

**No. 12-20633**

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**United States Court of Appeals**  
*for the*  
**Fifth Circuit**

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**SECURITIES AND EXCHANGE COMMISSION,**

**PLAINTIFF**

**VS.**

**ALBERT FASE KALETA,**

**DEFENDANT**

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

**APPELLANTS**

**VS.**

**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 in No. 4:09-cv-3674 (Hon. Nancy Atlas, Judge)*

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**APPELLANT'S REPLY**

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## **I. SUMMARY OF THE ARGUMENT ON REPLY**

The Objecting Investors maintain that Bar Order complained of was entered without legal authority, was decided without competent supporting evidence, and leads to a manifestly unjust result. The Receiver cites no valid authority for the Bar Order in his Brief. Notwithstanding the Receiver's arguments to the contrary, the record clearly demonstrates that the Wallace Bajjali Parties were less than transparent with the District Court, and that the District Court did not have complete information to evaluate the Receiver's settlement with the Wallace Bajjali Parties.

## **II. ARGUMENT**

### **A. THERE IS NO SPECIFIC LEGAL PRECEDENT FOR THE ENTRY OF THE BAR ORDER.**

The Objecting Investors still maintain that there is no published opinion in which a Federal Court of Appeals or the Supreme Court approved an anti-litigation injunction preventing third parties from filing suit against entities that were not part of a receivership. Notably, the Receiver does not refute this assertion. (*See generally* Appellee's Br.) Again, the authority cited by the Receiver before the District Court and in his brief to this Court that address anti-litigation injunctions all relate to injunctions preventing third parties from suing receivership entities (*See* R. at 1950-51; Appellee's Br. at 17-19).

The Receiver cites only authority for the general proposition that a federal district court has broad discretion in regard to SEC receiverships and that there are no federal rules of procedure on point (*See* Appellee's Br. at 17-18). This is not sufficient to support the Order at issue here. There is no basis—in statute or common law—for the injunction the District Court imposed.

The Receiver fails to recognize that the Objecting Investors have personal claims against the Wallace Bajjali Parties that arise from sources

independent of the Receivership Estate. First, there are claims that arise out of the Wallace Bajjali Parties' agency relationship with the Objecting Investors. As acknowledged by the Receiver, Wallace Bajjali Development Partners, LP acted as the agent for the Objecting Investors in many of the BizRadio notes (Appellee's Br. at 10.) The closing and documentation of these loans were such that the Objecting Investors lost their bargained-for security interests in the assets of BizRadio due to failings of the Wallace Bajjali Parties in regard to the UCC-1 financing statements and documentation of the application of the loaned funds (R. at 2770-2801). Particularly, in denying the Objecting Investors' claims to a security interest, the District Court made the following findings and determinations:

- The Objecting Investors were determined not to have been granted security interests because they lacked execution of a security agreement in order for a subsequent lender to become a "Secured Party" (R. at 2791) and because the description of the collateral in their notes was nonconforming (R. at 2792);
- Whatever security interest the Objecting Investor might have had was determined to be unperfected because their financing statements did not properly identify them as the secured parties (R. at 2793);

- The Objecting Investors could not utilize contractual subrogation because their loan documents did not comply with the “Replacement Financing” requirements described in the original loan documents (R. at 2786); and
- Rights of equitable subrogation were cut off, in part, because the documentation and handling of the investment monies was such that the Objecting Investor’s funds were not suitably traceable (R. at 2781-83).

These actions give rise to breach of contract, breach of fiduciary duty, and negligence claims against the Wallace Bajjali Parties for giving imprudent and self-serving investment advice, for mishandling investment transactions, for failing to adhere to their principals’ instructions regarding maximum investment in any one entity, by making loans to entities they knew or should have known were insolvent, and by violating the United States and Texas securities laws. Moreover, by denying priority distribution as secured claimants, the District Court was effectively leaving the Objecting Investors to pursue their claims against the Wallace Bajjali Parties outside the Receivership claims process (R. at 2793 (noting the failures of Wallace Bajjali Fund II to properly identify the Objecting Investors as secured parties under the secured BizRadio notes)). As such, there is no

legal basis for the District Court to foreclose the exercise of the Objecting Investors' rights to seek redress from the Wallace Bajjali Parties to recover their losses from the agency relationship.

The Receiver's response to this argument is that the Objecting Investors will be able to assert claims against the Receivership. Investors concede that they have multiple claims in the Receivership, for the BizRadio Notes and other loans/investments, but those claims are woefully inadequate to compensate investors for their losses. The Objecting Investors have over \$4 million in losses caused by Wallace Bajjali's wrongful conduct. There are solvent defendants against whom investors could seek to recover money, namely Messrs. Wallace and Bajjali and their related companies. However, the Bar Order at issue precludes the investors from obtaining redress from those parties. Essentially, the Receiver has settled the Objecting Investors' claims, without legal authority, without investors' consent, and without compensating them. Normally, that would be acceptable and appropriate, in the situation where the objecting parties' claims derive from the Receivership entities, but not where, as here, the barred claims result from transactions between two or more non-Receivership entities.

**B. APPELLANTS DO NOT ADVANCE INACCURATE OR MISLEADING INFORMATION.**

Contrary to the Receiver's allegations, there is no inaccurate or misleading information presented in Appellants' Brief. The procedural history and facts of the underlying transactions are undisputed. The Receiver makes a blanket statement that Investors made statements of fact without support in the record, but the Receiver does not contest a single factual statement. The most important facts in Appellants' Brief are acknowledged and affirmed by the Receiver:

- That KCM was a Ponzi scheme, (Appellee's Br. at 4,) used by its principals as a vehicle to funnel working capital into BizRadio and DFFS (*Id.* at 7); and
- That certain Wallace Bajjali Parties acted as agents for investors who made loans to BizRadio (*Id.*; R. at 2350:22-2351:11).

There are unresolved questions of fact regarding the Wallace Bajjali Parties' earning capacity and the litigation expense, all of which are factors militating against approval of the Receiver's settlement with the Wallace Bajjali Parties. As requested in the Objecting Investor's Motion for Reconsideration, the opportunity to conduct reasonable discovery and present evidence to the District Court on the nature and amount of the Objecting Investors' claims, the culpability of the Wallace Bajjali Parties for

the losses suffered by the Objecting Investors, and the prospective capacity of the Wallace Bajjali Parties to satisfy a judgment rendered against them would develop these facts so that there is certainty and fairness to a subsequent settlement, if one is to be made between the Receiver and the Wallace Bajjali Parties.

**C. APPELLANTS HAVE NOT WAIVED ANY ARGUMENTS.**

In the first place, all the arguments raised before this Court on appeal were presented to the District Court in the Objecting Investors' objection to the Receiver's settlement with the Wallace Bajjali Parties and/or in their Motion for Reconsideration of the order approving the settlement. Objecting Investors have raised the issue of the District Court's legal authority to enter this Bar Order from the inception of the dispute (R. at 2278-81). The fact that some of the details of the argument were not raised until the Motion for Reconsideration is not a waiver of those arguments, but rather a more detailed explanation of an argument made earlier. Thus, the Objecting Investors properly preserved and presented issues regarding the adequacy of the settlement and the equitable considerations surrounding the settlement as matters of factual inquiry.

Secondly, there are legal issues that are not subject to waiver, namely the authority of the district court to enter an injunction that reaches beyond

the Receivership Estate, as briefed in Section A, and the validity of the Bar Order *vis-à-vis* the Anti-Injunction Act. As the Objecting Investors would engage in state-court litigation to recover their BizRadio investment losses from the Wallace Bajjali Parties, the Act precludes entry of the Bar Order. *See* 28 U.S.C. § 2283; *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (U.S. 1970). As previously explained, the Objecting Investors' claims in state court against the Wallace Bajjali Parties do not impede the district court's jurisdiction over the Receivership Estate. As such, the Bar Order runs afoul of the Anti-litigation Act, regardless of how or when the matter was raised.

**D. THE DISTRICT COURT DID NOT CONDUCT EVIDENTIARY HEARINGS ON THE MOTION FOR RECONSIDERATION OF THE BAR ORDER.**

The Objecting Investors were never afforded the opportunity to discover and present evidence of the value of their claims nor of the collectability of any judgment against the Wallace Bajjali Parties. The Receiver suggests otherwise (See Appellee's Br. at 20.) This is clear from the order setting the first in-court conference on the Objecting Investors' Motion for Reconsideration (*See* R. at 3186 ("the Court will hold a conference (not an evidentiary hearing) on the Motion for Reconsideration"); *see also* R. at 3234). Although David Wallace and Costa

Bajjali did each give sworn testimony at the two conferences on the Motion for Reconsideration, this testimony was insufficient for a determination of the objection raised to the Bar Order. In the first place, the conferences were set as non-evidentiary, the Objecting Investors were not informed before either conference that Wallace or Bajjali would attend, and they had no opportunity to prepare questions or obtain written discovery from any of the Wallace Bajjali Parties in advance of either conference. Secondly, the testimony of Bajjali in particular was acknowledged by the District Court as overtly evasive, as shown by the following excerpt:

THE COURT: Okay. Well, I can [*sic*] that you don't want to answer my questions on the Record. So I'm going to be nice and I'm not going to make you answer them, because you have not answered my questions.

I just want you to know that I know you have not answered my questions about timing on money coming in or projections or a degree of impairment.

MR. COSTA BAJJALI: Okay.

THE COURT: And that's okay because I'm not trying to mess up your deals.

But you need to tell them.

(R. at 3297.) The above remarks were made after the Court asked more than six times to try to clarify the timing of when the Wallace Bajjali Parties would begin to realize return from the Joplin redevelopment project (R. at 3293-97). Objecting Investors were not given the opportunity to cross-

examine Mr. Bajjali at that hearing, and were given no opportunity to conduct discovery from the Wallace Bajjali parties on their financial wherewithal and the viability of the settlement. Thus, the District Court did not have complete information on the impact of the settlement, the Objecting Investors' objections, or their theories of recovery against the Wallace Bajjali Parties, as was the basis for the decision in *Gordon v. Dadante*, 336 F. App'x 540, 548 (6th Cir. 2009) (unpublished); (*contra* Appellee's Br. at 20.) As such, *Gordon* is not analogous, and, at the least, the Objecting Investors should be afforded a full evidentiary hearing before the District Court.

**E. THE WALLACE BAJJALI PARTIES ARE NOT AFFILIATES OF RECEIVERSHIP ENTITIES.**

The Receiver argues that the Wallace Bajjali Parties are related to Receivership Entities. The suggestion is that it would therefore be appropriate to protect the Wallace Bajjali Parties from a lawsuit as part of the administration of the Receivership. There is no legal authority for such a proposition. *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980) and other cases cited by the Receiver dealt with injunctions to protect entities within or affiliated with the receivership, which is not the case here.

Aside from the legal issue, the factual basis for the Receiver's argument in this regard is also incorrect. David Wallace is a former officer

and employee of BizRadio (Appellee's Br. at 10), but he never worked for KCM, DFFS, or any other Receivership Party. Rather, he manages a real estate development business that has its own relationship with the Objecting Investors – that of agent. The Objecting Investors made multiple investments through Mr. Wallace and his companies. A portion of those are the BizRadio Notes at issue here, and they were treated as arms-length transactions between WB Development Partners, on the one hand, and BizRadio on the other. Nothing in that relationship justifies the unprecedented bar order sought by the Receiver here. The fact that the WB Parties “insist” on the Bar Order in order to settle with the Receiver does not justify foreclosing third-parties’ claims against their agent. Such a role would create the proverbial “slippery slope,” where Receivers could bar third parties from suing any party the Receiver wishes to settle with.

### **III. CONCLUSION**

The District Court is still shown to have exceeded its legal authority by issuing the Bar Order preventing non-Receivership entities from suing other non-Receivership entities, such that the Bar Order should be vacated. Additionally, Appellants maintain that the entry of the Bar Order constitutes an abuse of the District Court’s discretion because the consideration paid to the Receivership is insufficient in light of the damages caused by Wallace

Bajjali and the financial position of the settling parties. Accordingly, the Objecting Investors respectfully re-urge their request that this Honorable Court reverse the order confirming the Receiver's proposed settlement with the Wallace Bajjali Parties, or, in the alternative, reverse and remand the matter for a full evidentiary hearing before the District Court to evaluate the reasonableness of the settlement.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), (e), I certify that I have served this document on all other parties, which are listed below, on April 4, 2013 as follows:

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s/ C. Thomas Schmidt

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C. Thomas Schmidt

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the paper size, line spacing, and margin requirements of Federal Rule of Appellate Procedure 32 (a)(4), the typeface requirements of Rule 32(a)(5)(A), and the page limitation of Rule 32(a)(7)(A). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font, double-spaced with one-inch margins.

Dated this 4<sup>th</sup> day of April 2013.

s/ C. Thomas Schmidt

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C. Thomas Schmidt

***United States Court of Appeals***  
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The following pertains to your brief electronically filed on 4/4/13.

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

Sincerely,

LYLE W. CAYCE, Clerk

By: 

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