

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.: 17- 21033-CIV-LENARD/GOODMAN**

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**LOTTONET OPERATING CORP., DAVID GRAY,  
JOSEPH VITALE A/K/A DONOVAN KELLY,**

**Defendants, and**

**ORACLE MARKETING GROUP INC.,  
CRM INTERACTIVE LLC,  
THE COUNCIL CLUB LLC,**

**Relief Defendants.**

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**PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST  
DEFENDANT JOSEPH VITALE A/K/A DONOVAN KELLY  
AND FOR TIME TO SEEK A SPECIFIC PENALTY AMOUNT AGAINST HIM**

Plaintiff Securities and Exchange Commission, pursuant to Federal Rule of Civil Procedure 55(b)(2) and the Court's Order of April 13, 2017 (DE 45), hereby moves for entry of a Default Judgment Against Defendant Joseph Vitale for failure to plead or otherwise defend. The Commission seeks a Default Judgment, permanent injunction, disgorgement of \$710,000 based on the amount Vitale profited from the fraud at issue in this case, prejudgment interest of \$2,366.67, and a civil money penalty against Vitale. As set forth below, we ask the Court to impose a civil penalty, with the specific amount to be determined upon the Commission's motion. We seek 60 days to file the motion to determine the specific penalty amount because there is a parallel criminal case pending against Vitale arising from the same conduct at issue in this case; any criminal sentence imposed in the parallel criminal case against Vitale will affect the amount of the civil penalty in this case; the trial in the parallel criminal case is scheduled for May 15, 2017; and the Commission staff is required to obtain authorization from the Commissioners of the Securities and Exchange Commission before seeking a specific penalty amount from the Court.

## **I. PROCEDURAL BACKGROUND**

The Commission filed this action on March 20, 2017 for injunctive and other relief against Vitale. (DE 1). Simultaneous with the Complaint, the Commission filed an emergency *ex parte* motion for temporary restraining order and other relief against Vitale (“TRO Motion”). (DE 8). On March 21, the Court granted the TRO Motion. (DE 15).

The Commission served Vitale with a copy of the Complaint and summons on March 21, 2017 (DE 26). Vitale’s response to the Complaint was due on April 11, 2017; he failed to file a response. On April 13, 2017, the Court issued an Order directing the Commission to file a motion for default judgment against Vitale or show cause why the case against him should not be dismissed for lack of prosecution. (DE 45). It is due today. Today the Court issued an Order for the Commission to file a motion for final default judgment within 10 days (DE 50).

## **II. THE COMMISSION’S COMPLAINT ALLEGATIONS**

The Commission’s Complaint alleges Vitale violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a)]; Sections 10(b) and 15(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 78j(b) and 78o(a)]; and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5]; and that he aided and abetted Defendant LottoNet Operating Corp.’s violation of Section 15(a) of the Exchange Act.

### **A. DEFENDANTS AND RELIEF DEFENDANTS**

Defendant LottoNet has its principal place of business in Pompano Beach, Florida. LottoNet is not registered with the Commission in any capacity. (DE 1 at ¶ 13).

Defendant David Gray is the Chief Executive Officer, President, and Chairman of the Board of Directors of LottoNet, and he owns more than half of LottoNet’s common stock. He has ultimate authority over LottoNet and runs the day-to-day operations. *Id.* at ¶ 14.

Defendant Vitale, a resident of Boca Raton, Florida, was a sales agent for LottoNet. He is not currently registered with the Commission in any capacity. On January 5, 2010, the Pennsylvania Securities Commission entered a cease-and-desist order against Vitale to prevent him from offering unregistered securities. On October 19, 2011, the Financial Industry Regulatory Authority (“FINRA”) permanently barred him from acting as a broker or otherwise associating with firms that sell securities to the public. *Id.* at ¶ 15.

Relief Defendant Oracle Marketing Group Inc. is a Florida corporation Vitale formed in March 2015, with its principal place of business in Boca Raton, Florida. Vitale was Oracle’s

president from March 2015 until at least September 2016. From no later than August 2015 until at least June 2016, LottoNet paid Vitale at least \$245,000 through payments to Oracle. Without any legitimate basis, Oracle received investor proceeds emanating from the fraud. *Id.* at ¶ 16.

Relief Defendant CRM Interactive Inc. is a company formed in 2016. Vitale is the signatory on CMR Interactive's bank account. From August 30, 2016 until January 31, 2017, LottoNet paid Vitale through at least 14 payments of investor funds to CMR Interactive totaling at least \$335,000. Without any legitimate basis, CRM Interactive received investor proceeds emanating from the fraud. *Id.* at ¶ 17.

Relief Defendant The Council Club is a company formed in 2015, and Vitale is its sole member. Vitale is the individual on The Council Club's bank account. From June 3, 2016 until September 14, 2016, LottoNet paid its sales agent Vitale by making at least 10 payments of investor funds to The Council Club totaling at least \$129,663. Without any legitimate basis, The Council Club has received investor proceeds emanating from the fraud. *Id.* at ¶ 18.

## **B. THE LOTTONET FRAUD**

### **1. The LottoNet Offering**

From approximately July 21, 2015 through present, LottoNet and Gray have offered and sold shares in the Company to the public. *Id.* at ¶ 22. The terms of the offering are memorialized in a PPM dated July 1, 2015. *Id.* at ¶ 23. As set forth in the PPM, LottoNet sought to raise \$5 million by offering to sell 40,000 shares of LottoNet common stock for \$125.00 per share. *Id.* at ¶ 24. LottoNet also launched a second securities offering, for LottoNet Peru, which LottoNet claimed had an exclusive license to operate lotteries in Peru. *Id.* at ¶ 30. LottoNet and its sales agents raised funds for this new offering. *Id.* at ¶ 31.

### **2. Solicitation of Investors**

From no later than July 21, 2015 until at least February 2017, Gray managed a boiler room in Pompano Beach where he utilized unregistered sales agents to place cold calls to potential investors nationwide. *Id.* at ¶ 33. From no later than May 2016 until at least February 2017, Vitale worked as an unregistered sales agent in the LottoNet boiler room. *Id.* at ¶ 35. The sales agents were given scripts Vitale prepared to use during calls to solicit investors (the "Scripts"). *Id.* at ¶ 36. From no later than July 2016 until at least February 2017, Vitale drafted the Scripts and directed the sales agents to read them verbatim during calls to solicit investors in LottoNet. *Id.* at ¶ 37. From no later than July 2016 until at least February 2017, sales agents

used the Scripts during calls to solicit investors. *Id.* at ¶ 38. Pursuant to the Scripts, sales agents told investors that “you’re looking at a monthly dividend payout of \$8,500 every month” on a \$25,000 investment if LottoNet reaches 1% market share. *Id.* at ¶ 39. LottoNet’s PPM, executive summary, and pro forma financial projections included similar figures touting the potential for enormous investment returns. *Id.* at ¶ 40. Vitale’s Scripts also touted the purported safety of the investment, noting that there is a “minimum floor” paid to the investor in the event the company is acquired and a 60% return is the “worst case” in that scenario. *Id.* at ¶ 41. As of February 28, 2017, LottoNet has only paid a total of \$10,525.43 to investors in investment returns in a Ponzi-like fashion, using funds from later investors to pay earlier investors. *Id.* at ¶ 42.

After Vitale and other LottoNet sales agents made cold-calls to potential investors by telephone, Vitale and the other LottoNet sales agents email the potential investors marketing materials that include a PPM, subscription agreement, investor questionnaire, pro forma financial projections, marketing video, and executive summary. *Id.* at ¶ 43. After the cold calls, sales agents placed additional telephone calls to potential investors to close the sales. *Id.* at ¶ 44. As of March 20, 2017, LottoNet raised a total of more than \$4.8 million from about 138 investors. Vitale personally raised at least \$1.4 million of this amount by soliciting investors. *Id.* at ¶ 45.

### **3. Misrepresentations and Omissions in the LottoNet Offering**

In connection with LottoNet’s offering, Vitale knowingly or recklessly made material misrepresentations and omissions about the use of investor funds, Gray’s compensation, and commissions paid to LottoNet’s sales agents. *Id.* at ¶ 47.

#### ***a. Vitale’s Representations About The Use Of Investor Funds***

From no later than July 21, 2015 until at least February 2017, LottoNet and Gray made materially false and misleading statements to potential investors in the PPM Vitale distributed to investors. *Id.* at ¶¶ 43, 48. The PPM states investor proceeds will be used to pay for:

“(i) the development cycle, which includes perfecting the software and hosting platform, (ii) for marketing; including online & offline advertising and the initial free ticket promotion; (iii) managerial and administrative expenses; (iv) legal expenses and consulting fees, including fees to take the company public.”

*Id.* at ¶ 49. The PPM further estimated how much of the \$5 million raised would be spent in each of these four categories, stating 15% of the total amount raised would be spent on management and administration. *Id.* at ¶ 50. Similarly, in the executive summary Vitale distributed to potential investors, LottoNet asserted the Company would use investor funds to

“invest[] primarily into marketing a quality product,” as well to pay for LottoNet software, management and administration, legal expenses including patents, and to go public. *Id.* at ¶ 51. The PPM falsely assures potential investors that “no commissions or any other form of remuneration will be paid on sales made directly to the public by the Company.” *Id.* at ¶ 52.

During telephone calls to solicit investors, Vitale and the sales agents made materially misleading oral representations to potential investors about the use of investor funds. *Id.* at ¶ 55. For example, one of the Scripts the sales agents read potential investors states that “we are only raising a small amount of 5 million dollars for advertising and Technical Support on the backside.” *Id.* at ¶ 56. During telephone calls with potential investors, Vitale also represented that LottoNet would use investor funds for technical development, including development of a cellular phone application, and the marketing of LottoNet. *Id.* at ¶ 57. As set forth below, Vitale’s representations about the use of investor funds were materially false. *Id.* at ¶ 59.

As of February 2017, LottoNet had received about \$4,075 from non-investor sources; all other funds in the accounts were from investors, totaling more than \$4.8 million. *Id.* at ¶ 58.

***b. Use of Investor Funds to Pay Undisclosed Commissions to Sales Agents***

Vitale failed to disclose to potential investors that LottoNet used investor funds to pay commissions to sales representatives in exchange for selling shares to investors. *Id.* at ¶ 66. Contrary to the representations about the use of investor funds in the PPM and executive summary, and contrary to Vitale’s oral representations to potential investors, investor funds were used to pay Vitale and other sales agents commissions for selling shares to investors. *Id.* at ¶ 67.

In exchange for selling LottoNet shares, LottoNet and Gray paid sales agents at least 35 percent of each investor contribution they obtained through their solicitation efforts. *Id.* at ¶ 68. LottoNet paid more than \$1.1 million of the investor funds to sales agents. *Id.* at ¶ 69. Vitale knowingly or recklessly concealed the commissions from potential investors. *Id.* at ¶ 70. For example, in August 2016, Vitale told a potential investor LottoNet would use investor funds for the technical development and marketing of LottoNet, while failing to disclose that he would receive a commission if the potential investor contributed funds. *Id.* However, by August 2016, Vitale had received at least \$245,000 in commissions from LottoNet. *Id.* at ¶ 71. As of February 28, 2017, Vitale received more than \$710,000 of investor funds in the form of payments to his entities, the Relief Defendants. *Id.* at ¶ 72.

Additionally, in the PPM, LottoNet and Gray represent that “no commissions or any remuneration will be paid on sales of the shares,” but that the Board of Directors “may authorize payment of commissions to licensed broker dealers who participate in the offer and sale of shares of common stock in this Offering.” *Id.* at ¶ 74. This is another lie. *Id.* at ¶ 75. Not only did LottoNet and Gray pay sales commissions, but also they recruited and paid commissions to unlicensed broker-dealers, including Vitale. *Id.* During the time he worked at LottoNet, Vitale was under a FINRA Order prohibiting him from affiliating with broker-dealers. *Id.* at ¶ 76.

#### **4. The Scheme To Conceal Vitale’s Background From Investors**

From no later than July 21, 2015 until about February 2017, Vitale engaged in a fraudulent scheme to knowingly or recklessly conceal from investors the negative regulatory history and sanctions previously imposed against him for securities-related violations. *Id.* at ¶ 77.

##### ***a. The Pennsylvania Securities Commission Has Found Vitale Violated The Securities Laws***

On January 5, 2010, the Pennsylvania Securities Commission entered a Summary Order to Cease and Desist against Vitale arising from his violations of the Pennsylvania Securities Act in connection with a \$10 million securities offering. *Id.* at ¶ 78. Specifically, the Pennsylvania Securities Commission found Vitale was the CEO and president of an unregistered broker-dealer he operated to place cold calls to solicit unaccredited investors to invest in an unregistered securities offering. *Id.* at ¶ 79. The Pennsylvania Securities Commission found Vitale violated Section 1-201 of the Pennsylvania Securities Act, which makes it unlawful to offer or sell unregistered securities, and Section 1-301(a) of the Act, which makes it unlawful to transact business as an unregistered broker-dealer. *Id.* at ¶ 80. Based on Vitale’s violations of the Pennsylvania securities laws, the Pennsylvania Securities Commission entered an Order directing him to cease and desist his securities offering. *Id.* at ¶ 81.

##### ***b. FINRA Has Barred Vitale From Associating With Any Broker-Dealer***

In Spring 2009, FINRA initiated an investigation, including but not limited to, whether Vitale had engaged in excessive trading in a customer’s account in violation of FINRA Conduct Rule 2010 and Procedural Rule 8210. *Id.* at ¶ 82. On October 14, 2010, the FINRA Department of Enforcement filed a Disciplinary Proceeding against Vitale for failing to respond to at least seven FINRA requests for information in connection with the investigation. *Id.* at ¶ 83. The FINRA Hearing Officer found Vitale “frustrated FINRA’s investigation into his misconduct, which had been protracted for over a year because of his obstructive tactics,” and found his

misconduct “renders him ‘presumptively unfit for employment in the securities industry.’” *Id.* at ¶ 84. On September 11, 2011, FINRA barred Vitale from associating with any FINRA member in any capacity. *Id.* at ¶ 85.

***c. Vitale and Gray Tell LottoNet Investors Vitale Is “Donovan Kelly”***

To conceal Vitale’s disciplinary history from potential investors, Vitale referred to himself as “Donovan Kelly.” *Id.* at ¶ 86. Vitale used the alias Donovan Kelly during his telephone calls to solicit potential investors to contribute to LottoNet. *Id.* at ¶ 87.

**5. LottoNet and Vitale Acted As Unregistered Broker-Dealers, And Vitale Also Aided And Abetted This Conduct**

From no later than May 2016 until at least February 2017, LottoNet retained Vitale and other unregistered sales agents to solicit investors for the LottoNet offering. *Id.* at ¶ 88. Gray and LottoNet agreed to pay Vitale and other unregistered sales agents for raising investor funds directly and through an unregistered boiler room where Gray managed at least 13 individuals to assist him with investor solicitation. *Id.* at ¶ 89. In exchange for soliciting investors, LottoNet and Gray used investor funds to pay the unregistered sales agents and others commissions totaling at least 35 percent of the amount raised from investors, broken down as follows:

- 10-15% commission to “fronters,” who placed the initial cold calls to solicit potential investors; and
- 20% commission to “closers,” who followed up with the potential investors to close the deals and obtain the investor funds. *Id.* at ¶ 90.

LottoNet paid the sales agents at least \$1.1 million of investor funds. *Id.* at ¶ 91. Neither the boiler room nor Vitale or the other sales agents used to sell the LottoNet shares were registered as broker-dealers, as required by the federal securities law. *Id.* at ¶ 92.

**III. MEMORANDUM OF LAW**

**A. LEGAL STANDARD**

The factual allegations of a complaint are deemed admitted by the entry of a default.<sup>1</sup> When a defendant fails to defend an action and a default has been entered against it, liability for violations of the federal securities laws as alleged in the Complaint, and the propriety of the requested relief, is deemed established.<sup>2</sup> The Complaint’s factual allegations support entry of a Default Judgment against Vitale.

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<sup>1</sup> *Buchanan v. Bowman*, 820 F.2d 359, 360 (11<sup>th</sup> Cir. 1987).

<sup>2</sup> *Id.*

**B. THE COMPLAINT ALLEGES VITALE VIOLATED  
SECTION 17(A) OF THE SECURITIES ACT AND  
SECTION 10(B) AND RULE 10B-5 OF THE EXCHANGE ACT  
(COUNTS I-VI)**

Section 10(b) of the Exchange Act and Rule 10b-5 render it unlawful, in connection with the purchase or sale of securities<sup>3</sup>, to: (a) employ any device, scheme, or artifice to defraud; (b) make any untrue statement or omission of material fact; or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person, in connection with the purchase or sale of any security.<sup>4</sup> The Commission must also establish scienter and that the violations were made while using any means or instrumentality of interstate commerce.<sup>5</sup> Reliance, damages, and loss causation are not required elements.<sup>6</sup>

Section 17(a) of the Securities Act makes it unlawful to engage in certain conduct “directly or indirectly” in “the offer or sale of securities.”<sup>7</sup> Specifically, Section 17(a)(1) prohibits “employ[ing] any device, scheme, or artifice to defraud; Section 17(a)(2) prohibits “obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission;” and Section 17(a)(3) prohibits “engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”<sup>8</sup> A showing of scienter is required under Section 17(a)(1), but Sections 17(a)(2) and (a)(3) only require a showing of negligence.<sup>9</sup>

The antifraud provisions also reach beyond misrepresentations or omissions and encompass any wrongdoing by any person that rises to the level of a deceptive practice.<sup>10</sup> A defendant engages in a fraudulent scheme in violation of the antifraud provisions of the securities

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<sup>3</sup> The Complaint alleges Vitale sold securities in the form of LottoNet shares. (DE 1 at ¶ 2).

<sup>4</sup> 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

<sup>5</sup> *SEC v. Corporate Relations Group*, No. 6:99-cv-1222, 2003 WL 25570113 at \*7 (M.D. Fla. March 28, 2003).

<sup>6</sup> *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012).

<sup>7</sup> 15 U.S.C. § 77q(a).

<sup>8</sup> 15 U.S.C. § 77q(a)(1)-(3).

<sup>9</sup> *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

<sup>10</sup> *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 10 (1971); *see also In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 913 (1961) (the subdivisions of Rule 10b-5, as well as Securities Act §17(a), should be considered “mutually supporting”).

laws and violates Section 17(a)(1) and (3) and Rule 10b-5(a) and (c) when he commits any manipulative or deceptive act or acts that are part of a fraudulent or deceptive course of conduct, or are in furtherance of a scheme to defraud.<sup>11</sup> To state a claim based on conduct violating these provisions, the Commission must establish: (1) the defendant committed a deceptive or manipulative act; (2) in furtherance of the alleged scheme to defraud; (3) with scienter (or negligently, with respect to Section 17(a)(3)).<sup>12</sup>

### **1. Vitale's Misrepresentations and Omissions**

As set forth above in Section II, Vitale made numerous material misrepresentations and omissions to investors. He sold shares of LottoNet common stock to investors by misrepresenting the purported use of investor funds and representing that LottoNet would not pay commissions on the investments. He also omitted to tell investors about commissions and payments to himself and his companies, thus rendering his representations about the use of investor funds misleading.

Vitale distributed a PPM to potential investors, which states that “no commissions or any other form of remuneration will be paid on sales made directly to the public by the Company.” This was false. LottoNet transferred more than \$1.1 million to its sales agents, either directly or through companies whose bank accounts the sales agents control. More than \$700,000 of this amount was received by Vitale, directly and through his companies. Vitale failed to disclose this use of investor funds. In addition, during telephone calls to solicit investors, Vitale and the sales agents have told potential investors that LottoNet would use investor funds for technical support and marketing. Vitale failed to disclose that LottoNet would give him a portion of the investor funds in exchange for soliciting investors.

To lure investors, Vitale also distributed an executive summary which asserted that the Company would use investor funds to “invest[] primarily into marketing a quality product,” as well to pay for LottoNet software, management and administration, legal expenses including patents, and to go public. This was false. Of the \$4.8 million raised from investors, LottoNet siphoned a total of more than \$2 million – to Vitale and his companies, to Gray, to sales agents, and to the LottoNet officers and directors.

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<sup>11</sup> *SEC v. Huff*, 758 F. Supp. 2d 1288, 1347-48 (S.D. Fla. 2010).

<sup>12</sup> *In re Alstom SA Securities Litigation*, 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005) (citing *In re Global Crossing*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004)).

All of these actions violated Section 17(a)(2) of the Securities Act in that they “obtain[ed] money or property by means of any untrue statement of a material fact or any [material] omission.” 15 U.S.C. § 77q(a)(2). The misrepresentations and omissions listed above each enabled Vitale to fraudulently persuade investors to invest in LottoNet. The misstatements and omissions set forth above violated Section 10(b) and Rule 10b-5(b) of the Exchange Act in that they constituted untrue statements or omissions of material fact or material omissions.

Under *Janus Capital Group, Inc. v. First Derivative Traders*,<sup>13</sup> only the “maker” of a misstatement may be directly liable under Section 10(b) and Rule 10b-5(b).<sup>14</sup> “The maker” is “the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”<sup>15</sup> More than one person or entity may have authority over a statement and therefore may be considered the maker of a false statement or responsible for a material omission.<sup>16</sup> As for the misrepresentations in the sales agent Scripts, Vitale drafted the Scripts and is a maker. Vitale is also the maker of the false representations and omissions discussed above that Vitale made during his phone calls with investors.

## **2. Vitale’s Misrepresentations and Omissions are Material**

A false statement or omission must be material for a Defendant to be liable. The test for materiality is “whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.”<sup>17</sup> Put another way, information is material if a reasonable investor would consider it significant to making an investment decision.<sup>18</sup> “[I]f a company chooses to make a statement on a subject, having chosen to speak, the company is

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<sup>13</sup> 131 S. Ct. 2296, 2302 (2011).

<sup>14</sup> *Janus* does not apply to Section 17(a)(2) of the Securities Act, which merely requires that a person use a misstatement or omission to obtain money or property, not make it. *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 795–98 (11th Cir. 2015); *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014).

<sup>15</sup> *Janus*, 131 S. Ct. at 2302.

<sup>16</sup> *City of Pontiac Gen. Employees’ Retirement Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) (*Janus* “has no bearing on how corporate officers who work together in the same entity can be held jointly responsible on a theory of primary liability. It is not inconsistent with *Janus* to presume that multiple people in a single corporation have the joint authority” to “make” a misstatement). See also *In re Pfizer Inc. Secs. Litig.*, 936 F. Supp.2d 252, 268–69 (S.D.N.Y. 2013).

<sup>17</sup> *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (citation omitted).

<sup>18</sup> *Basic v. Levinson*, 485 U.S. 224, 230 (1988).

obligated to make a full and fair disclosure.”<sup>19</sup> Truthful statements can be misleading when someone omits to state a material fact without which the truthful statement, based on the circumstances, becomes misleading.<sup>20</sup> “The test for materiality of an omission is ‘whether a reasonable man would attach importance to the fact omitted in determining a course of action.’”<sup>21</sup> A false statement or omission need not be outcome determinative for it to be considered material; rather it simply must be significant to the investor’s decision.<sup>22</sup> Under these standards, Vitale’s false statements and omissions are clearly material. His misrepresentations and omissions concern the use of investor funds.<sup>23</sup> Clearly, any reasonable investor would want to know LottoNet was not using his or her money in the way Vitale promised, but instead for Vitale’s own financial gain.<sup>24</sup>

Additionally, Vitale’s failure to disclose the total amounts taken from investor contributions, including commissions of 35 percent or more, particularly when he distributed a PPM stating LottoNet would not pay commissions and when he told investors LottoNet would spend investor funds on things other than commissions, constituted material misrepresentations and omissions.<sup>25</sup> Any reasonable investor would want to know that investor funds were not, as

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<sup>19</sup> *Harvey M. Jasper Retirement Trust v. Ivax Corp.*, 920 F. Supp. 1260, 1267 (S.D. Fla. 1995) (citing *Dominick v. Dixie Natl Life Ins. Co.*, 809 F. 2d 1559, 1571 (11th Cir. 1987) ([O]nce [defendant] undertook to speak, it was required to make a full and fair disclosure.”).

<sup>20</sup> 17 C.F.R. § 240.10b-5(b); *Harvey M. Jasper Retirement Trust*, 920 F. Supp. at 967.

<sup>21</sup> *Merchant Capital*, 483 F.3d at 768 (quoting *Kennedy v. Tallant*, 710 F.2d 711, 719 (11th Cir. 1983)).

<sup>22</sup> *SEC v. City of Miami*, 988 F. Supp. 2d 1343, 1357 (S.D. Fla. 2013) (“to be material, a fact need not be outcome-determinative, that is, it need not be important enough that it would necessarily cause a reasonable investor to change his investment decision”) (quoting *SEC v. Meltzer*, 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006)).

<sup>23</sup> *SEC v. Huff*, 758 F. Supp. 2d 1288, 1348 (S.D. Fla. 2010) (omissions regarding the use of investor funds are material).

<sup>24</sup> *U.S. v. Lochmiller*, 521 Fed. Appx. 687, 691-92 (10th Cir. April 15, 2013) (upholding conspiracy to commit securities fraud conviction because, among other things, Defendant made material misrepresentations when he told investors he would use money for low-income housing but instead used it for personal gain).

<sup>25</sup> *SEC v. Alliance Leasing Corp.*, 2000 WL 35612001 at \*8-9 (S.D. Cal. 2000), *aff’d* 28 Fed. Appx. 648, 652 (9th Cir. 2002) (“We agree with the district court that the 30% commissions were ‘so obviously important to an investor, that reasonable minds cannot differ on the question of materiality.’”) (quoting *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)).

Vitale represented, spending investor funds to develop the Company, but were instead being used to pay sales agents 35 percent commissions for soliciting their investments.

### **3. Vitale's Scheme Liability**

Vitale violated Sections 17(a)(1) and (3) of the Securities Act, and Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c), by participating in a scheme to defraud and engaging in a fraudulent course of conduct. As discussed above, to state a claim based on conduct violating these provisions, the Commission must establish: (1) the defendant committed a deceptive or manipulative act; (2) in furtherance of the alleged scheme to defraud; (3) with scienter (except as to Section 17(a)(3), which requires only a showing of negligence).<sup>26</sup>

A defendant engages in a fraudulent scheme in violation of Section 17(a)(1) and (3) and Rule 10b-5(a) and (c) when he commits any manipulative or deceptive act or acts that are part of a fraudulent or deceptive course of conduct, or are in furtherance of a scheme to defraud.<sup>27</sup> The defendant “must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme.”<sup>28</sup> Vitale’s false statements and omissions described above alone provide a basis for scheme liability under Sections 17(a)(1) and (3), and Rules 10b-5(a) and (c).<sup>29</sup> However, in this instance, Vitale committed numerous deceptive and fraudulent acts beyond making misrepresentations and omissions, which can also give rise to scheme liability.<sup>30</sup> Vitale made the fraud possible by drafting the Scripts, training sales agents on how to misrepresent the LottoNet offering, and soliciting investors. To conceal his own disciplinary history, Vitale engaged in the charade that he was someone else – Donovan Kelly.

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<sup>26</sup> *Alstom*, 406 F. Supp. 2d at 474.

<sup>27</sup> *Huff*, 758 F. Supp. 2d at 1347-48. See also *SEC v. Fraser*, 2010 U.S. Dist. LEXIS 7038 at \*23 (D. Ariz. Jan. 28, 2010), quoting *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997).

<sup>28</sup> *Fraser*, 2010 U.S. Dist. LEXIS 7038 at \*23.

<sup>29</sup> *Affiliated Ute Citizens of Utah v. U.S.* 406 U.S. 128, 153 (1972) (liability under Rule 10b-5(a) and (c) established even though the case was one “involving primarily a failure to disclose” to investors); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158-59 (2008) (defendants’ “deceptive acts” and “course of conduct included both oral and written statements, such as the backdated contracts”).

<sup>30</sup> *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 111-12 (2nd Cir. 1998) (“a primary violator is one who participated in the fraudulent scheme”); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1471-72 (2nd Cir. 1996) (scheme liability extends to those “who had knowledge of the fraud and assisted in its perpetration”); *SEC v. Lee*, 720 F. Supp. 2d 305, 334 (S.D.N.Y. 2010).

All of these actions constitute manipulative or deceptive acts that are part of a fraudulent or deceptive course of conduct, or are in furtherance of a scheme to defraud.

#### **4. Vitale Acted With Scienter**

Courts have defined scienter as a state of mind embracing intent to deceive, manipulate or defraud.<sup>31</sup> The Commission may establish scienter for violations of Sections 17(a) and 10(b) by showing defendants made representations to investors “without basis and in reckless disregard for their truth or falsity.”<sup>32</sup> The Eleventh Circuit has concluded that scienter may be established by a showing of knowing misconduct or severe recklessness.<sup>33</sup>

The evidence establishes Vitale acted knowingly, or at a minimum recklessly, while making the misrepresentations and omissions discussed above. Vitale drafted the Scripts omitting any reference to commission and represented only that funds would be distributed for developing the Company’s technology. He made phone calls to potential investors, lulling them with promises that their money would be used to pay to develop the Company. He also distributed the PPM which falsely stated LottoNet would not pay any sales commissions. However, when he made these representations, he and his companies, the Relief Defendants, had already received funds from LottoNet. Vitale also used an alias to conceal his true identity from investors so they would not discover his regulatory history. Even after having been sanctioned by the Pennsylvania Securities Commission and FINRA, Vitale made no effort to ensure compliance with the federal securities laws.

#### **5. The “In Connection With” Requirement**

Because Vitale made misrepresentations and omissions in connection with the offer, purchase, and sale of the securities they are offering and selling to investors, his acts meet the “in connection with” requirement of Section 10(b) and Rule 10b-5.<sup>34</sup>

#### **6. Interstate Commerce**

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<sup>31</sup> *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

<sup>32</sup> *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 10 (D.D.C. 1998).

<sup>33</sup> *Carriba Air*, 681 F.2d at 1324.

<sup>34</sup> *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (courts should interpret the “in connection with” requirement broadly to effectuate the remedial purpose of the federal securities laws); *SEC v. Merkin*, 2012 WL 5245561 \*8 (S.D. Fla. Oct. 3, 2012) (the “in connection with” requirement is satisfied if the SEC shows that the material misrepresentations were relayed to the public in a way that a reasonable investor would rely on them).

The Complaint alleges Vitale offered and sold LottoNet's unregistered securities in interstate commerce. Vitale used the telephone and email to deliver offering materials. Thus, the Complaint alleges Vitale violated Sections 17(a)(1)-(3) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act.

Accordingly, the Court should enter a Default Judgment against Vitale on Counts I-VI of the Complaint.

**D. THE COMPLAINT ALLEGES VITALE VIOLATED, AND  
AIDED AND ABETTED LOTTONET'S VIOLATIONS OF,  
SECTION 15(A)(1) OF THE EXCHANGE ACT  
(COUNTS VII AND IX)**

Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1), makes it illegal for a broker or dealer "to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker or dealer is registered" with the Commission or is a natural person associated with a registered broker-dealer. A person may be found to be acting as a broker if he participates in securities transactions "at key points in the chain of distribution."<sup>35</sup> "In determining whether a person has acted as a broker, several factors are considered," including, "whether the person: 1) actively solicited investors; 2) advised investors as to the merits of an investment; 3) acted with a 'certain regularity of participation in securities transactions;' and 4) received commissions or transaction-based remuneration."<sup>36</sup>

The Complaint alleges that since at least May 2016, LottoNet regularly operated a boiler room of sales agents for the express purpose of selling securities, and paid these sales agents transaction-based commissions. The Company utilized this boiler room and its PPM and other marketing materials to tout the Company, including the supposed profitability of the investment. At no time was LottoNet registered as a broker-dealer and accordingly, the Company violated Section 15(a)(1) of the Securities Act.

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<sup>35</sup> *Massachusetts Financial Services, Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass.), *aff'd*, 545 F.2d 754 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977).

<sup>36</sup> *U.S. Pension Trust Corp.*, 2010 WL 3894082, \*20-21 (S.D. Fla. 2010), quoting *SEC v. Corporate Relations Group, Inc.*, 2003 WL 25570113, \*17 (M.D. Fla. Mar. 28, 2003). Scierter is not an element of a Section 15(a)(1) violation. *Corporate Relations*, 2003 WL 25570113, \*17.

Vitale acted as an unregistered broker in violation of Section 15(a) because he was engaged in the business of effecting transactions in securities for the accounts of others. He participated in securities transactions at key points in the chain of distribution by personally soliciting the vast majority of the funds from investors for LottoNet. In exchange for selling the securities to investors, Vitale received transaction-based commissions. He also supervised the other sales agents and prepared Scripts the sales agents used to solicit investors.

This conduct demonstrates Vitale's unregistered broker conduct in violation of Section 15(a)(1) of the Exchange Act.<sup>37</sup> Accordingly, the Court should enter Default Judgment against Vitale on Count VII of the Complaint.

Vitale also aided and abetted LottoNet's violations of Section 15(a). In order to establish aiding and abetting liability, the Commission must show: (1) a primary violation; (2) the aider and abettor provided "substantial assistance" to the violator; and (3) the aider and abettor acted with scienter.<sup>38</sup> The knowledge requirement can be satisfied by extreme recklessness, which can be shown by "red flags," "suspicious events creating reasons for doubt," or "a danger . . . so obvious that the actor must have been aware of" the danger of violations.<sup>39</sup> Vitale negotiated the payment of at least one sales agents' salary and commission, solicited investors for commissions he did not disclose, prepared Scripts for use by the sales agents, and trained the sales agents to solicit investors. Vitale knew or was reckless in not knowing that he aided and abetted LottoNet's violations of Section 15(a). Accordingly, the Court should enter Default Judgment against Vitale on Count IX of the Complaint.

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<sup>37</sup> *SEC v. Kenton Capital, Ltd.*, 69 F. Supp.2d 1, 13 (D.D.C.1998) (defendants acted as brokers when they together solicited 40 investors and received a total of \$1.7 million in investments); *Alliance Leasing*, 2000 WL 35612001, at \*\*6-7 (finding defendants liable as unregistered brokers where they hired and supervised a staff of salespeople and managers who sold securities to investors and received commissions); *SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997) (defendants acted as brokers where they solicited investors and prepared and distributed documents and sales circulars); *Corporate Relations*, 2003 WL 25570113, at \*17 (defendant violated Section 15(a)(1) where it actively sought investors, recommended securities to investors through registered representatives, and its broker relations executives received transaction-based compensation); *SEC v. Montana*, 464 F.Supp.2d 772, 785 (S.D. Ind. 2006) (granting summary judgment; finding "[the defendants] offered interests to investors in the Trading Program and that in doing so, they were not registered as securities brokers").

<sup>38</sup> *SEC v. BIH Corp.*, 2011 U.S. Dist. LEXIS 97821 (S.D. Fla., August 31, 2011).

<sup>39</sup> *SEC v. K.W. Brown & Co.*, 555 F.Supp.2d 1275, 1307 (S.D. Fla. 2008).

**E. THE COURT SHOULD GRANT THE COMMISSION THE RELIEF IT SEEKS**

**1. The Court Should Enter A Permanent Injunction Against Vitale**

Section 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act permit the Commission to seek a permanent injunction against further violations of the federal securities laws. *See* 15 U.S.C. §77t(b); 15 U.S.C. §78u(d)(1). To obtain an injunction, the Commission must prove by a preponderance of the evidence that (1) the defendant violated the securities laws and (2) that there is a reasonable likelihood that the defendant will repeat the violations. *Calvo*, 378 F.3d at 1216. As discussed above, and as the Court held in granting the Commission's motion for a temporary restraining order, the facts demonstrate Vitale violated Section 17(a) of the Securities Act, and Sections 10(b) and 15(a)(1) and Rule 10b-5 of the Exchange Act. As the Court held in granting the Commission's motion for a temporary restraining order, the facts also demonstrate that there is a reasonable likelihood Vitale will repeat the violations.

In determining whether there is a reasonable likelihood that Vitale will repeat a violation of the securities laws, the Court considers the following factors: (1) the egregiousness of the defendant(s)' actions, (2) the isolated or recurrent nature of the violations, (3) the degree of scienter involved, (4) the Defendants' recognition of the wrongful nature of their conduct, (5) the sincerity of the Defendants' assurances against future violations, and (6) the likelihood that the defendant(s)' occupation will present opportunities for future violations. *Id.* All these factors justify an injunction here.

In this case, each of the factors set forth above weighs in favor of the Court entering a temporary restraining order. First, Vitale's conduct is egregious. Vitale blatantly misrepresented how LottoNet uses investor funds. He told investors the Company would spend the funds on marketing the LottoNet business to consumers and other business expenses, while omitting disclosure of the use of investor funds to pay Vitale, his companies, and sales agents commissions. Vitale raised money from investors under a false pretense so he could continue to line his own pockets. It is hard to imagine more egregious and brazen misconduct.

Second, the conduct was far from isolated. Vitale solicited investors from no later than May 2016 until March 2017, he drafted Scripts for the sales agents' use in selling the LottoNet securities to the unsuspecting public, and he has received about \$710,000 of the investor funds through the Relief Defendants, which are his companies and bank accounts.

Third, Vitale demonstrated a high degree of scienter. Vitale, operating under an alias,

knowingly made false representations to potential investors and omitting his history with a state regulatory agency and FINRA, while at the same time urging investors to purchase LottoNet shares and receiving about \$710,000 of that investor money in undisclosed commissions. It is hard to imagine someone displaying a higher degree of scienter than someone who knowingly profits at the expense of others. As to the fourth and fifth factors, Vitale has not offered any assurances against future misconduct and has given no indication he understands his conduct is wrong.

Vitale's past illegal conduct further shows a reasonable likelihood of future violations. Pennsylvania has issued a cease-and-desist order barring him from offering securities and FINRA sanctioned him and barred him from associating with a broker-dealer. Despite these orders against him, Vitale continued to violate the federal securities laws.

The Complaint allegations support the entry of a permanent injunction against Vitale.

## **2. The Court Should Order Disgorgement And Prejudgment Interest**

The Court should order Vitale to pay disgorgement with prejudgment interest. Disgorgement is designed both to force a defendant to surrender ill-gotten gains and deter others from violating the securities laws.<sup>40</sup> A district court has wide latitude to order disgorgement of profits acquired through securities fraud.<sup>41</sup> Disgorgement is an equitable remedy designed to compel defendants to "give up the amount by which [they were] unjustly enriched."<sup>42</sup> "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable."<sup>43</sup> Disgorgement "need only be a reasonable approximation of profits causally connected to the violation."<sup>44</sup> The Complaint alleges Vitale profited a total of \$710,000 through the payment of investor funds for undisclosed sales commissions he received through

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<sup>40</sup> *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2nd Cir. 1996) (disgorgement should be calculated by measuring illegal profits, not amount needed to reimburse defrauded investors); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989).

<sup>41</sup> *See SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 1996); *SEC v. Locke Capital Mgmt., Inc.*, 726 F. Supp. 2d 105, 108 (D.R.I. 2010).

<sup>42</sup> *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987).

<sup>43</sup> *Manor Nursing*, 458 F.2d 1082, 1103-04 (2d Cir. 1972); *see also SEC v. Druffner*, 517 F. Supp. 2d 502, 511 (D. Mass. 2007).

<sup>44</sup> *First Jersey*, 101 F.3d at 1475-76. ("Any risk of uncertainty in calculating the disgorgement amount should fall on the wrongdoer whose illegal conduct created that uncertainty.").

companies and bank accounts he controlled. Accordingly, the Court should enter an Order directing Vitale to pay \$710,000 in disgorgement.

In addition to disgorgement, Vitale should pay pre-judgment interest. Where a securities law violator has enjoyed access to funds over a period of time as a result of her wrongdoing, requiring the violator to pay prejudgment interest is consistent with the equitable purpose of disgorgement.<sup>45</sup> Prejudgment interest is calculated based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). Prejudgment interest from the date the Commission filed the Complaint through April 2017 is \$2,366.67. (Exhibit 1). Accordingly, the Court should order disgorgement of \$710,000, plus prejudgment interest of \$2,366.67, for a total of \$712,366.67. *Id.*

**C. THE COURT SHOULD IMPOSE A CIVIL PENALTY AGAINST VITALE AND GRANT 60 DAYS FOR THE FILING OF A MOTION TO SET THE AMOUNT**

The Court should impose a civil money penalty against Vitale for his violations of the federal securities laws. “Civil penalties are intended to punish the individual wrongdoer and to deter him and others from future securities violations...”<sup>46</sup> A permanent injunction and disgorgement with prejudgment interest – while meaningful, are not a sufficient deterrent. Ordering Vitale to disgorge the amount of investor money he took only returns the situation to the status quo before he commenced the fraudulent conduct, without imposing a real penalty.

The Commission respectfully asks the Court to impose a civil penalty, and to grant the Commission 60 days to file a motion to set the specific penalty amount. We request this time for two reasons. First, Commission staff lack authority to seek specific penalty amounts and must instead obtain authorization from the Commissioners of the specific penalty amount the Commission deems appropriate in each case. Second, this additional time would enable the Court and the Commission to have all of the facts necessary to consider an appropriate penalty amount. Specifically, in assessing a civil penalty amount, the Court considers whether a defendant has been penalized in a criminal case based on the same violative conduct at issue in the civil case. On April 6, 2017, the U.S. Attorney’s Office for the Southern District of Florida indicted Vitale for conspiracy to commit mail fraud and mail fraud based on the same conduct at

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<sup>45</sup> *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1090 (D.N.J. 1996), *aff’d*, 124 F.3d 449 (3d Cir. 1997); *SEC v. Tome*, 638 F. Supp. 638, 639 (S.D.N.Y. 1986).

<sup>46</sup> *SEC v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014) (alteration added; internal citations omitted).

issue in this case. *U.S. v. Vitale*, 17-cr-60102, at DE 6. Vitale, who has retained counsel in that case, entered a not guilty plea and trial is scheduled to commence on May 15, 2017. *Id.* at DE 7, 8, 11. Thus, in 60 days, we should know whether Vitale has received a penalty in the form of a prison sentence in the criminal case, which would affect the civil penalty amount.

Granting 60 days for the filing of a motion seeking a specific penalty amount would not cause any delay in this case, which involves an active receivership and claims against two other defendants and three relief defendants. Nor would granting this additional time affect any trial date or discovery deadlines, or affect litigation against the remaining defendants in any way.

In the event the Court declines to grant the Commission time to request a specific civil penalty amount, we provide the law concerning the calculation of penalty amounts to aid the Court in assessing a penalty.

In deciding penalty amounts, courts consider (1) the egregiousness of the defendants' conduct; (2) the degree of their scienter; (3) whether their conduct created substantial losses or the risk of substantial losses to others; (4) whether the conduct was isolated or recurrent; and (5) whether the court should reduce the penalty due to the defendants' demonstrated current and future financial condition.<sup>47</sup>

These considerations are largely the same considerations discussed above concerning the imposition of a permanent injunction. The Court has discretion to determine the penalty amount "in light of the facts and circumstances" of the securities law violations. 15 U.S.C. §78u-1(a)(2).

As detailed above, Vitale's alleged conduct was egregious and displayed a high degree of scienter. His conduct created substantial risk of loss to investors. Investors invested \$4.8 million in LottoNet, but Vitale took about \$710,000 of that money and investors only received about \$10,525.43 from their investments. Clearly, the investors, who contributed about \$4.8 million sustained losses from their investments. In addition, Vitale's violative conduct was recurrent and lasted for more than a year, with Vitale drafting several Scripts for sales agents to use in luring investors through false representations and omissions about the use of investor funds and sales agent commissions. As for Vitale's ability to pay, we do not have a complete picture of Vitale's assets, as he deprived us of the ability to assess that. Specifically, he failed to file the accounting the Court ordered him to file and failed to appear for his deposition in March 2017. (DE 15, 41).

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<sup>47</sup> *SEC v. U.S. Pension Trust Corp.*, No. 07-22570-CIV, 2010 WL 3894082, at \*25 (S.D. Fla. Sept. 30, 2010) (citation omitted)).

The appropriate amount of penalties to impose is determined under the framework of Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d); and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), which sets forth three tiers of penalties, all of which apply “for each violation...” All three tiers permit a penalty in the amount of defendant’s pecuniary gain if otherwise greater than the amount provided in the statute. That amount is \$710,000.

If the Court determined to assess the penalty based on the tiers instead of pecuniary gain, then under the first tier, a court may impose a penalty of up to \$7,500 *per violation* for violations that do not involve scienter or intent to defraud. The second tier, which authorizes the assessment of up to a \$75,000 penalty per violation, applies where the Court concludes that the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Finally, the third tier permits a penalty up to a \$160,000 penalty per violation, where the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and the violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

We provide this law concerning the penalty tiers in the event the Court declines our request to grant 60 days to determine the penalty amount, until after the conclusion of the criminal case and after the Commission staff obtains authorization to seek a civil penalty amount. However, as set forth above, we believe that granting this extension would enable the Court to determine the civil penalty amount based on the all the facts, and specifically any prison sentence imposed against Vitale in the parallel criminal case against him.

#### **IV. CONCLUSION**

For all the reasons set forth above, the Commission asks the Court to: (1) enter a Default Judgment against Defendant Joseph Vitale a/k/a Donovan Kelly on Counts I-VII and IX of the Complaint; (2) enter a permanent injunctions against Vitale, as set forth in the attached proposed Order; (3) order Vitale liable for paying disgorgement of \$710,000, and prejudgment interest of \$2,366.67; (4) order Vitale to pay a civil money penalty in an amount to be determined based on the Commission’s motion; and (5) grant undersigned counsel 60 days from the date of Judgment to obtain authorization from the Commission to seek a specific penalty amount and file a motion to set the civil penalty amount.

April 24, 2017

Respectfully submitted,

By: s/Amie Riggle Berlin  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on April 24, 2017, I electronically filed the above document using CM/ECF or directed service in the method set forth in the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those who are not authorized to receive electronically Notices of Electronic Filing.

s/Amie Riggle Berlin  
Amie Riggle Berlin

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*Counsel for Defendant Gray*

Adam L. Schwartz, Esq.



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### Joseph Vitale Prejudgment Interest

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$710,000.00
04/01/2017-04/30/2017	4%	0.33%	\$2,366.67	\$712,366.67
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-04/30/2017</b>			<b>\$2,366.67</b>	<b>\$712,366.67</b>

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17- 21033-CIV-LENARD/GOODMAN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LOTTONET OPERATING CORP.,  
DAVID GRAY,  
JOSEPH VITALE A/K/A DONOVAN KELLY,

Defendants, and

ORACLE MARKETING GROUP INC.,  
CRM INTERACTIVE LLC,  
THE COUNCIL CLUB LLC,

Relief Defendants.

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**ORDER GRANTING MOTION FOR DEFAULT JUDGMENT OF PERMANENT  
INJUNCTION AND OTHER RELIEF AS TO DEFENDANT JOSEPH VITALE A/K/A  
DONOVAN KELLY, AND GRANTING THE COMMISSION 60 DAYS TO FILE A  
MOTION SEEKING A SPECIFIC PENALTY AMOUNT**

The Securities and Exchange Commission having filed a Complaint and Defendant Joseph Vitale a/k/a Donovan Kelly having failed to enter an appearance or respond to the Complaint, and a Clerk's Default having been entered against him, it is hereby

**ORDERED AND ADJUDGED** that Default Judgment is entered against Vitale, as set forth below. It is further

**ORDER AND ADJUDGED** that the Commission shall have 60 days from the date of this Default Judgment to file a motion to set a specific civil penalty amount against Vitale.

**I.**

**PRELIMINARY INJUNCTION**

**A. Section 17(a)(1) of the Securities Act**

**IT IS ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 17(a)(1) of the Securities Act of 1933 (the "Securities Act"), 15

U.S.C. § 77q(a)(1), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly: to employ any device, scheme, or artifice to defraud, by, directly or indirectly (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment strategy or investment in securities; (B) the prospects for success of any product or company; (C) the use of investor funds; (D) compensation to any person; (E) Defendants' qualifications to advise investors; or (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**B. Section 17(a)(2) of the Securities Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly: to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, by, directly or indirectly (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment strategy or investment in securities; (B) the prospects for success of any product or company; (C) the use of investor funds; (D) compensation to any person; (E) Defendants' qualifications to advise investors; or (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**C. Section 17(a)(3) of the Securities Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 17(a)(3) of the Securities Act, 15 U.S.C. § 77q(a)(3), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly: to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, by, directly or indirectly (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment strategy or investment in securities; (B) the prospects for success of any product or company; (C) the use of investor funds; (D) compensation to any person; (E) Defendants' qualifications to advise investors; or (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**D. Section 10(b) and Rule 10b-5(a) of the Exchange Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 10(b) and Rule 10b-5(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(a), by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security, to employ any device, scheme, or artifice to defraud, by, directly or indirectly (i) creating a false

appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment strategy or investment in securities; (B) the prospects for success of any product or company; (C) the use of investor funds; (D) compensation to any person; (E) Defendants' qualifications to advise investors; or (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**E. Section 10(b) and Rule 10b-5(b) of the Exchange Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 10(b) and Rule 10b-5(b) of the Exchange Act, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(b), by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, by, directly or indirectly (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment strategy or investment in securities; (B) the prospects for success of any product or company; (C) the use of investor funds; (D) compensation to any person; (E) Defendants' qualifications to advise investors; or (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's

officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**F. Section 10(b) and Rule 10b-5(c) of the Exchange Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 10(b) and Rule 10b-5(c) of the Exchange Act, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(c), by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security, to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, by, directly or indirectly (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about: (A) any investment strategy or investment in securities; (B) the prospects for success of any product or company; (C) the use of investor funds; (D) compensation to any person; (E) Defendants' qualifications to advise investors; or (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**G. Violating Section 15(a)(1) of the Exchange Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is permanently restrained and enjoined from violating Section 15(a)(1) of the Exchange Act by to making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**H. Aiding and Abetting Violations of Section 15(a)(1) of the Exchange Act**

**IT IS FURTHER ORDERED AND ADJUDGED** that, pending further Order of the Court, Defendant Vitale is permanently restrained and enjoined from directly or indirectly aiding and abetting the violation of Section 15(a)(1) of the Exchange Act by knowingly or recklessly providing substantial assistance to anyone making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security.

**IT IS FURTHER ORDERED AND ADJUDGED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Preliminary Injunction by personal service or otherwise: (a) any of Vitale's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Vitale.

**II. DISGORGEMENT**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale is liable for disgorgement of \$710,000, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$2,366.67, for a total of \$712,366.67. Defendant shall satisfy this obligation by paying \$712,366.67 to the Securities and Exchange Commission within 14 days after entry of this Default Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center  
Accounts Receivable Branch  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Joseph Vitale a/k/a Donovan Kelly as a defendant in this action; and specifying that payment is made pursuant to this Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

### **III. CIVIL PENALTY**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Vitale shall pay a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. The Court shall determine the amount of the civil penalty upon motion of the Commission, which shall be filed within 60 days of the date of this Default Judgment.

### **IV. BANKRUPTCY AND NONDISCHARGABILITY**

**IT IS FURTHER ORDERED AND ADJUDGED** that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Vitale, and further, any debt for disgorgement, civil penalty or other amounts due by Vitale under this Default Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Vitale of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

**V. RETENTION OF JURISDICTION**

**IT IS FURTHER ORDERED AND ADJUDGED** that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Default Judgment.

Dated this \_\_\_\_ day of \_\_\_\_\_ 2017 in Miami, Florida.

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UNITED STATES DISTRICT JUDGE

Copy to all counsel and parties of record.