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-MHS
	§	
JAMES G. TEMME and STEWARDSHIP FUND, LP,	§	
	§	
Defendants.	§	

RESPONSE TO THE F&B GROUP'S OBJECTION TO THE RECEIVER'S MOTION TO APPROVE SETTLEMENT

The HSP/Harbour Parties[1] respond to the Response and Objection (Dkt. No. 289) filed by MDA Realty Holdings LLC, MVB Realty Holdings, LLC, LF Realty Holdings, LLC, 48th Street Holdings LLC, and F&B Note Holding, LLC's (collectively, the "F&B Group") to the Receiver's Motion to Approve Settlement, for Entry of Bar Order, to Allow and Pay Professional Fees, and Brief in Support (Dkt. No. 281).

I. OVERVIEW

The F&B Group opposes the Settlement with the HSP/Harbour Parties (the "Settlement") on two grounds: (1) the F&B Group claims the Court does not have jurisdiction to enjoin it from pursuing claims against the HSP/Harbour Parties; and (2) the Settlement is purportedly unfair to the F&B Group. The F&B Group's first argument has been recently rejected by the Fifth Circuit: this Court has jurisdiction to enjoin the F&B Group. The F&B Group's second

[1] The HSP/Harbour Parties, as used herein, are Home Solutions Capital, LLC, Home Solutions GP, LP, Home Solutions Advisors, LLC, Home Solutions Partners I, LP, Home Solutions Partners I REO, LLC, Home Solutions Partners III, LP, Home Solutions Partners III REO, LLC ("HSP III"), Home Solutions Partners IV, LP, Home Solutions Partners IV REO, LLC ("HSP IV"), Harbour Portfolio Advisors, LLC, Harbour Portfolio Capital, LLC, Harbour Portfolio GP, LP, Harbour Portfolio V, LLC ("Harbour V"), and Harbour Portfolio VI, LP. The Settlement also fully releases potential claims against Charles Vose, Edward Lasater, and Duncan Lee arising out of transactions or business dealings with the Receivership Entities.

argument fairs no better. The standard the Court must apply to determine whether to approve the Settlement is whether the Settlement is in the best interest *of the Receivership Estate*, not whether it is somehow "fair" to the F&B Group in isolation. As described herein and in the Receiver's Motion to Approve Settlement, the Settlement is fair, equitable, necessary, and in the best interest of the Receivership Estate as a whole and should be approved.

II. BACKGROUND FACTS

A. The HSP/Harbour Parties were victims of Temme's fraud.

From about 2009 through 2011, certain of the HSP/Harbour Parties invested with and engaged in transactions involving Stewardship Fund and James G. Temme ("Temme") in connection with the purchase, sale, and servicing of mortgage notes. Temme defrauded the HSP/Harbour Parties. The HSP/Harbour Parties lost millions of dollars. After his investigation, the Receiver in this action (Keith Aurzada) and his litigation counsel approached the HSP/Harbour Parties and demanded further payments to the Receivership Estate based on certain transactions with Receivership Entities. The HSP/Harbour Parties refused citing facts and defenses, including:

- The HSP/Harbour Parties were net losers in their dealings with Temme.
- Temme sold properties belonging to the HSP/Harbour Parties without their knowledge or consent.
- The HSP/Harbour Parties were fraudulently induced into the agreements with the Receivership Entities.
- The Receivership Entities could not possibly perform their continuing obligations under the relevant agreements and have not performed those obligations.

- The Receivership Entities received exact or reasonably equivalent value in the transactions with the HSP/Harbour Parties.
- Certain transactions with the HSP/Harbour Parties were structured to go through independent third-party intermediaries. Therefore, recovery of unreleased funds would violate the terms of those agreements.
- The Receivership lacked standing to bring certain claims.
- Temme demanded an "interest payment" from the HSP/Harbour Parties—purportedly to be paid to a third party. The HSP/Harbour Parties made the payment. Temme wrongfully retained the "interest payment".
- HSP/Harbour Parties retired debt incurred by Temme and/or Receivership Entities and incurred additional debt because of the actions of Temme (acting through Receivership Entities). This capital was never repaid.
- Amounts Temme and the Receivership Entities received and/or misappropriated are valid dollar-for-dollar set offs to any recovery by the Receivership Estate.
- The HSP/Harbour Parties have significant claims against the Receivership Estate.
- There are significant collectability issues for any judgment obtained by the Receiver.

The HSP/Harbour Parties voluntarily made their confidential business and financial documents and information available to the Securities and Exchange Commission, the Receiver, the Receivership's counsel, and the Receiver's litigation counsel.

B. The F&B Group has asserted the same arguments contained in its Objections on previous occasions and failed.

MDA Realty Holdings, LLC, MVB Realty Holdings, LLC, LF Realty Holdings, LLC, Equitas Housing Fund III, LP filed two Rule 202 Petitions in the 366th Judicial District Court in

Collin County, Texas. Judge Wheless correctly held that the Receivership Orders (Dkt. Nos. 24, 25 and 30) barred their requested relief. (*See* Dkt. No. 106 at Ex. A-C).

The F&B Group filed a "Notice of Potential Claimant" in this action and participated in the April 2, 2012 show-cause hearing. (*See* Dkt. No. 68). The relief it requested was denied.

The F&B Group has filed numerous objections to previous settlement agreements asserting the same arguments contained in their Opposition. The F&B Group filed a Motion for Relief from Stay and an Amended Motion for Relief from Stay again using the same arguments they employ in their Opposition.

After the hearing on the F&B Group's Amended Motion for Relief from Stay, this Court denied the Motion and correctly found that:

- The F&B Group failed to do reasonable due diligence, in that it: (1) never spoke to any of the HSP/Harbour Parties against whom it claimed to have a direct claim; (2) failed to even check with the Texas Secretary of State to determine whether the entity from whom Stewardship was purportedly getting the assets *even existed*; and (3) failed to check the deed records.
- The entity from which the F&B Group purportedly was to receive assets (by way of an assignment from Stewardship Fund, LP) did not exist.
- All misrepresentations to the F&B Group were made by Temme.
- There was no credible allegation that the HSP/Harbour Parties owed any duty to the F&B Group, especially when there was no evidence that the HSP/Harbour Parties had ever had any contact with the F&B Group whatsoever.

(Dkt. 135 at 6-10).

III. ARGUMENTS AND AUTHORITIES

A. The Court has the authority to approve the Settlement and Issue the Bar Order.

The federal courts have inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws. *SEC v. Kaleta*, CIV.A. 4:09-3674, 2012 WL 401069, at *3 (S.D. Tex. Feb. 7, 2012) ("*Kaleta I*") *aff'd*, 12-20633, 2013 WL 3030300 (5th Cir. June 19, 2013) ("*Kaleta II*") *quoting SEC v. Wencke*, 622 F.2d 1363, 1368–69 (9th Cir.1980) ("*Wencke II*") (observing that a district court's authority to issue an order staying a non-party from bringing litigation derives from "the inherent power of a court of equity to fashion effective relief"). The Fifth Circuit has long endorsed the proposition that "(a)ny action by a trial court in supervising an equity receivership is committed to his sound discretion and will not be disturbed unless there is a clear showing of abuse." *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372–73 (5th Cir.1982). "[A] district court has wide discretion to administer proceedings in an equity receivership—including the approval of settlements." *Gordon v. Dadante*, 336 F. App'x 540, 551 (6th Cir. 2009).

An anti-litigation injunction is one of the tools available to courts to help further the goals of the Receivership. A district court has broad authority to issue blanket stays of litigation to preserve the property placed in receivership pursuant to SEC actions. *SEC v. Stanford Int'l Bank Ltd.*, 424 F. App'x, 338, 340–41 (5th Cir. 2011); *Liberté Capital Group, LLC v. Capwill*, 462 F.3d 543, 551–52 (6th Cir. 2006). "[N]o federal rules prescribe a particular standard for approving settlements in the context of an equity receivership; instead, a district court has wide discretion to determine what relief is appropriate." *Gordon*, 336 F. App'x at 548. Although a court is not obligated to follow any particular procedure, courts have stayed proceedings by non-parties against a court-imposed receivership after finding an appropriate showing of necessity. *See, e.g., Wencke II*, 622 F.2d at 1371–72.

B. Recent Fifth Circuit precedent could not be clearer—the Court has the jurisdiction to enjoin the F&B Group.

The Southern District of Texas recently faced a very similar circumstance to the issue currently before this Court in *SEC v. Kaleta*. In that case, a non-party argued that the district court lacked the authority to issue a bar order very similar to that proposed by the Receiver in the instant Settlement. The Court rejected the objector's arguments and entered the bar order because it was in the best interest of the receivership estate in that case. *Kaleta I* at *7 ("The Bar Order advances that goal by arranging for reasonably prompt collection of the maximum amount of funds possible from the WB Parties under the present litigation and financial circumstances."). The Fifth Circuit affirmed. The concerns of the objectors in that case were not meaningful grounds to "re-trade" a settlement and bar order that a receiver had spent months negotiating in good faith. *Kaleta II* at *2. The circumstances that lead to the Settlement and Bar Order in this case are even more compelling than those in *Kaleta I* and *II*. In *Kaleta*, there were questions whether the settling parties had been entirely candid with the receiver. Here there is no such question. The HSP/Harbour Parties have willingly presented witnesses and all relevant documents to the SEC, the Receivership and its various counsel. The Court has the jurisdiction to enjoin the F&B Group from further litigation against the HSP/Harbour Parties.

C. The Settlement is in the best interest *of the Receivership Estate*.

The F&B Group argues that the Settlement is unfair to it. Objection at 2-7. This misses the point. The Ponzi scheme operated by Temme harmed dozens of "investors", *including the HSP/Harbour Parties*, who were victims of a massive fraud. These circumstances are not fair to any of the victims including the both F&B Group and the HSP/Harbour Parties. This Court has previously correctly observed that Temme, not the HSP/Harbour Entities, made the misrepresentations to the F&B Group. The HSP/Harbour Parties owed no duty to the F&B

Group. The F&B Group failed to perform reasonable due diligence. (*See* Dkt. No. 135). The F&B Group never had "direct dealings" with the HSP/Harbour Parties. According to its own documents, the F&B Group executed an assignment with Stewardship Fund, LP who was in turn to purportedly receive assets from the non-existent "Home Solutions Partners, LP".

The F&B Group argues the wrong standard. The Court has wide discretion to determine what relief is appropriate under the relevant circumstances. *See, e.g., Gordon*, 336 F. App'x at 548. The F&B Group presents no compelling reason why the fraud Temme inflicted upon it should be independently weighed against the Settlement terms with the HSP/Harbour Parties. This sort of reasoning was soundly rejected in *Kaleta I* and *II*. The question before the Court is whether the Settlement is in the best interest of the Receivership Estate. *See, e.g., Kalleta I* at *9 ("The Receiver has established that the proposed Settlement is fair, equitable, necessary, and in the interest of the Receivership Estate and all its claimants.").

In this case, the HSP/Harbour Parties have significant defenses and the Receivership's claims against them have significant weaknesses. *See supra* Section I.A; *see also* Motion to Approve Settlement (Dkt. No. 281). Denial of the Motion to Approve will only force the Receivership to litigate its purported claims against the HSP/Harbour Parties and (if it wins) attempt to collect on a judgment. That litigation would be at great expense to the Receivership Estate with at best an uncertain outcome. The Settlement is fair, equitable, necessary, and in the interest of the Receivership Estate and should be approved.

D. The F&B Group's alternative proposal is not within the power of the Court.

Citing no authority, the F&B Group proposes in the alternative that the Court reform the negotiated Settlement and specifically exempt the F&B Group. (*See* Objection at 8-9). The F&B Group's alternative proposal appears to misunderstand the fundamental nature of a

settlement agreement. The HSP/Harbour Parties and the Receivership negotiated an agreement, including the proposed Bar Order. No court has the authority to unilaterally force the parties to an agreement to assent to *a different agreement* than the one they made. Such an action would fail at the very foundation of contract law. There would be no offer, acceptance nor consideration for such an agreement and thus no contract would exist. *See, e.g., Johnson v. Vendor Res. Mgmt., Inc.*, 4:11-CV-762, 2012 WL 3485201 (E.D. Tex. May 14, 2012) *report and recommendation adopted,* 4:11CV762, 2012 WL 3473686 (E.D. Tex. Aug. 14, 2012). The Court should reject the F&B Group's alternative proposal.

CONCLUSION

For the reasons described herein, the HSP/Harbour Parties request the Court deny the F&B Group's objections and approve the Settlement.

DATE: November 4, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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