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

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

Attorneys for Traffic Monsoon, LLC, and Charles Scoville

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

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

INTRODUCTION

In its Motion for Preliminary Injunction (the "Motion"), and indeed in the Complaint in general, the Securities and Exchange Commission (the "SEC") overreaches by asking this Court to enjoin conduct that the U.S. Supreme Court has said is not covered by the very U.S. securities

laws under which the SEC purports to proceed. *See generally, Morrison v. National Australia Bank 2010 Ltd*, 561 U.S. 247, 273, 130 S. Ct. 2869 (2010). As the SEC notes in its Complaint and Motion, "approximately 90%[1]" of Traffic Monsoon's customers reside outside the United States.[2] (D.E. 1 at ¶66.) This fact is devastating to the SEC's case because, under *Morrison*, even if the advertising services Traffic Monsoon sold ("AdPacks") are securities (which, as explained below, they are not), where the AdPacks are not listed on a U.S. Exchange and do not involve domestic transactions, the U.S. securities laws do not apply. Thus, the 90% of AdPack purchases by individuals outside the United States are beyond the purview of the SEC.

The Court, however, should deny the SEC's motion in its entirety for more fundamental reasons: AdPacks are not "securities;" AdPack buyers are not and were not "investors;" and Traffic Monsoon is not a "Ponzi Scheme." The Complaint and the Motion proceeds with talismanic recitation of these labels, as well as unsubstantiated half-truths and question-begging conclusions. Stated another way, the SEC's factual allegations in the Motion and the Complaint do not support the legal conclusions they make. Because AdPacks are not securities, the SEC's motion for a preliminary injunction has no basis, even as to the small percentage of AdPack purchasers in the United States.

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[1]This 90% figure is a percentage of purchasers, but not the volume of purchases. To know the dollar amount of purchases originating within the United States versus purchases occurring outside the United States, which is relevant to this motion, Scoville would require access to the database that he created to help operate his business. Because the Order Appointing Receiver (Docket Entry 11) placed Traffic Monsoon under the receiver's control, Scoville has no access to that database. By a letter dated September 16, 2016, Scoville made a request of the receiver to obtain a copy of the database so he can provide this number to the Court. During a meeting on September 21, 2016, Scoville began working with the receiver toward a plan to obtain access to this data.

[2] Moreover, during the most of the relevant time, Scoville resided outside the United States as well. *See* Exhibit A. That means that both the seller and the purchaser of the AdPacks were outside of the United States when the transactions were completed. The SEC knew this to be true because an attorney for the SEC had phone conversations with Scoville while he was in the United Kingdom.

BACKGROUND

Charles Scoville operated his business, Traffic Monsoon, primarily from his home which was first in Midvale, Utah, but later in the United Kingdom. Traffic Monsoon is a traffic exchange which sells advertising services to people seeking to attract visitors to their websites. Traffic Monsoon became successful when it created a product called the Banner Ad Pack ("AdPack"), which coupled advertising services with the opportunity to earn commissions, sometimes referred to as revenue sharing, for participating in providing the services Traffic Monsoon sold by clicking on other customers' websites. To be clear, one can be a customer purchasing AdPacks as well as a service provider earning commissions. The business sold millions of AdPacks to customers around the world, 90% of whom were located outside the United States.

On Tuesday, May 17, 2016, Mr. Scoville traveled to the SEC's Salt Lake City, Utah Regional office from his home in the United Kingdom to give testimony to the SEC. (D.E. 3-2 at 1-6)[3]. There he described that after developing the idea for various internet marketing businesses while he was attending LDS Business College, he began selling advertising services. (D.E. 3-2 at 10-22). In answer to their questions, Mr. Scoville told the SEC that during his operation of the business he started before Traffic Monsoon, AdHitProfits (which sold a product virtually identical to AdPacks), he had responded to a request for information from the Utah Division of Securities (Ut. Div. of Sec.). Mr. Scoville cooperated with the Ut. Div. of Sec. on the investigation, which was ultimately closed "because a security was not involved." (See Exhibit B). Mr. Scoville also noted that after finding no securities were involved, the Ut. Div. of Sec. passed the matter to the

[3] D.E. 3-2 is the testimony Scoville provided to the SEC. The document is a miniscript and all page numbers referenced in this motion are to the actual page of the transcript and not the page numbers of the Exhibit as filed with the Court.

Utah Division of Consumer Protection, who also saw no problems with his business. (D.E. 3-2 at 20-21).

Traffic Monsoon markets its advertising products in a unique way. However, neither its advertising products nor its promotion is significantly different from technology companies like Google and Facebook, who also charge for advertising. Like Traffic Monsoon with AdPacks, more than 90% of Google's overall corporate revenue comes from a single advertising product AdWords.[4] Google AdWords clicks can cost advertisers as much as $50 for each customer who clicks on an advertisement.[5] Traffic Monsoon offers clicks at a much more economical rate.

By purchasing an AdPack for $50, a Traffic Monsoon customer is entitled to 1,000 website visits and 20 banner advertisements. (D.E. 1 at ¶17). In addition, Traffic Monsoon offers AdPack purchasers the opportunity to be a service provider and earn a commission if they participate in surfing other Traffic Monsoon customers' websites, thus providing the advertising clicks that Traffic Monsoon sells. A customer who purchased an AdPack is only able to earn a commission for a particular day if they "qualify" by clicking on a specified number of websites in that day. (D.E. 1 at ¶30). Like commissions paid in other businesses, Traffic Monsoon's commissions, while small, are a portion of the sales revenue generated by Traffic Monsoon on the day for which the AdPack purchaser qualifies by providing some of the clicks Traffic Monsoon is selling. For each AdPack purchased, Traffic Monsoon set a rebate-commission limit of $55. (D.E. 1 at ¶24). Customers, however, can purchase as much advertising as they want and they can receive commissions for each AdPack they purchased assuming that they qualify by providing services.

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[4] http://www.investopedia.com/articles/investing/020515/business-google.asp (Google's Advertising revenue from AdWords constituted $75,000,000,000 out of $83,000,000,000 of Google's revenue).

[5] *Id*.

(D.E. 3 at 10). Traffic Monsoon explicitly and repeatedly told AdPack purchasers that while they would share in revenue for days on which they qualified (i.e. the commissions), the commissions were only paid for a particular day if Traffic Monsoon earned revenue that day, that there was no guarantee that Traffic Monsoon would generate revenue, and that there was no guarantee that any commission would be paid, much less that the AdPack would ever reach the $55 rebate plus additional commission limit. (D.E. 1 at ¶26). Because Traffic Monsoon is not the only traffic exchange or website advertiser, they priced and marketed their advertising products to maximize interest in their services and to increase Traffic Monsoon's profits. These commissions or rebates are the same marketing efforts used for companies like PayPal and credit card companies offering frequent flier miles. The goal being to build customer loyalty.

Because of this marketing technique, consumers became particularly interested in purchasing Traffic Monsoon's AdPack product and Traffic Monsoon's business grew dramatically. (D.E. 3 at 2)(" The company was formed in September 2014 and, since then, has grown exponentially.") In early 2016, PayPal, which Traffic Monsoon used to process most of its customers' purchases, froze what would eventually amount to $60,000,000 (D.E. 1 at ¶50) of funds from Traffic Monsoon customer AdPack purchases. This amount represented almost one third of the cash Traffic Monsoon brought in during its entire existence. As would any business deprived of one third of its customers' purchase price, Traffic Monsoon has struggled to deliver all of the services it sold and has been unable to pay commissions to AdPack purchasers for services they provided.

Purchasing AdPacks was not the only way to earn commissions on Traffic Monsoon. The business also provides revenue opportunities to individuals who clicked on Traffic Monsoon's clients' advertisements or helped recruit other viewers to meet the demand of Traffic Monsoon's clients. (D.E. 3 at 5)

Traffic Monsoon, as a web-based business, has no physical office space although it has used Mr. Scoville's home address in Utah and an address in the United Kingdom as physical addresses when required to list one. (D.E. 3-2 at 9-10). Traffic Monsoon's customers come from around the world. As noted earlier, more than 90% of Traffic Monsoon's customers come from outside the United States. (D.E. 1 at ¶66)

When customers, whether inside or 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 information into their web-browser. Their purchase is paid using PayPal (or other foreign equivalents), 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 no physical documents were signed, other than electronic documents signed on the computer where the customer/service provider was located. (Exhibit B – Scoville's Dec at ¶11).

APPLICABLE LAW

I. IN ORDER TO OBTAIN A PRELIMINARY INJUNCTION THE SEC MUST SHOW A LIKELIHOOD OF PREVAILING ON THE MERITS.

"Preliminary injunctions are, of course, 'extraordinary equitable remedies.'" *Flood v. ClearOne Commun., Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010) (quoting *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009)). To win a preliminary injunction the moving party must show: "(1) a substantial likelihood that it will ultimately succeed on the merits of its suit; (2) it is likely to be irreparably injured without an injunction; (3) this threatened harm outweighs the harm a preliminary injunction may pose to the opposing party; and, (4) the injunction, if issued, will not adversely affect the public interest." *Id.* (quoting *Gen. Motors Corp. v. Urban Gorilla,*

LLC, 500 F.3d 1222, 1226 (10th Cir.2007)). The Second Circuit has eliminated some of these elements in cases brought by the SEC, holding that the SEC need not show a likelihood of irreparable injury, but also clarified that the SEC's burden of showing a likelihood of success is the same as any private litigant. *See S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1037 (2d Cir. 1990). Importantly, the court held: "[T]he Commission 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." *See id*. at 1039.

Furthermore, the SEC has no claim to freeze assets, nor should the 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) (noting that in cases where certain defining aspects of a securities are missing, the court will not grant a preliminary injunction).

Finally, "[l]ike injunctive relief, 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). While a receivership is an equitable remedy available in SEC enforcement cases, *See Sec. & Exch. Comm'n v. First Fin. Grp. of Texas*, 645 F.2d 429, 438 (5th Cir. 1981), "a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant." *Kelleam v. Maryland Cas. Co. of Baltimore, Md.*, 312 U.S. 377, 381, 61 S. Ct. 595, 598 (1941).

II. THE SECURITIES AND EXCHANGE ACTS DO NOT PROHIBIT EXTRATERRITORIAL CONDUCT.

"It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 561 U.S. at 255 (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S. Ct. 1227 (1991)). The Supreme Court held in *Morrison* that Section 10(b) of the Exchange Act, and consequently Rule 10b-5, does not apply extraterritorially.[6] *Id*. at 265. Subsequently, various courts have similarly recognized that Section 17(a) of the Securities Act of 1933 does not apply to extraterritorial conduct.[7] *See In re Vivendi Universal, S.A., Sec. Litig.,* 842F.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) of the Securities Act); *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*, No. 10 CIV. 4791 LAK, 2012 WL 2359830 at *2 (S.D.N.Y. June 21, 2012).

After *Morrison*, in order to plead a violation of Section 17(a) or 10(b), a plaintiff—including the SEC—must allege either (1) that the security in question was listed on a domestic exchange, or (2) that the transaction was a domestic securities transaction. Here, the Complaint alleges that the AdPacks were not registered with the SEC meaning they could not have been listed

[6] The Supreme Court explicitly noted that this is not a matter of jurisdiction, but rather, of the merits. *Morrison*, 561 U.S. at 254. The issue is not whether a court has jurisdiction to hear a matter involving extraterritorial conduct (it most likely does), but rather where the substantive statutes prohibit conduct outside the United States, or more precisely the sale of securities not listed on a U.S. exchange or that are not domestic securities transactions. *Morrison* held that they do not.

[7] The Supreme Court in *Morrison* foreshadowed these rulings, noting that, "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.

on a U.S. securities exchange.[8] As a result, the SEC must show that the transactions in question implicate the second prong of *Morrison*, which is a domestic sale of a security.

With regard to the second *Morrison* prong, 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 individual defendant's residency in California and corporate defendant's status as a California corporation was irrelevant to whether securities transaction was a domestic securities transaction and dismissing complaint for failure to allege sufficient facts to establish a domestic securities transaction.). 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.

III. A Contract For the Purchase and Sale of Goods and Services Is Not A Security, Even if the Contract Involves Refunds and Revenue Sharing.

The Securities Act of 1933 defines a security as:

> any 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,

[8] In any event the Complaint does not allege that they were listed on an exchange.

> 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).

To prevail, the SEC must first establish that Mr. Scoville offered or sold a "security." 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) 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).

Courts vary on what is needed to satisfy the common enterprise element. While there is debate, various courts view the common enterprise element as requiring either horizontal or vertical privity. The Tenth Circuit has expressly rejected the "horizontal commonality" requirement and instead anal the economic reality of the underlying transaction. *McGill v. American Land &Exploration Co.*, 776 F.2d 923, 925 (10th Cir. 1985) This Court has stated 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).

ARGUMENT

I. THE INJUNCTIVE RELIEF THE U.S. SECURITIES AND EXCHANGE COMMISSION SEEKS IS IMPROPER AND OVERREACHES BECAUSE THE SEC IS LIMITED TO TRANSACTIONS INVOLVING U.S. SECURITIES.

A. The SEC's Complaint and Motion Do Not Contain Allegations or Facts Sufficient to Establish A Likelihood of Prevailing Because Sales of AdPacks to Investors were Outside the United States.

When the Supreme Court issued its opinion in *Morrison*, it rejected forty 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 (emphasis added). Put simply, the purchase and sale of AdPacks by buyers in Bangladesh, Venezuela, or Morocco (Complaint at ¶66) or any of the countries where the 90% of non-domestic purchasers resided at the time of the purchase exclude those transactions from being domestic securities. That is because the irrevocable obligation to purchase, and Traffic Monsoon's irrevocable obligation to sell, an AdPack occurred where the user was when they clicked the button on their web-browser to consummate the sale of the AdPack. According to the 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.

In order to prevail on its motion, the SEC bears the burden of proving a likelihood of success on the merits. The Motion cannot prevail as to the 90% of purchasers who were not in the United States since the Complaint fails to state a claim because the statutes under which it proceeds do not prohibit the conduct it alleges as a violation.

The Complaint upon which the SEC proceeds contains absolutely no allegations regarding where the purchase or sale of AdPacks were made. To the extent it makes relevant allegations at all, the SEC points to the sales of AdPacks not being domestic transactions for at least 90% of the purchasers. Specifically, the Complaint alleges that, "Approximately 90%, or 145,000, of Traffic Monsoon investors reside outside the U.S." (D.E 1 at ¶66). The complaint also notes that in addition to web-based marketing, AdPack purchasers are found by "attending ***international***

seminars." *Id*. at ¶58. (emphasis added). However, the Complaint contains absolutely no allegations that would even give rise to an inference that either (1) there was an irrevocable liability to carry out the transaction within the United States or (2) a transfer of title took place within the United States as to **any** AdPack, much less the 90% of AdPacks sold to customers outside the United States.

The SEC's Motion offers little more in support of the SEC's burden to prove that domestic securities are involved. Indeed, the Motion makes no effort whatsoever to explain where any of the purchases of AdPacks took place. The reality is that during much of the time at issue, Traffic Monsoon's sole employee— Charles Scoville—was living in the United Kingdom. Exhibit A. Thus, neither party to the AdPack transactions was in the United States for a substantial majority of the transactions at issue.

The SEC fails to allege facts that would permit this Court to find that domestic securities transactions were involved. Because the SEC fails to allege in its Complaint—or establish in its Motion and accompanying evidence—facts necessary under *Morrison* and circuit court cases interpreting it that the AdPack purchases were transacted domestically, the SEC has not made a *prima facie* showing that it is likely to prevail as to that 90% of Traffic Monsoon transactions.

B. Because Domestic Securities Are Involved in Only About 10% of the AdPack Purchases, The Relief Sought by The SEC is Unwarranted and Overbroad.

The SEC seeks various forms of equitable relief, including a preliminary injunction and an order freezing assets.[9] It bears noting at this point that for the reasons cited in Section II below, injunctive relief is inappropriate at all. However, for the reasons set forth below, even assuming

[9] The SEC also sought and obtained an order appointing a receiver. In a separate motion Defendant Scoville moves to modify the receivership order.

that the AdPacks are securities and some form of injunctive relief is appropriate, each form of relief the SEC seeks is overbroad or enjoins conduct that is not plausibly in violation of U.S. Securities laws.

1. The TRO and Preliminary Injunction Prohibit Conduct that Does Not Violate the U.S. Securities Laws.

The Temporary Restraining Order ("TRO") issued by the Court (D.E. 8) and the Amended Temporary Restraining Order (D.E. 14-1) both provide that, "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."

As noted above, any transaction that does not constitute a domestic security is not prohibited by U.S. Securities laws. However, the TRO covers vast amounts of conduct that does not violate the securities laws because Defendants' solicitation, acceptance, or deposit of monies from customers outside the United States does not violate any U.S. securities law.

To illustrate how overbroad the TRO as presently written is, applying the prohibition of the TRO to Traffic Monsoon's past business would have enjoined nine times as much conduct not prohibited by the U.S. securities laws as conduct prohibited by the U.S. securities laws. An order precluding sales to those 90% of customers has no basis in the law, is unnecessary to avoid future violations of the U.S. securities laws, and should not be entered.

Because the injunctive relief sought by the SEC is overbroad, the Court should decline to enjoin Defendants in the manner of the present TRO. Instead, even if the Court finds that AdPacks are securities, it should enter, at most, an order enjoining "Defendants from soliciting, accepting, or depositing any monies obtained from actual or prospective investors, individuals, customers, companies, and/or entities, ***who are located within the United States***, through the Internet or other electronic means." Such an injunction would enjoin Defendants from any conduct that can

plausibly be called a violation of U.S. securities laws while not being overbroad and precluding Defendants from effectuating legal sales of AdPacks outside the United States.

2. There is No Basis for A Total Asset Freeze.

For very similar reasons, the Court's order freezing all of Defendants' assets is unwarranted. The Court entered an order taking "exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of Defendants." The SEC, in its Motion, argues that such an order is necessary "to satisfy any final judgment the Court might enter against the Defendants and to ensure a fair distribution to investors." However, assuming the SEC might prevail as to sales to United States AdPack purchasers—the only conduct even plausibly covered by U.S. securities laws—a total asset freeze is not necessary to accomplish this purpose.

Because only 10% of AdPack purchasers were within the United States and therefore covered by U.S. securities law, only the amount necessary to "ensure a fair distribution" to those purchasers is necessary for the Court to preserve. While at present, due to the fact that the receiver has the data and will not release it to Defendants,[10] Defendants cannot say precisely how much money would be necessary to refund all AdPack purchases by purchasers located within the United States. Nevertheless, that number is calculable and amounts to only a fraction of the total the receiver has seized and presently possesses; a reasonable estimate is $15,000,000[11] until a more

[10] To be clear, the receiver has indicated a potential willingness to work with Defendants to obtain these numbers. However, because of the receivership order and the receiver's unwillingness to simply provide a copy of, or access to, the databases of Traffic Monsoon, Defendants cannot obtain the information necessary to provide the Court with accurate numbers at this time.

[11] A rough estimate of how much money might be required can be arrived at using the numbers from the SEC's Motion. The Motion, at page 13, reads, "Since October 2014, approximately $207 million in new cash has come into Traffic Monsoon." Citing Frost Declaration at ¶6. Since purchasers outside the United States constitute almost 90% of purchasers, assuming U.S. purchasers purchase in proportion to their raw numbers, their total purchases would equal $20.7 million. However, according to the Motion, $61,000,000 was paid out to AdPack purchasers. Again assuming that U.S. AdPack purchasers received commissions proportional to their raw

quantifiable number can be produced once the information relevant to the U.S. purchasers of AdPacks is obtained from the Receiver.

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). Under this standard, the most that could be available for disgorgement is about $15,000,000.[12]

According to the SEC, at the time it filed its Motion, Traffic Monsoon had $59.6 million in cash in various bank accounts. (D.E. 3 at 8). Therefore, the cash in bank accounts at the time the SEC sought its asset freeze was almost four times as much as was necessary to satisfy any reasonable equitable judgment the Court might enter.[13]

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numbers, they would have received $6,100,000. Accordingly, a reasonable estimate is that U.S. AdPack purchasers have paid $14,600,000 more for AdPacks than they have received as commissions. The numbers are actually likely much lower because, in addition to payments through PayPal, Traffic Monsoon has used other payment processors to make revenue sharing payments. This means that the $61,000,000 figure likely underestimates the total paid out to AdPack purchasers because that figure reflects only payments made through PayPal. To reach an accurate number, Counsel would need access to the database of purchasers and would need the assistance of Defendant and his programmer to write a script that would identify what the financial amount of purchases by U.S. AdPack buyers is and how much of those purchases have already been returned to U.S. purchasers.

[12] This number is not proposed as a final number. Rather, it is a placeholder estimate until Defendants are able to query the data and get the accurate number from the sale of AdPacks to U.S purchasers.

[13] The SEC is not entitled to a pre-trial asset freeze to ensure Defendants' ability to pay legal judgments or penalties, only to ensure satisfaction of any equitable judgment. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 310, 333 119 S. Ct. 1961, 144 L.Ed.2d 319 (1999); *see also S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005).

However, instead of using a scalpel to carve out a reasonable estimate of the disgorgement they can plausibly obtain, the SEC asked, and now asks again, that this Court seize ***all*** of Defendants' assets. As noted in more detail in the Defendant's Motion to Set Aside Receivership, filed contemporaneous with this motion, this overbreadth is not without consequences to Defendants' Constitutional, including Due Process, rights nor to the administration of justice more generally.

The order freezing all of Defendants' assets is unwarranted when a limited freeze of the amount of cash necessary to meet any plausible disgorgement order of this Court, a sum well below what is in the bank accounts presently overseen by the receiver, is all that the SEC is even plausibly entitled. The Court should enter an order, at most, freezing assets totaling the amount that would be necessary to refund all purchases made by purchasers of AdPacks within the United States that have not previously been paid pursuant to the revenue sharing program, an amount estimated at $15,000,000 or less. This amount is calculable, and upon an order from the Court properly limiting the amount conceptually, counsel is confident a specific amount could be negotiated with counsel for the SEC, after obtaining sufficient data from the receiver.

II. THE REQUEST FOR INJUNCTIVE RELIEF IS ALSO OVERREACHING AND IMPROPER BECAUSE THE PRODUCT AND SERVICES IN QUESTION ARE NOT SECURITIES UNDER U.S. SECURITIES LAW.

A. The State of Utah Division of Securities Told Mr. Scoville That The Types Of Transactions In Question Are Not Securities, Thus Invalidating the SEC's Fraud and Negligence Claims.

The relevant tests and legal standards of what constitutes a "security" will be discussed in great detail below. However, before delving into those technical details, it is worthwhile to provide some context to this case that the Complaint leaves out.

Traffic Monsoon was not the first traffic exchange company started by Mr. Scoville. Mr. Scoville previously operated a company very similar to Traffic Monsoon known as AdHitProfits. Traffic Monsoon and AdHitProfits used essentially the same business model which was providing various internet advertising services while also offering the revenue sharing described above. Indeed, Mr. Scoville told the SEC during his investigative testimony that Traffic Monsoon was basically a copy of AdHitProfits. (D.E. 3-2 at 35–41)

In early 2014, the State of Utah Division of Securities (the "Ut. Div. of Sec.") had questions about the business model of AdHitProfits and made an inquiry to Mr. Scoville. As he did with the SEC, Mr. Scoville provided the Ut. Div. of Sec. with all the relevant information they requested. At some point later, Mr. Scoville asked what had become of the Ut. Div. of Sec.'s investigation. In response, on March 3, 2014, Mr. Scoville received an email from the Ut. Div. of Sec. stating the matter is closed because "a security was not involved." Exhibit B (emphasis added).

Sometime later, the Ut. Div. of Sec. referred the matter to the Utah Division of Consumer Protection, who also investigated. They too, declined to take action.

It is against this backdrop that Mr. Scoville started and operated Traffic Monsoon.

In both its Complaint (D.E. 1 at ¶¶ 72–74) and Motion (D.E. 3 at 25-26) the SEC argues that Mr. Scoville must have known that AdPacks are securities because Mr. Scoville told AdPack purchasers that they were not securities. While this "logic" should give anyone pause, in light of the facts of this case, it illustrates that the SEC is simply making it up as it goes along, alleging conclusions regardless of the predicate facts.

Mr. Scoville told AdPack purchasers that AdPacks were not securities based on his interactions with the Ut. Div. of Sec. Perhaps the SEC will tell us that the Ut. Div. of Sec. is incompetent; that will be for the SEC to argue. However, since scienter is "a mental state

embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst*, 425 U.S. 185, 193–94 (1976), if relying on the judgments of the Ut. Div. of Sec. truly amounts to evidence of scienter, then either "scienter" has lost all meaning or Utah state government has failed us miserably.

In any event, this motion is not the first time the SEC learned that the Division of Securities decided Scoville's product was not a security; Mr. Scoville disclosed to the SEC that he had been investigated by the Ut. Div. of Sec., and that they said such products were not securities. (D.E. 3-2 at 35–41). But this fact did not find its way into either the SEC's brief or its Complaint.

B. Scoville Lacked Scienter Because He Reasonably Believed, Based on the Statements from the Utah Division of Securities, That AdPacks Are Not Securities And He Did Not Operate a Ponzi Scheme.

As the Tenth Circuit has stated:

> An injunction based on the violation of securities laws is appropriate if the SEC demonstrates a reasonable and substantial likelihood that the defendant, if not enjoined, will violate securities laws in the future. 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. Although no single factor is determinative, we have previously held that the degree of scienter `bears heavily' on the decision. 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).

S.E.C. v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993) (emphasis added and internal citations omitted).Aside from being a heavily weighted factor in the analysis of likelihood of future violations, scienter is also an element necessary to plead a violation of Section 17(a)(1) of the Securities Act and Section 10(b) the 1934 Exchange Act, the two most serious claims alleged by the SEC. Scienter can be proven by showing either knowing or intentional misconduct or recklessness, that is, "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.'" *City of Philadelphia v. Fleming Companies, Inc.*, 264 F.3d 1245, 1258 (10th Cir. 2001) (quoting *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996)).

In the Motion the SEC directs the Court to two basic facts to establish scienter: (1) by attaching the label of "Ponzi Scheme" to Defendants' business, they argue scienter is inferred (*See* D.E. 3 at 19), and (2) they claim Mr. Scoville must have known that AdPacks were securities because he carefully and repeatedly explained to customers that they were not a security or investment. (*See* D.E. 3 at 20–21).

1. Scoville's Statements That AdPacks Were Not Investments or Securities Were Based on Interpretations of the Utah Division of Securities and Are Not Evidence that He Believed AdPacks Were Securities.

The SEC claims that the fact that Mr. Scoville was telling people that AdPacks were not securities demonstrates that he knew AdPacks were securities. (D.E. 1 at ¶¶72-73). In making this argument the SEC adopts mind-bending logic from which no one can escape. Whether you say something is security or that it is not a security makes no difference because either statement is treated as evidence that you know the thing is a security.

There is a simpler explanation, dealt with in Section A above, but simple to summarize here: Mr. Scoville told purchasers AdPacks were not securities because, based on prior interactions with regulators related to a virtually identical product, he reasonably believed AdPacks were not securities. Rather than demonstrating scienter, Mr. Scoville's statements about AdPacks not being investments reflected an earnest attempt to relay what he had been told, which was that he was selling an advertising product with commissions, not a security.

2. Scoville Did Not Operate a Ponzi Scheme.

The Tenth Circuit 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.

a. Traffic Monsoon Sold Advertising Services and Paid Commissions on the Sale of Advertising.

Traffic Monsoon's distributions of revenue to AdPack purchasers was financed by successfully selling future advertising services, including AdPacks. It is clear from the Complaint that Traffic Monsoon obtained profits from its sale of AdPacks. However, the SEC proceeds by pretending that AdPacks are not an advertising service. Instead, the SEC claims that AdPacks are "nothing more than a pretext designed in an effort to circumvent the strictures of the federal securities laws." (D.E. 3 at 21). Then, without any support at all, the SEC claims that purchasers of AdPacks "have no interest" in receiving advertising and that their "sole motivation in purchasing the AdPack is to earn the 10% return in 55 days." *Id*. Of course, such sweeping and broad generalizations are not rooted in any evidence. Indeed, the SEC has neither conducted a poll of AdPack purchasers to determine whether and to what extent they valued the advertising services nor has it asked a non-trivial number of AdPack purchasers why they purchased them. Instead, the SEC substitutes its conclusions about AdPack purchasers' motivations.

Here again the SEC's logic is lacking. One could say that because some children persuade their parents to purchase breakfast cereal in order to obtain the toy inside the box, the parents are purchasing toys, not cereal. But this would not lead to the conclusion that the cereal companies are not selling cereal. Even if some AdPack purchasers valued the advertising less than others, this does not mean that Traffic Monsoon was not actually selling advertising services and that the

revenue it distributed to AdPack buyers was not income from actual business revenue any more than a toddler's preference for the Happy Meal toy means McDonalds is not selling hamburgers.

In a similar vein, the SEC claims that while Traffic Monsoon distributed revenue from its sales of products, it would "imply that the majority of the revenue comes from the sale of Traffic Monsoon's many advertising products" rather than principally from AdPacks. (D.E. 1 at ¶34). However this is a naked conclusion with no factual support. The Complaint never claims that Traffic Monsoon made any representations whatsoever regarding the mix of revenue generated by its various advertising products and indeed Traffic Monsoon never made a representation about the percentage of its revenue derived from any particular advertising product. How saying nothing can imply anything is never explained.

b. AdPack Purchasers Were Not Promised Any "Returns."

The second defining characteristic of a Ponzi scheme is that "investors are promised large returns for their investments." *In re M & L Bus. Mach. Co., Inc., 84 F.3d at 1332 n. 1*. That emphatically did not happen here. As alleged in the Complaint, "[t]he Traffic Monsoon website claims that there is no set timeframe for the investor's account to reach $55, or any assurance that it will ever in fact reach $55." (D.E. 1 at ¶24). The Complaint continues, "[t]he website provides no assurance that the investor's 'bucket' will ever reach the $55 'fill line.'" (D.E. 1 at ¶26).

According to the SEC's own investigation, Traffic Monsoon told AdPack purchasers that while they would receive at most $55 in revenue sharing, there was no guarantee that they would ever receive any commissions at all, much less $55. *Id.* Similarly, Traffic Monsoon never represented how long it might take to accumulate $55, if that much did accumulate. To put this in the general terms of the Ponzi definition—Traffic Monsoon did not promise AdPack purchasers any "returns" much less "large returns." In fact, Traffic Monsoon told its customers they might not

get money back from their AdPack purchase; the exact opposite of one of the SEC's hallmark warning signs for a Ponzi scheme. (See https://www.sec.gov/answers/ponzi.htm#AvoidPonzi noting to '[b]e highly suspicious of any 'guaranteed' investment opportunity").

This is not a trivial factual difference. A Ponzi scheme operates by promising large returns to investors, paying some teaser investors those returns, and relying on them to recruit others, all while providing no service at all. Here, Traffic Monsoon made no promises of returns whatsoever. Furthermore, they explicitly told AdPack purchasers that they would get funds through revenue sharing on a daily basis provided that they were qualified for that day and limited their commission on recruiting others to a single level, rather than multilevel (which is more typical in a Ponzi scheme). (D.E. 3 at 10 n.7). Revenue sharing necessarily implies that there will only be funds available to AdPack purchasers if later customers purchase advertising, otherwise there will be no revenue to share. This is hardly surprising; if you buy a share of GM stock shortly after GM sells the last car it will ever produce, you will not have much likelihood of receiving a dividend. Similarly, AdPack revenue sharing necessarily, and openly, relied upon generation of future revenues from sales.

The SEC essentially ignores what Traffic Monsoon actually told AdPack buyers and instead imputes to Traffic Monsoon and Mr. Scoville false promises, which they emphatically and deliberately did not make. For example, the Complaint blithely ignores the fact that Mr. Scoville never promised any returns and concludes that AdPack purchasers "will receive an annual return on investment of approximately 60% a year." (D.E. 1 at ¶28). The Complaint, although at no point alleging that Traffic Monsoon told investors the revenue sharing would proceed at $1 per day, implies that because historically the revenue sharing proceeded at $1 per day, that was the rate of return promised by Mr. Scoville. (D.E. 1 at ¶27). The Complaint further uses phrases like "Scoville

established this 10% rate of return" in order to create the counterfactual impression that Mr. Scoville planned or promised a "rate of return." (D.E. 1 at ¶29).

Unlike a Ponzi scheme, here there was no promise of a return and an explicit disclosure that any revenue sharing would require future purchases of advertising services. Although the SEC makes an effort at alleging that Traffic Monsoon misled purchasers as to the source of the revenue, it points to no place where Traffic Monsoon made any representations about the mix of advertising products they sold to generate the revenue Traffic Monsoon used to pay commissions.

At its core, the SEC's "Ponzi" allegations are rooted less in the actual definition of a Ponzi scheme than in their desire to simply affix a label in lieu of alleging and proving scienter, because there are no facts they can allege or prove to establish scienter. Traffic Monsoon AdPack purchasers were told that commissions and revenue sharing would only be paid if the company made revenue in the future, it provided services, and it made no promise of any particular rate at which purchasers would earn commissions. It was not a Ponzi scheme no matter how many times the Complaint affixes the label in its overtly conclusory fashion.

c. AdPacks Are Not Securities Under the Applicable Legal Tests.

In addition to not being able to meet the scienter element, the SEC also has not shown a likelihood of prevailing on the merits because it cannot establish that AdPacks are securities. Fundamental to any of the SEC's causes of action is that AdPacks constitute securities. While the Securities Act of 1933 gives a broad definition of a security, the particular type of security that the SEC alleges to be at issue here, an "investment contract," which was defined in *SEC v. W.J. Howey,* 328 U.S. 293, 66 S. Ct. 1100 (1946). An investment contract is a security only if it involves: (1) an investment of money; (2) in a common enterprise; and (3) with the profits derived from the

efforts of others. *See* Howey, 328 U.S. at 298–99. Accordingly, the court must focus on the "economic realities of the underlying transaction and not on the name it carries." *See United Housing Foundation*, *Inc. v. Forman*, 421 U.S. 837, 849 (1975). "The question is whether an investor, as a result of the investment agreement itself or the factual circumstances that surround it, is left unable to exercise meaningful control over his investment." *Id*.; *see also* Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240 (4th Cir. 1988). Nevertheless, the Tenth Circuit has cautioned that the focus of the inquiry is not solely on "whose efforts actually affected the success or failure of the enterprise," Maritan v. Birmingham Properties, 875 F.2d 1451, 1457 (10th Cir. 1989), but that instead, "[c]onsideration must be given to control over the factors essential to the success of the enterprise." Crowley v. Montgomery Ward & Co., 570 F.2d 877, 880 (10th Cir. 1978).

1. AdPacks Fail the Howey Test's First Element.

Customers who purchase a $50 AdPack receive 20 click credits to their banner ads on the Traffic Monsoon traffic exchange and 1,000 visitors to their website. As such, this is not investment money, rather it is a payment for services.

This Court need not look any further than the "contract" in question to objectively see this. Simply stated, for an investment contract—or any other contract—to exist, there needs to be a meeting of the minds or mutual assent. *See Homestead Golf, Inc. v. Pride Stables,* 224 F.3d 1195, 1199 (10th Cir. 2000). Given this basic principal in contract law, it is hard to understand how the SEC can say an "investment contract" exists where the parties involved explicitly agree, by the Terms of Service, that "an investment (thus an investment contract) does not exist; that you will not purchase what you cannot afford; and that you have a chance to earn a "commission" for a referral." (*See* D.E. 3-3 at 111-114). Rather than providing any analysis, the SEC merely states in

its Motion, "[i]nvestors paid $50 for each AdPack, thus satisfying the first element [of *Howey*]." (D.E. 3 at 23).

This, however, does not meet the first element of *Howey.* The SEC failed to demonstrate the necessary steps to complete the first element under *Howey* because the economic realities do not meet their incorrect hypothesis. Mr. Scoville and his clients never agreed to any "investment contract" because there are no investors. There are only purchasers of advertising service with the ancillary potential for individuals to earn a commission in return for services provided.

2. AdPacks Fail the Second Element of the Howey Test.

As the SEC describes in the Motion, the Tenth Circuit evaluates the second element under *Howey* (common enterprise) by evaluating the economic realities in an alleged investment contract. An instrument which may appear to fall within the broad sweep of the Securities Laws is not to be considered a security if the context otherwise requires. *See Marine Bank v. Weaver*, 455 U.S. 551, 555 (1982). Each transaction which is alleged to involve securities must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. *See id.*

Despite the SEC's embellishment to the contrary, when boiled down to its simplest terms, the economic realities underlying AdPacks clearly show they are advertising services whose purchase is incentivized using the possibility of commissions for services rendered and rebates aimed at keeping AdPack owners in the Traffic Monsoon ecosystem. They are not investment vehicles meant to yield "approximately 60% a year" (D.E. 3 at 11).

Simple math will demonstrates that the economic realities of AdPacks favors a finding that they are not securities. According to the SEC, for sitting down at his or her computer, which they must do to qualify to earn a commission, an owner of an AdPack can spend 4.1 minutes—this is

the theoretical minimum amount of time necessary if each click happened at the earliest opportunity and a member did not stay on a website any longer than absolutely necessary, it also does not count the time necessary to log in to Traffic Monsoon before this frantic clicking can begin—of his or her day to earn "about $1." (D.E. 3 at 11). This earning is a gross figure, factoring out that they spent $50 in order to obtain the unassured possibility of earning this "about $1" and 54 other dollars. Furthermore, if the AdPack purchaser is willing to do this for 55 days straight—importantly this is an SEC figure, Traffic Monsoon made no promise of how long it might take to accumulate commissions—they have the chance of getting their initial $50 back plus another $5 if all goes well. Of course Traffic Monsoon and Mr. Scoville made no promise that each day would yield revenue sharing of $1, and the Complaint acknowledges this fact.

Based on those facts the math is simple—for going through the effort of logging into their computer for 55 days straight and putting in almost 4 hours' worth of work[14], an AdPack purchaser can earn a net of $5, or about $1.35 per hour. The economic reality of the transaction is that even assuming commissions accrue at $1 per day, which Traffic Monsoon did not guarantee, Traffic Monsoon pays a net of $.09 per day ($5 divided by 55 days) for someone to provide 50 clicks and at least between four and five minutes of their time.

Based on the combined value of advertising services sold and the value of services provided, the economic reality of this transaction is inconsistent with an investment unrelated to the value of services performed.

3. AdPacks Fail the Third Element of the Howey Test Because any Commissioned earned are based on the Consumer's Efforts.

[14] 4.1 minutes multiplied by 55 days equals 225.5 minutes, or three hours forty-five minutes and 30 seconds.

The Supreme Court has recognized an expectation of profits in two situations, namely, (1) capital appreciation from the original investment, and (2) participation in earnings resulting from the use of investors' funds. *Forman*, 421 U.S. at 852. These situations are to be contrasted with transactions in which an individual purchases a commodity for personal use or consumption. *Id.* at 858.

In *Forman*, apartment dwellers required to buy shares of stock in the nonprofit cooperative housing corporation that owned and operated the complex. Based on its determination that "investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments," the Court in *Forman* found that cooperative housing arrangement did not qualify as a security under either the "stock" or "investment contract" rubrics. *Id.* at 853. A great deal of the Court's conclusion rested upon an Information Bulletin distributed to prospective residents which stressed the nonprofit nature of the cooperative housing endeavor. *Id.* at 854. As in *Forman*, Traffic Monsoon customers were made aware of the non-speculative nature of Traffic Monsoon's business plan. They were explicitly told in the Terms of Services that "this is not an investment" and "don't purchase services you can't afford." (D.E. 3-3 at 111-114). Despite this reality, the SEC attempts to satisfy the third factor of the *Howey* (profits derived from the efforts of others) by stating that "the fact that investors are required to click 50 ads for 5 seconds per ad each day (a 4.1 minute per day investment of time) in order to qualify for profit-sharing does not take the membership packages they purchased outside the realm of securities." (D.E. 3 at 24). What does take this notion "out of the realm of securities" is the fact that AdPack purchasers provided services commensurate with their commissions and the "one or 1,000" argument made by the SEC does not withstand scrutiny of what actually occurred. Given the number of AdPacks sold (a little over 15 million) (D.E. 1 at ¶43) and the number of customers who purchased at least one AdPack (160,000) (D.E. 1 at ¶2) each AdPack purchaser owned on average a total of 100 AdPacks

over the entire life of Traffic Monsoon (not 100 at a time). In order to achieve the 60% return the SEC alleges for an entire year (D.E. 3 at 2) this average AdPack purchaser would have to spread his 100 AdPacks out so that she owned no more than 16 AdPacks at a time (one-sixth of her 100 lifetime AdPacks). At this rate the average AdPack owner's daily pay for performing clicks would "balloon" to about $1 a day instead of $.09 a day (over a 55 day period) for 4.1 minutes of work. By contrast an average SEC Trial Attorney making $200,000 per year between base salary and bonus who worked 50 weeks per year and took no vacation is paid about $6.83 for the same 4.1 minutes of work, and doesn't have to pay $5,000 every two months for the privilege of making this salary.

Or looked at one more way, the "free" members of Traffic Monsoon were members who bought no AdPacks put were paid to provide clicks; free members were paid approximately one penny per click. (D.E. 3 at 5) An AdPack Member would make 2750 clicks to qualify in the 55 days the SEC theorizes it takes to earn the $5 profit from an AdPack. A free member who provided the same number of clicks would receive $27.50. Thus, a purchaser of an AdPack gets $22.50 less over a 55 day period than a free member for providing the same number of clicks. Clearly AdPack purchasers are buying something other than the opportunity to make money: they are buying advertising.

CONCLUSION

Based on the foregoing the SEC has not shown a reasonable likelihood of success on the merits as to any sales of AdPacks, much less for the 90% of AdPack purchasers who were outside the United States because AdPacks do not constitue securities, much less domestic securities. Consequently the Court should not issue the Preliminary Injunction the SEC has proposed.

At most, if the Court finds some injunctive relief is appropriate, the Court should enter a limited Preliminary Injunction, as proposed above, and an asset freeze that is limited to a reasonable estimate of the amount of funds the SEC might plausibly obtain on the basis of the sale of domestic securities.

DATED: September 23, 2016

WASHBURN LAW GROUP, LLC

/s/ D. Loren Washburn
D. Loren Washburn

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUCTION** was served upon the person(s) named below, at the address set out below by Electronic Filing:

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

/s/ Melina Hernandez

Exhibit A

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

Attorneys for Traffic Monsoon, LLC, and Charles Scoville

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TRAFFIC MONSOON, LLC, a Utah Limited Liability Company, and CHARLES DAVID SCOVILLE, an individual, Defendants.	**DECLARATION OF CHARLES SCOVILLE** Civil No.: 2:16-cv-00832 DB Judge: Dee Benson

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

1. I am over twenty-one years of age and am fully and legally competent to execute this declaration.
2. I have personal knowledge of the matters stated herein and, if called upon to testify, I could and would competently testify as to the matters set forth herein.
3. I am the owner and creator of Traffic Monsoon, LLC.
4. Prior to creating Traffic Monsoon, LLC, I started and created a very similar company called AdHitProfits.
5. On or about Aug, 2013, I received a request from Brandon Dally of the Utah Division of Securities into the business practices of the AdProfits.
6. Over the following months, I spoke to Mr. Dally or members at the Utah Division of Securities.
7. On March 14, 2014 I received an email (See Exhibit B) from Mr. Dally at the Utah Division of Securities informing me that the Division of Securities had closed their investigation "because a security was not involved."
8. Thereafter I was told that the Division of Securities had referred the case to the Utah Division of Consumer Protection. I contacted the staff at the Division of Consumer Protection and volunteered any information they needed and was told I would be contacted if there were any additional matters to resolve. As of the date of the filing of this Declaration, I have not heard

anything from the Division of Consumer Protection and believe they have closed their investigation without taking any action.

9. Starting in January of 2015, I began traveling extensively overseas to promote Traffic Monson. Some time thereafter I purchased a home in England and resided there until the SEC brought this action against me in July of 2016.

10. Before and after purchasing my property in England, I maintained a residence in Utah as part of my custody rights to spend time with my son, who lives with his mother in Utah.

11. When individuals purchased Adpacks on the Traffic Monsoon website, the purchase was accomplished entirely by them entering information into the Traffic Monsoon website where they were located. Traffic Monsoon did not travel to purchasers to have them sign contracts, not did purchasers travel to Traffic Monsoon in order to accomplish the sale. Traffic Monsoon's servers accepted the information from purchasers automatically without any input from any employee or agent of Traffic Monsoon.

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

DATED: September 23, 2016

Charles Scoville

Exhibit B

Re: AdHitProfits

Brandon Dalley <[redacted]utah.gov>

03/14/14 at 8:01 PM

To: Charles Scoville

Dear Mr. Scoville:

I received your email concerning your payment situation. As I stated during our previous conversation the Division of Securities does not have any type of documentation that it can send you concerning the complaint it received. The Division closed the case because a security was not involved and forwarded the complaint on to the Division of Consumer Protection. If you have any other questions feel free to contact me at the number below.

Respectfully,

Brandon Dalley
Securities Investigator
Utah Division of Securities
160 E 300 S, 2nd Floor
PO Box 146760
Salt Lake City, UT 84111
[redacted]
[redacted]@utah.gov

On Fri, Mar 14, 2014 at 12:33 PM, Charles Scoville <[redacted]> wrote:

> Hello Brandon Dalley,
>
> A little while ago I called and asked the status of the file investigating AdHitProfits, and whether you might need any additional information.
>
> I was told by you that the investigation had been closed, and no violations of laws & regulations found.
>
> In Australia, my payment processor named ezybonds.com is withholding my account funds (belonging to my website affiliates, my business, and myself).
>
> They are requesting documentation from you to confirm your findings to be notarized.