

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SECURITIES AND EXCHANGE	§	
COMMISSION	§	
	§	
Plaintiff,	§	CA. NO. 4:11-CV-02830
	§	
V.	§	
	§	
BRIAN A. BJORK, THE ESTATE OF	§	
JOEL DAVID SALINAS, J. DAVID	§	
GROUP OF COMPANIES, INC., J.	§	
DAVID FINANCIAL GROUP LP,	§	
SELECT ASSET MANAGEMENT LLC,	§	
SELECT ASSET FUND I, LLC, AND	§	
SELECT ASSET PRIME INDEX FUND,	§	
LLC	§	
	§	
Defendants.	§	

**GASAWAY PROPERTIES, LP AND RICHARD C. GASAWAY’S
RESPONSE TO RECEIVER’S MOTION TO DISMISS**

TO THE HONORABLE KEITH P. ELLISON, UNITED STATES DISTRICT JUDGE:

Gasaway Properties, LP (“Gasaway Properties”) and Richard C. Gasaway (“Gasaway”) (together, the “Gasaway Parties”), file this their response to Receiver’s Motion to Dismiss Gasaway Properties, LP and Richard C. Gasaway’s Original Complaint Without Prejudice (the “Motion to Dismiss”) seeking to dismiss all of the claims and causes of action asserted by Gasaway Properties, LP and Richard C. Gasaway in their Original Complaint against the Receiver (the “Complaint”). In response to the Motion to Dismiss, the Gasaway Parties respectfully would show:

**I.
NATURE AND STAGE OF PROCEEDINGS**

1. On August 1, 2011, the Securities and Exchange Commission ("SEC") filed its Complaint (the “Receivership Action”) against Brian A. Bjork, Estate of Joel David Salinas, J.

David Group of Companies, Inc., J. David Financial Group LP, Select Asset Management LLC, Select Capital Management, LLC, Select Asset Fund I, LLC, and Select Asset Prime Index Fund, LLC (collectively, the "Receivership Entities"). The Receivership Action was docketed as Civil Action Number 11-CV-02830 and assigned to this Court for disposition.

2. On August 1, 2011, the Court entered an order appointing Steven A. Harr (the "Receiver") as Receiver of the Receivership Entities [Doc. No. 11]. Pursuant to your Order, all cases brought against the Receiver must proceed in this Court. (Doc. No. 11 at ¶7).

3. The undersigned counsel attempted to comply with this Court's Order by contacting the District Clerk's office prior to the filing of the Gasaway Parties' Original Complaint on June 18, 2012. However, due to inadvertence and apparent miscommunication with the District Clerk's office, this action against the Receiver was erroneously assigned to Judge Vanessa Gilmore.

4. On June 21, 2012, upon learning that the case had been assigned to the incorrect court, and prior to the filing of an answer or other appearance by the Receiver, the Gasaway Parties filed a Notice of Related Case and Motion to Transfer advising Judge Gilmore that a related case styled *SEC v. Brian Bjork, et al.*, C.A. No. 11-CV-2830, was pending before this Court. Plaintiffs further advised that this Court's Order Appointing Receiver requires this action to proceed before Judge Ellison.

5. Accordingly, the Gasaway Parties requested that Judge Gilmore issue an order transferring this matter to this Court for disposition, such order being granted on August 7, 2012.

6. On August 21, 2012, the Receiver filed its Motion to Dismiss the Gasaway Parties' Original Complaint Without Prejudice [Doc. No. 95].

II.

ISSUES TO BE RULED UPON BY THE COURT

7. Receiver raises two procedural issues which it believes justify the dismissal of the Original Complaint without prejudice:

- a. Whether the filing of the Original Complaint violated the Court's Order Appointing Receiver; and
- b. whether the filing of the Original Complaint violated the Court's Order regarding the use of Summary Procedures.

III.

ARGUMENTS AND AUTHORITIES

A. The filing of the Original Complaint Did Not Violate this Court's Order Appointing Receiver.

8. In the Motion to Dismiss, the Receiver asserts a violation of the Order Appointing Receiver [Doc. No. 11] which provides that:

Creditors and all other persons are hereby restrained and enjoined from the following actions, except in this Court, unless this Court, consistent with general equitable principals and in accordance with its ancillary equitable jurisdiction in this matter, orders that such actions may be conducted in another forum or jurisdiction.

Creditors and all other persons are hereby restrained and enjoined, without prior approval of the Court, from: (c) any act to collect, assess, or recover a claim against the Receiver or that would attach to or encumber the Receivership Estate; or (d) the set off of any debt owed by the Receivership Estate or secured by the Receivership Estate assets based on any claim against the Receiver or the Receivership Estate.

Defendants and their respective agents, officers, and employees and all persons in active concert or participation with them are hereby enjoined from doing any act or thing whatsoever to interfere with the Receiver's taking control, possession, or management of the Receivership Estate or to in any way interfere with the Receiver or to harass or interfere with the duties of the Receiver or to interfere in any manner with the exclusive jurisdiction of this Court over the Receivership Estate.. [A]ny actions so authorized to determine disputes related to Receivership Assets and Receivership Records shall be filed in this Court.

9. The Receiver's initial assertion appears to be that the Gasaway Parties should have filed the Original Complaint in this Court. The Gasaway Parties attempted to comply with the Court's Order Appointing Receiver by advising the intake clerk of the pending matter and reasonably believed that the Original Complaint would be properly filed in this Court. The Original Complaint was inadvertently filed in the incorrect court, but the Gasaway Parties took prompt action to obtain transfer to this Court. No one -- neither the Receiver, nor the Receivership Estate, nor this Honorable Court have been prejudiced by the inadvertent misfiling. Under similar circumstances, courts have held that removal to the bankruptcy court of a state court action to which the *Barton* doctrine applied had the effect of curing the plaintiff's violation of the *Barton* doctrine. See: In re Harris, 590 F.3d 730, Bankr. L. Rep. (CCH) ¶81657 (9th Cir. 2009) cert. denied, 130 S. Ct. 3413, 177 L. Ed. 2d 325 (2010). The matter is now properly before this Court, and this Court, consistent with the general equitable principals recognized by its Order Appointing Receiver, should deny the Motion to Dismiss.

10. The Receiver appears to further assert that the mere act of filing an Original Complaint violates the Court's Order. However, the Receiver disingenuously modifies the punctuation used by the Court and omits a pertinent provision. Paragraph 7 of the Court's Order, as recited above, ends with a colon, not a period, and then delineates matters which may be undertaken before this Court. Paragraph 7 actually reads, in pertinent part, as follows:

7. Creditors and all other persons **are hereby restrained** and enjoined **from the following actions, except in this Court**, unless this Court, consistent with general equitable principals and in accordance with its ancillary equitable jurisdiction in this matter, orders that such actions may be conducted in another forum or jurisdiction:

- (a) **The commencement** or continuation, including the issuance or employment of process, **of any judicial**, administrative, or other **proceeding against the Receiver**, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate, arising from the subject matter of this civil action...(Emphasis added).

Clearly, given a full reading of the Order, the Court contemplated that any person could pursue judicial proceedings against the Receiver in this Court, and the Motion to Dismiss on this basis should be denied.

B. The filing of an Original Complaint Does Not Violate the Court's Order for Use of Summary Procedures.

11. The Receiver also asserts that the filing of the Original Complaint violates the Court's Order Granting Summary Procedures, which permits the Receiver to utilize summary procedures to determine the rights of third parties. That Order provides:

Rather, the Court will allow the Receiver to proceed against debtors such as Gasaway Properties and Mr. Gasaway by utilizing "summary judgment type procedure" approved in *Sharp Capital*. The Receiver, as the moving party, must file a motion setting out his evidence and reasons for believing that each third-party debtor is in possession of receivership property.

12. The Gasaway Parties believe that the Receiver's interpretation of the foregoing Order is fundamentally incorrect. The Court's Order authorizes the Receiver to utilize summary proceedings, if the Receiver so chooses. It does not mandate that the Receiver use summary proceedings, nor does it dictate that all disputes must use such summary proceedings. Further, Plaintiffs filed their Original Complaint well in advance of the Receiver's filing of his Motion for Judgment. The Original Complaint in this action is appropriate under and consistent with the provisions of 28 U.S.C. Section 959(a), which provides:

- (a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.

Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

13. While the Receiver may request the review of evidence by the Court using Summary Procedures, the Court's Order does not prohibit the third parties from seeking relief

against the Receivership Entities by way of filing an Original Complaint asserting appropriately delineated causes of action. Indeed, the filing of a lawsuit against the Receiver is expressly permitted under 28 U.S.C. 959(a). Further, Summary Proceedings are still available to the Receiver with respect to the Gasaway Parties' claims pursuant to the terms and provisions of Rule 56 of the Federal Rules of Civil Procedure – they just must be appropriately delayed so that some reasonable discovery can be completed. Accordingly, the Court should deny the Receiver's request that the Original Complaint be dismissed simply due to an alleged violation of the Court's Order Granting Summary Procedures.

IV.

CONCLUSION AND PRAYER

The Motion to Dismiss should be denied and the case should be allowed to proceed before this Court in conformity with the Court's prior rulings, and consistent with the Rules of Federal Procedure and the provisions of 28 U.S.C. Section 959.

WHEREFORE, premises considered, the Gasaway Parties request that the court deny Receiver's Motion to Dismiss and for such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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By: /s/ Millard A. Johnson

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ATTORNEYS FOR GASAWAY PROPERTIES, LP AND
RICHARD C. GASAWAY

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2012, a true and correct copy of the foregoing pleading was served by electronic noticing on those parties entering appearances in the referenced proceeding.

/s/ Millard A. Johnson

Millard A. Johnson

