

1 DAVID R. ZARO (BAR NO. 124334)  
 2 JOSHUA A. DEL CASTILLO (BAR NO. 239015)  
 3 NORMAN M. ASPIS (BAR NO. 313466)  
 4 ALLEN MATKINS LECK GAMBLE  
 5 MALLORY & NATSIS LLP  
 6 865 South Figueroa Street, Suite 2800  
 7 Los Angeles, California 90017-2543  
 8 Phone: (213) 622-5555  
 9 Fax: (213) 620-8816  
 10 E-Mail: dzaro@allenmatkins.com  
 11 jdelcastillo@allenmatkins.com  
 12 naspis@allenmatkins.com

13 Attorneys for Receiver  
 14 GEOFF WINKLER

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 AUTHORITY TO ESTABLISH  
 DISGORGEMENT PROCEDURES  
 AND UNDERTAKE DISGORGEMENT  
 EFFORTS

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

Date: November 12, 2020  
 Time: 10:00 a.m.  
 Ctrm: 6D  
 Judge Hon. Fernando M. Olguin

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

27 **PLEASE TAKE NOTICE THAT** on November 12, 2020 at 10:00 a.m., in  
 28 Courtroom 6D of the above-entitled Court, located at 350 West First Street, Los  
 Angeles, CA 90012, Geoff Winkler (the "Receiver"), the Court-appointed  
 permanent receiver for Defendant Essex Capital Corporation and its subsidiaries and  
 affiliates, will and hereby does move for an order authorizing him to establish

1 disgorgement procedures and undertake disgorgement efforts against those  
2 individuals and entities whom the Receiver has identified as holding assets subject  
3 to disgorgement in accordance with this Court's prior orders and applicable law, as  
4 further set forth in the accompanying Memorandum of Points and Authorities.

5 This Motion is based, in part, on this Court's September 9, 2019 Order  
6 Regarding Permanent Injunction (ECF No. 113), which authorizes the Receiver to  
7 commence litigation, including to preserve or recover receivership assets, as well as  
8 the attached Memorandum of Points and Authorities, the documents and pleadings  
9 already on file in this action, and upon such further oral and documentary evidence  
10 as may be presented at the time of the hearing on the Motion.

11 **This Motion is made following the conference of counsel for the**  
12 **remaining parties, pursuant to L.R. 7-3, which took place on and around**  
13 **October 2, 2020.**

14  
15 Dated: October 12, 2020

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

16  
17  
18 By:           /s/          Joshua A. del Castillo            
19 JOSHUA A. DEL CASTILLO  
20 Attorneys for Receiver  
21 GEOFF WINKLER  
22  
23  
24  
25  
26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Geoff Winkler (the "Receiver"), the Court-appointed permanent receiver for  
4 Defendant Essex Capital Corporation ("Essex") and its subsidiaries and affiliates  
5 (collectively, the "Receivership Entities" or "Entities"), hereby submits the instant  
6 Motion for Authority to Establish Disgorgement Procedures and Undertake  
7 Disgorgement Efforts, pursuant to which he requests authority from this Court to  
8 establish the procedures governing, and authorize his commencement of, efforts to  
9 pursue the recovery of profits from those individuals and entities who profited from  
10 their investments in the Receivership Entities, and who, pursuant to the prior Orders  
11 of this Court and longstanding precedent, are obligated to disgorge such profits to  
12 the Receiver and the Receivership Entities.

13 **II. RELEVANT FACTUAL BACKGROUND.**

14 On December 21, 2018, this Court entered its Order Regarding Preliminary  
15 Injunction and Appointment of a Permanent Receiver (the "Appointment Order")  
16 (ECF No. 66), pursuant to which the Receiver was vested with exclusive authority  
17 and control over the Receivership Entities and their assets ("Receivership Assets" or  
18 "Assets"). On September 9, 2019, the Court entered its Order Regarding Permanent  
19 Injunction (the "Permanent Injunction") (ECF No. 113), which reaffirmed the  
20 authority initially conveyed upon the Receiver via the Appointment Order.

21 Among other things, the Appointment Order authorized, empowered, and  
22 directed the Receiver to: (1) assume exclusive authority and control over all  
23 Receivership Assets; (2) conduct such investigation and discovery as necessary to  
24 identify and locate outstanding Receivership Assets; and (3) preserve and prevent  
25 the dissipation of Receivership Assets. (ECF No. 66.) In connection with these  
26 duties, the Receiver has reviewed more than 500,000 pages of materials, reflecting  
27 hundreds of thousands of individual transactions, relating to the business and  
28 financial activities of the Receivership Entities. (See concurrently filed Declaration

1 of Geoff Winkler ["Winkler Decl."] at ¶ 2.) This effort enabled the Receiver to  
2 identify and quantify a significant portion of Entity transactions relating to  
3 potentially recoverable Assets. On the basis of his review, the Receiver has  
4 confirmed that the operations of the Receivership Entities were not profitable, and  
5 were unsustainable absent ongoing infusions of new funds from investors or lenders.  
6 (Id. at ¶ 3.) Essex's payments of so-called returns on investments to certain  
7 investors were funded in substantial part by money obtained from new investors,  
8 consistent with the operation of a Ponzi scheme. (Id.) On this basis, and as detailed  
9 significantly in the Receiver's prior submissions to the Court, including his Forensic  
10 and Investigative Accounting Report (ECF No. 171), the Receiver has concluded  
11 and reported that the activities of the Receivership Entities bear the hallmarks of a  
12 Ponzi investment scheme. (Id.)

13 Through his detailed analysis and accounting, the Receiver has confirmed  
14 that, as in most Ponzi schemes, certain Receivership Entity investors ("Net  
15 Winners") were paid more than the aggregate amounts they invested in the Entities,  
16 while others ("Net Losers") lost money on their investments. (Id., ¶ 4.) The  
17 Receiver has determined, in his reasonable business judgment, that in order to  
18 recover and return as much as possible to those investors and creditors with claims  
19 against the Entities, including Net Losers, and consistent with the law in this Circuit,  
20 it is necessary and appropriate to pursue the disgorgement of profits paid to the Net  
21 Winners. (Id.) The Receiver's detailed investigation and accounting of the  
22 Receivership Entities has identified at least fifty-one (51) potential Net Winners,  
23 who, collectively, appear to have been paid profits in excess of their principal  
24 investments in an amount that may exceed \$25 million. (Id.)

25 Based upon the Receiver's experience, and a comprehensive review of  
26 materials from comparable federal equity receiverships in this district, the Receiver  
27 has concluded that average recoveries from the Net Winners are unlikely to  
28 reach 100% of each Net Winner's individual respective profits ("Profit Amount").

1 (Id. at ¶ 5.) Accordingly, the Receiver believes that procedures tailored to enable  
2 him to pursue recoveries from Net Winners which minimize the costs to the  
3 receivership estate while maximizing funds (including in the form of recoveries  
4 from Net Winners) available for distribution to Net Losers and other entity creditors  
5 whose claims for reimbursement are ultimately allowed by the Court, are critical.

6 (Id.)

7 In consultation with the Plaintiff Securities and Exchange Commission (the  
8 "Commission"), the Receiver previously developed the following proposed  
9 procedures, designed to: (i) create an efficient and effective procedure for resolving  
10 the Receiver's claims for the recovery of Profit Amounts from Net Winners, either  
11 via settlement or litigation; (ii) allow the Receiver to act promptly to maximize the  
12 recoveries from Net Winners while safeguarding Net Winners' due process rights;  
13 and (iii) conserve judicial and receivership estate resources.

14 These procedures were initially submitted to the Court for approval on  
15 stipulation by the Receiver and the Commission on March 26, 2020. (See Dkt.  
16 No. 157.) Defendant Ralph Iannelli, who lacked standing to oppose the parties'  
17 stipulation nonetheless did so, presenting misleading and inaccurate arguments  
18 regarding the content of the stipulation. (See Dkt. Nos. 165, 169.) The Court has  
19 not entered an order on the stipulation and, accordingly, out of an abundance of  
20 caution and to maximize the value of the Entities' claims against Net Winners,  
21 including with an eye towards applicable statutes of limitations, the Receiver now  
22 submits the instant Motion.

23 **III. PROPOSED DISGORGEMENT PROCEDURES.**

24 By way of this Motion, the Receiver seeks authority to pursue the recovery of  
25 Profit Amounts from Net Winners, based upon the proposed procedures set forth  
26 below. (Winkler Decl. at ¶ 6.)  
27  
28

1           **A. Settlement Proposals.**

2           The Receiver proposes initially providing Net Winners with an opportunity  
3 and incentive to settle claims for the recovery of Profit Amounts prior to incurring  
4 the cost and time associated with litigation. The Receiver proposes sending demand  
5 letters to all Net Winners whom he has determined to pursue for reimbursement of  
6 Profit Amounts. This correspondence shall: (a) identify the Receiver's calculation  
7 of the Net Winner's Profit Amount; (b) state the Receiver's intention to pursue  
8 litigation against the Net Winner to recover the Profit Amount, along with a brief  
9 description of the basis for his claims; and (c) offer to settle his claims for a  
10 discounted amount prior to the commencement of litigation. Specifically, the  
11 Receiver proposes offering to settle for 60% of the Profit Amount, if payment is  
12 made in a lump sum, and within ninety (90) days of demand, or 67.5% of the Profit  
13 Amount if payment is made over time, not to exceed twelve (12) months, in monthly  
14 installments, from the demand. The Receiver's demand letter will also advise that  
15 such preliminary offers to settle shall expire sixty (60) days after its transmittal date.  
16 (Id. at ¶ 7.) The Receiver respectfully submits that it is appropriate for this Court to  
17 vest him with the discretion to fashion settlement agreements and releases as he  
18 deems appropriate, in his reasonable business judgment.

19           In order to accept any pre-litigation settlement offer by the Receiver, a Net  
20 Winner must: (a) confirm, in writing within sixty (60) days of the transmittal of the  
21 Receiver's demand letter, his or her intent to settle; (b) execute a settlement  
22 agreement with the Receiver, along with a stipulated judgment in the amount of his  
23 or her total Profit Amount (to be provided by the Receiver), and return both the  
24 executed settlement agreement and stipulated judgment to the Receiver within one  
25 hundred and five (105) days of the transmittal of the Receiver's initial demand letter.  
26 Settlement agreements executed in accordance with these procedures will be  
27 effective immediately, without further Court approval. (Id. at ¶ 8.)

28

1 Stipulated judgments will be held by the Receiver and not filed with the Court  
2 or otherwise sought to be enforced, provided a settling Net Winner timely makes all  
3 payments required under the applicable settlement agreement. If a settling Net  
4 Winner defaults on any payment, or otherwise fails to timely make all required  
5 payments, and does not cure such default within ten (10) calendar days of such  
6 default, the Receiver, in his sole discretion, may file a complaint in this Court  
7 against the Net Winner together with the stipulated judgment, and promptly request  
8 entry of the stipulated judgment. In the event that the Receiver's initial settlement  
9 offer lapses, either by failure of a Net Winner to respond or otherwise, the Receiver,  
10 in his sole discretion and exercising his reasonable business judgment, may file a  
11 complaint in this Court against any Net Winner, subject to the proposed litigation  
12 procedures described below. In the event that a Net Winner seeks to settle with the  
13 Receiver after a complaint is filed, but before litigation is concluded,  
14 the 60% and 67.5% settlement thresholds above will be raised to 80% and 90%,  
15 respectively, as will be stated in the demand letter. (Id. at ¶ 9.)

16 **B. Litigation.**

17 As noted above, in the event that the Receiver's initial settlement offer lapses,  
18 either by failure of a Net Winner to respond or otherwise, the Receiver would then  
19 be authorized, without further order of the Court, to initiate litigation against the Net  
20 Winner. In order to minimize the administrative expenses associated with any  
21 claims by the Receiver against Net Winners, and to maximize judicial efficiency, all  
22 actions relating to such claims would be prosecuted in this Court, which can  
23 exercise ancillary and supplemental jurisdiction over such claims pursuant to 28  
24 U.S.C. §§ 1345 and 1367(a). Accordingly, in connection with the filing of any  
25 action against a Net Winner in this Court, the Receiver proposes promptly filing a  
26 notice of related action with each such complaint, in compliance with L.R. 83-1.3.1.  
27 (Id. at ¶ 10.)  
28

1 **IV. ARGUMENT.**

2 **A. This Court Should Exercise Its Discretion To Establish the**  
3 **Disgorgement Procedures Proposed by the Receiver, and Authorize**  
4 **the Receiver to Commence Disgorgement Efforts.**

5 As a preliminary matter, both the Appointment Order and the Permanent  
6 Injunction already authorize the Receiver to "institute, pursue, and prosecute all  
7 claims and causes of action ... that may now or hereafter exist as a result of the  
8 activities of present or past employees of agents of [the Receivership Entities] and  
9 "to institute ... such actions or proceedings ... which (i) the Receiver deems  
10 necessary and advisable to preserve or recover any [Receivership] Assets, or (ii) the  
11 Receiver deems necessary and advisable to carry out the Receiver's mandate." (See  
12 ECF Nos. 66 at 9:4-13; 113 at 6:29-7:8.)

13 This grant of general litigation authority derives from the broad equitable  
14 powers of the Court in the receivership context. "The power of a district court to  
15 impose a receivership or grant other forms of ancillary relief does not in the first  
16 instance depend on a statutory grant of power from the securities laws. Rather, the  
17 authority derives from the inherent power of a court of equity to fashion effective  
18 relief." SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary  
19 purpose of equity receiverships is to promote orderly and efficient administration of  
20 the estate by the district court for the benefit of creditors." SEC v. Hardy, 803 F.2d  
21 1034, 1038 (9th Cir. 1986). As the appointment of a receiver is authorized by the  
22 broad equitable powers of the court, any distribution of assets must be done  
23 equitably and fairly. See SEC v. Elliot, 953 F.2d 1560, 1569 (11th Cir. 1992).

24 District courts have the broad discretion to determine the appropriate actions  
25 to be taken in the administration and supervision of an equity receivership. SEC v.  
26 Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005). As the Ninth Circuit  
27 has explained:

28 A district court's power to supervise an equity receivership  
and to determine the appropriate action to be taken in the



1 administration of the receivership is extremely broad. The  
2 district court has broad powers and wide discretion to  
3 determine the appropriate relief in an equity receivership.  
4 The basis for this broad deference to the district court's  
5 supervisory role in equity receiverships arises out of the  
6 fact that most receiverships involve multiple parties and  
7 complex transactions. A district court's decision  
8 concerning the supervision of an equitable receivership is  
9 reviewed for abuse of discretion.

6 Id. (citations omitted); see also CFTC v. Topworth Int'l, Ltd., 205 F.3d 1107,  
7 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory  
8 role, and 'we generally uphold reasonable procedures instituted by the district court  
9 that serve th[e] purpose' of orderly and efficient administration of the receivership  
10 for the benefit of creditors."). Accordingly, the Court has broad equitable powers  
11 and discretion in the context of the administration of the instant receivership,  
12 including broad power to authorize the Receiver to undertake litigation, when  
13 necessary and appropriate, and to authorize the Receiver to recover Assets of the  
14 Receivership Entities, including via disgorgement of Profit Amounts from Net  
15 Winners.

16 **B. Transfers to the Net Winners are Subject to Avoidance Under the**  
17 **California Uniform Fraudulent Transfer Act.**

18 Under the California Uniform Fraudulent Transfer Act ("CUFTA"), a transfer  
19 is subject to avoidance and recovery when made with (1) actual intent to defraud or  
20 (2) constructive fraudulent intent based on the lack of reasonably equivalent value  
21 provided in exchange. Cal. Civ. Code § 3439.04(a). Moreover, it is well  
22 established that federal equity receivers have standing to pursue fraudulent transfer  
23 claims on behalf of entities in receivership against the recipients of fraudulent  
24 transfers. See Donell v. Kowell, 533 F.3d 762, 776-777 (9th Cir. 2007).

25 In the context of avoidable transfers under the CUFTA, actual intent to  
26 defraud is presumed when the payments were made from entities operating a Ponzi  
27 scheme. In re Cohen, 199 B.R. 709,717 (B.A.P. 9th Cir. 1996); see also Donell,  
28 533 F.3d at 767; In re AFI Holding, Inc., 525 F.3d 700, 704 (9th Cir. 2008); In re

1 Nat'l Consumer Mortg., LLC, 2013 WL 164247 at \*11-12 (D. Nev. Jan. 14, 2013)  
2 ("Courts presume actual intent in relation to a Ponzi scheme because the debtor  
3 knows at the time of the transfer that the scheme ultimately must collapse."). Once  
4 fraudulent intent is established, the burden then lies with the transferee to show it  
5 took in good faith *and* provided equivalent value in exchange. See Cal. Civ. Code  
6 § 3439.08(a); In re Cohen, 199 B.R. at 718-719. It is the transferor's actual intent  
7 that matters; the transferee's intent does not matter unless it can also show it  
8 provided value in exchange for the transfer. In re Cohen, 199 B.R. at 716-717 ("The  
9 focus of the inquiry into actual intent is on the state of mind of the debtor."); In re  
10 Slatkin, 525 F.3d 805, 814 (9th Cir. 2008), (Holding that transferor's operation of a  
11 Ponzi scheme "with the actual intent to defraud his creditors conclusively  
12 establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and  
13 California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue").

14       Payments made to profiting investors in excess of the amount of their  
15 principal investment are not considered to be in exchange for value. In re United  
16 Energy Corp., 944 F.2d 589, 595 n. 6 (9th Cir. 1991) ("Such excess amounts would  
17 be avoidable because the debtor would not have received reasonably equivalent  
18 value for them."). This is because such profits are fictitious as "they do not  
19 represent a return on legitimate investment activity." See In re Lake State  
20 Commodities, Inc., 253 B.R. 866, 872 (citing In re United Energy Corp., 944 F.2d at  
21 595). Thus, the Ninth Circuit has adopted the "netting rule" whereby amounts paid  
22 to investors are netted against their investments. See Donell v. Ghadrnan,  
23 2013 WL 692853, \*3 (C.D. Cal. Feb. 26, 2013) (citing Donell v. Kowell, 533 F.3d  
24 at 771). Any excess in the form of fictitious profits is subject to disgorgement. Id.

25 \\\  
26 \\\  
27 \\\  
28 \\\

1 **V. CONCLUSION.**

2 For the foregoing reasons, the Receiver respectfully requests that the Court  
3 enter an order authorizing him to commence disgorgement efforts and establish  
4 disgorgement procedures, as set forth herein.

5  
6 Dated: October 12, 2020

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

7  
8  
9 By:           /s/          Joshua A. del Castillo          

JOSHUA A. DEL CASTILLO  
Attorneys for Receiver  
GEOFF WINKLER

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 13, 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 AUTHORITY TO ESTABLISH DISGORGEMENT PROCEDURES AND UNDERTAKE DISGORGEMENT EFFORTS**

**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 13, 2020** at Los Angeles, California.

/s/ Martha Diaz

Martha Diaz

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 LLPP  
1900 Avenue of the Stars, 7<sup>th</sup> Floor  
Los Angeles, CA 90067-4308