
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff

vs.

MERRILL SCOTT & ASSOCIATES, LTD.,
et al.,

Defendants.

ORDER REGARDING
SEPTEMBER 20, 2006 HEARING

2:02 CV 39

This matter came before the court for a status conference on September 20, 2006. The purpose of the conference was to identify outstanding issues and to outline a schedule for the resolution of those issues. After hearing from counsel participating in the status conference, the court now enters the following order that will govern further proceedings in this matter. The court notes that some of the dates discussed during the status conference have been modified, as outlined below, due to conflicts with the court's calendar.

ORDER

1. The court strikes the final pretrial conference, currently set for October 2, 2006.
2. The court strikes the October 23, 2006 trial date. Both the final pretrial conference and the trial date will be reset if necessary. The court strikes those dates due to the ongoing settlement discussions between Plaintiff Securities and

Exchange Commission and Defendant Patrick Brody, as well as the possibility that matters involving Defendant Michael Licopantis can be resolved without a trial.

3. The court sets a status conference for November 22, 2006, at 10:00 a.m. to discuss the status of the SEC's possible settlement with Mr. Brody and to reset a trial date if necessary.
4. The court strikes the September 28, 2006 hearing regarding the appropriate monetary penalty to be imposed upon Mr. Licopantis. (See Plf.'s Mot. for Imposition of Civil Monetary Penalty Against Def. Michael G. Licopantis (dkt. #697). That hearing is reset for November 3, 2006, at 2:00 p.m.
5. Currently, there are several lawsuits related to this case that have been assigned separate case numbers. It is the position of the SEC and the Receiver that those suits are ancillary to this case and that the issues raised in those cases should be resolved as part of this suit.

The court now orders that any party participating in a lawsuit that has been assigned a separate civil number who feels that the claims being litigated in such a case should not be resolved as a part of this lawsuit has until October 4, 2006, to file an objection with the court. Such objections must contain legal authority supporting the proposition that the objecting party is entitled to proceed on his or

her claims in a separate suit. The SEC and/or the Receiver is similarly invited to submit a memorandum supporting its position that separate suits should not provide the mechanism for the resolution of claims that are arguably ancillary to this proceeding.

6. All matters involving Thomas Shelton Powers, M.D., including both Dr. Powers's objection to the SEC's decision to classify him as an "insider" for the purposes of the Proposed Plan of Partial Distribution and Dr. Powers's dispute with the Receiver over the ownership of various assets, will be addressed at an evidentiary hearing¹ scheduled for November 2 and November 3, 2006, beginning each day at 8:45 a.m.

At the September 20, 2006 status conference, counsel for Dr. Powers indicated that he has prepared a motion for summary judgment addressing the question of whether Dr. Powers can be fairly characterized as an "insider" for the purposes of the SEC's Proposed Plan of Partial Distribution. The court orders that Dr. Powers file that motion no later than October 20, 2006. A responsive memorandum from the SEC must be filed no later than October 30, 2006. All affidavits and other evidence submitted in support of the parties' respective positions must be attached to their memoranda.

¹In December, the court will hear argument on various objections to the SEC's Proposed Plan of Partial Distribution. During the evidentiary hearing involving Dr. Powers, the court will determine if additional argument on Dr. Powers's objection to the SEC's distribution plan will be necessary. If so, the court will hear that additional argument at the same time that other objections to the plan are addressed.

The court directs Dr. Powers and the Receiver to file simultaneous briefs outlining their respective positions regarding the appropriateness of the Receiver claiming certain assets--that are also claimed by Dr. Powers--as part of the receivership estate. Those briefs must be received by the court no later than October 26, 2006. All affidavits and other evidence submitted in support of the parties' respective positions must be attached to their memoranda.

When addressing both Dr. Powers's status as an "insider" and his claim that the Receiver is not entitled to claim certain assets as part of the receivership estate, the court will consider affidavits and other evidence submitted by the parties in support of their respective positions. Individuals that provide testimony through affidavit must be made available during the evidentiary hearing to enable the opposing side to cross examine any witnesses.

The court notes that Thomas Mynar has filed an objection to the SEC's Proposed Plan of Partial Distribution and that Mr. Mynar's interests will possibly be affected by the manner in which the issues involving Dr. Powers are resolved. Accordingly, if Mr. Mynar wishes to participate in the briefing of the issues involving Dr. Powers and in the evidentiary hearing on November 2 and November 3, 2006, he may do so, provided that any materials he desires to submit are received by the court no later than October 30, 2006.

Similarly, Jonezen Enterprize, a lender to Dr. Powers and a participant in the suit designated Broadbent v. Powers, 2:05 CV 375, is invited to participate under the same conditions applicable to Mr. Mynar.

7. Jeffrey Bermant has initiated a lawsuit against the Receiver, Bermant v. Broadbent, 2:05 CV 466. In that suit, both Mr. Bermant and the Receiver have filed cross-motions for summary judgment. The court will hear oral argument on the cross-motions for summary judgment on October 17, 2006, at 3:00 p.m. The court notes that setting the hearing at that time will compress the briefing schedule. Accordingly, memoranda submitted in response to the respective summary judgment motions must be received by the court no later than October 15, 2006.

Should it appear through the course of briefing and argument that material facts are in dispute, the court will set aside time on October 21, 2006, to hold an evidentiary hearing.

8. Richard Gerber and the Receiver previously brought to the court's attention a dispute concerning whether the Receiver can properly claim ownership of certain assets. That dispute remains unresolved. The court orders the Receiver to file a motion and accompanying memorandum requesting resolution of this issue. The motion and memorandum in support must be received by the court no later than October 25, 2006. Any responsive materials submitted by Mr. Gerber must be received no later than November 14, 2006. The court will hold a hearing on the motion on November 20, 2006, at 3:30 p.m. Should it appear through the course of briefing and argument that material facts are in dispute, the court will schedule an evidentiary hearing.

9. Another dispute involving assets claimed by the receivership estate involves Greg and Portia Seely and their company, Advantage Software. The Receiver previously filed a motion requesting that the court determine the rightful owner of the assets. Based on the discussion at the September 20, 2006 status conference, it appears that discovery is ongoing in this matter, but should be completed in the near future. The court terminates the previous motion filed by the Receiver (dkt. #671) and directs the Receiver to file a new motion requesting the same relief. The parties are further ordered to submit simultaneous briefs outlining their respective positions no later than November 22, 2006. All affidavits and other evidentiary material must be submitted at the time the memoranda are filed. The court will hold an evidentiary hearing on this matter on December 7 and December 8, 2006, beginning at 8:45 a.m. each day. The parties must make available for cross-examination any individual who submitted an affidavit.

10. Multiple parties have filed various objections to the SEC's Proposed Plan of Partial Distribution. The court has set aside two days, December 11 and December 12, 2006, to hear argument on the objections to the Proposed Plan of Partial Distribution. The court orders the SEC to prepare a suggested schedule outlining the order of argument for those two days. The SEC is directed to submit that proposed schedule to the court no later than October 10, 2006.

Should any individual who filed an objection to the Proposed Plan of Partial Distribution wish to file supplemental materials in support of an objection,

such supplemental materials must be received by the court no later than October 20, 2006. The SEC may file a reply to any submitted supplemental materials no later than November 10, 2006.

SO ORDERED this 25th day of September, 2006.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

TENA CAMPBELL
United States District Judge