

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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| SECURITIES AND EXCHANGE COMMISSION, | § | |
| Plaintiff, | § | Case No. 4:09-cv-3674 |
| | § | |
| v. | § | |
| | § | |
| ALBERT FASE KALETA and KALETA CAPITAL MANAGEMENT, INC., | § | |
| Defendants, | § | |
| | § | |
| and | § | |
| | § | |
| BUSINESSRADIO NETWORK, L.P., d/b/a BizRadio and DANIEL FRISHBERG FINANCIAL SERVICES, INC., d/b/a DFFS CAPITAL MANAGEMENT, INC., | § | |
| Relief Defendants, | § | |
| Solely for the purposes of Equitable Relief. | § | |

**RECEIVER’S RESPONSE TO OBJECTION TO
PROPOSED SETTLEMENT WITH WALLACE BAJJALI PARTIES**

COMES NOW Thomas L. Taylor III, Court-appointed Receiver¹ in the above styled action, and files this Response (the “Response”) to the Investors’ Objection to Receiver’s Motion for Order Approving Proposed Settlement and for Ancillary Orders (Doc. 124) (the “Objection”).²

¹ All capitalized terms not defined herein shall have the same meaning assigned to them in Receiver’s Motion for Order Approving Proposed Settlement and for Ancillary Orders (Doc. 113) (hereinafter, the “Settlement Motion”).

² The objecting investors are Ronald & Lavonne Ellisor, Richard Kadlick, Sailaja Uri Konduri, Robert Ficks, Larry Mullins, TR Dunn Family Trust, Diane & Paul Collings, Kohur Subramanian, Timothy Koehl, Martin Grosbol, Doug & Kay Shaffer, Alisa K. Jones, Kevin Deering, Ed & Helena Gray, Johnny & Betty Gauntt, Tony Huerta, Jacob Tsabar, Marcus Erickson, Kurt Everson, George & Marene Tompkins, Richard Burkhart, James Maas, James & Patricia Stewart, Bob & Kathy Horlander, Don Keil, Dr. Gerald Crouch, Paul & Simona Williams, Steve Cook, Florence Reiley, Carlos Barbieri, Ivan Curiel, Jack McElligot, Pamela McElligot, Raymond Warner, and John Willis (hereinafter, the “Objectors”).

I. PRELIMINARY STATEMENT

In numerous material respects, the Objection is disingenuous, misleading and inaccurate. Regrettably, the Objectors and their counsel failed to acquire even a passing familiarity with material terms of the Settlement Agreement (*Settlement Motion*, Exhibit 1, Doc. 113-1) prior to interposing their Objection. Specifically, the Objectors have mischaracterized (1) the assets available for resolution of the Receivership's claims; (2) the nature of the claims which could be asserted by the Receivership Estate against certain entities; (3) the nature and scope of claims which, under the Settlement, could be asserted by certain parties in the Receivership distribution process; and (4) the scope of the proposed Bar Order which would be imposed as a condition of the Settlement.

The proposed Settlement is the result of protracted negotiations with David Wallace, Costa Bajjali and the Wallace Bajjali entities culminating in concessions on both sides. The Receiver believes that the proposed Settlement offers the highest net benefit to the Receivership Estate, in terms of maximizing Estate assets and minimizing the expenses incurred to obtain them. The Receiver recognizes that the Bar Order proposed in the Settlement affects certain rights of the BusinessRadio Note Holders, which is precisely why notice of the proposed Settlement was given to all known parties which could be affected by it.³ However, the proposed claim bar was a necessary compromise in order to achieve the totality of the Settlement proposed. In any case, the Objectors have misstated the reach of the Bar Order. Specifically, the proposed Bar Order would not affect potential claims by the Objectors other than those arising from the BusinessRadio promissory notes, which claims will ultimately be addressed, along with all of the other defrauded BusinessRadio investors, in the Receivership distribution process. Contrary to assertions in their Objection, the Bar Order would have no impact whatsoever on

³See *Settlement Agreement*, Exhibit A, Doc. 113-1 at pp. 21-23 (hereinafter the "Notice").

other claims and causes of action unrelated to the BusinessRadio Note Plan which the Objectors may have vis-à-vis Mr. Wallace, Mr. Bajjali or related entities.

II. ARGUMENT AND AUTHORITIES

A. The Objectors Have Grossly Misrepresented the Assets Available for Satisfaction of Potential Claims of the Receivership Estate Against David Wallace and Costa Bajjali

In their haste to disrupt the orderly administration of this Receivership Estate, the Objectors and their counsel have conflated the assets of Messrs. Wallace and Bajjali with assets of real estate partnerships which are owned by presumably innocent members of the public (including the Ellisors and other Objectors). Thus, the Objectors imply that the Receiver has rushed headlong into the proposed Settlement without taking into account assets which would be available to satisfy a judgment against Wallace and Bajjali: “Obviously, the Receiver is not taking into account the millions of dollars in real estate assets held by the Wallace Bajjali companies.” *Objection* at p. 3. Since the Ellisors and other members of their cohort are among the owners of these “Wallace Bajjali companies” it is surprising that they would suggest that their assets are available to satisfy claims which could be asserted against David Wallace and Costa Bajjali. Since these “millions of dollars in real estate assets” belong to members of the public (including themselves), the Objectors’ analysis in this regard is utterly pointless.

West Houston WB Realty Fund, L.P., Wallace Bajjali Investment Fund II, L.P. and LFW Economic Opportunity Fund, L.P. (collectively, the “WB Funds”) are investment vehicles through which members of the public -- including many of the Objectors -- made investments as

limited partners. The assets of those limited partnerships are owned by their limited partners, not their general partners or Messrs. Wallace and Bajjali individually.⁴

Moreover -- and apart from the question of ownership of the real estate assets -- the Receiver is not aware of the WB Funds having engaged in any wrongful or actionable conduct vis-à-vis the Receivership Entities. The Receiver is unaware of any claims the Receivership Estate has against the Note Entities (as distinct from claims against David Wallace and Costa Bajjali) other than for monies due to KCM on unpaid promissory notes, and no claims whatsoever against those WB Funds which did not receive investor money from KCM. All unpaid amounts owed to KCM by the Note Entities, along with interest -- which will continue to accrue until paid in full -- are accounted for in the proposed Settlement. Moreover, as discussed below -- and which the Objectors fail to acknowledge -- these amounts would now be personally guaranteed by Messrs. Wallace and Bajjali pursuant to terms of the Settlement.⁵ Absent the proposed Settlement, there is no preexisting duty on their part to do so.

B. The “Replacement Notes” and Personal Guaranty Agreements of Messrs. Wallace and Bajjali Are of Material Benefit to the Receivership Estate

The Objectors are dismissive of the Replacement Notes and fail even to address the personal guaranty agreements of Messrs. Wallace and Bajjali related to them,⁶ concluding that “[e]ffectively, the Receiver is compromising all of the Estate’s and [Objectors’] claims for \$300,000.” *Objection* at p. 3.⁷ But the restatement of the Note Entities’ obligations in the form

⁴ Indeed the WB Funds collectively own 100% of WB Real Estate Holdings, LLC, which in turn owns real estate assets and interests in certain real estate development entities, including Spring Cypress Investments. *See Affidavit of David Wallace*, Doc. 130 at p. 2 (hereinafter the “Wallace Aff.”).

⁵ *Settlement Agreement*, ¶4.2.

⁶ *See Settlement Agreement*, Exhibits I – T.

⁷ As stated in the Settlement Motion, additional consideration was negotiated in the form of the Cash Flow Note, *Settlement Agreement*, Exhibit U, Doc. 113-1 at p. 122, which has a face value of \$450, 000 and will be discharged upon receipt of \$300,000 before certain dates. Payments on the Cash Flow Note are calculated based on the Dedicated Cash Flow (as defined therein) received by WB Dev. Partners from its Development Agreements with the City of Amarillo. For further detail, see *Settlement Motion* §II(B)(c), ¶¶18-19; *Settlement Agreement*, Exhibit U.

of the Replacement Notes is of huge benefit to the Estate, totaling \$1,177,755.77 through October 18, 2011 with continuing accrual of interest beyond that date. The quantification of these obligations to this amount is no small matter since the advancement of KCM funds to these entities was conducted in a chaotic and poorly documented series of transfers not readily susceptible of proof. Absent the Settlement, the requirement of litigation to establish these obligations and to prove up their amounts would be an expensive and time-consuming process. Moreover, however established, these obligations would be established only as to the Note Entities. The payment of these obligations would depend upon the vagaries of the underlying asset performance of each of them. That the proposed Settlement includes -- for the first time -- personal guarantees on these amounts by Messrs. Wallace and Bajjali cannot be overemphasized.

It goes without saying that the Receiver has maintained since the inception of the Receivership that the Note Entities are liable to the Receivership Estate for all funds which they borrowed or otherwise received from KCM -- funds fraudulently obtained from KCM investors by Messrs. Frishberg and Kaleta. In the absence of a settlement, the Receiver would assert those claims through litigation. Such litigation would be a complex and costly affair. While the Note Entities "have admitted the obligations ... on the WB/KCM Notes," *Settlement Motion* ¶5, they have admitted generally that funds were advanced to the Note Entities by KCM; they have not admitted the extent of their liability on those loans and other payments, including defenses that could be raised in the litigation context. Receiver would be required to prove up all of the debts arising from the WB/KCM Notes and defeat any defenses to them at trial, an uncertain proposition given the poor quality of documentation and record keeping by KCM prior to the institution of the Receivership. The Replacement Notes not only affirm and acknowledge debt incurred prior to the institution of the Receivership, they establish their full amounts with

interest. It bears repeating that payments to the Estate by the Note Entities on the Replacement Notes are personally guaranteed by Messrs. Wallace and Bajjali.⁸

C. The Final Claim Bar Order

1. The proposed Bar Order is far narrower in scope than the Objectors represent

The Objectors claim that Court approval of this proposed Settlement, including the entry of a Bar Order, would deprive them of “claims in excess of \$15,000,000.00 against [certain] Wallace Bajjali [Parties], their professionals, and other third parties.” *Objection* at p. 3. A cursory reading of the Settlement Agreement will confirm that the Objectors’ characterization of a Bar Order is inaccurate. The proposed Bar Order is far narrower in scope.

As defined in the Settlement Agreement, a Final Claim Bar Order is an order entered by the Court that:

... permanently bars or enjoins any and all **BusinessRadio Note Holders** from commencing or continuing any judicial, administrative, arbitration, or other proceeding and/or asserting or prosecuting any Claims against any of the Wallace Bajjali Parties [and related persons and entities] **arising out of, in connection with, or relating to the BusinessRadio Note Plan, the loans made to BusinessRadio** or its affiliates by the BusinessRadio Note Holders, and/or the **notes issued by BusinessRadio** or its affiliates to the BusinessRadio Note Holders. ...

Settlement Agreement, ¶2.16 (emphasis added). The BusinessRadio Note Holders -- those parties sought to be bound by a Final Claim Bar Order -- are defined as:

the investors, their heirs, successors, agents and assigns, who **subscribed to the BusinessRadio Note Plan and/or made loans to BusinessRadio** or its affiliates **by or through any of the Wallace Bajjali Parties as their agent.**

Id., ¶2.12 (emphasis added). Lastly, the Settlement Agreement defines the BusinessRadio Note Plan as:

⁸*Settlement Agreement*, ¶4.2.

that plan or series of transactions whereby investors **made loans** to BusinessRadio or its affiliates **by or through any of the Wallace Bajjali Parties as their agent.**

Id., ¶2.11 (emphasis added).

Accordingly, a Bar Order entered by the Court would only affect rights related to claims arising from a transaction in which a Wallace Bajjali Party acted as agent for a BusinessRadio Note Holder in loaning money to BusinessRadio. Contrary to the Objectors' contentions, the proposed Settlement would have no impact whatsoever on any claims the BusinessRadio Note Holders may have against any Wallace Bajjali Party arising out of "losses ... incurred when Wallace Bajjali [Parties] made alleged equity investments in BizRadio." *Objection* at p. 3. Nor would the Settlement have any impact whatsoever on any "of the losses [which] arose in connection with real estate investments [which] had nothing to do with the Receivership entities," *id.*, or any other claims not related to loans made to BusinessRadio through a Wallace Bajjali Party. The **only** claims barred by the proposed Bar Order are those arising out of promissory note investments made in BusinessRadio in which a Wallace Bajjali Party acted as agent. And these barred claims would be redressed through the claims procedure which would be established in the Receivership's Plan of Distribution.

2. The authority of the Court to bar certain claims of the BusinessRadio Note Holders

"The law is well settled that a district court has broad powers and wide discretion in the supervision of an equity receivership." *SEC v. Forex Asset Mgmt.*, 2000 U.S. Dist. LEXIS 19486 at * 4 (citing *SEC v. Safety Finance Serv. Inc.*, 674 F.2d 368, 372 (5th Cir. 1982)). A federal court's inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws is derived from the inherent power of a court of equity to fashion effective relief. *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir.1980) ("Wencke II"); *See also SEC v. Byers*, 609 F.3d 87, 91 (2nd Cir. 2010). "An anti-

litigation injunction is simply one of the tools available to courts to help further the goals of the receivership.” *Byers*, 609 F.3d at 92.

As previously stated, while the Settlement funds at issue here are not currently under the control of the Receivership Estate, “if this settlement is approved by the Court, [those assets] will become assets of the Receivership Estate.” *Settlement Motion*, ¶33. Furthermore, under the legal theories of fraudulent transfer and unjust enrichment -- both of which would be asserted by the Receiver in any litigation related to the WB/KCM Notes -- the KCM proceeds received by the Note Entities are held under a constructive trust for the benefit of the Receivership Estate by the respective Note Entities, and remain Receivership Assets; the Cash Flow Note and personal guarantees of Wallace and Bajjali are the only aspects of the Settlement not yet Receivership Assets. Securing these additional pieces of consideration, in addition to the Receivership Assets held in trust by the Note Entities, enhances the actual value of those Receivership Assets currently held in trust by increasing the Receiver’s chances of recovery of those Receivership Assets. Lastly, as this Settlement would bring assets into the Receivership Estate for the benefit of all claimants, its approval affects assets of the Estate. The District Court has the authority to use its broad equitable powers to approve this Settlement and enter a Bar Order as a matter of law.

Indeed due process is satisfied so long as there is adequate notice and opportunity to be heard. *FTC v. Assail, Inc.*, 410 F.3d 256, 267(5th Cir. 2005) (citing *Commodities Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 2000)). Here, the Receiver seeks Receivership Assets allegedly held in constructive trust and additional consideration negotiated by the parties, which includes a Bar Order against the BusinessRadio Note Holders’ claims. Because Receiver sent the Notice to all known BusinessRadio Note

Holders, allowing for objections to be filed, the Court can enter an order approving the Settlement and barring claims of the BusinessRadio Note Holders without violating the due process rights of the BusinessRadio Note Holders.

D. Release of Claims of Certain Wallace Bajjali Parties Against the Receivership Estate

The Objectors complain that the “Wallace Bajjali [Parties] [are] not releasing the Receiver from their claims against the Estate,” *Objection* at p. 2, and that the “Receiver also is apparently not taking into account that [certain] Wallace Bajjali [Parties] ... [have] significant claims against the Receivership Estate. The LFW Economic Opportunity Fund, for instance, was the largest shareholder of Biz Radio.” *Id.* at p. 3. Once again, the Objectors have confused and conflated the rights and interests of David Wallace and Costa Bajjali with the rights and interests of investment partnerships which (1) are owned by innocent members of the public, including themselves; and (2) have not, to the Receiver’s knowledge, engaged in wrong doing vis-à-vis the Receivership Estate. As part of the proposed Settlement, Mr. Wallace and Mr. Bajjali have absolutely been required to release any and all claims they may have against the Receivership Estate. *Settlement Agreement*, ¶5.3.1(a). But the publically owned partnerships (LFW Economic Opportunity Fund, for example) have not been required to relinquish claims as investors to participate in the ultimate Plan of Distribution of the Receivership Estate and there is no basis upon which to require them to do so. It is remarkable that the Objectors contend otherwise, since a number of them are investors/owners of these very partnerships which may have claims based upon the misconduct of Frishberg, Kaleta and the Receivership Entities.⁹

⁹ In any event, to the extent that these claims relate to equity investments in BusinessRadio, it is highly unlikely that claimants upon them will receive anything of substance in the Plan of Distribution given that debt securities held by claimants upon the Receivership Estate will far exceed recoverable assets.

The Receiver specifically negotiated the exclusion of any claims that Messrs. Wallace and Bajjali could assert individually in the claims process associated with the ultimate Plan of Distribution.

E. Consistency of Receiver's Position

The Objectors contend that the Receiver's position regarding their purported security interests in Radio Station KTEK and related assets is inconsistent with this Settlement because entry of a Bar Order would preclude the Objectors from asserting claims against any Wallace Bajjali Party arising out of the allegedly defective documentation which did not grant them security interests as represented by Daniel Frishberg and Albert Kaleta.

In fact, the Receiver's position regarding the Objectors is consistent with those taken regarding the Objectors' objections to the sale of Radio Station KTEK. It is the Receiver's position that the BusinessRadio Note Holders (including the Objectors) are similarly situated to all defrauded investors, and that misrepresentations to them by Frishberg, Kaleta and others regarding any secured interests are simply a permutation of the overall fraudulent scheme. The BusinessRadio Note Holders were solicited to invest by Frishberg and Kaleta, and as has been stated by David Wallace, it was merely fortuitous these BusinessRadio promissory notes were issued to the investors through WB Dev. Partners as opposed to another Receivership Entity. *Testimony of David Wallace*, October 3, 2011, Doc. 138, 118:12-15. Hence, the benefits of this Settlement are shared by all claimants, Objectors included. Their claims in this regard will be addressed within the ultimate Plan of Distribution of the Receivership Estate.

III. CONCLUSION

Receiver respectfully asks the Court to overrule the Objection, approve the Settlement and enter a Bar Order per the Settlement's terms, for the reasons stated herein.

Date: October 18, 2011

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By: /s/ Thomas L. Taylor, III

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COUNSEL FOR RECEIVER

CERTIFICATE OF SERVICE

On October 18, 2011, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the CM/ECF electronic case filing system. I hereby certify that I have provided copies to all counsel of record electronically or by another manner authorized by Federal Rules of Civil Procedure 5(b)(2).

/s/ Thomas L. Taylor III
Thomas L. Taylor III