

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

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.

**ONE NINE COUNTRY DRIVE, LLC. AND MICHELLE SCARAMELLINO'S
RESPONSE IN OPPOSITION TO RECEIVER, RYAN K. STUMPHAUZER'S
EXPEDITED MOTION TO EXPAND THE RECEIVERSHIP
TO INCLUDE 19 COUNTRY DRIVE, MORRISTOWN, NJ 07960**

19 Country Drive, LLC (“19 Country Drive”) and Michelle Scaramellino (collectively, “Responding Parties”), through their undersigned counsel, file their *Response in Opposition to Receiver, Ryan K. Stumphauzer’s Expedited Motion to Expand the Receivership to Include 19 Country Drive, Morristown, NJ 07960 [ECF No. 1180]* (the “Expedited Motion”).

INTRODUCTION

The Receiver, without service of a summons and complaint, and without naming the Responding Parties as defendants, seeks by way of motion to take a non-party’s home in New Jersey and make it part of the Receivership. The Receiver does so on the basis that the New Jersey Home¹ is a “Recoverable Asset” under the Amended Receivership Order. However, as

¹ Though this response speaks in terms of the New Jersey Home, the home has since been replaced by net sales proceeds, which the Receiver is holding in escrow per the agreement of the parties approved by this Court. The agreement was entered into in an effort to preserve the status quo on the Receiver’s motion, while allowing the pending sale of the home to close. Per the agreement, the escrowed net proceeds are deemed to have the same situs as the home – New Jersey.

shown below, the New Jersey Home is not a “Recoverable Asset” under the plain language of the Receivership Order. Nor could it be since “Recoverable Assets” are frozen under the Receivership Order, and due process would have required, at a minimum, notice and a hearing for the owner of the property. Such notice and hearing did not occur, and indeed, such relief was never sought as to Responding Defendants or the New Jersey Home nearly 2 years ago when the Receivership Order was entered.

Moreover, the claim that the home was purchased with funds traceable² to the fraudulent scheme alleged in the SEC action, without more, is a wholly insufficient basis to take property from a non-party and add it to a receivership. Where a “legitimate claim” to the funds exists, as in this case where the funds at issue are loan proceeds borrowed pursuant to written loan documents, there is no authority to add such non-party’s property to a receivership, and there is no jurisdiction to do so. Nonetheless, the Receiver’s Motion does no more than claim that scheme proceeds were traced into the purchase of the home. The Receiver makes no claim that Mr. Scaramellino engaged in securities violations or was otherwise involved in the underlying fraudulent scheme.³

It is apparent that rather than having any basis under the securities laws and related equitable powers of this Court to add the New Jersey Home to the Receivership, the Receiver is instead trying to use that property to secure any ultimate judgment he may obtain in his separate

² The claim that the home was purchased solely with scheme proceeds is disputed. Mr. Scaramellino had \$1.5 million of funds that were not part of the loan proceeds from Eagle Six in the account used to pay the purchase price. However, since the Receiver has not even alleged a plausible theory to add the home to the Receivership, Responding Parties will not address the tracing issues in this Response. However, Responding Parties reserve all rights in this regard should this become an issue.

³ The Receiver sets out factual allegations involving use of the loan proceeds. However, this is not a securities violation or involvement in the underlying fraudulent scheme. Once borrowed, the funds were property of Mr. Scaramellino and he was free to use them as his own property. The Receiver’s colorful allegations regarding the use of the funds to purchase a home for his wife and the like are general creditors’ rights arguments. Such arguments do not support a claim that the loan proceeds, once loaned, continued to be property of the Receiver Entities or ultimately may be added to the Receiver Estate through a motion to expand the Receivership. General creditors’ rights issues are not properly before this Court. Indeed, the Receiver has an independent action pending in another court against Mr. Scaramellino alleging breach of the loan agreement.

collection lawsuit against Daniel Scaramellino pending in the Middle District of Florida. The Receiver is seeking damages in the Middle District lawsuit against Mr. Scaramellino for breach of contract – the alleged failure to repay under the loan agreement with Eagle Six. As the U.S. Supreme Court has long held, a federal court’s equity powers may not be used to prevent a party from disposing of its assets pending adjudication of a contract claim for damages. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

Efforts to obtain recoveries for defrauded investors should not come at the expense of due process or taking properties from parties that lawfully obtained the funds and provided consideration.

A. The New Jersey Home is not a “Recoverable Asset” under Order Appointing Receiver

The New Jersey Home is not a “Recoverable Asset” under the Amended Order Appointing Receiver [ECF No. 141]. For property to be a “Recoverable Asset” under the Order, it must be an asset of the Relief Defendant in the main SEC Action. Here, neither the Responding Defendants nor Daniel Scaramellino are Defendants or the Relief Defendant in the SEC Action.

The Receiver’s argument to the contrary misconstrues the Receivership Order. By definition, the Receiver is only authorized to marshal and preserve “... all assets of the Defendants (“**Receivership Assets**”) and those assets of the Relief Defendant that: (a) are attributable to funds derived from investors or clients of the Defendants; (b) are held in constructive trust for the Defendants; and/or (c) may otherwise be includable as assets of the estates of the Defendants (collectively, “**Recoverable Assets**”).” Amended Order Appointing Receiver (ECF 141) ¶ 1(Emphasis added).

Thus, the Receivership Order uses two separate defined terms: (1) “Receivership Assets”

and (2) “Recoverable Assets.” The defined term: “Receivership Assets” immediately follows “all assets of the Defendants.” Thus, “Receivership Assets” are limited to assets of the Defendants in the SEC Action. The defined term: “Recoverable Assets” immediately follows the defined term: “Receivership Assets.” “Recoverable Assets” is then followed by three subcategories (a), (b) and (c). However, each of those categories is immediately preceded by and limited to: “**those assets of the Relief Defendant.**” (Emphasis added). Thus, for example, under subcategory (a), assets attributable to investor or client funds would be limited to the Relief Defendant’s assets attributable to investor or client funds. Likewise, subcategories (b) and (c) only apply to the extent the properties at issue are “assets of the Relief Defendant.”

The above interpretation is further supported by how the above defined terms are used in the Order. If the Receiver were correct and “Recoverable Assets” was intended to also subsume the term “Receivership Assets”, there would be no reason to use both terms throughout the Order. Yet both terms are used in the Order. If “Recoverable Assets” was truly an all-encompassing term, there would be no need to do so. For example, under “asset freeze”, both “Receivership Assets” and “Recoverable Assets” are frozen, as follows: “Except as otherwise specified herein, all Receivership Assets **and** Recoverable Assets are frozen until further order of Court.” *Order*, ¶ 3 (Emphasis added). “[A]ll persons or entities with direct or indirect control over any Receivership Assets and/or Recoverable Assets ... are hereby restrained and enjoined...” *Id.* This freeze shall include, but not be limited to, Receivership Assets and/or Recoverable Assets that are on deposit with financial institutions...” *Id.* Further, in listing the Receiver’s duties and powers, the Order uses the term “Receivership Property.” The foregoing term is limited to “all property interests of the Receivership Entities.” The defined term does not include any reference to “Recoverable Assets.”

Nor could the New Jersey Home have been included in the Receivership since there was not even a pretense of complying with due process to have made the New Jersey Home property of the Receivership, or to have subjected it to the extraordinary remedy of an asset freeze, and Michelle and Daniel Scaramellino to the extraordinary remedy of the embedded injunction. This Court's Receivership Order should not be construed in an unreasonable fashion such that it would freeze assets of non-parties without notice or hearing in violation of their due process rights.

The foregoing is also the only reasonable interpretation to avoid an interpretation of the order as contrary to applicable law. As discussed below, a party's receipt of investor funds, standing alone, is not a sufficient basis to bring property traceable to the receipt of such funds into a receivership. Neither the SEC nor the Receiver can recover the property where the recipient had a legitimate claim to it. The cases that allow property acquired with fraudulently obtained investor proceeds to be brought into a receivership are premised on unjust enrichment due to the recipient's failure to provide consideration. Where a party borrows money, as Mr. Scaramellino did under agreements where the party assumes the obligation to repay, that party has a legitimate claim to the funds, and has not been unjustly enriched through receipt of such funds.

Under the Receiver's interpretation, a building security guard's receipt of investor proceeds to pay for his services would be subject to an asset freeze and recoverable by a receiver, as would any property traceable to the security guard's salary. Likewise, the rent paid with investor proceeds for a building leased by a receiver entity would be recoverable and any property of the Lessor traceable to such funds would be subject to an asset freeze and being brought into the Receivership. Further, property purchased with the proceeds of unpaid

Merchant cash advances would also be subject to an asset freeze and being brought into the Receivership. The Receiver has not sought such relief against those merchants, and where he seeks to enforce his claims through litigation, he has requested and obtained this Court's approval for relief from the litigation injunction to permit the receiver to bring separate lawsuits against these parties. The Receiver's theory of the case simply proves too much.

B. A Non-Party's Property Alleged to be Traceable to Investor Proceeds cannot be brought into Receivership where the Recipient had a Legitimate Claim

A receivership cannot be expanded to include a non-party's property on the basis that some or all of the property was purchased with investor funds where the recipient of such funds has a legitimate claim to them. In *Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009), investors purchased certificates of deposit with high returns in what turned out to be a multi-billion dollar ponzi scheme. The receiver named as "relief defendants" several hundred investors who received proceeds from Stanford CDs which were paid into their customer accounts. The Receiver sought the receivership court's authority to recover the interest received by these investors as assets of the receivership and to distribute them pro rata to all victims of the Stanford fraud. The Receiver further sought a preliminary injunction continuing an asset freeze on these investors' customers' accounts until all claims had been finally resolved. No wrongdoing was alleged against the investors. The district court denied the Receiver's motion to continue the freeze as to "return of principal" on the redeemed CDs, but continued the freeze on investors accounts as to the interest payments they received. The Fifth Circuit reversed the continued asset freeze as to interest payments, finding that the district court lacked authority to freeze the investors' accounts.

The Fifth Circuit's decision in *Janvey* turned on the nature of a relief defendant. The

Court wrote:

A relief defendant, sometimes referred to as a “nominal defendant,” has no ownership interest in the property that is the subject of litigation but may be joined in the lawsuit to aid the recovery of relief. *SEC v. Cavanagh*, 445 F.3d 105, 109 n. 7 (2d Cir.2006). A relief defendant is not accused of wrongdoing, but a federal court may order equitable relief against such a person where that person (1) has received ill-gotten funds, and (2) does not have a legitimate claim to those funds. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir.1998).

Janvey, at p. 834.

The *Janvey* court quoted from a Fourth Circuit decision that discussed the theory behind the “obscure common law concept”:

A “nominal defendant” is a person who can be joined to aid the recovery of relief without an additional assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of litigation. Because a nominal defendant has no ownership interest in the funds at issue, once the district court has acquired subject matter jurisdiction over the litigation regarding the conduct that produced the funds, it is not necessary for the court to separately obtain subject matter jurisdiction over the claim to the funds held by the nominal defendant; rather, the nominal defendant is joined purely as a means of facilitating collection. In short, a nominal defendant is part of a suit only as the holder of assets that must be recovered in order to afford complete relief; no cause of action is asserted against a nominal defendant.

(*Janvey*, 588 F.3d 831, 834, Quoting *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187 at 191-92 (4th Cir.2002)).

The Fifth Circuit held that the Receiver could not freeze the assets of the investors because they were not proper relief defendants. While the receiver met the first requirement that the investors held ill-gotten funds, the receiver did not meet the second requirement of showing that the investors did not have a “legitimate claim” to the funds. *Id.* The court found that “the jurisprudence requires only an ‘ownership interest’ to preclude an entity from being a proper relief defendant.” (citing

Kimberlynn Creek Ranch, 276 F.3d at 191; *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir.1991); *SEC v. Founding Partners Capital Mgmt.*, 639 F.Supp.2d 1291, 1294 (M.D. Fla.2009). Ownership of the certificates of deposit and the legal relationship established was a sufficient ownership interest to give the investors a legitimate claim to the funds.

In *SEC v. Sun Capital*, No. 209-cv-229-FTM-29SPC, 2009 WL 1362634 (M.D. Fla. May 13, 2009), based on reasoning closely paralleling that of the *Janvey* court, the court denied the SEC's motion to add Sun Capital as a relief defendant and the Receiver's motion to expand the Receiver's powers to encompass Sun Capital. The court found that although Sun Capital received ill-gotten funds, it had a legitimate claim to those funds, finding that Sun Capital: "received the loan proceeds pursuant to written loan agreements ..., which gives Sun Capital certain rights and obligations with regard to the loan proceeds." *Id.* at 1294. The court also noted that there had been "a debtor-creditor relationship between Sun Capital and [Defendant] based on written agreements" over an extended period of time and that "Sun Capital is a far cry from the 'paradigmatic' nominal defendant: a trustee, agent or depository." *Id.* As a result, the court found that it was without authority to freeze Sun Capital's assets. The court likewise denied the receiver's request to expand its powers over Sun Capital.

In the present case, Daniel Scaramellino had a legitimate claim to the funds he received from Eagle Six. As with Sun Capital, Daniel Scaramellino obtained the funds through written loan agreements establishing a debtor-creditor relationship. Further the loan was obtained more than a year before the receivership, and Mr. Scaramellino had made interest payments during that time. As in *Sun Capital*, there is no authority

or jurisdiction to add the New Jersey Home to the Receivership since Mr. Scaramellino had a legitimate claim to the loan proceeds he borrowed in a debtor-creditor relationship.

In SEC v. Nat. Diamonds Inv. Co., No. 9:19-CV-80633, 2019 WL 2583863, at *7 (S.D. Fla. June 11, 2019), the court expounded on what it means to have no legitimate claim to the funds. It explained: "... in the securities context, that an individual "gave no consideration for the [ill-gotten funds] and thus received them as a gift." *Id.* (Citation omitted). The court cited a number of cases in support of its conclusion. As seen above, this case, and in particular, Mr. Scaramellino's receipt of loan proceeds, does not involve receipt of ill-gotten funds as a gift or otherwise for no consideration.

C. There is no Jurisdiction over the New Jersey Home

28 U.S.C. §754 does not provide jurisdiction to seize assets in New Jersey and bring them into a Florida receivership. Although the New Jersey Home, by agreement of the parties, and as approved by this Court, has been sold, with the net proceeds being held in escrow by the Receiver, the foregoing was done to enable the pending closing on the home to be concluded. As part of that agreement, the parties agreed that the situs of the escrowed net proceeds is deemed to be in New Jersey since they are standing in place of the New Jersey Home.

Though 28 U.S.C. §754 under other circumstances could provide a receivership extraterritorial jurisdiction over property located in another state, that is not the case here. Section 754 deals with receivership property located outside the receivership court's jurisdiction. The property addressed is property over which a

receiver, upon giving bond as required by the court, would be vested with “complete jurisdiction and control ... with the right to take possession thereof.” In other words, for the statute to apply, the property must be property of the receivership. The foregoing statute is not intended to provide a receiver with the right to take possession and control of a non-party’s property that is not property of the receivership. As set out above, the New Jersey Home is not a “Recoverable Asset” under the Receivership Order and therefore is not property of the receivership. Likewise, Mr. Scaramellino had a legitimate claim to the loan proceeds claimed to be traceable into the purchase of the home, further reinforcing that such property cannot be receivership property.⁴

Accordingly, since the foregoing statute does not apply, there is no jurisdiction for the Receiver in the Florida receivership to take possession and control of property located in New Jersey, and to have it added to the Receivership.

D. The Receiver cannot use the New Jersey Home to Secure a Potential Judgment on Legal Claim in another Court for Sums Allegedly Owed

The Supreme Court, in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) -- reversed the lower court, and held that an unsecured general creditor without a money judgment cannot successfully invoke “equitable assistance in the collection of a legal debt.” 527 U.S. at 325. The Court explained that a creditor without a judgment historically “had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property.” 527 U.S. at 319–20. As *Grupo Mexicano* and *Rosen v. Cascade Intern., Inc.*, 21 F.3d 1520 (11th Cir. 1994) (Tjoflat, J.) explain,

⁴ Moreover, the Receiver seeks to expand the Receivership to add the foregoing property. If the New Jersey property was property of the receivership, which it is not, there would be no need to add it. One cannot use the hoped for accomplishment of the relief sought – making the New Jersey property part of the Florida Receivership and therefore, Receivership property -- to support the claim that the statutory predicate for use of the statute – that the property is receivership property – has been satisfied.

equity does not permit an asset freeze intended to ensure satisfaction of a future money judgment. *See Rosen*, 21 F.3d at 1531 (“[P]reliminary injunctive relief freezing a defendant's assets in order to establish a fund with which to satisfy a potential judgment for money damages is simply not an appropriate exercise of a federal district court's authority.”) *Grupo Mexicano* at p. 322 – “We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.”

As discussed above, the Receiver provides no basis for adding a non-party's property in New Jersey into the Receivership. However, the Receiver's real focus appears to be general creditors' rights type arguments in an effort to secure any judgment he may obtain in the Middle District of Florida collection action against Mr. Scaramellino. As set forth above, the equitable powers of a federal court do not permit such relief. Since the Receiver is proceeding on the basis of the Court's equitable powers, he must also live by the limits on those powers. The foregoing is also consistent with the Supreme Court's decision in *Liu v. SEC*, --- U.S. ---, 140 S. Ct. 1936 (2020), which explained further the limits of a federal court's equity powers in the context of the SEC's disgorgement power.

E. The Receiver's Cases are Distinguishable

CCUR Aviation Finance, LLC v. South Aviation, Inc., 2021 WL 1738764 (S.D. Fla. May 3, 2021) is distinguishable. In that case, there was evidence that the party sought to be added was an affiliate of the receiver entity, and there was evidence of a repeated transfer of funds between the two entities, the commonality of ownership across the two entities, the same registered agent, and the same office address listed for both entities. Even with this evidence, court still required notice and opportunity to respond before making a final determination as to whether to grant the receiver's request to expand the receivership to include what appeared to be

an affiliated entity. By contrast, none of those facts are present in this case.

Further, the court there emphasized: “However, a ‘request to expand the receivership estate ‘should be employed with the utmost caution and is justified only where there is a clear necessity to protect a party's interest in property, legal and less drastic equitable remedies are inadequate, and the benefits of receivership outweigh the burdens on the affected parties.’ ” *Id.* at *2 (quoting *Netsphere, Inc. v. Baron*, 703 F.3d 296, 305 (5th Cir. 2012)) (citing *United States v. Bradley*, 644 F.3d 1213, 1310 (11th Cir. 2011) (noting that “[a] district courts’ appointment of a receiver ... is an extraordinary equitable remedy.”)).” *CCUR Aviation Finance* at *2.

Likewise, *SEC v. First Fin. Grp. Of Tex.*, 645 F.2d 429, 438 (5th Cir. 1981) is off point. The quote cited dealing diversion and waste was not directed at bringing a non-party’s legally obtained property into a receivership. Rather, the quote dealt with why a receiver is necessary to maintain the status quo, otherwise the “corporate assets” will be subject to diversion and waste.

SEC v. Nadel, 2013 WL 2291871, (M.D. Fla. May 24, 2013) is also distinguishable. The court there noted that the entity sought to be added to the receivership was funded predominantly with scheme proceeds and much of the early funds invested came from parties connected with the scheme, including relief defendants.

F. Responding Defendants are Entitled to and Request Evidentiary Hearing, Discovery, and ability to put forth and prove defense if Court does not Deny Receiver’s Motion at this Juncture

As set forth above, it is evident that the Receiver has not made out a sufficient case, even on an allegations basis, to add the New Jersey Home to the Receivership. However, if this Court believes otherwise, Responding Defendants are entitled to an evidentiary hearing, discovery, the ability to put forth and prove their defenses, and the like. Accordingly, this Response requests the foregoing if the Court believes the Motion should not be denied at this juncture.

CONCLUSION

For the reasons stated, the Receiver’s motion to include non-party’s New Jersey Home in the Receivership should be denied. If not denied at this juncture, then Responding Defendants request an evidentiary hearing, full discovery, and an opportunity to present and prove their defenses.

Dated: June 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2022, a true and correct copy of the foregoing Response to Receiver, Ryan K. Stumphauzer’s Expedited Motion to Expand the Receivership to Include 19 Country Drive, Morristown, NJ 07960 was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing Notice of Limited Appearance is being served on this same date on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ James D. Silver
James D. Silver