IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	**Civil Action No. 4:11-CV-00655**
	§	
vs.	§	
	§	
JAMES G. TEMME, STEWARSHIP FUNDS, LP	§	
	§	
Defendants.	§	

RESPONSE IN OPPOSITION TO THE RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH HALO COMPANIES, INC. (DKT. 244)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Nonparties to this action and investors, Bruce Berg, Stuart Cartner, Kevin Doyle, Walter Haydock, Edward Leh, Kevin Murphy, Philip Schantz, DAIS Partners, LP, Singer Bros., LLC, Skeleton Lake, LLC, and Wildcat Lake Partners (collectively referred to as "Investors"), hereby oppose the Receiver's Motion to Approve Settlement Agreement with Halo Companies, Inc., as follows:

The Receiver's Motion should be denied because:

1. This injunction is beyond the jurisdiction of the Court to grant and is unfair to third parties to the Settlement, most notably the "Stewardship Creditors," which include the Investors.

2. The amount of the settlement is unreasonable because the monies received by Halo from Stewardship Fund, Temme and related entities were not for services rendered by Halo, but instead were advances and/or loans made to Halo.

I. BACKGROUND

On August 28, 2013, the Receiver filed a Motion to Approve Settlement Agreement with Halo Companies, Inc. ("Halo"). The Receiver's Motion requests, and the settlement is contingent upon, the entry of an order:

> permanently barring or enjoining any and all Stewardship Creditors from commencing or continuing any judicial, administrative, arbitration, or other proceeding, and from asserting or prosecuting any claims or causes of action against Halo arising out of, in connection with, or relating in any way to the Stewardship Investment Plan, the investments made in any Receivership Entity by the Stewardship Creditors, and any transfers received by Halo, directly or indirectly, from the Receivership Entities.

This injunction is beyond the jurisdiction of the Court to grant and is unfair to third parties to the Settlement, most notably the "Stewardship Creditors," which include Investors.

In Paragraph 3 of the Receiver's Motion, the Receiver represents that Halo alleges that the $1,164,100 received by Halo from "Stewardship Fund and related entities were not a loan, rather such funds were compensation for services rendered by Halo." Yet Halo's own business records refute Halo's allegations.

For example, on December 1, 2010, Cade Thompson, Halo's CEO, writes to Mr. Temme stating, among other things, that "[t]hanks for your financial support today in spite of all the things you have on your plate. I promise to make every penny and every

ounce of energy invested in me and our company be the best investment you have ever made both financially and intrinsically." (See Exhibit 1 to Affidavit of David W. Lunn which is attached hereto as Exhibit A.) On September 3, 2010, Mr. Thompson writes to Mr. Temme, "[l]astly, I wanted to thank you again for your willingness to help us out cash wise today. [ ] I will make sure that every penny you have put in is returned to you." (See Exhibit 2 to Exhibit A hereto.) As of September 3, 2010, Stewardship Fund LP/Temme had loaned Halo at least $490,000. (See Halo's discovery responses at Interrogatory No. 5 which is attached as Exhibit 3 to Exhibit A hereto.)

On June 11, 2010, Mr. Thompson wrote to Mr. Temme asking for Stewardship/Temme's financial support. (See Exhibit 4 to Exhibit A hereto.) On May 11, 2010, Mr. Thompson asks Stewardship/Temme to advance Halo another $200,000. (See Exhibit 5 to Exhibit A hereto.) The payments by Stewardship/Temme to Halo were loans and/or gifts – not fees for service.

Therefore, for these reasons, explained in greater detail below, the Investors object to the Receiver's Motion and respectfully request that it be denied.

II. ARGUMENT

A. The Court does not have jurisdiction to enjoin third-parties from suing Halo just because the third-party claims may arise out of investments that were made in any Receivership Entity.

There is little, if any, law regarding the jurisdiction of a District Court to enjoin third parties from suing a creditor of a receivership estate. But there is ample case law regarding a federal court's jurisdiction to enjoin non-debtor, third parties from suing a creditor of a bankruptcy estate. Case law is also replete with examples of courts applying

bankruptcy law in a receivership context. *See Bendall v. Lancer Management Group*, LLC 2013 WL 3441101, *2 (11th Cir. 2013) ("Given that a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, we will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context."[1] Under applicable Fifth Circuit law, the Court does not have jurisdiction to enter the injunction requested by the Receiver and required by the Settlement Agreement between the Receiver and Halo.

In the Fifth Circuit, a bankruptcy court may exercise jurisdiction over a third-party action (as part of a settlement between the bankruptcy estate and a creditor) if the debtor establishes that third-party action is property of the estate or the dispute between the estate and the creditor would have an effect on the estate. *Matter of Zale Corp.*, 62 F.3d 746, 753 (5th Cir. 1995).[2] The Receiver has not, and cannot, satisfy either of these requirements.

The Agreed Order Appointing Receiver of Entities Under Control of James G. Temme, entered on October 28, 2011, gives the Receiver, Keith Miles Aurzada, control over "Receivership Assets." Receivership Assets are as defined as: "assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and

[1] *See also S.E.C. v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992)(analyzing bankruptcy law in the receivership context); *Marion v. TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010) (same).

[2] *See also Wisconsin Dep't of Indus., Labor & Human Relations v. Marine Bank Monroe* (*In re Kubly*), 818 F.2d 643, 645 (7th Cir. 1987) ("[D]isputes among creditors of a bankrupt come within the federal bankruptcy jurisdiction only if they involve property of the estate or if resolving two creditors' intramural squabble will affect the recovery of some other creditor.").

description, wherever located, and the legally recognized privileges (with regard to the entities), the Temme-controlled entities as defined in this Order. . . ." As noted above, the Motion seeks to bar the "Stewardship Creditors," defined in the proposed order granting the Motion as "any creditors of any Receivership Entity, including any investor (and their heirs, successors, agents and assigns) who invested in any Stewardship Investment Plan," from proceeding against – judicially or otherwise – Halo Companies, Inc. By definition, the claims of the Stewardship Creditors are not Receivership Assets. If they were, the Receiver wouldn't need an injunction, he could waive or release them himself.

And the Receiver has not intimated, let alone proven, that the Stewardship Creditors' claims against Halo would have an effect on the estate. The mere fact that those claims might share facts with the dispute between the Receiver and Halo is insufficient to confer jurisdiction on the Court to enjoin those claims. *See Matter of Zale Corp.*, 62 F.3d at 753-54. Judicial economy is also not a justification for exercising jurisdiction over an otherwise unrelated suit. *Id.*[3]

Through the subject settlement provision, the Receiver is attempting to get an Order from this Court dismissing the Investors' civil lawsuit against Halo. On December 9, 2011, the Investors commenced an action against Halo, some of its related and affiliated entities and against some of its officers and directors. (Cause No. 11-15415, in

[3] *See also In re Kubly*, 818 F.2d at 645 ("Like other federal courts, a bankruptcy tribunal is one of limited jurisdiction. Its power must be conferred, and it may not be enlarged by the judiciary because the judge believes it wise to resolve the dispute.").

the 191st District Court, Dallas County, Texas.) (Attached hereto as Exhibit B is a true and correct copy of the Petition.) The causes of action asserted by the Investors against the Halo defendants are unique to the Investors and are not Receivership claims. It is wholly improper for the Receiver to ask this Court to enter an Order dismissing that lawsuit.

The Receiver previously attempted to pay Halo a 5% commission for marketing assets (DKT. 103 at ¶ 5). Now the Receiver is asking this Court to enter an Order prohibiting Stewardship Creditors from bring claims against Halo that are not within the jurisdiction of the Receivership action. The Receiver's inclusion of that provision in the proposed settlement agreement negatively taints the agreement in its entirety.

In sum, the Receiver has offered absolutely no justification for its request barring the Stewardship Creditors from pursuing claims against Halo, and in the absence of any factual justification or legal support, the Receiver's request, and contingent Motion to Approve Settlement must be denied.

B. The Receiver's Motion must necessarily be denied because the proposed Settlement is unfair to third parties.

To the extent a court may abridge third-party claims, under the limited circumstances noted above, neither a bankruptcy judge nor a federal judge with "the full powers of an equity judge" can just brush aside the complaints of third parties who are adversely affected by the settlement. *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1984). *See also Matter of Zale*, 65 F.3d at 754 ("While it is true that the bankruptcy court has jurisdiction to determine whether a settlement between the debtor and other parties is

fair and equitable, looking only to the fairness of the settlement as between the debtor and the settling claimant [and ignoring third-party rights] contravenes a basic notion of fairness.") (citations and quotations omitted).

Here, depriving the Stewardship Creditors of their claims against Halo would be patently unfair because the Stewardship Creditors, like the Investors, may have independent claims against Halo that are beyond the jurisdiction of this Receivership action. To find otherwise would violate the Stewardship Creditors' constitutional rights to equal protection and due process.

C. The proposed settlement amount of $250,000 is not warranted.

As discussed above, Halo's own records demonstrate that the $1,164,100 received by Halo from Stewardship/Temme were loans. Those funds were not paid to Halo for services rendered by Halo. And as shown by the timing of the loans (see Exhibit 3 to Exhibit A hereto), it is reasonable to conclude that the source of the funds given to Halo were investments made by the Stewardship Creditors. As such, Halo should be required to return all of those funds to the Receiver. No just reason exists for the Receiver to compromise its claims against Halo.

III. CONCLUSION

For the reasons set forth above, the Investors respectfully request that this Court enter an Order Denying the Receiver's Motion to Approve Settlement Agreement With Halo Companies, Inc., in its entirety.

DATED: September 13, 2013

Respectfully submitted,

/s/ David W. Lunn

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served per Local Rule 5.1(d) with a copy of the foregoing via the Court's CM/ECF system on this 13th day of September, 2013.

/s/ David W. Lunn
David W. Lunn