UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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

v.

KINETIC INVESTMENT GROUP, LLC *et al.*,

Defendants,
_____/

DEFENDANT'S SUR-REPLY

Defendant MICHAEL SCOTT WILLIAMS ("**Defendant**") submits this sur-reply in response to the *Receiver's Reply* [D.E. 281] ("**Reply**") and states:

The Receiver makes three new — and equally flawed — arguments, none of which are supported by the law or facts, and all of which should be denied.

First, the Receiver argues that its *Motion for Approval* [D.E. 275] ("**Motion**") should be granted because the Court authorized it to sell all real property of the Receivership Estates.

Defendant does not dispute the Receiver was appointed pursuant to the Court's *Order* dated March 6, 2020 [D.E. 34] ("**Appointment Order**"), which also set the bounds of the Receiver's authority. Nor does Defendant dispute the Appointment Order authorizes the Receiver to sell all real property in the "Receivership Estates." [D.E. 34 at ¶ 33].

Crucially, however, the Appointment Order defines "Receivership Estates" as "all property interests of the Receivership Defendants"; and it defines "Receivership Defendants" as Kinetic Investment Group, LLC, Kinetic Funds I, LLC ("**Kinetic Funds**"), KCL Services, LLC d/b/a Lendacy ("**Lendacy**"), Scipio, LLC, LF42, LLC, El Morro Financial Group, LLC, and KIH Inc. f/k/a Kinetic International LLC. [D.E. 34 at 1, ¶¶ 1, 7(A)].

Based on the Appointment Order, the Receiver has *no* authority to sell the Condos because they are *not* part of the Receivership Estates (because *none* of the Receivership Defendants have a property interest in them).

The Receiver nevertheless argues the Condos are the property of the Receivership Estates because Defendant purchased them with Kinetic Funds' investors' monies. The Receiver's argument, however, is based on a fundamental misunderstanding of the underlying transactions — and is directly contradicted by the undisputed facts (which presumably explains the Receiver's failure to present any evidence to support its argument).

The undisputed facts that are part of the record in this case establish that: **(1)** all investments in Kinetic Funds were first deposited into Kinetic Funds' bank account at BMO Harris Bank, N.A. ("**BMO**") [D.E. 221-2 at ¶ 91]; **(2)** Kinetic Funds transferred funds from its BMO account to its brokerage account at Interactive Brokers, LLC ("**IB**") to be invested in U.S.-listed financial products [D.E. 221-2 at ¶¶ 97, 134]; **(3)** for each Kinetic Funds investor,

an amount of U.S.-listed financial products was purchased in the IB account *equal in value to* the investor's investment [D.E. 221-2 at ¶¶ 97, 134]; **(4)** all the investments held in the IB account were "hedged" so they could *never lose more than 10%* of their value (many investments were hedged beyond this minimum protection; in some cases, they were hedged to the point they could *never lose anything*) [D.E. 221-2 at ¶¶ 131-133, 135]; **(5)** through the use of portfolio margin, Kinetic Funds was able to borrow from IB up to 90% of value of the investments in its IB account — which meant that if investor funds totaling $100 million were deposited into the BMO account, Kinetic Funds could transfer $10 million of those funds to its IB account and borrow $90 million from IB to purchase a total of $100 million in investments [D.E. 221-2 at ¶ 110];[1] **(6)** as a benefit for investing in Kinetic Funds, investors could borrow from Lendacy up to 70% of the value of their investments (which were hedged so that they could never fall below 90% of their value) [D.E. 221-2 at ¶ 136]; and **(7)** all the funds transferred from Kinetic Funds' BMO account to Lendacy were IB's funds that IB loaned to Kinetic Funds [D.E. 221-2 at ¶¶ 139-42, 209].

[1] Viewed by someone without the full story — *e.g.*, the Receiver, who tracked the flow of funds but never sought discovery from Defendant to understand the context of those flows, or the SEC — it might appear as though 90% of the investors' funds were sitting, uninvested, in the BMO account when, in fact, all the investors' funds were fully invested at IB. [D.E. 221-2 at ¶ 121]. The $100 million in investments held at IB belonged to Kinetic Funds, and the $90 million sitting in the BMO account were IB's funds, which IB had loaned to Kinetic Funds. [D.E. 221-2 at ¶¶ 111-121].

The undisputed facts also establish that: **(1)** on March 4, 2017, Defendant borrowed $1,500,000 from Lendacy to purchase the Condos [D.E. 221-2 at ¶¶ 177-178, 181]; **(2)** Defendant gave Lendacy collateral worth $8 million for the funds he borrowed from it [D.E. 221-2 at ¶ 179]; **(3)** Defendant also gave Lendacy the title documents to the Condos and agreed to assign Lendacy full title to the Condos if he failed to repay his loan [D.E. 221-2 at ¶ 180]; **(4)** the funds Lendacy loaned to Defendant were IB's funds, which IB loaned to Kinetic Funds and Kinetic Funds then loaned to Lendacy [D.E. 221-2 at ¶¶ 139-42, 209]; **(5)** on March 8, 2018, Defendant invested $1,565,000 with Kinetic Funds to be used as additional collateral for his loan [D.E. 221-2 at ¶¶ 27, 171-72, 185, 187]; **(6)** by January 2020, Defendant's Kinetic Funds investment had grown to $1,601,402.06 [D.E. 221-2 at ¶ 187]; **(7)** the Receiver has taken custody of all the funds in Kinetic Funds' BMO and IB accounts [D.E. 280 at 2-3]; **(8)** the Receiver has denied Defendant's claim for the funds he invested with Kinetic Funds [D.E. 249-4 at 1]; and **(9)** as of today, the value of the Condos has grown to at least $2.1 million [D.E. 275 at 2].

Thus, as established by the undisputed facts, the funds Defendant used to purchase the Condos were IB's funds, *not* Kinetic Funds' investors' monies. Moreover, because IB is not a "Receivership Defendant" (as that term is defined in the Appointment Order), its funds are *not* part of the Receivership Estates.

[D.E. 34 at 1, ¶¶ 1, 7(A)]. Accordingly, the Receiver has no authority sell the Condos (or to disburse the proceeds of their sale).

Even if the $1,500,000 Defendant used to purchase the Condos were part of the Receivership Estates (they are not), the Receiver *already recovered* those funds when it took custody of Kinetic Funds' BMO and IB accounts and denied Defendant's claim for the $1,601,402.06 he had invested with Kinetic Funds. [D.E. 221-2 at ¶¶ 171-72, 185, 187; D.E. 249-4 at 1; D.E. 280 at 2-3].[2] As such, there is nothing more for the Receiver to recover from Defendant. Allowing the Receiver now to sell the Condos would result in a double recovery.

Second, the Receiver alternatively argues the Condos are the Receiver's property such that it can sell them for the benefit of the Receivership Estates because Defendant transferred the Condos' title to the Receiver.

The Receiver's argument ignores that it stipulated that Defendant reserved the right to object to any attempt to sell the Condos. [D.E. 103 at ¶ 20]. More importantly, the Receiver's powers are set forth in — and constrained by — the Appointment Order, which *nowhere authorizes* the Receiver to locate and sell property outside of the Receivership Estates or to use such property

[2] If Defendant had purchased the Condos with funds that were part of the Receivership Estates (he did not) — and if also the Receiver had not recovered the funds Defendant invested with Kinetic Funds (it did) — then if the Receiver sold the Condos, it would have to return to Defendant the sale proceeds in excess of the $1,500,000 Defendant paid for the Condos minus the value of any other funds or assets the Receiver recovered from Defendant.

for the benefit of the Receivership Estates. [D.E. 34]. That the Receiver holds the Condos' title is immaterial to whether the Receiver can sell the Condos because the Appointment Order is clear: If the Condos are not part of the Receivership Estates, then the Receivership is not authorized to sell them.[3]

Third, and last, the Receiver argues that equitable concerns are irrelevant because it is acting pursuant to the Appointment Order. The Receiver's argument, however, completely ignores the fact that the Receiver is a "creature of equity" whose powers limited by "concepts of equity."[4] The Receiver cannot evade the equitable constraints that circumscribe its actions.

WHEREFORE, Defendant respectfully requests that the Court deny the Receiver's Motion.

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[3] Similarly, if the Condos are not part of the Receivership Estates, then the Receiver was not authorized to extract them from Defendant in the first place. That Defendant transferred the Condos' title to the Receiver does not alter the scope of the authority granted to the Receiver by the Court, nor does it mean the title transfer was proper, nor that the Receiver should be permitted to retain (or sell) the Condos. As a matter of equity and law, the Receiver should be required to return to Defendant the Condos, which it was never authorized to accept from Defendant and hold.

[4] *FTC v. On Point Global LLC*, 2020 WL 5819809, at *2 (S.D. Fla. Sept. 30, 2020) ("A receiver 'is a creature of equity' whose powers 'while extraordinary, are limited by the district judge's concept of equity.'" (quoting *In re Wiand*, 2012 WL 611896, at *5 (M.D. Fla. Jan. 4, 2012))); *see* [D.E. 34 AT ¶ 4 ("The Receiver shall have . . . all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of FED. R. CIV. P. 66.")]; FED. R. CIV. P. 66 *advisory committee's note to 1946 amendment* ("Rule 66 is applicable to what is commonly known as a federal 'chancery' or 'equity' receiver, or similar type of court officer."); *U.S. v. Bradley*, 644 F.3d 1213, 1310 (11th Cir. 2011) ("A district court's appointment of a receiver . . . 'is an extraordinary equitable remedy.'"); *SEC v. Harbor City Cap. Corp.*, 2021 WL 3110061, at *2 (M.D. Fla. July 21, 2021) ("In civil cases brought by the SEC for injunctive relief, the statutory authority for the court's appointment of a receiver stems from the general bestowal of equity powers on the district courts.").

Respectfully Submitted,

By: /s/ Timothy W. Schulz
Timothy W. Schulz, Esq., FBN 073024
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 Defendant

By: /s/ Jon A. Jacobson
Jon A. Jacobson, Esq., FBN 155748
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 Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 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/ Jon A. Jacobson