

EXHIBIT D

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

CASE NO.: 6:07-cv-0608-ORL-22-DAB

SECURITIES AND EXCHANGE COMMISSION,)
)
Plaintiff,)
)
-v.)
)
AQUACELL BATTERIES, INC. and)
MICHAEL J. NASTE,)
)
Defendants,)
)
AQUACELL BATTERIES FLORIDA, INC.,)
ETERENERGY, INC.,)
GAMING SOFTWARE, INC.)
(f/k/a BET-NET ENTERPRISES, INC.),)
GAMING SOFTWARE INTERNATIONAL,)
GODFATHER’S INC.,)
MIGHTY MUSCLE CARS, INC., and)
HOLLYWOOD MOVIE HAIR PRODUCTS, INC.)
)
Relief Defendants.)
	/

RECEIVER, MICHAEL L. GORE’S
MOTION FOR THE ENTRY OF AN ORDER DIRECTING THE TURNOVER AND
TRANSFER OF CERTAIN REAL PROPERTY LOCATED IN
GRAHAM COUNTY, NORTH CAROLINA AND SUPPORTING MEMORANDUM OF
LAW

Receiver, Michael L. Gore (“the Receiver”), moves this Court for the entry of an Order Directing the Turnover and Transfer of Certain Real Property Located in Graham County, North Carolina (“the North Carolina Property”) to the Receiver. In support thereof, the Receiver submits the foregoing Memorandum of Law and the Declaration of Michael L. Gore, filed contemporaneously herein.

MEMORANDUM OF LAW

INTRODUCTION

On April 12, 2007, the Securities and Exchange Commission (“SEC”) commenced this enforcement action against the corporate defendant, Aquacell Batteries, Inc. (“Aquacell”), individual defendant, Michael J. Naste, and relief defendants, Aquacell Batteries Florida, Inc., Eternergy, Inc., Gaming Software, Inc. (f/k/a Bet-Net Enterprises, Inc.), Gaming Software International, Godfather’s Inc., Mighty Muscle Cars, Inc., and Hollywood Movie Hair Products, Inc. On April 13, 2007, this Court entered its Temporary Restraining Order (“TRO”) and Order Appointing Receiver in this action. On May 24, 2007, this Court entered its Preliminary Injunction Order (“PIO”).

Based upon the Receiver’s independent investigation, the Receiver has determined that funds from Aquacell were used to purchase real property located in Graham County, Stecoah Township, North Carolina in the fall of 2005. Although the North Carolina Property was titled in the name of The Trophy Group, Inc. (“Trophy Group”), a company controlled by Defendant Naste, the funding for this purchase came entirely from Aquacell.

On April 19, 2007, less than a week after this Court entered its TRO, Mr. Naste, purporting to act on behalf of Trophy Group, signed a “Quitclaim Deed,” purporting to transfer the North Carolina Property to MWH Investments LLC (“MWH”), a company owned and controlled by Michael W. Hennigan (“Dr. Hennigan”) a physician located in Panama City, Florida, for no consideration. Dr. Hennigan has been previously discussed in the Receiver’s Supplemental Report dated December 14, 2007, and was also recently discussed in the Receiver’s Opposition to the motion of Fountainhead, LLC to lift the receivership stay,

particularly in the context of a discussion of the attempts to disguise Dr. Hennigan's role in paying for Mr. Naste's post-receivership attorney's fees¹. [DE 110].

The Receiver first learned of this transaction in early May 2007 and immediately demanded the return of the North Carolina Property. The SEC and the Receiver took Dr. Hennigan's deposition on November 30, 2007, although Dr. Hennigan asserted the Fifth Amendment privilege against self-incrimination with respect to most questions. The Receiver also obtained through subpoena the records of the North Carolina law firm which handled the North Carolina Property purchase in 2005 and has also examined the books and records of Aquacell, along with bank records.

The Receiver's Motion is based upon the following facts:

- On October 25, 2005², an Offer to Purchase and Contract was entered into between Mr. Naste on behalf of Trophy Group and Stecoah Vista LLC for the purchase of the North Carolina Property. The purchase price was \$267,900.00, with a deposit of \$26,900.00 and the balance of \$243,000.00 to be paid at closing. The funds were payable to the Richards Law Firm Trust Account. **Declaration of Michael L. Gore, Exhibit "A."**
- On December 12, 2005, a North Carolina General Warranty Deed was granted to Trophy Group by Stecoah Vista LLC for the North Carolina Property. **Declaration of Michael L. Gore, Exhibit "B."** Based upon photographs seen by the Receiver which appear to be of the North Carolina Property, the property appears to have improvements. **Declaration of Michael L. Gore, Exhibit C.**
- On October 26, 2005, a cashier's check was issued by Bank of America, N.A. ("BOA") in the amount of \$26,900.00 made payable to "Richard's Law Firm Trust Acct." The remitter is listed as "The Trophy Group." On December 9, 2005 a cashier's check was issued by BOA in the amount of \$244,555.0 made payable to "Richards Law Firm Trust Account." The additional amount was for closing costs. The remitter is listed as "The Trophy Group, Inc." **Composite Exhibit "C" to the Declaration of Michael L. Gore.**

¹ Dr. Hennigan is also the subject of the Receiver's contemporaneously – filed motion regarding the turnover of a 1997 Bentley.

² The Court will note that the date of this offer coincides almost exactly with the purchase of the property in Boston for Mr. Naste's daughters. [DE 102].

- While the remitters on these two cashier's checks are listed as variants of the name, Trophy Group, the BOA bank records demonstrate that these funds came from Aquacell's bank account, a BOA account ending in #1942 ("BOA Account # 1942"). Thus, the documentation attached to both of the cashier's checks show that these funds came from BOA Account # 1942. **Declaration of Michael Gore, Composite Exhibit D.** The debit withdrawal slips, one of which names "Michael Naste" and the other of which names "Aquacell," both indicate that the funds came from BOA Account #1942. **Composite Exhibit E to the Declaration of Michael L. Gore.** Finally, the actual account statements for BOA Account #1942 show a counter debit of \$26,900.00 on October 26, 2005 and a counter debit of \$244,555.00 on December 9, 2005. **Composite Exhibit F to the Declaration of Michael L. Gore.** The evidence thus appears undisputable that the funds used for the purchase of the North Carolina Property came from Aquacell. **Declaration of Michael L. Gore.**
- MWH was organized on April 17, 2007 (the second business day after this Court entered its TRO) and it registered with the Florida Department of State on April 19, 2007. **Declaration of Michael L. Gore, Composite Exhibit "G."** The principal and sole owner of MWH is Dr. Hennigan. Deposition of Dr. Hennigan at 37,42.
- On April 19, 2007, Mr. Naste, purportedly as "CEO" of Trophy Group, executed a Quitclaim Deed conveying the North Carolina Property to MWH. **Declaration of Michael L. Gore, Exhibit H.** That same day, Mr. Andrews wired \$50,000.00 to Baker & Hostetler. Deposition of Michael Andrews at 13-18.
- On April 24, 2007, Dr. Hennigan wired \$50,000.00 to Mr. Andrews as repayment for the \$50,000.00 advanced to Baker & Hostetler. **Declaration of Michael L. Gore, Exhibit I.**
- Despite requests for such information, the Receiver has not been provided with any evidence that any consideration was paid for this conveyance. Certainly no consideration was paid to either Aquacell or the Trophy Group, whose bank accounts are in the possession of the Receiver. **Declaration of Michael L. Gore.** Dr. Hennigan invoked the Fifth Amendment with respect to whether or not MWH paid any consideration for the North Carolina Property. Hennigan Deposition at 67.
- Dr. Hennigan is listed on the records of the Nevada Secretary of State as the Treasurer of Eternergy, Inc., one of the Relief Defendants. Dr. Hennigan is also listed on the records of the Nevada Secretary of State as the President and Treasurer (spelled "Michaor Honnigan") of Gaming Software International, another Relief Defendant. **Declaration of Michael L. Gore, Composite Exhibit "I."** At his deposition, Dr. Hennigan asserted the Fifth Amendment with respect to whether he was an officer of these corporations. Hennigan Deposition at 33. The address listed by his name under the Gaming Software International records is the address of his place of business. Hennigan Deposition at 59.

- Mr. Andrews, discussed above considered Dr. Hennigan a “friend and business associate of Mr. Naste.” Andrews Deposition at 126.
- Mr. Scott Sinclair, the attorney for a group of Aquacell investors, stated at his deposition on February 29, 2008 that he understood that as of August 9, 2004, Dr. Hennigan was a director of Aquacell. Sinclair Deposition at 79. In 2006, he was aware of “some kind of affiliation” between Mr. Naste and Dr. Hennigan. Sinclair Deposition at 121. Mr. Sinclair also identified an email dated March 27, 2006 from one of the Aquacell investors, describing a conversation with Dr. Hennigan regarding the Aquacell investment and describing Dr. Hennigan as Mr. Naste’s “partner.” **Declaration of Michael L. Gore, Composite Exhibit I.**
- Mr. Naste also invoked the Fifth Amendment privilege with respect to whether the Trophy Group was a recipient of Aquacell investor funds, whether he controlled Trophy Group’s bank accounts and assets, that funds to purchase the North Carolina Property came from Aquacell and that he conspired to transfer the North Carolina Property to Dr. Hennigan. Deposition of Michael J. Naste. Recently, however, through a communication from Mr. Naste’s counsel to counsel for Dr. Hennigan, Mr. Naste requested that Dr. Hennigan return the North Carolina Property to the Receiver. **Declaration of Michael L. Gore, Exhibit J.**
- Although not formally named as a Relief Defendant by the SEC in this action, subsequent investigation by the Receiver and his counsel has shown that the Trophy Group was owned and controlled by Mr. Naste, was part of the same group of affiliated companies located at the Aquacell property and had no known legitimate source of income or legitimate business purpose other than possibly the distribution of a paperback science fiction novel entitled “Archangels of Dreamland,” which appears to have been funded with Aquacell funds. The Receiver’s review of Trophy Group bank records shows that it was used as a conduit for funds Mr. Naste received from Receivership Entities and for Mr. Naste’s gambling habit. **Declaration of Michael L. Gore.**

Based upon this investigation, the Receiver has concluded that while the North Carolina Property was purchased with Aquacell funds, it was fraudulently titled in the name of the Trophy Group by Mr. Naste. The Receiver has also concluded that Mr. Naste’s attempted conveyance of the North Carolina Property to Dr. Hennigan immediately after this Court’s TRO was entered a sham transaction done in violation of this Court’s TRO.

I. THE NORTH CAROLINA PROPERTY BELONGS TO AQUACELL AND WAS CONVEYED TO MWH IN A SHAM TRANSACTION.

MWH was formed only two business days after this Court's TRO by Dr. Hennigan, who is an officer of two Relief Defendants. The North Carolina Property was then purportedly conveyed two days later for no consideration by Mr. Naste who is a Defendant and the controlling officer of Aquacell and all of the Relief Defendants. All of this came at the same time that Dr. Hennigan had promised to pay Mr. Naste's legal fees and used Michael Andrews to conceal Dr. Hennigan's payment of these fees. Moreover, Dr. Hennigan paid \$50,000.00 towards these fees only after the North Carolina Property had been conveyed to him.

The North Carolina Property was Aquacell's property and Mr. Naste and Dr. Hennigan created a sham transaction designed to secrete this asset from the Receiver and the reach of this Court's TRO. Section III A of this Court's TRO enjoined Defendants, Relief Defendants, and

“their directors, officers, agents, servants, employees, attorneys....” from “directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property....owned by, controlled by, or in the possession of,”

inter alia, Aquacell and Michael J. Naste.

The North Carolina Property, although titled in the name of Trophy Group, was owned by Aquacell because Aquacell funds were used to purchase this property. The North Carolina Property was also “controlled by or in the possession” of Mr. Naste. Moreover, as an officer of two Relief Defendants, someone identified as a director of Aquacell and someone described by Aquacell investors as “a friend and business associate” or “partner” of Mr. Naste, Dr. Hennigan was someone in “active concert or participation” with Mr. Naste and thus was also bound by this Court's Order.

Accordingly, the Receiver is seeking an Order from this Court determining that the North Carolina Property is property of the receivership; that the Receiver has a constructive trust over

this property and that the Receiver is entitled to an order transferring title to the North Carolina Property to the receivership estate. There do not appear to be any encumbrances upon this property.

Paragraph 24 of this Court's April 13, 2007 Order Appointing Receiver states that:

“In the event that the Receiver discovers that funds of persons who have invested in the Defendants have been transferred to other persons or entities, the Receiver shall apply to this Court for an Order giving the Receiver possession of such funds...”

The Receivership Order further empowers the Receiver to:

“[t]ake immediate possession of all property, assets and estates of every kind of Aquacell and the Relief Defendants, whatsoever and wheresoever located belonging to or in the possession of Aquacell and the Relief Defendants....”

and orders that all persons in custody, possession or control of property belonging to Aquacell and the Relief Defendants deliver such property to the Receiver “forthwith.” Order at 2, 5. The Court further orders that title to “all property, real or personal,” of Aquacell and the Relief Defendants, “wherever located within or without this state, is vested by operation of law in the Receiver.” Order at 7.

It is well established that Rule 56 of the Federal Rules of Civil Procedure gives federal district courts summary jurisdiction over all receivership proceedings. SEC v. Elliot, 953 F.2d 1560, 1566 (11th Cir. 1992). Further, the district court has broad powers and wide discretion to determine relief in an equity receivership. Id. (quoting SEC v. Safety Finance Service, Inc., 674 F.2d 368, 372 (5th Cir. 1982)). The Elliot court further reasoned that such discretion derives from the inherent powers of an equity court to fashion equitable relief to accomplish the goals of equity receiverships; thus, in granting such relief, it is appropriate for the district court to use summary proceedings. Id. (quoting SEC v. Hardy, 803 F.2d 1034, 1040 (9th Cir. 1986)).

Indeed, courts in situations are encouraged to use summary proceedings because they decrease litigation costs and prevent further dissipation of receivership assets. See Id., quoting SEC v. Wencke, 783 F.2d 829, 837 (9th Cir. 1986). This is of particular concern here as both the Receiver and the Court have recognized that there are limited assets available for investors. Accordingly, this Court has the authority to grant the Receiver the requested relief.

II. THE RECEIVER HAS A CONSTRUCTIVE TRUST OVER THE NORTH CAROLINA PROPERTY.

The purchase of the North Carolina Property with Aquacell funds renders it receivership property that is available to the Receiver to return to victims of Aquacell's fraud. See In re Financial Federated Title and Trust, Inc., 347 F.3d 880, 887 (11th Cir. 2003). When a receivership entity has used fraudulent funds to purchase or maintain a property, a constructive trust is created over these funds for the benefit of the defrauded victims. Id. A constructive trust is a "tool of equity designed in certain situations to right a wrong committed and to prevent unjust enrichment of one person at the expense of another either as a result of fraud, undue influence, abuse of confidence or mistake in the transaction." Id. at 892 (citing In re Powe, 75 B.R. 387, 393 (Bankr. M.D. Fla. 1987)). The constructive trust doctrine provides that the rightful owner of misappropriated trust property, in this case, the Receiver, may trace the proceeds of such property and whatever has been bought with the proceeds if it is capable of being substantially identified as having been acquired with the misappropriated property or funds. See In re Lewis J. Heckler, 316 B.R. 375, 387 (Bankr. S.D. Fla. 2004).

Based on the facts set forth above and this established authority, the Receiver has shown that funds from Aquacell's bank account were used to purchase the North Carolina Property. These funds came from investors and there was no legitimate basis to use investor funds to purchase property in Graham County, North Carolina or to disguise the title holder in the name

of another entity, the Trophy Group. As previously noted in the Receiver's Motion regarding the Boston Property purchased for Mr. Naste's daughters, this Court has already ordered the transfer of a 1969 Chevy Camaro that was purchased with Aquacell funds yet titled in the name of Candace Naste. [DE 94].

With respect to the attempted conveyance to Dr. Hennigan, this was a sham transaction done in violation of this Court's TRO which should be reversed. There was no consideration to Aquacell for this conveyance, it was done immediately after the Court entered its TRO to again disguise the true owner of this property, this time using MWH and it was accomplished with the assistance of two corporate officers of the Relief Defendants. Moreover, it appears to have been done as part of an effort by Mr. Naste to have his attorney's fees paid and at the same time conceal Dr. Hennigan's role in this transaction.

This Court is also entitled to draw adverse inferences from both Dr. Hennigan's and Mr. Naste's assertions of the Fifth Amendment at their depositions. Baxter v. Parmigiano, 425 U.S. 308, 318 (1976); Mitchell v. U.S., 526 U.S. 314, 327(1999); United States v. A Single Family Residence & Real Prop. Located at 900 Rio Vista Blvd., Ft. Lauderdale, 803 F.2d 625, 629n.4 (11th Cir. 1986). With respect to Dr. Hennigan, this Court is entitled to infer that MWH paid no consideration for the North Carolina Property and that he was an officer of Eternergy, Inc. and Gaming Software International. With respect to Mr. Naste, this Court is entitled to infer that he controlled the Trophy Group's bank account and assets and conspired to transfer the North Carolina Property to Dr. Hennigan.

Finally, this Court should give weight to Mr. Naste's recent request to Dr. Hennigan, through counsel, to comply with the Receiver's requests both with respect to the North Carolina

Property and the 1997 Bentley. The “grantor” side of this transaction is now requesting that this property be returned to the receivership estate.

The Receiver desires to ensure the marketability and insurability of the Receiver’s title to the Property through the issuance of a Court Order directing the turnover and transfer of the title to the North Carolina Property to the Receiver. Marketable title is essential to ensure the highest possible price to be derived from the sale of the North Carolina Property. Upon the entry of an appropriate order by this Court, all right, title and interest to this property should vest with the Receiver.

The Receiver also requests authority to promptly market and sell the North Carolina Property. The Receiver will hire a competent and experienced real estate broker, who will use his or her best efforts to sell the North Carolina Property. Once the sale is approved by this Court, the Receiver will proceed to close the transaction and all proceeds, net costs of sale, will be added to the receivership assets.

The Receiver has located in the receivership records what appear to be photographs of the North Carolina Property, evidenced by the presence of Mr. Naste’s son, Michael Naste, Jr.:



As the Receiver has previously noted in his reports, the North Carolina Property represents a significant asset that should be returned to the receivership estate for the benefit of investors. With a purchase price of \$267,900.00 and unencumbered, the sale of the North Carolina Property could realize a significant recovery for investors.

RULE 3.01(g) STATEMENT

Counsel for the SEC is in agreement with the relief sought in this motion. As stated earlier, through his counsel, Mr. Naste has requested that Dr. Hennigan return the North Carolina Property to the Receiver. Through counsel, Dr. Hennigan has indicated his opposition to the relief requested.

Dated this 9th day of May, 2008.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on May 9, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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