

Interim Report of the Special Master

Robert B. Carney, your Special Master, files this his Interim Report. The purpose of the Report is to keep the court advised regarding the progress made so far and to make some recommendations for future action.

The most recent Order of this court required the Defendants to produce of a Privilege Log by January 31, 2001. While a Privilege Log was presented timely, Plaintiff objected that it was not in compliance with *Tig Ins. Corp. v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001). The Parties met with your Special Master in February and came to an agreement for production of a more *Tig* compliant Privilege Log. This second log was produced and the Plaintiff again objected to its form. Again, the parties and the Special Master met, this time on March 15, 2011. At this second meeting, the Plaintiff requested that the Special Master recommend sanctions to and including a determination of a waiver of privilege.

As of this interim report a rather extensive list of documents has been pared from approximately sixteen thousand (16,000) documents to approximately two thousand (2,000) documents. All documents other than the two thousand (2,000) have been released to the Plaintiff. The remaining documents are emails, many of which have multiple recipients and include 'strings' of other emails. Your Special Master determined that the nature of the documents make very difficult the production of a Privilege Log for which there cannot be an objection raised. Continuing with production and objection was, in your Special Master's view, going to be counterproductive both in time and efficiency.

After discussion of this with the parties your Special Master has directed the following: 1. Defendant will produce to Plaintiff a master list of the names contained in the privilege log describing who they are. This production shall be done not later than March 22, 2011. This will provide the Plaintiff with a better ability to determine if there is any third party

disclosure. 2. On April 6, 2011, the parties will be present while your Special Master conducts and *in camera* inspection of the documents. The purpose of the *in camera* inspection is to cull the documents further and provide Plaintiff with further information regarding the specifics of the privilege asserted.

Following this *in camera* inspection, the parties will schedule an evidentiary hearing for a final resolution of the privilege issue with the Report of the Special Master to follow shortly thereafter.

Additional Recommendations

This matter came before this court because this court, through the trustee, had possession of the documents that Mr. Epstein sought in his state court action. Judge Crow, the state court judge has deferred to the procedures in place in the bankruptcy court while at the same time noting that he is not bound by the decisions of the bankruptcy court as it pertains to state court procedural and evidentiary rulings.

This leaves open the potential for conflicting court orders. While others before the bankruptcy court may have an interest in these documents, too, the fact remains that they are not party to the state court action, and Mr. Epstein is not party to any bankruptcy court action. Nor are they involved in any hearings before your Special Master. Mr. Epstein's rights derive solely as a result of his state court action, and Judge Crow is correct that he is, indeed, the presiding judge for procedural and evidentiary matters in that action.

My recommendations are as follows:

1. The parties approach Judge Crow regarding appointing your Special Master as a Special Master also in the state court action.
2. If Judge Crow agrees to such appointment, and if this court agrees, then the final report of the Special Master would be provided to both the bankruptcy judge and the state court judge, and objections, while presented to both, would be directed to Judge Crow. If there is an order adopting the Recommendations of the

Special Master it would come from Judge Crow. Likewise if any objections are sustained, that order, too, would come from Judge Crow.

3. By taking this approach, the potential of conflicting orders is eliminated. Implementation of any order entered by Judge Crow regarding documents in the possession of the trustee would be by order of this court, which leaves this court properly in control of documents in its possession. At the same time, this procedure relieves this court of having to resolve state court evidentiary issues for which this court has no interest.
4. If both Judge Crow and Judge Ray are amenable to this procedure, then each court's Orders be entered or amended accordingly.

The parties have agreed that Judge Crow needs to be involved in this process. As Mr. Ackerman noted in his February 11, 2011, letter to me: "We do not object to Judge Crow being presented with your report and ruling on any objections to it, provided Judge Ray agrees." Likewise, the Defendant has repeatedly requested that Judge Crow be the one to rule on any objections or be the one to adopt the Recommendations of the Special Master.

Your Special Master makes this his recommendation since as of yet, the parties, while agreeing in principal, have neither approached Judge Crow regarding the appointment in state court nor approached Your Honor to see if this court is amenable to that suggestion. If this recommendation does not itself provide that nudge, then perhaps this court can.

Respectfully submitted this day of March 2011.

Robert B. Carney
Special Master

