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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiffs, vs. AMERICAN PENSION SERVICES, INC., a Utah Corporation and CURTIS L. DeYOUNG, an individual, Defendants.	**MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND SUSPEND OR DISSOLVE ORDER APPOINTING RECEIVER** Case No.: 2:14-cv-00309 Judge: Robert Shelby Magistrate Judge: Dustin B. Pead

Defendant Curtis L. DeYoung ("Mr. DeYoung"), by and through undersigned counsel, who have entered a limited appearance pursuant to DUCivR 83-1.3(b), and pursuant to Federal Rule of Civil Procedure 65(b)(4), respectfully moves this Court for the entry of an Order dissolving the Ex Parte Temporary Restraining Order and Order Appointing Receiver, entered by this Court on April 24, 2014. Dissolution is appropriate because contrary to the assertions of the Securities and Exchange Commission (the "SEC"), it has failed completely to demonstrate or

even allege that the alleged wrongful acts of Mr. DeYoung and American Pension Services, Inc., constituted the offer or sale of any security or occurred in connection with the purchase or sale of any security by any party. Rather, the SEC complaint and ex-parte motion allege only that certain wrongful conduct occurred, and the SEC then implies that since the alleged wrongful acts took place within an investment related environment, the wrongful acts must be considered to have occurred in connection with the offer, sale, or purchase of securities. Even if the Court accepted these allegations as true, the SEC makes no effort to connect the alleged wrongful acts to any purchase or sale of a security: NONE. In the absence of a direct connection between the alleged wrongful acts and the offer, sale or purchase of securities, the SEC has no standing to bring the complaint against Mr. DeYoung in this action; thus, the complaint must be dismissed. And if the SEC's allegations are accepted, the application of this expansive rule would simply swallow all wrongful actions that occur in an investment environment into Section 17(a) of the Securities Act of 1933 and Rule 10b-5 of the Securities Act of 1934.

Furthermore, with only one narrow exception discussed below, the SEC's allegations that involve any sort of transaction all occurred more than five years before the SEC filed its complaint. The Supreme Court set forth, in *Gabelli v. SEC*, that the five-year period in which a securities fraud claim can be brought, and thus vest the court with jurisdiction, is triggered when the last act necessary for the claim to accrue occurs, and that the period does not flow, but is established as a fixed date. 133 S. Ct. 1219, 1220-21 (2013). The Court further declared that the discovery rule, which otherwise might be available to toll the running of the statute of limitations in civil litigation efforts to obtain damages, does not apply in the context of a government securities fraud claim. Consequently, even if this Court were to accept that Defendants somehow

engaged in securities fraud, the only such transactions articulated by the SEC occurred prior to April 2009, and thus, the SEC's claims for securities fraud are barred as a matter of law, eliminating any potential for the SEC's claims to succeed.

Consequently, for multiple reasons, the SEC has no substantial possibility of success in this matter and has not presented a prima facie case supporting its complaint, and the SEC's application for the entry of an ex parte TRO, avoiding any possible response by Mr. DeYoung, was improvidently entered and should be dissolved.

MEMORANDUM OF POINTS AND AUTHORITIES

Mr. DeYoung submits the following memorandum of points and authorities in support of the Motion to Dissolve the Temporary Restraining Order issued by this Court on an ex-parte basis on April 24, 2014.

LEGAL ISSUES TO BE DETERMINED

A. Did the SEC fail to articulate facts that demonstrate, or even suggest, that the alleged wrongdoing constituted an offer to sell, sale, or purchase in connection to the sale or purchase of a security, as that term is defined by the courts, pursuant to the Securities Act of 1933 and the Securities Act of 1934?

B. Did the SEC fail to timely bring its claims for Securities Fraud, given that all of the transactions identified by the SEC that could be described as involving the purchase or sale of securities took place prior to April 23, 2009?

RELEVANT PROCEDURAL 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. 8.

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.[1]

ARGUMENT

A TRO may issue upon a showing of (1) a prima facie case that Defendants have violated the securities laws; and (2) a reasonable likelihood that their violations will be repeated. *See SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 n. 2 (11th Cir.1999); *but see* Fed. R. Civ. P. 65; *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Here, the SEC's complaint alleges violations of both section 10b-5 of the Exchange Act and 17(a) of the Securities Act.

> To establish a § 10(b) or Rule 10b-5 violation, the SEC must prove that [DeYoung] made: (1) "a misrepresentation or omission (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of securities, and (5) by [means of interstate commerce]."Section 17(a)(1)-(3) requires substantially similar proof with respect to the offer or sale of securities.

SEC v. Smart, 678 F.3d 850, 856-57 (10th Cir. 2012) (internal citations omitted). In the absence of prima facie evidence that satisfies each of the elements required under sections 10(b) or 17(a), the SEC must be deemed to have failed to meet its burden for the entry of each of the following: the TRO, the so-called "Freeze Order," and the appointment of a receiver in this case. And in that absence, the TRO should be dissolved.

[1] For purposes of this motion, Mr. DeYoung accepts the factual allegations as pled by the SEC. However, were this matter in a different posture, Mr. DeYoung would dispute many of the facts as alleged by the SEC.

Moreover, if the material allegations of wrongdoing cannot be shown to have occurred after April 24, 2009, the SEC's complaint is untimely as a matter of law, and this Court lacked jurisdiction over the SEC's claims. A review of the SEC's complaint shows that the few specific allegations are untimely, and thus the TRO and all associated orders are void ab initio and must be dissolved.

I. THE SEC'S CLAIMS ARE FACIALLY UNTIMELY AND THIS COURT THUS HAS NO JURISDICTION OVER THE CLAIMS

The SEC's failure to timely bring its claims against Mr. DeYoung divests this Court, and in fact any court, of jurisdiction over the SEC's claims; thus, the TRO must be dissolved. "Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co. v. US*, 552 U.S. 130, 133 (2008). "Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims." *Id.* "As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'" *Id.* at 134 (citing *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2060, 2365-66 (2007)). As applied to this matter, the applicable statute for the determination of the limitations period is 28 U.S.C. 2462 (2013). *See Gabelli v. SEC*, 568 U.S. ---, 133 S.Ct. 1216, 1220-21 (2013). "This statute of limitations . . . governs many penalty provisions throughout the U.S. Code" including any penalty or sanction sought by the SEC related to the Security Act of 1933 and the Exchange Act of 1934. *Gabelli*¸ 133 S.Ct. at 1219.

Section 2462 establishes that "[e]xcept as otherwise provided . . . an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first

accrued." 28 U.S.C. § 2462. "The 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Gabelli,* 133 S.Ct. at 1220 (quoting *Wallace v, Kato,* 549 U.S. 384, 388 (2007)). A complete and present cause of action, in turn, exists when a "plaintiff can file suit and obtain relief." *Bay Area Laundry Bay Area Laundry Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal.*, 522 U.S. 192, 201 (1997). Thus, a claim for a violation of either Rule 10b-5 of the Exchange Act of 1934 or section 17(a) of the Securities Act of 1933, ripens no later than date of sale of the security involved. *See, e.g., Gabelli*, 133 S.Ct. at 1220-21; *SEC v. Wyly*, 950 F.Supp. 2d 547, 554 (S.D.N.Y. 2013) ("The SEC seeks civil monetary penalties under Section 21(d)(3) of the Exchange Act, which governs recovery for all violations of the Exchange Act. . . . Section 21A.41 Section 21(d)(3) does not contain an express statute of limitations. Therefore, 28 U.S.C. § 2462 governs the SEC's 21(d) penalty claims, and requires that claims be 'commenced within five years from the date when the claim first accrued.'" (quoting *Gabelli*, 133 S.Ct. at 1219)).

Moreover, applied to Mr. DeYoung's situation, the Supreme Court has held that the statutory time limit set by section 2462 represents a "fixed date when exposure to the specified Government enforcement effort ends, advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."" *Gabelli,* 133 S.Ct. at 1221 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Thus, the so-called "discovery rule," does not apply to "toll the five-year state of limitations for fraud cases in SEC enforcement actions." *SEC v. Pentagon Cap. Mgmt., PLC*, 725 F.3d, 279, 287 (2d Cir. 2013). In other words, the statute of limitations begins to run

on the date of the sale in question, and if the SEC fails to file its complaint within five years from the date of the sale, no court will have jurisdiction to adjudicate such claims. *See id.*

In the instant case, the final act necessary for a claim to accrue under either section 10(b) of the Exchange Act of 1933 or section 17(a) of the Securities Act of 1934 is the sale or purchase of a security. *See Gabelli*, 133 S.Ct. at 1219-21. As a consequence, in the absence of even bare allegations that Mr. DeYoung participated in the sale, offer, or purchase of a security after April 24, 2009, the SEC's claims, and its complaint, are untimely, and this Court is without jurisdiction and the TRO should be dissolved. *See, e.g., Evitt v. Durland*, 242 F.3d 388, 2000 WL 1750512 (10th Cir. 2000) (unpublished table decision).

Here, the SEC has alleged no facts that suggest Mr. DeYoung took part in the purchase, offer, or sale of any securities after April 24, 2009. First, in the SEC's motion for temporary restraining order, the SEC alleges only that "DeYoung and APS encourage investors to liquidate their current holdings in their retirement accounts and transfer the cash balance to an account controlled by DeYoung." *See* dkt. at 3, pg. 21. As discussed below, *see infra*, the acceptance of cash constitutes neither the offer or sale or the purchase or sale of a security, as defined under U.S. securities law. The SEC further alleges, in its Motion for Temporary Restraining Order, "the scheme perpetrated by DeYoung includes the actual, or intended, purchase of securities by DeYoung on behalf of his customers." *Id.* However, this statement is not a specific factual allegation, nor is it supported by either the complaint or the SEC's motion. Finally, the SEC alleges that "DeYoung has used the investor funds as his own personal piggy bank." *Id.* Once again, not only is this statement nothing more than a conclusion, it does not involve the purchase, offer, or sale of a security. At most, if true, the allegations perhaps describe theft,

misappropriation, or mismanagement. At bottom, the SEC's Motion is devoid of any reference to a date after April 24, 2009 involving Mr. DeYoung selling, purchasing or offering a security. Consequently, nothing within the SEC's Motion for Temporary Restraining Order supports a finding that this Court has jurisdiction over the SEC's claims.

The SEC's complaint, like its Motion for Temporary Restraining Order, suffers from a similar fatal flaw. Arguably, the SEC complaint vests this court with jurisdiction over the funds of Customer A, but if so, only over the events that allegedly occurred after April 2009; however, we will show those events do not involve the sale, purchase, or offer of a security. Specifically, as it relates to any transaction—whether or not describing a security—the SEC's complaint alleges the following:

- That APS followed customer instruction to transfer funds for investment to Remington Investments, which the SEC concedes was insolvent prior to April 23, 2009.[2] *See* Dkt. at 1, ¶¶ 67-73. The SEC's complaint, however, is silent as to when APS or Mr. DeYoung completed any specific investment direction from any APS client, and makes no attempt to identify any date on which an action that could be described as a purchase, offer, or sale occurred as it related to Remington Investments.
- That APS followed customer instructions to transfer funds to Charlevoix Homes, LLC.[3] *See* Dkt. at 1, ¶¶ 74-77. The SEC further alleges that Charlevoix Homes, LLC, sought "Chapter 7 bankruptcy protection on August 18, 2008." *Id.* Missing again from the SEC's complaint is any specific information related to these purported transactions. The

[2] The SEC did not allege that Mr. DeYoung knew of Remington Investment's issues, but rather, that he "knew or should have known."

[3] The SEC does not link this conduct with any material omission or material misstatement, rendering the alleged conduct outside of both section 10(b) and section 17(a).

SEC's complaint does not contain a single reference to any purchase, offer, or sale related to Charlevoix Homes, LLC, which includes no mention of such activity following April 24, 2009.

- That Mr. DeYoung, without either consulting or informing the APS clients, invested customer funds in certain investment vehicles. *See* Dkt. at 1, ¶¶ 78-80. However, the SEC complaint is again devoid of any dates related to the activity in question, fails to identify the security nature of the so-called investment vehicles, and perhaps most damning, makes no effort to connect the alleged use of the client's cash funds with any material omission or misstatement in connection with the purchase, offer, or sale of a security. Rather, the SEC complaint merely alleges that Mr. DeYoung misappropriated funds.
- That Mr. DeYoung and APS invested a client's funds in Charlevoix Homes, LLC, in 2006 without that client's permission, which that client allegedly learned in August 2008. *See* Dkt. at 1, ¶¶89-96. The SEC complaint then alleges that Charlevoix Homes, LLC, declared bankruptcy on August 28, 2008. *Id.* at ¶ 95.
- That APS and Mr. DeYoung forged direction letters without consulting clients, *see id.* at ¶¶81-96, inflated the value of the assets held, *see id.* at ¶¶ 97-98, and misappropriated customer funds, *see id.* at ¶¶47-54. But the facts as alleged by the SEC do not involve the purchase, sale, or offer of securities; instead, these facts focus either on forgery—an independent criminal allegation (as opposed to Securities Fraud)—misappropriation—also and independent criminal allegation—and mismanagement or malfeasance. In other

words, the remaining allegations do not, and cannot, be described as involving a material omission or misstatement in connection with the purchase, offer, or sale of a security.

At the very latest, whether taken either in isolation or in whole, with only the one exception discussed *infra* the SEC's complaint places the latest transaction—whether or not a security transaction—in August 2008.[4] This allegation involved a single client—"Customer B"—who allegedly requested that APS close her account in August 2008, and who then allegedly learned that the funds in her account had been invested in Charlevoix Homes, LLC. *See* dkt. at 1, ¶¶ 90-92. Absent from this allegation is any suggestion of a sale, offer or purchase occurring after August 2008. As a result, these claims are untimely.

The only later dates specifically alleged within the SEC's complaint involve so-called "Customer A." *See* dkt. at 1, ¶¶ 81-88. However, the SEC alleges that Customer A deposited cash with APS in August 2010. *See id.* at ¶ 82. The SEC then alleges that someone at APS—by implication Mr. DeYoung—removed those funds via forged documents, without Customer A's knowledge or consent, and misappropriated, mismanaged, and misinvested those funds. *Id.* at ¶¶83-88. Again, absent from the SEC's complaint is even a suggestion that Customer A was induced to invest in a security by Mr. DeYoung, let alone that Customer A had sold or purchased any security as a result of Mr. DeYoung's material misrepresentations or omissions. Instead, the SEC complaint clearly alleges that the cash that Customer A placed with APS was removed and

[4] The SEC's complaint refers to the default of "friend A's" business ventures in 2010. *See* dkt. at 1, ¶61. However, the date that friend A's business ventures failed is meaningless in the context of the allegations that Mr. DeYoung committed acts of Securities Fraud. Absent from the allegations related to Friend A are any specific dates and specific actions of Mr. DeYoung. Rather, as in the whole complaint, the SEC appears intent on painting Mr. DeYoung as a bad person, without reference to specific, actionable facts, which is contrary to the requirements of the statute and Rule 9(b) of the Federal Rules of Civil Procedure. *See SEC v. Tambone*, 473 F.Supp. 2d 162, 166 (D.Mass. 2006) (holding "to plead fraud with the requisite particularity pursuant to Fed.R.Civ.P. 9(b), the plaintiff must set forth the following allegations in the complaint: 1) the allegedly fraudulent statements, 2) the identity of the speaker, 3) where and when the statements were made and 4) how the statements were fraudulent.")

used without his knowledge or permission, which if true, would not constitute fraud, but would instead constitute theft or misappropriation. As a result, none of the claims involving Customer A state a violation of US securities laws, and consequently, these allegations are not material to the statute of limitations issue herein discussed.

The SEC's complaint contains no other allegations involving Mr. DeYoung that could be viewed as transactional, whether or not the unpled transaction would involve securities. Rather, the remaining allegations involve claims of forgery, claims of theft, claims of mismanagement, and claims of misappropriation. None of these allegations implicate either section 10(b) of the 1934 exchange Act or section 17(a) of the 1933 Securities Act. *Compare U.S v. O'Hagan,* 521 U.S. 642, 656 (1997) *with* the SEC's allegations of wrongdoing. Consequently, the SEC cannot shelter behind these allegations in an effort to avoid the fatal application of the limitations period of section 2462. Admittedly, the SEC has alleged several "facts" related to Customer A, which all occurred after April 2009, rendering those claims the only claims that are not stale under a statute of limitations argument. As the Supreme Court has clearly stated in adopting the position of the US Government in the context of the scope of Rule 10b-5: the protections and sanctions of Rule 10b-5 do not "apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities." *U.S v. O'Hagan,* 521 U.S. 642, 656 (1997) (quoting the United States Government's position with approval).[5]

Simply put, the SEC has failed to allege any conduct implicated under sections 10(b) or 17(a) that occurred after April 9, 2009. This failure is fatal to the SEC's claims under the plain

[5] Section 17(a) is much more restrictive in application; thus, if the facts related to Customer A are insufficient to satisfy rule 10b-5, they are by rule, insufficient to satisfy the requirements of section 17(a).

language of section 2642, and as a result, since section 2642 is a jurisdictional statute, this Court improperly issued the temporary restraining order, and that Ex Parte Order should be dissolved.

II. THE SEC FAILED TO PRESENT EVIDENCE THAT DeYOUNG OR APS ENGAGED IN THE OFFER, SALE, OR PURCHASE OF A SECURITY

A. The SEC Failed to Allege any Fact that Would Support a Conclusion that Mr. DeYoung Committed Fraud with the Offer or Sale of Securities Sufficient to Satisfy Section 17(a)

Under the plain language of Section 17(a) of the 1933 Securities Act, it is

> unlawful for any person in the *offer or sale* of any securities ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
> (1) to employ any device, scheme, or artifice to defraud, or
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a) (2013).[6] The terms "sale" and "offer to sell" are defined in section 2(3) as follows: "The term `sale' . . . shall include every contract of sale or disposition of a security or interest in a security, for value. The term . . . `offer' shall include every attempt or offer to dispose of . . . a security or interest in a security, for value." 15 U.S.C. § 77b(3) (2013). "Section 17(a) of the Securities Act 'was meant as a major departure' from the scope of the rest of that statute, and was 'intended to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary market trading.'" *SEC v. Tambone*, 550 F.3d 106, 120 (1st Cir. 2008) (quoting *U.S. v. Naftalin*, 441 U.S. 768 at 777-78 (1979)). "[T]here is unanimity . . . that § 17(a)(2) of the 1933 Act — indeed the whole of § 17

[6] The SEC asserts that it is proceeding under Subsections 1 & 2 of Section 17(a).

— was intended only to afford a basis for injunctive relief and, on a proper showing, for criminal liability." *SEC v. Texas Gulf Sulfer Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J, concurring).

And although the "Court has made clear, in the context of interpreting § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), that transactions other than traditional sales of securities are within the scope of section 17(a), and passage of title is not important," *Pinter v. Dahl*, 486 U.S. 622, 643 (1988), it is also true that the Court has held that "a person who solicits the purchase will have sought or received personal financial benefit from the sale, such as where he 'anticipat[es] a share of the profits." *Id.* at 654 (quoting *Lawler v. Gilliam*, 569 F.2d 1283, 1288 (4th Cir. 1978))[7]. In short, the general rule is that "section 17(a) applies only to brokers and dealers *selling* or *offering to sell* securities" to an investor in securities, and specifically to the securities being offered or sold. *Tambone* 550 F.3d at 122 (emphasis in original).

In neither its complaint nor its Motion for Temporary Restraining Order has the SEC alleged or argued that Mr. DeYoung was selling or offering to sell securities as that terms is defined statutorily, and interpreted by the United States Supreme Court. At most, the SEC points to three classes of transaction that arguably constitute the offer or sale of a security and at most, by implication, allege that Mr. DeYoung was involved in those transactions as a broker or dealer. Implication is insufficient, and the bare allegations show that Mr. DeYoung did not engage in the offer or sale of securities under section 17(a).

The SEC appears to argue, as interpreted by Mr. DeYoung, that Mr. DeYoung violated

[7] Mr. DeYoung understands that the *Pinter* Court was addressing Rule 12(1) under the Securities Act of 1933. *See Pinter v. Dahl*, 486 U.S. 622 (1988). However, the *Pinter* Court makes clear that the definitions discussed therein apply to all sections of the Securities Act, and specifically as applied to section 17(a), the *Pinter* Court defined "offer or sale." *Id.* at 643.

section 17(a) through his efforts to obtain clients through his presentations regarding APS. Specifically, the SEC alleges that Mr. DeYoung "encourages investors to transfer their current IRA or 401(k) plan assets to APS by touting the increase in available investment options," dkt 1, at ¶ 20; dkt. 3, at pg. 21, that as a result "[m]any APS customers sell securities in order to transfer their current IRA or 401(k) plan assets to APS [and] APS customers then purchase securities which are held in their APS accounts," *id.* at ¶ 21.[8] Taken at face value, this conduct cannot be described as a violation of section 17(a). As described by the SEC, Mr. DeYoung markets APS as an alternative investment house in which the clients control their own investments. He did not manage the investments that the clients liquidated prior to transferring their cash to APS. He did not broker any liquidation of accounts owned by clients prior to their decision to transfer cash to APS. And he did not liquidate the clients' pre-APS accounts. In other words, even assuming that investors in IRA and 401(k) accounts were swayed by Mr. DeYoung to liquidate their pre-APS 401(k) or IRA investments, his conduct did not involve the offer or sale of any security, in that he was neither selling a security, nor offering to sell any specific security in this context. Thus, the clients' decision to liquidate their earlier 401(k) accounts or IRA accounts does not satisfy the requirements of section 17(a) in any manner.

The SEC next appears to suggest that Mr. DeYoung's act of accepting funds from the clients on behalf of APS constitutes the offer or sale of a security. See dkt. at 3, pg. 21 ("DeYoung and APS encourage investors to liquidate their current holdings in their retirement

[8] The SEC's sole argument that Mr. DeYoung was involved in securities occurs on page 21 of the Motion for Temporary Restraining Order. Dkt. at 3, pg. 21. There, the SEC argues "DeYoung and APS encourage investors to liquidate their current holdings in their retirement accounts and transfer that cash balance to the account controlled by DeYoung." *Id.* On its face, this conduct does not implicate section 17(a) in that neither DeYoung nor APS are involved in the direct sale or offering of a security. In the absence of an actual allegation of the offer or sale of a security, as that term is defined by accepted authority, it is inappropriate for a TRO to issue pursuant to section 17(a).

accounts and transfer that cash balance to an account controlled by DeYoung.") Rather than belabor the point, accepting cash does not satisfy the offer or sale of a security requirement of section 17(a). As the Supreme Court recently pointed out, in the context of rule 10b-5, the misappropriation of cash, is insufficient on its own to justify a claim for Securities Fraud, even if used to purchase a security after the misappropriation. *See U.S. v. O'Hagan*, 521 U.S. 642, 656-57 (1997) ("In other words, money can buy, if not anything, then at least many things; its misappropriation may thus be viewed as sufficiently detached from a subsequent securities transaction that § 10(b)'s 'in connection with' requirement would not be met.").

The SEC levels no other allegations related to any transactions involving Mr. DeYoung, whether or not involving APS clients or potential clients of APS. Simply put, the SEC has failed to allege a single instance in which Mr. DeYoung played any role in the offering or sale of a security, as that term is defined in section 17(a) of the Securities Act of 1933, or illegal conduct related to such an offer or sale. In the absence of such an allegation, the SEC's section 17(a) claims do not rise to the level of a prima facie case, and to the extent that the TRO issued by this Court is based on these claims, that TRO should be dissolved.

B. The SEC Failed to Allege any Fact that Would Support a Conclusion that Mr. DeYoung Misstated or Omitted any Material Fact in Connection with the Purchase or Sale of a Security Sufficient to Meet the Requirements of Rule 10b-5

The SEC failed to allege any facts sufficient to show that Mr. DeYoung engaged in the purchase or sale of securities, or activities related to the purchase or sale of securities, as applied to section 10(b) or Rule 10b-5. "Section 10(b) of the Securities Exchange Act makes it unlawful for any person to 'use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as

the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.'" *Matrixx Initiatives, Inc. v. Siracusano*, --- U.S. ---, 131 S.Ct. 1309, 1319 (2011) (quoting 15 U.S.C. § 78j(b)). "The SEC promulgated Rule 10b-5 pursuant to authority granted under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)." *Janus Cap. Group v. First Derivative Traders*, --- U.S. ---, 131 S.Ct. 2296, 2301 (2011). By statutory necessity, the reach of Rule 10b-5, "does not extend beyond conduct encompassed by § 10(b)'s prohibition." *O'Hagan*, 521 U.S. at 651.

Section 10(b) does not prohibit unlawful conduct as a whole; rather, section 10(b), and by extension, rule 10b-5, prohibits and punishes only that unlawful conduct that occurs "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j(b); *see also SEC v. Zandford*, 535 U.S. 813, 820 (2002). Section 10(b) thus regulates only those unlawful acts that occur in connection with the purchase or sale of a security. *See Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971). The Tenth Circuit Court of Appeals has held that to prove that an unlawful act took place "in connection with" the purchase or sale of a security requires that the SEC demonstrate a causal connection between the alleged unlawful act and the alleged injury. *See SEC v. Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008). Among the "causal" connections recognized under the authority of the Tenth Circuit's interpretation is the public dissemination of documents "such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely" when making investment decisions. *Id.* (citing holdings from various other circuit courts of appeal). When such communications are involved, "the SEC need only show that the documents are reasonably calculated to influence investors,

and that the misrepresentations are material to an investor's decision to buy or sell *the security*." *Id.* (emphasis added). In other words, the alleged unlawful conduct of the broker or dealer, whatever it may be, must relate to a specific security, and the alleged unlawful conduct must have caused, at least in part, the alleged injury.

In the absence of evidence that the alleged unlawful conduct of Mr. DeYoung took place in connection with the purchase or sale of a specific security, a claim under section 10(b), and rule 10b-5 cannot lie. *See, e.g., SEC v. Thompson*, 732 F.3d 1151, 1157-58 (10th Cir. 2013).[9]

"Congress ... did not intend to provide a broad federal remedy for all fraud." *Marine Bank v. Weaver et ux.*, 455 U.S. 551, 556 (1982) ("We have repeatedly held that the test 'is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect"') (quoting *SEC v. United Benefit Life Ins. Co.*, 387 U. S. 202, 211 (1967)). As a result, mere allegations of internal corporate mismanagement are insufficient to trigger jurisdiction under Section 10(b). *See, e.g., Santa Fe Indus. Inc., v. Green*, 430 U.S. 462, 479 (1977) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co*, 404 U.S. 6, 12 (1971));[10] *see also O'Neill v. Maytag*, 339 F.2d 764, 768 (2d Cir. 1964) (holding that section 10(b) '"was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement or corporate affairs'" (citation omitted)). Additionally, the simple act of

[9] To the extent it is material to the Court's analysis of either the 17(a) or 10b-5 issues, the Supreme Court has held that the definition of a "Security" is essentially the same for both the 1933 Securities Act and the 1934 Exchange Act. *See United Housing Foundation, Inc., v. Forman*, 421 U.S. 837, 847 n.12 (1975).

[10] The absence of specificity in the SEC's complaint raises concerns that the SEC has failed to comply with Rule 9 of the Federal Rules of Civil Procedure, in that the complaint lacks particularity in terms of dates, individuals, and specific omissions or material misstatements that Mr. DeYoung is alleged to have made in connection with any transaction. Instead, the SEC appears to rely on a parade of horribles view of the sufficiency of its complaint and an effort to tar Mr. DeYoung not with specific allegations, but with claims that Mr. DeYoung misappropriated over $20 million over some unidentified period of time. *See* footnote 4, *supra*

convincing an individual or entity to pay cash to a malefactor, who then uses those funds to invest in securities—or in any other item—does not qualify as an act of securities fraud under section 10(b) or Rule 10b-5. *See O'Hagan*, 521 U.S. at 656-57 ("In other words, money can buy, if not anything, then at least many things; its misappropriation may thus be viewed as sufficiently detached from a subsequent securities transaction that § 10(b)'s 'in connection with' requirement would not be met.").

As noted above, the SEC, in its complaint and in its motion for temporary restraining order, has alleged that Mr. DeYoung engaged in three classes of conduct, each of which, the SEC argues, amount to Securities Fraud. Those classes of conduct include the following:

- Mr. DeYoung allegedly violated US Securities Laws when he undertook efforts to market APS and the products offered by APS, including self-directed 401(k) plans, as products that would be under the investment direction and control of any client who opted into APS by the payment of cash, after which some investors brought APS cash and opted into the APS model. *See* dkt. 1 at ¶¶ 2, 12, 15-17, 19-22, 35, 40, 44, 45; dkt. 3 at pg. 21 ("The scheme occurred in connection with the offer, purchase, or sale of a security, as required by Sections 17(a) and 10(b) of the securities laws. DeYoung and APS encourage investors to liquidate their current holdings in their retirement accounts and transfer than cash balance to an account controlled by DeYoung.").
- Mr. DeYoung allegedly violated US Securities Laws when he accepted cash from the APS clients and placed that cash in the APS Trust account, only to later use that cash for his own investments, and under his own direction, through the use of forged instruments or by simply taking funds from the Trust account. *See* dkt. 1 at ¶¶ 47-96 (alleging

misappropriation and forgery by APS and Mr. DeYoung, all without the knowledge or consent of the clients); dkt. 3 at pgs. 19, 21 (arguing that Mr. DeYoung encouraged potential client's to liquidate their then existing investments and to thereafter bring cash to APS and DeYoung, the investment of which the clients would then control without the control or recommendation of APS).

- Mr. DeYoung allegedly violated US Securities Laws by failing to issue accurate account statements to APS clients. *See* dkt. 1 at ¶¶ 97-98.

In short, the SEC has failed to allege that Mr. DeYoung engaged in any unlawful conduct in connection with the purchase or sale of any specific security. Rather, the SEC has alleged that Mr. DeYoung has engaged in mere unlawful conduct and implied some relationship to securities. Similarly, the SEC has failed to allege any facts that demonstrate a causal connection between any alleged unlawful act of Mr. DeYoung and any specific injury suffered by anyone arising from some security transaction related to the alleged unlawful acts. Instead, the SEC has alleged that Mr. DeYoung traveled, marketed APS as a place where investors could control their own investments, and encouraged others to consider placing their cash with APS and then use that cash to direct and manage their own accounts. *See* Dkt. 1, at ¶¶ 2, 12, 13, 19, 20, 22. The SEC further alleges that some measure of APS clients liquidated their then existing investments to obtain cash, which they then brought to APS after opting into the APS self-directed model. *See id.*; *see also id.* at ¶¶ 50-54. Mr. DeYoung then allegedly placed that cash in the APS trust account—neither offering nor making any security investment advice. *Id.* at ¶¶ 16, 20, 21, 28, 29.

The SEC then alleges that Mr. DeYoung removed cash from the APS trust account and invested those funds in various manners, including buying securities with the misappropriated funds, all without consulting the APS clients, or informing those clients of his intention, and without asking for their permission, and without giving those client even a choice as to his decision. *See id.* at ¶¶ 47,51-53, 59, 65, 74,78, 79. The SEC further alleges that Mr. DeYoung drafted forged documents, again without any information provided to the client, or consent from the clients, and later provided some of those documents to the clients. *See id.* at ¶¶81-96. Finally, the SEC alleges that Mr. DeYoung engaged in the practice of sending inaccurate account information to the clients, information that contained inaccurate accounting and valuation information. *See id.* at ¶¶ 97-98.

The SEC nowhere identifies any specific security, or class of securities, involved or connected with APS or Mr. DeYoung. The SEC nowhere identifies any unlawful act or material misstatement of Mr. DeYoung related to any specific security, or any specific unlawful conduct connected to such security through which the court could draw a causal connection between the alleged injury and the alleged unlawful conduct *as it relates to that security*. Instead, the SEC has offered the court a wholesale tale of theft, forgery, common fraud, and mismanagement and attempted to force those facts into a pattern that would meet the requirements of rule 10b-5. That effort is ill-conceived, and should not be permitted. According to the plain language of the *O'Hagan* Court, the protections and sanctions of Rule 10b-5 do not "apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities." 521 U.S. at 656 (quoting the position of the government with approval). Here, the SEC has alleged nothing more than that scenario.

According to the SEC, Mr. DeYoung convinced APS clients to give him cash on the premise that they alone could and would control its investment. He then allegedly placed all of the cash deposits into the commingled trust account of APS and thereafter used that commingled cash to make purchases without the knowledge, consent, or input of clients. The SEC clearly alleges, at least as pled, that Mr. DeYoung took funds from the commingled APS trust account in which all APS client funds were deposited—simply stealing them or obtaining them through forgery—and invested them without the knowledge or consent of the clients. *See, e.g.*, dkt. 1 at ¶ 83 ("Customer A never spoke to anyone from APS or signed any buy direction letters or other documents before investments were made for his APS IRA account"). In simple terms, the SEC's allegations do not amount to a violation of section 10(b) or Rule 10b-5; and in the absence of such a violation, the SEC's complaint was improperly placed before this Court and the TRO was improvidently entered. As a consequence, this Court should dissolve the TRO that the SEC improperly sought on an ex parte basis under the facts of this case.

CONCLUSION

Accordingly, pursuant to the foregoing analysis and authority, this Court should dissolve the TRO entered in this matter on April 24, 2014, and all of the orders associated with that TRO.

Dated: May 19, 2014.

Respectfully submitted,
Durham Jones & Pinegar

/s/ Paul T. Moxley
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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