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9 VINCENT MESSINA

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
12 **WESTERN DIVISION**

12 SECURITIES AND EXCHANGE  
COMMISSION,

13 Plaintiff,

14 v.

15 WORLD CAPITAL MARKET INC.;  
WCM777 INC.; WCM777 LTD. d/b/a  
16 WCM777 ENTERPRISES, INC.; and  
MING XU a/k/a PHIL MING XU,

17 Defendants,

18 KINGDOM CAPITAL MARKET, LLC;  
19 MANNA HOLDING GROUP, LLC;  
MANNA SOURCE INTERNATIONAL,  
20 INC.; WCM RESOURCES, INC.;  
AEON OPERATING, INC.; AND PMX  
21 JEWELS, LTD.,

22 Relief Defendants.

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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION  
TO EX PARTE APPLICATION OF  
RECEIVER**

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

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1 I. INTRODUCTION

2 This memorandum of Points and Authorities is submitted on behalf of non-party Vincent  
3 Messina (“Respondent”) in opposition to the Ex Parte Application of Receiver Krista Freitag  
4 (“Receiver Application”) seeking an asset freeze and an accounting.<sup>1</sup> The Receiver’s Application  
5 concerns a transfer of funds from a company called ToPacific to Mr. Messina on or about  
6 February 26, 2014, a transfer that is the subject of a Loan Agreement agreed to and executed by  
7 both Mr. Messina and Ming Xu.

8 As demonstrated below, the Receiver Application is patently deficient both factually and  
9 legally. The Receiver Application declines to acknowledge or address the factual and legal  
10 assertions that would actually support an application of this nature, and instead relies on an  
11 amalgam of insinuation and indignation. It provides no information concerning the source of the  
12 funds that were transferred to Mr. Messina and no evidence that they constitute “ill-gotten gains.”  
13 It fails to acknowledge that the SEC’s own analysis confirms that the funds received by Mr.  
14 Messina were *not* derived from the \$28 million that was obtained by Xu from United States  
15 investors, and may derive from Xu’s own business dealings having nothing to do with World  
16 Capital Markets. The SEC, for its part, acknowledged that it has no information concerning the  
17 source of the funds and instead relies on a kind of “net worth” concept, postulating that Xu has no  
18 funds other than those obtained from the fraud, and that therefore the funds that Mr. Messina  
19 received must be a portion of the proceeds of fraud. Suffice to say, neither the SEC nor the  
20 Receiver has provided to the Court a shred of evidence to support the rather far-fetched “net  
21 worth” claim, and their own pleadings suggest otherwise.

22 The Receiver displays equal disinterest in the additional requisite for the relief that it  
23 seeks, i.e., that the Receiver demonstrate that Mr. Messina has no legitimate claim to the funds.  
24 The Receiver acknowledges that there is a loan document and insists that there is a “substantial

25 \_\_\_\_\_  
26 <sup>1</sup> With respect to the asset freeze, the application at times speaks broadly about Mr. Messina’s bank accounts generally; it appears,  
27 however, that the Receiver is not actually attempting to freeze all bank accounts of Mr. Messina and instead is seeking a freeze on  
28 “*all funds in Mr. Messina’s bank accounts* received from Mr. Xu or the Receivership Entities.” Receiver’s Ex Parte Application  
[Doc. 29] at 10 (emphasis added). To the extent that the Receiver is seeking to freeze all of Mr. Messina’s accounts, that  
application is not only baseless but also the balance of hardships would tip decidedly in Mr. Messina’s favor.

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1 dispute” concerning the validity of that loan but provides nothing other than rhetoric in support of  
2 its contentions. The Receiver has not and cannot assert that Mr. Xu did not enter into that loan, or  
3 that Mr. Xu was prohibited from entering into that loan, and offers no authority in support of the  
4 argument that it can void the loan transaction. Instead of addressing any one of these legal issues  
5 or articulating any cogent theory as relates to the funds, the Receiver has adopted a purely  
6 visceral approach, stating that the funds came from Mr. Xu and asserting that the Court should  
7 therefore award it the requested relief. The Receiver’s expression of entitlement, without any  
8 factual or legal basis, should be rejected by the Court.

9 The contentions of the Receiver on this application are the veritable opposite of those  
10 which formed the basis for the SEC’s application for a Temporary Restraining Order in this case.  
11 The SEC’s application provided detailed factual and accounting analysis, and provided a tracing  
12 of funds into each of the accounts that it sought to seize. The Receiver’s Application, on the  
13 other hand, demonstrates that the Receiver lacks even the most basic information regarding the  
14 transfer to Mr. Messina, and cannot meet the requirements for preliminary relief.

15 The Receiver has, to this point, offered nothing but its own suppositions, and has failed to  
16 demonstrate any likelihood of success on the merits of its claims. The Receiver Application  
17 establishes only that there are substantial facts in dispute and legal issues, and that these issues  
18 should proceed and be resolved in the ordinary course, with a development of the facts relating to  
19 both the source of the funds at issue and the circumstances relating to the loan agreement.<sup>2</sup>

20 **II. STATEMENT OF FACTS**

21 **A. Phil Ming Xu**

22 According to the SEC’s submissions in this case, Phil Xu began the activities relating to  
23 World Capital Markets approximately one year ago, in or about March of 2013. Declaration of  
24 Peter Del Greco [Dkt. 16] (“Del Greco”) at ¶ 5. Xu and the other defendants solicited investors  
25 in the United States, and also conducted operations abroad. Del Greco at ¶ 6. The materials  
26

27 <sup>2</sup> Given the lack of factual and legal content in the Receiver Application, the Respondent is concerned that the Receiver will  
28 attempt to inject some substance into its application via its reply submission, leaving Respondent with no opportunity to address  
either its factual or legal contentions. If the Receiver submits new material and /or declarations, the Respondent will seek an  
opportunity both to obtain discovery and to provide a further opposition.

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1 relating to WCM have, for example, been translated into Chinese and the website includes  
2 information in both English and Chinese. Del Greco at ¶ 9. The materials contained in Exhibit 1  
3 to the Del Greco Declaration include references to offices in Beijing, Qingdao, Tokyo, Shenzhen  
4 and Hong Kong. Ex. 1 at 15.<sup>3</sup> Further, exhibits to the Del Greco Declaration reflect that the  
5 funds derived from United States investors actually constituted at most 37% of the amounts  
6 obtained by World Capital Markets. Ex. 29 to Del Greco Dec

7 Separate and apart from World Capital Markets, the Declaration of Mr. Del Greco and the  
8 attached exhibits reflect that Phil Ming Xu has had a lengthy and seemingly successful  
9 professional life. He is a graduate of Harvard Business School, purportedly operates seven  
10 companies and is the President of not only World Capital Market Group but also China Private  
11 Equity Group. Ex. 1 to Del Greco at 17. A biography of Xu describes decades of employment  
12 and financial pursuits in Beijing and elsewhere prior to the founding of World Capital Market  
13 including a sale of his own company for approximately \$50 million. Ex. 4 to Del Greco at 88.  
14 According to Exhibit 4 to Mr. Del Greco’s Affidavit, World Capital Markets is primarily engaged  
15 not in the “cloud computing” activity at issue in this case but in “merchant banking” and  
16 consulting. Ex. 4 to Del Greco at 68-69.

17 **B. The SEC Filings**

18 After an investigation that commenced in October 2013, the SEC on March 27, 2014 filed  
19 its Complaint and with it voluminous documents supporting its request for wide ranging  
20 preliminary relief. The SEC’s Complaint asserts four claims against all named defendants  
21 including violations of section 10(b) of the Exchange Act and Rule 10b-5, section 17(a) and  
22 section 5 of the Securities Act, and controlling person liability against Xu under section 20(a)  
23 section of the Exchange Act. The SEC alleges that defendants obtained money from investors  
24 through false statements, and that they sold those interests without registration in violation of  
25 section 5. Those claims are based on the SEC’s analysis of the activity of Xu and various entities  
26 during the period March 2013 through at least February 2014. Complaint [Dkt. 1] at ¶¶ 3-7.

27 \_\_\_\_\_  
28 <sup>3</sup> The SEC does not appear to be arguing that it can pursue claims based on, or seek disgorgement in relation to, those activities that occurred entirely in China or Hong Kong.

1 According to the Complaint, the SEC was able to identify a total of \$28 million that was  
2 raised in the United States through the alleged fraud between March and October 2013.<sup>4</sup>  
3 Complaint at ¶ 3. In support of its request for preliminary relief, the SEC filed an affidavit of  
4 Maria Rodriguez in which she traced the use and disbursement of those funds. Declaration of  
5 Maria Rodriguez [Dkt. 7] (“Rodriguez Dec.”). In her Declaration, Ms. Rodriguez sets out the  
6 substantial quantity of banking records that were obtained and analyzed, relating to at least twenty  
7 different bank accounts. Rodriguez Dec. at ¶¶ 6-7. She was able “to identify the sources and  
8 uses of cash for those accounts,” determining that a total of approximately \$28 million was  
9 received into those accounts and disbursed. Rodriguez Dec. at ¶ 10. She analyzed the  
10 disbursements, finding that the majority of the funds were deposited into other accounts  
11 associated with WCM or Ming Xu, and traced those transfers. Rodriguez Dec. at ¶¶ 13-15. She  
12 then describes those disbursements, including the use of funds to acquire property, payments to  
13 Kingdom Capital, payments to investors, payments to WCM Resources, payments to a WCM  
14 Merrill Lynch account and payments to Manna Holdings. Rodriguez Dec. at ¶¶ 16-29. Finally,  
15 she provided a schedule of “Other Disbursements,” leaving only approximately \$1 million  
16 unallocated. Rodriguez Dec. at ¶ 30.

17 That analysis of transfers of those funds from World Capital Markets to other entities then  
18 formed the basis for the SEC’s inclusion of various Relief Defendants in the Complaint, and its  
19 request for a freeze on various bank accounts.

20 The SEC’s submissions demonstrate that the SEC carefully analyzed the proceeds of the  
21 fraud during the period March through October 2013, and provided factual support to this Court  
22 when it sought asset freezes and other preliminary relief. Those submissions also demonstrate  
23 that the SEC found substantial transfers to other “WCM” accounts but found only little or no  
24 information relating to the entity that transferred funds to Mr. Messina, “ToPacific.” The only  
25 information contained in the SEC’s filings relating to that entity, “ToPacific,” are that it was

26 \_\_\_\_\_  
27 <sup>4</sup> The SEC also alleges that additional funds were raised from investors in the United States since October 2013 and held in Hong  
28 Kong; according to the Del Greco affidavit, that information was provided by counsel for World Capital Markets. Del Greco Dec.  
at ¶ 40. It is unclear the total amount of funds that were raised outside the United States that were also deposited in Hong Kong.

1 identified by Ming Xu as an account that was under his control (Del Greco Dec. at ¶ 42), that  
 2 Ming Xu is its principal and agent for service of process (Del Greco Dec. at ¶ 61), and that a total  
 3 of \$200,000 was paid from To Pacific in relation to a purchase of one of the pieces of property  
 4 that was acquired by Ming Xu (Rodriguez Dec. at ¶ 22).<sup>5</sup>

5 Throughout her analysis, Ms. Rodriguez also confirms that substantial amounts relating to  
 6 the acquisition of properties were transferred *from* a Hong Kong account, but she does not  
 7 attempt to characterize the source of those funds. In relation to the purchase of 710 Arabian  
 8 Lane, for example, Ms. Rodriguez states that \$75,000 of “investor funds” was used to pay a  
 9 portion of the total purchase price of \$2.4 million; Ms. Rodriguez makes to assertion with respect  
 10 to the source of the remainder that apparently came from a Hong Kong account. Rodriguez Dec.  
 11 at ¶ 18.

12 **C. Funds Received by Vincent Messina**

13 On February 26, 2014, a total of \$5 million was transferred by Xu from a To Pacific bank  
 14 account into an IOLTA account of Mr. Messina’s firm. Freitag Dec. [Dkt. 29-1] at ¶ 7. On  
 15 February 27, 2014, a promissory note was executed by both Mr. Messina and Mr. Xu in which  
 16 Mr. Messina agreed to repay the loan with 5% interest at the end of a five year period. Fates Dec.  
 17 [Dkt. 29-2] at ¶ 5, 8 and Ex. B.

18 More than a month later, on or about March 20, 2014, Mr. Xu sent a letter to Mr. Messina  
 19 with respect to funds that, according to Mr. Xu, were transferred to Mr. Messina “for [Xu’s]  
 20 private business.” Mr. Xu stated that he needed those funds in connection with his settlement of  
 21 matters with the SEC. Ex. 1 to Fates Dec.

22 **D. The Receiver’s Demand for Return of the Money Received by Mr. Messina**

23 On or about March 30, 2014, the Receiver’s counsel sent a letter to Mr. Messina seeking  
 24 to have Mr. Messina transfer \$5 million to the Receiver. That document appeared to be based on  
 25 statements by Mr. Xu in which he confirmed that he had transferred funds to Mr. Messina, that he  
 26

27 \_\_\_\_\_  
 28 <sup>5</sup> According to the SEC’s filings, ToPacific’s corporate registration is “suspended;” it may no longer be an operating corporate entity and it may have no current operations or activities that would properly be the subject of a receivership.

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1 had thereafter sought to get those funds back, and that he was asking for the Receiver’s assistance  
2 in obtaining those funds from Mr. Messina. Fates Dec. at ¶ 3.

3 It appears from that letter that Mr. Xu had failed to advise the Receiver that he had entered  
4 into a loan agreement with Mr. Messina.

5 Counsel for Mr. Messina then contacted Receiver’s counsel.<sup>6</sup> Counsel for Messina  
6 confirmed to the Receiver the transfer of funds, the entry into the loan agreement and the  
7 disbursement of a portion of those funds for business purposes. Asked about the terms of the  
8 loan, counsel confirmed that Mr. Messina was initially asked by Mr. Xu to “hold” money, and he  
9 declined to do so. Mr. Xu and Mr. Messina, who had previously discussed various business  
10 opportunities and interests, agreed that Mr. Xu would loan the funds to Mr. Messina and that, as  
11 business opportunities developed in the future, Mr. Xu may be offered and may decide to  
12 participate in those businesses. Declaration of Maranda Fritz (“Fritz Dec.”) at ¶¶ 3-4.

13 Counsel for Messina also explained that Mr. Messina understood that Mr. Xu and his  
14 family had enormous other assets having nothing to do with World Capital Markets and that Mr.  
15 Xu represented that the funds received by Mr. Messina had nothing to do with World Capital  
16 Markets. Fritz Dec. at ¶ 5.

17 Counsel for Messina provided a copy of the Loan Agreement to counsel for the Receiver,  
18 who has now had that documents for a number of days. Fates Dec. at ¶ 8.

19 At no time, during conversations or in connection with this application, has the Receiver  
20 asserted that the Loan Agreement was not agreed to and executed by Mr. Xu.

21 Counsel for the Receiver also, during the conversation, asked that Mr. Messina pay the  
22 funds to the Receiver. Based on all the circumstances, including the lack of any reference to  
23

24 <sup>6</sup> The Receiver devotes considerable time to the content of the discussions between counsel, all of which were aimed at settling or  
25 resolving the pending issues. Those discussions are not evidence, and the Receiver’s reliance on them only serves to illustrate the  
insufficiency of the Receiver Application.

26 The description of those communications provided by the Receiver is substantially accurate, though some items are overstated and  
27 much is omitted. The most significant error in the Receiver’s description of the conversation has to do with the use to which Mr.  
28 Messina intended to put the funds. Counsel for Messina stated to the Receiver’s counsel that Mr. Messina discussed with Mr. Xu  
that he intended to use the funds to advance and develop certain businesses, and they discussed the possibility of Mr. Xu later  
acquiring an interest in those businesses, but there was no agreement to that effect. Because the Receiver elected to inject those  
discussions into this record, counsel for Messina has provided a declaration that attempts to correct the Receiver’s statements as to  
certain portions of the conversations.

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1 those funds in the SEC’s extensive filings, counsel for Messina asked for more information  
2 concerning the source of those funds. The Receiver’s counsel insisted that it need not provide  
3 any such information, and acknowledged that it did not have nor could it obtain information that  
4 would connect the funds received by Mr. Messina to the alleged fraud. Fritz Dec. at ¶ 7.

5 In the end, the Receiver requested that Mr. Messina agree to escrow the funds that had not  
6 been disbursed for business, and counsel agreed to that proposal subject to approval by the client.  
7 Counsel then confirmed that the client agreed to that process. Notwithstanding that agreement,  
8 counsel for the Receiver contacted Bank of America and convinced them to place a hold on all of  
9 Mr. Messina’s Bank of America accounts. While the Receiver may have believed that she could  
10 thereby effectively freeze the bulk of the remaining funds regardless of Mr. Messina’s  
11 cooperation, that account in fact held only \$519,000. Fritz Dec. at ¶ 8-9.

12 With not just the relevant account but all of his Bank of America accounts frozen, and  
13 conduct by the Receiver that was squarely at odds with the agreement that had been reached, Mr.  
14 Messina was in the position of having to decide whether to voluntarily transfer the remaining  
15 funds into the escrow account. Mr. Messina had every opportunity to move those funds and/or  
16 decline to proceed with an escrow. Even though the agreement had apparently been abrogated by  
17 the Receiver, Mr. Messina complied with the agreement and voluntarily transferred a total of \$1.6  
18 million from other accounts that the Receiver did not know of or freeze. Although the Receiver’s  
19 obtaining a freeze of the Bank of America account caused a delay in that particular transfer, that  
20 total of \$519,000 was also transferred by Mr. Messina into the escrow account. Fritz Dec. at  
21 ¶ 10.

22 **E. The Receiver’s Ex Parte Application**

23 The only factual information in the Receiver Application regarding the actual transfer of  
24 funds to Mr. Messina consists of Xu’s confirmation of the transfer, a letter from Xu to Mr.  
25 Messina a month later asking for return of the money, a letter from the Receiver to Mr. Messina  
26 asking for return of the money, and the Loan Agreement.  
27  
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1 No declaration from any individual with knowledge is provided nor is there any evidence  
2 or even information concerning the source of the funds that were loaned to Mr. Messina.

3 Further, the Declaration of the Receiver reflects that the Receiver is in possession of the  
4 relevant bank records of the account of ToPacific from which the funds were transferred to Mr.  
5 Messina, and so has information regarding the source of those funds, but has included nothing in  
6 this application. Freitag Declaration at ¶ 7.

7 **III. ARGUMENT**

8 **A. The Temporary Restraining Order Does Not Encompass the Funds at Issue**

9 The Receiver argues first, in the Ex Parte Application, that the funds transferred to Mr.  
10 Messina are within the scope of the Temporary Restraining Order that was previously issued by  
11 the Court. Neither logic nor law supports that argument. By its terms, that Order applies to funds  
12 of the defendants, Relief defendants or affiliates, and funds held “in the name of, for the benefit  
13 of, or over which account authority is held by Defendants.” Temporary Restraining Order [Dkt.  
14 14] at ¶¶ V and VI.<sup>7</sup> While there may be disputes concerning the transfer to Mr. Messina, at  
15 least one thing is clear: the funds received by Mr. Messina are *not* being held on Mr. Xu’s behalf.  
16 To the contrary, Mr. Messina maintains that the funds were loaned to him, he disbursed those  
17 funds, he has since produced the Loan Agreement executed by both parties, and he declined to  
18 accede to Mr. Xu’s request that the funds be transferred back to him.

19 As a legal matter, the assertion that one is holding property “for the benefit of another”  
20 requires consideration of “six factors in a totality of the circumstances test with no single factor  
21 being dispositive.” Fourth Inv. LP v. United States, 720 F.3d 1058 (9th Cir. 2013). Most  
22 critically, the focus is on the extent to which the transferor retained possession, control and  
23 benefit of the property. Here, the relevant evidence that is before the Court at this point consists  
24 primarily of a loan agreement – not a retainer agreement. Notably absent from the Receiver’s  
25 submission is any suggestion that Xu did not actually sign that note and, in fact, the Receiver  
26

27 <sup>7</sup> The Receiver at times appears to be claiming that the funds were paid to Mr. Messina as a retainer, and asserts that “funds held  
28 in IOLTA trust accounts are held for the benefit of clients.” Receiver App. at 8-9. As the Receiver well knows, none of the funds  
were held in an IOLTA account as of the date of the Court’s order, no retainer agreement exists, and Xu executed a loan  
agreement.

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1 confirms that Xu has used a similar form in relation to other transactions. It appears, therefore,  
2 that both Mr. Messina and Mr. Xu are confirming that the funds were loaned to Mr. Messina, and  
3 were thereafter deployed by Mr. Messina. Where, as here, the funds were plainly transferred to  
4 Mr. Messina's possession, Xu did not retain either possession or control, and the recipient  
5 executed a fully enforceable promissory note to repay the amount with interest, there is no  
6 support for the Receiver's claim that the property is held in the name or for the benefit of the  
7 defendants.

8 **B. The Receiver is Required to Demonstrate that the Funds are Proceeds of the**  
9 **Fraud, that Mr. Messina has No Legitimate Claim to the Funds, and the Need**  
10 **for the Relief Because of the Likelihood of Dissipation**

11 To demonstrate entitlement to the preliminary relief sought by this application, the  
12 Receiver is required to articulate a factual and legal basis for the relief sought, and demonstrate a  
13 likelihood that she would ultimately obtain that relief. Where, as here, a third party is involved,  
14 and disgorgement is the issue, the Receiver would have to establish the likelihood that  
15 disgorgement would ultimately be obtained. These components of an application for an asset  
16 freeze were discussed at length in SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998). There, the  
17 SEC sought and failed to obtain preliminary relief against a third party, and later added that  
18 individual as a relief defendant. On appeal from an order of disgorgement against that third party,  
19 the court first addressed the SEC's ability to bring claims against "nominal" defendants, defined  
20 as one who "holds the subject matter of the litigation in a subordinate or possessory capacity as to  
21 which there is no dispute." The Court considered the appellant's argument that the court should  
22 "reject the use of nominal defendants," but concluded that there was "ample authority" to support  
23 the proposition that the federal court can employ its equitable powers "to recover ill-gotten  
24 gains."

25 The Colello court also set forth the standard that governs such a claim: "the creditor  
26 plaintiff must show that the nominal defendant has received ill-gotten gains and that he does not  
27 have a legitimate claim to those funds." *Id.* at 677. Notably, the court rejected the SEC's  
28 contention that the issue of a legitimate claim to the funds is an affirmative defense, stating that  
"we disagree with the SEC because *the lack of a legitimate claim to the funds is the defining*

1 *element of a nominal defendant.”* Id. (emphasis added) *See also* SEC v. JT Wallenbrock &  
2 Associates, 440 F.3d 1109, 1113 (9th Cir. 2006) (discussing authority of federal court to order  
3 disgorgement of the “ill-gotten gains” obtained from the fraud); SEC v. Hickey, 322 F.3d 1123,  
4 1132 (9th Cir. 2003) (Ninth Circuit affirmed the freezing of the assets of a third party brokerage  
5 firm because disgorgement orders had already been entered against defendant Hickey and he  
6 exercised “total and complete control” over the brokerage).

7 The basic requisites for an asset freeze were discussed and applied by the SEC in the  
8 initial application in this case for preliminary relief. As explained by the SEC, an asset freeze is  
9 appropriate to “preserve the illicit proceeds” of a defendant’s fraud and assure their availability  
10 for disgorgement. SEC Memorandum of Points and Authorities [Doc. 5-1] at 16:3-13. The SEC,  
11 in support of that application, discussed at length its evidence with respect to each of the elements  
12 of the alleged fraud and the evidence that each of the defendants received and held those funds.  
13 SEC Mem. at 4 & 17:18-27.

14 With respect to the relief defendants, the SEC discussed both the factual and legal  
15 predicate for its request for an asset freeze. The SEC provided to the Court evidence and  
16 argument under the heading “Relief Defendants Have Received Investor Funds,” going to  
17 significant lengths to trace the funds to each of the Relief Defendants. The SEC cited the  
18 authorities that establish that a party not involved in a violation of the securities laws may  
19 nonetheless be “joined as a party defendant in order to obtain disgorgement of *fraudulently*  
20 *obtained funds.*” SEC Mem. at 14: 12-23 (emphasis added). The SEC acknowledged and  
21 addressed each of the requisites for preliminary relief with respect to a third party: (1) that the  
22 third party received the proceeds of the fraud and/or “investor funds, and (2) that the entities  
23 “have no legitimate claim to those funds.” The SEC then argued that an asset freeze was  
24 appropriate as to the named Relief Defendants because they received proceeds of the fraud and  
25 had no legitimate claim and because “for all intents and purposes, these [Relief Defendants]  
26 appear to be under the control or influence of Defendant Xu.” SEC Mem. at ¶ 17.

27 The SEC did not name ToPacific as a Relief Defendant, much less name or seek relief  
28 against Mr. Messina.

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1           **C.     The Receiver Has Failed To Demonstrate that the Amounts Received by Mr.**  
2           **Messina are the Proceeds of the Fraud**

3           The Receiver has failed to make an adequate showing of any of the elements that are  
4 required to obtain this kind of preliminary relief. With respect to the threshold issue -- whether  
5 the amounts received by Mr. Messina are the proceeds of the alleged fraud -- the Receiver  
6 literally fails to acknowledge the issue, instead expecting that this Court will grant the relief  
7 simply because the funds were transferred to Mr. Messina by Mr. Xu. The absence of evidence is  
8 particularly striking not only in comparison to the SEC's earlier application but also because the  
9 Receiver has the bank records of the ToPacific account, which would reflect the source of the  
10 funds that were transferred to Mr. Messina, but has failed to put forth that information.

11           **D.     The Receiver Has Failed to Make Any Adequate Showing that Mr. Messina**  
12           **Does Not Have a Legitimate Claim to the Funds**

13           The Receiver skips past the fundamental issue regarding the source of the funds and  
14 instead discusses only the issue of Mr. Messina's claim to the funds. On that point, the Receiver  
15 Application responds with skepticism regarding the transaction and describes a version of a  
16 conversation that was had with counsel. Even assuming that those conversations constitute  
17 evidence, and putting aside whether the Receiver's recitation is accurate, the Receiver's  
18 discussion only serves to illustrate the critical facts that a Loan Agreement was executed, that the  
19 Receiver hopes to controvert and dispute that loan, but that the Receiver has nothing but *ipse dixit*  
20 to support that effort. The Receiver alludes to an issue regarding the validity of the loan, but fails  
21 to put forth any factual basis or legal theory to support the Receiver's desire to lay claim to the  
22 funds.

23           The Loan Agreement, on its face, constitutes an enforceable negotiable instrument under  
24 California law. *See e.g., Smith v. Citimortgage Inc.*, 2014 Bankr. LEXIS 1414 (N.D.Cal. March  
25 27, 2014) (held that note constituted negotiable instrument enforceable by the holder of the  
26 instrument). An effort to invalidate a loan agreement requires both a factual and a legal predicate  
27 and, in the wake of the financial crisis, there are certainly abundant authorities that address a  
28 contracting party's effort to invalidate such an agreement. *See, e.g., Bonyadi v. Citimortgage*  
*Bank*, 2013 U.S. Dist. LEXIS 33302 (C.D.Cal. March 8, 2013). In *Beazie v. Amerifund*

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1 Mortg.Elec.Fin., 2011 U.S.Dist LEXIS 63918 (June 16, 2011), for example, the plaintiff argued  
2 that the defendant had “engaged in various misdeeds in consummating the loan,” and sought  
3 damages and rescission. The court carefully evaluated the plaintiff’s claims and discussed the  
4 allegations and evidence of fraud in factum required to void a loan transaction. Id. at \*16. Here,  
5 the Receiver has not and could not assert that there was any misrepresentation by Mr. Messina or  
6 reliance by Mr. Xu.

7 Other plaintiffs have relied on theories of unconscionability, but that theory requires the  
8 presence of “unequal bargaining power” and oppressive terms, factors not present in the  
9 transaction at issue here. See Lona v. Citibank N.A., 202 Cal.App.4th 89, 108-09, 134  
10 Cal.Rptr.3d 622 (6th Dist. 2011); Skaggs v. HSBC Bank USA, 2011 U.S.Dist LEXIS 98057, \*16  
11 (D.Haw. Aug. 3.1 2011).

12 In other instances, plaintiffs seeking to invalidate a loan have contended that the loan was  
13 collusive. A claim that a contract is unlawful and therefore unenforceable carries with it its own  
14 set of evidentiary requirements. Where “a transaction is fair and regular on its face, the burden of  
15 proving the contract has an unlawful purpose falls upon the party asserting the illegality.” Long  
16 v. South Bay Savings & Loan Assn, 10 Cal.App.4th 947, 12 Cap.Rptr.2d 896 (4th Dist. 1992).  
17 Notably, even where a loan occurs in the context of an illegal transaction, the loan itself is “not in  
18 and of itself unlawful,” and the court must consider a raft of circumstances including the extent to  
19 which the loan agreement was linked with any illegality, the “relative culpability and equities of  
20 the parties,” and whether the party asserting the illegality is estopped from doing so. Here, the  
21 notion of collusion is plainly baseless; to the contrary, it appears that Xu entered into the Loan  
22 Agreement and then simply changed his mind and tried to retrieve the money.

23 **E. The Receiver Has Failed to Demonstrate a Likelihood of Dissipation**

24 In its claim that there is a likelihood of dissipation, the Receiver all but ignores the fact  
25 that an Escrow Agreement is already in place and fails even to provide that agreement to the  
26 Court. The Receiver fails to acknowledge that Mr. Messina voluntarily transferred more than \$2  
27 million into that escrow account, to be held pending an order of the Court. Not only is there no  
28

