IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ACTING SECRETARY OF COMMERCE, FERMIN M. ATALIG, in his official capacity as the CNMI DIRECTOR OF BANKING UNDER 4 CMC 6105(a), Plaintiff, v. THE BANK OF SAIPAN, INC., Defendant.	**CIVIL ACTION NO. 02-0268** **ORDER TERMINATING RECEIVERSHIP**

The instant Order governs the termination of the Bank of Saipan's ("the Bank's"), Receivership, which has been in place since August 30, 2002. The Order addresses the June 2, 2006 Stipulation to Terminate Receivership Proceedings ("the Stipulation," signed by all of the parties[1] to the litigation), as well as the right to be heard of David W. Axelrod and Schwabe, Williamson & Wyatt (collectively, "the Schwabe Firm").[2]

I. REQUISITES FOR TERMINATING RECEIVERSHIP

Under older jurisprudence, a party whose assets are controlled by a receiver has a right to have the receiver discharged and his property restored if he satisfies the debt upon which the receivership is based. *Milwaukee & M.R. Co. v. Soutter*, 69 U.S. 510, 521-22 (1864). This

[1] The parties are the Bank of Saipan, through counsel David Mair; the Receiver Antonio Muna (who replaced the prior Receiver, Randall Fennell), through counsel Joshua Berger; and the Secretary of Commerce (the initiator of the receivership), through counsel Marie Martinez.

[2] The Schwabe Firm served as counsel for Mr. Fennell during his tenure as Receiver.

jurisprudence vests the party who instituted the receivership with some degree of authority to terminate the receivership. *See Decker Bros. v. Berner's Bay Min. Co*., 3 Alaska 280 (1907) (discontinuance of the suit operates to discharge the receiver); *Whiteside v. Prendergast,* 2 Barb.Ch. 471 (N.Y.Ch.1847) (discontinuance of a suit will entitle the receiver to apply for his discharge, unless the interests of the defendants require the continuance of the receivership to protect their rights). *See also De Leonis v. Walsh,* 82 P. 1047 (Cal. 1905) (if the party with the right to request the appointment of a receiver no longer desires a receiver, another person cannot compel the appointment of a receiver).

More recent cases suggest that a trial court may, in the interests of equity, exercise its discretion to continue a receivership, even though the original debt has been satisfied. *Consol. Rail Corp. v. Fore River Ry. Co*. 861 F.2d 322, 328 (1st Cir.1988) (the trial court may continue the receivership for the benefit of other creditors even though the judgment of the petitioning creditor has been satisfied if there is a risk of unfair prejudice to warrant the continuance); *Dixie-Land Iron & Metal Co., Inc. v. Piedmont Iron & Metal Co*., 213 S.E.2d 897 (Ga.1975)(voluntary dismissal of complaint does not automatically discharge receiver who has qualified and taken possession of funds); *Hanno v. Superior Court of Santa Barbara County*, 87 P.2d 50 (Cal. App. 2 Dist. 1939) (the end of suit gives cause for discharge of receiver but does not, *ipso facto*, effect his discharge, which results only from order of court which appointed him so directing).

The trial court has broad discretion in determining whether the receivership should be terminated. *Securities and Exchange Commission v. An-Car Oil Co., Inc*., 604 F.2d 114 (1st Cir. 1979) (district court possesses broad range of discretion in deciding whether to terminate an equity receivership); *Jones v. Vill. of Proctorville, Ohio,* 290 F.2d 49, 50 (6th Cir. 1961) (discharge of a receiver is ordinarily a matter resting within the sound discretion of the appointing court). The

Court has a duty to make this determination using its own analysis of the pertinent facts and legal theories. *See Crow v. Nationwide Mut. Ins. Co.*, 824 N.E.2d 127 (Ohio App. 2004). In order to safeguard the interests of those with a stake in the Bank's financial condition, the Court must consider the rights and interests of all parties concerned. 65 Am. Jur. 2d *Receivers* §§ 6,141.

One court has suggested that the burden of proving whether termination is appropriate is on the party whose assets are subject to the receiver's control. *Milo v. Curtis*, 651 N.E.2d 1340, 1344 (Ohio App. 9 Dist. 1994). This party must demonstrate that, in the interests of equity, the receivership should be terminated and control over the property restored. *Id*.

The Stipulation states that termination is appropriate where there are no grounds for continuance of the receivership under 4 CMC § 6106(f). Stipulation at ¶ 6. However, this statute does not refer to the continuance or termination of a receivership. It refers only to the power of Bank Directors to ***initiate*** a receivership upon a determination "that a bank is not in sound financial condition to continue doing business or that its affairs are being conducted in such a manner that the public or the persons having securities or funds under its custody are in danger of being defrauded." 4 CMC § 6106(f). Rather than restricting its analysis to the Bank's capacity for doing business without defrauding the public and investors, the Court will consider whether the Bank is capable of restoring its creditors' funds, and whether terminating the receivership would result in an unfair prejudice to creditors and depositors.

II. CONSIDERATION OF AMICUS CURIE INPUT

A. Qualifications for an Amicus Curie

Black's Law Dictionary (8th Ed.) defines *amicus curie* as "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." Amicus curie participation is appropriate

where the applicant has special knowledge of the subject matter or issues before the court. *See Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996).

While the partiality of an amicus is a factor to consider in deciding whether to allow participation, "there is no rule ... that amici must be totally disinterested." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982). "[B]y the nature of things an amicus is not normally impartial." *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y.1991);

The decision to permit amicus participation is well within the court's discretion. *See U.S. v. Providence Journal Co*., 485 U.S. 693 (1988); *Pennsylvania Environmental Defense Foundation v. Bellefonte Borough*, 718 F.Supp. 431, 434 (M.D.Pa.1989); *Gotti*, 755 F.Supp. at 1158; *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D.Ill.1982). This discretion extends to a court's decision to allow the amicus to participate in oral argument. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987); *Cooper v. City of Picayune*, 511 So.2d 922, (Miss. 1987)

B. The Schwabe Firm's Role as Amicus

To the extent that it may later pursue an action against the Bank, the Schwabe Firm has a tangential interest in the Bank's financial well-being. *See In re Bank of Saipan*, No. 05-0525 (N.M.I. Supr. Ct. Mar. 23, 2006) (Order Denying Randall Fennell, David Axelrod, and Schwabe, Williamson, & Wyatt's Request for Appellee Status at ¶ 1). If this were the only association of the Schwabe Firm with the instant action, it would be insufficient to warrant amicus.

As counsel to the prior receiver, however, the Schwabe Firm may have insight into the affairs of the Bank. The Schwabe Firm's input may provide an additional perspective as to whether termination poses a risk to the Bank's depositors and creditors.[3] For this reason, the Court accepts the Schwabe Firm's input as an amicus curie.

[3] The Court agrees with the Schwabe Firm's assertion that the Court's duty is ultimately to protect the depositors and creditors. None of these persons, who appear to have a valid interest in this litigation, have chosen to intervene.

The Supreme Court similarly admitted the Schwabe Firm's amicus brief in the Bank's appeal of this Court's Spending Cap Order,[4] but cautioned against the participation in a manner calculated to disrupt the Bank's lawsuit against Mr. Fennell.[5] "If the Receivership stays open, presumably, it will be more difficult for the Bank to pursue the Fennell litigation." Order Denying Request for Appellee Status, at ¶ 6. This Court agrees that the receivership case must not be used as a sword to seek advantage in the Fennell case. For this reason, the Court will only consider the Schwabe Firm's factual arguments regarding whether the Bank has met the requisites for terminating the receivership. The Schwabe Firm's statements at the August 1, 2006 hearing and its briefs submitted in anticipation of the hearing have provided the Court with sufficient information to make its decision. Thus, the Schwabe Firm's role as amicus will be limited to what it has already submitted.

III. ANALYSIS

A. The Stipulation is persuasive but not decisive, particularly as a wholesale indemnification of the parties is inappropriate at this time.

As discussed above, the termination of the receivership and the terms of termination must be decided by the Court, not the stipulating parties. The Stipulation is influential on the Court's consideration, as it reflects the belief of all parties that the Bank is prepared to resume the management of its affairs. The parties, particularly the Receiver, are in the best position to assess the Bank's status. For the most part, the Bank is willing to give the stipulating parties the benefit of the doubt. *See Crites, Inc. v. Prudential Co.,* 322 U.S. 408, 414-15 (1944) (noting that a court has

---

[4] *See In Re Bank of Saipan*, No. 05-0025-GA, (Supr. Ct. May 24, 2006) (Order Vacating the October 14, 2005 "Spending Cap Order"). No oral arguments were held.

[5] *Bank of Saipan v. Randall T Fennell*, No. 04-0449.

right to expect that receivers "would not make undisclosed private agreements . . . or use their official positions to further the interests of themselves.").

Nevertheless, the Court cannot ignore the possibility that the parties may be motivated by self-interest. As the Schwabe Firm points out, the Stipulation offers the Receiver the personal benefit of exoneration without further review of his action. *See* Stipulation at ¶ 9. It allows the Bank Directors to immediately regain control of the Bank. It provides “key government depositors” with the Bank’s promise to attempt to accelerate the payment schedule set forth in a prior agreement with these parties. *See* Stipulation at ¶ 7.

A wholesale indemnification of any of the parties at this time is inconsistent with the Supreme Court’s reversal of the Superior Court’s complete exoneration of the former Receiver. As the Supreme Court explained in *In re Bank of Saipan, Inc.*, 2005 MP 03, ¶ 14 (2005), exoneration is inappropriate outside of a case or controversy on the matter. A receiver is entitled to immunity only after a determination in the suit against him that "his acts were done honestly, in [] good faith, and in the exercise of the authority derived from his appointment." *Id.; see also Federal Sav. and Loan Ins. Corp. v. PSL Realty Co.*, 630 F.2d 515 (7th Cir. 1980) (when receiver in obedience to court order has disposed of property in receivership, his liability and responsibility as receiver of that property ceases; however, in personam action against receiver concerning breach of his fiduciary duties to receivership property may nevertheless be maintained subsequent to his discharge).

Thus, while the Court takes notice of each signatory-party’s desire to terminate the receivership, it will not incorporate verbatim the terms of the Stipulation into the instant order.

B. Review of existing records and the submissions of the parties to the Stipulation suggest that the Bank is capable of restoring its creditors' funds, and that terminating the receivership will not result in an unfair prejudice to creditors and depositors.

The Schwabe Firm has raised legitimate concerns regarding the parties' forthrightness in determining the Bank's readiness to terminate its receivership. The Court shares some of these concerns, but finds that they have been adequately addressed in the submissions of the stipulating parties.

The Schwabe Firm notes that the Bank has not submitted the 2005 Bank Examination, which could provide this Court with direct insight on the Bank's condition. The Bank argues that the report contains confidential information about depositors and borrowers with the Bank and the disclosure of the document by the Bank is prohibited by 4 CMC § 6451. The Bank asserts that the Receiver has a copy of the Bank Examiner's Report, and has apparently examined it to his satisfaction.[6]

The Receiver did provide the Court with a Declaration of its Chief Financial Officer, indicating that (1) the deposit level has increased in the last year; (2) there is sufficient liquidity to pay retail deposits; (3) the Bank has continued making timely payments of the government agency deposits; (4) the Bank is currently profitable; (5) the Bank meets the CNMI capital earnings requirement; (6) the Bank has reserved funds that it believes will be sufficient to cover litigation costs; (7) the Bank's loans have increased and there are currently no delinquencies; and (8) the Bank has been able to sponsor community activities. The Court takes notice that the Bank, under the current receiver has been able to recover 100% of depositors' investments.[7]

---

[6] The Court is dismayed by the Bank's unwillingness to facilitate the termination proceedings by taking the necessary steps to provide the Court with the pertinent information contained in the Bank Examination. Because the Court has sufficient information from other sources, however, it declines to exercise its power under 12 U.S.C. § 3407 to subpoena the Bank Examination.

[7] The previous receiver was prepared to liquidate bank for a 15% return on investments.

C. Termination is timely.

The receivership is a stigma to Bank. The depositors are better served by terminating the receivership now and determining outstanding fees and other issues at a later time.

The Schwabe Firm notes that the CNMI Supreme Court's November 9, 2005 order stayed this action and held in abeyance the Bank Directors' request for a Writ of Mandamus to terminate the Receivership. It argues that the Supreme Court's May 24, 2006 order vacating the spending cap did not explicitly lift the stay or refer to the Writ of Mandamus. In fact, the May 24, 2006 order implies that these matters are within the realm of the Superior Court's jurisdiction: "The Bank has requested remedies that are unavailable and untimely, and thus we decline any invitation to go beyond our jurisdiction or intrude in matters that are not properly before us." *Id.* at ¶ 9.

Further, it appears that the stay was largely based on the excessive filing of briefs in the Supreme Court: "These filings have produced a plethora of responses that mount each day … Having reviewed the voluminous and mounting filings to date in support of, or opposition to, various matters concerning the parties, the Court has come to a decision regarding the procedure in this case." *Id.* at ¶¶ 5-6. This reasoning no longer applies.

Finally, any failure on the part of the Supreme Court to address these matters does not affect this Court's ability to resolve the case, as the issuance of the order effectively returned jurisdiction to the Superior Court.

The Court is not persuaded to prolong the receivership by the Schwabe Firm's argument that continuing the receivership will assure that the Receiver remains responsive to discovery requests from Fennell and the Schwabe Firm in related suits. Again, these entities are not entitled to use the receivership as a sword in related cases.

The Schwabe Firm refers to the role of the Bank Directors, their counsel, and the majority shareholders in the sale of the Bank and the subsequent mismanagement that gave rise to the receivership, and suggests that the termination of the receivership will foreclose the possibility of holding these parties liable for any misconduct. The Court does not find this argument convincing, as the minority shareholders or other investors remain free to bring a derivative action against these parties.

D. The terms of the Rehabilitation Plan will adequately govern the Bank's return to the private sector.

The Bank of Saipan Report and Rehabilitation Plan, prepared by the Andela Consulting Group and filed with the Court on January 29, 2003, was approved by the Court's February 13, 2003 order. This Plan must govern the Bank's actions following the termination of the receivership. In adhering to the Plan, the Bank must do the following:[8]

1. Management

- Put aside partisianship and adopt an attitude that best serves the Bank's depositors, the CNMI government, and the CNMI's people.
- Recruit new, well qualified banking professionals to serve as the CEO, Chief Lending Officer, and CFO. Consult with the FDIC, OCC and OTS officials before hiring these officials.
- Ensure the enforcement of Bank policies and procedures.
- Include additional independent and qualified members on the Board of Directors.
- Minimize the amount of credit and loan values that Bank officers may give.
- Continue regular Board and Loan Committee meetings.

[8] This list is not all-inclusive. The Plan contains 52 pages of targets for the Bank, some of which may have already been achieved, and some of which need more development.

2. Reduction

- Close any unnecessary premises.
- Liquidate any investments that are not U.S. treasury grade.

3. Customer relations

- Develop strategic business plans to expand the Bank's customer base and service.

4. Recovery of funds

- Recover fraudulent loans and pursue claims against wrongdoers.
- Establish repayment programs with existing qualified borrowers whose payments ceased subsequent to the establishment of the Receivership.
- Negotiate a guaranty loan swap or in lieu of payment demand a borrower deficit supplemental payment program with the CDA.
- Increase the Bank's liquidity by negotiating early repayment of select large loans.

5. Retention of funds

- Provide existing depositors with financial incentives tied to the retention of their deposits for a specific period of time.
- Negotiate the conversion of qualified and willing individual and business depositor-related deposit accounts into capital or capital notes
- Retain performing loans for income purposes

6. Application of funds

- Contribute collections from loans to a capital note sinking fund and/or to dividends on depositor-related stock.

- Settle Bank bond and insurance claims as quickly as possible.
- Reduce classified assets to specified levels by certain deadlines.

7. Acquisition

- Acquire capital infusion from the current major shareholders.

8. Other

- Establish a deadline for obtaining FDIC insurance and develop a plan to meet that deadline.
- Regularly report compliance matters to dept of commerce and director of banking.

The Plan anticipates litigation against those who have caused harm to the Bank. While the need to rectify wrongdoing is undisputed, the need for cost controls on litigation has been a point of contention. This Court's imposition of a spending cap of $200,000 and bond requirement of $2,000,000 was reversed in the Supreme Court's May 24, 2006 order. The Schwabe Firm points out that the reversal order did not take away the Court's power to impose reasonable cost controls. *See* the May 24, 2006 order at ¶ 11. The Schwabe Firm seems particularly concerned with the contingency fee agreement that controls the Bank's litigation against the Schwabe Firm and other persons.

The Court has reviewed the contingency fee agreement, and shares some of these concerns. However, the agreement does not appear to be so inadequate as to set the Bank up for failure. While the Court does not cede its power to impose cost controls, it must avoid micromanaging the Bank's affairs. The Supreme Court's May 24, 2006 opinion suggests that this Court would not be in a position to impose cost controls until and unless it obtains and evaluates all the pertinent facts. The Receiver and Bank Directors are currently privy to these facts, and believe that the contingency fee

will enable the Bank to control its costs while pursuing its claims. The Bank is a sophisticated business entity capable of making such a decision.

IV. CONCLUSION

The Court hereby orders the termination of the receivership. Management of the Bank must proceed according to the terms of the Rehabilitation Plan, as described in the Report and outlined above.

The Bank must file a report with the Court within six months of this order, demonstrating its compliance with the above outline for rehabilitation.

A second report must be submitted within one year of this order.

The Bank Directors have some discretion in the implementation of the outline, e.g., in seeking compensation for any mismanagement of the bank by former directors or receivers.

Any entity that feels it has suffered harm from any failure of the Bank to comply with this order may move the Court for an order of contempt.

SO ORDERED this 11th day of August, 2006.

/s/_____

JUAN T. LIZAMA, Associate Judge