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 et al.,

MICHAEL WILLIAMS' REPLY IN SUPPORT
OF HIS EMERGENCY MOTION (DOC. 49)

1. The SEC and Receiver do not dispute that the Silexx Sale Funds are untainted by the alleged wrongdoing at issue.

The SEC and Receiver do not dispute, because they cannot, that the funds at issue—the Silexx Sale Funds—are untainted by any alleged wrongdoing. The transfers of these funds were made before the contested hearing on the SEC's application for an asset freeze. Thus, this Court should grant the relief requested in the Emergency Motion for this reason alone. *See, generally, 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."); *see also S.E.C. v. Comcoa Ltd.*, 887 F. Supp. 1521, 1525 (S.D. Fla. 1995) ("The funds in question are only forfeitable to the extent they are comprised of the defendants' ill-gotten gains. If Grossman can show that the funds are from other, *untainted* source, it may have a legitimate claim to those funds.") (original emphasis). As explained in the Emergency Motion, the complete absence of any connection of alleged wrongdoing to the Silexx Sale Funds served as the primary basis for Mr. Williams' and Greenberg Traurig's (the

"Firm") position that these funds were not intended to be engulfed in the March 6th Orders. (Doc. 49 at pp. 11-12).[1]

2. Mr. Williams and the Firm acted reasonably and in good faith regarding the application of legal fees from the retainer payment on and after March 6th.

Mr. Williams first engaged the Firm in January and placed a retainer on deposit to be applied to defense fees and costs. After payment of the first invoice (before the SEC commenced this action), a portion of the retainer remained in place on March 5th when Mr. Williams deposited a portion of the Silexx Sale Funds with the Firm with the intent that the monies be applied to ongoing defense costs. The Firm received the funds before the contested hearing on the SEC's application for an asset freeze order and believing in good faith that they were not connected in any way to the allegations in this matter. When the Firm consulted with the Receiver on April 16th it candidly disclosed its interpretation of the application of the March 6th Order to the Silexx Sale Funds, including the sum deposited with the Firm. Moreover, virtually all the legal fees in dispute incurred after the Freeze Order was entered on March 6th related directly to responding to multiple, ongoing Receiver requests for information, documents and equipment. This is most certainly not a circumstance, as the SEC alleges, where the Firm asks for forgiveness and not permission.

3. The SEC and Receiver cite no authority supporting their claim that transfers made before the Asset Freeze Order are unlawful.

[1] As stated in the Emergency Motion, the Firm will replenish the subject fees already applied to pay Mr. Williams' defense fees and costs after the entry of the March 6th Orders if this Court (a) determines that Mr. Williams' 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) of the Emergency Motion. *See* Doc. 49 at p. 3 n. 2.

The SEC and Receiver appear to take the legally untenable position that Mr. Williams was obligated to voluntarily freeze all his assets, even assets that cannot be connected to Kinetic or Lendacy, *before* the highly contested hearing on the SEC's motion to freeze assets. They cite no caselaw to support this highly specious contention. The SEC's attempt to portray transfers made by Mr. Williams' and the Firm prior to the Freeze Order in a fraudulent and "deceitful" light is disingenuous. (Doc. 51 at pp. 5-6, Doc. 54 at pp. 8-9). It is undisputed that the Freeze Order was not entered at the time these transfers were made. The source of these transfers was entirely comprised of the Silexx Sale Funds which were totally unrelated to Kinetic investor and Lendacy money—a fact that neither the SEC nor Receiver dispute. Moreover, most of the Silexx Sale Funds were used by Mr. Williams and LF42 to pay off or pay down Lendacy loans, the alleged ill-gotten gains. Neither the SEC nor the Receiver point to any authority demonstrating that these pre-freeze transfers were unlawful or otherwise inappropriate.

4. Mr. Williams' statements regarding funds transferred to the Pyram King, Rex Tenax and Personal Accounts are true.

The Receiver claims that Mr. Williams appears to have made "false" statements by stating in the Emergency Motion that no monies from Kinetic Funds or any Relief Defendant were transferred to or from the Rex Tenax, Pyram King or Personal Accounts. (Doc. 54 at pp. 8-9). The Receiver is incorrect. As a threshold matter, Mr. Williams was transparent in the Emergency Motion when he stated that prior to the Freeze Order he "funded the Pyram King Account with approximately $25,000 of the Silexx Sale Funds . . ." (Doc. 49 at pp. 10, 22). [2]

[2] The $60,000 wire transfer the Receiver takes issue with to Mr. Williams' wife-also from Silexx Sales Funds-was for child support and healthcare for Mr. Williams' son. (Doc. 53-5 at p. 5).

Clearly, Mr. Williams did not misrepresent the origination of the funds held in the Pyram King Account.

Moreover, the Receiver does not point to a single transfer to support his claim that Kinetic Funds' or Relief Defendant monies were transferred to or from Mr. Williams' Personal Account at Banco Popular; instead, the Receiver identifies a transfer allegedly made by Mr. Williams to a personal account at BB&T Bank. (Doc. 54 at p. 8). Mr. Williams, however, does not ask this Court to unfreeze funds held in his personal account at BB&T Bank. (Doc. 49 at p. 10). The Receiver does not identify a single transfer to or from Mr. Williams' Personal Account at Banco Popular to substantiate his accusations.

In addition, the Receiver's allegation regarding the Rex Tenax Account is false and based on a misunderstanding of the exhibits attached to his Opposition. To the best of Mr. Williams' knowledge, the $25,000 wire identified by the Receiver was never completed because of an error in Rex Tenax's bank account number in the wire instructions. In fact, a cursory review of the "Wire Details" attached as Exhibit 5 to Mr. Maglich's Declaration evidences this error. The "Beneficiary Account Number" in the "Wire Details" identifies Rex Tenax's account number as ending in "2011." (Doc. 53-5 at p. 6). Yet, Mr. Williams' March 5th email excerpted by the Receiver clearly identifies Rex Tenax's account number as ending in "6852," (Doc. 53-6), which is the correct account number for the Rex Tenax Account. *See* Doc. 49 at p. 9. And, the March 6th email identified by the Receiver also identifies the correct

Rex Tenax Account. (Doc. 53-7). The Receiver does not provide *any* bank records evidencing that this wire was *received* and *deposited* into the Rex Tenax Account.[3]

5. Mr. Williams' frozen assets appear to exceed the disgorgement amount identified by the SEC at the time the transfers were made.

Mr. Williams respectfully submits that his assets appear to exceed the $6.3 million disgorgement amount requested by the SEC in its Freeze Motion; presenting this Court with another basis to grant Mr. Williams' request to use the Silexx Sale Funds deposited with the Firm to pay for his attorneys' fees and costs in defending this action.

The only disgorgement amount specifically identified by the SEC is $6.3 million that it claims Mr. Williams purportedly misappropriated investor funds, directly or indirectly through Relief Defendants, through Lendacy loans used to allegedly fund other business ventures and to pay for personal expenses. *See* Doc. 2 at pp. 2, 19-20, 23; Doc. 52 at p. 2.; *see S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (the SEC bears the burden of showing the amount of assets subject to disgorgement). Mr. Williams has denied the SEC's allegations of misappropriation and other wrongdoing, but even if the SEC prevails on its disgorgement claim, it appears that Mr. Williams' assets held individually and indirectly through Relief Defendants exceeds this amount.

As a threshold matter, it cannot reasonably be disputed that only $3,542,603 of the claimed $6.3 million disgorgement amount remains as a result of Mr. Williams' use of a

[3] Mr. Williams did not misrepresent the events that occurred on the April 16th call. As a threshold matter, Mr. Williams did not affirmatively state in his Emergency Motion that the Receiver had no objection to the unfreezing Pyram King, Rex Tenax or Personal Accounts. Instead, Mr. Williams represented that it was his belief, which was based on his own understanding of the Receiver's counsel's comments on the April 16th call, that the Receiver generally agreed that the March 6th Orders did not apply to the Accounts. *Compare* Doc. 49 at pp. 10-11, *with* Doc. 54 at ¶ 17. Regardless, Mr. Williams' counsel's summation of the April 16th call in his Emergency Motion is in accordance with his counsel's recollection of their discussion with the Receiver and his counsel.

majority of the Silexx Sale Funds on March 5th to (a) payoff of the $2,550,000 LF42 Loan, (b) payoff of the April 2015 $40,000 loan, (c) paydown the March 2017 loan by $84,875.35, and (d) paydown of Scipio's May 2018 loan by $82,521.58. *See* Doc. 49-2. Mr. Williams respectfully submits that his remaining assets held directly or indirectly through the Relief Defendants—not including the remaining Silexx Sale Funds deposited with the Firm—appear to exceed the remaining alleged disgorgement, which are as follows:

Asset	**Estimated Amount**[4]
Mr. Williams' investment in Kinetic Funds	$1,500,000 (Doc. 51 at p. 9 n. 4); (Doc. 25-1 at ¶ 23).
Value of historic bank building	$2,900,000 "as is" value as of September 17, 2019. (A copy of the Appraisal Report will be provided to the Court in advance of the hearing)
Cash in LF42's bank account	$62,000 (approximately)
Apartments in San Juan, Puerto Rico	$1,512,575.50 (purchase price from March 2017) *See* Doc. 2 at p. 13.
Mr. Williams Personal Account	$1,500 (approximately) *See* Doc. 49 at p. 22
Pyram King Account	$16,000 (approximately) *See* Doc. 49 at pp. 9-10
Rex Tenax Account	$4,000 (approximately) *See* Doc. 49 at p. 9
Total:	**$5,996,075.50**

Accordingly, Mr. Williams' referenced assets appear to exceed the purported remaining $3.6 disgorgement amount by **more than $2 million**. Importantly, the referenced assets do not even include the Silexx Sale Funds deposited with the Firm.

Because it appears Mr. Williams' assets exceed the only specific disgorgement amount identified by the SEC, this Court should, at the very least, allow Mr. Williams to use the Silexx Sale Funds deposited with the Firm—which the SEC and Receiver do not dispute are untainted

[4] Due to the Receivership Order, Mr. Williams does not have access to bank accounts identified in the table, therefore, the amounts identified in bank accounts are based on Mr. Williams' recollection.

by the alleged wrongdoing—to pay for his legal fees and costs in defending this action. *See, S.E.C. v. Sanitllo*, 18-cv-5491 (JGK), 2018 WL 3392881 (S.D.N.Y. July 11, 2018) (To unfreeze assets to pay for attorneys' fees in "an SEC civil enforcement action, the defendant must establish that the funds he seeks to release are untainted and that there are sufficient funds to satisfy any disgorgement remedy that might be ordered . . . .") (quotation omitted).[5]

6. The Court should not deny the Emergency Motion related to LF42 based on arguments advanced at the March 6th Hearing.

The SEC's claim that this Court should reject Defendants' arguments concerning LF42 in its Emergency Motion because, according the SEC, the Court already rejected this argument at the March 6th hearing is meritless. At the conclusion of the March 6th hearing, this Court expressly invited Defendants "to file a motion if there is some reason that some of [the Relief Defendants] shouldn't be frozen." (Doc. 51-1 at p. 4). Defendants complied with the Court's instructions by filing the Emergency Motion. The SEC cites no law to support its argument that Defendants' Emergency Motion should be denied as it relates to LF42 simply because a similar argument, or a portion thereof, was advanced by Defendants at the March 6th hearing.

7. The Court should grant Mr. Williams' request for funds to pay for necessary monthly living expenses.

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[5] The Honorable Judge Mary S. Sciven's order in *SEC v. Davison, et al.*, 8-20-cv-00325-MSS-AEP (M.D. Fla. Mar. 11, 2020) (ECF 48) is distinguishable. Among other things: (a) it is unclear whether the monies in *Davison* were untainted—as the Silexx Sale Funds are here; (b) there is no indication that the defendant in that matter had assets that exceeded the SEC's requested disgorgement amount, (c) it involved a claim by the defendant to unfreeze assets to pay for, among other things, attorneys' fees to be incurred in a separate class action lawsuit, and (d) the court in *Davison* previously authorized a release of funds for reasonable living expenses and in the amount of $75,000. Here, to the contrary, (a) Mr. Williams seeks release of only the untainted Silexx Sale Funds held by the Firm to pay for his attorneys' fees to defend this action and related parallel criminal proceeding, (b) Mr. Williams has assets that appear to exceed the only disgorgement amount specifically identified by the SEC, and (c) this Court has not previously entered an order providing Mr. Williams with funds for reasonable living expenses or attorneys' fees. Thus, the *Davison* Order does not warrant such a strict application here as requested by the SEC.

The SEC appears to believe that Mr. Williams' alternative request for $5,000 per month for necessary monthly living expenses should be denied because Mr. Williams "is a published novelist" and "has rental income." (Doc. 51 at p. 14). The SEC, however, fails to recognize that (a) under the SEC's own draconian interpretation of the Freeze Order, Mr. Williams would be precluded from accessing any purported income from his novel or rental income, and (b) the modest rental income of approximately $1,500 is inadequate to support his necessary monthly living expenses. In addition, Mr. Williams has earned only approximately $100 to date from his publication activities.

The SEC curiously relies on the decision *Sanitllo* to support its argument. (Doc. 51, pp. 13-14). *Santillo*, however, supports Mr. Williams' argument that this Court should permit him to access $5,000 per month for necessary living expenses. There, the court allowed the defendant to "draw the less of 5% or $5,000 each month" from frozen assets to meet the defendant's living expenses because he and his family "did not have sufficient funds outside the asset freeze to satisfy their living expenses because all of [the defendant's] assets [were] [] subject to the freeze . . . ." *Sanitllo,* 2018 WL 3392881 at *4. The same is true here as Mr. Williams has no access to his funds outside the Freeze Order; therefore, the modest sum of $5,000 per month should be unfrozen to meet Mr. Williams' living expenses.

8. Mr. Williams requests an *in camera* discussion with the Court, SEC and Receiver to discuss concerns for his personal safety.

In the interest of transparency, Mr. Williams advises the Court, the SEC and Receiver that he left Puerto Rico shortly after the March 6th hearing because of concerns for his personal safety. Mr. Williams respectfully requests an *in camera* discussion with the Court, SEC and Receiver to address circumstances regarding his departure from Puerto Rico.

Dated: May 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on May 4, 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