

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND)	
EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
vs.)	1:05-cv-1102-JDT-TAB
)	
)	
ALANAR, INC., et al.,)	
)	
Defendant,)	
)	
and)	
)	
CHURMEN'S INVESTMENT)	
CORPORATION, et al.,)	
)	
Defendant.)	

ENTRY ON MOTION TO REMOVE INDENTURE TRUSTEE (DOC. NO. 152)¹

The Receiver has moved to have Southern Michigan Bank & Trust (“SMBT”) removed as indenture trustee for all bond issuances in this litigation for which it is currently serving as trustee. SMBT has filed a response brief, but does not oppose the motion. The Receiver has filed a reply, so the motion is ripe for ruling.

Background

On July 26, 2005, the United States Securities and Exchange Commission filed a complaint alleging that the Defendants misused funds from the sale of church bonds

¹ This Entry is a matter of public record and will be made available on the court’s web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

and units of bond funds and misrepresented the bond funds' rates of return. It is alleged that the Defendants engaged in an unlawful "affinity" scheme by which they defrauded bondholders and other investors of \$120 million through the church bond issuances and \$50 million through the sale of bond fund units.

Also on July 26, the court entered an Order of Permanent Injunction and Other Relief against the Defendants, which among other things, enjoined them from violating the anti-fraud provisions of the federal securities laws and freezing the assets of Alanar, Inc., the Reeves Defendants and the six Relief Defendants controlled by the Reeves (the "July 26 Order"). That order also appointed Bradley W. Skolnik of Stewart & Irwin, P.C., as an independent monitor with the mandate to "protect the interests of the Bondholders and the Bond Fund investors, to the extent permitted by law." (Order of Permanent Injunction & Other Relief, 7/26/2005, ¶ IX.A.)² The court gave the Monitor approval authority over all facets of the operations of Alanar, the Bond Funds, the non-defendant bond funds, the Paying Agents, and the Relief Defendants.

On November 18, 2005, the SEC moved the court to convert the monitorship to a receivership to maximize investor recovery in this case. The court ultimately granted the SEC's motion on December 20, 2005, when it entered its Order Granting Plaintiff Securities and Exchange Commission's Motion to Convert Monitorship to Receivership ("the Receivership Order"), thus converting the monitorship to a receivership. The court

² This provision, however, is no longer in effect. The order converting the monitorship to receivership vacated the paragraph of the July 26 Order containing this language. (See Am. Order Granting Pl. SEC's Mot. Convert Monitorship to Receivership 2, ¶ II.)

appointed Bradley W. Skolnik the receiver of Alanar, the Defendant Bond Funds, the Non-Defendant Bond Funds, the Paying Agents and the Relief Defendants (collectively the "Receiver Defendants").

On that same day, SMBT filed a separate action against Guardian under Cause No. 1:05-cv-01880-JDT-TAB (the "SMBT action"). SMBT filed an amended complaint, and Guardian moved to dismiss and enforce the stay order in that action.

The Receivership Order was amended by court order on January 24, 2006, to add the Receiver's designees as authorized signatories for the Receiver Defendants' accounts.

On March 13, 2006, SMBT moved to intervene in this action "for the purpose of obtaining documents and records held by Guardian" in order for SMBT to fulfill its contractual duties to the bondholders of the church bond offerings for which SMBT acts as indenture trustee.

After a hearing in the SMBT action, on March 27, 2006, the court granted the motion to enforce stay order, thus staying that action until the decision on SMBT's motion to intervene in this action.

The Receivership Order was again modified on March 27, 2006, when further prohibitions were added. The Receivership Order, as amended, granted the Receiver the full powers of an equity receiver. The Order states in pertinent part:

1. The Receiver shall have the following powers and duties to fulfill his obligations:

a. Oversee all aspects of the operations of the Receiver Defendants with full powers of an equity receiver, including, but not limited to, full power over all funds, assets, . . . and other property belonging to or in the possession of or control of the Receiver Defendants, and any of their subsidiaries or affiliates.

b. Have access to and collect and take custody, control, possession and charge of all funds, assets, . . . and other property belonging to or in the possession or control of the Receiver Defendants, and any of their subsidiaries or affiliates, with full power to sue, foreclose, marshal, sell, liquidate, collect, receive, and take possession of such property.

(Receivership Order, 2-3, ¶ III.1.a & b.)

The Receivership Order, as amended, prohibits all investors and all others acting on their behalf from interfering with the Receiver's powers and duties as follows:

12. All investors, creditors, and other persons, and all others acting on behalf of any such investor, creditor or other persons . . . are stayed from the following without first having obtained the permission of the Receiver:

a. Commencing, prosecuting, continuing or enforcing or executing any suit or proceeding against the entities in receivership, judgment or order obtained against the Receiver Defendants' property, except that such actions may be filed to toll any statute of limitations;

b. Using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property owned by or in the possession of the Receiver Defendants, or the Receiver, wherever situated;

c. Attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage, indebtedness, security agreement or other agreement with the Receiver Defendants, or any entity controlled by them; and

d. Doing any act or thing whatsoever to interfere with the taking control, possession, or management, by the Receiver of the Receiver

Defendants' property and assets owned, controlled, or in the possession of the Receiver, or to in any way interfere with or harass the Receiver, or to interfere in any manner with the exclusive jurisdiction of this Court over the Receiver Defendants' property, including communicating about the effect of the Receivership with investors, creditors and any other persons who may be indebted to assets, funds, accounts or other properties controlled by the Receiver, or who may claim to be entitled to assets, funds, accounts or other properties controlled by the Receiver.

(Order Modifying Receivership Order, 3/27/06.)

SMBT has acknowledged that: "absent consent from the Receiver [the Receivership Order] prohibits SMBT from pursuing collection efforts on the bonds and . . . prohibits SMBT from contacting the churches or investors. The responsibility for pursuing collection on the bond offerings and the obligations under the trust indentures has therefore shifted to the Receiver instead of SMBT." (SMBT's Reply Br. Supp. Mot. Intervene 1-2.) SMBT therefore no longer sought intervention for the purpose of obtaining documents, but only to "(a) file an appearance in this proceeding and obtain copies of pleadings; and (b) file motions and responses to pleadings that other parties may file when issues arises that affect SMBT or the bondholders it represents." (*Id.* at 2.)

SMBT contends that its obligations as indenture trustee are triggered when it has notice of default "at which point SMBT has a duty to take steps to protect the interests of the issuance's Bondholders." (SMBT's Br. Supp. Mot. Intervene 4). The Trust Indenture provides that "[i]n case an event of Default has occurred and is continuing of which the Trustee has actual knowledge, the Trustee shall be entitled to, but shall not be obligated to, exercise such of the rights and powers vested in it by this Indenture. . .

.” (SMBT’s Br. Supp. Mot. Intervene, Ex. 1, § 701.) The Trust Indenture further provides as to the Trustee’s rights that: “[t]he Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request or direction of any of the Bondholders pursuant to this Indenture, unless such Bondholders shall have offered to the Trustee reasonable security or indemnity” (*Id.*, § 703(e)). There is no indication that any of the Bondholders have requested SMBT to exercise its rights or powers or that such Bondholders have offered SMBT any security or indemnity.

The Trust Indenture provides for the removal of the Trustee as follows:

If at any time the Trustee shall fail to have authority to act as a Trustee under applicable laws or the Trustee shall become incapable of acting . . . then the . . . the Bondholders holding at least 10% of the Outstanding Bonds, may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

(SMBT’s Br. Supp. Mot. Intervene, Trust Indenture 12-13, § 706). The Receiver states that the Bond Funds currently hold at least ten per cent (10%) of the bonds issued by certain churches for which SMBT serves as indenture trustee. (Receiver’s Mot. Remove Indenture Trustee ¶ 21). He also states that these bond issuers represent the majority of the bond issuances for which SMBT serves as indenture trustee. (*Id.* ¶ 22.)

On June 27, 2006, the court granted the motion to intervene of a committee of bond investors who invested in the church bonds offered and sold by Alanar and granted SMBT’s motion to intervene. The court’s entry explicitly defines the scope of intervention allowed:

The Bondholders are permitted to intervene for the following purposes: (1) to file appearances in this proceeding and obtain copies of pleadings, and (2) to file motions and responses to pleadings that other parties may file when issues arise that affect them. SMBT is permitted to intervene solely to address the motion for its removal as indenture trustee (Docket No. 152) for the present.

(Entry Granting Mots. Intervene 13.)³

Discussion

The Receiver asks the court to remove SMBT as indenture trustee for the bond issuances pending the appointment of a successor trustee. He asserts that given the Receivership, “there is no immediate need to appoint a successor trustee at this time” and he “is preparing a proposal that will be presented to the Court which contemplates the appointment of a successor trustee/paying agent for all bond issuances, including those for which SMBT currently serves as indenture trustee.” (Receiver’s Mot. Remove Indenture Trustee ¶ 23.) According to the Receiver, SMBT’s removal will avoid the inefficiencies and duplication sought to be avoided by the Receivership and will enable him “to act more efficiently, more cost-effectively, and with less interference.” (*Id.* ¶ 30.)⁴

³ The Bondholders were allowed to intervene for essentially the same purposes for which SMBT sought intervention.

⁴ The Receiver states that he has “been forced to expend time and resources to respond to SMBT’s various litigation efforts” and “has been hindered in his efforts by continually responding to correspondence, information demands, and attempts to impose conditions on his actions by SMBT,” resulting in the expenditure of time and limited resources and duplication of efforts and all “to address one entity purporting to act on behalf of a fraction of the investors and bond issuances involved in this matter.” (*Id.* ¶ 27.)

SMBT does not oppose the motion to remove it as indenture trustee. Its position is that “[t]he effect of the March 27 order is that the responsibility of communicating with bondholders and pursuing collection of the 49 bond offers falls upon the Receiver.” (SMBT’s Resp. 5.) The Receivership Order, as amended, prohibits SMBT from undertaking any collection efforts on the bond offerings. That Order also prohibits SMBT from contacting or communicating with the churches or bondholders, absent the Receiver’s consent. Thus, as SMBT concedes, “[a]s a practical matter, SMBT no longer has the ability to take any actions as indenture trustee” (*Id.*) SMBT requests that if the court grants the Receiver’s motion, then it require the Receiver to give prompt written notice of SMBT’s removal to “all parties in interest,” including issuing churches and bondholders. It further requests that the form of the notice be agreed upon between it and the Receiver. SMBT claims that any removal should be without prejudice to the rights, benefits, and protections provided it under existing agreements, including the right to be paid for its fees and expenses and its indemnification rights.

The court agrees that in light of the terms of the Receivership Order, as amended, SMBT is incapable of acting as Trustee. Thus, where the Receiver holds 10% of the Outstanding Bonds, Section 706 is applicable and SMBT should be removed as indenture trustee.

For the bond offerings for which the Receiver does not hold at least 10% of the Outstanding Bonds, the Receiver appeals to the court’s equitable powers. Federal courts have broad equitable powers to shape equitable remedies to the necessities of particular cases, especially in SEC actions. See *SEC v. Hardy*, 803 F.2d 1034, 1037

(9th Cir. 1986); *SEC v. Wencke*, 622 F.2d 1363, 1371 (9th Cir. 1980). In this case, it appears that SMBT's removal as Indenture Trustee would promote efficiencies and avoid unnecessary duplication of effort and expenditure of resources by SMBT and the Receiver. Furthermore, under the Receivership Order, as modified, SMBT is basically hamstrung to act as Indenture Trustee. All of these considerations counsel in favor of removing SMBT as Indenture Trustee for all bond issuances for which it currently serves in such capacity at issue in this litigation.

The Trust Indenture provides for the appointment of a successor trustee and further provides that the removal of the present trustee becomes effective upon such appointment—a safeguard for the bondholders. The Receiver, however, does not seek appointment of a successor trustee at this time. He indicates that he anticipates submitting a plan to the court for approval that will provide for a successor trustee/paying agent/bond servicing agent for most if not all bond issuances. (Reply Supp. Mot. Remove Indenture Trustee 7.)

A receiver is an officer of the court entrusted with the administration of the property and assets of the entity in receivership. See *Atl. Trust Co. v. Chapman*, 208 U.S. 360, 370-71 (1908); *Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994). The court that appoints the receiver determines the scope of the receiver's authority; a receiver acts under the direction and control of the court. See *Atl. Trust Co.*, 208 U.S. 371; *Farmers' Loan & Trust Co. v. Chi. & A. Ry. Co.*, 42 F. 6, 10 (C.C.D. Ind. 1889). And a receiver "is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it." *Atl.*

Trust Co., 208 U.S. at 371. Consistent with these principles, the Receiver represents that he will carry out the duties of the indenture trustee under the court's authority until a successor trustee is named under a court approved plan.

Relief Requested by SMBT

SMBT asks that if the court determines that removal is proper, then the order removing SMBT include the following:

1. That any and all existing or future obligations and duties of SMBT arising from or related to SMBT's role as indenture trustee in any bond offerings for which Alanar served as underwriter and/or Guardian served as agent shall be and hereby are terminated and released as of the date hereof, including under any and all trust indentures, bond service agent agreements, indemnification agreements, mortgages, security agreements, financing statements, escrow agreements, account control agreements and all other documents related to or executed by SMBT, Guardian, Alanar, the bond issuers and/or the bondholders.
2. That SMBT's removal as indenture trustee shall not prejudice or impair the rights, benefits and protections provided to SMBT under existing agreements as they may pertain to SMBT's former role as indenture trustee or services performed by SMBT prior to or in connection with the removal, including without limitation (a) SMBT's right to be paid for its fees and expenses, (b) SMBT's indemnification rights, and (c) all other rights, benefits and protections afforded to SMBT under any and all trust indentures, bond service agent agreements, indemnification agreements, mortgages, security agreements, financing statements, escrow agreements, account control agreements and all other documents related to or executed by Guardian, Alanar, the bond issuers and/or the bondholders. For purposes of clarification and avoidance of any doubt, SMBT's removal shall not prejudice or impair its rights to seek and obtain indemnification and payment for its fees and expenses from the receivership estate, the bond issuers, the bondholders or other parties.
3. That the Receiver shall give prompt written notice of SMBT's removal to all parties in interest, including without limitation all bond issuers and bondholders. The written notice shall be in a form to be mutually agreed upon by the Receiver and SMBT.

(SMBT's Resp. 10-11.)

The Receiver does not object to the requested relief, with the exception and clarifications noted below. First, the Receiver correctly states that termination of SMBT's duties and obligations should be prospective only—commencing on the date of SMBT's removal. The Receiver asks that the order removing SMBT also indicate that it does *not* release SMBT for actions taken prior to its removal, including any previously incurred obligations. Second, the Receiver does not object to SMBT's ability to seek any rights, benefits, and protections it claims to have following its removal, but asserts that the order should also provide that “the Receiver is free to oppose any claims made by SMBT against the Receivership Estate.” (Reply Supp. Mot. Remove Indenture Trustee 10.) Further, the Receiver agrees that prompt notification of SMBT's removal is appropriate; indeed, it is contemplated by the trust indentures. However, the Receiver's position is that SMBT's agreement in the form of the notice is unnecessary. Finally, the Receiver requests the court's order removing SMBT set forth the “parties in interest”. (*Id.* at 11.)

The Receiver is correct that the termination of SMBT's duties and obligations would be prospective only, that is, from the date of SMBT's removal as indenture trustee. The order will so indicate. The order also will indicate that it does *not* release SMBT for actions taken prior to its removal, including any previously incurred obligations. In addition, the order will state that SMBT is not prejudiced from pursuing its rights, if any, under the existing agreements and that the Receiver may oppose any claims made by SMBT against the Receivership Estate.

Therefore, the court's order removing SMBT as indenture trustee will provide for the relief SMBT requested, as modified by the additional language underlined:

1. That any and all existing and future obligations and duties of SMBT arising from or related to SMBT's role as indenture trustee in any bond offerings for which Alanar served as underwriter and/or Guardian served as agent shall be and hereby are terminated and released as of the date hereof, including under any and all trust indentures, bond service agent agreements, indemnification agreements, mortgages, security agreements, financing statements, escrow agreements, account control agreements and all other documents related to or executed by SMBT, Guardian, Alanar, the bond issuers and/or the bondholders. This termination of SMBT's obligations and duties is prospective only. This order does not release SMBT for actions taken prior to its removal, including any previously incurred obligations.

2. That SMBT's removal as indenture trustee shall not prejudice or impair the rights, benefits and protections, if any, provided to SMBT under existing agreements as they may pertain to SMBT's former role as indenture trustee or services performed by SMBT prior to or in connection with the removal, including without limitation (a) SMBT's right, if any, to be paid for its fees and expenses, (b) SMBT's indemnification rights, if any, and (c) all other rights, benefits and protections afforded to SMBT under any and all trust indentures, bond service agent agreements, indemnification agreements, mortgages, security agreements, financing statements, escrow agreements, account control agreements and all other documents related to or executed by Guardian, Alanar, the bond issuers and/or the bondholders. For purposes of clarification and avoidance of any doubt, SMBT's removal shall not prejudice or impair its rights, if any, to seek and obtain indemnification and payment for its fees and expenses from the receivership estate, the bond issuers, the bondholders or other parties. The Receiver may oppose any claims made by SMBT against the Receivership Estate.

3. That the Receiver shall give prompt written notice of SMBT's removal to all parties in interest, including without limitation all bond issuers and bondholders. The written notice shall be in a form prepared by the Receiver and approved by the court.

The court anticipates entering the order removing SMBT as indenture trustee once the Receiver has submitted a proposed form of notice of SMBT's removal and said form has been approved by the court.

As for the request that the "parties in interest" entitled to notification be set forth in the court's order removing SMBT, these parties would include all bond issuers and bondholders. It is unclear to the court whether the Receiver requests further specificity in identifying the parties entitled to notification. This matter may be addressed at the upcoming pretrial conference before Magistrate Judge Tim A. Baker, at which time the Receiver can indicate whether he seeks further specificity, and, if so, he and SMBT can state who should be considered the "parties in interest". In addition, if appropriate, the Magistrate Judge may set a deadline for the Receiver's submission of a plan for the court's approval which plan will provide for a successor trustee/paying agent/bond servicing agent for the bond issuances.

Conclusion

For the foregoing reasons, the Receiver's Motion to Remove Indenture Trustee (Doc. No. 152) will be **GRANTED**. A separate order removing SMBT as indenture trustee from all bond issuances for which it currently serves in such capacity at issue in this litigation will be issued in due course.

By prior order Magistrate Judge Tim A. Baker set this cause for a pretrial conference on November 13, 2006. The identities of the "parties in interest" to be notified of SMBT's removal as indenture trustee and the deadline for submission of the

Receiver's proposed plan for a successor trustee/paying agent/bond servicing agent may be addressed at that conference.

ALL OF WHICH IS ENTERED this 6th day of November 2006.



John Daniel Tinder, Judge
United States District Court

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