

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Civil Action No. 4:11-CV-00655

JAMES G. TEMME,
STEWARDSHIP FUNDS, LP

Defendants.

**RESPONSE AND OBJECTION TO MOTION TO APPROVE SETTLEMENT
WITH THE HOME SOLUTIONS AFFILIATES**

Non-parties to this action, MDA Realty Holdings, LLC, MVB Realty Holdings, LLC, LF Realty Holdings, LLC, 48th Street Holdings LLC, and F & B Note Holding, LLC (collectively, the "F & B Group"), file this Response and Objections to the Receiver's Motion to Approve Settlement with the Home Solutions Affiliates, and would respectfully show the Court the following:

1. The court-appointed Receiver has recommended a \$550,000 cash settlement with 14 different entities, as well as their "affiliates, partners and employees." These are referred to as the HSP/Harbour Parties in the Receiver's Motion, and referred to in this response as the "Home Solutions Affiliates", or just the "Affiliates". Not one of these persons or entities is a party to this proceeding and it is acknowledged by all, including the Affiliates, that none of their assets are part of the receivership estate. Yet, the Affiliates have negotiated a "bar order" as part of this proposed settlement providing as follows:

Any and all of the Stewardship Creditors and any and all holders of any equity interests in any of the Receivership Entities are hereby permanently BARRED, RESTRAINED, and ENJOINED, consistent with general equitable principles and in accordance with this Court's ancillary equitable

jurisdiction in the SEC Matter, from: (i) commencing or continuing any judicial, administrative, arbitration, or other proceeding of any kind whatsoever and asserting or prosecuting any claims and causes of action against any of the HSP, Harbour Parties or their respective past, present, and future agents, officers, directors, employees...arising out of, in connection with, or relating in any way to the Receivership Entities...

...The Order defines "Stewardship Creditors" as: any and all persons or entities (including any of their direct or indirect relatives, heirs, successors, assigns, affiliates, agents, parent companies, partners, subsidiaries, employees, and anyone acting by or through them) heretofore or hereafter asserting any claims of any type or nature directly or indirectly against any of the Receivership Entities or on account of any transaction with any of the Receivership Entities. Such term shall include, without limitation, (i) any person or entity who files a claim or enters an appearance in this receivership proceeding at any time, (ii) any person or entity asserting any claim at any time on account of any investment, loan, transfer of money or other property, or other transaction involving any of the Receivership Entities, regardless of whether such person, entity creditor, or claimant files a claim with the Receiver or enters an appearance in the receivership proceeding...(Emphasis supplied)

2. The F & B Group strongly objects to the settlement to the extent it includes the entry of this order because it is so broad that the Affiliates will attempt to argue that it would prevent F & B Group from asserting its direct claims against certain of the Affiliates.

3. Non-parties, the F & B Group, have already demonstrated to this Court that they have certain direct claims of at least \$3,139,667.20 against several non-parties to this proceeding, including, at least Home Solutions Partners I, LP, Home Solutions Partners III, LP, Harbour Portfolio I, Harbor Portfolio II, and Charles Vose. On April 27, 2011, the F & B Group wire transferred \$3,139,667.20 to the bank account of Home Solutions Partners I, LP, not to any Stewardship account. As shown by the Affidavit of Jacob Fain (Docket No. 68), someone with actual or exercised authority over that account transferred that money to the Destiny Fund II, LP Account, and a portion of that money went back to the following parties:

a.	Home Solutions Partners III, LP	\$1,821,305.80
b.	Harbour Portfolio I	211,785.00
c.	Harbour Portfolio II	<u>183,670.00</u>
	Total	\$2,216,760.80

4. Therefore, this is not a simple case of \$1,821,305.80 being sent by Stewardship to Home Solution Partners III, as inferred by the Motion. When Home Solution Partners I received F & B Group's money directly from the F & B Group, liability attached against Home Solution Partners I and whoever else with the Affiliates was involved in obtaining this money from the F & B Group, at the very moment their money hit the account on April 27, 2011. What happened after that event does not affect these parties' direct liability to F & B Group.

5. From the beginning, the Home Solutions Affiliates have contended that they knew nothing (for months) about this \$3.1 million hitting their account, and they have also asserted that the \$1.8 million later sent to them by Destiny was to unwind a December, 2009 sale of REO assets for which one of the Home Solutions entities had originally paid Stewardship Fund (not Destiny Fund) \$1,562,875.78. No documentation reflecting such a present intent has ever been provided. But as shown by the F & B Group's Amended Motion for Relief from Stay, filed on June 20, 2012, and incorporated herein by reference, the various Affiliates had engaged in at least six transactions with Stewardship over a three year period prior to April, 2011, totaling over \$7.7 million for mortgages for which no assignments were ever obtained.

6. The Receiver's Motion says there is a March, 2011 contract by which Stewardship agreed to repay \$1,821,305.80 for 267 REO assets bought by some. This "contract" has never been mentioned before in Mr. Vose's "declarations" to the Court,

and it is not provided with the Receiver's Motion. We don't know the identity of the parties to this contract. And the numbers obviously do not match: there is a "repayment" of \$1,821,305.80 for a failed \$1,562,875.78 transaction, a difference of \$258,430.02. The parties don't match either. Why is Destiny paying Home Solutions Partners III money that is supposedly owed by Stewardship? No explanation is provided.

7. The "net loser" analysis regarding the Affiliates is not well founded. This is based upon a May, 23, 2012 affidavit previously filed in this Court by Charles A. Vose, III in which he states that the thirteen (13) Affiliates as a group are "net losers" in their dealings with the Receivership Entities. This net loser analysis would not apply to insiders such as the Home Solutions Affiliates in the first place, and there is no such thing as a "group loser" in the second place. Each entity would need to be examined independently if they were not insiders. The Receiver notes in the Motion that these parties "engaged in substantial dealings with Stewardship Fund and Temme..." prior to the April, 2011 incident. There has never been any demonstration that Home Solutions Partners I or Home Solutions Partners III is a "net loser" in its dealings with Stewardship, and receipts of \$3.1 million and \$1.8 million, respectively, would call such a contention into question.

8. The main purpose of the proposed settlement with the Affiliates therefore appears to be the so-called "bar order" against the F & B Group, covering claims against the Affiliates to the extent they relate to a "transaction involving any of the Receivership Entities". Indeed, the Receiver makes clear, what is no doubt true, that the Affiliates are not interested in this settlement unless all the Affiliates, including Charles Vose, individually, obtains entry of this "bar order", enjoining the F & B Group

from suing the Affiliates for their \$3.1 million loss. The net effect of this settlement, therefore, would be to place the Affiliates squarely within the protection of the receivership and this Court, without any of the Affiliates or their assets being subject to the receivership, and indeed without any scrutiny of the Court of these parties' dealings with Stewardship, and their implausible explanations of the subject transactions.

9. As noted in their Amended Motion for Relief from Stay, the F & B Group wish to pursue the following claims against the Affiliates:

- a. recovery of the 440 mortgages for which they made full, and direct, payment directly to Home Solutions Partners I, LP;
- b. Damages caused directly to the F & B Group by the effort of the Affiliates to use the described Bank Accounts and Powers of Attorney to defraud the F & B Group;
- c. A civil theft claim against the appropriate Home Solutions Affiliates; and
- d. An alternative claim for negligence on the part of the various Home Solutions Affiliates in allowing Temme the use of the Affiliates' Bank Accounts, powers of attorney and control over the Affiliates mortgages to defraud the F & B Group, when the Affiliates had actual and constructive knowledge that Temme was defrauding people in his mortgage sales activities.

ARGUMENT

A. The Court does not have jurisdiction to enjoin the F & B Group from suing the Affiliates.

10. As shown at the evidentiary hearing on F & B Group's Amended Motion to Lift Stay, the F & B Groups' claims against the Affiliates do not arise out of any investments made in any Receivership Entity or in any assets of the receivership. F & B Group had a direct contract with the Affiliates to purchase 440 mortgages, which belonged to the Affiliates, not to any Stewardship entity. The Receiver and the Affiliates have conceded that the Affiliates, and not Stewardship, owned these mortgages. All F & B Group's money was sent to Home Solutions Partners I, not to any Stewardship Entity. Even in a bankruptcy proceeding, which this action is not, the Court may exercise jurisdiction over a third party claim only if the debtor establishes that the third party action is property of the estate or the dispute between the estate and the creditor would have an effect on the estate. *Matter of Zale Corp.*, 62F.3d 746, 753 (5th Cir. 1995).

11. The direct claims of the F & B Group against the Affiliates are not within the definition of "Receivership Assets". The Receiver has previously argued that \$1.8 million of F & B Group's \$3.1 million claims belong to the estate because F & B Group's money was removed from the account of Home Solutions Partners I (though it has never been established who moved the money) and placed in the Destiny II Fund account. (The Receiver has never argued that F & B Group's entire claim belongs to the Receivership, yet, this proposed settlement seeks to bar F & B Group's entire claim.) From the Destiny II account, \$1.8 million went right back to a similar account at Home Solution Partners III at the same bank. Therefore, the Receiver's Motion seems to concede that he is settling only a \$1.8 million claim, but the proposed order would potentially bar F & B Group from pursuing their claim against the Affiliates, even that portion of the claim in which the Receiver does not claim any interest.

12. F & B Group's claims against the Affiliates have no effect on this estate. In the prior hearings in this matter, there seemed to be an unproven assumption on the part of the Receiver and the Affiliates that with regard to \$1.8 million of F & B Group's claim, there is some mutual exclusivity between the Receiver's and F & B Group's right to recover against the Affiliates. That is not the case with regard to the tort claims of F & B Group against the Affiliates. F & B Group's principal claims against the Affiliates are for fraud and theft. The measure of damages on these claims, out-of-pocket damages, is based upon the damages to F & B Group; the benefit, if any, to the Affiliates is irrelevant. *Baylor University v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007); *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009); *Fortune Prod. V. Conoco, Inc.*, 52 S.W.3d 671, 681 (Tex. 2000); *Latham v. Castillo*, 972 S.W.2d 66, 70 (Tex. 1998); *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998). Destiny's payment to Home Solutions Partners III is a later and different transaction, occurring after F & B Group's \$3.1 million damages against the Affiliates were already incurred and already fixed. Both the Receiver and F & B Group could recover the full amount of their claims against the Affiliates, even though that would mean the Affiliates might have to pay actual damages of almost \$5 million. Thus, recovery of the full amount of F & B Group's claims against the Affiliates would have no effect on the Receiver's alleged claim against them.

B. The proposed settlement is patently unfair to the F & B Group.

13. Under the case law previously brought to the attention of this Court, the complaints of third parties adversely affected by a proposed settlement must be considered. *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1984). The modest settlement with the Affiliates apparently has as its main purpose, at least to the

Affiliates, a “bar order” against the F & B Group and all other parties whoever had any dealings with the Affiliates which are “related” to Stewardship. Indeed, the Receiver recognizes that the Affiliates will not enter into the settlement unless they get their “bar order”

14. The settlement is patently unfair to the F & B Group. They suffered a substantial loss on their direct dealings with the Affiliates. The token payment to the estate is a small fraction of their loss, not to mention the claims any other non-parties may have against the Affiliates. The proposed settlement should be denied on this basis alone. Anyone looking at this proposal objectively would conclude that this settlement has almost nothing to do with the receivership; it reflects how much the Affiliates are willing to pay the receivership estate to obtain an injunction from this Court which they can argue would prevent the F & B Group from suing the Affiliates for their \$3.1 million loss from their direct dealings with the Affiliates, including Home Solutions Partners I. This settlement victimizes the victims, and uses this court to protect parties who benefited from their dealings with Stewardship.

C. In the alternative, the Court should approve the settlement, but exempt F & B Group’s claims against the Affiliates, outlined above, from any “bar order”.

15. In the alternative to their request that the Court deny the request to approve the settlement with the Home Solutions Affiliates, the Court is requested to expressly exclude from the proposed “bar order” the claims of the F & B Group against the Affiliates. As noted above, F & B Group’s contract was with the Affiliates (the contract having been assigned by Stewardship to F & B Note Holding, LLC), its money

was sent directly to Home Solutions Partners I, LP – no money was sent by F & B Group to any Stewardship Entity. F & B Group has direct claims of at least \$3.1 million against some of the Home Solutions Affiliates that are neither property of the estate nor which would have any effect on the estate. Therefore, justice clearly requires that the Court exclude from any “bar order” the claims of the F & B Group against the Home Solutions Affiliates.

WHEREFORE, MDA Realty Holdings, LLC, MVB Realty Holdings, LLC, LF Realty Holdings, LLC, 48th Street Holdings LLC, and F & B Note Holding, LLC pray that the Court deny the Motion to Approve Settlement with the Home Solutions Affiliates, and in the alternative, reform the settlement to expressly exempt the claims of the F & B Group against the Affiliates from the “Bar Order”, and that the F & B Group recover such other and further relief in this matter and regard as they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 24, 2013, a true and correct copy of the foregoing document was served on the following counsel of record via electronic case filing or certified mail, return receipt requested.

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