

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

<hr/> <b>SECURITIES AND EXCHANGE COMMISSION,</b>	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	<b>4:11-CV-0655</b>
<b>JAMES G. TEMME, and</b>	:	(Judge Clark/Mazzant)
<b>STEWARDSHIP FUND, LP,</b>	:	ECF
	:	
Defendants,	:	
	:	
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**PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Confronted with specific evidence demonstrating that he committed, and profited from, securities fraud, Defendant James G. Temme (“Temme”) offers up inadmissible and generic statements that, even if taken at face value, only confirm his liability. Indeed, it is telling that he does not even attempt to explain why he boldly lied to investors if, as he would have the Court believe, the Commission has simply “misunderstood” his actions.<sup>1</sup> This silence, particularly coupled with his refusal to answer questions under oath and instead invoke his Fifth Amendment privilege, speaks volumes. In short, Temme falls far short of establishing a genuine issue of material fact.<sup>2</sup> As a result, the Commission asks the Court to enter judgment against him.<sup>3</sup>

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<sup>1</sup> See, for example, Plaintiff’s Motion for Summary Judgment and Brief at pp. 12-13.

<sup>2</sup> In determining whether summary judgment should be granted, once the moving party has met its initial burden of identifying the absence of a genuine issue of material fact, the non-moving party must come forward with “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As discussed in the Commission’s initial papers and below, the evidence more than identifies the absence of a genuine fact. And Temme wholly fails to produce specific facts showing such a genuine issue of material fact.

<sup>3</sup> As noted in the Commission’s initial brief, the Receiver does not contest the liability of Stewardship Fund, LP; nor has Temme addressed the allegations against Stewardship Fund, LP. Therefore, there is no dispute that summary judgment is proper against that Defendant.

## DISCUSSION

**A. The evidence conclusively establishes Temme’s liability both because he made specific material misrepresentations and omissions and because he engaged in a fraudulent scheme and committed other fraudulent acts.**

As a threshold matter, in an apparent attempt to make this case appear murky, Temme complains that the Commission has not set out specific misrepresentations. [Response at 2].

This complaint is both wrong and irrelevant. First, while the Commission has identified various material misrepresentations and omissions Temme committed, the Commission has also established that Temme engaged in a fraudulent scheme and committed various fraudulent transactions in connection with the offer, purchase or sale of securities. And Temme may be held liable under any of those alternatives.

**1. Temme effectively concedes his liability for fraudulently obtaining investor funds through the use of false promissory notes.**

Temme does not even address the Commission’s arguments and undisputable evidence reflected in business records recovered by the Receiver that Temme fraudulently obtained funds through “flip” transactions involving the issuance of so-called promissory notes. [See Plaintiff’s MSJ at 2-3, referencing Pls’s MSJ App. at 11, 20 (Aurz. Dec. at paragraphs 8, 50-53)]. This silence is telling. Moreover, because that evidence stands undisputed, it, even standing alone, establishes Temme’s liability for security fraud.

**2. Evidence secured by the Receiver and sworn statements from investors stand beyond dispute and establish Temme’s liability.**

As detailed in the Declaration of the court-appointed Receiver and the other declarations submitted along with the Commission’s motion for summary judgment, Temme routinely made material misrepresentations and omissions and engaged in other fraudulent conduct -- including misusing proceeds and misappropriating funds from one investor to send money to another

investor. Specifically, the evidence in this case establishes that Temme routinely “sold” or used as collateral for bogus promissory notes assets neither he nor Stewardship Fund, LP controlled or owned or that he also “sold” to or purported to use as collateral on behalf of more than one investor.

Temme’s response to this clear evidence is notable. Rather than presenting any admissible or persuasive evidence demonstrating that he did what he promised investors he was doing, he instead hopes to obscure his fraud by implying that his business is complicated and by offering inadmissible evidence that, even if it were considered, does not explain his conduct and in fact confirms his liability.<sup>4</sup>

**a. Temme has not, and cannot, avoid the clear evidence explained by the Receiver.**

Temme focuses much effort on trying discredit the testimony of Keith Aurzada, the Receiver duly appointed by the Court oversee and manage the Defendants. But this attempt is insufficient as a matter of law to create a genuine issue of material fact. As discussed in more detail in the Commission’s Response to Defendant’s Motion to Strike the Declaration of Keith Aurzada, the Court may and should rely on the evidence Mr. Aurzada has developed as part of discharging his duties and his explanation of that evidence. Mr. Aurzada serves the Court and, in fact, has a duty to report his relevant findings in this case to the Court. He has a duty to understand the relevant business records and develop an understanding of what those records are – and are not. This is precisely the sort of information the Court may rely on, particularly here where the Receiver’s explanations are supported by the relevant business records. *See* FED. R.

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<sup>4</sup> Of course, as discussed in the Commission’s motion for summary judgment, Temme should be precluded from offering any evidence given his decision to shield himself from discovery. But, it is noteworthy that to the extent he did introduce evidence, he does not produce anything that directly contradicts or disputes the Commission’s key allegations.

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EVID. 803(8) (evidence is not excluded as hearsay if it is a “record or statement of a public office [that] sets out ... a matter observed while under a legal duty to report ... and neither the source of information nor other circumstances indicate a lack of trustworthiness”); FED. R. EVID. 807 (residual hearsay exception); *see also In re: Stanford International Bank, Ltd.*, No. 3:09-cv-0721-N, slip op. at 11-12 (N.D. Tex. July 30, 2012) (overruling evidentiary objections to evidence submitted by court-appointed Receiver on several grounds, including the residual hearsay exception under FED. R. EVID. 807). and as the evidence secured and analyzed by the Receiver demonstrates, Temme routinely made false material misrepresentations to investors.<sup>5</sup>

**b. Because he cannot avoid the undisputable evidence, Temme misconstrues the Commission’s arguments and its evidence.**

In his Response, Temme is forced to make relatively straightforward facts appear convoluted and otherwise engage in semantic disputes that fail to create a genuine issue of material fact.<sup>6</sup> In fact, his argument appears to be that he hoped it would all work out and therefore should not be held liable. But that is not, and ever has been, the law. *See, e.g., SEC v. World Radio Mission, Inc.*, 544 F.2d 535 (1<sup>st</sup> Cir. 1976) (noting that confidence of eventual

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<sup>5</sup> The Commission has separately addressed Defendant’s objections and arguments related to the Receiver’s declaration in its Response to Defendant’s Motion to Strike and those arguments and evidence are incorporated herein.

<sup>6</sup> Throughout his response, Temme frequently suggests the relevant question is whether investors received “an appropriate return on their investment.” [See, e.g., Response at 3, 4, 7, 8]. Indeed, he frequently suggests that to answer the question of whether Temme conveyed the assets he promised it is necessary to show that somehow the investors did not receive some unspecified “proper return.” This misses the point. As demonstrated by the summary judgment evidence, Temme promised investors certain assets; he intentionally did not deliver those assets. This is a classic instance of misusing investor funds and is actionable as securities fraud. *See e.g., SEC v. Evolution Capital Advisors, LLC*, 866 F. Supp.2d 661 (S.D. Tex. 2011) (rejecting defendants’ arguments that what he did have was a substitute for what he promised).

Moreover, it is worth noting that many of the investors discussed in the Commission’s motion elected to pursue litigation against Temme based on the conduct described here. While such action is hardly necessary to establish Temme’s liability here, it does provide further corroboration that those investors believed his misrepresentations were material. [See generally the discussion of pending litigation against Temme at the time the Commission initiated this lawsuit found in the Declaration of Ty Martinez, which was included in Plaintiff’s Appendix in Support of Its Application for Emergency Relief.]

success or even that no investor will lose money is not equal to honesty for purposes of the federal securities laws).

For example, The Receiver explained the relevant documents, established the arrangement Temme promised with regard to an investment on behalf of a limited partnership known as Stewardship Fund 2, and established that he took the investors' money and did not spend it as promised.

In response, Temme attempts to rephrase the question as if the main point is whether Temme promised "all" of package 1<sup>st</sup> 0083 or a portion. [See Def's Response at 3]. But as the Receiver's declaration makes clear, the point is that Temme promised a pool of assets from package 1<sup>st</sup> 0083 and failed to deliver that pool as promised. Temme has offered no evidence contradicting that evidence. [See Pls's MSJ App. at 00014].

Similarly, the summary judgment evidence establishes that in February 2009, Temme took approximately \$1,282,157 from investors in the Stewardship Fund No. 3 limited partnership to purchase a specific pool of 171 assets and failed to convey those assets to the limited partnership. Instead, he delivered assets he had claimed to have conveyed to another limited partnership. Temme does not, and cannot, dispute this fact. Instead, he focuses on the irrelevant point that he had, he says, purchased those assets before the Stewardship Fund No. 3 investors had paid him. His only attempt to show that he did in fact convey the promised assets to the Stewardship Fund No. 3 limited partnership is a spreadsheet created by one of Defendant Stewardship Fund LP's former employees. As discussed below, this is no evidence at all and falls far short of the type of information necessary to raise a genuine issue of material fact.<sup>7</sup>

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<sup>7</sup> Temme's arguments related to the other representative examples noted in the Commission's motion for summary judgment are similar. He attacks points that are irrelevant to the main fraudulent conduct and, when he does address the main issue, he relies on inadmissible evidence or evidence that, at best, describes general conduct *SEC v. Temme, et al.*

**c. Temme's reliance on what is, at best, one of his own fraudulent documents cannot defeat summary judgment.**

Temme frequently claims that the "summary judgment evidence" in the form of a spreadsheet a former Stewardship Fund employee says he created demonstrates that there is at least a genuine question of material fact regarding the ownership and transfer of the assets described in the Commission's motion. [See, e.g., Def's Response at 5 (discussing the fraudulent conduct related to Stewardship Fund 3), Def's Response at 7 (discussing the fraudulent conduct related to Stewardship Fund 4), Def's Response at 8 (discussing the fraudulent conduct related to Stewardship Fund 5)]. But the spreadsheet at issue is insufficient, as a matter of law, to defeat summary judgment. First, as explained in the Commission's Objection to and Motion to Strike the Declaration of John Henry, which is incorporated herein, the spreadsheet is not admissible evidence.

Perhaps even more important, however, is that, under the circumstances of this case, Temme's attempt to rely on that spreadsheet is akin to a broker that fabricates an account statement relying on the statement to prove he did not misappropriate his client's funds. The undisputed evidence is that Stewardship Fund (and Temme in particular) did not own assets it claimed it did; the fact that it said otherwise in a spreadsheet is irrelevant. And, as demonstrated in the Commission's Motion to Strike (and in its motion for summary judgment) the spreadsheet

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but does not even attempt to discuss the events at issue. For example, in an attempt to rebut the clear evidence of fraudulent behavior towards the investors in the Stewardship Fund 6 limited partnership, he raises various suppositions, but no evidence. Even if the Court takes his story at face value (which it should not, given his refusal to testify), and it is assumed it "made sense," to sell the assets to another person, investors did not know this and were never provided their assets.

Likewise, he frequently addresses only the Receiver's evidence and not the undisputed evidence provided in the form of sworn testimony from investors. See, for example, his discussion of the fraudulent conduct directed to the Finch and Berry investor group. [Def's Response at 12-13]. The summary judgment evidence presented along with the Commission's motion stands on its own and demonstrates Temme's fraud. Temme's attempts to twist it should be rejected.

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is undisputedly wrong. At best it is irrelevant to several core facts, namely the fact that Temme frequently “sold” the same asset to multiple parties.

**B. Temme has not demonstrated a genuine issue of material fact regarding the remedies that should be imposed against him.**

Temme offers only a cursory attempt to suggest summary judgment is not proper with regard to the Commission’s requested remedies. None of his arguments has merit. First, he suggests injunctive relief is inappropriate because he should not be held liable. But, as demonstrated above, he should be held liable. And he has not even attempted to argue that injunctive relief would be inappropriate if he is held to have violated the antifraud provisions.

His argument with regard to civil penalties is likewise unpersuasive. The Commission’s motion set out the relevant criteria in summary fashion and presented the applicable range that could be imposed. There is more than sufficient evidence for the Court to award an appropriate remedy.<sup>8</sup>

Finally, Temme states, without elaboration, that disgorgement can only be based on specific profits paid to the defendant and, he says, there is no evidence here of the profits paid to him. His argument is simply wrong. It is well-established that in securities fraud cases it is appropriate to require payment of disgorgement equal to the amount of funds illegally obtained from investors by the wrongdoer. *See, e.g., SEC v. Halek*, 2013 WL 3971460, \*4 (5<sup>th</sup> Cir. Aug. 5, 2013) (rejecting defendant’s argument that disgorgement was limited to the small percentage of money allocated to his personal accounts and holding that disgorgement calculated as the

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<sup>8</sup> Temme complains that the Commission has not requested a specific amount. First, it is not necessary to do so. But if the Court would find additional briefing on the range or possibly appropriate remedies, the Commission will provide it.

amount raised because the defendants had the full benefit of that money and how it was distributed is irrelevant).<sup>9</sup>

**CONCLUSION**

The Commission respectfully requests that the Court grant the Commission's Motion for Summary Judgment.

Dated: August 22, 2013

Respectfully submitted,

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<sup>9</sup> Contrary to Temme's representation, the Commission presented evidence that at least \$414,000 were directed to Temme personally. Temme does not contest that amount. Nor does he present any evidence at all challenging the Receiver's calculation of illegal proceeds resulting from Defendants' conduct.



**CERTIFICATE OF SERVICE**

I certify that on August 22, 2013, I electronically filed the foregoing *Plaintiff's Reply in Support of Motion for Summary Judgment* with the Clerk of the Court for the Eastern District of Texas, Sherman Division, using the CM/ECF system. The electronic case filing system will send a "Notice of Electronic Filing" to all counsel of record who has consented in writing to accept service of this document by electronic means.

/s/ David B. Reece

David B. Reece