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

SECURITES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **JAMES G. TEMME,** **STEWARDSHIP FUNDS, LP** **Defendants.**	**Civil Action No. 4:11cv655**

REPLY TO RESPONSE TO DEFENDANT TEMME'S OBJECTIONS TO DECLARATION OF KEITH MILES AURZADA AND MOTION TO STRIKE

Testimony of any witness, including a receiver, must satisfy the Federal Rules of Evidence and the Federal Rules of Civil Procedure. In this case, large portions of Mr. Aurzada's affidavit do not. Mr. Aurzada, as any witness, may not speculate, may not offer conclusory statements, and may not testify as to ultimate legal conclusions. Because the SEC cannot demonstrate, as it has the burden to do, that the objectionable statements in Mr. Aurzada's declaration are admissible, Mr. Temme requests that the Court strike those portions of the Aurzada declaration.

The SEC's Response to Defendant Temme's Objections to Declaration of Keith Miles Aurzada and Motion to Strike ("Response") is divided into two primary portions. First, the SEC incorrectly attempts to argue that Fifth Circuit precedent grants receivers a blanket pass to testify without regard to the Federal Rules of Evidence. Second, the SEC attempts to present specific rebuttals to Mr. Temme's specific objections. Neither of these approaches, however, salvages the Aurzada Declaration.

I. Receivers Do Not Have Blanket Authority to Disregard the Rules of Evidence

The SEC's attempt to grant Mr. Aurzada immunity from the evidentiary rules begins with a misreading of both the *Warfield* and *Stringer* opinions. Neither of those cases dealt with the type of objections presented here.

First, concerning *Warfield*, the SEC's brief intentionally omits the critical fact demonstrating why that case does not apply. In that case, the defendant offered a single global objection that the receiver's affidavit was "not based on personal knowledge, was both hearsay and incompetent, and therefore was inadmissible for summary judgment purposes." *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006). The SEC's block quote to the Court, and discussion of this case, omits the critical fact that "Littlewood fails to specify any statement or document

attached to the Receiver's declaration that was inadmissible." *Id.* The Fifth Circuit did not hold that a receiver may testify without regard to the rules of evidence. The Fifth Circuit merely found that, in that case, where a generic, non-particularized objection was made the affidavit in question contained sufficient support to qualify as admissible evidence. *Id.*

The situation in this case is not *Warfield*. Here, Mr. Temme has provided over eleven pages of specific, particularized objections to specific portions of Mr. Aurzada's affidavit that are defective. Mr. Temme specifically did not object to those paragraphs that seemed to be admissible.[1] Mr. Temme, however, pointed the Court to the many legitimate problems with Mr. Aurzada's declaration.

Second, *F.D.I.C. v. Stringer* does not allow the type of conclusory, baseless testimony that Mr. Aurzada offers here. That case merely found that where a receiver becomes the custodian of records for documents placed in receivership, the receiver can prove up those documents. *F.D.I.C. v. Stringer*, 46 F.3d 66, *3 (5th Cir. 1995). Authentication of documents is not the sole issue here. The issue is that Mr. Aurzada has testified as to numerous substantive facts, legal conclusions, and ultimate issues without any support and (to the extent it is possible to tell) based on inadmissible evidence. That is impermissible and the *Stringer* case does not hold otherwise.

Indeed, contrary to the misreading of *Warfield* and *Stringer*, Courts in this circuit require receivers to properly prove their testimony. As an example, in *SEC v. Res. Dev. Int'l, LLC*, the court rejected the SEC's attempt to substitute a receiver's unsubstantiated opinion for actual fact. 2005 U.S. Dist. LEXIS 218, 9-10 (N.D. Tex. Jan. 5, 2005). In that case, the receiver sought to recover a $60,000 payment that he believed to be a fraudulent transfer. *Id.* at *6. There, the

[1] Mr. Temme does not necessarily agree with nor concede any of the facts stated in paragraphs to which he did not object.

court rejected the receiver's "sworn, detailed statement declaring he personally reviewed financial source documents and, on that basis, has personal knowledge that IERC transferred $ 60,000." *Id*. at *9. The court denied summary judgment because the receiver did not submit the underlying documents showing that the transfer actually occurred. *Id*. at *10. The receiver had the burden of proving summary judgment evidence that the transfer occurred. *Id*. His mere opinion was insufficient. *Id*.

The SEC's reliance on Rules 803(8) and 807 is likewise misplaced. First, the public records exception in Rule 803(8) does not apply because (A) Mr. Aurzada's declaration is not setting out a public office's activities, and (B) the Fifth Circuit explicitly excludes documents prepared for the purpose of litigation from Rule 803(8). *See, e.g. U.S. v. Stone*, 604 F.2d 922, 926-27 (5th Cir. 1979). Second, the residual hearsay exception in Rule 807 does not apply because it "is to be used only rarely, in truly exceptional cases" and "the proponent of the statement bears a heavy burden to come forward with indicia of both trustworthiness and probative force." *Bedingfield v. Deen*, 487 Fed. Appx. 219, 228 (5th Cir. 2012). Here, the SEC has offered no explanation why this case is truly exceptional or why the proffered statements are both trustworthy and probative. Indeed, the numerous problems that Mr. Temme has identified with the Aurzada Declaration suggest that it is both untrustworthy and not probative. Third, even if applicable, Rules 803(8) and 807 would not solve the numerous other problems facing the Aurzada declaration (e.g. hearsay within hearsay, conclusory allegation, no foundation for personal knowledge, speculative, etc.).

II. The SEC's Specific Responses Are Insufficient

The SEC's specific responses to Mr. Temme's specific objections do not meet the SEC's burden of showing that the declaration is admissible. Mr. Temme, unfortunately, does not have

space within this reply brief to address each objection/response individually. There are some observations regarding the individualized responses, however, which help summarize the recurring, fundamental problems.

First, the Court should note that neither Mr. Aurzada nor the SEC's Response cite to a specific statement/fact in a specific piece of evidence. Not once. Mr. Aurzada largely fails to mention evidence. Even when he does refer to exhibits, however, he fails to: authenticate them, discuss specific portions of them, analyze them, consider their admissibility, or relate them to anything he says. Notably, while the SEC tries to rehabilitate certain statements by arguing that Mr. Aurzada relied on specific exhibits, that effort largely appears to be a guess. Mr. Aurzada's declaration did not make those connections. Further, neither the SEC nor Mr. Aurzada show how the purported evidence supports Mr. Aurzada's statements. This not only demonstrates that Mr. Aurzada's statements are conclusory, but it also fails to demonstrate how Mr. Aurzada has personal knowledge supporting his statements.

Second, the SEC does not truly address the hearsay problems. The SEC's response is typically that Mr. Temme's statements are not hearsay because of party opponent and the residual hearsay exception. As described *supra*, the residual hearsay exception should not apply here because the SEC does not even attempt to meet its "heavy burden" on that point. Further, the party opponent exception does not help the SEC because Mr. Aurzada's failure to tie the evidence with any of his statements makes it entirely unclear which, if any, of Mr. Aurzada's statements derive from Mr. Temme's alleged statements. Also, as the SEC admits, some of the underlying evidence appears to come from investors and non-parties who are not excepted from

the hearsay rule. Indeed, the SEC does not even attempt to address the problems of hearsay within hearsay or to argue that any other exception applies.[2]

Third, the SEC is often forced to fall back on the mere excuse that Mr. Aurzada may testify solely because he has investigated the defendants and reviewed (unspecified) documents. That argument must fail because being a receiver is not *carte blanche* authorization to ignore the rules of evidence. Mr. Aurzada has not been disclosed as an expert witness in this case and therefore should not be permitted to offer any expert opinions. He is limited only to facts within his personal knowledge, as Mr. Temme noted in the Motion. Further, even were Mr. Aurzada to be considered an expert witness, he would still not be permitted to testify without laying the proper factual/evidentiary support. *See, e.g. Crayton v. Rossi*, 384 Fed. Appx. 330, 332 (5th Cir. 2010) (rejecting expert affidavit where "it merely sets out a variety of conclusory allegations that are actually opinions devoid of an underlying factual basis and explanation."). In any event, the Fifth Circuit has squarely rejected the SEC's argument that Mr. Aurzada can testify as to ultimate conclusions such as "the conclusion that the companies over which he is receiver operated as a Ponzi scheme." Response p. 2; *U.S. v. Setser*, 568 F.3d 482, 495 (5th Cir. 2009).

III. Conclusion

The SEC's motion for summary judgment seeks substantial relief against Mr. Temme. In these circumstances, the SEC should be held to its burden and should be required to present admissible evidence. The Aurzada declaration runs afoul of many of our legal system's most fundamental evidentiary protections. Those evidentiary rules exist for a reason and Mr. Temme respectfully requests that the Court give them effect here.

[2] As one notable example, the SEC does not even attempt to argue that the business records exception would apply. This is not surprising given the Aurzada Declaration's lack of any evidentiary predicate, including one for the business records exception.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served on counsel of record via the Court's CM/ECF system.

/s/ Ritch Roberts
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