

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY FILED IN DISTRICT COURT  
STATE OF OKLAHOMA OKLAHOMA COUNTY**

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, Administrator, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Seabrooke Investments LLC, *et al.*, )  
 )  
 Defendants. )

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 TIM RHODES  
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Case No. CJ-2014-4515

**OKLAHOMA DEPARTMENT OF SECURITIES' RESPONSE TO OBJECTION  
 OF ADVANCE RESTAURANT FINANCE N/K/A ARF FINANCIAL, LLC  
 TO RECEIVER'S REPORT ON CLAIMS AND RECOMMENDATION  
 FOR CLASSIFICATION OF SAME**

The Oklahoma Department of Securities (Department), *ex rel.* Irving L. Faught, Administrator, respectfully submits this response to Advance Restaurant Finance n/k/a ARF Financial LLC's Objection to Receiver's Report on Claims and Recommendation for Classification of Same (ARF Objection).

**BACKGROUND**

On August 11, 2014, the Department filed a verified *Petition for Permanent Injunction and Other Relief* (Petition) against the Defendants Seabrooke Investments LLC, Seabrooke Realty LLC, Oakbrooke Homes LLC, Bricktown Capital LLC, KAT Properties LLC, Cherry Hill LLC, Tom W. Seabrooke, and Judith Karyn Seabrooke (Defendants) pursuant to the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§1-101 through 1-701 (2011). On August 11, 2014, this Court appointed Ryan Leonard as Receiver (Receiver) for Defendants and the assets of the Defendants. Defendants have agreed to pay, and the Court has ordered the payment of, restitution to investors as determined by this Court. Defendants have waived any rights to the assets, properties, and funds of the receivership estate.

Since his appointment, the Receiver has liquidated the assets of the Defendants pursuant to orders of this Court. On January 22, 2015, this Court ordered a claims process to be established whereby proofs of claim could be filed by potential creditors and/or claimants (Claimants) of the receivership estate. Advance Restaurant Finance n/k/a ARF Financial LLC's (ARF) filed a timely claim with the Receiver asserting that \$251,437.85 is due pursuant to a Merchant Agreement with Defendant Bricktown Capital, LLC (Bricktown Capital) dated May 29, 2013 (Merchant Agreement).

On December 22, 2015, the Receiver filed Receiver's Report on Claims and Recommendation for Classification of Same (Report and Recommendation). In the Report and Recommendation, the Receiver made recommendations for the distribution of the assets of the receivership estate. The Receiver recommended that ARF not receive a disbursement from the receivership estate and ARF filed the ARF Objection.

## **AUTHORITIES AND ARGUMENT**

### **I.**

#### **The Receiver and the Department Have Been Released and Indemnified From All Debts and Obligations of Bricktown Capital and the Bricktown Hotel**

Bricktown Capital and the Bricktown Hotel and Convention Center (Bricktown Hotel) were originally subject to the receivership and the asset freeze. However, Bricktown Capital and the Bricktown Hotel sought a release from the receivership and the asset freeze in order to engage in efforts to sell the Bricktown Hotel. The release was granted on September 9, 2014, by order of this Court (Modification Order). At the time of the Modification Order, the Receiver had reported to the Court that the Bricktown Hotel had been operating at a deficit for over a year. The Department and the Receiver also reported to the Court that they believed the current value

of the Bricktown Hotel was less than the value of the Bricktown Hotel's existing mortgages. The Modification Order included the following language in releasing the Bricktown Hotel:

“IT IS FURTHER ORDERED that the Receiver and the Plaintiff be released and indemnified from and against all liability and loss for any debts or obligations, acts or omissions, of whatever nature of Bricktown Capital LLC and the Bricktown Hotel.”

On December 23, 2014, the Bricktown Hotel was sold and all debts secured thereby would arguably have been resolved at the sale and closing.

In lodging a claim with the Receiver, ARF is not asserting it is a creditor with a secured debt. ARF made no filing with a governmental entity to secure any amounts due under the Merchant Agreement. ARF claims it is a creditor of the receivership according to the terms of the Merchant Agreement. However, the Merchant Agreement granted ARF “a continuing first priority security interest” in all of Bricktown Capital's personal property, including deposit accounts, goods, equipment, fixtures, inventory, etc. Bricktown Capital's personal property stayed with the Bricktown Hotel and not the receivership. Any claim against Bricktown Capital and the Bricktown Hotel arising from the Merchant Agreement between ARF and Bricktown Capital should have been properly asserted by ARF against Bricktown Capital and the Bricktown Hotel. There is nothing in the Merchant Agreement that would entitle ARF to any receivership asset or any preference or priority over another Claimant.

Apparently, ARF did gain partial resolution of the debt with Bricktown Capital under the Merchant Agreement because ARF characterizes in its claim a \$50,000 lump sum payment it received in December, 2014, on the Merchant Agreement as a “bad debt payment.” Neither the Receiver nor the Department was a party to that settlement as the Bricktown Hotel and its debts had been removed from the receivership. ARF cannot now lay claim to the assets of the

receivership for a deficiency under the Merchant Agreement that is unrelated to the assets of the receivership. ARF is not a creditor of the receivership.

## II.

### **Court Has Broad Equitable Discretion to Determine Appropriate Relief in Equity Receivership**

Section 1-603 of the Act authorizes a district court, in a case involving a violation of the Act, to issue a permanent or temporary injunction, restraining order, or declaratory judgment, and to order appropriate or ancillary relief including, but not limited to, an asset freeze, appointment of a receiver, and order of restitution or disgorgement. In *State ex rel. Day v. Sw. Mineral Energy, Inc.*, 1980 OK 188, 617 P.2d 1334, 1338, the Oklahoma Supreme Court reviewed a case brought by the Department wherein the defendants, both individual and corporate, were alleged to have engaged in violations of the registration and anti-fraud provisions of the Act. The Court stated that Oklahoma districts courts have equitable powers in actions brought under the Act and, “[o]nce the equity jurisdiction of the District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies.” *Id.* at 1338. Section 1-608(A) of the Act promotes the goal of state and federal uniformity, and the Oklahoma Supreme Court has acknowledged that the judicial interpretation of the federal securities acts, upon which Oklahoma’s securities laws are modeled, is properly considered in the interpretation of similar state securities provisions. *Id.* at 1339-40.

One principle that has been consistently recognized in state and federal securities cases is that districts courts have “broad powers and wide discretion to determine the appropriate relief in an equity receivership,” *SEC v. Elliott*, 953 F.2d 1560, 1566 (11<sup>th</sup> Cir. 1992), and to craft remedies for securities violations. *Official Comm. of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006), *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). According to

the United States Supreme Court, in shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973). Within that broad authority is the power to approve a plan of distribution proposed by a receiver. *See SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 82–83 (2d Cir. 2002) (affirming approval of distribution plan as “within the equitable discretion of the District Court”).

ARF argues that its claim is entitled to a priority or be equally placed with “equity investors.” However, ARF misplaces the basis of its objection by relying on the authority of bankruptcy and insolvency laws and bankruptcy code priorities. ARF fails to recognize that this Court is determining the allocation of assets in an equity receivership, not a bankruptcy or insolvency proceeding. Bankruptcy code priorities do not apply to a court’s equity receivership distribution decisions. *Quilling v. TradePartners, Inc.*, No. 1:03–CV–0236, 2006 WL 3694629 (W.D.Mich. Dec. 14, 2006). It has been clearly established and distinguished that this Court has the authority to allocate assets in an equity receivership and to approve any distribution plan provided it is fair and reasonable. *Wang* 944 F.2d. at 85, *Worldcom* 467 F.3d at 84. “[I]n fashioning relief in an equity receivership, a district court has discretion to summarily reject formalistic arguments that would otherwise be available in a traditional lawsuit.” *Broadbent v. Advantage Software, Inc.*, 415 Fed.App’x. 73, 78 (10<sup>th</sup> Cir. 2011). Remedies to which claimants may be entitled under other laws may be suspended if such a measure is consistent with treating all claimants fairly. *SEC v. Credit Bancorp, Ltd.*, 2000 WL 1752979 at \*28 (S.D.N.Y November 29, 2000).

There is no basis for a priority to be given to ARF. A district court that is charged with distributing a limited fund in equity may properly refuse to give priority to one class of claimant over another, even if the law elsewhere recognizes such a priority. *See SEC v. Forex Asset Mgmt.*

*LLC*, 242 F.3d 325, 331 (5th Cir. 2001). In *SEC v. HKW Trading LLC*, No. 8:05-CV-1076-T-24-TB, 2009 WL 2499146, at \*3 (M.D. Fla. Aug. 14, 2009), the court found that “[p]ayment to claimants whose property was unlawfully taken from them is given a higher priority than payment to general creditors,” citing Ralph Ewing Clark’s *Treatise on the Law and Practice of Receivers*, 3d ed. (1959).

ARF also argues that the Receiver “intends to completely ignore an entire class of claimants in favor of equity investors.” To the contrary, the Receiver has systematically evaluated each claim submitted and made an individual recommendation for each Claimant, including the recommendation to exclude ARF’s claim. In finding that careful consideration had been given to the difficult job of deciding to exclude injured Claimants from the apportioning of limited funds, the *Worldcom* Court observed, “when funds are limited, hard choices must be made.” *Worldcom* 467 F.3d at 84.

ARF also suggests that if not given a priority over equity investors, all claims should be treated equally. There has been no finding that ARF is similarly situated to any other Claimant and there is no basis for designating a class to which ARF could belong. ARF, as a commercial Claimant, certainly does not belong in the Claimant class of Seabrooke investors.

The court in *SEC v. Byers*, 637 F. Supp. 2d 166, 180 (S.D.N.Y. 2009), in making a determination whether parties are similarly situated, stated, “their circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances.” (citing *Lizardo v. Denny’s Inc.*, 270 F.3d 94, 101 (2d Cir. 2001)). The court in *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001), held that “similarly situated” does not mean “identical”, but rather similar “in all material respects.” It is simple in this set of facts to distinguish ARF from other Claimants. ARF is the only merchant lender Claimant. ARF has received \$328,752.34 of the \$387,488.88 loaned to Bricktown Capital. No similarity exists between ARF and individual

Claimants who were solicited to invest money with the Defendants with no protection as to a return on their investments. No preference or priority can apply to the ARF claim. The Receiver's Recommendation and Report should be adopted and ARF's claim denied.

### III.

#### **Equity Supports the Exclusion of ARF's Claim Seeking Additional Funds**

In its claim, ARF concedes the Receiver's financial analysis. In summary, ARF advanced \$387,488.88 to Bricktown Capital and received \$328,752.34 from Bricktown Capital and Bricktown Hotel, a recovery of eighty four percent (84%) of the money ARF advanced.

ARF now claims that it is owed \$251,437.85 arising from its Merchant Agreement. Clearly, this claim is cumulative of principal, interest, and fees. Here, where the Receiver has inadequate funds to pay all claims, the Court must make an equitable determination to allow or disallow any part of a claim no matter how deserving a Claimant may be. If there are limited funds to distribute, the Court must apply the fair and reasonable test to each dollar sought.

In *Byers* 637 F. Supp. 2d at 183, the court adopted the *Worldcom* conclusion that it was fair and reasonable that limited funds available for distribution not be directed to those claimants who have already recovered more money than those who have recovered much less, if anything. The *Byers* court also found it fair and reasonable to allow no deficiency to be paid, even to secured creditors. *Id.* The court found it to be inequitable to allow a distribution to those who had already received a greater percentage of their claim than the other claimants. *Id.* Similarly here, equity will not support any additional payment to ARF that would unjustly diminish the recovery of the innocent investors.

Considering that ARF has already received back 84% of the funds loaned to Bricktown Capital, the grant of a further distribution would be at the expense of investor Claimants who have recovered little or nothing at all. Because ARF has already received proportionately much

more from Defendants than investor Claimants, it would be inequitable for them to receive additional monies. *Worldcom* 467 F.3d at 84, *Byers* 637 F. Supp. 2d at 183. The most grievously injured Claimants should receive the greatest share of the remaining funds in the receivership estate. *Worldcom* at 84, citing *SEC v. Certain Unknown Purchasers of the Common Stock of & Call Options for the Common Stock of Santa Fe International Corp.*, 817 F.2d 1018, 1020-1021 (2d Cir.1987).

### CONCLUSION

In light of the facts presented and authorities cited herein, and the absence of authority to support the ARF Objection, the Department respectfully requests that the ARF Objection be dismissed.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES  
Irving L. Faught, Administrator

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of February, 2016, a true and correct copy of the above and foregoing was emailed to the following:

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