

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

<b>SECURITIES AND EXCHANGE COMMISSION</b>	§	
<b>Plaintiff,</b>	§	
	§	
	§	
	§	<b>Civil Action No. 4:11-cv-655</b>
	§	
<b>v.</b>	§	
	§	
<b>JAMES G. TEMME, and</b>	§	
<b>STEWARDSHIP FUND, LP,</b>	§	
<b>Defendants.</b>	§	

**RECEIVER’S OBJECTION TO MOTION TO COMPEL**

COMES NOW, Keith M. Aurzada, as receiver in the above-captioned matter (the “Receiver”) for James G. Temme (“Temme”), Stewardship Fund, LP, and all other entities directly or indirectly controlled by Temme or Stewardship Fund, LP, including, but not limited to Stewardship Advisors, LLC, d/b/a Stewardship Advisors, LP, Stewardship Asset Management Genpar I, LLC, Stewardship Group, LLC, Destiny Fund, LP, and Stewardship Management, LP (collectively, the “Receivership Entities”), and submits this Objection to the Motion to Compel Production of Documents from Receiver and Brief in Support Thereof (the “Motion”) filed by MDA Realty Holdings, LLC, MVB Realty Holdings, LLC, LF Realty Holdings, LLC and F & B Note Holding, LLC (collectively, the “Finch and Barry Group” or the “Movants”). In support of his response to the Motion, the Receiver would respectfully show the Court as follows:

**I.**  
**INTRODUCTION**

1. In the Motion, the **non-party** Movants seek discovery directly from the Receiver regarding the a dispute between the Finch and Barry Group and various non-party Home Solutions Affiliates. Because Movants are non-parties, they have no authority to utilize

discovery methods available only to parties. Additionally, the Motion constitutes an impermissible attempt by Movants to obtain pre-suit discovery regarding a dispute between non-parties without authority to do so. Because the Motion seeks discovery regarding issues not currently before this Court, it is moot and/or not ripe. Finally, the Motion is an impermissible attempt to interfere with the Receiver's duties and second guess both the Receiver and the United States Securities and Exchange Commission (the "Commission"). For the reasons set forth herein, the Receiver respectfully requests that the Court deny the Motion.<sup>1</sup>

## **II.** **ARGUMENT**

### **A. The Finch and Barry Group are Non-Parties who Cannot Utilize Rule 34**

2. Federal Rule of Civil Procedure applies only to parties. FED. R. CIV. P. 34 (stating that "[a] party may serve on any other party a request [for production]").

3. Here, Movants have judicially admitted that they are non-parties to this action. *See* Motion, at p. 1 (admitting in first sentence that Movants are "Nonparties to this action"). As non-parties, Rule 34 is unavailable. Additionally, Movants are not even entitled to intervene as parties. *See, e.g., S.E.C. v. Wozniak*, 1993 WL 34702, at \*1 (N.D.Ill. Feb. 5, 1993) (holding that Commission's action is "impenetrable wall" preventing intervention); *Commodity Futures Trading Com'n v. Heritage Capital Advisory Services, Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984).

4. Because Rule 34 is inapplicable, the Court must deny the Motion.

### **B. The Motion is an Impermissible Attempt to Obtain Pre-Suit Discovery**

5. In their Amended Motion for Relief from Stay [Docket No. 96] (the "Motion for Relief from Stay"), Movants admit that they instituted a "Petition to Investigate Potential

---

<sup>1</sup> The Receiver reserves his right to further object to the individual requests for production and to provide briefing thereon in the event the Court rules that the Receiver must further respond to the Movant's discovery requests.

Claims” regarding certain Home Solutions Affiliates (as described in the Motion for Relief from Stay) in the 366th District Court of Collin County, Texas. Motion for Relief from Stay, at ¶ 5. Movants failed in their attempt to obtain pre-suit discovery because, according to Movants, relief from the stay had not been obtained. *See id.*

6. Here, the Motion is an attempt by non-parties to obtain discovery not regarding the instant action, but regarding potential claims against other non-parties. Unlike the Texas Rules of Civil Procedure, the Federal Rules of Civil Procedure are limited regarding the types of pre-suit discovery that may be obtained. Compare TEX. R. CIV. P. 202 *with* FED. R. CIV. P. 27 (regarding depositions to perpetuate testimony). Movants request therefore finds no procedural support. Additionally, the Motion (and the discovery requests) are not ripe because they do not seek discovery regarding any matter presently before this Court. This Court therefore lacks subject matter jurisdiction to even consider the Motion.

7. In the alternative, the Court lacks jurisdiction because the Motion is moot. The Receiver’s settlements with Harbour Portfolio I, LLC, Harbour Portfolio II, LLC, Harbour Portfolio IV, LLC, Cavco Holdings, LLC, and the Boyce Parties were already the subject of a hearing before this Court, upon which the Court has entered final orders. *See* Docket Nos. 79, 80, 95. To the extent the Motion seeks discovery on those previously litigated issues, it is moot.<sup>2</sup>

8. Because the Motion seeks discovery regarding matters not currently before the Court, the Court should deny the Motion.

**C. The Motion Infringes on the Receiver’s Duties**

9. By seeking to obtain discovery from the Receiver (i.e. property of the Receivership estate), Movants are arguably in violation of the Receiver Orders. By seeking to

---

<sup>2</sup> Even though the Receiver had no obligation to do so, the Receiver previously supplied significant documentation to Movants prior to the hearing on the Receiver’s settlement motions.

require the Receiver to incur time and expenses assisting only the Movants (to the detriment of all other beneficiaries of the Receivership estate) the Motion is certainly contrary to the goal of this receivership, which is to minimize expenses and maximize return for all beneficiaries of the Receivership estate. If the Receiver responds to discovery requests from the Movants, it will encourage other investors to seek discovery from the Receiver to bolster their potential claims against non-parties to this suit that may have a connection with the Receivership Entities. Such discovery requests would quickly overwhelm the Receiver to the detriment of all other investors.

10. The Receiver's position that he is not required to provide discovery to the non-party Movants is consistent with federal authority regarding providing non-parties with relief from the litigation stay frequently provided by SEC receiverships (as exists here). The factors courts consider in determining whether to afford relief from a litigation stay "enable a district court to remain mindful that (1) '[t]he interests of the Receiver are very broad and include not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy' and (2) the purpose of the stay of litigation is 'to give the receiver a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant.'" *United States v. Petters*, No. 08-5348, 2008 WL 5234527, at \*3 (D. Minn. Dec. 12, 2008) (quoting *Acorn*, 429 F.3d at 443).

11. Here, too, the Receiver should be allowed to perform his tasks without the burden of responding to discovery regarding issues not presently before this Court. The Receiver is particularly troubled by the Movants' requests because, according to Movants' counsel, the Movants would like the documents responsive to their requests (including settlement communications) to be posted to the Receivership website established herein at [www.stewardshipfundreceivership.com](http://www.stewardshipfundreceivership.com). Not only are such documents inadmissible (*see* FED. R.

EVID. 408), but requiring the Receiver to post them on his website will interfere with the Receiver's duties by potentially chilling the Receiver's ability to negotiate with counter-parties and obtain settlements in the best interest of the receivership estate.

12. Finally, should Movants obtain relief from the stay and institute litigation against third-parties, they would (with the Court's prior permission) be allowed to serve non-party discovery on the Receiver. There, the Receiver would be entitled to protection under Federal Rule of Civil Procedure 45 as a non-party. This is significant because the Receiver has limited resources and Movants seek to require the Receiver to incur expenses for the benefit of Movants only (and, at least at the margins, reducing recovery for other beneficiaries of the receivership estate). Unless and until Movants obtain leave from this Court to even request discovery from the Receiver, the Court should summarily deny any request.

### **III.** **CONCLUSION**

13. Movants, as non-parties, lack any procedural basis to obtain discovery from the Receiver. Additionally, their requests are moot or not ripe because they impermissibly seek pre-suit discovery on matters not currently before this Court. Finally, the Motion impermissibly seeks to interfere with the Receiver's duties by requiring the Receiver to incur time and expenses assisting only the Movants to the detriment of all other beneficiaries of the Receivership estate. The Receiver respectfully requests that the Court deny the Motion.

Dated: August 20, 2012

**BRYAN CAVE LLP**

By: //s// Jay L. Krystinik  
Keith Miles Aurzada  
State Bar No. 24009880  
Jay L. Krystinik  
State Bar No. 24041279  
Bradley J. Purcell  
State Bar No. 24063965  
2200 Ross Avenue, Suite. 3300  
Dallas, Texas 75201  
(214) 721-8000  
(214) 721-8100 Fax  
[keith.aurzada@bryancave.com](mailto:keith.aurzada@bryancave.com)  
[jay.krystinik@bryancave.com](mailto:jay.krystinik@bryancave.com)  
*Counsel for Keith Miles Aurzada, Receiver*

**CERTIFICATE OF SERVICE**

I certify that on August 20, 2012, I served a true and correct copy of the foregoing pleading by electronic mail through the Court's CM/ECF system to all parties consenting to service through same, including to counsel for the defendants, the Commission, and the Movants.

Additionally, the foregoing will be uploaded to [www.stewardshipfundreceivership.com](http://www.stewardshipfundreceivership.com)

//s// Jay L. Krystinik  
Jay L. Krystinik