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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' REPLY TO
OPPOSITIONS TO DEFENDANTS'
MOTION FOR STAY OF ORDER
PENDING APPEAL**

Date: November 15, 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 Reply to the Securities and Exchange Commission’s (“SEC”) and
5 Receiver’s Oppositions to Defendants’ Motion for Stay of Order Pending Appeal.

6 I.

7 INTRODUCTION

8 Following extensive briefing and over an hour of oral argument on July 26,
9 2013, the Court on August 16, 2013 issued its Order regarding Defendants’ motion
10 for modification of the preliminary injunction of March 13, 2013.

11 Although the Court granted Defendants’ motion to have the receivership
12 released over the GPs, the Court’s Order imposed several “equitable” conditions
13 precedent on the removal of the receivership. The main condition, which is the
14 subject of Defendants’ appeal and this Motion for Stay of Order Pending Appeal, is
15 quoted in its entirety (Dkt. No. 470, 25:20-26:9):

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

Under the Court’s Order, Western would be permanently stripped of at least
\$11 million of assets and likely millions of dollars of future investment returns
before the underlying claims have been tried, and without any judgment of liability

1 against Western having been entered first, if at all. If the Court's Order is not
2 stayed, Western will be deprived of the opportunity to present evidence to the trier
3 of fact why it is entitled to retain its equity interests in the GPs, and it will have been
4 deprived of due process.

5 There is no need or justification at this time to liquidate Western's equity
6 interests in the GPs. In fact, the caselaw mandates the opposite: *the primary*
7 *purpose of injunctive relief is to preserve and maintain the status quo until a full*
8 *trial can be held.* Liquidating the equity interests at this time will unalterably
9 change the status quo before the case on the merits can be heard, to the benefit of
10 none of the parties or the investors.

11 Enforcement of the Order and summary liquidation of Western's equity
12 interests, prior to review by the Court of Appeals, would cause irreparable harm to
13 Western and violate its due process rights. It would also essentially moot
14 Defendant's appeal, which was properly brought before the Ninth Circuit, since
15 Defendants would be permanently deprived of property that is the subject of the
16 appeal. Therefore, a stay of Section II.G.2 is warranted pending a decision on
17 appeal.

18 The briefing for the Ninth Circuit is ongoing, with Defendants' opening brief
19 having been filed on November 5, 2013, the SEC's and Receiver's opposition briefs
20 due December 3, 2013, and Defendants' reply brief due December 17, 2013.

21 The SEC has opposed the request for stay by demanding that the release of
22 the receivership over the GPs be stayed along with the liquidation of Western's
23 equity interests, and claims that "defendants are essentially cherry-picking that part
24 of the August 16 Order they liked...so they can contest the part they oppose." Dkt.
25 No. 501, 1:16-17.

26 The Receiver also objects on various grounds, including that imposing a stay
27 "would harm the receivership estate and those with claims to recover from it." Dkt.
28 No. 509, 2:23-24.

1 rules). “A probability of success on the merits” or “that serious legal questions are
2 raised and the balance of hardships tilts sharply in...favor” of the moving party. *See*
3 *Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002). The first two factors –
4 strong showing of likelihood of success on the merits, and whether irreparable
5 injury will result – are the most critical. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

6 1. Likelihood of Success on the Merits

7 To satisfy the first factor for a stay pending appeal, Defendants need not show
8 that it is more likely than not that they will win on the merits, but merely that there
9 is a “substantial case” for relief. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir.
10 2011) (*citing Nken v. Holder*, 556 U.S. 418, 432 (2009) (“The whole idea [of a stay]
11 is to hold the matter under review in abeyance because the appellate court lacks
12 sufficient time to decide the merits”)).

13 The SEC claims that Defendants are “silent on all of these issues” regarding
14 the factual and legal basis of the Court’s August 16, 2013 Order decreeing summary
15 liquidation. However, the SEC is flat wrong: Defendants addressed those issues at
16 length in the Motion (Dkt. No. 495-1, 4:1-6:19), and in the Appellants’ Opening
17 Brief before the Ninth Circuit (9th Cir., Case No. 13-56761, Dkt. No. 11-1). The
18 SEC’s tendency to claim that Defendants have not addressed issues, notwithstanding
19 Defendants’ arguing on those issues at length, is demonstrative of how the SEC has
20 shown no incentive to move this case forward to trial, preferring to let the Receiver
21 take the lead and drain Defendants of enough assets to force a settlement on the
22 SEC’s terms without the SEC ever having to prove its case – which was barely
23 adequate enough to obtain a preliminary injunction.

24 The caselaw cited by the Court in its September 19, 2013 order denying the
25 Motion for Partial Reconsideration does not support the SEC’s claim that
26 Defendants are not likely to succeed on the merits.

27 *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007) involved a disgorgement order
28 entered after imposition of a judgment and permanent injunction against the

1 defendants for sale of unregistered securities. *Ross* is significantly distinguishable
2 from, and inapplicable to, this case because it involved disgorgement proceedings
3 occurring *after judgment had been entered against the defendants for securities*
4 *fraud*. This Court's liquidation order was entered *before trial* and there has been *no*
5 *adjudication of liability against Defendants for anything*.

6 *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133 (9th Cir. 1996) involved a
7 receiver's sale of real property owned by the defendants' corporation following the
8 entry of consent judgments against the defendants in which they agreed to disgorge
9 their interests in the corporation. As was the case with *Ross*, *Am. Capital Invs., Inc.*
10 is significantly distinguishable from and inapplicable to this case because it involved
11 the *post-judgment* liquidation of property – unlike this case, in which Western is to
12 be stripped of its assets *even though no judgment of liability has been entered*
13 *against any Defendant*.

14 A pre-judgment order of disgorgement is subject to legal challenge because
15 there has not been an adjudication of liability. Therefore, caselaw regarding post-
16 judgment disgorgement is inapplicable to this case, which involves pre-judgment
17 disgorgement without trial, which is improper on its face. Under those
18 circumstances, Defendants have met their burden to show a likelihood of success on
19 the merits.

20 2. Danger of Irreparable Harm to Defendants

21 The SEC downplays the risk of irreparable harm to Defendants by stating that
22 “Western will be paid for its interests in a fair manner.” The Receiver states
23 likewise. Once again, the SEC's and Receiver's institutional arrogance is manifest.¹

24 _____
25 ¹ The SEC also states that “Defendants do not even attempt to argue that Schooler
26 will be harmed if the stay is not granted.” However, the SEC already made that
27 argument for them in the Complaint by alleging that Mr. Schooler is the sole
28 stockholder of Western (Dkt. No. 1, 3:6-7, ¶ 10), an allegation that Defendants
admitted (Dkt. No. 255, 2:13-16). Since Mr. Schooler is the sole owner of Western,
ipso facto he will be harmed if the stay is not granted.

1 First, Western will not be paid for its interests in a fair manner. Western
2 would receive no payment for the liquidation of those GP interests in which the GPs
3 currently have no money. Dkt. No. 470, 26:1-4. The interests will have been taken
4 away, forever, without any compensation whatsoever.

5 Second, Western, like any other property owner, has distinct investment-
6 backed expectations. By forcing a sale at a time when property values have
7 bottomed out, the Court's Order permanently deprives Western of those distinct
8 investment-backed expectations, namely the opportunity to hold onto the GP
9 interests until such time as the property values have rebounded and investors have
10 shown an interest in buying at a profit to the investors. Such a permanent
11 deprivation would not only violate Western's due process rights but also would
12 constitute a taking without just compensation. *Penn Central Transportation Corp.*
13 *v. New York City*, 438 U.S. 104, 127 (1978); *Pennsylvania Coal Co. v. Mahon*, 260
14 U.S. 393 (1922); *Superior Savings Assn. v. Cleveland*, 501 F.Supp. 1244 (N.D. Ohio
15 1980) (bank's distinct investment-backed expectations in mortgage on building
16 frustrated, and its due process rights violated, when city tore down mortgaged
17 building without complying with its own demolition-notice ordinance).

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

27 The broad supervisory discretion does not empower the Court to issue orders
28 that create an enormous, unrecoverable investment loss for Western - at this early

1 stage of litigation, particularly when it benefits none of the parties or the investors.
2 No trial has been held in this case, and no final judgment of liability has been
3 imposed upon Western.

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

12 The liquidation of Western’s assets at this time, without the issuance of a stay,
13 would serve only to deprive Western of a property right long before it has been
14 proven responsible for any wrongful action.

15 Therefore, without the issuance of a stay pending appeal, Defendants would
16 be irreparably harmed because the Receiver would be free to liquidate Western’s
17 property rights.

18 **3. Issuance of a Stay Will Not Substantially Injure the**
19 **Investors; Not Imposing a Stay Will Cause Harm**

20 The investors in the GPs would not be affected in any way by a stay here.
21 Whether or not Western’s interests in the GPs are liquidated, the GPs will still be
22 responsible for all the same ongoing obligations they have under the partnership
23 agreements. There is simply no harm to the SEC, the Receiver, or the investors for
24 Western to continue to simply hold its minority non-voting units during the
25 pendency of this litigation. In fact, if Western retains an ownership interest, it will
26 remain financially responsible for making payments and contributions to the GPs as
27 needed (see Dkt. No. 195-3, ¶ 2.2).

28 ///

1 On the other hand, not issuing a stay, and allowing the Receiver to liquidate
2 Western's interests, would substantially injure the investors. The history of this case
3 (specifically, the Receiver's Fee Applications and this Court's orders approving
4 them) and this Court's statements in the August 16, 2013 Order (see Dkt. No. 470,
5 26:1-4) indicate that the GPs will be burdened with the cost of buying out Western,
6 to the extent funds are available. Thus, despite the Receiver's claim that the GPs
7 will be burdened financially by Western retaining its ownership interest, *the GPs*
8 *will suffer more if Western's ownership interest is removed than if Western is*
9 *allowed to retain its interests. This is because forcing the GPs to buy out Western*
10 *will deprive the GPs of money to pay their operating expenses.*

11 Although the Receiver claims that letting Western retain its equity interests
12 "would harm the receivership estate and those with claims to recover from it," and
13 that "the most important public interest at issue is in preserving and protecting
14 Western's assets for the benefit of those with claims to recover from the estate"
15 (Dkt. No. 509, 2:23-24, 3:11-13) the Receiver ignores that the only person to date
16 who has benefitted – and who will benefit - from the sale of Western's assets is him,
17 and that his action will harm the investors rather than help them.

18 Despite his statements about how the most important issue is protecting the
19 investors, the Receiver fails to acknowledge that *he has not delivered one cent to the*
20 *investors*. Instead – not surprisingly, given his track record – the largest single part
21 of the Receiver's argument is complaining about not getting paid.

22 *The Receiver now all but admits that his primary reason for opposing*
23 *Defendants is to ensure that he gets paid first, even though the source of those*
24 *payments will be the forced sale of Western's interests to the GPs and the*
25 *deprivation of GP funds that would otherwise be used to pay GP operating*
26 *expenses.* Dkt. No. 509, 3:16-4:3.

27 Given the Receiver's actions, imposing a stay on Part II.G.2 of the Court's
28 August 16, 2013 order is necessary to protect the GP investors from harm – not from

1 Defendants, but from the Receiver. Until and unless he is stopped, the Receiver will
2 simply liquidate Western's equity interests at the GPs' expense, and consume
3 money that would otherwise be used for paying the GPs' operating expenses.

4 **4. The Public Interest Remains in Favor of a Stay**

5 As noted before, while a stay is in effect, the heart of this litigation – the
6 SEC's claims against Defendants – can move forward, through discovery and
7 pretrial motions, toward an evidentiary trial on the merits.

8 The public interest would not be harmed by the issuance of a stay, but rather
9 protected. If the intent in liquidating Western's GP interests is to provide funds for
10 injured investors as the Receiver appears to claim, waiting until the appeal has run
11 its course would not harm things. If Western is found at trial to have committed
12 securities fraud, liquidation at that point in time would still be possible. However,
13 there is no benefit to the public interest by ordering the liquidation of the GP
14 interests *before* trial.

15 Despite the SEC's contention that issuing a stay would expose Western to
16 joint and several liability for the GPs' debts and liabilities, that risk of exposure has
17 always existed while Western has held equity interests, including before the start of
18 this lawsuit and the imposition of a receivership. The only increased risk of
19 exposure was caused by this lawsuit, because of the Receiver not collecting money
20 for the GPs while simultaneously using GP money for forced purchase of Western
21 GP interests to ensure his payment. Also, as noted above, Western's ownership
22 interest carries the obligation under the Partnership Agreement to make
23 contributions as needed. Dkt. No. 195-3, ¶ 2.2. Therefore, the public interest in
24 protecting the receivership estate is promoted by a stay of the liquidation of
25 Western's equity interests.

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III.
CONCLUSION

For the reasons stated above and in their Motion, Defendants respectfully request that this Court reject the arguments of the SEC and Receiver, and instead issue a stay of Part II.G.2 of its Order of August 16, 2013, with regard to the liquidation of all Western-held equity interests in the GPs, pending the outcome of Defendants' appeal of the Order to the Ninth Circuit Court of Appeals.

DATE: November 8, 2013

Respectfully submitted,

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CERTIFICATION

I hereby certify that on the 8th day of November 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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