

Douglas A. Kelley (Kelley) to serve as their Receiver. Kelley was subsequently appointed Receiver for individual defendants Thomas Petters (Petters), Deanna Coleman, Robert White, James Wehmhoff, Larry Reynolds and Michael Catain, and various affiliated entities, by a separate order dated October 14, 2008.¹ On October 22, 2008, the Court stayed litigation against the Receivership Defendants. Under these Orders, Kelley was granted “the full power of an equity Receiver,” directed to take possession and control of the operations and assets of the receivership entities, and charged with performing all acts necessary or advisable to preserve the value of the assets of the receivership estate for the benefit of the defendants’ creditors.

This motion is brought to amend and clarify certain matters in the prior Orders and to address the scope of the Receiver’s authority in the bankruptcy proceedings

ARGUMENT

The instant receiverships were established pursuant to 18 U.S.C. §1345 and Fed. R. Civ. P. 65. Section 1345 authorizes broad injunctive relief to protect those affected by ongoing mail fraud, wire fraud or banking fraud schemes. Besides enjoining receivership defendants, 18 U.S.C. §1345(b) empowers district courts to “take such other action as is warranted to prevent a continuing or substantial injury to the United States or any other person . . . for whose protection [an anti-fraud] action is brought.” Victim restitution is a primary focus of §1345. *United States v. Payment Processing Ctr., LLC*, 439 F.Supp.2d 435, 438 (E.D.Pa. 2006). Toward that end, receivership actions under §1345 are often brought to preserve the status quo and protect innocent people while parallel criminal investigations proceed. *United States v. Payment*

¹On October 16, 2008, the Court appointed Gary Hansen receiver over defendant Frank Vennes and his related entities.

Processing Ctr., LLC, 435 F.Supp.2d 462, 464 (E.D.Pa. 2006) (citing S. Rep. No. 225, 98th Cong., 2d Sess. 401-02, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3539).

The instant receiverships are a product of the court's equity jurisdiction. Courts presiding over equity receiverships possess extremely broad power to supervise and protect receivership assets. *See, e.g., SEC v. Black*, 163 F.3d 188, 199 (3rd Cir. 1998) (noting that in dealing with Receivers vested with equitable powers, "district court has wide discretion as to how to proceed"); *FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) ("one common thread keeps emerging out of cases involving equity Receiver—that is, a district court has extremely broad discretion in supervising an equity Receiver").

The fundamental purpose of an equity receivership is to protect property for ultimate return to the proper parties. The receiver's role is to safeguard assets, preserve their value, and help facilitate an equitable property distribution. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006).

In this motion, the Receiver seeks to clarify certain matters, namely:

1. Clarifying that both the Order for Entry of Preliminary Injunction, Order Appointing Receiver, and Other Equitable Relief entered October 6, 2008 [Docket No. 12]; and the Order for Entry of Preliminary Injunction, Appointment of Receiver and Other Equitable Relief entered on October 14, 2008 [Docket No. 43]; were subsequently amended pursuant to the Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and other Equitable Relief entered October 22, 2008 [Docket No. 70].

2. Amending Section I ("Asset Freeze") of the Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief (Court Docket No. 70) to clarify the defendants whose assets are subject to the receivership.

These proposed changes are administrative in nature, and consistent with the intent of the parties and the Court as expressed in its prior Orders.

In this motion, the Receiver further seeks to address the scope of the Receiver's authority in the bankruptcy proceedings. Specifically, the Receiver seeks an Order: clarifying the defendants whose assets are subject to the receivership.

3. Amending the Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief (Court Docket No. 70), to clarify that the Receiver shall have full power to collect, receive, take and otherwise manage all assets of the Defendants and other persons or entities whose interests are now held by or under the direction, possession, custody or control of the Defendants from anyone including victims, by striking the following language from Section IV paragraph B 1:

PROVIDED, HOWEVER, the Receiver shall not attempt to collect any amount from a person if the Receiver believes the person was a victim of the mail, wire, or bank fraud scheme alleged in the Amended Complaint in this matter;

4. Further amending the Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief (Court Docket No. 70), to clarify the receiving powers and duties with respect to filing bankruptcy petitions for any of the entities to protect and preserve the assets of any of the entities, by striking the following language from Section IV paragraph B 2 c:

and acting as managing or Debtor in Possession of any of the entities so filed by the Receiver, and to appear and be heard in any bankruptcy of any of the entities not filed by the Receiver

And replacing the above language in Section IV paragraph B 2 c with the following language:

Any bankruptcy cases so commenced by the Receiver shall during their pendency be governed by and administered pursuant to the requirements of the United States Bankruptcy Code, 11 U.S.C. section 101 et seq., and the applicable Federal Rules of Bankruptcy Procedure. Notwithstanding the foregoing, any claims arising

under federal laws relating to forfeiture and restitution (1) against or to recover assets of the bankruptcy estates of such bankruptcy cases, or (2) for distribution from such bankruptcy cases, are preserved and not affected in any way by this paragraph.

These proposed revisions clarify that the Receiver shall have full power to collect, and manage all assets of the Defendants and other entities under their control regardless of whether the subject of any action is also a victim of the wrongdoing alleged against the Defendants. These proposed revisions further clarify that Chapter 11 of the U.S. Bankruptcy Code and the Federal Rules of Bankruptcy Procedure govern the bankruptcy cases filed by the Receiver, and that federal law claims relating to forfeiture and restitution are not affected by this Order. Again, these proposed revisions are consistent with the Court's intent as reflected by the prior Orders, and necessary for the full exercise of the Receiver's authority in the bankruptcy proceedings.

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that the Proposed Order be granted.

DATED: November 24, 2008.

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