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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 FIRST
INTERIM FEE APPLICATIONS**
(ECF NOS. 63, 64, 65)

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 aforementioned interests in real property. Before the Court are three interim fee applications related to the administration of the receivership estate. (ECF Nos. 63, 64, 65.) The Receiver and his professionals seek a total of

1 \$74,472.12 in this first set of interim fee applications. For the reasons that follow, the Court awards
 2 a total of \$64,833.92.

BACKGROUND

I. Fee Applications

5 The Receiver seeks \$28,705.50 in fees for work done in the following categories:

6 Category	Total
7 General Receivership	\$6,954.75
8 Asset Investigation & Recovery	\$10,410.75
9 Reporting	\$2,821.50
10 Operations & Asset Sales	\$8,394.75
11 Claims & Distributions	\$0
12 Legal Matters & Pending Litigation	\$123.75

13 The Receiver also seeks costs in the amount of \$870.86, which includes mileage, IT costs,
 14 locksmith costs, copies, and postage.

15 The Receiver's counsel seeks \$31,969.35 in fees for work done in the following categories:

16 Category	Total
17 General Receivership	\$15,131.25
18 Asset Investigation	\$518.40
19 Reporting	\$7,757.55
20 Operations & Asset Sales	\$5,841.90
21 Pending Litigation	\$2,720.25

22 The Receiver's counsel also seeks costs in the amount of \$726.41, which includes filing fees,
 23 messenger fees, copies, and postage.

24 The Receiver's forensic computer specialist seeks a one-time amount of \$12,200.00 for work
 25 done in connection with the forensic examination and imaging of all computer servers and hard drives
 26 owned by the receivership entities.

II. Defendants' Response

28 Defendants have filed an opposition to the fee applications, claiming the requested fees are

1 excessive and that the Receiver has not demonstrated the fees were incurred for the benefit of Western
2 or the general partnerships. Defendants argue that the Receiver has failed to demonstrate the requested
3 fees are reasonable under the multi-factor test set forth in Johnson v. Georgia Highway Express, Inc.,
4 488 F.2d 714 (5th Cir. 1974).

5 **III. Investors' Responses**

6 The Court has received sixty-five letters from investors who object to the Receiver's requests
7 for fees. Forty-nine of the letters appear to be a form letter that was circulated among investors.¹

8 As to the source of payment, the form letter asserts that payment of the requested fees "would
9 cause a tremendous unwarranted loss in value of our partnership properties being 'REDUCED TO
10 CASH' in a down real estate market in order to pay these fees." The form letter quotes a portion of
11 the fee applications, in which "The Receiver proposes that to the extent Western's cash or other liquid
12 assets and recoveries are not sufficient, Western's equity interests in the GPs be reduced to cash as
13 necessary to cover administrative expenses of the receivership." The form letter states "[t]here is **no**
14 **basis** for Western and the GP's to share responsibility for the costs of the receivership," as "[t]he
15 partnerships should not have been included in the Receivership in the first place as they have no legal
16 or administrative connection to [Western]." (Emphasis in original.) The form letter provides: "We
17 as investors have complete and independent control of our partnerships per registered land titles and
18 stated governess via our purchase contracts." The form letter asserts that investors "DO NOT need
19 to be protected," as "[t]here has been no finding of fraud or co-mingling of funds as suggest by the
20 SEC." The form letter states: "Being under the control of a Receiver is an undue financial burden to
21 an already losing investment."

22 The form letter further provides that investors "feel the fees are exorbitant and excessive." It
23 states, "The Receiver has certainly not been open nor helpful to the investors, denying access to a one-
24 to-one meeting with him to help us understand what and why he is doing things." The form letter
25 asserts that the Reciever "is spending money for property appraisals without our approval and asking
26 us to possibly pay for it."

27
28 ¹ ECF Nos. 90, 92, 94, 96 - 98, 100 -103, 105, 110, 112, 115, 116, 119, 121, 123, 124, 126 -
131, 133, 135, 137 - 139, 142 - 148, 150 - 154, 155, 157, 158, 160, 161, 163, 164, 168.

1 The remaining sixteen letters were not form letters, but they expressed similar concerns.² Mr.
2 Yue believes “it is wrong for the [SEC] to request for compensation, for work done, from a defendant
3 even before he/she has been given the fairness of a trial.” (ECF No. 77.)

4 Mr. and Ms. Coan assert that the SEC should absorb these costs until a judgment is rendered
5 in its favor, as “the case may be decided in favor of the defendant.” (ECF No. 79.) They further
6 provide that they “invested in this as if it were a public offering and after reading the prospectus.” (Id.)
7 They state they “are not attorneys with extensive experience in corporate law and may be the victims
8 of Western Financial misleading [them],” as they “have received no funds from this investment and
9 have only paid more funds for costs that Western Financial says they incurred.”

10 Ms. Hilton asserts that the Receiver should “move to the back of the line and await their
11 payment AFTER the rest of [the investors].” (ECF No. 84.)

12 Mr. and Ms. Kaul assert the general partners own and control the properties and that the
13 receivership is therefore unnecessary and burdensome. (ECF No. 87.)

14 Ms. Shaghnessy and Mr. Morones state they “need to be provided with greater clarification by
15 all parties concerned in terms of what is in our best interest before approving or disapproving [the]
16 application.” (ECF No. 99.)

17 Mr. Lee seeks clarification as to whether the requested fees would be deducted from current
18 Western assets/accounts rather than from the general partnerships’ assets/accounts. (ECF No. 109.)
19 He states Schooler and/or Western should be responsible for these costs, as the investors are the
20 victims. (Id.) He goes on to assert that, if Western can no longer operate, it should be liquidated and
21 the resulting funds should be distributed to investors (based on shares owned) after deducting the costs
22 of investigation. (Id.)

23 Ms. Robins requests “that the court find some way to ensure that the general partners are not
24 held financially accountable for the costs incurred by the SEC litigation and its proceedings.” (ECF
25 No. 113.)

26 Mr. Morgan “vehemently” opposes the general partnerships’ inclusion in the receivership
27 estate. (ECF No. 114.) Mr. Morgan asserts that, while Western may have an interest in the

28 ² ECF Nos. 77, 79, 85, 87, 99, 107, 109, 113, 114, 122, 125, 144, 149, 156, 152, 165.

1 investment properties as a general partner, the investment properties belong to the general partnerships
2 – not exclusively to Schooler or Western. (Id.) Mr. Morgan thus asserts that the requested fees (which
3 he believes are excessive for only eighteen days of work) should not be paid from general partnership
4 assets. (Id.)

5 Ms. Jalving expresses grave concern that the properties in which she has invested will be sold
6 at a time when the real estate market is still recovering to pay receivership fees. (ECF No. 149.) Mr.
7 Rocco expresses a similar concern that the “Receiver will spend all the partnerships’ cash and then sell
8 the land during bad economic times to pay for all his expenses.” (ECF No. 156.)

9 Mr. Loguidice urges the Court to restore Schooler to the position of managing Western’s and
10 the general partnerships’ affairs, as he believes the Receiver is not qualified to do so. (ECF No. 162.)

11 **IV. Receiver’s Reply**

12 In response to arguments that the Receiver has done nothing to benefit Western or the general
13 partnerships, the Receiver asserts that, since his appointment, he has “preserved and protected the
14 assets of the Receivership Entities, substantially reduced Western’s operating expenses, and kept the
15 Court and the parties apprised of his activities.”

16 The Receiver also asserts that, instead of the multi-factor test set forth in Johnson, the more
17 appropriate test determine the reasonableness of the requested fees is set forth in SEC v. Fifth Avenue
18 Coach Lines, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973). The Receiver notes that, regardless of the
19 correct standard, Defendants fail to identify any objectionable task described in the fee applications
20 or time entries in the attached bills. The Receiver further notes that Defendants do not contend that
21 the hourly rates charged by the Receiver and his counsel are unreasonable compared to other receivers
22 and attorneys in Southern California. The Receiver asserts that the Commission is familiar with such
23 fees.³

24 As to the source of payment, the Receiver asserts this Court has broad authority to permit the
25 Receiver to reduce Western’s equity interests in the general partnerships to cash. The Receiver asserts
26 this is currently the most appropriate way to pay the receivership expenses but recognizes that “equity
27

28 ³ Indeed, the Court notes that the SEC has filed a notice of non-opposition to the fee applications.

1 may dictate a different source or allocation in the future.”

2 The Receiver further asserts it is normal for receivership fees to be highest at the beginning of
3 the receivership given the need to perform one-time tasks such as gaining control of bank accounts,
4 gaining an understanding of accounting systems, and filing complaints and/or TROs in other
5 jurisdictions.

6 **V. Defendants’ Surreply**

7 Defendants assert that the Receiver has failed to establish the reasonableness of the requested
8 fees, and that the Receiver did not even attempt to address Defendants’ assertion that the Receivers’
9 work has not benefitted Western or the general partnerships.

10 Defendants further assert that the Receiver has failed to explain why the general partnerships
11 should bear the burden of any of the requested fees. Defendants assert that the money currently in the
12 general partnership accounts came directly from investors to pay administrative costs such as preparing
13 each general partner’s Form K-1 and paying property taxes. Defendants thus assert that, “[i]f GP funds
14 are used to pay the Receiver’s fees, the pace accelerates at which individual investors are required to
15 replenish their respective GP operating funds.”

16 Defendants further assert that the Court has not given investors any opportunity to be heard on
17 the necessity of a receivership, “let alone money being taken directly out of their accounts to pay the
18 Receiver.”

19 **DISCUSSION**

20 **I. Legal Standard**

21 “[I]f a receiver reasonably and diligently discharges his duties, he is entitled to fair
22 compensation for his efforts.” SEC v. Elliott, 953 F.2d 1560, 1577 (11th Cir.1992). “The court
23 appointing [a] receiver has full power to fix the compensation of such receiver and the compensation
24 of the receiver’s attorney or attorneys.” Drilling & Exploration Corp. v. Webster, 69 F.2d 416, 418
25 (9th Cir. 1934). A receiver’s fees must be reasonable. See In re San Vicente Med. Partners Ltd., 962
26 F.2d 1402, 1409 (9th Cir. 1992). District courts, however, have applied varying standards to determine
27 the reasonableness of such fees.

28 As Defendants note, at least one judge in this district has applied the multi-factor test set forth

1 in Johnson. See San Vicente, 962 F.2d at 1410 (affirming district court’s award of receivership fees
2 based on application of the Johnson factors). The Johnson factors, originally set forth to determine
3 reasonable attorney fees in a civil-rights case, include: (1) the time and labor required; (2) the novelty
4 and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the
5 preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee;
6 (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the
7 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and
8 ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the
9 professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d 714,
10 717-19 (5th Cir. 1974).

11 As the Receiver notes, however, the District Court for the Southern District of New York has
12 applied a different standard that considers: (1) the complexity of problems faced; (2) the benefit to the
13 receivership estate; (3) the quality of work performed; and (4) the time records presented. Fifth
14 Avenue Coach Lines, 364 F. Supp. at 1222. The court also gave “great weight” to the Commission’s
15 opposition or acquiescence to the fee application.

16 Furthermore, the District Court for the District of Oregon has compiled from various other
17 jurisdictions a list of factors to consider when determining the reasonableness of receivership fees.
18 In re Alpha Telcom, Inc., 2006 WL 3085616, at *2-3 (D. Or. Oct. 27, 2006). Those factors include:
19 (1) the fair value of the receiver’s time, labor, and skill measured by conservative business standards;
20 (2) the degree of activity, integrity, and dispatch with which work is conducted; (3) the result obtained,
21 this being a “critical factor”; (4) the economy of administration; (5) the burden the estate may safely
22 be able to bear; (6) the amount of time required to perform the necessary services; (6) the overall value
23 of those services to the estate. The court also recognized that “[i]nterim fees are generally allowed at
24 less than the full amount requested in recognition of the fact that until the case is concluded the court
25 may not be able to accurately determine the ‘reasonable’ value of the services for which the allowance
26 of interim compensation is sought.” The court further recognized that “[n]o statute compels” the
27 conclusion that the Commission’s views must be given “great weight” and that, to the contrary, the
28 Commission’s views should only be considered as a single factor, equal in weight to other relevant

1 factors.

2 In sum, this Court has found no clear set of factors that must be considered when determining
3 the reasonableness of a receiver's fees. The Court notes the Johnson factors do not seem well suited
4 for assessing reasonable receivership fees. In contrast, the factors enumerated in the Fifth Avenue
5 Coach Lines and Alpha Telcom cases are geared toward the determination of reasonable receivership
6 fees. Condensing those factors, the Court will consider: (1) the complexity of the receiver's tasks; (2)
7 the fair value of the receiver's time, labor, and skill measured by conservative business standards; (3)
8 the quality of the work performed, including the results obtained and the benefit to the receivership
9 estate; (4) the burden the receivership estate may safely be able to bear; and (5) the Commission's
10 opposition or acquiescence.

11 A district court's award of receivership fees is reviewed for an abuse of discretion. San
12 Vicente, 962 F.2d at 1409.

13 **II. Analysis**

14 The Court first finds that, because the Receiver and his professionals have been working on
15 this case since September 2012 without compensation, they are entitled to an award of interim fees.
16 The Court will first determine the amount of that award, after which the Court will address the source
17 of payment.

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

19 **1. Complexity of Tasks**

20 Defendants assert this case "does not involve novel or difficult questions, or extraordinary
21 levels of skill." The Receiver responds that, to the contrary, "the receivership involves over 100
22 entities each with its own bank account, 22 properties, and over 3,300 investors." The Receiver further
23 asserts there are "hundreds of loans between the Receivership Entities, their investors, banks and other
24 third parties." In reply, Defendants assert that – despite the number of entities, accounts, and loans
25 – "the accounts are all with one bank, the entities have a common office in San Diego with common
26 storage, and the entities hold only raw land with no day-to-day management required."

27 The Court finds that, at this juncture, the Receiver's tasks are significantly complex. Given
28 the number of entities, accounts, loans, and parcels of property, the Court finds the Receiver is faced

1 with the complex task of clarifying the financial affairs of the receivership entities while continuing
2 the day-to-day operations of those entities. The Court appointed a receiver for that very purpose.

3 In contrast, the Court finds the tasks of the Receiver's forensic computer specialist were
4 minimally complex. While several hard drives and servers needed to be examined and imaged, a
5 review of the specialist's billing invoice contains no indication that the specialist's work was anything
6 other than routine.

7 The Court also finds the tasks of the Receiver's counsel were minimally complex. Counsel's
8 time reports reflect routine legal tasks, such as drafting and reviewing legal documents,
9 communicating with other lawyers and the client, and appearing at hearings.

10 **2. Fair Value of Time, Labor, & Skill**

11 The Receiver and his professionals contend they have charged reasonable rates for their work.
12 They assert their rates are comparable to other such professionals in this geographic area. The
13 Receiver and his counsel further state that they have discounted their ordinary rates by ten percent.
14 Defendants note that the Receiver and his professionals have provided no evidence of comparable fees.

15 The Receiver billed his time at \$247.50 per hour and the time of those working for him at \$90 -
16 \$180 per hour.

17 The Receiver's forensic computer specialist billed its time at \$200 - \$250 per hour.

18 The Receiver's counsel billed its time at \$211.50 - \$585.00 per hour, with much of the work
19 being billed at \$418.50 per hour.

20 Considering its own experience in deciding fee requests, and considering conservative business
21 standards, the Court finds these fees represent the fair value of the time, labor, and skill required.⁴

22 **3. Quality of Work Performed**

23 The Receiver asserts that he has "preserved and protected the assets of the Receivership
24 Entities, substantially reduced Western's operating expenses, and kept the Court and the parties
25 apprised of his activities." Defendants assert the Receiver and his professionals have done nothing
26 to benefit the receivership entities.

27
28 ⁴ The Court encourages the Receiver and his professionals to submit evidence regarding
comparable rates in future fee applications.

1 The Court finds the quality of work performed by the Receiver and his professionals is
 2 adequate. The Receiver and his professionals have maintained the status quo of the receivership
 3 entities, which the Court finds has benefitted the receivership entities during these turbulent initial
 4 phases of litigation. The Receiver is in the process of rendering an accounting of the receivership
 5 entities, and the Court expects that the Receiver will soon be able to fully clarify the financial affairs
 6 of the receivership entities.

7 **4. Receivership Estate’s Ability to Bear Burden of Fees**

8 As both Receiver and Defendants recognize, Western has little to no cash available to pay the
 9 requested fees. In contrast, the general partnerships, which are part of the receivership estate at this
 10 time, hold approximately \$6.5 million in cash. The Court thus finds that the receivership estate has
 11 some ability to bear the burden of these initial fees. The Court further finds, however, that, given the
 12 apparent need to utilize general partnership funds to pay general partnership expenses, it may be that
 13 the receivership estate will be less able to bear future requests for similar amounts.

14 **5. Commission’s Opposition or Acquiescence**

15 While the Commission does not expressly approve of the fee applications as reasonable, the
 16 Commission has filed a notice of non-opposition to the fee applications.

17 Considering the above five factors together, and considering that “[i]nterim fees are generally
 18 allowed at less than the full amount,” the Court awards fees and expenses as follows:

Applicant	Fees Allowed	% of Request	Expenses Allowed⁵	% of Request
Receiver	\$25,834.95	90 %	\$813.06	93.3 %
Allen Matkins law firm	\$25,575.48	80 %	\$410.43	56.5 %
TERIS computer specialist	\$12,200.00	100 %	N/A	N/A

26 **B. Source of Payment**

27 _____
 28 ⁵ The Court finds a reasonable fee for “duplication” in this case is five cents per copy and thus reduces the expense requests accordingly.

