

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP,
INC., d/b/a PAR FUNDING, *et al.*,

Defendants.

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S
RESPONSE TO DEFENDANTS' MOTION TO DISCHARGE THE RECEIVER¹**

I. INTRODUCTION

The Court should deny Defendants' Lisa McElhone, Joseph LaForte, and Joseph Cole Barleta Motion to Discharge the Receiver [DE 649] because it lacks merit as a matter of law and fact.

The Defendants' Motion ignores the Court's Amended Order Appointing the Receiver, which sets forth the duties and scope of the Receiver's appointment. Instead, the Defendants argue that the Receiver has a fiduciary duty to the Receivership entities and to the investors. In doing so, the Defendants are essentially claiming they standing and authority to not only assert these claims against the Receiver, but also to do so on behalf of the investors the SEC alleges the Defendants defrauded.

The Defendants claim that the Receiver breached his duties to the Receivership entities and investors because the Receiver's Court-ordered reports and updates differ from the conclusions of

¹ The Commission is filing this Response about 30 minutes after the deadline and will immediately confer with defense counsel to file a Motion seeking leave for this 30 minute enlargement of time.

the expert witness the Defendants hired in this case. To put a finer point on it, the Receiver has advised the Court that Complete Business Solutions Group operated in a Ponzi-like manner, whereas the Defendants advised the Court that the Defendants hired an expert witness who believes CBSG did not operate in a Ponzi-like manner. Rather than identify a difference of opinion, the Defendants seeks the Receiver's removal on grounds the Receiver's report is "full discredited" (*i.e.*, the Defendants' expert witness has a different opinion than that of the Receiver), and thus the Receiver's reports to the Court about CBSG are only to "negatively influence this Court's view of CBSG and the Defendants." *Id.* at pdf p. 5. The Motion is bereft of any support for the theory that the Receiver is filing false reports with the Court, let alone that the Receiver is motivated to do so because he is attempting to negatively impact the way the Court views the Defendants.

Undersigned has advised Defendants' counsel that the accountant the SEC retained, at Kapila Mukamal, has reached opinions consistent with those reflected in the Receiver's report. Expert reports are due by August 13, 2021, and we will present these conclusions at that time as well as at the summary judgment and trial phases of this case. The Defendants' Motion essentially seeks an additional pre-trial trial on these issues, which is neither warranted nor proper.

The Defendants' final argument is that the Receiver should be removed because he "destroyed a once profitable and self-sustaining business." *Id.* Again, this argument essentially reflects the Defendants' position that the Receiver's decisions are wrong and that CBSG was more profitable when the Defendants operated it. The Defendants' operation of CBSG is an issue for trial and is at the heart of the SEC's claims against the Defendants. As set forth in the Complaint and Motion for Temporary Restraining Order, the SEC has alleged that in April 2020, a few months before the SEC filed this case, the Defendants advised investors that CBSG was enduring financial

hardships, and so much so that investors had to exchange their promissory notes for new notes in April 2020 whereby CBSG offered a fraction of the investment returns so that it could remain solvent. Thus again, the Defendants' Motion asks the Court to determine now the issues that the jury will be asked to determine during trial.

II. THE DEFENDANTS' ARGUMENTS LACK MERIT

A. Defendants' Statement of Facts Concerns Disputed Issues Of Fact In The SEC's Case

The Defendants make three assertions in Section I of their Motion: (1) that the expert witness reports the Defendants paid for, which have previously been filed with the Court, reflect the "hard truth" and are not only more accurate than the Receiver's reports to the Court, but should also be viewed to prove that the Receiver's reports are false, *Id.* at pdf pp 5-6; (2) the Receiver has not expended investor funds to pay Clifton, Larson, Allen, LLP ("CLA") to complete the work it was doing for CBSG while the Defendants operated CBSG, and had CLA completed its "audit" of CBSG this would have further proven that CBSG was profitable while the Defendants operated CBSG, *Id.* at pdf pp 6-8; and (3) the Defendants' expert has determined that not only was CBSG profitable, but the Defendants' expert has also determined that CBSG's "KPI Reports" were accurate while the Defendants operated CBSG, *Id.* at pdf pp 8-10.

These are not facts, but issues of fact that will be determined at trial. As to Defendants' fact number 1, as set forth above, the SEC will present evidence in this litigation that is consistent with the Receiver's reports about the financial status of CBSG and contrary to the Defendants' expert reports. The SEC has made the Defendants aware of our view of the financial status of CBSG. This is an issue for the factfinder in this case to determine in the SEC's case against the Defendants. It is relevant to the allegations concerning misrepresentations and omissions made to

investors about the default rates and the profitability of CBSG, as well as being relevant to the Defendants' scienter on the fraud claims against them.

As to the Defendants' fact number 2, CLA is a witness in this case and the Defendants are taking depositions of CLA employees next month. CLA employees will be witnesses at trial, and their work – and the true scope of their work and conclusions in the course of their work (among other things) – will be presented in connection with the SEC's claims against the Defendants.

As to Defendants' fact number 3, the "KPI Reports" are the very reports at issue in the Amended Complaint against the Defendants. The SEC has alleged that these reports were used in the Defendants' fraudulent scheme and course of conduct, and that the KPI Reports were misleading. Thus, each of the facts presented in support of the Defendants' motion is actually an issue of fact in the SEC's case against the Defendants. The Defendants are asking the Court to hold a min-trial or evidentiary hearing in advance of trial, to determine them in connection with their attack on the Receiver. This would require the SEC to try its case twice – once now in connection with the Defendants' motion and against at summary judgment/trial.

B. Defendants' Assertions About The Receiver's Conduct And The SEC's Allegations Are Belied By The Record

Section II of the Defendants' Motion is devoted to their argument that the Receiver is acting in bad faith with the personal motive of tarnishing the Court's view of the Defendants and destroying CBSG. This Section reflects the Defendants' disagreement with the Receiver's reports and decisions, as set forth above. The Amended Order appointing the Receiver authorizes the Receiver to make decisions and requires the Receiver to report to the Court on specific issues. Ignoring the Amended Order, the Defendants posit that the Receiver's work is fueled by a personal vendetta against them. They present no evidence to support this theory – which is all it is – and

instead present a recitation of the SEC's claims and allegations that reflect, at best, a failure to understand the claims against them.

Contrary to the Defendants' assertions in Section II of their Motion, the SEC did allege that the Defendants made misrepresentations and omissions about CBSG and its profitability and the success/profitability of CBSG's MCA Loan business – which was the purported source of investment returns. Among other things, the SEC alleges misrepresentations about the true default rate of the MCA Loans and the misleading nature of the information about the MCA Loans that was provided to investors. In proving these claims, and demonstrating that the Defendants acted with scienter, the SEC will present evidence about – among other things – the true nature of CBSG's business operations and profitability and the use of investor funds to line the Defendants' pockets. The Defendants are aware of this, as we presented this evidence, including financial audits and the KPI Report, at the preliminary injunction hearing in this case.

Contrary to the Defendants' assertions in Section II, the SEC made arguments about losses and about investor funds being at risk, in the papers presented at the outset of this case – which was filed on an emergency basis and for which the SEC sought emergency relief to protect investor funds.

The Defendants appear to argue the Receiver should be removed because the SEC did not assert that CBSG was a Ponzi scheme. As the SEC has previously expressed in this case, at the time of filing this emergency case, we had not yet completed our analysis of whether or not investor funds were used to pay other investors their purported returns. The SEC did not allege in the Complaint that this did not occur. The use of investor funds and whether the inflow of investor funds were necessary to keep CBSG in business, particularly in light of the massive defaults on the MCA Loans, is relevant to the SEC's claims.

Finally, the Defendant assert that the Receiver was appointed based on an advance promise of what the Receiver would do regardless of what the evidence showed, and the Receiver's reports do not gel with what the Defendants' expert witness will opine in this case. We address above the fact that the Defendants hired an expert witness to contest certain findings in this case, and will not restate that here. As for purported promises about what the Receiver would do, this assertion is belied by the Amended Order appointing the Receiver, which lays out what the Receiver is authorized to do. While the Defendants otherwise devote the remainder of their Motion to identifying each disagreement they have had with the Receiver's reports, this is not a new issue. The Defendants have filed "responses" to the Receiver's reports, have filed their own expert reports, and have litigated with the Receiver about his work and the expansion and operation of the Receivership extensively – and frankly, have litigated this case for the past year against the Receiver rather than against the SEC, as the Court docket reflects.

C. The Defendants' Legal Arguments Lack Merit And Ignore The Court's Order

Citing a series of private lawsuits and case law primarily from other jurisdictions, the Defendant argue that the Receiver has a duty to the Defendants – apparently, because the Defendants own the Receivership entities. They also argue a duty to noteholder investors, despite the fact that none of the Defendants are noteholder investors. As to the first issue, we are assuming the Defendants are claiming that they – McElhone, LaForte, and Cole – own the Receivership entities. This has not been established. See the Defendants' Answers and Affirmative Defenses. Moreover, the Defendants' arguments ignore the Court's Amended Order appointing the Receiver.

As explained in *Fed. Trade Comm'n v. On Point Glob. LLC*, No. 19-25046-CIV, 2020 WL 5819809, at *2 (S.D. Fla. Sept. 30, 2020), the scope of the Receiver's duties and authorities are those set forth in the Order appointing the Receiver (DE 141). Among other things, this Order

makes clear that the Receiver is appointed by the Court, has certain immunities, the Receiver's work shall not be interfered with, and the Receiver must report his findings to the Court. Among other things, the officers of CBSG – in other words, the Defendants, were terminated by the Amended Order, and by Court Order the Defendants have no authority over CBSG's operations. They might disagree with the Receiver, but they are not the Board of Advisors for the Receiver. Instead, the Order explicitly provides:

5. The trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Entities are hereby dismissed and the powers of any general partners, directors and/or managers are hereby suspended. **Such persons and entities shall have no authority with respect to the Receivership Entities' operations or assets, except to the extent as may hereafter be expressly granted by the Receiver.** The Receiver shall assume and control the operation of the Receivership Entities and shall pursue and preserve all of their claims.

[DE 141 (emphasis added)].

Further, contrary to the Defendants' position, the Amended Order provides that the Receiver must make "reasonable" efforts to determine the value of the CBSG assets:

7. Subject to the specific provisions in Sections III through XIV, below, the Receiver shall have the following general powers and duties:

A. To use **reasonable efforts to determine the nature, location and value of all property interests of the Receivership Entities**, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Entities own, possess, have a beneficial interest in, or control directly or indirectly ("Receivership Property" or, collectively, "Receivership Estates");

Contrary to the Defendants' arguments that the Receiver must operate and collect on MCA Loans the same way the Defendants did when they operated CBSG, the Order, at Paragraph 7(E), provides that the Receiver is "authorized to take any action which, prior to the entry of this Order, could have been taken by the officers, directors, partners, managers, trustees and agents of the

Receivership Entities.” The Order gives the Receiver discretion to make these decisions, and does not require that the Receiver must operate the entities as the Defendants did.

The Order prohibits the Defendants from interfering with the Receivership. However, as reflected in the Fee Applications the Receiver has filed, in the instant Motion, and in the litigation involving the Defendants and Receiver as reflected on the docket, the Defendants’ campaign of litigation concerning the Receivership has cost the Receivership – and thus the investors – significant funds. The Order provides that no one shall “[i]nterfere with or harass the Receiver, or interfere in any manner with the exclusive jurisdiction of this Court over the Receivership Estates.” DE 141 at Paragraph 41(D). Arguably, the instant Motion, based on the Defendants’ view that their hired expert is right and the Receiver is wrong, and that the Defendants’ collection methods were better than the Receiver’s – seeks to interfere with the Receivership and cause the Receiver to engage in litigation on unsupported and improper grounds.

Contrary to the Defendants’ argument that the Receiver is filing reports and investigating in order to cause the Court to have a negative view of the Defendants, the Order requires the Receiver to investigate and report to the Court. (DE 141 at Sections X and XIII).

And finally, the Order provides that:

49. The Receiver and his agents, acting within scope of such agency (“Retained Personnel”) are entitled to rely on all outstanding rules of law and Orders of this Court and **shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.**

Thus, the issue is whether the Receiver acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties. Even taking the Defendants' baseless theories as true, they would not meet this standard.

The Defendants' Motion makes one thing clear – they disagree with the Receiver. The issues they raise will be determined on the SEC's case because they are issues of fact in the case. The Defendants have had an opportunity to raise their concerns – and they have, repeatedly, throughout this case. The Court has permitted the Defendants to file response to the Receiver reports and to file their own expert witness report/declaration opposing the Receiver's report. The Court has explained at the status hearings in this case that the Defendants' filings are read. The Motion raises nothing new, and rehashes the myriad issues they have raised and litigated throughout the case.

Causing the Receiver to litigate the Motion – at the expense of investors' funds – to essentially pre-litigate these issues (essentially replacing the SEC) against the Defendants before trial would be improper and would further impede the Receiver's work and deplete the Receivership estate.

Finally, the Defendants failed to confer before filing, in violation of the Local Rules. This can itself be a basis for denying the Motion. The Defendants failed to confer with the SEC or the Receiver before filing this Motion, instead flouting the Local Rules that require good faith conferral efforts. Where litigation by the Receiver – and responding to a Motion – is paid for by the investors, there is arguably even greater need to enforce the Local Rules and require conferral before investors pay to litigate against the Defendants through the Receiver on this Motion.

For the reasons set forth above, the Court should deny the Motion.

Dated: July 28, 2021

Respectfully submitted,

By: s/Amie Riggle Berlin
Amie Riggle Berlin
Senior Trial Counsel
Fla. Bar No. 630020
Direct Dial: (305) 982-6322
Email: BerlinA@sec.gov

Attorney for Plaintiff
Securities and Exchange Commission
801 Brickell Ave., Suite 1800
Miami, FL 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

This motion was served on defense counsel via cm-ecf and on pro se defendant Michael Furman via email this same day, July 28, 2021. By: s/Amie Riggle Berlin