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 *et al.*,

Defendants,
_____/

DEFENDANT WILLIAMS' REPLY IN SUPPORT OF MOTION TO MODIFY

Defendant MICHAEL SCOTT WILLIAMS ("Williams"), submits this reply in support of his Motion [D.E. 135] and states as follows:

The SEC raises four objections to Williams' Motion and argues that he should not have access to *any* funds to defend himself. All of the SEC's objections are misplaced, and none warrant denying Williams access to his own money to pay for his defense.

First, the SEC argues that Williams' purported "ill-gotten gains" exceed the amount that the SEC believes it will be entitled to disgorge from him.

As evidence of Williams' gains, the SEC specifically identifies: (1) the $2,755,000 bank building Scipio, LLC (not Williams) purchased with a loan from Lendacy — which building the Receiver has recovered thereby removing it as a gain to Williams; (2) the $1,517,000 condo Williams purchased with a Lendacy loan collateralized by a $1,500,000 investment in Kinetic and a subsequent payment of approximately $100,000 — and for which the Receiver has recovered *both* the condo *and* Williams' Kinetic investment (and subsequent payment), meaning that instead of a

gain to Williams this is in fact is a *loss* of $1,500,000; (3) $2,100,000 the SEC claims was used to fund unidentified businesses, but which funds (to the extent Williams is able to accurately divine what the SEC is referencing) came from Lendacy loans that Williams has fully repaid and, therefore, are no longer gains (if they ever were); (4) the $37,000 Lendacy loan Williams used to pay a relative's mortgage — which Williams repaid in full thereby removing it as a gain; (4) the $2,000,000 the SEC vaguely asserts was misappropriated, but which funds (if Williams' assumption about what the SEC is referencing is correct) were (i) used to pay for legitimate business services provided to Kinetic and (ii) paid by Kinetic out of its fully disclosed management fee and *not* with any investor's funds; and (5) $405,358.91 in prejudgment interest erroneously calculated on the aforementioned "gains," which are not in fact gains.[1]

In fact, Williams never took a salary or other compensation while he managed Kinetic; and as demonstrated by the examples cited by the SEC, he has *no* gains, ill-gotten or otherwise.

More importantly, just this year, the Supreme Court of the United States ruled that the SEC's ability to seek disgorgement: (1) is limited to a wrongdoer's "net profits";[2] (2) can only be used to repay the victims (which means they cannot exceed the difference between the victims' actual, net losses and the approximately $32 million so far recovered by the Receiver); and (3) generally cannot be imposed as joint liability (*e.g.*, the SEC seeking to disgorge from Williams the loan taken out by Scipio, LLC). *See Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

[1] When weighing the SEC's currently unproven assertions regarding Williams' purported gains at this early stage, the Court should be mindful that the SEC investigated Kinetic for nearly a year before initiating this action, whereas Williams only received access to the SEC's 875,583-page production on August 17, 2020, and he has not yet been able to pay his attorneys to do more than conduct a very preliminary review of those documents.

[2] "Net gains" are defined as the wrongdoer's gains less any legitimate costs and expenses. *See id.* at 1945. Notwithstanding its one-year head start on Williams to prepare its case, the SEC has identified only "gains" — which Williams disputes and which the SEC cannot disgorge — as opposed to *net* gains.

Importantly, while the SEC talks at length about Williams' "ill-gotten gains," it has not alleged (much less proven or even established) that he has any "net profits," nor has it quantified the amount of any such net profits. Absent such a showing, the SEC has *no* authority to disgorge any of Williams' funds nor to object to unfreezing Williams' funds on the grounds that they are subject to disgorgement.

Second, the SEC argues that Williams' proposed budget is excessive because: (1) Williams has already propounded 239 requests for documents and 3 interrogatories[3] on the SEC and similar discovery on the other parties, yet Williams has budgeted 45 hours to conduct such discovery; and (2) Williams has budgeted 56 hours to prepare for and take four depositions of the Co-Defendant/Relief Defendants.[4]

In fact, Williams has allotted just 10 hours to propound requests for admissions and additional interrogatories on — and to respond to all of the requests for documents, admissions, and interrogatories he receives from — the SEC, the Receiver, the Co-Defendant, and each of the six Relief Defendants. Moreover, the SEC ignores that Williams has budgeted only 5 hours to meet and confer regarding discovery issues and 30 hours to draft and respond to discovery motions even though the SEC has objected to *two-thirds* of Williams' document requests and *all* of his interrogatories and refused to produce documents based on an *inapplicable* privilege and notwithstanding that additional issues will likely arise when the SEC and Receiver propound discovery.

[3] The SEC includes the nine subparts of Interrogatory No. 2 and the six subparts of Interrogatory No. 3 — and apparently interprets Interrogatory No. 3 (which has no subparts) to have 245 subparts — to come up with its assertion that Williams propounded 260 interrogatories on it. He did not.

[4] The SEC's objection overlooks two important facts. First, Williams' budget is only an "estimate." Litigation is a uniquely adversarial process, and it is impossible to know what will transpire between now and the trial. All Williams can do is present a reasonable budget based on his best estimate of what is likely to occur in the future. Second, Williams' proposed budget anticipates that he will present his attorneys' bills to the Court at the end of each month, at which time the SEC can raise appropriate objections to any specific fees it disputes. As such, approval of Williams' budget would in no way constitutes a "blank check" because there would be safeguards in place.

In addition, the Co-Defendant and six Relief Defendants entered into a Consent Order with the SEC in which they agreed not to dispute the SEC's allegations and claims. Williams will need to depose at least four of them regarding their decision and understanding of the facts. The deponent for such depositions would likely be the Receiver, who entered into the Consent Order on their behalf. In addition, Williams will need to depose certain representatives of the seven Co-Defendant/Relief Defendants to disprove the SEC's claims and to prove his defenses.

Third, the SEC argues that Williams' proposed budget is duplicative because he estimates his counsel will require 40 hours to review transcripts when his previous budget included an estimate of 13 hours to review those same transcripts. The SEC seems confused that Williams' counsel only cursorily reviewed the transcripts the first time to prepare for mediation and now needs to read them more closely to prepare for dispositive motions and trial. More importantly, the SEC omits that Williams' counsel did *not* bill for any of the time they spent on their initial review of the transcripts. As such, there is nothing duplicative about Williams' estimate.

Fourth, and last, the SEC argues that Williams' budget is "opaque" because: (1) he has budgeted 140 hours to review the 919,737 pages of documents but has not broken that estimate down into subsets of those documents; (2) his 20-hour estimate to file non-dispositive motions to address the release of assets unrelated to Kinetic is too vague; and (3) his 20-hour estimate to address unforeseen issues is vague speculation.

Notwithstanding that it would take 4,373 hours to review only the documents produced by the SEC, Williams has budgeted just 140 hours to review *all* the documents produced by *all* the parties. It is impossible for Williams to be more precise at this stage about how those 140 hours will be allocated among the parties' productions, but it should not matter since Williams has already discounted his estimate for document review by 96.8% (from 4,373 hours to 140 hours).

The SEC's complaint that William's anticipated non-dispositive motions are too vague to evaluate is equally baseless. Williams anticipates he will file 2-3 (but possibly more) motions to release assets unrelated to Kinetic currently held by the Receiver and to release additional funds to pay unanticipated expense to maintain the Condos. It is not unreasonable to think Williams' counsel will require 21 hours to complete this task (*i.e.*, 7 hours x 3 motions).

Finally, Williams' request to budget 20 hours for other non-dispositive issues that might arise between now and June 30, 2021 is likewise reasonable in light of the fact that: (1) unanticipated issues have already arisen; (2) it is impossible to know what future issues might arise; (3) Williams' budget is only an estimate; and (4) the SEC can raise objections if necessary when Williams submits his counsel's bills after each month.

Conclusion

For the reasons above, the SEC's objections should be denied, and Williams' Motion and proposed budget should be granted. Alternatively, the Court should grant Williams' Motion in part — *e.g.*, unfreeze sufficient funds for Williams' defense for the next three months ($214,500 ÷ 10 months = $21,500/month x 3 months) or for some other period less than the full time requested by Williams. When that period has ended, the parties can revisit whether additional funds should be unfrozen.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 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

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