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,

Williams, 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 Williams.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT MICHAEL SCOTT WILLIAMS AND SUPPORTING MEMORANDUM OF LAW

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Publications

INTRODUCTION

Since at least 2013, Michael Scott Williams ("Williams" or "MW") and his entity, Kinetic Investment Group, LLC ("Kinetic Group") (collectively, "Defendants"), raised at least $39 million from approximately 30 investors in an unregistered securities offering. Defendants solicited investors to invest in Kinetic Funds I, LLC ("Kinetic Funds"), a purported hedge fund that they managed, and steered them toward Kinetic Funds' largest sub-fund, Kinetic Funds Yield ("KFYield"). Among other things, Defendants told investors that their entire capital would be invested in income-producing U.S. listed financial products and that their principal would be secure because the KFYield portfolio would be hedged with listed options.

In reality, Defendants diverted a substantial portion of KFYield investor capital to KCL Services, LLC d/b/a Lendacy ("Lendacy"), a private, start-up company owned by Williams. Lendacy was neither listed on a U.S. exchange nor capable of being hedged with listed options. Williams then directed Lendacy to make purported loans using KFYield assets to himself, entities controlled by him, and others. Since at least 2015, Williams has misappropriated at least $6.3 million of Kinetic Funds' assets to fund other business ventures and to pay for personal expenses.

Accordingly, the SEC seeks summary judgment against Williams for his violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act"), and Sections 206(1), 206(2), 206(4) and Rule 206(4)-8 of the Investment Advisers Act of 1940 ("Advisers Act").[1]

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Williams Controlled Kinetic Group and Relief Defendants

1. Williams is the managing member of Kinetic Group,[2] Kinetic Funds,[3] Lendacy[4] and LF42,[5] the president of Scipio[6] and El Morro,[7] and a shareholder of KIH.[8] Williams is also the managing member of Kinetic Partners, LLC, which in turn is a managing member of Kinetic Funds.[9] At all relevant times, Williams had an ownership interest in, controlled, and exercised ultimate authority over Kinetic

[1] On March 6, 2020, the Court appointed the Receiver [DE 34] over Kinetic Group and Relief Defendants Kinetic Funds, Lendacy, Scipio, LLC ("Scipio"), LF42, LLC ("LF42"), El Morro Financial Group, LLC ("El Morro"), and KIH, Inc. f/k/a Kinetic International, LLC ("KIH") (collectively, "Relief Defendants", and with Kinetic Group, "Receivership Entities"). On November 5, 2020, the Court entered a judgment of permanent injunction against the Receivership Entities [DE 156] pursuant to their consent [DE 86] and with monetary relief to be addressed upon motion by the SEC.

[2] Ex. 1, Michael Williams Decl. ("MW Decl.") at ¶ 3; Ex. 2, SEC-BMO-P 0000481-0000484.

[3] Ex. 1, MW Decl. at ¶ 3; Ex. 3, SEC-Consultiva-E-0061310 and 0061271.

[4] Ex. 4, Lendacy corporate filing; Ex. 1, MW Decl. at ¶ 3; Ex. 5, SEC-BMO-P 0001407-0001409, 0000004-0000010.

[5] Ex. 1, MW Decl. at ¶¶ 3, 40; Ex. 6, SEC-BMO-P 0000803-0000809.

[6] Ex. 1, MW Decl. at ¶ 3; Ex. 7, Certificate of Formation for Scipio.

[7] Ex. 1, MW Decl. at ¶ 3; Ex. 8, Certificate of Formation for El Morro.

[8] Ex. 1, MW Decl. at ¶ 3; Ex. 9, Unanimous Written Consent of the Board of Directors of KIH.

[9] Ex. 10, SEC-BMO-P0001198-0001204; Ex. 3 SEC-Consultiva-E-0061304.

Group, Kinetic Funds, Lendacy, LF42, Scipio, El Morro and KIH.[10]

2. Kinetic Group, formerly known as Kinetic Management Group, LLC, is a private Florida limited liability company formed by Williams.[11] Kinetic Group manages Kinetic Funds, a private pooled investment fund,[12] and charges Kinetic Funds a 1% management fee.[13]

3. Kinetic Funds is a Delaware limited liability company[14] formed by Williams and operates as a private pooled investment fund managed by Williams.[15] Kinetic Funds filed a Form D with the Commission in October 2016 claiming an exemption under Rule 506(c) of the Securities Act for its pooled investment fund interests with a first sale date of October 2012.[16]

4. Lendacy is a Florida limited liability company formed by Williams and is purportedly in the business of providing lines of credit to accredited investors.[17] Between January 2015 and September 2019, Lendacy received approximately $9.1 million net of investor assets.[18]

---

[10] *See supra* n. 2-8; *see also* Ex. 11, MW's Responses to Requests for Admission ("RFAs") at Nos. 1-2, 4 ,6-7 (Kinetic Group, El Morro, Kinetic Funds, LF42 and Scipio); Ex. 12, MW Tr. at 49:14-52:5; 52:9-53:2 (RFAs); 145:16-24, 221:24-222:6, 224:24-225:7, 229:16-230:2, 233:24-234:7 (Lendacy), 256:25-257:9 (KIH), 363:12-14 (El Morro).

[11] Ex. 13, Kinetic Group corporate filing; Ex. 12, MW at 61:2-16.

[12] *Id.*; Ex. 14 Form D; Ex. 15, SEC-Consultiva-E-0059619; Ex. 16, Kelly Locke Tr. at 26:24-27:8; Ex. 12, MW at 60:7-22.

[13] Ex. 3, SEC-Consultiva-E-0061263 and 0061268; Ex. 16, Locke at 186:17-20.

[14] Ex. 17, Kinetic Funds corporate filing; Ex. 14.

[15] *Id.*; Ex. 11 at No. 4; Ex. 12, MW at 53:8-55:17; 56:18-57:4.

[16] Ex. 14.

[17] Ex. 4; Ex. 19, E-mail enclosing Lendacy brochure, etc., at pp. 3-4.

[18] Ex. 20, Crystal Ivory ("Ivory") Decl. at ¶11.

5. Scipio is a Puerto Rico limited liability company formed by Williams.[19] Scipio used at least $2,755,000 of investor assets routed through Lendacy to purchase a historic bank building in San Juan, Puerto Rico.[20]

6. El Morro is a Puerto Rico limited liability company formed by Williams.[21] El Morro received at least $565,000 of investor assets, routed through Lendacy, to fund general operating expenses for Williams' various entities and to partially fund a multi-day launch event for KIH.[22]

7. KIH is a Puerto Rico corporation formed by Williams as a purported Puerto Rico licensed international financial entity.[23] KIH used at least $1,380,000 of investor assets to fund its start-up costs.[24]

8. LF42 is a Delaware limited liability company formed by Williams.[25] LF42 executed a credit agreement with Lendacy reflecting a loan for $2,550,000, of which a substantial portion was used by El Morro and KIH and at least $100,000 was retained by LF42.[26]

---

[19] Ex. 7; Ex. 16, Locke at 83:11-25.
[20] Ex. 16, Locke at 85:8-94:19; Ex. 21, Recorded deed; Ex. 22 and 23, fund transfers; Ex. 24, check payments; Ex. 44.
[21] Ex. 8; Composite Ex. 25, Certificate of Existence, Certificate of Organization.
[22] Ex. 20, Ivory Decl. at ¶14; Ex. 26, Keli Pufahl Tr. at 109:21-111:9, 112:14-113:13.
[23] Ex. 27, Certificate of Formation.
[24] Ex. 20, Ivory Decl. at ¶14; Ex. 25; Ex. 28, Carla Mendez Tr. at 77:15-80:3; 94:7-96:12.
[25] Ex. 29, Certificate of Formation.
[26] Ex. 20, Ivory Decl. at ¶14; Ex. 30; Ex. 31; Ex. 28, Mendez Tr. at 104:12-20.

II. The Offering Materials and Securities Transactions

9. Since 2012, Williams, through Kinetic Group, has offered Kinetic Funds as an investment opportunity.[27] Kinetic Funds employs four investment strategies through sub-funds characterized as yield, gold, growth, and inflation.[28] The yield strategy, known as KFYield, accounted for approximately 98% of Kinetic Funds' assets as of January 2019.[29]

10. Williams initially offered Kinetic Funds to his friends, partners and associates.[30] Over time, Williams developed marketing brochures, websites and used referrals to solicit additional investors.[31]

11. Williams did not utilize a private placement memorandum to provide disclosures to potential investors.[32] Rather, Williams typically provided potential investors with (a) a copy of the Kinetic Funds Subscription Agreement ("Subscription Agreement"), (b) either Exhibit "B-1" or "C-1" to the Kinetic Funds Operating Agreement ("Operating Agreement"), which investors used to designate the strategy they wanted to invest in, (c) the Kinetic Funds Offering Questionnaire ("Offering Questionnaire"), and (d) Kinetic Funds marketing

---

[27] Ex. 14.
[28] Ex. 20, Ivory Decl. at ¶10; Ex. 12, MW at 57:5-58:1; Ex. 16, Locke at 33:22-34:8.
[29] Ex. 20, Ivory Decl. at ¶10; Ex. 16, Locke at 33:22-34:8; Ex. 32.
[30] Ex. 15, SEC-Consultiva-E-0059617; Ex. 12, MW at 100:20-101:14.
[31] *Id.*; Ex. 33, E-mail at p. 1; Ex. 16, Locke at 174:15-175:6, 190:21-191:20, 193:21-196:8; Ex. 12, MW at 118:14-119:1; 293:13-21.
[32] Ex. 12, MW at 80:7-15; Ex. 16, Locke at 106:21-112:11; Ex. 3, SEC-Consultiva-E-0061256.

brochures.[33] Williams gave some investors a copy of the Operating Agreement.[34]

12. Exhibit C-1 was signed by investors who *did* have a relationship with Lendacy.[35] Exhibit C-1 contains this language: "All Funds may include a 'Preferred Return' investment. This investment is in a private sector funding company that offers fixed rate preferred interest returns…". ("Preferred Return Provision").[36]

13. Exhibit C-1 does not identify the "preferred return investment" or the "private sector funding company."[37] Exhibit C-1 does not identify Williams as the majority owner of Lendacy.[38] Exhibit C-1 does not disclose that Williams or his entities would receive purported loans from Lendacy.[39]

14. Exhibit B-1 was signed by investors who did *not* have a relationship with Lendacy.[40] Exhibit B-1 omits the Preferred Return Provision.[41]

15. Williams had ultimate authority over the contents of the Subscription Agreement, Operating Agreement, Exhibit B-1 and Exhibit C-2 thereto, and the Offering Questionnaire.[42]

---

[33] Ex. 16, Locke at 106:21-112:11; Ex. 3 at SEC-Consultiva-E-0061256; Ex. 12, MW at 78:3-18.
[34] Ex. 16, Locke at 106:21-112:11.
[35] Ex. 12, MW at 138:5-139:15.
[36] Ex. 3, SEC-Consultiva-E-0061266; Ex. 12, MW at 141:16-142:7.
[37] Ex. 3, SEC-Consultiva-E-0061261-0061265; Ex. 12, MW at 144:16-145:15.
[38] Ex. 12, MW at 145:25-146:7.
[39] *Id*. at 147:3-17.
[40] *Id*. at 139:16-19.
[41] Ex. 3, SEC-Consultiva-E-0061261; Ex. 12, MW at 141:16-143:22.
[42] Ex. 3; Ex. 12, MW at 160:24-162:2, 164:11-17, 165:4-15, 126:18-127:13, 137:11-138:1, 163:18-164:6.

16. In most cases, investors signed the Subscription Agreement and either Exhibit B-1 or C-1 to the Operating Agreement, and completed the Offering Questionnaire.[43]

17. The Subscription Agreement provides that an investor "irrevocably subscribes for a membership interest" in Kinetic Funds and that such membership interests are "'restricted securities' as that term is defined in Rule 144 under the [Securities Act]."[44] Exhibits B-1 and C-1 to the Kinetic Funds Operating Agreement state that an investor agrees to invest in at least one of the Kinetic Funds investment strategies and that Williams has "full and complete discretion to make any and all trading decisions and affect any strategies as [he] shall determine . . . ."[45] It provides that KFYield focuses on "income generation" and that investors can make principal withdrawal requests under certain conditions, and authorizes Kinetic Group to charge an annual 1% management fee.[46]

III. Williams' Misrepresentations and Omissions

18. In 2015, Williams expanded the marketing materials in order to attract more investors.[47] He arranged to have, among other things, a description of KFYield and its performance information, assets under management and holdings

[43] Ex. 16, Locke at 106:21-112:11.
[44] Ex. 3, SEC-Consultiva-E-0061271.
[45] *Id.* at SEC-Consultiva-E-0061261 and 0061266.
[46] *Id.* at SEC-Consultiva-E-0061263 and 0061268.
[47] *See, e.g.*, Ex. 19.

available on Bloomberg.[48] Williams took this step in order to make KFYield appear transparent and to give it a measure of credibility.[49] From that point on, Williams provided potential investors with Bloomberg reports about the KFYield strategy.[50] Williams was responsible for the content and accuracy of the information provided to Bloomberg.[51]

19. Williams also began in 2015 to market Kinetic Funds with his other entity, Lendacy.[52] Williams sometimes described Lendacy as a "real estate lending structure" designed to meet credit demands of accredited investors.[53] Williams and his associate, who later became Lendacy's president, told prospective investors that if they invested in KFYield they were eligible to receive a Lendacy credit line of up to 70% of their investment in KFYield at low interest rates.[54] They promoted case studies with various scenarios regarding the potential use of drawing on the credit line, such as refinancing a home.[55]

---

[48] Ex. 34, E-mail encl. Bloomberg reports; Ex. 16, Locke at 139:24-142:13; Ex. 12, MW at 286:16-22.
[49] Ex. 16, Locke at 113:6-16; Ex. 12, MW at 286:16-22.
[50] Ex. 16, Locke at 142:6-13; Ex. 12, MW at 286:7-15.
[51] Ex. 16, Locke at 114:11-13, 140:9-142:1; Ex. 35, Anadi Guar Tr. at 266:12-267:10; Ex. 36, E-mail from K. Locke; Ex. 12, MW at 214:18-219:17, 287:12-21.
[52] Ex. 15 at SEC-Consultiva-E-0059613; Ex. 16, Locke at 46:18-47:10, 223:3-224:18; Ex. 3; Ex. 37, E-mail encl. Lendacy brochure; Ex. 38, E-mail re: Lendacy and KFYield.
[53] Ex. 39, Brochures, SEC-Consultiva-E-0064920-0064947.
[54] Ex. 16, Locke at 31:4-32:3, 40:14-19, 223:3-24; Ex. 39, SEC-Consultiva-E-0064920; Ex. 12, MW at 113:12-18; 262:8-20.
[55] Ex. 39, SEC-Consultiva-E-0064942; Ex. 37 at pp. 6-9; Ex. 12, MW at 275:5-279:5, 280:21-24.

20. In 2016, Williams moved from Florida to Puerto Rico, opened a second office there, and began soliciting investors in Puerto Rico to invest in Kinetic Funds.[56]

21. Williams ultimately raised approximately $39 million from at least 30 investors located mostly in Florida and Puerto Rico.[57]

22. Income-producing U.S. Listed Products. Williams told investors that their money would be invested in income-producing U.S. listed financial products.[58] Exhibits B-1 and C-1 to the Operating Agreement likewise state that Kinetic Funds "will trade derivatives, but may also be invested in individual stocks, components of the indices, cash, and other exchange listed products . . .".[59]

23. However, Williams did not invest all investor funds in U.S. listed financial products.[60] Since at least 2013, Williams diverted a substantial portion of investor capital to Lendacy, Williams' entity.[61] Lendacy is not a U.S. listed financial product.[62] Williams then used the investor funds diverted to Lendacy to

[56] Ex. 16, Locke at 20:12-15, 109:22-25, 110:1-8.
[57] Ex. 1, Ivory Decl. at ¶10; Ex. 32.
[58] Ex. 15, SEC-Consultiva-E-0059606-0059607, 0059617; Ex. 33, pp. 5-7, Ex. 39, SEC-Consultiva-E-0064932-0064933; Ex. 16, Locke at 155:10-156:13, 174:15-175:6; Ex. 41, Decl. of Wilmer Gonzalez Vargas ("Vargas") at ¶¶8-9; Ex. 12, MW at 101:15-19; 102:9-16; 103:5-11.
[59] Ex. 3, SEC-Consultiva-E-0061262, 0061267.
[60] Ex. 20, Ivory Decl. at ¶¶ 11-14; Ex. 16, Locke at 32:9-25; 52:3-19; Ex. 12, MW at 200:11-201:12; 264:10-23; 267:20-268:3.
[61] *Id*.
[62] Ex. 35, Guar at 292:1-293:3; Ex. 12, MW at 158:3-5; 202:9-203:20; 310:5-7.

fund purported loans to himself, his business entities, and others.[63] Furthermore, the purported loans to LF42, Williams' personal LLC, did not require interest.[64]

24. Secure Principal. Williams advised investors that KFYield was a conservative blended fund, and that their principal would be secure because the KFYield portfolio would be hedged with listed options.[65] Written marketing materials state that Kinetic Funds will "maintain 90% principle [sic] protection" and that "90% [of KFYield's] portfolio [is] hedged using listed options against market volatility risk."[66]

25. However, Williams did not hedge at least 90% of KFYield's portfolio using listed options.[67] KFYield assets diverted to Lendacy accounted for more than 23% of KFYield's proceeds between January 2015 and September 2019.[68] And, Lendacy could not be hedged using listed options.[69]

26. Lendacy's Funding Source. With respect to the Lendacy credit line product, Williams led prospective investors to believe Lendacy had a separate funding source that would finance the loan from Lendacy to the investor, and that

[63] Ex. 42 (MW); Ex. 43 (Scipio); Ex. 30-31 (LF42); Ex. 44, SEC-BishopJ-E 0000002, Summary of misappropriated funds.
[64] Exs. 30-31.
[65] Ex. 39, SEC-Consultiva-E-0064932-0064933; Ex. 41, Vargas at ¶¶ 8-9; Ex. 12, MW at 103:5-104:2; 111:10-12; Ex. 15, SEC-Consultiva-E-0059606-0059607.
[66] Ex. 33, p. 6; Ex. 41, SEC-Consultiva-E-0064920, 0064932; Ex. 36, p. 6; Ex. 12, MW at 290:2-6; 291:15-292:1; Ex. 15, SEC-Consultiva-E-0059606.
[67] Ex. 20, Ivory Decl. at ¶¶11-14; Ex. 44.
[68] Ex. 20, Ivory Decl. at ¶¶ 8, 11.
[69] Ex. 35, Guar at 292:1-293:3.

their entire capital would be invested in KFYield.[70] They gave investors marketing materials stating: "[y]ou keep 100% of your capital working, generating dividends and interest with the opportunity for continued appreciation." [71]

27. However, Williams used KFYield assets, not a separate funding source, to fund Lendacy and its undisclosed loans.[72] Most investors, such as CFSE, ACCA, FMB 1, LLC, EHRET, Inc. Pre-Need, Puerto Rico Community Foundation, Sacred Heart University, SPMT, LLC, and Plan de Pensiones Ministerial, Inc., were not told KFYield assets were used to fund their or others' Lendacy loans.[73]

28. Liquidity. Williams touted the liquidity of KFYield assets.[74] Written brochures claim: "Your money is always available . . . The fund's positions are hedged out to 90 days, so with a 30 day written notice prior to the quarter end, the fund can redeem 100% principal without penalties."[75]

29. KFYield's investment in Lendacy, the assets of which were unsecured loans primarily to Williams, significantly limited its ability to honor redemption requests to all investors equitably.[76]

30. Account Statements. Kinetic Funds' known assets are less than the

[70] Ex. 16, Locke at 31:4-32:3-8, 126:24-127:17, 212:23-213:1-8; Ex. 45, Myrna Rivera Tr. at 51:8-52:25.
[71] Ex. 39, SEC-Consultiva-E-0064938.
[72] Ex. 16, Locke at 32:9-25; 52:3-19; Ex. 12, MW at 200:11-201:12; 264:10-23; 267:20-268:3.
[73] Ex. 16, Locke at 32:9-25; 52:3-19; Ex. 45, Rivera Tr. at 51:8-52:25; 87:5-89:4; Ex. 41, Vargas Decl. at ¶¶ 14-16.
[74] Ex. 41, Vargas Decl. at ¶¶ 8-9; Ex. 15, SEC-Consultiva-E-0059606-0059607.
[75] Ex. 15, SEC-Consultiva-E-0059617.
[76] *See e.g.*, Ex. 30-31, 42-43.

aggregate amount reflected on investor account statements.[77] Williams had ultimate control over the contents of the account statements.[78]

31. Portfolio Performance. KFYield's reported performance to investors does not match its actual performance. For example, the Bloomberg reports provided to investors and financial advisors excluded the information contained in KFYield's brokerage statements.[79] The Bloomberg report as of December 29, 2017, the contents of which Williams had ultimate authority over,[80] reflects that Kinetic Funds' total assets were $31.78 million and its year-to-date performance was 1.04%.[81] It does not include the margin balance.[82]

32. The annual statement as of December 31, 2017 that KFYield received from its brokerage firm reflects that KFYield had a total net asset value of $4.7 million, which was a -27.62% annual rate of return from December 31, 2016, ($88,877,936.84) in cash, *i.e.*, margin, $439.632.20 in interest, and that KFYield incurred market-to-market losses of $3,154,506.38.[83]

33. Margin. Williams failed to disclose to investors what portion of Kinetic Funds' portfolio was margined.[84]

---

[77] Ex. 20, Ivory Decl. at ¶¶ 5-9 and Ex. D; Ex. 16, Locke 61:9-62:13.
[78] Ex. 12, MW at 272:23-273:1.
[79] *Compare* Ex. 46, SEC-KP-E-0264731-0264749 *with* Ex. 47, SEC-Receiver 000385-000997.
[80] *See supra* n. 51.
[81] Ex. 46 at 264740-264741.
[82] *Id.*; Ex. 12, MW at 274:6-24.
[83] Ex. 47, SEC-Receiver 000385-000997; Ex. 12, MW at 220:4-11.
[84] Ex. 12, MW at 274:6-24.

34. Williams' Ownership of Lendacy. Williams failed to disclose to most investors that investor assets would be invested "in a private sector funding company that offers fixed rate preferred interest returns."[85] He, in turn, failed to disclose to investors that the "private sector funding company" was Lendacy, a private company owned and controlled by Williams.[86]

35. Williams' Purported Loans. Williams failed to disclose that he and his entities, Scipio and LF42, received purported loans from Lendacy.[87]

36. Zephyr Aerospace. Williams failed to disclose that he used at least $497,300 in investor assets to invest in Zephyr Aerospace, a private company that was not listed on a U.S. exchange.[88]

37. Williams had ultimate authority for the false and misleading statements and omissions made orally and in documents provided to clients and prospective clients.[89]

---

[85] *Compare* Ex. 3, SEC-Consultiva-E-0061261 *with* 0061266; Ex. 12, MW at 138:13-139:19; 144:2-15; 108:15-109:9.
[86] Ex. 12, MW at 144:2-146:7
[87] *See supra* n. 73; Ex. 3, SEC-Consultiva-E-0061266-61269 (Exhibit C-1); Ex. 12, MW at 339:4-7 (MW), 352:8-10 (Scipio), Ex. 11 at No. 22 (Scipio).
[88] Ex. 3, SEC-Consultiva-E-0061261-0061265; Ex. 12, MW at 144:16-145:15, 373:5-25, 450:5-23; Ex. 26, Pufahl at 101:24-104:8; Ex. 44; Ex. 48, KCL 121-122, March 2019 Lendacy bank statement; Ex. 49, KFI 881-882, Dec. 2018 Lendacy bank statement.
[89] Ex. 16, Locke at 121:15-22, 132:19-22, 156:8-13, 172:13-174:8; Ex. 12, MW at 301:1-302:23 (Ex. 15); 291:15-23 (Ex. 36); 277:24-278:24 (Ex. 37); 308:1-15; 313:9-314:6 (Ex. 39 as to SEC-Consultiva-E-0064922-0064928, 0064929-0064937).

IV. Williams' Misappropriation of Investor Funds

38. All investor capital was deposited into Kinetic Funds' bank account at BMO Harris Bank N.A. ("Bank Account")—a single account which held exclusively investor capital.[90] Williams kept a portion of investor capital in the Bank Account and transferred the remainder to Kinetic Funds' brokerage account at Interactive Brokers LLC ("IB") ("Brokerage Account").[91]

39. Securities for KFYield were then purchased with a combination of investor capital and margin, *i.e.*, funds borrowed from its broker, IB.[92] For example, if an investor provided $1 million for investment in Kinetic Funds, $1 million worth of securities would be purchased for that investor with a combination of cash and portfolio margin.[93]

40. Margin is a debt that carries interest.[94] If the Brokerage Account fell below the minimum maintenance margin,[95] then IB, at its sole discretion, could issue a margin call, *i.e.*, require Kinetic Funds to put more cash into the Brokerage Account, purchase more options, or liquidate some of its positions.[96]

---

[90] Ex. 12, MW at 156:6-14; 157:18-158:2; Ex. 16, Locke at 36:15-37:7; Ex. 26, Pufahl at 87:22-88:14.
[91] *Id*. at 167:2-17, 177:18-178:15; Ex. 20, Ivory Decl. at ¶¶4.a, 9.
[92] *Id*. at 180:18-24.
[93] *Id*. at 198:2-19.
[94] *Id*. at 181:4-12, 195:14-196:4.
[95] *Id*. at 196:22-24.
[96] *Id*. at 190:14-25, 196:22-198:1, 182:25-183:7.

41. Williams chose to purchase securities for the KFYield portfolio with a mix of cash and margin so that investor assets left behind in the Bank Account could be directed to Lendacy and other private equity.[97]

42. Williams created the investment strategy for Kinetic Funds,[98] and controlled the Brokerage Account, including its operation and trading activity.[99] Williams had ultimate authority over the investment decisions for Kinetic Funds with the assistance of Anadi Guar ("Guar"), to whom Williams delegated the duty of executing day-to-day trades in accordance with Williams' investment strategy.[100] Guar reported to Williams and the two would assess Kinetic Funds' portfolio once a week.[101]

43. Williams controlled the Bank Account,[102] as well as Lendacy's two bank accounts at BMO Harris Bank N.A.[103]

44. Payoff of Relative's Mortgage. In April 2015, Williams used $37,000 of KFYield funds, routed to Lendacy, to pay off the mortgage on his relative's house.[104] On April 29, 2015, Williams executed a Lendacy "Credit Facility

[97] *Id*. at 198:20-199:15.
[98] *Id*. at 55:10-17, 87:12-20.
[99] *Id*. at 170:2-172:25; *see also* Ex. 50, SEC-BMO-P-0001198-0001204.
[100] Ex. 12, MW Tr. at 87:7- 91:6; 96:5-97:10.
[101] *Id*. at 71:24-72:1, 72:21-73:1, 86:21-22.
[102] Ex. 50, SEC-BMO-P-0001198-0001204; Ex. 12, MW at 173:25-177:5, 366:2-367:17.
[103] Ex. 51 SEC-BMO-P-0000004 – 00000017 and Ex. 12, MW at 248:13-252:18 (account xx8676); Ex. 52 SEC-BMO-P-0001407- 0001416 and Ex. 12, MW at 252:19-257:6 (account xx1081); 235:2-19 (wire authorization)
[104] Ex. 16, Locke at 96:9-16; Ex. 26; Pufahl at 139:12-141:5.

Agreement" dated April 29, 2015, reflecting a purported loan for $40,000.[105] The relative did not grant Lendacy a mortgage or any other consideration to Lendacy, and the Credit Facility Agreement was unsecured.[106]

45. Purchase of Real Property for Personal Use. In March 2017, Williams purchased for $1,512,575.50 three luxury apartments and two parking spaces for himself in San Juan, Puerto Rico.[107] Williams used KFYield funds, diverted to Lendacy, to pay for the properties.[108] Williams titled these properties in his name.[109]

46. Certain employees subsequently raised concerns to Williams about his use of KFYield funds to pay for the San Juan properties.[110] Williams responded by stating that he was expecting a future payout from the sale of an unrelated company and would pay KFYield back at that time.[111] After employees pressed the issue, Williams executed a Lendacy "Credit Facility Agreement" dated March 23, 2017, for a $1,517,000 loan ("Williams Credit Agreement").[112] Williams did not grant Lendacy a mortgage on the properties, and the Credit Facility Agreement is

[105] Ex. 53, Agreement between Lendacy and Williams for $40,000.
[106] *Id*.
[107] Ex. 16, Locke at 67:19-79:18, Ex. 26, Pufahl at 24:23-27:1; Ex. 54, deed; Ex. 12, MW at 323:18-326:3; Exs. 55-56, fund transfers.
[108] *Id*.; Ex. 20, Ivory Decl. at ¶ 14; Ex. 12, MW at 328:2-329:5, 325:7-326:3.
[109] Ex. 54; Ex. 16, Locke at 64:23-65:2; Ex. 12, MW at 323:18-324:22, 337:2-6.
[110] Ex. 26, Pufahl at 33:2-19, 141:20-142:24.
[111] *Id*. at 25:22-26:16.
[112] Ex. 42; Ex. 12, MW at 333:14-334:21.

unsecured.[113]

47. Purchase of Commercial Property. In May 2018, Williams used at least $2,755,000 of KFYield funds, routed to Lendacy in the form of a Lendacy loan, to purchase a historic bank building in Old San Juan, Puerto Rico.[114] Williams titled the building in the name of his entity, Scipio, and executed a Lendacy "Credit Facility Agreement" dated May 4, 2018 on Scipio's behalf.[115] Scipio did not grant Lendacy a mortgage on the property, and Williams did not guarantee repayment of the purported loan, which is unsecured.[116] At the time of the purported loan, Scipio had not invested any money in Kinetic Funds.[117]

48. Funding of Williams' Other Companies. In April 2019, Williams used $2,050,000 of additional KFYield funds in the form of two Lendacy loans to provide financial support to his outside business ventures.[118] These expenses included, among others, the development of KIH, an international financial entity in Puerto Rico, the development of an international exchange in Puerto Rico, and the payment of more than $600,000 for a multi-day event held to highlight and

---

[113] *Id*.
[114] *See supra* n. 20; Ex. 20, Ivory Decl. at ¶ 14; Ex. 12, MW at 342:14-343:22; 344:1-348:19. Ex. 16, Locke at 85:8-94:19; Ex. 21, Recorded deed; Ex. 22-23, fund transfers; Ex. 24, check payments for fees associated with purchase; Ex. 44.
[115] Ex. 43; Ex. 12, MW at 348:23-350:22; Ex. 21.
[116] Ex. 43.
[117] Ex. 12, MW at 350:23-351:2.
[118] Ex. 20, Ivory Decl. at ¶ 14; Exs. 30-31; Ex. 26, Pufahl at 45:13-47:20, 101:24-118:2; Ex. 28, Mendez at 95:15-101:10, 99:21-100:10.

introduce KIH to the public at a luxury hotel in Puerto Rico.[119] Williams executed two "Credit Facility Agreements" dated April 15, 2019, reflecting a total loan in the amount of $2,550,000 on behalf of his entity, LF42 (the "LF42 Credit Agreements").[120] Williams did not guarantee repayment of the purported loan, which is unsecured.[121]

49. As of October 2019, Lendacy had at least $12.6 million in outstanding purported loans made with KFYield assets to Williams, his entities, and other investors.[122] After the SEC's Complaint was filed, Williams repaid $2,354,399.21.[123]

V. Williams' Devices, Schemes, and Artifices to Defraud

50. The Williams Credit Agreement was executed *after* Williams purchased his San Juan properties with investor assets.[124] Furthermore, the purported loan for $1,517,000 exceeded 70% of his $65,000 investment in Kinetic Funds at the time.[125]

51. The LF42 Credit Agreements were executed *after* Williams used investor assets to fund the development of KIH and the international exchange,

[119] Ex. 20, Ivory Decl. at ¶ 14; Ex. 44; Ex. 12, MW at 359:18-360:6, 360:21-24, 361:19-363:3, 363:23-364:20, 369:3-23, 379:2-13, 380:12-15, 446:7-9.
[120] Exs. 30-31; Ex. 12, MW at 352:14-354:16.
[121] *Id*.
[122] Ex. 20, Ivory Decl. at ¶6 and Ex. B.
[123] Ex. 12, MW at 374:15-374:22.
[124] Ex. 26, Pufahl at 33:2-19, 141:20-142:24.
[125] Ex. 20, Ivory Decl. at Exhibit A, p. 10 (reflecting a $65,000 investment by MW on May 4, 2015).

and to pay for the Kinetic International Summit.[126] LF42 did not invest in Kinetic Funds.[127] Moreover, Williams papered a promissory note to make it look as though *LF42*'s assets funded ISX, LLC ("ISX"), the technology company Williams held a 40% interest in and was creating the software for the international exchange.[128] In reality, $2 million of *investor*'s assets, routed through Lendacy, were transferred to ISX.[129] LF42 agreed to pay back the $2 million, from a *future* payout due to Williams, to Lendacy, which was to forward the amount to Kinetic Funds.[130] ISX was then responsible to repay LF42 the $2 million.[131]

52. Additionally, Williams purchased securities for the KFYield portfolio on margin so he could divert investor capital to Lendacy.[132]

VI. Williams' Conflicts of Interest

53. Williams transferred investor capital amounting to at least $9.1 million net to Lendacy, an entity owned by Williams.[133]

54. Williams and two of his entities took unsecured loans amounting to

[126] *Compare* Ex. 20, Ivory Decl. at ¶ 14 *with* Exs. 30-31.
[127] Ex. 20, Ivory Decl. at Exhibit A (showing no investment by LF42, and reflecting only a $65,000 investment by MW on May 4, 2015 and a $1,500,000 investment by him on May 3, 2018 at pp. 10, 12).
[128] Ex. 57, $2 million promissory note signed by Williams as "Administrator" for ISX, in favor of LF42, on April 15, 2019; Ex. 12, MW at 363:23-364:20; Ex. 26, Pufahl at 37:20-38:15.
[129] Ex. 58 (e-mail explaining transactions); Ex. 12, MW at 363:23-364:20.
[130] Ex. 58; Exs. 30-31.
[131] Ex. 58.
[132] *See supra* n. 97.
[133] Ex. 20, Ivory Decl. at ¶ 11.

at least $6.8 million funded with KFYield assets.[134]

55. Between January 2015 and October 2017, Williams used $30,872.44 of investor funds to pay Silexx Financial Systems, LLC ("Silexx"), another company that Williams partially owned and/or had a financial interest in.[135]

MEMORANDUM OF LAW

I. The Standard For Granting Summary Judgment

The Court should grant summary judgment in favor of the SEC as a matter of law because there is no genuine dispute as to any material fact. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986). The trial judge must enter summary judgment "if, under the governing law, there can be but one reasonable conclusion." *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 250 (1986). *See also Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("'where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial."') (citation omitted). For purposes of summary judgment under Rule 56 of the Federal Rules of Civil Procedure, "material" means a fact that is essential to the proper disposition of the claim. *Anderson,* 477 U.S. at 248. A "genuine" factual dispute requires more than a "mere scintilla" of evidence. *Id.* at 252. Once the SEC

[134] *Id*. at Exs. B and E; Exs. 30-31, 41-42.
[135] Ex. 20, Ivory Decl. at ¶12; Ex. 12, MW at 398:7-15.

establishes the absence of a genuine issue of material fact, the defendant must provide "specific facts" – going beyond the pleadings – showing there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Anderson,* 477 U.S. at 250-51. Here, the undisputed material facts and memorandum of law set forth herein yield only one reasonable conclusion: Williams violated the federal securities laws.

II. Williams Violated the Antifraud Provisions of the Securities Act and the Exchange Act

Counts I, II and III of the Complaint [DE 1] state a claim against Williams for violations of Section 17(a)(1)-(3) of the Securities Act, and Counts IV, V and VI state claims for a violation of Section 10b and Rule 10b-5(a)-(c) of the Exchange Act. These provisions prohibit essentially the same type of conduct. *United States v. Naftalin,* 441 U.S. 768, 773 n. 4 (1979); *SEC v. Unique Financial Concepts,* 119 F. Supp. 2d 1332, 1339 (S.D. Fla. 1998), *aff'd,* 196 F.3d 1195 (11th Cir. 1999). The language of these provisions is "expansive" and "capture a wide range of conduct." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101-02 (2019). In *Lorenzo*, the Supreme Court recognized that there is "considerable overlap among the subsections of" Rule 10b-5 and Section 17(a), and thus the same underlying conduct may establish a violation of more than one subsection. *Id.* at 1101-02 (knowing dissemination of misrepresentations with an intent to deceive violates Rule 10b-5(a) and (c) and Section 17(a)(1)); *see also Malouf v. SEC*, 933 F.3d 1248, 1260 (10th Cir. 2019)

(applying *Lorenzo* to Section 17(a)(3) because it "is virtually identical to Rule 10b-5(c)").

To establish a violation under Section 10(b), the SEC must prove: (1) a device, scheme, or artifice to defraud or materially false misrepresentations or misleading omissions; (2) in connection with the purchase or sale of securities; (3) made with scienter. *SEC v. Monterosso*, 756 F.3d 1326, 1333-34 (11th Cir. 2014). As a final element, the SEC must also show the use of interstate commerce, the mails, or a national securities exchange. *SEC v. Corporate Relations Group,* No. 99-cv-1222, 2003 WL 25570113, at *7 (M.D. Fla. March 28, 2003).

To show a violation of Section 17(a)(1), the SEC must prove: (1) material misrepresentations or materially misleading omissions; (2) in the offer or sale of securities; (3) made with scienter. *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007). Unlike private securities actions, the SEC need not prove reliance or injury under Section 17 of the Securities Act or Section 10(b) and Rule 10b-5 of the Exchange Act. *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012). The elements for Section 17(a)(2) and 17(a)(3) are similar, except proof of mere negligence is sufficient to establish a violation. *Monterosso*, 756 F.3d at 1334.

A. Williams' Fraud Regarding the Use of Investor Assets

1. Williams' Misrepresentations, Omissions, and Schemes

Williams told investors that their capital would be invested in income-producing U.S. listed financial products and that their principal would be secure because the KFYield portfolio would be hedged with listed options. *See* Statement of Undisputed Material Facts ("SF") ¶¶22, 24. Contrary to Williams' representations, Williams "invested" a substantial portion of investor capital in Lendacy, which is not a U.S. listed financial product and could not be hedged using listed options. (SF ¶¶23, 25). Furthermore, KFYield's "investment" in Lendacy, the assets of which were unsecured loans primarily to Williams, impaired the liquidity of the fund and its ability to equitably honor redemption requests. (SF ¶29).

Additionally, Williams failed to disclose to most investors that KFYield would invest in a "private sector funding company", and to the extent he did, he conveniently omitted that the "private sector funding company" referred to Lendacy, his private entity. (SF ¶34).

Williams also led prospective investors to believe Lendacy had a separate funding source that would finance the loan from Lendacy to the investor, and that their entire capital would be invested in KFYield. (SF ¶26). In reality, Williams used investor capital to fund Lendacy loans, including to himself and his entities,

instead of deploying the entire capital for investment in KFYield. (SF ¶¶27, 38, 41, 44-48).

Williams concealed his scheme by purchasing securities with a mix of investor capital and margin. (SF ¶¶39, 52). The use of margin increased the cost and risk of investment in KFYield. (SF ¶40). Williams did not disclose to investors the cost or the extent of KFYield's margined positions. (SF ¶33). He instead presented a rosy picture of KFYield's performance which did not comport with brokerage account statements. (SF ¶¶31-32).

Williams further papered credit agreements, collateralized by supposed future payouts, to hide his use of investor assets to fund his personal expenses and business ventures. (SF ¶¶50-51).

2. Williams' Misrepresentations and Omissions Are Material

These misrepresentations and omissions were material. In the securities fraud context, the test for materiality is "whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *SEC v. Monterosso*, 786 F. Supp. 2d 1255, 1263 (S.D. Fla. 2011), *aff'd* 756 F.3d 1326 (11th Cir. 2014) (citations omitted). Thus, a statement or omission is material where "there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable shareholder as having significantly altered the 'total mix of information available.'" *Id*. Summary judgment is

appropriate where the misstatement is "so obviously important to an investor that reasonable minds cannot differ on the question of materiality." *Id.* (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)). "[W]hether an alleged misrepresentation or omission is material necessarily depends on all relevant circumstances of the particular case." *Id.* (citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000)).

Here, Williams' misrepresentations were clearly important to a reasonable person. *See e.g., SEC v. Smart*, 678 F.3d.850, 857 (10th Cir. 2012) (the fact money was not being used as represented would be material to a reasonable investor); *SEC v. Reynolds*, No. 1:06–CV–1801–RWS, 2010 WL 3943729, at *3 (N.D. Ga. Oct. 5, 2010 (misrepresentations that investor funds would remain in defendant's bank account until the transaction was approved were material as a matter of law). Instead of investing their funds as promised, Williams used investor funds, to the tune of at least $6.3 million, to purchase a luxury apartment for himself, to buy commercial real estate, to pay-off a relative's mortgage, and to fund other business ventures, among other things. (SF ¶¶22-25, 44-48). Instead of deploying the conservative investment strategy he touted, Williams margined the KFYield portfolio saddling investors with debt and the risk of a margin call. (SF ¶¶24, 38-40). A reasonable person would find it material that Williams did the exact opposite of what he promised investors.

3. Williams' Misuse and Misappropriation of Investor Assets

Williams not only made material misrepresentations and omissions to investors, but he also misappropriated at least $6.3 million of investor funds for his own personal enjoyment. (SF ¶¶ 44-48). *See SEC v. Zanford*, 535 U.S. 813, 821-22 (2002) (misappropriation of client's securities for personal use states a claim for scheme to defraud). Furthermore, he misused investor assets by investing them in Zephyr Aerospace, a company that is not on a U.S. listed exchange. (SF ¶36). Williams pulled all the levers in his long-running scheme: he controlled the relevant bank accounts, the brokerage account, the investment decisions for Kinetic Funds, and the relevant entities that improperly diverted and received investor assets. (SF ¶¶1-8, 42-43).

4. "In Connection With" and Interstate Commerce

Investments into Kinetic Funds constitute investment contracts and, therefore, are securities. *See* 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (defining security to include investment contracts under the Securities Act and Exchange Act). Under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), an investment contract exists if there is "(1) an investment of money, (2) a common enterprise, and (3) the expectation of profits to be derived solely from the efforts of others." *SEC v. Unique Financial Concepts*, 196 F.3d 1195, 1199 (11th Cir. 1999).

Here, investors provided Williams with money for the purpose of investing in Kinetic Funds. (SF ¶17). Commonality exists because investors were passive, relying on Williams' purported skill in creating and managing a hedge fund that would generate income with little risk to principal. *Id*. (applying a standard of "broad" vertical commonality, requiring only a finding that investors' fortunes were "inextricably tied to the efficacy of the [promoter]."). As for profits being derived "solely" from the efforts of others, "the focus is on the dependency of the investor on the entrepreneurial or managerial skills of a promoter or other party." *Merchant Capital,* 483 F.3d at 755. This prong is satisfied because Williams retained total control over Kinetic Funds' profitability. (SF ¶¶17, 42). All investors had to do was give Williams their money and wait to receive income from their principal investment. (*Id*.)

The interstate commerce requirement is met because the very misrepresentations and omissions are contained within Williams' e-mails back and forth to investors. (SF ¶¶15, 18, 22, 37). He also misused and misappropriated investor assets through wire transactions. (SF ¶¶5, 36, 45).

5. <u>Williams Acted with Scienter</u>

Violations of Sections 17(a)(1) and 10(b) and Rule 10b-5 require a "mental state embracing the intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). This requirement can be satisfied by

recklessness, which includes an extreme departure from the standards of ordinary care. *See SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982). Recklessness may be inferred from an "egregious refusal to see the obvious, or to investigate the doubtful." *In re Carter-Wallace, Inc., Sec. Litig.*, 220 F.3d 36, 40 (2d Cir. 2000). Negligence is sufficient for violations of Sections 17(a)(2) or 17(a)(3). *Aaron v. SEC*, 446 U.S. 680, 691, 701-02 (1980). Summary judgment on the issue of scienter is appropriate when "'no reasonable jury could doubt that [defendant] had acted with scienter.'" *Monterosso*, 756 F.3d at 1335 (quoting *SEC v. Lyttle*, 538 F.3d 601, 603-04 (7th Cir. 2008)).

A person may be held primarily liable under Section 10(b) and Rule 10b-5(b) for "making" a misleading statement if he or she had "ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *SEC v. Davidson*, No. 8:20-cv-00325-MSS-AEP, at *8 (M.D. Fla. Mar. 8, 2021) (ECF No. 277).

Williams knew his representations to investors were false because he directed both the transfer of KFYield assets to Lendacy and Lendacy's subsequent "loans" to himself and his entities. (SF ¶¶23, 44-48). He controlled both entities and their bank accounts. (SF ¶¶1, 3-4, 43).

He also controlled the investment decisions for Kinetic Funds and, as such, knew that his representations to investors about the use of investor assets, the

performance of Kinetic Funds, and the source of Lendacy's funding were false. (SF ¶¶41-42). *See SEC v. Cross Fin. Serv. Inc.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995) (defendant's use of investor funds for purposes other than those disclosed to investors satisfied scienter requirement); *SEC v. Watkins*, 317 F. Supp. 3d 1244, 1255 (N.D. Ga. 2018). Furthermore, he had ultimate authority over the marketing materials and Bloomberg reports provided to investors. (SF ¶¶18, 37).

Alternatively, even if the Court finds that Williams' actions were not conducted with scienter, based on the undisputed facts his actions were performed negligently and therefore the Court should enter summary judgment against him as to Sections 17(a)(2) and 17(a)(3) of the Securities Act.

III. Williams Violated the Antifraud Provisions of the Advisers Act

Counts VII, IX, XI and XIII state a claim against Williams for violations of Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8(a).

Section 206(1) of the Advisers Act prohibits any investment adviser from, directly or indirectly, employing any device, scheme or artifice to defraud any client or prospective client. Section 206(2) of the Advisers Act prohibits any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.

Section 206(4) of the Advisers Act, modeled on Sections 206(1) and (2) thereof, prohibits an investment adviser from, directly or indirectly, engaging in

any act, practice, or course of business which is fraudulent, deceptive, or manipulative. Rule 206(4)-8 defines such prohibited conduct. Among other things, advisers to "pooled investment vehicles," which include hedge funds such as Kinetic Funds, violate Section 206(4) if they make false or misleading statements to investors or prospective investors in those pools or otherwise defraud investors or prospective investors. *Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles* (SEC Rel. No. IA-2628, 2007 WL 2239114, *3 Aug. 9, 2007).

Section 206(1) requires scienter, while Section 206(2) and Section 206(4) and Rule 206(4)-8(a) require only negligence. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963); *Steadman v. SEC*, 967 F.2d 636, 647 (D.C. Cir. 1992); *SEC v. DiBella*, 587 F.3d 553, 569 (2d Cir. 2009). Such violations may appropriately be resolved in the SEC's favor on summary judgment. *SEC v. Young*, No. 09-1634, 2011 WL 1376045, at *10 (E.D. Pa. Apr. 12, 2011); *SEC v. Onyx Capital Advisors, LLC*, No. 10-11633, 2012 WL 4849890 (E.D. Mich. Oct. 11, 2012).

A. Williams is an Investment Adviser

Under the Advisers Act, an "investment adviser" is "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). This definition encompasses anyone who manages the funds of others

for compensation or controls an investment advisory firm. *SEC v. ABS Manager, LLC,* No. 13-cv-319, 2014 WL 7272385, at *4 (S.D. Cal. Dec. 18, 2014); *SEC v. Berger,* 244 F. Supp. 2d 180, 193 (S.D.N.Y. 2001) ("Because [the defendant] effectively controlled [the investment adviser] and its decision making, [he] is also properly labeled an investment adviser within the meaning of the Advisers Act"). The general definition of an "investment adviser" is broad. *Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011).

Kinetic Group is the investment adviser for Kinetic Funds, a private pooled investment fund.[136] (SF ¶¶2-3). As the founder, managing member and control person of Kinetic Group, Williams carried out Kinetic Group's responsibilities as investment adviser by, among other things, directing Kinetic Funds' investments, communicating with investors about Kinetic Funds' investment strategy and performance, and soliciting investors to Kinetic Funds. (SF ¶¶1-2, 18-20, 22, 24, 26, 28, 30-31, 41-42). Williams, through Kinetic Group, received a 1% management fee for managing Kinetic Funds and, thus, like Kinetic Group, meets the definition of an "investment adviser." (SF ¶¶1-3). *See In the Matter of John J. Kenny*, Advisers Act Rel. No. 2128, 2003 WL 21078085, *17 n.54 (May 14, 2003), *aff'd* 87 F. App'x 608 (8th Cir. 2004).

[136] An "investment adviser" under the Adviser's Act includes a general partner of a hedge fund or investment manager of a limited partnership, such as Kinetic Group, which manages a fund's investments for compensation. *See Abrahamson v. Fleschner*, 568 F.2d 862, 869-70 (2d Cir. 1977).

B. Williams Violated Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8(a)

The undisputed facts show that Williams violated the Advisers Act. Importantly, facts showing a violation of Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act by an investment adviser will also support a showing of a Section 206 violation. *Berger*, 244 F.Supp.2d at 188-89. As discussed in detail above, Williams' actions violated both Sections.

Williams' actions also independently violated the Advisers Act. The Advisers Act establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients. *Transamerica Mortgage Adviser, Inc. v. Lewis*, 444 U.S. 11, 17 (1979). An adviser's fiduciary duties include "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." *Capital Gains,* 375 U.S. at 191-94. The duty to disclose all material information is intended "to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested." *Id.* at 191-92. The existence of a conflict of interest is a material fact which an investment adviser must fully and fairly disclose to its client, so the client can understand the conflict and have a basis to consent to the conflict or reject it. *Id.*; *DiBella*, 587 F.3d at 568.

Here, Williams acted against the interest of Kinetic Funds by misappropriating and misusing investor funds to make purported loans to himself

and others, to fund his other business ventures and to cover operating costs. (SF ¶¶36, 44-49). He also failed to disclose conflicts of interest to investors, and get their consent before engaging in the conflicted transactions. *Di Bella*, 587 F.3d at 568. Specifically, he failed to disclose that he diverted investor funds into Lendacy, an entity owned by him, and then had Lendacy make unsecured "loans" funded with KFYield assets to himself, and that he directed Kinetic Funds to pay fees to Silexx, another entity he held a financial interest in. (SF ¶¶23, 34-35, 53-55).

Williams also violated Section 206(4) of the Advisers Act and Rule 206(4)-8 by misrepresenting and omitting material facts concerning the use of investor funds. As discussed above, Williams stated that KFYield would invest in U.S. listed financial products and hedge at least 90% of those holdings using listed options to ensure the safety and liquidity of investor capital. (SF ¶¶22, 24, 28). Williams instead diverted a substantial portion of KFYield assets to Williams' start-up venture Lendacy, which proceeded to make purported loans to Williams, his entities and other investors. (SF ¶¶23, 44-49).

IV. Williams Aided and Abetted Kinetic Group's Violations

The Commission moves for summary judgment as to Count VIII, X, XII, and XIV against Williams for aiding and abetting Kinetic Group's violation of the

Advisers Act.[137] To prove aiding and abetting liability under the federal securities laws, the SEC must establish: (1) a primary or independent securities law violation committed by another party; (2) awareness or knowledge by the aider and abettor that his or her role was part of an overall activity that was improper; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation. *See SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012); *Graham* v. *SEC,* 222 F.3d 994, 1000 (D.C. Cir. 2000). All three elements are satisfied here.

First, as addressed in Section III above, Kinetic Group is an investment adviser to Kinetic Funds and received a 1% management fee for managing the fund. (SF ¶2). The SEC has demonstrated Kinetic Group's violations of the Advisers Act *vis-à-vis* Williams, Kinetic Group's sole control person. Second, Williams was aware that his role in the overall activity was improper. The awareness requirement can be satisfied by extreme recklessness, which can be shown by "red flags," "suspicious events creating reasons for doubt," or "a danger…so obvious that the actor must have been aware of" the danger of violations." *Howard* v. *SEC,* 376 F.3d 1136, 1143 (D.C. Cir. 2004) (citations omitted). The knowledge or awareness requirement also can be satisfied by recklessness

[137] These Counts are brought in the alternative in the event the Court does not find Williams primarily liable for a violation of the Advisers Act in Counts VII, IX, XI and XIII.

when the alleged aider and abettor is a fiduciary or active participant. *Ross v. Bolton,* 904 F.2d 819, 824 (2d Cir. 1990). Williams knew that Kinetic Group, through its marketing materials, had represented to investors that KFYield would invest in U.S. listed financial products and hedge at least 90% of those holdings using listed options to ensure the safety and liquidity of investor capital. (SF ¶¶18, 22, 24, 28, 37). He knew Kinetic Group failed to disclose conflicts of interest to investors, *i.e.*, that Williams owned Lendacy, diverted investors funds to Lendacy, and then directed Lendacy to make purported loans to himself and his entities. (SF ¶¶23, 34-35, 53-55). He knew or should have known that such action severely compromised Kinetic Group's duties to act in Kinetic Funds' best interest.

Williams substantially assisted Kinetic Group's violations because Williams' actions were a proximate or substantial causal factor in the primary violation. *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 48 (2d Cir. 1978); *Lazzaro v. Manber*, 701 F. Supp. 353, 569 (E.D.N.Y. 1988). Among other things, he: (1) controlled Kinetic Group and what it told investors about Kinetic Funds' investment strategy (SF ¶¶1-2, 15, 18, 37); (2) controlled Kinetic Funds' brokerage and bank accounts (SF ¶¶42-43); (3) controlled Lendacy's bank account (SF ¶43); (4) directed the transfer of investor assets to Lendacy, and then to his entities and third parties to fund personal expenditures and his business ventures (SF ¶¶23, 36, 41-49); (5) failed to disclose his ownership of Lendacy (SF ¶34); and (6) failed

to disclose the use of investor assets to fund purported loans to himself, his entities, and other investors. (SF ¶¶27, 35). In sum, Williams drove Kinetic Group's primary violations, and he should be held liable for aiding and abetting those violations.

CONCLUSION

Based on the foregoing, the SEC respectfully asks the Court to grant this motion and enter summary judgment[138] on all counts of the Complaint against Williams: Counts I - III, alleging violations of Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act; Counts IV – VI, alleging violations of Section 10(b) of the Exchange Act and Exchange Act Rules 10b-5(a), 10b-5(b) and 10b-5(c); Counts VII, IX, XI and XIII, alleging violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Advisers Act Rules 206(4)-8(a)(1) and 206(4)-8(a)(2) or, in the alternative, Counts VIII, X, XII, and XIV, alleging aiding and abetting violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Advisers Act Rules 206(4)-8(a)(1) and 206(4)-8(a)(2).

March 12, 2021

Respectfully submitted,

By: */s/ Christine Nestor & Stephanie N. Moot*
Christine Nestor
Senior Trial Counsel

[138] The SEC seeks permanent injunctive relief, disgorgement, prejudgment interest, and a civil penalty against Williams. The SEC believes it appropriate to address the issue of remedies after liability has been determined.

Fla. Bar No. 597211
Direct Dial: (305) 982-6367
E-mail: nestorc@sec.gov

Stephanie N. Moot
Senior 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 March 12, 2021, 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.
Buchanan Ingersoll & Rooney PC
401 E. Jackson St., Suite 2400
Tampa, FL 33602
813-222-2098
Jordan.maglich@bipc.com
Counsel for Receiver, Mark A. Kornfeld