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.
_____/

REPORT AND RECOMMENDATIONS ON PLAINTIFF'S REQUEST FOR ENTRY OF PRELIMINARY INJUNCTION

I. INTRODUCTION

On March 21, 2017, United States District Judge Joan A. Lenard granted Plaintiff Securities and Exchange Commission's ("SEC") *Ex Parte* Motion for Temporary Restraining Order, Asset Freeze, and Other Emergency Relief, and ordered the Defendants to show cause why a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 should not be granted against Defendants ("Show Cause Hearing" or "Hearing") [ECF No. 15]. Judge Lenard referred the Show Cause Hearing to the

Undersigned [ECF Nos. 15; 16]. The Undersigned conducted a Show Cause Hearing on March 28, 2017 and respectfully recommends the following to the District Court: (i) entry of a preliminary injunction against all Defendants; (ii) continuation of the asset freeze, records preservation order, and repatriation order entered in the temporary restraining Order ("TRO") until the conclusion of the preliminary injunction; and (iii) identifying by name in the asset freeze order certain Defendants and Relief Defendants assets and LottoNet Operating Corporation ("LottoNet") subsidiaries.

II. PROCEDURAL BACKGROUND

On March 20, 2017, the SEC filed a Complaint alleging: (1) LottoNet, David Gray ("Gray"), and Joseph A. Vitale, a/k/a Donovan Kelly ("Vitale") have engaged in fraud in violation of Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act") (Counts I-VI); (2) LottoNet and Vitale have acted as unregistered broker-dealers in violation of Section 15(a)(1) of the Exchange Act, and Gray has aided and abetted those violations (Counts VII and VIII); (3) Vitale has aided and abetted LottoNet's violation of Section 15(a)(1) of the Exchange Act (Count IX); and (4) Gray has control person liability for LottoNet's violation of Section 10(b) and Rule 10b-5 of the Exchange Act (Count X) [ECF No. 1].

Simultaneous with the Complaint, the SEC filed an *Ex Parte* Motion for Temporary Restraining Order, Asset Freeze, and Other Emergency Relief ("TRO

Motion"), arguing that based on the ongoing nature of Defendants' violations and the scienter they have demonstrated through their willful disregard for the federal security laws, Defendants have shown they will continue to violate the law unless the Court granted injunctive and other emergency relief. [ECF No. 8]. The Court granted the TRO Motion, imposing a TRO against Defendants and an asset freeze against Defendants and Relief Defendants. [ECF No. 15]. The Court directed Defendants to show cause why the Court should not impose a preliminary injunction against them and referred the show cause hearing to the Undersigned [ECF Nos. 15; 16].

The TRO Order also granted the SEC's request for expedited discovery, requiring Defendants to appear for depositions upon two-day notice and stating that failure to appear for a duly noticed deposition may result in the Court prohibiting Defendants from introducing evidence at the Show Cause Hearing. [ECF No. 15]. On March 21, 2017, the SEC served Vitale with the summons and Complaint, as well as all filings and a notice to appear for his deposition on March 23, 2017. [ECF No. 26]. On March 22, 2017, the SEC served Gray with these same documents, noticing Gray's deposition for March 24, 2017. [ECF No. 25]. Vitale and Gray failed to appear for their duly noticed depositions and on March 24, 2017, the SEC filed a motion to preclude Vitale and Gray from introducing evidence during the Show Cause Hearing ("Motion to Preclude") [ECF No. 18], which the District Court referred to the Undersigned [ECF No. 20].

On or about March 25, 2017, the FBI arrested Vitale at Miami International Airport as Vitale tried to board a flight to Ecuador. [ECF No. 36-7, p. 7, ¶27]. Vitale has been held at the Broward County Jail since his arrest. [Vitale Testimony].[1]

The Undersigned conducted the Show Cause Hearing on March 28, 2017, and all parties were present either in Court or via telephone.[2] The Undersigned granted the SEC's Motion to Preclude to the extent the Undersigned ordered the Defendants could not testify during the hearing.[3] The SEC relied on the evidence filed with its TRO Motion [ECF No. 11]; introduced additional exhibits into the record [ECF No. 36]; presented testimony from three witnesses: SEC Accountant Allen Genaldi and former LottoNet sales agents Ronald Sexton and Christopher Jones; and introduced the proffer of the Receiver's Counsel Adam Schwartz. During the Hearing, counsel for Gray represented he does not oppose the preliminary injunction against Gray. The Receiver does not oppose the preliminary injunction against LottoNet. Vitale and Gray presented no evidence at the Hearing and did not cross examine any of the witnesses.

---

[1] All citations to Testimony of Vitale, Ronald Sexton, Christopher Jones, and Allen Genaldi refer to sworn testimony during the March 28, 2017 Show Cause Hearing. Specific citations to a transcript are not included because a transcript has not yet been docketed.

[2] The Court-appointed Receiver appeared on behalf of Defendant LottoNet and Relief Defendants Oracle Marketing Group Inc. ("Oracle"), CRM Interactive LLC ("CRM"), and The Council Club LLC ("Council Club"); Gray did not appear for the Hearing, but his counsel appeared via telephone; and Vitale, *pro se*, appeared via telephone from Broward County Jail.

[3] Gray did not appear at the hearing to testify.

The SEC, through the exhibits filed in support of the TRO Motion and the witness testimony, Receiver Proffer, and exhibits introduced during the Show Cause Hearing, has provided sufficient evidence to show the following.

III. THE DEFENDANTS' FRAUDULENT SCHEME

A. The LottoNet Offerings

1. The LottoNet Offering

From approximately July 21, 2015 until at least March 21, 2017, Defendants have offered and sold shares in LottoNet to the public. [ECF No. 36-4 (Private Placement Memorandum ("PPM") dated July 1, 2015)]. Gray, the Chief Executive Officer of LottoNet, owns more than half of LottoNet's common stock. [ECF Nos. 11-6, ¶ 4; 11-8, ¶ 3; 36-4, p. 20]. Until at least February 2017, Gray had authority to make business decisions for LottoNet, had control over LottoNet, and ran the day-to-day operations. [ECF No. 11-6, ¶ 5; Testimony of Sales Agent Ronald Sexton].

The terms of the offering are memorialized in a PPM dated July 1, 2015 [ECF No. 11-17, p. 6 (SEC 00034)], pursuant to which LottoNet seeks to raise $5 million by offering to sell 40,000 shares of common stock in the Company for $125.00 per share. [ECF No. 11-17, p. 10 (SEC00037)]. Gray is responsible for the representations in the PPM, which states:

> DG [Gray] has the power and authority to execute, deliver, and perform this Agreement and other agreements and instruments to be executed and delivered by the in connection with the transactions contemplated hereby. . . . This Agreement is, and the other agreements and instruments to be

> executed and delivered by [Gray] in connection with the transactions contemplated hereby, when such other agreements and instruments are executed and delivered, shall be, the valid and legally binding obligations of Gray enforceable against Gray in accordance with their respective terms.

[ECF No. 11-17, pp. 27-28 (SEC00054-55)].

LottoNet filed a Form D with the SEC on October 21, 2015, and an amended Form D with the SEC on November 23, 2015 ("Form D Filings"), stating LottoNet seeks to raise $5 million from investors. [ECF Nos. 36-11; 36-12]. Gray, in his capacity as CEO, executed the Form D and Amended Form D on behalf of LottoNet. [ECF Nos. 36-11, p. 8 (SEC00117); 36-12, p. 8 (SEC00125)].

LottoNet has raised at least $4.8 million. [ECF No. 36-13, ¶ 4]. LottoNet received only about $4,075 from non-investor sources. [ECF No. 36-13, ¶ 5].

2. The LottoNet Peru, LottoNet Guatemala, and LottoNet Colombia Offerings

Recently, LottoNet and Gray have launched three additional securities offerings, each of which is overseas. [ECF Nos. 11-6, ¶ 18; 36-8; 36-9; 36-10]. Specifically, since no later than January 2017, LottoNet and Gray have been seeking to raise: (1) $5 million through the offer of shares in LottoNet Peru S.A.C.; (2) $2.5 million through the offer of shares in LottoNet Guatemala Corp.; and (3) $2.5 million through the offer of shares in LottoNet Colombia Corp. [ECF No. 36-10]].

Defendant LottoNet is the parent company of LottoNet Peru. [ECF No. 36-8, p. 8 (addendum signed by Gray)]. LottoNet Peru operates from Defendant LottoNet's same

location. The LottoNet Peru Subscription Agreement states LottoNet Peru is located at 49 N. Federal Highway, Pompano Beach, Florida, which is the same location LottoNet provides as its address. [ECF Nos. 36-8, p. 1; 36-4, p. 1]. The Subscription Agreement identifies Gray as CEO of LottoNet Peru. [ECF No. 36-8, p. 7]. According to the LottoNet Peru Executive Brief, updated February 3, 2017 [ECF No. 36-9, p. 1], LottoNet Peru: (i) "formed as an extension of the main operating corporation's success," [ECF No. 36-9, p. 2]; (ii) LottoNet has started its own lottery in Peru and has a 10-year lottery and gaming license in Peru [ECF No. 36-9, p. 2]; (iii) LottoNet's lottery will be played in 10 countries by Summer 2017 [ECF No. 36-9, p. 2]; (iv) LottoNet anticipates revenue from its overseas lottery of $3.5 million in the first year and $25,625,000 in the fifth year[.]" [ECF No. 36-9, p.3].

On February 23, 2017, LottoNet transferred approximately $72,000 of LottoNet investor funds from the LottoNet Bank of America accounts to a Banco International Del Peru ("InterBank") account in the name of LottoNet Peru S.A. [ECF No. 36-13, ¶ 13]. During the Show Cause Hearing, SEC Accountant Allen Genaldi testified that LottoNet has more recently transferred additional LottoNet investor funds to Peru.

B. Solicitation of Investors

1. The Boiler Room

From no later than July 21, 2015 until at least February 2017, Gray has solicited investor contributions for LottoNet and LottoNet Peru by managing a boiler room in

Pompano Beach [ECF No. 36-2; Testimony of Sales Agent Sexton], where Gray has utilized and urged sales agents to place cold calls to potential investors nationwide. [ECF Nos. 11-6, ¶¶ 2-7, 11, 18; 11-8, ¶¶ 2-7; 11-17, ¶¶ 2-6; Testimony of Sexton]. Gray would urge the sales agents in the boiler room to raise more money from investors. [Testimony of Sexton]. LottoNet was recently seeking to hire an additional sales agent. [ECF No. 11-19]. Specifically, LottoNet recently advertised on the website www.Indeed.com that it was seeking to hire an additional "Private Placement Account Specialist," entailing "[o]utbound dialing fronting" for a commission. [ECF No. 11-19].

From no later than July 2016 until at least February 2017, Vitale drafted scripts for soliciting investors (the "Scripts"), and Vitale and Gray directed the sales agents to use them during calls to solicit investors in LottoNet. [ECF Nos. 11-6, ¶¶ 4, 9, 12-14; 11-8, ¶¶ 2-3; Testimony of Ronald Sexton]. The sales agents used the Scripts during calls to solicit investors in late 2016 and in at least January and February 2017. [ECF No. 11-6, ¶¶ 9, 14; Testimony of Sexton; Testimony of Jones]. LottoNet sales agents used an online portal called CRM Edge to email the potential investors marketing materials that included a PPM, subscription agreement, investor questionnaire, pro forma financial projections, marketing video, and executive summary. [ECF Nos. 11-6, ¶ 15; 11-8, ¶¶ 4-5]. CRM Edge is Gray's company and he used LottoNet employees, LottoNet's facilities, and LottoNet investor money to develop the portal. [Testimony of Sexton; Proffer of

Receiver Ryan Stumphauzer]. LottoNet is the only entity to utilize CRM Edge. [Proffer of Receiver Ryan Stumphauzer].

Gray has also utilized LottoNet's sales agents to solicit investors to purchase shares in the LottoNet Peru offering. [ECF No. 11-6, ¶ 18, pp. 31-32 (Ex. 7), pp. 33-34 (Ex. 8); Testimony of Sexton].

2. Gray Directly

In addition to utilizing a boiler room of sales agents to solicit LottoNet and LottoNet Peru investors, Gray has also personally solicited potential investors in these offerings as well as the LottoNet Guatemala and LottoNet Colombia offerings. As to LottoNet, a LottoNet report reflects that Gray raised about $351,000 from 5 investors and has at least 63 additional investor prospects. [ECF No. 36-3, p.1]. During the Show Cause Hearing, former sales agent Sexton testified that this LottoNet report accurately reflects Gray and the sales agents' sales of LottoNet shares to investors.

As to the overseas LottoNet offerings, in January 2017, Gray emailed a potential investor that LottoNet was selling shares in three international offerings and seeking to raise: (1) $5 million through the offer of shares in LottoNet Peru S.A.C.; (2) $2.5 million through the offer of shares in LottoNet Guatemala Corp.; and (3) $2.5 million through the offer of shares in LottoNet Colombia Corp. [ECF No. 36-10]. On February 3, 2017, Gray executed a LottoNet Peru Subscription Addendum telling this same investor LottoNet would provide a bonus and revenue bonus to the investor if he invested an

additional $50,000 by February 10, 2017, and that LottoNet would guarantee shares in LottoNet Peru S.A.C., LottoNet Guatemala Corp., and LottoNet Colombia Corp. [ECF No. 36-8, p. 8]. Attached to Gray's Subscription Addendum is the LottoNet Peru Subscription Agreement which directs the investor to wire transfer his investment funds for LottoNet Peru shares to Defendant LottoNet's bank account at Bank of America in Pompano Beach, Florida, or to mail a check to LottoNet Peru at Defendant LottoNet's address in Pompano Beach. [ECF No. 36-8, p. 7]. On February 10, 2017, the deadline Gray had provided for the bonus, the investor, who Gray had solicited, executed the LottoNet Peru Subscription Agreement to invest $50,000 in exchange for 50,000 shares in LottoNet Peru [ECF No. 36-8, pp. 2, 7].

3. Vitale Directly

From no later than May 2016 until at least February 2017, Vitale has worked as a sales agent in the LottoNet boiler room. [ECF Nos. 11-6, ¶¶ 2, 4, 17; 11-8, ¶¶ 2-3, 6-7; Testimony of Sexton; Testimony of Jones]. Vitale and Gray used the name "Donovan Kelly" when referring to Vitale at LottoNet. [ECF Nos. 11-6, ¶ 4; 11-8, ¶¶ 3, 6-7]. He solicited investors directly, by phone and in-person meetings at LottoNet. [ECF Nos. 36-7, ¶¶ 14-20; 11-6, ¶¶ 2, 4, 17; 11-8, ¶¶ 2-3, 6-7; Testimony of Sexton; Testimony of Jones]. LottoNet's sales agent report credits Vitale with raising $4,071,190.00 from 92 investors and having 597 investor prospects. [ECF No. 36-3, p. 1, (# 11: Donovan Kelly)].

C. Misrepresentations and Omissions in the LottoNet Offerings

In connection with LottoNet's offering, LottoNet, Gray, and Vitale have made material misrepresentations and omissions about the use of investor funds, Gray's compensation, and commissions paid to LottoNet's sales agents.

1. Defendants' Representations about the Use of Investor Funds

LottoNet and Gray have made material misrepresentations and omissions regarding the use of investor funds in LottoNet's offering documents. From no later than July 1, 2015 [ECF No. 36-4, p. 1] until at least February 2017 [ECF Nos. 11- 6, ¶¶ 2, 15; 11-17, ¶¶ 3 & 7, pp. 6-42 (Ex. 2)], they made false and misleading statements in LottoNet's PPM, which provides that investor funds 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."

[ECF No. 11-17, p. 11 (SEC00038)].

The PPM and Executive Summary further state that 100 percent of the investor funds raised would be spent in these four categories, including the percentage that would be spent in each category. [ECF No. 11-17, pp. 18, 48]. In the Form D filing Gray executed and filed with the SEC on behalf of LottoNet, he represents that the total compensation to officers and directors would be approximately $200,000. [ECF Nos. 36-11, p. 7 (SEC00116); 36-12, p. 7 (SEC00124)]. In the executive summary, Gray and

LottoNet assert LottoNet will use investor funds to "invest[] primarily into marketing a quality product." [ECF No. 11-17, p. 48 (SEC00075)].

In the Scripts Vitale drafted and, together with Gray, directed sales agents to use during calls with investors, Vitale states, "we are only raising a small amount of $5 million dollars for advertising and Technical Support on the backside." [ECF Nos. 11-6, ¶¶ 12-13, p. 11 (SEC00149); 11-8, ¶ 3]. Sales agents used the Scripts to tell potential investors LottoNet would use investor funds for advertising and technical support. [ECF 11-6, ¶ 13]. During the Show Cause Hearing, former sales agent Sexton testified he and other sales agents in the boiler room told potential investors LottoNet would use investor funds for technical development and marketing. Vitale also made these representations to potential investors directly during phone calls, representing that LottoNet would use investor funds for technical development, including development of a cellular phone application, and the marketing of LottoNet. [ECF No. 11-8, ¶¶ 6-7].

Additionally, Defendants assure investors their money will not be spent on sales agents or commissions. In the LottoNet PPM Gray, Vitale, and the sales agents distribute to potential investors, LottoNet represents that "no commissions or any other form of remuneration will be paid on sales made directly to the public by the Company." [ECF No. 11-17, p. 10 (SEC00037)]. Similarly, the Form D and Amended Form D Gray executed and filed with the SEC on behalf of LottoNet represents that

LottoNet will not pay commissions to sales agents or promoters. [ECF Nos. 36-11, pp. 5 (SEC00114), 6 (SEC00115); 36-12, pp. 5, (SEC00122), 6 (SEC00123)].

Each representation about the use of investor funds is false. Contrary to the representations in the PPM and executive summary that 100 percent of investor funds would be spent on software and technology development, marketing, managerial and administrative expenses, and legal expenses, LottoNet and Gray, a signatory on the accounts [ECF No. 36-13, ¶ 3], used investor funds to line Gray's and Vitale's pockets, pay sales agents, fund personal expenditures, and to produce a pornographic film at LottoNet's offices [Testimony of Jones (film production)]. As reflected in the below chart, contrary to the PPM and Gray's SEC filings on behalf of LottoNet, more than $1.3 million of investor funds were diverted to pay Vitale and other sales agents. Of the $4.8 million raised from investors, Gray and LottoNet misappropriated and misused more than $2 million of it. [ECF No. 36-13, ¶ 13]:

Recipient of Investor Funds	**Amount**
Defendant CEO David Gray	$473,000[4]
Defendant Sales Agent Joseph Vitale	
Through Relief Defendant Oracle[5]	$245,943[8]
Through Relief Defendant CRM[6]	$413,750[9]

[4] Testimony of SEC Accountant Genaldi that bank statements obtained after he executed his declaration filed in support of the TRO Motion [ECF No. 36-13,¶ 8(a)] reflect that Gray took additional funds and the updated total is about $473,000.

[5] ECF No. 11-13.

Through Relief Defendant Council Club[7] Total	$129,663[10] $789,356 (total)
LottoNet Sales Agents (other than Vitale)	$564,738[11]
LottoNet Officers and Directors (other than Gray)	$153,212[12]
Personal Expenditures	$121,183[13]
Transferred to an Account in Peru	$89,000[14]
	$2,190,489

---

[5] ECF No. 36-13, ¶ 8(d).

[4] ECF No. 36-13, ¶ 8(e).

[9] Testimony of Genaldi that the amount shown in his declaration [ECF No. 36-13, ¶ 8(e)], has increased to $413,750, based on more recent spending reflected in account statements received after executing the declaration.

[6] ECF No. 36-13, ¶ 8(c).

[10] ECF No. 36-13, ¶ 8(d).

[11] ECF No. 36-13, ¶ 8(b); Testimony of Sexton that Royce Teets was a sales agent; Testimony of Jones that remaining individuals identified in ECF No. 36-13, ¶ 8(b) are sales agents; ECF No. 36-15 (list of sales agents).

[12] ECF No. 36-13, ¶ 10. Alford is an officer (ECF No. 11-17, Ex. 2 (SEC00061)); Goldstein is a Director (ECF No. 11-17 SEC00057; "AG" identified as Goldstein at SEC00054).

[13] ECF No. 36-13, ¶ 8(b).

[14] Testimony of Genaldi that the amount shown in his declaration [ECF No. 11-13, ¶ 8(e)], has increased to about $89,000, based on an additional transfer reflected in account statements received after executing the declaration.

2. Misappropriation of Investor Funds and Gray's Compensation

Gray's misappropriation of investor funds to line his own pockets and pay personal expenditures is omitted from the marketing materials, including the PPM, executive summary, and Scripts. [ECF Nos. 36-4 (PPM); 36-5 (Executive Summary); 36-9 (LottoNet Peru Executive Summary); 36-2 (Scripts); 36-14 (Scripts)].

Additionally, in the PPM, LottoNet and Gray represent that Gray will receive $10,000 a month. [ECF No. 11-17, p. 30 (SEC00057)]. This is false. Gray has received, either directly or through payments for his personal expenses, at least the following LottoNet funds:

Month and Year	Amount
August 2015	$16,097
September 2015	$19,231
October 2015	$22,776
November 2015	$14,534
December 2015	$17,852
January 2016	$14,181
February 2016	$15,202
March 2016	$27,624
April 2016	$16,815
May 2016	$25,645
June 2016	$33,026
July 2016	$40,731
August 2016	$41,231
September 2016	$32,538
October 2016	$32,231
November 2016	$21,731
December 2016	$27,851
January 2017	$26,453

[ECF No. 36-13, ¶ 9].

In the Amended Form D Gray filed with the SEC, which remains in effect, he represents total compensation to officers and directors of approximately $200,000. [ECF No. 11-4, p. 7 (SEC00124)]. This is also false. As set forth in the chart shown above in Section III.C.1, LottoNet has paid more than $626,000 to Gray and its other officers and directors.

3. Use of Investor Funds to Pay Undisclosed Commissions to Sales Agents

Contrary to Defendants' representations about the use of investor funds in the PPM, Form D filings, and during solicitation calls to potential investors, LottoNet and Gray have used investor funds to pay the LottoNet sales agents commissions of about 35 percent in exchange for selling LottoNet shares to investors. [ECF No. 11-6, ¶ 7; Testimony of Sexton]. Contrary to Gray and LottoNet's representations in the PPM and Form D filing that LottoNet will not pay sales agents commission, LottoNet has paid sales agents more than $1.3 million of the investor funds. [See first chart above: $789,456 to Vitale plus $564,738 to other sales agents]. Gray and Vitale discuss these commissions with the sales agents, and Gray has paid them. [ECF Nos. 11-6, ¶¶ 4, 7, p. 6 (SEC00144); 11-17, ¶¶ 2, 4; Testimony of Sexton].

Vitale told potential investors 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 purchased shares. [ECF No. 11-8, ¶¶ 6-7]. One such call occurred in August 2016. [ECF No. 11-8, ¶ 6]. However, by

August 2016, Vitale had received at least $245,000 in investor funds that LottoNet siphoned to him by paying his company Oracle [ECF No. 36-13,¶ 8(c)] and he had discussed the sales commission structure with at least one newly-hired sales agent [ECF No. 11-6, ¶¶ 2, 4]. As reflected in the first chart in Section III.C.1 above and evidence supporting it, Vitale received more than $789,000 of LottoNet investor funds through his entities, the Relief Defendants. In addition, during a conference call with an undercover FBI agent ("UC"), Vitale, and another sales agent who is an FBI Cooperating Witness ("CWI") at LottoNet, the UC asked if a commission would be charged on the UC's investment, and Vitale instructed the CWI to represent that he received a $1,000 weekly salary and a percentage ownership in the company. [ECF No. 36-7, p. 6, ¶ 18]. Vitale told the UC that Vitale received a weekly salary "a little better" than the CWI, while failing to disclose that Vitale would earn a commission on the investment. [ECF No. 36-7, p. 6, ¶ 18].

In addition, 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." [ECF No. 11-17, pp. 10 (SEC00037), 38 (SEC00065)]. The evidence reflects that this is also false. Not only did LottoNet and Gray pay sales agents, but also the sales agents they paid were not registered as broker-dealers. [ECF Nos. 11-6, ¶ 7 (Sexton received sales commission); 11-

20 (FINRA has no license or other broker-dealer documents for sales agent Sexton)]; *Ross Sinclaire & Assoc. v. Premier Senior Living, LLC*, 11-cv-5104, 2012 WL 2501115, at *1 n. 1 (N.D. Cal. June 27, 2012) (FINRA is the quasi-governmental organization that regulates broker-dealers). In fact, during the time he worked at LottoNet as a sales agent, Vitale was under a FINRA Order prohibiting him from affiliating with broker-dealers. [ECF Nos. 11-18, ¶ 2(g); 11-12].

Additionally, the Scripts Vitale drafted, which Gray and Vitale told sales agents to read verbatim during calls with potential investors [ECF No. 11-8, ¶ 3], do not disclose the commissions paid to sales agents [ECF Nos. 36-2; 36-14; Testimony of Sexton]. LottoNet told then-sales agent Sexton not to disclose the SECs to potential investors. [ECF No. 11-6, ¶ 8].

Gray has concealed the commissions by telling sales agents to refer to the commission he received as a "bonus." [ECF No. 11-17, ¶ 4]. Gray has also instructed at least one sales agent, the CWI, on how to avoid answering questions about compensation. [ECF No. 36-7, p. 7, ¶ 20].

D. <u>The Scheme to Conceal Vitale's Background from Investors</u>

From no later than July 21, 2015 until approximately February 2017, Gray and Vitale concealed from investors the criminal history and negative regulatory history and sanctions previously imposed against Vitale for securities-related violations.

1. Vitale Pled Guilty to the Unlawful Operation of A Boiler Room And He Has Been on Probation Since 2013

In 2013, Vitale pled guilty to a state charge of unlawful operation of a boiler room. [ECF 36-7, p. 2, ¶ 8 (sworn affidavit for criminal complaint)]. Vitale is currently on probation until April 2018. [ECF 36-7, p. 2, ¶ 8].

2. The Pennsylvania Securities Commission Has Found Vitale Violated the Securities Laws and Entered a Cease and Desist Order against Him

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. [ECF No. 11-11]. 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. [ECF No. 11-11]. 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. [ECF No. 11-11]. 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 in Pennsylvania. [ECF No. 11-11].

3. FINRA Has Barred Vitale from Affiliating with Any Broker-Dealers

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 [ECF No. 11-12]. 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. [ECF No. 11-12]. 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.'" [ECF No. 11-12, p. 17]. On September 11, 2011, FINRA barred Vitale from associating with any FINRA member in any capacity. [ECF No. 11-12].

4. Vitale and Gray Tell LottoNet Investors Vitale Is "Donovan Kelly"

To conceal Vitale's criminal history for operating an unlawful boiler room and to conceal Vitale's negative regulatory history from potential investors, Gray and Vitale referred to Vitale as "Donovan Kelly." [ECF Nos. 6-7; 11-6, ¶ 4; 11-8, ¶¶ 3, 6-7]. Vitale used the alias Donovan Kelly during his telephone calls to solicit potential investors to contribute to LottoNet. [ECF No. 11-8,¶¶ 3, 6-7].

E. LottoNet and Vitale Acted as Unregistered Broker-Dealers, Gray Aided and Abetted LottoNet and Vitale's Violation, and Vitale Aided and Abetted LottoNet's Violation

From no later than May 2016 until at least February 2017, LottoNet, through Gray, retained sales agents to solicit investors for the LottoNet offering. [ECF Nos. 11-6, ¶¶ 4-5; 11-17, ¶ 2]. Gray and LottoNet agreed to pay sales agents for raising investor funds directly and through a boiler room where Gray managed at least 13 individuals to assist him with investor solicitation. [ECF Nos. 11-17, ¶ 3; 11-18, ¶ 2]. In exchange for soliciting investors, LottoNet and Gray used investor funds to pay the sales agents commissions totaling at least 35 percent of the amount raised from investors, broken down as follows:

- 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. [ECF No. 11-6, ¶¶ 3-4, 7; Sexton Testimony].

LottoNet has paid the sales agents at least $1.3 million of investor funds.

F. The Defendants Continued to Solicit Investors until March 21, 2017

LottoNet recently sought to expand its sales force by hiring an additional sales agent to solicit investors, and LottoNet planned to raise an additional $10 million from investors through recent offerings overseas in Peru, Guatemala, and Colombia. The

LottoNet boiler room was operating on March 21, 2017, the day the District Court entered the TRO Order in this case. On that date, the FBI executed a search warrant at LottoNet's office [ECF No. 36-7, p. 7, ¶ 26], and the lead counsel for the SEC in this case, as well as the Receiver and his counsel, were present.

IV. PRELIMINARY INJUNCTION

The Undersigned respectfully recommends that the District Court enter a preliminary injunction against all Defendants, based on the following:

A. Standard for Imposing

The SEC is entitled to a preliminary injunction if it establishes (1) a prima facie case showing the defendant has violated the securities laws and (2) a reasonable likelihood defendant will re-offend if not enjoined. *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1340 (S.D. Fla. 2003). The SEC appears "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Lauer*, 03-80612-CIV-MARRA, 2008 WL 4372896, at *24 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 F. App'x 550 (11th Cir. 2012). The SEC therefore faces a lower burden than a private litigant when seeking an injunction, and need not meet the requirements for an injunction imposed by traditional equity jurisprudence. *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *SEC v. J.W. Korth & Co.*, 991 F. Supp. 1468, 1472 (S.D. Fla. 1998).

Unlike private litigants, the SEC need not demonstrate irreparable harm or the unavailability of an adequate remedy at law. *Hecht*, 321 U.S. at 331; *J.W. Korth*, 991 F.

Supp. at 1473. Nor is it required to show a balance of equities in its favor. *SEC v. U.S. Pension Trust Corp.*, 07-22570-CIV-MARTINEZ, 2010 WL 3894082, at *22 (S.D. Fla. Sept. 30, 2010), *aff'd sub nom. SEC v. U.S. Pension Trust Corp.*, 444 F. App'x 435 (11th Cir. 2011).

The SEC's evidence in this case warrants entry of the requested injunctive relief against Defendants on all applicable grounds. The witness testimony and exhibits attached to the SEC's TRO Motion and admitted at the Show Cause Hearing demonstrate LottoNet, Gray, and Vitale repeatedly violated the anti-fraud provisions of the federal securities laws, and will continue to violate the law if the Court does not enter a preliminary injunction and continue the asset freeze against them.

B. The SEC Has Established *Prima Facie* Violations of the Securities Laws

The Undersigned respectfully recommends that the District Court find that the SEC has met its burden of establishing a *prima facie* showing of violations of the securities laws as alleged in the Complaint.

1. The Offered Investments Are Securities

The LottoNet's and LottoNet Peru's offering materials identify the common shares as investments and securities. [ECF Nos. 11-17, pp. 7 (SEC00034) ("This Memorandum is being used by LottoNet Operating Corp. [] solely in connection with the private placement of the securities."), 16 (SEC00043); 36-8, p. 3, Section h (stating the shares are offered and sold unregistered with the SEC pursuant to registration exemptions under Securities Act or relevant state securities laws)]. Their own

characterization of these investments as subject to the federal securities laws is sufficient to characterize them as securities where, as here, there are "no countervailing factors that would [lead] a reasonable person to question this characterization." *Diaz Vicente v. Obenauer*, 736 F. Supp. 679, 693 (E.D. Va. 1990) (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 68 (1990)).

2. *The Defendants Are Violating Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act*

The Undersigned respectfully recommends that the District Court find the SEC presented sufficient evidence to find Defendants have violated Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act, based on the following:

Section 10(b) of the Exchange Act and Rule 10b-5 render it unlawful, in connection with the purchase or sale or securities, 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. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. The SEC must also establish scienter and that the violations were made while using any means or instrumentality of interstate commerce. *SEC v. Corp. Relations Grp.*, No. 6:99-cv-1222, 2003 WL 25570113 at *7 (M.D. Fla. Mar. 28, 2003). For the SEC's case, reliance, damages, and loss causation are not required elements. *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012).

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." 15 U.S.C. § 77q(a). 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." 15 U.S.C. § 77q(a)(1)-(3). 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. *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

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. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971); *see also In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 913 (1961) (the SEC has held that the subdivisions of Rule 10b-5, as well as Securities Act §17(a), should be considered "mutually supporting").

A defendant engages in a fraudulent scheme in violation of the antifraud provisions of the securities 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. *SEC v. Huff*, 758 F. Supp. 2d 1288, 1347-48 (S.D. Fla. 2010). To state a claim based on

conduct violating these provisions, the SEC 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)). *In re Alstom SA Sec. Litig.*, 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)).

a. Defendants' Misrepresentations and Omissions

As discussed above in Section III, the Undersigned respectfully recommends that the District Court find that the SEC presented sufficient evidence that LottoNet, Gray, and Vitale have made numerous material misrepresentations and omissions to investors. Specifically, as set forth above, this includes evidence that they 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. Defendants also did not tell investors about commissions, payments for personal expenses, and Gray's misappropriation of investor funds, thus rendering representations about the use of investor funds misleading.

As discussed above, in the PPM Gray and Vitale distribute to potential investors, LottoNet and Gray represent that "no commissions or any other form of remuneration will be paid on sales made directly to the public by the Company." [ECF No. 11-17, p. 10 (SEC00037)]. This is false. LottoNet has transferred more than $1.3 million to its sales agents, either directly or through companies whose bank accounts the sales agents

control. LottoNet and Gray have 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 will 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.

In the PPM, LottoNet and Gray tell investors that Gray will receive compensation of $10,000 per month. This is false. In truth, Gray has taken an average of $23,210 of the investor funds each month.

Additionally, Gray and LottoNet do not disclose this misappropriation of investor funds to pay Gray directly as well as his personal expenses. Contrary to LottoNet's and Gray's representations in the PPM and during solicitation calls that LottoNet would use investor funds to market and develop the Company, LottoNet and Gray have used more than $585,000 of the investor funds to pay Gray directly and for personal expenses, including strip clubs, Las Vegas vacations, and some of Gray's wedding-related expenses.

Moreover, in the Form D and Amended Form D, LottoNet and Gray tell the SEC and potential investors that LottoNet will pay $200,000 in total to its officers and directors. This is false. LottoNet has paid at least $580,000 to its officers and directors.

In the executive summary Gray and Vitale distribute to potential investors, LottoNet asserts that the Company will 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. [ECF No. 11-17, p. 48 (SEC00075)]. This is false. Of the $4.8 million LottoNet has raised from investors, LottoNet has siphoned a total of more than $2 million -- to Gray personally, to pay personal expenses, to sales agents, and to the LottoNet officers and directors. [ECF 36-13, ¶ 13].

Also contrary to the representations in the PPM about 100 percent of investor funds being used for LottoNet business purposes, the SEC presented evidence that Gray and LottoNet used earlier investor money to pay newer investors their purported investment returns in Ponzi-like fashion. [ECF No. 36-13, ¶ 14]. For this same reason, the LottoNet PPM representation that investors will receive proceeds from LottoNet business revenue [ECF No. 11-17, p. 25 (SEC00052)] is false and misleading.

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 Defendants to fraudulently persuade investors to invest in LottoNet. Furthermore, 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*, 131 S. Ct. 2296, 2302 (2011), only the "maker" of a misstatement may be directly liable under Section 10(b) and Rule 10b-5(b).[15] "The maker" is "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 2302. 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. *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); s*ee also In re Pfizer Inc. Secs. Litig.*, 936 F. Supp. 2d 252, 268–69 (S.D.N.Y. 2013).

As for the statements in the PPM and Form D filings, LottoNet and Gray are the makers of the false statements and omissions. Gray, who is the principal of LottoNet, has ultimate authority over the statements in the PPM. [ECF Nos. 11-6, ¶ 5; 11-17, pp. 27-28 (SEC00054-55)]. Gray signed the false Form D filings filed with the SEC on behalf of LottoNet [ECF Nos. 36-11; 36-12]. As for the misrepresentations in the sales agent Scripts, Vitale and Gray are the makers. Vitale drafted the scripts [ECF No. 11- 8, ¶ 3]

---

[15] *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).

and Gray has ultimate authority over the company [ECF No. 11-6, ¶ 5]. As for the representations and omissions discussed above that Vitale made during his phone calls and in-person meetings with investors, Vitale is the maker. [ECF No. 11-8, ¶¶ 6-7].

Additionally, operating a Ponzi scheme is a violation of Section 10(b) and Rule 10b-5 of the Exchange Act. *SEC v. George*, 426 F.3d 786 (6th Cir. 2005).

b. Material Misrepresentations and Omissions

The Undersigned respectfully recommends that the District Court find the SEC presented sufficient evidence and legal authority to find the misrepresentations and omission are material, for the following reasons:

A false statement or omission must be material for a defendant to be liable for it. The test for materiality is "whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *SEC v. Merchant Capital, LLC,* 483 F.3d 747, 766 (11th Cir. 2007) (citation omitted). Put another way, information is material if a reasonable investor would consider it significant to making an investment decision. *Basic v. Levinson,* 485 U.S. 224, 230 (1988). "[I]f a company chooses to make a statement on a subject, having chosen to speak, the company is obligated to make a full and fair disclosure." *Harvey M. Jasper Ret. 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.")).

Truthful statements can be misleading when someone omits to state a material fact without which the truthful statement, based on the circumstances, becomes misleading. 17 C.F.R. § 240.10b-5(b); *Harvey M. Jasper Ret. Trust*, 920 F. Supp. at 967. "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.'" *Merchant Capital*, 483 F.3d at 768 (quoting *Kennedy v. Tallant*, 710 F.2d 711, 719 (11th Cir. 1983)). 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. *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)).

Under these standards, Defendants' false statements and omissions are material. Misrepresentations regarding the use of investors' funds are material. *U.S. v. Lochmiller*, 521 F. App'x 687, 691-92 (10th Cir. 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); *SEC v. Cochran*, 214 F.3d 1261, 1268 (10th Cir. 2000); *SEC v. Research Automation Corp.*, 585 F.2d 31, 35-36 (2nd Cir. 1978) (misleading statements and omissions about the use of investor funds were material as a matter of

law); *SEC v. Holschuh* 694 F.2d 130, 144 (7th Cir. 1982) (failing to use proceeds for promised mining operations was material); *SEC v. Merrill Scott & Assocs., Ltd*., Case No. 02-cv-39-TC, 2011 WL 5834271, at *11 (D. Utah Nov. 21, 2011) (finding that a reasonable investor "would consider it important to know [his] funds were being misappropriated and used for purposes other than those stated when solicited"); *SEC v. Smith*, Case No. C2-CV-04-739, 2005 WL 2373849 at *5 (S.D. Ohio, Sept. 27, 2005) ("Certainly a reasonable investor would consider how the Defendants would actually spend his money were he to invest to be an important factor when determining whether to invest in the offering."); *SEC v. Fitzgerald*, 135 F. Supp. 2d 992, 1022 (N.D. Cal. 2001) (failure to use proceeds for real estate development costs was material); *SEC v. Benson*, 657 F. Supp. 1122, 1130-31 (S.D.N.Y. 1997) (misusing proceeds for undisclosed compensation was material).

Any reasonable investor would want to know how Defendants were really using investor funds and that Defendants were misappropriating investor money, Defendants were using their money to finance a pornographic film at LottoNet, to pay new investors their purported proceeds, to pay commissions to sales agents for luring investors, and to finance personal expenditures.

Additionally, Defendants' failure to disclose the total amounts taken from investor contributions, including commissions of 35 percent or more, particularly when they stated LottoNet would not pay commissions or LottoNet would spend investor

funds on things other than commissions, are sufficient to constitute material misrepresentations and omissions. *SEC v. Alliance Leasing Corp.*, 98-cv-1810, 2000 WL 35612001, at *8-9 (S.D. Cal. 2000), *aff'd* 28 F. App'x 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)). Any reasonable investor would want to know that Defendants were not, as Defendants represented, spending investor funds to develop the Company, but were instead using 35 percent of investors' money to pay sales agents for soliciting their investments.

c. Scienter

The Undersigned respectfully recommends that the District Court find the SEC presented sufficient evidence that Defendants acted with the requisite scienter.

Courts have defined scienter as a state of mind embracing intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The SEC 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." *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 10 (D.D.C. 1998). The Eleventh Circuit has concluded that scienter may be established by a showing of knowing misconduct or severe recklessness. *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982). Gray's conduct is imputed to LottoNet when determining whether there is sufficient evidence

of LottoNet's scienter. *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1340 (S.D. Fla. 1999) (finding that the scienter of corporate officers is properly imputed to the corporation).

The evidence establishes Defendants have acted knowingly, or at a minimum recklessly, while making the misrepresentations and omissions discussed above. Gray is the architect of the fraudulent scheme. He has authority over LottoNet and runs the day-to-day operations. [ECF No. 11-6, ¶ 5]. As set forth above, he hires the sales agents, pays them their secret sales commissions, has attempted to conceal the SEC payments by referring to them as "bonuses," directs sales agents to utilize Scripts which do not disclose the SECs, and instructed the CWI how to avoid answering the UA's question about compensation. He has received more than $485,000 of the investor funds directly, he signed the Form D filings, and as clearly set forth in the PPM, he is responsible for the representations in the PPM.

As the PPM states, Gray, a director, has a fiduciary duty to the investors "to exercise good faith and integrity in handling the Company's affairs." [ECF No. 11-17, pp. 30 (SEC00057), 37 (SEC00064)]. In addition, Gray's signature block appears on the subscription agreements with the investors on behalf of the LottoNet and LottoNet Peru. He is also a signatory on the LottoNet bank accounts from which LottoNet pays investors their purported investment returns in Ponzi-like fashion and otherwise misuses investor funds. [ECF No. 36-13, ¶ 14].

According to the testimony of sales agent Jones, LottoNet, which was controlled by Gray, spent investor funds to produce a pornographic film in LottoNet's offices. Therefore, undisputed evidence was presented that Gray has known, or has been severely reckless in not knowing, that the PPM and Form D filings contain false statements and omissions about the use of investor funds and the payment of commissions and that LottoNet has been paying investors their purported investment returns using earlier investors' funds. Not only has Gray operated the LottoNet offering fraudulently, Gray recently began three more securities offerings through LottoNet and from LottoNet's offices -- this time overseas.

The SEC also presented sufficient evidence that Vitale engaged in knowing misconduct: He drafted the Scripts omitting any reference to commission and represented only that funds would be distributed for developing the Company's technology. However, when he made these representations, he and his companies, the Relief Defendants, had already received funds from LottoNet. He has used an alias to conceal his true identify from investors so they would not discover his criminal history, that he was on probation for operating an unlawful boiler room, and his regulatory history. Even after having been sanctioned by the Pennsylvania Securities Commission and FINRA, Vitale has made no effort to ensure compliance with the federal securities laws. He knew that knowledge of the commissions could cause someone not to invest, and so he instructed the CWI on how to falsely answer questions the UA asked about

commissions. And Vitale was misleading when the UA asked a direct question about commission payments, because Vitale responded about the salary he received and nothing more.

d. The "In Connection With" Requirement

The SEC presented undisputed evidence that Defendants made the misrepresentations and omissions in connection with the offer, purchase, and sale of the securities they are offering and selling to investors. Accordingly, the Undersigned respectfully recommends the District Court find Defendants' acts meet the "in connection with" requirement of Section 10(b) and Rule 10b-5. *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (noting that courts should interpret the "in connection with" requirement broadly to effectuate the remedial purpose of the federal securities laws); *SEC v. Merkin*, No. 11-23585, 2012 WL 5245561, at *8 (S.D. Fla. Oct. 3, 2012) (stating that 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) (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-62 (2d Cir. 1968)).

e. Interstate Commerce

The Undersigned respectfully recommends that the District Court find the SEC presented sufficient evidence that Defendants are offering and selling their unregistered securities in interstate commerce.

Specifically, the SEC has presented evidence that Defendants have attracted at least 138 investors nationwide through the telephone and the use of email to deliver offering materials. [ECF Nos. 11-6, ¶¶ 2, 20; 11-17, ¶¶ 2-3, 7, p. 61 (SEC00088); 36-13; 11-8, ¶ 2]. As former sales agent Sexton testified during the Hearing, LottoNet also accepts payments over the phone through credit card numbers. Further, the Subscription Agreements for LottoNet and LottoNet Peru direct investors to either wire investment funds to LottoNet's bank account or to mail a check to LottoNet. In the Subscription Agreement in evidence for LottoNet Peru, the investor is in Houston, Texas, and is directed to wire or mail his investment funds to Pompano Beach, Florida.

For all the foregoing reasons, the Undersigned respectfully recommends that the District Court find the SEC has established a prima facie case that the Defendants have violated and continue to violate the securities laws.

f. Control Person Liability as to Gray

The Undersigned respectfully recommends that the District Court find the SEC presented sufficient evidence for a finding that Gray can be liable as a control person, for the following reasons:

To establish Gray's liability as a control person under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), the SEC must show: (i) a primary violation of the securities laws, and (ii) that Gray had "control" over the primary violator. *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 288 (5th Cir. 2006). Section 20(a)

requires only "some indirect means of discipline or influence short of actual direction." *Lane v. Page*, 649 F. Supp. 2d 1256, 1306 (D.N.M. 2009) (quoting *Richardson v. Macarthur*, 451 F.2d 35, 41 (10th Cir. 1971)).

In the Eleventh Circuit, a defendant is liable as a control person where the defendant "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *Brown v. The Enstar Grp., Inc.*, 84 F.3d 393, 397 (11th Cir. 1996) (citation and quotation marks omitted). The Eleventh Circuit has held that neither Section 20(a) nor the SEC regulation, 17 C.F.R. § 230.405 (1995), defining "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person" appears to require participation in the wrongful transaction to establish liability. *Brown*, 84 F.3d at 397 n. 5.

The evidence amply establishes that Gray exercised control over LottoNet until the Court appointed a Receiver. Among other things, he 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. As LottoNet sales agent Sexton testified at the Show Cause Hearing, Gray had authority and control over LottoNet and ran the day-to-day operations. He signed each of LottoNet's filings with the SEC on behalf of the Company, and the subscription agreements with investors are prepared for his

signature. He is a signatory on the LottoNet bank accounts and signs the SEC checks to the sales agents. Thus, Gray controlled the finances and operations of LottoNet, including the use of investor funds.

g. The Defendants' Scheme Liability

The Undersigned respectfully recommends the District Court find that the SEC presented evidence for a finding that Defendants 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 SEC 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). *Alstom,* 406 F. Supp. 2d at 474.

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. *Huff,* 758 F. Supp. 2d at 1347-48; *see also SEC v. Fraser*, 09-00443, 2010 WL 5776401, at *7 (D. Ariz. Jan. 28, 2010) (quoting *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997)).

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." *Fraser*, 2010 WL 5776401, at *7.

The 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). *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153 (1972) (finding liability under Rule 10b-5(a) and (c) 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) ("deceptive acts" and "course of conduct included both oral and written statements, such as the backdated contracts").

However, in this instance, Defendants have committed numerous deceptive and fraudulent acts beyond making misrepresentations and omissions, which can also give rise to scheme liability. *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) (extending scheme liability 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).

The SEC presented evidence that Gray has committed numerous deceptive acts. As set forth above, this includes: misappropriating more than $485,000 of investor funds for himself; improperly using investor money to pay sales agents commissions for

selling investors LottoNet's shares, despite his representations in the PPM and Form D filings to the contrary; and attempting to conceal LottoNet's payment of commissions to sales agents. These actions stand in stark contrast to the use of funds representations in the LottoNet PPM and executive summary.

The SEC presented sufficient evidence that Vitale made the fraud possible by drafting the Scripts, training sales agents on how to misrepresent the LottoNet offering, and soliciting investors. To conceal Vitale's criminal and disciplinary history, Gray and Vitale engaged in the charade that Vitale was someone else -- namely, Donovan Kelly, a fictitious person. On top of that, Gray concealed the undisclosed sales commissions by referring to them as "bonuses," telling a sales agent to refer to his commissions as "bonuses," and coaching the CWI how to avoid answering questions about sales agent compensation.

The Undersigned respectfully recommends that the District Court find that 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. Because Gray's actions can be imputed to LottoNet, the Company along with Gray and Vitale are liable for violations of Sections 17(a)(1) and (3) of the Securities Act and Rules 10b-5(a) and (c).

3. Violating and Aiding and Abetting Violations of Section 15(a)(1)

The Undersigned respectfully recommends that the District Court find that the SEC has presented sufficient evidence to find violations of Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1), as follows:

Section 15(a)(1) of the Exchange Act 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 SEC 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." *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977). "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." *U.S. Pension Trust Corp.*, 2010 WL 3894082, at *20-21 (quoting *Corp. Relations Grp., Inc.*, 2003 WL 25570113, at *17). Scienter is not an element of a Section 15(a)(1) violation.

The SEC presented sufficient evidence to find that since at least May 2016, LottoNet has regularly operated a boiler room of sales agents for the express purpose of selling securities in LottoNet and LottoNet Peru. LottoNet pays its sales agents transaction-based commissions. The Company has utilized this boiler room and its PPM and other Marketing Materials to tout LottoNet and LottoNet Peru, including the supposed profitability of the investments.

Additionally, the SEC presented sufficient evidence to find that 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. Vitale 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 the Scripts sales agents used to solicit investors. Accordingly, Vitale acted as an unregistered broker and violated Section 15(a) of the Securities Act.

In the alternative, there is ample evidence that Vitale aided and abetted LottoNet's violations of Section 15(a). In order to establish aiding and abetting liability, the SEC 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. *SEC v. BIH Corp.*, 10-cv-577, 2011 WL 3862530, at *6 (S.D. Fla. Aug. 31, 2011). 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. *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2008).

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. [ECF Nos. 11- 8, ¶ 3; 11-6, ¶¶ 4, 6-7]. Vitale knew or was reckless in not knowing that he aided and abetted LottoNet's violations of Section 15(a).

There is also ample evidence in the record to find that Gray aided and abetted LottoNet's and Vitale's violations of Section 15(a)(1) of the Exchange Act. Gray hired sales agents and instructed them how to pitch investors. He directed Vitale to create scripts for the sales agents and train them. Gray signed the Form D, Amended Form D and subscription agreements, and had control over the PPM and other offering documents used to solicit investors.

Further, Gray had control over LottoNet's bank accounts and paid Vitale and the other sales agents a substantial portion of the investor proceeds as sales commissions. LottoNet also credits him with soliciting more than $350,000 from investors and having 63 "prospects" to solicit. Accordingly, Gray knew or was reckless

in not knowing that he aided and abetted LottoNet's and Vitale's violations of Section 15(a).

C. Defendants Are Likely to Continue to Violate the Securities Laws

The Undersigned respectfully recommends that the District Court find the evidence presented shows Defendants are likely to continue to violate the securities laws. To obtain a preliminary injunction, the SEC must: (1) make a *prima facie* showing Defendants have violated the securities laws; and (2) show a reasonable likelihood of future violations. *SEC v. Calvo,* 378 F.3d 1211, 1216 (11th Cir. 2004). The evidence above demonstrates Defendants violated the securities laws.

In assessing whether there is a "reasonable likelihood" of future violations, courts look to the following factors: (1) the egregiousness of defendant's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of a defendant's assurances against future violations; (5) the defendant's recognition of the wrongful nature of the conduct: and (6) likelihood of opportunities for future violations. *Carriba Air*, 681 F.2d at 1322; *SEC v. Unique Fin. Concepts, Inc.*, 119 F. Supp. 2d 1332, 1340 (S.D. Fla. 1998). Past illegal conduct is highly suggestive of the likelihood of future violations. *Commodity Futures Trading Com'n v. Matrix Trading Grp.*, 00-8880, 2002 WL 31936799, at *12 (S.D. Fla. Oct. 3, 2002).

In this case, the Undersigned recommends that the District Court find that each of the factors set forth above weighs in favor of the Court entering a preliminary

injunction. First, the SEC presented evidence that Defendants' conduct is egregious. Gray has misappropriated and misused more than $2 million of the investor funds LottoNet has raised from investors. His looting of investor money has caused LottoNet to nearly run out of money and has endangered the $4,855,950 the investors contributed to the Company, of which only about $30,701.23 remains. [ECF No. 36-13, ¶¶ 4, 7].

In addition, Gray and Vitale have blatantly misrepresented how LottoNet uses investor funds. They tell investors the Company will spend the funds on marketing the LottoNet business to consumers and other business expenses, while omitting disclosure of the sales agent commissions, personal expenses, and Gray's misappropriation of funds. Gray and Vitale have raised money from investors under a false pretense so they can continue to line their own pockets.

Second, the SEC presented evidence that the conduct is far from isolated. It has been going on since at least July 2015. LottoNet is seeking to expand its investor solicitation efforts by hiring a new sales agent for its boiler room, and Gray and LottoNet have started a new offering in Peru. Gray has operated the scheme since at least October 2015, when he filed the first Form D with the SEC misrepresenting the use of investor funds. From no later than May 2016 through at least February 2017, Gray has used sales agents and managed a boiler room to target investor funds. Vitale has solicited investors since no later than May 2016 [ECF Nos. 11-6, ¶¶ 2, 4; 11-18, ¶ 2(g)]. Vitale drafted several Scripts for the sales agents' use in selling the LottoNet securities

to the unsuspecting public, and he has received more than $780,000 of the investor funds through Relief Defendants, which are his companies and bank accounts.

Third, the evidence supports a finding that Gray and Vitale have demonstrated a high degree of scienter. Vitale, operating under an alias, is knowingly making 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, Defendants have not offered any assurances against future misconduct and plainly do not believe their conduct is wrong. Finally, unless this Court restrains and enjoins Defendants, they will have the opportunity to continue exactly as they have been.

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 has not ensured compliance with the federal securities laws.

V. Continuance of the Emergency Relief

1. Asset Freeze

The TRO Order imposes an asset freeze pending determination of the SEC's request for a preliminary injunction. [ECF No. 15]. The Undersigned respectfully recommends to the District Court the continuation of the asset freeze until the preliminary injunction concludes, for the following reasons:

Pursuant to their general equity powers, federal courts may order ancillary relief to effectuate the purposes of the federal securities laws, both to preserve Defendants' assets and ensure that wrongdoers do not profit from their unlawful conduct. *See, e.g., Levi Strauss & Co. v. Sunrise Int'l Trading Co.*, 51 F.3d 982, 987 (11th Cir. 1995); *SEC v. Solow*, 682 F. Supp. 2d 1312, 1325 (S.D. Fla. 2010). An asset freeze is appropriate "as a means of preserving funds for the equitable remedy of disgorgement." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005).

The Court need only find some basis for inferring a violation of the federal securities laws to impose an asset freeze. *SEC v. Unifund SAL*, 910 F.2d 1028, 1037 (2nd Cir. 1990); *SEC v. Comcoa, Ltd.*, 887 F. Supp. 1521, 1524 (S.D. Fla. 1995); *SEC v. Aragon Capital Advisors, LLC*, 07 CIV.919 FM, 2011 WL 3278642, at *6 (S.D.N.Y. July 26, 2011). The SEC's "burden for showing the amount of assets subject to disgorgement (and, therefore available for freeze is light: a reasonable approximation of a defendant's ill-gotten gains" is all that is required. "Exactitude is not a requirement[.]" *ETS Payphones*,

408 F.3d at 735 (citation and quotation omitted); *FTC v. IAB Marketing Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014). The SEC's burden to demonstrate the potential for dissipation of funds is even lighter. *FTC v. IAB Marketing Assocs., LP*, 972 F. Supp. 2d 1307, 1313 n.3 (S.D. Fla. 2013) ("There does not need to be evidence that assets will likely be dissipated in order to impose an asset freeze") (citing *ETS Payphones*, 408 F.3d at 734 and *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367-70 (S.D. Fla. 2006)); *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402, 415 (S.D.N.Y. 2001) ("the SEC must demonstrate only . . . a concern that defendants will dissipate their assets").

As set forth in the chart in section III.C.1 above, Gray personally took more than $485,000 and he raised about $4.8 from investors through his company LottoNet. Vitale received about $1.3 million for his role in the scheme. Relief Defendants received more than $800,000 of investor money. Less than 0.22 percent of investor money has been returned to LottoNet investors, and less than $60,000 of the $4.8 million raised remain in Defendants' accounts, *combined*. Thus, the disgorgement amounts against Defendants far exceed their assets and income.

If these funds are not frozen, then Gray and Vitale might dissipate it, particularly with fees for lawyers in another action. As SEC Accountant Allen Genaldi testified, in the brief time since filing his declaration in support of the SEC's TRO Motion, the amount Defendants have misused and misappropriated has increased. They have not repaid investors more than 0.22 percent on their investment. Instead, they have spent

investor money -- on sales agent commissions, the production of pornography, luxury vehicles, a yacht, and other items.

Additionally, both Gray and Vitale have demonstrated they have no respect for the Court's Orders. Neither Defendant appeared at, or even attempted to reschedule, their deposition. Instead, Defendants simply skipped them. Nor did either Defendant file an Accounting, as the TRO required.[16] An asset freeze is critical to preserving the investor money that remains. The SEC and Receiver presented evidence that the following vehicles and watercraft belong to Gray or Vitale, through Relief Defendants, and were acquired with investor funds:

- 2013 Jeep Wrangler purchased in 2016 from Chris Bosh, who had customized it (VIN: 1C4BJWDG4DL658912); registered owner is Relief Defendant Council Club.
- 2011 Ferrari California (VIN: ZFF65LJA2B0178422); registered owner is Relief Defendant Council Club.
- Yacht registered to David Gray (Vessel Number: FL1162KP; Hull ID is RGMLA050D203).

[Testimony of Jones].[17] The SEC has presented sufficient evidence to demonstrate that

---

[16] The SEC is working with counsel for Gray to arrange a date and time next week for his deposition, and will make arrangements directly with the jail holding Vitale.

[17] The SEC represents that these vessels also appear on Gray or Vitale's CLEAR reports.

the above-referenced vehicles and watercraft are subject to the Asset Freeze. Therefore, the Undersigned respectfully recommends to the District Court the inclusion of these vehicles and watercraft in the Asset Freeze. The Undersigned also respectfully recommends to the District Court that the following entities be named in the Asset Freeze Order: CRM Edge, LottoNet Peru, S.A., LottoNet Guatemala, and LottoNet Colombia. The SEC has identified these entities as subsidiaries of LottoNet, owned by Gray and created from investor funds.

2. *Continuation of Records Preservation Order*

The Undersigned respectfully recommends to the District Court the continuation of the records preservation order until the preliminary injunction concludes, for the following reasons:

The TRO Order includes a records preservation order and directs Defendants to file sworn accountings within 5 days of the date of the TRO Order, which deadline occurred March 27, 2017. Gray and Vitale, who has been incarcerated since March 25, 2017, have not filed sworn accountings. Vitale attempted to flee the country to Ecuador -- even though he had already been served with the summons and Complaint in this case. The Receiver is in the process of taking physical possession of LottoNet's and Relief Defendants' assets. However, Defendants have numerous bank accounts and the Receiver is still in the process of identifying and harnessing these assets.

Further, most LottoNet records and reports are maintained on CRM Edge, which

the Receiver is still in the process of harnessing and preserving. A continuation of the Records Preservation Order will ensure that files are preserved while the SEC and Receiver continue to identify assets, associates, agents, and partners of Defendants and Relief Defendants.

3. Continuance of Repatriation Order

The Undersigned respectfully recommends to the District Court the continuation of the repatriation order until the preliminary injunction concludes, for the following reasons:

The SEC presented evidence that LottoNet and Gray have sent investor funds overseas and that Defendant LottoNet's subsidiary LottoNet Peru holds an account in Peru. Under these circumstances where investor funds are overseas, a repatriation order will enable the retrieval of investor funds diverted overseas. The SEC also presented evidence that Vitale attempted to flee from the United States to Ecuador. To the extent Defendants diverted investor funds to Ecuador, a repatriation order will be essential for recovering those funds.

ACCORDINGLY, the Undersigned respectfully recommends that the District Court enter a preliminary injunction against Defendants and continue the asset freeze, repatriation order, and records preservation order until the preliminary injunction concludes.

OBJECTIONS

The parties will have until **noon on Tuesday, April 4, 2017**, to file written objections, if any, with United States District Judge Joan A. Lenard. Each party may file a response to the other party's objection by **noon on Wednesday, April 5, 2017**. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

The SEC shall immediately serve the Report and Recommendations on Vitale in jail. Any party filing objections and/or responses shall immediately serve their objections and/or responses on Vitale in jail.

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on March 31, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Joan A. Lenard
All Counsel of Record
Defendant Joseph Vitale, *Pro Se*