FILED

AUG 21 2017

Clerk, U.S. District Court
Texas Eastern

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE COMMISSION *Plaintiff*	§	
v.	§	Case No. 4:17-cv-00336-ALM
THURMAN P. BRYANT, III, and BRYANT UNITED CAPITAL FUNDING, INC. *Defendants*	§	
ARTHUR F. WAMMEL, WAMMEL GROUP, LLC, THURMAN P. BRYANT, JR., and CARLOS GOODSPEED a/k/a SEAN PHILLIPS d/b/a TOP AGENT ENTERTAINMENT d/b/a MR. TOP AGENT ENTERTAINMENT *Relief Defendants*	§	

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND SUSPEND OR DISSOLVE ORDER APPOINTING RECEIVER

Defendants THURMAN P. BRYANT, III, and BRYANT UNITED CAPITAL FUNDING, INC. (collectively, "BRYANT"), pursuant to Federal Rule of Civil Procedure 65(b)(4), respectfully moves this Court for the entry of an Order dissolving the Ex Parte Order Granting Motion for Temporary Restraining Order, Preliminary Injunction, Asset Freeze, Appointment of a Receiver, Document Preservation Order, Order to Make Accounting and Other Emergency Relief and Setting Hearing Date of Plaintiff's Preliminary Injunction Motion, entered by this Court on May 15, 2017. Dissolution is appropriate because contrary to the assertions of the Securities and Exchange Commission (the "SEC"), it has failed completely to demonstrate or even allege that the alleged wrongful acts of BRYANT constituted the offer or sale of any security or occurred in connection with the purchase or sale of any security by BRYANT. Rather, the SEC complaint and ex-parte motion allege only that certain wrongful conduct occurred, and the SEC then implies that since the alleged wrongful acts took place within an

investment related environment, the wrongful acts must be considered to have occurred in connection with the offer, sale, or purchase of securities. Even if the Court accepted these allegations as true, the SEC makes no effort to connect the alleged wrongful acts to any direct purchase or sale of a security: NONE. In the absence of a direct connection between the alleged wrongful acts and the offer, sale or purchase of securities, the SEC has no standing to bring the complaint against BRYANT in this action; thus, the complaint must be dismissed. And if the SEC's allegations are accepted, the application of this expansive rule would simply swallow all wrongful actions that occur in an investment environment into Section 17(a) of the Securities Act of 1933 and Rule 10b-5 of the Securities Act of 1934.

Consequently, for multiple reasons, the SEC has no substantial possibility of success in this matter and has not presented a prima facie case supporting its complaint, and the SEC's application for the entry of an ex parte TRO, avoiding any possible response by BRYANT, was improvidently entered and should be dissolved.

ARGUMENT AND AUTHORITIES

RELEVANT PROCEDURAL FACTS

1. On May 15, 2017, the Securities and Exchange Commission (the "SEC") filed the Complaint in this action against BRYANT. *See* Dkt. No. 1.

2. That same day, the Court entered an Ex Parte Order Granting Motion for Temporary Restraining Order, Preliminary Injunction, Asset Freeze, Appointment of a Receiver, Document Preservation Order, Order to Make Accounting and Other Emergency Relief and Setting Hearing Date of Plaintiff's Preliminary Injunction Motion (the "Freeze Order"). *See* Dkt. No. 16.

ARGUMENT

A TRO may issue upon a showing of (1) a prima facie case that Defendants have violated the securities laws; and (2) a reasonable likelihood that their violations will be repeated. *See SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 n. 2 (11th Cir.1999); *but see* Fed. R. Civ. P. 65; *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Here, the SEC's complaint alleges violations of both section 10b-5 of the Exchange Act and 17(a) of the Securities Act.

To establish a § 10(b) or Rule 10b-5 violation, the SEC must prove that [the Defendant(s)] made: (1) "a misrepresentation or omission (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of securities, and (5) by [means of interstate commerce]." Section 17(a)(1)-(3) requires substantially similar proof with respect to the offer or sale of securities. *SEC v. Smart*, 678 F.3d 850, 856-57 (10th Cir. 2012) (internal citations omitted).

In the absence of prima facie evidence that satisfies each of the elements required under sections 10(b) or 17(a), the SEC must be deemed to have failed to meet its burden for the entry of each of the following: the TRO, the so-called "Freeze Order," and the appointment of a receiver in this case. And in that absence, the TRO should be dissolved.

I. THE SEC FAILED TO PRESENT EVIDENCE THAT BRYANT ENGAGED IN THE OFFER, SALE, OR PURCHASE OF A SECURITY

A. The SEC Failed to Allege any Fact that Would Support a Conclusion that BRYANT Committed Fraud with the Offer or Sale of Securities Sufficient to Satisfy Section 17(a)

Under the plain language of Section 17(a) of the 1933 Securities Act, it is

> unlawful for any person in the *offer or sale* of any securities ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
> (1) to employ any device, scheme, or artifice to defraud, or

> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
>
> 15 U.S.C. § 77q(a) (2013)

The terms "sale" and "offer to sell" are defined in section 2(3) as follows: "The term `sale' . . . shall include every contract of sale or disposition of a security or interest in a security, for value. The term . . . `offer' shall include every attempt or offer to dispose of . . . a security or interest in a security, for value." 15 U.S.C. § 77b(3) (2013). "Section 17(a) of the Securities Act 'was meant as a major departure' from the scope of the rest of that statute, and was 'intended to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary market trading.'" *SEC v. Tambone*, 550 F.3d 106, 120 (1st Cir. 2008) (quoting *U.S. v. Naftalin*, 441 U.S. 768 at 777-78 (1979)). "[T]here is unanimity . . . that § 17(a)(2) of the 1933 Act — indeed the whole of § 17 – was intended only to afford a basis for injunctive relief and, on a proper showing, for criminal liability." *SEC v. Texas Gulf Sulfer Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J, concurring).

And although the "Court has made clear, in the context of interpreting § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), that transactions other than traditional sales of securities are within the scope of section 17(a), and passage of title is not important," *Pinter v. Dahl*, 486 U.S. 622, 643 (1988), it is also true that the Court has held that "a person who solicits the purchase will have sought or received personal financial benefit from the sale, such as where he 'anticipat[es] a share of the profits." *Id.* at 654 (quoting *Lawler v. Gilliam*, 569 F.2d 1283, 1288 (4th Cir. 1978)). BRYANT understands that the *Pinter* Court was addressing Rule 12(1) under the Securities Act of 1933. *See Pinter v. Dahl*, 486 U.S. 622 (1988). However, the *Pinter* Court

makes clear that the definitions discussed therein apply to all sections of the Securities Act, and specifically as applied to section 17(a), the *Pinter* Court defined "offer or sale." *Id.* at 643. In short, the general rule is that "section 17(a) applies only to brokers and dealers *selling* or *offering to sell* securities" to an investor in securities, and specifically to the securities being offered or sold. *Tambone* 550 F.3d at 122 (emphasis in original).

In neither its complaint nor its Motion for Temporary Restraining Order has the SEC alleged or argued that BRYANT was selling or offering to sell securities as that term is defined statutorily, and interpreted by the United States Supreme Court. At most, the SEC points to classes of transactions that arguably constitute the offer or sale of a security and at most, by implication, allege that BRYANT was involved in those transactions as a broker or dealer. Implication is insufficient, and the bare allegations show that BRYANT did not engage in the offer or sale of securities under section 17(a).

The SEC appears to argue, as interpreted by BRYANT, that BRYANT violated section 17(a) through his efforts to obtain clients through his presentations regarding BUCF. Specifically, the SEC alleges that BRYANT encourages investors with "guaranteed minimum annual returns of 30% on risk-free investments Bryant represented he would make in the mortgage industry." Dkt 1, at ¶ 2. Taken at face value, this conduct cannot be described as a violation of section 17(a). As described by the SEC, BRYANT markets BUCF as an investment house in which the clients deposit funds in order to collectively gain returns from mortgage industry investments. BUCF did not manage the end-point destination company receiving these investments, and his conduct did not involve the offer or sale of any security, in that he was neither selling a security, nor offering to sell any specific security in this context. Thus, the clients' decision to invest with BUCF does not satisfy the requirements of section 17(a) in any

manner. In the absence of an actual allegation of the offer or sale of a security, as that term is defined by accepted authority, it is inappropriate for a TRO to issue pursuant to section 17(a).

B. The SEC Failed to Allege any Fact that Would Support a Conclusion that BRYANT Misstated or Omitted any Material Fact in Connection with the Purchase or Sale of a Security Sufficient to Meet the Requirements of Rule 10b-5

The SEC failed to allege any facts sufficient to show that BRYANT engaged in the purchase or sale of securities, or activities related to the purchase or sale of securities, as applied to section 10(b) or Rule 10b-5. "Section 10(b) of the Securities Exchange Act makes it unlawful for any person to 'use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.'" *Matrixx Initiatives, Inc. v. Siracusano*, --- U.S. ---, 131 S.Ct. 1309, 1319 (2011) (quoting 15 U.S.C. § 78j(b)). "The SEC promulgated Rule 10b-5 pursuant to authority granted under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)." *Janus Cap. Group v. First Derivative Traders*, --- U.S. ---, 131 S.Ct. 2296, 2301 (2011). By statutory necessity, the reach of Rule 10b-5, "does not extend beyond conduct encompassed by § 10(b)'s prohibition." *O'Hagan*, 521 U.S. at 651.

Section 10(b) does not prohibit unlawful conduct as a whole; rather, section 10(b), and by extension, rule 10b-5, prohibits and punishes only that unlawful conduct that occurs "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j(b); *see also SEC v. Zandford*, 535 U.S. 813, 820 (2002). Section 10(b) thus regulates only those unlawful acts that occur in connection with the purchase or sale of a security. *See Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971). The Tenth Circuit Court of Appeals has held that to prove that an

unlawful act took place "in connection with" the purchase or sale of a security requires that the SEC demonstrate a causal connection between the alleged unlawful act and the alleged injury. *See SEC v. Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008). Among the "causal" connections recognized under the authority of the Tenth Circuit's interpretation is the public dissemination of documents "such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely" when making investment decisions. *Id.* (citing holdings from various other circuit courts of appeal). When such communications are involved, "the SEC need only show that the documents are reasonably calculated to influence investors, and that the misrepresentations are material to an investor's decision to buy or sell *the security*." *Id.* (emphasis added). In other words, the alleged unlawful conduct of the broker or dealer, whatever it may be, must relate to a specific security, and the alleged unlawful conduct must have caused, at least in part, the alleged injury.

In the absence of evidence that the alleged unlawful conduct of BRYANT took place in connection with the purchase or sale of a specific security, a claim under section 10(b), and rule 10b-5 cannot lie. *See, e.g., SEC v. Thompson*, 732 F.3d 1151, 1157-58 (10th Cir. 2013). "Congress ... did not intend to provide a broad federal remedy for all fraud." *Marine Bank v. Weaver et ux.*, 455 U.S. 551, 556 (1982) ("We have repeatedly held that the test 'is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect'") (quoting *SEC v. United Benefit Life Ins. Co.*, 387 U. S. 202, 211 (1967)). The absence of specificity in the SEC's complaint raises concerns that the SEC has failed to comply with Rule 9 of the Federal Rules of Civil Procedure, in that the complaint lacks particularity in terms of dates, individuals, and specific omissions or material misstatements that BRYANT is alleged to have made in connection with any

transaction. Instead, the SEC appears to rely on a parade of horrors view of the sufficiency of its complaint and an effort to tar BRYANT not with specific allegations, but with claims that BRYANT misappropriated over $20 million over some unidentified period of time. As a result, mere allegations of internal corporate mismanagement are insufficient to trigger jurisdiction under Section 10(b). *See, e.g., Santa Fe Indus. Inc., v. Green*, 430 U.S. 462, 479 (1977) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co,* 404 U.S. 6, 12 (1971)); *see also O'Neill v. Maytag*, 339 F.2d 764, 768 (2d Cir. 1964) (holding that section 10(b) '"was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement or corporate affairs'" (citation omitted)).

Additionally, the simple act of convincing an individual or entity to pay cash to a malefactor, who then uses those funds to invest in securities—or in any other item—does not qualify as an act of securities fraud under section 10(b) or Rule 10b-5. *See O'Hagan*, 521 U.S. at 656-57 ("In other words, money can buy, if not anything, then at least many things; its misappropriation may thus be viewed as sufficiently detached from a subsequent securities transaction that § 10(b)'s 'in connection with' requirement would not be met.").

In short, the SEC has failed to allege that BRYANT engaged in any unlawful conduct in connection with the purchase or sale of any specific security. Rather, the SEC has alleged that BRYANT has engaged in mere unlawful conduct and implied some relationship to securities. Similarly, the SEC has failed to allege any facts that demonstrate a causal connection between any alleged unlawful act of BRYANT and any specific injury suffered by anyone arising from some security transaction related to the alleged unlawful acts.

The SEC then alleges that BRYANT removed cash from the BUCF trust account and invested those funds in various manners, including buying securities with the misappropriated

funds, all without consulting the BUCF clients, or informing those clients of his intention, and without asking for their permission, and without giving those clients even a choice as to his decision. The SEC further alleges that BRYANT colluded with Wammel Group to issue Ponzi-type returns, to encourage further investment, and that he misappropriated BUCF funds to pay personal living expenses for an indeterminate amount of time. Finally, the SEC alleges that BRYANT invested yet more BUCF funds with Goodspeed, at the peril of the investors given Goodspeed's personal and professional history.

The SEC nowhere identifies any specific security, or class of securities, involved or connected with BRYANT. The SEC nowhere identifies any unlawful act or material misstatement of BRYANT related to any specific security, or any specific unlawful conduct connected to such security through which the court could draw a causal connection between the alleged injury and the alleged unlawful conduct *as it relates to that security.* Instead, the SEC has offered the court a wholesale tale of theft, collusion, common fraud, and mismanagement and attempted to force those facts into a pattern that would meet the requirements of rule 10b-5. That effort is ill-conceived, and should not be permitted. According to the plain language of the *O'Hagan* Court, the protections and sanctions of Rule 10b-5 do not "apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities." 521 U.S. at 656 (quoting the position of the government with approval). Here, the SEC has alleged nothing more than that scenario.

According to the SEC, BRYANT convinced BUCF clients to give him cash on the premise that it would be placed in a secured escrow account to be used as collateral. He then allegedly placed all of the cash deposits into the commingled trust account of BUCF and thereafter used that commingled cash to make purchases without the knowledge, consent, or

input of clients. The SEC clearly alleges, at least as pled, that BRYANT took funds from the commingled BUCF trust account in which all BUCF client funds were deposited—simply stealing them or obtaining them through baseless transfer—and invested them without the knowledge or consent of the clients. In simple terms, the SEC's allegations do not amount to a violation of section 10(b) or Rule 10b-5; and in the absence of such a violation, the SEC's complaint was improperly placed before this Court and the TRO was improvidently entered. As a consequence, this Court should dissolve the TRO that the SEC improperly sought on an ex parte basis under the facts of this case.

II. THE RECEIVERSHIP DOES NOT BENEFIT THE PLAINTIFF'S INTERESTS AND INSTEAD PRESENTS AN UNDUE AND UNWARRANTED BURDEN ON BRYANT

The SEC requested the appointment of a receiver in order to protect the assets and records it imagined must be found in the possession of BRYANT. While that may have been appropriate in some other set of circumstances, the corporate structure of BRYANT was such that no great accumulation of cash or assets was kept. Money that was invested with BUCF was primarily transferred into an account controlled by Wammel Group, to be invested, and returns received from Wammel Group based on these investments were distributed to the BUCF investors with little lag time, such that no large cash reserve was kept sitting in any account held by BRYANT. In fact, in its Freeze Order, 3, the SEC states that "there is good cause to believe that Defendants do not have sufficient funds or assets to satisfy the relief that might be ordered in this action." And, even making this assumption, they decided to press for the expensive and resource-demanding system of receivership.

The Receiver and her counsel have presented requests to the Court for approval of billing in an aggregate amount of over $200,000. This is not only outrageous – the accounts and records of BRYANT were certainly not extensive or complex enough to justify the sheer volume of

hours and resources supposedly expended on "deciphering" them – but seems misplaced, in that the activities supposedly undertaken by the receiver seem to be the very activities that would be expected as part of the investigation by the FBI or federal agency who originally began the inquest into this matter, and that such activity would be outside the normal scope of receivership.

The Receiver was wrongfully appointed, since the TRO itself which appointed her should not have been granted and should be dissolved. The accounts and records of BRYANT were not complex or difficult to understand, and the holdings and assets on hand were minimal.

The Receiver seized many assets and accounts that were beyond her purview, in an attempted fishing expedition to uncover something to incriminate BRYANT. This is not the purpose of a receivership. A receivership is intended to "use reasonable efforts to determine the nature, location and value" of the Estate's property, and "to take such action as necessary and appropriate for the preservation of Receivership Property," pending the outcome of the case. See Order Appointing Receiver, Dkt. 17. The receiver is not intended to try the case on her own, or to make determinations of intent or other decisions regarding BRYANT's assets or accounts; she is simply to oversee the Estate and ensure it is not removed or damaged such that the Court cannot meaningfully determine the eventual disposition of it as it relates to the outcome of this case. Instead, it appears that the Receiver is working with the Plaintiff – a clear violation of the principle that a receiver be a non-interested third party – and is seeking to recoup expenses for the federal investigation into BRYANT's affairs which preceded this lawsuit. The billing presented to date – and this case has just begun – already exceeds the value of the holdings of BRYANT as such holdings relate to the matter at hand.

The Receiver has further overstepped her authority in seizing and holding captive various accounts and assets that have no relation to the matter at hand, including accounts and assets held

and used by BRYANT's wife, who is not a defendant in this matter, and BRYANT's children, who are also not defendants in this matter. BRYANT has had to relocate his family residence, and his family struggles to meet personal financial obligations as a result of the over-reach of the Receiver. As such, and since the TRO which let to her appointment should be dissolved, the Receivership should likewise be dissolved and the burden and expense eliminated.

CONCLUSION

Accordingly, pursuant to the foregoing analysis and authority, this Court should dissolve the TRO entered in this matter on May 15, 2017, and all of the orders associated with that TRO, including but not limited to the Order Appointing Receiver entered on the same date.

Respectfully submitted,

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DEFENDANT PRO SE

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of August, 2017, a true and correct copy of the above and foregoing has been forwarded to all parties via electronic mail to the address listed below.

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