

"Station"), to STB free and clear of all liens, claims, encumbrances and interests because: (i) the Purchase Price being paid for the Station is sufficient and was the result of a robust sale process designed to generate the highest price for the Receivership Estate; (ii) STB is the only party that holds a duly perfected, valid and binding security interest in and liens on the Station; (iii) Industrial Info Resources, LLC ("IIR") no longer holds a priority security interest in the Station; and (iv) the Investors or the purported Priority Secured Noteholders (the "Investors") (as defined in the Amended Objection) are neither contractually nor equitably subrogated to IIR's interest.

II. RULE 8 RESPONSES TO AMENDED OBJECTION²

1. STB denies the statements in paragraph one.³
2. STB admits the statements in the second sentence of paragraph two. STB denies all other statements in paragraph two.
3. STB denies the statements in paragraphs three through five.
4. STB lacks sufficient knowledge or information to admit or deny the statements in paragraphs six and seven; accordingly, they are denied.
5. STB admits the statements in the second sentence of paragraph eight. STB denies all other statements in paragraph eight.
6. STB admits that it sold the Station to BusinessRadio Houston LLC and BusinessRadio Houston Licensee LLC for approximately \$7.75 million in 2008 and that all such amounts have not been paid. STB denies all other statements in paragraph nine.

² STB fully incorporates and adopts its Rule 8 Responses set forth in its Response to Investors' Objection to Sale of Radio Station Assets and Motion for Continuance of Confirmation Hearing (Docket No. 79) (the "First Response").

³ The paragraphs in the Amended Objection are not numbered, therefore, any reference in this Response to a numbered paragraph in the Amended Objection shall correspond to the numbering the paragraph would have had if numbered based on the order in which the paragraph appears in the Amended Objection, beginning with the second page of the Amended Objection.

7. STB lacks sufficient knowledge or information to admit or deny the statements in paragraphs 10 and 11; accordingly, they are denied.

8. STB admits that the Station is currently operated under a Time Brokerage Agreement. STB denies all other statements in paragraph 12.

9. STB lacks sufficient knowledge or information to admit or deny the statements in paragraphs 13 and 14; accordingly, they are denied.

10. STB admits that \$150,000.00 of the proceeds from the sale of the Station will be paid to the Asia Vision Plaintiffs as provided by the settlement approved by this Court. STB denies all other statements in paragraph 15.

11. STB denies the statements in paragraph 16.

12. STB admits that a portion of the Purchase Price for the Station is a release and waiver of BusinessRadio Houston LLC's obligations under Promissory Note B (as defined in the First Response). STB denies all other the statements in paragraphs 17 through 19.

13. STB submits that the March 2008 sale documents speak for themselves. STB lacks sufficient information or knowledge to admit or deny all other statements in paragraphs 20 and 21; accordingly, they are denied.

14. STB admits that IIR had a first and senior lien on the Station and that STB subordinated its lien and security interest to that of IIR pursuant to the Subordination Agreement. STB denies all other statements in the first and second sentences of paragraph 22. STB admits the statements in the third through fifth sentences in paragraph 22.

15. STB admits the statements in the first and second sentences of paragraph 23. STB denies all other statements in paragraph 23.

16. STB lacks sufficient information or knowledge to admit or deny the statements in paragraphs 24 through 26; accordingly, they are denied.

17. STB submits that the first through third sentences of paragraph 27 are assertions of the law, to which no response is required. STB denies all other statements in paragraph 27.

18. STB submits that the first and second sentences of paragraph 28 are assertions of the law, to which no response is required. STB admits the statements in the third sentence of paragraph 28. STB denies the statements in the fourth sentence of paragraph 28.

19. STB submits that the first sentence of paragraph 29 is an assertion of the law, to which no response is required. STB lacks sufficient information or knowledge to admit or deny the statements in the second sentence of paragraph 29; accordingly, they are denied.

20. STB submits that the second sentence of paragraph 30 is an assertion of the law, to which no response is required. STB denies all other statements in paragraph 30.

21. STB denies the statements in paragraph 31.

22. STB submits that paragraphs 32 and 33 are assertions of the law, to which no response is required.

23. STB admits that the doctrine of equitable subrogation seeks to prevent unjust enrichment. STB denies all other statements in paragraphs 34 through 38.

24. STB admits the statements in the first sentence of paragraph 39. STB denies all other statements in paragraph 39.

25. STB denies the statements in paragraph 40.

III. ARGUMENT AND AUTHORITIES

A. Factual and Legal Background

26. In order to avoid repetition of the arguments and authorities dealing with the lien perfection issues and subordination matters, STB fully incorporates and refers the Court to the thoroughly briefed legal arguments in its First Response and focuses only on the new arguments in the Amended Objection.

B. The Consideration for the Sale is Sufficient

27. The Receiver crafted commercially reasonable sale procedures approved by this Court in its Sale Procedures Order to enable potential purchasers in the commercial broadcast market to purchase the Station. Any potential purchaser, including the Investors, could have become a Qualified Competing Bidder and submitted a Topping Bid that surpassed STB's stalking horse bid. The sale procedures included a mechanism for a public auction to allow higher bids for the Station in the event timely Topping Bids were submitted. No one became a Qualified Competing Bidder, so the Receiver did not conduct an Auction and the Receiver has accepted the STB stalking horse bid to purchase the Station as the Winning Bid. The Court-approved sale procedures served as a proxy for any appraisals, and necessarily established the fair market value of the Station. The Sale Procedures Order specifically notes, "[a]ppraisal of the Station pursuant to Section 2001 of the Judicial Procedures Code shall not be required, as the procedures adapted herein will establish the value of the Station."⁴ In light of this transparent process and STB's belief in the Receiver's good faith actions to maximize value for the Receivership Estate, STB submits that the consideration provided for the purchase of the Station is sufficient and commercially reasonable and that no appraisals are necessary.

⁴ See Sale Procedures Order ¶1.

C. STB is a Secured Creditor who Validly Bid the Amount of its Credit

28. STB holds an undisputed security interest in the Station. The Amended Objection admits as much by asserting that the Subordination Agreement called for STB to subordinate its secured interest to that of IIR. *See* Amended Objection, ¶¶ 20, 22. Indeed, STB's loan documents speak for themselves and are fully described in the First Response.

29. Furthermore, no party in interest has contested the validity or extent of STB's security interest in the Station. More importantly, there is no suggestion or evidence that the Receiver has failed to properly exercise his duties to investigate, disclose, and/or pursue any legitimate and/or valuable claims of the Receivership Estate against STB, or to challenge the claims STB holds against BusinessRadio Houston LLC.⁵ Without more, the Amended Objection puts forth nothing more than a spurious and baseless claim that STB's secured claim is invalid, in dispute, may be offset, or should somehow be avoided.

D. IIR no Longer Holds a Priority Security Interest in the Station

30. As set forth in the Sale Motion, the Receiver investigated the assets and liabilities of BusinessRadio Houston LLC and reviewed its business and financial records, and has confirmed, with counsel for IIR, that all payments owing under the Senior Secured Promissory Note were paid in full, and that no further obligations remain owing under the loan documents. The Receiver has further determined that all obligations owing to STB under Promissory Note A (as defined in the First Response) have been paid in full, and that the obligations under Promissory Note B remain outstanding.

31. STB is unaware of any other valid liens, claims, encumbrances or other interests, perfected or otherwise, in or on the Station held by any other parties, and disputes any further

⁵ The claims resolution process provided under title 11 of the U.S. Code (the "Bankruptcy Code"), as well as § 363(k) of the Bankruptcy Code, do not apply to this Receivership proceeding; therefore, the Investors' reliance on the same in § 2, ¶ 17 of the Amended Objection is inapposite.

claims of Wallace Bajjali Investment Fund II, L.P. ("WB Fund II"), or the claims of the objecting Investors, to a duly perfected security interest in, or lien on, the Station. Finally, the Receiver has not advised STB that he is aware of any other duly perfected liens, claims, encumbrances or other interests in or on the Station by any other parties, other than certain taxing authority claims described in the Modified Sale Agreement.

32. Given the foregoing, and in light of the Receiver's investigation and conclusion that STB holds a valid and legally enforceable claim, STB was therefore entitled to bid the debt owed by BusinessRadio Houston LLC under Promissory Note B as partial consideration to purchase the Station.

E. The Investors Are Not Subrogated to IIR's Security Interest

- 1) The Investors May Not "Stand in the Shoes" of the Interest Formerly Held by WB Fund II, as agent for IIR

33. Since the Investors failed to file their own financing statements, they argue that they now stand in the first priority "shoes" of IIR and/or WB Fund II. The Investors argue that they should be considered "other senior lenders" under the financing statement filed by WB Fund II to secure IIR's loan to BusinessRadio Houston LLC. As explained in Parts D and E of the First Response, the Investors are not "other senior lenders" under the financing statement.

34. Indeed, the Investors are lenders to an entity foreign to the March 28, 2008 transaction and do not "stand in the shoes" of the interest formerly held by WB Fund II, as agent for IIR because: (i) the Investors do not have a perfected interest as "other senior lenders" under the financing statement filed by WB Fund II; (ii) the Investors do not hold perfected security interests because each secured party, or its representative, must file a separate financing statement, or an assignment of the same, that names the secured party or its representative, and the Investors and their agent Wallace Bajjali Development Partners, L.P., have failed to do so;

(iii) the borrower that granted WB Fund II a security interest is a different entity than the debtor that obtained loans from the Investors; and (iv) no replacement financing was exercised in the manner provided by the Subordination Agreement. *See* First Response, Parts D & E.

35. Assuming *arguendo* that the Investors hold valid security interests in the Station, which STB denies, the Investors' interests would necessarily be subordinate to STB's interest because they would have been created later in time and remain unperfected under the Texas Business & Commerce Code.

36. The Investors cannot establish a security interest in the Station, perfected or otherwise, based on the omissions in their loan documents, among other failures. Since they do not hold a perfected interest, they now argue in their Amended Objection that they should nevertheless be contractually and/or equitably subrogated to IIR's security interest. For the reasons set forth below, the Investors do not satisfy the requisites for subrogation, and the lien interests of STB should be afforded the protections of a secured lender for the reasons set forth in the First Response and the need for commercial certainty in lending transactions that is so central to the purposes of the Texas Business & Commerce Code.

2) The Investors are not Contractually Subrogated to IIR's Security Interest

37. Contractual subrogation arises when "a person advances money to take up and extend indebtedness secured by a vendor's lien on [property] under ***an agreement that such person shall stand in the place of the original holder of the indebtedness.***" *Vogel v. Veneman*, 276 F.3d 729, 735 (5th Cir. 2002) (quoting *Glasscock v. Travelers Ins. Co.*, 113 S.W.2d 1005, 1009 (Tex. Civ. App.—Austin 1938, writ ref'd)) (emphasis added). "A valid [security agreement] ***executed by both the borrower and lender*** establishes contractual subrogation." *Id.* (quoting *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 662 (Tex. 1996) (emphasis added)).

38. Here, the Investors' loan documents fail to establish a loan, security agreement, or other contractual obligation owing by BusinessRadio Houston LLC to the Investors. *See generally* First Response, Parts D & E. Also, the Investors' loan documents were not executed by BusinessRadio Houston LLC. *See id.*

39. As such, the Investors have failed to present any evidence or document executed by BusinessRadio Houston LLC prior to the date of the Subordination Agreement, or prior to or contemporaneously with the advancement of any funds from the Investors to BusinessRadio Houston LLC, establishing that BusinessRadio Houston LLC received funds from the Investors for the purpose of paying the indebtedness owing to IIR or STB. *See id.* Though case law has held that the security instrument between a borrower and a subrogated lender need not be enforceable (e.g., where the security agreement was executed based on fraudulent misrepresentations), it still must be executed by both parties and set forth the parties' intent that the lender be subrogated to the interest of the original or previous lender in order to establish contractual subrogation. *See Vogel*, 276 F.3d at 735; *Rubarts v. First Gibraltar Bank (In re Rubarts)*, 896 F.2d 107, 114-15 (5th Cir. 1990); *Glasscock*, 113 S.W.3d at 1009. Because the Investors have failed to produce any contractual agreements suggesting that they, or any other party, would be entitled to subrogation rights, and there is no specific assignment from IIR, WB Fund II, or STB to the Investors, the Investors are not contractually subrogated to IIR's former security interest or STB's security interest pursuant to Promissory Note A.

40. Assuming *arguendo* that the Investors did loan funds to BusinessRadio Houston LLC to extinguish pre-existing debts, the Investors would appear to have only loaned funds to extinguish a portion of STB's indebtedness (i.e., STB's Promissory Note A, as defined in the First Response). *See Amended Objection*, ¶ 24 at p. 10. Therefore, because the Investors' loans only

(allegedly) partially extinguished the debt owing to STB, the Investors may not be subrogated to any portion of STB's interest in the Station. *See Providence Inst. for Sav. v. Sims*, 441 S.W.2d 516, 519 (Tex. 1969) ("We recognize the general rule that a person who is subrogated to the rights or securities of another may not enforce the same until the claim of the latter against the debtor has been paid in full."); *accord Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 583 F.3d 348, 354-55 (5th Cir. 2009) (citing *Sims* and Restatement (First) of Security, § 141, cmt. e. illus. 10 (1941)).

3) The Investors are not Equitably Subrogated to IIR's Security Interest

41. "The doctrine of equitable subrogation allows a party who would otherwise lack standing to step into the shoes of and pursue the claims belonging to a party with standing. Although the doctrine most often arises in the insurance context, equitable subrogation applies 'in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter.' Thus a party seeking equitable subrogation must show it *involuntarily* paid a debt primarily owed by another in a situation that favors equitable relief." *Frymire Eng'g Co. v. Jomar Int'l, Ltd.*, 259 S.W.3d 140, 142 (Tex. 2008) (emphasis added).

42. "The principle is that one not a volunteer who advances money to pay a valid encumbrance . . . under circumstances from which an understanding is to be implied that at least a part of the advancement made is to be secured by a first lien on the [property] encumbered, is subrogated to the rights of the prior encumbrancer under his security, *unless superior or equal equities of others would be prejudiced thereby.*" *Means v. United Fid. Life Ins. Co.*, 550 S.W.2d 302, 309 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (emphasis added).

43. "A payment is voluntary when the payor acts 'without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and

without being compelled to do so for the preservation of any rights or property.'" *Frymire*, 259 S.W.3d at 145 (quoting *Oury v. Sanders*, 77 Tex. 278, 13 S.W. 1030, 1031 (1890)). Equitable subrogation, however, is not foreclosed to any party who pays a debt pursuant to the requirements of a contract, but a person who confers a benefit on a party as 'required by legal duty or contract' may not leverage equitable subrogation to assert claims against that same party. *See id.* (citing *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 337 (Tex. 1980)).

44. In light of the Texas Supreme Court's holding in *Smart*, as interpreted by the *Frymire* court, the Investors cannot utilize equitable subrogation to assert claims against BusinessRadio Houston LLC based on a contractual loan agreement into which the Investors voluntarily entered. By (allegedly) loaning funds to BusinessRadio Houston LLC, the Investors voluntarily conferred a benefit on BusinessRadio Houston LLC, and, consequently, incurred obligations "required by legal duty or contract," which contract may not be enforced against BusinessRadio Houston LLC through equitable subrogation. Indeed, this prohibition "reflects the *equitable* nature of *equitable* subrogation." *Id.* (emphasis added). The facts of *Frymire* illustrate this point.

45. In *Frymire*, a hotel owner hired Price Woods as a general contractor to remodel a meeting room. Price Woods in turn subcontracted HVAC and sheet metal work to Frymire Engineering. As part of the contract, Frymire agreed to indemnify Price Woods for any damages to the hotel caused by Frymire and to obtain liability insurance to cover the indemnity obligation.

46. Frymire installed a valve to a chilled water line in the hotel, which later ruptured and resulted in extensive water damage to the hotel. The hotel owner sought indemnification from Frymire, and Frymire's insurance carrier, Liberty Mutual, paid for the damages. Two years later, Liberty Mutual, on Frymire's behalf, sued Jomar International, the manufacturer of the

valve, to recoup the indemnification payment based on allegations of product liability, among other things. Jomar was granted summary judgment in the action, which was affirmed on appeal based on a finding that Frymire had not established its right to equitable subrogation and therefore lacked standing.

47. The Texas Supreme Court reversed, noting that Frymire was entitled to equitable subrogation because the indemnity payment: (i) extinguished a tort debt that the court found was primarily owed by Jomar; and, (ii) was involuntarily made pursuant to a binding contractual obligation between Frymire and a third party (i.e., Price Woods). *See Frymire*, 259 S.W.3d at 145.

48. The *Frymire* court noted that Frymire was legally obligated by its contract with Price Woods to pay the hotel owner for the water damage; therefore, the payment on Jomar's behalf was involuntary, even though it was an obligation that arose from a contract voluntarily entered into by Frymire. The court noted that contractual obligations may support an involuntary payment for the purposes of equitable subrogation insofar as the contractual obligation is not owed to the beneficiary of the payment. Indeed, the court noted that, "Frymire would lack standing to seek equitable subrogation if Frymire had contracted with Jomar, rather than with Price Woods, to pay the hotel's damages caused by Jomar." *Id.*

49. The same is true here. The Investors purportedly voluntarily entered into a contract with BusinessRadio Houston LLC to pay the indebtedness owed to IIR, WB Fund II, and/or STB. If so, the Investors lack standing to be equitably subrogated to IIR's former priority secured interest or STB's secured interest pursuant to Promissory Note A because the Investors seek to enforce claims against the very party (i.e., BusinessRadio Houston LLC) on whom they conferred a benefit pursuant to a contract into which they voluntarily entered. No legal

obligation existed prior to the Investors' voluntary execution of the alleged loan documents. The Investors' loan documents (attached as Exhibits to the Original and Amended Objections) do not evidence any assignment or agreement for subrogation, and the Investors were not compelled to loan any funds for the preservation of any pre-existing rights or property. *See id.* (citing *First Nat'l Bank of Kerrville v. O'Dell*, 856 S.W.2d 410, 415 (Tex. 1993)); *see also Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537, 542 (Tex. App.—Corpus Christi 1993, writ denied) (citing cases). As such, the Investors' payment to BusinessRadio Houston LLC, if any, was voluntary; therefore, they lack standing to be equitably subrogated to the security interest formerly held by IIR and/or WB Fund II, or STB pursuant to Promissory Note A.

50. Furthermore, the additional factors a court may consider in balancing the equities regarding a claim for equitable subrogation militate against permitting the Investors' claim. Those factors include: (i) the negligence of the party claiming subrogation; (ii) whether that party had notice of the intervening lien; and, (iii) whether the superior or equal equities of other interests (e.g., intervening lien holders) will be prejudiced if equitable subrogation is allowed. *See Bank of Am. v. Babu*, 340 S.W.3d 917, 926 (Tex. App.—Dallas 2011, no pet. h.); *see also Lewis v. Investors Sav. Ass'n*, 411 S.W.2d 794, 796 (Tex. Civ. App.—Fort Worth 1967, no writ) (citing *Kone v. Harper*, 297 S.W. 294, 298 (Tex. Civ. App.—Waco 1927), *aff'd sub nom.*, *Ward-Harrison Co. v. Kone*, 1 S.W.2d 857 (Tex. Comm'n App. 1928, judgm't adopted)).

51. Here, the Investors and/or their agent, Wallace Bajjali Development Partners, L.P., were negligent given that they failed to perfect their alleged security interest by filing a financing statement even though their loan documents contemplated that they would do so. *See* First Response Part B. Instead, the Investors rely upon a generic reference to a category of lenders (i.e., "Replacement Financing") in STB's loan documents to which the Investors are not

even signatories (i.e., the "Subordination Agreement") to establish the priority of their alleged rights.⁶ Moreover, the Investors' loan documents fail to identify BusinessRadio Houston LLC as the entity to which they allegedly loaned funds to extinguish the IIR/STB indebtedness.⁷ Also, when the Investors made their loans they are deemed to have constructive notice of at all times of STB's perfected junior lien on the Station and the Subordination Agreement. As described in more detail in the First Response, the Texas Business & Commerce Code enabled the Investors to protect themselves in a variety of ways to secure their loans. The Investors and their agent, have failed to do so and should not be rewarded for these omissions with equitable subrogation rights that take priority over STB's property perfected security interests.⁸

52. Lastly, STB had no notice of the Investors' alleged lien or its purported priority given that no financing statement was filed. As a result, STB and the Receivership Estate would undoubtedly be prejudiced to the extent that the Investors are equitably subrogated to the security interest formerly held by IIR and/or WB Fund II or STB, insofar as STB and the Receiver have expended considerable resources to negotiate and consummate the sale of the Station in reliance on the UCC filing office records indicating that there were no other encumbrances senior to STB's. *See Med Ctr. Bank v. Fleetwood*, 854 S.W.2d 278, 286 (Tex. App.—Austin 1993, writ

⁶ Indeed, in Section V, ¶ 39, p. 16 of the Amended Objection, the Investors attempt to rely on the Subordination Agreement as evidence of the priority of their alleged lien on the Station. However, as set forth herein, the Investors lack standing to enforce any lien on the Station that may be senior to that held by STB, and they certainly lack privity of contract to enforce or contest the terms of the Subordination Agreement, to which they are not signatories. Thus, no lien or other claim of the Investors should attach to the proceeds of the sale of the Station.

⁷ The Investors have failed to establish the possibility of unjust enrichment by any party given that no evidence before the Court, including the Investors' own loan documents, establishes that the Investors loaned funds to BusinessRadio Houston LLC for the purpose of extinguishing debts owing to IIR and/or WB Fund II or STB. Moreover, STB will not be unjustly enriched if it purchases the Station pursuant to the Sale Motion, Sale Procedures Order, and Modified Sale Agreement because the Receiver's investigation has determined that any formerly existing liens that were senior to STB's have been extinguished.

⁸ The Investors are not left without a remedy by the Court's declining to grant the remedy of equitable subrogation to the extent that their agent or advisors failed to properly document the transactions with the proper borrowing entity or file financing statements to protect their interests.

denied) (holding that prejudice to intervening interest holders is shown by: (i) additional debt having priority over or parity with the intervening interest; (ii) a material change in the terms of the superior interest; or, (iii) other pecuniary loss resulting from the subrogation).

53. In light of the foregoing, the Investors should not be equitably subrogated to the security interest formerly held by IIR or STB.

IV. PRAYER

STB respectfully requests that the Court overrule the Amended Objection, grant the Receiver's Sale Motion in all respects, enter a Confirmation Order approving the sale of the Station to STB pursuant to the Modified Sale Agreement, and grant STB such other and further relief the Court may deem just and equitable.

DATED: September 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 12, 2011, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court for the Southern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or *pro se* parties of record listed on the attached service list, electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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