

1 Eric J. Hougen, Esq. (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' RESPONSE TO
RECEIVER'S REPORT AND
RECOMMENDATIONS REGARDING
GENERAL PARTNERSHIPS**

Date: January 23, 2015

Time: 1:30 p.m.

Ctrm: 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. INTRODUCTION1

II. ARGUMENT.....4

 A. The Receiver’s First Proposal is Defective Because it Relies on Valuations Lacking Documentary Support And That Should Not be Given Weight.....4

 B. The Receiver’s Second Proposal Calls for the Wholesale And Premature Liquidation of the GPs Through Fire Sales Of Their Lands, Regardless of Financial Condition; The Receiver’s Report Assumes that All GP-Held Properties Will Eventually Be Sold for a Loss, While Failing to Acknowledge Past Performance.....6

 C. Both the First and Second Proposals Have Balloting Schemes and Conditions That Harm the Investors and Inevitably Lead to “Fire Sales” of Most GP-Held Properties; The Proposals Are Partial Regurgitations Of the Receiver’s 2013 Proposal that this Court Rejected.....7

 D. The Receiver’s Report is Not an Independent Neutral Evaluation of the GPs, but is the Product of the SEC’s Legal Assistance and Research and the Receiver’s Collusion with the SEC that is Inappropriate for a Purportedly Disinterested Arm of the Court 12

III. CONCLUSION..... 15

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

City of Chula Vista v. Gutierrez, 207 Cal.App.4th 681 (2012)..... 11

Sovereign Bank v. Schwab, 414 F.3d 450 (3d Cir. 2005)..... 11

1 Defendants LOUIS V. SCHOOLER (“Schooler”) and FIRST FINANCIAL
2 PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING
3 CORPORATION (“Western”) (collectively “Defendants”) hereby submit the
4 following Response to the Receiver’s Report and Recommendations Regarding
5 General Partnerships (Dkt. No. 852, “Receiver’s Report”).

6 I.

7 INTRODUCTION

8 On October 17, 2014, following hearings on October 10 and 15, 2014 at
9 which several dozen investors in the raw-land general partnerships (“GPs”)
10 established through Western and counsel for the parties and the Receiver spoke, the
11 Court issued an order directing the Receiver to provide an updated report and
12 recommendations regarding the GPs, to determine whether each GP was “healthy”
13 enough to be released from the receivership. Dkt. No. 808; Transcript, Oct. 15,
14 2014, 49:13-25.

15 The Court ordered that the Receiver’s Report include, *inter alia*, current
16 information on any amounts owed by each GP to Western, any amounts owed by
17 Western on mortgages for GP-held land, amounts of cash on hand for each GP, the
18 amount and schedule of previously-charged fees and costs for each GP including
19 property taxes, the amount and schedule of projected future fees and costs for each
20 GP, “[n]otice of anything that would significantly complicate the ability of a GP to
21 manage its property,” the amounts and schedule of operational billing by a GP of its
22 partners and amounts received, Western’s equity interests in each GP and valuation,
23 and “[a]ny other information that the Receiver believes is appropriate to consider
24 regarding the state of a GP and its property.” Dkt. No. 808, pp. 3-4.

25 The Court also ordered the Receiver to “assess whether it is prudent to release
26 or maintain the receivership in relation to each GP.” Dkt. No. 808, p. 4.

27 In his Report, the Receiver classifies the GPs, whether holding parcels
28 individually or in co-tenancy, into three different categories of financial health, with

1 the healthiest GPs in “Category A” – “those...that can all pay off their debts and
2 cover their projected operating expenses through the end of 2015...without raising
3 significant capital from their investors.” Category B contains “GPs that can pay off
4 their debts and sustain their 2015 Operations only if they raise a specific amount
5 from their investors...[which] must be less than the estimated net proceeds from a
6 sale of its property interest based on the appraised property value and estimated
7 closing costs.” Category C GPs are “underwater” because “in order to sustain
8 [themselves] for 2015 alone, the [GPs] would need to raise more money from [their]
9 investors than [their] property interest[s] [are] worth.” Dkt. No. 852, p. 16.
10 Defendants have no objection with the Receiver’s classifications of the GPs in that
11 fashion, but do dispute the Receiver’s reliance on the “estimate proceeds of sale” of
12 the GP-held lands because the Receiver’s GP valuation is based upon out-of-date,
13 unsupported appraisals that set things up for a “fire sale.”

14 The Receiver’s Report misses the point of the GP investments. The
15 properties acquired by the GPs were bought to be held for the long term until
16 development had reached the surrounding areas; that would be the triggering event
17 for the GPs’ sale of the properties. The Receiver would short-circuit the entire point
18 of the investments.

19 The Receiver’s Report disregards the Court’s orders by stating that “There are
20 many good reasons for all GPs to sell rather than retain their properties, including
21 GPs in Category A.” Dkt. No. 852, 21:1-2. The Receiver then spends the remainder
22 of his evaluation of the GPs’ financial health arguing for selling the properties – in
23 some cases, without even putting the matter of sale to the investors first (contrary to
24 the Partnership Agreements’ express language mandating that such actions be put to
25 a vote). Dkt. No. 852, 21:2-22:5; Dkt. No. 14-1, ¶ 5.1.2.

26 Furthermore, the Receiver’s conditions on balloting result in the default
27 position being the sale of the GP properties – even if there is no majority vote in
28 favor of a sale. These conditions are contrary to the GP governing documents and

1 the investors' intent to wait until the opportunity of ultimate sale of the properties.
2 See Dkt. No. 14-1, ¶ 1.3 (GP established "for the purpose of acquiring, maintaining,
3 and holding for investment purposes and at some future point in time disposing of"
4 real estate); Dkt. No. 14-3, ¶ 8 (partners' understanding that transferability of GP
5 interest is restricted and that GP investment is a long-term investment).

6 The Receiver's Report then goes beyond what the Court had requested by
7 proposing in Part 2 that the investors who wish to remain in the GPs buy out those
8 investors who wish to leave, with Western's interests to be bought out as well, and if
9 the investors who wish to remain in the GPs cannot raise enough funds to buy out
10 the objecting investors and Western, then the properties would be sold – at a loss –
11 in an "orderly process." The proposed buyout terms were not contemplated by the
12 Court in its October 17, 2014 order (let alone ordered) and do not accomplish
13 anything other than setting up a "fire sale" of the GP-held properties, to the benefit
14 of no one but the Receiver.

15 The underlying purpose of the GP investments is that developers will be
16 willing to pay very large amounts for the right property when the time is ripe for
17 development – but not before then. The Receiver's Report defeats this purpose by
18 creating conditions that would result in the sale of the properties before they are
19 needed for development.

20 The Receiver's Report is also riddled with various incorrect statements
21 regarding the procedural history of this case and Defendants' actions. For example,
22 the Receiver places the entire blame for the inability to send information packets to
23 investors in 2013 on Defendants' appeal of *part* of the Court's August 16, 2013
24 order releasing the GPs from receivership. Dkt. No. 852, 20:12-18. The Receiver
25 chooses to ignore that the SEC filed a cross-appeal as to the Court's *entire* order of
26 August 16, 2013. Dkt. No. 514. The Receiver also chooses to ignore that the basis
27 for Defendants' appeal was that part of the Court's August 16, 2013 order had
28 directed the liquidation of all of Western's GP equity interests, even though the

1 Court had not ruled that the GP interests were securities (let alone entered any final
2 judgment for the SEC). See Dkt. No. 470.

3 Finally, the Receiver's Report is also fatally tainted by the SEC's
4 involvement in the legal research and writing. Defendants have moved for the
5 Receiver's removal in part due to the Receiver's improper collaboration with the
6 SEC – including the Receiver's counsel's requesting and receiving legal research
7 from the SEC's appellate counsel, which the Receiver then inserted into the
8 Receiver's Report. Dkt. Nos. 860, 860-1.

9 II.

10 ARGUMENT

11 **A. The Receiver's First Proposal is Defective Because it Relies on** 12 **Valuations Lacking Documentary Support and That Should Not be** 13 **Given Weight**

14 In his "First Proposal" that classifies the GPs by financial health into
15 Categories A, B, and C, the Receiver uses "Estimated Proceeds from Land Sale" as
16 a determinative factor for whether a GP falls into Category B or C. If the amount of
17 money needed to pay off the GP's debts and the GP's 2015 operating expenses is
18 greater than the "Estimated Proceeds from Land Sale," the GP is in Category C, the
19 least-healthy category; otherwise, the GP is in Category B. Dkt. No. 852, p. 16.
20 However, the Receiver then states:

21 *[T]he figures in the "Est. Proceeds from Land Sale" column on the*
22 *Financial Health Analysis reflect only the estimated net proceeds*
23 *from the sale of a GP property interest and do not represent a gain or*
24 *loss on the investment. In almost all cases, the estimated net sale*
25 *proceeds result in a dramatic loss for investors.*

26 Dkt. No. 852, 16:22-26 (emphasis in original).

27 The Receiver has presented "updated" GP "valuation", but no workpapers,
28 updated appraisals, etc., to support his contention that "the recovery will be only a
fraction of [the GP investor-partners'] investments" based upon the "Estimated

1 Proceeds from Land Sale.” Dkt. No. 852, 8:1-2. The Receiver presented only the
2 summary sheets giving purported updated estimates of value for the GP properties.
3 There are no documents submitted that explain how the estimates of value were
4 determined, such as sales of comparable properties.

5 ***The GP valuations submitted in the “First Proposal,” when compared line-***
6 ***by-line with the Receiver’s Valuation Report of June 2013, show absolutely no***
7 ***change in value in the last one and a half years. See Dkt. Nos. 203-2, 852-1.***
8 Only two conclusions can be drawn from this comparison, neither of which justify
9 the Receiver’s recommendations: either (1) the Receiver failed to have new
10 appraisals done (presumably because he knew that any appraisal would not
11 accurately reflect the long-term value of the raw land) and relied on the nearly-two-
12 year-old prior appraisals (which makes his claim of an “updated” GP valuation
13 utterly false) or (2) the market remains too flat to justify selling the GP properties
14 now (which mean the Receiver’s “Second Proposal,” as explained below, would
15 constitute a “fire sale”).

16 Also, because the appraised property is raw land, the appraisals of that
17 property can vary considerably. In the case of the Dayton III land investment, the
18 appraisers hired by the condemning public utility produced an estimate of value that
19 was less than 10% of the value estimated by the appraiser for the GPs. Therefore, it
20 is possible that the Receiver’s appraisals represent the absolute bottom level of
21 value, particularly in this current market.

22 Moreover, even if the Receiver’s “updated” valuation is as accurate an
23 assessment of value as can be made, the value is only a *paper value*; it is not the
24 same as having a buyer willing to pay a discrete amount of money *now* for the land.

25 Finally, the return on the GPs’ investment has from the beginning been based
26 on waiting for development to reach the target property. ***Even an appraisal taken***
27 ***now, when that development has still not reached any of the subject properties,***
28 ***does not provide useful information regarding what the property will be worth if***

1 *and when development does eventually reach the property (a market that will in*
2 *no way resemble the current historically low market).*

3 Therefore, the Receiver’s “updated” valuation should be given little, if any,
4 weight in this Court’s determination on the Receiver’s “First Proposal.”¹

5 **B. The Receiver’s Second Proposal Calls for the Wholesale and**
6 **Premature Liquidation of the GPs Through Fire Sales of their**
7 **Lands, Regardless of Financial Condition; The Receiver’s Report**
8 **Assumes that All GP-Held Properties Will Eventually Be Sold for a**
Loss, While Failing to Acknowledge Past Performance

9 The Receiver contends in his “Second Proposal” that all GPs, whether in co-
10 tenancy or owning their own individual parcels – even those in Category A – should
11 “sell rather than retain their properties” because “[w]hether any GP property will
12 appreciate in value more than the GP has to pay in operating expenses is unknown,”
13 and therefore the investors should “cut [their] losses, sell, recover what [they] can,
14 and move on.” Dkt. No. 852, 21:1-3.

15 The critical error in the Receiver’s Report is his assumption that all of the GP-
16 held parcels will eventually be sold at a loss. However, the Receiver’s assumptions
17 are belied by factual evidence. As Defendants have pointed out to the Court before,
18 19 earlier GPs have sold their properties to third-party developers at a profit. Dkt.
19 No. 12-1. Adding up the track records of the 19 GPs that have sold their lands and
20 then dividing them shows that the average GP bought its title for approximately

21 _____
22 ¹ In the Partner Representations, the GP investors state their understanding that
23 “periodic appraisals of the Subject Property may be conducted, but that due to the
24 nature of undeveloped land, the difficulty in predicting its potential future value, and
25 the fluctuations in valuation that can be caused by the presence or absence of nearby
26 development and/or comparable land transactions, that such appraisals of the value
27 of the Subject Property and my corresponding Partnership Interest may be
28 substantially higher or lower than the amount of my initial investment and/or any
final actual realized return on my investment.” See Dkt. No. 14-3, p. 3, ¶ 18. The
investors also state their understanding that the investments are speculative
investments with a high rate of risk and potential for a total loss. *Id.* at p. 1, ¶ 6.

1 \$729,000 and resold that title to a third party for approximately \$2.47 million – a
2 239% profit. Dkt. No. 12-1. *The average GP investor tripled his money.*

3 Furthermore, the Receiver's assumption is defeated by information that he has
4 supplied to the Court: The Receiver's "Additional Factors to Consider" states that
5 the Silver Springs North and Silver Springs South properties are located near Tesla
6 Motors' "gigafactory" electric-vehicle battery factory site, on which ground has
7 been broken and which is expected to be complete in 2017. Dkt. No. 852-1, p. 19.
8 The Tesla Motors "gigafactory," when complete, will employ approximately 6,500
9 persons, with an average pay of \$26.16/hour, who will presumably need homes,
10 goods, services, and schools for their children. *Tesla Details Employment,*
11 *Investment Plans for Gigafactory*, Reno Gazette-Journal, Oct. 22, 2014, available at
12 [http://www.rgj.com/story/news/2014/10/22/tesla-submits-gigafactory-incentives-](http://www.rgj.com/story/news/2014/10/22/tesla-submits-gigafactory-incentives-application-technobubble/17751341)
13 [application-technobubble/17751341](http://www.rgj.com/story/news/2014/10/22/tesla-submits-gigafactory-incentives-application-technobubble/17751341) (last visited Dec. 23, 2014). Because of this
14 massive nearby industrial development, Silver Springs North and Silver Springs
15 South will probably increase substantially in value over the next few years as the
16 area is built out.²

17 **C. Both the First and Second Proposals Have Balloting Schemes and**
18 **Conditions That Harm the Investors and Inevitably Lead to "Fire**
19 **Sales" of Most GP-Held Properties; The Proposals Are Partial**
20 **Regurgitations of the Receiver's 2013 Proposal that this Court**
21 **Rejected**

22 In the Receiver's First Proposal, the investors are to be allowed to vote on
23 whether to retain the land held by their GPs and be released from the receivership,
24 or otherwise "move to an orderly sale process." Dkt. No. 852, 21:8-25.

25 However, for those GPs that are in Category C, the Receiver proposes that

26 ² The regional effects of the Tesla gigafactory on the Reno-Sparks area as a whole
27 would presumably lead to a substantial increase in value for the other GPs in the
28 area, not just Silver Springs North and Silver Springs South; presumably the
Receiver's focus on Silver Springs was due to the proximity to the Tesla site.

1 “the entire cotenancy be moved to an orderly sale process without any votes.” Dkt.
2 No. 852, 21:26-27. This astonishing act of paternalism deprives the investors in
3 Category C GPs of any control over their fate; they are not given the opportunity to
4 decide whether to keep their property and escape the receivership, but will have a
5 sale foisted upon them regardless of the future value of the property they own. The
6 end result of this process is a “fire sale” in which the investors can only lose.

7 For Category A or Category B property to be sold, a majority of investor
8 interests in the GP (and for co-tenancies, a majority of interests in each of the GPs in
9 the co-tenancy) must first vote to sell before the “orderly sale process” proceeds.
10 Dkt. No. 852, 21:12-14, 21:18-20. If there is no majority interest in favor of selling,
11 the GPs retain their property and are released from the receivership. Defendants
12 have no quarrel with that proposal, as it complies with the Co-Tenancy Agreements.

13 In the Second Proposal, the Receiver proposes balloting in which the
14 investors in each GP vote on whether to remain in the GP or get out of the GP with a
15 cash payment in the amount of their share of GP assets. Those investors who wish
16 to stay in the GP, as a condition precedent to the release of the GP from
17 receivership, become obligated to buy out Western and the investors who wish to
18 leave. Dkt. No. 852, 23:3-14. If insufficient money is raised to buy out Western
19 and the investors who wish to leave, the GP-held property then moves to the orderly
20 sale process. *Id.* The Second Proposal totally negates what each investor agreed to
21 when he or she bought the GP investment.

22 The Receiver asks that various conditions be imposed on the balloting that
23 make the retention option illusory, including:

- 24 • In the First Proposal, all GPs in Categories A and B must repay all
25 amounts owed to Western, including amounts loaned by Western to
26 pay the GPs’ operating expenses, in order to retain their properties and
27 escape the receivership. Dkt. No. 852, 17:17-18:16. Otherwise, the
28 Category B properties will be moved to the “orderly sale process” even

1 if there is no majority vote in favor of selling. Dkt. No. 852, 21:16-25.
2 The Second Proposal also requires full repayment of all amounts owed
3 to Western, including amounts loaned to pay operating expenses, in
4 order for those GP investors who wish to remain in the GPs to keep
5 their properties, and the failure to buy out the disaffected investors
6 results in the GPs' properties moving to the "orderly sale process."
7 Dkt. No. 852, 23:24-27, 24:12-15. This mandatory buyout clause was
8 previously presented by the Receiver in his June 20, 2003 Report and
9 Recommendations Regarding Valuation of Real Estate Assets of
10 Receivership Entities (Dkt. No. 203, 12:5-12) which this Court
11 *rejected* (Dkt. No. 470, 28:19-21).

- 12 ● For both the First and Second Proposals, Western's percentage share of
13 cash in the accounts held by those GPs that vote to retain their
14 properties and be released from the receivership should be retained by
15 Western in full satisfaction of its equity interests, through a full
16 liquidation of Western's remaining equity stake via a cash payment –
17 even if the separating GPs have no cash balance at all. Dkt. No. 852,
18 18:17-26 (First Proposal); Dkt. No. 852, 23:24-27 (Second Proposal).
19 This, too, was proposed by the Receiver in his 2013 report and
20 recommendations (Dkt. No. 203, 12:13-22) and *rejected* by the Court
21 (Dkt. No. 470, 28:19-21).
- 22 ● "[T]he recovery for investors in GPs that are released [from the
23 receivership under either proposal] must be limited to the assets of their
24 GP, which means those investors lose the opportunity to share in the
25 recovery from the receivership estate." Dkt. No. 852, 10:11-13. This
26 was also proposed by the Receiver in his 2013 report and
27 recommendations (Dkt. No. 203, 13:1-8) and *rejected* by the Court
28 (Dkt. No. 470, 28:19-21).

- 1 • In the Second Proposal, a failure to vote is treated as a vote to exit from
2 the GP, with the failing-to-vote investor being cashed out (Dkt. No.
3 852, 24:1-3)

4 In essence, the Receiver is saying the GPs can only be freed from his control
5 if they agree to immediately accelerate their 10-year note obligations and fully buy
6 out the non-voting partners (and in the Second Proposal, buy out the investors who
7 wish to leave – or who fail, for some reason, to vote at all). These arbitrary
8 conditions make no sense and are in fact, contrary to investor interests.

9 The default provision of transitioning to the “orderly sale process” in the
10 event the GPs are unable to pay off the amounts owing to Western and/or buy out
11 Western and disgruntled or uninvolved investors ensures that a “fire sale” will occur
12 in many if not most instances. This does not help the investors, and in fact is a
13 perversion of the balloting process because GP-held properties would be listed for
14 sale even if a majority of investors oppose selling the properties.

15 With regard to the condition in both proposals that the GPs should not be
16 allowed to separate from the receivership without having first repaid all money
17 loaned from Western, there is no legitimate basis for imposing this condition on the
18 GPs, and the Receiver has articulated no legal basis for it. The facts are, and always
19 have been, that the GPs are legally separate entities from Western and are not
20 Western’s alter egos, partners, or agents. It is true that Western owns interests in the
21 GPs, but those interests are not majority interests and are expressly prohibited by the
22 partnership agreements from having any voting power. Also, the loans from
23 Western to the GPs are non-recourse loans, and the requirement of prepayment
24 would worsen the GPs’ financial detriment.

25 Defendants do not understand how the Receiver’s recommendation to use GP
26 operating funds to prioritize repayment of non-recourse notes to Western can be
27 squared with the Receiver’s duty of care to the GPs. Because the Receiver is
28 appointed for the GPs as well as for Western, he has a duty of care toward the GPs,

1 just like any other fiduciary. *Sovereign Bank v. Schwab*, 414 F.3d 450, 454 (3d Cir.
2 2005) (“A receiver owes a fiduciary duty to the owners of the property under his
3 care”); *see also City of Chula Vista v. Gutierrez*, 207 Cal.App.4th 681 (2012).

4 The Receiver’s proposals demonstrate the fundamental conflict of interest
5 built into his receivership scheme: The Receiver, wearing his hat as Receiver of
6 Western, may request the repayment of the non-recourse loans, but when he wears
7 his hat as Receiver of the GPs, the duty of care he owes to the GPs requires him to
8 reject such a demand. For the Receiver to prioritize payment of an unsecured, non-
9 recourse debt of the GPs ahead of the GPs obligations to pay taxes and make note
10 payments is a direct violation of the duty of care owed to the GPs. Operating capital
11 should be made available for secured, recourse obligations ahead of unsecured, non-
12 recourse obligations. The cash in the GP operating accounts should be preserved to
13 pay taxes and note payments so that the GPs can be sure to continue to hold their
14 title to the land. The Receiver’s recommendation that such precious cash be used
15 instead to repay non-recourse debt to Western (which then is available to pay the
16 Receiver and his counsel’s fees and expenses) is not in the investors’ interests and
17 likely a breach of the duty of care owed to the GPs.

18 This dual conflict of interest between the Receiver’s duty of care owed to
19 Western versus the duty of care owed to the GPs shows up repeatedly in the
20 Receivers’ recommendations. A careful examination reveals the recommendations
21 are not in the best interests of the GPs as entities or their constituent investors.

22 Tying the GPs’ ability to control their own property to repayment of money
23 owed to Western is an attempt to create alter ego or principal-agent relationships
24 where there presently are none, and does nothing other than to create another source
25 of funds to pay the Receiver and his counsel and to discourage the investors from
26 voting to separate from the receivership.

27 Similarly, the Receiver’s proposed condition in both proposals that Western’s
28 proportionate share of GPs’ cash on hand be paid to Western upon the GPs’ release

1 from receivership (Dkt. No. 852, 18:21-22, 23:24-27) has no valid basis in fact or
2 law (and the Receiver has not pointed to one).

3 There is no need to have the GPs buy out Western's interests in order to show
4 that Western has no future obligation to pay any share of the operating expenses.
5 Instead, as with the condition of requiring the GPs to repay all Western-loaned funds
6 as a prerequisite to separation, this condition satisfies only the Receiver's need to
7 get paid and discourages the investors from voting to separate from the receivership.

8 The condition that the GPs' decision to separate from the receivership would
9 result in relinquishing any recovery from the litigation should also be stricken. The
10 GPs' investors' decision to reduce costs by taking back control of their investment
11 has no legal connection to the investors' ability to obtain any recovery in the
12 litigation.

13 Both the First and Second Proposals are not in the best interests of the GPs
14 and their investors; instead, they are grossly inconsistent with the Receiver's duty of
15 care toward the GPs and their investors and consist of regurgitated proposals
16 previously rejected by this Court. Therefore, both proposals should be rejected.

17
18 **D. The Receiver's Report is Not an Independent Neutral Evaluation**
19 **of the GPs, but is the Product of the SEC's Legal Assistance and**
20 **Research and the Receiver's Collusion with the SEC that is**
21 **Inappropriate for a Purportedly Disinterested Arm of the Court**

22 In the course of preparing the Receiver's Report and Recommendations – a
23 document that is supposed to be an independent evaluation by a neutral arm of the
24 Court – the Receiver and his counsel worked hand-in-hand with the SEC, and the
25 legal arguments presented in it were largely researched by the SEC's appellate
26 counsel, as shown by the frequent emails between the Receiver, his counsel, and the
27 SEC's appellate counsel during the last week and a half before the Receiver's
28 Report and Recommendations were filed. Dkt. No. 860-4, pp. 5-12.

28 ///

1 On November 13, 2014, Susan G. McDonald, the SEC's lead appellate
2 counsel for the interlocutory appeals filed in this case, sent an email to the
3 Receiver's counsel, Ted Fates, Esq., that forwarded research by other SEC
4 attorneys:

5 *You may already be familiar with the link below that has some good*
6 *stuff more updated than Clark on Receivers.* One useful case cited is
7 *Quilling v Trade Partners, Inc., 572 F3d 293, 300-301 (6th Cir 2009),*
8 *where the ct approved pro rata distribution in a viatical settlements*
9 *fraud case b/c despite investor's claim that he owned interest in a*
10 *specific life ins policy: also, ct viewed it as a form of "commingling" of*
11 *investors' funds where the premiums on the various policies were paid*
12 *out of the managing entity's "general escrow funds" -just as in our case*
13 *there was commingling of investors' funds when Schooler paid*
14 *Western's operating expenses. e.g., mortgage payments on the various*
15 *mortgages +the re-purchase of GP interests from disgruntled investors,*
16 *out of Western's general funds Western (which were all or nearly all*
17 *investors' funds paid to purchase GP interests). Quilling cites and*
18 *approves S E C v Basic Energy, Credit Bancorp, S E C v Forex Asset*
19 *Mgmt, + S E C v Elliott. Also, both Clark +the online handbook*
20 *support the idea that ordinarily, at least in S E C and similar actions, the*
21 *receivership continues until the case is closed; dist ct shld (sic) be made*
22 *aware of that.*

23 Dkt. No. 860-4, p. 7 (Decl. of Philip H. Dyson, Ex. 22)(emphasis added).

24 Mr. Fates then asked of Ms. McDonald on November 19, 2014, two days
25 before the Receiver's Report and Recommendations were due:

26 *Thanks Susan. Question- are you aware of any cases saying district*
27 *courts should not make decisions on investor distributions/recoveries*
28 *before addressing the SEC's fraud claims? Here, the court is being*
pushed to make difficult decisions that largely determine the recovery
for investors before deciding whether there was fraud.

Dkt. No. 860-4, p. 7 (emphasis added).

After Ms. McDonald sent Mr. Fates (and the Receiver) several emails
summarizing the SEC's argument and position, Mr. Fates responded:

1 Thanks Susan. *If you or Steve³ could direct us to the sections in the*
2 *treatises that indicate receiverships should continue until the case*
3 *ends, that would be great.* Thanks very much.

4 Dkt. No. 860-4, p. 10 (emphasis added).

5 Ms. McDonald then sent Mr. Fates on November 20, 2014 relevant language
6 from a treatise on receiverships (*see* Dkt. No. 860-4, p. 10) which was then
7 incorporated into the Receiver's Report and Recommendations (*see* Dkt. No. 852,
8 8:3-20). Defendants respectfully request that the Court compare Ms. McDonald's
9 email of November 20, 2014 with the Receiver's Report and Recommendations
10 filed the following day.

11 When Mr. Hebrank was questioned about the emails during his deposition, he
12 testified that he did ask Mr. Fates to discuss the case law with the SEC's counsel,
13 and that he was aware that Mr. Fates was soliciting research and information from
14 the SEC regarding the positions that Mr. Hebrank – as an ostensibly independent,
15 neutral, unbiased arm of the Court – was taking. Dkt. No. 860-5, pp. 57-60
16 (Hebrank Depo. Trans., Dec. 18, 2014, 56:7-59:7). Mr. Hebrank then stated that he
17 did not instruct Mr. Fates to discuss with Defendants' counsel because "I chose not
18 to." Dkt. No. 860-5, p. 60 (Hebrank Depo. Trans., Dec. 18, 2014, 59:8-10).

19 These emails and deposition testimony demonstrate the improper
20 entanglement between the Receiver and SEC that make a mockery of the concept
21 that a receiver is to be a disinterested, neutral arm of the Court. Defendants have
22 moved for Mr. Hebrank's removal from the post of Receiver (Dkt. No. 860) and the
23 same reasons for his removal merit the Court's rejection of the Report and
24 Recommendations and the release of the GPs from the receivership. The GP
25 investors should not have to suffer because of the Receiver's naked collusion with
26 the SEC.

27 ³ "Steve" refers to Stephen G. Yoder, the SEC assistant appellate counsel for the
28 interlocutory appeals in this case, who was copied on the email thread.

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

III.
CONCLUSION

As with his prior actions, the Receiver's Report and Recommendations are another example of why the receivership over the GPs should be dissolved. The Receiver has prepared a biased, one-sided report that advocates the fire sale of the GPs' properties, regardless of the GPs' financial health. That report was created with substantial help from the SEC's appellate counsel, from whom the Receiver's counsel solicited legal advice. The Receiver has violated his fiduciary duty to the GPs and contributes no benefit to the investors. Therefore, the Report and Recommendations should be rejected and the receivership dissolved so that the investors may regain control over their investments.

DATE: January 9, 2015

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

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

CERTIFICATION

I hereby certify that on the 9th day of January 2015, 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