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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

LOUIS V. SCHOOLER and FIRST
FINANCIAL PLANNING
CORPORATION, dba Western
Financial Planning Corporation,

Defendants.

) Case No. 3:12-cv-2164-GPC-JMA
)
) **ORDER GRANTING IN PART**
) **SECOND INTERIM FEE**
) **APPLICATIONS**

) **(ECF NOS. 175, 176, 181)**
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INTRODUCTION

This is a civil enforcement action initiated by the Securities and Exchange Commission (“Commission”), in which the Commission alleges defendants Louis V. Schooler (“Schooler”) and First Financial Planning Corporation d/b/a Western Financial Planning Corporation (“Western”) defrauded investors through the sale of unregistered securities tied to interests in real property. The Court has entered a preliminary injunction and appointed Thomas C. Hebrank (“Receiver”) as permanent receiver to operate and manage the affairs of Western, its subsidiaries, and the several general partnerships that Western formed in connection with the sale of the

1 aforementioned interests in real property. Before the Court are three interim fee
 2 applications related to the administration of the receivership estate. (ECF Nos. 175,
 3 176, 181.) Defendants have opposed the fee applications, (ECF No. 183), and the
 4 Receiver has filed a reply in support of the fee applications, (ECF No. 185).

5 The Receiver and his professionals seek a total of \$105,036.46 in fees and costs
 6 for the period October 1, 2012, through December 31, 2012 (“Second Application
 7 Period”). For the reasons that follow, the Court awards a total of \$94,311.43 in fees
 8 and costs for the Second Application Period.

BACKGROUND

I. Fee Applications

11 The Receiver asserts he has incurred \$61,432.65 in fees for work done in the
 12 following categories:

Category	Total
General Receivership	\$20,083.50
Asset Investigation & Recovery	\$5,351.40
Reporting	\$0.00
Operations & Asset Sales	\$31,468.50
Claims & Distributions	\$0.00
Legal Matters & Pending Litigation	\$4,529.25

19 While the Receiver incurred \$61,432.65 in fees, he now seeks only 90% of those
 20 fees, i.e., \$55,289.39. The Receiver does not waive the right to later seek the remaining
 21 fees incurred in his final fee application. The Receiver also seeks costs in the amount
 22 of \$301.92, which includes costs for a safe deposit box, website additions, copies, and
 23 postage.

24 The Receiver’s counsel asserts it incurred \$45,817.65 in fees for work done in
 25 the following categories:

Category	Total
General Receivership	\$11,959.65

1	Asset Investigation	\$3,504.60
2	Reporting	\$14,868.90
3	Operations & Asset Sales	\$7,909.65
4	Claims & Distributions	\$1,548.45
5	Pending Litigation	\$6,026.40

6 While the Receiver's counsel incurred \$45,817.65, it now seeks only 80% of
7 those fees, i.e., \$36,654.12. The Receiver's counsel reserves the right to later seek the
8 remaining fees incurred in its final fee application. The Receiver's counsel also seeks
9 costs in the amount of \$2,052.75, which includes expenses for document editing and
10 copying, filing fees, shipping, and postage.

11 The Receiver's special counsel seeks \$10,165.00 in fees and \$573.28 in costs for
12 representing four of the general partnerships (Gold Ridge partners, Grand View
13 partners, Rolling Hills partners, and Sky View partners) in connection with ongoing
14 eminent domain litigation in Nevada. The Receiver's special counsel has not yet been
15 compensated and thus seeks 100% of the requested fees.

16 DISCUSSION

17 **I. Legal Standard**

18 “[I]f a receiver reasonably and diligently discharges his duties, he is entitled to
19 fair compensation for his efforts.” SEC v. Elliott, 953 F.2d 1560, 1577 (11th
20 Cir.1992). “The court appointing [a] receiver has full power to fix the compensation
21 of such receiver and the compensation of the receiver’s attorney or attorneys.” Drilling
22 & Exploration Corp. v. Webster, 69 F.2d 416, 418 (9th Cir. 1934). A receiver’s fees
23 must be reasonable. See In re San Vicente Med. Partners Ltd., 962 F.2d 1402, 1409
24 (9th Cir. 1992).

25 As set forth in this Court’s Order Granting in Part First Interim Fee Applications,
26 (ECF No. 169), the Court will assess the reasonableness of the requested fees using the
27 factors enumerated in SEC v. Fifth Avenue Coach Lines, 364 F. Supp. 1220, 1222
28 (S.D.N.Y. 1973), and In re Alpha Telcom, Inc., 2006 WL 3085616, at *2-3 (D. Or. Oct.

1 27, 2006). Those factors include: (1) the complexity of the receiver’s tasks; (2) the fair
2 value of the receiver’s time, labor, and skill measured by conservative business
3 standards; (3) the quality of the work performed, including the results obtained and the
4 benefit to the receivership estate; (4) the burden the receivership estate may safely be
5 able to bear; and (5) the Commission’s opposition or acquiescence.

6 The Court has discretion in determining whether to award receivership fees. San
7 Vicente, 962 F.2d at 1409.

8 **II. Analysis**

9 The Court previously found the Receiver and his professionals were entitled to
10 an award of interim fees because they had been working on this case for several months
11 without compensation. That is no longer the case, as the Court previously awarded the
12 Receiver and his counsel each approximately \$25,000 plus costs. Considering that fact,
13 along with the difficulty of determining whether the receivership estate can ultimately
14 bear the fees incurred in this case, the Court will further reduce the percentage of
15 interim fees awarded to the Receiver and his counsel as set forth below. The Court
16 expects to be better able to assess this issue once the Receiver’s forensic accounting
17 of the receivership entities is complete.

18 The Court will first determine the reasonableness of the requested fees, after
19 which the Court will address the source of payment.

20 **A. Reasonableness of the Requested Fees**

21 **1. Complexity of Tasks**

22 Defendants maintain “the problems faced [in this case] were not truly complex
23 at the beginning of the receivership and have not grown more complex since.”
24 Defendants assert that, while “there are over 100 entities each with its own bank
25 account, 22 properties, and over 3,300 investors, the accounts are all with one bank, the
26 entities have a common office in San Diego with common storage, and the entities hold
27 only raw land with no day-to-day management required.” Defendants assert the GPs
28 have been able to meet all of their obligations for years at the nominal cost of between

1 \$100 and \$400 per month, and these obligations and needs did not suddenly increase
2 upon the appointment of a receiver.”

3 In reply, the Receiver asserts “[t]his factor should be weighed in relation to the
4 number of hours billed,” thus framing the question as “whether the number of hours
5 billed is reasonable in relationship to the tasks completed.” The Receiver notes:

6 Defendants have not identified a single instance in which the amount of
7 time billed by the Receiver or [his counsel] to complete a task is
8 excessive. Nor have [D]efendants identified any work performed by the
Receiver or [his counsel] that was not necessary or appropriate for the
Receiver’s performance of his duties under the Court’s orders.

9 The Receiver asserts “[n]o one disputes that each GP, in isolation, is a relatively
10 simple entity.” The Receiver asserts, however, that “the notes and other financial
11 obligations between and among the numerous GPs, their investors, Western, and the
12 various third party lenders are quite complex.” The Receiver observes that, indeed, the
13 Court tasked the Receiver with clarifying the receivership entities’ financial affairs.

14 The Receiver further asserts that his “tasks go far beyond administering the
15 GPs.” The Receiver asserts that, with the assistance of counsel, he has

16 (a) investigated and protected the real properties and other assets of the
17 Receivership Entities, including Western, (b) operated Western and the
18 GPs, including handling issues relating to bank accounts, loan payments,
operating expenses, taxes and employees, (c) communicated with
19 investors about the status of the receivership and their investments, (d)
provided a detailed report and proposal to the Court, and (e) protected the
Receivership Entities’ interests in various pending legal proceedings.

20 The Receiver’s counsel asserts the tasks it performed were “significantly
21 complex,” including analyzing documents and legal instruments, advising the Receiver
22 on applicable areas of law, and helping the Receiver “craft a detailed proposal on the
23 structure of the receivership and potential monitoring of assets.”

24 The Receiver’s special counsel asserts the tasks it performed “were complex in
25 that they required familiarity and research on . . . a matter of first impression before the
26 Nevada Supreme Court.”

27 The Court continues to find the tasks the Receiver performed were significantly
28 complex. In addition to the reasons stated in the Court’s First Fee Order, the Court

1 agrees that the tasks cited by the Receiver, when considered together with the number
2 of entities and investors involved, were and continue to be significantly complex.

3 The Court also continues to find the tasks performed by the Receiver's counsel
4 were minimally complex for the reasons stated in the Court's First Fee Order.

5 As to the complexity of the tasks performed by the Receiver's special counsel,
6 the Court finds its tasks were moderately complex given the need to address a matter
7 of first impression before the Nevada Supreme Court.

8 Lastly, the Court considers the fact that Defendants did not identify any
9 unnecessary or over-billed tasks in the time sheets submitted in support of the fee
10 applications. Indeed, the Court has reviewed the time sheets and finds that, at this time,
11 the tasks were necessary and not over-billed.¹

12 2. Fair Value of Time, Labor, & Skill

13 The Receiver billed his time at \$247.50 per hour and the time of those working
14 for him at \$90 - \$180 per hour. The Receiver's counsel billed its time at \$418.50 -
15 \$585.00 per hour, with most of the work being billed at \$418.50 per hour. These rates
16 reflect a ten percent discount from the Receiver's and his counsel's ordinary rates. The
17 Receiver's special counsel billed its time at \$275 - \$400 per hour.

18 The Receiver and his professionals contend they have charged reasonable rates
19 for their work. They assert their rates are comparable to other such professionals in this
20 geographic area and have provided the rates for receivers and their counsel in cases
21 from this geographic area in support of their assertion.² The Receiver's special counsel
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25 ¹ The Court notes that, on the time sheets submitted by the Receiver's counsel, some entries
26 are block-billed. The Court directs the Receiver's counsel to itemize individual tasks and their
27 corresponding times in future submissions.

28 ² Those cases and the fees charged therein are summarized as follows:

Case Name	Court & Case No.	Receiver's Hourly Rate	Receiver's Counsel's Hourly Rate
<u>SEC v. Van Tuig</u>	C.D. Cal. Case No. 06-cv-0172	Receiver: \$375 Staff: \$95 - \$300	\$290 - \$520

1 asserts, without evidence, that its rates “represent typical rates in Nevada for attorneys
2 of similar experience and expertise.”

3 In opposition, Defendants assert the rates charged in the cases cited by the
4 Receiver and his counsel are not comparable to the rates charged here because the facts
5 in those cases are distinguishable from the facts of this case.

6 In reply, the Receiver asserts that regardless of whether the specific facts of the
7 cited cases are distinguishable from the facts here, the point is that the cited cases
8 provide rates charged by receivers and their counsel in Southern California for work
9 done in civil SEC enforcement actions.

10 The Court agrees that, while the facts of the cases cited by the Receiver and his
11 counsel may be distinguished from the instant facts, the cases provide a reference point
12 for the Court to determine whether the fees charged by the Receiver and his counsel
13 reflect the fair value of their work. Based on the fees charged in the cited cases, the
14 Court finds that the rates charged by the Receiver and his counsel are indeed
15 comparable to such fees charged in this geographical area.

16 As to the Receiver’s special counsel, the Court will, based on its own experience
17 and expertise, accept special counsel’s representations regarding the rates normally
18 charged by Nevada attorneys.

19 **3. Quality of Work Performed**

20 Defendants argue the Receiver has not demonstrated the fees were incurred for
21 the benefit of Western or the general partnerships. Defendants assert “[t]he Receiver’s
22 own application indicate[s] a lack of results obtained and a conclusion that the
23 receivership provides no benefit to the estate whatsoever.” Defendants assert that
24 “[t]he Receiver admits that Western’s financial situation has not changed significantly

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26 27	<u>SEC v. Learn Waterhouse, Inc.</u>	S.D. Cal. Case No. 04-cv-2037	Receiver: \$300 Staff: \$75 - \$225	\$235 - \$525
28	<u>SEC v. Homestead Properties LP</u>	C.D. Cal. Case No. 09-cv-1331	Receiver: \$288 Staff: \$120 - \$288	\$306 - \$495

1 in recent months and that Western continues to be short on cash.” Defendants further
2 assert “[t]here has been no accounting to date of the fruits of the Receiver’s or
3 Receiver’s professionals’ expenditures.”

4 In response, the Receiver asserts he continued to maintain the status quo of the
5 Receivership Entities during the Second Application Period. The Receiver further
6 notes that his Third Interim Report, which this Court approved, and his Forensic
7 Accounting Report: Part One both provide substantial detail and clarification of the
8 financial affairs of the Receivership Entities. The Receiver argues the benefit of his
9 work “is further demonstrated by the fact that all loans secured by the GP properties
10 have been kept current since the Receiver’s appointment without using any cash in the
11 GP accounts” by reducing Western’s expenses and selling Western’s assets. The
12 Receiver finally asserts that he “was able to keep in place the key personnel necessary
13 to complete the 2012 tax returns for all GPs and issue all K-1s to investors in time for
14 them to file their personal tax returns.”

15 The Receiver’s counsel asserts it “diligently and competently assisted the
16 Receiver in all aspects of the Receivership.”

17 The Receiver’s special counsel asserts it, too, “diligently and competently
18 performed its tasks,” by avoiding further litigation in the Nevada litigation and by
19 entering meaningful settlement discussions with the opposing party in that litigation.

20 The Court finds the quality of work performed by the Receiver and his
21 professionals to be satisfactory. The Receiver and his professionals continued to
22 maintain the status quo of the receivership entities through the Second Application
23 Period. This included the work performed by the Receiver’s special counsel in the
24 Nevada litigation. In addition to maintaining the status quo, the Receiver and his
25 professionals have continued to work on clarifying the receivership entities’ financial
26 affairs. Indeed, the Receiver has submitted the first portion of his forensic accounting
27 report and anticipates a full accounting in short order. Moreover, the Court has found
28 the Receiver’s reports and submissions to be helpful in determining the appropriate

1 course of action in this case.

2 **4. Receivership Estate's Ability to Bear Burden of Fees**

3 As both the Receiver and Defendants recognize, Western has little to no cash
4 available to pay the requested fees. In the Court's prior fee order, however, the Court
5 found that the receivership estate had some ability to bear the burden of the requested
6 fees given the approximately \$6.5 million in cash held by the GPs. Since then, the
7 amount of cash held by the GPs has decreased to approximately \$6.18 million. The
8 Court thus finds that the receivership estate's ability to bear the burden of the currently
9 requested fees has not changed significantly.

10 The fees, however, were incurred several months ago and thus do not include the
11 fees incurred from January 2013 through the present. And the requested fees are but
12 a percentage of the total fees actually incurred. Thus, while the Court finds the
13 receivership estate continues to have some ability to bear the currently requested fees,
14 the Court has some reservation regarding the receivership estate's ultimate ability to
15 bear the costs of this receivership. This is especially true given that the Court does not
16 currently have a full picture of the receivership entities' financial affairs.

17 **5. Commission's Opposition or Acquiescence**

18 While the Commission does not expressly approve of the fee applications as
19 reasonable, the Receiver represents that the Commission has expressed its non-
20 opposition to the fee applications. The Court will accept this representation.

21 Considering the above five factors together, and considering that "[i]nterim fees
22 are generally allowed at less than the full amount," Alpha Telcom, 2006 WL 3085616,
23 at *2-3, the Court awards fees and expenses as follows:

24 Applicant	25 Fees Allowed	26 % of Fees Incurred³	27 Costs Allowed	28 % of Costs Incurred
Receiver	\$49,146.12	80%	\$301.92	100 %

³ The Court includes the percentage of fees incurred rather than a percentage of the fees requested given that the Receiver and his counsel request only a percentage of their actual fees.

1	Allen Matkins	\$32,072.36	70 %	\$2,052.75	100 %
2	law firm				
3	Cotton Driggs law	\$10,165.00	100 %	\$573.28	100%
4	firm				

5 **B. Source of Payment**

6 The Receiver again suggests that the fees first be paid from Western's assets and
7 then, to the extent Western is unable to pay the fees, that Western's equity interests in
8 the general partnerships be reduced to cash to cover the fees.

9 Defendants argue "the Receiver should not be allowed to invade GP-owed funds
10 to pay obligations that the Receiver clearly considers those of Western," as "[t]he
11 Receiver has yet to provide any rationale for using GP funds to pay Western's
12 obligations." Defendants further assert that this Court has not permitted the many
13 investors in this case an opportunity to be heard.⁴

14 In response, the Receiver notes that, "although the Court authorized the Receiver
15 to reduce Western's equity in the GPs to the extent Western's liquid assets were
16 insufficient to pay the fees and costs approved in the First Fee Order, the Receiver was
17 able to pay such fees and costs without doing so." The Receiver asserts he "was able
18 to cover the fees and costs . . . by collecting certain loans Western made to the GPs,"
19 but that "[b]efore making each loan payment, the Receiver analyzed the upcoming
20 expenses of each GP to ensure that the loan payments would not put the GP in jeopardy
21 of being unable to meet its financial obligations."

22 The Court continues to find the Receiver's proposal reasonable. To the extent
23 Western is unable to pay the above fees, the Receiver is permitted to reduce Western's
24 equity interests in the general partnerships to cover the fees. Thus, the Receiver may
25 withdraw cash that is already in the accounts of the general partnerships in which
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27 ⁴ The Court rejects this argument outright given that the Court has permitted investors to file
28 objections and has considered those objections in the appropriate context. (See ECF No. 169.) Indeed,
Defendants themselves note that "dozens of GP investors wrote the court to express their concerns
about their investments being jeopardized to pay the Receiver."

1 Western has an equity interest. It also means that whatever equity interest Western has
2 in those general partnerships will be reduced in proportion to the amount withdrawn
3 from the general partnership accounts.

4 **CONCLUSION**

5 After a careful review of the parties' submissions, and for the foregoing reasons,
6 **IT IS HEREBY ORDERED** that the second interim fee applications, (ECF Nos. 175,
7 176, 181) are **GRANTED IN PART** as set forth in the table above.

8 DATED: May 10, 2013

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10 HON. GONZALO P. CURIEL
11 United States District Judge
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