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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF, v. DAREN L. PALMER and TRIGON GROUP, INC., a Nevada Corporation, DEFENDANTS.	Civil No. Judge **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND EX PARTE MOTIONS FOR APPOINTMENT OF RECEIVER, AN ASSET FREEZE ORDER AND OTHER RELIEF**

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Plaintiff, Securities and Exchange Commission (the "Commission"), respectfully submits this Memorandum in Support of Its Motion for Preliminary Injunction and Ex Parte Motions for Appointment of Receiver, An Asset Freeze Order and Other Relief. The Commission seeks this emergency relief to protect its ability to recover some of the millions of dollars misappropriated by Defendants in a brazen Ponzi scheme. The Commission respectfully requests this Court to enter a preliminary injunction against Defendants to preliminarily enjoin them from further violations of the federal securities laws. In addition, the Commission requests the Court to enter an Ex Parte Order freezing Defendants' assets, expediting discovery and preventing the destruction of documents.

I. STATEMENT OF FACTS

1. **Trigon Group, Inc.** ("Trigon") is a Nevada corporation headquartered in Idaho Falls, Idaho. Trigon claims to be an investment business, specializing in helping clients generate high annual returns of approximately 20-25 percent. Palmer is the sole owner of Trigon. See Articles of Organization, attached hereto as Exhibit 1 ("Ex. 1"); Testimony of Daren L. Palmer ("Palmer Test."), attached hereto as Exhibit 2 ("Ex. 2") at pp. 9-10, 22.

2. Trigon has not registered any offering of its securities under the Securities Act or a class of Securities under the Exchange Act. See Declaration of Norman Korb ("Korb Decl."), attached hereto as Exhibit 3 ("Ex. 3") at ¶ 3.

3. **Daren L. Palmer**, age 40, is an Idaho resident living in Idaho Falls, Idaho. Palmer is the President and sole owner of Trigon. Ex. 2 at pp. 9-10

4. Palmer has never been registered with the Commission in any capacity and has never been licensed to sell securities. Ex. 2 at pp. 51-52; Ex. 3 at ¶ 3; Declaration of Tim Martin ("Martin Decl."), attached hereto as Exhibit 13 ("Ex. 13").

5. Beginning in 1996 and continuing through at least October 2008, Trigon and Palmer sold securities in the form of promissory notes and investment contracts to over 55 investors in unregistered, non-exempt transactions raising at least $40 million. Ex. 2 at pp. 26-32, 100; Ex. 3 at ¶ 3; Declaration of Jay Lane Butler ("Butler Decl."), attached hereto as Exhibit 4 ("Ex. 4") at ¶ 6; Declaration of Kevin Taggart ("Taggart Decl."), attached hereto as Exhibit 5 ("Ex. 5") at ¶¶ 3, 6; Testimony of David K. Swenson ("Swenson Decl."), attached hereto as Exhibit 6 ("Ex. 6") at ¶ 8; Declaration of Darryl Harris ("Harris Decl."), attached hereto as Exhibit 7 ("Ex. 7") at ¶ 5; Declaration of David Taylor ("Taylor Decl."), attached hereto as Exhibit 8 ("Ex. 8") at ¶¶ 4-5, 9; Declaration of Jack Larsen ("Larsen Decl."), attached hereto as Exhibit 9 ("Ex. 9") at ¶ 4; Declaration of Paul Ramsey ("Ramsey Decl."), attached hereto as Exhibit 10 ("Ex. 10") at ¶ 7.

6. Palmer marketed himself and Trigon to investors by representing that he had learned a complex trading strategy through which he invested in indexes, S&P 500 options or futures, currency futures and stocks in a way that generated consistent annual returns of 20 percent or greater. Ex. 2 at pp. 22-24; Ex. 7 at ¶ 4; Ex. 8 at ¶ 4; Ex. 9 at ¶ 4; Ex. 10 at ¶ 4.

7. Palmer touted his reputation in the Idaho Falls community as an honest family man who had a long track record of producing high returns for investors. Ex. 4 at ¶ 2; Ex. 5 at ¶ 2; Ex. 7 at ¶ 3; Ex. 8 at ¶ 3; Ex. 9 at ¶ 2; Ex. 10 at ¶ 3.

8. Palmer explained to investors that his trading program was difficult to understand, but that it essentially operated like a hedge fund. Ex. 2 at pp. 22-24; Ex. 7 at ¶ 4; Ex. 8 at ¶ 4; Ex. 9 at ¶ 4; Ex. 10 at ¶ 4.

9. Palmer told investors that their funds would be combined with the funds of other investors and traded as one fund. Ex. 6 at ¶ 5; Ex. 7 at ¶ 4; Ex. 8 at ¶ 5;

10. Palmer told investors that there were no risks to their principal and that high returns were guaranteed. Ex. 2 at p. 48; Ex. 4 at ¶ 3; Ex. 5 at ¶ 4; Ex. 6 at ¶ 5; Ex. 7 at ¶ 5; Ex. 10 at ¶ 4.

11. Palmer told many investors that he had been generating 20 percent or greater annual returns for more than twelve years. Ex. 2 at p. 33; Ex. 4 at ¶ 3; Ex. 5 at ¶ 4; Ex. 6 at ¶ 7; Ex. 7 at ¶ 5; Ex. 8 at ¶ 6; Ex. 9 at ¶ 4.

12. Palmer advised investors to place monies with him and Trigon in part because, under his trading strategy, he could earn high returns regardless of what the market did. Ex. 4 at ¶ 3; Ex. 7 at ¶ 5; Ex. 8 at ¶ 4; Ex. 10 at ¶ 4.

13. Palmer told investors that his compensation would be in the form of retaining a portion of the profits he made in his trading program. Ex. 5 at ¶ 4; Promissory Notes, attached hereto as Exhibit 12 ("Ex. 12").

14. Palmer told investors that he was licensed to sell securities. Ex. 5 at ¶ 5.

15. Palmer evidenced some of the investment monies he received with a Promissory Note ("Note"). Ex. 12. Palmer signed the Notes individually or as the President of Trigon. Id.

16. The Notes to individual investors are not identical. However, the Notes commonly state that Palmer owes the investor the principal plus interest of 20 to 25 percent annually. Ex. 12. In some instances, Palmer's Notes stated that the investor would be paid with interest "at the rate per performance from Trigon." Id.

17. Palmer also entered into verbal investment contracts in which he told investors he would pay them annual returns of 20 percent or more. Ex. 3 at ¶ 3; Ex. 7 at ¶ 6.

18. The Notes Palmer signed state "No collateral will be provided". Ex. 12.

19. On December 15, 2008, a group of Idaho Falls investors organized a meeting to discuss rumors and concerns about Trigon and Palmer. Palmer attended the meeting and told investors that through his trading program, he had lost almost all the principal his investors had given him. Ex. 4 at ¶ 9; Ex. 5 at ¶ 11-12; Ex. 8 at ¶ 12; Ex.9 at ¶ 9; Ex. 10 at ¶ 8.

20. In or around January 2009, Palmer admitted to investors that he had no money to give them. Palmer admitted that he had been running a Ponzi scheme for many years. Ex. 2 at pp. 47, 66; Ex. 5 at ¶¶ 11-13; Ex. 8 at ¶¶ 9, 13.

21. Palmer also admitted that he was building a new, expensive home in order to keep up an image of success that would allow him to bring in additional investor funds. Ex. 5 at ¶ 14.

22. Palmer admitted that although he gave investors payments accompanied by statements showing trading profits, the payments were actually from investments made by later investors. Ex. 2 at pp. 35, 66; Ex. 6 at ¶ 9; Ex. 10 at ¶ 8.

23. Palmer admitted that the later investors were not told that he would use their principals to pay returns to other, earlier investors. Ex. 2 at pp.48-49.

24. Palmer also admitted to using investor funds to pay his "salary," his personal credit cards and to purchase snowmobiles. Ex. 2 at pp. 47-48, 64-66, 68-101; Check Register, attached hereto as Exhibit 11 ("Ex. 11"). Palmer paid himself approximately $25-35,000 per month. Ex. 2 at p. 99.

25. In late 2008, Palmer provided his wife with a cashier's check for $411,710 from investor funds. Ex. 2 at pp. 79-80; Ex. 11.

26. Palmer gave the last $500,000 of investor funds to an African man and a Middle Eastern man, whose names he does not know, in what appears to be an advance fee scam. Ex. 2 at p. 82.

27. Although Palmer raised at least $40 million of investor funds, Palmer has admitted to placing only a fraction of investor funds into trading accounts and to using investor funds to pay personal expenses and to pay bogus returns to earlier investors. Ex. 2 at pp. 46-48.

28. Palmer admitted owing investors $35-45 million. Ex. 2 at p. 100. Palmer claims investor funds are completely lost. Id. at 92; Ex. 5 at ¶ 12; Ex. 8 at ¶ 13; Ex. 9 at ¶ 9; Ex. 10 at ¶ 12.

ARGUMENT

II. DEFENDANTS VIOLATED THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS

A. A Preliminary Injunction is Necessary to Protect Investors and the Public Interest

Section 20(b) of the Securities Act [15 U.S.C. § 77(b)] and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)] empower the Court to grant injunctive relief where it appears that a person is engaged in or about to engage in violations of the federal securities laws. Under these sections, the Commission is required to make a "proper showing" of violative activity in order to obtain injunctive relief.

When a federal agency charged by statute with safeguarding the public interest brings an action for injunctive relief, irreparable injury may be presumed. See, e.g., United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 174-75 (9th Cir. 1987). In order to obtain preliminary relief or a permanent injunction the Commission needs to prove: (1) a prima facie case of previous violations; and (2) a reasonable likelihood that the wrong will be repeated. See e.g. SEC v. Unifund Sal, 910 F.2d 1028, 1036-37 (2d Cir. 1990); SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100 (2d Cir. 1972). The Commission faces a lower burden than a private litigant when seeking a temporary restraining order or preliminary injunction. Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); Mgmt. Dynamics, Inc., 515 F.2d at 808; SEC v. Int'l Loan Network, Inc., 770 F. Supp. 678, 688 (D.D.C. 1991). For example, unlike private litigants, the Commission is not required to show irreparable

injury or a balance of equities in its favor in order to make the statutory "proper showing" to obtain a preliminary injunction. Unifund Sal, 910 F.2d at 1036; SEC v. Torr, 87 F.2d 446, 450 (2d Cir. 1937); SEC v. Musella, 578 F. Supp. 425, 434 (S.D.N.Y. 1984).

B. The Commission Has Established Its Prima Facie Case

i. Defendants Made False Statements and Material Omissions in Connection with the Purchase or Sale of Securities

Section 17(a) of the Securities Act [15 U.S.C. §77q(a)] prohibits persons, in the offer or sale of a security, from employing any device, scheme or artifice to defraud; obtaining money or property through materially false or misleading statements or omitting to state material facts; or engaging in any transaction, practice, or course of business which operates as a fraud or deceit. United States v. Naftalin, 441 U.S. 768, 773 (1979). Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit similar conduct in connection with the purchase or sale of a security. Section 10(b) was designed to prevent all manner of fraudulent practices. Chiarella v. U.S., 445 U.S. 222, 226 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976); Affiliated Ute Citizens of Utah v. U.S., 406 U.S. 128, 153 (1972); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

Defendants made numerous misrepresentations and omissions to investors. Defendants told investors that their funds would be placed in a proprietary trading program that would generate riskless returns in excess of 20% per year. Defendants did not place the majority of investors' funds in any type of trading program. Instead, Palmer used investors' money for personal purposes or to pay back earlier investors in a classic Ponzi scheme. Palmer failed to inform investors that their quarterly payments did not come from investment activity but instead came from newly invested funds. Palmer claimed to be a licensed securities professional. Palmer is not licensed to sell securities.

ii. Defendants' Misrepresentations and Omissions Were Material

Information is material if a substantial likelihood exists that the facts would have assumed actual significance in the investment deliberations of a reasonable investor. Basic, Inc. v. Levinson, 485 U.S. 224 (1988). Defendants' misrepresentations regarding the use of investors' funds are material. See SEC v. Cochran, 214 F.3d 1261, 1268 (10th Cir. 2000) ("information implicating the fair market value would be material to a reasonable investor"); Everest Sec., Inc. v. SEC, 116 F.3d 1235, 1239 (8th Cir. 1997) ("It would be material to an investor to know that the offering company's existing project had been abandoned, that none of its asset value was to be recouped."). Similarly, investors would consider it important to know their funds were being misappropriated by Defendants and Defendants operated a Ponzi scheme. SEC v. TLC Invs. & Trade Co., 179 F. Supp. 2d 1149, 1153 (C.D. Cal. 2001); see also SEC v. Smith, 2005 U.S. Dist. LEXIS 21427, at *15 (S.D. Ohio Sept. 27, 2005) ("it is obvious that a reasonable investor would consider it important to know that his money would not be invested in bank stock but would instead be used for other purposes, such as to pay for [Defendant's] American Express bill, car washes, dating services, and the expenses of [Defendant's] other companies").

Here, Palmer used investor funds to buy snowmobiles, pay his credit card bills, and build a $12 million home. Palmer also misappropriated investor funds to pay himself a salary of $25-35,000 per month. Palmer failed to invest the funds as he represented to investors and paid quarterly returns from newly-invested funds. Finally, Palmer misused investor funds by losing the last dollars invested in an off-shore advance fee scam.

iii. Defendants Acted With Scienter

Scienter is an element of violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder but is not a required element of a violation of Sections 17(a)(2) or 17(a)(3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980). The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst, 425 U.S. at 193. Reckless conduct has been held to satisfy the scienter requirement. Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 595-597 (10th Cir. 1979).

Here, Defendants acted with the requisite scienter. Palmer knew how investor funds were used, because he controlled the accounts into which investors transferred funds. He knew that he used money from new investors rather than trading profits to pay investors their quarterly returns. Palmer's check register demonstrates that he made the Ponzi payments to investors, misappropriated investor funds for personal purposes and made large transfers to members of Palmer's family.

iv. Defendants' Fraud Occurred In Connection With the Purchase or Sale of Securities

As the Supreme Court recently reaffirmed, the "in connection with" requirement is to be construed broadly and flexibly to effectuate its remedial purposes. SEC v. Zandford, 535 U.S. 813, 819 (2002). Thus, the "in connection with" requirement is satisfied when someone utilizes a device "that would cause reasonable investors to rely thereon" and "so relying, cause them to purchase or sell a corporation's securities." In re Carter-Wallace, Inc. Sec. Litig., 150 F.3d 153, 156 (2d Cir. 1998) (citing SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 860-62 (2d Cir. 1968) (Section 10(b) applies "whenever assertions are made ... in a manner reasonably calculated to influence the investing public."); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1171 (D.C. Cir. 1978) (The "in

connection with" requirement is satisfied when it can reasonably be expected that a publicly disseminated document will cause reasonable investors to buy or sell securities "regardless of the motive or existence of contemporaneous transactions by or on behalf of the violator."); see also In re Ames Dep't Stores, Inc. Stock Litig., 991 F.2d 953, 966 (2d Cir. 1993) ("[S]tatements which manipulate the market are connected to resultant stock trading."); SEC v. Rana Research, Inc., 8 F.3d 1358, 1362 (9th Cir. 1993).

Defendants' conduct in this case coincided with the sale of securities. Defendants sold promissory notes and investment contracts, which are securities. The misrepresentations regarding the use of funds occurred in the course of the sale of those securities.

v. Defendants Used the Means and Instrumentalities of Interstate Commerce

Defendants used the requisite jurisdictional means to affect the fraud. In Pereira v. U.S., 347 U.S. 1, 8-9 (1954), the United States Supreme Court noted that it is sufficient if a defendant knows that the use of mail or of wire services was a reasonably foreseeable consequence of a scheme to satisfy the "jurisdictional means" element. "All that is required to establish a violation of [Section 17(a), Section 10(b) or Rule 10b-5] is a showing that a means, instrumentality or facility of a kind described in the introductory language of th[e] section was used, and that in connection with that use an act of a kind described . . . occurred." Matheson v. Armbrust, 284 F.2d 670, 673 (9th Cir. 1960); accord, United States v. Tallant, 547 F.2d 1291, 1297 (5th Cir. 1977).

Here, Defendants made use of the mails, of the Internet and of the telephone to solicit investments. Investors wired funds to Palmer's accounts. Trigon and Palmer transferred funds to brokerage and trading accounts. Defendants used the telephone and email to communicate with investors. That is all that is required.

III. THE INVESTMENTS DEFENDANTS SOLD ARE SECURITIES

A. The Promissory Notes And Investment Agreements Are Securities

The Notes and investment agreements Defendants sold are securities. In assessing whether an investment is a security, the United States Supreme Court has noted that the fundamental purpose of the Securities Act is "to eliminate serious abuses in a largely unregulated securities market." United Housing Found., Inc. v. Forman, 421 U.S. 837, 849 (1975). In defining the scope of the products Congress wished to regulate, Congress painted with a broad brush. It realized the virtually unlimited scope of "human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" Reves v. Ernst & Young, 494 U.S. 56, 60-61 (1990) (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946)).

i. Promissory Notes Are Securities

According to the United States Supreme Court, notes are presumed to be securities unless the notes fall into certain judicially created categories that are plainly not securities or the notes bear a family resemblance to the notes in those categories. Reves, 494 U.S. at 62. The Reves Court identified four facts to consider in determining whether a particular note is a security. These four elements are:

> (1) the motivations that would prompt a reasonable seller and buyer to enter into [the transaction]. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the interest is likely to be a "security" . . . (2) the "plan of distribution" of the instrument . . . (3) . . . the reasonable expectations of the investing public . . . [and] (4) . . . whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary.

Id. at 60-61. None of the four factors is crucial, and the failure of one will not automatically result in a Court's concluding that the note in question is not a security. Rather, Courts take a balancing approach to determine whether, on the whole, the note looks more like a security than not. In re NBW Commercial Paper Litig., 813 F. Supp. 7, 10 n.7 (D. D.C. 1992) (holding commercial paper was a security).

ii. The Motivation of Investors

The first factor under Reves is an objective inquiry into the "motivations that would prompt a reasonable seller and buyer to enter into [the transaction]." SEC v. J.T. Wallenbrock and Assocs., 313 F.3d 532, 538 (9th Cir. 2002). A note is more like a security "if the seller's purpose is to raise money for the general use of a business and the buyer is interested primarily in the profit the note is expected to generate." Reves, 494 U.S. at 66; see also Pollack v. Laidlaw Holdings, Inc., 27 F.3d 808, 812 (2d Cir. 1994) ("The inquiry is whether the motivations are investment (suggesting a security) or commercial or consumer (suggesting a non-security)."). Alternatively, a promissory note that "is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose" will "less sensibly [be] described as a security. Reves, 494 U.S. at 66.

The first factor puts the Notes involved in this matter comfortably in the category of a security. Palmer raised money by telling people that their funds would be put into his trading program and earn high annual returns. Further, Palmer represented to investors that the monies they gave were an investment and that the interest guaranteed under the Notes was to be paid by the profit Palmer made by investing their monies in his trading program. Further, the investors were not provided any information regarding any assets that purportedly backed up the Notes.

See Wallenbrock, 313 F.3d at 538 (lack of information regarding assets backing loan indicated investment for general business purposes). In fact, the Notes indicated on their face that "[n]o collateral will be provided."

In addition, the attractive interest rate offered to investors suggests the Notes are securities. See id. (a promised interest rate above market rates suggested a security). Here, the Notes offered an interest rate of 20 percent per year or more, indicating the Notes are securities. Moreover, the fact that Defendants offered a fixed rather than variable rate of return does not affect the investments' status as a security. See SEC v. Edwards, 540 U.S. 389, 397 (2004) (analyzing Howey and holding "an investment scheme promising a fixed rate of return can be an 'investment contract' and thus a 'security' subject to the federal securities laws"); Stoiber v. SEC, 161 F.3d 745, 750 (D.C. Cir. 1998) (holding fixed rate notes are securities); Pollack, 27 F.3d at 813 (noting fixed rate bonds are regulated as securities). Under these facts, the first factor of Reves is met.

iii. The Plan of Distribution

The second Reves factor requires an examination of the plan of distribution of the promissory notes to determine whether the instrument has "common trading for speculation or investment." Reves, 494 U.S. at 66. If the promissory notes are sold to a broad segment of the general public, then common trading has been established. Id. at 68. Here, Palmer gave Notes to a large group of investors, more than 55, with investors coming from at least three states.

iv. Expectations of the Investing Public

The third Reves factor requires a consideration of "whether a reasonable member of the investing public would consider these notes as investments." McNabb v. SEC, 298 F.3d 1126, 1132 (9th Cir. 2002). The opinions of individual investors as to whether the notes are securities

are irrelevant. Id. Such admissions add little, if anything, to the analysis. Id. (citing Stoiber, 161 F.2d at 751). The verbal and written representations Palmer made to investors indicate that a reasonable investor would view the Trigon Notes as an investment. Palmer admits that he raised money, evidenced by the Notes, by convincing investors verbally that their money would earn high profits when invested in his trading program. Also, the Notes specifically state that the principal will be returned with interest of 20 percent per year or more or, in some cases, that the interest will accrue "at the rate per performance from Trigon." The investors reasonably understood, based on Palmer's representations, that payments under the Notes would be paid from the proceeds of the investment they made in the trading program operated by Trigon and Palmer. Palmer told investors their funds would be used to purchase securities, futures and currencies. A reasonable investor would view such a transaction as a security purchase.

v. Risk-Reducing Factors

The final factor for a Court to assess is whether there are adequate risk-reducing factors such as an alternative regulatory scheme that would "significantly reduce the risk of the instrument" to the lender, "thereby rendering the application of the Securities Acts unnecessary." Reves, 494 U.S. at 67. Here, there are no risk-reducing factors or alternative regulatory schemes that would reduce the risk to the investors in this case. First, Trigon's Notes are unsecured, offering no protection to investors. They specifically state that "[n]o collateral will be provided." Where notes are uninsured and uncollateralized, courts conclude such notes are securities. See SEC v. Cross Fin. Servs., Inc., 908 F. Supp. 718 (C.D. Cal. 1995). Thus, under a Reves analysis, the Notes Trigon and Palmer issued are securities and are required to be registered absent an exemption from registration.

B. INVESTMENT CONTRACTS ARE SECURITIES

For the investors who did not receive a Note, their investments are securities, because they are investment contracts. An investment contract is a security if it involves "(1) investments of money; (2) in a common enterprise; (3) with profits derived from others' efforts." SEC v. Howey, 328 U.S. 293, 301 (1946).

The elements of Howey are satisfied when applied to the facts surrounding the investment agreements Trigon and Palmer made with investors. The first element of Howey is met, because Trigon investors unquestionably invested money with Defendants from at least 1996 through October 2008.

The second element of Howey, a "common enterprise," is also met. It requires "either an enterprise common to an investor and the seller, promoter, or some third party (vertical commonality) or an enterprise common to a group of investors (horizontal commonality)." See SEC v. R.G. Reynolds Enters., Inc., 952 F.2d 1125, 1130 (9th Cir. 1991). Palmer has admitted that investor funds went into a common fund. Investor declarations also confirm that Palmer consistently told investors their funds would be pooled into one fund through which he traded various securities. "Horizontal commonality" is satisfied, because Palmer pooled investor funds received from at least 55 investors into a single account. See id. at 1131. The "vertical commonality" test is also satisfied, since the "fortunes of all investors are inextricably tied to the efficacy of the promoter." Revak v. S.E.C. Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994) (internal citations omitted).

Finally, Howey's third element is established, since the profits from the investment were to be derived solely from the efforts of Defendants, who were to invest the funds investors put into the program. Palmer told investors that he was able to pay annual returns of 20 percent or

more because his trading program generated profits exceeding that level of returns. Trigon investors had no role in investment decisions and provided nothing beyond their principal investment. Thus, the Notes and investment agreements in this case are securities and are subject to federal securities laws.

IV. TRIGON AND PALMER VIOLATED THE REGISTRATION PROVISION OF SECTION 5(a) AND (c) OF THE SECURITIES ACT

In order to establish a violation of the registration requirements of the Securities Act, the Commission must demonstrate that Defendants, directly or indirectly, offered or sold securities without a registration statement having been filed or in effect. See SEC v. Int'l Chem. Dev. Co., 469 F.2d 20, 27 (10th Cir. 1972). "The elements of [an] action for violation of Section 5 are (1) lack of a registration statement as to the subject securities; (2) the offer or sale of the securities; and (3) the use of interstate transportation or communication and the mails in connection with the offer or sale." Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 124 (2d Cir. 1998) (quoting In re Command Credit Corp., No. 3-8674, 1995 SEC LEXIS 989, at *2 (S.E.C. Apr. 19, 1995)).

Scienter is not an element of a Section 5 violation. See Aaron, 446 U.S. at 714 n.5; SEC v. Johnston, No. 90-4189, 1992 U.S. App. LEXIS 17626 (10th Cir. July 28, 1996); SEC v. Universal Major Indus. Corp., 546 F.2d 1044, 1046 (2d Cir. 1976); SEC v. Lybrand, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); SEC v. Alpha Telecom Inc., 187 F. Supp. 2d 1250, 1258 (D. Or. 2002). In fact, Section 5 imposes strict liability on anyone who directly or indirectly violates its plain terms. See SEC v. Friendly Power Co., 49 F. Supp. 2d 1363, 1367 (D.D.C. 1997) (citing SEC v. Tuchinsky, 1992 U.S. Dist. LEXIS 13650 (S. D. Fla. 1992)); SEC v. Alliance Leasing Corp., 98-CV-1810-J(CGA), 2000 U.S. Dist. LEXIS 5227, at * 20 (S.D. Cal. Mar. 20, 2000) (concluding that at a Section 5 violation does not require evidence of a specific intent to violate

the statute); SEC v. DCI Telecomms., 122 F. Supp. 2d 495, 501 (S.D.N.Y. 2000) ("regardless of intent defendants violated Section 5"); SEC v. Current Fin. Servs., 100 F. Supp. 2d 1, 5 (D.D.C. 2000) (Section 5 of the Securities Act imposes strict liability).

As set forth above, the notes and investment contracts Trigon and Palmer sold are securities. No registration statement has been filed as to those securities. Thus, Defendants violated Sections 5(a) and (c).

V. PALMER VIOLATED SECTION 15(a) OF THE EXCHANGE ACT

Section 3(a)(4) of the Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." The phrase "engaged in the business" connotes regular participation in securities transactions. Among the activities that indicate a person may be a broker are: solicitation of investors to purchase securities, involvement in negotiations between the issuer and the investor, and receipt of transaction-related compensation. See e.g. SEC v. Hansen, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,426 (S.D.N.Y. 1984). Section 15(a)(1) of the Exchange Act prohibits a broker or dealer from making use of the mails or any means or instrumentality of interstate commerce to effect or attempt to induce transactions in securities unless registered with the Commission in accordance with Section 15(b). SEC v. United Monetary Servs., Inc., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,284 at 96,302 (S.D. Fla. 1990). Scienter is not required in order to prove a violation of Section 15(a). See id.; SEC v. Nat'l Executive Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

Palmer was in the busness of selling securities in the form of Notes and investment contracts, held himself out as a licensed securities professional and was engaged in the repeated sale of securities over a significant period of time. Palmer told investors he would be paid from

profits earned through his trading in excess of the 20 percent promised to investors. Palmer therefore is a "broker" as defined under the Exchange Act. Palmer is not registered with Commission in accordance with Section 15(b) nor is he associated with a registered broker or dealer. Palmer used the mails or instrumentalities of interstate commerce to induce investors to purchase securities in the form of Notes or investment agreements. As a result, Palmer violated Section 15(a) of the Exchange Act.

VI. THERE IS A REASONABLE LIKELIHOOD THAT THE DEFENDANTS WILL PERSIST IN THEIR ILLEGAL CONDUCT UNLESS ENJOINED

The Commission must establish the likelihood of future violations to obtain an injunction. SEC v. Murphy, 626 F.2d 633 (9th Cir 1980). The Commission must "go beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence." SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 100 (2d Cir. 1978). In ascertaining the likelihood of future violations, the Court should look at several factors, including the degree of scienter; the egregiousness of the violation; whether the defendant will have opportunities for future violations; and, whether the defendant has acknowledged wrongdoing and made sincere assurances against future violations. SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir.1993) (citing SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984)); SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir.1978). Furthermore, in ascertaining the likelihood of future violations, the Court should look at "the totality of circumstances and factors suggesting that the infraction might not have been an isolated occurrence." SEC v. Am. Realty Trust, 429 F. Supp. 1148, 1175 (E.D. Va. 1977) (reversed on other grounds by SEC v. Am. Realty Trust, 586 F.2d 1001 (4th Cir. 1978)); see also, SEC v. Fehn, 97 F.3d 1276, 1295-96 (9th Cir. 1996); Pros Int'l, 994 F.2d at 769 (citing Youmans, 729 F.2d at 415 (6th Cir. 1984)).

This was not an isolated instance. Defendants constructed an elaborate scheme to defraud investors over a period of years. Defendants are willing and able to continue their fraudulent behavior.

The Court should also consider "the likelihood that the defendant's customary business activities might again involve him in such transactions." SEC v. Suter, 732 F.2d 1294, 1301 (7th Cir. 1984); see also SEC v. Holschuh, 694 F.2d 130, 144 (7th Cir. 1982); SEC v. Zale Corp., 650 F.2d 718, 720 (5th Cir. 1981); Murphy, 626 F.2d at 655; Commonwealth Chem., 574 F.2d at 100. Defendants have been in the investment business since 1996. Palmer has supported his lavish lifestyle through raising money from investors over the last six years. He will have ample opportunity to repeat his conduct.

Although no single factor is determinative, the degree of scienter "bears heavily" on the decision. Pros Int'l., 994 F.2d at 769 (citing SEC v. Haswell, 654 F.2d 698, 699 (10th Cir. 1981)). As explained above, Defendants knew that their conduct defrauded numerous investors. Palmer admits to having run a Ponzi scheme. All of these factors, including a high degree of scienter, are present in the instant case.

VII. AN ASSET FREEZE IS NECESSARY TO PREVENT FURTHER DIVERSION AND DISSIPATION OF INVESTOR FUNDS AND TO PRESERVE THE STATUS QUO

To obtain an asset freeze, the Commission must show a prima facie case that a violation of the securities laws has occurred. See Unifund Sal, 910 F.2d at 1040-41; see also 15 U.S.C. §§ 77t(b) and 78u(d)(1). A freeze order may be obtained even without showing a likelihood of future violations. See Unifund Sal, 910 F.2d at 1041 (citing Commonwealth Chem., 574 F.2d at 103 n.13). The Commission's burden when seeking an asset freeze is lower than its burden when seeking a temporary restraining order or preliminary injunction against statutory violations,

because such injunctive relief raises the specter of future liability for contempt, while an asset freeze only preserves the status quo. See Unifund Sal, 910 F.2d at 1039. Unlike private litigants, the Commission need not show risk of irreparable injury or the unavailability of remedies at law in a request for preliminary relief. Id. at 1036.

> The rationale for this rule is readily apparent. It requires little elaboration to make the point that the SEC appears in these proceedings not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws. Hence, by making the showing required by statute that the defendant "is engaged or about to engage" in illegal acts, the Commission is seeking to protect the public interest, and "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief."

Mgmt. Dynamics, 515 F.2d at 808-809 (quoting Hecht Co., 321 U.S. at 331).

As set forth above, the Commission has established a prima facie case that a violation of the federal securities laws has occurred. The evidence accompanying this memorandum demonstrates that Defendants defrauded at least 55 investors of over $40 million in a blatant Ponzi scheme. Defendants used investor funds for personal expenses, to purchase snowmobiles, to build a $12 million mansion and to pay Palmer an exorbitant salary. Palmer also transferred investor funds to family members, including an eleventh-hour transfer to his wife of an over $400,000 cashier's check. Under those circumstances, an asset freeze is appropriate to conserve whatever remains of investors' funds.

Obtaining the asset freeze against Defendants on an ex parte basis is also necessary. In past cases involving fraud, when the Commission has provided defendants with notice of an application for a temporary restraining order containing an asset freeze, defendants have taken the opportunity to hide or dissipate investor funds. See e.g. Current Fin. Servs., 100 F. Supp. 2d 1 (D.D.C. 2000) ($150,000 transferred to defense counsel); SEC v. Interlink Data Network of

Los Angeles, Inc., Civil No. 93 3073 R, 1993 U.S. Dist. LEXIS 20163 (C.D. Cal. Nov. 15, 1993) ($25,000 transferred to defense counsel between notice of proposed application and entry of freeze order). This Court should not allow these Defendants the opportunity to transfer investor funds to hide them or pay for legal expenses.

VIII. THIS COURT SHOULD APPOINT A RECEIVER OVER THE ASSETS OF TRIGON AND ENTER A STAY OF LITIGATION

The Court's authority to appoint a receiver is well established and has been exercised in similar cases in the past. SEC v. R.J. Allen & Assocs., Inc., 386 F. Supp. 866, 878 (S.D. Fla. 1974). Courts have wide discretion to order equitable relief in SEC actions. In re San Vicente Med. Partners Ltd., 962 F.2d 1402, 1406 (9th Cir. 1992). "The Court may appoint a receiver on a prima facie showing of fraud and mismanagement." Current Fin. Servs., 783 F. Supp. at 1443. As set forth above, the Commission has already made a strong prima facie showing of fraud and mismanagement. Thus, a receiver is warranted.

Trigon raised over $40 million from at least 55 investors in threes states promising returns in excess of 20 percent per year in a riskless trading program. Instead of investing the funds in a trading program as represented, Defendants operated a classic Ponzi scheme. Investors' returns were paid from recently-received capital from new investors. Palmer paid himself $25-35,000 per month and used investor funds for personal purposes, including building a $12 million home. As a result, this Court should appoint a Receiver over Trigon and related entities.

A stay of litigation is also appropriate under the circumstances here. In determining appropriate relief, this Court possesses the power to "issue a variety of ancillary relief measures," including ordering a stay of all pending and future litigation. SEC v. Wencke, 622 F.2d 1363, 1369 & 1371 (9th Cir. 1980). The Court's power to issue the requested stay is based on its well-

established inherent powers. Id. at 1369, accord SEC v. Acorn Tech. Fund, L.P., 429 F.3d 438, 442-43 (3rd Cir. 2005); SEC v. Merrill Scott & Assocs., Ltd., 2007 WL 26981, at *1, No. 2:02-CV-39 (D. Utah Jan. 3, 2007). This power can also be said to have derived from the All-Writs Act, which gives federal courts power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," including the power to stay the prosecution of lawsuits. 28 U.S.C. § 1651(a). That authority facilitates the "strong federal interest in insuring effective relief in SEC actions brought to enforce the securities laws." Wencke, 622 F.2d at 1372.

Without a stay of litigation, some more sophisticated investors may resort to executing against defendants' assets in order to obtain the lion's share of any potential recovery. In addition, defendants' outstanding creditors may take action to obtain control of assets that the Commission has yet to identify as a source of funds to repay investors. An asset freeze, coupled with the stay of litigation, will allow the receiver to evaluate meticulously potential avenues of recovery of investor funds and to determine a fair and equitable distribution of Defendants' assets.

IX. AN ORDER EXPEDITING DISCOVERY IS APPROPRIATE

The Commission seeks to depose witnesses, subpoena documents and take other discovery. Due to the threat of funds being removed and the fraud continuing, the Commission has brought this action expeditiously. Prompt resolution of this matter is critical to prevent further violative conduct. Expedited discovery of matters concerning Defendants' activities in connection with the sale of securities will permit the Commission to effectuate any Order entered

by this Court freezing assets and promptly ascertain the appropriate disposition of such funds. Accordingly, the Commission has requested that expedited discovery be permitted in the manner described in the order.

X. THIS COURT SHOULD ISSUE AN ORDER PREVENTING THE ALTERATION OR DESTRUCTION OF DOCUMENTS

Defendants have already shown the lengths to which they will go to avoid compliance with the federal securities laws. To protect the documents necessary for full discovery in this matter, the Commission seeks an order preventing the alteration or destruction of documents: good faith preservation of documents cannot be assumed. Such an Order is appropriate to protect the integrity of this litigation.

XI. CONCLUSION

Based on the forgoing, the Commission respectfully requests this Court to grant the Motion for a Preliminary Injunction, appoint a receiver, enter an Order freezing Defendants' assets, expediting discovery and preventing the destruction of documents.

Respectfully submitted this 26th day of February 2009.

/s/ Karen L. Martinez

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