

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CASE NO.: 7:10-CV-4-FL

Michael and Dorothy **MANUEL**,)
for themselves)
and all others similarly situated,)
Plaintiffs)
v.)
Joseph A. **GEMBALA**, III, Esq., et al.,)
Defendants.)
/

**MEMORANDUM SUPPORTING
PLAINTIFFS' (DE9) MOTION
TO APPOINT RECEIVERS
FOR ALL DEFENDANTS**

Plaintiffs request that this Court immediately appoint receivers for all Defendants per Fed.R.Civ.P. 66 and this Court's inherent powers, on the following grounds:

FACTS

Deputy Wendell [surveying a multiple murder scene]: It's a mess, ain't it, Sheriff?
Sheriff Ed Tom Bell: If it ain't, it'll do till the mess gets here.

This snippet from *No Country for Old Men* is as fitting as any legal description of the multimillion-dollar financial carnage left behind by Joe Gembala and his erstwhile sales force. Until Plaintiffs and law enforcement stopped their scheme, Defendants were running a mortgage modification scam; that is, they claimed (over the Internet and interstate phone lines, making it wire fraud) the ability to negotiate with lenders and thereby reduce Plaintiffs' mortgage payments, or to arrange other relief such as alternate loans under the "Hope for Homeowners" program, but always in return for an advance fee (the proceeds of mail and wire fraud, making it money laundering). In reality, Defendants' scheme was almost wholly fraudulent, and Defendants only took peoples' money in return for a stack of worthless forms (sent by FedEx, making it mail fraud) to

fill out and return to Defendants, who then might send them to mortgage lenders and make a followup call, knowing that this was unlikely to have the slightest effect on the terms of the mortgage. One Class Member reports that Defendants saved him \$300 per month off his first mortgage, but then broke their promises of virtually eliminating his second mortgage. No one else reports any favorable result whatsoever.

Since the commencement of the instant action and posting of the Complaint at GetOutOfDebt_org, a major consumer advocacy site with space for comments, some 30 of Defendants' victims have telephoned or emailed Counsel (as the Amended Complaint went to press, the total was only a dozen or so) with tragic tales of giving up an average of \$1,400 or more to Defendants, followed by soothing promises of speedy and inevitable relief from unpayable mortgages and imminent foreclosure. Invariably, the name of Joseph A. Gembala, III and his title of Attorney at Law with special real estate expertise figured prominently in the sales pitch, inspiring earnest confidence in Plaintiffs that with a real lawyer on their side, they had nothing to worry about. To their anguish, Plaintiffs now know that the one who was sworn to protect them chose to take their money and betray them instead, and now will not answer to his victims. Mr. Gembala's office phone goes straight to voicemail, but no one returns the dozens of angry messages demanding explanation and a refund.

Within a week of service of the instant action on Mr. Gembala, he ceased paying his "servicing arm" Secure Property Solutions and presumably its sister criminal organizations Custom Asset Solutions and National Mortgage Consultants Group, causing SPS's employee paychecks to bounce and inspiring SPS's principals to flee with most of its office equipment and computers. Mr. Gembala's visit to SPS's Barrington

office on or about 27 January found little but a jumble of 1,100 client files, and even those were burglarized on the evening of 29/30 January, meaning that Plaintiffs' most sensitive personal information is in the hands of criminals, with no immediate hope of recovery. It is now known that Michael Malone and Christopher Frisch were the main minds behind the SPS fraud, and they are the most likely persons to have engineered the Watergating of Plaintiffs' files. Barrington Police have taken an intense interest in the matter and there are reports of arrests, though their investigation is still confidential and they are not talking about what will happen to whom and when. More than \$1.5 million of Plaintiffs' money passed through Mr. Gembala's hands, and most of it went to Mr. Malone and Mr. Frisch. How those two managed to talk Mr. Gembala, a lawyer with a quarter century of experience and to date an unblemished record, into letting them use his name to rook desperate homeowners out of their last few dollars is scarcely imaginable, but they did. But for Michael and Dorothy Manuel's selfless decision to take a stand for righteousness, there is no telling how many more lives the SPS crew would have ruined.

Exh. 1 shows relevant pages of Gembala-law_com, Mr. Gembala's site, as it was on 28 November 2009, shortly after Named Plaintiffs contacted undersigned counsel ("Counsel"). At the top of page 4, Mr. Gembala refers to Secure Property Solutions as "his processing center" and claims to "have helped countless homeowners during this difficult time through the process of a loan modification." Exh. 2 shows, also as they appeared on 28 November 2009, relevant pages of securepropertysolutionsllc_com. Notable aspects include the false "BBB Accredited Business" seal on every page and the frequent references to "the Law Firm of Joseph A. Gembala, III & Associates." Exh. 3 shows relevant pages from customassetsolutions_com as of 04 January 2010. Custom

Asset Solutions and Secure Property Solutions used nearly identical templates, but CAS pages are identifiable by their different copyright in fine print even when the URL is not apparent. Exh. 4 is the only page of nationalmtgconsultants_com that was saved before the whole site went offline in late January 2010, but it is easily recognizable as just another scam, carelessly promising “mortgage mod,” “credit repair,” “debt management,” and “forensic loan audit” (whatever that is; perhaps an attempt to find enough defects in a loan’s documentation or chain of custody to legally avoid paying it, an extremely rare situation).

Incredibly, despite its organization date of 19 July 2009, NMCG claimed (emphasis in original) to “have been helping families and individuals ‘*achieve and maintain their dream*’ for over *ten years*.” The answering system at NMCG’s now-disconnected given number, 877 212 7022, stated as of 01 February 2010: “Hello, and thank you for calling Secure Property Solutions and National Mortgage. ... Press 1 to leave a message for loan modification department. Press 2 to leave a message for debt settlement department. Press 3 to leave a message for credit repair department. Press 4 to leave a message with National Mortgage.” A call on the same date to Custom Asset Solutions’ also now-defunct number, 800 210 2605, yielded a company phone directory with the following names, recorded in the individual’s own voice, and extensions:

Millie Costin 1016
Vanessa Medina
Andy Korman 1002
Ken Lacey 1005
Stephanie Lewis 1023 1014
John Malone 1011
Sara Michelik 1009
Tamara Newton 1008
Vivian Orr 1007
Christopher Osaji 1003

Mande Osaji 1001
Ann Krakauer 1010
Reggie Quinn 1024
John Anderson 1015
("This is") Sean 1006

The same number went to an outfit calling itself Premier Debt Solvers or US Premier Debt Solvers ("Press 1 for Custom Asset Solutions. Press 2 for Premier Debt."), which had the exact same names and extensions in its company directory. Premier Debt's page is the last one in Exh. 3, and shows every sign of being just another advance fee "debt elimination" fraud. Plaintiffs are simply gobsmacked that Mr. Gembala would have anything to do with such people, but it is said that once all impossibilities have been ruled out, whatever is left, however improbable, must be the truth.

Sadly, Exh. 5 shows that Mr. Gembala did indeed, for reasons best known to himself, willingly stand at the center of this lucrative racket. All client agreements of Defendants Secure Property Solutions, Custom Asset Solutions, and National Mortgage Consultants Group specify that all monies be paid to Joseph A. Gembala III & Associates, a sole proprietorship, so Mr. Gembala's pocket was the initial destination of Plaintiffs' money. Instead of protecting the public, a lawyer with a quarter century of experience has been using his credentials to cheat needy, sometimes desperate, innocent people of hundreds of dollars each, often practically the last money they had left.

The Terrible Human Cost of Defendants' Fraud

Exh. 6 reproduces seventeen heartbreaking emails to Counsel from Defendants' victims. De-identified except as to first names and cities, they are from Colorado, Illinois, Indiana, Michigan, Minnesota, Mississippi, New Jersey, Ohio, Oklahoma, and Virginia. Counsel's phone records indicate that he has gotten telephone calls from more

victims in Alabama, California, Florida, Georgia, Missouri, Pennsylvania, Rhode Island, Tennessee, and Washington. Each family lost from \$595 to \$2,500 for no benefit, and many will soon lose their homes, including Melanie, the only person with two emails in Exh. 6. Each other message is from a different family, and the details vary, but the unifying theme of hurt, anger, and despair is clear.

Exh. 7 is a nearly complete set of Gembala-SPS client documents, leaving out only two pages which had too much identifying information on them to redact, from Wendy of Boise, Idaho. The name of Joe Gembala is very common, as are the broken promises of help and relief or 100% refunds. Exactly as the Amended Complaint alleges, Wendy filled out mounds of official-looking paperwork containing her address, employment, assets, liabilities, and other very sensitive information. Almost certainly, these exact documents, only not redacted, are in the hands of the identity thieves who broke into the former SPS office. With some 25 identifiable households in 21 different states now known to be victims, it is beyond dispute that “the mess” has gotten here.

Attempts to Resolve the Case Short of Receivership

Counsel initially had productive discussions with Mr. Gembala’s counsel in the first week of February, and both sides appeared to agree that an early resolution was in everyone’s interest. It is quite clear to Plaintiffs, even from the limited evidence so far, that there is no conceivable defense or excuse to their claims against Mr. Gembala. However, Counsel has heard nothing of substance from defense counsel in the last two weeks, even though Plaintiffs have repeatedly stated their intention to seek appointment of receivers if some agreement could not be quickly concluded to protect Plaintiffs’ interests, i.e., Mr. Gembala’s assets, from waste, concealment, transfer, or expatriation.

Counsel's only direct contact with Mr. Gembala was a five-minute phone call to Mr. Gembala's office land line on 01 February 2010. The next day, defense counsel contacted Counsel, and he can no longer contact Mr. Gembala and thus has no direct way of learning Mr. Gembala's whereabouts. Disturbingly, everyone who has contacted Counsel has reported that nobody returns the numerous messages left at Mr. Gembala's office, or on his cell (which number was found on a publicly filed election document), and as far as Counsel and Plaintiffs are concerned, Mr. Gembala must be considered a fugitive. Together with the lack of contact from defense counsel, Plaintiffs see no alternative to prompt and definitive intervention, with a view toward winding up Defendants' affairs and liquidating whatever can be found to cover triple damages, costs, and attorney fees, expected to exceed a total of \$6 million.

POINTS AND AUTHORITIES

Jurisdiction and Venue

Shortly after commencing this action, Counsel received a telephone call from the Clerk's office to the effect that solely because Named Plaintiffs reside in the Middle District of North Carolina, the Clerk was of the opinion that this was the "wrong" district and that this Court might give Plaintiffs a chance to refile in the Middle District. If Plaintiffs did not do so, the Complaint would be sua sponte dismissed. Plaintiffs view this communication with some dismay. It should be well known that the general federal law of venue and personal jurisdiction is not as simple as what district a plaintiff lives in.

"The expression of legal rights is often subject to certain procedural rules: The failure to follow these rules may well result in a curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under

[Fed.R.Civ.P.] 12(h)(1), a waiver of the objection.” *Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 705 (1982). It is clear, then, that this Court may not dismiss the Complaint under Rule 12(b)(2) without a motion to do so. Also, it is wrong to suppose “that there is something unique about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights. A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.” *Id.* at 706. A defendant is also free to consent to personal jurisdiction and venue, and indeed, Mr. Gembala has already retained counsel in Raleigh, who has expressed no objection to litigating here. Plaintiffs’ first attempt to serve process in SPS, CAS, and NMCG resulted in returned certified mail, but when service on other Defendants besides Mr. Gembala is perfected, they may consent to jurisdiction and venue here as well.

Even without consent, this Court most assuredly has personal jurisdiction per RICO special venue and nationwide service of process, 18 U.S.C. § 1965:

(b) In any action under section 1964 of this chapter [18 USCS § 1964] in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

....

(d) All other process in any action or proceeding under this chapter [18 USCS §§ 1961 et seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

This overrides the limitations of any state longarm statute. Process has been served on Mr. Gembala and his law office in the Eastern District of Pennsylvania by certified mail. Defendants SPS, CAS, and NMCG seem to have submitted false addresses for their registered agents, authorizing substituted service of process on the New Jersey

Department of Treasury, which will be done. That is all RICO requires.

The district court may ultimately have to decide whether venue is proper, either under 18 U.S.C. § 1965(a) or (b), or under the general venue statutes. The question of *in personam* jurisdiction, however, depends on whether service of process has been authorized. Section 1965(d) authorizes service of process "in any judicial district in which such person . . . is found." Because service was accomplished on the defendants where they were found, personal jurisdiction was established.

ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 627 (4th Cir. 1997). This holds even if a defendant has insufficient minimum contacts with the forum state to subject it to specific, much less general, personal jurisdiction. *See id.* at 626. This Court also may exercise pendent jurisdiction, 28 U.S.C. § 1367, over state claims against Defendants, because "we can find no constitutional bar to requiring the defendants to defend the entire constitutional case, which includes both federal and state claims arising from the same nucleus of facts, so long as the federal claim is not wholly immaterial or insubstantial." *Id.* at 629. All claims here arise from the same set of facts establishing that Defendants perpetrated a mail and wire fraud scheme to cheat Plaintiffs of money and then launder it through Mr. Gembala's law office and Defendants' shell companies.

Even without RICO, Defendants subjected themselves to regular personal jurisdiction by North Carolina's longarm statute, NCGS § 1-75.4, in pertinent part:

(4) Local Injury; Foreign Act. -- In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant;

...

(5) Local Services, Goods or Contracts. -- In any action which: ...

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

“Scott” (if that was his real name) requested \$895 from Named Plaintiffs, Complaint ¶68, and they complied, ¶¶74-75, and then Defendants used a carrier (FedEx) to ship documents purportedly of value, including false representations of Better Business Bureau approval, to Named Plaintiffs in North Carolina. ¶¶78-83. “Scott” worked for Secure Property Solutions, and the money went straight to Mr. Gembala’s sole proprietorship. Since Mr. Gembala abused the privilege of LLC protection to work wrong upon innocent people, reverse veil-piercing drags the LLCs right along with him. Mr. Malone and Mr. Frisch’s wagons are hitched too, since they received Plaintiffs’ money from the LLCs, especially SPS, which indisputably has minimum contacts.

Generally, under the ‘alter ego’ or ‘instrumentality’ theory, ‘a corporate entity may be disregarded where there is such unity of interest and ownership that the separate personalities of the corporation and individual no longer exist.’ 18 Am.Jur.2d Corporations § 45. We conclude that here, where one entity is the alter-ego, or mere instrumentality, of another entity, shareholder, or officer, the corporate veil may be pierced to treat the two entities as one and the same, so that one cannot hide behind the other to avoid liability.

Strategic Outsourcing, Inc. v. Stacks, 176 N.C.App. 247, 254, 625 S.E.2d 800, 805 (2006). Jurisdiction exists over Mr. Gembala and Secure Property Solutions, and therefore over Custom Asset Solutions and National Mortgage Consultants Group and their puppeteers Mr. Frisch and Mr. Malone. Defendants are here to stay.

Federal Law Governs Receivership

This Court’s power to appoint receivers is inherent. “[T]he district court has within its equity power the authority to appoint receivers and to administer receiverships. See Fed. R. Civ. P. 66.” *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295, 302

(4th Cir. 2001). Rule 66 reads in full:

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

This language confers no authority to appoint receivers because the same is already an inherent court power; it merely requires federal courts to follow the Rules of Civil Procedure in receivership matters, and receivers to follow accepted federal practice (there is no corresponding NCEd local rule). “A receiver may be appointed ... In cases wherein restitution is sought for violations of G.S. 75-1.1 [NCUDTPA, Count X of the Complaint].” NCGS § 1-502(5). However, *Canada Life Assurance Co. v. LaPeter*, 563 F.3d 837, 843 (9th Cir. 2008) and other authorities hold that “regardless of whether state law provides a vehicle by which to appoint a receiver, the federal courts are free to provide that remedy solely by virtue of their equitable powers.”

“The law governing the appointment of receivers in federal courts has not been reduced to a convenient formula.” *The Chase Manhattan Bank, N.A. v. Turabo Shopping Center, Inc.*, 683 F.2d 25, 26 (1st Cir. 1982). But the consensus seems to be:

A receiver is an extraordinary equitable remedy that is only justified in extreme situations. Although there is no precise formula for determining when a receiver may be appointed, factors typically warranting appointment are a valid claim by the party seeking the appointment; the probability that fraudulent conduct has occurred or will occur to frustrate that claim; imminent danger that property will be concealed, lost, or diminished in value; inadequacy of legal remedies; lack of a less drastic equitable remedy; and likelihood that appointing the receiver will do more good than harm.

Aviation Supply Corp. v. RSBI, Inc., 999 F.2d 314, 316-17 (8th Cir. 1993). Taking these factors in turn:

“*A valid claim by the party seeking the appointment*”: If there were ever a valid

case of fraud, unfair trade practices, and civil RICO, this one is it, with over 2,000 counts of mail and wire fraud and money laundering against 1,100 Plaintiffs. The Exhibits, which support both receivership and class certification, are largely either judicially noticeable or Fed.R.Evid. 801(d)(2) admissions of a party opponent or Rule 803(6) business records, not subject to plausible denial. Exh. 6 displays consistent complaints from many people in many states. These all amount to clear and convincing evidence of a very large nationwide scam. The Federal Trade Commission and nearly every state attorney general has put mortgage modification and foreclosure rescue fraud literally at the top of their lists for enforcement priority. However, as will be seen, the official protectors of the public are very long on talk but woefully short on action.

“The probability that fraudulent conduct has occurred or will occur to frustrate that claim”: Defendants’ scheme was pure fraud, generously seasoned with money laundering, and served up in a variety of shell companies, false addresses, and desk names. No one working at or with any Defendant is a licensed lender, mortgage broker, or credit adjuster, and the only lawyer in Defendants’ “network” is Mr. Gembala himself. Sadly, he did not help consumers, but only posted his picture and bio and credentials online to lure the trusting public into giving him money. Since his law practice is not separately incorporated or LLCed (if that is a word), checks and debit card transactions to “Law Offices of Joseph A. Gembala III & Associates” are directly attributable to Mr. Gembala personally. Most of the money went right back out to Secure Property Solutions and its proprietors Mike Malone and Chris Frisch, concealing the nature, source, or destination of funds to keep Plaintiffs and law enforcement from recovering any. This is inexcusable and indefensible.

“Imminent danger that property will be concealed, lost, or diminished in value”:

As set forth above, Plaintiffs consider Mr. Gembala for all practical purposes a fugitive, since he will not return their calls and no Plaintiff has any idea where he is. Plaintiffs’ files have been stolen, probably by the same people who kept most of the money that they gave to Mr. Gembala. As evidenced by the retention of defense counsel, Plaintiffs expect that Mr. Gembala has malpractice insurance, but would not count on the policy limits being enough to reimburse 1,100 victims, or if his carrier will pay anything at all, given the evidence of intentional misconduct up to and including criminal racketeering. Speaking of which, Defendants are not unlikely to be in serious need of expensive criminal defense lawyers in the foreseeable future, and Plaintiffs need to get their money back before this happens—Defendants are then welcome to establish indigency and take public defenders. Every penny that Mr. Gembala has or can access is precious, and cannot be allowed to escape. It goes without saying that Mr. Frisch and Mr. Malone cannot be trusted for an instant with anything valuable, and are probably holding Plaintiffs’ files themselves for no good purpose.

“Inadequacy of legal remedies”: The law as applied to the facts compels eventual victory for Plaintiffs, but since that takes some time, Defendants can be counted on to bleed themselves dry by transferring, gifting, hiding, expatriating, or just plain wasting Plaintiffs’ money. After that, all the Rule 69 discovery in the world will do Plaintiffs no good. Plaintiffs are also entitled to an immediate order for Defendants to turn over any property that Defendants still hold, namely, Plaintiffs’ files. Furthermore, injunctive relief under RICO, NJRICO, NCUATPA, PUTP, and other statutes is only available to government, but government has so far not been of the slightest help. Plaintiffs have

submitted complaint forms to the Pennsylvania Attorney General and the Disciplinary Board of the Supreme Court of Pennsylvania, but each has brusquely informed Plaintiffs that their case will not be expedited. Catching the Federal Trade Commission's attention is like winning the lottery—wonderful if it happens, but the chances are vanishingly small. The Barrington Police Department is very interested and doubtless has alerted other law enforcement agencies, but Plaintiffs are not allowed to know just what those agencies will do or when they will do it.

“Lack of a less drastic equitable remedy”: The only less drastic remedy that Plaintiffs can think of, and even then it would not get their files returned, would be to require Defendants to post a bond in lieu of receivership. NCGS § 1-503 expressly provides that if “the subject of the action is the recovery of a money demand,” and if the property in question is “in danger of being lost, or materially injured or impaired, or that a corporate defendant is insolvent or in imminent danger of insolvency,” then a tender to the court, with at least two sureties, of “an undertaking payable to the adverse party of double the sum demanded by the plaintiff” allows the court discretion to refuse appointment of receivers. Plaintiffs are not sure at this point just how many members will be in the Class, or quite how much money the Class has lost, but if 1,100 people lost \$1,400 each, that is \$1,540,000 actual damages. Given that Defendants have been operating since 2007 with their marketing powered by the prestige of an experienced lawyer, the actual numbers may be higher. Pennsylvania and North Carolina fair trade law award triple damages automatically, as do RICO and NJRICO, making it \$4,620,000 plus attorney fees and court costs, or more than \$6,000,000 all told. Plaintiffs see no other way of stopping these hardcore fraudsters and preserving money than a definitive

federal receivership that can reach Defendants' assets—backed up with federal contempt of court powers—anywhere in the United States. However, if Defendants can indeed scrape up \$12 million, or even \$6 million (perhaps Mr. Gembala has properties, or relatives willing to lend money, or some savings), for the court registry in lieu of receivership, no one would be happier than Plaintiffs, if they get their files back too.

“And likelihood that appointing the receiver will do more good than harm”: This is no contest. Defendants have been harming as many desperate homeowners as they can, as fast as they can, since 2007 with no effective interference from law enforcement or Bar authorities. To the extent that Mr. Gembala is still legitimately practicing law, an operating receivership is certainly appropriate, but given that Mr. Gembala is displaying severe character issues, now including apparent abandonment of his law practice and obvious harm to any remaining clients, that call into question his fitness to continue practicing law, swift intervention is vital to protect the public.

Insolvency Is the Single Strongest Factor Favoring Receivership

Canada Life favorably cited *Aviation Supply*'s factors, “foremost among them being whether the property was of insufficient value to insure payment, and whether the defendant was of doubtful financial standing.” 563 F.3d at 844. As said, Plaintiffs very conservatively estimate Defendants' total liability at over \$4.5 million, together with the costs of the action and a reasonable attorney's fee, which in common fund cases is typically a percentage of the recovery, and a 25% contingent fee would require a gross recovery of over \$6 million to make the Class whole and to reward Named Plaintiffs generously for their public service (indeed, Counsel considers Mike and Dorothy Manuel to be national heroes for their decision to take a stand that has already put Defendants out

of the mortgage fraud business and saved hundreds more homeowners from victimization, when the Manuels could have just settled for Counsel's scaring Defendants into a quick individual refund). Inability to pay is not a RICO or PUTP mitigating factor. Defendants are just stuck with whatever the statute says. Very few people happen to have \$6 million or more in liquid assets, or less liquid assets such as slow-selling real estate, lying around in case they get sued for racketeering and unfair trade practices.

Receivership Pendente Lite Is More Than Justified

It is virtually judicially noticeable that no large fraudulent scheme ever ends with nearly enough even to reimburse single damages. Though the authorities cited above mostly concern postjudgment receiverships, here Plaintiffs need such relief as soon as possible after service of process as this Court can issue it. "The appointment of a receiver pendente lite is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it. A corollary of this rule is that if the desired outcome may be achieved by some method other than appointing a receiver, then this course should be followed." *Hollis v. Hill*, 232 F.3d 460, 471-72 (5th Cir. 2000), quoting *Hines v. Plante*, 99 Nev. 259, 661 P.2d 880, 881-82 (Nev. 1983). Again, the only alternative that Plaintiffs can think of is a bond in lieu of receivership, a very tall order at the best of times. Defendants' conduct has itself been "harsh and extreme" and they should consider themselves fantastically lucky if their only consequence is to give up all of their earthly possessions other than what is exempt from judgment.

Mr. Gembala, naturally, would be likely to object through counsel to winding-up and liquidation. This Court could, then, order the receiver(s) to at least try to keep Mr. Gembala's law practice going, in which event his assets will be waiting for him if he

wins the case. “It is well recognized that a receiver is the agent only of the court appointing him; he represents the court rather than the parties. He is custodian of property which is under the control of the court.” *Ledbetter v Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944, *cert den.* 323 U.S. 719 (1944), *reh. den.* 323 U.S. 813 (1944) *and reh. den.* 323 U.S. 886 (1945)). Indeed, Mr. Gembala needs all the money he can get, in order to pay Plaintiffs back.

This Court need not trouble with oral arguments or an evidentiary hearing, because “there is no general requirement of a hearing in Rule 66, and the court may approve of the appointment of a receiver without a hearing when the record discloses sufficient facts to warrant it.” *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1189 (11th Cir. 1991). Whether required or not, Plaintiffs have adduced specific Exhibits, which Defendants can scarcely deny, disprove, or contest, proving that Defendants’ main or sole business is fraud. When presented with a loan dispute involving \$12 million (in 1974 dollars) of collateral and many competing claims to it:

Rather than commence an extensive evidentiary hearing in this matter at that time, the court determined that in light of the complex circumstances, this case might be appropriate for the appointment of a receiver to conserve the collateral in issue pending resolution of this dispute. The court determined that “[any] hardship or inconvenience to defendants is greatly outweighed by the Court’s interest in preserving the subject assets and the status quo and protecting the Plaintiff against possible irreparable loss.”

Bookout v. Atlas Financial Corp., 395 F.Supp. 1338, 1340 (N.D.Ga. 1974).

It is worthy of note that federal and state trial courts routinely appoint receivers and freeze assets *ex parte* on far less evidence in far less compelling cases of fraud than presented here, so long as the requester is an attorney general representing a government. Plaintiffs concede that the applicable statutes—RICO, NJRICO, PUTP, NCUATPA—

seem not to allow them to apply for injunction, but there is no logical reason why any court would treat Plaintiffs and their evidence differently from a “real” AG on grounds that they are private parties with a private AG trying to bring fraudsters to justice. A “government of laws, not of men” should mean exactly that—whoever develops enough facts to apply to the law should have relief, no matter who “whoever” is.

It does not appear necessary from the caselaw for Plaintiffs to deposit any bond, but should they be required to, it should be no more than a nominal amount of say \$100.

WHEREFORE Plaintiffs request that this Court appoint receiver(s) as necessary to take control of all of Defendants’ assets, less minimum necessary cost of living allowances, to operate Mr. Gembala’s law practice and other legitimate enterprises that he may have, and to seize, marshal, and liquidate all other Defendants’ assets for orderly distribution to Plaintiffs. In the alternative, Plaintiffs would be satisfied with a bond in lieu of receivership sufficient to cover expected damages, costs, and attorney fees. In any event, Plaintiffs request an order for immediate turnover and prompt return of their files from any Defendant who has them, to prevent imminent harm.

Respectfully submitted this **22 February 2010**,

/s/Christopher W. Livingston
Christopher W. Livingston
Counsel for Plaintiffs
2154 Dowd Dairy Road
White Oak NC 28399
Land line and fax 910 866 4948
Cell 910 876 7001
chrisatty@hotmail.com
NC State Bar No. 27282
LR 83.1 Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **22 February 2010** I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notice of such filing to George W. Dennis III, Esq., Teague Campbell Dennis & Gorham, LLP, PO Box 19207, Raleigh NC 27619 counsel for Joseph A. Gembala III and Joseph A. Gembala III & Associates; and that hardcopies of the foregoing will be served on all other Defendants along with the Summons and Complaint.

Submitted this **22 February 2010** by:

/s/Christopher W. Livingston
Christopher W. Livingston
Counsel for Plaintiffs
2154 Dowd Dairy Road
White Oak NC 28399
Land line and fax 910 866 4948
Cell 910 876 7001
chrisatty@hotmail.com
NC State Bar No. 27282
LR 83.1 Counsel

From Article at
GetOutOfDebt.org