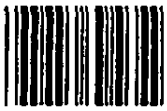
USDC SCAN INDEX SHEET



BJR 4/15/04 11:08

3:04-CV-00521 SEC V. GLOBAL MONEY MGT

44

O.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

GLOBAL MONEY MANAGEMENT, L.P.; LF GLOBAL INVESTMENTS, LLC; and MARVIN I. FRIEDMAN,

Defendants.

CASE NO. 04CV00521-BTM(WMC)

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING EX PARTE REQUEST FOR ATTORNEYS' FEES

On March 11, 2004, this Court granted the Securities and Exchange Commission's ("SEC") Request for a Temporary Restraining Order ("TRO"): (1) freezing assets; (2) prohibiting the destruction of documents; (3) appointing a receiver; and (4) for an accounting. On March 25, 2004, this Court heard arguments for a preliminary injunction and for payment of approximately $50,000 in attorneys' fees. For the reasons discussed below, the Court GRANTS the preliminary injunction and DENIES payment of the fees.

FACTUAL BACKGROUND

The facts in this case are somewhat disputed. Global Money Management ("GMM") is a California limited partnership located in San Diego, which functioned as a private hedge fund. L.F. Global Investments, LLC ('LF Global") is a California limited liability company also located in San Diego which is the general partner of GMM. Marvin I. Friedman ("Friedman") is the Managing Director of LF Global. According to the SEC,

44

Friedman makes all the investment decisions, controls all bank and brokerage accounts, is responsible for the day to day operations of both companies, and communicates with the investors and the accountants. (See Lohr Decl. ¶¶ 1-5.)

Friedman, through LF Global, offered and sold securities in the form of limited partnership interests in GMM, whose assets purportedly reached over $100 million. Defendants pooled investor funds and invested in stock, stock options, and a money market account. If the hedge fund's investment return exceeded 20%, LF Global was entitled to receive an annual "incentive" fee of 20% of the return generated by the fund.

Throughout the life of the GMM fund, Defendants sent quarterly account statements to investors. From the second quarter of 1997 through the second quarter of 2003, these statements were complied by Mark Albrecht ("Albrecht"), an independent accountant. LF Global provided Albrecht with the return percentage, dividend, and interest income, and partner deposits and withdrawals.[1] (Albrecht Decl. ¶ 6.) Albrecht would input this data into a worksheet which allocated interest and dividend income and calculated the return for each investor. Albrecht would then send these account statements to LF Global to mail to their investors. LF Global also sent Albrecht copies of the summary pages from its brokerage and bank accounts, which consisted of three main accounts: Spear, Leed, & Kellogg ("SL&K") account numbers 4J81 and 7W5F and UBOC account number A4T-143278. On an annual basis, Albrecht would reconcile the balances in these documents with the worksheets for the year that ended.

The SEC alleges that Friedman, through LF Global, misrepresented the value of the GMM fund by falsifying bank account statements. Huge discrepancies appear to exist between GMM's actual account balances and the statements sent to investors. For example, the SL&K account 4J81 summary statement that Albrecht used in his report listed a "long stock value" of $84,766,454. However, the actual December 2001 account statement lists a "long stock value" of only $1,766,454, a discrepancy of $83 million.

---

[1]From 1994 through December 2002, Albrecht's main contact at GMM was Paul Lohr. Beginning in January 2003, Abrecht's main contact was Friedman.

Similarly, the December 2002 SL&K account 4J81 statement included in the quarterly report lists a "long stock value" of $95,348,590, when the actual amount was only $1,348,590, a discrepancy of $94 million.

The SEC also alleges that Friedman misrepresented the growth and size of the hedge fund to investors. For the first quarter of 2003, Friedman reported to investors that the GMM fund made 0.68%. However, the SL&K statements show the fund actually lost $707,679.61. The six month report sent to investors reported a growth of 3.8%, however, the SL&K statements show a loss of $391,896.61. The nine month report stated that the fund grew 7.38%, again the SL&K statements show a loss of $925,364.36.

On December 31, 2002, GMM mailed statements to its investors purporting a cumulative fund value of over $116 million. However, the SEC maintains that since December 2002, GMM's holdings have not been worth more than $11 million. In September 2003, Friedman told an investor that the hedge fund was worth over $100 million, however the account statements show GMM held securities worth approximately $440,000 at that time. During the first two months of 2004, LF Global mailed account statements to investors purporting a cumulative value of $111,930,057. However, the aggregate value of the securities in GMM's accounts as of December 31, 2003 was $211,000. By January 2004, this value dropped to $20,000. During this time that the fund was losing money, it appears that Friedman paid himself approximately $1,682,300.

The SEC also submitted declarations from investors who have been unable to liquidate their investments in GMM. These investors claim Friedman has repeatedly missed verbal and written deadlines for liquidation payments. (See Derbes Decl. ¶ 11; Dunn ¶ 8; Owen Decl. ¶ 13.) While Friedman maintains that he paid out over $46 million to investors in 2003, some of these investors claim that they have only received small portions of their investments.

Friedman also has a trading disciplinary record which he did not disclose to investors. On at least four previous occasions, NASD has censured and fined Friedman for failing to maintain the minimum required capital. For the latter two grievances,

Friedman was barred from associating with any NASD member.[2]

In response to the SEC's allegations, Friedman maintains that LF Global's former managing partner Paul Levy is behind the culpable acts. Levy, who retired in February 2003, was in charge of GMM's administration and accounting and worked with outside accountant Albrecht to report the fund's performance.[3] Friedman claims that Levy's assistant Alice Swiderski, assumed Levy's responsibilities after he left the fund.

Friedman alleges that on March 10, 2004, he met with the SEC and reported culpable activity. Friedman informed the SEC of an accounting discrepancy in SL&K account #7W5F. The actual account statement for December 2002 valued the assets at $2,269,597,51, however, the copies of the account statements sent from LF Global to Albrecht showed GMM assets having a value of $19,269,597.51, a difference of $17 million.[4]

Friedman also reported suspicious conduct by Swiderski to the SEC. An investigator hired by Friedman talked to Ed Dinkins, an independent computer consultant. Swiderski allegedly hired Dinkins to delete files from the LF Global computer hard drives and the company's network server. Dinkins, upon Swiderski's request, copied the undeleted files from the old hard drives to new hard drives, which were installed on the computers. Dinkins then destroyed the old hard drives. Dinkens, on behalf of Swiderski, cancelled the company's file back-up service in early February 2004.

---

[2]According to the SEC, in 1989, Friedman and others were censured and fined $3,000 for failing to maintain sufficient net capital in violation of SEC Rule 15c3-1. In June 1991, Friedman and others were again censured and fined $8,000 for failing to maintain the minimum required capital. In March 1993, Friedman was censured, fined $20,000, and barred from associating with any NASD member for failing to maintain minimum required net capital and continuing business when he knew or should have known that the firm did not have sufficient capital. In 1996, Friedman was again censured, fined $120,000, and barred from associating with any NASD member in any capacity and ordered to reimburse his firm $815,634.94. During this last investigation, NASD also found that Friedman misused the funds and failed to respond to NASD's requests for information pursuant to Article IV, Section 5 of the Rules of Fair Practice. (Weissman Decl. Ex. 12.)

[3]Albrecht confirms that Levy was his main contact at LF Global up until December 2002. However, beginning in January 2003, Friedman was Albrecht's contact person. (Albrecht Decl. ¶¶ 5-6.)

[4]This discrepancy reportedly occurred in a different [illegible] one discussed by the SEC.

Friedman's attorneys also told the SEC that on March 4, 2004, Swiderski refused to help them access the company accounting system on the computer or explain how she maintained records. Swiderski retreated into her office and then left in secret with the company fax machine.

The SEC also alleges that LF Global dramatically increased the frequency of document destruction at its offices during January and February 2004. For comparison, in 2003, LF Global destroyed documents once a month. In January 2004, LF Global destroyed documents two times a month, while in February 2004, the company destroyed documents three times. The volume of documents destroyed has also increased significantly. For the entire year of 2003, LF Global destroyed 19 bins. For the first two months of 2004, the company has sought to destroy 9 bins. Friedman also recently listed his $2.5 million dollar home for sale several days before the TRO was issued.

DISCUSSION

I. Preliminary Injunction

The SEC brings this motion for a preliminary injunction pursuant to the Securities and Exchange Acts.[5] When deciding whether to issue an injunction authorized by a federal statute designed to "enforce and implement a Congressional policy," courts consider different burdens of proof than when weighing claims of two private litigants. United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 174-75 (9th Cir. 1987). Specifically, "[w]here an injunction is authorized by a statute, and the statutory conditions are satisfied . . . the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury." Id. at 175 (citing SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975)). This principle applies to injunctions brought by the

///////

[5]Section 20(d) of the Securities Act, 15 U.S.C. § 77t(b) reads:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of the subchapter, or of any rule or regulation prescribed under authority thereof, the Commission, may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond . . . .

SEC. See Mgmt. Dynamics, 515 F.2d at 808 ("Unlike private actions, which are rooted wholly in the equity jurisdiction of the federal court, SEC suits for injunctions are 'creatures of statute.' '[P]roof of irreparable injury or the inadequacy of other remedies as in the usual suit for injunction' is not required.") (citation omitted, bracket in original).

Under this lesser standard, courts will consider: (1) likelihood of success on the merits; (2) balance of hardships; and (3) likelihood of recurring violations. Odessa, 833 F.2d at 176-77; see also SEC v. Unifund SAL, 910 F.2d 1028, 1037 (2d Cir. 1990) (SEC must demonstrate: "(a) prima facie case that a violation of the securities law has occurred, and (b) a strong likelihood that a violation will occur again in the future.")

The SEC has alleged that Defendants have violated and are violating: (1) Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), which prohibits fraud in the offer and sale of securities;[6] (2) Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; which prohibits fraud in connection with the purchase or sale of any security;[7] and (3) Sections 206(1) and

---

[6]15 U.S.C. § 77q provides in its pertinent part:

> It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement . . . by the use of any means or instruments of transportation or communication in interstate commence or by use of the mails, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[7]15 U.S.C. § 78j(b) provides in its pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange–
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of

206(2) of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-6(1) & 80b-6(2); which prohibit investment advisers from defrauding any client or prospective client.[8]

These alleged causes of action essentially require the SEC to prove: (1) the investments are securities; (2) LF Global was an investment advisor; (3) Defendants made/are making misrepresentations of material fact; and (4) the Defendants acted with scienter.

The SEC has proved a prima facie case. First, the limited partnership interests, which are purchases of an ownership interest in GMM's pool of assets, are securities in the form of investment contracts. See SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (an investment contract is: (1) an investment of money; (2) in a common enterprise; and (3) with profits derived from the efforts of others); see also SEC v. Murphy, 626 F.2d 633, 640-41 (9th Cir. 1980) (investment in a limited partnership is a security). Second, LF Global is an investment advisor as defined by 15 U.S.C. § 80b-2(a)(11), for LF Global, under the control of Friedman, made the hedge fund's investment decisions and received compensation. See 15 U.S.C. § 80b-2(a)(11).

The SEC has also adequately established at this point that Defendants made material misrepresentations to investors. The evidence suggests that Defendants misled investors, both orally and on paper, as to the value and profits of the hedge fund. It is also clear that Friedman failed to disclose his disciplinary record to investors. These acts amount to material misrepresentations. See SEC v. Murphy, 626 F.2d 633, 652-53 (9th Cir. 1980) (omission of information regarding the condition, solvency, and profitability of an issuer was material); SEC v. Alliance Leasing Corp., 2000 U.S. Dist. LEXIS 5227 at

---

investors.

[8]15 U.S.C. §§ 80b-6(1) & 80b-6(2) provide in their pertinent part:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly–
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

*27 (S.D. Cal. March 20, 2000) (Defendants' omission of information relating to previous bankruptcy and cease-and-desist orders concerning fraudulent sales of unregistered securities was a material misrepresentation); SEC v. Freeman, 1978 U.S. Dist. LEXIS 19237, at *12 (N.D. Ill. 1978) ("[I]n the context of a small closely held enterprise, it is difficult to conceive of information which would have a greater influence on an investor's decision than a prior history of fraud or other securities-related misconduct on the part of the dominant figure in the enterprise. . . . Such information must be considered material by any sensible standard.").

Finally, the SEC has presented evidence that Friedman acted with scienter.[9] It appears that Friedman controlled the brokerage accounts, spoke directly with investors, and provided information to independent accountants. Given his integral role with LF Global and GMM, it is likely that he knew of the fraud, even if he did not conceive of its scheme. It is also obvious that Friedman knew of his disciplinary past and choose not to disclose it to investors.

When balancing the hardships imposed by an a statutory injunction, courts must also consider the "public interest." Odessa, 833 F.2d at 176 (citing Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531 (1987)). Here, GMM's investors will likely suffer hardship if a preliminary injunction is not imposed. The records submitted by the SEC indicate that the GMM fund was overvalued by as much as $95 million. These records also indicate a recent depletion of company funds. Without an injunction, the money left could disappear entirely. Alternatively, investors may race to sue Friedman and attach his assets, resulting in an inequitable recovery among investors.[10] Undoubtedly the

[9]The alleged causes of action here require different showings of scienter. In the Ninth Circuit, scienter for § 10b and Rule 10b-5 claims may be established by a showing of recklessness. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1999). Violations of Sections 17(a)(2) and 17(a)(3) may be established by proving negligence. Vernazza v. SEC, 327 F.3d 851 (9th Cir. 2003). Scienter is an element of a Section 206(1) violation, but not of a Section 202(2) violation. The evidence presented by SEC strongly suggests that Friedman at the least, acted recklessly. Thus, the SEC is likely to prove this element, regardless of which standard is applied.

[10]If the Court were required to consider "irreparable harm," analysis would be similar to what appears here. Cf. SEC v. Wenke, 622 F.2d 1363, 1366 (9th Cir. 1980) (district court granted preliminary injunction when SEC showed "likelihood of irreparable harm to . . .[the shareholders] unless the requested receivers are appointed.")

injunction, which freezes Friedman's personal assets, will cause him hardship. However, the interests of the investors in regaining whatever portion of their investment remains outweighs this hardship.

The Court also finds that there is a reasonable likelihood of future violations. A party's history of violations creates an inference that future violations are likely to occur. See Odessa, 883 F.2d at 176; SEC v. Koracorp Indus., Inc., 575 F.2d 692, 698 (9th Cir. 1978). Courts will also consider the degree of scienter involved, the isolated nature of the conduct, the defendant's recognition of the conduct, the likelihood that, based on the defendant's occupation, future violations may occur, and the sincerity of the defendant's assurances against future violations. Murphy, 626 F.2d at 653.

Here, the conduct by Friedman is similar to the actions he was disciplined for in the past: misrepresentations of available capital. The conduct occurred over the course of several years and concerned alterations of important documents that investors relied on. Moreover, neither Friedman's nor LF Global's recent conduct has been upstanding. While Friedman may have talked to the SEC about his suspicions of the ongoing fraud at LF Global, he also wrote checks for nearly $2 million dollars for himself when the fund was allegedly losing money and recently listed his $2.5 million home for sale. It also appears that someone at LF Global has been expediting the destruction of documents and computer hard drives. These activities show knowledge of the fraudulent activity and demonstrate a likelihood of continued violation in the future if the injunction is not issued.

II. Asset Freeze

Friedman argues that the asset freeze imposed by the preliminary injunction deprives him of his property, in violation of the Fifth Amendment and that the SEC has not made a sufficient showing to maintain such a freeze.

Federal courts have inherent equitable authority to issue ancillary relief measures in government injunction actions, including the power to freeze assets. See SEC v. Wenke, 622 F.2d 1363, 1369 (9th Cir. 1980); SEC v. Int'l Swiss Invest. Corp., 895 F.2d

/////

/////

1272, 1276 (9th Cir. 1990); SEC v. H.N. Singer, Inc., 668 F.2d 1107, 1112-13 (9th Cir. 1982) (district court has authority to freeze assets in FTC injunction action); Unifund SAL, 910 F.2d at 1041. Courts may issue freeze orders to prevent waste and dissipation of assets and to ensure their availability for restitution and disgorgement. See, e.g., Singer, 668 F.2d at 1113; Unifund SAL, 910 F.2d at 1041.

When the moving party has shown a likelihood of success on the merits and a public interest is involved, the party need only show a "possibility" of the dissipation of assets to obtain a freeze. FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989) ("The proper standard for the district court to apply in deciding whether to issue a freeze is whether FSLIC has shown a likelihood of success on the merits and a *possibility of dissipation*.") (emphasis added).[11]

The SEC has clearly met its burden here. The records show that investor funds have already been significantly depleted, as of January 2004, the value of GMM's main accounts had dropped to $20,000. Friedman, who admits that he liquidated certain partner's investments in 2003, possibly at the time when the fund was hemorrhaging money, contributed to this depletion. By recently placing his $2.5 million home on the market, Friedman has attempted to dissipate his own assets. Were an immediate freeze not imposed on LF Global's accounts and Friedman's personal accounts, any disgorgement order would likely be rendered meaningless.

LF Global's destruction of documents and computer hard drives, Friedman's failure to disclose his disciplinary past, and his delay in producing the accounting required by the TRO, also support a continuation of the current asset freeze. SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972) ("[F]ailure to present evidence

[11]Friedman argues that the SEC must prove there is a "likelihood" of asset dissipation rather than a "possibility." However, the case Friedman relies on, FTC v. Evans Products Company, 775 F.2d 1084 (9th Cir. 1985), is distinguishable. In Evans, the Ninth Circuit declined to issue an injunction when the violations occurred several years prior to the litigation and were not likely to recur. Moreover, the Ninth Circuit applied the traditional four prong preliminary injunction test rather than the public interest test. See FTC v. Inv. Dev., Inc., 1989 WL 62564 at *5 (E.D. La. June 8, 1989) (Commission need not show irreparable harm, but must (1) demonstrate the likelihood of success on the merits, and (2) balance the equities). The Ninth Circuit appears to be following this approach in its more recent cases. See Odessa, 833 F.2d at 175-76. Even if the SEC was required to show a "likelihood" of asset dissipation, the evidence presented clearly meets this burden.

to remove this uncertainty warranted a measure designed to preserve the *status quo* while the court could obtain an accurate picture of the whereabouts of the proceeds of the public offering. In addition, the continued failure of some appellants to furnish the information necessary to a complete understanding of the current situation justified extension of the temporary freeze until appellants have refunded the proceeds.")

This freeze of assets does not impinge on Friedman's due process rights. Contrary to Friedman's assertion, neither the TRO nor the preliminary injunction deprives him of access to *any* assets at all. Rather, Section VI of the injunction provides Friedman "with an allowance for necessary and reasonable living expenses to be granted only upon good cause shown by application to this Court with notice to and an opportunity for the Commission to be heard." This limited allowance is sufficient.

Moreover, defendants have no Fifth Amendment right to funds for an attorney when evidence suggests the money was fraudulently obtained. See SEC v. Quinn, 997 F.2d 287, 289 (7th Cir. 1993) ("Just as a bank robber cannot use the loot to wage the best defense money can buy . . . so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of the crime.") (citation omitted); SEC v. Cherif, 933 F.2d 403, 417 (7th Cir. 1991). A district court may properly forbid or limit payment of attorney fees out of frozen assets. See Commodity Futures Trading v. Noble Metals Int'l, Inc., 67 F.3d 766, 775 (9th Cir. 1995) (district court may deny attorney fee application when frozen assets fall far short of the amount needed to compensate injured parties).

In this case, the SEC has presented evidence that the money in Friedman's personal accounts was wrongfully taken from GMM and its investors. It appears that throughout the 2003 year, Friedman paid himself close to $1,700,000, when the fund was losing significant amounts of money. Investors likely put money into the fund based on representations that the fund was larger than it actually was. This suggests that any income Friedman received from GMM or LF Global was ill gained. LF Global's appointed receiver also points out that the sum potentially owed to investors may greatly exceed the value of the company's frozen funds. Thus, Friedman does not have a right to use these

funds to pay for legal representation.

III. Attorneys Fees Earned

Friedman has filed an ex parte request for a court determination that: (1) attorneys fees already earned by the law firm of Seltzer, Caplan, McMahon, and Vitek ("SCMV") prior to the TRO are not subject to the freeze; and (2) funds deposited by Charles Poh, Friedman's brother in law, for future legal services are also not subject to the freeze.[12] On April 19, 2004, the Court will hear oral argument on whether the title to funds deposited by Poh vested in Friedman or LF Global or still belongs to Poh, and thus only addresses the issue of whether the fees already earned by SCMV are subject to the freeze.

In SEC v. Interlink Data Network, 77 F.3d 1201 (9th Cir. 1996), the Ninth Circuit held that the portion of a deposit paid in advance to attorneys which was not needed to pay attorneys for services already rendered was property of the client, and thus potentially subject to a freeze on the client's assets. In Interlink, the client had deposited approximately $70,000 as an "advance deposit retainer." The parties in Interlink agreed that attorneys had performed services totaling $28,177 before the TRO was issued, thus approximately $41,000 of the funds were for services not yet rendered. The Ninth Circuit held that this portion could be subject to the freeze: "[the attorneys] did not 'earn' the advance deposit until it rendered services to [the client], and therefore the advance deposit was not 'owned' by [the attorneys] until that time." Id. at 1206. The Circuit remanded the case to the district court for a "determination of whether the unearned portion of the advance deposit was encompassed by the TRO." Id.; see also In re Bigelow, 271 B.R. 178, 188 (9th Cir. 2001) ("The fee . . . for certain well-defined legal services is not earned until the services are actually performed. These funds are deemed to be client trust funds until they have been earned by the lawyer . . . .") (citing Interlink).

---

[12] $175,000 is in dispute. $25,000 of this money is from Friedman's personal funds, the other $150,000 was transferred from Poh directly to the SCMV trust fund. SCMV has presented billing statements showing that it earned $50,525.00 in attorneys fees and $283.01 in costs before the freeze order was issued.

SCMV argues that it can be inferred from Interlink that fees already earned prior the issuance of a TRO or preliminary injunction under an advance retainer agreement are "owned" by the law firm and thus are not subject to a freeze on the client's assets. However, this issue was not directly before the Ninth Circuit, rather the panel focused on the status of the "unearned" portion of the retainer agreement, not the status of the "already earned" fees.

In SEC v. Credit Bancorp, 109 F. Supp. 142 (S.D.N.Y. 2000), the district court addressed exactly this issue. In Credit Bancorp, the defendant's attorneys, relying in part on Interlink, argued that approximately $300,000 in a client trust was not subject to a freeze of the clients assets because the firm had actually earned this amount prior to the TRO, but had not drawn down the funds. However, the court found that "Interlink does not stand for a general proposition of law dictating that this Court conclude that ownership of the [client trust fund] passed to [the attorneys] at the time services were rendered." Id. at 145.

Rather, the Court concluded that the terms of the retainer agreement determined when the transfer of ownership occurred. The retainer agreement at issue required the law firm to take affirmative steps, such as generating and sending out invoices and transferring the funds to the firm's account before it actually "owned" the funds. Id. The court held: "the terms of the fee agreement indicate that the transfer of ownership over the Trust Funds was not automatic upon the rendering of services–nor even when invoices were rendered. Therefore, the monies remaining in the Trust Account at the time of the freeze order were still the property of Credit Bankcorp." Id.

Here, like Credit Bankcorp, ownership of the funds on deposit did not transfer immediately upon services being rendered under the retainer agreement. The agreement requires Friedman to deposit a specified amount of money in a client trust account from which SCMV's "monthly billing fees and expenses will be paid." The agreement further states:

> [Y]ou will be authorizing and instructing us to deposit your money in our Client Trust Account and to disburse the proceeds incrementally from time to time to apply to fees and/or costs which our firm may advance or incur. Disbursements will be

made automatically to pay amounts that will be shown on our monthly statements. (Def.'s Am. Notice of Lodgement in Supp. of Ex Parte Application Ex. B at 2.).

In a supporting declaration, Charles Goldberg, Friedman's lead counsel, describes how SCMV's billing process works:

> On a periodic (usually monthly) basis the time entries for each matter are consolidated by our accounting department into a pre-billing statement. Invoices for costs incurred or advanced on behalf of a client must be approved by an attorney working on the matter; if approved, the invoices are forwarded to our accounting department which also incorporates the charges into the pre-billing statement. After the billing attorney makes any necessary corrections or adjustments to the pre-billing statement, a final statement is prepared and sent to the client for payment.

(Goldberg's Supplemental Decl. ¶ 3.) Goldberg candidly admits that this billing process had not been completed at the time the TRO was filed. Goldberg states that the initial retainer deposit ($25,000 from Friedman's personal funds) had been consumed by the time Friedman met with the SEC (March 10, 2004), prior to the issuance of the TRO. However, he explains: "[t]hose fees had not yet been billed and the funds not yet drawn out of out client's trust account as we bill monthly and the next invoice will not be processed until after March 31, 2004." (Goldberg Decl. ¶ 4.)

Based on this explanation, it appears that under the agreement, the title to funds did not automatically transfer once services were rendered. Rather, SCMV's bills go through a review process before a final statement is sent to the client. Only after the client receives the statement, does SCMV draw against the deposited funds. This process was not complete at the time the TRO was issued, thus Friedman still retained title to the fees, which are subject to the asset freeze. See Gala v. Enters., Inc. v. Hewlett Packard Co., 970 F. Supp. 212, 217 (S.D.N.Y. 1997) (funds still held in the client trust accounts "at the hour of the signing of the freeze order" are still owned by the client company and thus subject to the freeze).

As the courts in Credit Bankcorp and in SEC v. Princeton Economic International ltd., 84 F. Supp. 2d 443 (S.D.N.Y. 2000), have held under similar circumstances, title to funds in a client trust account held to cover legal fees does not pass to the lawyer until the funds were actually earned and withdrawn. While there is no dispute that SCMV

earned the fees, the firm had not withdrawn these funds from the trust account at the time of the freeze order. Indeed, under SCMV's practices, the amount earned had not been finally determined at the time of the freeze order. Thus, title to the portion of the trust fund which represented "earned" fees did not pass to SCMV until, at the earliest, the time the bill for the fees was issued to the client. While a retainer agreement can provide for title to pass to that portion of the trust account deposit actually earned, the retainer agreement here did not have such a provision.

Thus, since the Court holds that title to the $25,000 on deposit in the SCMV client trust account did not pass before the issuance of the TRO and freeze order, even though there is no dispute that the fees were "earned," it cannot release the $25,000 to SCMV.

III. CONCLUSION

For the reasons discussed above, the Court has GRANTED the SEC's motion for a preliminary injunction and the actual preliminary injunction was issued on April 9, 2004. The Court also DENIES SCMV's ex parte request for payment of attorneys' fees already earned. The Court will hear argument regarding the status of the funds deposited by Charles Poh on April 19, 2004 at 3:30 p.m.

IT IS SO ORDERED.

Dated: April 14, 2004

HONORABLE BARRY TED MOSKOWITZ
United States District Judge

Copies to: Magistrate Judge McCurine
All parties and counsel of record

I hereby attest and certify that this is a true, correct and full copy of the original document on file in my legal custody.
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA