

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

FEB 10 2016
TIM RHODES
COURT CLERK
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Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
 Plaintiff,)
)
 v.)
)
 Seabrooke Investments, LLC, an Oklahoma)
 limited liability company;)
 Seabrooke Realty LLC, an Oklahoma)
 limited liability company;)
 Oakbrooke Homes LLC, an Oklahoma)
 limited liability company;)
 Bricktown Capital LLC, an Oklahoma)
 limited liability company;)
 KAT Properties, LLC, an Oklahoma)
 limited liability company;)
 Cherry Hill LLC, an Oklahoma limited liability)
 Company doing business as Cherry Hill Apartments;)
 Tom W. Seabrooke, individually and as trustee of)
 Tom Seabrooke 2007 Revocable Trust and J.)
 Karyn Seabrooke 2007 Revocable Trust; and)
 Judith Karyn Seabrooke, individually and as trustee)
 of Tom Seabrooke 2007 Revocable Trust and)
 J. Karyn Seabrooke 2007 Revocable Trust,)
)
 Defendants.)

Case No. CJ-2014-4515

**RECEIVER’S 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**

COMES NOW the Receiver, Ryan Leonard (“Receiver”) and responds to the objection of Advance Restaurant Finance n/k/a ARF Financial, LLC, a California limited liability company (“Advance”) to the Receiver’s Report on Claims and Recommendation for Classification of Same (“Receiver’s Report”), as follows:

INTRODUCTION

Through its objection, Advance opposes the Receiver's recommendation to deny its claim arising from a commercial "Merchant Agreement" with Bricktown Capital, LLC ("Bricktown Capital") originated on April 29, 2013, pursuant to which monies were lent for the operation of the Bricktown Hotel.¹ The Merchant Agreement states that Mission Valley Bank obtained a "continuing first priority security interest" in all of Bricktown Capital's personal property, including deposit accounts, "Goods, Equipment, Fixtures, Inventory," etc., but a review of filings reflects that Mission Valley Bank never perfected its security interest by filing a UCC-1. Regardless of its unperfected security interest, Advance's objection fails for at least three reasons, including: (1) on September 9, 2014, this Court entered an Order that released Bricktown Capital and the Bricktown Hotel from the receivership and released and indemnified the Receiver and Plaintiff from all liabilities, debts or obligations of Bricktown Capital and the hotel, thereby precluding any recovery by Advance from the receivership estate; (2) this Court has broad authority sitting in equity to fashion appropriate remedies under the Oklahoma Securities Act, including to determine how and to whom monies are distributed, and; (3) the commercial Merchant Agreement upon which Advance rests its claim is not considered an investment in a "security," and accordingly not subject to the protections of the securities laws through these receivership proceedings. As a result, the Receiver recommends that Advance's claim be denied.

¹ A total of \$387,488.88 was loaned to Bricktown Capital by Advance's predecessor-in-interest, Mission Valley Bank, and \$328,752.34 was repaid by Bricktown Capital on the loan, for a net loss (on principal) of \$58,736.54. Rights to collect under the Merchant Agreement were assigned by Mission Valley Bank to Advance on September 3, 2014.

ARGUMENTS AND AUTHORITIES

I. ADVANCE SHOULD NOT BE CLASSIFIED AS A CREDITOR OF THIS RECEIVERSHIP ESTATE.

- 1. Bricktown Capital and the Bricktown Hotel were released from the Receivership pursuant to this Court's Order of September 9, 2014, and Advance may not recover from the Receivership Estate.**

On September 9, 2014, this Court ordered:

“[The Temporary Injunction is modified] by releasing Bricktown Capital LLC from the asset freeze and receivership and by releasing the Bricktown Hotel from the asset freeze and receivership, with it also being agreed that the Receiver and the Plaintiff shall 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.”

(Order of September 9, 2014, attached as Exhibit 1).²

The language of the Court's Order is unambiguous. Following the Order, the Receiver had no further authority over Bricktown Capital or the Bricktown Hotel, and was released and indemnified against all liabilities, debts or obligations of Bricktown Capital and the hotel. Further, the Receiver was not a party to the sale of the hotel by Bricktown Capital on December 19, 2014, and had no authority over or involvement in the payment of creditors, secured or unsecured, from the proceeds of the sale. As a result of Bricktown Capital and the Bricktown Hotel being released from the receivership, and the Receiver and Plaintiff being released and indemnified against all liabilities, debts or

² The Order further provides that “if the Bricktown Hotel is sold for an amount greater than the amounts owed on valid mortgages..the remaining funds will be used to pay, on a pro rata basis, investor restitution[.]” (emphasis added). A similar provision is made for future proceeds, if any, received from “insurance litigation or settlement” relating to any claim from damages to the Bricktown Hotel in 2013.

obligations of Bricktown Capital and the hotel, Advance, as an unsecured commercial creditor, is not entitled to recover from this receivership estate.

2. Moreover, this Court, sitting in equity, has broad authority and jurisdiction to fashion appropriate remedies under the Oklahoma Securities Act, including authority to determine how and to whom to distribute the available money.

“[T]he District Courts of Oklahoma are empowered to do equity in actions brought under the Oklahoma Securities Act [71 O.S. §1-101 *et seq.*]” *State of Oklahoma ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, 1338. “Once the equity jurisdiction of the District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies.” *Id.*; *see also S.E.C. v. Byers*, 637 F.Supp.2d 166, 174 (“Court has broad authority to craft remedies for violations of the federal securities laws.”); *S.E.C. v. Forex Asset Mgmt.*, 242 F.3d 325, 331 (5th Cir. 2001)(district court in securities fraud case “vested with broad discretionary power” to determine equitable remedy).³ This power includes the authority to distribute profits disgorged from defendants, and “it remains within the court’s discretion to determine how and to whom the money will be distributed[.]” *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir. 1997); *see also S.E.C. v. Byers*, 637 F.Supp.2d 166, 174 *citing S.E.C. v. Wang*, 944 F.2d 80, 81 (2nd Cir. 1991)(“Court has the authority to approve any plan provided it is ‘fair and reasonable.’”). “So long as the district court is satisfied that ‘in

³ “[T]he Oklahoma Supreme Court has stated that the interpretive history of the federal securities acts, upon which Oklahoma securities laws are modeled, is properly considered in the interpretation of similar state securities provisions.” *Oklahoma Dep’t of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶8, 231 P.3d 645, 651; *see also Citizens State Bank v. FDIC*, 639 F.Supp. 758, 761 (W.D.Okla. 1986)(“71 O.S. §501 of the Oklahoma Securities Act mandates the construction of this Uniform Act as so to ‘coordinate the interpretation and administration of this Act with the related federal regulation.’”)

the aggregate, the plan is equitable and reasonable,' the SEC [and in this case, the Oklahoma Department of Securities] may engage in the 'kind of line-drawing [that] inevitably leaves out some potential claimants.'" *Official Committee of Unsecured Creditors of Worldcom, Inc. v. S.E.C.*, 467 F.3d 73, 83 (2nd Cir. 2006) quoting *S.E.C. v. Wang*, 944 F.2d 80 at 88.

In response to Advance's argument that this Court should be bound by bankruptcy authority in determining its distribution plan, a bankruptcy proceeding is not analogous to these proceedings. As the Court held in *S.E.C. v. Byers*, 637 F. Supp.2d at 176, *supra*, a "bankruptcy court would have less flexibility in determining the most equitable approach to distribute assets to victims. The overriding goal of these proceedings should be fairness to the defrauded investors[.]"⁴ "There are no hard rules governing a district court's decisions in matters like these. The standard is whether a distribution is equitable and fair in the eyes of a reasonable judge." *S.E.C. v. Enter. Trust Co.*, 2008 WL 4534154, at *3 (N.D.Ill. Oct. 7, 2008).

Accordingly, this Court, sitting in equity in a securities fraud action, is not bound by the rigidities of the bankruptcy code. The purpose of these proceedings is to compensate victims of the alleged securities fraud of certain defendants. Indeed, it could even be argued that Advance's predecessor-in-interest, Mission Valley Bank, was one of the primary beneficiaries of the investments raised by defendants, as the bank received a return of nearly 85% of its principal from an otherwise unprofitable hotel operation,

⁴ "A reading of the Oklahoma Securities Act makes it clear that one of its purposes is to protect the uninformed from manipulative and deceptive practices when dealing in securities." *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, 1338.

presumably much of which was raised by Bricktown Capital from “investors” and paid to the bank. Advance’s argument that this Court should be bound by the provisions of the bankruptcy code is inconsistent with the legal authority and purpose of these proceedings, and would achieve an inequitable result. It should therefore be rejected.

3. Finally, the commercial “Merchant Agreement” between Advance, as successor-in-interest to Mission Valley Bank, and Bricktown Capital is not considered an investment in a “security” and, consequently, not subject to the protections of the securities laws applicable here.

“[The] purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called.” *Reeves v. Ernst & Young*, 494 U.S. 56, 61 (1990)(emphasis in original). “While common stock is the quintessence of a security[,] and investors therefore justifiably assume that a sale of stock is covered by the Securities Acts, the same simply cannot be said of notes, which are used in a variety of settings, not all of which involve investments.” *Id.* at 62. “[T]ypes of notes that are not ‘securities’ include ‘the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets...short-term notes secured by an assignment of accounts receivable...[and] notes evidencing loans by commercial banks for current operations.” *Id.* at 65 (emphasis added). In addition to the types of notes specifically identified that are not “securities,” the United States Supreme Court in *Reeves* enumerated several factors to consider in deciding whether a transaction involves a “security,” including:

“[i]f the seller’s purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested

primarily in the profit the note is expected to generate, the instrument is likely to be a “security.” However, “[i]f the note is exchanged...to advance some other commercial or consumer purpose...the note is less sensibly described as a ‘security.’” *Id.* at 66.

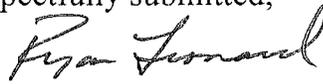
If a note is not a security, it is not subject to the protections of the securities laws. *See U.S. S.E.C. v. Zada*, 787F.3d 375, 381 (6th Cir. 2015)(“If the notes that [defendant] gave investors were not securities, then they ‘would escape federal regulation entirely.’”)

Here, there can be no dispute that the “Merchant Agreement” upon which Advance’s claim rests is a “commercial” loan, and not a “security.”⁵ The instrument was a short-term (78 weeks) loan to “[TO] BE USED SOLELY FOR THE BUSINESS PURPOSES OF THE ESTABLISHMENT AND NOT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES[,]” and was purportedly secured by “all of Merchant’s...personal property [] including...all of Merchant’s Accounts...Deposit Accounts; Documents; General Intangibles, Goods, Equipment, Inventory, Fixtures, Instruments, Money, Supporting Obligations[, etc.]” Such an instrument is precisely the type of note that is not a “security” under *Reeves v. Ernst & Young, supra*. As a result, Advance’s remedy is not against the Receiver through these proceedings, but rather against Bricktown Capital or its guarantors in another forum.

WHEREFORE, for the reasons stated herein and in the Receiver’s Report, the Receiver respectfully moves that the recommendation in the Report be adopted, and Advance’s claim denied.

⁵ Indeed, Advance’s own proof of claim submitted to the Receiver describes its claim as a “[c]ommercial loan[.]”

Respectfully submitted,



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RECEIVER

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of February, 2016, a copy of this pleading was served via First Class Mail, postage prepaid, to the following counsel of record:

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Ryan Leonard

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

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
 Plaintiff,)

v.)

Case No. CJ-2014-4515

Seabrooke Investments LLC, an Oklahoma)
 limited liability company;)
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 Defendants.)

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ORDER MODIFYING RELIEF

On August 11, 2014, the Oklahoma Department of Securities (“Department”), *ex rel.* Irving L. Faught, Administrator, filed a verified *Petition for Permanent Injunction and Other Relief* against the named 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, the Department filed the *Application for Temporary Restraining Order, Order Freezing Assets, Order Appointing Receiver, Order for Accounting and Temporary Injunction* pursuant to the Act.

On August 11, 2014, this Court entered the *Temporary Restraining Order, Order Freezing Assets, Order Appointing Receiver, Order for Accounting and Temporary Injunction*.

On September 5, 2014 entered the *Temporary Injunction and Ancillary Relief (Temporary Injunction)*.

A significant asset of the receivership is the Bricktown Hotel and Convention Center (Bricktown Hotel), an asset owned by Defendant Bricktown Capital LLC. Operation of the Bricktown Hotel has required substantial time of the Receiver and resulted in substantial expense to the receivership. The Receiver has determined that the Bricktown Hotel is operating at a deficit and has for at least a year. The amount due on the primary mortgage on the Bricktown Hotel is in excess of One Million Eight Hundred Thousand Dollars (\$1,800,000). The amount due on the secondary mortgage on the Bricktown Hotel is approximately Three Hundred Fifty Thousand Dollars (\$350,000). The Department and the Receiver believe that the current value of the Bricktown Hotel is less than the value of the Bricktown Hotel's existing mortgages.

The parties wish to modify the Temporary Injunction by releasing Bricktown Capital LLC from the asset freeze and receivership and by releasing the Bricktown Hotel from the asset freeze and receivership, with it also being agreed that the Receiver and the Plaintiff shall 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. All other provisions of the Temporary Injunction shall remain in effect.

IT IS HEREBY ORDERED that Bricktown Capital LLC be released from the receivership and the asset freeze herein effective immediately.

IT IS FURTHER ORDERED that monies in the following bank accounts of Bricktown Capital LLC, be allocated as follows:

(1) \$42,214.23 from the Bank of the West account number xxx-xx0749 and \$1,822.49 from the Bank of the West account number xxx-xx5268 shall be released to Bricktown Capital LLC; and

(2) \$34,500.94 from the Bank of the West account number xxx-xx9583 and \$9,575.75 from the Bank of the West account number xxx-xx0749 shall remain in the full custody and control of the Receiver and shall be transferred immediately by Bank of the West to an account in the name of the Receiver.

IT IS FURTHER ORDERED that the asset known as the Bricktown Hotel be released from the asset freeze and the receivership herein effective immediately.

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.

IT IS FURTHER ORDERED that if the Bricktown Hotel is sold for an amount greater than the amounts owed on valid mortgages existing as of the date of this order, the remaining funds will be used to pay, on a pro rata basis, investor restitution owed by Defendants as determined by this Court.

IT IS FURTHER ORDERED that if Bricktown Capital LLC or Bricktown Hotel receives proceeds from insurance litigation or settlement relating to any claim from damages to the Bricktown Hotel that occurred in 2013, in an amount greater than the amounts owed on valid

mortgages existing as of the date of this order and the amount necessary to repair the damages sustained from the 2013 incident, the remaining funds will be used to pay, on a pro rata basis, investor restitution owed by Defendants as determined by this Court.

IT IS FURTHER ORDERED that all other provisions of the Temporary Injunction shall remain in effect.

THIS ORDER IS ENTERED this 9th day of September, 2014.

PATRICIA G. PARRISH

DISTRICT COURT JUDGE

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IN DISTRICT COURT

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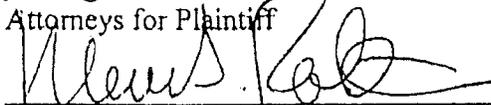
TIM RHODES Court Clerk
Oklahoma County

Tim Rhodes

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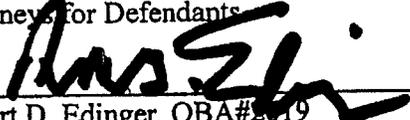
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