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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

JUSTIN ROBERT KING; AND ELEVATE INVESTMENTS, LLC,

Defendants,

SHANNON LEIGH KING,

Relief Defendant.

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) REQUIRING ACCOUNTINGS; (3) PROHIBITING THE DESTRUCTION OF DOCUMENTS; (4) GRANTING EXPEDITED DISCOVERY; AND (5) APPOINTING A TEMPORARY RECEIVER; AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND APPOINTMENT OF A PERMANENT RECEIVER

(FILED UNDER SEAL)

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I. INTRODUCTION

The Securities and Exchange Commission ("SEC") brings this emergency action to stop an ongoing investment scheme being perpetrated by Defendants Justin Robert King ("King") and Elevate Investments, LLC ("Elevate") (collectively "Defendants"). Since June 2019, King and Elevate have offered interests in the Elevated Investment Fund (the "Fund"), raising at least $7.4 million from investors. However, there is no legal fund entity; rather, investor money is held in brokerage accounts in the name of King, his wife Shannon King ("S. King") and/or Elevate. In offering and selling investments in the Fund, King and Elevate are making false and misleading statements on Elevate's publicly-accessible website. First, Elevate's website indicates that King's trading has historically resulted in profits for his clients year after year, including a 61% return for all of his clients' accounts from June 2019 through June 2020. In fact, King's trading, across all known accounts associated with him, has resulted in substantial losses year after year, including a staggering $3.8 million in trading losses from June 2019 through June 2020. In addition, Elevate's website lists certain "Trusted Providers," which includes broker-dealers TD Ameritrade and Interactive Brokers. In fact, TD Ameritrade closed King's and Elevate's accounts in July and August 2020, respectively, and King and Elevate have never had accounts at Interactive Brokers.

In just the three months from September through November 2020, King and Elevate raised $1.87 million from investors and suffered trading losses of $531,000. Additionally, in same period, King transferred $298,000 to S. King's bank account. On December 1, King transferred an additional $100,000 to S. King's account. At the end of November 2020, King's and Elevate's brokerage accounts held $1.99 million.

The SEC seeks emergency relief to stop this ongoing fraud and protect investors' assets and funds. In order to obtain the relief the relief sought by the SEC, it must show (1) a *prima facie* case that the defendants have violated the federal securities laws, and (2) a reasonable likelihood that the defendants will repeat their

violations. The evidence is clear that defendants are violating the law, and their violations are ongoing. Without the intervention of the Court, there will be nothing to stop them from continuing to further harm investors.

II. STATEMENT OF FACTS

A. Defendants

Justin Robert King, age 40, is a resident of San Juan Capistrano, California. King is the founder and president of Elevate and controls its brokerage and bank accounts. Declaration of Kelly Bowers ("Bowers Decl.") at ¶¶ 4 (Ex. 1), 8 (Ex. 5), 16 (Ex. 12), 19 (Ex. 15) & 20 (Ex. 16). Prior to forming Elevate, King traded securities for at one other pooled investment vehicle and three other clients and ran an auto glass replacement company. Bowers Decl. ¶ 6 (Ex. 3), 7 (Ex. 4), 9 (Ex. 6), 10 (Ex. 7) & 11 (Ex. 8). King has never held any securities licenses, been registered with the Commission in any capacity, or been associated in any capacity with a registered broker-dealer or investment adviser. Bowers Decl. ¶ 25. In 2012, King was twice charged with felony heroin possession in two separate incidences, and in 2013, he pleaded guilty to two felony counts of possession of a narcotic drug and was sentenced to three years' probation. Bowers Decl. ¶ 5 (Ex. 2). In addition, King was found guilty of felony assault in 2004 and found guilty of felony possession of marijuana with intent to deliver and money laundering in 2000. Bowers Decl. ¶ 5, (Ex. 2).

Elevate Investments LLC is a Wyoming limited liability company with its principal place of business purportedly in Sheridan, Wyoming. Bowers Decl. at ¶¶ 8 (Ex. 5), 16 (Ex. 12), 18 (Ex. 14), 19 (Ex. 15) & 20 (Ex. 16). On August 15, 2020, Elevate filed a Form D for a $100 million securities offering exempt from registration under Securities Act Rule 506(c). Bowers Decl. ¶ 18 (Ex. 14).

B. Relief Defendant

Shannon Leigh King, age 38, is a resident of San Juan Capistrano, California. Bowers Decl. ¶¶ 6 (Ex. 3) & 15 (Ex 11). S. King is King's wife. Bowers Decl. ¶ 7

(Ex. 4, p.). Elevate's website does not have any disclosure that S. King is in any way affiliated with Elevate, nor is S. King disclosed in the applications for Elevate's brokerage accounts as an affiliate of Elevate. Bowers Decl. ¶¶ 4 (Ex. 1), 8 (Ex. 5), & 16 (Ex. 12).

C. The Offering

Since June 2019, King and Elevate have been conducting a $100 million securities offering through a fund called Elevate Investment Fund LLC (the "Fund"). Bowers Decl. ¶ 18 (Ex. 14). In an August 15, 2019 Form D filed with the SEC, Elevate and King said that the offering was being conducted pursuant to Securities Act Rule 506(c). *Id.* As of November 30, 2020, King and Elevate had raised at least $7.4 million from investors. Kim Decl. ¶ 18.

Elevate has a publicly-accessible website that identifies King as Elevate's founder and President. Bowers Decl. ¶ 4 (Ex. 1). King's photograph appears on the website. *Id.* No other persons are identified as employees or affiliates. *Id.* Elevate's publicly-accessible website states that "Elevate Investment Fund, LLC" is a "Master Fund" domiciled in Wyoming. *Id.* In fact, there is no legal entity with the name "Elevate Investment Fund" formed under the laws of Wyoming or any other state. Bowers Decl. ¶ 24 (Ex. 19). Instead, Elevate and King are depositing money raised from investors into brokerage and bank accounts controlled by King that are in the name of King, Elevate, or S. King. Kim Decl. ¶ 18.

Elevate's website also indicates that Elevate and King will invest the Fund's money pursuant to an "Optimum Income Strategy," which is a "hybrid style which amalgamates managed futures, long/short equity, covered option writing, and market neutral characteristics producing a low volatility, high yield, uncorrelated return stream." Bowers Decl. ¶ 4 (Ex. 1). The website also states that Elevate will receive a performance fee for its managing the Fund. *Id.* Specifically, the website states that Elevate "does not charge any fees for AUM [assets under mangement]" and receives a performance fee "only … after [the investors] have made a 10% return on [their]

investment[s]." *Id.* The website further provides an example of Elevate's fee structure: if the Fund "performs 30%," 20% will go to the investor and 10% to "management." *Id.*

D. King and Elevate's Materially False Statements

In offering and selling investments in the Fund, Elevate and King make three materially false and misleading statements regarding the Fund, Elevate, and King. First, Elevate's website states that Elevate "delivered a 61% percent return" for all clients under its management from its inception in June 2019 through June 2020, "compared to -8% for that of its S&P 500 benchmark." Bowers Decl. ¶ 4 (Ex. 1). The website also touts a return of over $600,000 on an investment of $1 million. Bowers Decl. ¶ 4 (Ex. 1).

During the period from June 2019 through June 2020, King and Elevate did manage five brokerage accounts in the names of themselves and affiliates annd/pr clients. Bowers Decl. ¶¶ 6 (Ex. 3), 7 (Ex. 4), 8 (Ex. 5), 9 (Ex. 6) & 10 (Ex. 7). The accounts primarily engaged in short term options trading. Bowers Decl. ¶ 12. However, contrary to the touted 61% return, King's trading resulted in realized losses in every account, with losses totaling over $3.8 million, as shown on the chart below:

Time Period	Elevate	King & S. King	Opulent, LLC	Z Partners	Individual J	Total
June 1, 2019 – December 31, 2019	$(1,917,954)	$(113,274)	$(72,820)	$(45,232)	$(13,173)	$(2,162,453)
January 1, 2020- June 30, 2010	$(1,407,041)	$(247,294)		$(21,741)	$(23,304)	$(1,699,380)
Totals	$(3,324,995)	$(360,567)	$(72,820)	$(66,973)	$(36,477)	$(3,861,834)

Kim Decl. ¶ 27 (Ex. 18).

Second, Elevate's website touts King's trading skills and results. Bowers Decl. ¶ 4 (Ex. 1). Specifically, the website states: "King's extensive knowledge of the stock market is what sets his company apart from the others. His in-depth evaluations, charting, technical analysis and understanding of the market has made him one of the most successful traders in the industry. Whether it is a bull or bear

market, due to his trading style, [King] has continually made a profit for his clients year after year." Bowers Decl. ¶ 4 (Ex. 1).

Although King has managed brokerage accounts for himself and others, he has never achieved the returns touted on the Elevate website. Kim Decl. ¶ 26 (Ex. 17). Since 2016, King has had trading authority over at least eight brokerage accounts at TD Ameritrade ("TDA") and Charles Schwab & Co. ("Schwab"). Kim Decl. ¶¶ 8 (Ex. 7), 9 (Ex. 8), 10 (Ex. 9), 11 (Ex. 10), 12 (Ex. 11), 13 (Ex. 12), 14 (Ex. 13), 15 (Ex. 14). In one additional account at Schwab, held in his wife's name, King does not have express trading authority, but it appears he makes the trades because the trading is consistent with King's trading in the other accounts. Kim Decl. ¶ 16 (Ex. 15); Bowers Decl. ¶ 26.

King's trading resulted in significant realized losses year after year for all of the accounts he has controlled since 2016, as shown in the following chart:

Broker-Dealer	Account	2016	2017	2018	2019	2020	Total
TDA	Z Partners		$(85,137)	$(40,332)	$(28,176)	$(19,668)	$(173,313)
TDA	Individual C		$(17,760)	$(61,561)	$(37)		$(79,358)
TDA	Individual J			$(84,673)	$(302)	$(23,368)	$(108,343)
TDA	Opulent			$(323,279)	$(106,323)		$(429,602)
TDA	Elevate				$(1,917,954)	$(1,503,020)	$(3,420,974)
TDA	King & S. King	$(4,323)	$(140,995)	$(648,429)	$(70,252)	$(300,716)	$(1,164,715)
Schwab	King					$(403,428)	$(403,428)
Schwab	Elevate					$(145,230)	$(145,230)
Schwab	S. King					$(10,628)	$(10,628)
	Total						$(5,935,591)

Kim Decl. ¶ 26 (Ex. 17).

Third, Elevate's website touts its affiliation with well-known securities industry participants by stating that its "Trusted Providers" include TD Ameritrade, Charles Schwab, Interactive Brokers, and NinjaTrader. Bowers Decl. ¶ 4 (Ex. 1). In fact, TD Ameritrade closed Elevate's and King's accounts in July and August 2020. Bowers Decl. ¶ 13 (Ex. 9). Interactive Brokers has received account applications

from Elevate and King but has not approved the opening of any accounts. Bowers Decl. ¶ 17 (Ex. 13). NinjaTrader has no record of any business relationship with King or Elevate. Bowers Decl. ¶ 22 (Ex. 18).

Defendants' false and misleading statements to investors are material. A reasonable investor would have considered it important to know that the Fund was not paying 61% rates of return, that King was not the successful money manager the Elevate website held him out to be, and that Elevate did not have relationships with reputable brokerage firms.

King and Elevate are the makers of the statements on the Elevate website because King is the founder and president of Elevate, and the website represents him to be such. Bowers Decl. ¶ 4 (Ex. 1).

E. Defendants Engaged in a Fraudulent Scheme

In addition to making material misrepresentations to investors, Defendants are engaged in a fraudulent scheme. First, Defendants are soliciting investors to invest in the Fund, when no such entity exists, and all investor funds are being deposited into brokerage accounts in King's name and Elevate's name. Kim Decl. ¶ 18. King opened Elevate's Schwab brokerage account under the name of "Elevate Investments LLC" but opened the account as a sole proprietorship account and represented in the account application that he would use the account for his investments for those of his relatives. Bowers Decl. ¶ 16 (Ex. 12).

Second, Defendants are transferring investor funds to accounts controlled by the Kings. Since June 2019, King has transferred from the King and Elevate brokerage accounts $1.2 million to bank accounts affiliated with the Kings. Kim Decl. ¶ 25. Under the terms of the offering as disclosed on Elevate's website, neither King nor S. King has any legitimate claim to these funds.

F. Defendants' Fraud is Ongoing

King and Elevate continue to raise funds from investors. In the three months from September through November 2020, King and Elevate have raised $1.87 million

from investors. Kim Decl. ¶ 19. During the same period, King and Elevate suffered $532,232 in trading losses. Kim Decl. ¶ 28 (Ex. 19).

Despite suffering these losses, King transferred $298,000 to bank accounts in S. King's name. Kim Decl. ¶ 21. King transferred an additional $100,000 to S. King's bank account on December 1, 2020. Kim Decl. ¶ 22.

G. Elevate and King Are Investment Advisers to a Pooled Investment Vehicle

Elevate and King are investment advisers to the Fund. King and Elevate hold the Fund out to be engaged in the business of investing in securities, thus, it was a pooled investment vehicle as defined in Advisers Act Rule 206(4)-8(b). Bowers Decl. ¶ 4 (Ex. 1).

Elevate is advising the Fund on investing in securities. Bowers Decl. ¶ 4 (Ex. 1). In addition, Elevate's website states that it receives compensation from the Fund equal to 50% of the Fund's profits above 10%. Bowers Decl. ¶ 4 (Ex. 1).

King also meets the definition of an investment adviser. King provides the investment advice to the Fund in that he has the trading authority over his and Elevate's brokerage accounts and is prominently featured in Elevate's website as the person who is trading for the Fund. Bowers Decl. ¶ 4 (Ex. 1). He also receives compensation in that he has transferred investor funds to bank accounts held by himself, his wife S. King, or companies he controls. Kim Decl. ¶ 20.

H. Defendants Acted With a High Level of Scienter, or in the Alternative, were Negligent

King acted with a high level of scienter. King knew, or acted recklessly in not knowing, that the representations he made representations to investors in the Fund about his skills and past rates of return, and Elevate's relationships with brokerage firms, were materially false and misleading. Bowers Decl. ¶ 4 (Ex. 1). In addition, King's conduct was negligent. As an investment adviser and fiduciary, King's conduct was a departure from the ordinary standard of care expected of a fiduciary.

King's conduct in offering and selling securities issued by Elevate, while misrepresenting Elevate's rates of return and relationships with trusted brokers, and his skill as an investment adviser, was a departure from the ordinary standard of care of a person offering and selling securities. Bowers Decl. ¶ 4 (Ex. 1). King's state of mind is imputed to Elevate because he controls it.

III. ARGUMENT

A. The SEC Is Seeking Emergency Relief in The Public Interest

Section 20(b) of the Securities Act and Section 21(d) of the Exchange Act authorize the SEC to obtain a preliminary injunction or restraining order without a bond. *See* 15 U.S.C. §§ 77t(b) & 78u(d). In the Ninth Circuit, preliminary injunctive relief is warranted if there is "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in the applicant's favor." *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) (quotations and citations omitted).

Several district courts in the Ninth Circuit have interpreted the preliminary injunctive relief standard in SEC emergency actions to require that the SEC make only make a two-prong showing: (1) a *prima facie* case that the defendants have violated the federal securities laws, and (2) a reasonable likelihood that the defendants will repeat their violations. *See, e.g., SEC v. Blockvest, LLC*, No. 18CV2287-GPB(BLM), 2019 WL 625163, at *4 (S.D. Cal. Feb. 14, 2019); *SEC v. Schooler*, 902 F. Supp. 2d 1341, 1345 (S.D. Cal. 2012); *SEC v. Eadgear, Inc.*, No. 3:14-CV-04294-RS, 2014 WL 6900938, at *1 (N.D. Cal. Dec. 8, 2014); *SEC v. Homestead Props., L.P.*, No. SACV09-01331-CJC (MLGx), 2009 WL 5173685, at *2 (C.D. Cal. Dec. 18, 2009); *SEC v. Trabulse*, 526 F. Supp. 2d 1008, 1012 (N.D. Cal. 2007).

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). Because this enforcement action is brought in the public interest, the 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)); *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 358 (9th Cir. 1973) (in SEC enforcement action, "[a] *prima facie* case of the probable existence of fraud … is sufficient to call into play the equitable powers of the court").

B. 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

King and Elevate are violating the antifraud provisions of the Securities Act and the Exchange Act.

Securities Act Sections 17(a) makes it unlawful for any person, in the offer or sale of a security, directly or indirectly, (1) to employ any device, scheme, or artifice to defraud, (2) to obtain money or property by means of any false or misleading statement of material fact, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. Similarly, Exchange Act Section 10(b) and Rule 10b-5(a) makes it unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security (1) to employ any device, scheme, or artifice to defraud, (2) to make any false or misleading statement of material fact, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person. Those who knowingly disseminate false statements can also be held liable under Exchange Act Rules 10b-5(a) and (c) and Securities Act Section 17(a)(1). *See Lorenzo v. SEC*, 139 S. Ct. 1094, 1100-1101 (2019). Defendants have violated both antifraud provisions.

a. Investments in the Fund Are Securities

Securities Act Section 2(a)(1) and Exchange Act Section 3(a)(10) of the Exchange Act define the term "security" to include "investment contracts." An investment contract involves (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits derived from the efforts of others. *SEC v. W.J. Howey Co*., 328 U.S. 293, 298-299 (1946). "This definition 'embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (quoting *Howey*, 328 U.S. at 299).

Investments in the Fund are investment contracts under the *Howey* test and, therefore, are "securities" under the Securities Act and the Exchange Act. First, investors invest in the purported Fund by sending money to Elevate or King. Second, the purported Fund is a common enterprise. In the Ninth Circuit, where the proposed action, if authorized, will be filed, the common enterprise element is satisfied by the existence of either horizontal commonality (a pooling of investor funds and interests) or strict vertical commonality (the fortunes of the investor are linked with those of the promoter). *SEC v. R.G. Reynolds Enter., Inc*., 952 F.2d 1125, 1130 (9th Cir. 1991). Here, there is horizontal commonality because King and Elevate are pooling investors' funds in brokerage accounts in order to trade securities that purportedly will result in profits for the investors. There is also strict vertical commonality because Elevate's website states that it will receive a share of Fund's profits above 10%. Third, the Fund's investors reasonably expect their profits to come from King's trading efforts. Indeed, Elevate's website explains that, "King's extensive knowledge of the stock market is what sets his company apart from the others" and that, "[w]hether it is a bull or bear market, due to his trading style, [King] has continually made a profit for his clients year after year."

b. Defendants' materially false statements and omissions

To establish a *prima facie* case that a person made false or misleading statements in connection with the offer, purchase, or sale of securities under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, the SEC must prove by a preponderance of the evidence four basic elements: (1) a material misrepresentation or omission; (2) in connection with the offer, purchase, 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).

Violations of the antifraud provisions require that the misstatements and omissions 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.*, 426 U.S. at 449; *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, Inc.*, 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)). *See also SEC v. Murphy*, 626 F.2d at 653 (profitability of an issuer was material to investors).

Defendants King and Elevate are making materially false and misleading statements to investors. There is a substantial likelihood that the investors consider it important in making their investment decisions that (1) King's trading from June 2019 through June 2020 did not result in a 61% return but in fact resulted in substantial losses; (2) King's trading did not result in profits for clients year after year but in fact resulted in substantial losses for all of his clients; and (3) Elevate has never

had a relationship with Interactive Brokers or NinjaTraders and TD Ameritrade terminated its relationship with King and Elevate. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988) (act is material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision).

c. Defendants are the makers of the false statements

King and Elevate are "makers" of these false and misleading statements under Exchange Act Rule 10b-5(b). *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) ("the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it"). The false and misleading statements are on Elevate's website. *See Blank v. Tripoint Global Equities, LLC,* 338 F. Supp. 3d 194, 213 (S.D.N.Y. 2018) ("TriPoint Capital and TriPoint Global clearly can be liable for statements 'made' on their own corporate websites."). King is also a maker of the statements because, as Elevate's president, he has ultimate authority over the substance of the representations and how they are communicated. *Janus*, 564 U.S. at 144. Also, for the proposed Section 17(a)(2) claim, King and Elevate are obtaining money by means of the fraud by depositing investor funds into brokerage accounts in their names and transferring funds to S. King's bank account.

d. Defendants are acting with scienter

Exchange Act Section 10(b) and Securities Act Section 17(a)(1) require a showing of scienter, while claims under Securities Act Sections 17(a)(2) and 17(a)(3) only require a showing of negligence. *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Scienter is a "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter can be established by showing "knowing or reckless conduct." *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003). As for negligence, it may be proven by showing that a defendant failed to conform to the standard of care that would be exercised by a

reasonable person. *See SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). King knows, or is reckless in not knowing, that his trading has resulted in substantial losses. Similarly, he knows or is reckless in not knowing that Elevate has no relationship with Interactive Brokers and NinjaTraders and that TD Ameritrade had closed his and Elevate's accounts. Despite this knowledge, King has made and is continuing to make false and misleading statements on Elevate's website regarding his trading results and Elevate's securities industry affiliations. *Lorenzo*, 139 S. Ct. at 1100-1101 (those who knowingly disseminate false statements can also be held liable under Exchange Act Rules 10b-5(a) and (c) and Securities Act Section 17(a)(1)). As Elevate's principal, King's scienter can be imputed to Elevate. *See ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 477 (9th Cir. 2015); *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).

e. Defendants are negligent

To establish negligence, the SEC must show that the defendants failed to conform to the standard of care that would be exercised by a reasonable person. *See Dain Rauscher*, 254 F.3d at 856; *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453–54 (3d Cir.1997) (defining negligence in the securities context as the failure to exercise reasonable care or competence). Here, Defendants' raising money by claiming wildly inflated returns, based on the use of a non-existent pooled Fund, boasting fake relationships with third party brokerage firms, falls below the standard of care of any reasonable person in the securities industry.

f. Defendants are using interstate commerce

Defendants are using means and instrumentalities of interstate commerce to solicit investors, by soliciting via a website and accepting funds via wire transfer. (Bowers Decl. ¶ 4 (Ex. 1); Kim Decl. ¶ 17(a)). *United States v. Hornaday*, 392 F.3d

1306, 1311 (11th Cir. 2004) (The internet is an instrumentality of interstate commerce, as is the telephone).

2. Violations of Advisers Act Section 206(4) and Rule 206(4)-8

a. Elevate and King Are Investment Advisers

Elevate and King are investment advisers to the purported Fund's investors. *See* Advisers Act Section 202(a)(11) ("investment adviser" defined as "any person who, for compensation, engages in the business of advising others, . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities"). Elevate and King are advising the Fund and its investors on investing in securities, and King has the trading authority over his and Elevate's brokerage accounts. In addition, Elevate's website states that it receives compensation from the Fund equal to 50% of the Fund's profits above 10%. Moreover, King has transferred and is transferring investor funds to his, Elevate's, and S. King's brokerage and bank accounts. *See In re Stein*, Advisers Act Rel. No. 1497 (June 8, 1995) (Commission op. finding that diverting client funds for personal use constituted "compensation" under the Advisers Act).

As investment advisers, Elevate and King may be primarily liable for antifraud violations of the Advisers Act. *See Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977) ("[T]he general partners as persons who managed the funds of others for compensation are 'investment advisers' within the meaning of the statute."); *SEC v. Haligiannis,* 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007) (president/COO of investment adviser who had exclusive control over the management, operation, and investment decisions of hedge fund was an investment adviser under the Advisers Act); *In re Kenny*, Advisers Act Rel. No. 2128, (May 14, 2003) (Commission op. finding individual who controlled advisory firm, was its chairman, CEO, and owner was liable as a primary violator of Sections 206(1) and 206(2)); *but see In re Stein*, Advisers Act Rel. 2114, at n. 7 (Mar. 14, 2003) (Commission op.) (Advisers Act sections distinguishes between those applicable to investment advisers and to their

associated persons).

Section 206 of the Advisers Act establishes a federal fiduciary standard for investment advisers, including the obligations to exercise the utmost good faith in dealing with clients, to disclose to clients all material facts, and to employ reasonable care to avoid misleading clients. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Indeed, the Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations."); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). As fiduciaries, investment advisers are required "to act for the benefit of their clients, … to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." *SEC v. DiBella*, No. 3:04-cv-1342 (EBB), 2007 WL 2904211, at *12 (D. Conn. Oct. 3, 2007) (*quoting SEC v. Moran*, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996)), *aff'd*, 587 F.3d 553 (2d Cir. 2009); *see also Capital Gains Research Bureau, Inc.*, 375 U.S. at 194 ("Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients.").

b. Violations of Advisers Act Section 206(4) and Rule 206(4)-8

Advisers Act Section 206(4) and Rule 206(4)-8 prohibit an investment adviser to a pooled investment vehicle from making any false statement of material fact or omitting to state a material fact to any investor or prospective investor in the pooled investment vehicle or to engage in any act, practice or course of business that is fraudulent, deceptive or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. Scienter is not required for a violation of Section 206(4) and Rule 206(4)-8; mere negligence will suffice. *SEC v. Steadman*, 967 F.2d 636, 641-43 n.5 (D.C. Cir. 1992); *Vernazza*, 327 F.3d at 860.

Advisers Act Rule 206(4)-8 defines a "pooled investment vehicle" is defined as

any investment company as defined in Investment Company Act Section 3(a) or any company that would be an investment company under section 3(a) of that Act but for the exclusions found in Investment Company Act Sections 3(c)(1) and 3(c)(7). The purported Fund is a pooled investment vehicle because it is an unregistered investment company that is, and holds itself out as being, primarily engaged in trading securities. *See* Investment Company Act Section 3(a)(1). The Fund does not come within the exclusions in Investment Company Act Sections 3(c)(1) and 3(c)(7) because it is making a public offering through Elevate's website. As discussed above, King and Elevate are making material false and misleading statements regarding King's trading results and Elevate's securities industry affiliations. As also discussed above, King and Elevate are acting at least negligently in making these false and misleading statements. Accordingly, King and Elevate are violating Advisers Act Sections 206(4) and Rule 206(4)-8.

C. The SEC Has Shown the Violations Are Likely to Be Repeated

In addition to making a *prima facie* showing of Defendants' securities laws violations, the SEC has demonstrated a likelihood that Defendants' violations will be repeated. Whether a likelihood of future violations exists depends upon the totality of the circumstances. *See SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *Fehn*, 97 F.3d at 1295-96. The existence of past violations may give rise to an inference that there will be future violations. *See Murphy*, 626 F.2d at 655; *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 358-59 (9th Cir. 1973); *see also Odessa Union Warehouse Co-Op*, 833 F.2d at 176. Courts also consider factors such as the degree of scienter involved, the isolated or recurrent nature of the violative conduct, the defendant's recognition of the wrongful nature of the conduct, the likelihood that, because of the defendant's occupation, future violations may occur, and the sincerity of a defendant's assurances (if any) against future violations. *See Murph*y, 626 F.2d at 655.

Here, Defendants' fraud is ongoing. They have been raising money from investors since at least June 2019, and raised $1.87 million from September to

November 2020. Kim Decl. ¶ 19. They have transferred at least $1.2 million of investor money to accounts controlled by King and S. King – including $100,000 just this month. *Id.* at ¶ 25. Moreover, King is a convicted felon who has failed to disclose that fact to the people who are trusting him to manage their money. Bowers Decl. ¶ 5 (Ex. 2). Thus, there can be no question that a temporary restraining order is necessary to protect investors from Defendants' ongoing fraudulent conduct.

D. The Other Relief Sought By The SEC Is Needed

In addition to a restraining order, the SEC also seeks an asset freeze over Defendants' assets, an accounting, appointment of a temporary receiver, and expedited discovery. Federal courts have "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 1363, 1369 (9th Cir. 1980). "[O]nce the equity jurisdiction of the district court properly has been invoked, the court has power to order all equitable relief necessary under the circumstances." *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984).

1. The Court should freeze the assets of Defendants and Relief Defendant

The Court's equitable powers include the authority to freeze assets of both parties and nonparties. *See SEC v. Hickey*, 322 F.3d 1123, 1131 (9th Cir. 2003); *SEC v. Int'l Swiss Invest. Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990). The purpose of a freeze order is to prevent the dissipation of assets so that they may be available to be paid as 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); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105-06 (2d Cir. 1972). 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 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). Courts 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 have raised over $7.4 million from investors, and transferred at least $1.2 million to accounts in the name of King and S. King. Kim Decl. ¶¶ 18 and 25. An asset freeze is necessary to preserve any remaining assets. Moreover, because of the emergency nature of this action, the SEC has not located the all of the possible assets and accounts under Defendants' control. A freeze over all of Defendants' and Relief Defendant's accounts is necessary to prevent them from further dissipating the investor funds.

2. The Court should order accountings, document preservation and expedited discovery

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 and Relief Defendant 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 Court should also require Defendants and Relief Defendant 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 them. *See Int'l Swiss Invs. Corp*., 895 F.2d at 1276.

3. A receiver is necessary to protect the assets

The SEC seeks the appointment of a receiver over Elevate. 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 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).

Defendant King has an apparent lack of any integrity and should not be trusted with investor funds or assets. A receiver can rationalize the investors' interests, manage a claims process, and assist the Court to make sure assets are distributed fairly to legitimate claimants, under the supervision and direction of the Court. The SEC also requests that the receiver be excused from posting a bond. *See SEC v. Universal Financial*, 760 F.2d 1034, 1039 (9th Cir. 1985).

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court grant the requested relief.

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Respectfully submitted,

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