Paul T. Moxley (2342)
Thomas J. Burns (8918)
Z. Ryan Pahnke (11146)
DURHAM JONES & PINEGAR
111 East Broadway, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 415-3000
E-mail: pmoxley@djplaw.com
tburns@djplaw.com
rpahnke@djplaw.com

Attorneys for Curtis L. DeYoung

<table>
<tr><td colspan="2">IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
UNITED STATES OF AMERICA</td></tr>
<tr><td>SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

AMERICAN PENSION SERVICES, INC., a Utah Corporation and CURTIS L. DeYOUNG, an individual,

Defendants.</td><td>MOTION TO RELEASE PROFITS OF AMERICAN PENSION SERVICES, INC. FOR PAYMENT OF ATTORNEY FEES

Case No: 2:14-cv-00309

Judge Robert J. Shelby</td></tr>
</table>

Defendant Curtis L. DeYoung ("DeYoung"), by and through his counsel appearing by limited appearance pursuant to DUCivR 81-1.03(b),[1] hereby moves the Court for an order to release $250,000.00 from the funds that are subject the Order Appointing Receiver, Freezing Assets, and Other Relief (the "Freeze Order") that was entered by this Court on April 24, 2014. Dkt. No. 9. DeYoung also moves the Court for an order finding that counsel for DeYoung may accept the funds tendered as a retainer for DeYoung without disclosing privileged information in connection with the funds.

This motion is made on the grounds that the Freeze Order will effectively prevent DeYoung from maintaining the legal representation that is necessary to present a competent defense in this case unless funds are released under the Freeze Order. Releasing funds is proper in this case because the Freeze Order is not supported by the law or by the facts that have been alleged by the Securities and Exchange Commission (the "SEC"). Moreover, the Receiver appointed by the Court has acknowledged that the current revenues of American Pension Services, Inc. ("APS") and the revenues of APS 401K, a separate business that is also affected by the Freeze Order, are not implicated by the allegations in the Complaint before this Court; however, these funds are still subject to the Freeze Order. These legitimately acquired funds should be released under the Freeze Order for the purpose of allowing DeYoung to present a competent defense after the funds tendered as a retainer on DeYoung's behalf have been expended.

[1] Counsel's limited appearance is made conditioned upon approval by the Court of counsel's acceptance of funds paid by friends and family of DeYoung as a retainer, as explained herein. Although counsel is appearing only pursuant to a limited appearance, for convenience they are referred to herein simply as counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

DeYoung submits the following memorandum of points and authorities in support of the Motion to Release Funds Held by Receiver for Payment of Attorney Fees.

SUMMARY OF RELEVANT ALLEGATIONS AND FACTS

1. On April 24, 2014, the Securities and Exchange Commission (the "SEC") filed the Complaint in this action against American Pension Services, Inc. ("APS") and Curtis DeYoung ("DeYoung"). *See* Dkt. No. 1.

2. That same day, the SEC filed an *Ex Parte* Motion for Temporary Restraining Order, Order Appointing Receiver, Freezing Assets and Other Ancillary Relief and Memorandum in Support Thereof (the "TRO Motion"). *See* Dkt. No. 3.

3. That day, the Court entered an order granting the SEC's request for a TRO and entered a separate Order Appointing Receiver, Freezing Assets, and Other Relief (the "Freeze Order"). *See* Dkt. No. 9.

4. Among other things, the Freeze Order restricted the ability of any person or entity who has direct or indirect control over any Receivership Assets and/or any Recoverable Assets as defined in the Freeze Order. *See* Dkt. No. 9.

5. The Freeze Order specifically includes all assets of DeYoung, including his bank accounts, real property, and personal investment accounts. The Freeze Order resulted in DeYoung's credit being frozen, eliminating his ability to pay for any services, including legal services.

6. Following the entry of the TRO and Freeze Order, DeYoung has attempted to retain counsel to defend him in this matter. However, the terms of the Freeze Order have left DeYoung incapable of paying any attorney fees, including any retainer.

7. DeYoung's family and friends rallied to his defense and deposited $80,000—as revealed to the court by Mr. Moxley on May 8, 2014—with counsel for DeYoung's defense. When counsel informed the SEC of the receipt of these funds, the SEC requested a disclosure of privileged information, which counsel has refused to provide. Upon receipt of the funds, however, counsel ascertained that the funds deposited for DeYoung defense were obtained independent of funds from both DeYoung and APS.

8. At the hearing before this Court on May 8, 2014, the receiver appointed by the Court stated that APS is continuing its operations. The SEC has also presented evidence to show that in 2012, APS generated fees on customer accounts amounting to approximately $2.4 million through proper business activities that are not related to the allegations of the SEC in this case. *See* TRO Motion, p. 5 & Ex. G

ARGUMENT

Because DeYoung has at least colorable claims that 1) the SEC's claims are untimely as a matter of law, which, if true would divest this Court of jurisdiction over the claims, and 2) that the SEC's allegations are devoid of any actual allegation of securities fraud under the 1933 Securities Act and the 1934 Exchange Act, this Court should order the Receiver to release funds to DeYoung for his defense, including attorney fees. Moreover, the equities support releasing funds for DeYoung's defense because he is unable to pay the expenses of maintaining legal

representation absent the release of funds subject to the Freeze Order. If this Court refuses to permit DeYoung to present a defense in this matter, the inevitable result will be the termination of APS's ongoing and profitable business activities, and the SEC's effort will be a defacto victory without permitting DeYoung to defend against the allegations.

I. THE SEC FAILED TO SUPPORT ITS REQUEST FOR TRO WITH A PRIMA FACIE CASE AND ITS CLAIMS ARE UNTIMELY.

The Court should release the requested funds to DeYoung for the payment of attorney fees because the Freeze Order was not warranted under the facts alleged in this case. Although the SEC's burden to obtain a TRO is less than that necessary to obtain full injunctive relief, s*ee* *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *see also* 15 U.S.C. §§ 77t(b) and 78u(d)(1), the SEC has failed to meet its minimal burden of showing a *prima facie* case that a violation of the securities laws has occurred and that such violations will continue to occur in the absence of the TRO. The facts alleged in the Complaint and the SEC's TRO Motion do not show, even when construed in the SEC's favor, that DeYoung violated securities law.

Moreover, even if this Court were to conclude that the SEC had alleged facts that suggested that DeYoung had committed any unlawful act in connection with the offer, sale, or purchase of a security, the facts as alleged by the SEC in the Complaint and the TRO Motion demonstrate that each of the claims alleged by the SEC are untimely under 28 U.S.C. § 2462.[2] Under § 2462, the SEC must bring a claim for securities fraud no later than five years from the

[2] Mr. DeYoung has also filed a Motion to Dissolve the TRO and Associated Order, which more fully discusses, explains, and argues the applicability of section 2462 and the SEC's failure to timely raise any securities fraud claim against Mr. DeYoung pursuant to the very few specific allegations contained in the SEC's complaint

last act necessary for a securities fraud claim to have accrued. The SEC has failed to allege that DeYoung engaged in any unlawful act in connection with the offer, sale, or purchase of a security after April 23, 2009, let alone that DeYoung engaged in any transaction with any APS client following that date.

Instead, the SEC alleges only that DeYoung misappropriated funds from the APS commingled Trust Account, which is, and was, funded by APS customers and clients. The SEC also claims that DeYoung complied with APS customer instructions regarding their decisions to fund certain investments, which later failed. The SEC does not allege that DeYoung engaged in any unlawful act related to the offer, sale, or purchase of any securities identified the SEC's complaint. Instead, the SEC makes certain general allegations that DeYoung engaged in wrongdoing related to the commingled APS trust account, and attempts to use those allegations of wrongdoing to manufacture a Securities Fraud violation. In the absence of any allegations that would qualify as an actual violation of section 17(a) and rule 10b-5, the SEC's complaint is insufficient to vest this Court with jurisdiction over the SEC's claims. DeYoung should be permitted to present this defense through counsel.[3]

Additionally, the SEC's failure to alleged that DeYoung committed any unlawful act in connection with the offer, sale, or purchase of a security after April 23, 2009 should result in a determination that the SEC lacks standing to bring these claims against Mr. DeYoung, and a connected conclusion that this Court lacks jurisdiction over the SEC's claims against DeYoung. *See Gabelli v. SEC*, --- U.S. ---, 133 S.Ct. 1216, 1223-24 (2013) (holding that government claims

[3] Mr. DeYoung Motion to Dissolve also fully articulates the SEC's failure to make an actual securities fraud claim and DeYoung would refer the Court to his Motion to Dissolve for a more comprehensive discussion of this issue.

of fraud involving securities and seeking civil penalties must be brought within five-years of the last act necessary for a cause of action to accrue, and failure to do so divests all courts of jurisdiction over the claims).

In short, regardless of the posture, the SEC bears the burden of establishing facts sufficient to support this Court's exercise of jurisdiction. *See, e.g., Stevens v. Vowell*, 343 F.2d 374, 378 (10th Cir. 1965). Here, the SEC's complaint, as well as its motion for TRO, is devoid of sufficient facts to show, by a preponderance of the evidence, *see McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), that this court has jurisdiction over the matter. In the absence of such proof, the SEC has not established that it has standing to bring the claims, and it therefore cannot prevail on the merits of its claims. *See Penteco Corp. v. Union Gas Sys., Inc.,* 929 F.2d 1519, 1521 (10th Cir. 1991) ("[a] court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking" (quotations and citation omitted)).

The SEC's failure to state a *prima facie* case is obvious on the face of the complaint against DeYoung. Thus, the SEC failed to meet even the minimal standard for entry of injunctive relief against DeYoung and failed to demonstrate that the SEC has jurisdiction over any alleged wrongdoing. Thus, in the absence of properly invoked jurisdiction, it was improper to subject DeYoung to the restrictions of the Freeze Order and he should be permitted to utilize his assets and resources to prepare and present a defense in this matter.

II. THE RECEIVER SHOULD BE ORDERED TO RELEASE FUNDS FOR DeYOUNG'S ATTORNEY FEES.

Even if this Court were to conclude that the SEC supported its application for injunctive relief by a *prima facie* case, this Court should still order the receiver to release $250,000.00 from the frozen assets to allow DeYoung to prepare and present his defense to the SEC's claims. Doing so would be in line with a number of courts that have recognized the equities in a case such as this, resulting in orders releasing otherwise frozen assets when those assets are required for the payment of personal or legal expenses. *See, e.g.*, *S.E.C. v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427, 430 (S.D.N.Y. 2001); *S.E.C. v. Dowdell*, 175 F.Supp.2d 850, 855-56 (W.D.Va. 2001). In this case, DeYoung's request for fees should be granted because he possesses colorable arguments about timeliness and the quality of the SEC's claims and DeYoung will not be able to properly pursue those colorable claims in the absence of access to a portion of the assets subject to the Freeze Order.

In *Duclaud*, the court released a portion of otherwise frozen assets for the defendants' payment of legal expenses after the court issued an *ex parte* temporary restraining order and froze the assets in brokerage accounts held by the individual defendants. *See* 170 F.Supp.2d at 429. The individual defendants asked the court to release $700,000 out of $1,000,000 held in one account and $1,000,000 out of $3,700,000 held in another account for the payment of counsel fees and living expenses. *Id.* at 428. Both defendants argued that the payment of counsel fees and related litigation expenses had resulted in a severe financial burden and undermined their respective abilities to mount a meaningful defense. *Id.* at 430. The *Duclaud*

SLC_1838351.1

court denied the defendants' requests to release funds for personal expenses because neither defendant presented evidence of their overall financial condition; the court nevertheless modified the freeze order to allow both defendants to pay their legal fees incurred in disputing the evidentiary basis of the temporary restraining order. *Id.*; *see also U.S. v. Petters*, CIV 08-5348 ADM/JSM, 2009 WL 803482, *4 (D. Minn. Mar. 25, 2009) ("[I]n the interest of providing Defendant [] with the opportunity for a full and fair hearing on the merits in this complex case, and in the absence of other sources available to Defendant [] to secure counsel, the Court will authorize payment for attorney fees reasonably and necessarily incurred in Defendant['s] defense.").

Here, DeYoung vigorously disputes that the SEC has presented a *prima facie* case in support of its claims, or the Freeze Order. He also vigorously disputes that he has committed any securities violation, a fact supported by the absence of any substantive allegation in the SEC's complaint that could be viewed as sufficient to satisfy the requirements for pleading a securities violation in this matter. Should this Court refuse to release to DeYoung a portion of the frozen assets for his use in defending against the SEC's allegations, it would be depriving DeYoung of his right to present a meaningful defense and would preclude DeYoung from pursuing the dissolution of the preliminary injunction, destroying his ability to meaningfully participate in all subsequent proceedings.[4] *Dowdell*, 175 F.Supp.2d at 856 ("This court's central concern is the fairness of the proceedings. The court does not believe that it could achieve a fair

---

[4] Although a retainer has been paid to counsel for DeYoung on DeYoung's behalf, these funds cannot be expected to cover the expenses that will be incurred in preparing and presenting a competent defense on behalf of DeYoung at a preliminary injunction hearing.

result at the preliminary injunction hearing were it to deny defendants the ability to retain counsel."). When dealing with complex legal matters, such as those that DeYoung has raised in this case, "lawyers are essential to the presentation of issues" likely to come before the Court. *Id*. Depriving DeYoung of the opportunity to retain and maintain properly skilled and prepared legal representation throughout the course of this matter will prevent the Receiver, the Court, and all other parties involved in this action, including DeYoung, from the opportunity to efficiently and effectively litigate the claims that have been raised by the SEC in this case.

III. THE EQUITIES REQUIRE THAT PROFITS EARNED BY APS SHOULD BE AVAILABLE TO PRESENT A DEFENSE.

Injunctive relief in the form of the Freeze Order is equitable in nature. Likewise the considerations governing the appointment of a receiver are also equitable in nature. However, the equities in this case do not favor the Freeze Order or the liquidation of APS's ongoing and profitable business dealings under the receiver. If DeYoung is unable to prepare and present a defense in this case, the legitimate business interests and dealings of APS will undoubtedly be harmed. The equities do not favor the unnecessary destruction of APS's ongoing business. Instead, the equities support releasing a portion of the assets subject to the Freeze Order to allow DeYoung to tender a defense and to protect the interests and legitimate business dealings of APS over the previous several years.

APS continues to generate legitimately derived profits; profits not implicated by the SEC's Complaint. The SEC has presented evidence to show that APS generated approximately $2.4 million in fees in 2012, *see* TRO Motion, p. 5 & Ex. G; *see also Motion and Memorandum*

Supporting Clarification Regarding Order Appointing Receiver, Freezing Assets, and Other Relief, filed by Receiver May 15, 2014,[5] and at the hearing held on March 8, 2014, counsel for the SEC acknowledged that APS generated significant profits that are not implicated or tainted by the allegations of the Complaint. These profits therefore are not the result of any of the transactions alleged in the Complaint. The allegations of the Complaint and the evidence offered in support of the TRO Motion show that the transactions underlying the SEC's complaint occurred several years ago. Since that time, APS has successfully generated—and continues to generate—profits that will likely cease if the receiver's instructions to draft a liquidation plan is come to fruition while DeYoung is unable to prepare and present a defense due to a lack of fund. Equity requires that this court release some portion of the profits earned by APS and recognized by the SEC as non-tainted to DeYoung for the payment of his legal fees to permit him to prepare and to mount a defense that he believes will prevent the destruction of APS.

IV. THE COURT SHOULD FIND THAT COUNSEL MAY ACCEPT THE RETAINER FUNDS TENDERED ON BEHALF OF DeYOUNG.

DeYoung also requests that this Court enter an order that counsel for DeYoung is permitted to accept the funds tendered to counsel by DeYoung's friends and relatives as a retainer for representing DeYoung. Upon receipt of the funds, counsel for DeYoung engaged in a good faith inquiry regarding the origin and ownership of those funds. The information received by counsel confirmed that the funds were not subject to the Freeze Order and not derived through any activity connected to APS. Based upon this investigation and counsel's interest in protecting privileged communications related to the funds, DeYoung requests that the

[5] In this Motion, the Receiver articulates that APS continues to generate profits.

Court enter an order that counsel for DeYoung may accept the fees and that counsel will not be required to disclose privileged information regarding the funds.

CONCLUSION

For the reasons set forth above, DeYoung respectfully asks this Court to release $250,000.00 from the funds that are subject the Order for the payment of attorney fees and costs associated with the preparation and presentation of a competent defense in this matter and for an order finding that counsel for DeYoung may accept the funds tendered as a retainer for DeYoung without disclosing privileged information in connection with the funds.

Dated: May 19, 2014.

Respectfully submitted,
Durham Jones & Pinegar

/s/ Paul T. Moxley
Paul T. Moxley
Thomas J. Burns
Z. Ryan Pahnke
Counsel for Curtis L. DeYoung

CERTIFICATE OF SERVICE

I hereby certify that on the 19th of May, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification to counsel of record in this matter.

/s/ Paul T. Moxley