UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v. CASE NO. 8:12-cv-47-T-23MAP

TODD FARHA, et al.,

Defendants.
_____/

ORDER

As the SEC knows well, the governing law requires an injunction to state the enjoined conduct "specifically." Heeding the specificity requirement in Rule 65(d), Federal Rules of Civil Procedure, the decisions routinely refuse to enter an injunction (even a "stipulated," "agreed," or "unopposed" injunction) that orders a defendant to "obey the law" or that expansively and mischievously prohibits a topic as broad as "fraud."[1] For the third time in this action, the SEC requests an injunction that

[1] *See, e.g.*, *S.E.C. v. Goble*, 682 F.3d 934, 948–53 (11th Cir. 2012) (condemning an obey-the-law injunction requested by the SEC); *S.E.C. v. Coffey*, 493 F.2d 1304, 1309–12 (6th Cir. 1974) (condemning an obey-the-law injunction requested by the SEC); *S.E.C. v. Graham*, 823 F.3d 1357, 1362 n.2 (11th Cir. 2016) (condemning an obey-the-law injunction requested by the SEC); *S.E.C. v. Smyth*, 420 F.3d 1225, 1233 n. 14 (11th Cir. 2005) (condemning an obey-the-law injunction requested by the SEC); *S.E.C. v. Sky Way Global, LLC*, 710 F.Supp.2d 1274 (M.D. Fla. 2010) (condemning an obey-the-law injunction requested by the SEC); *S.E.C. v. Gentile*, 2017 WL 6371301 (D.N.J. Dec. 13, 2017) (condemning an obey-the-law injunction requested by the SEC).

violates the specificity requirement of Rule 65(d). The SEC's third attempt at an overbroad injunction fares no better than the first two (unsuccessful) attempts.

DISCUSSION

Suing several former executives of WellCare Health Plans for securities violations, the SEC alleges (Doc. 1) that the defendants implemented a scheme to retain money owed to the State of Florida. The defendants allegedly knew that retaining the money caused material misstatements in WellCare's financial statements, SEC filings, and registration statements, but the defendants authorized or approved the misleading papers.

In case no. 8:11-cr-115-JSM (M.D. Fla.), which originates from the same conduct alleged in this civil action, Thaddeus Bereday pleaded guilty to violating 18 U.S.C. § 1035(a)(2) by "making a false statement related to a health care matter."

Bereday agrees to the entry of a judgment and a permanent injunction in this civil action, and the SEC moves (Doc. 39) unopposed for a judgment against Bereday. In the consent (Doc. 39-1), Bereday acknowledges pleading guilty in the antecedent criminal action and "withdraws any papers [] in this action to the extent that they deny any allegation in the complaint."

Duplicative of broad statutes or regulations, several items in the proposed injunction impermissibly order Bereday to obey the law — a point mentioned repeatedly to the SEC in this action. For example, the SEC proposes enjoining Bereday's "using interstate commerce, the mails, or any national securities exchange

to employ any device, scheme, or artifice to defraud" — that is, the SEC proposes boundlessly to enjoin any prospective violation of Rule 10b-5.[2] Because Rule 10b-5 prohibits anyone and everyone in any place at any time from "using interstate commerce, the mails, or any national securities exchange to employ any device, scheme or artifice to defraud," the SEC's proposal — again — warrants denial for the reasons stated twice in this action.

An April 17, 2017 order (Doc. 27 at 1) explains:

> Because the SEC's proposed "obey-the-law" provisions violate the Fifth Amendment's Due Process Clause, the Seventh Amendment, Rule 65(d) of the Federal Rules of Civil Procedure, and the separation of powers, this order declines to adopt the proposed "obey-the-law" provisions.

(Doc. 27 at 1, which cites *S.E.C. v. Goble*, 682 F.3d 934 (11th Cir. 2012) and *S.E.C. v. Sky Way Global, LLC*, 710 F.Supp.2d 1274 (M.D. Fla. 2010))

Moving for reconsideration of the April 17 order, the SEC argued that the proposed injunctions comport with "Eleventh Circuit precedent because the enjoined conduct is specifically described in the referenced laws and rules." (Docs. 31 and 32) Explaining for the second time in this action that several of the SEC's requested

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[2] Although the SEC appended several clauses (including "concerning the financial performance of a company . . .") to the last item in the injunctive series in sections one and two, under the last-antecedent rule the clauses are inapplicable to the preceding items in the injunctive series. In any event, the proposed injunction offers no specific definition (almost certainly, no manageable definition exists) of a "device, scheme, or artifice to defraud;" an "untrue statement or omission of material fact;" an "act, practice, or course of business that operates as a fraud;" or a "false or misleading statement or omission." *Cf. Payne v. Travenol Labs, Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) (holding that a prohibition on "discriminating" violated Rule 65(d)). Despite the addition of the clauses, sections one and two expansively and impermissibly prohibit "fraud" — a topic that has produced thousands of decisions covering hundreds of thousands of pages in the Federal Reporter. The addition of the clauses fails to secure the proposed injunctions' conformity with the governing substantive and procedural law.

injunctive provisions violate Rule 65(d) and *Goble*'s prohibition on an obey-the-law injunction, a June 7, 2017 order states:

> The SEC argues that the provisions comply with Rule 65(d)'s specificity requirements because the "enjoined conduct is specifically described in the referenced laws and rules." (Doc. 32 at 34) But an injunction that duplicates a statute or regulation meets Rule 65(d)'s specificity requirement only if the statute or regulation identifies "specific, objective criteria for compliance." *Goble*, 682 F.3d at 951. In *Goble*, an injunction barred the defendant's violating Section 10(b), which bans the use of a "manipulative or deceptive device" in the purchase or sale of a security. Also, the injunction barred the defendant's violating Section 15(c)(3) and Rule 15c3-3, which require the maintenance of a monetary reserve according to a prescribed formula. The Section 15(c)(3) ban comported with Rule 65(d) because the defendant could "fairly" identify the conduct captured by the injunction, but the Section 10(b) injunction, which required the defendant to "review hundreds of pages of the Federal Reporters, law reviews, and treatises," failed to specifically inform the defendant about the proscribed conduct. *Goble*, 682 F.3d at 951–52. In other words, an injunction's reproduction of a statute or regulation fails to establish invariably the injunction's compliance with Rule 65(d).

(Doc. 34 at 2–3)

For the third time in this action, the SEC proposes an injunction replete with impermissibly broad provisions. As explained above, the SEC's proposal copies verbatim from Rule 10b-5 even though the June 7, 2017 order explained at length the problems attendant to an obey-the-law injunction and even though *Goble* expressly prohibits an injunction that "simply use[s] the language of Section 10b of the Exchange Act or Rule 10b-5." 682 F.3d at 951.

The SEC contends that "the April 17 judgments and the June 7 order offered no guidance regarding why the modified language in the proposed injunctions failed to meet the requirements of *Goble* or other relevant Eleventh Circuit precedent." The

SEC's protestation about the lack of "guidance" warrants a brief comment: In addition to the April 17 and June 7 orders, a long line of decisions, including *Smyth*, *Sky Wal Global*, and *Goble*, explain the defects in an obey-the-law injunction, and *Goble* specifically prohibits the exact language the SEC proffers on this occasion. Nothing obligates a district court to repeat incessantly the reasons for refusing an impermissible injunction, particularly when the litigant which moves for the prohibited relief suffered an adverse (published) decision in this circuit over this precise issue.[3] The SEC might cherish the expansive and streamlined option of the

[3] An injunction, which is summarily enforced through a contempt motion, deprives the defendant of constitutional rights (including the right to a trial by jury) that accompany a civil or criminal action initiated respectively through a complaint or an indictment. *S.E.C. v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012) ("We went out of our way to condemn these injunctions because they . . . deprive defendants of the procedural protections that would ordinarily accompany a future charge of a violation of the securities laws."). Also, an obey-the-law injunction that duplicates a broad statute or rule violates Rule 65(d)'s specificity requirement. *Goble*, 682 F.3d at 949. Specifically rejecting the SEC's claim that an injunction duplicative of Rule 10b-5 comports with Rule 65(d), *Goble* explains:

> [A] defendant reading the injunction would have little guidance on how to conform his conduct to the terms of the injunction. Indeed, that defendant would need to review hundreds of pages of the Federal Reporters, law reviews, and treatises before he could begin to grasp the conduct proscribed by Section 10b and in turn the injunction. What's more, the judicial gloss on Section 10b is not fixed. . . This ever-changing judicial landscape would further complicate a defendant's efforts to comply with an injunction that recited the language of Section 10b.

682 F.3d at 951. Additionally, a contempt proceeding risks wasting the time and resources of a district court with no connection (other than the entry of the obey-the-law injunction) to a prospective violation of the securities laws. If Bereday moves to Alaska in twenty years and engages in what the SEC perceives as an "artifice to defraud" a resident of Juneau, the SEC can move in the Middle District of Florida for contempt.

"obey-the-law" injunction, but, quite sensibly, the law says "no" (although judges sometimes forget).[4]

In its third attempt to secure an obey-the-law injunction, the SEC emphasizes that Bereday consented to the injunction and erroneously suggests that the parties' consent to an injunction requires entering the injunction in the form requested by the parties. But the SEC omits to mention that Bereday "consented" to the obey-the-law injunction while defending a related criminal action. In any event, just as two parties cannot stipulate to subject-matter jurisdiction, two parties cannot stipulate to an injunction violative of substantive and procedural law. *See, e.g.*, *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238 (11th Cir. 1997) (explaining that a district court must refuse to adopt an unlawful consent decree); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.3d 831, 845–46 (5th Cir. 1993) (Higginbotham, J.) ("Even if all the litigants were in accord, it does not follow that the federal court must do their bidding."). In addition to protecting a defendant from a contempt charge based on conduct that the defendant reasonably believed permissible under the injunction, the specificity requirement in Rule 65(d) obviates the need for judicial

[4] Attempting to distinguish *Goble*, several decisions cite *S.E.C. v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004), as permitting any injunction that duplicates a statute or regulation. Nothing in *Goble* conflicts with *Ginsburg*; *Goble* prohibits only an injunction that duplicates a vague or expansive statue or regulation. To the extent the decisions suggest that *Ginsburg* permits entering an overbroad injunction, a long line of decisions confirms the prohibition in Rule 65(d) on an overbroad injunction. *See, e.g.*, *Schmidt v. Lessard*, 414 U.S. 473 (1974); *Payne v. Travenol Labs, Inc.*, 565 F.2d 895, 897–98 (5th Cir. 1978). In any event, the Eleventh Circuit in *Ginsburg* never decided whether an injunction comported with Rule 65(d) because the defendant prevailed in the district court (that is, the district court never enjoined the defendant's violation of a statute or regulation).

interpretation and administration of an expansive or vague injunction. A recent decision explains:

> An injunction must describe the "restrained or required conduct" in a manner that permits a judge asked to enforce the injunction to speedily and confidently determine whether some oppugned conduct offends the injunction and, if so, to design, impose, and enforce a remedy with assurance that any violation is contrary to the manifest and unmistakable terms of the injunction and is, therefore, knowing and willful. As an injunction increases in ambiguity and breadth and taxes increasingly a judge's interpretative ability, the inclination and legal authority of a judge either to require compliance or to punish non-compliance decreases at least proportionally. In other words, an injunction should not leave a reasonable person with a good-faith doubt about whether some act is "restrained or required."

Regions Bank v. Kaplan, 2017 WL 3446914 at *4 (M.D. Fla. Aug. 11, 2017).

Although several items in the proposed injunction violate Rule 65(d) and the prohibition on an obey-the-law injunction, other items (including the five-year prohibition on Bereday's serving as an officer or director of a securities issuer) specify the enjoined conduct and appear susceptible to enforcement without protracted dispute about the meaning or validity of the injunction.

INJUNCTION

1. Section 13(b)(5) of the '34 Act (claim seven)

Bereday or, if acting with knowledge of this injunction, an agent, servant, employee, attorney, and a person in concert with one of the above people (1) must not circumvent or fail to implement a system of internal accounting controls over the financial reporting of an issuer for which Bereday works or serves as an officer or

director and (2) must not falsify the books, records, or accounts of an issuer for which Bereday works or serves as an officer or director.

2. Service as an officer or director of an issuer

For five years after this order, Bereday must not act as an officer or director of any issuer that must file reports under 15 U.S.C. § 78o(d) or that has a class of securities registered in accord with 15 U.S.C. § 78l.

MONEY JUDGMENT

Bereday stipulates to judgment for the Securities and Exchange Commission and against Bereday in the amount of $4,500,000, which comprises disgorgement and pre-judgment interest of $3,500,000 and a $1,000,000 civil penalty. Bereday must satisfy the judgment no later than fourteen days after the judgment.

Bereday may pay by an ACH transfer/Fedwire, through Pay.gov, or by a certified check, a bank check, or a United States Postal Service money order payable to the Securities and Exchange Commission. If Bereday elects not to pay electronically, Bereday must send the check or money order to:

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, Oklahoma 73169

A letter that includes the name of this civil action and the case number must accompany a payment sent by mail. Whether Bereday pays electronically or by mail, Bereday must promptly provide the SEC with proof of payment. By paying the

judgment, Bereday relinquishes any legal or equitable right, claim, title, or interest in the money.

The SEC must maintain the money (and interest or income earned on the money) until a further order permits disbursement. The SEC may move to distribute the money through a "related investor action"[5] or in accord with the Fair Fund provision of the Sarbanes-Oxley Act. If the SEC elects not to distribute the money, the SEC must remit the money to the United States Treasury.

Even if the SEC declines to disburse the money through a Fair Fund provision or a related investor action, the $1,000,000 civil penalty must "be treated as a penalty paid to the government for all purposes, including tax purposes." (Doc. 39-2 at 5) In a related investor action, Bereday must not argue for, or claim entitlement to, an offset or reduction in compensatory damages based on Bereday's satisfaction of the judgment in this action. If another court grants a penalty offset based on Bereday's satisfaction of the judgment in this action, no later than thirty days after the order that grants the offset Bereday must notify the SEC about the offset and must remit to United States Treasury an amount equal to the offset.

For the purpose of a discharge exception in Section 523 of the Bankruptcy Code, Bereday admits the allegations in the complaint and admits that a debt based on the judgment in this action constitutes a debt for violating "the federal securities laws or any regulation or order issued under such laws, as set forth in"

[5] A "related investor action" means a private action for damages against Bereday by an investor who alleges substantially the same facts as the SEC alleges in this action.

Section 523(a)(19) of the Bankruptcy Code. Jurisdiction is retained to modify or to enforce this order.

CONCLUSION

The motion (Doc. 39) for entry of judgment is **GRANTED-IN-PART** and **DENIED-IN-PART**. To the extent the SEC proposes ordering Bereday to obey the law, the request for an obey-the-law injunction warrants denial. The clerk is directed to enter judgment for the Securities and Exchange Commission and against Thaddeus Bereday in the amount of $4,500,000. After entering judgment, the clerk must **CLOSE** the case.

ORDERED in Tampa, Florida, on May 1, 2018.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE