UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
SOUTHERN DIVISION

In re SANCTUARY BELIZE LITIGATION (proposed)	No: _____
FEDERAL TRADE COMMISSION Plaintiff, v. ECOLOGICAL FOX, LLC et al. Defendants.	No.: 18-cv-3309-PJM

FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANT ANDRIS PUKKE'S MOTION TO STRIKE THE RECEIVER'S REPORT

Defendant Andris Pukke's Emergency Motion to Strike the Temporary Receiver's Report (DE 223) is without legal basis and should be denied. Not content with filing every conceivable motion to try to end this case while simultaneously "taking the Fifth" to every material question posed to him in deposition, Andris Pukke now files an "emergency" motion to strike the Temporary Receiver's Report. Pukke essentially contends: 1) the Report's contents go beyond the Receiver's mandate in this case; 2) the Report should not be used as evidence to establish any fact in contention and that the Report be hidden from the public; and 3) based on the foregoing, the parties preview any future report before it become public. Not only is there no basis to strike the Receiver's Report, there is also no basis to keep it under seal.

A. The Receiver's Report Was Ordered By the Court and Its Contents Are Well Within the Court's Mandate.

Pukke does not like the court appointed Receiver's Report. This distaste, however, is based on little more than the fact that the Report accurately recounts Pukke's varied and

voluminous misdeeds. Accurately reporting such information is the very mandate with which the Court tasked the Receiver.

The Court has power to exercise its equitable authority for interim relief, including appointing a temporary receiver. *See, e.g., FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984) (per curiam). The Court is given broad deference to define the powers of a receiver because most receiverships involve multiple parties and complex transactions. *SEC v. Hardy*, 803 F.2d 1034 (9th Cir. 1986); *see also SEC* v. *Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963) ("It is hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control of [the company's] affairs for the benefit of those shown to have been defrauded.").

Pursuant to this power, the Court appointed Robb Evans & Associates the Temporary Receiver ("Receiver") on November 7, 2018, and later continued the receivership, (DE 34) ("IPI"), providing him with "[the] full powers of an equity receiver." The Court's Order specifically provided that the Receiver shall be solely the agent of this Court. *See id.*, Section XV, at 27. The Court then directed its agent to determine whether the business operations could be "continued legally and profitably," and to report to the Court on the steps taken to implement the IPI, prevent any diminution in the value of Assets of the receivership estate, and "any other matters which the Temporary Receiver believes should be brought to the Court's attention." IPI, Sections XVI, XVII.

The Receiver then fulfilled this mandate by reporting that Pukke's operation could not continue to run legally and why that was the case. Each fact that Pukke complains of is directly relevant to this mandate. Had the Receiver provided a less fulsome report, it would have been an abdication of his Court imposed responsibilities.

B. The Receiver's Report is Admissible.

Not only is the Receiver's Report proper, it is admissible. *SEC v. Wang*, 2015 U.S. Dist. LEXIS 192319 (C.D. Cal. 2015) (receiver's report falls under business records and public

records hearsay exceptions); *see also SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 537, 614 (S.D.N.Y. 1986); *Remington Investment, Inc. v. Quintero & Martinez Co., Inc.*, 961 F. Supp. 344, 351 (D. Puerto Rico 1997); *FDIC v. Staudinger*, 797 F.2d. 908, 910 (10th Cir. 1986). Records attached to the Report are also admissible. *See FDIC v. Selaiden Builders, Inc.*, 973 F.2d 1249, 1254 fn.12 (5th Cir. 1992). Apart from the Report itself, Pukke complains it is somehow improper that the Receiver drew conclusions from the facts. Those conclusions, however, are also fully admissible. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) ("[P]ortions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report."); *see also*, *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984). "[T]he admissibility of a public record specified in the rule is assumed as a matter of course, unless there are sufficient negative factors to indicate a lack of trustworthiness." *Kennedy v. Joy Techs., Inc.*, 269 Fed. Appx. 302, 310 (4th Cir. 2008). Therefore, "the party opposing the admission of such a report bears the burden of establishing its unreliability." *Id*.

The Court must assess reliability by turning to several factors. Most notably, when the trustworthiness of such an investigative report has been challenged, a court should assess and weigh factors such as: (1) the timeliness of the investigation; (2) the special skill or experience of the investigators; and (3) any possible motivation problems. *Ellis*, 745 F.2d at 300-01. The Fourth Circuit also identified other factors that may, in proper circumstances, be appropriate to such an evidentiary assessment, including "unreliability, inadequate investigation, inadequate foundation for conclusions, [and] invasion of the jury's province." *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993). Here, Pukke cannot overcome the strong presumption of admissibility. The Receiver is a neutral agent of the Court itself. That very type of position creates, not undermines, credibility. Moreover, the Receiver conducted a timely

investigation according to the Court's own schedule. Importantly, he is motivated by no other purpose than to serve the Court, which, in turn, is solely motivated by getting to the truth.

To the extent Pukke complains that the Report is prejudicial, that claim is premised on the fact that Report recounts truthful information that is bad for him, not true legal prejudice (*i.e.*, that the Report would appeal to the Court's emotion or otherwise undermine the Court's ability to form a reasoned opinion). *See Schultz v. Butcher*, 24 F.3d 626, 631 (4th Cir. 1994) ("Rule 403, however, is concerned only with 'unfair' prejudice. That is, the possibility that the evidence will excite the jury to make a decision on the basis of a factor unrelated to the issues properly before it."). Because courts are more than capable of sorting out prejudicial material, inadmissibility based on prejudice is simply inapplicable in a bench trial. *Id.*, at 632.

Finally, Pukke cries foul arguing that admission of the Receiver's report will prevent him from cross-examining the Receiver. Those crocodile tears, however, are unavailing. *See Distaff*, 984 F.2d at 112 ("inability of the defense to cross-examine the author on the conclusions in the report is not a reason for exclusion."). Furthermore, the FTC has no objection to Pukke calling the Receiver at the hearing, and cross-examining the Receiver if he likes.

C. The Parties Need Not Pre-Screen Future Reports.

Pukke makes a false insinuation, if not outright accusation, claiming that the FTC drafted, wrote, or edited the content of the Receiver's Report. The FTC did not. Like the defendants, the FTC did not have access to the Receiver's Report until it was filed. The Receiver is the neutral agent of the Court. The Court does not need the parties interposed between it and its own agent.

D. There is No Basis to Seal the Receiver's Report.

Although the FTC understands why the Court temporarily sealed the Receiver's Report pending the outcome of this motion, there is no basis for the Receiver's Report to remain under seal. This is a public proceeding. The public, including the former and current clients of the Receivership Entities, have a right to know what the Receiver has done to discharge his duties,

what he has concluded regarding the business, and how and why he plans to operate the business moving forward. That Pukke finds the conclusions and determinations of an independent agent of the Court to be troubling to his case is no basis to seal them. *Doe v. Public Citizen*, 749 F.3d 246, 266, 269 (4th Cir. 2014) (discussing the strong presumption that all documents be public, noting the exceptions are very limited, and identifying no exceptions applicable to Receiver's Report); *id.* at 269 (claimed reputational harms are not a basis to seal).

For the foregoing reasons, Pukke's attempt to strike the Receiver's Report must be rejected and the Receiver's Report should be placed back on the public record.

Dated: February 28, 2019

Respectfully Submitted,

/s/ Benjamin J. Theisman

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Certificate of Service

I, Benjamin J. Theisman, hereby certify that on February 28, 2019, I served the foregoing FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANT ANRIS PUKKE'S EMERGENCY MOTION TO STRIKE THE TEMPORARY RECEIVER'S REPORT, and all related documents through ECF and otherwise by email to the following people and entities:

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