

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.: 8:20-cv-00394

SECURITIES AND EXCHANGE COMMISSION,)
)
Plaintiff,)
)
v.)
)
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.)
_____)

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S OPPOSITION TO
EMERGENCY MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE,
FOR MODIFICATION OF THE COURT’S MARCH 6, 2020 ORDERS**

Ask for forgiveness and not permission is the approach Defendant Michael S. Williams (“Williams”) and his counsel Greenberg Traurig, P.A. (“Greenberg Traurig”) take with the Court.¹ In blatant disregard of the Freeze Order (ECF 33), Williams is using credit cards, rental

¹ The operative motion (DE 49) purportedly is brought on behalf of all Defendants and Relief Defendants; however, the Receiver Order (DE 34) makes clear that the Receiver now represents the interests of all the Defendants and Relief Defendants, except Williams. The Receiver is not supportive and opposes the relief requested by Williams and Greenberg Traurig. Therefore, the Commission treats the Motion as having been raised solely by Williams.

income, and other frozen assets to pay his living expenses. Greenberg Traurig likewise has disbursed a significant amount, believed to be in the hundreds of thousands of dollars, of frozen funds to pay itself for legal fees incurred. Prior to siphoning the assets, Williams and his counsel never motioned the Court to unfreeze assets as the Court directed them to at the March 6, 2020 hearing and never motioned the Court for a carve out for attorneys' fees (*see* Exhibit 1 referenced in Section I.D below). Not getting the result they wanted at the March 6 hearing, they simply ignored this Court's directives and instead disbursed money which they knew full well was frozen and spent it at will.

Amazingly, they come to the Court with unclean hands – nearly 7 weeks after entry of the Freeze Order and after the Commission confronted them with their wrongdoing – to seek not only absolution, but license to continue to dissipate frozen assets. In doing so, Williams and Greenberg Traurig also misrepresent to the Court the position of the Receiver in this case, who wholly opposes the relief sought by Williams. The Court should deny their disingenuous “emergency” motion outright and sanction Williams and Greenberg Traurig for their brazen violation of this Court's Order.²

I. The Freeze Order And Receiver Order Are Clear And Unambiguous

A. The Freeze Order Specifically Prohibits The Actions Already Taken By Williams And Greenberg Traurig

After receiving substantial briefing and permitting counsel the benefit of hours of oral argument, the Court entered the Freeze Order which provides among other things that “the Court finds good cause to believe that, unless it imposes an asset freeze, Defendants and Relief

² The Commission contemporaneously moves for an order to show cause why Williams and his counsel should not be held in contempt for violating the Freeze Order.

Defendants could dissipate, conceal or transfer from the jurisdiction of this Court assets that are likely subject to an Order of Disgorgement.” *See* ECF 33, p 2. The Court accordingly ordered that “**Defendants and Relief Defendants . . . their attorneys . . . hereby are, restrained from**, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or **withdrawing any assets or property, including but not limited to cash, free credit balances . . . or charging upon or drawing from any lines of credit, owned by, controlled by, or in the possession of Defendants and Relief Defendants.**” *See* ECF No. 33, para. A (emphasis added). The Freeze Order later specifies that “[a]ny financial or brokerage institution or brokerage institution or other person or entity holding any such funds or other assets, in the name, for the benefit or under the control of Defendants or Relief Defendants, directly or indirectly, held jointly or singly, and wherever located...shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition, pledge, encumbrance...dissipation, concealment, or other disposal of any such funds or other assets...”. *See* ECF No. 33, para. B.

Williams and Greenberg Traurig have not identified what language from the Freeze Order perplexes them and requires clarification. They also did not seek the Commission’s position prior to disbursing and spending frozen assets. Instead, they re-argue positions already rejected by the Court.

B. Williams And His Counsel Have Known All Along That The Freeze Order Prohibits Expenditures For Living Expenses And Attorneys’ Fees

The Freeze Order is plain on its face. Williams and his counsel knew all too well that the Freeze Order covers legal fees and living expenses. Prior to entry of the Freeze Order they described it as a “full asset freeze” and a “blanket freeze” and argued that it would “completely

freez[e] every dollar and asset in their names and deprive[] Defendants of any ability to defend themselves...”. *See* Opposition to Emergency Motion for Asset Freeze, ECF No. 25 at pp. 2, 15, 17. Williams in his sworn declaration put it this way:

In addition, the overbroad scope of the Freeze Motion will immediately cripple my ability to defend against the SEC’s misguided Complaint. The scope of the SEC’s requested blanket asset freeze will (a) make it impossible for me to access any financial resources to defend myself or afford the costs associated with my defense, and (b) eliminate my access to any sources of financial assistance, including the ability to pay for my daily living expenses and needs.

See Declaration of Michael Scott Williams, ECF No. 25-1 at ¶39. Williams and Greenberg Traurig’s claim that they require “clarification” of an order they well understood before its entry is a farce, and as set forth in the Commission’s motion for an order to show cause, they should be required to answer for their contemptuous actions.

C. Williams and Greenberg Traurig Move Funds The Day Before The Hearing

Williams and his counsel anticipated that the Freeze Order would include the Obsidian³ funds they earmarked for attorneys’ fees and living expenses and sought ways to obscure those funds. The proposed Freeze Order, which was served upon Greenberg Traurig, specifically identified the Obsidian accounts that held funds owed to Williams. *See* ECF 2-62. Despite knowing that the Commission sought to freeze those funds, Greenberg Traurig shamelessly entangled themselves in a web of deceitful transactions that concealed assets from the Commission, the Receiver, and this Court. The timeline tells the story:

³ The term “Obsidian” refers to Obsidian Technologies, LLC f/k/a Silexx Financial Systems, LLC.

- On February 20, 2020, the Commission files its Complaint and motions seeking an asset freeze and receiver against the Defendants and Relief Defendants.
- On February 21, 2020, the Commission staff emails counsel for the Defendants and Relief Defendants the Complaint, the motions seeking asset freeze and receiver, and the proposed orders thereto.
- On February 21, 2020, the Court sets the hearing on the Commission's motions for February 28, 2020. The hearing date is later postponed to March 6, 2020.
- On March 3, 2020, three days prior to the hearing on the Commission's motions, Williams enters into a Distribution Agreement and Mutual Release with Obsidian, in which Williams, either "directly or through LF42," owned a 40% equity interest. The Agreement recites that Obsidian wished to distribute to its members funds Obsidian had recently received pursuant to a contract with a third party. *See* ECF 49-1. In the Agreement, Williams directed Obsidian to transfer his payout of \$3,414,964 to Greenberg Traurig "for the benefit of Williams, LF42 and any other affiliate of Williams that may claim an ownership interest in [Obsidian]". *Id.*
- On March 4, 2020, Williams, through counsel, files statements acknowledging that the asset freeze would preclude him from accessing funds to pay attorneys' fees and omitting any mention of their transfer of funds to Greenberg Traurig's account. *See* ECF No. 25, filed on March 4, 2020.
- On March 5, 2020, Obsidian transfers the \$3.4 million to Greenberg Traurig. (ECF 49, at 2)
- On March 5, 2020, Greenberg Traurig wires \$2,914,964 to Kinetic.

- On March 5, 2020, Williams causes Kinetic to make various wires and transfers, including wires to undisclosed accounts, such as one for approximately \$460,000, that the Commission understands the Receiver is addressing in his opposition brief.
- On March 6, 2020, the Court hears arguments and enters the Freeze Order and Receiver Order.
- On April 17, 2020, the Commission staff writes to Greenberg Traurig advising that the staff has learned that approximately \$500,000 remains in Greenberg Traurig's account for the benefit of Williams and seeking confirmation that the funds are frozen pursuant to the Freeze Order and requesting a response by April 20, 2020.
- On April 21, 2020, the Commission staff and Williams' counsel at Greenberg Traurig have a telephone conference whereby Greenberg Traurig advises the Commission for the first time that they have been holding funds in their trust account for the benefit of Williams and his related entities and that they have already tapped into the \$500,000 to pay themselves and an investigator approximately \$200,000. Greenberg Traurig also for the first time advises that Williams has paid his living expenses using funds distributed to him by Obsidian as well as credit cards. Greenberg Traurig further advises the Commission staff that it will seek clarification or modification of the Freeze Order and Receiver Order.
- On April 22, 2020, the Commission staff writes to Greenberg Traurig explaining that Williams and Greenberg Traurig have violated the terms of the Freeze Order,

demanding that they return the disbursed funds and halt further disbursement and advising that a motion for an order to show cause was contemplated.

- On April 23, 2020, Greenberg Traurig responds to the Commission declining to return the disbursed funds or any other demands made by the Commission and instead filed their motion.

The timeline is clear that it is only after their ruse had come to light to the Commission and the Commission requested confirmation that Greenberg Traurig had maintained the funds frozen in its account, that Williams and his counsel claim for the first time that the Freeze Order, which they understood perfectly clearly before and at the hearing, has somehow bewildered them over the last 7 weeks since its entry. Their newfound feigned confusion is just a thinly-veiled attempt to avoid the consequences of their flagrant violations of the Freeze Order.

D. Williams And Greenberg Traurig Raise The Same Arguments Regarding LF42 That The Court Has Already Rejected

Williams argues in the Motion that the assets of LF42 should be unfrozen because its disgorgement amount was paid the day before the March 6th hearing. The Court's rejection of this very argument at the hearing not only further illustrates the clarity of the Freeze Order, but betrays Williams' and Greenberg Traurig's knowledge that it covers LF42's assets. Toward the end of the hearing, counsel for Williams argued as follows:

MR. MALINA: By paying off, Your Honor, the loan to LF42, LF42 shouldn't be within the reach of even the request for relief. Mr. Williams advises that KIH, which is an international finance entity in Puerto Rico that has been working on an international exchange and has as an asset technology, certain technologies, these are -- the people who are working on that, if these entities are frozen aren't going to continue to do that. It's going to harm assets to these entities that are no longer traced to the loans at issue. I think, yes, by paying off

the loan that he paid off yesterday, there is no reason to reach into KIH or LF42 because that loan has been paid off. And that is part of what they want to freeze, and that's the only money arguably traceable to -- at issue here is no longer an issue.

THE COURT: I am telling the receiver that **I'm inviting the defense to file a motion if there's some reason that some of these companies shouldn't be frozen.** They mentioned two. There's of course restitutionary issues. There's tracing money issues. So although I'm not requiring Mr. Williams to file a sworn accounting, it's probably greatly in his interest to satisfy the receiver if he wants to free up some of this and might want to be getting on that right away. So here's your orders. And they're so entered. (emphasis added).

See Exhibit "1", March 6, 2020 Hearing Transcript at p. 86, line 7 – 88, line 10.

Williams has not submitted a sworn accounting and, in fact, we anticipate that the Receiver will be raising additional issues related to Williams' use of LF42 funds. As the argument was rejected before, so should it be now.

E. The Freeze Order Covers All Assets Regardless Of The Source

Williams and Greenberg Traurig claim they believed the Freeze Order did not cover the funds he received from Obsidian because Obsidian was not involved in the fraudulent scheme. This argument cannot withstand even the slightest scrutiny. The Freeze Order covers all of Defendants' and Relief Defendants' assets regardless of the source; there are no specified exceptions. The reason for this is clear, as the Commission argued in its original motion for emergency relief (ECF 2, at 23-24), a disgorgement award, which an asset freeze is meant to protect, is a personal liability to be satisfied without regard to whether the assets are tainted. See *FTC v. Leshin*, 618 F.3d 1221, 1234 (11th Cir 2010) (“[A] disgorgement order establishes a personal liability, which the defendant must satisfy regardless whether he retains the proceeds of his wrongdoing.”) (citation and quotation omitted); *SEC v. Lauer*, 445 F. Supp. 2d 1362,

1369 (S.D. Fla. 2006) (“[D]isgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset”) (citation and quotation omitted), *aff’d*, 240 F. App’x 355 (11th Cir. 2007).

There is no escaping that the funds Obsidian distributed to Williams are covered by the Freeze Order. Williams admits he owns a 40% equity stake in Obsidian and was entitled to a pro rata distribution of its assets. *See* ECF 49-1 at p. 1. Once Obsidian transferred those funds at Williams’ direction they became his money, and the Agreement confirms that the Obsidian funds transferred to Greenberg Traurig are for the benefit of “*Williams*, LF42 and any affiliate of Williams.” *Id.* at p. 1 (emphasis added). The funds are not solely for LF42, as Williams and his counsel would have this Court believe and, in any event, LF42 is Williams’ self-described “personal LLC” and LF42 is under the control of the Receiver, not Williams. *See* ECF No. 25-1 at ¶40 and ECF 34. Furthermore, not only does the Freeze Order’s broad language cover Obsidian funds, but the Freeze Order specifically identifies Obsidian accounts. *See* ECF No. 33 at p. 5. Williams and his counsel simply cannot credibly claim they were ignorant that Obsidian funds were off limits. Even if they did have a doubt, the proper course was to seek leave of Court to access the funds, not to first spend the funds and then request the Court’s blessing for doing so.⁴

⁴ As set forth in the Commission’s Motion for an Asset Freeze, there is no sanitizing the Obsidian funds despite Williams’ desperate attempt to do so. Williams finagled the \$1.5 million investor-funded purchase of his penthouse in March 2017 by promising to repay the purported loan with proceeds from Obsidian’s sale to the CBOE. After the Obsidian sale closed, however, Williams took the \$1.5 million sales proceeds and invested it in Kinetic Funds Yield for his personal benefit. *See* K. Locke Tr. 64:19-65:23, 70:10-73:7, attached hereto as Composite Exhibit “2”; *see also* K. Pufahl Tr. 25:10-27:1, attached hereto as Exhibit “3”. Additionally, Williams used approximately \$31,000 in investor assets to pay Obsidian

II. The Court Should Not Unfreeze Any Assets Of Defendants Or Relief Defendants

A. Dissipated Frozen Funds

In clear violation of the Freeze Order, Williams admits he is using credit cards, rental income from real property he owns, and \$9,000 from his Pyrum King account to pay for his living expenses. *See* ECF No. 49 at pp. 10, n.7, 16. Notably, the income-producing property, which address Williams conveniently failed to specify, is presumably the multiplex residence that he fraudulently purchased with investor funds.⁵ The Court should deny Williams' and his counsel's request to retroactively unfreeze these funds for the reasons set forth above and because to do otherwise would reward their misconduct and encourage others to follow their "shoot first, ask questions later" approach.

Greenberg Traurig mentions in a passing footnote that "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." *See* ECF 49, n. 2. While not revealed in their motion, from conversation with counsel, we understand that approximately \$200,000 of frozen assets have been accessed by Greenberg Traurig to pay themselves for services provided to Williams and his affiliates. These funds were disbursed by Greenberg Traurig without authorization of the Court. Greenberg Traurig also did not seek the Commission's position prior to making any such disbursement and instead rejected the Commission's demands to replenish the funds wrongfully disbursed once it was discovered. As discussed further in the Commission's

for alleged services to Kinetic Group without disclosing his ownership interest in Obsidian. *See* Decl. of C. Ivory, ECF No. 2-1 at ¶12; *see also* ECF No. 49, p. 4, n. 3.

⁵ Williams' refusal to provide an accounting of his assets and Greenberg Traurig's refusal to be forthcoming further complicates the matter.

motion for order to show cause, Greenberg Traurig should be ordered to return every penny disbursed, answer for their actions, and provide an accounting.

B. Frozen Assets Should Not Be Used To Fund Williams' Legal Expenses

Williams should not be permitted to use frozen funds to bankroll his litigation defense here. “In imposing a freeze of assets, there is no requirement that the court exempt sufficient assets for the payment of legal fees.” *See SEC v. Comcoa*, 887 F.Supp. 1521, 1524 (S.D. Fla. 1995). In *SEC v. Santillo*, 2018 WL 3392881, *4 (S.D.N.Y. July 11, 2018), the court confirmed that in SEC cases it has been routinely held that assets should remain frozen when the defendant has not demonstrated that there are sufficient frozen assets to pay disgorgement. *Santillo* citing *Lauer*, 445 F. Supp. 2d at 1369; *SEC v. Current Fin. Servc.*, 62 F. Supp. 2d 66, 68 (D.D.C. 1999). Therefore, defendants have been “barred from utilizing frozen assets to pay legal fees associated with representation in a civil action when it is not clear ‘whether the frozen assets exceed the SEC’s request for damages’ or disgorgement”. *Santillo* citing *FTC Capital Mkts*, 2010 WL 2652405, *7 (S.D.N.Y. Aug. 23, 1994); *FTC v. RCA Credit Services, LLC*, 2008 WL 5428039, *4 (M.D. Fla. Dec. 31, 2008) (defendants “may not use their victims’ assets to hire counsel to help them retain the fruits of their violations”).⁶ Requests for attorney’s fees for defense of a parallel criminal matter are not ripe until charges have been brought. *Santillo*,

⁶ *See also FTC v. Simple Health Plans LLC*, 379 F.Supp.3d 1346, 1364 (S.D. Fla. 2019) (denying carve out for attorneys’ fees and living expenses given the “vast disparity between Defendants’ substantial ill-gotten gains and the value of the frozen assets”); *FTC v. IAB Marketing*, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013) (denying defendants’ motion to “unfreeze” funds for living expenses where “Defendants’ monetary liability greatly exceeds the frozen funds”); *CFTC v. United Investors Group, Inc.*, 2005 WL 3747596, *1 n.1 (S.D. Fla. June 9, 2005) (refusing to except living expenses and counsel fees from asset freeze), *aff’d* on other grounds *sub nom. CFTC v. Levy*, 541 F.3d 1102 (11th Cir. 2008).

2018 WL 3392881, at *5; *CFTC v. Rust Rare Coin Inc.*, 2019 WL 752424 (D. Utah, April 4, 2019) (Sixth Amendment considerations do not support modifying asset freeze when criminal charges have not been filed).

Here, Williams has provided no evidence to establish that the frozen funds exceed the likely multi-million dollar disgorgement award against him. Unless and until he does so the Court should deny his request for attorney's fees.⁷

In the event the Court is inclined to consider the issue of attorneys' fees at this time, any assets that may be unfrozen for legal fees should be used only for fees incurred (but not already disbursed) *on or after* entry of the Freeze Order. Any such attorneys' fees must be at reasonable local rates, for this case, and for counsel who intend to stay on for the duration of this case. The Honorable Judge Mary S. Scriven just last month addressed the issue of attorneys' fees in light of an SEC asset freeze in *SEC v. Davison, et al.*, 8:20-cv-00325-MSS-AEP (M.D. Fla. March 11, 2020) (ECF 48), attached hereto as Exhibit "4". In that case, the court found that "[a]ny past due legal expenses that were incurred before the asset freeze must be dealt with in the normal course as with any other creditor." Judge Scriven modified the freeze order to allow the payment of legal expenses incurred on or after the entry of the asset freeze and

only at reasonable local rates not to exceed \$400.00 per hour for the most experienced counsel and \$320.00 for a second lawyer. Further the unfrozen assets may only be used by counsel who intend to stay on for the defense of this case. The funds may not be used to defend [d]efendant in the separate civil, putative class action case, nor may the funds be used to recoup fees for work performed prior to the asset freeze. If counsel

⁷ Even if the Court were inclined to carve out funds for attorneys' fees for Williams' purported criminal investigation, it is premature to do so because no criminal proceeding has been initiated against Williams.

does not intend to stay on as counsel in the case, the funds must be returned immediately and in full, no matter when they were incurred.

Counsel who intend to stay on as counsel in the instant case shall provide a budget for the case and submit it to the Court for review, *in camera*. (emphasis in original).

Greenberg Traurig has not provided any information regarding its hourly rates, the number of attorneys working on the matter, or proposed its budget. Instead, Greenberg Traurig chose to pay itself approximately \$200,000 in frozen assets and seeks unfettered access to at least another \$300,000 which it holds in its trust account. Granting the relief Williams and Greenberg Traurig requests would serve to further harm investors who have already suffered at the hands of Williams.

C. Living Expenses

Williams and his counsel set forth that Williams has business ventures that they claim are unrelated to the fraud underlying this action. Based on this premise, they ask that bank accounts and assets purportedly connected to those ventures are exempt from the Freeze Order. Such a finding would result in an unjust result for harmed investors. In *Santillo*, 2018 WL 3392881, the court addressed this very issue. There, the defendant earned revenue of approximately \$100,000 per month that was not derived from the underlying fraud. The defendant sought to unfreeze all of those funds, or alternatively at least \$70,000 per month, leaving \$30,000 per month for potential disgorgement. *Id.* at *3. The court rejected the defendant's arguments and ordered that the defendant may draw the lesser of 5% or \$5,000 each month from the revenue stream to pay for living expenses. *Id.* at *4.

Here, Williams touts himself as a published novelist, among other things. Motion at 22. Moreover, he apparently has rental income. The Commission is open to discussing with

Williams his proposal for reasonable living expenses. However, Williams must first remedy his violations of this Court's Orders and demonstrate what impact an allowance for living expenses will have on his ability to satisfy a disgorgement award.

D. LF42, Rex Tenax, LLC ("Rex Tenax") and Pyrum King Bank Accounts

There is no basis to unfreeze any bank accounts of Defendants or Relief Defendants. As set forth more fully in Section I.D. above, Williams seeks to unfreeze the accounts of LF42 because it has allegedly repaid its purported loan the day before the March 6th hearing. First, this exact argument was raised with the Court at the March 6th hearing and rejected. Second, LF42 is Williams' "personal LLC" and accordingly any assets of LF42 flow to Williams and should remain frozen. *See* ECF No. 25-1 at ¶40 and ECF 34. Third, LF42 received at least \$460,000 from Kinetic in the days leading up to the March 6th hearing for no justifiable reason, and accordingly LF42's accounts are properly frozen and under the control of the Receiver. *See* ECF No. 49 at p. 7. Lastly, it is expected that the Receiver has uncovered additional misuse of LF42 which will be set forth in his opposition to the Motion.

Williams seeks to unfreeze the bank accounts of Rex Tenax and Pyrum King at Banco Popular because he claims neither was involved in the fraudulent scheme. That is besides the point. *See CFTC v. Rust Rare Coin Inc.*, 2019 WL 752424 (D. Utah, April 4, 2019), (denying motion to lift freeze on assets held in the name of non-parties). What matters is that Williams owns and/or controls the Rex Tenax and Pyrum King accounts; therefore, any assets held there should be preserved for disgorgement. *See* Banco Popular letter dated April 13, 2020, ECF No. 49-3; *see also* Rex Tenax's Certificate of Formation (identifying Williams as the "Authorized Person"), attached hereto as Exhibit "5". Additionally, it is expected that the

Receiver will set forth in his opposition to the Motion that representations made by Williams that there is no connection between the Rex Tenex and Pyrum King accounts and the underlying unlawful conduct is inaccurate.

III. The Court Should Not Modify The Receiver Order

A. The Receiver Order Sets Forth The Receiver's Control of All Assets of Defendant Kinetic and all Relief Defendants

The Order Appointing the Receiver in this case (ECF 34) provides that the “the appointment of a receiver in this action is necessary and appropriate for the purposes of marshaling and preserving all assets of the Defendant (defined as Kinetic Investment Group, LLC) and those assets of the Relief Defendants that: (a) are attributable to funds derived from investors or clients of the Defendant; (b) are held in constructive trust for the Defendant; (c) were fraudulently transferred by the Defendant; and/or (d) may otherwise be includable as assets of the estate of the Defendant.” *See* ECF 34, p 2. The Receiver Order goes on to state that the Receivership Assets and Recoverable Assets are frozen.

The Receiver Order is in place “for the protection of the investors”. ECF 34. Modifying the Receiver Order would only serve to frustrate that purpose. Williams has not demonstrated a single valid reason to undo the Court’s reasoned Order which was established to marshal and safeguard assets. Furthermore, the Commission anticipates that the Receiver is submitting an opposition to Williams’ motion which sets forth ample basis for not only maintaining the Receiver Order as entered, but also raises numerous concerns about Williams’ further misuse.

IV. Conclusion

For the foregoing reasons, the Commission respectfully requests that the Court deny Defendants' and Relief Defendants' motion to clarify or, in the alternative, modify the Orders, and grant any other relief the Court deems just and proper.

April 26, 2020

Respectfully submitted,

By: /s/ Christine Nestor & Stephanie N. Moot

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on April 26, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Stephanie N. Moot

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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| SECURITIES AND EXCHANGE |) | |
| COMMISSION, |) | |
| |) | 8:20-CV-394-WFJ-SPF |
| PLAINTIFF, |) | Tampa |
| |) | March 6, 2020 |
| v. |) | 9:32 a.m. |
| |) | |
| KINETIC INVESTMENT GROUP, |) | |
| LLC, ET AL., |) | |
| |) | |
| DEFENDANTS. |) | |

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

Court Reporter: Tracey Aurelio, CRR, RMR, RDR
Federal Official Court Reporter
801 N. Florida Avenue, 15th Floor
Tampa, Florida 33602
(813) 301-5448

Proceedings recorded by mechanical stenography,
transcript produced by computer.



1 MS. MOOT: Your Honor, may we have a copy as well?

2 THE COURT: Yes, of course.

3 Anything else, Mr. Malina?

4 MR. MALINA: Just one second, Your Honor.

5 THE COURT: Take your time. I didn't know if you
6 were done or not. Take your time.

7 MR. MALINA: By paying off, Your Honor, the loan to
8 LF42, LF42 shouldn't be within the reach of even the request
9 for relief. Mr. Williams advises that KIH, which is an
10 international finance entity in Puerto Rico that has been
11 working on an international exchange and has as an asset
12 technology, certain technologies, these are -- the people who
13 are working on that, if these entities are frozen aren't going
14 to continue to do that. It's going to harm assets to these
15 entities that are no longer traced to the loans at issue.

16 I think, yes, by paying off the loan that he paid off
17 yesterday, there is no reason to reach into KIH or LF42
18 because that loan has been paid off. And that is part of what
19 they want to freeze, and that's the only money arguably
20 traceable to -- at issue here is no longer an issue.

21 THE COURT: All right. Anything else from the
22 defense?

23 MR. MALINA: Thank you, Your Honor.

24 THE COURT: Well, I am so grateful to both sides for
25 the very high level of presentation. And I do understand that

1 when you appoint a receiver, just the temple comes down, and
2 sometimes maybe the temple was going to be fine before that
3 happened. But I'm granting the order for an asset freeze, and
4 I'm granting the order for a receiver. And I'll tell you why.

5 Mr. Williams was a fiduciary. The evidence shows, I
6 think it's unrebutted, that when a dollar came in, it bought a
7 security worth a dollar, but about a third of that was
8 borrowed money. That wasn't the investors' money. That was
9 the money they borrowed from the broker, and about a third of
10 that went to unsecured loans at Lendacy.

11 Of the Lendacy money, about half of those loans went
12 to fiduciary himself. And a significant portion of that went
13 to what some people might call real estate speculation in the
14 Caribbean. Now, I know that bank is a fabulous place. I
15 looked at the website you told me to look at. And I'm sure
16 with the economy going, you know, everything would be fine.
17 When the sun shines, it's all good.

18 But if you step back and say a man who -- whatever
19 you want to call it. Promoter is a pejorative word. A man
20 who is a fiduciary that's taking in pension money is using
21 about a sixth of the money for his own benefit in an unsecured
22 loan, most of which is real estate or business speculation in
23 the islands, just that's what happened.

24 So notwithstanding this remarkable legal presentation
25 by the defense team, I'm entering the order. I'm not

1 requiring a sworn affidavit.

2 I am telling the receiver that I'm inviting the
3 defense to file a motion if there's some reason that some of
4 these companies shouldn't be frozen. They mentioned two.
5 There's of course restitutionary issues. There's tracing
6 money issues. So although I'm not requiring Mr. Williams to
7 file a sworn accounting, it's probably greatly in his interest
8 to satisfy the receiver if he wants to free up some of this
9 and might want to be getting on that right away.

10 So here's your orders. And they're so entered.
11 Thank you very much.

12 (Proceedings concluded at 12:29 p.m.)
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1 UNITED STATES DISTRICT COURT)
2 MIDDLE DISTRICT OF FLORIDA)

3
4 **REPORTER TRANSCRIPT CERTIFICATE**

5 I, Tracey Aurelio, Official Court Reporter for the United
6 States District Court, Middle District of Florida, certify,
7 pursuant to Section 753, Title 28, United States Code, that
8 the foregoing is a true and correct transcription of the
9 stenographic notes taken by the undersigned in the
10 above-entitled matter (Pages 1 through 89 inclusive) and that
11 the transcript page format is in conformance with the
12 regulations of the Judicial Conference of the United States of
13 America.

14 /s *Tracey Aurelio*

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Tracey Aurelio, RMR, RDR, CRR
Official Court Reporter
United States District Court
Middle District of Florida
Tampa Division
Date: April 24, 2020

FL-04184

LOCKE_KELLY_20190919

9/19/2019 10:07 AM

Full-size Transcript

Prepared by:

FL-04184

Thursday, October 3, 2019

EXHIBIT

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1 came from Kinetic a different time.

2 Q Okay. Thank you.

3 MS. INMAN: Would it be possible to do a
4 break?

5 MS. VINIEGRA: Yes. We can take a
6 five-minute break.

7 MS. INMAN: Yeah.

8 MS. VINIEGRA: So we're off the record at
9 11:43 a.m.

10 (Whereupon, a brief recess was taken, after
11 which, the following was had.)

12 MS. VINIEGRA: We're on the record at
13 11:57 a.m. on September 19th, 2019.

14 BY MS. VINIEGRA:

15 Q Ms. Locke, did you have any substantive
16 discussion with any members of the staff during our
17 break?

18 A No.

19 Q Earlier we discussed misappropriation of
20 investor capital and you specified two real estate
21 transactions, can you tell me about the first real
22 estate transaction?

23 A The first real estate transaction was for a
24 penthouse purchase. The building name is Villa
25 Gabriella. It's located on Luna Street and Cruz in

1 Old San Juan, Puerto Rico. And it was intended as a
2 new residence for Michael Williams. It is two units
3 that were combined together into one main house. And
4 then also in that transaction a second unit, Unit 2E
5 was purchased in addition to two parking spaces in
6 the garage. So all of that together I have spoken
7 and referred to it as one real estate purchase
8 because it was one transaction. Approximately \$1.9
9 million in which the transfer was made from Kinetic
10 Funds and then the wire was loaded from Lendacy to
11 send the funds to the title company and whatnot to
12 make the purchase.

13 I wasn't involved in that transaction. I
14 was aware. I didn't discuss with Michael how he was
15 going to afford to purchase it. I felt that it was a
16 lavish expense certainly, well beyond his current
17 living standard. So there was some initial concerns
18 and red flags there. And then I was presented a
19 collateral pledge agreement by Michael that he asked
20 that I sign and I did sign it, and it described in
21 there that he was pledging his future payout from the
22 Silexx sale back to Kinetic to -- or back to -- well
23 the companies.

24 I'm not sure which particular company, but
25 that the capital would be repaid once he received his

1 A Correct.

2 Q As well as a \$5,000 transaction coming in
3 and out -- coming out of Kinetic Funds into KCL
4 Services on March 23rd, correct?

5 A Correct.

6 Q And to the best of your knowledge, this was
7 used to purchase the Gabriella's house property for
8 Michael Williams personally, correct?

9 A Yes.

10 Q I'm going to ask the court reporter to mark
11 as Kinetic Exhibit 6, one -- a one-page e-mail from
12 Keli Locke to Michael Williams with an attachment
13 called Collateral Pledge Agreement and the first page
14 is Bates labeled SEC-KP-E-0534855.

15 (SEC Exhibit No. 6 was marked for
16 identification.)

17 BY MS. VINIEGRA:

18 Q I'm handing you what has been marked as
19 Exhibit -- as Kinetic Exhibit 6.

20 Ms. Locke, do you recognize this document?

21 MS. INMAN: You can take your time to look
22 at it.

23 A Yes.

24 BY MS. VINIEGRA:

25 Q Can you tell us what this document is?

1 A This is the collateral pledge agreement
2 that Michael Williams requested I sign pledging his
3 expected payout from the sale of Silexx Financial
4 Systems to the CBOE.

5 Q And is that the collateral pledge agreement
6 you mentioned earlier in testimony?

7 A Yes.

8 Q And if we go to page 2 of the collateral
9 pledge agreement at the bottom left-hand side, is
10 that your signature?

11 A Yes.

12 Q And you signed it as president of Lendacy,
13 correct?

14 A Yes.

15 Q And what is the date of this collateral
16 pledge agreement?

17 A I do not recall, but on the front page it
18 does say March 20th, 2017. I don't recall the exact
19 date I signed it, however, because I did not write
20 that in there.

21 Q Okay. So on March 20th, 2017 the sale had
22 not taken place -- the Silexx sale had not taken
23 place yet, correct?

24 A That is correct.

25 Q So Michael -- Michael Williams is pledging

1 something that he might have -- that he might get in
2 the future?

3 A Correct.

4 Q And you stated earlier that that sale did
5 take place. Did Michael Williams ever pay back or
6 provide the collateral to Lendacy as stated in this
7 collateral pledge agreement?

8 A Not to my knowledge. I believe there was
9 a -- there was a time that I recall, and I don't
10 remember exactly when it was, but he sent his wife,
11 Jamene Pinnow, to the bank to make a transfer or a
12 wire of some sort to put \$1 million into the company.
13 Now, what account that went into, I can't recall.

14 I'm not sure, but that was the only amount
15 that I was aware of that was ever, I suppose,
16 reimburse for whatever the purpose of that amount
17 was. I recall there being a situation where Jamene
18 Pinnow was at the bank and I believe the transaction
19 amount was exactly \$1 million. It's possible that it
20 is reflected on the bank statements somewhere, but I
21 can't say that that was associated to the repayment
22 of this collateral pledge agreement.

23 But aside from that transaction that I just
24 mentioned, to my knowledge, no. This \$1.5 million
25 was never reimbursed. I never received any paperwork

1 nor did I have a discussion with Michael that he made
2 good on this collateral pledge agreement after the
3 sale of Silexx.

4 Q So he never turned over any money from this
5 collateral pledge or the shares that he pledged on
6 the collateral pledge agreement?

7 A To my knowledge, no.

8 BY MR. HOUCHIN:

9 Q Do you have any understanding as to the
10 bank account that Mr. Williams wife used to transfer
11 the million dollars that you referenced?

12 A Where that money come from?

13 Q Yeah. Which bank account? Was it their
14 personal bank account? Was a corporate account?

15 A I don't know.

16 Q Okay.

17 BY MS. VINIEGRA:

18 Q And what bank account was it transferred
19 into?

20 A Either Kinetic Funds or KCL, one of those.
21 I'm not sure which entity he transferred it into. I
22 suspect it was one of the Kinetic entities. Either
23 Kinetic funds itself or the management entity for
24 Kinetic. I do not believe that it came from Lendacy,
25 but I'm not -- came into Lendacy, but I'm not quite

FL-04184

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9/20/2019 9:10 AM

Full-size Transcript

Prepared by:

FL-04184

Thursday, October 3, 2019

EXHIBIT

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1 he directed his wife to transfer \$1.5 million into
2 his fund -- his fund account.

3 Q And what property are you referring to?

4 A I refer to it as the penthouse, but it is
5 actually three -- well, legally it is referred to as
6 three separate properties and two parking garages.
7 So penthouse AB, which is one penthouse, Apartment
8 2E, which is an apartment underneath the penthouse
9 and then two parking spaces in La Cochera.

10 Q Is that the apartments that are in what's
11 referred to as Gabriella's House?

12 A Villa Gabriella, yes.

13 Q And it's your understanding, correct me if
14 I'm wrong, that sometime after that purchase was made
15 he directed his wife to transfer \$1.5 million in to
16 the KF Yield Fund?

17 A Yes, quite sometime after.

18 Q And what's the basis for you to believe
19 that it was sometime after that purchase was made
20 that that transaction occurred? Did you see
21 documents to that? Did someone tell you that?

22 A I asked him when he was going pay off the
23 credit line, it was explained to me that it was a
24 temporary bridge loan. And prior to the purchase he
25 had called me in and spoke to me privately to let me

1 know that -- he swore me to secrecy and
2 confidentiality -- that they were in the process of
3 selling Silexx Financial Systems to the Chicago Board
4 of Exchange, and that he had -- when he started
5 renting the penthouse he had done a lease option or
6 purchase option when obtaining that lease and that it
7 was coming up, and so the owners were going to sell,
8 but he had first right. And he really wanted the
9 house and that he was sharing the information with me
10 so that I would understand that he had quite a bit of
11 money coming to him on November 1st.

12 And so based on that information, that it
13 would be a temporary bridge loan, that he was going
14 to go ahead and purchase the property, but as soon as
15 he received the moneys from the sale of Silexx
16 Financial Systems he would pay that loan off.

17 Quite sometime passed and not only had he
18 not paid it off, he was not making any payments and
19 his 56,000 or roughly 56,000, there was not enough
20 dividends to cover the interest that was being
21 generated. And so he was angry with me for
22 questioning him and said, "I'll take care of it.
23 I'll take care of it", and he had her send the money.
24 Instead of paying off the loan, he put it into his
25 investment account to continue earning and generating

1 interest for himself.

2 Q Okay. And we may get into more details in
3 some documents on that a little bit later, but I want
4 to ask just a couple questions in relation to that
5 right now.

6 You said that they were in the process of
7 selling Silexx, who is the they other than Michael
8 Williams?

9 A His partner Thomas Frey.

10 Q That's F-R-E-Y?

11 A Correct.

12 Q And in the conversation that you had with
13 Mr. Williams about the potential selling of Silexx,
14 you said that he told you that he was going to get
15 quite a bit of money, did he give you any sort of
16 indication of how much he expected to receive from
17 the sale of Silexx to CBOE?

18 A He did not at that time, but that it would
19 be enough to cover it. He did tell me that he would
20 provide me with the sales agreement when he could.

21 Q Did he ever provide the sales agreement to
22 you?

23 A When I -- yes, he did.

24 Q When did he do that?

25 A When I started collecting documentation on

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No: 8:20-cv-00325-T-35AEP

BRIAN DAVISON, BARRY M.
RYBICKI, EQUIALT LLC, EQUIALT
FUND, LLC, EQUIALT FUND II, LLC,
EQUIALT FUND III, LLC, EA SIP, LLC,

Defendants,

128 E. DAVIS BLVD, LLC, 310 78TH
AVE, LLC, 551 3D AVE S, LLC, 604
WEST AZEELE, LLC, BLUE WATERS
TI, LLC, 2101 W. CYPRESS, LLC,
2112 W. KENNEDY BLVD, LLC,
BNAZ, LLC,
BR SUPPORT SERVICES, LLC,
CAPRI HAVEN, LLC, EANY, LLC,
BUNGALOWS TI, LLC, EQUIALT 519
3RD AVE S., LLC, MCDONALD
REVOCABLE LIVING TRUST, 5123 E.
BROADWAY AVE, LLC, SILVER
SANDS TI, LLC, TB OLDEST HOUSE
EST. 1842, LLC,

Relief Defendants.

ORDER

THIS CAUSE comes before the Court for consideration of Defendant Barry M. Rybicki's Motion to Modify Asset Freeze to Permit Access to Funds for Legal Defense Costs. (Dkt. 43) On February 28, 2020, this Court granted the Parties' joint motion to extend and modify the asset freeze imposed on February 14, 2020. (Dkts. 11, 31) The Court's release of funds was for the sole purpose of allowing Defendant Rybicki to

EXHIBIT

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cover his legal expenses in this action, not to permit his counsel to recover debts previously incurred before the freeze order. To have done so would have effectively elevated counsel's creditor status above all other creditors of the Defendant and the Defendant entities.

Any funds paid to counsel from the unfrozen assets may **only** be used toward legal fees incurred on or after February 14, 2020 — when the asset freeze was imposed in this lawsuit — not toward any legal fees previously incurred. Further, the unfrozen assets may only be used if counsel intends to represent Defendant Rybicki in this action. Any past due legal expenses that were incurred before the asset freeze must be dealt with in the normal course as with any other creditor. If counsel does not wish to undertake the representation of Defendant Rybicki going forward, they must return any money they received from the unfrozen assets to allow Defendant Rybicki to retain a different law firm.

Accordingly, upon consideration of the foregoing, it is hereby **ORDERED** that:


1. To the extent that the Motion to Modify Asset Freeze to Permit Access to Funds for Legal Defense Costs, (Dkt. 43), is seeking the Court's assistance in directing the SEC and/or the Receiver to unfreeze and release the \$75,000 referenced in this Court's February 28, 2020 Order, the Motion is **GRANTED**.¹ **These funds shall only be used for Defendant Rybicki's legal expenses incurred ON OR AFTER THE DATE THE ASSET FREEZE WAS IMPOSED BY THE COURT, and only at reasonable local rates not to exceed \$400.00 per hour for the most experienced counsel and**

¹ The Court assumes this has already been accomplished, but it includes this directive in an abundance of caution.

\$320.00 for a second lawyer. Further the unfrozen assets may only be used by counsel who intend to stay on for the defense of this case. The funds may not be used to defend Defendant Rybicki in the separate civil, putative class action case, nor may the funds be used to recoup fees for work performed prior to the asset freeze. If counsel does not intend to stay on as counsel in the case, the funds must be returned immediately and in full, no matter when they were incurred.

2. Counsel who intend to stay on as counsel in the instant case shall provide a budget for the case and submit it to the Court for review, *in camera*. Thereafter, the Court will determine whether additional funds are needed and should be paid from the assets frozen by the Court's prior Orders.

DONE and ORDERED in Tampa, Florida, this 11th day of March, 2020.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person



Government of Puerto Rico
Department of State

Transaction Date: 27-Jun-2019
Register No: 429857
Order No: 1672503

Government of Puerto Rico
Certificate of Formation of a Limited Liability Company

Article I - Limited Liability Company Name

The name of the Domestic Limited Liability Company is: REX TENAX LLC
Desired term for the entity name is: LLC

Article II - Principal Office and Resident Agent

Its principal office in the Government of Puerto Rico will be located at:

Street Address **151 San Francisco Street, Suite 200, SAN JUAN, PR, 00901**
Mailing Address **151 San Francisco Street, Suite 200, SAN JUAN, PR, 00901**
Phone **(415) 559-7792**

The name, street and mailing address of the Resident Agent in charge of said office is:

Name **Stolberg Law, LLC**
Street Address **151 San Francisco Street, Suite 201, SAN JUAN, PR, 00901**
Mailing Address **151 San Francisco Street, Suite 201, SAN JUAN, PR, 00901**
Email **jcstolberg@stolberglaw.com**
Phone **(787) 722-5567**

Article III - Nature of Business

This is a For Profit entity whose nature of business or purpose is as follows:
To engage in any lawful activity permitted under applicable law.

Article IV - Authorized Persons

The name, street and mailing address of each Authorized Person is as follows:

Name **Williams, Michael**
Street Address **109 Calle de la Cruz, PH, SAN JUAN, PR, 00901**
Mailing Address **109 Calle de la Cruz, PH, SAN JUAN, PR, 00901**
Email **msw.king@protonmail.com**

Article V - Administrators

Faculties will not end by presenting this Certificate.



REX TENAX LLC

Domestic Limited Liability Company

Article VI - Terms of Existence

The term of existence of this entity will be: **Perpetual**

The date from which the entity will be effective is: **27-Jun-2019**

Supporting Documents

| Document | Date Issued |
|-----------------|--------------------|
|-----------------|--------------------|

STATEMENT UNDER PENALTY OF PERJURY

IN WITNESS WHEREOF, I/We Williams, Michael, the undersigned, for the purpose of forming a limited liability company pursuant to the laws of Puerto Rico, hereby swear that the facts herein stated are true. This 27th day of June, 2019.