

IN THE UNITED STATES DISTRICT COURT FOR THE 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,
and GAYLEN DEAN RUST, an individual,
DENISE GUNDERSON RUST, an
individual, and JOSHUA DANIEL RUST, an
individual,

Defendants,

and

ALEESHA RUST FRANKLIN, 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.

ORDER DENYING
MOTION TO MODIFY ORDER
FREEZING ASSETS (ECF NO. 107)

Case No. 2:18-cv-00892-TC-DBP

Defendant Denise Rust has moved the court to lift a freeze on two assets: (1) her personal residence; and (2) the proceeds from the sale of a tractor in Ohio. For the reasons set forth below, the court denies Ms. Rust's motion without prejudice.

BACKGROUND

Plaintiffs Commodity Futures Trading Commission (CFTC) and the State of Utah Division of Securities (State Division of Securities) allege that Ms. Rust and her husband, Gaylen Rust, carried out a Ponzi scheme known as the "silver pool" through Mr. Rust's business, Rust Rare Coin. The Defendants allegedly solicited money from investors to buy, pool, and trade physical silver, then used the money to pay earlier investors, fund business ventures, and pay personal expenses.

In November of 2018, after the CFTC and State Division of Securities filed suit, the court entered an Order Appointing Receiver and Staying Litigation ("Receivership Order," ECF No. 54). Among other provisions, the Receivership Order appointed Jonathan O. Hafen as the receiver and authorized him to identify, marshal, and preserve assets linked to the silver pool. For assistance, Mr. Hafen hired D. Ray Strong as an accountant.

The Order also froze all assets held by the Defendants and Relief Defendants, as well as other "Recoverable Assets"—those assets that "(a) are attributable to funds derived from investors or clients of the Defendants and/or Relief Defendants; (b) are held in constructive trust for the Defendants and/or Relief Defendants; (c) were fraudulently transferred by the Defendants and/or Relief Defendants; and/or (d) may otherwise be includable as assets of the estates of the Defendants and/or Relief Defendants." (*Id.* at 2.) The Receivership Order did not place Mr. and Ms. Rust's personal residence in the "Receivership Estate" (assets "which the Receivership

Defendants own, possess, have a beneficial interest in, or control directly or indirectly,” and placed in the “custody, control and possession” of the receiver), but it did subject the residence to the asset freeze. (Id. ¶ 7.)

DISCUSSION

Ms. Rust seeks to modify the Receivership Order to lift the freeze on her residence and on funds she acquired when she sold a tractor in Ohio. She argues that the residence is owned by a non-party (the Legacy Ranch Trust, of which she and her husband are beneficiaries), and that the residence and tractor were not purchased with investor funds. She also argues that these assets would allow her and her husband to retain counsel, and so exercise their rights under the Sixth Amendment.

The CFTC and State Division of Securities oppose the motion. They contend that the receiver and his accountant need more time to determine whether the assets are tainted by investor funds, and that the Sixth Amendment does not provide a right to counsel in civil matters. Both the CFTC and State Division of Securities rely on a declaration by Mr. Strong (“Strong Decl.,” ECF No. 123), which details his most recent efforts to trace investor funds.

The Rust Residence

The Rusts’ residence is composed of four parcels, denoted as Parcels A, B, C1, and C2. Ms. Rust concedes that Parcels C1 and C2 were purchased with silver pool investor funds, and only seeks to unfreeze Parcels A and B.

The Rusts purchased Parcel A, 5.8 acres of land, in 1989, then quitclaimed the parcel to the Legacy Ranch Trust in 1992. In 2003, the Legacy Ranch Trust used Parcel A as collateral to secure a \$53,000 home equity loan from KeyBank and purchase an adjoining parcel of land,

Parcel B. According to Mr. Strong, Rust Rare Coin recorded the KeyBank loan in its accounting system, made most of the payments on the loan, and may have used the loan proceeds for Rust Rare Coin's own purposes. Mr. Strong is still investigating the source of funds used to pay off the loan, but his investigation to date suggests the comingling of funds between the Rusts, Rust Rare Coin, and the Legacy Ranch Trust. (See Strong Decl. ¶¶ 33–39.)

The Rusts subsequently used Parcel B to secure two loans. In 2004, Ms. Rust obtained a \$107,250.00 loan from Lehman Brothers Bank. That loan was paid off in 2016, and the final payment of \$54,668.75 came by wire transfer from an account linked to silver pool investor funds.

In 2011, Legacy Ranch Trust used Parcel B to secure a \$222,884.00 loan from JP Morgan Chase Bank. Mr. Rust made payments on this loan from his personal account, using funds that may have been commingled with investor funds.

Turning to the merits of Ms. Rust's motion, the court notes that the ownership of the residence by a non-party, does not, on its own, support lifting the asset freeze. The Receivership Order applies to assets of the Defendants and Relief Defendants and to assets "of any other entities or individuals" that are attributable to investor funds. (Receivership Order at 2.) For this reason, the Order falls within the plenary powers of the court to extend an asset freeze "to a person not accused of wrongdoing '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. S.E.C. v. I-Cubed Domains, LLC, 664 F. App'x 53 (2d Cir. 2016) (quoting S.E.C. v. Cavanagh, 155 F.3d 129, 136 (2d Cir. 1998)). It does not necessarily matter that the residence is owned by a trust, and not the Rusts themselves.

Additionally, Mr. Strong has not yet uncovered the full extent to which investor funds may be linked to Parcels A and B. He has already determined that silver pool investment funds were used to pay loans secured by the two parcels. It would be premature to lift the asset freeze on the residence before Mr. Strong has completed his accounting.¹

Proceeds from the Sale of the Tractor

Lifting the asset freeze on the proceeds from the sale of the tractor would be similarly premature. Ms. Rust argues that the tractor was purchased in 2005—before the start of the alleged Ponzi scheme, and without the use of investor funds. But the CFTC and State Division of Securities allege that the silver pool Ponzi scheme began “at least as early as 2008.” (Am. Compl. ¶ 1, ECF No. 56 (emphasis added).) Mr. Strong, in his declaration, states that he has not yet been able to “review all the documents necessary to determine . . . when the Ponzi scheme began.” (Strong Decl. ¶ 18.) The court will not unfreeze the proceeds from the sale of the tractor until the receiver and his accountant complete their review. Ms. Rust may renew her motion at that time.

¹ In her reply, Ms. Rust raises two arguments in response to Mr. Strong’s declaration. First, she uses Mr. Strong’s accounting to argue that the maximum amount of investor funds connected to residence totals \$186,737.26—well below the value of Parcels A and B. (See ECF No. 146, at 9–10.) But Mr. Strong has not yet completed his full accounting, and his declaration does not include final calculations of investor funds. Second, Ms. Rust argues that the mere comingling of funds, without more, cannot trigger forfeiture of her residence to the receiver. But questions of forfeiture are not before the court. The residence is subject to the court’s asset freeze—Ms. Rust may not sell or otherwise dispose of it—but the receiver has not yet sought to forfeit the residence to the Receivership Estate.

Sixth Amendment Considerations

Alternatively, Ms. Rust argues that the court should modify the Receivership Order on the basis that doing so would allow her and Mr. Rust to exercise their Sixth Amendment right to retain counsel. She cites to Luis v. United States, 136 S.Ct. 1083 (2016), a case involving healthcare fraud, in which the Supreme Court held that a lower court could not freeze a criminal defendant's untainted assets and so prevent her from retaining the lawyer of her choosing.

But Luis was a criminal case. The Court's opinion involved "the fundamental character of a criminal defendant's Sixth Amendment right to the 'Assistance of Counsel.'" Id. at 1088 (emphasis added). This is a civil matter, and while the United States Attorney's Office has sent Ms. Rust and her husband letters advising them that they are targets of a federal criminal investigation, the two have not yet been charged with a crime. "The Sixth Amendment right to counsel does not attach until the initiation of formal adversary criminal proceedings 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Lucero v. Gunter, 17 F.3d 1347, 1351 (10th Cir. 1994) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). Sixth Amendment considerations do not support modifying the asset freeze at this time.

Spousal Liability under Utah Code § 30-2-5

In her Reply Brief, Ms. Rust raises the additional argument that she is not liable for her husband's debts under Utah Code § 30-2-5. However, she raised this argument for the first time on reply, so the court will not rule on it now. See DUCivR 7-1(b)(2)(A) (limiting reply memoranda "to rebuttal of matters raised in the memorandum in opposition").

ORDER

For the foregoing reasons, Ms. Rust's Motion to Modify the Order Freezing Assets (ECF No. 107) is DENIED WITHOUT PREJUDICE.

DATED this 4th day of April, 2019.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

TENA CAMPBELL
U.S. District Court Judge