

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES AND EXCHANGE	)	CIVIL ACTION NO.: 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
)	
v.	)	<u>MEMORANDUM OPINION</u>
)	
TERRY L. DOWDELL, et al.)	
)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the plaintiff's motion for a preliminary injunction against defendants Kenneth Mason, Birgit Mechlenburg and the Vavas seur Corporation,¹ which would, *inter alia*, enjoin the defendants from committing federal securities violations, order the defendants to repatriate their overseas assets and freeze their assets. The court heard three days of oral argument on this motion at a hearing which commenced March 5, 2002. Having thoroughly reviewed the parties' submissions and arguments to this court, the court grants the plaintiff's motion for a preliminary injunction for the reasons set forth below.

I. Background

The SEC brought this civil enforcement action on November 19, 2001 at which time it sought injunctive and ancillary relief against certain of the individual defendants and corporate entities connected in what the SEC alleges is an ongoing securities fraud scheme. On that date,

¹ The court had denied the SEC's December 5, 2001 motion for preliminary injunction without prejudice to refile at the time a preliminary injunction hearing was scheduled. (See December 7, 2001 Memorandum & Opinion.) In the plaintiff's response to the trial brief submitted by defendants Mason and Mechlenburg, filed March 4, 2002, the SEC requested that the court deem its motion for a preliminary injunction refiled. The court considers this request to be a motion to renew the preliminary injunction motion and shall grant it.

the court entered an *ex parte* temporary restraining order and asset freeze order against the “Vavasseur defendants:” Terry L. Dowdell, Birgit Mechlenburg, Kenneth G. Mason, Dowdell, Dutcher and Associates, Inc. (hereinafter DDA) and Vavasseur Corporation.

According to the complaint, since April 1998, defendant Terry L. Dowdell (hereinafter Dowdell) has orchestrated a Ponzi scheme raising at least \$29 million from more than 60 investors in the United States and abroad with the pledge to use investor funds to purchase short and medium-term debenture instruments issued by a major money center bank.² The SEC contends that Dowdell offered and sold investments in a trading scheme known as the “Vavasseur program,” purportedly operated by the Bahamian-based Vavasseur Corporation controlled by Dowdell. The contracts signed by the investors projected a gross annual return of 160 percent. (SEC Ex. 10.) After sending their funds to a Dowdell account in Florida, investors would receive written confirmation that their money was to be wired to a Vavasseur account in The Bahamas. (SEC Ex. 15.)

The SEC contends that no such transfers occurred. Instead, the money was pooled together in various Dowdell accounts in the United States. From those accounts, Dowdell would make monthly payments to investors, falsely representing them as profits from trading activities. In its complaint, the SEC estimates that some \$13 million was paid out to investors. This amount has been adjusted to nearly \$17 million after the SEC acquired further bank documentation subsequent to the issuance of the TRO. (December 21, 2001 Miller Aff. at ¶ 7.) Dowdell is alleged to have used investor funds to pay Vavasseur marketers. He also spent funds for personal expenses such as the purchase of real estate and other property for family members. In March 2001, Dowdell represented to the SEC that Vavasseur had ceased U.S. operations and

² The SEC has subsequently adjusted this amount to some \$50 million based on bank records it received since the TRO issued.

was returning all U.S. investor money. He provided wire transfer confirmations indicating the return of some \$1.8 million. However, according to the SEC, most of the money returned to the United States was immediately transferred back into overseas accounts and reinvested in another Dowdell-related entity, Wicoff Overseas Corporation.

Birgit Mechlenburg and Kenneth Mason are alleged to have been Dowdell's primary marketers of the Vavas seur scheme. According to the SEC, they knew or should have known that the program was fraudulent, yet they marketed it anyway. Since April 1998, Mechlenburg is alleged to have raised millions of dollars of investor funds both in the United States and abroad, primarily in Denmark. Mason is linked to two U.S. investors to whom he recommended Vavas seur. However, for some time, Mason and Mechlenburg also had a fifty-fifty fee sharing arrangement in which Mason received payments based on investors Mechlenburg brought into the program. Records obtained by the SEC indicate Mason and Mechlenburg have each received at least \$500,000 in payments.

Mason and Mechlenburg state that they believed the program was legitimate based on the representations of Dowdell. Both defendants contend that they conducted thorough due diligence of Dowdell and considered him an honorable man. As such, they reasonably relied on his statements about the Vavas seur program.

In a five count complaint, filed November 19, 2001, the SEC alleges that the defendants³ violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Mechlenburg is also alleged to have violated the broker-dealer registration and anti-fraud provisions of Sections 15(a) and 15(c)(1)

³ The plaintiff has named relief defendants in its complaint who are not accused of any wrongdoing. They are alleged to be in possession of ill-gotten funds to which they have no legitimate claim.

of the Securities Exchange Act of 1934 and Rule 15c1-2 promulgated thereunder. The SEC sought an *ex parte* temporary restraining order which the court granted on November 19, 2001. Under the TRO, the defendants were enjoined, *inter alia*, from violating the above-mentioned securities provisions, and were ordered to provide accountings, comply with discovery, and preserve documents. As part of the ancillary relief requested by the SEC, the court also issued an order freezing the assets of the Vavasseau defendants.

While this case is replete with procedural history since November 19, 2001, the court finds for purposes of this Opinion that it can skip ahead to February 27, 2002, when the SEC, Terry L. Dowdell and DDA jointly moved for the entry of an agreed preliminary injunction order. In a separate consent and stipulation filed with the court, Dowdell and DDA consented to the entry of this order, without admitting or denying the allegations of the complaint except as to jurisdiction. The court granted the motion and entered the agreed preliminary injunction order which includes provisions that enjoin Dowdell and DDA from violating securities laws, freeze their assets, and provide new deadlines for discovery and accountings.

On March 5, 2002, the court commenced a preliminary injunction hearing as to the remaining defendants affected by the temporary restraining order - Mason, Mechlenburg and Vavasseau Corporation. Mason and Mechlenburg were present with counsel. No one appeared on behalf of Vavasseau Corporation.

Mason and Mechlenburg, in addition to challenging the merits of the SEC's allegations, raised in their brief a challenge to subject matter jurisdiction, which the court shall address first.

II. Subject Matter Jurisdiction

In its November 19, 2001 complaint, the SEC asserted jurisdiction pursuant to Section 22(a) of the Securities Act, 15 U.S.C. §77v(a), and Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1331. The SEC also represented that the defendants had made and were

making use of the means and instrumentalities of interstate commerce and of the mails in connection with the transactions at issue in the case. Defendants Mason and Mechlenburg⁴ challenge the court's subject matter jurisdiction pursuant to 15 U.S.C. §78dd(b) which reads:

The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

According to the defendants, Vavasseur is a foreign corporation transacting a business in securities without the jurisdiction of the United States. As the majority of known investors are foreign, the defendants also contend that the core conduct of the alleged fraud took place abroad and that the effect in the United States of the alleged fraud was insubstantial.

When addressing a Fed. R. Civ. P. 12(b)(1) motion, a court must initially determine whether it is a facial or a factual challenge. A facial challenge is made when a party contends that "a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In such cases, the facts alleged by the plaintiff in its complaint are assumed to be true. *See id.* Alternatively, jurisdiction is refuted on a factual basis when a party asserts that the jurisdictional allegations of the complaint are not true. The court "may then go beyond the allegations of the complaint and [...] determine if there are facts to support jurisdictional allegations." *Id.*

Defendants Mason and Mechlenburg do not specify what type of jurisdictional attack they are making. However, in their argument, the defendants do not contest the facts alleged; rather,

⁴ Defendants Mason and Mechlenburg raised this argument as an affirmative defense in their respective answers. Their counsel briefed the issue for the preliminary injunction hearing. The court notes that defendants Mason and Mechlenburg share counsel in this case.

they challenge the interpretation given the facts, that is, whether the facts alleged demonstrate sufficient conduct or effects in the United States to provide for subject matter jurisdiction. Accordingly, the court construes their attack to be a facial one, and assumes the facts alleged in the complaint to be true.

In doing so, the court finds that the plaintiff has alleged that sufficient conduct took place within the United States for subject matter jurisdiction to attach.⁵ Where the securities were sold to foreigners, some courts have found conduct sufficient only where the acts within the United States “directly caused such losses.” *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33, (D.C.Cir. 1987) (adopting what it construed as the Second Circuit's test for finding jurisdiction based on domestic conduct requiring that acts within the United States “directly cause” the harm to those who claim to be defrauded). Other courts have found jurisdiction where “at least some activity designed to further a fraudulent scheme occurs within this country.” *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (finding that activities crucial to the consummation of the fraud had been carried out in the United States including the execution of a key investment contract and the maintenance of records); *see also Travis v. Anthes Imperial Limited*, 473 F.2d 515, 524 (8th Cir. 1973) (“Subject matter jurisdiction attaches whenever there has been significant conduct with respect to the alleged violations in the United States. And this is true even though the securities are foreign ones that had not been purchased on an American exchange.”)

⁵ A sufficient demonstration of an adverse effect upon American investors or the American securities markets of conduct outside the United States is also grounds for subject matter jurisdiction. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-08 (2d Cir. 1968). As either test may independently determine jurisdiction, *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 905 (5th Cir. 1997), the court applies the conduct test to the facts of this case.

The court finds that under either the stricter or more lenient standards delineated above, the facts alleged in the complaint clearly make out a case for subject matter jurisdiction. Based on the allegations contained in the complaint, Dowdell ran the scheme primarily from the United States. All investor funds from April 1998 until March 2001 were deposited and maintained in Dowdell bank accounts in the United States. These same funds were the source of payments made by Dowdell to investors and his promoters. While Mechlenburg recruited abroad, she and Mason also introduced investors into the Vavasseur program from within the United States. Dowdell signed the Vavasseur investment contracts within the United States, and at least two investors from the United States executed the contract within the United States. Furthermore, the SEC alleges the defendants used U.S. mails and wires to effectuate their transactions. The court does not consider, as the defendants contend, that these actions were merely preparatory to the actual consummation of fraud elsewhere. *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975). It appears to the court from the facts alleged in the complaint that the actual fraud was centered in the United States, and that the activities in the United States were crucial to the fraud's consummation.

Furthermore, as for the defendants' reliance on 15 U.S.C. §78dd(b), the defendants fail to acknowledge that this section does not act as an absolute bar to the application of the Exchange Act to fraudulent transactions involving foreign sellers or securities. Even if foreign securities transactions were at issue in this case, substantial conduct carried out in the United States related to facilitating the sales of securities abroad is enough to find that the business of securities was not exempt from regulation because it was not transacted "without the jurisdiction of the United States." *See Roth v. Fund of Funds, Ltd.*, 405 F.2d 421, 422 (2d Cir. 1968). Similarly, in this case, the significant conduct identified as having taken place in the United States precludes application of the Section 78dd(b) exemption.

Accordingly, the court finds that the complaint alleges sufficient facts to invoke federal subject matter jurisdiction.

III. Preliminary Injunction

A. Standard and Applicable Law

Where the SEC is the entity seeking injunctive relief, the usual four factor balance-of-harm test utilized by this circuit to determine whether to grant a preliminary injunction does not apply. *See SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) (“[S]uits by Securities and Exchange Commission for injunctions are creatures of statute as to which proof of irreparable injury or inadequacy of other remedies ... is not required.”); *see also Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 196 (4th Cir. 1977) (setting forth the four factors necessary in usual suit for injunction).

Under the Exchange Act, 15 U.S.C. §78u(d)(1), and the Securities Act, 15 U.S.C. § 77t(b), the district court shall grant an injunction “upon a proper showing” by the Commission. A proper showing to enjoin future violations of securities laws requires “a substantial showing of likelihood of success as to both a current violation and the risk of repetition.” *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998); *see also SEC v. International Loan Network, Inc.*, 770 F.Supp. 678, 688 (D.D.C. 1991), *aff’d* 968 F.2d 1304 (D.C. Cir. 1992) (requiring the SEC to make a *prima facie* case that the defendants violated and were likely to continue violating the securities laws).

For purposes of this motion, the SEC alleges that Mason, Mechlenburg and Vavasour Corporation engaged in and are likely to engage in acts in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a)(1), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.

Mechlenburg is also alleged to have engaged in and is likely to engage in acts in violation of Sections 15(a) and 15(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(a) and 15 U.S.C. §78o(c), and Rule 15c1-2 promulgated thereunder, 17 C.F.R. 250.15c1-2.

Section 17(a) of the Securities Act makes it unlawful for any person in the sale or offering of securities through the use of communication in interstate commerce:

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). Similarly, Section 10(b) of the Exchange Act makes it unlawful for any person, through the use of interstate commerce or the mails:

- (b) [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5, promulgated by the SEC pursuant to Section 10(b), proscribes such conduct that “would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5.

To establish a violation of Section 17(a)(1) or Section 10(b) and Rule 10b-5 thereunder, the SEC must show that: (1) the defendant made an untrue statement of material fact or omitted a fact that rendered a statement made by the defendant misleading; (2) such misrepresentation or omission was made in connection with the offer, sale or purchase of securities; and (3) was made with scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Scienter is not required for violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act. *Aaron v.*

SEC, 446 U.S. 680, 701-02 (1980).

Regarding the broker-dealer provisions of the Exchange Act, Section 15(a) prohibits any broker from using interstate commerce to effect a transaction in securities or to induce or attempt to induce others to purchase or sell securities unless the broker is registered with the SEC. 15 U.S.C. § 78o(a)(1). A broker is defined under Section 3(a)(4) of the Exchange Act as “any person engaged in the business of effecting transactions in securities for the account of another.” 15 U.S.C. §78c(a)(4). Scier is not an element of a Section 15(a) violation. *SEC v. Randy*, 38 F.Supp.2d 657, 667 (N.D.Ill.1999).

Section 15(c)(1) prohibits brokers and dealers from using "any manipulative, deceptive or other fraudulent device or contrivance" in connection with securities transactions. 15 U.S.C. §78o(c). Rule 15c1-2, promulgated thereunder, states that the "manipulative, deceptive, or other fraudulent device or contrivance" prohibited in section 15(c)(1) refers to any untrue statement or omission of material facts "made with knowledge or reasonable grounds to believe that it is untrue or misleading." 17 C.F.R. 250.15c1-2. The same scier requirement attributed to Section 17(a)(1) and Section 10(b) violations applies to 15(c)(1) violations. *Darvin v. Bache Halsey Stuart Shields, Inc.*, 479 F.Supp. 460, 464 (S.D.N.Y. 1979).

Scier can be shown with proof of recklessness. The definition of recklessness in securities cases is conduct that is “highly unreasonable..., involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *Frankel v. Wyllie & Thornhill, Inc.*, 537 F.Supp. 730, 740 (W.D.Va. 1982).

With the law set forth, the court shall now proceed to relate it to the facts of this case to determine if the SEC has made a substantial showing that it is likely to succeed on the merits

in proving the alleged violations.

B. Findings as to Dowdell & DDA Agreed Preliminary Injunction Order

This court has already found that the SEC demonstrated a substantial likelihood of succeeding on the merits with regard to the Section 17(a) and Section 10(b) allegations against Terry Dowdell and DDA. (February 27, 2002 Agreed Preliminary Injunction Order). For the purposes of this motion, the court elaborates that the SEC made a proper showing that the Vavasseur trading program involved no trades. The exhibits and testimony of George Miller, a branch chief with the SEC, tasked with tracing the flow of funds and scheduling accounts related to this litigation, reveal that investor money deposited into Dowdell accounts in the U.S. was never transferred out to a Vavasseur account in The Bahamas. (See, e.g., SEC Ex. 17.) The money flow into and out of these accounts directly contradicted representations made to Vavasseur investors that their money was to be transferred overseas. (SEC Ex. 15). Such representations were made both in the overview on the program and in the contract itself. Moreover, the SEC documentation shows that investors were paid their “profits” from the same account into which they deposited their funds. (SEC Ex. 17). Thus, based on this evidence, the SEC has made a substantial showing of likelihood of success in proving that representations made in the Vavasseur investment contracts relating to the location of investor money, the use of investor money, and the existence of a trading program were false. The court also finds such misrepresentations to be material as there is a substantial likelihood that a reasonable person in considering this investment would consider them important. *See Randy*, 38 F.Supp.2d at 658.

C. Securities

The court’s finding with regard to Dowdell is relevant to Mason and Mechlenburg’s argument that they did not violate the securities laws since the Vavasseur securities were “issued or guaranteed by any bank” and thus exempted under Section 3(a)(2) of the Securities Act of

1933. 15 U.S.C. §77c(a)(2). They state that Dowdell represented that the profits were derived from the resale of foreign bank instruments or debentures in one million dollar denominations acquired at a discount to face and resold to an institutional purchaser. (December 4, 2001 Mason Br. Opp'n to Prelim. Inj. Order). The defendants claim such securities would be exempted from securities laws, and thus that they cannot be accused of violating these laws. The court requires more than the defendants' bold declarations of faith in the existence of a Vavasseau trading program before it can seriously address this argument, particularly when the SEC has made the proper showing of likelihood of success in proving that the Vavasseau program was fraudulent. However, defendants Mason and Mechlenburg have not presented the court with any proof of the existence of securities; rather, they argue that they think the securities exist, therefore, the securities do exist. The reasonableness of their Cartesian logic, and the corresponding recklessness which might attach to acting on it is addressed below, but in the meantime, the court rejects their argument that the program was exempt from U.S. securities laws.

The SEC relies on something more tangible to invoke the securities laws in this case, namely, the investment contracts made between investors and Vavasseau. Under Section 2(a)(1) of the Securities Act of 1933, 15 U.S.C. §77b(a)(1), and Section 3(a)(10) of the Exchange Act of 1934, 15 U.S.C. §78c(a)(10), the term "security" includes an investment contract. The Supreme Court established the test for determining what constitutes an investment contract in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Under the *Howey* test, an investment contract exists where there has been (i) an investment of money (ii) in a common enterprise (iii) with an expectation of profits garnered solely from the efforts of others. See *Teague v. Bakker*, 35 F.3d 978, 986 (4th Cir. 1994). The test is a flexible one, "capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299.

Indeed, as the First Circuit recently found, “courts have classified as investment contracts a kaleidoscopic assortment of pecuniary arrangements that defy categorization in conventional financial terms, yet nonetheless satisfy the *Howey* Court's three criteria.” *SEC v. SG Ltd.*, 265 F.3d 42, 47 (1st Cir. 2001). The First Circuit contributed to this assortment by holding that virtual shares in a fictional company sold on the Internet as part of an investment game were investment contracts subject to securities laws. *See id.* at 55. As for whether the facts of this case satisfy the *Howey* test, the court proceeds with the analysis.

1. Investment of Money

The first prong of the *Howey* test is satisfied in this case because the record indicates, and it is undisputed, that at least \$29 million, and perhaps \$50 million, has been paid by investors to Vavasseur.

2. Common Enterprise

The second prong requires “either an enterprise common to an investor and the seller, promoter, or some third party (vertical commonality) or an enterprise common to a group of investors (horizontal commonality).” *SEC v. R.G. Reynolds Enterprises, Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991). While recognizing that the *Howey* commonality requirement is often the topic of lengthy discussion and disagreement by courts, this court believes it unnecessary to engage in that debate. *See, e.g.*, 265 F.3d at 49 and *SEC v. Pinckney*, 923 F.Supp. 76, 81 (E.D.N.C. 1996). Instead, the court finds that this prong is satisfied by the existence of horizontal commonality where investors’ assets were pooled and investors shared in the profits. Like the Fourth Circuit in *Teague*, which found horizontal commonality because profits under the scheme were distributed *pro rata* to investors, *see* 35 F.3d at 986, profits from Vavasseur were paid out proportionate to the individual investment.

3. Expectation of Profits Solely from the Efforts of Others

The Supreme Court has defined an expectation of profits to mean either “capital appreciation resulting from the development of the initial investment” or “participation in earnings resulting from the use of investors’ funds.” See *Teague*, 35 F.3d at 986 (quoting *United Housing Foundation v. Forman*, 421 U.S. 837, 840 (1975)). There is little doubt that investors in Vavasseur were attracted by the prospect of financial returns on their investments. With pledges of up to 160% profits, they had an expectation of lucrative returns. See *id.* at 987 (discussing the necessary showing that purchases were induced by emphasizing the possibility of profits). As for the requirement that the profits would be garnered from the efforts of others, the only effort required of Vavasseur investors was that they complete a bank transfer of their money to a Dowdell account. After that, profits were expected to be “derived from the entrepreneurial or managerial efforts of others.” *Forman*, 421 U.S. at 840.

In conclusion, the court finds for the purposes of whether the SEC has met its burden for the issuance of a preliminary injunction, that the Vavasseur investment contract satisfies the three-prong *Howey* test and constitutes a security for purposes of the Securities Act of 1933 and the Exchange Act of 1934.

IV. Findings as to Mason and Mechlenburg

Having established that the Vavasseur investment contracts contained material misrepresentations in connection with the sale of securities, the court now determines whether defendants Mason and Mechlenburg, by promoting Vavasseur to potential clients, can be found to have made these misrepresentations, and if they did so recklessly.

A. Mason

Kenneth Mason is an attorney licensed to practice in Illinois since 1976. He admits to having extensive experience in corporate law. Mason confirmed that he had seen SEC warnings regarding fraudulent investment programs as early as 1994. In 1998, defendant Mason

recommended the Vavasseur program to the Schwandts, unsophisticated investors who were also clients in his law practice. There is no dispute that the Schwandts entered into an investment contract with Vavasseur. Mason testified that he told them the money would be leaving their control, but that he had a higher comfort level with the Vavasseur program because of his long relations with and extensive due diligence on Dowdell. Mason admits that at the time the Schwandts invested, Dowdell had no track record as a program manager for any trading program. Mason also testified that he never substantiated any program with returns of more than 120 percent. Mason earned at least \$500,000 from Vavasseur through a fifty-fifty fee sharing arrangement with defendant Mechlenburg by which he received fifty percent of her introducing party fees. Furthermore, after March 2001, when defendant Dowdell informed U.S. clients that their money was to be returned, Mason aided the Schwandts in reinvesting their money with Vavasseur, via an overseas account.

The SEC claims that defendant Mason should have known better when he was marketing the Vavasseur program, which pledged up to 160% gross annual return. According to the SEC, defendant Mason had no evidence of any actual trading of the bank instruments purportedly being traded in Vavasseur; he knew of the SEC's bank fraud alert; and he did not seek to verify whether Dowdell was engaged in any trading at all. Defendant Mason counters that his rigorous due diligence with regard to Terry Dowdell justifies his conduct, or at a minimum, demonstrates that he was not reckless in acting as he did.

Mason's defense rests almost entirely on his assertion that he believed Dowdell to be an honest man. In large part, this opinion was based on some references and Dowdell's resume. (Defs.' Exs. 10, 13, 14). This, according to Mason, justifies his promotion of Vavasseur to the Schwandts and his failure to relay to them information such as the lack of Dowdell's track record, or the SEC warning about fraudulent trading schemes. The only time Mason inquired

as to any of the details of Vavasieur was when he asked about the location of the Vavasieur funds at the conception of the program. Mason states that he accepted the explanation by Dowdell that the credit line would be maintained abroad and the profits would be deposited there. When questioned about the SEC produced schedule indicating that Vavasieur “profits” were being paid out of the U.S. bank, Amsouth, and not a Bahamian bank, Mason rather confusedly mentioned offsetting and stated that such payments were likely made in the United States as an accounting convenience. In a situation where Mason himself admitted to knowing of no successful high yield program, and that Dowdell had no track record in program management, and where the Vavasieur contract bears striking similarities to the schemes about which the SEC warned, the court believes due diligence would have required a much deeper exploration of the nature of these transactions, than merely accepting Dowdell’s explanation at the start of the program.

Therefore, the court finds that the SEC has demonstrated a substantial showing of likelihood of success in proving that Mason made material misrepresentations regarding the sale of securities when he recommended the program to the Schwandts and that he did so recklessly. The promise of such high returns for so little risk was so questionable that Mason should have been on notice to conduct further investigation. To put it in terms of the scienter standard, the danger in this case was so obvious that Mason must have been aware of it.

B. Mechlenburg

Birgit Mechlenburg, a resident of Massachusetts and a native of Denmark, represents that she has been self-employed in the field of finance for the past 18 years. Mechlenburg states that in late 1996, at the recommendation of Dowdell, she had placed \$20,000 of her own funds in the R.I.A. trading program, the predecessor of Vavasieur, and that she kept her money in when Dowdell took over as manager and the program became known as Vavasieur. Mechlenburg’s

mother was the first investor whom she introduced to the program. Since then, Mechlenburg admits that she introduced numerous investors, many from Denmark, to the Vavasseur program. As an introducing party for Vavasseur, the defendant arranged meetings between her clients and Dowdell, forwarded information to her clients on Vavasseur and her client's wire transfer information to Vavasseur, and retained certain records of the transaction. Her client list and the amount of investor funds has grown from \$6 million to \$13 million since March 2000. Mechlenburg has received at least \$500,000 in introducing party fees from Vavasseur. Upon receiving a payment from Vavasseur, Mechlenburg would take out her share and arrange for the distribution of the remainder of the sum to other introducing parties in the program.

It is undisputed that Mechlenburg facilitated transactions between her clients and Vavasseur. Like defendant Mason, defendant Mechlenburg contends that her due diligence of Dowdell led her to the reasonable belief that Vavasseur was legitimate. Unlike Mason who now expresses at least some doubt over the legitimacy of Vavasseur, Mechlenburg continues to declare it to be a legitimate trading program with essentially no risk of loss and returns of 100 percent or greater. According to Mechlenburg, the only risk of loss to investor principal was if a strong bank such as Barclays Bank, which she claims is the transnational bank for the program, went under.

Mechlenburg acknowledges that she can produce no document that substantiates the existence and success of any actual trading program of the type and scale involved in this case. Yet, the defendant contends that she did not need to in order to recommend Vavasseur. According to Mechlenburg, proper due diligence meant establishing that each element of a trading program had been set up or that the program was conducted by proper people. It is evident to the court that Mechlenburg did little to establish the elements of the trading program. Her erroneous assertion that Barclays Bank was the transnational bank for the program was not

based on any information she independently ascertained; rather, Dowdell is alleged to have told her this. Likewise, Mechlenburg stated that it was her understanding, based again solely on Dowdell, that investor funds wired to Dowdell's U.S. accounts were then transferred to The Bahamas. Thus, Mechlenburg's reliance on due diligence as a defense of her actions in recommending a no risk, high return investment rests entirely on the premise that she believed Dowdell to be the proper person to run Vavas seur.

In March 1995, Mechlenburg, due to her involvement in events related to an investment club in Massachusetts, consented to a permanent injunction enjoining her from violating Sections 17(a)(2) and 17(a)(3) of the 1933 Securities Act. A subsequent SEC Administrative Order issued in May 1996 barred Mechlenburg from association with any broker or dealer with a right to reapply to become so associated after one year. In her testimony, Mechlenburg suggested that her consent to the injunction was given out of convenience and a desire to be rid of prolonged litigation and not out of any admission of wrongdoing. Mechlenburg testified that the manager of that Massachusetts program was a swindler who cheated both her and the investors, misappropriated investor funds and lied about completing transactions. Six months after the SEC order, Mechlenburg invested in the trading program that would eventually become Vavas seur. Even though the Massachusetts scheme, which Mechlenburg states ruined her reputation, was a recent memory, the defendant never attempted to verify anything to do with the nature of the transactions which Vavas seur was allegedly conducting. This behavior, whether it resulted from deliberate ignorance or whether it can be attributed to remarkable gullibility, rises to the level of recklessness.

Therefore, the court finds that the SEC has demonstrated a substantial showing of likelihood of success in proving that Mechlenburg made misrepresentations regarding the sale of securities to her Vavas seur clients and that she did so recklessly.

On the issue of whether Mechlenburg was acting as a broker, it is undisputed that she arranged meetings between her clients and Dowdell, that she handled paperwork for them, forwarded information between her clients and Dowdell, explained details of the Vavasieur program to prospective clients, and retained various documentation related to the program. However, Mechlenburg denies acting as a broker, because she argues that she never marketed the program through networking, seminars or cold calling; rather, every individual investor came to her. Active solicitation is certainly a factor that courts look for in this inquiry, but it is not the only factor. *See SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (also mentioning whether the person is an employee of the issuer; received commissions as opposed to a salary; is selling, or previously sold, the securities of other issuers; is involved in negotiations between the issuer and the investor; and makes valuations as to the merits of the investment or gives advice). Generally, a court should determine if it can find a "certain regularity of participation in securities transactions at key points in the chain of distribution." *Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp.*, 411 F.Supp. 411, 415 (D.Mass.), *aff'd*, 545 F.2d 754 (1st Cir.1976).

It is not disputed that Mechlenburg received fees from Vavasieur based on the amount of investment funds which she brought into the program. Her actions on behalf of her clients were aimed at facilitating an agreement between her clients and Vavasieur. While Mechlenburg was never a full-time employee of Vavasieur, she testified that by the year 2000, she spent 100 percent of her time on her Vavasieur clients and the program. It is also undisputed that the amount of her client funds in the program more than doubled between March 2000 and November 2001. Taking all these factors into account, the assertion by Mechlenburg that she did not actively solicit clients is not fatal to the SEC's claim that she was acting as a broker. Thus, the court finds that the SEC has made a substantial showing of likelihood of success in

proving that Mechlenburg engaged in securities transactions for the accounts of others while not registered with the SEC as a broker-dealer in violation of Section 15(a)(1). As the court has already found that the SEC made a proper showing as to the making of misrepresentations with the requisite scienter under Sections 17(a)(1), Section 10(b) and Rule 10b-5 thereunder, the court also finds that a proper showing has been made with regard to a Section 15(c)(1) violation and Rule 15c1-2 thereunder.

C. Likelihood of Future Violations

Once the court has determined that the SEC met its burden in establishing past violations of securities laws, the next question to answer in deciding whether to issue an injunction is whether there is a reasonable likelihood that the wrong will be repeated. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972). Here, the court examines *inter alia* the degree of scienter involved, the isolated or recurrent nature of the infraction, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his or her conduct, and the likelihood, that because of the defendant's professional occupation, future violations might occur. *SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980).

Both Mason and Mechlenburg have a history of introducing parties to various trading or investment programs. Vavasseur was not an isolated incident. Both when allegedly notified by Dowdell that Vavasseur was ceasing U.S. operations, assisted in transferring either investor money or in the case of Mechlenburg, her own money, back into an investment program overseas. Absent from the testimony of the defendants was any recognition of the wrongful nature of their conduct. Mechlenburg, in particular, expressed her continuing belief that Vavasseur is a legitimate trading program. These defendants essentially promote a world of no risk and great rewards, and the court discerns nothing in the record to suggest that their world view will change.

Accordingly, the court finds that the SEC has made a proper showing as to the likelihood of future violations by defendants Mason and Mechlenburg.

V. Findings as to Vavasseur Corporation

A. Personal Jurisdiction

A court must have *in personam* jurisdiction over a party before it can validly enter an interlocutory injunction against it. *Visual Sciences, Inc. v. Integrated Communications Inc.*, 660 F.2d 56, 59 (2d Cir. 1981). As neither Mason nor Mechlenburg, upon appearing before the court, challenged personal jurisdiction, and because they appear to have been properly served, the court finds that personal jurisdiction is appropriately asserted with regard to both of these defendants. However, as Vavasseur Corporation has failed to appear, the court shall undertake a jurisdictional inquiry to determine if the SEC established a “reasonable probability of ultimate success on the issue of jurisdiction when the action is tried on the merits.” *Id.*; see also *Home-Stake Production Company v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1018 (10th Cir. 1990).

Both Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, authorize service “wherever the defendant may be found.” This language has been interpreted to provide for nationwide and worldwide service of process. See *Shotto v. Laub*, 632 F.Supp. 516, 524 (D.Md. 1986)(discussing Section 22(a) in terms of nationwide service of process); *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990)(same regarding Section 27) and *Robinson v. Penn Central Co.*, 484 F.2d 553, 554 (3d Cir.1973) (noting service of process provisions in Section 22(a) and Section 27 authorize worldwide service of process). When personal jurisdiction is invoked under a federal statute that confers nationwide or worldwide service of process, “the relevant inquiry is whether the defendant has had sufficient minimum contacts with the United States.” *In re Application to Enforce Admin. of Subpoenas of SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir.1996); see also

Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir.1985), *rev'd on other grounds sub nom. Holmes v. Securities Investor Protection Corporation, et al.*, 503 U.S. 258 (1992) (finding that "so long as the defendant has minimum contacts with the United States, Section 27 of the Exchange Act confers personal jurisdiction over the defendant in any federal court").

The court therefore shall determine whether the nonresident defendant has purposefully established minimum contacts with the forum and if so, whether the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *SEC v. Carrillo*, 115 F.3d 1540, 1542 (11th Cir. 1997); *see also Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994).

The SEC argues that Vavas seur Corporation intentionally conducted business in the United States and solicited American investors. While many foreign investors and a foreign corporation are involved in this case, the record reflects that the core operations of the program were conducted in the United States. The money, the paperwork and the personnel involved in the investment program operated by Vavas seur Corporation are all found in the United States. Moreover, an overview of Vavas seur Corporation, detailing the program for prospective clients, was distributed to investors in the United States. (SEC Court Ex. 10.) Contracts were completed in the United States. (SEC Ex. 10.) And at least two investors, the Schwandts, are U.S. citizens. The court thus finds that minimum contacts exist between Vavas seur Corporation and the United States.

In order to assess whether the notions of fair play and substantial justice will be offended by a finding of personal jurisdiction over Vavas seur Corporation, a court may evaluate "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in

obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Christian Science Bd. of Directors of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 217 (4th Cir. 2001). As the Fourth Circuit explained in *Nolan*, the overriding concern is that "jurisdictional rules are not exploited in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent." *Id.* (internal citations omitted).

It is doubtful that Vavas seur Corporation, having for the most part operated from within the United States since its inception, would face grave difficulties and inconvenience in having to litigate in this court. In addition, the United States has a strong interest in litigating cases of securities fraud where the acts constituting such fraud took place, and where at least some investors are located in the United States. Furthermore, the court recognizes that this is a complicated and convoluted case and accepts the SEC's representation that Vavas seur Corporation's participation in this litigation would be a convenient and effective way to address the wrongdoing involved. Thus, the court does not find that the notions of fair play and substantial justice are offended by exercising jurisdiction over Vavas seur Corporation.

Accordingly, the court has determined that the SEC has demonstrated a reasonable probability of ultimate success in showing that personal jurisdiction attaches to Vavas seur Corporation. The court also notes that service appears to be in proper order pursuant to Fed. R. Civ. P. 4(h)(2). The SEC was required to carry out service in a manner prescribed by the law of The Bahamas for service in an action in any of its courts of general jurisdiction. Fed. R. Civ. P. 4(f)(2)(A). Under Bahamian law, any notice on a company incorporated under Bahamian law can be served by leaving it or sending it to the company's registered office or to the company's registered agent. (Official Gazette The Bahamas, SEC Ex. 68.) The court has been provided with the acknowledgment of service form signed by Michael Paton, Vavas seur's

registered agent. (SEC Ex. 68.) In addition, the SEC represents, and corresponding records provided to the court support, that Paton has been consistently sent the orders and notices issued by this court. (SEC Ex. 76.) For the purposes of the preliminary injunction motion, the court also finds that Vavasseur has been issued notice pursuant to Fed. R. Civ. P. 65.

B. Preliminary Injunction Analysis

In setting forth the following facts and analysis, the court relies on the documentary evidence and witness testimony in the record but acknowledges that none of this has been provided by Vavasseur Corporation. The court also notes that the issue of whether Vavasseur is the alter ego of Terry Dowdell remains to be determined. The TRO contained an order to show cause why the court should not find that Vavasseur is the alter ego of Dowdell. Vavasseur never responded to the order, and Dowdell asserted his Fifth Amendment privilege. Meanwhile, the SEC has provided the court with a letter dated January 24, 2002, received from Vavasseur's registered agent, Michael L. Paton, in which he writes that "the Company denies that it is the alter ego of Mr. Dowdell." (SEC Ex. 75). The SEC has indicated that it needs to conduct further discovery on the issue, and the court awaits the results. As such, the court shall not take up the alter ego issue in this Opinion, and it moves now to whether Vavasseur Corporation should be enjoined.

As discussed above, the SEC must make a proper showing that Vavasseur Corporation made misrepresentations in connection with the sale of securities and, for purposes of Section 17(a)(1) or Section 10(b) and Rule 10b-5 thereunder, that this was done with scienter. The court finds that the record contains ample evidence to support the SEC's claim. The court has already found that the Vavasseur investment contract contained material misrepresentations, as does the the Vavasseur Overview which was provided to potential investors. Had Vavasseur Corporation adjusted the contract to eliminate promises of non-existent trades and prospects for extremely

high returns, there is substantial likelihood that reasonable investors may have considered such an adjustment as “as altering the total mix of information.” *SEC v. Randy*, 38 F.Supp. 657, 668-69 (N.D.Ill. 1999) (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). The court does not consider it to be an unfair burden to require that a corporation ascertain the truth of the statements contained in their contracts and their promotional materials. *See e.g. SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968)(*en banc*). No evidence is before the court that Vavas seur Corporation ever made such attempts. Indeed, the evidence before the court, in particular, Mechlenburg’s testimony that her clients were still receiving payments, suggests that the Vavas seur program continues to operate as before.

As for the likelihood of future violations, the court notes that on March 20, 2001, Dowdell, through counsel, represented that Vavas seur was to cease all U.S. operations and return investment funds. (SEC Ex. 20.) Yet documentation has been produced to show that investment money once received back into the United States was simply wired back out, this time to foreign accounts. This was the case with the U.S. investors, the Schwandts. While this information suggests that Vavas seur may now be more wily in avoiding U.S. law, this does not mean that the court should be unconcerned with a possible resurgence of the fraudulent activity in the United States. As such, the court finds that the SEC has made a substantial showing of likelihood of success on the merits in proving that Vavas seur Corporation engaged in and is likely to engage in violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

VI. Asset Freeze

The SEC also seeks an asset freeze to be included with the injunctive relief prohibiting future securities law violations. A court can grant an asset freeze upon a showing by the SEC that it is likely to succeed on the merits. *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998).

As the court has already determined that the SEC met the higher burden required for the preliminary injunction, that is, a substantial showing of likelihood of success as to both a current violation and the risk of repetition, the court finds that the SEC meets its burden with regard to an asset freeze. The court recognizes that Mason and Mechlenburg have a relatively small amount of funds which are subject to this order, but the court believes that the facts of the case warrant the requested relief. *See SEC v. Current Financial Services*, 783 F.Supp. 1441, 1443 (D.D.C. 1992) (finding such relief serves to preserve the basis for any disgorgement remedy).

VII. Other Pending Motions

A. Civil Contempt Motion against Mason

In the interest of disposing of pending motions in this case, the court shall also address the SEC motion for an order to show cause why defendant Mason should not be held in civil contempt. On November 20, 2001, the day after the court's asset freeze order took effect, defendant Mason withdrew \$5,000 from his business bank account. Moreover, Mason withdrew these funds after being served with the court papers containing the freeze order. Defendant Mason does not dispute these facts but claims that he did not actually read the court papers until after he had withdrawn the money from his account.

The SEC argues that Mason chose not to read the order at his own peril, and that it is undisputed that Mason did not comply with the court order. As such, the SEC moves for an order requiring Mason to replace the funds, proposing a reduction in the \$4,000 released by this court for Mason's monthly living expenses until the sum withdrawn is paid back into the bank account. The SEC further moves for the court to order Mason to pay the SEC its reasonable attorney's fees incurred in making this motion. According to the SEC, the motion was completely avoidable, and Mason has been obstinate and recalcitrant.

A court is required to make a finding of obstinance and recalcitrance before it can assess attorney's fees for the willful disobedience of a court order as part of the fine to be levied on the defendant. *See Columbia Gas Transmission Corp. v. Mangione Enterprises of Turf Valley, L.P.*, 964 F.Supp. 199, 204 (D.Md. 1996). Indeed, such attorneys' fees awards are to be granted only in exceptional circumstances. *See Omega World Travel, Inc. v. Omega Travel, Inc.*, 710 F.Supp. 169, 172-73 (E.D.Va. 1989) (discussing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), where the Supreme Court reaffirmed the "American rule," which disfavors awards of attorneys' fees except in a limited number of exceptional circumstances). While the court considers this a close call, it is not inclined to declare this such an exceptional circumstance to warrant an award of attorneys' fees.

As such, the court finds defendant Mason to be in contempt of a court order and orders him to return the sum of \$5,000 to his bank account within the next two months. The court leaves it to Mason's discretion as to whether he wishes to withdraw a lesser amount in living expenses over the coming months, or whether he wishes to replace the funds from another source, such as income from his legal practice. The court denies the SEC's request for attorneys' fees.

B. SEC Motion related to Mechlenburg's Discovery Obligations

Also before the court is a January 8, 2002 motion by the SEC for an order requiring defendant Mechlenburg to submit a revised affidavit describing her assets, to repatriate overseas assets and to otherwise comply with SEC discovery requests. Having found that a preliminary injunction should issue against Mechlenburg, and recognizing that the conditions and terms of the injunction encompass all the relief requested by the SEC in this motion, the court finds it unnecessary to issue a separate order obligating Mechlenburg to comply with what is already

contained in the preliminary injunction. The motion, therefore, is denied as moot.

VIII. Conclusion

The court recognizes that the entire story about the Vavasseau program has yet to be told. For example, this is a case where no investor complaints have yet to be made, but where at least two investors have asserted their Fifth Amendment privilege upon being contacted by the SEC. It is a case where it seems that every new bank document acquired by the SEC raises more questions. While the court may not have all the answers to the questions raised by the facts of the case, it does not need them at this stage of the proceedings.

Accordingly, the court finds that the SEC has made a substantial showing of likelihood of success in proving that Mason, Mechlenburg and Vavasseau Corporation engaged in and are likely to engage in acts that violate Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a)(1), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5. The SEC has made the same showing with regard to the claim that Mechlenburg engaged in and is likely to engage in acts that violate Sections 15(a) and 15(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(a) and 15 U.S.C. §78o(c), and Rule 15c1-2 promulgated thereunder, 17 C.F.R. 250.15c1-2. The court also finds that an asset freeze should enter against these defendants.

A preliminary injunction order against Mason, Mechlenburg and Vavasseau Corporation shall this day issue. The court shall also issue an order addressing the other motions discussed in this Opinion.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE	)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
)	
v.	)	<u>PRELIMINARY INJUNCTION</u>
	)	<u>ORDER</u>
TERRY L. DOWDELL, et al.,)	
)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

In its accompanying Memorandum and Opinion, the court set forth the findings of fact and conclusions of law for granting the SEC’s motion for a preliminary injunction order against defendants Birgit Mechlenburg, Kenneth Mason and Vavasseur Corporation (hereinafter “Vavasseur”). The court hereby reiterates that the SEC has made a proper showing for injunctive relief as required under the provisions of Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b) and Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(d).

In summary, the court has found the following:

5. That the court has jurisdiction over the parties and the subject matter in this case;
6. That the plaintiff has demonstrated a substantial showing of likelihood of success in proving that defendants Mechlenburg, Mason and Vavasseur have engaged in and are likely to engage in transactions, practices and courses of business that violate Sections 17(a)(1), (2) and (3) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. §§77q(a)(1), (2) and (3), and Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5, thereunder;

3. That there is good cause to believe that the SEC will ultimately succeed in establishing that defendant Mechlenburg has engaged and is likely to engage in transactions, practices and courses of business that violate Sections 15(a) and 15(c) of the Exchange Act [15 U.S.C. §78o(a) and 78o(c)], and Rule 15c1-2 [17 C.F.R. § 240.15c1-2] promulgated thereunder;
4. That there is substantial likelihood that defendants Mechlenburg, Mason and Vavasseur will continue to engage in such transactions, acts, practices and courses of business and in such violations unless immediately restrained and enjoined by Order of this court; and
5. Therefore, that the following Order is hereby issued:

I. ORDER RESTRAINING MECHLENBURG, MASON AND VAVASSEUR FROM VIOLATION OF SECTION 17(a) OF THE SECURITIES ACT

IT IS THEREFORE **ADJUDGED, ORDERED AND DECREED** that Defendants Mechlenburg, Mason and Vavas seur, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each of them, be and hereby are preliminarily restrained and enjoined from, directly or indirectly, in the offer or sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails:

- (1) employing any device, scheme or artifice to defraud;
- (2) obtaining money or property by means of any untrue statement of material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (3) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser,

in violation of Sections 17(a)(1), (2) and (3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1), (2) and (3).

II. ORDER RESTRAINING MECHLENBURG, MASON AND VAVASSEUR FROM VIOLATION OF SECTION 10(b) OF THE EXCHANGE ACT AND RULE 10b-5

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that defendants Mechlenburg, Mason and Vavas seur, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each of them, be and hereby are preliminarily restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of securities, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:

- (1) employing any device, scheme or artifice to defraud;

- (2) making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (3) engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17

C.F.R. § 240.10b-5, thereunder.

III. ORDER RESTRAINING MECHLENBURG FROM VIOLATION OF SECTION 15(a) OF THE EXCHANGE ACT

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that defendant Mechlenburg, her agents, servants, employees, attorneys, and those persons in active concert or participation with her who receive actual notice of this Order by personal service or otherwise, and each of them, be and hereby are preliminarily restrained and enjoined from, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, effecting any transaction in, or inducing or attempting to induce the purchase or sale of any security (other than an exempted security or commercial paper, bankers' acceptances or commercial bills) unless registered with the SEC as a broker or dealer in accordance with Section 15(b) of the Exchange Act [15 U.S.C. §78o(b), in violation of Section 15(a) of the Exchange Act [15 U.S.C. §78o(a)].

IV. ORDER RESTRAINING MECHLENBURG FROM VIOLATION OF SECTION 15(c) OF THE EXCHANGE ACT AND RULE 15c1-2

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that defendant Mechlenburg, her agents, servants, employees, attorneys, and those persons in active concert or participation with her who receive actual notice of this Order by personal service or otherwise, and each of them, be and hereby are preliminarily restrained and enjoined from, directly or indirectly, while acting as a

broker or dealer, making use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any securities (other than an exempted security or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange of which she is a member, by means of any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or by means of any untrue statement of material fact or omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, where such statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading, in violation of section 15(c) of the Exchange Act [15 U.S.C. §78o(c)], and Rule 15c1-2 [17 C.F.R. §240.15c1-2] promulgated thereunder.

V. ASSET FREEZE

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that:

- A. All funds and other assets of defendants Mechlenburg, Mason and Vavasseur, having been previously frozen by the court in the Order entered on November 19, 2001 and extended pursuant to the court's Orders entered on November 28, 2001 and December 7, 2001, shall remain frozen during the pendency of this litigation or until further Order of the court;
- B. Except as required or expressly permitted by Section VIII of this Order or until further Order of the court, Mechlenburg, Mason and Vavasseur, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, are hereby restrained and enjoined from, directly or indirectly:
 - 1. Transferring, selling, assigning, pledging, dissipating, concealing or otherwise disposing of, in any manner, any funds, assets, or other property belonging to, or in the possession, custody or control of defendants Mechlenburg, Mason and Vavasseur, wherever located and whenever acquired, including any and all accounts at any financial institution in the name of Mechlenburg, Mason and Vavasseur, and any and all accounts at any financial institution in which Mechlenburg, Mason or Vavasseur have signatory authority, otherwise exercise control, or have any beneficial interest;
 - 2. Opening or causing to be opened any safe deposit boxes, commercial mail boxes, or storage facilities titled in the name of Mechlenburg, Mason or Vavasseur, or subject to access by Mechlenburg, Mason or Vavasseur, without providing the SEC prior notice and an opportunity to inspect the contents in order to determine that they contain no assets subject to this Order;
 - 3. Transferring any funds or other assets subject to this Order for attorneys' fees or living expenses, except after providing prior written notice to the SEC and after obtaining prior approval by the court.

VI. ORDER PROHIBITING MECHLENBURG, MASON AND VAVASSEUR FROM OFFERING INVESTMENTS AND RAISING INVESTOR FUNDS

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that Mechlenburg, Mason and Vavasseur, their officers, directors, subsidiaries, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each of them, shall cease forthwith from: (1) soliciting, receiving or depositing into any account any additional investor funds; (2) promoting in any way their purported investment schemes as described in the Complaint; and (3) otherwise offering or selling investments relating to debenture transactions and off-shore investments.

VII. IDENTIFICATION OF ASSETS

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that, within fourteen (14) calendar days of this Order, defendants Mechlenburg, Mason and Vavasseur (to the extent not already done) shall identify, value, and state in writing the current whereabouts of all of their assets and funds having a value greater than \$5,000, including, but not limited to, all real and personal property.

VIII. REPATRIATION OF ASSETS

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that Mechlenburg, Mason and Vavasseur (to the extent not already done) shall take such steps as are necessary to repatriate to the territory of the United States of America all assets and funds, which are held by them or which are under their direct or indirect control, jointly or singly. Mechlenburg, Mason and Vavasseur must provide a written description of all such funds and assets so repatriated to this court and to the SEC's counsel within fourteen (14) days of the entry of this Order.

IX. ACCOUNTING

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that, within fourteen (14) days of this Order, defendants Mechlenburg, Mason and Vavas seur must provide the court and the SEC's counsel with (1) an accounting of all assets and funds received, directly or indirectly, from individuals who invested monies in the entities described in the SEC's Complaint, or in similar investments offered, directly or indirectly, by Mechlenburg, Mason or Vavas seur or any of the other defendants named in this lawsuit, the uses to which such funds were put and the amounts of any remaining funds and their location; (2) an accounting of all assets and funds received, directly or indirectly, from any other defendant, their officers, directors, subsidiaries, agents, servants, employees, and/or any persons in active concert or participation with them, the uses to which such funds were put, the amounts of any remaining funds and their location, and an accounting of all assets and liabilities; provided, however, that nothing in the Order shall be construed to require Mechlenburg, Mason or Vavas seur to abandon any constitutional or other legal privilege which they may have available to them under the laws of the United States.

X. ORDER PROHIBITING DESTRUCTION OF DOCUMENTS

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that defendants Mechlenburg, Mason and Vavas seur, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each of them, be and hereby are preliminarily restrained and enjoined from destroying, mutilating, concealing, altering or disposing of, in any manner, any of the books, records, documents, correspondence, brochures, manuals, obligations or other property of or pertaining to the offer and sale of securities by any defendant.

XI. DISCOVERY

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the SEC, Mechlenburg, Mason and Vavasseur are granted leave to serve interrogatories, requests for documents and requests for admissions, take depositions and subpoena documents immediately, and the time allowed to respond to such discovery requests is fourteen (14) business days after a request is served unless otherwise ordered by the court.

XII. NOTICE OF THIS ORDER

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that copies of this Order may be distributed by first class mail, overnight delivery, facsimile, or personally by agents or employees of the SEC, upon any bank, savings and loan institution, credit union, financial institution, broker-dealer, investment company, title company, commodity trading company, storage company, or any other person, partnership, corporation, or legal entity that may subject to any provision of this Order. For purposes of notice on anyone in possession of documents, records, assets, funds, property, or property rights, actual notice of this Order shall be deemed complete upon notification by any means, including, but not limited to, notice from distribution by facsimile transmission of the first page, Sections V and XII, and the final page of this Order, provided that such notice is followed within five days by delivery of a complete copy of this Order.

XIII. JURISDICTION

IT IS FURTHER **ADJUDGED, ORDERED AND DECREED** that this court shall retain jurisdiction of this matter for all purposes.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE	)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
	)	<u>ORDER</u>
v.)	
)	
TERRY L. DOWDELL, et al.,)	
)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The SEC's Motion to Refile its December 5, 2001 Motion for a Preliminary Injunction, filed March 4, 2002, shall be, and it hereby is, GRANTED and the Motion for a Preliminary Injunction is REFILED;

2. The SEC's Motion for a Preliminary Injunction is GRANTED, and a Preliminary Injunction Order against defendants Mason, Mechlenburg and Vavas seur Corporation shall issue;

2. The SEC's Motion for an Order to Show Cause Why Defendant Kenneth G. Mason should not be held in Civil Contempt, filed February 6, 2002, shall be, and it hereby is, GRANTED, in that the court finds Kenneth G. Mason in contempt for violation of the court's asset freeze order, issued November 19, 2001. The court orders him over the next two months to return \$5000 to the bank account from which he withdrew the funds.

3. The SEC's Motion for an Order Requiring Defendant Birgit Mechlenburg to Submit a Revised Affidavit Describing her Assets, to Repatriate Overseas Assets and to

otherwise Comply with SEC's Discovery Requests, filed January 8, 2001, shall be, and it hereby is, DENIED as MOOT.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date