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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

COMMODITY FUTURES TRADING
COMMISSION, and

STATE OF UTAH DIVISION OF
SECURITIES, through Attorney General,
Sean D. Reyes,

Plaintiffs,

vs.

RUST RARE COIN INC., A Utah
corporation, GAYLEN DEAN RUST, an
individual, DENISE GUNDERSON RUST,
an individual, and JOSHUA DANIEL
RUST, an individual

Defendants;

and

ALEESHA RUST FRANKLING, an
individual, R LEGACY RACING INC, a
Utah corporation, R LEGACY
ENTERTAINMENT LLC, a Utah limited
liability company, and R LEGACY
INVESTMENTS LLC, a Utah limited
liability company.

Relief Defendants.

**MOTION TO MODIFY ORDER
FREEZING ASSETS**

Case No. 2:18-cv-00892

Judge Tena Campbell

Defendant, Denise Rust, individually and as trustee on behalf of the R Legacy Ranch Trust, moves the Court to modify its Order Appointing Receiver and Staying Litigation in order to unfreeze (1) the personal residence of Gaylen and Denise Rust, and (2) the proceeds from the sale of a tractor in Ohio. The residence is owned by the R Legacy Ranch Trust and not by the defendant individually and should not be subject to the asset freeze. Furthermore, much of the residence and all of the tractor were purchased prior to any alleged wrongdoing and are untainted by the allegations. To the extent that these assets may be used for purposes of retaining defense counsel, it should be made available pursuant to defendants' Sixth Amendment right to counsel of their own choosing.

STATEMENT OF FACTS

1. On November 27, 2018 the court entered its Order Appointing a Receiver and Staying Litigation in order to marshal and preserve all of the assets of the defendants and relief defendants, as well as any assets (a) attributable to funds derived from investors or clients of the defendants, (b) are held in a constructive trust for the defendants, (c) were fraudulently transferred to the defendants, and/or (d) may otherwise be includable as assets of the estates of the defendants.

2. Among the assets that were subject to the court's order is Gaylen and Denise Rust's personal residence and surrounding property ("Residence") located in Layton, Utah. Although the Residence was specifically excluded from the Receivership Property and the Receivership Estate, it was expressly made subject to the asset freeze. See ¶ 7(L) of Order Appointing Receiver and Staying Litigation.

3. The Residence is solely owned by the R Legacy Ranch Trust (“Legacy Ranch Trust”). See Quit Claim Deed, July 27, 1992, attached as Exhibit 1.

4. Denise Rust is the trustee of the Legacy Ranch Trust. See R Legacy Ranch Trust, attached as Exhibit 2.

5. The Legacy Ranch Trust was not named as a defendant nor as a Relief Defendant in this suit.

6. The Residence sits on approximately 7.77 acres of land and was obtained in a series of transactions. First, in 1989, Denise and Gaylen Rust purchased a 5.8 acre parcel of land in Layton, Utah [Parcel A]. This purchase occurred prior to any alleged wrongdoing outlined in the Complaint. See Original Purchase Documents, attached as Exhibit 3. This purchase was made with the personal funds of Denise and Gaylen Rust. *Id.*

7. Ownership of the Residence was transferred to the Legacy Ranch Trust in July 1992. See Quit Claim Deed, July 27, 1992, attached as Exhibit 1.

8. In 2003, Gaylen and Denise Rust purchased an adjoining parcel of land [Parcel B]. See Documents for Purchase of 2843 W. Gordon, attached as Exhibit 4. This property was deeded to the Legacy Ranch Trust. See *id.*, at 23. The down payment on this property was provided by a home equity loan against Parcel A for \$53,000, and an additional \$12,000 from the Rust Investment Trust. See *id.*, at 11-16.

9. In 2016, funds from the silver trading program were used to purchase an additional two adjoining acres [Parcel C]. See Documents for purchase of 2779 W. Gordon, attached as Exhibit 5. This property was titled to the Legacy Ranch Trust. *Id.* at 19. Parcel C was then split into two parcels [Parcel C1 and Parcel C2], and the

Legacy Ranch Trust sold Parcel C2, described as .4 acres and a pre-existing home to Curt Rust for \$195,000 at 3% interest. See Documents for Sale of 2779 W. Gordon to Curt Rust, attached as Exhibit 6. As of this date, the Legacy Ranch Trust owns 7.77 acres of land in Layton, Utah, consisting of Parcel A, Parcel B, and Parcel C1.

10. The Complaint alleges the silver trading program began at least by 2017, and does not contain any allegations predating 2017. See Complaint 1:18-cv-00147.

11. None of the investor's funds from the "silver trading program" as defined in the complaint have been used by the Trust or in any capacity in regards to Parcel A and Parcel B of the Residence.

12. In 2005, Gaylen and Denise Rust purchased a New Holland tractor for use on a property they owned in Ohio. This tractor was purchased with personal funds, not in any way tied to the "silver trading program." Prior to the asset freeze ordered by this court, the tractor was sold for \$9,000.00 to Leslie Hill at Hill Haven Farms, an individual and entity not otherwise connected to the Rusts. The sale proceeds are currently held in the Bugden and Isaacson LLC trust account.

ARGUMENT

The court may exercise its discretion when deciding whether to freeze or unfreeze assets. "It is well settled that this Court has authority to freeze personal assets temporarily and the corollary authority to release frozen personal assets, or lower the amount frozen." *SEC v. Duclaud Gonzales de Castilla*, 170 F. Supp. 2d 427, 429 (S.D.N.Y. 2001) (citing *SEC v. Unifund SAL*, 917 F.2d 98 (2d Cir. 1990)). Here, the court should grant relief from its Order for the narrow purpose of unfreezing the Residence. It should do this on one or both of two bases: First, the Residence is owned

by a non-defendant, the Legacy Ranch Trust, and consequently should not be subject to the asset freeze. The Residence has already been excluded from the receivership estate, and it should also be removed from the list of frozen assets. Second, Parcels A and B of the Residence may be the only assets available to Defendant that would allow her to exercise her Sixth Amendment right to counsel of her own choosing. These Parcels were not obtained through the use of potentially tainted funds, the transfer of ownership to the trust occurred prior to any investigation or alleged wrongdoing, and there is no allegation of any fraudulent transfer of the Residence. They should therefore be unfrozen to allow Defendant to pay a reasonable sum for her defense.

1. The Legacy Ranch Trust is not a Defendant and its Assets should not be Frozen.

The court's authority to freeze accounts under 15 U.S.C. § 78u(d) does not extend to assets of nonparties as to whom no wrongdoing has been alleged, and any overly broad freeze order should be corrected. The Seventh Circuit has held, for example, that "[n]othing in the statute or case law suggests that 15 U.S.C. § 78u(d) or (e) authorizes a court to freeze the assets of a non-party, one against whom no wrongdoing is alleged." *SEC v. Cherif*, 933 F.2d 403, 413–14 (7th Cir. 1991). At most, "[t]he plenary powers of a federal court to order an asset freeze . . . extends to a person not accused of wrongdoing" only "where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." *S.E.C. v. Ahmed*, 123 F. Supp. 3d 301, 308 (D. Conn. 2015), *aff'd sub nom. Sec. & Exch. Comm'n v. I-Cubed Domains, LLC*, 664 F. App'x 53 (2d Cir. 2016), and modified sub nom. *United States Sec. & Exch. Comm'n v. Ahmed*, No. 3:15CV675 (JBA), 2017 WL 5515904 (D. Conn. Jan. 23, 2017).

This result is exemplified in *S.E.C. v. McGinn, Smith & Co., Inc.*, where the Court initially determined that the assets of a non-party trust were not properly frozen. 752 F. Supp. 2d 194 (N.D.N.Y. 2010).¹ In *McGinn*, the court held that the Trust was not an appropriate relief defendant, and consequently the SEC could not freeze its assets. Crucial to its determination was the fact that the Trust originated from stock purchased thirteen years before the alleged scheme began. Further, there was no proof that the fraudulently obtained funds were deposited into the Trust. Additionally, the assets of the Trust were easily identifiable and severable from the tainted account. *Id.* at 218. Finally, there was no evidence that the transfer of the property into the Trust account was either fraudulent or otherwise illegal. For these reasons, the assets in the Trust were not properly frozen. The Court on this reasoning granted the motion to unfreeze the assets.

The present situation is similar. The Residence is owned by the Legacy Ranch Trust who is not a party to the litigation and has not been accused of any wrongdoing. The Legacy Ranch Trust was not named as a defendant nor as a relief defendant. Furthermore, in regards to Parcel A and Parcel B, the Legacy Ranch Trust obtained ownership years prior to any alleged wrongdoing, and the nature and circumstances surrounding the purchase and transfer of these parcels to the Legacy Ranch Trust present no claim for illegitimacy or fraudulent transfer. Parcel A and Parcel B are easily identifiable and severable from any money or property obtained with funds from the silver trading program.

¹ This order was subsequently vacated due to an undisclosed private annuity contract that required the trust to make annual payments to the principals. See *S.E.C. v. Wojeski*, 752 F. Supp. 2d 220 (N.D.N.Y. 2010), *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011). However, the standards the court enumerated in its decision as to whether the trust should properly be frozen were not overturned.

Defendant concedes that Parcel C was purchased with money from the silver trading program. Parcel C was split into two Parcels, C1 and C2. Parcel C2 was sold to Curt Rust. Defendant therefore willingly submits that Parcel C1, and any proceeds or continued payments that the Trust receives for the sale of Parcel C2 are properly part of the receivership estate. However, Parcels A and B should be unfrozen and returned back to the ownership of the Legacy Ranch Trust.

2. The Residence should be Unfrozen to Allow Defendants to Exercise Their Sixth Amendment Right to Counsel.

In addition or alternatively, Defendant asks that the court unfreeze the Residence so that she and her husband can afford to pay a reasonable fee to be represented by counsel of their choice. Although Defendant concedes that the primary consideration in freezing assets is preserving resources to compensate potentially defrauded investors, the court must also consider “the disadvantages and possible deleterious effect of a freeze” and weigh those effects “against the considerations indicating the need for such relief.” *Duclaud*, 170 F. Supp. at 429. The disadvantages and deleterious effect of a freeze have become even more pronounced in this case as both defendants have received “target letters” from a United States Attorney, and cannot use the frozen assets to retain counsel of their choice to defend against a pending criminal investigation and indictment. Denise Rust’s counsel herein has met preliminarily with the United States Attorney and FBI. Mr. Rust’s preferred criminal defense counsel, who have received no compensation and have not been retained herein or in connection with the criminal investigation, have met preliminarily with the United States Attorney. The United States Attorney has also sent documents and other items collected as part of the criminal

investigation to preferred counsel for both defendants. There is little question that the defendants' Sixth Amendment rights are or very soon will be invoked.

The Supreme Court recently held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016). *Luis* involved an appeal of an order freezing the defendant's assets. The defendant argued that her legitimate assets should be available to her to afford counsel of her own choosing. The government conceded that the assets were untainted, but argued that even the defendant's untainted money was needed to pay restitution to the victims of her fraud. In *Luis*, the government conceded that the assets at issue were not tainted. Ultimately, the Court decided that the Sixth Amendment required the assets to be unfrozen so that the defendant would have the capacity to pay a reasonable fee for counsel of her choice. This right trumped even the restitution rights of the potential victims.

In the present case, there are no allegations against the Legacy Ranch Trust, and Parcel A and Parcel B can be definitively shown to have been purchased with legitimate funds. They were purchased several years before any alleged wrongdoing. Because Parcel A and Parcel B are legitimate and untainted, they should be released so that the defendants may retain qualified counsel to represent them in both this civil case and the pending criminal case.

Unlike *Luis*, there have been no formal charges against either Gaylen or Denise Rust. However, both defendants have received letters from the United States Attorney advising them that they are each "the target of a federal criminal investigation." See Letter of January 7, 2019, attached as Exhibit 7. Whether the Sixth Amendment right to

counsel ever attaches prior to formal charges being presented is an unsettled question, but the defendants' Sixth Amendment rights are clearly implicated by the target letters.

These letters include the following statement:

I am writing to extend you an invitation to have legal counsel contact me before criminal charges are formally presented to the grand jury against you. It may be in your best interest to resolve this case through a negotiated criminal settlement rather than require the United States to dedicate additional time and expense in further investigation, indictment and trial.

Id. The explicit invitation to have legal counsel contact the United States Attorney indicates an awareness from the prosecution that they expect the Defendants to be represented at this stage of the proceedings. A negotiated criminal settlement that effectively avoids indictment and trial by necessity implicates the Sixth Amendment right to counsel, as the substantive rights affected by the negotiation are identical to those at trial. To prevent defendants from retaining counsel of their choice at this point would lead to the perverse incentive to require the United States Attorney to file charges—a tactic that could negatively impact any resolution by pre-charge settlement—simply so that the assets could be unfrozen and allow defendants to retain counsel.

For this reason, although there is ambiguity as to whether defendants' Sixth Amendment rights have formally attached, the facts and circumstances surrounding this situation weigh in favor of unfreezing the Legacy Ranch Trust assets so that the defendants may retain counsel at this stage of the proceedings. The court, in its discretion, should unfreeze these assets to allow for an equitable result.

3. The Proceeds from the Sale of the New Holland Tractor Should Be Unfrozen to Allow Defendants to Exercise Their Sixth Amendment Right To Counsel.

Additionally, Defendant, in her individual capacity, asks the court to unfreeze the proceeds from the sale of the New Holland Tractor. The tractor was personal property owned by Gaylen Rust, separate and apart from the real property recently sold by the receiver to a bona fide purchaser in Ohio. It was not purchased with any tainted funds, and the proceeds have remained separate and distinct from any alleged tainted account or asset.

The arguments advanced, supra, in support of unfreezing the residence also apply to the proceeds from the sale of the tractor. Unfreezing the proceeds from the sale of the tractor will help to facilitate the Defendant's access to counsel of her choice, as well as assist Gaylen Rust in accessing counsel of his choice as provided by the Sixth Amendment.

CONCLUSION

For the above stated reasons, Defendant Denise Rust, individually and on behalf of the Legacy Ranch Trust, respectfully asks the court to unfreeze the Residence and the tractor proceeds.

DATED this 11th day of February, 2019

BUGDEN & ISAACSON, L.L.C.

By: /s/ Walter F. Bugden, Jr.
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Attorneys for Denise Rust