

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

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**KINETIC INVESTMENT GROUP, LLC and  
MICHAEL SCOTT WILLIAMS,**

**CASE NO.: 8:20-cv-394**

**Defendants, and**

**KINETIC FUNDS I, LLC,  
KCL SERVICES, LLC d/b/a LENDACY,  
SCPIO, LLC, LF 42, LLC, EL MORRO  
FINANCIAL GROUP, LLC, and KIH, INC.,  
f/k/a KINETIC INTERNATIONAL, LLC,**

**Relief Defendants.**

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**RECEIVER'S MOTION FOR POSSESSION OF AND TITLE TO RESIDENTIAL  
REAL PROPERTY PURCHASED BY DEFENDANT WILLIAMS IN SAN JUAN,  
PUERTO RICO AND INCORPORATED MEMORANDUM OF LAW**

Mark A. Kornfeld, Esq., as Receiver (the “Receiver”) appointed over Defendant Kinetic Investment Group, LLC (“Kinetic Group”) and Relief Defendants Kinetic Funds I, LLC (“Kinetic Funds”), KCL Services, LLC d/b/a Lendacy (“Lendacy”), Scipio, LLC, LF 42, LLC, El Morro Financial Group, LLC, and KIH Inc., f/k/a Kinetic International, LLC (collectively, the “Relief Defendants”), by and through his undersigned counsel and pursuant to Paragraph 7 of the Court’s Order Granting Plaintiff Securities and Exchange Commission’s Emergency Motion for Appointment of Receiver (the “Order Appointing Receiver”) (Doc. 34), hereby moves this Court for possession of and title to the following residential real

property purchased in March 2017 by Defendant Michael Scott Williams (“Williams”) in San Juan, Puerto Rico:

- Condominium Villa Gabriela, Apartment PH1-A/PH 1-B located at 109 De la Cruz Street, San Juan, Puerto Rico 00901;
- Condominium Villa Gabriella, Apartment 2-E located at 109 De la Cruz Street, San Juan, Puerto Rico 00901;
- Parking Space #321 located at Cochera San Francisco, Luna Street #204, San Juan, Puerto Rico 00901; and
- Parking Space #325 located at Cochera San Francisco, Luna Street #204, San Juan, Puerto Rico 00901.

These properties are collectively referred to as the “Property.”

Fresh off raising more than \$15 million in investments from several Puerto Rico government agencies entrusted with the stewardship of public funds, Defendant Williams brazenly and knowingly violated his duties to investors by wrongfully taking and converting millions of dollars of investor funds for his own benefit and personal enjoyment.<sup>1</sup> Simply put, Williams routinely treated millions of dollars of investor monies not as a fiduciary of the highest order responsible for those funds’ safekeeping and growth, but rather, as his own personal slush fund which he could access whenever he wanted for whatever he wanted.

As set forth herein, Williams specifically diverted over \$1.5 million of investor funds in order to make what can charitably be characterized as a “lifestyle purchase” — the purchase of the Property, a luxury apartment multiplex in Puerto Rico, to be used for his personal residence.<sup>2</sup> To be sure, this taking of investor money to fund this purchase was not authorized

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<sup>1</sup> These and other findings from the Receiver’s preliminary investigation are detailed in the Receiver’s First Interim Report filed on April 30, 2020 (the “Interim Report”) (Doc. 60).

<sup>2</sup> The Court has previously and accurately described Williams’ real estate activity as “real estate speculation in the Caribbean.” *See* Doc. 69 p. 2.

in any way. It was not part of any investment management strategy or legitimate business purpose for the benefit of investors. It was never disclosed, nor were investors ever informed. And Williams' investors — the victims of this wrongdoing — obviously did not benefit in any way from the misappropriation of their monies in this manner. The Receiver recognizes that this motion comes during the current COVID-19 pandemic, but as explained below Defendant Williams has acknowledged he no longer lives at the Property and the fact remains that the Property is recoverable Receivership Property and would be best preserved and maintained by the Receiver.

Because the Property's purchase is directly traceable to investor funds, it is property of the Receivership estate and must be immediately turned over to the Receiver. The Receiver now brings this motion, which the Commission does not oppose, seeking turnover of the Property to the Receivership estate so that it may be secured and liquidated for the benefit of Williams' defrauded investors. For the reasons stated below, the Receiver respectfully requests that the Court grant this Motion.

## **I. BACKGROUND**

### **A. Procedural Background And The Order Appointing Receiver**

1. On February 20, 2020, the Commission filed a complaint (the "Complaint") (Doc. 1) in the United States District Court for the Middle District of Florida (the "Court") against the Defendants Kinetic Investment Group and Williams and Relief Defendants, alleging that the Defendants violated the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 by making false or materially misleading

representations to investors and that over \$6 million of investor funds was misappropriated to fund other business ventures and pay for other unauthorized expenses. Doc. 1 ¶¶ 4, 28-38.

2. The Complaint alleged that the scheme involved securities offerings made on behalf of Kinetic Funds, a purported hedge fund with a sub-fund structure managed by Kinetic Investment Group and Williams. *Id.* ¶ 2. Defendants represented to investors that the largest sub-fund, KF Yield (the “KFYield Fund”), invested all of its assets in income-producing U.S. listed financial products hedged by listed options. *Id.* Potential investors were told that the KFYield Fund was a liquid investment that would “maintain 90% principle [sic] protection” and that an investor could redeem their principal investment “100% . . . without penalties” with a 30-day written notice. *Id.* ¶¶ 2, 28. Investors in the KFYield Fund, which attracted the near-entirety of investor funds entrusted to Kinetic Funds, were routinely provided with documentation from Bloomberg’s reporting service that claimed the KFYield Fund had achieved positive annual returns every year since inception. *Id.* ¶ 24. As the Commission alleged, these and other representations were false. *See, e.g.*, Docs. 2-3.

3. On March 6, 2020, the Court entered the Order Appointing Receiver.<sup>3</sup> Among other things, the Order Appointing Receiver directed the Receiver to “[t]o take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto . . . .” Doc. 34 at ¶ 7.B. The Order Appointing Receiver also explicitly authorizes the Receiver “to take immediate

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<sup>3</sup> By separate order, the Court also entered an Order granting the Commission’s Motion for Asset Freeze and other relief as to all Defendants (the “Asset Freeze Order”) (Doc. 33).

possession of all real property of the Receivership Defendants, wherever located, including but not limited to all ownership and leasehold interests and fixtures.” *Id.* at ¶ 15.

4. The Receiver’s initial investigation has uncovered significant evidence supporting the Commission’s allegations. This includes evidence that Defendants systematically and consistently misrepresented the net asset value of and the actual returns realized from the KFYield Fund, which received the near-entirety of investor funds during the relevant period.

5. As detailed in the Receiver’s Interim Report, the actual value of the KFYield Fund’s trading account at Interactive Brokers and the purported performance represented to investors and others from 2015 to 2019 are as follows:

<b>December 31:</b>	<b>NAV per Portfolio Analysis for Acct x 4161</b>	<b>Calculated Annual % Change in NAV</b>	<b>Annual Return per Portfolio Analyst for x4161</b>	<b>Return per Bloomberg Profile</b>
2013	n/a			
2014	7,418,915.58			
2015	6,766,313.65	-8.8%	-8.8%	0.21%
2016	6,510,940.57	-3.8%	-3.8%	2.24%
2017	4,734,380.58	-27.3%	-27.5%	1.04%
2018	11,199,977.98	n/a	12.8%	7.09%
2019	11,062,958.09	-1.2%	-1.2%	

Doc. 60 at pp. 26-28.

6. The net asset value of the KFYield Fund brokerage account at Interactive Brokers also never exceeded \$12.5 million during this period despite Kinetic Funds receiving at least \$44 million in investor funds which investors understood (and investment documents provided) would be “invested in one, or more, of the following investment funds. . .” Only approximately 25% of investor funds were actually transferred to the KFYield Fund brokerage

account and invested as promised. This was also inconsistent with the specified net asset value of KFYield Fund displayed in the publicly-available Bloomberg listing service as a result of the information provided by Defendants to Bloomberg.

7. The Interim Report also set forth additional preliminary findings based on the Receiver's preliminary investigation, including that:

- A significant shortfall existed between the amount of assets Kinetic Funds should have had available and the actual amount of available assets;
- A large portion of this shortfall was attributable to Williams' wrongful diversion of investor funds, directly and indirectly, for his personal use and benefit through a series of non-arm's length transactions that included the purchase of the Property, a historic commercial building in Old San Juan, and the funding and operation of several start-up businesses;
- At least \$12 million of investor funds were diverted to fund Lendacy's business of issuing unsecured and below-market rate loans to investors and other third-parties including Williams and other insiders; and
- Nearly \$4 million was paid by Kinetic Funds to Kinetic Investment Group, which appears to be excessive and contrary to disclosures to investors.

*See* Doc. 60.

8. This and other evidence suggests that Defendants' violations of federal securities laws began no later than 2015.

**B. Williams Purchases The Property In March 2017 Using Investor Funds**

9. Investors desiring to invest in the KFYield Fund (or any other sub-fund managed by Kinetic Funds) were required to wire or otherwise transfer their investment to Kinetic Funds' bank account at BMO Harris Bank with account number ending in "4255" (the "KF Bank Account").<sup>4</sup> The Receiver is unaware of any other bank account where investors deposited funds for investment with Kinetic Funds.

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<sup>4</sup> *See* Doc. 2 Ex. 6 at 68:20-24 ("[I]f you wanted to invest in Kinetic Funds and the KF Yield strategy, you -- per the subscription agreement to do so, you wired your capital to this Kinetic

10. As of October 31, 2016, the balance of the KF Bank Account was \$17,738.09. *See Declaration of Jordan D. Maglich in Support of Receiver's Motion for Possession of and Title To Residential Real Property Purchased By Defendant Williams in San Juan, Puerto Rico and Incorporated Memorandum of Law (the "Maglich Decl.") (Doc. 71) ¶ 5, Ex. 1 at p. 1.* On or around December 7, 2016, the KF Bank Account received a \$15 million deposit from an investment made by a Puerto Rico state insurance fund which increased the balance of the KF Bank Account to \$15,245,844.55. *Id.* ¶ 5, Ex. 1 at p. 7. The KF Bank Account subsequently received seven more investor deposits totaling \$4,185,000 during the time period from November 1, 2016 to March 21, 2017. *Id.* ¶ 5, Ex. 1. At least 99% of the funds in the KF Bank Account as of March 21, 2017 consisted of investor funds.

11. On or around March 22, 2017, Williams entered into an agreement to purchase the Property (the "Purchase Agreement"), which consisted of several luxury apartments located in Old San Juan, Puerto Rico, as well as two accompanying parking spaces. *Id.* ¶ 6, Ex. 2. The Purchase Agreement provided (and the recorded deed confirms) that Williams, not Kinetic Funds or any Receivership Defendant, would be purchasing the Property for \$1,500,000 in his personal capacity. *Id.*<sup>5</sup>

12. On March 21, 2017, \$1.5 million of investor funds was transferred from the KF Bank Account to Lendacy's bank account. *Id.* ¶ 5, Ex. 1. Prior to that transfer, the balance in Lendacy's bank account was less than \$12,000. *Id.* ¶ 7 Ex. 3. Two days later, on March 23, 2017, Williams directed former Lendacy employee Keli Pufahl to make several transfers

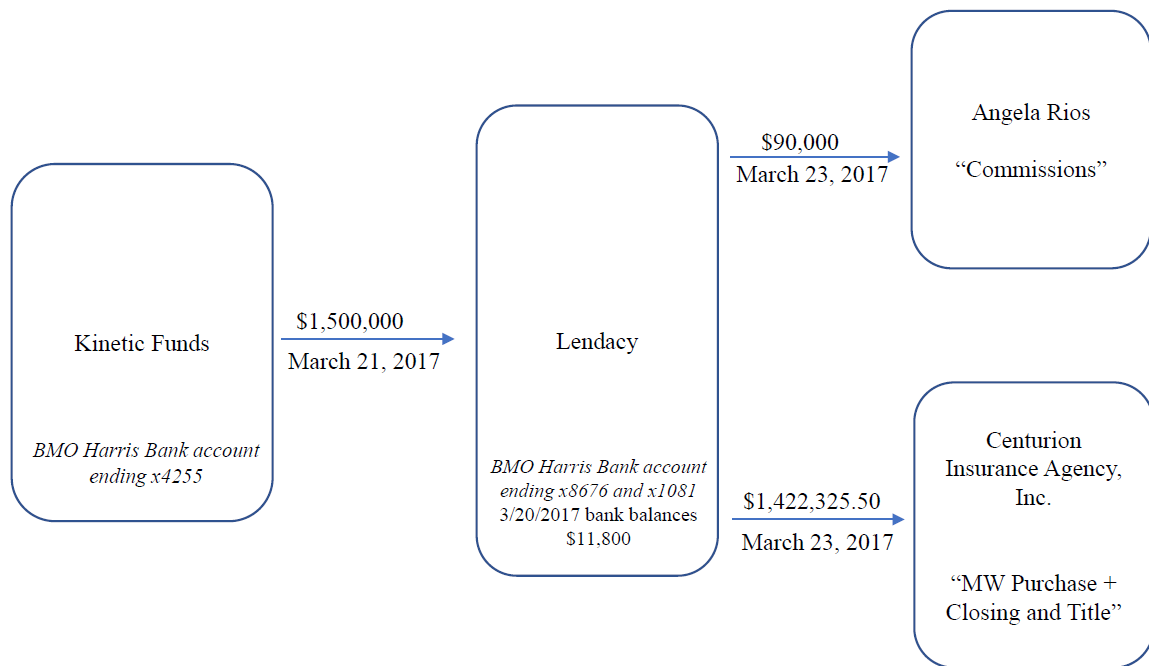
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Funds 1 BMO Harris account ending in 4255.")

<sup>5</sup> *See* Doc. 2 Ex. 9.

totaling approximately \$1.51 million from Lendacy’s bank account to various third parties for the purpose of purchasing the Property (the “Transfers”). Doc. 2 Ex. 6 at 79:7-18; Maglich Decl. ¶ 7, Ex. 3. One of the Transfers, for \$90,000, appears to have paid broker commissions for the purchase of the Property. *Id.* ¶ 8, Ex. 4. The second of the Transfers, for \$1,422,425, appears to have been paid to the seller for the purchase of the Property. *Id.*

13. A diagram of the flow of funds for the purchase of the Property is below:



14. At no time were KFYield Fund investors informed that their invested funds could be, or were, used by Williams to purchase a luxury residence for himself in Puerto Rico.<sup>6</sup>

<sup>6</sup> At the hearing on March 6, 2020, Williams advanced the theory that any transfers from the KF Bank Account to Lendacy were “never financed with KFYield investor funds” but were instead done so using “portfolio margin capabilities with Interactive Brokers combined with its existing cash balances.” Doc. 25 p.p. 6-7. This argument was rejected by the Court, is



15. Williams recently disclosed that he has been receiving regular rental payments from a tenant leasing the lower apartment of the Property.<sup>7</sup> The Receiver is not aware that any of those rental payments received by Williams were provided to any Receivership Defendant. Instead, it appears that Williams has been using the funds for his own personal benefit even after (and in violation of) the Court's entry of the Asset Freeze Order.<sup>8</sup>

**C. After Helping Himself To Investor Funds To Buy His Luxury Apartment, Williams Tries To Cover Up The Diversion Through A Sham 'Loan'**

16. At or around the time Williams purchased the Property, a former Lendacy employee raised concerns that investor funds were being used to purchase the Property.<sup>9</sup>

17. Following his purchase of the Property, Williams signed a "Credit Facility Agreement" memorializing a self-described \$1,517,000 Lendacy loan to himself specifying an "interest only" repayment option with a 2.79% interest rate (the "Lendacy Loan").<sup>10</sup> The agreement was back-dated to March 23, 2017, as the former Lendacy employee who

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inconsistent and contrary to the actual tracing and flow of funds, and conveniently ignores the overarching fact that Williams was never authorized to use investor funds (or any purported funds "generated" by borrowing against investor funds or securities) to speculate in real estate for his personal benefit. Even following Williams' discredited argument, it remains that any funds generated by those investor assets belonged to investors - not Williams. Nor was there any disclosure remotely informing investors that Williams would use their funds as collateral to borrow money that he would then use for his personal benefit. As the Court previously correctly found, this argument does not hold any weight and is contrary to the undisputed evidence.

<sup>7</sup> Doc. 35 at ¶ 3; Doc. 49 at p. 16.

<sup>8</sup> As the Court recently stated in its Order Granting in Part and Denying in Part Williams' Emergency Motion for Clarification, Williams' admitted use of rental income from the Property for recent living expenses after entry of the Asset Freeze Order was "in clear contravention of the Asset Freeze Order. . ." Doc. 69 at p. 8.

<sup>9</sup> Doc. 2, Ex. 10 at 33:2-19, 141:20-142:24.

<sup>10</sup> Doc. 2, Ex. 21. The remaining approximately \$4,674.50 comprising the \$1.517 million Lendacy Loan has been suggested to have also been attributable to the purchase of the Property. Doc. 2 Ex. 6 at 69:21-70:9.

“probably” created this document testified her belief that the document was created after the purchase of the Property.<sup>11</sup> The purported ‘loan’ was completely unsecured.

18. KFYield Fund investors were afforded the opportunity to borrow up to 70 percent of their KFYield investment in an unsecured and below-market-rate loan from Lendacy. To be eligible or potentially qualify for such a Lendacy loan, an investor was subject to a standard process, as well as certain underwriting guidelines and procedures, including but not limited to, an application.<sup>12</sup>

19. Neither Kinetic Funds nor Lendacy disclosure documents to investors indicated that company management or insiders like Williams could or would be allowed to “borrow” investor monies for their personal — which is exactly what occurred here.

20. As of March 23, 2017, Williams had not invested anywhere close to what would have been necessary for him to potentially qualify (assuming this was even permissible) for a \$1.5 million ‘loan’ from Lendacy. In fact, Williams’ total investment at that time in the KFYield Fund appeared to be less than \$70,000.<sup>13</sup>

21. According to the former Lendacy president, Williams did not go through the standard Lendacy approval or application process for the Lendacy Loan before transferring the money to purchase the Property:

He wired the money out of Lendacy's account, but he did not document a loan. There was not until later that I was told by Keli Pufahl after I resigned that she forced him to document the transactions on a Lendacy statement. And you can

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<sup>11</sup> See Doc. 2 Ex. 10 at 142:12-15 (“Do you know whether this document was created prior to the purchase or acquisition of that property, or was it done after the fact? A. I believe it was after the fact.”)

<sup>12</sup> Doc. 2 Ex. 6 at 78:15-25.

<sup>13</sup> Doc. 2 Ex. 6 at 96:9-16.

follow up with her about that. But while I was there, there were no -- Michael did not go through the standard lending process that we would require our investors or clients to go through. **He simply wired the money out for the purchase with no documentation associated to it.**

Doc. 2, Ex. 6 at 78:15-25 (emphasis added).

22. To be sure, this self-proclaimed “loan” was not a legitimate, arms-length transaction tied to any investment Williams personally made in Kinetic Funds. There was no independent oversight, compliance or process, as to this self-interested taking of investor money. It was, instead, Williams treating investor money as if it belonged to him.<sup>14</sup>

23. Williams also apparently presented the Lendacy employee with a “Collateral Pledge Agreement” around the time of the purchase of the Property. In that agreement, Williams purportedly pledged the Property as collateral for his promised repayment of the \$1.5 million diverted to purchase the Property with money he expected to receive from a future sale of his interest in a separate company named Silexx Financial Systems (“Silexx”).<sup>15</sup> No such repayment has occurred nor does the document change the fact that Williams used investor funds to purchase the Property and thus the Property immediately became Receivership Property upon being purchased.<sup>16</sup>

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<sup>14</sup> Further evidencing the bogus nature of this ‘loan’ is the fact that prior to the filing of the Commission’s action, Williams had re-paid less than \$50,000 of the \$1.517 million over the 33-month period after he took the money, while incurring over \$150,000 in accrued interest which resulted on paper of him being over his stated credit limit by more than \$100,000.

<sup>15</sup> Doc. 2 Ex. 6 at 65:17-25

<sup>16</sup> The Receiver is aware that on March 5, 2020, the day before the Court’s hearing on the Commission’s pending motions at which the Order Appointing Receiver was granted and entered, Williams orchestrated an eleventh-hour partial or full repayment of various outstanding loans to himself or his entities, including a partial payment of approximately \$84,000 towards the Lendacy Loan evidencing the purchase of the Property. Doc. 49 at p. 7. Notwithstanding the eleventh-hour nature of the payment, the outstanding balance on the Lendacy Loan is still equal to or above \$1.5 million and it is in default.

**D. Williams Has Represented That He No Longer Resides In The Property**

24. The same day the Court entered the Order Appointing Receiver, Williams filed an Emergency Motion for Relief from Order Granting Motion for Appointment of Receiver in which he claimed, in relevant part, that he “presently resides at [the Property] with his girlfriend and her younger sister. . .” and asked that the Court permit him the continued use of the Property as his residence.<sup>17</sup>

25. Recently, Williams has represented that he “left Puerto Rico shortly after the March 6th hearing” and thus no longer resides at the Property (or in Puerto Rico).<sup>18</sup> On information and belief, Williams owns a house in Sarasota, Florida (through his entity LF42) and he also previously resided in a different home in Sarasota, Florida which is currently titled in the name of his wife.

26. In sum, Williams cannot be allowed to continue to benefit unjustly from his wrongful conversion of investor proceeds. For the above reasons, and those set forth in further detail, *infra*, the Receiver submits that the Order Appointing Receiver, the governing law and the full balance of all meaningful equitable considerations all overwhelmingly favor the granting of the Receiver’s motion for immediate turnover of the Property.

**II. ARGUMENT**

**A. The Requested Relief Sought By The Receiver Is Authorized By The Order Appointing Receiver And Applicable Law**

In the Order Appointing Receiver entered on March 6, 2020, the Court found that appointment of a receiver was “necessary and appropriate for the purposes of marshaling and

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<sup>17</sup> Doc. 35 at ¶ 3.

<sup>18</sup> See Doc. 64 at p.8. This filing was later stricken from the record.

preserving all assets of the Defendant” and other assets that “are attributable to funds derived from investors or clients of the Defendant. . . were fraudulently transferred by the Defendant; and/or (d) may otherwise be includable as assets of the estates of the Defendant.” Doc. 34

p.2. The Order Appointing Receiver further directed the Receiver to:

To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto

Doc. 34 at ¶¶ 7.B., 32. Notably, the Order Appointing Receiver does not condition the Receiver’s ability to recover Receivership Property on the occurrence of temporal or case-specific milestones (such as any order of disgorgement or final judgment).<sup>19</sup> Rather, the determinative factor is whether the asset in question constitutes Receivership Property. It follows that the Receiver may seek such relief at any time in order to marshal and secure all Receivership Property for the benefit of defrauded victims. Indeed, the sole factor necessitating the Receiver’s filing of this Motion is Williams’ decision to title the Property in his own name rather than that of a Receivership Defendant. The Receiver was able to obtain possession of the El Banco Espanol building, which purchase was similarly traceable to investor funds, without seeking similar relief because that asset was titled in the name of Receivership Defendant Scipio.<sup>20</sup>

Both the Federal Rules of Procedure and controlling caselaw authorize the relief sought by the Receiver. It is well established that Rule 56 of the Federal Rules of Civil

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<sup>19</sup> A finding otherwise would be contrary to principles of equity and lead to the untenable result of essentially entrusting the accused party holding the asset in question to maintain and preserve that asset for the pendency of proceedings.

<sup>20</sup> See, e.g. Doc. 60 pp. 45-46.

Procedure gives federal district courts summary jurisdiction over all receivership proceedings. *See, e.g., SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992). In *Elliot*, the court referenced its broad inherent powers sitting as a court of equity, which includes the ability to use summary proceedings to obtain possession of receivership property. *Id.* (quoting *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *see also SEC v. Elm*, 2015 WL 7884644 (S.D. Fla. 2015) (noting a similarly-worded receivership order did not require the receiver to file a separate lawsuit to seek the turnover of funds transferred to third parties, instead finding the receiver must simply apply to the court for an order granting the receiver possession of such funds).

At the time the Property was purchased with funds belonging and attributable to Kinetic Funds investors, the Property became Receivership Property available to the Receiver to secure and manage for the benefit of Defendants' victims. *See In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d 880, 887 (11th Cir. 2003). The Eleventh Circuit has stated that when fraudulently-obtained funds are used to purchase or maintain a property, a constructive trust is created over those funds for the benefit of the defrauded victims. *Id.* A constructive trust is a "tool of equity designed in certain situations to right a wrong committed and to prevent unjust enrichment of one person at the expense of another either as a result of fraud, undue influence, abuse of confidence or mistake in the transaction." *Id.* at 892 (citing *In re Powe*, 75 B.R. 387, 393 (Bankr. M.D. Fla. 1987)). The constructive trust doctrine provides that the rightful owner of misappropriated trust property - in this case, the Receiver - can trace the proceeds of such property and any identifiable subsequent proceeds able to be traced to the misappropriated property or funds. *See In re Lewis J. Heckler*, 316 B.R. 375, 387 (Bankr. S.D. Fla. 2004).

**B. Turnover Of The Property To The Receiver Is Warranted By Applicable Caselaw And Equitable Principles**

There is no legitimate reason for Williams' continued enjoyment and ownership of a luxury apartment multiplex that was undisputedly purchased solely with investor funds. Williams' purchase of the Property benefitted himself, not Kinetic Funds investors, and served only to deplete available investor funds. Despite having enjoyed the benefit of living in the Property for over three years, the evidence shows that Williams has no legitimate claim to the Property. Because the Property became an asset of the Receivership estate when it was purchased with fraudulently-obtained investor funds, both governing caselaw and principles of equity and basic fairness dictate that the Property must be returned to the Receivership estate where it can be secured and liquidated for the benefit of investors. *In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d at 887.

This Court has previously employed a three-part inquiry in addressing a court-appointed receiver's motion for turnover of real property purchased with investor funds. In *SEC v. Aquacell Batteries, Inc.*, a receiver sought the turnover of real estate titled in the name of a defendant's daughters that was purchased using funds directly traceable to the receivership defendant and to which the defendant's daughters had no legitimate claim. 2008 WL 2915064, at \*3 (M.D. Fla. 2008) (Baker, J.). The Court followed a three-part inquiry in which the receiver had the burden of establishing that (1) the receivership entities fraudulently obtained funds from investors, (2) investor funds were transferred to the individual in question for his or her benefit to obtain the subject property, and (3) the individual has no legitimate claim to the funds. *Id.* Each of those factors are satisfied here.

**i. Defendants Fraudulently Obtained Funds From Investors**

First, the Commission presented abundant evidence in support of its Motion for Appointment of a Receiver (Doc. 3) and Motion for Asset Freeze (Doc. 2) that Defendants, including Williams, fraudulently obtained funds from investors. Based on this evidence, the Court granted the Motions and found that the Commission had made a “sufficient and proper showing in support of the relief granted...” Doc. 33 p. 2.

The Receiver’s preliminary investigation has found abundant evidence supporting the Commission’s allegations of fraudulent conduct by Defendants in raising and misappropriating investor funds. For example, despite promising investors that their funds would be “invested in one, or more, of . . .” the various Kinetic Funds sub-funds, only approximately \$11 million of investor funds were ever transferred to Interactive Brokers (and only \$5 million actually made it to the KFYield brokerage account).<sup>21</sup> At least \$6 million of investor funds were then diverted by Williams to purchase the Property and a historic commercial bank building in San Juan, Puerto Rico, fund and operate other independent companies in Puerto Rico, and make speculative investments in a cryptocurrency trading exchange and an airline seat prototype.<sup>22</sup> These are overwhelmingly sufficient grounds to satisfy the first prong. *See also Aquacell Batteries, Inc.*, 2008 WL 291064 at \*3 (“the underlying fraud of Defendants has been established by the findings in the Preliminary Injunction...and the wealth of supportive evidence of record.”)

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<sup>21</sup> Doc. 60 at p. 31.

<sup>22</sup> Doc. 60 at pp. 41-58.



**ii. Investor Funds Were Transferred For Williams' Benefit To Obtain The Property**

Second, it is undisputed that investor funds were transferred to purchase the Property for Williams' benefit. The funds used to purchase the Property are directly traceable to the KF Bank Account, which was the only bank account where Kinetic Funds investor funds were deposited.<sup>23</sup> From the time the balance of the KF Bank Account was less than \$20,000 at the end of October 2016, the account received nearly \$20 million in investor deposits and at least 99% of the funds in the account as of March 21, 2017 consisted of investor funds. Maglich Decl. ¶ 5, Ex. 1. The funds were then transferred to Lendacy's account where Williams directed several wire transfers to purchase the Property.

It is equally uncontroverted that the purchase of the Property had no benefit for Kinetic Funds investors, as the Property was purchased in Williams' personal capacity for use as his primary residence. *Id.* ¶ 6, Ex. 2. By virtue of the Property's purchase with Receivership funds, the Receiver is entitled to an equitable lien and/or constructive trust on the Property. *See, e.g., See In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d at 887 (constructive trust is created over the funds for the benefit of the victims where receivership funds were used to purchase real property, and equitable lien would be imposed to prevent "the [d]efendants' unjust enrichment at the expense of the defrauded investors.")

**iii. Williams Has No Legitimate Claim To The Investor Funds Used To Purchase The Property**

Finally, Williams neither had nor has any legitimate claim to the \$1.5 million in

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<sup>23</sup> Doc. 2 Ex. 6 at 68:18-25.

investor funds he diverted to purchase the Property. At the time of the purchase of the Property, Williams' entire investment in KFYield Fund was "approximately 60 to \$70,000" and he had previously received a Lendacy Loan of \$40,000 (i.e., approximately 70% of his investment).<sup>24</sup> When Williams was asked about this under oath, as well as the source and use of investor funds to purchase the Property, he asserted his Fifth Amendment right under the U.S. Constitution against self-incrimination.<sup>25</sup> The Court is permitted to draw an adverse inference from Williams' invocation of his Fifth Amendment privilege. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1304 (11th Cir. 2009).

The fact that Williams purportedly entered into the Lendacy Loan and Collateral Pledge Agreement has no bearing on this factor, as the evidence shows those documents were simply an after-the-fact attempt to legitimize the unauthorized misappropriation of investor funds. Lendacy's former president has testified that Williams "simply wired the money out for the purchase with no documentation associated to it" and "did not go through the standard lending process that we would require our investors or clients to go through."<sup>26</sup> When Williams was asked under oath about the timing of the preparation of the Lendacy Loan documentation, he again asserted his Fifth Amendment right against self-incrimination.<sup>27</sup> Again, the Court may draw an adverse inference against Williams based on this invocation. *Eagle Hosp. Physicians, LLC*, 561 F.3d at 1304.

Similarly, Williams' execution of the Collateral Pledge Agreement actually supports

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<sup>24</sup> Doc. 2 Ex. 6 at 96:9-16.

<sup>25</sup> Doc. 45 at 96:23-97:19.

<sup>26</sup> Doc. 2, Ex. 6 at 78:15-25; Doc. 2, Ex. 10 at 33:3-19

<sup>27</sup> Doc. 45 at 96:8-10.

the requested relief as it purportedly pledged the Property as collateral for the repayment of the funds used to purchase the Property with sale proceeds expected from a future sale of Silexx. There is no evidence that Williams made any contemplated repayment prior to the filing of this action.<sup>28</sup> Instead, the only subsequent transfer made by Williams to Kinetic Funds was in the form of a \$1.5 million investment in May 2018 - more than a year after he purchased the Property. This was not a repayment of any loan, let alone the Lendacy Loan, and is wholly inconsistent with investor statements showing Williams' \$1.5 million investment in KFYield and the continued accrual of interest on the Lendacy Loan. Maglich Decl. ¶ 9, Exs. 5-6. Even if the Collateral Pledge Agreement had any bearing (and the Receiver does not believe that is the case), Williams failure to comply with that agreement requires the return of the pledged collateral back to the receivership estate.

**iv. Principles Of Equity And Fairness Also Warrant Turnover Of The Property**

In addition to satisfying the necessary factors under *Aquacell Batteries*, it would also be patently inequitable to allow Williams to continue to benefit from his brazen misappropriation of investor funds by allowing him to retain control and ownership of the Property. By helping himself to investor funds to purchase the Property, Williams has been able to live in a free-and-clear luxury penthouse in historic Old San Juan for at least three years (and receive rental income from the remaining apartment). Williams' treatment of investor funds as his personal piggy bank that he somehow justified based on continually loaning investor funds to himself was a significant cause of what the Receiver's preliminary

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<sup>28</sup> Doc. 2, Ex. 6 at 78:9-11 ("To my knowledge, by the time that I had resigned he had not paid it back and I'm not aware that he has since.")

investigation suggests to be a large shortfall<sup>29</sup> between the assets owed to, and actually available to repay, Kinetic Funds investors.<sup>30</sup>

The Receiver submits that the requested relief is warranted by governing law and consistent with the wide discretion over this receivership held by the Court under principles of equity. *See, e.g., Elliott*, 953 F.2d at 1566. Turnover of the Property to the receivership estate is warranted to allow the Receiver to secure and manage the asset for the benefit of defrauded investors.

#### IV. CONCLUSION

The evidence is clear that the Property was acquired with investor funds which were fraudulently obtained by Defendants and that Williams has no legitimate claim to retain the Property. For the reasons set forth above, the Receiver respectfully requests that this Court (i) grant this Motion and order the turnover of the Property described herein; (ii) order Williams and all other tenants to vacate the Property within thirty (30) calendar days and to cooperate fully with the Receiver; and (iii) grant such other and further relief as is just and proper.

Dated: May 15, 2020.

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<sup>29</sup> Doc. 60 at pp. 21-25.

<sup>30</sup> As noted herein, Williams also has the use of at least one other residence in Sarasota and has admitted he no longer resides at the Property which further weighs in favor of the relief sought by the Receiver

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**LOCAL RULE 3.01(g) CERTIFICATION**

Pursuant to Local Rule 3.01(g), the undersigned certifies that counsel for the Receiver conferred with counsel for the Commission and Defendant Williams prior to filing this Motion. The Commission has indicated it does not oppose the relief requested in this motion, while Defendant Williams indicated he opposes the requested relief.

/s/ Jordan D. Maglich

Jordan D. Maglich

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to the following counsel of record:

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