UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO VEROS PARTNERS, INC.'S MOTION TO MODIFY PRELIMINARY INJUNCTION

Plaintiff United States Securities and Exchange Commission (the "SEC" or "Commission") in accordance with the Court's September 8, 2015 Minute Entry [Filing No. 121] and September 16, 2015 Marginal Entry [Filing No. 125], hereby files its Supplemental Response to Veros Partners, Inc.'s Motion to Modify Preliminary Injunction [Filing No. 91].

I. Response to Receiver's Valuation Report

The SEC has reviewed a letter, dated September 14, 2015, which Blue & Co. provided to the Receiver, and which was referred to in the Receiver's Valuation Report [Filing No. 124]. The Blue & Co. letter is just over eight pages long, and generally describes the assignment from

the Receiver, the documentary and other materials reviewed, and the various methods of attempting to determine a fair market value for the assets of Veros Partners, Inc. which are the subject of the pending motion. The Blue & Co. letter also contains the conclusion, which is repeated several times, that the fair market value of those assets "is consistent with the prospective Purchase Price" offered for those assets by Trueblaze LLC ("Trueblaze") and MW Banks Consulting ("MW Banks").

However, the Blue & Co. letter itself does not reveal any of the actual revenues, or projected revenues, associated with the Veros Partners assets, let alone any information about the revenues of comparable businesses, or prices which comparable businesses have obtained from the sales of similar assets. Nor does the Blue & Co. letter contain any financial analysis which would indicate the actual multipliers or discounts applied by Blue & Co. to reach its conclusion. In fact, Blue & Co. states that it "accepted the information as provided by Veros, [Adam] Decker, and [Amber] Banks without further verification of the accuracy of such financials and forecasts."[1] Blue & Co. also appears to have considered, and applied a discount for, the uncertainty and risk created by the SEC's action filed against Veros Partners, which seem appropriate under the circumstances. However, Blue & Co. does not indicate how the impact of the SEC action compares to the other specific risks to Veros Partners noted in its letter, including the stability of skilled employees, reliance on cash flow generated by certain customers, access to working capital and the stability and the volatility of historical revenues and earnings.

[1] For example, MW Banks has agreed to pay Veros Partners only $5,000 in return for releasing Amber Banks, Mylene Egenolf, and Wendy Day York from their non-compete agreements. (*See* MW Banks Consulting, LLC Asset Purchase Agreement § 1.04(a).) That amounts to only $1,666 per person, and cannot realistically be considered the amount of personal income that each of the principals of MW Banks expect to earn from future business conducted with Veros' dental consulting clients.

The SEC has requested an opportunity to review the documents and materials which Blue & Co. reviewed, including the '[f]orecasts, as prepared by Decker and Banks, for their respective book of business including as part of the BC&T Division for the years ended December 31, 2015, December 31, 2016 and December 31, 2017." As of the date of this filing, the SEC has not received copies of those documents.

Accordingly, the SEC acknowledges that it is not in a position to dispute Blue & Co.'s statement that the proposed purchase price for the Veros Partners assets is "consistent with a fair valuation of these assets." However, the SEC contends that even if Trueblaze and MW Banks have offered the fair market value of the Veros Partners assets, the Court still should consider following undisputed factors in determining whether to grant or deny the pending motion:

- the proposed sale does not appear to be as time-sensitive as represented by Veros Partners, because the firm has lost only a few dental consulting clients since the filing of the SEC's lawsuit in April 2015;

- the proposed asset purchase agreement with Trueblaze indicates that the firm contemplates continuing to share office space with Veros Partners, so apparently there is not present need for a complete separation of the two firms;

- according to information publicly-available on the Internet, MW Banks already has begun operations, and presumably is servicing some or all of Veros Partners clients contemplated in its proposed asset purchase agreement;

- the proposed sale may force Veros Partners out of business, by depriving it of approximately $1 million in annual revenues, and precluding the company from making future payments to any creditors other than MainSource Bank;

- although Trueblaze will pay $215,000, or approximately two-thirds of the proposed purchase price, Adam Decker will receive the benefit of the entire $305,000 purchase price under his personal guaranty of the amount owed to MainSource Bank; and

- if the proposed sale is approved, without modification, none of the proceeds of this sale will ever be available mitigate the losses suffered by defrauded investors.

II. IT IS PREMATURE FOR THIS COURT TO DETERMINE WHETHER MAINSOURCE BANK HAS PRIORITY OVER VEROS PARTNERS' INVESTORS.

A. The Court Has Equitable Power to Limit the Remedies of Secured Creditors.

As an initial matter, the SEC acknowledges that in cases where it obtains a judgment and order of disgorgement against a defendant, and attempts to enforce that judgment, the prior claims of a secured creditor generally have priority over the payment of injured investors. *See, e.g., SEC v. Spongetech Delivery Systems, Inc.*, 2015 WL 1509361 at *3 (*citing FTC v. Bronson Partners LLC*, 654 F.3d 359, 372-75 (2d Cir. 2011)). However, in this case the SEC has not obtained a judgment against Veros Partners, and the motion under consideration does not require the Court to determine whether MainSource Bank has priority over the Veros Partners investors. In fact, it would be premature to do so.

"In supervising an equitable receivership, the primary job of the district court is to ensure that the proposed plan of distribution is fair and reasonable." *SEC v. Wealth Management LLC*, 628 F.3d 323, 332 (7th Cir. 2010). *See also SEC v. Enterprise Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002). When investor assets are commingled, and the recoverable assets in a receivership estate are insufficient to fully repay investors, courts routinely approve the distribution of assets on a *pro rata* basis. *SEC v. Wealth Management*, 628 F.3d at 333. Accordingly, it is well-established that courts in receivership cases have the power to equitably subordinate the claims of certain investors in order to ensure equal treatment. *Id.*

In approving a plan of distribution, a court may even, under appropriate circumstances, exercise its equitable powers in order to limit the claims or remedies of secured creditors. *See e.g., SEC v. Byers*, 637 F.Supp.2d 166, 183 (S.D.N.Y. 2009) (precluding secured creditors from

pursuing deficiency claims under approved distribution plan which already provided that secured creditors would be paid more than investors); *SEC v. Quan*, 2013 WL 1703499 at ** 4-5 (D. Minn. April 19, 2013) (determining that secured assets could be subject to disgorgement, and distributed through a plan governed by equitable rather than legal rules, because those assets were purchased with money obtained by investor fraud). But the Receiver has not taken any action which would require the Court to consider whether to exercise its power of equitable subordination, such as by submitting a distribution plan to the Court for approval.

Further, a secured creditor cannot compel a court to enforce its rights existing under state law by removing assets from a receivership estate. In *SEC v. Management Solutions, Inc.*, 2013 WL 594738 (D. Utah Feb. 15, 2013), the district court recognized its obligation to respect the status and rights of secured creditors; but the court determined that the creditor's attempt to remove certain assets from the receivership estate was premature because the Receiver had taken which required a priority determination, such as by prepaying a loan or attempting to sell property. *Id.* at *4.

Here, the SEC is not attempting to enforce a judgment in this matter to the detriment of MainSource Bank. Nor is the Receiver attempting to adopt a plan of distribution, or broker a sale of Veros Partners assets in which MainSource Bank claims a security interest. So there is no need for the Court to make a determination that MainSource Bank's claims against Veros Partners have priority over the claims of defrauded investors. Accordingly, until the Court is presented with a proposed asset purchase agreement which is agreed to by all parties, the Court has no reason to decide whether MainSource is a secured creditor whose rights and remedies under state law should be accommodated.

B. MainSource Bank Does Not Appear to Have A Perfected Security Interest in All of the Veros Partners Assets At Issue.

Even if this Court were inclined to attribute legal significance to the status of a secured creditor, the Court does not have a sufficient basis to conclude that MainSource Bank has a perfected security interest in the assets which are the subject of this motion. Veros Partners and MainSource Bank both contend that MainSource has a perfected security interest in *all* of Veros Partners' assets, including the Veros dental consulting practice assets which Veros Partners wishes to sell in connection with this motion. However, that claim does not appear to bear close examination.

Under Indiana law, which governs the relationship between Veros Partners and MainSource Bank, the applicable UCC provisions require that a security agreement "reasonably identify" the collateral subject to a security agreement. *In re Grieves*, 81 B.R. 912, 949 (Bankr. N.D. Ind. 1987). When there is no ambiguity, a court construes the intent of the parties from the express language of the written agreement; if there is ambiguity, parol evidence may be used to help the court construe the terms. *Id*. at 951. But under Indiana law contracts are construed strictly against their drafters, particularly when they are form documents, or were drafted by attorneys. *Id.* at 952. In Grieves, the bankruptcy court determined that a security agreement was ambiguous, and therefore the bank only had a security interest in specific cattle or crops identified in that agreement. *Id.* at 955-59.

The Commercial Security Agreements between MainSource Bank and Veros Partners, which are dated February 15 and November 18, 2013, each contain a general description of collateral provision, and then specific sections describing the assets in which the Bank is taking a security interest. [*See* Filing No. 95-6, at pages 1-3 and 10-12] Each agreement states that the collateral covered by the agreement is "all" of Veros' assets, including general intangibles. [*Id.*

at pages 1 and 10] However, the agreements simply do not describe the kind of assets that are described in great detail in the two asset purchase agreements which are the subject of Veros Partners' motion. MainSource was the drafter of the agreements, presumably through counsel, and the Court is required to construe the agreements against MainSource rather than in its favor.

The agreements drafted by Veros Partners are very specific that Veros is selling relationships with certain clients, the right to provide specialized professional services, goodwill, tools and trademarks, itemized equipment, documents (presumably files) associated with the dental consulting practice, a telephone number and a URL, rights under non-compete agreements, office furniture, office supplies and prepaid golf outing position and membership in a dental study group. (*See* Section 1.01 of the MW Banks Agreement; Section 1 of the Trueblaze Agreement) Some of these assets – such as office supplies and equipment -- appear to fall comfortably within the definition of "collateral" in the security agreement, while others – such as goodwill and rights under non-compete agreements -- do not.[2] This is significant because, under the UCC if a security agreement fails to describe the collateral with sufficient specificity, then no security interest is created in those assets as a matter of law. *See e.g., Lilly v. Terwilliger*, 796 P.2d 199, 202-03 (Mont. 1990) (because a sales agreement did not describe certain assets, no security agreement was created in licenses, mailing lists, trade name, covenants not to compete and goodwill).

[2] It should not be sufficient to conclude that Veros Partners acknowledges that these assets are all subject to the security interest by MainSource Bank, so it must be true. That does not appear to have been Veros Partners' position back in July, when these asset purchase agreements were signed. Neither the MW Banks Agreement, nor the Trueblaze Agreement even acknowledges that the assets being sold are subject to any lien, security interest or potential claim by MainSource Bank. In each agreement, as the "Seller," Veros Partners provides a warranty that it has the unrestricted power and authority to sell all of these assets, and that the sale would not violate the provision of any existing contract. (*See* MW Banks Agreement at Article IV; Trueblaze Agreement at Section 12(a) (d) and (e))

So it does not appear from the definitions of collateral in the Commercial Security Agreements that MainSource Bank ever obtained a security interest in the goodwill and other intangible assets which Veros is purporting to sell to Trueblaze and MW Banks. Coincidentally, these intangible assets are assigned the majority of the value under the respective asset purchase agreements. (*See* Section 1.04 of the MW Banks Agreement; Section 3 of the Trueblaze Agreement) So if the Court were to conclude that MainSource had a security interest in certain assets, but not in the Veros Partners' goodwill, then MainSource's remedy under its agreements would only be for a fraction of the value of assets being sold.

Finally, even if the Court is persuaded that MainSource has a security interest in all of the assets sold, that interest would be insufficient if it was not properly perfected. MainSource contends that its security interest in Veros Partners' assets was perfected in a UCC-1 filing which occurred on December 22, 2010 – more than two years before MainSource Bank extended to Veros Partners the two loans which form the basis for the debt owed to MainSource Bank. [Filing No. 95 at ¶¶ 3 – 10; *see also* Filing Nos. 95-7, 95-1 through 95-4] Although the UCC permits a financing statement to be filed before the execution of a document granting or creating a security interest, a court finding that a disputed interest was perfected normally has some evidence that a security interest actually exists by that date. *See In re Oak Rock Financial LLC*, 527 B.R. 105, 117 (Bankr. E.D.N.Y. 2015).

Here, the Commercial Security Agreements filed with the Court do not refer to an existing relationship, or the prior filing of a financing statement. To the contrary, both Security Agreements authorize MainSource Bank to file a financing statement, and require Veros Partners to take any future action which may be necessary to assist MainSource in making such a filing. [Filing No. 95-6 at pages 5 and 14] In addition, neither MainSource Bank nor Veros Partners

has presented this Court with any evidence that the two companies had a preexisting debtor-creditor relationship in 2010 to which the MainSource UCC-1 statement should relate back.

Accordingly, unless the Court is presented with a proposed asset purchase agreement which is agreed to by all parties, the Court has no basis to conclude that MainSource Bank has a perfected security interest in all of the assets which are the subject of that agreement.

III. ABSENT AN AGREEMENT OF THE PARTIES, VEROS PARTNERS' MOTION MUST BE DENIED AND ITS ASSETS MUST REMAIN FROZEN.

The motion before the Court is not a request by the SEC enforce a settlement or monetary judgment and sell assets in order to distribute funds to investors pursuant to a disgorgement award. Nor is this motion a request by the Receiver to liquidate Veros Partners' assets and allocate them to various classes of claimants pursuant to a plan of distribution. The only question before the Court is whether to approve Veros Partners' motion to modify the asset freeze, and sell valuable, income-generating assets associated with Veros' dental consulting practice, in order to distribute 100% of the proceeds to MainSource Bank, while the investors get nothing.

A. The Purpose of the Court's Asset Freeze Is to Benefit Veros Partners' Investors, Not the Firm's Creditors.

As noted in the SEC's initial response to Veros Partners' motion [Filing No. 97], the purpose of an asset freeze in securities fraud cases is to ensure the availability of assets to compensate defrauded investors, and pay a civil penalty, in the event the SEC prevails in this action. *SEC v. McGinn*, 2014 WL 657611 at *3 (N.D.N.Y. Feb. 21, 2014) (*citing SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *SEC v. Infinity Group Co.*, 212 F.3d 180, 197 (3d Cir. 2000)). A district court "has a duty to ensure that Defendants' assets are available to make restitution to the alleged victims." *SEC v. Dobbins*, 2004 WL 957715 at *2 (N.D. Tex.

April 14, 2004) (*citing FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988)). "The investors, on whose behalf the assets were frozen, thus possess a heightened interest in having those assets maintained without further diminution pending the outcome of the action." *SEC v. McGinn*, 2014 WL 675611 at *3 (denying motion to release assets because illegally diverted funds far exceeded the value of frozen assets).

Here, the assets were frozen on behalf of and for the benefit of the defrauded investors. The Court's asset freeze order not only protects Veros Partners' assets from diversion by the defendants, it also protects Veros Partners, and the firm's investors, from the actions of other creditors who may wish to protect themselves by foreclosing on assets subject to a security interest. Veros Partners' assets were *not* frozen for the benefit of MainSource Bank, or as an invitation to the firm's other creditors to begin enforcing their security interests to the detriment of Veros and its injured investors. Currently, Veros Partners is paying MainSource Bank several thousand dollars each month in partial satisfaction of the firm's debt to the bank. However, Veros' investors are currently being paid nothing. Their only hope for a recovery of their investments hinges on the actions of the Receiver – in managing Veros Partners' private offerings to the most successful conclusion possible -- and of the SEC – in attempting to conclude this case either by settlement or an enforceable judgment.

B. Modifying the Asset Freeze Order, and Approving the Proposed Sale, Is Not in the Best Interest of Veros Partners' Investors.

Veros Partners does not dispute that, in order to grant a motion unfreeze assets, the Court "must assess whether a modification of the Preliminary Injunction is in the best interest of the defrauded investors." *SEC v. Dobbins*, 2004 WL 957715 at *2 (*citing FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988)) (the court refused to unfreeze assets to pay business expenses amongst other expenses). District Courts have the equitable

power to preserve assets for the benefit of victims of securities fraud. *SEC v. Current Fin. Servs.*, 62 F.Supp.2d 66, 68 (D.D.C. 1999) (recognizing that asset freeze should benefit investors and declining to release frozen assets which were dwarfed by investor losses). *See also, SEC v. Forte*, 598 F.Supp.2d 689, 692 (E.D. Penn. 2009) (the court refused to unfreeze any assets because investor losses dwarfed defendants' assets).

Here, unfreezing the Veros Partners assets for a proposed sale which benefits Adam Decker, Matthew Haab and MainSource Bank cannot be considered to be in the best interests of the investors. If the Court lifts the asset freeze and allows the proposed sale to proceed, Veros will lose an important revenue stream from its dental consulting practice that can be used to compensate the investors who have suffered, and are about to suffer, losses attributable to securities fraud. In fact, the loss of this income may itself be sufficient to cause Veros Partners to close its doors and preclude it from compensating its investors for their losses.

Furthermore, under the existing asset freeze order, MainSource Bank has no ability to foreclose on Veros Partners' assets in order to reduce the amount the firm owes the Bank. None of the cases cited to this Court by Veros Partners, or by MainSource Bank, arise out of a case with similar facts, or approve a transaction similar to this case.

Finally, the Receiver has advised the Court in his Preliminary Liquidation Plan [Filing No. 90 at 9] that the potential loss to investors is approximately $8,631,808. Although the Receiver is working diligently to reduce that number as far as possible, and has had real success managing investor assets, the SEC still expects the Veros Partners investors to incur millions of dollars in losses. Veros Partners has never claimed that, if the proposed sale is allowed to proceed, the value of the firm's assets which would remain frozen would be sufficient to

compensate investors for their potential losses. So there is no way for Veros Partners to meet the standards for a sale established by previous cases.

IV. CONCLUSION

For all of the foregoing reasons, Veros Partners' motion to modify the asset freeze and sell the firm's dental consulting practice assets should be denied unless and until the parties' jointly present a request to sell these assets in a manner that would benefit Veros Partners' investors.

Dated: September 22, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2015, I served copies of ***Plaintiff's Supplemental Response to Veros Partners, Inc.'s Motion to Modify Preliminary Injunction*** on all counsel of record through the Court's ECF filing system.

/s/Robert M. Moye
Robert M. Moye