

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

CASE NO. 8:09-cv-87-T-26TBM

**ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.**

Defendants,

**SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY IRA FUND, LTD,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, AND
VIKING MANAGEMENT**

Relief Defendants.

**PLAINTIFF'S RESPONSE OPPOSING AMENDED MOTION
FOR PAYMENT OF REASONABLE ATTORNEYS' FEES**

Neither Defendant Arthur Nadel nor his attorneys have given the Court any reason why it should allow Nadel pay his defense team with what little is left of the funds he took from the investors he defrauded. Nadel has no right to lift the asset freeze, to which he consented only six weeks ago, in order to spend victims' money on his own defense. There is no requirement that the Commission trace funds to his fraud before the Court can keep them frozen to satisfy any future disgorgement judgment. Additionally, Nadel certainly cannot justify a release of funds when he has failed to provide the Court-ordered sworn accounting or any evidentiary basis for either the fees his lawyers claim already to have earned or that they seek going forward.

Nor can Nadel complain of a due process violation, since by consenting to the February 3, 2009 Order of Preliminary Injunction and Other Relief (D.E. 29) (the “P.I. Order”) he waived his right to a full evidentiary hearing on whether the Court should continue the emergency asset freeze. Nadel has not provided any basis to revisit the asset freeze, and the Court should reject his attempts through counsel to do so by denying the Amended Motion for Payment of Reasonable Attorneys’ Fees (the “Amended Motion”).

I. Factual and Procedural Background

The Commission filed suit on January 21, 2009 alleging Nadel, Scoop Capital, LLC, and Scoop Management, LLC conducted a large-scale hedge fund fraud by greatly misleading investors about the value and profitability of hedge funds the defendants controlled, advised, and managed. Commission’s Complaint (D.E. 1); Commission’s Emergency Motion and Memorandum of Law in Support of Temporary Restraining Order and Other Emergency Relief (D.E. 2) (“TRO Motion”). The Commission sought and the Court granted, among other things, emergency relief against the Defendants and Relief Defendants freezing their assets, prohibiting violations of the anti-fraud provisions of the federal securities laws, and appointing a receiver over the Defendant and Relief Defendant entities (D.E. 2-3, 6, 7-9). On February 2, the Commission’s counsel visited Nadel in jail to take his deposition in preparation for the upcoming preliminary injunction hearing. Nadel, after consulting the same lawyers who now seek money for him, consented to a preliminary injunction extending the asset freeze and other emergency relief through the final resolution of this case. (D.E. 24, 29). Having issued the P.I. Order with Nadel’s consent, the Court cancelled the preliminary injunction hearing, at which Nadel could have presented argument and evidence in opposition to the asset freeze and other aspects of a preliminary injunction (D.E. 30).

II. Memorandum of Law

Almost all of the investors' money is gone, and the Court has already found the Commission both presented a *prima facie* case that Nadel violated the federal securities laws and established good cause to believe Nadel would have continued dissipating assets absent a Court order. *See* TRO Motion at 6-8 and accompanying exhibits (hedge funds' total assets no more than approximately \$515,000); Temporary Restraining Order and Other Emergency Relief ("TRO") (D.E. 9) at 2. *Id.* Additionally, Nadel consented to the existing asset freeze, postponing the Commission's attempt to depose him and waiving his right to a full hearing that in part would have explored his assets and the disgorgement he owes. Anything Nadel obtains from the freeze now would be yet one more episode in which investor funds go to Nadel for Nadel's benefit only.

A. The Asset Freeze is Necessary to Protect the Commission's Disgorgement Remedy

Disgorgement is an equitable remedy, the primary purpose of which is to force a defendant to surrender his ill-gotten gains.¹ *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2nd Cir. 1996) (disgorgement amount should be calculated by measuring illegal profits, not amount needed to reimburse defrauded investors); *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); *SEC v. Commonwealth Chemical Services*, 574 F.2d 90, 102 (2nd Cir. 1978); *SEC v. Drexel Burnham Lambert, Inc.*, 956 F. Supp. 503, 507 (S.D.N.Y. 1997). Courts may order disgorgement even if there are no victims entitled to damages. *Drexel Burnham*, 956 F. Supp. at 507.

The burden on the Commission for "showing the amount of assets subject to

¹ The Commission may well propose distributing any disgorged funds to investors at the conclusion of this case, but the ultimate use of disgorged funds should not be confused with the purpose of disgorgement.

disgorgement (and, therefore available for freeze) is light.” *SEC v. ETS Payphones*, 408 F.3d 727, 735 (11th Cir. 2005). All that is required is “a reasonable approximation of a defendant’s ill-gotten gains Exactitude is not a requirement.” *Id.* See also *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). The amounts should include “all gains flowing from the illegal activities.” *SEC v. Cross Fin. Servs.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995). Upon a reasonable approximation, the burden shifts to the defendant to show the amount is unreasonable. *Calvo*, 378, F.3d at 1217-18. The defendant then must *clearly* demonstrate the disgorgement figure is not a reasonable approximation of his gains. *First City Fin.*, 890 F.2d at 1232. The wrongdoer, who has created any uncertainty in the amounts through his violations of the securities laws, bears the risk of any uncertainty. *Calvo*, 378 F.3d at 1217; *First City Fin.*, 890 F.2d at 1232; *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983).²

The purpose of the asset freeze is “to preserve sufficient funds” for the payment of a disgorgement award. *SEC v. ETS Payphones*, 408 F.3d 727, 734 (11th Cir. 2005); *Levi Strauss & Co. v. Sunrise Int’l Trading, Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) (“district court may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible”); *SEC v. Musella*, 578 F. Supp. 425, 429-31 (S.D.N.Y.1984) (“[t]he objective, of course, is to ensure that defendants’ assets will remain available to satisfy any future court order to disgorge illegal profits.”) Accordingly, the Court should compare the amount of a defendant’s potential equitable liability with the value of his or her frozen assets. *ETS Payphones*, 408 F.3d at 735-36.

The Receiver has identified to date more than \$397 million Nadel and the advisers and

² Nadel has contributed to any uncertainty in the amounts he received from the fraud by failing to comply with the Court’s order that he provide a sworn accounting by February 8, 2009. P.I. Order at 4.

managers he controlled took in his hedge fund fraud. Declaration of Receiver Burton Wiand at ¶ 16, attached as Exhibit 1 to this response. Nadel ran the advisers and managers. TRO Motion at 3-5 and accompanying exhibits. The Commission therefore may seek disgorgement of the entire amount of ill-gotten gains from Nadel – at this point more than \$397 million – under a theory of joint and several liability.³

Even if the Court focused only on the amounts traced directly to Nadel or entities he controlled *so far*, the frozen assets still fall far short of covering Nadel's ill-gotten gains. Although the Receiver's investigation and work is less than two months old, he has identified more than \$17 million transferred from Scoop Management to Nadel and his wife, with Scoop Management collecting approximately \$60 million from the hedge funds during the fraud. Ex. 1 at ¶¶ 21, 24. The Receiver has also identified more than \$6 million dollars in putative fees from Scoop Management to Scoop Capital, both of which Nadel controlled. *Id.* at ¶¶ 22-23; TRO Motion at 3-5.

As Exhibit 1 demonstrates, Nadel's potential disgorgement is at a minimum more than \$17 million, and that number applies only if one considers solely transfers directly to Nadel and his wife while ignoring transfers through entities Nadel controlled or any salary he paid his wife. Because the value of the Receivership and frozen funds currently add up to only approximately \$12 million to \$13 million at best – without considering costs of maintaining or liquidating the

³ “Where two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they [may be] held jointly and severally liable for the disgorgement of the illegally obtained proceeds.” *SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1117 (9th Cir. 2006) (holding architect of fraud and his associated companies jointly and severally liable for all amounts fraudulently raised from investors), quoting *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). See also *Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (“it is a well settled principal that joint and several liability is appropriate in securities law cases where two or more individuals or entities have close relationships in engaging in illegal conduct” and finding founder and owner of partnership jointly and severally liable for all partnership gains where he was a “substantial factor” in illegal securities sales); *First Jersey*, 101 F.3d at 1474-75 (owner firm jointly and severally liable for firm's profits, not just his own ill-gotten gains, where he participated in and profited from illegal conduct).

assets – (Ex. 1 at ¶¶ 27-28), a blanket freeze remains appropriate under *ETS Payphones*, because the potential disgorgement – particularly the *actual* potential disgorgement – far exceeds the frozen funds.⁴ Furthermore, some case law holds an asset freeze is also appropriate to cover an award of prejudgment interest a civil penalty *SEC v. Unifund SAL*, 910 F.2d 1028, 1041-42 (2nd Cir. 1990).

B. The Commission does not have to trace frozen assets to the fraud

Contrary to the argument in Nadel’s Amended Motion, which focuses on criminal forfeiture cases (Amended Motion at 5-6), it is irrelevant whether the frozen assets are traceable to or “tainted” by Nadel’s fraud. Nadel ignores not only the disgorgement and asset freeze law discussed above, but also federal case law rejecting such a requirement. It is well settled that a Court may impose an interim asset freeze on *all* of a defendant’s assets up to the amount of the defendant’s ill-gotten gains to preserve funds for equitable remedies such as disgorgement. *Levi Strauss & Co.*, 51 F.3d at 987 (“district court may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible”).

⁴ Numerous courts in other circuits have also upheld the ability of the Commission and other litigants to obtain a freeze to preserve assets for equitable remedies. *United States ex rel Rahman v. Oncology Assoc.*, 198 F.3d 489, 494-99 (4th Cir. 1999) (asset freeze appropriate in case brought by U.S. government under the federal False Claims Act to preserve assets for equitable remedy of unjust enrichment); *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 996 (7th Cir. 2002) (upholding district court’s imposition of an asset freeze over all defendants’ personal and business assets because plaintiff sought equitable remedy of profit disgorgement); *In re Focus Media, Inc.*, 387 F.3d 1077, 1084-85 (9th Cir. 2004) (upholding bankruptcy court decision to issue preliminary injunction freezing assets to preserve defendant’s assets in action alleging equitable causes of action such as fraudulent conveyance and constructive trust); *Comcast of Illinois X, LLC v. Till*, 293 F.Supp.2d 936, 942 n.9 (E.D. Wisc. 2003) (granting *ex parte* order barring defendants from disposing of any assets because the freeze was to preserve assets for the equitable remedy of profit disgorgement); *Trafalgar Power Inc. v. Aetna Life Ins. Co.*, 131 F.Supp.2d 341, 349-50 (N.D.N.Y. 2001) (district court may grant asset freezes or like relief in cases involving equitable remedies); *Fairview Machine & Tool Co. v. Oakbrook Int’l, Inc.*, 77 F.Supp.2d 199, 201-206 (D. Mass 1999) (granting injunction freezing assets to potentially satisfy equitable remedies of unjust enrichment and restitution); *Slidell, Inc. v. Millennium Inorganic Chemicals, Inc.*, No. CIV A. 02-213, 2002 WL 649086 at *3 (D. Minn. April 17, 2002), (district court issued preliminary injunction preserving assets in case seeking equitable remedies of constructive trust and equitable lien); *FTC v. Windermere Big Win Int’l*, No. 98 C 8066, 1999 WL 608715 at *3 n.2 (N.D. Ill. Aug. 5, 1999) (issuing asset freeze against defendants in FTC action to insure that assets were available for restitution, an equitable remedy).

See also *CFTC v. American Metals Exchange*, 991 F.2d 71, 79 (3rd Cir. 1993); *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1103 (2nd Cir. 1972).

Courts here and elsewhere frequently freeze assets a defendant owned even before the fraud began to preserve them for potential disgorgement. *SEC v. Spear & Jackson, et al.*, Case No. 04-80354-CIV-MIDDLEBROOKS/JOHNSON, Slip. Op. at 3 (S.D. Fla. Aug. 19, 2004) (“there is no requirement that frozen assets be traceable to the fraudulent activity underlying a lawsuit”);⁵ *SEC v. A.B. Financing and Inv., Inc.*, Case No. 02-23487-CIV-UNGARO-BENAGES, Slip. Op. at 2 (S.D. Fla. Feb. 10, 2003) (“a district court may freeze assets not specifically traced to illegal activity”);⁶ *SEC v. Current Fin. Servs.*, 62 F.Supp.2d 66, 68 (D.D.C. 1999) (refusing to release personal funds not traceable to the fraud because Defendant’s liability exceeded total funds frozen); *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995) (“[i]t is irrelevant whether the funds affected by the Asset Freeze are traceable to the illegal activity”) (*aff’d*, 101 F.3d 109 (2nd Cir. 1996)); *SEC v. Roor*, No. 99 Civ. 3372 (JSM), 1999 WL 553823 at *3 (S.D.N.Y. July 29, 1999) (denying motion to release so-called “untainted” funds from mortgage of property that pre-existed alleged fraud); *SEC v. Glauberman*, No. 90 Civ. 5205 (MBM), 1992 WL 175270 at *2 (S.D.N.Y. July 16, 1992) (rejecting defendant’s argument that funds subject to disgorgement must be traced “dollar for dollar” to the illegal activity).

The cases Nadel cites such as *U.S. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001) and *U.S. v. Michelle’s Lounge*, 39 F.3d 684, 700-01 (7th Cir. 1994) are not on point, because they involve litigation where the Department of Justice brought both criminal and civil forfeiture actions. Unlike this case, where the Commission seeks its own independent equitable relief separate from any criminal prosecution, the bases for a pretrial restraint in cases such as *Farmer* are criminal

⁵ A copy of Magistrate Judge Johnson’s opinion is attached as Exhibit 2.

⁶ A copy of Judge Ungaro-Benages’ opinion is attached as Exhibit 3.

forfeiture statutes and probable cause requirements that often *do* require tracing. However as set forth immediately above, criminal forfeiture cases are inapplicable here, where the Commission seeks the equitable remedy of disgorgement.

C. Nadel cannot justify requiring investors to pay for his defense

In considering requests to use frozen funds for attorneys' fees, courts typically and properly place investors' interests over those of defendants, using an approach consistent with the purpose of the asset freeze discussed above. They require a defendant to establish that the frozen assets exceed possible disgorgement, and in many cases penalties, before releasing any funds. *See, e.g., SEC v. Bremont*, 954 F. Supp. 726, 733 (S.D.N.Y. 1997) ("until such time as the Court can determine whether the frozen assets exceed the SEC's request for damages, defendants will not be permitted to use any of the frozen assets").

In *SEC v. Comcoa*, 887 F. Supp. 1521 (S.D. Fla. 1995), the court refused to modify an asset freeze to allow payment of legal fees, noting that the use of frozen funds for those fees had been disallowed even in cases involving civil forfeiture and criminal violations. *Id.* at 1524 (citing cases). The court observed that "in all of [those] cases, the courts have essentially held that a defendant has no right to spend another's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain counsel of his choice." *Id.* *See also SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993) ("just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime"); *Roor*, 1999 WL 553823 at *2 (SEC defendant "may not use income derived from alleged violations of the

securities laws to pay for legal counsel”)⁷; *SEC v. Coates*, No. 94 Civ. 5361, 1994 WL 455558 at *3 (S.D.N.Y. Aug. 23, 1994) (“defendant is not entitled to foot his legal bill with funds that are tainted by his fraud”).

Nadel has failed to submit the sworn accounting this Court ordered, and his counsel has not provided the supplemental information the Court required for the Amended Motion. The Court’s March 11, 2009 Order (D.E. 72) directs Nadel’s counsel to “file a separate pleading on or before March 13, 2009, detailing the amount of reasonable attorneys’ fees they are seeking and, if known, the source from which those fees should be paid.” In their Supplement to Motion for Payment of Reasonable Attorneys’ Fees (D.E. 74), Nadel’s counsel gives billing rates and, without any evidentiary support, a figure of almost \$100,000 for time and expenses they claim to have expended on Nadel’s criminal and civil matters. They do not indicate how much they seek going forward. Not only does the case law not require a release of investor assets to pay for Nadel’s defense, but it would simply be unfair to order such a payment here. Having consulted with counsel before consenting to the asset freeze, Nadel has avoided being deposed or giving testimony at the hearing he could have had. He now seeks to vitiate the same asset freeze without providing a sworn accounting, testimony, or an explanation of how his counsel incurred the past defense costs and calculates future legal expenses. He provides the Court no

⁷ Of particular note in *Roor* is the court’s refusal to release even funds not directly attributable to the fraud to pay attorneys’ fees, explaining that “while money borrowed against the equity in [defendant’s] home may not be the proceeds of fraud, there exists a likelihood that [defendant] will soon have significant personal liabilities to the government and to the victims of a fraud he is alleged to have perpetrated.” *Roor*, 1999 WL 553823 at *3.

justification for letting him reduce the money available to pay a disgorgement judgment and potentially recompense victims.⁸

D. Treated as a motion for reconsideration, Nadel's request must fail

The Amended Motion seems to be a motion for reconsideration of the very preliminary injunction to which Nadel consented. Nadel provides no evidence or legal argument to justify revisiting the P.I. Order. A motion for reconsideration “must demonstrate why the court should reconsider its prior decision and ‘set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.’” *Dalton v. FMA Enterprises, Inc.*, No. 95-396-CIV-FTM-17D, 1996 WL 684441 at *2 (M.D. Fla. Nov. 25, 1996) (emphasis added), quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993). See also *Dawkins v. GMAC Ins. Holdings, Inc.*, No. 3:03CV322J20HTS, 2006 WL 580988 at *1 (M.D. Fla. March 8, 2006) (same). Generally, courts recognize only three grounds for granting a motion for reconsideration: (1) an intervening change in the law, (2) the availability of new evidence, and (3) the need to correct clear error or prevent manifest injustice. *Id.*

Nadel has not provided any real basis for the Court to re-examine this consent order, much less any support for the three required factors. There certainly is no manifest injustice in requiring him to abide by an order to which he consented only seven weeks ago.

E. Nadel has had due process

In the Amended Motion, Nadel demands a hearing, claiming without one he will not receive the due process to which he is entitled. Amended Motion at 4. Nadel primarily relies on

⁸ On page 7 of the Amended Motion, Nadel argues he is not seeking to set aside the P.I. Order, although he clearly is trying to gut the asset freeze provision, to which he consented, by seeking to drain the remaining investor assets for his legal needs. Ironically, Nadel also “affirms his willingness to accept responsibility by assisting the Receiver in the recovery of assets for the benefit of investors,” but still has not submitted his sworn accounting or disclosed any previously undisclosed assets to the Commission.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976) in which the United States Supreme Court held that due process is a flexible concept, the outlines of which depend on the nature of the private and governmental interests involved in the dispute. However, that case did not alter the basic premise of due process – notice and an opportunity to be heard. Nadel certainly has had that. The Court scheduled an evidentiary hearing on the Commission’s requests for an asset freeze and a preliminary injunction. Nadel, with experienced counsel by his side (who “spent a considerable amount of time in defense of [his] civil and criminal cases”),⁹ chose to forego the *already-set* hearing and consent to the P.I. Order. *Mathews v. Eldridge* does not hold that a litigant who voluntarily waives his right to a hearing has not received due process, and Nadel should not be able to invade investors’ remaining funds in the asset freeze by ignoring his choice to forego a hearing after enjoying the benefits of consenting to the P.I. Order.

III. CONCLUSION

The law does not entitle Nadel to draw yet more money from the investor proceeds of his fraud. The asset freeze is to preserve whatever it can for the Commission’s disgorgement remedy and potential return to defrauded investors, and the Commission does not have to trace the particular frozen assets to Nadel’s fraud in order to protect the availability of that money. Nadel has no right to use what funds he did not dissipate to defend himself, and he certainly cannot complain about a lack of due process when he consented to the preliminary injunction he now challenges and waived his right to a hearing on the matter. Even if Nadel had some ground to seek relief, the Court should not permit him to demand investor money without providing a sworn accounting, a deposition, and an evidentiary basis for the amount of money he seeks.

⁹ Amended Motion at 3.

For the foregoing reasons, the Securities and Exchange Commission respectfully requests the Court deny Nadel's Amended Motion.

March 18, 2009

Respectfully submitted,

By: s/ Scott A. Masel
Scott A. Masel
Senior Trial Counsel
Florida Bar No. 0007110
Direct Dial: (305) 982-6398
E-mail: masels@sec.gov
Lead and Trial Counsel

Attorney for Plaintiff
**SECURITIES AND EXCHANGE
COMMISSION**
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Burton W. Wiand, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 222-7411
Facsimile: (813) 229-8313
Email: bwiand@fowlerwhite.com
*Court-appointed Receiver for Corporate Defendants
and Relief Defendants*

Carl R. Nelson, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 222-7411

Facsimile: (813) 229-8313
Email: cnelson@fowlerwhite.com
Counsel for Receiver Burton W. Wiand

Gianluca Morello, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 222-7411
Facsimile: (813) 229-8313
Email: gianluca.morello@fowlerwhite.com
Co-counsel for Receiver Burton W. Wiand

Ashley Bruce Trehan, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 222-7411
Facsimile: (813) 229-8313
Email: atrehan@fowlerwhite.com
Co-counsel for Receiver Burton W. Wiand

Maya M. Lockwood, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 228-7411
Facsimile: (813) 229-8313
Co-counsel for Receiver Burton W. Wiand

Donald R. Kirk, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 228-7411
Facsimile: (813) 229-8313
Co-counsel for Receiver Burton W. Wiand

Barry A. Cohen, Esq.

E-mail: bcohen@tampalawfirm.com

Todd A Foster, Esq.

E-mail: tfoster@tampalawfirm.com

Michael L. Rubinstein, Esq.

E-mail: mrubinstein@tampalawfirm.com

Cohen, Jayson & Foster, P.A.

201 E. Kennedy Boulevard, Suite 100

Tampa, Florida 33602

Telephone: (813) 225-1655

Facsimile: (813) 225-1921

Counsel for Defendant Arthur Nadel

s/ Scott A. Masel

Scott A. Masel, Esq.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.,

Defendants,

CASE NO.: 8:09-cv-0087-T-26TBM

SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, AND
VIKING MANAGEMENT, LLC.

Relief Defendants.

**RECEIVER'S DECLARATION IN SUPPORT OF
THE SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO THE
AMENDED MOTION FOR PAYMENT OF REASONABLE ATTORNEYS' FEES**

Burton W. Wiand declares as follows:

1. I am an attorney with Fowler White Boggs P.A. ("Fowler White") in Tampa, Florida.
2. In the January 21, 2009, Order Appointing Receiver (Doc. 8), the Court appointed me Receiver over (a) defendants Scoop Capital, LLC ("Scoop Capital") and Scoop Management, Inc. ("Scoop Management") and (b) relief defendants Scoop Real Estate, L.P.;



Valhalla Investment Partners, L.P.; Valhalla Management, Inc.; Victory IRA Fund, Ltd.; Victory Fund, Ltd.; Viking IRA Fund, LLC; Viking Fund, LLC; and Viking Management, LLC (Scoop Real Estate, Valhalla Investment, Victory IRA, Victory Fund, Viking IRA, and Viking Fund are collectively referred to as the "Hedge Funds;" Scoop Capital, Scoop Management, Valhalla Management, and Viking Management are collectively referred to as the "Investment Managers.").

3. In a January 27, 2009, Order (Doc. 17), the Court also appointed me Receiver over Venice Jet Center, LLC, and Tradewind, LLC.

4. In a February 11, 2009 Order (Doc. 44), the Court also appointed me Receiver over Laurel Mountain Preserve, LLC; Laurel Preserve, LLC; the Marguerite J. Nadel Revocable Trust UAD 8/2/07; and the Laurel Mountain Preserve Homeowners Association, Inc.

5. In a March 9, 2009, Order (Doc. 68), the Court also appointed me Receiver over the Guy-Nadel Foundation, Inc.

6. In a March 17, 2009, Amended Order (Doc. 81), the Court also appointed me Receiver over Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (d/b/a Mr. Florist A Victorian Garden). The entities in receivership are referred to collectively as the "Receivership Entities."

7. Since my appointment as Receiver, I and professionals that I have retained (including lawyers and an accountant) have continued our investigation, which has included communicating with people associated with Nadel and/or the Receivership Entities and persons responsible for maintaining the financial books of Receivership Entities and of other

businesses controlled by Nadel; operating businesses controlled by Nadel or for assisting those businesses with their activities; performing accounting services; and administering the Hedge Funds.

8. We have also reviewed documents located in the offices of the Hedge Funds and Investment Managers (the "Office") (located at 1618 Main Street, Sarasota, Florida 34236); documents obtained from the accountant for Receivership Entities; information stored on Receivership Entities' computer network; documents obtained from other businesses controlled by Nadel; documents obtained from financial institutions and other third parties, including lawyers and others who assisted Nadel's businesses with their transactions; and information available in the public record.

9. In particular, we have reviewed (i) records that had been maintained by employees of Scoop Management using Quickbooks software; (ii) tax returns prepared by an accountant for years prior to 2008; and (iii) records that had been maintained using hedge fund management software, Advent. Our analysis indicated that the Quickbooks data is consistent with the tax returns and that all of the data is consistent on a global basis with fees reflected by the Advent software.

The Fraudulent Investment Scheme

10. On January 26, 2009, I submitted the Receiver's Declaration in Support of the Receiver's Unopposed Motion to Expand the Scope of Receivership (the "Receiver's January Declaration") (Doc. 16).

11. As shown in the Receiver's January Declaration and in Plaintiff's Emergency Motion and Memorandum of Law in Support of Temporary Restraining Order and Other

Emergency Relief (the "SEC Emergency Motion") (Doc. 2) and supporting papers, Nadel defrauded investors in the six Hedge Funds from at least 2003 (and likely earlier) through the time he fled in January 2009 by "massively overstating the value of investors' interests in them." (SEC Emerg. Mot. at 2, 6.) Specifically, from at least 2003 through 2008, the value of the Hedge Funds as represented to investors was significantly overstated. The investment returns and performance as represented to investors were based on the overstated numbers and thus were also false.

12. Our investigation has revealed that for each Hedge Fund, the fund's performance as disclosed to investors was based mainly on money and trading results that Nadel purported to have in two accounts: a brokerage account cleared through Goldman Sachs Group, Inc. (in which money was purportedly traded to generate the purported returns Nadel was yielding) and a bank account (from which purported distributions and purported redemptions were apparently paid). (While the disclosed performance of some funds at times also took into account investments purportedly held in other accounts, the value of those purported investments did not meaningfully impact the analysis in the table below – the overwhelming majority of the purported trading was supposed to take place in the Goldman Sachs brokerage accounts).

13. Below is a table comparing actual values of the Hedge Funds to the values as represented to investors. Specifically, for each year-end from 2003 to 2007, the table lists the actual value of the brokerage account of each Hedge Fund (identified as "Actual Brokerage") and the actual value of the bank account of each Hedge Fund (identified as "Actual Bank"). The actual values of each fund for each analyzed time period are added to determine the

actual total value of the Hedge Funds as of December 31st; that value is identified in the row labeled "Total Actual Value." Finally, the last row, labeled "Value Represented to Investors," identifies the collective value of the funds as of December 31st of each year analyzed in the table as represented to investors and as used by the Hedge Funds and Investment Managers to compute fees, returns, and other variables.

	Value as of 12/31/03 (\$)	Value as of 12/31/04 (\$)	Value as of 12/31/05 (\$)	Value as of 12/31/06 (\$)	Value as of 12/31/07 (\$)
Scoop Real Estate					
Actual Brokerage	fund not in existence	16,670,254.69	20,435,896.75	17,597,319.95	2,689,054.53
Actual Bank		2,595,096.26	2,568,381.69	202,116.95	1,443,406.92
Victory Fund					
Actual Brokerage	22,680,904.69	23,848,019.27	23,324,285.51	7,890,073.11	2,586,116.58
Actual Bank	3,672,956.54	2,051,485.25	724,809.85	326,132.15	551,836.41
Victory IRA					
Actual Brokerage	5,898,125.28	13,070,558.97	17,746,441.12	9,981,754.77	1,096,190.22
Actual Bank	283,477.20	1,733,770.80	2,223,265.61	325,675.56	178,009.43
Valhalla Investment					
Actual Brokerage	8,448,343.09	19,448,979.03	14,249,335.95	7,017,679.33	3,429,805.83
Actual Bank	576,760.49	3,391,544.40	3,027,125.65	406,661.65	13,281.47
Viking Fund					
Actual Brokerage	23,411,778.98	33,375,622.75	25,983,502.33	10,054,454.11	2,036,992.89
Actual Bank	1,382,193.93	5,184,911.26	2,112,871.29	185,311.70	1,583,671.26
Viking IRA					
Actual Brokerage	14,172,117.08	18,767,696.52	19,787,093.85	9,539,919.21	1,738,703.93
Actual Bank	293,720.78	2,935,428.03	548,977.10	187,995.90	695,791.20
TOTAL ACTUAL VALUE					
	80,820,378.06	143,073,367.23	132,731,986.70	63,715,094.39	18,042,860.67
VALUE REPRESENTED TO INVESTORS					
	128,953,973.27	216,868,604.46	274,387,098.31	282,379,592.45	313,960,110.28

14. As the previous table shows, for 2003 through 2007 (and, as shown by the SEC, also in 2008), the value of the Hedge Funds as represented to investors was

significantly overstated. The investment returns and performance as represented to investors were based on the overstated numbers and thus were also false.

15. As shown by the SEC, Nadel defrauded investors through his control of the Hedge Funds' advisers and managers, Scoop Capital and Scoop Management, which are now in receivership. (SEC Emergency Motion at 4-6.) Through those entities, Nadel was ultimately responsible for controlling the Hedge Funds' investment activities.

The Results Of Nadel's Scheme

16. Based on the information reviewed to date, including the Advent software used by the Hedge Funds, \$397,276,239.83 was raised by the Hedge Funds from investors.

17. Further, that information indicates that investors' losses from their investment in the Hedge Funds are approximately \$168,738,671.00.¹

The Money Left In Accounts Controlled By Nadel

18. Based on the information reviewed to date, the balances in the financial accounts titled in the name of Hedge Funds and Investment Managers at the time this receivership was commenced were as follows:

Name on Account(s)	Amount
Scoop Management	\$28,103.40
Scoop Capital	22,956.63
Valhalla Management	7,306.87
Viking Management	8,897.25
Scoop Real Estate	139,644.50
Victory Fund	83,832.57

¹ The information reviewed to date also shows that a group of investors had collective gains of over \$50 million, and I have begun the process of trying to recover that money for the benefit of the receivership estate.

Name on Account(s)	Amount
Victory IRA Fund	131,139.52
Valhalla Investment Partners	16,458.07
Viking Fund	65,708.33
Viking IRA Fund	67,285.24
TOTAL	\$571,332.38

19. In addition, based on the information reviewed to date, the balances in the financial accounts titled in the name of other Receivership Entities at the time the entities were brought into this receivership were as follows:

Name of Account(s)	Amount
Venice Jet Center	\$80,705.91
Tradewind	77,782.72
Laurel Mountain Preserve	5,303.03
Laurel Preserve	22,773.57
Guy-Nadel Foundation	56,807.70
Marguerite J. Nadel Revocable Trust	380,346.21
Lime Avenue Enterprises, LLC	1,703.89
TOTAL	\$625,423.03

"Fees" Paid By The Hedge Funds To Scoop Management And Scoop Capital

20. Evidence also showed that the Hedge Funds directly or indirectly paid substantial fees to Scoop Capital and Scoop Management, and to other Receivership Entities, in the form of management, advisory, and/or profit incentive fees. According to the Hedge Funds' documents, in 2003 the Hedge Funds paid a total of \$7,045,509.31 in fees; in 2004, they paid \$14,156,501.17 in fees; in 2005, they paid \$20,349,897.02 fees; in 2006 they paid

\$18,257,590.52 in fees; in 2007 they paid \$19,873,365.00 in fees; and in 2008 they paid \$15,854,930.76 in fees.

21. Specifically, according to Scoop Management's Profit and Loss Statement for the period from 2003 to 2008, Scoop Management received the following fees from the Hedge Funds: \$39,670,763.24 in "Incentive Fees;" \$19,065,409.19 in "Management Fees;" and \$1,930,000 in "Office Fees." In other words, Scoop Management received a total of \$60,666,172.43 in fees from the Hedge Funds between 2003 and 2008.

22. Also according to Scoop Management's Profit and Loss Statement, Scoop Management paid a portion of those fees to others. The amount paid was \$23,183,680.84, but \$6,040,566.83 of that amount was paid to another Receivership Entity formerly controlled by Nadel, Scoop Capital.

23. In sum, Scoop Management kept \$37,482,491.59 in fees from the Hedge Funds between 2003 and 2008, and an additional \$6,040,566.83 of the fees it received were transferred to Scoop Capital.

**Money Transferred By Scoop Management And
Scoop Capital To The Nadel's And For Nadel's Benefit**

24. As of December 31, 2008, according to the Balance Sheet for Scoop Management, Scoop Management had transferred \$6,761,000 to Nadel, \$5,090,000 to Nadel's wife, Marguerite "Peg" Nadel, and an additional \$5,326,896.56 jointly to Nadel and his wife. These amounts are in addition to the amounts Mrs. Nadel received from Scoop Management as compensation.

25. Scoop Management also had transferred \$6,433,804.40 to other entities controlled by Nadel.

26. Also as of December 31, 2008, according to the Balance Sheet for Scoop Capital, it had transferred at least \$1,300,000 to Nadel. It also had transferred \$6,293,637.12 to other entities controlled by Nadel.

Non-Cash Assets in Receivership

27. The receivership has come into possession of various non-cash assets. Those assets include: undeveloped land (14 acres in Thomasville, Georgia, and approximately 430 acres in Buncombe and McDowell counties, North Carolina); commercial real estate property (a building rented by Rite-Aid Pharmacy in Graham, North Carolina; a building rented by Electronic Data Systems in Raleigh, North Carolina; a building rented by Starbucks Corporation in Tupelo, Mississippi; a building rented by a florist in Sarasota, Florida; and a lot rented by a Shell gas station in Newnan, Georgia); private airport hangars located in Newnan, Georgia; a jet center located in Venice, Florida; a majority interest in a company that is in the pre-fabricated homes business; six aircrafts; three vehicles; and office furniture, office fixtures, computers, and miscellaneous supplies.

28. Although not all of these assets have been appraised, based on the information I have to date, I would estimate their value at roughly \$23,000,000. This is a rough estimate and is subject to change. Many of these assets are encumbered by loans, and the value of those loans exceeds \$12,000,000.

No Other Source Of Income For The Nadel

29. To date we have not uncovered any source of income for Nadel or his wife that was not in some manner funded with money from the scheme (whether through "management fees" or otherwise). Discussions with Nadel's wife and others have confirmed

that, during the time one or more of the Hedge Funds and Investment Managers were in operation (i.e., beginning in at least 1999), essentially all of Nadel and Mrs. Nadel's income was derived directly from those entities.

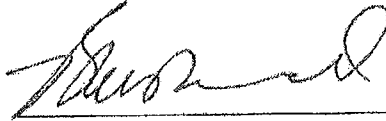
30. As detailed in the Receiver's January Declaration and the SEC Emergency Motion, the Hedge Funds and Investment Managers were operated as part of a fraudulent scheme from at least 2003 forward. As such, the source of Nadel and Mrs. Nadel's income during that period was Nadel's scheme.

31. Consistent with the Nadel's lack of any income that was not related the Nadel's scheme, all of the assets that we have located and brought within this receivership were funded with proceeds of the scheme. To the extent any asset were somehow funded with money that was completely unrelated to the scheme, that asset would have to be insignificant.

Conclusion

32. Allowing Nadel to use any of the money or other assets that are under my control as part of this receivership to finance his legal defense would decrease dollar-for-dollar the money and assets available to repay the investors (and other creditors) who suffered enormous losses because of Nadel's unlawful activities. In other words, it would allow Nadel to inflict even greater damage on those investors.

I declare under the penalty of perjury that the foregoing is true and correct and is
executed this 18th day of March, 2009.

A handwritten signature in dark ink, appearing to read 'Burton W. Wiand', is written over a horizontal line.

Burton W. Wiand, as Receiver
c/o FOWLER WHITE BOGGS P.A.
501 E. Kennedy Blvd.
Suite 1700
Tampa, FL 33602
Tel. 813.228.7411
Fax 813.229.8313
bwiand@fowlerwhite.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-80354-CIV-MIDDLEBROOKS/JOHNSON

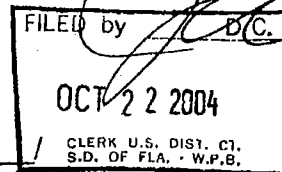
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DENNIS CROWLEY, *et al.*,

Defendants.



NOTICE OF SECOND RE-FILING

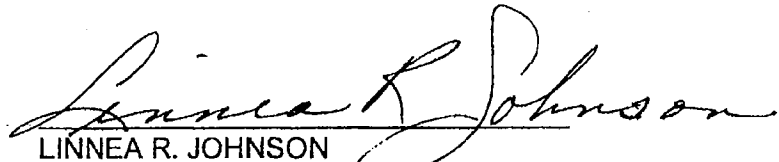
THIS CAUSE is before the Court on Defendants International Media Solutions, LLC, and Yolanda Velazquez' Motion for Partial Relief from, and Clarification of Freeze Order [DE #134]. Upon review of the docket, the Court notes the following:

1. On or about August 19, 2004, this Court filed it's Order ruling on the aforementioned motion.
2. On September 2, 2004, upon review of the docket, this Court noted that the subject Order had not been filed and docketed. On this same date, the Court filed it's Notice of Re-filing with a copy of its Order for filing and docketing.
3. Review of the docket today reveals that the re-filing notice along with the attached order has not been docketed. Despite the Court's two attempts, this Order continues to be absent from the record.



4. Accordingly, the Court is submitting this Second Re-filing Notice with attached August 19, 2004 Order for filing and docketing purposes.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 22nd day of October, 2004.


LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

Copies furnished:

Judge Donald M. Middlebrooks

Nate Mancuso, Esq.

Allan M. Lerner, Esq.

William Nortman, Esq.

Myles Malman, Esq.

*Robert K. Levenson, Esq. [via fax by chambers 305-536-4154]

Steven M. Greenberg, Esq. [via fax by chambers 954-767-8343]

CSC Services of Nevada, Registered Agent

Martha Gordon, Registered Agent

*Attorney Robert Levenson shall fax this notice with attached order to all parties upon receipt.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 04-80354-CIV-MIDDLEBROOKS/JOHNSON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DENNIS CROWLEY, SPEAR & JACKSON, INC.,
et al.,

Defendants.

ORDER

THIS CAUSE is before the Court on Motion of Defendant Yolanda Velazquez for Partial Relief from, and Clarification of Freeze Order (D.E. #134). This matter was referred to this Court by the Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, after the parties consented to trial before the undersigned United States Magistrate Judge. In view of said consent, the above-stated motion shall be disposed of by order rather than by report and recommendation.

By this motion Defendant Yolanda Velazquez ("Velazquez") seeks to "clarify" or modify a prior asset-freeze Order in a way which would allow her to access funds currently covered by said Order. On April 15, 2004, the District Court entered an Ex Parte Temporary Restraining Order ("TRO") against Velazquez and other

Defendants and Relief Defendants, which, among other things, froze Velazquez' assets pending further order of the Court. Velazquez subsequently consented to the entry of a Preliminary Injunction against her, which included an order extending the asset freeze pending resolution of this action.

In support of their TRO Motion, the Securities and Exchange Commission (the "Commission") submitted the Declaration of Commission accountant Michelle Lama which, together with supporting exhibits, showed that somewhere between February 2002 and August 2003, entities controlled by Defendants Crowley and Spear & Jackson transferred 350,000 shares of Spear & Jackson stock to International Media Solutions' ("IMS") brokerage accounts and that IMS received \$1,660,421 from selling those shares. The Commission has submitted in support of their Response to the instant Motion, a Second Declaration of Michelle Lama showing that during the same February 2002 through August 2003 time period, IMS disbursed to Velazquez \$606,300. The Asset Freeze Order, as it pertains to Velazquez, has managed to freeze three bank accounts in Velazquez' name with a combined total of \$11,200. When served with discovery requests seeking information regarding the whereabouts of the \$606,300 Velazquez received from IMS, she has responded by asserting her Fifth Amendment privilege against self-incrimination.¹

¹ Velazquez asserted her Fifth Amendment privilege when, prior to the Commission filing this action, she was subpoenaed to testify concerning her employment with and compensation from IMS, when, in both the TRO and the Preliminary Injunction, she was ordered to provide a sworn accounting of her assets and all funds received from IMS, and

Now, having repeatedly refused to disclose what happened to the money she made in commissions off of Spear & Jackson investors, Velazquez asks the Court to give her unchecked control over even more money that could be used to repay those investors by allowing her to keep a salary she apparently is earning. She justifies her request by contending that this new income is not connected to IMS and therefore, according to her logic, should not be subject to the asset freeze. As the Commission correctly observes, Velazquez' request to exempt from the scope of the asset freeze any new income received from her flies in the face of the purpose behind the asset freeze, and runs contrary to well-established case law concerning the scope and propriety of asset freezes entered as equitable relief.

Contrary to Velazquez' belief, the asset freeze in effect is not limited to assets connected to her activity at IMS. The law is well-established that a court may impose an interim asset on *all* of a defendant's assets up to the amount of the defendant's alleged ill-gotten gains to preserve funds for equitable remedies, including disgorgement. Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 987 (11th Cir. 1995). There is no requirement that frozen assets be traceable to the fraudulent activity underlying a lawsuit. SEC v. AB Financing and Inv., Inc., Case No. 02-23487-CIV-UNGARO-BENAGES, Slip Op. at 2 (S.D. Fla. Feb. 10, 2003)("a district court may freeze assets not specifically traced to illegal activity.");

when confronted with Production Requests from the Commission in this action.

SEC v. Current Fin. Servs., 62 F.Supp.2d 66, 68 (D.D.C. 1999)(refusing to release personal funds not traceable to the fraud because defendant's liability exceeded total funds frozen); SEC v. Grossman, 887 F. Supp. 649, 661 (S.D. N.Y. 1995)("[i]t is irrelevant whether the funds affected by the asset freeze are traceable to the illegal activity.") (aff'd, 101 F.3d 109 (2d Cir. 1996)); SEC v. Glauberman, 1992 WL 175270 at *2 (S.D. N.Y. July 16, 1992)(rejecting defendant's argument that funds subject to disgorgement must be traced "dollar for dollar" to the illegal activity). Indeed, courts frequently freeze assets a defendant owned even before the fraud began to preserve them for potential disgorgement. SEC v. Belmonte, 1991 WL 214252 (S.D. Fla. April 25, 1991)(J. Roettger)(refusing to release funds from sale of home, even though home had been acquired prior to the alleged fraud, because there had been no showing that ill-gotten funds had not been used to subsidize mortgage payments or improve home); SEC v. Roor, 1999 WL 553823 at *2 (S.D. N.Y. July 28, 1999)(denying motion to release so-called "untainted" funds from mortgage of property that pre-existed alleged fraud).

The cases cited by Velazquez, Rosen v. Cascade Int'l, Inc., 21 F.3d 1520 (11th Cir. 1994) and Mitsubishi Int'l v. Cardinal Textile Sales, 14 F.3d 1507 (11th Cir. 1994), are not to the contrary. One year after those two cases were decided, the Eleventh Circuit handed down its decision in Levi Strauss, 51 F3d at 987, which specifically upheld the district court's imposition of an interim asset freeze to satisfy the potential disgorgement of profits. In so ruling the Eleventh Circuit distinguished

Rosen and Mitsubishi which held a district court does not have authority to freeze all of a defendant's assets to satisfy a potential *money judgment*, from a district court's inherent authority to freeze all of a defendant's assets, even those unrelated to the underlying litigation, to ensure the availability of *equitable relief*. Thus, where, as here, a defendant's potential liability far exceeds the amount of frozen funds, it is appropriate to refuse to release any funds, regardless of whether they emanated from the underlying fraud alleged, unless the defendant can provide evidence of assets worth the minimum of the potential judgment. With Velazquez having failed to offer any proof of this sort, her request to modify the asset freeze is denied.

Velazquez' request to modify the asset freeze is rejected for another reason as well, namely, her failure and refusal to provide this Court with any evidence of her living expenses. Generally, a defendant wishing to exclude from an asset freeze, monies to pay reasonable living expenses is required to produce evidence of those expenses. A.B. Financing, Slip Op. at 4 (denying defendant's motion to modify the asset freeze in part because he failed to document his reasonable living expenses); S.E.C. v. Starcash, Inc., Case No. 02-80456-CIV-MIDDLEBROOKS, Slip Op. at 2 (S.D. Fla. June 18, 2002)(denying defendants' motion to modify the asset freeze because they had not submitted sworn statements showing their expenses or documentary evidence of those expenses); CFTC v. Prism Fin. Corp., 1996 WL 523349, *1, *4 (D. Col. April 5, 1996)(defendant wishing to apply for modification of asset freeze ordered to do so under oath, and with all proposed expenses "fully

substantiated by all relevant financial information.")

Velazquez clearly has not met her burden in this regard. Indeed she has provided even less than the defendants in A.B. Financing and Starcash, who at least provided a list of their expenses. Here, Velazquez comes to Court requesting a modification with empty hands, providing neither a sworn statement of her expenses nor any documentation of them. In the absence of that required evidence, Velazquez is not entitled to any modification of the asset freeze.

One last point bears mention. Velazquez complains she cannot comply with the evidentiary requirements because to provide a sworn statement of her expenses or to document them would violate her Fifth Amendment rights. This Court is confident that documentation of the sort required could somehow be managed without violating Velazquez' Fifth Amendment rights. Even assuming such could not be accomplished, this is not a valid defense as it is improper to use the Fifth Amendment as both a shield and a sword. It may well be Velazquez' right to assert the Fifth Amendment in response to Commission discovery requests and court orders, but she must then accept the consequences. One of the consequences of not providing sworn statements of the funds at her disposal and the expenses she has is that she can not meet the well established evidentiary requirements for modifying the asset freeze. In summary, the Fifth Amendment does not relieve Velazquez of the obligation to provide proper evidence of her reasonable living expenses in order to gain access to frozen funds. A.B. Financing, Slip Op. at 3

(defendant's refusal to provide sworn accounting due to Fifth Amendment prevented court from ascertaining whether any frozen assets were from "legitimate" sources and therefore mandated denial of motion to modify asset freeze). In accordance with the above and foregoing it is hereby,

ORDERED AND ADJUDGED that Velazquez' Motion for Partial Relief from, and Clarification of Freeze Order (D.E. #134) is **DENIED**.

DONE AND ORDERED, this 19th day of August, 2004, in Chambers at West Palm Beach, Florida.


LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

CC: Hon. Donald M. Middlebrooks
Nate Mancuso, Esq.
Allan M. Lerner, Esq.
William Nortman, Esq.
Myles Malman, Esq.
Robert K. Levenson, Esq.
Steven M. Greenberg, Esq.
CSC Services of Nevada, Registered Agent
Martha Gordon, Registered Agent

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 02-23487-CIV-UNGARO-BENAGES

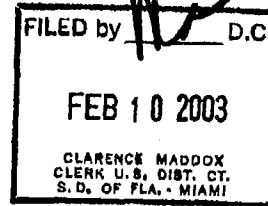
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

A.B. FINANCING AND INVESTMENTS, INC.,
and ANTHONY W. BLISSETT,
Defendants,

and

BLISSCO PROPERTIES, INC. JAMROCK
MARKETPLACE, INC., and CARIBBEAN
CULTURAL ART & EXHIBITION CENTRE, INC.
Relief Defendants.



**ORDER DENYING MOTION TO MODIFY ASSET FREEZE
TO ALLOW FOR THE PAYMENT OF REASONABLE LIVING EXPENSES**

THIS CAUSE is before the Court upon Defendant Blissett's Motion to Modify Asset Freeze, filed January 6, 2003.

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

On December 6, 2002, Plaintiff filed an emergency action against Blissett, A.B. Financing and Investments, Inc., and three corporate entities as relief defendants alleging violations of federal securities laws. The Court thereafter granted an *ex parte* Temporary Restraining Order that, *inter alia*, froze Defendant Blissett's personal assets. *See* Order of December 6, 2002. On December 13, 2002, with the consent of Defendant Blissett, the Court entered a preliminary injunction which continued the asset freeze imposed by the TRO. *See* Order of December 16, 2002. The instant motion followed on January 6, 2003, requesting modification of the asset freeze to allow for



reasonable living expenses and attorneys' fees.

On January 27, 2003, the Court entered an Agreed Order on Modification of Asset Freeze entitling Defendant Blissett to \$20,000.00 of the frozen funds to be used solely for his defense in this action. *See* Order of January 27, 2003 at 2. Thus, the only remaining issue before this Court is the question of Defendant Blissett's entitlement to additional funds to be used for living expenses.

Defendant submits three bases upon which he contends modification of the asset freeze is warranted: "(a) the extremely broad parameters of this asset freeze, (b) the unduly harsh consequences of its application ... [and], (c) Mr. Blissett's prior and ongoing cooperation." Motion at 5. Plaintiff opposes the motion contending: (1) the asset freeze is lawful and appropriate, (2) Blissett has not produced appropriate evidence of his expenses, and (3) Blissett has refused to participate in discovery and provide a sworn accounting. *See* Response at 6-10.

First, contrary to Defendant's assertion that the asset freeze is "extremely broad" and "arguably unlawful," a "district court may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible." *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) (citing *Federal Trade Commission v. United States Oil and Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984)). Additionally, the contention that the asset freeze is too "broad" is negated by the fact that a "district court may freeze assets not specifically traced to illegal activity." *Id.* (citing *Kemp v. Peterson*, 940 F.2d 110, 113-14 (4th Cir. 1991)). Thus, any suggestion by Defendant that his personal assets are outside the parameters of the asset freeze is without merit. *See, e.g.*, Motion at 2-3, Reply at 3. In

¹ Defendant's fourth contention, his need to retain counsel, has been obviated by the Court's Order of January 27, 2003, releasing funds for that purpose.

fact, Defendant Blissett's refusal to submit to an accounting prevents this Court from ascertaining the legitimate source of any of the funds, should one exist. *See Commodity Futures Trading Com'n v. American Metals Exchange Corp.*, 991 F.2d 71, 79 (3d Cir. 1993).

In that vein, Plaintiff dismisses Defendant's representation that he is fully cooperating with the investigation noting that he has declined to submit to a sworn accounting of his assets or participate in discovery electing instead to assert his rights under the Fifth Amendment. *See* Response at 4. Consequently, "until the [] court has had an opportunity to determine whether [Defendant's allegedly] ill-gotten gains can be quantified, it is premature to consider the propriety of the extent of the asset freeze." *American Metals Exchange Corp.*, 991 F.2d at 79. "Because a freeze is designed to preserve the status quo by preventing the dissipation and diversion of assets, [the undersigned] will allow the freeze to remain in effect until [the Court can] determine[] whether it can make an informed determination of the amount of unlawful proceeds retained by [Defendant] and, if it can, what that amount may approximate." *Id.* (citing *Commodity Futures Trading Com'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 582-83 (9th Cir. 1982)).

Second, Defendant Blissett has failed to demonstrate that sufficient funds will be available in the event this Court finds disgorgement is necessary to repay the allegedly defrauded investors. *See International Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974), *cert. denied*, 417 U.S. 932 (1974) ("an asset freeze may be appropriate to assure compensation to those who are victims of a securities fraud") (citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105-1106 (2d Cir. 1972)). Consequently, in light of the undisputed facts of this case, the asset freeze is neither too broad nor too harsh. *See* Response at 2-5.

Third, Defendant Blissett has failed to document sufficiently his living expenses enabling this

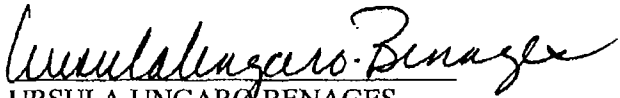
Court to determine a reasonable amount for release. *See American Metals Exchange Corp.*, 991 F.2d at 79 (modifying asset freeze only upon proof of “sufficiently documented” expenses); *S.E.C. v. Starcash, Inc.*, Case No. 02-80456-Civ-Middlebrooks (slip op. at 2) (S.D. Fla. June 8, 2002) (denying defendants’ motion to modify asset freeze for failure to provide “the Court with any supporting documentation upon which to make a determination as to their actual monthly living expenses”). Instead, Defendant Blissett only has submitted a declaration with estimated, undocumented cost amounts. *See* Blissett Decl. at 2. In fact, Defendant Blissett concedes this point requesting permission to belatedly submit the necessary proof. *See* Reply at 4. Additionally, Defendant now avers that he has reduced his living expenses in light of the asset freeze but does not reveal by how much. *See id.* Nevertheless, in light of the above, absent the ability to make a determination as to the source of the funds or their sufficiency for possible restitution, the Court finds any modification of the asset freeze would be premature. *See American Metals Exchange Corp.*, 991 F.2d at 79; *Co Petro Mktg. Group, Inc.*, 680 F.2d at 582-83; *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1042 (2d Cir. 1990), *reh’g denied*, 917 F.2d 98 (2d Cir. 1990) (A court has the authority to freeze assets at an amount that will cover the maximum civil penalty available under applicable law should securities law violations be proven at trial); *Levi Strauss & Co.*, 51 F.3d at 987.

Finally, Defendant Blissett maintains that assertion of his rights under the Fifth Amendment, precluding a sworn accounting or his participation in discovery, does not foreclose modification of the asset freeze to allow for reasonable living expenses. *See* Motion at 6; Reply at 5. Interestingly, Plaintiff cites to the same case for the proposition that assertion of the Fifth Amendment instead permits the inference “that all of Defendant’s accounts [are] traceable to the fraud” substantiating a complete freeze. Response at 9 (citing *S.E.C. v. Schiffer*, 1998 WL 307375 (S.D.N.Y. 1998))

("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.") (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976))). In fact, in *SEC v. Schiffer*, to which both parties cite, the court noted that as a result of the defendant's "invocation of the Fifth Amendment (rather than objection and proof as to the legitimacy of certain funds) considerable care must be taken to assure that assets properly subject to disgorgement are not depleted in an inadvertently or deliberately created murkiness of identification." 1998 WL 307375 at *6-7. Ultimately, therefore, the court assumed that all of the defendant's funds were "suspect in nature" and elected to *reduce* the amount of funds available for living expenses and attorneys' fees. *See id.* at *7. Faced with the same constraints in the case *sub judice*, it is hereby

ORDERED AND ADJUDGED that the Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of February, 2003.


URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

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counsel of record