UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff,* vs. MCGINN, SMITH & CO., INC. McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, LLC, TIMOTHY M. MCGINN, AND DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. SMITH, LAUREN T. SMITH, and NANCY MCGINN, *Defendants,* LYNN A. SMITH, and NANCY MCGINN, *Relief Defendants, and* DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, *Intervenor.*	10 Civ. 00457 (GLS/DRH)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE PRELIMINARY INJUNCTION ORDER

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Defendants Timothy M. McGinn and David L. Smith ("Defendants"), by and through their undersigned attorneys, oppose the motion of Plaintiff Securities and Exchange Commission (the "Plaintiff" or the "SEC") to amend the preliminary injunction order as follows:

PRELIMINARY STATEMENT

Plaintiff's motion to amend the preliminary injunction order ("PI Order") must be denied in its entirety because it seeks to enjoin Defendants from accessing unsecured loans – not assets – which are not properly the subject of a freeze. The PI Order restraining Defendants was entered on consent after Defendants had communications with the SEC which rejected the concept of restricting credit cards. Consistent with these communications, the PI Order makes no reference to credit cards. The SEC's current motion is inconsistent with the terms of the PI Order that were consented to, and is intended to render the Defendants unable to fund a defense in this action. Defendants would not have consented to any of the terms of the preliminary injunction had they known that they would be enjoined from accessing unsecured credit facilities to fund their defense. In the event that the Court is inclined to amend the PI Order, Defendants withdraw their consent. Moreover, the PI Order must be vacated (for lack of mutual consent) and the Defendants demand that they be provided with an opportunity to present evidence on the SEC's likelihood of success on the merits.

Plaintiff's implication that the Defendants have violated the preliminary injunction order similarly is without merit. It is a matter of fact that Defendants' access to credit lines does not encumber any particular asset which is currently frozen, and that use of credit cards is not a violation of the PI Order. The SEC's unsupported conclusion that there may be violation of the preliminary injunction order simply because there is no "carve out" for living expenses in this

case is pure speculation. The SEC has failed to present even a scintilla of evidence demonstrating that Defendants are currently violating, or intend to violate, the PI Order.

Finally, the Plaintiff's request for an accounting is without any basis because there has been no past or present violation of the PI Order. The SEC had knowledge of Defendants' use of credit cards before the consented to PI Order was filed, but did not include a request to restrain credit card use because Defendants would not agree. Put simply, the SEC knew that the Defendants intended to use credit cards as one of the interim measures necessary to finance their living expenses. Since the use of credit cards is not newly discovered and it does not violate the PI Order, there is no justification for burdening the Defendants with an accounting. An accounting would force the Defendants to waive their invocation of their Fifth Amendment privilege against self incrimination and should not be compelled absent some clear and convincing evidence of a violation.

Accordingly, the Defendants respectfully request that the Court deny the Plaintiff's motion in its entirety.

FACTS

The SEC filed an action against the Defendants for violations of certain of the federal securities laws on April 20, 2010. *See* Docket No. 1. At that time, the SEC filed an order to show cause seeking a preliminary injunction order against Defendants. *See* Docket No. 4. The Defendants thereafter informed the Court that they did not intend to file papers in opposition to the SEC's order to show cause because the Defendants and the SEC were in the process of negotiating a consent to a preliminary injunction. *See* Docket No. 38. In or about May 2010, Plaintiff learned in a deposition of Relief Defendant Lynn Smith that she and her husband had been using their credit cards. *See* Declaration of Alison B. Cohen, Esq. ("Cohen Decl.") ¶ 2.

The SEC contacted Defendants' counsel and demanded that the Defendants cease and desist any use of their credit cards. *See id.* Defendants' counsel objected to the SEC's demands and clearly stated Defendants position that the temporary order did not enjoin the Defendants from using credit cards. *See* Cohen Decl. ¶ 3. Defendants did not consent (and would have never consented) to an order which prohibited them from using credit cards. On or about June 3, 2010, aware of the Defendants' position on credit cards, the SEC filed a proposed preliminary injunction order with the Court which did not include terms enjoining the use of credit cards. *See* Docket No. 46. On or about June 8, 2010, the SEC filed an amended preliminary injunction order noting to the Court that the parties had engaged in subsequent negotiations resulting in certain changes to the proposed order. *See* Docket No. 58. The June 8, 2010 proposed preliminary injunction order also did not contain terms which enjoined the Defendants from using credit cards. Relying on the plain language of the SEC's proposed order, Defendants filed a consent to entry of the proposed PI Order that same day. *See* Docket No. 61. On or about July 22, 2010, the Court issued the PI Order. *See* Docket No. 96.

In bad faith – having learned of the Defendant position and use of credit cards nearly two months before the PI Order – the SEC accused Defendants of violating the PI Order by using credit cards. *See* Cohen Decl. ¶¶ 4 - 5. At that time, the SEC again demanded (this time to substitute counsel) that Defendants' cease and desist using credit cards and threatened to contact the credit card companies to assert its fatuous position. *See id.* at ¶¶ 5, 7. Defendants' counsel informed the SEC that the terms of PI Order did not prohibit the use of credit cards, and advised it that the threatened contact with credit card companies would constitute an actionable interference with Defendants' contracts with unsecured lenders. *See id.* at ¶¶ 6, 8 -11. On or about September 8, 2010, the Court held a telephonic pre-motion conference with the parties

relating to the credit card issue. *See id.* at ¶ 14; *see* Docket No. 140. On or about September 20, 2010, the SEC filed its motion to amend the PI Order.

ARGUMENT

1. THE PLAINTIFF'S REQUEST TO AMEND THE PRELIMINARY INJUNCTION ORDER MUST BE DENIED BECAUSE THERE IS NO BASIS TO CHANGE THE EXISTING ORDER

a. Credit Cards Provide Unsecured Loans That Do Not Encumber Any Existing Frozen Asset

Plaintiff's motion must be denied because Defendants' use of credit cards does not encumber the value of their currently frozen assets. Any debt incurred by on a credit card is unsecured – that is, not secured by an underling asset.[1] *See generally*, *In re Farmer*, 288 B.R. 31, 33 (N.D.N.Y. 2002) (describing credit card debt as "unsecured"). In the unlikely event that Defendants might fail to pay credit card minimums, the credit card company would not be able to take action with respect to any specific asset that is currently subject to the PI Order. It would first have to commence a litigation, get a judgment and then seek enforcement. Accordingly, no particular asset currently frozen is at risk of becoming encumbered through the Defendants' credit card use.

The only pertinent case cited by the SEC is distinguishable. Unlike *SEC v. Haligainnis*, 608 F. Supp.2d 444 (S.D.N.Y. 2009) on which the SEC relies, here there is little risk that the Defendants' credit card company would not have notice of the asset freeze (putting the SEC's status at risk). The SEC has already subpoenaed the Defendants' credit card companies to

[1] The credit cards at issue here are not "secured credit cards," which "requires you to open and maintain a savings account as security for your line of credit; an unsecured card does not." *FTC Facts for Consumers: Secured Credit Card Marketing Scams*, http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre25.shtm, last visited October 3, 2010.

demand their records, thereby putting the credit card companies on notice of the instant action. In addition, credit card companies are not unsophisticated lenders. Credit card companies routinely do credit checks, assess credit risk, and lend on payment history. Basic operating procedures would provide the lenders with sufficient opportunity to learn of the preliminary injunction and assess whether to extend credit to the Defendants. As a consequence, it is unlikely that the SEC would not have priority over a credit card company should it prevail on its claims of securities violations and obtain a judgment for disgorgement in this case.

b. The Plaintiff's Request To Amend the Preliminary Injunction Order Is Intended To Effectively Render the Defendants Destitute So That They Are Unable To Defend Themselves

Plaintiff's motion must be denied because Defendants' credit cards are indisputably one of their only remaining sources of funding to support their basic living and defense expenses. In this mater, Defendants' business has been placed in receivership, their jobs have been lost and all of their assets have been frozen. Their professional reputations are tarnished, and therefore, their employment prospects are extremely limited. Moreover, Defendants must pay attorneys to defend against allegations simultaneously in two, maybe three forums – this civil case, a FINRA disciplinary proceeding and a putative criminal case. It cannot be disputed that Defendants' immediate financial situation is dire and the credit card use provides a necessary lifeline. *See generally In re Davis*, 176 B.R. 118, 119 (W.D.N.Y. 1994) ("[i]t is a sure sign of financial distress when a consumer takes a cash advance on a credit card . . . to pay other unsecured obligations.").

Credit cards provide a revolving credit line by which the card company issues credit, the holder incurs debt, pays back at least a portion of the debt, and is subsequently issued additional

credit. *See Cheshire Academy v. Lee,* 112 Misc.2d 1076, 448 N.Y.S.2d 112, 114 (Civ. Ct. Bronx County 1982) ("credit card arrangements [are] a form of revolving credit"). Therefore, a credit card allows one to finance current living expenses against future earnings. The credit cards allow one to pay a minimum monthly payment and incur interest charges, or pay the monthly balance in full. Credit cards are a form of financing that allows one to purchase for goods and services now in exchange for payments over an extended period of time. They provide precisely the type of arrangement needed by a person with temporary liquidity problems (e.g., a freeze order).

The SEC has not – and cannot – credibly allege that the Defendants (or their friends and family members) are not currently making at least their minimum monthly credit card payments. The statements received by subpoena show otherwise. Indeed, the SEC is being disingenuous with respect to sources of income. It is well aware that Defendants are of sufficient age to qualify for social security benefits which could be used to make minimum credit card payments. Accordingly, the SEC's supposition that the credit card financing is fraudulent because the Defendants are drawing on funds they purportedly know they cannot repay is fundamentally flawed and its motion must be denied.

Finally, the SEC's "concern" for the credit card companies is simply feigned. It is evident that what the SEC is essentially attempting to do is cause Defendants extreme financial hardship. The SEC's statutory mandate does not include "protect[ion]" of credit card companies because the securities laws are not in any way implicated. *See generally, Carr v. New York Stock Exchange, Inc.,* 414 F.Supp. 1292, 1299 (N.D.Ca. 1976). ("[T]he SEC is the governmental authority charged with the enforcement of the provisions of the [Securities and Exchange] Act [of 1934]."). The SEC's real objective is to use the PI Order to limit the Defendants' access to unsecured loans and thereby deprive them of funding for basic living expenses and their defense.

By way of example, Defendants may need an unsecured loan from a family member (or any other unsecured lender) to pay attorneys fees. As proposed by the SEC, Defendants would not be permitted to borrow such funds for their defense without the approval of the Court (and expending additional attorneys' fees). Such a result is inequitable.

Accordingly, the SEC's motion to amend the preliminary injunction order to prohibit the Defendants from accessing unsecured credit arrangements must be denied.

c. The Preliminary Injunction Order Against The Defendants Should Be Vacated And An Evidentiary Hearing Must Be Held If The Court Is Inclined To Consider Amending The Preliminary Injunction To Enjoin The Use Of Credit Cards Because Defendants Did Not Consent To That Restriction

In the event that the Court is inclined to amend the PI Order to enjoin the Defendants' use of credit cards, the PI Order should be vacated and an evidentiary hearing held on the SEC's likelihood of success on the merits. The Defendants essentially entered into an agreement with the SEC when they consented to the terms of the PI Order and it should be construed as a contract. *See generally, Schurr v. Austin Galleries of Ill. Inc.*, 719 F.2d 571, 574 (2d Cir. 1983) ("A consent judgment or decree is 'an agreement of the parties entered upon the record with the sanction and approval of the [c]court'. . . For the purposes of enforcement, a consent judgment should be construed and interpreted as a contract."); *see also, Ferraro Foods Inc. v. M/V Izzet Incekara*, No. 01 Civ. 2682 (RWS), 2001 WL 940562 at *7 (S.D.N.Y. Aug. 20, 2001) ("stipulations are often compared to contracts."). Paragraph VII of the July 20, 2010 Preliminary Injunction Order states:

> **IT IS FURTHER ORDERED** that, pending final disposition of this action, the Defendants and the Relief Defendant, and each of their financial brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participants with them who receive actual notice of this Order by personal service, facsimile, service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal,

> transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Defendants, Relief Defendant, including but not limited to the MS Entities, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situation, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Defendants and Relief Defendant to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties including but not limited to, all assets, funds, or other properties held in the accounts listed on Exhibit B, as well as all real property owned directly or indirectly by the MS Entities.

Docket No. 96. The plain language of this provision addresses assets and does not mention credit cards or any other unsecured debt. As is set forth above, Defendants only consented to the PI Order because it did not enjoin them from using their credit cards. The issue was raised by the SEC when it discovered credit card use in advance of the PI Order and the concept of credit cards being restrained was rejected.

In or about May 2010, Plaintiff learned in a deposition of Relief Defendant Lynn Smith that she and her husband had been using their credit cards. Cohen Decl. ¶ 2. The SEC contacted Defendants' counsel and demanded that the Defendants cease and desist any use of their credit cards. *See id.* Defendants' counsel objected to the SEC's demands and clearly stated Defendants position that the temporary order did not enjoin the Defendants from using credit cards. *See id.* at ¶ 3. Defendants did not consent (and would have never consented) to an order which prohibited them from using credit cards. With this knowledge the SEC negotiated and agreed to the terms of the current PI Order with the express purpose of avoiding an evidentiary

hearing on the merits. From the plain language of the proposed order, it appeared to Defendants that the SEC's position on the issue correctly had been reconsidered and changed.[2]

On or about June 3, 2010, aware of the Defendants' position on credit cards, the SEC filed a proposed preliminary injunction order with the Court which did not include terms enjoining the use of credit cards. *See* Docket No. 46. On or about June 8, 2010, the SEC filed an amended preliminary injunction order noting to the Court that the parties had engaged in subsequent negotiations resulting in certain changes to the proposed order. *See* Docket No. 58. The June 8, 2010 proposed preliminary injunction order also did not contain terms which enjoined the Defendants from using credit cards. Relying on the plain language of the SEC's proposed order, Defendants filed a consent to entry of the proposed PI Order that same day. *See* Docket No. 61. The meeting of the minds – between the SEC and Defendants – is demonstrated by the plain language of the PI Order, and the absence of any reference to "credit cards" speaks volumes.

Had the SEC intended that the PI Order restrain the Defendants' use of their credit cards, it should have drafted the proposed order to explicitly stated it.[3] The SEC had plenty of

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[2] The SEC arguably had a duty to make the PI Order unambiguous if it truly intended the Defendants to be enjoined from using credit cards. By staying silent, it appears as though the SEC tried to mislead the Defendants. *See Levine v. Comcoa Ltd.*, 70 F.3d 1191, 1194 (11th Cir. 1994) (*concurring, dubitante*) ("The court today affirms contempt sanctions against a lawyer for doing what he knew the judge had ordered him not to do . . . The problem arose, however, because the party who petitioned for and obtained the TRO stood silent while the order inadvertently expired without counseling the court of the requirements for its extension. One would expect more from the [SEC].")

[3] In SEC enforcement actions, courts have previously ordered restraining orders which include explicit language restricting the use of credit cards. *See generally, SEC v. Private Equity Management Group*, No. CV 09-2901 PSG EX, 2009 WL 1310984 *2 (C.D. Ca. April 27, 2009) (defendants "are temporarily restrained and enjoined from, directly or indirectly, transferring, assigning, selling, hypothecating, changing, wasting, dissipating, converting, concealing,

opportunity to attempt to include such language in the proposed order during the course of negotiations with Defendants. The SEC was on notice that Defendants did not consider the temporary order to enjoin them from using their credit cards. *See* Cohen Decl. ¶ 3. This is not the first time the SEC has sought an injunction from the courts, and certainly it cannot be the first time the SEC has negotiated a defendant's consent to such a preliminary injunction order. *See generally, Levine v. Comcoa Ltd.*, 70 F.3d 1191, 1194 n.1 (11th Cir. 1994) (stating in the concurring opinion holding that the defendant's attorney violated a temporary restraining order, "[a]n electronic search using only the words 'Securities and Exchange Commission' and 'temporary restraining order' or 'TRO' yielded 11,541 cases. We are not suggesting that *all* these cases are similar to the instant situation, nor are we implying we have read each case. We would suggest that counsel representing the SEC are likely to have explored the requirements for effective extension of TROs from time to time."). In the *Levine* case, Senior Judge Hill implied in his concurring opinion that the SEC as an experienced government agency has a higher duty to ensure that the parties comply with restraining orders. *See* 70 F.3d at 1194. The SEC's failure in this case to propose specific language relating to a restriction on the Defendants' credit card use can only suggest that the SEC's motives in excluding it are suspect. It knew that the Defendants believed the credit cards to be excluded from the injunction, allowed them to file their consent, and now have the audacity to allege a violation. The SEC's guile actions should not be countenanced.

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encumbering, or otherwise disposing of, in any manner, any funds, assets . . .and from transferring, encumbering, dissipating, incurring charges or cash advances on any debit or credit card.").

If the Court chooses to credit the SEC's interpretation of the PI Order's language, there was no meeting of the minds and no contract was formed. The requisite mutual assent was not present to form an agreement at the time the Defendants consented to the preliminary injunction order. *See Gessin Electrical Contractors, Inc. v. 95 Wall Associates, LLC,* 74 A.D.3d 516, 903 N.Y.S. 2d 26, 28 (First Dept. 2010) ("Even if parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds, i.e., if the parties understand the contract's material terms differently."). In its best light, the Defendants were tricked into consenting to language that the SEC (as the drafter) knew would be rejected if it were not ambiguous. Since there was no meeting of the minds, the consent agreement should be vacated and an evidentiary hearing ordered.

In the *Schurr v. Austin Galleries of Ill. Inc.* case, the Second Circuit held that the consent judgment in a copyright infringement case was unenforceable because there was no meeting of the minds on the terms of the agreement. *See* 719 F.2d 571, 576. There, the parties settled the action and executed a final judgment on consent. *See Id.* at 573. At the time the consent judgment was executed, the defendant's attorney provided the plaintiff's attorney with an explanatory letter which purportedly interpreted the contractual language of the consent judgment. *See Id.* The previously negotiated and agreed upon terms of the executed consent agreement, however, had not changed in spite of the letter. *See Id.* at 575. Later, the plaintiff initiated a proceeding to hold the defendant in contempt for failing to comply with the consent judgment. *See Id.* at 574. In the contempt proceeding, the district court found that the language of the consent judgment was unambiguous on its face, but chose to incorporate the language contained in the explanatory letter. *See Id.* at 575. On appeal, the Second Circuit held that "[u]nder New York contract law, a court may only consider extrinsic evidence in contract

interpretation if the intent of the parties cannot be ascertained from the document itself because the language contained therein is ambiguous." *Id.* Having determined that the terms of the agreement were ambiguous, the court found that the letter sent with the consent judgment interpreting is terms prior to its execution rendered the consent itself an "utter nullity" even though both parties executed the agreement as drafted. *Id.* at 576. Ultimately, the court held that there was no meeting of the minds with respect to material terms of the agreement and thus the consent judgment was a "nullity and unenforceable." *Id.*

Like the consent judgment in *Schurr*, the Defendants' consent to the PI Order is null and unenforceable because there was no mutual assent by the parties. The language contained in Paragraph VII of the PI Order clearly does not enjoin the use of credit cards. But even if the Court were to determine that the terms of the PI Order are ambiguous, the Defendants understood credit cards to be excluded at the time they consented to it. The SEC apparently now claims to have intended otherwise. In the absence of mutual assent, the Defendants' consent to the PI Order is void.

Accordingly, to afford Defendants due process, the Court must vacate the preliminary injunction order and conduct an evidentiary hearing on the merits of the SEC's application for a preliminary injunction.

2. PLAINTIFF'S CLAIM THAT DEFENDANTS HAVE VIOLATED THE PRELIMINARY INJUNCTION ORDER IS WITHOUT MERIT AND MUST BE DISREGARDED

a. Plaintiff's Motion Must Be Denied Because it is Based on a Bad Faith Claim that the Defendants are Violating the Preliminary Injunction Order Simply Because There is No Carve Out for Living Expenses in this Case

The SEC's motion must be denied because it is based on an illogical conclusion that the lack of a carve out for living expenses in this case evidences a violation of the preliminary injunction order. The SEC has not provided any evidence that the Defendants violated the preliminary injunction order. Its allegations are speculative at best and made in bad faith. Indeed, the SEC must recognize that its allegations are nothing more than conjecture that would not support a contempt motion for the violation of the preliminary injunction order because it filed the instant motion to amend rather than for contempt. *See SEC v. Zubkis*, No. 97 Civ. 8086, 2003 WL 22118978, *3 (S.D.N.Y. Sept. 11, 2003) (in a civil contempt motion brought by the SEC for failure to comply with court's final judgment ordering disgorgement, the court held that the SEC would have to establish "by clear and convincing evidence that that order was not complied with."). The only reasonable conclusion one can make from the lack of a carve out in this case is that as a result of the broad scope of the asset freeze, Defendants may need to draw upon their credit cards to help pay for their basic living expenses and defense. Accordingly, the SEC's motion to amend the preliminary injunction order must be denied.

b. Plaintiff's Purported Violation of the Preliminary Injunction Order is Not a Violation Because Credit Cards Are not Assets Subject to the Preliminary Injunction Order

The SEC's improper implication that the Defendants have violated the preliminary injunction order is specious because the PI Order does not include unsecured lines of credit which do not encumber assets. As set forth *supra* in Part 1(c), the preliminary injunction order makes no mention of credit cards; rather, it enjoins Defendants from the "withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any *assets*." Docket No. 96. (emphasis added). The unsecured loan provided by a credit card is simply not an

asset. *See supra* Part 1(a). If anything, such unsecured loans are generally considered liabilities. *See generally*, *U.S. v. Walker*, 353 F.3d 130, 133 n.1 (2d Cir. 2003) (quoting the district judge who described credit card debt as a liability in affirming a restitution order in a criminal securities fraud case. The defendant's "personal financial statement revealed liabilities of approximately $40,000, primarily credit card debt."). Moreover, drawing upon an unsecured loan (use of a credit card) does not encumber or dissipate any particular asset that is subject to the PI Order. While the SEC argues a parade of horrible which ends with the SEC losing priority on a judgment, the only evidence (which is provided by the SEC) is that Defendants have been paying the minimum balance on their credit card bills. Accordingly, there is no basis for the SEC to allege that the Defendants have violated the preliminary injunction order and its motion must be denied.

3. PLAINTIFF'S REQUEST FOR AN ACCOUNTING SHOULD BE DENIED BECAUSE IT PRESENTS NO EVIDENCE SUGGESTING THAT DEFENDANTS ARE VIOLATING THE PRELIMINARY INJUNCTION AND WITHOUT ANY SUCH EVIDENCE THE COURT SHOULD NOT COMPEL THE DEFENDANTS TO SPEAK

The SEC's request that the Defendants be compelled to provide an accounting must be denied because there has been no violation of the preliminary injunction order and such accounting would force the Defendants to speak notwithstanding their invocation of their Fifth Amendment privilege against self incrimination in this case. Defendants have a right to assert their Fifth Amendment privilege in lieu of providing an accounting to the court in an SEC enforcement action. *See generally SEC. v. Roor*, No. 99 Civ. 3372(HB), 2004 WL 1933578 *9 (S.D.N.Y. Aug. 30, 2004) ("both [defendants] have refused to provide the written accounting ordered by the Court on June 7, 1999 and instead asserted their Fifth Amendment privilege. As

Second Circuit law makes clear, this is their absolute right."). Defendants have in fact asserted their Fifth Amendment Privilege against self incrimination in this case. They should not be compelled to speak and waive the privilege simply so that that the SEC can satisfy its baseless supposition of a possible violation of the PI Order.

If the SEC has reasonable suspicion, it has many discovery devices to assist it in proving a violation. Defendants have not stood in the way of legitimate discovery in this matter. Indeed, the SEC has already engaged in a campaign to subpoena financial institutions to obtain the evidence presented on this motion. It also has demonstrated that the SEC has no qualms about contacting those institutions. One can only surmise from the absence of proof on this motion that no violations have been discovered because there have been none. It is improper in that instance to shift the burden to the Defendants – especially since they have invoked the privilege against self-incrimination. Accordingly, the Court should protect the Defendants' right to assert their Fifth Amendment privilege and deny the Plaintiff's request for an accounting.

CONCLUSION

For the foregoing reasons, Defendants Timothy M. McGinn and David L. Smith respectfully request that the Court deny Plaintiff's motion in its entirety.

Dated: New York, New York
October 4, 2010

GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC

By: /s/Alison B. Cohen
Martin H. Kaplan, Esq.
Bar Roll No. 516380
Martin P. Russo, Esq.
Bar Roll No. 516389
Alison B. Cohen, Esq.
Bar Roll No. 516388
120 Wall Street
New York, New York 10005
Tel: (212) 269-1400
Bar Roll No. 516380
Attorneys for defendants Timothy M. McGinn and David L. Smith

CERTIFICATE OF SERVICE

I, Alison B. Cohen, hereby certify that on this 4th day of October 2010, I served a copy of this Opposition to Plaintiff's motion to amend the preliminary injunction by CM/ECF upon the following:

David P. Stoelting
Kevin P. McGrath
U.S. Securities & Exchange Commission
3 World Financial Center
New York, NY 10281
stoeltingd@sec.gov
mcgrathk@sec.gov
Attorneys for the plaintiff, United States Securities and Exchange Commission

William J. Brown
Phillips, Lytle Law Firm - Buffalo Office
3400 HSBC Center
Buffalo, NY 14203
wbrown@phillipslytle.com
Attorneys for the receiver

James D. Featherstonhaugh
Featherstonhaugh, Wiley Law Firm
99 Pine Street
Suite 207
Albany, NY 12207
jdf@fwc-law.com
Attorneys for defendant and relief defendant Lynn A. Smith

Jill A. Dunn
Dunn Law Firm - Albany Office
99 Pine Street
Suite 210
Albany, NY 12207
jdunn@nycap.rr.com
Attorneys for defendant and intervenor, David M. Wojeski, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/0, defendants Geoffrey R. Smith and Lauren T. Smith.

Nancy McGinn
nemcginn@yahoo.com
Appearing Pro Se

/s/Alison B. Cohen
Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, NY 10005

Attorneys for Defendants Timothy M. McGinn and David L. Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION	:	
	:	
Plaintiff,	:	
vs.	:	
	:	10 Civ. 00457 (GLS/DRH)
	:	
MCGINN, SMITH & CO., INC.	:	
McGINN, SMITH ADVISORS, LLC,	:	
McGINN, SMITH CAPITAL HOLDINGS CORP.,	:	
FIRST ADVISORY INCOME NOTES, LLC,	:	
FIRST EXCELSIOR INCOME NOTES, LLC,	:	
FIRST INDEPENDENT INCOME NOTES, LLC,	:	
THIRD ALBANY INCOME NOTES, LLC,	:	
TIMOTHY M. MCGINN, AND	:	
DAVID L. SMITH, LYNN A. SMITH,	:	
DAVID M. WOJESKI, Trustee of the David L.	:	
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
GEOFFREY R. SMITH, LAUREN T. SMITH, and	:	
NANCY MCGINN,	:	
Defendants,	:	
	:	
LYNN A. SMITH, and	:	
NANCY MCGINN,	:	
Relief Defendants, and	:	
	:	
DAVID M. WOJESKI, Trustee of the David L.	:	
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
	:	
Intervenor.	:	

DECLARATION OF ALISON B. COHEN, ESQ. IN SUPPORT OF THE OPPOSITION OF DEFENDANTS DAVID SMITH AND TIMOTHY MCGINN TO THE PLAINTIFF'S MOTION TO AMEND THE PRELIMINARY INJUNCTION ORDER

I, Alison B. Cohen, Esq., declare the following:

1. I am an associate of the firm of Gusrae, Kaplan, Bruno & Nusbaum PLLC, attorneys for defendants David L. Smith and Timothy M. McGinn (the "Defendants"). I am admitted to practice in the State of New York and the United States District Court in the Northern District of New York. I have personal knowledge of the matters set forth herein, except for those matters set forth upon information and belief.

2. On or about May 31, 2010, plaintiff the Securities and Exchange Commission (the "SEC") sent an email to Defendants' counsel stating that it had learned through a deposition of Lynn Smith that she and David Smith had been using their credit cards. The SEC further stated that Defendant Smith's use of credit cards were prohibited by the "April 20 Order" and demanded that the Defendants cease using their credit cards. A true and complete copy of the May 31, 2010 email is annexed hereto as Exhibit A.

3. I am informed by my predecessor counsel and believe that the Defendants objected to the SEC's demands and clearly stated their position that the temporary restraining order did not enjoin the Defendants from using their credit cards. It was made clear to the SEC that Defendants intended to continue to use their credit cards.

4. Nearly two months after the preliminary injunction order was filed, and approximately four months after the Defendants explicitly informed the SEC that Defendants position was that they were not enjoined from using their credit cards, the SEC raised the credit card issue with substitute counsel – Gusrae, Kaplan, Bruno & Nusbaum PLLC ("GKBN").

5. On or about September 1, 2010, the SEC sent a letter to GKBN informing it that Defendants have been using their credit cards since April 21, 2010 and claiming that such use was a violation of Paragraph XIV of the April 20, 2010 temporary restraining order. The letter

also demanded that no further charges be made on the credit cards. A true and complete copy of the September 1, 2010 letter from the SEC to GKBN is annexed hereto as Exhibit B.

6. GKBN immediately responded to the SEC and stated that Defendants' credit card use is not subject to a freeze order. A true and complete copy of the September 1, 2010 email from GKBN to the SEC is annexed hereto as Exhibit C.

7. The SEC responded that Paragraph XIV of the temporary restraining order and Paragraph VII of the preliminary injunction order restrained the Defendants' use of their credit cards because such use encumbered their assets. The SEC demanded that the Defendants cease use of their credit cards and threatened to send copies of the preliminary injunction order to the credit card companies to assert its misguided position. A true and complete copy of the SEC's September 1, 2010 email to GKBN is annexed hereto as Exhibit D.

8. GKBN responded that the Defendants' credit card use does not encumber assets because the lines of credit on those cards are unsecured. It also informed the SEC that it would further analyze the issue. A true and complete copy of the September 1, 2010 email from GKBN to the SEC is annexed hereto as Exhibit E.

9. GKBN later requested that the SEC provide it with authority on which to base its claim that unsecured loans encumber assets. A true and complete copy of the September 1, 2010 email from GKBN to the SEC is annexed hereto as Exhibit F.

10. The SEC did not provide the requested authority.

11. GKBN sent another email to the SEC requesting that it refrain from contacting the credit card companies, and advising the SEC that any such contact would constitute an actionable interference with Defendants' credit relationships with their unsecured lenders. GKBN again requested the authority on which the SEC relied to base its claim that unsecured loans encumber

assets. A true and complete copy of the September 1, 2010 email from Defendants' counsel to the SEC is annexed hereto as Exhibit G.

12. The SEC again failed to provide the requested authority.

13. On or about September 3, 2010, the SEC filed a letter with the Court requesting a pre-motion conference pursuant to Local Rule 7.1(b)(2) requesting leave to file its instant motion. *See* Docket No. 131.

14. On or about September 8, 2010, the Court held a telephonic pre-motion conference with the parties relating to the credit card issue. *See* Docket No. 140.

15. A true and complete copy of the opinion in the case captioned *Ferraro Foods, Inc. v. M/V Izzet Incekara*, No. 01 Civ. 2682 (RWS), 2001 WL 940562 (S.D.N.Y. Aug. 20, 2001) is annexed hereto as Exhibit H.

16. A true and complete copy of the opinion in the case captioned *SEC v. Zubkis*, No. 97 Civ. 8086 (JGK), 2003 WL 22118978 (S.D.N.Y. Sept. 11, 2003) is annexed hereto as Exhibit I.

17. A true and complete copy of the opinion in the case captioned *SEC v. Private Equity Management Group.*, No. CV 09-2901 (PSG) (EX), 2009 WL 1310984 (C.D. Ca. April 27, 2009) is annexed hereto as Exhibit J.

18. A true and complete copy of the opinion in the case captioned *SEC v. Roor*, No. 99 civ. 3372 (HB), 2004 WL 1933578 (S.D.N.Y. Aug. 30, 2004) is annexed hereto as Exhibit K.

19. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 4, 2010.

Alison B. Cohen

EXHIBIT A

Alison Cohen

From: Stoelting, David [StoeltingD@SEC.GOV]
Sent: Monday, May 31, 2010 7:53 PM
To: James Featherstonhaugh; Koenig, Michael L. (Shld-ALB-LT); Feyrer, Emily P. (Assoc-ALB-LT)
Cc: Mehraban, Lara; McGrath, Kevin
Subject: SEC v. McGinn Smith

Counsel – In her deposition on May 27, Lynn Smith testified that she and her husband have been using 3 credit cards since the imposition of the asset freeze on April 20: Mobil SpeedPass, MasterCard and Visa. The use of these cards violates the April 20 Order, as a result, we must ascertain the scope of credit card use since April 20. Please produce this week account statements for all credit cards used by Lynn Smith, David Smith and Timothy McGinn since April 20. All credit card usage must cease and all cards must be surrendered to counsel.

David

EXHIBIT B

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER
ROOM 400
NEW YORK, NEW YORK 10281-1022

WRITER'S DIRECT DIAL LINE
LARA SHALOV MEHRABAN
(212) 336-0591
MehrabanL@sec.gov

September 1, 2010

By E-Mail to Mrusso@gkblaw.com

Martin Russo, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400

Re: SEC v. McGinn Smith

Dear Marty:

We have received account statements and documents in response to subpoenas issued to American Express and Citibank that indicate that your clients have made charges on their personal credit cards after the April 20 Court-ordered asset freeze. In particular, Mr. McGinn has charged approximately $4,000 on a Citibank MasterCard in his name and over $500 on an American Express card in his name during the period from April 21, 2010 to July 2, 2010. Mr. Smith has charged over $5,000 on a Citibank MasterCard in his name from April 21 to June 22, 2010, including a $1000 cash advance taken on June 15, 2010. Such charges violate paragraph XIV of the TRO signed on April 20, 2010.

Please confirm that no further charges will be made on any credit cards held by your clients. Please also let us know whether arrangements have been made to pay these debts out of funds that are not subject to the asset freeze.

Regards,

Lara Shalov Mehraban

EXHIBIT C

Alison Cohen

From: Martin P. Russo [mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 3:27 PM
To: 'Mehraban, Lara'; 'Stoelting, David'; 'McGrath, Kevin'
Cc: Alison Cohen; mkaplan@gkblaw.com
Subject: RE: Please see the attached correspondence

Lara,

Please send us copies of the subpoenas you issued and the documents received. We never received copies of the subpoenas. Were they served on predecessor counsel? Were the subpoenas issued pursuant to rule 45? If so, you were obligated to provide us with a copy at the time of service. Please advise.

We will evaluate your request, but believe upon first blush that credit or loans would not be subject to a freeze order.

Best,

Marty

Martin P. Russo, Esq.
GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Mehraban, Lara [mailto:MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 3:01 PM
To: mrusso@gkblaw.com; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: Please see the attached correspondence

<<9.1.10 ltr.PDF>>

Lara Shalov Mehraban
U.S. Securities and Exchange Commission
New York Regional Office
Three World Financial Center
Suite 400
New York, NY 10281-1022
tel. 212.336.0591
fax 212.336.1348

EXHIBIT D

Alison Cohen

From: Mehraban, Lara [MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 4:47 PM
To: Martin P. Russo; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: RE: Please see the attached correspondence

Marty:

Paragraph XIV of the TRO (and paragraph VII of the PI Order) specifically prohibit defendants from encumbering their assets. The purpose of these orders with respect to the assets of McGinn and Smith is to preserve the status quo for the benefit of investors. By incurring without court approval credit card debt (that includes significant interest charges and other fees), Smith and McGinn are encumbering their assets. They are also creating creditors that did not exist as of April 20, 2010 as they have no current ability to pay these debts.

Please confirm that your clients will immediately cease making charges on all of their credit cards, and inform us how they intend to pay from assets not subject to the asset freeze all charges made on their credit cards after the April 20 order was signed (including all interest and expenses associated with these charges). If this issue is not resolved, we will be compelled to take appropriate action, including sending copies of the PI Order to the credit card companies directly.

Regards,
Lara

Lara Shalov Mehraban
U.S. Securities and Exchange Commission

From: Martin P. Russo [mailto:mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 3:27 PM
To: Mehraban, Lara; Stoelting, David; McGrath, Kevin
Cc: Alison Cohen; mkaplan@gkblaw.com
Subject: RE: Please see the attached correspondence

Lara,

Please send us copies of the subpoenas you issued and the documents received. We never received copies of the subpoenas. Were they served on predecessor counsel? Were the subpoenas issued pursuant to rule 45? If so, you were obligated to provide us with a copy at the time of service. Please advise.

We will evaluate your request, but believe upon first blush that credit or loans would not be subject to a freeze order.

Best,

Marty

Martin P. Russo, Esq.
GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Mehraban, Lara [mailto:MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 3:01 PM
To: mrusso@gkblaw.com; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: Please see the attached correspondence

<<9.1.10 ltr.PDF>>

Lara Shalov Mehraban
U.S. Securities and Exchange Commission
New York Regional Office
Three World Financial Center
Suite 400
New York, NY 10281-1022
tel. 212.336.0591
fax 212.336.1348

EXHIBIT E

Alison Cohen

From: Martin P Russo [mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 4:53 PM
To: Mehraban, Lara; Alison Cohen
Cc: Stoelting, David; McGrath, Kevin; Mr. Martin H. Kaplan
Subject: Re: Please see the attached correspondence

Lara,

Its a nice theory, but that would mean my clients could not even borrow funds to eat. Since the credit lines are unsecured, I disagree with you that they are encumbering an asset. In any event, we will analyze the issue because you have raised it.

Marty

Martin P. Russo, Esq., Gusrae Kaplan Bruno & Nusbaum, PLLC, 120 Wall Street, 11th Floor, New York, NY, 10005, (212) 269-1400 Sent via BlackBerry

---

From: "Mehraban, Lara" <MehrabanL@sec.gov>
Date: Wed, 1 Sep 2010 16:47:25 -0400
To: Martin P. Russo<mrusso@gkblaw.com>; <acohen@gkblaw.com>
Cc: Stoelting, David<StoeltingD@SEC.GOV>; McGrath, Kevin<McGrathK@SEC.GOV>
Subject: RE: Please see the attached correspondence

Marty:

Paragraph XIV of the TRO (and paragraph VII of the PI Order) specifically prohibit defendants from encumbering their assets. The purpose of these orders with respect to the assets of McGinn and Smith is to preserve the status quo for the benefit of investors. By incurring without court approval credit card debt (that includes significant interest charges and other fees), Smith and McGinn are encumbering their assets. They are also creating creditors that did not exist as of April 20, 2010 as they have no current ability to pay these debts.

Please confirm that your clients will immediately cease making charges on all of their credit cards, and inform us how they intend to pay from assets not subject to the asset freeze all charges made on their credit cards after the April 20 order was signed (including all interest and expenses associated with these charges). If this issue is not resolved, we will be compelled to take appropriate action, including sending copies of the PI Order to the credit card companies directly.

Regards,
Lara

Lara Shalov Mehraban
U.S. Securities and Exchange Commission

From: Martin P. Russo [mailto:mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 3:27 PM
To: Mehraban, Lara; Stoelting, David; McGrath, Kevin
Cc: Alison Cohen; mkaplan@gkblaw.com
Subject: RE: Please see the attached correspondence

Lara,

Please send us copies of the subpoenas you issued and the documents received. We never received copies of the subpoenas. Were they served on predecessor counsel? Were the subpoenas issued pursuant to rule 45? If so, you were obligated to provide us with a copy at the time of service. Please advise.

We will evaluate your request, but believe upon first blush that credit or loans would not be subject to a freeze order.

Best,

Marty

Martin P. Russo, Esq.
GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Mehraban, Lara [mailto:MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 3:01 PM
To: mrusso@gkblaw.com; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: Please see the attached correspondence

<<9.1.10 ltr.PDF>>

Lara Shalov Mehraban
U.S. Securities and Exchange Commission
New York Regional Office
Three World Financial Center
Suite 400
New York, NY 10281-1022
tel. 212.336.0591
fax 212.336.1348

EXHIBIT F

Alison Cohen

From: Martin P Russo [mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 4:57 PM
To: Mehraban, Lara; Alison Cohen
Cc: Stoelting, David; McGrath, Kevin; Mr. Martin H. Kaplan
Subject: Re: Please see the attached correspondence

Also, please provide me with any authority that you may have which supports your theory that unsecured loans encumber assets.

Martin P. Russo, Esq., Gusrae Kaplan Bruno & Nusbaum, PLLC, 120 Wall Street, 11th Floor, New York, NY, 10005, (212) 269-1400 Sent via BlackBerry

---

From: "Martin P Russo" <mrusso@gkblaw.com>
Date: Wed, 1 Sep 2010 20:53:04 +0000
To: Mehraban, Lara<MehrabanL@sec.gov>; Alison Cohen<acohen@gkblaw.com>
ReplyTo: mrusso@gkblaw.com
Cc: Stoelting, David<StoeltingD@SEC.GOV>; McGrath, Kevin<McGrathK@SEC.GOV>; Mr. Martin H. Kaplan<mkaplan@gkblaw.com>
Subject: Re: Please see the attached correspondence

Lara,

Its a nice theory, but that would mean my clients could not even borrow funds to eat. Since the credit lines are unsecured, I disagree with you that they are encumbering an asset. In any event, we will analyze the issue because you have raised it.

Marty

Martin P. Russo, Esq., Gusrae Kaplan Bruno & Nusbaum, PLLC, 120 Wall Street, 11th Floor, New York, NY, 10005, (212) 269-1400 Sent via BlackBerry

---

From: "Mehraban, Lara" <MehrabanL@sec.gov>
Date: Wed, 1 Sep 2010 16:47:25 -0400
To: Martin P. Russo<mrusso@gkblaw.com>; <acohen@gkblaw.com>
Cc: Stoelting, David<StoeltingD@SEC.GOV>; McGrath, Kevin<McGrathK@SEC.GOV>
Subject: RE: Please see the attached correspondence

Marty:

Paragraph XIV of the TRO (and paragraph VII of the PI Order) specifically prohibit defendants from encumbering their assets. The purpose of these orders with respect to the assets of McGinn and Smith is to preserve the status quo for the benefit of investors. By incurring without court approval credit card debt (that includes significant interest charges and other fees), Smith and McGinn are encumbering their assets. They are also creating creditors that did not exist as of April 20, 2010 as they have no current ability to pay these debts.

Please confirm that your clients will immediately cease making charges on all of their credit cards, and inform us how they intend to pay from assets not subject to the asset freeze all charges made on their credit cards after the April 20

order was signed (including all interest and expenses associated with these charges). If this issue is not resolved, we will be compelled to take appropriate action, including sending copies of the PI Order to the credit card companies directly.

Regards,
Lara

Lara Shalov Mehraban
U.S. Securities and Exchange Commission

From: Martin P. Russo [mailto:mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 3:27 PM
To: Mehraban, Lara; Stoelting, David; McGrath, Kevin
Cc: Alison Cohen; mkaplan@gkblaw.com
Subject: RE: Please see the attached correspondence

Lara,

Please send us copies of the subpoenas you issued and the documents received. We never received copies of the subpoenas. Were they served on predecessor counsel? Were the subpoenas issued pursuant to rule 45? If so, you were obligated to provide us with a copy at the time of service. Please advise.

We will evaluate your request, but believe upon first blush that credit or loans would not be subject to a freeze order.

Best,

Marty

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120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Mehraban, Lara [mailto:MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 3:01 PM
To: mrusso@gkblaw.com; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: Please see the attached correspondence

<<9.1.10 ltr.PDF>>

Lara Shalov Mehraban
U.S. Securities and Exchange Commission

New York Regional Office
Three World Financial Center
Suite 400
New York, NY 10281-1022
tel. 212.336.0591
fax 212.336.1348

EXHIBIT G

Alison Cohen

From: Martin P. Russo [mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 5:38 PM
To: 'Mehraban, Lara'; 'Stoelting, David'; 'McGrath, Kevin'
Cc: acohen@gkblaw.com; mkaplan@gkblaw.com
Subject: RE: Please see the attached correspondence

Lara,

I have re-read your email and urge you not to interfere with my clients' credit relationships. If you do so, we have been instructed that our clients intend to pursue their remedies to the fullest extent of the law. We will research the issue. If you have authority, please provide it now. Please cease and desist from any contact that might interfere with my client's contractual relationships.

Best,

marty

Martin P. Russo, Esq.
GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Mehraban, Lara [mailto:MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 4:47 PM
To: Martin P. Russo; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: RE: Please see the attached correspondence

Marty:

Paragraph XIV of the TRO (and paragraph VII of the PI Order) specifically prohibit defendants from encumbering their assets. The purpose of these orders with respect to the assets of McGinn and Smith is to preserve the status quo for the benefit of investors. By incurring without court approval credit card debt (that includes significant interest charges and other fees), Smith and McGinn are encumbering their assets. They are also creating creditors that did not exist as of April 20, 2010 as they have no current ability to pay these debts.

Please confirm that your clients will immediately cease making charges on all of their credit cards, and inform us how they intend to pay from assets not subject to the asset freeze all charges made on their credit cards after the April 20 order was signed (including all interest and expenses associated with these charges). If this issue is not resolved, we will be compelled to take appropriate action, including sending copies of the PI Order to the credit card companies directly.

Regards,
Lara

Lara Shalov Mehraban
U.S. Securities and Exchange Commission

From: Martin P. Russo [mailto:mrusso@gkblaw.com]
Sent: Wednesday, September 01, 2010 3:27 PM
To: Mehraban, Lara; Stoelting, David; McGrath, Kevin
Cc: Alison Cohen; mkaplan@gkblaw.com
Subject: RE: Please see the attached correspondence

Lara,

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We will evaluate your request, but believe upon first blush that credit or loans would not be subject to a freeze order.

Best,

Marty

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GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Mehraban, Lara [mailto:MehrabanL@sec.gov]
Sent: Wednesday, September 01, 2010 3:01 PM
To: mrusso@gkblaw.com; acohen@gkblaw.com
Cc: Stoelting, David; McGrath, Kevin
Subject: Please see the attached correspondence

<<9.1.10 ltr.PDF>>

Lara Shalov Mehraban
U.S. Securities and Exchange Commission
New York Regional Office
Three World Financial Center
Suite 400
New York, NY 10281-1022
tel. 212.336.0591
fax 212.336.1348

your computer system. The sender of this email does not intend to waive any privileges that may apply to the contents of this email or any attachments to it.

EXHIBIT H

Not Reported in F.Supp.2d, 2001 WL 940562 (S.D.N.Y.), 2001 A.M.C. 2940
(Cite as: 2001 WL 940562 (S.D.N.Y.))

C

United States District Court, S.D. New York.
FERRARO FOODS, INC., Plaintiff,
v.
M/V IZZET INCEKARA, her engines, boilers, etc., Asil Gida Ve Kimya Sanayi Ve Ticaret A.S., D.B. Deniz Nakliyati T.A.S., and D.B. Turkish Cargo Lines,
and
M/V CUMHURIYET 75, her engines, boilers, etc., Pinat Gida Sanayi Ve Ticaret A.S., D.B. Deniz Nakliyati T.A.S., and D.B. Turkish Cargo Lines, Defendants.
No. 01 CIV. 2682(RWS).

Aug. 20, 2001.

Hill Rivkins & Hayden, New York, By Charles A. Johnson, Esq., Of Counsel, for Plaintiff.

Lyons, Skoufalos, Proios & Flood, New York, By Kirk M.H. Lyons, Esq., Of Counsel, for Defendants Asil Gida Ve Kimya Sanayi Ve Ticaret A.S., Pinat Gida Sanayi Ve Ticaret A.S., D.B. Deniz Nakliyati T.A.S., D.B. Turkish Cargo Lines.

OPINION

SWEET, J.

***1** In this maritime action to recover for an international shipment of rotten tomatoes, defendants Asil Gida Ve Kimya Sanayi Ve Ticaret A.S., Pinat Gida Sanayi Ve Ticaret A.S., D.B. Deniz Nakliyati T.A.S. and D.B. Turkish Cargo Lines (collectively "the defendants") have moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) based upon the forum selection clause in the bills of lading, which specifies that the dispute shall be heard in Turkey. Plaintiff Ferraro Foods, Inc. ("Ferraro") opposes the motion on the grounds that defendants waived their right to invoke the forum selection clause when they stipulated to transfer this action here from the District of New Jersey pursuant to 28 U.S.C. § 1404(a). For the reasons set forth below, the motion will be granted and the action dismissed.

The Parties

Plaintiff Ferraro is a corporation organized and existing under the laws of New Jersey.

The defendant corporations each have offices in both Turkey and New Jersey.

Background

This action seeks to recover approximately $140,000 as a result of salt water damage to almost 63,000 cartons of peeled tomatoes shipped from Salerno, Italy to New York, New York on defendant ships MV Cumhuriet and Izzet Incekara in October and November of 1999. The bills of lading for these shipments specified that:

Any dispute arising under this Bill of Lading to be decided in Turkey by commercial Courts of Istanbul to the exclusion of the jurisdiction of the Courts of any other country and the decision of such Turkish court shall be deemed binding on the Carrier, shipper, receiver and/or owner of the goods.

(Lyons Decl. Ex. E, Art. 2.)

Notwithstanding this forum selection clause, Ferraro filed this action in the District of New Jersey on October 25, 2000, seeking remedies under the U.S. Carriage of Goods by Sea Act, 46 U.S.C. § 1300, et seq. ("COGSA").

In facsimile correspondence to Ferraro dated November 27, 2000 and transmitted early the next day, defendants noted the Turkey forum clause in the bills of lading and proposed that the action be transferred to the Southern District of New York, while "retaining all defenses including the forum

clause." (Lyons Reply Decl. Ex. A at 2.)

Meanwhile, defendants filed an answer on February 16, 2001, which raised several affirmative defenses, including lack of personal jurisdiction and subject matter jurisdiction, improper venue, forum non conveniens, and that the action must be dismissed and heard in Turkey pursuant to the terms of the bills of lading. (Lyons Decl. Ex. B ¶¶ 18, 20, 24, 28.)

With Ferraro's consent, defendants drafted a stipulation to transfer the action to this District and submitted it to the court in New Jersey. Invoking 28 U.S.C. § 1404(a), the four-line stipulation justified the transfer as "for the convenience of the parties and witnesses and in the interests of justice." (Lyons Decl. Ex. C.) The New Jersey court endorsed the stipulation on March 8, 2001, and the action was filed here on March 29, 2001.

***2** On June 1, 2001, before any discovery had been conducted, defendants moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) under the forum selection clause. Ferraro opposed the motion on the grounds that the defendants waived the right to invoke the clause by agreeing to transfer the action from New Jersey to the Southern District of New York. The motion was deemed fully submitted after oral argument on June 27, 2001.

Discussion

In short, this motion asks whether, in an action initially filed in a domestic forum but governed by a mandatory foreign forum selection clause, a defendant who has timely raised the existence of the clause as an affirmative defense and then stipulated to transfer to a second domestic forum without explicitly waiving or preserving the foreign forum clause, has thereby waived that defense. Neither party has cited a case directly addressing the legal effect of this rather unique factual scenario.

I. Enforceability of Forum Selection Clauses

Forum selection clauses are presumptively valid unless the party resisting the effect of the clause demonstrates that "enforcement is ... 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972). *See also Roby v. Corporation of Lloyd's,* 996 F.2d 1353, 1362-63 (2d Cir.1993). The Supreme Court has recently extended this presumption to forum selection clauses in bills of lading governed by COGSA unless the "substantive law to be applied [by the chosen forum] would reduce the carrier's obligations to the cargo on or below what COGSA guarantees." *Vimar Seguros v. Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528 (1995).

As a forum selection clause is prima facie valid, the party opposing its operation has the burden of proving that it should not be enforced. *See Reed & Barton Corp. v. M.V. Tokio Exp.,* No. 98 CIV. 1079(LAP), 1999 WL 92608, *2 (S.D.N.Y. Feb. 22, 1999). Even where the forum selected is a foreign one, " 'the party claiming [unfairness] should bear a heavy burden of proof." ' *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 592 (1991) (quoting *Bremen,* 407 U.S. at 17).

Despite bearing the burden of proof, the "party seeking to avoid enforcement of [a forum selection clause is] entitled to have the facts viewed in the light most favorable to it, and no disputed fact should be resolved against that party until it has had an opportunity to be heard." *New Moon Shipping Co., Ltd., v. Man B & W Diesel Ag,* 121 F.3d 24, 29 (2d Cir.1997).

The forum selection clause in Article 2 of the bills of lading in this action specifies that:

Any dispute arising under this Bill of Lading to be decided in Turkey by the Commercial Courts of Istanbul to the exclusion of the jurisdiction of the Courts of any other country and the decision of such Turkish Court shall be deemed binding on the Carrier, the shipper, receiver and/or owner of the goods.

(Lyons Decl. Ex. E, Art. 2.) Because it provides for jurisdiction in a specific Turkish court and specifically excludes any other court, the clause is mandatory rather than permissive, and should be enforced unless Ferraro makes a strong showing that an exception exists. *See John Boutari and Son, Wines and Spirits, S.A. v. Attiki Importers and Distributors Inc.,* 22 F.3d 51, 53 (2d Cir.1994). Specifically, a plaintiff may defeat a mandatory forum selection clause only by clearly demonstrating that it is unreasonable or invalid, *see M/S Bremen,* 407 U.S. at 15, likely to reduce the carrier's obligations, *see Sky Reefer,* 515 U.S. 528, or waived, *see In re Rationis Enterprises, Inc. of Panama,* No. 97 Civ. 9052, 1999 WL 6364 (S.D.N.Y. Jan. 7, 1999), *appeal dismissed,* 201 F.3d 432 (2d Cir.1999); *Avant Petroleum, Inc. v. Bangue Paribas (Two Cases),* 652 F.Supp. 542, 545 (S.D.N.Y.1987).

***3** Ferraro has not argued that the forum selection clause is unreasonable, invalid, or likely to reduce the carrier's legal obligations. Rather, Ferraro argues only that it would not have agreed to the transfer "if defendants' counsel gave any indication that he intended to file a motion to dismiss the case," and maintains that the defendants waived the contractual forum selection clause by "disingenuous[ly]" seeking to the transfer. (Pltf. Br. at 5.)

The Second Circuit has alternately analyzed motions to dismiss forum selection clauses under the competing rubrics of improper venue/forum non conveniens and contract law, *compare Jones v. Weibrecht,* 901 F.2d 17, 19 (2d Cir.1990) (affirming district court's dismissal of complaint for improper venue due to the forum selection clause) *with Bense v. Interstate Battery System of America,* 683 F.2d 718, 721 (2d Cir.1982) (viewing forum selection clause under contract law as "part of the bargain into which [defendant] freely entered."), and has declined to determine which body of law lower courts should apply, *see New Moon,* 131 F.3d at 28 ("no consensus developed as to the proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause... [T]here is no easy answer to the enforcement procedure question because there is no existing mechanism with which forum selection enforcement is a perfect fit."). *See also Marra v. Papandreou,* 216 F.3d 1119, 1123 (D.C.Cir.2000) ("while the forum-selection clause defense is a creature that has evaded precise classification, most courts and commentators have characterized it as a venue objection analogous to a forum non conveniens motion or motion for transfer of venue under 28 U.S.C. § 1404(a).").

In light of this procedural ambiguity, the motion will be addressed under both the venue and contract theories.[FN1] However, because the forum selection clause in this action is mandatory, the heightened *Bremen* standard of proof will apply.

> FN1. It should be noted that although courts have typically analyzed such motions as questions of venue rather than forum non conveniens, the latter approach is more appropriate here because the forum selection clause calls for suit in a foreign jurisdiction. *See Guidi v. Inter-Continental Hotels Corp.,* 224 F.3d 142, 148 (2d Cir.2000) (noting that forum non conveniens, not § 1404(a), is appropriate analytical mechanism where alternate forum is a foreign country). Although Ferraro maintains that a dismissal for forum non conveniens is barred after a defendant has successfully moved for transfer, it cites only Fifth Circuit law, which conflicts with the law of this Circuit. In *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.,* 145 F.3d 505 (2d Cir.1998), the Second Circuit held that district courts need not engage in any forum non conveniens analysis if they conclude that a mandatory foreign forum selection clause is binding and enforceable under the *Bremen* standard. 145 F.3d at 509-11. Because the parties agree that the forum selection clause is enforceable, no more forum non conveniens analysis is ne-

cessary. While the venue theory is perhaps not applicable under this reasoning, it has been briefed by the parties and therefore will be addressed here.

II. Improper Venue Theory

An objection to venue may be waived under Fed.R.Civ.P. Rule 8(c) or 12(h) by failing to raise it in an answer or initial motion to dismiss. [FN2] *See Satchell v. Dilworth,* 745 F.2d 781, 784 (2d Cir.1984) (venue may be waived under Rule 8(c) if not pleaded as affirmative defense); *Avant Petroleum, Inc. v. Bangue Paribas (Two Cases),* 652 F.Supp. 542, 545 (S.D.N.Y.1987) (finding waiver of venue defense under forum selection clause because not timely invoked as per Rule 12(h)). However, the defendants timely specified venue, forum non conveniens, and the bills of lading as affirmative defenses in their answer prior to the transfer, they have not waived the claim pursuant to Rules 8(c) or 12(h).

FN2. Rule 12(h)(1) provides: "(h) Waiver or Preservation of Certain Defenses. (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waiver (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

The improper venue defense may also be waived by implication when a party takes actions that are inconsistent with it. *See American Motorists Ins. Co. v. Roller Bearing Co. of America, Inc.,* No. 99 CIV 9133 AGS, 2001 WL 170658, * (S.D.N.Y. Feb. 21, 2001) ("A court may also interpret the defendant's pre-trial conduct as waiving its right to challenge venue."); *In re Rationis Enterprises, Inc. of Panama,* No. 97 Civ. 9052, 1999 WL 6364 (S.D.N.Y. Jan. 7, 1999) (finding forum selection clause waived where plaintiff had taken actions inconsistent with it); *Merz v. Hemmerle,* 90 F.R.D. 566, 568 (E.D.N.Y.1981) (citing *Fairhope Fabrics, Inc. v. Mohawk Carpet Mills, Inc.,* 140 F.Supp. 313 (D.Mass.1956) (improper venue defense waived where defendant's conduct in defending action indicated venue was not inconvenient)); *Sherman v. Moore,* 86 F.R .D. 471, 473 (S.D.N.Y.1980) ("It is clear that a party may waive its objection to venue by its pre-trial conduct") (quoting *Altman v. Liberty Equities Corp.,* 322 F.Supp. 377, 378-79 (S.D.N.Y.1977) (the federal "Rules are not inclusive of the circumstances in which a defense will be deemed waived. Rule 12(h) simply defines the outer and absolute limits of timeliness. It does not preclude waiver by implication.")).

***4** At the same time, because forum selection clauses may result in a waiver of substantive and procedural rights, it would be unfair to infer such a significant waiver absent a clear indication of intent through a party's actions. *See General Instrument Corp. v. Tie Mfg ., Inc.,* 517 F.Supp. 1231, 1235 (S.D.N.Y.1981).[FN3]

FN3. It should be noted here that the actions of plaintiffs, as well as defendants, may waive the forum selection clause, and that plaintiffs have done so by filing in the District of New Jersey rather than in Turkey. *See, e.g., Unity Creations, Inc. v. Trafcon Industries, Inc.,* 137 F.Supp.2d 108, 111 (E.D.N.Y.2001) (finding that plaintiff waived right to invoke forum selection clause by filing in non-selected forum).

Whether a party has impliedly waived objections to venue is a fact-intensive inquiry. *See Krape,* 194 F.R.D. at 86 (citing *Sherman,* 86 F.R.D. at 472). Courts have found implied waiver of venue where a party has repeatedly represented that venue is appropriate, *see Orb Factory Ltd. v. Design Science Toys,* 6 F.Supp.2d 203, 206-07 (S.D.N.Y.1998) or actively pursued substantive motions, *see Altman,*

322 F.Supp. at 378 ((collecting cases). In contrast, no waiver has been found where parties merely participated in pretrial motions, *see id.,* moved to dismiss after discovery has been completed, or where the opposing party was not prejudiced by dismissal, *see Sherman,* 86 F.R.D. at 473-74 (citing cases).

Although the parties agree that defendants initiated the idea of the transfer, neither party briefed the merits of transfer, submitted evidence in support thereof, or presented oral argument to the New Jersey court. Instead, defendants prepared a barebones stipulation that Ferraro signed and the court summarily endorsed without further inquiry. Transfer was effected pursuant to 28 U.S.C. § 1404(a) "for the convenience of the parties and witnesses and in the interests of justice." (Lyons Decl. Ex. C.) None of the other § 1404(a) factors or relevant contractual provisions were either raised or addressed, and the stipulation neither explicitly waived nor preserved the forum selection clause defense. In other words, the existence and legal implications of the forum selection clause were not litigated or even considered before the action was transferred to this District.

While the defendants' initiation of and acquiescence to the transfer may appear inconsistent with their attempt to dismiss this action under the forum selection clause, the evidence presented in fact establishes that the defendants notified Ferraro of their intention to pursue the forum selection clause matter at the same time they raised the subject of transfer to this District. (*See* Lyons Reply Decl. Ex. A.) Moreover, defendants' answer, which raised the forum selection clause defense, was filed after the parties agreed to seek a transfer, but before it was entered. The timing of these filings, and defendants' communication with Ferraro immediately following the transfer (Johnson Aff. Ex. E), suggest that the defendants had every intent to preserve their right to move to dismiss this action under the forum selection clause.

Without a showing that Ferraro has actually been prejudiced, the defendants' alleged "disingenuousness" is insufficient to establish a waiver of the improper venue defense. *See Shaw v. United States,* 422 F.Supp. 339, 341 (S.D.N.Y.1976) (finding no waiver of improper venue defense where plaintiffs did not demonstrate prejudice); *cf. Interstate Securities Corp. v. Siegel,* 676 F.Supp. 54, 57 (E.D.N.Y.1988) (although delay in invoking contractual arbitration clause after filing answer and participating in discovery may have been "disingenuous," defendant's right to arbitrate was not waived). Nor does mere delay prejudice the plaintiff. *See American Motorists,* 2001 WL 170658, at *2.

***5** In *Krape v. PDK Labs, Inc.,* 194 F.R.D. 82 (S.D.N.Y.1999), the Honorable Robert L. Carter found waiver where the defendant had not filed an affirmative venue defense, repeatedly represented to the transferor court that the Southern District of New York was the proper venue, and had failed to object to transfer or move to dismiss for improper venue of the transferee court until approximately two years after the action was filed. Here, in contrast, defendants specifically raised the forum selection clause defense in their answer before the case was transferred here from New Jersey, and stipulated to transfer the case here without having to make any explicit waiver of the defense.

Similarly, the holding in *Altman,* that "the failure to raise a venue objection within the context of a section 1404(a) motion constitutes waiver of that particular objection," 322 F.Supp. 377, is not dispositive. Unlike the defendants in this case, the defendant bank in *Altman* had not yet filed an answer or affirmative defenses when it joined another party's transfer motion. Moreover, the Altman court had already denied a § 1404(a) motion to transfer when the defendant moved to dismiss for improper venue. 322 F.Supp. at 378. Under those circumstances, the *Altman* court found that "the propriety of venue is a significant consideration in deciding a section 1404(a) motion... Therefore, the failure to assert defective venue effectively concedes it." 322 F.Supp. at 379. Although it may have been preferable to ad-

dress the venue question before (or contemporaneously with) the transfer motion in this case, the New Jersey court did not require any litigation of venue before approving the stipulation. While this lapse appears to violate the law of the Third Circuit, which reviews New Jersey district court rulings, *see White v. Abco Engineering Corp.,* 199 F.3d 140, 144 (3d Cir.1999) ("inter-district transfer by stipulation is inappropriate"), this court is not in a position to review another court's decision to transfer, *see Starnes v. McGuire,* 512 F.2d 918, 924 (D.C.Cir.1974). In any case, the defendants had clearly raised the venue defense in their answer, which was timely filed before the transfer stipulation was entered by the transferor court. It cannot be said that the defendants in this case "fail[ed] to assert defective venue."

Ferraro next turns to the language of the transfer statute in support of its argument that defendants have consented to venue in this District and are barred from moving to dismiss for forum non conveniens. Title 28, United States Code section 1404(a) specifies that transfers may be effected to any district in which the action "might have been brought." Because this phrase has been interpreted to mean that a court that receives a case transferred under § 1404(a) has proper venue, according to Ferraro's syllogism, the defendants' § 1404(a) transfer stipulation effectively waive objections to venue and personal jurisdiction in this district. (Pltf. Br. at 10-11.)

***6** However, this logic merely presumes its result. That a transfer has been effected does not establish that the action "might have been brought" in the transferee court, particularly where, as here, the transferor court has not analyzed this requirement of § 1404(a) before approving the transfer.

In *Hoffman v. Blaski,* 363 U.S. 335, 353, 80 S.Ct. 1084, 1095 (1960), the Supreme Court held that the phrase "where it might have been brought" must be determined as of the outset of the litigation, without regard to the defendant's subsequent consent to jurisdiction, even if explicit. *See also Invivo Research, Inc. v. Magnetic Resonance Equipment Corp.,* 119 F.Supp.2d 433, 437 (S.D.N .Y.2000); *Viacom Int'l, Inc. v. Melvin Simon Prods., Inc.,* 774 F.Supp. 858, 868 (S.D.N.Y.1991).

The existence of an enforceable forum selection clause in a contract is "a significant factor that figures centrally in the district court's calculus" under § 1404(a). *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29-30, 108 S.Ct. 2239, 2244, 101 L.Ed.2d 22 (1988). *See also Ramada Franchise Systems, Inc. v. Cusack Development, Inc.,* No. 96 Civ. 8085(MGC), 97 WL 304885, *2 (S.D.N .Y. June 6, 1997). In addition, an action "might have been brought" in a forum if the transferee court would have had personal jurisdiction over the defendant and if venue would have been proper there at the time the action was commenced, in addition to other factors that have not been briefed here. *See Hoffman,* 363 U.S. at 344, 80 S.Ct. at 1090; *NBA Properties, Inc. v. Salvino,* Inc., 99 Civ. 11799(AGS), 2000 WL 323257, at *3 n. 1 (S.D.N.Y. Mar. 27, 2000).

As the parties have not briefed any of these factors, it is impossible to ascertain whether the action "might have been brought" in this District initially. It is sufficient to note that the mere fact that the action was transferred here does not dictate that it "might have been brought" here initially, particularly given that the transfer was effected pursuant to stipulation rather than a careful weighing of the § 1404(a) factors. *See, e.g., Roba v. United States,* 604 F.2d 215, 219 & n. 6 (2d Cir.1979) (noting that action could not have been brought in transferee district because it lacked personal jurisdiction).

In sum, Ferraro has failed to demonstrate that the defendants waived the venue defense under the heightened standard applicable to mandatory forum selection clauses under *Bremen.*

III. Contract Theory

"A fortiori, a party with a contractual right to block

litigation in a particular forum can waive any rights the contract confers on it." *Licensed Practical Nurses, Technicians and Health Care Workers of New York, Inc. v. Ulysses Cruises, Inc.,* 131 F.Supp.2d 393, 410 (S.D.N.Y.2000). Ferraro contends that the stipulation to transfer contractually waived the forum selection clause.[FN4] The heightened *Bremen* standard applies as well to this approach to the analysis, because the forum selection clause is mandatory.

> FN4. Ferraro's argument that waiver of the mandatory forum selection clause was an essential element of the stipulation to transfer (Pltf. Br. at 8.) actually proves that the contract theory is inapplicable to this case. Although the stipulation invoked § 1404(a) and an explanation for the transfer, it did not make any reference to the effect of transfer on the substantive or procedural rights of the parties-most importantly the defendants' forum selection clause defense. Under Ferraro's theory, then, the stipulation lacked an essential term, which renders a contract unenforceable, "because an enforceable contract requires mutual assent to the essential terms and conditions thereof." *Schurr v. Austin Galleries of Illinois, Inc.,* 719 F.2d 575, 575 (2d Cir.1983). Absent a meeting of the minds on what Ferraro contends was an essential term, the stipulation is not enforceable as a contract, but only as a court order of transfer.

*7 Ferraro correctly argues that stipulations are often compared to contracts, *see Harvis Trien & Beck, P.C. v. Federal Home Loan Mortgage Corp. (In re Blackwood Assocs., L.P.),* 153 F.3d 61, 66 (2d Cir.1998), and that ambiguity in contract language is generally construed against the drafter, *Kerin v. U.S. Postal Service,* 116 F.3d 988, 992 (2d Cir.1997). However, the ultimate question in contract interpretation is the intent of the parties. *See Hugo Boss Fashions, Inc. v. Federal Ins. Co.,* 252 F.3d 608, 627 (2d Cir.2001). Where, as here, a stipulation is ambiguous, courts may to turn to extrinsic evidence to glean the parties' intent. *See Scholastic v. Harris,* 259 F.3d 73, 2001 WL 855516, *5 (2d Cir. July 25, 2001).

Three pieces of evidence belie the notion that the defendants intended to waive their mandatory foreign forum defense when they entered into the transfer stipulation. First, the communication in which the defendants originally raised the possibility of transfer specifically noted that the defendants would be "retaining all defenses including the forum clause." (Lyons Reply Decl. Ex. A.) Moreover, the defendants filed their answer-which included the affirmative defenses of venue, forum non conveniens, and the mandatory forum selection clause-*after* raising the transfer issue with Ferraro during the early stage of this litigation. Finally, the defendants sought to have Ferraro voluntarily dismiss the action for refiling in Turkey immediately after the transfer was effected. (Johnson Aff. Ex. E.)

Contracts may be modified by conduct or subsequent writing only upon mutual assent of the parties. *See Bensen v. American Ultramar Ltd.,* No. 92 Civ. 4420(KMW) (NRB), 1997 WL 66780, *7 (S.D.N.Y. Feb. 14, 1997). Ferraro has failed to make a strong showing that the defendants intended to waive their forum defense by stipulating to transfer.

Conclusion

Under either a venue or contract analysis, defendants did not waive the forum selection clause defense by agreeing to transfer the case to this Court. As Ferraro has not argued that the clause itself is unreasonable or that the contracted-for Turkish forum is either unavailable or lowers the defendants' legal obligations, the defendants' motion to dismiss is granted on the condition that the defendants submit to the jurisdiction of the Commercial Courts of Istanbul.

It is so ordered.

S.D.N.Y.,2001.
Ferraro Foods, Inc. v. M/V IZZET INCEKARA
Not Reported in F.Supp.2d, 2001 WL 940562
(S.D.N.Y.), 2001 A.M.C. 2940

END OF DOCUMENT

EXHIBIT I

Not Reported in F.Supp.2d, 2003 WL 22118978 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,506
(Cite as: 2003 WL 22118978 (S.D.N.Y.))

H

United States District Court,
S.D. New York.
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
Vladislav Steven ZUBKIS, et al., Defendants.
No. 97 Civ. 8086(JGK).

Sept. 11, 2003.

Securities and Exchange Commission (SEC) brought action alleging that corporate officer alleging violation of federal securities law in connection with sale and distribution of securities. On motion by SEC to find officer in civil contempt for failure to comply with court's prior final judgment ordering disgorgement, the District Court, Koeltl, J., held that: (1) officer was in civil contempt of court's prior order; (2) officer was required to turn over all of his stock in corporation to receiver to satisfy prior disgorgement order; (3) enforcement of disgorgement order required freeze of bank accounts of corporation.

Motion granted.

West Headnotes

[1] Securities Regulation 349B ⚿149

349B Securities Regulation
349BI Federal Regulation
349BI(E) Remedies
349BI(E)1 In General
349Bk149 k. Relief Granted in General. Most Cited Cases
Corporate officer was in civil contempt of court's prior order of disgorgement, since officer did not pay anything to satisfy ordered disgorgement and he had ability to pay portion of order.

[2] Securities Regulation 349B ⚿150.1

349B Securities Regulation
349BI Federal Regulation
349BI(E) Remedies
349BI(E)1 In General
349Bk150 Insiders' Profits, Recovery of
349Bk150.1 k. In General. Most Cited Cases
Corporate officer was required to turn over all of his stock in corporation to receiver to satisfy prior disgorgement order, since value of stock did not exceed amount of disgorgement, and turn over was necessary to effectuate compliance with order given officer's refusal over two year period to pay anything toward satisfaction of that order.

[3] Securities Regulation 349B ⚿150.1

349B Securities Regulation
349BI Federal Regulation
349BI(E) Remedies
349BI(E)1 In General
349Bk150 Insiders' Profits, Recovery of
349Bk150.1 k. In General. Most Cited Cases
Enforcement of disgorgement order required freeze of bank accounts of corporation, since civil contemnor had control of corporation, contemnor used those accounts for his personal use, freeze was necessary to ensure that contemnor had not used corporation to shield assets that should have been used to satisfy ordered disgorgement and to resolve any legitimate competing claims to those assets, and court was prepared to make provision in freeze order for legitimate business expenses of corporation, particularly for costs of defense.

OPINION AND ORDER

KOELTL, J.

***1** The plaintiff, the Securities and Exchange Commission ("Commission" or "S.E.C."), seeks an or-

Not Reported in F.Supp.2d, 2003 WL 22118978 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,506
(Cite as: 2003 WL 22118978 (S.D.N.Y.))

der holding the defendant, Vladislav Steven Zubkis ("Zubkis") in contempt of the Court's June 21, 2001 Final Judgment of Permanent Injunctive and other Relief, including an order of disgorgement in the amount of $21,578,731.39, filed on June 29, 2001. The Commission originally sought a temporary restraining order ("TRO"), and after a hearing on August 11, 2003, the Commission's motion for a TRO was granted. As part of the TRO, the Court ordered a freeze on specific assets of International Brands, Inc. ("IBI")-specifically a yacht and certain escrow accounts. The court appointed a receiver to take control of the yacht. After a hearing on August 26, 2003, the TRO was extended until September 10, 2003. Expedited discovery was authorized and conducted.

Following discovery, the Commission requests an order that would: (1) require Zubkis to turn over the yacht, the escrow accounts, as well as bank accounts of Platinum Management Investments Corp. ("Platinum") and International Brands, LP ("IBI LP") to the court-appointed receiver for liquidation; (2) extend the current asset freeze order regarding Zubkis's remaining assets; (3) extend the Commission's authority to take expedited discovery regarding Zubkis's remaining assets; (4) continue the receiver appointment; and (5) order Zubkis to cease all *de facto* and official officer and director activities regarding IBI. A final hearing on the preliminary injunction was held on September 8, 2003. After reviewing the arguments made and the evidence submitted, as well as the numerous submissions of the parties, the Court makes the following findings of fact and conclusions of law.

I.

In February 2000, this Court granted the Commission's motion for partial summary judgment finding Zubkis had committed numerous violations of the federal securities laws. *S.E.C. v. Zubkis,* 2000 WL 218393 (S.D.N.Y. Feb.23, 2000). The Court entered a Final Judgment against Zubkis on June 29, 2001. The judgment enjoined him from violating federal securities laws, barred him from serving as an officer or director of a public company, and ordered him to disgorge his ill-gotten gains and prejudgment interest within thirty days of the judgment. The disgorgement order totaled $21,578,731.39. That judgment was affirmed by the Court of Appeals for the Second Circuit on May 20, 2002.

Zubkis has not yet paid any of the ordered disgorgement. On July 16, 2003 he resigned from his officer and director positions at IBI.

The yacht frozen by the TRO and turned over to the receiver is an eighty-seven foot, steel-hulled yacht named "Ligeia III," and it is berthed in San Diego, California. (Receiver's Interim Report dated Aug. 25, 2003 ("Receiver's Report"), at 1.) The yacht has a cloudy history, but since at least December 1999, the yacht has been held by corporations controlled by Zubkis. On December 29, 1999, the yacht was transferred by its owner, Christopher Renwick, to Platinum Management Investments Corp. ("Platinum"). Zubkis accepted the yacht on behalf of Platinum as its attorney-in-fact. (Deposition of Vladislav Steven Zubkis dated August 29, 2003 ("Zubkis Dep."), at 93.) The yacht was Platinum's sole asset, as it is now. (*Id.* at 104.) In March 2000, all of Platinum's stock was acquired by Kona Beverage Company, Inc. ("Kona"). (*Id.* at 95-96; Fourth Supplemental Declaration of John J. Graubard dated Sept. 3, 2003 ("Fourth Graubard Decl.") ¶ 6 and Ex. D.) Kona was in turn owned by Z3 Capital, and Zubkis owned at least ninety percent of the stock of Z3 Capital. (Zubkis Dep. at 96, 148) Kona had no other assets besides Platinum. (*Id.* at 99.) In March 2001, IBI acquired all of Platinum's stock from Kona, in exchange for 46 million shares of IBI stock. (*Id.* at 99-100; Fourth Graubard Decl. ¶¶ 7-8 and Exs. E and F.) Zubkis concedes that the 46 million shares of IBI stock went to him because he owned Z3 Capital and Z3 Capital owned Kona. (Zubkis Dep. at 83.)

***2** Zubkis now claims to hold approximately 140 million shares of IBI stock. (Zubkis Dep. at 83-84.)

Although it is unclear exactly what percentage of IBI's stock Zubkis owns, Zubkis claims to be IBI's single largest shareholder. (*Id.* at 85-86.) IBI's headquarters are located at Zubkis's residence. (*Id.* at 129.)

Since Zubkis resigned from his officer and director positions at IBI on July 16, 2003, IBI has had a succession of four separate presidents. (Deposition of William Hales dated Sept. 2, 2003 attached as Ex. C to Fourth Graubard Decl., at 32.) William Hales, the third of the four presidents, was previously IBI's senior vice president for finance; Hales testified that he was unable to describe what kind of business IBI is engaged in, the companies that IBI owns, or IBI's revenue for the last year. (*Id.* at 9, 23-24.) The most recently appointed chief executive of IBI is Mack Hilber, who testified that he has been associated with IBI at various times for more than five years. (Deposition of Mack Hilber dated September 2, 2003 attached as Ex. B to Fourth Graubard Decl., at 3.) However, Hilber testified that he had no knowledge respecting IBI's assets, whether IBI owned any bank accounts, or IBI's financial statements or balance sheets. (*Id.* at 42-43.)

The escrow accounts frozen by the TRO are held at Laurel Hill Escrow Services, Inc. The escrow accounts are owned by IBI. (Zubkis Dep. at 114-15.) Zubkis controlled the escrow accounts until they were frozen by the Court's order, including the period after he resigned his officer and director positions at IBI, and he directed that checks be drawn on those accounts. (Fourth Graubard Decl. ¶ 9 and Ex. G.) Zubkis concedes that many of the transfers he authorized from the escrow accounts went to his wife, Alla Zubkis. (Zubkis Dep. at 129.) Records supplied by Laurel Hill indicate that the transfers Zubkis made to his wife total in the tens of thousands of dollars between May 2003 and the time the accounts were frozen.[FN1] (Third Supplemental Declaration of John J. Graubard dated Aug. 26, 2003 ("Graubard Third Decl.") ¶ 4 and Ex. A; Fourth Graubard Decl. at ¶ 9 and Ex. G.) Zubkis contends that the transfers to his wife were made pursuant to an agreement he had with IBI, whereby he would draw no salary from IBI but the company would pay his living expenses, including rent and utilities at his home. (Zubkis Dep. at 129.) During the same period, Zubkis caused checks amounting to over $20,000 to be drawn on the escrow accounts for yacht maintenance and improvements. (Fourth Graubard Decl. ¶ 9 and Ex. G.)

> FN1. The Commission has requested that Alla Zubkis's account at Bank of America be frozen as part of this order.

International Brands, L.P., ("IBI LP") is a limited partnership whose general partners are IBI and Zubkis. (Zubkis Dep. at 61-62.) Account number 11555-01027 at Bank of America is held in the name of International Brands, L.P. ("IBI LP Account"). From 2001 to 2003, Zubkis directed Laurel Hill to transfer more than $200,000 from one of the escrow accounts owned by IBI to IBI LP's Bank of America account. (Fourth Graubard Decl. ¶ 10 and Ex. H.) During the same period, Zubkis directed Laurel Hill to transfer over $80,000 to his father-in-law. (*Id.*)

***3** Platinum also has a Bank of America account-account number 11555-11908 ("Platinum Account"). From August 2001 until August 2003, the Platinum Account received approximately $300,000 in transfers from the escrow accounts at Laurel Hill. (Fourth Graubard Decl. ¶ 11 and Ex. I.) Between June 2001 and November 2002, Zubkis wrote checks totaling over $300,000 from this account. (Supplemental Declaration of John J. Graubard dated August 25, 2003, ¶ 10 and Ex. H.) Zubkis wrote seven checks payable to himself in the amount of $9,050. (*Id.*) He wrote another eleven checks payable to his wife or to cash in the amount of approximately $10,000. (*Id.*) More than $70,000 was used for yacht expenses and improvements. (*Id.*)

II.

The Court of Appeals for the Second Circuit has held that, in order to find a party in civil contempt for failure to comply with an order of the court, "the court need only (1) have entered a clear and unambiguous order, (2) find it established by clear and convincing evidence that that order was not complied with, and (3) find that the alleged contemnor has not clearly established his inability to comply with the terms of the order." *Huber v. Marine Midland Bank,* 51 F.3d 5, 10 (2d Cir.1995).

[1] This Court entered a clear and unambiguous Final Judgment against Zubkis that included an order of disgorgement. The Final Judgment entered on June 29, 2001 ordered as follows:

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that Zubkis disgorge $12,544,313.25, representing the amounts received by him from the sale of securities of the defendant Stella Bella Corporation, U.S.A., now known as International Brands, Inc., and/or securities of Z-3 Capital Corporation in violation of the federal securities laws as described in the Complaint, together with prejudgment interest of $9,034,418.14, for a total of $21,578,731.39. Zubkis shall be jointly and severally liable for a total of $7,038,901.53 of this amount together with the defendant Z-3 Capital Corporation. Zubkis shall, within thirty (30) days of the entry of this Final Judgment pay disgorgement and prejudgment interest in the total amount of $21,578,731.39 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) be made payable to the Securities and Exchange Commission; (C) be hand delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop O-3, Alexandria, Virginia 22312; and (D) submitted under cover letter that identifies Zubkis as a defendant in this action, the caption and docket number of this action, and a copy of which cover letter and payment shall be sent to Wayne M. Carlin, Regional Director, Securities and Exchange Commission, Northeast Regional Office, 7 World Trade Center, 13th Floor, New York, New York 10048.

Zubkis has not complied with the order. He does not dispute the fact that he has paid nothing to satisfy the ordered disgorgement.

***4** The S.E.C. has thus made a prima facie showing of civil contempt. To avoid a finding of contempt, Zubkis bears the burden of proving that he is unable to comply with the disgorgement order. *Huber,* 51 F.3d at 10. An alleged contemnor must prove "clearly, plainly, and unmistakably" that he has a "complete inability, due to poverty or insolvency, to comply with an order to pay court-imposed monetary sanctions...." *Id.* However, inability to pay is a defense only when it is impossible for the contemnor to pay any portion of the ordered disgorgement; "[o]therwise, the party must pay what he or she can." *S.E.C. v. Musella,* 818 F.Supp. 600, 602 (S.D.N.Y.1993).

Zubkis plainly cannot meet this burden. He concedes that he owns approximately 140 million shares of IBI common stock. (Zubkis Dep. at 83-86.) Moreover, it is clear that IBI has certain valuable assets. IBI owns the stock of Platinum. Platinum in turn owns the yacht, which has been assessed at $450,000. (Receiver's Report at 2.) While the Commission contends that the yacht has been controlled by Zubkis personally and has been moved as part of a shell game by Zubkis to avoid capture of his assets by the Commission, there appears to be no dispute that the legal ownership of the yacht is in the name of Platinum, and that the Platinum stock is held by IBI. IBI also owns the escrow accounts and is a general partner, along with Zubkis, in IBI LP. Zubkis has caused himself and his wife to be paid substantial amounts of money over the last four months. Zubkis has transferred from the escrow accounts to his wife funds totaling at least $44,000. (Third Graubard Decl. ¶ 4 and Ex. A.) He contends that these payments have been a form of compensation. (Zubkis Dep. at 129.) In any event, it is clear that Zubkis personally received and caused his wife to receive substantial payments

but paid nothing in satisfaction of the outstanding order of disgorgement. Because Zubkis has the ability to pay a portion of the clear and unambiguous disgorgement order, and plainly has not done so, he is in civil contempt of this Court's prior or- der.

[2] In determining an appropriate sanction for civil contempt, a court must consider: "(1) the character and magnitude of the harm threatened by the contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and the consequent seriousness of the burden of the sanction." *Dole Fresh Fruit Co. v. United Banana Co.,* 821 F.2d 106, 110 (2d Cir.1987). The purpose of civil contempt is to compel obedience to a lawful order or to provide compensation to a complaining party. *New York State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1351 (2d Cir.1989). The ultimate consideration is whether the coercive sanction is reasonable in relation to the facts. *Id.* at 1353.

Zubkis must turn over to the receiver all of his stock in IBI. There is no credible evidence that the value of the stock exceeds the amount of the disgorgement order. Zubkis continues to flout this Court's disgorgement order and apparently believes that he should be permitted to keep at least some ownership stake in IBI. Turn over of all the IBI stock is necessary to effectuate compliance with the disgorgement order. IBI-through its ownership interests in Platinum, the Laurel Hill escrow accounts, and the IBI LP limited partnership-has been used as a vehicle to facilitate Zubkis's asset transfers. Zubkis concedes that he owns the IBI stock and that he has not paid anything toward this Court's order to disgorge in excess of $21 million. Because he has the ability to pay a portion of that order, he must turn over the stock to the receiver. Directing Zubkis to forfeit his stock in IBI is reasonable given his refusal over the past two years to comply with the disgorgement order, and indeed to pay anything toward satisfaction of that order. Directing Zubkis to turn over his stock to the receiver could not reasonably be considered a punitive sanction. It is merely an order to comply with this Court's prior disgorgement order. So long as Zubkis has any assets that can be used to pay down the disgorgement order against him, Zubkis is in continuing contempt of this Court's order.

***5** [3] Ensuring compliance with the Court's disgorgement order requires more than directing Zubkis to turn over any stock he holds in IBI. The S.E.C. has made a strong showing that Zubkis is adept at using the protections afforded by the corporate form to obscure the assets he has at his disposal.

The Court has broad equitable powers to ensure the enforcement of the disgorgement order issued in this case. "Once the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy." *S.E.C. v. Manor Nursing Ctrs., Inc.,* 458 F.2d 1082, 1103 (2d Cir.1972).

An interim asset freeze is one remedy that the Court may employ to preserve the basis for a disgorgement remedy. *See S.E.C. v. Unifund SAL,* 910 F.2d 1028, 1041 (2d Cir.1990); *S.E.C. v. Am. Bd. of Trade, Inc.,* 830 F.2d 431, 438-39 (2d Cir.1987); *Manor Nursing,* 458 F.2d at 1105. An asset freeze "assures that any funds that may become due can be collected." *Unifund SAL,* 910 F.2d at 1041. In determining whether to order a freeze of assets, the court must weigh "the disadvantages and possible deleterious effect of a freeze" against "the considerations indicating the need for such relief." *Manor Nursing,* 458 F.2d at 1106.

The district court may also appoint a receiver if necessary "to effectuate the purposes of the federal securities laws." *Manor Nursing,* 458 F.2d at 1105. The power exists "where necessary to prevent the dissipation of a defendant's assets pending further action by the court." *Am. Bd. of Trade,* 830 F.2d at 436. Thus, the Court may appoint a receiver when it is necessary to preserve the status quo while the

Court unravels complicated business transactions to get a more accurate picture of what has transpired. *Manor Nursing,* at 1105.

The Court of Appeals for the Ninth Circuit has held that "the inherent equitable power of a district court allows it to freeze the assets of a nonparty when that nonparty is dominated and controlled by a defendant against whom relief has been obtained in a securities fraud enforcement action." *S.E.C. v. Hickey,* 322 F.3d 1123, 1125 (9th Cir.2003). In *Hickey,* the court of appeals affirmed the district court's order freezing the assets of a real estate brokerage ("Brokerage") owned by the contemnor's mother. The court found that Hickey, the contemnor, controlled the brokerage and had entered into an employment agreement whereby the brokerage paid his personal expenses. The court thus concluded that "[t]he necessity of the district court's asset freeze is demonstrated by the total and complete control that Hickey exercised over the Brokerage, and by the fact that Hickey's only source of income was the money that *he ordered paid to himself through the Brokerage* from the assets frozen by the court's order. That Hickey may have been clever enough to organize a completely separate, successful entity, and construct a unique employment compensation agreement covering all of his personal expenses using corporate assets, does not put him beyond the reach of a court's powers of disgorgement." *Id.* at 1131-32 (emphasis in original). The court of appeals concluded that the district court acted within its discretion in freezing the assets of the Brokerage, "so long as doing so was necessary to protect and give life to the disgorgement and contempt orders already entered against Hickey." *Id.* at 1131.

***6** The court of appeals in *Hickey* held as an initial matter that the district court is not required to find the existence of an alter ego relationship before freezing the assets of a nonparty. The court of appeals concluded that freezing assets does not constitute a "piercing" of the corporate veil: "the thrust of 'piercing' is the imposition of direct liability. The district court did not hold the Brokerage liable for Hickey's disgorgement obligation or contempt payments. In other words, the district court *did not* order the Brokerage to pay Hickey's obligations. Instead, the district court froze the assets of the Brokerage. An asset freeze is not an imposition of liability requiring an alter ego relationship." *Id.* at 1130-31 (emphasis in original).

The Court determines that enforcement of the disgorgement order requires that the freeze of the yacht and the escrow accounts, previously directed pursuant to the TRO dated August 11, 2003, should remain in effect. The yacht shall remain in the control of the receiver. In addition, the Court finds it necessary to freeze the IBI LP account and the Platinum account in the same manner as the escrow accounts. In this Court, IBI, through its counsel, has argued against the seizure and liquidation of the yacht, which it has described as the most important physical asset of IBI. The Court has determined not to order the sale of the yacht until it is clearer whether there are legitimate conflicting claims to the yacht. IBI has not specifically sought any special provisions with respect to any bank accounts, and the current chief executive of IBI did not know whether IBI had any bank accounts. The Court would be prepared to make provision in any freeze order for legitimate business expenses of IBI, particularly for the costs of defense. If IBI seeks such a provision, it should make a specific application for it.

The asset freeze is required to ensure the enforcement of the disgorgement order. Zubkis's thorough control of IBI now makes it difficult to determine whether the assets held by IBI might properly be used to satisfy the disgorgement order. For example, the S.E.C. has made a strong showing that the yacht might have been purchased using Zubkis's ill-gotten funds and that IBI does not have a legitimate claim to the yacht. *See S.E.C. v. Cavanaugh,* 155 F.3d 129, 136 (2d Cir.1998). There is also substantial evidence that Zubkis has used the escrow accounts as well as the IBI LP and Platinum ac-

counts for his personal use. A freeze of the yacht, the escrow accounts, and the bank accounts is necessary to ensure that Zubkis has not used IBI to shield the assets that should be used to satisfy the ordered disgorgement and to resolve any legitimate competing claims to those assets. The Commission has not demonstrated a basis to freeze the account of Mrs. Zubkis at this time.

Any detrimental effect on IBI as a result of the asset freeze will not be unreasonable in light of the necessity of uncovering the connections between Zubkis and IBI. There is in fact little reason to believe that IBI will be adversely affected by the freeze. IBI's counsel represents that the purpose of the yacht is to provide IBI with an asset that will help the company secure a posting of its shares on a national exchange. Indeed, IBI's only active business at this time appears to be holding the yacht. IBI has not attempted to defend any interest in the escrow accounts or to argue that it needs access to those accounts. IBI should not be adversely affected if the yacht is held by the receiver rather than by IBI, at least until the yacht's status is clearly determined. Thus, the yacht should continue to be held by the receiver and not sold until any conflicting claims are resolved by further order of the Court. The escrow accounts should remain frozen until any conflicting claims to the accounts are resolved. The remaining assets in which the Commission has identified an interest by Zubkis-and which IBI has not attempted to defend-namely the IBI LP account and the Platinum account, should be frozen until any conflicting claims are resolved.

*7 As with the original TRO, the asset freeze ordered here includes any assets owned or controlled by Zubkis. Zubkis has a continuing obligation to satisfy the disgorgement order, but he has failed to do so. An asset freeze on any assets owned or controlled by Zubkis preserves those assets for use in satisfying the disgorgement order.

The Commission is authorized to continue to conduct expedited discovery to resolve, among other things, the issues of the control of IBI and its assets, the location of other assets owned by Zubkis, and any competing claims to any assets.

The Commission requests a finding that Zubkis is in contempt of this Court's prior order barring him from holding any positions as an officer or director of a public company. The evidence shows that Zubkis resigned from the officer and director positions at IBI as of July 16, 2003. There is no indication that another order repeating the officer-and-director bar, to which Zubkis remains subject, is necessary at this time.

The Court has considered all of the arguments of the parties. To the extent not specifically discussed above, the arguments are either moot or without merit.

Conclusion

For the reasons explained above, Zubkis is found to be in civil contempt for failure to comply with this Court's prior Final Judgment ordering disgorgement. Zubkis is directed to turn over all of his stock in IBI to the receiver by September 30, 2003. The yacht and the escrow accounts remain frozen, and the yacht will remain in the possession of the receiver. The appointment of the receiver is continued. The IBI LP account and the Platinum account at Bank of America are frozen. Expedited discovery is authorized.

SO ORDERED.

S.D.N.Y.,2003.
S.E.C. v. Zubkis
Not Reported in F.Supp.2d, 2003 WL 22118978 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,506

END OF DOCUMENT

EXHIBIT J

Not Reported in F.Supp.2d, 2009 WL 1310984 (C.D.Cal.)
(Cite as: 2009 WL 1310984 (C.D.Cal.))

H
Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
PRIVATE EQUITY MANAGEMENT GROUP, LLC; Private Equity Management Group, Inc.; and Danny Pang, Defendants.
No. CV 09-2901 PSG EX.

April 27, 2009.

West KeySummary
Securities Regulation 349B ⚖178.1

349B Securities Regulation
349BI Federal Regulation
349BI(E) Remedies
349BI(E)2 Injunction
349Bk178 Preliminary Injunction
349Bk178.1 k. In General. Most Cited Cases
Temporary restraining order granted against an equity management group as the Securities and Exchange Commission (SEC) demonstrated a probability of success on the merits that the group constituted violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. Good cause existed to believe that the group would continue to engage in the violations and that irreparable loss and damage to investors and to the general public unless the restraining order was granted. Securities Act of 1933, § 7(a), 15 U.S.C.A. § 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

David J. Van Havermaat, Cal. Bar No. 175761, Lorraine B. Echavarria, Cal. Bar No. 191860, Paris Wynn, Cal. Bar No. 224418, Rosalind R. Tyson, Regional Director, Michele Wein Layne, Associate Regional Director, John M. McCoy III, Regional Trial Counsel, Los Angeles, California, for Plaintiff, Securities and Exchange Commission.

TEMPORARY RESTRAINING ORDER AND ORDERS: (1) FREEZING ASSETS; (2) APPOINTING A TEMPORARY RECEIVER; (3) REPATRIATING ASSETS; (4) REQUIRING ACCOUNTINGS; (5) PROHIBITING THE DESTRUCTION OF DOCUMENTS; (6) GRANTING EXPEDITED DISCOVERY; (7) SURRENDERING THE PASSPORT OF DANNY PANG; AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND APPOINTMENT OF A PERMANENT RECEIVER

GUTIERREZ, J.

***1** This matter came to be heard upon Plaintiff Securities and Exchange Commission's ("Commission") *Ex Parte* Application For A Temporary Restraining Order and Orders: (1) Freezing Assets; (2) Appointing a Temporary Receiver; (3) Repatriating Assets; (4) Requiring Accountings; (5) Prohibiting The Destruction Of Documents; (6) Granting Expedited Discovery; (7) Surrendering the Passport of Danny Pang; And Order To Show Cause Re Preliminary Injunction And Appointment Of A Permanent Receiver (the "Application").

The Court, having considered the Commission's Complaint the Application, the supporting Memorandum of Points and Authorities, Declarations and Exhibits, and all other evidence and argument presented regarding the Application, finds that:

A. This Court has jurisdiction over the parties to, and the subject matter of, this action.

B. Good cause exists to believe that defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang (collectively, "Defendants"), and each of them, have engaged in, are engaging in, and are

about to engage in transactions, acts, practices and courses of business that constitute violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a); and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

C. The Commission has demonstrated a probability of success on the merits and the possibility of dissipation of assets.

D. Good cause exists to believe that Defendants will continue to engage in such violations to the immediate and irreparable less and damage to investors and to the general public unless they are restrained and enjoined.

E. Good cause exists to believe that Denny Pang may seek to leave the United States in order to avoid responsibility for the fraudulent acts alleged herein.

F. It is appropriate and the interests of justice require that the Commission's Application be granted without notice to Defendants as the Commission set forth in its Application pursuant to Local Rule 7-19.2 the reasons supporting its claim that notice should not be required, and it appears from specific facts shown by the declarations and other supporting evidence filed by the Commission that immediate and irreparable injury, loss, or damage will result if notice to Defendants is given.

I.

IT IS HEREBY ORDERED that the Commission's Application For A Temporary Restraining Order and Orders: (1) Freezing Assets; (2) Appointing a Temporary Receiver; (3) Repatriating Assets; (4) Requiring Accountings; (5) Prohibiting The Destruction Of Documents; (6) Granting Expedited Discovery; (7) Surrendering the Passport of Danny Pang And Order To Show Cause Re Preliminary Injunction And Appointment Of A Permanent Receiver is hereby GRANTED.

II.

IT IS FURTHER ORDERED that Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, and their officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with any of them, who receive actual notice of this Order, by personal service or otherwise, and each of them, be and hereby are temporarily restrained and enjoined from, directly or indirectly, in the offer or sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails:

***2** A. employing any device, scheme or artifice to defraud;

B. obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

C. engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser

in violation of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

III.

IT IS FURTHER ORDERED that Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang and their officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with any of them who receive actual notice of this Order, by personal service or otherwise, and each of them, be and hereby are temporarily restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of any security, by the use of any

Not Reported in F.Supp.2d, 2009 WL 1310984 (C.D.Cal.)
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means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

A. employing any device, scheme, or artifice to defraud;

B. making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person

in violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 781(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

IV.

IT IS FURTHER ORDERED that, except as otherwise ordered by this Court, Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang and their officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with any of them, who receive actual notice of this Order, by personal service or otherwise, and each of them, be and hereby are temporarily restrained and enjoined from, directly or indirectly, transferring, assigning, selling, hypothecating, changing, wasting, dissipating, converting, concealing, encumbering, or otherwise disposing of, in any manner, any funds, assets, securities, claims, or other real or personal property, including any notes or deeds of trust or other interests in real property, wherever located and in whatever form such assets may exist, of Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, and their subsidiaries and affiliates, whether owned by, controlled by, managed by or in the possession or custody of any of them and from transferring, encumbering, dissipating, incurring charges or cash advances on any debit or credit card or the credit arrangement of Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang.

V.

***3** IT IS FURTHER ORDERED that, except as otherwise ordered by this Court, an immediate freeze shall be placed on all monies and assets in whatever form such assets may exist and wherever located (with an allowance for necessary and reasonable living expenses to be granted only upon good cause shown by application to the Court with notice to and an opportunity for the Commission to be heard) in all accounts at any bank, financial institution, brokerage firm, or Internet or "e-currency" payment processor, all certificates of deposit, and other funds or assets, such as personal or real property, held in the name of, for the benefit of, or over which account authority is held by Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang or any trust, partnership, joint venture, person or entity affiliated with them (including subsidiaries), including but not limited to accounts at the following institutions: (1) HSBC Bank; (2) East West Bank; (3) UBS Securities; and (4) Bank of Amer- ica.

VI.

IT IS FURTHER ORDERED that *Mosier & Company, Inc.* is appointed as temporary receiver of Private Equity Management Group, Inc. and Private Equity Management Group, LLC, and their subsidiaries and affiliates, with full powers of an equity receiver, including, but not limited to, full power over all funds, assets, collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, papers and other real or personal property, including notes, deeds of trust and other interests in real property, belonging

to, being managed by, or in the possession of or control of Private Equity Management Group, Inc. and Private Equity Management Group, LLC, and any of their subsidiaries and affiliates, and that such temporary receiver is immediately authorized, empowered and directed:

A. to have access to and to collect and take custody, control, possession, and charge of all funds, assets, collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, papers and other real or personal property, including notes, deeds of trust and other interests in real property, of Private Equity Management Group, Inc. and Private Equity Management Group, LLC and their subsidiaries and affiliates, with full power to sue, foreclose, marshal, sell, liquidate, collect, receive, and take into possession all such property;

B. to have control of, and to be added as the sole authorized signatory for all accounts of Private Equity Management Group, Inc. and Private Equity Management Group, LLC and their subsidiaries and affiliates, including all accounts over which Private Equity Management Group, Inc. and Private Equity Management Group, LLC and any of their officers, employees or agents, have signatory authority, at any bank, title company, escrow agent, financial institution or brokerage firm that has possession, custody or control of any assets on funds of Private Equity Management Group, Inc. or Private Equity Management Group, LLC, in whatever form such assets may exist and wherever located, or which maintains accounts over which Private Equity Management Group, Inc. or Private Equity Management Group, LLC and/or any of their officers, employees or agents have signatory authority;

***4** C. to conduct such investigation and discovery as may be necessary to locate and account for all of the assets of, or managed by, Private Equity Management Group, Inc. and Private Equity Management Group, LLC and their affiliates, and to engage and employ attorneys, accountants and other persons to assist in such investigation and discovery;

D. to take such action as is necessary and appropriate to preserve and take control of and to prevent the dissipation, concealment, or disposition of any assets of, or managed by, Private Equity Management Group, Inc. or Private Equity Management Group, LLC or their affiliates;

E. to make an accounting, as soon as practicable, to this Court and the Commission of the assets and financial condition of Private Equity Management Group, Inc. and Private Equity Management Group, LLC and the assets under their management, including all notes, deeds of trust and other interests in real property, and to file the accounting with the Court and deliver copies thereof to all parties;

F. to make such payments and disbursements from the funds and assets taken into custody, control, and possession or thereafter received by him, and to incur, or authorize the making of such agreements as may be necessary and advisable in discharging his duties as temporary receiver;

G. to employ attorneys, accountants, and others to investigate, advise and, where appropriate, to institute, pursue, and prosecute all claims and causes of action of whatever kind and nature which may now or hereafter exist, including in state or federal courts, or in foreign jurisdictions, as a result of the activities of present or past employees or agents of Private Equity Management Group, Inc. and Private Equity Management Group, LLC;

H. to have access to and monitor all mail of Private Equity Management Group, Inc. and Private Equity Management Group, LLC, in order to review such mail which he deems relevant to the business of Private Equity Management Group, Inc. and Private Equity Management Group, LLC, and the discharging of his duties as

temporary receiver, and to make appropriate notification to the United States Postal Service to forward delivery of any mail addressed to Private Equity Management Group, Inc. and Private Equity Management Group, LLC or to any of its subsidiaries or affiliates;

I. to operate and control the content of information posted on Private Equity Management Group, Inc. and Private Equity Management Group, LLC Internet web sites, and

J. to exercise all of the lawful powers of Private Equity Management Group, Inc. and Private Equity Management Group, LLC and their officers, directors, employees, representatives, or persons who exercise similar powers and perform similar duties.

VII.

IT IS FURTHER ORDERED that Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, and their officers, agents, servants, employees and attorneys, and any other persons who are in custody, possession or control of any assets, collateral, books, records, papers, notes, deeds of trust and other interests in real property, or other property of, or managed by, Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, shall forthwith give access to and control of such property to the temporary receiver.

VIII.

***5** IT IS FURTHER ORDERED that no officer, agent, servant employee, or attorney of Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, or their subsidiaries or affiliates shall take any action or purport to take any action, in the name of or on behalf of Defendants Private Equity Management Group, Inc. or Private Equity Management Group, LLC or any of their subsidiaries and affiliates, including posting any information on any Internet websites that purports to be any communication on behalf of Defendants Private Equity Management Group, Inc., and Private Equity Management Group, LLC, without the written consent of the temporary receiver or order of this Court.

IX.

IT IS FURTHER ORDERED that, except by leave of this Court, during the pendency of this receivership, all clients, investors, trust beneficiaries, note holders, creditors, claimants, lessors, and all other persons or entities seeking relief of any kind, in law or in equity, from Private Equity Management Group, Inc. or Private Equity Management Group, LLC, or their affiliates and subsidiaries, and all persons acting on behalf of any such investor, trust beneficiary, note holder, creditor, claimant, lessor, or other person, including sheriffs, marshals, servants, agents, employees, and attorneys, are hereby temporarily restrained and enjoined from, directly or indirectly, with respect to Private Equity Management Group, Inc., and Private Equity Management Group, LLC and their subsidiaries and affiliates:

A. commencing, prosecuting, continuing or enforcing any suit or proceeding (other than the present action by the Commission) against Private Equity Management Group, Inc. or Private Equity Management Group, LLC or any of their subsidiaries and affiliates;

B. using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property or property interests owned by or in the possession of Private Equity Management Group, Inc. or Private Equity Management Group, LLC or any of their subsidiaries or affiliates, wherever situated; and

C. doing any act or thing whatsoever to interfere with taking control, possession or management by the temporary receiver appointed hereunder of the property and assets owned, controlled or in the possession of Private Equity Management Group, Inc. or Private Equity Management Group, LLC, or any of their subsidiaries or affiliates, or in any way to interfere with or harass the temporary receiver, or his attorneys, accountants, employees or agents or to interfere in any manner with the discharge of the temporary receiver's duties and responsibilities hereunder.

X.

IT IS FURTHER ORDERED that Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, and their subsidiaries and affiliates and their officers, agents, servants, employees and attorneys, shall cooperate with and assist the temporary receiver, his attorneys, accountants, employees and agents and shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the temporary receiver, his attorneys, accountants, employees or agents in the course of the temporary receiver's duties. Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, and their subsidiaries and affiliates and their officers, agents, servants, employees and attorneys shall not interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the temporary receiver of the funds, assets, collateral, premises, and choses in action described above.

XI.

***6** IT IS FURTHER ORDERED that Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang shall pay the costs, fees, and expenses of the temporary receiver incurred in connection with the performance of his duties described in this Order, including the costs and expenses of those persons who may be engaged or employed by the temporary receiver to assist him in carrying out his duties and obligations. All applications for costs, fees and expenses for services rendered in connection with the temporary receivership other than routine and necessary business expenses in conducting the temporary receivership, such as salaries, rent and any and all other reasonable operating and liquidating expenses, shall be made by application on at least a quarterly basis setting forth in reasonable detail the nature of the services and shall be heard by the Court.

XII.

IT IS FURTHER ORDERED that no bond shall be required in connection with the appointment of the temporary receiver. Except for an act of gross negligence, the temporary receiver shall not be liable for any loss or damage incurred by any of the defendants, their officers, agents, servants, employees and attorneys or any other person, by reason of any act performed or omitted to be performed by the temporary receiver in connection with the discharge of his duties and responsibilities.

XIII.

IT IS FURTHER ORDERED that representatives of the Commission are authorized to have continuing access to inspect or copy any or all of the corporate books and records and other documents of Defendants Private Equity Management Group, Inc. and Private Equity Management Group, LLC and their subsidiaries and affiliates and continuing access to inspect its funds, property, assets and collateral, wherever located.

XIV.

IT IS FURTHER ORDERED that, except as otherwise ordered by this Court, Defendants Private Equity Management Group, Inc., Private Equity

Management Group, LLC and Danny Pang, and their officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with any of them, who receive actual notice of this Order, by personal service or otherwise, and each of them, be and hereby are temporarily restrained and enjoined from, directly or indirectly: destroying, mutilating, concealing, transferring, altering, or otherwise disposing of, in any manner, any documents, which includes all books, records, computer programs, computer files, computer printouts, contracts, correspondence, memoranda, brochures, or any other documents of any kind in their possession, custody or control, however created, produced, or stored (manually, mechanically, electronically, or otherwise), pertaining in any manner to Private Equity Management Group, Inc. and Private Equity Management Group, LLC.

XV.

IT IS FURTHER ORDERED that Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang shall, within five days of the date of issuance of this Order, prepare and deliver to the Commission a detailed and complete schedule of all assets of Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, including all real and personal property exceeding $5,000 in value, and all bank, securities, futures, Internet payment processor, and other accounts identified by institution, branch address and account number. The accountings shall include a description of the source(s) of all such assets. Such accountings shall be filed with the Court and copies shall be delivered to the attention of Paris Wynn at the Commission's Los Angeles Regional Office located at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036. After completion of the accountings, Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang shall produce to the Commission's Los Angeles Regional Office, at a time agreeable to the Commission, all books, records and other documents supporting or underlying the accountings.

XVI.

*7 IT IS FURTHER ORDERED that the Commission's application for expedited discovery is granted and that, immediately upon entry of this Order, the parties may take depositions upon oral examination and obtain document production from parties and non-parties subject to two business days notice; and may serve interrogatories and requests for admissions, subject to response within five calendar days of service. Service of all expedited discovery requests shall be proper if made upon the parties by facsimile or overnight courier. The times applicable to discovery under the Federal Rules of Civil Procedure shall govern upon the expiration of this Temporary Restraining Order.

XVII.

IT IS FURTHER ORDERED that, within ten days from the date of this Order, Defendants Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, and each of them, shall transfer to the registry of this Court all assets, funds, and other property held in foreign locations in the name of Private Equity Management Group, Inc., Private Equity Management Group, LLC and Danny Pang, or for the benefit or under the direct or indirect control of any of them, or over which any of them exercise control or signatory authority.

XIII.

IT IS FURTHER ORDERED that, immediately upon entry of this Order and service therefore, defendant Danny Pang shall surrender to the Clerk of the Court all passports that he holds. The Clerk of the Court shall maintain custody of such passports until otherwise ordered by this Court.

IX.

IT IS FURTHER ORDERED that defendant Danny Pang is prohibited from travelling outside of the United States unless and until this Court finds that Pang has fully complied with the provisions of this Order that require him to provide an accounting and to repatriate any assets.

XX.

IT IS FURTHER ORDERED that this Temporary Restraining Order shall expire at *5* o'clock *p.*m. on *May 11,* 2009, unless, for good cause shown, it is extended or unless the parties against whom it is directed consent that it may be extended for a longer period.

XI.

IT IS FURTHER ORDERED that at 1:30 o'clock *p.* m. on *May 11,* 2009, or as soon thereafter as the parties can be heard, the Defendants, and each of them, shall appear before the Honorable *Philip S. Gutierrez,* Judge of the United States District Court for the Central District of California, to show cause, if there be any, why a preliminary injunction should not be granted, and a permanent receiver not appointed, in accordance with the prayer for relief contained in the Complaint filed by the Commission. Any declarations, affidavits, points and authorities, or other submissions in support of, or in opposition to, the issuance of such an Order shall be filed with the Court and delivered to the Commission's Los Angeles Regional Office and the offices of the Defendants and/or their attorneys no later than *5* o'clock *p.*m. on *May 4,* 2009. Any reply papers shall be filed with the Court and delivered to opposing counsel no later than *5* o'clock *p.*m. on *May 7,* 2009. Service of all such papers shall be made by facsimile or personal service.

XXII.

***8** IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this action for the purpose of implementing and carrying out the terms of all orders and decrees which may be entered herein and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

IT IS SO ORDERED.

C.D.Cal.,2009.
S.E.C. v. Private Equity Management Group, LLC
Not Reported in F.Supp.2d, 2009 WL 1310984 (C.D.Cal.)

END OF DOCUMENT

EXHIBIT K

Not Reported in F.Supp.2d, 2004 WL 1933578 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,904
(Cite as: 2004 WL 1933578 (S.D.N.Y.))

H

United States District Court,
S.D. New York.
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
Peter ROOR,[FN1] individually and d/b/a Oxford Savings Club, Ltd. and Manumit Unlimited, Ronald L. Templin, individually and d/b/a American Leadership Network, Saratoga Holdings LLC, Secured Private Placements, The 650 Club, Internet Marketing Partners and Private Party Loan Program, and Laurie Elizabeth Weiss, Defendants.

FN1. A copy of Peter Roor's passport indicates that his name is, in actuality, Pieter Roor. Akhtar Decl. Ex. 1 at 1.

No. 99 Civ. 3372(HB).

Aug. 30, 2004.

OPINION & ORDER

BAER, J.

***1** In this civil enforcement action, plaintiff Securities and Exchange Commission ("SEC") alleges violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, as well as Section 17(a) of the Securities Act of 1933 ("Securities Act"), 17 U.S.C. § 77q(a). The SEC's claims, in broad brush, allege that the defendants engineered and promoted fictitious investment programs on the internet that promised astronomical returns on purportedly risk-free investments. This case was originally assigned to Judge Martin, but after the case was reopened on February 4, 2004 on the SEC's motion, it was reassigned to me. The SEC now moves pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ.P.") 56 for summary judgment against defendants Peter Roor ("Roor") and Ronald L. Templin ("Templin"). The SEC seeks a final judgment permanently enjoining Roor and Templin from future violations of federal securities laws, disgorgement of all ill-gotten profits and pre-judgment interest thereon, civil penalties, and turnover of the defendants' previously frozen assets. For the reasons set forth below, the SEC's motion is granted.

I. BACKGROUND

A. Roor

Roor is a Dutch citizen who lives in Amsterdam, The Netherlands. From as early as December 1998 until May 1999, Roor operated the Oxford Savings Club ("Oxford") and served as its Director of International Operations. According to Roor, he was primarily responsible for marketing investments in Oxford to new potential members. His wife assisted with the administration. Oxford was marketed as a registered savings club and managed by "Internationally Oriented Businessmen and Financial Experts." Akhtar Decl., Ex. 2 at 3. Roor's prior employment consisted of waiting tables aboard a cruise ship and managing a department store. In Oxford's promotional materials and internet website, [FN2] Roor invited the public to invest between $25 to $325,000 in the savings club and promised a return of 10% per month, which, if retained in an investor's account, would, he represented, result in earnings of 213.5% when compounded annually. Roor also offered members the opportunity to "purchase a special $50.00 'Oxford Growth Certificate' and in exactly 8 years from the date of receipt, the owner of this Oxford Growth Certificate can cash in this Certificate for U.S. $1,000,000.00." *Id.* Finally, as another "come on," Roor promised members between 1-3% interest on all contributions from new members sponsored by current members.

FN2. *http://www.oxford-club.com*

Not Reported in F.Supp.2d, 2004 WL 1933578 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,904
(Cite as: 2004 WL 1933578 (S.D.N.Y.))

Roor gave voluntary testimony to the SEC via telephone on February 25, 1999 and inperson on March 8, 1999, during which time he discussed his investment programs. According to Roor, such returns were possible because the "Oxford Savings Club combines small loans from many individuals. This makes it possible to invest large amounts in the Money Market. All loans are secured by Bankers Guarantees so that the funds are never in jeopardy." *Id.* When questioned by the SEC as to how it was possible to pay such high returns, Roor explained that

> *2 Oxford intends to invest in "Bank Debenture Trading Program" which generate large returns in connection with expansion of the money supply by the Federal Reserve ... [T]he Federal Reserve injects "billions" of dollars into the economy as follows: Since the end of World War II, the Federal Reserve has been transferring funds into numerous foreign banks, which loan these funds to multinational corporations at market interests rates. The Federal Reserve requires only that the banks have on deposit liquid funds approximately seven percent of the amount that the Federal Reserve gives to banks. Wealthy "private investors" who have at least one million dollars to invest have entered into contracts, called "programs" ... These "programs" typically promise private investors returns ranging between 500% to 1,000% per year, and the banks guarantee the private investors' deposits with a "certified bank draft."

Id., Ex. 4 ¶ 12.

Roor informed the SEC that he read about the "Bank Debenture Trading Program" in a book, whose title he could no longer recall. Roor said that he knew of some people-who he refused to identify-who had invested in this type of program, although he did not know whether they actually received the promised return. Roor asserted that banks and the Federal Reserve do not acknowledge the existence of this type of program because they do not want to disclose the existence of such high rates of return.

Roor also reported to the SEC that thousands of people joined Oxford, including some 600 to 800 United States citizens, although he refused to identify the members and the amount of their contribution. On March 8, 1999, Roor disclosed to the SEC that he received " 'close to one million dollars' from Oxford members." *Id.* ¶ 10. To promote Oxford, Roor twice traveled to the United States and used a 212 area code telephone number for Oxford to " 'make it cheaper for U.S. citizens' to invest in Oxford." *Id.* ¶ 8.

In addition to Oxford, Roor created two other investment programs, Manumit Unlimited ("Manumit") [FN3] and Top Return on Investment ("TROI"),[FN4] in March and April of 1999, respectively. Roor served as the Director of Manumit and advertised it as "Formerly Known As The Oxford Savings Club" in the promotional materials. *Id.*, Ex. 3 at 1.

> FN3. *http://www.manumit.com*

> FN4. *http://troi.tradeland.net/dummy*

B. Templin [FN5]

> FN5. Templin did not submit a counterstatement of undisputed material facts that comports with the requirements of Local Civil Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Rule 56.1 "), as amended on February 26, 2004. Under the amended rule, "[t]he papers opposing a motion for summary judgment shall include a *correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a* separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Local Rule 56.1(b) (emphasis in original). Tem-

> plin's 56.1 Counterstatement consists of a four paragraph letter that does not contain correspondingly numbered paragraphs or cite to "evidence which would be admissible, as required by Federal Rule of Civil Procedure 56(e)." Local Rule 56.1(d). Contrary to Templin's assertion in his first paragraph, the SEC's 56.1 Statement does not "appear [ ] in its Memorandum of Law, pages 2 through 11." Instead, the SEC's 56.1 Statement is separate document-titled "Plaintiff's Statement of Undisputed Facts Pursuant to Local Civil Rule 56.1 "-and consists of 33 numbered paragraphs. *See* docket entry number 82, filed on March 5, 2004. Templin's failure to comply with the amended rule is particularly troubling given that at the close of the briefing cycle, the Court, as a courtesy, asked Templin if he would be submitting a 56.1 Counterstatement and referred him to Local Rule 56.1. Consequently, the undisputed material facts in the SEC's 56.1 Statement are deemed admitted to the extent that the evidence cited therein supports the propositions stated. Local Rule 56.1(c); *Giannullo v. City of New York,* 322 F.3d 139, 140 (2d Cir.2003).

Templin is a resident of Kokomo, Indiana, who served in the United States Marine Corps from January 1959 to July 1972 and was later employed as a computer programmer. On March 20, 1999, Templin gave voluntary testimony to the SEC about his involvement in Oxford and other internet investment programs. Templin informed the SEC that when he first learned of Oxford, he contacted Roor to request his permission to set up a replicating website to duplicate that of Oxford. Templin did not recall specifically asking Roor how the investment program worked, nor did he think that Roor would have offered to explain it to him if he had. Templin informed the SEC that he simply believed the promotional materials originally provided by Roor even though he "didn't know it was a hundred percent true." *Id.* at 81:20-21. In fact, Templin admitted that he had no idea what the Oxford funds were invested in or whether it was a registered club that was run by "internationally oriented businessmen and financial experts," *id.* at 89:19-21, as it purported to be. What Templin did know was that "[i]f it was running I'd make a bunch of money." *Id.,* Ex. 5 at 49:10-11.

***3** Templin's website [FN6] announced, "[a]t first glance, the enclosed information may appear *'too good to be true,'* but the five minutes it takes you to read my web page could change your life and place YOU on the road to financial freedom." *Id.,* Ex. 10 at 1 (italics and caps in original). Templin's website promised the same returns and investment security outlined in Roor's Oxford investment plan. At this same website, Templin offered other investment programs, including Internet Marketing Partners ("IMP"),[FN7] Secured Private Placements ("SPP"), [FN8] and the 650 Club,[FN9] each of which promised risk-free astronomical returns. The SPP, for example, purportedly used investors' money to rent securities, such as Treasury Bills, that are leveraged into trading program to produce a 200% return every sixty days. *Id.,* Ex. 12 at 1, 3. Templin marketed the 650 Club as a "unique offshore financial opportunity," whereby an initial investment of $650 would yield a $2,000 payout and members would receive $100 for each new member they referred. *Id.,* Ex. 13 at 1. Finally, the IMP "Private Party Loan Program," which required a minimum $220 investment or "loan," promised a $20 return for each dollar invested after a 120-day maturation period.

> FN6. *http://www.opameria2.com*
>
> FN7. *http://www.opamerica2.com/imp/about-ppl.htm; http://www.opamerica2.com/IMP/ppl2.cfm; http://www.opamerica2.com/imp/termcond.htm; http://opamerica2.com/IMP/imp.cfm?id=loanman; ht-*

Not Reported in F.Supp.2d, 2004 WL 1933578 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,904
(Cite as: 2004 WL 1933578 (S.D.N.Y.))

tp://www.opamerica2.com/imp/ppl-appl.ht m

FN8. *http://www.opamerica2.com/spp/HowMoneyIsMade.htm; http://www.opamerica2.com/SPP/sppinfo.cfm?id=sppgroup; http://www.opamerica2.com/SPP/schedindx.htm; http:// www.opamerica2/SPP/schedule.htm*

FN9. *http://www.opamerica2.com/650; wysiwyg://117/http://www.opamerica2.com/650/yield.htm*

Templin admitted that although he preferred not to know whether the investment programs were legitimate, "at some point [he] understood that it was illegal," *id.,* Ex. 34 at 28:8-9, and that he was cheating people through these investment schemes. Indeed, unsuspecting investors sent Templin some $1.5 million between October 1998 and May 1999. One such beguiled investor was John B. Friedman ("Friedman"), who learned of SPP through an e-mail in October 1988 and then consulted Templin's website and communicated with Templin via telephone and e-mail. Templin assured Friedman that "SPP was an established program and would pay the returns promised," which were "twenty-to-one in approximately 30 to 60 days." Akhtar Supp. Decl., Ex. 10 ¶¶ 3, 7. Friedman sent Templin a check for $330, but never received any return on his investment. Instead of paying investors as promised, Templin purchased a $100,000 certificate of deposit for himself and his wife, Sandra Templin, wrote $62,745 in checks to himself and $29,715 in checks to his son, and transferred monies to banks in Latvia ($80,000) and Antigua ($90,000).

During his meeting with the SEC on March 20, 1999, "representatives of the SEC told [Templin] in no uncertain terms that this was a scam, that there was [sic] no programs that existed that could generate that type of returns." *Id.* at 21:19-22. Nevertheless, Templin continued to advertise and solicit investments after being so informed because, as he conceded, he was "greedy." *Id.* at 21:10-19.

Templin was indicted on June 19, 2002 for four counts of mail fraud in violation of 18 U.S.C. §§ 1341, 2, one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, and four counts of securities fraud in violation of 15 U.S.C. §§ 77q(a), 77x and 18 U.S.C. §§ 2 stemming from his involvement in Oxford, SPP, the 650 Club, and IMP "Private Party Loan Program." *United States v. Templin,* No. 02 Cr. 792. On May 13, 2003, Templin pleaded guilty before Judge Cedarbaum to Counts Two and Three of the indictment, which charged substantive securities fraud violations for his involvement in Oxford and SPP. Although these two counts charge criminal activity spanning from December 1998 to May 1999, Templin's plea agreement with the Government only pertained to his conduct after meeting with the SEC in March 1999 when the SEC expressly informed him that such activity was illegal. On September 9, 2003, Templin was sentenced to five months imprisonment and 36 months supervised release, with the first five months of supervised release to be home confinement. In addition, Templin was ordered to pay $40,000 in restitution and the $200 mandatory special assessment fee.

II. DISCUSSION

A. Standard of Review

***4** Pursuant to Fed.R.Civ.P. 56(c), a district court must grant summary judgment if the evidence demonstrates that "there is no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett,* 477 U.S. 317,

327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1).

To determine whether there is a genuine issue of material fact, the Court must resolve all ambiguities and draw all inferences against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir.1987). However, the mere existence of disputed factual issues is insufficient to defeat a motion for summary judgment. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11-12 (2d Cir.1986). The disputed issues of fact must be "material to the outcome of the litigation," *id.* at 11, and must be backed by evidence that would allow "a rational trier of fact to find for the non-moving party," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* With respect to materiality, "substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

B. Exchange Act § 10(b) and Securities Act § 17(a) Liability

The SEC has alleged that Roor and Templin violated Section 10(b) of the Exchange Act, Rule 10b-5 promulgated thereunder, and Section 17(a) of the Securities Act. These sections of the federal securities law are intended to protect the consumer against fraud and misrepresentation in the offer and sale of securities. To carry its burden with respect to both Section 10(b) and Section 17(a), the SEC must prove that the defendants "(1) made a material misrepresentation or omission as to which [they] had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir.1999); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir.1996).

Under this analysis, "[a] fact is material for the purposes of the antifraud provisions if there is a 'substantial likelihood that a reasonable investor would consider it important when making an investment decision." ' *SEC v. Gallard*, No. 95 Civ. 3099(HB), 1997 WL 767570, at *3 (S.D.N.Y. Dec.10, 1997) (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988)). As defined by the Supreme Court, "the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Scienter is established by knowing or reckless conduct, *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 45-46 (2d Cir.1978), *amended by*, 1978 WL 4098 (2d Cir. May 22, 1978), or even in some cases, by "willful blindness," i.e., a deliberate refusal to acquire information, *In re Fischbach Corp. Sec. Litig.*, No. 89 Civ. 5826, 1992 WL 8715, at *6 (S.D.N.Y. Jan.15, 1992). Finally, a misrepresentation made "in connection with the purchase or sale of securities" is actionable even if the "security" at issue does not exist. *Gallard*, 1997 WL 767570, at *3. With these principles in mind, I turn to the liability of the two defendants at issue on this motion.

1. Roor

***5** As outlined above, Roor made a series of misrepresentations on his Oxford website and in his promotional materials and promised what can only be described as phantasmagorical returns on purportedly risk-free investments. Yet, Roor could not explain in any sensible fashion how such returns were attainable. What he described to the SEC-that the Federal Reserve loans billions of dollars to private banks who then provide investment opportunities to wealthy investors at rates of 500% to 1,000% per year, secured by a "certified bank draft"-is akin to "prime bank instrument" ("PBI")

scheme that, as one court has observed, have become "rife in recent years." *SEC v. Bremont,* 954 F.Supp. 726, 728 (S.D.N.Y.1997). As described by the *Bremont* court, these schemes "rest on the premise that major international banks buy and sell PBIs-said to be high yield bank instruments-on a secret market that offers large and essentially risk free profits ... In fact, there is substantial evidence that no such instruments exist." *Id.* Indeed, the Federal Reserve and the SEC have issued press releases warning potential investors of these schemes. As the SEC's October 1993 "Information for Investors" release makes clear, the use of the word "prime" "is used to refer, generically, to financial institutions of purportedly high repute and financial soundness." Akhtar Decl., Ex. 20 at 1 n.1. Roor seized upon the reputation and stability of the Federal Reserve in the various incarnations of his scheme. Nevertheless, the Federal Reserve has specifically disavowed any knowledge of these alleged instruments [FN10] and warned that individuals may improperly be using the names of well-known banks and regulatory agencies. To say that the Federal Reserve, as Roor contends, is somehow involved in a massive investment opportunity conspiracy to benefit the wealthy is simply beyond cavil.

> FN10. According to the Federal Reserve's October 31, 1993 press release and accompanying October 21, 1993 Interagency Advisory, "[t]he questionable instruments are often denominated as 'Prime Bank Notes', 'Prime Bank Guarantees', or 'Prime Bank Letters of Credit'. They are also called by such other names as 'Prime European Bank Letters of Credit', 'Prime World Bank Debentures', or 'Prime Insurance Guarantees'." Akhtar Decl., Ex. 21 at 2.

There is therefore no serious question that Roor made material misrepresentations in connection with the purchase and sale of securities, thus satisfying the first and third elements of Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act. *Gallard,* 1997 WL 767570, at *3 (ruling that the sale of non-existent securities constituted a violation of the federal securities law antifraud provisions); *see also S.E.C. v. Lauer,* 52 F.3d 667, 671 (7th Cir.1995) ("An elementary form of [ ] misrepresentation is misrepresenting an interest as a security when it is nothing of the kind.") (internal citations omitted). As I previously held, "there is no question a reasonable investor would consider important the fact that the 'security' at issue did not exist ... and that the money would be misappropriated." *Gallard,* 1997 WL 767570, at *4. For our purposes, the "securities" at issue were "sold" at the time Roor received the duped would-be investors' money. *Id.*

The only remaining issue is whether Roor acted with the requisite scienter in making such misrepresentations. Roor filed no opposition to the SEC's motion for summary judgment. Instead, his submission was limited to a letter to the Court-which was sent more than three months after he was served with the SEC's motion papers-in which he stated, "I receive [sic] copies of all the correspondence sent to you by Mr. Kaufman from the SEC. I do not really understand what presently is going on, whether I have to go to jail, or have to pay a huge penalty, I really have no clue. I hope that you can give me an update on the status and what I can expect will happen." Letter from Roor to the Court of 6/8/04 at 1. In his correspondence, Roor further asserted that he "was not aware of doing anything illegal, like offering securities without a license," and that had he "been aware of any fraudulent activity [he] would have used a pseudonym." *Id.* Finally, Roor wrote that he was "afraid to travel to the USA, because before I know [sic] I might be spending the rest of my life in a U.S. prison." *Id.* This last comment is particularly prescient given that on May 10, 1999 and June 7, 1999, Judge Martin ordered Roor to, *inter alia,* repatriate, held him in contempt on December 29, 1999 for his failure to do so, and issued a warrant on January 10, 2000 for Roor's arrest upon entry into the United States.

***6** As the SEC notes, Roor's response is deficient

for a variety of reasons, not the least of which is its untimeliness and the fact that it is an unsworn statement that does not comport with the requirements of Fed.R.Civ.P. 56(e). *United States v. All Right, Title & Interest in Real Prop. & Appurtenances,* 77 F.3d 648, 657-58 (2d Cir.1996) (finding that an "unsworn letter was an inappropriate response to the government's motion for summary judgment, and the factual assertions made in that letter were properly disregarded by the court"). Roor's failure to respond to the motion does not, however, relieve the SEC of its burden on summary judgment. Instead, as the Second Circuit has recently held, " Fed.R.Civ.P. 56 ... does not embrace default judgment principles. Even when a motion for summary judgment is unopposed, the district court is not relieved of its duty to decide whether the movant is entitled to judgment as a matter of law." *Vt. Teddy Bear Co., Inc. v. 1-800 Beargram Co.,* 373 F.3d 241, 242 (2d Cir.2004). Accordingly, the Court has, as the Circuit instructs, independently examined the SEC's submissions to determine whether it is entitled to summary judgment against Roor.

Even if Roor's letter response were to be considered-and as a *pro se* litigant, his submissions should be read more leniently-Roor's protestation of innocence is belied by his other remarks and his conduct during the course of this litigation. Certainly, Roor's assertion that had his acts been knowingly fraudulent he would have used a pseudonym is hardly compelling. In actuality, Roor's acts did not have to be knowingly committed. As mentioned previously, under Second Circuit law, a reckless disregard for the truth or falsity of an assertion or even a willful refusal to acknowledge the truth of a matter is sufficient to satisfy the scienter requirement. *Rolf,* 570 F.2d at 45-46; *In re Fischbach Corp. Sec. Litig.,* 1992 WL 8715, at *6. Indeed, Roor's behavior seems to be the paradigm of recklessness as described by the Second Circuit: "Reckless conduct is, at the least, conduct which is 'highly unreasonable' and which represents an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Rolf,* 570 F.2d at 47 (internal quotation marks and citation omitted) (ellipse in original). As I found in *Gallard,* scienter can be found as a matter of law based on a defendant's "repeated conduct and total inability to provide any evidentiary support for the existence of the purported instrument." 1997 WL 767570, at *4. Moreover, as the Second Circuit has held, the Court may draw an adverse inference against Roor because he asserted his Fifth Amendment privilege against self-incrimination in response to the SEC's allegations and discovery requests. *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.,* 55 F.3d 78, 82-83 (2d Cir.1995); *Commodity Futures Trading Comm'n v. Int'l Fin. Servs. (New York), Inc.,* --- F.Supp.2d ----, No. 02 Civ. 5497, 2004 WL 1048241, at *19 (S.D.N.Y. May 07, 2004) ("While this inference alone does not suffice to meet the Commission's evidentiary burden, it significantly bolsters the Commission's independent evidence.") (internal citation omitted). Thus, the SEC has carried its burden with respect to defendant Roor.

2. Templin

*7 The above discussion is perhaps equally applicable to defendant Templin. Nevertheless, his civil liability need not detain us long as he has already pleaded guilty to a portion of the conduct at issue in this enforcement action. "It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *United States v. Podell,* 572 F.2d 31, 35 (2d Cir.1978). Counts Two and Three of the indictment charged Templin with violations of Section 17(a) of the Securities Act, 15 U .S.C. §§ 77q(a), 77x [FN11] for his involvement in the Oxford and SPP schemes. On May 13, 2003, Templin pleaded guilty to these two counts insofar as they pertained to his conduct after his March 1999 meeting with the SEC. This ends at least one portion of

our inquiry. The fact that the SEC's complaint alleges violations of both Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act is of no moment because, as noted earlier, these provisions have substantially the same elements. *SEC v. McCaskey,* No. 98 Civ. 6153, 2001 WL 1029053, at *4 (S.D.N.Y. Sept.6, 2001) (ruling that the defendant's guilty plea to a Section 10(b) and Rule 10b-5 served as an admission all of the elements of SEC's Section 17(a) claim); *Stewart v. United Australian Oil, Inc.,* No. 73 Civ. 3020, 1975 WL 362 (S.D.N.Y. March 12, 1975) (deciding that the defendant's guilty plea to a Section 17(a) violation established his civil liability for a Section 10(b) violation). Indeed, it matters not what the precise charges in the indictment and civil complaint are, so long as they are predicated on the same factual allegations. *SEC v. Dimensional Entm't Corp.,* 493 F.Supp. 1270, 1277 (S.D.N.Y.1980) (holding that the factual allegations underlying defendant's wire fraud convictions were sufficiently similar to the alleged securities fraud violations so as to conclusively establish his liability in a subsequent civil enforcement action).

> FN11. These counts of the indictment also charged Templin with violations of 18 U.S.C. § 2, the aider and abettor statute, which is not germane to this discussion.

It remains to be determined whether Templin's conduct from December 1998 to March 1999 can be included, since collateral "estoppel extends only to those issues that were essential to the plea." *Goodridge v. Harvey Group Inc.,* 728 F.Supp. 275, 278-79 (S.D.N.Y.1990). As discussed earlier with respect to defendant Roor, there is no serious question that the defendants' acts were material misrepresentations in connection with the purchase and sale of securities. However, Templin argues that before the SEC told him that his actions were illegal in March 1999, he did not act with the requisite scienter because he honestly believed that fantastic rates of return he offered were obtainable. Templin's assertion in this regard is at best suspect in light of the fact that after being so warned, he continued his fraudulent activities. And, as with Roor, the Court can and does find that an adverse inference is appropriate given Templin's assertion of his Fifth Amendment privilege in the course of this litigation. *SEC v. Princeton Econ. Int'l Ltd.,* Nos. 99 Civ. 9667, 99 Civ. 9669, 1999 WL 997149, at *3 (S.D.N.Y. Nov.3, 1999); *Bremont,* 954 F.Supp. at 733. These adverse inferences are further buttressed by the SEC's submissions, which show that instead of paying investors as promised, Templin spent the money on himself and his family and wired it to overseas accounts.

***8** Further, it is clear that Templin's conduct standing alone rises to the level of recklessness. At his plea allocution, Templin acknowledged that he did no investigation into viability of the "investment" opportunities he offered on his various websites, how the programs functioned, who managed the funds, or the degree of risk involved. Despite all of his promises and representations, Templin confessed that he did not even know if these purported investment programs were legitimate; indeed, he preferred not to know. Yet, "[w]here a defendant plays a central role in marketing an investment, his defense that he was unaware that the investment was fraudulent is less credible." *SEC v. Milan Capital Group, Inc .,* No. 00 Civ. 108, 2000 WL 1682761, *5 (S.D.N.Y. Nov. 9, 2000). Moreover, "[a]n egregious refusal to see the obvious, or to investigate the doubtful, may ... give rise to an inference of ... recklessness," *Chill v. General Elec. Co.,* 101 F.3d 263, 269 (2d Cir.1996). As discussed in *In re Fischbach Corp. Sec. Litig.,* 1992 WL 8715, at *6, this refusal to acquaint himself with, but rather, to turn a blind eye to information that would have revealed the misrepresentation can satisfy the scienter requirement so long as it was deliberate and intentional. Thus, by his own admissions, Templin has satisfied the standard for scienter in this Circuit. *E.g., Bremont,* 954 F.Supp. at 730 (ruling that the defendant's failure "to make the slightest attempt to verify" the fraudulent transactions "comfortably qualifies as reckless").

C. Remedies

1. Permanent Injunction

The SEC seeks a permanent injunction enjoining Roor and Templin from future violations of the federal securities law provisions. A permanent injunction is appropriate where there has been a violation of the federal securities laws and there is a reasonable likelihood of future violations. *SEC v. Commonwealth Chem. Sec., Inc.,* 574 F.2d 90, 99 (2d Cir.1978). Templin, whose counsel asserts that he has agreed not to be involved in the securities business, has apparently consented to such an injunction. Regardless, injunctive relief is appropriate where, as here, the defendants do not acknowledge their wrongdoing and continue to engage in fraudulent activity after having been warned of its illegality. *E.g., Gallard,* 1997 WL 767570, at *5. Both Roor and Templin have claimed ignorance of the fraudulent nature of their acts, which, as discussed previously, is belied both by the patently impossible returns promised and their subsequent conduct. Judge Martin already held Roor in contempt for his failure to abide by Court orders and Templin continued his fraud after the SEC told him to cease and desist. Under these circumstances, a permanent injunction seems particularly appropriate and will be granted with respect to both defendants.

2. Disgorgement

The SEC also seeks disgorgement of Roor and Templin's ill-gotten gains in the amounts of $1 million and $1,502,265.04 respectively and prejudgment interest thereon. Disgorgement is a remedial measure that derives from the Court's equitable powers. *First Jersey Sec., Inc.,* 101 F.3d at 1474. "[T]he primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched." *Commonwealth Chem. Sec., Inc.,* 574 F.2d at 102. Because of the equitable nature of the remedy, the Court has broad discretion in determining the amount of any disgorgement. *First Jersey Sec., Inc.,* 101 F.3d a 1474-75. "[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation," and "any risk of uncertainty ... should fall on the wrongdoer whose illegal conduct created the uncertainty." *SEC v. Patel,* 61 F.3d 137, 139, 140 (2d Cir.1995) (alteration in original).

***9** Here, both Roor and Temlin have refused to provide the written accounting ordered by the Court on June 7, 1999 and instead asserted their Fifth Amendment privilege. As Second Circuit law makes clear, this is their absolute right, but they cannot then benefit from the uncertainty created by their conduct. I will therefore rely on the evidence provided by the SEC to determine the amount of disgorgement. In his June 7, 1999 order, Judge Martin froze the funds in ten bank accounts in Indiana and Latvia held in the name of Roor, Templin, and their associated businesses.[FN12] When he met with the SEC on March 8, 1999, Roor reported that he had received " 'close to one million dollars' from Oxford members." Akhtar Decl., Ex. 4 ¶ 10. The SEC has also presented evidence that Templin received a total of $1,502,265.04 from unsuspecting investors. The SEC has made a sufficient showing to warrant disgorgement in these amounts and, accordingly, the burden then shifts to the defendants to prove that these amounts are unreasonable. *SEC v. Hasho,* 784 F.Supp. 1059, 1111 (S.D.N.Y.1992) ("The SEC has the burden to put forth a disgorgement figure that reasonably approximate the amount of unjust enrichment and then the burden shifts to the defendant to 'demonstrate that the disgorgement figure was not a reasonable approximation." ') (quoting *SEC v. First City Fin. Corp., Ltd.,* 890 F.2d 1215, 1232 (D.C.Cir.1989)).

FN12. The balances of these accounts are not indicated in the Court's June 7, 1999 order and the parties have provided information as to the current balances in connection with this motion. Although there was earlier correspondence to the Court regarding the amounts presently in the ten

> accounts, the letters do not shed any light on the matter as the parties are in substantial disagreement as to what the current balances are.

In his opposition, Templin argues that the SEC is only entitled to disgorgement of $20,000 to $40,000, the amount of profits Templin received after March 1999 when he met with the SEC, the timeframe that corresponds to his guilty plea. Templin's arguments, however, misapprehend the nature of this equitable remedy and the applicable law. Contrary to Templin's assertions, the SEC does not seek to have these monies forfeited for their own benefit. "Rather, the primary purpose of the equitable remedy of disgorgement in these circumstances is to ensure that those guilty of securities fraud do not profit from their ill-gotten gains." *SEC v. Wang,* 944 F.2d 80, 81 (2d Cir.1991).

Roor further contends that monies set aside in a legal defense fund ($42, 557.25) and a joint checking account with his wife, Sandra Templin, at First National Bank & Trust ($6,721.50) should not be subject to disgorgement because those funds were not derived from the investment scheme. Templin previously sought release of these funds from the Court-ordered freeze, which Judge Martin denied by Memorandum Opinion and Order. *SEC v. Roor,* No. 99 Civ. 3372, 1999 WL 553823, at *3 (S.D.N.Y. July 29, 1999). In so holding, Judge Martin noted

> More alarming is the $36,190 [FN13] contained in Templin's "Legal Defense Fund." To support his contention that this money was donated by his "supporters" and is the asset of a trust established to pay his legal fees, Templin submits the deposition testimony of Christopher Beal, a North Carolina tobacco farmer who invested $220 with Templin in expectation of receiving $108,000 within a year. Instead of proving that the Legal Defense Fund is a legitimate enterprise, the deposition testimony submitted by the defendant reveals Beal to be the vulnerable victim of a continuing scam. Moreover, Beal, who has a minimal income, could not explain where he obtained the substantial amount of money he allegedly loaned to Templin. The S.E.C. has also provided evidence that Templin treated the Fund as a personal asset and paid household expenses from the Fund. These funds will not be released. In short, Templin has failed to demonstrate a legitimate source for his "Defense Fund" and the asset freeze order will not be modified to permit him to make any use of these funds.
>
> FN13. It is unclear why the amount of money contained in the Legal Defense Fund at the time of Judge Martin's Memorandum Opinion and Order is $6,643.35 less than what the parties report it contains now. This apparent discrepancy, however, has no bearing on Judge Martin's or this Court's analysis and thus will be disregarded.

***10** *Id.*
Templin has offered no new evidence to alter this analysis, and therefore this Court adheres to Judge Martin's earlier decision.

As for the joint checking account, Templin asserts that this account contains payroll deposits from the employers of both Templin and his wife and was used to pay household expenses. These contentions are borne out by the banking statements Templin submitted with his opposition papers. Unfortunately, Templin has offered no means to identify with precision the amount of Sandra Templin's payroll deposits. Accordingly, Templin may submit, if he chooses, further proof-supported by admissible evidence and not merely counsel's assertions-within 10 days of the date hereof, which the SEC may oppose within 10 days thereafter.

Finally, the SEC seeks prejudgment interest on the disgorged funds. As with disgorgement, an award of prejudgment interest lies within the sound discretion of the Court. *First Jersey Sec., Inc.,* 101

F.3d at 1476. "Requiring payment of interest prevents a defendant from obtaining the benefit of what amounts to an interest free loan procured as a result of illegal activity." *SEC v. Moran,* 944 F.Supp. 286, 295 (S.D.N.Y.1996). An award of prejudgment interest is appropriate and it shall be calculated by the Clerk of the Court "at the same rate used by the IRS with respect to underpaid taxes." *Gallard,* 1997 WL 767570, at *6. The SEC's request for turnover of the frozen assets to satisfy this award of disgorgement is granted.

3. Civil Penalties

In addition to disgorgement, the Court may impose civil penalties upon violators of the antifraud provisions of the federal securities laws. 15 U.S.C. §§ 77t(d), 78u(d)(3). The statutes provide for three levels or "tiers" of penalties. Under the first tier, the Court may impose a penalty of up to "the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i). A second tier penalty is warranted for violations that involved fraud and may not "exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. §§ 77t(d)(2)(B), 78u(d)(3)(B)(ii). Here, the SEC seeks a third tier penalty, which is the "greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation" if the violation involved fraud and resulted in substantial losses. U.S .C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii).

To support its application, the SEC's motion papers merely track the statutory language and assert that such a penalty is appropriate because the violations of Roor and Templin involved fraud and created a substantial loss. Civil penalties are designed to deter securities fraud violations and extract a price beyond the ill-gotten profits that are disgorged, *SEC v. Coates,* 137 F.Supp.2d 413, 428-29 (S.D.N.Y.2001) (quoting H.H.Representation. No. 101-616 (1990)), but a "defendant's finances are relevant to the size of civil penalty, *SEC v. Robinson,* No. 00 Civ. 7452, 2002 WL 1552049, at *10 (S.D.N.Y. July 16, 2002), *supplemented by,* 2002 WL 1729559 (S.D.N.Y. July 23, 2002), adopted on October 11, 2002. Here, Templin's counsel asserts that Templin is "financially destitute" and "has no assets to speak of." Mem. Opp. at 9. While Templin offers no evidentiary support for this assertion, Templin has already been ordered to pay $40,000 in restitution in the criminal case against him, *United States v. Templin,* No. 02 Cr. 792, and this, coupled with his incarceration and the order of disgorgement, will provide sufficient deterrent. As for Roor, I believe a penalty in the amount of $100,000 is appropriate, although it is worth noting that the SEC may never be able to collect, as Roor seems intent on eluding judicial process. A penalty is particularly appropriate because Roor has failed to recognize the harm of his conduct or his own culpability. *Robinson,* 2002 WL 1552049, at *11. This amount is also "commensurate with penalties assessed by other courts." *Id.* at *12 (citing cases).

III. CONCLUSION

***11** For the foregoing reasons, the SEC's motion for summary judgment against defendants Roor and Templin is granted. Roor and Templin are permanently enjoined from violating the federal securities laws. Roor is ordered to disgorge $1 million and Templin is ordered to disgorge $1,502,265.04. However, if he so desires, Templin may submit further evidence of the exact amount of Sandra Templin's payroll deposits into the checking account held jointly by the Templins at First National Bank & Trust within 10 days of the date hereof and, should Templin avail himself of this opportunity, the SEC will have 10 days to respond and the Court will consider a reduction to the amount of Templin's disgorgement. The Clerk of the Court will calculate pre-judgment interest on the disgorged amounts using the IRS rate for underpaid taxes. The

assets ordered frozen on June 7, 1999 are to be turned over to the SEC with all accumulated interest in satisfaction of the amount of disgorgement. Should the interest exceed the Clerk's calculation it will be refunded to the defendants. Roor is further ordered by pay a $100,000 civil penalty. The SEC will provide the Court with a stipulation of settlement or voluntary dismissal with respect to the remaining defendant, Laurie Elizabeth Weiss, or be trial-ready within 30 days of the date hereof. The Clerk of the Court is instructed to close this motion.

THIS CONSITUTES THE DECISION AND ORDER OF THE COURT.

S.D.N.Y.,2004.
S.E.C. v. Roor
Not Reported in F.Supp.2d, 2004 WL 1933578 (S.D.N.Y.), Fed. Sec. L. Rep. P 92,904

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