UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. VEROS PARTNERS, INC., MATTHEW D. HAAB, JEFFERY B. RISINGER, VEROS FARM LOAN HOLDING LLC, TOBIN J. SENEFELD, FARMGROWCAP LLC, PINCAP LLC, Defendants, PIN FINANCIAL LLC, Relief Defendant.	)	Case No. 1:15-cv-659-JMS-MJD

MAINSOURCE BANK'S REPLY IN SUPPORT OF VEROS PARTNERS, INC.'S MOTION TO MODIFY PRELIMINARY INJUNCTION

MainSource Bank ("**MainSource**"), by counsel, for its Reply in Support of the Motion to Modify Preliminary Injunction (Doc. 91) of Veros Partners, Inc. ("**Veros**"), states as follows:

A. Introduction.

MainSource respectfully submits this Reply to respond to the arguments made by the United States Securities and Exchange Commission ("**SEC**") in its Supplemental Response (Doc. 127) relating to MainSource's perfected, first priority security interest in the assets Veros proposes to sell ("**Proposed Sale Assets**"). Most of these arguments are raised by the SEC for the first time in its Supplemental Response and, accordingly, MainSource has not had a previous

opportunity to respond to them.

B. The Proposed Sale Assets are not assets of the receivership.

The SEC's contention that the Court has the authority to alter MainSource's legal rights as secured creditor of Veros stems from the erroneous premise that the Proposed Sale Assets are part of the receivership. As Veros, and even the SEC, have previously acknowledged, they are not.

The Agreed Order Appointing Receiver entered by this Court limits the definition of "Receivership Assets"with respect to Veros to "all of the private offerings in which Defendant Veros Partners, Inc. controls investor funds." (Doc. 34, pp. 1-2). Additionally, the definition of "Receivership Defendants," as it relates to Veros, is limited to "all private offerings in which Defendant Veros Partners, Inc. controls investor funds." (Doc. 34, pp. 2). The Court took exclusive jurisdiction and possession and the Receiver was appointed for the purpose of marshaling and preserving only these assets of Veros. (Doc. 34, pp. 1-2). The SEC acknowledged in its Response to Veros' Motion to Modify Preliminary Injunction that the Proposed Sale Assets are not part of the receivership. (Doc. 97, pp. 8-9).

Notwithstanding the fact that the Proposed Sale Assets are not part of the receivership, the SEC continues to rely on cases involving assets which are the subject of equity receiverships to support its position that this Court should modify MainSource's secured claims. Contrary to the SEC's contention, MainSource is not attempting to compel this Court "to enforce its rights existing under state law by removing assets from a receivership estate" (Doc. 97, p. 5) because the Proposed Sale Assets aren't part of a receivership estate.

Because the Receiver does not control the Proposed Sale Assets, the SEC's argument that

determining the priority of MainSource's perfected security interest is premature because "the Receiver has not taken any action which would require the Court to consider whether to exercise its power of equitable subordination" (Doc. 97, p. 5) is a red herring. *See SEC v. Wealth Mgmt. LLC*, 2010 U.S. Dist. LEXIS 53117, *10-11 (E.D. Wis. April 30, 2010) (holding that an asset freeze order entered in an SEC action did not prohibit payment from an investment fund to creditors because the investment fund was not property in which the Receiver had any property interest).

Even if the Proposed Sale Assets were part of the receivership, the Court has no discretion to alter MainSource's secured creditor status. *See Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 412 (1938) ("[T]o the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution."); *SEC v. Homeland Communs. Corp*., 2010 U.S. Dist. LEXIS 57961, *22-24 (S.D. Fl. May 24, 2010) (rejecting the Receiver's argument that based on equity a secured creditor's claim should be subordinated to other trade creditors and the receivership); *See also SEC v. Wing*, 599 F.3d 1189, 1195 (10th Cir. 2010) (The appointment of a receiver does not determine any rights nor destroy any liens.).

SEC v. Wealth Management LLC, 628 F.3d 323 (7th Cir. 2010), cited by the SEC, does not support the SEC's claim that MainSource's secured status can be altered. *Wealth Management* addressed the argument made by certain **investors** that they should be given preferential treatment in the Receiver's proposed plan of distribution over the interests of **other investors**. The Seventh Circuit held that it was proper for the district court to approve the Receiver's plan of distribution providing for pro rata distribution to investors because it "avoided

the inequity of giving some investors preference even though all investors' claims were substantively the same." *Id*. at 334. Here, MainSource is not an investor with substantially similar claims to other investors. It is a secured creditor with rights under state law that continue unimpaired despite the initiation of this lawsuit by the SEC.

SEC v. Byers, 637 F. Supp. 2d 166 (S.D.N.Y. 2009) also does not support the SEC's position. In *Byers*, the Receiver's proposed distribution plan specifically contemplated that the secured creditor would be paid from its secured collateral. In fact, everyone acknowledged that the secured creditors "must be paid out of the proceeds of [their] collateral." *Id*. at 171. By contrast, the SEC in this case has refused to acknowledge that MainSource is entitled to be paid from its secured collateral, and the SEC has further attempted to obstruct the sales of the Proposed Sale Assets unless its demands for the majority of the proceeds are met.

Finally, in *United States SEC v. Quan*, 2013 U.S. Dist. LEXIS 56404 (D. Minn. April 19, 2013) cited by the SEC, the court denied a secured creditor's request to exclude secured assets from the receivership estate because they could be subject to disgorgement as ill-gotten gains. The SEC makes no such allegation with respect to Proposed Sale Assets in this case and the Proposed Sale Assets were intentionally excluded from the scope of the receivership.

Neither *Wealth Management*, *Byers* nor *Quan* support the SEC's argument that this Court may alter MainSource's secured creditor status. The Proposed Sale Assets do not represent investor assets and are not part of the receivership estate and, even if they were, MainSource's secured status remains unaffected by the filing of this action. MainSource is legally entitled to realize the value of its collateral by receiving all of the proceeds from the sale of the Proposed Sale Assets to be applied to its secured claim.

C. MainSource holds a properly perfected, first priority security interest in the Proposed Sale Assets.

In its Supplemental Response, the SEC completely ignores the relevant sections of Indiana's version of Revised Article 9 of Uniform Commercial Code in arguing that the collateral descriptions in the Commercial Security Agreements executed by Veros in favor of MainSource (collectively, "**Security Agreements**") (Doc. 95, Exs. 6-7, pp. 22-39) do not adequately identify the Proposed Sale Assets. To the contrary, the Security Agreements contain collateral descriptions which are expressly authorized under the Uniform Commercial Code.

Indiana Code Section 26-1-9.1-108(a) provides that a description of collateral reasonably identifies the collateral if it identifies the collateral by: (1) specific listing; (2) category; (3) except as otherwise provided in subsection (e),[1] a type of collateral defined in IC 26-1; (4) quantity; (5) computational or allocational formula or procedure; or (6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

The Security Agreements clearly identify the types of collateral authorized pursuant to Indiana Code Section 26-1-9.1-108(a) by specifically identifying equipment, accounts, inventory, instruments, general intangibles, investment property, chattel paper, deposit accounts, goods, documents, documents of title, fixtures, among others. (Doc. 95, Ex. 5, pp. 22-24, Ex. 6, pp. 31-33). The definitions of these types of collateral are set forth in Indiana Code Section 26-1-9.1-102, and the Security Agreements provide that they have the meaning provided for under the Uniform Commercial Code. (Doc. 95, Ex. 6, p. 23, Ex. 7. p. 32). *See* I.C. § 26-1-9.1-

[1] Subsection (e) of Indiana Code Section 26-1-9.1-108 addresses commercial tort claims and consumer transactions, which are not part of the Proposed Sale Assets.

102(2), (11), (29), (30), (33), (41), (42), (44), (47), (48) and (49).

Contrary to the SEC's contention, Revised Article 9 of the Uniform Commercial Code does not require that a security agreement contain an exact and detailed description of the collateral. Official Comment 3 to Indiana Code Section 26-1-9.1-108 provides that any requirement that a collateral description be exact and detailed has been rejected. The Indiana Comments to Indiana Code Section 26-1-9.1-108 provide that "[a] description will serve as constructive notice to third parties if it reasonably incites inquiry, and the property can be ascertained by reasonable investigation and parol inquiry." (citing *Burns v. Harris*, 66 Ind. 536 (1879)); *See also Fifth Third Bank v. Comark, Inc*., 794 N.E.2d 433, 439, (Ind. Ct. App. 2003) (holding that the collateral description does not need be specific and need only reasonably identify what is described).

Accordingly, the SEC's unsupported assertion that the collateral descriptions in the Security Agreements do not reasonably identify the goodwill and other intangible assets that are part of the Proposed Sale Assets is directly refuted by Indiana Code Section 26-1-9.1-108. All of the Proposed Sale Assets are among the types of collateral defined in Indiana Code Section 26-1-9.1-102 specifically identified in the Security Agreements.

In particular, the goodwill and non-compete agreements, which the SEC specifically argues are not covered by the Security Agreements, are general intangibles identified on page 2 of the Security Agreements. (Doc. 95, Ex. 6, p. 23, Ex. 7. p. 32). *See DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338, 345 fn. 4 (7th Cir. 2004) (citing to cases which hold that goodwill is a general intangible under Indiana's version of Article 9 of the UCC); *In re McDaniel,* 1988 Bankr. LEXIS 1428, *39-40 (Bankr. N.D. Ind. August 1, 1988)

("[T]he term 'general intangibles' brings under this Article miscellaneous types of contractual rights and other personal property which are used or may be customarily used as commercial security. Examples given are goodwill, literary rights and rights to performance, copyrights, trademarks and patents, except to the extent excluded by Section 9-104."); *In re Griffith*, 194 B.R. 262, 266 (Bankr. E.D. Okla. 1996) (holding that a covenant not to compete is a general intangible); *In re Mid-West Motors, Inc*., 82 B.R. 439, 443 (Bankr. N.D. Tex. 1988) (holding that a covenant not to compete is a general intangible).

The SEC's argument that MainSource is not properly perfected due to the timing of its Financing Statement filing is also directly contrary to Indiana Revised Article 9. In its Supplemental Response, the SEC fails to advise this Court that Indiana Code Section 26-1-9.1-502(d) provides that "[a] financing statement may be filed before a security agreement is made or a security interest otherwise attaches." A financing statement is effective for a period of five (5) years after the date of filing. Ind. Code §26-1-9.1-515(a); *See United States v. Gleaners & Farmers Co-Operative Elevator Co.*, 481 F.2d 104, 106 (7th Cir. Ind. 1973) (relying on the foregoing rules in holding that a financing statement filed in April 1967 was sufficient to perfect a security interest that was not created until March 1968).[2]

[2] Although not germane to the issue of MainSource's perfection because of Indiana Code Section 26-1-9.1-502(d), the loan made by MainSource to Veros pursuant to Loan No. 4750 was originated in December 2010 and is evidenced by a Commercial Line of Credit Agreement and Note dated December 17, 2010. Loan No. 4750 was thereafter renewed annually, with the most recent renewal being evidenced by the Commercial Line of Credit Renewal Agreement and Note dated November 18, 2014. Accordingly, the SEC's argument that MainSource did not make a loan to Veros until more than two years after MainSource's UCC Financing Statement was filed, is incorrect.

D. Conclusion.

Veros acknowledges that MainSource holds a valid first priority security interest in the Proposed Sale Assets and that MainSource's security interest in those assets is properly perfected. (Doc. 126, p. 2). The SEC's arguments regarding the validity and perfection of MainSource's security interest are unsupported by the law and should be rejected by the Court. The Court should grant Veros' Motion to Modify Preliminary Injunction and approve the proposed sales and Veros' immediate payment of the proceeds to MainSource to be applied to MainSource's secured claim.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, a copy of the foregoing *Mainsource Bank's Reply in Support of Veros Partners, Inc.'s Motion to Modify Preliminary Injunction* was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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