

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case No. 8:20-cv-00394

KINETIC INVESTMENT GROUP, LLC AND
MICHAEL SCOTT WILLIAMS,

Defendants, and

KINETIC FUNDS I, LLC,
KCL SERVICES, LLC D/B/A LENDACY,
SCIPIO, LLC,
LF42, LLC,
EL MORRO FINANCIAL GROUP, LLC, AND
KIH, INC. F/K/A KINETIC INTERNATIONAL, LLC

Relief Defendants

**DEFENDANTS' AND RELIEF DEFENDANTS' EMERGENCY MOTION FOR
CLARIFICATION OR, IN THE ALTERNATIVE, PARTIAL MODIFICATION OF
THE ORDERS GRANTING THE SEC'S EMERGENCY MOTIONS FOR ASSET
FREEZE AND APPOINTMENT OF RECEIVER (DOCS. 33 & 34)**

Defendants Kinetic Investment Group, LLC (“Kinetic Group”) and Michael Scott Williams (“Mr. Williams”), and Relief Defendants Kinetic Funds I, LLC (“Kinetic Funds”), KCL Service, LLC d/b/a Lendacy (“Lendacy”), Scipio, LLC (“Scipio”), LF42, LLC (“LF42”), El Morro Financial Group, LLC (“El Morro”), and KIH, Inc., f/k/a Kinetic International, LLC (“KIH”) move for clarification or, in the alternative, partial modification of the Order Granting SEC’s Emergency Motion For Asset Freeze And Other Relief (the “Freeze Order”) (Doc. 33) and the Order Granting SEC’s Emergency Motion for Appointment of Receiver (the “Receivership Order”) (Doc. 34), and state:

I. INTRODUCTION¹

Defendants and Relief Defendants respectfully seek clarification of or, in the alternative, relief from the March 6th Orders to unfreeze and release to them funds which are untainted by the alleged wrongdoing at issue. These subject funds were obtained by LF42, through Mr. Williams, on March 5th and derived from the publicly-known sale of LF42's ownership interest in Silexx Financial Systems, LLC ("Silexx") to the Chicago Board Options Exchange in November 2017. No Kinetic investor or Lendacy monies at issue were used for the funding, creation or development of Silexx. Moreover, upon its receipt of these funds, LF42 paid back all of its Lendacy loan (the only alleged ill-gotten gains it purportedly received from Defendants) and, among other things, deposited \$500,000 into the undersigned attorneys' account to apply toward the fees and costs for Defendants' and Relief Defendants' defense of this complex action through trial. Thus, there is no basis for the continued restriction of LF42's use of these funds.

Because the monies paid to LF42 from the sale of Silexx were untainted and in no way connected to the alleged unlawful conduct alleged by the Securities and Exchange Commission ("SEC") in its Complaint, it is Defendants' and Relief Defendants' position that this money is not engulfed in the March 6th Orders. To read the Orders otherwise would severely compromise Mr. Williams ability to pay his living expenses and Defendants' ability to defend themselves. The Defendants vehemently deny the SEC's allegations and intend to vigorously

¹ In this Motion, Kinetic Group and Mr. Williams are collectively referred to as "Defendants," and Kinetic Funds, Lendacy, Scipio, LF42, El Morro, and KIH are collectively referred to as "Relief Defendants". In addition, the Freeze Order and Receivership Order are collectively referred to as the "March 6th Orders."

defend themselves. Thus, Defendants and Relief Defendants seek clarification of the Court's March 6th Orders.²

To the extent this Court determines that the Silexx sale proceeds, including the \$500,000 deposited with Greenberg Traurig, are encompassed by the March 6th Orders, Defendants and Relief Defendants, for the reasons discussed below, respectfully request that this Court modify the March 6th Orders to: (1) release LF42 and unfreeze its assets, (2) provide Mr. Williams with \$5,000 per month to pay his necessary monthly living expenses, (3) approve of Defendants' and Relief Defendants' prior application of a portion of the Silexx sale proceeds held by Greenberg Traurig for the payment of legal fees, and (4) allow Defendants and Relief Defendants to use the remaining Silexx sale proceeds held by Greenberg Traurig to pay for their defense fees and expenses and Mr. Williams' defense of the parallel investigation.

In addition, Defendants and Relief Defendants request this Court unfreeze accounts held by unrelated third parties to this action—Rex Tenax, LLC and Pyram King, LLC. Defendants and Relief Defendants believe that the Receiver does not oppose the unfreezing of the Rex Tenax and Pyram King Accounts, but he has advised that he will not instruct the financial institution to release the freeze absent a Court order. These companies were formed in 2019, are not Relief Defendants, are not engaged in any businesses related to Kinetic Funds or Relief Defendants, and not conducting nor have conducted any business with Kinetic investors and/or Kinetic or Lendacy monies.

² As further explained in Section III(A), a portion of the \$500,000 has been applied to pay for Defendants' and Relief Defendants' defense fees and costs after entry of the March 6th Orders. Greenberg Traurig, however, will replenish these fees if this Court (a) determines that Defendants' and Relief Defendants' interpretation of the March 6th Orders is incorrect and (b) declines to modify the March 6th Orders as requested in Sections III(B)(1) and (3).

The Defendants and Relief Defendants conferred with the SEC and Receiver in compliance with the Local Rules to reach an amicable resolution on the issues raised in this Motion. The SEC, however, has refused to allow Mr. Williams to access a *single penny* to pay for groceries, shelter or defenses costs, or otherwise use accounts holding a few thousand dollars from wholly unrelated businesses to generate an income for himself. And the SEC would not agree to any compromise absent an agreement to their draconian conditions. The Defendants' and Relief Defendants' respectfully submit that the SEC's refusals and its draconian interpretation of the March 6th Orders are unnecessarily oppressive and borderline inhumane.

II. BACKGROUND.

A. Silexx Financial Systems, LLC.

Mr. Williams and his business partner co-founded Silexx in 2012. Mr. Williams owned a 40% interest in Silexx through his personal limited liability company, LF42. Silexx developed and operated an innovative multi-asset trade order and execution management system derived from software technology created by Mr. Williams and his business partner. No Kinetic investor or Lendacy monies at issue were used, directly or indirectly, for the funding, creation or development of Silexx and the SEC does not allege otherwise.³

³ Like Silexx's other customers, Kinetic Funds utilized Silexx for its terminal access and trade execution services in exchange for a monthly fee paid pursuant to an Electronic Services Agreement. On or about June 28, 2017, Kinetic Group and Silexx entered into the Electronic Services Agreement under which Kinetic Group transmitted trade orders to Silexx for execution upon one or more execution venues in exchange for a fee. As detailed *infra*, not long after Kinetic Group entered into the agreement, the Chicago Board Options Exchange purchased Silexx. The \$30,872.44 Kinetic Group paid to Silexx as alleged by the SEC (Doc. 1 at ¶ 39(c)) was for the Silexx terminal access and trade execution services. A copy of the Electronic Services Agreement is not attached to this Motion because it contains a

In late 2016, Silexx and publicly-traded Cboe Global Markets, Inc. (“CBOE”) began negotiating the purchase of Silexx. CBOE is one of the world’s largest exchange holding companies. Silexx subsequently sold all of its assets to CBOE in November 2017 pursuant to a confidential Asset Purchase Agreement dated November 1, 2017. The sale was publicly announced by CBOE on November 2, 2017.⁴ At closing, LF42 received a portion of the net proceeds of the sale (pursuant to its 40% interest in Silexx) and the remaining amount owed to LF42 was deposited into an account controlled by the majority stakeholder, which was to be paid to LF42 once certain earn-out conditions were satisfied.

B. The SEC Initiates This Action.

The SEC has been investigating Defendants and Relief Defendants regarding alleged securities laws violations since at least May 2019.⁵ Approximately one year later, on February 20, 2020, the SEC initiated this action by filing its Complaint for Injunctive and Other Relief and Demand for Jury Trial (“Complaint”) against Defendants claiming alleged securities violations and purported misappropriation of investor funds. (Doc. 1).

In its Complaint, the SEC sued LF42 as a Relief Defendant claiming that LF42 “received Kinetic Funds assets and proceeds of Defendants’ securities violations without any

confidentiality provision precluding its public disclosure. A copy of the Agreement, however, will be provided to the Court at a hearing on this Motion upon request.

⁴ PRNewswire, *CBOE Global Markets Acquires Assets of Silexx Financial Systems* (November 2, 2017, 9:29 AM), <https://www.prnewswire.com/news-releases/cboe-global-markets-acquires-assets-of-silexx-financial-systems-300548463.html>

⁵ The SEC’s investigation likely began months earlier. Defendants and Relief Defendants were first made aware of the SEC’s investigation by investigative subpoenas issued to them on or about May 7, 2019.

legitimate entitlement to the funds.” *Id.* at ¶ 5. The *only* alleged unlawful funds the SEC claims LF42 received from the Defendants is a \$2,550,000 credit line from Lendacy (the “Loan”) that was evidenced by two written Credit Facility Agreements and Disclosures dated April 15, 2019. *Id.* at ¶¶ 14, 37.

When it initiated this action the SEC also filed Emergency Motions for (a) Asset Freeze and Other Relief, and (b) Appointment of Receiver. (Docs. 2, 3). Among other things, the SEC requested in its Asset Freeze Motion that the Court freeze all of Defendants’ and Relief Defendants’ assets. (Doc. 2 at pp. 24-25). The Court scheduled a hearing on the Emergency Motions for March 6th. (Doc. 10).

C. LF42 Receives the Remaining Silexx Sale Funds And Pays Off Its Loan Before The March 6th Hearing.

Prior to the March 6th hearing, LF42, through undersigned counsel, engaged in discussions with counsel for Mr. Williams’ business partner in Silexx to obtain the remaining monies owed to LF42 from CBOE’s purchase of Silexx—\$3,414,964 (the “Silexx Sale Funds”). Mr. Williams’ business partner’s attorney advised Mr. Williams’ counsel that his business partner agreed to release the Silexx Sale Funds to LF42 on the condition that the monies were deposited with Greenberg Traurig (as counsel for Mr. Williams and LF42). On March 3rd, Mr. Williams, individually and on behalf of LF42, executed a Distribution Agreement and Mutual Release (“Distribution Agreement”) with his business partner, on behalf of Obsidian Technologies, LLC f/k/a Silexx, in exchange for the distribution of the Silexx Sale Funds. A copy of the Distribution Agreement is attached to this Motion as **Exhibit A**. Pursuant to the terms of the Distribution Agreement, Obsidian Technologies wired the Silexx Sale Funds to Greenberg Traurig for the benefit Mr. Williams and LF42. *See Ex. A.*

On March 5th, prior to the entry of the Freeze Orders, Greenberg Traurig, at the direction of Mr. Williams, wired \$2,914,964 of the Silexx Sale Funds to a Kinetic Group BMO Harris bank account (“Kinetic Group Account”), while \$500,000 of the Silexx Sale Funds remained at Greenberg Traurig for (a) Defendants’ and Relief Defendants’ payment toward their attorneys’ fees in their defense of what Mr. Williams anticipates will be a protracted litigation of this action through trial, and (b) Mr. Williams’ defense of the parallel investigation referenced in Defendants’ and Relief Defendants’ Response in Opposition to the SEC’s Emergency Motions. (Doc. 25 at p. 9). On that same day, Mr. Williams subsequently made the following transfers from the Kinetic Group Account: (1) \$2,179,519.86 to payoff LF42’s Loan in its entirety; (2) \$7,482.42 to payoff a Lendacy loan received by Mr. Williams in April 2015 in its entirety; (3) \$84,875.35 to pay down a Lendacy loan taken out by Mr. Williams in March 2017; (4) \$82,521.58 to pay down a Lendacy loan taken out by Scipio in May 2018; and (5) \$460,564.79 to an account held by LF42, which at the time was under Mr. Williams’ control. Documents evidencing the loan payments are attached to this Motion as **Exhibit B**. Mr. Williams also allocated \$100,000 to remain in the Kinetic Group Account for ongoing business expenses.

Mr. Williams and LF42 were unable to obtain the Silexx Sale Funds before Defendants’ and Relief Defendants’ Opposition to the SEC’s Emergency Motions was filed on March 4th. Thus, in Defendants’ and Relief Defendants’ Opposition, they advised the Court that, among other things, LF42 was in the process of paying off the Loan. (Doc. 25).

At the hearing, undersigned counsel advised the Court, the SEC, and the Receiver (who attended the hearing but was not yet appointed), that the Silexx Sale Funds were wired to

Greenberg Traurig and a portion of those funds were transferred at Mr. Williams' direction to the Kinetic Group Account and were subsequently used to (a) payoff LF42's Loan in its entirety, (b) payoff Mr. Williams' April 2015 Lendacy loan in its entirety, and (c) pay down Lendacy loans taken out by Mr. Williams' in March 2017 and Scipio in May 2018. Documents evidencing these payments were tendered to the Court and the SEC at the hearing. *See also* Exh. B.

D. The Asset Freeze Order And Appointment Of The Receiver.

This Court granted the SEC's Emergency Motions and entered separate written Orders on March 6. (Doc. 33, 34).

In the Freeze Order, the Court froze Defendants' and Relief Defendants' assets, including assets held by "[a]ny financial or brokerage institution . . . in the name, for the benefit or under the control of Defendants or Relief Defendants" (Doc. 33 at p. 2-3). Similarly, in the Receivership Order, the Court appointed Mark Kornfeld as the Receiver and froze the Receivership Defendants' assets including, but not limited to, those assets that are on deposit with financial institutions. (Doc. 34 at p. 3). It is undisputed that Mr. Williams is not a Receivership Defendant. (Doc. 39).

Thus, as a result of the March 6th Orders, Mr. Williams is unable to access any monies in now frozen bank accounts for any purpose including to buy food or pay for his necessary living expenses.

E. The Receiver's Refusal to Unfreeze Funds Owned By Third Parties.

The Receiver served copies of the March 6th Orders on financial institutions possessing (or potentially possessing) assets of the Defendants and Relief Defendants, including Banco

Popular de Puerto Rico (“Banco Popular”). In response to its receipt and review of the March 6th Orders, Banco Popular froze, among other things, two accounts owned by third parties which Mr. Williams is a signatory: (1) an account ending in 6852 owned by Rex Tenax LLC (“Rex Tenax Account”), and (2) an account ending in 6860 owned by Pyram King LLC (“Pyram King Account”). See letter from Banco Popular to the Receiver’s counsel dated April 13, 2020 attached to this Motion as Exhibit C. Rex Tenax and Pyram King have no relationship whatsoever to Defendant Kinetic Funds or any Relief Defendant.

Rex Tenax LLC is a business consulting and property management company that was formed by Mr. Williams and a business partner in late summer 2019—long after the SEC commenced its investigation into Defendants and Relief Defendants. Mr. Williams believes that, as of this Motion, approximately \$4,000 is in the Rex Tenax Account. Rex Tenax is not a Relief Defendant. Mr. Williams’ business partner uses the Rex Tenax Account to pay Rex Tenax’s bills and operating expenses. No monies from Kinetic Funds or any Relief Defendant were transferred to or from the Rex Tenax Account. Moreover, Rex Tenax is funded from services rendered that are wholly unrelated to the services rendered by Kinetic Funds and the Relief Defendants.

Pyram King is a pen name used by Mr. Williams. Pyram King is not a Relief Defendant. In January 2020, Mr. Williams authored a novel under this pen name titled “Destiny’s War: Part 1 Saladin’s Secret,” and formed Pyram King LLC to publish, market, and print his novel.⁶ No Kinetic investor or Lendacy monies were used for the creation of Pyram

⁶ Mr. William’s book is available for purchase on Amazon.com: https://www.amazon.com/Pyram-King/e/B07Z9WRHB6%3Fref=dbs_a_mng_rwt_scns_share.

King LLC or the publication, printing, or marketing of Mr. Williams' novel. Instead, Mr. Williams funded the Pyram King Account with approximately \$25,000 of the Silexx Sale Funds. Mr. Williams subsequently withdrew approximately \$9,000 from the Pyram King Account to pay for necessary living expenses and monthly bills.⁷

Banco Popular also froze a checking/savings account ending in 6259 owned by Mr. Williams individually ("Personal Account"). The Personal Account has a balance of approximately \$1,500, none of which was derived directly or indirectly from any Kinetic investor or Lendacy funds. However, because his Personal Account is frozen, Mr. Williams is unable to conduct any business—wholly unrelated to Kinetic Funds or any Relief Defendant—or otherwise make a living. Mr. Williams is also unable to access this modest sum for living expenses.

Shortly after discovering that the Rex Tenax, Pyram King and Personal Accounts were frozen, counsel for Defendants and Relief Defendants contacted the Receiver to inform him that the monies in these accounts were outside the scope of the March 6th Orders and to request that the Receiver instruct Banco Popular to unfreeze these accounts. While Mr. Williams' counsel believes the Receiver generally agreed that the March 6th Orders did not apply to (a) the Rex Tenax, Pyram King, and Personal Accounts, and (b) any accounts owned by Mr. Williams individually, the Receiver would not agree to instruct Banco Popular to unfreeze these accounts because, according to the Receiver, Paragraph B of the Freeze Order requires

⁷ The \$25,000 of Silexx Sale Funds was deposited before the March 6th Orders. However, Mr. Williams' withdrawal of approximately \$9,000 for necessary living expenses and monthly bills occurred after these Orders were entered because Mr. Williams did not believe at that time that the Freeze Order covered the Pyram King Account.

that “any request to unfreeze any accounts frozen thereunder or otherwise modify the asset freeze should be made to the Court.”⁸ Defendants’ and Relief Defendants’ disagree and respectfully submit that Paragraph B of the Freeze Order does not impose such a requirement.

III. ARGUMENT

A. Defendants and Relief Defendants Seek Clarification Regarding Whether The Silexx Sale Funds Are Covered By The March 6th Orders.

LF42, through Mr. Williams, deposited \$500,000 of Silexx Sale Funds with Greenberg Traurig to pay Defendants’ and Relief Defendants’ legal fees and related costs in connection with the SEC’s action and the pending investigation of Mr. Williams. Mr. Williams deposited these funds before the March 6th Orders were entered and with the understanding that Greenberg Traurig would bill Defendants’ and Relief Defendants’ for legal fees incurred in defending this action against that retainer. Most of the fees incurred to date by undersigned counsel are for work performed in (1) getting up to speed on the SEC’s significant yearlong investigation that pre-dated Greenberg Traurig’s retention and involved thousands of pages of documents, (2) investigating the SEC’s allegations in its Complaint and Emergency Motions, (3) preparing a written response to the SEC’s Emergency Motions, (4) preparing for and attending the March 6th hearing, (5) gathering information and documentation in response to multiple requests made by the Receiver, and (6) preparing a substantive response to the SEC’s Complaint. A modest invoice for investigative services was also paid from the \$500,000. These fees were applied after entry of the March 6th Order because it was Defendants’ and

⁸ The Receiver advised counsel that he instructed his paralegal to inform Banco Popular that the Receiver believes the March 6th Orders do not cover Mr. Williams’ personal accounts. Banco Popular, nonetheless, froze every account with any connection to Mr. Williams.

Relief Defendants' position that the Silexx Sale Funds were not intended to be engulfed in the March 6th Orders.

More specifically, the Silexx Sale Funds were owned by LF42 and have absolutely nothing to do with Kinetic, Lendacy or the alleged conduct at issue. LF42 used the majority of Silexx Sale Funds to pay back its Loan in full before the March 6th hearing. Thus, it is Defendants' and Relief Defendants' position that the \$500,000 deposited with Greenberg Traurig could be applied to fees incurred in the defense of this action because, as further discussed in Section III(B)(1), *infra*, these monies could not be recoverable from LF42 as the *only* sum of money allegedly improperly transferred to it from any Defendant is the Loan—which has been paid back. *See, generally, CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999) (“[T]he district court may not disgorge profits obtained without the aid of wrongdoing.”).

Recently, the Receiver and SEC inquired into the status of the \$500,000 deposited with Greenberg Traurig to pay for Defendants' and Relief Defendants' attorneys' fees. Defendants and Relief Defendants respectfully submit that this money was not intended to be engulfed in the Orders because LF42 paid back all of the alleged ill-gotten gains and the \$500,000, which LF42 deposited with Greenberg Traurig to pay its attorneys and is traceable to the sale of Silexx which had nothing to do with the alleged wrongdoing. Through this Motion, however, Defendants and Relief Defendants seek clarification of the Court's March 6th Orders.

B. If The Silexx Sale Funds Are Covered By The March 6th Orders, The Orders Should Be Clarified Or Modified To Release These Funds.

A district court has discretion to “release or lower the amount of assets frozen.” *FTC v. Washington Data Resources, Inc.*, No. 8:09-cv-2309-T-23TBM, 2010 WL 11507704, *3

(M.D. Fla. Jan. 15, 2010) (citing *FTC v. RCA Credit Servs., LLC*, N. 8:08-cv-2062-T-27MAP, 2008 WL 5428039, *4 (M.D. Fla. Dec. 31, 2008)). “Thus, a court may exercise its discretion to prohibit or limit payment of living expenses out of frozen assets.” *Id.*

“In freezing a defendant’s assets, the Court must ‘weigh the disadvantages and possible deleterious effect of a freeze . . . against the considerations indicating the need for such relief.’” *S.E.C. v. Quiros*, No. 1:16-cv-21301-DPG *2 (S.D. Fla. May 27, 2016) (quoting *S.E.C. v. Dowdell*, 175 F. Supp. 2d 850, 853 (W.D. Va. 2001)). “While the primary purpose of freezing assets is to facilitate compensation of defrauded investors in the event a violation is established at trial, ‘the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief.’” *S.E.C. v. Nat. Diamonds Inv. Co.*, No. 9:19-cv-80633-ROSENBERG, 2019 WL 2583863, at *6 (S.D. Fla. June 11, 2019) (quoting *S.E.C. v. Ahmed*, 123 F. Supp. 3d 301, 311 (D. Conn. 2015)). Thus, in determining whether to release or lower the amount of assets frozen the “Court balances the ability to provide restitution to the victims with the defendants’ ability to defend themselves prior to a finding of liability.” *Quiros*, 2016 WL 3032925 at *1 (citing *F.T.C. v. 4 Star Resolution, LLC*, No. 15-CR-1125, 2015 WL 4276273 at *1 (W.D.N.Y. July 14, 2015)).

Applying the referenced principles, Defendants and Relief Defendants respectfully request that the Court modify the March 6th Orders to: (1) unfreeze all of LF42’s assets including its bank accounts and the remaining Silexx Sale Funds held by it and its attorneys; (2), allow Mr. Williams access to his frozen bank accounts and assets to pay for his monthly living expenses; and (3) allow Defendants and Relief Defendants to use the remaining Silexx

Sale Funds to pay the undersigned attorneys to defend the SEC’s action against them, including for work already performed.

1. LF42’s Assets, Including Its Bank Accounts And The Remaining Silexx Sale Funds Held By It And Its Attorneys, Should Be Released From The March 6th Orders, If Encompassed By Them, Because LF42 Paid Back The Alleged Ill-Gotten Gains In Full.

To obtain an asset freeze against a relief defendant, such as LF42, the SEC must present sufficient evidence from which a reasonable fact finder could infer that the Relief Defendant “(1) [] received ill-gotten funds, and (2) does not have a legitimate claim to those funds.” *SEC v. Sun Capital, Inc.*, No. 09-CV-29-FTM-29SPC, 2009 WL 1362634, at *1 (M.D. Fla. May 13, 2009) (citing *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005)); *see also SEC v. Nat’l Diamonds Inv. Co.*, No. 9:19-CV-80633, 2019 WL 2583863, at *6 (S.D. Fla. June 11, 2019) (same). An asset freeze against a relief defendant, however, only extends to “the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.” *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005). “The Court has no authority to freeze a relief defendant’s assets if they are untainted by wrongdoing” *SEC v. CKB168 Holdings, Ltd.*, 13-CV-5584, 2017 WL 4465726, *7 (E.D.N.Y. June 20, 2017). Stated differently, a freeze of a relief defendant’s asset can only be in the sum of the allegedly ill-gotten funds received, and a blanket freeze is only appropriate when a relief defendant’s assets are less than that amount.

Here the *only* sum of money allegedly improperly transferred to LF42 from any Defendant—and therefore potentially recoverable from LF42—is the Loan. (Doc. 1 at ¶¶ 14, 37). It is undisputed, however, that LF42 paid back the Loan to Kinetic Funds in its entirety

after its receipt of the Silexx Sale Funds on March 5th, 2020. *See* Ex. C. Yet, all of LF42's assets remain frozen pursuant to the March 6th Orders.

Because LF42 paid back all of the money that could potentially be recoverable from it, LF42's assets—including its bank accounts and the remaining Silexx Sale Funds held by it and its attorneys or transferred by LF42 to other accounts—should be unfrozen as these monies are completely unrelated to any wrongdoing allegedly engaged in by the Defendants. *See, generally, SEC v. Wyly*, 73 F. Supp. 3d 315, 322 (S.D.N.Y. 2014) (concluding that the SEC may not obtain a freeze of relief-defendant assets that “are completely unrelated to any wrongdoing”), *rev'd on other grounds, SEC. v. Wyly*, Case No. 1:10-cv-05760, 2017 WL 4119282 (S.D.N.Y. June 12, 2017); *see also CKBI68 Holdings, Ltd.*, 2017 WL 4465726 at *7; *S.E.C. v. Heden*, 51 F. Supp. 2d 296, 302 n.4 (S.D.N.Y. 1999) (stating that there is no authority that an asset freeze applies to “any assets of a relief defendant other than the profits from an illegal trade.”).

2. The March 6th Orders Should Be Clarified Or Modified To Allow Mr. Williams To Pay For His Living Expenses.

To the extent this Court determines that LF42's bank accounts should not be released from the March 6th Orders, Mr. Williams respectfully requests that this Court modify the March 6th Orders to allow him to access \$5,000 per month to pay for his necessary monthly living expenses.

“A number of courts . . . have permitted defendants in SEC enforcement actions to receive a portion of frozen assets for necessary and reasonable living expenses.” *S.E.C. v. End of the Rainbow Partners, LLC*, No. 17-cv-02670-MSK-NYW, 2019 WL 8348323, *12 (D. Co. Nov 25, 2019) (quoting *See also, S.E.C. v. Carver*, No. SACV 08-00627-CJC(RNBx), 2008

WL 11343057, at *6 (C.D. Cal. June 19, 2008); *Quiros*, 2016 WL 3032925, *2 (ordering the Receiver to pay the defendant \$15,000 per month for living and other expenses); *S.E.C. v. Dowdell*, 175 F. Supp. 2d 850, 854 (W.D. Va. 2001) (granting defendant’s motion to unfreeze assets in the amount of \$4,000 per month for living expenses); *see also Washington Data Resources, Inc.*, 2010 WL 11507704, *3 (modifying a freeze order in a FTC action to authorize defendant to receive \$9,500 per month for living expenses). “When addressing requests for living expenses, courts consider evidence of the defendant’s overall assets or income, and make a determination as to the defendant’s necessary living expenses. Typically, a court will deny such a request where the defendant requests funds for luxuries rather than necessities or where the defendant has other sources of income.” *Absolute Activist Value Master Fund Limited v. Devine*, No.: 2:15-cv-328-FtM-29DNF, 2016 WL 7232580, *3 (M.D. Fla. Feb. 2, 2016) (citing *Dowdell*, 175 F. Supp. 2d at 854).

Here, Mr. Williams respectfully requests \$5,000 per month to pay for his necessary monthly living expenses, which are as follows:

Housing	\$1,200
Food	\$1,000
Electric/Water/Utilities	\$800
Health care/ insurance	\$1,000
Child support	\$500
Miscellaneous (gas, clothing, etc.)	\$500

Since the entry of the March 6th Orders, Mr. Williams has been able to pay for his monthly living expenses via a combination of \$9,000 from the Pyram King Account, credit cards, and rental income of approximately \$1,500 that he received from a tenant currently residing in real property he owns. *See, generally*, Doc. 35. The cash has been expended to pay for Mr.

Williams' necessary expenses for the months of March and April, and the rental income is insufficient to cover his monthly expenses. Mr. Williams has no alternative sources of income or unfrozen assets. Moreover, given the present situation of COVID-19 in Puerto Rico, it is unclear whether the rental income will continue to be collected. All of Mr. Williams's remaining bank assets are frozen, leaving him with no money to buy food or pay for housing. Accordingly, Mr. Williams respectfully requests that the Court clarify and modify the March 6th Orders to allow him to access \$5,000 per month to pay for his necessary monthly living expenses.

3. The March 6th Orders Should Be Clarified Modified To Allow Defendants And Relief Defendants To Use The Silexx Sale Funds For Past And Estimated Future Attorneys' Fees.

Defendants and Relief Defendants seek (1) this Court's approval of their prior application of a portion of the \$500,000 in Silexx Sale Funds deposited with Greenberg Traurig for defense of this action and parallel investigation, and (2) clarification or modification of the March 6th Orders to allow them to use the remaining Silexx Sale Funds for estimated future attorneys' fees.

a. The March 6th Orders hinder Mr. Williams' ability to pay for his defense in the parallel investigation.

When an asset freeze may hinder the defendant's ability to obtain counsel of his choosing in a criminal case, the Court must pay "particular attention to the defendant's Fifth and Sixth Amendment rights." *SEC v. Coates*, 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994). This is so because "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016). In this circumstance, the SEC bears the burden of making a prima facie case of a

securities law violation and providing evidence that the personal assets it seeks to freeze are traceable to the fraudulent conduct alleged in civil case. *Coates*, 1994 WL 455558, at *4 (citing *U.S. v. Monsanto*, 924 F.2d 1186 (1991)); *see also Commodity Futures Trading Comm'n v. Walsh*, Case No. 09 CV 1749, 2010 WL 882875, at *2 (S.D.N.Y. Mar. 9, 2010) (holding certain personal assets shall become available to defendants to pay legal fees in a parallel criminal case “if the Government cannot meet its burden of demonstrating that there is probable cause to believe that those funds are tainted by fraud.”).

Greenberg Traurig also represents Mr. Williams in connection with the parallel investigation and the unavailability of the Silexx Sale Funds precludes him from receiving advice from that counsel because these monies are the only funds available to pay for his defense. (Doc. 25 at p. 9). The Court should clarify if its March 6th Orders were intended to cover the Silexx Sale Funds, and, if they were, Defendants respectfully request that the Court unfreeze the Silexx Sale Funds because the SEC has not (and cannot) meet its burden of demonstrating that these monies are traceable to the purported fraudulent conduct alleged by the SEC.

b. The Silexx Sale Funds have no connection whatsoever to the alleged unlawful conduct and are the only available funds to pay for Defendants’ and Relief Defendants’ defense.

“A court has discretion to decide whether to unfreeze assets to pay attorney fees.” *F.T.C. v. Roca Labs, Inc.*, No. 8:15-cv-2231-T-35TBM, 2017 WL 11002307, *1 (M.D. Fla. Apr. 7, 2017); *Devine*, 2016 WL 7232580, *3 (same). “Factors for consideration include preserving the funds for defrauded victims, maintain fairness in the legal proceedings, and a defendant’s unclean hands after entry of the asset freeze order.” *Roca Labs, Inc.*, 2017 WL

11002307, *1. Notably, the “defendant’s ability to fund a defense is an important factor in determining whether equity favors the use of restrained property for defense costs.” *United States v. Payment Process Center, LLC*, 439 F. Supp. 2d 435, 440 (E.D. Pa. 2006). Courts have also “required a threshold showing by the defendant that he or she could obtain counsel only if the frozen funds were released.” *End of the Rainbow Partners, LLC*, 2019 WL 8348323 at *12.

Several courts, including this Court, have applied these principles and exercised their equitable authority and released funds to pay attorney’s fees in similar cases. *Dowdell*, 175 F. Supp. 2d at 855-56 (recognizing a split in authority as to whether frozen assets may be used to pay attorneys’ fees and granting a motion to access funds to attorney’s fees based on concerns of fairness and the complexity of the case); *Devine*, 2016 WL 7232580, *3 (releasing a total of \$201,994 from frozen assets to two defendants for past and future attorneys’ fees); *S.E.C. v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993) (noting that “the court indicated willingness to release small amounts” of assets frozen by a preliminary injunction “so that [the defendant] could defend this suit, and on occasion the court did so”); *F.T.C. v. Dinar Corp.*, No.:1:15-cv-538-WKW, 2016 WL 814893, *3 (M.D. Ala. Feb. 29, 2016) (granting a motion for release of \$95,000 of frozen funds to pay attorneys’ fees); *S.E.C. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 430 (S.D.N.Y. 2001) (releasing frozen assets for the limited purpose of paying legal expenses); *S.E.C. v. International Loan Network, Inc.*, 770 F. Supp. 678, 680 (D.D.C. 1991) (mentioning that it had granted a modification of the asset freeze to permit defendants to retain counsel on their behalf).

The District Court for the Western District of Virginia's decision in *Dowdell* is instructive. *Dowdell*, 175 F. Supp. 2d 850. There, the SEC initiated an enforcement action alleging that the defendants orchestrated and ran a Ponzi scheme involving approximately \$29 million of investor funds. *Id.* at 852. The court granted the SEC's motion for ex parte temporary restraining order which included provisions freezing assets of certain defendants. *Id.* at 851. Dowdell and other defendants moved to modify the TRO and permit payment of living expenses and attorneys' fees claiming financial hardship as the reason for their requests. *Id.* at 853-54. The court granted Dowdell's request. In doing so, the court stated that its "central concern is the fairness of the proceeding" and that it did "not believe that it could achieve a fair result" if it was to deny "defendants the ability to retain counsel" because the action was "a complex legal matter, and lawyers are essential to the presentation of issues related to it." *Id.* at 856.

Similarly, here, the only assets available for Defendants and Relief Defendants to pay for counsel are the Silexx Sale Funds deposited with Greenberg Traurig. It cannot be disputed that the Silexx Sale Funds were derived by means separate and apart from the alleged illegal activities at issue, all of which Defendants and Relief Defendants dispute and intend to vigorously defend. To the extent all of Defendants and Relief Defendants' remaining assets are deemed frozen, they would be precluded from paying counsel to defend them in this complex legal proceeding in which the SEC has asserted fifteen separate causes of action. Indeed, Defendants and Relief Defendants respectfully submit that its attorneys are essential to the presentation of the complex legal issues in this case and have already expended substantial time and money in, among other things, defending the SEC's complex and detailed

Emergency Motions and assisting the Receiver with gathering requested information and documents.

The Court's decision in *Roca Labs, Inc.*, 2017 WL 11002307 *1, is also instructive by way of contrast. There, this Court denied a motion for release of frozen funds to pay legal expenses because defendants made "no showing that the funds at issue were derived by means separate and apart from the alleged illegal activities" or that the frozen funds "were the only available source of funds to pay for their defense or are even a necessary source for the payment of defense costs. *Id.* Here, to the contrary, it is undisputed that the Silexx Sale Funds have no connection whatsoever to alleged unlawful conduct described in the SEC's Complaint and these funds are the only available funds to pay for Defendants' and Relief Defendants' defense.

Accordingly, Defendants and Relief Defendants respectfully request that this Court (1) approve their prior application of a portion of the Silexx Sale Funds to pay their attorneys for work performed, and (2) permit them to use the remaining Silexx Sale Funds held by Greenberg Traurig for estimated future attorneys' fees.

C. This Court Should Unfreeze The Rex Tenex, Pyram King And Personal Accounts.

The Rex Tenex, Pyrum King and Personal Accounts should be unfrozen because these entities have no connection whatsoever to the alleged unlawful conduct at issue. While Mr. Williams' counsel believes the Receiver does not oppose this relief, the Receiver refuses to contact Banco Popular to unfreeze the account without a Court order.

No monies from Kinetic Funds or any Relief Defendant were transferred to or from the Rex Tenax, Pyram King or Personal Accounts. The Rex Tenax Account is funded from services rendered by Mr. Williams' business partner that are wholly unrelated to the services

rendered by Kinetic Funds, Lendacy or any Relief Defendant. Rex Tenax cannot pay its necessary operating expenses and outstanding bills unless its account is unfrozen. Similarly, no investor monies were used for the creation of Pyram King LLC or the publication, printing, or marketing of Mr. Williams' novel. Instead, Mr. Williams funded the Pyram King Account with approximately \$25,000 of the Silexx Sale Funds which, as discussed above, are wholly unrelated to the alleged unlawful conduct at issue. This transfer was made before the March 6th Orders were entered. Because the Pyrum King Account is frozen Mr. Williams is unable to generate any income from the publication of his novel and he is unable to pay necessary expenses such as payments to the editor, the book cover designer, the copy editor, marketing, and other various fees.

Although Mr. Williams' Personal Account presently has under \$2,000 in it, he is unable to conduct any business—wholly unrelated to Kinetic Funds or any Relief Defendants—to live if this account remains frozen. In fact, if this Court granted Mr. Williams' request for reasonable living expenses, Mr. Williams would not be able to cash a check or deposit any money because his Personal Account remains frozen.

Accordingly, Defendants and Relief Defendants respectfully request that this Court enter an Order unfreezing the Rex Tenax, Pyram King and Personal Accounts.

IV. CONCLUSION

For the reasons set forth herein, Defendants and Relief Defendants respectfully request this Court enter an Order clarifying that the Silexx Sale Funds are not subject to the March 6th Orders and unfreezing the Rex Tenax, Pyram King and Personal Accounts.

To the extent this Court determines that the Silexx Sale Funds are subject to the March 6th Orders, Defendants and Relief Defendants respectfully request that this Court enter an Order modifying the March 6th Orders to (1) release LF42 from and unfreeze its assets including its bank accounts and the remaining Silexx Sale Funds held by it and its attorneys or transferred by LF42 to other accounts, (2) provide Mr. Williams with \$5,000 per month to pay his necessary monthly living expenses, if the Court determines that LF42's bank accounts should not be released from the March 6th Orders, (3) approve of Defendants' and Relief Defendants' prior application of a portion of the Silexx Sale Funds held by Greenberg Traurig for the payment of legal fees for work performed in defending this action, and (4) allow Defendants and Relief Defendants to use the remaining Silexx Sale Funds held by Greenberg Traurig to pay for their defense of this action and Mr. Williams' defense of the parallel investigation.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), counsel for Defendants and Relief Defendants certify that they conferred with counsel for the SEC who advised that they oppose the relief requested in this Motion.

Dated: April 23, 2020

Respectfully submitted,

/s/ Gregory W. Kehoe
Gregory W. Kehoe (FBN 0486140)
kehoeg@gtlaw.com
Danielle Kemp (FBN 474355)
kempd@gtlaw.com
Joseph Picone (FBN 118381)
piconej@gtlaw.com
GREENBERG TRAUIG, P.A.
101 East Kennedy Blvd., Suite 1900
Tampa, FL 33602

Telephone: (813) 318-5700

Facsimile: (813) 318-5900

/s/ Steven M. Malina

(Pro Hac Vice)

Steven M. Malina

Illinois Bar No. 6196571

GREENBERG TRAUERIG, P.A.

77 West Wacker Drive

Suite 3100

Chicago, IL 60601

Telephone: (312) 456-8400

Facsimile: (312) 456-8435

malinas@gtlaw.com

*Attorneys for Defendants and Relief
Defendants*

CERTIFICATE OF SERVICE

I CERTIFY that on April 23, 2020 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice to electronic filing to counsel of record.

/s/ Gregory W. Kehoe

Attorney