

1 JOHN B. BULGOZDY (Cal. Bar No. 219897)
Email: bulgozdyj@sec.gov
2 PETER F. DEL GRECO (Cal. Bar No. 164925)
Email: delgreco@sec.gov

3 Attorneys for Plaintiff
4 Securities and Exchange Commission
Michele Wein Layne, Regional Director
5 Lorraine Echavarria, Associate Regional Director
John W. Berry, Regional Trial Counsel
6 5670 Wilshire Boulevard, 11th Floor
Los Angeles, California 90036
7 Telephone: (323) 965-3998
Facsimile: (323) 965-3908

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

11
12 **SECURITIES AND EXCHANGE**
COMMISSION,

13 Plaintiff,

14 vs.

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

18 Defendants,
19 and

20 **KINGDOM CAPITAL MARKET,**
LLC; MANNA HOLDING GROUP,
21 **LLC; MANNA SOURCE**
22 **INTERNATIONAL, INC.; WCM**
RESOURCES, INC.; AEON
23 **OPERATING, INC.; PMX JEWELS,**
LTD.; TOPACIFIC INC.; TO
24 **PACIFIC INC.; VINCENT J.**
25 **MESSINA; and INTERNATIONAL**
MARKET VENTURES,

26 Relief Defendants.
27
28

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

PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR AN
ORDER (1) FREEZING ASSETS; (2)
REQUIRING DETAILED
ACCOUNTINGS; (3) GRANTING
EXPEDITED DISCOVERY; (4)
PROHIBITING THE DESTRUCTION
OF DOCUMENTS; (5)
REPATRIATING ASSETS; AND (6)
APPOINTING A RECEIVER OVER
RELIEF DEFENDANTS TOPACIFIC
INC., A DELAWARE
CORPORATION AND TO PACIFIC
INC., A CALIFORNIA
CORPORATION

TABLE OF CONTENTS

1
2
3 I. INTRODUCTION 1
4 II. STATEMENT OF FACTS 4
5 A. ToPacific (DE) and To_Pacific (CA)..... 4
6 1. ToPacific (DE) bank account activity..... 4
7 2. To_Pacific (CA) bank account activity 5
8 B. Vincent Messina 5
9 1. Messina holds himself out as an attorney although he is not an
10 active member of the bar..... 5
11 2. Messina’s role at “World Capital Market” 6
12 3. Messina received over \$5.2 million from Defendants and
13 Relief Defendants..... 7
14 4. Messina’s disbursement of funds..... 8
15 a. Disbursements from Messina’s BofA IOLTA Account..... 8
16 b. Disbursement from Messina’s BofA PA Account 9
17 C. Relief Defendant IMV received more than \$650,000 of the ToPacific
18 (DE) funds 10
19 1. Messina’s claim to the funds..... 11
20 III. ARGUMENT..... 12
21 A. Relief Defendants Have Received Investor Funds 12
22 B. The Court Should Grant the Relief Sought by the SEC..... 13
23 1. Asset freezes are necessary 13
24 2. It is appropriate to name a Receiver for the “ToPacific” entities 15
25 3. Orders prohibiting the destruction of documents, granting
26 expedited discovery on Relief Defendants’ disbursement of
27 funds, and requiring detailed accountings, are necessary 16
28 IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

CASES

1

2

3

4 *FTC v. Affordable Media, LLC,*
179 F.3d 1228 (9th Cir. 1999) 14

5

6 *FTC v. SlimAmerica, Inc.,*
77 F.Supp.2d 1263 (S.D. Fla. 1999) 20

7 *FTC v. The Crescent Publ. Gr., Inc.,*
129 F. Supp. 2d 311 (S.D.N.Y. 2001) 20

8

9 *Johnson v. Couturier,*
572 F.3d 1067 (9th Cir. 2009) 14

10 *Reebok Int’l, Ltd v. Marnatech Enterprises, Inc.,*
970 F.2d 552 (9th Cir. 1992) 13

11

12 *SEC v. Capital Consultants, LLC,*
397 F.3d 733 (9th Cir. 2005) 16

13 *SEC v. Colello,*
139 F.3d 674 (9th Cir. 1998) 13

14

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2006 WL 4729240 (C.D. Cal. 2006) 16

16 *SEC v. Fifth Ave. Coach Lines, Inc.,*
289 F. Supp. 3 (S.D.N.Y. 1968), *aff’d*, 435 F.2d 510 (2d Cir. 1970) 16

17

18 *SEC v. Hickey,*
322 F.3d 1123 (9th Cir. 2003) 13

19 *SEC v. Int’l Swiss Invs. Corp.,*
895 F.2d 1272 (9th Cir. 1990) 13, 18

20

21 *SEC v. Manor Nursing,*
458 F.2d 1082 (2d Cir. 1972) 13, 14

22 *SEC v. Unifund SAL,*
910 F.2d 1028 (2d Cir. 1990) 14

23

24 *SEC v. Wencke,*
622 F.2d 829 (9th Cir. 1986) 13, 16, 17

25

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1 **I. INTRODUCTION**

2 Plaintiff Securities and Exchange Commission (“SEC”) has filed a First
3 Amended Complaint naming four additional Relief Defendants: (1) ToPacific Inc., a
4 Delaware corporation; (2) To Pacific Inc., a California corporation; (3) Vincent J.
5 Messina (“Messina”); and (4) International Market Ventures “(IMV””, a consulting
6 firm based in Washington, D.C. The SEC moves *ex parte* for an order freezing assets
7 of Messina and IMV received from Defendants and Relief Defendants, and their
8 affiliates; for Messina and IMV to produce a detailed accounting supported with
9 documentation within five days; granting expedited discovery concerning the
10 disbursement of such funds by Messina and IMV; requiring Messina and IMV to
11 repatriate assets; and prohibiting the destruction of documents by Messina and IMV.
12 In addition, the SEC seeks an order appointing Krista Freitag as permanent receiver
13 over ToPacific Inc. and To Pacific Inc.

14 Emergency relief is needed against Messina and IMV to prevent further
15 dissipation of assets. While the total amount of Defendants’ assets transferred to
16 Messina and IMV remains unknown, Messina received over \$5.2 million from
17 Defendant World Capital Market Inc. (“WCM”) and either Relief Defendant
18 ToPacific Inc. or Defendant Ming Xu. Between February 26, 2014 and March 31,
19 2014, Messina disbursed all those funds to other accounts and apparently transferred
20 several million dollars to persons or entities outside the United States. Indeed, on
21 March 20, 2014, when Defendant Xu demanded the return of \$5 million, Messina
22 emptied his purported “IOLTA” account the next day. Messina took such action even
23 though he holds himself out as a lawyer, the funds were in what he called an IOLTA
24 account, and Messina was employed by Defendant Xu and World Capital Market as
25 “in house legal counsel.” Messina claims that the \$5 million was a loan from Xu,
26 although he admits he contrived a short, three-line loan “agreement” after Xu asked
27 Messina to just hold the funds for him. Messina been less than fully cooperative in
28 repatriating funds or producing documents, so this emergency action is required.

1 At an April 24, 2014 hearing, the Court issued a freeze order from the bench,
2 and, among other things, ordered Messina to make all efforts repatriate funds
3 transferred to third parties outside the United States. On April 30, Messina's counsel
4 informed the SEC that no such steps had been taken. Also at the April 24 hearing,
5 the Court ordered Messina to produce an accounting. On May 1, 2014, Messina
6 provided a vague, one-page chart that purported to account for \$2.811 million of the
7 funds he received, but which failed to identify dates and amounts of transfers,
8 included vague footnotes, and failed to identify recipients with any particularity. On
9 its face, the accounting suggests that funds were transferred on or after Messina and
10 IMV were given notice of the Court's Temporary Restraining Order, although the
11 lack of information makes this difficult to ascertain with certainty. Messina is
12 currently disputing the Receiver's subpoena for documents. Thus, a more specific
13 order requiring a detailed accounting and production of documents is necessary to
14 help locate and preserve assets.

15 Since the April 24 hearing, the SEC has also discovered that Messina does not
16 appear to have an active law license in any jurisdiction. At the April 24 hearing and
17 in a sworn declaration, Messina held himself out as a duly licensed attorney in the
18 State of Florida. In fact, Messina took "inactive" status in Florida in 2007, is not
19 eligible to practice law in Florida, and his statements concerning his status do not
20 comply with Florida State Bar Rules. Further, Messina has had an office in
21 California for several years, but is not licensed with the California State Bar. It is
22 unclear whether Messina complied with California State Bar Rules when he opened
23 several accounts he called IOLTA accounts. Nonetheless, Messina was named "in-
24 house legal counsel" to "World Capital Market" in June 2013, is "General Counsel"
25 of Relief Defendant International Market Ventures ("IMV"), and IMV represents that
26 Messina "currently practices as an in-house legal counsel at
27 www.worldcapitalmarket.com, a global merchant banking firm," on its website.
28 Messina's counsel trumpets his "unblemished" disciplinary history, but failed to

1 inform the Court accurately concerning the status of Messina's law license.

2 Shortly after this emergency action was filed, the Receiver learned of the
3 transfer of \$5 million to Messina, and on March 31, 2014, contacted Messina to
4 advise him of the asset freeze and demand return of the money. Messina
5 acknowledged receipt of the notice on April 1, 2014. Messina has refused to return
6 any funds to the Receiver, but agreed to place \$2.133 million in escrow. Messina
7 admittedly retains hundreds of thousands more that he has thus far not put in escrow.

8 At the April 24 hearing, the Court suggested that the parties stipulate to an
9 order that would obviate the need for the SEC to name Messina, who was represented
10 as a licensed attorney, as a Relief Defendant. The SEC and the Receiver engaged in
11 extended negotiations with Messina's counsel, but were unable to agree on the scope
12 of the asset freeze. In view of that inability to agree and new information, the SEC
13 has named Messina, and IMV, where he is General Counsel and which received at
14 least \$675,000, and perhaps a million or more of proceeds of the fraud, as Relief
15 Defendants. The SEC seeks this further relief to preserve and locate assets, for the
16 benefit of defrauded investors.

17 With this motion, the SEC has submitted a proposed order that requires
18 Messina and IMV to provide a detailed accounting and produce documents within
19 five days. This relief is appropriate because the Receiver and the SEC have requested
20 information, and the Receiver has subpoenaed documents, from Messina; however,
21 information and documents are not forthcoming, are subject to negotiation and delay,
22 and when information is provided, such as the May 1, 2014 accounting, it is woefully
23 inadequate. An order is appropriate and necessary to avoid further delays and
24 dissipation of assets.

25 The SEC also seeks an order directing Messina and IMV to repatriate,
26 forthwith, all funds sent to any correspondents or affiliates of Messina or IMV, or in
27 any way under their direction, custody, or control. While the Court ordered Messina
28 to take such steps on April 24, 2014, as of April 30, Messina had done nothing.

1 Accordingly, the Court should further order Messina and IMV to file sworn
2 declarations stating their efforts and success in repatriating assets within five days of
3 the Court's Order. The SEC seeks expedited discovery from Messina and IMV, and
4 the persons or entities who received funds from them, concerning the transfers and
5 disbursements of the funds received from Defendants, Relief Defendants, and their
6 affiliates. The SEC also seeks an order prohibiting Messina, IMV, and any
7 correspondent entities, from destroying any documents.

8 Finally, the SEC seeks an order appointing Krista Freitag as Receiver over
9 Relief Defendants ToPacific Inc., a Delaware corporation ("ToPacific (DE)"), and To
10 Pacific Inc., a California corporation ("To_Pacific (CA)"). These entities were
11 controlled by Defendant Xu and received proceeds from the fraudulent offering. The
12 SEC has been advised by counsel for Defendant Xu that he does not object to adding
13 these entities as Relief Defendants and appointing a receiver over them.

14 **II. STATEMENT OF FACTS**

15 In the interests of brevity, the SEC incorporates the statement of facts and
16 supporting declarations filed in support of its application for a temporary restraining
17 order and other relief, filed March 27, 2014. *See generally* Docket Nos. 5-8.

18 **A. ToPacific (DE) and To_Pacific (CA)**

19 **1. ToPacific (DE) bank account activity**

20 ToPacific (DE) was incorporated in August 2013, and its sole director is
21 Defendant Xu. (Bulgozdy Dec., Ex. 1.) On or about December 9, 2013, ToPacific
22 (DE) opened an account at Comerica, with the last four digits of the account number
23 0854 ("ToPacific 0854 Account"). Defendant Xu was listed as the President of
24 ToPacific (DE) and was the sole signatory on the account from its opening to
25 February 27, 2014, when an additional signatory was added. (Rodriguez Dec. ¶ 6.c.)
26 On or about January 6, 2014, ToPacific (DE) opened a second account at Comerica,
27 with the last four digits of the account number 7600 (ToPacific 7600 Account").
28 Defendant Xu was also a signatory on this account. (Rodriguez Dec. ¶ 6.d.)

1 Between December 31, 2013 and March 31, 2014, over \$16 million was
2 deposited into the ToPacific 0854 Account. Approximately \$15 million of those
3 deposits were similar in nature to investor deposits into the WCM777 accounts.
4 (Rodriguez Dec. ¶ 8.) These funds were proceeds of the WCM777 fraud. At this
5 time, neither the SEC nor the Receiver have account statements for the ToPacific
6 7600 Account, or any other accounts held in the name of ToPacific (DE).

7 As of March 31, 2014, substantially all \$16 million that had been deposited
8 into the ToPacific 0854 Account had been disbursed. On February 26, 2014, \$5
9 million was wired to an IOLTA account held by Relief Defendant Messina at Bank of
10 America (“BofA IOLTA Account”). (Rodriguez Dec. ¶ 12.a.)

11 **2. To_Pacific (CA) bank account activity**

12 To_Pacific (CA) is a California corporation, and Defendant Xu was its
13 principal and registered agent. (Bulgozdy Dec., Ex. 2.) In September 2011,
14 To_Pacific (CA) opened two accounts at JP Morgan Chase: (1) an account with the
15 last four digits of the account number 0111 (“To_Pacific 0111 Account”); and (2) an
16 account with the last four digits of the account number 3803 (“To_Pacific 3803
17 Account”). Defendant Xu was listed as the President of To_Pacific (CA) for both
18 accounts, and was the sole signatory on the accounts. (Rodriguez Dec. ¶¶ 6.e & 6.f.)

19 In the period after March 2013, which is after the WCM777 offering began,
20 approximately \$1.4 million of investor funds were deposited into the To_Pacific 3803
21 Account. (Rodriguez Dec. ¶ 10.)

22 **B. Vincent Messina**

23 **1. Messina holds himself out as an attorney although he is not an** 24 **active member of the bar**

25 In his April 24, 2014 Declaration of Vincent Messina (“4/24 Messina Dec.”),
26 Messina stated that he is “an attorney duly licensed to practice law in the State of
27 Florida.” (Bulgozdy Dec., Ex. 3 at ¶ 1.)

28 In fact, the Florida Bar’s records show that Messina is “Inactive” and “Not

1 eligible to practice in Florida.” (Bulgozdy Dec., Ex. 4.) The Florida Bar confirmed
2 to counsel for the SEC that Messina elected “Inactive” status voluntarily in 2007
3 because he was living in California. (Bulgozdy Dec., ¶ 6.) According to Florida
4 State Bar Rule 1-3.2, Membership Classifications, Inactive members “shall,” among
5 other things, “(3) affirmatively represent their membership status as inactive
6 members of The Florida Bar when any statement of Florida Bar membership is made;
7 (4) not hold themselves out as being able to practice law in Florida or render advice
8 on matters of Florida law.” (Bulgozdy Dec., Ex. 5.)

9 Messina uses an office address in Los Angeles, and for a period of time
10 operated the “Messina Legal Group” from that address, which is the same address
11 Messina provided to the Florida Bar. (Bulgozdy Dec., Ex. 6.) According to the
12 records of the California Bar, Messina is not licensed in California. (Bulgozdy Dec.,
13 ¶ 9 and Ex. 7.)

14 IMV’s internet site lists “Dr. Vincent J. Messina” as its “General Counsel,” and
15 states that he “is admitted to practice before the US District Court for the District of
16 Columbia and has been admitted to practice law in Virginia and Florida for many
17 years.” (Bulgozdy Dec., Ex. 8.) According to the records of the Virginia Bar,
18 Messina is not licensed in Virginia. (Bulgozdy Dec., Ex. 9.)

19 **2. Messina’s role at “World Capital Market”**

20 Messina was named as in-house counsel to “World Capital Market” in June
21 2013. (Bulgozdy Dec., Ex. 10.) Beginning around that time, Messina began
22 receiving monthly checks of \$5,000, first from accounts held in the name of
23 Defendant WCM777, and then from accounts held in the name of Defendant WCM.
24 (Rodriguez Dec., ¶ 25 and Ex. 21.)

25 IMV’s internet site touts Messina’s role at WCM, and as of May 1, 2014,
26 included in Messina’s bio that he “currently practices as in in-house legal counsel at
27 www.worldcapitalmarket.com, a global merchant banking firm.” (Bulgozdy Dec.,
28 Ex. 8.)

1 The SEC is continuing to investigate the scope of Messina's role at WCM.
2 Emails discovered thus far show that in July 2013, Messina was asked for advice on
3 how to move proceeds from the WCM777 offering from Brazil to the United States
4 or Hong Kong. (Bulgozdy Dec., Ex. 11.) In early December 2013, Messina was
5 copied on an email concerning "key personnel of WCM777." (Bulgozdy Dec., Ex.
6 12.) In February 2014, specifically on February 23, 2014, Messina provided Xu with
7 his BofA IOLTA information for the purpose of receiving \$15,937,427.18 in
8 Defendants' funds held in the trust account of another of Defendants' attorneys,
9 although on February 26, 2014, Messina stated that he refused to receive the funds
10 because he was not representing Xu, WCM, or their affiliates "before the SEC or any
11 other federal agency." (Bulgozdy Dec., Ex. 13.) On February 25, 2014, Messina was
12 asked to help gather information to respond to an SEC subpoena. (Bulgozdy Dec.,
13 Ex. 14.)

14 **3. Messina received over \$5.2 million from Defendants and**
15 **Relief Defendants**

16 Bank records available to date show that Messina received over \$5.2 million
17 from Defendants and Relief Defendants, from known accounts:¹

- 18 • \$5,000 from WCM777 on July 1, 2013;
- 19 • \$5,000 from WCM777 on August 9, 2013;
- 20 • \$5,000 from WCM on September 9, 2013;
- 21 • \$5,000 from WCM on September 30, 2013;
- 22 • \$5,000 from WCM on October 31, 2013;
- 23 • \$5,000 from WCM on November 27, 2013;
- 24 • \$200,000 from WCM on December 17, 2013

25
26 _____
27 ¹ The SEC and Receiver are still discovering accounts used by Defendants and Relief
28 Defendants. It is unknown if Messina received money through accounts controlled
by Defendants or Relief Defendants that have not yet been discovered.

- \$5,000 from WCM on December 31, 2013;
- \$5,000,000 from ToPacific (DE) on February 26, 2014

(Rodriguez Dec. ¶¶ 16, 25.)

4. Messina's disbursement of funds

Messina deposited the funds received from Defendants and Relief Defendants into various accounts he controlled, and transferred the funds among accounts he controlled at four different banks. Messina disbursed the funds to, among others, IMV, where he is general counsel.

Messina originally deposited the \$200,000 received from WCM in December 2013 into an IOLTA account at JP Morgan Chase ("JPMC IOLTA Account"). On February 4, 2014, Messina opened the BofA IOLTA Account with a deposit of \$217,000 from the JPMC IOLTA Account.² (Rodriguez Dec. ¶ 15.)

Also on February 4, 2014, Messina opened an account at Bank of America in the name of Vincent Messina, Professional Association ("BofA PA Account"), with a deposit of \$35,000. On March 3, 2014, Messina withdrew \$5,000 from his BofA PA Account for the benefit of Defendant WCM. (Rodriguez Dec. ¶¶ 19, 22.)

There was no activity in the BofA IOLTA Account or the BofA PA Account between February 4 and February 26, 2014.

On February 26, 2014, Messina accepted a wire of \$5 million from ToPacific (DE) into his BofA IOLTA Account.

a. Disbursements from Messina's BofA IOLTA Account

Between February 26 and March 31, 2013, Messina disbursed substantially all

² The State Bar of California requires attorneys who establish trust accounts to provide a "Notice to Financial Institution to Establish an IOLTA Account." Thus far, account opening documents produced for accounts Messina named as 'trust' or "IOLTA" accounts do not include this form. The checks for at least one account are labeled simply "Vincent Messina," and he handwrote in "IOLTA" or letters to that effect on the check. The SEC is continuing to obtain documents and information on whether Messina properly opened any IOLTA accounts, or simply called accounts that to suit his purposes.

1 the \$5.217 million held in his BofA IOLTA Account, in eight disbursements:

- 2 • On 2/28/2014, \$950,000 to Messina's BofA PA Account;
- 3 • On 3/3/2014, \$175,000 to Relief Defendant IMV;
- 4 • On 3/4/2014, \$300,000 to Messina's account at Preferred Bank;
- 5 • On 3/6/2014, \$500,000 to Messina's BofA PA Account
- 6 • On 3/10/2014, \$125,000 to Relief Defendant IMV;
- 7 • On 3/11/2014, \$500,000 to Andrew J. Savor, at Toronto Dominion Bank
- 8 in Canada;³
- 9 • On 3/12/2014, \$350,000 to Messina's account at Preferred Bank
- 10 • On 3/21/2014, \$2,306,912 to Messina's BofA PA Account.

11 (Rodriguez Dec. ¶ 18.)

12 Thus, of the \$5.2 million deposited into Messina's BofA IOLTA Account from
13 WCM and ToPacific, Messina transferred the funds to three recipients:

- 14 (1) Other accounts controlled by Messina, which received a total of
- 15 \$4,406,912;
- 16 (2) IMV, where Messina is General Counsel, received \$300,000; and
- 17 (3) Andrew J. Savor, a resident of Canada, received \$500,000.

18 **b. Disbursement from Messina's BofA PA Account**

19 Messina transferred funds from his BofA PA Account to yet other accounts he
20 controlled, to IMV, and to third parties:

- 21 • On 3/3/2014, \$750,000 to Messina's account at Wells Fargo;
- 22 • On 3/5/2014, \$10,000 to Parmesh Khatwada's BofA account;
- 23 • On 3/6/2014, \$100,000 to Mohamed Ei-Fatih, at Abu Dhabi Islamic

24 _____
25 ³ In total, \$779,000 was transferred to Andrew J. Savor, an individual residing in
26 Canada. Messina's May 1 accounting claims that Savor "is an officer of the Hong
27 Kong corporation." (Bulgozdy Dec., Ex. 15.) The Hong Kong entity is not
28 identified, the purpose of the transfer is not provided, nor is the reason why funds
were transferred through an individual in Canada when they are for the benefit of a
Hong Kong corporation.

1 Bank;

- 2 • On 3/24/2014, \$500,000 to Messina's account at Wells Fargo;
- 3 • On 3/24/20-14, \$350,000 to Relief Defendant IMV;
- 4 • On 3/26/2014, \$700,000 to Messina's account at Preferred Bank;
- 5 • On 3/28/2014, \$350,000 to CNC Consulting Limited, at Hong Kong and
- 6 Shanghai Bank;
- 7 • On 3/28/2014, \$200,000 in a counter withdrawal.

8 (Rodriguez Dec. ¶ 23.)

9 There were four main recipients of the funds deposited into Messina's BofA
10 PA Account:

- 11 (1) Other accounts controlled by Messina and the counter-withdrawal,
- 12 for a total of \$2.15 million;
- 13 (2) IMV, where Messina is General Counsel, received \$350,000;
- 14 (3) CNC Consulting Limited in Hong Kong received \$350,000; and
- 15 (4) Mohamed Ei-Fatih, in Abu Dhabi, received \$100,000.⁴

16 The business purpose for Messina transferring funds from his BofA PA
17 Account to other accounts he held at Wells Fargo and Preferred Bank is unclear.

18 **C. Relief Defendant IMV received more than \$650,000 of the ToPacific**
19 **(DE) funds**

20 Relief Defendant IMV is headquartered in Washington, D.C., with correspondent
21 offices in Los Angeles, Shanghai, Hong Kong, United Arab Emirates, Nigeria,
22 Democratic Republic of Congo, and South Africa. (Bulgozdy Dec., Ex. 8.) "Dr.
23 Vincent J. Messina" is identified on IMV's website as its "General Counsel." (Id.)
24 Scott Choi is identified as a "Senior Vice President" of IMV. (Bulgozdy Dec., Ex. 8.)

25
26 _____
27 ⁴ IMV has a "correspondent" relationship with an unknown entity in Abu Dhabi. The
28 business purpose for the transfer is unknown, as is any relationship between IMV,
Messina, and Ei-Fatih.

1 Scott Choi is also identified as an officer of Relief Defendant PMX Jewels, Limited.

2 Relief Defendant IMV received a total of \$650,000 of the ToPacific (DE)
3 funds, directly and indirectly, from Messina's IOLTA Account.

4 In addition, Messina claims that on March 31, 2014, he transferred \$400,000 to
5 IMV.⁵ (See May 1, 2014 Declaration of Vincent J. Messina (Bulgozdy Dec., Ex.
6 15).) Messina has not provided any documentation to support that claim.

7 There can be little doubt that IMV has knowledge of this case and the Court's
8 Temporary Restraining Order issued March 27, 2014. On March 31, 2014, counsel
9 for the Receiver contacted Messina and gave him notice of the filing of this case and
10 the Court's Temporary Restraining Order. (See Declaration of Ted Fates (Dkt. No.
11 29-2) ¶ 2.) On April 1, 2014, Messina acknowledged in writing receipt of that
12 information. (*Id.*, ¶ 4.) In addition, Relief Defendant PMX Jewels was served with
13 the relevant papers on April 1, 2014, thus providing notice to its officer, Scott Choi,
14 who is also an employee of IMV. (See Docket No. 27 (affidavit of service).)

15 According to Messina's "accounting" submitted on May 1, 2014, IMV has
16 transferred \$840,000 of the \$1.05 million it received "to or for the benefit of CNC
17 Consulting." (Bulgozdy Dec., Ex. 15.) It is unclear whether those transfers occurred
18 before or after IMV was effectively provided notice of the Temporary Restraining
19 Order, through Messina or Choi. It is unknown whether CNC Consulting is one of
20 the "correspondent" firms of IMV, or the business purpose for the transfers by
21 Messina and IMV to CNC Consulting. Messina's accounting claims that \$840,000
22 was disbursed "to or for the benefit of CNC Consulting," but the meaning of that is
23 unclear – such as whether funds were disbursed to an intermediary, and if so, why.

24 **1. Messina's claim to the funds**

25 Messina claims that he has a legal claim to the funds based on an "agreement"
26

27 ⁵ Coincidentally, Messina was provided notice by the Receiver's counsel of the
28 Temporary Restraining Order on March 31, 2014.

1 he executed with Defendant Xu one day after he received the \$5 million from
2 ToPacific (DE). (Bulgozdy Dec., Ex. 16.)

3 On March 20, 2014, Defendant Xu demanded that Messina return the funds.
4 (Bulgozdy Dec., Ex. 17.) Although now in a dispute with the principal of his
5 employer, World Capital Market, about these funds, Messina refused to return the
6 funds and instead cleaned out his BofA IOLTA Account, transferring over \$2.3
7 million into his BofA PA Account on March 21, 2014. Indeed, Messina wrote Xu
8 that he was “astounded, surprised, and appalled” by Xu’s demand for return of the
9 funds that ToPacific had deposited in Messina’s BofA IOLTA Account. (Bulgozdy
10 Dec., Ex. 18.)⁶ Over the next several days, Messina further disbursed the funds to his
11 accounts at Preferred Bank and Wells Fargo, to IMV, and to CNC Consulting in
12 Hong Kong. Messina has not explained why he did not maintain the funds once his
13 employer and client demanded their return.

14 Messina admits that he knew of the SEC’s investigation at the time he arranged
15 his loan from Xu. However, Messina has not explained how he could use money
16 received from a corporation, ToPacific (DE), to fund a loan from an individual,
17 Defendant Xu. Even though Xu controlled ToPacific (DE), they were corporate
18 funds transferred from a corporate account to Messina’s IOLTA account. To date,
19 Messina has not produced any documents from ToPacific (DE) authorizing the loan
20 from Xu using corporate funds.

21 **III. ARGUMENT**

22 **A. Relief Defendants Have Received Investor Funds**

23 Under certain circumstances, a party not alleged to be a securities law violator
24 may be joined as a party defendant in order to obtain disgorgement of fraudulently
25

26 ⁶ On March 25, 2014, Xu wrote a letter to another attorney and referred to
27 \$5,000,000.00 (Five Million USD) located at another attorney IOLTA Trust
28 Account.” (Bulgozdy Dec., Ex. 19.) This appears to be a reference to the funds
deposited by ToPacific in Messina’s BofA IOLTA Account.

1 obtained funds. For example, a court may order disgorgement from a party who has
2 received proceeds from the fraud where that party has no legitimate claim to those
3 funds. *See SEC v. Colello*, 139 F.3d 674, 676 & 679 (9th Cir. 1998).

4 Relief Defendants ToPacific (DE), To_Pacific (CA), Messina, and IMV have
5 each received investor funds. Accordingly, these entities and Messina are
6 appropriately named as Relief Defendants that should be ordered to disgorge their ill-
7 gotten gains.

8 **B. The Court Should Grant the Relief Sought by the SEC**

9 **1. Asset freezes are necessary**

10 The SEC seeks an asset freeze over Messina and IMV. Federal courts have
11 inherent equitable authority to freeze assets under its “inherent equitable power to
12 issue provisional remedies ancillary to its authority to provide final equitable relief.”
13 *Reebok Int’l, Ltd v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 559 (9th Cir. 1992);
14 *SEC v. Wencke*, 622 F.2d 829 (9th Cir. 1986). These powers include the authority to
15 freeze assets of both parties and nonparties. *SEC v. Hickey*, 322 F.3d 1123, 1131 (9th
16 Cir. 2003); *SEC v. Int’l Swiss Invs. Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990).
17 Courts use freeze orders to prevent waste and dissipation of assets and to ensure their
18 availability for disgorgement for the benefit of victims of the fraud. *See, e.g., Hickey*,
19 322 F.3d at 1132 (affirming asset freeze over nonparty brokerage firm controlled by
20 defendant to effectuate disgorgement order against defendant); *SEC v. Manor*
21 *Nursing*, 458 F.2d 1082, 1105-06 (2d Cir. 1972). Indeed, the Ninth Circuit has found
22 that “the public interest in preserving the illicit proceeds [of a defendant’s fraud] for
23 restitution to the victims is great.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228,
24 1236 (9th Cir. 1999). Courts have similarly recognized that a disgorgement order
25 will often be rendered meaningless unless an asset freeze is imposed prior to the entry
26 of final judgment. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990).

27 “A party seeking an asset freeze must show a likelihood of dissipation of the
28 claimed assets, or other inability to recover monetary damages if relief is not

1 granted.” *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). Courts
2 consider a defendant’s prior unlawful acts and the location of the assets in
3 considering whether an asset freeze is warranted. *See, e.g., id.* at 1085; *Affordable*
4 *Media*, 179 F.3d at 1236 (“district court’s finding regarding the likelihood of
5 dissipation is far from clearly erroneous” where defendant had a “history of spiriting
6 their commissions away to a Cook Islands trust.”); *Manor Nursing*, 458 F.2d at 1106
7 (“uncertainty existed with respect to the total amount of proceeds received and their
8 location,” thus asset freeze was warranted).

9 Here, Relief Defendant Messina has transferred the funds between and among
10 various accounts he controls, to IMV where he is general counsel, and to entities
11 outside the United States. Messina has escrowed \$2.133 million of the \$5.2 million he
12 received. Thus, in the space of less than a month, Messina spirited \$3 million out of
13 the country and, he hopes, beyond the reach of any U.S. court or regulator. Moreover,
14 because Messina has refused to provide documents in response to the Receiver’s
15 subpoena, and only a sketchy “accounting” in response to the Court’s Order, the
16 timing of some of the transactions and relationship with the recipients is unknown.
17 Indeed, based upon the information provided in the May 1 “accounting,” it appears
18 Messina is intent on making it as difficult as possible for the Receiver and the SEC to
19 recover these funds. At the April 24 hearing, Messina’s counsel made much of the
20 fact that Messina was an attorney with an “unblemished” disciplinary record. Messina
21 and his counsel failed to disclose that he is not currently licensed, has not been an
22 active member of the bar since 2007, and probably should not have been opening
23 IOLTA accounts at multiple banks and otherwise holding himself out as a licensed
24 attorney. It is no wonder Messina is unwilling to surrender the proceeds of
25 Defendants’ fraud, since Messina himself is not an active member of the Florida Bar
26 or, apparently, otherwise licensed to practice law.

27 Messina’s May 1 “accounting” claims, in a footnote, that \$840,000 of the funds
28 he transferred to his other employer, IMV, were transferred to an entity in Hong Kong.

1 Notably, Messina failed to produce any documentation to support that statement,
2 including information on the dates of such transactions. In view of Messina’s dual role
3 as in-house counsel to World Capital Market and general counsel of IMV, such
4 transactions are highly suspicious. Indeed, Messina admits that Defendant Xu intended
5 to park the \$5 million with Messina, but that Messina derived the purported loan
6 “agreement” as a means to cloak that conduct in some claim of legality.

7 Finally, a freeze is necessary because the total funds transferred to Messina and
8 IMV is unknown. Notably, Messina has refused to agree to language for an asset
9 freeze pursuant to the Court’s April 24 Order, on the grounds that any freeze must be
10 limited to only the \$5 million received from ToPacific (DE), and perhaps the
11 \$200,000 received from WCM. The Receiver is continuing to obtain documents and
12 information, and it is unknown whether additional funds were transferred to Messina,
13 IMV, or persons affiliated with them. Thus, a broad freeze on all funds received from
14 Defendants or Relief Defendants, or persons or entities affiliated in any way with
15 them, is necessary to prevent further dissipation of assets by Messina and IMV.

16 **2. It is appropriate to name a Receiver for the “ToPacific”**
17 **entities**

18 The Court has appointed Krista Freitag as the permanent receiver over the entity
19 Defendants and several Relief Defendants controlled by Defendant Xu. ToPacific
20 (DE) and To_Pacific (CA) are similarly entities controlled by Defendant Xu, and the
21 evidence establishes that they received and disbursed investor funds. Accordingly, it is
22 well within the Court’s discretion to appoint a receiver over these entities. *See SEC v.*
23 *Wencke*, 622 F.2d 829 (9th Cir. 1986); *SEC v. Capital Consultants, LLC*, 397 F.3d 733,
24 738 (9th Cir. 2005) (quotation omitted); *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F.
25 Supp. 3, 42 (S.D.N.Y. 1968), *aff’d*, 435 F.2d 510 (2d Cir. 1970). Courts have found a
26 receivership to be justified where management of an entity, collection of revenue, and
27 or distribution of investor funds are required. *See, e.g., SEC v. Credit First Fund*, 2006
28 WL 4729240, at *15 (C.D. Cal. 2006); *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F.

1 Supp. at 42.

2 A receiver can preserve and prevent future misappropriation and misuse of
3 assets of ToPacific (DE) and To_Pacific (CA), marshal and preserve existing assets,
4 and clarify the financial affairs of these entities. The SEC requests that Krista Freitag
5 be appointed as receiver over ToPacific (DE) and To_Pacific (CA).

6 **3. Orders prohibiting the destruction of documents, granting**
7 **expedited discovery on Relief Defendants' disbursement of**
8 **funds, and requiring detailed accountings, are necessary**

9 The Court's broad equitable powers in SEC enforcement actions include the
10 ability to order ancillary relief to require an accounting and prohibit document
11 destruction. *See Wencke*, 622 F.2d at 1369. The Court should enter an order
12 prohibiting the destruction of documents by Messina and IMV to prevent Relief
13 Defendants from destroying evidence.

14 The Court should also allow the SEC to obtain discovery on an expedited basis
15 concerning the actions taken by Messina and IMV to disburse the funds received
16 from Defendants and Relief Defendants. Expedited discovery is authorized by Rules
17 30, and 34 of the Federal Rules of Civil Procedure and a court's broad equitable
18 powers in SEC enforcement actions to order all necessary ancillary relief. *See*
19 *Wencke*, 622 F.2d at 1369. The SEC needs to obtain documents and testimony from
20 Messina, IMV, and the transferees to determine the purpose of the transfers, the
21 documentation for the transfers, and whether the funds remain in the transferees'
22 accounts or have been moved. The SEC also needs to obtain discovery concerning
23 claims Messina and IMV may have to the funds, such that they are within their
24 control and could be repatriated to the United States.⁷

25
26 ⁷ Messina argues that he needs discovery to establish his claim to the funds as a loan
27 from Defendant Xu. However, as a relief defendant who received the proceeds of a
28 fraud, Messina does not have any legitimate claim to the funds and such discovery is
not appropriate or necessary.

1 The Court should require Messina and IMV to prepare, in a short period of
2 time, detailed accountings showing specifics including the date of each transfer or
3 disbursement; the amount; the bank names, account name, and account number of the
4 transferring or disbursing account; the bank names, account name, and account
5 number of the recipient account; the person(s) who authorized the transfer or
6 disbursement; and as part of the accounting to produce all available documentation
7 supporting each transfer, including emails, authorizations, invoices, contracts, and
8 other documents.

9 Such an order is compelled by the fact that the Receiver and the SEC have
10 been requesting information from Messina since at least April 1, 2014. Finally, after
11 a month and a Court order, Messina provided a minimal “accounting” that
12 demonstrates a further Court order with specifics is needed to get basic information
13 from Messina and IMV. Messina has demonstrated that he will not provide
14 information in any meaningful fashion without a Court order. (*See* Bulgozdy Dec.,
15 Ex. 15.) Indeed, Messina’s May 1 “accounting” omits information about \$2.5 million
16 of transfers, and the information provided is vague. This is not a game in which
17 Messina and IMV can trickle out information, scrap by scrap, forcing the Receiver to
18 incur legal and other costs to obtain basic information. At this point, in the interest of
19 preserving assets (including those of the receivership estate), a Court order
20 compelling Messina and IMV to provide this detailed information within five days of
21 entry of the order is appropriate. IMV cannot complain about the timing of such an
22 order, since IMV has been on notice that funds of Defendants have been frozen for
23 over a month, through its General Counsel, Messina, as well as through its Senior
24 Vice President, Scott Choi, who is involved with Relief Defendant PMX Jewels.

25 To the extent that Messina argues the May 1 “accounting” was a good faith
26 first step, such an argument should be rejected. First, on its face the accounting only
27 addresses \$2.811 million, when Messina received at least \$5.2 million. The fact that
28 funds are escrowed does not mean that an accounting is not necessary. Second, the

1 accounting omits material information, such as the company with which Andrew
2 Savor is affiliated in Hong Kong, or why funds were sent to the personal account of
3 Mr. Savor in Canada rather than to a corporate account. Third, the accounting claims
4 that \$840,000 was “thereafter transferred to or for the benefit of CNC Consulting,”
5 which means that funds were transferred after March 31, 2014.⁸ Moreover, “to or for
6 the benefit” is deliberately vague. Fourth, no information is provided to identify
7 “Belmont,” or why it received \$200,000.⁹ Fifth, in a footnote Messina claims that
8 \$100,000 was deposited into the escrow account because it “was undisbursed as of
9 4/4/14,” but fails to identify the account that was the source of the funds or why April
10 4, 2014 is the operative date. Messina acknowledged notice of the freeze on April 1,
11 2014. Messina has failed to make a good faith effort to provide basic, necessary
12 information, and so it is appropriate to order him and his entity, IMV, to provide
13 specific information within a short period of time.

14 Messina has argued that he received the funds from ToPacific, which was not
15 the subject of the Temporary Restraining Order. However, Messina converted those
16 funds to the benefit of Defendant Xu when he conceived of the “agreement” wherein
17 he would take money from ToPacific (DE) and pay it to Xu personally. It is
18 disingenuous for Messina or IMV to rely on the source of the funds as an excuse for
19

20 ⁸ To the extent that Messina and IMV transferred any of the funds after March 31 or
21 April 1, 2014, there may be an issue that such transfers violated this Court’s
22 Temporary Restraining Order. For example, prior to March 31, 2014, IMV had only
23 received \$650,000 from Messina. However, Messina’s May 1 “accounting”
24 footnotes that \$840,000 was transferred “to or for the benefit of CNC Consulting.” It
25 is unknown if the additional funds in excess of \$650,000 were transferred after
26 Messina and IMV had notice of the Temporary Restraining Order.

27 ⁹ The SEC pointed out some of the deficiencies to counsel for Messina, who refused
28 to provide an accounting showing the movement of the funds placed in escrow. In an
email dated May 6, 2014, counsel identified the mailing address for “Belmont” as an
individual in Rosemead, California, but did not identify what “Belmont” is or why
the accounting described the transfer to “Belmont” rather than the individual. The
SEC and the Receiver should not be forced to extract, in increments, critical
information about the disposition of millions of dollars by Messina.

1 their conduct, since the purported agreement under which Messina now claims the
2 funds ignores that corporate reality. In essence, Messina assisted Xu in
3 misappropriating corporate assets of ToPacific (DE), and Messina clearly understood
4 that the Funds belonged to Xu. Indeed, when Xu demanded the return of the funds on
5 March 20, Messina did not dispute Xu's right to funds, but rather asserted that Xu
6 had somehow loaned ToPacific's money to Messina, to be paid back to Xu.

7 While Messina has deposited \$2.133 million in escrow with his attorney, he
8 has not provided any accounting for the source of those funds. Such information is
9 relevant to the extent that funds were transferred from other accounts, and may reveal
10 information about other transfers and accounts that could be recovered. For this
11 reason, too, a specific Court order requiring a detailed accounting of all movements
12 of the \$5.2 million, or whatever other funds Messina and IMV received from persons
13 or entities affiliated with Xu, is necessary and appropriate, along with all documents
14 concerning such transfers.

15 **4. Repatriation of assets is appropriate**

16 At the hearing on April 24, 2014, the Court ordered Messina to take steps
17 promptly to repatriate any assets he had transferred that were within his control.
18 During a telephone conversation with Messina's counsel on April 30, 2014, counsel
19 stated that no actions had been taken to repatriate any assets. (Bulgozdy Dec., ¶ 22.)
20 Indeed, Messina's counsel seemed to suggest that no order was effective until a
21 stipulation was submitted and signed, and Messina's counsel cannot agree on the
22 scope of such a stipulation.

23 It is well established that the Court may order Relief Defendants to repatriate
24 assets deposited overseas. *FTC v. The Crescent Publ. Gr., Inc.*, 129 F. Supp. 2d 311,
25 325-26 (S.D.N.Y. 2001); *FTC v. SlimAmerica, Inc.*, 77 F.Supp.2d 1263, 1275-77
26 (S.D. Fla. 1999).

27 The SEC requests that Messina and IMV be ordered forthwith to take all
28 possible steps to repatriate assets from any companies or individuals that received

1 ToPacific (DE) or WCM funds from them. Further, the SEC requests that the Court
2 order Messina and IMV to each provide a sworn declaration, within five days of the
3 Court's order, setting forth all steps taken to repatriate these assets, including copies
4 of communications, detailed recitals of telephone conversations, and documentation
5 of any amounts recovered.

6 Messina admits Defendant Xu asked him to hold the \$5 million while the SEC
7 investigation was ongoing, so that they could be returned to Defendant Xu at a later
8 date. Indeed, less than a month later, Defendant Xu demanded the return of the
9 funds, which Messina refused and he promptly took action to move as much of the
10 money so that it would be difficult to trace and, perhaps, be beyond the jurisdiction of
11 any court. It was Messina who decided that a personal, non-recourse loan, payable in
12 five years, was a means to accomplish Xu's request to camouflage the funds and hide
13 them from discovery. In effect, as purported in-house counsel for World Capital
14 Market, Messina was essentially agreeing to act as a trustee for Xu's benefit. Thus, it
15 should be fairly easy for Messina and his associates to provide a detailed accounting
16 for the funds, and return them forthwith.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court should grant the SEC's *Ex Parte*
19 Application and enter the requested relief.

20
21 Dated: May 7, 2014

Respectfully submitted,

22
23 /s/ John B. Bulgozdy

24 John B. Bulgozdy
25 Peter Del Greco
26 Attorneys for Plaintiff
27 Securities and Exchange Commission
28