UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80612-CIV-MARRA/SELTZER

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL LAUER,
LANCER MANAGEMENT GROUP, LLC, and
LANCER MANAGEMENT GROUP II, LLC,

Defendants,

and

LANCER OFFSHORE, INC.,
LANCER PARTNERS, LP,
OMNIFUND, LTD.,
LSPV, INC., and
LSPV, LLC,

Relief Defendants.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S LIMITED JOINDER TO RECEIVER'S (I) MOTION TO COMPEL MICHAEL LAUER, HEIDI CARENS AND JUDITH BRISMAN TO TURN OVER PAST DISTRIBUTIONS FROM MILLENNIUM 3 OPPORTUNITY FUND LLC; AND (II) MOTION TO DIRECT MILLENNIUM TO DISTRIBUTE TO RECEIVER ALL FUTURE DISTRIBUTIONS DUE LAUER

I. Introduction

Plaintiff Securities and Exchange Commission files its Limited Joinder to Receiver's (I) Motion to Compel Michael Lauer, Heidi Carens and Judith Brisman to Turn Over Past Distributions from Millennium 3 Opportunity Fund LLC ("Millennium"); and (II) Motion to Direct Millennium to Distribute to Receiver All Future Distributions Due Lauer ("Motion to Compel").[1] [DE 1265]. On March 9, 2006, Lauer filed his Response in Opposition

[1] The SEC's Joinder is limited to Part II of the Receiver's requested relief, which has not been ruled upon by the Court. Although, the SEC respectfully disagrees with the Court's prior order regarding Millennium, it is not requesting that the Court reconsider it, but would support a request by the Receiver to do so (for the reasons stated herein).

("Opposition") to the Receiver's Motion to Compel. [DE 1290]. Lauer's Opposition is largely based upon his erroneous assertion that the Court's Asset Freeze Order does not encompass assets he acquires after the Court imposed a blanket freeze on all of Lauer's assets. Contrary to Lauer's claim, the Court's Asset Freeze Order is not restricted to just assets Lauer owned at the time the Court imposed the asset freeze.

Moreover, Lauer's argument that the proposed distribution from Millennium **accrued after** the Court imposed the Asset Freeze is a red herring. Lauer's beneficial interest in the distributions from Millennium **accrued before** the Court imposed the asset freeze. The source of Millennium's distribution is **not from an accrual** of dividends, but from the proceeds of asset sales (Lauer's beneficial interest in the assets Millennium sold was frozen at the time the Court entered the asset freeze). The proposed distribution is, therefore, subject to the Court's Asset Freeze Order, which restrained Lauer from receiving the proceeds of asset sales, so the Court should require Millennium to distribute to the Receiver for safekeeping all future distributions due Lauer.

II. Background of Asset Freeze Order and Millennium Distributions

A. The Court Expressly Restrained Lauer from Receiving Any Interest in Any Asset, Such As His Interest in Millennium

On July 10, 2003, after finding that the SEC had made a *prima facie* case, the Court entered an ex parte temporary restraining order against Lauer and granted other ancillary relief, including a freeze of all of Lauer's assets. [DE 19]. Lauer, who was represented by counsel, had the opportunity to contest the SEC's allegations and dispute this Court's findings; instead, he consented to the Asset Freeze Order that froze his assets and prevented him from withdrawing or transferring any of his assets. [DE 22]. The Asset Freeze Order states, in pertinent part, as follows:

ASSET FREEZE

> **IT IS HEREBY FURTHER ORDERED** that, pending resolution of the above-styled cause on the merits or further Order of the Court, **Defendants** and Relief Defendants (not including Partners), their directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, who receive notice of this order by personal service, mail, facsimile transmission or otherwise, except any Receiver that may be appointed by this Court, **be and hereby are, restrained from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property owned by, controlled by, or in the possession of any Defendant** or Relief Defendant including, but not limited to, cash, free credit balances, fully paid for securities, and/or property pledged or hypothecated as collateral for loans.
>
> **This asset freeze shall apply to any accounts, banking, brokerage or otherwise in the names of third parties on which Lauer is a signatory**.

[Emphasis added, DE 22, at 5-6].

Lauer acquired a beneficial interest in Millennium before the Court imposed the asset freeze against him in July 2003. Lauer received his membership interest in Millennium through a $1.25 million Capital Contribution that he made during 2000. [See Subscription Agreement, DE 1304, Exhibit A]. In 2001, the Millennium Fund required Lauer to make a second $1.25 million Capital Contribution; however, he failed to make his second required contribution, so his capital account was reduced by 75% to $312,500. [See Notice of Default, Nov. 28, 2001, Id., Exhibit B]. On July 24, 2003, Lauer submitted a sworn affidavit to the SEC that purported to be a Statement of Lauer's Financial Condition as of July 14, 2003. One of the assets listed by Lauer was an interest in Millennium. [See Statement of Assets and Liabilities of Michael Lauer as of July 14, 2003, DE 567, Exhibit A, at p. 12]. Accordingly, there is no genuine dispute that Lauer's interest in Millennium is frozen, because he owned at the time the Court entered the Asset Freeze Order.

B. Lauer's Beneficial Interest in the Distributions from Millennium Accrued Before the Court Imposed the Asset Freeze on Lauer

The source of the Millennium distributions is from the sale of a portion of Millennium's assets. Millennium's distributions were not generated from accruals after the Court implemented the Asset Freeze Order, but from asset sales. Millennium is a fund that makes illiquid investments in companies. As investments mature, Millennium sells its interest in a company and distributes the sale proceeds to its investors and by doing so the value of the fund declines. In reality, Millennium is monetizing its investments by changing an asset (an investment in a company) into money.[2]

The reason why Lauer is receiving distributions from Millennium is due to his investment in Millennium that he made before the Court imposed the asset freeze. Through these distributions, Lauer is obtaining a return of the capital he contributed to Millennium. Per Millennium's Private Placement Memorandum, the first distributions members, such as Lauer, receive is a return of the amount they contributed:

> **Distributions** . . . will be made to the Members . . . in accordance with the following priorities: **(i) First, Distributions will be made 100% to all Members pro rate in accordance with the amounts of their respective Capital Contributions until the Members have received a cumulative amount equal to their aggregate Capital Contributions**. . .

[DE 727, Exhibit Q at p. 12, emphasis added]. Thus, until Lauer receives at least $312,500 worth of distributions (to date, less than $100,000 has been distributed to Lauer), he is receiving a return of his capital contribution that he invested in Millennium before the Court imposed the asset freeze.

[2] Undersigned counsel's understanding is that in the Receiver's Reply he will submit evidentiary support for these statements through an affidavit by Udi Toledano, the Member Manager of Millennium.

III. The Proposed Distribution is Derived From the Proceeds of the Sale or Liquidation of a Frozen Asset – Lauer's Interest in Millennium

Lauer's argument that the proposed distribution, worth more than $60,000, from Millennium accrued after the Court imposed the asset freeze is a red herring. The only thing that accrued after the Court imposed the asset freeze was that a portion of Lauer's interest in Millennium was monetized. As demonstrated above, there is no genuine dispute that Lauer's interest in Millennium existed at the time the Court imposed the asset freeze; hence, **Lauer "accrued" his beneficial interest before the Court imposed the asset freeze, not after** like Lauer speciously claims. The express terms of the Court's Asset Freeze Order restrains Lauer from "receiving" or "liquidating" any frozen asset (such as his interest in Millennium). The proposed distribution is, therefore, clearly subject to the Court's Asset Freeze Order.[3]

Millennium's distributions were generated from sales of Millennium assets. After members of Millennium, like Lauer, invest in the fund, it made investments in illiquid companies. After Millennium's investments mature, the fund sells its interest in these companies and distributes the sale proceeds to its investors (like Lauer). After Millennium distributes the sale proceeds the value of the fund declines; hence, the value of Lauer's frozen assets also declines, because every dollar distributed to Lauer from Millennium represents one less dollar that is realizable from this asset.

Moreover, in reality, Millennium is monetizing its investments by changing an illiquid asset (an investment in a company) into cash. This is no different than selling a portion of any

[3] Lauer has a demonstrated history of violating this Order. On January 24, 2006, the Court entered an Order finding Lauer in contempt for violating the Court's Asset Freeze Order and held that "Lauer has acted in bad faith throughout the discovery process . . . failed to fulfill his obligations in the discovery process, and repeatedly and blatantly ignored this Court's specific orders." [DE 1218 at pp. 14-15].

asset that Lauer owned at the time the Court entered its Asset Freeze Order.[4] If Lauer were to receive the proposed distribution that is derived from the sale of Millennium's assets it would violate the plain meaning of the Court's Asset Freeze Order, which restrains him from "**receiving, changing**, selling, pledging, **assigning, liquidating or otherwise disposing of, or withdrawing any assets or property owned by**, controlled by, or in the possession of **any Defendant**." The Court has restrained Lauer from doing exactly what he proposes to do (receive a frozen asset). The Court should, therefore, not allow Lauer to receive anymore distributions from Millennium to ensure that Lauer does not dissipate these funds before final resolution of this matter.[5]

IV. The Asset Freeze Applies to All of Lauer's Assets Since it is Irrelevant If He Acquired Them Before or After the Court Imposed the Asset Freeze

The Court's Asset Freeze Order applies to all assets Lauer currently owns no matter when he acquired them. Contrary to Lauer's claim, the Court did not limit the Asset Freeze Order solely to assets Lauer owned at the time the Court implemented the freeze. If the Court intended to do so, it would have used restrictive language, such as assets Lauer "presently" owns. See SEC v. Vaskevitch, 657 F.Supp. 312, 316 (S.D.N.Y. 1997) (where the court restricted its asset freeze order to only encompass assets "presently" owned or controlled by Defendants).[6] In the

[4] Using Lauer's "logic", he could sell a frozen asset (like a single stock in a brokerage account) and divert the proceeds away from the Court's Asset Freeze, because the proceeds of the stock sale allegedly **accrued** after the Court implemented the asset freeze. Lauer's "logic" would make a mockery of the Court's Asset Freeze Order, since he could strip out nearly all of the frozen assets before final judgment is entered.

[5] Given Lauer's contemptuous bad faith conduct that has permeated this conduct during this entire matter, specifically in regard to the Court's Asset Freeze Order, to have the Receiver hold any future distributions for safekeeping is a modest and reasonable step that furthers the Court's interest in preserving funds, so Lauer can satisfy at least a portion of his equitable liabilities in this matter.

[6] The asset freeze order in Vaskevitch reads, in pertinent part, that: IT IS FURTHER ORDERED that . . . the Defendants . . . shall hold and retain . . . any assets, funds or other property **presently held** by them or under their control; and each of the financial and brokerage institutions and all other persons or entities **presently** holding such assets . . . or other property **presently held** by or under its control on behalf of each defendant." [Emphasis added].

case at bar, the Court did not restrict its Asset Freeze Order to assets Lauer "presently held" when the Court imposed the asset freeze. Accordingly, the Court's Asset Freeze Order applies to all of Lauer's assets no matter when he acquired them.

Furthermore, Lauer's argument that the Court should construe its Asset Freeze Order so that it does not apply to after acquired assets, would contravene the underlying purpose of the asset freeze. The underlying purpose being served by the Court freezing Lauer's assets is to "preserve sufficient funds" so Lauer can pay all of his equitable liabilities arising from this matter. See SEC v. ETS Payphones, 408 F.3d 727, 734 (11th Cir. 2005) (where the Eleventh Circuit held that the purpose of the asset freeze is "to preserve sufficient funds" for the payment of a disgorgement award). The Eleventh Circuit also held that in determining if a blanket freeze is appropriate the court should look at the potential equitable liability of the Defendant as compared to the value of the Defendant's assets. [Id., at 735-36].[7]

Based upon the Eleventh Circuit's holding, the underlying purpose of the Court's Asset Freeze Order is not served if the Court allows Lauer to dissipate assets he acquires after the Court imposed the asset freeze, since he lacks sufficient assets to satisfy his equitable liabilities. Lauer's equitable liabilities arising from this matter are much greater than the value of all of his assets, including any assets allegedly acquired after the Court imposed the asset freeze. On October 28, 2003, Chief Judge Zloch held a multi-hour evidentiary hearing on this very issue, since Lauer was attempting to modify the asset freeze. [DE 85-86].[8] Afterwards, the SEC submitted its Closing Argument brief where the SEC estimated that Lauer's net worth at the time

[7] The burden on the SEC for "showing the amount of assets subject to disgorgement (and, therefore available for freeze) is light." Id., at 735. All that is required is "a reasonable approximation of a defendant's ill-gotten gains . . . Exactitude is not a requirement." Id.

[8] At this evidentiary hearing, Lauer testified, the SEC presented expert testimony, testimony from the Receiver, and numerous exhibits relating to the amount of Lauer's ill-gotten gains and the amount of his assets and liabilities.

of the freeze was less than $5 million. The SEC also submitted that a reasonable approximation of his expected equitable liabilities, **depends on whether the Court holds him jointly and severally liable** with the amounts received during the fraudulent time period by the Relief Defendants (over $600 million) or the Corporate Defendants (over $70 million), **or just personally liable** (over $35 million). [DE 93, at pp. 5-7 and Exhibit 12 and DE 1326 (SEC's Notice of Newly Issued Case Law – SEC v. JT Wallenbrock & Associates, et al., 2006 WL 572016 (9th Cir. 2006))].[9]

No matter which legal theory the Court holds Lauer liable under (joint and several or just personal), Lauer's potential equitable liability dwarfs the value of his frozen assets.[10] Accordingly, in order to effectuate the underlying purpose of the asset freeze (to "preserve sufficient funds" so Lauer can pay **all** of his equitable liabilities) the Court's Asset Freeze Order should encompass all of Lauer's assets no matter when he acquired them.

V. Conclusion

Based on the foregoing and the Receiver's Motion, the Court should require Millennium to distribute to the Receiver for safekeeping all future distributions due Lauer.

Respectfully submitted,

Dated: April 4, 2006

By: s/ Christopher E. Martin
Christopher E. Martin
Senior Trial Counsel

[9] In Lauer's Response to the JT Wallenbrock decision (DE 1331) he fails to give any reason why the Court should not impose joint and several liability on Lauer, and brazenly and falsely declares that the SEC's claim that Lauer's potential equitable liability is more than $600 million is a "*post hoc* rationale." Over twelve hundred docket entries ago, the SEC first proposed this rational to the Court. [DE 93, filed November 7, 2003]. Hence, there is nothing "*post hoc*" about it.

[10] Lauer even admits that should the SEC win this case that all of his assets will be wiped out. In a related matter, Lauer plainly states to this very Court that if "**the SEC succeeds** in obtaining the relief [it seeks in the case at bar], **there will be no assets remaining** for the Receiver **to recover from Lauer**." [Lauer's Reply Memorandum in Support of Omnibus Motion to Stay the Receiver's Four Ancillary Actions Against Him Pending Resolution of the Main SEC Action, at p. 3, emphasis added, 04-60899-CIV-MARRA].

SD Fla. Bar. No. A5500747
Direct Dial No.: (305) 982-6386

Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by FedEx this 4th day of April 2006, on the following:

Magistrate Judge Barry Seltzer
United States District Court
299 E. Broward Blvd., Room 109
Fort Lauderdale, FL 33301

Marty Steinberg, Receiver
Craig V. Rasile, Esq.
Hunton & Williams LLP
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131-1802

Carl Schoeppl, Esq.
Schoeppl & Burke, P.A.
4651 North Federal Highway
Boca Raton, FL 33431

s/ Christopher E. Martin
Christopher E. Martin