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 RESPONSE OF THE RECEIVER, IN SUPPORT OF MOTION FOR RECONSIDERATION

The Finch & Barry ("F&B") Group files this Reply Brief to the Receiver, in Support of Motion for Reconsideration, and would respectfully show the Court the following:

1. The basis of F&B's Motion for Reconsideration is that the specific personal tort claims of the F&B Group, outlined in the 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 discussed in more detail in F&B's October 11, 2012 Reply to the HS Affiliates' Response to F&B's Motion, neither of the two bases for finding that the stay affects F&B's tort claims are present here. The subject stay orders clearly do not even purport to address claims of non-parties against other non-parties, nor did the Court's order purport to expand the express language in the litigation stay orders. The F&B Group declines to fall into the trap of arguing the *Wencke* factors, so that an abuse of discretion standard would apply to this Motion. Since the issue raised by F&B is whether the stay applies at all, like a conclusion of law, F&B submits that this Court should review this issue on a *de novo* basis. *Affiliated Prof. Home Health Care Agency v. Shala*, 164 F.3d 282, 284 (5th Cir. 1999).

2. The basis for the Receiver's objection to the Amended Motion to Lift Stay is finally revealed in his Response. (Less than 24 hours before the hearing on F&B's Amended Motion to Lift Stay, the Receiver reversed his written neutral position on F&B's Motion, for leave to file money damage claims against the Home Solutions Affiliates, but in such notice, gave no explanation to the Court as to the reason or basis for the objection). The Receiver's sole substantive objection apparently centers around the contention that $1.8 million of his claim against the Home Solutions Affiliates is mutually exclusive with $1.8 million of F&B's $3.1 million claim against the HS Affiliates. But this oversimplification looks only at dollars, and not the relevant causes of action and relief sought. Based on the specific tort claims F&B wishes to present, the Receiver's objection is nothing more than a solution in search of a problem. The September 13, 2012 Order may be burdened with the same misunderstanding, based upon the comment in the order that F&B's claims seem to at least "implicate" potential claims of the Receiver.

3. As clearly explained in F&B's Reply to the HS Affiliates' urgent plea to this Court to protect them from F&B's direct claims, F&B has personal tort claims against HS Affiliates which are specifically set out in the Court's September 13 order, and which, by definition, are based upon conduct of the Affiliates which concluded at the very moment of completion of F&B's $3.1 million wire transfer to the account of HSP-I on April 27, 2011. That money was moved around (nobody has yet offered any evidence, as opposed to conjecture, of who did so), and $1.8 million was sent early the next month to the account of HSP-III from the Destiny II account, now part of the receivership. F&B's tort claims have nothing to do with that wire-transfer in early May, which the Receiver can pursue if he wishes. If the F&B Group proves their claims, they will recover $3.1 million from the Affiliates, not based on tracing, but based on F&B's out-of-pocket damages, based upon proof of fraud and theft, and damages fixed

on April 27, 2011. If the Receiver can recover the $1.8 million from the Affiliates, it would be based on a tracing type claim, totally unrelated to F&B's defined claim. Different time, different parties, different claims. The Affiliates could be liable for the full amount of both claims, neither claim, or a mixture of the two, but they are independent.

4. The Receiver's Brief relies exclusively upon a recent Fifth Circuit case regarding SEC stay litigation, *Janvey v. Stanford International Bank Limited,* 424 Fed. Appx. 338 (5th Cir. 2011). Counsel neglects to mention that the very first page of this opinion states:

> Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4 (Emphasis supplied).

The "limited circumstances" set forth in Rule 47.5.4 are that the opinion may only be used as precedent as to the doctrines of *res judicata,* collateral estoppel and "law of the case". In other words, the Fifth Circuit says the case can only be used as precedent in the *Janvey v. Stanford* case itself. The opinion was not attached to the Receiver's Brief as expressly required by the Federal Rule of Appellate Procedure 32.1, which would have notified this Court that the case cannot be cited as precedent in this case before the Court.

5. Besides the fact that the Fifth Circuit itself expressly says to ignore the *Janvey v. Stanford* case, it also clearly sets forth different circumstances than those before this Court. There were two customer arbitrations enjoined in the *Janvey* case, one sought to recover assets potentially belonging to the estate (proceeds of insurance policies), and the other would have interfered with a substantial active lawsuit already being pursued by the Receiver against the same subject broker.

6. Therefore, the *Janvey* case deals with claims by investors against non-parties, but the *Janvey* Court's express basis for the very unique, not-to-be-relied-upon, opinion is clearly the

fact that the "district court has broad authority to issue blanket stays of litigation to preserve the property placed in receivership pursuant to SEC actions", citing *Schauss v. Metals Depository Corp.*, 775 F. 2d 649, 654 (5th Cir. 1985)(emphasis supplied). The F&B Group is not seeking any assets in the receivership estate in its state court action, nor has the Receiver filed suit on any of F&B's personal tort claims, which are part of the proposed F&B state court action, nor does he have standing to do so. The Receiver cannot sue on fraud and theft claims belonging personally to the F&B Group; F&B's money went directly from F&B to the account of HSP-I, not through any receivership entities.

7. The other three cases cited by the Receiver on page 4 of his Brief all deal with recovery of claims by the Receiver for money paid out by receivership entities themselves to third parties, prior to appointment of the Receiver. These cases do not deal with the Receiver seeking to interfere with personal claims of non-parties to the receivership proceeding against other non-parties to the proceeding. The Receiver has no more right to these personal tort claims that he has to the automobiles the F&B folks will use to drive to the hearing on this Motion. Unless this Court is willing to allow the Receiver to impede claims and sequester personal assets of the members of the F&B Group, to use as bargaining chips to extract nominal settlements for the benefit of the estate, the Receiver's objections to the F&B Group's Motion should be overruled. The reasons for the HS Affiliates' spirited objection to the assertion of the F&B Group's claims is fairly obvious, but there is no other reasonable explanation as to why the Receiver would work so hard, and in such close and coordinated tandem with the HS Affiliates, to block F&B's independent personal tort claims against the Affiliates. The Receiver's actions regarding F&B are in stark contrast to the response to other similar ongoing litigation by other non-parties (against other non-parties) who dealt with Temme, as shown by Exhibit 16 at the hearing on F&B's Amended Motion. Why else would F&B be singled out for this opposition?

8. The other points made by the Receiver are misplaced. No evidence was offered on August 30, by the Receiver or the Home Solutions Affiliates, of any of the following facts:

> (1) That the Receiver is presently trying to negotiate a settlement with the Home Solutions Affiliates (the Receiver recently, and unsuccessfully, sponsored a global release of the HS Affiliates);
>
> (2) That any recovery by the F&B Group would reduce recovery by the estate under the one satisfaction rule (See pages 4-5 of F&B's Reply Brief to HS Affiliates for refutation of this new argument.);
>
> (3) That the Receiver would have to intervene in the F&B Group's lawsuit (This point is refuted on pages 2-4 of the HS Affiliates Reply Brief); and
>
> (4) That the HS Affiliates were not aware of the F&B transaction (as alleged by the HS Affiliates in their Response, without any supporting evidence) or the implication that Temme acted alone in designing and executing the transaction that harmed the F&B Group.

9. The F&B Group has been very surprised at the treatment it has received by the Receiver in this matter. The SEC has generously shared documents and information with F&B; the Receiver has refused to provide any of the documents, testimony or information received from the Home Solutions Affiliates, vigorously shielding documents on hand which would support F&B's claims. This latest suggestion that F&B's pursuit of a clearly independent claim for $3.1 million is wasting his time and that of this Court is a very, very troubling statement. It may be unprecedented. The F&B Group worked with the SEC in providing documents, cooperation, and an affidavit, at their expense, which were used to file this action. The honorable Magistrate has certainly not treated the F&B Group as if their claim is a waste of his time, and they have no reason to believe this Court will not give their request studied and careful consideration. The F&B folks respectfully request a hearing on this matter of great importance to them.

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

Respectfully submitted,

PENNINGTON HILL, LLP.

By: /s/ H. Allen Pennington, Jr.
H. Allen Pennington, Jr.
State Bar No. 15758500

Tindall Square—Warehouse No. 3
509 Pecan Street, Suite 101
Fort Worth, Texas 76102
Telephone: (817) 332-5055
Facsimile: (817) 332-5054

ATTORNEYS FOR MDA REALTY HOLDINGS, LLC, MVB REALTY HOLDINGS, LLC, LF REALTY HOLDINGS, LLC AND F&B NOTE HOLDING, LLC

CERTIFICATE OF SERVICE

I certify that on October 15, 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.

Mr. David B. Reece — *Via ECF*
U.S. Securities and Exchange Commission
Fort Worth Regional Office
Burnett Plaza, Suite 1900
801 Cherry Street, Unit #18
Fort Worth, Texas 76102-6882
Ph: 817-978-6476
Fax: 817-978-4927
Attorney for SEC

Mr. Jay L. Krystinik — *Via ECF*
Bryan Cave, LLP
2200 Ross Ave., Suite 3300
Dallas, Texas 75201-7965
Ph: 214-721-8000
Fax: 214-721-8100
Attorney for Receiver Keith Aurzada

Mr. John Helms — *Via ECF*
Helms Roberts & Diaz
6060 N. Central Expressway, Suite 560
Dallas, Texas 75206
Ph: 214-800-2086
Fax: 214-800-2057
Attorney for Defendant James Temme

Mr. Jim L. Flegle — *Via ECF*
Loewinsohn Flegle Deary, LLP
12377 Merit Drive, Suite 900
Dallas, Texas 75251
Ph: 214-572-1700
Fax: 214-572-1717
Attorney for Non-Party Charles A. Vose, III

Mr. Michael J. Quilling — *Via Facsimile*
Quilling, Selander, et al.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
Attorney for Non-Party Robert Boyce

/s/ H. Allen Pennington, Jr.
H. Allen Pennington, Jr.