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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 FIRST  
27 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  
ORDER APPROVING RECEIVER'S  
SEVENTH INTERIM REPORT**

Date: June 13, 2014

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 February 25, 2014, approving the court-  
6 appointed Receiver’s Seventh Interim Report (Dkt. No. 549) (“Court’s Order”).

7 I.

8 INTRODUCTION

9 On February 25, 2014, the Court issued the Court’s order approving the  
10 Receiver’s Seventh Interim Report, which was filed on February 5, 2014, as an item  
11 without a hearing date. The Court’s Order was issued without notice and a hearing.  
12 Paragraphs 1 and 2 of the Court’s Order, the subject of Defendants’ Motion, read in  
13 their entirety as follows:

- 14 1. Western’s land parcels, as identified in Exhibit D to the Receiver’s  
15 Seventh Interim Report, shall be listed for sale with a licensed broker.  
16 If and when reasonable offers are made on the parcels, the Receiver  
17 shall seek approval of such sales via a noticed motion.
- 18 2. Schooler is reminded that he is prohibited from interfering, directly or  
19 indirectly, with the Receiver’s performance of his duties. The Court  
20 notes that the letter Schooler apparently sent to investors, attached as  
21 Exhibit C to the Receiver’s Seventh Interim Report, demonstrates, in  
22 the Court’s view, an effort by Schooler to guide and influence the  
23 actions and perceptions of investors in these proceedings. These  
apparent efforts weigh against a finding of investor independence and  
in favor of a finding that investors have relied, and continue to rely, on  
Schooler to make decisions regarding their investments.

24 Western’s land holdings consist of five parcels in Nevada and Arizona,  
25 totaling 592.36 acres, which were remainders of the lands originally acquired by  
26 Western for sale to the general partnerships established through Western (“GPs”)  
27 that constitute the Dayton IV, Yuma I, Yuma II, Yuma III, and Silver Springs South  
28

1 projects. Dkt. No. 547, p. 27, Exh. D.<sup>1</sup> According to the Receiver, the lands have a  
2 present total estimated value of \$390,694, minus \$211,723 in mortgages on the  
3 Dayton IV and Yuma III notes to the original sellers. The mortgages are scheduled  
4 to be paid in full by October 2016. *Id.*

5 Under the Court's Order, Western would be permanently stripped of property  
6 owned by it – property unconnected with any allegedly fraudulent activity involving  
7 the GPs - before the underlying claims have been tried, and without any judgment  
8 of liability against Western having been entered first, if at all. In effect, it is  
9 disgorgement without adjudication. If the Court's Order is not modified, Western  
10 will be deprived of the opportunity to present evidence to the trier of fact why it is  
11 entitled to retain its land holdings, and it will have been deprived of due process.

12 There is no need or justification at this time to liquidate Western's land  
13 holdings, especially with the market for undeveloped raw land remaining depressed.  
14 The only persons who will benefit from the sale of the properties will not be the GP  
15 investors, but the Receiver and his counsel. Paragraph 1 should be reconsidered and  
16 stricken.

17 Paragraph 2 of the Order presents a problem that is particularly worrisome:  
18 the prohibition of Schooler's communicating with his fellow investors. Such a  
19 prohibition is a prior restraint on Schooler's right, as an American, to speak and  
20 associate with others. It is not the least-restrictive means of promoting a compelling  
21 state interest, is not content-neutral because it forbids criticism of the Receiver, is  
22 not narrowly-tailored, and does not leave open alternative channels of  
23 communication. Thus, Paragraph 2 is a violation of Schooler's constitutional rights  
24 and should be stricken.

25 ///

26 \_\_\_\_\_  
27 <sup>1</sup> The Receiver lists the properties as Yuma II, Yuma III, and "Yuma IV". However,  
28 there is no Yuma IV, although there is a Yuma I.

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II.

ARGUMENT

A. Standard of Review

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

Under Rule 59(e), the Court may properly reconsider its decision if, among other things, it "committed clear error or the initial decision was manifestly unjust." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 2003). Clear error occurs when "the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Smith v. Clark County Sch. Dist.*, 727 F.3d 950 (9th Cir. 2013) ("It is common for both trial and appellate courts to reconsider and change positions when they conclude they made a mistake").

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

Rule 60(b)(6) states that the court can relieve a party from a final judgment, order or proceeding for "any other reason that justifies relief." The relief provided under Rule 60(b)(6) is intended "to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Such manifest injustice exists here, because Western is to be permanently deprived of its land holdings without a trial on the merits to which Western is entitled, and because the Order imposes a prior restraint that improperly interferes with Schooler's constitutional rights of free speech and association.

///

1           **B. The Court's Order Deprives Western of Its Property Without**  
2           **Notice and a Hearing**

3           Even though no trial has yet been held, Paragraph 1 of the Court's Order  
4 essentially constitutes a pre-judging and finding of liability on the part of Western.  
5 Western is being treated as if it has already been tried and found liable for fraud,  
6 with the resulting punishment of disgorgement of ill-gotten gains, despite no proof  
7 that Western's land holdings are legally illegitimate. In fact, Western's land  
8 holdings that are to be listed for sale are not legally connected to the GPs or  
9 Western's equity interests in the GPs; even if the GPs sold their properties tomorrow  
10 and formally wound up, Western would still own the remainder parcels. Therefore,  
11 the Order mandating permanent and total liquidation of Western's land holdings is  
12 in excess of jurisdiction.

13           Paragraph 1 does not provide for any halt to the sale of Western's land. The  
14 only issue that can be determined at a future noticed hearing would be: How much is  
15 the offer? Whether any sale of the property should even be conducted in the first  
16 place (particularly given the current depressed values of the raw-land market) would  
17 not be discussed at all.

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 order the  
28 permanent liquidation of Western's lands at this early stage of litigation. No trial has



1 been held in this case, and no final judgment of liability has been imposed upon  
2 Western.<sup>2</sup>

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

11 The forced liquidation of Western’s land holdings would violate this clearly  
12 established principle, permanently curtailing the status quo without any showing  
13 that extreme or very serious harm would result if Western continues to own land  
14 until trial. It would also contradict the Court’s direction that the purpose of the  
15 receivership over Western was solely “to clarify Western’s financial affairs” – a step  
16 that has now been completed. Dkt. No. 59, 9:27; *see also* Dkt. Nos. 182, 504. The  
17 sale of land is unnecessary for such clarification in any event.

18 The Court’s Order that Western’s lands be sold would prematurely penalize  
19 Western by forcing the liquidation of its assets at enormous losses. The Receiver  
20 calculates the estimated sale value of the properties at \$161,073.90, after paying off  
21 all outstanding mortgages and closing costs. Assuming purely *arguendo* that the  
22 properties were purchased for less than one-fifth of what the GPs paid to buy from  
23 Western – a matter that is disputed by Western – and the Receiver’s current  
24 appraised values, the sale of these lands now would result in Western receiving  
25 about ten to twenty-five cents on the dollar for its investment in the properties, at  
26 most. *See* Dkt. No. 203, pp. 5-6, 8 (Receiver’s appraised values for Silver Springs  
27

28 <sup>2</sup> This same issue is on appeal to the Ninth Circuit in this case.

1 South, Dayton IV, and Yuma I, II, and III). Should Western prevail at trial, the  
2 implications of the Court's Order would be even more harmful, since Western  
3 would have been permanently deprived of assets without a finding of liability.

4 The Fifth Amendment's Due Process Clause forbids the federal government  
5 from summarily destroying or permanently depriving a person's property rights  
6 without prior notice and an opportunity to be heard, except in serious and time-  
7 sensitive circumstances such as war, natural disasters, or epidemics of disease. *See*  
8 *United States v. Caltex (Philippines) Inc.*, 344 U.S. 149 (1952) (destruction of  
9 property to thwart enemy invaders); *Juragua Iron Co. v. United States*, 212 U.S. 297  
10 (1909) (building destroyed to stop spread of disease). In this case, the Court's Order  
11 deprives Western of its property interests just as summarily.

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 There are no allegations of fraud with regard to Western's acquisition or  
21 possession of the land that it kept for itself. As the Receiver acknowledged in his  
22 Valuation Report, the sale of GP assets at this time would likely result in enormous  
23 losses, with Western receiving only pennies on the dollar for its investments. *See*  
24 Dkt. No. 203. The same would be true with regard to Western's remainder parcels  
25 for Dayton IV, Yuma I, Yuma II, Yuma III, and Silver Springs South. Moreover,  
26 such a premature sale of Western's assets would serve no beneficial purpose to any  
27 party or investors, other than putting money in the Receiver's pocket.

28 The law requires the Court to "exercise 'the least power adequate to the end

1 proposed’.” *Spallone*, 493 U.S. at 280. In the present case, the preservation of the  
2 *status quo* does not require the drastic step of permanently depriving Western of  
3 property that was intended for long-term holding and that was not retained for  
4 fraudulent purposes.

5 The Court’s action would be akin to a defendant in a criminal case having  
6 some of his assets permanently taken away by court order, even though he has not  
7 been found guilty and even though those assets are not ill-gotten gains from his  
8 alleged crimes. Such an order would be void under Rule 60(b)(4) as a violation of  
9 due process by “a plain usurpation of power,” and would produce manifestly unjust  
10 results that merit reconsideration under Rules 59(e) and 60(b). *Hoult*, 57 F.3d at 6.

11 **C. The Court’s Order Is an Unconstitutional Prior Restraint and**  
12 **Gag Order on Schooler’s Rights of Free Speech and Association**

13 A prior restraint is an administrative or judicial order “forbidding certain  
14 communications when issued in advance of the time that such communications are  
15 to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993).

16 Reasonable restrictions may be imposed “on the time, place, or manner of  
17 protected speech, provided the restrictions ‘are justified without reference to the  
18 content of the regulated speech, that they are narrowly tailored to serve a significant  
19 governmental interest, and that they leave open ample alternative channels for  
20 communication of the information.’” *Ward v. Rock Against Racism*, 491 U.S. 781,  
21 791 (1989) (citations omitted).

22 However, there is a strong presumption against the constitutionality of prior  
23 restraints, even those imposed by courts during criminal proceedings in order to  
24 preserve the accused’s Sixth Amendment right to a fair trial. *Nebraska Press Assn.*  
25 *v. Stuart*, 427 U.S. 539 (1976) (striking down trial court’s pretrial gag order  
26 specifically prohibiting reporters from reporting five particular subjects in a  
27 multiple-murder capital prosecution, including subjects that were testified to at a  
28 preliminary hearing open to the public; “We hold that, with respect to the order

1 entered in this case prohibiting reporting or commentary on judicial proceedings  
2 held in public, the barriers [of presumed unconstitutionality] have not been  
3 overcome”). The “most extraordinary remedy” of a prior restraint has thus been  
4 allowed “only where the evil that would result from the reportage is both great and  
5 certain and cannot be militated by less intrusive measures.” *Id.* at 562; *see also*  
6 *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Supreme Court’s stay of injunction  
7 against CBS’s broadcast of undercover video footage of allegedly unsanitary  
8 meatpacking operations, against claims by meatpacking company that injunction  
9 was necessary to prevent severe economic harm).

10 Prior restraints against persons protesting business practices have also been  
11 stricken down. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), a  
12 community organization distributed pamphlets denouncing a local real-estate broker  
13 for promoting “panic peddling” to white residents who were fearful of nonwhites  
14 moving into their town. The pamphlets were distributed to passerby in the  
15 neighborhood where the broker lived, including being left on the doorsteps of the  
16 broker’s neighbors. Two of the pamphlets contained the broker’s home phone  
17 number and an exhortation to call the broker and urge him to pledge not to engage in  
18 “panic peddling”. The broker obtained an injunction forbidding the organization  
19 from picketing and passing out leaflets or pamphlets in the town, even though  
20 evidence showed that the organization’s activities were “conducted in a peaceful  
21 and orderly manner, did not cause any disruption of pedestrian or vehicular traffic,  
22 and did not precipitate any fights, disturbances or other breaches of the peace.” The  
23 Supreme Court invalidated the injunction, because “[n]o prior decisions support the  
24 claim that the interest of an individual in being free from public criticism of his  
25 business practices in pamphlets or leaflets warrants use of the injunctive power of a  
26 court,” and because the organization acted in a peaceful manner. *Id.* at 419-420.

27 Although Section VI.C of the Preliminary Injunction Order forbids “doing  
28 any act or thing whatsoever to interfere with taking control, possession or

1 management by the permanent receiver...or in any way to interfere with or harass  
2 the permanent receiver...or to interfere in any manner with the discharge of the  
3 permanent receiver's duties and responsibilities hereunder," Dkt. No. 174, 8:13-20,  
4 this provision, both as written and as applied, is vague and ambiguous when it is  
5 applied to writings that may contain criticism of the Receiver.

6 The Receiver's court filings (Dkt. No. 547) and now the Court's Order  
7 approving the same (Dkt. No. 550) have stated that Mr. Schooler's letters to his  
8 fellow investors, which criticize the Receiver's behavior, violate Section VI.C. Yet,  
9 Section VI.C as written does not forbid criticism of the Receiver. To do so, which  
10 Paragraph 2 of the Court's Order does, results in an order that this Court does not  
11 have the power to make, because the general rule is that a court of equity will not  
12 enjoin the publication of a libel (or the truth, for that matter). *Crosby v. Bradstreet*  
13 *Co.*, 312 F.2d 483 (2d Cir. 1963) (setting aside district court's order requiring  
14 defendant "to refrain from publishing matter about" plaintiff); *Robert E. Hicks*  
15 *Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927) (denying  
16 issuance of injunction against business competitor's magazine which disparaged  
17 plaintiff's operations).

18 Schooler's letters to his fellow investors – not only the December 31, 2013  
19 letter, but letters sent in March, June, and July 2013, copies of which are attached  
20 hereto (see Declaration of Louis V. Schooler) – cannot be interpreted as inciting the  
21 investors to refuse to pay money to the Receiver with regard to operating shortfalls  
22 of the GPs, or otherwise interfering with or harassing the Receiver or preventing  
23 him from doing his duties. Instead, the Schooler letters simply provide status  
24 updates to the investors while filling in the Receiver's omissions and correcting the  
25 Receiver's misstatements. As the Supreme Court noted in *Nebraska Press Assn.*,  
26 "The damage [of a prior restraint] can be particularly great when the prior restraint  
27 falls upon the communication of news and commentary on current events." 427  
28 U.S. at 559.

1 In addition to improperly chilling Schooler's right to free speech, Paragraph 2  
2 of the Court's order also creates a prior restraint on Schooler's First Amendment  
3 right to freedom of association with his fellow GP investors (since Schooler, either  
4 individually or through Western, owns equity interests in the GPs). *See Thomas v.*  
5 *Collins*, 323 U.S. 516 (1945) (invalidating statutory requirement that an "organizer's  
6 card" be obtained from government before soliciting members for labor union).

7 As interpreted in the Court's Order, Section VI.C. of the Preliminary  
8 Injunction Order would prohibit Schooler from writing to or meeting with any of the  
9 GP investors to discuss the events in this case and/or the Receiver's actions  
10 (whether on public or private property) unless the purpose of the meeting or  
11 communication was to offer fulsome praise of the Receiver. Otherwise, the meeting  
12 or communication might be considered an "act...to interfere with taking control,  
13 possession or management by the permanent receiver...or in any way to interfere  
14 with or harass the permanent receiver...or to interfere in any manner with the  
15 discharge of the permanent receiver's duties and responsibilities hereunder" and run  
16 afoul of Paragraph 2. Such a restriction is not the least restrictive means of  
17 protecting a compelling governmental interest in the administration of litigation.  
18 Therefore, Paragraph 2 must be reconsidered, and should be stricken.

19 **III.**

20 **CONCLUSION**

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

22 1. Reconsider Paragraph 1 of its Order of February 25, 2013, with regard to  
23 the listing for sale of the five parcels owned by Western, and strike it;

24 2. Reconsider Paragraph 2 of its Order of February 25, 2013, prohibiting  
25 Schooler from sending letters to the GP investors, and strike it; and

26 3. Order the Receiver not to proceed with the listing and sale of Western's  
27 five parcels.

28 ///



1 DATE: March 24, 2014

Respectfully submitted,

2 /s/Philip H. Dyson

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**CERTIFICATION**

I hereby certify that on the 24<sup>th</sup> day of March 2014, 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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