IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BENJAMIN DANIEL DEHAAN and LIGHTHOUSE FINANCIAL PARTNERS, LLC,

Defendants.

Civil Action File No. 1:12-CV-1996- TWT

S. GREGORY HAYS, Receiver for LIGHTHOUSE FINANCIAL PARTNERS, LLC,

Plaintiff,

v.

PAGE PERRY, LLC, ESTATE OF J. BOYD PAGE, ALAN R. PERRY, JR., J. STEVEN PARKER, ROBERT D. TERRY, and DANIEL I. MacINTYRE,

Defendants.

Ancillary Proceeding File No. 1:13-cv-3925-TWT

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION FOR RULE 11 SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL

In response to Plaintiff's Motion for Reconsideration ("MFR"), Defendants accused Plaintiff and Plaintiff's counsel of additional Rule 11 violations. (*See,* Defendants' Response in Opposition to MFR, p. 8, fn. 3). Accordingly, Plaintiff and Plaintiff's counsel seek leave to file this Supplemental Response to address Defendants' renewed allegations regarding Rule 11 Sanctions, as follows:

1. **The Order appointing the Receiver in this case contains a limitation of liability provision that applies to Plaintiff and Plaintiff's counsel.**

S. Gregory Hays ("Hays") was appointed as Receiver (the "Receiver") for Lighthouse Financial Partners, LLC ("Lighthouse") pursuant to Order of this Court dated July 2, 2012 (the "Appointment Order"). The Appointment Order directed the Receiver to pursue all available claims on behalf of Lighthouse for the benefit of the investors and creditors of Lighthouse (the "Receiver Estate"). (*See,* Appointment Order, ¶ III.C.). In addition, the Appointment Order expressly limits any liability of Plaintiff and Plaintiff's counsel to acts of gross negligence or intentional misconduct:

> [E]xcept for an act of **gross negligence or intentional misconduct, the Receiver and all persons and entities engaged or employed by the Receiver shall not be liable for any loss or damage** incurred by the Defendants, or any other person, by reason of any act performed or omitted to be performed by them **in connection with the discharge of their duties and responsibilities in this matter.**

(Appointment Order, ¶ XXII) (Emphasis added). As set forth below, Plaintiff and Plaintiff's counsel have never engaged in any intentional misconduct or gross negligence, but at all times acted in good faith, within the scope of their duties and responsibilities under the Appointment Order.

Indeed, based on the authority and direction set forth in the Appointment Order, the Receiver, who is not himself an attorney, caused the Receiver Estate to employ general counsel and accountants (the "Professionals") who assisted the Receiver in conducting a thorough investigation of (1) the conduct and records of Lighthouse (and related parties); and (2) the various suits, actions and claims that could be pursued for the benefit of the Receiver Estate. (Affidavit of S. Gregory Hays, ¶ 3). Specifically, the Receiver and the Professionals reviewed the books and records of Lighthouse, which were voluminous but incomplete (and in certain instances unreliable). (Hays Affi., ¶ 4). In addition, the Receiver and the Professionals also interviewed numerous third parties, employees, investors, and creditors of Lighthouse. (*Id.*) As part of this effort, the Professionals also conducted a thorough interview of Benjamin DeHaan ("DeHaan"). (*Id.*)

Based on the results and extensive findings of the Professionals, the Receiver sought the advice of experienced securities litigation counsel regarding the potential viability of claims against Lighthouse's securities compliance

attorneys, Page Perry LLC. (Hays Affi., ¶ 5). As a result of these discussions, the Receiver Estate retained potential litigation counsel ("Litigation Counsel") on a contingency basis to further investigate and evaluate the facts and potential claims against Page Perry. (Hays Affi., ¶ 6). Notably, Litigation Counsel was introduced to the Receiver by investors of Lighthouse who were planning to bring claims against Page Perry directly, but instead deferred to the authority of the Receiver to pursue the claims on behalf of the Receiver Estate. (Hays Affi., ¶ 7).

In order to best evaluate the potential claims against Page Perry, Litigation Counsel retained a nationally-recognized authority on securities compliance law, Dr. Mercer Bullard ("Expert Counsel"), to review the documents related to Page Perry's lengthy representation of Lighthouse. (Hays Affi., ¶ 8). Following a two-month review of relevant documents, Expert Counsel provided his own factual allegations as well as a favorable opinion and ultimately a sworn affidavit attesting that, based on his knowledge and expertise, Page Perry's conduct in the representation of Lighthouse fell below the minimum standard of professional care for securities compliance attorneys *in numerous ways* and that Lighthouse therefore had viable claims against Page Perry and certain of its individual attorneys for legal malpractice. (Hays Affi., ¶ 9). In addition, Expert Counsel agreed to serve as an expert witness in such litigation. (*Id.*)

The Receiver also consulted certain counsel for the U.S. Securities and Exchange Commission ("SEC") regarding the claims against Page Perry and received positive support from such counsel for the pursuit of the claims. (Hays Affi., ¶10).

On August 6, 2012, a partial owner, vendor and investor of Lighthouse, Anatoly Melamud, filed suit against Page Perry and certain of its individual attorneys in Fulton County Superior Court (the "Melamud Action"), alleging, among other things, malpractice arising out of Page Perry's representation of Lighthouse. (Hays Affi., ¶ 11). The Melamud Action was subsequently settled for an undisclosed amount on the eve of trial, after the trial court denied Page Perry's motion for summary judgment in that case. (*Id.*) The Receiver Estate was not granted permission to participate in the Melamud Action. (*Id.*)

In April 2013, on behalf of the Receiver Estate, Litigation Counsel issued a demand letter to Page Perry and its individual attorneys detailing the Receiver Estate's claim for malpractice -- whereupon Page Perry requested a mediation. (Hays Affi., ¶ 12). The parties participated in a mediation in August 2013, which was not successful, but then settlement discussions continued for several more months. (*Id.*) During the settlement negotiations, Page Perry proposed a settlement range, the top end of which was more than seven figures. (Hays Affi.,

¶ 13). After consultation with the investors of Lighthouse, counsel for the Receiver, and certain counsel for the SEC, the Receiver reasonably concluded that the final settlement offer, though substantial, was not enough and was not in the best interest of the Receiver Estate. (*Id.*) Following the unsuccessful mediation and settlement negotiations, the Receiver filed this Ancillary Proceeding on behalf of the Receiver Estate against Page Perry and certain of its individual attorneys (the "Defendants"). (Hays Affi., ¶ 14).

Thus, in filing these claims against Defendants on behalf of the Receiver Estate, the Receiver: (1) performed extensive due diligence and investigation; (2) relied on the Professionals in the initial investigation; (3) relied on the opinion of experienced Litigation Counsel; (4) relied on the opinion of experienced Expert Counsel; (5) consulted counsel for the SEC about the claims; (6) considered the prior successful litigation against Page Perry on similar claims and facts; and (7) considered Defendants' substantial settlement offers made prior to initiation of the Ancillary Proceeding. Likewise, Litigation Counsel (1) conducted extensive due diligence; (2) consulted and relied on the factual allegations and opinion of Expert Counsel; (3) relied on the positive opinion of the claims by counsel for the SEC; and (4) considered the prior successful litigation and substantial settlement offers made by Defendants in pre-filing mediation and settlement discussions -- all of

which strongly supported their reasonable, good faith belief in the merit of the claims. After this Court's dismissal of the Complaint in the Ancillary Proceedings, Plaintiff filed the MFR, citing four errors of fact or law in the dismissal Order. The MFR relied on the same due diligence and investigation as the Complaint, particularly the affidavit of Expert Counsel, which set out factual allegations derived from facts and documents not in dispute which, accepted as true, give rise to valid legal claims against all the Defendants.

Under these circumstances, it is clear that neither Plaintiff nor Plaintiff's counsel engaged in any intentional misconduct or gross negligence. On the contrary, the Receiver and the Receiver's counsel at all times acted in good faith, within the scope of their authority under the Appointment Order, and in reliance on the judgment of expert opinions from Expert Counsel and competent legal advice (among other factors that lent merit to the claims). Thus, Defendants' Motion for Rule 11 Sanctions must be denied in accordance with the limitation of liability in the Appointment Order. *See, Maxwell v. KPMG, LLP*, 2008 WL 6140730 (7th Cir.) (finding persuasive that the bankruptcy trustee retained counsel to investigate and, if appropriate, pursue legal claims and subsequently relied on the judgment of counsel in pursuing the claims).

2. The Receiver was at all times acting solely in his representative capacity for the benefit of the Receiver Estate.

In Defendants' Motion for Rule 11 Sanctions and again in their renewed allegations in response to Plaintiff's MFR, Defendants at various places refer to "Hays" without definition. Of course, the Plaintiff in this Ancillary Proceeding is Hays acting in his representative capacity as the Receiver of Lighthouse, and the Motion for Sanctions, by its title, purports to seek sanctions against the "Plaintiff" and "Plaintiff's counsel." However, to the extent Defendants' references to "Hays" are in any way directed at Hays personally, they are improper because: (1) Hays is not a party to the Ancillary Proceeding in his individual capacity, and (2) at all times, Hays has acted solely in his representative capacity as Receiver and within the scope of his authority pursuant to the Appointment Order. Under well-settled law, the Receiver has qualified immunity when acting within the scope of his official, court-appointed duties. *See, e.g., Capitol Terrace, Inc. v. Shannon & Luchs, Inc.,* 564 A. 2d 49 (D.C. 1989); *Property Management & Invest. Inc. v. Lewis,* 752 F. 2d 599, 602 (11th Cir. 1985) ("court-appointed receivers ... enjoy judicial immunity for acts within the scope of their authority, and their authority extends to carrying out faithfully and carefully the orders of the appointing judge."); *In re Yellow Cab Co-op. Ass'n,* 185 B.R. 844, 852-53 (Bankr. D. Colo.

1995) (a receiver acting within the scope of his authority is protected by judicial immunity).

Here, there can be no question that the Receiver was acting solely in his representative capacity as Receiver, and within the scope of his authority under the Appointment Order, ¶ III.C., in pursuing these claims on behalf of the Receiver Estate (which he reasonably believed to be meritorious claims). Indeed, Defendants' Motion for Rule 11 Sanctions does not allege that Hays at any time acted beyond the scope of his authority as Receiver (nor could they). It is well established that a receiver who operates an entity under legal authority is not personally liable and any official liability of a receiver relates solely to the property being administered in the receivership. *See, e.g., Ball v. Mabry,* 91 Ga. 781, 782-83 (1893) ("The receiver of a railroad who operates the same under legal authority is not liable personally for his official acts ... Official liability relates to the fund or property which the court is administering by the machinery of receivership."). More recently, the Supreme Court confirmed that

> actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contract, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands.

Reading Co. v. Brown, 391 U.S. 471, 478 (1968). *See also, American*

Development Corp. v. Strack, 1996 U.S. App. LEXIS 8499 (9th Cir. 1996) (a receiver is "generally granted qualified immunity from personal liability for actions taken within their receivership authority.").

Furthermore, in Georgia, a court-appointed receiver is entitled to official immunity for discretionary acts unless a party can demonstrate that the receiver acted with actual malice or actual intent to injure. *See, Considine v. Murphy,* 327 Ga. App. 110 (2014). Moreover, "in the context of official immunity, 'actual malice' requires a deliberate intention to do wrong...'". *Adams v. Hazelwood,* 271 Ga. 414, 415 (1999).

Defendants have failed to demonstrate that the Receiver acted outside the scope of his authority or with any actual malice or intent to injure. On the contrary, the Receiver undeniably acted within the scope of his authority under the Appointment Order and, as set forth in detail above, in reliance of the advice of counsel and with the good faith, reasonable belief that the claims in the Ancillary Proceeding had substantial merit. Accordingly, the Receiver is afforded qualified immunity and has no personal liability for his official acts as a court-appointed fiduciary -- and to the extent Defendants' Motion for Rule 11 Sanctions seeks to impose sanctions against the Receiver personally, such claims must be denied.

3. Lack of authority to pursue claims against the Receiver

Finally, pursuant to the long established Barton Doctrine, a petitioning party must first seek leave of the court that appointed a receiver in order to sue a court-appointed receiver. *See, Barton v. Barbour,* 104 U.S. 126, 129 (1881); *Barbee v. Price Waterhouse, LLP (In re: Solar Financial Services),* 255 B.R. 801 (Bankr. S.D. Fla. 2000) (leave must be sought and granted from the court that appointed the trustee in order to proceed with any action against the trustee). Here, the Ancillary Proceeding was initiated in the Court that appointed the Receiver, yet Defendants did not first seek leave of the Court prior to seeking affirmative recovery against the Receiver in the Ancillary Proceeding in connection with his administration of the Receiver Estate. The Motion for Sanctions should also be denied for this reason.

CONCLUSION

In filing the claims against Defendants in the Ancillary Proceeding, the Receiver and the Receiver's counsel acted in reliance on numerous experienced counsel and experts, and with a reasonable, good faith belief that the claims were meritorious. There was clearly no intentional misconduct or gross negligence by the Receiver or the Receiver's counsel. Thus, Defendants' Motion for Rule 11

Sanctions should be denied as to both the Receiver and the Receiver's counsel in accordance with the limitation of liability provision in the Appointment Order. Furthermore, the Receiver has at all times acted solely in his representative capacity and within the scope of his authority under the Appointment Order. Therefore, the Receiver is also entitled to qualified immunity and has no personal liability for official acts within the scope of his court-appointed duties, particularly those taken in good faith reliance on counsel.

This 13th day of August, 2014.

Respectfully submitted,

DOVIN MALKIN & FICKEN LLC

/s/ Edward J. Dovin
Edward J. Dovin
Georgia Bar No. 227645

/s/ Allison S. H. Ficken
Allison S. H. Ficken
Georgia Bar No. 355875

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Attorneys for Plaintiff
S. Gregory Hays, Receiver for
Lighthouse Financial Partners, LLC

CERTIFICATE OF SERVICE

This is to certify that, in accordance with the Local Rules for the Northern District of Georgia, LR 5.1A, I have this day electronically filed the within and foregoing PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION FOR RULE 11 SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL in the above-styled case with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

H. Lane Young
Christine L. Mast
Zachary Lewis

I further certify, in accordance with LR 7.1(D), that this PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION FOR RULE 11 SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL was prepared using Times New Roman 14-point, a font and point selection approved by the Court in LR 5.1(C).

This 13th day of August, 2014.

DOVIN MALKIN & FICKEN LLC

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Attorneys for Plaintiff
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Lighthouse Financial Partners, LLC

EXHIBIT 1

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AFFIDAVIT OF S. GREGORY HAYS, RECEIVER FOR LIGHTHOUSE FINANCIAL PARTNERS, LLC

PERSONALLY APPEARED before me, the undersigned officer duly authorized to administer oaths in the State of Georgia, S. GREGORY HAYS, who, having first been duly sworn, deposes and states as follows:

1.

My name is S. Gregory Hays. I am over eighteen years of age, have personal knowledge of the facts herein contained, and am otherwise competent to give testimony in this matter.

2.

By Order of this Court dated July 2, 2012 (the "Appointment Order"), I was appointed as Receiver for Lighthouse Financial Partners, LLC ("Lighthouse") and any assets acquired for the benefit of Lighthouse (the "Receiver Estate") and have been duly acting in furtherance of my statutory duties since being appointed.

3.

I am not an attorney. Therefore, based on the authority and direction set forth in the Appointment Order, the Receiver Estate promptly employed general counsel and accountants (the "Professionals") who assisted me in conducting a thorough investigation of (1) the conduct and records of Lighthouse (and related parties); and (2) the various suits, actions and claims that could be pursued for the benefit of the Receiver Estate.

4.

Specifically, the Professionals and I reviewed the books and records of Lighthouse, which were voluminous but incomplete (and in certain instances unreliable). In addition, the Professionals and I also interviewed numerous third parties, employees, investors, and creditors of Lighthouse. (*Id.*) As part of this effort, the Professionals also conducted a thorough interview of Benjamin DeHaan ("DeHaan").

5.

Based on the results and extensive findings of the Professionals, I then sought the advice of experienced securities litigation counsel regarding the potential viability of claims against Lighthouse's securities compliance attorneys, Page Perry LLC.

6.

As a result of these discussions, the Receiver Estate retained potential litigation counsel ("Litigation Counsel") on a contingency basis to further investigate and evaluate the facts and potential claims against Page Perry.

7.

Notably, Litigation Counsel was introduced to me by investors of

Lighthouse who were planning to bring claims against Page Perry directly, but instead deferred to my authority as Receiver to pursue the claims on behalf of the Receiver Estate.

8.

In order to best evaluate the potential claims against Page Perry, Litigation Counsel retained a nationally-recognized authority on securities compliance law, Dr. Mercer Bullard ("Expert Counsel"), to review the documents related to Page Perry's lengthy representation of Lighthouse.

9.

Following a two-month review of relevant documents, Expert Counsel provided his own factual allegations as well as a favorable opinion and ultimately a sworn affidavit attesting that, based on his knowledge and expertise, Page Perry's conduct in the representation of Lighthouse fell below the minimum standard of professional care for securities compliance attorneys *in numerous ways* and that Lighthouse therefore had viable claims against Page Perry and certain of its individual attorneys for legal malpractice. In addition, Expert Counsel agreed to serve as an expert witness in such litigation.

10.

After obtaining the response of Expert Counsel, I also consulted certain counsel for the U.S. Securities and Exchange Commission ("SEC") regarding the claims against Page Perry and received positive support from such counsel for the pursuit of the claims.

11.

On August 6, 2012, a partial owner, vendor and investor of Lighthouse, Anatoly Melamud, filed suit against Page Perry and certain of its individual attorneys in Fulton County Superior Court (the "Melamud Action"), alleging, among other things, malpractice arising out of Page Perry's representation of Lighthouse. The Melamud Action was subsequently settled for an undisclosed amount on the eve of trial, after the trial court denied Page Perry's motion for summary judgment in that case. The Receiver Estate was not granted permission to participate in the Melamud Action.

12.

In April 2013, on behalf of the Receiver Estate, Litigation Counsel issued a demand letter to Page Perry and its individual attorneys detailing the Receiver Estate's claim for malpractice -- whereupon Page Perry requested a mediation.

The parties participated in a mediation in August 2013, which was not successful, but then settlement discussions continued for several more months.

13.

During the settlement negotiations, Page Perry proposed a settlement range, the top end of which was more than seven figures. After consultation with the investors of Lighthouse, counsel for the Receiver, and certain counsel for the SEC, however, I reasonably concluded that the final settlement offer, though substantial, was not enough and not in the best interest of the Receiver Estate.

14.

Following the unsuccessful mediation and settlement negotiations, I caused this Ancillary Proceeding to be filed on behalf of the Receiver Estate against Page Perry and certain of its individual attorneys (the "Defendants").

15.

Since my appointment as Receiver in July 2012, I have at all times acted solely in my representative capacity as a court-appointed fiduciary for the benefit of the Receiver Estate rather than in my personal capacity for my personal benefit.

16.

Section III.C. of the Appointment Order authorizes and empowers the Receiver to, among other things, pursue all "suits, actions, claims and demands" which may be brought by the Receiver Estate. Accordingly, in pursuing the claims in the Ancillary Proceeding, I was acting within the scope of my authority under the Appointment Order.

17.

In filing the Ancillary Proceeding on behalf of the Receiver Estate, I acted in good faith, reasonable reliance upon the Professionals, Litigation Counsel, Expert Counsel and my discussions with counsel for the SEC, and I also gave due and adequate consideration to the prior successful litigation by Melamud against Defendants based on similar claims and similar facts, as well as the substantial settlement offers made by the Defendants prior to filing of the claims.

FURTHER AFFIANT SAYETH NOT.

Sworn to and subscribed before me
this 13th day of August, 2014.

S. Gregory Hays, not individually
but as Receiver for Lighthouse
Financial Partners, LLC

Notary Public

My commission expires:

Kathryn A Malek
Notary Public
DeKalb County, State of Georgia
My Commission Expires 5/30/15