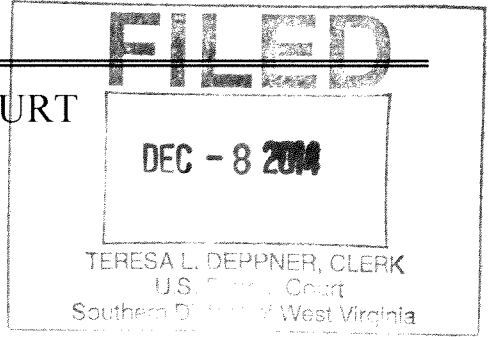


AO 91 (Rev. 11/11) Criminal Complaint



UNITED STATES DISTRICT COURT
for the
Southern District of West Virginia

United States of America
v.
Gary L. Southern
Defendant(s)

Case No.
2:14-mj-00107

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of January 21, 2014 - April 4, 2014 in the county of Kanawha in the Southern District of West Virginia, the defendant(s) violated:

Table with 2 columns: Code Section and Offense Description. Rows include 18 U.S.C. Section 157 (Bankruptcy Fraud), 18 U.S.C. Section 152 (False Oath in Bankruptcy Case), and 18 U.S.C. Section 1343 (Wire Fraud).

This criminal complaint is based on these facts:

SEE ATTACHED.

[X] Continued on the attached sheet.

Handwritten signature of James F. Lafferty II
Complainant's signature
James F. Lafferty II, FBI Special Agent
Printed name and title

Sworn to before me and signed in my presence.

Date: Dec 8, 2014

Handwritten signature of Dwane L. Tinsley
Judge's signature
Dwane L. Tinsley, United States Magistrate Judge
Printed name and title

City and state: Charleston, WV

A F F I D A V I T

SOUTHERN DISTRICT OF WEST VIRGINIA

JAMES F. LAFFERTY II, being duly sworn, deposes and states:

I. INTRODUCTION

1. I am a Special Agent with the Federal Bureau of Investigation and have been so employed for approximately eleven years. I am currently assigned to the Charleston, West Virginia, Resident Agency of the Pittsburgh Division. My primary experience as a Special Agent of the FBI is in investigations related to complex white collar crime.

2. I have been conducting an investigation to determine whether any federal criminal laws were violated in connection with a chemical spill into the Elk River in Charleston, West Virginia, in January 2014, and its aftermath. I make this affidavit in support of a criminal complaint charging Gary Southern with bankruptcy fraud, in violation of 18 U.S.C. § 157, making a false oath in bankruptcy, in violation of 18 U.S.C. § 152, and wire fraud, in violation of 18 U.S.C. § 1343.

3. I have learned the information in this affidavit from interviews and my personal review of records and transcripts, and also from other Special Agents and Investigators who are participating in the investigation. I have not included every fact known to me that relates to this investigation. Rather, I have set forth only those facts necessary to establish probable cause.

II. DETAILS OF INVESTIGATION

A. The Chemical Spill of MCHM Discovered on January 9, 2014

4. On January 9, 2014, a significant chemical spill was discovered at an above-ground storage tank farm located on the east bank of the Elk River, on Barlow Drive in

Charleston, West Virginia, within the Southern District of West Virginia. The tank farm, known as the Etowah River Terminal (“Etowah Facility”), was owned by Freedom Industries, Inc. (“Freedom”), a West Virginia corporation. The Etowah Facility contained ten large storage tanks, each with a capacity of approximately 400,000 gallons; three tanks with a capacity of approximately 47,000 gallons; and a number of smaller tanks. All of the tanks were located within a containment area, bordered by dike walls.

5. Freedom used the Etowah Facility to store and process chemicals, including a chemical that was used in the coal mining industry as a cleansing agent and which consisted primarily of the chemical 4-methylcyclohexane methanol. That substance, both in the form as Freedom originally purchased it and in the form after Freedom processed it for sale, was commonly referred to (and will be referred to hereinafter) as “MCHM.”

6. The spilled chemical substance consisted of MCHM, which leaked from two holes in the bottom of Tank 396 at the Etowah Facility. Tank 396 was one of the three 47,000 gallon-capacity tanks.

7. Based on information provided to me by officials of the West Virginia Department of Environmental Protection (“WVDEP”), who were present at the Etowah Facility on January 9, 2014, after the MCHM leak was discovered, I have learned that much of the leaked MCHM pooled in an area adjacent to Tank 396. A quantity of MCHM leaked out of the containment area, under and through the dike wall, in two areas, flowed down the riverbank, and then discharged into the Elk River.

8. The MCHM in the Elk River eventually flowed into a water treatment and distribution plant located approximately 1-1½ miles downstream from the Etowah Facility. Later, and as a result, at approximately 6:00 p.m. on January 9, 2014, the State of West Virginia

issued a “do not use” advisory, warning people not to use tap water for drinking, cooking, or washing. Consequently, for several days, water from the water company was not available to thousands of residents of Charleston and surrounding areas for anything but flushing toilets and putting out fires.

B. Freedom Industries

9. During my investigation, I have learned that for many years, and at all relevant times, Freedom and its affiliated companies, Etowah River Terminal, LLC (“Etowah River LLC”), and Poca Blending, LLC (“Poca Blending”), were engaged in the business of transporting, storing, and/or selling chemicals and other substances used in various industries such as the coal mining industry. Etowah River LLC was formed in 2001 to purchase and then operate the Etowah Facility. Poca Blending operated a chemical processing site in Nitro, West Virginia.

10. Freedom operated as an over-arching entity over both Poca Blending, which Freedom wholly owned, and Etowah River LLC. Freedom and Etowah River LLC shared common owners/members. Freedom and Etowah River LLC shared in common certain finance, administrative, and other personnel, including accountants. The plant manager for Etowah River LLC at the Etowah Facility in January 2014 was in fact an employee of Freedom. At all relevant times, Etowah River LLC acted on behalf of and with the intent to benefit Freedom and was affiliated with and closely related to Freedom.

11. The plant manager at the Etowah Facility reported to Gary Southern. Southern was initially brought on board by Freedom’s owners in approximately May 2009 to serve as Freedom’s Chief Operating Officer, with oversight and authority over Freedom, Etowah River LLC, and Poca Blending. Southern also served on Freedom’s board of directors from March

2010 until October 2013.

12. As the Chief Operating Officer of Freedom, Southern managed Freedom's day-to-day business affairs and operations at the Etowah Facility and at Poca Blending site in Nitro, West Virginia. He exercised authority in hiring employees and executing contracts, presided over staff meetings, and supervised employees.

13. The owners of Freedom sold their shares of Freedom, as well as their membership units in Etowah River LLC, on December 6, 2013, to a Pennsylvania corporation, Chemstream Holdings, Inc. ("Chemstream"). Southern played a key role in the negotiations leading up to the closing of the sale, as he provided information about Freedom to Chemstream, and assisted in negotiating the amount of money that would be placed in escrow for repairs to be made to the Etowah Facility.

14. Southern was appointed as Freedom's president in late December 2013.

C. Aftermath of the MCHM Discharge: Lawsuits and Bankruptcy

15. Shortly after the discharge of the MCHM was discovered, the FBI and the EPA opened an investigation to determine whether a violation of the Clean Water Act, specifically 33 U.S.C. § 1319(c), had occurred. The fact of the investigation was not a secret. As president of Freedom, Southern would have been aware of the federal investigation. He was on-site at the Etowah Facility for many days following January 9, 2014, and was present when an EPA special agent and I visited the Etowah Facility to conduct interviews. In addition, Freedom responded to several requests for documents from the federal government while Southern was working at the Etowah Facility, where many of Freedom's records and its computer server were stored.

16. In addition to the federal criminal investigation, there were other legal proceedings. Numerous lawsuits were filed against Freedom as a result of the discharge of

MCHM, and the subsequent denial of water from the water company for most uses. The first such lawsuit was filed in the morning of January 10, 2014.

17. On January 17, 2014, as a result of the numerous lawsuits against Freedom, and faced with the loss and potential loss of business and revenue, Freedom sought protection in bankruptcy by filing a voluntary petition for relief under Chapter 11 of Title 11, United States Code, the Bankruptcy Code, in the Bankruptcy Court in Charleston, West Virginia.

18. Southern was also sued individually as a result of the MCHM discharge and subsequent water denial. The first suit against Southern was filed on January 13, 2014, in the United States District Court in Charleston, West Virginia. A second lawsuit against Southern was filed in Freedom's bankruptcy case on January 20, 2014, in a proceeding known as an "adversary proceeding." (The individuals and entities who sued Southern will be referred to hereafter as the "Plaintiffs.")

D. Freedom's Bankruptcy Case

19. The Bankruptcy Court held a hearing in Freedom's bankruptcy case on January 21, 2014, in Charleston, West Virginia, shortly after the initiation of the bankruptcy case. At that point, it was Freedom's intent to reorganize. The purposes of the January 21 hearing included determining who had been responsible for the management, operations and recordkeeping of Freedom in the years and months leading up to the initiation of Freedom's bankruptcy case on January 17, 2014, and determining who should be entrusted with running Freedom as its bankruptcy case moved forward.

20. As president of Freedom, Southern testified under oath at the hearing about, among other things, whether he worked for or was otherwise affiliated with Freedom before

Chemstream purchased Freedom on December 6, 2013, and whether he was involved with Chemstream's purchase of Freedom.

21. Freedom's case involved a large number of creditors, including unsecured creditors. The creditors of Freedom include some or all of those who filed a lawsuit against Freedom and also those who sued Southern, that is, the Plaintiffs. As of December 3, 2014, over 3000 creditors have filed claims against Freedom, which total over \$176,000,000.

22. The Bankruptcy Court appointed a Committee of Unsecured Creditors (the "Committee") on February 5, 2014. One of the purposes of the Committee is to ensure that the amount of Freedom's funds available for the benefit of the unsecured creditors is maximized. A critical part of the Committee's purpose includes investigating the discharge of the MCHM into the Elk River and to determine if there are any legal causes of action that can and should be pursued on behalf of the unsecured creditors. Legal causes of action might include lawsuits against former officers, directors, and employees.

23. In Freedom's bankruptcy case, a meeting of creditors was held on February 25, 2014, in Charleston, West Virginia. The purposes of the meeting of creditors included reviewing the assets and liabilities of Freedom. It was also a purpose of the meeting of creditors to review issues that might affect those assets and liabilities, including whether there are any potential claims that might be brought on behalf of the debtor, that is, Freedom, or Freedom's creditors, and to have full information about those individuals who managed and operated Freedom in the years and months leading up to Freedom's filing for bankruptcy protection on January 17, 2014, insofar as that information may affect determinations about the assets and liabilities of Freedom.

24. Southern testified under oath at the meeting of creditors, answering questions about, among other things, his role with Freedom before Chemstream purchased Freedom on December 6, 2013, including whether he had been a part of Freedom's organization.

E. Southern Made False And/or Fraudulent Statements

25. Shortly after the leak and discharge of MCHM into the Elk River was discovered on January 9, 2014, Southern engaged in a pattern of deceitful behavior, which included numerous false and/or fraudulent statements about his role at Freedom, his role in the sale of Freedom to Chemstream, and his knowledge about conditions at the Etowah Facility.

26. For example, Southern falsely and fraudulently testified under oath at the January 21 hearing, in Freedom's bankruptcy case, about his role with Freedom before Chemstream purchased Freedom. The testimony was as follows:

Q: You didn't work for Freedom before the purchase by Chemstream, correct?

A [SOUTHERN]: I did not work for Freedom, no.

* * * * *

Q: Well, did you have any capacity prior to December 31, 2013 with any of the companies?

A: Yes.

Q: You did?

A: Prior to that - that's a great question. Prior to then, I worked as a part-time, financial type consultant to help the owners of that business get their finances and systems kind of back on track. Which is why I have a relatively detailed knowledge of the business.

Q: The owners of what?

A: The previous owners of Freedom - the previous

owners of Freedom Industries.

27. In fact, and as Southern then and there well knew, Southern did work for Freedom, and not as a “part-time, financial-type consultant,” before Freedom was purchased by Chemstream on or about December 6, 2013. Beginning in approximately May 2009, Southern worked for Freedom as its Chief Operating Officer, and he served on Freedom’s board of directors from March 2010 until October 2013. As the Chief Operating Officer, Southern managed Freedom’s day-to-day business affairs and operations at the Etowah Facility and the Poca Facility, exercised authority in hiring employees and executing contracts, authorized spending, presided over staff meetings, and supervised employees, among other things.

28. In that same January 21 hearing in Freedom’s bankruptcy case, Southern fraudulently testified under oath about his role in the purchase of Freedom by Chemstream. The testimony was as follows:

Q: Were you involved in the purchase of Freedom?

A [SOUTHERN]: Superficially.

29. In fact, and as Southern then and there well knew, Southern played a key role in the negotiations leading up to the closing of the sale, as he provided information about Freedom to Chemstream, and assisted in negotiating the amount of money that would be placed in escrow for repairs to be made to the Etowah Facility.

30. On February 19, 2014, Southern also made a deceptive statement to an official with the Occupational Safety and Health Administration about Southern’s role with Freedom before Chemstream purchased Freedom’s shares and about his knowledge of the condition of the dike wall in the containment area in the Etowah Facility. Southern stated that he “became President of Freedom Industries was [sic] on Dec. 31, 2013. My first day onsite as President was January 6, 2014. I provided some financial consulting prior to the purchase by Chemstream

Holdings.” This statement was deceptive because, before the purchase of Freedom by Chemstream, Southern worked for Freedom as the Chief Operating Officer, and not merely as a financial consultant. Southern possessed and exercised significant management authority, as noted above.

31. Southern also made a false and fraudulent representation while testifying under oath at the meeting of creditors that was held in Freedom’s bankruptcy case on February 25, 2014. Southern testified as follows:

Q: All right. And that purchase of equity interest involved what entities, Mr. Southern:

A [SOUTHERN]: Freedom Industries, Poca Blending and Crete Technologies and Etowah River Company.

Q: And it’s my understanding that all of these entities, approximately on December 31st of 2013, were merged into our current entity, Freedom Industries?

A: That is correct.

Q: All right. Now - so I can understand, as a basic outline of the schedules, while these entities were merged, they obviously were separate entities prior to the transaction on December 6th, as I understand it?

A: Uh-huh.

Q: And, in fact, they had different varied responsibilities or activities, would that be fair to say?

A: Yes.

Q: Okay. And what I’m going to try to do is, perhaps, go through each entity. And if you could, give me a basic description of what activities they, in fact, did prior to the acquisition would be helpful.

A: **Prior to the acquisition by Chemstream, I was not part of the Freedom organization.** I’m happy to speak

to what my understanding of the entities are, or [another witness] can speak to it. If you care for me to do it, I'm fine. [Emphasis supplied.]

32. In fact, and as Southern there and then well knew, Southern was “part of the Freedom organization” before Freedom was purchased by Chemstream on or about December 6, 2013. As noted above, and beginning in approximately May 2009, Southern worked for Freedom as its Chief Operating Officer, and he served on Freedom’s board of directors from March 2010 until October 2013. As the Chief Operating Officer, Southern managed Freedom’s day-to-day business affairs and operations at the Etowah Facility and the Poca Blending facility, exercised authority in hiring employees and executing contracts, authorized spending, presided over staff meetings, and supervised employees, among other things.

33. On March 15, 2014, Southern filed an application (the “Application”) for an order from the Bankruptcy Court that would confirm that paychecks for Southern’s services as president of Freedom could be issued and negotiated, and which would allow a claim for indemnification.

34. After objections were filed against Southern’s application, Southern filed, or caused to be filed, a “Notice of Withdrawal of Application,” on April 4, 2014. In the Notice, Southern stated that he was “withdrawing the Application to try to (i) end the unfounded allegations and ceaseless vilification of him for an incident that occurred a mere 6 working days after he became the President of the Debtor [Freedom], for which he bears no fault.” This statement was deceptive inasmuch as, before Southern became president of Freedom in late December 2013, he had served as Freedom’s Chief Operating Officer, beginning in May 2009, and had served on Freedom’s board of directors from March 2010 to October 2013. The Notice of Withdrawal of Application was filed with the Bankruptcy Court over the internet, via the case

management/electronic case filing (CM/ECF) system. Using the CM/ECF system, the Notice was served on numerous attorneys, some of whom are located out-of-state.

F. Southern's Intent to Defraud

35. Several facts indicate that Southern intended to defraud Freedom's creditors and the Plaintiffs, by misrepresenting and concealing material facts about his role and duties with Freedom before Chemstream purchased Freedom on December 6, 2013, and before Southern became president of Freedom in late December 2013.

36. First, the statements and representations themselves are indicative of an intent to defraud. They are either outright lies or are, at the very least, misleading. All of the statements indicate or suggest an effort to deflect blame from Southern for the discharge of MCHM into the Elk River, which resulted in the denial of water to thousands of people and businesses, for most uses, for several days.

37. Second, not only was Southern well aware of the federal criminal investigation into the MCHM discharge when he made the statements outlined above, he was also aware of lawsuits that had been filed related to the MCHM discharge. For example, at the January 21 hearing, while Southern was in the courtroom and before he testified, a lawyer orally noted his appearance, stating he was there on behalf of people who had filed a lawsuit. Those people were in fact plaintiffs against both Freedom and Southern, although it was not stated at the January 21 hearing against whom the lawsuit had been filed.

38. Also, on February 21, 2014, Southern caused to be filed in the Bankruptcy Court an "Omnibus Affidavit," which he signed and in which he acknowledged that "approximately 31 lawsuits had been commenced against Freedom in state and federal courts," relating to what

Southern deemed the “Incident” involving one of Freedom’s storage tanks on or about January 9, 2014.

39. Moreover, the Committee publicly stated, at a hearing in February 2014 in Freedom’s bankruptcy case, a critical component of the case includes investigating the MCHM discharge into the Elk River and determining whether the bankruptcy estate has any causes of action that should be pursued on behalf of Freedom’s creditors.

40. In addition, in Southern’s Application for an order confirming that paychecks to him could be issued and negotiated (discussed above in paragraph 33), which was filed with the Bankruptcy Court on March 15, 2014, Southern stated that he had been named in two lawsuits related to the “Incident.”

41. There is much at stake for Southern, as he possesses substantial assets. For example, on February 7, 2014, Southern transferred \$6.5 million from an account with Wells Fargo Bank, N.A., to an annuity account with Jackson National Life Insurance Company. Southern also has pension and/or retirement accounts with other financial institutions. The total of all of his account exceeds \$7,700,000 as of October 31, 2014.

42. Southern thus has a substantial motive to avoid being linked to Freedom before the purchase by Chemstream. And the efforts to avoid being linked to Freedom before the purchase by Chemstream have worked thus far. For example, when the Committee for Unsecured Creditors filed an objection to Southern’s Application on March 28, 2014, the Committee stated in its objection, “The Committee is informed and believes that Mr. Southern was employed as the president of the Debtor on the Petition Date. The Committee is further informed and believes that Mr. Southern is not a long standing employee of the Debtor; having served in his present capacity for no more than 30 days prior to the Petition Date.”

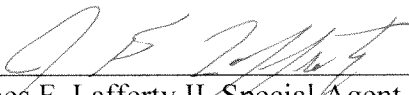
43. Counsel for the Committee has stated to me very recently that he has no information about Southern's working for Freedom before the purchase by Chemstream. According to Counsel, such information would affect the Committee's investigation of the MCHM discharge and its determination of whether there are any possible legal causes of action against former officer, directors, and employees.

44. All of these facts indicate that Southern's goal in making the false and/or deceptive statements is to protect his assets from legal judgments that may result from the lawsuits already filed by the Plaintiffs or that might result from other lawsuits or actions taken by or behalf of Freedom's creditors.

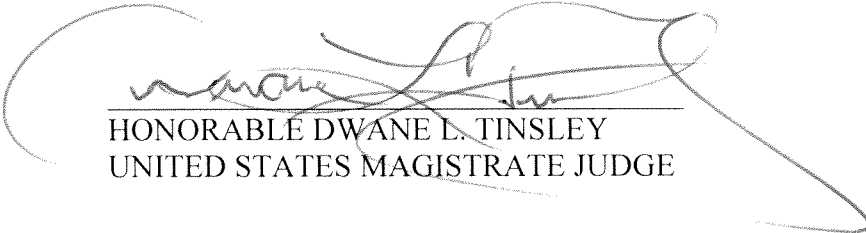
45. There is thus probable cause to believe that Southern devised a scheme to defraud that began shortly after January 9, 2014, and is in fact ongoing. He committed bankruptcy fraud by making false and fraudulent representations to execute or carry out the scheme, as outlined above in paragraphs 26, 28, and 31, and filing a document in Freedom's bankruptcy case, that is, the Notice of Withdrawal of Application, as noted above in paragraph 34. He made a false oath in and in relation to Freedom's bankruptcy case, as explained above in paragraph 31. And he engaged in wired fraud to execute the scheme to defraud, by causing to be transmitted by wire the "Notice of Withdrawal of Application," which was filed via the CM/ECF system in the Bankruptcy Court and served on out-of-state lawyers using the CM/ECF system, on April 4, 2014, as discussed above.

46. The proceeds of the wire fraud scheme to defraud include Southern's net worth. As of October 31, 2014, Southern's net worth is believed to be at least \$7,700,000.

Further your affiant sayeth naught.


James F. Lafferty II, Special Agent
Federal Bureau of Investigation

Sworn to before me, and subscribed in my presence, this 8th day of December, 2014.


HONORABLE DWANE L. TINSLEY
UNITED STATES MAGISTRATE JUDGE