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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' MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION FOR
PARTIAL RECONSIDERATION OF
THE ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
MODIFY PRELIMINARY
INJUNCTION ORDER**

Date: November 8, 2013
Time: 1:30 p.m.
Courtroom: 2D
Judge: Hon. Gonzalo P. Curiel

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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”) respectfully submit the
4 following Points and Authorities in support of Defendants’ Motion for Partial
5 Reconsideration of this Court’s order of August 16, 2013, granting in part and
6 denying in part Defendant’s Motion for Modification of Preliminary Injunction
7 (Dkt. No. 470) (“Order”). Defendants move for reconsideration of the portion of
8 Section II.G.2 of the Court’s Order that mandates that all of Western’s equity
9 interests in the real estate general partnerships (“GPs”) formed through Western’s
10 real estate syndication activities be liquidated before the receivership over the GPs is
11 lifted (Dkt. No. 470, pp. 25-26).

12 I.

13 INTRODUCTION

14 Following extensive briefing and over an hour of oral argument on July 26,
15 2013, the Court on August 16, 2013 issued its Order regarding Defendants’ motion
16 for modification of the preliminary injunction of March 13, 2013.

17 Although the Court granted Defendants’ motion to have the receivership
18 released over the GPs, the Court’s Order imposed several “equitable” conditions
19 precedent on the removal of the receivership. The main condition, which is the
20 subject of this Motion for Partial Reconsideration, is quoted in its entirety (Dkt. No.
21 470, 25:20-26:9):

22 First, the Court first orders a pro rata reduction of Western’s equity interests
23 in the GPs according to the properties’ current fair market value as set forth in
24 the appraisals obtained by the Receiver. To the extent a GP account has a
25 zero balance or insufficient funds to meet an obligation due within ninety
26 days from the date of the reduction of Western’s interests, such interests shall
27 nonetheless be formally liquidated with no payment to Western. Before the
28 GPs are released from the receivership, all of Western’s equity interests in the
GPs shall be liquidated to ensure that Western will have no future
responsibility for any liability incurred by the GPs. Additionally, given the
enormous disparity between the purchase prices of the GP properties and the

1 funds Western raised from the GPs, the Court finds it equitable to preclude
2 Western from receiving a share of any proceeds received from any future sale
3 of the GP properties.

4 Under the Court's Order, Western would be permanently stripped of \$11
5 million of assets before the underlying claims have been tried, and without any
6 judgment of liability against Western having been entered first, if at all. If the
7 Court's Order is not modified, Western will be deprived of the opportunity to
8 present evidence to the trier of fact why it is entitled to retain its equity interests in
9 the GPs, and it will have been deprived of due process.

10 There is no need or justification at this time to liquidate Western's equity
11 interests in the GPS. Doing so will unalterably change the status quo before the case
12 on the merits can be heard.

13 II.

14 ARGUMENT

15 A. Standard of Review

16 Defendant's motion for reconsideration of the Court's order is made pursuant
17 to Federal Rule of Civil Procedure 59(e), 60(b)(4) and 60(b)(6).

18 Under Rule 59(e), the Court may properly reconsider its decision if, among
19 other things, it "committed clear error or the initial decision was manifestly unjust."
20 *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 2003). Clear error
21 occurs when "the reviewing court on the entire record is left with the definite and
22 firm conviction that a mistake has been committed." *United States v. U.S. Gypsum*
23 *Co.*, 333 U.S. 364, 395 (1948); *see also Smith v. Clark County Sch. Dist.*, -- F.3d --,
24 2013 WL 4437599, at *4 (9th Cir. Aug. 21, 2013) ("It is common for both trial and
25 appellate courts to reconsider and change positions when they conclude they made a
26 mistake").

27 Rule 60(b)(4) provides for relief from a final judgment, order or proceeding if
28 the judgment or order is void. If the court, in rendering a judgment or order, acted

1 in a manner inconsistent with a party's right to due process, then the judgment or
2 order is void. *Winhoven v. United States*, 201 F.2d 174 (9th Cir. 1952); *see also*
3 *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995) (relief under Rule 60(b)(4) appropriate
4 when "the court's action amounts to a plain usurpation of power").

5 Rule 60(b)(6) states that the court can relieve a party from a final judgment,
6 order or proceeding for "any other reason that justifies relief." The relief provided
7 under Rule 60(b)(6) is intended "to prevent manifest injustice." *United States v.*
8 *Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Such manifest
9 injustice exists here, because Western is being permanently deprived of its property
10 interests in the GPs without the trial on the merits to which Western is entitled.

11 **B. The Court's Order Is Essentially an Act of Final Judgment Over**
12 **Western and Presupposes Liability for Fraud Without a Trial**

13 There has been no trial, yet the Court's Order essentially constitutes a pre-
14 judging and finding of liability on the part of Western. Western is being treated as if
15 it has already been tried and found liable for fraud, with the resulting punishment of
16 disgorgement of ill-gotten gains, despite no proof that Western's equity interests are
17 legally illegitimate. Therefore, the Order mandating permanent and total liquidation
18 of Western's equity interests is in excess of jurisdiction.

19 While federal courts have broad discretion to supervise an equity
20 receivership, the courts' supervisory actions must still comply with due process.
21 *SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir.
22 2001). As the Supreme Court has noted, in employing its broad equitable powers a
23 federal court must "exercise '*the least possible power adequate to the end*
24 *proposed.*'" *Spallone v. United States*, 493 U.S. 265, 280 (1990) (quoting *Anderson*
25 *v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)) (emphasis added). "Courts of equity can
26 no more disregard statutory and constitutional requirements and provisions than can
27 courts of law." *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893).

28 ///

1 The broad supervisory discretion does not empower the Court to order the
2 permanent liquidation of \$11 million of property interests at this early stage of
3 litigation. No trial has been held in this case, and no final judgment of liability has
4 been imposed upon Western.

5 The primary purpose of a preliminary injunction is to preserve the status quo
6 pending determination of the action on its merits. *Chalk v. United States Dist. Ct.*
7 *Cent. Dist. Of Calif.*, 840 F.2d 701, 704 (9th Cir. 1988); *Six Clinics Holding Corp. II*
8 *v. Cafcomp Systems Inc.*, 119 F.3d 393, 400 (6th Cir. 1997). In addition, injunctions
9 that alter the status quo are “subject to a heightened scrutiny” and are not
10 appropriate unless “extreme or very serious harm will result.” *Dahl v. HEM Pharm.*
11 *Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993); *Marlyn Nutraceuticals, Inc. v. Mucos*
12 *Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009).

13 The forced liquidation of Western’s property interests would violate this
14 clearly established principle, permanently curtailing the status quo without any
15 showing that extreme or very serious harm would result if Western maintains its
16 units in the GPs until trial. It would also contradict the Court’s direction that the
17 purpose of the receivership over Western was solely “to clarify Western’s financial
18 affairs” – a step that has not yet even been completed.” Dkt. No. 59, 9:27.

19 The Court’s Order that Western’s interests in the GPs be liquidated would
20 prematurely penalize Western by forcing the liquidation of its assets at enormous
21 losses. Western has over \$11 million in equity interests in the GPs. ***Under the***
22 ***Court’s order, Western would be permanently stripped of \$11 million of assets***
23 ***before the underlying claims have been tried, and without any judgment of***
24 ***liability against Western having been entered first, if at all.*** Should Western prevail
25 at trial, the implications of the Court’s Order would be even more harmful, since
26 Western would have been permanently deprived of assets without being found liable
27 of anything.

28 ///

1 The Fifth Amendment’s Due Process Clause forbids the federal government
2 from summarily destroying or permanently depriving a person’s property rights
3 without prior notice and an opportunity to be heard, except in serious and time-
4 sensitive circumstances such as war, natural disasters, or epidemics of disease. *See*
5 *United States v. Caltex (Philippines) Inc.*, 344 U.S. 149 (1952) (destruction of
6 property to thwart enemy invaders); *Juragua Iron Co. v. United States*, 212 U.S. 297
7 (1909) (building destroyed to stop spread of disease).

8 In this case, the Court’s Order deprives Western of its property interests just
9 as summarily, and is based upon assumptions of liability that have not been proven
10 by a preponderance of the evidence – or clear and convincing evidence, as the case
11 may be.

12 “We tolerate some exceptions to the general rule requiring predeprivation
13 notice and hearing, but only in ‘extraordinary situations where some valid
14 governmental interest is at stake that justifies postponing the hearing until after the
15 event.’” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993)
16 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)) (seizure of real property in civil
17 forfeiture cases requires pre-deprivation notice and hearing); *see also Fuentes, supra*
18 (loss of kitchen appliances and household furniture requires pre-deprivation
19 hearing).

20 The only fraud allegation made to date is with regard to the pricing of the GP
21 units. That allegation has not been proven at trial, and Western has not been given
22 an opportunity to show that it met all of its duties and obligations under the law,
23 including providing investors with all required material disclosures. The SEC has
24 made allegations, but has not proven its case. Defendants are entitled to an
25 opportunity to present their own evidence showing that investors not only were
26 provided with all material disclosures, but that the real estate market data will
27 support the conclusion that investors purchased their property interests at fair prices.

28 ///

1 The Court points to the disparity in price between what Western paid for the
2 property and what the GPs paid for the property as a rationale for divesting Western
3 of its property interests, but that is not a sufficient reason for this action by the
4 Court. The SEC's burden of proof in this matter will require them to show much
5 more than simply a difference in the price to acquire the property versus the price at
6 which the GPs acquired the property. The mere existence of the difference in price
7 paid by the entities does not rule out the Defendants' ability to show at trial that
8 investors not only purchased their property at fair prices, but that they also were
9 provided with all material disclosures regarding the investment. Equity demands the
10 status quo to be preserved until there is a full trial on the merits.

11 As the Receiver acknowledged in his Valuation Report, the sale of GP assets
12 at this time would likely result in enormous losses, with Western receiving only
13 pennies on the dollar for its investments. Moreover, such a premature sale of
14 Western's assets would serve no beneficial purpose to any party.

15 In fact, it would deprive the investors themselves of operating capital
16 intended for the payment of their property taxes and would have the perpetual ripple
17 effect of increasing the load investors must carry in maintaining their operating
18 capital going forward in that Western would no longer be contributing its pro rata
19 portion to the operating budgets of the GPs as it, like every other investor, has
20 always done. It is unclear how the Court can impose this additional burden and
21 deprivation of assets on the GPs in the same Order in which the Court confirms that
22 the GPs have not been provided due process regarding the current receivership.

23 Without due process, the Court lacks the authority to impose upon the GPs
24 this requirement that the GPs be forced to use their operating capital to purchase
25 Western's shares. Furthermore, by removing a member of the GPs, the Court is re-
26 writing the basic terms of the general partnership agreements. The Court simply
27 lacks the authority to alter the structure of the GP entities when the Court has
28 confirmed that the GPs have not yet been afforded due process.

1 There is no authority to force the GPs to make these payments to and alter
2 their structure – not without the hearing due process requires the GPs be provided.
3 The investors each undertook their pro rata share of the investment when they
4 entered into the investment – the Court’s action removing Western from the GPs
5 directly increases the ongoing pro rata burden each investor will have going
6 forward. Without due process with regard to the GPs, the Court does not have the
7 authority to make this permanent change to the GPs’ charters and investment
8 structures.

9 The Court’s second reason for taking this drastic step is “to ensure that
10 Western will have no future responsibility for any liability incurred by the GPs”.
11 This is wholly unnecessary in that the operative documents governing the GPs
12 already define the respective relationships and burdens of all relevant parties. To
13 the extent the Court believes this point needs clarity for the investors, there are less
14 drastic means by which the same goal can be accomplished, including disclosure
15 within the information packet investors are to receive, a clear delineation of what
16 obligations Western has as a non-voting member and a clear statement that Western
17 does not have any other “responsibility for any liability incurred by the GPs.”

18 The law requires the Court to “exercise ‘the least power adequate to the end
19 proposed’.” *Spallone*, 493 U.S. at 280. In the present case, the concern expressed by
20 the Court can be adequately addressed through clear notice to the investors of the
21 fact that under the operative documents Western is not responsible for any liability
22 incurred by the GPs. The law simply does not permit (1) the forced liquidation of
23 \$11 million of property interests belonging to Western, (2) the corresponding
24 deprivation of GP operating capital – both now and perpetually into the future, and
25 (3) the restructuring of the charters of 86 GPs the Court has confirmed have not had
26 their due process rights met – not when a much less drastic alternative exists – one
27 that would better preserve the status quo.

28 ///

1 The liquidation of Western's assets at this time would serve only to deprive
2 Western of a property right long before it has been proven responsible for any
3 wrongful action. As the Supreme Court has noted in the realm of drug-crime
4 forfeiture cases – which, like civil securities fraud cases, often involve the seizure of
5 assets prior to trial:

6 Moreover, the availability of a postseizure hearing may be no recompense for
7 losses caused by erroneous seizure. Given the congested civil dockets in
8 federal courts, a claimant may not receive an adversary hearing until many
9 months after the seizure. And even if the ultimate judicial decision is that the
10 claimant was an innocent owner, or that the Government lacked probable
11 cause, this determination, coming months after the seizure, "would not cure
12 the temporary deprivation that an earlier hearing might have prevented."

13 *United States v. James Daniel Good Real Property, supra*, 510 U.S. at 56,
14 quoting *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991) (striking down state statute that
15 authorized prejudgment attachment of real estate without prior notice or hearing, in
16 the absence of extraordinary circumstances).

17 The Court's action would be akin to a defendant in a criminal case having
18 some of his assets permanently taken away by court order, even though he has not
19 been found guilty. Such an order would be void under Rule 60(b)(4) as a violation
20 of due process by "a plain usurpation of power," and would produce manifestly
21 unjust results that merit reconsideration under Rules 59(e) and 60(b). *Hoult*, 57 F.3d
22 at 6.

23 III.

24 CONCLUSION

25 Based on the foregoing, Defendants respectfully request that this Court:

- 26 1. Reconsider Part II.G.2 of its Order of August 16, 2013, with regard to the
27 liquidation of all Western-held equity interests in the GPs, and;
- 28 2. Order the Receiver not to liquidate any of Western's equity interests in the
GPs.

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DATE: August 28, 2013

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CERTIFICATION

I hereby certify that on the 28th 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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