Eric J. Hougen (SBN 258968)
Law Offices of Eric J. Hougen
624 Broadway, Suite 303
San Diego, CA 92101
Telephone: (619) 702-1000
Facsimile: (619) 702-1005

Philip H. Dyson, Esq. (SBN 097528)
Law Office of Philip H. Dyson
8461 La Mesa Boulevard
La Mesa, CA 91942
(619) 462-3311

Edward Patrick Swan, Jr., Esq. (SBN 089429)
Jones Day
12265 El Camino Real, Suite 200
San Diego, CA 92130
Telephone: (858) 703-3132
Facsimile: (858) 314-1150

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LOUIS V. SCHOOLER and FIRST FINANCIAL PLANNING 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 MOTION FOR MODIFICATION OF PRELIMINARY INJUNCTION ORDER TO REMOVE THOMAS C. HEBRANK AS COURT-APPOINTED RECEIVER

Date: February 13, 2015
Time: 1:30 p.m.
Ctrm: 2D
Judge: Hon. Gonzalo P. Curiel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

RULES

Defendants LOUIS V. SCHOOLER ("Schooler") and FIRST FINANCIAL PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING CORPORATION ("Western") (collectively "Defendants") respectfully submit the following Points and Authorities in support of Defendants' Motion for Modification of this Court's order of October 5, 2012 (final order March 13, 2013) granting a Preliminary Injunction and appointing a receiver for Western and the real estate general partnerships established through Western ("GPs").

Defendants move for modification of the Preliminary Injunction to remove Thomas C. Hebrank as Court-Appointed Receiver and appoint a replacement receiver ***on the grounds that Mr. Hebrank has abdicated his role as an arm of the Court and allowed his activities to become unduly intertwined with the SEC's.***[1]

Mr. Hebrank's deposition testimony and his email correspondence with the SEC, which was produced in response to Defendants' deposition subpoena *duces tecum*, shows Mr. Hebrank and his counsel:

- Collaborating with the SEC on their respective filings with the Court, including sharing red-line draft reports with the SEC and then making last minute changes with regard to both language choices and legal conclusions based on the SEC's litigation strategy.
- Breaching his duty to the General Partnerships by specifically identifying for the SEC arguments and factors favorable to the GPs (and contrary to the SEC's litigation strategy) and then failing to identify those same factors and arguments for the Court in Mr. Hebrank's purported independent reports in which he claims to be

[1] Defendants maintain that a receivership is no longer necessary over Western or the GPs because the original purpose of the receivership – to provide an accounting of Western's and the GPs' financial affairs – has been completed. By filing this motion, Defendants do not concede that a receivership is necessary, but are simply requesting that Mr. Hebrank be removed for the reasons stated herein.

looking out for the GPs' best interests.

- Violating the Court's March 13, 2013 Preliminary Injunction Order (Dkt. No. 174) by providing information and documents to the SEC (and not Defendants) through channels other than those provided for by the Federal Rules of Civil Procedure.
- Conducting telephonic and in-person meetings with SEC counsel about strategy for court hearings;
- Receiving email communications from investors and forwarding those communications to the SEC, but withholding those same communications from Defendants;
- Requesting legal advice and assistance from the SEC's trial and appellate counsel; and
- Failing to take or keep notes of telephonic communications with the SEC and destroying emails of communications with the SEC, other than those that Mr. Hebrank unilaterally deemed to be important.

Defendants also request that the law firm of Allen Matkins Leck Gamble Mallory & Natsis LLP ("Allen Matkins") be disqualified from providing further legal services on behalf of the Receiver, whether Mr. Hebrank is allowed to retain that position or not. The disqualification of Allen Matkins is necessary because of its complicity in Mr. Hebrank's improper affiliation, collaboration and collusion with the SEC.

I.

BACKGROUND

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

On September 6, 2012, the Court appointed Mr. Hebrank as temporary

receiver of Western and 86 real estate general partnerships ("GPs"). Dkt. No. 10, 10-1.

Mr. Hebrank then hired Allen Matkins to provide legal services in support of the receivership, with Ted Fates, Esq., senior counsel at Allen Matkins' San Diego office, providing the bulk of services either directly or supervising junior attorneys. The Court reaffirmed the receivership in its order of October 5, 2012, granting the conversion of the TRO into a preliminary injunction. Dkt. No. 44.

The Court issued a Preliminary Injunction and Order appointing Mr. Hebrank as permanent receiver on March 13, 2013 ("Preliminary Injunction"), with the receivership continuing in effect over Western and the GPs. Dkt. No. 174, p. 4.

Mr. Hebrank was ordered by the Court to submit a report regarding the financial health of the GPs to determine if any GPs should be released from receivership. Dkt. No. 808. A report was filed on November 21, 2014, with Defendants, the SEC, and any interested investors to file responses by January 9, 2015 and with a hearing to be held January 23, 2015. Dkt. Nos. 831, 852.

Mr. Hebrank's deposition was taken on December 10 and 18, 2014, and he provided three banker's boxes of documents, including copies of email communications with the SEC's counsel, at the start of the deposition on December 10, 2014 as requested by subpoena *duces tecum*.[2] Declaration of Philip H. Dyson ("Dyson Decl."), ¶¶ 3-4. Mr. Hebrank's deposition testimony and the documents he produced show that Mr. Hebrank has abdicated his role as an arm of the Court and allowed his activities to become unduly intertwined with the SEC's.

///

[2] As discussed below, Mr. Hebrank deleted most of his emails regarding this case. Defendants have served a document request on the SEC for its emails and communications with Mr. Hebrank, and are serving a subpoena on Allen Matkins, Mr. Hebrank's counsel, for the same documents (which should have been produced as part of Mr. Hebrank's production since they are under his control).

II.

LEGAL STANDARDS

Federal courts have broad discretion "to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership." *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986).

Defendants' motion to modify the preliminary injunction is made pursuant to Federal Rule of Civil Procedure 54(b). Rule 54(b) states that a district court can modify an interlocutory order "at any time" before entry of a final judgment.

A. Role of Receiver as Disinterested, Neutral Arm of Court

"***[A] receiver is an 'officer of the court' – not an arm of the Commission.***" Dkt. No. 174 (Preliminary Injunction Order), p. 9, fn. 7, ¶ 2, citing *In re San Vicente Medical Partners*, 962 F.2d 1402, 1409 (9th Cir. 1991) (emphasis added).

"***The receiver is a neutral court officer appointed by the court.***" *Sterling v. Stewart*, 158 F.3d 1199, 1201 n. 2 (11th Cir. 1998) (emphasis added).

"***The receiver is not an agent of either party to the action …In other words, a receiver acts as a fiduciary on behalf of both parties as a representative and officer of the court.***" *Sec. Pac. Nat'l Bank v. Geernaert*, 199 Cal.App.3d 1425, 1432 (1988) (emphasis added).

Because the receiver is an agent or officer of the court, he or she cannot serve as an agent of the government at the same time; to do so would violate his fiduciary duty to both parties as the court's representative and officer. *See Donell v. Mojtahedian*, 976 F.Supp.2d 1183, 1188 (C.D. Cal. 2013) ("Receiver is not the Government").

III.

ARGUMENT

A. Mr. Hebrank's Abdication of Neutrality and Transition to De Facto Agent of the SEC

Despite Mr. Hebrank's obligation to be a neutral, disinterested court officer,

his conduct – both before and after his appointment by this Court – has shown a continuous course of partnership with the SEC, in which he and his counsel:

- Collaborate with the SEC's trial and appellate counsel on drafting of motions, including making final language choices in its purported independent reports to the Court based on the SEC's litigation strategy and requests.
- Identify for the SEC arguments that are favorable to GPs and then withhold those same arguments and facts from its reports to the Court.
- Provide documents, analysis, and data to the SEC in violation of the Court's March 13, 2013 Order instructing both the Reciever and the SEC to "abide by the Federal Rules of Civil Procedure, which includes the rules of discovery." Dkt. No. 174 at fn. 7.
- Share investors' communications with the SEC but not with Defendants;
- Provide detailed reports to the SEC of his findings while failing to share those reports with Defendants and their counsel;
- Engage in meetings and phone calls with the SEC's counsel to plot case strategy; and
- Engage in recordkeeping practices that constitute sloppy practice at best and at worst constitute spoliation of evidence.

Mr. Hebrank testified that he understands that he is an officer of the Court who is obligated to be independent of both the SEC and Defendants:

Q. You understood you were an officer of the Court, right?

A. Yes.

Q. Independent of both parties, correct?

A. Yes.

Declaration of Philip H. Dyson ("Dyson Decl."), Ex. 25 (hereinafter

"Hebrank Deposition Transcript Part 2"), 8:6-10.

> *Q.* *And you understood at the time that you received this e-mail from Sam[3] on October 18, 2012 that as a receiver, you were supposed to be independent of both parties, both the plaintiff and the defendant; is that correct?*
>
> ...
>
> ***A.*** ***Yes.***

Hebrank Deposition Transcript Part 2 (Ex. 25), 30:24-31:13.

> *Q.* *And you also understood at the time of this E-mail when you received this document that you were supposed to show bias to neither party, both the plaintiff nor the defendant; is that correct?*
>
> ***A.*** ***Correct.***
>
> *Q.* *And you also understood that you had a fiduciary duty to both parties including the plaintiff and defendant to act independent at the time you received this e-mail; is that correct?*
>
> ***A.*** ***Yes.***

Hebrank Deposition Transcript Part 2 (Ex. 25), 31:15-24.

Mr. Hebrank also acknowledged that none of the SEC's attorneys of record in this case were his counsel. Hebrank Deposition Transcript Part 2 (Ex. 25), 9:20-22. However, his conduct in this case – even before his formal appointment by the Court – shows a pattern of bias in favor of, and collaboration with, the SEC.

On August 1, 2012, Mr. Hebrank submitted his proposal for the proposed receivership over Western to Molly White, the SEC's lead counsel, "per your request." Dyson Decl., Ex. 1, p. 1. In his proposal, Mr. Hebrank stated that his company had expertise "to...perform forensic accounting and analysis of *the fraudulent scheme*," notwithstanding that, at the time he submitted his proposal, no

[3] "Sam" refers to Sam Puathasnanon, the SEC's lead trial counsel for this case.

complaint had been filed with the Court, let alone any *prima facie* case having been established. Dyson Decl., Ex. 1, p. 4, last paragraph (emphasis added).

1. Collaboration with the SEC on Preparation of Court Filings and Altering Final Conclusions based on SEC Litigation Strategy Concerns

Mr. Hebrank and his counsel collaborated with the SEC in the drafting of their respective motions, oppositions to motions, and other court filings, and notifications to investors.

On October 18, 2012, at 3:15 p.m., Mr. Puathasnanon emailed Mr. Hebrank and Mr. Fates a copy of the SEC's brief in support of Mr. Hebrank's proposal for Mr. Hebrank's review. Dyson Decl., Ex. 6. Mr. Puathasnanon's email was copied to SEC assistant trial counsel Sara Kalin and to the SEC's regional trial counsel, John Berry. Mr. Berry then emailed Mr. Hebrank, Mr. Fates, and Mr. Puathasnanon at 3:23 p.m. that day, asking:

> by the way, ***is it worth being more equivocal about Schooler's obligations to continue to fund Western?*** in our papers, we just say he "probably" won't have an legal obligation to fund in the future. Ted and Tom, in your report, you are a bit more absolute, saying Schooler definitely won't be required to do so. in the (granted, probably unlikely) event we may want to argue he is obligated on some funding need, ***it may be better to use softer language***?

Dyson Decl., Ex. 6 (emphasis added)

Less than 90 minutes later, at 4:54 p.m. on October 18, 2012, Mr. Hebrank filed his Second Report and Proposal, in which he wrote: "Although Mr. Schooler has stated that he intends to continue to fund Western, ***there is no mechanism in place to compel him to make payments required to keep loans current or to negotiate with lenders***." Dkt. No. 59, 5:11-13. Mr. Hebrank's final language indicates a softening of the earlier version of the report, which demonstrates the SEC's influence over his filings with the Court.

At the time that Mr. Hebrank received the emails containing the SEC's draft

response and Mr. Berry's suggestions to soften the language in his Second Report and Proposal, Mr. Hebrank understood that he was supposed to be an independent, neutral arm of the Court:

> *Q.* *And you understood at the time that you received this e-mail from Sam[4] on October 18, 2012 that as a receiver, you were supposed to be independent of both parties, both the plaintiff and the defendant; is that correct?*
>
> ...
>
> ***A.*** ***Yes.***
>
> ...
>
> *Q.* *And you also understood at the time of this E-mail when you received this document that you were supposed to show bias to neither party, both the plaintiff nor the defendant; is that correct?*
>
> ***A.*** ***Correct.***
>
> *Q.* *And you also understood that you had a fiduciary duty to both parties including the plaintiff and defendant to act independent at the time you received this e-mail; is that correct?*
>
> ***A.*** ***Yes.***
>
> ...
>
> *Q.* *You also understood that you were appointed by the court to be an independent party, independent from both the plaintiff and defendant, correct?*
>
> ***A.*** ***Correct.***

Hebrank Deposition Transcript Part 2 (Ex. 25), 30:24-32:7.

On December 7, 2012, Mr. Puathasnanon emailed Mr. Hebrank and Mr. Fates regarding the proposed Preliminary Injunction Order and asking them for their

[4] "Sam" refers to Sam Puathasnanon, the SEC's lead trial counsel for this case.

comments on proposed changes. Dyson Decl., Ex. 7.

On June 20, 2013, Mr. Hebrank and his counsel engaged in email correspondence with the SEC's counsel regarding language to be inserted in their respective opposition filings (see Dkt. Nos. 206, 207) to Defendants' motion to modify the Preliminary Injunction to remove the GPs from the receivership. As part of the correspondence, Mr. Fates supplied the latest version of their opposition to the SEC's counsel for their review:

> Having given in further consideration, we think it's important to say something about the role Western plays in operating and financing the GPs so that preventing foreclosures is not the only reason we talk about for the receivership over the GPs to continue (one could argue in response that each GP could independently decide to file bankruptcy and receive the same protection). ***Attached is a redline of our response reflecting the new language we added. We recognize that this an important issue in the case and that our new language may overlap somewhat with arguments you are making, so we thought it best to run it by you and get your feedback. Please let us know your thoughts.***

Dyson Decl., Ex. 8 (emphasis added). Mr. Puathasnanon responded: "***Thanks ted. I think the revision looks fine.***" Id. (emphasis added).

Mr. Hebrank testified that he was aware of Mr. Fates sharing draft pleadings with the SEC for their review and that ***he considered it appropriate, as an independent agent of the Court, for his counsel to share drafts of his pleadings with the SEC alone for their review and comment.*** Hebrank Deposition Transcript Part 2 (Ex. 26), 35:15-36:4. However, Mr. Hebrank did not recall if he had ever requested any feedback from Defendants' counsel prior to filing any pleadings or motions with the Court. Hebrank Deposition Transcript Part 2 (Ex. 26), 37:16-20.

This email demonstrates that Mr. Hebrank and his counsel were very aware and cognizant of the effect their language choices in their reports to the Court might have on arguments the SEC might want to make as part of its litigation strategy. Rather than take steps to ensure that his reports to the Court were his true

independently-arrived-at conclusions, Mr. Hebrank purposely asked the SEC to review his "new language" as it might "overlap somewhat with arguments you are making." There is no explanation for this inquiry other than to tailor Mr. Hebrank's supposed independent reports with the aims and goals of the SEC's litigation strategy. A true pursuit of independent conclusions would in all situations counsel the exact opposite behavior than that exhibited by Mr. Hebrank.

On August 28, 2013, Mr. Puathasnanon emailed Mr. Hebrank and Mr. Fates: "***Here is our first stab at a summary of the allegations. Please let us know if you have any thoughts or questions***." Dyson Decl., Ex. 9. Mr. Hebrank admitted to receiving the email and said that he thought it was appropriate for him to review the SEC's allegations. Hebrank Deposition Transcript Part 2 (Ex. 25), 37:21-38:3.

2. Using the Receiver's Purported Independent Factual Reports to Present Arguments Strategically Beneficial to the SEC

Even the Receiver's most recent report filed on November 21, 2014 that is currently before the Court for its consideration (Dkt. No. 852) is not the independent report requested by the Court. The legal arguments presented in it were largely researched by the SEC's appellate counsel. This is demonstrated by the emails back and forth between the Receiver and the SEC.

This collaboration began earlier this year. In emails on August 29, 2014, Mr. Hebrank and Mr. Fates were in communication with Susan S. McDonald and Stephen G. Yoder, who are the SEC appellate counsel assigned to this case.[5] Dyson Decl., Ex. 18.

On September 4, 2014, Mr. Hebrank informed both the trial counsel and appellate counsel, in response to a query from Ms. McDonald, he did not know how

[5] Defendants respectfully request that the Court take judicial notice of the interlocutory appeals in this case: Ninth Circuit Case Nos. 13-56761, 13-56948, 14-56313, and 14-56315, in which Ms. McDonald and Mr. Yoder have made appearances and filed briefs.

many email addresses Dennis Gilman, an investor who was organizing opposition to Mr. Hebrank, was writing to. Dyson Decl., Ex. 20. Ms. McDonald thanked Mr. Hebrank for looking into the matter. *Id.*

Then in mid-November 2014, Ms. McDonald emailed Mr. Hebrank and Mr. Fates to provide the findings of legal research and legal resources regarding receiverships. Mr. Fates then asked various legal questions of Ms. McDonald regarding whether district courts should not make decisions on investor distributions or recoveries before addressing the SEC's fraud claims. Ms. McDonald responded to Mr. Fates by providing him with quotations from and citations to various treatises. Dyson Decl., Exs. 22, 23. Mr. Fates then used the SEC's research as the basis for Mr. Hebrank's argument in his Report and Recommendations Regarding General Partnerships. Dkt. No. 852, p. 8.

This discussion between Mr. Hebrank, Mr. Fates, and the SEC's appellate counsel goes far beyond the straightforward accounting information and data that the Court asked Mr. Hebrank to provide. The discussion with the SEC is how the SEC's efforts to pursue disgorgement against Defendants (NOT the GPs) can be woven into considerations regarding whether the GPs – which are separate legal entities - are or are not financially and operationally sound enough to function without the aid of a receiver. To undertake the effort to factor in the SEC's larger disgorgement litigation strategy into a request by the Court for hard accounting metrics regarding the GPs demonstrates how actively Mr. Hebrank and his counsel are working for the SEC. Any claim that all of this just happens to line up with the Receiver's actual independent analysis of the case loses all credibility in the face of these extensive strategic discussions with one of the litigants to the matter.

Thus, a report that is presented as Mr. Hebrank's independent, neutral, and unbiased factual presentation to assist the Court in weighing the respective arguments of the parties to the litigation is in fact, one more report to this Court in which Mr. Hebrank has actively sought out the SEC's strategic considerations. The

result is that the SEC has put its thumb on that supposed neutral scale.

The legal arguments presented are not those of Mr. Hebrank as a purportedly independent and neutral arm of the Court, but rather an effort to further the SEC's arguments. The specific, delineated purpose of having a receiver – that the Court gets the benefit of an independent and unbiased weeding out of the various arguments put forth by the parties to the litigation – is the opposite of what has been occurring in this case.

Mr. Hebrank's and Mr. Fates' collaboration with the SEC in the preparation and filing of reports and oppositions to Defendants' motions is particularly offensive since they have complained about purported connections between Defendants and investors who are displeased with the heavy hand of receivership over their GPs. See Dkt. No. 852, p. 5. It is hypocritical for Mr. Hebrank and Mr. Fates to argue that Mr. Schooler is aligning with (or "manipulated," to use their term) upset GP investors when they have been actually working with the SEC to conduct legal research and prepare court filings on dispositive matters.

3. Breaching his Duty to the GPs by Sharing Arguments Favorable to the GPs with the SEC While Failing to Share the Same Information with the Court

In Mr. Fates' June 20, 2013 email to the SEC, he not only asks for their input regarding his new language choices, he also identifies for the SEC an argument that is favorable to the GPs regarding their removal from receivership:

> Having given in further consideration, we think it's important to say something about the role Western plays in operating and financing the GPs so that preventing foreclosures is not the only reason we talk about for the receivership over the GPs to continue ***(one could argue in response that each GP could independently decide to file bankruptcy and receive the same protection)***.

Dyson Decl., Ex. 8 (emphasis added).

Mr. Hebrank had identified a specific factor that largely negated one of the

arguments that both he and the SEC were putting forth as a reason why the GPs should not be removed from receivership. Rather than bring this relevant and important fact to the Court's attention, Mr. Hebrank's counsel decided instead to bring it to ONLY the SEC's attention and to do so within an email that is otherwise asking for additional input regarding language choices and strategic considerations "so that preventing foreclosures is not the only reason we talk about for the receivership over the GPs." This is the opposite of what a receiver is appointed to do – the Court knows the biased positions of the litigants, so the reason the Court looks to a Receiver is to have the purported benefit of neutral, unbiased facts that have not been put through the calculus of the plaintiff's litigation strategy. This Receiver needs to be removed immediately.

4. Sharing Information and Communications with the SEC, But Not with the Court or Defendants

During the course of this case, Mr. Hebrank and his counsel have engaged in sharing information and investor communications with the SEC, but not with Defendants or the Court. This is a one-sided distribution of information that demonstrates bias that is inappropriate for a purportedly neutral Court-appointed officer, as a review of the following assortment of these communications shows.

Mr. Hebrank admitted in his deposition that he had "probably" sent "hundreds" of emails to the SEC's counsel directly. Hebrank Deposition Transcript Part 2 (Ex. 25), 10:7-11:6. He did not recall any email correspondence that he sent to the SEC where he also included Defendants' counsel in the correspondence. Hebrank Deposition Transcript Part 2 (Ex. 25), 39:4-7.

Mr. Hebrank did not recall ever informing Defendants' counsel of any of his actions – planned or as carried out. Hebrank Deposition Transcript Part 2 (Ex. 25), 8:23-9:1.

Nevertheless, even though he is supposed to be a disinterested, neutral officer of the Court, Mr. Hebrank stated that he thought it was appropriate to communicate

only with the SEC while withholding information and communications from Defendants' counsel because the SEC was the "moving party." Hebrank Deposition Transcript Part 2 (Ex. 25), 11:8-12:17.

On the evening of September 6, 2012, Mr. Hebrank emailed the SEC's lead and assistant trial counsel, Ms. White and Ms. Kalin, that:

> The takeover went smoothly today. Mr. Schooler was cooperative, and we were able to secure and begin imaging the server and computers…We are meeting Mr. Schooler tomorrow morning at 9AM to review operations in greater detail and to obtain additional information, lists, etc. He was unable to reach his attorney while we were with him today, but we expect his attorney will be present when we meet tomorrow. Our forensic IT people were able to work with Western's IT person while we were there to assist with copying data. They have a large volume of computer backups that go fairly far back in time. ***We would like to have a call with you first thing in the morning, if you are available, to discuss the data that is available in order to best determine what needs to be imaged***. Please let me know your availability in the morning.

Dyson Decl., Ex. 2, p. 1 (emphasis added).

Mr. Hebrank admitted that he did not provide any report to Defendants' counsel about the takeover of Defendants' offices. Hebrank Deposition Transcript Part 2 (Ex. 25), 8:11-12. Mr. Hebrank was unable to explain why he decided it was necessary to report to the SEC – but not to Defendants' counsel – how the takeover of Defendants' business was progressing, the forensic IT work, or the volume of computer backups, or why he planned to call the SEC – but not Defendants' counsel – to determine what information needed to be "imaged" on the computers, other than to state that the SEC was "the moving party." Hebrank Deposition Transcript Part 2 (Ex. 25), 11:8-12:17.

Mr. Hebrank denied that he was acting as the SEC's agent on September 6, 2012, but when asked why he was contacting the SEC's counsel that day to ask them to discuss the data on the computers that he was tasked with safeguarding,

he refused to answer. Hebrank Deposition Transcript Part 2 (Ex. 25), 13:19-14:4.

The next day, Ms. Kalin emailed Mr. Hebrank to report that the SEC had contacted Regents Bank to inform it to allow credits into Defendants' accounts, but not withdrawals. Dyson Decl., Ex. 3. Mr. Hebrank couldn't explain why Ms. Kalin was speaking directly with him, instead of through Mr. Fates, and admitted that Ms. Kalin was not his attorney and was not appointed as receiver. Hebrank Deposition Transcript Part 2 (Ex. 25), 14:8-15:7. Thus, Mr. Hebrank was sharing confidential, non-discoverable material with the SEC.

On September 7, 2012, Ms. Kalin emailed Mr. Hebrank to give him instructions on locating documents and computer files. Dyson Decl., Ex. 4. When asked if he maintained images of Defendants' computers and servers, Mr. Hebrank replied that he did. Yet when he was asked about whether he had shared those images with the SEC, he said that he did not recall, but "If we had we would have been acting in compliance with the court order." Hebrank Deposition Transcript Part 2 (Ex. 25), 17:23-25.

However, Mr. Hebrank was incorrect; the Preliminary Injunction expressly states that the SEC was not to have access to Defendants' documents and records except through the discovery process. Dkt. No. 174, p. 10 ("IT IS FURTHER ORDERED that representatives of the [SEC]…shall not have any authority to have access to, inspect, or copy any or all of the corporate books and records and other documents of Western and/or the other entities in receivership, nor their funds, property, assets and collateral, wherever located, except as provided under the Federal Rules of Civil Procedure") (emphasis original).

On September 26, 2012, Mr. Hebrank emailed Ms. White, Ms. Kalin, and Mr. Puathasnanon to report that:

> …Western is in a serious cashflow bind at this time. Apparently, Mr. Schooler has been advancing funds on a regular basis to fund operations. As per the attached cashflow projection schedule, there are currently insufficient funds to meet payroll and other current

> obligations... ***I wanted to apprise you of the situation first, and get an update on the status of where things stand. Please let me know if you are available to discuss.***

Dyson Decl., Ex. 5.

Mr. Hebrank was questioned about why he gave a report to the SEC:

> Q. *So with that, I'm going to ask you again, why is it that you reported that Western is in a serious cash flow bind at this time do you the SEC, if you recall?*
>
> A. ***I don't recall.***

Hebrank Deposition Transcript Part 2 (Ex. 25), 22:14-18.

On April 28, 2014, Mr. Hebrank sent to the SEC a purchase-price analysis of the GP properties. Dyson Decl., Ex. 10. Mr. Hebrank didn't send that document to Defendants' counsel. Hebrank Deposition Transcript Part 2 (Ex. 25), 38:10-24.

On July 11, 2014, Mr. Hebrank ***forwarded to the SEC*** an email from his assistant, Geno Rodriguez, describing a communication with Matt Lubawy, an appraiser whom Mr. Hebrank's company had contacted to review a listing proposal by CB Richard Ellis for the sale of the property in Las Vegas jointly owned by Horizon and Rainbow Partners. The email stated that Mr. Lubawy had concluded that CB Richard Ellis's proposal was flawed and that his own appraisal could be justified to the Court. Dyson Decl., Ex. 15, p. 1.

This information was not shared with Defendants or the investors in the affected GPs, at least one of whom has requested the information. Dyson Decl., Ex. 15, pp. 2-3 (email from Nancy Kemper to Mr. Hebrank requesting appraisal information). ***Mr. Hebrank admitted in his deposition that he forwarded this information to the SEC, but "chose not to" send it to Defendants' counsel.*** Hebrank Deposition Transcript Part 2 (Ex. 25), 45:13-46:8.

At the hearing on July 18, 2014 regarding the Court's *sua sponte* reconsideration of the August 16, 2013 order releasing the GPs from receivership,

Mr. Fates did not identify Mr. Lubawy to the Court and did not notify the Court that he (1) had discussed Mr. Lubawy's report with the SEC only, (2) had not shared this information with Defendants, and (3) had certainly not shared this information with the affected investors. Hearing Transcript, July 18, 2014, 28:25-31:2.

In addition to withholding appraisal information from Defendants while sharing it with the SEC, Mr. Hebrank also testified that he shared with the SEC correspondence he received from investors, but did not send any of that correspondence to Defendants or their counsel:

Q. *You received various correspondences including but not limited to what's referenced in Exhibit 23 from various investors, right?*

A. ***Yes.***

Q. *And in Exhibit 23, again, you forward it to the SEC correspondence that you had received from investors, correct?*

A. ***Correct.***

Q. *Why?*

A. ***To share communications I received from the investors.***

Q. *And why didn't you share it with the defendants, as well?*

A. ***I chose not to.***

Q. *And that's true for all of the correspondences you received from investors that you shared with the SEC, you unilaterally decided not to share them with the defendants, correct?*

A. ***Correct.***

Hebrank Deposition Transcript Part 2 (Ex. 25), 41:18-42:11.

Q. *Did you consider it appropriate to discuss with the SEC counsel information you had acquired from*

the investors as the receiver in this action?

A. ***Yes.***

Q. Did you consider it appropriate to forward to the SEC counsel correspondences that you received from the investors in this action?

A. ***Yes.***

Q. Then why didn't you forward that same correspondence to the defendants' counsel?

A. ***I chose not to.***

...

Q. Why did you not choose to have conference calls with the defendants' counsel related to information you had received from the investors in this case?

A. ***Just chose not to.***

Q. I want to understand something, Mr. Hebrank, and maybe you can help me with this here. You were appointed by the court as the receiver in this action; is that correct?

A. ***Correct.***

Q. So you understood that by acting as a receiver you were acting as an officer of the court; is that correct?

A. ***Correct.***

Hebrank Deposition Transcript Part 2 (Ex. 25), 47:4-48:7.

On June 24, 2014, Mr. Hebrank ***forwarded to the SEC's counsel*** an email that he had received from an investor, Martin Sweeney, regarding one of Mr. Schooler's occasional letters to his fellow GP investors. Mr. Hebrank described the email as (alleged) proof that "Mr. Schooler has not been deterred from his communications" and that "He also seems to be organizing a rebellion for the

upcoming hearing [on July 18, 2014, regarding the Court's *sua sponte* reconsideration of its earlier order releasing the GPs] and selling them on his viewpoints." Dyson Decl., Ex. 11. ***Mr. Hebrank forwarded Mr. Sweeney's email to the SEC "to inform them of the correspondence" but chose not to inform Defendants or their counsel of the email.*** Hebrank Deposition Transcript Part 2 (Ex. 25), 40:23-41:14.

On July 11, 2014, Mr. Hebrank forwarded to the SEC "for our call" a letter he had received from investor Nancy Kemper regarding her efforts at balloting her fellow investors and soliciting a listing offer from CB Richard Ellis. Dyson Decl., Ex. 14. ***Mr. Hebrank "chose not to" send Ms. Kemper's letter to Defendants' counsel.*** Hebrank Deposition Transcript Part 2 (Ex. 25), 44:20-45:12.

On July 28, 2014 and August 18, 2014, Mr. Hebrank ***forwarded to the SEC*** emails he had received from investor Mark Westover. Dyson Decl., Exs. 16, 17. Mr. Hebrank did not provide those emails to Defendants either. Hebrank Deposition Transcript Part 2 (Ex. 25), 50:1-16, 50:18-25.

On July 3, 2014, September 2, 2014, and September 11, 2014, Mr. Hebrank ***forwarded to the SEC*** emails he had received from investors James and Karen Miller. Dyson Decl., Exs. 12, 19, 21. As with the emails from Mr. Sweeney and Mr. Westover, Mr. Hebrank did not provide the Millers' emails to Defendants either. Dyson Decl., ¶ 5.

5. Strategy Meetings and Phone Calls with the SEC

On July 8, 2014, Mr. Hebrank and Mr. Fates arranged to have a conference call with the SEC's counsel prior to the July 18, 2014 hearing regarding the Court's *sua sponte* reconsideration of the August 16, 2013 order releasing the GPs from receivership. Dyson Decl., Ex. 13. The stated purpose of the meeting was "to discuss and plan" for the July 18, 2014 hearing.

6. Improper Recordkeeping Practices

This case involves 31 years of GP formation and operations, in which 86 GPs

were established for investors to invest approximately $152 million to acquire interests in raw land for future resale. It would be axiomatic that a receivership of this magnitude would require excellent recordkeeping for purposes of review by the Court, particularly when it comes time for payment to be made to the receiver. However, Mr. Hebrank's recordkeeping practices have been sloppy at a minimum, and at worst constitute the deliberate spoliation of evidence.

At his deposition on December 10, 2014, Mr. Hebrank testified that ***he does not keep any records, whether in print or electronic form, of any phone conversations***, including those with the SEC. Dyson Decl., Ex. 24 (hereinafter "Hebrank Deposition Transcript Part 1"), 26:5-24, 34:2-19. Thus, the only way that telephone conversations between Mr. Hebrank and the SEC's attorneys could be reconstructed would be through either Mr. Hebrank's recollection or the recollection (or documents) of the other person with whom Mr. Hebrank was speaking. Hebrank Deposition Transcript Part 1 (Ex. 24), 34:20-35:7. Mr. Hebrank's time records would not be a reliable source for reconstruction of telephone conversations because he "sometimes" – but not always – provided a description of the phone conversation in the billing records. Hebrank Deposition Transcript Part 1 (Ex. 24), 34:12-15. Because of the lack of records of phone conversations, Mr. Hebrank was unable to recall the contents of any of the proposed phone calls described in the emails that he had produced.

Mr. Hebrank also testified that ***he did not retain all emails in this case, but made unilateral decisions as to which emails to keep***. "I retain ones I consider important to the case or that I need to retain," but otherwise kept only the last six months of email history. Hebrank Deposition Transcript Part 1 (Ex. 24), 30:17-20. Thus, other than those emails he chose to keep and those emails still on his computer server that were created in the six months prior to his deposition, Mr. Hebrank had no other email correspondence between him and the SEC to produce. Hebrank Deposition Transcript Part 1 (Ex. 24), 31:2-6, 31:15-32:2.

IV.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court modify the Preliminary Injunction to remove Mr. Hebrank and appoint a new receiver, and to disqualify the law firm of Allen Matkins from providing any further receivership-related legal services in this case.

The entanglement of Mr. Hebrank and Allen Matkins with the SEC and their role as agents of the SEC during the course of this litigation shows that there is no truly-disinterested party purporting to act on behalf of the Court or in the best interests of investors, thereby rendering the receivership a sham.

Contrary to this Court's statement in the Preliminary Injunction that Mr. Hebrank is to be "an 'officer of the court' – not an arm of the Commission," Mr. Hebrank has, from the outset of this case, provided unilateral service on the SEC's behalf, while withholding information from Defendants. In doing so, Mr. Hebrank has acted contrary to law, and therefore must be removed immediately.

DATE: December 22, 2014

Respectfully submitted,

/s/Philip H. Dyson

Philip H. Dyson, Esq. (SBN 097528)
Law Office of Philip H. Dyson
8461 La Mesa Boulevard
La Mesa, CA 91942

Counsel for Defendants

CERTIFICATION

I hereby certify that on the 22nd day of December 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:

Sam S. Puathasnanon, Esq.
Sara D. Kalin, Esq.
Lynn Dean, Esq.
Securities and Exchange Commission
444 S. Flower Street, 9th Floor
Los Angeles, CA 90071

Ted Fates, Esq.
Allen Matkins Leck Gamble Mallory & Natsis LLP
501 West Broadway, 15th Floor
San Diego, CA 92101

/s/Philip H. Dyson
Philip H. Dyson