UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION
Plaintiff

vs.

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

_____/

MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C., SECTION 1292(b) AND FOR STAY PENDING APPEAL STAY

COMES NOW, Defendant Joseph Cole Barleta ("Cole"), by and through his Undersigned Counsel, and files the instant Motion for Permission to File an Interlocutory Appeal and for Stay pending appeal. Mr. Barleta states the following in support:

1. This request is to file an interlocutory appeal of this Court's Order Granting Reciever's Motion to Compel [D.E. 1222].

2. Originally, the Receiver emailed counsel on February 21, 2022 and on March 9, 2022 and requested that Mr. Barleta provide information from 2016 through the present about whether he may have an ownership interest in 10 categories of assets including real estate; stocks, bonds and securities; bank accounts; safe deposit boxes; automobiles; indebtedness owed to Cole; partnerships and other business interests; trusts; other property; and disposal of property." (Ex. 2 and 3 of Receiver's Motion to Compel)

3. Mr. Barleta objects to providing any of the information requested on the basis of his Fifth Amendment privilege. There is a current investigation by the United States Attorney's Office in

the Eastern District of Pennsylvania which is based on the very same facts that are the subject of the SEC case herein. Mr. Barleta squarely possesses a Fifth Amendment right not to respond to the requests for documents when doing so would be testimonial in nature.

4. On April 29, 2022, this Court granted the Receiver"s Motion to Compel Defendant Joseph Cole Barleta to produce documents.

5. Having found that Mr. Barleta did not have a Fifth Amendment act of production right not to produce documents , Mr. Barleta now seeks appellate review. Mr. Barleta requests that this Court not deny him of his right to seek appellate review of this Fifth Amendment issue.

STANDARD OF REVIEW

28 U.S.C. § 1292(b) is a "statutory exception[] to the final judgment rule" that allows litigants to bring interlocutory appeals upon certification by the district court. See McFarlin v. Conseco Services, LLC, 381 F.3d 1251, 1253 (11th Cir. 2004). A district court may only certify an issue for interlocutory appeal when (1) the court's order being challenged involves a controlling question of law, (2) there is substantial ground for difference of opinion on a point of law, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. See *id*. at 1257. The party seeking review bears the burden of establishing these elements. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978). A "controlling question of law" involves determining "the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000)) It is "an abstract legal issue... [that a] court of appeals 'can decide quickly and cleanly without having to study the record.'" *Ahrenholz*, 219 F.3d at 676.

DISCUSSION

In our case, we have a controlling question of law of whether the Fifth Amendment protections apply and Mr. Barleta respectfully requests appellate review.

This Court has found that ten months passed between Cole's disclosures in a form and the day his assets were frozen. The Court found that,

> "Whatever change in the valuation of his assets that occurred in that ten-month period of time, and whatever limited changes have occurred since the Asset Freeze and Preliminary Injunction were put into place (which, this Court must assume, are quite limited due to the conditions of the Preliminary Injunction), do not overcome the 'reasonable particularity' the Receiver has shown in requesting documents of which he has prior knowledge."

However, such an Order is flawed because no documents were required nor produced with the 2019 form and much may have changed in one's financial condition during 2019 and 2020 particularly when the Covid pandemic began in mid March of 2020. Accordingly, the Receiver does not know if any documents exists in response to any of the ten categories of inquiry. A response by Mr. Barleta would require the use of his mind to identrify, assemble and produce documents which is testimonial in nature because it tells the Receiver of the existence, location and the sources of the information provided. and thereby violates Mr. Barleta' Fifth Amendment right. This Court's ruling that the Receiver's document request falls into the "foregone conclusion" category is flawed . However, the Receiver did not establish its independent knowledge of these three elements: the documents' existence, the documents' authenticity and [the defendant's] possession or control of the documents." *United States v. Sideman & Bancroft, LLP*, 704 F.3d 1197, 1202 (9th Cir. 2013).

Instead, Receiver relies upon assumptions hoping that it is correct and cites *In re Grand Jury Subpoena Dated Apr. 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004) *and In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1345–46 (11th Cir. 2012) for the

premise that "perfect knowledge of the existence of a piece of information or document is not required. However, what the Reviewer is far from "perfect" knowledge, and a mere speculation. For example, in *United States v. Hubbell*, 530 U.S. 27, 45, 120 S. Ct. 2037, 2048 (2000), the Court held,

> "Whatever the scope of this foregone conclusion rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent. The Government cannot cure this deficiency through the overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena." *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d 1335, 1345 (11th Cir. 2012).

In *Fisher*, therefore, the act of production was not testimonial because the Government had knowledge of each fact that had the potential of being testimonial. As a contrast, the Court in *Hubbell* found there was testimony in the production of the documents since the Government had no knowledge of the existence of documents, other than a suspicion that documents likely existed and, if they did exist, that they would fall within the broad categories requested.

In our case, and based on this Court's rationale, there is a hunch that these documents, or the information contained in the documents sought, might exist, and that noting has changed since 2019. That is not enough.

As such, the question of what kind of knowledge is required under *Hubbel* and *Fisher*, along with its progeny is a question of controlling law. Likewise, there is substantial ground for a difference of opinion, as this Court found when it wrote that Mr. Barleta's position was "substantially justified" as the law in this area is far from clear. Finally, immediate appeal from the order may materially advance the ultimate termination of the litigation.

Finally, a Stay should be issued because a stay may prevent duplicative proceedings.

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