

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 04-60573-CIV-MORENO/GARBER

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP.,
et al.,

Defendants,

VIATICAL BENEFACTORS, L.L.C.,
et al.,

Relief Defendants.

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SUPPLEMENTAL REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon a *sua sponte* reconsideration of that portion of this Court's November 12, 2004, Report and Recommendation which related to relief defendants other than Viatical Benefactors, LLC ("VBLLC") and Viatical Services, Inc. ("VSI"). This Supplemental Report and Recommendation does not alter the Court's conclusions and recommendations regarding any of the defendants or regarding relief defendants VBLLC and VSI.

In the November 12 Report and Recommendation, the Court recommended that Judge Moreno deny the SEC's request for entry of a preliminary injunction as to all relief defendants other than VSI and VBLLC. The Court held, in part: "With respect to the remaining relief defendants, although the SEC has demonstrated that they were merely conduits through which MBC made payments to the individual defendants, the SEC has not demonstrated how those relief defendants violated the federal

securities laws.” D.E. #522, at 46.

Implicit in the Court’s November 12 conclusions regarding those relief defendants was a presumption that in order to obtain injunctive relief against relief defendants, the SEC had to demonstrate that they violated federal securities laws. That, however, is an incorrect statement of the law. Instead,

[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. Courts have jurisdiction to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds from securities laws violations.

SEC v. Cherif, 933 F.2d 403, 414 n.11 (7th Cir. 1991) (emphasis added); *see also, e.g., CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002); *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) (“[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.”); *SEC v. Elfindepan, S.A.*, No. 1:00CV00742, 2002 WL 31165146, at *4 (M.D.N.C. Aug. 30, 2002); *SEC v. Chem. Trust*, no. 00-8015-Civ-Ryskamp, 2000 WL 33231600, at *11 (S.D. Fla. Dec. 19, 2000) (“Relief defendant ACC received proceeds from the defendants’ illegal scheme. As between the investors and ACC, ACC has no *bona fide* claim of title to any of the securities offering’s proceeds. Accordingly, the [SEC] can obtain equitable relief from ACC without charging it with any wrongdoing where it ‘possess[es] illegally obtained profits but ha[s] no legitimate claim to them.’”) (quoting *Cherif*, 933 F.2d at 414 n.11) (alterations in original); *SEC v. Infinity Group Co.*, 993 F. Supp. 324, 331 (E.D. Pa. 1998), *aff’d*, 212 F.3d 180 (3d Cir. 2000).

As the Court discussed in the November 12 Report and Recommendation, relief defendants received millions of dollars from MBC during the period of MBC’s fraudulent activities. D.E. #522,

at 7-10, 46. With regards to many of the relief defendants, written contracts explicitly provided that the fees they received from MBC were related to the sales of viatical settlements. With regards to the remaining relief defendants, the fees were also related to MBC's sales of viatical settlements.¹ Therefore, the fees that relief defendants received were undoubtedly the fruits of MBC's fraudulent activities. *See* D.E. #522, at 46 (“[T]he SEC has demonstrated that they were merely conduits through which MBC made payments to the individual defendants . . .”). Those fees were, at best, consulting fees for work which the individual defendants, and perhaps other principals of relief defendants, performed in furtherance of defendants' fraudulent activities.^{2 3}

The Court must next determine whether relief defendants and their principals have any legitimate claim to the funds they received from MBC. Those individual and entities “neither testified nor produced evidence which affirmatively demonstrates that [they] did any work for [MBC].” *SEC v. Infinity Group Co.*, 993 F. Supp. 324, 331 (E.D. Pa. 1998), *aff'd*, 212 F.3d 180 (3d Cir. 2000). To the extent they did perform work for MBC and “earned any of the funds which were transferred” to them, they

did so in the service of the very unlawful offering and sale of securities which is the subject of these proceedings. It would be contrary to the securities law to allow [them]

¹ There was no written agreement between MBC and relief defendant Twin Groves Investment, Inc., a Florida corporation whose president is Leslie Steigner. During the relevant period, however, MBC paid Twin Groves approximately \$1.2 million in “consulting fees.” The only record evidence suggests that those fees were the proceeds of MBC's sales of viatical settlements.

² There also exists the possibility that relief defendants and their principals did not perform any work in exchange for the so-called “consulting fees.”

³ As discussed *supra*, it is irrelevant whether relief defendants or their principals acted with scienter regarding defendants' fraudulent scheme. The relevant question is whether they “received proceeds from the defendants' illegal scheme.” *SEC v. Chem. Trust*, no. 00-8015-Civ-Ryskamp, 2000 WL 33231600, at *11 (S.D. Fla. Dec. 19, 2000).

to launder the proceeds of a securities fraud by billing bilked investors for services rendered in furtherance of that fraud. Illegal consideration is invalid consideration and thus cannot shield ill-gotten gains from disgorgement.

Id.

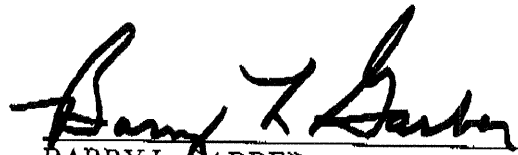
Additionally, and as the Court noted in the November 12 Report and Recommendation, relief defendants' principals all invoked their Fifth Amendment rights against self-incrimination in response to the SEC's subpoenas. Based on that fact, the Court draws an adverse inference against relief defendants and their principals. *See* D.E. # 522, at 10 n.7, 36-37. Their invocation of their Fifth Amendment rights "profoundly hinders [the Court's] ability to determine the true nature of [MBC's and relief defendants'] operations." *SEC v. Infinity Group Co.*, 993 F. Supp. at 331. Thus, even if the Court had doubts as to whether relief defendants and their principals improperly benefitted from MBC's acts of securities fraud, the Court would resolve those doubts against relief defendants and their principals. *See id.* at 331-32 ("Thus, to the extent that we have any doubts--and we harbor none--as to whether a massive securities fraud took place here, whether and to what extent defendants participated in it, and whether defendants and relief defendant Susan Benson improperly benefitted therefrom--we resolve those doubts against defendants and relief defendant Susan Benson."); *see also, e.g., CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002); *SEC v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998) ("As noted above, the district court based its ruling on the SEC's proof of Colello's receipt of the funds of the victims combined with an adverse inference drawn from Colello's silence. . . . The district court also considered the evidence presented by Colello and found nothing in it to support Colello's claims to the funds. . . . Thus, the district court's ruling did not turn on Colello's silence alone and the court did not err. The summary judgment may seem harsh, but Colello refused to give information necessary to determine whether he still possessed any of the funds or whether he had a legitimate claim to them.").

RECOMMENDATION

Accordingly, it is recommended that the Court GRANT the SEC's Motion for Preliminary Injunction as to relief defendants Kensington Management, Inc.; Rainy Consulting Corp; Twin Groves Investment, Inc; P.J.L. Consulting, Inc.; SKS Consulting, Inc.; and Camden Consulting, Inc.⁴

Those six relief defendants and the SEC⁵ have ten (10) days from receipt of this Report and Recommendation to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. *See* 28 U.S.C. § 636. Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 16th day of November, 2004.



BARRY L. BARBER
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
United States District Judge Federico A. Moreno

⁴ This Report and Recommendation is intended to modify only that portion of the Court's legal analysis contained in the second paragraph under the heading "Relief defendants" on page forty-six of the November 12 Report and Recommendation, as well as the Court's conclusions regarding the propriety of injunctive relief regarding those six relief defendants. This Report and Recommendation is not intended to affect the Court's analysis or conclusions regarding any defendant or regarding relief defendants VBLLC and VSI.

⁵ Because this Report and Recommendation does not relate to the SEC's request for preliminary injunctive relief as to defendants or relief defendants VBLLC and VSI, it should not extend those defendants' and relief defendants' deadline to file objections to the November 12 Report and Recommendation. Additionally, this Report and Recommendation does not extend the SEC's deadline for filing objections relating to the Court's November 12 recommendations regarding defendants and relief defendants VBLLC and VSI.

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