

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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:

**(1) GRANTING RECEIVER’S
EIGHTH INTERIM FEE
APPLICATION;**

[ECF No. 818]

**(2) GRANTING ALLEN MATKINS’
EIGHTH INTERIM FEE
APPLICATION;**

[ECF No. 819]

**(3) GRANTING DUFFY’S THIRD
INTERIM FEE APPLICATION**

[ECF No. 820]

I. INTRODUCTION

Before the Court are three fee applications by the court-appointed receiver Thomas C. Hebrank (the “Receiver”):

1. Eighth Interim Application for Approval and Payment of Fees and Costs to Thomas C. Hebrank, as Receiver (“Receiver’s Eighth Interim Fee Application”), (ECF No. 818);

1 following categories:

2 Category	8th App.
3 General Receivership	\$8,968.05
4 Asset Investigation	\$89.10
5 Reporting	\$3,430.35
6 Operations & Asset Sales	\$2,806.65
7 Claims & Distributions	\$1,692.90
8 Third Party Recoveries	\$29,026.35
9 Pending Litigation	\$445.50
Employment/Fees	\$712.80
10 Total	\$47,171.70

11 (ECF No. 819, at 1.)

12 While Allen Matkins incurred \$47,171.70, it now seeks only 80% of those fees,
 13 i.e., \$37,737.26. Allen Matkins' Eighth Fee Application covers the same period noted
 14 above. (*Id.*) Allen Matkins' reserves the right to seek any un-awarded fees in its final
 15 fee application. (*Id.* at 1 n.1) Allen Matkins also seeks costs in the total amount of
 16 \$489.45, which covers expenses for document editing and copying, service fees,
 17 reprographics, PACER fees, shipping, and postage. (*Id.* at 6.)

18 **C. Duffy**

19 Duffy asserts it incurred \$47,171.70 in fees for work done in the following
 20 categories:

21 Category	3rd App.
22 General Engagement Services	\$3,324.38
23 IT Consulting	\$2,747.63
24 Preparation of 2013 Form 1096 and 1099	\$86,782.88
25 Informational Returns and Preparation of 2013	
26 Income Tax Returns	
27 Total	\$92,854.89

28 (ECF No. 820, at 2–7.)

1 Duffy seeks the entirety of the \$92,854.89 in fees that it incurred. (*Id.* at 1.)
2 Duffy's Third Fee Application covers the period December 1, 2013 through April 30,
3 2014. (*Id.*) (*Id.* at 1 n.1) Allen Matkins also seeks costs in the total amount of \$72.83
4 per GP, i.e., \$6,994.99, which covers e-file fees and specialized tax software. (*Id.* at 6.)
5

6 III. LEGAL STANDARD

7 "[I]f a receiver reasonably and diligently discharges his duties, he is entitled to
8 fair compensation for his efforts." *Sec. and Exch. Comm'n v. Elliott*, 953 F.2d 1560,
9 1577 (11th Cir. 1992). "The court appointing [a] receiver has full power to fix the
10 compensation of such receiver and the compensation of the receiver's attorney or
11 attorneys." *Drilling & Exploration Corp. v. Webster*, 69 F.2d 416, 418 (9th Cir. 1934).
12 A receiver's fees must be reasonable. *See In re San Vicente Med. Partners Ltd.*, 962
13 F.2d 1402, 1409 (9th Cir. 1992).

14 As set forth in the Court's prior fee orders, (*see, e.g.*, ECF No. 640), the Court
15 will assess the reasonableness of the requested fees using the factors enumerated in
16 *Sec. and Exch. Comm'n v. Fifth Avenue Coach Lines*, 364 F. Supp. 1220, 1222
17 (S.D.N.Y. 1973), and *In re Alpha Telcom, Inc.*, 2006 WL 3085616, at *2–3 (D. Or. Oct.
18 27, 2006). Those factors include: (1) the complexity of the receiver's tasks; (2) the fair
19 value of the receiver's time, labor, and skill measured by conservative business
20 standards; (3) the quality of the work performed, including the results obtained and the
21 benefit to the receivership estate; (4) the burden the receivership estate may safely be
22 able to bear; and (5) the Commission's opposition or acquiescence. *See* 364 F. Supp.
23 at 1222; 2006 WL 3085616, at *2–3.

24 IV. DISCUSSION

25 A. Complexity of Tasks

26 The Court finds that the tasks performed by the Receiver were moderately
27 complex. The Receiver undertook the following tasks:

- 28 • participating in meetings and conferences with the SEC's counsel and his

- 1 own counsel;
- 2 • handling administrative issues, including reviewing mail, email, and other
- 3 correspondence to Receivership Entities;
- 4 • administering the bank accounts of Receivership Entities;
- 5 • reviewing and approving expenditures;
- 6 • maintaining and updating the Receiver's website with case information
- 7 and documents;
- 8 • managing and overseeing the GPs' operations and real property;
- 9 • managing and overseeing Western's operations;
- 10 • performing accounting functions of Receivership Entities, including
- 11 paying expenses, clearing checks, and ACH entries;
- 12 • managing and overseeing tax reporting for Receivership Entities;
- 13 • managing and overseeing GP operational bills, loan payments, and cash
- 14 management, including preparing operational bills, analyzing GP loan
- 15 balances, projecting GP cash needs, initiating property tax appeals on GP
- 16 properties, and conducting investor votes for GPs with expired terms; and
- 17 • meeting with his counsel and preparing legal filings related to operation
- 18 of the receivership.

19 (ECF No. 818, at 2–3.)

20 The Court finds that the tasks performed by Allen Matkins during its respective

21 application period to be somewhat complex. Allen Matkins undertook the following

22 tasks:

- 23 • advising the Receiver on Defendants' appeal and the SEC's cross-appeal
- 24 of this Court's August 16, 2013 Order;
- 25 • advising the Receiver on discovery requests, responses, and deposition
- 26 notices issued by the SEC and Defendants;
- 27 • advising the Receiver on Defendants' motion for partial summary
- 28 judgment and the SEC's motion for partial summary judgment;

- 1 • advising the Receiver on the SEC's motion to defer consideration of the
- 2 summary judgment orders;
- 3 • advising the Receiver on Defendants' motion for reconsideration of this
- 4 Court's order approving the Receiver's Seventh Interim Report;
- 5 • advising the Receiver on this Court's April 25, 2014 Order granting the
- 6 SEC partial summary judgment, including this Court's *sua sponte*
- 7 reconsideration of its August 16, 2013 Order;
- 8 • advising the Receiver on briefs filed by the SEC and Defendants in
- 9 response to the April 25, 2014 Order;
- 10 • advising the Receiver on Defendants' motion to remove Western from the
- 11 receivership;
- 12 • advising the Receiver on the SEC's motion to the Ninth Circuit to hold
- 13 appeals in abeyance due to this Court's *sua sponte* reconsideration of the
- 14 August 16, 2013 Order;
- 15 • advising the Receiver on Defendants' motion for reconsideration of the
- 16 April 25, 2014 Order;
- 17 • preparing a brief addressing issues raised in the April 25, 2014 Order and
- 18 opposing Defendants' motion to remove Western from receivership;
- 19 • investigation of tenants living on the Stead property;
- 20 • preparing the Receiver's Eighth Interim Report;
- 21 • issuing letters and operational bills issued to investors;
- 22 • advising the Receiver on expiration of certain GP terms and
- 23 voting/balloting for the same;
- 24 • advising the Receiver on the Partnership Administrators' performance of
- 25 their duties;
- 26 • advising the Receiver on the leases with tenants on the Stead property;
- 27 • advising the Receiver on the proposed broker listing obtained by investor
- 28 Nancy Kemper;

- 1 • assisting the Receiver in communicating with investors, creditors, and
2 their counsel;
- 3 • assisting the Receiver with the three cases against the LinMar Borrowers;
- 4 • advising the Receiver on litigation pending against Western; and
- 5 • assisting in the preparation of the Seventh and Sixth Interim Fee
6 Applications.

7 (ECF No. 819, at 2–6.)

8 The Court finds that the tasks performed by Duffy to be moderately complex.
9 Duffy undertook the following tasks:

- 10 • communicating with the Receiver and Western to establish engagement
11 and agree upon procedures, deadlines, and other circumstances;
- 12 • discussing the tax reporting treatment of the sale of partnership units and
13 related calculations;
- 14 • installing the 2013 ProSystem fx software on Duffy’s server;
- 15 • troubleshooting issues with the 2012.0400 software update release to
16 facilitate data proforma from 2012;
- 17 • working with ProSystem fx support regarding download of release
18 necessary to commence tax return preparation and necessary data transfer;
- 19 • setting up secure access to site for backup of all clients in tax software,
20 including upload to an FTP site;
- 21 • providing Western’s IT with software and perm key needed to install
22 software on the Western server and run their data input for the 2013 tax
23 returns;
- 24 • calculating total Form 1099 costs to be reported based on Western’s
25 report, including the persons that needed to be issued a 1099 and
26 corresponding amounts;
- 27 • verifying accounting fees in comparison the Western’s records for 1099
28 reporting;

- 1 • inputting the 2013 Form 1099 amounts and verifying all other
2 informational data included on the form,, such as names, addresses, and
3 ID numbers for Receivership Entities;
- 4 • drafting letters to receivership entities with instructions for filing the
5 forms;
- 6 • assembling the 1099 packet, including copies for the IRS (Form 1096), a
7 copy for the Receivership Entities' records, and copies for each of the
8 recipients;
- 9 • processing the initial receipt of the receivership entities' books and
10 records and electronic file backup for ProSystem fx;
- 11 • formatting and organizing the receivership entities files with the current
12 year data;
- 13 • verifying cash receipts and disbursements for the year and scanning detail
14 for reporting accuracy and consistency;
- 15 • reviewing the bank reconciliation to the bank statement;
- 16 • checking balance sheet account balances for assets, loan receivables, and
17 loan payables for variances compared to prior year and verifying correct
18 application of accounting rules in case of any differences;
- 19 • verifying and reconciling "investment in" accounts to the related LLC
20 books for receivership entities with structures that included single
21 member LLCs;
- 22 • reviewing the 2013 capital contributions recorded on each K-1 on the tax
23 return to the Western spreadsheet generated based on capital received and
24 ensuring ownership units were accurately reflected on the K-1s;
- 25 • verifying accuracy of partner names, addresses, ID numbers, and entity
26 types in ProSystem fx compared to the Western database that tracks all
27 partner changes submitted throughout the year;
- 28 • reviewing transfers of interest and ensuring transfers were correctly

- 1 calculated and reported on the 2013 tax return and K-1s, if applicable;
- 2 • verifying the calculation of basis and net gain on the sale of partnership
- 3 units for 2013;
- 4 • reviewing input sheets of information entered into ProSystem fx;
- 5 • manager level review of the above areas, as well as, overall review of tax
- 6 return forms and input;
- 7 • manager level verification of reporting accuracy, formatting, and
- 8 adherence to current federal and state partnership tax laws;
- 9 • manager level quality control check of partner names, addresses, ID
- 10 numbers, and entity types in ProSystem fx compared to Western database
- 11 that tracks all partner changes submitted throughout the year;
- 12 • manager level review of accuracy and tax recognition of the sale of
- 13 partnership units for 2013;
- 14 • staff and manager communication as needed to answer return
- 15 discrepancies or additional information needed to complete the tax return;
- 16 • partner level review of the above areas, as well as, overall review of tax
- 17 return forms and input;
- 18 • partner level verification of reporting accuracy, formatting, and adherence
- 19 to current federal and state partnership tax laws;
- 20 • partner level quality control check of partner names, addresses, ID
- 21 numbers, and entity types in ProSystem fx compared to Western database;
- 22 • partner level quality control check of sale of partnership units calculation
- 23 and related tax return reporting;
- 24 • finalizing of tax return and accompanying letters and schedules;
- 25 • printing tax return copies for each of the receivership entities, for
- 26 government filing, and the final K-1 packages;
- 27 • backup of receivership entities files to data stick to submit for client
- 28 records;

- 1 • assembly of a total of 8,197 K-1 packages to be mailed to partners;
- 2 • electronic filing of the 2013 partnership returns;
- 3 • printing acceptance letters for the tax files to verify successful submittal
- 4 and receipt by government agencies; and
- 5 • communication with Western staff to answer partner requests for single
- 6 K-1s or other questions regarding the 2013 tax returns and receivership.

7 (ECF No. 820, at 2–6.)

8 The Court has reviewed the time sheets filed in support of the instant fee
9 applications and finds that, at this time, the tasks were necessary and not over-billed.

10 **B. Fair Value of Time, Labor, and Skill**

11 The Receiver billed his time at \$247.50 per hour and the time of those working
12 for him at \$157.50–\$180.00 per hour. (ECF No. 818, at 1–2.) Allen Matkins billed its
13 time at \$279– \$445.50 per hour, with much of the work being billed at \$351.00 per
14 hour. (ECF No. 819, Ex. A, at 28.) The Receiver’s accounting firm, Duffy, billed its
15 time at \$70.00–\$375.00 per hour, with much of the work being billed at \$160.00 per
16 hour. (ECF No. 820, Ex. B, at 210.) These rates reflect a ten percent discount from the
17 Receiver’s and Allen Matkins’ ordinary rates, and a twenty-five percent discount from
18 Duffy’s ordinary rates. (ECF No. 818, at 1; ECF No. 819, at 1; ECF No. 820, at 1.)

19 The Court continues to find, as it has in previous fee orders, that the rates
20 charged by the Receiver, Allen Matkins, and Duffy are comparable to rates charged in
21 this geographic area and therefore represent a fair value of the time, labor, and skill
22 provided.

23 **C. Quality of Work Performed**

24 The Court finds the quality of work performed by the Receiver and his counsel
25 to be above average. The Receiver and his professionals continue to keep the
26 Receivership Entities afloat, which—for Western—is a challenging task given that its
27 main source of income (i.e., selling GP interests) has ceased since implementation of
28 the action. Without assistance from Defendants, the Receiver and his professionals

1 have ultimately been able to meet Western’s many obligations, including payments on
2 the loans secured by GP properties. This benefits the entire receivership estate.
3 Moreover, the Receiver and his counsel have complied with the Court’s orders and
4 have made every effort to protect investors’ interests in the GP properties during the
5 pendency of this litigation.

6 The Court finds the quality of work performed by Duffy to be satisfactory. The
7 Court has received no complaint that Duffy’s tax preparation activities have been
8 deficient.

9 **D. Receivership Estate’s Ability to Bear Burden of Fees**

10 Given the Receiver’s assurance that approved fees and costs will be paid from
11 Western’s assets above and beyond cash necessary to make payments on loans secured
12 by GP properties, the Receiver’s acknowledgment that approved fees and costs may
13 have to be paid in installments as funds become available, and the Receiver’s efforts
14 to collect on Western’s receivables, (*see* ECF No. 818, at 5) the Court finds the
15 receivership estate has sufficient ability to bear the instant fee requests.

16 **E. Commission’s Opposition or Acquiescence**

17 The Receiver indicates that the SEC does not oppose any of the fee applications.
18 (ECF No. 818, at 5; ECF No. 819, at 8; ECF No. 820, at 9.)

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 Considering the above five factors together, and considering that “[i]nterim fees
2 are generally allowed at less than the full amount,” *Alpha Telecom*, 2006 WL 3085616,
3 at *2–3, the Court awards fees and costs as set forth in the following table:


4 Applicant	5 Fees Allowed	6 % of Fees Incurred ¹	7 Costs Allowed	8 % of Costs Incurred
Receiver	\$46,175.40	80%	\$887.12	100%
Allen Matkins	\$37,737.26	80%	\$489.45	100%
Duffy	\$92,854.89	100%	\$6,994.99	100%

9 V. CONCLUSION AND ORDER

10 After a review of the parties’ submissions, the record in this matter, and the
11 applicable law, and for the foregoing reasons, **IT IS HEREBY ORDERED** that:

- 12 1. The Receiver’s Eighth Interim Fee Application, (ECF No. 818), is
13 **GRANTED**;
- 14 2. Allen Matkins’ Eighth Interim Fee Application, (ECF No. 819), is
15 **GRANTED**;
- 16 3. Duffy’s Third Interim Fee Application, (ECF No. 820), is **GRANTED**;
17 and
- 18 4. The awarded fees shall be paid from Western’s assets above and beyond
19 cash necessary to make payments on loans secured by GP properties.

20 DATED: January 15, 2015

21 
22 HON. GONZALO P. CURIEL
23 United States District Judge
24
25
26

27 _____
28 ¹ The Court includes the percentage of fees *incurred* rather than a percentage of
the fees requested, given that the Receiver and Allen Matkins request only a percentage
of their actual fees.