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

SECURITIES AND EXCHANGE COMMISSION	
Plaintiff,	
v.	Civil Action No.: 4:17-cv-00336-ALM
THURMAN P. BRYANT, III, and BRYANT UNITED CAPITAL FUNDING, INC.	
Defendants,	
ARTHUR F. WAMMEL, WAMMEL GROUP, LLC THURMAN P. BRYANT, JR., CARLOS GOODSPEED a/k/a SEAN PHILLIPS d/b/a TOP AGENT ENTERTAINMENT d/b/a MR. TOP AGENT ENTERTAINMENT	
Relief Defendants.	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND SUSPEND OR DISSOLVE ORDER APPOINTING RECEIVER

Plaintiff Securities and Exchange Commission ("Plaintiff" or "Commission") submits this Response to Defendants Thurman P. Bryant, III ("Bryant") and Bryant United Capital Funding, Inc.'s ("BUCF", collectively "Defendants") Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver [Dkt. No. 97] (the "Motion") and would respectfully show the Court as follows.[1]

[1] The Commission references "Defendants" in this brief in an effort to be consistent with the Motion. However, only the Receiver has the authority to seek relief or assert claims on behalf of BUCF. Thus, the Motion effectively only requests relief on behalf of Bryant, individually.

I.
INTRODUCTION

Defendants' Motion is founded on a fundamental misunderstanding of what security Defendants offered and sold. The primary—though not exclusive—security at issue in this lawsuit is the investment agreement in the purported BUCF mortgage investment program. This apparent misunderstanding has, in turn, led Defendants to the flawed position that the Commission failed to allege facts that might give rise to viable claims for Defendants' violations of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). Because they do not recognize that the BUCF investment was itself a security, Defendants mistakenly argue that they could not have defrauded investors in the "offer or sale" of securities or "in connection with" the purchase or sale of securities.

The BUCF investment was an investment contract as that term is defined in the Securities Act and the Exchange Act and as interpreted by clear U.S. Supreme Court precedent. Paragraph 16 of the Complaint states:

> Each of the investments offered and sold as described in this Complaint is an investment contract and, therefore, a security as that term is defined under Securities Act Section2(a)(1) [15 U.S.C. § 77b(a)(1) and Exchange Act Section 3(a)(10) [5 U.S.C. §78c(a)(10)].

Complaint at ¶ 16 (emphasis added). The Complaint further alleges facts establishing that the BUCF investment was an investment contract: (1) the BUCF investors invested their money, (2) in BUCF, the common enterprise, and (3) with the expectation of profits derived solely from the efforts of others. The fact is that the Commission's allegations in the Complaint; the Emergency Ex Parte Motion for Temporary Restraining Order, Preliminary Injunction, Asset Freeze, Appointment of a Receiver, Document Preservation Order, Order to Make Accounting and Other Emergency Relief [Dkt. No. 4] ("TRO Motion"); accompanying 37-page Memorandum of Law

in Support of the TRO Motion [Dkt. No. 4-1] ("Memorandum of Law"); and accompanying 358-page Appendix not only satisfy but exceed the Commission's obligations under the Federal Rules of Civil Procedure and establish the appropriateness of the emergency relief, including the TRO, asset freeze, and appointment of the Receiver. Thus, Bryant's allegation that the Commission "failed completely to demonstrate or even allege" (Motion at 1) that Defendants' activities concerned the offer or sale of a security is wholly without merit.

Defendants present no new evidence or allege that there are any changed circumstances that might warrant the dissolution or modification of the agreed preliminary injunction—not temporary restraining order—that is presently in place. Therefore, the Order should remain undisturbed and Defendants' Motion should be denied.

Further, Defendants' challenge to the Order Appointing Receiver is likewise misplaced. As previously discussed, the Order and preliminary injunction were properly entered by the Court, and the Order Appointing the Receiver is not impermissibly tainted, as Defendants would have the Court hold, because the Court's Order and subsequent entrance of a preliminary injunction were proper. And the Receiver is certainly necessary to collect, marshal, and preserve the assets of the receivership estate.

Accordingly, the Commission respectfully requests that the Court deny the Motion and grant the Commission such other relief to which it might show itself justly entitled.

II.
FACTS

The Commission filed its Complaint on May 15, 2017, alleging that Defendants violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act as well as Rule 10b-5 thereunder. *See, generally,* Complaint [Dkt. No. 1]. The Commission hereby incorporates by reference paragraphs 1-55 of the Complaint as set forth verbatim herein.

That same day, the Commission also filed its TRO Motion, seeking an order, *inter alia*, (1) temporarily restraining and preliminarily enjoining Bryant and BUCF from violating the antifraud provisions of the federal securities laws; (2) freezing the assets of Defendants; (3) prohibiting Defendants from moving, altering, or destroying books, records, and accounts; and (4) requiring Defendants each to provide sworn accountings. *See* TRO Motion [Dkt. No. 4]. The TRO Motion was accompanied by the Memorandum of Law, which alleges the same facts set forth in the Complaint and the TRO Motion and applies those facts to the applicable law. *See* Memorandum of Law [Dkt. No. 4-1]. The TRO Motion and Memorandum of Law were in turn accompanied by a 358-page Appendix that included admissible evidence supporting the allegations in the Commission's Complaint, TRO Motion, and Memorandum of Law. *See* Appendix [Dkt. Nos. 5 - 8-7]

After reviewing the Complaint, the TRO Motion, the Memorandum of Law, and the evidence contained within the Appendix, the Court granted the TRO Motion and entered its *Ex Parte* Order Granting Motion for Temporary Restraining Order, Preliminary Injunction, Asset Freeze, Appointment of Receiver, Document Preservation Order, Order to Make Accounting and Other Emergency Relief, and Setting Hearing Date on Plaintiff's Preliminary-Injunction Motion [Dkt. No. 16] (the "Order"). Also on May 15, 2017, the Court entered the Order Appointing Receiver [Dkt. No. 17].

On June 2, 2017, Bryant executed the Consent of Thurman P. Bryant, III's to an Order Granting Preliminary Injunction [Dkt. No. 26-2], and the Commission filed its Unopposed Motion to Enter Agreed Preliminary Injunction and Other Relief and Consents [Dkt. No. 26] (the "Preliminary Injunction Motion"). Later that day, the Court entered the Agreed Order Granting Preliminary Injunction and Other Relief [Dkt. No. 27] (the "Preliminary Injunction Order.")

III.
ARGUMENT

A. Rule 65(b)(4) Cannot Apply Because There Is a Preliminary Injunction.

As an initial matter, Fed. R. Civ. Proc. 65(b)(4), on which Bryant bases his motion, is not a viable procedural mechanism to dissolve the Order. Rule 65(b)(4) permits a party subject to an *ex parte* temporary restraining order to expeditiously move the court to dissolve that order. In this lawsuit, Bryant has already consented to, and the Court has entered, the Preliminary Injunction Order. Moreover, Defendants waived their rights to a hearing pursuant to Rule 65. *See* Consent of Thurman P. Bryant, III's to an Order Granting Preliminary Injunction [Dkt. No. 26-2] at ¶ 3. As such, the Court can and should deny the Motion as moot.

B. The Court Should Deny Bryant's Motion to Dissolve the Order.

1. Defendants Sold Securities in the Form of Investments Contracts Within the Meaning of Both Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 Thereunder of the Exchange Act.

While the procedural basis for Defendants' Motion is uncertain, what is clear is that Defendants are wrong when they argue that the Commission did not assert that "the alleged wrongful acts of BRYANT constituted the offer or sale of any security or occurred in connection with the purchase or sale of any security by BRYANT." Motion at 1. Defendants regurgitate this theme separately with regard to the Section 17(a) claim under the Securities Act (*id.* at 3-6) and with regard to the Section 10(b) claim under the Exchange Act and the associated Rule 10b-5 claim (*id.* at 6-10). Contrary to Defendants' protestations the Commission did, in fact, assert the necessary allegations in its pleadings and those allegations were supported by evidence. The Commission respectfully submits that even a casual reading of the Complaint, the TRO Motion, and/or the Memorandum of Law reveals the allegations Defendants claim to be absent.

The Commissions' allegations against Defendants are founded upon his sale of and offers

to sell investment contracts. *See* Complaint [Dkt. 1] at ¶ 16 ("Each of the investments offered and sold as described in this Complaint is an *investment contract* and, therefore, a security as that term is defined under Securities Act Section2(a)(1) [15 U.S.C. § 77b(a)(1) and Exchange Act Section 3(a)(10) [5 U.S.C. §78c(a)(10)]."") (emphasis added).

Setting aside the Commission's numerous allegations of Defendants' fraudulent misrepresentations and omissions, which Defendants do not contest in the Motion, the Commission alleged in its Complaint:

a. Defendants raised $22.7 million from 100 investors (Complaint at ¶ 2);

b. Defendants represented the investors' funds would be used in a mortgage-related investment program (*id.* at ¶ 3); and

c. The investors would have no active role in the operation of that mortgage-related investment program. Rather the profits were to be derived solely by Defendants, who, according to the relevant agreements, "shall have full, exclusive and complete authority and discretion in the management and control of the Partnership business […] and shall make all decisions affecting the business of the Partnership." (*id.* at ¶ 25) (quoting *Limited Partnership Agreement of Bryant United Capital Funding* at § 9.1 [Ex. 3 to Ex. B to Memorandum of Law [Dkt. No. 5-5] at App. 53]).

These allegations are further set forth in the Memorandum of Law, which is incorporated by reference into the TRO Motion. *See* Memorandum of Law [Dkt. 4-1] at 1, 5-6. These allegations sufficiently alleged that the investments in BUCF were securities under both the Securities Act and the Exchange Act.

2. The Investments Are Securities

The Commission not only alleged that the investments in BUCF were securities, but also provided an analysis supporting the allegation. As discussed in the Memorandum of Law, in *SEC v. W.J. Howey Co.*, the Supreme Court held that an investment contract exists where (1) a person invests his or her money, (2) in a common enterprise, and (3) with the expectation of profits derived solely from the efforts of the promoter or a third party. 328 U.S. 293, 298-99

(1946).

In this case, the BUCF partnership interests meet the *Howey* test. First, investors paid cash directly to accounts controlled by BUCF. *See* Declaration of Carol Stumbaugh at ¶ 11 [Ex. B to Memorandum of Law [Dkt. No. 5-1] at App. 4].) Second, they invested in a "common enterprise" because the investors' fortunes are dependent on the efforts and expertise of Bryant and BUCF, which is sufficient to satisfy the "broad vertical commonality" required in the Fifth Circuit. *See Long v. Shultz Cattle Company, Inc*., 881 F.2d 129, 140 (5th Cir. 1989); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974).

Third, the investors' role in the investment program was entirely passive and they were expected to realize profits based solely from the efforts of Bryant and BUCF. *See Limited Partnership Agreement of Bryant United Capital Funding* at § 9.1 [Ex. 3 to Ex. B to Memorandum of Law [Dkt. No. 5-5] at App. 53]. Courts have not interpreted the "solely" language in *Howey* restrictively. *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 754-55 (11th Cir. 2007). The relevant efforts of others are the "entrepreneurial or managerial" efforts on which investors' financial returns depend. *Forman*, 421 U.S. at 852 (1975) (citing *Howey*, 28 U.S. at 301). In *Williamson v. Tucker*, the Fifth Circuit noted that analysis of this factor turned on whether the efforts of others "are undeniably significant ones . . . which affect the failure or success of the enterprise." 645 F.2d 404, 418 (5th Cir. 1981), *citing SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973).

Viewed in the factual context, the BUCF investors are unable to exercise any meaningful control over their capital contributions and rely entirely on Bryant and BUCF to manage and direct the investment program. *See Limited Partnership Agreement of Bryant United Capital Funding* at § 9.1 [Ex. 3 to Ex. B to Memorandum of Law [Dkt. No. 5-5] at App. 53]. The BUCF

Partnership Agreement explicitly provides that BUCF has exclusive power to make decisions for the partnership, and does not give the limited partners any authority or control over the business. *Id.* The BUCF investment is designed (at least as represented by Bryant) to be the passive deposit of investment capital into a secure escrow account. *Id.*; *see Declaration of Stephen Hoselton* at ¶ 12 [Ex. B to Memorandum of Law [Dkt. No. 5-3] at App. 17]. Under this arrangement, the BUCF investors are left with a single choice—keep their investment principal where it is (or where it purports to be) or request that the capital (or some portion thereof) be returned to them. *See Limited Partnership Agreement of Bryant United Capital Funding* at §§ 6.6, 9.1, 9.2 [Ex. 3 to Ex. B to Memorandum of Law [Dkt. No. 5-5] at App. 52-53]. Thus, Bryant and BUCF alone had the power to make all of the significant decisions regarding the use of investor capital.

In sum, the limited partnership interests acquired by BUCF's investors are securities by virtue of being "investment contracts" that satisfy the *Howey* factors, and this analysis and accompanying evidence are included in the Commissions pleadings.

3. Defendants Offered and Sold Securities.

Defendants incorrectly argue that the Commission failed to allege that Defendants' offered and sold securities. "The Securities Act defines 'offers' broadly to include 'every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.'" *SEC v. Cavanagh*, 1 F.Supp.2d 337, 368 (S.D.N.Y. 1998). This definition has been interpreted as going well beyond the common law concept of an offer. *See Diskin v. Lomasney & Co.*, 452 F.2d 871, 875 (2d Cir.1971).

In this instance, Defendants undoubtedly offered and sold securities, even in the strictest interpretation of the statute. As alleged in the Complaint, Defendants offered and sold investments in BUCF, through which the investors would receive a guaranteed 30% annual

return. Complaint [Dkt. No. 1] at ¶¶ 20-23. This was a direct transaction with BUCF and its CEO Bryant. These allegations were repeated throughout the Complaint, TRO Motion, and Memorandum of Law.

Defendants argue that they did not offer and sale securities, but only:

> market[ed] BUCF as an investment house in which the clients deposit funds in order to collective gain returns from mortgage industry investments. BUCF did not manage the end-point destination company receiving these investments, and his conduct did not involve the offer or sale of any security, in that he was neither selling as security, nor offering to sell any specific security in this context.

Motion at 5. Again, this argument ignores the plain truth that the BUCF investments were themselves securities. Because those securities were offered and sold exclusively by Defendants, as alleged by the Commission, the Motion should be denied.

4. Defendants' Activities Were "in Connection With the Purchase or Sale" of Securities.

Defendants incorrectly argue that the Commission failed to allege that Defendants' activities were conducted "in connection with the purchase or sale" of securities. Motion at 6-10. This argument again appears to be based on the fact that Defendants do not recognize the BUCF investments as securities. *Id.* at 9 ("The SEC nowhere identifies any specific security, or class of securities, involved or connected with BRYANT."). Because the Commission sufficiently alleged that the BUCF investment contracts were securities, this arguments fails.

The Commission not only alleged that BUCF investments contracts were securities, but it also alleged that Defendants engaged in fraudulent conduct "in connection with the purchase or sale" of those securities. The "in connection with" requirement is construed broadly and flexibly to effectuate the remedial purposes of the federal securities laws. *SEC v. Zandford*, 535 U.S. 813, 819 (2002); s*ee SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992) ("any statement that is

reasonably calculated to influence the average investor satisfies the 'in connection with' requirement of Rule 10b–5."). This standard is echoed in the Defendants' own briefing. Motion at 6-7 (*citing SEC v. Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008)).

There can be no serious dispute that the Commission alleged a causal connection between Defendants' alleged fraudulent conduct and the BUCF investment contracts. Indeed, the Commission specifically alleged that Defendants made multiple misrepresentations about those securities to influence investors to invest with him, including:

- that returns were guaranteed;
- that investment capital would be protected in segregated escrow accounts;
- and that the capital would but used to fund a line of credit for short-term mortgage loans.

Complaint [Dkt. No. 1] at ¶¶ 23; 38-51. The Commission repeated these allegations throughout the Complaint, the TRO Brief, and Memorandum of Law.

5. The Court Should Use Its Discretion and Deny Defendants' Motion Because No Changes in Facts or Circumstances Warrant Such Relief.

In addition to sufficiently alleging Defendants' violations—and supporting those allegations in the Memorandum of Law and associated Appendix—the Commission analyzed why the allegations and evidence supported the TRO Motion ([Dkt. No. 4-1] at 16-26), asset freeze ([Dkt. No. 4-1] at 26-28), and the appointment of the Receiver ([Dkt. No. 4-1] at 28-29). And the Court found good cause to award that relief. *See* TRO Order [Dkt. 16]. The decision to amend or dissolve interlocutory orders such as temporary restraining orders, preliminary injunctions, and receivership orders rests within the Court's discretion. *Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974). The Commission respectfully requests that the Court in the application of that discretion deny Defendants' Motion.

The party seeking modification of a preliminary injunction bears the burden of proof.

See Sharp v. Weston, 233 F.3d 1166, 1170 (9th Cir. 2000). And to succeed in the effort to modify a preliminary injunction, the movant should present evidence of new facts, changed law, or circumstances which render the injunction inequitable. *See F.W. Derr Chemical Company v. Crandall Associate, Inc.*, 815 F.2d 426, 429 (6th Cir. 1987) ("The proper pretrial procedure is that when a ruling is made on a motion for preliminary injunction, an aggrieved party must either file a timely interlocutory appeal or request reconsideration on the basis of changed or otherwise unforeseen and unforeseeable circumstances."); *Winterland Concessions Company v. Trela*, 735 F.2d 257, 260 (7th Cir.1984) (Upon motion to vacate or modify a preliminary injunction, movant must show "changed circumstances which make the continuation of the injunction inequitable" by presenting "new facts to the district court which would justify modification."); *Tanner Motor Livery, Ltd. v. Avis,* Inc., 316 F.2d 804, 810 (9th Cir.1963); *FTC v. Magui Publishers, Inc.*, 1990 WL 132719 at *2 (C.D. Cal. Apr. 4, 1990) (A court "may vacate or modify a preliminary injunction upon a motion for reconsideration only upon a showing of changed circumstances.") To permit otherwise would allow a party to relitigate an existing preliminary injunction.

Defendants have failed to show any new facts, new law, or changed circumstances from when the Court entered the preliminary injunction *to which Bryant consented.* Thus, good cause for the TRO Order and Order Appointing Receiver still exists, and there is no reason that the Court should entertain Defendants' request to dissolve or modify them.

C. <u>The Court Should Not Dissolve the Receivership</u>.

Defendants' related request that the Receivership be dissolved is also misplaced, and the Court should deny this request. Defendants appear to make two arguments to convince the Court to dissolve the receivership: (1) the Order should not have been entered to begin with, and therefore a receiver need not have been appointed, and (2) Defendants' do not have any assets

that are appropriately within the receivership estate. As to the first argument, the Commission's arguments set forth above, as well as the facts and arguments set forth in the Complaint, TRO Motion, and the Memorandum of Law, confirm that the Court's entrance of the Order was appropriate.

In their second point, Defendants argue that BUCF had "no great accumulation of cash or assets" that might justify a receivership. Motion at 10. The purpose of a receiver is to collect, marshal and preserve *all* the assets of the receivership estate, which includes both Bryant's and BUCF's assets. From a practical perspective, Bryant's notion of what "cash or assets" fall under the receivership is a source of ongoing dispute, and the Court has already addressed this issue, at least in part, by authorizing the Receiver to liquidate certain of Bryant's assets. [Dkt. Nos. 105, 106].

Any remaining arguments are not appropriately before the Court at this time. For instance, Defendants complain that the Receiver has sought "approval of billing in an aggregate amount of over $200,000." Motion at 10. Defendants have had, and will continue to have, opportunities to challenge the Receiver's fee and expenditure requests to the Court. In addition, any complaints about the manner in which the Receiver is discharging her duties may go to the scope of the Receiver's powers, but not the appropriateness of her appointment. Motion at 11-12.

IV.
CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Count deny Defendants Thurman P. Bryant, III, and Bryant United Capital Funding, Inc. Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver and grant all other relief to which the Commission might show itself justly entitled.

Dated: September 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 5, 2017, I electronically filed the foregoing *Plaintiff's Response to Defendants' Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver* with the Clerk of Court for the Eastern District of Texas, Sherman Division using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have consented to electronic notification. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to all non-CM/ECF participants.

/s/ *Jason P. Reinsch*
Jason P. Reinsch