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9  
10 **UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

11 SECURITIES AND EXCHANGE  
12 COMMISSION,

13 Plaintiff,

14 vs.

15 LOUIS V. SCHOOLER and FIRST  
16 FINANCIAL PLANNING CORPORATION  
d/b/a WESTERN FINANCIAL PLANNING  
CORPORATION,

17 Defendants.  
18

Case No. 12 CV 2164 LAB JMA

**PLAINTIFF SECURITIES AND EXCHANGE  
COMMISSION'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
OF THE RECEIVER'S SECOND REPORT  
AND PROPOSAL REGARDING THE ASSETS  
OF WESTERN AND SCHOOLER**

1 Plaintiff Securities and Exchange Commission submits this memorandum of points and  
2 authorities in support of the Receiver's Second Report and Proposal Regarding the Assets of  
3 Western and Schooler (the "Receiver's Second Report"), dated October 18, 2012.

4 **I. As The Receiver Outlines In His Second Report, Western Should Remain Under**  
5 **Receivership For The Benefit Of The Investors And For Operational And Practical**  
6 **Reasons**

7 The Commission shares the concerns raised by Thomas C. Hebrank (the "Receiver") in  
8 the Receiver's Second Report about limiting the Court-appointed receivership to just the general  
9 partnerships ("GPs"), and not Defendant Western Financial Planning Corporation ("Western").<sup>1</sup>  
10 As the Receiver points out, such a limited receivership would pose extensive operational and  
11 practical difficulties. *See* Receiver's Second Report, at 1-4. For example, Western holds about  
12 \$4.3 million in debt secured by real estate owned by the GPs. If the Receiver could not control  
13 Western, it would be unable to ensure that these loans are kept current and would have difficulty  
14 selling the properties to generate income for the estate. *See id.* at 2.

15 The Receiver also will have limited, if any, ability to protect the interests of the investors  
16 if he is not in control of Western. *See id.* at 2-4. As the Receiver notes, Western's financial  
17 condition is "dire" and "only going to get worse." *Id.* at 2, 3. Schooler may have been the one  
18 keeping this enterprise afloat before the Court issued its preliminary injunction, but he has no  
19 incentive and probably no legal obligation to continue doing so. The Receiver is in by far the  
20 best position to right the ship for the benefit of the investors, and the Receiver can do that only if  
21 he controls Western – the entity that holds the debt encumbering the GP properties and that still  
22 owns an interest in properties that rightfully belong to investors. The Receiver also is the only

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23 <sup>1</sup> In Section IV of its October 5, 2012 Preliminary Injunction Order, entitled "Asset  
24 Freeze," the Court analyzed the parties' respective arguments concerning the legitimacy of a  
25 freeze over the assets of both Schooler and Western. Dkt. No. 44 (PI Order), at 22-25. After  
26 concluding that the Commission had not made the required showing for such a freeze, but  
27 without analyzing whether a showing for a receivership over Western had been made, the Court  
28 stated it would consider a proposal by the Receiver for a monitorship over the Defendants'  
assets, with guidance from *FTC v. Millennium Telecard, Inc.*, 2011 WL 2745963 (D.N.J. 2011).  
*See id.* at 24-25. The Court then stated that the "[t]he freeze and receivership of Defendants'  
assets will not be lifted until the Court approves the receiver's proposal." *Id.* After having only  
analyzed the appropriateness of an asset freeze, it is not clear whether the Court intended to lift  
both the freeze and the receivership over Western.

1 party who will have the incentive to pursue claims on behalf of Western against Schooler and  
2 any other party. And a receivership over Western will stay the litany of lawsuits against Western  
3 that have already been filed and are sure to result, as well as any bankruptcy petition. *See id.* at  
4 3-4; Dkt. No. 10 (TRO), Section XII.

5 Therefore, in the Receiver's view, a receivership over the GPs but not Western does not  
6 serve the best interest of investors. The Commission respectfully agrees. *See SEC v. Wencke*,  
7 577 F.2d 619 (9th Cir. 1978), *cert. denied*, 439 U.S. 964 (1978) ("a federal receiver was  
8 necessary to prevent further violations of federal securities laws and to protect the public  
9 investors").

## 10 **II. The Court Was Legally Justified To Appoint A Receiver Over Western**

11 The Court had, and continues to have, the legal authority and justification to impose a  
12 receivership over Western. Courts generally have broad discretion to appoint an equity receiver  
13 in Commission enforcement actions. *SEC v. Wencke*, 622 F.2d 1363, 1365 (9th Cir. 1980). The  
14 breadth of this discretion "arises out of the fact that most receiverships involve multiple parties  
15 and complex transactions." *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005)  
16 (*quoting SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986)).

17 Courts look to several factors in determining whether to appoint a receiver. *See Wencke*,  
18 622 F.3d at 1365, 1372. As the Ninth Circuit in *Wencke* outlined, these factors include (1)  
19 marshaling and preserving the assets of the corporate entities against further misappropriation  
20 and dissipation, (2) clarifying the financial affairs of the entities for the benefit of innocent  
21 shareholders, (3) conducting independent investigation of claims the entities might have against  
22 former management or other parties, prosecution of which would benefit investors and deter  
23 future violations, and (4) discovering and asserting defenses against other entities for possible  
24 fraudulent or collusive actions. *See id.* at 1372. "[T]hese are legitimate justifications for the  
25 district court's imposition of a receivership." *Id.* Other courts have also looked to additional  
26 factors in determining whether to appoint a receiver, such as the integrity of management, the  
27 collection of revenue, and the need for proper distribution of investor funds. *See, e.g., SEC v.*  
28 *Credit First Fund*, 2006 WL 4729240, at \*15 (C.D. Cal. 2006); *SEC v. Fifth Ave. Coach Lines*,

1 *Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968).

2 The Court's decision to lift the asset freeze over Western does not mean that Western  
3 cannot remain in receivership over Western. *See* Dkt. No. 44 (PI Order) at 24, 25. The standard  
4 for imposing a receivership is different than the standard for imposing an asset freeze. The sole  
5 dispositive factor for an asset freeze is whether assets are likely to be dissipated. *See id.* at 23.  
6 But for receiverships, as discussed above, the future dissipation of assets is just one factor among  
7 many that courts consider. *See Wencke*, 622 F.3d at 1372. Indeed, in several Commission  
8 enforcement actions, courts have appointed receivers while specifically declining to freeze any of  
9 the defendants' assets when issuing a temporary restraining order or preliminary injunction. *See*,  
10 *e.g.*, *SEC v. Westmoore Management*, Case No. SACV 10-849 AG (MLGx) (C.D. Cal. June 16,  
11 2010); *SEC v. Sunwest Management, Inc.*, Case No. 09-CV-6056-TC (D. Or. March 10, 2009);  
12 *SEC v. Tuco Trading, LLC*, Case No. 08cv0400 DMS (BLM) (S.D. Cal. March 5, 2008).

13 With this in mind, the Commission respectfully submits that even though the Court has  
14 concluded that an asset freeze over Western is not appropriate at this stage, the Court  
15 nevertheless has the legal authority and justification to have Western remain in receivership.  
16 The factors weighing in favor of continuing the receivership over Western are addressed below.

17 ***Marshaling and preserving assets.*** Controlling Western would allow the Receiver to  
18 marshal and preserve the investors' assets for their benefit. The Commission recognizes that the  
19 Court already concluded that it was "hesitant" to find that Defendants had likely dissipated  
20 assets, and thus did not order a freeze over their assets. *See* Dkt. No. 44 (PI Order) at 24, 25.  
21 That being said, and as the Receiver points out, the GPs' most significant assets are the  
22 properties they own. Many of these properties are encumbered by mortgages held not by the  
23 GPs, but by Western (or one of its affiliates); Western does not currently have sufficient funds to  
24 make the mortgage payments. *See* Receiver's Second Report, at 2. Keeping Western in the  
25 receivership would provide the Receiver with the flexibility to take appropriate actions with  
26 respect to these mortgages for the investors' benefit. For example, he could attempt to negotiate  
27 with the lenders to avoid default, or could sell certain Western assets to meet ongoing mortgage  
28 obligations. *See id.* Conversely, if Schooler is allowed to have control of Western, and Western

1 fails to make the mortgage payments, the Receiver's ability to preserve assets will be severely  
2 limited because the Receiver will be responsible for properties encumbered by mortgages that  
3 have already gone into default and that he has limited or no control over to negotiate with  
4 lenders. *See id.* Meanwhile, Schooler will be free to walk away, leaving his investors in a much  
5 more precarious situation than they would be had Western remained in receivership.

6 ***Clarifying the financial affairs of the entities.*** Only a receivership over both the GPs and  
7 Western would allow the Receiver to completely clarify and adequately manage the financial  
8 affairs of the Defendants' enterprise. Western's financial situation directly impacts the value of  
9 the GP assets and any prospects for investor recovery. But Western has limited income and has  
10 relied mainly on Schooler's previous capital injections to keep it operating. Nothing guarantees  
11 Schooler's continued financial support. Only maintaining the receivership over both Western and  
12 the GPs would allow the Receiver to ensure that the investors will receive the maximum return on  
13 their investment in the flailing enterprise. Keeping Western under receivership would also allow  
14 the entities to speak with a single voice, rather than running the risk that information disseminated  
15 by the Receiver and Schooler would conflict and confuse investors.

16 Moreover, the capital structure and intercompany obligations among Western and the  
17 GPs need clarification to determine how and to what extent these relationships impact investors.  
18 Having the receiver continue to control both Western and the GPs ensures that this can happen.  
19 As just one example, the Receiver mentions P51, LLC in his Second Report. *See id.* at 2-3.  
20 Western controls P51, LLC, which holds the interest in property that was already paid for by  
21 investors in F-86 Partners. Because P51, LLC is controlled by Western, the Receiver cannot  
22 adequately protect the interests of the F-86 Partners investors unless Western remains in the  
23 receivership.

24 ***Conducting investigations of potential claims against former management or other***  
25 ***parties.*** There should be no dispute that the Receiver is in the best position to conduct an  
26 investigation into whether Western has any claims against Western's management, the  
27 management of any affiliated entities, or third parties. Schooler was part of that management  
28 team, and so the Court could not rely on him to conduct such an investigation. The Receiver is

1 independent and would be free from any conflicts that could hinder or block any investigation.  
2 Prosecution of any discovered claims would help the Receiver to obtain funds that could be used  
3 to compensate harmed investors.

4 ***Defending against third party litigation.*** Keeping Western under receivership will also  
5 help to protect the company's assets from the cost of third-party litigation or bankruptcy. The  
6 temporary restraining order has, and the preliminary injunction order would likely contain, a  
7 provision shielding the entities in receivership from third-party litigation. *See* Dkt. No. 10  
8 (TRO), Section XII. This provision would be especially useful with respect to Western because  
9 it has already been named in at least three lawsuits. *See* Receiver's Second Report, at 4. This  
10 provision would also prevent a time-consuming and resource-draining bankruptcy. Having the  
11 ability to operate free from the distractions and expense of defending against potential investor,  
12 creditor, and lender lawsuits or the threat of bankruptcy will assist the Receiver to preserve the  
13 receivership estate and to maximize any assets for the benefit of Western, the GPs, and their  
14 investors.

15 ***Management integrity.*** Schooler's integrity, or lack of it, also weighs heavily in favor of  
16 appointing the Receiver over Western. *See Fifth Ave. Coach Lines*, 289 F. at 42 (appointing  
17 receiver because "the situation demands the appointment of a wholly disinterested officer of the  
18 court to administer [the entity defendant], to prosecute its action against [former officer], [and] to  
19 investigate and ascertain whether there are other actions that can be maintained"). Schooler  
20 never told investors about the mortgages that may now cause the loss of GP properties. *See* Dkt.  
21 Doc. 4 Ex. 2 (Schooler Test. pp. 289:3-15; 330:15-331:3); Dkt. Doc. 8 ¶¶ 8 & 13; Dkt. Doc. 4  
22 Ex. 5 (Macy Test. pp. 53:13-54:18.) He also never told them that Western would spend their  
23 money before it transferred an interest in land to their GP. *See* Dkt. No. 7, ¶ 12; Dkt. No. 8, ¶ 13.  
24 As a result, the investors in F-86 Partners, the offering that was ongoing when the Commission  
25 filed this case, are now stuck with virtually nothing – Western has already spent most of the  
26 money raised, and the investors have no interest in land. *See* Receiver's Second Report, at 2-3.  
27 In addition, Schooler falsely led investors to believe their GPs were buying land from Western at  
28 a fair price, but in reality, Western sold land to the GPs at more than five times their fair market

1 value, for which Schooler earned significant profits. *See* Dkt. Doc. 4, Ex. 1 (Schooler Test. pp.  
2 177:20-178:18); Dkt. Doc. 4, Ex. 2 (Schooler Test. pp. 311:12-19; 313:25-314:8; 315:13-25;  
3 357:24-358:7); Dkt. Doc. 5, ¶ 5; Dkt. Doc. 14-3, ¶ 74.

4 ***Generating revenue for the investors.*** The Receiver is also needed to determine how  
5 best to generate revenue for Western, which will ultimately inure to the benefit of investors. If  
6 Western does not remain in the receivership, the investors are essentially at the mercy of  
7 Schooler's whims. The decision to continue funding Western and paying the mortgages held by  
8 Western for the properties owned by the GPs would rest with Schooler alone. On the other hand,  
9 if Western remains the receivership, the Receiver could then determine how to best allocate  
10 Western's limited resources and maximize the value of those assets. For example, the Receiver  
11 could decide to sell certain property to unlock any equity in the property. Indeed, the Receiver  
12 has already outlined certain actions that he would take to reduce expenses if he were appointed  
13 Receiver over Western. *See* Receiver's Second Report, at 7-8. Without Western in the  
14 receivership, the Receiver has no authority to address Western's shaky financial situation, which  
15 places the interests of the GPs and their investors at serious risk.

16 ***Ensuring orderly distribution of funds to investors.*** A receiver over Western is also  
17 needed to ensure the orderly distribution of any funds to harmed investors. The GPs do not hold  
18 the only assets that should be preserved for the investors. As discussed above, Western holds  
19 significant assets as well. Only by controlling Western will the Receiver be able to fully  
20 implement the fair and orderly distributions to the investors of any assets that may be preserved  
21 or recovered from the receivership entities. Moreover, because some investors received  
22 preferential payments from Western (which the Commission alleges was "hush money"), a  
23 receivership over Western is needed to ensure that these distributions are taken into account if  
24 necessary.

25 Accordingly, for the foregoing reasons, and for the reasons set forth in the Receiver's

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1 Second Report, the Commission respectfully requests that the Court adopt the Receiver's  
2 proposal and have Western remain in the previously-ordered receivership.

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4 Dated: October 18, 2012

Respectfully submitted,

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/s/ Sam S. Puathasnanon

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Sam S. Puathasnanon  
Attorney for Plaintiff  
Securities and Exchange Commission

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**PROOF OF SERVICE**

I am over the age of 18 years and not a party to this action. My business address is:

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Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On October 18, 2012, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RECEIVER’S SECOND REPORT AND PROPOSAL REGARDING THE ASSETS OF WESTERN AND SCHOOLER** on all the parties to this action addressed as stated on the attached service list:

**OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency’s practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

**PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

**EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

**HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

**UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service (“UPS”) with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

**ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

**E-FILING:** By causing the document to be electronically filed via the Court’s CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

**FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: October 18, 2012

/s/ Sam S. Puathasnanon  
Sam S. Puathasnanon

1                                    **SEC v. Louis V. Schooler, et al.**  
2                                    **United States District Court – Southern District of California**  
3                                    **Case No. 12 CV 2164 LAB JMA**  
4                                    **(LA-4059)**

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