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

SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. THURMAN P. BRYANT, III and BRYANT UNITED CAPITAL FUNDING, INC., ARTHUR F. WAMMEL, WAMMEL GROUP, LLC, CARLOS GOODSPEED a/k/a SEAN PHILLIPS a/k/a GC d/b/a TOP AGENT ENTERTAINMENT d/b/a/ MR. TOP AGENT ENTERTAINMENT, Defendants, and THURMAN P. BRYANT, JR., Relief Defendant.	§ § § § § § § § § § § § § § § § § § § §	Case 04:17-CV-00336-ALM

REPLY IN SUPPORT OF THE RECEIVER'S MOTION TO LIQUIDATE PROPERTY AND VOID OR CLARIFY CONTRACT FOR DEED

Jennifer Ecklund, the Court-appointed Receiver (the "**Receiver**") for Defendants Thurman P. Bryant, III ("**Bryant**") and Bryant United Capital Funding, Inc. ("**BUCF**") (Bryant and BUCF, collectively, the "**Bryant Defendants**") and Defendant Arthur F. Wammel ("**Wammel**"), Defendant Wammel Group, LLC (the "**Wammel Group**"), and Wammel Group Holdings Partnership ("**WGHP**") (together Wammel, Wammel Group, and WGHP, the "**Wammel Defendants**") receivership estates (together, the "**Receivership Estate**" or the "**Receivership**"), hereby files this Reply (the "**Reply**") to *Stephen Garrett's Response and Objection to Receiver's*

Motion to Liquidate Property [Dkt. No. 307] (the "**Response**") and in support of the *Motion to Liquidate Property and Void or Clarify Contract for Deed* [Dkt. No. 298] (the "**Motion**").

To attempt to avoid liquidation of the real property located at 8101 South Humble Road, Texas City, Texas 77591 (the "**Property**"), Ancillary Defendant Stephen Garrett ("**Ancillary Defendant Garrett**") paints himself as "a victim of Wammel's fraud." Response at 1-2. But Ancillary Defendant Garrett was not a victim of Wammel's fraud; instead, he has been sued by the Receiver as a net-winner for receiving at least $162,766 in returns over and above his initial investment in the Wammel Group. Further, Ancillary Defendant Garrett's participation in the straw-buyer purchase allowed him to obtain equity in the Property that he demonstrably would not have been able to access without the straw-buyer purchase, and he invested over $600,000 of this equity in the fraudulent scheme.[1] Under the law, Ancillary Defendant Garrett's participation in the straw-buyer purchase alone is enough to void the Contract for Deed and support liquidation of the Property by the Receiver. Ancillary Defendant Garrett's arguments that the Property is not Receivership Property, that the Receiver has no standing, and that the Receiver's Motion deprives Garrett of due process are incorrect and unsupported. For the reasons outlined in more detail below, the Receiver moves to liquidate the Property and void the Contract for Deed.

I.
ARGUMENT

A. The Property is Receivership Property and can be liquidated.

The Receiver holds legal title to the Property, and the Property is property of the Receivership ("**Receivership Property**").[2] Ancillary Defendant Garrett argues that the Receiver

[1] Moreover, by his own admission, Ancillary Defendant Garrett was able to obtain $268,812 in equity through his sale of the Property to Wammel (in addition to the $617,000 that he invested with Wammel and profited therefrom). *See* Declaration of Stephen Garrett Regarding Homestead Property, at ¶ 6.

[2] *See* General Warranty Deed dated April 30, 2013, attached hereto as **Exhibit A**.

cannot liquidate the Property since it is not Receivership Property because the deed between Ancillary Defendant Garrett is void under the Texas Constitution as a "pretended sale." Response at 7-11. However, federal case law separates a fraudulent side agreement-homestead case from a "pure" homestead case, making clear that the provisions of the Texas Constitution were not meant to apply in such a way that would allow a participant in a straw-buyer purchase to avoid liability. Moreover, Ancillary Defendant Garrett has failed to prove the elements required to establish a pretended sale.

First, the Texas Constitution *does not* void the deed between Ancillary Defendant Garrett and Wammel because the United States Supreme Court and Fifth Circuit specifically outlined federal policy which prevents Ancillary Defendant Garrett from using his actions as both a sword and shield. Ancillary Defendant Garrett is prevented from relying on his own participation in the straw-buyer purchase to defeat the obligations of the deed as against the Receiver.

Specifically, two United States Supreme Court cases outline the public policy aimed to prevent an accommodation maker, like Ancillary Defendant Garrett, from benefitting from his participation in a straw-buyer purchase but later undoing such a purchase: "to protect the institution of banking from . . . secret agreements." *D'Oench, Duhme & Co v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 458 (1942) (announcing a common-law doctrine estopping accommodation makers from asserting a defense that the obligations based on promissory notes were invalid when the defense depended on a secret agreement by and between the accommodation maker and the bank); *see also Deitrick v. Greaney*, 309 U.S. 190, 198 (1940) (finding that the defendant who had concealed a bank's acquisition of its own stock through a straw man purchase and execution of a note to the bank could not rely on the defendant's wrongful conduct to defeat the obligation of the note as against the receiver of the bank). Federal policy prevents an

accommodation maker from using his participation as a defense against a receiver and its creditors where his actions contravene the general policy to protect the institution of banking from secret agreements (such as the one between Ancillary Defendant Garrett and Wammel). *D'Oench, Duhme*, 315 U.S. at 459 (1942); *Dietrick*, 309 U.S. at 198. Even more, proof of Ancillary Defendant Garrett's knowledge or bad actions is not necessary:

> The defendant may not have intended to deceive any person, but, when [he] executed and delivered . . . an instrument in the form of a note, [he] was chargeable with knowledge that, for the accommodation of the bank, [he] was aiding [in this case Wammel] to conceal the actual transaction. Public policy requires that a person who, for the accommodation of [in this case Wammel], executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.

D'Oench, Duhme, 315 U.S. at 459 (1942); *Dietrick*, 309 U.S. at 198.

Ancillary Defendant Garrett cannot now use the Texas Constitution to shield himself from the result of his participation in the straw-buyer purchase. *See Templin v. Weisgram*, 867 F.2d 240, 242 (5th Cir. 1989) (holding that the participant in the secret side agreement cannot assert the defense of fraud to void the deed under the Texas Constitution). Separating secret side agreement-homestead cases (like the one between Ancillary Defendant Garrett and Wammel) from "pure" homestead cases avoids a conflict between the federal policy outlined in *D'Oench, Duhme* and *Deitrick* and the strong protections of the Texas homestead exemptions. *D'Oench, Duhme*, *Deitrick*, and *Templin* establish that the Texas Constitution *does not* void the deed between Ancillary Defendant Garrett and Wammel.

Second, Ancillary Defendant Garrett cannot conclusively prove that he did not intend for title to vest in Wammel; thus, the straw-buyer purchase does not amount to a pretended sale under the Texas Constitution, and Ancillary Defendant Garrett instead alienated his homestead by transferring title to the Property to Wammel, regardless of whether he retained possession of the

Property. Neither Ancillary Defendant Garrett's self-serving Declaration supporting his intent nor the timing of the underlying transactions is enough to automatically void the deed. *See Paull & Partners Investments, LLC v. Berry*, 558 S.W.3d 802, 811 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (finding that the defendants did not conclusively prove lack of intent to vest title). Here, Ancillary Defendant Garrett deeded title to the Property to Wammel, alienating his right to homestead in the Property. *See Resolution Trust Corp. v. Olivarez*, 29 F.3d 201, 206 (5th Cir. 1994) (finding alienation of title prevented assertion of homestead, even though abandonment by discontinuation was not shown). Neither the Texas Constitution nor Ancillary Defendant Garrett's veiled assertion of homestead prevents the Receiver from moving forward with a liquidation of the Property under applicable law due to Ancillary Defendant Garrett's participation in the straw-buyer purchase.[3]

B. The Receiver has standing to assert that the occupancy fraud by Wammel and straw-buyer purchase between Ancillary Defendant Garrett and Wammel constitute mortgage and wire fraud, which voids the Contract for Deed between Wammel and Ancillary Defendant Garrett, regardless of Ancillary Defendant Garrett's knowledge of the fraud.

The Receiver has standing to void the Contract for Deed. Ancillary Defendant Garrett argues that the Receiver lacks standing due to Wammel's fraudulent actions. The Receiver is not saddled with Wammel's fraudulent conduct and is not dirtied by the unclean hands or actions of Wammel; thus, the Receiver retains standing to assert the claim. *See Corzin v. Fordu*, 209 BR 854, 863 (6th Cir. 1997); *see also Life Partners Creditors' Trust v. Black Diamond Lifeplan Fund*,

[3] "According to the Texas Supreme Court 'it is . . . a well-recognized principle of law that one's homestead right in property can never rise any higher than the right, title, or interest that he owns in the property attempted to be impressed with a homestead right. . . . [T]he homestead claimant, having naked possession without any title . . . may maintain [his] claim of homestead against all creditors *save the true owner or one having better title*." *Resolution Trust Corp.*, 29 F.3d at 206. Because Garrett alienated his homestead by transferring title to the Property to Wammel, he terminated his homestead interest and the Receiver – the true owner of the Property – has no barriers to move forward with liquidation.

No. 4:17-cv-00225-O, 2017 WL 9934885, at *7-8 (N.D. Tex. Nov. 27, 2017).

Ancillary Defendant Garrett also argues that the Receiver lacks standing to show that the Receivership Estate was harmed. But the Receiver can show and has shown the necessary injury in fact to the Receivership Estate. As a result of Ancillary Defendant Garrett's participation in the straw-buyer purchase, Ancillary Defendant Garrett obtained equity in the Property that he demonstrably would not have been able to access without the straw-buyer purchase and he invested over $600,000 of this equity in the fraudulent scheme, which regardless of his knowledge injected cash into and furthered the fraud by Wammel. Moreover, an injury to the Receivership Estate exists as a result of the liability owed by the Receivership Estate on the mortgage to AMI, which cannot be terminated without satisfaction of the mortgage.[4]

Finally, the Receiver has standing and can void the Contract for Deed regardless of Ancillary Defendant Garrett's knowledge or complicit participation in Wammel's fraud. Ancillary Defendant Garrett argues that the Receiver offers no authority that "an innocent pawn" such as Garrett can be allegedly punished for a fraud in which they are complicit. First, the Receiver does not concede that Ancillary Defendant Garrett is *innocent* or that he was not complicit in the participation. The facts as outlined by the Receiver in her Motion reveal at the very least that Ancillary Defendant Garrett was complicit in the straw-buyer purchase. He was not *without knowledge* that the mortgage was obtained on his behalf for a property that he would possess but for which Wammel would be the obligee—the straw-buyer purchase. However, the *D'Oench, Duhme* and *Deitrick* cases addressed above specifically provide that neither Ancillary Defendant Garrett's participation in the bad acts nor even knowledge are necessary to hold him accountable

[4] Regardless of whether the Court grants the relief sought by the Receiver, the debt owed by the Receivership Estate is something that must be resolved. The financial obligation owed by the Receivership Estate prevents the Receivership Estate from closing (given that the Receiver does not have the funds to satisfy the debt without liquidating the Property).

for the secret side agreement. *D'Oench, Duhme*, 315 U.S. at 459 (1942); *Dietrick*, 309 U.S. at 198. For this reason, the Receiver has standing and seeks to liquidate the Property and void the Contract for Deed based upon the occupancy fraud and straw-buyer purchase between Ancillary Defendant Garrett and Wammel.

C. Ancillary Defendant Garrett's due process argument is without merit.

Ancillary Defendant Garrett argues that summarily adjudicating ultimate ownership of the Property deprives him of due process. Ancillary Defendant Garrett's due process argument is without merit because the current notice and opportunity to be heard pursuant to the Motion provide due process.

Ancillary Defendant Garrett misconstrues the cases in support of his due process argument favoring form over substance. In *SEC v. Elliott*, the Eleventh Circuit made clear that due process requires notice and an opportunity to be heard, stating that "[w]hile the term 'summary' connotes that the procedure was abbreviated, it does not mean the parties received no procedure at all, and the court "must look at the actual substance, not the name or form, of the procedure to see if the claimant's interest were adequately safeguarded." 953 F.2d 1560, 1566-67 (11th Cir. 1992). In *Elliot*, the Eleventh Circuit ultimately held that the district court does not abuse its discretion "if its summary procedures permit the parties to present evidence when the facts are in dispute and to make arguments regarding those facts." *Id.* at 1567. Furthermore, the *First Nat. Bank of Plano v. State* case used as support by Ancillary Defendant Garrett is taken out of context. Although the court held that a receiver cannot through summary proceedings take into custody property found in the possession of persons claiming adversely, the judge granted such relief against the adverse party ex parte without providing the party the opportunity to be noticed, respond, and be heard. 555 S.W.2d 200, 203 (Tex. App.—Dallas 1977, no writ). Similarly, in the *United States v. Arizona Fuel Corp.* case cited to by Defendant Ancillary Garrett, the Ninth Circuit concluded that because

the adverse party had ample notice and opportunity to contest the Receiver's challenge, there was no denial of due process in the summary proceeding. 739 F.2d 455, 459 (9th Cir. 1984).

The Receiver does not oppose a full evidentiary hearing on the merits of the Motion.[5] And the Receiver provided Ancillary Defendant Garrett with ample notice of the Motion and never sought to deprive him of his opportunity to be heard and set forth evidence on the issue of liquidation. Ancillary Defendant Garrett first received notice of the Receivership Estate in July 2017. Ancillary Defendant Garrett mischaracterizes the Receiver's motion as "extreme overreaching" and a "gross abuse of power." Response at 2. Yet, the Receiver has been attempting to negotiate with Ancillary Defendant Garrett for over a year and has reserved Court intervention as a last resort.[6] The Receiver had every right to evict Ancillary Defendant Garrett at the outset of the Receivership but has never had the intent to displace Ancillary Defendant Garrett or his family and has gone above and beyond to prevent so doing.

The Receiver is charged to use reasonable efforts to determine the nature, location and value of "all property interests of the Receivership Defendants" and to "take custody, control and possession of all Receivership Property." Amended Order Appointing Receiver, Dkt. No. 48, at ¶ 7. Title to the Property is deeded and recorded to the Wammel Group, LLC,[7] which is why the Receiver is obligated to bring her claim against the Property to the Court's attention. But the Receiver is also charged with efficiently managing the costs of the Receivership Estate. An evidentiary hearing where Ancillary Defendant Garrett has sufficient time to subpoena witnesses,

[5] Moreover, the Receiver sought discovery in the alternative to clarify the Contract for Deed and its validity in its Motion. The Receiver is also not opposed to an abbreviated schedule for discovery prior to an evidentiary hearing on the Motion.

[6] In fact, the Receiver previously negotiated an offset based upon the interest and principal paid by Ancillary Defendant Garrett.

[7] *See* **Exhibit A**.

including the Receiver, the Receiver's experts, and any others involved provides Ancillary Defendant Garrett with sufficient due process. Doing so in the current action (as opposed to requiring a separate ancillary dispute), balances the efficiencies charged upon the Receivership Estate with the due process rights of Ancillary Defendant Garrett.[8] To argue technicalities (for example requiring that Ancillary Defendant Garrett be a named party in this action despite the fact that he has had notice of the action since July 2017 or that he be formally served with process when he received notice of the Motion) over substance would be costly and provide no extra measure of due process that Ancillary Defendant Garrett has not and will not already receive through an evidentiary hearing on the Motion.

Because Ancillary Defendant Garrett has been afforded due process and can further be provided with an opportunity to be heard, the form of the Motion does not deprive him of due process and the Court can move forward with an evidentiary hearing on the merits.

II.
CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court grant the Motion, deny the relief requested in the Response, and grant such other and further relief to which she may show herself justly entitled.

[8] This is highlighted by the Ninth and Eleventh Circuits acceptance of summary proceedings in analogous contexts. *See Elliott*, 953 F.2d at 1566; *see also Arizona Fuel Corp.*, 739 F.2d at 459.

Dated: March 8, 2019.

Respectfully submitted,

THOMPSON & KNIGHT LLP

By: */s/ Mackenzie S. Wallace*

Timothy E. Hudson
State Bar No. 24046120
Tim.Hudson@tklaw.com

Mackenzie S. Wallace
State Bar No. 24079535
Mackenzie.Wallace@tklaw.com

Mackenzie M. Salenger
State Bar No. 24102451
Mackenzie.Salenger@tklaw.com

THOMPSON & KNIGHT LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700
Facsimile: (214) 969-1751

COUNSEL TO RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I electronically filed the foregoing document with the Clerk for the United States District Court, Eastern District of Texas. The electronic case filing system (ECF) will send a Notice of Electronic Filing (NEF) to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. The foregoing document will also be sent to all counsel of record via the method identified below.

/s/ Mackenzie S. Wallace
Mackenzie S. Wallace

Via Electronic Mail:

Jason P. Reinsch
U.S. SECURITIES AND EXCHANGE COMMISSION
Fort Worth Regional Office
Burnett Plaza, Suite 1900
801 Cherry Street, Unit #18
Fort Worth, TX 76102-6882
Telephone: (817) 900-2601
Facsimile: (917) 978-4927
reinschj@sec.gov
COUNSEL FOR PLAINTIFF

Jimmy Ardoin
JONES WALKER LLP
811 Main Street, Suite 2900
Houston, TX 77002
Telephone: (713) 437-1811
jardoin@joneswalker.com
COUNSEL FOR THE WAMMEL DEFENDANTS

Mark L. Hill
Anna S. Brooks
SCHEEF & STONE LLP
2600 Network Blvd, Suite 400
Frisco, TX 75034
Mark.Hill@solidcounsel.com
Anna.Brooks@solidcounsel.com
COUNSEL FOR CARLOS GOODSPEED

By Electronic Mail and by U.S. Mail at both known addresses:

Thurman P. Bryant, III
Treybryant03@gmail.com
1535 Sun Mountain, San Antonio, TX 78258
2054 Hidalgo Lane, Frisco, TX 75034
PRO SE

By Electronic Mail and by Certified Mail, Return Receipt Requested:

Thurman P. Bryant, Jr.
sonny_103@hotmail.com
2 Dogwood Lane, Hilltop Lakes, TX 77871
PRO SE

Dinesh H. Singhal
Geoffrey Riddle
711 Louisiana Street, Suite 1900
Houston, Texas 77002
dinesh@singhallaw.com
geoff@singhallaw.com