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9
10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
11 **SAN FRANCISCO DIVISION**

12
13 SECURITIES AND EXCHANGE COMMISSION,

Case No. 3:14-cv-04188

14 Plaintiff,

15 v.

16 MICHAEL B. FERGUSON and
TRANSACTIONS UNLIMITED,

COMPLAINT

17 Defendants.
18

DEMAND FOR JURY TRIAL

19
20 Plaintiff Securities and Exchange Commission (“Commission”) alleges:

21 **SUMMARY OF THE ACTION**

22 1. From at least 2005 to at least 2013, Michael B. Ferguson used Transactions Unlimited
23 dba ATM Plus (“ATM Plus”) to raise at least \$12 million from over 160 investors by making false
24 and misleading representations regarding the profitability and purported business of ATM Plus.
25 Ferguson sold investments in ATM Plus by claiming that ATM Plus owned and/or operated
26 automated teller machines (“ATMs”) located in malls around the country. He also claimed that ATM
27 Plus had lucrative branding deals with several major distributors of ATMs and banks, under which
28 ATM Plus made money by finding banks to put their logos on the distributors’ ATMs. In reality,

1 Ferguson used ATM Plus, which was based in San Francisco, California, to run a Ponzi scheme.
2 Although Ferguson and ATM Plus paid investors millions in purported profits, the vast majority of
3 those funds was new investor money. Ferguson and ATM Plus also continued to pay to investors
4 purported profits in 2012 and 2013, well after ATM Plus stopped receiving any money from its ATM
5 and branding operations.

6 2. Ferguson went to great lengths to conceal the fraud. For example, he had ATM Plus
7 send investors monthly account statements that contained fabricated transaction histories for ATM
8 machines. These account statements purported to show that monthly payments to investors were
9 being made from revenue ATM Plus was earning from ATM operations, rather than from new
10 investor money. He also sent at least one investor a forged contract purporting to show that ATM
11 Plus recently purchased a large number of ATM machines.

12 3. Ferguson and ATM Plus (together, “Defendants”) violated numerous provisions of the
13 federal securities laws, including the antifraud statutes, by misappropriating investor assets and
14 making materially false and misleading statements in connection with the purchase or sale of
15 securities. The Commission seeks to enjoin the Defendants from further violations of the securities
16 laws, disgorgement of ill-gotten gains plus prejudgment interest thereon, and payment of civil
17 monetary penalties.

18 JURISDICTION AND VENUE

19 4. The Commission brings this action pursuant to Sections 20(b) and 20(d) of the
20 Securities Act of 1933 (“Securities Act”), 15 U.S.C. §§ 77t(b) and 77t(d), and Sections 21(d) and
21 21(e) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78u(d) and 78u(e).
22 This Court has jurisdiction over this action pursuant to Sections 20(d)(1) and 22(a) of the Securities
23 Act, 15 U.S.C. §§ 77t(d)(1) and 77v(a), and Sections 21(d)(3), 21(e) and 27 of the Exchange Act, 15
24 U.S.C. §§ 78u(d)(3), 78u(e) and 78aa. Defendants, directly or indirectly, have made use of the means
25 and instrumentalities of interstate commerce or of the mails in connection with the acts, transactions,
26 practices and courses of business alleged in this complaint.

27 5. Venue in this District is proper pursuant to Section 22 of the Securities Act, 15 U.S.C.
28 § 77v, and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because the Defendants are found, are

1 inhabitants of, or transact business in this District, and offerings and sales of securities, in which the
2 Defendants participated, took place in this District.

3 **INTRADISTRICT ASSIGNMENT**

4 6. Intradistrict assignment to the San Francisco Division is proper pursuant to Local Civil
5 Rule 3-2(c) because ATM Plus's principal place of business during the relevant period was in the
6 County of San Francisco.

7 **DEFENDANTS**

8 7. Defendant Michael B. Ferguson, age 45, resided during the majority of the relevant
9 period in San Francisco, California. Ferguson is the president, sole owner and operator of ATM Plus
10 and is the only authorized signer on ATM Plus's bank accounts. In January 2014, Ferguson filed for
11 personal bankruptcy. In March 2014, Ferguson was arrested in connection with a felony complaint
12 filed by the Santa Clara County, California District Attorney's Office.

13 8. Defendant Transactions Unlimited is a Nevada corporation that, during the relevant
14 period, did business as Transactions Unlimited, Inc., ATM Plus, Inc., and ATM Plus (together,
15 "ATM Plus") and was based in San Francisco. It does not appear that ATM Plus has been operating
16 since Ferguson's arrest.

17 **FACTUAL ALLEGATIONS**

18 9. From at least 2005 through at least November 2013, the Defendants fraudulently
19 raised at least \$12 million from at least 160 investors by offering and selling two different types of
20 securities. The first was in the form of investment contracts known as "ATM Management and
21 Operation Agreements." The second was in the form of promissory notes. Investors were from
22 several different states, and many were from the San Francisco Bay Area. Ferguson solicited
23 investors for ATM Plus by speaking with them by phone, communicating through email, and meeting
24 with them in person, sometimes at the investor's home.

25 **ATM Plus's Purported ATM Operations**

26 10. Ferguson offered and sold investments in ATM Plus first by telling investors that
27 ATM Plus either owned or operated ATMs located in malls around the country and that investors
28 would share in revenue generated by the machines. Investors paid ATM Plus to invest in one or more

1 ATMs (usually \$12,500 per machine), or in a pool of machines, with the right to receive a portion of
2 the revenue generated by the machines, after ATM Plus deducted its management fee and purported
3 operating expenses. Some investors selected the ATMs in which they wanted to invest from a list
4 that Ferguson provided. Investor money was deposited into ATM Plus's bank account.

5 11. The investment was documented by an ATM Management and Operation Agreement,
6 which Ferguson signed on behalf of ATM Plus and provided to investors. The agreement listed the
7 amount that ATM Plus would pay the investor for each ATM transaction that took place at the
8 machine (for example, \$0.14 per transaction) and detailed ATM Plus's role in managing the ATM.
9 Investors did not play a role in managing or operating the machines. Rather, according to the
10 agreement, ATM Plus was responsible for obtaining insurance for the machines and the cash in the
11 machines, contracting with an ATM processor to supply network access links, and providing machine
12 supplies and maintenance. The term of the agreement was specified (usually five years) and
13 automatically renewed at the end of the term. After a certain period of time, ATM Plus was obligated
14 to repurchase the contract from the investor if the investor wanted to terminate the agreement.

15 12. After investors entered into the ATM Management and Operation Agreement, ATM
16 Plus mailed them monthly account statements and checks (which Ferguson signed) that made it seem
17 like investors were receiving a portion of revenue generated by the ATMs. The account statements
18 included the fee per ATM transaction that had been agreed upon (for example, \$0.14 per transaction)
19 and the number of transactions at the ATM for the month, which served as the basis for the purported
20 calculation of the investor's monthly payment. Ferguson fabricated the number of ATM transactions
21 in these account statements.

22 13. In fact, ATM Plus earned far less from ATM operations than it was paying out to
23 investors (and earned nothing from such operations since at least early 2010), but was paying
24 investors with new investor money. As a result, Ferguson's representations to investors, the ATM
25 Management and Operation Agreement, and account statements, which all suggested that investors
26 would be paid from revenue from ATM operations, were false and misleading.

ATM Plus's Purported ATM Branding Agreements

14. A few years after ATM Plus and Ferguson began selling investments in ATMs, they began selling other investments in what they called the “ATM Plus Funds.” Here, Ferguson told prospective investors that ATM Plus had agreements with several ATM owners and distributors to find banks, for a fee, who wanted to put their logos on those ATMs (known as ATM “branding”). Ferguson also provided some of the ATM Plus Fund investors with a marketing presentation prominently displaying ATM Plus’s logo that described the branding agreements and claimed that ATM Plus had partnerships with three major ATM distributors (who had 60,000 ATMs combined) and that certain major banks were ATM Plus’s branding clients. The marketing presentation claimed that the fees paid by the banks for branding were the basis of the monthly returns paid to investors in the ATM Plus Funds. Ferguson emailed the presentation to at least 20 prospective investors from at least 2011 through at least 2013. However, several of the purported partnership and client relationships detailed in the ATM Plus Fund marketing presentation did not exist at the time Ferguson sent the presentation to prospective investors and since at least early 2011, ATM Plus was not earning revenue from branding agreements.

15. ATM Plus issued promissory notes to these ATM Plus Fund investors, which usually carried an annual interest rate of 15% and were usually due in five years. The promissory notes, which Ferguson signed on behalf of ATM Plus and provided to investors, stated that they were secured by the revenue ATM Plus was owed under specific branding agreements. To the ATM Plus Fund investors, ATM Plus mailed monthly account statements and checks (which Ferguson signed) representing interest payments on the notes. Some of these investors invested in additional ATM Plus promissory notes after receiving purported monthly returns on their original investments.

16. In reality, from at least early 2011, ATM Plus did not earn or receive any income from branding agreements, and it used new investor money, rather than profits from its purported business, to pay existing investors. As a result, the statements that ATM Plus was receiving revenue from branding agreements were false and misleading.

Ferguson and ATM Plus Intentionally Deceived Investors

17. Ferguson knew, or was reckless in not knowing, that ATM Plus was not making enough money from its purported ATM operations or branding agreements to pay returns to investors and that he was instead using new investor money to pay those returns. Ferguson was the sole signer on ATM Plus's bank accounts. He monitored those bank accounts to keep track of how much money was coming in and going out of ATM Plus. He also periodically reviewed ATM Plus's financial statements, which showed no income from ATM operations or branding since at least 2010 and 2011, respectively. He continued, however, even after ATM Plus was earning no money from its operations, to pay investors their purported profits.

18. He further knew, or was reckless in not knowing, that the statements he made orally to investors and prospective investors, in the written ATM Management and Operation Agreements, and in the written promissory notes for the ATM Plus Funds, regarding the existence and profitability of ATM Plus's ATM operations and branding business were false and misleading.

19. He further knew, or was reckless in not knowing, that the statements he made in the monthly account statements sent to investors in both the ATM operations and branding business regarding the investors' purported profits were false and misleading.

20. He further knew, or was reckless in not knowing, that the statements he made in the ATM Plus Funds marketing presentations were false and misleading because he negotiated and signed all of ATM Plus's branding agreements. Accordingly, he was well aware that ATM Plus did not have certain purported agreements in place when he solicited investors for the ATM Plus Funds.

21. All of these statements were material because they suggested to investors that Ferguson and ATM Plus were operating a bona fide, profitable business, which helped the Defendants keep their scheme operating. Some investors made additional investments in ATM Plus after receiving the false and misleading account statements and monthly checks. Ferguson also provided some potential investors with the names of existing investors (who were receiving monthly payments) to serve as references. Some investors invested after learning of the significant payments existing investors were receiving from ATM Plus.

1 practices, or courses of business which operated or would operate as a fraud or deceit upon the
2 purchasers of such securities.

3 28. By reason of the foregoing, Defendants have directly or indirectly violated
4 Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and unless restrained and enjoined will
5 continue to violate this provision.

6 **SECOND CLAIM FOR RELIEF**

7 **(Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder)**

8 29. Paragraph numbers 1 through 25 are re-alleged and incorporated herein by reference.

9 30. Defendants, by engaging in the conduct set forth above, directly or indirectly, by use
10 of means or instrumentalities of interstate commerce, or of the mails, or of a facility of a national
11 securities exchange, with scienter:

12 (a) employed devices, schemes, or artifices to defraud by, among other things, paying investor
13 returns with new investor money, providing monthly account statements and checks to investors
14 purporting to show that investor returns were based on ATM Plus's operations, providing a forged
15 contract to at least one investor, and referring prospective investors to existing investors who had
16 received payments purporting to be from ATM Plus's operations;

17 (b) made untrue statements of material fact or omitted to state material facts necessary in
18 order to make the statements made, in light of the circumstances under which they were made, not
19 misleading by, among other things, falsely stating orally, in emails, in written investment agreements
20 and promissory notes with investors, and in monthly account statements to investors that ATM Plus
21 owned and/or operated ATMs, that it had branding agreements, that ATM Plus earned revenue from
22 ATM operations and branding agreements, and that investor returns were paid from that revenue; and

23 (c) engaged in acts, practices, or courses of business which operated or would operate as a fraud
24 or deceit upon other persons by, among other things, paying investor returns with new investor
25 money, providing monthly account statements and checks to investors purporting to show that
26 investor returns were based on ATM Plus's operations, providing a forged contract to at least one
27 investor, and referring prospective investors to existing investors who had received payments

1 purporting to be from ATM Plus's operations, all in connection with the purchase or sale of
2 securities.

3 31. By reason of the foregoing, Defendants have directly or indirectly violated
4 Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R.
5 § 240.10b-5, and unless restrained and enjoined will continue to violate these provisions.

6 **THIRD CLAIM FOR RELIEF**

7 **(Violations of Sections 5(a) and 5(c) of the Securities Act)**

8 32. Paragraph numbers 1 through 25 are re-alleged and incorporated herein by reference.

9 33. Defendants, by engaging in the conduct set forth above, directly or indirectly, made
10 use of the means or instruments of transportation or communication in interstate commerce or of the
11 mails to offer and to sell securities through the use or medium of a prospectus or otherwise when no
12 valid registration statement had been filed or was in effect as to such offers and sales of such
13 securities and no exemption from registration was available.

14 34. By reason of the foregoing, Defendants have directly or indirectly violated Sections
15 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c), and unless restrained and
16 enjoined will continue to violate these provisions.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, the Commission respectfully requests that the Court:

19 I.

20 Permanently enjoin Defendants from directly or indirectly violating Sections 5(a), 5(c)
21 and 17(a) of the Securities Act, 15 U.S.C. §§ 77(e)(a), 77(e)(c) and 77q(a), Section 10(b) of the
22 Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

23 II.

24 Enter an order requiring Defendants to disgorge their ill-gotten gains according to proof, plus
25 prejudgment interest thereon.

26 III.

27 Enter an order requiring Defendants to pay civil penalties pursuant to Section 20(d) of the
28 Securities Act, 15 U.S.C. § 77t(d), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d).

IV.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

V.

Grant such other and further relief as this Court may determine to be just, equitable and necessary.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff Securities and Exchange Commission demands a trial by jury for all issues so triable.

Dated: September 29, 2014

Respectfully submitted,

/s/ Robert J. Durham

Robert J. Durham

Attorney for Plaintiff

SECURITIES AND EXCHANGE COMMISSION

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Securities and Exchange Commission

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Sheila E. O'Callaghan and Robert J. Durham Securities and Exchange Commission (415) 705-2500 44 Montgomery Street, Suite 2800, San Francisco, CA 94104-4802

DEFENDANTS

Michael B. Ferguson and Transactions Unlimited

County of Residence of First Listed Defendant San Mateo County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Violations of 15 U.S.C. §§ 77e(a), 77e(c), 77q(a) and 78j(b); and 17 C.F.R. § 240.10b-5. Brief description of cause: Securities Fraud

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 09/29/14 SIGNATURE OF ATTORNEY OF RECORD /s/ Robert J. Durham

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.