

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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	Civil Action No. 4:11-cv-655
	§	
JAMES G. TEMME and STEWARDSHIP FUND, LP,	§	
	§	
<i>Defendants.</i>	§	

**RECEIVER’S MOTION TO APPROVE SETTLEMENT, FOR ENTRY OF
BAR ORDER AND INJUNCTION, AND TO ALLOW AND PAY PROFESSIONAL FEES
AND BRIEF IN SUPPORT**

Receiver Keith Aurzada (the “Receiver”), in his capacity as receiver for James G. Temme (“Temme”), Stewardship Fund, LP (“Stewardship Fund”), and all other entities directly or indirectly controlled by them (all collectively, the “Receivership Entities”), files this Motion to Approve Settlement and for Entry of Bar Order and Injunction and Motion to Allow and Pay Professional Fees, and would respectfully show the Court the following:

INTRODUCTION & BACKGROUND

The U.S. Securities & Exchange Commission (the “SEC”) initiated this matter alleging claims that Mr. Temme and Stewardship Fund engaged in securities fraud in connection with the solicitation and sale of packages of non-performing mortgages that caused their investors to lose millions of dollars. The Receiver was appointed to take over the Receivership Entities and to marshal and pursue the recovery of their assets by the Agreed Order Appointing Receiver Over Entities Under Control of James G. Temme (Doc. 24), Agreed Order Appointing Receiver Over Stewardship Fund, LP, and Related Entities (Doc. 25), and Order Appointing Receiver Over James Temme (Doc. 30) (collectively, the “Receivership Orders”). After entry of the

Receivership Orders, the Receiver, with the assistance of litigation counsel, has engaged in a factual and legal investigation of potential claims against third parties to identify sources for recovery, including, but not limited to, reviewing voluminous documents, obtaining records from third-parties, and evaluating the strengths and weaknesses of potential claims.

Based on this investigation, the Receiver discovered that, despite massive losses resulting from the Stewardship investment schemes, certain entities associated with MC Smith Realty, LLC—MCS Small Cap Fund I, LP, MCS Stewardship No. 2 Invest, LP, and MCS Stewardship No. 3 Invest, LP (collectively, the “MCS Parties”)—realized “net profits” that apparently total about \$3 million from their dealings with the Receivership Entities, which apparently started around 2006. The Receiver was advised by the MCS Parties that these “net profits” had previously been distributed to the constituent parties of the various MCS Parties.

The Receiver prepared for litigation against the MCS Parties. Before filing suit, however, the Receiver raised these issues with the MCS Parties to determine whether a negotiated resolution would be possible. After extensive negotiations and the exchange of relevant documents, the Receiver determined that it is in the best interest of the Receivership Entities (and their claimants) to enter into a Compromise & Settlement Agreement (the “Settlement Agreement”) to resolve the claims against the MCS Parties, conditioned upon this Court’s approval. *See* Settlement Agreement (App. 1-13). Under the proposed settlement, conditioned upon the entry of a bar order by this Court, the MCS Parties will make a payment of \$1,335,000 to the Receiver for the benefit of the Receivership Entities.

In the Receiver’s legal and business judgment, the proposed settlement is prudent and advantageous to the Receivership Entities and represents a substantial recovery in light of the potential defenses by the MCS Parties and without the burden of protracted litigation. The

Settlement Agreement will benefit the Receivership estate and the legitimate claimants of the Receivership Entities, if approved by the Court, as it will result in the immediate recovery of assets. The proposed bar order requested in connection with the settlement would bar and enjoin other parties from attempting to pursue claims against the MCS Parties and related parties in connection with their involvement with the Receivership Entities (the “Bar Order”). *See* Bar Order (App. 15-20). This will prevent duplicative and piecemeal litigation that would only dissipate the limited assets of the Receivership Entities (and thus reduce the amounts ultimately distributed by the Receiver to the claimants), and the Bar Order is consistent with the Court’s Receivership Orders and the recently entered Order Denying Lifting Stay (Doc. 135). In reaching settlement, the Receiver engaged the law firm of Goldfarb LLP to assist with the investigation and prosecution of potential claims against the MCS Parties, as well as the negotiation of the proposed settlement with the MCS Parties, and in this motion, the Receiver requests approval for the payment of legal fees pursuant to the engagement agreement with Goldfarb LLP.

The Receiver respectfully requests that the Court approve the Settlement Agreement, enter the Bar Order, and authorize the Receiver to pay Goldfarb LLP for its professional services performed in connection with procuring a substantial recovery from the MCS Parties, and grant all other appropriate ancillary relief.

ARGUMENT & AUTHORITIES

A. The Receiver has entered the Settlement Agreement, subject to Court approval, in good faith and consistent with his Court-appointed duties.

A federally appointed receiver is permitted to enter into settlement agreements so long as he does so in good faith, within the terms of his appointment, and without misconduct, gross negligence, or criminal intent. *See, e.g., SEC v. Funding Resource Group*, No. 3-98-CV-2689-M, 2003 WL 21500431, at * 1 (N.D. Tex. April 22, 2003); *Hawk v. Williams*, No. Civ. A. 2:01-CV-

2615, 2002WL 31255096, at *5 (N.D. Tex. Oct. 4, 2002); *Brewer v. Hill*, 453 F.Supp. 67, 69 (N.D. Tex.1978). In this case, the proposed Settlement Agreement between the Receiver and the MCS Parties meets these standards and comports with the Receiver's duties as conferred by the Court in the Receivership Orders. *See* Receivership Orders at ¶ 5 (Docs. 24, 25, 30). The Receiver believes in good faith that the Settlement Agreement with the MCS Parties is in the best interest of the Receivership Entities, as it will result in the payment by the MCS Parties of \$1,335,000 to the Receiver for the benefit of the Receivership Entities (and thus their claimants). *See* Settlement Agreement (Ex. A). The Receiver has evaluated the evidence, engaged in multiple conferences with the MCS Parties, and reviewed the legal and evidentiary strengths and weaknesses of claims that could be pursued in litigation. (As discussed below, the MCS Parties disclosed a series of defenses it would assert to any claims.) After engaging in this diligence process, the Receiver has determined that the best interests of the Receivership Estate are served by entering into the Settlement Agreement and the Court's entry of the Bar Order. Accordingly, the Receiver respectfully requests that the Court approve the Settlement Agreement. *See id.*; Receivership Orders (Docs. 24, 25, 30); *see also Funding Resource Group*, 2003 WL 21500431, at * 1; *Hawk*, 2002WL 31255096, at *5; *Brewer*, 453 F.Supp. at 69.

B. The Bar Order is essential to permit the Receiver to collect and manage assets for the Receivership Entities.

A district court has broad authority to issue blanket stays of litigation (such as the proposed Bar Order) to help further the goals of the receivership by preserving property of the Receivership Entities. *SEC v. Kaleta*, Civ. Act. No. 4:09-3674, 2012 WL 401069, at *3-4 (S.D. Tex. Feb. 7, 2012) (citing *SEC v. Byers*, 609 F.3d 87, 92 (2d Cir. 2010); *SEC v. Stanford Int'l Bank Ltd.*, 424 F. App'x. 338, 340-41 (5th Cir. 2011); *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551-52 (6th Cir. 2006)).

In consideration of the proposed settlement with the MCS Parties, the Receiver respectfully requests that the Court enter the Bar Order submitted in the supporting Appendix. *See* Settlement Agreement at ¶ 10 (App. 4); Bar Order (App. 15-20). The MCS Parties will not complete the settlement in the absence of a Bar Order. The relief requested in the Bar Order is consistent with the litigation stay restraining the claimants from pursuing legal action to recover for claims of the Receiver. *See* Receivership Orders (Docs. 24, 25, 30). Further, in the Court's recent Order Denying Lifting Stay, the Court held that a certain group of investors was not entitled to lift the litigation stay imposed by the Receivership Orders to pursue certain claims against another set of entities involved with the Receivership Entities. *See* Order Denying Lifting Stay (Doc. 135). The Bar Order grants relief similar to that already ordered by the Court. The Receiver believes the Bar Order will benefit the Receivership Entities and the claims process.

Federal courts have considered the following non-exclusive factors in connection with determining whether to enter this relief: (1) the value of the proposed settlement; (2) the value and merits of the Receiver's potential claims; (3) the value and merits of any foreclosed parties' potential claims; (4) the complexity and costs of future litigation; (5) the risk that litigation would dissipate the receivership assets; (6) the implications of any satisfaction of an award on other claimants; and (7) any other equities attendant to the situation. *See Kaleta*, 2012 WL 401069, at *4. Here, these factors weigh in favor of entry of the Bar Order, as: (1) the MCS Parties have agreed to make a substantial payment of \$1,335,000 to the Receiver by the Settlement Agreement; (2) the settlement payment by the MCS Parties represents a significant recovery for the Receiver, while avoiding the costs, burden, delay, and litigation risks associated with protracted litigation; and (3) the actions sought to be enjoined by the Bar Order would seek recovery from the MCS Parties that is inconsistent with the Court's Receivership Orders and

Order Denying Lifting Stay. *Id.*; *see also* Receivership Orders (Docs. 24, 25, 30); Order Denying Lifting Stay (Doc. 135); Settlement Agreement (App. 1-13); Bar Order (App. 15-20).

Accordingly, the Bar Order will benefit the Receiver *and* the claimants of the Receivership Entities, as it will prevent duplicative litigation against the MCS Parties and potentially the Receivership Entities, which would dissipate Receivership assets. *Id.* Legitimate claimants would still be permitted to pursue the claims process in the Receivership, and the settlement payment by the MCS Parties will provide funds for allowed claims. As a result, the Receiver respectfully requests that the Court enter the Bar Order based on equitable principals and pursuant to the Settlement Agreement.

C. The MCS Parties retained counsel and asserted defenses that would need to be overcome in litigation.

The MCS Parties retained outside litigation counsel to oppose and defend against the Receiver's potential claims against the MCS Parties and to facilitate settlement negotiations. In the ensuing negotiations, the MCS Parties and their counsel advised the Receiver that they would raise a number of legal and factual defenses to the Receiver's claims, including the following:

(a) *Challenge to the Existence and Timing of the Alleged Ponzi Scheme:* The MCS Parties asserted that, to state a claim for actual fraudulent transfer, the Receiver must establish that Stewardship, through Temme, made transfers to the MCS Parties that actually received transfers pursuant to a fraudulent investment scheme. The relevant MCS Parties disputed the Receiver's claim that Stewardship made the transfers they received pursuant to a Ponzi scheme.

(b) *The Alleged Insolvency of Stewardship:* The MCS Parties asserted that, to state a claim for constructive fraudulent transfer, the Receiver must establish that Stewardship was insolvent at the time of the transfers, or that Stewardship was rendered insolvent by the transfers. The MCS Parties disputed that the Receiver can establish Stewardship's insolvency with respect to all transfers received.

(c) *Good Faith and Fair Value Defenses:* The MCS Parties asserted that, assuming that the Receiver successfully established a *prima facie* entitlement to recover, the MCS Parties will present "good faith" and "for value" defenses to attempt to establish that they acted properly and provided value with respect to the transfers they received.

(d) *Collectability Issues:* The MCS Parties asserted that even if the Receiver could secure a judgment against the MCS Parties (or their limited partners) after litigation, the Receiver would face additional problems in collecting on any judgment. Further, according to the MCS Parties, the Receiver would have to address and defeat the MCS Parties' transferees' "good faith" and "for value" defenses, which would be time-consuming, expensive, and involve additional risk as to collectability.

The MCS Parties made clear to the Receiver that they firmly believe that they did nothing wrong in their dealings with the Receivership Entities. Counsel for the MCS Parties has indicated that counsel was directed to provide an aggressive defense to the Receiver's claims if asserted in litigation, which could potentially result in long and expensive litigation.

D. Goldfarb LLP's legal services for the Receiver resulted in a substantial recovery by the Receiver, and the Receiver thus requests permission to pay professional fees.

The MCS Parties have agreed to make a settlement payment to the Receiver in the amount of \$1,335,000.00, subject to the Court's approval of the Settlement Agreement and entry of the Bar Order. Thus, under paragraph 5(m) of the Receivership Orders, after the MCS Parties make payment to the Receiver, the Receiver respectfully requests that the Court authorize the Receiver to pay professional fees and expenses to the law firm of Goldfarb LLP pursuant to the retention agreement with the Receiver in the total amount of \$333,750.00 in attorney's fees (or 25% of the \$1,335,000.00 settlement payment) plus \$210 in expenses.¹

By its appointment orders, the Court directed and authorized the Receiver to "[e]nter into such agreements in connection with the administration of the Receivership Estate, including, but not limited to, the employment of ... attorneys ... as Receiver judges necessary to perform the duties set forth in this Order and to compensate them from the Receivership Assets[.]" Receivership Orders at ¶ 5(h) (Docs. 24, 25, 30). The Receiver thus retained the lawyers with the law firm of Goldfarb LLP in order to assist him with performing his duties,

¹ The Receiver's law firm has already reimbursed expenses of \$1,949.41, which will be included in the Receiver's fee application when submitted to this Court.

including pursuing a recovery and reaching a compromise of his claims relative to the MCS Parties. *See id.* at ¶¶ 5(h)-(i). Under their engagement agreement, if the Receiver settled his claims against the MCS Parties prior to filing a complaint, the Receiver agreed to pay Goldfarb LLP fees equal to 25% of all amounts recovered by the Receiver from the MCS Parties, as well as for the reimbursement of expenses incurred by Goldfarb LLP in connection with pursuing recovery for the Receiver. If the claims were settled after the institution of litigation, the contingency fee percentage would have increased.

If the Court approves the Settlement Agreement and enters the Bar Order, the lawyers with Goldfarb LLP will have obtained a substantial recovery for the Receiver from the MCS Parties in the net amount of just over \$1 million. Based on the benefits conferred by legal services rendered, the Receiver believes that payment of the requested amount of professional fees to Goldfarb LLP is reasonable. *See, e.g., SEC v. Ruderman, et al.*, No. CV 09-02973 ODW (JCx), 2011 WL 5857452, at *4-5 (C.D. Cal. Nov. 21, 2011) (approving an SEC receiver's request to pay fees to counsel and holding that a 33% contingency fee represented a reasonable amount of fees incurred in connection with achieving settlement of claims); *see also Barrera v. Nat'l Crane Corp.*, SA-10-CV-0196 NN, 2012 WL 242828 (W.D. Tex. Jan. 25, 2012) (holding that "... the lodestar method does not quite fit a contingent fee arrangement, [but] the *Johnson* factors are helpful in determining reasonableness of a[n] award.").

The Receiver believes that the lawyers with Goldfarb LLP have performed under their contingent fee agreement and, should the settlement agreement be approved, the Receiver will have recovered a substantial settlement payment. The Settlement Agreement is a good result for the Receivership Entities, as it will result in saving significant time, resources, delay, and risk.

Counsel for the Receiver assisted the Receiver with both the factual and legal investigation and prosecution of the claim, and the negotiation of the settlement.

Based on these factors and in light of the circumstances of the legal representation, the Receiver respectfully requests that the Court allow the Receiver to provide compensation for legal services and reimbursement for expenses to Goldfarb LLP in the total amount of \$333,960.00.

CONCLUSION & PRAYER FOR RELIEF

The Receiver has reached a Settlement Agreement with the MCS Parties that, if approved by the Court, will result in a net recovery for the benefit of the Receivership Entities that amounts to just over \$1 million. This potential recovery, in the face of credible defenses by the MCS Parties, will facilitate the Receiver's effort to fulfill his duties conferred by the Court in the Receivership Orders. Likewise, the entry of the requested Bar Order will benefit the Receivership Estate, by enabling the Receiver to obtain a significant settlement payment from the MCS Parties and, in accordance with the Court's rulings in the Receivership Orders and the Order Denying Lifting Stay, by preventing duplicative and unnecessary litigation and the dissipation of the limited assets. The Receiver believes that the substantial recovery from the MCS Parties contemplated by the Settlement Agreement, in accordance with his Court-ordered duties, will provide a significant benefit to the Receivership Entities and their claimants.

Accordingly, the Receiver respectfully requests that the Court grant this motion, approve the Settlement Agreement, enter the Bar Order and Injunction, authorize the payment of professional fees and expenses to Goldfarb LLP, and that the Court grant all other relief deemed just and proper.

Dated: October 26, 2012

Respectfully submitted,

By: */s/ Jeffrey Goldfarb*

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**ATTORNEYS FOR RECEIVER
KEITH MILES AURZADA**

CERTIFICATE OF CONFERENCE

I hereby certify that Brad Purcell has conferred with David Reece, counsel for the U.S. Securities & Exchange Commission, and that he does not object to the motion. I certify that I conferred with John Helms, counsel for Defendant James G. Temme. Mr. Helms stated that he needed to confirm his client's position, but did not respond with a statement of his position before this motion was filed.

/s/ Jeffrey Goldfarb

Jeffrey Goldfarb

CERTIFICATE OF SERVICE

On October 26, 2012, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court for the Eastern District of Texas using the CM/ECF system, which will send a notice of electronic filing to all counsel of record. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2) and the Court's Local Rules. Moreover, the foregoing will be uploaded to www.stewardshipfundreceivership.com

/s/ Jeffrey Goldfarb

Jeffrey Goldfarb