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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

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

By this Motion, Charles Scoville moves this Honorable Court for an order setting aside the receivership over himself and his company, Traffic Monsoon.

More than 90% of Traffic Monsoon's customers are not within the United States, which means that the vast majority of Traffic Monsoon's business is not prohibited by United States securities laws, even assuming the truth of all the SEC's allegations in its Complaint.[1] The

[1] This motion is not primarily concerned with arguing that Traffic Monsoon or Scoville's conduct with regard to ***domestic purchasers*** is not in violation of the securities laws. Although that is Scoville's position, as noted in his opposition to the SEC's Motion for a Preliminary Injunction,

receivership order entered by this Court almost completely abrogates Mr. Scoville's Constitutional rights under the Fourth Amendment, strains his Fifth Amendment rights to due process and against self-incrimination, and places a person nominated by his opponent in this litigation in a position to oversee and control important aspects of his life. The SEC's limited legitimate interests in enforcing the securities laws of the United States could be addressed through less oppressive means. Because the remedy of a receivership impinges on Mr. Scoville's rights and is more than necessary to ensure an adequate remedy for any violations of U.S. securities laws, the receivership should be set aside in favor of less intrusive means of addressing the Commission's concerns.

I. Factual Introduction

Defendant Charles Scoville owned and operated a business called Traffic Monsoon. Traffic Monsoon sells web advertising in the form of guaranteed visitors to customer's websites and banner ads, which are advertisements placed on the top of another webpage, among other web-advertising products. It markets this advertising in a unique way, offering those who purchase a product called a "Banner Ad Pack" ("AdPack") a refund of their purchase price of fifty dollars ($50) in the form of commissions or revenue sharing, and indeed the possibility of a refund in excess of the price they paid *if* they participate in clicking on others' websites. In this way Traffic Monsoon's customers also became its service providers and, as service providers, receive a commission in the form of revenue shared. A customer who purchased an AdPack was "qualified" to participate in the revenue sharing for a particular day if they clicked on a specified number[2] of websites in that day. All "qualified" AdPack purchasers would receive a portion of the revenue

for purposes of this motion the Court need not agree with Scoville on that point as the basis for this motion.

[2] The amount of clicks necessary to qualify changed over time but eventually grew to 50 clicks per day.

generated by Traffic Monsoon by selling its products during that day. For each AdPack purchased, Traffic Monsoon limited the amount of lifetime revenue sharing to $55, but customers could purchase as much advertising as they wanted and could receive revenue sharing for each AdPack they purchased. Traffic Monsoon explicitly and repeatedly told AdPack purchasers that while they would share in revenue, there was no guarantee that Traffic Monsoon would generate revenue to share or that the revenue sharing portion of the AdPack would ever reach the $55 dollar limit, or any other specific amount.

Because of this marketing technique, consumers became particularly interested in purchasing Traffic Monsoon's AdPack product and Traffic Monsoon's business grew dramatically. In early 2016, Paypal—which Traffic Monsoon had used to process most of its customer's purchases—froze what would eventually amount to $60,000,000 of funds from Traffic Monsoon customer AdPack purchases. This amount represented almost one third of Traffic Monsoon's lifetime incoming cash. As would any business deprived of one third of its cash receipts, Traffic Monsoon has struggled to deliver all of the services it sold and has been unable to distribute the revenue sharing to AdPack purchasers.

Traffic Monsoon, as a web-based business, has no physical office space although it has used Scoville's home address in Utah and an address in the United Kingdom as physical addresses when required to list one.[3] (D.E. 3-2 at 4-5). Traffic Monsoon's customers come from around the world. Indeed, more than ninety percent of Traffic Monsoon's customers come from outside the United States. When customers outside the United States purchase an AdPack, they do so by opening a web-browser, clicking on a button to purchase an AdPack, and then entering required

[3] Doc. 3-2 is a transcript that has its own page numbers; the page numbers listed here are the pages of the Document, not the pages within the document. For example, here the relevant sections are found on pages 9 and 10 of the transcript, which are at pages 4 through 5 of Document 3-2.

information into their web-browser. Their purchase is paid using Paypal, again accomplished by them making entries into a web-browser on a computer where they are located. All of the steps of the customer purchasing, and Traffic Monsoon acquiring liability to sell, the AdPack take place in the country and city where the buyer is located. Traffic Monsoon did not meet with customers to consummate sales and documents were not signed other than electronic documents signed on the computer where the buyer was located.

On July 27, 2016, this Court entered an Order Appointing Receiver (the "Order"). (D.E. 11). The Court elected to appoint Mary Margaret (Peggy) Hunt (the "Receiver"), who was recommended by the SEC as a receiver and who has served as a receiver in SEC matters before. Ms. Hunt has no prior experience of working with or for Mr. Scoville or Traffic Monsoon. The Order finds that the SEC had shown, *ex parte* and without notice to Mr. Scoville or opportunity to identify the legal deficiencies in the Commission's argument, that it is necessary for a receiver to marshal and preserve all assets of Traffic Monsoon and of Mr. Scoville. (Order at p.1,2 ¶¶2,3). The Order further predicates its necessity on the proposition that, "[b]ecause the Defendants are unlikely to have sufficient assets to satisfy the full value of any judgment obtained in this case, any dissipation of the assets would irreparably harm the investors on whose behalf the Commission brought this suit." (*Id*. at ¶3).

The Order grants broad powers to the Receiver and imposes significant responsibilities on Mr. Scoville. Under the Order, the Receiver:

1. Is authorized to take possession of all assets, bank accounts or other financial accounts relating to Mr. Scoville and Traffic Monsoon;(*Id.* at ¶8).
2. Is authorized to take immediate possession of all Mr. Scoville's personal property, including: computers, books, papers, furniture, and office supplies; (*Id.* at ¶10).

3. Is authorized to take all Mr. Scoville's real property; (*Id.* at ¶11).

4. Has exclusive control of the keys to Mr. Scoville's real property; (*Id.* at ¶12).

5. Is authorized to hold and open all Mr. Scoville's mail. (*Id.* at ¶¶12, 13).

In addition to having his business, personal property, real property and mail taken from him, the Order also imposes obligations on Mr. Scoville. Under the Order, Mr. Scoville must "provide any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this Order" (*Id.* at ¶6) and must "respond promptly and truthfully to all requests for information and documents from the Receiver." (*Id.* at ¶7). Mr. Scoville must also produce various items to the Receiver, including documents, books and records. (*Id.* at ¶¶5, 6).

The Order places no limitations on the Receiver in her use, dissemination, or distribution of the information she obtains from Mr. Scoville or the answers the Order compels him to give. For example, while not explicitly authorized by the Order, nothing within the Order would preclude the Receiver from inviting federal, state, and local law enforcement officers into Mr. Scoville's apartment to examine the premises, or to invite them to be present when he answers questions she asks him.

II. Applicable Law

A. The Court Has the Power and Discretion to Order a Receivership.

Under section 20(b) of the Securities Act of 1933 (the "Securities Act") and section 21(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), a Court is empowered to provide injunctive relief. Among the forms of injunctive relief that are available to Courts in cases brought by the SEC is appointment of a receiver. However, "receivership is not a positive right. Rather, it is an extraordinary equitable remedy that lies in the discretion of the court, justifiable only in

extreme situations." *Waag v. Hamm*, 10 F.Supp.2d 1191, 1193 (D.Colo. 1998) (citing *Kelleam v. Maryland Cas. Co. of Baltimore, Md.*, 312 U.S. 377, 381, 61 S.Ct. 595, 85 L.Ed. 899 (1941). Moreover, a receivership should not be ordered when a more limited option is available and the SEC must make a more "persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks." *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990).

B. Sales of Securities Outside the United States Are Not Prohibited by The Statutes At Issue in The Complaint.

As noted in more detail in Defendant's Opposition to the SEC's motion seeking a preliminary injunction, which was filed simultaneous with this motion, the United States Supreme Court has held that the anti-fraud provisions of the Securities Act do not apply to transactions unless they are: (1) transactions in securities listed on a U.S. exchange or, (2) domestic sales of securities. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). The Second Circuit, meanwhile, has declared 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 (2d Cir. 2012).

III. Argument

A. The SEC Has Not Shown A Likelihood of Prevailing As to the 90% of Adpack Customers who purchased their Adpacks Outside the United States.

As discussed in greater detail in the Defendant's Opposition to the Preliminary Injunction, approximately 90% of Traffic Monsoon's customers reside outside the United States. Nothing in the SEC's Complaint or Motion provides any basis for the Court to conclude that any part of the sale of AdPacks to these international customers took place within the United States. Under

Morrison and its progeny, the statutes used by the SEC do not prohibit extraterritorial conduct, such as sales of AdPacks that take place outside the United States. As a result, the SEC cannot show a likelihood of prevailing on the merits as to the 90% of Traffic Monsoon customers who purchased AdPacks outside of the United States.

B. Because the SEC Can Not Proceed On Its Claims Based on Extraterritorial Conduct, The Receivership Order is Unnecessary.

(1) Scoville and Traffic Monsoon Have Enough Funds To Pay Any Judgment To Which The Commission Will Be Entitled.

Pre-trial equitable relief is only proper to the extent it is consistent with the amount of relief the Commission plausibly might obtain at the conclusion of the matter. It is improper to restrain assets pre-trial to secure the ability to pay a legal judgment, such as civil penalties the SEC might impose. *See SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). So here, the Court should not restrain more assets than would be required to fully pay an order of disgorgement based on the conduct prohibited by U.S. securities law. The Order finds that a receivership is necessary "[b]ecause the Defendants are unlikely to have sufficient assets to satisfy the full value of any judgment obtained in this case." While the SEC may have engineered this conclusion by failing to identify the factual and legal limits to its case in its *ex parte* presentation to the Court, the conclusion that Traffic Monsoon and Mr. Scoville do not have sufficient assets to satisfy the full value of an equitable judgment the SEC might plausibly be entitled to in this case is simply wrong.

Because Mr. Scoville has no access to books and records of Traffic Monsoon, he is unable to query the data to provide the Court with a conclusive picture of the amount of disgorgement that the Court could order based on AdPack purchases within the United States. However, as explained in more detail in his opposition to the SEC's requested preliminary injunction, a

reasonable estimate of that amount is no more than $15,000,000.[4] According to the Motion, Mr. Scoville and Traffic Monsoon have approximately $60,000,000 in funds on deposit at various financial institutions, plus the value of whatever real or personal property they own. (D.E. 3 at 8). Even providing a cushion in case U.S. purchasers purchased proportionally more per capita than other AdPack purchasers—and estimates will not be required once Mr. Scoville can query the data—there is enough money on deposit at financial institutions to full pay any judgment the Commission is likely to obtain in this case.

(2) The Court Could Accomplish All Legitimate Needs By A Limited Asset Freeze.

More than the amount needed to satisfy any judgment the Commission plausibly might obtain is currently on deposit in bank accounts that belonged to Mr. Scoville and Traffic Monsoon.[5] The Court could accomplish its goal of preserving assets for the payment of any order of disgorgement that the SEC might plausibly obtain by imposing a limited asset freeze. For example, the Court could order that an amount of money be kept in an escrow account pending a more definite calculation of the purchases by U.S. AdPack customers. Such an order would accomplish the goal of maintaining Defendants' ability to satisfy a judgment, without the need for expending resources for a receivership and infringing Mr. Scoville's Constitutional rights.

[4] U.S. AdPack customers were approximately 10% of the total AdPack purchasers. The total amount of AdPack purchases, according to the Complaint, was $207 million. Payments out to AdPack purchasers totaled about $61,000,000

[5] It may be that the Receiver has opened bank accounts and consolidated funds into those accounts. If so, the funds are no longer in accounts belonging to Scoville and Traffic Monsoon but they are nonetheless on deposit and available.

C. The Receivership Order Abrogates Many of Scoville's Constitutional Rights.

The Order impedes or eliminates entirely many of Mr. Scoville's important Constitutional rights. By taking property, ordering Mr. Scoville to provide information, and ordering his mail searched, the Court dramatically reduced many of Mr. Scoville's constitutional rights; some of the most fundamental rights are effectively eliminated. Moreover, because the Court placed no limits on the Receiver's ability to make use of the information obtained under the Order, this information may be used in any proceeding, including criminal matters.

(1) The Court's Order Taking All of Scoville's Real Property Effectively Eliminates His Right to Be Free From Unreasonable Searches in His House, Papers, and Effects.

The Fourth Amendment guarantees the right of citizens to be free from unreasonable—which is to say warrantless—searches and seizures of their houses, papers, and effects. The Order appointing the Receiver eliminated virtually all of Mr. Scoville's Fourth Amendment rights.

The Order authorizes the Receiver "to take immediate possession of all real property of the Receivership Defendants, wherever located." (Order at 4). Further it prohibits all persons, including Mr. Scoville, from "entering such premises." (*Id.*). The Order further gives the receiver "exclusive control of the keys" to Mr. Scoville's residence; the Order prohibits the Receivership Defendants from having keys to their real estate "in their possession during the term of the receivership" or from entering their real property without the receiver's authorization. (*Id.* at 4,5).

The Order does not define "real property." However, federal receivers are obligated to apply the law "of the state where the property is located." *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1193–94 (10th Cir.2010)(citing 28 U.S.C.A. § 959(b)). Under Utah law, the definition of real property includes leaseholds as well ownership interests. Thus, all property Mr. Scoville owns or leases is included in this order. Consequently, Mr. Scoville cannot legally obtain housing for

himself; he must rely on another homeowner or lessor to provide him with housing. This is because, if he has a leasehold interest in property, he is no longer allowed to possess a key for that property. Consequently, Mr. Scoville can only be a guest or licensee of a home.

Aside from the substantial affect on his ability to live in peace, this aspect of the Order effectively eliminates most of his right to be free from unreasonable searches and seizures. Since the Supreme Court's decision in *Katz*, courts have recognized standing to challenge a search under the Fourth Amendment only where a person has a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 351 (1967). However, more recent Supreme Court cases have explicitly tied Fourth Amendment rights to property rights. *See United States v. Jones*, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012) (holding that physical trespass was Fourth Amendment violation regardless of whether there was a reasonable expectation of privacy).

Because the Receiver owns and has exclusive control over any real property belonging to Mr. Scoville, he no longer has a reasonable expectation of privacy in his home—or for that matter any "real estate" he might obtain. This is because Mr. Scoville cannot have an expectation of privacy in a home over which he can no longer exercise control. The Fifth Circuit confronted this precise argument and ruled that once a Receiver takes possession of property pursuant to an order, the former owner has no reasonable expectation of privacy in that property. *See generally, United States v. Setser*, 568 F.3d 482 (5th Cir. 2009).

This intrusion on Mr. Scoville's rights is not theoretical. The receiver has already searched Mr. Scoville's apartment and taken possession of documents as well as noting their content. The Receiver not only seized mail for Traffic Monsoon from Mr. Scoville's apartment, she also went so far as to examine the dates on receipts for pizza she found in the apartment. Mr. Scoville has no right to challenge this search and if the Receiver chooses to share this information with law

enforcement he will not have a Fourth Amednment right to exclude the evidence at a trial against him.

It is useful to contrast his present situation with the showing that would have been required before the Order to accomplish the sames ends. Now, the Receiver can enter any of Mr. Scoville's real property at any time and conduct a search, seize documents and personal property, and share the information she obtains with anyone. Before the Order accomplishing the same ends would have required an application for a search warrant showing probable cause to believe the items to be seized were located in the location to be searched and that they constitute evidence of a crime. But even that would not be equivalent since a "general, exploratory rummaging in [Mr. Scoville's belongings" would be a general warrant, which is never allowed. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

In short, the day before the Order Mr. Scoville had the same rights in his home that you, I and every other Amerian enjoys under our Constitution. The moment after the Order was entered he could not legally resist any intrusion, however unreasonable, intrusive, or abusive; *his* copy of the Constitution has effectively been amended to his detriment.

(2) The Order Also Eliminates Scoville's Right to Be Free of Unreasonable Searches in His Papers and Effects.

The intrusion created by the receivership is not limited to physical space. The Order requires Mr. Scoville to turn over all "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" to the Receiver. (D.E. 11 at ¶10, emphasis added). The very word used in the Constitution,

"papers," to describe a category of things in which citizens enjoy a right to be free from unreasonable searches, is one of the categories of documents Mr. Scoville must turn over to the Receiver; the additional categories he must turn over include many categories that may reasonably be read as "effects." Any exclusive possession of "papers," or any of the other categories of records that one might typically expect to be free from general rummaging by a government agent, by Mr. Scoville is a violation of the Order. He is no longer free from searches of his papers or effects.

Again, this is not theoretical. The Receiver seized computers and papers from Mr. Scoville's apartment. The Receiver has also demanded that Mr. Scoville provide another laptop so that it can be imaged. Were the Receiver to find contraband, or evidence of a crime—related or unrelated to the SEC matter here—she could, and indeed may be obligated to, share it with law enforcement. Again, Mr. Scoville would have no Fourth Amendment right to challenge this search and seizure or right to object to the use of this information in a prosecution against him.

As a final note, Mr. Scoville no longer has the right to privacy in his mail. The Receiver can open mail directed to Mr. Scoville— an act that ordinarily would be a felony[6]—and share that information with anyone she chooses.

(3) The Order Obligates Scoville to Provide Information to the Receiver In Violation of His Fifth Amendment Right.

The Fifth Amendment protects citizens from being compelled to provide information that may be used against them in a criminal case. *See Chavez v. Martinez*, 538 U.S. 760, 770–71 (2003). Here, the Court has ordered Mr. Scoville to "provide any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the

[6] 18 USC § 1702.

Receiver under this Order." (D.E. 11 at ¶6). The Order further requires Mr. Scoville to "respond promptly and truthfully to all requests for information and documents from the Receiver." (*Id.*).

The Order does not provide Mr. Scoville the option not to answer questions, nor is it obvious from the Order that he can simply choose to not answer questions based upon his Fifth Amendment rights without risking being held in contempt of the Order.

In addition to requiring him to answer questions, the Order also directs him to provide virtually any records he has to the Receiver. The act of producing records can have a testimonial component and may also impinge on his Fifth Amendment right. *See generally*, *Braswell v. United States*, 487 U.S. 99, 104 (1988) (discussing act of production privilege). Again, should he choose not to produce documents or computers based the act-of-production privilege, he would be in violation of the Order and risk contempt.

Again, this is not theoretical. The very attorneys handling this case have a history of seeking contempt orders and of aggressively prosecuting contempt actions based upon perceived lack of cooperation with Receivers.[7] Indeed, both Trial Attorneys for the SEC in this matter have been cross-designated as Special Assistant United States Attorneys and have handled criminal matters, suggesting that the line between this civil action and a potential criminal case is thin, if not illusory.[8]

(4) **The Order Affects Scoville's Right to Due Process.**

Litigation is expensive. The process advocated by the SEC here deprives the opposing party of the practical ability to mount a defense. More specifically, the Order transfers ***all*** of Mr.

[7] *See generally*, *United States v. Bliss*, 2:15-CR-00484DN (Attorney Oliver cross designated as a Special Assistant United States Attorney as counsel of record for the United States).
[8] *Id.*; *also see generally*, *United States v. DeYoung*, 2:15-cr-00104-DN (Attorney Wadley representing United States in a criminal matter); *See also*, *Id*. D.E. No. 70 (Notice of Appearance of Daniel Wadley as Special Assistant United States Attorney).

Scoville's property, including all bank or financial accounts, to the Receiver. This means he has no personal funds—indeed cannot have personal funds—with which to secure the services of counsel to defend him.[9] His ability to defend against the SEC is entirely contingent on the willingness of third parties to finance his defense. He could proceed pro se, but it would be a shaky version of Due Process that allowed one side in litigation to deprive the opponent of the ability to obtain counsel based on the argument that the other side could always proceed without counsel.

It could hardly be called due process were a litigant to be allowed to steal all his opponent's money as the first step of litigation and then exploit the opponent's consequent poverty to the litigant's advantage. While the legality of what has gone on in this case and the hypothetical theft described in the preceding sentence are different, the practical effect is identical. Mr. Scoville simply has no control over his ability to hire counsel to defend him; he can only hope third parties will continue to help him fund a defense.

(D) The Order Should Be Rescinded Because Its Effects Are So Substantial and It Is So Overbroad That It Cannot Be Deemed to Serve the Legitimate Interests of the SEC in This Case.

The Order dramatically limits many of Mr. Scoville's Constitutional rights, and virtually eliminates his Fourth Amendment right to be free of unreasonable seizures. It also places him in the precarious position of balancing his Fifth Amendment right against self-incrimination against his obligation to provide information to and cooperate with the Receiver. Finally, it has placed his due process right to have counsel represent him in this civil matter entirely in the discretion and good will of third parties, since he is not allowed to have any funds himself.

[9] The undersigned would not accept money that came directly from Mr. Scoville in any event because doing so would violate the Order as well as the order freezing Mr. Scoville's assets.

Balanced against the extreme prejudicial effects of the Order is the scant need or legal basis for such a substantial equitable remedy in this case. A receivership is an "extraordinary equitable remedy" and is "justifiable only in extreme situations." *Waag*, 10 F.Supp.2d at 1193. As illustrated here, it abrogates property rights, eliminates constitutional rights, and eviscerates his ability to mount meritorious defenses in this litigation.

Here, however, there is no need for a receivership because all of the arguably legitimate interests of the SEC can be adequately protected with less extreme equitable relief, a limited asset freeze. Given the extreme prejudice the Order is causing, and the less prejudicial alternatives, this Court should use its discretion to fashion a remedy more tailored to the needs of this case, more limited to the relief the law will allow, and more protective of Mr. Scoville's core Constitutional rights.

IV. Conclusion

Based on the foregoing, Mr. Scoville requests that this Honorable Court set aside the Order appointing the Receiver and respectfully submits that a more limited form of relief, such as a freeze of $15,000,000 of funds presently held by the Receiver, will simultaneously eliminate the unjust effects of the Order while still protecting the legitimate interests of the Securities and Exchange Commission

In the alternative, should the Court find, as argued in Defendant's Opposition to the SEC's Motion for Preliminary Injunction, that the SEC has not shown a likelihood of prevailing as to any aspect of their case, the receivership should be liquidated and should not be replaced by other equitable relief.

DATED: September 23, 2016

WASHBURN LAW GROUP, LLC
/s/ D. Loren Washburn
D. Loren Washburn
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, the foregoing **MOTION TO SET ASIDE RECEIVERSHIP** was served upon the person(s) named below, at the address set out below by Electronic Filing:

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