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17 UNITED STATES DISTRICT COURT
18 DISTRICT OF NEVADA

<p>19 SECURITIES & EXCHANGE COMMISSION</p> <p>20 v.</p> <p>21 MATTHEW WADE BEASLEY; <i>et al.</i>;</p> <p>22 Defendants,</p> <p>23 THE JUDD IRREVOCABLE TRUST; <i>et al.</i>;</p> <p>24 Relief Defendants.</p>	<p>25 Case No. 2:22-cv-0612-JCM-EJY</p> <p>26 DEFENDANT RICHARD R. MADSEN’S REPLY TO SECURITIES & EXCHANGE COMMISSION’S RESPONSE TO MOTION TO CLARIFY ASSET FREEZE AND TO ALLOW ATTORNEYS TO RETAIN EARNED FEES</p> <p>27 ORAL ARGUMENT REQUESTED [LR 78-1]</p>
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28 Richard Madsen is accused of **only** two things in the Amended Complaint: selling unregistered securities and failing to register as a broker or dealer, both “strict liability” offenses. (See ECF No. 118 at 23-24 & 27, First and Fifth Claims for Relief.) If the Securities & Exchange Commission had reason to believe Richard Madsen committed fraud, it could have made that

1 allegation in the Complaint.¹ It did not. Instead, the SEC now says that it is entitled to prevent Mr.
2 Madsen from paying his attorneys because some other defendants allegedly committed fraud,
3 despite being unable to point to a single case supporting that novel claim. Paradoxically, the SEC
4 now argues that the absence of such a case is what supports this newfound power.²
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6 Importantly, neither the Receiver nor SEC has addressed the how the unique nature of the
7 engagement agreements Mr. Madsen executed with his attorneys establish that the funds are not
8 subject to the asset freeze or receivership orders. Similarly, neither the SEC nor the Receiver
9 disputes that the fees Mr. Madsen paid to his attorneys were reasonable. *See* ECF No. 332,
10 Defendant Richard R. Madsen’s Motion to Clarify Asset Freeze and to Allow Attorneys to Retain
11 Earned Fees, at 19. Thus, even if the Court does not recognize that the fees Mr. Madsen paid to his
12 attorneys are fully earned and thus their property as a matter of law, the Court should exercise its
13 discretion to allow Mr. Madsen’s attorneys to retain the funds. (*See* ECF No. 318, Order Denying
14 Defendant’s [Humphries & CJ Investments, LLC] Motion for Release of Funds at 5) (citations
15 omitted).³
16

17 **1. The SEC Has Not Alleged Defendant Richard Madsen Engaged In Fraudulent**
18 **Conduct And Therefore Is Not Entitled To Restrict His Payment Of Attorney’s Fees.**

19 In its response to Mr. Madsen’s motion, the SEC argues that so long as it alleges that *any*
20 defendant in this case is accused of engaging in fraud, it is appropriate for *all* the defendants in the
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22 ¹ That is not to suggest that the SEC could have alleged, consistent with its obligations under Fed.
R. Civ. P. 9(b) and 11(b)(3), that Mr. Madsen engaged in fraud.

23 ² The SEC adopts the arguments made by the Receiver in his response to Mr. Madsen’s motion
24 (ECF No. 338, Receiver Geoff Winkler’s Response to Defendant Richard R. Madsen’s Motion to
Clarify Asset Freeze), which Mr. Madsen responded to in his Reply to Receiver’s Response to
25 Defendant Richard R. Madsen’s Motion to Clarify Asset Freeze, ECF No. 347.

26 ³ As more thoroughly explained in his motion, (ECF No. 17-18), Mr. Madsen is not seeking a
27 release of all of his assets that did not originate from the illegal activities carried out by Defendant
Beasley and the other defendants allegedly engaged in fraudulent activity. To calculate that amount
28 with precision would undoubtedly require an unnecessary expenditure of judicial resources, not to
mention the parties’ resources, particularly when Mr. Madsen may lose his legal representation
depending on the result of this motion.

1 case – regardless of whether they even knew that any alleged fraud had taken place – to have all
2 their assets frozen. *See* ECF No. 339, Plaintiff Securities & Exchange Commission’s Response to
3 Defendant Richard R. Madsen’s Motion to Clarify Asset Freeze. That is not the law and the SEC
4 still has not cited a single case supporting this position.

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6 In fact, the only case the SEC cites for the proposition that fraud allegations against the
7 particular defendant are not necessary for an asset freeze (ECF No. 339 at 3) is *SEC v. Trabulse*,
8 526 F. Supp. 2d 1008, 1010 (N.D. Cal. 2007), an action against a hedge fund operator for fraud.
9 And even in *Trabulse*, the asset freeze only limited the accused fraudster from using hedge fund
10 assets for defense costs, not for other expenses. *Id.* at 1018. Moreover, the court in *Trabulse* did not
11 freeze the defendant’s personal assets, even though he had “commingled” fund and personal assets.
12 *Id.* at 1011-12.

13
14 Moreover, the SEC has not only never previously taken its current position, the SEC’s logic
15 here obliterates the rationale for the relief it seeks. The SEC has repeatedly cited *SEC v. Quinn*, 997
16 F2d 287 (7th Cir. 1993), where an asset freeze was based on allegations that the particular defendant
17 engaged in fraud. *See, e.g.*, ECF No. 180, Plaintiff Securities & Exchange Commission’s Response
18 to Defendant Jeffrey Judd’s Motion for Release of Funds for Attorney’s Fees, at 3; ECF No. 198,
19 Plaintiff Securities & Exchange Commission’s Response to Non-Party Oberheiden PC’s Motion
20 for (sic) Motion to Retain Earned Fees and Expenses, at 2; ECF No. 254, Plaintiff Securities &
21 Exchange Commission’s Response to Defendant Christopher Humphries and Relief Defendant CJ
22 Investments, LLC’s Motion for Release of Funds for Attorney’s Fees, at 2, always quoting the same
23 language (citing *U.S. v. Monsanto*, 491 US. 600 (1989) and *Caplin & Drysdale, Chartered v. U.S.*,
24 491 U.S. 617 (1989)). The court in *Quinn* compared the denial of a release for attorney’s fees in
25 the SEC case to the principle that “a bank robber cannot use the loot to wage the best defense money
26 can buy.” 997 F.2d at 289. But Mr. Madsen is has not been accused of any fraud, much less being
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28

1 a bank robber. The SEC has not alleged that he committed any offense requiring scienter.

2 The SEC is seeking to have it both ways in this case. The SEC clearly thought allegations
3 of fraud were important when opposing other defendants' requests for asset releases in this case.
4 For example, in the SEC's response to Defendant Humphries's argument that the SEC had not
5 sufficiently proven that he possessed the requisite scienter to be liable for fraud, the SEC spent
6 nearly its entire brief describing the evidence of Humphries's fraud, not once suggesting that the
7 mere fact that Mr. Humphries was a defendant in a case *involving* an alleged fraudulent Ponzi
8 scheme, or that other defendants engaged in fraud or had knowledge of the fraud was sufficient to
9 deny him a release from the asset freeze for attorney's fees. (*See* ECF No. 254, SEC's Response to
10 Humphries, at 2-8). Instead, the SEC took the position that "the Humphries Defendants provide no
11 evidentiary basis to reconsider Judge Mahan's ruling that the SEC has made a *prima facie* case that
12 Humphries – like Beasley and Judd – had violated the anti-fraud provisions of the federal securities
13 laws." (*Id.* at 6.) That is not true for Mr. Madsen. The SEC has made no allegation, let alone a
14 *prima facie* showing that Mr. Madsen committed fraud.

17 **2. Mr. Madsen Is Not Analogous To A Relief Defendant.**

18 The SEC and Receiver improperly rely on relief defendant cases to support freezing Mr.
19 Madsen's assets and not permitting the release of funds for attorney's fees. As explained in Mr.
20 Madsen's motion, cases involving relief defendants do not support the unlimited scope of relief the
21 SEC seeks against Mr. Madsen. The SEC mischaracterizes Mr. Madsen's argument, saying he
22 claims to be entitled to relief from the asset freeze because he provided "consideration." *See* ECF
23 339 at 3.⁴ Not true. Mr. Madsen's argument is that he is entitled to relief from the asset freeze
24 because (1) he is *not accused of fraud*, and separately, (2) he cannot be treated like a relief defendant
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27 ⁴ The SEC does not, and could not, claim that Mr. Madsen would be a proper relief defendant.
28 *See* ECF No. 181, Plaintiff Securities and Exchange Commission's Reply in Support of Motion to Amend Preliminary Injunction Order, at 8.)

1 because Mr. Madsen provided consideration for the commissions he received. *See* ECF No. 332 at
2 10, fn 1. *See also* ECF No. 181, Plaintiff Securities and Exchange Commission’s Reply in Support
3 of Motion to Amend Preliminary Injunction Order, at 8.

4 This is an important distinction for a court exercising its equitable jurisdiction. Individuals
5 like Mr. Madsen, who are only alleged to have engaged in registration offenses subject to strict
6 liability, are entitled to different treatment than defendants who allegedly committed fraud and
7 relief defendants who took money without providing any consideration. Relief defendants are a
8 special case because they knew they had no claim on the funds in the first place, having failed to
9 provide consideration. The same cannot be said for an individual like Mr. Madsen—or his
10 attorneys.

11
12 Moreover, the possibility that Mr. Madsen may be ordered to disgorge some portion of his
13 assets in the future does not support limiting his ability to pay his attorneys prior to the judgment.
14 If the SEC eventually chooses to litigate this case, perhaps it will be able to demonstrate it is entitled
15 to an order of disgorgement from Mr. Madsen for the strict liability offenses it alleges he
16 committed. But the SEC has not steps to do so. It appears to have no interest in giving reciprocal
17 discovery to the defendants in this action – at least while any of those defendants still have
18 attorneys. It is nearly six months past the deadline for the SEC to initiate a scheduling conference
19 of the parties pursuant to LR 26-1.⁵ The SEC has gotten everything it wants already: the alleged
20 Ponzi scheme was shut down before the SEC filed this action; the preliminary injunction and
21 receivership orders require the defendants to produce the bulk of any discoverable documents they
22 have without the bother of a discovery order; and the orders have frozen all the assets of not just
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27 ⁵ Even giving the SEC the benefit of the doubt by using the first appearance of a defendant after
28 the Amended Complaint was filed as the triggering date for LR 26-1, it is nearly three months
past the deadline for the SEC to initiate such a conference.

1 the principals but even individuals like Mr. Madsen, who invested their own money in the supposed
2 scheme.

3 **3. Conclusion**

4 For the foregoing reasons, Defendant Richard R. Madsen respectfully requests a declaration
5 that Bragança Law and Howard & Howard may retain the amounts he has paid to them pursuant to
6 Mr. Madsen's engagement agreements with both firms, as they were not and are not subject to the
7 asset freeze and receivership orders previously entered by this Court.
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9 Date: November 7, 2022

/s/David A. O'Toole

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CERTIFICATE OF SERVICE

I, David A. O’Toole, hereby certify that on November 7, 2022, I electronically filed **DEFENDANT RICHARD R. MADSEN’S REPLY TO SECURITIES & EXCHANGE COMMISSION’S RESPONSE TO HIS MOTION TO CLARIFY ASSET FREEZE AND TO ALLOW ATTORNEYS TO RETAIN EARNED FEES**, along with supporting papers, with the Court using the CM/ECF system, which will automatically send copies to any attorney of record in the case.

Respectfully Submitted,

/s/ David A. O’Toole
DAVID A. O’TOOLE