

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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CLERK OF DISTRICT COURT
S.D. OF FLORIDA - MIAMI

SECURITIES AND EXCHANGE)
COMMISSION,) CASE NO. 04-60573 MORENO/GARBER
)
Plaintiff,)
)
v.)
)
MUTUAL BENEFITS CORP., *et. al.*,)
)
Defendants,)
)
VIATICAL BENEFACTORS, LLC,)
VIATICAL SERVICES, INC.,)
KENSINGTON MANAGEMENT, INC.,)
RAINY CONSULTING CORP.,)
TWIN GROVES INVESTMENTS, INC.,)
P.J.L. CONSULTING, INC., and)
CAMDEN CONSULTING, INC.)
)
Relief Defendants.)
/

**RELIEF DEFENDANTS' CORRECTED PROPOSED FINDINGS AND
REQUEST FOR EMERGENCY RELIEF**

Pursuant to this Court's July 20, 2004 directive, Relief Defendants Viatical Benefactors, LLC ("VBLLC"), Viatical Services, Inc. ("VSI"), Kensington Management, Inc. ("Kensington"), Rainy Consulting Corp. ("Rainy"), Twin Groves Investments, Inc. ("Twin Groves"), P.J.L. Consulting, Inc. ("P.J.L."), and Camden Consulting, Inc. ("Camden") submit proposed findings of fact and conclusions of law with respect to the preliminary injunction hearing commenced before this Court on June 29, 2004 and concluded on July 22, 2004. As set forth below, Relief Defendants respectfully request a ruling at the earliest possible date convenient to the Court that the Securities and Exchange Commission ("SEC") failed to present **any** relevant proof as to Relief Defendants at the preliminary injunction hearing, and that, as a result, this Court has no

jurisdiction over Relief Defendants or their assets, which have been frozen without legal basis since May 4, 2004.

PRELIMINARY STATEMENT

Relief Defendants have not been accused of any wrongdoing by the SEC in its Complaint or in the preliminary injunction hearing. Nevertheless, all of Relief Defendants' assets have been frozen since May 4, 2004 based on nothing more than an ephemeral suggestion – not even a sufficient allegation¹ – that such assets must somehow be proceeds of fraud committed by Defendants.

The SEC has completely failed to meet its burden of proof – indeed has failed to present **any** proof – justifying its wholesale freeze of Relief Defendants' assets and the inclusion of Relief Defendants in its application for a preliminary injunction. More specifically, at the preliminary injunction hearing before this Court, the SEC failed to present **any** proof that: (1) Relief Defendants' frozen assets came from Defendants; (2) Relief Defendants' frozen assets are merely held in trust for Defendants and are not property of Relief Defendants; (3) Relief Defendants did not earn or otherwise have a legitimate ownership interest in their frozen assets; or that (4) Relief Defendants' frozen assets are proceeds of fraudulent securities transactions or fraudulently obtained investor funds.

As a result, this Court is without jurisdiction over Relief Defendants, who are not themselves accused of any wrongdoing and thus may only be named in this action if they have

¹ Even under the well-settled standards governing a traditional motion to dismiss, the SEC's claim as to Relief Defendants is insufficient because the Complaint does not allege that Relief Defendants have no legitimate right to their own frozen assets. *See* Complaint at ¶¶ 8-15.

no personal interest in their frozen assets and are merely holding the assets as trustees for Defendants who have, in turn, wrongfully acquired the assets.²

PROPOSED FINDINGS OF FACT

1. At the request of the SEC, all known assets of Relief Defendants have been frozen in an undifferentiated manner since the entry of a May 4, 2004 *ex parte* temporary restraining order.

2. The SEC seeks to continue the wholesale freeze of Relief Defendants' assets as part of the preliminary injunction application currently before this Court.

3. The SEC has neither alleged nor introduced **any** evidence of wrongdoing against Relief Defendants.

4. The SEC has not introduced **any** evidence that the frozen assets of Relief Defendants came from Defendants.

5. The SEC has not introduced **any** evidence that the frozen assets of Relief Defendants are merely held in trust for Defendants and are not the property of Relief Defendants.

6. The SEC has not presented **any** evidence that Relief Defendants did not earn or otherwise have a legitimate ownership interest in their frozen assets.

7. In fact, the SEC introduced the First Report of the Receiver which provides uncontroverted evidence that Relief Defendants VBLLC and VSI generate income through the provision of extensive business services and receive legitimate income as a result. *See* First Report of Receiver, pp. 15-18.

8. Similarly, the SEC introduced the deposition of Steven Steiner, which includes uncontroverted evidence that Relief Defendant Camden provides legitimate business services

² There is also no evidence that Defendants wrongfully acquired the assets.

and receives legitimate income from a number of unrelated business interests. *See* Deposition of Steven Steiner, pp. 14-15, 106, 110-11, and 192.

9. Moreover, the SEC introduced Exhibits 29, 30, 31, and 32, which provide uncontroverted proof that Relief Defendants Kensington, Rainy, Camden, and P.J.L. provide legitimate business services to various entities including Defendant Mutual Benefits Corp. (“Mutual Benefits”).

10. The SEC did not introduce **any** evidence that the frozen assets of Relief Defendants are proceeds of fraudulent securities transactions or fraudulently obtained investor funds.

PROPOSED CONCLUSIONS OF LAW

11. On June 25, 2004, Judge Moreno ruled that this Court has subject matter jurisdiction over the securities fraud claims alleged in the above-captioned matter against Defendants.³ No such claims are alleged against Relief Defendants.

12. On June 25, 2004, Judge Moreno also entered an order of referral to this Court requesting a determination as to whether the SEC had made a sufficient showing to support issuance of a preliminary injunction that would extend a May 4, 2004 *ex parte* temporary restraining order which includes a wholesale freeze of all Relief Defendants’ assets.

13. Relief Defendants are, as the SEC concedes, entities against whom no wrongdoing has been alleged.

14. As set forth below, the SEC has not offered **any** proof that Relief Defendants are, as they are required to be, entities who “ha[ve] no interest in the [frozen] property” and whose relationship to the suit “**is merely incidental and ‘it is of no moment [to them] whether the**

³ Judge Moreno also certified his decision as appropriate for immediate interlocutory review by the Eleventh Circuit.

defendants are “holding the funds of defendants”); *Black* 163 F.3d at 196-97 (affirming district court’s refusal to freeze relief defendant’s assets when it found “case law cited by the SEC actually supports the District Court’s determination that the freeze as to these funds was improper because in no case referenced by the SEC has it been granted a freeze *ex parte* of assets where those assets were anything other than property, or deemed property, of a defendant or of a culpable third party.”); *see also Cherif*, 933 F.2d at 415; *Cavanagh*, 155 F.3d at 136-37; *SEC v. Antar*, 831 F.Supp. 380, 401-02 (D. N.J. 1993); *Elfindepan*, 2002 WL 31165146 at * 4; *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998).⁴

22. The SEC has not presented evidence that any, much less all, of Relief Defendants’ frozen assets belong to Defendants or even came from Defendants.

23. There is no case in any Circuit where the SEC has successfully frozen the assets of a relief defendant as part of a preliminary injunction where, as here, the SEC has not proven the most basic fact – that Relief Defendants’ frozen assets came from and belong to Defendants. *See, e.g., Black* 163 F.3d at 196-97 (affirming district court’s refusal to freeze relief defendant’s assets when it found “case law cited by the SEC actually supports the District Court’s determination that the freeze as to these funds was improper because in no case referenced by the SEC has it been granted a freeze *ex parte* of assets where those assets were anything other than

⁴ Importantly, the majority of cases dealing with nominal or relief defendants involve disgorgement **after** trial or at summary judgment as opposed to a complete freeze of the relief defendant’s assets in a preliminary injunction, as the SEC seeks here. *See, e.g., SEC v. Infinity Group*, 993 F. Supp 324, 331 (E.D. Pa. 1998) (district court found disgorgement appropriate after a trial on the merits); *SEC v. Chemical Trust*, 2000 WL 33231600, * 6-7 (S.D. Fla. 2000) (disgorgement allowed after district court granted summary judgment in favor of SEC and relief defendants consented to disgorgement); *SEC v. Hickey*, 322 F.3d 1123, 1133 (9th Cir. 2003) (asset freeze over non-party’s assets ordered after defendant had been ordered to disgorge his fraud profits and had been held in contempt for his failure to disgorge such profits); *Picard Chemical*, 940 F.Supp. at 1136 (“[a]fter the dispute is resolved”, it is proper to order nominal defendant to turn over funds).

property, or deemed property, of a defendant or of a culpable third party.”); *Cavanagh*, 155 F.3d at 136-37 (asset freeze of relief defendants’ assets proper when assets were defendant’s fraudulently obtained investor funds); *Antar*, 831 F.Supp. at 401-02 (relief defendants – who were the wife and minor children of defendant – had trust accounts frozen when defendant opened and controlled trust accounts and monies in trust accounts were proven to be proceeds of defendant’s fraud); *Elfindepan*, 2002 WL 31165146 at * 4 (relief defendant’s assets subject to asset freeze when those assets were actually defendant’s assets); *Colello*, 139 F.3d at 676 (relief defendant properly named when relief defendant’s funds actually belonged to defendant).

24. Second, the SEC was required and failed to prove that Relief Defendants are neutral and uninterested repositories of the frozen assets at issue. *See Cherif*, 933 F.2d at 413-14. As the Seventh Circuit held in *Cherif*, a federal court may only assert jurisdiction over a relief defendant who has no interest in the matter, is a neutral stakeholder, and whose relation to the suit “is merely incidental and ‘it is of no moment [to him] whether the one or the other side in [the] controversy succeed[s].’” *Id.* at 414 (quoting *Bacon v. Rives*, 106 U.S. 99 (1882)). Thus, the typical relief or nominal defendant “is a bank or trustee, which only has a custodial claim to the property.” *Colello*, 139 F.3d at 677.

25. The SEC has not presented any evidence that Relief Defendants are neutral custodians or trustees of their frozen funds. There was no evidence presented by the SEC that Relief Defendants are simply holding funds, as a bank or trustee would, that belong to, and are actually controlled by, Defendants. There is no evidence that Relief Defendants are uninterested in the fact that the SEC has frozen all their assets without any allegation of wrongdoing.

26. Third, the SEC was required and failed to prove that Relief Defendants have no legitimate claim to their frozen assets. *See Cherif*, 933 F.2d at 413-14 (“[a] court can obtain

equitable relief from a non-party against whom no wrongdoing is alleged if it is established that the non-party possesses illegally obtained profits **but has no legitimate claim to them.**”) (emphasis added); *Bentley*, 2002 WL 519725 at * 1 (SEC failed to meet its burden because it did not prove that relief defendant did not have “legitimate claim” to frozen assets and thus, individual was not proper relief defendant); *CFTC v. Hanover Trading Corp.*, 34 F.Supp.2d 203, 207 (S.D.N.Y. 2004) (fact that assets at issue were legitimate compensation to relief defendant for services rendered gave relief defendant legitimate claim to funds); *Cavanagh*, 155 F.3d at 136 (relief or nominal defendant must not have a legitimate claim to the funds the SEC seeks to freeze); *Elfindapan, S.A.*, 2002 WL 311165146 at * 4 (where a relief defendant has a legitimate ownership interest in the funds in dispute, the court has “no subject matter jurisdiction”); *Colello*, 139 F.3d at 676 (relief defendant must have “no legitimate claim” to funds at issue).

27. In fact, the only evidence presented by the SEC regarding Relief Defendants indicates that Relief Defendants do, in fact, have a legitimate claim to the funds at issue.

28. The SEC introduced the First Report of the Receiver which details the extensive, legitimate business practices of Relief Defendants VBLLC and VSI. *See* First Report of Receiver, pp. 15-18.

29. Moreover, the SEC introduced deposition testimony of Steven Steiner, which confirms that Relief Defendant Camden provides legitimate business services and receives legitimate income from a number of unrelated business interests. *See* Deposition of Steven Steiner, pp. 14-15, 106, 110-11, and 192.

30. Similarly, the SEC introduced consulting agreements between Defendant Mutual Benefits and Relief Defendants Kensington, Rainy, Camden, and P.J.L. which demonstrate that

Relief Defendants provided legitimate services to Defendant Mutual Benefits and other business entities. *See* Exhibits 29, 30, 31, and 32.

31. Fourth, the SEC was required and failed to prove that Relief Defendants' frozen assets are proceeds of securities fraud or fraudulently obtained investor funds. *Cavanagh*, 155 F.3d at 136-37 (\$500,000 frozen in relief defendant's account when defendant placed the stock in relief defendant's bank account, fraudulently sold stock, and then placed \$500,000 in proceeds from fraudulent stock sale in relief defendant's account); *Heden*, 51 F.Supp.2d at 300 (portion of relief defendant parents' accounts preliminarily frozen where defendant son traded stocks illegally on the accounts, \$115,600 of the \$285,400 frozen represented profits from defendant sons' illegal trade and \$169,800 represented principal in illegal trade); *Infinity*, 993 F.Supp. at 331 (assets of relief defendants frozen when such assets were proven to be "unlawfully-obtained investor funds, for which he received no consideration at all and to which he ha[d] no legitimate claim"); *Chemical Trust*, 2000 WL 33231600 at * 6-7 (relief defendants' assets frozen when such assets were fraudulently obtained investor funds and relief defendants did not have a legitimate claim to the funds and relief defendants consented to disgorgement).⁵ Receipt of fraudulently obtained funds, however, is alone insufficient to justify freezing a relief defendant's assets. *See Shiner*, 268 F.Supp.2d at 1345 (district court refused to extend asset freeze over relief defendants' assets, as part of preliminary injunction, even though defendants owned relief defendants and assets were received from defendants).

⁵ As set forth above, the Seventh Circuit's decision in *Cherif* holds that a district court **never** has authority to **freeze assets** of a relief defendant under any circumstances. *See Cherif*, 933 F.2d at 413-15 ("[n]othing in the statute or case law suggests that 15 U.S.C. § 78u(d) or (e) authorizes a court to freeze the assets of a non-party, one against whom no wrongdoing is alleged.").

32. At oral argument subsequent to the preliminary injunction hearing, the SEC admitted that it had not adduced any proof that Relief Defendants were properly named in this case or that their assets were legally frozen. Instead, the SEC improperly attempted to rely on a presumed adverse inference that this Court might draw based on the fact that certain Defendants – not Relief Defendants – elected not to testify because of the unknown risks they faced in light of an admitted coordinated attack on them by the State of Florida, the SEC, and the Receiver. The SEC, however, cannot base its case against Relief Defendants solely on a derivative adverse inference that this Court might draw against Defendants. *See Infinity*, 993 F.Supp. 324, 331 (E.D. Pa. 1998) (only after SEC met its burden to support naming relief defendants in action did district court allow adverse inference against relief defendants who themselves did not testify); *Colello*, 139 F.3d at 678 (same).

33. Relief Defendants are clearly entitled to hold the SEC to the high burden of proof required to freeze, at the preliminary injunction stage, all assets of non-parties against whom no wrongdoing has been alleged.

34. The SEC has completely failed to meet the high burden of proof required to obtain a continued freeze of Relief Defendants' assets in the form of a preliminary injunction.⁶ The SEC's position is patently frivolous, callous and damaging to Relief Defendants, and should not be condoned by this Court.

⁶ Indeed, this Court should follow the holding of the Seventh Circuit in *Cherif, supra*, that there is no authority to freeze assets of a non-party against whom no wrongdoing is alleged.

CONCLUSION

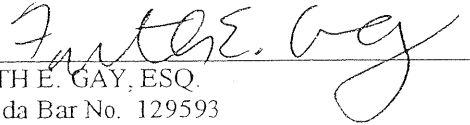
Because the SEC has provided no basis for this Court to assert jurisdiction over Relief Defendants, they should be dismissed from this action and the freeze of their assets immediately lifted.

DATED this 28th day of July, 2004.

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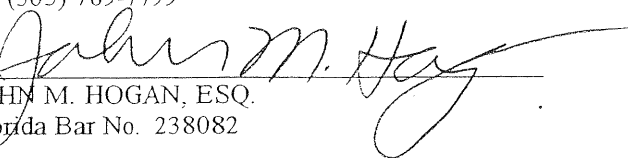
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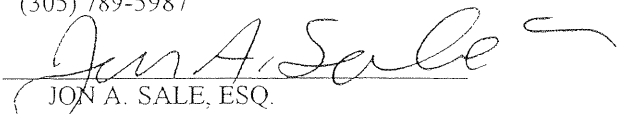
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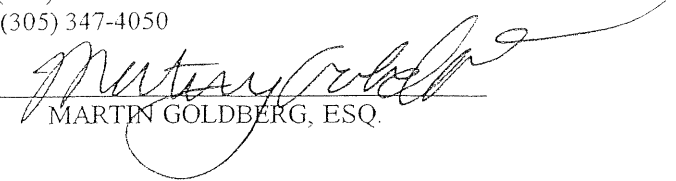
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USDC, SOUTHERN DISTRICT OF FLORIDA (Miami)
Case No. 04-60573-CIV-Moreno

SERVICE LIST
Updated July 6, 2004

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