The Honorable Ken Schubert
Hearing Date: November 29, 2022
Without Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA STATE OF WASHINGTON'S MOTION TO CONTINUE HEARING ON THE STATE'S MOTION FOR PRELIMINARY INJUNCTION AND TO EXTEND THE TEMPORARY RESTRAINING ORDER

I. RELIEF REQUESTED

Based on an incomplete recitation of the facts by the defense, the Court received the impression at the hearing on November 10 that the State willingly agreed to the November 10 date, which seemed to be a significant factor in the Court's decision to set the hearing on the State's Motion for a Preliminary Injunction on an extremely tight timeline. The State did not willingly agree to the November 10 date. It was obligated to set the hearing for that date based on a combination of Defendants' failure to respond to inquiries about scheduling and quirks of the local civil rules with respect to scheduling emergency motions.

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

The State brings this motion to ensure that the Court makes its decision to go forward with the extremely compressed timeline on a complete set of facts. Rather than proceed on such a tight timeline, the State requests a limited two-week continuance of the hearing on its motion for preliminary injunction to December 2, 2022, to provide a reasonable opportunity to review documents the Court ordered Defendants Albertsons Companies, Inc. and the Kroger Co. to produce at the November 10 hearing, and adequate time to prepare to examine the witnesses the Court has permitted the State to call at the forthcoming hearing. Without time to review documents and prepare to examine these crucial witnesses, the State will be deprived of a meaningful opportunity to present its evidence, support its motion for preliminary injunction, and meet its statutory and constitutional obligation to protect consumers and competition in Washington. In accordance with the continuance of the hearing, the State also requests that the Court extend the Temporary Restraining Order (TRO) through December 2.

II. STATEMENT OF FACTS

A. The State Diligently Sought Documents from Defendants and Objects to Proceeding on an Expedited Basis That Frustrates Its Ability to Adequately Prepare

At the November 10 hearing on the State's motion for preliminary injunction and motion for live witness testimony, the Court ordered Albertsons and Kroger to produce documents to the State and continued the hearing to Thursday, November 17, to permit witness testimony. Williams Decl. ¶ 2. Following the hearing, the Court advised the parties it has a conflict on November 17, and proposed taking witness testimony on Wednesday, November 16, with only the parties' arguments on the preliminary injunction heard on November 17. *Id.* ¶ 3. The State objects to proceeding on such an expedited timeline when it has only just received documents from Albertsons and Kroger and has not had a reasonable opportunity to review them and prepare for the hearing.

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Upon learning of the proposed merger agreement and dividend, the State promptly and repeatedly requested documents related to the proposed transaction from Albertsons and Kroger. *Id.* ¶ 4. The State issued Civil Investigative Demands (CID) pursuant to RCW 19.86.110 to Kroger and Albertsons on October 26, 2022, for documents they had already produced to the FTC and Office of the Attorney General for the District of Columbia, with a return date of October 31, 2022. *Id.* Despite a meet and confer with Kroger on October 28, during which its counsel represented documents would be produced, Kroger failed to do so. *Id.* ¶ 5. Instead, on their response due date, Kroger requested further confidentially assurances, despite the confidentiality protections afforded to materials produced in response to a CID under RCW 19.86.110(7). *Id.*

To further address Defendants' confidentiality concerns, the State sent a proposed stipulated protective order on Sunday, November 6. *Id.* ¶ 6. Rather than promptly execute the protective order, Defendants ignored the proposed order and did not respond *at all*. *Id.* Nor did they move to finalize the protective order and produce documents after the Court ordered them to do so at the November 10 hearing. *Id.* ¶ 7. Defendants did not return a redline of the proposed order to the State until after the State initiated another meet and confer with them the following morning regarding their document productions and the State sent them the proposed stipulated protective order for a second time. *Id.*

Albertsons and Kroger returned the executed protective order at 3:50 p.m. on Friday, November 11, and then Albertsons began producing documents later that evening, more than 24 hours after the Court ordered them to do so and less than 6 days before the November 17 hearing date—and even less time before the proposed November 16 date. *Id.* ¶ 8. The State received productions from Kroger late Friday evening, the following morning, and Sunday evening. *Id.* Due to this delayed production, the State has lost critical time to review these documents.

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

The productions are also nearly all designated confidential or highly confidential under the stipulated protective order. *Id.* ¶ 9. This raises additional complications to using the documents as exhibits during the hearing and in examining witnesses, requiring motions to seal the exhibits, motions to shorten time on the motions to seal, and the potential of having to seal portions of the hearing to offer the documents in evidence and discuss them with witnesses during the hearing on the preliminary injunction.

B. The State Sought A December 2 Hearing Date And Defendants Refused to Respond

At the November 10 hearing, Albertsons and Kroger repeatedly asserted that the State had agreed to the November 10 hearing date, effectively conceding that would be sufficient time to prepare for the hearing. Defendants' argument ignores both the constraints on the State dictated by the local court rules and the State's efforts to secure a December 2 hearing date. As required by the local rules, the State contacted the Court as soon as it filed the complaint and motion for temporary restraining order and the case was assigned, on November 1, to request available dates for hearing the motion for preliminary injunction per LCR 65(b)(2) prior to the November 3 ex parte hearing on the TRO Motion. *Id.* ¶ 10; ¶ 11, Ex. A at 7. The bailiff responded and advised that the Court "might be able to hear it Thursday 11/10" or special set it on Wednesday 11/16. *Id.* ¶ 11, Ex. A at 6-7.

The State included defense counsel on a responsive email to the Court on November 1 regarding availability for those hearing dates; Defendants did not respond or provide their availability. *Id.* ¶ 11, Ex. A at 6; ¶ 12. When Defendants still had not responded by the following day, the State followed up with defense counsel to confirm their availability and also asked the Court for additional dates. *Id.* ¶ 13; ¶ 14, Ex. B at 2-4. The bailiff responded that December 2 was available, and the State then requested that Defendants promptly advise if they were available December 2. *Id.* ¶ 14, Ex. B at 2-3. Defendants ignored the State's inquiry about December 2 and instead responded that they were available November 10, the date the bailiff

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

had previously indicated the Court may or may not be available. *Id.* at 1-2. The State replied and again asked if Defendants were available December 2; they did not respond. *Id.* at 1.

The ex parte procedure for confirming the emergency hearing for the TRO Motion required the State to submit a proposed order that included the date, time, and location of the preliminary injunction hearing in order to confirm the emergency hearing. *Id.* ¶ 15. The State filed a notice of hearing on November 2 to secure the available December 2 hearing date and comply with the requirement of the Ex Parte Department and LCR 65 to secure the emergency hearing on the TRO Motion the following day. *Id.* ¶ 16.

After the 4:30 close of the Superior Court and the Ex Parte Department, Defendants emailed back and advised the Court they had told the State they were available November 10 and requested that hearing date; they again failed to say whether they were available on December 2. *Id.* ¶ 11, Ex. A at 2-3. The following morning, the bailiff wrote back and told the parties to confer and contact the Court with an agreed mutual date. *Id.* at 2. The State wrote back to inquire if the Court was in fact available on November 10 or 16, since the original email providing those dates had been uncertain. *Id.* at 1, 6. The bailiff confirmed that November 10 was available. *Id.* at 1.

Because (1) the ex parte rules and civil rules required the State *shall* obtain a preliminary injunction hearing date prior to the emergency hearing, (2) the Court had instructed the parties to confirm a mutually available date, and (3) defendants had repeatedly refused to provide their availability for any date other than November 10, the State had no option but to re-note the hearing for November 10 to comply with the rules for confirming the emergency hearing and the bailiff's instructions.

Additionally, prior to the ex parte hearing, the State did not know if defendants would raise a notice objection invoking the requirements of CR 65(b), which requires that, absent consent otherwise, the preliminary injunction hearing be set "at the earliest possible time" if a

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

temporary restraining order is granted without notice. The earliest possible time for the preliminary injunction would have been November 10, according to the bailiff's email. At the same time the State sought to confirm the hearing date, it was also in the process of serving Albertsons and Kroger with the summons, complaint, and TRO Motion. *Id.* ¶ 17. Upon filing the documents on November 1, the State provided courtesy copies to defense counsel, and arranged for service of process the following day. Dkts. 33-37, 53-54, 75. Albertsons and Kroger received actual notice of the ex parte emergency hearing and TRO Motion two days before the hearing, and service of process was completed the next day. *Id.* Although in the end Defendants were given proper notice, prior to the ex parte hearing, the State did not know if Defendants would receive notice in time, or raise a notice objection, and so the State complied with CR 65(b)'s requirement to set the preliminary injunction hearing for the earliest possible date. Thus the court's rules and procedures dictated the State re-note the preliminary injunction hearing for November 10 prior to the hearing on the TRO Motion.

However, following the TRO hearing—in which Defendants appeared, participated, and did not object to notice—the State brought its motion to offer live witness testimony and request the preliminary injunction hearing be continued to permit an adequate opportunity to prepare for the hearing. Dkt. 78. With notice established, the CR 65(b) requirement the hearing proceed "at the earliest possible time" no longer applied. While the Court has permitted the State's request to call witnesses at an evidentiary hearing, it only continued the hearing one week, constraining the State's ability to adequately prepare and review documents Albertsons and Kroger only just produced—some of them as late as Sunday night, November 13.

III. STATEMENT OF ISSUES

Whether the Court should grant the State's motion for a limited continuance of the hearing on the State's Motion for Preliminary Injunction from November 17 to December 2 and

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

extend the TRO through that same date, to provide the State an adequate opportunity to review documents produced by Defendants and to prepare to examine witnesses at the hearing.

IV. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Holly A. Williams and exhibits thereto, as well as the pleadings and record before the Court.

V. ARGUMENT

A. The Court Should Continue the Preliminary Injunction Hearing for Two Weeks to Allow the State to Fully Develop Its Evidence

The purpose of a preliminary injunction is the same as a temporary restraining order, "to preserve the status quo until the trial court can conduct a full hearing on the merits of the complaint." *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn. App. 98, 115-16 (2007). At a preliminary injunction hearing, the trial court "does not reach or resolve the merits" and instead considers "only the *likelihood* that the plaintiff will ultimately prevail at a trial on the merits by establishing that he has a clear legal or equitable right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm." *Id*. Since injunctions are within the Court's equitable powers, "these criteria must be examined in light of equity, including the balancing of the relative interests of the parties *and the interests of the public*, if appropriate." *Tyler Pipe Indus., Inc. v. Dep't of Revenue,* 96 Wn.2d 785, 792 (1982) (emphasis added).

In *Northwest Gas*, the Court of Appeals reversed the trial's court's denial of a motion for a preliminary injunction where the court "issued a final order on the merits only four days after allowing new parties to intervene, without giving the original parties a full opportunity to present evidence and to prove their respective positions at a trial on the merits." *Id.* at 114-15. In that case, while the plaintiffs presented substantive declarations showing some of the evidence to support their claim, they "were unable to develop their evidence fully for the preliminary

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

injunction hearing because of the expedited timeframe." *Id.* at 14. The trial court's order denying plaintiffs' motion for preliminary injunction "following this summary procedure defeated the purpose of a preliminary injunction—to preserve the status quo while the plaintiff compiles the evidence necessary to establish the need for a permanent injunction, to be proven at a future trial on the merits." *Id.*

Similarly here, for the Court's grant of the State's request for live witness testimony and order to produce documents to be meaningful, the State must have a reasonable opportunity to review the documents obtained and to prepare to examine the witnesses. Six days is simply too short a period of time for the State to reasonably prepare—indeed, by the time the Defendants began producing documents, only five days remained before the November 17 evidentiary hearing date, and only four days before the proposed November 16 date. Defendants continued to produce documents through the weekend, with some documents being produced as recently as Sunday evening. This only gives the State a few days with the documents before the proposed hearing date. The State's claim of an anticompetitive agreement between the two largest grocery chains operating in Washington for payment of an unprecedented dividend with significant anticompetitive effects in the State is too serious an issue to be considered on an unnecessarily rushed basis. Defendants have not provided a compelling justification for why they cannot wait two more weeks to issue an unprecedented $4 billion payout that once issued, will be irretrievable. Meanwhile, the potential prejudice to Washington consumers is substantial and the request for two additional weeks to prepare is reasonable and limited.

At the November 10 hearing, Albertsons and Kroger repeatedly asserted that the State had agreed to the November 10 hearing date, thereby conceding that would be sufficient time to prepare for the hearing. Defendants' argument ignores both the constraints on the State dictated by the local court rules and the State's efforts to secure a December 2 hearing date. As described above, (1) the ex parte rules and civil rules required the State to obtain a preliminary injunction

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

hearing date prior to the emergency hearing, (2) the Court had instructed the parties to confirm a mutually available date, and (3) Defendants had repeatedly refused to provide their availability for any date other than November 10. Given the circumstances, the Court should not interpret the State's prior noting of the November 10 date as acknowledgement that it has had the necessary time to develop its evidence and prepare for the hearing.

B. The Court Has Good Cause to Continue the TRO to Allow the State to Fully Develop Its Evidence and Resolve Logistical Issues before the Hearing

Civil Rule 65(b) allows a temporary restraining order to continue beyond 14 days, and a preliminary injunction hearing set further out, "for good cause shown." First, the State notes that the 14-day limitation from CR 65(b) applies only if a TRO is "granted without written or oral notice to the adverse party or the adverse party's attorney." *See* CR 65(b); *see also Dep't of Lab. & Indus. v. Fowler*, 516 P.3d 831, 842 (2022). Defendants cannot argue that they did not receive notice of the emergency hearing because they appeared, participated, and did not object to notice. Consequently, the 14-day limitation does not apply.

Regardless, good cause exists in this case to extend the TRO. Courts have found good cause to extend TROs, for example, where the court needed "time to fully consider the various arguments and motions of the parties;" where the moving party needed additional time to prepare and present its preliminary injunction, despite diligent efforts; and where the moving party was continuing to attempt to serve the defendants and obtain more information about the case. *See, e.g., S.E.C. v. Comcoa Ltd.*, 887 F. Supp. 1521, 1526 n.7 (S.D. Fla. 1995); *Flying Cross Check, L.L.C. v. Cent. Hockey League, Inc.*, 153 F. Supp. 2d 1253, 1260 (D. Kan. 2001); *SEC v. One or More Purchasers of Call Options for the Common Stock of CNS, Inc.*, 2006 WL 3004875, *1-2 (E.D. Pa. 2006). In *Flying Cross Check*, for example, the court considered extending a TRO for "good cause" to allow the plaintiff to conduct limited discovery in preparation for and in support of its anticipated preliminary injunction motion. 887 F. Supp. at 1261. Similarly, good cause

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

exists in this case to extend the TRO to provide the State with the necessary time to process Defendants' documents produced just this weekend, and to prepare to take live testimony at the hearing. Without providing the State with an adequate opportunity to prepare and present its evidence, the Court risks transforming the proceedings into a summary proceeding like that in *Northwest Gas*, "defeat[ing] the purpose of a preliminary injunction" to preserve the status quo. 141 Wn. App. at 114.

In addition to the substantive reasons favoring a continuance, practical considerations also warrant one. As mentioned, nearly all of the documents Albertsons and Kroger have produced have been designated confidential or highly confidential subject to the stipulated protective order. Motions will need to be brought concerning sealing exhibits to be used at the hearing, and the parties and the Court will need to address whether consistent with the *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, (1982), the exhibits—and even parts of the testimony and hearing itself dealing with confidentially designated exhibits—may need to be under seal. *See* Dkt. 69 at 3-5 (State's motion to seal discussing application of the *Ishikawa* factors to determine whether documents may be filed under seal). There is simply not enough time remaining before November 17, let alone November 16, to adequately prepare in substance for the hearing and resolve the practical issues necessary in order to proceed with the preliminary injunction hearing.

VI. CONCLUSION

Everything in this case to date has happened on an expedited basis, from the short window between the disclosure of the merger agreement the proposed payout of the special dividend, to the filing of the State's complaint and TRO Motion, then the filing of its motion for preliminary injunction. Defendants have only just produced documents to the State this weekend—with some documents produced just Sunday evening—leaving only days before the evidentiary hearing for the State to review those documents and prepare to examine witnesses. The Court has more than sufficient justification to continue the hearing to December 2, 2022 and

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

good cause to extend the temporary restraining order through that date. For the foregoing reasons the State respectfully requests that the Court grant its motion to continue the hearing on its motion for preliminary injunction and to extend the TRO. A proposed order granting the relief requested accompanies this motion.

DATED this 14th day of November 2022.

ROBERT W. FERGUSON
Attorney General

s/ Holly A. Williams
JONATHAN A. MARK, WSBA. No. 38051
AMY N.L. HANSON, WSBA No. 28589
HOLLY A. WILLIAMS, WSBA No. 41187
RACHEL A. LUMEN, WSBA No. 47918
VALERIE K. BALCH, WSBA No. 47079
MIRIAM R. STIEFEL, WSBA No. 56611
LUMINITA NODIT, WSBA No. 50972
CHRISTINA M. BLACK, WSBA No. 58032
BROOKE HOWLETT LOVROVICH,
WSBA No. 47899
DALVIN K. YARBROUGH, WSBA No. 56769
Assistant Attorneys General
Antitrust Division
jonathan.mark@atg.wa.gov
amy.hanson@atg.wa.gov
holly.williams@atg.wa.gov
rachel.lumen@atg.wa.gov
valerie.balch@atg.wa.gov
miriam.stiefel@atg.wa.gov
lumi.nodit@atg.wa.gov
christina.black@atg.wa.gov
brooke.lovrovich@atg.wa.gov
dalvin.yarbrough@atg.wa.gov

ERIC S. NEWMAN, WSBA No. 31521
Litigation Section Chief
Consumer Protection Division
eric.newman@atg.wa.gov

PAUL M. CRISALLI, WSBA No. 40681
SUSAN E. LLORENS, WSBA No. 38049
Assistant Attorneys General
Complex Litigation Division
paul.crisalli@atg.wa.gov
susan.llorens@atg.wa.gov

State of Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Attorneys for Plaintiff State of Washington

I certify that this memorandum contains 3.303 words, in compliance with the Local Civil Rules.

DECLARATION OF SERVICE

I declare that I caused the foregoing document to be electronically served through the Court's Electronic Filing System on all counsel of record in this action.

DATED this 14th day of November 2022 in Seattle, Washington.

s/ Holly A. Williams
Holly A. Williams, WSBA No. 41187

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

The Honorable Ken Schubert
Hearing Date: November 29, 2022
Without Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18064-3 SEA ORDER GRANTING STATE OF WASHINGTON'S MOTION TO CONTINUE HEARING ON THE STATE'S MOTION FOR PRELMINARY INJUNCTION AND TO EXTEND TEMPORARY RESTRAINING ORDER [PROPOSED]

ORDER

This matter came before the Court on the State of Washington's Motion to Continue Hearing on the State's Motion for Preliminary Injunction and to Extend the Temporary Restraining Order. The Court considered the State's motion, any responses and replies, and any supporting materials submitted therewith. The Court having otherwise been fully advised in the premises, now therefore ORDERS as follows:

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

1. The State of Washington's Motion to Continue Hearing on the State's Motion for Preliminary Injunction and to Extend the Temporary Restraining Order is **GRANTED.**

2. The Hearing on the State of Washington's Motion for Preliminary Injunction is continued to December 2, 2022, and the Temporary Restraining Order is extended through that date.

IT IS SO ORDERED.

DATED this _____ day of November 2022.

_____
THE HONORABLE KEN SCHUBERT

Presented by:

ROBERT W. FERGUSON
Attorney General

s/ Holly A. Williams
JONATHAN A. MARK, WSBA. No. 38051
AMY N.L. HANSON, WSBA No. 28589
HOLLY A. WILLIAMS, WSBA No. 41187
RACHEL A. LUMEN, WSBA No. 47918
VALERIE K. BALCH, WSBA No. 47079
MIRIAM R. STIEFEL, WSBA No. 56611
LUMINITA NODIT, WSBA No. 50972
CHRISTINA M. BLACK, WSBA No. 58032
BROOKE HOWLETT LOVROVICH, WSBA No. 47899
DALVIN K. YARBROUGH, WSBA No. 56769
Assistant Attorneys General
Antitrust Division
jonathan.mark@atg.wa.gov
amy.hanson@atg.wa.gov
holly.williams@atg.wa.gov
rachel.lumen@atg.wa.gov
valerie.balch@atg.wa.gov
miriam.stiefel@atg.wa.gov

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

lumi.nodit@atg.wa.gov
christina.black@atg.wa.gov
brooke.lovrovich@atg.wa.gov
dalvin.yarbrough@atg.wa.gov

ERIC S. NEWMAN, WSBA No. 31521
Litigation Section Chief
Consumer Protection Division
eric.newman@atg.wa.gov

PAUL M. CRISALLI, WSBA No. 40681
SUSAN E. LLORENS, WSBA No. 38049
Assistant Attorneys General
Complex Litigation Division
paul.crisalli@atg.wa.gov
susan.llorens@atg.wa.gov
State of Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Attorneys for Plaintiff State of Washington

The Honorable Ken Schubert
Hearing Date: November 29, 2022
Without Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA NOTICE OF NON-WASHINGTON AUTHORITIES IN SUPPORT OF STATE OF WASHINGTON'S MOTION TO CONTINUE HEARING ON THE STATE'S MOTION FOR PRELIMINARY INJUNCTION AND TO EXTEND THE TEMPORARY RESTRAINING ORDER

Pursuant to Local Civil Rule 7(b)(5)(B)(v), Plaintiff State of Washington provides copies of the non-Washington authorities cited in its Motion to Continue Hearing on the State's Motion for Preliminary Injunction and to Extend the Temporary Restraining Order:

1. *S.E.C. v. Comcoa Ltd.*, 887 F. Supp. 1521, 1526 (S.D. Fla. 1995)
2. *Flying Cross Check, L.L.C. v. Cent. Hockey League, Inc.*, 153 F. Supp. 2d 1253 (D. Kan. 2001)

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

3. *SEC v. One or More Purchasers of Call Options for the Common Stock of CNS, Inc.*, 2006 WL 3004875 (E.D. Pa. 2006).

DATED this 14th day of November 2022.

ROBERT W. FERGUSON
Attorney General

s/ Holly A. Williams
JONATHAN A. MARK, WSBA. No. 38051
AMY N.L. HANSON, WSBA No. 28589
HOLLY A. WILLIAMS, WSBA No. 41187
RACHEL A. LUMEN, WSBA No. 47918
VALERIE K. BALCH, WSBA No. 47079
MIRIAM R. STIEFEL, WSBA No. 56611
LUMINITA NODIT, WSBA No. 50972
CHRISTINA M. BLACK, WSBA No. 58032
BROOKE HOWLETT LOVROVICH, WSBA No. 47899
DALVIN K. YARBROUGH, WSBA No. 56769
Assistant Attorneys General
Antitrust Division
jonathan.mark@atg.wa.gov
amy.hanson@atg.wa.gov
holly.williams@atg.wa.gov
rachel.lumen@atg.wa.gov
valerie.balch@atg.wa.gov
miriam.stiefel@atg.wa.gov
lumi.nodit@atg.wa.gov
christina.black@atg.wa.gov
brooke.lovrovich@atg.wa.gov
dalvin.yarbrough@atg.wa.gov

ERIC S. NEWMAN, WSBA No. 31521
Litigation Section Chief
Consumer Protection Division
eric.newman@atg.wa.gov

PAUL M. CRISALLI, WSBA No. 40681
SUSAN E. LLORENS, WSBA No. 38049
Assistant Attorneys General
Complex Litigation Division
paul.crisalli@atg.wa.gov
susan.llorens@atg.wa.gov

State of Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Attorneys for Plaintiff State of Washington

DECLARATION OF SERVICE

I declare that I caused the foregoing document to be electronically served through the Court's Electronic Filing System on all counsel of record in this action.

DATED this 14th day of November 2022 in Seattle, Washington.

s/ Holly A. Williams
HOLLY A. WILLIAMS, WSBA No. 41187

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

153 F.Supp.2d 1253
United States District Court, D. Kansas.

FLYING CROSS CHECK, L.L.C. d/b/a Topeka Scarecrows, Plaintiff,
v.
CENTRAL HOCKEY LEAGUE, INC. d/b/a Central Hockey League, Defendant.

No. 01–4026–SAC.
|
March 8, 2001.
|
Order Modifying Opinion March 12, 2001.

Synopsis

Hockey team filed suit in state court against hockey league and obtained ex parte temporary restraining order (TRO) to enjoin the league from preventing the team from playing during the remainder of the season. Hockey league removed action and moved to set aside the TRO. The District Court, Crow, Senior District Judge, held that: (1) team's loss of business reputation and loss of future economic opportunities qualified as irreparable harm; (2) team's loss of business reputation and loss of revenue generated by playoffs, and the threat to team's future business operations, substantially outweighed any harm to the hockey league; and (3) public interest weighed heavily in favor team.

Motion denied.

Attorneys and Law Firms

***1255** Randall J. Forbes, Kevin M. Fowler, John C. Frieden, Clinton E. Patty, Frieden, Haynes & Frobes, Topeka, KS,

Anne L. Baker, Thomas E. Wright, Wright, Henson, Somers, Sebelius, Clark & Baker, LLP, Topeka, KS, David N. Holstead, Topeka, KS, for defendant.

Jonathan C. Brzon, Tillotson, Nelson, Wiley & Brzon, Leavensworth, KS, Richard V. Eckert, Office of Shawnee County Counselor, Topeka, KS, for movant.

MEMORANDUM AND ORDER

CROW, Senior District Judge.

This removal action comes before the court on the defendant Central Hockey League, Inc.'s motion to set aside the temporary restraining order ("TRO") issued by the District Court of Shawnee County, Kansas, prior to removal (Dk.4); the motion to intervene (Dk.13) filed by the Board of County Commissioners of the County of Shawnee County, Kansas; and the plaintiff Flying Cross Check, L.L.C.'s amended motion to extend the TRO (Dk.15). On the defendant's request for a hearing, the court heard the motion to set aside on March 6, 2001. At that time, the parties' presented arguments and evidence concerning the duration, dissolution and extension of the TRO. The court took the matter under advisement and is now ready to rule.

PROCEDURAL BACKGROUND

On February 21, 2001, the plaintiff Flying Cross Check. L.L.C. ("FCC") filed suit by verified complaint in the District Court of Shawnee County, Kansas, against the defendant Central Hockey League, Inc. ("CHL"). On the same day, the plaintiff FCC applied for and received an ex parte temporary restraining order that enjoined the defendant from:

> (a) taking any direct or indirect action to terminate the Sanction Agreement between the parties or otherwise acting in any way to prevent Plaintiff from operating its hockey operations for the remainder of the 2000–2001 hockey season, including the playoffs; (b) implementing, maintaining or otherwise enforcing any actions based on the termination of the Sanction Agreement (including realigning the Central Hockey ***1256** League games schedule in place prior to February 20, 2001); and/or (c) preventing any Central Hockey League member club from appearing and/or playing the games as scheduled prior to February 20, 2001, based on such termination forthwith at any time prior to final hearing and disposition of Plaintiff's application for temporary injunction, including any appellate proceedings, or except as otherwise ordered by this Court for good cause shown.

On February 26, 2001, the defendant CHL filed its notice of removal in this court asserting diversity jurisdiction. (Dk.1). The petition alleges that the plaintiff FCC is a limited liability company organized and existing under Kansas law and that the defendant CHL is a corporation organized and existing under Oklahoma law with its principal place of business in Indianapolis, Indiana. The removal petition asserts the amount in controversy exceeds $75,000 in that the plaintiff FCC seeks as relief to be excused from its contractual obligation (subsection (d) of the Sanction Agreement) to make monthly payments of $10,000 which would have the pecuniary effect of denying the defendant CHL of $80,000.

Also on February 26, 2001, the defendant CHL filed a motion to set aside the temporary restraining order (Dk.4) and filed its memorandum in support of this motion late Friday afternoon on March 2, 2001. (Dk.9). The plaintiff FCC filed its response opposing this motion on March 5, 2001, (Dk.12), and later that day filed an amended motion to extend the TRO (Dk.15).

DURATION OF STATE COURT TRO FOLLOWING REMOVAL

"[A]fter removal, such state court orders remain in effect but 'federal rather than state law governs the future course of proceedings.' " *Palmisano v. Allina Health Systems, Inc.,* 190 F.3d 881, 885 (8th Cir.1999) (quoting *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 437, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974)). In other words, "after removal, the federal court merely takes up where the state court left off." *Alpert v. Resolution Trust Corp.,* 142 F.R.D. 486, 487 (D.Colo.1992). The court "must apply the Federal Rules of Civil Procedure and treat the case as though it were originally commenced here." *Bruley v. Lincoln Property Co., Inc.,* 140 F.R.D. 452, 453 (D.Colo.1991). Consequently "[a]n ex parte temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b), measured from the date of removal." *Granny Goose Foods,* 415 U.S. at 439–40, 94 S.Ct. 1113; *Rothner v. City of Chicago,* 879 F.2d 1402, 1418 (7th Cir.1989); *Carrabus v. Schneider,* 111 F.Supp.2d 204, 210–11 (E.D.N.Y.2000). The Supreme Court clarified its holding in a footnote with illustrations, including this one:

> Where, however, a state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to the federal court on Day 2, the restraining order will expire on Day 12, applying the 10–day time limitation of Rule 65(b) measured from the date of removal. Of course, in either case, the

> District Court could extend the restraining order for up to an additional 10 days, for good cause shown, under Rule 65(b).

Granny Goose Foods, 415 U.S. at 440 n. 15, 94 S.Ct. 1113.

Date of Removal

The procedure for removal is laid out in 28 U.S.C. § 1446, which states in part:

> ***1257** (d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

"The only rule that logically follows from 28 U.S.C. § 1446(d) is that removal is effected when the notice of removal is filed with the state court and at no other time." *Anthony v. Runyon,* 76 F.3d 210, 214 (8th Cir.1996); *Traynor v. O'Neil,* 94 F.Supp.2d 1016, 1023 (W.D.Wis.2000) ("many jurisdictions ... regard the filing of the notice with the state court as a necessary step to effect removal.") (citing 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3737 (3d ed. 1998) ("Accordingly, the sounder rule, and the one most consistent with the language of Section 1446(d) of Title 28, is that removal is not effective until all the steps required by the federal statute have been taken by the defendant.")); *see also* *Zeglis v. Sutton,* 980 F.Supp. 958, 961 (N.D.Ill.1997) ("Removal is effective when notice of removal is filed in state court."). The court agrees that the most logical reading of § 1446(d) is that removal is effective upon filing the notice in state court and that in most instances, this filing date will be the date of removal.

There is some dispute here over when the notice of removal should be considered as having been filed in state court. The defendant filed a notice of removal in federal district court on February 26, 2001. Its certificate of service shows that a copy of this notice was hand delivered on February 26, 2001, to FCC's counsel and to the Clerk of the District Court of Shawnee County, Kansas. Notwithstanding this certificate of service, the plaintiff submits a certified of copy of the notice of removal that was filed in state court. It bears a filing stamp date of February 28, 2001. There was no evidence or arguments offered to dispute that the state district court clerk received the notice on February 26, 2001, as provided in the certificate of service.

Section 1446(d) requires the defendant to "file a copy of the notice with the clerk of such State court." Rule 5(e) of the Federal Rules of Civil Procedure provides that "[t]he filing of papers with the court as required by these rules shall be made by filing them with the clerk of court." Filing under Rule 5(e) occurs with the delivery of the papers into the actual possession or custody of the clerk. *See In re Toler,* 999 F.2d 140, 142 (6th Cir.1993) ("filing of complaint ... is accomplished when the complaint is delivered to the clerk of the appropriate court"); *Hernandez v. Aldridge,* 902 F.2d 386, 388 (5th Cir.1990) (treats a complaint as filed when placed in the custody of the clerk), *cert. denied,* 498 U.S. 1086, 111 S.Ct. 962, 112 L.Ed.2d 1049 (1991); *Central States, Southeast & Southwest Areas Pension Fund v. Paramount Liquor Co.,* 34 F.Supp.2d 1092, 1094 (N.D.Ill.1999) (filing is complete upon delivery and receipt to the clerk's office); *United States v. Johnson,* 992 F.Supp. 1257, 1263–64 (D.Kan.1998) (documents are filed upon delivery to the clerk's custody); cf *Jarrett v. U.S. Sprint Communications Co.,* 22 F.3d 256, 258–59 (10th Cir.) ("constructive filing" concept used for complaint submitted with an in forma pauperis application), *cert. denied,* 513 U.S. 951, 115 S.Ct. 368, 130 L.Ed.2d 320 (1994). The hand delivery of the notice of removal to the custody and possession of the Clerk of the District Court of Shawnee County, Kansas, constitutes filing for purposes of § 1446(d), D.Kan. Rule 81 .1(c);

and Fed.R.Civ.P. 5(e). Consequently, the date of removal is February 26, 2001, and the ten-day period ***1258** provided in Fed.R.Civ.P. 65(b) commences on that date.

Calendar v. Business Days

Rule 6(a) of the Federal Rules of Civil Procedure provides that "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Courts apply this rule in computing the ten-day period under Rule 65(b). *See, e.g., Dan River, Inc. v. Sanders Sale Enterprises, Inc.,* 97 F.Supp.2d 426, 430 n. 2 (S.D.N.Y.2000); *Puertas v. Michigan Dept. of Corrections,* 88 F.Supp.2d 775, 778 (E.D.Mich.2000); *cf. S.E.C. v. Unifund SAL,* 910 F.2d 1028, 1034 (2nd Cir.1990) (ten business days); *Vittoria Corp. v. New York Hotel and Motel Trades Council,* 30 F.Supp.2d 431, 433 (S.D.N.Y.1998) (ten business days). Excluding Saturdays and Sundays, the ten-day period governing this TRO expires on March 12, 2001.

DISSOLUTION OF THE TRO

"The essence of a temporary restraining order is its brevity, its ex parte character, and (related to the second element) its informality." *Geneva Assur. Syndicate, Inc. v. Medical Emergency Services Associates,* 964 F.2d 599, 600 (7th Cir.1992). A TRO preserves the status quo and prevents immediate and irreparable harm until the court has an opportunity to pass upon the merits of a demand for preliminary injunction. These purposes serve as threshold requirements to a TRO request. Beyond these two threshold showings, a movant also must establish the following requirements which are the same for a preliminary injunction: (1) it will suffer irreparable injury unless the temporary relief issues; (2) the threatened injury to the movant outweighs whatever damage the temporary relief may cause the opposing party; (3) the temporary relief would not be adverse to the public interest; and (4) there is a substantial likelihood that the movant will eventually prevail on the merits. *City of Chanute v. Kansas Gas and Elec. Co.,* 754 F.2d 310, 313 (10th Cir.1985). When the first three elements are met, the Tenth Circuit has modified the fourth element so that "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.* at 314; *see Walmer v. U.S. Dept. of Defense,* 52 F.3d 851, 854 (10th Cir.), *cert. denied,* 516 U.S. 974, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995).

A movant's burden is particularly heavy when the injunctive relief sought would in effect grant the movant a substantial part of the relief the plaintiff would recover upon a trial of the merits. *SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1099 (10th Cir.1991) (such injunctive relief "is similar to the 'Sentence first-Verdict Afterwards' type of procedure parodied in Alice in Wonderland, which is an anathema to our system of jurisprudence"). The CHL argues the TRO here affords FCC substantially all the relief it seeks to recover on the merits. The CHL contends FCC filed this suit in order to stay its termination from the CHL and to allow the Topeka Scarecrows' completion of its 2000–2001 season and any playoff games. Because the regular season ends on March 31, 2001, and the last game of the playoffs is in late April, the CHL maintains this TRO and any preliminary injunction to follow would effectively provide FCC with most of the relief it seeks in this action.

The CHL argues first a procedural basis for dissolving the TRO. Because the plaintiff has not filed an application for a preliminary injunction, the court should dissolve the TRO immediately. Rule 65(b) ***1259** does not contain any requirement or condition that a TRO may issue or remain in effect only if a preliminary injunction request is pending. Rule 65(b) does contemplate that if the need for injunctive relief extends beyond the brief periods of protection offered by the TRO provisions, then a preliminary injunction must be pursued. The FCC says it intends to apply for a preliminary injunction, and the state court's TRO reflects those same intentions. CHL's procedural challenge is not well taken.

Irreparable Harm

A harm is irreparable if money damages are an inadequate remedy because of difficulty or uncertainty in their proof or calculation. *Equifax Services, Inc. v. Hitz,* 905 F.2d 1355, 1361 (10th Cir.1990). "[L]oss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm." *Zurn Constructors, Inc. v. B.F. Goodrich Co.,* 685 F.Supp. 1172, 1181 (D.Kan.1988); *see* *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.,* 86 F.Supp.2d 1102, 1108 (D.Kan.2000) (irreparable harm due to "extreme difficulty and uncertainty in restoring goodwill among customers and regaining the business of customers").

As alleged in its verified petition, "[t]he loss of reputation in the community, economic revenue generated by the upcoming playoffs and threat to the FCC's present and future business operations represents irreparable harm entitling FCC to injunctive relief." (Dk.1, ¶ 22). In his recent affidavit, Jonathan Fleisig avers:

> FCC seeks temporary injunctive relief from the Court to protect its reputation and goodwill, and to fulfill its commitments to the fans, the coach of the Topeka Scarecrows (who decline an offer to coach elsewhere just last week to remain with this team), the players in our organization, the support staff who depend on us for their employment, and Shawnee County through the end of this CHL hockey season, including the play-offs. I do not believe that money or money damages can ever fully or adequately compensate FCC and the Topeka Scarecrows for the injuries they will directly and indirectly suffer if the team is not permitted the opportunity to complete this season and compete for the CHL championship.

(Plaintiff's Ex. 1, ¶ 14). The CHL characterizes any injury to FCC's reputation and economic interests as "self-inflicted" and insufficient.

It is certainly true that FCC's own actions have played a part in jeopardizing, if not harming, its reputation and that of the Topeka Scarecrows in this community and beyond. Even so, to terminate now the regular season of a fledgling club when a play-off berth seems imminent is likely to create such disappointment and to engender such hard feelings that FCC would be forced to remove itself from any further involvement with hockey in this community. The loss of business reputation and loss of future economic opportunities to FCC qualifies as irreparable harm because of the extreme difficulty and uncertainty in proving and calculating the same in this case.

Balance of Harm

The CHL argues it will incur additional costs if the TRO continues. The testimony of Tom Berry, the CHL's commissioner, estimates the league will lose $30,000 or $40,000 after reimbursing teams for their additional costs from schedule changes and extra travel and for their lost gates. Commissioner Berry admitted on cross-examination that the CHL had no contractual or legal obligation to reimburse teams for these additional costs or lost revenues. It also became clear during cross-examination that these costs and lost revenues were due to the odd number of ***1260** teams remaining after the CHL terminated the first-year team of Border City Bandits and the Topeka Scarecrows on February 20, 2001, and after the TRO became effective on February 21, 2001, that prevented the Scarecrows' termination. At this juncture, the court is not convinced that the CHL's alleged costs and lost revenues are a proper consideration in the balance of harms. Even assuming that they are, the court believes the harm to the plaintiff, its employees and agents substantially outweighs any harm to the CHL.

Public Interest

Public interest weighs heavily in favor of permitting the Scarecrows to finish their play for this season. The fans and season ticket holders of Scarecrows are the public most directly impacted by what occurs in this action. Not only would they lose

money on their tickets, but they would lose an entertainment venue for them and their families. Finally, the embarrassment to this community for one of its sport teams to be denied the chance to finish its season cannot be overlooked.

Substantial and Doubtful Questions on the Merits

Because the first three elements for a TRO have been met, the plaintiff need only raise questions going to the merits that are so serious, substantial, difficult and doubtful as to be a fair basis for litigation and as to warrant more deliberate investigation.

The plaintiff alleges the CHL breached the implied covenant of good faith and fair dealing by not enforcing its rules and regulations on team salary caps and accurate reporting of the same. "CHL's failure to enforce the incorporated rules regarding the salary cap causing the loss of substantial revenue to FCC represents a breach of the implied of good faith and fair dealing." (Dk.12, p. 13). Though the plaintiff faces several serious legal hurdles in this claim, there are substantial questions here that warrant more deliberate investigation.

In sum, the court finds from the evidence and arguments presented that the plaintiff has sustained its burden of proving its entitlement to the TRO. The court denies the defendant CHL's motion to dissolve the TRO.

EXTENSION OF THE TRO

A court may extend a TRO for an additional ten days "for good cause shown" and for longer periods upon the consent of the parties. Fed.R.Civ.P. 65(b). The rule does not define "good cause." There are few decisions meaningfully applying this standard. A leading treatise offers "[a]lthough there does not seem to be any case law on what constitutes 'good cause' for purposes of extending a Rule 65(b) order, a showing that the grounds for originally granting the temporary restraining order continue to exist should be sufficient." 11A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure,* § 2953 p. 279 (1995). In *S.E.C. v. Comcoa Ltd.,* 887 F.Supp. 1521, 1526 n. 7 (S.D.Fla.1995), "good cause" was the court's need for "time to fully consider the various arguments and motions of the parties." In other contexts, the "good cause" standard focuses on the diligence of the party seeking the change who "must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghand v. Wal–Mart Stores, Inc.,* 904 F.Supp. 1218, 1221 (D.Kan.1995) (the standard for modifying a pretrial scheduling order pursuant to Fed.R.Civ.P. 16(b)) (citation omitted). Logically for Rule 65(b), "good cause" would include that a moving party despite its diligent efforts needs additional time to prepare and present its preliminary injunction, that the court's calendar cannot reasonably accommodate an earlier setting for the preliminary injunction hearing, or that the pendency of discovery ***1261** or related proceedings necessitates additional delay.

The grounds in support of the TRO, as have been discussed above, would still exist and justify an order filed March 12, 2001, extending the TRO for good cause shown. In addition, the plaintiff contends it needs to conduct limited discovery in preparation for and in support of its anticipated preliminary injunction motion. The court requests the parties to file no later than noon on March 12, 2001, their individual reports of what discovery is necessary in preparing for the preliminary injunction hearing. The court will conduct a telephone conference with the parties shortly thereafter to determine if the parties have agreed on a discovery schedule and, if not, to resolve that matter. The court informs the parties that it will be assisting the District Court of New Mexico with its overcrowded docket by sitting in Las Cruces, New Mexico, for the entire week commencing March 19, 2001. Consequently, the court is unavailable that week and will reserve filing any decision extending the TRO until March 12, 2001, after reviewing the parties' discovery plans.

AMOUNT OF SECURITY

Rule 65(c) provides that "[n]o restraining order ... shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The court has been informed the parties have met and agreed that in the event

the TRO is extended then the plaintiff will have until Wednesday, March 14, at 5:00 p.m., to post a $25,000 cash bond. The court will address the issue of security in the order to be filed March 12, 2001.

MOTION TO INTERVENE

At the hearing, the plaintiff said it did not oppose this motion filed by the Board of County Commissioners of the County of Shawnee County, Kansas, but the defendant announced its opposition. The court gives the defendant until March 13, 2001, to file a written memorandum in support of its position. The court takes the motion under advisement pending the filing and consideration of the defendant's memorandum opposing intervention.

IT IS THEREFORE ORDERED that the defendant Central Hockey League, Inc.'s motion to set aside (Dk.4) the temporary restraining order ("TRO") issued by the District Court of Shawnee County, Kansas, is denied, and this TRO will expire on March 12, 2001, absent an order filed that day extending the TRO for no more than ten additional business days for good cause shown or for a longer period upon the consent of the parties;

IT IS FURTHER ORDERED that the motion to intervene (Dk.13) filed by the Board of County Commissioners of the County of Shawnee County, Kansas, is taken under advisement pending the filing and consideration of the defendant's memorandum opposing intervention to be filed no later than March 13, 2001;

IT IS FURTHER ORDERED that the plaintiff Flying Cross Check, L.L.C.'s amended motion to extend the TRO (Dk.15) is taken under advisement until March 12, 2001, pending the court's review of the parties' discovery plans.

MEMORANDUM AND ORDER

The case comes before the court on the plaintiff Flying Cross Check, L.L.C.'s amended motion to extend the temporary restraining order (Dk.15). In its order filed March 8, 2001, the court took this motion under advisement pending its review of the parties' discovery plans to be filed no later than noon on March 12, 2001. (Dk.17). The parties having timely filed their submissions and a telephone conference ***1262** having been held, the court is ready to rule.

The parties agree to extend with certain modifications the temporary restraining order ("TRO") through the completion of the regular season and, in the event that the Topeka Scarecrows qualify for the playoffs, through the completion of playoffs. The first modification is that the defendant Central Hockey League, Inc. ("CHL") is permitted to make the following changes to the remaining regular season schedule of the Topeka Scarecrows:

March 18, 2001—Topeka at Memphis

March 20, 2001—Wichita at Topeka

March 21, 2001—Memphis at Topeka

March 27, 2001–San Antonio at Topeka

These scheduled games are in lieu of any games previously scheduled on those same days. The second modification is that the plaintiff Flying Cross Check, L.L.P. will post an appropriate surety bond with the court in the amount of $25,000 no later than 4:30 p.m. on Wednesday, March 14, 2001. If the bond requirement is not satisfied by that deadline, the TRO will expire at that time. The third modification is that the FCC will contribute its proportionate and equal share to the Playoff and Ring Pool as required by the terms of Section 20 of the 2000–20001 CHL Rules and Regulations. Unless further ordered by the court, the FCC's required contribution to this playoff pool shall not exceed $5,000.

IT IS SO ORDERED.

All Citations

153 F.Supp.2d 1253

End of Document

887 F.Supp. 1521
United States District Court,
S.D. Florida.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
COMCOA LTD., a/k/a Comcoa Ltd., Inc., and Thomas W. Berger, Defendants.

No. 94–8256–CIV.
|
March 13, 1995.
|
Order Denying Stay March 22, 1995.

Synopsis

Securities and Exchange Commission (SEC) sought order to show cause why attorney representing defendants in SEC enforcement action should not be held in contempt of court for violating temporary restraining order (TRO) against transferring clients' funds. The District Court, Highsmith, J., held that: (1) retainer agreement providing that funds in trust account would become nonrefundable upon institution of SEC enforcement action against clients was drafted with intent of circumventing federal securities laws and was void as against public policy; (2) attorney consented to extension of TRO; and (3) attorney was in contempt of court.

Motion for contempt and sanctions granted; motion for reconsideration denied.

Attorneys and Law Firms

***1523** Howard A. Tescher, Kipnis, Tescher, Lippman, Valinsky & Kain, Ft. Lauderdale, FL, for J.B. Grossman.

William Nortman, Nortman & Bloom, P.A., Miami, FL, for Comcoa defendants.

John C. Mattimore, Eric Bustillo, S.E.C., Miami, FL, for plaintiff.

Steven E. Siff, P.A., McDermott, Will & Emery, Miami, FL, for receiver for Comcoa.

ORDER

HIGHSMITH, District Judge.

This cause came before the Court for a show cause hearing on February 27, 1995, to determine whether the Law Offices of J.B. Grossman ("Grossman") should be held in contempt of Court for violation of a temporary restraining order ("TRO") entered in the above-styled action; and also upon Grossman's Motion for Clarification, filed November 4, 1994.

BACKGROUND

On May 6, 1994, a temporary restraining order was entered in the above-styled action which, *inter alia,* restrained the defendants and their agents, including their attorneys, from either "directly or indirectly transferring, setting off, receiving, changing,

selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property owned or controlled by the defendants." On May 16 and 17, 1994, the Court held a preliminary injunction hearing. At that hearing, the Court also considered the defendants' various pending motions, including their motion to dismiss for lack of subject matter jurisdiction and motion to vacate TRO.

At the time of the entry of the TRO, Grossman, counsel for the defendants, held $105,100.00 in a trust account on behalf of the defendants. Pursuant to the terms of the retainer agreement between Grossman and the defendants, the funds in this account would become nonrefundable upon the institution of an SEC enforcement action against the defendants.

At the hearing, the Court determined that the TRO would remain in effect until further order of the Court. Specifically, the Court stated that: "The status quo remains until I rule on the substantive motion, which I will, I will rule now on the substantive motion to dismiss for lack of subject matter jurisdiction, and depending upon that ruling, I will then rule upon the request for preliminary injunction as either moot, not warranted, or warranted. All right? Do you have anything further, questions that is?" At this point, Grossman responded "No sir." At no time did Grossman raise any objections or concerns with regard to the extension of the TRO.

On June 3, 1994, the Court issued its ruling on the defendants' various pending motions, including the motion to dismiss and the motion to vacate the TRO. All the defendants' motions were denied. Thereafter, on June 7, 1994, the Court issued an order of preliminary injunction. The preliminary injunction was dated "nunc pro tunc" to June 3, 1994, to correspond with the entry of the omnibus order of that date. [1]

***1524** On June 6, 1994, Grossman filed an emergency motion for release of funds. On that same day, instead of awaiting the Court's ruling on his emergency motion, Grossman transferred $91,500.00 out of the defendants' trust account and into an operating account held by the law firm, in satisfaction of the defendants' outstanding bill for Grossman's legal services; i.e., for costs incurred. [2] Thereafter, the SEC filed its motion for an order to show cause why Grossman should not be held in contempt of court for violating the Court's May 6, 1994, TRO and "subsequent orders effectively extending it."

DISCUSSION

The principal purpose of the federal securities laws is to protect investors by requiring the full disclosure of information material to investment decisions, by compensating defrauded investors, and by deterring fraud and manipulative practices. *Randall v. Loftsgaarden,* 478 U.S. 647, 664, 106 S.Ct. 3143, 3153, 92 L.Ed.2d 525 (1986). Because these laws are remedial in nature, they are to be liberally construed. *Craighead v. E.F. Hutton & Co.,* 899 F.2d 485, 493 (6th Cir.1990); *Castleglen, Inc. v. Commonwealth Sav. Ass'n,* 689 F.Supp. 1069, 1072 (D.Utah 1988). In an SEC enforcement action, the district court has the authority, through its equitable jurisdiction, to fashion an appropriate remedy on a proper showing of a securities violation. *SEC v. Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1103 (2d Cir.1972). The ultimate remedies available to the court include disgorgement, restitution, and rescission. *SEC v. Current Financial Servs., Inc.,* 783 F.Supp. 1441, 1443 (D.D.C.1992). To preserve a basis for such remedies, the district court may impose an interim asset freeze. *CFTC v. American Metals Exchange Corp.,* 991 F.2d 71, 79 (3d Cir.1993); *SEC v. Unifund SAL,* 910 F.2d 1028, 1041 (2d Cir.1990).

In imposing a freeze of assets, there is no requirement that the court exempt sufficient assets for the payment of legal fees. *See SEC v. Cherif,* 933 F.2d 403, 416–17 (7th Cir.1991), *cert. denied,* 502 U.S. 1071, 112 S.Ct. 966, 117 L.Ed.2d 131 (1992). Indeed, the use of frozen assets for attorney's fees has been disallowed in circumstances more extreme than in the instant case. *See, e.g., Caplin & Drysdale Chartered v. United States,* 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) (criminal forfeiture statute) (defendant paid attorney $25,000.00 in violation of restraining order); *United States v. Monsanto,* 491 U.S.

600, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) (criminal forfeiture statute) (defendant's motion to vacate restraining order to permit use of frozen assets to retain attorney denied); *United States v. One Residential Property Located at 501 Rimini Road,* 733 F.Supp. 1382 (S.D.Cal.1990) (civil forfeiture statute) (no constitutional right to civilly forfeitable assets for payment of legal fees). Moreover, in other contexts, attorneys have been required to disgorge nonrefundable retainers. *See, e.g., In re Mondie Forge Co.,* 154 B.R. 232, 239 (N.D.Ohio 1993) (bankruptcy case); *United States v. Harvey,* 814 F.2d 905, 913, 918 (4th Cir.1987) (RICO/CCE action). In all of these cases, the courts have essentially held that a defendant has no right to spend another's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain counsel of his choice. *See Property Located at 501 Rimini Road,* 733 F.Supp. at 1386 (quoting *Caplin & Drysdale,* 491 U.S. at 625, 109 S.Ct. at 2652). The reasoning of these cases has been extended to SEC enforcement actions. *See, e.g., Cherif,* 933 F.2d at 416–17.

In this case, the Court imposed an asset freeze on May 5, 1994. Subject to that freeze was the trust account maintained by Grossman on behalf of the defendants. Grossman contends that at the moment of the freeze, the law firm garnered title to the funds in that account. Hence, the Court must first determine who has the superior ***1525** interest in the funds, thereby establishing whether the funds were subject to the TRO.

1. *The Nonrefundable Retainer Account.*
Grossman contends that "the representation agreement and retainer the law firm fashioned for the Defendants was based on the firm's experience, business judgment and what may be needed to meet the clients' instructions to defend their rights in an asset freezing action," because, "[i]n its experience, the law firm has found that regulatory agencies move quickly and without notice in many circumstances involving telecommunications and securities questions." By example, Grossman cites to its experience with an on-going, unrelated SEC action, *FTC v. Metropolitan Communications, et al.,* 94–CIV–0142–(JFK) (SDNY).

It is a well-founded principle of contract construction that an instrument shall be construed most strongly against its draftsman. *See United States v. Seckinger,* 397 U.S. 203, 210, 90 S.Ct. 880, 884, 25 L.Ed.2d 224 (1970). In this regard, given Grossman's vast experience with the securities laws, the Court finds that, without a doubt, Grossman drafted the retainer agreement with the intention of circumventing federal securities laws. [3] By drafting the retainer agreement in such a fashion as here, Grossman has protected its own economic interests at the expense of others. Indeed, to uphold this type of retainer agreement would not only render the SEC powerless to effectively freeze assets to protect the interests of defrauded investors, but would also, in essence, require the defrauded investors to foot the bill of their opposing counsel. Such an outcome is extremely offensive to this Court, and unquestionably contrary to public policy and the intent and goals of the federal securities laws. [4] Because the Court finds that the retainer agreement at issue in this case contravenes public policy and the law, it concludes that such agreement is void and unenforceable as drafted. *See American Casualty Co. v. FDIC,* 1993 WL 610760, at *7 (S.D.Miss.1993). The fact that Florida generally recognizes nonrefundable retainers does not defeat this conclusion. Even under Florida law, an agreement that contravenes public policy is not enforceable as a matter of law. *See American Casualty Co. v. Coastal Caisson Drill Co.,* 542 So.2d 957, 958 (Fla.1989). Hence, the funds at issue were subject to the TRO entered on May 5, 1994.

The Court further finds that Grossman is not without recourse. The funds in question are only forfeitable to the extent they are comprised of the defendants' ill-gotten gains. *See, e.g., SEC v. Unioil,* 951 F.2d 1304, 1306–07 (D.C.Cir.1991) (Edwards, J., concurring) (Party seeking disgorgement is entitled to recover only the amount of the fraud.). If Grossman can show that the funds are from some other, *untainted* source, it may have a legitimate claim to those funds. [5] In addition, Grossman may have a suit in quantum meruit against the defendants. *See, e.g., Wong v. Michael Kennedy, P.C.,* 853 F.Supp. 73, 81 (E.D.N.Y.1994) (Although retainer agreement was void as a matter of law, counsel was not precluded from recovering payment in quantum meruit.). At the very least, Grossman can file a creditor's claim with the Receiver and, like all other creditors are required to

do, wait its turn in line. *Cf.* *United States v. Thier,* 801 F.2d 1463, 1474 (1986), *opinion modified on denial of reh'g,* 809 F.2d 249 (5th Cir.1987) (Attorney may bring third-party claim for ***1526** reasonable fee against potentially forfeitable assets under Continuing Criminal Enterprise statute.).

2. *The Temporary Restraining Order.*

Because the Court has determined that Grossman has no superior interest in the funds at issue and that the funds were subject to the TRO, it must now determine whether Grossman violated that TRO by transferring the funds. Pursuant to *Fed.R.Civ.P.* 65(b), temporary restraining orders granted without notice must be "indorsed with the date and hour of issuance" and "shall expire by its terms within such time after entry, not to exceed ten days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered in the record." While TRO's cannot be extended indefinitely, they can be extended pending a ruling on a motion for a preliminary injunction. *S.E.C. v. Unifund Sal,* 910 F.2d 1028, 1034 (2d Cir.1990) ("Nothing in Rule 65 of the Federal Rules of Civil Procedure prevents a district court from continuing a TRO while reserving decision on a motion for a preliminary injunction."). Moreover, a TRO can be extended beyond the 20–day period with the consent of the restrained party. *See* *Fernandez–Roque v. Smith,* 671 F.2d 426 (11th Cir.1982).

A. Consent to the extension of the TRO

The threshold issue for the Court to address is whether Grossman, on behalf of the defendants, consented to the extension of the TRO until the Court ruled on the pending motions. In this regard, Grossman first contends that it did not consent to the extension of the TRO. The Court, however, finds otherwise. In this case, at the close of the hearing on the SEC's motion for preliminary injunction, the Court stated that the TRO would remain in effect in all aspects until the Court ruled on the pending motions to dismiss and for preliminary injunction. Grossman did not object at that time, or at any time subsequent to the hearing. Hence, by virtue of its conduct, the Court finds that Grossman consented to the extension of the TRO until the Court ruled on the pending motions. *See* *Fernandez–Roque v. Smith,* 671 F.2d 426 (11th Cir.1982). In *Fernandez–Roque,* at a hearing to determine the disposition of a previously entered TRO, the district court inquired of the restrained party whether it was willing to let the TRO continue until some time in the future. The restrained party responded that it "would like to leave it up in the air right now." The district court interpreted that response as consent to an extension of the TRO. The Eleventh Circuit agreed. [6] *Id.* at 430.

Alternatively, Grossman argues that it did not consent to an extension beyond the twenty days provided in Rule 65(b). Specifically, Grossman asserts that "[n]either the Defendants nor the law firm consented to an extension beyond the twenty day time limit of Rule 65(b). When the Court on May 17, 1994 extended the TRO until further order of the Court, it was entirely reasonable for the law firm to believe that the Court was aware of the time limitations of Rule 65(b)." The Court finds, however, that Grossman's subjective belief as to the length of the TRO extension does not negate or limit its consent. *See Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Assocs.,* 964 F.2d 599 (7th Cir.1992) (An extension of a TRO beyond the 20–day period was deemed valid even though consent to the extension was based on the mistaken assumption that such extension was appealable.). [7] Moreover, Rule 65(b) clearly contemplates extension of ***1527** a TRO beyond twenty days, and Grossman never sought to clarify the issue in this regard. Accordingly, the Court finds that the TRO was still in effect at the time of Grossman's transfer of the funds at issue. [8]

B. Contempt of court

The sole remaining issue for the Court to address is whether it should find Grossman in contempt for violating the TRO. In this regard, the Court notes that Grossman's failure to comply with the TRO need not have been with the intent to disobey.

See Piambino v. Bestline Prods., Inc., 645 F.Supp. 1210, 1213 (S.D.Fla.1986) (Contempt proceedings were brought against attorneys for failure to obey a court order to repay into the court registry amounts previously withdrawn in payment of legal fees following settlement of a class action where settlement had been overturned on appeal.). Indeed, the United States Supreme Court has stated that:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.... An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949) (citations omitted). Hence, even if Grossman believed, in good faith, that it held legal title to the funds at issue, and that its transfer of the funds was not in violation of the Court's orders, such belief does not protect it from a finding of contempt.

In *Lamb v. Cramer,* 285 U.S. 217, 52 S.Ct. 315, 76 L.Ed. 715 (1932), a civil contempt proceeding against an attorney was brought ancillary to an action to set aside fraudulent conveyances of land and other dispositions of money and personal property by the defendant. The contempt petition alleged that the defendant in the principal suit had transferred to the attorney a substantial part of the property at issue, allegedly in payment of attorney's fees. The Supreme Court held that the attorney was subject to contempt proceedings for his actions in this regard. Specifically, the Court stated:

> The [attorney], as counsel in the principal suit, had notice of the equities alleged in the bill. So far as he acquired, pendente lite, any interest in the property involved in the suit, he was not only subject to those equities, but bound by any decree which the court might make with respect to it, to the extent that it might adjudicate the rights of the plaintiffs against the defendants.... His receipt and diversion of the property, which was then in gremio legis, tended to defeat any decree which the court might ultimately make in the cause. That and his retention of the property after the decree was entered were in fraud of the rights of the plaintiffs to prosecute the suit to its conclusion, and an obstruction of justice constituting a contempt of court which might be proceeded against civilly.

Lamb, 285 U.S. at 219, 52 S.Ct. at 316. Here, Grossman acquired its interest in the disputed funds by virtue of the SEC's initiation of this law suit; i.e. pendente lite.

Grossman urges the Court to consider the case of *Republic of the Philippines v. Marcos,* 1987 WL 28670, 1987 U.S.Dist. LEXIS 11437 (S.D.N.Y.1987), in which the defendant, before the court could enter a preliminary injunction and upon the advice of counsel that the TRO in that case had expired, transferred funds to his attorney in payment of services rendered. The district court found that the defendant's actions could be deemed "sly," and that such actions were clearly made in bad faith. Nevertheless, the court did not hold the defendant in contempt because the court found that there was "sufficient doubt as a matter of law" as to whether the TRO was in effect at the time of the defendant's actions. *Id.* at *5–6, ***1528** 1987 U.S.Dist. LEXIS at *14–15. The Court finds the *Marcos* case neither persuasive nor instructive. Unlike that case, the TRO at issue here clearly did not expire until the Court ruled on the pending motions to dismiss and for preliminary injunction. Moreover, the *Marcos* case involved a defendant relying on the advice of counsel that the TRO had expired. Here, Grossman acted on its own belief that the TRO had expired, and that it held legal title to the funds at issue. Being composed of officers of the court trained

in the laws of this country, Grossman should be held to a higher standard of conduct in matters of this nature. Moreover, the law is clear that the alleged contemnor may not rely on its own inadvertence or misunderstanding to avoid a finding of contempt. *SEC v. Musella,* 818 F.Supp. 600, 606 (S.D.N.Y.1993). Grossman took a calculated risk in transferring the funds; it must now bear the responsibility of its actions. To that end, the Court concludes that Grossman is in contempt for violating the TRO entered May 5, 1994, as subsequently extended.

CONCLUSION

Based upon the foregoing considerations, it is

ORDERED AND ADJUDGED that:

1. The SEC's motion for contempt and sanctions is GRANTED. The Law Offices of J.B. Grossman is hereby found in civil contempt of Court, and is directed to remit to the Court-appointed Receiver, within ten (10) days from receipt of this order, the sum of $91,500.00, plus interest calculated pursuant to 28 U.S.C. § 1961 from June 15, 1994, the date of demand by the Receiver, to the date of this order. Payment of this amount shall purge the aforementioned contempt. Should the Law Offices of J.B. Grossman fail to make the required remittance within the time allotted, the Court shall hold a hearing to determine the appropriateness of any additional sanction as a remedy to enforce the orders of this Court.

2. Grossman's motion for reconsideration is DENIED.

DONE AND ORDERED.

ORDER ON EMERGENCY MOTION FOR STAY

THE CAUSE comes before the Court on the Law Practice of J.B. Grossman, P.A.'s ("Grossman") Emergency Motion for Stay of Contempt Order Pending Appeal, filed March 17, 1995.

Pursuant to *Fed.R.App.P.* 8(a), as a basis for a stay of an order pending appeal, the movant must show the following: (1) that the movant is likely to prevail on the merits on appeal; (2) that absent a stay, the movant will suffer irreparable damage; (3) that the adverse party will suffer no substantial harm from the issuance of the stay; and (4) that the public interest will be served by issuing the stay. *Garcia–Mir v. Meese,* 781 F.2d 1450, 1453 (11th Cir.1986); *Securities Investor Protection Corp. v. Blinder, Robinson & Co.,* 962 F.2d 960, 968 (10th Cir.1992). "Ordinarily the first factor is the most important." *Garcia–Mir,* 781 F.2d at 1453. Here, Grossman made no initial showing. [1] Instead, only upon the filing of its reply memorandum, after the filing of plaintiff's opposition memorandum, did Grossman address the aforementioned factors. Despite Grossman's neglect in this regard, the Court has considered the arguments advanced by Grossman in its reply. The Court concludes that Grossman has failed to state a proper case justifying the extraordinary remedy of a stay in this instance.

With regard to the first factor, substantial likelihood of success on the merits, the Court finds that Grossman has not met its burden of persuasion. Indeed, Grossman has merely restated the arguments it advanced both in its memorandum in opposition to the entry of a contempt order and at the hearing thereon, which arguments the Court has already addressed. Grossman has advanced no new argument in this regard that would tend to show that the ***1529** Court's order of contempt was in error. Grossman's arguments as to the second factor, irreparable harm, are similarly unpersuasive. Mere economic injury is not enough to justify a stay of a court order pending appeal. *Sampson v. Murray,* 415 U.S. 61, 90–92, 94 S.Ct. 937, 953, 39 L.Ed.2d 166

(1974) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC,* 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958)). Moreover, as the Court has already determined, other avenues of relief are available to Grossman.

Finally, as to the remaining two factors, the Court finds that any further delay in this matter will significantly hinder the Receiver's ability to discharge his duties for the protection of the defrauded investors' interests. Moreover, the Court does not accept Grossman's contention with regard to the contempt order's "chilling effect on access to counsel." The Court did not rule that attorneys could not be paid at all for their work, only that they could not be paid with *tainted* funds. Accordingly, it is hereby

ORDERED AND ADJUDGED that The Law Practice of J.B. Grossman, P.A.'s emergency motion for stay of contempt order pending appeal is DENIED. However, Grossman shall have ten (10) additional days from the original deadline within which to comply with the purging of contempt provision of that order.

DONE AND ORDERED.

ORDER GRANTING MOTION FOR CLARIFICATION

THIS CAUSE came before the Court upon Worldwide Reporting Service's Motion for Clarification, filed March 29, 1995.

Upon due consideration, it is hereby

ORDERED AND ADJUDGED that Worldwide Reporting Service's motion is GRANTED. The Court's order of March 13, 1995, is hereby amended to reflect the following: "The Law Practice of J.B. Grossman's Motion for Clarification, filed November 4, 1994, is DENIED." It is further

ORDERED AND ADJUDGED that the Court's March 13, 1995, order does not preclude payment of costs incurred in the representation of the defendants from funds other than those connected with the instant litigation.

DONE AND ORDERED.

All Citations

887 F.Supp. 1521, Fed. Sec. L. Rep. P 98,679, 32 Fed.R.Serv.3d 76

Footnotes

1 While Grossman takes issue with respect to the propriety of the Court's *nunc pro tunc* dating of the preliminary injunction, the Court need not reach this issue as it is beyond the scope of the show cause hearing; namely, whether Grossman violated the TRO.

2 The SEC maintains that the actual amount held in the retainer account at the onset of this action and then subsequently transferred to the law firm's operating account is $106,000.00. At the show cause hearing on this matter, Grossman testified that only $91,500.00 was transferred, and that the remainder, approximately $3,600.00, is still being held in the defendants' trust account. The Court finds that $91,500.00 is the correct amount in dispute, and that the remaining $3,600.00 is unquestionably subject to disgorgement to the Receiver.

3 Indeed, the Court finds that Grossman is well-versed in the ways of SEC enforcement of the federal securities laws. The law firm has represented several telecommunications/securities clients other than the defendants in the instant case. And J.B. Grossman, himself, has over 21 years legal experience, including serving as a Commodity Futures Trading Commission attorney and also as special counsel for the New York Stock Exchange.

4 The Court can envision still other repercussions from the upholding of agreements such as the one presented here; one being the potential for defendants, in the guise of paying legal fees, to hide assets. Such a "loophole" could conceivably be used to circumvent regulations in non-SEC areas as well.

5 Grossman, however, has not argued that the funds are untainted. Instead, its sole position is that it has a vested interest in the funds as a matter of law by virtue of its retainer agreement with the defendants.

6 Grossman also makes the argument that its filing of a motion to dismiss supports a finding that it did not consent to the extension of the TRO. The Court disagrees. *Cf. Ultracashmere House, Ltd. v. Madison's of Columbus, Inc.,* 534 F.Supp. 542 (S.D.N.Y.1982) (On a motion to dissolve a stay of a TRO, the moving party evinced implied consent to extend the stay until the merits of dissolution were determined.).

7 To the extent Grossman asserts that the Court failed to show "good cause" on the record for the extension, such an assertion is without merit. The Court, in essence, stated it was extending the TRO in order to have time to fully consider the various arguments and motions of the parties.

8 Because the Court finds consent, it need not address Grossman's arguments as to the calculation of the TRO period.

1 Indeed, Grossman failed to file a memorandum of law in support of his emergency motion, as required by Local Rule 7.1(A)(1), and the motion itself does not address these factors in any respect.

End of Document

2006 WL 3004875
United States District Court,
E.D. Pennsylvania.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
ONE OR MORE PURCHASERS OF CALL OPTIONS FOR the COMMON STOCK OF CNS, INC., Defendants.

Civil Action No. 06-4540.
|
Oct. 20, 2006.

Attorneys and Law Firms

Dean M. Conway, H. Michael Semler, United States Securities and Exchange Commission, Washington, DC, for Plaintiff.

MEMORANDUM

EDUARDO C. ROBRENO, J.

I. INTRODUCTION

***1** The SEC has brought this action against unknown defendants who purchased call option contracts in CNS, Inc ("CNS") immediately prior to the announcement of the company's acquisition by GlaxoSmithKline plc ("Glaxo") on October 9, 2006. The SEC maintains that these purchases were made based on insider information. Because the purchases were effectuated by accounts located in Switzerland with undisclosed beneficial owners, the SEC does not know the identity of the alleged inside traders.

On October 12, 2006, the Court granted a Temporary Restraining Order (i) freezing certain proceeds generated through the insider trading alleged in the Complaint, (ii) providing for expedited discovery, (iii) authorizing alternative means for service of process, (iv) requiring defendants to provide identifying information, and (v) prohibiting the alteration or destruction of documents (doc. no. 4) (the "TRO"). The Court described the background of this case and explained its reasons for granting that TRO in an accompanying Memorandum of Law (doc. no. 3), familiarity with which is presumed here.

The SEC now seeks a ten-day extension of the TRO and an order requiring the defendants (also referred to as "Unknown Purchasers") to show cause why the asset freeze and the other ancillary relief requested by the SEC should not remain in place until the conclusion of this litigation.

II. DISCUSSION

Rule 65 of the Federal Rules of Civil Procedure authorizes an extension of the expiry of a temporary restraining order for an additional ten (10) days for good cause shown.

The Court finds that an extension to the TRO order may be granted, without notice to the adverse party, pursuant to Rule 65(b), under these circumstances. The SEC has shown it is still likely to succeed on the merits of its insider trading claims. Moreover, it is still true that immediate and irreparable injury will result before the defendants can be heard in opposition. An extension of the TRO is still required to prevent the defendants from moving the proceeds of the insider trading beyond the jurisdiction of the Court.

The Court also remains satisfied that the SEC is continuing to make reasonable efforts to serve the defendants in this case. Since this Court issued the TRO on October 12, 2006, the SEC has served the Unknown Purchasers pursuant to the alternative service of process authorized by the TRO. The SEC is also moving aggressively to procure information regarding the identity of the Unknown Purchasers by working with the Swiss authorities, and has advised that, in that regard, has obtained the cooperation of Zurich Cantonal Bank, who has served process on counsel for one of the Unknown Purchasers.

Finally, the balance of the harms favors the SEC, who will be unable to secure appropriate relief in enforcement proceedings if the assets have already been moved beyond the jurisdiction of the United States courts. The public interest will accordingly be served by preserving the status quo.

III. CONCLUSION

***2** For the reasons set forth above, the Court finds there is good cause to grant the SEC's request for an extension of the TRO and a rule to show cause why the asset freeze and other preliminary relief should not remain in place until the conclusion of this litigation.

An appropriate order will be entered.

AND IT IS SO ORDERED.

TEMPORARY RESTRAINING ORDER FREEZING ASSETS AND GRANTING OTHER RELIEF AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

The Securities and Exchange Commission (“Commission”) has applied for an extension of the temporary restraining order entered on October 12, 2006(i) freezing certain proceeds generated through the insider trading alleged in the Complaint, (ii) providing for expedited discovery, (iii) authorizing alternative means for service of process, (iv) requiring defendants to provide identifying information, and (v) prohibiting the alteration or destruction of documents. The Commission also requests that an order be issued requiring the defendants (also referred to as “Unknown Purchasers”) to show cause why the asset freeze and the other ancillary relief requested by the Commission should not remain in place until the conclusion of this litigation. Having considered the Commission's application, and being advised that the current custodians of the assets at issue, Swiss American Securities Inc. (“SASI”) and National Financial Services LLC (“NFS”), have been notified of the Commission's application, the Court grants the Commission's application and orders as follows:

I.

It is hereby **ORDERED** that defendants and their officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including without limitation Swiss American Securities, Inc. (“SASI”) and National Financial Services LLC (“NFS”), shall hold and retain within their control, and prevent any disposition, transfer or dissipation of, any proceeds currently in their possession, custody, or control from: (i) the sales of 430 October-30 call option contracts and 475 November-30 call option contracts on October 9 and 10 in the account maintained in the name of or for the benefit of the Credit Suisse; and (ii) from the sales of 195 October-30 call option contracts, 66 November-30 call option contracts, and 20 November-35 call option contracts on October 9 in the account maintained in the name of or for the benefit of Zurich Cantonal Bank.

II.

IT IS FURTHER ORDERED that (A) in addition to all other potential means of service, service of all pleadings, process, and papers in this litigation, including the summons, complaint, and this Order, may be made by serving such documents on the following as agents of defendants: For defendants who directly or indirectly purchased call options at issue in this litigation through Swiss American Securities, Inc., service may be made on Swiss American Securities, Inc. For defendants who directly or indirectly purchased call options at issue in this litigation through National Financial Services LLC, service may be made on National Financial Services LLC or Prudential Equity Group LLC.; and that (B) in addition to all other potential methods of service, service on defendants, directly or through their agents or attorneys, may be by facsimile, overnight courier, mail, or any alternative permitted by Rule 4 of the Federal Rules of Civil Procedure, including letters rogatory, or as this Court may direct by further order.

III.

***3 IT IS FURTHER ORDERED** that each defendant shall submit the following identifying information to the Commission within five days following service of this Order on that defendant: (A) all names by which each defendant is known; defendant's business and residence addresses; defendant's post office box numbers, telephone numbers, and facsimile numbers; and defendant's nationality; and (B) each account held by that defendant with any financial institution or brokerage at any time between September 1, 2006, and October 15, 2006.

IV.

IT IS FURTHER ORDERED that in lieu of the time periods, notice provisions, and other requirements of Rules 26, 30, 33, 34, 36 and 45 of the Federal Rules of Civil Procedure, and the Local Rules of this Court, discovery shall proceed on the following expedited basis: (A) The Commission is authorized to take depositions upon oral examination subject to three days notice pursuant to Rule 30(a) of the Federal Rules of Civil Procedure; (B) All depositions in this action, unless properly noticed to take place elsewhere, shall be taken within the United States; (C) Pursuant to Rule 33(a) of the Federal Rules of Civil Procedure and Local Rule 33, defendants shall answer the Commission's written discovery, including interrogatories and requests for production, within three days of service of such discovery; (D) Pursuant to Rule 34(b) of the Federal Rules of Civil Procedure, defendants shall produce all documents requested by the Commission within three days of service of such request; and (E) All written responses to the Commission's discovery requests shall be delivered to the Commission at 100 F Street, N.E., Washington, D.C. 20549-4010, to the attention of H. Michael Semler, Assistant Chief Litigation Counsel, or such other place as counsel for the Commission may direct in writing, by overnight delivery.

V.

IT IS FURTHER ORDERED that defendants and their officers, agents, servants, employees, and attorneys, including Swiss American Securities, Inc., National Financial Services LLC, and Prudential Equity Group LLC, are hereby restrained from destroying, mutilating, concealing, altering or disposing of any documents or other items, including any books, records, documents, agreements, correspondence, memos, and electronic data or communication in any form, relating to defendants' direct or indirect purchase or sale of options relating to the stock of CNS during the period September 1, 2006, through October 15, 2006.

The Order will expire as of October 30, 2006, unless extended by the Court.

VI.

IT IS FURTHER ORDERED that defendants or their attorneys shall appear before this Court at 9:00 a.m. on November 30, 2006, Courtroom 11A to show cause why this Court should not enter a preliminary injunction extending the asset freeze and other ancillary relief entered in this Order until a final adjudication of this case on the merits.

All Citations

Not Reported in F.Supp.2d, 2006 WL 3004875, Fed. Sec. L. Rep. P 94,108