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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.

**REPLY TO PLAINTIFF'S RESPONSE
AND MEMORANDUM IN OPPOSITION
TO DEFENDANT DENISE RUST'S
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, by and through counsel, Walter F. Bugden, Jr., respectfully submits this reply to Plaintiffs Response to Defendant's Motion to Modify Order Freezing Assets and Receiver's Objection to Defendant's Motion to Modify Order Freezing Assets.

The Plaintiffs and the Receiver's arguments against modifying the Court's asset freeze Order to unfreeze the personal residence of Denise Rust (Layton property) and the proceeds from the sale of the Ohio tractor boil down to the:

(1) use of some investor funds to make mortgage payments or pay off loans secured by the Layton property renders the entire property subject to forfeiture because of co-mingling;

(2) it is too early to say whether the fraud began as early as 2005 when the Ohio tractor was purchased.

Essentially, the Plaintiffs and the Receiver argue that any use of traceable investor funds to make mortgage payments or to retire loans secured by the property triggers a complete loss of Denise Rust's interest in her personal residence as the trustee of the R Legacy Ranch Trust.

However, Plaintiffs and Receiver's arguments overlook that Utah statutory and case law protect a spouse's homestead exemption, misapplies the law on forfeiture and co-mingling, and trivializes the Sixth Amendment right to counsel.

PROCEDURAL HISTORY

Plaintiffs have accurately listed important dates in this litigation.

1. **November 13, 2019** – Plaintiffs Complaint filed. Plaintiffs named Denise Rust, Josh R. Rust, Aleesha Rust, Franklin, and several entities owned by Gaylen Rust as relief defendants.

2. **November 15, 2018** – This Court granted the ex parte temporary restraining order sought by Plaintiffs.

3. **November 27, 2018** – The Court entered a preliminary injunction, with the consent of Gaylen Rust, Denise Rust, and the other entity relief defendants. Mr. Hafen was also appointed as the Receiver.

4. **December 6, 2018** – Plaintiffs amended the complaint and named Denise Rust and Joshua Rust as defendants, adding the allegations that Denise and Joshua Rust aided and abetted the fraudulent scheme of Gaylen Rust and Rust Rare Coin by intentionally and knowingly participating in the scheme.

5. It is significant that the conversion of Denise Rust from relief defendant to defendant is based entirely upon the allegation that Denise Rust, who assisted in the day to day operations of Rust Rare Coin, signed checks issued to investors “knowing that these checks were Ponzi payments involving money contributed by other investors and by transferring money on the bank accounts defendants Rust and RRC used to receive investor funds to one or more relief defendants. Amended Complaint ¶¶ 4, 7, 17, and 47-49.

6. The Amended Complaint alleges Denise Rust knew the checks she was issuing were Ponzi payments, but this imputed knowledge and scienter is not supported by any specific facts because there are none.

ARGUMENT

I. A Husband's Debt is not a Wife's Debt.

Under U.C.A. § 30-2-5, “neither spouse is personally liable for the separate debts, obligations, or liabilities of the other,” and “wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse.” U.C.A. § 30-2-5 (2). Wife’s property is not attachable to her husband’s separate debts. *Peterson v. Peterson*, 571 P.2d 1360, 1977 (Utah 1977).

The Utah courts have protected the homestead exemption for nearly a century. In *Payson Exch.Sav. Bank v. Teietjen et ux*, 63 Utah 321 (1924), a debtor fraudulently conveyed real property. The court ruled that the homestead could not be reached by a creditor even if the property was sold or conveyed in fraud, “this is so because the homestead is not subject to attack by a creditor, and for the further reason that the homestead right is for the benefit of the family and such right cannot be frittered away even by the head of the family.” *Id.* at 600.

It is Gaylen Rust that is alleged to be the architect of the fraudulent Ponzi scheme. It is Gaylen Rust that allegedly met with the investors. It is Gaylen Rust that allegedly made misrepresentations. The residence is solely owned by the R Legacy Ranch Trust. Denise Rust is the trustee of the R Legacy Ranch Trust. Gaylen Rust quitclaimed his interest in the residence in 1992, long before the 2008 date, which the Plaintiffs now allege was the starting date of the fraud in the Amended Complaint.

II. Co-mingling does not Trigger Forfeiture.

The Plaintiffs and the Receiver are mistaken that the traceable co-mingling of *any* funds triggers the forfeiture to the Receiver of the entire asset, even the traceable untainted portion of the asset. Co-mingled funds that did not accrue because of the criminal offense will only be subject to forfeiture if the Receiver carries the burden of proof to show that the co-mingling was done *to facilitate the criminal enterprise*. The Tenth Circuit follows a facilitation theory for forfeiture based on co-mingling. Property is used to facilitate money laundering “when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance.” *United State v. Bornfield*, 145 F.3d 1123, 1135 (internal quotation marks omitted), (quoting Tencer, 107 F3d at 1134).

With respect to legitimate money co-mingled with illegitimate funds:

“Forfeiture of legitimate and illegitimate funds co-mingled and in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate, *i.e.*, disguise the nature and source of his scheme.” *Id.* at 1135 (citations omitted) (citing Tencer, 107 F3d at 1134-35).

To prevail under the facilitation theory, the Receiver must show that the facilitation was more than incidental or trivial; it must be substantial. *United States v. King*, 231 F.Supp.3rd 872, 897 (W.D. Okla. 2017) (quoting Cassella, Stefan D., *Asset Forfeiture Law in the United States*) (2d Ed. 213, Section 26-1, P. 938.)

A. The Receiver’s Burden

In order for the Receiver to forfeit the entire property held by R. Legacy Trust, the Receiver must show that co-mingling and pooling of funds was done to facilitate, *i.e.*, disguise the nature and source of, his scheme.” *King*, 231 F. Supp. 3d 872, 911. This

the Receiver cannot show with respect to a house purchased nearly 20 years before the fraud is alleged to have begun.

B. The Receiver does not have a Basis to forfeit the Entire Layton Property.

The Tenth Circuit has held that “the account itself is not ‘property’ subject to forfeiture, but merely a container to hold the ‘property’ where money is subject to forfeiture. In other words, the account number is merely used for identification purposes and is not itself a forfeitable item.” *King*, 231 F.Supp.3d 872, 911 (quoting *Bornfield*, 145 F.3d at 1137 N.7.). As the court goes on to say in *King*, “the ‘mere pooling or co-mingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture.” *King* at 231 F.Supp.3d at 912.

The R Legacy Ranch Trust is analogous to an account or a container. The Receiver and Plaintiffs must prove a nexus between the asset in the trust and the criminal conduct giving rise to the asset freeze. Simply tying the trust to co-mingled funds is not sufficient to trigger the forfeiture of this entire asset. The Layton property can be split between tainted and untainted portions of the entire asset.

C. Forfeiture or Loss of the Asset to Receiver

There are several important takeaways from the Tenth Circuit’s approach to co-mingling. First, the burden of proving the nexus between the criminal conduct and the property to be forfeited lies with the Receiver and the nexus must be substantial and not merely incidental. Second, not all tainted properties are necessarily subject to forfeiture, but only that part which derives from the criminal conduct *facilitating the*

disguising of the nature and source of the criminal scheme. That was certainly not the case when some investor funds were used to make mortgage payments or to pay off loans secured by the property originally purchased in 1989, long before ever a hint of a fraud or Ponzi scheme.

Forfeiture of legitimate and illegitimate funds co-mingled in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate, i.e., disguise the nature and source of, a scheme. *Libretti v. Courtney*, 633 Fed. Appx. 698, 2016 U.S. App. Lexis 1279 (10th Cir. Wyo., 2016), 215 U.S. Dist. Lexis 175867, citing *United States v. Bornfield*, 145 F.3d at 1135; *United States v. Gallant*, No. 03-cr-00232-RPM, 2006 U.S. Dist. LEXIS 7341 (D. Colo. Feb. 3, 2006), citing *Bornfield*, the court noted the “co-mingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture”; held that the amount to be forfeited could not be greater than the total amount of the transfers into an operating account. “The fact that the total value of the purported loans to customers which was materially overstated as a result of manipulations of the defendants did not justify a finding of forfeiture of the aggregate amount of the transfers into the operating account”);

United States v. Wittig, No. 03-40142-JAR, 2007 U.S. Dist. LEXIS 47172 (D. Kan. June 27, 2007) is another case following *U.S. v. Bornfield*, supra and particularly instructive. The court considered whether the government was entitled to the forfeiture of an entire mansion or just a portion of the traceable funds. The court agreed with the defendant that the mansion was not purchased or obtained fraudulently, but rather that the fraud stemmed from the over-renovation of the mansion. The court reduced the

forfeiture verdict to reflect only the amounts traceable to the fraud, which were the amounts expended to renovate the residence from a fraudulently obtained line of credit.

In *United States v. Miller*, No. 06-40151-JAR, 2009 U.S. Dist. LEXIS 83260 (D. Kan. Sep. 10, 2009), the court rejected the government's argument that a boat and an airplane that were partially funded from loan payments coming from the defendant's accounts constituted "proceeds" of the conspiracy to commit bank fraud. The defendant argued that the government had failed to establish a sufficient nexus between the acquisition of the boat and airplane and the proceeds generated by the bank fraud conspiracy to make the loan payments. The defendant also argued that the evidence of loan payments on the boat and airplane made from the operating account of the defendant failed to justify forfeiture of the entire boat and airplane. The court agreed that the government's proof only established that four payments . . . on the boat came from an account tied to the conspiracy to commit bank fraud. Because the preponderance of the evidence did not support the jury's forfeiture of the entire boat and airplane, the court reduced the forfeiture verdict to reflect only the amounts actually tied to the bank fraud conspiracy (the 4 payments on the boat).

In the instant matter, the asset freeze should be modified to allow for the sale of the property to allow Ms. Rust to retain counsel holding back the funds attaching from the Receiver's lien. There is no prejudice to the Plaintiffs or the Receiver by modifying the asset freeze in this fashion.

III. The Amount of Investor Funds Which Arguably Benefitted the R Legacy Trust is an Identifiable and Traceable Number

The amount of investor funds used for the benefit of the Layton property is traceable and can be calculated. Even assuming the computations of D. Ray Strong are 100 percent accurate, the value of Denise Rust's residence far exceeds the "lien" or obligation of the R Legacy Trust to reimburse the Receiver for the amounts of investor funds paid towards the property. Defendant Rust does not seek to unfreeze parcels C1 and C2. Defendant Denise Rust only seeks to unfreeze parcels A and B with an obligation to repay the Receiver for the full value of any investor funds traceable to these parcels. A sketch of the parcels is attached as Exhibit A. Parcel A is 5.8 acres. The Rust residence sits on this acreage. Parcel B is 5 acres and has a small home rented to a tenant. Parcel C1 and C2 consist of 2 acres. The R Legacy Ranch Trust sold C2 to Curt Rust. Defendant Rust is not asking the court to unfreeze parcels C1 and C2.

IV. Parcels A and B

- Purchase of Parcel B
 - \$65,002.84

- Pay off KeyBank Home Equity Line
 - September 30, 2008
 - \$22,065.67

- Pay off Lehman Brothers Loan
 - March 15, 2016
 - \$54,668.75

- Payments on Chase Loan
 - \$45,000

- TOTAL = \$186,737.26

Although an appraisal has not been obtained for the value of parcels A and B, the estimated value easily exceeds \$1 million.

The parcel with Denise Rust's home sits on 5.8 acres. Land in this area is selling for \$180,000 - \$200,000 per acre with water. The property contains four shares of water. Not all of the shares are necessary to sell the property. The water has an estimated value of \$20,000 - \$25,000 per share. The home has an estimated value of \$400,000 - \$450,000. Additionally, parcel B has a rental house with a half-acre of land with an estimated value of \$250,000.

Assuming Mr. Strong has accurately identified funds that were used either to purchase parcel B or to pay off loans secured by the entire property, including parcel A, the Receiver's lien's is equal to \$186,737.26. In the event that the property was sold, funds would be held back from the sale of the property, with the Receiver's lien from the *lis pendens* attaching to those proceeds pending further order from the Court. In this way, the receiver would be made whole for any sum arguably tainted and satisfying the *Bornfield* and *King* facilitation and substantial tests.

Attorney Fees

Gaylen, Denise, and Joshua Rust have all received target letters. This court has discretion to recognize Denise Rust's Sixth Amendment right to counsel. Admittedly, Ms. Rust has not been indicted. However, in certain circumstances, courts do appoint counsel to represent targets before indictments have been returned. This is a complicated, document intensive criminal investigation. Denise Rust needs representation now.

In *United States v. Miller*, supra, the court, after concluding that the government was not entitled to the forfeiture of the entire aircraft or boat, but was instead limited to the loan payments made from the accounts linked to the conspiracy to commit bank fraud, granted the defendant's motion for release of funds but held back proceeds from the sale of the plane to remain in escrow. There the court noted, "the court declines, however, to direct how the defendant shall utilize these proceeds, trusting he will work with defense counsel [to whom he had an outstanding debt for fees] to satisfy his obligations as set forth in the motion." In at 32.

Defendant Rust urges this court to reach the same result and allow the R Legacy Trust to be unfrozen on Parcels A and B to the extent that the receiver shall retain a lien against the proceeds from any sale in the amount of \$186,737.26.

Ohio Tractor

The Plaintiffs and the Receiver cannot present a compelling evidentiary basis to impound the proceeds from the sale of the Ohio tractor purchased in 2005. The acquisition of the tractor preceded the Plaintiffs' most recent commencement date of the alleged fraud. For the reasons previously stated, these funds should be released to Ms. Rust.

DATED this 18th day of March, 2019.

BUGDEN & ISAACSON, L.L.C.

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