UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Case No. 09-C- 506

v.

WEALTH MANAGEMENT LLC;
JAMES PUTMAN and SIMONE FEVOLA,

Defendants, and

WML GRYPHON FUND LLC;
WML WATCH STONE PARTNERS, L.P.; WML PANTERA PARTNERS, L.P.; WML PALISADE PARTNERS, L.P.; WML L3, LLC; and WML WUETZAL PARTNERS, L.P.

Relief Defendants.

BRIEF OF DR. DAVID JANSSEN ON MOTION FOR CLARIFICATION OF FREEZE ORDER

INTRODUCTION

Dr. David Janssen is not an investor with Wealth Management, LLC. ("WM"). He is the holder of promissory notes issued by the Brown Investment Fund LP.[1] Two of the WM subfunds are limited partners of the Brown Investment Fund LP and relief defendants in this proceeding. Dr. Janssen brings this motion for clarification and modification of the May 20, 2009 Order Freezing Assets ("Freeze Order") as extended by Order of May 26, 2009. The question raised by the motion is the scope of the Freeze Order, specifically whether it

[1] Dr. Janssen holds promissory notes both as an individual and as the trustee of a 401(k) plan. This brief fefers to "Dr. Janssen" in both capacities.

applies to and restrains an entity that is not a WM subfund, but rather a limited partnership in which WM subfunds are limited partners.

FACTS

On May 20, 2009, on emergency motion of the SEC, this Court entered an Order Freezing Assets ("Freeze Order"). The Freeze Order was extended by order entered May 26, 2009. The Freeze Order, as extended, states in pertinent part, as follows:

> **IT IS HEREBY ORDERED** that, Defendant WM, and Relief Defendants the WM Funds, . . . hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of any corporate, partnership, or funds, or other properties (including money, real or personal property, securities, chose in action or property of any kind whatsoever) of Defendant WM or Relief Defendants the WM Funds currently held by them or under their control . . .
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> **IT IS FURTHER ORDERED** that this Asset Freeze shall not apply to the court-appointed Receiver in this case, Faye Feinstein. The Receiver shall have authority to direct the disbursement of funds and other assets. Financial institutions and other custodians of assets otherwise subject to this Order shall honor any requests by the Receiver for the disbursement of such assets.

This motion concerns the Brown Investment Fund LP (the "Brown Fund"). The Brown Fund is a Delaware limited partnership, governed by Del. Stats §17-1101 et seq. The Brown Fund's general partner is Wood, Hat & Silver, LLC, a Delaware limited liability company. Joseph Aaron is the managing member of WHS. The limited partners of the Brown Fund are the Palisade Fund and the Watch Stone Fund (relief defendants in this proceeding) and three other limited partners. (Bartzen Dec. ¶4).

Dr. David Janssen is a medical doctor with a practice in Oshkosh, Wisconsin. Dr. Janssen is the trustee of a 401(k) plan (the "Plan"). The Plan and Dr. Janssen each loaned money to the Brown Fund. The Brown Fund is the maker, and Janssen is the holder, of a

promissory note dated June 1, 2008, in the principal amount of $125,000.00 (the "Janssen Note"). (Bartzen Dec. Exh. 1). The Brown Fund is the maker, and the Plan is the holder, of a promissory note dated June 1, 2008, in the principal amount of $68,000.00 (the "Plan Note"). (Bartzen Dec. Exh. 2).

Both notes are fully due and payable by their terms. Janssen has made formal written demand for their payment. The Brown Fund has declined to pay the notes, although it does not dispute its obligation to pay the notes One reason it declines to pay the notes is the existence of the Freeze Order. (Depo. of J. Aaron, Bartzen Dec. ¶4). Janssen therefore seeks clarification and if necessary modification of the Freeze Order.

ARGUMENT

I. THE COURT'S JURISDICTION

This action was commenced by the Securities and Exchange Commission against Wealth Management LLC ("WM"), its majority owner James Putman ("Putman") and its former President Simone Fevola ("Fevola") as defendants, and certain subfunds of WM as "relief defendants." Jurisdiction exists under 15 U.S.C. §77t(b) and 15 U.S.C. §80b-9(d).

Upon motion of the SEC, the Court appointed a receiver for "WM and the WM Funds, its subsidiaries, successors and assigns." The Court found:

> The appointment of a receiver is necessary to: (a) preserve the status quo; (b) ascertain the rightful ownership interests in certain assets currently within the possession, custody and control of WM and the WM Funds, and the disposition of client funds; (c) prevent the further misappropriation or misuse of the property and assets held by WM and the WM Funds on behalf of their clients or investors; (d) prevent the encumbrance or disposal of property or assets rightfully belonging to WM clients and WM Funds investors; (e) provide for continuity of operation and liquidity concerning WM's services to its advisory clients with segregated accounts and administer WM's business affairs with respect to those accounts; (f) ascertain the financial viability of WM; and (g) provide and implement a plan for recovering investments on behalf of the WM Funds and liquidating all WM Fund investments,

and for the equitable distribution of WM Funds' assets to their investors. (Order Appointing Receiver, Dkt#8, ¶4).

It is well established that the court may order ancillary relief, including appointment of a receiver, under appropriate circumstances. Securities and Exchange Commission v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1105 (2d Cir.1972)("Despite the absence of explicit statutory authority, however, we repeatedly have upheld the appointment of trustees or receivers to effectuate the purposes of the federal securities laws.); Securities and Exchange Commission v. Keller Corporation, 323 F.2d 397, 403 (7th Cir. 1963)("The prima facie showing of fraud and mismanagement, absent insolvency, is enough to call into play the equitable powers of the court. . . . In such cases the appointment of a trustee-receiver becomes a necessary implementation of injunctive relief."). Dr. Janssen does not dispute, and probably lacks standing to dispute, the propriety of the Receiver's appointment.

The Brown Fund is not a defendant in this proceeding, and has not appeared as a party, creditor or interested person in this proceeding. Nothing in the record reflects any effort by the Receiver to liquidate Palisades' or Watch Stone's limited partnership interests in the Brown Fund.

As noted by the Seventh Circuit, 28 U.S.C. §1367 statutory supplemental jurisdiction incorporated ancillary jurisdiction concepts in non-diversity cases, and provides the basis for subject matter jurisdiction of actions by the receiver to recover property. Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995). In Tcherepnin v. Franz, 485 F.2d 1251, 1255-56 (7th Cir.1973), the Seventh Circuit noted the broad scope of the Court's ancillary jurisdiction:

> The ancillary jurisdiction of federal courts over actions incident to a receivership established by a federal court has long been recognized. So long as an action commenced by a court appointed receiver seeks "to accomplish the ends sought and

> directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the . . . court of the United States is concerned."

Tcherepnin v. Franz, 485 F.2d at 1255-56, quoting Pope v. Louisville, New Albany & Chicago Ry. Co., 173 U.S. 573, 577, 19 S.Ct. 500, 43 L.Ed. 814 (1899)

However, the Court's ancillary jurisdiction is not unlimited. In OILS, INC., v. Blankenship, 145 F. 2d 354 (10th Cir. 1944) the 10th Circuit described two categories of ancillary jurisdiction relating to receiverships:

> A federal court, which has taken custody and control of property in a proceeding of which it has jurisdiction, has ancillary jurisdiction of a subordinate suit or proceeding affecting such property, even though the jurisdictional facts necessary to confer jurisdiction in an independent suit do not exist. (2) A federal court, which has appointed a receiver in a proceeding of which it has jurisdiction, has jurisdiction to entertain a suit or proceeding to collect or recover assets. But a controversy cannot be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.
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> The test of whether a suit is ancillary is whether it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.

In this case, the Receiver has not filed any sot of action to determine the rights of the relief defendants in Brown Fund as against Brown Fund's other creditors. The assets of the Brown Fund are not subject to the Court's custody and control. The Receiver has simply taken the position that the Freeze Order retrains Brown Fund's general partner from paying Brown Fund's creditors, and Brown Fund's general partner has thus far honored the Receiver's position. As a result, Brown Fund's creditors, including Dr. Janssen, are stymied in their efforts to enforce their rights as creditors of the Brown Fund.

II. THE RELATIONSHIP OF THE FREEZE ORDER TO THE BROWN FUND.

The Brown Fund is a Delaware limited partnership. (Bartzen Dec. ¶4). Two relief defendants, Palisades and Watch Stone, are limited partners of the Brown Fund. (Id.). The Freeze Order states: "The Receiver shall have authority to direct the disbursement of funds and other assets. Financial institutions and other custodians of assets otherwise subject to this Order shall honor any requests by the Receiver for the disbursement of such assets." But the Brown Fund is not the "custodian" of assets to which the Order applies. The two relief defendants each own an asset: a limited partnership interest in the Brown Fund, nothing more. The language of the Freeze Order therefore does not affect the Brown Fund's assets or restrain the Brown Fund from doing business as it normally does, including paying its creditors.

The Freeze Order reaches and controls Palisade's assets and Watch Stone's assets, including those relief defendants' limited partnership interests in Brown Fund. But the Freeze Order cannot reach and does not reach the Brown Fund's assets. Brown Fund is a separate legal entity, and the limited partners do not own Brown Fund's assets. Reiter v. Greenberg, 21 N.Y.2d 388, 391, 288 N.Y.S.2d 57, 235 N.E.2d 118 (1968); Evans v. Galardi 16 Cal.3d 300, 306-307 128 Cal. Rptr. 25, 546 P.2d 313] (1976). Stepping into the shoes of Palisade and Watch Stone, the Receiver has no more rights than they did. The Receiver's position that the Freeze Order extends to assets of the Brown Fund is not supported by the language of the Freeze Order.

III. THE RECEIVER AND THE COURT CANNOT ALTER THE RIGHTS AND DUTIES OF THE LIMITED PARTNERS AND CREDITORS OF THE BROWN FUND

Since Brown Fund is a Delaware limited partnership, the rights and duties of its general partner, limited partners and creditors are defined by Delaware law. It is well established that a limited partner "has no interest in the partnership property by virtue of his status as a limited partner." Evans v. Galardi, 16 Cal.App.3d 300, 307, 128 Cal.Rptr. 25 (Cal.1976); Smith v. Bader, 458 F.Supp. 1184, 1187 (S.D.N.Y.1978)(" the limited partner has no property interest in the assets of the partnership, but only a right to share in the profits"). See also In re Granite Partners, 208 B.R. 332, 344 (Bankr. S.D. N.Y. 1997)("under the absolute priority rule, the creditors stand ahead of the investors on the receiving line; the enterprise cannot distribute profits until it satisfies its creditors' claims").

Stepping into the shoes of the relief defendants, the Receiver can own no more than what the relief defendants own: limited partnership interests. The Receiver cannot convert a limited partnership interest into a debt, or convert someone else's creditor claim into a limited partnership interest. "When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion." Newton National Bank v. Newbegin, 74 F. 135, 140 (8th Cir. 1896), cited in In re Stirling Homex Corp., 579 F.2d 206, 213 (2d Cir. 1978), cert. denied, 439 U.S. 1074, 99 S.Ct. 847, 59 L.Ed.2d 40 (1979). The reverse should be met with equal suspicion: an effort by the Receiver to put someone else in the garb of stockholder and thereby improve the Receiver's recovery. Palisades and Watch Stone are limited partners; they own only a right to the

profits of the Brown Funds. Neither the Receiver nor the Court can alter that fundamental fact.

The Brown Fund Limited Partnership Agreement expressly states that upon dissolution, assets of the partnership shall be applied first "to the payment and discharge of all of the Fund's debts and liabilities (other than those to Partners), including the establishment of any reserves [and] second, to the payment of any debts and liabilities to the Partners" with any balance to the partners as a return of capital. (Bartzen Dec. Exh. 4; Aaron Depo. Exh. 1, §13.2.1,2 (Bates No. BROWN 0060). The limited partnership agreement is a contract between the general partner and the limited partners. The Receiver cannot alter or modify the terms of that contract.

Dr. Janssen, on the other hand, is not a limited partner. He did not make the investment choice of becoming a limited partner. He chose to lend Brown Fund money, evidenced by promissory notes. He is not in the same class as Palisades and Watch Stone with respect to Brown Fund assets. He has a prior claim to the assets of the limited partnership, better than Palisades and Watch Stone, and better than the Receiver.

If the Receiver wants a court to declare that the limited partners and Dr. Janssen are to be treated pari passu, the Receiver has taken no steps to achieve that end. Dr. Janssen submits that there is no lawful basis for such a result, but at a minimum, the Receiver needs to bring some sort of action that would subject Brown Fund, the note holders and the limited partners to the proper jurisdiction of a court. The Receiver has not done that.

CONCLUSION

Dr. David Janssen respectfully requests that the Court clarify its Freeze Order.

Dated this 15th day of March, 2010.

BOARDMAN, SUHR, CURRY & FIELD LLP

/s/ James E. Bartzen

By:_____

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