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Cannabis Co. Says Indicted CEO Can't Testify In Civil Suit

By **Mike Curley**

Law360 (October 17, 2022, 2:15 PM EDT) -- A cannabis-friendly banking firm is urging a California court to issue a stay on claims that it failed to pay taxes on behalf of one of its clients, resulting in millions in penalties, saying because the CEO has been indicted and is now in federal custody, he cannot appear to testify at an upcoming hearing.

In a **reply brief** filed Friday, Pacific Banking Corp. and its CEO, Justin Costello, said the indictment, which concerns much of the same conduct that CCSAC Inc. and Cann Distributors Inc. are suing over, requires a delay in the suit, as any testimony he is compelled to give in the civil suit would implicate his Fifth Amendment rights.

The reply comes less than a week after Cann filed its **response** to Pacific's bid for a stay in the case. In that response, Cann had argued that Costello need not be present at the hearing scheduled for Oct. 18, that Costello had already waived his Fifth Amendment rights by giving deposition and testimony in this case, and that it would be prejudiced by a stay, given the discovery delays that prompted its motions for sanctions.

"Defendants have ignored multiple court orders, systematically shirked their discovery obligations, and submitted a sham declaration opposing summary judgment, greatly increasing the costs of this litigation," Cann wrote last week. "An open-ended delay in resolving this case makes it increasingly unlikely that Plaintiffs will ever get their money back."

In Friday's reply, Pacific wrote that the court had explicitly stated that it expects Costello will be prepared to testify — an expectation that cannot be met while Costello is in federal custody following a late-September indictment.

Costello's arrest hampers his defense counsel's ability to prepare and file oppositions to Cann's bids for sanctions, according to the reply brief, as Costello is the defendants' only witness to the substance of the matters at issue in this case.

Pacific further contended the argument that Costello's Fifth Amendment privileges aren't implicated is "preposterous," saying "any compelled speech whatsoever" runs against his privilege against self-incrimination, and he cannot have waived his Fifth Amendment rights, as that right applies on a question-by-question basis, and can't be asserted or waived generally.

Cann first sued Pacific in March 2020, accusing it of failing to make more than \$2 million in tax payments to the state of California on its behalf, as well as failing to pay vendor invoices. A month later, the company secured an order blocking Pacific from touching the roughly \$2.8 million Cann said it had deposited with the marijuana-friendly financial institution, a middleman between cannabis companies and traditional banks. The unpaid taxes have racked up \$2 million in state penalties, Cann said in a September filing.

Cann **sought sanctions and a default judgment** against Pacific in September, saying Costello lied during a deposition and submitted falsified documents. That motion came after U.S. District Judge James Donato of the Northern District of California **threatened** the banking firm with sanctions and blamed it for multiple rounds of discovery disputes, according to a transcript of court proceedings.

At that hearing, there was concern about the exact location of money that the court had ordered set

aside for the length of the dispute. When asked whether Costello had moved money from that account, Steven M. Selna of Selna Partners LLC, a lawyer for Cann Distributors, said Costello had invoked the Fifth Amendment.

"Where is the money? I mothballed that money. Where is it?" Judge Donato asked. "It should be in an account to the dollar, to the cent. I did this. Where is it?"

In addition to the indictment, Costello was also hit **in September** by a complaint from the U.S. Securities and Exchange Commission, alleging he defrauded investors of millions by posing as a Special Forces veteran and Harvard-educated hedge fund billionaire, while trading stocks of companies he had control of, in a scheme that also involved Pacific.

While Cann had argued in its response last week that the only question before the court at this point is what type of sanctions to levy against Pacific and Costello, Pacific argued Friday this is not the case, as the court has not made a finding that sanctions are warranted, but instead intended to hear arguments on whether to issue sanctions.

"If Defendants' only key witness is unavailable to appear in this court or assist in opposing the sanctions motion, that would be the only extant 'disservice to the interests of justice,'" Pacific wrote.

Selna said Cann was pleased to move forward.

"We were pleased to see that in response to our Opposition as well as our two motions for sanctions, it appears the Court will be ruling on all pending motions and the order to show cause on November 15," he told Law360 on Monday, referring to the judge's order for a brief arguing why the defendants shouldn't be held in contempt for disturbing the funds.

Representatives for Pacific Banking Corp. and the other defendants could not immediately be reached for comment Monday.

Cann Distributors Inc. is represented by Steven Michael Selna and Robert William Selna of Selna Partners LLP.

Pacific Banking Corp. and the other defendants are represented by Stephen M. Lobbin of SML Avvocati PC.

The case is CCSAC Inc. et al. v. Pacific Banking Corp. et al., case number 3:20-cv-02102, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jonathan Capriel and Anna Scott Farrell. Editing by Alex Hubbard.