

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

JAMES G. TEMME,
STEWARDSHIP FUNDS, LP
Defendants.

Civil Action No. 4:11cv655

DEFENDANT’S SURREPLY TO PLAINTIFF’S SUMMARY JUDGMENT MOTION

Defendant James G. Temme (“Mr. Temme”), respectfully submits the following surreply to Plaintiff’s Motion for Summary Judgment:

I.

ARGUMENT

A. The Court Should Deny Summary Judgment Based On Promissory Notes Because Plaintiff Did Not Move For Summary Judgment On This Basis And Because Plaintiff’s Evidence Does Not Establish Entitlement To Summary Judgment.

Plaintiff’s Reply initially argues that the Court should grant summary judgment as to some unidentified promissory notes because Mr. Temme did not address Plaintiff’s arguments and evidence concerning “flip transactions.” Reply at 2. As an initial matter, Mr. Temme was not required to address Plaintiff’s statements in this regard because Plaintiff did not present them as a basis for summary judgment.

The “flip transactions” are referenced in subsections II(A) and the introductory paragraph to subsection II(B) of Plaintiff’s Motion for Summary Judgment. *See* Plaintiff’s MSJ at 1-3. Subsection II(A) is called “Temme and Stewardship Fund obtained millions of dollars from

investors.” This section contains background about Stewardship Funds. It mentions flip transactions in general terms as part of Stewardship’s business, but it does not say that they were fraudulent. The introductory paragraph of subsection II(B) refers to alleged fraud in general terms, but it does not identify any specific transaction or any specific representation claimed to be fraudulent. *See* Plaintiff’s MSJ at 3. The last sentence of the introductory paragraph then states: “Several specific representative transactions detailing Defendants’ fraudulent procurement of over \$17 million are discussed below.” *Id.*

In the subsections that follow, Plaintiff set forth the specific transactions. Defendant responded to each transaction that Plaintiff specifically identified. Plaintiff used a narrative style and never actually listed the alleged fraudulent representations with analysis supporting each element of a securities fraud claim. The flip transactions are not among them.

Nowhere in sections II(A) or II(B), or anywhere else in the motion, does plaintiff identify a specific representation or specific flip transactions on which it seeks summary judgment. As such, Plaintiff did not move for summary judgment on these, and Plaintiff’s general statements, without any specific alleged misrepresentations or transactions, or any demonstration of materiality as to any specific representation, are too conclusory for the Court to grant summary judgment.

Additionally, because the Motion for Summary Judgment did not identify any specific alleged promissory note, neither Mr. Temme nor the Court can determine whether some unspecified alleged “note” is a security. *See Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 951-52 (1990) (identifying factors to consider in determining whether a particular “note” is a security).

Moreover, Mr. Temme objected to and moved to strike the operative paragraphs of the declaration on which Plaintiff relies. *See* Defendant's Objections To Declaration of Keith Miles Aurzada and Motion to Strike, items 4-5 (referring to Aurzada Decl. ¶ 8), items 40-42 (referring to Aurzada Decl. ¶¶ 50, 52, 53). Among other things, these paragraphs of the Aurzada Declaration do not identify the particular notes, alleged representations, or transactions and are based on inadmissible evidence.

Plaintiff therefore fails to meet its summary judgment burden. Even if Plaintiff had done so, there is no basis to calculate any

B. Plaintiff's Remaining Arguments On Liability Fail To Respond To The Deficiencies In Plaintiff's Proof And The Summary Judgment Record.

In his Response to Plaintiff's Motion for Summary Judgment, Mr. Temme painstakingly organized Plaintiff's alleged misrepresentations. One by one, Mr. Temme identified why Plaintiff has not met its summary judgment burden of proving the lack of a fact issue as to each element of its claim and/or why evidence that Mr. Temme submitted shows that there is a disputed fact issue as to at least one element of Plaintiff's claim. In subsections A(2)(a) and (b) of its Reply, Plaintiff again refuses to analyze each alleged representation and whether, for each, the record shows that Plaintiff has met its summary judgment burden of showing that it is entitled to judgment as a matter of law as to each element of a securities fraud claim. Instead, Plaintiff prefers to write something more like a closing argument than a summary judgment analysis. Mr. Temme's Response demonstrates, as to each specified transaction, that Plaintiff has not met its summary judgment burden.

C. The Spreadsheet Attached To The Henry Declaration Is Admissible and Not “Fraudulent.”

Plaintiff’s Reply argues that the spreadsheet prepared by John Henry in or about August 2011 and attached to his Declaration is “fraudulent.” Plaintiff just asserts this and offers no evidence of it. As explained in Defendant’s Response to Plaintiff’s Objection To And Motion to Strike the Declaration of John Henry, the spreadsheet is admissible. As such, Plaintiff’s argument is simply that the Spreadsheet is not credible because Mr. Temme is not credible. This argument is no different than an argument that a party’s declaration testimony is not credible. It is not a proper argument for summary judgment purposes because credibility is for a jury, not for summary judgment.

D. The Court Should Deny Summary Judgment For The Remedies Plaintiff Seeks.

The only issue on remedies that merits a surreply concerns disgorgement. In his Response to Plaintiff’s Motion for Summary Judgment, Mr. Temme argued that summary judgment as to a disgorgement amount is improper because Plaintiff asked for disgorgement for the entire amount of money allegedly *raised* for all transactions, whereas the proper amount of disgorgement is *profits* from illegal activity. See Defendant’s Response to Plaintiff’s MSJ at 13-14. Plaintiff and did not submit any evidence on alleged profits from wrongdoing whatsoever.

In its Reply, Plaintiff argues that the total amount raised, rather than illegal profit, is the proper measure of disgorgement. In support, Plaintiff cites a case that literally and repeatedly says the exact opposite. In *SEC v. Halek*, 2013 WL 3971460 (5th Cir. 2013), the Fifth Circuit *repeatedly* expressed the proper measure of disgorgement as the amount of illegal *profits*. For example:

- “[T]he district court entered findings of fact that Halek, along with Halek Energy and CBO Energy, had received \$21,452,137 in *ill-gotten profits*.” *Id.* at *2.

-“The purpose of disgorgement is not to make victims whole but to prevent the wrongdoer’s enrichment from *ill-gotten profits*.” *Id.* at *3 (emphasis added).

-“Disgorgement is ‘limited to property causally related to the wrongdoing,’ but it need only be a ‘reasonable approximation’ of *those profits*.” *Id.* at *3 (emphasis added).

-“Halek failed to show that \$21,452,137 was not a reasonable approximation of Halek and the energy companies’ *ill-gotten profits*....” *Id.* at *4 (emphasis added).

-“Halek, CBO Energy, and Halek energy had the full benefit of the \$21,452,137 in *ill-gotten profits*....” *Id.* at *4 (emphasis added).

In fact, there was no dispute in *Halek* that illegal profits was the proper measure of disgorgement. The dispute was over whether the individual defendant should be jointly and severally liable for disgorgement of the illegal profits made by himself as well as his two energy companies. *See id.* at *4. Thus, Plaintiff’s parenthetical description of *Halek* as approving disgorgement based on “the amount raised” and Plaintiff’s description of what it calls “well-established” law is false. *See* Plaintiff’s Reply at 7-8.

Plaintiff’s failure to calculate or submit summary judgment proof of alleged illegal profit precludes summary judgment as to any disgorgement amount.

The other issues on remedies need no surreply and are sufficiently addressed in Mr. Temme’s Response to Plaintiff’s Motion for Summary Judgment.

II.

CONCLUSION

Mr. Temme respectfully requests that the Court deny Plaintiff’s motion for summary judgment.

Respectfully submitted:

/s/ John Helms, Jr.

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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/ John Helms, Jr.

John Helms, Jr.