

ROBB EVANS & ASSOCIATES LLC

Receiver of

**High Park Investment Group, Inc. and
Harbor Financial Investment Group, Inc., et al.**

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**Securities and Exchange Commission v. Edward Showalter
Civil Action No. 98-1106 (RMU)**

**Motion for Turnover of Funds Paid by Defendant Showalter on the
Judgment to the Receivership Estate of High Park Investment
Group, Inc. and Statement of Facts in Support Thereof**

Filed June 28, 2006

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

EDWARD R. SHOWALTER,

Defendant.

Civil Action No. 98-1106 (RMU)

**MOTION FOR TURNOVER OF FUNDS PAID BY DEFENDANT SHOWALTER
ON THE JUDGMENT TO THE RECEIVERSHIP ESTATE OF
HIGH PARK INVESTMENT GROUP, INC. AND STATEMENT OF FACTS
AND MEMORANDUM IN SUPPORT THEREOF**

Robb Evans & Associates LLC as Receiver over High Park Investment Group, Inc., Harbor Financial Investment Group, Inc. and their subsidiaries and affiliates, appointed in the pending action Securities and Exchange Commission v. High Park Investment Group, Inc., etc., et al., United States District Court, Central District of California, Southern Division, Case No. SACV 05-1090 CJC (MLGx), hereby moves the Court for an order for plaintiff Securities and Exchange Commission (“SEC”) in this action to turn over to the Receiver the sums held by the SEC comprising the \$150,000 civil penalty (“Penalty”) and the sums held by the Registry of this Court comprising the disgorgement award of \$538,400 in this action, plus pre-judgment and post-judgment interest paid by defendant Edward R. Showalter, believed to be in the total amount of \$863,393.23 (“Disgorgement Award”) (collectively such sums believed to be in the total amount of \$1,013,393.23 being referred to as the “Judgment Amount”), plus interest accrued thereon since the funds have been deposited and until the funds are turned over to the Receiver. The Receiver moves the Court for an order for immediate turnover of the Judgment Amount, plus all accrued interest thereon, to the Receiver for the benefit of the receivership estate of High Park Investment Group, Inc. (“High Park”), and its related affiliates and

subsidiaries, on the ground that the source of the vast majority of the funds used to pay the Judgment Amount were funds wrongfully and illegally obtained by defendant Showalter in connection with his operation of a fraudulent investment scheme through High Park and its affiliates and that equity and good cause exist for the turnover of all such funds for the benefit of the High Park receivership estate under the circumstances of this case. The Receiver submits that good cause exists for the relief sought in this Motion based on the following.¹

I. STATEMENT OF FACTS

This Motion involves two civil enforcement actions filed by the SEC, one filed in 1998 by the SEC in this Court against Hollywood Trenz, Inc., Edward R. Showalter and two other individuals (“DC Action”), and one filed by the SEC in 2005 in the United States District Court for the Central District of California against High Park, Harbor Financial Investment Group, Inc. (“Harbor”), and Edward R. Showalter (“Showalter”) (such action being referred to as the “California Action”).

A. The DC Action and Judgment

In connection with the DC Action, the SEC alleged that Showalter committed various violations of the securities laws by materially misrepresenting the value of assets of an entity in which Showalter was the principal in filings made with the SEC and to the public and by circumventing the registration rules and unlawfully selling unregistered securities through consultants. On May 15, 2001, the Court in the DC Action entered a Final Judgment of Permanent Injunction and Other Relief Against Edward R. Showalter (“Final Judgment”), which provided for injunctive relief, a monetary disgorgement award of \$538,400 plus pre-judgment interest of \$213,560.43, plus a \$150,000 civil penalty payable to the SEC.

¹ Pursuant to Local Civil Rule 7(m), the Receiver has conferred with counsel for the SEC and attempted to confer with counsel for Edward R. Showalter prior to filing this Motion. The SEC is considering the Motion and expects to file a formal statement of its position shortly after the Motion is filed. Jonathan Boynton, counsel for defendant Showalter in the California Action, as hereinafter defined, took no position regarding the Motion on the basis that he has not represented Showalter, and does not now represent Showalter, in this case.

Showalter failed to timely pay the amounts due the SEC under the Final Judgment. The Court thereafter issued an order holding Showalter in contempt of court, and a subsequent order providing a payment plan for satisfaction of the judgment by Showalter was entered on November 19, 2002. Showalter began making small payments on the Judgment Amount of a few thousand dollars per month. Beginning in early 2004, Showalter made significant payments to reduce and satisfy the Judgment Amount, including a separate \$150,000 payment by cashier's check payable and sent directly to the SEC on or about August 10, 2004 to pay the Penalty and payments to the Clerk of the United States District Court for the balance of the Judgment Amount. By order entered August 17, 2004, the entire Judgment Amount was satisfied and paid by Showalter. A copy of the Court's ledger for the funds paid to the Registry on account of the Final Judgment shows that as of August 17, 2004, the Judgment Amount was paid in full and there was a total of \$863,393.23 in funds on hand in the Registry on account of the Final Judgment, including all amounts awarded under the Final Judgment and post-judgment interest of \$111,432.80. These sums have been retained by the SEC and the Registry subject to further order of the Court. There is presently the sum of \$900,269.42 on hand in the Registry on account of the Judgment Amount, including interest which has accrued on the funds therein.

In the more than five years since the Final Judgment was entered against Showalter in this case, the docket in the DC Action does not reflect that any claimants have asserted claims against the funds comprising the Judgment Amount. To the extent any funds in this case are not turned over to the Receiver of the High Park estate pursuant to this motion, no repayment plan is anticipated to be proposed and instead the funds would ultimately be directed to the U.S. Treasury rather than to repayment of the victims of Showalter's fraudulent conduct.

B. New Investment Scheme Commenced by Showalter and California Action

Showalter's new investment scheme commenced in or about 2003 through High Park and a related entity Harbor Financial Investment Group, Inc. ("Harbor"). Showalter's new scheme involves a purported real estate investment enterprise pursuant to which Showalter solicited investments from third party investors or joint venturers who would provide funds which Showalter represented would be used to remodel properties, comprised mostly of single family

residences in Southern California. Showalter represented the amounts invested would be secured by a deed of trust against the property being remodeled that would be recorded in second or third position behind only institutional deeds of trust, that the properties would generally be completed and resold within two to four months, and that investors would receive profits or returns on their investment generally of 20 to 50% or more, plus interest payments in many cases. The investment scheme was in fact operated as or similar to a Ponzi scheme and the properties were in effect "oversubscribed" by which multiple deeds of trust in favor of multiple investors were recorded against individual properties at random times. See Complaint attached as Exhibit 1 to the Request for Judicial Notice filed concurrently herewith.

On November 8, 2005, the SEC filed its civil enforcement action against High Park, Harbor and Showalter and sought and obtained a temporary restraining order and order appointing Robb Evans & Associates LLC as temporary receiver over High Park, Harbor and their subsidiaries and affiliates ("Receivership Entities"). In December 2005, the SEC and the defendants subsequently stipulated to a preliminary injunction order and order appointing Robb Evans & Associates LLC as the Permanent Receiver of the Receivership Entities. See Preliminary Injunction Order attached to Exhibit 2 to the Request for Judicial Notice filed concurrently herewith. The District Court in the California Action has subsequently determined that because the receivership estate is to be liquidated, the liquidation should be accomplished in the context of a bankruptcy case and has directed the Receiver to file a plan for placing the receivership entities in bankruptcy. Showalter has executed a criminal plea agreement arising out of his fraudulent investment activities relating to High Park and the California Action which is under review by the U.S. Attorneys' Office. It is anticipated that upon filing and entry of the criminal plea, Showalter will enter into a stipulation for entry of a civil judgment in the California Action.

In connection with its investigation of the Receivership Entities and the defendants in the California Action, the SEC has examined payments made from the accounts of High Park. As set forth in the accompanying Declaration of James C. Bullard of the SEC, the SEC has traced \$831,719.08 in funds of High Park that were paid to the Registry of this Court and to the SEC by

Showalter to satisfy the Judgment Amount in the DC Action, the source of which was funds raised by High Park in connection with its fraudulent investment scheme which is the subject of the California Action and related receivership. See Declaration of James C. Bullard in support hereof. The Receiver is responsible for recovering these funds as assets properly belonging to this receivership estate.

C. The Receiver Seeks Recovery of Funds Paid to the SEC and the Court

The Receiver's charge under the Preliminary Injunction Order includes all powers of an equity receiver including the power and duty to take possession, custody and control of all assets of the Receivership Entities and to pursue recovery of all assets transferred or disposed of. Preliminary Injunction Order, Sections VII.A. and VII.F. In addition, persons in possession or custody of property of the Receivership Entities are directed to turnover possession and control of such property to the Receiver. Preliminary Injunction Order, Section VIII.

As set forth above, almost all of the funds paid by Showalter in connection with the DC Action are traceable to High Park and the funds Showalter, through High Park, fraudulently and illegally solicited from investors under its improper investment scheme. Those funds properly belong to the receivership estate and should be restored to the Receivership Entities' estate from which they were improperly transferred by Showalter.

Although \$831,719.08 of the payments on the Judgment Amount have been traced to the funds invested by High Park, the Receiver contends that all funds on hand representing the Judgment Amount, plus interest that has accrued on those funds while deposited, should be turned over to the High Park receivership estate. To date, more than five years after judgment was entered, no claimants have asserted claims for recovery of the funds paid in connection with this case. See Request for Judicial Notice (docket for this case). To the extent any of the funds in the DC Action are not turned over to the Receiver pursuant to this motion, the funds will ultimately be released to the general U.S. Treasury. The SEC is the judgment creditor of Showalter in this case, and it is anticipated that there will soon be a judgment entered against Showalter in the California Action. Showalter's assets are subject to an asset freeze in connection with the California Action to preserve the assets pending entry of judgment in the

High Park case, and the SEC concurs that the interests of the public and the victims of Showalter's fraudulent investment schemes are best served by the disbursement of all of the funds to the High Park receivership estate under the circumstances so that the additional funds may be available for payment of High Park claims.

Alternatively, to the extent that the Court does not deem it appropriate for all of the Judgment Amount to be turned over to the Receiver for the reasons set forth, the Receiver contends that at a minimum, the sum of \$831,719.08, plus all interest accrued on such funds, should be turned over to the Receiver as traceable funds properly belonging to High Park and its receivership estate.

II. THE FUNDS PAID TO THE SEC AND THE COURT SHOULD BE TURNED OVER TO THE RECEIVER UNDER THE PRELIMINARY INJUNCTION ORDER AND APPLICABLE LAW

Almost all of the funds paid to the SEC and the Court Registry in this case properly belong to the receivership estate of High Park. Equity and good conscience require that those funds be deemed subject to a constructive trust in favor of the High Park receivership estate under the circumstances and that the funds be restored to that estate by turnover to the Receiver, along with all other funds paid by Showalter in the DC Action for the reasons set forth to maximize the receivership assets that may be available for payment of claims. The funds wrongfully transferred by High Park and/or Showalter are properly recovered by the Receiver as funds subject to constructive trust and/or funds fraudulently conveyed by High Park without consideration and with intent to defraud the investors of High Park.

California Civil Code section 2224 provides that “[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.” As a leading California legal treatise explains:

Constructive trusts are creatures of equity. In dealing with them, equity will disregard mere form, and will ascertain and act on the

substance of things, regarding that as done which should have been done.

A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must share the measure of the relief.

60 California Jurisprudence 3d, Trusts § 342, p. 467 (West 2005).

A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from a person who is wrongfully² holding it to its rightful owner, and its purpose is to prevent unjust enrichment. Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704 (1998). A constructive trust is not based on the intention of the parties (see Estrada v. Garcia, 132 Cal. App. 2d 545, 552, 282 P.2d 547 (1955)), and is a proper remedy in the case where one receives money which does not belong to him or her. Decorative Carpets, Inc. v. State of Equalization, 373 P.2d 637, 638 (Cal. 1962).

Under California Civil Code sections 2223 and 2224, a constructive trust is imposed by law when three conditions are satisfied: (i) the existence of a res (property or some interest in the property); (ii) the claimant's right to that res; and (iii) the respondent's "wrongful" acquisition or detention of the property. Burlesci v. Petersen, 68 Cal. App. 4th at 1067, 80 Cal. Rptr. 2d 704 (1998). The beneficiary may enforce a constructive trust even where money has been commingled with other funds. Rivero v. Thomas, 194 P.2d 533, 541 (Cal. App. 1 Dist. 1948). An ascertainable interest in a bank account of the constructive trustee in which funds of the constructive trustee and of the beneficiary are deposited constitutes an asset definite enough to be the subject of a constructive trust. Id.

Under California Civil Code sections 3439.04, et seq., the transfers of assets of High Park to pay the Judgment Amount constitute fraudulent conveyances recoverable by the Receiver. The transfers drained essential assets from an insolvent fraudulent enterprise, and the transfers

² As used herein and in the constructive trust authorities cited, the term "wrongful" does not mean or require that the party, in this case the SEC and the Court, received the transferred property with "bad intent" or with knowledge of the adverse claims to the funds by High Park and its investors. Rather, as set forth in the cited authorities, the retention of the funds by the transferee is "wrongful" in relation to the superior claim or interest of the party claiming the funds, in this case the Receiver of High Park for the benefit of High Park's creditors.

were clearly made with intent to hinder, delay and defraud creditors by taking assets purportedly invested in High Park's real estate business to pay personal debts of Showalter in this other action, making these transfers recoverable by the Receiver for the High Park. See Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995) (affirming receiver's right to recover assets of corporation dissipated by corporation's president). Further, the focus of inquiry in a claim for recovery of an intentional fraudulent conveyance is the transferor's intent, specifically whether the transferor made the transfer with actual intent to hinder, delay or defraud its creditors. Cal. Civ. Code § 3439.04(a). As in the case of recovery of funds held in constructive trust, the SEC and the Court as the recipients of the fraudulent transfers do not need to have received the transfers with intent to defraud in order to be held liable under the California fraudulent conveyance statutes. Fisher v. Gibson, 90 Cal. App. 4th 275, 109 Cal. Rptr. 2d 145 (2001).

The funds in question are readily ascertainable, and the vast majority of the funds have been traced from the Receivership Entities. The Receivership Entities have a clear and substantial interest in the funds. Turnover of all of the funds presently held on account of the Judgment Amount to the Receiver in the California Action will promote the policies and purposes of the securities laws and the remedies granted to the SEC thereunder to try to protect victims of investment fraud and where available, recover funds to repay them for their losses in the fraudulent investment scheme. Turnover of all of the funds is particularly appropriate under the circumstances in that any funds in excess of the specific traced payments, representing a small fraction of the Judgment Amount, would not be returned to the injured investors or victims in this case, and the interests of justice will therefore be better served by turnover to the receivership estate where the funds can be utilized to redress claims in that estate.

III. THIS ISSUE IS PROPERLY DETERMINED AS A TURNOVER MOTION UNDER APPLICABLE LAW

A motion by a receiver seeking turnover of receivership property and/or disgorgement of funds improperly transferred to a third party by a receivership entity is the proper mechanism to restore the funds held by the SEC and the Court Registry under receivership law. For example, in In re Alpha Telecom, CV01-1283-PA, 2004 U.S. Dist. LEXIS 20002 (D. Ore. Aug. 18, 2004),

the receiver appointed in an enforcement action filed a motion seeking disgorgement of commissions paid by the receivership entity to 165 sales agents. Similar relief was sought against non-parties in Securities and Exchange Commission v. Shiv, 379 F. Supp. 2d 609 (S.D.N.Y. 2005) (turnover of funds and determination of lien interest of funds held by bank); Securities and Exchange Commission v. Infinity Group Co., 27 F. Supp. 2d 559 (E.D. Pa. 1998) (motion for recovery of funds of receivership against non-party and to void real estate mortgages held by non-party); FTC v. Productive Mktg. Inc., 136 F. Supp. 2d 1096 (C.D. Cal. 2001) (receiver's motion to hold third party broker in civil contempt of preliminary injunction order for holding and failing to turn over despite demand funds obtained from receivership entity).

IV. CONCLUSION

Based upon the foregoing and the declarations submitted in support hereof, and on the pleadings, records and files of this Court and the Court in the California Action of which the Receiver requests the Court take judicial notice, the Receiver respectfully requests that the Court order the turnover to the Receiver forthwith of all funds held in the Court Registry and by the SEC on account of the Judgment Amount, plus interest accrued thereon. Alternatively, and only

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2006, I served a copy of (1) the Motion for Turnover of Funds Paid by Defendant Showalter on the Judgment to the Receivership Estate of High Park Investment Group, Inc. and Statement of Facts and Memorandum in Support Thereof, (2) Declaration of James C. Bullard in Support of Receiver's Motion for Turnover of Funds Paid by Defendant Showalter on the Judgment to the Receivership Estate of High Park Investment Group, Inc., (3) Request for Judicial Notice in Support of Motion for Turnover of Funds Paid by Defendant Showalter on the Judgment to Receivership Estate of High Park Investment Group, Inc., and (4) Proposed Order on:

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