IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-02594-RM-SKC

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MEDIATRIX CAPITAL INC., et al.,

Defendants,

and

MEDIATRIX CAPITAL FUND LTD., et al.,

Relief Defendants.

RESPONSE IN OPPOSITION TO "RENEWED MOTION FOR A PARTIAL STAY OF DISCOVERY AGAINST THE INDIVIDUAL DEFENDANTS MICHAEL S. STEWART AND BRYANT E. SEWALL, RENEWED MOTION TO PERMIT THE UNFREEZING OF CERTAIN ASSETS FOR THE PAYMENT OF ATTORNEY'S FEES AND REQUEST FOR HEARING" (DOC. 229) AND JOINDER TO PLAINTIFF'S RESPONSE IN OPPOSITION

Brick Kane of Robb Evans & Associates LLC ("Receiver") submits the following Response in opposition to the Renewed Motion for a Partial Stay of Discovery Against the Individual Defendants Michael S. Stewart and Bryant E. Sewall, Renewed Motion to Permit the Unfreezing of Certain Assets for the Payment of Attorney's Fees and Request for Hearing (Doc. 229) ("Renewed Motion for Funds") brought by Defendant Michael Stewart, Relief Defendant Victoria M. Stewart (collectively, the "Stewarts"), Defendant Bryant Sewall and Relief Defendant Hanna Ohonkova Sewall (collectively, the "Sewalls"). (All of these moving parties are collectively referred to as the "Moving Defendants.") The Receiver also joins in and adopts

the response in opposition to the Renewed Motion for Funds filed or to be filed by the Plaintiff, United States Securities and Exchange Commission ("SEC") as it relates to the release of assets.

I. INTRODUCTION

The Receiver was appointed on September 11, 2020 pursuant to the Order Appointing Receiver (Doc. 153). In the Order Appointing Receiver, the Court found that it was necessary and appropriate to appoint the Receiver for the purposes of marshaling and preserving all assets of the Defendants and the Recoverable Assets of the Relief Defendants. Among other things, the Order Appointing Receiver empowers the Receiver "[t]o take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;" (Section I.4.G). Receivership Property is broadly defined to include all property interests of the named Defendants and the Recoverable Assets of the Relief Defendants, defined to include assets attributable to funds derived from investors or clients of the Defendants, held in constructive trust for the Defendants, fraudulently transferred by the Defendants and/or which "may otherwise be includable as assets of the estates of the Defendants."

While unclear, it appears that the Renewed Motion for Funds seeks the release of $260,000 to the Sewalls and $500,000 to the Stewarts, for a total of $760,000. Pursuant to his responsibilities enumerated in the Order Appointing Receiver, the Receiver opposes the release of $760,000 or any sum to the Defendants.

Defendant Michael S. Young and Relief Defendant Maria C. Young (the "Youngs") filed a joinder (Doc. 230) to the Renewed Motion for Funds, but solely as it relates to the request for a litigation stay. The Youngs have clarified this position in a brief filed with the 10th Circuit, in which they expressly stated that they are not seeking a release of funds in the District Court.

(*See* Young Appellants' Response in Opposition to the Securities and Exchange Commission's Motion for a Limited Remand and Stay of Briefing, filed April 12, 2021, Doc. No. 010110506084, at p. 4.) The Receiver takes no position on the Moving Defendants' and the Youngs' request for a stay of the instant action and/or for a stay of discovery, provided that any stay does not affect the Receiver's powers and duties, because the basis for any stay would be inapplicable to the Receiver's discharge of those powers and duties.

The Receiver joins in and adopts the SEC's response in opposition to the Renewed Motion for Funds as it relates to the release of assets and submits this additional response in opposition.

II. THE RENEWED MOTION FOR FUNDS IS OBSOLETE AND LACKS EVIDENTIARY SUPPORT

A. The SEC Has Agreed to Release Personal Property Assets that are Untainted by the Fraud

The Renewed Motion for Funds is obsolete at this point. The SEC has agreed to the release of certain tangible personal property assets which the Moving Defendants have demonstrated were acquired before the alleged fraudulent conduct giving rise to the instant litigation. The Receiver anticipates that the Court will be asked to approve this agreement in the form of an "unopposed motion" shortly. After consulting with the SEC and counsel for the Moving Defendants, the Receiver has determined not to oppose the relief requested therein.

The Renewed Motion for Funds does not describe what assets the SEC has agreed can be released and what additional tangible and cash assets are requested to be released. At this point, the Court should deny the Renewed Motion for Funds outright. Before evaluating another request for release of assets, the Moving Defendants should explain what more is requested in light of the release of assets negotiated with the SEC.

B. The Motion Contains No Support for the Living Expenses and Legal Fees Sought to be Paid

Yet again, the Renewed Motion for Funds contains no budget or breakdown itemizing how much is needed for living expenses and what time period is encompassed by the request, let alone any admissible evidence setting forth this information.[1] Similarly, there is no detail provided as to how much is needed for criminal counsel and how much is needed for civil counsel. There is no budget as to legal expenses or the time period covered by the request for legal expenses. As a result, the request for funds for living expenses and legal fees should be denied out of hand. *See, Securities and Exchange Commission v. End of the Rainbow Partners, LLC* 2019 WL 8348323, at *12 and *13 (D. Colo. November 25, 2019).

C. There are Insufficient Assets on Hand to Justify a Release of Funds

The Court found in the Order Granting Plaintiff's Emergency Motion for an Ex Parte Asset Freeze, Temporary Restraining Order, Order to Show Cause, and Other Emergency Relief (Doc. 10) ("Temporary Restraining Order") that, unless restrained and enjoined by Court order, there was good cause to believe that the Defendants and Relief Defendants will dissipate, conceal or transfer assets that could be subject to disgorgement. The Court ordered that assets of the Defendants and Relief Defendants should be frozen up to the amount of $251,074,084. This finding and the asset freeze up to the amount of $251,074,084 were maintained in the Stipulation and Order Granting an Asset Freeze, Preliminary Injunction, and Other Relief (Doc. 38) ("Stipulated Preliminary Injunction").

[1] The Renewed Motion for Funds has no evidence in the form of admissible declarations under penalty of perjury as required under 28 U.S.C. §1746. It contains old declarations from Bryant Sewall (Doc. 229-4) and Michael Stewart (Doc. 229-6), each executed in November 2020 in support of prior unsuccessful motions to release funds. Neither purported declaration is executed under penalty of perjury and neither purported declaration states the place of its execution. Therefore, these are not admissible declarations and carry no evidentiary weight.

The amount of assets to be frozen is far greater than the amount of assets in the Receiver's possession and control. Presently, the Receiver has cash on hand of $8,543,997.72 which includes funds obtained from various Defendants and Relief Defendants.[2] The Receiver is also in possession and control of several parcels of real property, including two properties in Scottsdale, Arizona, two properties in Little Elm, Texas and vacant land in Port Charlotte, Florida.[3] The Receiver has determined that these properties have a collective net asset value to the estate of approximately $3,500,000. Therefore, the Receiver is presently in control of assets worth approximately $12,043,997.72. The value of these assets in the possession and control of the Receiver and the gross amount held by Equiti, without accounting for any potential setoff, totaling approximately $24,983,855.72, are far below the $251 million amount to be frozen pursuant to the Stipulated Preliminary Injunction. Any amount paid out by the Receiver to the Moving Defendants is money that will be unavailable for distribution to investors and clients harmed by the Defendants' alleged misconduct. There are no excess funds available to pay $760,000 for living expenses and legal fees.

[2] This amount does not include $12,939,858 held by Equiti Capital UK Limited ("Equiti") pursuant to the Court's Order Requiring Equity UK Limited and Equity Armenia CJSC to Close All Open Blue Isle Positions (Doc. 134), which Equiti asserts is subject to a setoff of $3,513,447.

[3] While the Receiver is in possession of some of the Moving Defendants' personal property, it is not included in this calculation because much of that personal property is going to be released under the unopposed motion negotiated between the Moving Defendants and the SEC, assuming Court approval.

D. The Amounts Sought Far Exceed any Claimed or Actual Untainted Assets

The Renewed Motion for Funds contains no admissible evidence or even a clear explanation in support of the position that $760,000 should be released to the Moving Defendants. Apparently, the Sewalls claim to have assets of $122,782 pre-dating the alleged fraudulent conduct, but seek a release of $260,000. The Stewarts claim to have assets in excess of $100,000 pre-dating the alleged fraudulent conduct, but seek a release of $500,000. The SEC is agreeing to the release of various personal property assets acquired prior to the conduct giving rise to the lawsuit, but there is no admissible evidence in the Renewed Motion for Funds as to the value of the assets to be released. Therefore, the present request for a release of assets cannot be properly evaluated in light of the pending unopposed motion for release of tangible assets.

Additionally, there is no evidence that there is presently in existence cash assets unrelated to the purported fraudulent conduct. Funds that may have been in bank accounts in 2015 are irrelevant. There is no showing in the Renewed Motion for Funds that any cash assets of the Moving Defendants (or non-cash assets not subject to agreement with the SEC) presently exist which do not originate from the Entity Defendants or the purported fraudulent conduct. There is no evidence in the Renewed Motion for Funds that any amount of cash currently in existence can be traced separately and distinctly to assets unrelated to the fraudulent conduct alleged in this action. Untainted funds long since spent or commingled with tainted funds cannot be considered untainted funds held in the receivership. Finally, the Moving Defendants do not explain why they are entitled to a release of $760,000 when they claim, without proof, that they have frozen assets that pre-date the fraudulent conduct totaling only $222,782.

III. CONCLUSION

On at least two prior occasions, the Court denied the Moving Defendants' request for a release of funds (Docs. 133 and 213). The Renewed Motion for Funds provides no additional evidentiary support or justification for the relief requested, and in fact relies on the same inadmissible declarations used in the prior unsuccessful motions brought by the Stewarts and the Sewalls. The Renewed Motion for Funds is further lacking in merit given the pending unopposed motion for release of tangible assets. For these and the other reasons set forth herein and set forth in the SEC's response in opposition, it is respectfully requested that the Court deny the Renewed Motion for Funds as it relates to the request for the release of tangible and cash assets.

Respectfully submitted,

DATED: April 20, 2021

/s/ Gary Owen Caris

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DECLARATION OF BRICK KANE IN SUPPORT OF RESPONSE IN OPPOSITION TO "RENEWED MOTION FOR A PARTIAL STAY OF DISCOVERY AGAINST THE INDIVIDUAL DEFENDANTS MICHAEL S. STEWART AND BRYANT E. SEWALL, RENEWED MOTION TO PERMIT THE UNFREEZING OF CERTAIN ASSETS FOR THE PAYMENT OF ATTORNEY'S FEES AND REQUEST FOR HEARING" (DOC. 229)

I, Brick Kane, declare:

1. I am the President of Robb Evans & Associates LLC. I have been appointed Receiver in this action pursuant to the Order Appointing Receiver entered on September 11, 2020. I have personal knowledge of the matters set forth in this declaration and if I were called upon to testify to these matters I could and would competently testify thereto.

2. My duties and responsibilities under the Order Appointing Receiver require me to, among other things, identify, account for, and preserve and protect Receivership Property, as defined therein. Along with members and staff of Robb Evans & Associates LLC acting under

my management, supervision and direction, I have brought cash and non-cash assets into the receivership estate and under my possession and control as Receiver in this matter.

3. Presently, in my capacity as Receiver, I have cash on hand of $8,543,997.72 which includes funds from various Defendants and Relief Defendants. I also have multiple parcels of real property in my possession and control in my capacity as Receiver, including two properties in Scottsdale, Arizona, two properties in Little Elm, Texas and vacant land in Port Charlotte, Florida. I have determined that the collective net asset value to the estate of these properties is approximately $3,500,000. Therefore, in my capacity as Receiver, I am presently in control of assets worth approximately $12,043,997.72. I also have various items of personal property of the Defendants and Relief Defendants in my possession and control, however I am not including the value of any personal property because I understand that much of the personal property is proposed to be released to the Stewarts and Sewalls pursuant to an agreement they reached with the United States Securities and Exchange Commission ("SEC"). After communications with the SEC and counsel for the Stewarts and Sewalls, I have decided not to object to such agreement, which is to be presented to the Court in the form of an unopposed motion.

4. In addition, $12,939,858 is held by Equiti Capital UK Limited ("Equiti") pursuant to the Court's Order Requiring Equity UK Limited and Equity Armenia CJSC to Close All Open Blue Isle Positions. Equiti has asserted this amount is subject to a setoff of $3,513,447, although I do not concede this is correct. The value of real property and cash assets in my possession and control as Receiver and the gross amount held by Equiti in connection with this matter,

without accounting for any potential setoff in favor of Equiti, total approximately $24,983,855.72.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 20, 2021 at Alhambra, California.

BRICK KANE