

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 v.

14 PATH AMERICA, LLC, et al.,

15 Defendants.

CASE NO. C15-1350JLR

ORDER

16 Before the court is Defendants Path America, LLC, Path America Snoco, LLC,
17 Path America Farmer's Market, LP, Path America Kingco, LLC, Path America Tower,
18 LP, Path Tower Seattle, LP, Potala Tower Seattle, LLC, and Lobsang Dargey,
19 (collectively "Defendants") and Relief Defendants Potala Shoreline, LLC, and Potala
20 Village Kirkland, LLC's (collectively "Relief Defendants") motion to modify the court's
21 temporary restraining order. (Mot. (Dkt. # 33).) Defendants and Relief Defendants also
22 filed a memorandum in support of their motion (Def. Mem. (Dkt. # 34)), which

1 | simultaneously serves as their response to Plaintiff Securities and Exchange
2 | Commission's ("SEC") motion for a preliminary injunction (PI Mot. (Dkt. # 10)).¹ In
3 | response, the SEC filed a "notice" of its "intent to oppose Defendants' and Relief
4 | Defendants' Motion to Modify Temporary Restraining Order." (Notice (Dtk. # 42).) For
5 | the reasons stated herein, the court declines to hear Defendants and Relief Defendants'
6 | motion to modify the temporary restraining order prior to the date presently scheduled for
7 | hearing on the SEC's motion for preliminary injunction.

8 | Defendants and Relief Defendants filed their motion to modify the court's
9 | temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b)(4). (*See*
10 | Mot. at 1 (citing Fed. R. Civ. P. 65(b)(4)).) This Rule permits Defendants and Relief
11 | Defendants "[o]n 2 days' notice . . . to move to dissolve or modify the order." Fed. R.
12 | Civ. P. 65(b)(4). "The court must then hear and decide the motion as promptly as justice
13 | requires." *Id.* This order addresses only the timing of the court's consideration of
14 | Defendants' and Relief Defendants' motion. The court concludes, based on its analysis
15 | below, that justice does not require that it hear and decide the motion to amend the

16 |
17 | ¹ The court notes that Defendants and Relief Defendants' memorandum in opposition to
18 | the SEC's motion for a preliminary injunction was due on September 21, 2015. (*See* Min. Entry
19 | dated 9/11/15 ("The response brief shall be filed by Monday, September 21, 2015 and the reply
20 | brief shall be filed by Friday, September 25, 2015.")) Defendants and Relief Defendants did not
21 | file their memorandum until Tuesday, September 22, 2015, at approximately 12:15 a.m.
22 | Defendants and Relief Defendants' response to the SEC's motion for preliminary injunction was,
therefore, untimely. The court's deadlines are not optional. Nevertheless, Defendants and Relief
Defendants failed to meet the deadline by only approximately 15 minutes in this case, and the
SEC has not indicated it has suffered any prejudice by this minor delay. In the future, however,
the court expects that parties to adhere to Federal Rule of Civil Procedure 6(b) regarding the
extension of deadlines. *See* Fed. R. Civ. P. 6(b)(1)(A), (B). Further failure to adhere to the
Federal Rules of Civil of Procedure and the court's local rules by any party or any party's
counsel may result in the court's imposition of sanctions.

1 temporary restraining order prior to its hearing of the SEC’s motion for preliminary
2 injunction.

3 The court received the SEC’s motion for a temporary restraining order on August
4 24, 2015, and entered a temporary restraining order later that same day. (*See* Mot. for
5 TRO (Dkt. # 2); TRO (Dkt. # 9).) At that time the court set the hearing on the SEC’s
6 motion for a preliminary injunction for September 14, 2015. (*See* TRO § XII at 10; *see*
7 *also* 8/24/15 Min. Entry (“A preliminary injunction hearing is scheduled for Monday,
8 September 14, 2015 at 1:00 p.m.”).) The SEC filed its motion for a preliminary
9 injunction on August 27, 2015. (PI Mot.)

10 On September 4, 2015, the parties filed a stipulation with the court seeking a
11 number of modifications to the temporary restraining order. (9/4/15 Stip. (Dkt. # 19).)
12 The parties stipulated to striking the September 14, 2015, hearing date for the SEC’s
13 motion for preliminary injunction and also stipulated to extending the duration of the
14 temporary restraining order until the court heard the SEC’s motion for preliminary
15 injunction. (*Id.* ¶¶ 4-5, at 4.) The court entered the parties’ stipulation as an order later
16 that same day. (9/4/15 Order (Dkt. ## 20 (sealed), 21 (redacted))). The hearing on the
17 SEC’s motion for preliminary injunction was then set for October 6, 2015, pursuant to the
18 parties’ stipulation and the court’s order. (*See id.* ¶ 5 (“[T]he parties are instructed to
19 contact the Clerk of Court to reschedule the hearing on Plaintiff’s motion for preliminary
20 injunction.”); *see also* 9/4/15 Stip. (same); 9/11/15 Min. Entry (setting the date for the
21 hearing on October 6, 2015).)

1 Defendants and Relief Defendants now move to modify the temporary restraining
2 order on two days notice. (*See generally* Mot.) Specifically, they seek to lift the court’s
3 freeze on all bank accounts and investment accounts maintained or controlled by
4 Defendants and Relief Defendants. (*See* Def. Mem. at 3 (citing TRO §§ VI.a, b).) Since
5 the court’s entry of the August 24, 2015, temporary restraining order, Defendants have
6 sought and the SEC has stipulated to five alterations of the order, all of which the court
7 has entered as modifications to its original order. (*See* Dkt. ## 17, 18, 20 (sealed), 21
8 (redacted), 24, 27 (sealed), 28 (redacted).) Four of these modifications permit
9 Defendants and/or Relief Defendants to make selected payments on an item-by-item
10 basis despite the imposition of a freeze on bank and investment accounts. (*See* Dkt. ##
11 18, 20 (sealed), 21 (redacted), 24, 27 (sealed), 28 (redacted).) Defendants and Relief
12 Defendants acknowledge that the SEC “could not have been any more cooperative and
13 responsive, and they have acted in good faith.” (Def. Mem. at 3.) In addition,
14 Defendants and Relief Defendants acknowledge that the court “has been extraordinary in
15 its instantaneous review and issuance of orders consistent with the modifications.” (*Id.*)
16 Nevertheless, Defendants and Relief Defendants insist that “***this process is simply not***
17 ***working.***” (*Id.* (emphasis in original).) Defendants and Relief Defendants contend that
18 the SEC lawyers are not “charged with managing day-to-day construction and
19 management decisions,” the court has been burdened by repeated requests to modify its
20 orders, and harm to Defendants, Relief Defendants, and their affiliates “grows as
21 payments are late or not made, and essential business and management activities grind to
22 a halt.” (*Id.*)

1 At the time that Defendants and Relief Defendants stipulated to an extension of
2 the temporary restraining order and to rescheduling the hearing on the SEC's motion for
3 preliminary injunction from September 14, 2015, to October 6, 2015, they had already
4 been operating under the temporary restraining order for 11 days. (*Compare* TRO
5 (entered on August 24, 2015) *with* 9/4/15 Stip. (filed on September 4, 2015).) The
6 stipulation which requested the extension of the temporary restraining order and hearing
7 for the motion for preliminary injunction was the third stipulation to modify the
8 temporary restraining order requested by the parties and granted by the court. (*See, e.g.,*
9 Dkt. ## 17, 18, 20, 21.) Thus, Defendants and Relief Defendants understood the realities
10 of operating under the temporary restraining order and seeking approval for
11 modifications as necessary. Despite these realities, they sought an extension for the
12 preliminary injunction hearing and the temporary restraining order until October 6, 2015.
13 If Defendants and Relief Defendants had not sought these extensions, the court would
14 have already heard the SEC's motion for preliminary injunction on September 14, 2015,
15 and the injunction would either be in place or the temporary restraining order would have
16 been lifted. Therefore, the fact that Defendants and Relief Defendants are still operating
17 under the temporary restraining order and the bank account freeze is an issue largely of
18 their own creation.

19 There are additional reasons, however, that the court declines to hear this motion
20 prior to the hearing on the SEC's motion for preliminary injunction. First, although
21 Defendants and Relief Defendants dispute certain allegations in the SEC's complaint (*see*
22 Def. Mem. at 7-11), for purposes of their motion seeking a modification of the temporary

1 | restraining order, Defendants and Relief Defendants “do not contest whether the SEC has
2 | met its *prima facie* burden on the merits.” (*Id.* at 7.) Thus, for purposes of ruling on
3 | Defendants and Relief Defendants’ motion to modify the temporary restraining order, the
4 | court treats the SEC’s burden as met.

5 | Second, Defendants and Relief Defendants have submitted testimony questioning
6 | the sufficiency of their own management structure and supporting corporate
7 | infrastructure. (*See* Kanner Decl. (Dkt. # 35) ¶¶ 2-3.) Indeed, the chief operating officer
8 | of Dargey Development testifies that Mr. Dargey’s “rise, especially over the last five
9 | years, has been so fast that his supporting corporate infrastructure has just not grown
10 | nearly fast enough to keep up with the volume of business he is doing.” (*Id.* ¶ 3.) To
11 | address this need, the current chief operating officer of Dargey Development joined Mr.
12 | Dargey “in September 2014 with the goal of bringing structure and process to [Mr.
13 | Dargey’s] real estate development business.” (*Id.*) Despite the addition of this new chief
14 | operating officer a year ago, Defendants and Relief Defendants admit that Path America,
15 | LLC, (“Path America”) still lacks employees capable of performing the court-ordered
16 | accounting for the money and other assets held by Path America or the other affiliated
17 | Defendants.² (9/18/15 Stip. (Dkt. # 25) at 2 (“Path America LLC lacks employees or
18 | regular outside accountants with the capability to perform the accounting”)) Thus,

19 |
20 | ² As a result, Path America retained Navigant Consulting to assist in performing the
21 | required accounting. (9/18/15 Stip. (Dkt. # 25) at 3.) The accounting performed by Navigant
22 | Consulting—based on information provided by Defendants and counsel—was timely filed with
the court on September 21, 2015. (Accounting (Dkt. # 32) (sealed).)

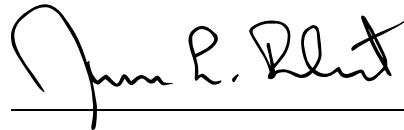
1 in addition to the evidence of fraudulent activity that the SEC provided in conjunction
2 with its motions for temporary restraining order and preliminary injunction, there is also
3 substantial uncertainty over the total amount and location of Defendants' assets. This
4 uncertainty is due to Defendants' and Relief Defendants' admitted insufficient corporate
5 infrastructure and present inability to perform an in-house accounting. Under these
6 circumstances, the freeze on bank accounts ensures that there is no additional waste
7 pending the court's consideration of the SEC's motion for preliminary injunction.

8 Finally, as Defendants and Relief Defendants acknowledge, both the SEC and the
9 court have been sensitive to the needs of the various entities at issue to make or receive
10 certain payments. Accordingly, the SEC and the court have stipulated to and ordered,
11 respectively, modifications to the temporary restraining order and freeze on bank
12 accounts. On balance, the court concludes that the present system of seeking stipulated
13 modifications to the temporary restraining order, as needed, strikes the appropriate
14 balance between permitting certain business operations to continue and protecting
15 innocent investors—at least until such time as the court can hear and decide the SEC's
16 motion for preliminary injunction.

17 Based on the foregoing, the court concludes that there is good cause for the
18 temporary restraining order to remain in effect, as amended to date, until such time as the
19 SEC's motion for preliminary injunction is heard and decided by the court. As noted
20 above, the hearing on the SEC's motion for preliminary injunction is presently scheduled
21 for October 6, 2015. The court also concludes that justice does not require that it hear
22 and decide Defendants and Relief Defendants' motion to modify the temporary

1 | restraining order to lift the bank and investment account freeze prior to the court's
2 | hearing of the SEC's motion for preliminary injunction on October 6, 2014. Both
3 | motions will be heard on October 6, 2015. As has been its practice since it imposed the
4 | temporary restraining order, the court will continue to endeavor to review and act
5 | promptly on any stipulated amendments to the temporary restraining order submitted by
6 | the parties.

7 | Dated this 24th day of September, 2015.

8 |
9 | 

10 | JAMES L. ROBART
11 | United States District Judge