UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-81565-HURLEY/HOPKINS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CREATIVE CAPITAL CONSORTIUM, LLC,
A CREATIVE CAPITAL CONCEPT$, LLC, and
GEORGE L. THEODULE,

Defendants.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT GEORGE I. THEODULE AND MEMORANDUM OF LAW IN SUPPORT

I. INTRODUCTION

From at least November 2007 until December 29, 2008, when this Court entered its Temporary Restraining Order, Defendant George I. Theodule, directly and through Creative Capital Consortium, LLC ("CCC") and A Creative Capital Concepts, LLC ("ACCC") (collectively, the "Companies"), raised approximately $63 million through a Ponzi scheme targeting the United States Haitian community. Theodule told investors he would double their money within 90 days by trading stocks and options, and claimed this was a zero risk investment. In reality, Theodule had never made a profit for the Companies' investors. As Theodule has admitted, he lost more than 97% of the investor funds he traded.

To conceal the truth from investors, Theodule operated a Ponzi scheme and used approximately $19.1 million in new investor funds to pay earlier investors their purported returns. While the Companies' investors were losing their savings, Theodule was using more

than $2 million of investors' money to fund his extravagant lifestyle, which included two luxury vehicles, a wedding, and a mansion in Georgia.

The undisputed facts in this case show Theodule violated the anti-fraud provisions of the federal securities laws by making numerous material misrepresentations and omissions in connection with investments in stocks and options. As a result, the facts show the Commission is entitled to summary judgment as a matter of law against him.

The Commission asks the Court to find Theodule liable for violating Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act"). The Commission then asks the Court to enter an injunction permanently enjoining Theodule from future violations of those laws and directing him to pay disgorgement, prejudgment interest, and a civil penalty.

II. THE STANDARD FOR GRANTING SUMMARY JUDGMENT

The Court should grant summary judgment if the moving party establishes there is no genuine issue of material fact, and therefore is entitled to judgment as a matter of law. *Carlin Communication, Inc. v. Southern Bell Tel. and Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986). Although the Court must view all evidence and inferences to be drawn from that evidence in a light most favorable to Theodule, the trial judge should enter summary judgment "if, under the governing law, there can be but one reasonable conclusion." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial'") (citation omitted).

In reviewing the evidence, the Court must determine whether the non-moving party has identified specific facts demonstrating there is a genuine issue of material fact for trial. *Id.* at 587. Here the undisputed facts and the law set forth in this memorandum yield only one

reasonable conclusion: Theodule made material misrepresentations and omissions about securities investments while offering and selling them to the public. Accordingly, the Court should enter summary judgment.

III. THEODULE'S ASSERTION OF THE FIFTH AMENDMENT

Throughout this litigation, Theodule has asserted his Fifth Amendment privilege against self-incrimination whenever called on to testify. Despite his court papers' repeated claims of innocence, he has refused to answer any questions about the offer and sale of the investments, his role in the sales process, statements he made to prospective investors, or what he did with the millions of dollars he and his companies received. For example, when the Receiver deposed him on April 9, 2009, Theodule invoked his Fifth Amendment privilege against self-incrimination 165 times. He did this in response to virtually every substantive question the Receiver asked him. [Exhibit 16, Theodule Deposition, at 19-23, 25, 32-33, 41-42, 53-55, 59-76, 78-79, 84, 87-88, 94-95, 98-104, 108-110, 122, 124-125, 127-128, 135, 152, 164-170].[1] Specifically, Theodule took the Fifth Amendment when asked about:

- His net worth and sources of income, including CCC. [*Id.* at 22, 124-25];
- His employment history and experience with investments, commercial property development, and general professional experience. [*Id.* at 19-23];
- CCC's organization, operations, and control over investment clubs. [*Id.* at 21-22, 109-110];
- His solicitation of investors. [*Id.* at 19-23]; and
- The vast amounts of investors' money he diverted for personal use or lost through CCC. [*Id.* at 57-84, 109-110, 127-28, 167].

Similarly, when the Commission deposed Theodule on August 14, 2009, Theodule took the Fifth Amendment on every single question relating to the substance of every element of every claim

[1] References to Exhibit Numbers refer to the Exhibits to the Commission's Statement of Undisputed Facts, filed as DE 171.

in this case. [Ex. 15, at 5 ("Mr. Theodule will be taking the Fifth Amendment as to any substantive questions.")]. Specifically, he took the Fifth concerning, among other things:

- The use of investor funds [*Id.* at 31:9-20; 68:3-13, 114:12-146:2; 155:22-159:16];
- Theodule paying investors their purported profits from new investors' funds [*Id.* at 87:10-23]; whether SIMS was an independent regulatory agency and third-party verification system [*Id.* at 40:18-25, 41:16-14], Theodule's affiliation with SIMS [*Id.* at 39:6-8]; whether CCC paid SIMS employees, SIMS lack of independent judgment [*Id.* at 41:1-6]; and whether SIMS actually provided any verification services [*Id.* at 61:19-62:5];
- Theodule's affiliation and control over the investment clubs [*Id.* at 42:16-51:11; 83:13-17].
- His representations to investors about his investment background and experience, [*Id.* at 54:2-56:8], representations about the growth rate of investors' funds [*Id.* at 53:6-19], his promises to double investors' funds within 90 days [*Id.* at 70:4-71:24, 76:1-15, 87:10-23], the safety of their investment and investment returns [*Id.* at 99:7-105:10; 107:6-108:13; 112:20-114:15], and whether from November 2007 until December 2008 he raised money from CCC investors making false promises that he never delivered on [*Id.* at 159:10-16].

Additionally, Theodule asserted the Fifth Amendment in response to every one of the Commission's interrogatories and requests for admissions. This included questions on matters relevant to every element of the claim against him. [Ex. 25 & 26].

As a result of Theodule's refusal to testify at his depositions and answer interrogatories and requests for admissions, the Court should draw the adverse inference that had he done so, his testimony and responses would have been adverse to his position. A court may draw an adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Accordingly, courts routinely draw adverse inferences against parties who do not testify. *United States v. A Single Family Residence*, 803 F.2d 625, 629 n.4 (11th Cir. 1986) (trial court properly drew adverse inference from corporate representative's refusal to testify that testimony would not have been favorable to corporation's position); *SEC v. Cherif*, 933 F.2d 403, 412 (7th Cir. 1991) (affirming preliminary injunction where court took adverse inference from assertion of Fifth

Amendment); *BankAtlantic v. Coast to Coast Contractors, Inc.*, 22 F.Supp.2d 1354, 1359 (S.D. Fla. 1998) (granting summary judgment where defendant's mere denials insufficient to overcome evidence, including adverse inference drawn from invocation of Fifth Amendment).

Because of Theodule's refusal to testify on the topics listed above, the Court should draw the adverse inference that Theodule: (1) had no sources of income outside of funds he diverted from CCC investors; (2) overstated his past professional experience when soliciting investors; (3) controlled the investment clubs along with his associates; (4) made specific guarantees of investment success; and (5) took investor money for his own use.

IV. THEODULE VIOLATED THE SECURITIES LAWS

A. Factual Background

From November 2007 until this Court entered a Temporary Restraining Order against him on December 29, 2008, Theodule and his Companies made false statements and omissions to prospective and actual investors to lure them into investing in stocks and options through the Companies.[2] Theodule, directly and through the Companies, told prospective and actual investors he had a successful history in trading stocks and options, promised to double their money within 90 days, and represented that this was a no-risk investment.[3] The scam worked, and Theodule raised more than $63 million from investors.[4] Theodule has now admitted that he never realized a net profit from trading.[5] Theodule traded approximately $18 million of the $63 million he raised, and lost 98% of that through trading.[6] Additionally, Theodule diverted

[2] Undisputed Facts at ¶¶ 4, 38-48. References to "Undisputed Facts" refer to the Commission's Statement of Undisputed Facts, filed as DE 169.

[3] *Id.* at ¶¶ 10-15.

[4] *Id.* at ¶ 30.

[5] *Id.* at ¶¶ 32, 39, 47.

[6] *Id.* at ¶ 32, 39.

approximately $24 million to his wife and close relatives.[7] He also siphoned off approximately $4 million for himself.[8] To conceal the truth from investors, Theodule and his Companies used approximately $19 million of new investor funds to pay existing investors their purported returns.[9]

On December 29, 2008, the Commission filed a Complaint and motion for temporary restraining order, which motion this Court granted that same day. The Commission's Complaint includes one claim, under Section 10(b) and Rule 10b-5 of the Exchange Act.

B. TheoduleViolated The Anti-Fraud Sections Of The Securities Laws

Section 10(b) and Rule 10b-5 of the Exchange Act proscribe fraudulent conduct in connection with the purchase or sale of securities. *United States v. Naftalin*, 441 U.S. 768, 773 n.4, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). To establish violations of Section 10(b), the Commission must show Theodule made: (1) a misrepresentation or omission; (2) of material fact; (3) acting with scienter; (4) in connection with the purchase or sale of securities; (5) while using the facilities of interstate commerce. *Basic, Inc. v. Levinson*, 485 U.S. 224, 235, n.13, 108 S.Ct. 978 (1988). Notably, the "SEC does not need to prove investor reliance, loss causation or damages" in actions under Section 10(b). *SEC v. Merchant Capital*, 483 F.3d 747, 764 (11th Cir. 2007) (Eleventh Circuit does not mention of any of these elements when listing elements the SEC must prove to show these violations).

1. Theodule Made False Statements And Omissions

Theodule, directly and through the Companies, made material misstatements and omissions in connection with the sale of stocks and options regarding: (i) guaranteed investor

[7] *Id.* at ¶ 31(a).

[8] *Id.* at ¶ 31(b).

[9] *Id.* at ¶ 31(c).

returns; (ii) his experience trading stocks and options; (iii) the safety of investing through CCC; and (iv) the use of investor funds and returns. Any one of these misrepresentations and omissions can form the basis of violations under Section 10(b) and Rule 10b-5 of the Exchange Act.

Rule 10b-5 expressly makes it unlawful to "omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5 (2006); *KW Brown*, 555 F.Supp.2d at 1304; *Ackerman v. Schwartz*, 947 F.2d 841 (7th Cir.1991) ("Federal securities laws require persons to tell the truth about material facts once they commence speaking."). *See also SEC v. Global Express Capital Real Estate Investment Fund LLC, et al.*, 289 Fed.Appx. 183, 2008 WL 3822442 at *1 (9th Cir. Aug. 7, 2008) (granting SEC's summary judgment motion; defendant made a statement and failed to include facts necessary to make the statement not misleading).

Within this legal framework, the Commission now turns to address Theodule's false and misleading statements and omissions.

a. Misrepresentations And Omissions Concerning Investor Returns

Theodule, directly and through the Companies, told investors he would double their money within 90 days through his stock and options trading success.[10] In reality, the investments with CCC experienced significant losses – of up to 98% - from November 2007 through December 2008.[11] Theodule has admitted that the accounts experienced a net trading loss.[12] Theodule did not disclose his trading losses.[13] Rather, Theodule routinely boasted to

[10] *Id.* at ¶¶ 9, 11.

[11] *Id.* at ¶¶ 32, 39.

[12] *Id.* at ¶¶ 32, 39, 47.

[13] *Id.* at ¶¶ 38-40.

investors about CCC's high rates of return,[14] and stressed the need to begin investing as soon as possible.[15] He told at least one investor he had made millionaires out of a significant number of people in the time it had taken her to decide to invest.[16] These claims were patently false.[17]

To continue the scam, Theodule hid these losses from current and prospective investors, paying principal and purported profits to existing investors from new investor funds in true Ponzi fashion.[18] In all, the Defendants paid existing investors $19 million from new investor funds and never disclosed that these were new investor funds and not, as they led investors to believe, profits from trading.[19]

b. Misrepresentations Concerning Theodule's Trading Experience

The investment clubs pooled investor funds and sent them to CCC for a 90-day period, during which time Theodule purportedly traded stocks and options on behalf of the investment club members.[20] To lure investors, Theodule, directly and through his Companies, told investors he had tremendous success trading stocks and options.[21] In reality, Theodule never recognized a profit on trading stocks and options through CCC.[22] Of the more than $18 million deposited in brokerage accounts Theodule controlled, he lost approximately 98% trading stocks and options.[23]

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[14] *Id.* at ¶ 11.

[15] *Id.* at ¶ 13.

[16] *Id.*.

[17] *Id.* at ¶¶ 31-32, 39, 47.

[18] *Id.* at ¶¶ 33-34, 40-41.

[19] *Id*.

[20] *Id.* at ¶ 20.

[21] *Id.* at ¶¶ 10-11.

[22] *Id.* at ¶¶ 32, 39.

[23] *Id*.

c. Misrepresentations Concerning The Safety Of Investing

Theodule's presentations to prospective investors also emphasized the safety and security of investing with CCC when he led investors to believe: (i) they could withdraw their funds anytime after the 90-day investment period;[24] (ii) there was no risk;[25] and (iii) a purported self-regulatory agency verified the security of their funds.[26] These representations were all patently false.

Theodule told investors they could withdraw their funds anytime after the 90-day investment period.[27] In reality, CCC did not pay newer investors who requested the return of their principal and supposed profits after the 90-day period.[28]

Theodule made oral and written representations guaranteeing investors 100% returns with no risk.[29] He entered into agreements with investors that represented this was a "zero risk investment after 90 days."[30] This could not be further from the truth. From November 2007 until December 2008, Theodule never made a net profit trading and lost 98% of the investors' funds he traded.[31] In addition, Theodule siphoned off approximately $4 million of investors' funds for his personal use and diverted approximately $24 million to his family members.[32] Thus, this investment was not a risk-free venture.

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[24] *Id.* at ¶¶ 22, 35, 46.

[25] *Id.* at ¶¶ 14, 25-27.

[26] *Id.* at ¶¶ 16-17.

[27] *Id.* at ¶¶ 22, 35, 46.

[28] *Id.* at ¶¶ 22, 35, 37, 46.

[29] *Id.* at ¶¶ 11, 13-15, 25-27.

[30] *Id.* at ¶¶ 25-27.

[31] *Id.* at ¶¶ 32, 39.

[32] *Id.* at ¶¶ 31(a)-(b).

Additionally, to give investors a false sense of security, Theodule directed prospective investors to form "investment clubs."[33] He directed investors to work with SIMS to help them form their investment clubs, and represented to investors that SIMS was a self-regulatory agency that protects investors through independent verification of their deposits.[34] In reality, however, Theodule has now admitted SIMS was a private company and not a governmental regulatory agency.[35] SIMS was a private company created by Theodule's brother and run by a former CCC employee, and not a regulatory entity.[36] Theodule paid SIMS and its employees out of investor funds.[37] There is no evidence that SIMS verified investors' deposits.[38] Indeed, SIMS did not protect investors' contributions, as Theodule commingled investor funds extensively with his own personal accounts and misappropriated approximately $4 million for himself and diverted approximately $24 to his family members and others.[39]

The investment clubs did not operate independently of Theodule, investor funds placed with investment clubs were placed solely with Theodule and CCC, and Theodule misappropriated investor funds and commingled them with CCC funds.[40] The investment clubs served principally as vehicles to funnel funds to Theodule and CCC. [41]

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[33] *Id.* at ¶¶ 16-17.

[34] *Id*.

[35] *Id*. at ¶18.

[36] *Id*. at ¶ 18, 42-43.

[37] *Id*. at ¶43.

[38] *Id*.

[39] *Id*. at ¶¶ 31(a)-(b).

[40] *Id*. at ¶ 19.

[41] *Id*. at ¶¶ 20-24.

d. Misrepresentations And Omissions Concerning Use Of Investor Funds And Trading Profits

Theodule told prospective investors they would invest their funds in the stocks and options of well-known companies such as Google, John Deere, Monsanto, Best Buy, GameStop, and others.[42] In reality, Theodule invested only a portion of new investor funds and used some of those funds to pay existing investors their purported returns.[43] Of the $63 million Theodore raised from investors, he deposited approximately $18 million in brokerage accounts he controlled and used approximately $19 million from new investors to pay existing investors their purported returns.[44] In addition, Theodule siphoned off approximately $4 million of investor funds to fund his lifestyle and pay for, among other things, luxury vehicles, credit card payments, and a wedding.[45] He also diverted $24 million in investor funds to his wife and others.[46] Theodule never told investors how their funds were really spent, and instead falsely represented that investor funds would be invested in stocks and options.[47]

Theodule targeted prospective investors in the Haitian community.[48] To lure these investors, Theodule claimed he used trading profits to fund new business ventures, some of which benefitted the Haitian community in the United States, Haiti, and Sierra Leone.[49] In reality, however, there were no trading profits, and most of the funds disbursed went to pay

[42] *Id*. at ¶ 14.

[43] *Id*. at ¶¶ 31-32, 34, 40.

[44] *Id*. at ¶¶ 32, 34, 40.

[45] *Id*. at ¶¶ 31(b), 45.

[46] *Id*. at ¶¶ 31(a), 44.

[47] *Id*. at ¶ 14.

[48] *Id*. at ¶¶ 6-8.

[49] *Id*. at ¶ 8.

earlier investors their purported profits or were misappropriated by Theodore, and were not used to fund business projects.[50]

2. Theodule's False and Misleading Statements and Omissions Were Material

Information is deemed material if there is a substantial likelihood that the misrepresented or omitted facts would have assumed actual significance in the deliberations of a reasonable investor. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982). An omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Levinson*, 485 U.S. at 231-32; *Carriba Air*, 681 F.2d at 1323 (a statement is material if "a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action").

Theodule's misrepresentations and omissions concerning investor returns were material. Since one of the principal purposes of investing is to earn returns on the amount invested, falsely promising returns is a material misrepresentation. *SEC v. Lauer*, Case No. 03-80612-CIV, 2008 WL 4372896, at *20 (S.D. Fla. Sept. 24, 2008) (citing *SEC v. Haffenden-Rimar Int'l*, 362 F.Supp. 323, 327 (E.D. Va. 1973) (finding defendants knowingly and materially violated antifraud provisions of securities laws when they promised returns)). In addition, Theodule's failure to disclose CCC was not a legitimate investment venture, but a Ponzi scheme destined to crash were clearly material. *SEC v. Better Life Club of America, Inc.*, 995 F.Supp. 167, 176 (D.D.C. 1998) (where defendants enticed investors with promises of doubled money in 60 or 90

[50] *Id.* at ¶¶ 31, 41.

days and never revealed to potential investors that the investment was nothing more than a Ponzi scheme, "the entire solicitation process was itself a broad misrepresentation on the grandest scale."). Additionally, a reasonable investor would also consider it important that Theodule commingled investor funds with his personal accounts and misappropriated investor funds for his personal use. Accordingly, Theodule's misrepresentations and omissions were material. *Id.* at 176 ("Defendants' fabulous promises were substantial inducements to investment in the Advertising Pool, and it is more than reasonable to assume that prospective investors would have shied away had they known that the Advertising Pool was a pyramid scheme. Furthermore, no rational investor would knowingly invest in a project which never funded profitable ventures and which diverted substantial funds to the personal use of its promoters. Therefore, there is no question that defendants' frequent misrepresentations and misleading omissions were material.").

3. Theodule Acted With Scienter

The Commission must show Theodule acted with scienter, which is defined as either knowing misconduct or severe recklessness – extreme departure from the standards of ordinary care. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1375 (1976); *Carriba Air*, 681 F.2d at 1322. The Eleventh Circuit has defined severe recklessness as involving "highly unreasonable omissions or misrepresentations ... that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir.1989) (citation omitted).

Here, Theodule acted with the highest degree of scienter. Theodule was the principal architect and promoter of the entire CCC investment scheme, and he repeatedly and willfully made promises to investors that he knew or should have known were false. Even as he continued

to lose more money, Theodule continued to make the same false promises to lure additional investors.[51]

Theodule promised to double investors' money in ninety days by investing it in the stock market, and he told investors there was no risk to the money they invested with him.[52] Theodule knew this was a lie. As Theodule himself acknowledged in his motion for summary judgment, the truth was Theodule lost approximately 98% of the money he invested in the market.[53] As Theodule admitted in his Answer, he never made a net profit from these trades.[54] Theodule's lie that that he could double investors' money in ninety days is direct evidence of scienter.

Theodule also told investors there was no risk to the money they invested with him.[55] Theodule also knew this was a lie. The truth was Theodule misappropriated approximately $4 million to his personal use, making massive counter-withdrawals from investor accounts and funneling money and property to himself and his associates in excess of $24 million that he knew belonged to CCC. Theodule's lie that that he did not place investor funds at risk is direct evidence of scienter.

Additionally, Theodule told investors that SIMS offered protection by independently verifying their deposits.[56] Theodule knew this was false. The truth was SIMS was not a regulatory entity. SIMS was a private company run by a former CCC employee. Theodule's lie that SIMS protected investor funds is also direct evidence of scienter.

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[51] *Id*. at ¶¶ 32, 39 (trading losses since November 2007), 36-37, 47.

[52] *Id.* at ¶¶ 9-15, 25, 27.

[53] *Id.* at ¶¶ 32, 39.

[54] *Id.*

[55] *Id.* at ¶¶ 14, 25-27.

[56] *Id*. at ¶¶16-18, 42.

Theodule also told investors he was an experienced and savvy businessman to whom they could entrust their money.[57] Theodule knew this was a lie. The truth was Theodule was an inexperienced and fraudulent operator who controlled a vast Ponzi scheme, using the funds of newer investors to "repay" earlier investors their purported investment returns. At least $15.2 million of newer investor funds were used to repay earlier investors to fraudulently depict a successful investment strategy where none in fact existed. Theodule's lies about his professional background and the actual operations of CCC are direct evidence of scienter.

The evidence shows that Theodule knew or was severely reckless in not knowing he made material misrepresentations in operating a fraudulent Ponzi scheme. In the face of the facts demonstrating Theodule's scienter in lying about a 90-day guarantee to double investor funds, misappropriation of investor funds, the security of investor funds, and his professional background, the Commission has clearly proven scienter. *See SEC v. Utsick*, 2009 WL 1404726 (S.D. Fla. May 19, 2009) (scienter established in Ponzi scheme case where defendant falsely promised inflated returns, commingled and misappropriated investor funds, and lost massive amounts of funds); *Gustin v. Hoffman*, 2009 WL 604957, at *4 (M.D. Fla. Mar. 9, 2009) (scienter established in Ponzi scheme case where defendants who "could not deliver on the promises they made to their investors" showed intent to deceive); *SEC v. Lauer*, 2008 WL 4372896, at *23 (S.D. Fla. Sept. 24, 2008) (scienter established in Section 10(b) case where defendant knew or was extremely reckless in not knowing of "pattern of deception" in making false promises to investors, using associates to perpetuate scheme); *Better Life*, 995 F.Supp. at 178 (finding scienter where defendant knew or was reckless in not taking measures to know the complete state of affairs of company engaged in Ponzi scheme and yet continued to offer the

[57] *Id*. at ¶¶10-15.

securities and sell them "by offering the same illusory promises, bolstered by the same straw stories of profitability and financial stability").

4. Theodule's Conduct Meets The "In Connection With" Test

Theodule's conduct in the instant case satisfies the "in connection with the purchase or sale" requirements of Section 10(b) and Rule 10b-5 of the Exchange Act. Specifically, Theodule's misrepresentations and omissions concerned trading in stocks and options, which are securities.

In determining whether a misstatement or omission is related to later securities transactions, the Supreme Court has held courts should broadly interpret the "in connection with" language of Section 10(b) because the securities laws "should be construed not technically and restrictively, but flexibly to effect [their] remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819, 122 S.Ct. 1899 (2002). Statements or omissions made with regard to trading in general, not just particular transactions, meet the "in connection with" requirement. *In re Carter-Wallace Sec. Litig*., 150 F.3d 153, 156 (2d Cir.1998) (company statements in technical medical journals were in connection with trading of securities); *SEC v. Rana Research*, 8 F.3d 1358, 1362 (9th Cir.1993) (in connection with requirement satisfied if the "fraud ... somehow 'touch[es]' upon securities transactions" (quoting *SEC v. Clark*, 915 F.2d 439, 449 & n. 18 (9th Cir.1990) ("in connection with" requirement more broadly construed in SEC actions than in private actions))). "Any statement that is reasonably calculated to influence the average investor satisfies the 'in connection with' requirement of Rule 10b-5." *Hasho*, 784 F.Supp. at 1006 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 861-62 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969)).

Theodule promised investors he would double their money through his successful stock and options trading to entice investors to invest. The very purpose of the investment clubs and

contributions was to allow Theodule to trade securities on investors' behalf to secure a 100% return on the investment within 90 days. Accordingly, Theodule conducted his fraudulent activities in connection with the purchase or sale of securities.

5. Theodule Used Interstate Commerce

In his Answer, Theodule admitted that he used interstate commerce in connection with the fact allegations set forth in the Commission's complaint.[58] Indeed, Theodule solicited investors nationwide and transferred at least some of the investment funds to brokerage accounts where he lost the overwhelming majority of those funds trading stocks and options via national trading exchanges. Thus, Theodule was engaged in interstate commerce, and meets all of the elements under Section 10(b) and Rule 10b-5 of the Exchange Act.

V. THE COURT SHOULD GRANT THE COMMISSION THE REMEDIES IT SEEKS

A. The Court Should Enter A Permanent Injunction Against Theodule

The Commission is entitled to a permanent injunction if it establishes (1) the defendant violated the securities laws, and (2) a reasonable likelihood the defendant will repeat the violations. *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 1204). It is important to remember the Commission appears in this matter "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 (2nd Cir. 1975). We therefore do not have to show irreparable injury or a balance of the equities in our favor. *SEC v. Unifund SAL*, 910 F.2d 1028, 1036 (2nd Cir. 1990). As discussed above, the Commission has established Theodule violated Section 10(b) of the Exchange Act and Rule 10b-5. The Court must then determine whether there is a reasonable likelihood Theodule will repeat his violations if the Court does not

[58] *Id*. at ¶ 48.

enjoin him. In making that determination, the Court should consider (1) the egregiousness of Theodule's actions, (2) the isolated or recurrent nature of the violations, (3) the degree of scienter involved, (4) Theodule's recognition of the wrongful nature of his conduct, (5) the sincerity of his assurances against future violations, and (6) the likelihood Theodule's occupation will present opportunities for future violations. *Calvo*, 378 F.3d at 1216.

All six factors justify an injunction here. First, Theodule's actions were egregious. From November 2007 until this Court entered a Temporary Restraining Order on December 29, 2008, Theodule defrauded investors by telling them he would double their money within 90 days, when in fact he lost the vast majority of the investment funds in trading. To conceal the truth from investors, Theodule ran a Ponzi scheme and paid existing investors from new investors' funds. Theodule also lured investors by telling them this was a no-risk investment, when in truth he never realized net profit from trading for investors, investor funds were used to fuel a Ponzi scheme that was ultimately doomed to fail, and Theodule misappropriated investor funds.

Second, Theodule's actions were recurrent. As discussed above, he solicited investors for the purchase and sale of securities for years, and he told countless lies to make it happen. This was not an isolated occurrence – it was a systematic and calculated plan to deceive investors. Third, for the same reasons, Theodule displayed the highest degree of scienter. He knew he was misleading investors by promising to double investors' money within 90 days and not disclosing the true, Ponzi scheme nature of the investment structure, but did it anyway. Fourth, Theodule has never admitted he did anything wrong. Despite the overwhelming evidence adduced in this lawsuit, Theodule has never given even a hint that he understands his conduct was in any way wrong.

Fifth, Theodule has given no assurances he will not violate the securities laws in the future, and given that he has not admitted he did anything wrong and the pains he took to hide the fraud, any assurances he might give would not be credible. *KW Brown*, 555 F.Supp.2d at 1311. Sixth, until this Court entered the Temporary Restraining Order, Theodule continued making fraudulent misrepresentations and omission to investors.

Given the existence of all six factors, the only way to assure Theodule does not repeat his securities law violations is for the Court to enter a permanent injunction against him.

B. The Court Should Order Disgorgement And Prejudgment Interest

The Court should order Theodule to pay disgorgement with prejudgment interest. Disgorgement is designed both to force a defendant to surrender his ill-gotten gains and deter others from violating the securities laws. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2nd Cir. 1996) (disgorgement amount should be calculated by measuring illegal profits, not amount needed to reimburse defrauded investors); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC v. Manor Nursing Ctrs*, 458 F.2d 1082, 1103-04 (2nd Cir. 1972) ("the effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable"). The district court has broad discretion in calculating the amount to be disgorged, which "need only be a reasonable approximation of profits causally connected to the violation." *Id.* ("Any risk of uncertainty in calculating the disgorgement amount should fall on the wrongdoer whose illegal conduct created that uncertainty."). Where a securities law violator has enjoyed access to funds over a period of time as a result of his wrongdoing, requiring the violator to pay prejudgment interest is consistent with the equitable purpose of disgorgement. *Hughes Capital*, 917 F. Supp. at 1090. All told, the Defendants obtained ill-gotten gains of $63

million, and therefore the Court should order disgorgement in this amount, plus prejudgment interest as of the date of judgment.

C. The Court Should Order Theodule To Pay A Civil Penalty

The Commission seeks a civil penalty against Theodule pursuant to Section 20(d) of the Securities Act and Section 21(d) of the Exchange Act. Undersigned counsel does not yet have authority from the Commission to recommend a specific penalty. Accordingly, we request the Court to reserve jurisdiction to determine a specific penalty amount upon a later motion.

VI. CONCLUSION

For all the reasons set forth in this motion and memorandum of law and the Undisputed Facts, the Commission asks the Court to: (1) grant summary judgment against Theodule on the single count of the Complaint; (2) enter a permanent injunction ordering Theodule not to violate Section 10(b) of the Exchange Act and Rule 10b-5; (3) order Theodule to pay disgorgement of $63 million and prejudgment interest in an amount to be calculated as of the date of judgment; and (4) order Theodule to pay a civil penalty, with amounts to be determined.

Date: October 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 2, 2009, a copy of the foregoing was served via cm/ecf filing upon:

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