UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

KINETIC INVESTMENT GROUP, LLC and MICHAEL SCOTT WILLIAMS,

Defendants, and

KINETIC FUNDS I, LLC, KCL SERVICES, LLC d/b/a LENDACY, SCIPIO, LLC, LF42, LLC, EL MORRO FINANCIAL GROUP, LLC, and KIH, INC. f/k/a KINETIC INTERNATIONAL, LLC,

Relief Defendants.

NOTICE OF FILING

Plaintiff Securities and Exchange Commission (the "Commission") respectfully writes to notify the Court of a recent Supreme Court decision, *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024), that relates to the standard for issuance of temporary or preliminary injunctive relief. The ongoing asset freeze order entered in this case against Defendant Michael Scott Williams ("Williams") satisfies that standard, and therefore should remain in effect.

I. Introduction

Starbucks applied a four-part test for temporary and preliminary injunctions. Although *Starbucks* involved preliminary injunctive relief sought by a different government agency, on July 9, 2024, the Third Circuit in *SEC v. Chappell*, 107 F.4th 114 (3d Cir. 2024), applied the *Starbucks* test to enforcement actions brought by the Commission. That test requires a plaintiff to demonstrate the following factors to obtain a temporary or preliminary injunction: (1) a likelihood of success on the merits; (2) irreparable harm absent the injunction; (3) that the balance of equities tips in the plaintiff's favor; and (4) that the injunction sought is in the public interest. *Starbucks*, 144 S. Ct. at 1576. In this case, the Commission sought and obtained as preliminary relief, an asset freeze against the Defendants and Relief Defendants.

On March 6, 2020, following briefing by the parties and a hearing, this Court entered a preliminary injunction for an asset freeze (the "Order") against Williams and his entities, Kinetic Investment Group, LLC ("Kinetic Group") (collectively, "Defendants"), 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 (collectively, "Relief Defendants"), among other emergency relief [DE 33]. The Court also appointed a receiver over Kinetic Group and Relief Defendants (collectively, "Receivership Defendants")

[DE 34].[1] The Court subsequently entered consented-to permanent injunctions against Receivership Defendants [DE 156]. The Order remains in place as to Williams, and has been modified to: (1) exclude the Banco Popular bank accounts of Pyram King, Rex Tenax, and Williams [DE 69 and 95]; and (2) release frozen funds for the payment of (a) past due HOA fees [DE 95], (b) Williams' monthly living expenses in the amount of $2,943.12 [DE 95], and (c) Williams' attorneys' fees and costs, and eDiscovery vendor [DE 123, 126, 134, 168, 237, 238, and 250].

As to the entry of a preliminary injunction for an asset freeze, the Court applied a standard that required the Commission to establish: (1) a *prima facie* case showing that Defendants violated the federal securities laws and, therefore, are liable for a disgorgement;[2] and (2) that, unless an asset freeze is imposed, Defendants and Relief Defendants could dissipate, conceal, or transfer from the Court's jurisdiction assets that are likely subject to a disgorgement order. *See* DE 33 at p. 2. *See also SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734-35 (11th Cir. 2005).

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[1] Although a receiver remains in place, an asset freeze is necessary because at a minimum approximately $174,000 remains in an account pending final determination of this case. *See* DE 332-2 at n. 2.

[2] The Court's power to freeze assets extends to a relief defendants. *CFTC v. Walsh*, 618 F.3d 218, 225 (2nd Cir. 2010); *CFTC v. International Berkshire Group Holdings, Inc.*, 2006 WL 3716390 *10 (S.D. Fla. Nov. 3, 2006). A relief defendant is a party not charged with wrongdoing who nevertheless "possesses illegally obtained profits but has no legitimate claim to them." *SEC v. Huff*, 758 F. Supp. 2d 1288, 1362 (S.D. Fla. 2010). To obtain a freeze of a relief defendant's assets, the Commission "must demonstrate only that [it] is likely ultimately to succeed in disgorging the frozen funds." *Walsh*, 618 F.3d at 225.

Furthermore, in imposing a total asset freeze, the Court considered whether the likely disgorgement award exceeds the amount of assets to be frozen. *See* DE 33 at p. 2.

As shown below, applying the four-part *Starbucks* test to the asset freeze over Williams results in the same outcome. Accordingly, the Commission respectfully suggests that the evidence the Commission offered in support of its application for the Order satisfies the *Starbucks* standard, and the asset freeze should remain in place until entry of a final judgment.

II. The Commission Has Demonstrated a Likelihood of Success on the Merits of Its Claims

In its application for the Order, the Commission presented evidence showing a likelihood of success on the merits. As a threshold matter, the Commission established that investments into Kinetic Funds, a purported hedge fund managed by Defendants, constitute investment contracts under *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). *See* the Commission's Emergency Motion and Incorporated Memorandum of Law for Asset Freeze and Other Relief (the "Motion"), DE 2 at pp. 7-8, 18.

Additionally, based on the declaration of Crystal C. Ivory [DE 2-1], testimony of individuals formerly employed by Williams' entities, and other documents submitted with the Motion, the Commission showed that Defendants raised at least $39 million from at least 30 investors located in Florida and Puerto

Rico in an unregistered securities offering. *See* DE 2 at p. 9. Defendants solicited investors through websites and marketing brochures, among other means, to invest in Kinetic Funds, and steered them toward Kinetic Funds' largest sub-fund, Kinetic Funds Yield ("KFYield"). *Id*. at p. 7. 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. *Id*. at p. 10. In reality, Defendants diverted a substantial portion of KFYield investor capital to Lendacy, a private, start-up company owned by Williams. *Id*. at pp. 11. Lendacy was neither listed on a U.S. exchange nor capable of being hedged with listed options. *Id*. at p. 11. Williams then directed Lendacy to make purported loans using KFYield assets to himself, entities controlled by him, and others. *Id*. at pp. 12-14.

III. The Commission Has Demonstrated Irreparable Harm

The Commission can demonstrate irreparable harm by "show[ing] a cognizable risk of future harm." *Chappell*, 107 F.4th at 128. *Cf. Sterling Ornaments Pvt. Ltd. v. Hazel Jewelry Corp.*, No. 14-cv-8822 (JSR), 2015 WL 3650182, at *1 (S.D.N.Y. June 9, 2015) (citation omitted). In the context of an asset freeze, irreparable harm can be demonstrated if there is "good cause to believe that, unless funds and assets are frozen" the defendant "will dissipate, conceal, or transfer from the jurisdiction of this Court assets that could be subject to an order

directing disgorgement or the payment of civil money penalties in this action." *Chappell*, 107 F.4th at 138; *see also SEC v. Liu*, 851 F. App'x 665, 667–68 & n.1 (9th Cir. 2021) (affirming asset freeze under four-factor test, noting that absent a freeze defendants would expatriate their assets); *SEC v. Reven*, No. 1:22-cv-03181 (D. Colo. July 26, 2024), DE 156 at 21 n.12 (confirming asset freeze under *Starbucks* because "dissipation of the defendants' assets could irreparably harm existing investors and the availability of funds to pay any disgorgement or other future judgment").

Good cause exists here to believe that Williams will dissipate, conceal, or transfer assets that could be subject to disgorgement or a civil penalty. The Commission established in its Motion that Williams fraudulently raised and misappropriated millions of dollars from investors. *See* DE 2. It was no stretch, therefore, to conclude he would conceal assets to avoid paying a disgorgement award. *See Chappell*, 107 F.4th at 138 (defendant's apparent "willingness to trade on information to avoid losses makes us wary that he would also, but for the preliminary injunction, seek to conceal assets to avoid a potential future order directing him to disgorge an amount equal to the losses he avoided.").

Later unfolding facts only bolster the appropriateness of the Order and the need to keep it in place. In fact, Williams immediately violated the Order by disbursing frozen funds for the payment of legal fees and expenses to his prior

counsel. *See* DE 69 at p. 7 ("Despite the clear directive from the Court to file a motion if there was some reason LF42's assets should be unfrozen, no such motion was filed prior to the dissipation of approximately $200,000 to Greenberg Traurig from its trust account for payment of legal fees and expenses. This was a violation of the March 6, 2020 Orders."). Furthermore, Williams was indicted for securities fraud (18 U.S.C. § 1348) and wire fraud (18 U.S.C. § 1343) in a parallel criminal case based on the same conduct alleged here. *United States v. Williams*, 3:23-cr-00276-SCC (D.P.R.) ("Criminal Case"). The Indictment alleges, among other things, that "Williams solicited funds under false pretenses, failed to use investors' proceeds as promised, and misappropriated and converted investors' proceeds for his personal benefit." *Id*. at p. ¶ 6.

IV. The Balance of Equities Tips in the Commission's Favor

The "balance of equities tips in [the Commission's] favor." *Starbucks*, 144 S. Ct. at 1575. "[T]he disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). Here, the likely disgorgement order warrants the asset freeze. Williams misappropriated individually and through entities he owned at least $6.3 million, which is subject

to substantial prejudgment interest.[3] *See* DE 2-1 (identifying Williams' misappropriation of at least $6.3 million individually and through entities he solely controlled); *see also* Receiver's Eighteenth Interim Report, DE 332-2 at pp. 24-25 (tracing "millions of dollars in investor funds that were transferred to or for the benefit of Defendant Williams and without any discernible authorized purpose or benefit to Kinetic Funds", including at least an additional $400,000 in misappropriated funds). In comparison, any alleged financial hardship Williams may experience as a result of the asset freeze is purely speculative. Williams obtained the release of frozen funds for the payment of his monthly living expenses, as well as his attorneys' fees and costs, among other things. *See* Williams' Deposition Transcript, DE 200-15 at 40:21-25; DE 134, 237, 238, and 250. In any event, the "asset freeze seeks not to modify or transfer assets in any way, but rather, merely to preserve the status quo in anticipation of a final judgment." *SEC v. Miller*, 808 F.3d 623, 632 (2d Cir. 2015) (quotation omitted).

V. The Relief Requested Is in the Public Interest

"As a practical matter, if a plaintiff demonstrates both likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff," *Chappell*, 107 F.4th at 139 (quotation

[3] Williams repaid $2,354,399.21 of the diverted investor funds on the eve of the asset freeze hearing. *See* Receiver's First Interim Report, DE 60 at p. 10; DE 69 at p. 6, n. 4; DE 139 at p. 4.

omitted), particularly when the plaintiff is a government agency tasked with protecting investors and securities markets' integrity. *See* 15 U.S.C. 78b. "The essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do." *SEC v. Resch-Cassin, Co.*, 362 F. Supp. 964, 978 (S.D.N.Y. 1973) (quoting *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943)).

The evidence shows that the Commission is likely to succeed on its claims. Congress authorized courts to enter judgments for monetary relief against securities law violators (*see* 15 U.S.C. § 78u(d)(3)(A)), and the asset freeze here prevents dissipation of Williams' assets that can be applied toward satisfying any judgment. The public interest therefore favors an asset freeze in situations like this one to ensure that securities law violators cannot avoid paying any monetary relief a court may ultimately impose. *Reven*, No. 1:22-cv-03181 at 21 n. 12.

VI. Conclusion

For these reasons, the Commission gives notice that the evidence offered in support of the Order satisfies *Starbucks*, and the Order should remain in place until entry of a final judgment.

September 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 24, 2024, 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
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