

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

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

Plaintiff,

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

v.

**BOTFLY, LLC, DAVID R. LEWALSKI,
and JON J. HAMMILL,**

Defendants.

**MOTION FOR ORDER DIRECTING RECEIVER TO RELEASE FUNDS
FOR REASONABLE LIVING EXPENSES AND ATTORNEYS FEES**

Comes Now Defendant, Jon J. Hammill, by and through his undersigned counsel, and moves that the Order Appointing Receiver in this case and the Temporary Injunction be modified to permit Mr. Hammill access to funds sufficient to pay his ordinary and reasonable living expenses and an attorney's fee. In support of this motion Mr. Hammill alleges as follows:

1. On April 1, 2010, the Office of the Attorney General filed a complaint against Botfly, LLC, David R. Lewalski, and Jon J. Hammill, alleging violations of the Florida Securities and Investor Protection Act (F.S. 517.011, et seq.), and the Florida Deceptive and Unfair Trade Practices Act (F.S. 501.201, et seq.)

2. Also on April 1, 2010, this Court issued a Temporary Injunction prohibiting Mr. Hammill, individually or through any other person acting on his behalf, from "transferring, conveying, encumbering, disposing of or otherwise alienating" his personal and business bank accounts, his automobiles, and "personal property or real property" owned by him.

3. On the same date this Court entered an Order Appointing Receiver, pursuant to which Michael E. Moecker was designated as receiver over Mr. Hammill, as a Defendant herein and,

“all other entities operated, controlled, or otherwise associated with the Defendants’ activities....”

4. In conformity with the above Order the receiver has taken possession and control over all of Mr. Hammill’s “assets,” as defined in the Order to include, in part, “files, records, documents, monies, leases, mortgages, securities, investments, contracts, effects, lands, agreements, judgments, bank accounts, books of accounts, records, rents, chooses in action [sic], goods, automobiles, ... and all other property, whether real, personal or mixed....”

5. Mr. Hammill has effectively been placed in receivership by the Court’s Order. As such, it is incumbent on the Receiver to ensure for his well being and basic standard of living. Indeed, the Receivership Order requires the Receiver to pay for the items requested herein. More specifically, the Receivership Order requires the Receiver to:

- a. “make payments and disbursements from Defendants’ bank accounts, including rents, accounts payable, expenses, costs of merchandise or equipment, and payroll.” (Order Appointing Receiver, Para. 4(b)).
- b. “maintain appropriate insurance for Defendants, its premises, and/or its merchandise.” (Order Appointing Receiver, Para. 4(c)).
- c. “disburse regularly and punctually (to the extent available), all amounts hereafter due and payable as reasonable, necessary and proper operating expenses of the Receivership, subject to the terms of this Order.” (Order Appointing Receiver, Para. 4(d)).

6. By virtue of the Temporary Injunction and Order Appointing Receiver Mr. Hammill has been deprived of any and all access to and use of funds in his Wachovia accounts (\$326,527.02) and (\$4,656.39), his accounts at Grow Financial Federal Credit Union (\$5,000), E-Trade Financial (\$25,776.92), and Bank of America (\$37, 740.55). (Copies of the foregoing account statements are attached as composite Exhibit A.)

7. In addition Mr. Hammill’s car and his boat have both been seized.

8. The following is an estimated breakdown of Mr. Hammill's monthly expenses:

Rent	\$3,500
Car payment	\$580
Electric	\$220-\$300
Water	\$70
Cable	\$138
Cell phone, and data card	\$185
Health Insurance	\$188
Food & personal supplies	\$400
Lawn maintenance	\$100
Total	<u>\$5,463.00</u>

9. In addition to the above, and although he no longer has the use of his automobile, Mr. Hammill continues to pay insurance on it for \$200 monthly.

10. Mr. Hammill has retained counsel and is responsible for fees incurred and to be incurred.

11. As a result of the Temporary Injunction and the receivership Mr. Hammill, who has not yet had the opportunity to contest the validity of the allegations against him, has been left completely without financial means to pay for his daily expenses.

12. Mr. Hammill was himself an alleged investor in Botfly, LLC before being hired as an independent contractor to handle administrative duties for Mr. Lewalski in early 2009. Mr. Hammill had no signatory authority over this account, did not receive monthly statements, and had no control over distributions from the account. When Mr. Hammill was directed to make payments for the benefit of Botfly, he was directed to issue checks from a separate account. He had no authority to remove funds from this, or any, bank account without the express authorization of Mr. Lewalski. Mr. Hammill was directed to withdraw money at Mr. Lewalski's direction.

13. All money received by Mr. Hammill from Botfly, LLC was paid to him as salary.

14. At no time did Mr. Hammill believe he was working for a Ponzi scheme. On the contrary, it was Mr. Hammill's firm belief that Mr. Lewalski had devised a highly successful method of trading in foreign currencies.

15. The undersigned has communicated with the attorney for the Receiver, Karen Cox, Esq. and Assistant Attorney General, George Slemph, Esq., requesting a modification of the temporary injunction. Ms. Cox stated that the Receiver objects to this request. Mr. Slemph stated that the Attorney General objects to the request.

INCORPORATED MEMORANDUM OF LAW

Granting a temporary injunction and creating a receivership are equitable powers inherent in the Court and subject to the Court's discretionary authority to be exercised according to the particular facts and circumstances of each case *Welch v. Gray Moss Bondholders Corp.*, 128 Fla. 722, 175 So. 529 (1937); *Harvey v. City of St. Petersburg*, 138 Fla. 597, 189 So. 861(1939); *Bayview Homes Co. v. Sanders*, 102 Fla. 516, 136 So. 234 (1931); *Edenfield v. Crisp*, 186 So. 2d 545 (Fla. DCA 2d 1966); *Insurance Management Inc. v. McCleod*, 194 So. 2d 16 (Fla. DCA 3d 1966). A receiver is an officer or agent of the appointing court which must supervise and independently approve the receiver's factual and legal findings. *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 So. 502 (1909). From time to time the court may direct the receiver to take such action as may be necessary for the protection of the interests concerned. *Puma Enterprise Corp. v. Vitale*, 566 So.2d 1343 (Fla. DCA 3d 1990). In this respect a receivership is similar to an injunctive order. Neither one should be broader than is necessary to secure the rights of the injured party without injustice to the adversary. *Florida Peach Orchards, Inc. v. State*, 109 So.2d 796 (Fla. DCA 1st 1966).

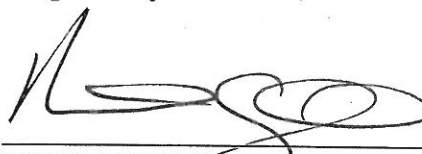
In the present case all of Mr. Hammill's assets were frozen by injunction and summarily placed in receivership, effectively removing them from his control. This was accomplished

without notice to him or a hearing. As a consequence, and without opportunity for his day in court, Mr. Hammill has been placed in a position of inability to meet his ordinary daily living expenses or pay his attorneys.

This Court is urged to exercise its equitable power by directing the receiver to release sufficient funds to permit Mr. Hammill to pay his bills. Authorizing payment of living expenses has been done routinely in similar cases. *F.T.C. v. F.T.N. Promotions, Inc.*, 2008 WL 151888 (M.D. Fla.); *United States v. Vennes*, 2008 WL 4619716 (D. Minn.); *United States v. Petters*, 2008 WL 4572517 (D. Minn.); *S.E.C. v. Pension Fund of America, LC*, 2006 WL 1104768 (S.D. Fla.); *S.E.C. v. Recile*, 10 F. 3d 1093 (5th Cir. 1993); *Aviation Supply Corp. v. S.B.I. Aerospace, Inc.*, 999 F.2d 314 (8th Cir. 1993); *Omaha Indemnity Co. v. Wining*, 949 F.2d 235 (8th cir. 1991). The same applies to payment of attorney's fees. *S.E.C. v. Lauer*, 445 F.Supp. 2d 1362, 1366 (S.D. Fla. 2006); *S.E. C. v. Ducloud Gonzalez de Castilla*, 170 F. Supp. 2d 427 (S.D.N.Y. 2001); *S.E.C. v. Daudell*, 175 F.Supp. 2d 850, 855-56 (W.D. Va. 2001).

WHEREFORE based on the foregoing arguments and authorities Defendant Jon J. Hammill prays for an Order directing the receiver to release the sum of \$5500 monthly for Mr. Hammill's reasonable living expenses and funds for a reasonable attorney's fee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to: **R. Scott Palmer, Special Counsel**, and **Gregory S. Slemp, Assistant Attorney General**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; **Karen Cox, Esquire**, Bush Ross, 1801 N. Highland Avenue, Tampa, Florida 33602; and **David R. Lewalski, Individually and as Registered Agent of Botfly, LLC**, 2515 SW 35th Place, Apartment 112, Gainesville, Florida 32608 on this 24th day of May, 2010.



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