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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

vs.

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

Defendants.

**RECEIVER'S OPPOSITION TO
DEFENDANT CURTIS DEYOUNG'S
THIRD MOTION TO RELEASE
FUNDS FOR PAYMENT OF
ATTORNEY FEES**

Case No.: 2:14-CV-00309-RJS-DBP

**Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead**

Diane Thompson, the Court-Appointed Receiver ("Receiver"), by and through undersigned counsel, hereby opposes Defendant Curtis L. DeYoung's ("DeYoung's") Third Motion to Release Funds for Payment of Attorney Fees [Docket No. 313] (the "Third Motion").

INTRODUCTION

American Pension Services, Inc. ("APS") is bankrupt due to the misappropriation by DeYoung of \$25 million in APS investor funds. DeYoung's Third Motion asks the Court to once

again order APS clients to financially fund the defense of the very person who defrauded them. The Court previously decided the issue now raised by DeYoung. The Court found that DeYoung is not entitled to access APS funds to pay for his defense after July 23, 2014, the date on which the SEC's motion for preliminary injunction was granted. All of the attorney fees now sought by DeYoung were incurred after July 23, 2014. Further, DeYoung cannot tap his retirement accounts to raise money for his defense as these moneys were fraudulently transferred into those accounts and are subject to a fraudulent transfer suit initiated by the Receiver and are subject of disgorgement. Therefore, DeYoung's Third Motion should be denied in its entirety.

FACTUAL BACKGROUND

1. On May 19, 2014, DeYoung filed his first Motion to Release Profits of American Pension Services, Inc. for Payment of Attorney Fees [Docket No. 65] (“First Motion”) wherein he asked the Court to release \$250,000.00 from APS funds for the payment of attorney fees and costs. (*See* First Motion at 12.)

2. At a hearing on May 23, 2014, the Court denied the First Motion, noting that “a majority of courts that consider requests for release of funds by defendants who are charged with securities fraud in the face of a prima facie showing not unlike the showing that the Securities and Exchange Commission has made here, most courts say that the defendants are not entitled to release of those funds.” (*See* Transcript of May 21, 2014, Hearing at 30:10-17.)

3. The court also voiced its “concerns that Mr. DeYoung may have intentionally violated the Court’s temporary restraining order after receiving notice of it by destroying documents” as well as “sought to transfer funds that were frozen by the Court’s order” and, further, “may have deliberately delayed participation in communication with the Commission to facilitate a timely inventory of equipment and documents in accordance with the Court’s order.” (Transcript at 31:3-11.)

4. Notwithstanding these concerns, the Court left open the possibility of directing the release of some funds from APS in the future in recognition that it would be beneficial to the Court and the public interest that DeYoung have competent counsel “at least in the first instance through the preliminary injunction.” (*Id.* at 31:16-25, 32:1-9.)

5. On May 30, 2014, this Court authorized \$80,000 from non-APS funds to be used for DeYoung’s defense [Docket No. 84]. This amount was later raised to \$85,000.

6. On July 23, 2014, almost exactly four months after the Receiver was first appointed, the Court granted the SEC's Motion for Preliminary Injunction [Docket No. 38]. In granting the SEC's Motion for Preliminary Injunction, the Court found that the SEC had demonstrated a prima facie case that DeYoung and APS engaged in securities fraud by misappropriating approximately \$25 million belonging to clients. DeYoung was represented by counsel at the hearing.

7. The SEC subsequently prepared a proposed order granting the Preliminary Injunction, to which DeYoung has failed to respond. (Third Motion at 4-5.)

8. APS does not have sufficient funds to pay for DeYoung's legal defense. In 2012, APS had total revenue of \$2.4 million with APS expenses of \$2.1 million, leaving a net ordinary income of \$299,542. (*See* Declaration of Mark Hashimoto ("Hashimoto Decl."), dated August 4, 2014, ¶ 3, [Docket 171-1].)

9. In 2013, the total revenue of APS was \$2.5 million with expenses totaling \$2.25 million, leaving a net ordinary income of \$254,700. (*Id.* at ¶ 4.) Instead of using the net ordinary income to reimburse the more than \$25 million misappropriated, DeYoung chose to loan the funds to Michael Memmott, Jr., which funds have not been repaid as of this date, and to pay himself and his wife exorbitant salaries. (Depo. of C. DeYoung, at 106-113.) The payments to Innovative Equity Partners, a Michael Memmott entity, totaled \$155,617 in 2013. These were characterized as loans and, therefore, not included in APS's 2013 profits and losses. Further, Curtis DeYoung chose to take distributions (dividends) of \$83,903.45 from APS, in addition to his salary, in 2013. These distributions were similarly not included in APS's 2013 profits and losses. (Hashimoto Decl. at ¶¶ 5-6.)

10. As of the appointment of the Receiver on April 24, 2014, the Receiver and her forensic accountant have determined that APS is in essence bankrupt due to the misappropriation of more than \$25 million. In fact, APS became insolvent long before April 2014 and as early as January 2001. Based on the assets located to date, APS's assets only have a value of approximately \$1.0 to \$1.5 million while its liabilities exceed \$25 million rendering APS insolvent. (*Id.* at ¶ 7.)

11. Although APS continues to operate under Court order, it will not generate or recover the sufficient assets to cover all monthly expenses and/or liabilities. (*See* Hashimoto Decl. at ¶ 5.)

12. As of April 24, 2014, the starting date of the Receivership, APS had \$126,225.49 in cash in its operating account (the "Operating Account"). (*Id.* at ¶ 8.)

13. APS also maintains a commingled master trust account at First Utah Bank (the "APS Master Trust Account") which had a balance of approximately \$26,067,698 as of April 25, 2014. (*Id.* at ¶ 9.)

14. Since taking control APS, the Receiver has cut operating costs and expenses of APS significantly. (*Id.* at ¶¶ 10-11.)

15. The Receiver has terminated all but six (6) employees, including DeYoung, his wife Michelle, his mother, and his daughters, which reduces employee salaries substantially—including DeYoung's and Michelle DeYoung's combined monthly salary of \$40,000.00. (*Id.* at ¶ 10.)

16. The monthly revenue of APS is approximately \$200,000, with monthly expenses of approximately \$60,000, excluding the administrative costs of the Receivership, which are significant. (*Id.* at ¶ 12.)

17. As of September 30, 2014, APS's Operating Account had a balance of \$395,319.80. This amount is likely to dwindle over time and remain insufficient to cover current operating and administrative expenses of the Receivership. (Second Quarterly Status Report of Receiver at 26.)

18. On Monday, April 28, DeYoung, acting with the assistance of his wife, Michelle DeYoung, and his former APS paralegal, Dean Becker, liquidated funds held by LLCs at Zions First National Bank ("Zions Bank") and re-deposited those funds into newly opened bank accounts held in the name of those same LLCs at Brighton Bank. ((Hashimoto Decl. at ¶¶ 14-15.)

19. The clear intent of the transfer was to prevent Zions Bank from freezing those assets pursuant to the Receivership Order.

20. The Receiver did not learn of this transfer until May 5, 2014. That day, while reviewing APS records, certified fraud examiner Mark Hashimoto discovered that in February 2014, DeYoung had transferred approximately \$151,000.00 held in the IRA, 401(k) and HSA accounts of DeYoung and Michelle DeYoung from the APS Master Trust Account and the APS 401(K) Trust Account to bank accounts located at Zions Bank in the name of newly formed LLCs: DLC2 Investments, LLC and RE Ventures, LLC. (*Id.* at ¶ 14.)¹

21. On April 28, to avoid detection, DeYoung instructed his wife Michelle DeYoung and Dean Becker, acting in his capacity as manager for each of the four LLCs, to withdraw funds

¹ According to the Utah Division of Corporations, Dean Becker is the registered agent and manager of these LLCs.

in the accounts, including the \$151,000.00, by requesting cashier's checks made payable to each of the LLCs. (*See id.* ¶ 15.) Although the Receiver had notified Zions Bank that same day to freeze all assets held by DeYoung and any APS entities, the transfers apparently were authorized because the assets were held in the name of newly-created LLCs bearing no obvious relationship to APS or DeYoung. Dean Becker then deposited those funds in newly created accounts at Brighton Bank. (*Id.* at ¶ 15.)

22. Having learned of the existence of these accounts at Zions Bank, and having discovered that the accounts suddenly and mysteriously had a \$0 balance, the Receiver requested and obtained from Zions Bank copies of each of the four cancelled cashier's checks and determined that the checks had been negotiated at Brighton Bank. (*See id.*) The next day, May 6, the Receiver notified Brighton Bank that the funds were to be frozen pursuant to the Receivership Order before DeYoung, Becker, or anyone else could transfer the funds elsewhere. (*Id.* at ¶ 16.)

23. As of today's date, two Brighton Bank accounts have deposits totaling approximately \$151,000, which are held in the name of DLC2 Investments, LLC and RE Ventures, LLC. The entities are owned by DeYoung's and Michelle DeYoung's 401(k), Roth IRA, SEP IRA, and IRA, respectively. (*Id.* at ¶ 14.)

24. On July 11, 2014 DeYoung filed his Second Motion to Release Portion of Revenues and Assets of American Pension Services, Inc. for Payment of Attorney Fees ("Second Motion") [Docket No. 147].

25. The Receiver filed her Opposition to DeYoung's Second Motion on August 5, 2014 [Docket No. 171] ("Second Opposition").

26. On September 12, the Court held a hearing to consider the Second Motion, among other motions.

27. The Court stated at the hearing that:

My own view of it is that the Receiver and the SEC correctly articulated what I think is the majority rule, that release of funds in an instance like this is disfavored by most courts, and even then when it's done it's usually in instances where a defendant seeking release of funds in an instance like this can show that there are adequate funds to ensure complete disgorgement, and that the victims of the fraud will be made whole, and that any funds that are the subject of release would be unrelated to and untainted, in the language of the case law, by the alleged fraud. I think that they've correctly stated that as a majority rule.

You [DeYoung] also suggest that the Court look to the equities of the case as a basis to provide compensation for his counsel through the injunction hearing. And on the whole, if we consider the record as a whole, I think the SEC and the Receiver have the better of that argument also. That in light of the facts and circumstances here I can't—I'm not sure I can conclude that the equities weigh in favor of releasing funds.

(Hearing Transcript, dated September 12, 2014, 24-25.)

28. Ultimately, the Court granted DeYoung's Second Motion, but only through the preliminary injunction hearing on July 23, 2014 for the narrow reasons set forth below. (Hearing Transcript, dated September 12, 2014, 82-84; Order, dated September 15, 2014 [Docket 217]).

29. Regarding the importance of DeYoung having counsel *through the injunction hearing on July 23, 2014*, the Court stated:

As a judicial officer signing [the Court's freeze order and order appointing a receiver], they are anything but routine. It is an extraordinary judicial exercise of authority in my view to seize the assets of a United States citizen, including a corporation that an individual formed and operated for 30 years, and to do it without notice, without an opportunity to be heard.

And I think especially in light of those circumstances and the nature of the relief sought by the Commission here, I think it's a huge service to the judiciary to ensure the integrity of this process through a vigorous adversarial process, especially where there were underlying issues in this case, I think genuine issues, concerning whether the Court had jurisdiction in the first instance to issue the asset freeze order, to seize a corporation and supplant its leadership with a court appointed receiver and the like.

Id. at 25-26.

30. Regarding attorney fees beyond July 23, 2014, the Court stated:

[N]ow that we've addressed what I view is those important threshold issues in this case, including the Court's jurisdiction, and in light of the strength of the SEC's showing thus far in the case, the Court is not authorizing, is not presently authorizing, any additional funds for costs associated with the defense of the case and especially not from the estate.

Id. at 84.

31. The Court further stated:

Let me see if I can crystallize little bit my expectations. I will consider requests for—to move—to exempt from the freeze order personal assets of Mr. DeYoung to satisfy attorney's fees obligations I think in part upon a demonstration that those funds are not in any way related to what's alleged here is the securities fraud, but I'm not going to direct any funds from APS or the APS estate for any attorney's fees after July 23rd.

Id. at 95.

32. Regarding the fraudulent transfer by DeYoung of funds into his retirement accounts, the Court stated:

Insofar as the SEC or the Receiver can at some future date establish that the \$151,000 that is the subject of the 401(k) accounts that were initially held at APS and later transferred were related to the fraud, and if an adequate showing is made at a later time, the Court, of course, will consider whether those assets should be brought back into the estate for distribution and disgorgement, but that's an issue that we will defer for another day.

Id. at 85.

33. DeYoung filed his Third Motion on November 3, 2014 [Docket No. 313].

34. This week, the Receiver will file a complaint against DeYoung and Michelle DeYoung for fraudulent transfers, among other claims, that include the moneys transferred by DeYoung and Michelle DeYoung into their respective retirement accounts.

ARGUMENT

I. THE OVERWHELMING WEIGHT OF AUTHORITY REQUIRES THAT DEYOUNG'S MOTION BE DENIED.

The governing case law establishes that “[a] defendant in a case brought by the SEC may not use income derived from alleged violations of the securities laws to pay for legal counsel.” *SEC v. Roor*, No. 99 Civ. 3372 (JSM), 1999 WL 553823, at *3 (S.D.N.Y. July 29, 1999).² “Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims’ assets to hire counsel who will help him retain the gleanings of crime.” *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993); accord *SEC v. Coates*, No. 94 Civ. 5361, 1994 WL 455558 at *3 (S.D.N.Y. Aug. 23, 1994). The Court recognized this as the majority rule. (Statement of Fact “SOF”, ¶ 27.) The Receiver hereby incorporates by reference Section I of her Second Opposition as if it were fully set forth herein.

II. PURSUANT TO THE COURT'S ORDER, THE PRELIMINARY INJUNCTION HEARING ON JULY 23, 2014 WAS THE LAST DATE ON WHICH DEYOUNG COULD ACCESS APS FUNDS TO PAY HIS ATTORNEY FEES.

By his Third Motion, DeYoung argues that “[a]lthough the Court granted the SEC’s motion for preliminary injunction on July 23, the preliminary injunction has not been entered, DeYoung has, nevertheless, still required representation in this matter.” (Third Motion at 4.) DeYoung’s argument fails for multiple reasons.

First, the Court did not cite the entrance of the preliminary injunction order as the line in the sand between the time DeYoung was and was not entitled to access APS funds to pay his

² See also *SEC v. Stein* Case No. 07 Civ. 3125(GEL), 2009 WL 1181061 at *1 (S.D.N.Y. Apr. 20, 2009) (refusing to release assets to pay for legal fees because “it appears that there are assets sufficient to cover the likely disgorgement and restitution obligations the Commission seeks”); *SEC v. Coates*, No. 94 Civ. 5361(KWM), 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994) (“A defendant is not entitled to foot his legal bill with funds that are tainted by his fraud. In a criminal case, such restrictions on a defendant’s ability to obtain legal counsel do not violate his Sixth Amendment rights.”)

defense counsel. The Court clearly found this delineation to occur on July 23, 2014, the date on which the court granted the SEC's motion for preliminary injunction. (SOF, ¶¶ 28-31.) Further, by his own admission, it is DeYoung who is delaying the Court's entry of a formal preliminary injunction order. (Third Motion at 4-5.)

Second, DeYoung's continued representation "during the Receiver's intense and extensive discovery efforts" is wholly unrelated to the threshold issues in this case and do not bear on the overwhelming evidence that DeYoung was defrauding APS clients. The Court found that the denial of attorney fees paid from APS funds after July 23, 2014 was appropriate due to the prior resolution of the "important threshold issues in this case" as well as "the strength of the SEC's showing" regarding the involvement of DeYoung in a fraudulent scheme. (SOF, ¶ 30.) Thus, the justification for awarding DeYoung with his attorney fees is no longer present after July 23, 2014.

By his Third Motion, DeYoung next argues that the "benefits recognized by the Court are not limited only to the representation of DeYoung that preceded the consideration of the SEC's motion for preliminary injunction." (Third Motion at 5.) DeYoung proceeds to explain that not only should the Court authorize the release of funds to continue to protect DeYoung's interests, but that the presence of counsel has helped to facilitate the efficient resolution of the SEC's case by settling its enforcement action. *Id.* at 5-6. Certainly, the initial benefits of representation recognized by the Court do not apply through the discovery and settlement stages of litigation and, further, DeYoung's willingness to consent to SEC fraud charges further establishes his role in defrauding APS clients. However, despite his assertions, DeYoung *has not* cooperated in providing detailed information about his financial condition or assets. Absent his full and

complete cooperation DeYoung should not—on the basis that he is willing to quickly and efficiently consent to a finding of fraud by the SEC—be permitted to reach into the pockets of the very clients he will be found to have defrauded to pay for his defense. This is precisely the result the majority rule seeks to avoid in prohibiting a securities market swindler from using stolen money to assist in his defense.

III. THE RETIREMENT ACCOUNTS OF DEYOUNG MAY NOT BE USED TO PAY DEYOUNG’S LEGAL FEES.

Alternatively, DeYoung requests the release of money from his retirement funds to pay for his attorney fees because “[t]he Receiver has not established a claim to these funds.” (Third Motion at 7.) This week, the Receiver will file claims to these funds as fraudulent transfers, among other claims. (SOF, ¶ 34.) Therefore, they should not be made available to cover DeYoung’s legal fees.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that DeYoung’s Third Motion be denied.

DATED this 17th day of November, 2014.

/s/ Mark R. Gaylord
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November 2014, I caused a true and correct copy of the foregoing **RECEIVER'S OPPOSITION TO DEFENDANT CURTIS DEYOUNG'S THIRD MOTION TO RELEASE PORTION OF FUNDS FOR PAYMENT OF ATTORNEY FEES** to be delivered as follows:

Through the CM/ECF System for the U.S. District Court.

Hand Delivery

U.S. Mail, postage prepaid

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