

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, Civil Action No. 4:09-cv-3674, Southern District of Texas (the “SEC Action”), respectfully moves the Court to consolidate the above-entitled action for all purposes with the SEC Action pending before this Court. The action sought to be consolidated arises out of the Receivership duties assigned by this Court to Receiver, specifically regarding recovery on a promissory note and guaranty, an asset of the Receivership Estate (as defined in the Order Appointing Receiver, ¶2, attached hereto as Exhibit A). Furthermore, this Court assumed exclusive jurisdiction over the SEC Action, Order Appointing Receiver, ¶1, and granted Receiver the authority to “[i]nstitute, prosecute, compromise, adjust, intervene in, or become party to such actions or proceedings in state, federal, or foreign courts that the Receiver deems necessary and advisable to preserve the value of the Receivership Estate.” Order Appointing Receiver, ¶5(i). Receiver has conferred with counsel for the SEC, Protechnik, Inc. and Brian DeArmas, who do not oppose this motion. Accordingly, the present action should be consolidated with the SEC Action presently pending before the Honorable Nancy F. Atlas, United States District Judge.

LEGAL ANALYSIS

Rule 42(a) of the Federal Rules of Civil Procedure permits a court to consolidate actions “involv[ing] a common question of law or fact.” The decision to consolidate actions is within the discretion of the district court when it finds that consolidation would avoid unnecessary cost or delay. *Dillard v. Merrill Lynch, Pierce, Genner & Smith, Inc.*, 961 F.2d 1148, 1161 (5th Cir. 1992). In deciding whether to consolidate cases, a district court examines factors that include the following:

(1) whether the actions are pending before the same court, (2) whether common parties are involved in the cases, (3) whether there are common questions of law and/or fact, (4) whether there is risk of prejudice or confusion if the cases are consolidated, and if so, is the risk outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately, (5) whether consolidation will conserve judicial resources, (6) whether consolidation will result in an unfair advantage, (7) whether consolidation will reduce the time for resolving the cases, and (8) whether consolidation will reduce the cost of trying the cases separately.

In re Camp Arrowhead, Ltd., No. SA-10-CV-170-XR, 2010 WL 841340, at *1 (W.D.Tex. March 8, 2010). Furthermore, suits that are consolidated merely for reasons of convenience and judicial economy are not merged into a single suit, and do not change the rights of the parties or make parties in one suit parties in the other. *In re Transtexas Gas Corp. v. TransTexas Gas*, 303 F.3d 571, 577 (5th Cir. 2002); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

Here, the SEC Action and that of the Receiver satisfy the above factors in favor of consolidation. These cases are both pending in the Southern District of Texas, and contain common questions of law and fact regarding assets of the Receivership Estate. There is no risk of prejudice or confusion if the matters are consolidated. Furthermore, consolidation will preserve judicial resources, will not result in an unfair advantage for any party, and will reduce both the time for resolving the cases and the cost of keeping these actions separate.

Consolidating the two actions would reduce the time spent by the Receiver on these actions, therefore better preserving the value of the Receivership Estate for the benefit of its defrauded investors.

CONCLUSION

For the foregoing reasons, Receiver respectfully requests that the Court consolidate the above-entitled action with the SEC Action.

Respectfully submitted,

By: /s/ Thomas L. Taylor, III
Thomas L. Taylor III
Texas State Bar: 19733700
THE TAYLOR LAW OFFICES, P.C.
4550 Post Oak Place Drive
Suite 241
Houston, Texas 77027
Tel: 713.626.5300
Fax: 713.402.6154
taylor@taylorlaw.com
*Court-Appointed Receiver for
Kaleta Capital Management, Inc.*