

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,

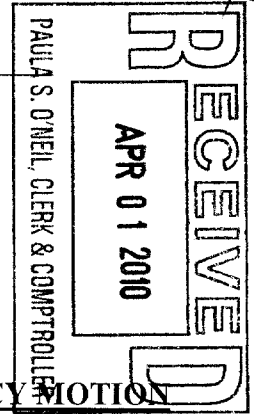
vs.

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

Defendants.

51-2010-CA-2912-WS / G

CASE NO. _____



**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION
FOR TEMPORARY INJUNCTION WITHOUT NOTICE AND FOR APPOINTMENT
OF RECEIVER**

Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida ("OAG"), by and through its undersigned attorneys, hereby files this Memorandum of Law in Support of Emergency Motion for Temporary Injunction Without Notice and for Appointment of Receiver against Defendants Botfly L.L.C. ("Botfly"), David R. Lewalski ("Lewalski"), and Jon J. Hammill ("Hammill"), and states as follows:

Introduction

Defendants Botfly, Lewalski, and Hammill orchestrated a Ponzi scheme involving more than \$23 million in investor funds by promising investors in Botfly a 10% per month return on their investments. Defendants failed to invest most of the money invested in Botfly, and instead, diverted investor money to Lewalski and Hammill's personal bank accounts or spent the money

for luxury sports cars, lavish hotel stays, and private charter jet services. Further, Defendants used new investor money in order to pay returns to existing investors.

Plaintiff filed the instant action seeking temporary injunctive relief to stop Defendants' fraudulent investment scheme and to prevent Defendants from dissipating the moneys provided by investors to Botfly, as well as other relief pursuant to the Florida Securities and Investor Protection Act ("FSIPA"), Fla. Stat. §§ 517.011 et seq. and the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201 et seq. In the instant Emergency Motion for Temporary Injunction Without Notice, Plaintiff requests this Court to enter a temporary injunction against Defendants prohibiting them from further soliciting investors and receiving funds from investors, freezing Defendants' bank accounts to protect investors' funds, prohibiting Defendants from selling or liquidating their assets including their cars obtained with investor funds, and appointing a receiver over the assets of the Defendants.

Facts

Defendants Lewalski and Hammill recruited persons to invest in Botfly and promised to pay investors a 10% per month return on their investments. (Affidavit of Claude W. Anderson III ("Anderson Aff."), ¶¶ 6-12 and Exhibit A). Lewalski and/or Hammill signed and provided to investors a "Promissory Note" when consumers invested money in Botfly. (Anderson Aff., ¶¶ 13-16 and Exhibit A). Defendant Botfly's Promissory Note contained representations that investors would receive 10% interest per month on their investments. (Anderson Aff., ¶ 16 and Exhibit A). This equates to an interest rate of 120% per year using simple interest. Defendants provided to at least one investor a statement via the internet indicating that the investor had been credited with a 10% rate of return. (Supplemental Affidavit of Claude W. Anderson III ("Supp. Anderson Aff."), ¶ 8). In the Promissory Note, Defendants claimed that the principal amount of

the investment was to be held for “investment and margin purposes only.” (Anderson Aff., ¶ 17 and Exhibit A). However, Defendants knowingly used investor funds for their own personal use, spending hundreds of thousands of dollars received from investors on the purchase of luxury cars, such as a Porsche and a Land Rover, hotel expenses, private jet charter services, and purchases at lavish retailers. (Affidavit of William T. Bivens (“Bivens Aff.”), ¶ 21).

Furthermore, Defendants actually diverted investor funds into personal accounts controlled by Lewalski and Hammill. More than \$1.1 million of investor money was paid to Hammill personally or his company Jon J. Hammill, P.A. (Bivens Aff., ¶ 21i). Lewalski made cash withdrawals of more than \$345,000 of investor money. (Bivens Aff., ¶ 21g). Much of the funds received from investors were held by Botfly in a non-interest bearing account with Bank of America. (Bivens Aff., ¶ 13). Botfly never even invested much of the money it received from investors. (Bivens Aff., ¶ 20). In fact, although investors were providing money to Botfly as early as January 2008, Botfly never invested any of the funds until at least September, 2009. (Bivens Aff., ¶ 16). Botfly apparently invested close to \$1 million of investor funds in Dukascopy, a Swiss trading company. (Bivens Aff., ¶ 21d). However, after the supposed investment in Dukascopy, two payments from Dukascopy totaling approximately \$200,000 were deposited directly into Lewalski’s personal bank account with Bank of America, and these funds were not paid to investors. (Bivens Aff., ¶ 21d).

Unsuspecting consumers have provided to Defendants more than \$23 million for investments. (Bivens Aff., ¶ 13). More than 500 persons and entities have invested in Botfly. (Bivens Aff., ¶ 13). Defendants have solicited and received money from numerous individuals, businesses, and even churches. A review of the bank records indicates that Defendants were relying upon money received from new investors in order to pay the returns to existing investors,

which is classic evidence of a Ponzi scheme. (Bivens Aff., ¶¶ 11, 16). Further, Defendants have illicitly skimmed much of investor money to themselves or have spent the money on their own personal purchases without investing the money. (Bivens Aff., ¶¶ 20, 21).

Argument

Plaintiff OAG should be granted a temporary injunction against Defendants under both the Florida Securities and Investor Protection Act and the Florida Deceptive and Unfair Trade Practices Act. Plaintiff OAG is authorized to obtain injunctive relief under FSIPA if it “has reason to believe that a person has engaged or is engaged in any act or practice constituting a violation of s. 517.275, s. 517.301, s. 517.311, or s. 517.312, or any rule or order issued under such sections.” Fla. Stat. § 517.191(5) (2009). In addition, Plaintiff is statutorily authorized to seek injunctive relief pursuant to FDUTPA, Section 501.207(3), Florida Statutes (2009).

As a result of the statutory authority to obtain a temporary injunction, Plaintiff is not bound by the standard for temporary injunctive relief set forth in Rule 1.610, Florida Rules of Civil Procedure. “[B]ecause section 501.207...expressly authorizes the Department to seek injunctive relief on behalf of the state, the Department does not have to establish irreparable harm, lack of an adequate legal remedy or public interest.” *Millennium Commun. & Fulfillment, Inc. v. Office of the AG, Dep't of Legal Affairs*, 761 So. 2d 1256, 1260 (Fla. 3d DCA 2000) (citations omitted). Indeed, “[t]he Department's sole burden at a temporary injunction hearing under FDUTPA is to establish that it has a clear legal right to a temporary injunction.” *Id.* “Where an injunction is authorized by statute, it is proper to issue such an order to restrain violations of the law if the statutory conditions are satisfied.” *U.S. v. Sene X Eleemosynary Corp., Inc.*, 479 F. Supp. 970, 981 (S.D. Fla. 1979) (citations omitted). Further, “where a statute authorizes an injunction,” the “government is not bound to prove the absence of an adequate

remedy at law” or provide “proof of irreparable harm.” *Id.* (citations omitted). In this case, Plaintiff satisfies the criteria for temporary injunctive relief under either statutory standard for injunctive relief.

I. Plaintiff Has a Substantial Likelihood of Success on the Merits

Plaintiff OAG has a strong likelihood of success on the merits of its claim for violation of the Florida Securities and Investor Protection Act, Fla. Stat. §§ 517.011 et seq. Pursuant to Fla. Stat. § 517.191(5), the OAG has sued Defendants for injunctive relief and other relief as a result of Defendants’ violations of Fla. Stat. § 517.301. Section 517.301(1), Florida Statutes, declares that it is unlawful for any person to “employ any device, scheme, or artifice to defraud” in connection with the offer or sale “of any investment or security.” Further, Section 517.301(1)(c), Florida Statutes, declares that it is unlawful for a person to “knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.”

In this case, Defendants have engaged in and are currently engaging in acts or practices that violate Section 517.301, Florida Statutes. Defendants have represented to investors that they will receive a 10% interest per month return on their investments. (Anderson Aff., ¶¶ 6-12, 16, and Exhibit A). In addition, Defendants have represented to at least one investor that he is earning 10% interest on his investment in Botfly. (Supp. Anderson Aff., ¶ 8). However, this is an unsustainable rate of return for any investment. (Bivens Aff., ¶ 6). Further, much of the investor funds are held in a non-interest bearing account at Bank of America. (Bivens Aff., ¶ 13). A review of the bank accounts of Botfly indicates that Botfly is taking money from new investors and using a portion of the new investor funds to pay returns to existing investors.

(Bivens Aff., ¶ 16). No investment return is paying for the payments received by some existing investors. (Bivens Aff., ¶ 16).

Defendants stated to at least one investor that Defendants would use money invested in Botfly for “investment or margin purposes only.” (Promissory Note, ¶ 6, attached to the Anderson Aff. as Exhibit A). However, Defendants have used investor funds for purposes other than “investment or margin purposes.” (Bivens Aff., ¶ 20). Defendants have used investor funds for personal purchases of luxury automobiles totaling at least \$616,000 including a Porsche and a Land Rover, expenses at a lavish resort hotel totaling at least \$155,000, private jet charter services totaling at least \$475,000, and purchases at lavish retailers such as Gucci, Cartier, and Hermes of Paris in the amount of at least \$244,000. (Bivens Aff., ¶ 20, 21). Additionally, Defendants have diverted more than \$1.1 million of investor funds to Hammill personally and to his company, Jon J. Hammill, P.A., and more than \$345,000 in cash withdrawals to Lewalski. (Bivens Aff., ¶ 21(g), (h)). Further, Botfly’s bank accounts where investor funds were deposited are not margin accounts. (Bivens Aff., ¶ 21(a)). Thus, Defendants have fraudulently represented to at least one investor the use of the supposed investments, thereby jeopardizing the funds provided by investors to Botfly.

Moreover, Botfly’s investment program possesses the major characteristics of a Ponzi scheme. (Bivens Aff., ¶ 11). A Ponzi scheme “is one in which funds obtained from new investors are used to satisfy interest and principal obligations due on earlier investors’ notes (and usually to line the pockets of the scheme’s perpetrators). Such a scheme requires an ever-larger circle of new investors to keep it afloat, and thus almost invariably ends in disaster.” *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 613 n. 3 (7th Cir. 1996); *see also In re Forex Fidelity Intern.*, 222 Fed. Appx. 810, 814 (11th Cir. 2007) (“[A] Ponzi scheme is a phony investment plan

in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.”) (citations omitted). Here, Defendants’ bank records indicate that Defendants used money generated from new investors in order to pay returns to existing investors. (Bivens Aff., ¶ 16). In addition, most of the investor funds received by Botfly were not even invested, which is further evidence that Defendants operated a Ponzi scheme. (Bivens Aff., ¶¶ 16, 20, 21); see, e.g., *U.S. v. Treadwell*, 593 F.3d 990, 994 n. 3 (9th Cir. 2010) (stating that “it is the absence of evidence of any investment of investor funds that makes ‘Ponzi scheme’ an apt characterization of the defendants’ fraud”) (citations omitted).

Further, Ponzi schemes typically promise high rates of return on investments. In one case involving a Ponzi scheme, the defendant “displayed a 27.4% return for 1997 and a 12.4% return for 1998.” *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 12 (S.D.N.Y. 2007). The Court concluded that “[s]uch representations are consistent with the existence of a Ponzi scheme.” *Id.* Here, Defendants have promised extraordinarily high investment returns of 10% per month, which absent compounding interest, would equate to a return of 120% per year. (Anderson Aff., ¶¶ 6-12, 16, and Exhibit A). Such a return is impossible to sustain without relying on the use of new investor funds and is thus indicative of a Ponzi scheme. (Bivens Aff., ¶¶ 6, 11, 16).

In addition, Ponzi schemes include investor funds being “skimmed off for personal use by the members of the scheme.” *U.S. v. Silvestri*, 409 F.3d 1311, 1317 (11th Cir. 2005). Here, Lewalski and Hammill have skimmed investor funds for their own use, including the purchases of luxury automobiles including a Porsche and a Land Rover, lavish hotel expenses, private jet charter services, and purchases at lavish retailers. (Bivens Aff., ¶¶ 20, 21). Accordingly, Plaintiff OAG has a substantial likelihood of success on its claims and a temporary injunction should be entered.

Additionally, Plaintiff OAG has a strong likelihood of success on the merits of its FDUTPA claim. Defendants' business activities with consumers are acts within the purview of Chapter 501, Part II, Florida Statutes (2009). The Act is to be "construed liberally" to, *inter alia*, "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2) (2009).

The Defendants are engaged in "trade or commerce," defined by the Act as "the advertising, soliciting, providing, offering or distributing...of any good or service, or any property... or thing of value." Fla Stat. § 501.203(8). Consumers are defined as "an individual; ... business; firm; association; joint venture; partnership; ... or any other group or combination." Fla. Stat. § 501.203(7). The purpose of the Act is to "protect the consuming public ... from those who engage in ... unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2). Violations of the Act may be based on violations of "any law, statute, rule, regulation, or ordinance which proscribes...unfair, deceptive, or unconscionable acts or practices." Fla. Stat. § 501.203(3)(c). As described above, Defendants' conduct is unconscionable and deceptive and violates FDUTPA and should be enjoined. Defendants have misrepresented the rate of return on the investments and that investor funds would be held for investment or margin purposes only and have concealed that they are using investor funds for personal expenses and diverting investor funds into the personal accounts of Lewalski and Hammill. (Bivens Aff. ¶¶ 6, 11, 20, 21).

In regard to the Defendants' deceptive trade practices under FDUTPA, the Court in *State v. Beeler*, discusses the defendant's continuously seeking new investors to avoid the collapse of the scheme in an ongoing course of fraud and deception. *State v. Beeler*, 530 So. 2d 932, 934

(Fla. 1988). Similarly, as of February, 2010, Defendants were continuing to receive new investor funds. The Defendants have devised an unscrupulous investment program in order to take advantage of Florida citizens and should therefore be enjoined.

Moreover, even under the traditional formula for obtaining a temporary injunction, Plaintiff meets the elements required. The four elements for a temporary injunction include: “1) the likelihood of irreparable harm; 2) the unavailability of an adequate remedy at law; 3) substantial likelihood of success on the merits; and 4) considerations of the public interest.” *Snibbe v. Napoleonic Society of America, Inc.*, 682 So. 2d 568, 570 (Fla. 2d DCA 1996) (quoting *Richard v. Behavioral Healthcare Options, Inc.*, 647 So. 2d 976, 978 (Fla. 2d DCA 1994)). “A trial court is afforded broad discretion in granting, denying, dissolving or modifying injunctions, and unless a clear abuse of discretion is demonstrated, an appellate court must not disturb the trial court's decision.” *Carricarte v. Carricarte*, 961 So. 2d 1019, 1020 (Fla. 3d DCA 2007) (citations omitted). Plaintiff has demonstrated likelihood of success on the merits above. Plaintiff will now demonstrate that it meets the other traditional elements for entry of a temporary injunction.

II. A Strong Likelihood of Irreparable Harm Exists Absent a Temporary Injunction

More than 500 persons located in Florida and throughout the United States have invested in Botfly. (Bivens Aff., ¶ 13). As of February, 2010, Botfly was still receiving money from investors. (Bivens Aff., ¶ 21(o)). An injunction is needed to stop Botfly from receiving funds from consumers and to stop Botfly from soliciting persons to invest in Botfly. Investors have provided millions of dollars to Botfly and are in danger of losing their investments if the Court does not enter an injunction to freeze the accounts and assets of Defendants to prevent the dissipation of funds and assets. Moreover, Defendants have not invested the money received

from consumers as Defendants represented to investors. (Bivens Aff., ¶¶ 20, 21). Ponzi schemes “must eventually collapse when the flow of new funds can no longer support payments required on the earlier funds invested.” *U.S. v. Treadwell*, 593 F.3d 990, 993 n. 2 (9th Cir. 2010). Once a Ponzi scheme collapses, “the investors lose their remaining investments.” *Id.* Here, an injunction is needed before the Botfly Ponzi scheme collapses to protect the funds provided by investors to Botfly.

III. No Adequate Remedy At Law Exists

A remedy at law would not be an adequate remedy in this case. Simply put, a money judgment will not stop the conduct of the Defendants or protect Florida citizens from the actions of the Defendants. An injunction is needed to stop Defendants from soliciting and receiving investments from consumers in Florida and throughout the United States. Furthermore, an injunction is needed to freeze and preserve the funds provided by investors to Botfly so that the Defendants cannot abscond with these funds and leave investors with nothing. Finally, an injunction is needed to prevent Defendants from transferring, selling, or otherwise converting assets purchased with investor funds in order to evade this action.

IV. Considerations of the Public Interest Favor Granting an Injunction

The public interest favors granting a temporary injunction against the Defendants. The public must be protected from the unscrupulous actions of the Defendants. An injunction would protect the public from the phony investment scheme devised by the Defendants and would also preserve investor funds still held by Defendants. The public has a strong interest in protections from fraudulent investment peddlers. One Court has noted that “[t]he problems of protecting the public from Ponzi schemes are ongoing: according to the Associated Press, over 150 Ponzi schemes collapsed in 2009.” *U.S. v. Treadwell*, 593 F.3d 990, 993 n. 2 (9th Cir. 2010) (citations

omitted). Thus, investors in Florida and elsewhere will have some opportunity to recoup at least a portion of their investments in Botfly if this Court enters the temporary injunction.

V. This Court Should Appoint a Receiver

Plaintiff moves for the appointment of a receiver pursuant to the statutory authority of Sections 517.191(2) and 501.207(3), Florida Statutes. Rules 1.610 and 1.620, Florida Rules of Civil Procedure, authorize the appointment of a receiver under appropriate circumstances. Florida Rule of Civil Procedure, Rule 1.620(a). (“The provisions of rule 1.610 as to notice shall apply to applications for the appointment of receivers.”) In *Insurance Management, Inc. v. McLeod*, 194 So. 2d 16, 17 (Fla. 3d DCA 1967), the Court stated that the “power to appoint a receiver is inherent in equity jurisdiction and its exercise lies in the sound discretion of the chancellor to be granted or withheld according to the facts and circumstances of the particular case.” Further, *McLeod* acknowledged that “a temporary receiver is appointed only to preserve the property and to protect the rights of all parties therein.” *Id.* at 18. As described above, the conduct of Defendants warrants the appointment of a receiver over the assets of the Defendants and the business of Botfly to protect the property and rights of investors in Botfly. *See, e.g., McAllister Hotel v. Schatzberg*, 40 So. 2d 201, 203 (Fla. 1949).

VI. Notice to Defendants of the Instant Motion Is Not Required in This Case

In the event that notice of this Motion is given to Defendants, the funds provided by consumers and other evidence of the acts alleged herein may be removed, dissipated, or transferred, prejudicing Plaintiff’s prosecution of this action and the ability to recover restitution for consumers.

[R]ule 1.610(a) requires a ‘strong and clear’ showing before a temporary injunction without notice may issue. To satisfy the Rule’s mandate of establishing why notice should not be required, a plaintiff seeking an ex parte temporary injunction must demonstrate (1) how and why the giving of notice would

accelerate or precipitate the injury or (2) that the time required to notice a hearing would actually permit the threatened irreparable injury to occur. Examples of such a showing are where notice of a hearing will prompt a defendant to ... cause unsecured assets to be liquidated in the context of a fraudulent enterprise, or precipitate the disposal of the major asset.... *Smith v. Knight*, 679 So. 2d 359, 361-362 (4th DCA 1996) (internal citations omitted).

Plaintiff has met its burden in view of the diversion of money from consumers that has been detailed in the instant Motion, Memorandum, and Affidavits. Notice to the Defendants of the relief requested by this Motion and the accompanying disclosure of the evidence that Plaintiff has uncovered will provide the Defendants opportunity to divert money, dissipate assets, and perhaps depart from Florida with money that would otherwise have been beyond their control with the granting of the requested equitable relief. The granting of the requested equitable relief will also prevent future DCA payments to the Defendants from consumers.

Pursuant to Fla. R. Civ. P. 1.610(b), Plaintiff, as an agency of the State of Florida, is not subject to the requirement of posting bond, and under the facts alleged herein, it is in the public interest to dispense with the requirements for same.

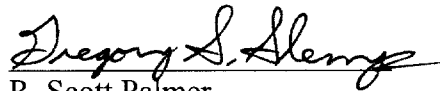
Conclusion

Plaintiff's Affidavits filed in support of this Motion clearly present prima facie evidence of violations of FSIPA and FDUTPA through the Ponzi scheme operated by Defendants. If Defendants are permitted to continue to conduct business and continue the fraudulent practices described above, the number of consumers aggrieved by these fraudulent acts and practices will increase unless equitable relief is granted by this Court. Plaintiff has no adequate remedy at law to protect the consuming public against these continuing fraudulent business practices. Irreparable harm will result to consumers without the requested relief. The irreparable harm will occur because Defendants have received and will likely continue to receive money from consumers while deceiving consumers into believing that Defendants are investing their money.

A statutorily created right to equitable relief exists in this case. Therefore, the entry of a temporary injunction and the appointment of a receiver without notice against Botfly, L.L.C., David R. Lewalski, and Jon J. Hammill is clearly in the public interest based upon the allegations contained in the Motion and instant Memorandum as supported by the Affidavits filed herewith.

IT IS HEREBY CERTIFIED that a true and correct copy of this Memorandum of Law and accompanying Affidavits will be served with the Emergency Motion for Temporary Injunction without Notice and for Appointment of Receiver.

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