

No. 12-20633

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF

v.

ALBERT FASE KALETA,

DEFENDANT

RONALD ELLISOR; LAVONNE ELLISOR; RICHARD KADLICK; SAILAJA URI
KONDURI; ROBERT FICKS; ET AL.,

APPELLANTS

v.

THOMAS L. TAYLOR III, THE RECEIVER FOR KALETA CAPITAL MANAGEMENT, INC.;
BUSINESSRADIO NETWORK, L.P., DOING BUSINESS AS BIZRADIO; DANIEL FRISHBERG
FINANCIAL SERVICES, INC., DOING BUSINESS AS DFFS CAPITAL MANAGEMENT, INC.,
AND ALL OF THE ENTITIES THEY OWN OR CONTROL,

APPELLEES

*On Appeal from the United States District Court
for the Southern District of Texas, Houston Division*

BRIEF OF APPELLEE THOMAS L. TAYLOR III

March 6, 2013

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Thomas L. Taylor III, the Receiver for Kaleta Capital Management, Inc., BusinessRadio Network, LP d/b/a BizRadio, Daniel Frishberg Financial Services, Inc. d/b/a DFFS Capital Management, Inc. and all of the entities they own or control
2. The Taylor Law Offices, PC, Houston, TX, Attorneys for the Receiver
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Susan K. Hellinger
5. David Wallace, Sugar Land, Texas
6. Costa Bajjali, Missouri City, Texas
7. Wallace Bajjali Development Partners, LP, a Texas Limited Partnership
8. West Houston WB Realty Fund, LP, a Texas Limited Partnership
9. Laffer Frishberg Wallace Economic Opportunity Fund, LP, a Texas Limited Partnership
10. Wallace Bajjali Investment Fund II, LP, a Texas Limited Partnership
11. Spring Cypress Investments, LP, a Texas Limited Partnership

12. Alisa and Phillip Jones, The Woodlands, TX
13. Barbara Ploetz, Middleton, WI
14. Betty Gauntt, Pasadena, TX
15. Blake Taylor, Sugar Land, TX
16. Bruce Ruisard, The Woodlands, TX
17. Dan Gunderson, Houston, TX
18. Don and Ethelyn Taylor, Sugar Land, TX
19. Douglas and Kay Shaffer, Baycliffe, TX
20. Dr. James Stewart, San Antonio, TX
21. Ed Gray, Montgomery, TX
22. Ellis Couch, Tulsa, OK
23. Eric Rothenberg, Houston, TX
24. Florence Reiley, Bellaire, MI
25. George and Marene Tompkins, Houston, TX
26. Geraldine Willis, Katy, TX
27. Glenn and Ann Latta, Livingston, TX
28. Helena Gray, Montgomery, Texas
29. James Stewart, San Antonio, Texas
30. John Dosier, The Woodlands, TX
31. John Willis, as Executor of the Estate of Geraldine J. Willis, under administration in Hampden County, Massachusetts
32. Johnny Gauntt, Pasadena, Texas
33. Jose Huerta, Houston, TX

34. Joseph Miller, San Antonio, Texas
35. Kevin Deering, Argyle or Corinth, TX
36. Kohur and Anuradha Subramanian, Sugar Land, TX
37. Larry Mullins, Angleton, TX
38. Lavonne Ellisor, Houston, Texas
39. Marcus Erickson, Missouri City, TX
40. Martin Grosboll, Humble or Kingwood, TX
41. Nada Por Nada, Ltd, a Texas Limited Partnership
42. Patricia Stewart, San Antonio, Texas
43. Paul and Diane Collings, Houston, TX
44. Paul and Simona Williams, Houston, TX
45. Public Express, Inc., a Texas Corporation
46. Raymond Warner, Spring, TX
47. Richard Kadlick, Houston, TX
48. Robert Ficks, Sugar Land, TX
49. Roger Taylor Dec. Trust, Sugar Land, TX
50. Ronald Ellisor, Houston, Texas
51. Ronald Martens, Deer Park, TX
52. Ruisard Revocable Trust, The Woodlands, TX
53. Sailaja Uri Konduri, Houston, TX
54. Sarah Miller, San Antonio, Texas
55. Steve Cook, Houston, TX
56. Timothy Koehl, Houston, TX

57. Tompkins 2007 Family Partnership, Ltd., a Texas Limited Partnership
58. Tompkins, Inc., a Texas Corporation
59. Tony Huerta, Houston, Texas
60. TR Dunn Family Trust, Houston, TX
61. Youssef Boutrous, Houston, TX

/s/ Andrew M. Goforth

Attorney of Record for

Thomas L. Taylor III, the Receiver for Kaleta Capital Management, Inc., BusinessRadio Network, LP d/b/a BizRadio, Daniel Frishberg Financial Services, Inc. d/b/a DFFS Capital Management, Inc. and all of the entities they own or control

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. This appeal involves straightforward legal issues and is presented on a concise record. The facts and legal arguments are adequately presented in the briefs and the record. *See* FED. R. APP. P. 34(a)(2)(C). If the Court determines otherwise, the Receiver requests the opportunity to present oral argument.

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal of the injunctive Order entered by the District Court, USCA5 at 3461 – 64 (the “Bar Order”), pursuant to 28 U.S.C. § 1292(a)(1) (granting “jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions”).

This Court has jurisdiction over the appeal of the District Court’s Order approving the negotiated settlement agreement, USCA5 at 2966 – 92 (the “Memorandum and Order”), pursuant to the exemption to the statutory “final-judgment rule” in 28 U.S.C. § 1291 (granting “jurisdiction of appeals from all final decisions of the district courts of the United States”), as articulated by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Court has stated that for an order to fall within the small class of appealable decisions excepted by *Cohen*, it must:

- 1) conclusively determine the disputed question, 2) resolve an important issue completely separate from the merits of the action, and 3) be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The Memorandum and Order meets all three prongs of this test. It conclusively determines the dispute, namely the entry of the Bar Order and the implementation of the terms of the settlement agreement between the Receiver and the Wallace Bajjali Parties. It

finally resolves certain claims of and against the Receivership Estate, a subgroup investors in a Receivership entity (to which the Appellants belong), and the Wallace Bajjali Parties, which are separate from the merits of the Securities and Exchange Commission's enforcement action. Furthermore, it is effectively unreviewable on appeal from a final judgment because the implementation of the settlement agreement will have taken place.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court, in overseeing an equity receivership arising from a Securities and Exchange Commission enforcement action, abused its discretion when it approved a negotiated settlement agreement between the Receiver and third-parties closely affiliated with the receivership entities; and
2. Whether the District Court abused its discretion when, in conjunction with approving the negotiated settlement agreement, it entered a narrowly tailored injunctive order barring litigation by a distinct subset of receivership claimants against the third-parties closely affiliated with the receivership entities, arising from promissory notes issued by an entity in Receivership, and which claims would be addressed in the Receivership's Claims process to be supervised by the District Court.

III. STATEMENT OF THE CASE

This interlocutory appeal arises from a District Court’s order approving a negotiated settlement (the “Settlement”), USCA5 at 1957 – 2096, between Thomas L. Taylor III (“Receiver”), the equity receiver¹ appointed in the underlying Securities and Exchange Commission enforcement action, and third-parties David Wallace (“Wallace”), Costa Bajjali (“Bajjali”), West Houston WB Realty Fund, L.P. (“W. Houston Fund”), Wallace Bajjali Investment Fund II, L.P. (“WB Fund II”), LFW Economic Opportunity Fund, L.P. (“LFW Fund”), Spring Cypress Investments, L.P. (“Spring Cypress”) and Wallace Bajjali Development Partners, L.P. (“WB Development”) (collectively the “Wallace Bajjali Parties”). *Id.* The Settlement is conditioned on the entry of the Bar Order, carefully limited in scope, enjoining legal action by a subgroup of investors against the Wallace Bajjali Parties related to the promissory notes issued by Receivership Entity BizRadio, for whom WB Development acted as agent. USCA5 at 1963; ¶4.7.1.

The Wallace Bajjali Parties are affiliated with the entities of the Receivership Estate² and their principals in several respects. First, certain Wallace

¹ Receiver for Kaleta Capital Management, Inc. (“KCM”), Daniel Frishberg Financial Services, Inc. d/b/a DFFS Capital Management, Inc. (“DFFS”), Business Radio Network, L.P. d/b/a BizRadio (“BizRadio”), and all entities they own or control (collectively the “Receivership Entities”). USCA5 at 94 – 104, 382 – 84.

² The Receivership Estate is defined in the Agreed Order Appointing Receiver as the Receivership Records and Receivership Assets, collectively, as those terms are defined therein. USCA5 at 94 – 104.

Bajjali Parties received loans from the Receivership Entity KCM, USCA5 at 2968 – 69, which loans necessarily derived from funds fraudulently raised from the public through the KCM Ponzi scheme. USCA5 at 179. Second, David Wallace was a former officer of the Receivership Entity BizRadio. USCA5 at 2408, 2440. Third, certain Wallace Bajjali Parties invested funds in the Receivership Entity BizRadio, and potentially hold claims which could be made in the Receivership Claims process for distribution of Estate assets. USCA5 at 1940. Fourth, certain Wallace Bajjali Parties acted as the agent for investors purchasing promissory notes from the Receivership Entity BizRadio. USCA5 at 2968. Many of these investors in the BizRadio promissory notes were also clients of the Receivership Entity DFFS, a registered investment advisor. USCA5 at 2448 – 49.

The Settlement arose from protracted negotiations between the Receiver and the Wallace Bajjali Parties which were commenced by the parties in an effort to avoid the expense and uncertainty of litigation. USCA5 at 1945. The Settlement subsumes several distinct claims which the Receiver would assert against the Wallace Bajjali Parties. The Receiver maintains that the Receivership Estate holds various claims against the Wallace Bajjali Parties -- in tort and under other legal theories -- related to their affiliation with the Receivership Entities and participation in the unlawful investment scheme perpetrated by the Receivership Entities and their principals. USCA5 at 2970, 2973. The Wallace Bajjali Parties

would vigorously defend against these claims in any litigation commenced by the Receiver. USCA5 at 1949, 2980. The Settlement also provides for the reaffirmation and repayment of funds loaned by KCM to the Note Entities, with interest, and the payment of additional funds tied to cash flows from an incipient WB Development project in Amarillo, Texas.³ USCA5 at 1946 – 48. As part of the Settlement, Wallace and Bajjali personally guaranteed these amounts (subject to some limitations in regard to the Cash Flow Note), which are otherwise unsecured and unliquidated absent the approval of the Settlement. *Id.* Furthermore, the Settlement is conditioned on the Bar Order described *supra*. USCA5 at 1963; ¶4.7.1.

The District Court entered a Memorandum and Order approving the Settlement and holding it to be in the best interest of the Receivership Estate, and upon the denial of a Motion for Reconsideration, entered the Bar Order. The Appellants now challenge the District Court's approval of the Settlement, asserting that the District Court abused its discretion in fashioning relief in an equity receivership because the terms of the Settlement are manifestly unjust and were based on incomplete and misleading disclosures. Appellants' Brief at 20 – 28.

³ WB Development purportedly is leading a public/private development project of a civic center hotel and multi-purpose event venue in downtown Amarillo, Texas, pursuant to a Master Development Agreement by and between it and the City of Amarillo dated February 15, 2011, and a \$113 million Phase I Development Plan and Plan of Finance Resolution that were unanimously approved by the Amarillo City Commission on August 23, 2011. USCA5 at 1947.

Appellants further assert that the District Court exceeded its authority in entering the Bar Order. *Id.* at 10 – 20.

The Receiver disputes the Appellants’ assertions -- which are clearly unsupported by the Record -- and believes several of them have been waived by the Appellants. The Receiver contends that the District Court was well within its discretion in entering its Memorandum and Order approving the Settlement and in entering the Bar Order upon the Appellants’ unsuccessful Motion for Reconsideration.

IV. STATEMENT OF FACTS

A. The Commission’s Enforcement Action and Appointment of the Receiver

On November 13, 2009, the Securities and Exchange Commission (the “Commission”) filed a complaint alleging that Defendants Albert Fase Kaleta (“Kaleta”) and KCM raised approximately \$10 million from approximately 50 investors in a fraudulent offering of promissory note securities. *See* USCA5 at 36. On December 2, 2009 the District Court entered an order appointing Thomas L. Taylor III as Receiver for KCM. USCA5 at 94. Based upon the Receiver’s investigation after his appointment, the Receiver filed a Motion to expand the Receivership to expressly include, *inter alia*, Relief Defendants DFFS and BizRadio. USCA5 at 152. Following a preliminary hearing before the District

Court, the Receiver, DFFS and BizRadio filed a Stipulation to modify the Order Appointing Receiver to include DFFS and BizRadio within the Receivership Estate. USCA5 at 374. The District Court entered an Order on June 17, 2010 placing DFFS and BizRadio within the Receivership Estate. USCA5 at 382.

B. The KCM / DFFS / BizRadio Scheme

Based upon his investigation after appointment, the Receiver found substantial evidence that Daniel Frishberg (“Frishberg”) and Kaleta had created a network of affiliated companies -- including DFFS, BizRadio and KCM -- which they owned and/or controlled. USCA5 at 182 [22-1 p. 5]. These entities conducted business either from a shared office suite or from the homes of Frishberg or Kaleta. *Id.*

DFFS was a registered investment adviser through which Frishberg and Kaleta developed a substantial client base. USCA5 at 38 – 39, 153, 155. BizRadio and affiliated entities operated a radio network that broadcast financial-themed programming, including a show hosted by Frishberg, designed to attract clients to the DFFS investment advisory business. USCA5 at 153 [22]. KCM was, in substance, a vehicle through which Frishberg and Kaleta funded the operations of BizRadio and DFFS. Frishberg and Kaleta used KCM to solicit investments from DFFS clients, among others. USCA5 at 157. A majority of the proceeds fraudulently raised by KCM were then loaned to entities owned and controlled by

Frishberg and Kaleta, including DFFS and BizRadio. USCA5 at 154. KCM funds were used by Kaleta and Frishberg as a de facto line of credit for their affiliated entities. USCA5 at 157 – 58. Moreover, the books and records made clear that Frishberg and Kaleta used KCM funds for their personal benefit, including through the receipt of compensation from DFFS and BizRadio, and the use of KCM credit cards to pay for personal expenses. USCA5 at 157. KCM had no business operations and served no function other than to raise money from the public; all funds transferred from KCM to others were necessarily funds raised from defrauded investors. *Id.*

C. The BizRadio Promissory Notes

In addition to the KCM pipeline of unlawfully solicited investor funds, Frishberg and Kaleta caused BizRadio to offer promissory note securities to DFFS clients, among others. USCA5 at 2448 – 49. WB Development acted as agent for certain investors purchasing BizRadio promissory notes. USCA5 at 2364. BizRadio sold in excess of \$5 million in promissory notes to members of the public, primarily to DFFS clients. USCA5 at 2725. There is significant overlap among DFFS clients, KCM investors and BizRadio investors. USCA5 at 2460, 2497 [22]. It was merely fortuitous that some investors purchased BizRadio promissory notes and others purchased KCM promissory notes. USCA5 at 2461.

D. Wallace Bajjali Parties' Affiliation with the Receivership Entities

The Wallace Bajjali Parties were closely affiliated with the Receivership Entities and their principals. In addition to transferring investor funds directly to DFFS and BizRadio, KCM also loaned investor funds to other parties, including to Wallace and Bajjali, personally, and to W. Houston Fund, LFW Fund and Spring Cypress (the "Note Entities"), which were investment vehicles sponsored by the Wallace Bajjali Parties. USCA5 at 2968 – 69. Loans to the Note Entities came in the form of expenses paid directly by KCM on their behalf and through promissory notes, sometimes executed after the fact. USCA5 at 1941. The personal loans made by KCM to Wallace and Bajjali were repaid upon demand of the Receiver at the inception of the Receivership. USCA5 at 639.

The Wallace Bajjali Parties were also involved in the marketing and offering of investments to clients of DFFS. Limited partnership interests in the W. Houston Fund, WB Fund II and LFW Fund, of which Wallace and Bajjali are officers, were offered to DFFS clients through presentations made by Wallace and others. USCA5 at 2448 – 49. Moreover, certain Wallace Bajjali Parties advanced funds to BizRadio in the form of debt and equity investments. USCA5 at 1940. Pursuant to the Settlement, the Wallace Bajjali Parties have retained their claims for distribution of Estate assets, because the funds invested in BizRadio were

necessarily supplied by the limited partner investors in those entities.⁴ Wallace was also a former officer of BizRadio. USCA5 at 2408, 2440. WB Development acted as the agent for investors purchasing promissory notes from BizRadio. USCA5 at 2968.

These relationships with the Receivership Entities form the basis of claims the Receiver could make against the Wallace Bajjali Parties in litigation which would have been commenced absent the negotiation of the Settlement and its approval by the District Court. The interrelationship of the Wallace Bajjali Parties and the Receivership Entities and their principals also bears on the nature of the relief sought through the Bar Order -- namely the narrowly tailored nature of the Bar Order applying only to the claims arising from the BizRadio promissory notes.

E. The Receiver's Settlement with the Wallace Bajjali Parties

Following protracted negotiations with the Wallace Bajjali Parties, the Receiver reached settlement terms with respect to (1) funds borrowed by the Note Entities from KCM; and (2) the asserted liability of certain Wallace Bajjali Parties arising from their affiliation with the Receivership Entities, Frishberg and Kaleta. USCA5 at 1945, 2970, 2973.

Pursuant to the terms of the Settlement, the obligations of the Note Entities to the Receivership Estate were liquidated and the Note Entities agreed to pay all

⁴ Wallace and Bajjali have released all personal claims to any distribution of Receivership Estate assets as part of the Settlement. USCA5 at 2973.

amounts received plus interest (totaling \$1,177,755.77 as of October 18, 2011, with interest continuing to accrue until paid in full at a weighted-average rate of approximately 12%). USCA5 2980. Upon approval of the Settlement, personal guarantee agreements as to those amounts executed by Wallace and Bajjali would be triggered. These guarantees would not exist absent the Settlement and were bargained for by the Receiver as part of the settlement process. USCA5 at 2972 – 73.

Moreover, pursuant to the Settlement, WB Development agreed to pay the Receivership Estate between \$300,000 and \$450,000 from the cash flow generated from its incipient Amarillo development project (the “Cash Flow Note”) (the exact amount depending upon the timing of the final payment to the Receivership Estate). *Id.* Wallace and Bajjali also executed personal guarantee agreements as to WB Development’s payment of the Cash Flow Note which would be triggered upon approval of the Settlement. *Id.* These guaranty agreements pertain to the payments of Dedicated Cash Flow, as defined in the Cash Flow Note, and do not guarantee the Receivership Estate will receive any specific amount. USCA5 at 1948.

The parties to the Settlement also agreed to mutually release all claims against each other, with the exception of certain of the Wallace Bajjali entities’ claims to future distribution of Receivership Assets, subject to proof and as

supervised by the District Court, which would benefit investors who purchased limited partnership interests in those entities (many of whom were clients of DFFS). USCA5 at 2973. Wallace and Bajjali agreed to release all of their personal claims for any distribution amount against the Receivership Estate. USCA5 at 2973, 2989.

As a condition to the Settlement, the Receiver sought entry of the Bar Order, which is limited in scope and enjoins legal action against the Wallace Bajjali Parties. The Bar Order was narrowly tailored to apply only to claims by investors who purchased promissory notes issued by the Receivership Entity BizRadio and for whom WB Development acted as agent in loaning those funds. As to those investors, the Bar Order would apply only to their claims arising out of the BizRadio promissory note purchases. USCA5 at 2974 – 76, 3233. Those investors, however, would be able to assert their BizRadio loan-related claims through the claims process in the Receiver's ultimate plan of distribution of Receivership assets as supervised by the District Court. USCA5 at 2974. Those investors, pursuant to the terms of the Settlement, also would retain all other putative claims against the Wallace Bajjali Parties. USCA5 at 2568, 3264.

The Receiver assessed the fairness of the Settlement based on the following factors: (a) the potential claims he could bring against the Wallace Bajjali Parties; (b) the likelihood of success on the merits in bringing such claims; (c) the expense

of litigation, both to the Estate for prosecuting those claims and to the Wallace Bajjali Parties for defending against them -- expenses which would affect what funds would be available to satisfy any potential judgment in favor of the Receiver; (d) the length of any potential litigation; and (e) the financial condition of the Wallace Bajjali Parties as it related to their ability to satisfy an adverse judgment. USCA5 at 1945. The financial condition of the Wallace Bajjali Parties was evaluated based upon sworn affidavits by Wallace and Bajjali with supporting documentation. USCA5 at 1949.

F. Procedural History

The Receiver and the Wallace Bajjali parties executed the Settlement as of September 12, 2011, and on that day the Receiver filed a Motion to Approve. USCA5 at 1939. Objections to the Settlement were filed by certain investors on October 3, 2011. USCA5 at 2275. The Receiver filed a Response on October 18, 2011. USCA5 at 2567. The Objectors did not file a Reply. On February 7, 2012, following *in camera* inspection of the financial disclosures of the Wallace Bajjali Parties, the District Court entered the Memorandum and Order approving the Settlement, including the Bar Order. USCA5 at 2966.

The objecting investors subsequently filed a Motion for Reconsideration of the Memorandum and Order approving the Settlement on March 6, 2012. USCA5 at 3033. They asserted that the Wallace Bajjali Parties had failed to disclose

material information on their financial condition and misled the District Court because, based on potential business opportunities, “within one year their net worth will be in excess of \$100 million.” USCA5 at 3033 – 34.

The Receiver filed a Response, USCA5 at 3090, and the objecting investors filed a Reply. USCA5 at 3146. On May 2, 2012 the Court held a hearing on the Motion for Reconsideration, hearing testimony under oath by Mr. Bajjali. USCA5 at 3228. The District Court withheld its ruling on the Motion for Reconsideration until a later date in order to supplement the record before it, including the submission of additional information by the parties as to the potential claims of the Appellants against the Wallace Bajjali Parties. USCA5 at 3303. A second motion hearing on the Motion for Reconsideration was held before the District Court on August 1, 2012, during which the District Court heard testimony from Mr. Wallace, who was examined by counsel for the Appellants. USCA5 at 3551. Following the hearing, the District Court denied the Motion for Reconsideration and entered the Bar Order. USCA5 at 3461, 3600 – 3603.

V. SUMMARY OF THE ARGUMENT

The Receiver negotiated a global settlement of multiple claims against the Wallace Bajjali Parties arising from their affiliation with the Receivership Entities and their receipt of funds from KCM which had been fraudulently obtained from

investors. The Receiver weighed several factors and determined that the Settlement was reasonable. The Bar Order was a necessary concession of settlement in order to secure (1) the Cash Flow Note payable by WB Development; and (2) the personal guarantees of Wallace and Bajjali with regard to the payment of promissory notes by the Note Entities and WB Development. These guarantees did not exist absent the Settlement. The Settlement funds will be available for distribution by the Receiver to the defrauded investors of the Receivership Estate in the eventual distribution of Estate assets in the manner to be approved by the District Court, and the BizRadio promissory note investors affected by the Bar Order will be able to assert those BizRadio note-related claims through that claims process.

This Court reviews the District Court's order for abuse of discretion. The District Court acted within its broad discretion in the supervision of equity Receiverships when it approved the Settlement and entered the Bar Order. The District Court assessed the information submitted to it, which was materially complete, held hearings, received testimony and argument and, in its discretion, "conclude[d] that the proposed Settlement [was] sufficient, fair, and necessary." USCA5 at 2979. The District Court reached the same conclusion upon reconsideration and upon having received additional evidence on the prospective --

albeit speculative -- business revenues of the Wallace Bajjali Parties. USCA5 at 3600 – 3603.

The Appellants’ Brief sets forth incorrect and misleading information -- lacking citation to the record and to applicable authority. These factual inaccuracies and legal assertions relate -- most notably -- to the scope of the Bar Order and the disclosures made to the District Court.

Finally, the Appellants raise arguments in their Brief which have been waived, as they were not properly or timely raised before the District Court. These arguments cannot properly be raised on appeal.

VI. ARGUMENT

A. Standard of Review

This Court reviews “action[s] by a trial court in supervising an equity receivership” for abuse of discretion. *See SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 373 (5th Cir. 1982) (*quoting SEC v. Arkansas Loan & Thrift Corp.*, 427 F.2d 1171, 1172 (8th Cir. 1970)). This Court reviews a “district court's actions pursuant to the injunction it issued for an abuse of discretion.” *Newby v. Enron Corp.*, 542 F.3d 463, 468 (5th Cir. 2008). Findings of fact supporting a district court's decision are examined for clear error. *Affiliated Prof. Home Health Care Agency v. Shalala*, 164 F.3d 282, 284 – 85 (5th Cir. 1999). “A finding of fact is

clearly erroneous when ‘although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” *Butler Aviation Int’l v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1127 – 28 (5th Cir. 1993) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

B. The District Court’s Authority to Fashion Relief in an Equity Receivership

Federal courts “have inherent equitable authority to issue a variety of ‘ancillary relief’ measures in actions brought by the Commission to enforce the federal securities laws.” *SEC v. Wencke*, 622 F.2d 1363, 1368 – 69 (9th Cir. 1980) (“*Wencke II*”); see also *SEC v. Safety Fin. Serv.*, 674 F.2d 368, 372 – 73 (5th Cir. 1982). This authority “derives from the inherent power of a court of equity to fashion effective relief.” *Id.* at 1369. “It is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.” *Safety Fin. Serv.*, 674 F.2d at 373 (quoting *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir. 1978)).

This authority extends to the approval of settlements. *Gordon v. Dadante*, 336 F. App’x 540, 551 (6th Cir. 2009) (unpublished). A district court “has wide discretion to determine what relief is appropriate” in approving a settlement because “no federal rules prescribe a particular standard ... in the context of an

equity receivership.” *Gordon*, 336 F. App’x at 548 (citing *Liberté Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006)).

While a court is not obligated to follow any particular procedure, courts have stayed proceedings by non-parties against a court-imposed receivership after finding an appropriate showing of necessity. *See Wencke II*, 622 F.2d at 1371 – 72. “An anti-litigation injunction is simply one of the tools available to courts to help further the goals of the receivership.” *SEC v. Byers*, 609 F.3d 87, 92 (2d Cir. 2010). A district court has broad authority to issue even blanket stays of litigation to preserve the property placed in receivership pursuant to Commission actions. *See SEC v. Stanford Int’l Bank Ltd.*, 424 F. App’x, 338, 340 – 41 (5th Cir. 2011) (unpublished) (citations omitted); *Liberté Capital*, 462 F.3d at 551 – 52 (citations omitted); *see also SEC v. Byers*, 609 F.3d at 91.

In determining whether a stay is necessary, courts have considered many factors, including the value of the proposed settlement, the value and merits of the receiver’s potential claims, the value and merits of any foreclosed parties’ potential claims, the complexity and costs of future litigation, the risk that litigation costs would dissipate receivership assets, the implications of any satisfaction of an award on other claimants, and any other equities attendant to the situation. *See Liberté Capital*, 462 F.3d at 553 (citations omitted); *Wencke II*, 622 F.2d at 1371; *Gordon*, 336 F. App’x at 544, 549. Furthermore, a district court may conclude that

a proposed settlement amount is sufficient in the absence of any evidence to the contrary. *See Gordon*, 336 F. App'x at 548.

C. The District Court Did Not Abuse Its Discretion in Approving the Settlement

1. Approval of the Settlement was Based on Sound Analysis

The District Court approved the Settlement following a thorough review of the facts submitted to it. *See* USCA5 at 2966, 3231 – 34. As courts in other Circuits have done, noted *supra*, the District Court assessed the merits of the Settlement based upon consideration of (1) the value to the Receivership Estate and its claimants of the “replacement notes,” the Cash Flow Note and the guaranty agreements related to them, including the value of the liquidation of damages related to the KCM debts (USCA5 at 297 – 73, 2979 – 83); (2) the financial condition of the Wallace Bajjali Parties and the assets available to satisfy any judgment against them in litigation, including future earning potential (USCA5 at 2981); (3) the value and merits of the Receiver’s and the BizRadio investors’ potential claims against the Wallace Bajjali Parties, and the Wallace Bajjali Parties’ claims against the Receivership Estate (USCA5 at 2982 – 83, 2985, 2988); (4) the complexity and costs of litigation, including the risk that litigation costs would dissipate Receivership assets and assets available to satisfy any judgment obtained against the Wallace Bajjali Parties (USCA5 at 2970 – 71, 2975, 2980 – 83); (5) the implications to other claimants of the Receivership Estate of the costs and

risks attendant in litigation against the Wallace Bajjali Parties (USCA5 at 2976, 1986 – 87); and (6) the authority of courts sitting in equity to fashion appropriate relief based on the facts and circumstances of the case before it vis-à-vis the narrowly tailored Bar Order. USCA5 at 2987 – 88, 2990.

The District Court “was well informed regarding the nature of the settlement, the history of the case, the parties' objections, and the potential theories of recovery.” *Gordon*, 336 F. App'x at 548. In the Memorandum and Order, the District Court carefully analyzed the foregoing factors in weighing the interests of all affected parties and in granting relief it found to be equitable to the settling parties and all claimants of the Receivership Estate. USCA5 at 2990 – 91.

Upon the Appellants' filing of the Motion to Reconsider, the District Court accepted additional submission of evidence regarding the ongoing business activity of the Wallace Bajjali Parties. USCA5 at 3090, 3110, 3162, 3422. Affidavits and updates were filed by the parties. *Id.* The Court held two motion hearings at which Wallace and Bajjali were placed under oath and questioned. USCA5 at 3228, 3551.

The District Judge found the equities of the Settlement to be strong, particularly when viewed in the context of all investors which would benefit from the funds brought into the Estate:

I, basically, don't see a reason to upset the apple cart. I am persuaded, also, that Mr. Taylor's comments about

the vast majority of investors, being of more limited means, is a consideration that the objecting investors are disinterested in. But I, as the presiding judge over the Receivership, as a whole find important. The other investors may not get as much money as a win in the home run litigation, but they will get funds sooner and at a reasonable level.

...

This is a settlement. It is not something that is 100 percent or the like of what some win might be. But it does avoid many collection problems and does liquidate claims that were otherwise complex and difficult to pursue on behalf of the estate.

I'm persuaded that the settlement is fair and reasonable, and in the best interest of the estate, just as I wrote, so I re-affirm my Memorandum and Order....

USCA5 at 3602 – 3603. The District Court took special care in weighing the Settlement in light of the varying interests and equities and, within its sound discretion, found it to be reasonable.

2. The Approval of the Settlement Was Not Based on False or Incomplete Information

The Appellants assert that the Receiver and the District Court were not fully or accurately informed of the financial condition of the Wallace Bajjali Parties and their ability to pay a judgment rendered against them when negotiating and approving the Settlement, respectively. Appellants' Br. at 9, 20 – 24. This assertion is patently inaccurate and without support in the Record.

As an initial matter, the Appellants' assertions regarding the District Court's finding of "insolvency" is a red herring. Appellants' Br. at 3, 20 – 23. The District Court neither held that the Wallace Bajjali Parties were insolvent nor that insolvency was necessary for approval of the Settlement. The District Court found that based upon the financial condition of the Wallace Bajjali Parties at the time of the Order approving the Settlement, the Settlement represented a fair compromise of claims and that, when considering, *inter alia*, the costs of litigation to the Receiver and the Wallace Bajjali Parties (which would deplete any funds available to satisfy judgment against them), the benefits of approving the Settlement were greater than not approving it. USCA5 at 2971. The Court denied the Motion for Reconsideration notwithstanding the fact that information regarding the Wallace Bajjali Parties' continuing business activities was supplied by the parties. USCA5 at 3600 – 3603. In fact, the Appellants' Brief belies their assertion that insolvency was required: "Receiver stated that he was 'satisfied that those settlement obligations undertaken by the Wallace Bajjali Parties *is the maximum which they likely could bear while maintaining the economic viability necessary to discharge those obligations.*'" Appellants' Brief at 21 (emphasis added). In other words, materially greater financial demands would have risked the financial collapse of various Wallace Bajjali Parties, diminishing prospects for a significant recovery for the Receivership Estate.

The Receiver negotiated the Settlement based on financial documents proffered by the Wallace Bajjali Parties at the time of negotiations, including (1) sworn financial affidavits in the form of the Commission's Statement of Financial Condition; and (2) information with respect to the potential for revenue from the incipient WB Development Amarillo project. USCA5 at 3094, 3102 – 3103. Prior to the District Court's ruling approving the Settlement, the Receiver supplied these financial disclosures to the District Court for *in camera* inspection, USCA5 at 2932, and the District Court considered these disclosures in reaching its conclusion on the Settlement. USCA5 at 2971, 3250.

Following the filing of the Motion for Reconsideration, the District Court was supplied with a declaration by David Wallace explaining the status of the Amarillo Project, the potential for a similar development project in Joplin, Missouri and a potential IPO. USCA5 at 3110 – 34. The District Court continued to receive updated information on various potential Wallace Bajjali Party business activity until the Motion for Reconsideration was denied. USCA5 at 3162, 3273 – 74, 3278 – 79, 3282 – 92.

The Court requested and received new evidence of factual issues not in existence at the time the Memorandum and Order was entered. The District Judge stated:

I did feel that I needed this additional information that's been filed and the weight [*sic*] was one that I think was

worth the time. I think that the objectors' efforts, while not successful, did enable me to dig deeper and to let the factual circumstances percolate in a way that helped clarify the situation. So, I think that that was to the benefit of everybody, at least to me, in terms of establishing even greater certainty that the settlement is appropriate and warranted.

USCA5 at 3603 [218]. The District Judge further stated on the record that the new information provided by the parties regarding WB Development's incipient projects in Amarillo, Texas and Joplin, Missouri, was true and complete, notwithstanding the assertions of Appellants. The District Judge stated that:

The concept that the Wallace/Bajjali entities have material amounts of assets that will be either liquid, cash or in a form that could be the subject of meaningful Judgment collection efforts is limited. I think, the Trustee or the Receiver has made significant and successful efforts to obtain everything that would reasonably be available. And in fact, has reduced unliquidated and contingent liabilities or potentially uncollectible liabilities, such as the underlying notes that give rise to the replacement notes. I think they liquidated that in a way that is very successful and will benefit the estate.

The other aspects of the deal with Wallace/Bajjali are, I think, sufficiently beneficial to the estate that I defer and believe that the Trustee's Judgment should be upheld.

I am not persuaded by the objectors' or Frishberg's arguments that the concerns expressed by the objectors are meaningful grounds to re-trade the deal or to deny the approval.

...

I think that the developments that Mr. Wallace describes about the Amarillo project make the settlement with the

Trustee more favorable or actually possibly less insecure than it was even at the time I ruled. And so, contrary to the objectors' arguments, I find that the new developments re-enforce the Trustee -- sorry, Mr. Taylor, you're going to be a Trustee in my world -- the Receiver's judgments.

USCA5 at 3600 – 3602 [218].

Not only was the District Court fully informed of the ongoing and evolving business activity of the Wallace Bajjali Parties, but it fully considered the status of those activities and the likelihood that they would materially alter the Wallace Bajjali Parties' financial condition sufficiently to alter the District Court's assessment of the Settlement. USCA5 at 3600 – 3603. The District Court concluded that those projected and potential business activities were not sufficiently certain to do so, and denied the Appellants' Motion for Reconsideration. *Id.*

3. Entry of the Bar Order was Appropriate

a. *The Bar Order is Narrowly Tailored and of Limited Scope*

The Appellants misrepresent the scope of the Bar Order entered by the District Court. Painting the Bar Order as “of unlimited duration and scope,” Brief at 18, the Appellants misstate the reach of the Bar Order and the extent to which it bars certain investors from asserting claims against the Wallace Bajjali Parties.

The Bar Order is narrowly tailored to apply only to persons who invested in promissory notes issued by the Receivership Entity BizRadio and for whom a

Wallace Bajjali Party acted as agent in loaning those funds, and applies only to those claims such investors may have related to their purchase of BizRadio promissory note(s). USCA5 at 2974 – 76, 3233. The Bar Order narrowly addressed these claims of these investors because the investors will be able to assert their BizRadio promissory note-related claims through the claims process in the Receiver's ultimate plan of distribution of Receivership assets as supervised by the District Court. USCA5 at 2974. They would also retain, pursuant to the Bar Order's plain terms, all other investment related -- indeed, all -- other claims against the Wallace Bajjali Parties.

b. *The Bar Order Protects Receivership Interests*

Entry of the Bar Order was within the sound discretion of the District Court because it protects the interests of the Receivership Estate and assets traceable to Estate assets. The Wallace Bajjali Parties required the entry of the Bar Order to agree to the Settlement terms, including the personal guarantees of Messrs. Wallace and Bajjali on amounts owed by entities. These Wallace Bajjali entities received funds from KCM which were fraudulently obtained from investors.

Furthermore, the Wallace Bajjali Parties, while not under Receivership, are so intertwined with the Receivership Entities that the administration of the Receivership Estate would be substantially affected by a vacation of the Bar Order and Settlement. Courts may issue injunctions barring suits pursuant to an

exception to the Anti-Litigation Act, 28 U.S.C. § 2283, if the injunction is necessary to protect their jurisdiction. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (U.S. 1970). Because of the Wallace Bajjali Parties' interrelationship with the Receivership Entities, failure to approve the Bar Order will interfere with the administration of the Receivership.

In *SEC v. Stanford Int'l Bank Ltd.*, 424 Fed. App. 338 (5th Cir. 2011) (unpublished), this Court noted "that the financial advisors at issue were, in many cases, parties to ancillary litigation already initiated by the Receiver. Recovery against one of them could deplete possible assets coming into the estate." *Id.* at 341. The Receiver, in light of his mandate to minimize expenses to the Receivership Estate, decided to settle with the Wallace Bajjali Parties prior to filing litigation. However the Receiver has asserted that he holds claims against the Wallace Bajjali Parties and absent settlement would litigate those claims.

Furthermore, vacating the Bar Order and disallowing the Settlement would "deplete possible assets coming into the estate," as would the litigation that the Bar Order enjoins. Affirming the District Court's approval of the Settlement would allow for the transfer of assets of approximately \$1.3 million to the Estate for distribution to defrauded investors, including those BizRadio investors affected by the Bar Order. USCA5 at 2980.

As this Court noted in *Stanford Int'l. Bank*, “the Receiver's task to marshal, preserve and conserve the receivership estate is as much for [the appellant investors’] benefit as for the benefit of all of the other investors -- investors who also lost amounts of money that changed their lives.” *Id.* at 341. The Settlement benefits all investors of the Receivership Estate who were defrauded, and entry of the Bar Order is necessary to gain those benefits.

Appellants cite the Tenth Circuit’s decision in *FDIC v. Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992), as analogous to this action, but the facts here are distinguishable. The *Gelderman* court vacated an injunction against claims for contribution of *defendants* against non-party *defendants*. *Id.* at 698. That is not the case here. That court further noted that in neither of the “confirmation proceedings were both the Defendants and the Settlers present at the same time.” *Id.* at 699. In the present action, the Appellants and Wallace Bajjali Parties appeared in several hearings, and the Appellants’ counsel cross-examined them. USCA5 at 3598.

Entry of the Bar Order was within the sound discretion and authority of the District Court and it should not be vacated.

c. *The District Court Heard Evidence in Deciding to Approve the Settlement*

Notwithstanding the Appellants’ claims to the contrary, the District Court heard evidence in regard to the circumstances surrounding the Settlement, including the financial condition of the parties, the claims asserted by the

Appellants, and the continuing business activities of certain Wallace Bajjali Parties. Indeed the District Court noted in the Memorandum and Order that the “Objectors have failed to provide factual detail, evidence, or meaningful analysis of the value or likelihood of success of their alleged claims against the WB Parties.” USCA5 at 2986 (emphasis added).

The District Court held two hearings at which Wallace and Bajjali were placed under oath and questioned. USCA5 at 2381, 3578. At the first hearing, the District Judge stated that “I have said that this [first hearing] is not evidentiary hearing because I thought that ... it would take up unnecessary time and give me more detail, much of which is not necessary. If we need an evidentiary hearing after this session or I need additional information, I will ask for it and we’ll see where we go from here.” USCA5 at 3234 – 35. The District Court then accepted and indeed requested new submissions of factual evidence regarding the ongoing business activity of the Wallace Bajjali Parties. Affidavits and updates were filed by the parties. The Court then heard testimony by Wallace at the second hearing, and Appellants counsel cross-examined him. USCA5 at 3598 – 3600.

The Court requested and received new evidence of factual issues not in existence at the time the Memorandum and Order was entered, determined they did not impact the Court’s previous balancing of factors in regard to the Settlement, and denied the Appellants’ Motion to Reconsider.

D. Appellants' Waiver of Arguments on Appeal

1. Failure to Adequately Cite to the Record or Authority

The Appellants' Brief is replete with inaccurate and misleading factual assertions that are unsupported by citation to the Record on Appeal, in violation of the Federal Rules of Appellate Procedure and Local Rules of the Fifth Circuit. *See* FED. R. APP. P. 28(a)(7) (requiring "a statement of facts relevant to the issues ... with appropriate references to the record."); 5TH CIR. LOC. R. 28.2.2 (requiring that "[e]very assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record...").

"Failure adequately to brief an issue on appeal constitutes waiver of that argument." *P&G v. Amway Corp.*, 376 F.3d 496, 499 n. 1 (5th Cir. 2004) (citing cases); *see also United States v. Upton*, 91 F.3d 677, 684 n. 10 (5th Cir. 1996) ("We decline to reach the merits of this argument because claims made without citation to authority or references to the record are considered abandoned on appeal.").

The Appellants' "Jurisdictional Statement" and "Statement of the Case" include no record references at all. Appellant's Br. at 1 – 5. Appellants' "Statement of Facts" includes some citations to the record, although only approximately half of the factual statements are supported by a record reference. *Id.* at 5 – 10. At least one paragraph fails to include any citations at all. *Id.* at p. 7. In another instance,

Appellants cite to 56 pages of hearing transcription in support of an assertion of fact. *Id.* at p. 19.

Also, several sections of Appellants' argument include no reference to case authority or any citations to the record, specifically Appellants' contention that they are being deprived of a significant property right, *see id.* at 10 – 12, and their contention that the Settlement is manifestly unjust. *See id.* at 25 – 28.

Because the Appellants have failed to adequately brief these issues, they have waived those arguments before this Court.

2. Arguments Not Properly Made Before the District Court

The Appellants assert that entry of the Bar Order exceeds the authority of the District Court based upon arguments which were not properly raised before the District Court; Appellants are precluded from now raising those arguments on appeal.

In order to avoid waiver of an argument on appeal, “the argument must be raised to such a degree that the trial court may rule on it.” *Butler Aviation Int'l v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1128 (5th Cir. 1993). “[T]o be preserved, an argument must be pressed, and not merely intimated.” *Id.* (quoting *In Re Gilchrist*, 891 F.2d 559, 561 (5th Cir. 1990)).

The Appellants assert that the Bar Order must be overturned because it violates the Anti-Injunction Act, 28 U.S.C. § 2283, and does not fall within any of

the exceptions to it.⁵ Appellant’s Br. at 12 – 13. However the Appellants failed to properly assert this argument before the District Court.

The Appellants filed objections to the Receiver’s Motion to approve the Settlement, objecting to the approval of the Settlement and entry of the Bar Order. Appellants argued that the Bar Order exceeded the District Court’s authority by distinguishing the facts of cases cited by the Receiver in support of his Motion to Approve. USCA5 at 2278. The Receiver filed a Response to the objection, and the Appellants did not file a reply. . The Settlement was subsequently approved by the District Court in the Memorandum and Order.

Appellants first raised the issue of the Anti-Injunction Act in their Motion for Reconsideration. USCA5 at 3036. However, as the Receiver asserted then in his Response, motions for reconsideration are neither a “vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment,” *Anderson v. JPMorgan Chase, N.A.*, 2011 U.S. Dist. LEXIS 137654, at *2 – 3 (S.D. Tex. Nov. 30, 2011) (*quoting Templet v. Hydrochem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004)) (emphasis added), nor are they proper to re-litigate matters that have been resolved to the dissatisfaction of the movant, giving a party a second bite at the apple. *Id.*

⁵ See §VI.C.3.b, *supra*, for discussion of the Bar Order being exempted by the Anti-Injunction Act.

By raising new legal arguments in the Motion for Reconsideration “that could have been offered or raised before the entry of judgment,” *id.*, the Appellants did not properly and timely raise the issue “to such a degree that the trial court may rule on it.” *Butler Aviation* at 1128. Therefore they cannot now assert it on appeal before this Court.

March 6, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 6, 2013 a copy of Appellee Thomas L. Taylor's Brief was filed using the U.S. Court of Appeals for the Fifth Circuit's ECF/CM system and all counsel of record listed below were served using the court's electronic Notice of Docket Activity pursuant to 5th Cir. R. 25.2.5.

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/s/ Andrew M. Goforth
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Dated: March 6, 2013

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No. 12-20633, SEC v. Albert Kaleta
USDC No. 4:09-CV-3674

The following pertains to your brief electronically filed on 3/11/13.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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