

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

KLAUS HOFMANN,

Plaintiff,

CASE NO.: 09-20526-CIV-GOLD/MCALILEY

v.

EMI RESORTS, INC., *et al.*

Defendants.

**DEFENDANTS ENRIQUE DE MARCHENA AND DEMARCHENA KALUCHE
& ASOCIADOS' OBJECTION TO THE REPORT AND RECOMMENDATION
FOLLOWING PRELIMINARY FORENSIC ANALYSIS [D.E. 832]**

Defendants Enrique de Marchena and De Marchena Kaluche & Asociados ("DMK") (collectively "the DMK Defendants") object to the *Report and Recommendation Following Preliminary Forensic Analysis* [D.E. 832] as follows:

A. Standards of Review

"The powers of special masters, who are quasi-judicial officers, are set forth generally in Federal Rule of Civil Procedure 53. They include the ability to convene and to regulate hearings, to rule on the admissibility of evidence, to subpoena and swear witnesses, and to hold non-cooperating witnesses in contempt. Fed. R. Civ. P. 53(c)-(d)." *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1240 (M.D. Ala. 2004). The Special Master's responsibilities typically culminate in a report. The Court has a duty to review the Special Master's report and make the final determination of all the issues. *See Rogers v. Societe Internationale*, 278 F. 2d 268, *cert. denied*, 364 U.S. 895, 81 S. Ct. 223 (1960).

Fed. R. Civ. P. 53 sets forth the appropriate standard of review for this Court in reviewing findings of fact and conclusions of law made or recommended by the Special Master. Rule 53(f) provides as follows:

(3) *Reviewing Factual Findings.* The court must decide *de novo* all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval stipulate that:

(A) the findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Reviewing Legal Conclusions.* The court must decide *de novo* all objections to conclusions of law made or recommended by a master.

The parties have not stipulated to make the Special Master's factual findings final or reviewable only for clear error. Accordingly, pursuant to Rule 53(f) this Court must decide the DMK Defendants' objections to the Special Master's findings of fact and conclusions of law in his Report *de novo*.¹ See *Department of Educ., Hawaii v. Karen I.*, 2009 WL 3378587, 2 (D. Hawaii 2009); *Cornn v. United Parcel Service, Inc.*, 2006 WL 2642540, 1 (N.D. Cal. 2006); *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc.*, No. C01-20418JW, 2005 WL 149555, 2 (N.D. Cal. June 21, 2005); *Grace v. City of Detroit*, 341 F. Supp. 2d 709, 14 (E.D. Mich. 2004). In addition, the Court reviews matters of procedure for abuse of discretion. See

¹ *De novo* review does not necessarily mean a review that includes the submission of new evidence. When a record on review "is sufficiently developed the district court may, *in its discretion*, merely conduct a *de novo* review" of the decision, making its own independent determination. Although *de novo* review refers to the review based on the record below plus any additional evidence received by the reviewing court, it also refers to review of the decision based only on the record below. The plain language of Rule 53 shows that the review of a Special Master's decision requires the court to make a *de novo determination*, not conduct a *de novo hearing*. Rule 53 is similar to 28 U.S.C. § 636(b)(1)(C), when a district court reviews the recommendations of a magistrate judge, the district judge "may accept, reject, or modify" the findings made by the magistrate and "may receive further evidence." Unlike a *de novo* hearing, "a *de novo* determination requires the district judge to 'consider the record which has been developed before the magistrate [judge] and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate [judge].'" *Commissariat %22a l'Energie Atomique v. Samsung Electronics Co.* 245 F.R.D. 177, 179 (D. Del. 2007).

Fed. R. Civ. P. 53(g)(5); *Comtech EF Data Corp. v. Radyne Corp.*, 2008 WL 906532, 2 (D. Ariz. 2008).

B. The Master's Report Impermissibly Exceeds The Scope of the References.

The power of a Special Master is completely dependent upon his order of reference. *U.S. v. International Business Machines Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974). Special Masters are only authorized to take “evidence upon all matters embraced in the reference” and file a report covering “the matters submitted to the master by the order of reference.” *See* Fed. R. Civ. P. 53(c), (e)(1); *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1071 (6th Cir. 1977) (“power and authority” depends on reference); *Sauget v. Johnston*, 315 F.2d 816, 818 (9th Cir. 1963) (“report should only cover those matters stated in the order of reference”). In rendering his findings regarding the DMK Defendants and others, the Special Master exceeded the scope of the references by deciding questions of ultimate fact (*i.e.*, jury matters) and making recommendations regarding matters not properly at issue.²

1. There Was No Statutory Basis for the Appointment of A Special Master In This Case.

Fed. R. Civ. P. 53(a)(1) provides that a court may appoint a master only to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if the appointment is warranted by:

² The DMK Defendants' argument is timely. While it is true that an aggrieved party may seek review of an order of reference by an interlocutory appeal, *see* 28 U.S.C. § 1292(b), or a writ of mandamus, *see La Buy*, 352 U.S. at 254-55, 77 S. Ct. 309, a party is not required to do so because such order, as in this action, may be reviewed on appeal. *See Piper*, 532 F.2d at 1018.

- (i) some exceptional condition; or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

Rule 53(a)(1) does not permit reference to a master where as here, a jury trial is to be held.

The Court has not set forth any specific provision of Rule 53(a)(1) in its orders of referral. [See D.E. 348 at 9 and D.E. 528]. Clearly, neither Section (A) nor (C) apply here, leaving only Section (B) as the possible basis for the initial appointment of the Special Master. With the exception of financial accounting and complicated damage computations, under Section (B) the Court may not refer non-jury matters to a non-magistrate master without a showing that some “exceptional condition” requires it. See Fed. R. Civ. P. 53(a). No such condition, however, existed here and, “without such a showing, the [l]itigants are entitled to a trial by the court.” See *La Buy v. Howes Leather Co.* 352 U.S. 249, 258-59 (1957); *Sierra Club v. Clifford*, 257 F. 3d 444, 446-48 (5th Cir. 2001); *Piper v. Hauck*, 532 F.2d 1016, 1019 (5th Cir. 1976).

“The use of masters is ‘to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court.’ ” *La Buy*, 352 U.S. at 256, 77 S. Ct. at 309 (citation omitted); *Piper*, 532 F. 2d at 1019. The Court's articulated reasons for making the referral -- the complexity of the case and the volume of the filings on the docket - - clearly do not satisfy Rule 53's requirement of an “exceptional condition” and are plainly insufficient under the cases of the Supreme Court and its progeny. See *La Buy*, 352 U.S. at 259; *Piper*, 532 F. 2d at 1019; *In re Watkins*, 271 F. 2d 771 (5th Cir. 1959); also *Bradshaw v. Thompson* , 454 F.2d 75, 80 (6th Cir 1972) (The fact that “the case involves complex issues of

fact and law is no justification for reference to a Master, but rather is an impelling reason for trial before an experienced judge.”).³

2. The Special Master Was Not Charged With Determining The Civil Liability and Criminal Culpability of the DMK Defendants And Others.

Federal Rule of Civil Procedure 53(b)(2) requires an order of referral or appointment to include “the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c).” *Satyam Computer Services, Ltd. v. Venture Global Engineering, LLC*, 2007 WL 1806198, 6 (E.D. Mich. 2007). In its *Interim Order Following Hearing on Preliminary Injunction; Preliminarily Appointing Special Master* [D.E. 348], the Court appointed Thomas E. Scott, Esquire to be the Special Master “to investigate and recommend resolution of the many issues present in this case.” [D.E. 348 at 9]. The Court wrote:

I envision Master Scott’s role to involve two phases – the first an investigation, and the second a recommendation.

The scope of the Master’s duties will address the key concerns that have risen to date in this case. With respect to the Juan Dolio project, the Special Master, through accountants and real estate experts that he may retain, would review the accounting of the DMK Trust Account, including control over the account and incoming and outgoing funds. The Master would so assess the viability of the business plan, ascertain the cost to complete the Juan Dolio project, and determine if alternative sources of funding, such as a sale of the Miches property, could be used to complete the project and should be included in the business plan. The Special Master would evaluate the mortgage and other closing documents relating to the investments, and determine whether appointing a receiver would trigger a foreclosure right or otherwise have legal consequence. The Master would also investigate the potential diversion of Juan Dolio monies to other Elliott

³ In *La Buy*, the Supreme Court expressly held that a congested docket, the complexity of issues, and the extensive amount of time required for a trial do not, either individually or as a whole, constitute an exceptional condition justifying a Rule 53 reference to a special master in a non-jury antitrust action. *See La Buy*, 352 U.S. at 258-59, 77 S. Ct. 309. In *Piper*, 532 F. 2d at 1019, the court held that a crowded docket and the plaintiff's filing of sixteen different lawsuits in the same court did not constitute an exceptional condition warranting a reference of the trial to a magistrate judge under Rule 53.

businesses including whether such diversion was at the behest of James Catledge. The Master could then recommend an injunction that is narrowly tailored so as to maximize the return to investors and not jeopardize completion of the Juan Dolio or Cofresi projects.

The Special Master would also serve as this Court's liason with the courts in the Turks and Caicos and the Dominican Republic and recommend whether this Court should request the Turks and Caicos and Dominican Republic courts to refrain from taking action in the interests of comity, as Plaintiffs elected to first file suit here. Additionally, the Master would recommend whether Plaintiffs should be enjoined from filing suit elsewhere, given the tremendous drain on Plaintiffs' and Defendants' resources posed by the duplicative litigation, and recommend alternate remedies of an anti-suit nature, again to ensure that the limited resources available are used efficiently to further the goals of the investors.

Further, the Special Master would work with the parties to reach a confidentiality agreement, devise a discovery plan, and coordinate expert and fact discovery. To streamline discovery and avoid unnecessary disputes, I would grant Master Scott subpoena power to get records directly from the parties and require the parties to go through the Special Master before filing "emergency" motions with the Court.

To ensure that the cases are litigated so as to offer the investors full relief, the Special Master would verify Impact and Catledge's interest in the Elliott properties and the litigation, recommend proper alignment of the parties, including whether Plaintiffs need to be grouped by their investment vehicle, and recommend how to coordinate among the various suits.

Finally, the Special Master would investigate the potential sources of funding for his services, and the services of a receiver if I were to appoint one. The Special Master would recommend to the Court an allocation of costs and expenses among the parties.

[D.E. 348 at 9-11].

Rule 53 permits the district court to expand the initial mandate of the Special Master, but only by amending the referral order and "giving notice to the parties and an opportunity to be heard." Fed. R. Civ. P. 53(b)(4). Here, the Court apparently effectively did so when it issued its July 17, 2009 *Order Following Hearing on Plaintiffs' Joint Motion for Order to Show Cause*

[D.E. 474]; *Appointing Monitor By Agreement of the Parties* [D.E. 528]. According to that Order:

1. **The Special Master, in addition to his present duties, is appointed as MONITOR over the Elliott Defendants [footnote omitted] and their financial and business affairs.**

2. The Monitor over the Elliott Defendants shall have full and exclusive power, duty and authority to:

a. Examine, review and monitor the business affairs, funds, assets, choses in action and any other property of the Elliott Defendants;

b. Identify all of the Elliott Defendants' assets; and,

c. Take whatever actions are necessary for the negotiation (in conjunction with the Elliott Defendants and Plaintiffs' counsel) with creditors concerning the preservation or refinance of such assets, pursuant to this Court's Orders.

[D.E. 528 at 2-3; emphasis added].

Significantly, nowhere in the terms of reference (*i.e.*, the Monitor Order), was the Special Master charged with developing and proving a two-tier RICO liability theory of the case (for the Plaintiff's benefit [*see* D.E. 832 at 6-7]), determining the relative degree of civil liability of the defendants, including that of the DMK Defendants [D.E. 832 at 31-32], and evaluating if there is a "good faith and reasonable basis" [D.E. 832 at 29 n. 34] for recommending the Defendants and other third-parties for criminal investigation and prosecution as set forth in the Report. In doing so (and without a hearing and with evidence not made available to the DMK Defendants),⁴ the Special Master -- a former federal prosecutor and federal judge -- has overreached his legal authority and impermissibly usurped the duties and obligations of the Plaintiff, this Court, and the putative jury.

⁴ The Report admits that it "does not provide the explicit, detailed support for many of the statements which follow. . . ." D.E. 832 at 5.

3. The Special Master Has Usurped the Authority of the Court and Jury.

This Court did not have the power to appoint a Special Master to engage in the subject matter of the present Report and Recommendation (aside from simply performing a forensic analysis) without inappropriately abdicating its Article III judicial function. The Special Master has baldly concluded in the Report that “[t]here is enough and sufficient information available which establishes a reasonable and supportable conclusion that criminal activities have occurred and/or are still ongoing,” and includes the DMK Defendants. [See D.E. 832 at 5, 50-51]. With regard to the civil liability for Plaintiff’s claims, the Special Master has found that “Plaintiffs’ original complaints filed in this matter are, in large measure, factually correct based upon the information and documentation we have analyzed...” [See D.E. 832 at 5 n. 5.] It would be a usurpation of this Court’s obligations under Article III if this Court were to adopt these impermissible ultimate findings of fact and conclusions of law reached by the Special Master.⁵

The Court does not have the authority to refer the determination of the case's underlying RICO merits to a special master over, as here, a party’s objections -- as apparently has occurred here. *See La Buy*, 352 U.S. at 256, 77 S. Ct. at 309; *Ingram v. Richardson*, 471 F.2d 1268, 1271

⁵ *See La Buy*, 352 U.S. at 255-56 (where district court judge referred actions to special master on issues of existence of alleged conspiracies, liability, damages, and propriety of injunctions, despite judge's familiarity with the case and parties' objections, Seventh Circuit found judge's reference an abuse of power under Rule 53(b) and Supreme Court concluded that reference “amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation”); *Burlington N. R.R. Co. v. Department of Revenue of Wash.*, 934 F.2d 1064, 1072 (9th Cir.1991) (where “entire case” was referred to special master,” “master was given ‘all powers and privileges normally exercised’ ” by a district court judge, “circumstances of case were not ‘exceptional,’ ” and district court “rubber stamp[ed]” master's order, Seventh Circuit found “inexcusable abdication of judicial responsibility” and Article III violation) (citation omitted); *In re Clay*, 35 F.3d 190, 193 (5th Cir.1994) (holding that jury trial was an essential attribute of judicial power and hence, could not be delegated to a bankruptcy judge); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695-96 (1st Cir.1992) (where district court referred fundamental issues of liability to special master without sufficient court review or consent of parties, First Circuit vacated reference).

(6th Cir. 1972); also *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 439 (3rd Cir. 2005). A district court simply may not abdicate its judicial function by referencing the basic issues of liability to “a temporary substitute appointed on an *ad hoc* basis” *La Buy*, 352 U.S. at 259, 77 S. Ct. 309; see also *Stauble v. Warrob, Inc.*, 977 F.2d 690, 694 (1st Cir.1992) (“[W]here a district judge does not hear and determine the main course, *i.e.*, the meat-and-potatoes issues of liability, there is an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.”). The DMK Defendants certainly object to the unauthorized and improper referral here.⁶ Despite the DMK Defendants' protests to the contrary, the instant Report and Recommendation implicates the central merits of the Plaintiff's RICO case, which is reserved for this Court and jury. [See D.E. 832 at 5-29]

As the unauthorized trier of fact, the Special Master impermissibly determined witness credibility issues,⁷ the weight to be given evidence,⁸ and the permissible reasonable inferences all without permitting the DMK Defendants and the Elliott individual and corporate Defendants the opportunity to be heard.⁹ The parties' underlying dispute must be considered and tried by this Court and a properly empanelled jury in strict accordance with the Federal Rules of Evidence, not by the Special Master based solely upon his own review of unidentified, selected documents and unsworn and hearsay testimony not otherwise made available at this stage of the litigation to the Defendants.

⁶ To the extent that the Court relies on the DMK Defendants purported consent to the Monitor Order as a basis for its authority, the DMK Defendants have appealed the validity of the Order and have filed a Motion to Stay that Order [see D.E. 855].

⁷ See, e.g., D.E. 832 at 24 n. 29 (“Mr. De Marchena cannot simply have been mistaken; rather, he was untruthful in his statements to the Court.”).

⁸ See, e.g., D.E. 832 at 32 (“it is likely, and appears to be the case, based upon information received and analyzed, that De Marchena and his firm took direction from William Lambert and Gardiner Roberts; if not on every major decision and plan, then at least most of them”).

⁹ See, e.g., D.E. 832 at 32 (Mr. De Marchena “knew or should have known the use of funds” that were “handled through his trust account”).

The References here did not give the Special Master the authority to pass judgment on the DMK Defendants [*see* D.E. 832 at 7, 23 n.28, 24 n. 29, 31 and 32] with respect to their civil and criminal liability as to Plaintiff Hofmann's claims and the propriety of referring the DMK Defendants to U.S. and Dominican criminal authorities. Adopting the Special Master's Report would wrongfully be giving the Court's imprimatur to this misuse of power and improperly make the faulty findings of fact and conclusions of law the Law of this Case.¹⁰

Accordingly, based upon these procedural defects, the *Report and Recommendation Following Preliminary Forensic Analysis* [D.E. 832] in its totality must be rejected.

C. The Findings of Fact Regarding the DMK Defendants Are Wholly Unsubstantiated And Should Be Rejected.

With respect to the DMK Defendants, the Special Master reached the following findings of fact without specifically identifying much of the supporting documentary evidence or sworn witness testimony:

- Was the facilitator for many of the Elliotts' transactions relating to Juan Dolio and Cofresi;
- Mr. DeMarchena and his firm have received numerous large payments from the Elliotts for the work they performed, payments which were derived from investor funds;
- De Marchena's and his firm's involvement in virtually every aspect of the Elliotts' enterprise and business in the Dominican Republic (at least) is pervasive and he and his firm should be held accountable for facilitating many of the potentially illegal activities undertaken by the Elliotts. Mr. De Marchena and his firm were absolutely instrumental in carrying out the various transfers between corporations, corporate ownership structure and various other transactions with the Elliotts that essentially further improperly and fraudulently alienated the investors from their invested monies, away from their intended purpose and to another ulterior improper purpose and motive;
- Whether Mr. De Marchena and his firm were the lead architect of these legal maneuvers and/or advice to the Elliotts relating to the same and the Elliotts' misappropriation and/or outright theft of investor money remains to be seen; however, it is likely, and appears to

¹⁰ Adopting the Report and Recommendation in its present form would be akin to granting summary judgment on liability in Plaintiff Hofmann's favor, a duty and power clearly not within the terms of the present reference.

be the case, based upon information received and analyzed, that Mr. De Marchena and his firm took direction from William Lambert and Gardiner Roberts; if not on every major decision and plan, then at least most of them; and

- Many of the transactions were handled through De Marchena's trust account. As such, he knew or should have known the use of funds was invariably not for the intended purposes of the particular deposits, illegally commingling funds of separate entities. And he and his firm profited directly from those funds.

[D.E. 832 at 31 and 32].

Needless to say, the DMK Defendants object to each of these findings of fact made by the Special Master and requires that this Court review them *de novo* based upon the undisclosed evidentiary record¹¹ then before *only* the Special Master. In a document that reads more like a Bill of Indictment than a report of a forensic analysis, the Special Master drew every possible negative inference conceivable from the available factual record without granting the DMK Defendants the opportunity to be heard or to supplement it— *i.e.*, offering their own witness testimony and documentary evidence.¹² For example, the Special Master automatically attributes a nefarious motive to the DMK Defendants desire to get paid (and getting paid) for legitimate legal services that they performed over many years for the Elliotts and their companies.

In addition, the Special Master holds Mr. De Marchena to a duty of care standard regarding the use of his trust account not recognized in either Dominican or U.S law -- Mr. De Marchena (if he really did not “know”) “should have known” how funds were being used in the DMK trust account. In fact, the Special Master charges that Mr. De Marchena has been “untruthful in his statements to the Court” [D.E. 832 at 24 n. 29] and, thereafter impermissibly

¹¹ The DMK Defendants request that the documentary evidence and any transcribed witness testimony be provided immediately to them for their review.

¹² The DMK Defendants do not now attempt to rebut the Special Master's findings of fact with their own documentary evidence and sworn testimony because the Special Master has recommended that the Court refer the DMK Defendants for criminal investigation and prosecution. The Special Master's action requires the DMK Defendants to hereafter invoke their Fifth Amendment privilege against self-incrimination in this civil proceeding.

draws the direct opposite conclusions on the subject matter from the alleged false testimony.¹³
See id.

Finally, the Special Master finds that the DMK Defendants' alleged performance of corporate services for the Elliott Defendants makes them "facilitators" and thereby logically and automatically implicates the DMK Defendants in the alleged civil and criminal misdeeds engaged in by the Elliots. [See D.E. 832 at 51]. Adopting this rationale would, in effect, result in the wholesale indictment of lawyers (and non-U.S. lawyers) who practice corporate law.

Based upon these suspect findings of fact, the Special Master concludes that there is a "good faith and reasonable basis" to refer the DMK Defendants to U.S. and Dominican criminal authorities and to re-freeze the DMK Defendants' U.S. bank accounts. [D.E. 832 at 50] The DMK Defendants disagree.

The Special Master has fallen far short of demonstrating by clear and convincing evidence that there is a "good faith and reasonable basis" to refer the DMK Defendants to any criminal authority. The Special Master's findings of fact regarding the DMK Defendants cannot be adopted because of the lack of a substantial evidentiary basis to support them and the gross procedural violations which have occurred with regard to the appointment of the Special Master and the permissible scope of his duties.

¹³ A court may not reject a witness's testimony and use that ruling to infer - without countervailing evidence - that exactly the opposite must have occurred. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) ("discredited testimony is not considered a sufficient basis for drawing a contrary conclusion"); *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020, 1025 (7th Cir. 1999) ("A plaintiff cannot win just by putting the defendant on the stand and asking the jury to disbelieve him."); *Eckenrode v. Pa. R.R. Co.*, 164 F.2d 996, 999 n.8 (3d Cir. 1947) ("a belief that that testimony is false will not support an affirmative finding that the reverse of that testimony is true"); *United States v. Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956) (where a suggestion "does not arise from the evidence, but rather from unwillingness to believe that the evidence is true ... disbelief does not supply proof"). Thus, to the extent the Recommendations rest in any respect on a contrary finding, this Court must reject those Recommendations as unsupported by the record.

Further, there is no basis for re-freezing the DMK Defendants' U.S. bank accounts. The Report is devoid of any legitimate explanation for doing so. The Special Master has not demonstrated by clear and convincing evidence that the funds in any of the bank accounts were from investor funds obtained through fraud¹⁴ or that the DMK Defendants would dispose of their funds in these bank accounts to defeat any potential judgment.¹⁵ Accordingly, the Special Master has not demonstrated a basis for re-freezing the DMK Defendants' U.S. bank accounts.

CONCLUSION

For the foregoing reasons, Enrique de Marchena and De Marchena Kaluche & Asociados request that the Special Master's *Report and Recommendation Following Preliminary Forensic Analysis* [D.E. 832] be rejected in its entirety.

Respectfully submitted:

s/ Carlos F. Concepcion
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¹⁴ See, e.g., *Hudson Nat. Bank v. Shapiro*, 695 F. Supp. 544 (S.D. Fla. 1988) (Bank established clear legal right to recover funds in merchant accounts under Florida's civil theft and RICO statutes, for purposes of determining whether it was entitled to preliminary injunction freezing the accounts; bank presented evidence that accounts were used in fraudulent credit card scheme in which one account holder used several different factors to process sales with knowledge that there were large numbers of both chargebacks and unsatisfied refunds and that there were insufficient funds to cover chargebacks.).

¹⁵ The Eleventh Circuit Court of Appeals has held that an asset freeze is generally inappropriate when the purpose is to satisfy a potential judgment for money damages, a legal remedy. *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1530 (11th Cir.1994). The appellate court, however, distinguished an asset freeze ordered for the purpose of preserving assets for a legal remedy from one ordered for the purpose of preserving assets for an equitable remedy. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 987 (11th Cir.1995). The court found that "[a] request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief." *Id.*

In the legal-remedy context, asset freezes unrelated to the underlying illegal activity are considered to be attachments. *Rosen*, 21 F.3d at 1530; *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir.1994). Thus, in an action for damages, assets unrelated to the illegal activity may only be frozen as provided by state attachment law, in accordance with Federal Rule of Civil Procedure 64. *Mitsubishi*, 14 F.3d at 1521.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Carlos F. Concepcion
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SERVICE LIST

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United States District Court, Southern District of Florida

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