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

10 SECURITIES AND EXCHANGE
COMMISSION,

11 Plaintiff,

12 vs.

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

16 Defendants.
17

Case No. 12 CV 2164 LAB JMA

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANTS'
MOTION FOR STAY OF ORDER
PENDING APPEAL**

Date: November 15, 2013
Time: 1:30 p.m.
Ctrm.: 2D
Judge: Hon. Gonzalo P. Curiel

1 **I. INTRODUCTION**

2 With their motion, defendants seek to stay just one piece of the Court's
3 August 16, 2013 Order (Dkt. No. 470) ("August 16 Order") pending defendants'
4 appeal of that ruling. In that order, the Court ordered that the general partnerships
5 ("GPs") managed by Defendant Western Financial Planning ("Western") be
6 released from the receivership estate and that Western's equity interests in those
7 GPs be liquidated. *See* Dkt. No. 470, pp. 25-26. Defendants Louis Schooler and
8 Western have now appealed that order, but they only challenge one aspect of the
9 Court's ruling—the part requiring Western to liquidate its GP interests. They now
10 ask the Court to stay only that part of the ruling, as if the release of the GPs and the
11 liquidation of Western's interests are completely unrelated.

12 Plaintiff Securities and Exchange Commission ("SEC") does not oppose a
13 stay in principle, but strongly opposes one that is limited in the way defendants
14 propose. If there is a stay, it should stay *both* the liquidation of Western's GP
15 interests *and* the release of the GPs from the receivership. By asking for a more
16 limited stay, defendants are essentially cherry-picking that part of the August 16
17 Order they liked—the release of the GPs—so they can contest the part they
18 oppose—the liquidation of Western's interests. But the Court's order liquidating
19 Western's equity interests and releasing the GPs was not intended to be carried out
20 piecemeal. You cannot have one without the other. In fact, the Court specifically
21 held that the liquidation of Western's interests was a pre-condition to the release of
22 the GPs from the receivership "to ensure that Western will have no future
23 responsibility for any liability incurred by the GPs." Dkt. No. 470, p. 26.

24 Not only is the scope of the stay proposed by defendants too limited, their
25 motion has failed to satisfy the requirements under Federal Rule of Civil Procedure
26 62(c) for obtaining such a stay. First, defendants have not made a strong showing
27 that they are likely to succeed on the merits. They completely ignore the core
28 factual and legal issues identified by the Court in the August 16 Order. Second,

1 defendants present no evidence whatsoever that either of them will suffer
2 irreparable harm. In fact, Western will receive compensation for the liquidation.
3 The only harm defendants identify is related to a purported \$11 million valuation
4 of the GP interests. But that number is unsupported and nothing more than an
5 imagined number; it is insufficient to support a claim of irreparable harm. Finally,
6 the receivership estate and the investors will be harmed if a stay is issued. Staying
7 the liquidation but releasing the GPs would leave the receivership estate joint and
8 severally liable for the debts and liabilities of the GPs without the benefit of the
9 equity held by Western. This would unnecessarily dissipate the receivership estate.

10 **II. ARGUMENT**

11 **A. The Stay Proposed By Defendants Is Too Limited**

12 Defendants have asked the Court to stay part of its August 16 Order while
13 they appeal another part of that ruling. They want to have their cake and eat it too.
14 However, if a stay is imposed, it should not be as limited as defendants request.
15 Instead, a stay, if issued, should stay both the release of the GPs and the liquidation
16 of Western's interests.

17 The liquidation of Western's interests and the release of the GPs are inter-
18 related. In granting defendants' motion to modify the preliminary injunction, the
19 Court stated that "[t]here are certain conditions the Court finds equitable to impose
20 in connection with releasing the GPs from the receivership." Dkt. No. 470, p. 25.
21 For one, the Court required a *pro rata* reduction of Western's GP interests based
22 on the properties' current fair market value. *See id*, pp. 25-26. The Court stated
23 that "[b]efore the GPs are released from the receivership, all of Western's equity
24 interests in the GPs shall be liquidated." *Id.*, p. 26 (emphasis added). The Court
25 imposed this condition because it wanted "to ensure that Western will have no
26 future responsibility for any liability incurred by the GPs." *Id.* Moreover, as the
27 Court also noted, "given the enormous disparity between the purchase prices of the
28 GP properties and the funds Western raised from the GPs, the Court finds it

1 equitable to preclude Western from receiving a share of the proceeds received from
2 any future sale of GP properties.” *Id.*

3 The limited stay proposed by the defendants conflicts directly with the
4 August 16 Order. Defendants only seek to stay one provision of that Order—the
5 liquidation of Western’s GP interests. In doing so, the defendants ask the Court to
6 ignore a condition required for the release of the GPs and impose only the relief
7 that defendants like. In effect, they are cherry-picking. The Court should stay both
8 the liquidation of Western’s GP interests and the release of the GPs to ensure that
9 the relief it ordered is carried out in the manner that it intended.¹

10 Moreover, a stay of the release of the GPs and the liquidation of Western’s
11 GP interests would preserve the *status quo*. The Court did not appear to envision a
12 situation where Western would continue to hold GP interests after the release of
13 the GPs. Giving effect to certain provisions of the August 16 Order while staying
14 others does not preserve the *status quo*. A stay that covers both the release of the
15 GPs and the liquidation of Western’s interests is the only way to preserve the
16 *status quo* while this case is heard on appeal.²

17 **B. Defendants Have Failed To Satisfy The Requirements Of Rule**
18 **62(c) To Justify A Stay Of The Liquidation Of Western’s Interests**

19 Defendants do not just seek a stay that is too limited in scope. They also
20 have failed to satisfy the requirements of Rule 62(c). If the Court is not inclined to
21 stay the liquidation of Western’s GP interests and the release of the GPs from the
22 receivership, then it should deny defendants’ motion to stay only the liquidation.
23

24
25 ¹ If the Court does stay the release of the GPs, then the Court should also stay the
26 distribution of the investor packets so that they are distributed in conjunction with
the release of the GPs.

27 ² The SEC recently informed the Ninth Circuit that counsel for the SEC is
28 considering whether to recommend a cross-appeal in connection with the August
16 Order. *See* Exhibit 1, attached hereto.

1 A court must consider four factors in determining whether to issue a stay
2 pending appeal pursuant to Federal Rule of Civil Procedure 62(c): “(1) whether
3 the stay applicant has made a strong showing that he is likely to succeed on the
4 merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
5 whether issuance of the stay will substantially injure the other parties interested in
6 the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481
7 U.S. 770, 776 (1987); *see also* FED. R. CIV. P. 62(c). The standard for a stay
8 pursuant to Rule 62(c) is similar to the standard for a preliminary injunction. *See*
9 *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Therefore, a court should
10 apply the Ninth Circuit’s “sliding scale” approach to preliminary injunctions in
11 evaluating a request for a stay pending appeal. *See Conservation Congress v. U.S.*
12 *Forest Service*, 803 F. Supp. 2d 1126, 1129 (E.D. Cal. 2011). Under the current
13 formulation of this approach, “the elements of the preliminary injunction are
14 balanced, so that a stronger showing of one element may offset a weaker showing
15 of another. For example, a stronger showing of irreparable harm to plaintiff might
16 offset a lesser showing of likelihood of success on the merits.”³ *Alliance for the*
17 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Clear*
18 *Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

19 Because defendants fail to make the requisite showing under Rule 62(c), and
20 an application of the Ninth Circuit’s balancing approach does not favor defendants,
21 a stay of the liquidation is not warranted. Therefore, the SEC asks that the Court
22 deny defendants’ motion for stay of the liquidation of Western’s GP interests.

23
24
25 ³ The Ninth Circuit has also adopted a version of the “sliding scale” approach,
26 where a preliminary injunction can issue when the likelihood of success is such
27 that “serious questions going to the merits were raised and the balance of
28 hardships tips sharply in the [plaintiff’s] favor.” *Alliance for the Wild Rockies*,
632 F.3d at 1131. Although defendants make a passing reference to this standard
(Def. Mot. at 3:8-10), they do not identify any “serious questions” at issue here
and only argue the standard cited above.

1 **1. Defendants are not likely to succeed on the merits**

2 Defendants have failed to establish the first prong for a stay under Rule
3 62(c)—a likelihood of success on the merits of their appeal—because their motion
4 utterly fails to address the issues cited by the Court in ordering the release of the
5 GPs and the liquidation of Western’s GP interests. To demonstrate a likelihood of
6 success on the merits, defendants must show, at a minimum, that they have a
7 “substantial case” for relief on the merits. *Leiva-Perez v. Holder*, 640 F.3d 962,
8 968 (9th Cir. 2011). But defendants cannot do so.

9 The August 16 Order and the Court’s September 19, 2013 order denying
10 defendants’ motion for reconsideration (“September 19 Order”) set forth the
11 factual and legal basis for its order to liquidate Western’s GP interests. *See* Dkt.
12 No. 494. Specifically, the August 16 Order states that the liquidation of Western’s
13 GP interests ensures that Western would not be responsible for any GP liabilities in
14 the future. *See* Dkt. No. 470, p. 26. The September 19 Order later stated that the
15 Court had broad powers to administer, retrieve, and dispose of assets belonging to
16 the receivership. *See* Dkt. No. 494, p. 4 (*citing SEC v. Ross*, 504 F.3d 1130, 1145
17 (9th Cir. 2007)). The Court also stated that “the power of sale is within the scope of
18 a Receiver’s ‘complete control’ over receivership assets.” *Id.*, p. 5 (*citing SEC v.*
19 *Am. Capital Invs., Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996)). The Court’s decisions
20 supervising a receivership are reviewed for abuse of discretion. *See id.* (*citing SEC*
21 *v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005)). In exercising its
22 broad authority, the Court also explained that it sought the most equitable way to
23 remove the GPs from the receivership estate in a way that would ensure the GPs’
24 actual independence and protect the remaining receivership estate from any risk of
25 liability incurred by the GPs. *See id.*

26 Defendants’ motion for stay is silent on all of these issues. In discussing
27 their claimed likelihood of success on the merits, defendants completely ignore the
28 Court’s basis and reasoning for liquidating Western’s GP interests. This silence on

1 the core legal issues undermines their assertion that they have presented a
2 “substantial case” for relief. As a result, defendants cannot meet their burden to
3 show that they are likely to succeed on the merits.

4 Rather than confront the basis for the Court’s liquidation order, defendants
5 instead choose to recite, nearly verbatim, the arguments they raised in connection
6 with their denied motion for reconsideration.⁴ *Compare* Def. Mot. (Dkt. No. 495-
7 1) at 4-5 *with* Def. Mot. for Recon. (Dkt No. 474-1) at 3-5. Defendants argue that
8 the liquidation of Western’s claimed, but unsupported, \$11 million interest in the
9 GPs violates Western’s due process rights. *See* Def. Mot. at 3. Defendants also
10 challenge the liquidation because no final judgment of liability has been entered.
11 *See id.* at 4. Defendants further argue that the liquidation of Western’s GP
12 interests would jeopardize the *status quo*. *See id.* And defendants argue that the
13 disparity in what Western paid and what the GPs paid for the real property is an
14 insufficient reason for liquidating Western’s GP interests. *See id.* at 5.

15 The Court found each of these arguments unconvincing when it denied the
16 defendants’ motion for reconsideration, and concluded that it “is not left with a
17 ‘definite and firm conviction that a mistake has been committed’” or that “its
18 decision was manifestly unjust.” Dkt No. 494, p. 6. By rehashing the same
19 arguments again, defendants cannot establish a likelihood of success on the merits.
20 *See SEC v. Bilzerian*, 641 F. Supp. 2d 16, 17 (D.D.C 2009) (finding that defendant
21 failed to establish likelihood of success where, in motion to stay pending appeal, he
22 “merely rehashes meritless arguments that were rejected” by the court).

23 2. Defendants are not likely to suffer irreparable harm

24 Defendants have also failed to meet the second prong under Rule 62(c). For
25 this prong, they must show that irreparable injury is likely in the absence of a stay.
26

27
28 ⁴ Indeed, 12 of the 18 cases cited in the table of authorities for the defendants’
motion to stay were also cited in their motion for reconsideration.

1 *See Leiva-Perez*, 640 F.3d at 968. Defendants’ burden on this prong is higher than
2 the likelihood of success prong because they must show that irreparable injury is
3 the more likely or probable outcome if a stay is not issued. *See id.*

4 Here, defendants fail to meet their burden. Defendants do not even attempt
5 to argue that Schooler will be harmed if the stay is not granted. As for Western,
6 the August 16 Order liquidating Western’s GP interests ensures that it will be paid
7 in cash if its interests are liquidated. The Court ordered Western’s GP interests to
8 be reduced on a *pro rata* basis according to the properties’ current fair market
9 value, as evidenced by the property appraisals obtained by the Receiver. *See* Dkt
10 No. 470, pp. 25-26. Western will be paid for its interests in a fair manner and
11 therefore would not be irreparably harmed if a stay is not issued. Therefore,
12 neither Western nor Schooler can show that it will suffer any irreparable harm.

13 Defendants’ sole claim of irreparable harm is their repeated but unsupported
14 claim that Western’s GP interests are worth \$11 million. *See* Def. Mot. at 7.
15 Defendants previously argued this \$11 million valuation in its motion for
16 reconsideration. *See* Dkt No. 474-1, p. 4. But in the September 19 Order, the
17 Court stated that defendants “provide no support for their contention that their
18 interests in the GPs amount to \$11 million.” Dkt. No. 494, p. 5. With their current
19 motion, the defendants had yet another opportunity to present the Court with
20 evidence of this supposed \$11 million valuation, but they again offered nothing
21 more than a conclusory assertion. *See* Dkt No. 495-1, p. 7. So, while they argue
22 that they will be “harmed” due to a “massive deprivation of property interests,”
23 that claim is illusory. In reality, there is no real harm because Western will receive
24 fair market value for its interests.

25 **3. A stay would harm the receivership estate and investors**

26 The defendants have also failed to meet their burden to demonstrate that
27 issuance of the stay will not substantially injure other parties interested in this
28 action. Defendants claim that “[n]either the SEC nor the Receiver would suffer

1 any injury.” Def. Mot. at 8. But that misses the point. The key here is not the
2 SEC. Rather, it is the harm that will befall the receivership estate and investors.

3 That harm is real. As discussed more fully in the Receiver’s response to the
4 defendants’ motion for stay, the receivership estate and those with claims to
5 recover from the estate will be substantially harmed if the Court issues a stay
6 pending the defendants’ appeal. *See* Dkt. No. 509, pp. 1-2. The GPs’ ability to
7 raise funds and avoid defaults and foreclosures is unknown. If the liquidation of
8 Western’s GP interests is stayed, Western would remain liable for the GPs’
9 liabilities in the event they cannot successfully raise more funds. Western’s
10 remaining assets should not be consumed by covering investor shortfalls to avoid
11 the impairment or loss of property interests.⁵

12 A stay of just the liquidation, therefore, would not only harm investors and
13 the estate, it would also seem to contradict the intentions of the Court. In its
14 September 19 Order, the Court stated that “each interest holder in a general
15 partnership is jointly and severally liable for the debts and liabilities of the general
16 partnership.” *See* Dkt No. 494, pp. 5-6. In supporting its decision to liquidate
17 Western’s GP interests, the Court stated that it did so in part to protect the
18 remaining receivership estate from any future risk of liability incurred by the GPs.⁶

21 ⁵ Defendants have argued that the stay would not harm the Receiver because he has
22 filed suit against three businesses to recover money loaned to them by Western.
23 *See* Def. Mot. at 8. Presumably defendants are arguing that any recovery in these
24 actions could be used to operate Western, compensate investors and pay the
Receiver’s fees. However, whether the Receiver will actually receive any
recovery is purely speculative at this point.

25 ⁶ Defendants have argued that they can only recoup their costs and make a profit by
26 holding on to the GP interests. *See* Def. Mot. at 7. In support, defendants claim
27 to have raised \$80.2 million from investors, while spending \$95.8 million in
28 expenses, giving the appearance that defendants have lost money on these deals.
However, the “expenses” include approximately \$20 million paid to Schooler in
salary. *See* Dkt. No. 504, p.1.

1 *See id.*; *see also* Dkt. No. 470, p. 26 . A stay pending appeal would mean that
2 Western, and thus the receivership estate, would remain jointly and severally liable
3 for the debts and liabilities of the general partnerships. Such a result would harm
4 the Receiver and investors.

5 **4. The public interest does not favor a stay**

6 Finally, the public interest of protecting and preserving Western’s assets for
7 investors and others who may have a claim against the estate does not weigh in
8 favor of granting a stay of the liquidation. The Court expressly recognized this
9 interest in the September 19 Order. It stated that the “primary purpose of equity
10 receiverships is to promote the orderly administration of the estate by the district
11 court for the benefit of creditors.” Dkt. No. 494, p. 4 (*citing SEC v. Hardy*, 803
12 F.2d. 1034, 1038 (9th Cir. 1986). As discussed above, issuing a stay over the
13 liquidation would expose Western to joint and several liability for the debts and
14 liabilities of the general partnership, a result that would undermine the public
15 interest of protecting the receivership estate.

16 **III. CONCLUSION**

17 For the foregoing reasons, the SEC respectfully requests (a) that if the Court
18 issues a stay, then the stay should stay both the liquidation of Western’s GP
19 interests and the release of the GPs, or (b) that the Court otherwise deny
20 defendants’ Motion for Stay Pending Appeal.

21
22 Dated: November 1, 2013

Respectfully submitted,

23
24 /s/ Sam S. Puathasnanon
25 Sam S. Puathasnanon
26 Attorney for Plaintiff
27 Securities and Exchange Commission
28

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

LOUIS V. SCHOOLER and FIRST FINANCIAL
PLANNING CORPORATION d/b/a Western
Financial Planning Corporation,

Defendants-Appellants,

THOMAS C. HEBRANK,

Receiver-Appellee.

No. 13-56761

**MOTION OF THE SECURITIES AND EXCHANGE COMMISSION
TO VACATE THE BRIEFING SCHEDULE**

The Securities and Exchange Commission (“Commission”) hereby moves to vacate the briefing schedule set forth in this Court’s order dated October 10, 2013, because under that schedule appellants’ opening brief is due 13 days before the Commission’s time to appeal expires.

The Commission’s time to file a cross-appeal does not expire until November 18, 2013. The notice of appeal stated that the order being appealed was

the district court's order dated August 16, 2013 (Docket Entry No. 470).¹ On August 28, 2013, appellants filed a motion for partial reconsideration of the August 16 order, in which they sought relief under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure (Docket Entry No. 474), thereby staying the time for both parties to appeal, *see* Fed. R. App. P. 4(a)(4)(A). The district court denied the motion for reconsideration by order dated September 19, 2013 (Docket Entry No. 494). The deadline for the Commission to file a cross-appeal therefore falls 60 days after September 19, *i.e.*, on November 18, 2013. *See* Fed. R. App. P. 4(a)(1)(B).

The Commission is a federal agency whose five members would have to vote to authorize the filing of any cross-appeal. Counsel for the Commission are currently considering whether to recommend a cross-appeal. Under the current briefing schedule, appellants' opening brief is due not later than November 5, 2013, which is 13 days before the Commission's time to appeal expires. Therefore, to conserve resources and avoid duplication of briefing, the briefing schedule in the instant appeal should be vacated pending the Commission's decision whether to file a cross-appeal.

For the same reasons, counsel for the Commission are unable at this time to assess the appropriateness of the case for settlement discussions or mediation, as

¹ The docket entries here refer to the district court docket in *SEC v. Louis V. Schooler et al.*, No. 3:12-cv-02164 (S.D. Cal.).

directed in this Court's order dated October 16, 2013. Concurrent with the present motion, counsel for the Commission are sending the Circuit Mediator a letter to this effect.

The undersigned counsel contacted counsel for appellants earlier today, but they were unable to state their position on the present motion prior to the close of business today (Eastern Time).

For the foregoing reasons, the briefing schedule should be vacated.

Respectfully submitted,

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Senior Litigation Counsel

s/ Stephen G. Yoder
STEPHEN G. YODER
Senior Counsel

Securities and Exchange Commission
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Dated: October 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on October 29, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Eric J. Hougen
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s/ Stephen G. Yoder
STEPHEN G. YODER
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Dated: October 29, 2013

PROOF OF SERVICE

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

U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648

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

On November 1, 2013, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF ORDER PENDING APPEAL** 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: November 1, 2013

/s/ Sam S. Puathasnanon
Sam S. Puathasnanon

