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.
_____/

DEFENDANTS JOSEPH LAFORTE AND LISA MCELHONE'S MEMORANDUM OF LAW IN OPPOSITION TO THE RECEIVER'S MOTION FOR ORDER: (1) AUTHORIZING RECEIVER'S SALE OF ALL REAL PROPERTY WITHIN THE RECEIVERSHIP ESTATE; AND (2) COMPELLING LISA MCELHONE AND JOSEPH LAFORTE TO VACATE AND SURRENDER HAVERFORD HOME OR, IN THE ALTERNATIVE, PAY OBLIGATIONS FOR SINGLE-FAMILY HOMES

Defendants, Joseph LaForte and Lisa McElhone (collectively the "Defendants"), by and through their undersigned counsel, file this Memorandum of Law in Opposition to the Receiver's Motion for Order: (1) Authorizing Receiver's Sale of All Real Property Within the Receivership Estate; and (2) Compelling Lisa McElhone and Joseph LaForte to Vacate and Surrender Haverford Home or, in the Alternative, Pay Obligations for Single-Family Homes (the "Motion", ECF No. 1484), and as support therefore state as follows:

INTRODUCTION

The Receiver seeks permission to begin marketing 25 separate properties for sale. These properties consist of: three single-family homes (including the Haverford Home, which is the Defendants' primary and current residence); the two properties which have historically been CBSG's offices; and 20 additional properties consisting of residential and commercial rental units (collectively the "Properties"). A few of the Properties are owned by Defendant Lisa McElhone

(either directly or indirectly), but the vast majority are owned by the L.M.E. 2017 Family Trust (the "Trust"), which was brought into the Receivership Estate pursuant to the Court's Expansion Order (ECF No. 436) – which is one of the key issues in the Defendants' pending appeal to the Eleventh Circuit.[1] The Defendants recognize that the Receiver is imbued with broad discretion to manage the Receivership Estate, but they urge the Court not to permit the marketing of the Properties at this time for at least two reasons.

First, the Properties are unique assets which are the subject of an appeal, and Ms. McElhone and the Trust will be permanently divested of their ownership interests if a sale is permitted.[2] If, for example, the Eleventh Circuit rules that the expansion of the Receivership over the Trust was improper, there would be no way to return the Properties *after* they have been sold, and the Trust would thereby suffer irreparable harm. Likewise, if the appellate court holds that the penalty assessed against Ms. McElhone is excessive, that the disgorgement calculation was incorrect, or that additional deductions should have been applied as part of the Court's disgorgement calculation, the Judgment against the Defendants may be significantly reduced such that the sale of the Properties would not be warranted.[3]

Second, the marketing and sale of the Properties would strip the Receivership of a large and reliable source of income. The Properties are currently generating significant rental income for the Receivership Estate – in fact, the Receiver's most recent report reflects that the Properties generated $1,121,269 in net income during the first three quarters of 2022. (ECF 1437-1 at p. 15). Obviously,

[1] The Defendants previously appealed the Expansion Order, but the Eleventh Circuit did not reach the merits of that appeal because it determined that it did not have jurisdiction. Now that a Final Judgment has been entered in this case and an appeal has been taken, the merit issues presented in Defendants' prior appeal are ripe for review.

[2] Defendants understand that the Receiver would need to seek an additional order from the Court authorizing the actual sale of the Properties. However, this is a ministerial process, and it would not benefit anyone for the Receiver to incur the expense of marketing the Properties unless the sales will ultimately be approved.

[3] Notably, the penalties assessed against the Defendants are approximately $42 Million, which is less than the valuation the Receiver has given for the 22 commercial properties. Accordingly, a substantial reduction of the penalties could easily obviate the need to sell some – or all – of the Properties.

this income will be diminished with each and every sale. Moreover, 22 of the 25 Properties are commercial buildings located in a highly concentrated area of downtown Philadelphia and marketing this portfolio of properties will create a glut of inventory which will inevitably depress values. Likewise, the recent increase in interest rates creates additional market pressures which make this an inopportune time to liquidate a significant real estate portfolio.

The Receiver's Motion also asks the Court to compel the Defendants to vacate their residence *unless* they pay $61,481.17 in rent and expenses for the three single-family homes which are currently part of the Receivership Estate (the Haverford Home, and Defendants' houses in Jupiter, Florida and Paupack, Pennsylvania). The Receiver claims the Defendants owe these sums pursuant to an agreement they entered with the Receiver (the "Agreement," attached hereto as Exhibit A) – but fails to mention that the Agreement (by its own terms) expired almost a year ago and is no longer in force or effect. Furthermore, the Receiver makes clear that he may seek to evict the Defendants from their residence *at any time* regardless of whether they agree to pay the sums requested.[4]

Traditional principles of equitable jurisprudence suggest that it would be inequitable to evict Defendants from their home or hold them responsible for payments under an expired Agreement. To begin, the Defendants have owned the Haverford Home free and clear and, according to the Receiver's most recent report, the Receivership's assets attributable to the Defendants far exceed the face value of the judgment. Moreover, the Defendants owned the Haverford home for years prior to the judgment (in fact, they've owned the home since 2016, prior to the creation of the PPM structure which was the focus of the SEC's Complaint) and no justification exists for putting Defendants out on the street. This is especially true where, as here, the proceeds of a prospective sale are not

[4] *See* Motion at p. 9, stating that, in exchange for the payment of the allegedly past-due amount and future rent payments, Defendants may continue live at the Haverford Home "until such future time that the Receiver seeks an Order authorizing the Receiver to sell the Haverford Home or requiring [Defendants] to vacate and surrender the Haverford Home to the Receiver."

necessary to satisfy the extant judgment. Second, for approximately two years, Defendants have paid the Receiver rent and upkeep expenses on the Haverford Home (which is currently their sole residence) as well as the Paupack and Jupiter houses, and these payments – totaling over $1 Million – have enriched the Receivership Estate. Under these circumstances, Defendants respectfully submit that they should be permitted to occupy the Haverford Home without paying the Receiver rent.

MEMORANDUM OF LAW

1. The Court Should Not Permit The Sale of the Properties at this Time

The Defendants request that the Court deny the Receiver's request for authorization to begin the process of marketing and selling the Properties at this time because the liquidation of the Properties prior to the outcome of Defendants' appeal may cause the Defendants and the Trust irreparable harm, and because the rental income derived from the Properties creates a substantial source of income for the Receivership Estate during the pendency of Defendants' appeal. Although the Receiver's Motion draws a distinction between marketing the Properties for sale versus the actual sale of the properties (which would require additional authorization from the Court), the Receiver is seeking to take a significant step toward liquidation, and would obviously not incur the expense of marketing the Properties unless he expected to sell them.[5] Thus, Defendants' objection to the sale of their Properties – prior to the outcome of an appeal which may eliminate the justification for such sale – is neither speculative or premature.

The relevant caselaw provides support for denying the Receiver's motion to market the Properties. In *SEC v. Ahmed*, 3:15cv675(JBA), 2019 WL 11824928 (D. Conn. Nov. 26, 2019), the defendant sought a stay of all proceedings pending his appeal of an Amended Final Judgment holding

[5] Indeed, the Receiver titled its Motion as a "Motion for Order Authorizing Receiver's Sale of All Real Property Within the Receivership Estate" – which further illustrates that the distinction between the marketing and sale of the Properties is mere hair-splitting.

him liable for disgorgement of nearly $42 Million. The Receiver and the SEC argued that the Receiver should be allowed to proceed with the liquidation in order to limit the exposure of the assets under the receivership to market risks which could reduce their value and compromise the ability to satisfy the judgement. After weighing the Receiver and the SEC's concerns against the Defendants' "substantial risk of irreparable harm resulting from the liquidation of assets which cannot be retrieved even if those assets ultimately prove unnecessary to satisfy the judgment" (*id.* at *4), the Court ultimately determined that the balance of interests favored the defendant and stayed the liquidation.

Here, as in *Ahmed*, the risk of irreparable harm caused by the liquidation of Defendants' homes and the Trust's real estate portfolio *prior to the outcome of their appeal* outweighs the Receiver's interest in liquidating these assets at this time (even without the lost income to the Estate). The Receiver's Motion contains only a general statement that "in his reasonable business judgement" he believes that the marketing and private sale of the Properties is the method most likely to maximize their value. (*See* ECF No. 1484 at p. 5). However, this is an unsworn statement of counsel which does not even attempt to articulate the basis of the "reasonable business judgment" or any immediate concern that the Properties will lose value. Nor does counsel acknowledge that the Properties are throwing off more than a million dollars a year in rental-income *after expenses*[6] – and are therefore an important source of income to the Receivership Estate during the pendency of Defendants' appeal. Likewise, the motion does not acknowledge that the sale of the Properties would cause irreparable harm to the Trust and the Defendants because the Properties are unique assets which cannot be replaced – and the sale of these Properties may not be necessary to satisfy the Final Judgement against Defendants based on the outcome of the appeal, and/or the Receivers' efforts to collect on over $320

[6] For whatever reason, the Receiver's Motion notes that the properties incur ongoing operation and maintenance expenses, but *does not* mention the fact that, after paying those expenses there is more than $1 Million in net profit. Likewise, the Motion fails to mention that the Receiver is occupying and utilizing certain property rent-free to conduct ongoing business operations.

Million in MCA receivables and other assets in the Receivership which have not yet been liquidated. Accordingly, the Defendants urge the Court to deny the Receiver's request for an Order authorizing the Receiver to begin the process of marketing and selling the Properties.

2. The Defendants Should Not Be Ordered To Comply With An Expired Agreement, Or To Continue Paying The Receiver Rent To Live In Their Own Home

The Receiver claims that the Defendants owe at least $61,481.17 in arrears under the Agreement and asks the Court to enter an Order requiring them to pay these amounts – and to continue paying rent and expenses on the Haverford Home and Paupack and Jupiter houses – or face eviction from their residence. In exchange for such payments, the Receiver states that he would allow the Defendants to continue living in the Haverford Home and will not market that house for sale – *until he decides otherwise* and seeks an Order permitting the sale of that property. The Receiver also makes clear that he will continue his efforts to market and sell the Paupack and Jupiter houses *even while the Defendants pay rent and expenses on those homes*. The Court should deny the Receiver's Motion for several reasons.

First, the Receiver is seeking to enforce compliance with an expired contract. The Agreement was memorialized in a February 23, 2021 email from the Receiver's counsel, Gaetan J. Alfano, which expressly states: "This agreement will remain in place for the lesser of one year OR a verdict or other resolution in the SEC case. No party may change the material terms of this agreement without an Order of the Receivership Court." (See Exhibit A at p. 3). Accordingly, the Agreement expired on February 23, 2022. Since most of the rent and expenses the Receiver is seeking to collect were incurred after the Agreement expired,[7] the Defendants are not contractually obligated to pay those

[7] The Receiver's exhibit listing the expenses for which it seeks reimbursement reflects that $9,228.76 was incurred during the term of the Agreement, and $52,252.41 was incurred after the Agreement expired. (*See* ECF 1484-1).

amounts – and the Defendants respectfully submit that the Court should not force them to incur these obligations on pain of eviction.

Second, the terms the Receiver is seeking to impose on the Defendants are deeply inequitable under the facts presented. The Defendants should not be forced to incur rent and upkeep obligations on the Paupack and Jupiter houses when the Receiver has barred them from setting-foot on those properties and is actively seeking to sell them over Defendants' objections.[8] Furthermore, it is inequitable for the Receiver to force the Defendants to pay rent on the Haverford Home when the Defendants have owned their home outright for many years and the assets in the Receivership Estate are more than sufficient to satisfy the face value of the judgement *without* selling the Haverford Home. The Receiver's most recent Quarterly Report reflects that the hard assets available to satisfy the judgement against the Defendants' include:

- Over $118 Million in cash, at least $105 Million of which is attributable to Defendants;
- $44,284,000 for the 22 commercial properties which the Receiver seeks to market and sell;
- $8,400,000 for the Paupack and Jupiter houses;[9] and
- $3,631,100 in art, vehicles and other personality.

While the Defendants believe that the Receiver has significantly undervalued the non-cash property identified above, taking those figures at face value, the Receiver has over $161 Million in hard assets available to satisfy the judgement against Defendants. On top of this, the Receiver has $321,600,000 in MCA Receivables for Par (which the Receiver has written down to $189,300,000 to

[8] The Defendants agreed to pay these expenses prior to the expiration of the Agreement because they were seeking to preserve their homes in the hopes that they would be able to recover the properties at the conclusion of the litigation. However, there is no reason for them to pay the Receiver rent for those homes while the Receiver is actively trying to sell them – and they are not required to do so under the Receivership Orders or any valid agreement.

[9] The Receiver acknowledges that the value listed for the Paupack and Jupiter houses is based on purchase price, and therefore does not account for the enormous gains in the real estate market since that time. Based on discussions with realtors, the Defendants believe a conservative estimate of the current value of these homes is $14 Million. Notably, the popular real estate website, redfin.com, currently estimates the value of the Jupiter house as 11,768,390.

account for collectability issues) and an additional $35,800,000 in receivables for two entities Ms. McElhone owns (Eagle Six Consulting and Heritage Business Consulting). The Receiver also has access to other assets which it can and should bring into the Receivership, including a corporate jet worth over $ 6 Million and a stock account worth approximately $12 Million.[10] Thus, even a cursory review of the assets under Receivership reflects that there is more than enough to satisfy the judgment – and the Defendants should not be forced to pay the Receiver rent and expenses to continue living in the home they own and occupy under these circumstances.

The appointment of a receiver is an "extraordinary equitable remedy." *See United States v. Bradley*, 644 F.3d 1213, 1310 (11th Cir. 2011); *see also Netsphere, Inc. v. Baron*, 703 F.3d 296, 305 (5th Cir. 2012) ("Receivership is an extraordinary remedy that 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") (internal citations omitted). Furthermore, this Court maintains discretion to modify an asset freeze and related orders over the Receiver's opposition. *See e.g. SEC v. Davison*, No. 8:20-cv-325-MSS-AEP, 2022 WL 2349981 at *3 (M.D. Fla. May 31, 2022) (authorizing, over the Receiver's opposition, a release of frozen funds to pay defendant's attorneys' fees).

Accordingly, the Defendants respectfully request that the Court exercise its equitable discretion by: 1) permitting the Defendants to remain in the Haverford Home pending further order of this Court; and 2) denying the Receiver's request for an Order requiring them to pay $61,481.17, plus continued rent and expenses for the Haverford Home and the Paupack and Jupiter houses, pursuant to an expired contract.

[10] These assets are discussed in Defendants Motion for Order to Show Cause (ECF No. 1468), which the Court recently denied based on a finding that the Defendants lacked standing to bring the motion.

CONCLUSION

For all of the foregoing reasons, the Defendants request that the Receiver's Motion be denied in all respects, that the Defendants be permitted to continue living in the Haverford Home pending further Order of this Court, and that the Court grant such other or further relief as it deems proper.

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Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 2023, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: /s/ *James M. Kaplan*
JAMES M. KAPLAN

Gmail

Lisa Mac <lisamacpriv@gmail.com>

Fwd: 3 residential properties

1 message

Joe L <joeacpriv@gmail.com> Mon, Mar 1, 2021 at 12:49 PM
To: Lisa Mac <lisamacpriv@gmail.com>

Sent from my iPhone

Begin forwarded message:

From: "James R. Froccaro Jr." <jrfesq61@aol.com>
Date: March 1, 2021 at 11:52:58 AM EST
To: joeacpriv@gmail.com
Subject: Fwd: 3 residential properties
Reply-To: "James R. Froccaro Jr." <jrfesq61@aol.com>

FYI

JAMES R. FROCCARO JR. , ESQ.
20 Vanderventer Ave. Suite 103W
Port Washington, New York 11050
516-944-5062-(office)
516-944-5066-(fax)
516-965-9180-(mobile)
jrfesq61@aol.com - (email)

-----Original Message-----
From: James R. Froccaro Jr. <jrfesq61@aol.com>
To: gja@pietragallo.com <gja@pietragallo.com>
Cc: asfuterfas@futerfaslaw.com <asfuterfas@futerfaslaw.com>
Sent: Mon, Mar 1, 2021 11:52 am
Subject: 3 residential properties

Gaetan,

I am just letting you know that in accordance with our agreement below, the payment of the property taxes for the Florida property taxes has been. The total payment amount was $78,292.26. The tax collector indicated that 1-3 business days should be allowed for the payment to be processed.

In addition, please let me know where the rental payments for the Haverford property should be forwarded and to whom the funds should be made payable to. Once you provide me with those instructions - payment of the rents owed from February 1 thru August will be immediately forthcoming.

Finally, I will be separately providing you with a list of all the entities and/or people responsible for the upkeep of the Florida and Lakehouse properties. They are all paid thru Ms. McElhone's nail salon via auto-pay.
I am respectfully requesting that they all be re-hired and/or continued and not replaced.

Thank you and take care.

James

JAMES R. FROCCARO JR. , ESQ.
20 Vanderventer Ave. Suite 103W
Port Washington, New York 11050
516-944-5062-(office)
516-944-5066-(fax)
516-965-9180-(mobile)
jrfesq61@aol.com - (email)

-----Original Message-----
From: James R. Froccaro Jr. <jrfesq61@aol.com>
To: GJA@Pietragallo.com <GJA@Pietragallo.com>
Cc: berlina@sec.gov <berlina@sec.gov>; asfuterfas@futerfaslaw.com <asfuterfas@futerfaslaw.com>
Sent: Tue, Feb 23, 2021 6:17 pm
Subject: Re: 3 residential properties - Receiver's position

Gaetan,

I know you are more than sophisticated enough to understand that by agreeing to these terms we are not conceding that the Haverford or any other property subject to the expansion order was purchased with tainted funds.

In any event, your counter proposal set forth below is accepted.

Thank you and take care.

James

JAMES R. FROCCARO JR. , ESQ.
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Port Washington, New York 11050
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516-944-5066-(fax)
516-965-9180-(mobile)
jrfesq61@aol.com - (email)

-----Original Message-----
From: Gaetan J. Alfano <GJA@Pietragallo.com>
To: James R. Froccaro Esquire (jrfesq61@aol.com) <jrfesq61@aol.com>
Cc: Amie Riggle Berlin Esquire (berlina@sec.gov) <berlina@sec.gov>
Sent: Tue, Feb 23, 2021 5:59 pm
Subject: 3 residential properties - Receiver's position

James,

The Receiver’s position on the 3 residences is as follows:

Mr. LaForte and Ms. McElhone will pay all of the carrying costs for the Paupack, Jupiter and Haverford properties, which includes taxes, homeowners insurance, utilities, maintenance, homeowner association fees, etc., as applicable. They will pay directly any costs that have accrued and are unpaid as of today’s date and will escrow with the Receiver payment for any other costs that will be due during the term of this agreement.

Mr. LaForte and Ms. McElhone will not have access to the Paupack or Jupiter properties. Those properties will remain vacant during the term of this agreement.

Mr. LaForte and Ms. McElhone may continue to live in Haverford and must pay rent of $5,000 a month. We believe that the fair market rental value of Haverford is substantially higher but we are willing to accept a lesser amount with the understanding that Mr. LaForte and Ms. McElhone pay the carrying costs. The Receiver is not willing to accept any arrangement in which they continue to live in the

property without rent. The Haverford property was acquired with investor proceeds (like all of the properties subject to the Court's December 16, 2020 expansion Order). It is inequitable to allow Mr. LaForte and Ms. McElhone to continue to live there rent free at the expense of the investors.

This agreement will remain in place for the lesser of one year OR a verdict or other resolution in the SEC case. No party may change the material terms of this agreement without an Order of the Receivership Court.

Thank you

Gaetan Alfano

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