DAVID R. ZARO (BAR NO. 124334)
JOSHUA A. DEL CASTILLO (BAR NO. 239015)
NORMAN M. ASPIS (BAR NO. 313466)
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
865 South Figueroa Street, Suite 2800
Los Angeles, California 90017-2543
Phone: (213) 622-5555
Fax: (213) 620-8816
E-Mail: dzaro@allenmatkins.com
jdelcastillo@allenmatkins.com
naspis@allenmatkins.com

Attorneys for Receiver
GEOFF WINKLER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RALPH T. IANNELLI and ESSEX CAPITAL CORP., Defendants.	Case No. 2:18-cv-05008-FMO-AFM REPLY IN SUPPORT OF FIRST INTERIM APPLICATION OF RECEIVER, GEOFF WINKLER, AND ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP, GENERAL COUNSEL TO THE RECEIVER, FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES OF RECEIVER [December 21, 2018 - March 31, 2019] Date: May 30, 2019 Time: 10:00 a.m. Ctrm: 6D Judge Hon. Fernando M. Olguin

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT Geoff Winkler (the "Receiver"), the Court-appointed permanent receiver for Defendant Essex Capital Corporation and its subsidiaries and affiliates (collectively, the "Receivership Entities" or "Entities"), along with his counsel of record, Allen Matkins Leck Gamble Mallory & Natsis LLP ("Allen Matkins"), hereby submits the following Reply in support of the Receiver's and Allen Matkins' collective First Interim Application for Payment of Fees and Reimbursement of Expenses (the "Fee Application") (ECF No. 80, *et seq.*), as follows:

I. INTRODUCTION.

The Receiver's and Allen Matkins' collective Fee Application is not opposed by the Plaintiff Securities and Exchange Commission (the "Commission"). The sole objecting parties are Messrs. Grant, Perry, and Wolansky (collectively, the "Objecting Parties[1]"), each of whom the Receiver has identified as among the largest recipients of potentially voidable transfers from the Receivership Entities, and any one of whom could be subject to an eventual disgorgement action by the Receiver.

The stated bases for the Objecting Parties' Opposition to the Fee Application – that the Fee Application fails to adequately describe the services performed by the Receiver and that interim payments are improper – are not supported by the law or the facts of this case. The Fee Application describes, in great detail, the services provided by the Receiver and Allen Matkins, and the rationales underlying those services, including but not limited to the Receiver's determination that a comprehensive forensic accounting is necessary and appropriate given the facts and circumstances of this case. Likewise, the Receiver's concurrently submitted First Interim Report and Petition for Further Instructions (the "Interim Report") (ECF No. 78, *et seq.*) provides ample support for the Receiver's

[1] Messrs. Grant, Perry and Wolansky misleadingly characterize themselves as "Intervenors" in this action. The Court previously permitted intervention solely in connection with issues related to their opposition to their prospective opposition to the Court's consideration of an asset freeze and appointment of a receiver or monitor. (See ECF No. 53.) The Court's record does not suggest that their status as limited intervenors extends to their challenge to the Fee Application.

reasonable belief and estimation that his recoveries in this matter will be more than sufficient to fund the administration of this receivership for its duration in a manner consistent with the legal standards governing the propriety of fee and expense requests. It is well-established that receivers and their professionals are entitled to interim compensation for services performed, and that such compensation may not properly be held hostage to advance the unilateral interests of particular prospective creditors.

For these reasons, and more, the Objecting Parties' Opposition may be more reasonably viewed as a procedurally improper objection brought to challenge the Fee Application in an effort to hamstring the Receiver's asset recovery efforts and hinder his administration of the instant receivership. The Receiver respectfully submits that this Court should not countenance any efforts to undermine the administration of the instant receivership for the unilateral benefit of one, or a small handful of, interested parties. The purpose of the receivership is to do equity, and the Fee Application and its associated Interim Report clearly reflect the Receiver's wholly appropriate efforts to establish a foundation for the recovery of available assets and the equitable treatment of all investors and creditors. The Fee Application should therefore be granted.

II. ARGUMENT.

A. The Commission Does Not Object To The Fee Application.

Courts give great weight to the judgment and experience of the Commission relating to receiver compensation. "[I]t is proper to [keep] in mind that the [Commission] is about the only wholly disinterested party in [this] proceeding and that … its experience has made it thoroughly familiar with the general attitude of the Courts and the amounts of allowances made in scores of comparable proceedings." In re Phila. & Reading Coal & Iron Co., 61 F. Supp. 120, 124 (E.D. Pa. 1945). Indeed, the Commission's perspectives are not "mere casual conjectures, but are recommendations based on closer study than a district judge could ordinarily give to such matters." Finn v. Childs Co., 181 F.2d 431, 438 (2d Cir. 1950) (internal quotation marks omitted). In fact, "recommendations as to fees of the [Commission] may be the only solution to the 'very undesirable subjectivity with

variations according to the particular judge under particular circumstances' which has made the fixing of fees seem often to be 'upon nothing more than an ipse dixit basis.'" Id. Thus, the Commission's perspective on the matter should indeed be given "great weight," as observed by the court in SEC V. Fifth Ave. Coach Lines, Inc., 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973), because it alone is sufficiently "thoroughly familiar with … the amounts of allowances made in scores of comparable proceedings." In re Phila. Reading Coal & Iron Co., 61 F. Supp. at 124. Here, the Commission has stated, after having met and conferred with the Receiver and his counsel, that "it will not oppose the [Fee Application]." (ECF No. 85.) Its decision not to oppose the Fee Application should receive "great weight[,]" and the Fee Application should be granted.

B. Interim Payment Of Fees And Expenses Is Necessary And Proper.

"[W]here both the magnitude and the protracted nature of a case impose economic hardships on professionals rendering services to the estate[,]" an interim award of fees is appropriate. CFPB v. Pension Funding, LLC, 2016 U.S. Dist. LEXIS 187607, at *4 (C.D. Cal. July 7, 2016). Interim allowances are necessary "to relieve counsel and others from the burden of financing lengthy and complex [] proceedings." In re Rose Way, Inc., 1990 Bankr. LEXIS 3028, at *9 (Bankr. S.D. Iowa Mar. 1, 1990) (citing In re Mansfield Tire & Rubber Co., 19 B.R. 125 (Bankr. N.D. Ohio 1981)).

Nonetheless, the Opposing Parties request that the Court deny the Receiver's and Allen Matkins' interim payment requests *in their entirety* at this time. Instead of citing to any authority for the unprecedented proposition that interim payments are not appropriate, the Opposing Parties offer statements of opinion regarding their personal dissatisfaction with the content of the Receiver's invoices, the Receiver's estate administration decisions, and what they mischaracterize as the "speculative" nature of future recoveries (see, e.g., Opposition at 3:27-28, 4:1-5:10, 6:2-11), along with mischaracterizations of the Receiver's presentation to the Court (see, e.g., 5:13-23). The Receiver and Allen Matkins respond to the Opposing Parties' most material contentions as follows:

1. The Receiver has, in fact, provided detailed information regarding the nature of the services he performed.

Without any sense of irony, the Opposing Parties make detailed use of the specific information provided in the Receiver's Interim Report regarding the nature of the work performed during the application period to challenge the Fee Application, including on the basis of insufficient specificity. This is particularly true of their mischaracterization of the Receiver's forensic accounting work, which the Opposing Parties simultaneously attack as overbroad based on the detailed summary of work provided by the Receiver and deride as insufficiently specific.

The Opposing Parties cannot have it both ways: either the Receiver provided information specific enough for them to form an opinion on his work or he did not. Given the Opposing Parties' acrimonious response to the Receiver's forensic accounting work, it is clear that the information provided was sufficient to develop a comprehensive understanding of the services performed by the Receiver, including but not limited to the Receiver's detailed review and analysis of nearly 400,000 pages of documents relating to the business and financial activities of the Entities. As explained in the Fee Application and Interim Report, the Receiver was required to address more than 60,000 unique transactions involving tens of millions of dollars, as well as assess the amount and location of potentially recoverable receivership assets. Among the assets identified are funds and interests potentially fraudulently transferred to third parties.[2]

The Receiver has stated emphatically that his expenditures on forensic accounting during this application period are likely to substantially reduce the cost associated with a later claims process.[3] As such, and while the Opposing Parties may have a unique interest

---

[2] Notably, despite the Opposing Parties' claim that the Receiver engaged in "excessive" investigation of transactions going back to the 1980s, the Fee Application makes it clear that the overwhelming bulk of the Receiver's efforts focused on the period after 1996, when Essex was formed. (See, e.g., EFC No. 80-1 at 6:5-8:10.)

[3] The Opposing Parties, therefore, have no basis to assert that "[a]t this rate, the estate will run out of cash before the end of the year." (Opposition at 3:27-28.) To the contrary, every indication in the Fee Application and the Interim Report is that the Receiver's progress now will yield increased cost-savings (and recoveries) in the future.

in undermining the Receiver's administrative and investigative decisions, they cannot reasonably accuse the Receiver of failing to detail the scope, nature, and necessity of the work carried out during the application period.

2. The Opposing Parties mischaracterize the Receiver's presentation to the Court.

The Opposing Parties mischaracterize the Receiver's proposal to retain special counsel in New York to continue litigating valuable Receivership Entity claims. Specifically, they reference the Receiver's request that the Court approve an initial budget of $35,000 for special counsel to conduct preliminary discovery and settlement efforts. The Opposing Parties assert that "if the estate cannot afford to spend more than $35,000 to litigate a $5.4 million claim … it cannot afford to pay the Receiver and his general counsel[.]" (Opposition at 5:20-23.) Of course, nowhere in his Interim Report does the Receiver suggest that the $35,000 requested reflects the sum total of the anticipated litigation budget for this matter. Indeed, it is clear in the Interim Report that the proposed $35,000 expenditure is intended to cover only initial discovery and efforts aimed at securing a near-term settlement. The Receiver also states that he is prepared to prosecute the matter "through summary judgment or trial, if necessary." (Interim Report at 8:9-9.) To claim that the Receiver proposed limiting his proposed special counsel's budget to $35,000 on a claim potentially worth millions to the Receivership Entities is highly misleading.

3. The value of the receivership estate is not limited to cash on-hand.

The Opposing Parties suggest to the Court that the amounts requested in the Fee Application – despite already accounting for a 20% holdback to permit the Court to adjust fees later in the case should it determine that is necessary – are improper given the cash recovered by the Receiver during the first three months of his appointment. Setting aside the fact that, as this Court well knows, receiverships tend to be most costly at their inception, the Receiver's Interim Report provides substantial detail on the Receiver's estimation of the value of the receivership estate. (See Interim Report at Ex. A.) Even if

one were to apply a conservative discount to the Receiver's likely recoveries, as the Opposing Parties urge, it is clear that total recoveries in this matter will run in the millions of dollars, and perhaps reach as high as $14 million, *even before* any recoveries from disgorgement or claw-back litigation are factored into the accounting. The suggestion that the estate therefore cannot afford what the Receiver himself has characterized as "front-loaded" costs is therefore unjustified.

Given the amount of work undertaken by the Receiver and Allen Matkins, and the beneficial foundation for the receivership that such work has generated, it would be grossly inequitable – and completely out of step with established precedent – to deny the Fee Application or deny an interim payment of fees and expenses at this time.

C. The Opposing Parties May Not Substitute Their Opinions For The Receiver's Business Judgment.

The defects in the Opposing Parties' arguments are all the more critical given that they are not entitled to substitute their opinions for the Receiver's reasonable business judgment. Indeed, in the estate administration context, courts are deferential to the business judgement of bankruptcy trustees, receivers, and similar court-appointed fiduciaries. See, e.g., Bennett v. Williams, 892 F.2d 822, 824 (9th Cir. 1989) ("[W]e are deferential to the business management decisions of a bankruptcy trustee."); Sw. Media, Inc. v. Rau, 708 F.2d 419, 425 (9th Cir. 1983) ("The decision concerning the form of … [estate administration] … rested with the business judgement of the trustee."); In re Thinking Machs. Corp., 182 B.R. 365, 268 (D. Mass. 1995) ("The application of the business judgment rule … and the high degree of deference usually afforded purely economic decisions of trustees, makes court refusal unlikely.") (rev'd on other grounds, In re Thinking Machs. Corp., 67 F.3d 1021 (1st Cir. 1995)). In other words, it is the Receiver's business judgment, not the Opposing Parties' self-serving opinions, that should guide this Court's consideration of the Fee Application.

D. The Opposing Parties' Standing To Object Is Tenuous.

In its October 1, 2018 Order Regarding Preliminary Injunction (the "Intervention Order") (ECF No. 53 at 1:10-21), this Court specifically agreed to permit the Opposing Parties' intervention in this action exclusively "for the limited purpose of being heard on the topics of any asset freeze and any Receivership/monitor over Defendant Essex." In other words, the Opposing Parties are not "Intervenors" as the term is normally understood; they were permitted to intervene here only for the purpose of challenging a then-prospective asset freeze and fiduciary appointment. Those issues having long since been resolved, the Opposing Parties' standing as limited "Intervenors" is, at best, tenuous.

Likewise, the Opposing Parties have not satisfied basic constitutional standing requirements. In order to do so, the Opposing Parties would have to demonstrate that "(1) [they] ha[ve] suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the [other party]; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004). Here, by the Opposing Parties' own admission, nothing the Receiver has done has specifically injured them, and the various, unsubstantiated threats that they imagine to the receivership estate are, by their own admission, hypothetical, and based exclusively upon their personal disagreement with the Receiver. As such, it is unclear what standing, if any, the Opposing Parties have to oppose the Fee Application.

\\\

\\\

\\\

\\\

\\\

III. CONCLUSION.

For the foregoing reasons, and on the basis of the information provided in connection with the Receiver's and Allen Matkins' collective Fee Application, and the Receiver's concurrently submitted Interim Report, the Receiver respectfully requests that the Court grant the Fee Application, in full, and authorize the interim fee and expense payments requested therein.

Dated: May 22, 2019

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
DAVID R. ZARO
JOSHUA A. DEL CASTILLO
NORMAN M. ASPIS

By: */s/ David R. Zaro*
DAVID R. ZARO
Attorneys for Receiver
GEOFF WINKLER

PROOF OF SERVICE

Securities and Exchange Commission v. Ralph T. Iannelli and Essex Capital Corporation
USDC, Central District of California – Case No. 2:18-cv-05008-FMO-AFM

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 865 S. Figueroa Street, Suite 2800, Los Angeles, California 90017-2543.

On **May 22, 2019**, I caused to be served the document entitled: **REPLY IN SUPPORT OF FIRST INTERIM APPLICATION OF RECEIVER, GEOFF WINKLER, AND ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP, GENERAL COUNSEL TO THE RECEIVER, FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES OF RECEIVER** on all the parties to this action addressed as stated on the attached service list.

☒ **OFFICE MAIL**: By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **OVERNIGHT DELIVERY**: I deposited in a box or other facility regularly maintained by express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelope(s) or package(s) designed by the express service carrier, addressed as indicated on the attached service list, with fees for overnight delivery paid or provided for.

☐ **HAND DELIVERY**: I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **ELECTRONIC MAIL**: By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING**: By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX**: By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on **May 22, 2019** at Los Angeles, California.

/s/ *Martha Diaz*
Martha Diaz

SERVICE LIST

Securities and Exchange Commission v. Ralph T. Iannelli and Essex Capital Corporation
USDC, Central District of California – Case No. 2:18-cv-05008-FMO-AFM

Mark Riera, Esq.
Jeffer Mangels Butler & Mitchell LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-4308

Via First Class Mail