UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	Cause No. 1-15-cv-00659-JMS-MJD
v.	)	
VEROS PARTNERS, INC. MATTHEW D. HAAB, JEFFERY B. RISINGER, VEROS FARM LOAN HOLDING LLC, TOBIN J. SENEFELD, FARM GROWCAP LLC, and PINCAP LLC,	)	

VEROS PARTNERS, INC.'S SUPPLEMENTAL BRIEF REGARDING COURT'S AUTHORITY TO MODIFY ASSET FREEZE ORDER

Introduction and Summary

Defendant Veros Partners, Inc. ("Veros") submits this brief in support of the Court's legal authority to modify the asset freeze order contained in its preliminary injunction.

As stated more fully in Veros' July 31, 2015 Motion to Modify Preliminary Injunction [Doc. 91], the Securities and Exchange Commission ("SEC") filed suit against Veros and other defendants alleging various securities violations. On April 23, 2015, the Court entered a 14-day temporary restraining order [Doc. 12] freezing certain of Veros' assets and appointing a receiver over certain of Veros' assets. On May 7, 2015, the temporary restraining order was superseded by a preliminary injunction (the "Injunction") [Doc. 48] that remains in effect.

Veros has moved to modify the Injunction to permit the release of certain assets for purchase by Trueblaze, LLC ("Trueblaze") and MW Banks Consulting, LLC ("Banks"). Trueblaze has offered to pay $215,000.00 for certain assets used in Veros' business consulting and accounting business. Banks has offered to pay $90,000.00 for certain assets used in Veros' business consulting and accounting business. Veros wishes to enter into the proposed transactions for the sale of assets, which are subject to a valid, perfected first-priority security interest held by MainSource Bank ("MainSource").

Veros presently owes MainSource approximately $620,000.00 that must be paid in full on or about November 18, 2015. Veros currently is making monthly payments of approximately $7,400.00 per month to MainSource, and must make a balloon payment on the maturity date of approximately $604,500.00. Veros wishes to apply the sales proceeds toward reducing its secured debt to MainSource, and Veros believes that Indiana law compels it do so. The SEC objects to allowing the transaction to proceed if the proceeds are applied toward Veros' secured debt to MainSource.

Argument

A. The Court has broad authority to modify its preliminary injunctions, including those that temporarily freeze assets.

Inherent in the temporary nature of a preliminary injunction is the Court's ability to modify its terms. Indeed, the preliminary injunction at issue in this case specifically contemplated its own modification. On this point, the injunction provides that the asset freeze at issue in this case may be "modified … subsequently

by a separate order of Court" (Preliminary Injunction dated May 5, 2015, Doc. No. 48 at p. 5).

There is no question that the Court has the authority to modify its own preliminary injunction orders. As Judge Sarah Evans Barker concluded in *Eppley v. Iacovelli*, 2010 U.S. Dist. LEXIS 85151 (U.S.D.C. S.D. Ind. Aug. 17, 2010), "[t] here is no dispute that a court has the authority to modify a preliminary injunction." In so holding, Judge Barker cited the Third Circuit determination that, "[w] hen modifying a preliminary injunction, a court is charged with the exercise of the same discretion it had in granting or denying injunctive relief in the first place." *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 340 (3d Cir. 1993).

More particularly, a court may modify its own injunctions with respect to asset freezes like this one. "The decision to freeze assets, or to modify an asset freeze, is committed to the district court's discretion." *SEC v. One or More Unknown Traders in Securities of Onyx Pharmaceuticals, Inc.*, 296 F.R.D. 241, 255 (S.D.N.Y. 2013) (citing *Smith v. SEC*, 653 F.3d 121, 127 (2d Cir. 2011). Logic dictates this result. "If the court has the authority to freeze personal assets temporarily, it logically has the 'corollary authority to release frozen personal assets, or lower the amount frozen.'" *SEC v. Dowdell*, 175 F.Supp.2d 850, 854 (W.D. Va. 2001) (quoting *SEC v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427, 429 (S.D.N.Y. 2001). "While the primary purpose of freezing assets is to facilitate compensation of defrauded investors in the event a violation is established at trial, 'the disadvantages and possible deleterious effect of a freeze must be weighed against

the considerations indicating the need for such relief.'" *SEC v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427, 429 (S.D.N.Y. 2001). (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972)). For example, in one case a district court found that an investor was not entitled to the release of frozen assets to pay personal expenses or to continue involvement in a real estate project, but that modification of the amount of frozen assets was warranted to permit the investors to pay legal fees. *SEC v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427, 430-431 (S.D.N.Y. 2001).

The Court has the authority to release frozen personal assets or lower the amount frozen so that Veros may sell assets at a purchase price that the Receiver has already determined to be appropriate. (See Receiver's Valuation Report dated September 16, 2015, Doc. No. 124). *See SEC v. Dowdell*, 175 F.Supp.2d 850, 854 (W.D. Va. 2001). Although the SEC argues the freeze should be kept in place to compensate allegedly defrauded investors, the Court must weigh against that the importance of Veros' ability to pay its senior creditors and to generate revenue from a rapidly diminishing asset. *See SEC v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427, 429. Furthermore, if a district court has the authority to modify the amount of frozen assets for a defendant to pay legal fees, the Court here has authority to modify the amount of frozen assets for the specific purpose of allowing Veros to pay MainSource. *See SEC v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427, 430-431.

B. The cases cited by the SEC are distinguishable because Veros seeks a release of funds solely to pay a pre-existing debt to a senior secured creditor.

The cases cited by the SEC in its response to Veros' Motion to Modify the Preliminary Injunction are easily distinguishable from the facts at issue here. Veros intends to use the proceeds of the asset sale to pay MainSource, a creditor with a valid, perfected first-priority security interest. The cases on which the SEC relies differ significantly because of how the defendants in those cases sought to use frozen assets, and how they documented their requests.

For example, the SEC relies on *SEC v. Forte*, 598 F.Supp.2d 689, 691-692 (E.D. Pa. 2009). There, the court rejected defendant's request to release assets because the defendant's request to use the funds for living expenses were excessive, including mortgage payments for multiple homes, premium satellite television service including the "NFL Sunday Ticket" and special HD service, and more. *Id.* at 694. Furthermore, the defendant did not limit his request to necessary living expenses and failed to provide documentation supporting those requests that might be necessary. *Id.*

SEC v. Forte is clearly distinguishable from the case against Veros. Veros does not seek the release of assets for luxury expenses, but instead to pay a creditor with a senior perfected interest. Veros owes a debt to MainSource, and it seeks to only use the proceeds of the asset sale to make good on that debt. Veros does not seek a release of funds for frivolous purposes, but rather to pay a necessary debt.

Finally, unlike the defendant in *Forte*, Veros has documented its request through evidence of the offers by TrueBlaze and Banks.

The SEC also relies on *SEC v. Dobbins* 2004 WL 957715 at *2 (N.D. Tex. Apr. 14, 2004) for the proposition that the Court must assess whether a modification of the Injunction is in the best interests of the defrauded investors. In that case, the defendants requested access to frozen assets to pay for attorney fees, accountant's fees, living expenses, and business expenses. *Id.* at *2. The court denied the defendants' request for $5,000 per month in attorney fees because they "have not shown any basis for the reasonableness of the amount of their request." *Id.* The court also denied the defendants' request as to the $5,000 for accountant fees because the defendants did not provide the Court with any documentation to support the requested amount. *Id.* at *3. Finally, the court denied the defendants' request to modify the asset freeze to allow payment of "ordinary living expenses" in the amount of $11,671.05 per month, per defendant, because there was not enough information for the court to properly evaluate whether such high monthly living expenses were warranted. *Id.* The court also denied the defendants' request to use frozen assets to pay for business expenses in the amount of $17,410.57 for the same reason. *Id.*

Here, and unlike the moving party in *SEC v. Dobbins*, Veros has fully documented its need to modify the asset freeze order by evidencing Trueblaze's offer of $215,000.00 and Banks' offer of $90,000.00, and both the Receiver and the Receiver's valuation consultant (the accounting firm of Blue & Co.) have reviewed

all relevant documentation and concluded that the proposed purchase price is reasonable. In other words, unlike the request in *Dobbins*, in this case the documentation provided is "sufficient for the Court to determine the legitimacy of the request." *See SEC v. Dobbins*, 2004 WL 957715 at *2.

Finally, the SEC relies on *SEC v. McGinn* for the proposition that investors "have a heightened interest in having those assets maintained without further diminution pending the outcome of the action." 2014 WL 675611 at *5 (N.D.N.Y. Feb. 21, 2014). *SEC v. McGinn* involved trust beneficiaries moving to amend a trust to delete the provisions authorizing the trust to enter into a private annuity agreement. *Id.* at *1. The defendants sought modification of the underlying trust documents. *Id.* at *3.

SEC v. McGinn is distinguishable because it involved the modification of a trust's underlying document, not the release of specific funds to pay a senior creditor. Despite the "heightened interest" of investors as argued by the SEC, the Court must weigh that against other pertinent factors. (*See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) ("[T]he disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief."). MainSource has an interest in receiving payment on the $620,000.00 owed by Veros, and Veros seeks to make good on its obligation to its creditor. Moreover, and of critical importance here, if Veros does not pay MainSource in full this November, MainSource indisputably has the right to foreclose on its security interests, effectively putting Veros out of business and

eliminating any meaningful chance of recovery by the investors on whose behalf the SEC argues.

Conclusion

The Court clearly has the authority to modify the asset freeze provisions of its May 5, 2015 preliminary injunction under the circumstances present in this case. For all of the reasons presented to the Court in prior briefs and at the hearing held on September 3, 2015, Veros requests that the Court grant its motion for such relief despite the SEC's objections.

Further, in light of the urgent timing issues inherent in its request, Veros asks that the Court continue to expedite the resolution of this matter, and that the Court approve the asset sale transactions at issue as soon as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on September 22, 2015, the foregoing document was filed using the Court's CM/ECF system, which will serve notice upon the following counsel of record:

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