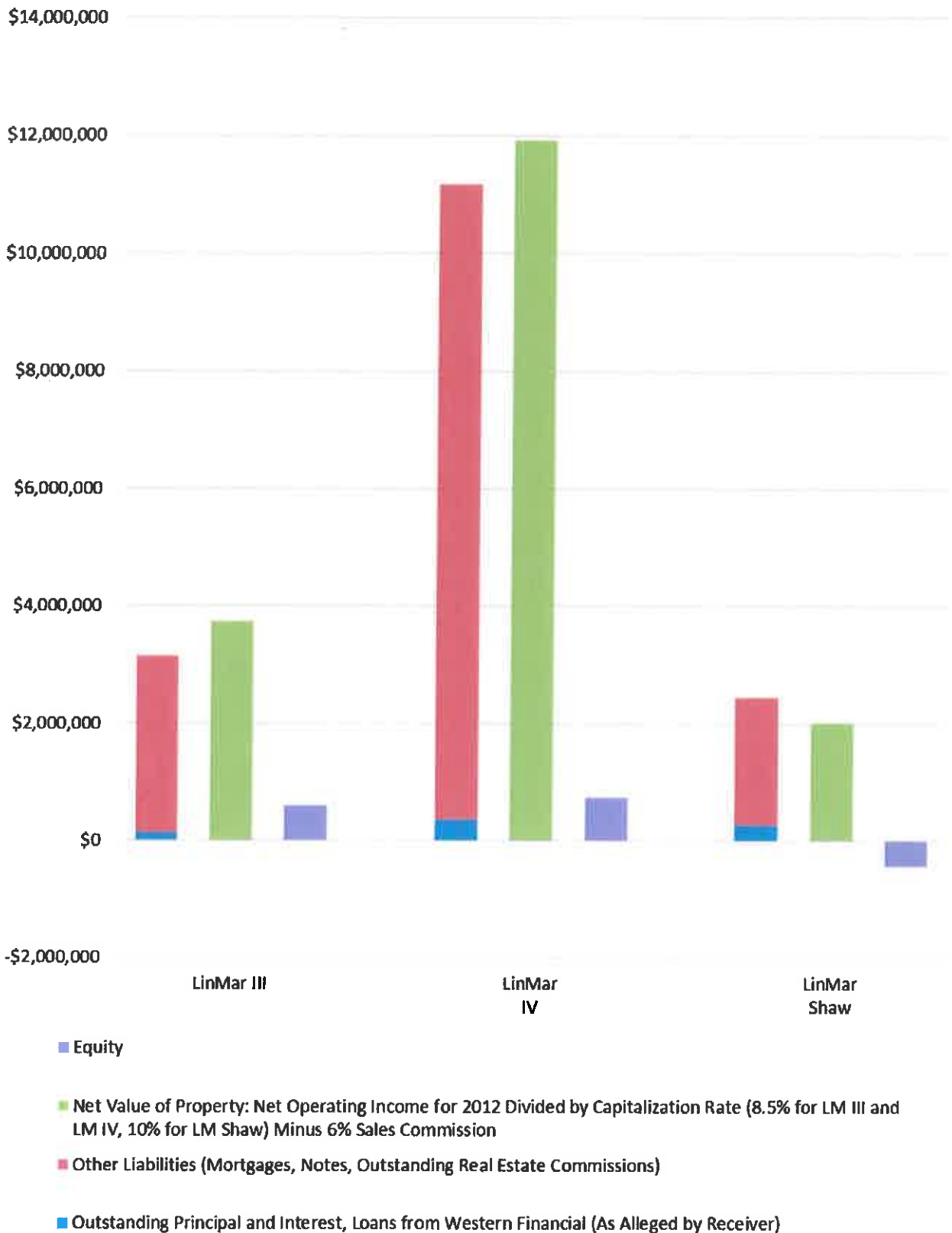
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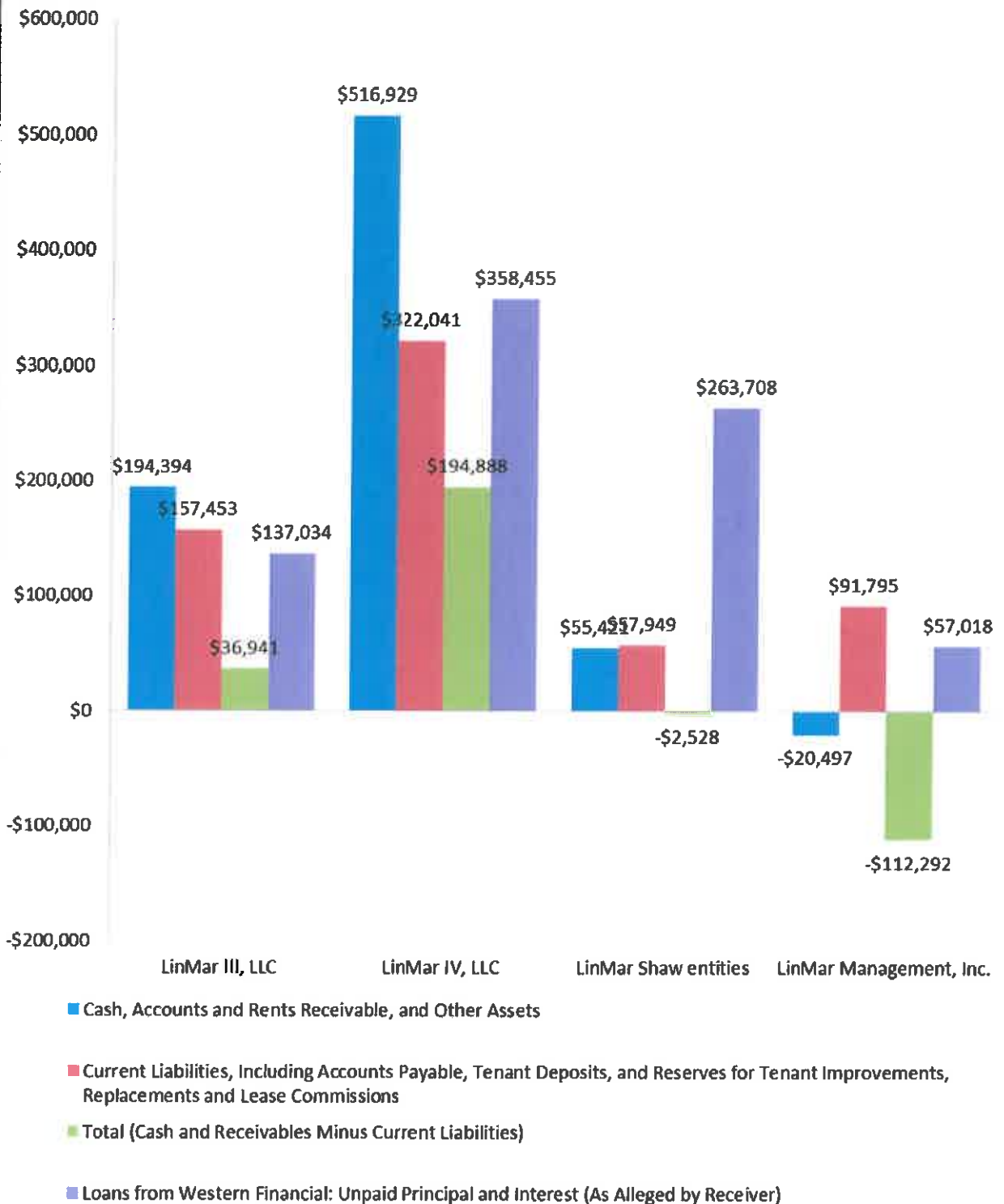
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LinMar Borrowers' Properties' Present Equity



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LinMar Borrowers' Cash and Receivables and Current Liabilities (1st Quarter 2013), and Outstanding Principal and Interest on Loans From Western



1 Therefore, there are no spare funds available from the LinMar Borrowers to
2 repay the loans from Western. Moreover, should the properties owned by the
3 LinMar Borrowers be liquidated and the proceeds used to pay off all mortgages and
4 other encumbrances, it is more likely than not that there will still be little or no
5 funds available for repaying the loans from Western.

6 Because the loans (with the exception of the loan to LinMar Tacoma LLC)
7 were non-recourse and unsecured, Western is a creditor with a low priority
8 compared to the secured lienholders with trust deeds and notes against the properties
9 held by the LinMar Borrowers. In order to collect, Western (i.e. the Receiver) will
10 need to conduct full-bore litigation against the LinMar Borrowers, including
11 discovery, applying for writs of attachment, and – in the event of a verdict for
12 Western – execute on the judgments for collection. All of this will be very
13 expensive, given the Receiver’s counsel’s known hourly rates. Coupled with the
14 lack of equity in some of the LinMar Borrowers’ properties and the *de facto*
15 insolvency of many of the LinMar Borrowers, the available potential recovery
16 would be low, both gross and net.

17 The Receiver’s proposed future action would therefore produce little to no
18 benefit to Western and will likely result in a net cost to Western instead. For that
19 reason, the Receiver’s motion should be denied.

20 **B. The LinMar Borrowers Are Separate and Distinct from Western**

21 The Receiver states that Schooler manages the LinMar Borrowers directly or
22 through entities controlled by him, and that the LinMar Borrowers operate out of the
23 same office space as Western. Dkt. No. 192-2, ¶ 2-3 (Receiver’s declaration). It is
24 unclear why those facts would be relevant to the issue of obtaining leave to sue the
25 LinMar Borrowers, unless the Receiver is hinting at some sort of relationship
26 between the LinMar Borrowers and Western.

27 As stated before, the LinMar Borrowers and Western are separate entities by
28 law and in administrative operation. Schooler Decl., ¶ 14. The ownership diagram

1 attached to this Opposition (Schooler Decl., Exh. 1) shows that Western has no
2 ownership interest in any of the LinMar Borrowers. *See also* Schooler Decl., ¶ 15.
3 The LinMar Borrowers have separate bank accounts from Western, to which
4 Western has no access. Schooler Decl., ¶ 16. The LinMar Borrowers observe the
5 necessary corporate and LLC legal formalities. Schooler Decl., ¶ 17.

6 All of the loans were documented in writing with detailed terms including
7 amount, interest rate, maturity date, and so on. All of the loans had promissory
8 notes executed by the LinMar Borrowers, with one loan secured by a deed of trust.
9 Schooler Decl., Exhs. 2-12.

10 There is no allegation that corporate or LLC forms have been disregarded.
11 There is no overlap in management or control between Western and the LinMar
12 Borrowers, other than the role of Schooler in both. Western observes its own
13 corporate practices, which are distinct from the practices of the LinMar Borrowers.
14 Therefore, pursuing action against the LinMar Borrowers by relying on common
15 ownership, management, or office space is not justified and should not be granted.

16 **C. The Receiver's Assertions About the Production of "A Small**
17 **Portion of the Requested Documents" and the Lack of a Response**
18 **to His Counter-Proposal Are False and Do Not Justify His**
19 **Collection Efforts**

20 To buttress his claims for filing suit against the various LinMar Borrowers
21 without regard to their financial condition, the Receiver claims that Schooler
22 "produced a small portion of the requested documents" in response to subpoenas
23 "seeking documents relevant to [the Receiver's] investigation of the loans."
24 Hebrank Decl., ¶ 5. The Receiver then states that no response has been made to his
25 counter-proposal of April 24, 2013. *Id.*

26 The Receiver's allegedly "relevant" subpoenas sought the following classes
27 of documents from *each* of the LinMar Borrowers, *including the LinMar Tacoma*
28 *entities which the Receiver knew were subject to receivership:*

1 1. Any and all copies, in their entirety, including amendments, of the
2 entity's federal tax returns for 2010 and 2011;

3 2. Any and all copies, in their entirety, including amendments, of the
4 entity's state tax returns for 2010 and 2011;

5 3. Any and all copies, in their entirety, of the entity's financial statements
6 reflecting operating results for 2012, including profit and loss statements and
7 income statements;

8 4. Any and all copies, in their entirety, of documents used in real estate
9 transactions, detailing the amount of money transacted in the transfer of ownership
10 for any and all properties acquired by the entity, including any closing statements;

11 5. Any and all copies, in their entirety, of valuations or appraisals for any
12 and all properties acquired by the entity;

13 6. Any and all copies, in their entirety, of contracts between the entity and
14 any party for the usage of the entity's real property, including any and all leases;

15 7. Any and all loan documents or other materials, including notes and
16 deeds of trust, referring or relating to any and all loans secured by real property the
17 entity owns or holds title to;

18 8. Any and all ledgers, financial statements, accounting records, bank
19 records, invoices, receipts, wire transfer confirmations, cancelled checks, and
20 cashier's checks referring or relating to payments on the loans secured by real
21 property the entity owns or has title to.

22 Declaration of Philip H. Dyson ("Dyson Decl."), ¶ 3, Exh. 1.

23 In all, *the Receiver sent Schooler and the LinMar Borrowers a total of 20*
24 *subpoenas in less than 10 days.* Dyson Decl., ¶¶ 3-5, Exhs. 1-20.

25 In response to the Receiver's subpoenas, the LinMar Borrowers responded by
26 producing such responsive documents as were available, notwithstanding that the
27 Receiver's subpoenas were excessive, unnecessary, and a waste of time and money,
28 particularly with regard to the Tacoma property since it was under receivership and

1 in the midst of foreclosure proceedings. See Dyson Decl., ¶¶ 6-8 (15 emails
2 containing over 100 megabytes' worth of attached responsive documents). The
3 Receiver apparently viewed the LinMar Borrowers' production as a satisfactory
4 response to his subpoenas since he did not move to compel. Dyson Decl., ¶ 9.

5 The Receiver's counter-proposal of April 24, 2013, was in response to a
6 proposal made by Defendants after the production of the LinMar Borrowers'
7 documents. The Defendants' proposal was very reasonable and cost-effective with
8 regard to the financial realities of the LinMar Borrowers, as shown in the documents
9 provided from the LinMar Borrowers and Western. Since the proposal was made
10 under a designation of confidentiality pursuant to Federal Rule of Evidence 408 and
11 California Evidence Code sections 1152 and 1154, the exact details will not be
12 presented here. However, despite the Defendants' reasonableness, the Receiver
13 responded with a counter-proposal that was so unreasonable and disconnected from
14 the financial reality of the LinMar Borrowers as not to merit a response.

15 IV.

16 CONCLUSION

17 The Receiver's proposed action is not in the best interests of Western. There
18 is no legal action the Receiver can bring that will change the economic reality of the
19 current financial condition of the LinMar Borrowers. Acceptance of the payment
20 plan proposed by the LinMar Borrowers would immediately bring a monthly
21 receivable into Western, whereas bringing litigation would do the opposite, creating
22 additional costs for Western.

23 Even to the extent such litigation were to result in a judgment, the economic
24 reality of the LinMar Borrowers is such that the Receiver would not be able to
25 collect any more many at any faster pace than already offered by the LinMar
26 Borrowers. Thus, the proposed action would only serve to reduce any potential
27 recovery from the LinMar Borrowers by anywhere from \$45,000 to as much as
28 \$600,000 (the full cost of the six separate actions at the Receiver's estimated cost of

1 \$7,500 to \$100,000 per matter) – and the low end of this range is unrealistic
2 considering all the other creditors and lienholders that would have to be dealt with
3 by the Receiver in collecting on any judgment.

4 The Receiver was appointed for purposes of “clarify[ing] Western’s financial
5 affairs.” Dkt. No. 59, p. 9 of 12, ll. 25-27. Yet, the Receiver has spent a good deal
6 of time, and presumably incurred substantial bills, chasing what is a will o’ the wisp:
7 the LinMar loans.

8 Despite bombarding the LinMar Borrowers with 20 wide-ranging and highly
9 intrusive subpoenas for virtually every scrap of paper in their possession, the
10 Receiver has produced no rational justification for suing the LinMar Borrowers,
11 since the financial state of the LinMar Borrowers and the properties they own would
12 make any collection litigation by the Receiver wasteful, with the results not
13 justifying the expenditures. The evidence of the LinMar Borrowers’ precarious
14 finances has been provided to the Receiver and is further presented in this
15 Opposition and supporting documents. All sides would be best served if the
16 Receiver’s request for leave to sue the LinMar Borrowers was denied.

17 This is not a clarification of Western’s financial affairs, but rather a make-
18 work project to attempt to justify the Receiver’s average bill of more than \$60,000
19 per month chasing activities that have been demonstrated not to benefit the
20 Receivership estate.

21 Based on the foregoing, Defendants respectfully request that this Court deny
22 the Receiver’s motion for leave to sue the LinMar entities to collect on the
23 promissory notes provided to Western.

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1 DATE: June 20, 2013

Respectfully submitted,

2 /s/Philip H. Dyson

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CERTIFICATION

I hereby certify that on the 20th day of June 2013, 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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