IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:19-cv-02594-RM

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

MEDIATRIX CAPITAL INC., et al.

Defendants.

and

MEDIATRIX CAPITAL FUND LTD., et al.

Relief Defendants.

MICHAEL AND MARIA YOUNG'S RESPONSE IN OPPOSITION TO THE RECEIVER'S MOTION FOR AUTHORITY TO PURSUE PRE-JUDGMENT COLLECTION ACTIVITIES
AND
REQUEST FOR HEARING IN THE ORDINARY COURSE

Michael S. Young and Maria C. Young (the "Youngs") respond in opposition to the Receiver's Motion for Authority to Pursue Certain Avoidance Claims and for other relief as follows:

INTRODUCTION

The Receiver's motion should be denied outright because under Federal law the Receiver has no authority to pursue private claims against third parties who have not been sued by the government. Under 28 U.S.C. § 3103, a federal court may only appoint a receiver "for property in which the *debtor* has a substantial

nonexempt interest[.]" 28 U.S.C. § 3103(a) (emphasis supplied). Here, the Receiver is asking this Court to expand his powers to reach the property of certain investors and non-party brokers in which no defendant has any interest at all but in which some of the *investors,* as opposed to the debtors, may have an interest. The powers the Receiver is asking to receive are unlawful because this Court cannot appoint a Receiver for property that no debtor has any interest in recovering.

The Receiver's motion should also be denied because it is based on unsupported allegations of Ponzi-like conduct which are simply untrue. There has been no finding of liability against any of the Defendants. There is no actual evidence of a Ponzi-scheme. There is no evidence that investors funds were not maintained in separate accounts. There is no evidence of "pooling" beyond what is common in everyday commerce where, for example, undersigned's funds in her bank account are not retained in a separate cash register drawn from the funds maintained in the Receiver's own bank account. Every investor had their own account and made profits or losses on their own trades. The narrative of a Ponzi-scheme is made up out of whole cloth and until this Court actually sees evidence that one investor's funds were given to another investor, any action taken on the basis of hearsay allegations in the SEC's Complaint are inadequate to support the Ponzi-scheme accusations.

Here, there is evidence in the form of investor statements that shows that some of the investors made profits on their own trades and cashed out the profits

they earned on their own trades. There is no basis in law under which such investors should be forced to disgorge their own earnings. Given the actual facts, it simply makes no sense for this Court to allow the Receiver to further drain the assets of the Estate pursuing unlawful recoveries based on hearsay allegations alone. The Receiver and his predecessor have already paid themselves and their team more than half a million dollars while they have not increased the value of the Estate at all, they have only diminished it. The planned attack on innocent third parties, most of whom are foreign nationals outside the jurisdiction of this Court, will only drain the assets even further although the effort will certainly serve to enrich the Receiver and his team who charge high hourly fees for their work.

It is time for this Court to put a stop to the unchecked spending by the Receiver who has already accomplished the limited role he was appointed to perform. The SEC is capable of litigating any asset-freeze violation by other defendants on its own and without spending the Estate's resources to do so. The investors are wealthy individuals and entities who can pursue their own claims including any fraudulent transfer claims if they wish.

Indeed, they are already doing so, focusing their efforts on the prime broker, Equiti. *See e.g.,* Case No. 21-mc-00038-CMA Document 1-4 (D. Colo.). A copy of the 28 U.S.C. § 1782 application in that case is attached hereto as Exhibit A. The investors have retained private counsel to pursue a case against Equiti Capital UK Limited ("Equiti UK") in the United Kingdom because of Equiti's role in taking

large commissions for itself while understanding that it was failing to execute trades in a timely fashion, among other improper actions. Mr. Young has fully cooperated with the investors in their pursuit of Equiti. Filing claims against Equiti in the United Kingdom is a complicated process that Mr. Young cannot afford to join because all of his assets are frozen. Nonetheless, he has and will continue to cooperate with the Equiti proceedings to the full extent of his ability.

ARGUMENT

The Youngs submit that any litigation activity proposed by the Receiver at this juncture is fundamentally premature. There has been no finding of liability in the SEC's favor. There is no evidence that any investor was paid from the funds of another investor. Most importantly, federal law prohibits the expansion of his powers that the Receiver now seeks.

A. The Receiver Lacks Authority Under this Court's Order to Institute Pre-judgment, pre-litigation collection activities against innocent third parties.

This Court entered its Order Appointing Receiver ("Order") on September 11, 2020. As part of this Order, the Receiver was given very broad authority over the assets of the Defendants and of the Relief Defendants but was not given authority over the assets of others because any such authority would be unlawful. *See* Order Appointing Receiver at p. 2. The Receiver's powers, while very broad, do *not* extend to control over the assets of any of the non-parties to whom the Receiver wants to send threatening demand letters. Amending the Order to grant the Receiver such powers would contravene federal law, specifically, 28 U.S.C. § 3103(a) ("a court may

appoint a receiver for property in which the debtor has a substantial nonexempt interest if the United States shows reasonable cause to believe that there is a substantial danger that the property will be removed from the jurisdiction of the court, lost, concealed, materially injured or damaged, or mismanaged.").

The Order now in place vests the Receiver with broad general powers and duties that permit the Receiver to take custody, control and possession of "all Receivership Property" but do *not* permit the Receiver to take custody, control and possession of property that does *not* fall within the definition of Receivership Property. *See* Order at pp. 3-4, ¶ 4.B.

The Receivership Property subject to control by the Receiver is limited to the assets of the defendants and the relief defendants, *not* third-party brokers or any of the investors. The term "Receivership Property" is defined specifically in the Order as any and all property "which the Receivership Defendants and Receivership Relief Defendants own, possess, have a beneficial interest in, or control directly or indirectly ("Receivership Property"). *See* Order at p. 4, ¶ 4.A.

There is literally nothing in the Order that permits the Receiver to engage in pre-judgment collection activities against non-party brokers or investors because these parties do not own anything which the Defendants or the Relief Defendants "own, possess, have a beneficial interest in, or control directly or indirectly." *Id.* p. 4, ¶ 4. And, as the Tenth Circuit explains, this Court cannot, as a matter of law, grant the Receiver power over the assets of any non-parties in any event. *Teton Millwork Sales v. Schlossberg*, 311 Fed. Appx. 145, 151 (10th Cir. 2009) ("While the court order

permitted [the Receiver] to collect [a party's] assets even if they were held in the name of another entity … **the court order did not grant [the Receiver] authority to seize assets that did not belong to** [the party]. In fact, **the court could not grant such authority if the affected individuals or entities were not parties to the proceeding**[.]") (Emphasis supplied.) Here, the investors and brokers the Receiver proposes to sue are not parties to this proceeding.

At least one other Court that addressed a similar situation ruled against the Receiver and found that the Receiver did *not* have the power to obtain or enforce any judgment against non-parties. In *The Am. Cancer Soc. v. Cook*, 675 F.3d 524, 529 (5th Cir. 2012), a case that also involved an SEC Receiver's improper collection activities, the Fifth Circuit explained that the Receiver utterly lacks authority to collect transfers made *prior* to the date that the SEC's Complaint was filed. The First Circuit ruled: "First, [Receiver] argues that the receivership order-which authorized [him] to take possession of 'any assets traceable to assets owned by the Receivership' and to institute actions necessary to achieving this end-provides an independent justification for the $240,000 judgment[.]. **This argument is meritless**. [Defendant's] transfers []occurred between January 10, 2007, and August 13, 2009, ***before the SEC filed its complaint*** or the court entered the receivership order.") (Emphasis supplied.)

The clear import of the Court's ruling in *Cook* is that the Receiver lacks authority to take funds from parties who are not parties to the lawsuit. Here, both the law, and the Order setting forth the Receiver's powers, prevent the

Receiver from precisely the type of collections he is now proposing. The Receiver cites a number of cases that stand for the proposition that an equity receiver has the power to sue for fraudulent transfers "on behalf of entities in receivership," but none of the cases cited by the Receiver permits a federal receiver to sue some non-parties on behalf of other non-parties. Here, the receiver intends to sue certain non-parties on behalf of the investors who are also non-parties to this case. By his own admission, the Receiver does not intend to return money to any of the Defendants.

Tellingly, a review of the cases cited by the Receiver in his motion shows that the case law does not in truth support the Receiver's proposed actions. Specifically, the case of *Miles Multimedia, LLC v. Schumann Printers, Inc.*, 2013 WL 1858448, at *6 (D. Colo. May 2, 2013) does not involve a receivership at all and does not stand for the proposition that federal equity receivers have standing to pursue fraudulent transfers. *Miller v. Wulf*, 84 F. Supp. 3d 1266, 1272 (D. Utah 2015) involved a case where a Receiver pursued transfers only *after* a Ponzi scheme was proven with accounting records and other evidence, not on supposition alone. And, in all of the cases cited by the Receiver, the actions were meant to benefit the receivership estate, *not* non-party investors who have not sued in their own name.

B. There is no evidence of a Ponzi scheme.

Here, there is no proof, or even any admissible evidence suggesting, that Mediatrix operated as a Ponzi scheme and the only basis for the Receiver's

suggestion that a Ponzi scheme existed at Mediatrix is the SEC's own Complaint. Allegations in a Complaint are not evidence. The Receiver's affidavit saying he relied on the SEC's Complaint for his suppositions is not evidence. Indeed, a Court appointed Receiver cannot proceed to collect on a fraudulent transfer theory absent real evidence of a Ponzi scheme. The Receiver in another case tried the same thing as the Receiver is trying now and the Fifth Circuit reversed, explaining: "The sole evidence relied upon by the district court was Cook's affidavit and the attending exhibits. The testimony in the affidavit, however, is highly conclusory and thus depends on the data furnished in the exhibits. The exhibits included the following: a summary of Giant's profitability, a list of payments made by Giant Operating to DSSC, and what appears to be a checkbook registry of an account of DSSC at Comerica Bank. Nothing in these documents demonstrates that investor funds were used to issue "returns" to other investors—a *sine qua non* of any Ponzi scheme." *Am. Cancer Soc. v. Cook*, 675 F.3d 524, 528 (5th Cir. 2012).

Here, there is no evidence that the investors accounts were not maintained separately. The is no evidence that any investor's own funds were used to pay a different investor. There is evidence that closed transactions were reported on statements and open positions were not, but this is industry standard for the algorithmic foreign currency trades in order to protect against reverse engineering of the algorithm. The investors all knew that only closed positions were reported on their statements. For sure, some investors may have lost money when the government forced open positions to close without regard to the

markets. But that does not mean that investors who exited with profits did so at the expense of others. Unless and until this Court sees real evidence that one investor's money was used to pay a different investor, no action should be taken based on mere allegations of a Ponzi scheme that never existed. All parties, including the Youngs, are entitled to defend these charges before collection activities that are typical of post-judgment collection activities commence. In sum, by proceeding on mere allegations alone and without any finding of liability at all, the Receiver is putting the cart miles before the horse.

The Receiver posits that because aggregate accounts were negative, the investors who made profits must have done so at the expense of other investors. This supposition is far from the level of proof required to establish the existence of a Ponzi scheme. *Cook* at 528. Indeed, the SEC's own filings show many profitable months of trading. *See, e.g.,* ECF No. 1-24, showing combined gains of $9,012,610.51 for the month of February 2019 alone; *see also* ECF No. 1-25 (showing each investor's account was maintained separately). Unless the Receiver can show actual proof that investors who cashed out were paid using the funds of others, rather than their own profits, the fraudulent conveyance actions against any of the investors lack merit.

C. Mr. and Mrs. Young Request a Hearing.

If the Receiver's motion is not denied outright, the Youngs request a hearing handled in the normal course so that they or this Court may examine the Receiver as to the identities of the investors who made profits so that the Youngs can review

their statements for themselves. The Youngs further request a hearing to cross-examine the Receiver as to the basis, or lack thereof, as to any suppositions regarding Ponzi-like payments. The Youngs further request a hearing to determine the information relied upon by the Receiver in calculating the "net winnings" that the Receiver seeks to disgorge from innocent investors.

WHEREFORE, Defendants Michael S. Young and Maria C. Young respectfully request that the Receiver's motion be denied and for an order directing the Receiver to refund to the Estate any funds he has already expended on pursuing any non-parties as all such efforts are precluded by the limited scope of the Receiver's powers as contained in the appointment Order. The Receiver should not be charging the Estate to pursue any claims against non-parties under the appointment Order that is now in effect.

Dated this 31st day of May 2022.

ROBINSON WATERS & O'DORISIO P.C.
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CERTIFICATE OF SERVICE

I certify that on this 31st day of May 2022, a true and correct copy of the foregoing **MICHAEL AND MARIA YOUNG'S RESPONSE IN OPPOSITION TO THE RECEIVER'S MOTION FOR AUTHORITY TO PURSUE PRE-JUDGMENT COLLECTION ACTIVITIES AND REQUEST FOR HEARING IN THE ORDINARY COURSE** was served via CM/ECF on:

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/s/ Holly Stahl

IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF COLORADO

In re:	:	**Case No. _____**
Ex Parte Application Pursuant to 28 U.S.C. §1782 for an Order to Take Discovery of Michael Young for Use in a Foreign Proceeding	:	***Filed EX PARTE***

***EX PARTE* APPLICATION PURSUANT TO 28 U.S.C. § 1782 FOR AN ORDER TO TAKE DISCOVERY OF MICHAEL YOUNG FOR USE IN A FOREIGN PROCEEDING**

Based upon this Application, concurrently filed Memorandum of Law, and Declaration of Robert K. Campbell ("Campbell Decl."), the following individuals and entities: (1) Oak Trust, (2) Acorn Trust, (3) Eagle Trust, (4) Duffy Trust, (5) Robert J. Parfet Living Trust, (6) Geluk Global Fund Limited SAC (a company incorporated in the Bahamas), (7) Migration Investments, LLC (a Colorado, US LLC), (8) Boustrophedon International Ltd (a company incorporated in Hong Kong), (9) Michael R. Shea, (10) Erin Shea, (11) Angela Ling, (12) Fuhua Ling, (13) Philip Bullock, (14) Lifang Liu, (15) Justin Payne, (16) Michael Dietzen, (17) Kimberly J. Dietzen, (18) Brian Sly, (19) David K. Sly, (20) Gregory Sly, (21) Karen Sly, (22) Nelson Sly, (23) Helen S. Sly, (24) Sly Family Trust, and (25) Tamara A. Sly Separate Property Trust (together the "Applicants"), by and through Faegre Drinker Biddle & Reath LLC, apply to this Court pursuant to 28 U.S.C. § 1782 for an Order granting them leave to serve targeted discovery, in compliance with all relevant provisions of Fed. R. Civ. 45, and in the same form as the Subpoena *Duces Tecum*,

EXHIBIT A

and Subpoena *Ad Testificandum*, attached hereto as Exhibits A and B[1], upon Michael Young, whose personal residence is located within this district at 5406 South Cottonwood Court, Greenwood Village, CO 80121, permitting Applicants to obtain documents and testimony for use in an anticipated foreign proceeding in which they will be claimants. Applicants request that the Court grant them leave *ex parte*. This is the normal procedure for Section 1782 applications, and Young, as respondent to this Application, retains the ability to respond to the subpoenas attached to this Application as Exhibits A and B pursuant to the governing discovery rules, and/or to object pursuant to Fed. R. Civ. P. 45(c)(3).

Applicants expect to be claimants in an anticipated proceeding in the High Court of England and Wales in London, England (the "U.K. Proceeding"). *See* Campbell Decl., ¶¶ 3, 7-11. Young is not expected to be a party to the U.K. Proceeding. *See* Campbell Decl., ¶ 13. Applicants have not yet been provided copies of the documents they seek pursuant to the Subpoena *Duces Tecum*, attached hereto as Exhibit A, or an opportunity to elicit the testimony described in the Subpoena *Ad Testificandum* attached hereto as Exhibit B. *See* Campbell Decl., ¶ 20.

As more fully detailed in the Campbell Declaration and Memorandum of Law accompanying this Application, the documents and testimony Applicants seek from Young are believed to contain key information relevant to formulating their claims in the anticipated U.K. Proceeding. *Id.* ¶¶ 14-16. More specifically, they seek documents and testimony believed to

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[1] As drafted and attached hereto, the Document Subpoena and Deposition Subpoena do not contain specific dates for compliance, as such dates setting forth the time period in which respondent is to comply, cannot be populated until such time as an order may be granted authorizing their service. Accordingly, as reflected in the attached proposed order, upon entry of an order granting the relief requested herein, counsel for Applicants would anticipate revising Exhibits A-B to reflect compliance dates in accordance therewith.

EXHIBIT A

support their allegations that the wrongful conduct of Equiti Capital UK Limited ("Equiti UK") in connection with its facilitation and concealment of a fraudulent Forex trading scheme ("the Mediatrix Fraud") operated by Mediatrix Capital Inc. ("Mediatrix") and Blue Isle Markets Inc. ("Blue Isle 1") and its successor, Blue Isle Markets Ltd. ("Blue Isle 2") (collectively referred to as "Blue Isle"), in which Applicants invested, resulted in their suffering significant financial losses. *Id.* Under the Civil Practice Rules 1998 governing procedure in the High Court of England and Wales ("the CPR"), Applicants have served Equiti UK with a formal "Letter of Claim," detailing certain factual and legal bases to support their claims against Equiti UK pursuant to laws of England and Wales, including claims for damages and/or equitable compensation under various legal theories stemming from Equiti UK's role in connection with Blue Isle / Mediatrix's fraud. *Id.*, ¶ 9.

As set forth in the accompanying Memorandum of Law and Campbell Declaration, this Application satisfies the statutory elements of 28 U.S.C. § 1782, and the discretionary factors identified in *Intel Corp. v. Advanced Micro Devices, Inc.*, also favor granting the relief requested herein. 542 U.S. 241, 264-65, 124 S. Ct. 2466, 2483 (2004). The statutory elements are satisfied because Young resides and is found in this District, the claims that Applicants expect to file in the U.K. constitute a reasonably anticipated proceeding before a foreign tribunal (*see* Campbell Decl., ¶ 11), and Applicants seek documents and testimony for use in that proceeding.

As for *Intel's* discretionary factors, the discovery sought through this Application is not otherwise accessible to Applicants—including because Young is not expected to be a party to the U.K. Proceeding or otherwise subject to the jurisdiction of the High Court of England and Wales, *see id.*, ¶ 19—and, production of the requested discovery will not circumvent any policies of the

EXHIBIT A

United Kingdom or United States, or violate any court order or directive. *Id.* ¶ 20. Additionally, the CPR contemplates that parties to proceedings within the High Court of England and Wales will engage in discovery and allows for the submission of documentary evidence. Accordingly, it is anticipated that discovery collected through this Application will be admissible in the context of the U.K. Proceeding. *See Id.*, ¶¶ 17-18. Further, the requests to Young, attached hereto as Exhibits A and B, are specific and narrowly tailored, and, thus, their production not anticipated to be unduly intrusive or burdensome. Young may also avail himself of the protections available to any third-party subpoena respondent under the Federal Rules of Civil Procedure to shield from disclosure privileged and proprietary information. Lastly, the filing of the U.K. Proceeding is reasonably anticipated, as confirmed by Applicants' issuance of a Letter of Claim to Equiti UK, which demand remains unsettled. *Id.*, ¶¶ 3, 7-12.

Moreover, the burden on Young to respond to the attached subpoenas is minimal to the extent he is being commanded to produce documents already preserved, identified and/or produced in other litigation involving the same operative facts. For instance, the U.S. Securities and Exchange Commission has conducted an investigation and initiated litigation against Young personally, as well as Mediatrix and Blue Isle, for the fraud Applicants assert Equiti UK facilitated. That litigation remains pending in the United States District Court for the District of Colorado.[2] To the extent Young has collected and/or produced documents related to the SEC investigation or litigation, it would not be burdensome for Young to reproduce such documents in response to the attached subpoenas.

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[2] *See United States Securities and Exchange Commission v. Mediatrix Capital Inc. et al*, No. 1:19-cv-02594-RM-SKC (D. Colo. filed Sept. 12, 2019).

EXHIBIT A

For these reasons, Applicants respectfully request that this Court grant their Application for an Order giving them leave to serve upon Young the Subpoenas attached hereto as Exhibits A and B.

Dated: February 18, 2021

FAEGRE DRINKER BIDDLE & REATH LLP

By: *s/ Michael R. MacPhail*
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EXHIBIT A