

1 Eric J. Hougen (SBN 258968)
2 Law Offices of Eric J. Hougen
3 624 Broadway, Suite 303
4 San Diego, CA 92101
5 Telephone: (619) 702-1000
6 Facsimile: (619) 702-1005

7 Philip H. Dyson, Esq. (SBN 097528)
8 Law Office of Philip H. Dyson
9 8461 La Mesa Boulevard
10 La Mesa, CA 91942
11 (619) 462-3311

12 Edward Patrick Swan, Jr., Esq. (SBN 089429)
13 Jones Day
14 12265 El Camino Real, Suite 200
15 San Diego, CA 92130
16 Telephone: (858) 703-3132
17 Facsimile: (858) 314-1150

18 Attorneys for Defendants

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' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
MODIFICATION OF PRELIMINARY
INJUNCTION (INJUNCTION
AGAINST RECEIVER'S
INTERFERENCE WITH BALLOTING
BY GENERAL PARTNERS AND
MISLEADING WEBSITE)**

Date: December 19, 2014

Time: 1:30 p.m.

Ctrlm: 2D

Judge: Hon. Gonzalo P. Curiel

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page No.

I. BACKGROUND1
II. ARGUMENT.....5
III. CONCLUSION11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page No.

CASES

Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119
(9th Cir. 2005)5

Gordon v. Washington, 295 U.S. 30 (1935).....5

Kelleam v. Maryland Cas. Co., 312 U.S. 377 (1941)5

SEC v. Hardy, 803 F.2d 1034 (9th Cir. 1986)5

SEC v. Lincoln Thrift Ass 'n, 577 F.2d 600 (9th Cir. 1978)5

SEC v. Madison Real Estate Group LLC, 647 F.Supp.2d 1271
(D. Utah 2009)5

Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804 (9th Cir. 1963)5

RULES

Federal Rule of Civil Procedure 54(b).....5

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 enjoin the
9 Receiver from enjoining, refusing to honor the results of, interfering with, or
10 disseminating knowingly-false claims regarding, any balloting initiated by the GP
11 investors, and to order the Receiver to correct misleading statements on his website
12 www.ethreeadvisors.com that are contrary to this Court’s statements on the record at
13 the July 18, 2014 hearing on the Court’s *sua sponte* reconsideration of its earlier
14 order (Dkt. No. 470) releasing the GPs from the receivership.

15 I.

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.

6 On August 16, 2013, this Court issued an Order Granting in Part and Denying
7 in Part Defendants’ Motion for Modification of Preliminary Injunction. Dkt. No.
8 470 (“Modification Order”). In the Modification Order, the Court ordered the
9 dissolution of the receivership over the GPs upon the satisfaction of certain
10 conditions precedent, on the grounds that the operational and administrative
11 requirements for the GPs were so minimal that a formal receivership was no longer
12 necessary.

13 On April 25, 2014, this Court issued an order granting in part and denying in
14 part the SEC’s motion for partial summary judgment and denying Defendants’
15 motion for summary judgment. The Court held that the GP equity interests were
16 securities as a matter of law, that it would *sua sponte* reconsider the Modification
17 Order, and that it would hold a hearing on July 18, 2014 on the *sua sponte*
18 reconsideration. Dkt. No. 583.

19 On July 18, 2014, a hearing was held in which counsel for the SEC,
20 Defendants, and the Receiver spoke. At the hearing, the following was said
21 regarding the GPs’ briefs to be filed on the issue of the receivership:

22 MR. HOUGEN: Certainly with regard to -- the parallel
23 would be with regard to Western. There's a receiver over
24 Western; he has authority over Western, but for purposes of
25 litigation, we speak for Western. This was an issue that came
26 up in the early stages of the preliminary injunction order.
27 I just want to be clear that the receiver is still in
28 position, everyone is respecting his authority and his ability
to conduct business on behalf of the general partnerships; but
for purposes of this exercise, it's an exercise the GPs
undertake, and there is not a requirement for them to go

1 through the receiver with regard to that.
2 Because we -- it seems like there's some problematic
3 issues where he's technically in control of them, and you are
4 asking for a legal pleading from that entity.

5 THE COURT: From the GPs?

6 MR. HOUGEN: Yeah. Yeah. The GPs are conducting
7 this exercise without having to necessarily have the discretion
8 or guidance of the receiver as to this activity since it's
9 going to the heart of the issue whether he should be in place
10 or not.

11 THE COURT: Hopefully, it's clear, given what the
12 Court is seeking -- that is, the input from the GPs -- that
13 these briefs don't have to be approved by -- they don't have to
14 be routed through the receiver. And I expect that the language
15 of the Court's order will make that clear, that there doesn't
16 have to be a signoff by the receiver for the filing of these
17 briefs.

18 Transcript of July 18, 2014 Hearing, 37:22-38:23.

19 On July 22, 2014, the Court issued an order formally reconsidering the
20 Modification Order, directing that the GPs would remain in the receivership, but
21 giving the GPs a hearing on October 10, 2014, with the GPs being permitted to file
22 one brief each of no more than 15 pages on or before September 12, 2014. Dkt. No.
23 629 ("Reconsideration Order"), pp. 7-9. The Reconsideration Order states in part:
24 "[T]he GPs will be permitted to provide a response to the Court's decision without
25 the response being reviewed or approved by the Receiver" and "All official
26 responses must include an attachment that lists the names of the individual investors
27 that have signed on to the official response." Dkt. No. 629, 8:5-7, 8:21-22 (emphasis
28 added).

Sometime after the issuance of the Reconsideration Order, investors in each
of the 86 GPs under receivership initiated balloting among the GPs by requesting
that the GP secretaries distribute ballots to all investors. The ballots contained two

1 items for voting: (1) whether to keep the GPs in the receivership and (2) whether the
2 investors agreed to an assessment of not more than \$30 per investor to pay for legal
3 services on the GPs' behalf related to removal of the receivership. Declaration of
4 Philip H. Dyson ("Dyson Decl."), Ex. 1.

5 In response to the investor-initiated balloting, the Receiver posted statements
6 to his website www.ethreadvisors.com, in which he stated the following in the
7 "Case Updates" on the main page ([http://www.ethreadvisors.com/cases/sec-v-
8 louis-v-schooler-and-first-financial-planning-corp-dba-western-financial-planning-
9 corp](http://www.ethreadvisors.com/cases/sec-v-louis-v-schooler-and-first-financial-planning-corp-dba-western-financial-planning-corp), last visited Aug. 29, 2014, Dyson Decl., Exhibit 2, emphasis added):

10 [Question:]

11 I recently received a ballot circulated by the Partnership Administrators. Was
12 this ordered by the Court?

13 [Receiver's Answer:]

14
15 *No, the ballots were not approved or authorized by the Court, nor were the*
16 *issues the ballots ask investors to vote on approved or authorized by the*
17 *Court.*

18 *After the July 18th hearing, a small group of investors held an informal*
19 *meeting and created a committee that appears to be responsible for*
20 *generating this ballot, according to correspondence provided by some*
21 *investors. The Partnership Administrators then circulated these ballots to*
22 *investors by e-mail without the Receiver's prior knowledge or input. It has*
23 *been represented to the Receiver that an investor from each of the 84 active*
24 *General Partnerships requested the ballot be circulated. We additionally*
25 *understand that these ballots only went out to investors that had email*
26 *addresses available. The ballot also asks investors to approve assessing each*
27 *of the approximately 9,000 investor interests for the 84 General Partnerships*
28 *(there are 3,400 investors, but many hold interests in more than one*
partnership) \$30 each for retaining legal services. The assessment of legal
fees has not been authorized by the Court, and the Receiver is not requesting
that the investors pay these amounts.

The Receiver then contacted the GP secretaries and demanded the names of

1 the investors in each GP who initiated the balloting request. Dyson Decl., Ex. 3.

2 II.

3 ARGUMENT

4 Federal courts have broad discretion “to supervise an equity receivership and
5 to determine the appropriate action to be taken in the administration of the
6 receivership.” *S.E.C. v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *see also S.E.C.*
7 *v. Lincoln Thrift Ass’n*, 577 F.2d 600 (9th Cir. 1978)(district court has “wide
8 discretion to determine the appropriate relief in an equity receivership”). However,
9 “[a] receivership is only a means to reach some legitimate end sought through the
10 exercise of the court of equity. It is not an end in itself.” *Kelleam v. Maryland Cas.*
11 *Co.*, 312 U.S. 377, 381 (1941) (emphasis added) (quoting *Gordon v. Washington*,
12 295 U.S. 30, 37 (1935)). “Consequently, a receivership must be monitored to ensure
13 it is still serving the function for which it was created.” *S.E.C. v. Madison Real*
14 *Estate Group, LLC*, 647 F. Supp. 2d 1271, 1275 (D. Utah 2009) (citing *Gordon*, 295
15 U.S. at 37).

16 Defendants’ motion to modify the preliminary injunction is made pursuant to
17 Federal Rule of Civil Procedure 54(b). Rule 54(b) states that a district court can
18 modify an interlocutory order “at any time” before entry of a final judgment. The
19 Ninth Circuit “has long recognized ‘the well-established rule that a district judge
20 always has power to modify or to overturn an interlocutory order or decision while it
21 remains interlocutory.’” *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d
22 1119, 1124 (9th Cir. 2005) (citing *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d
23 804, 809 (9th Cir. 1963)). Under Rule 54(b), the motion to modify a preliminary
24 injunction can be made “to relieve inequities that arise after the original order” and
25 “in substance is based on new circumstances that have arisen after the district court
26 granted the injunction.” *Id.* Such inequities and new circumstances exist here.

27 The preliminary injunction should be modified to enjoin the Receiver from
28 enjoining, refusing to honor the results of, interfering with, or disseminating

1 knowingly-false claims regarding, any balloting initiated by the GP investors, and to
2 order the Receiver to correct the misleading statements on his website, and to order
3 the Receiver to correct his website by removing the misleading and false statements
4 and replacing them with statements explaining that the Court did in fact specifically
5 provide for the GPs to engage in the process of preparing briefs and hearing
6 presentations for the GPs' hearing on October 10, 2014 without the involvement of
7 the Receiver.

8 In addition, the Court's statements at the July 18, 2014 hearing and the
9 specific provisions of the Reconsideration Order clearly contemplate a voting
10 process for the investors in order for the GPs to establish the official majority
11 position of each GP. For example, in Item 7 of the Reconsideration Order the Court
12 ordered that "All official responses must include an attachment that lists the names
13 of the individual investors that have signed on to the official response." Dkt. No.
14 629. Therefore, it is misleading for the Receiver to post on his website that the
15 balloting being undertaken by the investors with regard to this matter was "*not*
16 *approved or authorized by the Court, nor were the issues the ballots ask investors to*
17 *vote on approved or authorized by the Court.*" (quoting from the Receiver's
18 website, emphasis added). To the contrary, the Court specifically provided for the
19 investors to conduct balloting on these very issues – and to do so without any
20 interference from the Receiver.

21 The Receiver should be ordered to immediately correct his website to inform
22 investors that the Court has in fact ordered and authorized the investors to
23 communicate with one another and conduct balloting in order to determine the
24 official majority position of each GP and to provide a list to the Court of "the
25 investors that have signed on to the official response." Dkt. No. 629.

26 The Receiver should also be ordered to remove his comments regarding the
27 efforts of certain investors, because in highlighting only one group's
28 communications (the so-called committee referenced by the Receiver on his

1 website), he is commenting on only one of what have likely been dozens if not
2 hundreds of communications between and among investors on this issue. For the
3 Receiver to additionally state that “[t]he Partnership Administrators then circulated
4 these ballots to investors by e-mail without the Receiver’s prior knowledge or
5 input,” misleadingly implies that the ballots were supposed to have had the
6 Receiver’s input, when the Court has specifically ordered the contrary.

7 The Receiver’s incomplete explanation of the process is directly misleading –
8 creating confusion among investors as to the legitimacy and validity of the balloting
9 process specifically contemplated by the Court. While the specific language in the
10 ballots that have been circulated has not been reviewed by or specifically blessed by
11 the Court or the Receiver – stating this while conveniently and misleadingly leaving
12 out the fact that the Court specifically provided for a process by which each GP
13 should determine, through balloting, what each GPs majority position is and to
14 document for the Court the specific investors in support of that position is troubling
15 at best and must be immediately corrected to preserve the validity of the exercise
16 that has been undertaken by the investors at the direction of the Court.

17 After all, the balloting that has been undertaken is the specific process set
18 forth in the GP’s respective governing documents as to how issues are to be
19 addressed and how decisions are to be made within the structure of the GP’s. For
20 example, the GPs’ Partnership Agreements state that:

- 21 • “Notwithstanding the provisions of the Section titled ‘Signatory
22 Partners,’ *each Partner* (subject to the limitations placed on the Non-
23 Voting Partners as described below) *shall participate in the control,*
24 *management, and direction of the business of the Partnership.*” Dkt.
25 No. 14-1, ¶ 5.1.1 (emphasis added).
- 26 • “*All Partnership decisions shall be made in accordance with the vote*
27 *of a majority of the interests in the capital contributed to the*
28 *Partnership by Partners entitled to vote...*Partnership decisions may

1 be made at meetings of the Partners *or by written assent of the*
2 *Partners through a ballot process.*” Dkt. No. 14-1, ¶ 5.1.2 (emphasis
3 added).

- 4 • “Louis V. Schooler, Western Financial Planning Corporation, First
5 Financial Planning Corporation, EBS Land Co., and any and all
6 persons or entities receiving compensation of any kind from Louis V.
7 Schooler, Western Financial Planning Corporation, First Financial
8 Planning Corporation, or EBS Land Co. shall be ‘Non-Voting
9 Partners.’” Dkt. No. 14-1, ¶ 5.1.3.
- 10 • “*Any Partner, including Non-Voting Partners, may request a vote of*
11 *the Partnership on any matter relevant to the business and operation*
12 *of the Partnership. Upon receipt of such a written request, the*
13 *Partnership Administrator will in a prompt manner prepare and*
14 *distribute a ballot to all Partners at the addresses listed in the most*
15 *recent List of Partners.* In the interests of ensuring all Partners are
16 informed of any and all proposed Partnership action, Non-Voting
17 Partners, although not allowed to vote, will be included in the
18 distribution of any ballot or request for written assent. Procedures will
19 be put in place allowing for Partners to submit their ballot signatures
20 by facsimile, email, or hard-copy delivery.” Dkt. No. 14-1, ¶ 5.2
21 (emphasis added).

22 The plain text of the Partnership Agreements states that any partner can
23 request that a vote be taken, through the balloting process, of the entire GP on “any
24 matter relevant to the business and operation” of the GP. Whether the GP investors
25 are in favor of remaining in the receivership (and forfeiting operational control of
26 their investment to the Receiver) is highly relevant to the GP’s business and
27 operation. Therefore, the decision by a GP to submit a written brief to the Court
28 and/or file a written notice of intention to appear and speak at the October 10, 2014

1 hearing necessarily involves the initiation of a ballot by a GP investor, its circulation
2 to the other investors in the GP, and voting thereon. Otherwise, without balloting,
3 how is a GP expected to take legally binding action?

4 *There is nothing in the Preliminary Injunction that forbids the investor-*
5 *partners from initiating a ballot at any time on any relevant matter, including*
6 *whether to list a property for sale, and there is nothing in the Preliminary*
7 *Injunction that requires the investors to get the Court's or Receiver's consent to*
8 *start the balloting process or to get the Court's or Receiver's approval to what is*
9 *being put on the ballot.*

10 *As stated above, the Court directed that the GP investors were free to*
11 *prepare briefs without getting the Receiver's approval. Furthermore, by directing*
12 *that the GP brief include a list of the investors signing onto the brief, the Court*
13 *has ordered that the GP investors conduct balloting.* Since the Receiver is an arm
14 of the Court for all intents and purposes, it naturally follows that the investors can
15 vote and prepare briefs without advance approval from the Court as well.

16 The Receiver's statements are deliberately intended to manipulate the
17 balloting and briefing process for the GPs. As the Court ordered in the
18 Reconsideration Order, the GPs would be allowed to file briefs on the issue of
19 remaining in receivership, but individual investors were not allowed to file their
20 own briefs. Therefore, it necessarily followed that the investors in a GP would need
21 to vote on the issue of whether or not to be in the receivership, in order to present a
22 brief (or notice to appear at the October 10, 2014 hearing). Indeed, *the Court's*
23 *order requires the investors to vote*, because the Reconsideration Order states that
24 the GP briefs must contain a list of the investors in favor of the GPs' position.

25 Furthermore, if it were decided to submit a brief in favor of removing the
26 Receiver, it would be most efficacious to hire counsel to prepare and file a brief on
27 behalf of the GP (and presumably argue on the GP's behalf on October 10); this
28 would be the right of any other general partnership or other corporate form in the

1 state of California in responding to the imposition of a receivership on its
2 operations. If the GPs want to take such action under consideration to gain the
3 advice of counsel regarding their rights, it would be a due process violation to
4 interfere with such efforts, in the very same way that this Court ordered that
5 Western, despite being subjected to receivership, has the right to be represented by
6 the counsel of their choice in this matter. The Court specifically rejected the
7 Receiver's earlier efforts in this regard. Dkt. No. 174, p. 4, fn. 2.

8 By intimating that this Court's and the Receiver's prior authorization was
9 required as to the balloting process in general and to the two voting items in
10 particular, the Receiver has mislead the investors and therefore is harming the GPs
11 by interfering with the investors' balloting process.

12 A GP cannot act on its own; it can only act through the collaborative efforts
13 of its partners through the affirmative act of voting. That is what distinguishes a
14 general partnership, in which all partners are responsible for making management
15 decisions, from a limited partnership in which the bulk of investors have no powers
16 whatsoever.

17 Here, the investors, on their own, initiated the process of voting on the issues
18 relevant to the October 10 hearing, *as required by the Court in the Reconsideration*
19 *Order*. The Receiver has chosen to interfere with and manipulate the balloting
20 process by disseminating information designed to mislead or deter investors from
21 voting on the most critical issue affecting their investment right now: whether the
22 Receiver is to remain in control of the GPs.

23 Furthermore, the Receiver's comments about the investors' committee are
24 truly inappropriate. The investors are communicating with one another in various
25 ways, so for the Receiver to single out one method of communication and
26 coordination is out of line. The Receiver must confine his comments to informing
27 investors that the Court has set forth the process to be followed with the briefs and
28 Notices of Intent to Appear, and that the Receiver has been ordered to not be

1 involved in this process so he is unable to comment on any details of the process.

2 Thus, the Receiver needs to be ordered to correct his website and be enjoined
3 from further manipulating, interfering with, deterring, misleading, or suppressing or
4 refusing to honor the investors' exercise of their powers under the GP partnership
5 agreements to initiate and conduct voting on matters affecting the GPs, including the
6 filing of briefs and requests to speak at the October 10, 2014 hearing.

7 *Factually-correct and non-misleading replacement language must be*
8 *immediately posted to the Receiver's website, to replace the two misleading*
9 *paragraphs and read substantively as follows:*

10 "The Court's Order on Reconsideration of Releasing the GPs from the
11 Receivership stated that the GPs will be permitted to provide a response to the
12 Court's decision without the response being reviewed or approved by the Receiver,
13 and that any briefs submitted by the GPs must include a list of those investors voting
14 in favor of the brief. It did not state that the response had to be approved by the
15 Receiver or the Court before filing. It did not state that the GPs' investors were
16 prohibited from circulating ballots on what position the GPs were to take regarding
17 the continuation of the receivership over the GPs, through written briefs or
18 appearing in court at the October 10, 2014 hearing to speak. It did not state that the
19 initiation or circulation of ballots in general or the questions posed on the ballots had
20 to be approved or authorized by the Court or the Receiver. Therefore, the GP
21 investors can initiate and circulate ballots on issues regarding the October 10, 2014
22 hearing, including whether to file a brief or Notice of Intent to Appear, and what the
23 GP's position shall be in the brief or in oral presentation to the Court at the October
24 10, 2014 hearing."

25 **III.**

26 **CONCLUSION**

27 Based on the foregoing, Defendants respectfully request that this Court
28 modify the Preliminary Injunction to state that the Receiver is prohibited from

1 enjoining, refusing to honor the results of, interfering with, or disseminating
2 knowingly-false claims regarding, any balloting initiated by the GP investors, and
3 order the Receiver to *immediately* correct the information on his website to read as
4 stated above.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATE: September 2, 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

