



The Receiver seeks to sell the radio station assets of BizRadio (the “Assets”), free and clear of all liens, claims, encumbrances and other interests, to South Texas Broadcasting, Inc. (“STB”). Investors have objected to the sale on the bases that: (1) the sale is not in the best interests of the Estate because the proposed total consideration for the sale is unreasonably low; (2) the Receiver failed to get an appraisal of the assets as required by law, when a sale is a private sale; (3) STB’s security interest and claim are not established for purposes of allowing a credit bid component of the STB bid; and (4) if STB’s security interest is valid, it is subject to a first priority security interest of certain of the Investors in the assets being sold pursuant to the legal principles of contractual subrogation, equitable subrogation, and contractual subordination.

STB is not paying fair value for the assets. These assets are the primary assets of the Estate. It is uncontested that (a) they were purchased from STB in 2008 for more than three times the amount being offered; (b) STB itself offered 50% more value to purchase the assets before the Receivership was initiated; (c) One company, Asia Vision, signed an agreement to purchase the assets for \$3.5 million just prior to the Receivership; and (d) there has been no appraisal of the assets to ascertain the value of the Assets. Due to these unusual circumstances, where essentially a party, such as STB sold the same assets at a much higher value within two years of the receivership, it is imperative that appraisals be conducted by independent third parties to ensure that the value paid is within the range of reason for these assets. Until this is done, the sale should not be approved.

The Priority Secured Noteholders,<sup>1</sup> a subset of the Investors asserting this Objection, hold a senior and first lien and security interest in the Assets that are the subject of the sale, by virtue of having paid off the initial purchase money debt held by Industrial Info Resources, Inc. (“IIR”) The proposed purchaser, STB, contractually subordinated its lien to that of the Investors/IIR. The Priority

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<sup>1</sup> The Priority Secured Noteholders are identified in the Objections filed by Investors.

Secured Noteholders object to the Receiver attempting to sell BizRadio's assets without payment in full of the Priority Secured Noteholders' indebtedness, which was used to pay the IIR indebtedness. Moreover, due to STB's contractual subordination of any payment received and its debt to "Senior Lender(s)", which includes the Priority Secured Noteholders, pursuant to paragraph 6 of the Subordination Agreement, to the extent their investments were utilized to pay the senior indebtedness of IIR, Salem cannot "credit bid" any of its secured debt as part of the purchase price of the assets and obtain the assets free and clear because any credit bid must pay these Priority Secured Noteholders loans in full. Because it does not, the sale cannot be approved as proposed. Alternatively, in the event the Court approves the sale, all of Investors' liens, claims, interests and encumbrances must attach to the sales proceeds, in the same priority as existed prior to the sale, and should not be disbursed pending further order of the Court.

Finally, the Investors have numerous procedural and substantive objections to the sales process utilized by the Receiver. First, due to the severe qualifications placed on a party to be a "Qualified Bidder," the public at large cannot bid on the assets, which warrants a determination that the sale to STB is a private sale, triggering the requirement for an appraisal of the assets prior to the sale in accordance with 28 USC sections 2001 and 2004 in order to ensure that STB is paying fair value for these assets. Second, the Investors also provided the Receiver with a "Topping Bid," to purchase the Assets, which the Receiver has refused to consider.<sup>2</sup>

For these reasons, the sale should not be confirmed by the Court.

#### ARGUMENT

#### I. THE PROPOSED SALE IS NOT IN THE BEST INTERESTS OF THE ESTATE

##### **A. The Consideration for the Sale is Insufficient**

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<sup>2</sup> One of the Receiver's objections to Investors' Topping Bid is that it was late. As discussed at the prior hearing, Investors did not receive notice of the Receiver's proposed sale in a timely fashion, and provided the

***1. There have been no appraisals or determination of market value.***

The Receiver has not obtained any appraisals of the Station or its assets, and there is no evidence in the record to suggest that the proposed sale price of the assets is reasonable in light of the market value of the assets. Section 2001 of Title 28 requires that a Court review three appraisals prior to confirming a private sale of assets.<sup>3</sup> The reason for that requirement is to give Courts a clear indication from credible evidence that the value received for the assets approximates their true value so that, prior to any confirmation of a sale, the Court can determine from objective evidence that fair value was obtained. While the Court has the power to order other procedures, in this case, appraisals are needed due to STB's involvement in the sale of these same assets within a two years of the receivership.

Another factor which supports the need for objective evidence of value in the form of independent appraisals is the fact that the conditions for a party to submit a competing bid limit the public at large from submitting a bid. The Receiver stated: "Similar sale procedures have been used previously by federal courts for sales of a variety of assets." *Citing SEC v. Stanford Intl. Bank, Ltd., et al.*, Case 3:09-cv-00298-N, Doc. 1023 (N.D. Tex. Feb. 24, 2010); *In Re Texas Rangers Baseball Partners*, 431 B.R. 707 (Bankr. N.D. Tex. 2010). It is precisely the difference between those two sales and this one that illustrate why the Receiver's Proposed Sale cannot be confirmed -- in both instances a public auction took place. Here, there was no auction. Thus, the proposed arrangement is a "private sale" under 28 U.S.C. §2001(b), and the Court cannot approve the sale without three appraisals being tendered and the sale price exceeding 66.66% of the appraised value.

There should not be a rush to close this deal without a proper determination of the value of the Assets. Given that the intent of the Receivership is to perform all acts necessary to conserve,

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Topping Bid in a reasonable time after learning of the proposed sale.

<sup>3</sup> 18 U.S.C. §2001(b) (West 2011).

hold, manage and preserve the value of the Receivership Estate, and the fact that the radio station is currently being operated, the Receiver is obligated to maximize the value obtained by the Estate through the sale of the Assets.

**2. *STB sold this same Station for \$7.25 million a mere three years ago.***

In 2008, STB sold this very station to BizRadio for \$7.25 million, of which it received at nearly \$6 million in cash. It is now attempting to repurchase the station for \$1 million cash, plus contributing \$1.5 million of its windfall from the prior transaction. Aside from demonstrating the lack of arms-length bargaining and the unreasonableness of this transaction, this fact is one piece of evidence before the Court that points to a market value for the assets far in excess of \$2.5 million.

**3. *The proposed sale to Asia Vision was better for the Estate.***

The proposed sale to Asia Vision in 2009 called for a purchase price, “as is” of \$3,500,000.00. Such sale would have provided greater value to the estate, and obviated the need to pay off Asia Vision for its lawsuit. The fact that Asia Vision offered 40% more for the same assets is strong evidence that Salem’s offer is too low. Section 2001(b) of Title 28 provides that no private sale can be approved unless it exceeds two-thirds of the appraised value of an asset. If the market value of the assets is \$3.5 million, the proposed offer does not represent more than two-thirds of that value.

**4. *Salem’s prior offer was higher.***

The Asset Purchase Agreement signed on March 5, 2010, referred to as “the Original Sale Agreement,” provided far greater value than the current “Modified Sale Agreement.” The original agreement included a \$1,640,000 credit for program airtime for BizRadio to purchase airtime from STB and/or its parent company Salem. This credit had value in that it could have been sold or otherwise transferred to interested parties. In the current modified agreement, that value is simply

omitted. In his Motion seeking Court approval of the sale, the Receiver states that the air time credit would be of no benefit to the Receivership Estate. There is no evidence the Receiver even considered the potential value of such a credit on the open market, and there was no substituted consideration provided by Salem. The value of the original offer was \$3,700,000.00. The purchase price under the Modified Sale Agreement is listed as \$2,488,337.48 as of January 31, 2011. This proposal is not for more than two-thirds of the value of the assets and it clearly does not conserve and preserve the assets of the Estate.

**5. *The Station generates positive cash flow.***

The Station is currently operating under a lease agreement to Salem. Salem is paying the lease now and the Station is generating positive cash flow for Salem. That cash flow could be flowing to the Estate.

To maximize the assets of the Estate, the Receiver can hire a third-party management service to manage the Station for a fee, and the Receiver can collect cash flow from the operation.

Attempting to sell the Station when it has not had positive cash-flow in recent years is nearly impossible and certainly does nothing to maximize the value to the Estate. Investors have spoken with third-parties who have agreed to manage the Station for the Estate and asserted that with the programming they can bring to the Station, the Station will operate with a positive cash flow. If the Station can be operated at a positive cash flow for a period of 8-10 months the fair market value of the Assets will be substantially higher, and could be sold at that time with a much better return to the Estate. There is no evidence the Receiver investigated this option in fulfilling his duties to the Estate.

**B. *Paying \$150,000.00 to Asia Vision is Unreasonable***

Under the Receiver's proposed terms of sale, \$150,000.00 of the sale proceeds is to be set

aside for the settlement of a lawsuit brought against BizRadio and STB by Asia Vision related to STB's alleged tortious interference with AsiaVision's agreement to purchase the Station for \$3.5 million. The \$150,000.00 payment represents 15% of the cash consideration STB is proposing to pay for the assets of the Estate. Asia Vision does not have a judgment; it merely has an unliquidated claim that has never been evaluated by this Court. Fifteen percent of the total cash consideration is unreasonable under those circumstances. There is no reason why Asia Vision should receive anything from the Estate. Absent a judgment, Asia Vision's claim has no greater priority than any other claim against the Estate, and its unliquidated claim stands behind most of the other claims against the Estate.

Further, there is no legitimate basis for the Receiver to use Estate assets to settle a claim on behalf of STB. Asia Vision's claim against STB has nothing to do with the Receiver's action against BusinessRadio Network, LP, as a Relief Defendant in this suit. If STB wishes to settle its litigation with Asia Vision, that matter should be handled separately from the Receivership's sale of the Radio Station Assets, and should have no impact on the sums recovered by the Receiver in favor of the Estate.

**II. STB'S CLAIM CANNOT BE CREDIT BID BECAUSE IT IS SUBJECT TO QUESTION, IT SHOULD ARGUABLY BE TREATED AS UNSECURED, AND IT HAS NOT BEEN ALLOWED**

STB has offered to release, through a credit bid, its alleged secured claim as part of the purchase price being paid for the assets. However, there is no evidence in the record to support the claim or its secured status. The Receiver has not conducted any discovery or investigation to determine whether the Estate has any claims against or defenses to STB's claims or its security interest. Courts typically do not allow parties to credit bid claims unless they have previously been determined or "allowed." *See, e.g.*, 11 U.S.C. §363(k) ("At a sale under subsection (b) of this section of property that is subject to a lien that secures an *allowed* claim, unless the court for cause

orders otherwise the holder of such claim may bid at the sale....”) (emphasis added).

Due to the fact that STB was intimately involved with the prior sale of the same assets for a much higher price in March 2008, the Court should not allow STB to credit bid. Further, the Receiver must investigate whether any claims exist against STB relating to the March 2008 purchase, which would avoid as a potential fraudulent transfer, reduce, eliminate, or equitably subordinate this alleged claim. Without such an analysis, it cannot be established that STB has an allowed claim for purposes of allowing its credit bid or whether its claim is disputed. *See In re McMullan*, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996) (Lender not allowed to credit bid while validity of lien and security interest “unresolved”); *In re Octagon Roofing*, 123 B.R. 583, 592 (Bankr. N.D. Ill. 1991) (Bank required to post irrevocable letter of credit prior to credit bid in event lien later found to be invalid.)

Further, under this section of the Bankruptcy Code, the Court can limit the right of an alleged secured creditor to credit bid. Moreover, case law imposes the specific condition upon a party that credit bids that he/she must “pay the mortgages and liens (if any) which have priority senior to its mortgage.” *In re Daufuskie Island Properties, LLC*, 441 B.R. 60, 64 (Bankr. D.S.C. 2010). In this case, STB should not be allowed to credit bid without paying the senior lien of the Priority Secured Noteholders, pursuant to their rights of subrogation in full.

### **III. PRIORITY SECURED NOTEHOLDERS HAVE A PRIORITY INTEREST THAT IS SENIOR TO STB’S**

In 2007, the Radio Station was sold by STB to BizRadio for \$7,250,000.00. STB provided seller financing for \$3,250,000.00 of the purchase price. Industrial Info Resources, LLC (“IIR”), a party brought to the table by David Wallace, loaned \$4,000,000.00 to BizRadio to accomplish the purchase of the radio station from STB. In order to induce IIR to make the loan, BusinessRadio Houston, LLC, and STB agreed that IIR’s security interest would be a first priority interest, and that

STB's would be subordinate. A Subordination Agreement was executed by the parties to that transaction. The Receiver acknowledges that IIR loaned \$4,000,000.00, that a UCC-1 was filed perfecting the priority security interest (see **Exhibit A**), and that STB agreed to subordinate its security interest to IIR.<sup>4</sup>

The UCC-1 filed by Wallace Bajjali on behalf of IIR indicates there are other secured lenders in addition to IIR. It was contemplated at the time of the original purchase by BizRadio that Wallace Bajjali would borrow money from new investors and use the proceeds to pay off the IIR indebtedness.<sup>5</sup> That plan was stated clearly in the Subordination Agreement, attached as **Exhibit C**, and in the Security Agreement signed by BusinessRadio Houston, LLC, in favor of Wallace Bajjali Investment Fund II, LP, as agent for IIR and other Senior Lenders, attached as **Exhibit D**. Moreover, STB agreed that "any lender" who provided new funds to pay down the IIR indebtedness or the STB's indebtedness would stand in the shoes of IIR with a priority security interest, as shown in the definition of Senior Lender set forth in the Subordination Agreement.

It is uncontested that IIR had a first and senior lien on the assets of BusinessRadio Houston. In fact, South Texas Broadcasting, Inc. ("STB") expressly subordinated its lien and security interest to the lien and security interest of IIR and any Replacement Investors whose funds were utilized to pay off the IIR indebtedness in that certain Subordination and Intercreditor Agreement by and among IIR, as Initial Senior Lender, Wallace Bajjali Investment Fund II, L.P., as Administrative Agent, "on behalf of the Senior Lenders (as hereinafter defined)" (the "Agent") and South Texas Broadcasting, Inc., as Subordinate Lender, dated as of March 28, 2008 (the "Subordination Agreement"). Senior Lender is defined as "the Initial Lender and any lender that makes a Replacement Loan as provided

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<sup>4</sup> See, Motion for Entry of Orders [Docket 62], at p.13; See also, STB's UCC-1 Financing Statement, attached hereto as Exhibit B.

<sup>5</sup> See, e.g., Exhibit C, Subordination Agreement, at Section 6, pp. 8-9 (discussing Replacement Financing and new lenders becoming "Senior Lenders" under the Agreement.); Exhibit D, Security Agreement.

in Section 6. “Senior Loan” is defined as “the Initial Senior Loan and any Replacement Loan made to Borrower by any Senior Lender, provided the aggregate principal outstanding at any time under the Senior Notes shall not exceed \$5,750,000, as provided in section 6.” The Initial Senior Lender is defined as IIR. Section 6 provides as follows:

“6. Replacement Financing. The parties hereto acknowledge that Borrower intends to obtain additional financing secured by the Shared Collateral and use the proceeds of such financing to, among other things, satisfy Borrower’s obligations under the Subordinate Loan and under the Initial Senior Loan (the “Replacement Financing”, which term shall include any subsequent financing borrowed by Borrower and used to pay any Replacement Financing). Upon payment of any portion of the Subordinate Loan or the Initial Senior Loan with the proceeds of any Replacement Financing, or upon payment of any such Replacement Financing with loan proceeds from additional financing (which then shall become Replacement Financing), Subordinate Lender shall agree to subordinate the remaining Subordinate Loan and the remaining Subordinate Loan Documents to the lien of such Replacement Financing, but only to the extent a portion of the Subordinate Loan or the Initial Senior Loan, or other Replacement Financing, is actually satisfied with the proceeds of such Replacement Financing; provided that the aggregate principal amount of the Senior Loans shall not exceed \$5,750,000 at any time.”<sup>6</sup>

“Shared Collateral” is defined in Exhibit A to the Subordination Agreement as the assets of BusinessRadio Houston that the Receiver seeks to sell to Salem, an affiliate of STB, the Subordinate Lender. “Initial Senior Loan” is defined as the Loan made by IIR to BusinessRadio Houston in the amount of \$4,000,000.00 and Subordinate Loan is defined as the Loans made to BusinessRadio Houston by STB in the amount of \$1,750,000.00 and \$1,500,000.00, respectively. It is uncontested that the Senior Loans never exceeded the \$5,750,000 amount.

The investors who made those loans were the Priority Secured Noteholders, whose funds were used to pay IIR in full, and to pay \$1.75 million of BizRadio’s total indebtedness to STB, thus their funds were “Replacement Financing.” The Priority Secured Noteholders made loans to BizRadio through Wallace Bajjali Investment Fund II, LP (“WB Fund II”) and through Wallace

Bajjali Development Partners, LP (“WB Partners”), the ultimate parent of WB Fund II. The Priority Secured Noteholders are prepared to present evidence at the hearing to demonstrate that their funds went directly to IIR, and were never commingled with BizRadio’s assets. This evidence will include investors’ testimony, wire transfer records showing funds transferred directly from Wallace Bajjali accounts to IIR, and testimony from Wallace Bajjali representatives regarding the nature and extent of the transactions.

STB and the Receiver contend that BusinessRadio Houston, LLC, was not indebted to the Priority Secured Noteholders because the Senior Secured Notes named a different entity. However, BusinessRadio Houston, LLC, and all of its relevant affiliates ratified and confirmed the debts and the priority perfected security interests on January 31, 2010, when they signed a new subordination agreement with Ron Crider. That document (the “Crider Subordination Agreement,” attached hereto as **Exhibit F**) clarifies any confusion regarding the parties liable to Priority Secured Noteholders and whether a security interest existed. In paragraph 10, the BusinessRadio entities confirmed and ratified Priority Secured Noteholders’ security interests. Thus, any argument that there is not consistency of debtors is moot.

The Priority Secured Noteholders, through their agent WB Partners, hold promissory notes and security agreements documenting their security interests in all of the assets of BizRadio Network, L.P. (“Network”), the ultimate parent of the owner of the Station assets, BusinessRadio Houston, LLC. Those documents were created to establish a security interest in a set of collateral more broad than that at issue here. The collateral includes all of the stock of BusinessRadio Houston, LLC, and many of the other assets of Network. For the Court’s purposes here, the security agreements with Network are not determinative. Investors rely on the security agreement

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<sup>6</sup> See Exhibit C; see also Exhibit E, Senior Secured Promissory Note from BusinessRadio Houston, LLC, to IIR (signed by BusinessRadio Houston, LLC, and granting a security interest to replacement financing).

BusinessRadio Houston, LLC, signed in favor of IIR. By paying the IIR indebtedness, Priority Secured Noteholders stepped into the shoes of IIR as the holder of the first lien perfected security interest. The Priority Secured Noteholders are contractually subrogated to IIR and thus stand in the shoes of IIR as senior secured parties with a priority lien over STB.

In the Fifth Circuit case of *Vogel v Veneman*, the last lender in a chain of financings, the FSA, was held to be both equitably and contractually subrogated to the valid previously affixed first lien on the Debtors' homestead. 276 F3d 729, 735 (5<sup>th</sup> Cir. 2002). The Fifth Circuit held that even though the FSA's own Deed of Trust on the property was invalid, the FSA had valid subrogation rights to assert the lien of the prior lienholder. "Even if the FSA deed of trust is void ... the original purchase money lien remains a valid encumbrance on the property, and any subsequent lender is subrogated to this valid lien." *Id.* at 734. In the instant case, because it is uncontested that IIR had a valid purchase money first lien on the assets, the Priority Secured Noteholders succeed to these lien rights under the doctrine of subrogation even if their loan documents are not in perfect order.

As held by the *Vogel* court, contractual subrogation arises under Texas law when a party pays an obligation, "[u]nder an agreement that such person shall stand in the place of the original holder of the indebtedness." *Id.* at 735, quoting *Glasscock v Travelers Ins. Co.*, 113 S.W.2d 1005, 1009 (Tex. Civ. App.—Austin 1938, writ ref'd). In the *Vogel* case, the Fifth Circuit ruled that the "chain of financings...in which each lender advanced money to extinguish prior amounts owing" satisfied the requirements of contractual and equitable subrogation. In our case, the Subordination Agreement expressly provides that STB "shall agree to subordinate the remaining Subordinate Loan and the remaining Subordinate Loan Documents to the lien of such Replacement Financing." The Priority Secured Noteholders submit that this provision satisfies both the requirements for contractual subrogation and contractual subordination of STB's indebtedness and lien to any party who pays the

IIR indebtedness.

Moreover, “When a party is contractually subrogated to another lender, the terms of the original contract govern.” *Id.* at 735. That prospect of law echoes the provisions of the Subordination Agreement in this case.

IV. PRIORITY SECURED NOTEHOLDERS ARE EQUITABLY SUBROGATED TO IIR’S PRIORITY SECURITY INTEREST.

In the event the Court disagrees with Priority Secured Noteholders’ claims that they are contractually subrogated to IIR’s senior position, Investors proffer that the Texas law doctrine of equitable subrogation requires the same result. “The doctrine of subrogation provides that subsequent lenders will succeed to the rights of prior lenders and become entitled to ‘all rights of prior lenders in relation to the debt.’” *Vogel v Veneman*, 276 F.3d 729, 735 (5<sup>th</sup> Cir. 2002) quoting *Means v United Fid. Life Ins. Co.*, 550 S.W.2d 302, 308 (Tex. Civ. App.—El Paso 1977, writ ref’s n.r.e). Pursuant to that doctrine, Priority Secured Noteholders should be granted a first and senior lien on the assets to be sold to the extent their funds were utilized to pay the first and senior lien indebtedness to IIR on behalf of BusinessRadio Houston.

The funds that the Investors loaned were expressly invested for the purpose of paying off the indebtedness of IIR. A large portion, if not all of the funds actually were transferred directly to IIR to pay off the IIR indebtedness.

The Texas Supreme Court has recognized the doctrine of equitable subrogation as the law of the State of Texas stating, that the case law on equitable subrogation “‘recognize the doctrine ...to the fullest extent.’” *Frymire Engineering Co., Inc. v Jomar Int’l, Ltd.*, 259 SW3d 140, 141 (Tex. 2008) quoting *Faires v Cockerell*, 88 Tex. 428 (Tex. 1895). As recently stated by the Dallas Court of Appeals in the case of *Bank of America v. Babu*, 2011 Tex App. LEXIS 3325, \*18-\*21 (Tex. App.—Dallas, May 3, 2011) (citations omitted):

“Equitable subrogation ‘is a legal fiction’ whereby ‘an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another.’ ... The general purpose of equitable subrogation is to prevent unjust enrichment of the debtor.... *Texas courts are particularly hospitable to the doctrine of equitable subrogation. Texas courts have also given the doctrine ‘a liberal application... broad enough to include every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter.’* ... There are two key elements to equitable subrogation: (1) the person whose debt was paid was primarily liable on the debt, and (2) the claimant paid the debt involuntarily.”

(emphasis added). *See also Starcraft Co., Div. of Bangor Punta Operations, Inc. v. C.J. Heck Co.*, 748 F.2d 982, 990 (5<sup>th</sup> Cir. 1984), quoting 53 TEX.JUR.2D *Subrogation* § 1 (“Equitable subrogation is ‘the substitution of one person in the place of another . . . so that he who is substituted succeeds to the rights of the other in relation to the debt or claim..’”); *Smart v Tower Land and Investment Co.*, 597 SW2d 333, 337 (Tex. 1980) (“Equitable subrogation may be invoked to prevent unjust enrichment ... A right to subrogation is often asserted by one who pays a debt owed by another.”).

While each case turns on its own facts, “[f]actors a court may consider in conducting this balancing test are the negligence of the party claiming subrogation, whether that party had notice of the intervening lien, and whether the intervening lien holder will be prejudiced if equitable subrogation is allowed.... The determination of whether subrogation prejudices intervening interests is made ‘as of the time of the transaction supporting subrogation.’” *Babu*, at \*20-\*21 (citations omitted).

Applying the law to the facts of this case requires that the Investors be equitably subrogated to the IIR Senior Lien and be repaid all amounts which they loaned and which were utilized by BusinessRadio Houston to pay the Senior Loan of IIR. The first element is satisfied as it is uncontested that BusinessRadio Houston was primarily liable on the debt to IIR. The second element

is satisfied as the Investors did not pay the debt to IIR voluntarily (*i.e.*, without a priority security interest). The only way the funds would have been loaned is if the Investors received a first and senior lien on the Assets and, as strong evidence of this fact, IIR and STB entered into the Security Agreement and Subordination Agreement with the Agent to protect the Investors' rights in the funds they invested and specifically referred to the Senior Secured Notes and the Investors in both documents. The course of events that actually played out was exactly what STB and BusinessRadio Houston contemplated at the time of the creation of STB's subordinate lien.

Moreover, all of the factors discussed in the Babu case favor equitable subrogation under Texas law. The major purpose of equitable subrogation is to prevent unjust enrichment. In this case, BusinessRadio Houston would be unjustly enriched if it is allowed to borrow funds from the Investors for the express purpose of making payment to IIR, and satisfying the IIR Loan with the Investors Loans, and then not allow the Investors their lien and security interest on the assets that IIR held. More importantly, STB would be unjustly enriched if it is entitled to get a better deal than it bargained for by elevating its lien to first in line.

There is no negligence that would affect the application of equitable subrogation as the Investors invested money after STB recorded its lien which is why their agent obtained the Subordination Agreement from Salem before carrying out the series of transactions. Finally, STB is not prejudiced because STB, as intervening lien holder, *contractually* agreed to subordinate its debt, liens and rights to payment to IIR and any party that paid the IIR debt and STB must be bound by that agreement.

For these reasons, the Investors must be equitably subrogated to the first and senior lien of IIR plus interest at the legal rate. The Investors' funds were used to retire the Senior Loan of IIR.

The Receiver has conceded as much. At least a portion of the funds were sent directly from Wallace Bajjali (as agent) to IIR, without ever touching a BizRadio account.

Because Priority Secured Noteholders have a first priority security interest in the assets being sold, to which STB is contractually and equitably subordinated, no sale of the assets may be approved free and clear of liens and encumbrances without Priority Secured Noteholders being paid in full for the funds utilized to pay off the IIR indebtedness.

**V. STB IS CONTRACTUALLY SUBORDINATED TO THE LIEN OF THE PRIORITY SECURED NOTEHOLDERS AS SENIOR LENDERS UNDER THE SUBORDINATION AGREEMENT.**

As a separate and independent ground, pursuant to the terms of sections 8 and 9 of the Subordination Agreement, STB subordinated both its debt and the liens and security interests created thereby “to the Senior Loan(s)” (Subordination Agreement at para. 8(a)), as well as all rights to payment in paragraph 9(a) as follows: “Except as expressly provided in this Agreement, all of Subordinate Lender’s rights to payment of the Subordinate Loan and the obligations evidenced by the Subordinate Loan Documents are hereby subordinated to all of Senior Lender’s rights to payment by Borrower of the Senior Loan....” In addition, any payments received by STB are to be held in trust by STB for the benefit of the “Senior Lender(s).” Due to the subordination of payment and debt to “Senior Lender(s)”, which includes Investors pursuant to section 6 of the Subordination Agreement, Salem cannot “credit bid” \$1.477 million of its secured debt as part of the purchase price of the assets and obtain the assets free and clear because any credit bid must pay the Senior Loans in full, which includes all Replacement Financing provided by the Investors which paid off IIR. The Investors do not consent to this treatment.

**VI. THE INVESTORS’ LIENS, SECURITY INTERESTS, ENCUMBRANCES AND INTERESTS SHOULD ATTACH TO THE SALES PROCEEDS**

In the event the Court approves the sale free and clear, to which the Investors vehemently object for the reasons set forth herein, the sale order should contain a provision that all liens, claims, interests and encumbrances of the Investors, at law or in equity, attach to the sales proceeds, in the same priority under applicable law as existed prior to the sale, and shall not be disbursed pending further order of the Court.

CONCLUSION

In light of the foregoing, Investors request that the Court refuse to approve the sale of the Assets to STB and confirm Priority Secured Noteholders' security interest in the assets.

RESPECTFULLY SUBMITTED,

**THE SCHMIDT LAW FIRM**



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C. THOMAS SCHMIDT  
STATE BAR NO. 00797386  
DAVID J. COATES  
STATE BAR NO. 00783844  
3730 KIRBY DRIVE, SUITE 1200  
HOUSTON, TEXAS 77098

ATTORNEYS FOR INVESTORS

PRESTON T. TOWBER  
STATE BAR NO. 20152600; FED ID NO. 8217  
TOWBER LAW FIRM PLLC  
6750 WEST LOOP SOUTH, SUITE 920  
BELLAIRE, TEXAS 77401  
TEL: (832) 485-3555  
FAX: (832) 485-3550  
DIRECT: (832) 485-3556  
PRESTON@TOWBERLAW.COM

ATTORNEYS FOR INVESTORS

OF COUNSEL:

Charles L. Fridge, III  
Texas State Bar No. 24004286  
3000 Smith Street  
Houston, Texas 77002

**CERTIFICATE OF SERVICE**

This is to certify that the above and foregoing instrument was submitted to the clerk of the court using the electronic case filing system of the court. I hereby certify that the parties below have been served electronically, on this the 24th day of June 2011:

Thomas L. Taylor, III  
The Taylor Law Offices, P.C.  
4550 Post Oak Place Drive, Suite 241  
Houston, Texas 77027

*Electronically*

Joseph G. Epstein  
Winstead P.C.  
1100 JPMorgan Chase Tower  
600 Travis Street  
Houston, Texas 77002

*Electronically*



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C. Thomas Schmidt