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

SECURITIES AND EXCHANGE COMMISSION	§	
Plaintiff,	§	
	§	
	§	
	§	**Civil Action No. 4:11-cv-655**
	§	
v.	§	
	§	
JAMES G. TEMME, and	§	
STEWARDSHIP FUND, LP,	§	
Defendants.	§	

RESPONSE TO INVESTORS' MOTION FOR RECONSIDERATION OF ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

COMES NOW, Keith M. Aurzada, as receiver in the above-captioned matter (the "Receiver") for James G. Temme ("Temme"), Stewardship Fund, LP, and all other entities directly or indirectly controlled by Temme or Stewardship Fund, LP, including, but not limited to Stewardship Advisors, LLC, d/b/a Stewardship Advisors, LP, Stewardship Asset Management Genpar I, LLC, Stewardship Group, LLC, Destiny Fund, LP, and Stewardship Management, LP (collectively, the "Receivership Entities"), and submits this Response to Investors' Motion for Reconsideration of Order Adopting Report and Recommendation of the United States Magistrate Judge (the "Motion to Reconsider"), as follows:

I.

INTRODUCTION

1. The Motion to Reconsider is devoid of new evidence, new legal arguments, or any indication that the Berg Group[1] is likely to succeed in state court on its claims against Halo. Instead, the Motion to Reconsider rehashes arguments made by the Berg Group in **four** previous pleadings, each of which has been rejected by Magistrate Judge Mazzant and by this Court. As with the previous objections, the Motion to Reconsider should be denied.

II.

BACKGROUND

2. On August 28, 2013, the Receiver filed a Motion to Approve Settlement Agreement with Halo Companies, Inc. (the "Settlement Motion"). In the Settlement Motion, the Receiver seeks the Court's approval of a settlement agreement (the "Settlement") with Halo Companies, Inc. ("Halo"). The Settlement includes a request for a bar order (the "Bar Order"), which precludes investors in the Receivership Entities (including the Berg Group) from asserting claims against Halo related to investments in the Receivership Entities or transfers between the Receivership Entities and Halo. The Receiver believes that the Settlement is in the best interest of the Estate and will maximize the recovery for the investors in the Receivership Entities.

3. In the Motion to Reconsider, the Berg Group opposes the Settlement on the grounds that (i) the Court lacks authority to enter the Bar Order; and (ii) the Settlement is unfair to the Berg Group in that it fails to account for the value and viability of the Berg Group's claims against Halo, which were filed in Texas state court.

[1] The Berg Group includes the following investors in the Receivership Entities: 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.

4. The Berg Group previously asserted those same objections in its: (i) Response in Opposition to the Receiver's Motion to Approve Settlement Agreement with Halo Companies, Inc. [Dkt. No. 255] (the "Response"); (ii) Sur-Reply in Opposition to the Receiver's Motion to Approve Settlement Agreement with Halo Companies, Inc. [Dkt. No. 275] (the "Sur-Reply"); (iii) Objection to Magistrate November 4, 2013 Report and Recommendation Granting the Receiver's Motion to Approve Settlement with Halo Companies, Inc. [Dkt. No. 295]; and (iv) Reply in Support of Investors' Objections to Report and Recommendation of United States Magistrate Judge and Request for Hearing [Dkt. No. 326].

5. Each time the objections have been overruled by Magistrate Judge Mazzant and this Court. *See, e.g.,* Order Adopting Report and Recommendation of the United States Magistrate Judge [Dkt. No. 336] (the "Order").

III.

ARGUMENT AND AUTHORITIES

A. Legal Standard

6. Motions to reconsider a court's order are recognized under Federal Rule of Civil Procedure 59(e) relating to motions "to alter or amend judgment." See FED. R. OF CIV. P. 59(e)*Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993) (analyzing Rule 59(e) under the 10-day period in effect prior to the 2009 amendment to Rule 59). A judgment may be altered or amended under Rule 59(e) only if there has been "(1) an intervening change in controlling law; (2) the availability of new evidence that was previous not available; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice." *Brown v. DFS Servs., LLC*, 719 F. Supp. 2d 785, 788 (S.D. Tex. 2010) (citing *Brown v. Miss. Co-op. Extension Serv.*, 89 Fed. Appx. 437, 437 (5th Cir. 2004)).

B. <u>There has Not been a Change in Controlling Law</u>

7. In the Motion to Reconsider, the Berg Group fails to allege, much less prove, a change in controlling law that would entitle it to the requested relief. In his Response to Objections to Report and Recommendation of United States Magistrate Judge [Dkt. No. 314], the Receiver correctly cited a myriad of cases supporting his authority to enter into the Settlement and the Court's authority to enter the Bar Order. *See, e.g.*, *SEC v. Kaleta*, Civ. Act. No. 4:09-3674, 2012 WL 401069, at *3-4 (S.D. Tex. Feb. 7, 2012) (citing *SEC v. Byers*, 609 F.3d 87, 92 (2d Cir. 2010); *SEC v. Stanford Int'l Bank Ltd*., 424 F. App'x. 338, 340-41 (5th Cir. 2011); *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551-52 (6th Cir. 2006)).

8. Specifically, the Receiver relied upon the *Kaleta* case. In SEC v. Kaleta certain investors "who were allegedly defrauded by Receivership Entities in violation of federal securities law … challenged the district court's approval of a negotiated settlement between the court-appointed Receiver and third parties…who were closely affiliated with the Receivership Entities…challenging the court's entry of a bar order enjoining them and other investors from commencing or continuing any legal action." The Fifth Circuit upheld the district court's approval of the settlement agreement, including the bar order, based on the district court's "wide discretion" to fashion ancillary relief including "injunctions to stay proceedings by non-parties to the receivership."

9. The Court's authority to enter the Bar Order, including the *Kaleta* case, was briefed by the Receiver in his Reply in Support of the Settlement Motion and the Berg Group in its Sur-Reply opposing the Settlement Motion. In fact, the Berg Group provided four pages of briefing in its unsuccessful attempt to distinguish *Kaleta* from this case. After copious briefing on the authority to enter the Bar Order (and the *Kaleta* case in particular), the Court entered the

Order, which provides that "to the extent that a third party has claims from an investment in the Receivership Entities or transfers between Receivership Entities and Halo, such claims are property of the Receivership Estate or will have a significant and substantial impact on the Receivership Estate and may be enjoined, and the claims will be resolved through the Receivership claims process."

10. In the Motion to Reconsider, the Berg Group does not allege that there has been a change in controlling law which would merit reconsideration of the Order. Rather, once again the Berg Group unsuccessfully attempts to distinguish *Kaleta* from the present case. Moreover, the Berg Group seeks to distinguish *Kaleta* with the same argument provided in the Sur-Reply—that *Kaleta* is distinguishable because it related to causes of action by third parties against receivership assets or entities. The Berg Group's argument is once again unpersuasive. The *Kaleta* case provides that federal courts have broad discretion to enjoin non-parties from filing lawsuits that would interfere with or otherwise affect a court-appointed receiver, receivership entity, or receivership asset.

11. Here, the Court has considered the proper legal authorities and determined that it may enjoin claims against Halo "to the extent [they arise] from an investment in the Receivership Entities or transfers between Receivership Entities and Halo." The Berg Group has failed to identify an intervening change in controlling law that would merit reconsideration of the Order.

C. <u>No New Evidence has been Presented</u>

12. The Motion to Reconsider should be denied because no new evidence has been presented. In its Sur-Reply opposing the Settlement Motion and Objection to the Report and

Recommendation, the Berg Group asserted that the Settlement was unjust because the Receiver failed to account for the value and viability of the Berg Group's state court claims against Halo.

13. Subsequently the Receiver informed the Court that the state court granted two no-evidence motions for summary judgment dismissing all of the Berg Group's claims against Halo. In its Reply opposing the Report and Recommendation, the Berg Group responded that:

> the Investors filed a Motion for New Trial/Reconsideration of the trial court's rulings on the no evidence motions for summary judgment. Because the Investors strongly believe that the trial court erred when it granted the no evidence motions, the Investors are confident that the trial court will grant the Motion for New Trial/Reconsideration. The Investors have provided the trial court with well more than a scintilla of evidence in support of their claims against the Halo defendants. If for some reason the trial court does not grant that motion, the Investors are extremely confident that the court of appeals will reverse the trial court's granting of the no evidence motions. The Investors have incurred hundreds of thousands of dollars in fees and costs in connection with their lawsuit against the Halo defendants. When the Investors ultimately prevail against the Halo defendants, their claims against the Estate will be substantially reduced. That will clearly be more of a benefit to the Estate than Halo's proposed settlement payment of $250,000.

14. In the Motion to Reconsider, the Berg Group has made the same argument—that its claims are meritorious and will be reinstated by the trial court or court of appeals (in fact the Berg Group's argument in the Motion to Reconsider is almost verbatim the argument made in its Reply). In support, the Berg Group has provided the same "evidence" as it provided in the Reply opposing the Report and Recommendation—copies of its state court pleadings. The notice of appeal attached to the Motion to Reconsider presents identical arguments as the motion to reconsider the summary judgments that were previously provided to this Court.

15. This Court is not in a position to second-guess the state court and weigh-in on the viability of the Berg Group's claims. The state court has evaluated the claims and determined that there is not more than a scintilla of evidence supporting them.

16. More important, however, is the fact that this same "evidence" was presented to this Court before it entered the Order. The Berg Group has failed to present any **new** evidence that was previous not available. Once again, the Berg Group is merely rehashing arguments that it made previously that were overruled.

D. <u>There is No Error of Law or Fact or Need to Prevent Manifest Injustice</u>

17. The Berg Group has also failed to identify a clear error of law or fact in the Order or identify manifest injustice. As provided *supra*, the Court has correctly applied the law to the facts of this case. Courts have broad discretion to enjoin third-parties from initiating claims that will would interfere with or otherwise affect a court-appointed receiver, receivership entity, or receivership asset. Here, the Court has carefully crafted an Order that bars only certain third-party claims against Halo, namely claims arising from "an investment in the Receivership Entities or transfers between Receivership Entities and Halo."

18. Moreover, the Order will not cause a manifest injustice. First, the Berg Group's claims are not viable. The state court has dismissed all of the Berg Group's claims against Halo. As a result, the Bar Order will not cause a manifest injustice by vitiating the Berg Group's claims. Second, the Berg Group has the ability to participate in the claims process—the same as every other investor in the Receivership Entities. Accordingly, the Berg Group will not suffer a manifest injustice as a result of the Order.

19. Because the Berg Group has failed to identify a change in the controlling law, present any new evidence, or identify a clear error of law or manifest injustice, the Court should deny the Motion to Reconsider.

Dated: May 1, 2014

BRYAN CAVE LLP

By: //s// *Bradley J. Purcell*

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CERTIFICATE OF SERVICE

I certify that on May 1, 2014, I served a true and correct copy of the foregoing pleading by United States First Class Mail, postage prepaid, to the following in accordance with the Federal Rules of Civil Procedure:

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Moreover, the foregoing will be uploaded to www.stewardshipfundreceivership.com

//s// *Bradley J. Purcell*
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