



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

January 16, 2019

**BY E-MAIL**

Iterative Capital / Iterative OTC LLC  
c/o Robert H. Hotz Jr., Esq.  
Akin Gump LLP

Dear Mr. Hotz:

Please be advised that the accompanying grand jury subpoena has been issued in connection with an official criminal investigation of a suspected felony being conducted by a federal grand jury. **Pursuant to the accompanying non-disclosure order issued under 28 U.S.C. § 1651, you are prohibited from notifying anyone of the existence of this subpoena for a period of one year from the date of the order. If you ever plan to notify anyone of this subpoena, even after the one-year period, please advise me before you do so, in case the investigation remains ongoing and the order needs to be renewed.**

Thank you for your cooperation in this matter.

Very truly yours,

GEOFFREY S. BERMAN  
United States Attorney

By: \_\_\_\_\_

Assistant United States Attorney  
Southern District of New York

United States District Court  
SOUTHERN DISTRICT OF NEW YORK

TO:  
Iterative Capital / Iterative OTC LLC  
c/o Robert H. Hotz Jr., Esq.  
Akin Gump LLP

GREETINGS:

WE COMMAND YOU that all and singular business and excuses being laid aside, you appear and attend before the GRAND JURY of the people of the United States for the Southern District of New York, in the Borough of Manhattan, City of New York, New York, in the Southern District of New York, at the following date, time and place:

Appearance Date: January 30, 2019  
Appearance Time: 10:00 am  
Appearance Place: United States Courthouse, 40 Foley Square, Room 220

to testify and give evidence in regard to an alleged violation of:  
18 U.S.C. §§ 1343 and 1349

and not to depart the Grand Jury without leave thereof, or of the United States Attorney, and that you bring with you and produce at the above time and place the following:

**SEE ATTACHED RIDER**

Personal appearance is not required if the requested records are produced on or before the return date to [REDACTED] Assistant U.S. Attorney, One St. Andrew's Plaza, New York, New York 10007, [REDACTED] **PLEASE PROVIDE IN ELECTRONIC FORMAT IF POSSIBLE AND VIA EMAIL.**

Failure to attend and produce any items hereby demanded will constitute contempt of court and will subject you to civil sanctions and criminal penalties, in addition to other penalties of the Law.

DATED: New York, New York  
January 16, 2019

GEOFFREY S. BERMAN  
*United States Attorney for the Southern  
District of New York*

[REDACTED]  
Assistant United States Attorney  
One St. Andrew's Plaza  
New York, New York 10007  
[REDACTED]



**RIDER**

(Grand Jury Subpoena to Iterative Capital / Iterative OTC LLC dated January 16, 2019)

With respect to Iterative Capital / Iterative OTC LLC's arbitration proceeding against Volantis Escrow Platform LLC and Volantis Market Making LLC, please provide all discovery productions made and received by any party in the proceeding, any transcripts of arbitration proceedings including depositions, and any documents filed in the arbitration proceeding by any party or by the arbitrator.

**IMPORTANT: NON-DISCLOSURE REQUIRED PURUSANT TO THE ATTACHED  
ORDER**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In Re Grand Jury Subpoena to Iterative  
Capital / Iterative OTC LLC dated January  
16, 2019; USAO Reference No. 2018R01689

**Application for Order  
Pursuant to 28 U.S.C. § 1651(a)  
Precluding Notice of  
Grand Jury Subpoena**

**SEALED**

STATE OF NEW YORK                    )  
  ) ss.  
COUNTY OF NEW YORK                )

Drew Skinner, pursuant to Title 28, United States Code, Section 1746, hereby affirms under penalty of perjury the truth of the facts set forth herein:

1. I am an Assistant United States Attorney in the Office of Geoffrey S. Berman, United States Attorney for the Southern District of New York (the “United States Attorney’s Office” or the “Government”). In that capacity, I am familiar with the investigation underlying this request. I respectfully submit this application for an Order pursuant to the All Writs Act, Title 28, United States Code, Section 1651(a), directed at Iterative Capital / Iterative OTC LLC (“Iterative”), a cryptocurrency trading firm and wholesale dealer based in New Jersey, not to notify any person of the existence of the attached subpoena for a period of one year from the date of the non-disclosure order herein requested.

**BACKGROUND**

2. The Government is investigating possible violations of 18 U.S.C. §§ 1343 and 1349, among other charges (the “Subject Offenses”). Specifically, the Government is investigating a fraudulent scheme in which J. Barry Thompson (“Thompson”) and/or individuals associated with Volantis Escrow Platform LLC and/or Volantis Market Marking LLC (“Volantis”), among others (together, the “Target Subjects”) obtained millions of dollars from Iterative by promising to

provide cryptocurrency to Iterative in exchange for fiat currency. The Target Subjects, however, did not provide the cryptocurrency to Iterative nor did they return Iterative's fiat currency. The Government is investigating apparent misrepresentations made by the Target Subjects to Iterative in connection with this transaction, which occurred in or about June 2018. In addition to the transaction involving Iterative, the Government is also investigating a similar, apparently fraudulent transaction that occurred in or about July 2018, in which the Target Subjects obtained millions of dollars in fiat currency from another entity on the promise of delivering cryptocurrency. Again, the Target Subjects neither provided the cryptocurrency nor returned the fiat currency.

3. In or about August 2018, Iterative entered into an arbitration proceeding against Volantis related to the above-described transaction, which resulted in the arbitrator issuing a decision in Iterative's favor in or about November 2018. The attached subpoena (the "Subpoena") seeks discovery materials produced by either party in connection with that arbitration and documents filed by any party or the arbitrator in the arbitration proceeding. Based on my conversations with counsel for Iterative, Iterative desires to comply with the Subpoena and would like to provide the requested documents to the Government without notifying any other party; however, Iterative believes it has a contractual obligation to disclose to Volantis and the Target Subjects its compliance with the Subpoena. Counsel for Iterative has advised that it will accept and comply with a non-disclosure order pursuant to the All Writs Act.

4. The Subpoena relates to an ongoing criminal investigation that is neither public nor otherwise known to the Target Subjects. Disclosure of the Subpoena to the Target Subjects would severely jeopardize the investigation because it would inform the Target Subjects about the existence of the federal investigation. The Target Subjects are believed to have the financial means that would facilitate their flight from prosecution. For instance, Thompson is believed to have

engaged in multiple cryptocurrency transactions each involving millions of dollars' worth of cryptocurrency and to have control over substantial amounts of cryptocurrency and fiat currency. The Target Subjects are also known to use computers and electronic communications in furtherance of their activity and thus could easily delete, encrypt, or otherwise conceal such digital evidence from law enforcement were they to learn of the Government's investigation. Much of the communications between the Target Subjects and the victims were through electronic means. The cryptocurrency transactions at issue inherently involved computers and electronically stored information. Consequently, there is reason to believe that notification of the existence of the attached Subpoena will seriously jeopardize the investigation, including by giving the Target Subjects an opportunity to flee or avoid prosecution, or tamper with evidence, including electronically stored information that is easily tampered with or destroyed. The Government anticipates that given the complexity of the transactions and the nature of the investigation, these circumstances will continue for at least the next year. Accordingly, the Government believes that one year is an appropriate delay of notice period for the Court to order, subject to extension upon further application if necessary.

### **DISCUSSION**

5. The All Writs Act provides, in relevant part, that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act permits a court, in its "sound judgment," to issue orders necessary "to achieve the rational ends of law" and "the ends of justice entrusted to it." *United States v. New York Telephone Co.*, 434 U.S. 159, 172-73 (1977) (internal quotation marks and citations omitted). The All Writs Act provides a "residual source of authority to issue writs that are not otherwise covered by statute." *Penn. Bureau of Corr.*

*v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). “Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.” *Id.*

6. This Court has “inherent supervisory authority” over the grand jury. *See In re Petition of Kutler*, 800 F. Supp. 2d 42, 47 (D.D.C. 2011). The grand jury is an ““appendage of the court”” and it “depend[s] on the judiciary in its role as an investigative body.” *United States v. Seals*, 130 F.3d 451, 457 (D.C. Cir. 1997) (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959)). As relevant here, the United States District Court for the District of Columbia has held that an order under the All Writs Act may be appropriate to prevent disclosure of a grand jury subpoena to third parties. *See In Re Application of the United States for an Order Pursuant to 28 U.S.C. 1651(a) for Order Precluding Notice of a Grand Jury Subpoena*, Case No. 17-mc-01604, 2017 WL 3278929 (D.D.C. July 7, 2017) (Howell, C.J.) (the “Howell Opinion”). As the Court in that case explained,

the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. . . . As the grand jury is a constitutional fixture in its own right, a district court must be empowered to effectuate and prevent the frustration of the grand jury system. Thus, a non-disclosure order may, in some cases, be necessary to achieve the rational ends of law.

*Id.* at 3-4 (internal quotation marks and citations omitted).

7. Because the All Writs Act provides authority to “fill statutory interstices,” *Penn. Bureau*, 474 U.S. at 42 n.7, a non-disclosure order pursuant to the All Writs Act can be used where a party, such as Iterative, is not clearly subject to any other statutory non-disclosure obligation.<sup>1</sup>

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<sup>1</sup> Iterative does not appear to be a “financial institution” for purposes of the non-disclosure provisions of the Right to Financial Privacy Act, 12 U.S.C. § 3401, *et seq.*, nor does it appear to

Such an order is not prohibited by Federal Rule of Criminal Procedure 6(e), as Rule 6(e) “allows for ‘rare exceptions premised on inherent judicial power’ and ‘[a]bsent restriction, courts have inherent power, subject to the Constitution and federal statutes, to impose secrecy orders incident to matters occurring before them.’” Howell Opinion, 2017 WL 3278929 at \*3 (quoting *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005)). A non-disclosure order under the All Writs Act must be justified by “‘compelling necessity . . . shown with particularity.’” Howell Opinion, 2017 WL 3278929 at \*3 (quoting *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 681 (8th Cir. 1986)).

8. This application sets forth facts showing that there is a compelling necessity for a non-disclosure order under the All Writs Act. Without the requested Order, Iterative’s position is that it must notify Volantis of its compliance with the Subpoena, which will adversely impact the Government’s investigation for the reasons described in paragraph 4 above, including by providing the opportunity for flight from prosecution and the destruction of evidence. *See* Howell Opinion, 2017 WL 3278929 at \*3 (finding a “compelling necessity” where Uber’s policy of notifying riders and drivers of requests for their information “directly conflict[ed] with the primary reason for grand jury secrecy:” preventing flight from prosecution). Moreover, Iterative in fact desires to produce the requested documents to the Government without notifying any other party because it recognizes the risks of disclosing the federal investigation. Accordingly, the proposed Order only imposes a restriction on Iterative with which it wishes to comply in any event. To the extent the proposed Order burdens Volantis because Volantis may have expected to be notified of Iterative’s compliance with the Subpoena, that interest is in direct conflict with, and is heavily outweighed

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be an “electronic communications service” or “remote computing service” for purposes of the non-disclosure provisions of the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*

by, the Government's interest in preserving the confidentiality of the criminal investigation and the interests of grand jury secrecy. Accordingly, the Government submits that the requested Order is both permissible and necessary under the circumstances.

9. The Government further requests that this Application and the Court's Order be placed under seal until further order of the Court, except that the Government may provide copies of the Application and Order as need be to personnel assisting the Government in the investigation and prosecution of this matter, and may disclose these materials as necessary to comply with discovery and disclosure obligations in any prosecutions related to this matter.

10. No prior request for the relief set forth herein has been made.

WHEREFORE, the Government respectfully requests that the Court enter the accompanying proposed Order directing that Iterative shall not notify any other person (except attorneys for Iterative for the purpose of receiving legal advice) of the existence of the Subpoena for one year, subject to extension upon further application if necessary.

Dated: New York, New York  
January 16, 2019

\_\_\_\_\_  
Assistant United States Attorney  
Southern District of New York  
\_\_\_\_\_

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In Re Grand Jury Subpoena to Iterative  
Capital / Iterative OTC LLC dated January  
16, 2019; USAO Reference No. 2018R01689

**Non-Disclosure Order  
Pursuant to 28 U.S.C. § 1651(a)**

**SEALED**

1. This matter having come before the Court pursuant to an application by the Government under the All Writs Act, 28 U.S.C. § 1651(a), requesting that the Court issue an Order directing Iterative Capital / Iterative OTC LLC (“Iterative”), based in New Jersey, not to disclose the existence of the attached subpoena for a period of one year, the Court finds that the Government has demonstrated with particularity a compelling necessity for a non-disclosure order pursuant to the All Writs Act.

Accordingly, it is hereby ORDERED:

2. Iterative shall not, for a period of one year from the date of this Order (and any extensions thereof), disclose the existence of this Order or the attached subpoena to any person, except that Iterative may disclose the attached subpoena to an attorney for Iterative for the purpose of receiving legal advice.

3. This Order and the Application upon which it was granted are to be filed under seal until otherwise ordered by the Court, except that the Government may without further order provide copies of the Application and Order as need be to personnel assisting the Government in the investigation and prosecution of this matter, and disclose these materials as necessary to comply with discovery and disclosure obligations in any prosecutions related to this matter.

Dated: New York, New York

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HONORABLE SARAH NETBURN  
UNITED STATES MAGISTRATE JUDGE