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

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| **SECURITIES AND EXCHANGE COMMISSION**, | : | |
| Plaintiff, | : | |
| v. | : | Civil Action No. **4:11-CV-0655** |
| **JAMES G. TEMME, and STEWARDSHIP FUND, LP,** | : | (Judge Clark/Mazzant) ECF |
| Defendants, | : | |

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF**

Dated: June 5, 2013.

Respectfully submitted,

*/s/ David B. Reece*

DAVID B. REECE
Lead Attorney
Texas Bar No. 24002810
SECURITIES AND EXCHANGE COMMISSION
Fort Worth Regional Office
801 Cherry Street, 19th Floor
Fort Worth, Texas 76102
(817) 978-6476
(817) 978-4927 (fax)
reeced@sec.gov

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## I.
## MOTION AND STATEMENT OF ISSUES

Plaintiff Securities and Exchange Commission asks, under Federal Rule of Civil Procedure 56, for summary judgment against Defendants James G. Temme and Stewardship Fund, LP on each of its claims. The Commission's motion asks the Court to resolve the following issues:

(1) Did Temme and Stewardship Fund violate Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5?

(2) Should both Defendants be enjoined and required to disgorge, on a joint and several liability basis, their ill-gotten gains, plus prejudgment interest, and (b) should Temme be required to pay a third-tier civil money penalty?

## II.
## STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

### A. Temme and Stewardship Fund obtained millions of dollars from investors.

During the relevant time period, Temme resided in Plano, Texas. [Pl's MSJ App. at 9 (Aurz. Dec.at ¶2)]. Before this case, he controlled multiple entities (including Stewardship Fund) that acted as the managing general partner for a variety of limited partnerships. [Id.] Defendant Stewardship Fund is a Texas limited partnership with offices in Plano, Texas. [Id.][2] Rather than appear to answer questions under oath in this litigation, Temme elected to invoke his privilege under the Fifth Amendment to avoid self-incrimination. [See Pl's MSJ App. at 1-3].

[1] These facts are supported by references to the evidence contained in the Appendix filed with this Motion ("Pl's MSJ App. at ___") or the Appendix filed by the Commission at the commencement of this action, which is already included within this Court's records at Docket Numbers 2.2, 3, 3.1-3.12, 4, 4.1-4.4, 5, and 5.1-5.9 and incorporated herein ("TRO App.at ___). Additional copies of declarations included in the TRO App. are reproduced in the Pl's MSJ App, but some references are to the evidence's location within the TRO App.

[2] Stewardship Fund and Temme, along with other entities Temme controlled (including 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) were placed under the control of a Receiver subject to this Court's oversight after this action was filed in October 2011. [See Docket No. 24, 25 and 30].

Since at least 2008, Temme, acting through Stewardship Fund and other entities he controlled, raised at least $25 million from over 100 entities and individuals from around the country through a course of conduct involving multiple types of transactions. [See Pl's MSJ App. at 10-12 (Aurz. Dec. at ¶6-10)].[3] During the November 2008 to March 2001 time frame, at least $414,000 in investor funds were distributed directly to Temme. [See Pl's MSJ App. at 23 (Aurz. Dec. at ¶64)].

The Defendants raised many of these funds from investors who acquired limited partnership interests in limited partnerships purportedly formed to invest in non-performing residential mortgages and real properties. [See Pl's MSJ App. at 10-11 (Aurz. Dec. at ¶6-7)]. In these transactions, Temme told investors he (or one of his entities) owned or could acquire the nonperforming loans at a discount and that he would then (acting through a general partner he controlled) work with the homeowner towards restructuring the non-performing loans into performing loans. Temme told the limited partners they would be paid returns based on his efforts, i.e., through payment streams from the homeowners or from proceeds obtained when the general partner sold the now-performing mortgages or the underlying property. [Id.; see also Pl's MSJ App. at 762-767 (Finch Dec.)].

Temme also obtained funds through "flip" transactions involving the issuance of promissory notes. [Pl's MSJ App. at 11, 20 (Aurz. Dec. at ¶8, 50-53)]. In these transactions, Temme (acting on behalf of one of his entities) executed a Secured Promissory Note pursuant to which the investor would provide Temme with funds that were, according to Temme's

[3] It appears that a significant higher amount of money was actually raised by Temme and Stewardship Fund. However, upon appointment, the Receiver found Defendants' records in disarray. [Pl's MSJ App. at 12 (Aurz. Dec. at 10-12]. The Receiver's work is ongoing and discovery remains open. Therefore, this motion focuses only on the evidence necessary to establish Defendants' liability as a matter of law. In the event summary judgment is not granted, additional evidence would be presented and it is possible that the amount of ill-gotten gains established at trial would be higher. Despite the Receiver's best efforts, there is a strong chance of substantial losses to the investors Temme defrauded.

representations, to be used to acquire and re-sell a particular package of assets in a short period of time (usually 30-90 days). In return, the investor was promised a guaranteed rate of return (typically 20%) and, on many occasions, a putative security interest in the notes acquired by the Defendant. [See Id.].

**B. Defendants made various material misrepresentations and omissions.**

Temme and Stewardship Fund made a variety of material misrepresentations and omissions in connection with the offer and sale of the limited partnership interests and promissory notes. Contrary to the promises to the promissory note investors, the assets putatively securing the notes were not owned by him or any Stewardship entity or were actually also pledged to be sold to various of the limited partnerships with which Temme was involved. [Pl's MSJ App. at 20, 456-477 (Aurz. Dec. at ¶50-53 and related Ex. 18)].[4] Similarly, contrary to the assurances Temme provided to the limited partnership interest investors, he routinely never properly acquired or owned the assets promised, misrepresented the identity of the assets to be acquired (or falsely pledged the same assets to multiple parties) or, simply misappropriated the funds. These misrepresentations were pervasive throughout the Defendants' course of conduct that resulted in their obtaining over $25 million. [Id. at 11, 12 (Aurz. Dec. at ¶ 9, 13)]. Several specific representative transactions, detailing Defendants' fraudulent procurement of over $17 million are discussed below.

**1. Temme and Stewardship Fund defrauded a group of Dallas-based investors.**

From October 2008 to December 2010, Temme obtained over $19 million from a group of Dallas-based investors (referred to herein as the "Canadian Peso Investor Group") through a

[4] Similarly, Temme also "sold" particular assets in exchange for a purchase price when in fact he either did not own the assets or had pledged them to other buyers. As a result, a variety of persons and entities paid Temme for assets Temme failed to convey to them. [See Pl's MSJ App. at 21 (Aurz. Dec. ¶55-56)].

course of conduct involving at least ten instances of putative acquisitions of "tapes" or "pools" of non-performing notes that, in each instance, were to be acquired by various limited partnerships. [See Pl's MSJ App. at 13 (Aurz. Dec. at ¶14-15)]. Throughout the course of their dealings with the Canadian Peso Investor Group, Defendants made material misrepresentations related to the offered investments. [Id. At 14 (¶16)]. Those misrepresentations related to, among other things, (i) which assets were being purchased or otherwise available to be conveyed; the use of funds provided by the investors, and the management of the limited partnerships. [Id.].

For example:

- In November and December 2008, Temme (acting through Stewardship Fund as the general partner of a limited partnership called Stewardship Fund No. 2, L.P.) represented to the Canadian Peso Investor Group that, for payments of $1,627,361.41 and $1,480,879: he would acquire for the limited partnership ½ of a particular pool of assets identified as Package 1st0082; acquire all of a second pool of assets known as Package 1st0083 that he would then, on behalf of the limited partnership, re-sell within 2 weeks at a 20% profit. Instead, Temme used their funds to acquire for Stewardship Fund No. 2, LP all of package 1st0082. He then, on behalf of others acquired and re-sold Package 1st0083 and did not convey that package or the proceeds of the subsequent re-sell to the limited partnership. Nor did he inform the limited partnership of these actions. [See Pl's MSJ App. at 14-15, 25-58, 59-103, 104 (Aurz. Dec. at ¶17-22 and related Exhibits 1-3)];

- A few months later, in February 2009, the Canadian Peso Investor Group (this time in connection with another limited partnership, Stewardship Fund No. 3, L.P.) paid Temme $1,282,157 putatively to purchase a pool of 171 assets; instead, Temme conveyed -- not the promised 171 assets – but a portion of the Package 1st0083 (the same assets he claimed to have bought and re-sold for the Canadian Peso Investor Group's Stewardship Fund No. 2, LP) to Stewardship Fund LP No. 3 and sent the $1.2 million to an account of one of his alter-egos, Destiny Fund I LP. [See Pl's MSJ App. at 15, 105-156, 157-201, 202-221 (Aurz. Dec. at ¶24-25 and Exhibits 4-6)];

- In December 2009 and January 2010, Temme represented to the Canadian Peso Investor Group that he (acting as the general partner for limited partnership Stewardship Fund No. 4, LP) would acquire for the limited partnership a tape of assets from a company called Home Shield, LLC for approximately $500,000. There is no doubt the Stewardship Fund No. 4, LP investors wired the purchase price to one of Temme's bank accounts.

But, Temme did not provide the limited partnership with clear title to the assets. First, Temme never acquired the assets from Home Shield. Indeed, there is no evidence at all suggesting that the assets were ever conveyed to Stewardship Fund No. 4, LP. Moreover, according the records reviewed by the Receiver, Temme had earlier "sold" these same assets to two separate (unrelated parties). In short, at best Temme "double pledged" the same assets to at least three different parties; alternatively, he simply misappropriated the purchase price. [See Pl's MSJ App. at 16 (Aurz. Dec. at ¶29-31);

- In a separate, but similar transaction in December 2009, Temme represented that he would acquire for Stewardship Fund No. 4, LP a package of 141 assets for $1,307,948. As instructed, the Stewardship Fund No. 4, LP investors wired the purchase price to a putative escrow company called American Equity, LLC. But, in fact, Temme had purported to sell these same 141 assets in October 2008 to separate investors not related to the Canadian Peso Investor Group. In any event, it is clear that the assets were not conveyed to Stewardship Fund No. 4, LP and the $1,307,948 purchase price was not returned to them. In short, at best Temme "double pledged" the same assets to at least three different parties (thereby harming all three of them); alternatively, he simply misappropriated the purchase price. [See Pl's MSJ App. at 17-18 (Aurz. Dec. at ¶37-40)];

- In October 2010, Temme (putatively acting as the general manager of a Canadian Peso Investor Group-based limited partnership named Stewardship Fund No. 5, LP) instructed the investors to wire $2,024,609 to a company called Madison Settlement Service, LLC. They did so on October 8, 2010. It is undisputed that this package of assets was not purchased by Temme and certainly not conveyed to the limited partnership as promised. Instead, Stewardship Fund received deposits on October 12 and 15, 2010 of an amount virtually identical to the purchase price. [See Pl's MSJ App. at 18 (Aurz. Dec. at ¶41-43)].

Two other notable transactions occurred in December 2010 in connection with soliciting capital contributions in connection with a limited partnership named Stewardship Fund No. 6, LP. Temme solicited $2.794 million from the investors in Stewardship Fund No. 6 in order to purchase a pool of 31 assets that Temme claimed he would be able to resell at a profit within 90 days. The investors wired the money to the entity Temme told them was the seller of the properties, but the investors never received the assets. And they did not receive the assets because, in fact, Temme had already – a month earlier – arranged for the owner of those assets to

sell them to another entity with which Temme was associated. [See Pl's MSJ App. at 18-19 (Aurz. Dec. at ¶44-46)].

Finally, Temme sought and obtained capital contributions of $2,347,323 from the limited partnership investors of Stewardship Fund No. 6 in order, according to Temme's representations, purchase a package of 410 assets from a company called Home Shield. There is, however, no evidence that Temme used the funds to acquire those assets, much less evidence that Temme conveyed them to the limited partnership as promised. To the contrary, Temme used those capital contributions to fund a settlement with a separate group of investors that had sued him. [See Pl's MSJ App. at 19 (Aurz. Dec. at ¶47-48)].[5]

**2. Temme fraudulently obtained over $3 million from an Illinois-based investor group.**

In early 2011, Temme pitched his investment scheme to a group of Illinois-based investors, including Leroy Finch, the manager of LF Realty Holdings, LLC. [See Pl's MSJ App. at 762-763 (Finch Dec. at ¶¶1-3)]. During those conversations, Temme represented that he, acting through Stewardship, was forming a new limited partnership, Equitas Housing Fund III, LP ("Equitas"). [Id. at ¶12]. These Illinois-based investors, including several individuals and affiliated entities, will be referred to here as the "Equitas Investors."[6]

In conference calls and in-person meetings in early 2011, Temme represented to the Equitas Investors that he was offering them the opportunity to acquire limited partnership interests in a limited partnership that would acquire a group of non-performing residential mortgages. [Pl's MSJ App. at 763 (Finch Dec. at ¶2)]. These loans were specifically identified and were later referenced on an Exhibit to the ultimately-executed Equitas limited partnership

[5] Temme also defrauded other investors to fund that settlement. [See Pl's MSJ App. at 20, 21 (Aurz. Dec. at ¶49, 54-56)].

[6] In his Declaration, the Receiver refers to this group as the Finch and Barry Group.

agreement. [See Pl's MSJ App. at 762-767 (Finch Dec.) and at 774, 775, 803-813 (excerpt from Equitas Housing Fund III, LP limited partnership agreement) and at 859-876]. The mortgages Temme represented would be acquired for the Equitas limited partnership will be referred to here as the "Equitas Mortgages." During the course of their discussions, Temme represented that the Equitas Mortgages would be purchased from an entity known as Home Solutions Partners, LP. [See Pl's MSJ App. at 763-764 and 877-900, 762]. As described below, these representations were false.

Temme further explained to the Equitas Investors that Stewardship had a partnership arrangement with Halo Group, Inc., a Texas-based public company that would service the Equitas Mortgages on behalf of the limited partnership (i.e., help modify the loans so that they were performing of such that they would be sold to the underlying owner). [Pl's MSJ App. at 762-763]. During these communications in early 2011, Temme also represented to the Equitas Investors that their investments would be repaid from proceeds from the management or disposition of the Equitas Mortgages. [Id].

Before investing in Temme's scheme, the Equitas Investors conducted certain due diligence. For example, they contacted Tim Weber, an investment adviser representative associated at the time with Goldman Sach's private wealth management group, and Weber confirmed that he and other friends and contacts of his had successfully invested with Temme and related entities. [Finch Dec. at paragraph 3, Pl's MSJ App. at 763].

Accordingly, the Equitas Investors, in April 2011, again based on Temme's representations, negotiated with him the terms of the limited partnership agreement, confirming that the capital contributions of the limited partners (i.e., the Equitas Investors) would be used to purchase the Equitas Mortgages. [Pl's MSJ App. at 763-764]. During the April 26 and 27 time

frame, the parties agreed that Equitas Investors (as limited partners) would pay an additional 10% of the purchase price of the Equitas Mortgages, and that those funds would be used by the party that would become the general partner of the Equitas partnership to service the Equitas Mortgages. [Pl's MSJ App. at 763-764].

Based on Temme's representations, the Equitas Investors agreed to invest with Temme. [Pl's MSJ App. at 763-764]. However, Temme insisted to the Equitas Investors that the putative seller, Home Solutions Partners LP, was requiring the purchase price to be delivered immediately, because Stewardship's contract with the Home Solutions Partners LP provided for a closing date of April 26, 2011. [Pl's MSJ App. at 763-764]. To support this claim, he provided the Equitas Investors with what appeared to be a signed purchase agreement between Stewardship and Home Solutions Partners, LP. [Pl's MSJ App. at 763-764 and 858-876].

The putative purchase agreement Temme provided the Equitas investors reflected the purchase of the Equitas Mortgages by Stewardship from Home Solutions Partners, LP. [Pl's MSJ App. at 763, 902]. It reflected a closing date of April 26, 2011. [Id]. Temme signed the agreement on behalf of Stewardship. [Id.] The document included the printed name and purported signature of Chad Vose, an individual who is the President of Home Solutions Advisors, LLC, a management company that operates several partnerships that used the "Home Solutions" name, including Home Solutions Partners I, LP. [See Pl's MSJ App. at 859-876, 909-913]. The document made it appear that HSA's President had signed the agreement on behalf of the putative seller, Home Solutions Partners, LP. [Pl's MSJ App. at 865]. That document, however, was false. As discussed below, Mr. Vose did not execute such an agreement. [Pl's MSJ App. at 765-766, 906, 910].

As a result of Temme's story, the Equitas Investors entered an agreement with him in which Temme, on behalf of Stewardship Fund purported to assign the Equitas Mortgages to a holding company created by the Equitas Investors, with the understanding that the Equitas Mortgages would be transferred to Equitas (the limited partnership) once the partnership agreement was finalized. [Pl's MSJ App. at 763, 878-900].

Based on Temme's misrepresentations and following his instructions, on April 27, 2011, the Equitas Investors collectively wired $3,139,667.20, representing their capital contributions. [Pl's MSJ App. at 762 (Finch Dec) and 901-904 (bank records)]. As instructed by Temme, they wired this money directly to a bank account at Comerica Bank that was purportedly in the name of Home Solutions Partners LP, the purported seller of the Equitas Mortgages. [Id.]. It was the Equitas Investors' understanding that these funds would be used to acquire the Equitas Mortgages, which would then be transferred to Equitas and serviced by Stewardship Fund and Halo Corp., in order to generate returns on the Equitas Investors' investments. [Pl's MSJ App. at 764]. The Equitas Investors also wired $313,967.00 to Halo Corp., consistent with their agreement to pay 10% of the purchase price to cover expected servicing expenses. [Pl's MSJ App. at 764]. Ultimately, the previous agreement to form Equitas was memorialized in a formal partnership agreement. [Pl's MSJ App. at 764 (Finch Dec.) and 769-857 (limited partnership agreement].

In truth, neither Temme, Stewardship Fund, nor any entity he controlled owned or made in real effort to procure the assets he purported to sell to the Equitas Investors in exchange for their capital contributions in the Equitas limited partnership. [Pl's MSJ App. at 21 (Aurz. Dec. at ¶58)]. To the contrary, as discussed below, Temme used those capital contributions for his own purposes.

For several months, the Equitas Investors were able to track information about the Equitas Mortgages they believed they owned on a website operated by Halo Corp. [Pl's MSJ App. at 764-765]. Although the information on Halo's website appeared to reflect that Halo had been servicing the Equitas Mortgages, the Equitas Investors learned in late August 2011 that, in fact, Chad Vose (the president of Home Solutions, the party that Temme claimed had sold him the Equitas Mortgages) knew nothing about the purported transfer of the Equitas Mortgages, that there was no entity known as Home Solutions Partners, LP (the name Temme had supplied as the purported seller), and that Vose's purported signature on the document purporting to show Stewardship Fund's purchase of the Equitas Mortgages was a forgery. [Pl's MSJ App. at 764-765, 906, 910]. In short, the Equitas Investors learned that, contrary to the representations of Temme and Stewardship Fund, the Equitas Mortgages had never been sold to the Equitas Investors or otherwise procured by Temme or Stewardship Fund for the benefit of Equitas. [See Id.].

Notably, Vose's statements are consistent with internal Stewardship records and other information. For example, the Receiver has reviewed Temme's e-mails and other Stewardship-related information and has not seen any e-mail communications or other documents referencing any communications between Temme or other Stewardship employees and Vose related to the putative agreement Temme provided to the Equitas Investors. [Pls' MSJ App. at 21 (Aurz. Dec. at ¶58)].

When the Equitas Investors and, separately, HSA's President, confronted Temme with these facts, he did not deny that he forged HSA's President's signature; rather, Temme immediately agreed to return the Equitas Investors' money. [See Pl's MSJ App. at 765 (Finch Dec.) and at 911 (Vose Dec.)]. Likewise, although Temme has admitted he was aware of the

putative purchase contract in which Stewardship was represented as purchasing the Equitas Mortgages, Temme has not denied that the Equitas Mortgages were never transferred to Equitas or the Equitas Investors. [See, e.g., Pl's MSJ App. at 765 (Finch Dec.)]. And, in fact, there is no evidence of any such transfer. [Pl's MSJ App. at 21 (Aurz. Dec. at¶ 58)].

**C. Temme actively concealed his fraud.**

On August 26, 2011, Temme assured the Equitas Investors that their investment had been sent to an individual named "Karl Koch" and that Koch was buying the rest of the mortgage portfolio of the Equitas Seller. [Pl's MSJ App. at 765]. The evidence allows only one reasonable conclusion: this was a lie.

First, although Temme provided what he claimed was a phone number for Koch, neither the Equitas Investors nor Commission staff were able to reach Koch by telephone at that number, much less confirm his role in connection with the investments. [See Pl's MSJ App. at 765 (Finch Dec.) and Pl's MSJ App. at 574-585 (Martinez Dec.)].[7] Likewise, one of the Equitas Investors attempted to e-mail Mr. Koch at the address provided, with no response. [Id.]. Indeed, a member of the Commission's staff investigated the putative phone number for Mr. Koch that Temme provided to the Equitas Investors, and it appeared to be a phone number owned by a service provider not an individual, i.e., a prepaid phone. [See Id.].

[7] Curiously, in his Initial Disclosures in this case, Temme listed "Karl Koch" as a person with knowledge "of his communications with Mr. Temme about Stewardship." His disclosures list Mr. Koch as being located in Austin, Texas with a phone number of (972) 208 5437. [See Pl's MSJ App. at 555 (Defendant's Initial Disclosures)]. But, when Plaintiff's counsel and counsel for the Receiver tried to contact Mr. Koch at that number, it was discovered that the number was actually the main number for the Plano (Texas) Sports Authority, a local youth sports organization. According to the Receiver, Temme had certain e-mails from the PSA that referred to a "Karl Koch" and from a Karl Koch identifying Mr. Koch as the PSA Softball Director. In contrast, the only e-mails related to any investment-related issues consisted of an e-mail from Temme's Stewardship e-mail account putatively addressed to Mr. Koch and copying a member of the Equitas Investors (M. Berry), with no known response or further related e-mails other than a reply to Mr. Koch from the Equitas Investors. [See Pl's MSJ App. at 22 Aurz. Dec. at p. 14, footnote 8).

Finally, the undisputed evidence is that Chad Vose, the then-President of Home Solutions Advisers, LLC (the management company of various Home Solutions partnerships) did not know Mr. Koch. This is inconsistent with Temme's claims to the Equitas Investors that the assets owned by Voses's entity had been transferred to a Mr. Koch. [See Pl's MSJ App. at 911 (Vose Dec.)]. Moreover, as Mr. Vose investigated the forged purchase agreement and the status of the Equitas Mortgages, Temme gave him a different story about Mr. Koch, claiming that Mr. Koch was a friend of one of the Equitas Investors. This was obviously untrue, as the Equitas Investors do not know if "Koch" even exists. [Pl's MSJ App. at 765 (Finch Dec.)].

Temme's concealment did not end with the mysterious Mr. Koch. Temme also provided the Equitas Investors with what he claimed was a copy of a Legacy Texas Bank wire transfer form, purporting to show that he had attempted to wire back all of their money. [Pl's MSJ App. at 765 (Finch Dec.)]. Again, this document was a fraud. No such form was presented to Legacy Texas Bank and, even if it had, Temme did not have even close to sufficient funds in any Legacy account to fund such a wire transfer. [Pl's MSJ App. at 566-568 (Martinez Dec.)].[8] In fact, the Legacy Bank account was not opened until August 24, 2011, with a deposit of $100. [See Pl's MSJ App. at 563-568 (Legacy Texas Bank Statement dated August 31, 2011 and Account Opening Documents)].

Regardless, Temme has not returned the bulk of the more than the $3 million paid to him by the Equitas Investors. [Pl's MSJ App. at 765]. Likewise, he never used those investor funds to purchase the promised mortgages on behalf of the Equitas Investors. [Id.; see also Pl's MSJ App. at 21 (Aurz. Dec. at ¶58)]. To the contrary, at least six of the properties that appear on the

[8] The business records of Legacy Bank include a copy of the purported wire transfer request, with a notation that it was received by Legacy Bank via fax from the Equitas Investors' bank on August 26, 2011. [See Pls's MSJ App. at 560 (Legacy Bank business records)].

list of properties that were supposed to be purchased on behalf of Equitas are identified as having been acquired by another limited partnership organized by Temme. [See Pl's MSJ App. at 583 (Martinez Dec.)]. And, in fact, neither Temme nor any of his entities owned them or attempted to acquire them. [Pl's MSJ App. 21 (Aurz. Dec. at ¶58)].

**D. Temme used the Equitas Investors' money to pay others.**

If Temme did not use the $3.1 million he obtained from the Equitas Investors as he promised them, what did he do with that money? Ultimately, he diverted much of it to pay off other people to whom he owed money.

First, as noted above, Temme directed the Equitas Investors to wire their approximately $3.1 million capital contribution into a Comerica bank in the name of a Home Solutions entity, on which he was a signatory.[9]

The same day the approximately $3.1 million capital contribution from the Equitas Investors was deposited into the Home Solutions Partners I LP account, Temme immediately wired it out of the account and into another Comerica account that was in the name of Destiny Fund II, LP. [Pl's MSJ App. at 583 (Martinez Dec.); and Pl's MSJ App. at 912 (Vose Dec.)].

Temme is a signatory to and has control over the Destiny Fund II Comerica Account. [See TRO App. at 9-10]. HSA's President, Mr. Vose, had not been aware of the deposit to the Home Solutions Partners I, LP account or the immediate transfer of funds to the Destiny Fund

[9] Notably, the funds were wired at Temme's direction to an account that was not in the name of "Home Solutions Partners, LP," which is a non-existent entity, but rather to Home Solutions Partners I, LP. Home Solutions Partners I, LP is a partnership that was operated by HSA and HSA's president (Mr. Vose) for the benefit of its own investors. Temme was not a general partner in Home Solutions Partners I, LP. However, Stewardship had a service contract with Home Solutions Partners I, LP that provided Temme signatory authority over its bank account at Comerica. Neither Home Solutions Partners I LP nor its general partner had authorized Temme to use the account for business unrelated to his service contract. Moreover, prior to April 27, 2011 the account had been dormant, because, *at Temme's request*, Temme and the President of HSA had agreed to use a different bank account for business relating to Home Solutions Partners I, LP. Apparently recognizing that the account was not regularly monitored by HSA's president or his staff, Temme used the account as a pass through to give the Equitas Investors the impression they were investing in assets acquired from a Home Solution entity. [See Pl's MSJ Dec. at 911 (Vose Dec.) and 762-767 (Finch Dec.)].

Comerica Account until he checked the account records on or about October 5, 2011. [Pl's MSJ App. at 912].

Although the evidence shows that Vose did not know of that deposit into the Home Solutions Partners I, LP account or Temme's transfer to the Destiny Account, shortly thereafter Temme re-transferred a sizable a sizable portion of that money to another Home Solutions account, in a transaction Vose did know about. This was not, however, to purchase the assets the Equitas Investors had been promised, but instead to repay an old, unrelated debt to another Home Solutions entity.

In December 2009, Temme and Stewardship had agreed to sell certain foreclosed homes to another Home Solutions partnership in exchange for $1,562,875. [Pl's MSJ App. at 912 (Vose Dec.)]. After the partnership had funded the agreement, there was a long delay during which Temme failed to provide the partnership with the deeds confirming that the titles to the properties had actually been conveyed. In fact, according to HSA's President, title to those properties was never conveyed to the partnership. [Id.]. Accordingly, the partnership demanded that Temme repay the purchase price, plus certain additional costs that had been incurred. [Id.]. In May 2011, Temme paid the partnership $1,821,306, representing the paid purchase price, plus compensation for the costs the partnership had occurred. [Id.].

The funds Temme used to fund this approximately $1.8 million payment were wired from the same Destiny Fund II Comerica account to which Temme had transferred the Equitas Investors' approximately $3.1 million capital contribution. [Pl's MSJ App. at 23 (Aurz. Dec. at ¶61-62); see also Pl's MSJ App. at 583].

**E. Temme defrauds another group to partially repay the Equitas Investors.**

While using the money he received from the Equitas Investors for other purposes, Temme attempted to placate the Equitas Investors' demands by paying them a partial refund of $419,966.72. On August 31, 2011, the Equitas Investors received a wire for $313,966.72 (representing the money they had paid for servicing expenses) and another wire on September 2, 2011, for $106,000. [Pl's MSJ App. at 767 (Finch Dec.)]. Although this In fact, these funds were not taken from the funds paid by the Equitas Investors. Instead, these wire transfers were funded by funds Temme obtained from a separate group of investors in another limited partnership, known as Stewardship Philanthropy Fund No. 4, as discussed further below. [Pl's MSJ App. at 23 Aurz. Dec. at ¶61, describing Texas Capital Bank records)].

As background, beginning in approximately 2010, Temme asked Timothy Weber, who was then a registered investment adviser employed at Goldman Sachs, whether he was interested in making an investment in Temme's Stewardship-related businesses. [See Affidavit of Tim Weber ("Weber Aff") at Pl's MSJ App. at 915]. Temme told Weber that he was engaged in the business of purchasing nonperforming residential mortgages, working with the homeowners to restructure the terms of their indebtedness so that they could make their monthly payments, and then reconstituting these previously nonperforming loans into packages of performing loans. Temme also assured Weber that his investment would be repaid from the management or disposition of those mortgages. [Id.].

On August 26, 2011, Mr. Weber and certain other entities and individuals working with him acquired limited partnership interests in a limited partnership called Stewardship Philanthropy Fund No. 4 ("SPF 4") [Pl's MSJ App. at 914, 918, 725-761]. The limited partners in SPF 4 included an entity controlled by Mr. Weber's spouse, an entity controlled by his

brother, and several clients and employees of the major investment bank at which Mr. Weber then worked. [Pl's MSJ App. at 914-915, 918].

Before this, throughout January 2011 through August 2011, in various in-person meetings and teleconferences, Temme explained to Mr. Weber and SPF 4 investors that he was in the business of purchasing nonperforming residential mortgages, working with the homeowners to restructure the terms of their indebtedness so that they could make their monthly payments, and then reconstituting those previously nonperforming loans into packages of performing loans. [Pl's MSJ App. at 915-916]. Temme also represented during this time period that the various portfolios of these assets would be placed into separate limited partnerships, and that each limited partnership's assets (including proceeds from the management or disposition of the mortgages) would be segregated and would not be commingled with any other limited partnership's assets. [Id.]. These representations were also included as part of the limited partnership agreement. [See Pl's MSJ App. at 918].

SPF 4 was supposedly managed by an entity known as Halo Asset Management Genpar I, LLC ("Halo Genpar"). [Pl's MSJ App. at 918]. According to Temme, Halo Genpar had been jointly formed by Temme and Halo Corp. (the same company referenced in the paragraphs above regarding Temme's fraud in connection with Equitas) for the purpose of creating various investment funds. [Id.; see also Pl's MSJ App. at 580]. In fact, before this time, the entity had changed its name and was controlled by Temme. [See Pl's MSJ App. at 923 (July 2011 Certificate of Amendment)].

SPF 4 investors wired their collective capital contribution of approximately $1.6 million to an account in the name of Stewardship Group, LLC at Legacy Texas Bank between August 26 and August 29, 2011. [Pl's MSJ App. at 581]. Temme was a signatory to that account. This

was the only activity in this account, other than an opening deposit and a $15,000 disbursement for rent. [See Pl's MSJ App. at 566-568, 570 (Legacy Texas bank record showing rent payment) and Pl's MSJ App. at 580]. In fact, given that this was the only activity in the account, it is clear that Temme used at least a portion of the investors capital contribution for a rent payment, not to purchase the properties promised.

Under the terms of the SPF 4 partnership agreement, and in accordance with other representations made by Temme, the SPF 4 investors' payments were supposed to be used by the general partner to acquire certain particularly identified distressed mortgages. The partnership agreement also obligated the general partner to provide certain periodic reports to the limited partners and to make to the limited partners quarterly distributions of the amounts received from the homeowners. [Pl's MSJ App. at 581]. Despite these obligations, the SPF 4 limited partners did not receiver any distributions from Temme. [See Pl's MSJ App. at 918-919]. Moreover, despite demands from the limited partners, Temme refused to account for their funds or provide other information regarding the mortgages supposedly acquired by the partnership. [Pl's MSJ App. at 920].

In September 2011, the SPF 4 investors, including Mr. Weber, became concerned because one of the limited partners' capital contribution was mistakenly double-wired to Temme and his Stewardship entities, yet Temme failed to return the duplicative payment despite a request that he do so. [Pl's MSJ App. at 919]. The investors' concerns were amplified when they learned of pending state court litigation against Temme. [Id.].

Accordingly, the SPF 4 investors asked Temme to explain the lawsuits and to provide specific information regarding Temme's use of the SPF 4 investors' proceeds. Temme failed to provide the requested information. [Id.].

Moreover, rather than using the proceeds he obtained from the SPF 4 investors to obtain the nonperforming mortgages that he had represented he would, Temme wired a sizable portion of the funds (over $400,000) to the Equitas Investors and to a separate group of investors. [See Pl's MSJ App. at 23, 478-536 (Aurz. Dec. at ¶61 and Exhibit 19)) and Pl's MSJ App. at 582;]. Specifically, Legacy Texas Bank closed his account on August 31, 2011, and that same day Temme transferred the SPF 4 funds to an account at Texas Capital Bank on August 31, 2011. [Pl's MSJ App. at 23 (Aurz. Dec. ¶61, citing bank records) and at 561 (Legacy Bank records); Pl's MSJ App. at 581-582]. That same day, he sent $313,966.72 to the Equitas Investors and he sent another $106,000 on September 2, 2011. [Pl's MSJ App. at 582]. He also sent $100,000 to a group known as Ten Lords, Ltd, which also had an investment through a Stewardship entity and had sued Temme. [See, e.g., Pl's MSJ App. at 23, 519 (Aurz. Dec. at ¶61 and Exhibit 19, citing bank records) and at 576-579 (Martinez Dec citing lawsuits)].

**F. Defendants flouted lawsuits and court orders.**

Beginning in approximately October 2010, Temme and Stewardship was sued multiple times by different sets of investors in private state court actions. [Pl's MSJ App. at 576]. In these private actions, different groups of investors raised similar allegations, generally alleging that Temme misrepresented to them that he would purchase certain mortgages with the investors' investments, had failed to pay returns, and had misrepresented the use of proceeds from the investments. [Id.] Unfortunately, rather than halting Temme's actions, this piecemeal litigation resulted in Temme and Stewardship Fund defrauding new investors.

For example, on April 27, 2011, certain investors initiated litigation against Temme in a Texas district court in Dallas, in a case styled *Canadian Peso 21, et al. v. Stewardship Fund, LP*, et al, case no. DC-11-05254, District Court of Dallas County, Texas. The investor-plaintiffs in

*Canadian Peso* alleged that Temme had made a variety of misrepresentations in inducing them to invest approximately $19.8 million with him, and sought a variety of relief, including restrictions on Temme's transfer or disposition of cash and other liquid assets. [See generally Pl's MSJ App. at 590-670].

After initially entering a temporary restraining order, the state district court in *Canadian Peso* entered an Agreed Amended Temporary Injunction on August 9, 2011 that prohibited Temme from taking any action to remove or seek the removal of any of the funds (other than for ordinary and reasonable business expenses, such as rent, utilities, and salaries of current employees) in any account over which Temme or other defendants in the litigation had control or signature authority, without the express, written consent of the plaintiffs or the written authorization of the Court. That temporary injunction was to last through a trial on the merits, which was scheduled to occur in November 2011. [See Pl's MSJ App. at 671-724].

Despite this restraint, on August 24, 2011, Temme caused at least two accounts to be opened at Legacy Texas Bank ("Legacy"). [See Pl's MSJ App. at 563-565, 571-572 (account opening documents)]. The first account was in the name of Stewardship Group, LLC, with an account number ending in 2479 ("the Stewardship Group LLC Legacy 2479 Account"). Temme was a signatory to that account. [Id.] The second was in the name of Destiny Fund I, LP, having an account number ending in 2487 ("the Destiny Fund I, LP Legacy 2487 Account").

Between August 26, 2011 and August 29, 2011, approximately $1.6 million was deposited into the Stewardship Group LLC Legacy 2479 Account. [See Pls' MSJ App. at 566-568 (8/31/11 Legacy bank statement)]. As discussed below, this $1.6 million represented funds received from another investor group that had, on August 26, 2011, entered into a limited partnership agreement with Temme called Stewardship Philanthropy Fund 4, LP ("SPF 4"). [See

Pls' MSJ App. at 566-568 (8/31/11 Legacy bank statement); Pl's MSJ App. at 581; Pl's MSJ App. at 918 (Weber Affidavit)]. SPF 4 is a partnership whose limited partners are different from the investor-plaintiffs in the *Canadian Peso* litigation. [Cf. Pl's MSJ App. at 591 to Pl's MSJ App. at 918].

On August 30, 2011, both the Stewardship Group LLC Legacy 2479 Account and the Destiny Fund I, LP Legacy 2487 Account were closed by the bank due to questionable activity. Upon the accounts' closing, Temme obtained a cashier's check from Legacy Bank in the amount of approximately $1.6 million, which was the amount of money SPF 4 investors had just invested into SPF 4. [Pl's MSJ App. at 581].

Despite the Dallas District Court's temporary injunction entered in the *Canadian Peso* litigation prohibiting the removal of funds from any account Temme controlled, Temme caused this $1.6 million cashier's check to be deposited into an account at another financial institution, Texas Capital Bank, with an account number ending in 8011, in the name of Stewardship Group, LLC. ("the Stewardship Group, LLC Texas Capital 8011 Account"). [Pl's MSJ App. at 561-562].

## III.
## LEGAL DISCUSSION AND ARGUMENT

Summary judgment is appropriate because there are no genuine issues as to any material facts, and the Commission is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether summary judgment should be granted, once the moving party has met its initial burden of identifying the absence of a genuine issue of material fact, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Commission has established the absence of any genuine issue of material fact and the Defendants cannot demonstrate specific facts showing a genuine issue.[10] Notably, Temme has asserted his Fifth Amendment privilege against self-incrimination instead of submitting to a deposition. He cannot possibly come forward with sufficient evidence on which a reasonable jury could return a verdict for him. *See Hatfield v. Bd. of County Com'rs. for Converse Cty.*, 52 F.3d 858, 862 (10th Cir. 1995); *Ojiaka v. Taco Bell Corp.*, No. 05-2094-RDR, 2006 WL 1049981, at *4 (D. Kan. April 19, 2006). In addition, as discussed in depth above, the Receiver appointed in this case has reviewed and analyzed countless documents related to the Defendants' conduct and has concluded (and demonstrated) that Temme and Stewardship Fund's activities since at least 2008 were riddled with dishonesty and conduct that, at best, qualifies as extreme recklessness.

**A. Temme's reliance on his Fifth Amendment privilege against self-incrimination raises an adverse inference against him and precludes him from offering evidence.**

Rather than appear to answer questions under oath, Temme elected to invoke his privilege under the Fifth Amendment to avoid self-incrimination. [See Pl's MSJ App. at 1-3]. As a result, the Court is entitled to draw reasonable adverse inferences against Temme. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 682 (D.D.C. 1995). In addition, Temme should not now be allowed to offer evidence to contradict the Commission's claims after using the 5th as a shield to prevent full discovery. *See SEC v. Merrill Scott & Assoc., Ltd.*, No., 505 F. Supp. 2d 1193, *10 (D. Utah May 21, 2007); *SEC v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987); *Gutierrez-Rodriguez v. Cartagena*, 882 F.3d 553, 577 (1st Cir. 1989); *Traficant v. C. I.R.*, 884 F.2d 258, 265 (6th Cir. 1989). *See also*

[10] This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act and Section 27 of the Exchange Act. Defendants, directly and indirectly, made use of the mails and of the means and instrumentalities of interstate commerce in connection with the acts, practices, and courses of business described in this Complaint. Venue is proper because several of the acts and events underlying the violations at issue occurred in the Eastern District of Texas.

*SEC v. Benson*, 657 F.Supp. 1122, 1129 (S.D.N.Y. 1987) (defendant precluded from offering evidence in support of his denials and affirmative defenses); *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 549 (S.D.N.Y. Jul 08, 1985).[11]

**B. Temme's fraud was in connection with securities.**

The limited partnership interests sold by Temme and his entities are securities. In particular, they are "investment contracts," which are securities under Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. An investment contract is (1) an investment of money (2) in a common enterprise (3) with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). It is well-established that purchases of limited partnership interests investment contracts under facts like those here satisfy this test. Investors in the limited partnerships provided Temme and Stewardship with funds, the funds were to be pooled together to purchase the underlying mortgages, and the general partners of the limited partnerships were entirely in control of the management of the mortgages in order to generate investment returns. *See McGreghar Land Co. v. Meguiar*, 521 F.2d 822, 824 (9th Cir. 1975) (limited partnership interests are investment contracts under *Howey* test); *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 899 n.4 (5th Cir. 1977) (limited partnership interests are securities).[12]

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[11] The Commission does not dispute Temme's right to invoke the Fifth Amendment, but the assertion of that right has consequences. His use of the privilege against self-incrimination in this case has blocked civil discovery by the Commission. Consequently, Temme should be precluded from offering any evidence in this case regarding the Commission's allegations of fact, Temme's denials of those allegations, and all other aspects of his defense.

[12] In addition, promissory notes like those Temme offered and sold are presumed to be securities and there is no basis to disregard that presumption here. *See* Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act (defining "security" to include "any note." ).

**C. The Defendants violated the antifraud provisions.**

Section 17(a) of the Securities Act makes it unlawful for any person, in the offer or sale of a security, to, among other things, obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Similarly, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder make it unlawful for any person, in connection with the purchase or sale of a security, to, among other things, make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The "in connection with" requirement of Section 10(b) and Rule 10b-5 is satisfied if the fraud touches upon a securities transaction. *See SEC v. Zandford*, 535 U.S. 813, 819-20 (2002).[13]

To prove violations of these antifraud provisions, the Commission must show that a defendant: (a) by the use of the mails or an instrumentality of interstate commerce[14]; (b) made false and misleading statements or omissions of material fact or otherwise employed any device, scheme or artifice to defraud or engaged in any transaction, practice or course of business which operates as a fraud or deceit; (c) in connection with the offer, purchase, or sale of securities; and

[13] In addition to material misrepresentations and omissions, the antifraud provisions encompass not only material misstatements and omissions, but deceptive "practices," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 475-76 (1977), deceptive "conduct," *id.* at 475 n. 15; *United States v. O'Hagan*, 521 U.S. 642, 659 (1997); and deceptive "acts," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 173 (1994); *See Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 9 (1971). As noted by the Supreme Court in *SEC v. Zandford*, 535 U.S. 813, 815 (2002), "each time respondent 'exercised his power of disposition (of his customers' securities) for his own benefit,' that conduct, 'without more,' was a fraud."

[14] The evidence easily establishes that Temme and Stewardship Fund used interstate commerce in connection with their fraud. Moreover, as noted above, the statements were made in connection with the offer or sale of a security.

(d) acted with the required intent or *scienter*. *Aaron v. SEC*, 446 U.S. 680, 697 (1980); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833,860 (2d Cir. 1968).[15]

**1. Temme and Stewardship made material misstatements.**

A misrepresentation or omission is material if there is a substantial likelihood that disclosure of the misstated or omitted fact would have significantly altered the "total mix" of information to be considered by a reasonable investor. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). *See also, Krim v. BancTexas Group, Inc*., 989 F.2d 1435, 1445 (5th Cir. 1993) (the appropriate inquiry is whether, under all the circumstances, the statement or omitted fact is one that a reasonable investor would consider significant in making the decision to invest, "such that it alters the total mix of information available about the proposed investment."); *Koehler v. Pulvers*, 614 F. Supp. 829, 842 (S.D. Cal. 1985) (finding omissions and misrepresentations about "the use of investor funds" material).

There is no doubt that Temme and Stewardship Fund made material misrepresentations and omissions about the securities they offered and sold. First, they lied about the very nature of the limited partnership investment by representing falsely that investors' funds would be used to buy particular mortgages when in fact, different assets were delivered or, even worse, no such

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[15] Violations of Sections 17(a)(1) and 10(b) and Rule 10b-5 require a showing of *scienter*, the mental state embracing intent to deceive, manipulate, or defraud. *Aaron v. SEC*, 446 U.S. 680, 691 (1980). But such a showing is not required for Sections 17(a)(2) and (3). *Id.* at 696-97. There can be no doubt, therefore, that Temme and Stewardship Fund violated Sections 17(a)(2) and (3) of the Securities Act.

Moreover, as discussed herein, the evidence establishes they acted with the requisite *scienter* under Section 17(a) of the Securities Act and 10(b) of the Exchange Act. *Scienter* is established by showing that the defendants acted intentionally or with severe recklessness. *See Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 961 (5th Cir. 1981) (*en banc*), *cert. denied*, 454 U.S. 965 (1981). The *scienter* of a company's management may be imputed to the company. *See, e.g., SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082 (2d Cir. 1972).

mortgages were bought and the proceeds were used to, in essence, make Ponzi payments to other investors.

Courts have held that where investors were induced to invest through misrepresentations that had a direct bearing on the value and profitability of the investment, and hence on the risk associated with an investment, the misrepresentations were material as a matter of law. *See, e.g., SEC v. Recile*, 10 F.3d 1093, 1097-98, 1098 n.16 (5th Cir. 1993); *SEC v. Research Automation Corp.*, 585 F.2d 31, 35-36 (2d Cir. 1978); *Spatz v. Borenstein*, 513 F. Supp. 571, 580-81 (N.D. Ill. 1981). Moreover, it is well settled that misappropriation of investor proceeds and lies about the company's business and operations violate the federal securities laws. *See, e.g., Luce v. Edelstein*, 802 F.2d 49, 55-56 (2d Cir. 1986) (stating that specific promises to induce a securities transaction while secretly intending not to carry them out, knowing they could not be carried out, or knowing that they would not be carried out, are sufficient to state a claim for relief under Section 10(b)); *SEC v. Research Automation Corp.*, 585 F.2d at 35-36 (misleading statements and omissions concerning the use of money raised from investors were material as a matter of law and injunction was the proper remedy).

Finally, as demonstrated above, Temme's misrepresentations continued even after the original investments, further demonstrating that he understood the materiality of the earlier fraud. *See SEC v. Holschuh*, 694 F.2d 130 (7th Cir. 1982) (a scheme to defraud includes later efforts to avoid detection of the original fraudulent conduct); *Local 875 I.B.T. Pension Fund v. Pollack*, 992 F. Supp. 545, 565 (E.D.N.Y. 1998) (misrepresentations made after decision to invest actionable because they induced customers to maintain investment).

**2. Temme and Stewardship Fund acted with *scienter*.**

Temme and Stewardship Fund, LP acted with *scienter*.[16] The evidence clearly demonstrates that Temme knew that, contrary to his representations, he would not use investors' funds to buy the referenced mortgages, but instead that he would misapply investors funds by using new investor funds to pay off other parties. It is axiomatic that Temme could not have promised to sell mortgages he did not own (or make efforts to obtain) without understanding the falsity of his statements. Indeed, his *scienter* is evidenced by his repeated efforts to avoid detection, including by giving inconsistent answers to investor efforts to obtain accurate information about their investments, by creating false documents, by transferring funds despite state court injunctions being in place, and by taking money from one group of investors and paying it to other parties. Temme's scienter is imputed to Stewardship, the entity he controlled.

**D. Defendants should be held jointly and severally liable to disgorge their ill-gotten gains, plus prejudgment interest.**

"The District Court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997). In calculating an appropriate amount of disgorgement, the amount "need only be a reasonable approximation of profits causally connected to the violation." *Id*.; *see also SEC v. Better Life Club of Am., Inc.*, 1999 U.S. App. LEXIS 7319 at *13 (D.C. Cir.), *cert. denied*, 528 U.S. 867 (1999); *SEC v. First Pacific*

[16] Summary judgment is appropriate, "even in cases where elusive concepts such as motive or intent are at issue . . . if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Forsyth* v. *Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993)). Thus, the element of *scienter* may be appropriately decided on summary judgment. *SEC v. Ficken*, 546 F.3d 45, 51 (1st Cir. 2008); *SEC v. Suman*, 684 F. Supp. 2d 378, 389-90 (S.D.N.Y. 2010) *aff'd*, 2011 U.S. App. LEXIS 9393 (2d Cir. 2011) (granting summary judgment to SEC in insider trading case alleging violation of Exchange Act Section 10(b) and Rule 10b-5).

*Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). The D.C. Circuit has explained:

> If exact information were obtainable at negligible cost, we would not hesitate to impose upon the government a strict burden to produce that data to measure the precise amount of the ill-gotten gains. Unfortunately, we encounter imprecision and imperfect information. . . . Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task.

*First City*, 890 F.2d at 1231. In determining an approximate amount of ill-gotten profits, "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *SEC v. Hughes*, 917 F. Supp. 1080, 1085 (D.N.J. 1996). "[D]oubts are to be resolved against the defrauding party." *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983); *see also Hughes*, 917 F. Supp. at 1085.[17]"[W]here two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they [may be] held jointly and severally liable for the disgorgement of illegally obtained proceeds." *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1117 (9th Cir. 2006) (quoting *SEC v. First Pacific Bancorp*, 142 F.3d at 1191).

Through their illegal conduct as detailed in this motion for summary judgment, Temme and Stewardship Fund fraudulently obtained at least $25 million from investors. And it is irrelevant whether those ill-gotten gains are considered gains by Stewardship Fund or Temme; Temme, as a result of his close connection with Stewardship Fund and other entities he controlled, is liable for the ill-gotten gains the entities received under well-established principles of joint and several

[17] Disgorgement is "meant to prevent the wrongdoer from enriching himself by his wrongs." *SEC v. Huffman*, 996 F.2d 800, 802-03 (5th Cir. 1993); *see also SEC v. AMX Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir. 1993); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). By preventing unjust enrichment, disgorgement also has the effect of "deterring violations of law." *Commodity Futures Trading Com'n v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir.), *cert. denied*, 479 U.S. 853 (1986). "The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

liability. Consequently, each should be held jointly and severally liable for disgorging those ill-gotten gains.[18]

In addition, "[a]n award of pre-judgment interest in a case involving violations of the federal securities laws rests within the equitable discretion of the district court to be exercised according to considerations of fairness." *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1 (1977). Where a securities law violator has enjoyed access to funds over a period of time as a result of his or her wrongdoing, requiring the wrongdoer to pay prejudgment interest is consistent with the equitable purpose of the remedy of disgorgement. *See Hughes*, 917 F. Supp. at 1090. The IRS underpayment rate is appropriate for calculating prejudgment interest in SEC enforcement actions such as this one. That rate of interest "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *First Jersey*, 101 F.3d at 1476. Based on a principal amount of $25,000,000.00, application of that rate from January 1, 2008 to the present, results in a total prejudgment interest amount of $5,929,542.82. [*See* Pl's MSJ App. at 548, 550 (Declaration of Angelia Stewart)].

**E. Defendants should be enjoined.**

Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d

[18] In the alternative, although the disarray with which Temme maintained Stewardship-related records and limitations inherent in a receivership have complicated efforts to pinpoint precisely how much money went directly to Temme's personal account and/or use, the Receiver has identified payments of at least $414,000.00 [See Pl's MSJ App. at 23 (Aurz. Dec. at ¶64)]. At a minimum, Temme should be required to disgorge those payments, plus prejudgment interest.

Moreover, the Commission acknowledges that the Defendants made certain distributions to some investors during the course of their scheme. Those distributions may of course be considered by the Court and the Receiver in analyzing claims submitted by such investors. Likewise, as discussed above, certain payments were directed to other parties rather than directly to Defendants' accounts. That should not diminish the proper measure of disgorgement. The Defendants, through their fraud, tricked investors into sending money for the Defendants' undisclosed purposes rather than as promised. It is irrelevant how Defendants' elected to spend those funds.

Cir. N.Y. 1996). The Court may grant permanent injunctions against future violations of the securities laws on a motion for summary judgment. *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. Cal. 1980); *SEC v. Am. Commodity Exch., Inc*., 546 F.2d 1361, 1365 (10th Cir. 1976); *Geyser Minerals*, 452 F.2d 876 (10th Cir. 1971). In order to make the "proper showing" required by statute, the Commission must establish that there is a substantial likelihood of future violations. *SEC v. Pros Int'l, Inc*., 994 F.2d 767, 769 (10th Cir. Utah 1993); *Murphy*, 626 F.2d at 655.

When determining the likelihood of future violations, the courts should evaluate the totality of the circumstances. *Id*. Past illegal conduct, particularly that consisting of systematic wrongdoing, is highly suggestive of the likelihood of future violations *SEC v. Management Dynamics, Inc*., 515 F.2d 801, 807 (2d Cir. 1975); *SEC v. Milan Capital Group, Inc*., 2000 U.S. Dist. LEXIS 16204 (S.D.N.Y. Nov. 8, 2000). Other factors to consider include "the seriousness of the violation, the degree of *scienter*, whether the defendant's occupation will present opportunities for future violations, and whether defendant has recognized his wrongful conduct and gives sincere assurances against future violations." *SEC v. Pros Int'l*, 994 F.2d at 769.

Applying these factors, it is clear that both Temme and Stewardship Fund should be permanently enjoined. Through Stewardship Fund, Temme carried out, over a period of years, a scheme of fraudulent conduct that wrongfully induced investors to give him millions of dollars. And Temme has neither recognized his wrongful conduct nor given assurances against future violations.

**F. Temme and Stewardship Fund should pay a third-tier civil money penalty.**

Section 21(d) of the Exchange Act and Section 20(d) of the Securities Act authorize the Commission to seek civil penalties in district court actions from those persons who have violated any provision of those Acts. Under those same provisions, a "third-tier" civil penalty is

appropriate if the defendant's violation (1) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and (2) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." Third-tier civil penalties for a natural person shall not exceed the greater of $150,000 (per the inflation adjustment specified by 17 C.F.R. § 201.1003) or the gross amount of pecuniary gain to such defendant as a result of the violation and the analogous standard for an entity is $725,000. Because of his egregious scheme and utter disregard of federal securities laws, Temme's conduct (and through him Stewardship Fund's conduct) resulted in substantial investor losses. Both Temme and Stewardship Fund, LP should pay a third-tier civil monetary penalty.

## CONCLUSION

The Commission respectfully requests that the Count grant the Commission's Motion for Summary Judgment.

Dated: June 5, 2013.

Respectfully submitted,

*/s/ David B. Reece*

DAVID B. REECE
Lead Attorney
Texas Bar No. 24002810
SECURITIES AND EXCHANGE COMMISSION
Fort Worth Regional Office
801 Cherry Street, 19th Floor
Fort Worth, Texas 76102
(817) 978-6476
(817) 978-4927 (fax)
reeced@sec.gov

**CERTIFICATE OF SERVICE**

I certify that on June 5, 2013, I electronically filed the foregoing Plaintiff's Motion for Summary Judgment with the Clerk of the Court for the Eastern District of Texas, Sherman Division, using the CM/ECF system. The electronic case filing system will send a "Notice of Electronic Filing" to all counsel of record who has consented in writing to accept service of this document by electronic means.

*/s/ David B. Reece*
David B. Reece

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

| | | |
|---|---|---|
| **SECURITIES AND EXCHANGE COMMISSION**, | : | |
| Plaintiff, | : | |
| v. | : | Civil Action No. 4:11-cv-00655-MHS |
| **JAMES G. TEMME, and STEWARDSHIP FUND, LP,** | : | |
| Defendants, | : | |

**PROPOSED ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Before this Court is Plaintiff, U.S. Securities and Exchange Commission's Motion for Summary Judgment.

**IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment is granted.

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