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15 **UNITED STATES DISTRICT COURT**
 16 **CENTRAL DISTRICT OF CALIFORNIA**
 17 **WESTERN DIVISION**

18 SECURITIES AND EXCHANGE
 19 COMMISSION,

20 Plaintiff,

21 v.

22 WORLD CAPITAL MARKET INC.;
 23 WCM777 INC.; WCM777 LTD. d/b/a
 24 WCM777 ENTERPRISES, INC.; and
 25 MING XU a/k/a PHIL MING XU,

26 Defendants,

27 KINGDOM CAPITAL MARKET, LLC;
 28 MANNA HOLDING GROUP, LLC;
 29 MANNA SOURCE
 30 INTERNATIONAL, INC.;
 31 WCM RESOURCES, INC.; AEON
 32 OPERATING, INC.; AND PMX
 33 JEWELS, LTD.,

34 Relief Defendants.

Case No. CV-14-2334-CAS-MRW

**RECEIVER'S EX PARTE
 APPLICATION FOR ORDER:
 (1) TEMPORARILY FREEZING THE
 BANK ACCOUNTS OF VINCENT
 MESSINA; AND (2) REQUIRING
 VINCENT MESSINA TO PROVIDE
 AN ACCOUNTING**

Ctrm: 5 - 2nd Floor
 Judge: Hon. Christina A. Snyder

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1 **I. INTRODUCTION**

2 In this Ex Parte Application, Krista Freitag ("Receiver"), the Court-appointed
3 temporary receiver for Defendants World Capital Market Inc., WCM777 Inc., and
4 WCM777 Ltd. d/b/a WCM777 Enterprises, Inc., Relief Defendants Kingdom
5 Capital Market, LLC; Manna Holding Group, LLC; Manna Source
6 International, Inc.; WCM Resources, Inc.; and their subsidiaries and affiliates
7 (collectively, "Receivership Entities"), applies for an order: (1) temporarily freezing
8 the bank accounts of Vincent Messina, and (2) requiring Mr. Messina to provide an
9 accounting of all funds received from Defendant Phil Ming Xu or the Receivership
10 Entities, including, but not limited to, the \$5 million he received from
11 ToPacific, Inc., an entity controlled by Defendant Phil Ming Xu, approximately
12 40 days ago.

13 The alleged fraudulent scheme operated by Defendants is discussed in detail
14 in the Complaint, Declarations of Peter Del Greco and Maria Rodriguez, and
15 Ex Parte Application filed by the Securities and Exchange Commission
16 ("Commission") on March 27, 2014. To very briefly summarize, the Commission
17 has alleged Defendants operated a Ponzi scheme raising more than \$65 million from
18 a large number of investors in the United States and abroad. The Receiver is
19 informed that Defendants will not oppose the entry of a preliminary injunction or
20 the permanent appointment of the Receiver.

21 Pursuant to the Temporary Restraining Order entered on March 27, 2014, the
22 Receiver moved immediately to investigate and secure the assets of the
23 Receivership Entities, preserve their value, and implement the other provisions of
24 the Order. During her initial investigation, the Receiver learned that, approximately
25 one month before this case was filed, \$5 million was transferred from
26 ToPacific, Inc., an entity owned by Defendant Phil Ming Xu and whose accounts are
27 now frozen, to the IOLTA trust account of attorney Vincent Messina. Mr. Messina
28 has refused to turn over the funds and his counsel has stated that some of funds have

1 already been disbursed, but the details of those disbursements have not been
2 provided. The Receiver asked that Bank of America freeze Mr. Messina's accounts,
3 which the bank agreed to place on temporary administrative hold.¹

4 The Receiver initially sought to recover the funds from Mr. Messina, which
5 Mr. Messina refused. The Receiver then asked Mr. Messina to agree to escrow the
6 undisbursed funds pending further order of the Court and provide an accounting of
7 the funds he received. On April 4, 2014, Mr. Messina, the Receiver, and the
8 Commission agreed that \$2,332,000 wired by Mr. Messina from various accounts he
9 controls to the client trust account of Thompson Hine LLP, Ms. Fritz's law firm,
10 would be held in escrow by Thompson Hine pending further order of the Court.
11 Mr. Messina still refuses, however, to provide any information about the remaining
12 \$2.668 million, stating only that it was disbursed for "business purposes."

13 On April 8, 2014, Ms. Fritz confirmed that \$2,133,000 has been received by
14 Thompson Hine and is being held pursuant to the escrow agreement. In connection
15 with the wire transfer of funds from accounts Mr. Messina controls to the Thompson
16 Hine account, the Receiver agreed to release the temporary hold put in place by
17 Bank of America such that funds in Mr. Messina's accounts at Bank of America
18 could be wired to Thompson Hine.

19 The remaining \$200,000 to be held pursuant to the escrow agreement has not
20 been received by Thompson Hine. The Receiver learned Mr. Messina obtained a
21 \$200,000 cashier's check from Bank of America, which he claims he lost.
22 Mr. Messina is apparently putting a claim in with Bank of America that the funds be
23 credited back to his account. Bank of America advises it may take as long as
24 91 days for such claim to be approved and the funds credited back to Mr. Messina's
25 account.

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¹ The temporary hold was later released in connection with Mr. Messina wiring funds to his counsel's client trust account to be held in escrow, as discussed below.

1 Mr. Messina's position is that the \$5 million transfer is a loan pursuant to a
2 two-line loan agreement dated February 27, 2014, in which Mr. Messina is the
3 beneficiary of a \$5 million non-recourse loan, to be repaid in 2019 in a single
4 balloon payment. The funds were wired to Mr. Messina's IOLTA trust account.
5 The purported loan agreement, which is attached as Exhibit B to the Declaration of
6 Ted Fates filed herewith, is virtually identical to other purported non-recourse,
7 unsecured loan agreements signed by Receivership Entity Manna Holding
8 Group, Inc., an entity owned by Mr. Xu's wife, in connection with large transfers
9 from World Capital Market, Inc. and Kingdom Capital Market, LLC for the
10 purchase of real property. Declaration of Peter Del Greco, Dkt. No. 6, Exhibits 32
11 and 33. No payments are due under the purported loan agreement until
12 January 2019.

13 Moreover, Defendant Phil Ming Xu subsequently asked for return of the
14 "retainer" from Mr. Messina, which undermines a claim that this was a *bona fide*
15 loan transaction for some legitimate purpose.

16 Considering the large sum of money at issue, the compelling evidence of
17 fraud and that Defendant Xu uses nominees to hold the proceeds of fraud, as well as
18 the proximity of the transfer to the filing of the case, and the fact that Mr. Messina
19 refuses to provide any information about the whereabouts of the remaining
20 \$2.668 million, it is critical that Mr. Messina's bank accounts be immediately frozen
21 to protect the Receivership Entities' investors from further dissipation of the funds.
22 The temporary freeze should remain in place pending further investigation and a
23 determination by the Court of the true nature of the \$5 million transfer. To aid in
24 this investigation and determination, Mr. Messina should be directed to provide an
25 accounting of the funds, a relatively simple task considering he received them only
26 about 40 days ago. The accounting will also assist in determining the appropriate
27 scope of the freeze, which should cover accounts containing funds received from
28 Mr. Xu or the Receivership Entities.

1 This Ex Parte Application is based upon this application and the
2 accompanying declarations of Ted Fates ("Fates Declaration") and Krista Freitag
3 ("Freitag Declaration") and exhibits.

4 **II. RELEVANT FACTUAL BACKGROUND**

5 **A. The Court Issues a TRO and Order, Among Other Things,**
6 **Appointing the Receiver and Freezing Assets of the Receivership**
7 **Entities**

8 On March 27, 2014, the SEC filed its Complaint against Defendant Phil Ming
9 Xu and the Receivership Entities, together with Declarations from Peter Del Greco
10 and Maria Rodriguez, and an *Ex Parte* Application for a temporary restraining order
11 and order: (1) freezing assets; (2) prohibiting destruction of documents; (3) granting
12 expedited discovery; (4) requiring accountings; (5) authorizing alternative service;
13 (6) repatriating assets; and (7) appointing a temporary receiver and order to show
14 cause re preliminary injunction and appointment of a permanent receiver. On the
15 same day, the Court granted the requested temporary restraining order, including
16 appointing the Receiver as temporary receiver ("Order"). Dkt. No. 14.

17 Among other things, the Order provides:

18 Defendants . . . **Ming Xu a/k/a Phil Ming Xu** . . . and
19 their officers, agents, servants, employees, **attorneys**,
20 subsidiaries and affiliate, and those persons in active
21 concert with them, **who receive actual notice of this**
22 **Order, by personal service or otherwise . . . be and**
23 **hereby are temporarily restrained and enjoined from,**
24 **directly or indirectly, transferring, assigning, selling,**
25 **hypothecating, changing, wasting, dissipating,**
26 **converting, concealing, encumbering, or otherwise**
27 **disposing of, in any manner, any funds, assets,**
28 **securities, claims or other real or personal property,**
including any notes or deeds of trust or other interest
in real property, wherever located, of any one of the
Defendants or Relief Defendants, or their subsidiaries
or affiliates, owned by, controlled by, managed by or in
the possession or custody of any of them. . . .

1 See Dkt. No. 14, pp. 4-5, ¶ V (emphasis added).

2 The Court also ordered that:

3 **an immediate freeze shall be placed on all monies and**
4 **assets. . . in all accounts at any bank, financial**
5 **institution** or brokerage firm, or third-payment payment
6 processor, all certificates of deposit, **and other funds or**
7 **assets, held** in the name of, **for the benefit of**, or over
which account authority is held by Defendants . . . Ming
Xu a/k/a Phil Ming Xu. . .

8 See id., p. 5, ¶ VI (emphasis added).

9 **B. The Receiver Learns That \$5 Million of Estate Assets Were**
10 **Transferred to Mr. Messina Right Before This Case was Filed,**
11 **Yet Mr. Messina Refuses to Turnover the Funds**

12 In the Receiver's initial investigation and review of documents located at the
13 Receivership Entities' offices, she reviewed a letter from Mr. Xu to Vincent Messina
14 dated March 20, 2014. See Freitag Declaration, ¶ 2. The letter states (a) Mr. Xu
15 wired \$5 million to Mr. Messina's IOLTA trust account on February 26, 2014,
16 (b) Mr. Xu demanded the funds be returned, and (c) Mr. Messina failed to obey the
17 request. Id., ¶ 2, Exhibit 1. Specifically, the letter states Mr. Xu is "in the final
18 stages of dealing with ongoing SEC issues" and "with the SEC payments in mind I
19 requested that you in your capacity as my lawyer, working with an ongoing retainer,
20 'return' the funds lodged at your IOLTA Trust Account to me directly. As you know
21 you failed to obey this direct request." See id.

22 Accordingly, on March 30, 2014, counsel for the Receiver e-mailed a copy of
23 the Order to Mr. Messina, along with a letter requesting he immediately return
24 monies received from the Defendants, Relief Defendants, or their affiliates. See
25 Fates Declaration, ¶ 30, Exhibit A. On March 31, 2014, the letter and Order were
26 also personally delivered to the two addresses identified on the letter, which came
27 from the Receivership Entities' records. See id. On April 1, 2014, Mr. Messina
28

1 verbally acknowledged receipt of the letter and Order. Id., ¶ 3. He also
 2 acknowledged receiving the \$5 million wire transfer from Mr. Xu. Id. He claimed
 3 the transfer was a loan for which there was a promissory note, and refused to turn
 4 over the funds or state where they are. Id. He also stated he received \$200,000
 5 from Mr. Xu to set up a political action committee, and that approximately \$70,000-
 6 \$80,000 of those funds have not yet been used. Id. Finally, he stated he was in the
 7 process of engaging a lawyer. Id.

8 On March 31, 2014, the Receiver and her counsel met with Mr. Xu at the
 9 WCM offices in Pasadena. Id., ¶ 3. During the meeting, Mr. Xu stated that
 10 \$6 million² had been wired to Mr. Messina. Id. He stated the money should be
 11 returned and asked for the Receiver's assistance in recovering the funds. Id. Mr. Xu
 12 stated that Mr. Messina's IOLTA trust account information was in his WCM e-mail
 13 account. Id. The Receiver promptly located the wire transfer information provided
 14 by Mr. Messina in Mr. Xu's WCM e-mail account. Id. She then e-mailed Bank of
 15 America and requested a freeze on Mr. Messina's IOLTA account. Id. Her counsel
 16 also printed the e-mail and faxed it to Bank of America, together with the Order. Id.

17 **C. Mr. Messina and His Lawyer Acknowledge Mr. Messina has**
 18 **Already Disbursed Some of the Funds**

19 On April 1, 2014, the Receiver spoke to a representative of Bank of America
 20 about the request to freeze Mr. Messina's IOLTA account. Id., ¶ 4. Based on that
 21 conversation, the Receiver believes some of the \$5 million has already been
 22 disbursed from Mr. Messina's IOLTA account to other accounts under
 23 Mr. Messina's name. See id.

24 On the morning of April 2, 2014, the Receiver and her counsel spoke with
 25 Maranda Fritz, a lawyer located in New York retained by Mr. Messina. See Fates
 26 Declaration, ¶ 4; Freitag Declaration, ¶ 5. Ms. Fritz confirmed that \$5 million had
 27

28 ² As discussed below, the Receiver has since confirmed that the amount wired was
 in fact \$5 million.

1 the Commission supports the ex parte application. Counsel for Mr. Messina stated
2 Mr. Messina opposes the ex parte application. Per the Court's chambers rules,
3 counsel for Mr. Messina was advised that Mr. Messina has 48 hours to file
4 opposition.

5 **IV. MR. MESSINA'S BANK ACCOUNTS SHOULD BE**
6 **FROZEN AND AN ACCOUNTING PROVIDED**

7 **A. The Order Freezes the Subject Funds**

8 The Order freezes all monies held in the name of or for the benefit of Mr. Xu
9 or the Receivership Entities, including the bank accounts of ToPacific, Inc. Thus,
10 the funds transferred to Mr. Messina's IOLTA trust account, which came from
11 ToPacific, Inc., are subject to the existing asset freeze under the Order. Funds held
12 in IOLTA trust accounts are held for the benefit of clients. Accordingly, whether
13 the client was Mr. Xu, ToPacific, Inc., or another Receivership Entity,
14 Mr. Messina's accounts should be frozen pursuant to the Order.³ See SEC v.
15 Interlink Data Network of Los Angeles, Inc., 77 F.3d 1201, 1205 (9th Cir. 1996);
16 CFTC v. Co Petro Marketing Group, Inc., 700 F.2d 1279 (9th Cir 1983); SEC v.
17 Credit Bancorp, Ltd., 109 F.Supp.2d 142, 144-46 (S.D.N.Y. 2000) (court
18 determined that a retainer held in a law firm's trust account remained property of the
19 client, and was therefore subject to an asset freeze order against the client).

20 Mr. Messina claims the transfer to his IOLTA account was a loan, but the
21 evidence gathered to date does not support his claim. IOLTA accounts are used
22 solely to hold retainers and client funds. Having the funds wired to an IOLTA
23 account is consistent with an attorney-client relationship and a retainer, and
24 inconsistent with a loan. Moreover, in his March 20, 2014 letter, Mr. Xu calls
25 Mr. Messina his lawyer, states the monies were a retainer, and asks for the retainer
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28 ³ In fact, funds of the Receivership Entities in the amount of \$11.2 million being
held in the IOLTA trust account of attorney Simon Horsman have already been
recovered by the Receiver pursuant to the Order.

1 to be returned. See Freitag Declaration, ¶ 2, Exhibit 1. The proximity of the
2 transfer to the filing of the Commission's complaint, the two-line loan document that
3 is virtually identical to other purported loans between Receivership Entities to
4 purchase real property, and the lack of any security, payment schedule, or other
5 normal loan terms further negate the claim of a loan and support an attorney-client
6 relationship and a retainer.

7 The statements of Mr. Messina's own counsel also call into question the
8 validity of the purported loan. According to Ms. Fritz, Mr. Xu originally came to
9 Mr. Messina and asked that he help him "put some money aside." When
10 Mr. Messina said he would not do that, the two came up with an alternate
11 arrangement - Mr. Xu would "loan" Mr. Messina the money, the two would make
12 "investments" together, and Mr. Xu would get the equity from the investments as
13 reduction of the debt. No payments would be due under the two-line loan document
14 until January 2019. In other words, Mr. Messina would hold the funds for Mr. Xu in
15 his IOLTA account, make disbursements as directed by Mr. Xu, and Mr. Xu would
16 forgive the debt. Therefore, although a two-line loan document may have been
17 signed, the facts indicate the loan is a sham, the relationship was really that of
18 attorney and client, and the funds were being stashed by Mr. Xu in Mr. Messina's
19 IOLTA account before they could be frozen. Accordingly, Mr. Messina holds the
20 funds for the benefit of the Receivership Entities or Mr. Xu and they are subject to
21 the asset freeze under the Order.

22 **B. An Asset Freeze is Warranted to Secure Assets of the**
23 **Receivership Entities**

24 Even if the Court determines the existing asset freeze under the Order does
25 not cover funds in Mr. Messina's accounts received from Mr. Xu and the
26 Receivership Entities, the Court should freeze the funds under its broad equitable
27 powers to secure assets of the Receivership Entities and those derived from a
28 fraudulent scheme.

1 Federal courts have inherent equitable powers to issue a variety of ancillary
2 remedies in SEC injunction actions. SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir.
3 1980). These powers include the authority to freeze assets of both parties and
4 nonparties. SEC v. Hickey, 322 F.3d 1123, 1131 (9th Cir. 2003). Courts use freeze
5 orders to prevent waste and dissipation of assets and to ensure their availability for
6 disgorgement for the benefit of victims of the fraud. See Hickey, 322 F.3d at 1132
7 (affirming asset freeze over nonparty brokerage firm controlled by defendant to
8 effectuate disgorgement order against defendant).

9 An asset freeze may take the form of a preliminary injunction. Republic of
10 Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988). "One moving for a
11 preliminary injunction assumes the burden of demonstrating either a combination of
12 probable success and the possibility of irreparable injury or that serious questions
13 are raised and the balance of hardships tips sharply in his favor." Benda v. Grand
14 Lodge of Int'l Assoc. of Machinists & Aerospace Workers, 584 F.2d 308, 314-15
15 (9th Cir. 1978). In a statutory enforcement proceeding, the government is entitled to
16 a "presumption" of irreparable injury where the government shows that it is likely to
17 succeed on the merits of its claims. United States v. Nutri-Cology, Inc., 982 F.2d
18 394, 397-98 (9th Cir. 1992) ("In statutory enforcement cases where the government
19 has met the 'probability of success' prong of the preliminary injunction test, we
20 presume it has met the 'possibility of irreparable injury' prong because the passage of
21 the statute is itself an implied finding by Congress that violations will harm the
22 public.").

23 In demonstrating the likelihood of irreparable injury, a party seeking an asset
24 freeze must show a likelihood of dissipation of the claimed assets, or other inability
25 to recover monetary damages, if relief is not granted. Johnson v. Couturier,
26 572 F.3d 1067, 1085 (9th Cir. 2009). When allegations of past fraud are coupled
27 with supplemental evidence that demonstrates a likelihood of dissipation, courts
28 may freeze assets. In Johnson v. Courturier, 572 F.3d 1067 (9th Cir. 2009), the

1 plaintiff-stockholders brought suit against a corporation's president and his fellow
2 directors, claiming the president was vastly overcompensated, having received
3 \$35 million dollars in compensation, which was over 33% of the value of the
4 company's stock. The Ninth Circuit found that if the defendant president was able
5 to convince his fellow directors to consent to diverting nearly \$35 million from the
6 company into his personal bank account, he was "presumably more than capable of
7 placing assets in his personal possession beyond the reach of a judgment." Id. at
8 1086. In other words, a history of diverting funds and the ability to divert more was
9 sufficient to establish a likelihood of dissipation.

10 Here, Defendants are not opposing the entry of a Preliminary Injunction or
11 contending they did not operate a Ponzi scheme. There is not only a strong
12 likelihood that monies transferred to Mr. Messina will be dissipated, but evidence
13 they already have been. Mr. Messina and his attorney have stated that some of the
14 funds transferred to Mr. Messina have already been disbursed and Mr. Messina
15 intends to disburse more. Thus, funds very recently obtained from the Receivership
16 Entities have already been dissipated and will likely continue to be dissipated. This
17 poses a serious risk of irreparable injury to the receivership estate and investors.
18 Once monies are disbursed by Mr. Messina, it will be difficult, if not impossible, to
19 recover them for the benefit of investors.

20 On the other hand, if the Court issues the requested freeze, the status quo will
21 be maintained while further investigation is done so the Court can determine the true
22 nature of the transfer and grant appropriate relief. Considering the serious risk of
23 irreparable injury and the facts strongly indicating the transfer was an attempt by
24 Mr. Xu to stash funds in Mr. Messina's IOLTA account before they could be frozen,
25 the Court should temporarily freeze Mr. Messina's accounts so the funds are secured
26 pending further order of the Court.

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1 **C. Mr. Messina Should be Required to Provide an Accounting**

2 An accounting will aid in the investigation and determination of the true
3 nature of transfer, assist in locating and securing funds already disbursed (if
4 necessary and appropriate), and require very little effort by Mr. Messina considering
5 the funds were received only about 40 days ago. Accordingly, the Receiver requests
6 Mr. Messina be directed to provide an accounting of all funds received from Mr. Xu
7 or the Receivership Entities, including ToPacific, Inc.

8 **V. CONCLUSION**

9 For the reasons set forth herein, the Receiver requests an immediate asset
10 freeze on all funds in Mr. Messina's bank accounts received from Mr. Xu or the
11 Receivership Entities, including ToPacific, Inc., and an order directing Mr. Messina
12 to provide an accounting of all funds received from Mr. Xu or the Receivership
13 Entities, including ToPacific, Inc.

14
15 Dated: April 8, 2014

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
DAVID R. ZARO
TED FATES

16
17
18 By: /s/ Ted Fates
19 TED FATES
20 Attorneys for Temporary Receiver
21 KRISTA L. FREITAG
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