

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

JAMES HUGH BRENNAN III; DOUGLAS
ALBERT DYER; AND BROAD STREET
VENTURES, LLC,

CIVIL ACTION FILE
NO. 1:16-cv-307-TRM-
SKL

Defendants,

and

CAROLE JOHNSTON BRENNAN;
ALISON F. DYER,

Relief Defendants.

U.S. SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR AN
ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE
HELD IN CONTEMPT OF THIS COURT'S ASSET FREEZE ORDER,
AND MEMORANDUM IN SUPPORT THEREOF

Comes Now the U.S. Securities and Exchange Commission (hereinafter “SEC” or “Commission”), by and through undersigned counsel, and hereby files its Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt of this Court’s Asset Freeze Order.

The SEC has received evidence indicating that the Defendants have violated this Court’s Preliminary Injunction Order [Dkt. No. 24], which, with the Consent of the Defendants, [Dkt. No. 22], continued the asset freeze first imposed in the Temporary Restraining Order (“TRO”) [Dkt. No. 16]. The Commission therefore files this Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt.

I. PROCEDURAL HISTORY

Following investigation of facts showing that the Defendants James Hugh Brennan, III (“Brennan”) and Douglas Albert Dyer (“Dyer”), working through their company, Broad Street Ventures, LLC (“Broad Street”), raised more than \$5 million from more than 240 investors through material misrepresentations and omissions, the Commission filed this emergency enforcement action on July 20, 2016, seeking a TRO, an asset freeze, and other equitable relief. [Dkt. No. 2]. The Commission proved its entitlement to such relief on that date, and the Court entered the requested TRO and asset freeze the same day, amending that Order on

July 22, 2016. [Dkt. No. 20]. On July 27, 2016, before the scheduled preliminary injunction hearing, the Defendants and Relief Defendants consented to entry of a preliminary injunction and continued asset freeze. [Dkt. No. 24]. The Defendants sought relief from the asset freeze, and the Court conducted a hearing on that motion on August 31, 2016. [Dkt. No. 36]. At that hearing the Defendants and Relief Defendants abandoned their request except for a request that the Court allow them to borrow money from friends and family unrelated to the facts described in the Commission's complaint. The Court entered such an order, and the Defendants and Relief Defendants have taken advantage of the procedure set by the Court to borrow legal fees and living expenses. [Dkt. No. 44].

II. FACTS

The Commission has received evidence tending to show that Defendants, in violation of the asset freeze imposed by this Court, transferred and disposed of shares of stock in Fision Corporation. ("Fision"). Specifically, the Commission received copies of correspondence from the transfer agent for Fision indicating that Defendants ordered that shares of Fision be distributed to shareholders in Scenic City F10 VIII, a company at the heart of the scheme described in the Commission's Complaint. See documents attached to the Declaration of Michael Mashburn, which is attached hereto as Exhibit 1. Currently pending before this

Court is a motion by Defendants seeking relief from the asset freeze to allow for such a transfer of Fision stock. [Dkt. No. 94]. Of course, having been filed on November 18, 2016, that motion has not yet been considered, much less granted. Defendants did not inform the Court in their motion that they already have ordered the transfer of the frozen assets, and that the motion therefore is a cynical attempt to get retroactive approval for a violation of the asset freeze order.

III. LEGAL STANDARD

Courts have the inherent power to enforce compliance with their lawful orders by contempt. *Young v. United States ex rel Vuitton Et Fils S.A.*, 481 U.S. 787, 795 (1987); *Shillitani v. United States*, 384 U.S. 364, 370 (1966). This power is essential to the proper conduct of the judicial function and without it courts would be unable to assert their authority by order or decree. *Young*, 481 U.S. at 796. Congress codified the courts' contempt powers in 18 U.S.C. § 401, which states:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and no other, as –

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401.

“In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court’s prior order.” *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991). That showing includes three elements: (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court’s order. *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir. 1987). “A litigant may be held in civil contempt if his adversary shows by clear and convincing evidence that he violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act with knowledge of the court’s order.” *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987).

IV. THE SEC HAS CARRIED ITS BURDEN AND ASKS THE COURT TO ORDER DEFENDANTS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT

The Commission has established each of the three elements of a contempt action. First, not only was the asset freeze order in effect, but the defendants consented to it. [Dkt. No. 22].

Next, the order required certain conduct. Specifically, the Order provides:

the Defendants and Relief Defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, . . . , be, and

hereby are, restrained from directly and indirectly, **transferring**, setting off, receiving, changing, selling, pledging, assigning, liquidating or **otherwise disposing of** or withdrawing any assets and property owned by, **controlled by, or in the possession of said Defendants** and Relief Defendants. Upon reasonable notice of this Order or the TRO, this Court further enjoins any disbursement by the Defendants and Relief Defendants, their agents, representatives, employees and officers and all persons acting in concert or participation with them, whatever business names they may operate under, of any proceeds derived from the sales of securities described in the complaint.

Preliminary Injunction Order ¶ II, p. 3 (emphasis added).

Finally, the SEC presents clear and convincing evidence of Defendants' violation of the Order. Defendants attached to their motion for relief from the asset freeze a stock certificate issued by Fision to Scenic City F-10 VIII 9[Dkt. No. 94, Attachment], an entity described in detail in the SEC's Complaint as being at the heart of Defendants' fraudulent scheme. See Complaint at ¶¶ pp. 6, 23-32. Defendants' brief in support of their motion for relief from the freeze establishes that without an affirmative act on the part of the Defendants that certificate could not be transferred to Fision for reissuance of the shares to investors. Specifically, Defendants state as follows regarding the Fision shares:

These shares, which total One Million Two Hundred Seventeen Thousand Nine Hundred Eighty-One (1,217,981) common shares, are presently in the name of Scenic City F-10 VIII and are ready to be distributed to the individual investors. (Attachment 1 – Stock Certificate). **To issue those shares to the individual investors, Defendants need permission to sign documents** on behalf of Scenic City F-10 VIII.

Defendants' Brief at p. 3 [Dkt. No. 94] (emphasis added).

In the last several days, one of Defendants' victims has provided proof that the Defendants did indeed take that affirmative step to transfer the shares to Fision for reissuance to Defendants' victims. See Declaration of Michael Mashburn, attaching document received from investor.¹ As evidenced by their motion, such a transferred could not have occurred without the affirmative action of the Defendants.

While “good faith . . . is no defense for failure to comply with a court order enjoining certain conduct,” *Peppers v. Barry*, 873 F.2d 967, 968 (6th Cir. 1989), Defendants conduct here seems to establish the antithesis of good faith, which ought to be considered on the issue of the remedy for Defendants’ contempt. Had there been a good faith misunderstanding as to whether such a transfer of frozen assets was allowed, despite the plain language of the Order, defense counsel would

¹ If the Court grants the Motion to Show Cause, the SEC intends to further authenticate the document through a witness in open court.

have brought the fact to the Court’s attention. Instead, their motion not only fails to mention the completed transfer, but, feigning respect for the Court’s Order, seeks relief from the Order already violated.²

The Commission has met its burden. First, the Court issued the asset freeze order. Second, the order prohibits the Defendants from “transferring” and “disposing of” “any assets . . . controlled by [them], or in [their] possession.” Finally, Defendants have transferred and disposed of Fision stock in their possession and control. The burden now shifts to the Defendants to explain why they should not be held in contempt.

In fashioning a remedy in civil contempt proceedings, courts should consider “the probably effectiveness of any suggested sanction in bringing about the desired result.” *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991). The Court has authority to order incarceration pending compliance. *Penfield Co. v. SEC*, 330 U.S. 585, 594 (1947); *In re Grand Jury Subpoena*, 957 F.2d 807 (11th Cir. 1992); *In re Stephen Jay Lawrence*, 279 F.3d 1294 (11th Cir. 2002). Given that the violation in question involves the disposition of assets subject to the freeze order, though, incarceration does not seem suited to the violation, as the Defendants could not free themselves by affirmative compliance

² If Fusion issued shares without the supposed necessary signatures by the Defendants, the Defendants can withdraw their motion for relief from the freeze, as its stated purpose has already been accomplished.

with the Court's order. A fine would be more appropriate, but still would not give the Court any comfort that the Defendants are not disposing of other assets in violation of the freeze order. The Commission therefore suggests that Defendants be ordered to establish by competent evidence the value of the stock transferred to Fision and to deposit into the registry of the court an amount equal to that value. By making such payment (which of course, would have to come from sources other than currently frozen assets) the Defendants would be purged of the contempt.³

WHEREFORE, the SEC requests an order consistent with the foregoing.

November 28, 2016

RESPECTFULLY SUBMITTED,

/s/ Robert F. Schroeder
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³Moreover, the SEC suggests that the Defendants conduct provides further support for the proposition that this enforcement action should proceed expeditiously through discovery and an adjudication on the merits, as the Defendants cannot be trusted not to use the delay they seek to further transfer away assets subject to the asset freeze.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on November 28, 2016, he has served the foregoing **U.S. SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT OF THIS COURT'S ASSET FREEZE ORDER, AND MEMORANDUM IN SUPPORT THEREOF** via the ECF system to counsel of record and by United States Postal Service overnight delivery as follows:

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Respectfully,

/s/ Robert F. Schroeder
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