UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

v. Case No. 8:19-cv-886-T-33SPF

OASIS INTERNATIONAL GROUP, LIMITED, ET AL.,

Defendants,

and

MAINSTREAM FUND SERVICES, INC., ET AL.,

Relief Defendants.
_______________________________________/

DEFENDANT RAYMOND P. MONTIE, III's RESPONSE IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; MOTION TO DISSOLVE, OR IN THE ALTERNATIVE MODIFY, THE RECEIVERSHIP AND STATUTORY RESTRAINING ORDER AS IT APPLIES TO RAYMOND P. MONTIE, III; AND MEMORANDUM OF LAW

Raymond P. Montie III, a named defendant in this action and victim of the Ponzi scheme outlined in the First Amended Complaint, by and through his undersigned attorney, files this memorandum in opposition to the plaintiff's motion for a preliminary injunction. Doc. 4. Further, pursuant to 7 U.S.C. § 13a-1, Rule 65(b)(4), Federal Rules of Civil Procedure, and this Court's equitable powers, Mr. Montie moves this Court for entry of an order dissolving the receivership as it applies to Mr. Montie. In the alternative, Mr. Montie request this Court to modify the receivership to exclude Mr. Montie, and order the receiver to

return Mr. Montie's assets and property to him (*i.e.*, lift the asset freeze). If unwilling to lift the asset freeze, Mr. Montie requests this Court to enter an order removing the following items from the receivership, as they bear no nexus to the Ponzi scheme: (1) Mr. Montie's income from Ambit; (2) Mr. Montie's businesses unrelated to the Ponzi scheme; and (3) Mr. Montie's real properties.

A. PROCEDURAL HISTORY

1. On April 15, 2019, the plaintiff filed a complaint. Doc. 1.

2. That same day, the plaintiff filed an *ex parte* motion seeking a statutory restraining order and preliminary injunction ("SRO motion"), which incorporated the allegations in the complaint. Doc. 4.

3. On April 15, 2019, the Court entered a statutory restraining order ("SRO"), freezing Mr. Montie's assets and placing them in a receivership. Doc. 7.

4. On April 17, 2019, the U.S. government filed a verified complaint for forfeiture *in rem*, in case number 8:19-cv-908-T-02AEP. The government filed an amended verified complaint the following day ("verified forfeiture complaint"), which can be found at docket entry 12 in that case. The verified forfeiture complaint is related to this case. Doc. 54.

5. The plaintiff served Mr. Montie with the complaint and SRO on April 18, 2019. Doc. 23.

6. Mr. Montie filed a motion to dismiss the complaint. Doc. 58.

7. The plaintiff filed a first amended complaint ("FAC") on June 10, 2019. Doc. 110.

8. Mr. Montie is listed on the board of directors for Oasis International Group

("OIG"), which is one of business defendants Michael J. DaCorta, Joseph S. Anile, II, and others used to perpetrate the Ponzi scheme that is described in the FAC, albeit inaccurately.

9. The receiver has submitted to this Court a request to pay for certain services, including for a vendor that imaged electronic data at OIG. Doc. 114. In Doc. 114-8, the vendor listed all email accounts that OIG hosted. Mr. Montie does not have an account listed.

10. The receiver also has possession of the OIG bank accounts. Mr. Montie is not listed as someone authorized to access the funds in the accounts, or cause the funds in those accounts to be transferred or withdrawn.

11. In sum, defendants DaCorta, Anile, and others conned Montie and others to "loan" money to various entities, all of which used variations of the name Oasis. According to defendant DaCorta's convincing fraudulent inducements, the entities would invest in foreign currency ("forex") trading and were guaranteed to make a profit. Mr. Montie was listed on the board of directors for only one Oasis entity, OIG.

12. Mr. Montie does not admit that his actions violated the law or that he had engaged in any commodity-related activities. Mr. Montie was never involved in forex trading before meeting defendant DaCorta, and is not currently involved in forex trading. Further, Mr. Montie will not engage in forex trading in the future.

B. PARTIAL LIST OF EXHIBITS FILED WITH THIS MEMORANDUM

1. Exhibit A is an Internal Revenue Service Memorandum of Interview of defendant DaCorta, wherein defendant DaCorta inculpates himself and several others, but states several times that he hid the fraud from Mr. Montie.

2. Exhibit B is the verified forfeiture complaint.

3. Exhibit C is an affidavit from Deb Cheslow, who worked for defendant DaCorta. Defendant DaCorta admitted in Exhibit A that he hid the fraud from Ms. Cheslow. Defendant DaCorta told Ms. Cheslow on several occasions that Mr. Montie had no authority at OIG.

4. Exhibit D is an affidavit from Vinny Raia, who worked for defendant DaCorta and managed the Oasis real properties. Defendant DaCorta admitted in Exhibit A that he hid the fraud from Mr. Raia. The Oasis staff considered defendant DaCorta and defendant Anile "bosses." Mr. Montie was a recruiter. Mr. Raia can testify that Mr. Montie did not have a physical office in Oasis.

5. Exhibit E is an affidavit from Robert Marchiony, an attorney licensed to practice law in New York, and who works for the New York state courts. Mr. Marchiony researched defendant DaCorta before investing in OIG, but could not find any information that defendant DaCorta was prohibited from trading by the plaintiff or the National Futures Association ("NFA").

6. Exhibit F is an affidavit from Lois Burnell, who worked as an Ambit Consultant and invested in Oasis. When she was experiencing financial hardships, Mr. Montie encouraged Mrs. Burnell to withdraw funds from Oasis.

C. Statement of Facts

1. Plaintiff Conflated Events and Acts to Confuse the Court About Mr. Montie

The plaintiff's vague allegations in the complaint, FAC, and SRO motion are disingenuous. The plaintiff intertwined vague allegations with evidence of fraudulent activity that defendants DaCorta, Anile, and others committed to portray Mr. Montie as equally

culpable. The artful pleadings improperly paint Mr. Montie guilty by association with the defendants DaCorta, Anile, and others.

Simply put, Mr. Montie is a victim of the fraud defendants DaCorta, Anile, and others perpetrated. Mr. Montie is the classic early Ponzi scheme investor. He believed OIG's operations were legitimate and successful up to the point where the scheme crashed on April 18, 2019. The plaintiff has further victimized Mr. Montie in this case. The affidavits and report filed contemporaneously with this memorandum require Mr. Montie to be released from the SRO, and no preliminary injunctions should be entered against him.

2. Mr. Montie and Ambit, a Legally Unrelated Business to the Oasis Ponzi Scheme

Since 2007, Mr. Montie successfully worked as a consultant for Ambit Energy ("Ambit"), which "provides electricity and natural gas services in deregulated markets across the United States, primarily marketed through a direct sales channel of more than 250,000 Independent Consultants." https://www.ambitenergy.com/about-ambit-energy (last visited May 17, 2019). Ambit legally operates as a multi-level marketing business.[1] In 2010, *Inc.* magazine called Ambit the nation's fastest-growing private company. *See* https://www.prnewswire.com/news-releases/inc-500-recognizes-ambit-energy-as-americas-fastest-growing-private-company-101373959.html (last visited May 17, 2019). For Ambit, Mr. Montie recruits independent consultants, produces training videos, aids his independent

[1] Multi-level marketing businesses use independent consultants, who are generally issued IRS-1099 forms for tax purposes, to sell products or services. A consultant's income is usually derived from two income streams, one paid from commissions on sales a consultant made directly to retail customers and one paid from commissions on sales other distributors, the consultant recruited, made to retail customers. https://en.wikipedia.org/wiki/Multi-level_marketing (last visited May 17, 2019). Well known multi-level marking businesses include Mary Kay, Legal Shield, and The Pampered Chef. https://en.wikipedia.org/wiki/List_of_multi-level_marketing_companies (last visited May 17, 2019).

consultants with selling Ambit's products and recruiting new independent consultants, and manages his team of consultants. From 2007 until April 18, 2019, Mr. Montie earned in excess of $10,000,000.[2] Ambit is a business operation that is completely unrelated to the Oasis Ponzi scheme.

On or about Monday, June 13, 2011, Mr. Montie hosted a conference for approximately 50 people, who were interested in joining Ambit as independent consultants. Defendant DaCorta was there and introduced himself to Mr. Montie before Mr. Montie commenced his presentation. Defendant DaCorta told Mr. Montie that he wanted to meet Mr. Montie, but did not intend to stay for the presentation. On June 17, 2011, defendant DaCorta joined Mr. Montie's team of Ambit independent consultants. Mr. Montie began introducing defendant DaCorta to the independent consultants on Mr. Montie's team.

In October 2011, after lulling Mr. Montie into a false sense of security, defendant DaCorta convinced Mr. Montie to give defendant DaCorta $25,000 to invest. By the end of the year, defendant DaCorta told Mr. Montie that he had invested the money in forex trading and made a substantial profit. Without knowing defendant DaCorta had been barred from trading, Mr. Montie encouraged defendant DaCorta to supplement his Ambit income trading forex and invested an additional $50,000 with defendant DaCorta.[3] Defendant DaCorta began

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[2] Since the SRO was entered, Ambit has continued to pay Mr. Montie for the work he has done to date, but the receiver has directed those funds to an account Mr. Montie does not control.

[3] For inexcusable reasons, the plaintiff did not make defendant DaCorta's debarment from the NFA readily accessible to the public. Several Oasis victims formerly held jobs in the legal professional and law enforcement and could not find defendant DaCorta's debarment while conducting a background check on him before investing in Oasis. Mr. Montie was also not aware that defendant Anile was also involved with defendant DaCorta in the business that resulted in defendant DaCorta's debarment from the NFA. https://opencorporates.com/companies/us_fl/F06000001807 (last visited May 19, 2019); *see also* *http://search.sunbiz.org/Inquiry/corporationsearch/SearchResultDetail?inquirytype=EntityName&directionType=PreviousList&searchNameOrder=ICT%20F060000018070&aggregateId=forp-f06000001807-01fb244d-*

encouraging Ambit consultants, including Mr. Montie, to invest with him in a business defendant DaCorta named Oasis Management, LLC ("OM").[4] Defendant DaCorta told Mr. Montie and several Ambit independent consultants that they would invest money into OM, and defendant DaCorta would use the funds to invest in forex and make a profit for the investors.

3. Defendants DaCorta and Anile Defrauded Mr. Montie and Others

With all the building blocks in place to allow defendant DaCorta to repeat the fraud he'd perpetrated in the past (the fraud that caused his debarment from the NFA), defendant DaCorta commenced his fraud. Defendant DaCorta convinced Mr. Montie to invest in OM and to urge his Ambit independent consultants to invest in OM. Given the financial success the Ambit independent consultants enjoyed, none of them questioned defendant DaCorta's business model. Further, defendant DaCorta brought defendant Anile, an attorney licensed to practice law in New York and self-proclaimed securities law expert, into OM's management. Defendant Anile assured Ponzi scheme victims that, as a lawyer, he ensured Oasis operated legally.

Despite the outward appearance that OM was legitimate, the FBI concluded that defendant DaCorta began defrauding Mr. Montie as soon as Mr. Montie invested with defendant DaCorta. "Within months of creating [OM], [Mr. Montie] invested a large sum of

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[4] Defendants DaCorta and Anile went on to create a number of entities to perpetuate the fraud using the Oasis brand, Mr. Montie was only on the board of directors for OIG. He served in no capacity for any other entity, other than as a fraud victim.

money. [Defendant DaCorta] almost immediately started using a portion of this money for personal expenses." Exhibit B at 6.[5] On the same day the FBI caused the verified forfeiture complaint to be filed, defendant DaCorta confirmed what was set forth in the verified forfeiture complaint.

In mid-2013, defendants DaCorta and Anile created Oasis International Group, Limited ("OIG"). To ensure Mr. Montie did not withdraw his funds from OM, defendant DaCorta told Mr. Montie that he would be an owner of OIG. Defendants DaCorta and Anile led Mr. Montie to believe he would earn a significant sum when they sold the company or issued stock. Mr. Montie agreed to a position on the board of directors, but in reality had only the title. In 2017, defendant DaCorta told Oasis investors that defendant Anile said all investors had to "loan" funds to OIG, which defendant DaCorta would invest in forex trading and "market making."

On April 18, 2019, defendant DaCorta spoke with Internal Revenue Service Criminal Investigation Special Agent ("SA") Shawn Batsch and FBI SA Ric Volp.[6] The discussion was memorialized in an official government record called a Memorandum of Interview.[7] In sum, defendant DaCorta explained the fraud he committed against Oasis investors and inculpated several others, including defendant Anile. Defendant DaCorta told agents "things

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[5] Page numbers refer to the page number the Court's electronic filing system assigned it when filed in this case.

[6] The receiver billed 11 hours for meeting and communicating with the CFTC, FBI, and law enforcement on April 18, 2019. That time included meeting with defendant DaCorta at his residence. The receiver billed additional hours on subsequent days for conferring with the CFTC, the U.S. Attorney's Office, and law enforcement. Doc. 114-3. The receiver's lawyers also billed for several communications with government lawyers and law enforcement on and after April 18, 2019.

[7] At this stage of the proceeding, a court may rely on affidavits and hearsay materials that would not be otherwise admissible when seeking a permanent injunction. *See CFTC v. Hunter Wise Commodities, LLC, No. 12-81311-CIV, 2013 WL 718503, at *9 (S.D. Fla. Feb. 26, 2013), aff'd, 749 F.3d 967 (11th Cir. 2014).*

got out of control too quickly and I didn't know how to handle it." Defendant DaCorta used investor funds "to purchase his houses, fund his kid's college education, purchase automobiles for himself, his wife, and his daughter, go on vacations, and other personal expenses. DaCorta agreed he spent a lot of money going out to eat and money he used was investor fund." Exhibit A at 3-4.

Regarding Mr. Montie, defendant DaCorta said:

> DaCorta started OIG after getting involved with Ambit with Ray Montie. Montie gave DaCorta money to trade in FOREX market and it blew up from there. Montie brought in people from Ambit and the company grew. Montie doesn't know there are trading losses and probably thinks the assets are an influx of revenues from the trading platform. *(sic.)*

Exhibit A at 4 (*emphasis added)*. On more than one occasion defendant DaCorta confirmed that Mr. Montie did not know about the trading losses and that Mr. Montie "had nothing to do with the fraud." Exhibit A at 7.

To perpetrate the fraud, defendant DaCorta and others maintained a web portal, called "the back office," which investors, including Mr. Montie, used to view account balances. Exhibit A at 6. The back office did not incorporate trading losses. Defendant DaCorta admitted that the information presented to an investor viewing the back office was "misleading because each investor believes they are earning money and the company is earning money." *Id*. In addition to lying to investors, defendant DaCorta told investigators that he hid the fraud from OIG employees, like Deb Cheslow and Vinny Raia. Exhibit A at 4. These statements to law enforcement corroborate recorded statements defendant DaCorta made and text messages he sent during the fraud, all designed to conceal the fraud from Mr. Montie and others.

Defendant's DaCorta's confession to investigators is corroborated by the affidavits filed contemporaneously with this memorandum, and the verified forfeiture complaint. The FBI explained in the verified forfeiture complaint that defendants DaCorta, Anile, and others, used a large portion of funds invested into OIG "for large personal houses, multiple luxury vehicles such as a Porsche and Ferrari, and maintaining a very lavish lifestyle." Exhibit B at 7. The verified forfeiture complaint also asserts that defendants DaCorta and Anile "created a network of people to help recruit new investors," but the FBI conspicuously failed to allege facts showing that the "network of people" knew the statements they made to recruit new investors were false, should have known were false, or made with reckless disregard as to the truth. *Id.* at 7.

The plaintiff's own investigator, Elise Robinson, prepared an affidavit that fails to support the claims in the FAC and SRO motion that Mr. Montie was involved in a fraud, much less should have been subject to a SRO. Doc. 4-1. Ms. Robinson identified several entities defendants DaCorta, Anile, and others used to commit fraud, but conspicuously included no facts that Mr. Montie created any of those entities, or served in any capacity in any of them, except OIG. Ms. Robinson found no proof that Mr. Montie made any assertions that Mr. Montie knew were false, should have known were false, or made with reckless disregard as to the truth. None could be made, under oath, because Mr. Montie made statements that he believed to be true. Like other investors, Mr. Montie believed what defendants DaCorta and Anile told him. Defendant DaCorta conned Mr. Montie into investing in Oasis in order to gain access to Mr. Montie's Ambit independent consultants. Defendant DaCorta's skillful lies and deceitful actions convinced many people, including

Mr. Montie, to not only invest with defendant DaCorta, but to bring family members and loved ones to Oasis. For example, Mr. Montie convinced his own parents to invest with defendant DaCorta.

Ms. Robinson's flawed financial analysis, doc. 4-9, misleads the Court to conclude that Mr. Montie is similarly situated to the other defendants. For example, Mr. Montie is alleged to have been paid funds from Oasis that were used for "personal payments." Doc. 4-9. Several Oasis investors withdrew funds or were paid interest, and used the funds to make personal payments. Those other investors were not included on doc 4-9, leaving the Court to conclude Mr. Montie's payments were nefarious. Upon a closer examination, the financial analysis shows that only defendants DaCorta and Anile used funds withdrawn from Oasis to pay for chartered jets, luxury hotels, repayment of loans, acquisition of real properties and vehicles, and starting up businesses unrelated to Oasis. Doc. 4-9. Ms. Robinson repeats the same abysmal analysis in both doc. 4-11 and doc. 4-12.

In sum, the purported financial analyses in doc. 4-9, 4-11 and 4-12, do not provide evidence that Mr. Montie knowingly engaged in a scheme to defraud. Review of the flawed financial analyses clearly shows that Mr. Montie did not spend money on the lavish lifestyle defendants DaCorta and Anile enjoyed from the fruits of their scheme. This material observation is conspicuously omitted from the plaintiff's FAC, the SRO, and Ms. Robinson's affidavit.

Perhaps the most glaring example of vague allegations intertwined with facts about other defendants to paint Mr. Montie with a broad brush is found at page 23 in Ms. Robinson's affidavit. Doc. 4-1. "The following is a detailed summary of the deposit activity

in OM account 9302 during the time period above:…(b)…$30,000 from Montie that may have been funds given to [him] by others for investment in the Oasis Pools…" Said another way, Mr. Montie may have invested his own money, but we are not sure. In other words, the statements about Mr. Montie amount to no more than a guess. "May have" is not proof that Mr. Montie collected money from pool participants and engaged in a scheme to defraud. On April 18, 2019, Mr. Montie cooperated with FBI agents and confirmed that he only invested his own money. Mr. Montie is an Oasis Ponzi scheme victim.

Ms. Robinson also included an OIG organizational chart, doc. 4-3 at 33. Mr. Montie is listed on the board of directors, but no other place on the chart. *See id*.[8] Defendant DaCorta is listed as an OIG director, chief executive officer, chief investment officer, and in charge of marketing & creditor relations. Doc. 4-3. Defendant Anile is listed as an OIG director and president. Ms. Robinson included a .pdf version of the Oasis website, which lists defendants DaCorta and Anile as the leaders of Oasis, but the website conspicuously omits Mr. Montie. Doc. 4-13 at 11, 33-34. The plaintiff and Ms. Robinson leave the Court conclude on its own that Mr. Montie is not as culpable, if culpable at all, rather than candidly admit the factual weakness of the case. Finally, Ms. Robinson attached a chart of the various Oasis entities defendants DaCorta and Anile used to engage in a scheme to defraud. Mr. Montie is only on the board of directors for OIG, and serves no role in Oasis Global FX, S.A., Oasis Global (Nevis) Limited, Oasis Management, LLC, Bowling Green Capital Management, LLC, Lagoon Investments, Inc., Roar of the Lion Fitness, LLC, 444 Gulf of Mexico Drive, LLC,

[8] The FAC alleges Mr. Montie is, among other things, a "vice president of OIG [and] executive director of sales." That bald allegation is inconsistent with doc. 4-3 at 33.

4046 Founders Club Drive, LLC, 6922 LaCantera Circle, LLC, 13318 Lost Key Place, LLC, and 4Oaks, LLC. Defendants DaCorta and Anile never put Mr. Montie in any position where he could have perceived the pervasive fraud the defendant DaCorta, defendant Anile, and others undertook.

Deb Cheslow, a retired United States Air Force Captain and flight instructor, worked for defendant DaCorta and had the title Director of Lender Services in OIG. Ms. Cheslow interacted with investors, handled administrative matters, and completed other tasks defendant DaCorta assigned to her. Defendant DaCorta repeatedly told Ms. Cheslow that Mr. Montie had no authority at Oasis, and that defendant DaCorta made all decisions. Defendant Anile assured Ms. Cheslow that he used his legal skills to ensure that Oasis conformed to all laws.

Kevin Kerrigan, one of Mr. Montie's independent consultants in Ambit, was told by defendant DaCorta that defendant Anile was the securities lawyer who ensured that Oasis operated within the confines of the law. Lois Burrell invested in Ambit and Oasis. When she struggled to pay bills, Mr. Montie encouraged Mrs. Burrell to withdraw funds from Oasis to meet her financial debts. If Mr. Montie was involved in fraud, he would not urge investors to withdraw funds to help investors struggling to pay debts.

D. MEMORANDUM OF LAW

To obtain a preliminary injunction, the plaintiff must demonstrate a *prima facie* case that a violation has occurred and that there is a reasonable likelihood of a future violation. *See CFTC v. Hunter Wise Commodities, LLC*, No. 12-81311-CIV, 2013 WL 718503, at *9 (S.D. Fla. Feb. 26, 2013), aff'd, 749 F.3d 967 (11th Cir. 2014) (citing *CFTC v. Hunt,* 591

F.2d 1211, 1220 (7th Cir.1979)). Further, when the government seeks, as the plaintiff does here, an overly onerous injunction, including one permitting an asset freeze, a more substantial showing is required to support the relief sought. *See CFTC v. Sterling Trading Grp., Inc.*, 605 F. Supp. 2d 1245, 1291 (S.D. Fla. 2009) (citing *SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir.1990)[9] ("Like any litigant, the Commission should be obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks.")). The plaintiff can neither prove Mr. Montie participated in a fraud nor that a reasonable likelihood exists that Mr. Montie will engage in a future fraud without a preliminary injunction. Therefore, the plaintiff's motion should be denied.

1. Plaintiff Cannot Establish Mr. Montie's Participation in a Fraud

To establish liability using a fraud theory pursuant to 7 U.S.C. § 6b and 17 C.F.R. § 5.2(b)(1)-(3), the plaintiff must prove: "(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." *Hunter Wise Commodities, LLC*, 749 F.3d at 981 (quoting *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002)) (emphasis added). In the context of a trial on the merits, failing to establish any one of these elements is dispositive. *See R.J. Fitzgerald & Co.*, 310 F.3d at 1328. Failing to prove one of the elements at this stage should result in the plaintiff's motion being denied.

The Eleventh Circuit has held that scienter can be established in enforcement actions: if Defendant intended to defraud, manipulate, or deceive, or if Defendant's

[9] Courts have found the injunctive relief provisions provided to the SEC and CFTC are similar, and cases from the SEC context are persuasive. *See Hunter Wise Commodities, LLC*, 2013 WL 718503, at *9.

> conduct represents an extreme departure from the standards of ordinary care...[or] when Defendant's conduct involves "highly unreasonable omissions or misrepresentations…that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it."

Id. at 1328.

Mr. Montie never intended to defraud, manipulate, or deceive OIG investors. Mr. Montie only made representations that he believed were true. Like other OIG victims, Mr. Montie relied on the back office portal, which only posted fabricated data reflecting a profit. Given the lengths that defendants DaCorta and Anile went to hiding the fraud, Mr. Montie's lack of authority and control at OIG, Mr. Montie's inability to access the actual trades and OIG bank accounts, and the inability to easily find defendant DaCorta's debarment from the NFA, it cannot be said that the fraud was so obvious that Mr. Montie must have been aware of it.

The plaintiff's reliance on a trial court case from more than a decade ago is misplaced. In *SEC v. Asset Recovery & Mgmt. Tr., S.A.*, No. 2:02-CV-1372, 2008 WL 4831738, at *5 (M.D. Ala. Nov. 3, 2008), the defendant "was a signatory on one of ARM's accounts at The Reserve Fund and made payments from that account for ARM's telephone and fax services." The defendant in that case also directed employees to open bank accounts in Costa Rica, and directed wires to be sent using investor funds. *See id*. Finally, the defendant in that case did not actually believe the investment was real. *See id*. at *8. Mr. Montie did not have access to any OIG accounts, never directed any accounts to be opened for OIG, and never accessed investor funds. Mr. Montie, like the other more than 700 fraud victims, believed the fraud defendants DaCorta and Anile sold.

The conclusory allegations in the complaint, FAC, and SRO motion fail to prove scienter in the face of the evidence Mr. Montie has provided this Court. Accordingly, the plaintiff cannot obtain a preliminary injunction.

2. Plaintiff Cannot Establish Potential Future Violations

To obtain a preliminary injunction, the plaintiff must also prove that Mr. Montie will likely violate the law in the future. *See S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005). "Binding precedent in this circuit suggests . . . that where the Commission seeks to enjoin future violations, it must also show a reasonable likelihood of future violations in addition to a prima facie case of illegality." *Hunter Wise Commodities, LLC*, 749 F.3d at 974 (citing *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) (opining that had the Commission sought an injunction of future violations, it might be necessary to show a likelihood of future violations)). To make that determination, courts look at "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *S.E.C. v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004) (citations omitted).

> Although the mere fact of a past violation does not ipso facto establish the SEC's right to injunctive relief, and thus is not alone tantamount to the "proper showing" of present or future violations, the Commission is entitled to prevail when the inferences flowing from the defendant's prior illegal conduct, viewed in light of present circumstances, betoken a "reasonable likelihood" of future transgressions....
>
> Relevant considerations in the "reasonable likelihood" analysis resolve into essentially three areas of inquiry: the nature of the past violation, the defendant's present attitude, and objective constraints on (or opportunities for)

> future violations.... Such factors include the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

CFTC v. Sterling Trading Grp., Inc., 605 F. Supp. 2d 1245, 1291 (S.D. Fla. 2009) (quoting *SEC v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir.1981); and *SEC v. The Globus Group, Inc.*, 117 F.Supp.2d 1345 (S.D. Fla. 2000)).

In this case, Mr. Montie did not undertake any egregious actions. Mr. Montie never violated securities or commodities laws before this matter, and there is no proof that he will do so in the future. Mr. Montie, as noted herein, did not act with any degree of scienter. Mr. Montie's current occupation is working for Ambit, a completely legal multi-level marketing energy company. Mr. Montie is also involved with a snake breeding business, cellular telephone app, and other business that do not engage in activity subject to being governed by securities or commodities laws. Simply put, the plaintiff cannot prove a reasonable likelihood that Mr. Montie will violate the law in the future and the preliminary injunction should be denied. *See CFTC v. Oystacher*, No. 15-CV-9196, 2016 WL 3693429, at *6 (N.D. Ill. July 12, 2016).

3. Plaintiff Cannot Establish Controlling Person Liability Against Mr. Montie

Along with the plaintiff's other theories, the plaintiff also cannot prove that Mr. Montie was a controlling person in OIG pursuant to 7 U.S.C. § 13c(b). To prevail using 13c(b), the plaintiff must show that Mr. Montie, as a controlling person, did not act in good faith or knowingly induced, directly or indirectly, the conduct which constitutes a violation of the Act. *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1568 (11th Cir. 1995). The controlling person

must have had actual or constructive knowledge of the core activities that make up the violation at issue and allowed them to continue. *See id*. Section 13c(b) imposes liability for those who can prevent illegal conduct, but fail to so.

While the FAC makes bald allegations that Mr. Montie was a vice president of OIG and executive director of sales, Mr. Montie denies that allegations, Further, those allegations are inconsistent with the plaintiff's filing at doc. 4-3 at 33, where Mr. Montie is not listed as a vice president nor an executive director of sales. However, assuming *arguendo*, the proof before this Court is unequivocal – Mr. Montie did not have actual or constructive knowledge that defendants DaCorta and Anile were perpetuating a fraud. Regardless of whatever titles fraud victims assumed Mr. Montie held, or defendants DaCorta and Anile heaped upon him, Mr. Montie did not have the ability to exercise any control over OIG. Mr. Montie did not know of the fraud and fail to stop it. Defendant DaCorta targeted Mr. Montie as a fraud victim, both for Mr. Montie's own money and for the business contacts Mr. Montie had developed for years in Ambit.

4. Preliminary Injunction Should Not Impose Future Financial Restrictions or Restrict Real Properties

Even if the Court finds that the plaintiff has met the standard for the preliminary injunction as to potential future law violations, the Court should limit its ruling to enjoining Mr. Montie from violating the law and not impose financial or restrictions on real properties.

A claim for equitable relief will only warrant imposition of a pre-judgment asset freeze when the freeze bears a sufficient nexus to both the merits of the action and the particular property sought. Preliminary injunctions "may not address matters 'lying wholly outside the issues in the suit.'" *CFTC v. Next Fin. Servs. Unlimited, Inc.*, No. 04-80562-CIV,

2005 WL 6292467, at *12 (S.D. Fla. June 7, 2005) (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945) (invalidating preliminary injunction preventing defendant from transferring assets out of the country as unrelated to claims of restraint of trade and monopolization)). In *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002), the Supreme Court found pre-judgment asset freezes must bear a nexus to particular property. Indeed, the plaintiff's FAC prays this Court make certain findings against Mr. Montie, prohibit Mr. Montie from having anything to do with commodities trading, disgorgement of all benefits received from the Oasis fraud, restitution to victims (a class of which Mr. Montie belongs), and pay civil monetary penalties.

The plaintiff cannot show a nexus from defendant DaCorta and defendant Anile's fraud to several things subject to the SRO, specifically:

a. Mr. Montie's income from business that bears no nexus to any funds derived from Oasis.

b. Mr. Montie's income from Ambit.

c. Mr. Montie's income from a reptile breeding business, where reptiles are currently growing.

d. Mr. Montie's income from a cellular telephone application.

e. Mr. Montie's income from renting his home to vacationers on a popular online marketplace.

Compounding Mr. Montie's losses as an Oasis victim, the receiver has seized money Mr. Montie was in the process of paying to government agencies to satisfy his quarterly tax assessments. Mr. Montie cannot even pay living expenses due to the asset freeze. In addition, the receiver is preventing Mr. Montie from receiving income from Ambit even though that income bears no nexus to the investments made by victims in Oasis.

5. Plaintiff's Failure to Disclose Unfavorable Evidence Militates Against a Preliminary Injunction

The very nature of seeking an extraordinary injunctive relief *ex parte* means the party subject to that relief is deprived of the ability to defendant himself or herself before the relief is entered. Federal and state law imposes a heightened duty of candor upon the plaintiff when it sought the extraordinary injunctive relief, requiring it to advise the Court of all material facts, regardless of whether the facts supported or are adverse to the plaintiff's theory of the case. *See* Fla. Bar R. 4-3.3(c) ("In an *ex parte* proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."); *Green Dev. Corp. S.A. De C.V. v. Zamora*, 2016 WL 2745844 *4 (S.D. Fla. 2016) ("The duty of candor is particularly heightened where, as here, *ex parte* proceedings are launched without the opposing party's knowledge or participation"). It is without question that this is much more important when the moving party is an agency of the United States. *See United States v. Toader*, 582 F. Supp. 2d 987, 991 (N.D. Ill. 2008) ("when the government seeks relief on an *ex parte* basis…it assumes an enhanced duty of candor and care, due to the absence of an opportunity for adversarial challenge.").

Contrary to the plaintiff's motion, the plaintiff's investigation and the evidence contemporaneously filed with this memorandum demonstrate that Mr. Montie did not commit a "'willful and blatant' fraud." The plaintiff only believes Mr. Montie "may," or may not, have joined defendants DaCorta and Anile in their scheme to defraud. The plaintiff cannot prove that Mr. Montie misrepresented or failed to disclose certain material information, because Mr. Montie believed what he said to investors was true. Mr. Montie,

like all of the victims, had no idea defendants DaCorta and Anile were perpetuating a fraud. Further, the plaintiff cannot prove that Mr. Montie acted with scienter as required in *R.J. Fitzgerald & Co.*, 310 F.3d at 1328.

Without proof that the plaintiff could prevail, the Court is left to dissolve or modify the receivership as it relates to Mr. Montie. This Court has continuing jurisdiction to modify the SRO. *See Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974) ("A district court has continuing jurisdiction over a preliminary injunction [and in] the exercise of the jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason"); *Polaris Pool Sys., Inc. v. Great Am. Waterfall Co.*, 2006 WL 289118 at *4 (M.D. Fla. 2006). Modification is proper "when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original from inequitable." *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993). "While changes in fact or law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted t accomplishing its purposes." *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969). Without advising the Court about the lack of evidence against Mr. Montie, the plaintiff obtained the SRO against Mr. Montie is, at best, in error.

E. CONCLUSION

Wherefore, Mr. Montie request this Court to:

1. Deny the plaintiff's motion for a preliminary injunction; and
2. Dissolve the receivership as it applies to Mr. Montie, or in the alternative
3. Modify the receivership to remove Mr. Montie's income from his businesses unrelated to the Ponzi scheme, and his real properties.

Respectfully submitted on June 24, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all parties of record who are equipped to receive service of documents via the CM/ECF system.

I hereby further certify that on June 24, 2019, I provided service of the foregoing via electronic mail to:

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I hereby certify that on June 24, 2019, I provided service of the foregoing via U.S. mail to the following unrepresented party:

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s/ Vincent A. Citro
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