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19 **UNITED STATES DISTRICT COURT**  
20 **SOUTHERN DISTRICT OF CALIFORNIA**

21 **SECURITIES AND EXCHANGE**  
22 **COMMISSION,**

23 Plaintiff,

24 v.

25 **LOUIS V. SCHOOLER and FIRST**  
26 **FINANCIAL PLANNING**  
27 **CORPORATION d/b/a WESTERN**  
28 **FINANCIAL PLANNING**  
**CORPORATION,**

Defendants.

Case No. 12 CV 2164 GPC JMA

**DEFENDANTS' OPENING BRIEF RE:  
COURT'S PROPOSED  
RECONSIDERATION OF ORDER  
GRANTING IN PART AND DENYING  
IN PART DEFENDANTS' MOTION  
TO MODIFY PRELIMINARY  
INJUNCTION ORDER (RELEASE OF  
GENERAL PARTNERSHIPS FROM  
RECEIVERSHIP)**

Date: July 18, 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 Opening Brief in response to Part 4 of this Court’s order of April 25,  
5 2014, granting in part and denying in part Plaintiff Securities and Exchange  
6 Commission’s (“SEC”) Motion for Partial Summary Judgment (Dkt. No. 583)  
7 (“Order”).

8 Defendants address that part of the Court’s Order that states that the Court  
9 will reconsider its earlier order of August 16, 2013, in which it modified the  
10 Preliminary Injunction of March 13, 2013 to release the raw-land general  
11 partnerships that are the subject of this litigation (“GPs”) from the control of the  
12 Court-appointed Receiver (Dkt. No. 470) (“Modification Order”).

13 **I.**

14 **INTRODUCTION**

15 Following extensive briefing and over an hour of oral argument on July 26,  
16 2013, the Court on August 16, 2013 issued its Modification Order releasing the GPs  
17 from the receivership subject to various conditions precedent. Dkt. No. 470. The  
18 Court then denied Defendants’ motion for reconsideration of Part II.G.2 of the  
19 Modification Order, a condition precedent of liquidating Western’s equity interests  
20 in the GPs. Dkt. No. 494. Upon this Court’s denial of their motion for  
21 reconsideration, Defendants filed an appeal of Part II.G.2 of the Modification Order  
22 with the Ninth Circuit. Dkt. No. 499.

23 Defendants moved for a stay of Part II.G.2 of the Modification Order pending  
24 the outcome of the appeal to the Ninth Circuit. On November 14, 2013, this Court  
25 granted Defendants’ motion in part but stayed the entire Modification Order pending  
26 the conclusion of the appeal. Dkt. No. 513. The next day, the SEC filed a cross-  
27 appeal challenging the entirety of the Modification Order. Dkt. No. 514.

28 ///

1 Defendants and the SEC filed opening and reply briefs between November  
2 2013 and March 2014. *SEC v. Schooler*, 9th Cir. Case Nos. 13-56761 and 13-  
3 56948, Dkt. Nos. 11, 25, 29, 32.

4 On April 25, 2014, following the filing of cross-motions for partial summary  
5 judgment by Defendants and the SEC, this Court issued its Order denying  
6 Defendants' motion and granting the SEC's motion in part, and ruling that as a  
7 matter of law, the GP interests were securities. In Part 4 of its Order, this Court  
8 stated that it was *sua sponte* reconsidering the Modification Order, even though  
9 cross-appeals on the Modification Order are pending. Dkt. No. 583, 20:20-21:7.

10 On April 30, 2014, the Ninth Circuit issued a Notice of Oral Argument for  
11 July 11, 2014, in Pasadena, California. *SEC v. Schooler*, 9th Cir. Case Nos. 13-  
12 56761 and 13-56948, Dkt. No. 37.

## 13 II.

### 14 ARGUMENT

#### 15 A. Standard of Review

16 District courts have the authority to reconsider and revise interlocutory orders,  
17 such as orders granting motions for partial summary judgment and orders entering  
18 preliminary injunctions. *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996). A  
19 district court may reconsider and revise a previous interlocutory decision for any  
20 reason it deems sufficient, even in the absence of new evidence or an intervening  
21 change in or clarification of controlling law. *Hydranautics v. Filmtec Corp.*, 306 F.  
22 Supp. 2d 958, 968 (S.D. Cal. 2003).

23 However, a court should generally leave a previous decision undisturbed  
24 absent (1) a showing that it represented clear error or would work a manifest  
25 injustice; (2) newly discovered evidence; or (3) an intervening change in controlling  
26 law. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); Order  
27 Denying Motion for Partial Reconsideration, Dkt. No. 494, at 3 (citing *Sch. Dist.*  
28 *No. 1J, Mulmouth County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993)).

1 Clear error occurs when “the reviewing court on the entire record is left with the  
2 definite and firm conviction that a mistake has been committed.” *United States v.*  
3 *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

4 After an appeal has been filed, the district court lacks jurisdiction to modify,  
5 dissolve, or vacate a preliminary injunction appealed from on the basis of new  
6 arguments or new evidence. *See, e.g., Prudential Real Estate Affiliates, Inc. v. PPR*  
7 *Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000); *Coastal Corp. v. Texas Eastern*  
8 *Corp.*, 869 F.2d 817, 819-20 (5th Cir. 1989) (holding that the district court’s  
9 dissolution of an injunction based on newly submitted evidence fell outside of the  
10 authority vested in the district court by Rule 62(c) of the Federal Rules of Civil  
11 Procedure). Likewise, the district court lacks jurisdiction to reconsider an order that  
12 has been appealed. *See Vroman v. United States*, 997 F.2d 627, 627 (9th Cir. 1993)  
13 (“The district court was without jurisdiction to respond to Vroman’s motion for  
14 reconsideration because he filed it after having filed a notice of appeal.”).

15 **B. Because the Modification Order Is On Appeal and Was Stayed**  
16 **Pending Appeal, this Court Has Been Divested of Jurisdiction to**  
17 **Reconsider It**

18 Generally, the timely filing of a notice of appeal is an event of jurisdictional  
19 significance, immediately conferring jurisdiction on a Court of Appeals and  
20 divesting a district court of its control over those aspects of the case involved in the  
21 appeal. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *Davis v.*  
22 *United States*, 667 F.2d 822 (9th Cir. 1982) (since notice of appeal regarding  
23 dismissal of case had been filed, district court had no jurisdiction to consider motion  
24 for leave to amend complaint). The district court cannot then take action that would  
25 alter or modify the substance of the matter on appeal. *Sumida v. Yumen*, 409 F.2d  
26 654, 655-56 (9th Cir. 1969).

27 An appeal from a grant or modification of a preliminary injunction divests the  
28 district court of jurisdiction over the preliminary injunction, because the grant,

1 denial, or modification of a preliminary injunction is, pursuant to 28 U.S.C. §  
2 1292(a), an immediately-appealable order not requiring certification from the  
3 district court. *Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012) (appeal from  
4 grant of preliminary injunction).

5 Because the entire Modification Order is on appeal, this Court cannot take  
6 action that would alter or modify it – such as reconsidering the Modification Order  
7 altogether. *Prudential*, 204 F.3d at 880 (“A district court lacks jurisdiction to  
8 modify an injunction once it has been appealed except to maintain the status quo  
9 among the parties”); *Sumida v. Yumen*, 409 F.2d at 655-56; see also *Small ex rel.*  
10 *NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*,  
11 611 F.3d 483 (9th Cir. 2010) (reversing district court’s order modifying preliminary  
12 injunction; modification order was issued while injunction was on appeal).

13 The one exception – Rule 62(c) of the Federal Rules of Civil Procedure,  
14 which allows a district court to “suspend, modify, restore, or grant an injunction  
15 during the pendency of the appeal upon such terms...as it considers proper for the  
16 security of the rights of the adverse party” – “grants the district court no broader  
17 power than it has always inherently possessed to preserve the status quo during the  
18 pendency of an appeal; it ‘does not restore jurisdiction to the district court to  
19 adjudicate anew the merits of the case.’” *Natural Res. Def. Council v. Southwest*  
20 *Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001), quoting *McClatchy Newspapers*  
21 *v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982).

22 Rule 62(c) does not allow this Court to reconsider the Modification Order  
23 because the status quo, at the time Defendants filed their appeal (and at the time this  
24 Court entered its order staying the Modification Order), was that the GPs were to be  
25 released from the receivership upon (1) this Court’s approval of an informational  
26 packet to be prepared by the Receiver (subject to Defendants’ comments) and  
27 distributed to the investors, (2) the liquidation of Western’s equity interests in the  
28 GPs, (3) the continuation of operational billing by the GP administrators, (4) the



1 ceasing of Western's payments to the GP administrators and the formation of  
2 agreements between the GPs and the administrators for services, and (5) the  
3 Receiver's continued payment of Western's underlying notes to the original sellers  
4 of the GP-held lands. The Court's reconsideration of the Modification Order would  
5 not preserve the status quo but would upend it.

6 Moreover, since this Court issued an order staying the Modification Order  
7 pending the outcome of Defendants' appeal, this Court's decision to reconsider the  
8 Modification Order would risk disturbing the appellate process.

9 Therefore, the Modification Order should not be reconsidered but left in  
10 effect pending the outcome of the appeal. Since oral argument will be held before  
11 the Ninth Circuit on July 11 – one week before the hearing on this matter – it would  
12 be prudent to allow the appeal to run its course, as the Ninth Circuit's ruling may  
13 provide judicial precedent that would not only affect this particular case but future  
14 cases as well, for the benefit of future litigants and receivers.

15 **C. Whether the GP Interests are Securities as a Matter of Law is**  
16 **Irrelevant to the Issue of Whether a Receivership Over the GPs Is**  
17 **Legally and Factually Justified; Management of the GPs Remains**  
18 **Minimal and Does Not Require the Presence of a Receiver**

19 Part 4 of the Court's Order of April 25, 2014, appears to conflate the issue of  
20 whether the GP interests are securities with the issue of whether maintaining a  
21 receivership over the GPs is justified under the law and facts. Whether the  
22 Partnership Agreements and Co-Tenancy Agreements fail to vest any rights or  
23 powers on the investors at the time of investing and therefore prove the existence of  
24 a security – a matter that Defendants dispute – the GPs, upon completion of the  
25 offering, are real, legally-established entities holding legitimate title to land. The  
26 SEC does not contend, and cannot prove, that the Partnership Agreements and Co-  
27 Tenancy Agreements are void or voidable, that the GPs are not legally-established  
28 entities, or that the GPs do not actually hold title.

1 This Court has acknowledged in the Modification Order that the continuation  
2 of the receivership – an admittedly “extraordinary remedy” – over the GPs is  
3 unwarranted “given the minimal operations needed to run the GPs.” Dkt. No. 470,  
4 25:11-12. As this Court has noted, “[A]verage citizens pay their mortgages,  
5 property taxes, and insurance premiums every day. And some even hire  
6 professionals, such as accountants and lawyers, to help them manage their affairs.  
7 There is thus no reason to believe that investors could not do the same on behalf of  
8 the GPs...” *Id.* at 25:13-16.

9 The operations needed to run the GPs - paying the property taxes and  
10 insurance for the parcels (and any notes for the purchase of their lands from  
11 Western), and ensuring that the partners receive their Form K-1's in time for  
12 preparing their tax returns – remain the same whether the GP interests are deemed as  
13 a matter of law to be securities. They are minimal activities and will remain so in  
14 the future. The Court’s April 25 Order does nothing to change any of facts regarding  
15 how the GPs operate – the GPs still have minimal administrative functions (paying  
16 taxes, insurance, and filing K-1’s) while they wait for the eventual sale of their  
17 property. The Court’s granting of partial summary judgment with regard to the first  
18 *Williamson* factor does nothing to alter this reality or otherwise make the ongoing  
19 operation of the GPs any more complicated than it has ever been.

20 Receivers are typically appointed and maintained in position when an activity  
21 involving real estate is being mismanaged to the point that investors’ funds are  
22 jeopardized and in danger of wrongful dissipation. However, the GPs – unlike other  
23 cases cited to by the SEC in support of its TRO application (Dkt. No. 3-1) – are not  
24 complex business activities involving improved properties such as orange groves,  
25 jojoba plantations, or apartment buildings, where active management is necessary to  
26 ensure a steady flow of rental income or a marketable harvest. *See SEC v. W.J.*  
27 *Howey Co.*, 328 U.S. 293 (1946); *Koch v. Hankins*, 928 F.2d 1471 (9th Cir. 1991);  
28 *McConnell v. Frank Howard Allen & Co.*, 574 F.Supp. 781 (N.D. Cal. 1983).

1           The GPs' investment consists of raw land held solely for long-term  
2 appreciation through the growth of nearby properties, with no farming, mining,  
3 grazing, or maintenance and operation of buildings upon it (and none planned  
4 during the GPs' ownership of it). The GPs were not organized to perform the  
5 business activities required for eventual development of the land, such as applying  
6 for land-use entitlements, or installing the necessary infrastructure such as roads,  
7 water and sewer mains, and electricity. Those complex activities would be done by  
8 the developers after they buy the land from the GPs. The defined purpose, as  
9 presented in the partnership agreements and Partner's Representations, was for the  
10 GPs to hold the land until, in the general partners' opinion, the time was right to sell  
11 – that is, when the developers needed the land for residential neighborhoods,  
12 shopping centers, or industrial parks. The only decision to be made is whether to  
13 accept an offer to purchase the land held by the GP. Thus, there is no risk of  
14 mismanagement that would justify the Receiver's presence.

15           The imposition and continuation of a receivership over a system that has  
16 functioned without incident for over three decades harms the GPs in two ways. First,  
17 the receivership removes control of the land from its owners, the investor-general  
18 partners who are the sole beneficiaries of their ownership decisions. Second, the  
19 cost of the receivership, including legal fees and consultant/expert fees, is an  
20 expense that was never anticipated by anyone involved, certainly not the investors.

21           As Defendants have previously explained at length (Dkt. No. 195-1), the  
22 SEC's position, upon which this Court appointed the Receiver, is based on a  
23 fundamental misunderstanding of how the GPs are organized and operated.<sup>1</sup> Under  
24 the terms of the partnership agreements, the GP investors retain full control and all

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25  
26 <sup>1</sup> As Defendants will contend on appeal at the close of this case, Part 3 of the Court's  
27 Order declaring the GP interests to be securities as a matter of law is likewise based  
28 on a fundamental misunderstanding of how the GPs are organized and operated.  
However, that matter will be more fully elucidated another day.

1 major decisions require a majority vote, with Defendants having only a non-voting  
2 interest. Defendants share in the profits of the eventual sale of the raw land to  
3 developers, but they do not get to control when the land is to be sold, to whom, and  
4 for how much, because of their complete lack of control through voting. The GP  
5 investors, by virtue of retaining control by majority vote, are true general partners,  
6 clothed with all necessary and sufficient authority to carry out these basic  
7 administrative tasks. Classifying the GPs as securities does not change anything  
8 about the structure, operation, and governing documents by which the GPs function.

9 The analysis carried out last summer with regard to the need, or lack thereof,  
10 for a Receiver over the GPs has not changed. The granting of partial summary  
11 judgment does not change a single word in the General Partnership Agreement and  
12 other governing documents. It does not cause one single additional operational  
13 change in how any of the GPs operate. They still only have to pay taxes, insurance,  
14 and file K-1's while they wait for an interested buyer. The Court's granting of  
15 partial summary judgment has zero impact upon the day to day operational functions  
16 and needs of the GPs. The analysis from last summer that the GPs are separate and  
17 independent legal entities with minimal administrative needs remains exactly the  
18 same before and after the Court's April 25 Order.

19 This becomes even clearer when examining the basis for the Court's granting  
20 of partial summary judgment. The Court looked to the offering period in  
21 determining the first *Williamson* factor was met. However, the 86 GPs that continue  
22 to be subjected to the Receivership all exited the offering period years ago – they no  
23 longer are in the timeframe focused on by the Court in its April 25 Order. Even  
24 assuming the Court's analysis is correct that the GPs do not take effect until after the  
25 offering period closes (a contention Defendants challenge), all 86 of the GPs at issue  
26 reached the end of the offering period and even by the Court's interpretation of the  
27 governing documents, became full-fledged general partnerships at least by the time  
28 the offering closed. They today exist as legally separate entities with all the rights

1 and obligations any other legal entity has.

2 Thus, the Court's analysis of the offering period and the details regarding  
3 whether or not the GP Agreements took effect upon execution by each individual  
4 investor or only when the offering period closed has absolutely no bearing on the  
5 question of whether the 86 GPs, now fully formed as separate legal entities, should  
6 or should not be subjected to receivership. The offering period and the securities  
7 analysis has no role in the question that was briefed, argued, and decided last  
8 summer: Should the GPs continue to be subjected to a receivership when (1) the  
9 GPs were never provided their due process hearing, and (2) there is no demonstrated  
10 need for the receiver to assist the GPs in paying their insurance and tax bills twice a  
11 year.

12 Whether Western had or did not have an obligation to make filings with the  
13 SEC regarding the investments offered is a question with no bearing on whether the  
14 GPs, now fully formed, can have their constitutional due process rights violated.

15 This Court has held that the continued presence of the Receiver was to clarify  
16 Western's financial affairs. Dkt. No. 59. The Receiver has since clarified  
17 Western's financial affairs in a two-part report and found the accounting records for  
18 Western and the GPs to be "accurate and reliable." Dkt. No. 182, p. 14; *see also*  
19 Dkt. No. 504. The Receiver has not identified any operational malfeasance or  
20 financial mismanagement. The dollars are accounted for. The transactions are what  
21 they purport to be. Noticeably absent are any of the accounting issues one normally  
22 reads about in cases of investment fraud.

23 The only fraud allegation made to date is with regard to the pricing of the  
24 units. There is nothing the Receiver can do at this point with regard to that alleged  
25 activity. There simply is no evidence or even any allegation regarding ongoing  
26 operational malfeasance or financial mismanagement of the GPs requiring the  
27 protection of a receiver.

28 ///

1           “A receivership is only a means to reach some legitimate end sought through  
2 the exercise of the court of equity. *It is not an end in itself.*” *Kelleam v. Maryland*  
3 *Cas. Co.*, 312 U.S. 377, 381 (1941) (emphasis added) (quoting *Gordon v.*  
4 *Washington*, 295 U.S. 30, 37 (1935)). “Consequently, a receivership must be  
5 monitored to ensure it is still serving the function for which it was created.” *SEC v.*  
6 *Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1275 (D. Utah 2009)  
7 (citing *Gordon*, 295 U.S. at 37).

8           Any speculative concerns identified by the SEC at the outset of this case  
9 about financial malfeasance or commingling or unaccounted for transactions have  
10 been erased. Any concern by the Court that the Receiver needed to take inventory  
11 of all assets, bank accounts, and records belonging to Western and the GPs no  
12 longer exists. Full inventory and lockdown has been accomplished. No  
13 mismanagement has been identified. All that is left are the original causes of action  
14 brought by the SEC against the Defendants, which will in no way be prejudiced or  
15 otherwise hindered by removing the GPs (and Western) from the receivership.

16           The Modification Order was not issued in clear error, since it was issued upon  
17 the same facts that existed then and now with regard to the administration of the  
18 GPs. There is no manifest injustice that would result if the Modification Order  
19 remained in place pending the Ninth Circuit’s appeal. However, manifest injustice  
20 would result if the Modification Order was reconsidered and reversed by this Court,  
21 because the investors would have no escape from the expensive mismanagement of  
22 the Receiver.

23           The reconsideration of the Modification Order, with the continued  
24 receivership over the GPs, would mean that the receivership has become an end in  
25 itself even though it does not serve the function for which it was created. This  
26 Court’s granting partial summary judgment to the SEC is a separate matter and does  
27 not compel the reconsideration of the Modification Order.

28 ///

1           **D. Because This Court’s Reconsideration of the Modification Order**  
2           **Would Keep the GPs and Their Investors in Thrall to a Receiver**  
3           **Who Was Foisted Upon Them Without Due Process or Their**  
4           **Consent, The Investors Are Entitled To an Opportunity to File**  
5           **Briefs and Be Heard**

6           In the Modification Order, this Court acknowledged that the GP investor-  
7 partners had not yet been provided any hearing in this case and that the investors  
8 had not had a full opportunity to be heard regarding the inclusion of the GPs in the  
9 receivership. Dkt. No. 470, 19:24-25, 22:2-3. However, this Court then concluded  
10 that because the GPs were to be released from the receivership (albeit subject to  
11 specific conditions precedent, including the liquidation-of-Western’s-equity-interest  
12 condition that is the subject of Defendants’ interlocutory appeal), the GPs had not  
13 suffered a due process violation.

14           If this Court reconsidered the Modification Order, the GPs and their investors  
15 would remain in thrall to the Receiver, whom the investors did not consent to being  
16 foisted upon them, and who was foisted upon them without any hearing provided to  
17 the investors.

18           When a receiver is appointed over assets that are disputed by a third party,  
19 such as investors who are not named as plaintiffs or defendants, due process dictates  
20 that the third party be given a hearing on the matter. *Liberte Capital Group, LLC v.*  
21 *Capwill*, 421 F.3d 377, 384 (6th Cir. 2005), quoting *Board of Regents of State*  
22 *Colleges v. Roth*, 408 U.S. 564, 569-70 (1972) (“When protected interests are  
23 implicated, the right to some kind of prior hearing is paramount.”) (other citations  
24 omitted).

25           When it requested its temporary restraining order, even the SEC recognized  
26 that the “GPs will ... have notice and an opportunity to be heard before any of their  
27 assets are placed under the control of a permanent receiver.” Dkt. No. 3-1 at 23,  
28 citing *In re San Vicente Med. Partners, Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992)  
29 (“a district court has the power to include the property of a non-party limited

1 partnership in an SEC receivership order as long as the non-party meets the  
2 minimum contact standard ... *and receives actual notice and an opportunity for a*  
3 *hearing*") (emphasis added).

4 "The Constitution *requires* that property owners receive procedural due  
5 process in the form of notice and opportunity *for a hearing.*" *In re San Vicente*  
6 *Med. Partners, Ltd.*, 962 F.2d at 1407 (emphasis added), citing *Goss v. Lopez*, 419  
7 U.S. 565, 577-79 (1975) ("deprivation of life, liberty, or property by adjudication  
8 [must] be preceded by notice and *opportunity for hearing* appropriate to the nature  
9 of the case") (emphasis added, citations and quotations omitted). *C.f.*, *United States*  
10 *v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984) (non-party received due  
11 process in receivership proceeding since they were involved in multiple steps,  
12 including appearance of their attorney at preliminary injunction hearing); *SEC v.*  
13 *Whitworth Energy Resources Ltd.*, 243 F.3d 549 (9th Cir. 2000) (investors'  
14 procedural due process rights protected since they were given an opportunity for a  
15 hearing concerning the sale of property in receivership).

16 The Court recognized, in the Modification Order, that many of the investors  
17 affected here have challenged having their assets placed in the receivership by  
18 submitting communications to the Court. Dkt. No. 470, 19:17-20. However, due  
19 process requires an actual hearing before those assets can be placed into  
20 receivership. Therefore before the Court can even undertake reconsideration of its  
21 Modification Order, the Court must provide the investors the hearing due process  
22 requires, including an opportunity for full briefing on the threshold question of  
23 whether a receivership can or should be imposed upon them. Until the investors are  
24 provided with that hearing, this Court lacks authority to hold the July 18 hearing  
25 proposed by the Court.

26 To the extent the Court proceeds with a reconsideration of the Modification  
27 Order, due process absolutely requires the investors be given the opportunity to  
28 provide further considerations directly before the Court through the filing of briefs



1 and appearances before the Court at the July 18, 2014 hearing, particularly since  
2 their expectations of being liberated from the Receiver's control and administering  
3 their investments will be thwarted by the reconsideration of the Modification Order.  
4 *See Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377, 384 (6th Cir. 2005)  
5 (district court improperly denied a hearing to determine claimant's ownership).  
6 Without the full participation of investors in the hearing, the Court has no authority  
7 to make any determinations regarding the subjection of the investors' assets to  
8 receivership. The only action the Court can take without a full hearing of the  
9 investors is to order the immediate and unconditional release of the GPs from the  
10 receivership – any other action requires a full hearing with investor participation.

11 **III.**

12 **CONCLUSION**

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

- 14 1. Permit the investors to file briefs and be heard at the hearing on July  
15 18, 2014;
- 16 2. Refrain from reconsidering the Order of August 16, 2013 releasing the  
17 GPs from the receivership, and maintain that Order in full force and effect pending  
18 the Ninth Circuit's decision on the cross-appeals from the Order of August 16, 2013;  
19 and
- 20 3. Maintain the Order Granting in Part Motion for Stay pending the Ninth  
21 Circuit's decision on the cross-appeals from the Order of August 16, 2013.

22 DATE: May 9, 2014

Respectfully submitted,

23 /s/Philip H. Dyson

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**CERTIFICATION**

I hereby certify that on the 9th day of May 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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