

I. GROUNDS FOR INJUNCTIVE RELIEF

1. This Motion is supported by the material facts as alleged by the Receiver in the Complaint for Appointment of Receiver, Asset Freeze, Disgorgement of Ill-Gotten Gains and Other Injunctive Relief (the "Complaint"), filed contemporaneously herewith, in addition to the Agreement Regarding Appointment of Receiver, Freezing Assets, Requiring an Accounting and Injunctive Relief (the "Agreement"), which is submitted to the Court, herewith for *in camera* inspection and review. All such facts are incorporated herein by reference as if fully set forth. In the interest of brevity, the Parties will not restate the supporting facts in this pleading.

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II. NATURE OF THIS MOTION

2. This is not an agreed motion. However, the Parties have reached an agreement with respect to various matters contained in the Complaint, including, among other things, an agreement to have the Receiver appointed for each of the Defendants, to freeze of certain assets and to certain injunctive relief, which various agreements are addressed in the Agreement. Pending the Court's acceptance of the Agreement, the parties have tendered a form of Agreed Order Appointing Receiver, Freezing Assets, Requiring an Accounting, and Granting Other Preliminary Injunctive Relief (the "Agreed Order"), filed contemporaneously herewith, for the Court's consideration and signature. Defendants believe that it would be in the best interests of the Correll Receivership Estate and the investors in general that a receiver be appointed, as otherwise the Defendants have stated their intent, and would likely file for protection under the Bankruptcy Code due to the self-help measures being taken against them by certain investors, as well as vexatious litigation commenced by some of the investors. A bankruptcy could lead to further litigation between the Receiver and the bankruptcy trustee as to the proposed Sitton Receivership Assets (as described in the Complaint). As is alleged in the Complaint, it is the Receiver's position, agreed to by the Defendants, that the

assets sought by this motion and as set forth in Exhibit "A" to the Agreement, are Receivership Assets as described in the Order Appointing Receiver, dated December 7, 2005, in the Correll Litigation.

III. NECESSITY OF INJUNCTIVE RELIEF

3. Injunctive relief as set forth below is necessary to preserve the *status quo* and to protect the Receivership Estate assets. Unless relief is granted, some defrauded investors will seek to obtain Receiver Estate assets in individual state court proceedings to the exclusion of others. This would confound and thwart the methodology envisioned in the Correll Litigation¹ of orderly marshaling the assets in the Receiver Estate and creating an orderly process for the application, adjustment and payment of valid claims. The Receiver needs extraordinary and immediate equitable relief in order to stop the prosecution of actions against the Defendants and the self-help measures currently being taken against Receivership Estate assets now in Defendants' possession. In order that the marshaling of Receivership Estate assets, accounting and eventual liquidation and distribution of those assets proceed in an orderly fashion, injunctive and equitable relief to preserve the *status quo* is necessary.

4. Further, an injunction prohibiting Defendants from destroying, secreting or otherwise spoliating evidence and documents relating to the Receivership Estate Assets would obviously enhance the Receiver's ability to perform his obligations on the defrauded investors' behalf. Such records are part and parcel of the Receivership Estate and are vital to understanding the flow of investor funds into the hands of Defendants and other parties. Defendants have agreed to retain,

¹ *Securities and Exchange Commission vs. Correll, et. al.*; Civil Action No. 4:05CV472

disclose and generally produce and/or make all such documents and records available to the Receiver.

5. For the foregoing reasons, the Receiver and Receivership Estate will suffer irreparable harm if injunctive relief is not granted. No money judgment against Defendants would be effective if Receivership Estate Assets have been seized or liquidated prior to its issuance, or if only some of the defrauded investors were made whole to the exclusion of others. As such, there is no adequate legal remedy available to the Receiver in that respect.

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6. Issuance of preliminary injunctive relief in this case does not adversely affect public interest or policy. To the contrary, it would enhance them, as the public has a decided interest in both the efficient and orderly administration of justice as well as in making sure all, not just some, defrauded victims of *Ponzi* schemes are given a chance to get their money back.

7. Additionally, such harm is imminent - indeed, it is already occurring, as investors have begun to file state court lawsuits against the Defendants and engage in other extra-judicial self-help remedies.

8. There is a substantial likelihood that the Receiver will prevail on the merits of his case against Defendants. As set forth above, the Defendants, in fact, are agreeing with some of the relief being requested by the Receiver herein, including an asset freeze, and have compiled a list of assets in their possession that, at least in part, constitute Receivership Estate Assets. *See*, Exhibit "A" of the Agreement. They have, essentially, admitted to participation in a *Ponzi* scheme. With respect to the Receiver's Fraudulent Conveyance, Unjust Enrichment and Disgorgement claims, the Uniform Fraudulent Transfer Act ("UFTA") provides that:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose within a reasonable time before or after the transfer was made or the

obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) with actual intent to hinder, delay, or defraud any creditor of the debtor . . .

Tex. Bus. & Com. C. § 24.005. The transferor's intent to "hinder, delay, or defraud" is established as a matter of law by the mere existence of a *Ponzi* scheme. *Quilling v. Gilliland*, 2002 WL 373560, *2 (N.D. Tex. Mar. 6, 2002); *S.E.C. v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001); see also, *In re Ramirez Rodriguez*, 209 B.R. 424, 434 (Bankr. S.D. Tex.1997); *In re Independent Clearing House Co.*, 77 B.R. 843 (Bankr. D. Utah 1987). This presumption is necessarily true because a *Ponzi* scheme is insolvent from its conception. *Warfield v. Byron*, 2006 WL 118250, *5 (5th Cir. Jan. 17, 2006) (*Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924)). Accordingly, all transfers from a *Ponzi* scheme are intended to hinder, delay, and defraud creditors. See *Cook*, 2001 WL 256172 at *3, 4 (granting Receiver's motion for summary judgment to recover transfers from a *Ponzi* scheme); see also *Warfield*, 2006 WL 118250 at *6-7 (disgorging compensation from a *Ponzi* scheme); *In re Alpha Telecom, Inc.*, 2004 WL 3142555, *4 (D. Or. Aug. 18, 2004) (disgorging transfers made for selling securities on behalf of a *Ponzi* scheme).

9. In this case, Defendants admit receiving the transfers described in the Receiver's Complaint, and they have not yet disputed that they originated from a *Ponzi* scheme. Accordingly, the Receiver can easily establish fraudulent intent as a matter of law under the UFTA and would, therefore, be entitled to summary judgment on that issue, along with a judgment of disgorgement against Defendants.

10. The balance of the hardships also favors the Receiver under these circumstances. Any injury suffered by Defendants is insignificant compared to the injury likely to occur to the Receiver, on behalf of the defrauded investors, if injunctive relief is not granted. First, the Defendants

themselves are not even injured by merely being enjoined from destroying or spoliating evidence and documents relating to the Receivership Estate Assets in their possession. Whereas the Receiver would not be able to do his job without these documents, to the detriment of the investors and Receivership Estate. Second, any injury suffered by third parties due to the injunction, such as those currently engaging in state court litigation and other self-help remedies against Defendants in relation to Receivership Estate Assets, is secondary to the injury potentially to be suffered by ALL defrauded investors who have an interest in these assets if such activities are allowed to continue. Denuding the Receivership Estate of assets for the benefit of a single investor or group of investors, to the exclusion of other similarly situated investors who have suffered the same or greater injury, is contrary to the very nature and purpose of Receiverships and general concepts of equity.

IV. INJUNCTIVE RELIEF REQUESTED

11. Pursuant to the foregoing, the Parties hereby stipulate and agree to and request that the Court issue an order granting the Receiver the following preliminary injunctive relief:

a. an injunction preventing third-party claimants from denuding the estate and filing suits against Defendants touching or concerning Receivership Estate assets outside the instant proceeding; and

b. an injunction preventing the Defendants from destroying, removing, mutilating, altering, concealing or disposing of, in any manner, any of their books and records or documents relating to the matters set forth in the Complaint, or the books or records and such documents of any entities under their control, until further order of this Court.

V. BOND

12. The Receiver is willing to post a bond in an amount the Court deems appropriate to secure performance of his duties.

VI. MOTION TO FILE AGREEMENT UNDER SEAL

13. The Receiver hereby moves to file the Parties' Agreement, submitted *in camera* herewith, under seal, to be forever protected from public view and unavailable as part of the record in this case except to the parties herein and the Court in accordance with the Local Rules for the Eastern District of Texas, unless and until so modified by further order of this Court. The information contained in the Agreement is confidential and privileged as attorney work product, and the Agreement necessarily contains confidential information about and the identity of certain of Defendants' assets that are not likely to be determined to be Receivership Assets. Further, if the Agreement were not ordered sealed by the Court, Defendants' many creditors would have easy access to a laundry list of assets which they could then use for self-help collection efforts, to the detriment of the Sitton Receivership Estate. In any event, Exhibit "A" to the Agreement, which lists those of Defendants' assets which are part of the Receivership Estate, will not be sealed, as it is attached to the proposed Agreed Order that the parties will present to the Court herein.

VII. PRAYER

WHEREFORE, the Parties jointly request that the Court grant them the following relief, as set forth hereinabove, through and until a final trial on the merits can be had in this case: injunctive relief enjoining third parties from engaging in self-help against Receivership Estate assets or filing lawsuits or making claims against Defendants other than in the instant proceeding; injunctive relief enjoining Defendants from destroying or altering their books and records relating to Receivership Estate assets; and an order sealing the Parties' Agreement; and for such other and further relief as is deemed just, equitable and proper by the Court.

Respectfully submitted,

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