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

SECURITIES AND EXCHANGE COMMISSION	§	
Plaintiff,	§	
	§	
	§	
v.	§	**Civil Action No. 4:11-cv-655**
	§	
JAMES G. TEMME, and	§	
STEWARDSHIP FUND, LP,	§	
Defendants.	§	

MOTION FOR SHOW CAUSE HEARING AGAINST AMERICAN EQUITY FUNDING, INC., ALONG WITH REQUEST FOR EXPEDITED CONSIDERATION, AND BRIEF IN SUPPORT

COMES NOW, Keith M. Aurzada, as receiver in the above-captioned matter (the "Receiver") for James G. Temme ("Temme"), Stewardship Fund, LP, and all other entities directly or indirectly controlled by Temme or Stewardship Fund, LP, including, but not limited to Stewardship Advisors, LLC, d/b/a Stewardship Advisors, LP, Stewardship Asset Management Genpar I, LLC, Stewardship Group, LLC, Destiny Fund, LP, and Stewardship Management, LP (collectively, the "Receivership Entities"), and submits this Motion for Show Cause Hearing Against American Equity Funding, Inc., Along with Request for Expedited Consideration, and Brief in Support (the "Motion"). In support of this Motion, the Receiver would respectfully show the Court as follows:

I.
INTRODUCTION

1. It is the settled law of this District that profits and commissions paid from a Ponzi scheme should be disgorged and returned to the Receivership Estate. Receivership records in this case indicate that the Receivership Entities were operated as a Ponzi scheme and that the respondent, American Equity Funding, Inc. ("AEF"), received several hundred thousand dollars

in profits and commissions in its dealings with the Receivership Entities. As a result, the Receiver seeks to disgorge such improper benefits from AEF.

2. The Receiver has spent substantial time over many months attempting to settle the Receivership Estate's claims against AEF. AEF has failed to timely and meaningfully respond and has forced the Receiver to seek judicial intervention. As explained more fully below, the Receiver requests that the Court direct AEF to appear in this case and show cause why the net gains should not be disgorged to the Receivership Estate.

I.

BACKGROUND FACTS

A. The Receivership

3. On October 14, 2011, the Commission instituted the above-captioned action, and the Receiver was appointed as receiver for the Receivership Entities through the Court's entry of the Agreed Order Appointing Receiver Over Entities Under Control of James G. Temme (Dkt. No. 24); Agreed Order Appointing Receiver Over Stewardship Fund, LP, and Related Entities (Dkt. No. 25); and Order Appointing Receiver Over James Temme (Dkt. No. 30) (together, the "Receiver Orders"). Pursuant to the Receiver Orders, the Receiver is to "immediately take and have complete and exclusive control, possession, and custody of the Receivership Estate and to any assets traceable to assets owned by the Receivership Estate." Agreed Order Appointing Receiver Over Entities Under Control of James G. Temme ¶ 4 (Dkt. No. 24).

4. In its Complaint, the Commission alleges that during at least the three years prior to filing suit, Temme and the Receivership Entities operated a Ponzi scheme that defrauded investors out of at least $35 million by promising to purchase distressed and non-performing residential mortgage loans that the Receivership Entities would restructure into performing loans and resell at a profit. *See* Complaint ¶¶ 3-6. The Commission further alleges that the

Receivership Entities represented to investors that they would receive returns based on either payments from the homeowners or from the resale of the repackaged mortgages or underlying properties. *See id.* Based on those representations, the Commission alleges that the Receivership Entities misappropriated investor funds through a "web of deceit," in which the Receivership Entities: "falsely represented that investor funds would be used to purchase certain mortgages or property when in fact the investor funds were used to pay off other investors; falsely claimed to own mortgages or other loans they did not; and falsely promised different investor groups that he had purchased the same loans on their behalf." Complaint ¶ 4 (Dkt. No. 1).

5. The Receiver's investigation has substantially confirmed the facts alleged by the Commission: from a period of at least 2008 until the entry of the Receivership Orders, the Receivership Entities' business and investment operations were based largely, if not entirely, on misrepresentations to investors regarding the nature of their investments, the collateral for their investments, the sources and uses of funds, and the general management and operations of the Receivership Entities. *See* Declaration of Keith Miles Aurzada in Support of Plaintiff's Motion for Summary Judgment Against James G. Temme and Stewardship Fund, LP [Dkt. No. 195-2]. In fact, it has become evident that the Receivership Entities frequently solicited funds from investors for the sole purpose of satisfying claims of other investors. *See id.*

B. <u>American Equity Funding Received Improper Payments from Receivership Entities</u>

6. AEF operated as a broker and escrow agent for transactions (many of which were fictitious) performed by the Receivership Entities. The Receivership Entities made substantial payments to AEF over time, and those payments were ostensibly for two categories of services:

(1) commissions on alleged asset purchases[1] and (2) escrow fees. The Receiver's investigation has revealed that Receivership Entities paid AEF at least $552,560.94 in commissions on alleged asset purchases, the bulk of which were from Home Servicing, LLC ("Home Servicing"), a Louisiana-based servicer of and investor in performing and non-performing mortgages. As compensation for sending a few emails to Receivership Entities and Home Servicing, AEF apparently charged a commission of 1% of the unpaid principal balance of the loans being purchased. Since the Receivership Entities typically paid Home Servicing 6% to 10% of the unpaid principal balance, AEF's commission was 10% to 15% of the purchase price. Moreover, it appears that some of the transactions on which AEF received a commission either did not occur as represented or did not result in any benefit to the investor group actually funding the transaction.

7. Even more troubling, however, are the funds that Receivership Entities paid over time for the escrow services purportedly provided by AEF. The Receiver's investigation has revealed that AEF entered the escrow business only at the request of Temme. For its escrow services, AEF received an agreed-upon fee of $1,500 (for transactions under $1 million) to $3,000 (for transactions in excess of that amount). Such excess fees far exceed industry standard. Moreover, AEF transferred funds that were placed in escrow at the direction of Temme without notice to the parties to the transaction and without escrow instructions.

8. It should have been clear to AEF from the outset that Temme and the Receivership Entities were misappropriating investors' funds. By way of example, the very first

[1] Exhibit A hereto details, to the best of the Receiver's knowledge, all of the payments made from Receivership Entities to AEF. The Receiver acknowledges that AEF may possess information impacting the amount of the funds it actually received from Defendants. Moreover, since AEF has refused to date to produce the additional documentation that the Receiver has recently sought, the Receiver reserves the right to increase these calculations to incorporate all of the payments AEF received over time.

escrow transaction that AEF handled for the Receivership Entities resulted in AEF wiring all of the $1.282 million submitted by a group of Dallas-based investors to a Comerica Bank account in Dallas. AEF knew at the time of this transaction that Comerica Bank was the bank used by Stewardship Fund, LP, and it should come as no surprise that Temme controlled the account into which AEF wired these funds and provided these investors with little (if any) value for their payments.

9. While AEF occasionally received escrow instructions from investors, in the overwhelming majority of the escrow transactions it handled, AEF sought and followed only the instructions it received from Temme. By neither seeking investor approval for disbursements nor informing them of payments as they were made, AEF enabled the Receivership Entities to misuse their investors' funds. In addition, AEF determined, on one or more occasions, which escrow account funds would be pulled from, and it apparently did so without regard to whether the investment group whose funds were being used had any interest in the transaction at issue. Some of the commissions AEF received over time were paid by withdrawals from escrow accounts that other investors had funded. AEF also paid itself for two escrow fees from a single escrow fund and withdrew funds from three separate escrow accounts for its fee on the "Merrill Lynch pool." Not surprisingly, the Receivership Estate lost most (if not all) of the millions of dollars that these investor groups sent to AEF.

II.

BRIEF IN SUPPORT

C. Respondents Should Disgorge All Net Proceeds Received From the Receivership Entities

(i) Disgorgement of Net Proceeds

10. All of the Receivership Entities' transfers to AEF (whether in the form of commissions, escrow fees, or other payments) are voidable under the Texas Uniform Fraudulent Transfer Act (the "UFTA") or the supplemental provisions of common law. In relevant part, the UFTA provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor ... if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud ...

Tex. Bus. & Com. Code § 24.005.

11. While a plaintiff must ordinarily prove fraudulent intent to recover under this provision, courts have repeatedly held that this element is automatically established for transfers out of a Ponzi scheme. *See Quilling v. Gilliland*, C.A. No. 3:01-CV-1617, 2002 U.S. Dist. LEXIS 3720, at *5-6 (N.D. Tex. Mar. 6, 2002); *SEC v. Cook*, C.A. No. 3:00-cv-272-R, 2001 U.S. Dist. LEXIS 2601, at *8 (N.D. Tex. Mar. 8, 2001); *see also Floyd v. Dunson* (*In re Ramirez Rodriguez*), 209 B.R. 424, 433-34 (Bankr. S.D. Tex. 1997); *Merrill v. Abbott* (*In re Independent Clearing House Co.*), 77 B.R. 843, 860 (Bankr. D. Utah 1987). This presumption is necessarily true here because the Ponzi scheme that the Receivership Entities ran was insolvent from its inception. *See Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (citing *Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924)). Accordingly, all of the payments from the Receivership Entities' Ponzi scheme—including commissions, escrow fees, and other fraudulent transfers of

property for little or no consideration—are presumed fraudulent and must be disgorged and returned to the Receivership Estate.[2] *See Cook*, 2001 U.S. Dist. LEXIS 2601, at *9 (holding that commission payments from a Ponzi scheme were fraudulent transfers); *see also Warfield*, 436 F.3d at 558-60 (same).

12. Moreover, the payments received by AEF were not exempted from disgorgement because they were received "in good faith and for reasonably equivalent value" under Tex. Bus. & Com. Code § 24.009. AEF bears the burden, which it cannot meet, of establishing that both (i) the payments were received in good faith; and (ii) for reasonably equivalent value. *See Cook*, 2001 U.S. Dist. LEXIS 2601, at *10-13. This is a burden that AEF cannot meet, inasmuch as it (1) knew or should have known, through the way in which the Receivership Entities handled the funds of their investors, that the investors were not receiving proper value, and (2) was receiving unreasonable amounts in both commissions and escrow fees.[3] Simply put, AEF's conduct worked to the detriment of the Receivership Estate, which precludes any attempt to establish good faith and reasonably equivalent value. *See Warfield*, 436 F.3d at 560 (noting that the "primary consideration" in analyzing the value of a transfer is "the degree to which the transferor's net worth is preserved"). Indeed, courts have repeatedly rejected the argument that this exception enables a third party to retain the commissions it received through a Ponzi scheme. *See, e.g., Martino v. Edison Worldwide Capital (In re Randy),* 189 B.R. 425, 440-441 (Bankr. N.D. Ill. 1995) (holding that commission payments to parties assisting in the furtherance of a Ponzi scheme were not made for value and in good faith); *Dicello v. Jenkins (In re Int'l Loan*

[2] Indeed, this result ensues even if AEF did not knowingly participate in the scheme. *See Warfield*, 436 F.3d at 559 (observing that "the transferees' knowing participation is irrelevant under the [UFTA]").

[3] Indeed, the excessive commissions and escrow fees that Defendants paid to AEF strongly suggest that Defendants were buying AEF's complicity in their scheme.

Network, Inc.), 160 B.R. 1, 16 (Bankr. D.C. 1993) (finding that commission payments were for services that "conferred no value to the estate but, in fact, only worsened its condition"); *Wilson v. RHS & Assocs. (In re Blazo Corp.)*, Adversary Case No. 93-6087, 1994 Bankr. LEXIS 1242, at *5-6 (Bankr. N.D. Ohio 1994) (refusing to allow the defendants to offer evidence of the commissions to which they claimed entitlement in connection with a Ponzi scheme).

13. As such, the Receiver is entitled to recover *all* of the funds that the Receivership Entities paid to AEF over time.[4] Attached hereto as Exhibit A is a record of all payments made from Receivership Entities to AEF to the best of the Receiver's knowledge. In addition, "[a]n award of pre-judgment interest in a case involving violations of the federal securities laws rests within the equitable discretion of the district court to be exercised according to considerations of fairness." *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1 (1977). Where a securities law violator has enjoyed access to funds over a period of time as a result of his or her wrongdoing, requiring the wrongdoer to pay prejudgment interest is consistent with the equitable purpose of the remedy of disgorgement. *See SEC v. Hughes*, 917 F. Supp. 1080, 1090 (D.N.J. 1996). The IRS underpayment rate, which has recently ranged from 3.00% to 4.00%, is appropriate for calculating prejudgment interest in SEC enforcement actions such as this one, as such rate "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the

[4] Disgorgement is "meant to prevent the wrongdoer from enriching himself by his wrongs." *SEC v. Huffman*, 996 F.2d 800, 802-03 (5th Cir. 1993); *see also SEC v. AMX Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir. 1993); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). By preventing unjust enrichment, disgorgement also has the effect of "deterring violations of law." *Commodity Futures Trading Com'n v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir.), *cert. denied*, 479 U.S. 853 (1986). "The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972). Moreover, "where two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they [may be] held jointly and severally liable for the disgorgement of illegally obtained proceeds." *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1117 (9th Cir. 2006) (quoting *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999)).

defendant derived from its fraud." *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996). Based on a principal amount of $564,560.34 (commission payments of $552,560.34 and escrow fees of $12,000), application of the applicable IRS underpayment rate results in $80,345.57 in prejudgment interest.

14. All told, the Receiver believes that (1) the Receivership Entities operated a Ponzi scheme by diverting funds from new investors to pay earlier investors and (2) AEF received at least $564,560.34 from the operation of such scheme. The Receiver is thus entitled to recover all of those payments, plus prejudgment interest, on behalf of the Receivership Estate.

B. EXPEDITED CONSIDERATION IS APPROPRIATE IN THIS CASE.

15. This Court may order Respondents to disgorge improper payments following an expedited show cause hearing. Federal receivership law recognizes the use of such summary proceedings to resolve disputes to property claimed by a Receivership Estate. *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 668 (6th Cir. 2001); *see also Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 2000); *SEC v. Wencke*, 783 F.2d 829, 837-38 (9th Cir. 1986). It is well settled that Federal Courts have "broad powers and wide discretion" to fashion such relief in equitable receivership proceedings. *Basic Energy & Affiliated Res.*, 273 F.3d at 668. This discretion, which derives from the Court's inherent equitable powers, makes abbreviated and summary proceedings possible without violating the interests of due process. *See id.* (allowing summary proceedings so long as they "permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts"); *SEC. v. Elliott*, 953 F.2d 1560, 1571 (9th Cir. 1992). Therefore, as long as this Court gives Respondents a meaningful opportunity to present its factual and legal contentions, summary

proceedings are proper to determine whether Respondents must disgorge the improper payments that they received from the Receivership Entities.

16. Furthermore, summary proceedings are favored in the context of federal receivership actions because they embrace the long-recognized policy of preserving and protecting assets for claimants of the Receivership Estate. *See Elliott,* 453 F.2d at 1566; *Wencke,* 783 F.2d at 837-38. Abbreviated procedures—including the use of a single receivership proceeding to resolve all claims—advance the government's interest in judicial efficiency by "reducing the time needed to resolve disputes, decreasing the costs of litigation, and preventing the dissipation of the receiver's assets." *Basic Energy & Affiliated Res.,* 273 F.3d at 668; *Elliott,* 453 F.2d at 1566; *Wencke,* 783 F.2d at 837-38. Summary proceedings allow the Receiver to consolidate litigation before a single District Judge and "avoid formalities that would slow down the resolution of disputes." *Wencke,* 783 F.2d at 837 n.9. This both promotes judicial efficiency and reduces litigation costs to the receivership. *Id.* (citing *Smith v. Am. Indus. Research Corp.,* 665 F.2d 397, 399 (1st Cir. 1981)).

17. To allow ample time for the Respondents to receive notice of this Motion (and the requested Show Cause Order), and to allow time for the Receiver to potentially settle his disputes with certain of the Respondents, the Receiver requests a show cause hearing no sooner than August 15, 2014.

III.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests as follows: (1) that this Court set a show cause hearing no sooner than August 15, 2014; (2) that it order the Respondents to appear and respond to this motion; and (3) that, following a hearing on

this motion, the Court order Respondents to disgorge all net payments received from the Receivership Entities. The Receiver also requests that the Court expedite its consideration of this motion, adopt summary procedures, and grant the Receiver such other and further relief, general or special, at law or in equity, to which he might show himself otherwise entitled.

Dated: July 14, 2014

BRYAN CAVE LLP

By: //s// *Bradley Purcell*

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CERTIFICATE OF SERVICE

I certify that on July 14, 2013, I served a true and correct copy of the foregoing pleading by electronic mail through the Court's CM/ECF system to all parties consenting to service through same, including to counsel for the SEC, the Defendants, and the Objectors.

Additionally, a true and correct copy of the foregoing pleading was served on Respondent's counsel via certified mail return receipt requested at the following address:

Mr. Timothy R. McCormick
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201-2533

Moreover, the foregoing will be uploaded to www.stewardshipfundreceivership.com

//s// Bradley Purcell
Bradley Purcell

CERTIFICATE OF CONFERENCE

I certify that over the course of many months, the Receiver and his counsel have been in negotiations with Respondent and his counsel related to the above pleading. The Receiver and Respondent have been unable to resolve their dispute regarding the above-referenced claims and, therefore, the Receiver seeks relief from the Court. Respondent and his counsel have made it clear that they oppose the above-requested relief.

//s// Bradley Purcell
Bradley Purcell