IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

FEDERAL TRADE COMMISSION Plaintiff, vs. ECOLOGICAL FOX LLC *et al.* Defendants.	No. 18-cv-03309-PJM

OPPOSITION TO DEFENDANT ANDRIS PUKKE'S MOTION TO MODIFY ASSET FREEZE PROVISIONS OF TEMPORARY RESTRAINING ORDER TO PAY REASONABLE LIVING EXPENSES AND ATTORNEYS' FEES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Robb Evans & Associates LLC, Temporary Receiver ("Receiver") over the Receivership Entities as defined in the Ex Parte Temporary Restraining Order With Asset Freeze, Writs *Ne Exeat*, Appointment of a Temporary Receiver, and Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue ("TRO") and over the assets of Andris Pukke ("Pukke") and Peter Baker ("Baker"), submits this opposition to Pukke's motion to modify the asset freeze provisions of the TRO to pay $8,000 per month for unspecified living expenses and $500,000 for attorneys' fees costs "through the preliminary injunction hearing."

As set forth in the accompanying declaration of Brick Kane at the present time the receivership estate has less than $300,000 on hand, with approximately $75,000 of that total

presently subject to a restriction as to how it may be used. [1] However, none of the frozen cash or cash in the Receiver's account are in or originating from accounts in Pukke's name, so it is unclear what assets Pukke seeks to release for the payment of living expenses and legal fees. The Receiver is spending approximately $95,000 per month to fund necessary and critical operating expenses to maintain the Belize development property subject to the receivership known as the Reserve at Sanctuary Bay ("Reserve"), which means that the receivership estate is on the verge of being illiquid and unable to pay critical expenses in less than two months. Against this backdrop, the Federal Trade Commission ("FTC") has alleged consumer harm in excess of $100 million. *See*, pp. 1 and 47 of the FTC's Memorandum in Support of Motion for TRO (Doc. 5-1). The Receiver's initial report to the Court (Doc. 219) filed February 22, 2019 reflects that at least $124 million was paid by consumers to the Receivership Entities for the payment of lots in the Reserve.

The Receiver opposes the relief requested in the Motion for several reasons. First, the Motion is devoid of any evidence as to Pukke's financial condition or needed expenditures. Compounding this failure, Pukke has failed to comply with the TRO by providing the FTC and the Receiver a completed financial statement signed under penalty of perjury (TRO, Section V). The Motion repeatedly references unfreezing Pukke's assets, **but does not describe what those assets are or where those assets are located**. The Receiver has much less in unrestricted estate funds than the amounts sought for living expenses and legal fees and none of it is in the name of

[1] While there is approximately $4.3 million in other frozen funds, over $3.7 million is in Newport Land Group, LLC accounts subject to dispute and approximately $370,000 is in merchant processing accounts not currently available.

Pukke, who consistently places his assets in the names of friends, relatives, business associates or entities nominally owned by friends, relatives and business associates.[2]

Second, despite being counsel for Pukke since at least as early as November 28, 2018, the Pierce Bainbridge Beck Price & Hecht LLP ("Pierce Bainbridge") and Price Benowitz LLP ("Price Benowitz") (Pierce Bainbridge and Price Benowitz are referred to collectively as "Pukke's Counsel") firms waited to make this fee request until February 15, 2019, the last day available for motions to be filed for argument in advance of the preliminary injunction hearing. Having waited to the last minute, Pukke's Counsel request $500,000, a shocking amount for fees and expenses through the preliminary injunction hearing. As with the request for living expenses, Pukke's Counsel failed to submit any evidence in support of the request for $500,000: no declaration, no retention agreement, no disclosure of hourly rates, no invoices showing amounts incurred, and no budget for amounts anticipated to be incurred. Given that they have been vigorously defending Pukke in this case for three months, there is no showing that any carve-out for legal fees is needed in order to get a fair result at the preliminary injunction hearing. There is not even any evidence before the Court as to whether Pukke's Counsel have received funds from Pukke or anyone else to defend this matter.

Third, the Motion seeks a determination that "untainted" assets are not subject to the TRO. Despite the obvious problem that the Motion does not even describe with specificity what

[2] Pukke has adopted a new method to shield assets. Two valuable parcels of real estate asserted by the Receiver to be assets of the receivership estate were placed in the name of the AAC Family HYCET Trust ("Chittenden Trust"). AAC are the initials for Pukke's putative spouse, Angela Chittenden ("Chittenden"). The beneficiaries of the Chittenden Trust are the two children Pukke and Chittenden had together. Pukke was at one time a Trustee of the Chittenden Trust. "HYCET" is an acronym brazenly created by the attorney who drafted the Chittenden Trust: "Have Your Cake and Eat It Too."

those "untainted assets are,[3] the law is clear that the asset freeze is properly not limited to assets traced to the misconduct alleged by the FTC, particularly when the scope of consumer injury, likely in excess of $100 million, dwarfs the scope of all receivership assets, whether or not owned by Pukke.

Fourth, the exorbitant amounts sought for fees and expenses through the preliminary injunction hearing are entirely inappropriate, particularly when the receivership estate does not have the present financial ability to pay any sums at all for Pukke's living expenses and legal fees given the amount of funds in the receivership estate, the monthly expenses being incurred for the maintenance of the Belize property, and the potential for consumer injury in excess of $100 million.

II. THE ABSENCE OF EVIDENCE IN SUPPORT OF THE MOTION AND PUKKE'S FAILURE TO PROVIDE A SWORN FINANCIAL STATEMENT PRECLUDE THE REQUESTED RELIEF

The Motion relies on *SEC v. Dowdell*, 175 F.Supp.2d 850 (W.D. Va. 2001) to support its request for $8,000 per month for living expenses and $500,000 for attorneys' fees and costs through the preliminary injunction hearing. But the Court in *Dowdell* made it clear that: "Courts which have addressed requests for living expenses look for evidence of the defendant's overall assets or income." *Id.* at 854. Here, no evidence, admissible or otherwise, has been presented as to Pukke's overall assets and he has failed and refused to provide the FTC and the Receiver a sworn financial statement as required by the TRO. This is particularly critical here because Pukke does not typically hold assets in his name, so the Court and the Receiver can only guess at

[3] The Motion suggests that Pukke be permitted to "reduce untainted personal property that he has to cash and then use the ensuing cash proceeds." Motion, p. 6:15-16. But there is no disclosure of the personal property he claims to own, let alone any disclosure of the personal property he claims to own which is allegedly untainted.

the assets Pukke believes to be owned by him. When Pukke asked the Receiver to release $3,000 for living expenses pursuant to the Order Authorizing Limited Access to Assets (Doc. 102), the Receiver was only able to release $2,643.02 from one bank account **because that was the only known account in Pukke's name with any funds in it.** At this point, the Receiver holds no assets owned in Pukke's name.

Further, there is no itemized list of expenses provided, so the Court cannot discern whether his living expense request is reasonable. In assessing a request for living expenses, the Court in *Dowdell* made clear that evidence was required to demonstrate that the money sought would be used for ordinary living expenses and not luxury items. In *SEC v. North Star Finance, LLC,* 15-cv-1339-GJH, Judge Hazel in this District Court similarly denied a request for living expenses because it lacked proper documentation. *See* Docs. 42 and 51. In *SEC v. Forte,* 598 F.Supp.2d 689 (E.D. Pa. 2009), the Court refused a defendant's request to modify a restraining order to pay expenses. One of the reasons the request was denied was that defendant, like Pukke here, failed to comply with a Court order to provide a verified accounting of his assets. *Id.* at 693. Unlike Pukke, the defendant in Forte actually scheduled his expenses, but the Court still denied the request since many of the requests were either luxurious or lacked documentation. *Id*. at 694. The Court in *Forte* also noted the absence of any evidence about defendant's efforts to obtain employment or whether he had access to funds from friends or family members. *Id.* at 693. Similarly, Pukke has not presented any evidence addressing these issues. Absent any evidentiary showing, the Motion must be denied.

III. PUKKE'S COUNSEL SHOULD NOT BE PERMITTED TO CARVE OUT ANY ASSETS FOR THE PAYMENT OF $500,000 FOR LEGAL FEES AND EXPENSES THROUGH THE PRELIMINARY INJUNCTION HEARING

Pukke's Counsel should not be entitled to an eleventh-hour $500,000 carve out for legal fees and expenses through the preliminary injunction hearing. The Motion cites *Dowdell* for the proposition that "courts should avoid a situation in which a 'fair result at the preliminary injunction hearing' could not be achieved due to inability to pay for effective legal representation." Motion at p. 4:13-15, citing to *Dowdell*, 175 F.Supp.2d at 856. However, even a cursory review of *Dowdell* shows its inapplicability in the present case.

In *Dowdell*, the TRO was granted on November 19, 2001. *Dowdell*, 175 F.Supp.2d at 851. By December 6, 2001, the *Dowdell* defendants had already filed their motion and argued their request for the fee carve-out before the Court. *Id*. Thus, the Defendants in *Dowdell* requested the right to fees nearly contemporaneously with the TRO and well in advance of the preliminary injunction. Furthermore, the *Dowdell* court required the defendants and their counsel to provide "reasonable estimates" of the anticipated fees. *Id.* at 856. An estimate, of course, contemplates predicting the cost of work before it is done. Here, Pukke's request comes nearly three months after Pukke retained top-flight legal counsel. Pukke's Counsel are obviously committed and ethically required to continue to defend him through the preliminary injunction stage at this point. There is no evidence to suggest that a carve-out of $500,000, or any sum, is needed to get a fair result at the preliminary injunction hearing, because Pukke's Counsel are intensively and vigorously defending the matter and undoubtedly will not abandon him at this late stage immediately prior to the preliminary injunction hearing. Therefore, the "central concern" of the *Dowdell* court about the "fairness of the proceedings" is inapplicable.

Not only does Pukke have counsel, Courts have held that before they will unfreeze assets, the defendant must "establish that [the] modification is in the interest of the defrauded investors." *SEC v. Grossman,* 887 F.Supp. 649, 661 (S.D.N.Y.1995) (denying release of funds to pay attorneys' fees and funeral and burial expenses), *aff'd,* 101 F.3d 109 (2d Cir.1996). Similarly, in *FTC v. Sharp,* 1991 U.S. Dist LEXIS 19295 (D. Nev. 1991), the Court denied a request for payment of fees from the receivership estate where there did not appear to be sufficient money in the estate to compensate all potential victims. The Court stated that:

> Where [counsel] decided to represent Houston and Houston R&R, he should have known that payment for his services was not guaranteed. He knew that Houston could not afford to pay him. [cite] He also knew that payment from the Receiver's estate was subject to the Court's approval. … As an attorney, [counsel] is presumed to have known that the Court had discretion to approve or deny a request for payment of attorney's fees from the Receiver's estate. … Because [counsel] could not reasonably believe he was assured payment, Houston's alleged victims have a stronger claim to the frozen assets than [counsel]. Because it does not appear there is sufficient money in the estate to recompense all potential victims, [counsel] should not be allowed at this time to recover attorney's fees from the Receiver's estate. 1991 U.S. Dist. LEXIS 19295 at *3-4.

Similarly, here the Receiver has a limited pool of liquid assets and none are in Pukke's name, and consumer injury may likely exceed $100 million. It is premature to allow any funds to be released from the receivership estate to pay Pukke's Counsel. *See also FTC v. Jordan Ashley, Inc.* 1994 U.S. Dist. LEXIS 7577 at *9-10 (S.D. Fla. 1994): "[A]n attorney who knowingly consents to represent a defendant whose assets have been frozen assumes the risk of not being paid."

Furthermore, a defendant in a civil action has no constitutional right to counsel. Even in a criminal case where the Sixth Amendment right to counsel attaches, the right to counsel does not incorporate a right to use proceeds of theft or fraud that properly belong to third parties in

order to retain counsel. As the United States Supreme Court stated in *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 109 S. Ct. 2646 (1989), a "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. … There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to so in order to exercise a constitutionally protected right." 491 U.S. at 626-628.

If there is no right to use frozen funds to exercise one's Sixth Amendment right to counsel in a criminal case, Pukke certainly has no right to use $500,000 from the receivership estate to use counsel of his choice. Where assets are wholly insufficient to satisfy potential consumer injury and there are allegations of fraud, it is appropriate to deny the release of funds for attorneys' fees. *See CFTC v. Noble Metals Int'l. Inc.,* 67 F.3d 766, 775 (9th Cir. 1995) (noting "the frozen assets fell far short of the amount needed to compensate [the defrauded] consumers. This was reason enough in the circumstances of this case for the district court, in the exercise of its discretion, to deny the attorney fee application.").

Finally, the evidentiary infirmity that dooms Pukke's request for living expenses also dooms the request for $500,000 for legal fees. Absent any sworn testimony about Pukke's assets, income, employment prospects or access to funds from friends or family members, the Court may not approve any funds for legal fees and expenses. Additionally, without any sworn testimony from Pukke's Counsel about its retention agreement, hourly rates, billings to date, estimated future billings through the preliminary injunction hearing, and whether Pukke's Counsel have been paid any sums from any source for this representation, the Court may not approve any funds for legal fees and expenses. *See*, *e.g.*, *SEC v. Dobbins*, 2004 WL 957115, *

(N.D. Tx. 2004) (denying motion to modify freeze order to pay for attorneys' fees when defendants did (i) "not provide the Court with any documentation to support the requested amount"; (ii) failed to disclose any retainer with counsel; and (iii) failed to "make the accounting required in the Preliminary Injunction").

IV. THE ASSET FREEZE IS NOT AND SHOULD NOT BE LIMITED TO TAINTED FUNDS

The Motion seeks the Court to "clarify" that any untainted assets "not connected to the misconduct alleged by the FTC" are not subject to the TRO. Motion, p. 6:11-13. This is not the law. All assets of Pukke and the other defendants are frozen in order that funds will be available for distribution to the alleged victims which, it has been estimated by the FTC and confirmed by the Receiver's Report, may exceed $100 million. The authority of the Court to freeze assets is not limited to assets that can be traced to the alleged unlawful activities, or that would be clearly subject to collection after judgment. *See Kemp v. Peterson,* 940 F.2d 110, 113-114 (4th Cir. 1991). A blanket freeze is necessary to make sure that assets will be available to provide final relief to injured consumers and to preserve the status quo until the scope of the defendants' assets can be determined. Courts routinely and consistently freeze assets without regard to their source. *See SEC v. Professional Assocs.,* 731 F.2d 349, 352 (6th Cir. 1984); *CFTC v. Morgan, Harris, & Scott, Ltd.,* 484 F.Supp. 669, 678-679 (S.D. N.Y. 1979). Since money is fungible, and the goal is to make victims whole, the source of funds used to make recompense is irrelevant. *United States v. Cannistraro,* 694 F.Supp. 62, 73 n. 11 (D. N.J. 1988), aff'd in part and vacated in part on other grounds, 871 F.2d 1210 (3rd Cir.1989).

In any event, no evidence is presented to the Court by Pukke that he has any untainted assets. Further, untainted assets should not simply be considered assets "connected to the misconduct alleged by the FTC," because Pukke has a history of fraudulent conduct which

would fall outside this definition. For example, if Pukke hid assets from the Receiver and the FTC in the prior *Ameridebt* action and receivership, he should not be permitted to use those assets now to fund a legal defense simply because those are assets unconnected to the misconduct alleged by the FTC in the present case.[4]

V. THE COURT SHOULD DENY THE MOTION BECAUSE THERE ARE INSUFFICIENT ASSETS TO SATISFY THE POTENTIAL CLAIMS OF CONSUMERS

As set forth above, the receivership estate has less than $300,000 on hand at present, of which approximately $75,000 is subject to restricted use. None of the funds which are frozen or which are in the receivership estate are in Pukke's name or originated from accounts in Pukke's name. The Receiver is spending approximately $95,000 per month to fund necessary operating expenses in Belize. However, the FTC alleges consumer harm in excess of $100 million and the Receiver has determined that at least $124 million was paid by consumers for lots to the Receivership Entities.

Given these facts, it would be premature to modify the asset freeze to permit further living expenses or any attorneys' fees to be paid to Pukke or Pukke's Counsel. Where the assets on hand are insufficient to satisfy consumer claims, there should be no further release of funds. *CFTC v. Noble Metals Int'l, Inc.,* 67 F.3d 766, 775 (9th Cir. 1995).

[4] The Motion also seeks clarification that untainted gifts and untainted proceeds of "non-recourse" loans should be excepted from the TRO. Obviously, true third party gifts that are not actually hidden receivership assets and that do not give rise to administrative tax claims against the receivership estate are not subject to the TRO in the first place. It is uncertain how a *bona fide* "non-recourse" loan is different from a gift and, assuming it does not give rise to an administrative tax claim against the receivership estate, would not be subject to the TRO. But, once again, there is no evidence of the proposed gifts or non-recourse loans, and it is impossible for the Court and the Receiver to evaluate hypothetical transfers.

VI. *KOKESH* IS NOT APPLICABLE

In his supplemental brief (Doc. 221), Pukke argues that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) nullifies this Court's ability to enter injunctive relief and, accordingly, his assets should be unfrozen. However, a District Court refused to apply *Kokesh* in an FTC matter. *FTC v. J. William Enterprises, LLC*, 283 F.Supp.3d 1259 (M.D. Fla. 2017). In that case, like here, Defendants used *Kokesh* as a basis to question the legality of the FTC's ability to seek equitable relief, including disgorgement of profits, rescission or reformation of consumers' contracts, refunds, and restitution. The *J. William* Court found *Kokesh* inapplicable, noting that "*Kokesh* addressed the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applied to claims for disgorgement imposed as a sanction for violating a federal securities law … As a threshold matter, *Kokesh* did not involve section 13(b); it dealt with federal securities law." *Id*. at 1262. The *J. William* court further noted "the Court needs no express grant of authority to grant equitable relief under section 13(b). District courts possess inherent power to grant equitable relief unless otherwise provided by statute. *F.T.C. v. Gem Merch. Corp.,* 87 F.3d 466, 469 (11th Cir. 1996) (quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 S.Ct. 1332 (1946). Accordingly, section 13(b), which contains no language restricting the Court's authority to grant equitable relief, provides an unqualified grant of statutory authority to issue the full range of equitable remedies. There is no shortage of case law recognizing the availability of the equitable relief sought by the FTC under section 13(b)." *Id*. at 1261 (internal quotations and certain internal citations omitted).

VII. CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Court deny Pukke's Motion in its entirety.

Dated: February 26, 2019

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Certificate of Service

I, James E. Van Horn, hereby certify that on February 26, 2019, I served the foregoing document through ECF and otherwise by email to the following people and entities:

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