

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.

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**NOTICE OF FILING POSITION ON MCELHONE AND LAFORTE'S
MOTION TO HOLD THE U.S. ATTORNEY IN CONTEMPT OF COURT**

Defendants Joseph LaForte and Lisa McElhone's Motion asking this Court to hold the U.S. Attorney prosecuting LaForte in the Eastern District of Pennsylvania in contempt of this Court is the latest example of their outrageous conduct in this case, their relentless interference with the Receivership, and their inability to tell the whole truth. They appear to be improperly seeking to use this Court to interfere with a criminal investigation against them and to divest the U.S. Attorney of assets held pursuant to two Orders issued by the Eastern District of Pennsylvania. The Motion is improper and should be swiftly stricken or denied.

As LaForte and McElhone have previously argued in this case, only the Receiver has standing to seek to enforce the Receivership Order or to seek contempt concerning it. Not LaForte and McElhone, as they know full well from their aggressive litigation of this very issue last year when the Commission sought to enforce the Receivership Order through the issuance of an Order to Show Cause against them for contempt.

When the Commission sought the Receivership Order, it was never contemplated that a defendant would attempt to use the Receivership Order to interfere with orders related to a criminal investigation concerning that defendant. But that is precisely what is occurring in the Motion, which is not properly before this Court and which could be an improper attempt to use this Court to affect a criminal case or investigation, or to apply pressure on the U.S. Attorney in the plea negotiations referenced in McElhone and LaForte's exhibit to their Motion.¹

A. As LaForte and McElhone Have Previously Argued in this Case, Only the Receiver Has Standing to Seek to Enforce the Receivership Order

LaForte and McElhone have no standing to file the instant Motion. As they have aggressively argued previously in this case, the Receivership Order vests only the Receiver with exclusive authority to seek contempt for violations of the Receivership Order, to marshal assets under the Order, and to enforce it. Rather than re-brief this issue here, undersigned inserts the text with case law used by LaForte, McElhone, and Fox Rothchild (the latter of whose motion to strike LaForte and McElhone adopted) to oppose the Commission's motion seeking an order to show cause for contempt against them in 2021:

III. THE RECEIVER IS THE PROPER PARTY TO ASSERT THIS CLAIM, NOT THE SEC.

As this Court observed in its Receivership Order [ECF No. 36], the SEC sought "a Receiver with full and **exclusive** power, duty, and authority to: administer and manage the Receivership Entities' business affairs, funds, assets, causes of action, and any other property; marshal and

¹ The plea negotiations are referenced by McElhone and LaForte through their filing of Exhibit 2, which is the basis for all statements about the plea negotiations in this notice.

safeguard all of the assets of the Receivership Entities; and take whatever actions are necessary for the protection of the investors.” *Id.* at p. 2 (emphasis supplied).

As provided in paragraph 7(a) of the Amended Receivership Order [ECF No. 141], the Receiver was granted the power and duty 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”).

As provided in paragraph 7(b) of the Amended Receivership Order, the Receiver was charged with the duty to “take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Entities; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto.”

This Court charged the Receiver, not the SEC, with the obligation to sue to recover any assets believed to be part of the Receivership Estate. Fox disputes that the cash it is holding is part of the Receivership Estate, but, without question, it is the Receiver whose responsibility it is to pursue any claim against Fox if the Receiver decides to do so. Consistent with this notion, all of the Fox firm’s communications on this matter—until September 14, 2021—were with the Receiver. For reasons unknown, the SEC, which is merely a party litigant in this case and not an arm of the Court or a *de facto* receiver, has decided to pursue this matter and to do so in an inappropriate manner.

As provided in 28 U.S.C.A. § 754, “a receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.” These duties are codified by the terms of 28 U.S.C.A. § 959(b), which requires receivers to manage and operate the receivership property in the same manner that the owner or possessor of the property would be bound to do if in possession of it.

Notwithstanding this Court’s orders, and two federal statutes, the SEC seeks to undermine the very purpose of a receiver and circumvent the exclusive powers granted to the Receiver by pursuing the recovery or putative receivership assets. Not only does this violate the Court’s Receivership Orders and federal law, but it creates a conflict of interest. The Receiver is a neutral party, an arm of the Court. The SEC is a party litigant intent on prevailing in contentious securities litigation. *See Sterling v. Stewart*, 158 F.3d 1199, 1201 (11th Cir. 1998) (“[a] receiver is a neutral court officer appointed by the court, usually to “take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of ... undertaking any [] appropriate action.”).

[ECF No. 762 at pp, 12-14, adopted in full by McElhone, ECF No. 780, and LaForte during the 7/20/2021 hearing)]. At the hearing on this Motion to Strike, LaForte adopted this same position, and the Receiver stated his position that the Receiver can seek to enforce the Receivership Order.

Thus, as LaForte and McElhone have admitted and argued before in this case, they have no standing to file the instant Motion. The Court should swiftly strike or deny it.

B. LaForte and McElhone are Improperly Interfering with the Receivership in Violation of the Injunction Within the Receivership Order

LaForte and McElhone not only lack standing to seek this relief, but are also interfering with the Receivership in direct violation of the Receivership Order. Under the explicit language

of the Receivership Order, the Receiver – not the individual defendants - has the authority to enforce the Receivership Order, marshal assets and preserve them. [ECF 141 at 3 and 19]. Under the Receivership Order, the individual defendants are precluded from interfering with the Receivership and the Receiver’s duties [ECF 141 at Section VII]. They are enjoined from interfering with the Receiver’s efforts and from interfering with the Receivership in the performance of his duties. *Id.* And yet they filed this Motion, invading the Receiver’s duties and attempting to interfere with a criminal matter and to hold a U.S. Attorney in contempt of this Court’s Order for holding assets pursuant to Orders issued previously in the Eastern District of Pennsylvania.

C. There Has Been No Conferral with the U.S. Attorney

McElhone and LaForte’s Motion has no certificate of conferral with the U.S. Attorney – because there was none. They did not confer with the U.S. Attorney about the relief they seek in this case. Thus, the Motion violates Local Rule 7.1, and cannot stand.

If the Receiver wishes to litigate against the U.S. Attorney, then the Receiver can confer with the U.S. Attorney and then file the proper pleading, whether that be determined to be in this case or in the Eastern District of Pennsylvania where the seizure warrants were issued.

Notably, failure to confer was another basis for McElhone and LaForte arguing against the Motion for Order to Show Cause filed against them, where they argued the Motion was improper because there as not full conferral and claimed the Motion for Order to Show Cause caused embarrassment because it was filed in the public forum. *See* ECF No. 780. And yet they have filed the instant motion – which they have no standing to file – without ever conferring with the U.S. Attorney about a contempt motion under the Receivership Order.

**D. LaForte and McElhone are Improperly Attempting to Use the
Receivership Order to Interfere with a Criminal Matter**

Prior to the Commission filing this case, the U.S. District Court for the Eastern District of Pennsylvania issued two Warrants to Seize Property Subject to Forfeiture concerning the plane and account at issue in LaForte and McElhone's Motion.² LaForte and McElhone's Motion does not advise this Court of those Orders, or that the assets at issue are subject to Court orders in connection with a criminal investigation concerning LaForte and McElhone.

According to Exhibit 2 to LaForte and McElhone's Motion, LaForte and McElhone have been in plea negotiations with the U.S. Attorneys Office for the Eastern District of Pennsylvania. They now seek to hold that same U.S. Attorney in contempt in this civil case for supposedly violating this Court's Order for taking possession of assets pursuant to the Orders issued by the Eastern District of Pennsylvania.

Not only that, but the same U.S. Attorney also indicted LaForte on a separate case, and that case proceeds to trial in the Eastern District of Pennsylvania in April 2023. But LaForte is asking this Court to direct that very U.S. Attorney to appear in this case to litigate against LaForte in this forum for holding the plane and account pursuant to orders in the Eastern District of Pennsylvania. It is unclear whether LaForte and McElhone are improperly attempting to use this case to apply pressure on the U.S. Attorney during plea discussions, to embarrass the U.S. Attorney, to use this case to require the U.S. Attorney to appear before this Court to address the assets/evidence and obtain discovery they cannot obtain in a criminal case, or for another purpose.

However, one thing is for certain: LaForte and McElhone have no standing to seek the relief they seek. They cannot slip into the shoes of the Receiver for any reason, let alone to interfere

² These Orders remain under seal.

with the work of the U.S. Attorney in the matter(s) against them or to interfere with the Receivership.

Conclusion

As LaForte and McElhone know and have aggressively argued in this case before, only the Receiver is vested with the duty to marshal assets. The Receiver has not demanded the transfer of these assets into the Receivership. As the Receiver told LaForte and McElhone's counsel when they conferred, the Receiver has not even *discussed* this with the U.S. Attorney [See Motion conferral paragraph]. If the Receiver believes the assets belong in the Receivership and that the Eastern District of Pennsylvania Orders should be set aside or that the U.S. Attorney is in contempt of this Court's Receivership Order, then the Receiver can address that by speaking with the criminal authorities as a first step to confer.

The Court should swiftly deny the Motion or strike it, and should not entertain the instant Motion filed by LaForte and McElone against the U.S. Attorney investigating them and prosecuting LaForte. If they have an issue with their criminal matter(s) or the orders entered in that forum, then they should address those issues there if there is a legal basis for doing so.

December 23, 2022

Respectfully submitted,

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