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,
____/

DEFENDANT'S RESPONSE TO THE RECEIVER'S MOTION FOR APPROVAL TO SELL DEFENDANT'S CONDOS [D.E. 275]

Defendant MICHAEL SCOTT WILLIAMS ("**Defendant**") submits this response in opposition to *Receiver's Motion for Approval of the (1) Private Sale of Puerto Rico Real Properties and Parking Spaces; and (2) Proposed Publication, Marketing, and Overbid Procedures Associated with the Sale of the Real Properties* [D.E. 275] ("**Motion**") and states as follows:[1]

[1] On July 6, 2012, in an effort to address the issues raised in *Receiver's Motion for Possession of and Title to Residential Real Property Purchased by Defendant Williams in San Juan Puerto Rico and Incorporated Memorandum Of Law* [D.E. 72], the Receiver and Defendant entered into a Joint Stipulation [D.E. 103; D.E. 105] pursuant to which Defendant transferred to the Receiver Defendant's title to: (1) the condominium (and associated parking space) that Defendant's was living in and (2) the condominium (and associated parking space) that Defendant was then renting to a paying tenant (collectively, "**Condos**"). The parties expressly agreed that the Joint Stipulation would *not* prevent Defendant from responding to any motion filed by the Receiver to sell or otherwise encumber the Condos. [D.E. 103 at ¶ 20].

I. INTRODUCTION

Defendant opposes the Receiver's request for approval to sell the Condos — which have been Defendant's primary residence (at least until this action was filed) — on the grounds that:

1. Any such sale is premature as there has been no finding that Defendant committed any wrongdoing — or even that anything was done wrong (the undisputed facts that are part of the record in this case establish that Defendant did *nothing* wrong); and

2. The Receiver has already taken custody, control, and possession of the funds Defendant invested with Kinetic Funds I, LLC ("**Kinetic Funds**") — which, as of January 2020, totaled *$1,601,402.06* and are more than sufficient to satisfy any "net gains" Plaintiff might be entitled to disgorge if it prevails on its claims.

Accordingly, for the reasons discussed in greater detail below, the Receiver's request for approval to sell the Condos should be denied. In the event the Receiver's request is granted, however, Defendant should be allowed a reasonable opportunity to return to the Condos and remove from them any of his possessions that might still remain there, and the Receiver should be directed to hold (and not disburse) the proceeds of the sale of the Condos until there has been a final determination of Defendant's liability and the amount of his "net gains" that Plaintiff can legally disgorge.

II. <u>RELEVANT BACKGROUND</u>

On March 23, 2017, Defendant executed a document titled "Credit Facility Agreement and Disclosure" pursuant to which he sought a $1,517,000 line of credit from KCL Services, LLC d/b/a Lendacy ("**Lendacy**"). [D.E. 221-2 at ¶¶ 18, 176].

As collateral for his line of credit, Defendant pledged to Lendacy a security interest in his 40% interest in Silexx Financial Systems, LLC ("**Silexx**"), which Defendant was then in the process of selling to the Chicago Board of Options Exchange ("**CBOE**") for $20,000,000 (rendering Defendant's 40% stake in Silexx worth $8,000,000). [D.E. 221-2 at ¶¶ 59, 179].[2] Defendant also gave Lendacy the title documents and other paperwork related to the Condos and agreed to assign to Lendacy full title to the Condos in the event he failed to repay his line of credit. [D.E. 221-2 at ¶ 180].

Lendacy subsequently approved Defendant's line of credit; and on March 4, 2017, Defendant used his Lendacy line of credit to purchase the Condos to use as his primary residence for a total price of $1,500,000. [D.E. 221-2 at ¶¶ 177-178, 181 and Ex. 10 at 6].

None of the funds that Defendant borrowed from Lendacy to purchase the Condos (or for any other reason) belonged to Kinetic Funds or its investors.

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[2] No Kinetic Funds, Kinetic Funds Yield ("**KFYield**"), or investor funds, assets, or capital were transferred to, received by, used by, or invested in Silexx. [D.E. 221-2 at ¶ 143].

[D.E. 202-1 at ¶¶ 13-18; D.E. 221-2 at ¶¶ 140-142, 209]. Moreover, all of the funds Defendant borrowed from Lendacy (including the funds Defendant borrowed to purchase the Condos) were supported by collateral that was more than sufficient to cover the entirety of Defendant's loans if he failed to repay them. [D.E. 221-2 at ¶¶ 172-174, 179-180, 185, 187, 190, 195, 197].

On March 8, 2018, after the sale of Silex was completed, Defendant invested $1,500,000 of the proceeds from the sale with Kinetic Funds — which brought the total amount that Defendant had invested with Kinetic Funds up to $1,565,000 (*i.e.*, 104.33% of the amount Defendant that had borrowed from Lendacy to purchase the Condos). [D.E. 221-2 at ¶¶ 27, 171-172, 185, 187]. All of the funds Defendant invested in Kinetic Funds were applied as collateral in support of Defendant's Lendacy line of credit.

The $1,565,000 that Defendant invested with Kinetic Funds remains invested with Kinetic Funds. [D.E. 221-2 at 187]. By January 2020, Defendant's investment had grown to $1,601,402.06 (*i.e.*, 106.76% of the amount that Defendant borrowed from Lendacy to purchase the Condos). [D.E. 221-2 at ¶ 187].

Defendant presented all of the foregoing facts (along with supporting evidence) in his response to *Plaintiff Securities and Exchange Commission's Motion for Summary Judgment Against Defendant Michael Scott Williams and Supporting Memorandum of Law*. [D.E. 221]. Notwithstanding that Plaintiff was given leave to file a reply and to exceed the standard seven-page limit for

replies — and despite the fact that Plaintiff attempted to address in its 17-page reply the arguments raised by Defendant in his response — Plaintiff did not offer any evidence to contradict, dispute, or otherwise rebut any of the foregoing facts. [D.E. 226; D.E. 227].[3] As such, the foregoing facts are undisputed.[4]

On March 6, 2020, the Court appointed Mark A. Kornfeld as Receiver for Defendant Kinetic Investment Group, LLC ("**Kinetic Group**") and the Relief Defendants. [D.E. 34; D.E. 221-2 at ¶¶ 17, 36 and Ex. 1].

The Receiver now has custody, control, and possession of both (1) the $1,601,402.06 that Defendant invested with Kinetic Funds (which equals ***106.76%*** of the amount that Defendant borrowed from Lendacy to purchase the Condos) and also (2) the Condos, for which the Receiver has received an "as is" purchase offer in the amount of $2,100,000 (which equals *an additional 140%* of the amount that Defendant borrowed from Lendacy to purchase the Condos). [D.E. 275 at 2].

[3] Instead, Plaintiff only reverted to the "evidence" it previously cited in its Motion for Summary Judgment — despite the fact that Plaintiff's purported evidence could never be presented in a form that would be admissible in evidence, *see* FED. R. CIV. P. 56(c)(1)(B), and/or did not actually prove what Plaintiff claimed it proved. *See*, *e.g.*, [D.E. 227 at 9] (citing the Declaration of Crystal Ivory); [D.E. 221 at 4, n.16 (explaining the deficiencies of Ms. Ivory's Declaration); [D.E. 221-1 at 7] (same).

[4] Defendant adopts and incorporates herein all of the statements, arguments, and case law in *Defendant's Motion for Judgment on the Pleadings* [D.E. 201], *Defendant's Motion for Summary Judgment* [D.E. 202], and *Defendant Williams' Response to Plaintiff's Motion for Summary Judgment* [D.E. 221]. *See* FED. R. CIV. P. 10(c).

After the *Complaint for Injunctive and Other Relief and Demand for Jury Trial* ("**Complaint**") [D.E. 1] was filed in this action — and after articles began to appear in various Puerto Rican publications (in English and in Spanish) repeating the allegations in the Complaint (almost all of which were not true for the reasons set forth in Defendant's Declaration [D.E. 221-2]) — Defendant began to receive threats on his life. Fearing for his safety, and at the suggestion of a former FBI agent and security specialist, Defendant left Puerto Rico and moved to Portugal until the situation was resolved.[5] Unfortunately, when the COVID-19 pandemic subsequently swept across the globe, all international traffic was shut down, and Defendant was effectively stranded there. When flights to and from Europe and the U.S. later reopened, Defendant did not have sufficient funds to return to Puerto Rico nor the means to secure his safety.

Defendant's girlfriend at the time, her 80-year-old mother, and Defendant's paying tenant (none of whom were subjects of the threats directed at Defendant) continued living in the Condos after Defendant moved to Portugal.[6] On or about June 19, 2021, Defendant received written notice from the Receiver directing him to vacate the Condos by July 7, 2021. In compliance with

[5] The Director of Kinetic Bank also received death threats and was similarly forced to leave Puerto Rico with the aid of federal agents.

[6] Defendant's girlfriend's mother is in poor health and has no source of income nor any means of transportation. As a result, it was necessary for Defendant's girlfriend to chaperone her mother to and from her various doctors' offices and to attend to her other personal needs.

the Receiver's eviction notice, Defendant's girlfriend, her mother, and the tenant timely moved out of the Condos.[7] Defendant understands from the Receiver's Motion that the Receiver never took action to preserve the Condos after they were vacated at its request.

III. ARGUMENT

A. There Has Been No Finding that Defendant Committed Any Wrongdoing — and There is No Record Evidence to Support Such a Finding

As a matter of equity — which is the only relief being sought in this case [D.E. 1 at 21-23] — it would be manifestly unfair (and contrary to concept of cause-and-effect) to sell Defendant's primary residence *before* there has been a trial or a finding that Defendant has actually done anything wrong.

In support of its Motion, the Receiver summarily parrots the broad allegations set forth in Plaintiff's Complaint and in the Receiver's own *Motion for Possession of and Title to Residential Real Property Purchased by Defendant Williams in San Juan, Puerto Rico and Incorporated Memorandum of Law* ("**Turnover Motion**") [D.E. 72] and its supporting Declaration [D.E. 71], all of which were filed without ever interviewing Defendant.[8] [D.E. 275 at 3, 6-7].

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[7] As a result of the Receiver's eviction notice and Defendant's depleted income (Defendant had received monthly rental income from the tenant until the Receiver evicted him), even if Defendant were able to return to the U.S., he now has nowhere to live.

[8] Plaintiff interviewed Defendant once prior to filing its Complaint. At the time of that interview, however, Defendant had been led to believe he was also the subject of a potential criminal enforcement action. Accordingly, upon the advice of his counsel, Defendant declined to respond to Plaintiff's questions based on his rights under the Fifth Amendment (prior to his

Crucially, however, as (exhaustively) demonstrated in *Defendant's Motion for Summary Judgment* [D.E. 202] and *Defendant Williams' Response to Plaintiff's Motion for Summary Judgment* [D.E. 221], *none* of the evidence that Plaintiff claims establish Defendant's alleged misconduct actually proves what Plaintiff says it does. [D.E. 221 at 2-22; D.E. 221-2]. To the contrary, the undisputed facts establish that Defendant never acted improperly, never committed any wrongdoing, and never violated the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Advisers Act of 1940.[9] [D.E. 202; D.E. 202-1; D.E. 221; D.E. 221-2].

Not only has Plaintiff failed to present any admissible evidence to support its claims against Defendant — and not only has Defendant presented

interview, Defendant informed Plaintiff that he would be invoking the Fifth Amendment). When Defendant later learned that he was not (and had never been) the subject of a criminal enforcement action, Defendant offered to make himself available for a second interview at Plaintiff's offices and further offered not to assert any objections to any of Plaintiff's questions. Plaintiff, however, would only agree to re-interview Defendant during a four-day window that same week. Defendant's counsel informed Plaintiff that he was unavailable during that window due to his obligations in another case and proposed doing Defendant's interview the following week. Inexplicably, Plaintiff refused to interview Defendant any time other than that week and proceeded to file its Complaint without availing itself of the opportunity to learn all of the facts from Defendant. For its part, the Receiver has never propounded any discovery requests on Defendant nor made any effort to interview him.

[9] Among other things, the undisputed facts establish that: (1) none of the funds transferred to Kinetic Group or any of the Relief Defendants belonged to Kinetic Funds, KFYield, Kinetic Funds' investor, or KFYield's investors; (2) none of the funds that Defendant borrowed from Lendacy belonged to Kinetic Funds, KFYield, Kinetic Funds' investor, or KFYield's investors; (3) Defendant did not receive any compensation from Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors; (4) all of the investments purchased in Kinetic Funds' Interactive Brokers, LLC brokerage account were hedged so that they could never lose more than 10% (in some cases they could never lose *any* of their value). [D.E. 202-1 at ¶¶ 13-18, 21-23; D.E. 221-1 at ¶¶ 135, 136-143, 209, 221-223].

undisputed evidence that rebuts Plaintiff's claims — but as demonstrated in *Defendant's Motion for Judgment on the Pleadings* [D.E. 201] and the case law cited therein, Plaintiff has failed to even plead the requisite allegations necessary to assert a claim against Defendant.

Similarly, while the documents relied on by the Receiver in its Turnover Motion show that $1.5 million was transferred from Kinetic Funds' bank account to third parties to purchase the Condos, those documents do *not* show that those funds were "investor funds" (because they were not investor funds).[10] [D.E. 276 at 7]; *compare* [D.E. 72 at ¶ 12] *with* [D.E. 202-1 at ¶¶ 16-18; D.E. 221-1 at ¶¶ 136-43, 209, 223].

In light of the foregoing — *i.e.*, that there has been *no* finding that Defendant has committed any wrongdoing; that there is *no* evidence to support a finding that Defendant committed any wrongdoing; and that the undisputed record evidence shows that Defendant did *not* commit any wrongdoing — it would be fundamentally unfair (or, at a very minimum, premature) to permit the Receiver to sell the Condos, which are Defendant's primary residence.

[10] Notwithstanding the Receiver's efforts to track the flow of funds between and among various accounts and financial institutions (as recited in the Receiver's periodic interim reports), the Receiver is unable to place those funds or their transfers in the proper context — or to identify to whom those funds legally belonged (as evidenced by the omissions in the Receiver's interim reports) — because the Receiver never availed itself of the opportunity to depose Defendant or propound any discovery on him.

B. The Receiver Has Already Recovered from Defendant Sufficient Funds to Satisfy Any "Net Gains" Plaintiff Could Disgorge If It Prevails on Its Claims

Plaintiff is seeking to disgorge from Defendant all of the "ill-gotten gains" Defendant allegedly received within the applicable statute of limitations. [D.E. 1 at 22].

The Supreme Court of the United States has ruled that Plaintiff's ability to seek disgorgement is limited to disgorging only Defendant's "net profits," which the Supreme Court defined as Defendant's gains less any legitimate costs and expenses incurred by Defendant. *See Liu v. SEC*, 140 S. Ct. 1936, 1940, 1945-46, 1950 (2020).[11]

The undisputed facts that are part of the record in this case establish that Defendant has <u>*no*</u> profits (much less "net" profits") and <u>*no*</u> gains (ill-gotten or otherwise). Specifically, the undisputed facts establish that:

1. Defendant did not receive any compensation from Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors. [D.E. 202-1 at ¶¶ 21-23];

2. None of the funds that Defendant borrowed from Lendacy to purchase the Condos (or for any other reason) belonged Kinetic Funds, KFYield,

[11] The Supreme Court has further held that Plaintiff <u>*cannot*</u> seek disgorgement of any net gains that accrued to Kinetic Group, the Relief Defendants, or anyone else (*i.e.*, joint-and-several liability). *See Liu*, 140 S. Ct. at 1949 (2020). Thus, for example, Plaintiff cannot disgorge from Defendant any of the funds borrowed by Scipio, LLC (which funds were used to purchase a $2,755,000 bank — which the Receiver subsequently sold for approximately $4,000,000, which amount was more than sufficient to repay what Scipio, LLC borrowed [D.E. 269 at 4]).

Kinetic Funds' investor, or KFYield's investors. [D.E. 202-1 at ¶¶ 13-18; D.E. 221-2 at ¶¶ 140-142, 209]; and

3. All of the funds that Defendant borrowed from Lendacy (including the funds Defendant borrowed to purchase the Condos) were supported by collateral that was more than sufficient to cover the entirety of Defendant's loans if he failed to repay them. [D.E. 221-2 at ¶¶ 172-174, 179-180, 185, 187, 190, 195, 197].

As such, there is *nothing* for Plaintiff to disgorge from Defendant because no funds belonging to Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors were ever paid or lent to Defendant.

Even if Defendant had any net gains (he does not), the Supreme Court has held that Plaintiff's ability to seek disgorgement of Defendant's (non-existent) net gains is further limited to disgorging only an amount sufficient to repay the KFYield investors. *Liu*, 140 S. Ct. 1940, 1947-48.

The Receiver has recovered approximately $20,000,000. [D.E. 269 at 6]. Accordingly, pursuant to *Liu*, Plaintiff cannot disgorge from Defendant net gains (if Defendant had any) in excess of the difference between: (1) the KFYield investors' actual, net losses;[12] and (2) the approximately $20,000,000 so far recovered by the Receiver.

[12] The Receiver has approved investor claims totaling $33,040,127.25. [D.E. 263 at 2]. Crucially, however, the Receiver has nowhere identified what portion of those approved claims is the result of Defendant's alleged wrongdoing as opposed to being the result of market activity unrelated to Defendant (*e.g.*, the stock market crash in March 2020 during which the stock market dropped approximately 26% in just four days) or being due to the fact that the

As discussed above, Defendant invested a total of $1,565,000 in Kinetic Funds. [D.E. 221-2 at ¶¶ 27, 171-172, 185, 187].[13] In addition, on March 24, 2017, Defendant borrowed $1,500,000 from Lendacy to purchase the Condos. [D.E. 221-2 at ¶¶ 177-178, 181 and Ex. 10 at 6].[14]

The Receiver has already recovered all of the funds that Defendant invested in Kinetic Group; and on or about July 6, 2020, Defendant additionally transferred to the Receiver his title to the Condos [D.E. 103; D.E. 105; D.E. 275 7-8]. As a result, the Receiver has recovered from Defendant (and is now holding) a total of at least $3,701,402.06 (*i.e.*, $1,601,401.06 in cash and $2,100,000 in real estate) — *before* there has been a finding that Defendant has committed any wrongdoing (or even that anything was done wrong).

In light of the fact that the undisputed record evidence establishes that Defendant has <u>no</u> net gains, the $3,701,402.06 that the Receiver has now recovered from Defendant is more than sufficient to satisfy any amount Plaintiff

KFYield investors' positions (which had locked in guaranteed profits — or at least minimized the investors' losses to 10% or less — if they were held to conclusion [D.E. 221-2 at ¶¶ 122-133]) *were prematurely closed by the Receiver* (generating unnecessary losses that would have been avoided had the positions been held to conclusion). Absent this basic information, neither Plaintiff nor the Receiver (nor the Court) can establish the amount of net gains that Plaintiff can legally disgorge from Defendant (if Defendant had any net gains).

[13] By January 2020, Defendant's original $1,565,000 investment had grown to $1,601,402.06. [D.E. 221-2 at ¶ 187].

[14] The Receiver has received an offer to purchase the Condos "as is" for $2,100,000 and is now seeking higher offers ("overbidders").

could disgorge if it prevails on its claims. Indeed, half (or a third or a quarter) of that amount is sufficient.

Accordingly, based on the undisputed facts and the law, there is simply no need or urgency for the Receiver to sell the Condos — which are Defendant's primary residence — before there has been an actual finding that Defendant committed a wrongdoing.

IV. CONCLUSION

For all of the reasons discuss above, Defendant respectfully requests that the Court deny the Receiver's request for approval to sell the Condos. In the event the Court is inclined to grant the Receiver's request, Defendant respectfully requests that the Court: (1) permit Defendant to return to the Condos and remove from them any of his possessions that might still remain there; and (2) direct the Receiver to hold (and not disburse) the proceeds of the sale of the Condos until there has been a final determination of Defendant's liability and the amount of Defendant's net gains.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 15, 2022, 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