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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 DENYING MOTION FOR
MODIFICATION OF
PRELIMINARY INJUNCTION
ORDER**

(ECF NO. 581)

On March 13, 2013, the Court issued its Preliminary Injunction Order and Order Appointing Thomas C. Hebrank Permanent Receiver (“Injunction Order”). (ECF No. 174.) The Injunction Order provides that a receiver be appointed over defendant Western and related entities and notes that “the Court appointed a receiver to operate Western long enough to clarify Western’s financial affairs.” (Id. at 6-7 n.2; see also ECF No. 59 at 9.) The Injunction Order further provides that “[w]hether a receivership will remain necessary after the Receiver renders an accounting is unknown.” (ECF No. 174 at 7 n.2.) Indeed, in the Court’s November 30, 2012 Order re Receiver’s Second

1 Report and Proposal, the Court observed that, “because Western’s financial affairs need
2 clarification, it is unknown whether a receiver would[—in the future—]be helpful in
3 collecting revenue on behalf of Western.” (ECF No. 59 at 10.) The Court further
4 noted that, “while it may be too early in these proceedings to be certain, it is likely a
5 receiver will be required to oversee the proper distribution of investor funds.” (Id.)

6 On August 16, 2013, the Court issued its Order Granting in Part and Denying in
7 Part Defendants’ Motion to Modify Preliminary Injunction Order (“Modification
8 Order”). (ECF No. 470.) The Modification Order provides, among other things, that
9 the general partnerships organized by Western and Schooler to hold interests in real
10 property (“GPs”) should be released from the receivership upon satisfaction of certain
11 conditions. (Id. at 25-27.) Both Schooler and the SEC appealed the Modification
12 Order. (ECF Nos. 499, 514.) These appeals remain pending, and the GPs remain in
13 the receivership.

14 On April 25, 2014, the Court issued its Order Denying Defendants’ Motion for
15 Partial Summary Judgment and Granting in Part and Denying in Part Plaintiff’s Motion
16 for Partial Summary Judgment (“Summary Judgment Order”). (ECF No. 583.) In the
17 Summary Judgment Order, the Court concludes the interests in real property that
18 Defendants sold to investors are, as a matter of law, securities subject to federal
19 securities laws and regulations. Per this conclusion, the Court found good cause to
20 reconsider the Modification Order to the extent that the Modification Order provides
21 for the release of the GPs from the receivership. A hearing on this issue is scheduled
22 for July 18, 2014.

23 Presently before the Court is defendant Schooler’s Motion for Modification of
24 Preliminary Injunction Order to Remove Western Financial Planning Corporation from
25 Receivership (“Motion”). (ECF No. 581.) The Motion has been fully briefed, (ECF
26 Nos. 584, 587, 590), and the Court finds the Motion suitable for disposition without
27 oral argument, see CivLR 7.1.d.1.

28 Schooler asks the Court to modify the Injunction Order to remove Western from

1 the receivership for two reasons: (1) “The Receiver has completed all necessary tasks,
2 namely the clarification of Western’s financial affairs”; and (2) “The operations of
3 Western are sufficiently restrained – and reduced in scope - by the preliminary
4 injunction so as to make a continued receivership unnecessary.” (ECF No. 581-1 at 2.)
5 In support of his request, Schooler asserts that: (1) the Receiver has uncovered no
6 evidence of “misappropriation of funds, commingling, or other financial
7 mismanagement”; (2) “the [Injunction Order]’s other terms that restrain Western’s
8 activities provide sufficient preservation of the status quo and should adequately
9 alleviate any concerns the [SEC] has about protecting the public”; and (3) “dissolution
10 of the receivership over Western will in no way hinder or otherwise prejudice the
11 SEC’s ability to fully litigate all pending claims against Defendants.” (Id. at 2-3.) In
12 short, Schooler asserts the receivership has served its original purpose and that
13 Western’s current operations are so minimal that a receivership is no longer justified.

14 In response, the Receiver argues Western should remain in the receivership so
15 that its “remaining assets are preserved and protected and are available for distribution
16 to investors if and when the Court so orders.” (ECF No. 584 at 2.) The Receiver
17 further asserts that, in addition to managing Western’s day-to-day operations, he will
18 continue to:

19 (a) collect loans Western made to the LinMar entities controlled by Mr.
20 Schooler (which had all matured with no collection efforts made prior to
21 the receivership), (b) collect loans made to the GPs to cover operation
22 shortfalls (which likewise were never collected prior to the receivership),
23 (c) collect notes payable from the GPs to Western[,] (d) keep all mortgage
payments, property taxes, and insurance premiums current, (e) sell land
parcels owned by Western, and (f) evaluate potential claims against third
parties, including professionals who represented Western prior to the
receivership.

24 (Id. at 2-3.) The Receiver concludes by noting he has “reduced Western’s operating
25 expenses to a fraction of what they were under Mr. Schooler,” such that “any claim the
26 receivership over Western is harming Western or investors has no merit.” (Id. at 3.)

27 The SEC also argues the Motion should be denied. (ECF No. 587.) The SEC
28 asserts the receivership over Western remains necessary for several reasons. First, the

1 SEC argues the Receiver is needed to continue to marshal and preserve Western’s
2 assets under challenging financial circumstances, including the need to continue
3 making mortgage payments on certain GP properties. (Id. at 3.) The Receiver
4 specifically notes that Western’s chronic cash shortage—caused by Western’s inability
5 to sell additional GP units and by the fact that any amount owed by the GPs to Western
6 is less than the amount Western owes on the underlying mortgages—makes running
7 Western particularly difficult.

8 Second, the SEC argues the Receiver’s duties go beyond clarifying Western’s
9 financial affairs. (Id. at 6.) The SEC notes that the Court has ordered the Receiver to
10 collect revenue owed to Western, which the Receiver has been attempting to collect
11 from investors that borrowed money from Western and from the LinMar entities that
12 also borrowed money from Western. The Receiver further argues it is likely the
13 Receiver will be required to oversee the distribution of any funds collected on behalf
14 of Western.

15 Third, the SEC argues Schooler cannot, on behalf of Western, pursue claims
16 against third parties objectively because Schooler owns a stake in several entities that
17 owe money to Western. (Id. at 7.) The SEC further argues that, because Defendants
18 have asserted an affirmative defense of reliance on professionals, Western may have
19 a claim against its professionals, including the attorney that currently represents
20 Defendants’ interests in this matter (Mr. Eric Hougen). The SEC thus argues that
21 Schooler could not, with his current counsel, objectively evaluate whether to file any
22 claims against this same counsel.

23 Fourth, the SEC argues the Receiver is necessary to ensure investors receive
24 accurate and objective information. (Id. at 8.) The SEC cites, for example, the Court’s
25 finding that a letter Schooler apparently sent to investors seemed to be an attempt “to
26 guide and influence the actions and perceptions of investors in these proceedings.”
27 (See ECF No. 549 at 2.)

28 “The Power of a district court to impose a receivership or grant other forms of

1 ancillary relief . . . derives from the inherent power of a court of equity to fashion
2 effective relief.” SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980). The “primary
3 purpose of equity receiverships is to promote orderly and efficient administration of the
4 estate by the district court of the benefit of creditors.” SEC v. Hardy, 803 F.2d 1034,
5 1038 (9th Cir. 1986). The court may therefore employ “reasonable procedures” to
6 serve this purpose. Id.

7 “A district court’s power to supervise an equity receivership and to determine
8 the appropriate action to be taken in the administration of the receivership is extremely
9 broad.” SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005). A
10 district court’s supervisory decisions are reviewed for an abuse of discretion. Id.

11 Generally, “any order . . . that adjudicates fewer than all the claims or the rights
12 and liabilities of fewer than all the parties . . . may be revised at any time before the
13 entry of a judgment adjudicating all the claims and all the parties’ rights and
14 liabilities.” Fed. R. Civ. P. 54(b). “A motion to modify a preliminary injunction is
15 meant only to relieve inequities that arise after the original order.” Credit Suisse First
16 Boston Corp. v. Grunwald, 400 F.3d 1119, 1124 (9th Cir. 2005) (quotation marks &
17 citation omitted).

18 Here, the Court concludes the receivership over Western remains necessary.
19 While Western’s financial affairs have been largely clarified, the Court finds—as it
20 predicted in its November 30, 2012 and March 13, 2013 orders—that a Receiver
21 remains necessary to collect revenue owed to Western, to evaluate potential claims
22 against third parties, and to handle the likely distribution of funds to investors.

23 The Receiver is currently litigating claims against the LinMar entities—three
24 entities in which Schooler owns a stake and which apparently owe Western over \$1.26
25 million. The Court agrees that returning Western to Schooler’s control at this time
26 would give rise to a conflict of interest because Schooler owns a stake in the LinMar
27 entities.

28 The Court further agrees that, given Defendants’ affirmative defense of reliance

1 on professionals, that an objective evaluation of whether Western has any claim against
2 its professionals is required and that Schooler—being represented by at least one of the
3 professionals on whom Western allegedly relied—is not in a position to objectively
4 evaluate such a claim.


5 Given the Court’s conclusion that the GP units Defendants sold to investors are
6 securities, the likelihood that some funds will eventually be distributed to investors has
7 increased. Thus, the need for a receiver to oversee such a distribution has become
8 more likely.

9 In the meantime, the Court agrees that a receiver remains necessary to manage
10 Western’s chronic cash shortage. Specifically, the Court agrees that a receiver is
11 necessary to ensure that the mortgages on some GP properties are paid without putting
12 investors in the precarious position of having—for the first time—to organize
13 themselves in order to avoid a default or foreclosure. To avoid a default or foreclosure
14 in the event that Western failed to make a mortgage payment on a given piece of
15 property, for example, as many as 400 investors might need to meet and decide how to
16 proceed. [See ECF No. 583 at 5-6 (explaining GP structure).] The current record
17 reflects that investors have never, without the help of Defendants, coordinated such a
18 large scale effort.

19 Finally, the Court agrees that a neutral third-party, such as the Receiver, remains
20 necessary to provide investors with objective information. The Receiver is currently
21 the only individual approved by the Court to inform investors as to the status of these
22 proceedings. Because investors are not a party to this action, they do not have the level
23 of access available to the parties. The SEC does not propose that it be allowed to
24 communicate directly with investors about the status of these proceedings. And
25 Schooler cannot honestly contend—given the clear conflict of interest that exists
26 between himself and the investors to whom he sold unregistered securities and
27 allegedly defrauded—that he is in a place to provide these same investors with
28 objective information about these proceedings.

1 In sum, the Court finds that no inequities have arisen since the Injunction Order
2 was issued that would require Western to be removed from the receivership. See Credit
3 Suisse, 400 F.3d at 1124. Accordingly, the instant Motion, (ECF No. 581), is
4 **DENIED**. The hearing on the Motion, currently set for June 20, 2014, is **VACATED**.

5 DATED: June 16, 2014

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7 HON. GONZALO P. CURIEL
8 United States District Judge
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