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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION

18 SECURITIES AND EXCHANGE
19 COMMISSION,

20 Plaintiff,

21 v.

22 RALPH T. IANNELLI and ESSEX
23 CAPITAL CORP.,

24 Defendants.

Case No. 2:18-cv-05008-FMO-AFM

NOTICE OF MOTION AND MOTION
OF RECEIVER, GEOFF WINKLER,
FOR ORDER APPROVING
RECOMMENDED PROCEDURES FOR
SALE OF PERSONAL PROPERTY
OUT OF RECEIVERSHIP;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

[Declaration of Geoff Winkler and
[Proposed] Order submitted concurrently
herewith]

Date: April 9, 2020
Time: 10:00 a.m.
Ctrm: 6D
Judge Hon. Fernando M. Olguin

25 **TO ALL INTERESTED PARTIES:**

26 **PLEASE TAKE NOTICE THAT** on April 9, 2020 at 10:00 a.m., in
27 Courtroom 6D of the above-entitled Court, located at 350 West First Street, Los
28 Angeles, California 90012, 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" or

1 "Entities"), will and hereby does move for an order authorizing and approving the
2 sales procedures proposed here in connection with the Receiver's contemplated sale
3 of private equity investments and partnership or membership interests, as detailed
4 further in the attached Memorandum of Points and Authorities and Declaration of
5 Geoff Winkler.

6 This Motion is based on this Court's September 9, 2019 Order Regarding
7 Permanent Injunction, which authorizes the Receiver to assume exclusive authority
8 and control over, and to manage, the Receivership Entities and their assets, as well
9 as the attached Memorandum of Points and Authorities, the concurrently filed
10 Declaration of Geoff Winkler, and the documents and pleadings already on file in
11 this action, and upon such further oral and documentary evidence as may be
12 presented at the hearing on the Motion.

13 **This Motion is made following the conference of counsel pursuant to L.R.**
14 **7-3, which took place on February 26, 2020.**

15
16 Dated: March 2, 2020

ALLEN MATKINS LECK GAMBLE
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JOSHUA A. DEL CASTILLO
NORMAN M. ASPIS

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19 By: /s/ David R. Zaro

20 DAVID R. ZARO
21 Attorneys for Receiver
22 GEOFF WINKLER
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 The Receiver was appointed on December 21, 2018 pursuant to this Court's
4 Order Regarding Preliminary Injunction and Appointment of a Permanent Receiver
5 (the "Appointment Order") [Dkt. No. 66] and vested with, among other things,
6 exclusive authority and control over "Defendant Essex and its subsidiaries and
7 affiliates" and empowered to take into possession and manage the Receivership
8 Entities' assets. The Court's September 9, 2019 Order Regarding Permanent
9 Injunction (the "Permanent Injunction") [Dkt. No. 113] reaffirmed this authority.

10 While the Appointment Order and the Permanent Injunction contain language
11 vesting the Receiver with exclusive authority over the Receivership Entities and
12 their assets, these orders do not specifically authorize the Receiver to establish sales
13 procedures or to undertake the sale of any property out of receivership. As reflected
14 in the Receiver's various Interim Reports to the Court, the Receivership Entities own
15 a number of private equity investments and partnership or membership interests,
16 collectively and conservatively valued in the amount of approximately \$2.5 million.
17 The Receiver has determined that certain of these interests should be liquidated
18 promptly, while other property may be held and sold at a later time.

19 The Receiver has concluded that, ultimately, all of the property of the
20 Receivership Entities, including the interests in issue here, should be sold in order to
21 generate funds for the benefit of the Entities and the receivership estate, and to
22 enable distributions on allowed claims. Rather than incur the expense and delay that
23 would result from piecemeal requests to this Court to authorize sales of personal
24 property on an asset-by-asset basis, the Receiver proposes that the Court approve
25 procedures for the sale of the Entities' interests, and authorize the Receiver
26 thereafter, and consistent with those procedures, to undertake those personal
27 property sales which, in his reasonable business judgment, he deems appropriate to
28 preserve and maximize the value of the receivership estate. The intent of the

1 proposed sale procedures is to facilitate the timely sale of the interests held by the
2 Receiver (exclusive of the Entities' rights and interests in the equipment leases they
3 administer, which are administered in the ordinary course of business in accordance
4 with the Court's prior orders). The Receiver anticipates returning to Court to seek
5 authority to sell any receivership real property, as well as personal property that
6 cannot or should not be sold pursuant to the sale procedures proposed here.

7 **II. STATEMENT OF RELEVANT FACTS.**

8 The Receiver was appointed on December 21, 2018 pursuant to the terms of
9 the Appointment Order, which directed and empowered the Receiver to assume
10 exclusive control over and thereafter administer the Receivership Entities and their
11 assets. (See Dkt. No. 66.) The Court entered the Permanent Injunction on
12 September 9, 2019, reaffirming this authority. (See Dkt. No. 113.)

13 The personal property assets of the Receivership Entities are comprised
14 principally of private equity investments and partnership or LLC membership
15 interests (collectively, the "Interests"), all of which were acquired with cash, via
16 option, warrants, or transfers. (See concurrently filed Declaration of Geoff Winkler
17 ["Winkler Decl."] ¶ 2; see also Dkt. Nos. 103, 123.) The Interests fall into four (4)
18 categories:

- 19 • Publicly traded equity investments (this is limited to one asset);
- 20 • Investments that are "lightly traded," typically in the context of fund-
21 raising rounds of investment;
- 22 • Equity investments for which there are no established, public markets;
23 and
- 24 • Partnership or LLC membership interests, largely in real estate- and
25 business-focused enterprises.

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1 Specifically, the Interests consist of the following:

<u>Interest / Investment</u>	<u>Nature of Investment</u>
151 Lenox LLC	real estate-related partnership interest
2886 16th St. LLC	real estate-related partnership interest
Carwood Investors, LP	real estate-related partnership interest
69 MWS LLC	real estate-related partnership interest
NEOS Therapeutics, Inc.	publicly traded investment
aPEEL Sciences	private equity investment
Baswood, Inc.	private equity investment
City Group Four LLC	private equity investment
Cogito Corporation	private equity investment
Conjugon, Inc.	private equity investment
IntegenX, Inc.	private equity investment
Liquitaria LLC	private equity investment
Onus Technologies, Inc.	private equity investment
Procept BioRobotics Corp.	private equity investment
Procure Technologies, Inc.	private equity investment
Redstone Resources Corporation	private equity investment
Twinlab Consolidated Holdings, Inc.	private equity investment
Upfront III Investors, LP aka Upfront III Partners, LP; GRP III Partners, LP; Upfront III, LP	private equity investment
VoterCircle, Inc.	private equity investment

24 Based on his review of available information, the Receiver believes that,
 25 provided appropriate markets can be identified or established and appropriate buyers
 26 located, the aggregate value of the Interests is approximately \$2.5 million, and that
 27 the best means of realizing their highest value for the benefit of the receivership
 28

1 estate is to sell the Interests via arms-length sales that are consistent with applicable
2 law. (Winkler Decl. ¶ 3.) However, because many of the Interests are of the type
3 for which no established public market exists, the Receiver must have sufficient
4 flexibility to conclude sales quickly, whenever he can successfully establish a
5 private market or identify a suitable buyer, or at such time as an appropriate
6 opportunity otherwise presents itself. (Id.) The Receiver therefore requests that the
7 Court authorize him to market and sell the Interests pursuant to the following
8 procedures, which procedures he has determined, in his reasonable business
9 judgment, provide the flexibility necessary to identify or create suitable markets or
10 identify suitable buyers, and maximize the sale price achieved for each of the
11 Interests:

12 1. The Receiver will strive to identify an appropriate forum through which
13 to market or present each of the Interests for sale out of receivership. This forum
14 will be selected based on the unique nature of each of the Interests, and the
15 likelihood of the Receiver's ability to solicit purchase offers from appropriately
16 qualified buyers.

17 (a) *Publicly Traded Asset.*

18 The Receivership Entities own interests in NEOS Therapeutics, Inc.
19 ("NEOS"), a publicly traded company. Accordingly, the Receiver proposes
20 liquidating the NEOS interest on the open market at such time as he determines a
21 sufficient price for the interest can be realized.

22 (b) *Real Estate-Related Partnership Interests.*

23 As reflected above, the Receivership Entities hold interests in numerous real-
24 estate related partnerships, for which standardized public markets do not exist.
25 Nonetheless, the Receiver anticipates pursuing prospective sales of the Entities'
26 interests to other partners in those partnerships and, in the absence of interest from
27 existing partners, soliciting offers, directly or through a qualified intermediary (e.g.,
28

1 a broker) from prospective buyers identified through other means, including but not
2 limited to online exchanges.

3 (c) *Private Equity Investments.*

4 With respect to the Entities' private equity investments, the Receiver
5 anticipates soliciting interest, directly or through a qualified intermediary, via a
6 variety of exchanges established for the trading of private equity holdings. Any
7 sales of the Entities' private equity investments will, of course, be subject to any
8 applicable restrictions as to the nature of the sales and the buyers' qualifications.

9 2. Upon notice of an interest by an apparently qualified buyer(s) of any
10 Interests, the Receiver will enter into negotiations with his prospective buyer(s).
11 Buyers will be provided with a reasonable opportunity to conduct due diligence as
12 to each asset. If more than one offer for any given asset is received, the Receiver
13 will use his business judgment to select the offer he deems most likely to maximize
14 the total monetary recovery for the Entities. Upon the selection of a buyer at a
15 definite price, the Receiver will promptly consummate the sale of and transfer
16 ownership of the subject Interests to the buyer(s), without further order of the Court.

17 3. Thereafter, either in the context of his quarterly Interim Reports, or by
18 supplemental report, the Receiver will advise the Court of any completed Interest
19 sales, the prices realized via those sales, and the business judgment rationale
20 underlying each sale.

21 (Winkler Decl. ¶ 4.)

22 **III. ARGUMENT.**

23 **A. This Court Has The Authority To Approve The Receiver's**
24 **Proposed Sales Procedures And To Authorize The Sale(s) Of The**
25 **Interests In Accordance Therewith.**

26 A court sitting in equity, and having authority over a receivership *res*, is
27 vested with wide discretion to order the sale of property out of receivership. See,
28 e.g., SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992) (describing the Court's

1 broad powers and wide discretion to determine relief in an equity receivership).
2 "The power of sale necessarily follows the power to take possession and control of
3 and to preserve property." SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1144 (9th
4 Cir. 1996) (abrogated on other grounds by Steel Co. v. Citizens for a Better Env't,
5 523 U.S. 83 (1998)) (citing 2 Ralph Ewing Clark, Treatise on Law & Practice of
6 Receivers § 482 (3d ed. 1992) (citing First Nat'l Bank v. Shedd, 121 U.S. 74, 87
7 (1887)). "When a court of equity orders property in its custody to be sold, the court
8 itself as vendor confirms the title in the purchaser." 2 Ralph Ewing Clark, Treatise
9 on Law and Practice of Receivers § 487.

10 Generally, when a court-appointed receiver is involved, the receiver, as agent
11 for the appointing court, may conduct the sale of the receivership property. Blakely
12 Airport Joint Venture II v. Fed. Sav. and Loan Ins. Corp., 678 F. Supp. 154, 156
13 (N.D. Tex. 1988). A receiver's sale conveys "good" equitable title, enforced by an
14 injunction against the owner and against parties to the suit. See 2 Ralph Ewing
15 Clark, Treatise on Law and Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
16 (3d ed. 1992).

17 "In authorizing the sale of property by receivers, courts of equity are vested
18 with broad discretion as to price and terms." Gockstetter v. Williams, 9 F.2d 354,
19 357 (9th Cir. 1925). Moreover, in the fiduciary context, courts are deferential to the
20 business judgment of bankruptcy trustees, receivers, and similar estate custodians.
21 See, e.g., Bennett v. Williams, 892 F.2d 822, 824 (9th Cir. 1989) ("[W]e are
22 deferential to the business management decisions of a bankruptcy trustee."); Sw.
23 Media, Inc. v. Rau, 708 F.2d 419, 425 (9th Cir. 1983) ("The decision concerning the
24 form of ... [estate administration] ... rested within the business judgment of the
25 trustee."); In re Thinking Machs. Corp., 182 B.R. 365, 368 (D. Mass. 1995) ("The
26 application of the business judgment rule ... and the high degree of deference
27 usually afforded purely economic decisions of trustees, makes court refusal
28

1 unlikely.") (rev'd on other grounds, In re Thinking Machs. Corp., 67 F.3d 1021 (1st
2 Cir. 1995)).

3 The Receiver's proposed sales procedures for the Interests are consistent with
4 the aims of the receivership, and well within the Court's discretion to approve.
5 Accordingly, the Receiver respectfully requests that the Court approve the sales
6 procedures and authorize the Receiver to undertake the sales of the Interests in
7 connection therewith.

8 **B. Appraisals And Public Sales Are Not Required Here.**

9 28 U.S.C. § 2004 provides that "[a]ny personalty sold under any order or
10 decree of any court of the United States shall be sold in accordance with section
11 2001 of this title, *unless the court orders otherwise.*" (emphasis added.) 28 U.S.C.
12 § 2001, in turn, which requires a seller to satisfy certain appraisal and public sale
13 requirements, is applicable only to real property, *not* personal property.

14 Even were 28 U.S.C. § 2001 somehow to apply to the Interests, this Court
15 would be empowered to modify the terms of sale because "[t]he statute on its face
16 vests the court with discretion in directing the terms and conditions of the public
17 sale." Keybank Nat'l Ass'n v. Perkins Rowe Assocs., LLC, 2012 U.S. Dist. LEXIS
18 157828, *4 (M.D. La. Nov. 2, 2012); see also U.S. v. Little, 2008 U.S. Dist. LEXIS
19 93467, *4-5 (E.D. Cal. June 30, 2008) (finding that "[t]he Court has broad discretion
20 in setting the terms and conditions of a sale under 28 U.S.C. § 2001."); U.S. v.
21 Heasley, 283 F.2d 422 (8th Cir. 1960) (finding that in the context of 28 U.S.C.
22 § 2001(b), "the matter of confirming a judicial sale rests in the sound judicial
23 discretion of the trial court").

24 Here, the nature of the Interests is such that the markets for them are largely
25 not well-established and routinized. Moreover, as noted above, the Receiver's
26 proposed sales procedures are intended to ensure that the sale of each of the Interests
27 occurs in the context of an appropriate forum, best suited to the unique nature of
28 each of the Interests, and most likely to result in offers from qualified buyers

1 genuinely consistent with the asset being sold. Accordingly, the Receiver
2 respectfully submits that the additional sales requirements established in 28 U.S.C.
3 § 2001 – which, again, need apply only in the context of real property sales, and
4 even then are subject to modification – are unnecessary here.

5 **IV. CONCLUSION.**

6 For the foregoing reasons, the Receiver respectfully requests that this Court
7 enter an order approving his proposed sales procedures for the Interests, and
8 authorizing him to undertake the marketing and sale of the Interests in accordance
9 therewith.

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11 Dated: March 2, 2020

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By: /s/ David R. Zaro

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Attorneys for Receiver
GEOFF WINKLER

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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 **March 2, 2020**, I caused to be served on all the parties to this action addressed as stated on the attached service list the document entitled: **NOTICE OF MOTION AND MOTION OF RECEIVER, GEOFF WINKLER, FOR ORDER APPROVING RECOMMENDED PROCEDURES FOR SALE OF PERSONAL PROPERTY OUT OF RECEIVERSHIP; MEMORANDUM OF POINTS AND AUTHORITIES.**

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 **March 2, 2020** at Los Angeles, California.

/s/ Martha Diaz
Martha Diaz

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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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