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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SECURITIES AND EXCHANGE
COMMISSION,

vs.

JOHN CLEMENT and EDGEFUND
CAPITAL, LLC,

Plaintiff,

Defendants.

CASE NO. 11cv1034-LAB (WVG)
**TEMPORARY RESTRAINING
ORDER**

The SEC accuses John Clement, through his company Edgefund Capital, of running a Ponzi scheme by soliciting over \$2 million in investments to two hedge funds, projecting substantial returns and capped losses, and re-distributing investors' money as purported returns. The rest of the money, the SEC alleges, went into a Bank of America account from which Clement drew heavily for extravagant personal expenses, and into a brokerage account that made no profit whatsoever. Clement is charged with violating section 17(a) of the Securities Act, section 10(b) of the Exchange Act, and section 206 of the Advisers Act. Now before the Court is the SEC's application for a temporary restraining order freezing

1 Clement's and Edgefund's assets and prohibiting the destruction of documents.¹

2 The Court is typically guided by the factors set forth in *Winter v. Natural Res. Def.*
3 *Council, Inc.* in determining whether to grant injunctive relief: "A plaintiff seeking a preliminary
4 injunction must establish that he is likely to succeed on the merits, that he is likely to suffer
5 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
6 favor, and that an injunction is in the public interest." 555 U.S. 7, 129 S.Ct. 365, 374 (2008).
7 The *Winter* standard is less applicable in a case like this one, however, because the SEC's
8 status is not that of "an ordinary litigant," but of "a statutory guardian charged with
9 safeguarding the public interest in enforcing the securities laws." *S.E.C v. Management*
10 *Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). For this reason, irreparable injury can be
11 *presumed* if "the likelihood of future violation of the securities laws has been clearly
12 demonstrated." *Id.* Indeed, under section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d),
13 "the SEC is entitled to a preliminary injunction when it establishes the following: (1) a prima
14 facie case of previous violations of federal securities laws, and (2) a reasonable likelihood
15 that the wrong will be repeated." *S.E.C. v. Unique Financial Concepts, Inc.*, 196 F.3d 1195,
16 1199 n. 2 (11th Cir. 1999).

17 The question now before the Court, however, is not whether injunctive relief is
18 justified, but whether *emergency* injunctive relief is. That's the difference between a TRO
19 and a preliminary injunction. "The court may issue a temporary restraining order . . . only
20 if . . . *immediate* and irreparable injury, loss, or damage will result to the movant before the
21 adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A) (emphasis added).
22 On the one hand, the Court doesn't see the need for immediate relief here. If the SEC's
23 allegations are true, the jig is pretty much up for Clement and Edgefund Capital. An SEC
24 investigation is well underway, a legal action has been initiated, and the company has no
25 money in the Bank of America account and only \$4 in its brokerage account. On top of that,

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27 ¹ The SEC also asks that the Court prohibit Clement and Edgefund from violating the
28 antifraud provisions of the securities laws, and require an accounting, but neither request
necessitates the immediate relief of a TRO. In fact, it is unlikely Clement could even provide
an accounting in the short time between the issuance of a TRO and a subsequent
adversarial hearing on whether a preliminary injunction should issue.

1 many of Clement's alleged transgressions — false representations that investors will receive
2 substantial returns and fabricated financial statements, for example — do not appear to be
3 ongoing. The SEC also subpoenaed documents from Clement as far back as July 2010, and
4 his conduct ever since has been evasive by any measure. (Mangolini Decl. ¶¶ 7–25.) The
5 Court struggles to see that now, all of a sudden, an emergency has arisen.

6 On the other hand, assuming the SEC's allegations to be true, Clement is in very hot
7 water, and the initiation of a legal action against him, coupled with his evasive conduct to
8 date, raises legitimate concerns that he may further dissipate the investors' funds at issue
9 *and* destroy documents that will reveal his alleged violations of the securities laws. The SEC
10 also alleges that in March 2011 Clement stopped paying his investors any returns or
11 distributions, that he is falsely claiming his accounts have been frozen, *and* that he is falsely
12 implying he has been cooperating with the SEC's investigation of Edgefund Capital. On
13 these bases, the Court finds that minimal temporary relief is in order. The SEC has made
14 out a *prima facie* case that Clement has violated the securities laws, and there is a
15 reasonable likelihood that his some of his violations are ongoing and necessitate emergency
16 relief by the Court. *Unique Financial Concepts*, 196 F.3d at 1199 n. 2. Specifically, the Court
17 finds good cause to freeze the assets of Clement and Edgefund Capital, and to prohibit
18 Clement from destroying documents that are relevant to the SEC's action against him. See
19 *S.E.C. v. Hickey*, 322 F.3d 1123, 1131–32 (9th Cir. 2003).

20 **IT IS THEREFORE ORDERED:**

21 **First**, that Defendants Clement and Edgefund Capital, and their officers, agents,
22 servants, employees, attorneys, subsidiaries and affiliates, and those persons in active
23 concert or participation with any of them, who receive actual notice of this Order, by
24 personal service or otherwise, and each of them, be and hereby are temporarily
25 restrained and enjoined from, directly or indirectly:

- 26 A. transferring, assigning, selling, hypothecating, changing, wasting,
27 dissipating, converting, concealing, encumbering, or otherwise disposing of,
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1 in any manner, any funds, assets, securities, claims, or other real or
2 personal property, wherever located, of Defendants Clement and Edgefund
3 Capital; and their subsidiaries or affiliates, including but not limited to The
4 Edge Fund Ltd, LP and The Edgefund LP, owned by, controlled by,
5 managed by or in the possession or custody of any of them; and

6 B. transferring, assigning, selling, hypothecating, encumbering, or otherwise
7 disposing of any securities, including, but not limited to, any securities of
8 Edgefund Capital, and any of its subsidiaries or affiliates, including but not
9 limited to The Edge Fund Ltd, LP and The Edgefund LP.
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11 It is further ordered that an immediate freeze shall be placed on all monies and
12 assets (with an allowance for necessary and reasonable living expenses to be granted
13 only upon good cause shown by application to the Court with notice to and an opportunity
14 for the Commission to be heard) in all accounts at any bank, financial institution or
15 brokerage firm, all certificates of deposit, and other funds or assets, held in the name of,
16 for the benefit of, and/or over which account authority is held by Clement, Edgefund
17 Capital, The Edge Fund Ltd, LP, The Edgefund LP, or any entity affiliated with any of
18 them, including, but not limited to, the accounts set forth below:
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<u>Institution Name</u>	<u>Account Name</u>	<u>Account No.</u>
Bank of America	Edgefund Capital, LLC	24701-71112
Fidelity Investments	John Clement	X34771783
Fidelity Investments	Edgefund Capital LLC John K Clement	Z70689599
Fidelity Investments	John Clement	X34771791
JPMorgan Chase Bank, N.A.	John K Clement	877609768
Pension Financial	John Clement	84725480

<u>Institution Name</u>	<u>Account Name</u>	<u>Account No.</u>
Services, Inc. (Introducing Broker: Thinkorswim, Division of TD Ameritrade, Inc.)		
Penson Financial Services, Inc. (Introducing Broker: Thinkorswim, Division of TD Ameritrade, Inc.)	John Clement	10979029
Penson Financial Services, Inc. (Introducing Broker: NT Securities, LLC)	John Clement	27808948
Penson Financial Services, Inc. (Introducing Broker: Golden Beneficial Securities)	John Clement	17954918
Penson Financial Services, Inc.	John Clement	38201091
Penson Financial Services, Inc. (Introducing Broker: Lightspeed Trading, LLC)	John Clement	54045471
Mission Federal Credit Union	Cheryl A. Kilmer	2671376

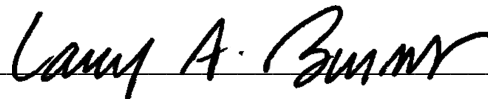
Second, that Defendants Clement and Edgefund Capital, and their officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with any of them, who receive actual notice of this Order, by personal service or otherwise, and each of them, be and hereby are temporarily restrained and enjoined from, directly or indirectly: destroying, mutilating, concealing,

1 transferring, altering, or otherwise disposing of, in any manner, any documents, which
2 includes all books, records, computer programs, computer files, computer printouts,
3 contracts, correspondence, memoranda, brochures, or any other documents of any kind
4 in their possession, custody or control, however created, produced, or stored (manually,
5 mechanically, electronically, or otherwise), pertaining in any manner to Defendant
6 Edgefund Capital, and its subsidiaries and affiliates, including but not limited to The Edge
7 Fund Ltd, LP and The Edgefund LP.

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9 **Third**, that the SEC serve this Order, along with its entire application for a
10 temporary restraining order and the proposed order it submitted to chambers, on Clement
11 and Edgefund Capital forthwith. The temporary restraining order here issued will expire
12 at **3:00 p.m. on Monday, May 16**. At that time, Clement must appear in Courtroom 9 of
13 the United States District Court for the Southern District of California and show cause why
14 a preliminary injunction should not issue.

15 **IT IS SO ORDERED.**

16 DATED: May 13, 2011

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18 **HONORABLE LARRY ALAN BURNS**

19 United States District Judge

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