

COPY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

NO. 3:98mc96-McK

IN RE: ALL FUNDS ON DEPOSIT IN §
ACCOUNT NUMBER 000669829075 §
IN THE NAME OF MM ACMC BANQUE §
DE COMMERCE, INC., AT §
NATIONSBANK, N.A., CONSISTING §
OF \$18,756,420.97, MORE OR LESS §

FILED
CHARLOTTE, N.C.
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U.S. DISTRICT COURT
W. DIST. OF N.C.

RESPONSE TO MOTION FOR RETURN OF PROPERTY SEIZED

TO THE HONORABLE H. BRENT McKNIGHT, UNITED STATES MAGISTRATE JUDGE:

COMES NOW, Michael J. Quilling ("Receiver") and files this his Response to the Motion for Return of Property Seized filed by MM ACMC Banque de Commerce, Inc. ("MM ACMC") and in support of such would respectfully show unto the Court as follows:

Background Facts

1. On October 29, 2001, in Civil Action Number 3:01CV205-McK, styled *George and Delores Rollar v. United States of America, et al* (the "Rollar Lawsuit"), the Receiver was appointed to determine, among other things, the proper claimants to the funds seized by virtue of the initiation of the above-entitled and numbered proceedings.

2. The Order appointing Receiver provides in pertinent part:

"Pursuant to Rule 19(b), Mr. Quilling is deemed to be the representative of the claimants who are required to be joined."

3. On December 20, 2001, the Receiver filed an Unopposed Motion to Expand Powers and Duties. Based upon the unopposed nature of the Motion, the Receiver anticipates that the Court will issue an Order expanding the Receiver's powers to include filing this Response.

The Motion Should be Denied for Several Reasons

A. None of the funds belong to MM ACMC Banque de Commerce, Inc.

MM ACMC claims that a failure to return the seized property to the Bank of America account constitutes a taking of property without due process of law. A fundamental problem with such an argument is that none of the funds seized from the account have ever belonged to MM ACMC. Instead, at best, MM ACMC purports to be nothing more than an authorized custodian on behalf of others. Under such circumstances, MM ACMC's rights, if any, are inferior to the true owners of the funds. The true owners of the funds oppose any return of the funds to a custodial account if the custodian is going to be MM ACMC.

B. The funds should not be returned to alleged criminals.

MM ACMC apparently requests a return of the money to the Bank of America account so that it can continue along its merry way with Sterling Asset Services, Ltd. under the guise of the purported Escrow Agreement and the fanciful contemplated investment programs. Again, the fundamental flaw in such an argument is that both A.C.W. Mohr (President of MM ACMC) and Fred Gilliland (the president-equivalent of Sterling Asset Services, Ltd.) are both alleged criminals. Mr. Mohr has been charged and tried by the Norwegian authorities for, among other things, his role in the scam which led to the deposit of the funds in the Bank of America account by Sterling Asset Services, Ltd. and the initial seizure. Currently, a decision is being awaited from the Norwegian Court as to whether he is guilty and as to when he will be incarcerated. Fred Gilliland has been indicted by a federal grand jury in Pensacola, Florida, has fled to Canada and is currently considered a fugitive. Under no circumstances should any portion of the funds be returned to such unsavory characters so as to allow them to continue to perpetuate what is undeniably, and always has been, a fraudulent financial program.

C. **The Escrow Agreement is unenforceable and does not convey any rights upon MM APMC.**

It is axiomatic that contracts which are founded upon or grow out of transactions which are illegal cannot and will not be enforced. *See, i.e., Blythe v. Lovinggood*, 1841 WL 782 (N.C. 1841); *Seminole Phosphate Co. v. Johnson*, 124 S.E. 859 (N.C. 1924); *Lamm v. Crumpler*, 65 S.E.2d 336 (N.C. 1951). Here, the contemplated bogus (and illegal) transactions contemplated by Mr. Mohr and Mr. Gilliland, for which they have both been indicted, gave rise to the Escrow Agreement. It is, therefore, unenforceable and does not convey any rights upon MM APMC, including the right to have the funds returned.

D. **The purported Escrow Agreement has been terminated.**

Assuming *arguendo*, that the purported Escrow Agreement has any legal validity whatsoever, it has expired by its own terms. Specifically, paragraph 1. of the Escrow Agreement defines the "Escrow Period" as commencing on the date of the execution of the Agreement and ending on September 16, 1999. The Agreement has obviously expired and the true owners of the funds (the claimants in the Rollar Lawsuit) have no desire to continue the escrow relationship. Likewise, paragraph 20. of the Escrow Agreement provides that upon the disbursement of funds in the account into court pursuant to section 5 of the agreement, the Escrow Agreement shall terminate. Although the funds were not voluntarily put into court by MM APMC pursuant to section 5, the practical reality is the same and the Escrow Agreement has, therefore, been terminated. In addition, upon the contemplated entry by this Court of the Unopposed Application to Expand Powers and Duties, the Receiver intends to terminate the Escrow Agreement.

E. The Escrow Agreement contemplates administration of the funds by a court.

Paragraph 5c. of the Escrow Agreement contemplates that in the event any dispute with respect to performance under the Escrow Agreement arises, one of the options is to interplead the funds into a court of competent jurisdiction in any venue convenient to the escrow agent for further instructions. While MM ACMC did not initiate the interpleader action on its own accord, the practical reality is that such a thing has occurred. *See*, Consent Order of October 11, 2001, entered in the Rollar Lawsuit, paragraph 8. It cannot be seriously argued that this Court is not a court of competent jurisdiction and it cannot be seriously argued that venue before this Court is not convenient to MM ACMC, which MM ACMC admits was incorporated in North Carolina.

Likewise, paragraph 8c. provides that the Escrow Agent is authorized to comply with orders entered by any court with respect to the funds. As only a custodian, without any ownership interest in the funds, MM ACMC has no continued liability for the funds now that this Court has issued orders such as the Consent Order of October 11, 2001 in the Rollar Lawsuit. To the extent MM ACMC's feigned concerns over the funds is tied to liability issues, it should simply defer to this Court as the Escrow Agreement contemplates.

F. The purported Escrow Agreement has been breached and is, therefore, void.

Although the Escrow Agreement is a poorly written document between two alleged criminals playing a con game, it nonetheless establishes certain basic obligations which have undeniably been breached. For instance, paragraph 2. of the Agreement provides the Escrow Agent will hold, invest and disburse the funds in accordance with the Escrow Agreement. Paragraph 6. of the Escrow Agreement provides that the funds will be invested and held in only certain things. Although the Receiver has not completed his financial tracings, it is already clearly known that after the funds were received into the Bank of America account, at least \$3,550,000.00 was transferred out of the

account to MM ACMC and Fred Gilliland. These transfers cannot be reconciled with the absolute obligation to invest the funds only in the items stated in paragraph 6. of the Escrow Agreement. Instead, movement of the funds from the account constituted nothing more than theft of the funds to the detriment of the claimants for whom the Receiver acts as representative. In addition, the document entitled "Underlying Agreement #1" provides that "any divergence from this Agreement" will cause the Agreement to be null and void. Not only did MM ACMC deviate from the terms of the Escrow Agreement, it also deviated from the terms of the Underlying Agreement #1. Under these circumstances the Agreement is void.

Request to Take Discovery and for Evidentiary Hearing

4. As set forth in the Unopposed Motion to Expand Powers and Duties, the Receiver requests that he be allowed to conduct discovery as to matters relevant to the Motion for Return of Property Seized. The Receiver requests that after allowing appropriate time to conduct discovery that the Court schedule an evidentiary hearing to consider the matter.

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that upon final hearing and consideration of the Motion for Return of Property Seized that it be, in all things, denied and for such other and further relief, general or special, at law or in equity, to which the Receiver may show himself justly entitled.

Respectfully submitted,

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By:


Michael J. Quilling
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ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2001 a true and correct copy of the foregoing document was served via first class mail, postage pre-paid, on:

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