

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JAMES M. NICHOLSON and
WESTGATE CAPITAL MANAGEMENT, LLC,

Defendants,

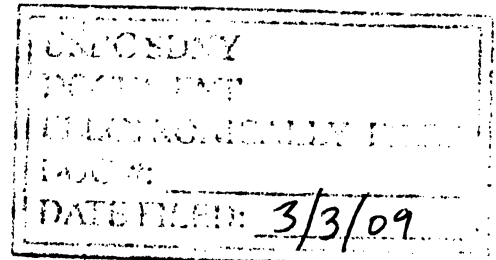
and

WESTGATE ABSOLUTE RETURN FUND, LP,
WESTGATE ALPHA FUND, LP,
WESTGATE EQUITY FUND, LP,
WESTGATE FOCUS FUND, LP,
WESTGATE GROWTH FUND, LP
WESTGATE OPPORTUNITY FUND, LP,
WESTGATE OPPORTUNITY MASTER FUND, LTD.,
WESTGATE PREMIER GROWTH FUND, LP,
WESTGATE SELECT FUND, LP,
WESTGATE STRATEGIC GROWTH FUND, LP, and
WESTGATE SUMMIT FUND, LP,

Relief Defendants.

ECF CASE

Case No. 09 CV 1748 (RMB)



**PRELIMINARY INJUNCTION AND
ORDER APPOINTING RECEIVER ON CONSENT**

WHEREAS, Plaintiff Securities and Exchange Commission ("Commission") has filed a Complaint naming the Defendants James M. Nicholson and Westgate Capital Management, LLC and the Relief Defendants Westgate Absolute Return Fund, LP, Westgate Alpha Fund, LP, Westgate Equity Fund, LP, Westgate Focus Fund, LP, Westgate Growth Fund, LP, Westgate Opportunity Fund, LP, Westgate Opportunity Master Fund, LTD, Westgate Premier Growth

Fund, LP, Westgate Select Fund, LP, Westgate Strategic Growth Fund, LP, and Westgate Summit Fund, LP, (collectively “Hedge Funds”) and seeks a preliminary injunction, a permanent injunctive and the appointment of a Receiver for all defendants herein, and other equitable relief. Specifically, pending a final disposition of this action, the Commission seeks an order preliminarily:

- (i) enjoining the Defendants from future violations of the federal securities laws;
- (ii) freezing the assets of the Defendants and Relief Defendants;
- (iii) mandating that the Defendants repatriate funds transferred to overseas accounts and to deposit such funds into the Registry of the Court;
- (iv) requiring that the Defendants and Relief Defendants provide an accounting detailing all of their assets and all funds or other assets received from the Hedge Funds’ investors and their disbursement;
- (v) preventing the destruction of evidence;
- (vi) providing for expedited discovery and
- (vii) appointing a Receiver for all defendants.

WHEREAS, upon review of the Complaint, the declarations of David Smyth, Nandkumar Nayar, and plaintiff’s counsel and the exhibits attached thereto, and the memorandum of law filed in support of the Commission’s application, in accordance with Federal Rule of Civil Procedure 65(b), it appears to the Court that:

- (i) the Court possesses jurisdiction over the subject matter of this action and the Defendants;

- (ii) the Commission is a proper party to bring this action seeking the relief sought in its Complaint;
- (iii) all defendants having conferred with counsel and consented, without admitting or denying any of the allegations in the Complaint, except as to jurisdiction of this Court, to the relief granted herein,
- (iv) an accounting is appropriate to determine the disposition of Hedge Funds' investors funds and to ascertain the total assets that should continue to be frozen;
- (v) it is necessary to preserve and maintain the Defendants and Relief Defendants business records from destruction;
- (vi) the timing restrictions of Fed. R. Civ. P. 26(d) and (f), 30(a)(2)(C) and 34 do not apply to this proceeding in light of the Commission's requested relief and its demonstration of good cause;
- (vii) expedited discovery is appropriate to permit a prompt and fair hearing on this matter; and
- (viii) the public interest is best served by granting this Order at this time.

IT IS THEREFORE ORDERED, PENDING FURTHER ORDER OF THIS COURT, THAT:

I.

A. The Defendants are preliminarily restrained and enjoined from violating Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§80b-6(1), (2), (4)], directly or indirectly, by use of the mails or any means or instrumentality of interstate commerce, by:

- (1) employing any device, scheme, or artifice to defraud any client or prospective client; or
- (2) engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

B. The Defendants are preliminarily restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a)], directly or indirectly, in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, by:

- (1) employing any device, scheme, or artifice to defraud; or
- (2) obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statement(s) made, in the light of the circumstances under which they were made, not misleading;
or
- (3) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser;

C. Defendants are preliminarily restrained and enjoined from violating Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 [15 U.S.C. § 78j(b) and 17 C.F.R. §240.10b-5], directly or indirectly, in connection with the purchase or sale of any security, by making use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

- (1) to employ any device, scheme, or artifice to defraud;

- (2) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

II.

A. The Defendants and Relief Defendants are hereby preliminarily restrained and enjoined from, directly or indirectly, making any payment or expenditure of funds belonging to or in the possession, custody, or control of the Defendants and Relief Defendants, or effecting any sale, gift, hypothecation, or other disposition of any asset belonging to or in the possession, custody, or control of the Defendants and Relief Defendants, pending a showing to this Court that the Defendants have sufficient funds or assets to satisfy all claims and penalties arising out of the violations alleged in the Commission's Complaint or by the posting of a bond or surety sufficient to assure payment of any such claim and penalty. This provision shall continue in full force and effect until further order by this Court and shall not expire.

B. Defendants and Relief Defendants are hereby preliminarily restrained and enjoined, in regard to any account at any bank, savings and loan association, savings bank, trust company, securities broker-dealer, commodities dealer, investment company, other financial or depository institution, and investment company in the name, on behalf or for the benefit such defendant, from engaging in any transaction in securities (except liquidating transactions necessary to comply with a court order) or any disbursement of funds or securities pending further order of this Court. This provision shall continue in full force and effect until further order by this Court and shall not expire.

C. All other individuals, corporations, partnerships, limited liability companies, and other artificial entities are hereby preliminarily restrained and enjoined from disbursing any funds, securities, or other property obtained from the Defendants and Relief Defendants without adequate consideration and prior authorization by the Staff of the Commission or this Court. This provision shall continue in full force and effect until further order by this Court and shall not expire.

D. All banks, savings and loan associations, savings banks, trust companies, securities broker-dealers, commodities dealers, investment companies, other financial or depository institutions, and investment companies that maintain one or more safe deposit boxes in the name, on behalf or for the benefit of the Defendants and Relief Defendants are hereby preliminarily restrained and enjoined, from opening or causing to be opened any safe deposit boxes, without providing the Commission prior notice and opportunity to inspect the contents in order to determine that they contain no assets subject to the Order. This provision shall continue in full force and effect until further order by this Court and shall not expire.

III.

A. The Defendants and Relief Defendants shall forthwith:

- (1) take such steps as are necessary to repatriate to the territory of the United States all funds and assets of any Defendant, Relief Defendant or investors described in the Commission's Complaint in this action which are held by them, or are under their direct or indirect control, jointly or singly, and deposit such funds into the Registry of this Court; and
- (b) provide the Commission and the Court a written description of the funds and assets so repatriated.

IV.

The Defendants and Relief Defendants are hereby required to make an accounting, under oath, within thirty (30) days of the issuance of this order,

- (1) detailing all monies and other benefits which each received and disbursed, directly or indirectly, as a result of the activities alleged in the Complaint (including the date on which the monies or other benefit was received/dispensed and the name, address, and telephone number of the person paying/providing/receiving the money or the benefit);
- (2) listing all current assets in which each Defendant and Relief Defendant has any direct or indirect beneficial interest, wherever they may be located and by whomever they are being held (including the name and address of the holder and the amount or value of the holdings); and
- (3) listing all accounts with any financial or brokerage institution maintained in the name of, on behalf of, or for the benefit of, Defendants and Relief Defendants (including the name and address of the account holder and the account number) and the amount held in each account at any point during the period from August 16, 1999 through the date of the accounting.

This provision shall continue in full force and effect until further order by this Court and shall not expire. The Defendants and Relief Defendants may assert their legal privileges, if any, in response to this paragraph.

V.

The Defendants and Relief Defendants are hereby preliminarily restrained and enjoined from destroying, removing, mutilating, altering, concealing, or disposing of, in any manner, any

books, records, documents (as defined in Fed. R. Civ. P. Civ. 34(a)(1)(A)), correspondence, brochures, manuals, papers, ledgers, accounts, statements, obligations, files and other property of or pertaining to, the Defendants, Relief Defendants, or any entities under their control. This provision shall continue in full force and effect until further order by this Court and shall not expire.

VI.

- A. Expedited discovery may take place consistent with the following:
1. Any party may notice and conduct depositions upon oral examination and may request and obtain production of documents or other things for inspection and copying from parties prior to the expiration of thirty days after service of a summons and the Commission's Complaint upon Defendants.
 2. All parties may take depositions upon oral examination of parties and non-parties subject to seventy-two (72) hours of service of a written deposition notice. Should the Defendants and Relief Defendants fail to appear for a properly noticed deposition, they may be prohibited from introducing evidence at the hearing on the Commission's request for a preliminary injunction.
 4. All parties shall produce for inspection and copying all documents and things that are requested within seventy-two (72) hours of service of a written request for those documents and things.
 5. All parties shall serve written responses to written interrogatories within seventy-two (72) hours after service of the interrogatories.

6. Should a party fail to respond to request for admission within seventy-two (72) hours of service, that request may be deemed admitted for all purposes in this action.

B. All parties shall serve written responses to any other party's request for discovery and the interim accountings to be provided by the Defendants and Relief Defendants to the Commission by courier service or next-day mail addressed as follows:

ATTN: Jordan A. Thomas
U.S. Securities and Exchange Commission
Division of Enforcement--Trial Unit
100 F. Street NE, Mail Stop 4030
Washington, DC 20549
Direct: (202) 551-4475
FAX: (202) 772-9245

and by delivery to other parties at such address(es) as may be designated by them in writing.

Upon agreement of the parties, alternative methods of service, including E-mail and facsimile, may be utilized.

VII.

Pending the determination of the Commission's action on the merits, or such other time as the Court may order, Lee S. Richards is hereby appointed to serve without bond as receiver ("Receiver") for the estates of the following Defendants and Relief Defendants: James M. Nicholson ("Nicholson"), Westgate Capital Management, LLC ("Westgate") and Relief Defendants Westgate Absolute Return Fund, LP; Westgate Alpha Fund, LP; Westgate Equity Fund, LP; Westgate Focus Fund, LP; Westgate Growth Fund, LP; Westgate Opportunity Fund, LP; Westgate Opportunity Master Fund, Ltd.; Westgate Premier Growth Fund, LP; Westgate Select Fund, LP; Westgate Strategic Growth Fund, LP; and Westgate Summit Fund, LP (collectively "Receivership Defendants").

VIII.

General Powers and Duties of Receiver

A. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers and general and limited partners of the entity Receivership Defendants under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692; Fed. R. Civ. P. 66; and New York Civil Practice Law and Rules, Article 64 et seq.

B. The trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Defendants are hereby dismissed and the powers of any general partners, directors and/or managers are hereby suspended. Such persons and entities shall have no authority with respect to the Receivership Defendants' operations or assets, except to the extent as may hereafter be expressly granted by the Receiver. The Receiver shall assume control of the operations of the Receivership Defendants and shall pursue and preserve all of their claims.

C. No person holding or claiming any position of any sort with any of the Receivership Defendants shall possess any authority to act by or on behalf of any of the Receivership Defendants.

D. Subject to the specific provisions in Sections IX through XVIII, below, the Receiver shall have the following general powers and duties:

1. To use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Defendants, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands,

premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly (“Receivership Property” or, collectively, the “Receivership Estates”);

2. To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto;
3. To manage, control, operate and maintain the Receivership Estates and hold in his/her possession, custody and control all Receivership Property, pending further Order of this Court;
4. To use Receivership Property for the benefit of the Receivership Estates, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his/her duties as Receiver;
5. To take any action which, prior to the entry of this Order, could have been taken by the officers, directors, partners, managers, trustees and agents of the Receivership Defendants;
6. To engage and employ persons in his/her discretion to assist him in carrying out his/her duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, securities traders, registered

- representatives, financial or business advisers, liquidating agents, real estate agents, forensic experts, brokers, traders or auctioneers;
7. To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;
 8. To issue subpoenas to compel testimony of persons or production of records, consistent with the Federal Rules of Civil Procedure and applicable Local Rules concerning any subject matter relating to the identification, preservation, collection and/or liquidation of Receivership Property;
 9. To bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his/her duties as Receiver;
 10. To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates; and,
 11. To take such other action as may be approved by this Court.

IX.

Access to Information

A. The past and/or present officers, directors, agents, managers, general and limited partners, trustees, attorneys, accountants and employees of the Receivership Defendants, as well as those acting in their place, are hereby ordered and directed to turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Defendants

and/or all Receivership Property; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

B. Within seven (7) days of the entry of this Order, the Receivership Defendants shall file with the Court and serve upon the Receiver and the Commission a sworn statement, listing: (a) the identity, location and estimated value of all Receivership Property; (b) all employees (and job titles thereof), other personnel, attorneys, accountants and any other agents or contractors of the Receivership Defendants; and, (c) the names, addresses and amounts of claims of all known creditors of the Receivership Defendants.

C. Within thirty (30) days of the entry of this Order, the Receivership Defendants shall file with the Court and serve upon the Receiver and the Commission a sworn statement and accounting, with complete documentation, covering the period from August 16, 1999 to the present:

1. Of all Receivership Property, wherever located, held by or in the name of the Receivership Defendants, or in which any of them, directly or indirectly, has or had any beneficial interest, or over which any of them maintained or maintains and/or exercised or exercises control, including, but not limited to: (a) all securities, investments, funds, real estate, automobiles, jewelry and other assets, stating the location of each; and (b) any and all accounts, including all funds held in such accounts, with any bank, brokerage or other financial institution held by, in the name of, or for the benefit of any of them, directly or indirectly, or over which any of them maintained or maintains and/or exercised or exercises any direct or indirect control, or in which any of them had or has a direct or indirect

- beneficial interest, including the account statements from each bank, brokerage or other financial institution;
2. Identifying every account at every bank, brokerage or other financial institution: (a) over which Receivership Defendants have signatory authority; and (b) opened by, in the name of, or for the benefit of, or used by, the Receivership Defendants;
 3. Identifying all credit, bank, charge, debit or other deferred payment card issued to or used by each Receivership Defendant, including but not limited to the issuing institution, the card or account number(s), all persons or entities to which a card was issued and/or with authority to use a card, the balance of each account and/or card as of the most recent billing statement, and all statements for the last twelve months;
 4. Of all assets received by any of them from any person or entity, including the value, location, and disposition of any assets so received;
 5. Of all funds received by the Receivership Defendants, and each of them, in any way related, directly or indirectly, to the sale of securities. The submission must clearly identify, among other things, all investors, the securities they purchased, the date and amount of their investments, and the current location of such funds;
 6. Of all expenditures exceeding \$1,000 made by any of them, including those made on their behalf by any person or entity; and
 7. Of all transfers of assets made by any of them.

D. Within seven (7) days of the entry of this Order, the Receivership Defendants shall provide to the Receiver and the Commission copies of the Receivership Defendants' federal income tax returns for the years 1999 to 2008 with all relevant and necessary underlying documentation.

E. The Receivership Defendants' past and/or present officers, directors, agents, attorneys, managers, shareholders, employees, accountants, debtors, creditors, managers and general and limited partners, and other appropriate persons or entities shall answer under oath to the Receiver all questions which the Receiver may put to them and produce all documents as required by the Receiver regarding the business of the Receivership Defendants, or any other matter relevant to the operation or administration of the receivership or the collection of funds due to the Receivership Defendants. In the event that the Receiver deems it necessary to require the appearance of the aforementioned persons or entities, the Receiver shall make its discovery requests in accordance with the Federal Rules of Civil Procedure.

F. The Receiver is authorized to issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure.

G. The Receivership Defendants are required to assist the Receiver in fulfilling his/her duties and obligations. As such, they must respond promptly and truthfully to all requests for information and documents from the Receiver. However, this requirement does not impinge on the Receivership Defendants' rights to assert any applicable privilege.

X.

Access to Books, Records and Accounts

A. The Receiver is authorized to take immediate possession of all assets, bank accounts or other financial accounts, books and records and all other documents or instruments relating to the Receivership Defendants. All persons and entities having control, custody or possession of any Receivership Property are hereby directed to turn such property over to the Receiver.

B. The Receivership Defendants, as well as their agents, servants, employees, attorneys, any persons acting for or on behalf of the Receivership Defendants, and any persons receiving notice of this Order by personal service, facsimile transmission or otherwise, having possession of the property, business, books, records, accounts or assets of the Receivership Defendants are hereby directed to deliver the same to the Receiver, his agents and/or employees. Nothing in this paragraph shall impinge on a person's rights to assert any applicable privilege.

C. All banks, brokerage firms, financial institutions, and other persons or entities which have possession, custody or control of any assets or funds held by, in the name of, or for the benefit of, directly or indirectly, and of the Receivership Defendants that receive actual notice of this Order by personal service, facsimile transmission or otherwise shall:

1. Not liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Defendants except upon instructions from the Receiver;
2. Not exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court;

3. Within three (3) business days of receipt of that notice, file with the Court and serve on the Receiver and counsel for the Commission a certified statement setting forth, with respect to each such account or other asset, the balance in the account or description of the assets as of the close of business on the date of receipt of the notice; and,
4. Cooperate expeditiously in the transfer of funds, other assets and accounts to the Receiver or at the direction of the Receiver.

XI.

Access to Real and Personal Property

A. The Receiver is authorized to take immediate possession of all personal property of the Receivership Defendants, wherever located, including but not limited to computers, laptops, hard drives, external storage drives, digital information and data, and any other such memory, media or electronic storage devices, books, papers, data processing records, evidence of indebtedness, bank records and accounts, savings records and accounts, brokerage records and accounts, certificates of deposit, stocks, bonds, debentures, and other securities and investments, contracts, mortgages, furniture, office supplies and equipment.

B. The Receiver is authorized to take immediate possession of all real property of the Receivership Defendants, wherever located, including but not limited to all ownership and leasehold interests and fixtures. Upon receiving actual notice of this Order by personal service, facsimile transmission or otherwise, all persons other than law enforcement officials acting within the course and scope of their official duties, are (without the express written permission of the Receiver) prohibited from: (a) entering such premises; (b) removing anything from such premises; or, (c) destroying, concealing or erasing anything on such premises.

C. In order to execute the express and implied terms of this Order, the Receiver is authorized to change door locks to the premises described above. The Receiver shall have exclusive control of the keys. The Receivership Defendants, or any other person acting or purporting to act on their behalf, are ordered not to change the locks in any manner, nor to have duplicate keys made, nor shall they have keys in their possession during the term of the receivership. Entry onto the premises, or possession of said keys, by anyone other than the Receiver, without the express written consent of the Receiver, shall constitute a trespass enforceable by the appropriate police department at the direction of the Receiver.

D. The Receiver is authorized to open all mail directed to or received by or at the offices or post office boxes of the Receivership Defendants, and to inspect all mail opened prior to the entry of this Order, to determine whether items or information therein fall within the mandates of this Order.

XII.

Notice to Third Parties

A. The Receiver shall promptly give notice of his/her appointment to all known officers, directors, agents, employees, shareholders, creditors, debtors, managers and general and limited partners of the Receivership Defendants, as the Receiver deems necessary or advisable to effectuate the operation of the receivership.

B. All persons and entities owing any obligation, debt, or distribution with respect to an ownership interest to any Receivership Defendant shall, until further ordered by this Court, pay all such obligations in accordance with the terms thereof to the Receiver and its receipt for such payments shall have the same force and effect as if the Receivership Defendant had received such payment.

C. In furtherance of his/her responsibilities in this matter, the Receiver is authorized to communicate with, and/or serve this Order upon, any person, entity or government office that he/she deems appropriate to inform them of the status of this matter and/or the financial condition of the Receivership Estates. All government offices which maintain public files of security interests in real and personal property shall record this Order upon the request of the Receiver or the Commission.

D. The Receiver is authorized to instruct the United States Postmaster to hold and/or reroute mail which is related, directly or indirectly, to the business, operations or activities of any of the Receivership Defendants (the "Receiver's Mail"), including all mail addressed to, or for the benefit of, the Receivership Defendants. The Postmaster shall not comply with, and shall immediately report to the Receiver, any change of address or other instruction given by anyone other than the Receiver concerning the Receiver's Mail. The Receivership Defendants shall not open any of the Receiver's Mail and shall immediately turn over such mail, regardless of when received, to the Receiver. All personal mail of any individual Receivership Defendants, and/or any mail appearing to contain privileged information, and/or any mail not falling within the mandate of the Receiver, shall be released to the named addressee by the Receiver. The foregoing instructions shall apply to any proprietor, whether individual or entity, of any private mail box, depository, business or service, or mail courier or delivery service, hired, rented or used by the Receivership Defendants. The Receivership Defendants shall not open a new mailbox, or take any steps or make any arrangements to receive mail in contravention of this Order, whether through the U.S. mail, a private mail depository or courier service.

E. Any entity furnishing water, electric, telephone, sewage, garbage or trash removal services to the Receivership Defendants shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver.

F. The Receiver is authorized to assert, prosecute and/or negotiate any claim under any insurance policy held by or issued on behalf of the Receivership Defendants, or their officers, directors, agents, employees or trustees, and to take any and all appropriate steps in connection with such policies.

XIII.

Injunction Against Interference with Receiver

A. The Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would:

1. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
2. Hinder, obstruct or otherwise interfere with the Receiver in the performance of his/her duties; such prohibited actions include but are not limited to, concealing, destroying or altering records or information;

3. Dissipate or otherwise diminish the value of any Receivership Property; such prohibited actions include but are not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property, enforcing judgments, assessments or claims against any Receivership Property or any Receivership Defendant, attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage, indebtedness, security agreement or other agreement executed by any Receivership Defendant or which otherwise affects any Receivership Property; or,
4. Interfere with or harass the Receiver, or interfere in any manner with the exclusive jurisdiction of this Court over the Receivership Estates.

B. The Receivership Defendants shall cooperate with and assist the Receiver in the performance of his/her duties.

C. The Receiver shall promptly notify the Court and Commission counsel of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order.

D. Until further Order of this Court, the Receiver, in his/her capacity as Receiver, shall not be required to respond to any subpoena or other court process (for documents or testimony).

XIV.

Managing Assets

A. For each of the Receivership Estates, the Receiver shall establish one or more custodial accounts at a federally insured bank to receive and hold all cash equivalent

Receivership Property (the "Receivership Funds"). The Receiver shall invest any and all money or proceeds in his/her possession and control in United States Treasury instruments or in a money market account that invests solely in United States Treasury instruments.

B. The Receiver's deposit account shall be entitled "Receiver's Account, Estate of [Name of Receivership Defendant]" together with the name of the action.

C. The Receiver is authorized to borrow on behalf of any of the Receivership Estates and is authorized to cause any of the Receivership Estates to issue Receiver's Certificates of Indebtedness in the principal amounts of the sums borrowed. Said Receiver's Certificates of Indebtedness shall have priority over all other debts and obligations of the borrowing Receivership Estate, excluding administrative expenses of the Receivership, whether currently existing or hereinafter incurred.

D. The Receiver may, without further Order of this Court, transfer, compromise, or otherwise dispose of any Receivership Property, other than real estate, in the ordinary course of business, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such Receivership Property.

E. Subject to Paragraph F, immediately below, the Receiver is authorized to locate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.

F. Upon further Order of this Court, pursuant to such procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, all real property in the Receivership Estates.

G. The Receiver is authorized to take all actions to manage, maintain, and/or wind-down business operations of the Receivership Estates, including making legally required payments to creditors, employees, and agents of the Receivership Estates and communicating with vendors, investors, governmental and regulatory authorities, and others, as appropriate.

H. The Receiver shall take all necessary steps to enable the Receivership Funds to obtain and maintain the status of a taxable "Settlement Fund," within the meaning of Section 468B of the Internal Revenue Code and of the regulations, whether proposed, temporary or final, or pronouncements thereunder, including the filing of the elections and statements contemplated by those provisions. The Receiver shall be designated the administrator of the Settlement Fund, pursuant to Treas. Reg. § 1.468B-2(k)(3)(i), and shall satisfy the administrative requirements imposed by Treas. Reg. § 1.468B-2, including but not limited to (a) obtaining a taxpayer identification number, (b) timely filing applicable federal, state, and local tax returns and paying taxes reported thereon, and (c) satisfying any information, reporting or withholding requirements imposed on distributions from the Settlement Fund. The Receiver shall cause the Settlement Fund to pay taxes in a manner consistent with treatment of the Settlement Fund as a "Qualified Settlement Fund." The Receivership Defendants shall cooperate with the Receiver in fulfilling the Settlement Funds' obligations under Treas. Reg. § 1.468B-2.

XV.

Investigate and Prosecute Claims

A. Subject to the requirement that leave of this Court is required to resume or commence certain litigation, the Receiver is authorized, empowered and directed to investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in his/her sole discretion be advisable or proper to recover and/or conserve Receivership Property.

B. The Receiver is authorized, empowered and directed to:

1. Investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and (after obtaining leave of this Court) to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate; the Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order; and,
2. Defend, compromise or settle legal actions in which the Receivership Defendants or the Receiver are a party, having been resumed or commenced with leave of this Court; except, however, in actions where the Receivership Defendants are nominal parties, as in certain foreclosure actions where the action does not affect a claim against or adversely affect

the value of any Receivership Property, the Receiver may file appropriate pleadings in the Receiver's discretion.

C. The Receiver hereby holds, and is therefore empowered to waive, all privileges, including the attorney-client privilege, held by all entity Receivership Defendants.

XVI.

Bankruptcy Filing

A. The Receiver may seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United States Code (the "Bankruptcy Code") for the Receivership Defendants. If a Receivership Defendant is placed in bankruptcy proceedings, the Receiver shall become, and shall be empowered to operate each of the Receivership Estates as, a debtor in possession. The Receiver shall have all of the powers and duties as provided a debtor in possession under the Bankruptcy Code to the exclusion of any other person or entity.

B. Following authorization by this Court to place a Receivership Defendant in bankruptcy proceedings, the Receiver will be authorized to take any action which he/she deems to be necessary and appropriate in order to cause such a filing under the Bankruptcy Code, including the execution of all necessary corporate resolutions or directions.

C. Should the Receiver elect to file petitions under the Bankruptcy Code for any of the Receivership Defendants, he/she shall have 15 days from the date of such filing to file with the Bankruptcy Court any lists or schedules required to be filed with such petitions, this Court recognizing that the Receiver will require time to assemble such data for filing.

D. Any person or entity, other than the Receiver, is barred from placing any of the Receivership Defendants in bankruptcy proceedings. If a bankruptcy petition is filed on behalf of a Receivership Defendant by anyone other than the Receiver, the bankruptcy reference shall

be withdrawn and jurisdiction over Receivership Property and the Receivership Estate shall remain with this Court.

XVII.

Liability of Receiver

A. Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with his/her fiduciary obligations in this matter.

B. The Receiver and his/her agents, acting within scope of such agency (“Retained Personnel”) are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

C. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based upon acts or omissions committed in their representative capacities. Such actions shall comply with the provisions of 28 U.S.C. § 959.

D. The Receiver may be removed at any time by the Court and replaced with a successor, sua sponte, upon request of the Commission, or otherwise. In the event the Receiver decides to resign, the Receiver shall first give written notice to the Commission’s counsel of record and the Court of its intention, and the resignation shall not be effective until the Court appoints a successor. The Receiver shall then follow such instructions as the Court may provide.

XVIII.

Recommendations and Reports

A. The Receiver is authorized, empowered and directed to develop procedures: (a) to administer, hear, and evaluate claims of creditors, as reasonably necessary and appropriate, who assert an entitlement to any Receivership Property (the “Creditor Claims Proceedings” or “Claims Bar Date Process”); and, (b) for the fair, reasonable, and efficient recovery, liquidation, and distribution of all remaining, recovered, and recoverable Receivership Property to investors, and/or to the U.S. Treasury, as applicable (the “Liquidation Plan”).

B. The Receiver shall initiate the Claims Bar Date Process only after the Receiver has made significant progress in identifying and marshalling the assets and claims held by the Receivership Estate. Any cross-claims or rights of set-off that might be available to the Receiver should be identified and developed prior to the initiation of the Claims Bar Date Process.

C. Creditor Claims Proceedings should include, at a minimum, procedures for: (i) providing notice to known and unknown claimants; (ii) receipt and review of claims; (iii) making recommendations to the Court for payment or denial of claims; and (iv) final disposition of claims.

D. Within ninety (90) days of the entry date of this Order, the Receiver shall file the Liquidation Plan in the above-captioned action, with service copies to counsel of record.

E. Within thirty (30) days after the end of each calendar quarter, the Receiver shall file and serve a full report and accounting of each Receivership Estate (the “Quarterly Status Report”), reflecting (to the best of the Receiver’s knowledge as of the period covered by the report) the existence, value, and location of all Receivership Property, and of the extent of

liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estates.

- F. The Quarterly Status Report shall contain, at a minimum, the following:
1. A summary of the operations of the Receiver;
 2. The amount of cash on hand, the amount and nature of accrued administrative expenses, and the amount of unencumbered funds in the estate;
 3. A schedule of all the Receiver's receipts and disbursements (attached as Exhibit A to the Quarterly Status Report), with one column for the quarterly period covered and a second column for the entire duration of the receivership;
 4. A description of all known Receivership Property, including approximate or actual valuations, anticipated or proposed dispositions, and reasons for retaining assets where no disposition is intended;
 5. A description of liquidated and unliquidated claims held by the Receivership Estate, including the need for forensic and/or investigatory resources; approximate valuations of claims; and anticipated or proposed methods of enforcing such claims (including likelihood of success in: (i) reducing the claims to judgment; and, (ii) collecting such judgments);
 6. A list of all known creditors with their addresses and the amounts of their claims;
 7. The status of Creditor Claims Proceedings, after such proceedings have been commenced; and,

8. The Receiver's recommendations for a continuation or discontinuation of the receivership and the reasons for the recommendations.

G. On the request of the Commission, the Receiver shall provide the Commission with any documentation that the Commission deems necessary to meet its reporting requirements, that is mandated by statute or Congress, or that is otherwise necessary to further the Commission's mission.

H. The Receiver shall give all interested parties and creditors advance prior written notice of the time and place of hearings of:

1. All reports described in Paragraphs E – F above;
2. All petitions for approval of distributions;
3. All petitions to pay or deny claims of creditors;
4. All petitions for confirmation of sales of real or personal property;
5. All Quarterly Fee Applications;
6. Any application for the discharge of the Receiver;
7. All petitions for authority to sell property at private sale; and,
8. The petition to approve the Final Accounting and the Receiver's final application for compensation and expense reimbursement from the Receivership Estates.

XIX.

Fees, Expenses and Accountings

A. Subject to Paragraphs B – H immediately below, the Receiver need not obtain Court approval prior to the disbursement of Receivership Funds for expenses that the Receiver deems advantageous to the orderly administration and operation of the receivership. Further, prior Court approval is not required for payments of applicable federal, state or local taxes.

B. Subject to Paragraph C immediately below, the Receiver is authorized to solicit persons and entities (“Retained Personnel”) to assist him in carrying out the duties and responsibilities described in this Order. The Receiver shall not engage any Retained Personnel without first obtaining an Order of the Court authorizing such engagement.

D. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from the Receivership Estates. Such compensation shall be in amounts commensurate with the services performed by the Receiver and Retained Personnel and shall require the prior approval of the Court.

E. Within thirty (30) days after the end of each calendar quarter, the Receiver and Retained Personnel shall apply to the Court for compensation and expense reimbursement from the Receivership Estates (the “Quarterly Fee Applications”). At least fifteen (15) days prior to filing each Quarterly Fee Application with the Court, the Receiver will serve upon counsel for the Commission a complete copy of the proposed Application, together with all exhibits and relevant billing information in a format to be provided by Commission staff.

F. All Quarterly Fee Applications will be interim and will be subject to cost benefit and final reviews at the close of the receivership. At the close of the receivership, the Receiver

will file a final fee application, describing in detail the costs and benefits associated with all litigation and other actions pursued by the Receiver during the course of the receivership.

G. Quarterly Fee Applications are subject to a holdback in the amount of 20% of the amount of fees and expenses for each application filed with the Court. The total amounts held back during the course of the receivership will be paid out at the discretion of the Court as part of the final fee application submitted at the close of the receivership.

H. Each Quarterly Fee Application shall:

1. Comply with the terms of the “Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission” (the “Billing Instructions”) agreed to by the Receiver; and,
2. Contain representations (in addition to the Certification required by the Billing Instructions) that: (i) the fees and expenses included therein were incurred in the best interests of the Receivership Estate; and, (ii) with the exception of the Billing Instructions, the Receiver has not entered into any agreement, written or oral, express or implied, with any person or entity concerning the amount of compensation paid or to be paid from the Receivership Estate, or any sharing thereof.

I. At the close of the Receivership, the Receiver shall submit a Final Accounting, in a format to be provided by Commission staff, as well as the Receiver’s final application for compensation and expense reimbursement.

XX.

All provisions of this preliminary injunction and order shall remain in full force and effect until specifically modified by further order of this Court.

XXI.

Pursuant to Rule 65(d)(2) of the Federal Rules of Civil Procedure this Order shall be binding on the Defendants, the Relief Defendants and on their officers, agents, servants, employees, and attorneys, including but not limited to all banks, savings and loan associations, savings banks, trust companies, securities broker-dealers, commodities dealers, investment companies, other financial or depository institutions, and investment companies that hold one or more accounts in the name, on behalf or for the benefit of the Defendants and Relief Defendants, who receive actual notice of this Final Judgment by personal service or otherwise.

March **3**, 2009.
New York, New York

RMB

UNITED STATES DISTRICT JUDGE

Accepted and stipulated to on behalf of all Defendants and Relief Defendants.

James Nicholas

Richard A. Bereman

Dated: March 3, 2009