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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' RESPONSE TO
THIRD INTERIM APPLICATIONS
FOR APPROVAL AND PAYMENT
OF FEES AND COSTS (RECEIVER
AND COUNSEL TO RECEIVER)**

Date: August 16, 2013

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

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1 Defendants LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING
2 CORPORATION (collectively “Defendants”) respond as follows to the Third
3 Interim Applications for Approval and Payment of Fees and Costs to the Court’s
4 appointed receiver, Thomas C. Hebrank, CPA (“Receiver”), and the Receiver’s
5 counsel, Allen Matkins Leck Gamble Mallory & Natsis LLP (“Receiver’s
6 Counsel”).

7 I.

8 INTRODUCTION

9 The Receiver, on behalf of himself and Receiver’s Counsel, has filed third
10 interim applications for payment of fees and costs involving the continued
11 receivership of Western Financial Planning Corporation (“Western”) and the real
12 estate general partnerships (“GPs”) for the period of January 1, 2013 through March
13 31, 2013.

14 The Receiver and Receiver’s Counsel claim to have incurred a total of
15 \$192,561.17 in fees and costs for work performed for those three months, with
16 \$136,360.35 in fees and \$799.39 in costs for the Receiver, and \$50,899.50 in fees
17 and \$4,501.93 in costs for Receiver’s Counsel. *See* Dkt. No. 200, p. 2 of 3. These
18 fees are calculated after a 10% fee discount for the Receiver. Dkt. No. 197, p. 2 of
19 32, ll. 15-16.

20 Defendants object to the Third Interim Applications on several grounds.
21 First, due to the fact that the Receiver, despite having available cash in Western’s
22 bank account, has recently stopped making payments on the seller-financing
23 carryback notes that Western owes to the original sellers of the GP-owned properties
24 (the “Underlying Notes”), **the Receiver must be required to certify to the Court that**
25 **all Underlying Notes are current before the Court approves any portion of the**
26 **Third Fee Applications.** The Receiver has been having the GPs continue to pay
27 their GP note obligations to Western, but then ***not*** using that cash to pay the
28 corresponding Underlying Note obligations. This is causing cash to accumulate in

1 Western's account – cash that will undoubtedly be used by the Receiver to pay his
2 fees upon approval of the Third Fee Applications.

3 The money that the GPs have paid to Western on the GP Notes has been paid
4 with the express understanding and obligation, under the all-inclusive deed of trust,
5 that Western will apply those funds directly to the corresponding Underlying Notes.
6 The Court must not allow the Receiver to divert those funds to payment of his own
7 fees. The Receiver's duty of care to the receivership entities requires that available
8 cash be used to pay existing obligations. The Court must not allow the Receiver to
9 prioritize his fees ahead of existing secured obligations, the nonpayment of which is
10 not only a breach of the Receiver's duty of care to the receivership entities, but
11 potentially puts the GPs' title interests at risk. There can be no consideration of
12 payment of fees to the Receiver in the face of direct evidence that the Receiver is
13 not currently meeting the obligations he owes to the Receivership entities.

14 Second, even if the Underlying Notes are brought current by the Receiver, the
15 fees and costs to be recovered by the Receiver continue to be unreasonable and
16 excessive in light of the lack of benefit to the receivership entities, and in fact,
17 mounting evidence that the Receiver's actions have unnecessarily caused actual
18 harm to the receivership entities. For example, the Receiver has prioritized
19 repayment of lowest-priority unsecured, non-recourse debt ahead of higher-priority
20 secured debt, placing numerous GPs in the position of having insufficient funds to
21 make their next property tax payment – GPs that would have enough cash for their
22 next tax payment but for the actions of the Receiver. The Receiver must not be
23 compensated until the situation of these GPs has been rectified. The Receiver
24 cannot be allowed to be paid for actions that are a direct breach of his duty of care to
25 the receivership entities.

26 Third, the Receiver should not be allowed to invade GP-owned funds to pay
27 obligations that the Receiver clearly considers to be those of Western. The GPs are
28 separate and distinct legal entities and the Receiver's use of GP funds to pay

1 obligations the Receiver considers to be those of Western, must stop. The Receiver
2 must not be allowed to force the GPs, without input from the investors, to continue
3 to use GP operating capital (deposited by investors with the express intent that those
4 funds would be used to pay taxes and insurance) to repurchase Western's GP units.

5 Therefore, Defendants request that the Third Interim Applications be *denied*.
6 In the alternative, to the extent the Court decides to approve any portion of the Third
7 Interim Applications, the Receiver must first be required (1) to bring the Underlying
8 Notes current and (2) to reverse the payments he has forced the GPs to make on
9 their lowest priority unsecured debt, before the Receiver is allowed to collect on any
10 fees identified in the Third Interim Applications.

11 **II.**

12 **ARGUMENT**

13 **A. THE FEE APPLICATION MUST NOT BE APPROVED UNLESS**
14 **AND UNTIL THE RECEIVER CERTIFIES THAT HE HAS**
15 **APPLIED ALL FUNDS RECEIVED FROM THE GPs TO THE**
16 **CORRESPONDING UNDERLYING NOTES OWED BY**
WESTERN TO THE ORIGINAL SELLERS

17 Since late May 2013, the Receiver has stopped making payments on
18 Western's behalf for the Underlying Notes. *See* Dkt. No. 407, p. 17 of 27 (listing
19 payments not made by Receiver, which were due in June and early July 2013). The
20 money that the GPs provide to Western as payment for the GPs' notes to Western,
21 which would otherwise be applied by Western as payments on the Underlying
22 Notes, is now accumulating in Western's accounts, presumably as a source of funds
23 for the Receiver and his counsel to tap if the Fee Applications are granted.

24 The Receiver's failure to pay the Underlying Notes from Western to the
25 original sellers causes harm to the GP investors, since the GPs are parting with the
26 cash in their accounts to Western without receiving the corresponding benefit of
27 Western's payment on the underlying obligation. The GPs suffer a double negative
28 impact by being deprived of cash even as their title is placed in jeopardy without

1 corrective action. *See* Dkt. No. 407, p. 20 of 27.

2 The Receiver claims that he has not made the payments because (a) there is a
3 limited amount of cash and (b) he needs the funds to pay Western's employees and
4 pay the other expenses associated with the proposed move of Western's operations.
5 *See* Dkt. No. 455, p. 9 of 14, ll. 7-9 ("Western does not currently have enough cash
6 to make all mortgage payments and pay its basic operating expenses"). What the
7 Receiver fails to understand is that the funds he is collecting into Western's bank
8 account from the GPs has been paid by the GPs to Western with the express
9 understanding as detailed under the all-inclusive trust deed ("the "AITD") that
10 Western will apply those funds to the corresponding Underlying Note. For the
11 Receiver, who owes a duty of care to the GPs, to collect from the GPs, but then use
12 those funds for purposes other than payment of the Underlying Notes is not a
13 permitted use, at best.

14 The funds collected by Western from the GPs must be directly allocated to the
15 Underlying Notes. The minimal operating funds required to pay the few remaining
16 employees and move Western's operations could be more than covered by the
17 monthly payments offered months ago by the Linmar Borrowers to Western.

18 Despite the discretion afforded to receivers, they are still bound by the limits
19 of the law and the duties of care owed to the receivership entities. The Receiver
20 owes a duty of care to the GPs. When he makes the GP Note payments on behalf of
21 the GPs, he knows the GPs expect a corresponding payment from Western on the
22 Underlying Notes. The Receiver's diversion of those funds to other uses, such as
23 paying his fees or his counsel's fees or covering Western's operational expenses, is
24 not permitted. The Receiver is obligated to apply those funds to the Underlying
25 Notes.

26 The duty of care he owes to the GPs requires it and the duty of care he owes
27 to Western requires it. He breaches his duty to the GPs in that they are deprived of
28 cash without receiving the corresponding benefit to which they are entitled. He

1 breaches his duty to Western in that he causes a default on a secured debt when
2 there is available cash and no higher priority payment obligation required.

3 On July 18, 2013, Defendants' counsel sent a letter to the Receiver's Counsel
4 advising that the Receiver had failed to make payments on the Underlying Notes
5 that were due in June and July 2013. Declaration of Philip H. Dyson ("Dyson
6 Decl."), ¶ 3. In response to the letter, the Receiver's Counsel called Philip H.
7 Dyson, co-counsel for Defendants, on the afternoon of Friday, July 19, 2013. Dyson
8 Decl., ¶ 4. During the phone conversation, the Receiver's Counsel stated that the
9 reasons for the non-payment of the Underlying Notes were that "there is a small
10 amount of cash, and he [the Receiver] needs monies to pay employees and pay
11 whatever expenses there are in moving." Dyson Decl., ¶ 4. The Receiver's Counsel
12 then stated that the Receiver was working on a cash-flow analysis and would know
13 by the following Monday (July 22, 2013) what payments the Receiver was going to
14 make. Dyson Decl., ¶ 5.

15 The Receiver did not provide any cash-flow analysis or list of payments by
16 July 22, 2013, but instead filed a Surreply to Defendants' Motion for Modification
17 of Preliminary Injunction in which he claimed he had made "the majority of the loan
18 payments" listed in Defendants' Reply - but without specifying which payments
19 were made and when. *See* Dkt. No. 455, p. 9 of 14, ll. 10-12; Dyson Decl., ¶ 7.

20 The Receiver needs to be required to present a full accounting demonstrating
21 the current payments on all Underlying Notes before any consideration should be
22 given to his pending fee applications. Unless and until such a showing has been
23 made, the Third Fee Applications should be denied.

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1 **B. THE RECEIVER'S FEE APPLICATION SHOULD BE DENIED**
2 **IN LIGHT OF THE ACTUAL HARM THAT HAS BEEN**
3 **CAUSED TO DATE TO THE RECEIVERSHIP ENTITIES BY**
4 **THE RECEIVER'S ACTIONS**

5 As set forth in detail in Section E of Defendants' Reply to the Receiver's and
6 the Securities and Exchange Commission's Oppositions to Motion for Modification
7 of the Preliminary Injunction Order to Remove the Real Estate General Partnerships
8 (Dkt. Doc. 407, pp. 19-27), the Receiver's actions have unnecessarily caused actual
9 harm to the receivership entities. In addition to not paying the Underlying Notes, as
10 discussed above in Section A, the Receiver has breached the duty of care owed to
11 the GPs, inflicting unnecessary harm in multiple ways.

12 To begin with, the Receiver has used GP operating capital that was deposited
13 by the investors for the express purpose of paying property taxes and insurance to
14 instead repay unsecured, non-recourse notes to Western. As identified in the list set
15 forth on pages 20-21 of Dkt. Doc. 407, there are nine GPs that today would have
16 enough money to make their next property tax payment except for the fact that the
17 Receiver used limited available cash to repay the unsecured debt owed to Western
18 instead of preserving that cash for the next tax payment.

19 To be clear: Nine GPs do not have enough money to make their next property
20 tax payment for no other reason than the decision by the Receiver to inexplicably
21 prioritize unsecured debt ahead of pending property tax payments. Without
22 corrective action, these nine GPs will not be able to make their tax payment,
23 unnecessarily incurring late fees and penalties.

24 The Receiver has further exacerbated this problem by unilaterally deciding to
25 suspend all operation billing. Normally, the GPs have conducted operational billing
26 to replenish GP operating funds when necessary. The Receiver has first depleted
27 funds and now refuses to take action to replenish those funds. If these GPs miss
28 their tax payments and are assessed late fees and penalties it will be only due to the

1 Receiver's breach of his duty owed to those GPs.

2 The Receiver must not be permitted to be paid for such actions directly
3 contrary to the interests of the entities he has a duty to protect.

4 There are a total of 28 GPs with current bank balances below \$5000, meaning
5 each of these is in need of operational billing or they too are in danger of not making
6 their next tax payments. The Receiver should not be allowed to pay the fees for
7 himself and his counsel at the same time that he is creating a cash flow problem for
8 the entities in his care. Operational billing should be required to resume
9 immediately.

10 The Receiver should not be allowed to collect any fees until all corrective
11 action is taken to reverse the unnecessary damage caused by the Receiver's actions
12 to date.

13 **C. THE RECEIVER MUST NO LONGER BE ALLOWED TO**
14 **FORCE THE GPs TO PURCHASE WESTERN'S GP UNITS**

15 To date, the Receiver has caused the GPs to use \$51,000 of GP operating
16 capital designated for property taxes and insurance to be used instead to purchase
17 51,000 units from Western. This was done without any authority from the investors
18 who deposited that money into the GP operating account and who have the right to
19 vote on any transactions not identified in their respective General Partnership
20 Agreements. The Receiver should not be allowed to force the GPs to enter into any
21 such transaction – especially in light of the pending motion before the Court
22 regarding the removal of the GPs from the Receivership.

23 The Receiver must not be allowed to continue to deprive the GPs of their
24 operating capital at a time when the GPs have yet to have the hearing they are
25 entitled to under their due process rights. To the extent the Court were to approve
26 any portion of the pending fee application, the Receiver must be ordered to stop
27 forcing the GPs to purchase any GP units from Western.

28 ///

1 The well-established law in the Ninth Circuit and elsewhere holds that before
2 a third party's property can be included in a receivership -- much less liquidated by
3 that receiver through the forced buyout of another's interests or other property -- the
4 party is entitled to a formal hearing before the court, as the SEC even acknowledged
5 (and promised) at the beginning of this litigation. Dkt. No. 3-1, p. 31 of 33 ("a
6 district court has the power to include the property of a non-party limited
7 partnership in an SEC receivership order as long as the non-party meets the
8 minimum contact standard ... and receives actual notice and an opportunity for a
9 hearing" (quoting *In re San Vicente Med. Partners Ltd.*, 962 F.2d 1402, 1408 (9th
10 Cir. 1992) (emphasis added)); see *San Vicente*, 962 F.2d at 1407 ("The Constitution
11 requires that property owners receive procedural due process in the form of notice
12 and opportunity for a hearing.") (emphasis added) (citing *Goss v. Lopez*, 419 U.S.
13 565, 577-79 (1975) ("deprivation of life, liberty, or property by adjudication [must]
14 be preceded by notice and opportunity for hearing appropriate to the nature of the
15 case") (emphasis added, citations and quotations omitted).

16 The Receiver's Third Fee Application continues to demonstrate that the only
17 people benefitted by the continued existence of the Receivership are the Receiver
18 and Receiver's Counsel, not the GP investors. See Dkt. Nos. 195, 195-1, 195-2
19 (Defendants' Motion for Modification of Preliminary Injunction). The Receiver's
20 Third Fee Application should be denied.

21 **D. THE FEES AND COSTS CLAIMED ARE STILL**
22 **UNREASONABLE WHEN COMPARED TO THE RESULTS**

23 Upon applying the factors of *SEC v. Fifth Avenue Coach Lines*, 364 F.Supp.
24 1220, 1222 (S.D.N.Y. 1973) to the fee applications, there are many areas in which
25 the applications fall short. There is no great complexity of problems faced, and the
26 benefit to the receivership estate is increasingly nonexistent; as stated above and at
27 length in other documents, the Receiver's continued existence is highly detrimental.
28 See Dkt. Nos. 195, 205, 407.

1 The problems faced were not truly complex at the beginning of the
2 receivership and have not grown more complex since. Although there are over 100
3 entities each with its own bank account, 22 properties, and over 3,300 investors, the
4 accounts are all with one bank, the entities have a common office in San Diego with
5 common storage, and the entities hold only raw land with no day-to-day
6 management required.

7 The GPs have been able to meet all of their obligations for years at the
8 nominal cost of between \$100 and \$400 per month, and these obligations and needs
9 did not suddenly increase upon the appointment of a receiver. The GPs' needs have
10 been and remain extremely basic.

11 The GPs themselves have never been accused of any wrongdoing; they are
12 not parties to this case. There has been no finding, nor even an allegation, of
13 operational wrongdoing or ongoing mismanagement. The only allegations made to
14 date pertain to isolated issues relevant to the offering process. The actual ongoing
15 operation of the GPs has been found to be "accurate and reliable". After four years
16 of the SEC investigating and one year of the Receiver conducting full-blown
17 forensic review, there has not been any allegation of ongoing operational
18 malfeasance for the Receiver to be required to protect the underlying entities.

19 In fact, this Court, on October 5, 2012, found no evidence that Defendants
20 were hiding, misappropriating, or offshoring GP funds.

21 The Receiver concedes, in his Appraisal Report, that the GPs are perfectly
22 capable of operating without the Receiver's oversight. Dkt. No. 203, p. 3 of 17.

23 The Receiver owes an obligation to the receivership entities to preserve their
24 assets and to adequately justify any amounts paid to himself out of their accounts,
25 yet he has not explained what value he has provided to the GPs in return.

26 As noted above, the Receiver, in his Appraisal Report, states that he has
27 recently stopped sending bills to the GP investor-partners for GP expenses such as
28 payments on promissory notes for the properties held by the GPs, property taxes,

1 and insurance premiums. Dkt. No. 203, p. 15 of 17. And, as also noted above, the
2 Receiver has failed to pay the Underlying Notes. In one instance (the Dayton II
3 property, held by the Storey County, Comstock, Silver City, and Nevada View
4 GPs), the Receiver's decision to stop collecting operational funds and failure to pay
5 the Underlying Notes has resulted in the property being at risk of default and
6 foreclosure for failure to make the 120th and final underlying note payment.

7 The Receiver's decisions – which was made with no input from and no formal
8 vote taken of the GP investor-partners – has put the GPs' titles at unnecessary risk.
9 How can this action of the Receiver's be deemed to have provided value to the GPs
10 or their investors?

11 The GP accounts' money is that of the individual investors comprising each
12 GP. The Receiver has an obligation to examine how best to preserve the assets of
13 the entities in his receivership, not to deplete their accounts without the entities even
14 having a chance to be heard.

15 As all parties recall from the Receiver's First Fee Applications and
16 Defendants' Motion for Modification of Preliminary Injunction, *over 300 GP*
17 *investors wrote the court to express their concerns about their investments being*
18 *jeopardized to pay the Receiver, and almost 700 investors – or 20% of the total*
19 *investor class – signed a petition addressed to the Court urging that the Receiver*
20 *be removed.* See Dkt. No. 430.

21 The court is not “required to fix fees in total disregard of the fact that this
22 receivership produced a very lean harvest, that all interests suffered heavily, and that
23 the whole enterprise was not a success.” *Specialty Products Co. v. Universal Indus.*
24 *Corp.*, 21 F.Supp. 92, 94 (M.D. Pa. 1937).

25 The result obtained by the Receiver is a critical factor. *SEC v. Elliott*, 953
26 F.2d 1560, 1577 (11th Cir. 1992); *United States v. Code Products Corp.*, 362 F.2d
27 669, 673 (3d Cir. 1966). Since there has been no indication as to the results
28 obtained through the Receiver's labors to date, the Receiver's work “merits an

1 'incomplete' grade" and therefore the fee application should be denied in its entirety
2 or else the award should be reduced significantly. *In re Alpha Telcom, Inc.*, 2006
3 U.S. Dist. LEXIS 79997 at *16 (D. Or. Oct. 27, 2006).

4 At a minimum, the Receiver should not be allowed to use GP funds to pay
5 himself for fees he characterizes as belonging to *Western*, an entity separate,
6 distinct, and independent from the GPs.

7 **III.**

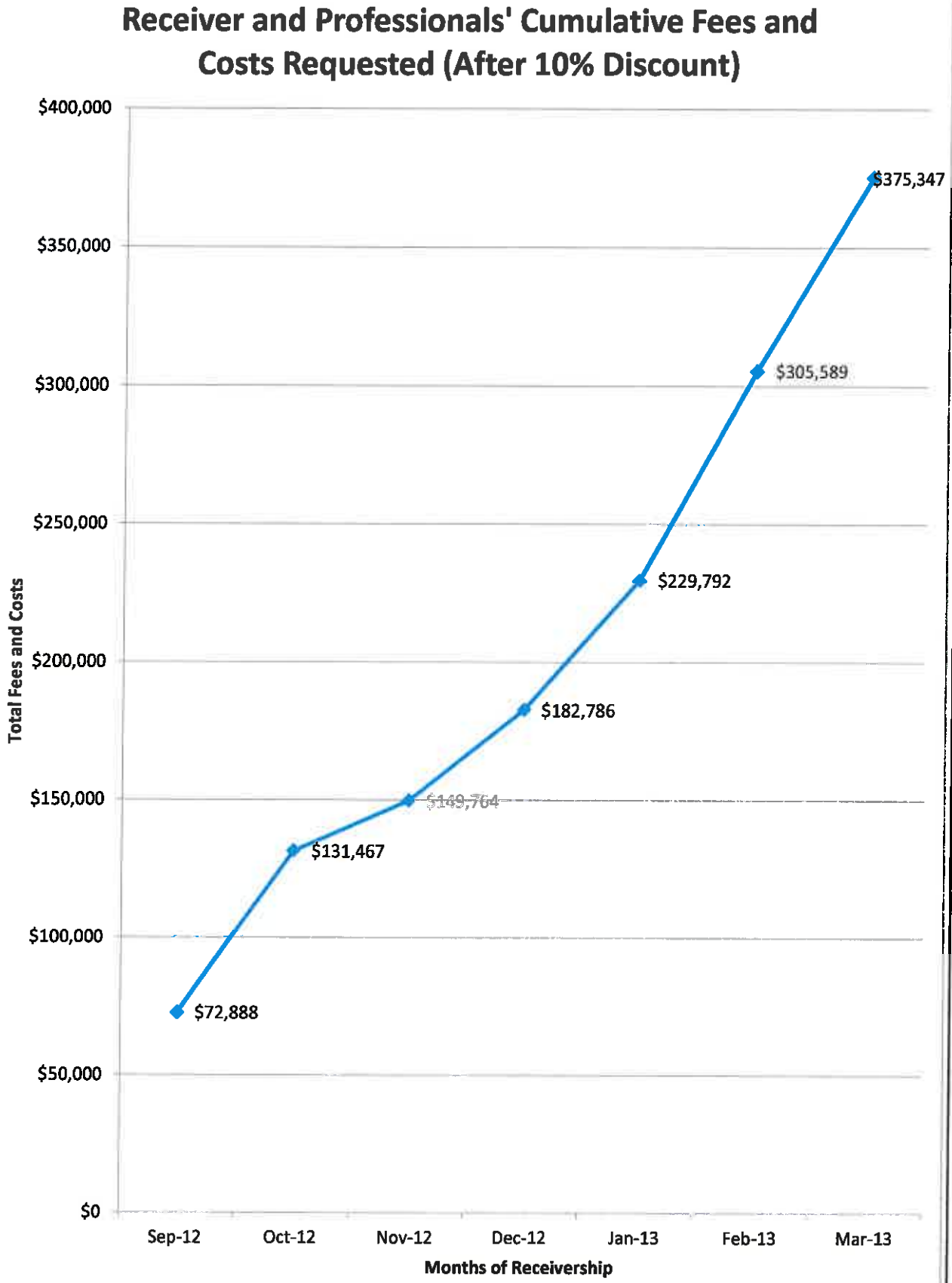
8 **CONCLUSION**

9 The application for fees and costs requested by the Receiver and Receiver's
10 Counsel should be denied. The requested fees and costs are unreasonable. There is
11 no showing as to how the work performed has benefitted *Western* or the GP's. In
12 fact, there is greater evidence that the actions taken by the Receiver to date have
13 actually harmed the receivership entities. The Receiver should not be allowed to
14 collect his fees when he has in fact breached the duty of care he owes to the
15 receivership entities.

16 To date, even with a 10% discount by the Receiver, the Receiver's Fee
17 Applications have requested a total of over \$375,000 for a total of six months' work,
18 as shown in the graph below that is derived from the figures in all three fee
19 applications for the Receiver, Receiver's Counsel, and TERIS:

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1 For all of the reasons set forth above, Defendants request that the Third
2 Interim Applications be *denied*. In the alternative, to the extent the Court decides to
3 approve any portion of the Third Interim Applications, the Receiver must first be
4 required (1) to bring the Underlying Notes current and (2) to reverse the payments
5 he has forced the GPs to make on their lowest priority unsecured debt, before the
6 Receiver is allowed to collect on any fees identified in the Third Interim
7 Applications.

8

9 DATE: August 2, 2013

Respectfully submitted,

10

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Counsel for Defendants

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CERTIFICATION

I hereby certify that on the 2nd day of August 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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