

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Civil Action No. 09-CV-506

WEALTH MANAGEMENT, LLC;
JAMES E. PUTMAN;
AND SIMONE FEVOLA,

Defendants, and

WML GRYPHON FUND, LLC;
WML WATCHSTONE PARTNERS, L.P.;
WML PANTERA PARTNERS, L.P.;
WML PALISADE PARTNERS, L.P.;
WML L-3, LLC;
WML QUETZAL PARTNERS, L.P.;

Relief Defendants

**OBJECTION OF THE BENDER CREDITORS TO THE RECEIVER'S
PROPOSED PLAN FOR THE ALLOCATION OF THE ASSETS OF
WEALTH MANAGEMENT LLC, WML GRYPHON FUND LLC, WML
PALISADE PARTNERS L.P. AND WML QUETZAL PARTNERS L.P.**

The Brian W. and Marianne P. Bender Joint Revocable Trust, Brian W. Bender IRA, and Brian W. Bender Personal Revocable Trust (collectively, "Bender"), by their attorneys, objects to the Receiver's Proposed Plan for the Allocation of the Assets of Wealth Management LLC, WML Gryphon Fund LLC, WML Palisade Partner's LP and WML Quetzal Partner LP ("Proposed Plan"), in accordance with the Court's September 11, 2009 Order. Bender objects to the Proposed Plan on the grounds that it does not distinguish between creditors and investors and unfairly discriminates against creditors by creating only one class of claimants, contrary to applicable equitable and legal principles. In support of Bender's objection, Bender respectfully states as follows:

BACKGROUND ON THE OBJECTORS

1. Brian W. and Marianne P. Bender Joint Revocable Trust (“Bender Joint Trust”) initially invested:

- (a) \$930,000¹ in WML Gryphon Fund LLC (“Gryphon”) and
- (b) \$100,000² in WML Quetzal Partners LP (“Quetzal”).

The last four digits of the account number for Bender Joint Trust was Account Number 9522. The Bender Joint Trust notified Gryphon and Quetzal, in writing, that Bender Joint Trust was withdrawing all funds invested in Gryphon and Quetzal, and those Funds recognized the withdrawal request effective December 31, 2007. Brian W. Bender Declaration (hereinafter “Bender Decl.”) ¶ 2.

2. Brian W. Bender IRA Rollover (“Bender IRA”) initially invested \$338,000³ in WML Palisade Partner LP Series A (“Palisade”). The last four digits of the Bender IRA account were 8266. Bender IRA notified Palisade that the Bender IRA was withdrawing all funds invested in Palisade, and this Fund recognized the withdrawal to be effective March 30, 2008. Bender Decl. ¶ 3.

3. Brian W. Bender Personal Revocable Trust (“Bender Personal Trust”) initially invested \$479,000⁴ in Gryphon. The last four account digits of the Bender Personal Trust are 6493. The Bender Personal Trust notified Gryphon, in writing, that Bender Personal Trust was withdrawing all funds invested in Gryphon, and the Fund recognized the withdrawal to be effective as of December 31, 2007. Bender Decl. ¶ 4.

¹ This is the initial investment only and does not include subsequent investments in the Fund.

² This is the initial investment only and does not include subsequent investments in the Fund.

³ This is the initial investment only and does not include subsequent investments in the Fund.

⁴ This is the initial investment only and does not include subsequent investments in the Fund.

APPLICABLE CONTRACT PROVISIONS

4. The Gryphon Confidential Offering Memorandum provides at page 23 that upon receiving notice of an investor's request to withdraw, the Managing Member of Gryphon has the *option* of placing the investor's pro rata share of the Gryphon Fund in a segregated portfolio and liquidate those securities for the withdrawing Member's Account. If that option is exercised, the withdrawing investor bears the risk of a downward fluctuation of value. Upon receipt of the Bender Joint Trust and Bender Personal Trust withdrawal request, the Managing Member elected to pay Bender by creating an account payable (referred to by Wealth Management as a "note payable"), fixing the amount due, and the Managing Member did not exercise its option to create a segregated portfolio. The Bender Personal Trust and Bender Joint Trust were prohibited from enjoying the benefits of future capital appreciation by being an investor in Gryphon (the Fund would benefit from any capital appreciation that occurred between the time securities were liquidated and funds paid), and Bender Joint Trust and Bender Personal Trust became a creditor to Gryphon for the value of the note/payable recorded. Bender Decl. ¶ 5 Ex. A.

5. The Palisade Confidential Offering Memorandum provides at page 24 that upon receiving notice of an investor's request to withdraw, the Managing Partner of Palisade has the *option* of placing the investor's pro rata share of the Palisade Fund in a segregated portfolio and liquidate those securities for the withdrawing investor's Account. If that option is exercised, the withdrawing investor bears the risk of a fluctuation of value. Upon receipt of the Bender IRA withdrawal request, the Managing Partner elected to pay the Bender IRA by creating an account payable (called a "note payable" by Wealth Management), fixing the amount due, and the Managing Partner did not exercise its option to create a segregated portfolio. The Bender IRA was prohibited from enjoying the benefits of future capital appreciation by being an investor in Palisade (the Fund would benefit from any capital appreciation that occurred between the time securities were liquidated and funds paid), and it became a creditor to Palisade for the value of the note/payable recorded. Bender Decl. ¶ 6 Ex. B.

6. The Quetzal Confidential Offering Memorandum provides at page 22 that upon receiving notice of an investor's request to withdraw, Quetzal Managing Partner has the *option* of placing the investor's pro rata share of the Quetzal Fund in a segregated portfolio and liquidate those securities for the withdrawing investor's Account. If that option is exercised, the withdrawing investor bears the risk of fluctuation of value. Upon receipt of the Bender Joint Trust withdrawal request, the Managing Partner elected to pay Bender by creating an account payable (called a "note payable" by Wealth Management), fixing the amount due, and the Managing Partner did not exercise its option to create a segregated portfolio. The Bender Joint Trust was prohibited from enjoying the benefits of future capital appreciation by being an investor in Quetzal (the Fund would benefit from any capital appreciation that occurred from the time securities were liquidated and paid), and it became a creditor to Quetzal for the value of the note/payable recorded. Bender Decl. ¶ 7 Ex. C.

7. Wealth Management confirmed in writing to Bender that they were no longer an investor in the funds as of the effective date of withdrawal, and K-1's issued to federal and state taxing authorities by Gryphon and Quetzal recognized that fact. When Bender requested tax information in 2008 to prepare estimated taxes, Bender was assured by Wealth Management:

"For you[r] taxable accounts you were out of the investments as of 12/31/07 so there is no taxable information to report." 5/28/08 e-mail from L Coonen to B Bender at 3:27 p.m.

Bender Decl. ¶ 8 Ex. D.

8. Gryphon acknowledged that Bender's status was converted from being an investor to a creditor of the Fund:

...As of the date of acceptance of this redemption request, *your capital is no longer invested in the Fund* and you will *not* be subject to gains and/or losses generated by the ongoing operations of the Fund.

In accordance with the Operating Agreement, an account payable has been created in the Fund financials in your name... (Emphasis added.)

Bender Decl. ¶ 9 Ex. E and F.

9. Palisade acknowledged that Bender's status was converted from being an investor to a creditor of the Fund, with the exception of "side pocket" investments, as that term is defined in the Limited Partnership Agreement:

Your request for a complete redemption from WML Palisade Partners, LP has been accepted by the General Partner as of March 31, 2008...*As of the date of acceptance of this request, the bulk of your capital is no longer subject to gains and/or losses generated by the ongoing operations of the Partnership.* However, a portion of your account allocated to side-pocket assets will remain invested in the Fund until those assets are liquidated. (Emphasis added.)

Bender Decl. ¶ 10 Ex. G.

10. Quetzal acknowledged that Bender's status was converted from being an investor to a creditor of the Fund, with the exception of "side pocket" investments, as that term is defined in the Limited Partnership Agreement:

Your request for a complete redemption from WML Quetzal Partners, LP has been accepted by the General Partner as of December 31, 2007...*As of the date of acceptance of this request, the bulk of your capital is no longer subject to gains and/or losses generated by the ongoing operations of the Partnership and will not be subject to gains and/or losses generated by ongoing operations of the Partnership.* However, any portion of your account allocated to side-pocket investments will continue to take part in those ventures. (Emphasis added.)

Bender Decl. ¶ 11. Ex. H. In reality, there were no side pocket investments in Quetzal. Id.

FUND PAYABLES OWED

11. Bender Joint Trust (Account 9522) is owed approximately \$250,400 after deducting redemptions received. Bender Decl. ¶ 12.

12. Bender Personal Trust (Account 6493) is owed approximately \$121,400, after deducting redemptions received. Bender Decl. ¶ 13.

13. Bender IRA (Account 8266) is owed approximately \$32,100, after deducting redemptions received.⁵ Bender Decl. ¶ 14.

14. Gryphon, Quetzal and Palisade treated the Bender Joint Trust, Bender Personal Trust and Bender IRA, as applicable, as a creditor, not an investor, after withdrawal requests were made, with the exception of distinct “side pocket investments.” Tax reporting was consistent with creditor, as opposed to investor, status, in these Funds prior to the appointment of the Receiver. Bender Decl. ¶ 15.

THE RECEIVER’S PROPOSED PLAN

15. The Proposed Plan is unprecedented in its treatment of claims of creditors such as Bender. As noted on page 23 (and elsewhere) of the Receiver’s Proposed Plan, “...the Plan does not treat investors who made redemption requests as “creditors” with unsecured claims entitled to be paid before investors who did not make redemption requests.”

16. The rationale for the non-recognition of creditor status for those investors who made redemption requests is that the “...Receiver believes it is inequitable to give some investors preferential access to the assets of what may ultimately be insolvent WM Funds, solely because some investors submitted redemption requests while others did not, and some such requests were honored, while others were not.” See Proposed Plan, Page 30.⁶

17. For the reasons set forth below, the Receiver’s rationale that it is “inequitable to give some investors preferential access to assets,” is without merit, and the Plan as proposed is inequitable.

⁵ Bender IRA excludes from the calculation the Palisade side pocket in account 8266 in the amount of \$23,500. Neither Gryphon nor Quetzal had side pocket investments.

⁶ The Receiver concedes that the Funds invested in illiquid assets, and it is undisputed that the offering memoranda made withdrawals effective at the end of a calendar quarter, so it should not be surprising that the investors who made the redemptions first, would receive their Note payments before another group who made their withdrawals commencing at a subsequent quarter. In addition, the applicable operating agreements provide wide discretion as to how and when withdrawals will be recognized or paid—the Receiver has not identified any instance where the express provisions of the Operating Agreement, Partnership Agreement or Offering Memoranda were not followed in the manner in which redemptions were recognized or paid.

ARGUMENT

I. EQUITABLE PRINCIPLES OF RECEIVERSHIP AND BANKRUPTCY DISTINGUISH BETWEEN UNSECURED CREDITORS AND EQUITY SECURITY-HOLDERS AND GIVE PRIORITY TO CREDITORS OVER INVESTORS.

18. As the Receiver recognizes, distributions must be allocated in accordance with applicable state law priorities. (Prop. Plan at 4.) Federal law requires as much. 28 U.S.C. § 959(b) provides:

Except as provided in Section 1166 of Title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

19. As the Receiver also acknowledges, an entity's obligations to its creditors on debts owed to those creditors must be paid before investors/equity holders may receive distributions on account of their equity interests. (Prop. Plan at 18, citing, *inter alia*, Wis. Stat. § 183.0905 and Wis. Stat. § 179.74.) Indeed, the Wisconsin Legislature has articulated what it deems to be the equitable order of distribution of the debtor's estate in a receivership proceeding. Wis. Stat. § 128.17(1). Under Wisconsin's statutory scheme, creditors' claims take priority over claims of equity investors. *Id.*

20. Analogous federal bankruptcy law similarly provides that claims of creditors take priority over claims of equity investors. *See, e.g.*, 11 U.S.C. §§ 507 ("Priorities") 1122 ("Classification of Claims and Interests"), and 1129 ("Confirmation of Plan"). It is a bedrock principle of federal law that claims and interests are inherently different and cannot be classified together. *See, e.g.*, *Standard Gas & Elec. Co. v. Taylor, In Re Deep Rock Oil Corp.*, 113 F.2d 266, 269 (10th Cir. 1940) (affirming judgment that, under mandate of the Supreme Court, principal and interest owing to note holders took priority over principal and dividends owed to preferred stockholders which, in turn, took priority over the equity interests of common stockholders).

II. BENDER IS A BONA FIDE CREDITOR NOTWITHSTANDING ITS SEPARATE STATUS AS AN EQUITY INVESTOR.

21. There can be no question that, with respect to the Gryphon, Palisade and Quetzal accounts described above, Bender was a creditor prior to commencement of this action. A “creditor” is one to whom a debt or obligation is owed, whether contractual or otherwise. *Black’s Law Dictionary*, 424 (9th ed. 2009).

22. As noted in paragraphs 4 – 7 above, the Offering Memoranda for Gryphon, Quetzal and Palisade provide for redemption and give the managing partner for each of those funds the option of either (i) placing the redeeming investor’s *pro rata* share of the fund in a segregated portfolio and liquidating those securities for the investor, or (ii) immediately issuing a written promise to pay. In each instance, the fund manager chose the latter option, thereby fixing the amount that was due to the redeeming investor and barring the investor from enjoying the benefits of future capital appreciation. By satisfying Bender’s redemption requests with a written confirmation of its obligation to pay, Bender became not simply an investor, but also a creditor – a status that was reiterated in writing in response to Bender’s request for tax information to prepare estimated taxes.

III. THE RECEIVER’S PLAN IS INEQUITABLE AND CONTRARY TO STATE AND FEDERAL LAW.

23. The receiver acknowledges that a “ ‘creditor’ is a person who holds the claim against, and an ‘investor’ is a person who holds an equity interest in, WM and/or one or more of the WM funds.” (Prop. Plan at 18.) These terms, as defined by the Receiver, are not mutually exclusive. (*In re St. Charles Pres. Investors, Ltd.*, 112 BR. 469, 474 (DDC 1990.) (The terms creditor and equity investor are not mutually exclusive.) As noted, some investors, including Bender, have contract claims and therefore qualify as creditors. Nonetheless, the Receiver asserts that she “will seek an order barring investors from asserting claims as creditors on account of redemption requests.” (Prop. Plan at 23, n.4.) Thus the Receiver concludes that she “does not believe that any

WM fund estate has any creditors who would be entitled to distributions before any investors are paid.” (Prop. Plan at 23.) The Receiver’s proposal to bar investors who also have contract claims by virtue of exercising their contractual redemption rights is improper and should be rejected for three reasons.

24. First, although receiverships are equitable proceedings, claims accorded legal priority by statute, must be given precedence. *Wiswall v. Sampson*, 55 U.S. 52, 66 (1852) (where a statute gives a claimant priority over other claimants, a court of equity will preserve that priority).

25. Second, to deprive Bender of its contractual rights would constitute an unconstitutional “taking” without due process of law.

26. Third, contrary to the Receiver’s contention, to deprive Bender of his rights would be unfair and inequitable. Bender gave up its rights to participate in potential gains of an equity investment, and assumed creditor status prior to May 2008.⁷ This creditor status was acknowledged by Wealth Management in oral and written communications, and was reported as such to federal and state taxing authorities. Having given up its rights to participate in the equity investment’s “upside,” Bender became a creditor. The Receiver’s Proposed Plan is inequitable for Bender is now deprived of the benefit of their choate creditor contractual rights. In essence, Bender is placed in the worst of both worlds: not having the right to participate in the benefits of possible capital appreciation, but required to fully accept the risks of capital loss, when he was no longer a participant in the various Funds (with the exception of those distinct side-pocket investments, which Bender acknowledges would be an equity investment in Palisade).

⁷ According to the Receiver, in May 2008, a disclosure was made that certain officers of Wealth Management received improper compensation, which allegedly triggered redemption requests that would not otherwise have been made. There is no evidence whatsoever those investors who made redemption requests prior to May 2008 did so other than for lawful purposes and in the ordinary course of business that prudent accredited investors follow for their individual goals and objectives.

DATED: September 30, 2009.

/s/ Jeffrey J. Liotta

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