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18 Attorneys for Defendants LOUIS V. SCHOOLER  
19 and FIRST FINANCIAL PLANNING CORPORATION

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

22 SECURITIES AND EXCHANGE  
23 COMMISSION,

24 Plaintiff,

25 v.

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

Defendants.

Case No. 12 CV 2164 GPC JMA

**DEFENDANTS' OPPOSITION TO  
RECEIVER'S EX PARTE  
APPLICATION FOR AUTHORITY  
TO USE FUNDS IN CERTAIN  
GENERAL PARTNERSHIP  
ACCOUNTS TO COVER  
SHORTFALL IN FUNDS  
NECESSARY TO MAKE  
MORTGAGE PAYMENTS, PENDING  
RESOLUTION OF APPEAL**

Ctrm: 2D

Judge: Hon. Gonzalo P. Curiel

1 Defendants LOUIS V. SCHOOLER (“Schooler”) and FIRST FINANCIAL  
2 PLANNING CORPORATION d/b/a WESTERN FINANCIAL PLANNING  
3 CORPORATION (“Western”) (collectively “Defendants”) hereby submit the  
4 following opposition to the Receiver’s Ex Parte Application for Authority to Use  
5 Funds in Certain General Partnership Accounts to Cover Shortfall in Funds  
6 Necessary to Make Mortgage Payments, Pending Resolution of Appeal.

7 I.

8 ARGUMENT

9 The Receiver’s Ex Parte Application, like so many of his earlier filings in this  
10 case, is replete with inaccuracy and mendacity. Instead of acknowledging that his  
11 insistence on using Western’s available funds to pay himself ahead of the carryback  
12 notes (“Underlying Notes”) from Western to the original sellers of the properties  
13 held by the real estate general partnerships (“GPs”) has aggravated the shortfall  
14 between the payment of Underlying Notes and the payment of the notes from the  
15 GPs to Western under the All-Inclusive Trust Deeds (“GP Notes”), the Receiver  
16 continues to claim that it is all Mr. Schooler’s fault. Yet, the Receiver’s claims are  
17 belied by his own intransigence and his failure to timely pay the Underlying Notes,  
18 which have now resulted in late fees and other charges, and letters from the holders  
19 of the Underlying Notes declaring defaults and the intent to accelerate the  
20 Underlying Notes.

21 **A. The Shortfall Is Less than the Receiver Claims – And Will Shrink**  
22 **Into Non-Existence in the Near Future**

23 First, the Receiver incorrectly states that the current shortfall is \$10,360. The  
24 Receiver’s spreadsheets attached to his Reply to Opposition to Fourth Interim Fee  
25 Application (Dkt. No. 508-1, pp. 6-9) show a monthly *overage* of \$10,960 for the  
26 notes in Category 1, a monthly *shortfall* of \$30,859 for the notes in Category 2, and  
27 a monthly *overage* of \$16,806 for the notes in Category 3. Simple arithmetic  
28  $((10,960 - 30,859) + 16,806)$  shows a monthly shortfall of **\$3,093**, not \$10,630 as this

1 Court calculated in the Order Granting in Part the Receiver's Third and Fourth  
2 Interim Fee Applications (Dkt. No. 511).

3 Second, one of the Underlying Notes (Dayton Valley II, 2nd Trust Deed for  
4 Schafer, monthly payment \$1,691) is due to be paid in full as of December 2013  
5 (Dkt. No. 508-1, p. 9), which reduces the shortfall to \$1,402/month. The shortfall  
6 will be completely eliminated as of March 2015, when the next Underlying Note is  
7 paid off; after that, Western will be ever-more cash-flow positive on the Underlying  
8 Notes.

9 **B. Repayment of the LinMar Loans**

10 To further support his false conclusion that the continued misuse of GP funds  
11 is necessary to pay the difference, the Receiver claims that the LinMar Borrowers  
12 "have refused to pay any portion of the loans Western made to them, instead  
13 electing to litigate with the Receiver." Dkt. No. 519, 3:9-11. As the attached  
14 declaration from Defendants' counsel and supporting correspondence shows, the  
15 LinMar Borrowers have agreed to pay the loans, yet the Receiver insisted on  
16 unreasonable and unrealistic repayment plans, and then filed suit when the LinMar  
17 Borrowers rightfully rejected his counter-proposals.

18 Because the Receiver's court filings paint a picture of the Western-LinMar  
19 situation that is remarkably one-sided, devoid of information, and utterly  
20 misleading, Defendants are obliged to respond so that the Court will have a greater  
21 understanding of the situation, especially since the Receiver has now filed suit  
22 against three of the LinMar Borrowers.

23 As Defendants explained in their Opposition to the Receiver's Motion for  
24 Authority to Pursue Claims, many of the LinMar Borrowers are in a precarious  
25 financial situation, with negative cash flow, expensive repairs and maintenance that  
26 are necessary but which have been deferred, low to non-existent equity, and  
27 comparatively low occupancy rates. Dkt. No. 205.

28 ///

1 On March 6, 2013, the Receiver's counsel called Defendants' co-counsel to  
2 discuss arrangements for payment of the loans to the LinMar Borrowers and  
3 production of certain documents. *See* attached Declaration of Philip H. Dyson  
4 ("Dyson Decl."), ¶ 3. On March 20, 2013, the Receiver's counsel emailed  
5 Defendants' counsel to state that because certain documents regarding the LinMar  
6 Borrowers had not been provided to him, collection action against the LinMar  
7 Borrowers would commence. Dyson Decl., ¶ 4, Exh. 1. The Receiver's counsel  
8 then served the LinMar Borrowers and Schooler with subpoenas for eight different  
9 types of documents. *See* Dkt. Nos. 205 and 205-1 (describing subpoenas).

10 To address the Receiver's demands for payment and production of  
11 voluminous amounts of documents under subpoena, counsel for Defendants sent  
12 two letters to the Receiver on April 22, 2013.

13 The first letter responded to the Receiver's counsel's March 20, 2013 email.  
14 In that letter, Defendants offered a monthly payment of \$12,000 to Western, on  
15 behalf of LinMar Management, Inc., LinMar III, LLC, and LinMar IV, LLC, with  
16 the proceeds to be applied to various obligations of Western, with payments to  
17 continue until all outstanding principal and interest had been paid. In return, the  
18 Receiver would stop seeking additional documents from Schooler and the LinMar  
19 Borrowers and refrain from pursuing collection or foreclosure actions against the  
20 LinMar Borrowers unless LinMar Management, LinMar III and LinMar IV had  
21 defaulted by one month in repayment. Dyson Decl., Exh. 2.

22 The second letter urged the Receiver's counsel not to pursue collection  
23 actions against LinMar Tacoma and LinMar Shaw, because (1) LinMar Tacoma was  
24 under receivership and its primary asset, an office building, was in foreclosure, and  
25 because (2) LinMar Shaw's building complex had no equity and was in need of  
26 renovations. Dyson Decl., Exh. 3.

27 Defendants' offers were reasonable and cost-effective, because they provided  
28 a workable repayment plan and took into consideration the financial realities of the

1 LinMar Borrowers, as shown in the documents provided to the Receiver's counsel  
2 in response to the subpoenas - and as shown in Defendants' Opposition to the  
3 Motion for Authority to Pursue Claims. Dkt. No. 205.

4 On April 24, 2013, the Receiver's counsel responded with a counter-proposal  
5 that rejected Defendants' offers. In the counter-proposal, the Receiver's counsel  
6 insisted upon payment by LinMar Management, LinMar III, and LinMar IV of one-  
7 half of the outstanding balance within 30 days and the remainder to be paid in six  
8 equal installments beginning July 1, 2013. Dyson Decl., ¶ 6, Exh. 4. Since the  
9 Receiver's stated balances for LinMar Management, LinMar III, and LinMar IV  
10 totaled \$552,505.88 (*see* Dkt. No. 192-1, p. 3 of 6), this meant that over \$276,000  
11 would have to be paid within 30 days followed by payments of over \$46,000 per  
12 month. As Defendants have stated in their opposition to the Receiver's Motion for  
13 Authority, the Receiver's counter-proposal was so detached from the economic  
14 reality of the situation that no response was made. *See* Dkt. No. 205, 14:12-14.

15 Following the Order of August 16, 2013, the Receiver submitted a new  
16 demand to Defendants. Under the Receiver's new proposal, LinMar Management,  
17 LinMar III, and LinMar IV would pay \$100,000 immediately and then \$50,000 per  
18 month beginning on October 1, 2013, with production of documents to be held in  
19 abeyance while payments are made (and with the subpoenas to be withdrawn upon  
20 completion of payment). Dyson Decl., Exh. 5. This demand, too, was as unrealistic  
21 as the Receiver's previous demand.

22 Defendants are willing to offer a global payment of \$12,000 per month to the  
23 Receiver, as that remains the most-realistic amount of money that can be assembled  
24 at this time. Declaration of Louis V. Schooler ("Schooler Decl."), ¶¶ 6-14. As  
25 Western's monthly shortfall of \$3,093 is reduced, and ultimately eliminated within  
26 the next 15 months by the paying-off of the underlying notes from Western to the  
27 original sellers, the Receiver's proposal of an initial payment of \$100,000 followed  
28 by monthly payments of \$50,000 becomes more unnecessary and unreasonable.

1           **C. Contrary to the Receiver’s Statements, Late Fees Have Already**  
2           **Accrued and the Underlying Note Holders Have Declared Defaults**  
3           **Because the Receiver is Making Late Payments**

4           Continuing to build upon his foundation of sand, the Receiver then claims that  
5 the use of GP funds is necessary because “late fees and other charges will be  
6 incurred soon and lenders will likely seek relief from the litigation injunction to  
7 commence foreclosure proceedings.” Dkt. No. 519, 3:25-27. The Receiver is not  
8 being truthful with the Court – Defendants have received correspondence and  
9 notices from the holders of the Underlying Notes showing that for several months  
10 now, the Receiver has failed to timely pay the Underlying Notes and late fees have  
11 already accrued. In fact, several of the holders of the Underlying Notes have sent  
12 written letters declaring their Underlying Notes to be in default and declaring their  
13 intent to invoke the acceleration clauses. Schooler Decl., ¶¶ 15-21 and exhibits  
14 thereto.

15           *Since the Receiver’s actions are contrary to his statements made to this*  
16 *Court, under oath, that he has been making the loan payments in a timely manner*  
17 *(Dkt. No. 508-1, ¶ 2), the truthfulness of the Receiver’s statements must be*  
18 *seriously questioned.*

19           The Receiver, by virtue of his role over Western, has a fiduciary duty to  
20 Western. *Sovereign Bank v. Schwab*, 414 F.3d 450, 454 (3d Cir. 2005) (“A receiver  
21 owes a fiduciary duty to the owners of the property under his care”); *see also City of*  
22 *Chula Vista v. Gutierrez*, 207 Cal.App.4<sup>th</sup> 681, 143 Cal.Rptr.3d 689 (2012). That  
23 fiduciary duty includes paying Western’s obligations such as the Underlying Notes.  
24 Since the Receiver has not been paying the Underlying Notes on time, he has  
25 repeatedly incurred late fees and other charges already, and the holders of the  
26 Underlying Notes are now formally declaring Western to be in default. By exposing  
27 Western to liability for nonfeasance, the Receiver has breached his duty, and  
28 continues to breach his duty to Western to this very day. Therefore, the Receiver’s



1 request should be denied.

2 **III.**

3 **CONCLUSION**

4 As with his prior actions, the Receiver's *ex parte* application is another  
5 example of why the receivership should be dissolved, not only as to the GPs as  
6 previously order by this Court in the August 16, 2013, Order, but also as to Western.  
7 The Receiver has outlasted his stated purpose of clarifying Western's financial  
8 affairs. To the extent the GP investors and general public need to be protected, the  
9 remaining portions of the Preliminary Injunction will suffice.

10 The Receiver's *ex parte* application is an attempt to blame everyone but  
11 himself for the predicament. The Receiver has the funds to pay the Underlying  
12 Notes, but instead pays himself while letting the Underlying Notes slide into default.  
13 He has a fiduciary duty to Western, which he has repeatedly breached by failing to  
14 pay the Underlying Notes on time and in the amounts due. As a result of that  
15 breach, the holders of the Underlying Notes have notified Defendants that a default  
16 has occurred and that the acceleration clauses will be invoked.

17 Therefore, the Defendants respectfully request that the Receiver's *ex parte*  
18 application be denied.

19 DATE: November 27, 2013

Respectfully submitted,

20 /s/Philip H. Dyson

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25 Counsel for Defendants

**CERTIFICATION**

I hereby certify that on the 27<sup>th</sup> day of November 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following counsels of record:

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/s/Philip H. Dyson

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