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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION UNITED STATES OF AMERICA	
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. AMERICAN PENSION SERVICES, INC., a Utah Corporation and CURTIS L. DeYOUNG, an individual, Defendants.	SECOND MOTION TO RELEASE PORTION OF REVENUES AND ASSETS OF AMERICAN PENSION SERVICES, INC. FOR PAYMENT OF ATTORNEY FEES Case No: 2:14-cv-00309 Judge Robert J. Shelby

Defendant Curtis L. DeYoung ("DeYoung"), by and through his counsel, hereby moves the Court for an order requiring the Receiver to release \$67,334.37 from the funds that are

subject to the Order Appointing Receiver, Freezing Assets, and Other Relief (the “Freeze Order”) that was entered by this Court on April 24, 2014 at Dkt. No. 9.

This motion is made on the grounds that the Freeze Order effectively prevents DeYoung from maintaining the legal representation that is necessary to present a competent defense in this case. The Court previously authorized the payment of a portion of DeYoung’s attorney fees through payments that were made on DeYoung’s behalf from funds that were not subject to the Freeze Order. Dkt. No. 84. These fees have been exhausted in preparation of the hearing for the Securities and Exchange Commission’s (the “SEC”) Motion for Preliminary Injunction (Dkt. No. 38) and DeYoung’s Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver (Dkt. No. 66). In order to continue preparations for the hearing on these motions, DeYoung requests that the Court release a portion of American Pension Services, Inc.’s (“APS”) legitimately earned revenues and assets in the amount of \$67,334.37 for the payment of DeYoung’s attorney fees through June 30, 2014.

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 SEC. The Receiver appointed by the Court has acknowledged that the current revenues of 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. Nevertheless, these undisputedly legitimately earned funds are still subject to the Freeze Order. A portion of these legitimately earned funds should be released under the Freeze Order for the purpose of allowing DeYoung to maintain legal representation in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

DeYoung submits the following memorandum of points and authorities in support of his Second Motion to Release Portion of 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 restricts 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 from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets. *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 net effect of this Freeze Order is

that DeYoung's credit is also frozen, eliminating his ability to pay for any services, including legal services. *See* Dkt. No. 9.

6. 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.

7. DeYoung caused to be delivered to counsel funds contributed by friends and family—none associated with APS—in the amount of \$85,000.00¹ (the “Retainer Payment”) for the payment of fees and costs associated with DeYoung's initial response to the SEC's actions in this matter. *See* Declaration of Paul T. Moxley in Support of DeYoung's Second Motion to Release Portion of Revenues and Assets of American Pension Services, Inc. for Payment of Attorney Fees (“Moxley Dec.”) ¶ 7.

8. Thereafter, this Court found that the Retainer Payment was raised from the independent resources of DeYoung's supporters and were not related to APS or DeYoung. *See* Dkt. No. 84. This Court also held that depositing the Retainer Payment with Durham Jones & Pinegar for the payment of DeYoung's legal expenses did not violate the Freeze Order and the funds would not be subject to subsequent clawback. *See id.*

¹ As a result of miscommunications between counsel and billing personnel, this amount was previously misstated to the Court as \$80,000.00. *See* Moxley Dec. ¶ 8.

9. At that time, the Court did not grant DeYoung's request for an order requiring the Receiver to release additional fees from the legitimately earned revenues and assets of APS for the payment of DeYoung's anticipated legal expenses, but at the hearing the Court indicated that it would review requests of this nature as needed in the future. *See id.*

10. In preparing for the hearing for the SEC's Motion for Preliminary Injunction and DeYoung's Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver, DeYoung has exhausted the original Retainer Payment on legal expenses. *See Moxley Dec.* ¶¶ 9-10.

11. In May, Mr. DeYoung incurred \$82,680.00 in legal fees and costs for representation in this case. *Moxley Dec.* ¶ 9.

12. In June, Mr. DeYoung incurred \$69,654.37 in legal fees and costs for representation in this case. *Moxley Dec.* ¶ 10.

13. In accordance with the Court's previous directions, copies of the May and June bills to DeYoung will be submitted for *in camera* review contemporaneously with the filing of this motion.

ARGUMENT

The Court should order the Receiver to release a portion of the legitimately earned revenues and assets of APS to DeYoung for the payment of the portion of DeYoung's attorney fees incurred in May and June that exceeds that Retainer Payment paid on DeYoung's behalf. Releasing funds for the payment of DeYoung's attorney fees at this time is proper because the Freeze Order is not supported by a *prima facie* case in favor of the SEC's case. Moreover, the

equities support releasing these funds because DeYoung will not be able to pay the expenses of maintaining legal representation unless the funds are released under the Freeze Order, and 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.

I. THE SEC HAS NOT SHOWN A PRIMA FACIE CASE TO JUSTIFY THE FREEZE ORDER.

As DeYoung has previously argued, (Dkt. Nos. 65, 66, 137), the SEC's claims will not prevail. DeYoung asks the Court to release the requested funds to DeYoung for the payment of attorney fees to show that the Freeze Order was not warranted under the facts alleged in this case. Although the SEC is not required to meet the standard for full injunctive relief to obtain a preliminary order freezing assets, *see 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 burden of showing a *prima facie* case that a violation of the securities laws has occurred. The facts alleged in the Complaint, the TRO Motion, and the Motion for Preliminary Injunction do not show, even when construed in the SEC's favor, that DeYoung committed any violation of securities law. Moreover, had the SEC alleged facts that suggested that either of the defendants had made material misrepresentations, the facts alleged by the SEC in the Complaint, the TRO Motion, and the Motion for Preliminary Injunction demonstrate that each of the claims alleged by the SEC are barred by the applicable statute of limitation under 28 U.S.C. § 2462.

The SEC bears the burden of establishing facts sufficient to support this Court's exercise of jurisdiction, *see McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), but

the Complaint, as well as the motions for TRO and for Preliminary Injunction, is devoid of sufficient facts to show, by a preponderance of the evidence that this court has jurisdiction over the matter.

Despite the SEC's repeated and consistent representations regarding the grounds for relief in the Complaint, Motion for TRO and Motion for Preliminary Injunction, the SEC surprisingly shifts their argument away from these facts in its Opposition to DeYoung's Motion to Dissolve. *See* Dkt. 110. In doing so, the SEC abandons the theories regarding the alleged misappropriation and unlawful conduct that provided the foundation for the SEC's original request for the Freeze Order. Consequently, the SEC's original justification for the Freeze Order no longer supports the existence of the Freeze Order. Moreover, the novel position presented in the SEC's Motion for Preliminary Injunction likewise fails to establish facts or a legal basis sufficient to support this Court's exercise of jurisdiction. *See* Reply Memorandum in Further Support of DeYoung Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver, Dkt. 137.

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)). For these reasons, the SEC's failure to state a *prima facie* case does not meet the standard for entry of injunctive relief through a freeze order. Thus, DeYoung should not be subject to the restrictions of the Freeze Order and should be permitted to

utilize his own assets and resources to pay for representation in preparing and presenting a defense in this matter.

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

Even assuming that the Freeze Order were supported by a *prima facie* case, this Court should still enter an order requiring the receiver to release \$67,334.37 from the frozen assets for the payment of DeYoung's legal fees accrued in preparing and presenting a defense in this case. A number of courts have recognized the equities in similar situation cases and have ordered the release of 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 a dispute exists as to whether the Freeze Order was properly entered due to the SEC's failure to support its request with a proper *prima facie* case, and DeYoung will not be able to challenge the Freeze Order absent the release of sufficient assets from the frozen assets for the payment of DeYoung's attorney fees.

In *Duclaud*, the court found it proper to release frozen assets for the payment of legal expenses after issuing an *ex parte* temporary restraining order which 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* 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.”).

As argued previously, DeYoung vigorously disputes that the SEC has met its burden to present a *prima facie* case in support of the Freeze Order, and he vigorously disputes that any securities violation has occurred. This Court’s refusal to release a portion of the revenues and assets of APS to DeYoung from the frozen assets to allow him to pay his attorney fees would deprive DeYoung of representation and a meaningful defense, and would preclude DeYoung from pursuing the dissolution of the preliminary injunction and destroy his ability to meaningfully participate in all subsequent proceedings. *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 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 maintain properly skilled and prepared legal representation in preparation for the hearing on the SEC's and DeYoung's competing motions will prevent the Court, the Receiver, 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 REVENUES AND ASSETS EARNED BY APS SHOULD BE AVAILABLE TO PRESENT A DEFENSE.

Releasing a portion of the revenues and assets earned by APS to allow DeYoung to prepare and argue the motion is supported by the equities of this case. 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. Nevertheless, 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 has generated and continues to generate legitimately derived revenues; revenues 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, and at the

hearing held on March 8, 2014, counsel for the SEC acknowledged that APS generated significant revenues and assets that are not implicated or tainted by the allegations of the Complaint. These revenues and assets 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—revenues and hold assets that will likely cease if the receiver's instructions to draft a liquidation plan 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 revenues and assets 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.

CONCLUSION

For the reasons set forth above, DeYoung respectfully asks this Court to release \$67,334.37 from the funds that are subject to the Freeze Order for the payment of attorney fees and costs associated with the preparation of a competent defense in this matter.

Dated: July 11, 2014.

Respectfully submitted,

Durham Jones & Pinegar


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Thomas J. Burns

Z. Ryan Pahnke

Joshua D. Chandler

Durham Jones & Pinegar

Counsel for Curtis L. DeYoung

CERTIFICATE OF SERVICE

I hereby certify that on the 11th of July, 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.

Cathy Fremdsen