

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,
JON J. HAMMILL, and
JON J. HAMMILL, P.A.

Defendants.

**PLAINTIFF STATE OF FLORIDA'S RESPONSE AND OBJECTION TO DEFENDANT
HAMMILL'S MOTION FOR ORDER DIRECTING RECEIVER TO RELEASE FUNDS
FOR REASONABLE LIVING EXPENSES AND ATTORNEYS' FEES**

COMES NOW Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida, by and through its undersigned attorneys, and files this objection to Defendant Jon J. Hammill's Motion for Order Directing Receiver to Release Funds for Reasonable Living Expenses and Attorneys' Fees ("Motion"), and alleges as follows:

1. Having received over \$1,500,000.00 from investors through his involvement in an unregulated, unlicensed and unlawful Ponzi scheme, Hammill now seeks affirmative relief by seeking the monthly release of \$5,500.00 for, *inter alia*, his rent, cable television, and cellular phone.
2. Hammill does not contest the basis for the Temporary Injunction entered against him or the Amended Order Appointing Receiver (entered on April 14, 2010). Instead, Hammill asks that this Court construe the Amended Order Appointing Receiver to force the receiver to

provide Hammill with ill-gotten gains until the conclusion of this litigation for his comfort and legal expenses.

3. At the outset, Plaintiff State of Florida objects to Hammill's affirmative representations in his Motion, which cannot be verified, and this court should not consider any of them.

a. Hammill continues to violate this Court's orders. The State of Florida has no way to verify that the court-appointed receiver "has taken possession and control over all of Mr. Hammill's 'assets'" since he has not complied with the Order Appointing Receiver dated April 1, 2010 and Amended Order Appointing Receiver dated April 14, 2010, requiring him to cooperate, turnover assets, and complete a financial statement. *Cf.* Motion, ¶ 4. Moreover, in contrast to Hammill's representations, according to Hammill's agents he recently enjoyed out-of-state travel to Wisconsin earlier this month.

b. Hammill was deposed twice by the receiver on April 16, 2010, and again on June 10, 2010. Hammill asserted his Fifth Amendment right to avoid self-incrimination, and chose not to answer a single question about his role in Botfly, L.L.C., or the source or location of its assets. Now, Hammill asserts that he had limited authority with respect to his Ponzi scheme, and that he did not believe that he was working for a Ponzi scheme. Motion, ¶¶ 12, 14. This Court should not entertain any of Hammill's allegations: "[a] civil litigant's fifth amendment right to avoid self-incrimination may be used as a shield but not as a sword." *See Fassi v. American Fire and Cas. Co.*, 700 So.2d 51, 52 (Fla. 5th D.C.A. 1997). In addition, this Court is allowed to draw an adverse inference from the invocation of Hammill's right against self-incrimination. *See Atlas v. Atlas*, 708 So.2d 296, 299 (Fla. 4th D.C.A. 1998) (holding the trial court

could have properly drawn an adverse inference from Fifth Amendment invocation); *Waskin v. Waskin*, 452 So.2d 999 (Fla. 3d D.C.A. 1984) (upholding trial court's striking of testimony where party later invoked Fifth Amendment), *disapproved on other grounds*, *Bowen v. Bowen*, 471 So.2d 1274, 1278 (Fla. 1985).

4. Contrary to his assertions, Hammill has an opportunity to contest the State of Florida's allegations against him, but has chosen not to. Hammill knows he will not be able to contest the State of Florida's showing it has already made to this Court: that Hammill participated in an illegal Ponzi scheme, and that any funds in his name can be directly traced to Defendants' illegal activity. Prior to filing bankruptcy on February 10, 2009, Hammill received at least \$111,000.00 in illegal profits from the operations of Botfly, L.L.C. In his sworn bankruptcy petition, Hammill asserted he only had \$20,465.90 in personal property on that date. Throughout his bankruptcy and continuing to the present, Hammill has received at least \$1,447,000.00 in additional, illegal funds. Upon conclusion of the litigation, it is believed Hammill will owe over \$1,500,000. As a result, Hammill is, and will be, insolvent. He should not be entitled to enjoy a comfortable lifestyle in the interim.
5. Hammill misconstrues the purpose of this receivership. The purpose of the receivership is not to create a trust for Hammill's well-being or provide him with an income stream from his illegal profits, but to "protect" the assets from being "dissipated" by Hammill. Amended Order Appointing Receiver, first paragraph.
6. Hammill misconstrues the Amended Order Appointing Receiver. The specific provisions in the Amended Order recited by Hammill are for the maintenance and administration of lawful business affairs, not to dole out to Hammill monies from investors' savings so that he does not have to obtain lawful employment like every other resident of Florida.

7. Hammill asserts that \$5,500.00/month is required for his basic standard of living. Motion, ¶ 5. Hammill's alleged current monthly expenses are in stark contrast with his monthly expenses less than a year ago, when he received a discharge for Chapter 7 bankruptcy and alleged he had \$3,481.00 in monthly expenses.
8. Assuming equity applies to Hammill's Motion for the purpose of interpreting this Court's Amended Order Appointing Receiver, equity is unavailable to Hammill. A cardinal rule of equity is that he who comes into equity must come with clean hands; it is a self-imposed ordinance that closes the door to one tainted with inequity or bad faith relative to the matter in which he seeks relief. *See Precision Instrument v. Automotive Maintenance Machinery*, 324 U.S. 806, 814 (1945). Many of the investors in Botfly, L.L.C. have had their financial lives ruined by Hammill. Upon information and belief, many are faced with losing their homes, if they have not done so already. They are currently receiving no disbursements from Botfly, L.L.C.'s assets for their expenses.
9. Hammill's Motion contends that "[a]uthorizing payment of living expenses has been done routinely in similar cases." Motion, 5. Each case cited by Hammill for this proposition involved language in a receivership order either granting the receiver the ability to apply to pay living expenses, or specifically provided for the allowance for living expenses in the receivership order. Entitlement to living expenses was not an issue in those cases, which also involve operations that may have been legitimate, or at least have a lawful purpose to them. *See F.T.C. v. F.T.N. Promotions, Inc.*, 2008 WL 151888 (M.D. Fla) (finding that "[t]elemarketing is not an illegal enterprise, and in this case it provides employment for a significant number of people" and holding that the injunction is "without prejudice to any party who may seek a modification after the Receiver has had sufficient time to operate the

telemarketing businesses to determine whether they can be operated legally.”). Here, the Defendants’ Ponzi scheme and alleged activity in foreign currency is unlicensed and unlawful, and all of the proceeds Hammill received were ill-gotten gains from the enterprise.

10. Hammill offers caselaw for the proposition that receivers “routinely” authorize payment of attorneys’ fees. Hammill cites *SEC v. Lauer*, but *Lauer* denied the defendant’s motion for relief from an asset freeze order for repeatedly violating court orders and refusing to reveal assets’ whereabouts, just as Hammill has done:

Just as a bank robber cannot use the loot to wage the best defense money can by [sic], (internal citations omitted), so a swindler in securities markets cannot use the victims’ assets to hire counsel who will help him retain the gleanings of crime. (internal citations omitted) *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir.1993).

A similar philosophy was expressed in the *Coates* case . . . where the court found that “[a] defendant is not entitled to foot his legal bill with funds that are tainted by his fraud,” *Securities and Exchange Commission v. Coates*, 1994 WL 455558 at *3 (S.D.N.Y. Aug. 23, 1994). . . . However, at least one court has found that such a showing by the defendant would be irrelevant where the potential disgorgement order would vastly exceed the assets that had been frozen. *See SEC v. Current Financial Services*, 62 F.Supp.2d 66, 68 (D.D.C.1999) (finding that the defendant’s profit from fraud exceeded \$156,000.00 and his frozen funds only amounted to \$44,000.00 and denying a motion to unfreeze assets for attorney’s fees).

* * *

Lauer “knowingly, wilfully, intentionally and repeatedly violated” multiple Court Orders [DE 1218 at 17]. He failed to disclose numerous assets and diverted assets from the freeze in violation of the very same order of which he now seeks an equitable modification for his own benefit. . . . *Lauer*’s unclean hands have closed the door on any attempt by *Lauer* to seek relief from the Court’s equitable asset freeze order

S.E.C. v. Lauer, 445 F.Supp.2d 1362, 1365 -1367 (S.D.Fla.,2006) (citing *S.E.C. v. Dowdell*,

175 F. Supp. 2d 850, 855-56 (W.D. Va. 2001)).

11. In the alternative, if this Court is inclined to grant Hammill's Motion, the State of Florida requests that any Order granting his request only take effect once Hammill has complied with the Amended Order Appointing Receiver dated April 14, 2010, and that the receiver be allowed to use its discretion in determining reasonable expenses.

WHEREFORE, Defendant Hammill's Motion should be denied.

Respectfully submitted this 13th day of July, 2010.

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CERTIFICATE OF SERVICE

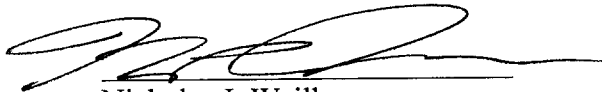
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail and electronic transmission where noted this 13th day of July, 2010.

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Jon Hammill
*Via electronic transmission per court order
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Nicholas J. Weilhammer