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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **WESTERN DIVISION**

20 SECURITIES AND EXCHANGE
21 COMMISSION,
22
23 Plaintiff,
24
25 v.
26 WORLD CAPITAL MARKET INC.;
27 WCM777 INC.; WCM777 LTD. d/b/a
28 WCM777 ENTERPRISES, INC.; and
MING XU a/k/a PHIL MING XU,
Defendants,
KINGDOM CAPITAL MARKET, LLC;
et al.
Relief Defendants.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO EX PARTE APPLICATION OF
SECURITIES AND EXCHANGE
COMMISSION**

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

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1 **I. INTRODUCTION**

2 This Court is now being asked – for the third time – to issue various orders relating
3 to funds that were received by Vincent Messina from Ming Xu and ToPacific. A number
4 of these issues have already been the subject of rulings from this Court and so the SEC’s
5 request at first blush appears redundant and pointless. A closer review of the SEC’s
6 proposed order, however, reflects that the SEC is returning to this Court for the purpose of
7 seeking precisely the relief that the Court rejected or denied at the last hearing.
8

9 In the meantime, the SEC has made patently clear its disinterest in any cooperative
10 dialogue with counsel, abandoning the process of preparing a stipulation that would
11 incorporate the rulings from the last hearing, and eliminate or narrow the issues now
12 presented to the Court. Instead, the SEC sought language in the stipulation that was flatly
13 at odds with this Court’s actual rulings and, when that effort failed, simply stopped
14 discussing the stipulation and shifted its attention to its current application. If these events
15 are any indication of the litigation to come, the SEC intends to return to this Court in a fit
16 of pique any time that it does not get precisely the ruling or the language that it seeks - -
17 even where the same request was already denied. This is, in a word, unproductive.
18

19 As set forth below, relief defendant Messina – once again – agrees to the orders
20 that the Court found to be appropriate at the last hearing: an order freezing the funds that
21 had been received by Mr. Messina from the defendants and relief defendants; an order
22 directing an accounting; and an order directing that Mr. Messina seek to repatriate the
23 disbursed assets. Further, the Court had already granted to the SEC expedited discovery.
24

25 By this application, the SEC nonetheless seeks that same relief but then adds back
26 in the same defective provision that was rejected at the last hearing, this time trying to slip
27 it into the proposed order rather than request it outright. The SEC also adds a few other
28

1 items that are either meaningless or inappropriate. The SEC, for example, complains
2 about the accounting that was provided, and seeks an order requiring a “detailed”
3 accounting. That request is senseless. While many cases involve complex accountings,
4 this case is focused on one \$5 million transfer to Mr. Messina, and his disbursement of
5 those funds. Of that \$5 million, more than \$2.3 had already been accounted for through
6 the escrow arrangement. The remaining \$2.7 was disbursed by Mr. Messina to six
7 recipients in eleven transfers, all of which were reflected in the accounting provided by
8 Mr. Messina. The SEC then asked for additional information *and it was promptly*
9 *provided*. While the Court and counsel have certainly dealt with accountings that required
10 far greater detail, the information provided in this case to the SEC, including the response
11 to the SEC’s requests for greater detail, is appropriate and no further order is necessary or
12 appropriate.
13

14 Similarly, the SEC seeks an order compelling production of documentation from
15 Mr. Messina that supports his accounting, while at the same time submitting declarations
16 *that include those precise records* of Mr. Messina’s bank accounts.
17

18 With respect to the issue of discovery, the events since the last conference have
19 been decidedly disappointing. At that conference, counsel for Mr. Messina advised the
20 Court that there had been a basic agreement reached with the Receiver that there would be
21 an exchange of documents and depositions of both Mr. Messina and Mr. Xu to develop the
22 facts relating to the ToPacific transfers at issue. Neither the Receiver nor the SEC
23 expressed any objection to or disagreement with counsel’s statements, and the Court
24 thereafter repeatedly made reference to a limited period of discovery that would be
25 followed by a further conference with the Court. After the conference, apparently at the
26 urging of the SEC, the Receiver disavowed any agreement as to an exchange of discovery,
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1 the SEC refused even to discuss bilateral discovery, and the SEC now seeks to have the
2 Court impose on defendants the SEC’s one-sided and punitive view of the scope and
3 timing of discovery.

4 The SEC has also added International Market Ventures (“IMV”) as a relief
5 defendant, and seeks orders directed against IMV, although the SEC has already been
6 advised that IMV is not in possession of any of the funds at issue. Additional information
7 on those disbursements is now being gathered and we anticipate filing a motion to dismiss
8 the claim against IMV as a relief defendant. In the meantime, IMV does not object to an
9 appropriate order directing that it hold and not transfer any of the funds that were obtained
10 from World Capital Markets, Ming Xu or ToPacific.

11 **II. STATEMENT OF FACTS**

12 **A. Vincent Messina’s Law Practice**

13 According to the Declaration of John Bulgozdy, he has devoted considerable time
14 to an investigation of Mr. Messina’s status as an attorney. Mr. Bulgozdy apparently was
15 able to confirm that Mr. Messina was and is listed with the Florida Bar Association and
16 has never had any issues in relation to his practice of law. Mr. Bulgozdy also determined
17 that Mr. Messina, who was admitted to practice in 1962 -- 52 years ago -- shifted to
18 “Inactive” status in 2007. SEC Mem. at 6. According to Mr. Bulgozdy, having elected
19 Inactive status, Mr. Messina is not permitted to hold himself out as being able to practice
20 law in Florida. Mr. Messina was not aware of that constraint, stands corrected, and
21 promptly paid the fee that returned him to a Member in Good Standing of the Florida Bar,
22 as reflected in updated records of the Florida Bar.

23 Mr. Bulgozdy also stated that Mr. Messina is not licensed to practice law in
24 Virginia. That is false. Mr. Messina is an attorney in good standing in Virginia.
25

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1 **B. The Receipt of the \$5 Million & the Loan Agreement**

2 The SEC has also points out that, at or around the same time as the transfer of the
3 \$5 million, Mr. Messina *refused* to receive a transfer of more than \$15 million precisely
4 because it related to the settlement with the SEC and he was not the attorney who had
5 negotiated that SEC settlement. As reflected in Mr. Messina’s declaration, he was advised
6 that those were the funds that were involved with World Capital Markets and would
7 conclude the settlement with the SEC.
8

9 Mr. Messina was also advised that the funds that *he* received were *not* involved
10 with World Capital Markets – and as a matter of fact, and unlike the other amounts
11 previously paid to Mr. Messina, the funds did *not* come from World Capital Markets. Mr.
12 Messina received the transfer of \$5 million from a different entity, ToPacific. And the
13 SEC appears not to dispute that Mr. Xu executed the Loan Agreement in relation to that
14 transfer. SEC Opp. at 11-12.
15

16 The SEC also describes Mr. Messina’s disbursement of those funds, as was
17 reflected on the accounting provided by Mr. Messina. Immediately on receipt of those
18 funds, Mr. Messina began a series of disbursements to IMV, Andrew Savor and to other
19 accounts of Mr. Messina. From those other accounts, Mr. Messina further disbursed funds
20 for business purposes.
21

22 **C. The Prior Hearing and the Orders that Are Currently in Place**

23 At the last conference in this matter, on April 24, 2014, the Court considered the
24 Receiver’s expansive application for relief and issued the orders that the Court considered
25 appropriate: (1) an order freezing the funds that had been received by Mr. Messina from
26 the defendants and relief defendants; (2) an order directing Mr. Messina to provide an
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1 accounting; and (3) an order directing that Mr. Messina seek to repatriate the disbursed
2 assets.

3 Counsel also described to the Court the discussion with the Receiver’s counsel,
4 advising the Court that during a phone conversation, the Receiver’s counsel “indicated his
5 agreement” to a limited *exchange* of discovery and “indicated” that agreement again in his
6 reply submission. Transcript of April 24, 2014 (“Tr.”) at 10:10-12. Counsel had
7 specifically proposed to the Receiver that depositions be scheduled of Mr. Messina and
8 Ming Xu, and that the defendant be given access to documents that related to the ToPacific
9 bank accounts. Tr. at 10:19-23. Again, counsel reported to the Court that it appeared that
10 the Receiver’s counsel agreed, but had not returned an executed stipulation. Tr. at 10:14-
11 15, 24-25.

12 At no time did the Receiver’s counsel utter even a word of disagreement with or
13 objection to those statements, and the Court proceeded to make repeated references to the
14 view that defense counsel would be able to obtain discovery. The Court stated, for
15 example, that “I do understand that discovery may be appropriate. I’m just concerned
16 about what’s going to happen between now and when we conclude, who validly holds
17 what money and who doesn’t.” Tr. at 13:15-16. The Court stated that “if Messina’s
18 counsel feels that she needs certain discovery, she ought to be able to do it too.” Tr. 19:5-
19 7. See also Tr. at 12:6-9, 13:8-9 (“of course you need to have an order with discovery of
20 the issues”).

21 The Court then moved to the issue of the extent of the orders that should be entered
22 “while we’re conducting discovery.” The Court acknowledged the jurisdictional issue,
23 stating that the order that had been submitted by the Receiver was “overly broad because it
24 does things that I’m not sure I have jurisdiction to do.” The Court concluded that it could
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1 direct Mr. Messina “to try to bring the funds back” and that it had “the authority to freeze
2 assets in Mr. Messina’s possession,” but that it could not go beyond those orders. Tr. at
3 18:1-3. Tr. at 18:18-23. At the SEC’s request, the Court also added that it could require
4 an accounting. Tr. at 18:24-19:1.

5 In the end, the Court ordered that the approximately \$2.3 that was transferred to the
6 escrow account by Mr. Messina would continue to be held by Thompson Hine, that Mr.
7 Messina hold and retain any money in his possession, that he make best efforts and
8 “promptly seek the return of money that he has transferred which he has reason to believe
9 belongs to the investors,” and that he provide an accounting. Tr. at 22:12-22. See also Tr.
10 at 23: 22-24:5.

11 The Court then advised that “we have to have a return date to this Court after you
12 conducted the discovery so I can make a reasoned determination, based on what the
13 evidence shows.” Tr. at 23:13-15.

14
15
16 **III. ARGUMENT**

17 **A. The SEC Seeks the Same Relief that is Beyond the Jurisdiction of the**
18 **Court**

19 At the last hearing, the Receiver sought an order freezing accounts of nonparty
20 entities and individuals at unnamed banks across the globe. The Court acknowledged the
21 plain jurisdictional issues and declined to grant that relief.

22 The SEC is now attempting to obtain the same relief but this time through the back
23 door, failing to mention its request in its memorandum and yet inserting it in its Proposed
24 Order.¹ In the Memorandum of Points and Authorities [Dkt. 53-1] the SEC purports to be
25 seeking – as to Mr. Messina -- much the same relief that was already granted. SEC Mem.
26

27 _____
28 ¹ It appears that the SEC has taken this tack without even including in its application the requisite statement that the same relief was previously sought and denied.

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1 at 1:6-11. The SEC claims to be seeking only more “detailed” directives relating to the
2 accounting and the repatriation efforts. SEC Mem. at 3:17-4:7. The SEC fails to alert the
3 Court that its Proposed Order, [Dkt.53-2], includes the same global relief that is improper
4 and that this Court has already denied. Instead of directing an asset freeze at the
5 individual before the Court, the SEC has prepared an order that quite deliberately purports
6 to be directed at “any bank, financial institution or brokerage firm or third party payment
7 processor,” and purports to direct those financial institutions – world wide – to “hold and
8 retain within their control and prohibit the withdrawal” of “such monies” or “funds.”
9 Proposed Order [Dkt 53-2] at 1:25-28.
10

11 The relief sought by the SEC is neither supported nor appropriate. It implicates a
12 host of jurisdictional issues that the SEC has failed even to acknowledge, much less
13 address. As of the last appearance, the Court appeared familiar with the extent of its
14 jurisdiction, and its ability only to impose orders on the individuals, entities and property
15 within its jurisdiction. If the Court seeks further discussion of that issue, defendants ask
16 for a full and fair opportunity to brief those matters and address the relevant authorities.
17 At this point, certainly the SEC has failed to demonstrate any entitlement to that relief.
18

19 **B. The SEC Seeks Expedited Unilateral Discovery**

20 The Court has already granted to the SEC expedited discovery. At the last
21 conference, the Court acknowledged the request of Mr. Messina’s counsel for discovery,
22 and directed the parties to meet and confer regarding that discovery. Instead, the SEC
23 returns to the Court with a proposed order that is both entirely unilateral and unreasonable.
24 The SEC sets out various forms of discovery and imposes time periods in which the
25 defendants should be required to respond. Proposed Order at 4:2-28. By way of example,
26 *the SEC may depose any witness, Monday through Saturday, on two days’ notice delivered*
27
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1 by facsimile. The SEC may serve interrogatories, requests for admissions and document
2 demands, and all must be responded to within three days.

3 Notwithstanding the discussion that was had at the last conference, the SEC still
4 maintains that discovery should be entirely unilateral and that defendants are entitled to no
5 discovery regarding the funds at issue or the circumstances surrounding the entry into the
6 Loan Agreement. It remains the defendants' position that the SEC's request for relief
7 should be denied, and it should be directed to actually meet and confer and agree to
8 reasonable and bilateral forms of discovery and timetables.
9

10 **C. With Respect to International Market Ventures, the SEC is Entitled**
11 **Only to An Order Directing IMV to Hold the Funds Obtained from**
12 **Vincent Messina and Provide an Accounting**

13 The requirements of an application for an asset freeze are discussed at length in
14 SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998). There, the SEC sought and failed to
15 obtain preliminary relief against a third party, and later added that individual as a relief
16 defendant. On appeal from an order of disgorgement against that third party, the court first
17 addressed the SEC's ability to bring claims against "nominal" defendants, defined as one
18 who "holds the subject matter of the litigation in a subordinate or possessory capacity as to
19 which there is no dispute." The Court considered the appellant's argument that the court
20 should "reject the use of nominal defendants," but concluded that there was "ample
21 authority" to support the proposition that the federal court can employ its equitable powers
22 "to recover ill-gotten gains."
23

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

1 affirmative defense, stating that “we disagree with the SEC because *the lack of a*
2 *legitimate claim to the funds is the defining element of a nominal defendant.*” Id.
3 (emphasis added) Under the particular circumstances of that case, and given the third
4 party’s assertion of the Fifth Amendment, the Ninth Circuit affirmed the trial court’s
5 finding that the SEC had adequately established that the third party had no legitimate
6 claim to the funds. See also SEC v. JT Wallenbrock & Associates, 440 F.3d 1109, 1113
7 (9th Cir. 2006) (discussing authority of federal court to order disgorgement of the “ill
8 gotten gains” obtained from the fraud); SEC v. Hickey, 322 F.3d 1123, 1132 (9th Cir.
9 2003) (Ninth Circuit affirmed the freezing of the assets of a third party brokerage firm
10 because disgorgement orders had already been entered against defendant Hickey and he
11 exercised “total and complete control” over the brokerage).

12
13 Here, virtually every salient issue – including the source of the funds and the
14 validity of the Loan Agreement – is disputed. The SEC has put forth evidence suggesting
15 that funds were received by ToPacific in small increments, suggestive of a transfer from an
16 investor. Still unclear is the circumstance under which any investor would transfer funds
17 to “ToPacific,” since the materials relating to the alleged Ponzi scheme were disseminated
18 by and directed transfers to World Capital Markets.

19
20 Further, the SEC again declines to controvert the Loan Agreement. Instead, the
21 SEC appears to claim that the loan is invalid only because Mr. Messina was aware of the
22 pending SEC issues. As previously explained by Mr. Messina, he was persuaded by Mr.
23 Xu that those issues were being resolved through the payment of substantial amounts that
24 he, Mr. Messina, declined to receive. Mr. Messina also understood that Mr. Xu had ceased
25 activities in the United States, that he had ample other resources beyond those associated
26 with World Capital Markets, and that the funds that he received were not derived from the
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1 activities of World Capital Markets. Also clear from the SEC’s own presentation is that
2 Mr. Messina treated those funds as proceeds of a loan, promptly disbursing funds for
3 business purposes. The SEC’s theory – that Mr. Messina agreed to hold those funds for
4 the SEC – is completely at odds with those facts.

5 The dispute in this proceeding is clear: Mr. Messina maintains that he obtained a
6 loan from someone who had authority and ability to enter into the loan agreement, and Mr.
7 Messina then treated those funds as loan proceeds. The SEC will have to acknowledge
8 both the Loan Agreement, and the disbursement of those loan proceeds, but will seek to
9 develop a legal theory by which that loan can be voided or the funds otherwise clawed
10 back. Relevant authorities indicate that the Loan Agreement constitutes an enforceable
11 negotiable instrument under California law, and the Receiver has offered no authority that
12 demonstrates a likelihood that her effort to void the loan will succeed. See e.g., Smith v.
13 Citimortgage Inc., 2014 Bankr.LEXIS 1414 (N.D.Cal. March 27, 2014) (held that note
14 constituted negotiable instrument enforceable by the holder of the instrument). At this
15 point, the SEC has put forth no theory that will enable it to invalidate the loan and force
16 disgorgement of funds received by Mr. Messina under a legitimate claim.

17 Under these circumstances, the SEC is entitled only to an order directing
18 International Market Ventures not to disburse any of the funds that were received from
19 Vincent Messina and to provide an accounting. It is not entitled to do that which it plainly
20 intends to do: obtain from this Court language that it can then use to persuade any
21 financial institutions to freeze any and all assets and accounts of a third party recipient of
22 funds, International Market Ventures.
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1 **IV. CONCLUSION**

2 For the foregoing reasons, it is respectfully submitted that the SEC’s proposed
3 order be rejected and that the Court leave in place the orders that were entered at the last
4 hearing in this matter with the addition only of a further order that International Market
5 Ventures not disburse any funds received from Mr. Messina and provide an accounting of
6 its receipt and disbursement of those funds.

7 Dated: May 13, 2014

8 THOMPSON HINE LLP

9
10 By: _____/s/
MARANDA FRITZ

11 CLYDE SNOW & SESSIONS

12
13 By: _____/s/
MARK L. SMITH

14 Attorneys for Respondent
15 VINCENT MESSINA
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