D. Loren Washburn (#10993)
loren@washburnlawgroup.com
THE WASHBURN LAW GROUP LLC
50 West Broadway, Suite 1010
Salt Lake City, UT 84101
Telephone: (801) 477-0997
Facsimile: (801) 477-0988

John E. Durkin (#15308)
jdurkin@smithcorrell.com
SMITH CORRELL, LLP
124 West 1400 South, Suite 204
Salt Lake City, UT 84115
Telephone: (801) 436-5550
Facsimile: (866) 784-6991

Attorneys for Traffic Monsoon, LLC, and Charles Scoville

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

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

Defendant Charles Scoville hereby files his Reply to the SEC's Opposition to his Motion to Set Aside the Receivership (D.E. 39, the "Opposition"). In the Opposition and in the Plaintiff's Reply in Support of Motion For Preliminary Injunction (D.E. 38, the "Reply") the SEC makes a number of arguments that have no basis in law or fact to warrant a receiver in this

case. This is part of an unfortunate pattern in which the SEC cites theories, beliefs or half-truths as "facts," and ignores the plain language of the law when it does not comport with the Commission's objectives in this case. Further the SEC has rushed to judgment and sent a series of false alarms to this Court. Because the SEC cannot meet its burden to warrant the drastic remedy of sustaining the appointment of the Receiver in this case, Mr. Scoville's Motion to Vacate the Receiver should be granted.

ARGUMENT

I. The SEC's Position On Dodd-Frank's Alleged Morrison Fix Ignores The Plain Language Of The Statute And Finds No Support From Any Court Decision.

Without belaboring an issue that has been fully briefed by all parties (See D.E. 41, 42, and 43), the SEC incorrectly argues in the Opposition that the holding in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) was "fixed" by a jurisdiction provision in the Dodd-Frank Act (the "Jurisdiction Provision") and that the SEC no longer has a problem in this case, namely that the Supreme Court's holding in *Morrison* that the anti-fraud provisions of the U.S. Securities laws do not apply to 90% of the transaction at issue in this case, and thus do not warrant the drastic remedy of a receiver in this case. The SEC's argument fails for at least two reasons: (1) it ignores the plain language of the statute and performs a bait and switch by substituting other language that is not found in the statute; and (2) the SEC's reading has never been adopted by any Court in the United States in the more than six years since the President signed the Dodd-Frank statute that was passed by Congress. Since more than 90% of the purchases of Traffic Monsoon's AdPacks were made outside the United States, and thus not subject to the anti-fraud provisions alleged in the Complaint, the Receiver is not necessary. The SEC will not be entitled to a disgorgement order of more than approximately $10 million, and the Receiver has almost five times that. A limited asset freeze is all that is necessary.

A. The Receiver should be Dismissed Because Dodd-Frank Section 929 Deals Only with Jurisdiction and No Court has Adopted the SEC's Reading of 929.

In the SEC's argument at page 4 of the Opposition, the SEC argues that, "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." But that is not what Section 929 of the Jurisdiction Provision says. What it says is that "district courts of the United States . . . ***shall have jurisdiction*** of an action. . ." The Supreme Court made a clear and deliberate distinction between jurisdiction, which was not a problem, and merits—which was—in *Morrison*. *See Morrison* at 253. The SEC's unwillingness to deal squarely with the language of the statute—actually passed by Congress and signed into law by the President— that addresses only jurisdiction and therefore cannot "fix" the fact that the anti-fraud provisions of the securities laws are not applicable to over 90% of the transactions at issue here, and their substitution of words not appearing in the statute for those that do, suggests that they know their argument cannot withstand the scrutiny of a simple reading of the language of the law.

The only post-*Morrison* case cited by the SEC in its Opposition, *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012), actually supports the continued applicability of the Supreme Court's holding that the anti-fraud provisions of the Securities laws do not apply extraterritorially, which supports Mr. Scoville's argument. The SEC does not cite any case that adopts their contorted reading of the Jurisdiction Provision because there is no such case. The lack of judicial support for the SEC's interpretation in other federal district court opinions in matters directly relating to the Jurisdiction Provision of Dodd-Frank in the six years since the Dodd-Frank Act passed is further evidence that their position lacks merit.

B. The SEC's Argument Regarding the Morrison Fix Sets Out Conflicting Standards in the Tenth Circuit and Fails and Demonstrate a Reasonable Likelihood of Prevailing and thus Makes the Receiver an Extreme Remedy.

The SEC's preferred reading of the Jurisdiction Provision would add a layer of confusion in U.S. Securities law. The Tenth Circuit has held that *Morrison* applies in a number of cases not involving the SEC. For example, in *Sanchez v. Crocs, Inc*, the Tenth Circuit noted that *Morrison* deprives a plaintiff of the ability to sue because § 10(b) does not prohibit extraterritorial conduct, noting that it was a merits, not jurisdiction issue. *See Sanchez v. Crocs, Inc.*, No. 11-1116, 2016 WL 3959191, at *6 (10th Cir. July 19, 2016) (citing *Morrison*, 561 U.S. at 254, 130 S.Ct. 2869). So, according to the SEC's logic, although Section 10(b) does not prohibit extraterritorial conduct, under the same substantive statutory language, the SEC believes they apparently would be allowed to bring a case when others similarly situated cannot. This makes no sense.

For example, if AdPack purchasers were to bring an action alleging the very same claims the SEC is making against Traffic Monsoon in this case, this Court would have jurisdiction to hear the claims, but because of *Morrison* the conduct would not be barred by the same anti-fraud provisions at issue here. That the same substantive statutes would apply differently where a purchaser of securities sought to protect her own interest as opposed to when a government agency brought an action to protect the same purchaser, even though the substantive statute allegedly violated is the exact same in both cases. This is illogical and confounding and is simply not supported by any reasonable reading of the statute the SEC relies on.

C. The SEC Fails to Prove a Domestic Transaction Took Place.

In order to adequately allege the existence of a domestic transaction, the SEC must make allegations leading to a plausible inference that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability

within the United States to deliver a security. *See SEC v. Goldman Sachs & Co.*, 790 F.Supp.2d 147, 159 (S.D.N.Y.2011); *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010). The SEC alleged in its Complaint that 90% of the AdPack purchasers were out of the U.S. (Complaint at ¶66). In addition, during the vast majority of the time at issue, Mr. Scoville was living outside the U.S. and only traveling back to the U.S. for visitation with his son.

The SEC has pointed to a number of factors to establish some activity in the United States, but this fails for two reasons: (1) it is based on half-truths; and (2) none of it amounts to evidence that the irrevocable liability transferred within the United States.

The SEC alleges that Traffic Monsoon listed Mr. Scoville's apartment in Murray, Utah as its address (D.E. at 38); this is misleading because the SEC fails to tell the Court that at all times that Traffic Monsoon listed the Utah address it also listed an address in the United Kingdom, and indeed the UK address was listed first. (*See* Ex. A Declaration of Charles Scoville (Scoville Decl.) and Ex. B). The SEC claims that Traffic Monsoon had call centers in the United States; this is misleading because Traffic Monsoon also had call centers in the Philippines for International AdPack purchasers. (D.E. 38-14) The SEC claimed that Mr. Scoville was moving money offshore; this is misleading as well because Mr. Scoville's business operated offshore, he lived "offshore," and he used offshore funds to make payments using foreign payment processors. (Complaint at ¶51) Further, the SEC failed to note that Traffic Monsoon's lead programmer lived and worked in Russia. In short the SEC overstates the extent to which Traffic Monsoon had any meaningful activity in the United States and supplies this Court with half-truths and innuendos that do not warrant the Receiver in this matter.

More to the point, none of what the SEC cites is sufficient to establish that the AdPack sales are domestic sales of securities. The naked assertion that some transactions took place in the United States is not enough to adequately plead the existence of domestic transactions. *Absolute Activist*, 677 F.3d at 69.

II. The SEC and the Receiver Cited Premature Facts Regarding the Amount of Money Involving U.S. AdPack Purchases and Therefore Reached Conclusions that Misguided this Court as to the Amount in Controversy.

The next incorrect claim the SEC makes is that the funds on deposit with the Receiver (approximately $49 million) are not enough to pay any judgment the SEC might receive in this case. In the SEC's Opposition, the Commission claims that making whole U.S. AdPack purchasers would require more than $50,000,000. This number is based on an initial data query Mr. Scoville asked the Receiver to make. While the Receiver should have understood was the first of a series of steps to get the actual numbers, they nevertheless passed it along to the SEC without telling Mr. Scoville, and, apparently that the SEC also did not understand there was still more to do. This rush to judgement coupled with fundamental data illiteracy led the SEC to make claims that are false. The actual amount needed to place all U.S. purchasers of AdPacks in the same financial situation they would have been in had they never purchased an AdPack is approximately $10 million.

A. Most AdPacks were Purchased Using Existing Funds From Initial Purchases and Commissions Earned on Previous AdPacks and Damages are Much Less than what the Damages the SEC Set Forth.

When dealing with damages issues in matters pertaining to the Securities and Exchanges Acts one must look at the "actual damages," which—for fraud—is the "out of pocket rule." *Richardson v. MacArthur*, 451 F.2d 35, 43 (10th Cir. 1971).

> "In determining the amount of damages, it is a well-recognized rule that the complaining party is entitled to be made whole. That is, he is entitled to be

> compensated only to the extent that he received less than what he was entitled to under the agreement. He cannot, however, recover in excess of that to which he was entitled in making him whole."

Id.

In order to understand how the SEC completely overstated the amount necessary by a factor of five, it is helpful to have a rudimentary understanding of how Traffic Monsoon and AdPack purchases and commissions worked.

People who purchased AdPacks received (1) advertising services and (2) the ability to participate in commissions by "qualifying." For example, a new AdPack purchaser (the "Purchaser") who bought a single AdPack would have to fund that initial purchase of $50 by using a payment processor like PayPal. At that point, Traffic Monsoon would deliver visitors to the Purchaser's website and 20 click credits through a banner ad (the "Provided Services"). If the Purchaser did nothing, else the transaction was complete and they receive the Provided Services *See* Ex. F Declaration of Lyndon M. Hara.

If the Purchaser wished to qualify for commissions they would then have to click 50 websites on the Traffic Monsoon exchange on a given day, which would allow them to get paid commissions based on the revenues generated during the period for which they performed qualified ad clicking services. It bears noting that the Traffic Monsoon explicitly and repeatedly explained that commissions would not be paid if there were no revenues generated for the period of qualification and that commissions were never guaranteed. When commissions were earned for clicking on websites, they would be credited to the Purchaser's Traffic Monsoon account and would be available for immediate withdrawal on the day the commission was earned for the services performed. So, for example, if on the first day the AdPack was purchased a buyer

qualified by clicking on 50 websites, the buyer might earn a commission of $1.13.[1] Those funds would be available for immediate withdrawal from the Traffic Monsoon account and paid into the buyer's PayPal account. If the Purchaser never clicked on subsequent days, they would be entitled to only $1.13, and would also have received the provided website advertising services.

The aggregate total of commissions was limited to $55 for each AdPack purchased, so if after a number of days[2] the AdPack buyer had received commissions on that AdPack totaling $55, they could no longer get commissions without purchasing additional AdPacks. However, if the buyer had not withdrawn money from her Traffic Monsoon account along the way and continued to qualify, at the point her AdPack commissions maxed out she would have $55 in her Traffic Monsoon account. The Purchaser could withdraw the $55 into her PayPal account if she wanted to, or she could also choose to purchase another AdPack using her Traffic Monsoon balance of $55 (at which point she would have another AdPack's advertising services, the chance to earn more commissions, and the $5 excess of the first AdPack's commissions over the purchase price of the second AdPack). If she bought a second AdPack using her balance, she would now have made a total of $100 in AdPack purchases, but would have only contributed $50 in new money, since the second AdPack was bought with a balance in her Traffic Monsoon Account and not with any new money. In short, the Purchaser can fund the purchase of advertising services they wish to buy in the future for providing clicking services, or they can

[1] This is merely a hypothetical number. In fact commissions ranged based on the day, and the Traffic Monsoon website repeatedly told purchasers that commissions were based on, and therefore contingent on revenue from later purchases, and were not guaranteed.

[2] The SEC puts in a placeholder of 55 days but that is arbitrary. The actual amount of time that a AdPack buyer had to qualify to reach the $55 limit depended on daily revenue, the number of people who qualified to share the commissions and other factors. Further the Traffic Monsoon website made clear that it was possible that if there was no revenue then there would be no commissions and the commission total would never reach $55.

withdraw their money at any time; which was never contingent on future sales. *See* https://www.sec.gov/answers/ponzi.htm (noting "[d]ifficulty receiving payments is a 'red flag' in a Ponzi Scheme.").

Therefore, when this process was repeated, a buyer who bought only one AdPack using new money could purchase substantially more in Adpacks than they contributed in cash. In this way if the Purchaser was "refunded" for non-new-money purchasers, she would be receiving a windfall that she neither earned in commissions nor had any other logical claim to receive. In short, refunding the gross AdPack purchases would pay most AdPack purchasers substantially more than they actually spent in real dollars to purchase AdPacks, and would violate the out-of-pocket rule.

B. Adpack Purchasers in the U.S. Purchased Less than $15 Million In New-Money Adpacks, Of Which They Have Withdrawn $5 Million In Actual Cash

In its Opposition, the SEC—either because it did not understand this difference, or because it does not care about factual precision—made the error of confusing these two purchase numbers. The SEC argues that "[a]ccording to Traffic Monsoon's own records, Traffic Monsoon's U.S.-based investors are owed approximately $56 million." This is demonstrably false. The number that Mr. Scoville asked the Receiver to query was the gross total of AdPack purchases by U.S. Adpack buyers—including all AdPacks purchased with account balances and through payment processors. That total amount is $61,777,350.00. (D.E. 39-1 at 5). But that is not the amount U.S. Adpack purchasers spent in actual dollars to purchase AdPacks. The total amount of new-money purchases by U.S. AdPack purchasers was $15,438,231.37. *See* Ex. 1 of Ex. C. Declaration of Ray B. Strong (Strong Decl). This means that about one fourth of U.S. AdPack purchases used new money, while three fourths were non-cash purchases. Put another way, placing all U.S. AdPack purchasers in the same financial position they would have been in

had they never purchased an AdPack would take approximately $15,438,231.37. If one were to refund $61,777,350 to U.S. AdPack purchasers it would be paying them $4 for every $1 in cash they used to buy AdPacks. There is no rational basis to consider this as a remedy for any of the SEC's alleged violations.

But this is only half the equation. As mentioned above, at any time an AdPack purchaser could withdraw commissions they earned by qualifying, and U.S. based AdPack purchasers did so. In total, U.S. based AdPack purchasers withdrew a total of $5,607,527.54 (Strong Decl).

So netting the total cash in from U.S. AdPack purchasers, $15,438,231.37 against the total cash out from U.S. AdPack purchasers, $5,607,527.54 yields the aggregate net cash position of U.S. AdPack purchasers: $9,660,157.39. This is roughly[3] the amount necessary to place all U.S. AdPack purchasers in the position they would have been had they never purchased an AdPack.

The Receiver has more than $49,000,000 on deposit in accounts under her control (*See* Ex. D, Declaration of Peggy Hunt), almost $40,000,000 more than would be necessary to return all U.S. AdPack purchasers to the position they would have been in had they never purchased an AdPack.

Mr. Scoville has suggested that the Court keep $15,000,000 on deposit to pay any amount the SEC might reasonably get in disgorgement for U.S. purchasers, and as explained above, this

[3] Between the time PayPal froze Traffic Monsoon's accounts in January, and the time the Order Appointing the Receiver was entered in July, PayPal chose to refund some Traffic Monsoon customers' purchases. These refunds, because they were conducted outside Traffic Monsoon's system, are not captured in the database from which these figures were derived. To the extent U.S. based AdPack purchasers obtained refunds directly from PayPal, those refunds would reduce the total amount necessary to return all U.S. based AdPack purchasers to the place they would have been had they never purchased an AdPack. The total amount of PayPal generated refunds to U.S. based AdPack purchasers is not yet known. (*See* Complaint at ¶52)

is more than enough to return all U.S. purchasers to where they would have been had they never purchased an AdPack.[4]

III. The SEC has not established a likelihood of prevailing beyond the amount on deposit with the Receiver, has not demonstrated a high degree of scienter, and consequently the drastic remedy of a receivership is not Warranted.

A. Pre-Trial Equitable Remedies, Such As A Receivership, Are Limited to the Amount the Commission Might Plausibly Get in Equitable Relief After Trial, Which Is This $9,660,157.39.

A receiver is an extraordinary equitable remedy that is only justified in extreme situations. When a district court creates a receivership its focus is "to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary." *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). However, courts sitting in equity are not allowed to disregard the law in its entirety and a court has the power to remove the receivership if one cannot "make a strong showing" that a receivership is "necessary and that the disadvantageous effect on others would be clearly outweighed." Furthermore, receiverships for conservation of property "are to be watched with jealous eyes lest their function be perverted." *S.E.C. v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271, 1275–76 (D. Utah 2009) (citing *Michigan v. Michigan Trust Co.*, 286 U.S. 334, 345, 52 S.Ct. 512, 515, 76 L.Ed. 1136. (1932).

At this point, there is no justification for the Receiver to remain. The SEC will not be entitled to a judgment of more than approximately $10,000,000 in this case. Furthermore, the receiver is likely to be ineffectual in most of its efforts. While the Receiver has the power to bring suits for matters in the U.S., *Booth v. Clark*, 58 U.S. 322 (1854), they are,

[4] To be clear, Mr. Scoville is not conceding that the SEC is likely to get this remedy. Rather, this is an attempt to reduce the equitable relief the Court has granted to something proportional to what the SEC might reasonably be entitled.

however, quite limited in their international reach because many foreign jurisdictions will not cooperate in enforcing SEC judgments—as the SEC knows (*See SEC v. Franklin* 348 F. Supp.2d. 1159 (S.D. Cal. 2004) (D.E. 423-24 at 7-21)—much less receiverships.

Here, the Receiver is not necessary. Had the SEC informed the Court of the limits of its case under *Morrison*, and the true amount it had any hope of collecting to make U.S. based AdPack purchasers whole, the Court would have seen that a receiver was not necessary or appropriate. *Sec. & Exch. Comm'n v. Spence & Green Chem. Co*., 612 F.2d 896, 904 (5th Cir. 1980) (citing *Skirvin v. Mesta*, 141 F.2d 668, 673–74 (10th Cir. 1944).

B. Because the SEC Has Failed to Show Scienter or a Likelihood of Prevailing, the equitable remedies should also be limited.

When scienter is an element of the substantive violation sought to be enjoined it must be proved before an injunction may be issued. *See Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 700–01, 100 S. Ct. 1945, 1957–58, 64 L. Ed. 2d 611 (1980). Because the SEC must show some likelihood of a future violation, a defendant's past actions should show more than mere negligence to warrant such a drastic remedy and should not be obtained against one acting in good faith. *See Sec. & Exch. Comm'n v. Haswell*, 654 F.2d 698, 700 (10th Cir. 1981). Moreover, "a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief." *Aaron*, 446 U.S. at 701.

1. The SEC Understates the Importance of the State of Utah's Determination on Scoville's scienter.

The SEC claims that the State of Utah's decision that Mr. Scoville's prior company was not selling securities is a red herring. (D.E. 38 at 22). AdHit Profits, the company Mr. Scoville operated before Traffic Monsoon, sold "AdPacks" on virtually the same terms as Traffic

Monsoon. AdHit Profits "AdPacks" mixed advertising services with the opportunity to earn commissions, the same as Traffic Monsoon AdPacks. In short, the two iterations of AdPacks are not different in any meaningful way. (*See* Ex. E and Scoville Decl). Rather than confront the fact that Mr. Scoville has previously been told the same conduct does not implicate securities laws, and thus had a reason to believe his conduct was not in violation of securities laws, the SEC simply calls it a red herring because AdHit Profits was a different company than Traffic Monsoon. The superficial distinction the SEC relies on is meaningless. The Tenth Circuit has further refined the scienter element in a suit alleging the omission of a material fact and held that a plaintiff must show: "(1) the defendant knew of the potentially material fact, and (2) the defendant knew that failure to reveal the potentially material fact would likely mislead investors." *Weinstein v. McClendon,* 757 F.3d 1110, 1113 (10th Cir.2014) (quoting *City of Phila. v. Fleming Cos.*, 264 F.3d 1245, 1261 (10th Cir. 2001)). Here, Mr. Scoville believed his conduct was compliant because securities regulators had reviewed the same product sold by an earlier company he operated and had concluded it did not violate the law.

2. Traffic Monsoon Did Not Operate a Ponzi Scheme.

The SEC also claims that Traffic Monsoon was a Ponzi scheme. This claim is premised on ignoring AdPack purchasers, ignoring what Traffic Monsoon promised, and imputing promises to Traffic Monsoon that the company never made.

i. There are No Investors in Traffic Monsoon.

In order to have a Ponzi scheme you must have investors. The SEC's own evidence shows that AdPack purchasers did not believe or say that they were investors. (*See* Frost Declarations at Ex. B to Compliant P 38). Both the AdPack purchasers and Traffic Monsoon's website repeatedly made clear that AdPacks were advertising services, not investments. The SEC

ignores this and applies the label of investors because some AdPack purchasers were more interested in the commissions than in the Advertising. This is not a uniform position, indeed thousands of AdPack purchasers never qualified and therefore clearly valued only the advertising, not the opportunity to obtain commissions. (*See* Strong Decl.f at Ex. 1 # 6, 7). Indeed, in the last few months of operation, tens of thousands of AdPack purchasers never bothered to qualify, meaning a plurality of AdPack purchasers bought AdPacks only for advertising. (*Id.* at #8, 9). In short, the only thing all AdPack purchasers uniformly received or were guaranteed was advertising services.

ii. There Were No Material Misrepresentations.

The SEC claims there were material misrepresentations, but there were not. As the SEC acknowledges, Traffic Monsoon never promised returns. (D.E. 38-21). But, the SEC argues that because people received commissions there were returns, and therefore implicit promises. This argument proceeds by pretending that clicking on advertisements provided no value; but it did.

It is worth noting that as a matter of contract law, Traffic Monsoon has met all of the promises to its clients that it made. Traffic Monsoon could fully pay all AdPack purchasers the commissions they have earned by clicking on advertisements. Moreover, this will always be true because commissions are only earned when an AdPack purchaser qualified and during that period Traffic Monsoon receives revenue. This means that Traffic Monsoon explicitly made payment of commissions contingent on future revenue.

The material misrepresentation alleged by the SEC was simply never made. In a typical Ponzi scheme a company promises some return, typically a high return, but can't pay it based on its sales. Traffic Monsoon made no promise of future commissions, and the commissions it did pay were based on the productivity on the day of qualification.

A misrepresentation is "material," only if there is a substantial likelihood that the misrepresentation would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. *Basic Inc. v. Levinson,* 485 U.S. 224, 231–32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). Cautionary language that relates directly to the issue on which plaintiff claims to have been misled can render the alleged misrepresentation or omissions immaterial as a matter of law. *See Grossman v. Novell, Inc.,* 120 F.3d 1112, 1118 (10th Cir. 1997) (internal citations omitted)

Furthermore, under the "bespeaks caution" doctrine, "a court can rule as a matter of law that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *In re Worlds of Wonder Sec. Litig.,* 35 F.3d 1407, 1413 (9th Cir.1994), *cert. denied,* 516 U.S. 868, 116 S.Ct. 185, 133 L.Ed.2d 123 (1995) (citation omitted). The Tenth Circuit has, at times, endorsed the "bespeaks caution" doctrine[5]. Moreover, every circuit that has addressed the issue has endorsed the doctrine[6]. Accordingly, the "bespeaks caution" doctrine can be a valid defense to a securities fraud claim in the Tenth Circuit. Given the SEC's inability to overcome this hurdle, there is no

[5] Two district court opinions in this circuit have applied the doctrine. *See Grossman,* 909 F.Supp. at 850; *In re Storage Technology Sec. Litig.,* 147 F.R.D. 232, 237 (D.Colo.1993).

[6] *See Gasner v. Board of Supervisors,* 103 F.3d 351, 358 (4th Cir.1996); *In re Worlds of Wonder Sec. Litig.,* 35 F.3d 1407, 1413 (9th Cir.1994), *cert. denied,* 516 U.S. 868, 116 S.Ct. 185, 133 L.Ed.2d 123 (1995); **1121 In re Donald Trump Sec. Litig.,* 7 F.3d 357, 371–73 (3d Cir.1993), *cert. denied,* 510 U.S. 1178, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 949 F.2d 243, 245–46 (8th Cir.1991); *Sinay v. Lamson & Sessions Co.,* 948 F.2d 1037, 1040 (6th Cir.1991); *I. Meyer Pincus & Assocs. v. Oppenheimer & Co.,* 936 F.2d 759, 763 (2d Cir.1991); *Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 879 (1st Cir.1991); *Rubinstein v. Collins,* 20 F.3d 160, 167 (5th Cir.1994); *Saltzberg v. TM Sterling/Austin Assocs., Ltd.,* 45 F.3d 399, 400 (11th Cir.1995). *Cf.* PSLRA, which has created a statutory version of the doctrine. 15 U.S.C. § 77z–2; *see Shaw v. Digital Equipment Corp.,* 82 F.3d 1194, 1213 & n. 23 (1st Cir.1996) (discussing statutory version of "bespeaks caution" found in PSLRA).

need for the Receiver to be in place where there is little likelihood to prevail. Under the Terms of Service, Mr. Scoville told AdPack purchasers: "[a] purchase of advertising service with us is not considered a deposite, nor investment," "do not purchase services you can not afford to pay for," "not to be regarded as solicitation for investments solicitation," and "we reserve the right to change the commissions;" (emphasis added) hardly what even the SEC should consider is a misrepresentation in a Ponzi Scheme. *See* https://www.sec.gov/answers/ponzi.htm (noting "Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk.").

iii. Scoville and Traffic Monsoon Were Solvent at All Times.

An injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith. *See Sec. & Exch. Comm'n v. Haswell*, 654 F.2d 698, 700 (10th Cir. 1981). Traffic Monsoon has acted in good faith; no AdPack purchaser could prevail on a breach of contract claim against Traffic Monsoon premised on failure to pay earned commissions and Traffic Monsoon made no promises of "returns" other than commissions. The total amount Traffic Monsoon needs to make current all AdPack Purchasers worldwide on commissions they have earned is just over $34 million. (See Strong Decl. at Ex. 1 #13) The $49,500,822.10 (D.E. 39-6) the Receiver has is more than enough funds to cover any amount in controversy with U.S. Purchasers of AdPacks or all money owed.

Despite the SEC's suggestion that Traffic Monsoon was a Ponzi scheme, the SEC has adduced zero substantive allegations or evidence that Traffic Monsoon was, or involved in any inherently sham or deceptive transactions; it was in the business of keeping its promises before PayPal, and later the SEC, intervened and froze money thereby precluding Traffic Monsoon from paying the commissions its customers earned.

IV. Because the Receivership is an Onerous Burden, the SEC Must Make a More Substantial Showing that It is Likely to Prevail.

Much of the SEC's argument in its Opposition seems to misperceive Mr. Scoville's argument. The SEC argues at length that a receivership is Constitutional. Mr. Scoville never argued in his Motion that a receivership was not constitutional. Rather, he pointed out the extreme burdens a receivership, such as the one ordered by this Court, impose upon a Defendant who has not been adjudicated to have violated any law, much less committed any crime. In short, Mr. Scoville has effectively had his Fourth Amendment rights suspended, has no ability to obtain housing, has been ordered to cooperate in ways that implicate his Fifth Amendment rights, and has had money seized that makes it difficult, if not impossible to defend against these claims.

The SEC, almost gleefully, blows right past all these harms and blithely claims that if it can be done there is no reason it should not have been done here.

This argument misses the point entirely. Before the Court should impose such onerous burdens as this receivership order does impose, it should require the SEC to make a much more persuasive showing than it has made. The Second Circuit has said that the "SEC must make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks." *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1039 (1990). The Supreme Court, for its part, has said that the degree of scienter is a factor that is relevant to the Court's exercise of its equitable discretion in imposing injunctive relief. *See Aaron* 446 U.S. at 701.

It is hard to imagine a more onerous form of injunctive relief than that which the SEC seeks here. However, the SEC's showing of a likelihood of prevailing and scienter is simply not proportional to the relief it seeks. Because the anti-fraud provisions of the securities laws do not apply extraterritorially, the total remedy the SEC can receive is limited and is much smaller than

the amount on deposit with the Receiver right now. Mr. Scoville's conduct here was simply an extension of conduct that he believed had been reviewed and found acceptable by the Utah Division of Securities. There is no reason to think that he intended to violate laws or that he would not follow any order of this Court. The SEC has dramatically inflated and overblown its case here. The Court should reject its invitation to impose the extensive and unwarranted injunctive relief the SEC seeks.

CONCLUSION

Mr. Scoville's Motion to Set Aside the Receivership should be granted because *Morrison* sets the precedent in this case. *See Morrison*, 561 U.S. at 254, 130 S.Ct. 2869. The SEC's opposition is flawed because it misconstrues that the Jurisdictional Provision of Dodd-Frank Section 929 remedied the decision Supreme Court decision in *Morrison*. No federal court has interpreted the Jurisdictional Provision in the way the SEC has argued to this Court. The SEC has not shown a substantial showing of a likelihood of prevailing in this case based on the reply arguments set forth above which show the onerous burden on Mr. Scoville's Constitutional rights. Accordingly, Mr. Scoville respectfully requests this Court to grant the Motion to Set Aside the Receivership.

DATED this 21st day of October, 2016.

WASHBURN LAW GROUP, LLC

/s/ D. Loren Washbburn
D. LOREN WASHBURN
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, the foregoing **REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO SET ASIDE RECEIVERSHIP** was served upon the person(s) named below, at the address set out below by Electronic Filing:

Daniel J. Wadley
Amy J. Oliver
Alison J. Okinaka
Cheryl M. Mori
SECURITIES EXCHANGE COMMISSION
351 South West Temple, Suite 6.100
Salt Lake City, Utah 84101

/s/ Melina Hernandez

Exhibit A

D. Loren Washburn (#10993)
loren@washburnlawgroup.com
THE WASHBURN LAW GROUP LLC
50 West Broadway, Suite 1010
Salt Lake City, UT 84101
Telephone: (801) 477-0997
Facsimile: (801) 477-0988

Attorneys for Traffic Monsoon, LLC, and Charles Scoville

IN THE UNITED STATES DISTRICT COURT

CENTRAL 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 CHARLES SCOVILLE** Civil No.: 2:16-cv-00832 DB Judge: Dee Benson

I, Charles Scoville, an adult and currently resident of Davis Co. in the state of Utah declare as follows:

1. I am over twenty-one years of age and am fully and legally competent to execute this declaration.
2. I have personal knowledge of the matters stated herein and, if called upon to testify, I could and would competently testify as to the matters set forth herein.
3. I am the owner and creator of Traffic Monsoon, LLC.

4. Prior to creating Traffic Monsoon, LLC, I started and created a very similar company called AdHitProfits.
5. On or about Aug, 2013, I received a request from Brandon Dally of the Utah Division of Securities into the business practices of the AdProfits and the sale of AdPacks.
6. Attached to this Reply to Plaintiff's Opposition to Motion to Set Aside Receivership (the "Reply") is Ex. E, which is a true and accurate view of a product that AdHitProfits had called an AdPack.
7. The Product that AdHitProfits sold call an AdPack is the same product that Traffic Monsoon sold with the exact same name, an AdPack, with just a slight variance in pricing over time.
8. Attached to the Reply is Ex. B, which a true an accurate view of Traffic Monsoon's website that contained the contact information for Traffic Monsoon with the following addresses; Traffic Monsoon used:
    a. In England and for international clients it was 2 Heigham Road, East Ham, London, UK, E6 2jG (the "International Address"); and
    b. In the U.S. it was 4927 S. Murry Blvd 29, Murray, UT 84123 (the "US Address")
9. At all times that the US Address was on the contact portion of the Traffic Monson website so was the International Address.
10. Before and after purchasing my property in England, I maintained a residence in Utah as part of my custody rights to spend time with my son, who lives with his mother in Utah.

///

///

///

I declare under penalty of perjury under the laws of the State of Utah that I have read this declaration, consisting of 1 numbered paragraphs, know its contents, and hereby declare that the foregoing is true and correct.

DATED: October 21, 2016

Charles Scoville

Exhibit B

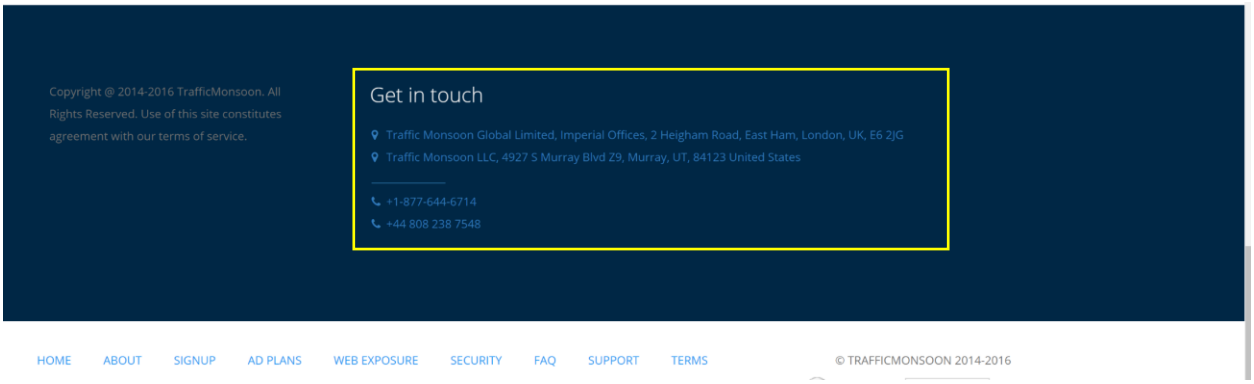
Copyright @ 2014-2016 TrafficMonsoon. All Rights Reserved. Use of this site constitutes agreement with our terms of service.
Get in touch
Traffic Monsoon Global Limited, Imperial Offices, 2 Heigham Road, East Ham, London, UK, E6 2JG
Traffic Monsoon LLC, 4927 S Murray Blvd Z9, Murray, UT, 84123 United States
+1-877-644-6714
+44 808 238 7548
HOME
ABOUT
SIGNUP
AD PLANS
WEB EXPOSURE
SECURITY
FAQ
SUPPORT
TERMS
© TRAFFICMONSOON 2014-2016

Exhibit C

Peggy Hunt (Utah State Bar 6060)
Michael F. Thomson (Utah State Bar No. 9707)
Nathan S. Seim (Utah State Bar No. 12654)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Facsimile: (801) 933-7373
Email: hunt.peggy@dorsey.com
thomson.michael@dorsey.com
seim.nathan@dorsey.com

Attorney for Court-Appointed Receiver, Peggy Hunt

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 1**.

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 21st day of October, 2016.

D. Ray Strong

Exhibit 1

1. How much total purchases (all payment processors including account balance): $884309455.42
2. How much total purchases from actual payment processors: $187018017.04
3. How much of that total from payment processors are in the USA: $15438231.37
4. How much of that total from payment processors in the USA was for adpack purchases (not account balance purchases) ? $15267684.93
5. How much of the total adpack buyers world wide clicked ads: 105925 ad clickers of 107057 adpacks buyers
6. How much of the total adpack buyers world wide clicked ads qualified after 1 Jul 2016: 52737 ad clickers of 107057 adpacks buyers
7. How much of the total adpack buyers in the USA clicked ads: 7620 ad clickers of 7656 adpacks buyers
8. How much of the total adpack buyers in the USA clicked ads qualified after 1 Jul 2016: 4576 ad clickers of 7656 adpacks buyers
9. How much total from payment processor purchases for adpacks in the USA and qualified after 1 July 2016 (# of members and $ amount) : 4501 members and $12297983.93
10. How much in dollar amount did USA customers get paid? $5607527.54
11. What is the difference in dollar amounts between #4 and #10: $9660157.39
12. What is the difference in dollar amounts between #9 and #10: $6690456.39
13. Total balances combined of what members have in current available which they have earned: $34273458.49

Exhibit D

Peggy Hunt (Utah State Bar 6060)
Michael F. Thomson (Utah State Bar No. 9707)
Nathan S. Seim (Utah State Bar No. 12654)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Facsimile: (801) 933-7373
Email: hunt.peggy@dorsey.com
thomson.michael@dorsey.com
seim.nathan@dorsey.com

Attorney for Court-Appointed Receiver, Peggy Hunt

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 be imaged (the "Database"), and I directed that the Database be provided to Berkley Research Group ("BRG"), the accountants that I have engaged in this case with Court approval.

4. On two separate occasions, 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 $49,182,599.43.

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 14th day of October, 2016.

Peggy Hunt
Court-Appointed Receiver

Exhibit E

How it works

We Offer Multiple Advertising Services That Bring Visitors to Your Website

We Share Our Profits With Those Who Surf In Our Traffic Exchange

You begin advertising by simply purchasing either a directory listing for $45 or text ad pack for $10. There are multiple other services, but these are the only 2 services which enable you to receive revenues as reward for surfing ads. Your directory listing will appear on the top of the directory listing page until someone else bumps their listing back to the top.

	Directory Listing Ad Packs	Text Ad Mini Ad Packs
Service:	Directory Listing, 1000 Visitors	Text Ads, 200,000 Views
Price:	$45.00	$10.00
Share Up To:	$56.25	$12.50
Active Positions:	Unlimited	Unlimited

Amount rewarded daily will vary, and is only from actual sales revenues received. There is no set daily amount awarded. This is not an investment, nor security. Amounts received are only disbursed to members who have clicked ads in the traffic exchange for up to 24 hours and continue to be disbursed up to the maximum only when member clicks ads.

After purchase of your directory listing or text ad pack:

1. Click 25 Traffic Exchange Ads Daily
2. Receive Cash (not credits!)
3. Surf More To Earn More Website Visitors (2:1 Surf Ratio)

Purchasing a Directory Listing or Text Ad Pack is Not Required Before Using Our Other Services

VIP members get 1:1 Surf Ratio and Only Click 10 Ads Daily

What's in it for you to meet the minimum daily ad click requirements?

- Traffic to Your Website For 24 Hours Up to the # of Assigned Credits
- Share of Site Revenues For 24 Hours Up to Your Maximum

Cash Received Is REAL Share In ALL Site Sales Revenues!

Exhibit F

D. Loren Washburn (#10993)
loren@washburnlawgroup.com
THE WASHBURN LAW GROUP LLC
50 West Broadway, Suite 1010
Salt Lake City, UT 84101
Telephone: (801) 477-0997
Facsimile: (801) 477-0988

Attorneys for Traffic Monsoon, LLC, and Charles Scoville

IN THE UNITED STATES DISTRICT COURT

CENTRAL 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 LYNDON M. HARA** Civil No.: 2:16-cv-00832 JNP Judge: Jill N. Parrish

I, Lyndon M. Hara, an adult and currently resident of Arizona and declare as follows:

1. I am over twenty-one years of age and am fully and legally competent to execute this declaration.
2. I have personal knowledge of the matters stated herein and, if called upon to testify, I could and would competently testify as to the matters set forth herein.
3. I am the owner of a business website titled VacationSensei.com and VacationSensei, LLC.

4. Beginning in or about December 2015, I became a member of Traffic Monsoon and began purchasing AdPacks.
5. I purchased AdPacks for a business purpose, which was to obtain new visitors to my business' website. Having many unique visitors to my website increased its Alexa score (an important measure of online relevance) increased the likelihood that my website would appear in relevant search engine searches, and reduced the ability of competitors to adversely affect my reputation through false-negative reviews.
6. Traffic Monsoon delivered tens of thousands of unique visitors to my websites. These visits to my website created search engine optimization ("SEO") and web reputation benefits to my business that, had I paid an SEO consultant to provide, would have cost thousands or tens of thousands of dollars.
7. The visitors delivered through AdPacks have substantially helped my business and have allowed me to manage my business marketing in a much more economical fashion than I believed I could find in the market elsewhere.
8. In addition to the benefits of receiving advertising services, I also participated in getting commissions through my AdPacks by clicking on others' websites. I believe that by clicking on others' websites I was helping them to grow their businesses as well.
9. By participating in the commissions I was able to reduce the cost of AdPacks to me and indeed received commissions in excess of what I paid for AdPacks.
10. Until Traffic Monsoon's business was shut down I continued purchasing AdPacks because of the benefits they provided to my business and because I could not find any comparably beneficial product in the market at price competitive to Traffic Monsoon.

I declare under penalty of perjury under the laws of the State of Utah that I have read this declaration, consisting of 1 numbered paragraphs, know its contents, and hereby declare that the foregoing is true and correct.

DATED: October 21, 2016

Lyndon M. Hara
Creator – VacationSensei.com