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, TOBEV J. SENEFELD, FARMGROWCAP LLC, PINCAP LLC, Defendants, PIN FINANCIAL LLC, Relief Defendant.	)	Case No. 15-cv-659-JMS-MJD

MAINSOURCE BANK'S RESPONSE TO VEROS PARTNERS, INC.'S MOTION TO MODIFY PRELIMINARY INJUNCTION

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

I. Introduction.

MainSource is the secured creditor of Veros. MainSource made two loans to Veros, pursuant to which Veros is currently indebted to MainSource in excess of $638,000.00. The loans are due and payable in full by November 18, 2015. Pursuant to its Motion to Modify Preliminary Injunction (the "**Motion**"), Veros seeks to sell certain assets relating to its business consulting and accounting business–which are subject to MainSource's perfected first priority

security interest–to third parties for a total sum of $305,000.00 (the "**Proposed Sale**") and to pay the proceeds to MainSource. MainSource consents to the Proposed Sale, provided it receives the sale proceeds to be applied to its secured claim.

The United States Securities and Exchange Commission (the "**SEC**") has advised Veros that it will attempt to rely on asset freezes entered by this Court to object to the Proposed Sale unless it receives a portion of the proceeds from the sale of MainSource's collateral. MainSource does not believe that the SEC disputes that MainSource holds a perfected first priority lien in the assets proposed to be sold, and MainSource has previously provided copies of the loan documents evidencing its perfected security interest to the Receiver.

The Court should permit Veros to enter into the Proposed Sale, and to pay the sale proceeds to MainSource to be applied to Veros' secured debt. By virtue of its perfected first priority security interest, MainSource's interest in the assets Veros proposes to sell is superior to the interests, if any, of all other creditors of Veros and parties to this action, including the SEC. As Veros states in its Motion, the assets proposed to be sold are unrelated to its investment business, and no investor funds or other investor assets are part of the Proposed Sale. Accordingly, the assets are not part of the receivership and are unrelated to the Veros' investment business which is the subject of this action.

The Proposed Sale is not only in the interest of MainSource as a secured creditor of Veros, but also the other creditors of Veros. Veros indicates in its Motion that the consulting client relationships it proposes to sell will likely be leaving Veros in the near future due to the adverse publicity this case has caused. Therefore, the opportunity to realize value from these client relationships may be lost if the Court prohibits the Proposed Sale. Approval of the

Proposed Sale and payment of the proceeds to MainSource will allow Veros to substantially reduce its secured debt owed to MainSource.

II. Background.

a. MainSource's loans to Veros.

MainSource made two loans to Veros pursuant to Loan No. XXXX1041 and Loan No. XXXX4750. [Affidavit of David L. Colter ("Colter Aff.") ¶ 4]. Loan No. XXXX1041 ("**Loan 1**") is most recently evidenced by a Business Loan Agreement and Commercial Promissory Note in the amount of $314,500.00 each dated February 15, 2013 ("**Note 1**"). [Colter Aff. ¶ 4, Exs. 1, 2]. Loan 1 was used by Veros to purchase business assets, including equipment, furniture and fixtures, as well as tenant improvements and moving expenses associated with its move to a new location.

Loan No. XXXX4750 ("**Loan 2**") is most recently evidenced by a Business Loan Agreement and Commercial Line of Credit Renewal Agreement and Note each dated November 18, 2014 and a Loan Modification Agreement dated March 18, 2015 ("**Note 2**"). [Colter Aff. ¶ 5, Exs. 3-5]. Pursuant to the Loan Modification Agreement, Veros' Line of Credit Limit was increased from $450,000.00 to $520,000.00 on March 18, 2015. [Colter Aff. ¶ 6].

Loan 1 and Loan 2 are secured by Commercial Security Agreements most recently dated February 15, 2013 and November 18, 2013, respectively (collectively, "**Security Agreements**"). [Colter Aff. ¶ 7, Ex. 6].[1] Pursuant to the Security Agreements, Veros granted MainSource a security interest in, among other things, all deposit accounts, equipment, accounts, inventory,

[1] The Business Loan Agreements, Note 1, Note 2, the Loan Modification Agreement and the Security Agreements are collectively referred to herein as "**Loan Documents**."

instruments, general intangibles, investment property, chattel paper and titled vehicles ("**Collateral**") as security for Loan 1 and Loan 2. [Colter Aff. ¶ 9]. The Collateral includes the business assets that Veros purchased using the proceeds from Loan 1. [Colter Aff. ¶ 9].

MainSource perfected its security interest in the Collateral by filing a UCC Financing Statement with the Indiana Secretary of State on December 22, 2010 as Document No. 201000010762544 and through control of deposit accounts of Veros. [Colter Aff. ¶ 10, Ex. 7]. *See* I.C. § 26-1-9.1-310 (setting forth the numerous types of collateral perfected by filing a UCC financing statement); I.C. § 26-1-9.1-314(a) (a security interest in deposit accounts is perfected by control); I.C. § 26-1-9.1-104 (a secured party has control of a deposit account if the secured party is the bank with which the deposit account is maintained).

As of July 31, 2015, the amount due pursuant to Loan 1is $172,105.17, plus interest, attorney's fees, expenses, late charges, prepayment penalties and other amounts that become due pursuant to the Loan Documents. As of July 31, 2015, the amount due pursuant to Loan 2 is $465,877.06, plus attorney's fees, expenses, late charges, prepayment penalties and other amounts that become due pursuant to the Loan Documents. [Colter Aff. ¶ 11]. Loan 1 and Loan 2 will become due and payable in full on November 18, 2015. [Colter Aff. ¶ 12].

b. The asset freeze orders in the Order Appointing Receiver and Preliminary Injunction Order are inconsistent.

The SEC's claims are based on Veros' alleged violation of federal securities law in connection with its provision of investment advisory services. [*See* Amended Complaint, Dkt. 57]. Specifically, the SEC alleges that Veros fraudulently raised investments in two separate farm loan offerings, pursuant to which investor funds were used to make short-term operating

loans to farmers. [Dkt. 57]. The SEC states in its Amended Complaint that it "brings this action to enjoin Defendants from raising additional **investor funds**, to prevent them from ensnaring more victims in their scheme, and to prevent the further dissipation of **investor assets**." [Dkt. 57, ¶ 6] (emphasis added).

As the SEC acknowledges in its Amended Complaint, the provision of investment advisory services is just one aspect of Veros' business. [Dkt. 57, ¶ 9]. Veros also offers business consulting, accounting and tax services to its clients. The SEC has not made any allegation that Veros engaged in any illegal or improper conduct or violated any law in connection with these aspects of its business and has not sought to enjoin Veros from continuing to provide these types of services. Instead, the sole focus of the SEC's claims is on Veros' investment business in which Veros raised investments through private offerings for farm loans.

The distinction between the aspect of Veros' business that the SEC contends violated the law (Veros' investment business) and the aspects of Veros' business that are not part of the SEC's claims (Veros' business consulting, accounting and tax advisory businesses) is made clear from the Agreed Order Appointing Receiver entered in this case. The Order Appointing Receiver limits the definition of "Receivership Assets" to "all of the private offerings in which Defendant Veros Partners, Inc. controls investor funds." [Dkt. 34]. Additionally, the definition of "Receivership Defendants" does not include the Veros entity and all its assets. Instead, it is limited to "all private offerings in which Defendant Veros Partners, Inc. controls investor funds." [Dkt. 34].

Therefore, pursuant to the Order Appointing Receiver, the Court did not appear to intend to take exclusive jurisdiction and possession of all of Veros' assets, but rather as requested by the

SEC only investor funds and investor assets. The limited scope of the Order Appointing Receiver is consistent with the claims and stated purpose of the SEC's Amended Complaint, which focus solely on the investments raised by Veros and do not encompass the other aspects of Veros' business.

Certain aspects of the Preliminary Injunction Order ("**Injunction Order**") [Dkt. 48] also are limited to the investment services offered by Veros, and exclude Veros' business consulting, accounting and tax services. The Injunction Order prohibits Veros from soliciting, accepting or depositing moneys from prospective investors in connection with any private offering of securities, but does not prohibit Veros from continuing to offer its business consulting, accounting and tax advisory services to its clients.

However, unlike the language of the asset freeze in the Order Appointing Receiver, the language of the asset freeze in the Injunction Order appears to extend well beyond investor funds and other investor assets. The Injunction Order arguably imposes a freeze on **all** assets of Veros through its general reference to all "funds and other assets of defendants." [Dkt. 48]. It is unclear whether this language is intentionally broader than the language used in the Order Appointing Receiver or whether the reference to "defendants" in the Injunction Order was intended to be consistent with the definition of "Receivership Defendants" in the Order Appointing Receiver.

c. The Proposed Sale is not related to Veros' investment business and does not involve investor funds or other investor assets.

As set forth in Veros' Motion, the assets which are the subject of the Proposed Sale are unrelated to its investment business and do not involve investor funds or other investor assets.

Rather, the assets relate to Veros' business consulting and accounting business, which are neither the subject of the SEC's Amended Complaint nor enjoined pursuant to the Injunction Order.

Despite this, the SEC has indicated that it will attempt to use the asset freezes entered in this case to prevent the Proposed Sale unless the SEC receives some portion of the sale proceeds. As set forth below, there is no legal basis for the SEC's request for a portion of the proceeds from the Proposed Sale of MainSource's Collateral and there is no legally justifiable reason why MainSource should not receive immediate payment of the proceeds to be applied to its secured claim.

III. Argument.

a. The Court should approve the Proposed Sale and immediate payment of the proceeds to MainSource.

As detailed above, the assets which are the subject of the Proposed Sale do not constitute investor funds or other investor assets. In fact, some of the assets consist of office furniture, equipment and fixtures financed by MainSource pursuant to Loan 1. Accordingly, the asset freeze contained in the Order Appointing Receiver should not preclude the sale because the assets proposed to be sold are not "Receivership Assets," as defined therein. *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).

By contrast, the asset freeze in the Injunction Order arguably imposes a freeze on **all** assets of Veros, including those assets which have no relation to Veros' investment business. To

the extent the scope of the asset freeze in the Injunction Order was intended to cover the assets which are the subject of the Proposed Sale, the freeze should be modified to allow the Proposed Sale to close and MainSource to receive the proceeds to be applied to its secured claim.

MainSource holds a perfected first priority security interest in the assets Veros proposes to sell and in the proceeds of those assets. I.C. § 26-1-9.1-315 ("a security interest attaches to any identifiable proceeds of collateral"). MainSource's secured status does not change because a Receiver has been appointed. *SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1277 (D. Utah 2009) (quoting *Marshall v. New York*, 254 U.S. 380, 385, 41 S. Ct. 143, 65 L. Ed. 315 (1920)) ("[I]t is well-established that a 'receiver appointed by a federal court takes property subject to all liens priorities or privileges existing or accruing under the laws of the State.'"); *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.).

By virtue of its first priority lien, MainSource's interest in the assets proposed to be sold is superior to that of Veros' other creditors and all parties to this action, including the SEC and the investors it represents. *See Madison Real Estate Group, LLC*, 647 F. Supp. 2d at 1277 (while recognizing that it has broad powers to carry out the purpose of the receivership, holding that the court would not put the interests of the receivership over the interests of secured creditors); *See 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).

MainSource's secured status should not be diminished or marginalized in the SEC's quest to recover funds for repayment to investors, especially because the assets which are the subject of

the Proposed Sale have no connection to Veros' investment business and do not represent investor funds. *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.").

Further, there is no legal principle which permits the Court in a federal receivership to ignore state law establishing the priority of MainSource's security interest in the name of equity. *Id*. at 413 ("[A] lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (citation omitted) or into equity receivership, and though interest will be denied the unsecured creditors if the assets are insufficient to pay all claims in full."); *see also In re Real Prop. Located at [Redacted] Jupiter Drive*, 2007 U.S. Dist. LEXIS 65275, *4 (D. Utah September 4, 2007) (holding that the court "is not aware of any court that has explicitly held that priority of liens as established by state law can be ignored simply because a receivership is in place.").

Moreover, attempting to block the Proposed Sale and opposing payment of the proceeds to MainSource also does not further any legitimate interest of the receivership and is, in fact, contrary to the self-interest of the SEC and other creditors of Veros. *See Kelleam v. Maryland Casualty Co.*, 312 U.S. 377, 381 (1941) (quoting *Michigan v. Michigan Trust Co.*, 286 U.S. 334, 345 (1932)) ("'A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself.'").

As set forth in Veros' Motion, Veros believes that the consulting clients which are the primary subject of the Proposed Sale will take their business elsewhere in the near future. The

Proposed Sale therefore presents an opportunity to realize significant value from the sale of client relationships that Veros will likely lose regardless of whether the Proposed Sale is approved. By allowing the Proposed Sale to close, the secured debt owed by Veros to MainSource, which becomes due and payable in full in just 3 ½ months, will be substantially reduced. In its Motion, Veros acknowledges that MainSource is its senior secured creditor, that the assets which are the subject of the Proposed Sale are part of MainSource's Collateral and subject to MainSource's perfected first priority security interest and that MainSource is legally entitled to the sale proceeds pursuant to law.

Although the Receiver has not taken a written position on who he believes is legally entitled to the proceeds from the Proposed Sale, a receiver owes fiduciary duties to the creditors of the receivership and "is obligated to act in the interests of the creditors and to protect their interests." *PNC Bank, N.A. v. OCMC, Inc*., 2010 U.S. Dist. LEXIS 98368, *17-19 (S.D. Ind. September 20, 2010) (quoting *KeyBank N.A. v. Shipley*, 846 N.E.2d 290, 295 (Ind. Ct. App. 2006)).

"No act on the part of the receiver can change a general claim into a preferred one, or place any creditor in a more favorable position than he occupied when the receiver was appointed. A receiver takes the res of the receivership estate subject to all existing liens, but the rights of creditors remain as they were when the receiver was appointed." *KeyBank Nat'l Ass'n v. Michael*, 737 N.E.2d 834, 850 (Ind. Ct. App. 2000) (quoting *Interstate Fin. Corp. v. Dodson*, 12 N.E.2d 989, 991 (Ind. App. 1938)). Moreover, a receiver is an officer of the court and not an arm of the SEC. *SEC v. Schooler*, 2015 U.S. Dist. LEXIS 46870, *7 (S.D. Cal. March 4, 2015). Accordingly, to the extent the Receiver believes it controls the assets Veros proposes to sell, the

Receiver owes fiduciary duties to protect and preserve MainSource's first priority security interest in those assets and the proceeds thereof.

MainSource was not named by the SEC as a party in this action and was not served with process. It therefore did not have an opportunity to challenge the entry of the orders freezing its Collateral upon which the SEC will likely rely to oppose the Motion. The SEC has not articulated any legal basis for its request for a portion of the proceeds from the sale of MainSource's Collateral. Nor is there as compelling reason for the SEC to oppose the Proposed Sale, only to allow the value of those assets to diminish. MainSource has a valid legal interest in realizing the value of its Collateral, and that interest will be violated if the Proposed Sale is prohibited and immediate payment of the proceeds to MainSource is denied. *See In re Townley*, 256 B.R. 697, 700 (D. N.J. 2000) ("The right of a secured creditor to the value of its collateral is a property right protected by the Fifth Amendment.").

WHEREFORE, MainSource respectfully requests that Veros' Motion to Modify Preliminary Injunction be granted, the Court approve the Proposed Sale, the Court approve Veros' immediate payment of the sale proceeds to MainSource to be applied to MainSource's secured claim, and for all other relief just and proper.

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By /s/ Joshua W. Casselman
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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2015, a copy of the foregoing *Mainsource Bank's Response to 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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