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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

VS. Civil Action No. 4:11-cv-00655

JAMES G. TEMME,
STEWARDSHIP FUNDS, LP

Defendants.

**REPLY BRIEF TO HOME SOLUTIONS AFFILIATES IN SUPPORT OF MOTION FOR RECONSIDERATION**

The Finch & Barry ("F&B") Group files this Reply Brief to Home Solutions Affiliates, and would respectfully show the Court the following:

1. The basis of F & G's Motion for Reconsideration is that the specific personal tort claims of the F&B Group, outlined in its Amended Motion to Lift Stay, are not subject to the Court's litigation stay in the first place, not that the factors of *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980), as to whether to lift an applicable stay, were not applied correctly. As shown in F&B's Motion, the only two bases for finding that the stay affects F&B's tort claims would be the specific words in the Court's stay order, or a finding that the Receiver "owns" F&B's tort claims. The express words of the stay orders clearly do not even address claims of non-parties against other non-parties, and there is no basis whatsoever for any finding that Temme or Stewardship "own" F&B's tort claims against the HS Affiliates, nor has the Honorable Magistrate made such a finding. These points are adequately briefed and explained on pages 9-13 of F&B's Motion for Reconsideration. F&B does not discuss the *Wencke* factors, because the litigation stay does not apply to F&B's tort claims in the first place.

2. Regarding the "merits" of F&B's tort claims, all parties agree, in the briefing that has occurred on F&B's Motion for Clarification, that the September 13, 2012 order does not

adjudicate the ultimate merits of F&B's claim.[1] The order states that "…the Court cannot decide the merits of the Finch and Barry Group's claims…" (Order, p. 11). F&B's point, which continues to be misconstrued, are that the perceived merits of F&B's claims have nothing to do with whether they are covered by the stay in the first place. Weak or strong, made weaker or stronger once F&B finally gets to depose Charles Vose and see the documents of the HS Affiliates, the claims are covered by the Court's stay or they are not. F&B strongly believes they are not.

3. Whether the Receiver would be a "necessary party" to the F&B Group's money damage tort claims is a matter of a Texas state judge's discretion under Texas Rule of Civil Procedure 39. Just as the Home Solutions Affiliates re-craft every other argument of F&B into a new straw man they can knock down, the HS Affiliates attempt a wholesale redefinition of F&B's intended claims (which are based upon conduct which ended April 27, 2011), into including a $1.8 million payment made by Destiny Fund II to Home Solutions Partners III, LP, ("HSP-III") in early May, 2011. HS then concludes, with no legal analysis, that Temme and other receivership entities are "necessary parties" under Rule 39 to F&B's state court action against Charles Vose and the HS Affiliates, implying that F&B is seeking recovery of that $1.8 million payment.

[1] F&B does take issue with the statements by Home Solutions as to what the evidence showed at the August 30, 2012 hearing, but does not have room here to refute what the record of the hearing itself amply refutes. One example, however, is the bold statement, without any citation to the record, that "Respondents [the Home Solutions Affiliates] were not even aware of the relevant transaction [with F&B"]. There was absolutely no evidence presented at the hearing of this fact by the Affiliates – they put on no evidence at the hearing, and successfully quashed a subpoena served upon Charles Vose, which would have required him to come to court and answer this specific question. Charles Vose's self-serving affidavits filed in this Court clearly do not answer this question; he only states in his October 10, 2011 affidavit that he had never seen the physical contract upon which his name was signed (probably by Temme pursuant to a power of attorney). The affidavit says he confronted Temme as to why he "hadn't been paid for the mortgages;" not that he didn't know about the sale to F&B, or that Temme did not have the power of attorney and necessary paperwork to sell the mortgages. Home Solutions apparently seizes upon this affidavit to state that none of the Home Solutions Affiliates knew about the F&B transaction; a leap of hyperbolic proportions and an apparent attempt to make its allegation of ignorance of the transaction part of the lore of the case, rather than anything actually supported by any evidence ever presented.

4. The Court should instead examine the actual issue before the Court, which is whether the F&B Group's state court claims for fraud and theft against the HS Affiliates, in connection with the April 27, 2011 wire transfer of $3.1 million into the Affiliates' bank account, would require the Receiver as a necessary party under Texas Rule 39. As shown by Home Solutions' own authorities, this is a matter of discretion for a Texas state court judge, but the Affiliates would rather this Court substitute its discretion on a matter of state court procedure. See *Longoria v. Exxon Mobil Corp.*, 255 S.W.3d 174, 179 (Tex. App – San Antonio 2008, *pet. denied*). This, the Court should decline to do.

5. As long as the F&B Group limits its claims to those delineated in its Amended Motion for Leave, what happened after the money left the Home Solutions Affiliates accounts, and whether they were able to hold onto any of that money, is irrelevant. The fact that HSP-III later received some money from Destiny, which is traceable to money originally sent by F&B to HSP-I several days earlier, is irrelevant; therefore, Destiny II is not a necessary party to F&B's tort claims. Home Solutions' novel argument that an alleged non-existent entity, Home Solutions Partners, LP, is a necessary party to a state court action obviously has no basis in concept or law.[2] It is evidence of the lengths to which the HS Affiliates will go to avoid their day in court with the F&B Group.

6. The question of whether Temme or Stewardship are necessary parties under Rule 39 is an easy one. The Texas Supreme Court has observed that under Rule 39, "it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined." *Cooper v. Texas Gulf Industries*, 513 S.W.2d 200, 204 (Tex. 1974). F&B Group chooses to sue only the

[2] The Texas Civil Practices & Remedies Code does address allocation of responsibility to real parties whose identity is not known. Tex. Civ. Prac. & Rem. Code 33.004(j). No legislation yet on non-existent parties.

HS Affiliates for its $3.1 million loss in its state court action at this time; that is their prerogative under Texas procedure. Since F&B is asserting tort claims against the HS Affiliates, they have the ability, under unique Texas procedural statutes, to attempt to name Temme and Stewardship as "responsible third parties" under Chapter 33 of the Texas Civil Practices & Remedies Code. If they are successful in doing so, those parties' responsibility for F&B's damages would be allocated to 100%, along with the responsibility of the HS Affiliates. Chapter 33 requires neither F&B nor the HS Affiliates to make Temme and Stewardship actual parties to the state court action, as wishfully suggested without support in Home Solutions' response. The only reason the Receiver would want to be a party to F&B's state court action would be to get to have a judgment entered against the estate for Temme's proportionate responsibility, if any, for F&B's loss, under the Chapter 33 allocation scheme. The Receiver will not do that.

7. For F&B's money damage tort claim, Home Solutions does not even attempt to explain why Temme or Stewardship would, as a matter of law, meet either prong of the Texas Rule 39 test. First, all the relief sought by F&B, $3.1 million, the amount they received on April 27, 2011, could be awarded against the HS Affiliates. Would this relief in favor of F&B impede the Receiver's ability to recover his alleged $1.8 million claim for the May transfer to HSP III? Absolutely not; that claim is based on a different transaction that occurred several days later, after the conduct for which F&B is suing was concluded. Would the HS Affiliates be exposed to a risk of multiple liabilities on the same claims? No, because the Receiver's claim is a different claim for a different amount, a claim for $1.8 million, based on different facts, different considerations and timeframe, and different parties from F&B's claims relating to Home Solutions' conduct which culminated and fixed F&B's damages at $3.1 million earlier on April 27, 2011. F&B's decision not to pursue the 440 mortgages at this time resolves any possible

argument that the Receiver would be a necessary party in F&B's money damage tort claim in a Texas state court.

8. Furthermore, HS Affiliates gets to make its argument in the state court action that the Receiver is a necessary party under Rule 39. This Court's decision not to pre-judge that matter of Texas procedure, for reasons of comity or otherwise, prejudices the Affiliates not at all.

9. Counsel has been unable to find many, if any, cases where one was found to be a necessary party under Rule 39, other than in a real property ownership or will contest situations. The *Longoria* case involves forty-two plaintiffs trying to establish ownership of mineral rights without joining the record owners of the minerals. The case before this Court has nothing to do with the necessary party situations where Rule 39 is a legitimate consideration. Under Texas responsible third party practice, the F&B Group will be entitled to recover that portion of the $3.1 million attributable to the responsibility of the HS Affiliates for F&B's loss on April 27, 2011, regardless of whether Temme and Stewardship are named parties in that proceeding.

10. The misstatements as to the record of the August 30, 2012 hearing, and the mischaracterization of every one of F&B's arguments, is further proof that the HS Affiliates, non-parties to this proceeding, are simply misusing and abusing this proceeding to shield them from a lawsuit from other non-parties. This Court should not allow this misuse of the system. The Court's stay does not even allude to the idea of shielding non-parties from legitimate lawsuits by other non-parties. The useable case law on point, which is in the Sixth Circuit, excoriates this abusive and unconstitutional use of a receivership, and a reading of the plain language of the Court's stay orders clearly shows their inapplicability to F&B's tort claims against the Affiliates.

WHEREFORE, the F&B Group respectfully prays that this Court reconsider the September 13, 2012 order, and grant their Motion for Reconsideration.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 11th, 2012, a true and correct copy of the foregoing document was served on the following counsel of record via electronic case filing or certified mail, return receipt requested.

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