STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 07-CP-40-3116

HENRY D. MCMASTER,
in his official capacity as the
SECURITIES COMMISSIONER FOR
THE STATE OF SOUTH CAROLINA,

Plaintiff,

-vs-

CAPITAL CONSORTIUM GROUP, LLC;
3 HEBREW BOYS, LLC; TONY POUGH
a/k/a TONY BERNARD POUGH; TIM
MCQUEEN a/k/a TIMOTHY MCQUEEN;
JOSEPH BRUNSON a/k/a JOSEPH B.
BRUNSON; DANIEL DEVELOPMENT
GROUP, LLC; FIRST CITIZENS BANK
AND TRUST CO., INC.;

Defendants.

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BARBARA P. SCOTT
C.C.C. & G.S.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

TO: DEFENDANTS ABOVE-NAMED

Plaintiff Henry D. McMaster, in his official capacity as the Securities Commissioner for the State of South Carolina ("Plaintiff"), hereby submits the instant memorandum in support of the Motion for Temporary Injunction ("Motion") filed in this action on June 22, 2007.

Plaintiff's Motion seeks, among other relief, an asset freeze, cessation of business activities, and a temporary injunction pursuant to § 35-1-603 of the South Carolina Uniform Securities Act of 2005 ("Securities Act" or "Act"), to enjoin defendants Capital Consortium Group, LLC ("CCG"); 3 Hebrew Boys, LLC ("3HB"); Tony Pough a/k/a Tony Bernard Pough ("Pough"), Tim McQueen a/k/a Timothy McQueen ("McQueen"), Joseph Brunson a/k/a Joseph B. Brunson ("Brunson") and Daniel Development Group, LLC ("Daniel Development") (collectively, "Defendants") from selling, transferring, concealing, damaging, altering, encumbering or otherwise disposing of any real or personal property ("Assets") titled in the name of, controlled by, owned by or otherwise in the possession of Defendants 3HB, CCG or Daniel Development, or which may come into the possession of Defendants (or any other individual or entity) at any time hereafter, until a trial on the merits is held.

PLAINTIFF IS STATUTORILY AUTHORIZED TO OBTAIN THE REQUESTED RELIEF UPON A "PROPER SHOWING"

The Securities Act provides that if Plaintiff "believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of [the Act]" or "is about to . . . materially ai[d] a violation" thereof, Plaintiff can maintain an action "**to enjoin the act, practice, or course of business** and to enforce compliance with [the Act]." S.C. CODE ANN. § 35-1-603(a) (emphasis added). The Act further provides that "upon a proper showing" the court may issue a permanent or temporary injunction and "order other appropriate or ancillary relief," such as:

> (A) an **asset freeze**, accounting, writ of attachment, writ of general or specific execution, and **appointment of a receiver** or conservator, that may be the Securities Commissioner, **for the defendant or the defendant's assets**;

(B) ordering the Securities Commissioner to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) imposing a civil penalty in an amount not to exceed ten thousand dollars for each violation; **an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter** or the predecessor chapter or a rule adopted or order issued under this chapter.

S.C. CODE ANN. § 35-1-603(b)(1), (b)(2)(A) - (C) (emphasis added).

The Official Comments to Section 603 note that "[t]he term 'upon a proper showing' has a settled meaning in federal securities laws." Federal case law uniformly interprets "upon a proper showing" to mean that the plaintiff must demonstrate only a "prima facie case of past violations and a reasonable likelihood or propensity to engage in future violations." Securities and Exchange Commission v. Prater, 289 F.Supp.2d 39, 49 (D.Conn. 2003) (internal citations omitted). Although courts are to consider the totality of the circumstances[1] in making such a determination, "the commission of past illegal conduct is highly suggestive of the likelihood of future violations." Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 807 (2nd Cir. 1975). "The burden is on the defendants to show that there is no reasonable expectation that their illegal activities will be repeated." Securities and Exchange Commission v. Globus International, Ltd., 320 F.Supp. 158, 160 (D.C.N.Y. 1970). "This burden is a heavy one." Id.

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[1] Among the factors considered are: (1) the seriousness of the original violation; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved on the part of the defendant; (4) the defendant's recognition of his unlawful conduct and the sincerity of his assurances against future violations; and (5) the likelihood that the defendant's occupation will present opportunities for future violations. Securities and Exchange Commission v. Marker, 427 F.Supp.2d 583, 590 (M.D.N.C. 2006).

THE COURT HAS ALREADY FOUND THAT PLAINTIFF HAS MET THE HIGHER BURDEN FOR OBTAINING A NON-STATUTORY INJUNCTION

A court order previously entered in this action establishes both a prima facie case of Defendants' past violations of securities laws and a likelihood of future violations. Plaintiff previously filed a motion for temporary injunction on May 22, 2007 seeking to freeze certain bank accounts owned or controlled by Defendants[2] containing investor funds. At the May 31, 2007 hearing on said motion, the Court heard testimony that Defendants' bank accounts contained several million dollars from the unlawful sale of securities (transcript at 49:21-25, 50:1-17). The Court also heard witnesses testify regarding several large purchases of assets with investor funds contained in Defendants' bank accounts. Among these assets were a 4-to-5 million dollar Gulfstream jet (transcript at 42:7-25, 43:1-2), a million dollar luxury motor home (transcript at 43:4-14), and millions of dollars' worth of land in South Carolina and various foreign countries (transcript at 43:17-25, 44:1-12, 45:2-25, 46:1-2).

The Circuit Court granted Plaintiff's motion and issued a formal Order that was filed on June 25, 2007 ("Order")[3]. The findings of fact and conclusions contained in the Order reflect that Plaintiff put forth evidence that:

(a) Defendants, individually and by and through their agents and representatives, have been holding seminars in several states and foreign countries at which they

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[2] Daniel Development was not a defendant in this action at the time Plaintiff filed the May 22, 2007 motion. However, the bank accounts at issue therein were in the name of Daniel Development, and Defendant Pough is its registered agent.

[3] The use of "Defendants" in the June 25, 2007 Order does not apply to Daniel Development, although Defendants Pough, Brunson, McQueen, 3HB and CCG were enjoined by the Order from taking any action with respect to said entity's bank accounts. By Amended Complaint filed on June 22, 2007, Plaintiff added Daniel Development as a defendant and alleged that Daniel Development was the alter ego of said Defendants.

have been offering an investment scheme ("Investments") to the public (Order at 3, ¶ 2);

(b) the Investments, as described at these seminars, constitute "securities" under South Carolina law (Order at 3, ¶ 2);

(c) Defendants are not licensed or registered to sell securities in South Carolina (Order at 3, ¶ 3);

(d) the Investments offered by Defendants are not and never have been registered for sale in or from the State of South Carolina (Order at 3, ¶ 3);

(e) Defendants used funds obtained from the sale of the Investments in a manner inconsistent with the representations made to investors and in violation of securities law (Order at 4, ¶ 6); and

(f) Defendants are spending investor funds at a rapid pace (Order at 4, ¶ 6).

Accordingly, the Court found that Plaintiff demonstrated a likelihood of success on the merits with respect to Defendants' violations of South Carolina securities law and Defendants' committing fraud upon their investors (Order at 4, ¶ 8).

The Court's Order is significant in that it found that Plaintiff satisfied the elements for a *non-statutory* injunction, namely, that (1) the investors would suffer irreparable harm if the injunction were not granted, (2) Plaintiff will likely succeed on the merits of the litigation, and (3) there is no adequate remedy at law. (Order at 3, ¶ 5; 4, ¶¶ 7-8; 5, ¶¶ 11-13.)

The relief Plaintiff now seeks is explicitly authorized by the Securities Act, which "frees [Plaintiff] of the responsibility usually imposed on those requesting a preliminary injunction of showing the risk of irreparable injury or the unavailability of remedies at law." Prater, 289 F.Supp.2d at 49. Plaintiff is required at this stage only to make the aforementioned "proper

showing" because Plaintiff is seeking relief "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." Management Dynamics, Inc., 515 F.2d at 808. Plaintiff has already satisfied a higher burden than was required by the Securities Act in previously establishing Defendants' violations of securities laws and the resulting harm, as clearly set forth in the Court's Order or otherwise contained in the record. Consequently, the "proper showing" required at this juncture has already been met.

PLAINTIFF IS ENTITLED TO EXPAND THE SCOPE OF THE RELIEF TO PRESERVE ASSETS DURING THE PENDENCY OF THIS CASE

Plaintiff previously obtained an injunction enjoining Defendants' use and access to funds derived from the sale of unlawful Investments. Plaintiff's current Motion is likewise designed to expand the scope of injunctive relief to recover and preserve *all* assets of any kind which were unlawfully acquired, or which may hereafter be acquired, with investors' funds. The record already contains specific testimony regarding Defendants' possessing a jet, motor home, and several parcels of real property. Other real and personal property undoubtedly exists, and Plaintiff seeks the appointment of a receiver to preserve and marshal Defendants' assets so that they will not be squandered or disposed of by Defendants prior to the trial of this case. To that end, Plaintiff also seeks to halt Defendants' business activities so that no new capital can be infused into Defendants' unlawful enterprises or used to acquire new assets.

Plaintiff has made a proper showing for the foregoing relief in accordance with § 35-1-603(a) and (b) of the Securities Act and applicable federal law, namely, that there is a reasonable likelihood that Defendants, if not so enjoined, will continue violating the securities laws of this State. Defendants cannot overcome their burden to show the absence of such a likelihood,

particularly in light of the Court's clear findings with respect to past violations and the inference that is drawn therefrom regarding future violations.

Plaintiff thus asks the Court to (1) issue an injunction enjoining Defendants–and all other individuals and entities who may come into possession of assets acquired with investor funds–from access to or dominion over the Assets, as more fully set forth herein; (2) order Defendants to cease and desist soliciting or receiving money in connection with their sale of unlawful Investments/securities; (3) appoint a receiver to recover and maintain Defendants' assets, and confer upon such receiver all powers and authority allowed by law to effectuate those ends; and (4) award such other and further relief as the Court deems just and proper.

CONCLUSION

For the foregoing reasons, Plaintiff asks that the Court grant the relief requested in the Motion and set forth more fully herein.

Respectfully submitted,

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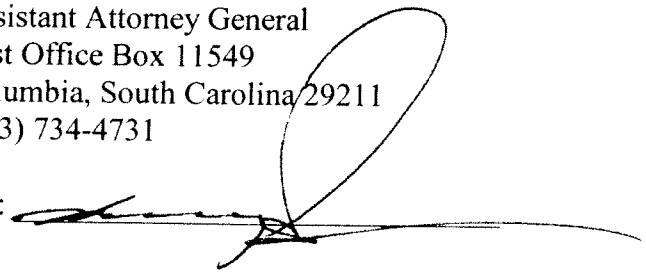
BY: 

June 28, 2007