

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 20-CIV-81205-RAR**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP,  
INC., d/b/a PAR FUNDING, et al.,

Defendants.

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**DEFENDANT PERRY ABBONIZIO'S MOTION FOR AN ORDER DIRECTING  
CITIZENS BANK TO UNFREEZE HIS ACCOUNTS AND MEMORANDUM IN  
SUPPORT OF LIMITING THE SCOPE OF ANY POTENTIAL ASSET FREEZE**

In advance of the hearing on Plaintiff Securities and Exchange Commission's (the "SEC's") request for a preliminary injunction, which is scheduled for Tuesday, August 18, 2020 at 10:00 A.M., Defendant Perry Abbonizio submits this Motion for an Order Directing Citizens Bank to Unfreeze His Accounts and Memorandum in Support of Limiting the Scope of any Potential Asset Freeze. For the reasons set forth below, the Court should immediately clarify the scope of the TRO and direct Citizens Bank to unfreeze Mr. Abbonizio's personal bank accounts which he owns jointly with his wife who had no involvement with Par Funding or this matter. As of this filing, the SEC has not moved to freeze Mr. Abbonizio's assets and the Court did not order that relief in its TRO or at any time thereafter. *See* Court's July 28, 2020 Order Granting Emergency *Ex Parte* Motion for Temporary Restraining Order and Other Relief (the "TRO"). And yet, since August 4, 2020, Mr. Abbonizio and his wife have been subjected to an unlawful, *de facto* asset freeze of their personal bank accounts — which resulted from the SEC's transmission of this Court's TRO to the Abbonizios' personal bank. Despite repeated requests, the SEC has refused to

provide any clarification of the TRO to Mr. Abbonizio's bank — necessitating this motion to the Court for immediate relief. The unauthorized freezing of Mr. Abbonizio's accounts has prevented him from responding to the SEC's outstanding discovery requests, obtaining the information necessary to prepare the Court-ordered accounting, depositing checks, and paying daily living expenses.

To the extent the SEC does seek an asset freeze against Mr. Abbonizio in the future and this Court determines that an asset freeze is warranted, however, then the Court should limit the scope of that freeze to no more than the net profits Mr. Abbonizio received from Defendant Complete Business Solutions Group d/b/a Par Funding ("Par Funding") during the relevant time period addressed by the SEC's allegations as to Mr. Abbonizio. But freezing Mr. Abbonizio's bank accounts would be unnecessary even under that scenario, because even if the Court imposes an asset freeze, Mr. Abbonizio has other, more significant, assets and equity interests that should be sufficient to fulfill the proper scope of any freeze.

#### **I. BACKGROUND**

On August 4, 2020, the SEC filed a "Notice of Financial Institutions to Which the Court's Order was sent and Amounts Frozen Pursuant to the Asset Freeze." D.E. 81. Included in a footnote was mention that over \$650,000 in Mr. Abbonizio's two personal bank accounts had been frozen. *See id.* at n.1. The SEC sent the TRO to Citizens Bank ("Bank"), Mr. Abbonizio's personal bank, even though in its Motion to this Court for a TRO it made plain that "[t]he Commission is not seeking an asset freeze against Abbonizio [] at this time . . . ." TRO Motion at 79 (DE 14). Neither this Motion nor any similar clarifying language was provided by the SEC to the Bank. Upon receipt of the TRO, the Bank did what the SEC knew it would — it immediately froze the joint personal checking accounts that Mr. Abbonizio shares with his wife, who has no relationship to Par Funding or this matter. Upon repeated inquiry, the Bank advised that it construed, and

continues to construe, the SEC's transmission of the Order as a directive to freeze Mr. Abbonizio's accounts, which it will only reverse upon clarification from the SEC.

Upon learning of this unauthorized freeze and hearing the Bank's explanation, the undersigned promptly brought it to the attention of the SEC. Yet, incredibly, when the SEC was asked to simply clarify for the Bank that this was not its intent, and that a freeze on Mr. Abbonizio's bank accounts was not within the scope of relief it had sought and obtained from the Court, the SEC feigned confusion at the request and declined, stating "[w]e simply fax the Court's Order to banks and they and their counsel identify which accounts to freeze. . . . We do not give banks instructions on which accounts to freeze, and therefore I am unclear why, if you believe the bank has incorrectly interpreted the Court's Order, you are asking the Commission to interpret the Order for the bank." <sup>1</sup>

And thus, because of the SEC's actions — whereby it *specifically* declined to seek an asset freeze against Mr. Abbonizio in its *Ex Parte* Motion for Temporary Restraining Order, but then proceeded to use the TRO to effectuate a freeze against him anyway, which it then disclaimed responsibility for and refused to help resolve — Mr. Abbonizio has, without any advance notice, been left unable to pay his mortgage and other bills, buy food for his family and cover day-to-day living expenses, pay defense costs, or even deposit checks. Importantly, Mr. Abbonizio has also been left without any way of compiling the bank records requested by the SEC or preparing the sworn accounting ordered by the Court in Section IV of the TRO Order: Indeed, the Bank has not

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<sup>1</sup> Despite repeated efforts to resolve this matter amicably with the SEC and without need of this Court's intervention, the SEC has refused to take appropriate action. On August 5, 2020 and thereafter, we have tried without success to have the SEC confirm the following substance in writing: "*We have conferred with Counsel for the SEC in this matter. The TRO order entered by the Court does not individually name Perry Abbonizio in the asset freeze section of the order. The SEC did not send a copy of the order to your bank to require Mr. Abbonizio's accounts to be frozen or held and does not object at this time to a release of the hold on his accounts with the bank.*"

only restricted Mr. Abbonizio from making transactions, but also from obtaining his historical banking records or current account balances.

As explained herein, the Court should decline to impose any asset freeze whatsoever on Mr. Abbonizio, as the SEC has not moved for that relief and has not, and cannot, demonstrate that it is entitled to it. But in the event the Court disagrees and finds that an asset freeze is warranted, then the Court should limit the scope of that freeze to the net profits Mr. Abbonizio received from Par Funding, because pursuant to the United States Supreme Court's recent holding in *Liu v. Securities and Exchange Commission*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1936 (2020), that amount represents the maximum amount of a potential disgorgement award against him.

Finally, the Court should enter an immediate order directing Citizens Bank to lift the freeze on Mr. Abbonizio's bank accounts, and the Court should do so *even if* it determines that an asset freeze is warranted. In addition to allowing Mr. Abbonizio to comply with his obligations in this case, this is because Mr. Abbonizio earns income from sources entirely separate and independent from Par Funding — and a freeze on his accounts would effectively cut off those income streams while leaving him without the means to live and support his family. Additionally, the funds in Mr. Abbonizio's accounts actually represent a relatively small portion of his total assets. Mr. Abbonizio has other assets that are sufficient to cover the proper scope of a potential asset freeze — including personal real estate and an interest in a portfolio of commercial office buildings.

## **II. LEGAL STANDARD**

In order to establish its entitlement to an asset freeze if and when the SEC moves for one against Mr. Abbonizio, the SEC must make a prima facie case of violations of the federal securities laws. *See SEC v. Creative Capital Consortium, LLC*, No. 08-81565-CIV-Middlebrooks, 2009 WL 10664454, at \*2 (S.D. Fla. Jan. 8, 2009). In considering the SEC's request, the Court should also consider, among other factors, “the egregiousness of the defendant's actions, the isolated or

recurrent nature of the infraction, [and] the degree of scienter involved . . . .” *Id.* (citation omitted). The more onerous the relief sought by the SEC, the more severe its burden. *See SEC v. Compania Int’l Financiera S.A.*, No. 11-04904-CIV, 2011 WL 3251813, at \*7 (S.D.N.Y. July 29, 2011).

The purpose of an asset freeze is to preserve the status quo and prevent the dissipation of assets pending a determination on the merits, and the proper scope of an asset freeze is therefore limited to the amount potentially subject to disgorgement. *Id.* at \*11–12. Just this term, in *Liu v. Securities and Exchange Commission*, the United States Supreme Court considered the extent to which the SEC may seek disgorgement pursuant to its power to award equitable relief under 15 U.S.C. § 78u(d)(5). The Supreme Court held that, “to avoid transforming an equitable remedy into a punitive sanction,” courts must “*restrict[] the remedy to an individual wrongdoer’s net profits to be awarded for victims.*” 140 S. Ct. at 1942, 1946 (emphasis added).

The Supreme Court clarified that net profits refer to “the gain made upon any business or investment, when both the receipts and payments are taken into account.” *Id.* at 1949–50. In other words, “courts must deduct legitimate expenses before ordering disgorgement . . . .” *Id.* at 1950. Although the Supreme Court recognized an exception to this holding for deductions where the “entire profit of a business or undertaking results from the wrongful activity,” the Court explained that this exception applies only to scenarios in which a defendant attempts to “diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions.” *Id.* (citing and quoting *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 203 (1881)). The limited exception is meant to encompass “wrongful gains ‘under another name.’” *Id.* at 1950 (citing and quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 803 (1869)).

Although exactitude is not required, in order to obtain an asset freeze, the SEC has the burden of showing a “reasonable approximation” of the amount potentially subject to disgorgement. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).

### **III. ARGUMENT**

#### **A. THE COURT SHOULD DECLINE TO IMPOSE AN ASSET FREEZE ON MR. ABBONIZIO**

The Court should decline to impose an asset freeze on Mr. Abbonizio because the SEC has yet to even move for this relief against him, and because in any event the SEC has not met its burden of showing an asset freeze is warranted. With regard to an asset freeze against Mr. Abbonizio, the SEC has indicated only that such a request will likely be forthcoming at some point. *See* TRO Motion at 79 (DE 14) (“The Commission is not seeking an asset freeze against Abbonizio [] at this time . . . .”). Yet, even in the SEC’s recently-filed Amended Complaint, the SEC excludes Mr. Abbonizio from the scope of its requested asset freeze relief. *See* Am. Compl. at 55 (§ III).

Mr. Abbonizio has been diligently working to gather documentation to prepare the sworn accounting ordered by the Court in Section IV of the TRO, which he has been unable to complete in part because his bank accounts have been frozen as a result of steps taken by the SEC that effectuated an unauthorized expansion of the TRO’s scope. Non-receipt of the accounting can hardly serve as the SEC’s justification for not moving to freeze his assets, however, given that the SEC’s Amended Complaint includes specific allegations as to the amounts Mr. Abbonizio received from Par Funding. *See* Am. Compl. at ¶ 20 (DE 119).

Regardless, the Court should also decline to enter an asset freeze as to Mr. Abbonizio because the SEC has simply not met its burden of making a prima facie case that Mr. Abbonizio has violated the federal securities laws. For example, other than in a conclusory manner, the SEC has not alleged (or substantiated through its evidentiary submissions) that Mr. Abbonizio,

specifically, had the scienter required to commit the alleged violations. Nor has the SEC articulated any basis for its supposed concern that Mr. Abbonizio would deplete or dissipate assets without a freeze in place.

**B. THE COURT SHOULD LIMIT THE SCOPE OF ANY POTENTIAL ASSET FREEZE TO AN AMOUNT EQUAL TO THE NET PROFITS MR. ABBONIZIO RECEIVED FROM PAR FUNDING**

If the SEC moves for an asset freeze against Mr. Abbonizio and the Court determines a freeze is appropriate, then given the Supreme Court's holding in *Liu* that any disgorgement award must be limited to an individual's net profits from the alleged wrongdoing, the scope of any freeze against Mr. Abbonizio should be limited accordingly to a reasonable approximation of the net profits he received from Par Funding. For the avoidance of doubt, under *Liu*, any asset freeze that is *instead* based on the gross amount Mr. Abbonizio received from Par Funding, or that implies Mr. Abbonizio should also face disgorgement liability for profits that accrued to one of his co-Defendants, would be impermissibly overbroad. *See Liu*, 140 S. Ct. at 1946 (explaining that "[t]he SEC's disgorgement remedy . . . is in considerable tension with equity practices" when joint-and-several disgorgement liability is imposed and when legitimate expenses are not deducted from gross receipts).

Further, in calculating Mr. Abbonizio's net profits from Par Funding, Mr. Abbonizio will be entitled to deduct the legitimate business expenses he incurred. *See Liu*, 140 S. Ct. at 1949–50; *Kokesh v. SEC*, 137 S. Ct. 1635, 1644–45 (2017) (quoting and affirming the Restatement (Third) § 51, Comment *h*, at 216: "As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction . . .").

**C. THE COURT SHOULD ENTER AN ORDER DIRECTING CITIZENS BANK TO UNFREEZE MR. ABBONIZIO'S BANK ACCOUNTS**

The Court should enter an order directing Citizens Bank to immediately lift the freeze on Mr. Abbonizio's bank accounts. As noted, this is necessary to allow Mr. Abbonizio to obtain bank records that are needed to comply with his discovery obligations and to prepare the Court-ordered accounting. It is also essential so that Mr. Abbonizio can pay day-to-day living expenses, provide for his family, and pay legal fees to counsel of his choice so that his due process rights in this quasi-criminal proceeding may be effectuated.

Further, it is appropriate to lift the freeze on Mr. Abbonizio's bank accounts because he continues to earn income from legitimate sources entirely independent from Par Funding — including rental income from the several personal properties he owns, as well as distributions and other income from passive investments in a series of properties through a commercial real estate investment company unrelated to Par Funding. A continued freeze of Mr. Abbonizio's accounts would effectively cut off those income streams and undermine the very purpose of an asset freeze — which is to *preserve* assets and prevent their dissipation. *See, e.g., SEC v. Spongetech Delivery Sys., Inc.*, No. 10-02031-CIV, 2011 WL 887940, at \*5 (E.D.N.Y. Mar. 13, 2011) (“The court must weigh the importance of ensuring that assets will be available to compensate investors or provide disgorgement against the possibility that the freeze will cause such a disruption of the defendants’ legitimate business affairs that the assets would be destroyed and the investors would be placed in greater danger of losing their funds.”).

A freeze of Mr. Abbonizio's bank accounts is simply unnecessary in this case because Mr. Abbonizio's cash on hand — i.e., the approximately \$660,000 in funds the SEC has learned are in Mr. Abbonizio's frozen Bank accounts (*see* DE 81 at n.1) and approximately \$300,000 in undeposited checks — represents a relatively small portion of his total assets. Although Mr.

Abbonizio is still compiling the documents and information required to prepare his sworn accounting, upon information and belief he has a net worth in excess of \$13 million, and his total assets exceed his net profits from Par Funding. Mr. Abbonizio has other assets sufficient to satisfy the scope of a potential asset freeze, provided the freeze is properly confined to the net profits he received from Par Funding, in accordance with *Liu*. These non-bank account assets exceed even the gross receipts received from Par Funding (not including the legitimate expenses and deductions Mr. Abbonizio would be entitled to under *Liu*).

Mr. Abbonizio's assets are understood to include, for example: (1) his equity in personal real estate (five properties), which is believed to be approximately \$4 million; (2) financial interests in a portfolio of commercial office buildings (31 properties), which is believed to be approximately \$6 million; and (3) brokerage accounts containing securities in excess of \$1.7 million.

Mr. Abbonizio requests that the opportunity to substantiate his assets upon completion of the Court-ordered accounting and prior to the Court's consideration of an asset freeze against him. In the event the Court nevertheless imposes an asset freeze on Mr. Abbonizio at this time, then Mr. Abbonizio requests that the Court nevertheless lift the freeze on his personal bank accounts, and instead implement whatever measures are appropriate to ensure Mr. Abbonizio's stake in other assets is preserved. If the Court nevertheless determines that it is necessary to include the funds in Mr. Abbonizio's bank accounts within the scope of a potential asset freeze, then Mr. Abbonizio requests a carve-out for his reasonable living expenses and defense costs.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should enter an order directing Citizens Bank to immediately lift the unlawful and unauthorized freeze on Mr. Abbonizio's bank accounts. The Court also should decline to impose an asset freeze over Mr. Abbonizio because it has yet to move

for that relief and is not entitled to it. However, if the Court determines an asset freeze is warranted, then the Court should limit the scope of the freeze to no more than the net profits Mr. Abbonizio received from Par Funding.

Date: August 14, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2020, a true and correct copy of the foregoing memorandum was served via CM/ECF on all counsel or parties of record on the Service List.

By: /s/ Jeffrey E. Marcus  
Jeffrey E. Marcus