

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

SECURITIES AND EXCHANGE §  
COMMISSION, §  
§  
PLAINTIFF, §  
§  
vs. §  
§  
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 §  
CAPITAL MANAGEMENT LLC, SELECT §  
ASSET FUND I, LLC, AND SELECT §  
ASSET PRIME INDEX FUND, LLC. §  
§  
DEFENDANTS. §

CIVIL ACTION NO. 4:11 CV - 02830

**SUPPLEMENTAL BRIEF IN SUPPORT OF RECEIVER’S  
MOTION FOR SHOW CAUSE ORDER AND RELATED RELIEF**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Receiver, Steven A. Harr (“Receiver”) files this *Supplemental Brief in Support of Motion for Show Cause Order and Related Relief*, with respect to its request for an order that Gasaway Properties, LP (“Gasaway Properties”) and its principal Richard C. Gasaway be cited to appear and show cause why they should not be held in contempt for violating this Court’s Order Appointing Receiver, respectfully showing the Court the following:

**I.**

**INTRODUCTION**

1. Currently pending before the Court is Receiver’s Motion for Show Cause Order seeking relief for the failure to comply with the Court’s Receivership Order based on the refusal to pay Receivership funds into the Receivership Estate under a promissory note and guaranty

agreement. At the hearing on the motion, the Court inquired as to its jurisdiction to order the relief requested. The Receiver provides this supplemental brief on the issues of jurisdiction of the Court over third-parties and the use of summary proceedings to determine the rights of the receivership estate in certain contracts under which Debtors have failed to pay the Receiver.

## II.

### FACTS

2. On August 1, 2011, this Court entered an Order Appointing Receiver (the “Receivership Order”), wherein Mr. Harr was appointed as Receiver for Brian A. Bjork, The Estate of Joel David Salinas, J. David Financial Group of Companies, Inc., J. David Financial Group, L.P., Select Asset Management, L.L.C., Select Capital Management, L.L.C., Select Asset Fund I, L.L.C., and Select Asset Prime Index Fund, L.L.C., (collectively the “Receivership Entities”).<sup>1</sup> The Receivership Entities engaged in an extensive multi-faceted Ponzi scheme that bilked investors out of millions of dollars. One of the facets to the scheme was the solicitation of investment in Select Asset Prime Index Fund, L.L.C. which for purposes of this litigation has been referred to as “Fund II”.

3. The stated purpose of Fund II was to make commercial loans. Various Receivership Entities represented to potential investors that payments received on those loans would provide a handsome return on their investment. Fund II received millions of dollars from numerous such investors. Many of the loans from Fund II and the similar Select Asset Fund 1 (“Fund I”) were undocumented advances to insiders who are currently among the Receivership Entities. Other loans from Fund I and Fund II were made to outsiders. Several of these loans were in default at the time of the Receiver’s appointment, but the Receiver has had success in

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<sup>1</sup>Order Appointing Receiver, a true and correct copy of which is attached as Exhibit “A” to the Motion for Show Cause Order and Related Relief.

negotiating compromises that have resulted in payments into the Receivership Estate.<sup>2</sup> The Receiver is still in the process of negotiating payments on these defaulted loans. Some borrowers, however, are refusing to cooperate which is impeding the Receiver's performance of his duties under the Receivership Order. To date, there are three such loans each with multiple borrowers and/or guarantors.<sup>3</sup>

4. The Receiver needs an effective and expeditious means to resolve these matters. Litigation through plenary proceedings is not the answer. In the matter before the Court, as well as with the other loans, full-blown, protracted litigation will result in the unnecessary expenditure of the ultimate dollars to be reimbursed to the victims of this fraud and will consume a year or more of time delaying the Receiver's ability to close this case.

### III.

#### **ARGUMENT AND AUTHORITIES**

##### **This Court has Nationwide Jurisdiction by Virtue of the Receivership Action**

5. With respect to jurisdiction, this Court, by presiding over an equity receivership, has nationwide jurisdiction over all property of the receivership estate provided the filings required by 28 U.S.C. § 754 have been made.<sup>4</sup> *SEC v. Vision Comm., Inc.*, 74 F.3d 287, 291-292 (D.C. Cir. 1996). Once the Court acquires jurisdiction over the receivership property, the Court

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<sup>2</sup>See, e.g., DKT # 27 (Order approving compromise of loan to Case Creek Trails, LLC); DKT # 46 (Order approving compromise of loan to Chris Peden).

<sup>3</sup>In addition to the loan currently before the Court, the Receiver is currently in negotiations regarding the following loans: a loan from Fund I made to National Insurance Partners, Inc. with partial, personal guarantees by Miles Prentice and William MacDonald; and a loan from Fund II to KO Supply, LLC with a personal guaranty by Kevin Maley.

<sup>4</sup>Section 754 provides in pertinent part:

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

also acquires jurisdiction over all parties who have an interest in such property, so long as they have minimum contacts with the United States. *Id.*<sup>5</sup> When a statute, such as 28 U.S.C. § 1692<sup>6</sup> provides for nationwide service, Congress has effectively provided for the national exercise of personal jurisdiction over a defendant based on his contacts with the United States. *Driver v. Helms*, 74 F.R.D. 382, 390 (D.R.I. 1977), *aff'd in relevant part and rev'd in part*, 577 F.2d 147 (1<sup>st</sup> Cir. 1978), *rev'd*, 100 S.Ct. 774 (1980).

6. In this case, it is undisputed that the promissory note and guaranty agreement in question, and the causes of action for default of that note and guaranty, are property of the Receiver. Furthermore, the property and the Respondents all reside in the Southern District of Texas. It is not necessary for the Receiver to make a section 754 filing in the district of the appointing court in order for the appointing court to assert jurisdiction over assets in such district. *See United States v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9<sup>th</sup> Cir. 1984)(“A receiver achieves jurisdiction and control of property in district *other than that of appointment* by filing copies of the complaint and order of appointment in the district court where the property is located.”)(emphasis added). There can be no question then, that the Court acquired jurisdiction over these assets and obtained personal jurisdiction over all parties, including Respondents, who had an interest in the assets of the Receivership Entities that were located within the Southern

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<sup>5</sup>It is only logical that once a court acquires jurisdiction over certain property, it must also acquire jurisdiction over all persons with an interest in that property. If this were not the case, the court could never make any sort of final determination regarding the rights of the respective parties in the subject property and its jurisdiction over the property would be rendered meaningless.

<sup>6</sup>Section 1692 provides for nationwide service when the filing requirements of section 754 have been complied with in the district where the receivership property is located. Section 1692 provides in pertinent part:

In proceedings in a district court where a receiver is appointed for property, real, personal or mixed, situated in different districts, process may issue and be executed in any such district, but orders affecting the property shall be entered of record in each such district.

District of Texas, so long as the party has minimum contacts with the United States. Respondents clearly have minimum contacts with the United States and as a result, this Court acquired personal jurisdiction over Respondents when the Receiver was appointed.

7. The only issue, then, relates to the due process rights of the Respondents. For the reasons set out below, summary procedures such as the show cause order do not violate the due process rights of third-parties who have an interest in Receivership assets and are in fact favored in these circumstances.

### **Summary Proceeding Provides Due Process**

8. Federal receivership law recognizes that it is proper to use summary proceedings to resolve disputes regarding the ownership of property that the Receiver claims belongs to the receivership estate. *SEC v. Sharp Capital, Inc.*, 315 F.3d 541, 545 (5<sup>th</sup> Cir. 2003); *Securities and Exchange Comm'n v. Basic Energy & Affiliated Resources*, 273 F.3d 657, 668 (6<sup>th</sup> Cir. 2001); *see also Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9<sup>th</sup> Cir. 2000); *Securities and Exchange Comm'n v. Wencke*, 783 F.2d 829, 838 (9<sup>th</sup> Cir. 1986). It is well established that federal courts have “broad powers and wide discretion” with which to fashion relief in an equity receivership proceeding. *Basic Energy & Affiliated Resources*, 273 F.3d at 668. “This discretion, which ‘derives from the inherent powers of an equity court to fashion relief,’ makes the use of abbreviated, summary processes possible.” *Id.*

9. In determining that it is proper to use summary proceedings, the courts have recognized that the use of summary proceedings furthers the policy of preserving and protecting the assets of the receivership estate for the claimants of the estate. *Id.* In *Basic Energy & Affiliated Resources*, the Sixth Circuit held that “[s]uch abbreviated procedures . . . advance the government’s interest in judicial efficiency by reducing the time needed to resolve disputes,

decreasing the costs of litigation, and preventing the dissipation of the receiver's assets." *Id.* In *Wenke*, the Ninth Circuit held that "[t]he use of such proceedings enables a receiver to consolidate all litigation concerning his receivership in a single district court and before a single district judge, and to avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership." 783 F.2d at 837, n. 9.

10. The Fifth Circuit has applied these principles to hold that summary procedures are proper when determining the rights of a third-party, who was not a party to the receivership lawsuit, in a cause of action if the procedure allows the third-party to present evidence on disputed facts and make legal arguments on those facts. *SEC v. Sharp Capital, Inc.*, 315 F.3d 541, 545 (5<sup>th</sup> Cir. 2003). In *Sharp Capital, Inc.*, a Special Master in an SEC receivership instituted settlement/collection efforts on claims of the receivership defendant, Sharp Capital, Inc., including claims against a third-party who had borrowed substantial sums from the defendant and whose loans were in default. *Id.* at 542. Meanwhile, a group of Sharp Capital, Inc. investors sued the same borrower in state court. *Id.* When the Special Master reached a settlement agreement with the borrower, it applied to the court for approval of the release not only of Sharp Capital, Inc.'s claims, but also the investor-plaintiffs' claims pending in state court, and also sought an injunction against those individuals from further pursuing those claims. *Id.* at 543.

11. The investor-plaintiffs objected to the motion to approve the settlement and the district court held a single hearing in which it considered the state court pleadings, documentary

evidence, declarations and arguments of counsel. *Id.*<sup>7</sup> The district court approved the settlement after the hearing and entered a permanent injunction barring the investor-plaintiffs from pursuing their claims against the borrower in state court. *Id.* at 544.

12. In holding that the single-hearing summary procedure was appropriate to determine the investor-plaintiffs' rights in the cause of action, the Fifth Circuit held that a district court does not abuse its discretion in implementing a summary procedure if that procedure allows the complaining party to present evidence when the facts are in dispute and to make arguments regarding those facts. *Id.* at 545 (citing *SEC v. Elliott*, 953 F.2d 1560, 1567 (11<sup>th</sup> Cir. 1992)). In order to establish abuse, the complaining party must show how it was prejudiced by the summary proceedings and how it would have been better able to defend its interests in a plenary proceeding. *Id.*

13. Other Circuits have applied these principles with the same result. In *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, a shareholder of Topworth, the company in receivership, claimed that it was entitled to \$300,000 in its attorney's trust account. 205 F.3d 1107, 1111 (9<sup>th</sup> Cir. 2000). The receiver contended that the funds actually belonged to Topworth and should be turned over to the receivership estate. Following summary proceedings, the trial court ordered the funds turned over to the receiver. On appeal, the shareholder argued that its due process rights were violated by the use of summary proceedings to determine the question of who had the superior rights to the property. The Ninth Circuit reasoned that "for the claims of non-parties to property claimed by receivers, summary proceedings satisfy due process as long as there is adequate notice and opportunity to be heard." *Id.* at 1113. The court held that the summary proceedings did not violate the shareholder's due process interest because "[t]here was

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<sup>7</sup>The Special Master entered a similar settlement with the bank that held the investor accounts of Sharp Capital, Inc. The investor-plaintiffs also objected to the approval of that settlement. The district court held a separate hearing on that objection.

ample opportunity for the appellants in this case to file papers, and two hearings were held in the district court.” *Id.*

14. In *Wencke*, the receiver filed an application for disgorgement seeking to have non-parties turn over certain shares of stock and the profits they derived from those shares. 783 F.2d at 832. The district court utilized summary proceedings and ordered the non-parties to turn over the assets. On appeal, the Ninth Circuit affirmed and found that given all of the procedural protections available to the non-parties in that instance, “the use of summary proceedings and the lack of a formal complaint, answer and summonses” did not violate the non-parties due process rights. *Id.* at 836-837.

15. The law is clear, therefore, that this Court’s broad, equitable powers authorize the use of summary proceedings against a non-party to the receivership litigation if such proceedings (1) advance the government’s interest in judicial efficiency by reducing the time needed to resolve disputes, decreasing the costs of litigation, and preventing the dissipation of the receiver’s assets; (2) afford adequate notice; and (3) offer an opportunity to be heard, which in the Fifth Circuit entails (a) the opportunity to present evidence on disputed facts and (b) the ability to make legal arguments on those facts. The show cause proceeding proposed by the Receiver meets all of these criteria.

16. First, there is a need for efficient resolution of multiple defaulted loans. If the Receiver is required to go through the formalities of independent lawsuits against each defaulting borrower and guarantor, including filing a formal complaint and issuing and serving summonses, entering into a scheduling order and obtaining a formal trial setting on the Court’s calendar, there will be an unnecessary expenditure of the ultimate dollars to be reimbursed to the victims of this fraud and these proceedings will consume a year or more of time delaying the Receiver’s ability

to close this case. In some cases, the third parties are pro-se and that fact alone will delay the proceedings even more.<sup>8</sup>

17. Second, the Respondents in the matter currently pending before the Court clearly had sufficient notice. Richard Gassaway appeared, asked questions and presented an explanation of his position. The order for show cause hearing will offer additional notice and the show cause hearing itself will offer more than sufficient opportunity for the Respondents to present evidence and legal argument.

18. For these reasons, the Court should proceed with the show cause hearing.

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

/s/ Steven A. Harr \_\_\_\_\_

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ATTORNEY'S FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via electronic filing and first class mail on this 28th day of March, 2012, as follows:

Timothy S. McCole  
Securities and Exchange Commission  
Fort Worth District Office  
Burnett Plaza, Suite 1900  
801 Cherry Street, Unit #18  
Fort Worth, Texas 76102

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<sup>8</sup>In the instant case, Mr. Gassaway has not returned follow up calls regarding this matter since the initial hearing.

I hereby certify that a true and correct copy of the foregoing document has been served on the following via certified mail, return receipt requested, and first class mail on this 28th day of March, 2012, as follows:

Richard C. Gasaway  
Gasaway Properties, LP  
309 Hunters Lane  
Friendswood, Texas 77546

/s/Christopher D. DeMeo  
Christopher D. DeMeo

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