

**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-00655-MHS

MOTION TO QUASH SUBPOENA

Charles A. Vose III (“Movant” or “Vose”) moves to quash a subpoena served by the Finch and Barry Group (“F&B Group”) commanding him to appear and testify at the August 30 hearing on the F&B Group’s Amended Motion for Relief from Stay (Dkt. No. 96). For the following reasons, the Motion to Quash (“Motion”) should be granted and the subpoena should be quashed.

1. On August 27, 2012 at 4:42 p.m., the F&B Group served a subpoena commanding Vose to appear on August 30, 2012 at a hearing in this matter. A copy of the subpoena is attached as Exhibit A.

2. The subpoena was issued by Alan Pennington, Jr. (“Pennington”), counsel for F&B Group, a nonparty to this action. The subpoena imposes undue burden and expense on Vose. Prior to service of the subpoena, counsel for Vose explained the impropriety of the subpoena to Pennington. A copy of the correspondence to Pennington is attached as Exhibit B.

3. The subpoena should be quashed for the following reasons, among other things: (1) Vose is unavailable to appear at the time and date specified because of long-standing

professional obligations outside of the United States; (2) the subpoena fails to allow a reasonable time to comply and enforcement would cause undue burden and expense to Vose; (3) the hearing on F&B Group's Amended Motion for Relief from Stay is not evidentiary; (4) the F&B Group is not a party to this action; and (5) Vose has no unique knowledge on the matters to be heard. The subpoena should be quashed and the F&B Group should be ordered to pay the reasonable attorneys' fees and expenses incurred in filing this Motion.

I. Vose is unavailable to appear at the time and date specified because of long-standing professional obligations outside of the United States.

Over a year ago, Vose agreed to professional obligations outside of the United States beginning August 29, 2012 and continuing through September 3, 2012. A copy of the Vose Declaration is attached as Exhibit C. Vose's travel arrangements for his professional obligations were made weeks ago. *Id.* at ¶ 4. The airfare and hotel accommodations are non-refundable at this late date. The subpoena places undue burden and expense on Vose and should be quashed.

II. The subpoena fails to allow a reasonable time to comply and enforcement would cause undue burden and expense to Vose.

The F&B Group has known about the August 30 hearing setting since August 1, 2012. It's original Motion for Relief from Stay (Dkt. No. 83) was filed May 15, 2012. It's Amended Motion for Relief from Stay was filed on June 20, 2012 (Dkt. No. 96). It waited until the week of the hearing to issue the subpoena. The subpoena, on its face, fails to allow Vose a reasonable time to comply. Moreover, this is not the first time the F&B Group has attempted what amounts to improper nonparty discovery in this action. Previously, the F&B Group has improperly pursued: two state court Rule 202 petitions; a notice of potential claimant; show-cause hearing argument; objections to settlement agreements; the F&B Group's original Motion for Relief from Stay; multiple discovery requests; and two motions to compel. Under the circumstances, the

subpoena, in addition to causing undue burden and expenses, is harassing. It should be quashed and the F&B Group should pay the reasonable attorneys' fees and expenses incurred by Vose.

III. The hearing on F&B Group's Amended Motion for Relief from Stay is not evidentiary.

The F&B Group neither requested, nor was granted an evidentiary hearing. *See* F&B Group's Amended Motion for Relief from Stay (Dkt. No. 96); *see also* Order setting Amended Motion for Relief from Stay for Hearing (Dkt. No. 99). Additionally, no evidentiary hearing is necessary for the Court to Rule on the F&B Group's Motion for Relief from Stay. *See, e.g., S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 669 (6th Cir. 2001) ("Although the Escrow Investors have not been provided with a full evidentiary hearing, they have been represented by counsel at motion hearings addressing their objections. The Escrow Investors' counsel has had ample opportunities to rebut the Receiver's characterization of the facts, which have subsequently been adopted by the district court."). Because the August 30 hearing is not an evidentiary hearing and because no evidentiary hearing is necessary for the Court to rule on the F&B Group's pending motion, the subpoena should be quashed.

IV. The F&B Group is not a party to this action.

When a subpoena is issued as a discovery device under the Federal Rules of Civil Procedure, relevance for purposes of the undue burden test is measured according to the standard of Rule 26(b)(1). *See, e.g., Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998) ("When a subpoena is issued as a discovery device, relevance for purposes of the undue burden test is measured according to the standard of Rule 26(b)(1)."). Under Rule 26(b)(1), "*parties* may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26. (emphasis supplied). No member of the F&B Group has appeared as a party in this action, and thus, no member of the F&B Group has standing to serve discovery

requests under Rules 26 and 45. In order to become a party to a pending action, a non-party must intervene. However, intervention is not available to the F&B Group in this receivership. Merely being a claimant in a receivership does not authorize intervention because the claimant's rights are sufficiently protected by a court-appointed receiver supervised by a federal district court. *See, e.g., Commodity Futures Trading Com'n v. Heritage Capital Advisory Services, Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984) (“[Claimant] may assert this claim in the claims procedure established by the receiver and supervised by the district court.”). Because the F&B Group is not a party to this action, the subpoena should be quashed.

V. Vose has no unique knowledge on the matters to be heard.

Vose has no unique knowledge necessary for the hearing on the F&B Group's Amended Motion for Relief from Stay. If the hearing were evidentiary—which it is not—the F&B Group has access to sufficient sources of information without Vose's attendance at the hearing. Vose has been interviewed extensively by the SEC and by the Receiver. He has provided declarations that are before the Court.

The F&B Group has provided no such testimony. The evidence before the Court clearly shows that the claims that the F&B Group attempts to assert are based on the conduct of James Temme, Stewardship Fund, LP, and other Receivership Entities. The subpoena creates unnecessary and undue burden and expense on Vose. Because Vose has no unique knowledge necessary for the hearing, the subpoena should be quashed.

CONCLUSION

For the reasons described herein, Vose requests that the Court quash the F&B Subpoena and grant him any and all relief to which he is justly entitled.

DATE: August 29, 2012.

Respectfully submitted,

LOEWINSOHN FLEGLE DEARY, LLP

/s/ Jim L. Flegle

JIM L. FLEGLE

Texas Bar No. 07118600

MICHAEL J. DONLEY

Texas Bar No. 24045795

12377 Merit Drive, Suite 900

Dallas, Texas 75251

(214) 572-1700

(214) 572-1717 (fax)

ATTORNEYS FOR VOSE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above pleading was served on the parties identified below on August 29, 2012:

H. Allen Pennington, Jr. *Via ECF and Facsimile*
Jacob T. Fain
Pennington Hill, LLP
509 Pecan Street, Suite 101
Fort Worth, Texas 76012
817-488-4545 (*facsimile*)

Bradley J. Purcell *Via ECF*
Jay L. Krystinik
Bryan Cave, LLP
JP Morgan Chase Tower
2200 Ross Avenue, Suite 3300
Dallas, Texas 75201

David B. Reece *Via ECF*
Securities and Exchange Commission
Fort Worth Regional Office
801 Cherry Street, 19th Floor
Fort Worth, Texas 76102

John Helms *Via ECF*
Helms Roberts & Diaz
6060 N. Central Expressway, Suite 560
Dallas, Texas 75206

Michael Quilling *Via Facsimile*
Quilling, Selander, *et al.*
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
214-871-2111 (*facsimile*)

/s/ Michael J. Donley

Michael J. Donley

EXHIBIT A

AO 88 (Rev. 07/10) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

UNITED STATES DISTRICT COURT
for the
Eastern District of Texas

SECURITIES AND EXCHANGE COMMISSION)
Plaintiff)
v.) Civil Action No. 4:11-CV-655
JAMES G. TEMME AND STEWARDSHIP FUND, LP)
Defendant)

SUBPOENA TO APPEAR AND TESTIFY
AT A HEARING OR TRIAL IN A CIVIL ACTION

To: Charles V. Vose, III, 8117 Preston Road, Suite 160, Dallas, Texas 75225

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place set forth below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Table with 2 columns: Place (U.S. Courthouse Annex, 200 N. Travis Street, Sherman, Texas 75090; 903-893-7008) and Courtroom No. / Date and Time (08/30/2012 1:30 pm)

You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable):

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Fed. R. Civ. P. 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 8-23-12
CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk
Attorney's signature (H. Allen Pennington, Jr.)

The name, address, e-mail, and telephone number of the attorney representing (name of party) MDA Realty Holdings, LLC, MVB Realty Holdings, and LF Realty Holdings, who issues or requests this subpoena, are:

H. Allen Pennington, Jr., Pennington Hill, LLP, 509 Pecan Street, Suite 101, Fort Worth, Texas 76012; apennington@phblaw.com; Telephone: 817-332-5055

AO 88 (Rev.07/10) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action (page 2)

Civil Action No. 4:11-CV-655

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows: _____

MICHAEL DONLEY

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

\$ 40.00 .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date:

8/27/2012
4:40pm

Vincent G. Zubars, Jr. SCH-6091

Server's signature

VINCENT G. ZUBARS, JR.

Printed name and title

TEXAS COURT PROCESS SERVICES

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.**(1) Producing Documents or Electronically Stored Information.**

These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

PENNINGTON HILL, LLP

509 PECAN ST, SUITE 101
TINDALL SQUARE WHSE NO. 3
FORT WORTH, TEXAS 76102
817-332-5055

1886

DATE August 23, 2012

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PAY TO THE ORDER OF Charles V. Vose, III

\$ 40,00

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DOLLARS

Security Features
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FOR Witness fee

H. Allen [Signature]

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EXHIBIT B

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LOEWINSOHN FLEGLE DEARY
L · L · P

August 24, 2012

H. Allen Pennington, Jr.
Jacob T. Fain
Pennington Hill, LLP
509 Pecan Street, Suite 101
Fort Worth, Texas 76012

Via Facsimile

Re: *Securities and Exchange Commission v. James G. Temme and Stewardship Fund, L.P.*; Civil Action No. 4:11-CV-00655-ALM; in the United States District Court for the Eastern District of Texas, Sherman Division

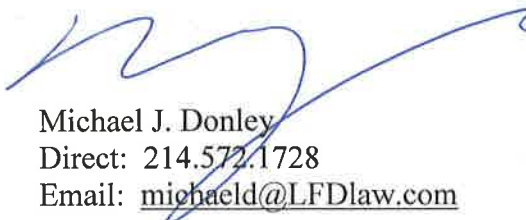
Dear Allen:

You have requested that our firm accept service of a subpoena directed to Charles A. Vose III for purposes of the hearing on your clients' Amended Motion to Lift Stay on August 30, 2012. We will accept service of the subpoena, however, we strongly urge your clients to reconsider the propriety of such subpoena and advise that if such subpoena is served, we will resist it through all necessary means.

There are several reasons the subpoena is improper. Fundamentally, your clients are not parties in the referenced action and we know of no authority supporting your clients' standing to issue a subpoena. Further, Mr. Vose has previously provided declarations to the SEC and has cooperated with the Receiver in this action. If necessary, we will address these and additional reasons in any required motion to quash.

Your clients should also be aware that, should we be required to file a motion to quash, we will request that attorneys' fees and expenses be awarded for having to deal with an improper subpoena.

Very truly yours,


Michael J. Donley
Direct: 214.572.1728
Email: michaeld@LFDlaw.com

MJD/arh

EXHIBIT C

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

JAMES G. TEMME and
STEWARDSHIP FUND, LP,

Defendants.

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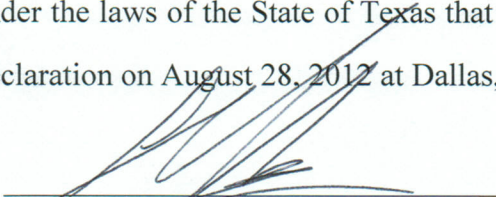
Civil Action No. 4:11-CV-00655-MHS

DECLARATION OF CHARLES A. VOSE, III

I, Charles A. Vose, III, do hereby declare that the following is true and correct, and that I am competent to testify to the matters stated herein.

1. I am a resident of Dallas, Texas.
2. I have professional obligations for which I will be travelling outside of the United States of America from August 29, 2012 and continuing until September 3, 2012.
3. The obligations described in Paragraph two were planned approximately one year ago.
4. The travel arrangements, including air travel and hotel accommodations, for the obligations referred to in Paragraph two were made weeks ago and are nonrefundable.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that I executed this declaration on August 28, 2012 at Dallas, Texas.



Charles A. Vose, III

**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-00655-MHS

ORDER

The Court has considered the Motion to Quash Subpoena filed by Charles A. Vose, III. Vose is not a party to this proceeding. The subpoena was served by nonparties Finch and Barry Group and directed Vose to appear at the hearing on the F&B Group’s Amended Motion for Relief from Stay on August 30, 2012. After consideration of the Motion and the reasons set forth therein, including any additional evidence and arguments, it is the Court’s opinion that the Motion to Quash Subpoena be GRANTED in its entirety.