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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 vs.

14 LOUIS V. SCHOOLER and FIRST
FINANCIAL PLANNING
15 CORPORATION d/b/a WESTERN
FINANCIAL PLANNING
16 CORPORATION,

17 Defendants.

Case No. 12 CV 2164 GPC JMA

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
RESPONSE TO DEFENDANTS'
OPPOSITION TO RECEIVER'S
REPORT AND
RECOMMENDATIONS
REGARDING VALUATIONS OF
REAL ESTATE ASSETS OF
RECEIVERSHIP ENTITIES**

Date: TBD
Time: TBD
Ctrm: 2D (Hon. Gonzalo P. Curiel)

1 Plaintiff Securities and Exchange Commission (“SEC”) files this response to
2 Defendants’ Opposition to Receiver’s Recommendations Regarding Valuations of
3 Real Estate Assets or Receivership Entities (Dkt. No. 210) to address two
4 misstatements contained within defendants’ Opposition.

5 **A. Co-Tenancy Agreements**

6 In defendants’ Opposition, they object to the Receiver’s proposal to require
7 the unanimous consent of all GPs holding a particular piece of land prior to
8 transferring control of the land to investors. Defendants falsely claim that
9 “contrary to the Receiver’s false assertions that the co-tenancy agreements require
10 a unanimous vote of the co-tenant GPs, ...the co-tenancy agreements state that
11 only a *majority vote* of the GPs is needed.” *See* Dkt. 210, p. 6 (emphasis included
12 in original). In support of this claim, defendants cite to one *unexecuted* co-tenancy
13 agreement regarding the Stead offering. *See* Dkt. 210, p. 6.¹ The Stead Co-
14 Tenancy Agreement was never fully executed and is not effective because the
15 offering was cut short by the Court’s TRO in this case.

16 Moreover, defendants fail to disclose that the co-tenancy agreements in
17 effect for Western’s completed offerings require the unanimous consent of all GPs.
18 The co-tenancy agreements state that “[a]ll Co-Tenancy consents and decisions
19 shall be made upon the unanimous consent of the Co-Tenants.” *See, e.g.*, Ex. 1
20 (Silver Springs North Co-Tenancy Agreement) to the Declaration of Sara Kalin
21 (“Kalin Decl.”), ¶ 1.3; Kalin Decl. Ex. 2 (Silver Springs South Co-Tenancy
22 Agreement), ¶ 1.3; Kalin Decl. Ex. 3 (Washoe 5 Co-Tenancy Agreement), ¶ 1.3;
23 Kalin Decl. Ex. 4 (Dayton IV Co-Tenancy Agreement), ¶ 1.3; Kalin Decl. Ex. 5
24 (Yuma II Co-Tenancy Agreement), ¶ 1.3; Kalin Decl. Ex. 6 (Yuma III Co-Tenancy
25 Agreement), ¶ 1.3; Kalin Decl. Ex. 7 (Fernley I Co-Tenancy Agreement), ¶ 1.4.

26
27
28 ¹ Defendants’ Opposition cites to the “attached” Stead Co-Tenancy Agreement that was not attached to Dkt. 210, but instead filed as Dkt. 208-1 and subsequently withdrawn. *See* Dkt. No. 209.

1 After making its baseless assertions regarding the terms of the co-tenancy
2 agreements, the defendants further state that, “[r]equiring unanimity [where land is
3 held by three or more GPs] would be potentially unworkable.” Dkt. 210, p. 6. The
4 SEC agrees with the defendants. The SEC’s position has always been that
5 investors were dependent on Schooler and Western to manage their investments.
6 Selling one piece of land to multiple GPs made up of tens or hundreds of investors
7 each, and then requiring the unanimous vote of all GPs in order to make decisions
8 regarding the property *is* unworkable without a manager effectively controlling the
9 investors and the property. And in fact, the investors continue to rely on Schooler
10 to direct their actions.

11 “Over the past 10 months or so, we have received
12 extensive correspondence from Schooler bemoaning the
13 legal fate of WFPC and encouraging investors somehow
to become active, and at least implicitly, to complain to
the courts and SEC about the treatment of WFPC.”

14 *See* Dkt. 375, p. 1 (Investor letter to Office of the Clerk dated July 14, 2013).
15 Defendants essentially confirm that if the GPs actually operated independently and
16 without Schooler’s influence, their ability to make decisions would be “potentially
17 unworkable and would produce a *liberum veto* effect.” Dkt. 210, p. 6.

18 **B. Partner Defaults**

19 Defendants also mischaracterize how defaults are handled when an investor
20 fails to make a payment on a note owed to a GP. Defendants claim that the
21 Receiver’s proposal to stop collecting note payments from investors would
22 deliberately sabotage the voting process by eliminating the votes of investors who
23 ceased making payments. *See* Dkt. 210, p. 13. Defendants cite language in the
24 partnership agreements stating that a partner cannot vote on any matter while they
25 are in default. *Id.* But defendants fail to explain that this particular provision kicks
26 in only 30 days after an investor has been given notice of a default and only if the
27 partnership chooses to deny a defaulting partner the opportunity to vote. *See, e.g.,*
28 Dkt. 4, Ex. 17 (Statement and Agreement of Partnership of Night Hawk Partners,

1 §§ 6.2, 6.2.5). Here, the Receiver has not sent out default notices and has proposed
2 that “failure to make note payments during the receivership have no adverse effect
3 on investor voting rights.” Dkt. No. 457, p. 2.

4 Furthermore, prior to the appointment of the receiver, Western itself (again,
5 acting on behalf of investors) did not pursue the remedies outlined in the
6 partnership agreement when investors defaulted on their note payments. Beverly
7 Schuler, a long-time Western employee who became an “independent contractor”
8 for the GPs after the SEC began its investigation, testified as follows:

9 Q: In your experience at Western, did any of the note
10 partners ever default on their payments?

11 A: Yes.

12 Q: And what happened when that happened?

13 A: Nothing.

14 Q: Nothing?

15 A: No. They're still in default.

16 Q: So they go into default, and then -- and what
17 happens? Is any notice sent out or --

18 A: We send out notices to that partner. You
19 know, you're in default. Please make arrangements for
20 payment on your note. That's as far as we've taken it to
21 date.

22 Q: Okay. So if a partner stops paying their notes,
23 nothing happens?

24 A: Not right now, no.

25 *See Kalin Decl., Ex. 8 (Schuler Testimony), pp. 87:23-88:12.*

26 Because Western did not always adhere to the provisions of the partnership
27 agreements, it is misleading for defendants to now claim that “[t]he Receiver is
28 attempting to engage in wholesale re-writing of the core documents governing the

1 GPs.” In fact, the Receiver is abiding by the terms of the Co-Tenancy Agreements,
2 and has simply elected not to enforce the same terms of the partnership agreements
3 that defendants themselves ignored.
4

5 Dated: July 25, 2013

Respectfully submitted,

7 /s/ Sara D. Kalin
8 Sara D. Kalin
9 Attorney for Plaintiff
Securities and Exchange Commission

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648

Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On July 25, 2013, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO DEFENDANTS' OPPOSITION TO RECEIVER'S REPORT AND RECOMMENDATIONS REGARDING VALUATIONS OF REAL ESTATE ASSETS OF RECEIVERSHIP ENTITIES** on all the parties to this action addressed as stated on the attached service list:

OFFICE MAIL: By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

PERSONAL DEPOSIT IN MAIL: By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

EXPRESS U.S. MAIL: Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

HAND DELIVERY: I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

UNITED PARCEL SERVICE: By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

ELECTRONIC MAIL: By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

E-FILING: By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

FAX: By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 25, 2013

/s/ Sara D. Kalin
Sara D. Kalin

