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16 **UNITED STATES DISTRICT COURT**  
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18  
19 SECURITIES AND EXCHANGE  
COMMISSION,

20 Plaintiff,

21 v.

22 LOUIS V. SCHOOLER and FIRST  
23 FINANCIAL PLANNING  
24 CORPORATION d/b/a WESTERN  
FINANCIAL PLANNING  
25 CORPORATION,

26 Defendants.

Case No. 12 CV 2164 GPC JMA

**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
MODIFICATION OF PRELIMINARY  
INJUNCTION ORDER TO REMOVE  
WESTERN FINANCIAL PLANNING  
CORPORATION FROM  
RECEIVERSHIP**

Date: June 20, 2014

Time: 1:30 p.m.

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

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 Modification  
5 of this Court’s order of October 5, 2012 (final order March 13, 2013) granting a  
6 Preliminary Injunction and appointing a receiver for Western and the real estate  
7 general partnerships established through Western (“GPs”).

8 Defendants move for modification of the Preliminary Injunction to dissolve  
9 the receivership as to Western on the grounds that:

10 1. The Receiver has completed all necessary tasks, namely the  
11 clarification of Western’s financial affairs.

12 2. The operations of Western are sufficiently restrained – and reduced in  
13 scope - by the preliminary injunction so as to make a continued receivership  
14 unnecessary.

15 **I.**

16 **INTRODUCTION**

17 Western should immediately be removed from the receivership for the  
18 following reasons:

19 1. After three years of investigation by the SEC and an additional year of  
20 forensic analysis by the Receiver, not one instance of misappropriation of funds,  
21 commingling, or other financial mismanagement has been identified or even alleged  
22 as to the GPs or Western. In fact, the Receiver has found all amounts accounted for  
23 and has determined the accounting records for Western and the GPs to be “accurate  
24 and reliable” – enough so as to rely on them fully in issuing his lengthy two-part  
25 Forensic Report that analyzes Western’s income and expenditures.

26 2. A continued receivership over Western is unnecessary, because the  
27 preliminary injunction’s other terms that restrain Western’s activities provide  
28 sufficient preservation of the status quo and should adequately alleviate any

1 concerns the Securities and Exchange Commission (“SEC”) has about protecting the  
2 public pending the outcome of this litigation. Since no GP interests are being  
3 marketed or sold, Western’s business operations are minimal at best. Western  
4 collects on existing receivables and makes payments on the underlying notes for  
5 carryback financing due from Western to the original sellers of the properties now  
6 held by the GPs (“Underlying Notes”). The only other tasks are maintaining  
7 Western’s server and hard-copy archives and paying its taxes and insurance. That’s  
8 it. There is no threat, danger, or risk to the general public, to the GPs, or to the GPs’  
9 land investment for which the Receiver’s presence is necessary.

10 3. Finally, dissolution of the receivership over Western will in no way  
11 hinder or otherwise prejudice the SEC’s ability to fully litigate all pending claims  
12 against Defendants. Any further imposition of unnecessary and excessive costs at  
13 this juncture – before the SEC has even carried the burden of proving its case at trial  
14 – is unwarranted.

## 15 II.

### 16 BACKGROUND

17 The SEC brought its Complaint against Defendants on the grounds that the  
18 GPs are “securities.” As part of these proceedings, the SEC sought an order from  
19 the court appointing a receiver for Western and the GPs, first as part of the SEC’s  
20 proposed TRO and then as part of the preliminary injunction.

21 On September 6, 2012, the Court appointed Thomas C. Hebrank as temporary  
22 receiver “of Western and the entities it controls,” including approximately 86  
23 general partnerships. (Dkt. No. 10, 10-1.) The Court then reaffirmed the  
24 receivership in its order of October 5, 2012, granting the conversion of the TRO into  
25 a preliminary injunction. Dkt. No. 44.

26 On November 30, 2012, the Court in its Order Re: Receiver’s Second Report  
27 and Proposal continued the receivership in effect because while there “may be no  
28 need for a receiver to marshal and preserve assets from misappropriation and

1 dissipation,” the receivership “over Western is needed to clarify Western’s financial  
2 affairs.” Dkt. No. 59, p. 9, ll. 26-27, and p. 10, ll. 17-18.

3 The Court issued a Preliminary Injunction and Order appointing a permanent  
4 receiver on March 13, 2013 (“Preliminary Injunction”), with the receivership  
5 continuing in effect over Western and the GPs. Dkt. No. 174. The terms of the  
6 Preliminary Injunction not having to do with the imposition of the receivership  
7 include:

- 8 • Defendants are enjoined from the sale of unregistered securities  
9 (Section I);
- 10 • Defendants shall not transfer, sell, assign, mortgage, etc. any funds,  
11 assets, securities, claims, or real estate or personal property belonging  
12 to Western, its subsidiaries, or the GPs (Section II);
- 13 • All “clients, investors, trust beneficiaries, note holders, creditors,  
14 claimants, lessors and all other persons or entities seeking relief of any  
15 kind, in law or in equity, from Western, its subsidiaries, or [the GPs],  
16 and all persons acting on behalf of any such” persons shall not sue  
17 Western, its subsidiaries, or the GPs, or take any action for purposes of  
18 seizing or levying upon any property owned or possessed by Western,  
19 its subsidiaries, or the GPs (Section VI); and
- 20 • Defendants and their employees, agents, officers, and attorneys, and the  
21 GPs, are forbidden from altering, destroying, transferring, or  
22 concealing any and all documents pertaining to Defendants (Section  
23 XI).

24 In the Preliminary Injunction, this Court stated that “the Court appointed a  
25 receiver to operate Western long enough to clarify Western’s financial affairs.  
26 Whether a receivership will remain necessary after the Receiver renders an  
27 accounting is unknown.” Dkt. No. 174, pp. 6-7, fn. 2.

28 On August 16, 2013, this Court issued an Order Granting in Part and Denying

1 in Part Defendants' Motion for Modification of Preliminary Injunction. Dkt. No.  
2 470. In its Order, the Court ordered the dissolution of the receivership over the GPs  
3 upon the satisfaction of certain conditions precedent, on the grounds that the  
4 operational and administrative requirements for the GPs were so minimal that a  
5 formal receivership was no longer necessary.

6 In his Receiver's Forensic Accounting Report: Part One (Dkt. No. 182) filed  
7 on April 18, 2013, the Receiver performed a series of tests on the "OPADS  
8 Accounting System and other data maintained by Western." (Id. at 14.) The  
9 Receiver's conclusion was that the accounting records for Western and the GPs  
10 were "accurate and reliable." This Court has approved the Forensic Accounting  
11 Report: Part One. Dkt. No. 191. The Receiver then submitted a Forensic  
12 Accounting Report: Part Two on October 16, 2013, which discussed the sources of  
13 Western's funds and how the money was then used. Dkt. No. 504. To date, this  
14 Court has not yet ruled whether to approve the Forensic Accounting Report: Part  
15 Two.

### 16 III.

### 17 ARGUMENT

18 Federal courts have broad discretion "to supervise an equity receivership and  
19 to determine the appropriate action to be taken in the administration of the  
20 receivership." *S.E.C. v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *see also S.E.C.*  
21 *v. Lincoln Thrift Ass'n*, 577 F.2d 600 (9th Cir. 1978)(district court has "wide  
22 discretion to determine the appropriate relief in an equity receivership"). However,  
23 "[a] receivership is only a means to reach some legitimate end sought through the  
24 exercise of the court of equity. It is not an end in itself." *Kelleam v. Maryland Cas.*  
25 *Co.*, 312 U.S. 377, 381 (1941) (emphasis added) (quoting *Gordon v. Washington*,  
26 295 U.S. 30, 37 (1935)). "Consequently, a receivership must be monitored to ensure  
27 it is still serving the function for which it was created." *S.E.C. v. Madison Real*  
28 *Estate Group, LLC*, 647 F. Supp. 2d 1271, 1275 (D. Utah 2009) (citing *Gordon*, 295

1 U.S. at 37).

2 Defendants' motion to modify the preliminary injunction is made pursuant to  
3 Federal Rule of Civil Procedure 54(b). Rule 54(b) states that a district court can  
4 modify an interlocutory order "at any time" before entry of a final judgment. The  
5 Ninth Circuit "has long recognized 'the well-established rule that a district judge  
6 always has power to modify or to overturn an interlocutory order or decision while it  
7 remains interlocutory.'" *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d  
8 1119, 1124 (9th Cir. 2005) (citing *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d  
9 804, 809 (9th Cir. 1963)). Under Rule 54(b), the motion to modify a preliminary  
10 injunction can be made "to relieve inequities that arise after the original order" and  
11 "in substance is based on new circumstances that have arisen after the district court  
12 granted the injunction." *Id.* Such inequities and new circumstances exist here.

13 The preliminary injunction should be modified to dissolve the receivership  
14 altogether – not just as to the GPs, as this Court previously ordered on August 16,  
15 2013, but now as to Western.

16 Besides the fact that there has been adequate opportunity for the Receiver to  
17 clarify Western's financial affairs, which the Court found as the main purpose of the  
18 receivership, the terms of the Preliminary Injunction provide adequate security  
19 against any alleged future risk of misdeeds by Defendants (although there are no  
20 activities of Defendants that would constitute "misdeeds", past, present or future).

21 Defendants are enjoined from selling any unregistered securities; they cannot  
22 alter, conceal, destroy, or move documents; and they cannot sell, transfer, or  
23 mortgage Western's property. With the imposition of the Preliminary Injunction,  
24 Western's activities have now dwindled to collecting payment from the GPs on the  
25 GP Notes and making payments on the Underlying Notes – simple, straightforward  
26 activities that can be (and are) performed by a minimal staff without requiring the  
27 Receiver's supervision.

28 Any speculative concerns identified by the SEC at the outset of this case

1 about financial malfeasance or commingling or unaccounted for transactions have  
2 been erased. Any concern by the Court that the Receiver needed to take inventory  
3 of all assets, bank accounts, and records belonging to Western and the GPs no  
4 longer exists. Full inventory and lockdown has been accomplished. No  
5 mismanagement has been identified. All that is left are the original causes of action  
6 brought by the SEC against the Defendants, which will in no way be prejudiced or  
7 otherwise hindered by removing Western from the receivership. The case law is  
8 clear that a receivership is “not an end in itself.” The receivership must have a  
9 defined purpose.

10 After three years of investigation and almost one and a half years of a receiver  
11 having full and complete access to all books and records and the Receiver’s  
12 submission of a thorough forensic report and a half-dozen interim reports, there has  
13 yet to be one single claim or allegation of operational or financial malfeasance.  
14 There is no claim that GP funds were misappropriated or that there was improper  
15 commingling. The SEC’s most aggressive claims are that Western artificially  
16 inflated the offering price, and the SEC’s evidentiary burden to prove that claim  
17 does not require or justify the presence of a receiver, particularly since this Court  
18 has ruled that the SEC cannot do end-around discovery through the Receiver  
19 without complying with the Federal Rules of Civil Procedure. See Dkt. No. 174, p.  
20 10-11, fn. 7. The SEC does not identify any ongoing operational malfeasance by  
21 Western from which the GP investors, or the public at large, need the protection of a  
22 receiver on an ongoing basis in addition to the imposition of a preliminary  
23 injunction.

24 To be clear, the remaining operational functions of Western are extremely  
25 minimal. There simply is no need for a receiver’s oversight when the only tasks  
26 being carried out by Western are: (1) the collection of debt obligations owed to  
27 Western, (2) making corresponding payments on the Underlying Notes owed by  
28 Western to original sellers of certain GP parcels, (3) maintaining Western’s server

1 and hard-copy archives, and (4) paying property taxes and insurance. These are  
2 straight-forward, simple tasks that have been ably carried out by Western for  
3 decades. None of these tasks involve any level of complexity or concern so as to  
4 require the oversight of a receiver.

5 The Receiver has had ample opportunity to take possession of all records and  
6 can thus conduct any and all reviews and analysis, and produce any and all forensic  
7 or other reports relevant to the assets, books, and records in this matter. It does not  
8 necessitate his continued oversight of Western, particularly since the Preliminary  
9 Injunction's terms have halted all sales activity and reduced Western's operations to  
10 receiving funds owed by the GPs and making scheduled payments on the  
11 Underlying Notes. Those particular functions have been performed by Western's  
12 staff without incident for decades and do not require the Receiver's presence. The  
13 Receiver has long completed his sole objective assigned by this Court to "clarify  
14 Western's financial affairs."

15 Thus, the receivership over Western has served whatever purpose it needed to  
16 serve and it has no more reason for imposing additional costs on Defendants.

17 **IV.**

18 **CONCLUSION**

19 Based on the foregoing, Defendants respectfully request that this Court  
20 modify the Preliminary Injunction and dissolve the receivership in its entirety as to  
21 Western.

22  
23 DATE: April 24, 2014

Respectfully submitted,

24 /s/Philip H. Dyson

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