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.,

_____/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE IN OPPOSITION TO DEFENDANT JOSEPH COLE BARLETA'S EXPEDITED MOTION FOR MODIFICATION AND JUDICIAL RELIEF [ECF NO. 1572] AND NOTICE OF POSITION PER THE COURT'S ORDER [ECF NO. 1573]

I. INTRODUCTION

The Court should deny Defendant Joseph Cole Barleta's Expedited Motion for Modification and Judicial Relief [ECF No. 1572]. Mr. Barleta seeks the modification of the Asset Freeze this Court entered against him on grounds he purportedly "cannot operate his business, cannot pay for his legal team, and is completely and utterly left with cut wings." [ECF No. 1572 at p. 5]. In essence, Mr. Barleta seeks to lift the Asset Freeze to pay investors in another securities offering and to pay his own attorneys.[1]

However, the Asset Freeze imposed against Mr. Barleta remains in effect. Notably absent from Mr. Barleta's Motion are the following facts:

- Mr. Barleta has been ordered to pay more than $12 million for the benefit of the investors in this case – and he has not paid a dime of that Final Judgment; and
- The funds at issue are in a bank account Mr. Barleta controls and are therefore frozen pursuant to the explicit terms of the Asset Freeze.

[1] The asset freeze order is against Mr. Barleta personally and was obtained by the Commission. Accordingly, the Commission files a Response to the Motion, which also serves as the Notice of Position the Court ordered [ECF No. 1573].

Nor does Mr. Barleta address the factors courts generally consider when addressing a request to lift an asset freeze. Instead, Mr. Barleta blames the Receiver's counsel for providing this Court's Order to the bank and makes the hollow assertion that he wishes to use the frozen funds to pay investors in a *different* securities offering and to pay his own legal team. As discussed more fully below, neither argument establishes grounds to modify the asset freeze in this case.

What Mr. Barleta's Motion *does* establish, however, is that Mr. Barleta has been violating the asset freeze order. By his own admission, Mr. Barleta has distributed funds he controls to investors in a different promissory note offering[2] and has recently entered into new promissory notes wherein he pledged these funds to investors in a different offering he operated.

While Mr. Barleta blames the Receiver for sharing this Court's Order with the bank, this is frankly a distinction without a difference. This is because Mr. Barleta is – and has been since August 2020 – subject to the Asset Freeze. Mr. Barleta knows that because Mr. Barleta explicitly consented to the Order imposing the Asset Freeze. The bank taking steps to freeze the account is a safeguard to prevent Mr. Barleta from violating the Asset Freeze. However, regardless of whether a bank takes steps to make it impossible for a defendant to violate an Asset Freeze order, the ***Defendant*** himself is responsible for complying with the Asset Freeze.

Ignoring this entirely, Mr. Barleta essentially comes before the Court to say:

- He has been violating the asset freeze by distributing and pledging funds to [at least] investors in a different offering he operated,
- But the bank has taken steps to halt the violations [as the Asset Order explicitly directs the bank to do],
- And so he wants the Court to eviscerate the Asset Freeze order so that he can return to spending funds he controls – while ignoring the Final Judgment against him that requires him to pay the investors in this case.

– Brazen.

[2] The full extent of Mr. Barleta's dissipation of funds subject to the Asset Freeze is unknown at this time – because Mr. Barleta failed to provide the sworn accounting this Court ordered.

II. THE ASSET FREEZE

The Commission filed this case in June 2020, alleging violations of the registration and anti-fraud provisions of the federal securities laws against Mr. Barleta and others [ECF No. 1]. The Commission simultaneously filed, among other things, an *ex parte* Motion for a Temporary Restraining Order, seeking Preliminary Injunctions and other relief against Mr. Barleta and his co-Defendants [ECF No. 14] ("TRO Motion").

On September 28, 2020, the Court granted the TRO Motion, entered an Order to Show Cause why Preliminary Injunctions should not be entered, and directed Mr. Barleta and his co-Defendants to file sworn accountings within five days [ECF No. 42]. The Order required Mr. Barleta to disclose his bank accounts and all accounts over which he had the power or right to exercise any control [ECF No. 42 at p.17]. Mr. Barleta ignored the Order and failed to file the sworn accounting. During discovery, the Commission sought documents from Mr. Barleta, including all statements for any bank accounts he owned or controlled, and all accounts reflecting his source of income [ECF No. 1213-17 at Request Numbers 13 and 17]. Mr. Barleta produced no bank account records for Capital Source 2000.

On August 22, 2020, the Court entered a Preliminary Injunction, by Consent, against Mr. Barleta [ECF No. 202]. The Preliminary Injunction includes an Asset Freeze, limited to $5.5 million, which states:

> A. **Barleta** and his respective **directors, officers**, agents, servants, employees, attorneys, depositories, **banks, and those persons in active concert or participation with him** who receive notice of this Order by personal service, mail, email, facsimile transmission or otherwise, hereby are **restrained from**, directly or indirectly, **transferring**, setting off, receiving, changing, selling, **pledging**, assigning, liquidating **or otherwise disposing of, or withdrawing any assets or property, including but not limited to cash**, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or drawing from any lines of credit, **owned by, controlled by, or in the possession of, whether jointly or singly, and wherever located, Joseph Cole Barleta**.

[ECF No. 202 at Section II.A (emphasis added)].

Thus, the Asset Freeze explicitly prevents *Mr. Barleta*, his bank, and any person participating with Mr. Barleta from (among other things) pledging, transferring or withdrawing any cash that Mr. Barleta (whether alone or with others) owns, controls, or has possession of.

To prevent violations of the Asset Freeze, the Order goes on to direct banks and other financial institutions to prohibit the withdrawal of such funds. [ECF No. 2020 at Section II.B].

III. THE FINAL JUDGMENT

In December 2021, Mr. Barleta consented to a Final Judgment with the amount of monetary relief to be determined upon the Commission's motion [ECF No. 1016]. After litigation concerning the monetary relief, the Court entered a Final Judgment against Mr. Barleta ordering him to pay disgorgement of $10,055,625, prejudgment interest of $754,525.32, and a civil penalty of $1,330,000 [ECF no. 1434]. The Court ordered Mr. Barleta to pay a total of $12,140,150.32 to the Receiver within thirty (30) days. *Id.* The Order also provides for post-judgment interest, which continues to accrue.

Mr. Barleta has yet to pay a dime.

IV. THE COURT SHOULD DENY THE MOTION TO LIFT THE ASSET FREEZE

A. Legal Standard

The Eleventh Circuit has determined that a district court may exercise its full range of equitable powers, including an asset freeze, to preserve sufficient funds for the payment of a disgorgement award. *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984); *see also Levi Strauss & Co. v. Sunrise Int'l Trading Co.*, 51 F.3d 982, 987 (11th Cir. 1995). The purpose of such a freeze order is to ensure that "any funds that may become due can be collected. The order functions like an attachment." *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir.1990); *see also Infinity Grp. Co.*, 212 F.3d at 197 ("A freeze of assets is designed to

preserve the status quo by preventing the dissipation and diversion of assets.") (internal citation omitted).

Where, as here, the Defendant consented to the asset freeze [ECF No. 202], the standards for the modification of consent decrees govern. The Eleventh Circuit has determined that the district court may modify a consent decree if the movant shows that: (1) there has been "a significant change either in factual conditions or in law[;]" and (2) "the proposed modification is suitably tailored to the changed circumstances." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1033 (11th Cir. 2002) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 391 (1992)).

B. Mr. Barleta Does Not Meet His Burden For Lifting the Asset Freeze

Mr. Barleta did not address these factors, and therefore the Court should deny his Motion.[3] Nor could he meet these factors even if he had argued the correct standard.

1. Mr. Barleta Did Not Show a Significant Change Either in Factual Conditions or in Law

According to the notes and offering letter Mr. Barleta files with his Motion, he has owed the investors in the Capital Source 2000 offering money since *before* the Commission even filed its case. Thus, it appears that when he consented to the Asset Freeze, he *already* owed these same investors money. Since consenting to the Asset Freeze, nothing has happened other than Mr. Barleta – by his own admission in the Motion and exhibits filed thereto – recently renegotiated with those investors to pay them even *less* than before. Further, the Receiver's counsel emailing the Asset Freeze to Mr. Barleta's new bank is a distinction without a difference. As set forth above, the Asset Freeze prohibits Mr. Barleta from transferring the funds. The only thing that has changed is the bank prevented Mr. Barleta from continuing to violate the Asset Freeze. He never should have violated it to begin with. And as for his supposed need for legal fees, Mr. Barleta has been paying lawyers in this case for 3 years, including as of the time he signed the consent to the

[3].

Asset Freeze. He failed to file the sworn accounting the Court ordered, and failed to produce financial records, and therefore there is no evidence whatsoever about his need for fees. Regardless, as set forth in Section B below, lifting the Asset Freeze is not appropriate where, as here, the defendant has not paid his Final Judgment.

2. The Proposed Modification is Not Suitably Tailored to The Changed Circumstances

The changed circumstance since Mr. Barleta consented to the Asset Freeze is the imposition of a Final Judgment against him. He has failed to pay a dime and the Final Judgment remains outstanding against him.

Capital Source 2000 was released from the Receivership because it was determined that there were no longer CBSG funds in Capital Source 2000. The Receiver was appointed ***only over the corporate defendants and the corporate defendants' assets.*** The Commission collects against ***individual*** defendants – such as Mr. Barleta - and corporate defendants on Final Judgments. The Commission had determined that the Capital Source 2000 funds could not be collected against CBSG (the corporate Defendant). However, based on the new information obtained concerning Mr. Barleta and Capital Source 2000, these funds might be collectible on the Final Judgment against Mr. Barleta personally. Mr. Barleta failed to file the Court-ordered sworn accounting and did not produce financial records, and therefore his disclosures and admissions in the Motion have illuminated his control over and use of these funds.

Mr. Barleta bears the burden, and he has presented ***no evidence*** that the funds in the Capital Source 2000 bank account he controls are not subject to collections activity on the Final Judgment issued against him personally. Indeed, his Motion indicates that he uses these funds for personal purposes and/or receives distributions because he argues he needs the Capital Source 2000 account unfrozen in order to pay his own lawyers. The amount in the Capital Source 2000 account Mr. Barleta controls has less in it than the Final Judgment imposed against him, and at this time none

of the more than $12 million Mr. Barleta owes to investors under the Final Judgment has been paid – thus, at this time there is a potential shortfall of at least $12 million for the victims of Mr. Barleta's fraud in this case. Because Mr. Barleta failed to demonstrate that the Capital Source 2000 funds are not subject to collections activity on the Final Judgment against him, and failed to meet his burden for modifying the Asset Freeze to which he consented, the Court should deny his Motion.

C. The Court Should Exercise Its Discretion To Deny The Motion

The Court should decline to lift the asset freeze to permit Mr. Barleta to obtain money for legal fees and his other offering because that money is necessary to ensure maximum compensation to the victims in this case. *See Mountain Capital Mgmt., L.L.C.,* 2010 WL 2473588, at *2 ("The Court evaluates an application to unfreeze assets for payment of attorneys' fees also in light of the principle that '[n]either civil nor criminal defendants have the right to use frozen investor funds to pay their counsel.' ") (quoting *Credit Bancorp Ltd.,* 2010 WL 768944, at *4).

The fact that the Capital Source 2000 account may not contain funds tainted by Callahan's fraud is of no moment. That is because the purpose of an asset freeze is to preserve all of the defendant's assets for the victims of his fraud, and therefore, a "defendant can be ordered to disgorge funds that were not causally tied to the fraudulent activity." *S.E.C. v. Spongetech Delivery Sys.,* Inc., No. 10–CV–2031 DLI JMA, 2011 WL 887940, at *9 (E.D.N.Y. Mar. 14, 2011) (citing *SEC v. Aragon Capital Mgmt., LLC,* 672 F.Supp.2d 421, 443 (S.D.N.Y.2009)); *see also S.E.C. v. Banner Fund Int'l,* 211 F.3d 602, 617 (D.C.Cir.2000) ("As the SEC points out, the requirement of a causal relationship between a wrongful act and the property to be disgorged does not imply that a court may order a malefactor to disgorge only the actual property obtained by means of his wrongful act. Rather, the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge."); *S.E.C. v.*

Callahan, 12-cv-1065, 2015 WL 10853927 (E.D.N.Y. Dec. 24, 2015) (denying motion to partially lift asset freeze).

The Capital Source 2000 funds should not be released for for multiple reasons. First, the amount of loss to investors asserted by the Commission in this case, and which Mr. Barleta has been ordered to repay to investors in the Final Judgment against him, far exceeds the known value of available assets of Mr. Barleta, who claims in his Motion he will be financially impacted if the funds remain frozen because, among other things, he needs the money for lawyers and to pay debts to ***other investors***. A further depletion of assets to pay other investors and pay Mr. Barleta's lawyers would not be in the best interests of the investors of this case. *S.E.C. v. Forte*, 598 F. Supp. 2d 689, 692-94 (E.D. Pa 2009) ("[I]f the frozen assets fall short of the amount needed to compensate consumers for their losses, a court is within its discretion to deny an application for living expenses and attorney fees.") (citations omitted)).

Mr. Barleta has provided no sworn account – despite being ordered to do so – and no evidence that he cannot use the money in the Capital Source 2000 account to pay the investors of this case. If anything, his Motion proclaiming the need for the funds to pay his own lawyers indicates he can use the Capital Source 2000 funds for any purpose. Further, the notes attached to the Motion, pursuant to which Mr. Barleta and his company supposedly owe other investors in yet another offering, were entered into in March 2023 – after the Final Judgment was issued in this case and after Mr. Barleta consented to the Asset Freeze. Given that Mr. Barleta has paid ***none*** of the Final Judgment imposed against him, and given the lack of evidence Mr. Barleta presented about the Capital Source 2000 funds, the Court should decline to lift the Asset Freeze and permit Mr. Barleta to spend these funds on anything at this time.

As Mr. Barleta has ignored the Court's Order to provide an accounting of his assets, his true financial condition is unknown. In the absence of facts from which an accurate assessment of

Mr. Barleta's financial condition can be determined and the use of Capital Source 2000 funds can be determined, the depletion of assets frozen for the benefit of investors in this case to pay lawyers and to pay investors in a different securities offering cannot be justified. *See Duclaud Gonzalez de Castilla, 170 F. Supp. 2d at 430; S.E.C. v. Schiffer, No. 97-CV-5853, 1998 WL 901684, at *1-3* (S.D.N.Y. June 25, 1998*)* (denying reconsideration of defendant's request to unfreeze assets because his failure to provide financial information on Fifth Amendment grounds "warranted a measure designed to preserve the status quo while the court could obtain an accurate picture of the whereabouts of the proceeds of the [alleged fraud].").

If Mr. Barleta wishes to have the Asset Freeze lifted, he need only pay the Final Judgment against him in this case. He has chosen to ignore the Final Judgment and seeks to use funds he controls for purposes other than that for which the Asset Freeze was intended and the Final Judgment mandates. The Court should deny the Motion.

Based on Mr. Barleta's admissions about his use of the Capital Source 2000 funds, the parties should engage in discovery to determine the scope of Mr. Barleta's violation of the Asset Freeze and to determine what if any funds can be collected for the benefit of investors in this case. Mr. Barleta has concealed his financial assets by failing to produce documents and file the Court-ordered sworn accounting, but the information Mr. Barleta disclosed in his Motion certainly proves one thing – there is an account at Capital Source 2000 over which Mr. Barleta maintains control and which funds he has utilized already despite the Asset Freeze. Releasing those funds based on Mr. Barleta's Motion would, at best, be premature at this time given the foregoing.

June 2, 2023

Respectfully submitted,

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