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.	§	

SURREPLY TO THE F&B GROUP'S REPLY IN SUPPORT OF ITS AMENDED MOTION FOR RELIEF FROM STAY

The F&B Group's Reply ("Reply") (Dkt. No. 117) is procedurally improper and should be stricken.[1] If the Reply is considered, Respondents[2] request the Court to consider this Sur-reply. For the following reasons, the relief sought by the F&B Group should be denied.

The F&B Group base its request to lift stay on its alleged right to recover damages against Respondents in the amount of $2,216,761. Reply, p.2. This admittedly represents amounts that were distributed by Destiny Fund II LP—a Receivership Entity—to Home Solutions Partners III, LP, Harbour Portfolio I, LLC and Harbour Portfolio II, LLC. Reply, p. 3. The Receiver has reviewed transaction documents for each of these entities pursuant to a Show Cause Order entered by this Court earlier this year. The Receiver has settled with Harbour Portfolio I, LLC and Harbour Portfolio II, LLC. This should end the Court's analysis and the

[1] The F&B Group's Reply is improper because it: (1) is twelve pages and thus violates the five-page limit of Local Rule CV-7(a)(2); and (2) contains arguments and authorities raised for the first time in a reply.

[2] Respondents are: (1) Home Solutions Advisors, LLC; Home Solutions GP, LP; Home Solutions Partners I, LP; Home Solutions Partners II, LP; Home Solutions Partners III, LP; Harbour Portfolio I, LLC; and Harbour Portfolio II, LLC.

stay should not be lifted. However, additional misstatements and admissions in the Reply show why the Amended Motion should be denied:

> ***"That money was moved around a bit and came to rest as follows . . ."*** (Reply, p. 3).

The "mov[ing] around a bit" was directed by Temme and the funds were "moved around" into at least one Receivership Entity, in particular, Destiny Fund II LP. The F&B Group's request to lift stay to pursue claims for payments received from Destiny Fund II LP clearly implicates Receivership Entities and the Receivership Estate.

> ***"In other words, the Home Solutions Affiliates do not want to be in the Stewardship club, they just want the benefits of membership."*** (Reply, p. 3)

Respondents have responded to this Court's Show Cause Order. Certain of them have entered settlement agreements approved by the Court. They have collectively suffered substantial losses as a result of the conduct of Temme and the Receivership Entities. There is no inconsistency in their position that the F&B Group investors should not receive preferential treatment with a lift of the stay. The fact of the matter is that the F&B Group's funds were transferred into Receivership Entities and are subject to this Court's jurisdiction.

> ***"It is true that the Home Solutions Affiliates and other parties were able to convince a State District Judge in Collin County to require clarification from this Court . . ."*** (Reply, p. 5)

Judge Whelass held that the subject matter of the F&B Group's 202 petition was properly subject to the Receivership Orders, not that the F&B Group should seek clarification. In fact, the original 202 petition requested discovery from Temme.

> ***"The Receiver, of course, has no way to recover the $2.2 million from the Home Solutions Affiliates, because the SEC has recognized early on in this case, rightly or wrongly, that those monies were retained by the Home Solutions Affiliates in payment of antecedent debts that Stewardship owed to these Home Solutions Affiliates."*** (Reply, pp. 5-6)

The F&B Group admits that the payments it seeks to recover were actually payments to antecedent debts owed by a Receivership Entity to certain Respondents. Contrary to the law of the Fifth Circuit, what the F&B Group is now asking this Court to do is take on the role of Robin Hood merely because other investors were injured—as were Respondents. *See, e.g., Janvey v. Libyan Inv. Auth.*, 3:11-CV-1177-N, 2012 WL 1059028, at *4 (N.D. Tex. Feb. 29, 2012) *aff'd,* 12-10240, 2012 WL 2136603 (5th Cir. June 13, 2012) ("[I]f the Court were to rule in favor of the Receiver solely for those reasons, the Court would be nothing more than a judicial Robin Hood—well-meaning, but nonetheless a thief.").

> ***"F&B had a direct contract with Home Solutions Partners to buy 440 specific mortgages."*** (Reply, p. 6).

The alleged "direct contract" was created by Temme, with a forged signature purportedly on behalf of "Home Solutions Partnership LP"—an entity that does not exist. It would be futile to allow the F&B Group to pursue claims against an entity that does not exist.

> ***"The Home Solutions Affiliates presumably still own these mortgages, and the Receiver has stated in open court that he knows of no claims to the mortgages."*** (Reply, p. 9)

Respondents have repeatedly stated that they **never** owned all of the "440 Contested Mortgages" and there is no evidence that they owned all of them.[3] Further, the Receiver has filed a Response to the F&B Group's Motion to Lift Stay (Dkt. No. 107) wherein the Receiver represents that the "440 Contested Mortgages" are potential Receivership Estate assets and, as such, are properly the subject of the stay."

> ***"It probably is true that . . . the Receiver will urge a set off for any claim of F&B in this proceeding."*** (Reply, p. 10).

[3] *See, e.g.*, Joint Response to F&B Group's Motion at 9; *see also* Joint Emergency Motion to Set a Hearing on the Finch and Barry Group's Objection at 6.

This statement unmistakably shows that the F&B Group is seeking preferential treatment in this Receivership. The Receiver has stated that claims related to the 440 mortgages are potential Receivership Estate assets and, as such, are properly the subject of the stay.

> ***"Nothing proposed by the F&B Group at this time would jeopardize the Receiver's ability to assert such ownership [of the 440 mortgages], should the F&B Group ever obtain a final judgment of entitlement to these mortgages."*** (Reply, p. 12)

This statement again shows how the F&B Group is seeking preferential treatment. The 440 mortgages are potential Receivership Estate assets and as such, are properly the subject of the stay. The Court should not complicate the Receiver's role by forcing it into the dispute with the F&B Group that would occur if the F&B Group is allowed to prosecute its claims to a "final judgment of entitlement" that would conflict with the orders and/or settlements in this case.

Numerous other statements in the F&B Group's Reply completely lack factual support. For example, the F&B Group repeatedly states that it would bring fraud, civil theft and negligence claims against Respondents. The F&B Group has no good-faith basis to plead a fraud claim against Respondents because **no member of the F&B Group has ever spoken to Respondents**. There can be no good-faith basis for allegations of the misrepresentations when parties never communicated. Misrepresentations by Temme are undeniably receivership issues. With regard to civil theft, the F&B Group cannot plead in good faith that Respondents intended to deprive the F&B Group of its property. **Respondents did not even know that the F&B Group existed during the relevant time.** With regard to negligence, the F&B Group cannot plead that Respondents owed them a legal duty. **No member of the F&B Group has ever spoken to Respondents.** The F&B Group appears to believe, as long as it can dream up any possible scenario that an independent claim might exist, this Court can preapprove any claim it may formulate in the future. The F&B Group is wrong.

If the Court considers the F&B Group's authorities,[4] those authorities do not support the F&B Group's position. These Sixth Circuit cases do not involve receiverships in SEC enforcement actions. None of these cases involved injured investors asserting claims against other injured investors based on facts asserted in an SEC complaint. In *Jarrett v. Kassel*, 972 F.2d 1415, 1426 (6th Cir. 1992), the court held that customers could not rely on actions taken by a corporate receiver to support the tolling of a statute of limitations on their individual claims, despite the receiver's authority to protect the customers' interests in the receivership property. In *Liberte Capital Group, LLC v. Capwill*, 148 Fed.Appx. 426, 428 (6th Cir. 2005) (unpublished), claims against the investors' broker-dealers were held to be claims of the individual investors, since no receivership entity had any dealings with the broker-dealers. Here, the F&B Group is not claiming any Respondent was its broker-dealer or trusted advisor. The F&B Group and Respondents are simply (1) competitors who never interacted and (2) similarly situated victims of fraud being investigated by the SEC. Further, the $2,216,761 that the F&B Group seeks to recover were funds paid by a Receivership Entity—Destiny Fund II LP.

The F&B Group has judicially admitted that: (1) Temme orchestrated the transactions that are the basis of the F&B Group's claims; (2) the F&B Group was defrauded by Temme and Stewardship when it sought to create a partnership with a Receivership Entity; and (3) the $2,216,761 claimed by the F&B Group went into Destiny Fund II LP (a Receivership Entity) before it was paid to other entities. The F&B Group has never plead facts that would allow it to pursue independent claims. For these reasons and those previously described in Respondent's Response, the F&B Group's Motion should be denied.

[4] The Court should not consider the F&B Group's newly raised authorities because they are raised in violation of local Rule CV-7(a)(2) and were raised for the first time in its Reply.

DATE: August 27, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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