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

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, an individual,

DEFENDANTS.

OPPOSITION TO MOTION TO UNFREEZE ASSETS TO PAY ATTORNEY FEES AND TO RETAIN EXPERT WITNESSES

Civil No.: 2:12-cv-00591-BSJ

Judge: Bruce S. Jenkins

The United States Securities & Exchange Commission ("Commission") respectfully submits this Opposition to Wayne L. Palmer's ("Palmer") Motion to Unfreeze Assets to Pay Attorney Fees and to Retain Expert Witnesses ("Motion to Unfreeze").

On August 16, 2012, approximately two months after the Commission initiated this action, Palmer stipulated to the entry of a preliminary injunction (Docket No. 42), to the appointment of a receiver and to the continuation of the Court-ordered asset freeze (Docket No. 43). Nearly Two and

a half years have gone by since that stipulation, and in the intervening years Palmer has been represented by no fewer than six attorneys from four separate law firms, the most recent of whom represented him in connection with potential settlement discussions during August and September of 2014. Now, yet another firm and two more attorneys have made an appearance on Palmer's behalf, with the newly-raised assertion that through the pendency of this action Palmer has been unable to obtain adequate legal representation and that without lifting the asset freeze to pay attorney fees and litigation costs his constitutional rights will be violated.

Palmer's eleventh hour attempt to lift the stipulated asset freeze fails for at least two reasons. First and foremost, the asset freeze is necessary to preserve and maximize the assets that can be distributed to defrauded investors. Drawing upon those limited funds would add additional insult to the already injured victims of Palmer's fraud. National Note's and Palmer's assets, as of June 25, 2012, were indeed frozen by stipulation of the parties and by Order of this Court (Docket Nos. 8, 9, 43, and 53) ("Freeze Order"). That Freeze Order did not apply to amounts Palmer earned, or could have earned, after that date. Palmer had the opportunity to obtain employment over these past two and a half years to help offset his litigation expenses. Apparently he has chosen not to pursue other employment. Palmer's decision to not obtain another job should not be the basis to further injure the victims of his fraud by depleting the already-inadequate pool that will be used to partially repay investors. Second, and more fundamentally, caselaw is clear that litigants have no constitutional right to an attorney in a civil proceeding. This action is a civil proceeding and hence the rule applies here. Palmer has provided no legal support for his argument that, as a defendant in a civil securities fraud case, he is somehow exempt from this general rule and is entitled to counsel. As a result,

Palmer's attempt to craft a constitutional rights argument fails as a matter of law. There is no deprivation of his constitutional rights, practically or otherwise.

Even under a best case scenario, neither Palmer nor National Note has assets remotely sufficient to make up for the loss caused by Palmer's fraudulent enterprise. Investors will never be made whole. The Freeze Order is necessary to preserve investor funds for equitable relief, and the Freeze Order is proper given the fact that the funds are tainted. Accordingly, the Commission respectfully requests that the Court deny Palmer's Motion to Unfreeze.

ARGUMENT

National Note's limited assets should not be unfrozen to pay for Palmer's defense in this matter. Palmer raised over $100 million from investors and, for nearly 20 years, operated a far reaching fraudulent enterprise. His operation was never profitable; it generated massive losses, especially in its waning years. Desperate to sustain his failing enterprise, Palmer was continually, frantically, seeking out potential investors from whom he could obtain new funds, even while National Note was incapable of paying its promised returns to earlier investors or returning principle amounts when demanded. His misrepresentations to investors were consistent and have been extensively documented. As is nearly inevitable in cases such as this, the fissures in Palmer's house of cards eventually became too much to sustain, causing the enterprise to collapse. It is now left to the Receiver and the injured investors to sort through the rubble. Tens of millions of dollars will never be recovered and investors' lives will forever be impacted by their unfortunate association with Palmer. Because there are nowhere near enough National Note or Palmer assets to make up for this shortfall, the Court should not require those investors, who have already been defrauded by Palmer, to face further hardship through what would amount to be a forced funding of his defense.

In support of his request, Palmer argues that National Note funds should be used to fund his defense because: (1) the Court has discretion to lift the freeze in order for Palmer to draw from the funds to finance his defense; and (2) a lifting of the asset freeze to fund his defense is necessary to ensure fundamental fairness and to protect Palmer's Due Process rights. The elements of Palmer's arguments are interrelated, and both arguments have been rejected by the vast majority of courts that have been presented with these same arguments in securities fraud cases.

First and foremost, the facts in this case, in contrast to those cases cited by Palmer, do not justify lifting the asset freeze. Unlike those cases, Palmer stipulated to the asset freeze early in this matter, has been represented by counsel throughout this case, and has had ample opportunity over the past two years to obtain new employment to help fund his representation. Second, contrary to Palmer's novel, but misplaced, Due Process and fairness arguments, because this is a civil action, he has no constitutional right to an attorney. Neither fairness nor Due Process requires that he be provided an attorney here. More fundamentally, neither fairness nor Due Process requires that Palmer's victims fund his defense in this case. When the equities are balanced between Palmer and the victims of his fraud, certainly fairness and equity cause the scales to tip in favor of Palmer's victims. For these reasons, Palmer's arguments do not justify lifting the asset freeze. There is simply no justifiable rationale to release frozen funds to pay for Palmer's further defense in this matter.

I. Palmer Defrauded His Investors, and Courts Throughout the Country Have Denied Requests to Unfreeze Assets Where the Defendant's Assets Are Insufficient to Satisfy Disgorgement.

Courts around the country have consistently denied requests by defendants to unfreeze assets in order to pay defense costs, especially where, as here, the Commission had satisfied its

burden of demonstrating a *prima facie* case of securities fraud. Indeed, this issue was (and should have been) resolved when Palmer himself stipulated to the imposition of the asset freeze at the outset of this case. Palmer has provided the Court with nothing that would justify departing from this consistent line of cases, and his request, like so many others, should be denied.

In carrying on his longstanding and pervasive fraudulent enterprise, Palmer violated Sections 5 and 17(a) of the Securities Act of 1933 and Section 10(b) and 15(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The Court's initial imposition of the asset freeze, and Palmer's subsequent stipulation to the continuation of the freeze, satisfied the Commission's initial *prima facie* burden of demonstrating that Palmer had violated these provisions. The evidence compels a finding that Palmer defrauded his investors, that much is clear.

The Tenth Circuit, echoing the conclusions reached by other federal courts, has ruled that "a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime." *SEC v. Marino*, 29 Fed.Appx. 538, 541 (10th Cir. 2002), *quoting SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993). Further to this point, courts have consistently recognized that freezing assets in securities fraud cases, and thus preserving the status quo for the protection of defrauded investors, is a proper exercise of the court's discretion and does not violate a defendant's constitutional rights, even if it complicates the defendant's ability to retain counsel. *See, e.g.*, *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 627 (1989) ("a robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his."); *SEC v. Cherif*, 933 F.2d 403, 416-17 (7th Cir. 1991) (defendant has no right to spend another person's money to pay for attorney); *SEC v. Coates*, 1994 WL 455558 at *3 (S.D.N.Y.) (court may freeze assets even if asset

freeze precludes him from obtaining counsel); *SEC v. FTC Capital Markets, Inc.*, 2010 WL 2652405 at *3 (S.D.N.Y.) (same); *U.S. v. Monsanto*, 491 U.S. 600, 615-16 (1989) ("Put another way: if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial").

Courts have refused requests to access frozen funds to pay for defense costs because in civil enforcement matters, unlike criminal matters, there is no Sixth Amendment right to counsel and because those funds are properly preserved for the purpose of repaying defrauded victims. *See U.S. v. Vilar*, 2013 WL 5797581 at *2 (S.D.N.Y.) ("The Sixth Amendment, however, by its terms, is limited to 'criminal prosecutions.' [Cites] There is thus no Sixth Amendment right to counsel in civil cases." (citations omitted)); *see also Cullins v. Crouse*, 348 F.2d 887, 889 (10th Cir.1965) (holding that the Sixth Amendment right to counsel does not apply to civil cases).

The purpose of the asset freeze is to safeguard the funds until they can be returned to the proper parties – the defrauded investors. Thus the relevant question in determining the propriety of an asset freeze, particularly in the face of a request to unfreeze some portion of the funds to pay defense costs, is whether there are sufficient funds to satisfy an ultimate disgorgement amount. *See, e.g., SEC v. Lauer*, 445 F.Supp.2d 1362, 1369 (S.D. Fla. 2006). In *Lauer*, the court concluded that "the amount of assets to be frozen, prior to the finding of liability, is determined not by whether the funds themselves are traceable to the fraudulent activity underlying the lawsuit, but by showing a reasonable approximation of the amount, with interest, the defendant was unjustly enriched." *Id.*, *citing SEC v. ETS Payphones*, 408 F.3d 727, 735 (11th Cir. 2005) (All that is required is "a

reasonable approximation of a defendant's ill gotten gains … Exactitude is not a requirement."); *see also SEC v. Current Financial Services*, 62 F.Supp.2d 66, 68 (D.D.C. 1999) (refusing to unfreeze assets where the potential disgorgement order would vastly exceed the assets that had been frozen); *SEC v. Bravata*, 763 F. Supp. 2d 891, 920 (E.D. Mich. 2011))"To persuade a court to unfreeze assets, the defendant must establish that… there are sufficient funds to satisfy any disgorgement remedy that might be ordered in the event a violation is established at trial.")

In the face of this overwhelming authority, Palmer cites two primary cases, neither of which are on point here, for the proposition that, at least in his case, funds should be unfrozen to allow him to defend himself. In doing so, he makes no effort to distinguish this matter from the numerous other cases, much more on point than the few he cites, in which courts have rejected the very same plea that he is making here. In *SEC v. Dowdell*, Palmer's first cited authority, the court recognized the substantial body of caselaw refusing to unfreeze assets, but nevertheless felt that it could not achieve a fair result *at the preliminary injunction* stage of the proceeding, given the complicated issues presented and the extraordinary relief requested by the Commission, without providing the defendant with some amount to fund his defense. *SEC v. Dowdell*, 175 F.Supp.2d 850, 856 (W.D. Va. 2001). Far from providing a blank check to the defendant, however, the court invited the parties to submit estimates of the fees necessary to take them through the preliminary injunction hearing which, the court stated, it would approve if the fees were reasonable. *Id.* This matter is long past the preliminary injunction stage of the proceeding, and the concerns identified by the court in *Dowdell* were resolved by Palmer's stipulation to the emergency relief sought by the Commission here.

In *SEC v. Duclaud Gonzalez De Castilla*, Palmer's second primary cited case, after the defendants had moved for summary judgment, the court observed that, at least as to the two defendants who had petitioned for attorney fees, there was some question as to whether the Commission's claims were supported by the necessary quantum of proof, and that as such there was some question as to whether disgorgement would be ordered. *SEC v. Duclaud Gonzalez De Castilla*, 170 F.Supp.2d 427, 430 (S.D.N.Y. 2001).

In contrast to those two cases, there is no question that the frozen funds will be inadequate to satisfy an eventual disgorgement order against Palmer. Further, Palmer has had funds, and more importantly the opportunity to obtain funds, to pay for his defense. During this proceeding, he has been represented by four law firms, now going on five, and eight attorneys. Certainly it cannot be said that Palmer has suffered from a lack of attorney representation stemming from the Freeze Order. Moreover, in the two and a half years since he stipulated to the entry of the Freeze Order, Palmer has not referenced even the most preliminary of efforts to obtain other employment. Before tapping into the limited fund necessary to repay defrauded investors, at the very least Palmer should be required to obtain employment and finance his defense in the same manner as every other litigant is required to do in a civil case. He has chosen not to do so, and he should be required to shoulder the consequences of his choice.

Additionally, unlike *Duclaud*, Palmer's centrality, and thus his liability, in this matter is not in serious doubt. His fraudulent enterprise has been extensively documented by the Receiver and the Commission's designated expert, Lone Peak Financial. Although the Court declined to grant summary judgment, this does not appear to be a case in which a disgorgement order is seriously in dispute. Because the frozen funds are insufficient to satisfy a likely disgorgement order against

Palmer, because Palmer has had defense counsel in this case, stipulated to the Freeze Order, and has had ample opportunity to obtain funds to pay for his defense, and because Palmer has no constitutional right to an attorney in a civil proceeding, the Court should deny Palmer's petition to unfreeze precious funds that should be used to repay defrauded investors.

II. Fairness and Equity Support Maintaining the Asset Freeze in this Case.

Given Palmer's involvement in defrauding investors, lifting of the asset freeze to pay for his defense costs would not in the best interest of the harmed investors. The frozen assets were derived from the investors, and the Receiver estimates that all National Note investors will suffer a significant loss. The frozen assets should be preserved, and, to the extent possible, returned to the harmed investors. The assets should not be given back to the very person who perpetrated this fraud.

There is no question as to the Court's vested authority to freeze a defendant's assets in a securities enforcement proceeding such as this. "Freezing assets is a well accepted equitable remedy employed to 'preserve the status quo' and is proper in actions arising under the Securities Act." *SEC v. Lauer*, 445 F.Supp.2d 1362, 1367 (S.D. Fla. 2006). Notwithstanding this uncontested authority and the clear purpose for freezing the assets, Palmer nevertheless asserts that fundamental fairness (and his Due Process rights) requires that he be allowed to use those assets to fund his defense. In other words, Palmer claims that equity demands that he be given access to the funds to finance his defense costs.

Regarding equity, the *Lauer* court further observed that:

> A cardinal rule of equity is 'he who comes into equity must come with clean hands [i]t is a self-imposed ordinance that closes the door … to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.' *Precision Instrument v.*

> *Automotive Maintenance Machinery*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945). Under this cardinal rule of equity, Lauer's unclean hands have closed the door on any attempt by Lauer to seek relief from the Court's equitable asset freeze order…."

Id. at 1366-67.

Without citing a single, relevant case, notwithstanding the numerous cases addressing asset freezes in the context of a securities fraud matter, Palmer's fairness argument centers on his contention that "an asset freeze – prior to any adjudication of wrongdoing – implicates the procedural protections mandated by the Due Process Clause of the Fifth Amendment," and that as such he "is entitled to a meaningful opportunity to be heard in his defense of this matter prior to the permanent deprivation of his property rights." Motion to Unfreeze, p. 7. As explained above, courts have been clear that there is no right to an attorney in a civil action such as this. He has not suffered, and will not suffer, a deprivation of his constitutional rights in this case.

Moreover, and even more importantly, Palmer's fairness argument is two and a half years too late and ignores the glaring reality that he stipulated to the very Freeze Order that he now claims violates fundamental fairness and his constitutional rights. Because of this, to argue that the Freeze Order, to which he stipulated while he was represented by counsel, violates fairness and his constitutional rights because it was entered "prior to any adjudication of wrongdoing" is disingenuous. It was Palmer's actions, not the Receiver's, the Court's, or the Commission's, that have harmed investors. It was Palmer who made material misrepresentations to investors, who operated a fraudulent enterprise, and who concealed the failing business from new and existing investors for years. Because of Palmer's actions, investors have lost tens of millions of dollars

and any protest he makes as to the asset freeze and preservation of funds rings hollow. He does not approach this equity argument with clean hands.

The equities in this case weigh heavily in favor of preserving every dollar possible to repay investors. Investors will never be made whole. Probably not even close. It would be inequitable, indeed it would be an injustice at this stage of the proceeding, with the evidence of Palmer's fraud so apparent, to further drain what assets are available to fund Palmer's defense. For these reasons, the Commission respectfully requests that the Court deny Palmer's Motion to Unfreeze Assets to Pay Attorney Fees and To Retain Expert Witnesses.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court deny Palmer's Motion to Unfreeze Assets to Pay Attorney Fees and To Retain Expert Witnesses.

DATED this 23rd day of January 2015.

/s/ Daniel J. Wadley
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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, I caused to be sent the forgoing to be served on all parties entitled to service in this action by the means indicated below:

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