UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. PATRICK CHURCHVILLE, CLEARPATH WEALTH MANAGEMENT, LLC Defendants, and CLEARPATH MULTI-STRATEGY FUND I, L.P. CLEARPATH MULTI-STRATEGY FUND II, L.P. CLEARPATH MULTI-STRATEGY FUND III, L.P. HCR VALUE FUND, L.P. Relief Defendants.	Case No. 15-cv-00191-S-LDA

PLAINTIFF'S OPPOSITON TO
DEFENDANT PATRICK CHURCHVILLE'S
MOTION TO MODIFY THE RESTRAINING ORDER TO RELEASE ASSETS

Defendant Patrick Churchville will not stop trying to take his victims' money for his own benefit. This time, he tries to claw back money reserved for victims to retroactively pay for counsel in his criminal case. Plaintiff Securities and Exchange Commission opposes Defendant Patrick Churchville's Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case (ECF No. 123). A criminal defendant has certain rights to "untainted" assets to obtain criminal defense counsel. But the assets Churchville seeks are not untainted and, as of now, Churchville has no need to hire counsel. His Motion should be denied.

I. Legal Standard

"A defendant … has a Sixth Amendment right to use her own *innocent* property to pay a reasonable fee for the assistance of counsel." *Luis v. United States*, 136 S. Ct. 1083, 1096 (2016) (emphasis added). But that right is not absolute. *See, e.g., United States v. Bokari*, 185 F. Supp. 3d 254, 264 (1st Cir. 2016) *citing Kaley v. United States*, 134 S. Ct. 1096 (sometimes a defendant will be unable to retain counsel of his choice if he cannot use forfeitable assets). A "defendant is not entitled to foot his legal bill with funds that are tainted by his fraud." *See SEC v. Coates*, 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994). "Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel…." *SEC v. Bremont*, 954 F. Supp. 726, 733 (S.D.N.Y. 1997), *citing SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993). Here, Churchville identifies only tainted assets, or those that arise from or were maintained with tainted funds. In addition, his *post hoc* request for counsel funds—well after he hired able counsel and that counsel completed their representation—does not share the Sixth Amendment protections detailed in *Luis.*

II. The Identified Assets Have No Value and/or Are Tainted

Churchville wants to use three assets to cover his defense costs: (1) the 6 Whitney Court condominium; (2) his partnership share of the HCR Value Fund; and (3) a refund from his former country club. Churchville should not be permitted to access any funds from these assets because each asset is either valueless or tainted.

A. The Condominium Had No Net Value to the Receivership Estate, and Was Maintained with Tainted Assets

Churchville claims the condominium is worth $276,738, based on the sale price obtained by the Receiver, but forgets that there was no equity in the property. The condominium had a $431,663 mortgage (according to Churchville's own July 2, 2015 Declaration of Assets) and thus

was "under water" by $154,924. When the Receiver sold the property, the mortgage holder permitted the Receivership Estate to retain only $23,000 to cover the Receiver's costs for maintenance and sale of the property. In other words, no money from the sale of the condominium is available to pay counsel.

And, while the condominium was purchased in 2005, Churchville must have paid the mortgage with funds derived from Churchville's frauds. Churchville's income during this period came from management fees he charged his investors while defrauding them in multiple ways (in violation of several civil and criminal laws and his fiduciary duty to them), so the condominium was paid for and maintained with those tainted funds. *See Luis*, 136 S. Ct. at 1089 (discussing "untainted assets" as those not connected to the offense). Churchville should not now get to use the condominium as if he had kept it isolated from his frauds.

B. The HCR Value Partnership Interest is a Tainted Asset

Next, Churchville claims a 1.26% partnership interest in the HCR Value Fund. The HCR Value Fund was liquidated for $714,226.09, so Churchville's share would be $8,999, if it were untainted. Churchville correctly points out that the HCR Value Fund is not part of the criminal charges against him. But the criminal charges are not the boundaries of his fraud. On June 2, 2015, the Court imposed an asset freeze in this civil fraud action, and the HCR Value Fund is a relief defendant named by the Commission in this case. The Commission's Amended Complaint (ECF No. 85-1), which may be accepted as fact by the Court, as Churchville has not answered and been defaulted, discusses how Churchville's frauds involved the HCR Value Fund, including: ¶65 (Churchville diverted funds from OPCO investment to fund HCR Value); ¶108 (HCR Value had received improper transfer of $1.2 million from MSF III as part of a series of fraudulent transfers); ¶114 (further details of fraudulent HCR transfer); ¶116 (HCR Value Fund received funds derived from Defendants' fraudulent scheme through 35 transfers of cash

between HCR Value and MSF Funds); ¶117 (other ClearPath hedge funds improperly were primary source of initial funding ($3.7 mm) of HCR Value); and ¶118 (several transfers were funded by diversion of investment redemption or loan proceeds). In particular, paragraph 83 of the Amended Complaint explains how Churchville diverted funds from the Managed Futures investment to fund a $400,000 investment—*unallocated to any of his investors and presumably for himself*—in HCR Value. *See also* Amended Complaint, ¶47 ("unallocated" investments allowed Churchville to fraudulently hold investments for his own benefit). Churchville makes no showing in his Motion that his partnership share in the HCR Value Fund is untainted by his fraudulent actions involving the HCR Value Fund. The Amended Complaint details how this share is tainted, and should not be given to Churchville.

C. The Country Club Membership was Maintained with Tainted Funds and Would Not Exist but for the Receiver's Efforts

Finally, Churchville wants the $6,000 refund that that the Court's Receiver arranged from the Port Judith Country Club. Churchville does not provide details about this membership refund, other than to say he purchased the membership before his criminal conduct began. Based on Churchville's continued membership during his frauds, one may reasonably conclude that Churchville paid annual membership dues and other country club-related expenses. Like the mortgage payments on the condominium, these club-related expenses were likely paid for by Churchville with the fees he charged his defrauded victims. Thus, money returned from the country club cannot be considered untainted. In addition, the membership refund should not be considered Churchville's "asset," as this $6000 was only obtained through the efforts of the Receiver, and was not an asset available to Churchville to retain counsel when he was criminally charged. To give Churchville the money from the Receiver's efforts would give Churchville the benefit of a Court-appointed business manager paid for with the victims' money.

At bottom, the assets that Churchville identifies are not "untainted" and are not available to pay counsel fees.

III. Churchville's Claimed Need for Counsel Funds Is Defective

Churchville requests money to: (1) repay a June 2016 loan taken to pay counsel for plea negotiations; (2) pay interest on that loan; and (3) pay appeal-related legal and auditor fees. But this Court ordered Churchville not to take any loans in its Asset Freeze. And Churchville needs no counsel now because he has no appeal pending and no right to an appeal. So Churchville does not need counsel funds, and his Motion should be denied.

A. If Churchville Took a $100,000 Loan in June 2016, He Violated this Court's Order

This Court's Preliminary Injunction and Asset Freeze (ECF No. 13, June 2, 2015) Paragraph VI.A prohibits:

> … the Defendants and … each of their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them … from taking any actions to … dissipate, assign, pledge, alienate, encumber, dispose of, or diminish the value in any way (including, but not limited to, making any charges on any credit card or draws on any other credit arrangement) any funds or other assets of the Defendants or presently held by them, for their direct or indirect benefit, under their direct or indirect control , or over which they exercise actual or apparent investment or other authority ….

Churchville gives no details about the loan, but there are only three possibilities for its origin: (1) he borrowed the money himself; (2) someone else acting on his behalf took out the loan, and now Churchville needs to pay it back; or (3) someone else took out the loan and Churchville does not need to pay it back. If the loan was taken out in one of the first two ways, Churchville (and possibly whoever acted on his behalf) defied this Court's Asset Freeze Order. This violation should not now be endorsed by the repayment of a loan that should never have been

taken in the first place.[1] In the third possibility, then Churchville cannot now claim $100,000 in victim-compensation funds to give to that other person. That person took on their own debt to help Churchville and cannot claim funds under *Luis.* And, as Churchville is not entitled to repayment of that loan, he is similarly not entitled to payment on the interest on the loan.

B. Unlike Luis, Churchville Did Not "Need" Untainted Funds to Hire Defense Counsel

Churchville's argument also fails because he did not "need" the supposedly untainted assets to retain his choice of counsel in his criminal case. Rather, he both chose and hired Mr. Traini and Mr. Lepizzera to represent him in connection with his entry of a guilty plea. *Luis* limits only the restraint of assets "needed" to retain counsel of choice. *See* 136 S. Ct. at 1086 (prohibiting the pretrial restraint of untainted assets "insofar as innocent funds are *needed* to obtain counsel of choice[.]") (emphasis added). Thus, if the defendant does not need access to those assets to hire counsel of choice, *Luis* is inapplicable.

The Tenth Circuit rejected a claim like Churchville's (by a criminal defendant in a 28 U.S.C. §2255 petition), where a criminal defendant alleged that the pretrial restraint of certain assets violated his Sixth Amendment rights because he could not use these assets to fund his defense. *See United States v. Gordon,* 657 Fed. Appx. 773 , 778-79 (10th Cir. 2016). The court rejected Gordon's Sixth Amendment claim, both because the assets were directly forfeitable and because the defendant "did not need the assets to retain counsel as he, in fact, had retained counsel of his choice and that counsel 'thorough[ly] and vigorous[ly]' represented him at trial.'"

[1] Churchville could have made a request for payment of counsel fees before incurring those fees. If he had done so, and if (unlike his present motion) he could point to untainted assets, he might then have been entitled to payment of reasonable counsel fees. But, at that hypothetical point, the Court could have set limits and exercised oversight of fees and expenses. Instead, Churchville appears to have waited, violated the Court's Order, and side-stepped any oversight the Court could have exercised. That behavior cannot now be rewarded.

Id. As in *Gordon*, *Luis* is wholly inapplicable to Churchville because he plainly did not need those assets to hire his counsel of choice.

C. No Funds Are Needed to Hire Appellate Counsel, Because No Appeal Is Pending

Churchville pled guilty to his crimes. In his plea agreement, Churchville agreed that he waived his "right to appeal the convictions and sentences imposed by the Court, if the sentences imposed by the Court are within or below the sentencing guideline range." The Court sentenced Churchville below that guideline range. His right to appeal has been waived. Indeed Magistrate Judge Almond recently issued a Report and Recommendation that discussed Churchville's current appeal rights, finding that "Mr. Churchville is not entitled to appeal at all…." Churchville has no present need for appellate counsel and his Motion should be denied for that reason as well.

For the reasons stated above, the Commission respectfully requests that this Court deny Churchville's Motion

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

By its attorney,

/s/ Marc J. Jones

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