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.	§	

SUR-REPLY IN OPPOSITION TO THE RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH HALO COMPANIES, INC.

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

In further opposition to the Receiver's Motion to Approve Settlement Agreement with Halo Companies, Inc., 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, the "Investors"), state as follows:

The Receiver's Reply is without merit, and the Motion to Approve Settlement Agreement with Halo Companies, Inc., should be denied for the following reasons:

1. The proposed "Bar Order" enjoining litigation against Halo by nonparties (including the Investors) is not justified under the facts or the law, including the

case relied upon by the Receiver, *SEC v. Kaleta*, 2012 WL 401069 (S.D. Tex. Feb. 7, 2012).

2. The Receiver's assessment of the transfers of money to Halo from Stewardship Fund, Temme, and related entities ignores obvious facts in favor of tenuous inferences: The Receiver maintains that the transfers were most likely payments for services because they approximate the dates and amounts of some invoices, and because the payments were sporadic, typical of payments for services. But emails from Halo's CEO/Chairman/Director, Cade Thompson, (attached to Investors' Response - Dkt. No. 255) clearly indicate that Halo asked for and received substantial transfers from Temme which were wholly unconnected to any services Halo might have provided.

3. The Receiver's Motion and Reply fail to grasp the nature and value of the Investors' claims. While the Investors' claims against Halo relate, in part, to transfers between Temme/Stewardship and Halo, not all of them do. Moreover, many of the Investor's claims against Halo have independent legal bases that cannot be asserted by the Receiver; they can only be asserted by the Investors. Specifically, the Investors' claims against Halo are based in large part on the breach of legal duties owed by Halo to the Investors. The Investors' claims against Halo are worth approximately $5,000,000 (as evidenced in the state court Complaint against Halo attached to the Investors' Objection), far in excess of the $250,000 proposed in the settlement. And any recovery on these claims by the

Investors will inure to the benefit of the Receivership Estate, inasmuch as it will directly reduce the Investors' claims against the Estate.

I. ARGUMENT

A. *Kaleta* does not support the entry of the Bar Order.

The Receiver's Motion was bereft of legal support for his request for a "Bar Order," but in his Reply, the Receiver argued that the Court has the authority to bar actions by nonparties against Halo under *SEC v. Kaleta.* The Receiver's reliance on *Kaleta* is misplaced.

Putting aside that *Kaleta* is not binding on this Court and that none of the cases relied upon by *Kaleta* enjoined nonparties from suing the settling party – the injunctions in those cases were limited to third party actions against receivership assets or entities – the court in *Kaleta* specifically stated that receivership cases are "highly fact-specific." And the facts here differ significantly from *Kaleta* and do not justify the imposition of such a broad injunction.

Kaleta involved a scheme in which the entity (or entities) under receivership had solicited investments in promissory notes through its agent, the settling entity. The agent received investors' money, directly or through the receivership entities, and executed promissory notes payable to the receivership entity or the investors. After analyzing the claims against the agent, the receiver proposed a settlement whereby the agent agreed, among other things, to execute more attractive (in terms and with personal guarantees) replacement notes and to pay $300,000 to $450,000 in exchange for releases, including a release from claims brought by nonparty investors.

The settlement approved in *Kaleta* differs in several key respects from the settlement proposed here.

First, the claims barred in *Kaleta* were limited to claims arising from the conduct of the receivership entities' agent. Because the settling entity was an agent who knowingly received funds in connection with the promissory note securities, the claims were so closely intertwined with the investors' claims against the receivership entity, that the justification for the injunction – *e.g.*, conservation of receivership estate assets and equal treatment of equally situated creditors – was far more compelling in *Kaleta* than it is here. The Investors' claims against Halo do not arise from Halo's conduct as Temme's or Stewardship's agent. And the Investors' claims against Halo can be pursued only by the Investors; the Receiver does not have standing to pursue the claims the Investors have asserted against the Halo defendants.

Second, consistent with well-established law that an injunction must be narrowly tailored to effectuate its goal,[1] the injunction approved in *Kaleta* was significantly narrower than the bar proposed by the Receiver. In *Kaleta*, the litigation bar did not enjoin any suit related to the receivership estate; it was limited to matters involving the notes issued by the receivership entities' agent. The court specifically noted that the litigation injunction did not enjoin the investors from bringing the "real estate" or "equity investment" claims, which presumably had a connection to the receivership estate. It barred only those claims related to the agent's issuance of the notes.

[1] *See, e.g., Lagos v. Plano Economic Development Bd., Inc.* 378 S.W.3d 647 (Tx. Ct. App. 2012) (applying Tx. R. Civ. P. 683).

In contrast, the Bar Order sought by the Receiver enjoins any matter related to the Receivership Estate, including the claims of the Investors that can only be asserted by Investors and only against Halo. Thus, the injunction sought here is overly broad, unwarranted under the circumstances, and without justification in law or equity.

Third, the settlement proposed in *Kaleta* did not devalue the investors' claims to anywhere near the extent the Receiver proposes to do here. To the contrary, in *Kaleta*, the settlement required the settling party/agent to issue replacement notes on better terms and with personal guarantees, presumably a dollar-for-dollar benefit, if not better, whereas here, the Settlement appears to place no value on the Investors' claims.

Finally, contrary to the Receiver's interpretation, the factors set forth in *Kaleta* for evaluating a litigation injunction do not support the entry of an injunction here. As noted in *Kaleta*, courts evaluating the propriety of a litigation injunction may consider: (1) the value of the proposed settlement, (2) the value and merits of a receiver's potential claims, (3) the value and merits of any foreclosed parties' potential claims, (4) the complexity and costs of future litigation, (5) the risk that litigation costs would dissipate receivership assets, (6) the implications of any satisfaction of an award on other claimants, and (7) any other equities attendant to the situation.[2]

None of these factors warrant the entry of a litigation injunction here. The value of the settlement bears little relation to the value of the Receivership claims being released which, as discussed below, are far more viable then the Receiver depicts. The value of the Investors' claims sought to be foreclosed is significant; their claims are

[2] *Kaleta*, 2012 WL 401069, at *4 (citations omitted).

worth approximately $5,000,000. The complexity and costs of future litigation is irrelevant, since those would be borne by the Investors. The risk that litigation costs would dissipate receivership assets is nil since, again, those costs would be borne by the Investors. The implications of any satisfaction of an award on other claimants would be positive – not negative – since any recovery by the Investors will decrease their claims against the Receivership Estate. And, finally, the other equities overwhelmingly favor the Investors. The Receiver seeks to bar the Investors' claims against Halo even though the Investors are the only ones who can bring those claims.

In sum, to the extent *Kaleta* is instructive here, it supports denying the Receiver's motion.

B. The Receiver ignores significant evidence that transfers from the Receivership Entities to Halo were not payment for goods or services.

In his Reply, the Receiver contends that the chances of prevailing on a fraudulent transfer claim against Halo for the approximately $1,200,000 it received from the Receivership Entities in 2010 and 2011 are low because of a lack of evidence (due to Temme's assertion of the Fifth Amendment Privilege) and because the timing and amount of payments resemble payments for services. The Receiver's assessment of the potential fraudulent transfer claim against Halo strains credulity.

The amount and date of the transfers are no secret. It's also no secret that Halo received at least $490,000 received from Temme/Stewardship as gifts or loans unconnected to any services Halo might have provided. (See Dkt. No 255 at pp 2-3). Temme's testimony isn't necessary to establish either of these facts. Nor would his

testimony be necessary to establish prove that Halo did not provide reasonably equivalent value for these transfers.[3]

And the $375,665.42 of invoices attached to the Receiver's Reply pose little, if any, hurdle to prevailing on a fraudulent transfer claim. None of the invoice dates match up in amount or date of the transfers, begging the question, "Why would Temme/Stewardship pay more than the amounts invoiced?" Even giving credit for these invoices, they would shield only about one-third of the transfers from avoidance, leaving over $750,000 in facially valuable fraudulent transfer claims that the Trustee has inexplicably valued at less than $250,000.

C. The Receiver fails to appreciate the value and independent nature of the Investors' claims.

The Receiver states, without any meaningful analysis, that the Investors' claims either fall outside the Bar Order because they have nothing to do with transfers between Receivership Entities and Halo, or they are subject to the Bar Order because they will have a significant and substantial impact on the estates and will be resolved through the Receivership claims process. This binary analysis is overly simplistic and inaccurate.

The Investors' claims are independent and involve transfers between Receivership Entities and Halo. They are independent because they arise from duties – standard of care, fiduciary, and equitable – owed directly to the Investors. The breaches of these

[3] To avoid a transfer as constructively fraudulent under Texas law, a plaintiff must bring a claim within four years of a challenged transaction and demonstrate (1) that the debtor made transfer without receiving reasonably equivalent value in exchange; (2) that the debtor was insolvent at time of transfer; and (3) that there was existing creditor whose claim arose prior to occurrence of challenged transfer. Tex. Bus. & Com.Code Ann. §§ 24.006.

duties cannot be asserted by the Receiver, even if they relate to transfers between the Receivership Entities and Halo.

And while the Receiver is technically correct that the claims will have a significant and substantial impact on the estate, the effect they will have will be positive, not negative as the Receiver implies. The Investors' claims against the Receivership Estate will be reduced dollar for dollar by any amount they recover from Halo. The value of the Investors' claims is approximately $5,000,000, so even a partial recovery on these claims will significantly reduce the Investors' claims against the Receivership Estate.

III. CONCLUSION

As noted in the Investors' Response (Dkt. No. 255), complaints of third parties who are adversely affected by a settlement cannot be brushed aside. But that is exactly what Receiver is trying to do, turning a blind eye to substantial evidence that the transfers to Halo were loans, and grossly underestimating the merit, value, and independent viability of the Investors' claims.

Moreover, the Receiver's Motion and proposed settlement turns due process on its head. He asserts that the Investors' claims have no value and, essentially, demands approval of the settlement unless the Investors come forward with substantial evidence of their value. The Investors have done this, but the ultimate burden of establishing the benefit, propriety, and fairness of the settlement rests with the Receiver, and he has failed to meet that burden.

Therefore, 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: October 2, 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 2nd day of October, 2013.

/s/ David W. Lunn
David W. Lunn