

D. Loren Washburn (#10993)  
[loren@washburnlawgroup.com](mailto: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](mailto: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*

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

TRAFFIC MONSOON, LLC, a Utah Limited  
Liability Company, and CHARLES DAVID  
SCOVILLE, an individual,

Defendants.

**PROPOSED FINDINGS OF FACT**

Civil No.: 2:16-cv-00832 JNP  
Judge: Jill N. Parrish

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FINDINGS OF FACT

After two days of an evidentiary hearing in the above captioned matter, and review of the pleadings filed by the parties, the Defendant, Mr. Charles Scoville, offers the following Findings of Fact.

<b>I. Traffic Monsoon Operated as a Legal and Popular Advertising Business</b>		
<b>No.</b>	<b>Findings</b>	<b>Citation</b>
1.	Traffic Monsoon was a business with legal entities based in Utah and the United Kingdom.	D.E. 55 Ex.1,2 and 4.
2.	Traffic Monsoon's business was to sell advertising services, including banner advertisements and visitor credits, which entitled the purchaser to have a visitor visit their website.	D.E. 55 Ex.3 1-23; Evidentiary Hr'g Tr. 12:27 – 13:17 (Nov. 1, 2016).
3.	Traffic Monsoon's website described the advertising services in detail and had, among other things, substantive Frequently Ask Questions section as well as Terms of Service.	D.E. 55 Ex.3 p.16-23.
4.	Traffic Monsoon's website received significant traffic, achieving an Alexa score of approximately 1,000, making it, at that time, one of the top 1,000 most popular website in the world.	Evidentiary Hr'g Tr. 165:24 – 164:14 (Nov. 1, 2016).
5.	Achieving a significant Alexa score requires a large amount of web traffic and unique visitors to a website. Websites with lower Alexa scores than Traffic Monsoon include NBA.com, the official website of the National Basketball Association.	Evidentiary Hr'g Tr. 167:18-19 (Nov. 1, 2016).
6.	Web traffic, like the visitor credits and guaranteed banner advertisement clicks sold by Traffic Monsoon provide value to a business both because they represent possible clients for a web-based business and because the visits themselves can increase a website's profile and can form part of the marketing strategy of a web-based business.	Evidentiary Hr'g Tr. 165:24 – 167:14 (Nov. 1, 2016).
7.	Some businesses that purchased advertising services from Traffic Monsoon were able to use that traffic to create sales of their services.	Evidentiary Hr'g Tr. 189:16 – 194:17 (Nov. 1, 2016).
8.	Other businesses that purchased advertising services from Traffic Monsoon used the visits to increase their search engine placement and saturation of the first-page results on search engines such as Google.com.	Evidentiary Hr'g Tr. 168:18 – 174:23 (Nov. 1, 2016); Def. Ex. 105 Evidentiary Hr'g Tr. (Nov. 1, 2016).
9.	In addition to selling advertising, Traffic Monsoon also provided the opportunity for its members to make money or earn advertising credits by clicking on other members' websites.	Evidentiary Hr'g Tr. 114:17 – 117:23 and 170:7 – 171:7 (Nov. 1, 2016).
10.	One way members could make money was clicking on others websites through a program called Cash Links. By clicking on others' websites members could earn as much as \$.01 per click (See complaint).	D.E. 55 Ex. 3 p.12-15 ( <i>See</i> "AdPlans" heading of website under title "Cash Links").

No.	Findings	Citation
11.	Members could also use their clicks to earn visits to their own website. For every two websites they visited they would earn a visit to their own website.	D.E. 55 Ex. 3 p.13 of 23 ( <i>See</i> “AdPlans” heading of website under title “Earn Traffic Credits”).
12.	Members could also earn money on Traffic Monsoon by referring others to Traffic Monsoon. Members who referred others were sometimes called affiliates. (Redirect of Peggy/Website).	D.E. 55 Ex. 3 p.8 of 23 ( <i>See</i> AdPlans heading of website under title “10% Affiliate Program”). Evidentiary Hr’g Tr. 133:23-134:7(Nov. 1, 2016).
13.	Affiliates earned a 10% commission on each advertising purchase by a member whom they referred. Affiliates only earned commissions on people they directly referred, not second or third level referrals (those that their referrals referred).	Evidentiary Hr’g Tr. 20:16-24; 183:5-25 (Nov. 1, 2016).
14.	The referral commissions were explained on the Traffic Monsoon website.	D.E. 55 Ex. 3 p.15 of 23( <i>See</i> AdPlans heading of website under title “10% Affiliate Program”); Evidentiary Hr’g Tr. 133:17-134:12 (Nov. 1, 2016).
15.	The cost of advertising services varied but was similar to, and in some cases significantly cheaper than, what such services would cost on other advertising platforms such as Google AdWords.	Evidentiary Hr’g Tr. 161:2-7; 162:1 – 162:23; 193:25 – 194:1 (Nov. 1, 2016).
16.	For example, 20 banner ad clicks purchased on Traffic Monsoon cost \$5.00.	D.E. 55 Ex. 3 p.14 of 23 ( <i>See</i> AdPlans heading of website under title “Services”); Evidentiary Hr’g Tr. 150:19 – 153:2 (Nov. 1, 2016).
17.	By comparison a banner advertisement on a website with a similar Alexa rating can cost as much as \$30 per each click.	Evidentiary Hr’g Tr. 162:1-4 (Nov. 1, 2016).
18.	Traffic Monsoon customers could purchase visits to their website for \$5.95 for 1,000 visits.	D.E. 55 Ex. 3 p.14 of 23 ( <i>See</i> AdPlans heading of website under title “Services”); Evidentiary Hr’g Tr. 150:19-153:2. (Nov. 1, 2016).
19.	Traffic Monsoon’s most popular advertising product – by a large margin – was called the Banner Ad Pack.	Evidentiary Hr’g Tr. 17:10-18 (Nov. 1, 2016).

II. The Banner AdPack		
No.	Findings	Citation
20.	The Banner AdPack combined two advertising products, website visits and banner advertisements, and also allowed a purchaser to share in revenue upon two conditions: qualification of the AdPack and the company earning revenue. Each Banner AdPack cost \$50.	Evidentiary Hr'g Tr. 18:7-20:1; 117:10-118:2. (Nov. 1, 2016).
21.	Each Banner AdPack entitled the purchaser to 20 clicks to banner ads for their website placed on the Traffic Monsoon website.	D.E. 55 Ex. 3 p.14 of 23 ( <i>See</i> AdPlans heading of website under title "Services"); Evidentiary Hr'g Tr. 18:7-20:1; 117:10-118:2. (Nov. 1, 2016).
22.	Each Banner AdPack also entitled the purchaser to 1000 visitors to their website.	Evidentiary Hr'g Tr. 115:10-13 (Nov.1, 2016).
23.	Each Banner AdPack also entitled the purchaser to a revenue sharing position.	Evidentiary Hr'g Tr. 18:7-20:1; 117:10-118:2 (Nov.1, 2016).
24.	In order to share in revenue after purchasing an AdPack, a buyer had to "qualify" her AdPacks by clicking on a certain number of websites for each 24 hour period for which they hoped to share in revenue.	Evidentiary Hr'g Tr. 18:7-20:1; 117:10-118:2 (Nov.1, 2016).
25.	The number of clicks required to qualify changed over time, but ended up being 50 clicks to qualify for each 24 hour period.	Evidentiary Hr'g Tr. 18:7-20:1 (Nov. 1, 2016).
26.	The number of clicks a member provided to qualify did not change based on the number of AdPacks the member owned: the owner of one AdPack had to perform the same number of clicks to qualify her AdPacks as the owner of 3,500 AdPacks.	Evidentiary Hr'g Tr. 23:7-20. (Nov. 1, 2016).
27.	Traffic Monsoon informed customers that they only shared revenue when there was revenue and that there was no guarantee that there would be revenue on any given day. Traffic Monsoon also did not guarantee the amount of revenue that would be shared, and did not guarantee that an AdPack purchaser would ever receive revenue sharing, much less a specific amount of revenue.	D.E. 55 Ex. 3 p. 13 of 23 ( <i>See</i> AdPlans heading of website under title "Sharing"); Evidentiary Hr'g Tr. 19:16-20; 126:14-18. (Nov. 1, 2016).
28.	Revenue sharing was, however, limited to \$55 of shared revenue for each Banner AdPack. After \$55 was shared, no more revenue would be shared based on that AdPack, though a purchaser could purchase subsequent AdPacks and obtain additional Revenue Sharing that way.	D.E. 55 Ex. 3 ( <i>See</i> AdPlans heading of website under title "Sharing"); Evidentiary Hr'g Tr. 19:3-5; 117:10-15. (Nov. 1, 2016).

<b>III. Traffic Monsoon Advertising Business Flourished</b>		
<b>No.</b>	<b>Findings</b>	<b>Citation</b>
29.	Traffic Monsoon sold 17,449,323 AdPacks. The total purchase price for these AdPacks was approximately \$872 million.	Evidentiary Hr'g Ex. 9 ("Summary of AdPack Purchases"); Evidentiary Hr'g Tr. 310:11-311:4. Nov. 3, 2016).
30.	Of this \$872 million in banner AdPack purchase price, only \$173 million was purchased through members transferring funds into their accounts from payment processors like PayPal to purchase the AdPacks.	<i>Id.</i> See also Evidentiary Hr'g Tr. 310:15- 311:3 (Nov. 3, 2016).
31.	The rest of the AdPack purchases were accomplished by members directly applying credit they had earned in various ways through Traffic Monsoon to purchase AdPacks.	Evidentiary Hr'g Tr. 249:1-8; 310:23-311:1 (Nov. 3, 2016).
32.	Traffic Monsoon members earned credit through Traffic Monsoon in various ways including: revenue sharing distributions from Traffic Monsoon, referral commissions (we should use the phrase they use) of 10% of the purchases made by members they referred to Traffic Monsoon, and money earned from clicking on "CashLinks" links.	D.E. 55 Ex. 3 p.12, 13 and 15 of 23 and (See AdPlans heading of website under title "Sharing," "10% Affiliate Program," "Cash Links" ); Evidentiary Hr'g Tr. 114:17 – 117:23; 133:23-134:7 and 170:7 – 171:7; (Nov. 1, 2016).
33.	When Traffic Monsoon members had credit in their account they could withdraw cash or could use that credit to purchase additional products.	Evidentiary Hr'g Tr. 249;6-8; 261:14-16 (Nov. 1, 2016).
34.	In fact, Traffic Monsoon members often chose to use the credit they had accumulated from revenue sharing or bonuses to purchase additional advertising, including AdPacks. In this way approximately three-fourths of all AdPacks that were purchased were purchased through credits earned through Traffic Monsoon's various methods of payout, rather than from deposit of new cash.	Evidentiary Hr'g Tr. 249;6-8; 261:14-16 (Nov. 1, 2016). See also See Evidentiary Hr'g Plaintiff's Ex. 9.
35.	Because at all times Traffic Monsoon had enough cash to pay out all Traffic Monsoon members' balances, if they chose to cash out, there was no principled difference between a purchase from new cash and a purchase from credit, since a credit purchaser could have simply withdrawn cash and then used the same cash to make a cash purchaser.	Evidentiary Hr'g Tr.20:2-14 (Nov. 1, 2016); Evidentiary Hr'g Tr. 418:13-20 (Nov. 3, 2016). See also See Evidentiary Hr'g Defense Ex. 112.

<b>IV. The AdPack Revenue Sharing</b>		
<b>No.</b>	<b>Findings</b>	<b>Citation</b>
36.	Under the terms of the AdPack, Traffic Monsoon was obligated to share revenue with members who had purchased AdPacks if those members qualified and if the company had revenue for the 24 hour period before the time for which the member qualified.	D.E. 55 Ex. 3 p.21 of 23( <i>See</i> AdPlans heading of website under title “FAQ’s”); Evidentiary Hr’g Tr.171:2-5 (Nov.1, 2016); and Evidentiary Hr’g Tr. 359:5-9 (Nov.3, 2016).
37.	After a Traffic Monsoon member qualified their AdPacks, the company would distribute credit to the Traffic Monsoon member’s account every hour for the 24 hours for which the AdPack qualified.	Evidentiary Hr’g Tr.18:7-30:1 (Nov.1, 2016). D.E. 55 Ex. 3 p. 21 of 23 ( <i>See</i> heading of website under title “FAQ’s”).
38.	These funds were immediately available for withdrawal through PayPal or another payment processor or could be used to purchase services through Traffic Monsoon.	Evidentiary Hr’g Tr.19:16-20:1 (Nov.1, 2016).
39.	Traffic Monsoon made significant revenue sharing distributions to members. Over time it has shared hundreds of millions of dollars with AdPack purchasers. The almost \$700,000,000 worth of AdPacks purchased with credit were largely purchased with revenue sharing returns.	Evidentiary Hr’g Tr. 310:23-311:1 (Nov.3, 2016).
40.	Traffic Monsoon’s revenue sharing program did not share all of the revenue with AdPack purchasers. For every AdPack purchase Traffic Monsoon’s policy was to pay: 1) a 10% affiliate commission (again we should standardize how we refer to this) to the person who had introduced the purchaser to Traffic Monsoon; 2) 6% in administrative fees to Traffic Monsoon and the computer programmer who worked for Traffic Monsoon; and 3) 84% into a revenue sharing pool either in the form of a reserve or direct daily revenue sharing.	Evidentiary Hr’g Tr.367:13-21 (Nov.3, 2016). <i>See</i> Evidentiary Hr’g Defense Ex. 112.
41.	Traffic Monsoon never “shared” more in revenue sharing than it took in.	Evidentiary Hr’g Tr. 372: 2-6 (Nov.3, 2016); <i>See</i> Evidentiary Hr’g Defense Ex. 112. D.E. 55 Ex. 3; <i>See</i> AdPlans heading of website under title “Sharing.”
42.	The receiver currently has approximately \$49.5 million in cash on deposit and is in the process of pursuing millions more dollars in possible funds.	Evidentiary Hr’g Tr. 110:13-22 (Nov.1, 2016).
43.	Paying out the balances in all Traffic Monsoon members’ account would require only \$34 million.	Evidentiary Hr’g Tr. 367:22-368:13 (Nov.1, 2016).

No.	Findings	Citation
44.	Thus, Traffic Monsoon currently has approximately \$15 million more than is necessary to fully pay all Traffic Monsoon members the funds they were owed under the AdPack purchase contracts.	Evidentiary Hr'g Tr. 346:19 – 24; 367:22-368:13 (Nov.3, 2016). See also, Evidentiary Hr'g Tr. 9:11 - 15 (Nov.1, 2016).
45.	Traffic Monsoon is currently solvent, meaning that it could pay all Traffic Monsoon members the balances in their accounts and still have cash left over.	Evidentiary Hr'g Tr. 345:6-20; 110 - 113 (Nov.3, 2016);
46.	There is no evidence that Traffic Monsoon was ever insolvent; the SEC has not introduced evidence that Traffic Monsoon could not, at any time of its existence, have fully paid all the amounts that were due to members out of the cash Traffic Monsoon had on hand.	Evidentiary Hr'g Tr. 431:20-23 (Nov.3, 2016).
<b>V. Traffic Monsoon Operation of Business</b>		
47.	Traffic Monsoon was an entirely online business. There is no evidence that Traffic Monsoon ever conducted any business other than through its website.	Evidentiary Hr'g Tr. 12:17 - 13:2 (Nov.1, 2016).
48.	Traffic Monsoon was a Utah company but had no employees other than Scoville and an independent contractor programmer who lived in Russia.	Evidentiary Hr'g Tr. 89:25-90:3; 65: 6 - 8 (Nov.1, 2016).
49.	Traffic Monsoon's website operated through servers located in Atlanta and California.	Evidentiary Hr'g Tr.65:15 – 16 (Nov.1, 2016); Evidentiary Hr'g Tr.240:23–241:3 (Nov.3, 2016).
50.	At all relevant times Scoville lived in Manchester.	Evidentiary Hr'g Tr. 215:8 – 216:3 (Nov., 2016).
51.	Scoville owned a home in Manchester.	Evidentiary Hr'g Tr. 47:5 - 17 (Nov.1, 2016).
52.	Scoville travelled to Utah approximately once a month to visit with his son, who lived in Utah.	Evidentiary Hr'g Tr. 104:21-105:5; 47:13-16 (Nov.1, 2016).
53.	While in Utah, Scoville stayed in a modest basement apartment in Midvale.	Evidentiary Hr'g Tr. 43:25 – 44:2 (Nov.1, 2016).
54.	The SEC offered no evidence that Scoville ever performed any act related to the operation of Traffic Monsoon while he was in the United States.	
<b>VI. Forming Contracts</b>		
55.	Traffic Monsoon sold AdPacks exclusively through its website.	Evidentiary Hr'g Tr. 12:17-21; 127:8-10. (Nov.1, 2016).
56.	Within the ordering process, the purchaser was required to accept the terms and conditions of the Traffic Monsoon website.	D.E. 55 Ex. 3 p.21 of 23.



No.	Findings	Citation
57.	Customers could not alter the terms of the AdPack purchase; the terms were offered as a take-it-or-leave-it offer.	D.E. 55 Ex. 3 p.21 of 23.
58.	Approximately 90 percent of Traffic Monsoon customers were located outside the United States.	Complaint at ¶66 (July 26, 2016).
<b>VII. The AdPacks In Practice</b>		
59.	Approximately 160,000 AdPack purchasers purchased a total of 17.5 million AdPacks.	Evidentiary Hr'g Tr. Ex. 9 ("Summary of AdPack Purchases") (Nov. 3, 2016)
60.	Each AdPack entitled the purchaser to 1,000 web visits meaning that the 17.5 million AdPacks entitled customers to a total of about 17.5 billion website visits. Each AdPack purchase entitled the purchaser to 20 banner ad clicks meaning that the 17.5 million AdPacks entitled customers to a total of about 350 million banner ad clicks.	Evidentiary Hr'g Tr. 117:10-118:2 (Nov. 1, 2016).
61.	Purchasing 17.5 billion visit credits "ala carte" through Traffic Monsoon's website would cost approximately \$103 million. Purchasing 350 million banner ad clicks "ala carte" through Traffic Monsoon's website would cost approximately \$87 million.	Evidentiary Hr'g Tr. 375:18-377:14. (Nov.3, 2016).
62.	In the aggregate, AdPack purchasers got more advertising services per dollar by purchasing AdPacks than they would have received had they purchased the same advertising services "ala carte."	Evidentiary Hr'g Tr. 377:4-17 (Nov.3, 2016).
63.	Not all purchasers used all of their website visit credits to run advertising campaigns.	Evidentiary Hr'g Tr. 182:3-14 (Nov.1, 2016).
64.	Of those who purchased AdPacks, 1127 of them never clicked on a website to qualify their AdPacks for revenue sharing under the AdPacks.	Exhibit 5 at Pg. 4 Item 5; Evidentiary Hr'g Tr. 380:16-381:7 (Nov.3, 2016).
65.	At least some Traffic Monsoon members used the advertising services they purchased in order to promote their independent businesses.	Evidentiary Hr'g Tr. 173:18-176:19 (Nov.1, 2016); Exhibit 105.
66.	Traffic Monsoon members purchased goods and signed up for newsletters as a result of reviewing other members websites as part of the qualification process.	Evidentiary Hr'g Tr. 173:10-17; 171:13-172:11; 198:7-15 (Nov.1, 2016).
67.	Businesses were also able to increase their sales and bolster their websites' search engine profile.	Evidentiary Hr'g Tr. 157:19 – 160:11 (Nov.1, 2016).
68.	The advertising services received through purchase of AdPacks provided benefits that would have cost dramatically more to achieve through other search engine optimization services.	Evidentiary Hr'g Tr. 157:19 – 160:11; 173:18-176:19 (Nov.1, 2016).



No.	Findings	Citation
69.	Traffic Monsoon provided superior advertising services to other available traffic exchanges in the marketplace.	Evidentiary Hr'g Tr. 178:13 - 24 (Nov.1, 2016).
<b>VIII. Traffic Monsoon Prior to the PayPal Freeze</b>		
70.	Prior to PayPal freezing Traffic Monsoon's accounts, there is no evidence that any Traffic Monsoon customer ever complained of delivery of services or payment of funds to which they were entitled.	Evidentiary Hr'g Tr. 138:15-139:3 (Nov.1, 2016).
71.	Indeed, PayPal froze the funds based on the counterintuitive proposition that very rapid growth with almost no chargebacks or refund credits.	See Complaint at ¶46 (July 26, 2016).
<b>IX. Traffic Monsoon Did Not Market Itself as an Investment</b>		
72.	At no point did Traffic Monsoon market itself as an investment.	Evidentiary Hr'g Tr. 87:25-88:3 (Nov.1, 2016).
73.	Traffic Monsoon explained on its website that "we do not guarantee reaching \$55, because earnings from revenue sharing is completely dependent upon the sales of ad services."	D.E. 55 Ex. 3 p.21 of 23.
74.	There is no evidence that Traffic Monsoon ever paid out more than it had previously received in Revenue. Charles Scoville was careful in his presentation of Traffic Monsoon and always presented it as advertising services in online information such as YouTube videos.	Evidentiary Hr'g Tr. 422:19 – 423:13 (Nov.3, 2016).
75.	Neither Traffic Monsoon nor Scoville ever made guarantees that there would be any revenue to share under the revenue sharing program.	Evidentiary Hr'g Tr.126:19-127:2; 204:15-25(Nov.1, 2016).
76.	In fact, through the Cashlinks program of Traffic Monsoon, if you clicked on websites you could make as much as \$.01 per click (See description of program by Peggy, SEC's complaint).	D.E. 55 Ex. 3 p.12 of 23(See AdPlans heading of website under title "Cash Links").
77.	The Utah Department of Securities concluded that the sale of AdPacks do not constitute the sale of a securities.	D.E. 32-2 Ex. B.

DATED: November 28, 2016.

WASHBURN LAW GROUP, LLC

/s/ D. Loren Washburn  
D. Loren Washburn

**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2016, the foregoing **PROPOSED FINDINGS OF FACT** 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

D. Loren Washburn (#10993)  
[loren@washburnlawgroup.com](mailto: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](mailto: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*

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

TRAFFIC MONSOON, LLC, a Utah Limited  
Liability Company, and CHARLES DAVID  
SCOVILLE, an individual,

Defendants.

**PROPOSED CONCLUSIONS OF LAW**

Civil No.: 2:16-cv-00832 JNP

Judge: Jill N. Parrish

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**The AdPack Is A Valid And Enforceable Contract**

1. By purchasing an AdPack a Traffic Monsoon customer entered into a “click-wrap” contract with Traffic Monsoon that is valid and enforceable. *Hancock v. Am. Tel. & Tel.*

*Co.*, 701 F.3d 1248, 1255 (10th Cir. 2012) (citing *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa.2007))

2. The legally binding terms of the AdPack contract are defined by the descriptions of the Adpack contained on the Traffic Monsoon website. *Trans-W. Petroleum, Inc. v. U.S. Gypsum Co.*, 584 F.3d 988, 993 (10th Cir. 2009) (citing *Giusti v. Sterling Wentworth Corp.*, 201 P.3d 966, 975 (Utah 2009)).

3. Purchasers in the European Union had an absolute right of withdrawal from the AdPack contract for 14 days after the date of the original agreement. 2011/83/EU Article 9(1) (See, Exhibit A to Defendant Scoville's Memorandum Of Points And Authorities In Response To The Court's November 3, 2016, Request For Supplemental Briefing.)

4. The duties of the AdPack purchaser under the contract was to pay \$50 to Traffic Monsoon for the AdPack. FOF 20<sup>1</sup>.

5. The duties of Traffic Monsoon under the AdPack contract were to provide 1,000 web visit credits and 20 banner ad visits, which the purchaser could use at their discretion to drive traffic to a website of their choosing. FOF 21, 22; Evidentiary Hr'g Tr. 115:10-13; 117:10-118:2; Hr'g Exhibit 1-3.

6. The AdPack contract also contained an additional opportunity for the AdPack purchaser to share in revenues through a separate opportunity to enter a unilateral contract. *Z-Corp v. Ancestry.Com Inc.*, 2016 UT App 192, 382 P.3d 652, 654 (citation and internal quotation marks omitted); FOF 23.

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<sup>1</sup> Reference to FOF #, refer to the Defendant's proposed Findings of Fact of the corresponding number. Defendant's proposed findings of fact are filed contemporaneous with these proposed conclusions of law.

7. Traffic Monsoon had a duty, under the unilateral contract, to share revenue from the prior day with each person who had previously purchased an AdPack on the following conditions: (1) the AdPack owner qualified by clicking on a certain number of other Traffic Monsoon members' websites during the day; (2) Traffic Monsoon had not already shared \$55 with respect to a given AdPack; and, (3) Traffic Monsoon had revenue from the previous day to share. FOF 24, 25, 26, 27, 28; Evidentiary Hr'g Tr. 19:6-7; 117:10-118:2; Hr'g Exhibit 1-3.

8. Traffic Monsoon did not have a duty under the AdPack contract to share revenue unless it earned revenue from the sale of advertising services in the previous day. FOF 27, Evidentiary Hr'g Tr. 117:10-118:2; Hr'g Exhibit 1-3.

9. Traffic Monsoon did not have an unconditional duty under the AdPack contract to share \$55 with respect to any AdPack. FOF 28, Evidentiary Hr'g Tr. 117:10-118:2; 394:4-9; Hr'g Exhibit 1-3.

10. Traffic Monsoon did not have a duty under the AdPack contract to share any specific, pre-determined dollar amount of revenue per day with respect to an AdPack. FOF 27; Evidentiary Hr'g Tr. 117:10-118:2; 170:25-171:5; Hr'g Exhibit 1-3.

11. Traffic Monsoon's duty under the AdPack contract to share revenue was explicitly conditioned on Traffic Monsoon earning revenue from the sale of advertising services and Traffic Monsoon did not include a guarantee in the contract that the revenue sharing would ever reach \$55. FOF 27, 28; Evidentiary Hr'g Tr. 117:10-118:2; Hr'g Exhibit 1-3.

12. Traffic Monsoon did not modify the AdPack contracts or undertake additional duties through inconsistent oral representations or oral modifications of the contract by Scoville or any other authorized agent of Traffic Monsoon.

**Traffic Monsoon Did Not Operate A Ponzi Scheme.**

13. A company is solvent when its liabilities do not exceed its assets. FOF 45.

14. Traffic Monsoon was solvent because the total amount it owes to its customers, reflected in the customer account balances, is less than \$35,000,000 but the cash-on-hand in the receiver's bank accounts is more than \$49,000,000 and Traffic Monsoon has no other significant liabilities. FOF 42, 43, 45.

15. Traffic Monsoon's accounting records are not tainted by false entries and no party has suggested that the account balances of Traffic Monsoon's customers are more than the approximately \$35,000,000 figure. *Janvey v. Brown*, 767 F.3d 430, 439 (5th Cir. 2014)

16. Because Ponzi schemes "are insolvent by definition," Traffic Monsoon's solvency demonstrates that it cannot be a Ponzi scheme. . . ." *Klein v. Cornelius*, 786 F.3d 1310, 1320 (10th Cir. 2015).

17. In addition to insolvency, Ponzi schemes share the following characteristics:

a. Profits to investors are not created by the success of the underlying business venture but instead are derived from the capital contributions of subsequently attracted investors, *Sender v. Simon*, 84 F.3d 1299, 1301 n. 1 (10th Cir.1996), but that did not happen here because Traffic Monsoon's AdPacks were advertising products and the funds shared from AdPack sales represented profit from selling that product. FOF 24.

b. Investors are promised large returns for their investments; but that did not happen here because Traffic Monsoon told customers that they could not guarantee a specific amount of revenue sharing or that any revenue would be available to be shared at all. *Sender v. Simon*, 84 F.3d 1299, 1301 n. 1 (10th Cir.1996); FOF 27.

c. Without new sales the Ponzi scheme is unable to pay the amounts it owes to earlier investors and the scheme collapses; but that did not happen here because Traffic Monsoon had no fixed liabilities under the AdPack contract and was only obligated to share revenue when it earned new revenue, and at present it has sufficient funds to pay all members the amounts in their account balances. *Merrill v. Abbott (In re Independent Clearing House Company)*, 77 B.R. 843, 860 (D.Utah 1987); *In re World Vision Entm't, Inc.*, 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002); FOF 27.

18. Traffic Monsoon did not operate as a Ponzi scheme.

**Traffic Monsoon Did Not Make Misrepresentations To Its Customers Regarding AdPacks.**

19. To prevail on a securities fraud claim, the SEC must show a substantial likelihood that a misrepresentation or omission of fact would have altered the ‘total mix’ of information made available and that the misrepresentation or omission was made in connection with the sale of a security. *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32, 108 S. Ct. 978, 983, 99 L. Ed. 2d 194 (1988); *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1246 (10th Cir. 2016), as amended (July 6, 2016).

20. Scoville and Traffic Monsoon did not make a material misrepresentation regarding the amount of revenue that would be shared because they did not represent a specific dollar amount would be shared and Traffic Monsoon used the kind of cautionary language regarding the fact that there may be no revenue to share that acts as a defense to a claim of securities fraud under the bespeaks caution doctrine. *In Grossman v. Novell, Inc.*, 120 F.3d 1112, 1120-21 (10th Cir. 1997); Complaint ¶¶27-29.

21. Traffic Monsoon has no duty under the AdPack contract to share any more revenue than it took in and thus could pay all amounts it owed under the AdPack contract even if



it never sold another AdPack; Traffic Monsoon disclosed that it could not guarantee that \$55 would be shared with respect to each AdPack because revenue sharing was dependent on sales of advertising products and was not required to make any disclosure beyond what it did on this point. FOF 35; Complaint ¶38.

22. Traffic Monsoon promised to share revenue from sales of advertising products; did share revenue from all advertising products; and makes no representation regarding the mix of sales that generate the revenue it shares. Traffic Monsoon did not make a material misrepresentation or omit any material facts regarding the mix of product sales that generated its revenue or that it otherwise had a duty to make such a disclosure to customers. Complaint at ¶ 39; FOF 40.

23. Traffic Monsoon did not make a material misrepresentation regarding the distributions from the reserve fund since the reserve fund was funded on a daily basis by revenue from that day and to the extent Traffic Monsoon shared revenue earned on prior days, it shared more than it was obligated to share under the AdPack contract, which did not harm any AdPack purchaser and did not create any economic injury and thus failure to disclose it was not an intentional material omission. *See generally, Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 1628, 161 L. Ed. 2d 577 (2005); *City of Philadelphia v. Fleming Companies, Inc.*, 264 F.3d 1245, 1261 (10th Cir. 2001) (“failure to reveal the potentially material fact would likely mislead investors”).

**Section 10(B) And Section 17(A) Do Not Apply To 90% Of Transactions Where the Buyers Were Outside the United States**

24. There is no affirmative indication in the text of Sections 10(b) and 17(a), which are the basis for the SEC’s fraud claims here, that the statutes are intended to apply extraterritorially. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 265, 130 S. Ct. 2869,

2883, 177 L. Ed. 2d 535 (2010) *S.E.C. v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164 (S.D.N.Y. 2011)(finding that “*Morrison* applies to Section 17(a) of the Securities Act.”).

25. Whether a statute applies extraterritorially is an issue of merits, that is what conduct the statute prohibits, and not a question of jurisdiction or power for the Court to hear the claim. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254, 130 S. Ct. 2869, 2877, 177 L. Ed. 2d 535 (2010).

26. In interpreting Sections 10(b) and 17(a) the Court is obligated to analyze the “statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose” and must enforce “plain and unambiguous statutory language according to its terms.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S. Ct. 2149, 2156, 176 L. Ed. 2d 998 (2010) (*quoting Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009)).

27. The clear and unambiguous language in Sections 929P(b)(1) and (2) Dodd–Frank Wall Street Reform and Consumer Protection Act, codified in sections 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934, respectively, deals only with jurisdiction of the courts, or power of the district courts of the United States to hear disputes, and does not change the scope of conduct prohibited by 10(b) or 17(a) from the scope they had at the time of the Supreme Court’s opinion in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265, 130 S. Ct. 2869, 2883, 177 L. Ed. 2d 535 (2010).

28. Because Sections 10(b) and 17(a) do not apply extraterritorially, they only apply to purchases or sales of securities in the United States, domestic sales. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 273, 130 S. Ct. 2869, 2888, 177 L. Ed. 2d 535 (2010).

29. For purposes of applying *Morrison*, a purchase or sale of securities takes place in the United States when the parties incur irrevocable liability to purchase or sell the securities in the United States. *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 62 (2d Cir. 2012).

30. Regulation S, which represents an effort by the SEC to determine when sales of securities take place in the United States in a context similar to the *Morrison* inquiry, defines the location of a sale of security by the location of the buyer at the time of the offer and at the time the buyer entered the order to buy the security. 17 C.F.R. § 230.902.

31. For the AdPack purchasers who were outside the United States at the time they clicked the button on their web browser to purchase the AdPacks, Sections 10(b) and 17(a) do not apply to those AdPack sales. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 273, 130 S. Ct. 2869, 2888, 177 L. Ed. 2d 535 (2010); *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 62 (2d Cir. 2012); 17 C.F.R. § 230.902.

32. The fact that Traffic Monsoon's servers were in the United States does not alter the legal conclusion that the sales took place where the buyers were at the time they made the purchase because entries in servers represent "actions needed to carry out ... transactions" and not the transactions themselves. *In re Petrobras Sec. Litig.*, 150 F. Supp. 3d 337, 341 (S.D.N.Y. 2015).

33. The fact that Traffic Monsoon was a Utah company and that Scoville was occasionally in the United States also does not alter the legal conclusion since "a party's residency or citizenship is irrelevant to the location of a given transaction." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 70 (2d Cir. 2012); FOF 5-.

34. Even if the conducts test or effects test controls, the SEC has not established that the conduct of Traffic Monsoon or Scoville in selling to buyers outside the United States was sufficient for application of Sections 10(b) or 17(a) to those transactions.

35. Under the conducts test, when transactions involve foreign citizens, the SEC must prove that the conduct within the United States directly caused losses to foreigners and “merely preparatory activities in the United States did not suffice to trigger application of the securities laws for injury to foreigners located abroad.” *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 258, 130 S. Ct. 2869, 2879, 177 L. Ed. 2d 535 (2010) (citations and quotations omitted).

36. The U.S. based conduct proved by the SEC (occasional residency in the United States, locating servers in the United States, locating some customer service call centers in the United States, and receiving mail in the United States, use of a U.S. based cell phone, the use of U.S. bank accounts and the incorporation of Traffic Monsoon as a Utah limited liability company), is insufficient to prove direct causation of harm to foreign citizens, and instead is the kind of merely preparatory activity that does not meet the conduct test. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

37. The kind of conduct that has been held to meet the conduct test such as: negotiations and sales of shares, *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) and trading domestic futures contracts on American commodities exchanges, *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983), *Tamari v. Bache & Co., (Lebanon) S.A.L.*, 547 F.Supp. 309 (N.D.Ill.1982); are absent here. Instead, this is like the cases where courts have found that the conduct does not pass the conduct test such as *Cornwell v. Credit Suisse Grp.*, 666 F. Supp. 2d 381, 392 (S.D.N.Y. 2009), where the Defendants sent statements of financial condition from Switzerland, filed reports with the SEC in the United States, residents of the United States

participated in conference calls where false statements were made, giving interviews to the U.S. press, and conducting substantial unrelated business in the United States, but this conduct collectively was held not to pass the conduct test.

38. The conduct alleged by the SEC also does not meet the effects test. The effects test is met when “the wrongful conduct had a substantial effect in the United States or upon United States citizens.” *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 258, 130 S. Ct. 2869, 2879, 177 L. Ed. 2d 535 (2010).

39. The SEC has not met the effects test because it has not presented any evidence or even made any allegations that sales of AdPacks to foreign citizens located outside the United States had any effect within the United States or on U.S. citizens. *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 (2d Cir. 1998) *abrogated by Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). Cases where courts have found substantial effects in the United States include: promises of green cards or citizenship to investors, *U.S. S.E.C. v. Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 917 (N.D. Ill. 2013), or harm to a U.S. parent company of a foreign purchaser, *Itoba Ltd. v. Lep Grp. PLC*, 54 F.3d 118, 124 (2d Cir. 1995) *abrogated by Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010), where evidence of a direct effect within the United States of a purchase by foreign investors is present. No such effects have been shown here.

#### **Scoville Did not Act With Scienter**

40. In order to show a likelihood of prevailing in its action, the SEC must show that Scoville had scienter, or intent to defraud. Scienter is an element of the SEC's causes of action

for fraud under 10(b) and under 17(a)(1). *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 691, 697 100 S. Ct. 1945, 1952–53, 64 L. Ed. 2d 611 (1980).

41. Because Traffic Monsoon did not operate as a Ponzi scheme, the SEC cannot rely on the Ponzi presumption to prove that Scoville acted with intent to defraud. *See, S.E.C. v. Mgmt. Sols., Inc.*, No. 2:11-CV-1165-BSJ, 2013 WL 4501088 at \*19-20 (D. Utah Aug. 22, 2013).

42. The SEC “must plead facts rendering an inference of scienter at least as likely as any plausible opposing inference,” and the facts they have alleged related to scienter are, in this case, equally susceptible to a finding that Scoville did not act with intent to defraud. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 311, 127 S. Ct. 2499, 2503, 168 L. Ed. 2d 179 (2007).

43. Scoville explaining on the Traffic Monsoon website that AdPacks were not securities does not demonstrate intent to defraud, because Scoville had a good faith basis to believe that AdPacks were not securities based on his interactions with the Utah Division of Securities, and the inference of deception is less compelling than the inference of good faith reliance on his understanding of the Utah Division of Securities. FOF 77.

#### **AdPacks Are Not Securities**

44. AdPacks are not securities because they do not involve an investment of money. *SEC v. W.J. Howey*, 328 U.S. 293, 298-99, 66 S. Ct. 1100 (1946). Rather the purchase of an AdPack was a purchase of valuable advertising services that would have cost substantially more to purchase from other advertising services, like Google Adwords. Moreover, because of the ability to use revenue sharing to purchase additional advertising, Traffic Monsoon members got

more advertising services per dollar by purchasing AdPacks than they would have gotten by purchasing the advertising without the revenue sharing component. FOF 6,7, 60, 61, 62.

45. AdPacks are also not securities because the revenue sharing is not a result of a common enterprise. *Howey*, 328 U.S. at 298-99. Rather, payments of revenue sharing to AdPack purchasers were an inducement to them to qualify their AdPacks and thereby to participate in providing the very advertising services that Traffic Monsoon sold producing the revenue that they shared. The minority of AdPack owners who did not qualify their AdPacks were not entitled to revenue sharing and were not paid the revenue sharing that qualifying customers earned. FOF 10, 25, 28.

46. AdPacks also fail the *Howey* test's third element because the payments to qualifying AdPack owners were the actions AdPack purchasers performed to qualify their AdPack for 55 days – clicking a total of 2750 other websites – was a valuable service for which they would have been entitled to be paid \$.01 per click through the Cashlinks program, and thus the payments were primarily derived by efforts of the AdPack purchasers. *Howey*, 328 U.S. at 298-99. Unlike *Howey*, where the buyers could not and did not assist in cultivating the orange groves, here Traffic Monsoon members only participated in revenue sharing if they participated in the very advertising conduct that Traffic Monsoon sold to others and without the active participation of AdPack owners, Traffic Monsoon would have had no advertising product to sell. *Howey Co.*, 328 U.S. at 299; FOF 10, 25, 28.

47. AdPacks do not meet the test for securities.

**There is no need for a Receiver**

48. The power to appoint a receiver should be jealously safeguarded and is not appropriate here because the SEC has not shown that irreparable injury will result if a receiver is



not appointed. Traffic Monsoon has kept its contracts with its customers, providing advertising services to the satisfaction of the only customers who testified, maintaining sufficient cash reserves to pay all account balances and amounts owed to its customers under its contracts, and making appropriate disclosures of its contracts and the appropriate expectations of AdPack purchasers. FOF 6, 7, 68, 69, 70; *Skirvin v. Mesta*, 141 F.2d 668, 673 (10th Cir. 1944) (citations and quotations omitted).

49. To the extent a receiver was ever needed in this case, that need has ceased, both because the vast majority of sales are not subject to the anti-fraud claims the SEC has brought because that would involve inappropriate extraterritorial application of Section 10(b) and 17(a) and because Traffic Monsoon has demonstrated that it is solvent and able to pay all customers the amount they are entitled to under their contracts. Failure to remove the receiver would work a great hardship on Traffic Monsoon and on Scoville's rights, which is not justified based on the evidence submitted by the parties. *Skirvin*, 141 F.2d at 673.

50. The Receiver would work a further hardship here because although the receiver is subject to the portions of the Judicial Canon regarding impartiality between the parties, the Receiver has shown favoritism by providing unsolicited information to the SEC, while not providing the same benefit to the Defendant, including openly assisting the SEC in preparing for the testimony of a witness who was then on the stand in open court during the evidentiary hearing on this matter by passing her cell phone back and forth between herself and counsel for the SEC. *S.E.C. v. Schooler*, No. 3:12-CV-2164-GPC-JMA, 2015 WL 1510949, at \*3 (S.D. Cal. Mar. 4, 2015)( citing CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 2, 3(A)(1) (2014); MODEL CODE OF JUDICIAL CONDUCT R. 1.2, 2.2 (2010)).

**The SEC Has Not Shown A Likelihood That It Will Prevail On The Merits**

51. In order to prevail on the preliminary injunction that the Securities and Exchange Commission seeks it must show “(1) a substantial likelihood that it will ultimately succeed on the merits of its suit; (2) it is likely to be irreparably injured without an injunction; (3) this threatened harm outweighs the harm a preliminary injunction may pose to the opposing party; and, (4) the injunction, if issued, will not adversely affect the public interest.” *Flood v. ClearOne Commun., Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010) (quoting *Gen. Motors Corp. v. Urban Gorilla LLC*, 500 F.3d 1222, 1226 (10th Cir.2007)).

52. The SEC cannot demonstrate a likelihood that it will prevail because it cannot establish scienter, has failed to show that Traffic Monsoon operated as a Ponzi scheme, has failed to prove that Traffic Monsoon made material misrepresentations or omissions, and because Traffic Monsoon is solvent and able to pay all amounts it owes its customers under its contracts with them.

53. Because a preliminary injunction is an extraordinary remedy that should not be issued unless the movant's right to relief is “clear and unequivocal,” the Preliminary Injunction sought by the SEC is inappropriate. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

54. Especially the preliminary injunction sought here, which would bar Scoville and Traffic Monsoon from engaging in extraterritorial activity, would freeze more funds than necessary to insure that Traffic Monsoon will be able to pay any judgment issued by the Court, and would effectively deprive Scoville of important Constitutional rights should not be issued because such as preliminary injunction would require a persuasive showing of the SEC’s

entitlement to a preliminary injunction, and the evidence offered has not met that burden. *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990).

55. Further, the SEC has failed to prove a likelihood of future violation because it has failed to prove a violation, has failed to prove that Scoville acted with scienter, which is the primary factor that bears heavily on the Court's determination. *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993).

DATED: November 28, 2016.

**WASHBURN LAW GROUP, LLC**

/s/ D. Loren Washburn  
D. Loren Washburn

**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2016, the foregoing **PROPOSED CONCLUSIONS OF LAW** 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