

(1) the amount of money to be paid by the Wallace Bajjali Parties under the proposed settlement is too low given the agreed nature of the claims and the amount of money involved in the investments at issue; (2) Wallace Bajjali is not releasing the Receiver from their claims against the Estate; (3) the settlement proposes to foreclose claims which involve personal property rights of the Investors and other third parties, not of the Estate which is the subject of the Receivership; (4) the Receiver has taken the position that the Investor's security interests in the station are invalid, yet seeks to absolve Wallace Bajjali of any liability to Investors for their negligence and other torts.

II.

OBJECTION

a. The proposed settlement funds are inadequate in consideration of the claims compromised.

The proposed settlement calls for payments to the Estate of \$1.2 million with the possibility of payments exceeding \$1.75 million. Investors doubt, however, that the proceeds will exceed the minimum of \$1.5 million. That sum is grossly inadequate, given that most of the Receiver's claims are agreed and admitted by Wallace Bajjali.

The proposed settlement funds consist of \$1.2 million, the "Replacement Notes" and payment of \$300,000.00 to \$450,000.00 on the "cash flow note." The "Note Entities" in regard to the obligations implicated by the Replacement Notes are identified as a) West Houston Fund - \$595,176.35, b) LFW Fund \$275,000.00 and c) Spring Cypress Investment - \$9,000.00. As the Receiver states, "The Wallace Bajjali Parties have admitted the obligations of the Note Entities on the WB/KCM Notes." Doc. 113, para. 5. Therefore, the principal requirement of the settlement is that the Wallace Bajjali Parties pay the notes they have already admitted they owe. In addition, the Wallace Bajjali Parties pay between \$300,000.00 and \$450,000.00 "depending upon cash flow" from their Amarillo Project. There is no evidence presented in the Receiver's motion to suggest that the

cash flow from the Amarillo Project is likely to increase the obligation of Wallace Bajjali over the \$300,000.00 minimum. Moreover, the proposed settlement agreement provides that if the Wallace Bajjali Parties pay the \$300,000.00 within 18 months, the debt is extinguished regardless of the cash flow from the Amarillo Project. So the deal is: if the Wallace Bajjali Parties pay \$300,000.00 and the debts they have already admitted liability for, they are released from any further action by the Receiver, and all claims that the defrauded investors may have for negligence, fraud, breach of fiduciary duty, and other claims are barred.

Effectively, the Receiver is compromising all of the Estate's and Investors' claims for \$300,000. The only basis for this is that the Receiver has reviewed financials of the settling parties and has been convinced that they do not have more assets to pay a settlement. Obviously, the Receiver is not taking into account the millions of dollars in real estate assets held by the Wallace Bajjali companies, nor is it taking into account Messrs. Wallace and Bajjali's ability to earn income in future years. The Receiver also is apparently not taking into account that Wallace Bajjali, in various different capacities, has significant claims against the Receivership Estate. The LFW Economic Opportunity Fund, for instance, was the largest shareholder of Biz Radio.

Investors have claims in excess of \$15,000,000.00 against Wallace Bajjali, their professionals, and other third parties. Approximately \$5,000,000.00 of these claims relate directly to the Secured Promissory Notes at issue in connection with the radio station asset sale. Other claims relate to losses Investors incurred when Wallace Bajjali made alleged equity investments in BizRadio. An estimated \$6,000,000.00 of the losses arose in connection with real estate investments and had nothing to do with the Receivership entities. There is no basis in fact or law for the Receiver to be able to settle any of those claims, particularly in light of the amount of the settlement proposed by the Receiver.

The Receiver states: "It is the wish of the Wallace Bajjali Parties to buy peace through settlement with the Receiver, wholly and finally." Messrs. Wallace and Bajjali are buying whole lot of

peace for a mere \$300,000.00 under this proposed settlement. The Receiver should be focused on the wishes of the defrauded Investors, not the wishes of the Wallace Bajjali Parties or the convenience of wrapping up this matter as quickly and effortlessly as possible.

b. The proposed settlement forecloses individual claims.

Wallace Bajjali Development Partners, LP, was the explicit agent for each of the Investors in regard to their investments in, and loans to BizRadio. Wallace Bajjali Investment Fund II, L.P., was their indirect agent as well. Through those relationships, as well as the overall relationship between them, Messrs. Wallace and Bajjali, as well as the two entities, (collectively, "Wallace Bajjali") owed a fiduciary duty to Investors. Wallace Bajjali breached that fiduciary duty to Investors by, among other things, failing to act as a reasonably prudent investment counselor, by failing to ensure that the documents used in these transactions were appropriately drafted, by failing to act in the best interest of their principal, by failing to comply with the requirement that limited the percentage of investment in any one entity, by making loans to and investments in entities that they knew or should have known were insolvent, and by violating the United States and Texas securities laws. The claims of Investors against Wallace Bajjali for negligence, fraud, breach of fiduciary duty, negligent misrepresentation and civil conspiracy to defraud are the personal claims of the individual Investors. Those claims are not part of the Receivership Estate, and the Receiver does not have the authority to make a settlement with Wallace Bajjali that purports to waive Investors' right to sue and/or recover on the Investors' individual claims.

The Receiver argues that this Court has already enjoined actions against the Defendants, the Receiver and the Receivership Estate, and asks that the stay be extended to include the claims held by the BuisnessRadio Note Holders against the Wallace Bajjali Parties, and to make it permanent. Doc. 113, para. 28. The original stay is not at issue here, but requested extension is a gross over-reach. The Wallace Bajjali Parties are not parties to this litigation. The Investors' claims under state law,

against non-parties to this action, are not subject to the jurisdiction of this Court. The deal the Receiver proposes with the Wallace Bajjali Parties involves separate claims which are personal to the Investors. Moreover, the investors, on whose behalf the Receiver is purportedly acting, had no notice or knowledge of an impending settlement which seeks to extinguish investors' right to pursue claims against the Wallace Bajjali Parties. Investors were not consulted on the issue.

The Receiver states that "Blanket anti-litigation stays have been repeatedly been upheld in circumstances affecting assets of a Receivership estate." Doc. 113, para. 29. Only three cases are cited, none of them from the 5th Circuit. The cited cases involve different fact situations.

SEC v. Byers, 609 F. 3d 87 (2nd Cir. 2010) involved a preliminary injunction preventing an involuntary bankruptcy filing. The *Byers* Court described the situation as follows: "In this litigation the receivership must manage hundreds of Wextrust entities that sprawl across the Middle East, Africa and the United States, many of which may have co-mingled assets." Those circumstances are not present in this case. Moreover, the *Byers* Court noted, "The receivership protects the assets of the estate, just as a stay would in bankruptcy," suggesting the same benefit to the creditors was available through the receivership. There is no similar benefit in this case, the Receivership has no standing to pursue the Investors' personal claims against the Wallace Bajjali Parties.

In *SEC v. Wenke*, 622 F. 2d 1363 (9th Cir. 1980), the district court which appointed a receiver in a securities fraud action, issued a blanket stay prohibiting all persons from commencing any suit against the receivership entities except by leave of court. The first issue is that the stay only involved "receivership entities." The Wallace Bajjali Parties are not "receivership entities" in this litigation. Moreover, in *Wenke II* the stay at issue was not a permanent bar which was consideration for the Receiver's settlement agreement, to the contrary, third parties could seek leave of court to pursue their claims.

The opinion in *Liberte Capital Group, LLC v. Capwell*, 462 F.3d 543 (6th Cir. 2006) is

similarly distinguishable. There the injunction staying litigation was with regard to the receiver and the receivership entities, and the stay did not prohibit litigation (and it certainly did not provide a permanent bar), it merely required leave of court as a condition precedent. The litigation bar sought in this instance serves a wholly different purpose than the stays issued in the cases the Receiver cites.

What the Receiver seeks here is not a stay, but a permanent bar of Investors' personal property right to pursue claims under state law against the Wallace Bajjali Parties. The goal is not the orderly handling of litigation, as in *Byers*, but to provide an incentive for the Wallace Bajjali Entities to settle with the Receiver. The litigation bar brings money into the Receivership Estate at no cost the Receiver, provides a substantial windfall to the Wallace Bajjali Parties if they do not face litigation by the defrauded investors, and all costs are borne by the investors who have had no say in the settlement negotiations. A Court ordered litigation bar would constitute a prohibited "taking," as the Investors have not been afforded due process in regard to their personal property rights in their causes of action for negligence, fraud, and conspiracy. The receiver cites no authority for the permanent bar of third party claims which are not the subject of the Receivership, and the Court should deny any such litigation bar.

c. The Receiver's positions are inconsistent.

In connection with the sale of the radio station assets, the Receiver has contested the Investors claim of a security interest. The Receiver takes the position that defects in the promissory notes and security agreements render those securities defective. All of that documentation was prepared by the Wallace Bajjali Parties or Wallace Bajjali's agents. In those transactions, Wallace Bajjali was acting as the agent for each of the individual Investors as is clearly stated in the documents; thus, the Wallace Bajjali Parties owed Investors a fiduciary duty that was breached. The Receiver's position is that all of the paperwork the Investors are relying on is defective, yet in his proposed settlement with Wallace Bajjali Parties, the Receiver seeks to foreclose the Investors ability to seek recovery from the

Wallace Bajjali Entities for their potential negligence and fraud. The deal benefits the Receiver and the Receivership Estate, and the deal greatly benefits the Wallace Bajjali Entities. The only persons the settlement does not benefit are the defrauded investors whose money has been taken and now the Receiver seeks to take away their right to seek redress from their “agent” and its professionals. If equity is to be served in this proceeding the Receiver’s Motion for Order Approving Proposed Settlement and for Ancillary Orders should be denied.

PRAYER

For the reasons stated above, Investors move this Court to deny the Receiver’s Motion for Order Approving Proposed Settlement and for Ancillary Orders.

RESPECTFULLY SUBMITTED,

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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 3rd day of October 2011:

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