IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE, COMMISSION,	)	CIVIL ACTION NO. 3:01CV00116
Plaintiff,	)	
	)	MEMORANDUM OPINION
v.	)	
TERRY L. DOWDELL, et al.,	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the "Motion of Certain Relief Defendants for a Declaration of the Scope of the November 19, 2001 Asset Freeze Order," filed February 4, 2002, and the plaintiff's "Motion for an Order to Show Cause Why Certain Defendants Should Not Be Held in Contempt and for Ancillary Relief," filed February 7, 2002. The parties presented oral argument to the court at a hearing on February 12, 2002 at which time the court orally ordered certain assets to be frozen. Having reviewed the motions and oppositions thereto, and having heard oral argument by counsel, the court hereby confirms its oral order of February 12, 2002, and denies the relief defendants' motion and grants in part the plaintiff's motion for the reasons stated herein.

I.

The court assumes familiarity with the underlying facts of this case. *See SEC v. Dowdell*, 175 F. Supp. 2d 850 (W.D.Va. 2001). On November 19, 2001, this court issued a temporary restraining order under which the assets of Terry L. Dowdell and certain other defendants were frozen. The order encompassed "any and all accounts at any financial institution in the name of any one or more of the Vavasseur Defendants, and any and all

accounts at any financial institution in which any one or more of the Vavasseur Defendants have signatory authority or a beneficial interest." (TRO Section V.) It has now been brought to the court's attention that on November 20, 2001, Rebecca Dowdell, a relief defendant in this case, withdrew $512,000.00 with a check co-signed by Mary Dowdell, another relief defendant in this case, from a Bank of America account in the name of Authorized Auto Service, Inc. (hereinafter: Authorized Auto) over which Terry Dowdell had signatory authority. Rebecca Dowdell deposited the $512,000.00 cashier check into new accounts opened in the name of Authorized Auto at SunTrust Bank and over which Terry Dowdell did not have signatory authority. The court is informed that approximately $80,000.00 of that money remains in the accounts.

Authorized Auto is an automotive repair and maintenance business which was incorporated in Virginia on February 15, 2001 and opened for business in Charlottesville, Virginia on January 7, 2002. Until his resignation from the company on November 26, 2001, Terry Dowdell was the Chief Executive Officer and one of the directors of Authorized Auto. Terry Dowdell and his wife, Mary Dowdell, had signatory authority over the company's account at Bank of America.

The relief defendants argue that the decision to authorize Rebecca Dowdell to establish new corporate accounts at SunTrust and to transfer funds from the Bank of America account was made on November 14, 2001, before the TRO issued. The directors of Authorized Auto issued a Notice of Written Action (Defs.' Ex. 3) authorizing the transfer and stating that Terry and Mary Dowdell would be deleted as signers on the corporate bank account. The relief defendants further contend that Rebecca Dowdell opened the SunTrust accounts before being served with any of the pleadings in this case and before she learned of the asset freeze order.

According to the relief defendants, most of the $512,000.00 transferred from the Bank of America account has been used to purchase equipment and to renovate a former carpet warehouse to serve as the business premises for Authorized Auto. The SEC also submitted records which indicate that $50,000.00 of this money was paid on December 6, 2001, to Covington & Burling as a retainer for legal services for the relief defendants and Authorized Auto directors Adam Dowdell, Wendy Dowdell and Rebecca Dowdell. (Pl.'s Ex. 3 & 4.) The relief defendants assert that access to the remaining $80,000.00 in the SunTrust accounts is important to Authorized Auto's chances of becoming a successful business and that any decision to deprive the company of use of these funds would put the company out of business immediately.

On February 4, 2002, Mary, Rebecca, Adam and Wendy Dowdell (hereinafter: relief defendants) filed a motion for a declaration of the scope of the asset freeze order. They seek a declaration from the court that the asset freeze order does not apply either to the Authorized Auto account in Bank of America or to the $512,000.00 transferred from that account to SunTrust Bank on November 20, 2001. Alternatively, the relief defendants request that in as much as the court finds that the asset freeze order does apply, that it modify that order to allow enough funds to be unfrozen to permit Authorized Auto to pay ordinary business expenses.

On February 7, 2002, the SEC moved for an order to show cause why Terry Dowdell and the above-named relief defendants should not be held in civil contempt. The SEC requests, among other relief, that the court find that the bank accounts and money at issue are subject to the asset freeze order and that the SEC be permitted to conduct expedited emergency discovery concerning the November 20, 2001 withdrawal and the subsequent dissipation of the funds.

II.

These motions present the court with two main issues. The first is whether the asset freeze order applies to the Bank of America account in the name of Authorized Auto. If the court so finds, the second issue to address is whether the freeze should then extend to the assets moved from that account by Rebecca Dowdell, after the issuance of the freeze order, into the SunTrust account over which Terry L. Dowdell has no signatory authority.

A.

The relief defendants argue that the asset freeze order does not apply to the Bank of America account in the name of Authorized Auto. They explain that although Terry L. Dowdell had signature authority over the account, the funds in the account did not belong to him and were never his to spend for personal use. According to the relief defendants, Mr. Dowdell was merely an officer of the Authorized Auto corporation, and as such he did not have possession, custody or control over the assets. The relief defendants also note that Mr. Dowdell had evidenced his intent to relinquish his signature authority over the Authorized Auto account on November 14, 2001. Thus, they argue that Mr. Dowdell had no meaningful authority over the account as of November 19, 2001, the date the TRO issued. The relief defendants further contend that a finding by the court that the asset freeze order encompassed this account would be equivalent to freezing the assets of a non-party without notice or a proper showing by the SEC.

The relief defendants reject the premise that the plain language of the asset freeze order encompasses the account. They suggest that freezing Authorized Auto's Bank of America account would be similar to freezing the accounts of Mr. Dowdell's former employer, the Templeton Fund, had that company simply forgotten to remove Mr. Dowdell's name as a signer on their accounts when he departed. The relief defendants assert that the court could not freeze

the Templeton Fund's account because "there is no basis to suppose that those funds belong to Terry Dowdell or that he has any right to spend them for his personal use." (Relief Defs.' Resp. at 4.)

However, the court does not have before it a hypothetical account crafted to emphasize the possible extreme ramifications of applying a freeze order. Instead, at issue is an actual bank account which not only names Terry L. Dowdell as a signer, but also contains funds transferred from another of Mr. Dowdell's business accounts and is in the name of a company where Mr. Dowdell was chief executive officer and a director. (Pl.'s Ex. 2.) The evidence before the court indicates a far greater connection between Mr. Dowdell, the funds in question and Authorized Auto than that which exists in the relief defendants' hypothetical.

Furthermore, in its earlier pleadings and oral argument to this court on whether to grant the TRO, the plaintiff raised the concern that millions of Vavasseur dollars had been diverted or dissipated by Mr. Dowdell and that money had been funneled into third party accounts to make tracing more difficult. This was the basis for an asset freeze order that encompassed accounts in which the Vavasseur defendants had signatory authority or a beneficial interest.

For these reasons, the court is not persuaded that a decision to freeze the Bank of America account is an overly broad application of the asset freeze order. As such, the court finds that the asset freeze order does embrace Authorized Auto's Bank of America account.

B.

The next question for the court to address concerns what action it should take with regard to the assets withdrawn from the Bank of America account and deposited in the two SunTrust accounts. Since the TRO issued on November 19, 2001, Terry L. Dowdell has resigned his position with Authorized Auto, and he never had signatory authority over these new accounts.

The relief defendants concede that these assets could eventually be frozen by the court. They assert, however, that no authority exists which would allow this court to freeze the assets of Authorized Auto before it is named as a relief defendant and before the SEC made the proper showing. *See CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002) (discussing the concept of nominal defendant and explaining that "'[f]ederal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds.'" (quoting *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998)); *see also SEC v. Cherif*, 933 F. 2d 403, 414 (7th Cir. 1991) (finding that a nominal defendant's asset may be frozen but remanding for a determination of whether the person was indeed a nominal defendant).

Thus, the relief defendants maintain that the court would, in effect, be putting the cart before the horse if it froze assets before holding a hearing to establish that Authorized Auto had been joined as a party and to examine its ownership claim to the funds. The problem the court sees in the relief defendants' analogy is that it presumes the continued existence of the cart. Based on the facts before the court, the assets are fast disappearing. Over $500,000.00 was deposited on November 20, 2001 into the SunTrust accounts, and now, less than three months later, only some $80,000.00 remains.

"[A] district court possesses 'inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief.'" *Kimberlynn Creek Ranch*, 276 F.3d at 193 (quoting *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995)); *see also SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998)(finding that courts have "broad equitable powers … to recover ill gotten gains for the

benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong"). The court is concerned that were it to delay its ruling to allow for the submission of briefs and a hearing, the assets would be spent. The court's earlier finding concerning the Bank of America account links these assets to Terry L. Dowdell and to the asset freeze order in effect since November 19, 2001. As such, the court finds that in order to preserve the status quo and to prevent the complete dissipation of the assets, it is necessary to order the SunTrust accounts frozen. The court shall entertain briefs from the parties concerning the necessity of continuing the freeze. The court shall also await the result of expedited discovery. In the meantime, the court grants leave to the relief defendants to request a modification of the freeze to allow for payment of ordinary business expenses.

III.

The plaintiff has moved for an order of contempt to be entered against Terry L. Dowdell and the relief defendants for their involvement in the withdrawal of funds from the Bank of America account on November 20, 2001. The facts that are now before the court are the cause of some concern. However, the court believes that the factual record must be more fully developed before it can take up the issue of contempt. Accordingly, the court shall grant the plaintiff's request for expedited discovery such that the plaintiff may take the depositions of Terry L. Dowdell and the relief defendants, and these depositions shall not be counted towards the SEC's allotment of depositions in the principal action. The court also orders the relief defendants to provide an accounting of the assets withdrawn from the Bank of America.

IV.

In conclusion, the court shall deny the relief defendants' motion for a declaration of the

scope of the November 19, 2001 asset freeze order. The court finds, instead, that the Bank of America account in the name of Authorized Auto is embraced by the asset freeze order, and orders that the assets in the Authorized Auto's SunTrust accounts be frozen. The court grants the plaintiff's motion such that it orders expedited discovery and an accounting of the assets.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE, COMMISSION,	)	CIVIL ACTION NO. 3:01CV00116
Plaintiff,	)	
	)	ORDER
v.	)	
TERRY L. DOWDELL, et al.,	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in open court and in the accompanying memorandum opinion, it is

ADJUDGED, ORDERED AND DECREED

as follows:

(1) The motion by certain relief defendants for a declaration of the scope of the November 19, 2001 asset freeze order, filed February 4, 2002, shall be, and it hereby is, DENIED;

(2) The plaintiff's motion for an order to show cause why Terry Dowdell and certain relief defendants should not be held in civil contempt, and for ancillary relief, filed February 7, 2002, shall be, and it hereby is, GRANTED in part as follows:

(3) The court declares that the Bank of America account in the name of Authorized Auto is subject to this court's asset freeze order, issued November 19, 2001;

(4) The court orders that the assets contained in the SunTrust accounts in the name of Authorized Auto shall be, and they hereby are, frozen;

(5) The court orders expedited discovery to take place regarding the withdrawal of

funds from the Authorized Auto account in Bank of America; and

(6) The court orders the relief defendants to provide an accounting of the assets withdrawn from the Authorized Auto account in Bank of America.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date