IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ART INTELLECT, INC., a Utah corporation d/b/a MASON HILL and VIRTUALMG, PATRICK MERRILL BRODY, and LAURA A. ROSER,[1] Defendants.	**PRELIMINARY INJUNCTION ORDER** Case No. 2:11-CV-357-TC

INTRODUCTION

This matter comes before the court on a Motion for Preliminary Injunction[2] filed by Plaintiff Securities and Exchange Commission (SEC) against Defendants Art Intellect (d/b/a Mason Hill and VirtualMG), Patrick Brody, and Laura Roser. Based on applicable law and evidence in the record (including testimony presented at the hearings on the Motion[3]), the SEC's Motion for Preliminary Injunction is GRANTED for the reasons set forth below.

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[1]In April 2011, Defendant Gregory Wood consented to entry of judgment and a permanent injunction against him. (See Docket Nos. 7-8.) Accordingly, this Preliminary Injunction Order does not apply to him.

[2]Docket No. 2.

[3]The hearings, held June 29, 2011, and July 12, 2011, also dealt with the SEC's motion for a finding of contempt against Defendants Patrick Brody and Laura Roser. The court's ruling on the contempt matter will be announced in the near future.

FINDINGS OF FACT[4]

Plaintiff SEC contends that Defendants Art Intellect (d/b/a Mason Hill and VirtualMG) ("Mason Hill"), Patrick Brody, and Laura Roser (collectively "Defendants") have violated the federal securities laws by acting as unregistered brokers or dealers while fraudulently selling unregistered "investment contract" securities beginning as early as April 2009.

The "Hassle Free" Turnkey "Mason Hill Real Estate Investment Model"

Patrick Brody and his wife Laura Roser created Mason Hill, a company that solicited investments in real estate. Ms. Roser was the founder and president of Art Intellect, the CEO of Mason Hill, and the founder of VirtualMG. Ms. Roser wrote and managed all of the marketing material of Mason Hill, including the website, brochures, webinars, and press releases.[5] Mr. Brody controlled the operations of Mason Hill (for example, he solicited investors, recruited employees, made hiring decisions, was involved in the day-to-day operations of Mason Hill, called himself a financial director for the company, directed how funds of the company would be spent, and was referred to as the "de-facto CEO").[6] Representatives and employees of Mason

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[4]The facts are taken from the evidence submitted by parties in declarations (see Appendix to Docket No. 3, and Docket Nos. 24, 64, 70), and during the June 29, 2011, and July 12, 2011, evidentiary hearings (see Hr'g Transcripts (Docket Nos. 75, 88)).

[5]See Deposition of Gregory Wood (Ex. B to Mem. Supp. Mot. Prelim. Inj. (Docket No. 64) [hereinafter "Mem. Supp."] at 19-20, 48, 60, 68, 72-73, 103.

[6]See, e.g., Wood Dep. at 9-10, 38, 55, 106; Testimony of Gregory Wood as recorded in July 12, 2011 Tr. of Evid. Hr'g [hereinafter "July Tr."] (Docket No. 88) at 156-57; Decl. of Thomas Love (Ex. D to Mem. Supp.) ¶¶ 4, 12; Testimony of Thomas Love as recorded in June 29, 2011 Tr. of Evid. Hr'g [hereinafter "June Tr."] (Docket No. 75) at 14, 24-25; Decl. of Dave Young (Ex. A to Mem. Supp.) ¶¶ 2, 5; Testimony of Dave Young in June Tr. at 44, 53, 66-67; Decl. of Thomas E. Larkin (Ex. B to Mem. Supp.) ¶¶ 5, 8, 24; Testimony of Thomas Larkin in June Tr. at 92, 105; Decl. of Michael Keith (Ex. E to Mem. Supp.) ¶¶ 2-4, 6; Decl. of Ryan Reilly (Ex. 3 to Mem. Supp. Mot. re: Civil Contempt (Docket No. 24) [hereinafter "Civil

Hill solicited investors and acted on behalf of Mason Hill at the direction of Laura Roser and Patrick Brody.[7] In this Order, when the court refers to "Mason Hill," the term includes Ms. Roser and Mr. Brody, whose representatives made the sales pitch at their direction.

Neither Mr. Brody nor Ms. Roser has ever been registered in any capacity with the SEC or any other securities regulatory agency.

Mason Hill offered "The Mason Hill Real Estate Investment Model" to prospective investors, who entered into a "Reservation Agreement" and "Real Estate Purchase Agreement" with Mason Hill. Mason Hill attracted approximately 75 investors and raised at least $2.5 million. Mason Hill solicited investors through its website, through "webinar" presentations, and through other communications with investors. Mason Hill also engaged a network of "strategic partners" to solicit investors nationwide in exchange for a "referral fee."[8]

The Mason Hill model offered a "turnkey" approach to real estate investing. Specifically, Mason Hill claimed that it purchased distressed real estate at a low price for investors, rehabilitated the properties and secured tenants. In addition, Mason Hill said it would collect the

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Contempt Mem."]) ¶¶ 2-3; Decl. of Stacie Parker (Ex. 1 to Civil Contempt Mem.) ¶ 2, 5.

[7]See, e.g., Wood Dep. at 20, 38 ("according to Mason Hill, meaning Pat Brody and Laura [Roser]"), 55; Love Decl. ¶ 12; Love Testimony in June Tr. at 14 ("I was told by various employees that Mr. Brody was in control of everything, that they would not act without his permission. That whenever they promised me that they would do certain things and he countermanded it, that they could no longer do it[.]"); Young Decl. ¶ 2 ("[Patrick Brody] spoke of Mason Hill as his company and gave me the impression that he owned Mason Hill."); Larkin Testimony in June Tr. at 92, 104-06; Keith Decl. ¶ 3 (he was managing based on instructions from Brody); Frost Decl. ¶14; see also supra nn.5-6.

[8]Appendix to Mot. TRO (Docket No. 3) [hereinafter "App."] Ex. 1 at 87.

rents and maintain the properties, and it promised investors a "hassle free"[9] option for real-estate investing.

Mason Hill told investors that it maintained an inventory of properties in well-desired areas in Florida, Ohio, and Kansas, with increasing property values that it would sell to investors at a substantial discount. Mason Hill represented that it acquired properties in bulk from banks, allowing it to obtain them at lower prices than could an individual investor. Mason Hill further represented that the properties were "newer" (built in 2004 to 2007 or later) and that Mason Hill refurbished all properties to "near-new" condition, with new paint, remodeled kitchens, new appliances, and all repairs so that the properties would be attractive to tenants.

Mason Hill claimed that it had an on-site, in-house property management team that screened and placed tenants so that the properties would already be rented and the investor could immediately obtain an income stream from a purchased property.[10] Mason Hill explained that it would also manage the property after purchase, handle all maintenance, services, and rent

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[9]On its website, Mason Hill published a brochure entitled "What Everyone Should Know About the Mason Hill Real Estate Investment Model." (App. Ex. 1 at 74.) It started out with the following: "How a new kind of real estate investment can produce a 14% to 26% cash-on-cash return, year after year . . . even if you never lift a finger to manage the properties, fix the properties or find a tenant. . . ." (Id. (emphasis added).) On the same website, under the heading "Turnkey *Cash Flow*," Mason Hill advertised a "LIVE webinar" called "The Hassle Free Investment: Generate Passive Income Through Real Estate." (Id. at 83; see also id. at 101 ("We do it all for you.").)

[10]According to Mason Hill: "Reliable renters want to live in these properties – tenants with a better track record of on-time payments, good employment history, and a clean background. We have an on-site property management team with a waiting list of these tenants – delivering an average occupancy rate of 93% for all of our properties." (Turnkey Cash Flow brochure at 117 (emphasis added).)

collection, and that it would provide clients with a monthly payment and cash flow report.[11] Mason Hill promised investors returns that ranged from 10% to 30%, with monthly net rental profits of $650 to $1000 or more. This was touted as a passive investment, and that is what attracted and motivated investors. Given the nature of the investment, the incentives, and the promised returns, any appreciation in value was of secondary importance.[12]

Mason Hill told investors that they could reserve a Mason Hill property with a "reservation deposit" of $20,000. Investors were given information sheets and photographs of specific properties that Mason Hill purportedly owned and had available. Mason Hill created a sense of urgency to push investors to make reservation deposits by claiming prices would be going up soon or that there was a waiting list and the property would only be available for a short time before someone else reserved it. Once investors decided to invest, they executed Reservation Agreements and sent Mason Hill $20,000 per property. Mason Hill claimed that these payments would be placed in an escrow account and applied as down payments toward the purchase of individual properties. Mason Hill stated that transactions could be completed within 30-60 days and that investors would begin receiving monthly rental payments almost immediately thereafter. Mason Hill also represented to investors that if they needed a mortgage for part of the purchase price, Mason Hill offered in-house seller financing or it would arrange

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[11] Although the property management services was not a requirement after the property was purchased through Mason Hill, it was offered as an incentive to prospective investors, and it was one of the features that attracted investors. See, e.g., Testimony of Gregory Wood in July Tr. at 152; Love Testimony in June Tr. at 29, 33; Young Testimony in June Tr. at 47; Larkin Testimony in June Tr. at 94, 102-03.

[12] See, e.g., Love Testimony in June Tr. at 30; Young Decl. ¶ 10; Young Testimony in June Tr. at 47, 51, 66-67.

financing of non-recourse loans from other lenders. Mason Hill told investors that they could use IRA or 401(k) funds to purchase the properties and that it would assist with these transactions.

Misrepresentations

Mason Hill, in fact, did not maintain an inventory of properties that could be sold to investors. Indeed, many investors were told that Mason Hill had purchased a specific property, only to discover later that Mason Hill had either (a) not purchased the real estate at all or (b) had purchased a different property with their funds. Many of the properties Mason Hill purchased were not rehabilitated. Instead, many properties were in a state of disrepair and were not in rentable condition. Properties were sold to investors without tenants despite Mason Hill's guarantee that the properties would be rented with reliable tenants and long-term leases at the time of closing.

For example, Tom Love, an investor with Mason Hill, signed four reservation agreements for four properties offered by Mason Hill.[13] Mr. Love gave Mason Hill a total of $80,000 in "reservation deposits."[14] After receiving Mr. Love's deposit money, Mason Hill suggested that Mr. Love buy four properties in Florida.[15] Mr. Love, after reviewing the properties, decided to accept two of the properties and rejected two others. The two properties accepted by Mr. Love, to his surprise, were withdrawn without explanation.[16]

After Mason Hill withdrew the properties and failed to present other properties, Mr. Love

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[13]Love Testimony in June Tr. at 8.

[14]Id.

[15]Id. at 9.

[16]Id.

reluctantly became a private lender in the amount of the reservation deposits he had already given to Mason Hill.[17] Mr. Love accepted the private lender agreement for the $80,000 with the expectation that the amount would be repaid with interest.[18] Mr. Love received six months of payments, totaling approximately $6,800. The payments suddenly stopped. When Mr. Love contacted Mason Hill regarding its failure to make payments to him, various Mason Hill employees told him that Mr. Brody was in control of everything.[19] In fact, Mr. Brody made the decision to withdraw the properties originally offered to Mr. Love.[20] Subsequently, Mr. Love discovered that many of the properties previously offered to him were either given to other Mason Hill investors or were not owned by Mason Hill.[21]

During a visit to Florida, Mr. Love discovered that the properties were built decades earlier.[22] In fact, Mr. Love discovered that none of the properties offered to him was "like new," as Mason Hill represented.[23] For example, one of the properties was in a state of disrepair – "like a war zone [] with all the trash and junk all around."[24] Other properties offered did not have

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[17]Id. at 10.

[18]Id. at 11.

[19]Id. at 14.

[20]Id. at 14, 24-25.

[21]Id. at 26.

[22]Id. at 16.

[23]Id. at 21.

[24]Id.

the sewer connected, required air conditioning units and significant landscaping.[25] Most importantly, the properties were not suitable for occupancy by tenants.[26]

Mr. Love had expected to profit from his initial investment of $80,000 with Mason Hill.[27] His expectations were a direct result of Mason Hill's and its employees' representations to him through various webinars, the national sales manager, Bruce Bowen, the strategic partner director, Steve Saunders, and Michael Keith.[28] Investors like Love, in turn, expected a passive investment.[29] Mason Hill promised to find renters and have properties occupied before the property was turned over to the investor. Investors expected to incur no effort in maintaining the property.[30]

David Young, another investor with Mason Hill, met Mr. Brody in 2009.[31] Initially, Mr. Brody provided flyers to Mr. Young and actively promoted Mason Hill. Mr. Brody represented that the real estate owned by Mason Hill was "phenomenally cheap," in good condition, and easy to rent.[32] Mr. Brody described Mason Hill as a turnkey operation, involving new or like-new

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[25] Id. at 23.

[26] Id. at 21.

[27] Id. at 19.

[28] Id. at 20.

[29] Id. at 30.

[30] Id. at 29.

[31] Young Testimony in June Tr. at 48.

[32] Id. at 49.

properties that could rent for between $625 and $650 a month per unit.[33] Mr. Brody presented Mason Hill as a "passive investment" in which (1) the investor gives money; (2) Mason Hill manages everything; and, (3) the investor, in turn, generates a return on the investment.[34] The return was to come from the rents on the properties; any appreciation in the value of the properties was considered merely fortuitous.[35]

Mr. Young purchased thirteen duplex properties.[36] Mason Hill did not originally own, as represented, many of the thirteen properties later purchased by Young. Rather, Mason Hill would purchase the property shortly after entering into an agreement with the investor.[37] Some of the properties were switched. Mason Hill would promise certain properties, sign agreements, but purchase different properties.[38]

The rental income, as Mr. Young subsequently learned, was overstated. Young periodically received a monthly rent roll indicating rented properties and the income generated from those properties.[39] Young relied on the accuracy of the rent rolls. In reality, little was going as planned. In particular, one property was left completely unfinished, requiring nearly $75,000

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[33]Id. at 50.

[34]Id. at 51.

[35]Id. at 52.

[36]Id. at 39.

[37]Id. at 41.

[38]Id. at 42.

[39]Id. at 43.

in work.[40] Yet Mason Hill represented to Young, through the rent rolls, that the unfinished property was generating rent.[41] Indeed, there were no tenants, and the putative rent payments were falsified by Mason Hill to mislead Mr. Young and other investors.

Thomas Larkin is the former CEO of Mason Hill. During his tenure at Mason Hill, Mr. Larkin became aware of a number of misrepresentations that Mason Hill, through its employees and marketing materials, was making to investors, including (1) the promise of a 12 to 14 percent return; (2) that Mason Hill owned the properties offered; and, (3) that Mason Hill had credit lines with lenders.[42]

Mr. Larkin personally conducted an audit of all Mason Hill properties. As a result of the audit, he discovered that 30% of properties were unoccupied and another 20% were tenanted but with tenants not paying rent.[43] Five to eight properties were in serious disrepair. Several properties listed on internal Mason Hill documents as belonging to a specific investor, in reality, did not.[44] Properties purchased by Mason Hill were often obtained by simultaneous closings in which Mason Hill purchased the property on the same day that it sold the property to an investor.[45]

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[40] Id. at 46.

[41] Id.

[42] Larkin Testimony in June Tr. at 74; Larkin Decl. ¶ 22.

[43] June Tr. at 93.

[44] Id. at 97.

[45] Id. at 98.

Initially, Mr. Larkin had a difficult time obtaining Mason Hill's records.[46] After pressuring Mr. Brody and Ms. Roser for information and documentation, Mr. Larkin formed a better understanding of the extent of the fraud.[47] Mr. Larkin's scrutiny of Mason Hill's records revealed that Mr. Brody and Ms. Roser's expenses were lumped under a marketing payment to a related company, VirtualMG.[48] Mr. Larkin approached Ms. Roser to discuss the fraudulent operation of Mason Hill. Following the conversation, in which Ms. Roser, indifferent, directed Mr. Larkin's concerns to Mr. Brody, Mr. Brody admonished Mr. Larkin for bringing the issues up with Ms. Roser.[49] Mr. Brody claimed to be the "de facto C.E.O. . . . in charge of Mason Hill for 22 months" and that all conversations concerning Mason Hill's financial situation were to be had with him.[50] During their conversation, Mr. Larkin spoke with Mr. Brody about the the fraudulent nature of Mason Hill's operation, exorbitant personal expenses of Mr. Brody and Ms. Roser, and cited several misuses of escrowed investor funds by Mr. Brody and Ms. Roser, including a hot tub, personal assistants' salaries, an extravagant trip to New York and restoring cars.[51]

Gregory Wood, a former president of Mason Hill, testified that many of the representations made in Mason Hill's website and elsewhere were false or misleading. Mason

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[46]Id. at 75.

[47]Id.

[48]Id.

[49]Id. at 105.

[50]Id.

[51]Id. at 107.

Hill never purchased properties in bulk at discounts. In fact, Mason Hill purchased properties individually at the same price at which an individual investor could obtain the properties. Consequently, investors did not receive steep discounts on the properties as Mason Hill and its employees and/or agents represented. Mr. Wood admitted that Mason Hill often did not own properties advertised on its website as available.

Mr. Wood testified that not all properties were "turnkey" ready, because the properties were not refurbished to "near-new" condition, as represented. He also testified that Mason Hill had outsourced property management to other companies, even though the website stated it had in-house, on-site property management. Mr. Wood admitted that Mason Hill was not able to "line up" financing or provide seller financing, as was represented on the website and elsewhere. Mr. Wood further stated he had previously discussed the website and the misleading statements with Ms. Roser. Ms. Roser wrote and was responsible for all the marketing materials and programs for Mason Hill, including the website, brochures, and webinars. In spite of this, Ms. Roser refused or failed to make changes to the website and other marketing materials so that the representations were not misleading.

Commingling and Improper Use of Investor Funds

Investor funds were commingled and later used for the personal expenses of Mr. Brody and Ms. Roser. Mason Hill told investors that once they reserved a property and paid a reservation deposit, the funds would be placed in escrow and applied to the purchase price of the property at closing. Rather than placing funds in escrow, Mason Hill commingled reservation deposits with Mason Hill's operating accounts. Investor funds were used to pay Mason Hill's operating expenses, sales commissions, and the lavish personal expenses of Mr. Brody and Ms.

Roser. These personal expenses included trips to New York, Florida, Las Vegas and San Diego, cruises, rare book purchases, Mr. Brody's and Ms. Roser's house and car payments, a hot tub, and the payments on a Cadillac CTS used exclusively by Mr. Brody's criminal defense lawyer.

Ponzi Scheme

Mason Hill operated as a Ponzi scheme.[52] Returns to investors were funded from the principal sums of newly-attracted investors. Later investor funds were used to purchase properties for earlier investors and to make putative profit payments to earlier investors, even when properties had not been purchased or rented as promised. In fact, Mason Hill did not complete transactions as promised for a number of investors. Mr. Brody maintained that Mason Hill was entitled to do whatever it wanted with investor deposits because the deposits were non-refundable.[53]

Thomas Larkin testified that while he worked at Mason Hill, he became convinced that Mason Hill was operating as a Ponzi scheme. Mr. Larkin determined that Mason Hill was operating as a Ponzi scheme when Patrick Brody directed him to use funds from new investors to purchase properties for earlier investors. Based on this knowledge, Mr. Larkin concluded Mason Hill could not continue as a profitable operation, and he resigned from Mason Hill.[54]

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[52]See, e.g., Wood Dep. at 10, 30-32, 39, 50-51, 77-79, 172; Larkin Decl. ¶¶ 21-23; Larkin Testimony in June Tr. at 75-77 (discussing profit and loss statement), 93; Keith Decl. ¶¶ 2, 5, 7, 10-11; Young Decl. ¶ 16; Young Testimony in June Tr. at 68.

[53]See, e.g., Wood. Dep. at 55; Larkin Testimony in June Tr. at 92; Keith Decl. ¶ 4.

[54]His tenure with Mason Hill, from approximately August to October 2010, was brief. He left Mason Hill based on his concerns of personal liability stemming from his liability to "effect a business model that was not bordering on fraudulent." (June 29, 2011 Tr. at 72.)

Defendants' Actions After Entry of Asset Freeze and Temporary Restraining Orders

Sale and Disappearance of Assets

On April 18, 2011, this court entered Orders temporarily restraining Defendants from violating federal securities laws and freezing the assets of Mr. Brody, Ms. Roser and Mason Hill.[55] The court appointed a receiver, R. Wayne Klein (the "Receiver"), to oversee the assets of Mason Hill.[56] In pertinent part, the Asset Freeze Order[57] states:

> 3. Except as otherwise specified herein, all Receivership Assets are frozen until further order of this Court. Accordingly, all persons and entities with direct or indirect control over any Receivership Assets, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets.
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> 4. Defendants Patrick M. Brody, Laura A. Roser and Gregory D. Wood, their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of such Order by personal service, facsimile service, or otherwise, and each of them, hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of any assets, funds, or other properties . . . of Defendants Patrick Merrill Brody, Laura A. Roser and Gregory D. Wood currently held by them or under their control . . . .

(Asset Freeze Order (Docket No. 5) at ¶¶ 3-4.)

As a result of Defendants' attempt to evade traditional service of process, the SEC sought permission to serve Mr. Brody, Ms. Roser and Mason Hill by publication and alternative means

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[55]See Docket Nos. 4-5.

[56]See Asset Freeze Order (Docket No. 5).

[57]The Defendants were properly served with the Complaint, other pleadings and this court's orders.

on or about April 22, 2011.[58] The court granted the SEC's motion on April 25, 2011.[59] As a consequence of that Order, the SEC published notice of its action against Mr. Brody, Ms. Roser and Mason Hill in the Salt Lake Tribune and Deseret News and also sent copies of the TRO, Asset Freeze Order, Complaint and other pleadings to all known email addresses of Mr. Brody and Ms. Roser. In addition to service by published legal notice and electronic mail, Mr. Brody and Ms. Roser were personally served with the Complaint and other pleadings and Orders on or about April 25, 2011.[60] The Defendants have been properly served with the Complaint, other pleadings and this court's orders.

The language of the Asset Freeze Order enjoining all parties from "transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets" is clear. (Id.) Nevertheless, in May 2011, the Receiver learned that furniture and computers, among other items, belonging to Mr. Brody and Ms. Roser were being advertised and offered for sale in violation of the Court's Asset Freeze Order. Defendants attempted to sell (and in some cases appear to have sold) assets subject to the Asset Freeze Order and belonging to the Receivership Estate.[61] This violation of the order was in addition to Mr. Brody's and Ms. Roser's failure to comply with disclosure requirements of the Asset Freeze Order.

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[58] See Docket Nos. 11-12.

[59] Docket No. 13.

[60] Docket Nos. 15-16.

[61] See Exhibits attached to Mem. Supp. Mot. for Order to Show Cause Why Defs. Brody and Roser Should not be Held in Civil Contempt ("Civil Contempt Mem.") (Docket No. 24).

On June 23, 2011, the SEC took Mr. Brody's and Ms. Roser's depositions.[62] During the depositions, SEC counsel asked several questions regarding assets that belong to the Receivership Estate and which the Receiver was not able to locate during his inventory at the Brody-Roser home. Mr. Brody and Ms. Roser, in response, asserted their Fifth Amendment right against self-incrimination to every question concerning assets, including whether he or she recognized the assets, whether the assets were contained in the home and whether any of the items had been sold.[63]

During a court-ordered inventory of the Brody-Roser home, it became clear that several items were missing, including a grand piano, antique typewriter, hot tub, rare books, jewelry, and a restored Porsche automobile. Currently, neither the SEC nor the Receiver knows the location of those items. Defendants' refusal to cooperate with the legitimate efforts of the Receiver to marshal assets harms Mason Hill's investors.

Continuation of Similar Enterprise

Even after receiving notice and proper service of the Complaint, other pleadings and court orders (including the TRO and Asset Freeze Order), Mr. Brody continued to recruit sales people and to solicit investor funds in a fraudulent scheme almost identical in nature to Mason Hill.[64] Mr. Brody and Ms. Roser have used the entity names "Jensen Blair" and "Residential Realty Advocates" to perpetuate their scheme. Mr. Brody has represented himself to at least one

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[62]See Dep. of Patrick M. Brody (Pl.'s Ex. 2 from July 12, 2011 Hr'g); Dep. of Laura Roser (Pl.'s Ex. 3 from July 12, 2011 Hr'g).

[63]See, e.g., Brody Dep. at 17-21; Roser Dep. at 22, 35, 38-39, 43-45, 55-57.

[64]See Declaration of Ryan Reilly (Ex. 3 to Civil Contempt Mem.) ¶¶ 2-3, 5-7, 9; Parker Decl. ¶ 9; Declaration of Scott Frost (Ex. 2 to Civil Contempt Mem.) ¶¶ 9, 13.

potential salesperson as "Patrick Merrill" in an apparent attempt to hide his connection to Mason Hill.[65] As with other topics, during Mr. Brody's deposition, when SEC counsel asked Mr. Brody whether he attempted to establish a business venture in Ireland, Mr. Brody's response was, "I take the Fifth."[66] When SEC counsel asked if Mr. Brody was "familiar with the term Jensen Blair," he once more exercised his Fifth Amendment rights.[67]

CONCLUSIONS OF LAW

Section 20(b) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77t(b)] and Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78u(d)] empower the court to grant injunctive relief where it appears that a person is engaged in or about to engage in violations of the federal securities laws. These sections require the SEC to make a proper showing of violative activity in order to obtain injunctive relief.

When a federal agency charged by statute with safeguarding the public interest brings an action for injunctive relief, irreparable injury may be presumed. See, e.g., United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 174-75 (9th Cir. 1987). In order to obtain preliminary relief or a permanent injunction the SEC needs to prove: (1) a prima facie case of previous violations; and (2) a reasonable likelihood that the wrong will be repeated. See e.g., SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993); SEC v. Unifund SAL, 910 F.2d 1028, 1036-37

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[65] See Decl. of Ryan Reilly (Ex. 3 to Mem. Supp. Mot. Civil Contempt Order (Docket No. 24) ¶¶ 5-7, 9.

[66] Brody Dep. at 57.

[67] Id.

(2d Cir. 1990); SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975).

The SEC faces a lower burden than a private litigant when seeking a temporary restraining order or preliminary injunction. Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); Mgmt. Dynamics, Inc., 515 F.2d at 808; SEC v. Int'l Loan Network, Inc., 770 F. Supp. 678, 688 (D.D.C. 1991), aff'd, 968 F.2d 1304 (D.C. Cir. 1992). For example, unlike private litigants, the Commission is not required to show irreparable injury or a balance of equities in its favor in order to make the proper showing to obtain a preliminary injunction. Unifund SAL, 910 F.2d at 1036; Mgmt. Dynamics, Inc., 515 F.2d at 808; SEC v. Musella, 578 F. Supp. 425, 434 (S.D.N.Y. 1984). Moreover, the SEC need only prove its case by a preponderance of the evidence. See Wall St. West, Inc. v. SEC, 718 F.2d 973, 974 (10th Cir. 1983).

The Defendants Sold Investment Contracts.

Mason Hill, through its employees and control persons, offered investment contracts in the form of reservation and purchase agreements. An investment contract is a security if it involves (1) investment of money; (2) in a common enterprise; (3) with profits derived solely from others' efforts. SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). The elements of Howey are satisfied here.

Investments of Money

Investors unquestionably invested money with Mason Hill. The Reservation Agreements required investors to transfer at least $20,000 to Mason Hill in order to secure the opportunity to purchase a property. Investors advanced money to Mason Hill to buy properties Mason Hill had found. In fact, Mason Hill marketing materials and employees actively portrayed Mason Hill as a portfolio-quality investment. Mason Hill investors ultimately committed their money, a sum of at

least $20,000 per property, in order to gain the promised 10% to 30% return on their investments.

Common Enterprise

The Tenth Circuit has held that the determination of whether a common enterprise exists is not based solely on the presence of either horizontal or vertical commonality. The Tenth Circuit has rejected such "rigid" requirements and instead, the "economic reality" is examined so that when a transaction, in substance, involves an investment, the common enterprise will be present. McGill v. Am. Land & Exploration Co., 776 F.2d 923, 925 (10th Cir. 1985) (citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). The "determining factor of a common enterprise and the economic reality of the transaction is whether or not the investment was for profit." Campbell v. Castle Stone Homes, Inc., Case. No. 2:09-CV-250-TS, 2011 WL 902637 *4 (D. Utah Mar. 15, 2011).

Here, the economic realities demonstrate that the common enterprise element is met. Mason Hill coupled the sale of real estate with Mason Hill's management to generate promised returns. Mason Hill offered a free year of management services as added value for investors. Mason Hill, in brief, touted itself as a hassle-free investment. Its website claimed that it presented a "turnkey cash flow real estate investment." Mason Hill told investors they would receive annual returns of between 10% and 30% and represented that investors would see immediate cash flow of at least $650 per month. Mason Hill represented to investors that it would generate profits through Mason Hill's simple, five-step approach to real estate investing. Mason Hill's literature was replete with diagrams, charts and step-by-step illustrations presenting Mason Hill as a passive investment. Furthermore, Mason Hill commingled investor funds – including reservation deposits – in common accounts. Consequently, the common enterprise

element of the Howey test is satisfied.

Profits Derived Solely From Others' Efforts

Howey's third element is established because the profits from the investment were to be derived solely from the efforts of Mason Hill. Investors had no role in the selection of the properties and provided nothing beyond their principal investment. Mason Hill found the properties, selected the tenants, provided all property management services and sent out the monthly checks. Investors had no role in the investment decisions and provided nothing beyond funding. The investors expected to make a profit on the investment with Mason Hill.

Defendants' reliance on land speculation cases to rebut the application of the Howey test is misplaced because those cases are factually distinguishable. In Woodward v. Terracor, 574 F.2d 1023 (10th Cir. 1978), the Tenth Circuit was faced with whether a real estate purchase agreement, in and of itself, constituted an investment contract. The Tenth Circuit Court found that the only agreement between the plaintiffs and Terracor was a Uniform Real Estate Contract. "This real estate contract provided only for the sale of the described parcels of land together with the usual improvements . . . ." Id. at 1025. Similarly, in Davis v. Rio Rancho Estates, Inc., 401 F. Supp. 1045 (S.D.N.Y. 1975), the court found that "[t]here was no management contract between plaintiff and defendants, nor were defendants obligated by the Purchase Agreement to perform any such services." Id. at 1050.

Mason Hill's business model did not involve the mere purchase of land. First, the model was specifically offered as an investment vehicle. Mason Hill's offering was "being promoted as a pure investment, as opposed to a residential development which may, incidentally, be also a good investment." Id. at 1049-50 (internal citation omitted). Second, Mason Hill offered an

investment vehicle in real estate, premised upon the purchase of a specified duplex (rehabilitated through the efforts of Mason Hill), together with a package of services associated with that duplex. For example, Mason Hill promised to locate the duplex, promised that the duplex would meet certain pre-defined criteria and then Mason Hill would locate tenants, collect rents and maintain the property. The additional agreements signed between Mason Hill and the investor is what constitutes the offering of an investment contract.

Mason Hill does not present any evidence that any investor simply purchased a duplex and then went elsewhere for rental or property management services. The investors who testified all stated that it was the "turnkey" approach to real estate investment that induced them to invest with Mason Hill. Investors expected Mason Hill's property selection and management efforts to be the source of the profits. While the rents were the source of the profits expected, those profits were to be earned through the efforts of Mason Hill in tenant selection, rent collection and maintenance, not through the effort of the individual investor.

Defendants stress that investors did not purchase interests in Mason Hill, but that is not what the Howey test or the investment contract analysis requires. It is accurate that Mason Hill did not offer interests in Art Intellect, Inc., its corporate alter ego. That is merely where the investment contract inquiry begins. It would akin to saying that Merrill Lynch does not sell securities because investors do not purchase an investment in the broker-dealer itself. The SEC alleges that Mason Hill offered investment contracts, much like the promoter in Howey offered interests in orange groves, not in a corporation which owned orange groves.

Defendants made false statements and omission in connection with the purchase or sale of securities.

Section 17(a) of the Securities Act [15 U.S.C. §77q(a)] prohibits persons, in the offer or sale of a security, from employing any device, scheme or artifice to defraud; obtaining money or property through materially false or misleading statements or omission of material facts; or engaging in any transaction, practice, or course of business which operates as a fraud or deceit. United States v. Naftalin, 441 U.S. 768, 772-73 (1979). Section 10(b) of the Exchange Act and Rule 10b-5 prohibit similar conduct in connection with the purchase or sale of a security. Section 10(b) was designed to prevent all manner of fraudulent practices. Chiarella v. United States, 445 U.S. 222, 226 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153 (1972); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

Defendants' misrepresentations and omissions of fact are numerous and significant. Defendants' failure to inform investors that investor money would subsidize the Defendants' profligate lifestyle is a material omission of fact. Indeed, as a part of their scheme, Defendants solicited IRA and 401(k) retirement funds from investors – funds which were dissipated on Defendants' personal bills and extravagant expenditures.

Defendants' claims that investor reservation deposits were held safely in escrow was a material misrepresentation of fact. Defendants transferred investor funds from the escrow accounts, commingling the money with Mason Hill's general operating accounts. Unbeknownst to investors, Defendants used these funds to pay Mason Hill's operating expenses, sales commissions and Mr. Brody's and Ms. Roser's personal expenses. Defendants also used new

investor funds to purchase properties for some earlier investors and to make the promised profit payments to earlier investors – a classic Ponzi scheme.

Defendants' marketing strategy was misleading. Misrepresentations were made to investors regarding high monthly returns through a "turnkey" approach to real estate investing. Defendants promised investors "turnkey" ready properties, refurbished to "near-new" condition. That was false. Many of the properties purchased by Mason Hill were not rehabilitated, but were in various states of disrepair and often unsuitable for tenancy. Nevertheless, Defendants and their employees and/or strategic partners promised investors returns, varying from 10% to 30%, with monthly net rental profits of at least $650 to $1000.

The property selection process, the pretext that Mason Hill maintained on-site property management and even claims of an inventory of property purchased in bulk to provide investors discounts were all further misrepresentations Defendants made in their solicitation of funds. Defendants provided information sheets and photographs of specific properties purportedly owned by Mason Hill and available for purchase. Often, Defendants had either not purchased the real estate at all or had purchased a different property using investor funds. Defendants also claimed to maintain an in-house property management team. The management team was to screen and place tenants and ensure the timely occupancy of properties to obtain an immediate income stream for investors. In reality, the Defendants did not maintain an on-site management team.

Finally, Defendants misrepresented to investors that Mason Hill held an inventory of available properties. Defendants claimed that Mason Hill had acquired the alleged properties in bulk from banks and/or REOs at prices not available to individual purchasers. Not only was there

was no inventory of properties, Mason Hill had never purchased properties in bulk. In fact, Mason Hill provided no discounts for investors, because it actually purchased properties individually – and at the same price at which the properties could be obtained by an individual investor. Often, Mason Hill participated in simultaneous closings in which it would acquire a property and immediately sell it to an investor. Mason Hill did not disclose this practice to its investors.

Defendants' Misrepresentations and Omissions were Material.

Information is material if a substantial likelihood exists that the facts would have assumed actual significance in the investment deliberations of a reasonable investor. Basic Inc. v. Levinson, 485 U.S. 224, 234-36, 240 (1988). Misrepresentations regarding the use of investors' funds are material. See SEC v. Cochran, 214 F.3d 1261, 1268 (10th Cir. 2000) (information implicating the fair market value would be material to a reasonable investor); Everest Sec., Inc. v. SEC, 116 F.3d 1235, 1239 (8th Cir. 1997) (holding that it would be material to an investor to know that the offering company's existing project had been abandoned, that none of its asset value was to be recouped.) Similarly, investors would consider it important to know their funds were being misappropriated and used for purposes other than those stated when solicited. SEC v. TLC Invs. & Trade Co., 179 F. Supp. 2d 1149, 1153 (C.D. Cal. 2001).

Here, as described above, the Defendants made misrepresentations and omissions regarding the use of the investors' funds and failed to disclose that such funds were being misappropriated and used for purposes other than those stated when solicited. The Defendants, for example, misrepresented to investors that their funds would be placed in escrow, when in reality the funds were misappropriated by the Defendants or directed towards Mason Hill's

day-to-day operations. There is a substantial likelihood that such information would have assumed actual significance in the investment deliberations of the Defendants' investors. The Defendants' misrepresentations and omissions, therefore, are material.

Defendants Acted With Scienter.

Scienter is an element of violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5, but is not a required element of a violation of Sections 17(a)(2) or 17(a)(3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980). The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst, 425 U.S. at 193 n.12. Reckless conduct has been held to satisfy the scienter requirement. Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 595-97 (10th Cir. 1979).

The Defendants acted with the requisite scienter. Here, Mr. Brody and Ms. Roser were involved in the operations of the business, with significant decision-making power. Mr. Brody, among other things, misrepresented to investors the nature of their investment, namely that Mason Hill invested in real estate in well-desired areas, offered steep discounts, high returns and provided the safety of investor funds. Ms. Roser was chiefly responsible Mason Hill's marketing materials, including maintaining and developing its website, wherein Mason Hill touted itself as a hassle-free approach real estate investing. Defendants knowingly misappropriated investors' monies, including funds from IRA and 401(k) accounts. Defendants caused and/or instructed the transfer of investors' funds to VirtualMG, a front company Ms. Roser owned and controlled, in order to pay for Ms. Roser's and Mr. Brody's personal expenses. Company managers confronted both Mr. Brody and Ms. Roser with evidence of wrongdoing; however Mr. Brody and Ms. Roser

chose to ignore the evidence. Ultimately, Defendants knowingly operated a classic Ponzi scheme for their personal benefit.

The court notes that it draws an adverse inference from Mr. Brody's and Ms. Roser's invocation of their Fifth Amendment Privilege. Both refused to answer any substantive questions during their depositions. The United States Supreme Court has held that, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]" Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). "'Failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.'" Id. at 319 (quoting United States v. Hale, 422 U.S. 171, 176 (1975)).

Mr. Brody and Ms. Roser's silence and failure to contest the SEC's assertions is evidence of their acquiescence to the fact that they were conscious of Mason Hill's fraudulent activities and their active involvement in the scheme to defraud Mason Hill investors and that they knowingly and purposely defrauded investors.

Defendants Used the Means and Instrumentalities of Interstate Commerce

Defendants used the requisite jurisdictional means to effectuate the fraud. In Pereira v. United States, 347 U.S. 1, 8-9 (1954), the United States Supreme Court noted that the "jurisdictional means" element is satisfied if a defendant knows that the use of mail or of wire services was a reasonably foreseeable consequence of a scheme. "All that is required to establish a violation of [Section 17(a), Section 10(b) or Rule 10b-5] is a showing that a means, instrumentality or facility of a kind described in the introductory language of th[e] section was used, and that in connection with that use an act of a kind described [in the relevant section]

occurred." Matheson v. Armbrust, 284 F.2d 670, 673 (9th Cir. 1960); accord United States v. Tallant, 547 F.2d 1291, 1297 (5th Cir. 1977). Here, Defendants made use of the mails, the Internet and the telephone to solicit investments. Funds were wired to Defendants' bank accounts and subsequently used to make rental payments to investors. That is all that is required.

There is a Reasonable Likelihood that the Defendants Will Persist in their Illegal Conduct Unless Enjoined.

In determining the likelihood of future violations, the court looks at several factors, including the degree of scienter, the egregiousness of the violation, whether the defendant's occupation will present opportunities for future violations, and, whether the defendant has acknowledged wrongdoing and made sincere assurances against future violations. SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993). The court must consider the totality of the circumstances. SEC v. Suter, 732 F.2d 1294, 1301 (7th Cir. 1984).

Mr. Brody has violated the securities laws before. (See SEC v. Merrill Scott, Case No. 2:02-CV-39-TC (D. Utah).) There is no assurance that Mr. Brody will not revert to defrauding investors. In fact, the evidence of his activities following the court's issuance of a TRO in this case shows just the opposite. Mr. Brody and Ms. Roser have created elaborate investment schemes and aggressively solicited investors. Defendants have hidden or sold assets belonging to the Receivership Estate. Defendants have neither accepted their wrongdoing nor provided any guarantee that they will not commit future violations. Defendants neither recognize the wrongfulness of their actions nor the need to redress those harmed.

The court must also consider "the likelihood that [] [defendants'] customary business activities might again involve [] [them] in such transactions." Suter, 732 F.2d at 1301. It appears

that Mr. Brody and Ms. Roser have no occupation beyond soliciting investments.

Finally, the degree of scienter "bears heavily" on the decision. Pros Int'l., 994 F.2d at 769 (citing SEC v. Haswell, 654 F.2d 698, 699 (10th Cir. 1981)). As explained above, Defendants knew (based on the facts and the adverse inference drawn from the Defendants' exercise of their Fifth Amendment privilege) that their conduct defrauded numerous investors. Both Mr. Brody and Ms. Roser were told by their employees that their businesses bore the hallmarks of fraud.

All of the Pros factors, including a high degree of scienter, are present here. Accordingly, the court holds that the SEC has established the likelihood of future violations.

ORDER

For the foregoing reasons, the SEC's motion for preliminary injunctive relief against Patrick Brody, Laura Roser, and Art Intellect, Inc. (d/b/a Mason Hill and VirtualMG) (Docket No. 2) is GRANTED.

IT IS HEREBY ORDERED that pending a final adjudication of this matter, Defendants Art Intellect, Inc. (d/b/a Mason Hill and VirtualMG), Patrick M. Brody, and Laura A. Roser, their officers, agents, servants, employees, attorneys, and accountants, and those persons in active concert or participation with any of them, who receive actual notice of the order by personal service or otherwise, and each of them, are preliminarily restrained and enjoined from engaging in transactions, acts, practices, and courses of business described herein, and from engaging in conduct of similar purport and object in violation of Sections 5(a), 5(c) and 17(a) of the Securities Act, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder.

IT IS FURTHER ORDERED that the court's April 18, 2011 asset freeze order (Docket

No. 5) remains in effect.

SO ORDERED this 20th day of October, 2011.

BY THE COURT:

TENA CAMPBELL
U.S. District Court Judge