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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF, v. TRAFFIC MONSOON, LLC, a Utah Limited Liability Company and CHARLES D. SCOVILLE, an individual, DEFENDANTS.	**PLAINTIFF'S OPPOSITION TO MOTION TO SET ASIDE RECEIVERSHIP** Case No.: 2:16-cv-00832-JNP Judge Jill N. Parrish

Plaintiff, Securities and Exchange Commission (the "Commission"), by and through its counsel of record, respectfully submits this Opposition to Motion to Set Aside Receivership ("Opposition"). In his Motion to Set Aside Receivership ("Motion"), defendant Charles D. Scoville ("Scoville") requests that the Court either set aside the receivership and asset freeze altogether, or, at the very least, set aside the receivership and replace it with a limited asset freeze

of approximately $15 million. Scoville's arguments are without merit and his Motion should be denied.

INTRODUCTION

On July 29, 2016, the Court granted the Commission's request to freeze the defendants' assets and appoint a receiver in this matter. *See* Doc. Nos. 8 & 11. In granting the Commission's emergency request, the Court evaluated the evidence and determined that the Commission had met its initial burden of demonstrating a *prima facie* case that the defendants had violated the antifraud provisions of the federal securities laws and that, if not restrained, they would continue to violate the securities laws in the future. By issuing these orders, Traffic Monsoon's unlawful Ponzi scheme was arrested and the Receiver was able to marshal and preserve tens of millions of dollars that will be returned to defrauded investors.

In his Motion, Scoville reiterates the arguments he sets forth more fully in his contemporaneously-filed Opposition to Plaintiff's Motion for Preliminary Injunction, claiming that the Commission lacks enforcement authority over the 90% of Traffic Monsoon, LLC ("Traffic Monsoon") investors who reside outside of the United States. For this reason, together with his claim that the Receivership Order has the potential to unnecessarily infringe on his constitutional rights, Scoville petitions the Court to dissolve the Receivership and to lift the asset freeze or, in the alternative, to reduce the asset freeze to $15 million in order to cover the U.S.-based Traffic Monsoon investors.

In asking this Court to dissolve the receivership and set aside the asset freeze, the defendant has provided no facts to controvert the Commission's *prima facie* evidentiary showing in this matter. Moreover, as set forth in much greater detail in the Commission's Reply in Support of Motion for Preliminary Injunction, Scoville's argument that the Commission lacks authority under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to pursue transnational frauds such as Traffic Monsoon is incorrect. Likewise, the defendant's argument

that his constitutional rights could be violated by the Receiver has been rejected by other courts when faced with the same petition in matters involving the appointment of a receiver. The Commission has the authority to enforce the federal securities laws, and the Court has the authority to appoint a receiver over the assets of the defendants. The receivership does not violate any constitutional rights. For these reasons, the defendant's Motion should be denied.

ARGUMENT

I. THE FEDERAL SECURITIES LAWS APPLY TO THE ENTIRE SCOPE OF TRAFFIC MONSOON'S FRAUDULENT SCHEME.

In arguing that the anti-fraud provisions of the federal securities laws do not extend to the extraterritorial investors in Traffic Monsoon due to the limits set forth in the *Morrison* case, Scoville inexplicably fails to mention, let alone discuss or distinguish, Section 22(c) of the Securities Act of 1933 (15 U.S.C. §77v(c)) ("Securities Act") and Section 27(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78aa(b)) ("Exchange Act") which codify Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1]

Section 929P(b) of Dodd-Frank, colloquially known as the *Morrison* fix, was drafted and implemented in response to the issues raised in the *Morrison* case and, for matters brought by the Commission and/or the Department of Justice (as opposed to private causes of action), reinstated the conduct-and-effects test that had been the governing law for 40 years prior to *Morrison*. Because Scoville's fraudulent conduct within the United States constituted significant steps in furtherance of the alleged violation, even if the securities transactions occurred outside the United States and involved only foreign investors, the federal securities laws apply here.

Section 929P(b) of Dodd-Frank amended the sections of the securities laws that addressed the scope of the Commission's jurisdiction to pursue conduct that involved

[1] The Commission's Reply in Support of Motion for Preliminary Injunction sets forth the legal aspects of the statutory response to the *Morrison* decision in significantly greater detail. In the interests of judicial efficiency, the Commission will not reiterate the entirety of the argument here, and instead adopts the legal argument herein by reference.

transnational fraud by reinstating the conduct-and-effects test that had been restricted by the *Morrison* case. Accordingly, pursuant to Section 22(c) of the Securities Act and Section 27(b) of the Exchange Act, this Court is empowered to hear and adjudicate the Commission's case against Scoville and Traffic Monsoon for operating a transnational fraudulent scheme, in violation of the federal securities laws, because it involved:

> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

§ 27(b) of the Exchange Act. In considering the "conduct test," courts have held that "jurisdiction exists only when substantial acts in furtherance of the fraud were committed within the United States, and that the test is met whenever (1) the defendant's activities in the United States were more than merely preparatory to a securities fraud conducted elsewhere and (2) the activities or culpable failures to act within the United States directly caused the claimed losses." *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003) (internal citations and quotations omitted).

In this case, Scoville's and Traffic Monsoon's conduct in creating, marketing, selling, and managing the Traffic Monsoon investment scheme all occurred within the United States, thereby satisfying the legal requirements for jurisdiction under Section 22(c) of the Securities Act and Section 27(b) of the Exchange Act. Accordingly, Scoville's argument that this Court lacks jurisdiction over Traffic Monsoon's transnational scheme, or that the federal securities laws do not extend to encompass this scheme, is without merit. As such, his request that the Court set aside the Receivership should be denied.

II. THE COURT PROPERLY FROZE THE DEFENDANTS' ASSETS AND APPOINTED A RECEIVER IN THIS MATTER.

Dispensing with the extraterritorial arguments advanced by Scoville, the two remaining arguments he makes in petitioning the Court to dissolve the receivership are 1) that he and Traffic Monsoon have sufficient funds to repay U.S.-based investors and that a limited asset freeze of approximately $15 million would be sufficient to protect those investors, and 2) that the receivership has the potential to abrogate his constitutional rights. Neither is the basis to dissolve the receivership put in place here. As such, the Court should deny his request.

In support of a petition for emergency equitable relief, including the appointment of a receiver and to freeze a defendant's assets, the Commission is required to make a "proper showing" of violative conduct. The Court may appoint a receiver on a "*prima facie* showing of fraud and mismanagement," and should not permit "those who were enjoined from fraudulent misconduct to continue in control of [the defendant's] affairs." *SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963); *see also SEC v. Current Fin. Servs.*, 783 F. Supp. 1441, 1443 (D.D.C. 1992); *SEC v. Manor Nursing Ctrs. Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972). The Court found that the Commission had satisfied its burden of demonstrating Scoville's improper conduct, and the defendant has failed to controvert any of the Commission's evidence in requesting that the receivership be set aside.

A. Traffic Monsoon Does Not Have Sufficient Funds To Repay Investors.

Specifically with respect to Scoville's first issue, that Scoville and Traffic Monsoon have sufficient funds to repay all Traffic Monsoon investors, and that the asset freeze should be reduced to cover only the U.S.-based investors, he is simply incorrect. Not only are there not enough funds on hand to repay all Traffic Monsoon investors, there are not enough funds on hand even to repay only the U.S.-based investors.

In connection with its briefing on these issues, Scoville's counsel requested that the Receiver calculate the amount invested by U.S.-based Traffic Monsoon investors, the amount

that had been repaid to those investors, and the remaining amount owing. According to Traffic Monsoon's own records, Traffic Monsoon's U.S.-based investors are owed approximately $56 million. *See* Ex. A, Declaration of Ray B. Strong. Currently the Receiver has $49,500,822.10 in frozen funds – approximately $6 million less than is owed to Traffic Monsoon's U.S.-based investors. *See* Ex. B, Declaration of Peggy Hunt. Therefore, it is incorrect that Traffic Monsoon has sufficient funds to repay investors. Accordingly, any revision of the asset freeze, and certainly any reduction of the funds that have been frozen, would work to disadvantage all Traffic Monsoon investors.

Based on the foregoing, the Court should deny the defendant's request to modify the asset freeze and reduce the frozen funds to $15 million.

B. Scoville's Constitutional Rights Are Not Abrogated By The Receivership.

Scoville's second issue boils down to an argument that this receivership, like all receiverships, has the potential to create a circumstance in which his constitutional rights could be threatened. In raising this as a basis to dissolve the receivership, Scoville is essentially requesting an advisory opinion from the Court finding that the receivership should be dissolved, not because Scoville's constitutional rights actually have been abrogated, but rather because the receiver could possibly share information that she obtains with criminal law enforcement personnel, which in turn, he contends, could constitute an abrogation of his rights if a future criminal case is pursued. "It is well settled that a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Davis v. U.S.*, 2015 WL 1422425 at *9 (D.S.C. Mar. 27, 2015). As the potential violations identified by Scoville are purely hypothetical, and as courts "do not rule in the abstract on questions of suppression," *U.S. v. Setser*, 568 F.3d 482 (5th Cir. 2009), the Court deny Scoville's requested relief.

Scoville himself cites the 5th Circuit decision of *Setser* in which the court considered, and rejected, many of the same arguments put forward by Scoville here. *See* Motion, p. 10, *citing U.S. v. Setser*, 568 F.3d 482 (5th Cir. 2009).[2] In *Setser*, the Commission and the FBI began parallel civil and criminal investigations into siblings who were operating a Ponzi scheme focused on soliciting funds from Christian groups that were ostensibly to be placed into real estate investments. *Id.* at p. 486. The Commission brought an emergency action against the siblings and successfully petitioned the court to appoint a receiver. The following day the criminal authorities unsealed an indictment against the siblings and the defendants were arrested and ultimately convicted.

The defendant argued on appeal that the receiver lacked authority to take possession of the defendant's assets and that his constitutional rights had therefore been violated when the receiver shared materials with the criminal authorities. The court rejected this argument and found that the receiver was well within his court-ordered and statutory authority to investigate and seize the defendants' assets, and that, because he was in proper possession of those assets, there was no violation of the defendant's Fourth or Fifth Amendment rights when the receiver turned the materials over to law enforcement agents, at their request. *Setser*, 568 F.3d at 490. Central to the court's holding was the following reasoning:

> Once the receiver took possession of the property, Setser's possessory rights were lost. Setser could neither exclude others from the seized property nor take precautions to maintain the privacy of the property. After appointment, the receiver was "vested with complete jurisdiction and control" of the property and had the "right to take possession" of it. 28 U.S.C. § 754. . . . The receiver became possessor, and as such could consent to the search of the seized documents. [citations].
>
> We also find justification for what occurred from the fact that a receiver is to be appointed only after a "prima facie showing of fraud and mismanagement." *SEC v. First Fin. Group of Tex.*, 645 F.2d 429, 438 (5th Cir. 1981). It would make little

[2] Importantly, in the *Setser* case, in contrast to Scoville's argument here, the defendant raised the defenses, not in the civil case, but as a motion to suppress in the criminal matter itself – which would be the proper forum to hear such a complaint.

> sense to hold that Setser continued to exercise veto power over the receiver's uses of his property when the purpose of the receivership was to preserve assets from fraudulent depletion.
>
> We conclude that after a receiver validly takes possession of records and other property, becoming their "lawful custodian," the original owner has lost any "reasonable expectation that those records would remain private." [citation omitted] Accordingly, Setser's Fourth Amendment rights were not violated when the receiver turned over the property he seized from Setser to law enforcement officials.

Id. at 491. Based on the foregoing, as long as there was no collusion between and among the different governmental agencies, wherein the civil process was used in a deceptive manner to obtain evidence that otherwise would not have been available through the criminal process, the court concluded there was no violation of a Fourth and Fifth Amendment right. *Id.* at 493. There has been no such alleged collusion in this matter, and the Receiver is well within her court-ordered and statutory rights to possess and marshal the defendants' assets. As such, Scoville has no constitutional rights violations here.

Likewise, the asset freeze in this case does not abrogate Scoville's Due Process rights. As this matter is civil, not criminal, in nature, Scoville does not have a constitutional right to counsel. Courts have refused requests to access frozen funds to pay for defense costs because, in civil enforcement matters, unlike criminal matters, there is no Sixth Amendment right to counsel and because those funds should be used to repay defrauded victims. *See U.S. v. Vilar*, 979 F.Supp.2d 443, 445-46 (S.D.N.Y. 2013) ("The Sixth Amendment, however, by its terms, is limited to 'criminal prosecutions.' [citations omitted] There is thus no Sixth Amendment right to counsel in civil cases."); *see also Cullins v. Crouse*, 348 F.2d 887, 889 (10th Cir.1965) (holding that the Sixth Amendment right to counsel does not apply to civil cases).

In addition, specifically with respect to frozen assets in Commission enforcement matters, the Tenth Circuit, echoing the conclusions reached by other federal courts, has ruled that "a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime." *SEC v. Marino*, 29 Fed.Appx. 538, 541 (10th Cir. 2002), *quoting SEC v.*

Quinn, 997 F.2d 287, 289 (7th Cir. 1993) (unpublished). *See also Caplin & Drysdale v. U.S.*, 491 U.S. 617, 627 (1989) ("a robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his."); *SEC v. Cherif*, 933 F.2d 403, 416-17 (7th Cir. 1991) (defendant has no right to spend another person's money to pay for attorney); *SEC v. Coates*, 1994 WL 455558 at *3 (S.D.N.Y.) (court may freeze assets even if asset freeze precludes him from obtaining counsel); *SEC v. FTC Capital Markets, Inc.*, 2010 WL 2652405 at *3 (S.D.N.Y.) (same); *U.S. v. Monsanto*, 491 U.S. 600, 615-16 (1989) ("Put another way: if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial"). Scoville has no right to counsel, and he certainly has no right to use investor funds to pay for such counsel.[3]

The relevant question in determining the propriety of an asset freeze, particularly in the face of a request to unfreeze some portion of the funds to pay defense costs, is whether there are sufficient funds to satisfy an ultimate disgorgement amount. *See, e.g., SEC v. Lauer*, 445 F.Supp.2d 1362, 1369 (S.D. Fla. 2006). In *Lauer*, the court concluded that "the amount of assets to be frozen, prior to the finding of liability, is determined not by whether the funds themselves are traceable to the fraudulent activity underlying the lawsuit, but by showing a reasonable approximation of the amount, with interest, the defendant was unjustly enriched." *Id., citing SEC v. ETS Payphones*, 408 F.3d 727, 735 (11th Cir. 2005) (All that is required is "a reasonable approximation of a defendant's ill-gotten gains … Exactitude is not a requirement."); *see also SEC v. Current Financial Services*, 62 F.Supp.2d 66, 68 (D.D.C. 1999) (refusing to unfreeze assets where the potential disgorgement

[3] Scoville does appear to misunderstand the scope of the asset freeze and receivership. *See generally*, Motion, pp. 13-14. The asset freeze and receivership only apply to assets held at the time the Orders were executed. Nothing in the documents restricts Scoville's ability to undertake employment, secure a residence, or pay for an attorney with funds earned in post-receivership work.

order would vastly exceed the assets that had been frozen); *SEC v. Bravata*, 763 F. Supp. 2d 891, 920 (E.D. Mich. 2011) ("To persuade a court to unfreeze assets, the defendant must establish that… there are sufficient funds to satisfy any disgorgement remedy that might be ordered in the event a violation is established at trial.").

As explained above, there are not sufficient funds frozen and in the possession of the Receiver to repay even the U.S.-based investors, let alone the tens of thousands of Traffic Monsoon investors located throughout the world. The receivership and asset freeze do not abrogate the defendant's constitutional rights, and the funds and the receivership are necessary to repay, to the extent possible, the Traffic Monsoon investors. For these reasons, and all those set forth more fully above and in the Commission's Reply in Support of Motion for Preliminary Injunction, this Court should deny the defendant's Motion to Set Aside the Receivership.

CONCLUSION

Based on the foregoing, the Commission respectfully requests that this Court deny the defendant's Motion to Set Aside Receivership.

Respectfully submitted this 7th day of October, 2016.

/s/ Daniel J. Wadley
Daniel J. Wadley
Amy J. Oliver
Alison Okinaka
Cheryl Mori
Attorney for Plaintiff
U.S. Securities & Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I caused to be filed the forgoing using the Court's CM/ECF System. A true and correct copy of the document was served on all parties entitled to service through the Court's CM/ECF System.

/s/ Marlea Furlong
Marlea Furlong

Exhibit A

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Michael F. Thomson (Utah State Bar No. 9707)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff. v. TRAFFIC MONSOON, LLC, a Utah Limited Liability Company, and CHARLES DAVID SCOVILLE, an individual, Defendants.	**DECLARATION OF D. RAY STRONG** 2:16-cv-00832-JNP The Honorable Jill N. Parrish

I, D. Ray Strong, declare as follows:

1. This declaration is based upon my personal knowledge of the facts set forth herein.

2. I am certified public accountant, certificated fraud examiner, and certified insolvency and restructuring advisor.

3. Berkeley Research Group, LLC ("BRG") has been engaged as accountants by Peggy Hunt, the Court-appointed receiver in this case (the "Receiver"), and I have been contracted by BRG to assist with this case. BRG's employment has been approved by the Court.

4. The Receiver provided to BRG information and data contained on the servers that hosted the website operated by Defendant Traffic Monsoon, LLC (the "Database").

5. The Receiver provided me with a code script in a .php file to query certain requested information contained in Database (the "Script").

6. BRG ran the Script in the Database, and the results of running the Script in the Database are attached hereto as **Exhibit A**.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Dated this 6th day of October, 2016.

D. Ray Strong

EXHIBIT A

1. How much in dollar amounts did USA customers buy adpacks : $61777350.00
2. How much in dollar amounts did USA customers get paid : $5607527.54
3. How much the difference is: $56169822.46

Exhibit B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff. v. TRAFFIC MONSOON, LLC, a Utah Limited Liability Company, and CHARLES DAVID SCOVILLE, an individual, Defendants.	**DECLARATION OF RECEIVER PEGGY HUNT** 2:16-cv-00832-JNP The Honorable Jill N. Parrish

I, Peggy Hunt, as the Court-appointed receiver in this case, declare as follows:

1. This declaration is based upon my personal knowledge of the facts set forth herein.

2. On July 27, 2016, I was appointed by the Court pursuant to the *Order Appointing Receiver*.

3. In accordance with my duties, I obtained control of information on the servers that hosted the website operated by Defendant Traffic Monsoon, LLC ("Traffic Monsoon"). I requested that the data from those servers was imaged (the "Database"), and I directed that the Database to be provided to Berkley Research Group ("BRG"), the accountants that I have engaged in this case with Court approval.

4. Counsel for Defendant Charles David Scoville asked me to obtain certain information from the Database. I agreed to do so if Mr. Scoville provided me with a specific code script that I could provide to BRG to generate the requested information from the Database. I received that script from Mr. Scoville's counsel, and I provided it to BRG.

5. In connection with performing my duties as Receiver in this case, I have collected funds of the receivership estate and have deposited those funds into a bank account (the "Account"). As of today's date, the balance of funds in the Account is $49,500,822.10.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Dated this 6th day of October, 2016.

/s/ Peggy Hunt
Peggy Hunt
Court-Appointed Receiver