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**

DEFENDANT'S RESPONSE TO PLAINTIFF'S OBJECTION TO AND MOTION TO STRIKE THE DECLARATION OF JOHN HENRY

Defendant James G. Temme ("Mr. Temme"), responds as follows to Plaintiff's Objection to and Motion to Strike the Declaration of John Henry ("Henry Declaration"), and would respectfully show as follows:

I.

ARGUMENT

A. The Rule 1002 Best Evidence Rule Objection Is Misplaced.

First, Plaintiff objects to the Henry Declaration and its attached exhibit based on the so-called "best evidence rule," which is Rule 1002 of the Federal Rules of Evidence. This objection is misplaced.

Plaintiff's objection is really directed at Exhibit A to the Henry Declaration rather than to the declaration itself. Exhibit A is a spreadsheet of assets that were owned and being worked by Stewardship Fund (the "Spreadsheet"). The Henry Declaration proves that the Spreadsheet dates back to 2011, that it was created in connection with Stewardship's business, and that it meets the requirements of a business record under Rule 803(6) of the Federal Rules of Evidence. In his

response to Plaintiff's summary judgment motion, Mr. Temme used the Spreadsheet as proof that Stewardship had purchased certain assets and was working them.

Plaintiff argues that the Spreadsheet is inadmissible because other evidence, such as deeds, would be better evidence that Stewardship purchased the disputed assets. This would mean, Plaintiff apparently theorizes, that the Spreadsheet is not the best evidence. Plaintiff's objection misinterprets Rule 1002 by arguing that the rule requires the best evidence of a fact.

The title of Rule 1002 is "Requirement of Original." The rule states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." Fed. R. Evid. 1002.

The fact that Rule 1002 is known as the "best evidence rule" is somewhat confusing, because this label incorrectly suggests that the rule requires the best possible proof of a fact. This is not the case. According to its terms, Rule 1002 applies only to proof of the "content" of a writing, recording, or photograph. Fed. R. Evid. 1002. As Wright, Graham, Gold, and Graham explain:

> The phrase by which the subject of Article X is generally known, the best evidence doctrine, obscures the scope of Rule 1002. This broadly-worded phrase gives the misimpression that the doctrine creates a general preference for 'the best evidence.'….But Rule 1002 makes it clear that the best evidence doctrine regulates the admissibility of evidence only when it is offered to prove the contents of a writing, recording, or photograph."

31 Charles Alan Wright, Kenneth W. Graham, Victor J. Gold & Michael H. Graham, Federal Practice & Procedure, Evidence § 7183 (1st ed. 2013).

Contrary to Plaintiff's objection, Rule 1002 only applies when a party seeks to prove the ***contents*** of a ***writing***. But Mr. Temme is not using the Spreadsheet to prove the content of any writing other than the Spreadsheet itself. He is using the Spreadsheet to prove that Stewarship

Fund purchased and was working certain assets. The fact that an asset was purchased and was being worked is not the ***contents*** of a writing. Thus, Rule 1002 does not apply.

Federal case law uniformly holds that the best evidence rule does not apply in situations when a witness or other documents attest to facts that are contained in a document, as opposed to the contents of the document. For example, in *Allstate Ins. Co. v. Swann*, 27 F.3d 1539 (11th Cir. 1994), the Eleventh Circuit reversed and remanded because the district court erroneously excluded evidence under the best evidence rule. The district court refused to allow an Allstate witness to testify that Allstate would not have issued an insurance policy if it had known that the applicant made his living from illegal gambling. The district court held that the testimony would have been based on Allstate's written underwriting guidelines and that those guidelines were the best evidence. The Eleventh Circuit held that this was error. First, the Eleventh Circuit noted that Rule 1002 "does not, however, 'require production of a document simply because the document contains facts that are also testified to by a witness.'" *Id.* at 1543 (quoting *United States v. Finkielstain*, 718 F.Supp. 1187, 1192 (S.D.N.Y. 1989)). The Eleventh Circuit then concluded that, even though the witness would have relied on the guidelines for his answer, his testimony was admissible because he did not actually testify to the contents of the guidelines. *See id.* (finding that "[t]he question posed to Mr. Looby did not seek to elicit the content of any writing; therefore, Rule 1002 was not implicated.").

Similarly, in *United States v. Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), the appellant had objected under Rule 1002 to witness testimony that a county had received more than $10,000 in federal funds. The appellant had argued that a federal fund report would have contained the details of federal funding and would have been the best evidence of the funds received. The district court overruled the objection, and the Eleventh Circuit affirmed. The Eleventh Circuit

ruled that Rule 1002 did not apply because the testimony involved the question of whether the county received more than $10,000, rather than the contents of the specific record. *See id.* at 1455. *See also Telecom Techn. Servs., Inc. v. Rolm Co.*, 388 F.3d 820, 830 (11th Cir. 2004) (affirming admission of unsigned sample contracts and testimony as evidence of a company policy regarding contracting and rejecting Rule 1002 objection that the actual contracts themselves were the best evidence.).

It is also black-letter law that the best evidence rule does not preclude testimony or other evidence that a document exists, was executed, or was delivered. In these situations, the document itself is not required. *See* 31 Charles Alan Wright, Kenneth W. Graham, Victor J. Gold & Michael H. Graham, Federal Practice & Procedure, Evidence § 7183 (1st ed. 2013) ("For example, evidence that a document was written or that a photograph was taken raises no issue under Rule 1002."); 2 McCormick, Evidence, § 233 (4th ed. 1992) ("Consequently, evidence that a certain document is in existence or as to its execution or delivery is not within the rule and may be given without producing the document.").

Here, Mr. Temme is using the Spreadsheet to prove that assets were acquired for Stewardship entities and that they were being worked. He is not trying to prove the ***contents*** of deeds or other documents. He would be allowed to testify to these matters directly. The spreadsheet is simply another type of evidence of these facts. There may be many ways to prove these facts. The Spreadsheet is one of them, and Rule 1002 does not apply.

B. <u>The Rule 1006 Summary Objection Is Misplaced</u>.

Next, Plaintiff objects that the Spreadsheet does not meet the requirements of a Rule 1006 summary. Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart,

> summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place [sic]. The court may order that they be produced in court.

Fed. R. Evid. 1006.

Based on a Sixth Circuit case called *United States v. Modena*, 302 F.3d 626 (6th Cir. 2002), Plaintiff claims that Rule 1006 imposes a requirement that a summary must be "reliable [and] accurate." Motion to Strike at 4. Plaintiff then argues that this alleged "reliable [and] accurate" requirement applies to the Spreadsheet. Plaintiff's argument misapplies Rule 1006 and distorts Sixth Circuit case law.

In the first place, Rule 1006 does not apply to the Spreadsheet at all. As the *Modena* opinion explains, "Rule 1006 governs the admissibility of ***evidentiary summaries***." *Modena*, 302 F.3d at 632 (emphasis added). That is, Rule 1006 applies to summaries of evidence—specifically, to evidence that is "so voluminous that it cannot conveniently be examined in court." Fed. R. Evid. 1006. Rule 1006 allows parties to create summaries of such voluminous evidence to aid in their presentation to the fact finder during litigation. *See id.* But the Spreadsheet is not a ***summary*** of evidence. It ***is*** evidence. It is a business record of Stewardship Fund. Thus, Rule 1006 does not apply to it at all.

Second, Plaintiff distorts Sixth Circuit case law in arguing that Rule 1006 requires that the Spreadsheet must be "accurate [and] reliable," in the sense of being completely free of errors. In *Modena*, the Sixth Circuit cited an earlier Sixth Circuit case, *United States v. Bray*, 139 F.3d 1104, 1109-10 (6th Cir. 1998), for the proposition that one requirement of Rule 1006 is that the summary must be "accurate and nonprejudicial." *See Modena*, 302 F.3d at 633 (citing *Bray*). *Modena* did not discuss what "accurate and nonprejudicial" means, because *Modena* turned on the Government's failure to produce the documents from which the Government created the

summary. However, *Bray* explained that the "accurate and nonprejudicial" requirement means that "the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner….It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise." *Bray*, 139 F.3d at 1110.

Thus, as *Bray* makes clear, the "accurate and nonprejudicial" requirement exists to make sure that lawyers or litigants who create a Rule 1006 summary accurately summarize the underlying documents and to make sure that the lawyers or litigants do not try to inject any kind of advocacy into the summery. As to the requirement of accuracy, inaccuracies in a summary can be corrected before presenting the summary to a fact finder. These requirements are specific to Rule 1006 summaries of underlying documents that are created for trial. They do not apply to actual evidence.

As to business records such as the Spreadsheet, "[t]he federal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all." *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977); *see also Young v. Illinois Centr. Gulf RR Co.*, 618 F.2d 332, 337 (5th Cir. 1980) (noting the "liberal nature of the Federal Rules of Evidence" and quoting *Carranco* with approval). Accordingly, alleged errors in the Spreadsheet affect the weight rather than the admissibility. *See, e.g., United States v.* McGill, 953 F.2d 10, 15 (1st Cir. 1992) (holding that "[t]he mere fact that errors or deviations have occurred from time to time" does not make a business record inadmissible); *In re Worldcom, Inc. Securities Litig.*, 2005 WL 375313 at *9 (S.D.N.Y. Feb. 17, 2005) (holding that flaws in a business record "do not affect

[its] admissibility, but rather the weight which the jury should give to [it]"); *Stroud v. Roper Corp.*, 1990 WL 115610 at *3 (S.D.N.Y. Aug. 9, 1990) ("Plaintiff's arguments as to possible errors in the testing procedure go to the weight, rather than the admissibility, of the hospital records.").

Here, Plaintiff identifies alleged errors on five individual properties out of approximately 8886 property entries on the Spreadsheet. *See* Def's Response to MSJ, Ex. 1 (Henry Decl., Ex. A) (Spreadsheet contains 8887 rows, first row is a heading). This would be an error rate of .05 percent. Moreover, each of the five alleged errors involves an alleged mistake as to an individual property rather than an entire package of properties. This is significant because it shows that the alleged errors are isolated. Indeed, each of the five individual properties was part of a much larger package of properties. 2993 Parsons was one of a package of 33 properties. *See* Def's Response to MSJ, Ex. 1 (Henry Decl., Ex. A) (lines 7520-7552). 53 Henry Street was one of a package of 97 properties. *See id.* (lines 7234-7330). 825 West Charles Street was one of a package of 83 properties. *See id.* (lines 6119-6201). 300 N. Hobson was one of a package of 35 properties. *See id.* (lines 8850-8884). 527 Norris was one of a package of 349 properties. *See id.* (lines 3302-3650). Under the cases cited above, alleged errors such as these in a document go to the weight, not the admissibility.

Additionally, Plaintiff errs with respect to at least one of its five alleged errors. As to 527 Norris, Norristown, Pennsylvania, Plaintiff notes that the Spreadsheet shows that it was owned by Equitas Housing Fund III, LP. Plaintiff then states: "And neither Mr. Henry nor Defendant has offered any evidence that HSP II sold or conveyed this asset to Equitas Housing Fund III, LP." Motion to Strike at 7. That statement is not true. Pages 11-12 of Defendant's Response to Plaintiff's MSJ explain that the Spreadsheet shows the acquisition of 349 properties for Equitas

Housing Fund III. It further explains that the fact that the Spreadsheet contains detailed non-public boarding tape information for these 349 properties is persuasive evidence that HSP II sold and conveyed these properties, because owners do not release this information prior to closing. *See* Defendant's Response to Plaintiff's MSJ at 11-12.

As to 527 Norris, Plaintiff also says that the current AMX Tracker system lists the owner as an entity called Helping Hands Housing I, LLC. Motion to Strike at 7. This is irrelevant because the AMX Tracker system was taken over by Halo and was out of Stewardship Fund's hands by in or about August 2011. *See* Defendant's Response to Plaintiff's MSJ, Ex. 1 (Henry Decl. ¶ 4). The Spreadsheet, however, was created before Halo took over the AMX Tracker system. *See id.* What Halo may have done with the 527 Norris property after it took over, or what data Halo may have entered in the AMX Tracker system after the Spreadsheet was created, is irrelevant to the accuracy of the Spreadsheet.

None of Plaintiff's Rule 1006 objections have merit. The Court should overrule them.

II.

CONCLUSION

Mr. Temme respectfully requests that the Court overrule Plaintiff's objections and deny the motion to strike.

Respectfully submitted:

/s/ John Helms, Jr.
John Helms, Jr.
Texas Bar No. 09401001
jhelms@fhsulaw.com
Ritch Roberts III
Texas Bar No. 24041794
rroberts@fhsulaw.com
Fitzpatrick, Hagood, Smith & Uhl LLP
Chateau Plaza, Suite 1400
2515 McKinney Ave.
Dallas, Texas 75201
Tel: (214) 237-0900
Fax: (214) 237-0901
COUNSEL FOR JAMES G. TEMME

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.