

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

**SECURITIES AND EXCHANGE COMMISSION,**

Plaintiff,

v.

**JAMES G. TEMME, and  
STEWARDSHIP FUND, LP,**

Defendants,

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: Civil Action No.  
: **4:11-CV-0655**  
: (Judge Clark/Mazzant)  
: ECF  
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**REPLY BRIEF IN SUPPORT OF OBJECTION TO AND MOTION TO STRIKE THE  
DECLARATION OF JOHN HENRY**

May a party try to create a genuine issue of material fact by seeking to introducing into evidence a document that is inherently unreliable and speculative, a document about which even its putative author offers no real detail? No, because the document is not proper evidence.

Temme’s response highlights one of the most pertinent objections to the Henry spreadsheet and declaration. As Temme notes, the Commission’s objection centers on the Exhibit, not the Declaration. That is because, as discussed below, the Declaration does not contain any real information. Standing alone it is irrelevant. And Mr. Henry’s silence on key issues renders both his declaration and the spreadsheet inadmissible. At the very least, even if it is admissible, Temme’s response only confirms that Mr. Henry’s spreadsheet is wholly insufficient to defeat the Commission’s motion for summary judgment.

In evaluating the admissibility of the Henry spreadsheet and declaration, it is important to place these materials in context. Temme claims that the spreadsheet should be admitted on its own (as opposed to a summary) as evidence that Stewardship Fund “purchased and was working

certain assets.”<sup>1</sup> And he argues it is admissible as such evidence because it is a business record of Stewardship Fund.

His attempt to turn Mr. Henry’s spreadsheet into a Stewardship Fund business record should be rejected. First, according to Mr. Henry, “his” spreadsheet consists of data he says he extracted from the AMX database. As confirmed by the Receiver, that database was actually maintained by a third-party, Halo Corp. Moreover, Mr. Henry offers no testimony at all as to how information was put into the AMX system, by whom, when, and on what basis. Nor does Mr. Henry explain why he created the spreadsheet in August 2011. More specifically, Mr. Henry, other than parroting the language of Rule 803, does not offer any detail at all claiming that Stewardship Fund employees regularly input data related to the underlying transactions at or near the time of the transaction. Nor could he make such a claim. And, even if they were placed into the AMX system contemporaneously, the data in Mr. Henry’s spreadsheet was after-the-fact. Moreover, by August 2011, Stewardship Fund was in disarray and, as evidenced in the materials the Commission supported in its original application for emergency relief, embroiled in litigation raising issues similar to those raised in this case. There is no reason in these circumstances to believe the spreadsheet was created as a normal business record. Finally, Mr. Henry offers no information about what, if anything, he did in connection with the spreadsheet since that time. Given that since October 2011 Stewardship Fund has been under the control of

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<sup>1</sup> This position is not surprising, because it is clear that the spreadsheet would not be admissible as a summary document. Temme’s efforts to explain away, through argument of counsel rather than evidence in Mr. Henry’s declaration, the errors included in the spreadsheet fail. The Commission noted representative errors in the spreadsheet demonstrating the spreadsheet’s unreliability as a summary. Of course, these are merely examples, not an exhaustive list. And it’s hardly surprising that the spreadsheet is unreliable. As noted below, it was created after-the-fact for unknown reasons and in all likelihood reflecting information that, ultimately, was provided by Temme himself.

the Receiver, there is no basis to hold that this spreadsheet has been properly maintained as Stewardship Fund business record.<sup>2</sup>

Temme's additional arguments to attempt to overcome the spreadsheet's deficiencies are equally without merit. At the end of the day, Temme is attempting to use this spreadsheet to prove the contents of certain documents that relate to transactions involving real property. That is because, as explained in the Commission's original objection, those transactions can only be proven by the contents of the underlying transaction documents. Even though it would be objectionable under the circumstances here if Mr. Henry personally testified that such a transaction occurred, at least arguably such testimony could putatively be based on personal knowledge. But that is not the form of evidence here. Instead, contrary to his suggestion, Temme's real argument here is not just that certain documents exist, but about the contents of the documents, i.e., he claims the spreadsheet is evidence that those underlying documents would say that Stewardship Fund acquired certain assets and that Stewardship Fund was "working" such assets.<sup>3</sup>

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<sup>2</sup> Temme suggests that Mr. Henry testifies that the AMX system was maintained by Stewardship Fund and thus the spreadsheet derived from it is a Stewardship Fund business record. This claim does not help his use of this document. First, that is not Mr. Henry's testimony. Though Mr. Henry offers boiler-plate language tracking the language of Rule 803(6), he noticeably does not explain how Stewardship Fund created, used, or maintained such data such that it would qualify as an admissible business record. This is especially relevant here, where the Receiver, who by law is the custodian of records for Stewardship Fund, has cast doubt on this document's legitimacy.

<sup>3</sup> In a curious argument, Temme suggests that he would be allowed to testify to whether Stewardship Fund acquired certain assets and therefore Mr. Henry's spreadsheet is admissible. [Response at p. 4]. It's unclear exactly what form of testimony this argument envisions. Perhaps he is suggesting Mr. Temme could testify about his role in actually effectuating such transactions by personally effectuating particular transaction-related documents. As a threshold matter, this argument does not take into account particular evidentiary requirements related to proving real estate transactions. But perhaps he is correct and Temme could, under the rules of evidence, testify on those matters. Even assuming that is true, however, Temme has chosen *not* to testify on those subjects. Instead, he hopes to substitute such sworn testimony with a wholly-speculative spreadsheet of uncertain origins and maintenance putatively created by a person who does not even claim to have any personal knowledge of the underlying transactions. The bottom line is that if Temme wanted to offer the type of testimony he suggests, he could. Instead, he has refused to testify under oath, citing his Fifth Amendment privilege to avoid incriminating himself. And as noted in the Commission's original objection, for this reason alone, the Court should exclude the Henry spreadsheet.

That is precisely the sort of flawed evidence the Federal Rules of Evidence prohibit. For example, Temme cites to authority that suggests “evidence that a certain document is in existence or as to its execution or delivery” may be given without introducing the document. [Response at pg. 4]. But, Temme is not arguing only that certain documents exist; he cares about what he wants to the Court to believe those documents say, i.e., his claim that they would support his argument that Stewardship Fund acquired certain assets. Similarly, Temme’s reliance on cases such as *Allstate Ins. Co. v. Swann*, 27 F.3d 1539 (11<sup>th</sup> Cir. 1994) is misplaced. In those cases, as Temme admits, a witness testified as to certain facts that were also reflected by certain documents. But here, Mr. Henry is not offering such testimony. Instead, he is attempting to suggest that the spreadsheet accurately reflects what the underlying documents reflect. That is precisely the sort of unreliable evidence the rules of evidence proscribe.

In sum, Temme offers the Henry spreadsheet – and virtually this spreadsheet alone – as evidence to counteract the detailed demonstration of fraudulent behavior outlined in the Commission’s motion for summary judgment and supporting materials. In other words, Temme argues that because this spreadsheet states that a certain asset was owned or conveyed to someone, it was. For the reasons noted above and in the Commission’s original objection, this spreadsheet is too riddled with inaccurate data and uncertainties surrounding its creation and preservation to be considered as such evidence. *See, e.g.*, Fed. R. Evid. 803(6)(E) (specifying that a record may be admitted despite being hearsay if “neither the source of information nor the method or circumstance of preparation indicated a lack of trustworthiness.”). Therefore, the Commission respectfully asks the Court to disregard it.

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But in any event, as discussed here, the fact that he has attempted to rely on this unreliable document riddled with errors only reinforces his liability.

Respectfully submitted,

/s/ David B. Reece

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**CERTIFICATE OF SERVICE**

I certify that on October 22, 2013, I electronically filed the foregoing ***Reply in Support of Objection to and Motion to Strike the Declaration of John Henry*** 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