

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the matter of)
)
CORONA HOLDINGS, INC.) WC Docket No. 08-254
)
Application for approval of transfer of control)
from DB Zwirn Special Opportunities Fund,)
L.P. to ZM Private Equity Fund II, L.P.)

To: The Secretary,
Federal Communications Commission

JOINT OPPOSITION TO COMMENTS AND PETITION TO DENY

Transferor DB Zwirn Special Opportunities Fund, L.P. (“DBZ-SOF”) and Transferee ZM Private Equity Fund II, L.P. (“ZM II”) (collectively the “Applicants”), by their attorneys, respectfully oppose the “Comments and Petition to Deny” (the “Protest”) filed in the captioned proceeding on February 18, 2009 by a collection of 10 individuals headed by David A. Schum. The Protest has not and cannot articulate a coherent theory by which the captioned application of Corona Holdings, Inc. should be denied or designated for hearing, much less make the required *prima facie* showing that such relief is warranted. Instead, it merely reprises allegations from broadcast license proceedings that have already been rejected by the Commission, not once, but *three times*. Accordingly, the Protest should be summarily rejected and the captioned application should be granted.

Background

The captioned application requests Commission approval for the substitution of ZM II for DBZ-SOR as the 99% passive investor in SSF Partners, LLC, the controlling parent of Corona

Holdings, Inc. and its subsidiaries. The Protest requests that it be “treated as a formal ‘Petition to Deny,’”¹ and in relevant part consists of the following purported analysis: (1) Mr. Schum *et al.* “have been raising issues relative to the basic character qualifications of [DBZ-SOF] before the Media Bureau” in various AM radio broadcast proceedings, allegations which they acknowledge have been rejected *three times* on their merits;² and (2) various newspapers allegedly have reported that DBZ-SOF is “closing its doors”, with a web site allegedly stating that one of the publications has reported allegations that a former senior financial officer is accused of some irregularities at the firm.³ From these “facts” Mr. Schum *et al.* jump to the conclusion that the Commission “has a statutory obligation to find out” whether non-citizens own more than 20% of DBZ-SOF in violation of Section 310 of the Communications Act.⁴

For good measure, Mr. Schum *et al.* also throw out the wholly unsubstantiated allegation that there is an ongoing investigation of DBZ-SOF at the Securities and Exchange Commission;⁵ and they point to a consent decree with the Commission involving the parent company of DBZ-SOF, and others,⁶ in which the Commission specifically concluded that its investigation “raises no substantial or material questions of fact” as to whether the parent company of DBZ-SOF or any affiliated party to the investigation “possess the basic qualifications including, but not limited to, those related to character, to hold or obtain any Commission license or authorization”.⁷ From these “facts” Mr. Schum *et al.* conclude that the captioned application should be dismissed or denied, or should be consolidated with already-granted applications involving AM radio sta-

¹ Protest at p. 2.

² *Id.* at p. 2 & n. 3.

³ *Id.* at p. 3.

⁴ *Id.*

⁵ *Id.* at p. 4. The allegation is irrelevant to the Protest in any event, whether or not it can be substantiated, since the Commission will consider only “certain forms of *adjudicated*, non-FCC related misconduct” when deciding character issues. *AT&T, Inc. and BellSouth Corporation Application for Transfer of Control (Memorandum Opinion and Order)*, 22 FCC Rcd 5662, 5756 & ¶191 (FCC 2007). (Subsequent history omitted). (Emphasis added).

⁶ *Tama Broadcasting, Inc., et al. (Order)*, DA 09-225, released February 17, 2009 (Enf. Bur.).

⁷ *Id.*, Order at ¶4. (Emphasis added).

tions KFCD and KHSE and designated for evidentiary hearing on various ownership-related issues they enumerate.⁸

Opposition Argument

The Protest is frivolous at best and should be summarily rejected. Mr. Schum *et al.* do not even have standing to protest the captioned application; the Protest rests entirely on allegations that have already been determined adversely to the protestants not just once, but *three times*; and the Commission's own investigation has affirmatively demonstrated that there are "*no substantial or material questions of fact*" as to whether its parent or other affiliates of DBZ-SOF "possess the basic qualifications . . . to hold or obtain any Commission license or authorization".⁹ There is thus no conceivable basis for denying the captioned application or designating it for hearing, and the application accordingly should be promptly granted.

As a threshold matter, Mr. Schum *et al.* do not even attempt to establish their standing to file a petition to deny in this proceeding, and they have none. To establish standing they must allege facts sufficient to establish (1) personal injury, (2) that is fairly traceable to the challenged action, and (3) a substantial likelihood that the relief requested will redress the injury claimed.¹⁰ Mr. Schum *et al.* utterly fail on all counts.

Mr. Schum *et al.* do not attempt to connect their alleged grievance with DBZ-SOF in any fashion with the captioned application; instead they simply incorporate by reference "all pleadings and materials" filed in some AM radio broadcast proceedings.¹¹ But the basis on which they had standing to air their (meritless) allegations in those cases was sworn declarations that a

⁸ Protest at p. 6.

⁹ *Tama Broadcasting, Inc., et al. (Order)*, *supra*, Order at ¶4. (Emphasis added).

¹⁰ *See, e.g., MCI Communications Corp. and Southern Pacific Telecommunications Co.*, 12 FCC Rcd 7790, 7794 (FCC 1997).

¹¹ Protest at p. 3.

“majority of Petitioners reside within the stations’ primary service areas”.¹² Obviously, the protestants’ residence in AM radio broadcast service areas has nothing to do with establishing standing to challenge the captioned application. Moreover, whatever their grievances in the AM radio cases may be, such grievances likewise are not “fairly traceable” to the transaction they seek to challenge in this case, and would not be redressed in any event even if the captioned application were denied. In short, the Protest should be summarily denied for Mr. Schum *et al.*’s utter failure to demonstrate any of the elements necessary to establish their standing in this proceeding.

Even apart from lack of standing, the Protest offers absolutely no colorable basis whatsoever to deny the captioned application or to designate it for hearing. Mr. Schum *et al.* acknowledge, as they must, that their allegations involving DBZ-SOF have been rejected by the Commission as unsubstantiated not just once, but *three times*, in the very same proceedings whose record the protestants purport to incorporate by reference in this case.¹³ The fact that an application for review may be pending before the full Commission is irrelevant, because in the absence of a stay by the Commission (which has not issued), staff orders are valid and effective upon release and constitute adverse determinations of Mr. Schum *et al.*’s allegations concerning DBZ-SOF.¹⁴

At the risk of understatement, allegations that have been determined adversely to the petitioner cannot possibly form the basis for denying an application or designating it for hearing. Just as the “Commission will not grant reconsideration” to again debate “matters on which the tribunal has once deliberated and spoken,”¹⁵ attempts to reprise the same matters in a new application proceeding cannot, as a matter of law, raise a substantial or material question of fact warranting denial of the new application or

¹² *KFCD(AM), Farmersville, TX, et al. (Order)*, File No. BAL-20060117ACU, *et al.*, 21 FCC Rcd 14996 (Audio Div., MMB 2006) (*Schum I*), Slip Op. at p. 4.

¹³ Protest at p. 2 & n. 3, citing *Schum I, supra*; *KFCD(AM), Farmersville, TX, et al. (Order)*, File No. BAL-20070216ABA, DA 08-408, released February 19, 2008 (Audio Div., MMB) (*Schum II*); *KFCD(AM), Farmersville, TX, et al. (Order on Reconsideration)*, File No. BAL-20060117ACU, *et al.*, DA 08-409, released February 19, 2008 (Audio Div., MMB) (*Schum III*).

¹⁴ 47 C.F.R. §1.102(b)(providing that non-hearing actions taken under delegated authority are effective upon release of the document containing the full text of the action).

¹⁵ *Schum III, supra*, Slip Op. at p. 3, citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965) (subsequent history omitted); *WAIT Radio*, 46 RR 2d 1556 (1980).

designating it for hearing.¹⁶ In fact, Mr. Schum *et al.* are affirmatively barred by the doctrines of res judicata and collateral estoppel from again attempting to litigate their meritless allegations in this proceeding.¹⁷

Furthermore, not only have Mr. Schum *et al.*'s allegations already been determined adversely by the Media Bureau, thus barring their reprise here, but an investigation of an unrelated matter by the Enforcement Bureau has raised “*no substantial or material questions of fact*” as to whether the parent of DBZ-SOF and affiliated parties to the investigation “possess the basic qualifications . . . to hold or obtain any Commission license or authorization”.¹⁸ Stated another way, not only have Mr. Schum *et al.*'s allegations of misconduct been determined adversely to their position by the Media Bureau, and are thus barred in this proceeding by the doctrines of res judicata and collateral estoppel, but an Enforcement Bureau investigation has independently determined that there is no reason to doubt that DBZ-SOF or any of its affiliates lack the basic qualifications to hold “any Commission license or authorization”. Therefore, even if, as Mr. Schum *et al.* claim, DBZ-SOF's basic qualifications properly could be re-litigated in this proceeding (which they properly cannot), the argument is egregiously misplaced under the facts of this case.

¹⁶ *Cf., e.g., GAF Broadcasting, Inc., et al.*, 8 FCC Rcd 1742, 1746 (Audio Div., MMB) (FCC rejection of allegations against applicant in a prior proceeding are dispositive of subsequent petition to deny raising same issues).

¹⁷ *See, e.g., TSR Wireless v. US West*, 15 FCC Rcd 11166, 11173-11174 (FCC 2000), *aff'd sub nom. Qwest v. FCC*, 252 F.3d 462 (DC Cir. 2001) (describing the principle of res judicata to mean that “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action” and the principle of collateral estoppel to mean that “a judgment in a prior suit precludes relitigation by the same parties of issues actually litigated and necessary to the outcome of the first action,” and applying the doctrine to bar U.S. West from relitigating the validity of Section 51.701, *et seq.*, of the Commission's interconnection rules). So, here, the Commission's adverse determination of the same, unsubstantiated foreign ownership allegations in the AM radio broadcast proceedings otherwise relied upon by Mr. Schum *et al.* precludes them from attempting to relitigate them in this case.

¹⁸ *Tama Broadcasting, Inc., et al. (Order)*, *supra*, Order at ¶4. (Emphasis added).

Conclusion

For the reasons stated above, the Protest filed by David A. Schum *et al.* is frivolous as a matter of fact and barred as a matter of law, and should be summarily rejected by the Commission.

Respectfully submitted,

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February 25, 2009

Certificate of Service

I hereby certify that I have this 25th day of February, 2009, served the foregoing “Opposition to Comments and Petition to Deny” upon petitioners by mailing a true copy thereof, first class postage prepaid, to their counsel, as shown on the following list:

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