KARA B. HENDRICKS, Bar No. 07743
hendricksk@gtlaw.com
JASON K. HICKS, Bar No. 13149
hicksja@glaw.com
KYLE A. EWING, Bar No 014051
ewingk@gtlaw.com
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

JARROD L. RICKARD, Bar No. 10203
jlr@skrlawyers.com
KATIE L. CANNATA, Bar No. 14848
klc@skrlawyers.com
SEMENZA KIRCHER RICKARD
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Telephone: (702) 835-6803
Facsimile: (702) 920-8669

DAVID R. ZARO*
dzaro@allenmatkins.com
JOSHUA A. del CASTILLO*
jdelcastillo@allenmatkins.com
MATTHEW D. PHAM*
mpham@allenmatkins.com
*admitted *pro hac vice*
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
865 South Figueroa Street
Suite 2800
Los Angeles, California 90017-2543
Telephone: (213) 622-5555
Facsimile: (213) 620-8816

Attorneys for Receiver Geoff Winkler

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

MATTHEW WADE BEASLEY *et al.*

Defendants,

THE JUDD IRREVOCABLE TRUST *et al.*

Relief Defendants.

Case No. 2:22-CV-00612-CDS-EJY

RECEIVER'S RESPONSE TO DEFENDANT RICHARD MADSEN'S MOTION TO CLARIFY ASSET FREEZE AND TO ALLOW ATTORNEYS TO RETAIN EARNED FEES

Comes now, Geoff Winkler, the Court-appointed Receiver (the "Receiver"), by and through his counsel of record the law firm of Greenberg Traurig, LLP, and hereby submits this Response to Richard Madsen's Motion to Clarify Asset Freeze and to Allow Attorneys to Retain Earned Funds (ECF No. 332) ("Response"). This Response is based upon the Memorandum of

Points and Authorities, attached hereto, the pleadings and papers on file herein, and such other and further arguments and evidence as may be presented to the Court in connection with the Motion.

DATED this 28th day of October 2022.

GREENBERG TRAURIG, LLP

By: /s/ Kara B. Hendricks

KARA B. HENDRICKS, Bar No. 07743
JASON K. HICKS, Bar No. 13149
KYLE A. EWING, Bar No. 014051
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135

JARROD L. RICKARD, Bar No. 10203
KATIE L. CANNATA, Bar No. 14848
SEMENZA KIRCHER RICKARD

DAVID R. ZARO*
JOSHUA A. del CASTILLO*
MATTHEW D. PHAM*
**admitted pro hac vice*
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

Attorneys for Receiver Geoff Winkler

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Richard Madsen ("Madsen") filed the instant Motion seeking to whittle down the scope and application of the injunctive relief and seeking to be exempted from the obligations imposed on all Defendants through the Receivership. The crux of Madsen's arguments is that because he has not been accused of fraud by the Securities and Exchange Commission ("SEC") that the asset freeze is unprecedented and that the Receiver should not be able to claw back the $250,000 he paid his attorneys. However, Madsen's Motion misses the mark. Indeed, this Court has considered the very issues raised on multiple occasions and required the turnover requested by the Receiver. Notably, this Court's prior rulings expressly require the party seeking to retain funds to establish the funds were/are untainted. Madsen has not done so. Rather, Madsen challenges this Court's prior orders and misrepresents the allegations in the operative complaint. As set forth herein, the precedent is clear—if a Defendant wants to utilize Receivership Property for the

payment of attorney's fees, that Defendant must establish that those funds are untainted. Madsen has not met his burden and Madsen's Motion should be denied and the funds he provided to Braganca Law LLP and Howard & Howard should be turned over to the Receiver forthwith.

II. RELEVANT FACTUAL BACKGROUND

A. Procedural History.

As alleged in the Amended Complaint, a long-running fraudulent Ponzi scheme gives rise to the claims asserted against all Defendants, including Madsen. (ECF No. 118). At the outset of this case, the SEC moved, *ex parte*, for the Entry of a Temporary Restraining Order and Orders: (1) Freezing Assets; (2) Requiring Accountings; (3) Prohibiting the Destruction of Documents; (4) Granting Expedited Discovery; and (5) Order to Show Cause Re: Preliminary Injunction (the "TRO Application"). (ECF No. 2). By and through the TRO Application, the SEC established the nature of the Ponzi scheme by providing this Court with detailed allegations and credible evidence, including direct statements from Beasley, detailing the origin and progression of the Ponzi scheme. *Id.* Moreover, through the Complaint and the TRO Application, the SEC outlined the extravagant assets the Receivership Defendants acquired with Ponzi scheme funds, and their concerted attempts to liquidate and dissipate substantial assets. (ECF Nos. 1, 2). After considering the Complaint, the TRO Application and the relevant evidence, the Court entered a Temporary Restraining Order (1) Freezing Assets; (2) Requiring Accountings; (3) Prohibiting the Destruction of Documents; and (4) Granting Expedited Discovery, among other things (the "TRO")[1]. (ECF No. 3). The terms of the TRO were later affirmed via this Court's entry of the Preliminary Injunction.

Subsequent to the Preliminary Injunction, this Court issued its Order Appointing Receiver (the "Receivership Order") which, among other things, ordered "[a]ll persons and entities having control, custody or possession of any Receivership property [] **to turn such property over to the Receiver**."[2] (ECF No. 88 at ¶ 15) (emphasis added) (the "Turnover Provision"). Thus, any person

[1] The TRO was later sealed following a Motion to Seal by Defendant Shane M. Jager. (ECF Nos. 51 and 57).

[2] On July 28, 2022, this Court entered an Order Amending Receivership Order through which the Appointment Order was amended to include within its purview eight (8) new defendants: Larry Jeffrey,

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

or entity (including counsel) that is in possession of Receivership Property is under an express obligation to turn over all monies held in trust on behalf the Defendants. Section III of the Appointment Order further obligates individuals and entities in receipt of the Receivership Order to "[c]ooperate expeditiously in providing information and transferring funds, assets and accounts to the Receiver or at the direction of the Receiver." *Id.* On July 28, 2022, this Court entered Orders Amending the Receivership Order (ECF No. 207) (the "Amended Receivership Order") and the Preliminary Injunction (ECF No. 206) (the "Amended Preliminary Injunction) to add new parties consistent with the Amended Complaint. Through the amended orders, this Court expressly applied the terms of the Receivership Order and the Preliminary Injunction to the "New Defendants", including Madsen. Indeed, Sections V and VI of the Amended Preliminary Injunction expressly enjoins Madsen and his counsel from transferring any asset and froze the same.

On August 8, 2022, Madsen filed an Emergency Motion for Reconsideration of: (1) Order Amending Preliminary Injunction and Asset Freeze Order; and (2) Order Amending Receivership Order (the "Motion for Reconsideration"). (ECF No. 236). Through the Motion for Reconsideration, Madsen argued the amended orders entered by the Court did not reflect the Court's decision and that as a result Madsen would suffer undue hardship due to the Asset Freeze. *Id.* In the Motion for Reconsideration, Madsen argued that he had "limited involvement" in the Ponzi scheme and as a result, the scope of the Asset Freeze and Receivership Order should be limited. *Id.* On August 9, 2022, this Court entered an order denying Madsen's Motion for Reconsideration in its entirety (the "Order Denying Madsen's Motion for Reconsideration"). (ECF No. 244).

Following communications between counsel regarding the Receiver's demand for turnover of funds paid by Madsen to his counsel, Madsen filed the instant Motion. The subject Motion concerns the retention of Receivership Funds[3] provided to two law firms engaged by Madsen in

Jason Jenne, Seth Johnson, Christopher Madsen, Richard Madsen, Mark Murphy, Cameron Rohner and Warren Rosegreen. (ECF No. 207). All other terms of the Appointment Order remain in effect.

[3] Pursuant to this Court's Order Appointing Receiver, "Receivership Property" is defined as "monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

relation to this matter. More specifically, Madsen's Motion seeks a declaration from this Court exempting him from the terms of the asset freeze and turnover provisions in existing court orders and an order permitting the law firms of Braganca Law and Howard & Howard to retain $250,000 paid to them by Madsen. (ECF No. 332 at 19). However, the funds held by Braganca Law and Howard & Howard are Receivership Property subject to the Asset Freeze and Turnover Provision imposed by this Court and Madsen has not provided this Court with any ground to deviate therefrom.

B. Communication with Counsel and Turnover of R. Madsen Funds.

Counsel for the Receiver began communicating with counsel for Madsen regarding the scope of the Amended Receivership Order in August of 2022.[4] During the initial discussion which occurred on August 18th, the issue of attorney fees was discussed and counsel for Madsen was unable to provide information indicating the funds provided to the two firms representing Madsen had not been commingled with tainted funds.[5] Madsen's counsel also explained the unique structure they utilized as part of their engagement which they claimed entitled both firms to retain the collective $250,000 they were provided.[6] At that time, counsel for the Receiver indicated a willingness to review any documents and authority counsel had in support of their position.[7] A subsequent discussion was had on August 26, 2022 and the parties were unable to come to an agreement regarding the fee issue and counsel for the Receiver suggested that if Madsen believed his position was unique and turnover was not required, that Madsen should file a Motion with the Court to address the same.[8]

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

indirectly." ECF No. 88 at ¶ 7A. For the purpose of this Response, the funds held by CTL shall be referred to as the "**Receivership Funds**" as the money falls within the definition of "Receivership Property" established by this Court.

[4] *See* Declaration of Kara B. Hendricks ("Hendricks Declaration") attached hereto as **Exhibit 1, ¶ 4.** Notably, Madsen has misrepresented to this Court the prior communications with counsel for the Receiver in an attempt to distract the Court from his inability to establish the funds provided to counsel were clean. Madsen's disagreement with counsel on the case law and directives of the Court provides no basis to suggest the Receiver did not review documents and/or act in good faith in trying to move this matter forward and is counter-productive. The communication between the parties speaks for itself.

[5] **Exhibit 1,** Hendricks Declaration at ¶ 5.

[6] *Id.* at ¶ 6.

[7] *Id.* at ¶ 7.

[8] *Id.* at ¶ 8.

After no motion was filed by Madsen regarding the fee issue, on September 9, 2022, counsel for the Receiver wrote to counsel for Madsen to discuss and ascertain information regarding funds paid by Madsen to counsel (the "September 9 Correspondence").[9] In the September 9 Correspondence, counsel for the Receiver requested:

> "1) Information regarding the amount of funds received by you and/or your firm from Defendant Richard R. Madsen; and 2) information establishing the funds received are untainted and/or were not co-mingled with funds from the alleged Ponzi-scheme. Please provide this information within ten days of the date of this letter. If information cannot be provided that establishes funds received by you were untainted and/or were not co-mingled with funds from the alleged Ponzi-scheme, demand is hereby made for the same to be turned over to the Receiver forthwith consistent with the Turnover Provision referenced below."[10]

Counsel for Madsen thereafter responded via a letter dated September 19, 2022 (the "September 19 Correspondence").[11] However, the September 19 Correspondence failed to provide the information requested; misrepresented prior communications between counsel; and opined that the funds received from Madsen were not Receivership Property.[12]

After reviewing the limited authority Madsen provided in support of this position, on October 5, 2022, counsel for the Receiver once again wrote to counsel for Madsen to address the comments made in the September 19 Correspondence (the "October 5 Correspondence") and referenced the recent Court Order that further supported the Receiver's turnover request.[13] Additionally, the October 5 Correspondence addressed the problems with the analysis offered and demanded turnover of the funds paid by Madsen as counsel had yet to be provided information to demonstrate that the funds received by counsel were untainted.[14]

III. ARGUMENT

Through the instant Motion, Madsen seeks to minimize the reach of the Asset Freeze and Turnover Provisions that apply to each and every defendant in this case. Indeed, Madsen's Motion

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[9] **Exhibit 2**, September 9, 2022 Correspondence from Kara B. Hendricks to Braganca Law LLC (the "September 9 Correspondence"); **Exh. 1** at ¶ 9.

[10] **Exh. 2**, September 9 Correspondence.

[11] **Exhibit 3**, September 19, 2022 Correspondence from David A. O'Toole to Kara B. Hendricks (the "September 19 Correspondence"); **Exh. 1** at ¶ 10.

[12] **Exh. 3**, September 19 Correspondence; **Exh. 1** at ¶ 11.

[13] **Exhibit 4,** October 5, 2022 Correspondence; **Exh. 1** at ¶ 12.

[14] **Exh. 4,** October 5 Correspondence; **Exh. 1** at ¶ 13.

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

effectively seeks reconsideration of this Court's prior rulings, to adjudicate his role in this case and to be exempted from the measures this Court has taken to marshal and preserve the assets derived from the alleged Ponzi scheme in favor of the victims. Despite Madsen's efforts, the instant Motion does not provide this Court with any sufficient ground to relieve Madsen and his counsel of their obligation to comply with this Court's orders.

A. Madsen Has Failed to Meet His Burden for Counsel to Retain Funds.

As noted above, the instant Motion centers on a request to retain Receivership Property for the payment of attorney's fees. To accomplish this feat, Madsen's Motion seeks a declaration from this Court that Braganca Law and Howard & Howard may retain the funds Madsen paid to them pursuant to engagement agreements with both firms. (ECF No. 332 at 19). While Madsen posits the instant analysis is a novel consideration, this Court has previously considered this issue and outlined the burden a party seeking to retain funds paid by a Defendant in this case must meet. More specifically, this Court has considered multiple requests by firms to retain funds paid by various Defendants in this case and each time has reiterated that the party seeking to retain or release funds must establish that such funds are untainted. *See* ECF No. 235 and ECF No. 318.

On two separate occasions, this Court has considered arguments mirroring those made by Madsen and determined that the party seeking to retain fees bears the burden of establishing that the funds they seek to retain are untainted. This Court has previously found:

> Contrary to the arguments set forth in VanCott's motion, once the SEC has met its preliminary showing that the assets in question can be traced to fraud[15], the burden of establishing whether the funds are tainted or untainted falls squarely on Judd. (ECF No. 235 at 8).

The Court echoed this finding in response to another request for fees by counsel for Defendant Humphries:

> Here, the SEC met its preliminary showing that the assets in question can be traced to fraud, thus the burden of establishing whether the funds are tainted or untainted fall squarely on Humphries and CJ Investments. (ECF No. 318 at 9).

Thus, in an instance such as this, where a Defendant seeks to retain or utilize funds attributable to the fraudulent conduct giving rise to the case, the defendant (Madsen) bears the

[15] The Court notes that the SEC has met its burden which resulted in the Temporary Restraining Order and the subsequent Preliminary Injunction.

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

burden of establishing the funds they seek to retain and/or release are untainted. *See SEC v. Santillo*, 2018 WL 3392881, at *4 (S.D.N.Y. July 11, 2018) (stating that in a civil action, including enforcement actions brought by the SEC, a "Defendant must establish that the funds he seeks to release are untainted and that there are sufficient funds to satisfy any disgorgement remedy that might be ordered in the event a violation is established"); *SEC v. Private Equity Management Group, Inc.*, 2009 WL 2058247, at *2-3 (C.D. Cal. July 9, 2009) (noting that the SEC had made the necessary preliminary showing that funds were tainted and explaining "it is now up to [defendant] to demonstrate that the assets he possesses are untainted by the fraud"). Here, Madsen has not provided this Court with any evidence or information to demonstrate the funds paid to Braganca Law and Howard & Howard were untainted or not commingled with funds from the alleged Ponzi scheme. For this reason alone, Madsen's Motion should be summarily denied from the outset.

B. The Basis of Madsen's Motion is Inherently Flawed

Even assuming, *arguendo*, that Madsen had presented this Court with a valid request to retain attorney's fees, the foundation on which Madsen brings this Motion is inherently flawed.

First, Madsen has already made (and lost) this argument through a motion for reconsideration.[16] Indeed, the Motion for Reconsideration filed by Madsen argued that he had "limited involvement" in the Ponzi scheme and as a result, the scope of the Asset Freeze and Receivership Order should be limited as to him. (ECF No. 236). However, on August 9, 2022, this Court did not agree with Madsen and entered an order denying Madsen's Motion for Reconsideration in its entirety. (ECF No. 244). Second, Madsen's self-proclaimed lack of involvement in this case does not absolve him of the obligations under this Court's prior orders. Third, Madsen incorrectly asserts that an asset freeze in a situation akin to this is unprecedented.

[16] On August 8, 2022, Madsen filed an Emergency Motion for Reconsideration of: (1) Order Amending Preliminary Injunction and Asset Freeze Order; and (2) Order Amending Receivership Order (the "Motion for Reconsideration"). (ECF No. 236). Through the Motion for Reconsideration, Madsen argued the amended orders entered by the Court did not reflect the Court's decision and that as a result Madsen would suffer undue hardship due to the Asset Freeze. *Id.* In the Motion for Reconsideration, Madsen argued that he had "limited involvement" in the Ponzi scheme and as a result, the scope of the Asset Freeze and Receivership Order should be limited. *Id.* On August 9, 2022, this Court entered an order denying Madsen's Motion for Reconsideration in its entirety (the "Order Denying Madsen's Motion for Reconsideration"). (ECF No. 244).

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

Fourth, Madsen's argument that the funds at issue are not receivership property simply because they were transferred to counsel runs afoul of existing authority and this court's prior rulings. Finally, Madsen's reliance on *US v. $448,342.85* is misplaced.

i. This Court Has Already Determined Injunctive Relief as to Madsen is Warranted.

Madsen's arguments that the Asset Freeze and Turnover Provision should not apply to him because the Amended Complaint does not allege that Madsen engaged in fraud has already been rejected by this Court. Madsen's argument is premised on the conclusion that the Amended Complaint only accuses him of selling unregistered securities and failing to register as a broker or dealer and because fraud is not specifically alleged, he should be treated different than the other Defendants. In support of this position, Madsen argues that he was only tangentially affiliated with the Ponzi-scheme giving rise to this matter and that the Amended Complaint does not contain sufficient allegations against him to warrant the imposition of the Asset Freeze and Turnover Provision. However, as discussed above, Madsen's previously filed a Motion for Reconsideration addressed these issues and the Court denied the same. S*ee,* ECF Nos. 236 and 244. Taking a second bite at the apple and making the same arguments under the guise of a "Motion to Clarify" is wholly improper and a waste of judicial resources.[17]

Although Madsen has presented this as a "Motion to Clarify", what Madsen is truly seeking is a reconsideration of this Court's previous orders amending the Receivership Order and the Preliminary Injunction following the filings of the Amended Complaint. Given that the Motion is not a properly filed Motion for Reconsideration arguments regarding the scope and/or application of the Receivership Order and the Preliminary Injunction are procedurally improper and should be summarily denied. This is especially the case when reconsideration was already requested and denied.

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[17] This Court has already encountered this scenario, through Humphries' Request for Fees (ECF No. 209). In response to Humphries' request, this Court noted the request was "essentially a motion for reconsideration, which has not been properly filed and is not pending before the court." (ECF No. 318 at 7).

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

ii. Madsen's Role in this Case as Alleged in the Amended Complaint Supports the Turnover of Funds.

Madsen's position is not consistent with this Court's prior orders and does not accurately represent the allegations in the Amended Complaint. Indeed, upon a thorough review of the Amended Complaint, it is clear that Madsen's Motion attempts to minimize the role Madsen played in the scheme and the allegations against him. Interestingly, the subject Motion makes much of the fact that Madsen is not named in the very first paragraph of the Amended Complaint. However, such an argument is a red herring as focusing on a single paragraph of the Amended Complaint (which contains significant allegations against Madsen) does not establish his purported lack of involvement or liability in this case. In fact, the Amended Complaint is replete with express factual allegations against Madsen, including allegations that he knew the purchase agreements were fraudulent, promoted the scheme and solicited investors for which he received commissions.[18] By way of example, the Amended Complaint contains express allegations that Madsen "promoted the 'purchase agreement' investment scheme to multiple investors and received compensation for the investments he procured." (ECF No. 118 at ¶ 28). In fact, the Amended Complaint alleges that Madsen was intricately involved in the perpetration of the Ponzi-scheme in that Madsen was one of the individuals who offered the purported investments on behalf of the J&J Entities. *Id.* at ¶ 43. What is more, Section IV of the Amended Complaint outlines Madsen's alleged conduct in the Ponzi-scheme and alleges that Madsen not only solicited investors to invest in the purchase agreements, but that Madsen distributed "returns" and handled investor funds through two Nevada entities. *Id.* at ¶¶ 28, 89.

Further, the Amended Complaint expressly alleges that Madsen directed funds from investors to be transferred to two shell entities of which he had sole control and that Madsen distributed "proceeds" to investors during the time in question.[19] Thus, to argue that Madsen has not been alleged to have been part of the fraud in this case is an abhorrent misrepresentation of the record in this matter as the Amended Complaint is replete with allegations regarding Madsen's

[18] Amended Complaint, ECF No. 118 at ¶¶ 4, 5, 43, 76, 77, 78, 92, 99, and 100.
[19] Amended Complaint, ECF No. 118 at ¶¶ 28, 89.

significant involvement in the alleged Ponzi scheme. As such, to the extent that Madsen seeks to be excepted from his obligations from this Court's Orders based on his argument that the Amended Complaint does not allege his involvement in the Ponzi scheme, any such argument fails.

C. Madsen is Properly Subject to the Asset Freeze and Funds Provided to His Attorneys Should be Turned Over to the Receiver.

Following the assertion that there is no allegation of fraud, the Madsen Motion argues "[t]here is no precedent for including previously paid fully earned retainer funds in an asset freeze in the absence of fraud allegations." (ECF No. 332 at p. 10). In support of this position, Madsen merely argues "[n]either the SEC nor the Receiver has identified a single case in which any court limited a conduct defendant's use of their own funds for attorney's fees in the absence of fraud allegations." (ECF No. 332 at p. 10).[20] Madsen goes on to cite a number of cases previously cited by the SEC and the Receiver and summarily concludes that because claims of fraud were involved in those cases it must be required to for an asset freeze. However, the Madsen Motion provides no authority demonstrating that an asset freeze is not appropriate in the absence of a fraud allegation.

Contrary to Madsen's position, courts may implement an asset freeze where they deem it necessary to "prevent [the assets'] dissipation and waste so that they will be available for disgorgement." *SEC v. Hickey*, 322 F.3d 1123, 1132 (9th Cir. 2003). In line with the foregoing, courts routinely enter asset freezes in cases in which the party whose assets are to be frozen has not been alleged to have committed fraud. "In a securities fraud case brought by the SEC, a federal court has the authority to freeze the assets of a party not accused of wrongdoing where that party: '(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds.'" *SEC v. Byers*, 2009 U.S. Dist. LEXIS 59689, at *6 (S.D.N.Y. Jan. 7, 2009) (quoting *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998); *accord SEC v. Cherif*, 933 F.2d 403, 414 n.ll (7th Cir. 1991)). Thus, to the extent that Madsen seeks to be exempted from the Asset Freeze and Turnover

[20] Critically, Madsen has presented this Court with no authority to demonstrate that the SEC or the Receiver bear the burden of locating case law supporting the imposition of an asset freeze upon a defendant in the absence of fraud allegation. Indeed, such a position is non-sensical. Any issue that Madsen has with the imposition of the Asset Freeze is properly addressed through reconsideration or appeal of this Court's orders.

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

Provision based upon his own self-proclaimed lack of fraudulent activity, such an argument should be given no weight.

i. Funds Paid to Counsel Under Pre-Paid Engagement Agreements Prior to the Entry of the Asset Freeze and Receivership Order Are Receivership Property

The Madsen Motion spills considerable ink regarding the retainer agreements executed by Madsen and the two firms filing the Motion in an attempt to recharacterize the funds provided to counsel as something other than Receivership Property. *See e.g.* ECF No. 332 at pp. 18-19. In sum, Madsen's position is that because the funds were transferred to counsel prior to him being named as a Defendant in this case, those funds are not Receivership Property. However, Madsen's position is simply incorrect. This Court has already addressed and disposed of the same argument. Specifically, counsel for Defendant Humphries argued that they were entitled to retain funds which were paid and earned prior to the SEC's initiation of this case. (ECF No. 209 at 9-10). However, this Court entered an order denying the fees requested. (ECF No. 318). In so doing, this Court emphasized the need for compliance with the Court's orders and ruled:

> **There is no exception included for funds transferred to Humphries' attorneys before the receivership order was entered**. **Nor is there an exception to the defendants' obligation to demonstrate that the assets at issue are not tainted. Full compliance with the receivership order is required**. Lack of compliance with the court's orders frustrates the purpose of equity receiverships, which are designed 'to promote orderly and efficient administration of the estate by the district court for the benefit of creditors,' *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). If individuals alleged to have violated the Securities Act and the Exchange Act could avoid court orders requiring the freezing or turnover of assets by simply moving them into a trust or other account held by their attorney, then the court would not be able to recompensate victims of those securities or exchange violations. ECF No. 318 at p. 8 (emphasis added).

The same analysis and conclusion is warranted here. Notably in its prior rulings this Court has expressly directed any party seeking a release of funds for attorney's fees to "follow the orders of the court and meet their burdens in establishing and/or identifying the source of any and all funds in question." (ECF No. 318 at 7-8). The rationale behind this Court's decision flows from the purpose of a receivership which is to gather and protect assets for the benefit of the creditors.

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

The primary purpose of a receiver is to "promote orderly and efficient administration of the estate by the district Court for the benefit of the creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). In so doing, receivers are tasked with preserving the status quo while arranging a defendant's complicated business records. *SEC v. Path Am., LLC*, No. C15-1350JLR, 2016 U.S. Dist. LEXIS 53075, at *18-21 (W.D. Wash. Apr. 20, 2016). "A receiver is particularly necessary in instances where defendants have allegedly defrauded members of the investing public to avoid the continued diversion or dissipation of corporate assets." *Id.* (citing *SEC v. First Fin. Grp. of Tex.*, 645 F.2d 429, 438 & n.14 (5th Cir. 1981)). In instances such as this, the Court may appoint receivers with a variety of tools and broad authority "to help preserve the status quo while various transactions [a]re unraveled" and "to obtain an accurate picture of what transpired." *Id.* (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1973) (approving the appointment of a receiver to unravel complicated transactions and trace investors)).

Here, the Court appointed the Receiver to marshal and preserve all assets of the Defendants and the Relief Defendants that: (a) are attributable to funds derived from investors or clients of the Defendants; (b) are held in constructive trust for the Defendants; (c) were fraudulently transferred by the Defendants; and/or (d) may otherwise be includable as assets of the estates of the Defendants. (ECF No. 88 at 2). Thus, the Receiver's role is to gather and protect the assets, which necessarily includes the funds transferred from Madsen to counsel, that were derived from the Ponzi scheme and marshal said assets as directed by this Court. Indeed, finding that a Defendant could protect funds simply by transferring them to counsel before the initiation of a proceeding is nonsensical and has been dispelled by this Court and other courts considering this very scenario.

In a proceeding such as this, the onus is on the party seeking to retain Receivership Property—not the Receiver or the SEC—to establish that the funds are untainted and have not been commingled. *FTC v. Digital Altitude, LLC*, No. LA CV18-00729 JAK (MRWx), 2018 WL 4944419, at *6-9 (C.D. Cal. July 26, 2018) (denying request for payment of attorneys' fees out of frozen assets finding the evidence presented did not support directing the Receiver to release additional frozen funds to pay for the defendant's legal fees); *see also SEC v. Rosenthal*, 42 Fed. App'x. 1 (2d Cir. 2011) ("The SEC is not required to trace specific funds to their ultimate

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

recipients' because '[i]mposing such a tracing requirement would allow [a defendant] to escape disgorgement by spending down illicit gains while protecting legitimately obtained assets or…by commingling and transferring such profits"). Thus, if Madsen, or any other Defendant for that matter, believes his assets or funds are not Receivership Property, that party must submit sufficient evidence to the Court to establish any such funds are untainted and/or that the funds have not been co-mingled—something Madsen has not done.

Here, Madsen's Motion is devoid of any evidence to demonstrate the funds he seeks to retain are untainted or that such funds have not been commingled. In fact, Madsen has not even attempted to establish or identify the source of the funds paid to counsel. Rather, Madsen has simply concluded, without a valid basis, that he should not be held to the same standard as other Defendants in this case and that the funds held by counsel are not receivership property simply because they were transferred to counsel. Madsen's arguments miss the mark and are not consistent with this Court's express orders regarding the turnover of fees. *See* ECF No. 318 at 7- 8.

ii. Case Law Relied on by Madsen Support Turnover.

In an attempt to bolster his position, Madsen cites to *US v. $448,342.85, et al*, for the proposition that even if tainted money had entered Madsen's account, the entire account should not be subject to the Asset Freeze. However, *US v. $448,342.85* does not stand for what Madsen proposes. Indeed, Madsen cites to dicta from this case for the proposition that "'only property used in or traceable to the specified unlawful activity' is subject to forfeiture, not every penny that passes through a particular account." (ECF No. 332 at 17). However, after analyzing the facts relating to a money laundering scheme and three separate accounts used by the parties therein, the Seventh Circuit found that the United States was entitled to all three accounts: "Abandoning one deceitful device among a large repertory does not make the operation lawful. Drawing all inferences in favor of the persons opposing the motion for summary judgment does nothing to help these claimants. Details of tracing are accordingly irrelevant; the United States is entitled to the entire balances." 969 F.2d at 477. Thus, despite Madsen's reliance thereon, *US v. $448,342.85* the case actually demonstrates that absent clear evidence that the funds and/or account are untainted, the funds are subject to turnover. *Id.*

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

Because Madsen has failed to demonstrate the $250,000 that was "pre-paid" to counsel was not tainted or commingled with funds from the alleged Ponzi-scheme, Madsen's position cannot stand and his Motion should be denied.

IV. CONCLUSION

For the foregoing reasons the Receiver respectfully requests this Court enter an Order denying Madsen's Motion to Clarify Asset Freeze and to Allow Attorneys to Retain Earned Fees and order the same to be turned over to the Receiver forthwith.

DATED this 28th day of October, 2022.

GREENBERG TRAURIG, LLP

By: /s/ Kara B. Hendricks

KARA B. HENDRICKS, Bar No. 07743
JASON K. HICKS, Bar No. 13149
KYLE A. EWING, Bar No. 014051

JARROD L. RICKARD, Bar No. 10203
KATIE L. CANNATA, Bar No. 14848
SEMENZA KIRCHER RICKARD

DAVID R. ZARO*
JOSHUA A. del CASTILLO*
MATTHEW D. PHAM*
**admitted pro hac vice*
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

Attorneys for Receiver Geoff Winkler

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

CERTIFICATE OF SERVICE

I hereby certify that, on the **28th day of October 2022**, a true and correct copy of the foregoing was filed electronically via the Court's CM/ECF system. Notice of filing will be served on all parties by operation of the Court's CM/ECF system, and parties may access this filing through the Court's CM./ECF system.

/s/ Evelyn Escobar-Gaddi
An employee of GREENBERG TRAURIG, LLP

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

SECURITIES & EXCHANGE COMMISSION v. MATTHEW WADE BEASLEY,
USDC CASE NO. 2:22-CV-00612-CDS-EJY

EXHIBIT	DESCRIPTION
Exhibit 1	Declaration of Kara B. Hendricks, Esq.
Exhibit 2	Letter to C. Braganca et al. dated September 9, 2022
Exhibit 3	Letter from David O'Toole dated September 19, 2022
Exhibit 4	Letter to David O'Toole, etc. re R Madsen Funds dated October 5, 2022

EXHIBIT 1

EXHIBIT 1

Declaration of Kara B. Hendricks, Esq.

KARA B. HENDRICKS, Bar No. 07743
hendricksk@gtlaw.com
JASON K. HICKS, Bar No. 13149
hicksja@glaw.com
KYLE A. EWING, Bar No 014051
ewingk@gtlaw.com
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

JARROD L. RICKARD, Bar No. 10203
jlr@skrlawyers.com
KATIE L. CANNATA, Bar No. 14848
klc@skrlawyers.com
SEMENZA KIRCHER RICKARD
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Telephone: (702) 835-6803
Facsimile: (702) 920-8669

DAVID R. ZARO*
dzaro@allenmatkins.com
JOSHUA A. del CASTILLO*
jdelcastillo@allenmatkins.com
MATTHEW D. PHAM*
mpham@allenmatkins.com
*admitted *pro hac vice*
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
865 South Figueroa Street
Suite 2800
Los Angeles, California 90017-2543
Telephone: (213) 622-5555
Facsimile: (213) 620-8816

Attorneys for Receiver Geoff Winkler

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

MATTHEW WADE BEASLEY *et al.*

Defendants,

THE JUDD IRREVOCABLE TRUST *et al.*

Relief Defendants.

Case No. 2:22-CV-00612-CDS-EJY

DECLARATION OF KARA B. HENDRICKS IN SUPPORT OF RECEIVER'S RESPONSE TO DEFENDANT RICHARD MADSEN'S MOTION TO CLARIFY ASSET FREEZE AND TO ALLOW ATTORNEYS TO RETAIN FEES

I, Kara B. Hendricks, hereby declare as follows:

1. I am a duly licensed attorney, authorized to practice law in the state of Nevada. I am a shareholder with the law firm of Greenberg Traurig, LLP, ("GT") and counsel for Geoff Winkler, the Court-appointed Receiver (the "Receiver") in the above captioned matter.

2. I make this declaration in support of the Receiver's Response to Defendant Richard Madsen's Motion to Clarify Asset Freeze and to Allow Attorneys to Retain Earned Fees ("Response").

3. I have personal knowledge of the following facts and am competent to testify thereto if necessary.

4. I began communication with counsel for Richard Madsen ("Madsen") regarding the scope of the Amended Receivership order in August of 2022.

5. During the initial discussion which occurred on August 18th, the issue of attorney fees was discussed and counsel for Madsen was unable to provide information indicating the funds provided to the two firms representing Madsen had not been commingled with tainted funds.

6. Madsen's counsel also explained the unique structure they utilized as part of their engagement which they claimed entitled both firms to retain the collective $250,000 they were provided.

7. At that time, I indicated a willingness to review any documents and authority counsel had in support of their position.

8. A subsequent discussion was had on August 26, 2022 and the parties were unable to come to an agreement regarding the fee issue and I suggested that if counsel believed that Madsen's position was unique and turnover was not required, then they should file a motion with the Court to address the same.

9. After no motion was filed by Madsen regarding the fee issue, on September 9, 2022, I wrote to counsel to discuss and ascertain information regarding funds paid by Madsen to counsel. Attached as **Exhibit 2** to the Response is a true and correct copy of the September 9, 2022 letter I sent to Madsen's counsel (the "September 9 Correspondence").

10. Counsel for Madsen thereafter responded via a letter dated September 19, 2022. Attached as **Exhibit 3** to the Response is a true and correct copy of the September 19, 2022 response from Madsen's counsel to me (the "September 19 Correspondence").

/ / /

/ / /

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

11. However, the September 19 Correspondence failed to provide the information requested; misrepresented prior communications between counsel; and opined that the funds received from Madsen were not Receivership Property.

12. After reviewing the limited authority Madsen provided in support of this position, on October 5, 2022, I once again wrote to counsel for Madsen to address the comments made in the September 19 Correspondence (the "October 5 Correspondence") and referenced the recent Court Order that further supported the Receiver's turnover request. Attached as **Exhibit 4** to the Response is a true and correct copy of my October 5, 2022 response to Madsen's counsel.

13. Additionally, the October 5 Correspondence addressed the problems with the analysis offered and demanded turnover of the funds paid by Madsen as I had yet to be provided information to demonstrate that the funds received by counsel were not co-mingled or untainted.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 28th day of October 2022.

/s/ Kara B. Hendricks
KARA B. HENDRICKS
Declarant

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
(702) 792-3773
(702) 792-9002 (fax)

EXHIBIT 2

EXHIBIT 2

Letter to C. Braganca, et al. dated September 9, 2022

GT GreenbergTraurig

Kara B. Hendricks
Tel 702.792-3773
Fax 702.792.9002
hendricksk@gtlaw.com

September 9, 2022

VIA EMAIL and U.S. MAIL
Celiza P. Braganca, Esq.
David O'Toole, Esq.
Braganca Law LLC
5250 Old Orchard Road, Suite 300
Skokie, IL 60077
lisa@secdefenseattorney.com
david@secdefenseattorney.com

Cami Perkins, Esq.
John J. Savage, Esq.
Howard & Howard
3800 Howard Hughes Parkway. Suite 1000
Las Vegas, NV 89169
cperkins@howardandhoward.com
jjs@h2law.com

Re: Securities and Exchange Commission v. Matthew Wade Beasley, et al.
Case No. 2:22-cv-00612 ("SEC Action")
Funds provided to you by Defendant Richard R. Madsen

Dear Counsel:

We understand your office represents Defendant Richard R. Madsen in the above-referenced and/or other legal proceedings.

Our office represents the court appointed receiver, Geoff Winkler of American Fiduciary Services LLC ("Receiver") in the SEC Action. By and through this correspondence, **the Receiver is hereby requesting: 1) information regarding the amount of funds received by you and/or your firm from Defendant Richard R. Madsen; and 2) information establishing the funds received are untainted and/or were not co-mingled with funds from the alleged Ponzi-scheme. Please provide this information within ten days of the date of this letter.** If information cannot be provided that establishes funds received by you were untainted and/or were not co-mingled with funds from the alleged Ponzi-scheme, demand is hereby made for the same to be turned over to the Receiver forthwith consistent with the Turnover Provision referenced below.

By way of background, on April 13, 2022, the Court entered a Temporary Restraining Order ("TRO"), an asset freeze and accounting order, and related relief. ECF No. 3. Thereafter, on April 21, 2022, the Court issued a preliminary injunction, asset freeze, and other equitable relief ("the Injunction Order") ECF No. 56. Subsequently, on

June 3, 2022, the Court granted Plaintiff's motion to appoint a receiver in this action. ("Receivership Order") ECF No. 88. The Receivership Order set forth a plan for the preservation of assets and states that **"[a]ll persons and entities having control, custody or possession of any Receivership Property are hereby directed to turn such property over to the Receiver**" (the "Turnover Provision"). ECF No. 88 at 8, ¶ 15 (emphasis added). The terms of the Injunction Order and the Receivership Order were extended to your client *via* two orders entered in the SEC Action on July 28, 2022 (ECF No. 206 and ECF No. 207). The language within the Receivership Order, including the Turnover Provision, are clear and unambiguous and have been reaffirmed by the Court in subsequent orders relating to attorney requests to retain funds and serve as the basis for this request.

In addition to the foregoing, we request that you remind your client of the reporting obligations set forth in the Receivership Order and ensure compliance with the same.

We hope to avoid the need for additional motion practice and appreciate your cooperation and prompt attention to these matters.

Best regards,

GREENBERG TRAURIG, LLP
Kara B. Hendricks

cc: Geoff Winkler

EXHIBIT 3

EXHIBIT 3

Letter from David O'Toole dated
September 19, 2022

Bragança Law LLC
5250 Old Orchard Road, Suite 300
Skokie, Illinois 60077

David A. O'Toole
Of Counsel
312.343.8003

September 19, 2022

Kara B. Hendricks
Greenberg Traurig LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135
hendricksk@gtlaw.com

Re: *SEC v. Beasley, et al.*, No. 2:22-cv-612 (D. Nev.)
Letter of September 9, 2022

Dear Kara:

This letter is in response to your letter of September 9, 2022, addressing, *inter alia*, funds paid to Bragança Law LLC and Howard & Howard Attorneys PLLC ("Howard & Howard") by our client Richard R. Madsen for representing him in this matter.

On Tuesday, September 13, 2022, we provided you the information requested in your letter. In particular, we included the two Confidential Engagement Letters executed by Bragança Law and Mr. Madsen, dated May 4, 2022, and July 5, 2022, respectively, and the Engagement for Performance of Legal Services executed by Howard & Howard and Mr. Madsen, dated July 11, 2022. The agreements expressly provide that they are "fixed fee" agreements, whereby the firms agreed to represent Mr. Madsen in this matter for a period of twelve months and the amounts paid were earned upon receipt. Inasmuch as the agreements were executed and payments made prior to the court orders extending the preliminary injunction and receivership to Mr. Madsen on July 28, 2022, *see* Dkt. 206 and Dkt. 207, Mr. Madsen no longer had any ownership interest in the amounts paid and thus they did not and do not constitute "Receivership Property." *See* Order Appointing Receiver ¶ 7.A., Dkt. 88, as modified by the Order Amending Receivership Order, Dkt. 207.

In addition, if you review the financial information provided on September 13, 2022, you will note that Mr. Madsen has earned substantial amounts in the past several years that have no connection whatsoever to the conduct alleged in the Amended Complaint, Dkt. 118. These "untainted" funds, including the profit he earned on the sale of property purchased long before he had any involvement with Mr. Beasley, Mr. Judd, or any of the other individuals who allegedly orchestrated the scheme described in the Amended Complaint, are several times greater than the amount he paid our firms. In contrast, you told us during our conversations of August 18, 2022, and August 26, 2002, that many or most of the other defendants in this action had no significant assets which could not be traced directly to the conduct alleged in the Amended Complaint.

As we indicated in our August calls, both Bragança Law and Howard & Howard have and will continue to maintain records of time we have spent on this matter, pursuant to our ethical obligations under both Illinois and Nevada law to ensure that our fees are reasonable. We did not include those records with the financial submission last week, and have not included them with this letter, because you unequivocally informed us that the Receiver does not view its role as making any determination as to the reasonableness of the defendants' attorney's fees in this matter. You stated that the Receiver has no basis to determine whether the attorney's fees or billing rates are reasonable or appropriate and therefore has no interest in reviewing such bills. Your only concession on this matter was that the Receiver was prepared to follow any court order allowing attorney's fees.

Finally, as we explained in the August calls, we believe that your view as to commingling has no support in the text of the amended preliminary injunction order, *see* Dkt. 206, or the receivership orders, *see* Dkt. 88 and Dkt. 207, as discussed above, or in the law. We understand that the Receiver's position is that if any funds not associated with the conduct alleged in the Amended Complaint were deposited in an account that also included funds that are traceable to the alleged conduct – even though there is no allegation that Mr. Madsen had any knowledge that the alleged underlying conduct was fraudulent -- all funds in the account are "tainted." You confirmed that you knew of no authority supporting this view other than the cases cited in your briefs relating to the requests for attorney's fees made by other defendants in this matter, but those cases do not support your expansive view of the law on this subject. We are not aware of (and you have not directed us to any) cases supporting the claim that all funds in a bank account of a defendant not even accused of fraud are subject to a pre-judgment asset freeze merely because some allegedly tainted money is deposited in the same account.

Moreover, as explained in our calls, the Receiver's position would essentially eliminate any tracing requirement in any SEC case seeking disgorgement. In fact, the only thing Mr. Madsen could have done to avoid having all of his assets frozen in this matter would have been to segregate and never spend anything he received from the primary defendants—even though he had no reason to believe the funds were fraudulently obtained. That is not the law and does not follow from the text of the orders entered in this matter. As the court explained in *US v. $448,342.85, et al.*, 969 F.2d 474, 476 (7th Cir. 1992), "the presence of one illegal dollar in an account does not taint the rest—as if the dollar obtained from fraud were like a drop of ink falling into a glass of water."

We expect to have a discussion or discussions with the SEC in the near future regarding an appropriate carve-out from the asset freeze to accommodate Mr. Madsen's ongoing living expenses. Our understanding is that the Receiver will abide by any agreement made by the parties and has no interest in being included in any such discussions. If that is incorrect, please let us know and we will include you in the scheduling of any such call.

Similarly, if you disagree with the views we have expressed in this letter, please let us know when you are available to further meet and confer on any areas of disagreement prior to submitting any filing with the Court so that we do not unnecessarily burden the Court on matters that we, as counsel, should be able to amicably resolve. As always we appreciate your professionalism in this matter.

Sincerely,

/s/David A. O'Toole

cc: Geoff Winkler
Celiza P. Bragança
Cami M. Perkins
John J. Savage

EXHIBIT 4

EXHIBIT 4

Letter to David O'Toole etc. re R. Madsen Funds
dated October 5, 2022

GT GreenbergTraurig

Kara B. Hendricks
Tel 702.792-3773
Fax 702.792.9002
hendricksk@gtlaw.com

October 5, 2022

VIA ELECTRONIC MAIL & FIRST CLASS MAIL

David O'Toole, Esq.
david@secdefenseattorney.com
Celiza P. Braganca, Esq.
lisa@secdefenseattorney.com
BRAGANCA LAW LLC
5250 Old Orchard Road
Suite 300
Skokie, Illinois 60077

Cami Perkins, Esq.
cperkins@howardandhoward.com
John J. Savage, Esq.
jjs@h2law.com
HOWARD & HOWARD
3800 Howard Hughes Parkway
Suite 1000
Las Vegas, Nevada 89169

Re: ***Securities and Exchange Commission v. Matthew Wade Beasley, et al.***
Case No. 2:22-cv-00612 ("SEC Action")
Subject: Funds provided to you by Defendant Richard R. Madsen

Counsel:

This correspondence will serve as a follow-up to my letter dated September 9, 2022 and will respond to and address concerns raised by your September 19, 2022 letter which did not accurately reflect our prior discussions.

As you are aware, on September 27, 2022, Judge Christina D. Silva issued her second order in relation to a law firm's request for the release of funds provided to counsel by a defendant in this matter (ECF No. 318). In so doing, Judge Silva clearly articulated that counsel for defendants must meet their burden in establishing and/or identifying the source of funds in question and that defendants have an obligation to demonstrate that the assets at issue are not tainted. Further, the order indicates that there is no exception for funds that were transferred to attorneys before the Receivership Order was entered. Accordingly, **demand is hereby made that funds paid to you and/or your firm and the Howard & Howard firm by Mr. Madsen be turned over to the Receiver no later than October 14, 2022.** To facilitate the same, enclosed herein is a copy of the Receiver's wire instructions.

Although we appreciate you providing additional information regarding the engagement letters that Mr. Madsen executed, we are not aware of any binding authority that would allow the funds provided by Mr. Madsen in what you characterize as a "fixed fee agreement" to be deemed anything but Receivership Property. Additionally, as referenced above, Judge Silva's recent order makes it clear that such funds are Receivership Funds, irrespective of when you contend the fees were "earned," even if they were paid to your firm prior to the court order. Further, your analysis and reliance on

United States v. $448,342.85 for the argument that "the presence of one illegal dollar in an account does not taint the rest—as if the dollar obtained from fraud were like a drop of ink falling into a glass of water" takes the case out of context and is inconsistent with Judge Silva's findings in this case. Indeed, *United States v. $448,342.85* does not even provide a holding that supports your position and instead demonstrates that the funds held by your firm are subject to the turnover provision. *See* 969 F.2d 474, 477 (7th Cir. 1992).

In *U.S. v. $448,342.85*, the Seventh Circuit considered whether the United States was entitled to three (3) accounts that were "involved" in a money laundering scheme in a forfeiture proceeding.[1] As you have done here, the defendants argued that the accounts contained funds that were not tied to the fraud, however, the defendants in that case provided eleven affidavits to support their position. *Id.* at 477. Despite this, the Seventh Circuit found defendants' position unavailing and ultimately found that the defendants had not met **their burden** of establishing that the funds in the subject accounts had not come from unlawful activity. *Id.* In other words, the Seventh Circuit decision (to the extent the provisions of 18 U.S.C. § 981 *et seq.* can be interpreted in this context) demonstrates that it is Mr. Madsen's burden, not the SEC or the Receiver, to demonstrate that the funds are untainted, which has not happened here.

The holding in *U.S. v. $448,342.85* falls squarely in line with the court's rulings in this case. Indeed, as referenced above, Judge Silva has issued two separate orders finding funds deposited from defendants into law firm accounts are Receivership Property. Notably, in the order entered last week the Court found:

> "Any challenges to the origin of any frozen assets should be directed to the Receiver, and any unresolved challenges should be raised with the court. There is no exception included for funds transferred to [] attorneys before the receivership order was entered. **Nor is there an exception to the defendant's obligation to demonstrate that the assets at issue are not tainted.**"

ECF No. 318 at p. 8 (emphasis added).

Thus, contrary to the position taken in your correspondence, there is actually an absence of authority supporting the notion that the funds paid to your firm by Mr. Madsen are not Receivership Property. Based on available information it appears the funds provided by

[1] The money laundering scheme in *U.S. v. $448,342.85* involved a scheme in which cheap, poorly made speakers were sold to unsuspecting individuals by way of fraud. The illegally obtained funds were then deposited into local accounts and "pooled for transfer to other accounts, often via cashiers' check of less than $10,000." Ultimately, the Seventh Circuit sided with the Government, finding the subject accounts were subject to forfeit. "Abandoning one deceitful device among a large repertory does not make the operation lawful. Drawing all inference in favor of the persons opposing the motion for summary judgment does nothing to help these claimants. Details of tracing are accordingly irrelevant; the United States is entitled to the entire balances." *United States v. $ 448,342.85*, 969 F.2d 474, 477 (7th Cir. 1992)

Mr. Madsen to the law firms referenced above were comingled with tainted funds and thus your suggestion that Mr. Madsen earned substantial amounts that are not connected to the allegations in the Amended Complaint is irrelevant.

In short, the funds paid to your firm by Mr. Madsen are Receivership Funds and are therefore required to be turned over to the Receiver. Any position to the contrary directly contradicts the repeated findings of the Court and the terms of the Receivership Order. Indeed, the Court emphasized this fact by stating:

> "[f]ull compliance with the receivership order is required. Lack of compliance with the court's orders frustrates the purpose of equity receiverships, which are designed 'to promote orderly and efficient administration of the estate by the district court for the benefit of the creditors.'"

ECF No. 318 at p. 8. Accordingly, if the funds provided to your firm by Mr. Madsen are not turned over to the Receiver on or before October 14, 2022, we will have no choice but to file a motion to compel and we will seek to recover any attorney fees associated with the same.

Lastly, we are compelled to address several misstatements in your September 19th letter. First, the Receiver is a necessary party to any agreement reached with the SEC regarding Mr. Madsen's living expenses. As such, we expect to be advised if you reach an agreement with the SEC for living expenses and the Receiver will need to review and approve the stipulation before it is filed. Second, the statement in your letter referencing purported statements by me regarding assets of other defendants is wholly inaccurate and was not stated. The Receiver's investigation is ongoing as is a forensic accounting that will facilitate the tracing of funds. Third, your letter omitted the fact that we discussed your firm filing a motion with the Court if you disagreed with the Receiver's position regarding attorney fees and I referred you to the existing briefing on the matter. You have taken those discussions out of context.

Best regards,
GREENBERG TRAURIG, LLP

/s/ Kara B. Hendricks
Kara B. Hendricks, Esq.

KBH:eeg
Enclosure (as stated)

cc: Geoff Winkler