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8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **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

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

Date: April 24, 2014  
Time: 1:00 p.m.  
Ctm: 5 - 2nd Floor  
Judge: Hon. Christina A. Snyder

1 Krista L. Freitag ("Receiver"), the Court-appointed permanent receiver for  
2 Defendants World Capital Market Inc. ("WCM"), WCM777 Inc. ("WCM777"), and  
3 WCM777 Ltd. d/b/a WCM777 Enterprises, Inc. ("WCM777 Enterprises"), and  
4 Relief Defendants Kingdom Capital Market, LLC ("KCM"); Manna Holding  
5 Group, LLC ("MHG"); Manna Source International, Inc. ("MSI"); WCM  
6 Resources, Inc. ("WCM Resources"); and their subsidiaries and affiliates  
7 (collectively, "Receivership Entities"), hereby submits this reply in support of her  
8 ex parte application for order: (1) temporarily freezing the bank accounts of Vincent  
9 Messina, and (2) requiring Mr. Messina to provide an accounting of all funds  
10 received from Defendant Phil Ming Xu or the Receivership Entities ("Ex Parte  
11 Application").

12 Now that the Receiver has had some additional time to investigate the facts  
13 and circumstances surrounding the \$5 million transfer to Mr. Messina's IOLTA trust  
14 account, certain key facts have become clear. Among other things, it is now clear  
15 the source of the \$5 million was money raised from investors, To Pacific, Inc. is an  
16 affiliate of the Defendants, Mr. Messina is an insider of the Defendants, and Mr. Xu  
17 transferred the funds to Mr. Messina so they would not be frozen when the  
18 Securities and Exchange Commission filed this case. The evidence supporting an  
19 immediate bank account freeze and accounting from Mr. Messina is even more  
20 compelling now than two weeks ago.

## 21 I. INTRODUCTION

22 The Ex Parte Application was filed on April 8, 2014, 11 days after the  
23 Receiver was appointed. At that very early stage of the receivership, the facts  
24 known about the \$5 million transfer to Mr. Messina were as follows:

- 25 • On February 26, 2014, less than 30 days before this case was filed,  
26 \$5 million was transferred from To Pacific, Inc., an entity controlled by  
27 Defendant Phil Ming Xu and whose accounts are now frozen ("To  
28 Pacific"), to the IOLTA trust account of attorney Vincent Messina.

- 1 • On February 27, 2014, Mr. Messina and Mr. Xu apparently signed a  
2 two-line loan document, purporting to show a \$5 million non-recourse  
3 loan with no payments due until maturity in January 2019, at which  
4 time the full balance is due with 5% interest.
- 5 • The purported loan document is virtually identical to other purported  
6 non-recourse, unsecured loan documents signed by Receivership Entity  
7 Manna Holding Group, Inc., an entity owned by Mr. Xu's wife, in  
8 connection with large transfers from Defendant WCM and Relief  
9 Defendant KCM for the purchase of real property.
- 10 • On March 20, 2014, Mr. Xu sent a letter to Mr. Messina in which  
11 Mr. Xu referred to Mr. Messina as his lawyer, referenced "SEC  
12 payments," and demanded return of the \$5 million "retainer."
- 13 • On March 31, 2014, Mr. Xu met with the Receiver, confirmed that the  
14 funds had been wired to Mr. Messina's IOLTA account, stated that  
15 Mr. Messina was his lawyer and had no right to retain the funds, and  
16 asked for the Receiver's assistance in getting the funds back.
- 17 • On April 1, 2014, Mr. Messina acknowledged receipt of the March 30,  
18 2014 letter from the Receiver's counsel and the TRO. He also  
19 acknowledged receiving the \$5 million wire transfer from Mr. Xu. He  
20 claimed the transfer was a loan for which there was a promissory note,  
21 and refused to turn over the funds or state where they are. He also  
22 stated he received \$200,000 from Mr. Xu to set up a political action  
23 committee and that approximately \$70,000-\$80,000 of those funds had  
24 not yet been used. Finally, he stated he was in the process of engaging  
25 a lawyer.
- 26 • On April 2, 2014, the Receiver and her counsel spoke to Maranda Fritz,  
27 Mr. Messina's counsel, who confirmed that \$5 million had been  
28 transferred to Mr. Messina and stated that Mr. Xu had asked

1 Mr. Messina to help him "put the money aside." Mr. Messina refused  
2 to return the funds or provide any information about to whom the  
3 monies had been disbursed or for what purpose.

4 • On April 4, 2014, Mr. Messina, the Receiver, and the Securities and  
5 Exchange Commission ("Commission") agreed that \$2,332,000 would  
6 be wired by Mr. Messina from various accounts he controls to the client  
7 trust account of Thompson Hine LLP, Ms. Fritz's law firm, and held in  
8 escrow by Thompson Hine pending further order of the Court.

9 • On April 8, 2014, however, Ms. Fritz reported that only \$2,133,214.62  
10 had been wired to the Thompson Hine trust account by Mr. Messina.  
11 That amount is being held pursuant to the escrow agreement.

12 Over the last two weeks, the Receiver has been able to further investigate the  
13 \$5 million transfer, the source of the funds transferred, the close affiliation between  
14 the Defendants and To Pacific, and the relationship between the Defendants, the  
15 Relief Defendants, and Mr. Messina. The Receiver also obtained bank records for  
16 Mr. Messina's accounts at Bank of America via subpoena. From this further  
17 investigation, the following additional facts are now clear:

- 18 • The \$5 million transferred to Mr. Messina from To Pacific came  
19 directly from investor deposits into the To Pacific account in January  
20 and February 2014.
- 21 • To Pacific was directly affiliated with WCM777 and the Defendants'  
22 enterprise, was owned and controlled by Mr. Xu, and received more  
23 than \$15 million raised from investors.
- 24 • Mr. Xu has indicated that he caused To Pacific to transfer the  
25 \$5 million to Mr. Messina so the funds would not be frozen when the  
26 Securities and Exchange Commission ("Commission") filed this case.

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- 1 • Mr. Xu has told the Receiver he did not intend the transfer to the  
2 IOLTA account to be a loan, but signed the two-line loan document so  
3 Mr. Messina would hold the funds on his behalf.
- 4 • Mr. Messina was an insider of Defendants and Relief Defendants. He  
5 had known Mr. Xu for approximately 10-12 months, advised the  
6 Defendants' on various legal and business matters, had a WCM e-mail  
7 address, assisted in responding to a subpoena issued by the  
8 Commission, and was a director of PMX Holdings (HK) Limited,<sup>1</sup> a  
9 Hong Kong entity in which Mr. Xu is also a director. Mr. Messina  
10 knew Defendants were under investigation by the Commission.
- 11 • Bank records show that as of March 30, 2014, the date Mr. Messina  
12 received notice of the TRO and the Receiver's demand for return of the  
13 \$5 million, he had transferred \$3.4 million to himself, \$300,000 to his  
14 son's company, and \$950,000 to foreign bank accounts of unknown  
15 parties. Yet, Mr. Messina thereafter represented he had only  
16 \$2,332,000 in his possession and then transferred only \$2,133,214.62 to  
17 the trust account of Thompson Hine pursuant to the escrow agreement.
- 18 • The whereabouts of the remaining \$1.3 million in Mr. Messina's  
19 possession as of March 30, 2014 is still unknown. Mr. Messina has  
20 also failed to provide the accounting required under the TRO and  
21 Preliminary Injunction Order of the separate \$200,000 he received  
22 allegedly for the political action committee or to return the \$70,000-  
23 \$80,000 he acknowledged has not been used.

24 At the hearing held on April 10, 2014, the Court advised Mr. Messina's  
25 counsel that disclosing where the funds went after Mr. Messina received them was  
26 important to determining whether the transfer was really a loan. Yet, rather than  
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28 <sup>1</sup> PMX Jewels, Ltd. is a Relief Defendant described in the Complaint as "a rough  
diamond jewel merchant in Hong Kong." Dkt. No. 1, ¶ 5.

1 take the opportunity to show the transfers had a legitimate purpose, Mr. Messina  
2 still refuses to disclose where the money went or for what purpose. This is further  
3 confirmation the transfer was not a legitimate loan – if a legitimate business purpose  
4 existed, there would be no reason for Mr. Messina to conceal where the money  
5 went.

6 The facts now show overwhelmingly that the purpose of the transfer was to  
7 stash funds in Mr. Messina's IOLTA account so they would not be frozen and could  
8 be used by Mr. Xu to settle the impending civil and criminal charges. In addition,  
9 bank records show numerous transfers already made by Mr. Messina to himself and  
10 foreign bank accounts. Accordingly, there is both a strong likelihood the Receiver  
11 will succeed in her claims against Mr. Messina and very serious risk of irreparable  
12 harm to investors if an immediate asset freeze is not put in place. Mr. Messina  
13 should also be ordered to provide a full accounting such that the Court can properly  
14 determine the true nature of the \$5 million transfer.

15 Finally, considering the weight of evidence of fraudulent conduct by both  
16 Mr. Xu and Mr. Messina and the newly obtained evidence regarding the recipients  
17 of transfers from Mr. Messina, the Receiver expands her request for an asset freeze  
18 and asks that the Court freeze the accounts of International Market Ventures (the  
19 company of Mr. Messina's son) and the other recipients of transfers from  
20 Mr. Messina's accounts at Bank of America. The recipients and their accounts are  
21 discussed further below.

## 22 II. BACKGROUND FACTS

23 At the time of the Receiver's appointment on March 27, 2014, the  
24 Receivership Entities main business locations were at 150 South Los Robles  
25 Avenue, #900, Pasadena, California ("Pasadena Office") and 3620 Cypress Avenue,  
26 El Monte, California ("El Monte Warehouse"). The Pasadena Office is leased and  
27 the El Monte Warehouse is owned by KCM. It was believed the Receivership  
28 Entities were also operating out of 1218 John Reed Court, City of Industry,

1 California; however, this location had been vacated. Supplemental Declaration of  
2 Krista Freitag filed herewith ("Freitag Decl."), ¶ 5.

3 **A. To Pacific is Part of the WCM777 Enterprise**

4 In her review of documents seized from the Pasadena Office and El Monte  
5 Warehouse and WCM e-mail correspondence, the Receiver has seen several  
6 documents and e-mails which clearly demonstrate To Pacific is not only an affiliate  
7 of the Defendants and Relief Defendants, and therefore a Receivership Entity, but  
8 also an extension of the enterprise the Commission has characterized as a Ponzi  
9 scheme. Freitag Decl. ¶ 7. These documents and e-mails include:

- 10 • The lease for the Pasadena Office lease, on which To Pacific is the  
11 lessee. Defendant Phil Ming Xu signed the lease as Chairman and  
12 CEO of To Pacific. *Id.* ¶ 8, Ex. A.
- 13 • WCM emails indicating that investors were permitted to "redeem  
14 points earned, which were transferred from WCM777 or Kingdom  
15 Card business for Company (To Pacific, Inc.) stocks" and how  
16 "members swap their points for our shares." Included in these e-mails  
17 is also a message from an investor asking for a refund of his purchase  
18 of "To Pacific, Inc. pre-stock." *Id.* ¶ 9, Ex. B
- 19 • The form of Consultant Agreement used by WCM states the agreement  
20 is "between World Capital Market, Inc. . . . (the 'Company' or its  
21 affiliates such as 'WCM777 Inc.' and 'To Pacific Inc.')." *Id.* ¶ 10,  
22 Ex. C.
- 23 • Correspondence from the third-party payroll processing company who  
24 performed payroll services for the Receivership Entities reflects that the  
25 last pre-receivership payroll for all non-KCM, MSI and WCM  
26 Resources employees was processed from To Pacific. On March 27,  
27 2014, the payroll processing company was asked by a representative of  
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1 the Receivership Entities to replicate the same payroll from WCM  
2 rather than To Pacific. *Id.* ¶ 11.

3 • Bank records reflecting that \$2 million was transferred from To Pacific  
4 to WCM on January 23, 2014. *Id.* ¶ 12, Ex. D.

5 **B. Mr. Messina Acts as Agent and Advisor to the Receivership**  
6 **Entities**

7 The Receiver has also located company documents and e-mails showing that  
8 Mr. Messina acted as an agent and advisor to the Defendants and Relief Defendants.  
9 These documents and e-mails include:

- 10 • A Consultant Agreement and W9 located in a folder entitled "Vincent  
11 Messina" in the El Monte Warehouse. The Consultant Agreement is  
12 not signed, but the W9 is filled out. *Id.* ¶ 13, Ex. C.
- 13 • E-mails from the WCM e-mail address created for Mr. Messina  
14 ([vincent.messina@worldcapitalmarket.com](mailto:vincent.messina@worldcapitalmarket.com)). The e-mail account was  
15 active at the time of the Receiver's appointment. Included in the  
16 [vincent.messina@worldcapitalmarket.com](mailto:vincent.messina@worldcapitalmarket.com) e-mails are requests for  
17 Mr. Messina to complete and return his W9 and a request that  
18 Mr. Messina review a draft employee handbook. Most notably, on  
19 February 25, 2014, there is an email from Edward King, a WCM  
20 employee, to Mr. Xu and Mr. Messina seeking assistance with  
21 production of documents demanded in a subpoena issued by the  
22 Commission. The \$5 million wire occurred the day after this e-mail  
23 was sent. *Id.* ¶ 14, Ex. E.
- 24 • A cancelled check in the amount of \$5,000 paid to Mr. Messina on  
25 February 28, 2014. *Id.* ¶ 15, Ex. F.
- 26 • A letter addressed to "Vincen Messina" at the Receivership Entities'  
27 Pasadena Office from Mr. Dylan Whitenton of West Bay Exploration,  
28 LLC. The purpose of the letter was to obtain a lease on the oil, gas, and



1 mineral interest on "your" land, with parcel numbers of the vacant land  
2 in New Cuyama, California purchased by KCM. The proposed lease  
3 agreement attached to the letter was to be signed by Mr. Messina as  
4 agent of KCM. *Id.* at ¶¶ 16-17, Exs. G, H.

- 5 • A March 28, 2014 letter from the Hong Kong Companies Registry  
6 referencing Mr. Messina's role as a "first director" of PMX Holdings  
7 (HK) Limited, a Hong Kong company in which Mr. Xu is also a "first  
8 director." *Id.* ¶ 18, Ex. I. As noted above, PMX Jewels, Ltd. is a Relief  
9 Defendant described in the Complaint as "a rough diamond jewel  
10 merchant in Hong Kong." Dkt. No. 1, ¶ 5.

### 11 **Investor Monies Wired to Mr. Messina**

12 The Receiver has reviewed the December 2013 through March 2014 bank  
13 statements for the To Pacific account at Comerica bank from which the \$5 million  
14 wire to Mr. Messina came. The account was opened in December 2013. The bank  
15 statements reflect a large number of investor electronic deposits totaling more than  
16 \$15 million between December 2013 and March 31, 2014. In February 2014, the  
17 total received from investors was \$8,949,508.06. On February 26, 2014, \$5 million  
18 was wired from the account to Mr. Messina. Freitag Decl. ¶ 19.

19 On April 2, 2014, the Receiver's counsel served a subpoena on Bank of  
20 America demanding records for Mr. Messina's accounts. On April 18, 2014, the  
21 records were received from Bank of America. *Id.* ¶ 20, Ex. K. According to the  
22 bank records, in early February 2014, Mr. Messina opened an IOLTA account and a  
23 checking account at Bank of America. He deposited \$217,000 into the IOLTA  
24 account and \$35,000 into the checking account. On February 26, 2014, the  
25 \$5 million wire from To Pacific was received into the IOLTA account. *Id.* ¶ 21.

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1 Mr. Messina then made the following transfers from the IOLTA account to  
2 his Bank of America checking account:

3 02/28/14	\$950,000
4 03/06/14	\$500,000
5 03/21/14	\$2,306,912
<b>Total</b>	<b>\$3,756,912</b>

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7 *Id.* ¶ 22.

8 The \$2,306,912 transfer occurred on March 21, 2014, the day after Mr. Xu  
9 demanded that Mr. Messina return the "retainer" in his March 20, 2014 letter. *See*  
10 Declaration of Krista Freitag, Dkt. No. 29-1, Exhibit 1. The \$2,306,912 transfer  
11 essentially swept the account, leaving a balance of only \$10,000. Freitag Decl. ¶ 23.

12 Mr. Messina also wrote the following checks to himself from the IOLTA  
13 account and deposited them into his account at Preferred Bank:

14 03/03/14	\$300,000
15 03/12/14	\$350,000
<b>Total</b>	<b>\$650,000</b>

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17 *Id.* ¶ 24.

18 Mr. Messina also made the following disbursements from the IOLTA  
19 account:

20 03/01/14	International Market Ventures	\$175,000
21 03/10/14	International Market Ventures	\$125,000
22 03/11/14	Andrew Savor (Toronto)	\$500,000
<b>Total</b>		<b>\$800,000</b>

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24 *Id.* ¶ 25.

25 Mr. Xu's counsel has informed the Receiver's counsel that International  
26 Market Ventures is owned by Mr. Messina's son, Gary Messina. This is consistent  
27 with the signature on the back of the 3/1/14 check for \$175,000, which reflects the  
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1 name "Gary C. Messina." The Andrew Savor account to which the \$500,000 went  
 2 is located at Toronto Dominion Bank in Toronto, Canada. *Id.* ¶ 26.

3 In summary, the total activity in the IOLTA account was as follows:

<b>Credits:</b>		
Messina Deposit		\$217,000
Wire from To Pacific		\$5,000,000
<b>Total Credits</b>		<b>\$5,217,000</b>
<b>Debits:</b>		
Transfers to Messina Bank of America checking		\$3,756,912
Transfers to Messina Preferred Bank		\$650,000
Payments to International Market Ventures		\$300,000
Payment to Andrew Savor		\$500,000
Bank Fees		\$88
<b>Total Debits</b>		<b>\$5,207,000</b>
<b>3/31/14 Balance</b>		<b>\$10,000</b>

14 *Id.* ¶ 27.

15 Mr. Messina then made the following cash withdrawals and transfers from his  
 16 Bank of America personal checking account to other accounts he controls:

03/03/14	Wells Fargo IOLTA	\$750,000
03/10/14	Cash Withdrawal	\$306,000
03/24/14	Wells Fargo	\$350,000
03/24/14	Wells Fargo	\$500,000
03/26/14	Preferred Bank	\$700,000
03/28/14	Cashier's check (lost) <sup>2</sup>	\$200,000
	Debit card transactions & Withdrawals	\$10,141
<b>Total</b>		<b>\$2,816,141</b>

24 *Id.* ¶ 28.

27 \_\_\_\_\_  
 28 <sup>2</sup> This is understood to be the \$200,000 cashier's check Mr. Messina previously stated was lost and for which he apparently put in a claim with Bank of America for return of the funds.

1 The following disbursements were also made from Mr. Messina's Bank of  
 2 America personal checking account:

3 03/06/14	Mohamed Eifatih, Abu Dhabi Islamic Bank	\$100,000
4 03/06/14	Parmesh Khatiwada	\$10,000
5 03/28/14	CNC Consulting Limited, Hong Kong and Shanghai	\$350,000
6 <b>Total</b>		<b>\$460,000</b>

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 8 *Id.* ¶ 29.

9 In summary, the total activity in the Bank of America personal checking  
 10 account was as follows:

11 <b>Credits:</b>	
Messina Deposit	\$35,000
Transfers from IOLTA account	\$3,756,912
Payment from WCM	\$5,000
<b>Total Credits</b>	<b>\$3,796,912</b>
<b>Debits:</b>	
Transfers to Messina	\$2,816,141
Transfers to unknown third parties	\$460,000
Bank Fees	\$190
<b>Total Debits</b>	<b>\$3,276,331</b>
<b>03/31/14 Balance</b>	<b>\$520,581</b>

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 20 *Id.* ¶ 30.

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1 Combining the activity from the two accounts, the summary is as follows:

<b>Combined Credits:</b>	
Messina Deposits	\$252,000
Wire from To Pacific	\$5,000,000
Payment from WCM	\$5,000
<b>Total Combined Credits</b>	<b>\$5,257,000</b>
<b>Combined Debits:</b>	
Transfers to Messina	\$3,466,141
Transfers to Messina's son	\$300,000
Transfers to Unknown third parties	\$960,000
Bank Fees	\$278
<b>Total Combined Debits</b>	<b>\$4,726,419</b>
<b>03/31/14 Balance</b>	<b>\$530,581</b>

12 *Id.* ¶ 31.

13 The TRO and a letter demanding return of the funds was e-mailed and  
 14 delivered to Mr. Messina's addresses on March 31, 2014. Mr. Messina  
 15 acknowledged receipt of the letter the next day. Declaration of Ted Fates, Dkt.  
 16 No. 29-2, ¶ 4. However, although Mr. Messina had received \$3,466,141 at the time  
 17 he received notice of the TRO (or \$3,766,141 including funds transferred to his  
 18 son), he later represented that he only had \$2,133,214.62 in his possession and  
 19 transferred that amount to the Thompson Hine LLP trust account to be held pursuant  
 20 to the escrow agreement. Freitag Decl. ¶ 32.

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1 All but \$10,000 of the \$960,000 transferred to unknown third parties appears  
 2 to have gone to foreign bank accounts in three different countries. *Id.* ¶ 33.  
 3 According to the bank records, the bank accounts to which the \$5 million wired  
 4 from To Pacific to Mr. Messina's IOLTA account was then transferred as follows:

5 Messina IOLTA	Bank of America
6 Messina checking	Bank of America
7 Messina IOLTA	Wells Fargo
8 Messina checking	Wells Fargo
9 Messina checking	Preferred Bank
10 International Market Ventures	
11 Andrew Savor	Toronto Dominion Bank
12 Mohamed Eifatih	Abu Dhabi Islamic Bank
CNC Consulting Limited	
Parmesh Khatiwada	Bank of America

13 The Receiver requests that these accounts be immediately frozen in order to  
 14 protect the investor victims of the alleged Ponzi scheme from further dissipation of  
 15 the funds. *Id.* ¶ 34.

### 16 III. ARGUMENT

#### 17 A. An Immediate Asset Freeze is Necessary to Protect Investors

18 As discussed in the Ex Parte Application, in order to obtain an asset freeze (a  
 19 form of preliminary injunction), the Receiver must demonstrate "either a  
 20 combination of probable success and the possibility of irreparable injury or that  
 21 serious questions are raised and the balance of hardships tips sharply in his favor."  
 22 *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d  
 23 308, 314-15 (9th Cir. 1978). In demonstrating the likelihood of irreparable injury, a  
 24 party seeking an asset freeze must show a likelihood of dissipation of the claimed  
 25 assets, or other inability to recover monetary damages, if relief is not granted.  
 26 *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009).

27 Here, the facts show overwhelmingly that the \$5 million transfer was a  
 28 fraudulent transfer under the Uniform Fraudulent Transfer Act ("UFTA"). Cal. Civ.

1 Code § 3439.04(a). The UFTA provides for disgorgement or avoidance of a  
2 fraudulent transfer if the transfer was made with (1) actual intent to defraud, or  
3 (2) constructive fraud. *See* Cal. Civ. Code § 3439.04(a); *In re Cohen*, 199 B.R. 709,  
4 716 (B.A.P. 9th Cir. 1996). Specifically, the UFTA defines a "fraudulent transfer,"  
5 as a transfer: 1) "made with the actual intent to hinder, delay or defraud" a creditor;  
6 or 2) without receiving "reasonably [\*18] equivalent value." *See* Cal. Civ. Code  
7 § 3439.04(a)(1)-(2). A receiver may proceed under the UFTA to recover transfers  
8 made by a Ponzi scheme operator. *See In re Cohen*, 199 B.R. 709; *Donell v.*  
9 *Kowell*, 533 F.3d 762, 767 (9th Cir. 2007).

10 For clarification, fraudulent transfers under the UFTA do not require a finding  
11 of "fraud, in the sense of morally culpable conduct . . . An actually fraudulent  
12 transfer could, in principle, occur without genuine fraud." *In re Cohen*, 199 B.R. at  
13 716. "The focus in the inquiry into the actual intent is on the state of mind of the  
14 debtor [ponzi scheme operator]. Neither malice nor insolvency are required.  
15 Culpability on the part of the dealer transferees is not essential." *Id.* at 716-717.  
16 Moreover, "[t]ransfers made in furtherance of Ponzi schemes have achieved a  
17 special status in fraudulent transfer law. Proof of a Ponzi scheme is sufficient to  
18 establish the Ponzi operator's actual intent to hinder, delay, or defraud creditors for  
19 purposes of actually fraudulent transfers under." *Id.* at 171 (also noting that finding  
20 actual intent to defraud is the same under the Bankruptcy Code and the UFTA); *see*  
21 *also Donell*, 533 F.3d at 767; *In re AFI Holding, Inc.*, 525 F.3d 700, 704 (9th Cir.  
22 2008); *In re Nat'l Consumer Mortgage, LLC*, 2013 U.S. Dist. LEXIS 5986 at \*32-33  
23 (D. Nev. 2013) ("Courts presume actual intent in relation to a Ponzi scheme because  
24 the debtor knows at the time of the transfer that the scheme ultimately must  
25 collapse.")

26 Here, there is compelling evidence of a Ponzi scheme. Defendants have not  
27 opposed entry of the Preliminary Injunction Order or contended they did not operate  
28 a Ponzi scheme. To Pacific, the entity that transferred the funds to Mr. Messina,

1 was under Mr. Xu's control, received more than \$15 million raised from investors,  
2 and was part of the alleged Ponzi scheme. WCM and To Pacific operated from the  
3 same offices, large amounts of money moved between WCM and To Pacific, WCM  
4 investors were allowed to redeem or swap their WCM777 points for To Pacific  
5 stock, and payroll for the companies' employees was processed by both entities.  
6 Moreover, the specific funds wired to Mr. Messina's IOLTA account were raised  
7 directly from investors in the alleged Ponzi scheme. Accordingly, the \$5 million  
8 transfer is presumed to be a fraudulent transfer and the burden shifts to Mr. Messina  
9 to disprove the elements of a fraudulent transfer. Mr. Messina has presented no  
10 evidence of any kind.

11 Indeed, the evidence before the Court confirms the presumption. Actual fraud  
12 under the first prong of the UFTA can also be shown through factors indicating  
13 "badges of fraud" as set forth under § 3439.04(b). Specifically, these factors  
14 include:

- 15 1. Whether the transfer or obligation was to an insider.
- 16 2. Whether the debtor retained possession or control of the  
17 property transferred after the transfer.
- 18 3. Whether the transfer or obligation was disclosed or concealed.
- 19 4. Whether before the transfer was made or obligation was  
20 incurred, the debtor had been sued or threatened with suit.
- 21 5. Whether the transfer was of substantially all of the debtor's  
22 assets.
- 23 6. Whether the debtor absconded.
- 24 7. Whether the debtor removed or concealed assets.
- 25 8. Whether the value of the consideration received by the debtor  
26 was reasonably equivalent to the value of the asset transferred or  
27 the amount of the obligation incurred.
- 28 9. Whether the debtor was insolvent or became insolvent shortly  
after the transfer was made or the obligation was incurred.
10. Whether the transfer occurred shortly before or shortly after a  
substantial debt was incurred.
11. Whether the debtor transferred the essential assets of the  
business to a lienholder who transferred the assets to an insider  
of the debtor.

Cal. Civ. Code § 3439.04(b).



1 Here, Mr. Xu's fraudulent intent is clear. At the time the transfer was made,  
2 Mr. Xu was facing serious civil and criminal charges. The transfer was made  
3 approximately 30 days before the Commission filed this case. Mr. Xu told  
4 Mr. Messina he wanted to "put the money aside." Mr. Xu clearly intended to retain  
5 control of the funds – they were wired to Mr. Messina's IOLTA account,  
6 Mr. Messina was his lawyer, and Mr. Xu demanded the funds be returned several  
7 weeks later. Mr. Xu had also transferred a large sum of money to an IOLTA  
8 account held by attorney Simon Horsman. More than \$11.2 million was recovered  
9 from Mr. Horsman's IOLTA account. The purported two-line loan document is  
10 virtually identical to other purported non-recourse, unsecured loan documents  
11 signed by Receivership Entity Manna Holding Group, Inc., an entity owned by  
12 Mr. Xu's wife, in connection with large transfers from WCM and KCM for the  
13 purchase of real property. Declaration of Peter Del Greco, Dkt. No. 6, Exs. 32, 33;  
14 Declaration of Ted Fates, Dkt. No. 29-2, Ex. B.

15 Any claim by Mr. Messina that he received the money without knowledge of  
16 the fraud and for a legitimate business purpose is belied by the evidence.  
17 Mr. Messina was an agent and advisor to the Defendants and Relief Defendants. He  
18 advised them on various legal and business matters, had a WCM e-mail address,  
19 received at least one cash payment, and assisted them in responding to the subpoena  
20 issued by the Commission. Mr. Messina and Mr. Xu were co-directors of PMX  
21 Holdings (HK) Limited, a Hong Kong company that appears to be related to PMX  
22 Jewels, Ltd., a Relief Defendant that received at least \$750,000 from Defendants.  
23 Declaration of Maria Rodriguez, Dkt. No. 7, ¶ 30. Furthermore, Mr. Messina  
24 transferred the majority of the funds (more than \$3.7 million) directly to himself and  
25 his son and has refused to provide any information about the nature or purpose of  
26 any of the transfers.

27 Considering all of this evidence, the Receiver's likelihood of success on her  
28 fraudulent transfer claim is very high. The risk of irreparable harm to investors is

1 also very high. As of March 31, 2014, \$950,000 had already been transferred by  
 2 Mr. Messina to foreign bank accounts in three different countries. Mr. Messina  
 3 represented he only had \$2.3 million in his possession. He then transferred  
 4 \$2.1 million to the Thompson Hine escrow. The bank records, however, show that  
 5 when Mr. Messina received notice of the TRO, he had more than \$3.4 million in his  
 6 possession. Therefore, Mr. Messina lied about the whereabouts of the funds. The  
 7 current location of the additional \$1.3 million in his possession as of March 31,  
 8 2014 is not known and Mr. Messina refuses to disclose any information about the  
 9 nature or purpose of the transfers. Under these circumstances, an immediate asset  
 10 freeze is critical to protect investors from further dissipation of the funds.

11 Considering the weight of evidence of fraudulent conduct by Mr. Xu and  
 12 Mr. Messina, and the newly obtained evidence regarding the recipients of transfers  
 13 from Mr. Messina, the Receiver expands her request for an asset freeze and asks that  
 14 the Court freeze the accounts of Mr. Messina's son and the other recipients of  
 15 transfers from Mr. Messina. The accounts that should be frozen are as follows:

Messina IOLTA	Bank of America
Messina checking	Bank of America
Messina IOLTA	Wells Fargo
Messina checking	Wells Fargo
Messina checking	Preferred Bank
International Market Ventures	
Andrew Savor	Toronto Dominion Bank
Mohamed Eifatih	Abu Dhabi Islamic Bank
CNC Consulting Limited	
Parmesh Khatiwada	Bank of America

24 **B. Mr. Messina Should be Ordered to Produce a Full Accounting**

25 Although the immediate disposition of the funds wired to Mr. Messina's  
 26 IOLTA account is now known,<sup>3</sup> an accounting still should be ordered. The current

28 <sup>3</sup> The IOLTA account had a \$10,000 balance as of March 31, 2014. These funds were not transferred to the Thompson Hine escrow and their whereabouts is

1 location of the additional \$1.3 million Mr. Messina had in his possession as of  
2 March 31, 2014 is unknown. Mr. Messina withdrew \$306,000 in cash and  
3 transferred another \$2.95 million to other accounts he controls. The Receiver is  
4 issuing subpoenas for records to Wells Fargo Bank and Preferred Bank, but it could  
5 be a month or more before the records are produced. The purpose of the transfers of  
6 \$950,000 to three separate countries, and of \$300,000 to Mr. Messina's son, is  
7 unknown. Moreover, an accounting will be very simple for Mr. Messina to produce  
8 considering that he received the \$5 million transfer less than 55 days ago.

9 **C. Mr. Messina's Request to Take Discovery**

10 The Receiver's counsel was contacted by Mr. Messina's counsel who asked if  
11 the Receiver would agree to Mr. Messina taking discovery. Although the Receiver  
12 suspects this is merely a delay tactic, she does not oppose Mr. Messina taking  
13 limited discovery, provided an asset freeze is in place and an accounting is  
14 produced. Considering the amount of evidence already before the Court and the  
15 receivership estate resources already expended in obtaining recovery of the funds,  
16 the Receiver submits that Mr. Messina should be permitted to (a) make document  
17 requests of the Receiver narrowly tailored to the issues raised in the parties' briefs,  
18 and (b) schedule a half day deposition of Defendant Phil Ming Xu. The Receiver  
19 has issued a subpoena to Mr. Messina and will agree to likewise limit Mr. Messina's  
20 deposition to a half day. Further discovery would impose undue costs on the  
21 receivership estate and would unduly delay the Court's determination of the issues  
22 and recovery of the funds.

23 **IV. CONCLUSION**

24 For the foregoing reasons, the Receiver requests entry of an order  
25 immediately freezing the accounts identified above and requiring Mr. Messina to

26  
27 unknown. Mr. Messina represented that only \$519,000 remained in the Bank of  
28 America accounts and wired that amount to Thompson Hine. That was the  
approximate balance in the Bank of America personal checking account as of  
March 31, 2014.

1 provide a full accounting of all funds received from Mr. Xu or the Receivership  
2 Entities, including To Pacific, within three (3) business days.

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Dated: April 21, 2014

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:           /s/ Ted Fates            
TED FATES  
Attorneys for Permanent Receiver  
KRISTA L. FREITAG