

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

JAMES G. TEMME and
STEWARDSHIP FUND, LP,

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 4:11-CV-00655

**JOINT RESPONSE TO FINCH AND BARRY GROUP'S
MOTION FOR RECONSIDERATION**

The Home Solutions, Harbour Portfolio and Cavco Entities¹ (“Respondents”) jointly file this Response (“Response”) to the Finch and Barry Group’s (“F&B Group” or “Movants”) Motion for Reconsideration (“Motion”) (Dkt. #142). The Finch and Barry Group requests reconsideration of Judge Mazzant’s September 13, 2012 Order (the “September 13 Order” or the “Order”) denying the F&B Group’s Amended Motion for Relief from Stay (Dkt. #96). For the reasons stated herein the F&B Group’s Motion for Reconsideration should be denied and the F&B Group’s Motion for yet another oral hearing should be denied.

OVERVIEW

The F&B Group’s Motion for Reconsideration should be denied for three reasons. First, the F&B Group’s Motion for Reconsideration advances no new arguments and fails to address the standards or the findings of the September 13 Order. Second, the merits of the F&B Group claims were properly evaluated by Judge Mazzant in reaching his decision. Third, the F&B

¹ 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; Harbour Portfolio II, LLC; and Cavco Holdings, LLC. Respondents are not “Affiliates” as the F&B Group again asserts without support.

Group is wrong regarding whether the Receivership is a necessary party in any potential state court action.

ARGUMENTS AND AUTHORITIES

A. The F&B Group's Motion for Reconsideration advances no new arguments and fails to address the standards or the findings of the September 13 Order.

The F&B Group's Motion for Reconsideration simply repeats the statements that the F&B Group has made in over a dozen petitions, motions, discovery requests, subpoenas, and hearings related to this SEC enforcement action and the injuries 48th Street Holdings, LLC (an entity not before the Court) allegedly suffered when it wired funds (at Temme's direction) for an investment transaction with Stewardship Fund, LP involving interests Stewardship allegedly purchased from Home Solutions Partners, LP (a nonexistent entity). Nonparty Respondents, the Receiver, and the U.S. Securities and Exchange Commission have responded to these arguments by the F&B Group in multiple filings with the Court, (Dkt. ##106, 107, 120, 122, and 130) at multiple hearings and through evidence. Respondents incorporate those responses as if fully stated herein.

In the September 13 Order, the Court held that the applicable standard for the F&B Group's Motion was a balancing test first announced in *SEC v. Wencke*. See Order at 9; see also *S.E.C. v. Wencke*, 622 F.2d 1363, 1373 (9th Cir. 1980). The *Wencke* test balances these factors to determine whether to grant relief from a stay in an SEC receivership: (1) whether refusing to lift the injunction genuinely preserves the status quo or whether the moving party will suffer substantial injury if it is not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the injunction is made; and (3) the merits of the moving party's underlying claim. The F&B Group's Motion for Reconsideration fails to make any argument with regard to balancing these factors. The F&B Group further fails to explain why the standard

the Court employed is not applicable. In fact, the F&B Group's Motion for Reconsideration fails to even mention the *Wencke*, *Acorn* and *Petters* cases that Judge Mazzant relied upon in making his decision. Compare F&B Group's Motion for Reconsideration with September 13 Order; see also *Wencke*, 622 F.2d at 1373; *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 444 (3d Cir. 2005); *United States v. Petters*, No. 08-5348, 2008 WL 5234527, at *3 (D. Minn. Dec. 12, 2008). Because the F&B Group's Motion for Reconsideration advances no new arguments and fails to address the standards or the findings of the September 13 Order, the Motion should be denied.

B. The merits of the F&B Group claims were properly evaluated by Judge Mazzant in reaching his decision.

The F&B Group asserts, without citing authority, that the merits of its claims are not at issue. The F&B Group is wrong. Under the standard applied by the Magistrate Judge, the merits of the F&B Group's claims were properly analyzed to determine whether to grant relief from a stay in any SEC receivership. See, e.g., *Wencke*, 622 F.2d at 1373 ("The merit of the moving party's claim is also a relevant consideration."). As Judge Mazzant noted, the lack of merit of the F&B Group's claims is clear. The F&B Group never explained the plethora of bad facts facing its claims, including: (1) no member of the F&B Group has ever spoken to Respondents; (2) Respondents were not even aware of the relevant transaction; (3) James Temme designed and executed the transaction that harmed the F&B Group; (4) 48th Street Holdings, LLC, the only party that can claim damages, is not before the Court; (5) Respondents never, even collectively, owned the 440 Subject Mortgages that form the basis of the F&B Group transaction; and (6) the F&B Group failed to do even the most basic due diligence in its dealings with Temme. Given these undisputed facts, Judge Mazzant's characterization of the merits of the F&B Group's

claims as “weak” is generous. Because the merits of the F&B Group’s claims are so weak, this Court need not disturb the sound reasoning contained in the September 13 Order.

C. The F&B Group is wrong regarding whether the Receivership is a necessary party in any potential state court action.

The F&B Group asserts, again without reference to case authority, that the Receiver is incorrect in his judgment that he would be forced to intervene in any action based on the facts that the F&B Group has presented. Motion at ¶25. Rule 39 of the Texas Rules of Civil Procedure reads as follows:

Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

The F&B Group further vows that it will only bring “tort claims” and not claims related to the “same 440 mortgages” that the F&B Group declares are potential Receivership assets. This analysis misses the point. The alleged “tort claims” the F&B Group describes are all based on the same facts as any claim for the “same 440 mortgages”. James Temme, Stewardship Fund LP, and Destiny Fund II LP (all of which are subject to the Receivership Orders entered in this case) were part of the F&B Group’s transaction. Thus, James Temme, Stewardship Fund LP, and Destiny Fund II LP are all necessary parties for the just adjudication of any claim based on the F&B Group’s transaction. *See, e.g., Longoria v. Exxon Mobil Corp.*, 255 S.W.3d 174, 180-84 (Tex. App.—San Antonio 2008, pet. denied); *see also Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 832 (Tex. App.—Amarillo 1993, writ denied) (describing the three categories of persons that should be joined: (1) relief will be incomplete without the person; (2)

adjudication without the person will hinder the person's ability to protect his or her interests; and (3) the absence of the person will expose the remaining parties to a "substantial risk" of multiple or inconsistent obligations). If any of Respondents were sued by the F&B Group in state court, there is little doubt that the: (1) perpetrator of the fraud (Temme); (2) the entities whose names are on the fraudulent assignment agreement (Stewardship Fund, LP and the nonexistent Home Solutions Partners LP); and (3) the entity that paid Home Solutions Partners III, LP for an antecedent debt (Destiny Fund II LP) are necessary parties required for just adjudication.

CONCLUSION

For the reasons described herein, Respondents respectfully request that the Court deny the F&B Group's Motion and grant Respondents any and all relief to which they are justly entitled.

DATE: October 04, 2012.

Respectfully submitted,

LOEWINSOHN FLEGLE DEARY, LLP

/s/ Jim L. Flegle

JIM L. FLEGLE

Texas Bar No. 07118600

MICHAEL J. DONLEY

Texas Bar No. 24045795

12377 Merit Drive, Suite 900

Dallas, Texas 75251

(214) 572-1700

(214) 572-1717 (fax)

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above pleading was served on the parties identified below on October 04, 2012:

H. Allen Pennington, Jr. *Via ECF and Facsimile*
Jacob T. Fain
Pennington Hill, LLP
509 Pecan Street, Suite 101
Fort Worth, Texas 76012
Fax – 817-488-4545

Bradley J. Purcell *Via ECF*
Jay L. Krystinik
Bryan Cave, LLP
JP Morgan Chase Tower
2200 Ross Avenue, Suite 3300
Dallas, Texas 75201

David B. Reece *Via ECF*
Securities and Exchange Commission
Fort Worth Regional Office
801 Cherry Street, 19th Floor
Fort Worth, Texas 76102

John Helms *Via ECF*
Helms Roberts & Diaz
6060 N. Central Expressway, Suite 560
Dallas, Texas 75206

Michael Quilling *Via ECF*
Quilling, Selander, *et al.*
2001 Bryan Street, Suite 1800
Dallas, Texas 75201

/s/ Michael J. Donley
Michael J. Donley

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

JAMES G. TEMME and
STEWARDSHIP FUND, LP,

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 4:11-CV-00655

ORDER

On this day came on to be heard Finch and Barry Group's Motion for Reconsideration (Dkt. No. 142). After consideration of the Motion, responses, any reply, evidence and arguments, it is the Court's opinion that the Finch and Barry Group's Motion for Reconsideration be DENIED.