

<p>DISTRICT COURT, DENVER COUNTY, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>FRED J. JOSEPH, Securities Commissioner for the State of Colorado,</p> <p>Plaintiff,</p> <p>v.</p> <p>SEAN MICHAEL MUELLER, MUELLER CAPITAL MANAGEMENT, LLC, and MUELLER OVER UNDER FUND, LP,</p> <p>Defendants.</p>	<p><b>FILED Document</b></p> <p>CO Denver County District Court 2nd JD Filing Date: Apr 23 2010 4:18PM MDT Filing ID: 30756416 Review Clerk: Stacy Shaul</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General RUSSELL B. KLEIN, 31965* Assistant Attorney General SUEANNA P. JOHNSON, 34840* Assistant Attorney General 1525 Sherman Street, 7<sup>th</sup> Floor Denver, CO 80203 Klein Tel: (303) 866-5287 Johnson Tel: (303) 866-5255 russell.klein@state.co.us sueanna.johnson@state.co.us *Counsel of Record</p>	<p>Case No.:</p> <p>Courtroom:</p>
<p><b>EX PARTE VERIFIED COMBINED MOTION FOR TEMPORARY RESTRAINING ORDER, ORDER FREEZING ASSETS, ORDER OF NON-DESTRUCTION OF RECORDS, AND PRELIMINARY INJUNCTION WITH SUPPORTING LEGAL AUTHORITY</b></p>	

Plaintiff, Fred J. Joseph, Securities Commissioner for the State of Colorado (the “Commissioner”), by and through his counsel, the Colorado Attorney General, hereby moves this Court for an *Ex Parte* Temporary Restraining Order and Preliminary Injunction, Order Freezing Assets, and Order of Non-Destruction of Records against Defendants Sean Michael Mueller, Mueller Capital Management, LLC, and Mueller Over Under Fund, LP (“Defendants”), and as grounds for this Motion, states as follows:

1. This Motion is made pursuant to § 11-51-602, C.R.S. (2009) which authorizes the Commissioner to bring this action to temporarily, preliminarily and permanently restrain and enjoin violations of the Colorado Securities Act (“Act”) by the Defendants and to enforce compliance with the Act. The Commissioner incorporates herein by reference his Complaint for Injunctive and Other Relief (“Complaint”) filed contemporaneously with this Motion.

2. The Commissioner seeks issuance of the Temporary Restraining Order, Order Freezing Assets, and Order of Non-Destruction of Records in this matter *ex parte* because the time delay between the date the Defendants receive notice of the hearing and an actual hearing may result in further injury to unsuspecting Colorado investors. The delay in time may permit the Defendants to continue to diminish investor assets by transferring and concealing fungible assets, including money in bank accounts and securities in securities accounts. An initial review by the Division of Securities (“Division”) has revealed that the Defendants have essentially engaged in a classic “Ponzi”<sup>1</sup> strategy of using new investments by new investors to pay off old investors. Should the Defendants be permitted to continue their current course of action with no temporary restraining order in place, the Defendants will continue to be able to offer and sell their investments to the detriment of unsuspecting Colorado investors and in defiance of the Act. If an order freezing assets is not put in place, the Defendants will continue to be able to dissipate investor funds and assets which have been improperly titled in the names of the Defendants while continuing to improperly use new investor funds to make distributions to older investors. Finally, evidence has come to light to the Division showing that defendant Mueller has attempted to or may attempt to take drastic measures to evade liability for his violations of the Act. Thus, given the actions of the Defendants, there is an immediate threat of harm to Colorado investors, an immediate threat of dissipation of assets and irreparable damages to investors in Colorado if a temporary restraining order is not put in place and assets are not frozen on an *ex parte* basis.

## INTRODUCTION

3. The Commissioner is entitled to a temporary restraining order and preliminary injunction barring the Defendants’ sales of its securities in and from Colorado because the Defendants’ sales activities constitute violations of the Act. § 11-51-602(1), C.R.S. (2009). The Commissioner is not required to prove irreparable injury, demonstrate an inadequate remedy at law, or post bond. *Kourlis v. District Court*, 930 P.2d 1329 (Colo. 1997); *Joseph v. Equity Edge*, 193 P.3d 573 (Colo. App. 2008). The Defendants investments are securities

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<sup>1</sup> The name “Ponzi” scheme comes from Charles Ponzi, who in the early twentieth century orchestrated a multi-million dollar scheme of arbitrage using postal coupons. The only way Ponzi was able to pay off old investors was by bringing in new investor money.

as defined in § 11-51-201(17) (2009) in that they are at least “investment contracts.” The Defendants have violated the Act by selling securities in Colorado in violation of the antifraud provisions of the Act, § 11-51-501, C.R.S. (2009). Accordingly, in order to protect investors, the Commissioner requests that this Court enter an order halting the Defendants’ continued violations of the Act.

4. Further, under the equitable remedies afforded under the Act, the Commissioner is entitled to an order freezing assets to maintain the status quo for investor funds and to preserve assets to prevent diversion and waste to the detriment of those who were induced to invest in the Defendants’ scheme. *Eureka Coal Co. v. McGowan*, 212 P. 521 (Colo. 1922). Given the actions of the Defendants in this case, there is an immediate and ongoing threat of dissipation of assets, continued misuse of investor funds, and irreparable damage that will occur to investors in Colorado and nationwide if an order is not entered by this Court on an *ex parte* basis.

#### FACTUAL BACKGROUND

5. Mueller Capital Management, LLC (“MCM”) is a Delaware limited liability company headquartered in Greenwood Village, Colorado. Sean Michael Mueller (“Mueller”) is the managing director for MCM. The primary client of MCM is the Mueller Over Under Fund, LP (the “Fund”), a hedge fund organized as a limited partnership in Delaware.

6. The Fund was organized on September 20, 2002, and MCM was named the general partner. According to the Private Placement Memorandum (“PPM”) for the Fund, the offering was for up to \$100,000,000.00 worth of limited partnership interests, with a minimum investment of \$500,000.00. *See* PPM attached hereto as Exhibit 1.

7. According to the PPM, the Fund was to use short-term investment strategies involving long and short investments<sup>2</sup> in equities. By short-term, the Fund intended to hold the investment for as little as a few minutes. *See* exhibit 1, p. 4. In order to deploy its strategy, the Fund stated that it would ‘hedge’ its positions by buying “call” options and “put” options<sup>3</sup> and that it would use margin investing (leveraged investments through

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<sup>2</sup> Long investments refer to investments in companies that are expected to have price appreciation due to under-valuation. Short investments refer to investments in companies that are expected to have price depreciation due to over-valuation.

<sup>3</sup> A “call” option gives the holder the right to buy the underlying security at a certain price within a certain time period. A “put” option gives the holder the right to sell the security at a certain price within a certain time period.

borrowed money). Exhibit 1, p. 5 – 6. MCM, as the General Partner was entitled to collect a 1% annual fee from the limited partners for assets under management, as well as a 20% fee, at the end of each quarter, for increases on the limited partners' investment account. See Exhibit 1, p. 2.

8. On March 25, 2010, the Division received a complaint regarding Mueller, MCM, and the Fund. A copy of the letter is attached hereto as Exhibit 2. Although undated and unsigned, the letter expressed concern that Mueller was effectively operating the Fund as a Ponzi scheme, representing that he has never lost money in any monthly period and providing investors with inflated expectations of returns.

9. On April 23, 2010, the Division information regarding Mueller, MCM, and the Fund, and indicating that Mueller attempted to take his own life on April 22, 2010. This information was confirmed by the Greenwood Village Police Department. According to information received by the Division, Mueller was intercepted by the Greenwood Village Police Department and taken to the hospital for evaluation and treatment. On April 22, 2010, various investors with Mueller received the e-mails attached as Exhibits 3, 4, and 5.<sup>4</sup> In the e-mails (both dated April 22, 2010), Mueller makes statements to investors suggesting that he intended to 'disappear' to avoid difficulties associated with the Fund. For example, in Exhibit 3, Mueller states:

Nobody here or anywhere else had any idea what was happening. ... I think you can redo the taxes and recover a good amount of money. Nobody except myself had any access to the statements.

Sometimes life stresses overwhelm a person to the point where they can't go on. The confusion has finally won its battle with me and I feel like there are no good options left. I always thought I could make it back but that's not going to happen.

As you know, nothing in this world has been more important to me than my wife and two boys. I am pleading with you to assist them as you would want somebody to for your family if in the same situation. ...

See Exhibit 3. The e-mails in Exhibits 4 and 5 express substantially the same sentiment. As of April 23, 2010, the offices of MCM are locked and investors are unable to contact Mueller or MCM to determine the status of their investments.

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<sup>4</sup> For the protection of the investors, their identities have been removed from the e-mails.

10. In addition, these e-mails provide compelling evidence that Mueller and the Defendants have engaged in an ongoing practice of misleading investors about their alleged gains. In two of the three e-mails, Mueller indicates that investors can and should refile their tax returns to get back the taxes that they have already paid (on profits) and recover on the losses (that they will now be showing). *See Exhibits 4 and 5.*

11. In September and October of 2009, the Defendants conducted securities transactions through a variety of brokerage accounts. In October of 2009, at least one brokerage firm noticed a sudden change in Mueller's trading habits along with continued investor withdrawals and contributions. When the firm questioned Mueller about the sudden change, Mueller stated that his investment strategy had changed and that he was moving his accounts to other firms that would support his new strategy in futures contracts. Mueller would not disclose balances in the new accounts that would support the pending partner withdrawals. Mueller closed his account and withdrew over \$1 million. The firm filed a suspicious activity report.

12. Over the course of 2008 and 2009, the Defendants continuously sent monthly statements to investors in the Fund claiming that there were monthly gains of 1 to 2 percent, during a period where the markets were consistently down. As revealed in the e-mails attached as Exhibits 3 through 5, there were in fact no profits, and instead, there were losses suffered by the investors. Moreover, within the week before this motion was filed, Mueller revealed to at least two accountants that the Fund was essentially a Ponzi scheme and a fraudulent investment.

**LEGAL STANDARD APPLICABLE TO MOTION FOR TEMPORARY  
RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND ORDER  
FREEZING ASSETS**

13. Section 11-51-602(1), C.R.S. (2009) of the Act outlines a specific statutory procedure that governs the Commissioner's authority to obtain a preliminary injunction or temporary restraining order. Section 11-51-602(1) provides, in relevant part:

Whenever it appears to the securities commissioner upon sufficient evidence satisfactory to the securities commissioner that any person has engaged in or is about to engage in any act or practice constituting a violation of this article or of any rule or order under this article, the securities commissioner may apply to the district court of the city and county of Denver to temporarily restrain or preliminarily or permanently enjoin the act or practice in question and to enforce compliance with this article or any rule or order under this article. . . . In any such action, the securities commissioner shall not be required

to plead or prove irreparable injury or the inadequacy of the remedy at law. Under no circumstances shall the court require the securities commissioner to post a bond.

14. Unlike C.R.C.P. 65 and the six factor test described in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), § 11-51-602(1) specifically does not require the Commissioner to prove irreparable injury, demonstrate an inadequate remedy at law, or post bond. Furthermore, section 602(1) of the Act specifies that the Commissioner need only establish that a person has violated or is about to violate any provision of the Act to obtain a temporary restraining order or an injunction. In resolving this conflict, *Kourlis v. District Court*, 930 P.2d 1329, 1335 (Colo. 1997) is dispositive. See *Joseph v. Equity Edge*, 193 P.3d 573 (Colo. App. 2008).

15. In *Kourlis*, 930 P.2d at 1334-37, the court considered the authority of the Commissioner of Agriculture to obtain a temporary restraining order or preliminary injunction. The Commissioner of Agriculture's authority, outlined in § 35-80-111(3), C.R.S., conflicted with the more general requirements of C.R.C.P. 65. The Court determined that the specific requirements of § 35-80-111(3) prevailed over the general standards in C.R.C.P. 65.

16. Section 35-80-111(3) provided, in relevant part:

Whenever the Commissioner *possesses sufficient evidence satisfactorily indicating that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this article* or any rule adopted under this article, the commissioner may apply to any court of competent jurisdiction to temporarily or permanently restrain or enjoin the act or practice in question.... In any such action, the commissioner shall not be required to plead or prove irreparable injury or the inadequacy of the remedy at law. Under no circumstances shall the court require the commissioner to post a bond.

*Id.* at 1334 & n.12 (emphasis added). Section 35-80-111(3) is substantively identical to § 11-51-602(1), C.R.S.

17. In construing § 13-80-111(3), the Colorado Supreme Court concluded that the statute specifically did not require the Commissioner of Agriculture to show irreparable injury, demonstrate the inadequacy of a remedy at law, and to post bond. *Kourlis*, 930 P.2d at 1336. The court reasoned that the remaining factors identified in *Rathke* should not be applied to frustrate the purposes of the Pet Animal Care and Facilities Act ("PACFA"). *Id.*

Therefore, if the Commissioner of Agriculture demonstrated to the court that he possessed “sufficient evidence satisfactorily indicating that any person has engaged in or is about to engage in” a violation of PACFA, he could obtain a preliminary injunction and a temporary restraining order. *Id.* at 1336-37; *see State ex rel. Salazar v. Cash Now Store, Inc.*, 12 P.3d 321, 325 (Colo. App. 2000) *rev'd on other grounds*, 31 P.3d 161 (concluding that specific statutory provision of the Uniform Consumer Credit Code outlining administrator’s standard for obtaining a preliminary injunction or temporary restraining order prevailed over the six-factor test of C.R.C.P. 65 and *Rathke*).

18. The Colorado Securities Act is virtually identical in all material respects to PACFA. Section 11-51-602(1) delineates a specific statutory procedure as part of a comprehensive statutory scheme. *See* § 11-51-101 through § 11-51-908, C.R.S. (2009). Accordingly, the standards in § 11-51-803, C.R.S. (2009). Accordingly, the standards in § 11-51-602(1) prevail over the more general requirements of C.R.C.P. 65 and *Rathke*.<sup>5</sup> The Commissioner thus only needs to produce “sufficient evidence satisfactorily indicating that [the Defendants] [have] engaged in or [are] about to engage in” a violation of the Act to obtain a temporary restraining order or temporary injunction.

19. Moreover, an order freezing assets is appropriate to ensure that sufficient funds are available to satisfy any final judgment the Court might enter against the Defendant and to ensure a fair distribution to investors. *See, e.g., SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2nd Cir. 1972); *SEC v. Unifund SAL*, 910 F.2d 1028 (2nd Cir. 1990). An asset freeze is appropriate to assure satisfaction of whatever equitable relief the court ultimately may order and to preserve investor funds. *Id., CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978). Additionally, an asset freeze “facilitates enforcement of any disgorgement remedy that might be ordered” and may be granted “even in circumstances where the elements required to support a traditional SEC injunction have not been established.” *See SEC v. Unifund Sal*, 910 F.2d 1028, 1041 (2d Cir.) *reh'g. denied*, 917 F.2d 98(1990). It is well recognized that an asset freeze is sometimes necessary to ensure that a future disgorgement order will not be rendered meaningless. *See, e.g., United States v. Cannistraro*, 694 F. Supp. 62, 71 (D.N.J. 1988), *modified*, 871 F.2d 1210 (3d Cir. 1989); *SEC v. Vaskevitch*, 657 F. Supp. 312, 315 (S.D.N.Y. 1987); *SEC v. R.J. Allen & Assocs., Inc.*, 386 F.Supp 866,881 (S.D. Fla. 1974).

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<sup>5</sup> *Compare Baseline Farms Two, LLP v. Hennings*, 26 P.3d 1209, 1212 (Colo. App. 2001) (applying the *Rathke* six-factor test and distinguishing *Kourlis* in determining standards for obtaining a preliminary injunction because the case did not involve enforcement action undertaken by a governmental entity and was not undertaken pursuant to a specific statutory procedure).

20. The ancillary remedy of a freeze order requires a lesser showing than that needed to obtain injunctive relief. See *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402, 415 (S.D.N.Y. 2001) (“courts may order a freeze even where the SEC has failed to meet the standard necessary to enjoin future violations”). The lower standard is the direct result of the recognition that injunctive relief raises the possibility of future liability for contempt; an asset freeze only preserves the status quo. *Unifund Sal*, 910 F.2d at 1039. Accordingly, where there are concerns that defendants might dissipate assets, a freeze order requires only that the court find some basis for inferring a violation of securities laws. *Id.* at 1041.

### LEGAL ARGUMENT AND ANALYSIS

21. In the Complaint, the Securities Commissioner has alleged that the Defendants have violated the antifraud provisions of the Act.<sup>6</sup>

22. Section 11-51-501(1), C.R.S. (2009), the antifraud section of the Act, provides:

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:

- a. to employ any device, scheme, or artifice to defraud;
- b. to make any untrue statement of a material fact or to omit 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; or
- c. to engage in any act, practice or course of business which operates or would operate as a fraud or deceit on any person.

#### **I. The Investments Offered by the Defendants are Securities.**

23. The investments offered by the Defendants are securities as contemplated under § 11-51-201(17), C.R.S. in that they are at least “investment contracts.”

24. Colorado courts, when considering whether an investment vehicle is an “investment contract” and therefore a security, have adopted the test first announced in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), as modified by *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975). See *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1205 (Colo. 1976); *Toothman v. Freeborn & Peters*, 80 P.3d 804, 811 (Colo. App. 2002). An

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<sup>6</sup> The allegations are contained in the Complaint, filed contemporaneously with this Motion, are incorporated in this Motion.



“investment contract” under Colorado law, therefore, is: (1) a contract, transaction, or scheme whereby a person invests his or her money (2) in a common enterprise, and (3) is led to expect profits derived from the entrepreneurial or managerial efforts of others. *Toothman*, 80 P.3d at 811; *Joseph v. Viatica Mgmt., LLC*, 55 P.3d 264, 266 (Colo. App. 2002); *Feigin v. Digital Interactive Associates, Inc.*, 987 P.2d 876, 881 (Colo. App. 1999). This definition “embodies a flexible rather than a static principle, one that is 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; *see also Lowery*, 556 P.2d at 1205 (holding that the expansive language in the definition of a “security” under the federal securities act “indicates a legislative intent to provide the flexibility needed to regulate the various schemes devised by those who seek the use of the money of others with the lure of profits”).

25. Here, the Defendants offered an investment that is a security as an investment contract. First, the PPM attached as Exhibit 1 indicates that investors were investing in limited partnership interests in the Fund, a common enterprise, and the structure of the investment clearly contemplated that the investors were to expect profits in return. The Defendants promise of returns leads investors to expect profits from the investment. And, this profit would come as a result of the efforts of the Defendants, who were responsible for the management of the Fund (with Mueller serving as the director of MCM, and MCM serving as the general partner and investment adviser to the Fund) and all of its alleged underlying investments. The Defendants directed all of the activities necessary to effect the management and conduct of the Fund, devised the investment strategy, and identified equity securities to acquire to increase the overall value of the Fund. This arrangement virtually guaranteed that the Defendants, and not the investors, would be the parties responsible for managing the investment.

## **II. The Commissioner Has Met His Burden for the Entry of a Temporary Restraining Order and a Preliminary Injunction.**

26. Pursuant to § 11-51-602(1), C.R.S. (2009) and *Kourlis*, the Commissioner only needs to produce sufficient evidence satisfactorily indicating that the Defendants have engaged in a violation of the Act to obtain a temporary restraining order or a preliminary injunction. As set forth in this Motion and the Complaint, the Defendants are offering and selling the investments in the Fund in violation of the antifraud provisions of the Act, to the detriment of the investing public in Colorado, all in violation of § 11-51-501, C.R.S. (2009).

27. Because of the Defendants’ violation of the antifraud provisions of the Act, and the indications from Mueller that he has either effectively abandoned the Fund and Fund investors, or that he intends to abandon the Fund and Fund investors, a temporary restraining order is necessary to preserve the status quo, and at a minimum, allow the Plaintiff an

opportunity to more fully review the status of the Fund and the intentions of Mueller. Indeed, Mueller has indicated in his e-mail to investors that investors will need to file corrected tax returns to recover taxes paid on profits, and that they will now be able to recover for losses that they will now be reporting. Moreover, given Mueller's indications that he intends to at a minimum, abandon his clients and the Fund, the Defendants must be enjoined from bringing new investors into the Fund and from carrying out its operations.

28. The issuance of a temporary restraining order or a preliminary injunction will not create an undue hardship on Defendants since the Defendants' conduct is in violation of the Act, and it is established that compliance with the Act and similar laws is necessarily in the public interest for a variety of reasons. In *Black Diamond Fund v. Joseph*, 211 P.3d 727, 738 (Colo. App. 2009), the Colorado Court of Appeals recognized that "[c]ompliance with the [Colorado Securities Act] is necessarily in the public interest. The passage of such laws by the legislature establishes the public interest underlying such provisions." See also, *Reich v. Monfort*, 144 F.3d 1329, 1335 (10<sup>th</sup> Cir. 1998) (recognizing that compliance with regulatory schemes serves numerous purposes, including protecting the public interest to prevent continuous unlawful conduct, taking away the gains and the prospect of gains from violators, and even to protect those who do comply with the law from having to compete with those who fail to comply). The purpose of the Act is to "protect investors and maintain public confidence in the securities markets...." See § 11-51-101(1), C.R.S. (2009). And, § 11-51-602, C.R.S. (2009) specifically authorizes the Commissioner to seek injunctive relief as an enforcement tool to enjoin such violations. Thus, as statutorily authorized, enjoining the unlawful acts of the Defendants will serve the public interest by protecting investors.

29. Based on his investigation, the Commissioner believes that the Defendants have in their possession documents and information relevant to this matter, which information and documents may be concealed, destroyed, or otherwise altered. The Commissioner requests that the Court enter an order, in connection with the temporary restraining order and preliminary injunction, directing the Defendants to not destroy, mutilate, or otherwise dissipate any books, records or documents in its possession relating to the subject matter of this action pending further order of the Court as destruction, concealment or other alteration of books, records or documents in Defendants' possession may irreparably damage the Court's ability to grant effective final relief for Colorado investors in the form of restitution, rescission, disgorgement and other equitable relief.

30. Moreover, although the Commissioner has not been able at this time to identify any actual trading accounts or bank accounts controlled or titled to the Defendants in connection with the investment, the Commissioner requests that this Court issue an order freezing any accounts titled to any of the Defendants. Given Mueller's statements that indicate he was misleading investors regarding profits, and his attempt to take his own life,

the Defendants' accounts must be frozen to prevent any dissipation of assets or other unpredictable actions at the hands of Defendants.

31. Thus, together with the temporary restraining order or preliminary injunction and the order of non-destruction of records, the issuance of a temporary restraining order or a preliminary injunction freezing the funds and securities in the accounts controlled and held by the Defendants will serve to preserve the status quo and prevent the further dissipation of investor assets. Section 11-51-101(1), C.R.S. states that the purpose of the Act is to "protect investors and maintain public confidence in the securities markets...." And, § 11-51-602, C.R.S. specifically authorizes the Commissioner to seek injunctive relief. Thus, as statutorily authorized, freezing the assets will serve to further the public interest by ensuring that the seized assets remain available to return to investors in the event of any disgorgement or damages award, and to ensure that to the extent that there are any investor funds remaining, that those assets are able to be returned at the conclusion of the case.

### CONCLUSION

32. The Defendants have engaged in a scheme, operated from Colorado, to defraud investors through the sale of limited partnership investments in a hedge fund. The evidence establishes that the Commissioner has a strong likelihood of success on the merits, and that the entry of a temporary restraining order or preliminary injunction, order of non-destruction of records, and order freezing assets is necessary and appropriate in the public interest, as well as consistent with the legislative intent embodied in the Colorado Securities Act. Therefore, the Commissioner requests that the Court enter the orders submitted contemporaneously herewith, entering a temporary restraining order or preliminary injunction, freezing the assets and accounts of the Defendants pending the hearing on the motion for preliminary injunction, ordering the Defendants to preserve all records, and enter such other and further relief as this Court deems just and equitable.

WHEREFORE, the Commissioner respectfully requests that the Court enter relief as follows:

1. A temporary restraining order and preliminary injunction or other Order of this Court, enjoining Defendants Sean Michael Mueller, Mueller Capital Management, LLC, and Mueller Over Under Fund, LP, as well as their officers, agents, servants, employees, successors and attorneys, as may be; any person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under the common control with Defendants; and all those in active concert or participation with Defendants who receive actual notice of the Court's Order by personal service, facsimile transmission or otherwise, from engaging in the following acts:

- a. Offering to sell or selling any security, including but not limited to the Defendants' securities, to any person in or from Colorado, until further order of this Court;
  - b. Transacting business in or from Colorado as a broker-dealer or sales representative, until further order of this Court;
  - c. In connection with the offer, sale, or purchase of any security or investment in Colorado, directly or indirectly:
    - (1) Making any written or oral untrue statements of material fact, or omitting to state material facts necessary to make the statements made, in light of the circumstances under which they are made, not misleading; or
    - (2) 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 § 11-51-501(1), C.R.S.;
  - d. Engaging in any conduct in violation of any provision of the Colorado Securities Act; and
  - e. Destroying, mutilating, altering or in any other way dissipating the books and records of the Defendants Sean Michael Mueller, Mueller Capital Management, LLC, and Mueller Over Under Fund, LP;
2. Issue on an *ex parte* basis an Order, in the form submitted, an Order Freezing Assets and Order of Non-Destruction of Records;
  3. For expedited discovery in advance of the hearing on Preliminary Injunction;
  4. Enter and issue such further and other relief as this Court deems just and equitable.

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JOHN W. SUTHERS  
Attorney General

/s/ Russell B. Klein

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Financial Unit

Business & Licensing Section

Attorneys for Plaintiff

\*Counsel of Record

**VERIFICATION**

I, Michael Williams, being duly sworn, state as follows:

1. I am employed by the Colorado Division of Securities as an Investigator.
2. I am familiar with the information contained in the foregoing *Ex Parte* Verified Combined Motion for Temporary Restraining Order, Order Freezing Assets, Order of Non-Destruction of Records, and Preliminary Injunction with Supporting Legal Authority (“Verified Motion”).
3. I have reviewed the Verified Motion. The facts stated therein are true and correct to the best of my knowledge.

FOR THE STAFF OF THE COLORADO  
DIVISION OF SECURITIES

\_\_\_\_\_  
Michael Williams  
Investigator

Subscribed and sworn to before me this \_\_\_\_ day of April, 2010.

\_\_\_\_\_  
Notary Public

Commission Expiration: \_\_\_\_\_