

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|--|---|---------------------|
| ALLSTATE INSURANCE | : | |
| COMPANY, et al., | : | |
| Plaintiffs, | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| DAVIDSON MEDICAL GROUP, et al., | : | No. 01-5938 |
| Defendants. | : | |

MEMORANDUM AND ORDER

Schiller, J.

October 18, 2004

Plaintiffs are twelve insurance companies who claim that Defendants Joseph Davidson, Phyllis Davidson, Christopher Boucher, Brian Torchin, and nine corporate entities¹ conspired to defraud them by billing them for excessive and unnecessary chiropractic services. Presently before this Court is Plaintiffs' motion for prejudgment disclosure of property and assets, an equitable accounting, and a preliminary injunction against Defendant Joseph Davidson.² Following a hearing on September 30, 2004, and pursuant to Federal Rule of Civil Procedure 52(a), the Court now enters the following Findings of Fact and Conclusions of Law. For the following reasons, Plaintiffs' motion is granted in part and denied in part.

¹The nine corporate Defendants are: Davidson Medical Group; Center City Medical, Inc.; North Philadelphia Medical, Inc.; South Philadelphia Therapy; Strawberry Mansion Medical, P.C.; West Philadelphia Medical, Inc.; B.S.T. Enterprises, P.C.; Joseph Davidson, P.C.; and Advanced Medical Supply.

² Although Plaintiffs initially made their motion against all Defendants, Plaintiffs advised this Court on September 29, 2004 that they would be proceeding with their motion against Defendant Joseph Davidson only.

I. FINDINGS OF FACT

On November 28, 2001, Plaintiffs initiated this action pursuant to the United States Racketeer Influenced and Corrupt Organizations Act (“RICO”), Pennsylvania statutory law, and federal and state common law. Plaintiffs allege that Defendant Joseph Davidson (“Davidson”) presided over and directed an enterprise which engaged in fraudulent practices to obtain payments from automobile insurance carriers. (Second Am. Compl. ¶ 1.) Plaintiffs claim that Davidson, along with the other named Defendants, created and submitted medical documentation to Plaintiffs that contained, inter alia, falsified examination reports, billing for unnecessary treatment, and billing for treatment not rendered. (*Id.* ¶ 4.) Plaintiffs further claim that, through illegal money laundering and transaction structuring, Davidson has systematically secreted and dissipated the assets he fraudulently obtained from Plaintiffs. (*Id.* ¶ 205-17.) In addition to equitable and injunctive relief, Plaintiffs seek compensatory damages in excess of \$3,000,000.00. (*Id.* ¶ 241.)

On August 5, 2004, Plaintiffs filed the instant motion for prejudgment disclosure, an equitable accounting, and a preliminary injunction freezing Davidson’s assets. Plaintiffs have produced documentary evidence in support of their motion, including the affidavit of Defendant Christopher Boucher and the expert report of CPA Thomas Nihill. (Pls.’ Mot. for Prejudgment Disclosure of Property and Assets and for an Equitable Accounting and Preliminary Injunction Ex. A (Boucher Aff.), Ex. B (Expert Rep.) [hereinafter “Pls.’ Mot.”].) Plaintiffs have offered the Boucher affidavit and Nihill report as evidence that Davidson engaged in the fraudulent activities alleged in the complaint. (*Id.* at 6-7.) Davidson has failed to dispute any of this evidence. Instead, because Davidson is currently under investigation in a related criminal matter, he has asserted his

privilege against self-incrimination pursuant to the Fifth Amendment of the United States Constitution. (Ans. at 1.)

On September 30, 2004, the Court conducted a hearing on Plaintiffs' motion. At that hearing, Davidson's counsel indicated that Davidson is currently negotiating a plea agreement with the Government, and as such, he will continue to assert his Fifth Amendment privilege in this action. The parties did stipulate, however, that for purposes of the instant motion, the damages incurred by Plaintiffs as a result of Davidson's allegedly wrongful conduct are valued at \$1,800,000.00. The parties also agreed that should this Court decide to issue a preliminary injunction freezing Davidson's assets, the injunction need not apply to Davidson's ordinary living expenses.

II. CONCLUSIONS OF LAW

Plaintiffs have moved for: (1) a preliminary injunction freezing Davidson's assets; and (2) an order compelling Davidson to disclose any property or assets in which he has an interest and produce an equitable accounting of the assets he has allegedly dissipated since 1996. For the following reasons, Plaintiffs' request for a preliminary injunction is granted, and Davidson is hereby enjoined (either directly or through any other persons, trustees, nominees, or assigns) from concealing, dissipating, converting, conveying, selling, transferring, gifting, destroying, disposing, assigning, encumbering or secreting his assets, outside of ordinary living expenses, up to the sum of \$1,800,000.00. In all other respects, Plaintiffs' motion is denied.

A. Preliminary Injunctive Relief

1. Standard of Review

A party seeking a preliminary injunction must show that it is likely to succeed on the merits

and that it will suffer irreparable harm absent injunctive relief. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). If relevant, a district court should also take into account whether there will be greater harm to the nonmoving party if the injunction is granted, and whether granting the injunction is in the public interest. *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000). As a threshold matter, a court may only issue a preliminary injunction freezing a defendant's assets if the plaintiff has: (1) asserted a cognizable equitable claim; (2) demonstrated a sufficient nexus between that claim and specific assets of the defendant which are the target of the injunctive relief; and (3) shown that the requested interim relief is a reasonable measure to preserve the status quo in aid of the ultimate equitable relief claimed.³ *F.T. Int'l, Ltd. v. Mason*, No. Civ. A 00-5004, 2000 U.S. Dist. LEXIS 14979, at *4, 2000 WL 1514881, at *1 (E.D. Pa. Oct. 11, 2000) (citations omitted); *see also United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 496-97 (4th Cir. 1999).

Plaintiffs have satisfied the three threshold requirements for freezing Davidson's assets before a final judgment. First, Plaintiffs have asserted a claim for unjust enrichment (Second Am. Compl. ¶ 223), which is a cognizable equitable claim. *Bunnion v. Consol. Rail Corp.*, 108 F. Supp. 2d 403, 427 (E.D. Pa. 1999). Second, this equitable claim has a clear nexus to the assets Plaintiffs now move to freeze, for Plaintiffs have alleged that those very assets have unjustly enriched Davidson and ultimately seek to secure them through a constructive trust. (Second Am. Compl. ¶

³ There is some authority to suggest that the civil RICO claims alleged by Plaintiffs are also a proper basis upon which to grant a prejudgment asset freeze. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 697 (7th Cir. 2001) (holding that RICO statute allows private plaintiffs to seek injunctive relief), *rev'd on other grounds*, 537 U.S. 393 (2003); *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002) (same); *but see Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986) (holding that only government has right to seek equitable relief under RICO statute). Because I find that injunctive relief is permissible pursuant to Plaintiffs' unjust enrichment claim, I decline to address the question of whether Plaintiffs could also obtain injunctive relief under RICO.

218-25); *see Mason*, 2000 WL 1514881, at *2 (“Plaintiff seeks a constructive trust on the funds to be targeted by the injunctive relief, and thus a sufficient nexus exists.”). Finally, the requested asset freeze is a reasonable measure to preserve the status quo, because it would further the Court’s ability to grant a constructive trust over those assets at a later date. *Rahman*, 198 F.3d at 498 (“To impose a constructive trust over assets obtained through fraud requires preservation of the assets, and to be able to void fraudulent transfers of assets obtained through fraud likewise requires that those assets be preserved.”). Accordingly, Plaintiffs are entitled to a prejudgment freeze of Davidson’s assets, provided they have also made “the traditional showing necessary to obtain preliminary injunctive relief.”⁴ *Mason*, 2000 WL 1514881, at *1.

2. *Elements of a Preliminary Injunction*⁵

a. Likelihood of Success on the Merits

Plaintiffs have established that they are likely to succeed on the merits on their claim for unjust enrichment. Under Pennsylvania law, the elements of unjust enrichment are that: (1) plaintiff conferred benefits upon defendant; (2) defendant realized those benefits; and (3) defendant accepted and retained the benefits under circumstances in which it would be inequitable for

⁴ Davidson’s contention that there is no legal basis for an asset freeze is utterly without merit. Davidson maintains that the relief sought by Plaintiffs is “in its nature a request for a fraudulent debtor’s attachment,” which is no longer authorized under Pennsylvania law. (Def.’s Resp. to Pls.’ Mot. at 2.) However, “[w]hile it is true that [an] asset freeze has an effect comparable to that of an attachment, it is not an attachment.” *Fed. Trade Comm’n v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982). The mere fact that an attachment may be unavailable as a remedy does not mean that an equitable asset freeze is also unavailable. *Id.*

⁵ Davidson’s assertion of his Fifth Amendment privilege in lieu of challenging Plaintiffs’ evidence does not prevent this Court from considering whether Plaintiffs have met their burden on the elements of a preliminary injunction. *See, e.g., Singer*, 668 F.2d at 1113-14 (upholding preliminary injunction freezing defendants’ assets where defendants did not challenge evidence supporting freeze order and later asserted privilege against self-incrimination).

defendant to retain them without payment of value. *Bunnion*, 108 F. Supp. 2d at 427. Inequitable circumstances include those where a defendant acts wrongly or fraudulently in appropriating a plaintiff's property. *Mason*, 2000 WL 1514881, at *1 (citations omitted).

In this case, the affidavit of Defendant Christopher Boucher is undisputed evidence that Plaintiffs conferred benefits on Davidson which Davidson realized, accepted, and retained under inequitable, fraudulent circumstances. Boucher, the named treasurer of one of Davidson's chiropractic businesses (Boucher Aff. ¶ 6), affirms that he and Davidson conducted businesses "which systematically engaged in the submission through the United States Mail of false, fraudulent and exaggerated medical records, invoices and documentation to Plaintiff insurance companies which fraudulently induced Plaintiffs to pay medical bills" (*id.* ¶ 31). Boucher gives a detailed description of the manner in which he and Davidson carried out this scheme (*id.* ¶¶ 8-31), stating that "Davidson added services to patient bills and charged for the services although the services were not actually provided to the patients" (*id.* ¶ 13) and that "Davidson attempted to make treatment for each patient to last at least six months to maximize revenue obtained from the Plaintiff insurance companies" (*id.* ¶ 20). Boucher further affirms that "Davidson acted willingly and intentionally to deceive the Plaintiff insurance companies." (*Id.* ¶ 17.) This unchallenged affidavit is enough to establish a likelihood of success on the merits on Plaintiffs' equitable claim. *See Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001) ("[O]n an application for preliminary injunction, the plaintiff need only prove a prima facie case, not a certainty that he or she will win.").

b. Irreparable Injury

Plaintiffs' undisputed documentary evidence also establishes that, absent injunctive relief, Plaintiffs are likely to suffer irreparable injury. The probability of an unsatisfied money judgment

can constitute irreparable injury. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205-06 (3d Cir. 1990). Plaintiffs have produced sufficient evidence to show that any money judgment entered against Davidson is likely to go unsatisfied because Davidson has been dissipating assets that he fraudulently obtained from Plaintiffs. In his affidavit, Boucher affirms that “Davidson engaged in illegal money laundering through the use of bank and brokerage accounts established in my name.” (Boucher Aff. ¶ 32.) Boucher describes the money laundering scheme at length (*id.* ¶¶ 36-106), noting that “[b]etween August 1999 and June 2002[,] Davidson transferred and converted to cash approximately \$2,260,900[,] mostly through numerous transactions of approximately \$9,900 dollars” (*id.* ¶ 34). Boucher’s statements are corroborated by the Nihill report, which examines the relevant bank and brokerage records and concludes that “there is substantial evidence that Dr. Davidson engaged in a scheme to convert funds generated from his chiropractic offices into cash.” (Pls.’ Mot. Ex. B at 4.) This undisputed expert report, along with Boucher’s undisputed affidavit, establishes that a money judgment against Davidson is likely to go unsatisfied, and in turn, satisfies Plaintiffs’ burden on the element of irreparable injury. *See Mason*, 2000 WL 1514881, at *2 (holding defendants’ diversion and transfer of millions of dollars sufficient to show irreparable injury to plaintiff).

c. Harm to the Defendant and the Public Interest

Consideration of the relative harm to the Defendant and the public interest also weighs heavily in favor of Plaintiffs. *See Adams*, 204 F.3d at 484 (noting district court should consider these two elements where relevant). First, the irreparable harm Plaintiffs would suffer in the absence of a preliminary injunction substantially outweighs the harm to Davidson from the preliminary injunction ordered today, which is narrowly tailored to reflect the value of Plaintiffs’ damages and

which grants Davidson an exception for ordinary living expenses. *See Hoxworth*, 903 F.2d at 207 (“Of course a preliminary injunction causing serious injury to defendants can be justified if it inflicts no more harm than reasonably necessary to prevent plaintiffs who are likely to prevail on the merits from suffering an irreparable injury.”). Moreover, issuing a preliminary injunction against Davidson will not adversely affect the public interest. To the contrary, “the prevention of unjust enrichment by means of fraud or misappropriation, even that affecting only private entities, is in the general public interest.” *Mason*, 2000 WL 1514881, at *2.

Therefore, Plaintiffs’ request for a preliminary injunction is granted.

B. Equitable Accounting and Disclosure of Assets

Plaintiffs have also moved for prejudgment disclosure and an equitable accounting of Davidson’s assets. In general, parties may obtain discovery on any matter that is relevant to their claims or defenses. *See* FED. R. CIV. P. 26(b)(1). Furthermore, a plaintiff may obtain an equitable accounting where the defendant possesses money or property which, because of some particular relationship between himself and the plaintiff, he is obliged to surrender. *Am. Air Filter Co. v. McNichol*, 527 F.2d 1297, 1300 (3d Cir. 1975). Accordingly, Plaintiffs contend that they are entitled to an order compelling Davidson to disclose his assets and produce an equitable accounting of the assets which he has allegedly dissipated.

Because Davidson has asserted his Fifth Amendment rights, however, the Court cannot issue such an order. Davidson’s invocation of his Fifth Amendment privilege against self-incrimination is proper in this case, for the privilege “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a

subsequent state or federal criminal proceeding.” *United States v. Balsys*, 524 U.S. 666, 672 (1998) (citations and quotations omitted). As a result, Davidson cannot be compelled to participate in the discovery process in a manner that would amount to self-incrimination.⁶ *See Rogers Transp., Inc. v. Stern*, 763 F.2d 165, 166 (3d Cir. 1985) (“Although the contents of a document may not be privileged under the fifth amendment, the act of producing or authenticating the document may be privileged.”). Moreover, Davidson cannot be compelled to create an equitable accounting, as the process of making and producing an accounting would be testimonial and potentially self-incriminating. *See Hughes Tool Co. v. Meier*, 489 F. Supp. 354, 372-73 (D. Utah 1977) (holding defendant could not constitutionally be compelled to produce equitable accounting over invocation of Fifth Amendment privilege).

Therefore, Plaintiffs’ request for prejudgment disclosure and an equitable accounting is denied.

III. CONCLUSION

For the reasons set forth above, Plaintiffs’ motion for prejudgment disclosure of property and assets, an equitable accounting, and a preliminary injunction against Defendant Joseph Davidson is granted in part and denied in part. An appropriate Order follows.

⁶Notably, the Fifth Amendment does not excuse Davidson from the discovery process altogether. The parties have already been directed to engage in discovery (*see* Scheduling Order of June 25, 2004), and to the extent that doing so does not violate his Fifth Amendment rights, Davidson is expected to comply with that directive. For instance, Davidson may be able to produce records that have been created by third parties. *See Singer*, 668 F.2d at 1114 (upholding district court’s order directing defendant to produce third party documents, as production under compulsion of order would not necessarily constitute privileged authentication of documents).

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| Defendants. | : | |

ORDER

AND NOW, this **18th** day of **October, 2004**, upon consideration of Plaintiffs’ Motion for Prejudgment Disclosure of Property and Assets and For An Equitable Accounting and Preliminary Injunction (Document No. 52), Defendant Joseph Davidson’s response thereto, and following a hearing on September 30, 2004, it is hereby **ORDERED** that Plaintiffs’ Motion is **GRANTED in part** and **DENIED in part**, as follows:

1. Plaintiffs’ request for a preliminary injunction is **GRANTED** as to Defendant Joseph Davidson only. Davidson is hereby enjoined (either directly or through any other persons, trustees, nominees, or assigns) from concealing, dissipating, converting, conveying, selling, transferring, gifting, destroying, disposing, assigning, encumbering or secreting his assets, outside of ordinary living expenses, up to the sum of \$1,800,000.00. The term “assets” includes any personal property, real property, intangible property, rights under any insurance policy, investments, rights to any income, earnings or property pursuant to a will or trust, goods, credit, rights to receive income and/or any other thing of value in which Davidson possesses any

ownership, legal interest or equitable interest.

2. In all other respects, Plaintiffs' motion is **DENIED**.

BY THE COURT

Berle M. Schiller, J.