

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 8:20-cv-394

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.

**DEFENDANT WILLIAMS' SECOND MOTION TO MODIFY
THE ASSET FREEZE ORDER TO DEFEND THIS CASE**

Defendant MICHAEL SCOTT WILLIAMS (“Williams”), pursuant to the Court’s Order dated May 8, 2020 [D.E. 69], moves to modify the Court’s *Order Granting Plaintiff Securities Exchange Commission’s Emergency Motion for Asset Freeze and Other Relief* dated March 6, 2020 (“Asset Freeze Order”) [D.E. 33] to unfreeze a reasonable amount of funds for attorneys’ fees to defend this case for the nine-month period of time running from and including August 29, 2020 through and including June 30, 2021.

While this is not an emergency motion, time is of the essence as Williams' undersigned counsel cannot continue to do any further work to respond to the allegations made by Plaintiff SECURITIES AND EXCHANGE COMMISSION ("SEC") or to prepare Williams' defenses until they have a clear understanding of what work will be compensated (and what work will not be compensated).

In support of this Motion, Williams states as follows:

Introduction

1. This case arises from the SEC's allegations concerning Kinetic Funds I, LLC ("Kinetic"), an investment fund that: (1) invested the funds invested into it in income-generating, exchanged-traded securities held at an unrelated, third-party brokerage firm; (2) "hedged" (*i.e.*, insured) those securities through the use of listed stock options so that the value of the securities could never fall by more than 10% (*e.g.*, if \$1,000 was invested in a particular security, that investment could go up or stay flat, but its value could never fall below \$900); and (3) used those hedged securities as collateral to borrow funds from the brokerage firm (through the use of margin privileges) and lend those borrowed funds to an affiliated private lending company which, in turn, lent the borrowed funds to the Kinetic's investors at favorable rates.¹

2. Kinetic's private lending affiliate benefited from this arrangement because it charged interest on the amounts it loaned; and its loan was protected because the amount an investor could borrow was typically limited to 70% of the investor's investment in Kinetic (the value of which could never fall by more than 10%) or was otherwise collateralized.² Kinetic benefited

¹ Williams managed the Kinetic and was also an investor in it.

² In addition, the investors provided documentation regarding their net worth, income, assets, liabilities, etc., when they invested in Kinetic and also later when they borrowed from Kinetic's affiliate, thereby identifying additional funds and assets the affiliate could recover to repay the loan if necessary.

because its affiliate paid interest on the loan to it. And Kinetic's investors benefited because: (1) the money they invested with Kinetic was always invested in income-generating, exchanged-traded securities pursuant to Kinetic's strategy; (2) they could borrow — at favorable rates — up to 70% of the value of their investment in Kinetic to use for any purposes whatsoever without reducing the amount of their funds invested in Kinetic's strategy; (3) the income generated by their investment in Kinetic was more than sufficient to pay the interest on their loan; and (4) the interest paid by the affiliate to Kinetic on the money that it borrowed was reinvested in Kinetic thereby increasing the investors' returns.

3. The SEC alleges Williams: (1) made misrepresentations to the investors regarding the mechanics of Kinetic; (2) diverted the investors' funds away from Kinetic and used those funds for his own purposes; and (3) failed to disclose to the investors purported conflicts of interest relating to the fact that several of Williams other entities did business with the Kinetic.³ Based on these allegations, the SEC has asserted 14 separate causes of action against Williams arising under three similar but different statutory regimes (*i.e.*, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940) and sought six specific forms in relief. In his Answer, Mr. Williams denied the SEC's allegations and asserted 13 affirmative defenses.

4. Williams' counsel estimate they will require approximately 600 hours of work from August 29, 2020 (the day after the parties' mediation) through June 30, 2021 (two months before the start of the trial term) to complete the tasks necessary to fully learn and understand the underlying facts (including, among other things, reviewing the 919,737 pages of documents produced by the parties to date, conducting witness interview, and taking/defending 10 depositions), research

³ Between the Complaint [D.E. 1] and the Receiver's First Interim Report [D.E. 60], there are 90 detailed allegations of purported wrongdoing that can be organized into 17 broad categories of alleged misconduct.

and analyze the relevant law, prepare and/or respond to dispositive and non-dispositive motions, respond to the SEC's allegations, prepare Williams' defenses, and fulfill their ethical and professional obligations and duties to Williams, the Court, and opposing counsel.

5. The Court has previously approved — twice — Williams' counsel's reduced hourly rate of \$357.50/hour. [D.E. 104; D.E. 123]

6. For the reasons discussed in greater detail below, Williams estimates that his counsel will require a total of approximately 600 hours to complete all of the work necessary to represent and defend him through June 30, 2021.

7. Based on the estimated number of hours that will be required to prepare this case over the course of the next ten months and William's counsel's reduced rate, Williams anticipates he will incur a total of approximately \$214,500 (*i.e.*, 600 hours x \$357.50/hour) in attorneys' fees through between August 29, 2020 and June 30, 2021. A summary of Williams' proposed litigation budget is attached hereto as **Exhibit A**.

8. Accordingly, for the reasons discussed in greater detail below, Williams respectfully requests that the Asset Freeze Order be modified to unfreeze **\$214,500** to pay his counsel's attorneys' fees for the ten-month period of time running from and including August 29, 2020 through and including June 30, 2021.⁴ Additionally, Williams requests that he be permitted to seek reimbursement from the frozen funds for any reasonable costs incurred by his counsel in defending him when those costs are incurred.⁵

⁴ If the parties' dispute remains unresolved on June 30, 2021, Williams will present a third proposed budget for his counsel's fees and costs to defend him at trial. Ideally, even if this case is still pending at that time, many of the issues in dispute will have been resolved (or at least narrowed), which will allow Williams to prepare a more accurate (and smaller) trial budget of his counsel's anticipated fees and costs.

⁵ Presently, the only costs that Williams anticipates his counsel might incur are court reporter fees for depositions and costs for transcripts of those deposition. It is possible, however, that Williams will not need to take all of the depositions he is currently anticipating, nor does Williams know at this time for which of the anticipated depositions he might need a copy of the transcript. In addition, it is possible Williams' counsel might incur other costs that Williams

9. The Court previously authorized \$64,350 to be unfrozen to pay William’s counsel’s fees for the period from May 27, 2020 through August 28, 2020. If that previous amount is added to the \$214,500 that Williams is now requesting to be unfrozen, Williams is requesting permission to unfreeze a total of \$278,850 to pay his counsel’s anticipated fees to represent and defend him over the course of the 13-month period running from May 27, 2020 through June 30, 2021.

10. Stated another way, the total amount of funds that Williams is requesting to be unfrozen to pay his counsel’s anticipated fees to represent and defend him over the course of 13 months (\$278,850) is ***\$45,403.91 less*** than the total amount of attorneys’ fees the Receiver has so far incurred — and which the Court approved — *in just the first four months of this case* (\$324,253.91). [D.E. 101; D.E. 128]⁶

11. Pursuant to the Court’s May 8 Order [D.E. 69], Williams has made a good faith effort to present and explain to the SEC his proposed litigation budget and the basis for his estimates of the number of hours that will be required to complete various tasks.

12. The SEC has informed Williams that it objects to his proposed budget; however, it has not identified any specific issues or objections regarding any of the line items in Williams’ proposed budget. Instead, the SEC has stated only that Williams’ proposed budget “is excessive and duplicative, among other deficiencies” and that it objects to Williams “using investor assets to fund his defense.”

has not anticipated. Accordingly, Williams requests permission to request reimbursement for his counsel’s costs as they are incurred (instead of attempting now to present an estimate — based what would essentially be an informed guess — of what those costs might be).

⁶ The SEC did not oppose or raise any objections to the *Receiver’s First Interim Omnibus Application for Allowance and Payment of Professionals’ Fees and Reimbursement of Expenses for March 6, 2020 – March 31, 2020* [D.E. 73], nor to the *Receiver’s Second Interim Omnibus Application for Allowance and Payment of Professionals’ Fees and Reimbursement of Expenses for April 1, 2020 – June 30, 2020* [D.E. 121].

I. Williams' Counsel Will Charge a Reduced Rate Equal to \$357.50/Hour

13. Williams' undersigned counsel, Jon A. Jacobson, Esq. and Timothy W. Schulz, Esq., will bill their work at a reduced rate equal to \$357.50/hour.

14. The Court has previously approved — twice — this reduced hourly rate for Williams' counsel. [D.E. 104; D.E. 123].

II. Williams' Counsel Will Require Approximately 600 Hours To Complete the Necessary Work to Defend Williams Through June 30, 2021

15. Based on their current knowledge of the underlying facts and myriad legal issues — and based on a preliminary review of the voluminous files received from Williams' previous counsel and the even larger number (by nearly two orders of magnitude) of documents produced by the SEC and the Receiver — Williams estimates his counsel will require a total of approximately 600 hours of work to complete the basic tasks necessary to learn the underlying facts, research and analyze the relevant law, conduct and complete discovery, prepare and respond to dispositive and non-dispositive motions, and prepare Williams' defenses.

16. Williams appreciates the SEC's general assertion that his proposed budget is "excessive"; however, Williams' counsel do not believe it is realistic to reduce the hours they have budgeted any further without jeopardizing their ethical obligations to Williams (or their duties to the Court and opposing counsel).

17. To the contrary, based on what is known about this case so far — and in light of the fact that Williams previously underestimated his first budget [D.E. 102], resulting in his counsel having to write off a portion of their time [D.E. 33] — Williams' is concerned that his current estimate of the number of hours his counsel will need to complete their work through June 30, 2021 is already too low.

A. Williams' Counsel Will Require Approximately 235 Hours to Conduct Their Factual and Legal Investigation

18. Williams estimates that his counsel will require approximately 235 hours to conduct their investigation of the underlying facts and legal issues in this case.

19. The Complaint and the Receiver's First Interim Report collectively contain a total of 90 very specific and detailed allegations of (disputed) wrongdoing that can be organized into 17 broad categories of alleged misconduct.⁷ Based on those allegations, the SEC has asserted 14 separate causes of action against Williams arising under three similar but different statutory regimes and is seek six different forms of relief; and in response to those allegations, Williams has asserted 13 affirmative defenses.

20. Williams has so far received a total of *919,737 pages* of documents relating to the issues, claims, and defenses in this case, which his counsel must review and digest.⁸

21. Specifically, as part of its Rule 26 disclosures, the SEC produced 875,583 pages of documents to Williams; and in response to a subpoena from Williams, the Receiver has produced another 33,079 pages of documents. On top of that, Williams previously produced 11,075 pages of documents to the SEC through his prior counsel.

22. In addition to the sheer volume of documents that must be reviewed, Williams' counsel's task is further complicated by the fact that the SEC's production is not formally organized.⁹ Rather, the SEC produced its documents in the form of a massive electronic "database."

⁷ Williams has invited the SEC to identify any of the 90 allegations of wrongdoing it is prepared to stipulate it will not pursue at trial, in which case Williams could reduce the number of hours he estimates his counsel will require and prepare a revised and reduced budget. The SEC has not responded to this offer.

⁸ It is likely Williams will receive additional documents before discovery is completed.

⁹ For his part, the Receiver organized his 33,079-page production into broad categories (*e.g.*, documents obtained from BMO Harris Bank statements, documents obtained from Interactive Brokers, etc.) and then produced his documents in the form of 59 separate electronic files. To locate a particular document within the Receiver's production, each file must be opened and searched individually. The documents provided by Williams prior counsel are similarly organized

As a result, if Williams' counsel wants to find a specific document, they must use special document management software to locate that document in the database — *e.g.*, by searching for a particular key term or searching for documents within a particular time period, etc., and then reviewing all of the documents identified by such a search until the relevant document is found (and if the document sought is not among the search results, by trying a different search — again and again — until the document is found).¹⁰

23. One of the eDiscovery vendors Williams sought to use for this task (until the SEC objected to that vendor's costs), estimated it would take *4,373 hours* to review all of the documents produced by the SEC. [D.E. 125-3]

24. Notwithstanding this estimate, Williams's proposed budget assumes that the document management software provided by the SEC's preferred eDiscovery vendor will be sufficient to allow his counsel to locate and review (once they have become familiar with the software) the relevant documents without the need of having to review every document. Based on that assumption, Williams estimates his counsel will require 140 hours to review the documents in this case.

25. In addition, the files from Williams' prior counsel contain 1,575 pages of transcripts from six interviews of relevant witnesses conducted by the SEC. Williams estimates his counsel will require approximately 40 hours to review and annotate these transcripts and to compare and

into broad categories; however, each document has been provided as a separate, untitled .pdf file within a thematic electronic folder — which means that each .pdf file must be opened and reviewed, one-by-one, to locate a specific document.

¹⁰ One of the interrogatories Williams has already served on the SEC requested that it identify the document or documents among its 875,583-page production that are responsive to each of Williams' document requests. The SEC, however, has objected to Williams' interrogatory. As a result, Williams' counsel will have to expend substantial time foraging through the SEC's voluminous production to find relevant documents. Further, because the SEC objected to the eDiscovery vendor that Williams originally wanted to use (which uses a robust document management software with which Williams' counsel are already familiar) and Williams agreed to use instead the SEC's preferred eDiscovery vendor, Williams' counsel must rely on a cumbersome document management software with which they are unfamiliar to review the SEC's production and search for documents in it — which will further increase the amount of time required to review documents.

verify the witnesses' respective testimonies with the documents and the information obtained from witnesses and other sources.¹¹

26. Finally, Williams estimates his counsel will require 5 hours to conduct witness interviews necessary to understand the underlying facts, 10 hours to communicate with Williams about the underlying facts and law, and 40 hours to conduct the legal research necessary to learn and address the issues in this case as well as any new issues that might arise over the course of the next nine months.

27. Thus, Williams estimates his counsel will need a total of approximately **235 hours** (*i.e.*, 140 hours + 40 hours + 5 hours + 10 hours + 40 hours) to accomplish the minimum work necessary to be able to learn the underlying facts and research and analyze the relevant law.

B. Williams' Counsel Will Require Approximately 190 Hours to Conduct and Complete Discovery

28. Williams estimates that his counsel will require approximately 190 hours to conduct and complete discovery.

29. Williams has already propounded document requests and interrogatories on the SEC, the Co-Defendant, and each of the Relief Defendants, and he has served a subpoena for documents on the Receiver.¹²

¹¹ Although fees to complete this task were included in Williams' first budget, in an effort to minimize their fees, Williams' counsel only cursorily reviewed a few of these transcripts to prepare for the parties' mediation. In light of the fact that mediation was unsuccessful, Williams' counsel will now need to thoroughly read these transcripts.

¹² In an effort to minimize the burden on the SEC (and the other parties), Williams' document requests were drafted as narrowly as possible so as to encompass a small and discrete number of easily identifiable documents. By way of example, Document Request No. 1 sought documents sufficient to identify the names, addresses, and telephone numbers of the Kinetic investors. To take another example, Document Request No. 8 sought documents sufficient to identify the amounts that each Kinetic investor invested in the KFYield subaccount. As a result, the SEC was able to confirm that many of the documents sought by Williams are already included among the 875,583 pages of documents the SEC produced as part of its initial disclosures (however, as noted above, *supra* n.10, the SEC has objected to identifying where in its production those documents are located).

30. Neither the SEC, the Receiver, the Co-Defendant, nor any of the Relief Defendants have yet propounded any discovery on Williams.

31. Williams estimates his counsel will require: (1) approximately 10 hours to draft and serve any necessary additional discovery and to respond to any discovery served on him; (2) approximately 5 hours to meet and confer with the SEC and the Receiver to discuss and resolve any issues regarding discovery; and (3) approximately 30 hours to draft any necessary discovery motions and to respond to any discovery motions directed to him.

32. In addition, Williams estimates his attorneys will require approximately 140 hours to prepare for and take/defend ten depositions.¹³

33. Finally, Williams estimates his counsel will require approximate 5 hours to communicate with him about discovery and the facts learned through discovery.

34. Based on the foregoing, Williams estimate his counsel will require a total of approximately 190 hours (*i.e.*, 10 hours + 5 hours + 30 hours + 140 hours + 5 hours) to conduct and complete discovery.

C. Williams' Counsel Will Require Approximately 105 Hours to Prepare and Respond to Dispositive Motions

35. Williams estimates that his counsel counsel require approximately 105 hours to prepare and respond to dispositive motions.

36. Based on their current knowledge of the underlying facts and the law, and without disclosing confidential work product information or trial strategy, Williams counsel anticipates they will draft and file dispositive motions relating to one or more of the: (1) 14 causes of action

¹³ Williams currently anticipates taking the depositions of the SEC, the Receiver, the Co-Defendant, at least three of the Relief Defendants, at least three third parties, and at least one expert, as well as being deposed himself. This list of deponents could change, however, as Williams' counsel better learn the underlying facts and further develop Williams' defenses.

asserted by the SEC; (2) six remedies sought by the SEC; and (3) 13 affirmative defenses asserted by Williams.

37. In addition, the SEC has indicated to Williams (albeit only generally) its intent to move for summary judgment on one or more of its claims.

38. Due to the factual specificity (supported by identifiable evidence) required of such motions, the legal research and analysis required to be presented in support of (or in opposition to) such motions, and the strict procedural requirements imposed on such motions, Williams estimates his counsel will require a total of approximately 100 hours to prepare and respond to the anticipated dispositive motions in this case.

39. In addition, Williams estimates his counsel will require approximately 5 hours to communicate with him about the underlying facts, the law, and other issues relevant to the dispositive motions that will be filed in this case.

40. Based on the foregoing, Williams estimates that his counsel will require a total of approximately 105 hours (*i.e.*, 100 hours + 5 hours) to prepare and respond to the anticipated dispositive motions in this case

D. Williams' Counsel Will Require Approximately 70 Hours to Prepare and Respond to Non-Dispositive Motions

41. Williams estimates that his counsel will require approximately 70 hours to prepare and respond to non-dispositive motions.

42. Based on their current knowledge of the underlying facts and the law, and without disclosing work product information or trial strategy, Williams' counsel anticipates they will file one or more non-dispositive motions regarding assets held by the Receiver that are unrelated to Kinetic and therefore should be released to Williams. Williams counsel also anticipate they will file a non-dispositive motion to modify the Asset Freeze Order due to an unanticipated expense

incurred by Williams. Williams estimates that his counsel will require approximately 20 hours to prepare and draft these motions.

43. Williams also anticipates that his counsel will need to respond to, among other things: (1) the valuation of the assets the Receiver has located and is currently holding; (2) preliminary actions taken by the Receiver relating to those assets; (3) the liquidation of those assets; and (4) the distribution of those assets to Kinetic's investors. Williams estimates that his counsel will require approximately 25 hours to attempt to resolve these issues either amicably among the parties or by motion to the Court if a compromise cannot be reached.

44. Williams does not yet know what other issues will arise over the course of the next ten months. Nevertheless, Williams believes it prudent to reserve an additional 20 hours to address any such potential issues.

45. In addition, Williams estimates his counsel will require approximately 5 hours to communicate with him about the underlying facts, the law, and other issues relevant to the non-dispositive motions that will be filed in this case

46. Based on the foregoing, Williams estimates that his counsel will require a total of approximately 70 hours (*i.e.*, 20 hours + 25 hours + 20 hours + 5 hours) to prepare and respond to the anticipated non-dispositive motions in this case.

Conclusion

For all of the the reasons discussed above, Williams respectfully requests that the Court enter an Order: (1) approving a reduced hourly rate equal to \$357.50/hour for both of Williams' undersigned counsel; (2) approving William's proposed litigation budget attached hereto as **Exhibit A**; (3) modifying the Asset Freeze Order [D.E. 33] to unfreeze \$214,500 to pay Williams' counsels' fees to defend this case on and from August 29, 2020 through and including June 30,

2021; and (4) authorizing Williams' counsel to submit their monthly bills to the Court for review and, upon approval, issuance of an Order directing the Receiver to pay those bills from the unfrozen funds.

Respectfully Submitted,

By: /s/ Timothy W. Schulz
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LOCAL RULE 3.01(g) CERTIFICATION

I HEREBY CERTIFY that undersigned counsel has conferred with counsel for the SEC in a good faith effort to resolve the issues raised by this Motion. Counsel for the SEC does not agree on the resolution of this Motion.

By: /s/ Jon A. Jacobson

By: /s/ Timothy W. Schulz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 9, 2020, the foregoing document was filed with the Clerk of the Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of the Notice of Electronic Filing generated by CM/ECF.

By: /s/ Jon A. Jacobson

By: /s/ Timothy W. Schulz

Service List

SECURITIES AND EXCHANGE COMMISSION

v.

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CASE NO.: 8:20-cv-394

United States District Court, Middle District of Florida

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