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I. NATURE AND STAGE OF THE PROCEEDING

Plaintiff Thomas L. Taylor III (“Receiver”) was appointed by this Court as receiver for Kaleta Capital Management, Inc. (“KCM”), BusinessRadio Network, L.P. d/b/a BizRadio (“BizRadio”), Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc. (“DFFS”) and all entities they own or control (collectively the “Receivership Entities”) in the civil action styled *SEC v. Kaleta, et al.*, No. 4:09-cv-03674 (S.D. Tex. 2009) (the “Enforcement Action”). *See* Enforcement Action Docs. # 7, 34.¹

In the Enforcement Action, this Court approved a Compromise Settlement and Release Agreement (EA Doc. # 113-1, the “Settlement Agreement”) entered into by the Receiver and the “Wallace Bajjali Parties”² pursuant to which, *inter alia*, Defendants LFW Fund and West Houston Fund (together the “Note Defendants”) executed replacement promissory notes with respect to debts owed to KCM prior to the appointment of the Receiver (**Exhibits B – F** attached hereto) (the “Replacement Notes,” incorporated herein by reference)³ and Defendants Wallace and Bajjali executed guaranty agreements with respect to each Replacement Note (**Exhibits G – P** attached hereto) (the

¹ Citation to the Enforcement Action Docket will be styled as “EA Doc. # _.”

² The “Wallace Bajjali Parties” are David G. Wallace (“Wallace”), Costa Bajjali (“Bajjali”), Laffer Frishberg Wallace Economic Opportunity Fund, L.P. d/b/a LFW Economic Opportunity Fund (“LFW Fund”), West Houston WB Realty Fund, L.P. (“West Houston Fund”), Spring Cypress Investments, L.P. (“Spring Cypress”), Wallace Bajjali Investment Fund II, L.P., and Wallace Bajjali Development Partners, L.P. (“WB Dev. Partners”).

³ **Exhibits B and C** are referred to together as the “LFW Notes.” **Exhibits D – F** are referred to collectively as the “West Houston Notes.”

“Guaranty Agreements,” incorporated herein by reference).⁴ *See SEC v. Kaleta*, 2012 U.S. Dist. LEXIS 14880, 2012 WL 401069 (S.D. Tex. Feb. 7, 2012) (EA Doc. # 170, the “Order Approving Settlement”); *see also* EA Doc. # 210 (the “Bar Order”).

The Replacement Notes and Guaranty Agreements were executed pursuant to the Settlement Agreement by the Note Defendants and Wallace and Bajjali, respectively, on or about November 26, 2013. The Replacement Notes matured on December 31, 2014, and all outstanding principal plus accrued interest was due and payable to the Receivership Estate⁵ on or about that date. No payments were made on the Replacement Notes prior to maturity. On January 5, 2015 the Receiver made written demand upon the Note Defendants, through counsel, for payment of the Replacement Notes in full. The Note Defendants failed to make any payments on the Replacement Notes. The Guaranty Agreements obligated Wallace and Bajjali, respectively, to satisfy all amounts due under the Replacement Notes within 10 business days of written demand following the default of the Note Defendants. On January 15, 2015 the Receiver made written demand upon Wallace and Bajjali, through counsel, for payment in full on the Replacement Notes, pursuant to the Guaranty Agreements. Wallace and Bajjali failed to make any payments on the amounts due under the Replacement Notes pursuant to the Guaranty Agreements within 10 business days of written demand, or otherwise.

⁴ **Exhibits G – K** are referred to collectively as the “Bajjali Guaranty Agreements.” **Exhibits L – P** are referred to collectively as the “Wallace Guaranty Agreements.”

⁵ As that term is defined in this Court’s Order Appointing Receiver (EA Doc. # 7).

The Receiver then initiated the present action against Defendants on January 29, 2015 for breaches of the Replacement Notes and Guaranty Agreements. Doc. # 1. The case was assigned to Honorable Gray Miller, J. Doc. # 2. On February 5, 2015 the Receiver moved the Court to transfer the case to Honorable Nancy Atlas, J., who presides over the Enforcement Action (Doc. # 3); on February 17, 2015 the case was so transferred. Doc. # 6.

Bajjali was served individually on January 31, 2015. Doc. # 9. Wallace was served individually, and as registered agent for the Note Defendants, on February 2, 2015. Docs. # 8, 10 – 11; *see also* Declaration of Thomas L. Taylor III, **Exhibit A**, at ¶10 (hereinafter the “Taylor Decl.,” and incorporated herein by reference) and **Exhibit U**.

Wallace filed an Answer to the Receiver’s Complaint on February 13, 2015. Doc. # 5. Bajjali filed an Answer to the Receiver’s Complaint on February 20, 2015. Doc. # 14. The Answers of Wallace and Bajjali are defective in numerous respects, failing to conform to Rule 8(b) of the Federal Rules of Civil Procedure (the “Rules”). Specifically, but without limitation, the Answers of Wallace and Bajjali contain only general denials. Rule 8 permits a general denial only by a “party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds....” FED. R. CIV. P. 8(b)(3). Otherwise, a party “must either specifically deny designated allegations or generally deny all except those specifically admitted.” *Id.* As demonstrated below, the material allegations of the Receiver’s Complaint -- including without limitation those of jurisdiction -- cannot be disputed.

The Note Defendants failed to appear and answer the Receiver's Complaint or otherwise defend themselves in this action. Accordingly, on February 24, 2015, the Receiver filed requests for entries of default as to the Note Defendants. Docs. # 12, 13.

The Receiver now moves for partial summary judgment against Defendants Wallace and Bajjali under Rule 56 with respect to the Guaranty Agreements.

II. ISSUE TO BE RULED UPON BY THE COURT AND STANDARD OF REVIEW

1. Whether the Receiver is entitled to summary judgment against Defendants Wallace and Bajjali for damages resulting from their breaches of the Guaranty Agreements, based upon Defendants' failure timely (or at all) to satisfy their obligations to the Receivership Estate pursuant to those valid, enforceable contracts. Summary judgment is proper if the Receiver shows through the pleadings, the discovery and disclosure materials on file, and any affidavits⁶, "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *O'Dea v. Wells Fargo Home Mortg.*, 2013 U.S. Dist. LEXIS 15713, at *7-8 (S.D. Tex. Feb. 5, 2013) (Atlas, J.) (citations omitted). A genuine issue of

⁶ Affidavits "constitute valid summary judgment evidence" but, without more, "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden' and defeat a motion for summary judgment." *Mosley v. White*, 464 Fed. Appx. 206, 213 (5th Cir. 2010) (quoting *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996)) (internal citation omitted); see also *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 531 (5th Cir. 2005); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001) ("self-serving allegations are not the type of 'significant probative evidence' required to defeat summary judgment"); *BMG Music v. Martinez*, 74 F.3d 87, 91 (5th Cir. 1996) (affirming summary judgment where "the only evidence in support of the defendants' theory is a conclusory, self-serving statement by the defendant").

material fact exists only when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Tamez v. Manthey*, 589 F.3d 764, 769 (5th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. SUMMARY OF ARGUMENT

The Receiver and the Defendants entered into the Settlement Agreement, which was approved by this Court. Pursuant to the Settlement Agreement, the Note Defendants and the Receiver executed the Replacement Notes and Wallace and Bajjali executed the Guaranty Agreements, which are valid, enforceable contracts. The Note Defendants have defaulted upon the Replacement Notes in failing timely (or at all) to satisfy their obligations under the Replacement Notes. Wallace and Bajjali have breached the Guaranty Agreements in failing timely (or at all) to satisfy their obligations under the Guaranty Agreements, namely the obligations of the Note Defendants under the Replacement Notes. Wallace and Bajjali's failure to satisfy their obligations under the Guaranty Agreements has caused injury to the Receivership Estate.

Wallace and Bajjali are jointly and severally liable to the Receiver (along with LFW Fund) with respect to the LFW Notes and applicable Guaranty Agreements for damages of \$533,698.59 in principal and interest accrued through January 29, 2015, plus interest accruing at \$122.74 per day from January 30, 2015 until the date of judgment, plus post judgment interest thereafter.

Wallace and Bajjali are jointly and severally liable to the Receiver (along with West Houston Fund) with respect to the West Houston Notes and applicable Guaranty

Agreements for damages of \$977,799.78 in principal and interest accrued through January 29, 2015, plus interest accruing at \$179.37 per day from January 30, 2015 until the date of judgment, plus post judgment interest thereafter.

Wallace and Bajjali are jointly and severally liable (along with LFW Fund and West Houston Fund) for all costs of collection, including reasonable attorney's fees, incurred by the Receiver with respect to the Replacement Notes and Guaranty Agreements, and for post judgment interest with respect to any judgment for costs of collection.

IV. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Receivership Estate and the Receiver's Appointment

On December 2, 2009 this Court appointed Thomas L. Taylor III as Receiver over KCM's Records and Assets and subsequently on June 17, 2010 placed DFFS and BizRadio into the Receivership Estate. *See* EA Docs. # 7, 34. The Order Appointing Receiver empowers the Receiver to institute and compromise actions and proceedings that the Receiver deems necessary and advisable to preserve the value of the Receivership Estate and to carry out his mandate under the Order. EA Doc. # 7 ¶5(i).

B. The Receiver's Settlement Agreement with the Wallace Bajjali Parties

Upon his appointment by this Court, the Receiver commenced to investigate the facts and circumstances underlying the Enforcement Action. Taylor Decl. ¶2. The Receiver learned that Wallace, Bajjali and entities under their control were tied to the

Receivership Entities in several respects, including, *inter alia*, that proceeds from the KCM promissory note offering at the heart of the Enforcement Action had been transferred to, or for the benefit of, certain Wallace Bajjali Parties. *Id.*; *see also* **Exhibits B – F** (Replacement Notes language concerning the previous debts to KCM which the Replacement Notes represent). The Receiver asserted to the Wallace Bajjali Parties that the Receivership Estate held numerous legal claims against them, and commenced to negotiate, through counsel, a global settlement of those claims in an effort to avoid the costs and uncertainty of litigation and obtain assets for the benefit of defrauded investors of the Receivership Estate. Taylor Decl. ¶3. In furtherance of the settlement negotiations, the Wallace Bajjali Parties provided sworn financial affidavits and supporting information to the Receiver with respect to the entities, and Wallace and Bajjali individually. *Id.* The settlement negotiations resulted in the Settlement Agreement. EA Doc. # 113-1.

The Receiver and the Wallace Bajjali Parties executed the Settlement Agreement on or about September 12, 2011. *See* EA Doc. # 113-1 at 13-19; Taylor Decl. ¶4. Defendants Wallace and Bajjali executed the Settlement Agreement individually; Defendant Wallace also executed the Settlement Agreement on behalf of the entity Wallace Bajjali Parties, including the Note Defendants. *Id.* Through the Settlement Agreement, the Receiver and the Wallace Bajjali Parties agreed to a mutual release of all claims in exchange for, *inter alia*, the execution by the Note Defendants of the Replacement Notes, and the execution by Wallace and Bajjali of the Guaranty

Agreements. *Id.* §§4.1, 4.2, 5. Texas law governs the “interpretation, validity, and enforceability” of the Settlement Agreement. *Id.* §12.1.

The Receiver’s Motion seeking approval of the Settlement Agreement was filed on September 12, 2011. EA Doc. # 113. Following extended argument and evidentiary hearings with respect to objections filed by certain investors affected by the Settlement Agreement, *see* EA Docs. # 124, 142, this Court approved the Settlement Agreement on February 7, 2012, entering its Order Approving Settlement. *SEC v. Kaleta*, 2012 U.S. Dist. LEXIS 14880, 2012 WL 401069 (S.D. Tex. Feb. 7, 2012) (EA Doc. # 170). The objecting investors moved for reconsideration of the Order Approving Settlement on March 6, 2012, *see* EA Doc. # 179, which motion was denied on August 1, 2012. EA Doc. # 209. The Court then entered the Bar Order. EA Doc. # 210. The objecting investors subsequently appealed the Order Approving Settlement and the Bar Order to the U.S. Court of Appeals for the Fifth Circuit. *See* EA Doc. # 214. Briefing to the Court of Appeals was completed on April 4, 2013, and on June 19, 2013 the Court of Appeals affirmed this Court’s Orders. *SEC v. Kaleta*, 530 Fed. Appx. 360 (5th Cir. 2013).

The form replacement promissory notes attached as exhibits to the Settlement Agreement became due and payable on or before December 31, 2012. *See* EA Doc. 113-1 at 28, 31, 35, 38, 42. However, performance by the Wallace Bajjali Parties under the Settlement Agreement was not required until all related appeals were exhausted and the Bar Order was not subject to any pending collateral attack. *See* EA Doc. # 113-1 at §§2.16, 2.17. In this regard, the Wallace Bajjali Parties’ obligations under the Settlement

Agreement did not vest until 90 days following entry of the Fifth Circuit's mandate⁷ -- on or about September 17, 2013 (more than nine months after the maturity dates of the form replacement promissory notes attached as exhibits to the Settlement Agreement).

On October 21, 2013 the Receiver filed a Motion to modify the form replacement promissory notes attached as exhibits to the Settlement Agreement. EA Doc. # 252. The modifications proposed by the Receiver related only to the dates of maturity, which at that time had passed due to the appeal of the Order Approving Settlement and Bar Order. *Id.* The modifications sought did not change the substantive terms of the Settlement Agreement or the Replacement Notes and Guaranty Agreements. *Id.* The Court approved the modifications sought by the Receiver by Order entered on November 15, 2013. EA Doc. # 259.

On or about November 26, 2013, Defendant Wallace, on behalf of the Note Defendants, executed the Replacement Notes as modified. **Exhibits B – F**; *see also* Taylor Decl. ¶9. Wallace, as the manager of LFW Management, LLC (LFW Fund's general partner), had the authority to execute the LFW Notes. Taylor Decl. ¶10; Exh. U. Wallace, as the manager of WB Substitute GP, LLC (West Houston Fund's general partner), had authority to execute the West Houston Notes. *Id.* The Receiver also executed the Replacement Notes as "Payee." Exhs. B – F; Taylor Decl. ¶9. Also on or about November 26, 2013, Defendants Wallace and Bajjali executed the Guaranty Agreements individually. **Exhibits G – P**; *see also* Taylor Decl. ¶9. Wallace and Bajjali's signatures on the Guaranty Agreements are notarized. *Id.*

⁷ *See* SUP. CT. R. 13.

The Replacement Notes and Guaranty Agreements are governed by Texas law. *See* Exhs. B at §§12-13, C at 2-3, D – E at §13, F at §12, G – P at §12. The Note Defendants submitted to the jurisdiction of this Court with respect to the Replacement Notes. *See* Exhs. B at §§12-13, C at 2-3, D – E at §13, F at §12. Wallace and Bajjali also submitted to the jurisdiction of this Court with respect to the Guaranty Agreements. Exhs. G – P at §10 (incorporating by reference the contents of the Replacement Notes and Settlement Agreement⁸).

C. Applicable Terms of the Replacement Notes and Guaranty Agreements

1. The LFW Notes

LFW Note 1 (Exh. B; *see* Taylor Decl. ¶5) is dated as of August 12, 2008, with a principal amount of \$250,000, an annual interest rate of 15%, and a maturity date of, at latest, December 31, 2014. Interest accrues on LFW Note 1 from August 12, 2008 at \$102.74 per day. Taylor Decl. ¶15; **Exhibit W**. LFW Note 1 further obligates LFW Fund “to pay on demand all reasonable costs, including attorney’s fees, incurred by [Receiver], in collection of or enforcing payment of this [LFW Note 1] in accordance with its terms.” Exh. B ¶7.

LFW Note 2 (Exh. C; *see* Taylor Decl. ¶5) is dated as of May 6, 2009, with a principal amount of \$25,000, an annual interest rate of 11% through maturity on

⁸ Texas law governs the “interpretation, validity, and enforceability” of the Settlement Agreement. EA Doc. # 113-1 at §12.1. The Court also retained jurisdiction with respect to “all matters related to the administration, interpretation, effectuation, or enforcement of this [Bar] Order, the [Settlement Agreement], and any related disputes.” EA Doc. # 210 ¶VI.

December 31, 2014. Interest accrued on LFW Note 2 at \$7.53 per day from May 6, 2009 through December 31, 2014. Taylor Decl. ¶15; Exh. W. After December 31, 2014, post-maturity interest accrues on all unpaid principal and interest due at maturity (equaling \$40,549.45) at an annual rate of 18%,⁹ which equals \$20.00 per day. *Id.* LFW Note 2 further obligates LFW Fund “to pay all expenses incurred, including reasonable attorneys' fees, all of which shall become a part of the principal hereof.” Exh. C at 2.

Principal plus accrued interest upon the LFW Notes through January 29, 2015 equals \$533,698.59, with interest accruing at \$122.74 per day until the date of judgment. Taylor Decl. ¶15; Exh. W.

2. The West Houston Notes

West Houston Note 1 (Exh. D; *see* Taylor Decl. ¶6) is dated as of March 26, 2009, with a principal amount of \$360,176.35, an annual interest rate of 11%, and a maturity date of, at latest, December 31, 2014. Interest accrues on West Houston Note 1 from March 26, 2009 at \$108.55 per day. Taylor Decl. ¶15; Exh. W. West Houston Note 1 further obligates West Houston Fund “to pay on demand all reasonable costs, including attorney's fees, incurred by [Receiver], in collection of or enforcing payment of this [West Houston Note 1] in accordance with its terms.” Exh. D ¶8.

⁹ Following the maturity date of LFW Note 2, interest began to accrue on all unpaid principal -- and unpaid interest at maturity -- at an annual rate equal to the weekly rate ceiling in effect as provided in TEX. FIN. CODE §303.002. Exh. C at 1. This rate is 18% annually for the relevant post-maturity time period. Taylor Decl. ¶14, **Exhibit V**.

West Houston Note 2 (Exh. E; *see* Taylor Decl. ¶6) is dated as of March 26, 2009, with a principal amount of \$215,000, an annual interest rate of 11%, and a maturity date of, at latest, December 31, 2014. Interest accrues on West Houston Note 2 from March 30, 2009 at \$64.79 per day. Taylor Decl. ¶15; Exh. W. West Houston Note 2 further obligates West Houston Fund “to pay on demand all reasonable costs, including attorney's fees, incurred by [Receiver], in collection of or enforcing payment of this [West Houston Note 2] in accordance with its terms.” Exh. E ¶8.

West Houston Note 3 (Exh. F; *see* Taylor Decl. ¶6) is dated as of April 7, 2009, with a principal amount of \$20,000, an annual interest rate of 11%, and a maturity date of, at latest, December 31, 2014. Interest accrues on West Houston Note 3 from April 7, 2009 at \$6.03 per day. Taylor Decl. ¶15; Exh. W. West Houston Note 3 further obligates West Houston Fund “to pay on demand all reasonable costs, including attorney's fees, incurred by [Receiver], in collection of or enforcing payment of this [West Houston Note 3] in accordance with its terms.” Exh. F ¶7.

Principal plus accrued interest through January 29, 2015 for the West Houston Notes equals \$977,799.78, with interest accruing at \$179.37 per day until date of judgment. Taylor Decl. ¶15; Exh. W.

3. The Wallace Guaranty Agreements

The Wallace Guaranty Agreements (Exhs. G – K; *see* Taylor Decl. ¶7) are dated November 26, 2013 and are executed by Defendant Wallace, whose signatures are notarized. Each respective Wallace Guaranty Agreement guarantees the payment of debts

for each respective Replacement Note. *Id.* “Upon the occurrence of a default by [a Note Defendant] in payment of [a Replacement Note],” Wallace is required to “pay the amount then due on [such Replacement Note] to [Receiver] within 10 Business Days after written demand.” *Id.* at §5.

The Wallace Guaranty Agreements further obligate Defendant Wallace to pay “any and all costs, attorneys’ fees, and expenses incurred by [Receiver] by reason of [the respective Note Defendant’s], [Wallace’s], or any other obligor’s default in respect of any of the foregoing [guaranteed obligations].” *Id.* at §1(c).

4. The Bajjali Guaranty Agreements

The Bajjali Guaranty Agreements (Exhs. L – P; *see* Taylor Decl. ¶8) are dated November 26, 2013 and are executed by Defendant Bajjali, whose signatures are notarized. Each respective Bajjali Guaranty Agreement guarantees the payment of debts for each respective Replacement Note. *Id.* “Upon the occurrence of a default by [a Note Defendant] in payment of [a Replacement Note],” Bajjali is required to “pay the amount then due on [such Replacement Note] to [Receiver] within 10 Business Days after written demand.” *Id.* at §5.

The Bajjali Guaranty Agreements further obligate Defendant Bajjali to pay “any and all costs, attorneys’ fees, and expenses incurred by [Receiver] by reason of [the respective Note Defendant’s], [Bajjali’s], or any other obligor’s default in respect of any of the foregoing [guaranteed obligations].” *Id.* at §1(c).

D. Default by LFW Fund and West Houston Fund upon the Replacement Notes, and Breach of Guaranty Agreements by Wallace and Bajjali

With respect to each Replacement Note, the principal amount, plus all interest accrued thereon, was due and payable in full at maturity -- on or before December 31, 2014. Exhs. B, D – F ¶2; Exh. C at 1. No payments were made to the Receivership Estate with respect to any Replacement Note prior to December 31, 2014. Taylor Decl. ¶11. Failure by a Note Defendant “to make any payment of principal or interest under [each respective Replacement Note] within five (5) business days of” December 31, 2014 “constitute[d] an event of default.” Exhs. B, D – F ¶4; Exh. C at 2. On January 5, 2015 the Receiver made written demand upon the Note Defendants, through counsel, for payment of amounts due on the Replacement Notes. Taylor Decl. ¶12; **Exhibits Q – R**. The Note Defendants failed to respond to the Receiver’s demand. Taylor Decl. ¶12. No payments were made by the Note Defendants on the Replacement Notes within five business days of maturity, nor have any payments been made since. *Id.* The Note Defendants are in default upon (and breach of) the Replacement Notes.

With respect to the Guaranty Agreements, following the Note Defendants’ default upon the Replacement Notes, on January 15, 2015 the Receiver made written demand upon Wallace and Bajjali, through counsel, for payment of amounts due on the Replacement Notes pursuant to the Guaranty Agreements. Taylor Decl. ¶13; **Exhibits S – T**. Wallace and Bajjali failed to respond to the Receiver’s demand. Taylor Decl. ¶13. No payments were made by Wallace or Bajjali pursuant to the Guaranty Agreements within ten business days of written notice of the Note Defendants’ default, nor have any

payments been made since. *Id.* Wallace and Bajjali are in default of the Guaranty Agreements.

V. ARGUMENT

A. Applicable Legal Standards

1. Receiver May Bring His Causes of Action Against the Defendants in this Court

The Receiver stands in the shoes of the entities in Receivership, and therefore may bring not only claims of the Receivership Estate, but the claims of the Receivership Entities. Liability to an entity “may be enforced by any person who is seeking to assert the claim of the [entity],” including by a receiver. *Sutton v. Reagan & Gee*, 405 S.W.2d 828, 834 (Tex. Civ. App.—San Antonio 1966, *writ ref'd n.r.e.*).

2. Breach of Contract (Guaranty Agreements)

To recover upon the guaranty of a promissory note, a plaintiff must establish “(1) the existence and ownership of the guaranty contract, (2) the terms of the underlying [promissory note] by the holder, (3) the occurrence of the conditions upon which liability is based, and (4) the failure or refusal to perform the promise by the guarantor.” *Wiman v. Tomaszewicz*, 877 S.W.2d 1, 8 (Tex. App.—Dallas 1994) (citing *Barclay v. Waxahachie Bank & Trust Co.*, 568 S.W.2d 721, 723 (Tex. Civ. App.—Waco 1978, no writ).

A promissory note is a contract evincing an obligation to pay money, *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, no pet.), and is “governed by the fundamental rules applicable to contract law.” *Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 588 (Tex. App.—Houston [14th Dist.] 2000) (quoting *Guthrie v.*

National Homes Corp., 387 S.W.2d 158, 159 (Tex. Civ. App.—Fort Worth), *judgment reformed*, 394 S.W.2d 494 (Tex. 1965)).¹⁰

B. The Guaranty Agreements are Valid, Enforceable Contracts which were Breached by Defendants Wallace and Bajjali, Causing Injury to the Receiver

The Replacement Notes and the Guaranty Agreements are valid, enforceable contracts. With respect to the Replacement Notes, the undisputed material facts establish that (1) the Receiver is the legal holder of each Replacement Note; (2) Wallace, on behalf of each Note Defendant, executed each Replacement Note (and had authority to do so); and (3) an outstanding balance is due and owing on each Replacement Note. The undisputed material facts establish that no payments have ever been made on any Replacement Note by a Note Defendant. The Note Defendants have defaulted upon each Replacement Note.

With respect to the Guaranty Agreements, the undisputed material facts establish (1) the existence of the Guaranty Agreements and that Wallace and Bajjali, respectively, are the owners of the Guaranty Agreements; (2) that the terms of the Guaranty Agreements require payment of all amounts due and owing under the Replacement Notes within 10 business days of written notice by the Receiver to Wallace and Bajjali following default of the Note Defendants on the Replacement Notes; (3) that the Note

¹⁰ To recover for a debt due and owing under a promissory note, a party must establish that (1) it is the legal holder of an existing note, (2) the debtor's execution of the note, and (3) that an outstanding balance is due and owing. *Austin v. Countrywide Homes Loans*, 261 S.W.3d 68, 72 (Tex. App.—Houston [1st Dist.] 2008) (citing *Commercial Servs. of Perry, Inc. v. Wooldridge*, 968 S.W.2d 560, 564 (Tex. App.—Fort Worth 1998, no pet.)).

Defendants defaulted upon the Replacement Notes, and failed timely (or at all) to satisfy their obligations under the Replacement Notes; and (4) that following the default of the Note Defendants, the Receiver made written demand upon Wallace and Bajjali, through counsel, with respect to amounts due and owing under the Replacement Notes, and that Wallace and Bajjali failed to satisfy the amounts due and owing under the Replacement Notes within 10 business days of such written notice. The undisputed material facts establish that no payments have ever been made on any amount due under a Replacement Note by Wallace or Bajjali pursuant to the Guaranty Agreements.

These breaches of the Guaranty Agreements by Defendants Wallace and Bajjali have caused injury to the Receivership Estate in amounts equal to the principal amounts of the Replacement Notes, which funds were transferred previously from KCM to the respective Note Defendants, and all interest accruing thereon from the date of each respective Replacement Note until the date of judgment. The undisputed material facts establish the following damages with respect to the Replacement Notes:

- (a) With respect to LFW Note 1, the Receiver has been damaged in the principal amount of \$250,000, plus \$102.74 per day in interest accruing since August 12, 2008. Through and including January 29, 2015, accrued interest equals \$242,569.14, and continues to accrue at \$102.74 per day until the date of judgment.
- (b) With respect to LFW Note 2, the Receiver has been damaged in the principal amount of \$25,000, plus \$7.53 per day in interest accruing between May 6, 2009 and December 31, 2014, totaling \$15,549.45. Interest accrues at \$20.00

per day (on all unpaid principal and interest as of December 31, 2014) from January 1, 2015 through the date of judgment. Through and including January 29, 2015, total accrued interest equals \$16,129.45, and continues to accrue at \$20.00 per day until the date of judgment.

(c) With respect to West Houston Note 1, the Receiver has been damaged in the principal amount of \$360,176.35, plus \$108.55 per day in interest accruing since March 26, 2009. Through and including January 29, 2015, accrued interest equals \$231,754.25, and continues to accrue at \$108.55 per day until the date of judgment.

(d) With respect to West Houston Note 2, the Receiver has been damaged in the principal amount of \$215,000, plus \$64.79 per day in interest accruing since March 30, 2009. Through and including January 29, 2015, accrued interest equals \$138,067.49, and continues to accrue at \$64.79 per day until the date of judgment.

(e) With respect to West Houston Note 1, the Receiver has been damaged in the principal amount of \$20,000, plus \$6.03 per day in interest accruing since April 7, 2009. Through and including January 29, 2015, accrued interest equals \$12,801.69, and continues to accrue at \$6.03 per day until the date of judgment.

Accordingly, the undisputed material facts establish that Wallace and Bajjali are, with respect to the applicable Guaranty Agreements upon the LFW Notes, jointly and severally liable to the Receiver for damages of \$533,698.59 through and including

January 29, 2015, plus interest accruing at \$122.74 per day from January 30, 2015 until the date of judgment. Moreover, the undisputed material facts establish that Wallace and Bajjali are, with respect to the applicable Guaranty Agreements upon the West Houston Notes, jointly and severally liable to the Receiver for damages of \$977,799.78 through and including January 29, 2015, plus interest accruing at \$179.37 per day from January 30, 2015 until the date of judgment.

C. Defendants are Liable to the Receiver for Costs of Collection, including Reasonable Attorney’s Fees, with Respect to the Replacement Notes and Guaranty Agreements

The undisputed material facts establish that under each Replacement Note, each respective Note Defendant is obligated to pay all costs of collection, including reasonable attorney's fees, incurred by the Receiver in enforcing the payment of or collecting on each Replacement Note. Exhs. B, F ¶7; Exh. C at 2; Exhs. C – D ¶8. The undisputed material facts further establish that under each Guaranty Agreement, Defendants Wallace and Bajjali are obligated to pay all costs of collection, including reasonable attorney's fees, incurred by the Receiver in enforcing the payment of or collecting on each Replacement Note. Exhs. G – P §1(c) (defining “Guaranteed Debt” to include, *inter alia*, “any and all costs, attorneys’ fees, and expenses incurred by Payee by reason of ... default”).

Wallace and Bajjali are jointly and severally liable to the Receivership Estate for these costs of collection, and any additional costs of collection incurred by the Receiver in the future. The Receiver shall move for costs of collection, including reasonable

attorney's fees, upon entry of judgment against Defendants, and subject to proof of such costs and fees at that time.

VI. RELIEF REQUESTED

Receiver respectfully requests the Court enter summary judgment against Defendants Wallace and Bajjali in his favor, providing that:

- (a) the Replacement Notes and Guaranty Agreements are valid and enforceable contracts between the Receivership Estate and Defendants;
- (b) LFW Fund defaulted upon the LFW Notes;
- (c) West Houston Fund defaulted upon the West Houston Notes;
- (d) Wallace breached the Wallace Guaranty Agreements, causing injury to the Receivership Estate;
- (e) Bajjali breached the Bajjali Guaranty Agreements, causing injury to the Receivership Estate;
- (f) Wallace and Bajjali are, with respect to the LFW Notes and applicable Guaranty Agreements, jointly and severally liable to the Receiver for damages of \$533,698.59, plus interest accruing at \$122.74 per day from January 30, 2015 until the date of judgment, plus post judgment interest thereafter;
- (g) Wallace and Bajjali are, with respect to the West Houston Notes and applicable Guaranty Agreements, jointly and severally liable to the Receiver for damages of \$977,799.78, plus interest accruing at \$179.37 per day from January 30, 2015 until the date of judgment, plus post judgment interest thereafter;

- (h) Wallace and Bajjali are jointly and severally liable to the Receiver for all costs, including reasonable attorneys' fees, with respect to collection of the amounts due under the Replacement Notes and Guaranty Agreements, and for post judgment interest with respect to any judgment for costs of collection; and
- (i) Receiver is entitled to such other and further relief, at law and in equity, as the Court deems proper under the circumstances.

Dated: March 9, 2015

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By: /s/ Andrew M. Goforth

Andrew M. Goforth
Texas State Bar: 24076405
goforth@tltaylorlaw.com

4550 Post Oak Place Drive, Suite 241
Houston, Texas 77027
Tel: (713) 626-5300
Fax: (713) 402-6154

COUNSEL FOR RECEIVER

CERTIFICATE OF SERVICE

On March 9, 2015, I served the foregoing document on all parties as listed below by U.S. Mail, Return Receipt Requested, pursuant to Federal Rule of Civil Procedure 5(b)(2)(C).

Via U.S. Mail, Return Receipt Requested:

David G. Wallace
1634 Brookstone Ln.
Sugar Land, TX 77479

Costa Bajjali

2911 Waters Lake Ln.
Missouri City, TX 77459

Laffer Frishberg Wallace Economic Opportunity Fund, L.P. d/b/a LFW Economic Opportunity Fund

c/o David G. Wallace, registered agent
1634 Brookstone Ln.
Sugar Land, TX 77479

West Houston WB Realty Fund, L.P.

c/o David G. Wallace, registered agent
1634 Brookstone Ln.
Sugar Land, TX 77479

/s/ Andrew M. Goforth

Andrew M. Goforth