ORAL ARGUMENT REQUESTED

NO.: 17-4059

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Utah, No. 2:16-cv-00832-JNP
Judge Jill Parrish, Presiding

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, counsel for Defendants-Appellants states the following:

Defendant-Appellant Traffic Monsoon, LLC ("Traffic Monsoon") is not a publicly traded company nor is it owned by a publicly traded company. Defendant-Appellant Charles David Scoville ("Mr. Scoville") is an individual.

Traffic Monsoon and Mr. Scoville were represented in the District Court by D. Loren Washburn, Esq. (formerly of the Washburn Law Group, LLC) and John E. Durkin, Esq. of Smith Correll LLP. Traffic Monsoon and Mr. Scoville are represented in this Court by Micah S. Echols, Esq. of Marquis Aurbach Coffing and D. Loren Washburn, Esq.

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Dated: September 12, 2017

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STATEMENT OF RELATED CASES

Traffic Monsoon and Mr. Scoville are not aware of any related cases before this Court, and it is believed that there are no related cases under Tenth Circuit Rule 28.2(C)(1).

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I. JURISDICTIONAL STATEMENT

Plaintiff-Appellee, Securities and Exchange Commission ("SEC"), filed this action in the District Court on the basis of federal question jurisdiction under 28 U.S.C. § 1331. 1 Aplt. App. at 13–32. Specifically, the SEC alleged that Traffic Monsoon violated various securities laws, for which the SEC claimed subject matter jurisdiction in the District Court according to 15 U.S.C. § 77v(a) and 15 U.S.C. § 78aa. 1 Aplt. App. at 15, ¶ 8.

Defendants-Appellants, Traffic Monsoon, LLC and Charles David Scoville (collectively "Traffic Monsoon" unless otherwise noted), appeal from: (1) the District Court's memorandum decision and order granting a preliminary injunction and denying the Defendants' motion to set aside the receivership (9 Aplt. App. at 2064–2108);[1] (2) the preliminary injunction (9 Aplt. App. at 2109–2111);[2] and (3) the amended order appointing receiver.[3] 9 Aplt. App. at 2112–2117, 2118–2120. Traffic Monsoon's appeal from the injunction orders is authorized by 28 U.S.C. § 1292(a)(1). Similarly, Traffic Monsoon's appeal from the amended

[1] The District Court's memorandum decision and order granting a preliminary injunction and denying the Defendants' motion to set aside the receivership is attached as **Exhibit 1**.

[2] The preliminary injunction is attached as **Exhibit 2**.

[3] The amended order appointing receiver is attached as **Exhibit 3**.

order appointing receiver and the order denying the Defendants' motion to set aside the receivership is authorized by 28 U.S.C. § 1292(a)(2).

The three appealed orders were filed on March 28, 2017. 9 Aplt. App. at 2064–2117. According to FRAP 4(a)(1), Traffic Monsoon timely filed its notice of appeal on April 14, 2017. 9 Aplt. App. at 2118–2120.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS ENTIRE LITIGATION SINCE NO "SECURITY" WAS INVOLVED IN TRAFFIC MONSOON'S TRAFFIC EXCHANGE BUSINESS.

B. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THAT THE DODD-FRANK ACT IMPLICITLY OVERRULED THE KEY HOLDINGS IN *MORRISON v. NATIONAL BANK LTD.*, 561 U.S. 247, 130 S.Ct. 2869 (2010), LIMITING THE EXTRATERRITORIAL APPLICATION OF SECTION 10(b) OF THE SECURITIES AND EXCHANGE ACT OF 1934.

C. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THAT TRAFFIC MONSOON'S TRAFFIC EXCHANGE BUSINESS CONSTITUTES A PONZI SCHEME, DUE TO THE LACK OF LEGAL AND FACTUAL SUPPORT.

III. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This appeal arises from the SEC's improper interference with Traffic Monsoon's lawful traffic exchange business. While ignoring the traffic exchange business model, the SEC alleged that Traffic Monsoon constitutes a Ponzi scheme. 1 Aplt. App. at 13–32. Even though the SEC acknowledged in its complaint that

90% of Traffic Monsoon's business originates outside the United States (1 Aplt. App. at 25, ¶ 66), the SEC obtained an ***ex parte*** order to freeze the assets of both Traffic Monsoon and Mr. Scoville, while he was residing in the United Kingdom. 2 Aplt. App. at 285–289. After an evidentiary hearing, the District Court entered a preliminary injunction in favor of the SEC and limited the scope of the receivership to only Traffic Monsoon, while largely excluding Mr. Scoville, individually. 9 Aplt. App. at 2064–2117. In the preliminary injunction order, the District Court concluded, "But, Mr. Scoville did not sell any AdPacks. His LLC, Traffic Monsoon, did." 9 Aplt. App. at 2093 n.12. Nevertheless, the District Court has inexplicably chosen to leave Mr. Scoville as a party Defendant in this litigation. Traffic Monsoon and Mr. Scoville now appeal the District Court's preliminary injunction orders and the orders refusing to set aside the receivership. 9 Aplt. App. at 2118–2120.

In this appeal, Traffic Monsoon raises three main arguments: First, Traffic Monsoon's traffic exchange business does not involve a "security," even with the incentives and rewards that Traffic Monsoon conditionally offered to its members. *See, e.g.*, *Marine Bank v. Weaver*, 455 U.S. 551, 102 S.Ct. 1220 (1982). A traffic exchange is comprised of a network of members who click on each other's websites to increase traffic to their respective websites. *See, e.g.*, https://en.wikipedia.org/wiki/Traffic_exchange (last visited September 11, 2017).

If Traffic Monsoon prevails on this threshold issue, the proper remedy is for this Court to vacate all of the District Court's orders for lack of subject matter jurisdiction. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974); *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 1785 (2002). At a minimum, the Court should conclude that the District Court lacks subject matter jurisdiction over Mr. Scoville, personally, since he admittedly did not sell any securities. 9 Aplt. App. at 2093 n.12.

Second, if this Court determines that the District Court had subject matter jurisdiction over this litigation, Traffic Monsoon next challenges the District Court's departure from *Morrison v. National Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869 (2010). The District Court analyzed *Morrison* based on the premise that "[a]pproximately 90% of the Traffic Monsoon members who purchased AdPacks reside outside of the United States and presumably purchased the AdPacks while located in their home countries." 9 Aplt. App. at 2071, ¶ 22. Under the key holdings in *Morrison*, the District Court was required to limit the scope of the SEC's lawsuit and the receivership to only the 10% of AdPacks purchased domestically. But, the District Court instead concluded that "the text of Section 929P(b) [of the Dodd-Frank Act], the legal context in which this amendment was drafted, legislative history, and the expressed purpose of the amendment all point to a congressional intent that, in actions brought by the SEC, Sections 10(b) and

17(a) should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied." 9 Aplt. App. at 2090. However, the actual text of Sections 10(b) and 17(a) was not changed by the Dodd-Frank Act. And, Section 929P(b) of the Dodd-Frank Act does not actually speak to the adjudication of extraterritorial transactions. As such, Traffic Monsoon asks this Court to limit Section 929P(b) of the Dodd-Frank Act to its actual language, including the codification at 15 U.S.C. §§ 77v and 78aa, instead of the overreaching interpretation adopted by the District Court.

As an alternative analysis, the District Court also concluded that the corporate formation of Traffic Monsoon as an LLC in Utah somehow provides the domestic nexus to actually satisfy the *Morrison* transactional test for extraterritorial application. 9 Aplt. App. at 2091–2093. But, *Morrison*'s presumption against the extraterritorial application of Section 10(b) requires more than just a superficial domestic connection to overcome the presumption. *See Morrison*, 561 U.S. at 266, 130 S.Ct. at 2884 ("For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.") (italics in original). So, the Court should similarly reject the District Court's alternative analysis to overcome the key holdings and application of *Morrison* to this case. Notably, the District Court expressed uncertainty with regard to both its own interpretation of Section 929P(b) of the Dodd-Frank Act and

whether the *Morrison* transactional test was actually satisfied. 9 Aplt. App. at 2107. Therefore, Traffic Monsoon asks this Court to hold true to the Supreme Court's key holdings and governing guidelines in *Morrison*. For this *Morrison* issue, the proper remedy from this Court would be to limit the entire District Court litigation to only the 10% domestic AdPack sales, thus requiring the release of 90% of Traffic Monsoon's assets from the receivership.

Third, regardless of how the Court rules on the *Morrison* issue, the Court should conclude that Traffic Monsoon's traffic exchange does not constitute a Ponzi scheme. Of course, if the Court concludes that the Traffic Monsoon business model does not involve a security, then no Ponzi scheme exists as a matter of law. *See Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1273 n.2 (10th Cir. 2008) (citation omitted). The District Court's labeling of Traffic Monsoon's traffic exchange as a Ponzi scheme misapprehends the business model and completely ignores the business aspects of the traffic exchange. And, no Traffic Monsoon member was entitled to any revenue sharing, as an incentive for participating in the traffic exchange, unless existing revenue was available and the member had qualified the AdPacks by making the required clicks per day. 9 Aplt. App. at 2069–2070, ¶ 19(a). Even though the District Court concluded that Traffic Monsoon is a Ponzi scheme, it later expressed uncertainty in reaching this decision: "[W]hether Traffic Monsoon's particular business model constitutes a

Ponzi scheme in light of the contingent nature of the promised returns appears to be an issue of first impression in this circuit." 9 Aplt. App. at 2107. After reviewing the relevant legal and factual information, including solvency, lack of intent, and disclaimers, Traffic Monsoon asks this Court to determine that its business model of a traffic exchange is not a Ponzi scheme. The proper remedy for this Court's determination that Traffic Monsoon did not operate as a Ponzi scheme is to reverse the District Court's preliminary injunction orders and set aside the receivership.

In summary, Traffic Monsoon asks this Court to first determine that the District Court lacked subject matter jurisdiction over this entire litigation due to the absence of a "security" in Traffic Monsoon's traffic exchange business. The District Court's lack of subject matter jurisdiction would require all of its orders to be vacated. Second, if this Court determines that the District Court had subject matter jurisdiction, Traffic Monsoon next asks this Court to determine that 90% of its business is beyond the adjudicative reach of the District Court by virtue of *Morrison*. The proper application of *Morrison* to this case would require the District Court litigation to be limited to only the 10% domestic sales of AdPacks, and a corresponding limitation on the assets retained by the receivership. Third, Traffic Monsoon asks this Court to determine that its traffic exchange does not constitute a Ponzi scheme, which would similarly require the preliminary

injunction and receivership orders to be reversed and reevaluated on remand. At a minimum, the Court should order the release of Traffic Monsoon's funds that admittedly fall outside of any of the SEC's claims. Upon these grounds, Traffic Monsoon respectfully urges this Court for relief.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. BACKGROUND INFORMATION ON TRAFFIC EXCHANGES.

Traffic exchanges have been in existence since the advent of the internet. https://en.wikipedia.org/wiki/Traffic_exchange (last visited September 11, 2017). A person wanting others to view his website can generate views by joining a traffic exchange network. *Id.* To receive views of his own website, this person must visit other websites to receive "credits" from the traffic exchange. *Id.* These credits entitle the person to a certain number of views of his own website based upon the ratio set by the traffic exchange administrator. *Id.* Thus, a member of a traffic exchange network can generate guaranteed traffic to his own website by viewing websites of other members in the traffic exchange network. *Id.* Many traffic exchanges are free. *Id.* However, some traffic exchanges offer credits for purchase. *Id.* Under either scenario, members of a traffic exchange network can build their own referral networks to earn additional credits from other members within their own networks. *Id.*

Today, numerous traffic exchange networks are in operation. For example, www.traffic-splash.com; www.startexchange.com; www.trafficg.com; www.wingoads.com; www.10khits.com; www.ilovehits.com; www.dragonsurf.biz; www.royalsurf.com; www.hitsafari.com; www.realhitz4u.com; www.soaring4traffic.com; www.hitleap.com; www.addmoretraffic.com; and www.easyhits4u.com are just a few traffic exchange networks currently in operation (last visited September 11, 2017). Aside from manual traffic exchange networks (with actual human users), autosurf exchanges work off the same principle of visiting network members' websites using automated visits to other network websites. *See, e.g.*, www.trexlist.com (ranking autosurf exchanges and manual traffic exchanges currently in operation) (last visited September 11, 2017). Many of these traffic exchange networks offer both free and paid memberships, with the paid version allowing additional incentives and sometimes revenue sharing. *Id.*

Other traffic exchange networks are specifically advertised as "revenue sharing" networks. *See, e.g.*, www.revenue-share.info (ranking top 10 revenue sharing traffic exchanges in operation) (last visited September 11, 2017). Revenue sharing traffic exchanges, in addition to the normal functions of a traffic exchange, pay members for clicking on cash links, adding new members to their own referral networks, and other services. *Id.* The revenue sharing traffic exchanges are

designed to share revenues of available past profits only. *Id.* Ultimately, the members of a traffic exchange network benefit by receiving traffic to their own websites, which results in either actual sales or website promotion for search engine optimization ("SEO"), credits for additional website views, or actual revenue from their own efforts. *Id.*

B. THE SEC'S COMPLAINT.

Without appreciating the framework of a traffic exchange business model, the SEC erroneously labeled Traffic Monsoon as a Ponzi scheme. 1 Aplt. App. at 13, ¶ 1. In fact, the SEC looked beyond written and agreed-upon disclaimers, the legitimacy of Traffic Monsoon, and the actual work done by Traffic Monsoon members, as well as the benefits they received. To make its claims, the SEC also ascribed a fraudulent intent to almost every aspect of Traffic Monsoon. 1 Aplt. App. at 25–27.

In its complaint, the SEC alleged claims against Traffic Monsoon and Mr. Scoville, individually, for (1) violation of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)];[4] (2) violation of Section 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)]; (3) violation of Section 10(b) of the Exchange Act

[4] The full text of 15 U.S.C. § 77q appears in **Addendum A**.

[15 U.S.C. § 78j(b)][5] and Rule 10b-5(a) and (c) [17 C.F.R. § 240.10b-5(a) and (c)];[6] and (4) violation of Sections 5(a) and (c) of the Exchange Act [15 U.S.C. § 77e(a) and (c)]. 1 Aplt. App. at 28–30.

C. THE SEC'S *EX PARTE* TEMPORARY RESTRAINING ORDER AND *EX PARTE* ORDER APPOINTING RECEIVER.

Although the SEC acknowledged in its complaint that 90% of Traffic Monsoon's business originates outside the United States (1 Aplt. App. at 25, ¶ 66), the SEC obtained an ***ex parte*** order to freeze the assets of both Traffic Monsoon and Mr. Scoville, while he was residing in the United Kingdom. 2 Aplt. App. at 285–289, 514–520. The SEC also obtained an ***ex parte*** order appointing a receiver of its own selection. 2 Aplt. App. at 514–520. The SEC premised its ex parte motions on the theory that Traffic Monsoon was on the brink of financial ruin, as claimed by the SEC's own investigators. 2 Aplt. App. at 115–243. The District Court did not require the SEC to comply with FRCP 65(b)(1)(B)[7] before issuing an ex parte temporary restraining order ("TRO"), even though Mr. Scoville provided a

[5] The full text of 15 U.S.C. § 78j appears in **Addendum B**.

[6] The full text of 17 C.F.R. § 240.10b-5 appears in **Addendum C**.

[7] FRCP 65(b)(1)(B): "The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if…. (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required."

voluntary statement to the SEC (1 Aplt. App. at 36–114) and was in constant email contact with the SEC. 1 Aplt. App. at 115–243.

The District Court's ex parte TRO simply adopted the form provided by the SEC. 1 Aplt. App. at 244–248; 2 Aplt. App. at 285–289. The ex parte TRO restrained all of Traffic Monsoon's business both within and outside of the United States. 2 Aplt. App. at 286–287. The ex parte TRO also froze funds in all financial institutions "whether held in the name of Defendants Traffic Monsoon, LLC and/or Charles Scoville…." without any regard for the source of these funds. 2 Aplt. App. at 287–288. Similarly, the ex parte order appointing receiver gave the receiver control of the frozen assets in addition to the Traffic Monsoon business operations. 2 Aplt. App. at 514–520. In fact, the receiver was permitted to take possession of all of Mr. Scoville's personal property, enter into his real property, and exclude him from his own property. 2 Aplt. App. at 517–518. Ultimately, the receiver took control of approximately $50 million belonging to Traffic Monsoon and its members from one source (2 Aplt. App. at 538–540) and another $6 to $10 million from another source. 3 Aplt. App. at 673.

D. THE EVIDENTIARY HEARING AND THE DISTRICT COURT'S INJUNCTION AND AMENDED RECEIVERSHIP ORDERS.

1. The Evidentiary Hearing.

The District Court held an evidentiary hearing over the course of two days to hear testimony and consider evidence on the SEC's motion for preliminary injunction and Traffic Monsoon's motion to set aside the receivership. 3 Aplt. App. at 564–793; 4 Aplt. App. at 794–1004. The SEC called as witnesses the receiver, Peggy Hunt, and one of the receiver's accountants, Ray Strong ("Mr. Strong"). 3 Aplt. App. at 569–717; 4 Aplt. App. at 798–1000. Traffic Monsoon called two of its members, Lyndon Hara ("Mr. Hara") and Saheed Chaudry ("Mr. Chaudry"). 3 Aplt. App. at 717–751, 751–779. The District Court also considered the documentary evidence submitted by the parties. 5 Aplt. App. at 1005–6 Aplt. App. at 1512; 7 Aplt. App. at 1513–8 Aplt. App. at 1836.

After the evidentiary hearing, the District Court heard argument nearly a month later after requesting supplemental briefs. 9 Aplt. App. at 1918–2063. During this hearing, the District Court also received into evidence a print copy of Traffic Monsoon's website. 8 Aplt. App. at 1870–1917. Notably, the District Court relaxed the Federal Rules of Evidence during the preliminary injunction hearing and specifically allowed the SEC's witnesses to present hearsay testimony.

3 Aplt. App. at 636. The District Court did not immediately issue a ruling, but took the matter under advisement.

2. The Injunction and Amended Receivership Orders.

After several months, the District Court issued three orders that are the subject of this appeal: a memorandum decision, a preliminary injunction order, and an amended order appointing receiver. 9 Aplt. App. at 2064–2117.

a. The Memorandum Decision and the Preliminary Injunction Order.

In the memorandum decision, the District Court granted the SEC's motion for preliminary injunction and denied Traffic Monsoon's motion to set aside the receivership. 9 Aplt. App. at 2064–2108. The District Court recognized that Traffic Monsoon is a "revenue sharing advertising company." 9 Aplt. App. at 2065, ¶ 2. The District Court also acknowledged that Traffic Monsoon offered several different advertising services through its website. *Id.*, ¶ 3. Traffic Monsoon was registered as an LLC in Utah. 9 Aplt. App. at 2065, ¶ 1. Although, the Traffic Monsoon website also listed an address in the United Kingdom. 8 Aplt. App. at 1876. The focus of the SEC's complaint is Traffic Monsoon's AdPack, which could be purchased for $50 in exchange for 1,000 website visits and 20 clicks to a member's banner ad. 9 Aplt. App. at 2066, ¶ 8. The AdPack permitted the purchaser to share in the available revenues of Traffic Monsoon by receiving

credits to the member's account up to a maximum amount of $55 per AdPack. *Id.* There were two main conditions placed upon any revenue sharing from AdPacks: First, the member had to click on 50 member ads for five seconds each on a daily basis to qualify the AdPack. *Id.*, ¶ 9. The District Court noted that Traffic Monsoon did not prohibit the "stacking" of AdPacks, meaning that a single member could have multiple AdPacks and could qualify all of them at the same time. *Id.* Approximately 99% of Traffic Monsoon members holding AdPacks qualified. *Id.*, ¶ 10. Second, Traffic Monsoon distributed revenue to all members holding qualified AdPacks only if there was available revenue, which was capped at $55 per AdPack. 9 Aplt. App. at 2070, ¶ 19(a). The District Court accepted the allegation in the SEC's complaint that "[a]pproximately 90% of the Traffic Monsoon members who purchased AdPacks reside outside of the United States and presumably purchased the AdPacks while located in their home countries." 9 Aplt. App. at 2071, ¶ 22.

Other incentives Traffic Monsoon offered to its members included a 10% commission on any products purchased by a member referral, including AdPacks. 9 Aplt. App. at 2067, ¶ 11. Of the $50 AdPack purchase price, 10% was deposited into the referring member's account, 4.5% was retained by Traffic Monsoon, 1.5% went to Traffic Monsoon's programmer, and the remaining 84% was either distributed to all qualifying AdPack holders (capped at $55 per AdPack) or placed

into a reserve fund. *Id.*, ¶ 12. Notably, neither the SEC's investigator nor the receiver's accountant confirmed that any of the AdPack funds went directly to Traffic Monsoon or Mr. Scoville. 1 Aplt. App. at 122, ¶ 36; 4 Aplt. App. at 929. When revenue sharing was available, Traffic Monsoon members received about $1 per day for each qualified AdPack. 9 Aplt. App. at 2068, ¶ 15. So, it would take about 55 days for a Traffic Monsoon member to recoup the original $50 price for an AdPack and earn the maximum $5 in revenue sharing, provided that the AdPack was qualified and funds were available for revenue sharing. *Id.*, ¶ 16.

Traffic Monsoon members agreed to be bound by a series of terms and conditions,[8] including that the purchased advertising services could not be considered a deposit, an investment, or a solicitation. 9 Aplt. App. at 2069, ¶ 18(a)–(c). Traffic Monsoon members also agreed that past performance does not guarantee the same result in the future. *Id.*, ¶ 18(d). Once again, members were notified that revenue from AdPacks was dependent upon qualifying the AdPacks and available revenue to distribute. 9 Aplt. App. at 2069–2071, ¶ 19(a)&(c). Traffic Monsoon also provided an explanation as to why it is not a Ponzi scheme. *Id.*, ¶ 19(b). At the time the receiver shut down the Traffic Monsoon website, she

[8] Traffic Monsoon developed these terms and conditions based upon Mr. Scoville's prior dealings with Brandon Dalley of the Utah Division of Securities, who explained that a similar traffic exchange network, AdHitProfits, did not involve a security. 2 Aplt. App. at 528–529.

calculated that approximately 90% of the web traffic purchased by members through AdPacks had not yet been delivered. 9 Aplt. App. at 2072, ¶ 25. Some Traffic Monsoon members acquired dozens or hundreds of AdPacks. *Id.*, ¶ 27. Many members, including Mr. Hara and Mr. Chaudry, purchased new AdPacks as soon as they had enough money in their accounts to increase traffic to their websites. *Id.*; 3 Aplt. App. at 717–751, 751–779. The District Court also noted that some Traffic Monsoon members promoted AdPacks as a way of making money. 9 Aplt. App. at 2073, ¶ 29. But, none of these statements are attributed to Traffic Monsoon or overcome the two requirements to both qualify the AdPack and have enough funds for distribution before any available revenue can be earned.

The District Court recognized that at the time the receiver froze the Traffic Monsoon assets, there was a member account balance of $34.2 million and that the receiver had between $50 and $60 million in frozen assets. 9 Aplt. App. at 2075, ¶¶ 36–37. The District Court then speculated that if all AdPacks matured, the member account balance would "swell by an additional $243.9 million, for a combined balance of $278.1 million." *Id.*, ¶ 36. Of course, the District Court's speculation did not take into account the revenue side of Traffic Monsoon's business or that the AdPacks may not be qualified or have available revenue for distribution.

The District Court's memorandum decision then made a series of legal conclusions that are presented to this Court for review. The District Court first limited the scope of the injunction to Section 10(b) of the Exchange Act, along with Rule 10b-5(a) and (c), as well as Section 17(a)(1) and (3) under the Securities Act. 9 Aplt. App. at 2075 & n.4. In its analysis, the District Court first addressed the presumption against the extraterritorial application of statutes, as outlined most prominently in *Morrison v. National Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869 (2010). The District Court claimed that it was not required to locate a "clear statement" to overcome the presumption against the extraterritorial application of statutes. 9 Aplt. App. at 2079. The District Court then conflated the clear statement principle with the notion that it had license to look beyond the plain language of statutes to delve into legislative history and other resources. *Id.* The District Court looked to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–1865 (2010) ("Dodd-Frank Act") to depart from *Morrison*. 9 Aplt. App. at 2082. Ultimately, the District Court concluded that the language of 15 U.S.C. §§ 77v(c)[9] and 78aa(b)[10] implicitly overruled the key holdings of *Morrison* on the presumption

[9] The full text of 15 U.S.C. § 77v appears in **Addendum D**.

[10] The full text of 15 U.S.C. § 78aa appears in **Addendum E**.

against extraterritorial application of Section 10(b). 9 Aplt. App. at 2082–2090. Since the District Court adopted its position based on the Dodd-Frank Act, it then had to agree with the application of the conduct and effects test, which *Morrison* had explicitly rejected. 9 Aplt. App. at 2091.

As a fall-back position, the District Court then concluded that *Morrison*'s transactional test was actually satisfied and that all the AdPack sales were domestic sales. 9 Aplt. App. at 2091–2094. The District Court reasoned that Traffic Monsoon's formation as an LLC in Utah was a sufficient nexus to categorize all AdPack sales as domestic sales. *Id.* The District Court reached this conclusion, in part, based on the language of Section 17(a). *Id.* at 2093.

For the remainder of its decision, the District Court concluded that Traffic Monsoon constitutes a Ponzi scheme. 9 Aplt. App. at 2096–2102. For its various reasons, the District Court incorrectly assumed that Traffic Monsoon members were "entitled" to receive "profits" from their AdPacks. *Id.* The District Court also discounted the entire traffic exchange industry in order to make its conclusions. *Id.* Based upon the same incorrect assumptions, the District Court next concluded that AdPacks were securities and created an investment contract between Traffic Monsoon and its members. 9 Aplt. App. at 2102. Finally, the District Court determined that the existence of a Ponzi scheme implies scienter, regardless of Traffic Monsoon's actual intentions. 9 Aplt. App. at 2104–2105.

Based upon all of these reasons, the District Court granted the SEC's motion for preliminary injunction. The District Court also filed a separate preliminary injunction order enjoining both Traffic Monsoon and Mr. Scoville. 9 Aplt. App. at 2109–2111.

b. The Memorandum Decision and the Amended Order Appointing Receiver.

The District Court did not directly address the arguments presented by Mr. Scoville for setting aside or, at least, narrowing the scope of the receivership. 9 Aplt. App. at 2106. But, the District Court eliminated Mr. Scoville, personally, from some of the requirements of the receivership, such as to turn over all his personal property and assets to the receiver, regardless of the source. 9 Aplt. App. at 2112–2117.

Before concluding its memorandum decision, the District Court expressed uncertainty as to its rulings with regard to (1) whether Section 929P(b) of the Dodd-Frank Act reinstated the conduct and effects test rejected in *Morrison*; (2) whether Traffic Monsoon's sale of AdPacks to foreign customers constituted a domestic transaction; and (3) whether Traffic Monsoon's business model constitutes a Ponzi scheme, due to the "contingent nature of the promised returns." 9 Aplt. App. at 2107. Traffic Monsoon now appeals from these orders based upon the three main legal issues presented in this appeal. 9 Aplt. App. at 2118–2120.

V. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING INJUNCTION ORDERS.

This Court reviews a district court's decision to grant a preliminary injunction for an abuse of discretion. *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1245 (10th Cir. 2017) (citation omitted). "An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* (citation omitted). In making this determination, this Court "review[s] the district court's factual findings for clear error and its conclusions of law de novo." *Id.* (citation and internal quotation marks omitted).

B. STANDARDS FOR REVIEWING QUESTIONS OF LAW.

This Court reviews a district court's interpretation of a federal statute de novo. *See United States v. Fillman*, 162 F.3d 1055, 1056 (10th Cir. 1998) (citations omitted). The question of whether an instrument is a security is a "question of law and not of fact…." *SEC v. Thompson*, 732 F.3d 1151, 1160 (10th Cir. 2013) (citations and internal quotation marks omitted).

VI. LEGAL ARGUMENT

A. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS ENTIRE LITIGATION SINCE NO "SECURITY" WAS INVOLVED IN TRAFFIC MONSOON'S TRAFFIC EXCHANGE BUSINESS.

Traffic Monsoon's traffic exchange business does not involve a "security," even with the incentives and rewards that Traffic Monsoon conditionally offered to its members. *See, e.g., Marine Bank v. Weaver*, 455 U.S. 551, 102 S.Ct. 1220 (1982). A traffic exchange is comprised of a network of members who click on each other's websites to increase traffic to their respective websites. *See, e.g.*, https://en.wikipedia.org/wiki/Traffic_exchange (last visited September 11, 2017). If Traffic Monsoon prevails on this threshold issue, the proper remedy is for this Court to vacate all of the District Court's orders for lack of subject matter jurisdiction. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974); *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 1785 (2002). At a minimum, the Court should conclude that the District Court lacks subject matter jurisdiction over Mr. Scoville, personally, since he admittedly did not sell any securities. 9 Aplt. App. at 2093 n.12.

1. Traffic Monsoon's Traffic Exchange Business Model Did Not Involve a "Security."

Traffic Monsoon's traffic exchange business model did not involve a "security." A "security" is "[c]ollateral given or pledged to guarantee the

fulfillment of an obligation…." BLACK'S LAW DICTIONARY, 1559 (10th ed. 2014). In the instant case, there was no "guarantee" and there was no "obligation" with respect to AdPacks. Traffic Monsoon members did not have a guarantee to receive any revenue sharing since they needed to qualify the AdPacks, and revenue had to be available. 9 Aplt. App. at 2070, ¶ 19(a). Because of these conditions, Traffic Monsoon had no obligation to pay its members any revenue arising from the AdPacks.

The Securities Act of 1933 defines a security as:

> [A]ny note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(a)(1). The term "security" is defined to include any "investment contract." *See id.*; 15 U.S.C. § 78(c)(a)(10). An investment contract is a security if it involves (1) an investment of money; (2) in a common enterprise; (3) with profits derived solely from others' efforts. *See SEC v. W.J. Howey, Co.*, 328 U.S.

293, 301 (1946). However, Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud. *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1253 (9th Cir. 1976); *Bellah v. First Nat'l Bank*, 495 F.2d 1109, 1114 (5th Cir. 1974).

As to the first *Howey* factor, there was no "investment of money." Rather, Traffic Monsoon members purchased advertising packages. The funds the members provided for the AdPacks created revenues for Traffic Monsoon from the sales. For the second *Howey* factor, the Supreme Court has explained that the "determining factor of a common enterprise and the economic reality of the transaction is whether or not the investment was for profit." *United Housing Foundation v. Forman*, 421 U.S. 837, 852 (1975). Once again, revenue from AdPacks was capped at $55 and only shared with Traffic Monsoon members when it was available. 9 Aplt. App. at 2070, ¶ 19(a). For the third *Howey* factor, Traffic Monsoon members did not receive any "profits" solely from others' efforts. *See Forman*, 421 U.S. at 849. Instead, Traffic Monsoon members had to qualify their AdPacks. 9 Aplt. App. at 2066, ¶ 9. Additionally, the very nature of a traffic exchange network requires a particular member to view other members' websites to receive credits for views to his own website. So, the revenue is ultimately derived from members in a network exchanging traffic.

The District Court expressed concern in its memorandum decision of whether the contingent nature of the benefits to Traffic Monsoon members was permissible. 9 Aplt. App. at 2107. The Traffic Monsoon website agreement states:

> What does "share revenue up to $55" mean?
>
> This means we cannot guarantee the amount you'll receive per day, but as long as you are qualified to receive share in site revenues, you'll continue to receive of revenues on each sharing position up to $55.
>
> This also means we do not guarantee reaching $55, because earnings from revenue sharing is completely dependent upon the sales of ad services, and also dependent upon you meeting the qualification to receive of revenues by surfing a minimum of 10 ads in a 24 hour period.

8 Aplt. App. at 1905. The District Court expressed a similar concern during the oral argument hearing in response to the SEC's argument: "Well, once again, you're assuming away the contingent that there had to be revenue to share….Once again, we're ignoring the terms of the agreement pursuant to which the investment was made." 9 Aplt. App. at 1968. As a matter of law, the definition of a "security" which seems to fall within the broad sweep of statutory definitions cannot be considered a security if the context otherwise requires. *See Marine Bank v. Weaver*, 455 U.S. 551, 558–559, 102 S.Ct. 1220, 1225 (1982). Therefore, the Court should conclude that no "security" is involved in Traffic Monsoon's traffic exchange business model.

2. The District Court Lacked Subject Matter Jurisdiction Over This Entire Litigation Due to the Absence of a "Security."

The District Court lacked subject matter jurisdiction over this entire litigation due to the absence of a "security." If the Court determines that Traffic Monsoon's traffic exchange did not involve a security, the Court should next determine that the District Court lacked subject matter jurisdiction over this entire litigation. *See, e.g., Arnson v. My Investing Place L.L.C.*, 2012 WL 2922683, at *4 (D. Utah 2012) ("[I]f the 'investments' at issue in this case do not constitute 'securities' within the meaning of the securities laws, this court would lack jurisdiction over the subject matter since no federal question would exist."). "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002). Objections to subject matter jurisdiction may be raised at any time, "even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 824 (2013). This is true even though such an objection "may also result in the waste of judicial resources and may unfairly prejudice litigants." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S.Ct. 1197, 1202 (2011). Accordingly, if the Court reaches the conclusion that the District Court lacked

subject matter jurisdiction, the proper remedy is to order this entire litigation dismissed.

3. At a Minimum, Mr. Scoville, Individually, Should Be Dismissed From This Litigation.

At a minimum, Mr. Scoville, individually, should be dismissed from this litigation. The District Court has already concluded, "But, Mr. Scoville did not sell any AdPacks. His LLC, Traffic Monsoon, did." 9 Aplt. App. at 2093 n.12. Since Mr. Scoville admittedly did not sell any securities, the District Court lacks subject matter jurisdiction over him because there is no federal question jurisdiction. Therefore, this Court should, at a minimum, order Mr. Scoville, individually, dismissed from this litigation.

In summary, Traffic Monsoon asks this Court to first determine that the District Court lacked subject matter jurisdiction over this entire litigation due to the absence of a "security" in Traffic Monsoon's traffic exchange business. The District Court's lack of subject matter jurisdiction would require all of its orders to be vacated and this litigation dismissed. At a minimum, Mr. Scoville, individually, should be dismissed since he admittedly did not sell any securities.

B. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE DODD-FRANK ACT IMPLICITLY OVERRULED THE KEY HOLDINGS IN *MORRISON v. NATIONAL BANK LTD.*, 561 U.S. 247, 130 S.Ct. 2869 (2010), LIMITING THE EXTRATERRITORIAL APPLICATION OF SECTION 10(b) OF THE SECURITIES AND EXCHANGE ACT OF 1934.

If this Court determines that the District Court had subject matter jurisdiction over this litigation, Traffic Monsoon next challenges the District Court's departure from *Morrison v. National Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869 (2010). The District Court analyzed *Morrison* based on the premise that "[a]pproximately 90% of the Traffic Monsoon members who purchased AdPacks reside outside of the United States and presumably purchased the AdPacks while located in their home countries." 9 Aplt. App. at 2071, ¶ 22. Under the key holdings in *Morrison*, the District Court was required to limit the scope of the SEC's lawsuit and the receivership to only the 10% of AdPacks purchased domestically. But, the District Court instead concluded that "the text of Section 929P(b) [of the Dodd-Frank Act], the legal context in which this amendment was drafted, legislative history, and the expressed purpose of the amendment all point to a congressional intent that, in actions brought by the SEC, Sections 10(b) and 17(a) should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied." 9 Aplt. App. at 2090. However, the actual text of Sections 10(b) and 17(a) was not changed by the Dodd-

Frank Act. And, Section 929P(b) of the Dodd-Frank Act does not actually speak to the adjudication of extraterritorial transactions. As such, Traffic Monsoon asks this Court to limit Section 929P(b) of the Dodd-Frank Act to its actual language, including the codification at 15 U.S.C. §§ 77v and 78aa, instead of the overreaching interpretation adopted by the District Court.

As an alternative analysis, the District Court also concluded that the corporate formation of Traffic Monsoon as an LLC in Utah somehow provides the domestic nexus to actually satisfy the *Morrison* transactional test for extraterritorial application. 9 Aplt. App. at 2091–2093. But, *Morrison*'s presumption against the extraterritorial application of Section 10(b) requires more than just a superficial domestic connection to overcome the presumption. *See Morrison*, 561 U.S. at 266, 130 S.Ct. at 2884 ("For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.") (italics in original). So, the Court should similarly reject the District Court's alternative analysis to overcome the key holdings and application of *Morrison* to this case.

1. ***Morrison*** **Unequivocally Limits the Extraterritorial Application of Section 10(b).**

Morrison unequivocally limits the extraterritorial application of Section 10(b). "When a statute gives no clear indication of an extraterritorial

application, it has none," *Morrison*, 561 U.S. at 248, 130 S.Ct. at 2878, and reflects the "presumption that United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454, 127 S.Ct. 1746 (2007). This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227 (1991). The anti-fraud provisions reach only purchases and sales of securities in the United States since U.S. securities laws do not punish deceptive conduct, but rather they punish deceptive conduct in connection with the purchase or sale of any domestic transactions in securities. *Morrison*, 561 U.S. at 265,130 S.Ct. at 2883. Under this framework, *Morrison* held that Section 10(b) of the Exchange Act, and consequently Rule 10b-5, do not apply extraterritorially. *Id.*

The *Morrison* court also clarified that what conduct Section 10(b) reaches is essentially asking what conduct Section 10(b) prohibits, which is a merits question, not a question of subject matter jurisdiction. *Id.*, 561 U.S. at 254,130 S.Ct. at 2877. The Supreme Court went on to discuss the unworkability of the conduct and effects test—judicial-speculation-made law—to create a uniform and "stable background against which Congress can legislate with predictable effects." *Id.*, 561 U.S. at 261,130 S.Ct. at 2881. Rejecting the notion of judicial lawmaking, the Supreme Court confirmed, "[W]hen it comes to "the scope of [the] conduct

prohibited by [Rule 10b–5 and] § 10(b), the text of the statute controls our decision." *Id.*, n.5. The Supreme Court next explained that broad language that refers to "foreign commerce" or even "foreign countries" is insufficient to overcome the presumption against extraterritorial application: "The fleeting reference to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality." *Id.*, 561 U.S. at 262–263,130 S.Ct. at 2882.

In the instant case, the SEC's complaint agrees that approximately 90% of Traffic Monsoon's customers reside outside of the United States. 1 Aplt. App. at 25, ¶ 66. The District Court's memorandum reached the same conclusion: "Approximately 90% of the Traffic Monsoon members who purchased AdPacks reside outside of the United States and presumably purchased the AdPacks while located in their home countries." 9 Aplt. App. at 2071, ¶ 22. Therefore, based upon *Morrison*'s prohibition against the extraterritorial application of Section 10(b), the Court should limit the scope of the District Court litigation and the receivership to only the 10% of domestic AdPack sales.

2. The Dodd-Frank Act Did Not Overrule the Key Holdings in *Morrison*.

The Dodd-Frank Act did not overrule the key holdings in *Morrison*. The District Court erroneously determined that the Dodd-Frank Act impliedly

overruled *Morrison*'s presumption against the extraterritorial application of Section 10(b). 9 Aplt. App. at 2090. In particular, the District Court rejected the 'clear statement rule' but failed to appreciate that statutory interpretation must give "the most faithful reading of the text." *Id.*, 561 U.S. at 265, 130 S.Ct. at 2883 (internal quotation marks omitted). In other words, the ability of a court to overcome the presumption against extraterritorial application of statutes cannot be done by ignoring the plain language of the statute at issue. The Supreme Court explained, "It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Id.*, 561 U.S. at 270, 130 S.Ct. at 2886.

Although the District Court disavowed the guidelines outlined in *Morrison* in its memorandum decision, it held an opposing position during the oral argument hearing:

> SEC: Your Honor, this is the thorny legal issue in this case when you're talking about was there conduct in the United States or was there a domestic securities transaction. And this is exactly why—this is one of the reasons why Congress remedied the Morrison analysis.
>
> The Court: I just don't buy that. I have to tell you that I think that was a jurisdictional—I mean, the language of the statute was jurisdictional, and I'm just not buying that Dodd-Frank fixed that.

9 Aplt. App. at 1944–1945. Once again, even though the District Court went to great lengths to "interpret" 15 U.S.C. §§ 77v and 78aa in its memorandum

decision, the District Court disagreed with this entire method of statutory construction during the hearing:

> SEC: I do think the Chicago Convention Center case, again, does a very good job of identifying the terms of the statute, 929P(b), and how the terms contrast with what is a fairly punted legislative history.
>
> The Court: I agree with you wholeheartedly on that, but I just don't think I can look at statutory language that I believe is clear on the face of the statute and then say, well, but because of all this other extraneous stuff out here, I'm going to use that to create an ambiguity where none exists. That's just not my understanding of how statutory interpretation works.

9 Aplt. App. at 1947. With respect to the notion of looking at individual speakers within the legislative history to determine "intent," the District Court similarly expressed its disdain:

> SEC: Now I'm just in the realm of speculation, Your Honor. I suspect that it probably was a lack of appreciation by Representative Ken Jaworski and other Congress persons as to what the actual effect of using certain terms would be.
>
> The Court: Right. But I suppose the new language could just be a clarification. It maybe doesn't have to do something new. I mean, I think the problem is, as you acknowledge, once we leave the words that Congress has selected and that have actually been passed into law, we are just speculating wildly about what the intent was, and what individual legislators thought, and how it was supposed to fit in. I mean, we just leave the realm of what was passed and just have nothing that is really grounded in anything reliable.

9 Aplt. App. at 1949–1950. In these three excerpts from the oral argument hearing, the District Court foreshadowed why its own later analysis in the

memorandum decision is legally flawed:

First, the Dodd-Frank Act did not "fix" the *Morrison* presumption against the extraterritorial application of Section 10(b). As the District Court previously recognized, 15 U.S.C. §§ 77v(c) and 78aa only address jurisdiction:

> (c) **Extraterritorial jurisdiction**. The district courts of the United States and the United States courts of any Territory ***shall have jurisdiction of an action or proceeding*** brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.
>
> * * * *
>
> (b) **Extraterritorial jurisdiction**. The district courts of the United States and the United States courts of any Territory ***shall have jurisdiction of an action or proceeding*** brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(emphases added). Looking at the plain language of these statutes, they simply resolve that district courts have jurisdiction to hear cases involving allegations of

violations of Section 10(b) but not necessarily adjudicate those cases if they do not involve domestic securities. Prior to *Morrison*, the subject matter jurisdiction of district courts to hear these kinds of cases was unsettled. But, the Supreme Court beat Congress to the punch and clarified that district courts, indeed, have subject matter jurisdiction: "The District Court here had jurisdiction under 15 U.S.C. § 78aa3 to adjudicate the question whether § 10(b) applies to National's conduct." *Morrison*, 561 U.S. at 254, 130 S.Ct. at 2877. Therefore, consistent with *Morrison*, there is no need to look beyond the plain language of 15 U.S.C. §§ 77v(c) and 78aa to guess some other intent.

Second, the District Court cannot delve into legislative history when the plain language of 15 U.S.C. §§ 77v and 78aa does not affect *Morrison*'s presumption against the extraterritorial application of Section 10(b). In fact, this was the very issue contemplated by the *Morrison* court:

> Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to "discern" whether Congress would have wanted the statute to apply.

Id., 561 U.S. at 255, 130 S.Ct. at 2878. In the instant case, the District Court has violated the very principle announced in *Morrison* by attempting to "discern" some intent of Congress beyond the statutory language. The District Court previously determined that the statutes are not ambiguous, so there was no reason to look

beyond the statutory language. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947 (2000) ("Congress says in a statute what it means and means in a statute what it says there.") (citation and internal quotation marks omitted). Therefore, the Court should disregard the District Court's attempt to cobble together some intent other than what is stated in these statutes.

Third, the District Court cannot rely upon single legislators to "interpret" the plain language of statutes. Despite the District Court's previously-expressed disdain for relying upon a single legislator for "discerning" the intent of Congress, the District Court did just this in attempting to overcome the plain language of 15 U.S.C. §§ 77v(c) and 78aa. 9 Aplt. App. at 2088. The Supreme Court has specifically frowned upon such methods of statutory interpretation: "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself....'" *Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S.Ct. 1562, 1567 (1993) (Scalia, J., concurring) (citation omitted). Therefore, the Court should disregard the District Court's attempts to go beyond the plain language of these statutes based upon comments by individual legislators.

3. Section 17(a) Does Not Alter the Governing Effect of *Morrison*.

Section 17(a) does not alter the governing effect of *Morrison*. In an effort to bypass *Morrison*, the District Court next determined that because the SEC's claim was based upon the "unique" language of Section 17(a), mentioning both "offer" and "sale," this inclusion somehow makes Section 17(a) applicable extraterritorially. 9 Aplt. App. at 2088. Yet, if Congress had intended for Sections 10(b) and 17(a) to be applied extraterritorially, they would have so stated. *Morrison*, 561 U.S. at 255, 130 S.Ct. at 2878 ("When a statute gives no clear indication of an extraterritorial application, it has none."). And, "possible interpretations of statutory language do not override the presumption against extraterritoriality." *Id.*, 561 U.S. at 264, 130 S.Ct. at 2883 (citation omitted).

The Supreme Court warned that not every sale with some connection to the United States is a domestic sale:

> [I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.

Id., 561 U.S. at 266,130 S.Ct. at 2884 (italics in original). In fact, even though the defendant in *Morrison*, National Australia Bank, had a mortgage servicing company headquartered in Florida, the corporate existence in the United States was

an insufficient nexus for a domestic sale of securities. *Morrison*, 561 U.S. at 251, 130 S.Ct. at 2875. The location of a sale is important then because, as the Supreme Court pointed out, Congress only indicated an intent to apply the anti-fraud provisions of the laws regarding sales of securities within the United States.

When the Supreme Court issued its opinion in *Morrison*, it rejected 40 years of case law applying the "conduct" or "effects" tests in the United States in favor of a rule that the anti-fraud provisions of the Securities Act of 1933 and the Exchange Act of 1934 apply only when "the purchase and sale [of the security] is made in the United States, or involves a security listed on a domestic exchange." *Morrison*, 561 U.S. at 269–270, 130 S.Ct. at 2886. Put simply, the purchase and sale of AdPacks by buyers in Bangladesh, Venezuela, or Morocco (1 Aplt. App. at 25, ¶ 66), or any of the countries where the 90% of non-domestic purchasers resided, were not domestic sales. The irrevocable obligation to purchase, and Traffic Monsoon's irrevocable obligation to sell, an AdPack occurred where the user was located when he clicked the button on his web browser to consummate the sale of the AdPack. According to the SEC's complaint, 90% of the purchasers of AdPacks were non-domestic purchasers, and consequently, the United States securities laws—specifically Sections 10(b) and 17(a)—were not implicated by those sales. As such, even if the conduct and effects test were reinstated, the SEC cannot satisfy the test under either Section 10(b) or 17(a).

After *Morrison*, various courts have similarly recognized that Section 17(a) does not apply to extraterritorial conduct. *See In re Vivendi Universal, S.A., Sec. Litig.*, 842 F.Supp.2d 522, 2012 WL 280252, at *5 (S.D.N.Y. Jan. 27, 2012); *SEC v. Goldman Sachs & Co.*, 790 F.Supp.2d 147, 164 (S.D.N.Y. 2011) (applying *Morrison* to Section 17(a)); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F.Supp.2d 327, 338 & n.11 (S.D.N.Y. 2011); *SEC v. ICP Asset Mgmt., LLC*, 2012 WL 2359830, at *2 (S.D.N.Y. June 21, 2012). The Supreme Court in *Morrison* foreshadowed these rulings: "The same focus on domestic transactions is evident in the Securities Act of 1933, 48 Stat. 74, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading." *Morrison*, 561 U.S. at 268, 130 S.Ct. at 2885. Therefore, the Court should join in these authorities by upholding the presumption in *Morrison* against the extraterritorial application of Sections 10(b) and 17(a).

4. The Facts of This Case Do Not Satisfy the *Morrison* Transactional Test.

The facts of this case do not satisfy the *Morrison* transactional test. The Second Circuit has held that "a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2nd Cir. 2012). Whether an individual or a

corporation is a resident of the United States or a United States citizen "is irrelevant to the location of a [securities] transaction." *Id.* at 70 (holding that an individual defendant's residency in California and a corporate defendant's status as a California corporation was irrelevant to whether securities transaction was a domestic securities transaction and dismissing a complaint for failure to allege sufficient facts to establish a domestic securities transaction).

In *Absolute Activist*, the plaintiffs were nine Cayman Islands-based hedge funds that hired Absolute Activist to act as their investment manager. Absolute Activist then caused the hedge funds to purchase thinly-traded shares of U.S.-based companies with stock that was quoted on the OTC bulletin boards. The funds purchased the stock directly from the companies, all of which were located in the United States. The principals of Absolute Activist, including two who were residents and registered broker-dealers in the United States, already owned shares in the companies. The Absolute Activist principals used their holdings in these same companies to execute a "pump and dump" to their personal benefit and to the hedge funds' detriment. The plaintiff hedge funds alleged that Absolute Activist's purchase of the penny stocks directly from the companies constituted fraud.

Despite the arguably strong presence of U.S. activity, the Second Circuit still examined whether these transactions met the "domestic transaction" requirement under *Morrison* and explained:

> [R]ather than looking to the identity of the parties, the type of security at issue, or whether each individual defendant engaged in conduct within the United States, we hold that a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.

Absolute Activist, 677 F.3d at 69. The court then concluded that, although the funds purchased securities directly from the U.S.-based issuers, that allegation in the complaint was insufficient to establish that any domestic transaction took place within the United States, and, therefore, Section 10(b) did not apply under *Morrison*.

Since the decisions in *Morrison* and *Absolute Activist*, courts have provided additional guidance on what constitutes a domestic transaction. In *In re Petrobras Sec. Litig.*, 150 F.Supp.3d 337, 341 (S.D.N.Y. 2015), the plaintiffs argued that, because the sales of securities "settled through the Depository Trust Company (the "DTC") in New York, New York," the sales took place in the United States. Although the court agreed that settlement of the sales took place on DTC's servers in New York, this fact was insufficient to bring the transactions under U.S. securities laws. Instead, the court found that settlement of a trade through servers based in the United States was the kind of "actions needed to carry out…transactions" that are "insufficient to satisfy *Morrison*." *Id.* at 342 (citing *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2nd Cir. 2014)). Computer

servers settling trades are not "the transactions themselves" and therefore alleging that the servers were in the United States did not establish a domestic sale. *Id.*

Thus, the U.S. securities laws under which the SEC is proceeding prohibit sales only if the parties to the transactions incurred irrevocable liability to carry out the transaction in the United States or if title to the securities were passed within the United States. Therefore, it was reversible error for the District Court to conclude that all of Traffic Monsoon's Adpacks were domestic sales of securities. 9 Aplt. App. at 2091–2093.

Further, the SEC has issued regulations regarding when a securities transaction take place offshore. Regulation S exempts certain sales to foreign buyers from the ordinary registration requirements of Section 5. *See* 17 C.F.R. § 230.901 et seq. The purpose of Regulation S is to exempt sales of securities that occur outside the United States. In its definition section, Regulation S explains that a sale of securities is an "offshore transaction" if: "(i) The offer is not made to a person in the United States" and "(ii) [a]t the time the buy order is originated, the buyer is outside the United States…." Thus, under Regulation S the location of a sale of securities is defined by the location of the buyer.

Under the definition contained in Regulation S, the AdPack sales took place outside the United States as offshore transactions because at the time of the offers and sales, the foreign buyers were outside the United States. This provides yet

another basis to conclude that the AdPack sales took place where the buyers were—outside the United States. Accordingly, this Court should conclude that the facts of this case do not satisfy the *Morrison* transactional test.

5. The District Court's Departure from *Morrison* Will Create the Very International Law Conflicts Warned of in *Morrison*.

The District Court's departure from *Morrison* will create the very international law conflicts warned of in *Morrison*. 561 U.S. at 270–271, 130 S.Ct. at 2886. In this case, the foreign purchasers were outside the United States when they made their purchases of AdPacks. The Traffic Monsoon members entered contracts in foreign jurisdictions that are governed by foreign laws that determine when irrevocable liability arises. And, under the laws where many of the purchasers were located, irrevocable liability did not arise at the time the sale was logged in the U.S.-based servers but as many as 14 days later in some instances. Determining when and where irrevocable liability takes place requires consulting the law of the jurisdiction where the buyer was at the time of the purchase. For example, in the European Union, under the EU Directive 2011/83/EU, on consumer rights, "the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason." 4 2011/83/EU Article 9(1). 8 Aplt. App. at 1844–1869. AdPacks purchases were "distance contracts," so purchasers in the EU had 14 days to withdraw without giving any

reason after their initial "purchase." Thus, their liability to purchase did not become "irrevocable" until the expiration of their right of withdrawal. In other words, at the time the U.S. servers logged the sale, there was no irrevocable liability. Instead, irrevocable liability rose later and had nothing to do with servers, or for that matter anything else, in the United States. Since the law governs where the AdPack purchasers are located, the SEC cannot apply its own conflicting laws outside of the United States.

Aside from this international regulation, the parties' meeting of the minds took place outside the United States. As noted by the Second Circuit in *Absolute Activist*, "'[c]ommitment' is a simple and direct way of designating the point at which, in the classic contractual sense, there was a meeting of the minds of the parties; it marks the point at which the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time." 677 F.3d at 67–68. The territory of the United States had nothing to do with the meeting of the minds of the parties in the instant case. The meeting of the minds between Traffic Monsoon and its customers happened when the consumer, having visited Traffic Monsoon's website, elected to press the button on their web browser that consummated a purchase of an AdPack. The final commitment took place when the purchaser did not exercise his

unconditional right of withdrawal within the statutory 14 days thereafter—not when the use of an internet server was implicated.

In the end, the SEC had the burden to demonstrate that it could apply Sections 10(b) and 17(a) outside of the United States. The SEC has failed to do this, and the presumption against the extraterritorial application of these statutes must prevail. Therefore, Traffic Monsoon asks this Court to hold true to the Supreme Court's key holdings and governing guidelines in *Morrison*. For this *Morrison* issue, the proper remedy from this Court would be to limit the entire District Court litigation to only the 10% domestic AdPack sales, thus requiring the release of 90% of Traffic Monsoon's assets from the receivership.

C. THE DISTRICT COURT ERRED BY CONCLUDING THAT TRAFFIC MONSOON'S TRAFFIC EXCHANGE BUSINESS CONSTITUTES A PONZI SCHEME, DUE TO THE LACK OF LEGAL AND FACTUAL SUPPORT.

Regardless of how the Court rules on the *Morrison* issue, the Court should conclude that Traffic Monsoon's traffic exchange does not constitute a Ponzi scheme. Of course, if the Court concludes that the Traffic Monsoon business model does not involve a security, then no Ponzi scheme exists as a matter of law. *See Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1273 n.2 (10th Cir. 2008) (citation omitted). The District Court's labeling of Traffic Monsoon's traffic exchange as a Ponzi scheme misapprehends the business model and

completely ignores the business aspects of the traffic exchange. And, no Traffic Monsoon member was entitled to any revenue sharing, as an incentive for participating in the traffic exchange, unless existing revenue was available and the member had qualified the AdPacks by making the required clicks per day. 9 Aplt. App. at 2069–2070, ¶ 19(a).

1. The Traffic Monsoon Traffic Exchange Business Model Does Not Constitute a "Ponzi Scheme."

The Traffic Monsoon traffic exchange business model does not constitute a Ponzi scheme. A "Ponzi scheme" is "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." BLACK'S LAW DICTIONARY, 1348 (10th ed. 2014). Notably, Traffic Monsoon did not limit its available revenue sharing to only "original investors." Instead, even recent Traffic Monsoon members could participate in revenue sharing, so long as there were available funds, and the members had qualified their AdPacks. 9 Aplt. App. at 2069–2071, ¶ 19(a)&(c). And, Traffic Monsoon only shared available revenue with all its qualifying members from previous purchases. 8 Aplt. App. at 1897. So, Traffic Monsoon's business model does not fit within even the most basic definition of a "Ponzi scheme."

This Court has defined a "Ponzi scheme" as:

> [A]n investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments. Typically, investors are promised large returns for their investments. Initial investors are actually paid the promised returns, which attract additional investors.

In re M & L Bus. Mach. Co., Inc., 84 F.3d 1330, 1332 n.1 (10th Cir. 1996). Traffic Monsoon lacks any of the defining characteristics of a Ponzi scheme. Traffic Monsoon's "underlying business structure" is a revenue sharing traffic exchange. As the Court can see from the testimony of Traffic Monsoon's two witnesses, Mr. Hara and Mr. Chaudry, the traffic exchange was highly effective to grow their businesses. 3 Aplt. App. at 717–751, 751–779. They were both willing to pay for the price of the traffic exchange advertising, which was far less expensive than using SEO consultants. 3 Aplt. App. at 739. The fact that they were able to earn more credits through their own labors and referral networks does not make Traffic Monsoon a Ponzi scheme—precisely because even new members who qualified their AdPacks were entitled to share in available revenue. In contrast to the "contingent nature of the promised returns," which the District Court recognized later in its memorandum decision (9 Aplt. App. at 2107), the District Court made the improper assumption that members had the "right" to receive revenue. 9 Aplt. App. at 34. The District Court's assumption that Traffic Monsoon members

holding qualified AdPacks had a "right" to receive revenue is not supported by any evidence.

In fact, the receiver's accountant, Mr. Strong, first presumed that Traffic Monsoon would suffer a loss on its first day of business. 4 Aplt. App. at 936. But, once counsel took him through a series of scenarios, Mr. Strong agreed that Traffic Monsoon members actually paid less for AdPacks than they would have for similar à la carte services. 4 Aplt. App. at 941–944. Mr. Strong also agreed that Traffic Monsoon members had no guarantee of any revenue sharing. 4 Aplt. App. at 948, 958. Since Traffic Monsoon dealt with revenue sharing on a daily basis, the only way to properly analyze the revenue flow was on a daily basis. Once again, counsel took Mr. Strong through all possible scenarios of selling and purchasing AdPacks, as well as cash withdrawals. During this exchange, Mr. Strong could not think of any scenarios other than those where Traffic Monsoon would be solvent. 4 Aplt. App. at 972–973. In fact, Mr. Strong conceded that Traffic Monsoon would have excess cash. 4 Aplt. App. at 977. Despite its conclusion that Traffic Monsoon was a Ponzi scheme, the District Court later expressed its uncertainty: "[W]hether Traffic Monsoon's particular business model constitutes a Ponzi scheme in light of the contingent nature of the promised returns appears to be an issue of first impression in this circuit." 9 Aplt. App. at 2107. Therefore, based upon the legal definitions of a "Ponzi scheme" and the evidence presented during

the evidentiary hearing, this Court should make the determination that Traffic Monsoon is not a Ponzi scheme.

2. The District Court Never Actually Determined that Traffic Monsoon Had Any Fraudulent Intent.

The District Court never actually determined that Traffic Monsoon had any fraudulent intent. The District Court's refusal to address Traffic Monsoon's lack of scienter under Sections 10(b) or 17(a)(1), implies that the District Court was unable to reach such a conclusion. *See Ernst & Ernst*, 425 U.S. 185, 193–194 (1976) (stating that scienter is "a mental state embracing intent to deceive, manipulate, or defraud"). Instead, the District Court relied upon Section 17(a)(3) for the notion that the SEC did not have to prove scienter to demonstrate that Traffic Monsoon is a Ponzi scheme. 9 Aplt. App. at 2076. The District Court instead relied upon the notion that Traffic Monsoon was allegedly "inherently deceptive." *Id.* at 2100. For this line of reasoning, the District Court once again reverted to the notion that "returns" were guaranteed. *Id.* But, there was no testimonial or documentary evidence to support this notion. The District Court's circular reasoning continued by claiming that the disclaimers were insufficient because Traffic Monsoon should have disclosed to its members the inner workings of the revenue sharing. *Id.* But, the District Court did not explain how the allegation of the failure to disclose creates a Ponzi scheme, unless a Ponzi scheme

is presumed. For example, any business that offers rewards or cash back on purchases does not have to disclose how these incentives are funded. Similarly, so long as Traffic Monsoon kept its promise of sharing available revenue to qualified AdPack holders, how could this constitute a Ponzi scheme or even negligence under the relaxed standard of Section 17(a)(3)? *See Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223 (1982) ("[W]e are satisfied that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.") (citation omitted).

Although scienter does not need to be proven under Section 17(a)(3), it is still a factor to consider in determining a violation under this Section. *See Aaron v. SEC*, 446 U.S. 680, 701, 100 S.Ct. 1945, 1958 (1980). In *Aaron*, the Supreme Court articulated that "[a]n important factor in this regard is the degree of intentional wrongdoing evident in a defendant's past conduct." *Id.* (citation omitted). Despite this standard, the District Court failed to look at the mitigating factors before enjoining Traffic Monsoon. Mr. Scoville had been involved in creating other traffic exchange networks, and had received approval from the Utah Division of Securities, which explained that a similar traffic exchange network, AdHitProfits, did not involve a security. 2 Aplt. App. at 528–529. The Traffic Monsoon website contained various disclaimers based upon Mr. Scoville's prior experience with traffic exchange networks. 8 Aplt. App. at 1870–1917. Mr.

Scoville did not personally receive any of the funds generated from Traffic Monsoon AdPacks, as confirmed by the SEC's own investigator and the receiver's accountant. 1 Aplt. App. at 122, ¶ 36; 4 Aplt. App. at 929. Finally, Mr. Scoville cooperated extensively with the SEC by traveling from the United Kingdom to Utah to provide a voluntary statement and answer numerous follow-up emails from the SEC. 1 Aplt. App. At 36–243. In essence, the SEC unnecessarily filed this enforcement action when it could have simply continued to communicate with Mr. Scoville. Therefore, when considering whether Traffic Monsoon operated a Ponzi scheme, the Court should take into account Mr. Scoville's and Traffic Monsoon's lack of scienter, as a necessary factor.

3. The District Court Cannot Rewrite the Disclosed and Agreed-Upon Conditions of Participating in Traffic Monsoon's Traffic Exchange Network.

The District Court cannot rewrite the disclosed and agreed-upon conditions of participating in Traffic Monsoon's traffic exchange network. During the oral argument hearing, the District Court questioned the SEC how Traffic Monsoon could operate a Ponzi scheme if all the terms and conditions had been disclosed. 9 Aplt. App. at 1930–1931; *see also Hancock v. Am. Tel. & Tel. Co*., 701 F.3d 1248, 1255 (10th Cir. 2012) (defining "click-wrap" as a term for agreements requiring a computer user to "consent to any terms or conditions by clicking on a dialog box on the screen to proceed with [a]…transaction") (citation omitted). The

SEC once again labeled Traffic Monsoon as inherently fraudulent and that it was bound to collapse, without really answering the District Court's question. *Id.* The District Court then pointed out to the SEC that when there was no available revenue, the Traffic Monsoon members had no "contractual entitlement or expectation of receiving a dime." 9 Aplt. App. at 1932. The SEC responded that a fully disclosed Ponzi scheme is still a Ponzi scheme. *Id.* Thus, the SEC once again relied upon its own Ponzi scheme label of Traffic Monsoon without actually demonstrating the satisfaction of the necessary elements. Yet, since Traffic Monsoon has fully disclosed everything to its members, as the District Court suggested, what else was Traffic Monsoon to do to avoid the SEC affixing its Ponzi scheme label? This entire line of discussion before the District Court demonstrates that the SEC's case requires a Ponzi scheme label to succeed, the stated conditions under which revenue was shared with qualifying members is disregarded, and the entire traffic exchange industry must be dismissed as unnecessary and a sham. However, the law does not countenance such an approach, especially in blanket fashion over the entirety of Traffic Monsoon and Mr. Scoville. *See SEC v. Mgmt. Solutions, Inc.*, 2013 WL 4501088, at *20 (D. Utah 2013) ("An effort to apply such a 'Ponzi presumption' in all securities fraud cases which have some Ponzi scheme characteristics is inappropriate."); *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1246 (10th Cir. 2016)

("Liability for securities fraud requires the making of a material misrepresentation."). Therefore, Traffic Monsoon asks this Court to determine that its business model of a traffic exchange is not a Ponzi scheme. The proper remedy for this Court's determination that Traffic Monsoon did not operate as a Ponzi scheme is to reverse the District Court's preliminary injunction orders and set aside the receivership.

D. AT A MINIMUM, THE COURT SHOULD ORDER THE DISTRICT COURT TO RELEASE THE TRAFFIC MONSOON FUNDS THAT ARE ADMITTEDLY OUTSIDE THE SCOPE OF ANY OF THE SEC'S CLAIMS.

At a minimum, the Court should order the District Court to release the Traffic Monsoon funds that are admittedly outside the scope of any of the SEC's claims. The SEC has no claim to freeze assets, nor should a court order a receivership, when a defendant has a "legitimate claim" to the assets because they were not obtained in violation of any U.S. securities laws. *See Commodity Futures Trading Comm'n v. Hanover Trading Corp.*, 34 F.Supp.2d 203, 207 (S.D.N.Y. 1999). The SEC's burden to show the amount of assets subject to an asset freeze is "a reasonable approximation of a defendant's ill-gotten gains." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). However, the "power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment and is not

subject to being included in pre-trial equitable freezing of assets. *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).

In its complaint, the SEC acknowledged that there was $3,000,000 in revenue since its inception from Traffic Monsoon based upon products other than AdPacks. 1 Aplt. App. at 19, ¶ 35. The District Court also recognized that approximately 2% of Traffic Monsoon's business dealt with products other than AdPacks. 9 Aplt. App. at 2071, ¶ 21. The SEC has not alleged any wrongdoing with respect to Traffic Monsoon's products that are not AdPacks. 1 Aplt. App. At 13–32. The receiver has the Traffic Monsoon database within her control and can readily determine the specific funds that are not in any way related to AdPacks. *See* 6 Aplt. App. at 1396–1400. Therefore, the Court should, at a minimum, order the Traffic Monsoon funds released from the receivership for which the SEC admittedly has no claim.

VII. CONCLUSION

In summary, Traffic Monsoon asks this Court to first determine that the District Court lacked subject matter jurisdiction over this entire litigation due to the absence of a "security" in Traffic Monsoon's traffic exchange business. The District Court's lack of subject matter jurisdiction would require all of its orders to be vacated. Second, if this Court determines that the District Court had subject matter jurisdiction, Traffic Monsoon next asks this Court to determine that 90% of

its business is beyond the adjudicative reach of the District Court by virtue of *Morrison*. The proper application of *Morrison* to this case would require the District Court litigation to be limited to only the 10% domestic sales of AdPacks, and a corresponding limitation on the assets retained by the receivership. Third, Traffic Monsoon asks this Court to determine that its traffic exchange does not constitute a Ponzi scheme, which would similarly require the preliminary injunction and receivership orders to be reversed and reevaluated on remand. At a minimum, the Court should order the release of Traffic Monsoon's funds that admittedly fall outside of any of the SEC's claims. Upon these grounds, Traffic Monsoon respectfully urges this Court for relief.

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Dated: September 12, 2017

ORAL ARGUMENT STATEMENT

Traffic Monsoon and Mr. Scoville request that this Court schedule oral argument because, as the District Court explained, "This order contains several controlling question[s] of law as to which there is substantial ground for difference of opinion…." 9 Aplt. App. at 2107 (internal quotation marks omitted). The District Court noted that there is a difference of opinion on the following issues: (1) "whether Section 929P(b) of Dodd-Frank reinstated the conduct and effects test for litigation brought by the SEC." *Id.*; (2) "whether Traffic Monsoon's sale of AdPacks to foreign customers constituted a domestic transaction if the *Morrison* test still applies to litigation brought by the SEC." *Id.*; and (3) "whether Traffic Monsoon's particular business model constitutes a Ponzi scheme in light of the contingent nature of the promised returns appears to be an issue of first impression in this circuit." *Id.*

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CERTIFICATES OF COMPLIANCE

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 12,902 words, excluding the parts of the document exempted by FRAP 32(f) and 32a7biii

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, Times New Roman, 14-point font.

3. Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

   a. All required privacy redactions have been made in accordance with FRAP 25(a)(5);

   b. The paper copies required by the Court are exact copies of the ECF filing; and

   c. This document was scanned for viruses with Malwarebytes Anti-Malware 1.75.0.1300, Version v2017.09.06.11, updated September 12, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on the 12th day of September, 2017.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

ADDENDUM A

15 U.S. Code § 77q - Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) Use of interstate commerce for purpose of offering for sale

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) Exemptions of section 77c not applicable to this section

The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

(d) Authority with respect to security-based swap agreements

The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 78c(a)(78) of this title) shall be subject to the restrictions and limitations of section 77b–1(b) of this title.

(May 27, 1933, ch. 38, title I, § 17, 48 Stat. 84; Aug. 10, 1954, ch. 667, title I, § 10, 68 Stat. 686; Pub. L. 106–554, § 1(a)(5) [title III, § 302(b), (c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–452; Pub. L. 111–203, title VII, § 762(c)(2), July 21, 2010, 124 Stat. 1759.)

ADDENDUM B

17 CFR 240.10b-5 - Employment of manipulative and deceptive devices.

§ 240.10b-5 Employment of manipulative and deceptive devices.
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)
[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

ADDENDUM C

15 U.S. Code § 78j - Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)

(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u–1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

(June 6, 1934, ch. 404, title I, § 10, 48 Stat. 891; Pub. L. 106–554, § 1(a)(5) [title II, § 206(g), title III, § 303(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A–432, 2763A–454; Pub. L. 111–203, title VII, § 762(d)(3), title IX, §§ 929L(2), 984(a), July 21, 2010, 124 Stat. 1761, 1861, 1932.)

ADDENDUM D

15 U.S. Code § 77v - Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) Contumacy or refusal to obey subpena; contempt

In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—

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

(May 27, 1933, ch. 38, title I, § 22, 48 Stat. 86; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 10, 1954, ch. 667, title I, § 11, 68 Stat. 686; Pub. L. 91–452, title II, § 213, Oct. 15, 1970, 84 Stat. 929; Pub. L. 100–181, title II, § 209, Dec. 4, 1987, 101 Stat. 1253; Pub. L. 105–353, title I, § 101(a)(3), Nov. 3, 1998, 112 Stat. 3230; Pub. L. 111–203, title IX, §§ 929E(a), 929P(b)(1), July 21, 2010, 124 Stat. 1853, 1864.)

ADDENDUM E

15 U.S. Code § 78aa - Jurisdiction of offenses and suits

(a) In general

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

(b) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

> **(1)** conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(June 6, 1934, ch. 404, title I, § 27, 48 Stat. 902; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 100–181, title III, § 326, Dec. 4, 1987, 101 Stat. 1259; Pub. L. 111–203, title IX, §§ 929E(b), 929P(b)(2), July 21, 2010, 124 Stat. 1853, 1865.)

References in Text

This chapter, referred to in text, was in the original "this title". See References in Text note set out under section 78a of this title.

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Codification

As originally enacted section contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted "the district court of the United States for the District of Columbia" for "the Supreme Court of the District of Columbia", and act June 25, 1948, as amended by act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia". Pub. L. 100–181 struck out reference to the United States District Court for the District of Columbia. Previously, such words had been editorially eliminated as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which provides that "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district", and section 88 of Title 28 which provides that "the District of Columbia constitutes one judicial district".

Amendments

2010—Pub. L. 111–203, § 929P(b)(2), designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

Pub. L. 111–203, § 929E(b), inserted "In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil

Procedure shall not apply to a subpoena issued under the preceding sentence." after "defendant may be found."

1987—Pub. L. 100–181 struck out ", the United States District Court for the District of Columbia," after "district courts of the United States" and substituted "sections 1254, 1291, 1292, and 1294 of title 28" for "sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347)". See Codification note above.

Effective Date of 2010 Amendment

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Transfer of Functions

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175,64 Stat. 1265, set out under section 78d of this title.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TRAFFIC MONSOON, LLC and CHARLES D. SCOVILLE, Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING A PRELIMINARY INJUNCTION AND DENYING THE DEFENDANTS' MOTION TO SET ASIDE THE RECEIVERSHIP** Case No. 2:16-cv-00832-JNP District Judge Jill N. Parrish

Two related motions are before the court. First, the SEC has moved for a preliminary injunction that continues the receivership and asset freeze put into place by the TRO entered by the court. Second, defendants Traffic Monsoon, LLC and Charles Scoville (collectively, Traffic Monsoon) have moved to set aside the receivership. [Docket 33]. The court GRANTS the SEC's request for a preliminary injunction and DENIES the defendants' motion to set aside the receivership.

PROCEDURAL BACKGROUND

On July 26, 2016, the SEC moved for a TRO freezing the assets of Mr. Scoville and Traffic Monsoon and appointing a receiver for these assets. The court granted the TRO, appointed Peggy Hunt as the receiver for Mr. Scoville's and Traffic Monsoon's assets, and set a preliminary injunction hearing. Traffic Monsoon subsequently moved to set aside the receivership.

The court held evidentiary hearings on the SEC's request for a preliminary injunction and Traffic Monsoon's motion to set aside the receivership on November 1, 2016 and November 3, 2016. The parties presented legal argument on November 30, 2016.

FINDINGS OF FACT

1. On September 29, 2014, Mr. Scoville registered Traffic Monsoon with the State of Utah as a limited liability company. Hearing Transcript ("Tr.") 29–32; Ex. 1, tab 1. Organizational documents filed with the State of Utah identify Mr. Scoville as Traffic Monsoon's sole member, manager and registered agent. The documents list his Murray, Utah, apartment as Traffic Monsoon's corporate address. Ex. 1, tab 1.
2. Traffic Monsoon was operated by Mr. Scoville through a website with the address www.trafficmonsoon.com. Tr. 12; Ex. 1 ¶ 8. The website prominently identified Traffic Monsoon as a "revenue sharing advertising company." Docket 64-2, p. 2.
3. Traffic Monsoon operated as a web traffic exchange that sold several different products designed to deliver "clicks" or "visits" to the websites of its customers. Tr. 12-17. The exclusive method of purchasing these services was through the website. Tr. 12, 127.
4. These purchased visits are of value to website owners because they make the website appear more popular than it actually is. Because search engines such as Google employ algorithms that prioritize more frequently visited websites over less frequently visited websites, these paid visits tended to result in a higher ranking on a search engine query.
5. Individuals who wished to purchase services from Traffic Monsoon would create an account and became "members" of the Traffic Monsoon website.

6. A large majority of the financial transactions the members completed with Traffic Monsoon—both payments made to Traffic Monsoon and withdrawals from the member's account—were conducted through PayPal. Tr. 19, 54.
7. Traffic Monsoon sold 1,000 website visits for $5.95 and 20 clicks on a member's banner ad for $5.00. Tr. 17-18, 246-47.
8. Traffic Monsoon's most popular product by a large margin, however, was the Banner AdPack (AdPack). AdPacks, which could be purchased for $50, bundled 1,000 website visits and 20 clicks to the member's banner ad. What set this product apart (and justified the additional cost for identical services that could be purchase à la carte for just $10.95) is that the AdPack permitted the purchaser to share in the revenues of Traffic Monsoon by receiving credits in the member's account up to a maximum amount of $55 per AdPack.
9. To qualify for this AdPack revenue sharing, the member had to click on a number of websites each day. The number of required clicks increased over time, but the member was ultimately obligated to click on 50 ads and remain on each website for five seconds. This took the member a little over four minutes per day. The member's obligation to click on 50 ads for five seconds each did not scale with the number of AdPacks purchased. Whether the member owned 1 or 1,000 AdPacks, he or she was obligated to click on only 50 ads per day and remain on the website to which the member was directed for five seconds each in order to participate in revenue sharing.
10. 99% of AdPack buyers qualified for some portion of revenue sharing after their purchase of an AdPack. Tr. 260-61; Ex. 5.

11. Traffic Monsoon members also were entitled to a 10% commission on all products—including AdPacks—that were purchased by individuals whom the member referred to Traffic Monsoon. Tr. 301-02. This 10% commission was paid on all future purchases made by the referred member, including when the referred member rolled over revenues from existing AdPacks to purchase new AdPacks. Tr. 20–21.

12. Mr. Scoville stated in emails to the SEC that he allocated the $50 purchase price of an AdPack as follows: 10% was deposited in the referring member's account, 4.5% was retained by Traffic Monsoon, 1.5% went to Traffic Monsoon's programmer in Russia, and the remaining 84% either was distributed to other AdPack holders who had qualified in the past 24 hours or was placed in a reserve fund. Ex. 110. The amount placed in the reserve fund for future sharing was used to even out fluctuations in the amount of money flowing into the member accounts. Ex. 110. In other words, out of the $50 purchase price, the referring member received $5, Traffic Monsoon and its programmer received $6, and the remaining $39 was either shared with other qualified AdPack holders or placed in a reserve fund for future distribution.

13. Mr. Scoville kept no accounting records for Traffic Monsoon. Ex. 1, tab 6. So there are no readily available documents that describe precisely how the money was distributed. After the receiver in this case conducted a preliminary investigation of how Traffic Monsoon distributed the money it received, she expressed some doubt as to whether the funds were distributed in the exact manner that Mr. Scoville described. Tr. 25–26. Rather, it appeared that the money coming into Traffic Monsoon was simply pooled together and then paid out as needed. *Id.*

14. At any rate, neither the website nor any other publicly available source of information informed the members how Traffic Monsoon split revenue between itself and qualified AdPack holders. So long as Traffic Monsoon shared some undefined portion of the revenue coming into the company with qualified AdPack holders and paid out a 10% commission, Mr. Scoville was free to distribute the money however he wished.

15. AdPack purchasers typically received about $1 per day in revenue sharing per AdPack purchased. Tr. 296. These revenue sharing payments would appear as credits in the member's Traffic Monsoon account. The member could then use these credits to purchase additional AdPacks or to purchase Traffic Monsoon's other services. The member could also convert these credits into real currency by performing an electronic transfer to a bank account.

16. If the owner of an AdPack consistently performed his or her daily obligation to click on 50 ads, the owner would typically recoup the original $50 payment, plus an additional $5 in profit in about 55 days. If the member continually purchased a new AdPack after the previous AdPack matured, he or she could reap an impressive 66% annual return on the $50 investment.[1] The member could earn even more money by convincing others to buy AdPacks.

17. Thus, for all $50 AdPacks that were purchased by a referred member, Traffic Monsoon typically deposited $60 worth of credits in member accounts: $55 into the

[1] This calculation does not take into account compound interest. If a customer purchased multiple AdPacks and continually reinvested the resulting revenue stream by purchasing new AdPacks, higher annual rates of return were possible.

purchasing member's account over a 55-day period (so long as the member qualified) and $5 into the referring member's account.

18. When a customer purchased an AdPack, he or she agreed to be bound by several terms and conditions. Some of these terms and conditions are as follows:

    a. "TrafficMonsoon[2] registered as a limited liability company and not a bank nor a security firm. A purchase of advertising service with us is not considered a deposit, nor investment." Docket 64-2, p. 44.

    b. "You agree to recognize TrafficMonsoon as a true advertising company which shares its revenues, and not as any form of investment of any kind." Docket 64-2, p. 44.

    c. "The information, communications and / or any materials TrafficMonsoon contains are for educational purposes, and is [sic] not to be regarded as solicitation for investments in any jurisdiction which deems a non-public offers or solicitations [sic] unlawful, nor to any person whom it will be unlawful to make such an offer and / or solicitation." Docket 64-2, p. 45.

    d. "You agree that our past performance does not guarantee you the same result in the future." Docket 64-2, p. 44.

19. The Traffic Monsoon website also makes a number of representations regarding its services. Some of those representations are as follows:

    a. "Only 1 of the services we offer includes a revenue sharing position. We do not sell 'shares.' We only sell advertising services. It's from the sales of all our

[2] On its website, Traffic Monsoon often identifies itself as "TrafficMonsoon." Because the company is registered as "Traffic Monsoon," the court uses this version of its name.

services that we share revenues. When our members purchase a service from TrafficMonsoon, the revenues from that purchase are held by the company. Then, you can qualify to receive share [sic] of the profits! Naturally there is cost associated with providing services. Each service provided generates a profit margin. We share those profits with you! . . . As long as you are qualified, each sharing position you receive with your AdPack Combo purchase will continue to share in revenue up to $55.00. Reaching this maximum is not guaranteed, or affixed to any time frame. It's completely reliant upon sales of services, and you being qualified." Docket 64-2, p. 19.

b. "Is TrafficMonsoon a hyip, Ponzi, pyramid scheme, or illegal? What is a Ponzi? ponzis [sic] are investment schemes which offer interest payments. they [sic] pay interest from new investor principle deposits. If you add together the interest earned total and principle total, there would be a debit balance created. Sufficient funds would not be available to pay people their principles and interest. . . . Why is Traffic Monsoon not a Ponzi? Traffic Monsoon only offers ad services. Nothing else is for sale than ad service. There is no investment plan offered. Yes, you can qualify to share in the sales revenue generated when services are sold by actively viewing other people's websites, but this is not interest. . . . New sales of advertising service generate new earnings. That's not a ponzi. . . . In conclusion, when looking at pure definitions, Traffic Monsoon is not a ponzi . . . ." Docket 64-2, p. 31.

c. "[W]e cannot guarantee the amount you'll receive per day, but as long as you are qualified to receive share [sic] in site revenues, you'll continue to receive

of revenues [sic] on each sharing position up to $55. This also means we do not guarantee reaching $55, because earnings from revenue sharing is completely dependent upon the sale of ad services, and also dependent upon you meeting the qualification to receive of revenues [sic] . . . .” Docket 64-2, p. 36.

20. Despite these disclaimers, the Traffic Monsoon website also promoted the AdPacks as a way to make money: “There are really 4 opportunities to earn with traffic monsoon [including revenue sharing through AdPacks]. . . . Each one can be your main focus, or all of them. Naturally, the more you utilize all 4 of these ways to earn money, the more you’ll earn.” Docket 64-2, p. 33.

21. By a large margin, AdPacks were Traffic Monsoon’s most popular product. The sale of AdPacks constituted over 98% of all Traffic Monsoon revenue. Tr. 17, 274. Thus, over 98% of the revenue sharing distributed to qualified AdPack owners came from the sale of other AdPacks. The Traffic Monsoon website did not inform members that almost all of the revenue that was shared with qualified AdPack owners was generated by the sale of new AdPacks.

22. Approximately 90% of the Traffic Monsoon members who purchased AdPacks reside outside of the United States and presumably purchased the AdPacks while located in their home countries. Complaint at ¶ 66.

23. Some individuals initially purchased AdPacks principally as a way to promote their online businesses. But for many members, the profits that could be reaped from the AdPacks themselves quickly eclipsed this motive. Tr. 180–86.

24. Traffic Monsoon member correspondence with the receiver evidences that Traffic Monsoon customers' primary motivation in purchasing AdPacks was to earn the $5 return on each AdPack, not to receive the advertising services that were available for only $10.95 if purchased separately from the AdPack. Tr. 74-76, 84-85. Indeed, many members have not received or used the web visits and banner clicks purchased in the AdPack. Tr. 181-186. A number of members indicated that they had invested their "life savings" or "savings" by purchasing AdPacks. Ex. 3, p. 7 & tab 8.
25. By Traffic Monsoon's own description, it has delivered only 1.6 billion website visits out of the 17.5 billion that have been purchased by Traffic Monsoon members. Tr. 82-84. In other words, it has delivered only 10% of the web traffic purchased by members through the sale of AdPacks. It would cost Traffic Monsoon tens of millions of dollars to acquire and deliver the billions of web visits it owes to its members.
26. Many individuals began to purchase or accumulate hundreds or even thousands of AdPacks. Tr. 23; Exs. 11, 12.
27. Members typically did not cash out an AdPack when it matured. Instead, they rolled over the money deposited in their accounts by purchasing another AdPack. Tr. 20. In order to maximize their returns, members purchased dozens or hundreds of AdPacks. They would then use the revenue from the existing AdPacks to purchase new AdPacks as soon as they had enough money in their account to do so. Thus, members that owned hundreds of AdPacks, which could return thousands of dollars in shared revenues, typically had relatively little money in their account because the members would continually reinvest it by purchasing new AdPacks. Ex. 10.

28. If the members rolling over money in their accounts had been referred by another member for the 10% commission, these rollover transactions also generated commission payments to the referring members. Tr. 20–21. Therefore, if the referred member purchased a single AdPack for $50 and then rolled the proceeds over into a new AdPack every 55 days, the referring member would reap $30 in commissions in less than one year.

29. Enticed by these commission payments, Traffic Monsoon members promoted the AdPacks to others. Several members actively promoted the AdPacks online or through presentations as a money making opportunity with slogans such as "If You Can Click a Mouse. [sic] You Can Get Paid!!" Tr. 88–89, 210–11. Ex. 3, tab 19.

30. After making an initial investment to purchase multiple AdPacks, a member could accumulate an ever-growing number of AdPacks by purchasing additional AdPacks with the 10% profit the member acquired over a 55-day period. For example, if a member initially invested $5,000 by purchasing 100 AdPacks and only rolled over the principal amount in new AdPacks, the member could purchase about 166 AdPacks at the end of one year by reinvesting the principal and profit into new AdPacks. If the same member continued this pattern of rolling over the principal amount and investing the profit at the end of the year, the member could purchase around 275 AdPacks at the end of the second year and 456 AdPacks at the end of the third. If the member then allowed these 456 AdPacks to mature, he or she could accumulate

$25,080—over five times the initial investment.[3] If the member were able to convince family or friends to make similar bulk purchases of AdPacks, the member could reinvest the resulting 10% commission and acquire even more AdPacks.

31. Between October 2014 and July 2016, Traffic Monsoon members worldwide paid Traffic Monsoon $173 million in new money to purchase 3.4 million AdPacks. Tr. 270-77; Ex. 6. Traffic Monsoon members purchased approximately 14 million additional AdPacks for $700 million during that same period by rolling over their revenue-sharing payments into the purchase of these new AdPacks. *Id.* During that same period, Traffic Monsoon members paid approximately $2.9 million for all other Traffic Monsoon products combined. *Id.*

32. Out of the $175.9 million total paid into Traffic Monsoon by its members, approximately $88.4 million has been paid back out to its members, leaving a difference of $87.4 million between what has been paid in by members and what they have taken out. Tr. 278-81; Ex. 7.

33. In January, 2016, PayPal became concerned about the enormous growth in the volume of transactions between Traffic Monsoon and its members, and it froze Traffic Monsoon's account. Tr. 26, 137.

34. The PayPal freeze significantly reduced the amount of money that was flowing into Traffic Monsoon. Tr. 26. Traffic Monsoon then began to transition to other electronic payment processors such as Payza, Allied Wallet, and SolidTrustPay. Tr. 27. With the

[3] This hypothetical assumes that the member retained all profits in the member account and only reinvested the profits at the end of the one-year period. If the member reinvested the profits by purchasing additional AdPacks at the end of each 55-day cycle, as members typically did, the returns would be even higher.

introduction of these new payment processors, AdPack transactions began to rise again. Tr. 27.

35. Traffic Monsoon's resurgence was halted on July 26, 2016, when this court froze its assets and appointed a receiver.

36. The current combined account balance of Traffic Monsoon members is $34.2 million. Tr. 284-86; Ex. 7. If the outstanding AdPacks currently owned by Traffic Monsoon members had matured, the account balance would swell by an additional $243.9 million, for a combined balance of $278.1 million. *Id.*

37. The receiver currently has between $50-$60 million in frozen Traffic Monsoon assets. Tr. 110.

ANALYSIS

The SEC alleges in its complaint that Traffic Monsoon's sale of AdPacks constituted an illegal Ponzi scheme that violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5(a) and (c) promulgated thereunder. The SEC also alleges that Traffic Monsoon violated Section 17(a)(1) and (3) of the Securities Act of 1933 (Securities Act).[4] [Docket 2, ¶¶ 84–92].

Section 10(b) of the Exchange Act makes it unlawful for a person to "use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Pursuant to this statutory grant of authority, the SEC adopted Rule 10b-5. Subsections (a) and (c) of this rule provide:

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[4] The SEC further alleges that Traffic Monsoon violated Sections 5(a) and (c) of the Exchange Act by selling unregistered securities. *See* 15 U.S.C. § 77e(a) and (c). But the SEC does not rely on this allegation to support its request for a preliminary injunction.

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, . . . or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. In order to prevail on its Rule 10b-5 claims, the SEC must prove that Mr. Scoville committed the acts described in either subsection (a) or (c) with the requisite scienter, which has been defined by the Supreme Court as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). The scienter requirement may be satisfied with proof of either intent to defraud or recklessness.[5] *City of Philadelphia v. Fleming Companies, Inc*., 264 F.3d 1245, 1258 (10th Cir. 2001).

Section 17(a)(1) and (3) of the Securities Act similarly states:

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly (1) to employ any device, scheme, or artifice to defraud, or . . . (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). In order to prevail on its "device, scheme, or artifice to defraud" claim under subsection (1), the SEC must also prove that Mr. Scoville acted knowingly or intentionally.[6]

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[5] "Recklessness is defined as 'conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Dronsejko v. Thornton*, 632 F.3d 658, 665 (10th Cir. 2011) (citation omitted).

[6] Counsel has not provided the court with legal authority on the question of whether the knowing and intentional requirement for Section 17(a)(1) includes reckless behavior. *See Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) ("We have no occasion here to address the question . . . whether, under some circumstances, scienter may also include reckless behavior."). It appears that the Tenth Circuit has only directly endorsed the recklessness standard in connection with Rule 10b-5

Aaron v. SEC, 446 U.S. 680, 696 (1980). Subsection (3), however, does not incorporate a scienter requirement. *Id.* Proof of negligence alone will suffice to establish a violation of this subsection. *See SEC v. Sullivan*, 68 F. Supp. 3d 1367, 1377 n.9 (D. Colo. 2014).

The SEC argues that it will likely succeed in proving its claims under Rule 10b-5 and Section 17(a) and requests a preliminary injunction freezing Traffic Monsoon's assets until this case is resolved. In response to the SEC's request for a preliminary injunction, and in support of its own motion to set aside the receivership, Traffic Monsoon presents two main arguments.

First, Traffic Monsoon relies upon *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), arguing that Section 10(b), upon which Rule 10b-5 depends, and Section 17(a) do not authorize this court to enjoin activity related to foreign transactions. It asserts that because approximately 90% of its customers purchased AdPacks over the internet while located outside the United States, the SEC cannot regulate these transactions. Traffic Monsoon, therefore, contends that any injunction freezing its assets must be limited to assets sufficient to refund money paid to it by customers who purchased AdPacks while they were located within the territorial boundaries of the United States.

Second, Traffic Monsoon argues that this court should not issue an injunction because the SEC has not adequately shown that it will prevail on the merits.

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claims. *See Dronsejko*, 632 F.3d at 665; *City of Philadelphia v. Fleming Companies, Inc.*, 264 F.3d 1245, 1257–58 (10th Cir. 2001); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232–33 (10th Cir. 1996); *Hackbart v. Holmes*, 675 F.2d 1114, 1117–18 (10th Cir. 1982). Because the question of whether the scienter requirement of Section 17(a)(1) may be satisfied by a showing of recklessness is not determinative here, the court need not resolve this uncertainty at this juncture.

The court addresses each of Traffic Monsoon's arguments in turn. The court then addresses Traffic Monsoon's objections to some of the terms of the SEC's proposed injunction. Finally, the court certifies this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

I. APPLICABILITY OF SECTION 10(b) AND SECTION 17(a) TO ADPACKS PURCHASED OUTSIDE OF THE UNITED STATES

A. *Morrison* and the Presumption Against the Extraterritorial Application of Statutes

Prior to the Supreme Court's *Morrison* opinion, most of the circuits applied one version or another of the conduct and effects test to determine whether an extraterritorial securities transaction fell within the ambit of Section 10(b) and Rule 10b-5. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 257–59 (2010). Under this test, Section 10(b) could be applied to an extraterritorial transaction if significant wrongful conduct related to the transaction occurred in the United States or if "the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Id.* at 257 (citation omitted).

In *Morrison*, the Supreme Court reviewed the Second Circuit's application of the conduct and effects test in a case in which Australian citizens purchased shares of an Australian bank on an Australian stock exchange. *Id.* at 251–52. As a preliminary matter, the Court held that the Second Circuit erred in its conclusion that "the extraterritorial reach of § 10(b) [raises] a question of subject-matter jurisdiction." *Id.* at 253. The Court clarified that the limits on a district court's authority to adjudicate a Section 10(b) claim based upon a foreign transaction are not jurisdictional in nature because 15 U.S.C. § 78aa(a) conferred jurisdiction over suits to enforce the provisions of the Exchange Act to the district courts. *Id.* at 254.

The Court then went on to analyze the language of Section 10(b) to determine whether Congress intended the statute to be applied outside of the United States. Because the statute is silent on this issue, the Court employed the canon of construction "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id*. at 255 (citation omitted). Under this judicially created presumption, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id*. (citation omitted).

In order to overcome this presumption against the extraterritorial application of a statute, Congress does not necessarily have to include a clear statement in the statute that says "this law applies abroad."[7] *Id*. at 265. Instead, the context provided by related statutory provisions can be consulted to determine if the presumption should be applied. *Id.* Indeed, "all available evidence about the meaning" of a statute—including the history of amendments to the statute, the text of other provisions found within the larger statutory scheme, the underlying purpose of the statute,

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[7] Some commentators had interpreted *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (*Aramco*) to embrace a "clear statement rule," which requires a clear statement in the statute itself to overcome the presumption against extraterritoriality. *See id.* at 258 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute."); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 73 (2d Cir. 1994) ("The *Aramco* dissent and some commentators have interpreted the majority opinion in *Aramco* as setting forth a 'clear statement' rule, such that the presumption against extraterritoriality cannot be overcome absent a clear statement in the statute itself."). But *Morrison* and other Supreme Court opinions have since clarified that the presumption is not governed by a "clear statement rule." *Morrison*, 561 U.S. at 265 ("[W]e do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule,' if by that is meant a requirement that a statute say 'this law applies abroad.'" (citation omitted)); *see also Sale*, 509 U.S. at 176–77 & n.33; *Smith*, 507 U.S. at 201–03 & n.4.

and legislative history[8]—should be consulted to determine whether the presumption has been overcome. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176–77 & n.33 (1993); *see also Smith v. United States*, 507 U.S. 197, 201–03 & n.4 (1993) (examining surrounding statutes and legislative history to determine whether the Federal Tort Claims Act applies to extraterritorial conduct); *United States v. Spelar*, 338 U.S. 217, 222 (1949) (looking to "the language of [a] statute and the legislative purpose underlying it" to determine whether the presumption had been overcome); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 73 (2d Cir. 1994) ("[T]he Supreme Court has made clear . . . that reference to nontextual sources is permissible" to determine whether the presumption had been overcome); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 110–12 (1998) (stating that "the lower courts . . . have been unanimous in concluding that the presumption against extraterritoriality is not a clear statement rule" and that courts should refer to other indicia of congressional intent).

In determining whether the presumption against the extraterritorial application of Section 10(b) had been overcome, the *Morrison* Court examined several related statutes to determine whether they evidenced a congressional expression of intent that 10(b) be applied beyond the borders of the United States. The Court found that the presumption had not been defeated for two principal reasons. First, the Court examined three related statutes—15 U.S.C. § 78c(a)(17), 15 U.S.C. § 78b(2), and 15 U.S.C. § 78dd(b)—and determined that any inference afforded by these

[8] Although legislative history generally may not be consulted to interpret clear statutory language, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 254 (2010) (Scalia, J., concurring), the Supreme Court has consulted legislative history to determine whether the presumption against extraterritoriality may be overcome because what is at issue is not the meaning of unambiguous statutory text, but rather how to interpret legislative silence on the extraterritorial reach of a statute.

statutes that Congress intended the extraterritorial application of Section 10(b) was too uncertain to overcome the presumption. *Morrison*, 561 U.S. at 262–65. Second, the Court expressed its concern that there was no textual support in the Exchange Act for either the conduct and effects test that had been created by the circuit courts or an alternate test proposed by the Solicitor General that would permit the extraterritorial application of Section 10(b) under certain circumstances. *Id*. at 261 ("The results of judicial-speculation-made-law [i.e., the conduct and effects test]—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality."); *Id*. at 270 ("Neither the Solicitor General nor petitioners provide any textual support for this [significant and material conduct] test."). It expressed its reticence to engage in "judicial lawmaking" by creating or endorsing an extraterritorial application test made from whole cloth. *See id.* at 261 n.5.

The *Morrison* Court therefore concluded that the presumption against extraterritorial application had not been overcome and rejected the conduct and effects test. *Id.* at 265–66. In its place, the Court created a transactional test. Analyzing the language of Section 10(b), which prohibits manipulative or deceptive devices used "in connection with the purchase or sale of any security," the Court determined that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266. Thus, *Morrison* held that Section 10(b) and Rule 10b-5 could only be applied "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Id*. at 273.

B. Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

At the same time that *Morrison* was pending in the Supreme Court, Congress was in the process of amending both the Securities Act and the Exchange Act through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Signed into law less than a month after the Supreme Court issued *Morrison*, Section 929P(b) of Dodd-Frank added the following language to both Section 22 of the Securities Act and Section 27 of the Exchange Act:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of [either Section 10(b) of the Securities Exchange Act or Section 17(a) of the Securities Act] involving--
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010); *see also* 15 U.S.C. §§ 77v(c), 78aa(b). Thus, Dodd-Frank clarified that United States district courts have jurisdiction over a Section 10(b) action or a Section 17(a) action brought by the SEC if the conduct and effects test has been satisfied.

The SEC and Traffic Monsoon dispute whether Section 929P(b) of Dodd-Frank reinstated the conduct and effects test that had just been repudiated in *Morrison*, or whether Section 929P(b) left the *Morrison* transactional test in place. Traffic Monsoon correctly asserts that the plain language of Section 929P(b) did not explicitly overturn the core holding of *Morrison*. As noted above, *Morrison* overruled precedent in the circuit courts holding that the

extraterritorial reach of Section 10(b) implicates the jurisdiction of the court to hear the case. 561 U.S. at 253–54. *Morrison* clarified that there was no jurisdictional impediment to the extraterritorial application of Section 10(b); it was the meaning of the language of the statute itself—as viewed through the lens of the presumption against extraterritorial application—that prohibited courts from applying Section 10(b) to transactions occurring outside of the United States. *Id.* at 255, 262–65. Thus, Section 929P(b), which addresses only the jurisdiction of the courts, does not overtly expand the extraterritorial reach of the language of Section 10(b) or Section 17(a).

Traffic Monsoon argues that because the plain language of Section 929P(b) does not directly address the application of the Securities Act or the Exchange Act to foreign transactions, the *Morrison* test remains in effect.[9] If the Supreme Court had adopted a "clear statement rule," *see supra* n.7, Traffic Monsoon's argument would likely carry the day. But the Court has rejected this rule and recognized that the judicial presumption against the extraterritorial application of a statute may be rebutted by referring to "all available evidence about the meaning" of a statute—including the context provided by related statutes, history of amendments, underlying purpose, and legislative history. *Sale*, 509 U.S. at 176–77 & n.33. The presumption against extraterritorial application is, in essence, a judicial guess as to what Congress would have wanted when the statute is silent on this issue. Contrary indications of congressional intent short of a clear

[9] Traffic Monsoon asserts, for example, that in order to overcome the presumption against extraterritorial application, this court would have to use legislative history to arrive at a tortured reading of Section 929P(b) that contradicts its plain language. But Traffic Monsoon sets the bar too high. In order to find that the presumption has been rebutted, this court need not conclude that the language of Section 929(b) *requires* the extraterritorial application of Sections 10(b) and 17(a). The presumption may be defeated if Section 929(b) sufficiently *evidences* congressional intent that Sections 10(b) and 17(a) be applied outside the borders of the United States.

statement may be sufficient to rebut the presumption. In order to determine whether the presumption has been overcome in this case, the court must determine whether Section 929P(b), which was not in place when *Morrison* was decided and was not considered by the Supreme Court, provides a sufficient indication of congressional intent to apply Sections 10(b) and 17(a) to certain extraterritorial transactions.

The legal landscape when Section 929P(b) was initially proposed and considered by congress is vital to discerning this congressional intent. As noted above, the circuit courts had applied the conduct and effects test for almost four decades until *Morrison* rejected it. *See Morrison*, 561 U.S. at 256–60 (describing the evolution of the conduct and effects test in the Second Circuit and noting that other circuits have adopted it as well); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (holding that either conduct or effects in the United States may justify the application of Section 10(b) to a securities transaction). These circuit courts held that this conduct and effects test was jurisdictional in nature. *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 169–71, 176 (2d Cir. 2008); *Cont'l Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979); *Gottfried v. Germain* (*In re CP Ships Ltd. Sec. Litig.*), 578 F.3d 1306, 1313 (11th Cir. 2009). Therefore, the prevailing view of the law prior to *Morrison* was that satisfying the conduct and effects test was essential to the jurisdiction of a court to adjudicate a dispute arising under Section 10(b).

It was in this pre-*Morrison* legal context that Congress first drafted and considered the language that would become Section 929P(b) of Dodd-Frank. In the 2008 *Morrison* opinion issued by the Second Circuit, the court recognized that Congress had not explicitly defined the federal courts' jurisdiction to apply Section 10(b) to transactions occurring outside the United States and urged Congress to address this omission. *Morrison v. Nat'l Australia Bank Ltd.*, 547

F.3d 167, 170 n.4 (2d Cir. 2008) ("We respectfully urge that this significant omission receive the appropriate attention of Congress and the Securities and Exchange Commission."). In response to this invitation, Congress did just that. On October 15, 2009, the core of the language that would later become Section 929P(b) of Dodd-Frank was included in a bill introduced in the House of Representatives that was designed to "provide the Securities and Exchange Commission with additional authorities to protect investors from violations of the securities laws." Investor Protection Act of 2009, H.R. 3817, 111th Cong. § 216 (2009). This language was later introduced in a separate bill that would become the Dodd-Frank Act, which was passed by the House on December 11, 2009. Dodd-Frank, H.R. 4173, 111th Cong. § 7216 (as passed by the House, Dec. 11, 2009). The Senate passed an amended version of the bill on May 20, 2010 that excluded the Section 929P(b) language. *Id.* (as passed by the Senate, May 20, 2009). The House and Senate versions of the bill were then referred to a conference committee for reconciliation. The conference committee first met on June 10, 2010 and held its last meeting on June 24, 2010. CONGRESS.GOV, Actions Overview H.R. 4173—111th Congress (2009–2010), https://www.congress.gov/bill/111th-congress/house-bill/4173/actions. On June 29, 2010, the committee issued a conference report that contains the final version of the bill, including Section 929P(b) in its present form. 156 CONG. REC. H5103 (daily ed. June 29, 2010) (conference report on Dodd-Frank). The House and the Senate each passed the conference committee version of the bill and Dodd-Frank was signed into law on July 21, 2010. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010).

Meanwhile, the Supreme Court issued *Morrison* on June 24, 2010. Thus, the Court altered the legal landscape regarding the jurisdiction of courts to adjudicate claims involving foreign transactions only on the last day on which the conference committee convened to

hammer out the final version of Dodd-Frank, which was only five days before the committee published the final version of the bill and less than a month before it was signed into law. Accordingly, the language that would become Section 929P(b) was drafted and initially considered by Congress at a time when the prevailing law dictated that the question of whether an extraterritorial transaction could be scrutinized for violations of Sections 10(b) or 17(a) was jurisdictional in nature.

In this pre-*Morrison* context, Section 929P(b) merely codified the prevailing Second Circuit rule that courts had both jurisdiction and statutory authority to adjudicate a Section 10(b) claim if the conduct and effects test had been satisfied. Indeed, the committee report for the language that would later become Section 929P(b) explicitly stated that the language codified the conduct and effects test as it then existed:

> Courts have previously ruled that Federal securities laws are silent as to their transnational reach, so two court tests—the conduct test and the effects test—have emerged for making such determinations and different courts apply different tests. This section would codify the SEC's authority to bring proceedings under both the conduct and the effects tests developed by the courts regardless of the jurisdiction of the proceedings.

H.R. REP. No. 111-687, pt. 1, at 80 (2009).

The fact that the Supreme Court issued *Morrison* on the last day that the conference committee met to negotiate a reconciliation between the House and Senate bills, and five days before the final version of the bill was published, does not convincingly demonstrate that Congress had changed its mind about codifying the conduct and effects test. Although courts generally presume that Congress is familiar with the precedents of the Supreme Court when it enacts legislation, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698–99 (1979), the close proximity between the date when *Morrison* was issued and the date when the language of Dodd-Frank was

finalized, greatly undermines this presumption. It strains credulity to assume that legislators read *Morrison* on the last day that they met to negotiate the final version of a massive 850-page omnibus bill designed to overhaul large swaths of the United States financial regulations and consciously chose to enact Section 292P(b) against the background of the fundamental shift in securities law brought about by *Morrison*. Given this timing, the more reasonable assumption is that *Morrison* was issued too late in the legislative process to reasonably permit Congress to react to it. To conform Section 929P(b) to the *Morrison* opinion at the last minute would be like requiring a steaming battleship to turn on a dime to retrieve a lifejacket that fell overboard. Thus, the court does not presume that Congress intended Section 929P(b) to be a nullity.

Indeed, when the final version of Dodd-Frank was presented to the House and the Senate for approval, congressmen from both chambers expressed their understanding that Section 929P(b) codified the conduct and effects test. On June 30, 2010, Representative Paul Kanjorski, who initially drafted the Section 929P(b) language, spoke in favor of the final version of Dodd-Frank when it was presented in the House. 156 CONG. REC. H5235, H5237 (daily ed. June 30, 2010). Representative Kanjorski confirmed that the purpose of Section 929P(b) was to codify the conduct and effects test:

> [T]he purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States, when the conduct within the United States is significant or when conduct outside the United States has a foreseeable substantial effect within the United States.

Id. at H5237. He went on to acknowledge that *Morrison* had been decided just six days earlier and that the basis for the Supreme Court's opinion was the presumption against extraterritorial application. *Id.* Representative Kanjorski then explained that Section 929P(b)'s "provisions concerning extraterritoriality, however, are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department." *Id.* Similarly, Senator Jack Reed noted in the Senate debate on the final version of Dodd-Frank that the bill contained

> extraterritoriality language that clarifies that in actions brought by the SEC or the Department of Justice, specified provisions in the securities laws apply if the conduct within the United States is significant, or the external U.S. conduct has a foreseeable substantial effect within our country, whether or not the securities are traded on a domestic exchange or the transactions occur in the United States.

156 CONG. REC. S5915–16 (daily ed. July 15, 2010). Thus, both the legal context in which the Section 929P(b) language was drafted and the legislative history of this provision indicate a legislative intent to apply Sections 10(b) and 17(a) to extraterritorial transactions if the conduct and effects test can be satisfied.

In addition, the text of Dodd-Frank suggests that Congress intended Sections 10(b) and 17(a) to be applied to certain extraterritorial transactions. First, the title of Section 929P of Dodd-Frank is "STRENGTHENING ENFORCMENT BY THE COMMISION [SEC]." This title suggests an intent to expand the SEC's authority to regulate deceptive or fraudulent practices through Section 929P(b), rather than an intent that the language of this subsection have no effect. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (citation omitted)). Second, Section 929Y of Dodd-Frank directs the SEC to conduct a

study to determine whether private rights of action under Section 10(b) should be extended to cover transactions that satisfy the same conduct and effects test laid out in Section 929P(b). Commissioning such a study demonstrates Congress's expectation that it had already extended the SEC's authority to bring an enforcement action in Section 929P(b).

Furthermore, the operative language of Section 929P(b) strongly indicates Congress's intent that Sections 10(b) and 17(a) be applied to extraterritorial transactions. By clarifying that the district courts of the United States have jurisdiction over a Section 10(b) or 17(a) claim brought by the SEC so long as the conduct and effects test has been satisfied, Congress necessarily expressed its understanding that Sections 10(b) and 17(a) may be applied extraterritorially—at least to the extent that the conduct and effects test may be met. It would be pointless to clarify that district courts had jurisdiction to hear Section 10(b) and 17(a) claims based on certain extraterritorial transactions unless Congress also intended that these statutes be applied extraterritorially. *See Bell v. New Jersey*, 461 U.S. 773, 784–86 (1983) (holding that an amendment to a statutory scheme that necessarily presumes a particular interpretation of an existing statute is a persuasive indication of the meaning of the existing statute); *South Carolina v. Regan*, 465 U.S. 367, 392 (1984) ("[S]ubsequently *enacted* provisions and the legislative understanding of them are entitled to 'great weight' in construing earlier, related legislation." (citation omitted)); Larry M. Eig, Congressional Research Service, 97-589, Statutory Interpretation: General Principles and Recent Trends 48 (2011), https://fas.org/sgp/crs/misc/97-589.pdf ("Other statutes may be expressly premised on a particular interpretation of an earlier statute; this interpretation may be given effect, especially if a contrary interpretation would render the amendments pointless or ineffectual."). Moreover, the fact that Congress chose to employ a conduct and effects test, which had been employed in the circuit courts for nearly four

decades to determine when a party could enforce Section 10(b), can hardly be a coincidence. The use of this familiar test indicates an intent to codify the conduct and effects test as it had been applied in the circuit courts—to determine the reach of Section 10(b) to regulate foreign transactions.

Finally, a contrary interpretation of the legislative intent animating Section 929P(b) would require the court to assume that Congress intended the amendment be a nullity. To assume that Congress intended this amendment to be mere surplusage, with no discernable effect, flies in the face of reason. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (Courts "are 'reluctant to treat statutory terms as surplusage in any setting.'" (citation omitted)); *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

In sum, the text of Section 929P(b), the legal context in which this amendment was drafted, legislative history, and the expressed purpose of the amendment all point to a congressional intent that, in actions brought by the SEC,[10] Sections 10(b) and 17(a) should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied.[11] The court concludes that these clear indications that Congress intended Sections 10(b) and 17(a) to be applied to foreign transactions are sufficient to overcome the presumption against extraterritorial application.

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[10] Section 929P(b) is explicitly limited to actions brought by the SEC or the United States. Thus, *Morrison* would still control in a private cause of action brought under Section 10(b).

[11] Section 929P(b) also rebuts the *Morrison* opinion's criticism that the conduct and effects test had been created by the circuit courts without any textual justification. *See Morrison*, 561 U.S. at 261 & n.5, 270. This provision provides the missing statutory basis for the test.

C. Application of the Conduct and Effects Test

The court determines that the test for determining whether the Rule 10b-5 (under Section 10(b)) and Section 17(a) may be applied to any alleged foreign transactions is the conduct and effects test laid out in Section 929P(b) of Dodd-Frank. Under this test, Rule 10b-5 and Section 17(a) may be applied to violations of these provisions that involve: "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010); *see also* 15 U.S.C. §§ 77v(c), 78aa(b).

Even if some of the securities transactions at issue in this case are deemed to be foreign transactions, the conduct and effects test has been satisfied in this case. Specifically, "conduct within the United States . . . constitute[d] significant steps in furtherance of the violation" of Rule 10b-5 and Section 17(a). Mr. Scoville conceived and created Traffic Monsoon in the United States. Through Traffic Monsoon, he created and promoted the AdPack investments over the internet while residing in Utah. Indeed, Traffic Monsoon does not dispute in its briefing that "significant steps" in furtherance of the AdPack sales were carried out in the United States. Therefore, Rule 10b-5 and Section 17(a) may be applied to all of the transactions at issue in this case.

D. Application of the *Morrison* Transactional Test

There is an alternative reason why Rule 10b-5 and Section 17(a) must be applied to all of the AdPack sales at issue in this case. Even if the court has erred in concluding that Section

929P(b) reinstated the conduct and effects test, all of the AdPack sales challenged by the SEC are domestic transactions under the *Morrison* transactional test.

1) Section 10(b) and Rule 10b-5

In *Morrison*, the Supreme Court analyzed the language of Section 10(b), which prohibits manipulative or deceptive devices used "in connection with the purchase or sale of any security," and determined that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266. Thus, *Morrison* held that Section 10(b) and Rule 10b-5 could only be applied "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Id*. at 273.

The Second Circuit has noted that "[w]hile *Morrison* holds that § 10(b) can be applied to domestic purchases or sales, it provides little guidance as to what constitutes a domestic purchase or sale." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). In analyzing the question of where a transaction occurs, *Absolute Activist* held that the location of the two parties to the transaction at the time that they became irrevocably bound determines the location of the transaction. *Id.* at 68. Thus, a domestic transaction occurs when "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." *Id.*

This test for determining when a domestic transaction has occurred comports with the language of Section 10(b), which prohibits the use of manipulative or deceptive devices "in connection with the *purchase or sale* of any security." (Emphasis added). Either a domestic purchaser or a domestic seller of a security may bring a transaction within the purview of Section 10(b).

In this case, Traffic Monsoon sold all of the AdPacks over the internet to both foreign and domestic purchasers. In all of these transactions, the seller of these securities, a Utah LLC, incurred irrevocable liability in the United States to deliver this security. Thus, all of the transactions satisfy the domestic transaction test under *Morrison* and *Absolute Activist*.[12]

2) Section 17(a)

Morrison only analyzed the language of Section 10(b) to determine its territorial reach. It had no occasion to consider Section17(a). Because the wording of Section 17(a) is different from Section 10(b), it requires a separate analysis.

While Section 10(b) prohibits certain deceptive practices "in connection with the *purchase or sale of any security*," Section 17(a) forbids deceptive practices "in the *offer or sale of any securities*." (Emphasis added). Section 10(b) employs two terms that denote a completed transaction: "purchase" and "sale." But Section 17(a) regulates not only a completed securities transaction—a "sale"—it also applies to an "offer," which is a primary step to a completed transaction.[13]

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[12] Traffic Monsoon proffered evidence that Mr. Scoville lived in both the United Kingdom and Utah during the period of time that Traffic Monsoon sold AdPacks over the internet. It argued that Mr. Scoville's physical location at the moment when an AdPack was sold determined the location of the seller for all AdPacks sold. But Mr. Scoville did not sell any AdPacks. His LLC, Traffic Monsoon, did. Mr. Scoville may not claim the advantages afforded by operating through an artificial business entity, only to discard this legal fiction when it suits him. Moreover, Mr. Scoville did not act as an agent of Traffic Monsoon by entering into contracts to sell AdPacks on foreign soil. The exclusive method of purchasing an AdPack was directly from Traffic Monsoon, LLC over the internet. Thus, Mr. Scoville's physical location when a member purchased an AdPack is irrelevant to the question of where the transaction occurred.

[13] Citing several cases from the Southern District of New York, Traffic Monsoon argues that "various courts have similarly recognized that Section 17(a) of the Securities Act of 1933 does not apply to extraterritorial conduct." [Docket 32, p. 8]. *See SEC v. Goldman Sachs & Co*., 790 F. Supp. 2d 147, 164 (S.D.N.Y. 2011) ("[T]he Court agrees that *Morrison* applies to Section 17(a) of the Securities Act. At least one post-*Morrison* court in this district has held the Securities Act

Section 17(a), therefore, applies to AdPacks sold to individuals outside the United States for two reasons. As noted above, the sale occurs both in the United States and in the foreign country of the purchaser. In addition, Traffic Monsoon's offer to sell AdPacks over the internet occurred in the United States where Traffic Monsoon, LLC is located.

II. PRELIMINARY INJUNCTION

"[U]pon a proper showing," this court may grant the SEC's request for a preliminary injunction restraining acts in violation of either the Securities Act or the Exchange Act. 15 U.S.C. §§ 77t(b), 78u(d). When the SEC seeks a preliminary injunction pending trial, it must show a likelihood of prevailing on the merits and a reasonable likelihood that the wrong will be repeated.[14] *SEC v. Unifund SAL*, 910 F.2d 1028, 1031, 1039 (2d Cir. 1990). The degree to which the SEC must prove these two elements depends upon the nature of the injunction that it seeks:

> Though the "clear showing" qualifier appears to have been abandoned for injunctions that serve the traditional purpose of preserving the status quo, plaintiffs have been put to a more rigorous burden in obtaining preliminary injunctions that order some form of mandatory relief. We have said that a "clear showing" is required where the injunction is mandatory. Thus, even when applying the traditional standard of "likelihood of success," a district court, exercising its equitable discretion, should bear in mind the nature of the preliminary relief the [SEC] is

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does not apply to 'sales that occur outside the United States.'" (citing *In re Royal Bank of Scotland Grp. PLC Sec. Litig.,* 765 F.Supp.2d 327, 338–39 (S.D.N.Y.2011)). It is true that under *Morrison*, Section 17(a) would also be limited to domestic conduct. But the language of Section 17(a) expands the domestic conduct that is regulated to include both completed transactions and offers to sell securities.

[14] To the extent that the SEC only seeks an asset freeze to guarantee money will be available to remedy a violation, it need not show a reasonable likelihood that the wrong will be repeated. *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998) ("An asset freeze requires a lesser showing; the SEC must establish only that it is likely to succeed on the merits."). Because the SEC seeks injunctive relief that exceeds a mere asset freeze in this case, it must also show a likelihood of future violations.

> seeking, and should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence, whenever the relief sought is more than preservation of the status quo. Like any litigant, the [SEC] should be obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks.

Id. (citations omitted). Under this sliding standard, an injunction that maintains the status quo, such as an asset freeze, can be issued upon a "showing that the probability of [the SEC] prevailing is better than fifty percent." *Id.* at 1039, 1041 (citation omitted); *see also SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998). However, a mandatory injunction that alters the status quo or a particularly onerous injunction may be issued only upon a "clear showing" that the SEC will prevail. *Unifund*, 910 F.2d at 1039, 1040–41.

The SEC has requested an injunction that contains elements of both a traditional prohibitory injunction and a more restrictive mandatory injunction. It seeks to maintain the status quo by requesting a freeze on Traffic Monson's assets. But the requested receivership order, which is a necessary component of the preliminary injunction that the SEC's seeks, contains at least one element of mandatory relief: an order that Mr. Scoville "provide any information to the Receiver that the Receiver deems necessary." [Docket 3-5, ¶ 10; Docket 11, ¶ 6].

Moreover, the preliminary injunction that the SEC seeks is particularly burdensome. It would continue the receiver's possession of not just Traffic Monsoon's assets, but also Traffic Monsoon's business operations pending the resolution of this litigation. This interruption in Traffic Monsoon's business, which relies upon a steady stream of new AdPack purchasers to pay revenue sharing to existing AdPack holders, would certainly harm the continuing viability of the enterprise. The keystone to Traffic Monsoon's success has been the cultivation of its members' expectation that the purchase of an AdPack will result in a steady stream of revenues into the

members' accounts. The court is also mindful of the hardship born by the many individuals who have used their savings to purchase AdPacks. The asset freeze denies these individuals access to much needed funds.

Given these considerations, the court requires a clear showing of both a likelihood of success on the merits and that the violations would continue absent an injunction.

A. Likelihood of Success

Traffic Monsoon argues that the SEC cannot show a clear likelihood of success in this litigation for several reasons. First, it asserts that its sale of AdPacks does not constitute a Ponzi scheme that would violate Rule 10b-5 or Section 17(a). Second, it argues that the AdPacks are not securities and are therefore not subject to the restrictions contained in Rule 10b-5 or Section 17(a). And third, it argues that the SEC likely cannot prove the scienter requirements of Rule 10b-5 or Section 17(a).

1) Existence of a Ponzi Scheme

The Tenth Circuit has defined a Ponzi scheme in several different ways. In *M & L Business Machine* it was defined as:

> an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments. Typically, investors are promised large returns for their investments. Initial investors are actually paid the promised returns, which attract additional investors.

Jobin v. McKay (*In re M & L Bus. Mach. Co.*), 84 F.3d 1330, 1332 n.1 (10th Cir. 1996) (quoting *Sender v. Heggland Family Trust* (*In re Hedged-Invs. Assocs., Inc.*), 48 F.3d 470, 471 n.2 (10th Cir. 1995). Alternatively, the circuit court has said that a "Ponzi scheme is a fraudulent investment scheme in which '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 (10th Cir. 1996). Yet another iteration of the definition of a Ponzi scheme is that it is a

> fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments. Money from the new investors is used directly to repay or pay interest to earlier investors, usually without any operation or revenue-producing activity other than the continual raising of new funds.

Mosier v. Callister, Nebeker & McCullough, 546 F.3d 1271, 1273 n.2 (10th Cir. 2008) (quoting *Ponzi scheme*, BLACK'S LAW DICTIONARY (8th ed. 2004)). Although there are minor variations, these definitions all agree that the central characteristic of a Ponzi scheme is that returns are not based upon any underlying business activity. Instead, money from new investors is used to pay earlier investors.

Under this definition, Traffic Monsoon operated as a Ponzi scheme. When a member purchased a $50 AdPack, the member obtained a right to share Traffic Monsoon's "revenue" up to $55. The AdPacks typically reached the maximum $55 payout in about 55 days. For many AdPacks, Traffic Monsoon also paid a $5 commission to the referring member. Unbeknownst to the Traffic Monsoon members, though, the revenue sharing returns that flowed into the member's account to obtain the 10% return and 10% commission were derived almost exclusively from the sale of AdPacks to later purchasers. Thus, the profits and commissions generated by the AdPack did not come from underlying business activity. Instead, the profits and commissions were derived from subsequent investments in AdPacks by later purchasers. An AdPack investor was almost completely reliant upon new AdPack purchases to recapture the $50 investment and reap the $5 return. The impressive 66% (or more) annual return obtained by early

AdPack investors served as an example that both attracted new investors and convinced existing investors to roll over their AdPack returns into new AdPacks. [15]

But this cycle of returns to early investors fueled by new investments cannot last forever. A 20% payout every 55 days (10% in revenue sharing and a 10% commission) could not be sustained by Traffic Monsoon's relatively anemic revenue generated by selling website visits. Instead, these impressive returns were paid with either new investor money or members rolling over credits in their accounts toward new AdPack purchases. But as the number of outstanding AdPacks expands exponentially, the new investment money must be divided among an ever-growing number of AdPacks, requiring a commensurate exponential expansion of the amount of new investment money just to maintain the same rate of return. At some point, the daily payments deposited in AdPack holders' accounts must begin to decrease until an inevitable

[15] One of the unique aspects of Traffic Monsoon that differentiates it from other Ponzi schemes is that members had to continually reinvest in the scheme by rolling over the profit from fully matured AdPacks into the purchase of new AdPacks. This amounted to a shell game in which an initial investment of a sum of money would continually cycle among the members' accounts. A large portion of an initial investment would be distributed to other members as either revenue sharing or a commission. Then the members that received the revenue sharing payments or commissions would reinvest it by rolling it over into new AdPAck purchases. Under this system, the same dollar could be distributed to member accounts as revenue sharing or a commission many times, until either Traffic Monsoon withdrew it as profit or a member withdrew it from his or her account. This explains why the members had a relatively small amount in their accounts when the court entered the TRO—$34.2 million—while the number of outstanding AdPacks, if allowed to mature, would amount to $243.9 million. So long as the members, encouraged by a continual flow of money into their accounts, reinvested most of their money rather than withdrawing it, a relatively small amount of money continually redistributed among the members through revenue sharing could fuel much greater expectations as to the near-future value of the AdPacks. But once the money ceased to continually recycle among the member accounts, as happened when the court entered the TRO, there wasn't enough money to pay what experience had led the members to believe their AdPack investment would be worth after a short 55-day wait. That is why Traffic Monsoon had only about $60 million in assets to cover outstanding AdPacks that would be worth $243.9 million if they had matured, even though member account balances amounted to only $34.2 million.

tipping point is reached where fewer members rollover their AdPacks and fewer new investors are attracted to the scheme. Then, a vicious cycle would begin in which a decrease in new investment would lower the rate of return, which would in turn decrease the amount of new investment even more. This cycle would continue until the system collapsed and the unlucky individuals who had not pulled out their money in time would be left with next to nothing. *See Merrill v. Abbott* (*In re Indep. Clearing House Co*.), 77 B.R. 843, 860 (Bankr. D. Utah 1987) ("A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry.").

A Ponzi scheme is inherently deceptive because it generates a false appearance of profitability by using money from new investors to generate returns for earlier investors. *Mukamal v. General Electric Capital Corp.* (*In re Palm Beach Fin. Partners, L.P.*), 517 B.R. 310, 346 (Bankr. S.D. Fla. 2013) ("[T]he hallmark of a Ponzi scheme, which is inherently fraudulent in nature, is 'that the entity gives the false appearance of profitability by seeking investments from new sources rather than earning profits from assets already invested.'" (citation omitted)). These artificial returns mislead new investors and conceal the fact that the Ponzi will inevitably collapse and investors will lose money. Therefore the operator of a Ponzi scheme will likely violate the prohibitions against employing "any device, scheme, or artifice to defraud" or engaging "in any act, practice, or course of business which operates or would operate as a fraud or deceit" contained in Rule 10b-5(a), (c) and Section 17(a)(1), (3). *See SEC v. Helms*, No. A-13-CV-01036 ML, 2015 WL 5010298, at *13–*14 (W.D. Tex. Aug. 21, 2015) (concluding that a Ponzi scheme was a "scheme to defraud" under Rule 10b-5 and Section 17(a)); *Merrill*, 77 B.R. at 860 (The perpetrator of a Ponzi scheme "must know all along, from the very nature of his activities, that investors at the end of the line will lose their money.").

Traffic Monsoon argues that it cannot be liable under Rule 10b-5 or Section 17(a) because it did not operate a Ponzi scheme. First, it points to the fact that its website does not promise any particular rate of return for AdPack purchases and specifically notifies members that reaching the maximum $55 payout is not guaranteed. Quoting language from *M & L Business Machines*, Traffic Monsoon notes that "[t]ypically, investors [in a Ponzi scheme] are promised large returns for their investments." 84 F.3d at 1332 n.1. But although promised returns may be a "typical" indicator of a Ponzi scheme, it is not a necessary element of such a scheme. What is required is the payment of returns to existing investors with new investor money. As evidenced by the rapid expansion of Traffic Monsoon's AdPack sales, the false appearance of profitability afforded by this practice was more than sufficient to entice new investors.

The deception at the heart of the Traffic Monsoon Ponzi scheme is that it concealed the fact that almost all of the returns from the AdPacks were derived from subsequent AdPack purchases. The website did not notify its members that over 98% of the returns came from subsequent investments in AdPacks. By calling the returns "revenue sharing," and falsely claiming that the sale of AdPacks did not constitute a Ponzi scheme, Traffic Monsoon suggested that the returns were generated by business revenue rather than by other investments in AdPacks. Indeed, the website asserted that "[n]ew sales of advertising service generate new earnings" and that "[i]t's from the sale of all our services that we share revenues," misleading the members as to the source of the AdPack returns.

Traffic Monsoon also asserts that it does not operate a Ponzi scheme because it has sufficient funds to pay out all of the money in its members' accounts. According to Traffic Monsoon, if its business model collapses and no more AdPacks are sold, it will have broken no promises because it will be able to pay out all of the money it is contractually obliged to remit.

But breaching a contract is not the hallmark of a Ponzi scheme. Its defining characteristic is the inherently deceptive practice of using new investor money, rather than revenue derived from an underlying business, to pay returns to existing investors.

It is true that Traffic Monsoon's sale of AdPacks differs somewhat from a run-of-the-mill Ponzi scheme. In most Ponzi schemes, an investor who deposits $1,000 in the scheme will be told that there is $1,000 in his or her account, and this total will be augmented with fictitious returns. This iteration of a Ponzi scheme is inherently bankrupt because there isn't enough money to pay out the fictitious sums in all of the victim's accounts. In the case of Traffic Monsoon, however, if a member purchased $1,000 in AdPacks, that money would immediately be distributed to the referring member, to other qualified AdPack holders, and to Traffic Monsoon. The purchasing member's account would initially have zero dollars in it. Then money that other investors used to purchase AdPacks would flow into the member's account until it reached $1,100 about two months later. What made Traffic Monsoon a successful Ponzi scheme, however, was that members would not allow large amounts of money to accumulate in their accounts. They would continually reinvest this money by purchasing additional AdPacks, leaving Traffic Monsoon with a relatively modest obligation to pay out money contained in the member accounts. But the fact that Traffic Monsoon might have enough money to pay out the money contained in the member accounts if the AdPack model were allowed to collapse under its own weight does not mean that it does not operate a Ponzi scheme. Members would still have been deceptively enticed to invest their savings in the scheme by the illusion of profitability Traffic Monsoon cultivated by using new investor money to pay returns to earlier investors. And those members that would be left holding hundreds or thousands of worthless AdPacks would still have lost their savings.

Finally, Traffic Monsoon suggests that it does not operate a Ponzi Scheme because it operates a legitimate advertising business. However, "[t]he fact that an investment scheme may have some legitimate business operations is not determinative. If the [defendant's] legitimate business operations cannot fund the promised returns to investors, and the payments to investors are funded by newly attracted investors, then the [defendant] is operating a Ponzi scheme." *In re Twin Peaks Fin. Serv's Inc.,* 516 B.R. 651, 655 (Bankr. D. Utah 2014); *accord Miller v. Wulf*, 84 F. Supp. 3d 1266, 1272 (D. Utah 2015) ("'[S]eemingly legitimate business activity does not insulate companies from a finding that they were operated as part of a Ponzi scheme.' Ponzi schemes sometimes use legitimate operations to attract investors, but the existence of that legitimate business does not preclude a finding that the company operated a Ponzi scheme." (alteration in original) (footnote and citation omitted)). The less than 2% of revenue Traffic Monsoon collected from the sale of website visits was clearly insufficient to fund the AdPacks' aggressive returns.

2) AdPacks are securities

Both Rule 10b-5 and Section 17(a) regulate transactions that involve securities. The SEC argues that the AdPacks are securities because they amount to an investment contract, which was defined by the U.S. Supreme Court in the seminal *Howey* opinion as comprising three elements. They are: "[1] an investment of money [2] in a common enterprise [3] with profits to come solely from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). In applying this definition of an investment contract, "form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

Traffic Monsoon argues that its sale of AdPacks did not create an investment contract and, therefore, the AdPacks are not securities. First, Traffic Monsoon argues that its sale of an

AdPack does not constitute "an investment of money in a common enterprise," but rather the purchase of services. The fact that members received some services for their AdPack purchases, however, does not mean that the AdPack was not an investment. The same services available through the AdPack could be purchased à la carte for just $10.95. The only explanation for why members would pay an additional $39.05 for the same services was that they wanted to invest their money to obtain the generous returns obtained by early investors. The evidence clearly points to the fact that Traffic Monsoon's explosive growth was driven by members purchasing and repurchasing AdPacks in order to obtain the incredible returns on their investment, not by intense demand for Traffic Monsoon's services. Indeed, many AdPack purchasers had no interest in the website visits Traffic Monsoon offered, and Traffic Monsoon only ever delivered a fraction of the clicks it promised to deliver. In short, the economic reality of the AdPack purchases is that they were investments.

Second, Traffic Monsoon contends that the profits from the AdPacks did not "come solely from the efforts of others" because its members were required to invest a little over four minutes every day to visit 50 websites for five seconds each. It asserts that this requirement to qualify for revenue sharing constituted efforts on the part of the members to reap the profits from the AdPacks.

This argument is unavailing. "[T]he word 'solely' used in the Howey test 'should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities.'" *Crowley v. Montgomery Ward & Co.*, 570 F.2d 877, 879 (10th Cir. 1978) (citation omitted). "Investments satisfy the third prong of the *Howey* test 'when the efforts made by those other than the investor are the ones which affect significantly the success

or failure of the enterprise.'" *SEC v. Shields*, 744 F.3d 633, 645 (10th Cir. 2014) (citation omitted). "[T]he test is 'whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.' " *Crowley v. Montgomery Ward & Co.,* 570 F.2d 875, 877 (10th Cir. 1975) (citation omitted)). In this case, the efforts of the members in visiting websites for about four minutes a day was not a significant contribution to the success or failure of the AdPack scheme. Over 98% of Traffic Monsoon's revenue sharing came from the sale of AdPacks. The success of AdPack sales had nothing to do with the members' efforts and depended solely on Mr. Scoville's acumen in promoting them.

Because the three elements of the *Howey* test are satisfied, the AdPacks were securities subject to regulation under Rule 10b-5 and Section 17(a).

3) Scienter

Traffic Monsoon also argues that the SEC cannot prove the scienter element of Rule 10b-5 or Section 17(a). As evidence for this proposition, it states that in early 2014, the Utah Division of Securities investigated a scheme similar to Traffic Monsoon run by Mr. Scoville called AdHitProfits. When Mr. Scoville inquired as to the status of that investigation, he received an email stating that the matter has been closed because "a security was not involved." Traffic Monsoon cites this email as persuasive evidence that Mr. Scoville lacked scienter because he did not know that the AdPacks were securities.

This argument is unavailing for several reasons. First, Traffic Monsoon provides no authority for the proposition that the SEC is required to prove that Mr. Scoville knew that the AdPacks meet the definition of a security. Second, to the extent that Traffic Monsoon argues that the SEC cannot prove that Mr. Scoville had the requisite knowledge that the AdPacks were a

"device, scheme, or artifice to defraud" or a "course of business which operates or would operate as a fraud or deceit" under Rule 10b-5 or Section 17(a), the operation of a Ponzi scheme itself is evidence of scienter. The perpetrator of a Ponzi scheme "must know all along, from the very nature of his activities, that investors at the end of the line will lose their money." *Merrill*, 77 B.R. at 860. And third, Section 17(a)(3) does not have a scienter requirement. *Aaron v. SEC*, 446 U.S. 680, 696 (1980). At minimum, Traffic Monsoon's scienter argument is unavailing as to this claim.

4) Conclusion

In sum, all of Traffic Monsoon's arguments as to why it will win this case are without merit. Reviewing the evidence, the court concludes the SEC has made a clear showing that it will likely prevail on the merits.

B. Reasonable Likelihood that the Wrong Will Be Repeated

In the Tenth Circuit, courts examine several factors to evaluate the likelihood that the wrong will be repeated:

> Determination of the likelihood of future violations requires analysis of several factors, such as the seriousness of the violation, the degree of scienter, whether defendant's occupation will present opportunities for future violations and whether defendant has recognized his wrongful conduct and gives sincere assurances against future violations. . . . A knowing violation of §§ 10(b) or 17(a)(1) will justify an injunction more readily than a negligent violation of § 17(a)(2) or (3). However, if there is a sufficient showing that the violation is likely to recur, an injunction may be justified even for a negligent violation of § 17(a)(2) or (3).

SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993).

Mr. Scoville does not argue that the likelihood of future violations prong of the preliminary injunction test has not been met. He sold AdPacks through Traffic Monsoon from

October, 2014 up until the day that this court entered a TRO enjoining this practice in July, 2016. Mr. Scoville has provided no assurances that he will discontinue the sale of AdPacks if the TRO is permitted to expire. Instead, his entire defense has been that his sale of AdPacks was a legitimate and legal business practice. Moreover, the very nature of a Ponzi scheme is that it must be perpetuated through the solicitation of additional investments or it will collapse.

The court concludes that, absent a preliminary injunction, the SEC has made a clear showing that Mr. Scoville will continue to violate securities laws by perpetuating a Ponzi scheme. Moreover, to the extent that the SEC seeks an asset freeze, proof of a likelihood of future violations is not required. *Cavanagh*, 155 F.3d at 132.

C. Conclusion

The SEC has made a clear showing that it will prevail and that Mr. Scoville will continue to violate the law by operating a Ponzi scheme absent an injunction. The court therefore grants the SEC's request for a preliminary injunction.

III. OBJECTIONS TO THE RECEIVERSHIP ORDER

In his motion to set aside the receivership, Mr. Scoville argues that the present receivership order violates his Fourth and Fifth Amendment rights. The court need not determine whether the current receivership order violates these rights because the court exercises its discretion to amend the receivership order to address his concerns.

Without citing authority, Mr. Scoville also argues that the receivership order violates his right to due process because it deprives him of funds to mount a legal defense to the SEC's claims. But "a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime." *SEC v. Marino*, 29 F. App'x 538, 541–42 (10th Cir. 2002) (unpublished) (quoting *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993)). Indeed, in a

criminal prosecution, "[a] robbery suspect . . . has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989). If a criminal defendant may not use ill-gotten gains to fund a defense, a civil defendant certainly may not.

Because the court concludes that the SEC has demonstrated a strong likelihood that it will prove that Mr. Scoville operated an illegal Ponzi scheme, it denies his due process objection to the receivership order.

IV. SECTION 1292(b) CERTIFICATION

The court certifies this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This order contains several "controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation."

There is "substantial ground for difference of opinion" as to whether Section 929P(b) of Dodd-Frank reinstated the conduct and effects test for litigation brought by the SEC. Although several district courts have noted the possibility that Section 929P9(b) may have superseded the *Morrison* test, none have actually decided the question. *See SEC v. Battoo*, 158 F. Supp. 3d 676, 692 (N.D. Ill. 2016); *SEC v. Brown*, No. 14 C 6130, 2015 WL 1010510, at *5 (N.D. Ill. Mar. 4, 2015) (unpublished); *SEC v. Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 916–17 (N.D. Ill. 2013). Alternatively, there are grounds for a difference of opinion as to whether Traffic Monsoon's sale of AdPacks to foreign customers constituted a domestic transaction if the *Morrison* test still applies to litigation brought by the SEC. And finally, the issue of whether Traffic Monsoon's particular business model constitutes a Ponzi scheme in light of the contingent nature of the promised returns appears to be an issue of first impression in this circuit.

CONCLUSION

Traffic Monsoon's motion to set aside the receivership [Docket 33] is DENIED. The SEC's request for a preliminary injunction is GRANTED. The court shall issue a separate preliminary injunction order and a revised receivership order.

Signed March 28, 2017.

BY THE COURT

Jill N. Parrish
United States District Court Judge

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TRAFFIC MONSOON, LLC and CHARLES D. SCOVILLE, Defendants.	**PRELIMINARY INJUNCTION** Case No. 2:16-cv-00832-JNP District Judge Jill N. Parrish

IT IS HEREBY ORDERED:

Defendants are hereby prohibited from soliciting, accepting, or depositing any monies obtained from actual or prospective investors, individuals, customers, companies, and/or entities, through the Internet or other electronic means for Traffic Monsoon or a business model substantially similar to Traffic Monsoon's sale of AdPacks.

Defendants and each of their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including facsimile transmissions, electronic mail or overnight delivery service, and each of them, shall, within five days of receiving actual notice of this Order, take such steps as are necessary to repatriate and deposit into the registry of the Court in an interest bearing account, any and all funds or assets of Traffic Monsoon LLC or funds or assets that were obtained directly or indirectly from Traffic Monsoon LLC that presently may be located outside of the United States. Defendants and each of their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who

receive actual notice of this Order by personal service or otherwise, including facsimile transmission, electronic mail, or overnight delivery service, are hereby restrained from destroying, mutilating, concealing, altering, disposing, or transferring custody of any items, including but not limited to any books, records, documents, correspondence, contracts, agreements, assignments, obligations, tape recordings, computer media or other property relating to Traffic Monsoon, LLC.

I. ORDER FREEZING ASSETS

This Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of Traffic Monsoon, LLC and of Charles D. Scoville that were obtained directly or indirectly from Traffic Monsoon, LLC (Defendants' Assets).

Except as otherwise specified herein, Defendants' Assets are frozen until further order of this Court, including but not limited to any accounts held at PayPal Holdings, Inc., Payza, Solid Trust Pay, Allied Wallet LTD, and JPMorgan Chase Bank, N.A. Accordingly, all persons and entities with direct or indirect control over any of Defendants' Assets, including but not limited to the Defendants, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets. This freeze shall include, but not be limited to, Defendants' Assets that are on deposit with financial institutions such as banks, brokerage firms and mutual funds.

Defendants Traffic Monsoon and Scoville, their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, and each of them, shall hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance,

assignment, dissipation, concealment, or other disposal of Defendants' Assets.

Each of the financial or brokerage institutions, debtors, and bailees, or any other person or entity holding Defendants' Assets shall hold or retain within their control and prohibit the withdrawal, removal, transfer, or other disposal of any such assets, funds, or other properties.

II. STAY OF LITIGATION

The Court hereby orders a stay of all litigation in any court against Traffic Monsoon, LLC or Charles Scoville where (1) the Securities and Exchange Commission is not a party or privy to a party in the lawsuit and (2) the lawsuit involves or seeks to recover the assets frozen by this Order. The parties to any such litigation are enjoined from taking any action in connection with the lawsuit, including, but not limited to, the issuance or employment of process. All courts presiding over any such litigation are also enjoined from taking or permitting any action in the lawsuit until further order of this Court.

This Court shall retain jurisdiction over this action for the purposes of implementing and carrying out the terms of all orders and decrees that may be entered herein and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

DATED March 28, 2017 at 5:00 pm.

Jill N. Parrish
United States District Judge

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TRAFFIC MONSOON, LLC and CHARLES D. SCOVILLE, Defendants.	**AMENDED ORDER APPOINTING RECEIVER** Case No. 2:16-cv-00832-JNP District Judge Jill N. Parrish

IT IS HEREBY ORDERED:

1. Mary Margaret (Peggy) Hunt of Dorsey & Whitney LLP is hereby appointed to serve without bond as receiver (Receiver) for the purpose of marshaling and preserving all assets of Traffic Monsoon, LLC and all assets of Charles D. Scoville that were obtained directly or indirectly from Traffic Monsoon (Receivership Assets).

2. From the date of the entry of this Order until further notice is provided by this Court the Receiver shall have the following general powers and duties.

I. General Powers and Duties of Receiver

3. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers and general and limited partners of Traffic Monsoon, and any affiliated entities owned or controlled by Traffic Monsoon or Scoville (Receivership Defendants) under applicable law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, and Fed.R.Civ.P.

66.

4. The trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of Traffic Monsoon shall have no authority with respect to Traffic Monsoon's operations or assets, except to the extent as may hereafter be expressly granted by the Receiver. The Receiver shall assume control of the Receivership Assets and the operation of Traffic Monsoon and any affiliated entities owned or controlled by the Receivership Defendants and shall pursue and preserve all of their claims.

II. Access to Information

5. The Receivership Defendants and the past and/or present officers, directors, agents, managers, general and limited partners, trustees, attorneys, accountants, agents, including those maintaining and/or hosting servers or websites, and employees of the entity Receivership Defendants, as well as those acting in their place, are hereby ordered and directed to immediately preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to Traffic Monsoon and/or all property interests of Traffic Monsoon; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

6. The Receivership Defendants and their agents shall provide any passwords and execute any documents required to access any computer or electronic files of Traffic Monsoon in any medium, including but not limited to electronically stored information stored, hosted or otherwise maintained by an electronic data host.

III. Access to Books, Records and Accounts

7. The Receiver is authorized to take immediate possession of all assets, bank accounts or other financial accounts, books and records and all other documents or instruments relating to

Traffic Monsoon or the Receivership Assets. All persons and entities having control, custody or possession of any Receivership Assets are hereby directed to turn such property over to the Receiver.

8. The Receivership Defendants, as well as their agents, servants, employees, attorneys, accountants any persons acting for or on behalf of the Receivership Defendants, and any persons receiving notice of this Order by personal service, facsimile transmission or otherwise, having possession of Receivership Assets or books, records, or accounts of Receivership Assets are hereby directed to deliver the same to the Receiver, her agents and/or employees.

IV. Access to Real and Personal Property

9. The Receiver is authorized to take immediate possession of all personal property of Traffic Monsoon, wherever located, including but not limited to electronically stored information, computers, laptops, hard drives, servers, external storage drives, and any other such memory, media or electronic storage devices, books, papers, data processing records, evidence of indebtedness, bank records and accounts, savings records and accounts, brokerage records and accounts, certificates of deposit, stocks, bonds, debentures, and other securities and investments, contracts, mortgages, furniture, office supplies and equipment.

10. The Receiver is authorized to take immediate possession of all real property of Traffic Monsoon, wherever located. Upon receiving actual notice of this Order by personal service, email or facsimile transmission or otherwise, all persons other than law enforcement officials acting within the course and scope of their official duties, are (without the express written permission of the Receiver) prohibited from: (a) entering such premises; (b) removing anything from such premises; or, (c) destroying, concealing, disposing of, transferring, or erasing anything on such premises.

11. In order to execute the express and implied terms of this Order, the Receiver is authorized to change door locks to the premises described above. The Receiver shall have exclusive control of the keys. The Receivership Defendants, or any other person acting or purporting to act on their behalf, are ordered not to change the locks in any manner, nor to have duplicate keys made, nor shall they have keys in their possession during the term of the receivership.

12. The Receiver is authorized to open all mail directed to or received by or at the offices or post office boxes of the Traffic Monsoon, and to inspect all mail opened prior to the entry of this Order, to determine whether items or information therein fall within the mandates of this Order.

V. Notice to Third Parties

13. The Receiver is authorized to instruct the United States Postmaster to hold and/or reroute mail which is related, directly or indirectly, to the business, operations or activities of Traffic Monsoon (Receiver's Mail), including all mail addressed to, or for the benefit of, Traffic Monsoon. The Postmaster shall not comply with, and shall immediately report to the Receiver, any change of address or other instruction given by anyone other than the Receiver concerning the Receiver's Mail. The Receivership Defendants shall not open any of the Receiver's Mail and shall immediately turn over such mail, regardless of when received, to the Receiver. The foregoing instructions shall apply to any proprietor, whether individual or entity, of any private mail box, depository, business or service, or mail courier or delivery service, hired, rented or used by the Receivership Defendants. The Receivership Defendants shall not open a new mailbox, or take any steps or make any arrangements to receive mail in contravention of this Order, whether through the U.S. mail, a private mail depository or courier service.

VI. Liability of Receiver

14. Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with her fiduciary obligations in this matter.

15. The Receiver, her counsel, and her agents, acting within scope of such agency (Retained Personnel) are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

VII. Fees and Expenses

16. Subject to Paragraphs 19 – 20 immediately below, the Receiver need not obtain Court approval prior to the disbursement of receivership funds for expenses in the ordinary course of the administration and operation of the receivership, including but not limited to costs associated with communications with potential claimants and securing electronic information.

17. The Receiver is authorized to employ professionals to assist her in carrying out the duties and responsibilities described in this Order. The Receiver shall not engage any professionals without first obtaining an Order of the Court authorizing such engagement. The Receiver is authorized to retain Dorsey & Whitney LLP, a firm in which the Receiver is a partner, as the Receiver's counsel in this matter.

18. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from the receivership estate as described in the "Billing Instructions for

Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission" agreed to by the Receiver. Such compensation shall require the prior approval of the Court.

DATED March 28, 2017 at 5:00 pm.

Jill N. Parrish
United States District Judge