

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff,

v.

Case No. 09-cv-3332 (MJD/FLN)

TREVOR COOK et al.,
Defendants,

R.J. ZAYED,
Receiver.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,

v.

Case No. 09-cv-3333 (MJD/FLN)

TREVOR G. COOK, et al.,
Defendants,

R.J. ZAYED,
Receiver.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,

v.

Case No. 11-cv-574 (MJD/FLN)

JASON BO-ALAN BECKMAN, et al.,
Defendants,

R.J. ZAYED,
Receiver.

**RECEIVER'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION
TO ENJOIN DISTRIBUTION OF SETTLEMENT PROCEEDS
TO THE FINRA CLAIMANTS**

I. INTRODUCTION

The FINRA Claimants admit that the "Receiver is charged with locating and preserving assets of the Receivership Defendants for distribution." *Opposition to Receiver's Motion To Enjoin Distribution Of Settlement Proceeds To The FINRA Claimants*, 11-civ-0574, Docket No. 76 ("Opp. Mem."), at 2-3. This is precisely what he seeks to do. The Receiver has determined that both Cook and Beckman Receivership entities, alone or in combination, have claims against NRP and Western for damages of potentially over \$150 million. These claims are an asset of the Receivership. The FINRA Claimants through improper self-help have sought to seize part of that asset ahead of the Receiver. Any money paid by NRP and Western to the FINRA Claimants before the Receiver's recovery would affect the Receiver's ability to recover that asset and violate the Court's Orders.

The FINRA Claimants' opposition to the Receiver's motion is predicated upon mischaracterizing the Receiver's position.¹ Contrary to the FINRA Claimants' characterization, the Receiver does not claim that the Settlement Proceeds themselves are a Receivership asset, nor does he intend to bring a damage claim on behalf of the FINRA Claimants. Rather, the Receivership has

¹ The FINRA Claimants further use terms like "disingenuous" and "no good faith" to refer to the Receiver's position. *See* Opp. Mem. at 3 and 9. The Receiver will not engage the FINRA Claimants' non-substantive remarks other than to say they are meritless.

assets in the form of an independent damage claim on behalf of certain Receivership entities, including the Beckman Receivership entity Oxford Private Client Group, LLC ("OPCG") and the Cook Receivership entity Oxford Global Advisors, LLC ("OGA") against NRP and Western. If the Settlement Proceeds are distributed to the FINRA claimants, that distribution would deplete the amount that the Receivership is able to recover on its own claims.

The Receiver's position is not merely appropriate under the Court's Orders, but mandated. *See Second Amended Order Appointing Receiver*, No. 09-cv-3333, Docket No. 68, at 2-4; *see also Order Continuing Appointment of the Temporary Receiver*, No. 09-cv-3332, Docket No. 96 at 3-5; *Order Appointing Receiver*, No. 11-cv-0574, Docket No. 10, at 2-4.

II. LEGAL ANALYSIS

A. The Receiver Seeks To Preserve A Receivership Asset

The Court's Orders explicitly froze any and all assets of the Receivership entities, including OPCG and OGA, and tasked the Receiver with preventing their dissipation. *See id.* OPCG and OGA have several viable causes of action against NRP and Western for their involvement and transgressions with respect to the Ponzi Scheme, which caused Receivership entities to lose millions of dollars. *See Receiver's Memorandum In Support of Motion To Enjoin Distribution Of Settlement Proceeds To The FINRA Claimants*, 09-cv-3333, Docket No. 776 ("Receiver's Mem."), at 2-3, 13-14. The Receiver's causes of action and resulting damage claim constitute an asset. *See, e.g., In re Ford*, 492 F.3d 1148, 1151 n.1

(10th Cir. 2007) (damage claims must be disclosed as an asset in a bankruptcy proceeding); *Casey v. Peco Foods, Inc.*, 297 B.R. 73, 76 (S.D. Miss. 2003) (same).

The distribution of the Settlement Proceeds would deplete the Receiver's asset. Neither NRP nor Western has the financial wherewithal to satisfy a full judgment against them, nor do their insurance policies provide sufficient coverage. The distribution of the Settlement Proceeds would diminish NRP's and Western's already finite capital, further reducing the Receiver's ultimate recovery. Receiver's Mem. at 14-15. Any recovery by the Receiver would further be subject to an argument by NRP and Western that it should be reduced proportionately. *Id.*

To argue otherwise, the FINRA Claimants mischaracterize the Receiver's position by contending that he claims right to the Settlement Proceeds because they themselves are a Receivership asset. (Opp. Mem. pp. 8-9.) Based on this straw man argument, they argue that the Settlement Proceeds are not a Receivership asset under the Court's Orders, meaning they are neither depleting a Receivership asset nor engaging in improper investor self-help. The FINRA Claimants' characterization is wrong, making their opposition misplaced.²

The Receivership's asset is its damage claim against NRP and Western for potentially over \$150 million; this asset falls directly within the scope of the Court's Orders. *See, e.g., Order Imposing Asset Freeze and Other Ancillary Relief*, No. 11-cv-0574, Docket No. 9, at 2-3 (freezing "any and all assets of

² If the FINRA Claimants were right, the Receiver would be seeking to seize the Settlement Proceeds as opposed to enjoining their distribution.

...Defendant Oxford PCG..."); *Order of Preliminary Injunction, Asset Freeze, and Other Ancillary Relief*, No. 09-cv-3333, Docket No. 51, at 5 ("[A]ny and all assets of ... Defendants [including OGA] are hereby frozen"). The FINRA Claimants' attempt to deplete this asset for only their benefit, and to the detriment of the other defrauded investors, is forbidden by the Court's Orders. *See, e.g., Second Amended Order Appointing Receiver*, No. 09-cv-3333, Docket No. 68, at 6-7; Docket No. 96 at 3-5; *Order Appointing Receiver*, No. 11-cv-0574, Docket No. 10, at 6-7.

The FINRA Claimants also suggest that the Receiver sanctioned their self-help through a response on December 16, 2010 to an investor question. Opp. Mem. at 10-11. This is a red-herring. The Court entered its Asset Freeze Orders long before December 16, 2010. All investors, including the FINRA claimants, were aware of those Orders. In addition, the Receiver stated that he was "not in privity to the terms of any settlements." He merely stated that "to the extent that investors recover for their losses in this Ponzi scheme in another forum, their claims to the Receiver will be reduced by the amount of their recovery." Nothing in his response could be reasonably construed as sanctioning the violation of the Court's Orders to deplete a Receivership asset.

B. The Receiver Has Standing To Assert Claims On Behalf Of Receivership Entities Against NRP and Western

The Receiver has authority to assert claims on behalf of both the Cook and Beckman Receivership entities, including OCPC and OGA, for losses sustained

due to NRP's and Western's conduct. *See Order Appointing Receiver*, No. 09-cv-0574, Docket No. 10, at 3 (the Receiver has the right to “bring such legal actions . . . he deems necessary . . . in discharging his duties as Receiver); *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Docket No. 68, at 3 (same). Further, the Receiver has legal standing to pursue such claims. *See Scholes v. Schroeder*, 56 F.3d 750, 755 (7th Cir. 1995) (concluding that a Receivership entity, once rid of the wrongdoer, is entitled to pursue assets dissipated by the wrongdoer); *see also Marion v. TDI, Inc.*, 591 F.3d 137, 148-49 (3d Cir. 2010).

To argue otherwise, the FINRA Claimants again mischaracterize the Receiver's position and create a second straw man argument. They claim that the Receiver intends to file claims on behalf of the FINRA Claimants, other investors, and third parties. The FINRA Claimants then cite a litany of cases standing for the unremarkable proposition that a receiver cannot pursue claims of investors and third parties. (Opp. Mem. at 11-15.) The FINRA Claimants' characterization of the Receiver's claims is wrong, again rendering their law and argument misplaced.

The Receiver has consistently stated that he intends to file claims on behalf of the Cook and Beckman Receivership entities, including in particular OPCG and OGA, for losses those entities sustained due to NRP's and Western's conduct. The claims are unique to the Cook and Beckman Receiverships and he alone has standing to bring them. *See Scholes*, 56 F.3d at 755; *Marion*, 591 F.3d at 148-49; *see also, Liberte Capital Group, LLC v. Capwill*, 248 Fed.Appx. 650, 2007 WL

2733335 (6th Cir. 2007)³ ("the receiver may only assert claims that could have been asserted by the corporation...").

C. The Court's Receivership Orders Justify The Receiver's Request That The Settlement Proceeds Be Enjoined From Distribution

The Receiver seeks an injunction preventing the FINRA Claimants from absconding with several million dollars to which the Receiver has priority. The Court's Orders stay investors from engaging in self-help that affect Receivership assets, including settling arbitration proceedings. *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Docket No. 68 at 6; *Order Appointing Receiver*, No. 11-cv-0574, Docket No. 10 at 6. As shown above, the FINRA Claimants' Settlement Proceeds if distributed would negatively impact the Receiver's damages claim, *i.e.*, a Receivership asset, meaning they were secured in violation of the Court's stay of investor self-help. *See id.* The only way to ensure that the Settlement Proceeds do not negatively impact a Receivership asset is to enjoin their distribution pending resolution of the Receiver's claim.

The cases cited by the FINRA Claimants to support their argument that this Court "does not have authority" to enjoin the Settlement Proceeds are inapposite. *See Opp. Mem.* at 15. They involve instances where a plaintiff is concerned that a defendant might engage in tactics to frustrate a potential money judgment. Here, the Receiver is not seeking an injunction against NRP or Western, but against the

³ This unpublished decision was provided to the Court as Exhibit E to the Declaration of Christopher A. Grgurich in Support of Opposition to Receiver's Motion to Enjoin Distribution of Settlement Proceeds to the FINRA Claimants.

distribution of Settlement Proceeds that were secured by investors in violation of the Court's Orders. Further, none of the cases cited by the FINRA Claimants involves a Receivership, instances where an asset freeze order has been issued and where investors were expressly stayed from seeking self-help, or investors who knowingly violated a court order. The cases cited by the FINRA Claimants do not control this dispute; the Court's Orders do.

D. The Receiver's Assets Include Additional Insurance Policies Covered By the FINRA Settlements

The Receiver seeks to enjoin the FINRA Claimants from pursuing additional claims under various insurance policies of NRP and Western, including policies issued by the Scottsdale Insurance Company and the Everest Insurance Company.⁴ Receiver's Mem. at 16. The policies have finite policy limits of somewhere between \$2 and \$5 million. The FINRA Claimants' attempt to seize and cash out these insurance policies is inappropriate for the same reasons set forth above in Section II.A, as the proceeds from them could be used by NRP and Western to pay off the Receiver's damage claim.

Moreover, the Court's Order explicitly froze insurance policies that cover Beckman. *Order Imposing Asset Freeze and Other Ancillary Relief*, No. 11-cv-0574, Docket No. 9, at 9 (freezing "insurance policies or proceeds" for which Beckman "is a covered person or beneficiary."). Beckman is named on at least

⁴ These policies are subsumed within the defined term "Settlement Proceeds," but are specifically addressed to coincide with the FINRA Claimant's opposition and to emphasize the Court's explicit Order freezing them.

two of the policies. *See* Receiver's Mem. at Exs. 11 and 12. Those policies are frozen; the FINRA Claimants' attempt to seize them violates the Court's Orders.

E. The FINRA Claimants Should Recover Attorneys' Fees Only After The Receiver Recovers The Settlement Proceeds

The Receiver offered that in the event he takes possession of the Settlement Proceeds he would recommend that the FINRA Claimants be reimbursed for the reasonable attorneys' fees and expenses they incurred to pursue their FINRA arbitrations. Receiver's Mem. at Ex. 13. But the FINRA Claimants now demand that they be paid immediately and in full (over \$270,000) if the Settlement Proceeds are enjoined or if any portion of the Settlement Proceeds (no matter how small) is transferred to the Receiver. Their position is unreasonable and could result in the FINRA Claimants securing additional money at the expense of the other defrauded investors.

The Receiver intends to honor his original offer, but the FINRA Claimants should only receive recompense for their reasonable attorneys' fees and expenses after the Receiver takes permanent possession of the Settlement Proceeds and is able to distribute them on a *pro rata* basis to all defrauded investors.

F. If The Receiver's Claims Against NRP And Western Are Not Successful, The Settlement Proceeds Should Remain Enjoined Pending Recovery By The Other Defrauded Investors

This is not the appropriate time to analyze the merits of the Receiver's claims against NRP and Western; however, if the Receiver's claims are ultimately not successful, the Settlement Proceeds should remain enjoined pending claims by

the defrauded investor group. Roughly 700 investors abided by the Court's Asset Freeze Orders and delayed asserting their individual claims against NRP and Western, ceding priority to the Receiver's claim. If the Receiver is ultimately unable to obtain a recovery from NRP and Western, these 700 or so investors will have an opportunity to bring their individual claims collectively and obtain a group recovery.

By contrast, the FINRA Claimants violated the Court's Orders and raced to secure a recovery for themselves to the detriment of the other defrauded investors. NRP and Western do not have sufficient capital to pay either the Receiver's full damages claims or the defrauded investor group's claims. Permitting the Settlement Proceeds to be distributed exclusively to the FINRA Claimants at any time prior to resolution of the class claims would be fundamentally unfair to those who waited their turn in accordance with the Court's Orders.

Accordingly, the Receiver requests that the Court, as a sanction for violating the Court's Orders and to ensure equitable distribution of assets, enjoin the FINRA Claimants from receiving the Settlement Proceeds until either the Receiver prevails over NRP and Western and receives full compensation or the remaining defrauded-investor class prevails and receives full compensation.

III. CONCLUSION

The FINRA Claimants violated the Court's Orders by using self-help to secure the Settlement Proceeds. They now seek permission to distribute those proceeds, which would deplete a Receivership asset, in further violation of the

Court's Orders. The end result would be an inequitable distribution of the Receiver's recovery in contravention to the spirit and purpose of the Receivership. Accordingly, the distribution of the Settlement Proceeds should be enjoined.

Dated: May 20, 2011

CARLSON, CASPERS, VANDENBURGH
& LINDQUIST

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