UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.: 8:20-cv-00394-MSS-SPF

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'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO SECOND MOTION TO MODIFY ASSET FREEZE ORDER TO DEFEND THIS CASE

In his reply [ECF No. 144], Defendant Michael Scott Williams does not distinguish any of the cases cited in Plaintiff Securities and Exchange Commission's Opposition [ECF No. 139] rejecting the use of frozen assets to pay legal fees. Instead, misreading *Liu v. SEC*, 140 S.Ct. 1936 (2020) and bereft of evidence, Williams attempts to challenge his at least $6,459,959.70 disgorgement liability with prejudgment interest. Williams, however, has failed to rebut the disgorgement figure presented by the Commission, which the Court has already found supports "a *prima facie* case showing a reasonable approximation of the likely disgorgement award against the Defendants and Relief Defendants, which exceeds the amount of assets to be frozen." *See* Asset Freeze Order, ECF No. 33 at p. 2.

A. Williams Identifies No Legitimate Business Expense That Would Reduce His Disgorgement Liability

Williams argues that the Commission has not established "net profits" for disgorgement. *Liu*, 140 S.Ct. at 1941 (holding that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under [15 U.S.C.] § 78u(d)(5) [Section 21(d)(5) of the Securities Exchange Act].)." Yet, Williams has done nothing to rebut his at least $6,459,959.70 in ill-gotten gains. He has not identified a single legitimate business expense that would reduce his disgorgement liability. Nor has he provided the Court with a sworn accounting that would substantiate a reduction in disgorgement, despite the Court's invitation to do so at the March 6, 2020 Asset Freeze hearing.[1]

[1] *See* Tr. of March 6, 2020 hearing before the Honorable Judge William F. Jung, ECF No. 58 at 88: 2-9; *see also* Order denying Williams' Motion for Clarification entered by the Honorable Judge Mary S. Scriven, ECF No. 69 at p. 3 citing same.

Instead, Williams pretends that his post-freeze and post-receivership turnover of the Banco Espanol building and Villa Gabriella apartment complex to the Receiver has erased his liability for purchasing these properties with misappropriated investor assets. He presents no evidence, however, that either property will be sold for at least the purchase price. In fact, the anticipated sale of the Banco Espanol building for $2,100,000 falls well short of its $2,755,000 purchase price. *See* ECF No. 148 ¶ 3.[2] Williams also acts as though his purported $1.5 million investment in Kinetic Funds[3] offsets his disgorgement, despite (a) his likely disqualification from the distribution plan (ECF No. 139 at p. 5, n. 1), and (b) his entitlement, if included in the distribution, to the same "cents on the dollar" as other investors, not the full $1.5 million.

As to Williams' misappropriation of at least an additional $2 million as identified by the Receiver, Williams claims that such funds came from Kinetic Group's "fully disclosed management fee" and were used to pay for "legitimate business services provided to Kinetic [Group]." *See* Williams' Reply, ECF No. 144 at p. 2. The evidence betrays his tale. First, it is questionable that Kinetic Group was even entitled to a management fee given that a majority of investor funds were not deposited into brokerage accounts as represented to investors. *See* Receiver's First Interim Report, ECF No. 60 at p. 36, n. 24. Second, the Receiver's ongoing investigation has revealed that Kinetic Group "seemingly receiv[ed] amounts [from Kinetic

[2] The premise of Williams' argument—that his transfer to the Receiver of real estate purchased with misappropriated money eliminates his disgorgement liability even if the assets are sold for less than the amount misappropriated—is contrary to law. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) ("[A]n order to disgorge establishes a personal liability, which the defendant must satisfy regardless whether he retains the selfsame proceeds of his wrongdoing.") (quoted with approval in *FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013)).
[3] All capitalized terms herein shall have the meaning ascribed to them in the Complaint. *See* ECF No. 1.

Funds] significantly above that to which it was contractually entitled". *Id*. at p. 36. Third, the money trail shows that Williams diverted the at least additional $2 million – all originating from investor assets – to fund other business ventures and enrich himself. *See* ECF No. 60 at pp. 33-36 (explaining Williams diverted $235,938 from Kinetic Group to GlobalScreen B.V. and $200,000 from Kinetic Group to FinLink, Inc.); *Id*. at p. 47 (noting Kinetic Group's transfer of $60,000 to LF42 for Williams' benefit pursuant to purported consulting agreements); *Id*. at p. 51 (noting El Morro's receipt of $963,852 from Kinetic Group and $586,500 from Lendacy, and that "more than $1 million was spent by El Morro just on payroll, the Kinetic International launch event, and American Express bills"); *see also* Receiver's Second Interim Report, ECF No. 111 at pp. 14-15. Moreover, Kinetic Group's payments to El Morro were not for legitimate expenses as Williams claims, but "were, at best, duplicative of any services already being provided by Kinetic [Group]" to Kinetic Funds. *See* ECF No. 60 at p. 48. In fact, the Receiver confirmed that "it appears that El Morro primarily functioned as a conduit to siphon investor funds from Kinetic Funds." *Id*.

B. Disgorgement Is Measured By Ill-Gotten Gains, Not Investor Losses

Misinterpreting *Liu*, Williams suggests that investor net losses provide a basis for reducing his disgorgement liability. *See* ECF No. 144 at p. 2 (arguing disgorgement "cannot exceed the difference between the victims' actual, net losses and the approximately $32 million so far recovered by the Receiver"). *Liu*, however, further supports the longstanding principle that the disgorgement amount is determined by the wrongdoer's gain ("net profits") rather than the amount of investor losses. 140 S.Ct. at 1940; *see SEC v. Huff*, 758 F.Supp.2d 1288, 1359 (S.D. Fla. 2010) citing *SEC v. Fischbach Corp.,* 133 F.3d 170, 176 (2d Cir.1997) ("The

measure of disgorgement need not be tied, for example, to losses suffered by defrauded investors"); *SEC v. Huffman,* 996 F.2d 800, 802 (5th Cir. 1993) ("[Disgorgement] is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs."); *SEC v. BIC Real Estate Dev. Corp*., 2017 WL 1740136, at *7 (E.D. Cal. 2017) (recognizing that investor losses are irrelevant to ill-gotten gains). Rather, disgorgement includes the "gains flowing from the illegal activities," *SEC v. Platforms Wireless Int'l Corp.,* 617 F.3d 1072, 1096 (9th Cir. 2010), and "whether the money is 'tainted' or not is irrelevant for purposes of disgorgement." *BIC*, 2017 WL 1740136, at *4.

Liu's concern with disgorged funds being deposited with the Treasury rather than returned to investors, 140 S.Ct. at 1947-48, is simply not implicated on the facts of this case. Williams' victims will not recoup anywhere near the amount entrusted to him: at least a $23 million gap exists between the investor raise and the receivership assets (assuming the Court's approval of the proposed settlement between the Receiver and Fogarty Family investors). *See* Receiver's Amended Motion to Establish and Approve Procedure to Administer and Determine Claims, ECF No 131; *see also* Receiver's Motion to Approve Settlement, ECF No. 141 at p. 8, n. 3 (filed subsequent to the Commission's Opposition, ECF No. 139).

C. Williams Provides No Evidence That Would Relieve Him From Joint-And-Several Liability For Amounts Misappropriated Through His Entities

Williams wrongly claims that under *Liu*, he cannot be jointly liable for funneling misappropriated funds through his entities. Joint-and-several liability, however, can be imposed under *Liu* "for partners engaged in concerted wrongdoing", among other reasons. 140 S.Ct. at 1949 (recognizing that joint-and-several liability has been imposed "for partners engaged in concerted wrongdoing" when they "knowingly connected [themselves] with and

aided in . . . fraud."); *SEC v. Smith*, 2020 U.S. Dist. LEXIS 194614, *8-9 (C.D. Cal. Oct. 19, 2020) (imposing joint-and-several liability against individual and entities he controlled).

Williams has not presented any evidence absolving him from joint-and-several liability. *Liu*, 140 S.Ct. at 1949 ("Petitioners did not introduce evidence to suggest that one spouse was a mere passive recipient of profits. Nor did they suggest that their finances were not commingled, or that one spouse did not enjoy the fruits of the scheme or that other circumstances would render a joint-and-several disgorgement order unjust."). To the contrary, Williams has admitted that: (a) he was the managing member of Kinetic Group, Kinetic Funds, Lendacy and LF42, (b) he was the president of Scipio and El Morro, (c) he was a shareholder of KIH, (d) he was the manager of Kinetic Funds, (e) LF42 was his "personal LLC", and (f) he had an ownership interest in the Relief Defendants." *See* Williams' Declaration, ECF No. 25-1 at ¶¶ 3, 8, 40; Answer and Affirmative Defenses, ECF No. 56 at ¶ 8. Moreover, the Honorable Judge Jung already found that the Commission established a *prima facie* case that Williams misappropriated investor assets through his entities:

> Of the Lendacy money, about half of those loans went to fiduciary himself. And a significant portion of that went to what some people might call real estate speculation in the Caribbean. Now, I know that bank is a fabulous place...But if you step back and say a man who – whatever you want to call it . . . A man who is a fiduciary that's taking in pension money is using about a sixth of the money for his own benefit in an unsecured loan, most of which is real estate or business speculation in the islands, just that's what happened.

See ECF No. 58 at 87:11-23; *see also* ECF No. 33. Thus, there is no basis for Williams to escape liability for misappropriated sums he siphoned through his entities.

WHEREFORE, the Commission respectfully requests that the Court deny Williams' second motion to unfreeze assets to fund his defense.

October 27, 2020

Respectfully submitted,

By: */s/ Christine Nestor & Stephanie N. Moot*
Christine Nestor
Senior Trial Counsel
Fla. Bar No. 597211
Direct Dial: (305) 982-6367
E-mail: nestorc@sec.gov

Stephanie N. Moot
Trial Counsel
Fla. Bar No. 30377
Direct Dial: (305) 982-6313
E-mail: moots@sec.gov

Attorneys for Plaintiff
Securities and Exchange Commission
801 Brickell Avenue, Suite 1950
Miami, FL 33131
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 27, 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
Stephanie N. Moot

SERVICE LIST

Timothy W. Schulz, Esq.
TIMOTHY W. SCHULZ, P.A.
224 Datura Street, Suite 815
West Palm Beach, Florida 33401
Telephone: (561) 659-1167
Facsimile: (561) 659-1168
Email: schulzt@twslegal.com
Email: e-service@twslegal.com
Co-Trial Counsel for Williams

Jon A. Jacobson, Esq.
JACOBSON LAW P.A.
224 Datura St., Suite 812
West Palm Beach, FL 33401
Telephone: (561) 880-8900
Facsimile: (561) 880-8910
Email: jjacobson@jlpa.com
Email: e-service@jlpa.com
Co-Trial Counsel for Williams

Jordan D. Maglich, Esq.
Quarles & Brady LLP
101 E. Kennedy Blvd., Suite 3400
Tampa, FL 33602
Telephone: 813-387-0300
Email: Jordan.maglich@quarles.com
Counsel for Receiver, Mark A. Kornfeld