

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
TOPEKA DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DAVID TANNER, Individually, and d/b/a  
CAPITAL ENHANCEMENT CLUB,  
ROCKY D. SPENCER,  
MARROC CORP., and  
RICHARD P. KRINGEN,

Defendants,

and

MARGARET F. SPENCER,  
OMNIBUS LLC,  
VECTRA RESOURCES, LLC, and  
DYNAMIC ENVIRONMENTAL SOLUTIONS, INC.,

Relief Defendants.

Civil Action No.  
05-4057-SAC

**PLAINTIFF’S MOTION FOR ORDER REQUIRING DEFENDANT DAVID TANNER  
TO EXECUTE CONSENT DIRECTIVE AND MEMORANDUM IN SUPPORT**

Plaintiff Securities and Exchange Commission moves for an Order requiring that defendant Tanner execute consent directives. In support of this Motion, the Commission states:

**I. Facts**

1. On May 4, 2005, the Commission filed a Complaint alleging that defendant David Tanner masterminded a scheme to defrauded investors of at least \$15 million through the fraudulent offer and sale of securities referred to as a “private joint venture investment.” Operating under the name Capital Enhancement Club (“CEC”), Tanner

and others falsely claimed that CEC would pay monthly interest of approximately 7% to 11% (120% to 260% annually) from “trading in international markets.” In reality, CEC’s trading program is nonexistent and the investor funds were pocketed by the Defendants or transferred at Tanner’s instruction to an offshore bank.

2. Based on the Commission’s motion, this Court entered an Order freezing the assets of Tanner and the other defendants. (the “Asset Freeze Order”)[Doc.9]. The Court further ordered that Tanner and others repatriate all funds or assets held outside the territorial limits of the United States, received directly or indirectly, from the activities described in the Commission’s Complaint. The Court also ordered Tanner to provide an accounting and turn over records relating to CEC.

3. Since the entry of the Asset Freeze Order and other orders, Tanner has failed to provide meaningful discovery or to repatriate assets. Tanner asserted his Fifth Amendment privilege and failed to provide discovery of documents, repatriation of funds, or provide an accounting of investor funds—all previously ordered by the Court. Most recently, Tanner refuses to schedule an agreeable deposition time, again relying on a blanket Fifth Amendment privilege assertion.<sup>1</sup> Incredibly, Tanner seems to believe he can answer the Commission’s Complaint with a general denial and defend in this matter while refusing to appear in person for a deposition and refusing to provide basic identification information including his place of residence.

4. The Commission and the court-appointed Receiver now ask this Court to properly define the limits of Tanner’s assertion of his Fifth Amendment privilege in this

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<sup>1</sup> “A subject of a subpoena should appear before the interrogating officer and under oath specifically claim his constitutional rights as to particular questions while answering others not presenting a threat of self-incrimination.” *Unites States v. Malnik*, 489 F.2d 682 (5<sup>th</sup> Cir. 1974). In a future motion, the Commission intends to challenge Tanner’s overly-broad assertion of privilege.

civil action and order Tanner to sign a consent directive that will allow the Commission and the Receiver to obtain information and documents concerning his extensive offshore financial dealings.

**II. A Consent Directive is Necessary and Supported by Supreme Court Precedent**

5. In view of the evidence reflecting that Tanner has received at least \$15 million of investor funds for which he refuses to account to this Court, relying upon his Fifth Amendment privilege not to incriminate himself, the Commission seeks an Order directing him to provide a consent directive.

6. This consent directive sought in this case is based on the Supreme Court's holding in *Doe v. U.S.*, 487 U.S. 201 (1988). In *Doe*, the District Court ordered the defendant to execute a consent directive substantially similar to that sought by the SEC in the present case. The Fifth Circuit and the Supreme Court affirmed. The Supreme Court, defining the limits of a defendant's Fifth Amendment assertion commented as follows on this form of consent directive:

"The consent directive itself is not 'testimonial.' It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist. . . . The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. . . ."

487 U.S. at 215. See also *U.S. v. Ghidoni*, 732 F.2d 814, cert. denied, 469 U.S. 932 (1984).

7. This Court is also no stranger to the use of the *Doe* consent directive. In *SEC v. Oracle Trust, et al*, No. 99-1483-MLB (D. Kan. Jan. 19, 2000)(order requiring consent directives), Olathe, Kansas, defendant Jerome DeFries master-minded a high-yield investment scheme nearly identical to CEC. Like Tanner, DeFries asserted his Fifth Amendment privilege against self-incrimination and ignored the court's orders requiring repatriation of funds sent offshore. This Court ordered DeFries to provide a consent directive in the form now sought in this action.<sup>2</sup> Ultimately the Commission and the Receiver were able to use the directive to discover necessary banking records and return a substantial amount of funds to defrauded Oracle Trust investors. A copy of Judge Beloit's order and the consent ultimately signed by DeFries are attached as exhibit A.

8. This Court's May 4, 2005, Asset Freeze Order required Tanner to repatriate to the Court's Registry all funds or assets held outside the territorial limits of the United States, which he received directly or indirectly, from the activities described in the Commission's Complaint. As set forth in the Commission's original application for repatriation, the Court has the power to order Tanner to cause funds that he controls to be transferred from foreign accounts to the United States. As the Supreme Court held in *United States v. First National City Bank*, 379 U.S. 378, 384 (1965), "the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States." *Accord In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985) (the court had the authority to compel the repatriation of foreign assets where defendant had engaged in "numerous" and "substantial efforts to hide and secrete

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<sup>2</sup> Ironically, the Receiver has discovered that in this matter defendant Tanner paid DeFries \$18,000.

assets"). See also *Inter-Regional Financial Group, Inc. v. Hashemi*, 562 F.2d 152, 154 (2d Cir. 1977), cert. denied, 434 U.S. 1046 (1978) (district court had authority to order defendant to transfer foreign assets into the jurisdiction to enable the court to attach them); *Fleming v. Gray Manufacturing Co.*, 352 F. Supp. 724, 726 (D. Conn. 1973) ("this Court has personal jurisdiction over the defendants and, if justice and the reasonable demands of the situation warrant, may order the defendants to do or refrain from doing, certain acts in another state").

9. The need for temporary relief assumes added importance in cases brought, as here, to protect the public interest. "[W]hen the public interest is involved in a proceeding of this nature, [a district court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1988) (citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1106).

10. Repatriation and a consent directive is plainly an appropriate step in a case such as this, where the Commission has already demonstrated a prima facie case, and where Tanner asserts an overly-broad Fifth Amendment privilege as to matters alleged in the Compliant, including the receipt of at least than \$15 million from defrauded CEC investors.

### **III. Conclusion**

11. In view of the evidence reflecting that the defendant Tanner transferred money raised from CEC investors outside the territorial limits of the United States, the Commission desires to obtain information and documents concerning Tanner's dealings

with foreign banks. Therefore, the Commission requests that the Court order Tanner to sign consent directives, in multiple originals, in the forms attached hereto as exhibit B.

12. The Receiver has reviewed this motion and concurs in the relief sought.

DATED: July 28, 2005.

Respectfully submitted,

**s/ TIMOTHY P. DAVIS**

TIMOTHY P. DAVIS

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**CERTIFICATE OF CONFERENCE**

I hereby certify that on July 25, 2005, I provided to Robert Herskovits, attorney for defendant Tanner, a copy of the foregoing **PLAINTIFF'S MOTION FOR ORDER REQUIRING DEFENDANT DAVID TANNER TO EXECUTE CONSENT DIRECTIVE AND MEMORANDUM IN SUPPORT**. The parties were unable to reach agreement as to the substance of the motion.

**s/ TIMOTHY P. DAVIS**

Timothy P. Davis

**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2005, I electronically filed the foregoing **PLAINTIFF'S MOTION FOR ORDER REQUIRING DEFENDANT DAVID TANNER TO EXECUTE CONSENT DIRECTIVE AND MEMORANDUM IN SUPPORT.** with the Clerk of the Court for the District of Kansas, Topeka Division, by using the CM/ECF system which will send a notice of electronic filing to the following CM/ECF participants:

Michael Bachner, Robert L. Herskovits and Thomas D. Haney, Counsel for Defendant Tanner;

Christopher M. Joseph & Stephen M. Joseph, Counsel for Spencer Defendants;

Roger N. Walter, Local Counsel for Relief Defendant Vectra Resources, LLC;

Kenneth L. Weltz & Brian M. Holland, Counsel for Receiver.

**s/ TIMOTHY P. DAVIS**

Timothy P. Davis