

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO.: 20-cv-81205-RAR**

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS  
GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.

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**DEFENDANT LISA MCELHONE'S OPPOSITION TO THE RECEIVER'S  
MOTION TO LIFT THE LITIGATION STAY**

Defendant Lisa McElhone submits this opposition to the Receiver's motion (ECF No. 557) for leave to litigate a fraudulent conveyance action against her and various third parties. The motion should be denied for a number of reasons. For one thing, no Receivership Entity has since November 2019 possessed an enforceable interest in the property that would be the subject of the contemplated action. For another, the sheer number of unresolved issues in this case – including, but by no means limited to, Defendants' motion to dismiss (ECF No. 363) and an appeal from this Court's December 2020 expansion order – counsel against permitting the Receiver to embark on an ambitious – and costly – new project at this time. Finally, the Receiver's motion utterly fails to articulate a plausible fraudulent conveyance claim.

## THE RECEIVER'S ALLEGATIONS

Concealed within the Receiver's gratuitously long submission is a relatively straightforward fact pattern. The allegations relevant to the proposed fraudulent conveyance action are as follows:

1. In April 2019, Par Funding purchased \$6.5m of Kingdom Logistics' future receipts for \$4.6m in cash. As security for this obligation, Kingdom Logistics conveyed the surface rights in a tract of land located at 4309 Old Decatur Road, Texas ("Texas Property"), to a Par affiliate company, Liberty Eighth Avenue, LLC ("Liberty Eighth").

2. The companies agreed that the Texas Property would "automatic[ally]" revert to Kingdom Logistics if it satisfied the \$6.5m obligation to Par Funding by November 18, 2019. ECF No. 557 at ¶ 18. The mechanism for this reversion was set out in a document captioned "LEASE WITH PURCHASE OPTION AGREEMENT" ("Option Agreement"). ECF No. 557-3. Under that Agreement, Kingdom's satisfaction of the \$6.5m obligation – which the Option Agreement characterized as "Rent" – constituted the exercise of an "Option" to "[p]urchase" the Texas Property. *Id.* at §§ 3-4. The relevant language was as follows:

4. Purchase Option.

a. In the event that [Kingdom] exercises the Purchase Option, [Liberty Eighth] will transfer title to the [the Texas Property] to [Kingdom] by qui[t] claim deed, without any representation or warranties, and in the same AS-IS and WITH ALL FAULTS conditions as set out in Section 2(b) of this [Option Agreement].

.....

c. In the event that [Kingdom] pays all of the Rent set out in this [Option Agreement] by November 18, 2019 (the “Options Period”), and is not in default under this Lease, Tenant *will be considered to have exercised its Purchase Option*.

*Id.* (emphasis supplied).

3. Kingdom Logistics made all required payments to Par Funding by November 18, 2019. As such, it “exercised its Purchase Option” (*id.*), re-acquiring the Texas Property that served as collateral for its \$6.5m obligation to Par Funding.

4. On September 30, 2020, Liberty Eighth delivered a deed memorializing the restoration of Kingdom’s rights in the Texas Property under the terms of the Option Agreement.

5. On October 22, 2020, Kingdom Logistics “transferred” the Texas Property to another MCA company through an entity called “DEF Capital.” *Id.* at ¶ 66-68.

### **ARGUMENT**

The “three factors [] consider[ed] in deciding whether to lift a receivership stay” are as follows:

(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party’s underlying claim.

*S.E.C. v. Universal Financial*, 760 F.2d 1034, 1037-38 (9th Cir. 1985). In this case, each of these factors weighs against the Receiver's motion.

## **I. THE LITIGATION INJUNCTION GENUINELY MAINTAINS THE STATUS QUO**

There is no serious dispute that Kingdom, under the terms of the Option Agreement, re-gained its ownership interest in the Texas Property long before the Receivership's inception. The Receiver appears to acknowledge as much in its submission, recognizing that in "November 2019, ¶ the Decatur Road property was transferred [back] to Kingdom Logistics." ECF No. 557 at ¶ 22; *see also id.* at ¶ 26 (claiming that the "Receivership team was not aware of the transfer of the Property in August and September 2020"). There is, moreover, no claim that the Option Agreement – which was executed over a year before the SEC commenced this action – anticipated the Receivership's advent. Maintaining the litigation injunction with respect to the transactions between Liberty Eighth and Kingdom, then, is consistent with "the preservation of the status quo" as it existed before the Receivership. *Universal Financial*, 760 F.2d at 1038.

The Receiver's asserted concern – that the supposed "current owner" of the Texas Property, DEF Capital, "may further transfer the Property, thereby increasing the difficulty of the Receiver's fraudulent conveyance claims" (Motion at 19-20) – is, in the absence of a plausible basis for voiding both the transfer from Liberty Eighth to Kingdom and from Kingdom to DEF Capital, a *non sequitur*. The Receiver's allegation

that “DEF Capital purchased the [Texas] Property at below market consideration” and “DEF Capital or others associated with DEF Capital are likely [] involved in MCA operations” (Motion at ¶ 66), provides no such basis. If these claims are true, then DEF Capital acquired the Texas Property under the same circumstances as Liberty Eighth – i.e., as collateral for moneys it advanced to Kingdom. It would follow, then, that DEF Capital’s current interest in the property is every bit as strong as Liberty Eighth’s expired interest and the Receiver is precluded from maintaining a claim for fraudulent conveyance. With no viable claim, the possibility of a “further transfer” is irrelevant.

## **II. THE RECEIVER’S MOTION IS POORLY TIMED**

The proposed action’s merits (or lack thereof) notwithstanding, now is not the time for the Receiver to embark on new projects at great expense. For one thing, this Court has not yet decided Defendants’ Joint Motion to Dismiss (ECF No. 363), which propounds a serious challenge to the SEC’s authority to maintain the underlying enforcement action. Dismissal of the underlying action would, of course, bring the Receivership to a speedy and final conclusion.

Also pending is Ms. McElhone’s appeal from this Court’s December 16, 2020 expansion of the receivership to include (among other entities) Liberty Eighth. Once again, a victory for Ms. McElhone on this appeal would deprive the Receiver of authority to pursue a fraudulent conveyance claim on Liberty Eighth’s behalf.

Even if the existential questions posed by the dismissal motion and the appeal are put aside, we have not yet reached “the point in the course of the receivership” at which costly new litigation makes sense. *Universal Financial*, 760 F.2d at 1038. There has been no judgement on any of the SEC’s claims against Ms. McElhone. Nor is there yet a clear picture regarding the extent of the Defendants’ potential liability. *See* 5/3/2021 Status Report, ECF No. 577, at 13 (estimating, based on the current trial date, that a “claims and distribution process” could not begin before “sometime in 2022”). Given these uncertainties, the wisdom of permitting the Receiver to engage in new litigation of any kind is questionable. The highly speculative nature of the proposed action magnifies these concerns.

### **III. THE RECEIVER’S MOTION FALLS WELL SHORT OF ARTICULATING COLORABLE CLAIMS OF FRAUDULENT CONVEYANCE**

The Receiver devotes approximately six lines of his 20-page writing to the merits of the proposed fraudulent conveyance action. Devoid of analysis or legal authority, this exceedingly brief discussion consists of a trio of conclusory statements that purportedly “support[ a] claim for fraudulent transfer.” Motion at 20. The Receiver declares:

1. “Liberty Eighth, Kingdom Logistics, DEF Capital and McElhone. . . . transferred the Property to avoid its imminent inclusion into the Receivership Estate;”

2. Liberty Eighth “transferred the Property to an insider for no real consideration;” and
3. Kingdom “then transferred the Property for below market consideration.”

*Id.* Not one of these statements withstands even the most casual scrutiny.

The first statement – which deals with the “parties” supposed intent to avoid the Texas Property’s inclusion in the Receivership Estate – finds contradiction in the Receiver’s own allegations. As the Receiver himself notes, the April 2019 “Option Agreement” included an “automatic right of repurchase.” Motion ¶ 18. Under the plain language of that provision, Kingdom’s rights in the Texas Property were automatically restored if it satisfied its \$6.5 million obligation to Par Funding by November 2019. The Receiver does not dispute that Kingdom met this condition. As such, the Texas Property could not have been included in the Receivership Estate.

On September 30, 2020, counsel for Kingdom Logistics contacted counsel for Ms. McElhone, providing a copy of the Option Agreement and demanding that Liberty Eighth execute a deed formalizing the transfer of the collateral back to Kingdom.<sup>1</sup> The lawyer wrote:

As I believe you are aware, your client, Liberty Eighth Avenue, LLC, entered into a lease agreement with Kingdom Logistics, LLC. A copy of this lease is attached.

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<sup>1</sup> A copy of this email is attached as an exhibit to this memorandum.

The lease contained a purchase option for leased property that [] was deemed exercised by Kingdom on November 18, 2019[,] when Kingdom completed its rent payments under the lease. At that time, Liberty Eighth should have transferred the subject property to Kingdom. We recently discovered, however, that the property was not transferred and title remains in your client's name. Attached is a Special Warranty Deed ("SWD") effecting the transfer that should have occurred last year.

We request that your client execute the SWD as soon as possible and return it via both scan (to this email address) and overnight delivery to my attention at the address below. We are currently in the process of a financing transaction and the subject property constitutes part of the collateral for this financing. Consequently, timing is of the utmost importance.

Consistent with this demand, Ms. McElhone's delivered the deed for the Property to Kingdom Logistics. This step – which was required by the terms of the Option Agreement – was nothing more than a mere formality.

The Receiver presents no evidence that even hints at a causal relationship between the Receivership and the Texas Property's conveyance from Kingdom to DEF Capital. To the contrary, the facts provided in the Receiver's motion suggest that Kingdom is once again using the property as collateral to secure cash funding from a Merchant Cash Advance company. *See* Motion ¶ 66 (observing that "DEF Capital or others associated with DEF Capital are . . . involved in MCA operations").<sup>2</sup> The

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<sup>2</sup> This inference is entirely consistent with the above-quoted email from Kingdom Logistics' counsel, which explained that "[Kingdom was] currently in the process of a



Receiver has provided no basis to distinguish the October 2020 transaction between Kingdom and DEF from the April 2019 transaction between Kingdom and Liberty Eighth. It follows that the Receiver's challenge to the Kingdom-DEF transaction would only undermine Liberty Eighth's interest in the Property, precluding the Receiver's claim.

The Receiver's statement that Liberty Eighth "transferred the property to an insider for no real consideration" refers, presumably, to the Receiver's claim that Kingdom "simply recycled a portion of Par Funding's own funds back to Par Funding." Motion at ¶ 62. Unless the Receiver has had an opportunity to examine Kingdom's books and records, this allegation should be dismissed as wholly unsubstantiated. It is also implausible, given the Receiver's assertion that the Texas Property has "an operational value . . . exceed[ing] \$26.2 [million]." Motion at 20 fn.3. Kingdom's ownership of such a valuable asset renders incredible the Receiver's suggestion that the company needed to "recycle[]" advances from Par. Evidently, Kingdom Logistics' business was real and substantial.<sup>3</sup>

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financing [a] transaction and the subject property constitutes part of the collateral for this financing."

<sup>3</sup> Needless to say, the Receiver's acceptance of the \$26.2 million valuation of the Texas Property is at odds with his previous representations concerning the purported "flaw[s]" in Par's underwriting process. ECF No. 305 at 3. If anything, Kingdom's obligation to Par was substantially over-collateralized.

The Receiver's third statement – a claim concerning the supposedly “below market” consideration that Kingdom received from DEF Capital – purposely misrepresents the point of the transaction. As noted above, the Receiver's own allegations – as well as the attached email from Kingdom's counsel – support an inference that Kingdom merely posted the Property as security for the financing it was to receive from DEF Capital or its affiliates. Given the apparent nature of the transaction – which should be familiar to the Receiver after months in the Merchant Cash Advance business – there is no basis for a claim of “below market consideration.” DEF Capital – like Liberty Eighth before it – merely received a contingent interest in the Property as collateral for a cash advance.

### **CONCLUSION**

For the foregoing reasons, the proposed fraudulent conveyance action will merely add additional legal fees to an already expensive Receivership. The motion should be denied.

Dated: New York, New York  
May 11, 2021

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 11, 2021, I caused the electronic filing of the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Michael F. Bachner

MICHAEL F. BACHNER

**EXHIBIT**

From: "Robert J. Johnston" <[robert.johnston@kingdom-legal.com](mailto:robert.johnston@kingdom-legal.com)>  
To: [asfuterfas@futerfaslaw.com](mailto:asfuterfas@futerfaslaw.com)  
Cc: "Magee, Jessica" <[Jessica.Magee@tklaw.com](mailto:Jessica.Magee@tklaw.com)>; "Anthony Zingarelli" <[anthonyemilzingarelli@gmail.com](mailto:anthonyemilzingarelli@gmail.com)>  
Sent: 9/30/2020 3:31:12 PM  
Subject: Liberty Eighth / Kingdom Logistics

Mr. Futerfas -

By way of introduction, I am General Counsel for Kingdom Logistics.

As I believe you are aware, your client, Liberty Eighth Avenue, LLC, entered into a lease agreement with Kingdom Logistics, LLC. A copy of this lease is attached.

The lease contained a purchase option for leased property that option was deemed exercised by Kingdom on November 18, 2019 when Kingdom completed its rent payments under the lease. At that time, Liberty Eighth should have transferred the subject property to Kingdom. We recently discovered, however, that the property was not transferred and title remains in your client's name. Attached is a Special Warranty Deed ("SWD") effecting the transfer that should have occurred last year.

We request that your client execute the SWD as soon as possible and return it via both scan (to this email address) and overnight delivery to my attention at the address below. We are currently in the process of a financing transaction and the subject property constitutes part of the collateral for this financing. Consequently, timing is of the utmost importance.

If you have any questions, please do not hesitate to call.

Best regards,  
Robert J. Johnston  
General Counsel

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