

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

OFFICE OF THE ATTORNEY
GENERAL, DEPARTMENT OF
LEGAL AFFAIRS, STATE OF FLORIDA,

Plaintiff,

vs.

Case No.: 51-2010-CA-2912-WS/G

BOTFLY L.L.C., DAVID R. LEWALSKI,
and JON J. HAMMILL,

Defendants.

**MOTION TO COMPEL TURNOVER
OF RECORDS AND ASSETS OF BOTFLY, LLC**

Michael E. Moecker, as Receiver of Botfly, LLC, David R. Lewalski, and Jon J. Hammill and all other entities operated, controlled or otherwise associated with the Defendants' activities, by and through undersigned counsel, moves the Court to compel Defendant Botfly, LLC ("**Botfly**") to comply with this Court's April 14, 2010 Amended Order Appointing Receiver (the "**Order**"), and in support thereof states:

1. The Order requires Botfly to provide the Receiver with a full accounting of all funds, documents, and assets located outside of the United States.
2. Paragraph 19(b) of the Order requires, among other things, that Botfly transfer within the State of Florida all funds, documents, and assets located outside of the United States, which are titled in his name, are held by any person or entity for his benefit, or are under his direct or indirect control (the "**Foreign Assets**").

3. Further paragraph 19(d) requires that Botfly provide the Receiver and the Office of the Attorney General access to all records of the Foreign Assets by signing any and all necessary forms to permit such access.

4. Botfly has violated Paragraphs 18 and 19 the Order by refusing to provide the Receiver with a complete and accurate financial statement and an accounting of all funds, documents, and assets located outside of the United States.

5. Defendant Botfly is a Florida corporation, and Defendant David Lewalski is the manager of Botfly and the corporate custodian of the records concerning the requested information.

6. On August 10, 2010, Botfly filed a financial statement, which was signed by David Lewalski but not notarized.

7. Botfly failed to provide any documents or any financial information to the Receiver in accordance with the Court's Amended Order Appointing Receiver. Botfly answered only the basic, introductory questions on the financial statement.

8. Counsel for Botfly advised in its cover that Botfly was invoking its Fifth Amendment privilege against self-incrimination with respect to paragraph 19 of the Court's Order requiring Botfly to provide the Receiver and the Office of the Attorney General with the following: (1) a full accounting of funds, documents, and assets located outside of the United States in the name of, held for the benefit of, or under the direct or indirect control of any Defendant; (2) transfer of such funds, documents, and assets within the State of Florida; and (3) access to such funds, documents, and assets by signing any and all forms necessary to permit such access.

9. Corporations, such as Botfly, have no Fifth Amendment right to assert against the production of documents or authentication of records. *See Bellis v. United States*, 417 U.S. 85 (1974); *State v. Wellington Precious Metals, Inc.*, 510 So.2d 902 (Fla. 1987). Further, David Lewalski has no privilege against self-incrimination in the contents of Botfly's voluntarily created business records. *Wellington*, 510 So.2d at 905 (quoting *Bellis*, 417 U.S. at 90, "since no artificial organization may utilize the personal privilege against compulsory self-incrimination, . . . it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege.").

10. To allow a corporate custodian of records to assert his personal Fifth Amendment privilege would frustrate the legitimate governmental regulation of such artificial organizations. *Bellis*, 417 U.S. at 90.

11. The documents and financial information sought by the Receiver does not fit within the narrow exception reserved for cases where the act of production itself would personally incriminate Mr. Lewalski. The Receiver does not seek these documents or this financial information merely to authenticate them, to build a criminal case against Mr. Lewalski personally, or to obtain incriminating acknowledgement of Mr. Lewalski's control over these documents or this information. *See Federated Institute for Patent and Trademark Registry v. State*, 979 So.2d 1162, 1165 (Fla. 1st DCA 2008). Instead, it is the contents of the documents that the Receiver is seeking. Neither Mr. Lewalski, on behalf of Botfly, nor Botfly itself can resist the disclosure and production of such information by way of a Fifth Amendment privilege against self-incrimination. *See Delisi v. Smith*, 423 So.2d 934, 940 (Fla. 2d DCA 1982) (holding that the custodian of corporate records cannot object to their production on self-incrimination grounds even when the corporation is a small or closely held business and the records custodian

is an officer, director, or partner who might be implicated in the criminal activity by virtue of the contents of the records).

12. Further, the Receiver has demanded that Botfly provide the location of certain motor vehicles which are titled to Botfly, or were purchased with Botfly funds and have been found to constitute assets of the Botfly Receivership Estate. In response, counsel for Botfly refused to answer on the grounds of the Fifth Amendment Privilege against self-incrimination.

13. Botfly has the present ability to comply with the provisions of the Order.

WHEREFORE, Receiver respectfully requests that this Court enter an order (1) compelling Botfly to comply with the provisions of the Amended Order Appointing Receiver, (2) compelling Botfly to provide the Receiver with a complete and accurate financial statement disclosing the answers to the remaining questions on the statement, (3) awarding Receiver \$500 as reasonable attorneys' fees for having to pursue this motion, and (4) granting such other and further relief as this Court deems just and proper.

Receiver also requests that this Court enter an order compelling Botfly to comply with the Order within three (3) days of the date of this order.

Dated: Tampa, Florida
January 7, 2011

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 7th day of January, 2011 a true and correct copy of the foregoing Motion to Compel Turnover of Records and Assets of Botfly, LLC has been furnished via regular U.S. Mail to the following:

Gregory S. Slemm, Esq.
R. Scott Palmer, Esq.
Nicholas J. Weilhammer, Esq.
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