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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 OPPOSITION OF RECEIVER, GEOFF WINKLER, TO PROPOSED INTERVENOR CVL'S MOTION TO INTERVENE AND TO REMOVE CVL'S ASSETS FROM THE COURT-ORDERED FREEZE [ECF NO. 115] [Declaration of Geoff Winkler submitted concurrently herewith] Date: October 24, 2019 Time: 10:00 a.m. Ctrm: 6D Judge Hon. Fernando M. Olguin

TO ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD, AND THIS HONORABLE COURT:

PLEASE TAKE NOTICE THAT Geoff Winkler (the "Receiver"), the Court-appointed permanent receiver for Defendant Essex Capital Corporation ("Essex") and its subsidiaries and affiliates (collectively, with Essex, the "Receivership Entities"), hereby opposes the Motion to Intervene and to Remove

Assets from the Court-Ordered Asset Freeze [ECF No. 115, *et seq.*] (the "Motion") of proposed intervenor, 915 Elm Avenue CVL, LLC ("CVL"), for the following reasons:

I. INTRODUCTION.

CVL's procedurally inappropriate[1] Motion is predicated largely upon misleading (and occasionally outright false) allegations, inadmissible hearsay, and a fundamental misapprehension of the law in the receivership context. The gravamen of CVL's Motion is the claim that the Receiver conspired with the Plaintiff Securities and Exchange Commission (the "Commission") and Defendant Ralph Iannelli to ensure that certain CVL property assets were brought within the ambit of the Court-imposed asset freeze, initially via the Court's Order Regarding Preliminary Injunction and Appointment of a Permanent Receiver [ECF No. 66] (the "Appointment Order") and, later, its Order Regarding Permanent Injunction [ECF No. 113] (the "Permanent Injunction") and that, given CVL's ownership, the asset freeze should not apply. CVL is incorrect, as a matter of both law and fact, and, the asset freeze being appropriately applied to certain CVL assets, there is no basis for intervention. Moreover, even assuming, *arguendo*, that CVL can overcome a well-established statutory bar to its proposed intervention that it has ignored, CVL has not established a right to intervene in this matter, permissibly or otherwise. The Receiver consequently requests that this Court deny CVL's Motion.

[1] While CVL met and conferred regarding its right to intervene to challenge the Court's asset freeze, its Motion suggests that it is seeking far broader relief – challenging the Receivership Entities' interest in or claims against the LLC on the merits. The merits of these arguments were not the subject of the parties' meet and confer efforts and the Motion is therefore procedurally inappropriate. See L.R. 7-3.

II. RELEVANT FACTUAL BACKGROUND.

Setting aside CVL's baseless and improper[2] characterization of the motives underlying the application of the asset freeze to its property, the facts relevant to the instant Motion are as follows:

In 2015, Mr. Iannelli and CVL's other principal, William S. Reyner, Jr. established CVL in order to purchase a business operation and associated real property (collectively, the "Lumber Yard") from J&G Clay Properties, LLC and its principal, James Gally (collectively, "Mr. Gally"). (See, e.g., ECF No. 115-1 at 8:18-20; 115-3 at ¶ 10.) Messrs. Iannelli and Reyner were initially the joint managers of CVL, although Mr. Iannelli's membership interest and other participation in CVL were later reduced. (See ECF No. 115-1 at 8:11 – 9:1.)

CVL's purchase of the Lumber Yard was funded in large part by a seller carryback note (the "Gally Note") issued by Essex to Mr. Gally, in the amount of $1.5 million, and two loans (the "MBT Loans") obtained by CVL from Montecito Bank & Trust ("MBT") in the respective initial principal amounts of $1,158,750 and $1,225,000. (Declaration of Geoff Winkler ["Winkler Decl."] ¶ 3, Exs. 1, 2, 3.) Roughly concurrently with the Gally Note, CVL executed notes payable to Essex (collectively, the "CVL Notes") in the initial principal amount of at least $1,625,000, in order to provide for and fund the repayment of the Gally Note. (Id., Ex. 4.) The MBT Loans were cross-defaulted against the Gally Note, notwithstanding the fact that Essex was the borrower under the Gally Note, and

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[2] The Declaration of William S. Reyner, Jr. [ECF No. 115-3], submitted in support of CVL's Motion, is replete with inadmissible hearsay. In his declaration, and among other things, Mr. Reyner purports to testify to representations made to him by Mr. Iannelli and discussions he claims to have had with the Receiver, during the pendency of the Receiver's service as Court-appointed monitor. See, e.g., ECF No. 115-3 at ¶¶ 8, 12, 13, 16, 17, 23. He also purports to testify as to a legal conclusion and facts for which he does not establish any basis for personal knowledge. See Id. at ¶¶ 5, 12, 14. The Receiver objects to these statements and respectfully submits that they are inadmissible under the Federal Rules of Evidence, and should not be considered in connection with the relief requested in CVL's Motion. Fed. R. Evid. 602, 801, 802,

CVL was the borrower on the MBT Loans. (Id.) While Essex paid over $400,000 to Mr. Gally in the pre-receivership period in connection with its payment obligation on the Gally Note, the Gally Note is now in default. (Id.) The CVL Notes are likewise in default. (Id.)

In addition, Mr. Iannelli and Mr. Reyner were each obligated to make personal monetary contributions to CVL. (See ECF No. 115-1 at 8:23-24.) At least some of Mr. Iannelli's putatively "personal" contributions to CVL were made with funds diverted from Essex. Specifically:

- On January 11, 2016, $500,000 was transferred from an Essex account at First Republic Bank to Mr. Iannelli's personal account at MBT. On January 13, 2016, $393,460 of this amount was transferred from Mr. Iannelli's MBT account to CVL. (Winkler Decl. ¶ 4, Exs. 5, 6, 7.)
- On July 12, 2016, $125,000 was transferred from an Essex account at MBT to Mr. Iannelli's personal account at MBT. That same day, the $125,000 was transferred from Mr. Iannelli's MBT account to CVL. (Winkler Decl. ¶ 5, Exs. 8, 9, 10.)
- On October 13, 2016, $125,000 was transferred from an Essex account at MBT to Mr. Iannelli's personal account at MBT. That same day, the $125,000 was transferred from Mr. Iannelli's MBT account to CVL. (Winkler Decl. ¶ 6, Exs. 11, 12, 13.)

As concerns the present receivership, CVL's purchase of the Lumber Yard was funded in substantial part by a $1.5 million repayment obligation incurred by Essex – not Mr. Iannelli or Mr. Reyner – to Mr. Gally, and at least $643,000 in funds diverted from Essex exclusively for Mr. Iannelli's and CVL's benefit. In other words, over $2.1 million in Essex funds and obligations are inextricably linked to CVL and its purchase of the Lumber Yard, not including CVL's repayment obligation to Essex.

The Court entered the Appointment Order on December 21, 2018. (ECF No. 66.) Among other things, the Appointment Order imposed a freeze on certain assets implicated in the receivership, including, specifically an MBT account identified as held in CVL's name, and the real property upon which the Lumber Yard is situated. (ECF No. 66 at 5:10-11, 22-28.) The September 9, 2019 Permanent Injunction reaffirmed these terms. (ECF No. 113 at 3:16-4:8.) The Appointment Order and the Permanent Injunction likewise imposed a general asset freeze over assets "held in the name of" or "for the benefit of" Essex and Mr. Iannelli. (ECF No. 66 at 3:26-4:4; 113 at 3:16-4:8.)

While conceding that Mr. Iannelli holds an interest in CVL (see, e.g., Motion at 8 n. 3), and without identifying any specific harm arising from the asset freeze, CVL now demands permission to intervene in order to cause the asset freeze to be lifted as against the Lumber Yard's associated real property and, apparently, to challenge the Receivership Entities' interest in or claims against CVL. (See, e.g., ECF No. 115-1 at 14:24-27.)

III. ARGUMENT.

A. CVL Is Not Entitled To Intervene As A Matter Of Right.

As reflected in its Motion, CVL contends that, as a consequence of the above facts, it is entitled to intervene as a matter of right. Setting aside the fact that intervention in an enforcement proceeding brought by the Commission is not permissible absent written agreement from the Commission (see, e.g., 15 U.S.C. § 78u(d)(g); SEC v. Egan, 821 F.Supp. 1274, 1275 (N.D. Ill. 1993); SEC v. Homa, 2000 U.S. Dist. LEXIS 14582, 2000 WL 1468726, at *2 (N.D. Ill. Sept. 29, 2000); SEC v. Qualified Pensions, 1998 U.S. Dist. LEXIS 942, 1998 WL 29496, at *3 (D.D.C. Jan. 16, 1998)), CVL's analysis is incorrect.

The Ninth Circuit has generally outlined four requirements for intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). A proposed intervenor must: (1) timely file an application; (2) possess a 'significantly protectable' interest relating

to the property or transaction that is the subject of the action; (3) be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) be inadequately represented by the parties to the action. California ex rel. Lockyear v. U.S., 450 F.3d 436, 441 (9th Cir. 2006) (citing Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir. 1993)). Failure to satisfy any one of the requirements is fatal to a motion to intervene. Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2009).

At a minimum, CVL has not offered any evidence that its ability to protect its interests would be impaired absent an intervention; indeed, it has identified no impaired interest whatsoever, instead merely offering the unsupported opinion that the asset freeze *might* have "*potentially* created problems for CVL's bank accounts" and "*may* impair [its] ability to protect its [unspecified] interests[.]" (ECF No. 115-1 at 14:16-17 and 21) (emphasis added). Such statements of opinion are insufficient for CVL to meet its burden of proof pursuant to the Ninth Circuit in considering adequacy of representation, including whether: (1) the interest of a party is such that it will undoubtedly make the intervenors arguments; (2) the present party is capable and willing to make such arguments; and (3) the intervenor would offer any necessary elements to the proceedings that the other parties would neglect. See People of California v. Tahoe Regulatory Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986). "The most important factor in determining the adequacy of representation is how the interests compare with the interests of existing parties." Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003). As noted by one court, "the adequacy of interest requirement is more than a paper tiger. A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy". Pub. Serv. Co. of New Hampshire v. Douglas Patch, 136 F.3d 197, 206 (1st Cir. 1998) (citing Moosehead Sanitary Dist. v. SG Philips Corp., 610 F.2d 49, 54 (1st Cir. 1979)); see also SEC v. TLC Invs. and Trade Co., 147 F.Supp.2d 1031, 1042 (C.D. Cal. 2011).

Indeed, where "one of the duties of the existing parties is to represent the interest of the intervenor, intervention will not be allowed unless a compelling showing of inadequate representation is made." In re Christina Thompson, 965 F.2d 1136, 1143 (1st Cir. 1992). In such circumstances, mere conclusory speculation by intervenors is insufficient and "the putative intervenor must assert concrete facts which demonstrate that (1) the existing representation of the putative intervenors interest is inhibited by the personal interest of the existing representative, (2) the existing representative and opposing party are engaged in collusive activities, or (3) the existing representative has failed or refused to fulfill the … duty to protect the interests asserted by the putative intervenor." Id.

Put simply, CVL cannot satisfy this standard. As noted above, more than $2 million in Receivership Entity funds and obligations are implicated in CVL and its purchase of the Lumber Yard. The Receiver therefore has an unquestionable interest in protecting and maximizing the value of CVL. Indeed, the Receiver has already requested that Mr. Iannelli turn over to the Receiver his interest in CVL, given that it was acquired with funds diverted from Essex. The value of this interest is dependent upon the value of CVL as a whole, meaning the Receiver's and CVL's respective interests in preserving and maximizing CVL's value are aligned.

Moreover, given that CVL has identified no specific harm resulting from the asset freeze, any claim that it lacks adequate representation is disingenuous.[3] While CVL may disagree with the Receiver's administration of the receivership, including as to his intent to pursue the Receivership Entities' interest in or claims against CVL, it cannot deny that preserving and maximizing the value of CVL would result in preservation and maximization of the value of those same interests or claims. The

[3] By way of example, while complaining of the asset freeze as related to the frozen CVL account, CVL simultaneously concedes that "CVL does not use that account" and this is merely worried that, "without further explanation" third parties might get the "impression that all CVL's accounts fall within the … freeze." (ECF No. 115-1 at 18:20-22.) Yet CVL identifies no other accounts or associated operations that have been disrupted, even temporarily, by the freeze.

fact that CVL would *prefer* to intervene and insert itself into the Receiver's administrative process does not give rise to a *right* to intervene. See, e.g., SEC v. Am. Pension Servs., Inc., 2015 U.S. Dist. LEXIS 6782, *14 (D. Utah Jan. 20, 2015) (movant's interests are not considered impaired or impeded solely because they disagree with the receiver's administration plans); SEC v. Nadal, 2009 U.S. Dist. LEXIS 94302, *4-5 (M.D. Fl. Sept. 24, 2009).

B. The Equities Strongly Militate Against Permissive Intervention.

As a preliminary matter, this Court enjoys broad discretion in administering the instant receivership and its associated assets, including as relates to CVL. See, e.g., SEC v. Universal Fin., 760 F.2d 1034, 1038-39 (9th Cir. 1985). Because "the interests of the Receiver are very broad and include not only the protection of the receivership res, but also the protection of investors and judicial economy[,]" the interests of the Receiver in administering the entities and assets under his control should "weigh more heavily than the merits of … [another] … party's claim." Id. at 1039; see also SEC v. Wencke, 622 F.2d 1363, 1373-74 (9th Cir. 1980).

The asset freeze thus reflects an entirely appropriate exercise of this discretion, given that it is intended to protect the *status quo* for the benefit of the Receivership Entities and their creditors. SEC v. Current Fin. Servs., Inc., 783 F.Supp. 1441, 1443 (D.D.C. 1992). Such protections simply could not be maintained by exempting CVL from the asset freeze, given the nature and magnitude of the receivership assets and obligations implicated here. CVL's stated goal in seeking intervention – dissolving the asset freeze – would undermine the very purpose of the Permanent Injunction. Unsurprisingly, the Ninth Circuit has already determined that a district court may properly exercise its equitable powers to include partnership interests within the scope of a receivership order, *even where that partnership is a non-party*. See, e.g., SEC v. Am. Capital Invs., 98 F.3d 1133, 1143-44 (9th Cir. 1996).

Permissive intervention is discretionary. Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977). In determining whether to exercise its discretion, a court may consider, among other things, whether the proposed intervenor's interests are adequately represented by other parties, whether intervention will prolong or unduly delay litigation, and whether intervenor will significantly contribute to full development of the underlying factual issues. Id. A party seeking permissive intervention has the burden of establishing the basis for intervening. Citizens For Balanced Use v. Montana Wilderness Assoc., 647 F.3d 893, 897 (9th Cir. 2011).

The Receiver respectfully submits that CVL has not demonstrated that permissive intervention is necessary here, having failed to demonstrate a lack of adequate representation or to provide the Court with any examples of an actual injury arising from the asset freeze, meaning its participation as an intervenor is unlikely to contribute significantly to the development of the factual issues underlying the instant receivership. Moreover, the equities strongly militate against permitting CVL to intervene, particularly given that its stated purpose is to dissolve the asset freeze as against the Lumber Yard and its associated real property, all of which are directly implicated in the present receivership (having been partially purchased with or funded by Receivership Entity dollars) and against which the Receivership Entities may have a claim, and thereby to frustrate or complicate the Receiver's pursuit of Receivership Entity interest and claims.[4] In other words, the only way to preserve the *status quo* for the benefit of the Receivership Entities as concerns CVL is to ensure the asset freeze remains in place.[5]

[4] CVL's assertion that it is "a victim" of Essex's conduct strains credulity, given that Essex money funded its purchase.

[5] To the extent CVL's Motion is read as expressing any due process concerns, any litigation by the Receiver as against CVL would give rise to a right to respond, meaning that CVL's rights will not be compromised here.

IV. CONCLUSION.

For the foregoing reasons, the Receiver respectfully requests that CVL's Motion be denied.

Dated: October 2, 2019

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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 **October 2, 2019**, I caused to be served the document entitled: **OPPOSITION OF RECEIVER, GEOFF WINKLER, TO PROPOSED INTERVENOR CVL'S MOTION TO INTERVENE AND TO REMOVE CVL'S ASSETS FROM THE COURT-ORDERED FREEZE [ECF NO. 115]** 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 **October 2, 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

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