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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Western Division

CV 14 07249-SJO(FFMx)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

NATIONWIDE AUTOMATED SYSTEMS, INC., JOEL GILLIS, and EDWARD WISHNER,

Defendants,

and

OASIS STUDIO RENTALS, LLC, OASIS STUDIO RENTALS #2, LLC, and OASIS STUDIO RENTALS #3, LLC,

Relief Defendants.

Case No.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDERS (1) FREEZING ASSETS; (2) PROHIBITING THE DESTRUCTION OF DOCUMENTS; (3) GRANTING EXPEDITED DISCOVERY; (4) REQUIRING ACCOUNTINGS; AND (5) APPOINTING A TEMPORARY RECEIVER, AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND APPOINTMENT OF A PERMANENT RECEIVER

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I. INTRODUCTION

This is a government enforcement action brought by Plaintiff Securities and Exchange Commission ("SEC") to stop Defendants from continuing an illegal Ponzi scheme that is happening right now. As part of this ongoing offering fraud, Defendants have raised at least $123 million in investor funds since 2013. In August and September 2014 alone, the Defendants raised about $3.36 million from defrauded investors, and have since used those funds, rather than any real investment profits, to pay returns back to existing investors in pure Ponzi fashion.

In fact, in August, after bouncing hundreds of investor checks, Defendants closed their long-time bank account, opened up a new account at another bank, and resumed raising investor funds and making Ponzi payments through the end of August and in the month of September. To allay investors' concerns, Defendants lied—telling investors in a written letter that their August payment problems were due only to "processing issues", and that going forward, they should stop calling to inquire on payments—and further assured investors that Defendants' operations would be fully "back on track" come October. Unbeknownst to investors, however, Defendants have been transferring to themselves, or to entities affiliated with them, at least $130,000 in investor money since the beginning of September.

The SEC now seeks emergency relief to halt this fraudulent scheme in its tracks. This fraud is being perpetrated by Defendants Nationwide Automated Systems, Inc. ("NASI"), Joel Gillis, NASI's president, and Edward Wishner, NASI's vice president, treasurer and secretary. Defendants have defrauded thousands of investors by marketing false investment opportunities in automated teller machines ("ATMs"). In supposed "sale and leaseback transactions," NASI told investors they were buying, from NASI, an actual ATM, which NASI would then lease back from the investor. As rent, NASI promised it would pay investors $0.50 per ATM transaction from what Defendants claimed was revenue generated by the ATM. Defendants also guaranteed that investors would receive annual returns of 20%; so, to

the extent an ATM did not have enough transactions to reach this level of return, NASI promised it would pay investors any shortfall. And last, NASI claimed it would return the full amount of an investor's original investment after two years, if the investor exercised their supposed right to return their ATMs to NASI.

Defendants' offering is in fact an illegal Ponzi scheme and a fraudulent offering. While NASI appears to claim that it owns about 31,000 ATMs, in truth, it only receives ATM transaction revenue from 235 ATMs. Of the approximate $145 million in cash received by NASI in the last 20months, less than 2% of that amount represents legitimate ATM transaction revenue. The rest is overwhelmingly comprised of funds raised from new investors. Defendants have never told investors that NASI did not own the ATMs ostensibly sold to and leased back from investors. Nor did they ever tell investors that their funds were not being used by NASI to acquire, operate and maintain the ATMs investors had presumably paid for, but were instead being used to pay the guaranteed returns that NASI already owed to earlier investors. And Defendants made sure no investor found out the truth. They had a "non-interference" provision in their standard ATM lease contract, which prohibited investors from ever contacting the far-flung locations where their leased ATMs were purportedly being operated.

The SEC seeks a Court order that will stop this fraud, freeze assets that are the product of the fraud, put a court-appointed receiver in place, and thus protect the public and the investors that have been the victims of the fraud. The SEC seeks these emergency measures to prevent the dissipation of assets and preserve the *status quo.*

II. STATEMENT OF FACTS

A. Background on NASI

NASI is run by Gillis, its president. (Wong Dec. ¶ 16, Ex. 10). Wishner is NASI's vice president, treasurer, and secretary. (Del Greco Dec., Exs. 1, 13, 15.)

Both Gillis and Wishner are signatories on all of NASI's bank accounts. (Del Greco Dec. Exs. 13, 15).[1]

According to a NASI press release, the company is "an ATM machine provider" that "works with high-traffic retail locations, hotels, casinos, convenience stores and movie theatres located throughout the United States." (Wong Dec. ¶ 16, Ex. 10). That same release claims that NASI "has been consistently recognized for its exceptional customer service, sturdy machines and aggressive revenue-sharing model." (*Id.*) NASI also represented that through its operation of "over 80 branches" with "1,000 certified technicians on standby," NASI is able to service more than $1 billion in ATM transactions per month. (*Id.*) In each and every investor agreement, NASI represents that it "is in the business of placing, operating and maintaining automated teller machines." (Wong Dec. ¶ 10, Ex. 5B; Appel Dec. ¶ 5, Ex. A; Wilks Dec. ¶ 4, Ex. A).

B. The Unregistered NASI Offering

1. Defendants' solicitation of investors

Defendants have offered securities—in the form of ATM sale and leaseback agreements—to the public since at least 1999. The scale of Defendants' fraudulent offering is staggering. In just the last 20 months, from January 2013 to the first week of September 2014, Defendants have raised approximately $123 million in new investor funds. Defendants' salesforce, including Gillis himself, solicited new investors through a number of different marketing tactics.

Defendants touted a 19-year track record of profitable returns for investors; indeed, the apparent reliability of NASI's monthly payments caused many new investors to come to NASI through word-of-mouth. (Appel Dec. ¶ 2; Wong Dec. ¶ 3). Defendants also claimed that the business locations that NASI had allegedly obtained

[1] Although the SEC scheduled the investigative testimonies of both Gillis and Wishner, each has informed the SEC, through counsel, that they would assert their Fifth Amendment privilege not to testify. (Del Greco Dec. ¶ 54, Ex. 46).

for the installation of investor ATMs were advantageous, making strong investment performance likely, perhaps even in excess of NASI's already guaranteed 20% annual return. A NASI salesperson sent an email to investors saying exactly that:

> It is a new month already and instead of entering into a period where no ATM's are available as I thought we would be ... guess what? That's right. [NASI] secured a new very large group of Convenient [sic] Store locations, 3500 in fact ...The majority of these locations are connected to gas stations and I believe that this group is mostly located in the Midwest. It continues to be the case that the performance of the Convenience Stores is impressive, many actually get more transactions than the guaranteed 20%.

(Wong Dec. ¶ 6, Ex. 2 (May 4, 2011 email)). In addition, the Defendants endeavored to create a sense of false urgency to invest by periodically claiming that NASI had secured a new round of ATM locations, but given the limited number of opportunities available, potential investors would be well-advised to act quickly. (*Id.* (August 5, 2011 email)). In a marketing email, Defendants also encouraged potential investors to reinvest their retirement savings in NASI's ATM sale and leaseback scheme because NASI's guaranteed 20% annual returns would outperform other alternatives. (*Id.* (August 16, 2012 email)).

For his part, Defendant Gillis personally solicited investors during in-person meetings at NASI's office in Calabasas, or over the phone. (Appel Dec. ¶ 3; Wilks Dec. ¶ 3). To dispel concerns about how NASI was able to provide a 20% annual guaranteed rate of return, Gillis claimed to a potential investor that all of the ATMs sold and leased back by NASI charged a transaction fee much larger than the $.50/transaction being returned to investors. (Appel Dec. ¶ 4). Because, according to Gillis, most of the ATMs charged in the range of $2.50 to $3.00 per ATM transaction, NASI's margin on these fees remained high. (*Id.*) And so, in the event an investor's $.50 return per transaction was not enough to provide an annual return of 20%, Gillis told the investor that NASI had plenty of additional transaction revenue from that investor's ATM to make up the difference. (*Id.*)

2. The terms of the NASI offering

Defendants sold investors ATMs through a standard package of agreements, comprised of: (i) an ATM Equipment Purchase Agreement ("Purchase Agreement"); (ii) an ATM Equipment Lease Agreement ("Lease Agreement"); and (iii) an Addendum To Owner Lease Agreement ("Addendum"). (Wilks Dec. ¶ 4, Ex. 5; Wong Dec. ¶ 10, Ex. 5; Appel Dec. ¶ 5, Ex. A; Del Greco Dec. ¶ 47, Exs. 38-39). All three documents were executed at or around the same time by investors, with Gillis signing on behalf of NASI.

For their investments, the investors paid NASI a fixed amount to buy one or more ATMs from NASI—typically $12,000, but in some cases $19,800 per ATM. (*See, e.g.*, Wong Dec. ¶¶ 10-11, Exs. 5, 6). The ATMs were identified in an exhibit to the Purchase Agreement by both an alleged "serial number" for each ATM and the name of the supposed location where the ATM was to be delivered. (*Id.*) NASI was identified as the "Seller" in the contract, and agreed to deliver the ATMs supposedly sold to the investor to the location identified in the agreement. (*Id.* ¶ 10, Ex. 5A). NASI also warranted that "the ATM(s) purchased by BUYER shall, at the time of delivery, be free and clear of all lines, claims, debts, encumbrances, security interests, or other charges." (*Id.*)

The investors then leased their ATMs back to NASI for an initial 10-year term, under the Lease Agreement. (*Id.* ¶ 10, Ex. 5B). Under the lease, NASI states that it would, "at its sole cost and expense," "operate and maintain the ATMs and provide all services relating thereto," including "processing and accounting for all ATM transactions, obtaining, the delivering and loading of cash for the ATMs, and repairing, maintaining and servicing the ATMs." (*Id.* Ex. 5B (Lease ¶ 5)). The lease also states that NASI, again "at its sole cost and expense," to "maintain insurance coverage on the ATMs in an amount not less than the full replacement value of the ATMs", as well as "liability insurance (both public liability and property damage) covering the operation of the ATMs." (*Id.* Ex. 5B (Lease ¶ 6)).

NASI also states in the Lease Agreement that it "shall pay to [the investor] as rent an amount equal to $0.50 for each 'approved transaction' ... produced by the ATMs for each calendar month during the term of this Agreement." (*Id.* Ex. 5B (Lease ¶ 3)). Following the initial 10-year lease term, the Lease Agreement automatically renewed for additional 3-year periods thereafter, unless investors provided written notice at least 60 days in advance of expiration of their intent to terminate. (*Id.* Ex. 5B (Lease ¶ 2)). If terminated, NASI would either deliver an investor's ATMs to a designated place, or alternatively, return the full amount of their initial investment, i.e., the purchase payment provided for in the Purchase Agreement. (*Id.* Ex. 5B (Lease ¶ 12)).

The Lease Agreement also contained the following "non-interference" clause:

> Non-Interference. During the term of this Agreement, including any extensions thereof, and provided that NASI is not in default under the terms hereof, Lessor agrees not to interfere with the operation of the ATMs by NASI in any manner including, but not limited to, contacting the locations where the ATMs is/are installed and/or any service providers under contract with NASI relating to the operation of such ATMs.

(*Id.* Ex. 5B (Lease ¶ 11)).

In the Addendum, NASI guaranteed it would pay investors a return of at least 20% per year. Specifically, in that document, NASI promised that "[i]f at anytime [*sic*] the owner's ATM machine fails to make enough transactions [t]o pay the owner a monthly check equivalent to twenty (20%) percent [a]nnual return on the owner's investment ... [NASI] guarantees to pay owner the difference between what the Owner has received and [a 20% annual return.]" (*Id.* ¶ 10, Ex. 5C). The Addendum also modified the ten-year lease term provided for in the Lease Agreement by granting investors the right, after only two years, to sell their ATMs back to NASI at their original sales price at any time. (*Id.*)

NASI would also provide investors with monthly account statements, which purportedly reported to investors the transaction data for their ATMs, each identified by serial number and business location. (*Id.*. Ex. 8 (Monthly Investor Summary)).

C. The NASI Offering Is a Fraudulent Scheme

NASI's claims of operating actual ATMs and paying investor returns from those ATMs are demonstrably false. Contrary to the representations made by NASI in its standard Purchase Agreement, Lease Agreement, and Addendum, investors did not own, as their "sole and exclusive personal property," "free and clear of all liens, claims, debts, encumbrances, security interests, or other charges," the ATMs that they had paid NASI tens of thousands of dollars to purchase. Nor did NASI own, operate, maintain, and insure the ATMs specifically identified in each investor agreement. The monthly transaction reports that NASI sent investors to substantiate the amount of their monthly payments were fabricated. And NASI never paid investors monthly rent from the true transaction revenue generated by their ATM investments, rather, investor payments for funded by cash coming into NASI from new investors in the NASI ATM scheme.

1. NASI operates only 235 of the 31,000 ATMs it claims to have sold and leased back from its investors

NASI claimed to sell investors ATMs that it never actually owned. In response to the SEC's investigative subpoenas, NASI produced a voluminous spreadsheet listing all of its purported ATM holdings. (Del Greco Dec. ¶ 39). NASI's spreadsheet states that it is current as of the June 2014 reporting period, and the spreadsheet contains 31,417 separate rows, each corresponding to an ATM identified by serial number, the name of the business and the city and state in which the ATM was purportedly installed by NASI.[2] (*Id.*¶ 39, Ex. 31). NASI also produced monthly spreadsheets detailing the total number of transactions allegedly generated by each of its ATMs.

[2] The spreadsheet curiously contains in many instances duplicate rows for the same ATM. Even accounting for duplication, the number of ATMs listed on NASI's spreadsheet far exceeds the 235 ATMs from which NASI receives transaction revenue from its third-party servicers, National Link and Cardtronics. This duplication further suggests, as discussed *infra*, that NASI "sold" the same sham ATMs to multiple investors.

(*Id.* ¶ 41). NASI's June monthly transaction report contains transaction data, consistent with its ATM list, for 31,417 separate ATM entries. (*Id.* ¶ 41, Ex. 33). NASI's record claims that in June, these 31,417 ATM entries generated an aggregate of 17,950,346 transactions. (*Id.* ¶ 42). NASI's records are patently fabricated.

The SEC subpoenaed NASI's ATM service provider agreements. NASI produced only two contracts – one with Cardtronics USA, Inc. ("Cardtronics") and one with National Link Inc. ("National Link"). (*Id.* ¶¶ 21-22, Exs. 17-18). Under the terms of NASI's agreements with Cardtronics and National Link, these two ATM servicers provide ATM processing, settlement, clearing, installation, and maintenance services to NASI. (*Id.*). Each month, Cardtronics and National Link issued settlement reports to NASI, detailing the revenue generated by NASI's ATMs, less fees owed to the ATM servicers, with the balance to be paid to NASI by monthly check. (*Id.* ¶¶ 23-24, 30-31). These settlement reports listed each NASI ATM by location and by Terminal ID. (*Id.*) NASI has produced no other ATM service agreements. Thus, by NASI's own admission, its only possible source of ATM revenue is from Cardtronics and National Link.

NASI's June record of tens of thousands of ATMs under its ownership or operation, and 17 million transactions processed by NASI ATMs in June cannot be squared with Cardtronics and National Link's settlement reports. Cardtronics lists 149 ATMs in its June 2014 report, with total transaction revenue to NASI in the amount of $48,523.96. (*Id.* ¶ 33). National Link lists 86 ATMs in its June 2014 report, with total transaction revenue to NASI in the amount of $66,635.88. (*Id.* ¶ 27).

In short, the number of ATMs, and the revenue generated from those ATMs, stands in stark contrast to the number of ATMs sold and investment returns paid to investors. In June 2014, NASI actually owned just 235 ATMs, which generated a meager $115,159.84 in revenue. (Del Greco Dec. ¶ 43). In contrast, its internal records claimed that NASI owned 31,417 ATMs, which would have generated $8,975,173.00 in investor returns (based on the promised $0.50 per transaction

return). (*Id.*)[3] This evidence compels only one conclusion: Defendants have "sold" and "leased back" tens of thousands of ATMs to NASI investors that they never owned, that they never operated, and that may have never existed.

As another example of the fraud, NASI's records list 673 ATMs allegedly operated by NASI at Casey's Convenience Marts across Nebraska, Iowa, Minnesota, Kansas and Illinois. (*Id.* ¶ 40, Ex. 32). These same Casey's Convenience Mart locations are identified by dozens of NASI investor agreements as the business locations at which NASI installed the ATMs that these investors supposedly paid for. (*See, e.g.*, Wong Dec. ¶ 9, Ex. 4; Appel Dec., Ex. A; Del Greco Dec., Ex. 38A). NASI's records and investor agreements showing ownership of Casey's ATMs are outright lies. Neither NASI nor its investors own any of the ATMs being operated in Casey's Convenience Mart stores. Rather, each and every ATM installed at a Casey's Convenience Mart is in fact owned by MobileMoney, Inc., a San Clemente-based company which has no affiliation with NASI. (Seger Dec. ¶¶1-3, Ex. A).

In conclusion, each and every month, Defendants meticulously fabricated and sent investors false transaction reports for either non-existent ATMs or ATMs that neither NASI nor its investors actually owned. (*See, e.g.*, Wilks Dec. ¶ 5, Ex. B; Wong Dec. ¶ 13, Ex. 8; Appel Dec. ¶ 6).

2. NASI's business is a Ponzi scheme

Defendants did not pay investors transaction revenue from the operation of the ATMs that NASI claimed to have sold investors. Defendants instead made Ponzi-like payments funded by cash from new investors. In April, May and June 2014, a total of about $23,783,827.29 was deposited to NASI's bank accounts. (Boudreau Dec. ¶ 20). Of that amount, only about $390,805.46—or 1.64% of incoming funds—represented legitimate ATM transaction revenue received from NASI's third-party ATM servicers. (*Id.* ¶ 25). By contrast, about $18,420,608.25 in investor funds were

[3] This is based on the 17,950,346 transactions documented in NASI's records.

deposited to NASI's bank accounts. (*Id.* ¶ 20). In those three months, NASI paid to existing investors at least $23,492,097 in amounts owed under NASI's ATM sale and leaseback agreements. (*Id.* ¶ 24). Accordingly, NASI's April, May and June investor payments were not funded by legitimate ATM transaction revenue, but instead by cash raised from new investors. There is no question NASI made Ponzi payments with money from other investors.

3. Defendants' false and misleading statements

In NASI's sale and leaseback agreements and other written communications, Defendants NASI and Gillis falsely told investors that they were buying from NASI an actual, serial number-identified ATM "free and clear of all liens, claims, debts, encumbrances, security interests, or other charges." (*E.g.*, Appel Dec., Ex. A). They falsely told investors that these ATMs were going to be installed at a designated business, where they would be operated, maintained, serviced and insured by NASI. (*Id.*) They falsely told investors that even so, at all times these ATMs would remain the investor's "sole and exclusive personal property." (*Id.*) They falsely told investors that during the lease term, NASI would pay $.50 per transaction out of the revenue generated by an investor's ATM, and that if these returns fell short of a 20% annual return, NASI would make up the difference. (*Id.*) They falsely told investors that NASI was able to guarantee a 20% annual return because ATM transaction fees were in the range of $2.50-$3.00, and since NASI paid 50 cents per transaction under the lease, NASI could additionally guarantee a 20% return by simply shifting more of its share of the ATM transaction revenue to investors. (*Id.* ¶ 4).

4. Defendants' fraudulent Ponzi scheme is ongoing

In August 2014, NASI mailed approximately $2.8 million in investor checks that were returned for insufficient funds. (Boudreau Dec. ¶ 32). Following hundreds of calls from concerned investors, Gillis wrote an August 28 letter to investors claiming, variously, that NASI "cannot control the U.S. mail," that in "19 years we have never, never been late," that NASI's August checks had been "mailed out in

batches ... due to some processing issues," and that instead of waiting for their batch to be delivered, investors "demanded new re-issued checks" only to call NASI "2-3 days later to say they received their original checks." (Wilks Dec. ¶ 8, Ex. C). Since "[m]any [duplicate] checks ... were deposited and cleared before we could stop them," Gillis claimed that the payment problems in August had been caused by mistaken overpayments. (*Id.*) Before confirming that investor payments would resume in September, Gillis struck a defensive tone:

> Sadly, customers who have been with us for over 15 years had voiced their soured opinions after having made tens of thousands of dollars above and beyond their original purchase ...The September 1st check will be going out late as well due to the inordinate amount of time spent on complaints, cleaning up the general accounting and system upgrades. We hope to be back on track by October 1st.

(*Id.*) Unbeknownst to investors, NASI had drained its general account during the course of August, from a beginning balance of about $2.88 million to only $194,584.71 by month's end. (Boudreau Dec. ¶ 32). On August 20, NASI opened a new account at a different bank. (Del Greco Dec., Ex. 15). It then resumed raising investor money and making Ponzi-like payments to existing investors.

From August 20 to September 8, 2014, a total of about $3,871,430 was deposited to NASI's new bank account. (Boudreau Dec. ¶ 16). Of that amount, only about $52,463.27—or 1.36% of incoming funds—represented legitimate ATM transaction revenue received from NASI's third-party ATM servicers. (*Id.* ¶ 18). By contrast, about $3,360,800 in investor funds were deposited to NASI's new bank account from August 20 to September 8. (*Id.* ¶ 20). In those 19 days, NASI paid to existing investors at least $2,044,050 in amounts owed under NASI's ATM sale and leaseback agreements. (*Id.* ¶ 31). Because Defendants raised new investor money as recently as September, and because they continued to use those funds to pay existing investors in the first week of September, their fraudulent scheme is ongoing.

D. Investor Funds Transferred to NASI, Gillis and Relief Defendants

Even after bouncing hundreds of investor checks in August, depleting their

operating account, and inexplicably opening up a new checking account from which to conduct their fraud, Defendants Gillis and Wishner continued to enrich themselves with investor money, and further transferred the wrongful proceeds of their fraud to the three Relief Defendants— Oasis Studio Leasing, LLC, Oasis Studio Leasing #2, LLC and Oasis Studio Leasing #3, LLC (collectively, "Oasis Studio Leasing"). Wishner is the registered agent for each of these entities and a principal of Oasis Studio Leasing #3, LLC. (Del Greco Dec. ¶ 46, Ex. 37). In September, having just sent millions of dollars in bounced checks to investors in the previous month, NASI still wrote four checks in three days to Wishner for a total of $44,820, one check to Gillis in the amount of $12,500, and two checks to Relief Defendant Oasis Studio Rentals in the amount of $70,000. (Boudreau Dec. ¶¶ 33-35). Since 2013—a period in which NASI was almost entirely funded by money from new investors—Wishner and Gillis respectively took at least $793,420 and $207,900 from NASI's bank accounts. (Boudreau Dec. ¶¶ 34-35).

With respect to relief defendants, NASI's April 2013 balance sheet reflects a $1,477,192 receivable due from Oasis Studio Rentals. (Del Greco Dec. ¶ 51). In eight months, this $1.477 million receivable was reduced to only $75,000 on NASI's balance sheet. (*Id.*) NASI's bank records, however, reflect just $23,250 in payments made by Oasis Studio Rentals to NASI during that period of time. (*Id.* at ¶ 52). In that timeframe, NASI's incoming cash was almost entirely new investor funds. (Boudreau Dec. ¶ 10).

III. ARGUMENT

A. Legal Standard for a Temporary Restraining Order

Section 20(b) of the Securities Act and Section 21(d) of the Exchange Act authorize the SEC to obtain a permanent or temporary injunction or restraining order without a bond on a proper showing. 15 U.S.C. §§ 77t(b), 78u(d) & 80b-9; *see SEC v. Wencke*, 622 F.2d 1363, 1375 (9th Cir. 1980) (SEC enforcement actions do not require a bond). To obtain such relief, the SEC must establish: (1) a *prima facie* case

of that a violation of federal securities laws has occurred; and (2) a reasonable likelihood that the violation will be repeated. *SEC v. Unique Financial Concepts, Inc.*, 196 F.3d 1195, 1199 n.2 (11th Cir. 1999); *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 358 (9th Cir. 1973). The SEC appears before the Court "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). "[W]hen 'the public interest is involved in a proceeding of this nature, [the district court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) (*quoting FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982)).

The SEC faces a lower burden than a private civil litigant seeking a temporary restraining order or other pretrial relief. If the SEC shows a probability of success on the merits, the court presumes irreparable injury. *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992) ("[i]n statutory enforcement cases where the government has met the "probability of success" prong of the preliminary injunction test, we presume it has met the "possibility of irreparable injury" prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public."); *accord United Financial Group*, 474 F.2d at 358 ("[a] *prima facie* case of the probable existence of fraud . . . is sufficient to call into play the equitable powers of the court").

B. The NASI Offering Involves the Offer and Sale of Securities

Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Securities Exchange Act define a "security" to include, among other things, any "investment contract" and any "option or privilege on any security" and any "receipt for, or warrant or right to purchase . . . any security." 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10). Under the seminal test set forth in *SEC v. W.J. Howey Co.*, an "investment contract" must feature: (i) the investment of money, (ii) in a common

enterprise, (iii) with an expectation of profits to be derived solely from the efforts of others). *See* 328 U.S. 293, 298-99 (1946). For example, in *SEC v. Edwards*, the Supreme Court addressed a situation almost identical to this case. *See* 540 U.S. 389 (2004). There, the defendant sold payphones to investors in a leaseback transaction. These investors had no involvement in the day-to-day operation of the payphones they owned; instead, the defendant's company selected the sites for the phones, installed the equipment, arranged for connection and long-distance service, collected coin revenue, and maintained and repaired the phones. *Id.* at 391-92. Investors were paid a 14% annual return and had the right to return their phones at the end of the lease for a refund of the full purchase price. *Id.* at 392. Applying the standards set forth in *Howey*, the *Edwards* court held that these payphone sale and leaseback packages were "investment contracts." *Id.* at 397.

In the very same way, NASI's ATM sale and leaseback agreements are also securities in the form of investment contracts. They represent an investment of money, in a common enterprise, with the expectation of profits to be derived from the efforts of a third party. *See id.*; *Howey*, 328 U.S. at 298-99. Investors provided money to NASI for investment purposes. Because the terms of the NASI Purchase Agreement, Lease Agreement and Addendum made investors entirely dependent on NASI to operate and maintain their purported ATMs, investors were investing in a common enterprise. And for that same reason, along with investors' contractual promise not to "interfere" with the operation of their ATMs, NASI's efforts were essential to the failure or success of the common enterprise. Thus, the ATM sale and leaseback transactions offered and sold by NASI are securities. *See also SEC v. Phoenix Telecom, LLC*, 239 F. Supp. 2d 1292, 1298 (N.D. Ga. 2000).

C. The SEC Has Made a *Prima facie* Showing That Defendants Are Violating the Federal Securities Laws

1. Defendants are violating the antifraud provisions of Section 17(a), Section 10(b) and Rule 10b-5

Section 17(a) of the Securities Act prohibits fraud in the offer or sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5 prohibit fraud in connection with the purchase or sale of any security. *See* 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855 (9th Cir. 2001). Section 17(a)(1) of the Securities Act prohibits any person, in the offer or sale of any securities, from employing any device, scheme, or artifice to defraud, and Section 17(a)(3) of the Securities Act prohibits any person, in the offer or sale of any securities, from engaging in any transaction, practice, or course of business which operates, or would operate, as a fraud or deceit upon the purchaser. Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder make it unlawful for any person in connection with the purchase or sale of securities to employ any device, scheme or artifice to defraud, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

a. All of the Defendants engaged in a scheme to defraud

The SEC has established a *prima facie* case that all three Defendants—NASI, Gillis and Wishner—engaged in a scheme to defraud. To be liable for a scheme to defraud, a 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. *See Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds sub nom., Avis Budget Group Inc. v. Cal. State Teachers' Ret. System*, 552 U.S. 1162 (2008).

Here, Defendants engaged in a fraudulent scheme by making Ponzi-like payments to NASI investors, by fabricating fictional monthly transactional reports designed to lead investors to believe that they owned, outright, actual ATMs whose transaction fees were the source of investor payments, by requiring investors to agree to a "non-interference" provision barring them from ever attempting to confirm that their ATM investments had been installed in the locations represented to them, by misappropriating NASI investor money, and by attempting to "lull" investors in

August when claiming that banking "glitches" and investor overpayments had led to NASI's bounced checks, in an effort to conceal their fraud. *See, e.g., SEC v. Merrill Scott & Associates, Ltd.*, 505 F. Supp. 2d 1193, 1214 (D. Utah 2007); *SEC v. Holschuh*, 694 F.2d 130, 143 (7th Cir. 1982) (when determining whether a defendant has engaged in securities fraud, a court may consider "lulling" activities because "a scheme to defraud may well include later efforts to avoid detection of the fraud.").

b. NASI and Gillis also made false and misleading statements to investors

The SEC has also established a *prima facie* case against NASI and Gillis for making material misstatements and omissions to the investors. To establish a claim under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 for fraudulent misrepresentations, the SEC must prove by a preponderance of the evidence four basic elements: (1) a material misrepresentation or omission; (2) in connection with the purchase, offer, or sale of a security; (3) with scienter; and (4) in interstate commerce. *SEC v. Platforms Wireless*, 617 F.3d 1072, 1092 (9th Cir. 2010); *see also SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993). Defendants' misstatements and omissions must concern material facts. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See TSC Indus., Inc.*, 426 U.S. at 449; *SEC v. Platforms Wireless*, 617 F.2d at 1092. Liability arises not only from affirmative representations but also from failures to disclose material information. *SEC v. Dain Rauscher*, 254 F.3d at 855-56. The antifraud provisions impose "'a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading.'" *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (*quoting Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992)).

In NASI's sale and leaseback agreements—signed by Gillis—and other

marketing communications made to investors, NASI and Gillis made numerous material misrepresentations in connection with the NASI offering:

- They represented that investors were buying from NASI an actual ATM, identified by serial number, which they owned outright.
- They represented that the ATMs they now owned would then be installed by NASI at a designated place of business.
- They represented that during the lease term, NASI would operate, maintain, service, and insure their ATMs.
- They represented that during the lease term, NASI would pay to investors 50 cents for each of their ATM's transactions, but if these returns fell short of a 20% annual return, NASI would make up the difference out of its revenue share.
- They represented that every month, NASI would send investors transaction reports which purportedly detailed the performance of their ATMs.

These representations—which went to the basic nature, terms, and putative performance of their investments—were all material. *See Phoenix Telecom*, 239 F. Supp. 2d at 1298-99 (misrepresentations about investor's security interest in and extent to which telephones were insured went "to the essence of the investment decision" and were "clearly material"); *SEC v. ETS Payphones, Inc.*, 123 F. Supp. 2d 1349, 1351 (N.D. Ga. 2000) (finding that failure to tell payphone sale and leaseback investors "that ETS had failed to make a profit; (2) that ETS was losing money on its payphone program; and (3) that ETS depended on funds from new investors in order to sustain operations" constituted material misrepresentations and omissions), *aff'd*, *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 737 (11th Cir. 2005).

All of these statements, however, were false because NASI did not own or operate the tens of thousands of ATMs it claims to have sold and leased back from its investors; real ATM transaction revenue comprised only a tiny fraction of NASI's incoming funds; and the overwhelming majority of investor payments were instead funded by money solicited from new investors to NASI's Ponzi scheme.

c. Defendants acted with scienter

Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 also require a showing of scienter for both the SEC's scheme to defraud claim (against all Defendants) and its misrepresentation claim (against NASI and Gillis). *See* 15 U.S.C. § 77q(a)(1); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). In the Ninth Circuit, scienter may be established by a showing of recklessness. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990); *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003). Further, recklessness may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91, n.30 (1983); *SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987).

There is ample evidence that Gillis carried out the fraudulent NASI offering with a high degree of scienter. As NASI's president, Gillis signed thousands of NASI ATM sale and leaseback agreements which raised, from defrauded investors, about $159 million since the beginning of 2013. Gillis then made thousands of Ponzi-like payments in the form of monthly checks to investors—which he signed (Boudreau Dec. ¶¶ 24, 28)—with those payments supposedly substantiated by the fabricated NASI ATM transaction reports that accompanied them. Gillis directly solicited investors with false representations about how NASI was able to guarantee a 20% annual return. And Gillis worked to conceal Defendants' fraud in August, after hundreds of NASI investor checks were returned for insufficient funds, by claiming to investors that "processing issues" had caused NASI's August problems. That month, Defendants virtually emptied NASI's banking accounts and set up shop at a new account with a different bank. Gillis, as a signatory to that second account, knew that NASI would be unable to pay investors the monthly amounts owed to them going forward—in the area of $8.9 million, if NASI's June transaction report of 17,950,346 transactions is to be believed—but he still lied to investors when telling them that

NASI hoped "to be back on track by October 1st." *See ETS Payphones*, 408 F.3d at 733 (finding scienter where defendant told investors that company remained profitable when, in fact, company would be unable to buy back phones if a substantial number of investors so requested, and company relied on new investors to sustain operations).

In the same vein, there is substantial evidence that Wishner likewise acted with a high level of scienter. Wishner is NASI's vice president, treasurer, and secretary, and prepared NASI's tax returns. Like Gillis, Wishner is a signatory on all of NASI's bank accounts. Wishner knew, or was reckless in not knowing, the most damning aspect of NASI's true financial condition—that legitimate ATM transaction revenue comprised less than 2% of all money coming into NASI, and that NASI was almost entirely funded by new investor money. Wishner made dozens of Ponzi-payments in the form of checks sent to investors from NASI's newly-established bank account in August and September, in spite of NASI's dire financial straits. (Boudreau Dec. ¶ 28). And last, as discussed below, Wishner transferred more than $100,000 in NASI funds to himself or entities under his control at the start of September, as NASI's Ponzi scheme was collapsing upon itself.

Scienter is also established against NASI, the corporate defendants, because Gillis's and Wishner's mental states are imputed to it. *SEC v. Platforms Wireless Intern. Corp.*, 559 F. Supp. 2d 1091, 1096 (S.D. Cal. 2008), *aff'd*, 617 F.3d 1072 (9th Cir. 2010), *citing SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1972) (a defendant's knowledge may be imputed to the entities that he controlled).

d. The fraud was perpetrated in interstate commerce

Defendants used electronic mail to solicit investors for NASI, which alone satisfies this element. In addition, Defendants deposited checks in their accounts in California from investors in other states, such as Washington. (Wong Dec. ¶ 2).

2. NASI and Gillis are violating the registration provisions of the securities laws

The SEC has established a *prima facie* case that NASI and Gillis have violated

Sections 5(a) and 5(c) of the Securities Act, which prohibit the unregistered offer or sale of securities in interstate commerce unless an exemption from registration applies. 15 U.S.C. §§ 77e(a) & 77e(c); *SEC v. Phan*, 500 F.3d 895, 901-02 (9th Cir. 2007); *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). Section 5 is a strict liability statute. *SEC v. Holschuh*, 694 F.2d at 137 n.10 ("good faith is not relevant to whether there has been a primary violation of the registration requirements"). A *prima facie* Section 5 violation is established by showing: (1) the defendant, directly or indirectly, has offered or sold securities; (2) no registration was in effect or filed with the SEC for those securities; and (3) interstate transportation or communication or the mails were used in connection with the offer or sale. 15 U.S.C. §§ 77e(a) & 77e(c); *see also SEC v. Phan*, 500 F.3d at 902.

The SEC has made such a showing. As discussed above, NASI's ATM sale and leaseback packages are securities. The offer and sale of NASI securities have never been registered. (Del Greco Dec. ¶ 36, Ex. 28). Defendants offer and sell the securities in interstate commerce as demonstrated by their use of the Internet and mails to solicit investors across the United States. Once the SEC establishes a *prima facie* Section 5 violation, the defendant bears the burden of proving that an exemption from registration applies. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Murphy*, 626 F.2d at 641. Defendants will be unable to meet that burden given their broad national solicitation of investors and the sheer size of the offering.

D. Relief Defendants Have Received Ill-Gotten Investor Funds

Under certain circumstances, a party not alleged to be a securities law violator may be joined as a party defendant in order to obtain disgorgement of fraudulently obtained funds. For example, a court may order disgorgement from a party who has received proceeds from the fraud where that party has no legitimate claim to those funds. *See SEC v. Colello*, 139 F.3d 674, 676 & 679 (9th Cir. 1998); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998).

Relief Defendants Oasis Studio Rentals are affiliated with Wishner and on

NASI's April 2013 balance sheet, Oasis Studio Rentals owed a $1,477,192 receivable to NASI. (Del Greco Dec., ¶ 51, Ex. 43A). In just eight months, this $1.477 million receivable was reduced to $75,000 on NASI's balance sheet, (*Id.*, Ex. 43B), but NASI's bank accounts reflect just $23,250 in payments from Oasis Studio Rentals to NASI during the same period in time. (*Id.*, ¶ 52, Ex. 44). Worse, on September 3 and September 5, Defendants transferred another $70,000 in cash to Oasis Studio Rentals, less than a week after Gillis had assured concerned NASI investors in writing that the hundreds of checks bounced by NASI in August were due to "processing issues". Nothing in NASI's sales and leaseback agreements permits Defendants to take investor money and loan it to entities controlled by a NASI principal, with NASI then forgiving or writing off the bulk of that debt in just a matter of months. Accordingly, the Oasis Studio Rentals entities have no legitimate claim to investors' money and are appropriately named as Relief Defendants that should be ordered to disgorge their ill-gotten gains.

E. The Court Should Grant the Relief Sought by the SEC

1. A temporary restraining order is appropriate

A temporary restraining order is necessary and appropriate because Defendants continue to raise funds from investors. The facts described above establish a *prima facie* showing of securities law violations and a likelihood of future violations, which can also be inferred from past violations. *See SEC v. Murphy*, 626 F.2d at 655; *SEC v. United Financial Group, Inc.*, 474 F.2d at 358-59. Courts may consider a number of factors to determine the likelihood of future violations based on the totality of the circumstances. *See, e.g., Murphy*, 626 F.2d at 655; *SEC v. Fehn*, 97 F.3d at 1295-96. Here, Defendants have acted with a high level of scienter, and the conduct has been ongoing. The only way to stop this offering is for the Court to enter a temporary restraining order. It is plain that Defendants are intent on defrauding as many investors as they can, for as long as they can. A temporary restraining order is not only appropriate, but also necessary.

2. Asset freezes are necessary

Federal courts have inherent equitable authority to freeze assets under its "inherent equitable power to issue provisional remedies ancillary to its authority to provide final equitable relief." *Reebok Int'l, Ltd v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 559 (9th Cir. 1992); *SEC v. Wencke*, 622 F.2d at 1369. These powers include the authority to freeze assets of both parties and nonparties. *SEC v. Hickey*, 322 F.3d 1123, 1131 (9th Cir. 2003); *SEC v. Int'l Swiss Invs. Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990). Courts use freeze orders to prevent waste and dissipation of assets and to ensure their availability for disgorgement for the benefit of victims of the fraud. *See, e.g., Hickey*, 322 F.3d at 1132 (affirming asset freeze over nonparty brokerage firm controlled by defendant to effectuate disgorgement order against defendant); *Manor Nursing*, 458 F.2d at 1105-06. Indeed, the Ninth Circuit has found that "the public interest in preserving the illicit proceeds [of a defendant's fraud] for restitution to the victims is great." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999). Courts have similarly recognized that a disgorgement order will often be rendered meaningless unless an asset freeze is imposed prior to the entry of final judgment. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990).

"A party seeking an asset freeze must show a likelihood of dissipation of the claimed assets, or other inability to recover monetary damages if relief is not granted." *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009).[4] Courts

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[4] In *Sahni*, the Ninth Circuit held that to obtain an asset freeze, the SEC need only establish that it is likely to succeed on the merits of its claims and that the mere "possibility" of dissipation of assets exists. *See FSLIC v. Sahni*, 868 F.2d 1096, (9th Cir. 1989), overruled by *Winter v. NRDC, Inc.*, 557 U.S. 7 (2008). In a case involving a non-governmental plaintiff, the Ninth Circuit held that *Sahni* had been overruled in this respect because the Supreme Court held in *Winter* that a private plaintiff must establish a "likelihood of irreparable harm" to obtain a preliminary injunction. *See Johnson*, 572 F.3d at 1085 n.11 (9th Cir. 2009). For this reason the Ninth Circuit held that to obtain an asset freeze, a private plaintiff must establish the likelihood of dissipation of assets rather than a mere possibility. *Id.* However, the SEC, unlike a private plaintiff, does not need to establish a likelihood of irreparable

consider a defendant's prior unlawful acts and the location of the assets in considering whether an asset freeze is warranted. *See, e.g., id.* at 1085; *Affordable Media*, 179 F.3d at 1236 ("district court's finding regarding the likelihood of dissipation is far from clearly erroneous" where defendant had a "history of spiriting their commissions away to a Cook Islands trust."); *Manor Nursing*, 458 F.2d at 1106 ("uncertainty existed with respect to the total amount of proceeds received and their location," thus asset freeze was warranted).

Here, Defendants drained NASI's bank account in August, opened up a new account at a different bank in the aftermath of missed investor payments, and though they had received investigative subpoenas from the SEC seeking their banking records, Defendants never revealed that they were now depositing new investor funds in an undisclosed account. In the first week of September, Gillis and Wishner transferred to themselves, or entities affiliated with them, more than $135,000 in investor funds in a series of unexplained transactions. Because of Defendants' recent history of depositing investor funds among different accounts, and because of their efforts to conceal NASI's financial condition from investors, while at the same time enriching themselves with investor proceeds, an asset freeze is necessary to prevent further dissipation of assets.

3. A receiver is needed to oversee the entity defendant

The Court has broad discretion to appoint an equity receiver in SEC enforcement actions. *See Wencke*, 622 F.2d at 1365. The breadth of this discretion "arises out of the fact that most receiverships involve multiple parties and complex transactions." *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (quotation omitted). A receiver plays a crucial role in preventing further dissipation and misappropriation of investors' assets. *Wencke*, 783 F.2d at 836-37 n.9. Factors

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harm to obtain interim injunctive relief. *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 936 n.17 (N.D. Cal. 2010), *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998). Nevertheless, under either standard, an asset freeze is warranted.

such as the integrity of management and the likelihood of future misuse of assets are critical in determining whether a receiver should be appointed. *See SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968), aff'd, 435 F.2d 510 (2d Cir. 1970). Courts have found a receivership to be justified where management of an entity, collection of revenue, and or distribution of investor funds are required. *See, e.g., SEC v. Credit First Fund*, 2006 WL 4729240, at *15 (C.D. Cal. 2006); *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. at 42.

In this case, it is necessary and appropriate to appoint a receiver over Defendant NASI and its subsidiaries and affiliates, to preserve assets and prevent future misappropriation and misuse. Defendants have misappropriated investor funds, they moved NASI's funds from bank account to bank account, and they used investor assets to enrich themselves at the detriment of investors. Defendants have made Ponzi payments to investors, which is further evidence that current management lacks the integrity to manage investor funds.

A court-appointed receiver is therefore critical to take control of the remaining funds to prevent further misuse and dissipation. A receiver is required to marshal and preserve existing assets, clarify the financial affairs of the entities, and ensure that Defendants cannot further misappropriate assets. A receiver will also be able to take steps to liquidate and monetize what ATM assets NASI truly has for the benefit of the defrauded investors, manage and administer a claims process, and distribute assets to the defrauded investors. In addition, a receiver will be able to conduct a forensic accounting to determine the true state of affairs, and can investigate claims. For all these reasons, appointment of a receiver is necessary and appropriate to prevent dissipation of assets and rationalize the management of NASI.

4. Orders prohibiting the destruction of documents, granting expedited discovery and requiring accounts are necessary

The Court's broad equitable powers in SEC enforcement actions include the ability to order ancillary relief to require an accounting and prohibit document

destruction. *See Wencke*, 622 F.2d at 1369. The Court should enter an order prohibiting the destruction of documents to prevent Defendants from destroying evidence of their violations and ongoing fraud. The Court should also allow the SEC to obtain discovery on an expedited basis. Expedited discovery is authorized by Rules 30, and 34 of the Federal Rules of Civil Procedure and a court's broad equitable powers in SEC enforcement actions to order all necessary ancillary relief. *See Wencke*, 622 F.2d at 1369. The SEC seeks expedited discovery in the form of a deposition of Defendants Gillis and Wishner and Rule 30(b)(6) depositions of the Defendant entities to the extent necessary to develop additional evidence regarding the Defendants' wrongdoing and to ensure that any asset freeze is fully implemented. In addition, the SEC requests that if Defendants and Relief Defendants produce witnesses or declarations in opposition to the SEC's motion for a preliminary injunction, then the SEC should be permitted to depose such witnesses on an expedited basis. The Court should also require Defendants and to prepare accountings, so the SEC can identify all available assets to help ensure that funds and assets are frozen properly and available to satisfy any future order of disgorgement or civil penalties against the Defendants. *See Int'l Swiss Invs. Corp.*, 895 F.2d at 1276.

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully asks the Court to grant the SEC's *Ex Parte* Application and enter the requested relief, and otherwise grant the requested relief in the form of the proposed temporary restraining order.

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Respectfully submitted,

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