

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

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p style="padding-left: 40px;"><i>Plaintiff,</i></p> <p>v.</p> <p>JAMES G. TEMME and STEWARDSHIP FUND, LP,</p> <p style="padding-left: 40px;"><i>Defendants.</i></p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>Civil Action No. 4:11-cv-655</p>
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RECEIVER’S REPLY IN SUPPORT OF MOTION TO APPROVE SETTLEMENT

The Receiver requests that the Court approve an arm’s-length Settlement Agreement with the HSP/Harbour Parties. Upon the Court’s approval, the HSP/Harbour Parties will make a \$550,000 payment to the Receivership Estate and will release claims against the Estate. The proposed Bar Order, which is a condition to the agreement, will enjoin piecemeal litigation by third parties against the HSP/Harbour Parties. The objecting parties, the F&B Group, comprise certain investors that have lodged the only objections to the settlement. Notwithstanding the F&B Group’s objections, the Receiver maintains that the settlement promotes the best interests of the Estate and requests the Court’s approval of the Settlement Agreement and entry of the Bar Order.

A. The Court has jurisdiction to enter the Bar Order.

In an equity receivership, the Court has broad power and wide discretion to determine appropriate relief, including approving the Settlement Agreement and entering the Bar Order. *S.E.C. v. Kaleta* (“*Kaleta I*”), CIV.A. 4:09-3674, 2012 WL 401069, at *4 (S.D. Tex. Feb. 7, 2012) (approving settlement agreement and entering bar order with respect to third-party claims),

aff'd by S.E.C. v. Kaleta (“*Kaleta II*”), No. 12-20633, ___ F. App’x ___, 2013 WL 3030300, at *1 (5th Cir. June 19, 2013) (upholding the district court’s order approving the settlement terms).

The F&B Group challenges the Court’s jurisdiction to enter the Bar Order. However, the Court has jurisdiction and previously entered a similar Order in November 2012—without objection by the F&B Group—that enjoined claims by third parties against the MCS investors (the “MCS Bar Order”). *Compare* MCS Bar Order at 3 ¶ 4(c) (Exhibit A), *with* Bar Order (Doc. 281, Ex. A) at 3-4 ¶ 4(c). The Court’s jurisdiction is unaffected by the F&B Group’s purported, prospective, and unfiled “direct claims” against the HSP/Harbour Parties.

Under similar circumstances, the *Kaleta I and II* courts examined relevant factors in approving a settlement and entering a bar order in the face of objections by other investors. *See generally Kaleta I*, 2012 WL 401069; *Kaleta II*, 2013 WL 3030300. As in this case, an investor objected based on the alleged lack of fairness of a settlement, including the scope of a bar order. *Id.* The Fifth Circuit held that, after balancing equities, “the concerns expressed by the objectors are not meaningful grounds to re-trade the deal or to deny the approval of the settlement.” *Kaleta II*, 2013 WL 3030300, at *2. The Receiver requests that the Court follow this precedent.

The Bar Order at issue in this case contains language comparable to the bar order at issue in *Kaleta I and II* (the “*Kaleta Bar Order*”). *Compare* Bar Order at 3-4 ¶ 4(c) (Doc. 281, Ex. A), *with* *Kaleta Bar Order* at 3 ¶ III (Exhibit B). The *Kaleta Bar Order* stated in pertinent part:

Any and all of the BusinessRadio Note Holders are hereby permanently barred, restrained, and enjoined, consistent with general equitable principles and in accordance with this Court’s ancillary equitable jurisdiction in this matter, from commencing or continuing any judicial, administrative, arbitration, or other proceeding and/or asserting or prosecuting any claims and/or causes of action against any of the Wallace Bajjali Parties arising out of, in connection with, or relating in any way to the BusinessRadio Note Plan, the loans made to BusinessRadio or its related entities by the BusinessRadio Note Holders, and/or the notes issued by BusinessRadio or its related entities to the BusinessRadio Note Holders.

Kaleta Bar Order at 3 ¶ III (Exhibit B). The Bar Order before the Court states in pertinent part:

Any and all of the Stewardship Creditors and any and all holders of any equity interests in any of the Receivership Entities are hereby permanently BARRED, RESTRAINED, and ENJOINED, consistent with general equitable principles and in accordance with this Court's ancillary equitable jurisdiction in the SEC Matter, from: (i) commencing or continuing any judicial, administrative, arbitration, or other proceeding of any kind whatsoever and asserting or prosecuting any claims and causes of action against any of the HSP/Harbour Parties...arising out of, in connection with, or relating in any way to the Receivership Entities, the Stewardship Investment Plan, any investments made in any of the Receivership Entities by the Stewardship Creditors, or any transfers made to or received by any of the HSP/Harbour Parties, directly or indirectly, from any of the Receivership Entities....

Bar Order at 3-4 ¶ 4(c) (Doc. 281, Ex. A, 1-5); *see also* MCS Bar Order at 3 ¶ 4(c) (Exhibit A).

Similar to *Kaleta I and II*, the Bar Order was critical to obtaining the settling parties' agreement to pay the Receivership Estate and to release claims, and the Bar Order expressly affirms the rights of claimants of the Estate to participate in the claims process. *Compare Kaleta II*, 2013 WL 3030300, at *2, *with* Bar Order at 4 ¶ 6 (Doc. 281, Ex. A) ("The rights of the Stewardship Creditors and any equity holders of any of the Receivership Entities to participate in the claims process for the Receiver's ultimate plan of distribution for the Receivership Entities shall not be impaired by this Order."). These equitable factors support entry of the Bar Order. *Id.*

The F&B Group, citing *Matter of Zale Corp.*, 62 F.3d 746, 750 (5th Cir. 1995), contends that this Court "may exercise jurisdiction over a third party claim only if the debtor establishes that the third party action is property of the estate or the dispute between the estate and the creditor would have an effect on the estate." However, *Matter of Zale* was a bankruptcy case decided under the Bankruptcy Code, and the court in *Kaleta I* rejected a similar argument:

Significantly, this is not a bankruptcy proceeding and...the undersigned is an Article III judge who is not impaired by Article I bankruptcy judges' lack of plenary authority. Furthermore, the Objectors personally have submitted to this Court's jurisdiction to the extent they have asserted claims for recovery against the Receivership Estate and/or made objections to the Receiver's actions.

Kaleta I, 2012 WL 401069, at *8. This Article III Court has jurisdiction to enter the Bar Order.

B. The Settlement Agreement and Bar Order are fair and equitable.

The F&B Group disputes the fairness of the settlement, but fails to consider the interests of all claimants of the Estate, and even seeks to amend the Bar Order to carve-out only the F&B Group's purported claims. The Receiver's proposed settlement provides for an equitable settlement on terms that apply equally to all claimants of the Estate.

The F&B Group claims that the settlement is somehow "patently unfair" because the settlement payment is less than the F&B Group's claimed losses. Facing a similar argument, the court in *Kaleta I* held that "[i]n cases where investors are similarly defrauded, equity favors treating them alike." *Id.* at *7. The proposed settlement treats all claimants of the Estate equally, while the F&B Group seeks "favored treatment" by urging the exclusion of its claims alone from the Bar Order. *Id.* The Bar Order does not preclude the F&B Group from participating in the claims process for the Receiver's ultimate plan of distribution.

The F&B Group claims that it has direct fraud and theft claims against the HSP/Harbour Parties and asserts that it should be able to pursue these claims independent of the Receiver's settlement. In support, the F&B Group argues that the damages model for their claims somehow supports the contention that its claims have no effect on the Estate. The F&B Group cites cases regarding the economic-loss rule under Texas law, which addresses distinctions between contract and tort claims, but the F&B Group fails to explain how these cases establish separate or direct claims against the HSP/Harbour Parties. The F&B Group's claims appear to arise from payment by 48th Street Holdings pursuant to a contract purporting to assign notes from Stewardship Fund to F&B Note Holding, LLC. *See* Exhibit C. Charles Vose, a principal of certain HSP/Harbour Parties, testified that the notes were allegedly transferred to Stewardship Fund under a contract bearing his forged signature and by a non-existent entity—Home Solutions Partners, LP. *See*

Exhibit D at 1-2 ¶¶ 2-4. The F&B Group has failed to prove that these claims would have no effect on the Estate.

The F&B Group argues that \$550,000 is a “token payment.” If that were true, the F&B Group could have offered to acquire the Estate’s claims against the HSP/Harbour Parties for this amount of money to prosecute the claims itself. The Receiver has engaged counsel and evaluated the merits of prosecuting, as opposed to settling, the claims, and the Receiver has determined that the settlement would benefit the Estate.

The F&B Group contends that the “net profits” analysis does not apply, especially with respect to HSP III, and that the HSP/Harbour Parties are “insiders” or “affiliates” of Stewardship. The F&B Group presents no evidence that Temme or Stewardship Fund owned or controlled HSP III. HSP III might argue that the “net profits” analysis would apply to the Receiver’s claims against HSP III based on constructive fraudulent transfers. *See* TEX. BUS. & COM. CODE § 24.002 (defining “insiders” and “affiliates”); *Scholes v. Lehmann*, 56 F.3d 750, 759 (7th Cir. 1995) (discussing the basis and method for calculating damages for “net profits” as opposed to principal). Based on the contracts and payments between HSP III and Stewardship Fund, which are reflected in documents the HSP/Harbour Parties provided to the Receiver, HSP III’s “net profits” would be \$258,430.02 (\$1,821,305.80 minus \$1,562,875.78). *Compare* Exhibit E, with Exhibit F. The settlement calls for the HSP/Harbour Parties to pay more than twice this amount.

C. Conclusion & Prayer for Relief.

The Settlement Agreement is in the best interests of the Receivership Estate, and the F&B Group’s objections lack evidentiary support and legal merit. The Receiver respectfully requests that the Court approve the settlement, enter the Bar Order, allow payment of professional fees, and grant all other relief deemed just and proper.

Dated: November 4, 2013

Respectfully submitted,

By: /s/ Jeffrey Goldfarb

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**ATTORNEYS FOR RECEIVER
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CERTIFICATE OF SERVICE

On November 4, 2013, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court for the Eastern District of Texas using the CM/ECF system, which will send a notice of electronic filing to all counsel of record. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2) and the Court's Local Rules.

/s/ Jeffrey Goldfarb
Jeffrey Goldfarb