

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

KINETIC INVESTMENT GROUP, LLC *et al.*,

Defendants and Relief Defendants.

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**DEFENDANT WILLIAMS' FIFTH MOTION**  
**TO MODIFY FREEZE ORDER**

Defendant MICHAEL SCOTT WILLIAMS (“Defendant”), 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 (“Freeze Order”) [D.E. 33] to unfreeze a reasonable amount of funds for attorneys’ fees and costs to defend this case for the period of time running from and including April 29, 2021 through and including the last day of the trial.<sup>1</sup>

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<sup>1</sup> The trial term is set for September 2021 and begins on August 30, 2021. [D.E. 88].

While this is not an emergency motion, time is of the essence as the trial term is set to begin on August 30, 2021 and Defendant's counsel will be limited in the work they will be able to do to prepare Defendant's case for trial until they have a clear understanding of what work will be compensated (and what work will not be compensated).

In support of this Motion, Defendant states as follows:

### **Introduction**

1. This case arises from the SEC's allegations concerning Kinetic Funds I, LLC ("Kinetic Funds"), 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) and lend those borrowed funds to an affiliated private lending company which, in turn, lent the borrowed funds to the Kinetic Funds' investors at favorable rates.

2. Kinetic Funds' 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.<sup>2</sup> Kinetic Funds benefited because its affiliate paid interest on the loan to it. And Kinetic Funds' investors benefited because: (1) the money they invested with Kinetic Funds was always invested in income-generating, exchanged-traded securities; (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 Funds; (3) the income generated by their investment in Kinetic Funds was more than sufficient to pay the interest on their loan; and (4) the interest paid by the affiliate to Kinetic Funds on the money that it borrowed was reinvested in Kinetic Funds thereby increasing the investors' returns.

3. Plaintiff alleges Defendant: (1) made misrepresentations to the investors regarding the mechanics of Kinetic Funds; (2) diverted the investors' funds away from Kinetic Funds 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 Defendant's other entities did business with the Kinetic Funds. Based on these allegations, Plaintiff has asserted 14 separate

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

causes of action against Defendant 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, Defendant denied Plaintiff's allegations and asserted 13 affirmative defenses.

4. Defendant's undersigned counsel estimate they will require approximately **484.50 hours** from April 29, 2021 (the day after Defendant's previous pre-trial budget terminated) through the last day of the trial (the trial term begins on August 30, 2021) to complete all the tasks necessary to prepare Defendant's defenses and present them at trial — including, among other things: (1) negotiating and drafting the Joint Final Pretrial Statement, Jury Instructions, and Voire Dire Questions; (2) drafting and responding to motions *in limine*; (3) reviewing and responding to third-party filings; (4) conducting legal research; (5) identifying and preparing exhibits (including demonstrative exhibits); (6) identifying and preparing witnesses; (7) drafting witness outlines and opening statements; (8) attending the trial; and (9) otherwise fulfilling their ethical and professional obligations and duties to Defendant, the Court, and opposing counsel.

5. The Court has previously approved the reduced hourly rate of **\$357.50/hour** for Defendant's undersigned counsel. [D.E. 104; D.E. 123; D.E. 173; D.E. 180; D.E. 250].

6. Based on the estimated number of hours that will be required to prepare this case through the end of the trial and Defendant's counsel's reduced rate, Defendant anticipates he will incur a total of approximately **\$173,208.75** (*i.e.*, 484.50 hours x \$357.50/hour) in attorneys' fees from April 29, 2021 through the last day of trial. A summary of Defendant's proposed litigation budget is attached hereto as **Exhibit A**.

7. Accordingly, for the reasons discussed in greater detail below, Defendant respectfully requests that the Freeze Order be modified to unfreeze at least **\$173,208.75** to pay his counsel's attorneys' fees for their work during the period from and including April 29, 2021 through and including the last day of the trial. Additionally, Defendant requests that he be permitted to seek reimbursement from the frozen funds for any reasonable costs incurred by his counsel in defending him when or after those costs are incurred.<sup>3</sup>

8. Pursuant to the Court's May 8 Order [D.E. 69], Defendant has made a good faith effort to present and explain to Plaintiff his proposed trial

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<sup>3</sup> Presently, the only costs Defendant anticipates his counsel might incur are costs to prepare exhibits and travel costs to travel from West Palm Beach to Tampa to attend the trial (*e.g.*, gas, hotel costs, meals, etc.). It is anticipated the trial will require eight days; however, the exact number of trial days has not yet been finalized, nor has the location of the trial been confirmed. It is possible Defendant's counsel will incur other costs that Defendant has not anticipated. Accordingly, Defendant requests permission to request reimbursement for his counsel's costs as or after they are incurred (instead of attempting to present an estimate now based what would essentially be a guess).

budget and the basis for his estimates of the number of hours that will be required to complete various tasks.

9. Plaintiff has informed Defendant that is opposes Defendant's Motion for the reasons addressed in Plaintiff's prior opposition [DE 139] to Defendant's request to modify the Freeze Order but that it recognizes the Court has previously allowed Defendant to use otherwise frozen funds for defense fees [DE 123, 134, 180, 238, 250].

10. The Receiver has informed Defendant that he takes no position as to Defendant's Motion.

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

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

12. The Court has previously approved this reduced hourly rate for Defendant's counsel. [D.E. 104; D.E. 123; D.E. 173; D.E. 180; D.E. 250].

**II. Defendant's Counsel Will Require a Total of Approximately 484.50 Hours to Defend Defendant From April 29, 2021 Through the Last Day of the Trial**

13. As set forth in greater detail below, Defendant estimates his counsel will require a total of approximately **484.50 hours** to complete all the remaining pretrial tasks, prepare Defendant's case for trial, and attend the trial.

**A. Defendant's Counsel Will Require Approximately 150.50 to Complete the Remaining Pretrial Tasks**

14. Defendant estimates his counsel will require a total of approximately 150.50 hours to complete all the remaining pretrial tasks before they can begin to prepare for trial.

15. Defendant's counsel has already expended 2.50 hours preparing for and attending the parties' Final Pretrial Conference.

16. Defendant anticipates his counsel will require a total of approximately 40 hours to negotiate, draft, revise, and finalize the parties' Joint Final Pretrial Statement — which, among other things, includes negotiating, drafting, revising, and finalizing the parties' Statement of Admitted Facts, Statement of Facts at Issue, Statement of Agreed Principles of Law, Statement of Issues of Law.

17. Defendant anticipates his counsel will require a total of approximately 12 hours to negotiate, draft, revise, and finalize the parties' Jury Instructions (which will involve preparing specific instructions for 14 different claims, each of which has four or five separate elements as well as numerous specific terms of art to be defined and explained).

18. Defendant anticipates his counsel will require a total of approximately 12 hours to negotiate, draft, revise, and finalize the parties' Verdict Forms for 14 different claims — each of which has four or five separate

elements, and each of which requires specific findings concerning at least five alleged misappropriations and potentially *more than 30* alleged misrepresentation and omissions.<sup>4</sup>

19. Defendant anticipates his counsel will require a total of approximately 4 hours to negotiate, draft, revise, and finalize the parties' Voire Dire Questions.

20. Defendant anticipates his counsel will require a total of approximately 20 hours to review the 909,890-plus pages of documents produced by Plaintiff and locate, identify, and prepare the exhibits they will present at trial.

21. Defendant anticipates his counsel will require a total of approximately 20 hours to draft and respond to motions *in limine*.

22. Based on his prior experience in this case, Defendant anticipates his counsel will require a total of approximately 20 hours to review and respond to motions and other filings by the Receiver and other third parties.

23. Finally, Defendant anticipates his counsel will require a total of approximately 20 hours to conduct necessary legal research.

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<sup>4</sup> Throughout this proceeding and to date, Plaintiff has resisted identifying the specific misrepresentations and omission it intends to prove at a trial, instead identifying (albeit incompletely) more than 30 "examples" of such misrepresentations and omissions and leaving it to Defendant to guess as to the specific claims being asserted against him. Defendant is concerned his current estimate of 12 hours might be too low and reserves the right to revise his estimate if Plaintiff truly does intend to attempt to prove more than 30 alleged misrepresentations and omissions at trial.



24. Based on the foregoing, Defendant estimates his counsel will require a total of approximately **150.50 hours** (*i.e.*, 2.50 hours + 40 hours + 12 hours + 12 hours + 4 hours + 20 hours + 20 hours + 20 hours + 20 hours) to complete all the remaining pretrial tasks before they can begin to prepare for trial.

**B. Defendant's Counsel Will Require Approximately 90 Hours to Prepare for Trial**

25. Defendant estimates his counsel will require a total of approximately **90 hours** to prepare Defendant's case for trial.

26. Specifically, Defendant anticipates his counsel will require a total of approximately 20 hours to identify and prepare the witnesses he intends to call at trial and to coordinate their appearances.

27. Defendant anticipates his counsel will require a total of approximately 40 hours to draft witnesses outlines for the witnesses he intends to call at trial as well as the witnesses Plaintiff intends to call.<sup>5</sup>

28. Defendant anticipates his counsel will require a total of approximately 20 hours to identify, prepare, and/or create Defendant's trial exhibits (including demonstrative, summary, and illustrative exhibits).

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<sup>5</sup> The parties have discussed the number of witnesses they are considering calling (with the proviso that the actual number could change prior to finalizing the Joint Final Pretrial Statement). It presently appears likely that a total of six to nine witnesses will be called by the parties to testify at the trial.

29. Finally, Defendant anticipates his counsel will require a total of approximately 10 hours to draft, revise, and finalize his opening statement.

30. Based on the foregoing, Defendant estimates his counsel will require a total of approximately 90 hours (*i.e.*, 20 hours + 40 hours + 20 hours + 10 hours) to prepare Defendant's case for trial.

**C. Defendant's Counsel Will Require Approximately 244 Hours to Attend the Trial**

31. Defendant estimates his counsel will require a total of approximately 244 hours to attend the trial in this case.

32. According to the Case Management and Scheduling Order [D.E. 88], the parties originally estimated the trial would require six to eight days.

33. More recently, the parties have conferred regarding their revised estimate of the length of the trial (based on what they learned through discovery and the current status of the case and their respective claims and defenses), and they presently agree the trial will likely require at least eight days.<sup>6</sup>

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<sup>6</sup> Based on the number of claims at issue (14), the number of alleged misappropriations (five) and alleged misrepresentations (potentially more than 30), the numerous complicated concepts that will need to be explained to the jury (leverage, margin, hedging, options, etc.), and the complicated mechanics of how Kinetic Funds and its related entities operated (and the complicated mechanics of the underlying transactions at issue), the parties presently anticipate: (1) they will need one day to install the jury, explain the trial process to the jury, and present opening statements; (2) Plaintiff will need three days to present its case; (3) Defendant will need three days to present his defense; (4) Plaintiff will need one day to present its rebuttal; and (4) the parties will need one day to present closing arguments and explain the deliberation process to the jury. However, Plaintiff has also allowed that — based on the case it ultimately presents (Plaintiff did not elaborate) — the trial might require up to 11 days.

34. Defendant anticipates both of his undersigned counsel will attend the trial for 10 hours each day. Assuming the trial requires eight days, Defendant anticipates his counsel will require a total of approximately 160 hours to attend the trial (*i.e.*, 2 attorneys x 10 hours/day x 8 days).

35. Defendant further anticipates his counsel will each spend four hours the night before each day of trial preparing for the next day of trial and five hours on both days of the intervening weekend preparing for the commencement of the trial. Assuming the trial requires eight days, Defendant anticipates his counsel will require a total of approximately 84 hours outside of the actual trial preparing for the next day of the trial (*i.e.*, [2 attorneys x 4 hours/day x 8 days] + [2 attorneys x 5 hours/weekend day x 2 weekend days]).

36. Based on the foregoing, Defendant estimates his counsel will require a total of approximately 244 hours (*i.e.*, 160 hours + 84 hours) to attend the trial in this case.<sup>7</sup>

### Conclusion

For all of the reasons discussed above, Defendant respectfully requests that the Court enter an Order: (1) approving a reduced hourly rate equal to \$357.50/hour for both of Defendant's undersigned counsel; (2) approving Defendant's proposed litigation budget attached hereto as **Exhibit A**; (3)

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<sup>7</sup> Defendant reserves the right to amend this estimate and request additional funds be unfrozen to pay his attorneys fees for attending the trial in the event the trial requires more than eight days.

modifying the Asset Freeze Order [D.E. 33] to unfreeze \$173,208.75 to pay Defendant's counsels' fees to defend this case from and including April 29, 2021 through and including the last day of the trial; (4) authorizing Defendant's 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; and (5) authorizing Defendant to request further reimbursement from the frozen funds for his counsel's costs when or after they are incurred.

**LOCAL RULE 3.01(g) CERTIFICATE OF GOOD FAITH  
CONFERENCE**

I HEREBY CERTIFY that, in accordance with Middle District Local Rule 3.01(g), the undersigned has conferred with counsel for Plaintiff and the Receiver in a good faith effort to resolve the issues raised in. Plaintiff opposes Defendant's Motion for the reasons addressed in Plaintiff's prior opposition [DE 139] to Defendant's request to modify the Freeze Order but recognizes the Court has previously allowed Defendant to use otherwise frozen funds for defense fees [DE 123, 134, 180, 238, 250]. The Receiver takes no position regarding the relief sought by Defendant.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 1, 2021, the foregoing document was filed with the Clerk of the Court using the CM/ECF system and served on all counsel of record.

By: /s/ Timothy W. Schulz

By: /s/ Jon A. Jacobson