

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO.: 17- 21033-CIV-LENARD/GOODMAN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LOTTONET OPERATING CORP., ET AL.,

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**PLAINTIFF'S MOTION FOR FINAL DEFAULT JUDGMENT AGAINST  
DEFENDANTS DAVID GRAY AND JOSEPH VITALE, AND FINAL JUDGMENT  
AGAINST LOTTONET OPERATING CORP. AND RELIEF DEFENDANTS**

**I. INTRODUCTION**

Plaintiff Securities and Exchange Commission hereby files this motion to resolve all relief against all Defendants and Relief Defendants in this case. Pursuant to Federal Rule of Civil Procedure 55(b)(2) and the Court's Order of December 21, 2017, the Commission moves for entry of a Final Default Judgment Against Defendants David Gray and Joseph Vitale a/k/a Donovan Kelly. We also seek Final Judgment against Defendant LottoNet Operating Corp. ("LottoNet") and Relief Defendants Oracle Marketing Group Inc. ("Oracle"), CRM Interactive LLC ("CRM"), and The Council Club LLC ("Council Club"). LottoNet and the Relief Defendants are in a receivership, and the Receiver is filing his consent to the relief sought herein in a separate filing.

Specifically, the Commission seeks the following relief

- A. Permanent injunctions as to all Defendants;
- B. As to Defendant Gray: (i) joint and several liability with LottoNet for disgorgement in the amount of \$473,000, representing the amount of LottoNet investor funds Gray misappropriated; (ii) prejudgment interest of \$14,398.46; and (iii) a civil money penalty equal to the amount of his pecuniary gain (\$473,000); and (iv) an officer and director bar;
- C. As to Defendant Vitale: (i) disgorgement in the amount of \$789,356, representing the amount of his ill-gotten gains, (ii) prejudgment interest in the amount of \$24,028.57; (iii) an order deeming these disgorgement and prejudgment interest amounts satisfied in light of the \$2 million restitution order against Vitale in the parallel criminal case against him; (iv) dismissal of the civil money penalty against Vitale, who is currently incarcerated for the same conduct at issue here.

- D. As to Defendant LottoNet: (i) disgorgement in the amount of \$4.8 million, representing the amount raised from LottoNet investors through securities fraud; (ii) prejudgment interest in the amount of \$146,115.56; and (iii) dismissal of the claim for a civil money penalty;
- E. As to Relief Defendant Oracle: (i) joint and several liability with Vitale for \$245,943 in disgorgement, representing the amount of ill-gotten gains Vitale received through payments to Oracle; (ii) prejudgment interest in the amount of \$7,486.68; and (iii) an order deeming these disgorgement and prejudgment interest amounts satisfied in light of the \$2 million restitution order against Vitale in the parallel criminal case;
- F. As to Relief Defendant CRM: (i) joint and several liability with Vitale for \$413,750 in disgorgement, representing the amount of ill-gotten gains Vitale received through payments to CRM; (ii) prejudgment interest in the amount of \$12,594.85; and (iii) an order deeming these disgorgement and prejudgment interest amounts satisfied in light of the \$2 million restitution order against Vitale in the parallel criminal case; and
- G. As to Relief Defendant Council Club: (i) joint and several liability with Vitale for \$129,663 in disgorgement, representing the amount of ill-gotten gains Vitale received through payments to Council Club; (ii) prejudgment interest in the amount of \$3,947.04; and (iii) an order deeming these disgorgement and prejudgment interest amounts satisfied in light of the \$2 million restitution order against Vitale in the parallel criminal case.

## **II. PROCEDURAL BACKGROUND**

The Commission filed this action on March 20, 2017 for injunctive and other relief against Vitale. (ECF No. 1). Simultaneous with the Complaint, the Commission filed an emergency *ex parte* motion for temporary restraining order (“TRO Motion”) (ECF No. 8), and a motion for the appointment of a receiver (ECF No. 6). On March 21, the Court granted the TRO Motion and appointed a receiver over LottoNet and the Relief Defendants (ECF No. 12 & 15). The Court subsequently granted the Commission’s request for a preliminary injunction in this matter (ECF No. 40 & 42). Gray and Vitale failed to answer or otherwise plead to the Complaint, and the Clerk entered defaults against them (ECF No. 49 & 58).

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

### **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. (ECF No. 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 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 is a company formed in 2016. Vitale is the signatory on CMR’s bank account. From August 30, 2016 until January 31, 2017, LottoNet paid Vitale through at least 14 payments of investor funds to CMR totaling at least \$335,000. Without any legitimate basis, CRM received investor proceeds emanating from the fraud. *Id.* at ¶17.

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

## **B. THE LOTTONET FRAUD**

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

From about July 21, 2015 through the filing of this case, LottoNet and Gray offered and sold LottoNet shares to the public. *Id.* at ¶22. The terms of the offering were 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. Gray was responsible for the representations in the PPM , which stated:

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 them in connection with the transactions contemplated hereby, and DG [Gray] will have taken all necessary action to authorize the execution and delivery of this

Agreement .... 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.

*Id.* at ¶25. 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. *Id.* at ¶26. Gray, in his capacity as CEO, executed the Form D and Amended Form D on behalf of LottoNet. *Id.* at ¶27. In the Form D Filings, LottoNet and Gray state the offering will not last longer than one year. *Id.* at ¶28. This representation is false, as the LottoNet offering continued beyond one year. *Id.* at ¶29. 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, and transferred about \$72,000 of investor funds overseas to Peru. *Id.* at ¶¶31 & 32.

## **2. Solicitation of Investors**

From no later than July 21, 2015 until at least February 2017, Gray solicited investors and 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. The 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. LottoNet 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, Gray used sales agents to place telephone calls to the 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, the Defendants 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. 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 assured 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. The Form D and Amended Form D Gray executed and filed with the Commission on behalf of LottoNet falsely said LottoNet would not pay commissions to sales agents or promoters, *id.* at ¶53, and falsely said the total compensation to officers and directors would be \$200,000, *id.* at ¶54.

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. The Defendants’ representations about the use of investor funds were materially false. *Id.* at ¶59. As set forth in more detail below, Gray and LottoNet misused or misappropriated more than \$2 million of the investor funds, contrary to the representations made about the use of investor funds. *Id.* at ¶60.

***a. Misappropriation of Investor Funds and Gray’s Compensation***

Contrary to the LottoNet and Gray’s representations about the use of investor funds in the PPM and during solicitation calls, from July 21, 2015 until at least February 28, 2017, more than \$464,000 of the investor funds were transferred from LottoNet to Gray directly. *Id.* at ¶61. Contrary to the representation in the PPM that Gray would receive \$10,000 a month as compensation, Gray received an average of \$22,000 per month. *Id.* An additional \$121,000 of investor funds were used to pay for personal expenses, including strip clubs, clothing, and some of Gray’s wedding-related expenses. *Id.* at ¶62. Gray and LottoNet did not disclose the misappropriation and misuse of investor funds to pay personal expenses. *Id.* at ¶63. The misappropriation and misuse of investor funds is omitted from the PPM, executive summary, Scripts, and other Marketing Materials. *Id.* at ¶64. Contrary to the Amended Form D Gray filed with the Commission, that officer and director compensation would be about \$200,000, LottoNet paid officers and directors three times that amount – about \$617,000. *Id.* at ¶65.

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

LottoNet, Gray, and 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, executive summary, and Form D filing, and contrary to Vitale’s oral representations to potential investors, Gray and LottoNet used investor funds 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. The

Defendants 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 – even though by August 2016, Vitale had received at least \$245,000 in commissions from LottoNet. *Id.* at ¶¶ 70-71. 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. Gray concealed the commissions by, among other things, telling at least one sales agent to refer to the commission he received as a “bonus,” and paying commissions in installments so they would appear to be salaries. *Id.* at ¶73.

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 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 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. In September 2011, FINRA barred him from associating with any FINRA member. *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 Gray and Vitale Aided And Abetted This Conduct**

From no later than May 2016 until at least February 2017, LottoNet, through Gray, 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. *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.

**IV. MEMORANDUM OF LAW**

**A. LEGAL STANDARD FOR DEFAULT JUDGMENTS AGAINST GRAY AND VITALE**

The factual allegations of a complaint are deemed admitted by the entry of a default.<sup>1</sup>

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

When a defendant fails to defend an action and a default has been entered, 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>

**B. THE COMPLAINT ALLEGES GRAY AND VITALE VIOLATED SECTION 17(A) OF THE SECURITIES ACT AND SECTION 10(B) 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>2</sup> *Id.*

<sup>3</sup> The Complaint alleges Vitale sold securities in the form of LottoNet shares. (ECF No. 1 at ¶ 2).

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

<sup>5</sup> *SEC v. Corp. Relations Group*, 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. Misrepresentations and Omissions**

As set forth above in Section III, the Defendants made numerous material misrepresentations and omissions to investors. 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. The Defendants also omitted to 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.

In the PPM Gray and Vitale distributed to potential investors, LottoNet and Gray represented that no commissions or any other form of remuneration would 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. LottoNet and Gray failed to disclose this use of investor funds. In addition, during telephone calls to solicit investors, Vitale and the sales agents told potential investors that LottoNet would use investor funds for technical support and marketing. This was false. Vitale received more than \$700,000 of investor funds, directly and through his companies (the Relief Defendants). However, he failed to disclose this to potential investors.

In the PPM , LottoNet and Gray told investors that Gray would receive compensation of \$10,000 per month – which was another false statement. In truth, Gray took an average of \$23,210 of the investor funds each month. Gray and LottoNet did not disclose this misappropriation of investor funds to investors. Contrary to representations to investors in the PPM and during solicitation calls to potential investors that LottoNet would use investor funds to market and develop the company, Gray and LottoNet used more than \$585,000 of the investor

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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)).

funds to pay Gray directly and for personal expenses, including strip clubs, Las Vegas vacations, and wedding expenses. Moreover, in the Form D and Amended Form D filed with the Commission, Gray represented the company would pay \$200,000 in total to its officers and directors. This was also false. LottoNet paid at least \$580,000 to its officers and directors.

In the executive summary Gray and Vitale distributed to potential investors, LottoNet 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 LottoNet raised from investors, LottoNet siphoned a total of more than \$2 million - to Gray personally, to Vitale and his companies (the Relief Defendants), to pay personal expenses, to sales agents, and to the LottoNet officers and directors.

All of these actions violated Section 17(a)(2) of the Securities Act in that the Defendants “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

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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).

Scripts and is a maker and Gray is a maker since he had ultimate authority for them as LottoNet's principal. Vitale is the maker of the false representations and omissions discussed above that Vitale made during his phone calls with investors. 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 was the principal of LottoNet, had ultimate authority over the statements in the PPM, and he signed the false Form D filings filed with the Commission on behalf of LottoNet.

## **2. The 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 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, the false statements and omissions are clearly material. The 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 the Defendants promised, but instead

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<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).

<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).

for Gray and Vitale's own financial gain.<sup>24</sup>

Additionally, the 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 the Defendants 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. Scheme Liability**

The 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 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> Gray and Vitale's false statements and omissions described above alone provide a basis for scheme liability under Sections 17(a)(1) and

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<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)).

<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.

(3), and Rules 10b-5(a) and (c).<sup>29</sup> However, in this instance, the Defendants 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. As for Gray, he committed numerous deceptive acts. As set forth above, he misappropriated investor funds for himself. In addition, he improperly used investor funds to pay sales agents commissions for selling investors LottoNet shares, despite his representations in the PPM and Form D filings to the contrary and then attempted to conceal LottoNet’s payments of these commissions.

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. 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 the Defendants acted knowingly, or at a minimum recklessly, while making the misrepresentations and omissions discussed above. Gray was the architect of the fraudulent scheme. He had authority over LottoNet and ran the day-to-day operations, and he signed the false representations filed with the Commission. He hired sales agents, paid them

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<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 (2d 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 (2d 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).

<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.

secret sales commissions, attempted to conceal the commission payments by referring to them as “bonuses,” and directed sales agents to use the Scripts which failed to disclose the commissions and misrepresented how LottoNet would use investor funds. He misappropriated investor funds for his own personal use, signed the false Form D filings, and was responsible for the representations in the PPM. He was the signatory on the LottoNet bank accounts from which the Company paid investors their purported returns in a Ponzi-like fashion and otherwise misused investor funds. Therefore, Gray knew, or has been severely reckless in not knowing, that the PPM and Form D filings contained false statements and omissions about the use of investor funds and the payments of commissions, and that LottoNet was paying investors their purported investment returns using nothing more than earlier investors’ funds.

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

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

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

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<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).

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

**C. VITALE VIOLATED, AND VITALE AND GRAY AIDED AND ABETTED  
VIOLATIONS OF, SECTION 15(A)(1) OF THE EXCHANGE ACT  
(COUNTS VII - 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.

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

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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). Scierer is not an element of a Section 15(a)(1) violation. *Corporate Relations*, 2003 WL 25570113, \*17.

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.

Additionally, Gray aided and abetted LottoNet's and Vitale's violations of Section 15(a)(1) of the Exchange Act. As set forth in the Complaint, 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. Accordingly, Gray knew or was reckless in

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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).

not knowing that he aided and abetted LottoNet's and Vitale's violations of Section 15(a). Accordingly, the Court should enter Default Judgment against Gray on Count VIII.

**D. CONTROL PERSON LIABILITY AS TO GRAY**  
**(COUNT X)**

To establish Gray's liability as a control person under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), the Commission must show: (i) a primary violation of the securities laws, and (ii) that Gray had 'control' over the primary violator. *Financial 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 Group, 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 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" [17 C.F.R. § 230.405 (1995)] appears to require participation in the wrongful transaction to establish liability. *Brown*, 84 F.3d at 397 n.5.

The allegations amply establish that Gray exercised control over LottoNet until the Court appointed a Receiver. Among other things, he was the Chief Executive Officer, President, and Chairman of the Board of Directors of LottoNet, and he owned more than half of LottoNet's common stock. He signed each of LottoNet's filings with the Commission on behalf of the Company. He was the signatory on the LottoNet bank accounts and paid himself and the sales agents investor funds. Thus, Gray controlled the finances and operations of LottoNet, including the use of investor funds. The Court should enter Default Judgment against him on Count X.

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

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

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 motions for a temporary restraining order and preliminary injunction, the facts demonstrate Gray and Vitale engaged in the alleged violations. As the Court held in granting the Commission's motions for a temporary restraining order and preliminary injunction, the facts also demonstrate that there is a reasonable likelihood Gray and Vitale will repeat the violations.

In determining whether there is a reasonable likelihood that Gray and 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 permanent injunction. First, the conduct egregious. Gray and Vitale blatantly misrepresented how LottoNet used investor funds. They 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 themselves, Vitale's companies, and sales agents commissions. Vitale raised money from investors under a false name so he could continue to line his own pockets. Gray lied about the use of investor funds and officer and director compensations, and also misrepresented investor money for his personal use. He lied to investors in the PPM, and he lied to the Commission in the Form D filings. It is hard to imagine more egregious and brazen misconduct.

Second, the conduct was far from isolated. Gray began the fraud in 2015, and Vitale solicited investors from no later than May 2016 until March 2017. Gray ran the scheme and directed the improper transfer of investor funds, including the Ponzi scheme. Vitale drafted Scripts for the sales agents' use in selling the LottoNet securities to the unsuspecting public, and received about \$710,000 of the investor funds through the Relief Defendants, which are his companies and bank accounts.

Third, as discussed above, Gray and 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 investor money in undisclosed commissions. Gray blatantly lied to investors and the Commission about the use of investor funds, and operated a Ponzi-like scheme for his own profit. It is hard to imagine someone displaying a higher degree of scienter than someone is who knowingly profits at the expense of others. As to the fourth and fifth factors, Gray and Vitale have not offered any assurances against future misconduct and have given no indication that they understand their conduct is wrong.

Vitale is currently incarcerated, but this does not obviate the need for a permanent injunction against him. Vitale has a history of being sanctioned by the government, and serving time in prison for securities violations, and yet repeating his illegal conduct after being sanctioned and serving his prison term. Vitale was on probation for a crime involving the unlawful operation of a different boiler room when he commenced his unlawful conduct in connection with the LottoNet boiler room. Specifically, as set forth in the Report and Recommendation entered March 31, 2017 (ECF No. 40), in 2013, Vitale pled guilty to a state charge of unlawful operation of a boiler room. (ECF No. 36-7, p. 2, ¶8 (sworn affidavit for criminal complaint)). Vitale was on probation until April 2018 in connection with that crime, and yet he commenced the LottoNet fraud in May 2016. (ECF No. 36-7, p. 2, ¶8). In addition, as set forth in the Complaint, Pennsylvania 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 by engaging in the LottoNet fraud.

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

The Court should order the Defendants 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

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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).

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>

***a. Vitale and the Relief Defendants***

As set forth in the Report and Recommendation adopted by the Court (ECF No. 40 and 50), Vitale profited a total of \$789,356 through the payment of investor funds for undisclosed sales commissions he received through the Relief Defendants, which are companies he controlled. (ECF No. 40 at pp.13 & 14). Specifically, as set forth in the Report and Recommendation (ECF No. 40 at pp. 13 & 14) (citing evidence in the docket), Vitale and the Relief Defendants received the following:

Defendant Sales Agent Joseph Vitale	
Through Relief Defendant Oracle	\$245,943
Through Relief Defendant CRM	\$413,750
Through Relief Defendant Council Club	\$129,663
<u>Total</u>	\$789,356 (total)

Accordingly, the Court should enter an Order directing Vitale to pay \$789,356 in disgorgement; and for the Relief Defendants to be held jointly and severally liable with Vitale for paying disgorgement in the amounts they received – namely, for Oracle to be held jointly and severally liable with Vitale for \$245,943 in disgorgement; for CRM to be held jointly and severally liable with Vitale for \$413,750 of disgorgement; and for Council Club to be held jointly and severally liable with Vitale for \$129,663 of disgorgement. The Relief Defendants are in a receivership, and the Receiver will file his consent to these amounts.

In addition to disgorgement, Vitale and the Relief Defendants should pay pre-judgment interest.<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.

<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.”).

<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).

§ 6621(a)(2). While the Commission could seek prejudgment interest beginning when Vitale and the Relief Defendants obtained the ill-gotten gains, we are seeking it only from the time we filed the Complaint. The amount is \$24,028.57 for Vitale (Exhibit 1), \$7,486.68 for Oracle (Exhibit 2), \$12,594.85 for CRM (Exhibit 3), and \$3,947.04 for Council Club (Exhibit 4).

In the parallel criminal case, Vitale has been ordered to pay restitution of \$2 million based on the same conduct at issue in this case (Exhibit 7). Since that amount exceeds and includes the amount at issue in this case, we ask that the Court enter disgorgement and prejudgment interest against Vitale and the Relief Defendants in the amounts set forth above, and deem these disgorgement and prejudgment interest amounts satisfied by the restitution order.

***b. LottoNet***

As set forth in the Complaint, LottoNet raised more than \$4.8 million from investors. Therefore, the Court should enter an Order directing the Company to disgorge this amount. The Receiver will file a consent to this judgment, including prejudgment interest in the amount of 146,115.56 (Exhibit 5).

***c. Gray***

The Court should enter an Order finding Gray liable for disgorgement in the amount of \$473,000, representing the amount Gray misappropriated for his personal use. (ECF No. 40 at p. 9 & ECF No. 50). Prejudgment interest on this amount from the date of the Complaint totals \$14,398.46 (Exhibit 6).

**3. The Court Should Impose A \$473,000 Penalty Against Gray, And Dismiss The Civil Penalty Claims Against LottoNet and Vitale**

The Court should impose a civil money penalty against Gray 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 Gray 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. Courts consider the following in assessing a penalty amount:

- (1) the egregiousness of the defendants’ conduct; (2) the degree of their scienter;

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

(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, Gray'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, while Gray misappropriated \$473,000 for himself and used investor funds to pay unlawful sales commissions, pay for his own wedding, and run a Ponzi-like scheme. Meanwhile, Gray only distributed about \$10,525.43 total to investors. Clearly, the investors, who contributed about \$4.8 million sustained massive losses from their investments. In addition, Gray's violative conduct was recurrent and lasted for years, with Gray orchestrating the scheme, being fully responsible for the misrepresentatives in the PPM, running the Ponzi-like scheme, controlling all the LottoNet monies and investor funds, managing an illegal boiler room, hiring unregistered brokers to solicit investors and paying them concealed commissions with investor funds, and making misrepresentations about the use of investor funds to the Commission in public filings. As for Gray's ability to pay, we do not have a complete picture of his assets, as he deprived us of the ability to assess that by failing to file the accounting the Court ordered (ECF No. 15, 41).

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 a penalty equal to pecuniary gain, or three tiers of penalties, all of which apply "for each violation..." Third tier penalties are appropriate in this case. Third tier of penalties apply 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. 15 U.S.C. §§ 77t(d)(3). A third tier violation is \$160,000. Multiplied by each of the 8 counts against Gray, the total would be \$980,000. While we could seek this amount, given the uncertainty about Gray's ability to pay the penalty, we are instead seeking a civil penalty equal to Gray's pecuniary gain –

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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).

which, as set forth above, is \$473,000.

#### **4. The Court Should Impose An Officer And Director Bar Against Gray**

The Securities Act and the Securities Exchange Act authorize the Court to prohibit a defendant who violates the anti-fraud provisions of these acts from serving as an officer or director of a publicly held company upon a showing that the defendant's "conduct demonstrates unfitness to serve as an officer or director of any such issuer."<sup>48</sup> Alternatively, a Court may impose an officer or director bar under its inherent equitable powers.<sup>49</sup>

Under the Sarbanes-Oxley Act, courts generally consider a number of factors in determining "unfitness," including: (1) the "egregiousness" of the underlying securities law violations; (2) the defendant's "repeat offender status"; (3) the defendant's "role" or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur.<sup>50</sup> Most of these factors are discussed above in connection with the permanent injunction and penalty the Commission seeks against Gray. The conduct was egregious, and involved misrepresenting facts to investors and the Commission, misappropriating investor funds, operating an unlawful boiler room of unregistered brokers, and running a Ponzi-like scheme to defraud investors. Gray was the owner of LottoNet and orchestrated the fraud. He controlled the bank account, and thus was directly in control of the Ponzi scheme and the misappropriation. He signed the false Commission filings, and he hired the unregistered broker-dealers. As set forth above, he acted with a high level of scienter, and he had a significant stake in the violation because he owned LottoNet and used the investor funds for his personal gain to the tune of \$473,000 – even siphoning off money from investors to help pay for his wedding and to entertain himself at strip clubs. As set forth above and in the Report and Recommendation (ECF No. 40), there is a high likelihood Gray will engage in misconduct in the future. Gray should be permanently barred from serving as an officer or director of a public company.

#### **IV. CONCLUSION**

For all the reasons set forth above, the Commission asks the Court to enter the relief set forth herein.

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<sup>48</sup> 15 U.S.C. § 77t(e); 15 U.S.C. § 78u(d)(2).

<sup>49</sup> See *SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994).

<sup>50</sup> See *SEC v. Monterosso*, 2012 WL 12950028 (J. Lenard) (S.D. Fla. Feb. 16, 2012) (internal citations omitted).

January 4, 2018

Respectfully submitted,

By: s/Amie Riggle Berlin  
Amie Riggle Berlin, Esq.  
Senior Trial Counsel,  
Florida Bar Number 630020  
Direct Dial: (305) 982-6322  
E-mail: berlina@sec.gov

*Attorney for Plaintiff*  
**SECURITIES AND EXCHANGE COMMISSION**  
801 Brickell Avenue, Suite 1800  
Miami, Florida 33131  
Telephone: (305) 982-6300  
Facsimile: (305) 536-4154

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on January 4, 2018, 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

Joseph Vitale a/k/a Donovan Kelly  
Inmate Number 901700216  
Joseph V. Conte Facility  
1351 N.W. 27<sup>th</sup> Avenue  
Pompano Beach, FL 33069  
*Pro Se Defendant*  
Via UPS Overnight Delivery, Fax, and Mail

Ryan Stumphauzer, Esq.  
Stumphauzer & Sloman  
Sun Trust International Center  
One SE 3<sup>rd</sup> Avenue, Suite 1820  
Miami, FL 33131  
Telephone: 305-371-9686  
Email: [rstumphauser@sslawyers.com](mailto:rstumphauser@sslawyers.com)  
*Receiver*

Adam L. Schwartz, Esq.  
Home Bonner Jacobs  
1200 Four Seasons Tower  
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Miami, FL 33131  
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Email: [Robert@rglawfirm.us](mailto:Robert@rglawfirm.us)  
*Counsel for Defendant Gray*



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### Vitale

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$789,356.00
04/01/2017-06/30/2017	4%	1%	\$7,871.93	\$797,227.93
07/01/2017-09/30/2017	4%	1.01%	\$8,037.80	\$805,265.73
10/01/2017-12/31/2017	4%	1.01%	\$8,118.84	\$813,384.57
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-12/31/2017</b>			<b>\$24,028.57</b>	<b>\$813,384.57</b>



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### Oracle

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$245,943.00
04/01/2017-06/30/2017	4%	1%	\$2,452.69	\$248,395.69
07/01/2017-09/30/2017	4%	1.01%	\$2,504.37	\$250,900.06
10/01/2017-12/31/2017	4%	1.01%	\$2,529.62	\$253,429.68
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-12/31/2017</b>			<b>\$7,486.68</b>	<b>\$253,429.68</b>



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### CRM

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$413,750.00
04/01/2017-06/30/2017	4%	1%	\$4,126.16	\$417,876.16
07/01/2017-09/30/2017	4%	1.01%	\$4,213.11	\$422,089.27
10/01/2017-12/31/2017	4%	1.01%	\$4,255.58	\$426,344.85
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-12/31/2017</b>			<b>\$12,594.85</b>	<b>\$426,344.85</b>



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### Council Club

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$129,663.00
04/01/2017-06/30/2017	4%	1%	\$1,293.08	\$130,956.08
07/01/2017-09/30/2017	4%	1.01%	\$1,320.32	\$132,276.40
10/01/2017-12/31/2017	4%	1.01%	\$1,333.64	\$133,610.04
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-12/31/2017</b>			<b>\$3,947.04</b>	<b>\$133,610.04</b>



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### LottoNet

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$4,800,000.00
04/01/2017-06/30/2017	4%	1%	\$47,868.49	\$4,847,868.49
07/01/2017-09/30/2017	4%	1.01%	\$48,877.14	\$4,896,745.63
10/01/2017-12/31/2017	4%	1.01%	\$49,369.93	\$4,946,115.56
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-12/31/2017</b>			<b>\$146,115.56</b>	<b>\$4,946,115.56</b>



# U.S. Securities and Exchange Commission

## Division of Enforcement

### Prejudgment Interest Report

#### Gray

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$473,000.00
04/01/2017-06/30/2017	4%	1%	\$4,717.04	\$477,717.04
07/01/2017-09/30/2017	4%	1.01%	\$4,816.43	\$482,533.47
10/01/2017-12/31/2017	4%	1.01%	\$4,864.99	\$487,398.46
<b>Prejudgment Violation Range</b>			<b>Quarter Interest Total</b>	<b>Prejudgment Total</b>
<b>04/01/2017-12/31/2017</b>			<b>\$14,398.46</b>	<b>\$487,398.46</b>

**UNITED STATES DISTRICT COURT**  
**Southern District of Florida**  
**Fort Lauderdale Division**

**UNITED STATES OF AMERICA**  
**v.**  
**JOSEPH VITALE**

**AMENDED JUDGMENT IN A CRIMINAL CASE**

Case Number: **17-60102-CR-BLOOM-001**  
 USM Number: **15859-104**

*Date of Original Judgment: 8/22/17*  
*Reason for Amendment: Stipulation to Restitution*

Counsel For Defendant: **Frank Maister**  
 Counsel For The United States: **Michael Berger**  
 Court Reporter: **Yvette Hernandez**

**The defendant pleaded guilty to count 4.**

The defendant is adjudicated guilty of these offenses:

<u>TITLE &amp; SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 USC § 1341	Mail Fraud	10/31/2016	4

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

**All remaining counts are dismissed on the motion of the government.**

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Amended Sentence: **10/24/2017**



**Beth Bloom**  
**United States District Judge**

Date: October 24, 2017

DEFENDANT: **JOSEPH VITALE**  
CASE NUMBER: **17-60102-CR-BLOOM-001**

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **57 months** as to count 4 of the Indictment.

**The court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant be designated to a facility in the Pensacola, Florida and participate in the 500 hour RDAP Program.**

**The defendant is remanded to the custody of the United States Marshal.**

**RETURN**

I have executed this judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

\_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JOSEPH VITALE**  
CASE NUMBER: **17-60102-CR-BLOOM-001**

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years** as to count 4 of the Indictment.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

**The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.**

**The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### **STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JOSEPH VITALE**  
CASE NUMBER: **17-60102-CR-BLOOM-001**

### **SPECIAL CONDITIONS OF SUPERVISION**

**Financial Disclosure Requirement** - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

**Related Concern Restriction** - The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

**Substance Abuse Treatment** - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

**Permissible Search** - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

**Self-Employment Restriction** - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

**Unpaid Restitution, Fines, or Special Assessments** - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

**No New Debt Restriction:** The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining written permission from the United States Probation Officer.

DEFENDANT: **JOSEPH VITALE**

CASE NUMBER: **17-60102-CR-BLOOM-001**

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$2,000,000.00

The defendant must make restitution (including community restitution) to the attached list of payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>	<u>PRIORITY OR PERCENTAGE</u>
All Victims listed in Schedule A, submitted by the Government to U.S. Probation and Clerk of Courts, SDFL. All Victims names and addresses confidential and submitted under seal to protect victims' personal identity information.	\$2,000,000.00	\$2,000,000.00	100%

**Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of \$2,000,000.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.**

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

\*\*Assessment due immediately unless otherwise ordered by the Court.

**DEFENDANT: JOSEPH VITALE**  
**CASE NUMBER: 17-60102-CR-BLOOM-001**

**SCHEDULE OF PAYMENTS**

Having assessed the defendant’s ability to pay, payment of the total criminal monetary penalties is due as follows:

**A. Lump sum payment of \$100.00 due immediately.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons’ Inmate Financial Responsibility Program, are made to the clerk of the court. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE**  
**ATTN: FINANCIAL SECTION**  
**400 NORTH MIAMI AVENUE, ROOM 08N09**  
**MIAMI, FLORIDA 33128-7716**

The assessment/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u><b>CASE NUMBER</b></u> <u><b>DEFENDANT AND CO-DEFENDANT NAMES</b></u> <u><b>(INCLUDING DEFENDANT NUMBER)</b></u>	<u><b>TOTAL AMOUNT</b></u>	<u><b>JOINT AND SEVERAL AMOUNT</b></u>
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**The Government shall file a preliminary order of forfeiture within 3 days.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**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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**FINAL DEFAULT JUDGMENT AGAINST DEFENDANT JOSEPH VITALE**

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

**ORDERED AND ADJUDGED** that Default Judgment is entered against Joseph Vitale, as follows:

**I.**

**PERMANENT 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 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 \$789,356, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$24,028.57, for a total of \$813,384.57. This amount is deemed satisfied by the restitution ordered against Vitale in the criminal case concerning the same conduct at issue in the case, *United States v. Joseph Vitale*, Case No. 17-cr-60102 (S.D. Fla. 2017).

**III. CIVIL PENALTY**

**IT IS FURTHER ORDERED AND ADJUDGED** that the civil penalty against Vitale is hereby dismissed.

**IV. 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.

**V. CERTIFICATION UNDER RULE 54(b)**

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated this \_\_\_\_ day of \_\_\_\_\_ 2018 in Miami, Florida.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

Copy to all counsel and parties of record.

**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 GRAY A/K/A DONOVAN KELLY,**

**Defendants, and**

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

**Relief Defendants.**

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**FINAL DEFAULT JUDGMENT AGAINST DEFENDANT DAVID GRAY**

The Securities and Exchange Commission filed a Complaint and Defendant David Gray failed to enter an appearance or respond to the Complaint, and a Clerk's Default has been entered against him. Accordingly, it is hereby

**ORDERED AND ADJUDGED** that Default Judgment is entered against David Gray, as follows:

**I. PERMANENT INJUNCTION**

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

**IT IS ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

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

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

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

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

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

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

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

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

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

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

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

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray 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 Gray's officers, directors, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Gray.

## **II. DISGORGEMENT, PREJUDGMENT INTEREST, AND CIVIL PENALTY**

**IT IS FURTHER ORDERED AND ADJUDGED** that Defendant Gray is liable for disgorgement of \$473,000, prejudgment interest thereon in the amount of \$14,398.46, and a civil penalty of \$473,000, for a total of \$960,398.46. Defendant shall satisfy this obligation by paying \$960,398.46 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; David Gray 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, Amie Berlin. 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 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.

#### **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 Gray, and further, any debt for disgorgement, civil penalty or other amounts due by Gray 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 Gray 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. OFFICER AND DIRECTOR BAR**

**IT IS FURTHER ORDERED AND ADJUDGED** that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] and Section 20(e) of the Securities Act [15 U.S.C.

§ 77t(e)], Defendant Gray is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78I] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

**VI. 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 Final Judgment.

**VII. CERTIFICATION UNDER RULE 54(b)**

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated this \_\_\_\_ day of \_\_\_\_\_ 2018, in Miami, Florida.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

Copy to all counsel and parties of record.