

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 20-CV-81205-RAR

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**COMPLETE BUSINESS SOLUTIONS
GROUP, INC. d/b/a PAR FUNDING, et al.,**

Defendants,

**NON-PARTY BROADWAY ADVANCE, LLC'S RESPONSE TO
ORDER TO SHOW CAUSE REGARDING STANDING [DE 272],
AND MEMORANDUM OF LAW IN SUPPORT**

Non-Party Broadway Advance, LLC ("Broadway"), by and through undersigned counsel, responds to the Court's Order to Show Cause Regarding Standing ("Order to Show Cause") [ECF No. 272] and, as the issues are significantly the same, also replies to the issues raised by the SEC in its Response in Opposition [ECF No. 266] and states as follows:

FACTS AND PROCEDURE

1. Broadway is a merchant advance lender that operates a similar business to that of Defendant Par Funding, although in a much smaller role. [ECF No. 251 at ¶ 3].
2. Actum Processing ("Actum") is a third-party payment processor that facilitates and executes ACH payments for various companies. Actum processed ACH payments on behalf of Par Funding. [ECF No. 240-1].

3. Actum also processes ACH payments on behalf of Broadway and is currently holding between \$80,000.00 and \$100,000.00 in funds belonging to Broadway. [ECF No. 251 at ¶ 2].

4. Actum has frozen these funds because Defendant Joseph Cole Barletta is listed within Actum's files as the primary contact on behalf of Broadway predicated on a 2014 document when the account was opened, and because this Court's Order Granting Preliminary Injunction by Consent as to Defendant Joseph Cole Barleta ("Preliminary Injunction Order") directed all financial institutions to freeze all funds "owned by, controlled by, or in the possession of" Cole. (ECF No. 202, at pp. 4-5).

5. Mr. Cole previously provided accounting services to Broadway as an outside accountant from July 2014 to January 2016, but no longer provides such services and no longer has any control over the funds of Broadway that Actum is holding. [ECF No. 251 at ¶¶ 4-8].

7. Broadway hired an in-house Chief Financial Officer in November of 2015 and ceased using Cole's services in January 2016. (Id., at ¶ 5).

8. Accordingly, Broadway filed a Motion for a Clarification of Order and Request for a Hearing ("Motion for Clarification") requesting the Court to conduct an evidentiary hearing to clarify whether Mr. Cole controls these funds that Actum holding on behalf of Broadway and to authorize the release of those funds to Broadway. (Id., at ¶ 5).

9. The Receiver filed a Response to the Motion for Clarification. [ECF No. 263]. Plaintiff Securities and Exchange Commission ("SEC") also filed Responses. The SEC argues that the entities and individuals who are not parties to this case, including Broadway, have no standing to file in this case, and have not moved to intervene in this case. See SEC's Responses [ECF No. 265] at 2 and [ECF No. 266] at 1.

10. As a result, this Court has issued an Order to Show Cause Regarding Standing (“Order to Show Cause”) to Broadway, requiring that the Court must be satisfied that Broadway has standing to file the Motion for Clarification before the Court considers this Motion. [ECF No. 272]

MEMORANDUM OF LAW

The Preliminary Injunction Order directed all financial institutions to freeze all funds “owned by, controlled by, or in the possession of” Cole. (ECF No. 202, at pp. 4-5). This order also requires that “any financial institution or other entity which holds such funds or assets for the benefit of or under the control of Cole to retain and not dispose of those funds or assets.” Actum was unsure of the meaning of the language in Preliminary Injunction Order and, in an excess of caution, refused to release the funds to Broadway. Broadway has the right to seek clarification of Preliminary Injunction Order without risking the potential of being held in contempt by this Court.

Federal Rule of Civil Procedure 65 governs who may be bound by a federal injunction. Rule 65(d) “embod[ies] rather than ... limit[s]” the common law powers of the district court. ADT LLC v. NorthStar Alarm Services, LLC, 853 F.3d 1348, 97 Fed. R. Serv. 3d 515 (11th Cir. 2017) At common law, an injunction bound “not only ... the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control.” Id., citing Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14, 65 S.Ct. 478, 89 L.Ed. 661 (1945). Broadly speaking, Rule 65 and the common-law doctrine contemplate two categories of nonparties potentially bound by an injunction.” Id. The first category is comprised of parties who aid and abet the party bound by the injunction in carrying out prohibited acts.Id. The second category, “captured under the general rubric of ‘privity,’ ” includes “nonparty successors in interest” and nonparties “otherwise ‘legally identified’ with the enjoined party.” Id. Non-parties are subject to this Court’s contempt powers as defendants may not nullify [the injunction] by carrying out

prohibited acts through aiders and abettors, although they were not parties to the original proceeding.” FTC v. Leshin, 618 F.3d 1221, 1235 (11th Cir. 2010);

Here, Broadway, Actum and other third parties that might fall under Rule 65(d)'s umbrella need not risk a contempt hearing to discover whether they have obligations under the Preliminary Injunction Order. District courts may provide parties with “clarification” of their duties under an injunction in light of “transactions [that] raise doubts as to the applicability of the injunction.” Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15 (1945). Nonparties may also seek clarification from district courts when questions arise as to who is bound by an injunction through operation of Rule 65.” Gucci Am. Inc. v. Bank of China, 768 F.3d 122 n.9 (2d Cir. 2014) citing NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 243 (2d Cir. 2013).

CONCLUSION

Rather than being potentially subject to a contempt hearing, or being otherwise without any remedy to determine whether its funds are properly frozen, Broadway has the right to seek clarification of the Preliminary Injunction Order to determine if it is bound by it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 24, 2020 I electronically filed the foregoing with the Clerk of the Southern District of Florida.

/s/ Fred A. Schwartz