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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **Western Division**

12 SECURITIES AND EXCHANGE
13 COMMISSION,

14 Plaintiff,

15 vs.

16 ZACHARY J. HORWITZ; AND
17 1INMM CAPITAL, LLC,

18 Defendants.

Case No. 2:21-cv-02927-CAS-GJS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
MOTION THAT RECEIVER BE
APPOINTED**

Date: January 10, 2022

Time: 10:00 a.m.

Ctrm: 8D

Judge: The Hon. Christina A. Snyder

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1 **I. INTRODUCTION**

2 Plaintiff Securities and Exchange Commission (“SEC”) requests the
3 appointment of a permanent equity receiver in this action against Zachary J. Horwitz
4 (“Horwitz”) and 1inMM Capital, LLC (“1inMM”). In April 2021, this court granted
5 an emergency asset freeze order against Horwitz and 1inMM for operating a Ponzi
6 scheme in which they raised over \$690 million from investors. This court also
7 instituted an asset freeze over Horwitz and 1inMM and halted a pending sale of
8 Horwitz’s residence, which subsequently was sold with net proceeds of more than
9 \$1.4 million going to the court registry for the benefit of investors. The criminal
10 authorities charged and arrested Horwitz contemporaneously with the Commission’s
11 emergency filing in April 2021. On October 4, 2021, Horwitz agreed to plead guilty
12 to one count of securities fraud.

13 An equity receiver is appropriate here to marshal investor assets that were
14 misappropriated into a variety of third party business enterprises by Horwitz for his
15 personal benefit. Notably, none of these business enterprises are alleged to have been
16 involved in the fraud alleged in the SEC’s Complaint. However, Horwitz invested
17 significant funds into these investments, including approximately \$1.6 million
18 invested in several startup companies through an entity called LayJax Ventures, LLC
19 (“LayJax”) and approximately \$21.5 million invested in the production of at least
20 seven independent movies through an entity called Rogue Black, LLC (“Rogue
21 Black”). Horwitz is a member, manager, and half-owner of both LayJax and Rogue
22 Black. Both LayJax and Rogue Black have ongoing business activities, expenses,
23 and expected profits, all of which require management in order to maximize value.
24 However, Horwitz who is out on bond, but expected to be criminally sentenced on
25 January 3, 2022, is not in a position to make these business decisions. Moreover,
26 additional third-parties may also have liability to 1inMM’s investors as a result of
27 money they received from Horwitz and 1inMM during the course of Horwitz’s
28 scheme. Therefore, we request the court appoint a permanent receiver over 1inMM,

1 and over all assets held by, for the benefit of, or under the direct or indirect control of
2 Horwitz, including Horwitz’s interests in LayJax and Rogue Black, and the funds
3 held in the Court Registry, and to identify any other significant assets that may be
4 available to compensate investors.

5 **II. STATEMENT OF FACTS**

6 **A. Procedural History**

7 In early April 2021, the SEC filed an injunctive action against Horwitz and
8 1inMM. (Dkt. 1.) The SEC also alleged that Horwitz had dissipated almost all the
9 funds raised, leaving only a de minimis amount in his primary bank account and in
10 1inMM’s bank accounts. (Dkt. 5 at 20). This court granted an asset freeze against
11 Horwitz and 1inMM, preventing the sale of his multi-million dollar home purchased
12 with investor funds. (Dkt. 18.) Subsequently, the Court granted the parties’ joint *Ex*
13 *Parte* Application for limited relief from the asset freeze to allow the sale of
14 Horwitz’s home to be completed, but to deposit the net proceeds from the sale into
15 the Court Registry Investment System, and not allow Defendants to access those
16 funds. (Dkt. 28.) On May 10, 2021, \$1,417,517.16 was received into the Court
17 Registry from the sale of the house. (Dkt. 37.)

18 On April 6, 2021, the Court issued an order granting the SEC’s application to
19 freeze “all assets, funds or other property of Defendants,” including, but not limited
20 to, certain real property and bank accounts. (Dkt. 18.) On May 14, 2021, the Court
21 issued a further order extending the order freezing all of defendants’ assets “pending
22 further action by this Court.” (Dkt. 43.) This freeze order remains in effect.

23 On May 4, 2021, the United States Attorney’s Office for the Central District of
24 California filed an indictment charging Horwitz with: (1) five counts of securities
25 fraud, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and 15
26 U.S.C. §78ff; (2) six counts of wire fraud, in violation of 18 U.S.C. § 1343; and (3)
27 two counts of aggravated identify theft, in violation of 18 U.S.C. § 1028A(a)(1).
28 *United States v. Horwitz*, No. 2:21-cr-00214-MCS-1 (the “Criminal Action”), Dkt.

1 25. On October 4, 2021, Horwitz pled guilty to one count of securities fraud, with
2 sentencing currently scheduled for January 3, 2021. (Criminal Action Dkt. 47.)
3 Horwitz is out of custody on a million dollar secured bond. (Criminal Action Dkt. 6.)

4 In June 2021, prior to answering the complaint, Defendants moved to stay this
5 action in its entirety pending the disposition of Horwitz's criminal case. (Dkt. 46.) In
6 July 2021, the court granted the motion solely as to Horwitz, ruling that the SEC's
7 action may proceed as to 1inMM which does not have the same Fifth Amendment
8 privilege against self-incrimination concerns as does Horwitz. (Dkt. 50.)

9 In August 2021, third party Rogue Black petitioned this Court for relief to
10 modify the asset freeze in order to open a new bank account to allow Rogue Black to
11 deposit funds and pay certain reasonable necessary business expenses. (Dkt. 53.)
12 The court granted the unopposed request, allowing Rogue Black to open a new
13 account to receive payments in connection with the films it produced and to withdraw
14 funds for payment of the ordinary and necessary business expenses that Rogue Black
15 identified. (Dkt. 54.)

16 As of the date of this filing, defendant 1inMM has not answered or otherwise
17 responded to the Complaint. 1inMM waived service of the summons on April 13,
18 2021, giving it 60 days to answer or otherwise respond to the Complaint. (Dkt. 35.)

19 **B. Additional Sources of Assets for Recovery for Investors**

20 At the time of the SEC's emergency filing of this action, the SEC had
21 identified Horwitz' personal residence as the only significant remaining asset
22 purchased with investor money. (Dkt. 5 at p. 8.) The SEC has now identified assets
23 in addition to Horwitz's personal residence that may be available for recovery if
24 appropriately managed by a Receiver -- in particular, third party business investments
25 obtained through misappropriated investor money.

26 First, Horwitz invested at least \$1,668,092 in LayJax. *See* Declaration of
27 Lorraine Pearson ("Pearson Decl.") at ¶ 11. The majority of these funds came
28 directly from Horwitz's personal bank account (ending in 5270) to the LayJax

1 business account (ending in 7302). *Id.* at ¶ 11(f). During the course of the fraud,
2 Horwitz transferred funds from both of 1inMM business bank accounts to his
3 personal bank account. (Dkt. 6 at ¶ 29.) LayJax is a California limited liability
4 company with its principal place of business in Los Angeles, California. Declaration
5 of Kathryn Wanner (“Wanner Decl.”) ¶ 2, Ex. 1. It is now registered in California
6 under the name Haus Capital, LLC. *Id.* at ¶ 3, Ex. 2. Horwitz is a half-owner and
7 one of two member-managers of LayJax. *Id.* at ¶ 4, Ex. 3. LayJax’s business
8 purpose was to invest in start-up companies, and has invested in numerous start-up
9 companies, including food and beverage companies and beauty and wellness
10 companies. *Id.* at ¶ 5. These investments remain outstanding. *Id.* Should these
11 investments prove lucrative, Horwitz, through his investment of misappropriated
12 1inMM investor funds, is entitled to his contractual portion of the returns on these
13 investments.

14 Second, Horwitz invested at least \$21,513,968 in Rogue Black. Pearson Decl.
15 at ¶ 10. The vast majority of these funds (\$21,506,468) came directly from 1inMM’s
16 two business bank accounts to the Rogue Black account (ending in 1710). *Id.* at ¶ 12.
17 Rogue Black is a Delaware limited liability company with its principal place of
18 business in New York, New York. Wanner Decl. at ¶ 7, Ex. 5. Horwitz is a half-
19 owner and one of two member-managers of Rogue Black through his entity ZJH
20 Enterprises, LLC. Declaration of Andrew Esbenshade (“Esbenshade Decl.” at ¶ 2.
21 Horwitz is also a signatory on Rogue Black’s bank accounts, other than the account
22 opened with the Court’s August 2021 approval. (Dkt. 6 at ¶ 12.) Rogue Black is a
23 film production company. (Dkt. 52 at ¶ 3 (Goldstein Declaration in support of Rogue
24 Black’s Ex Parte Application to Modify Account Freeze). Since inception, Rogue
25 Black has produced at least seven independent films and has two more films in the
26 late stages of production. Wanner Decl. at ¶ 8.

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1 **C. LayJax and Rogue Black Require Ongoing Management to Protect**
2 **and Maximize Investments**

3 Ongoing management - including business and economic decisions - of both
4 LayJax and Rogue Black are required to protect the already invested funds at issue.
5 First, by the terms of its Operating Agreement, Horwitz is one of two managers of
6 LayJax. Wanner Decl. at ¶ 6, Ex. 4. As a manager, Horwitz has responsibilities and
7 powers pertaining to managing the company. Similarly, Rogue Black is an ongoing
8 business concern, which still has two films in the late stages of production. *Id.* at ¶ 8.
9 As a member-manager of Rogue Black, Horwitz has rights and responsibilities to
10 protect and maximize the investment of 1inMM investor funds in Rogue Black.

11 Moreover, Rogue Black has already had to petition this Court for relief from
12 the asset freeze in order to open a bank account to receive deposits and make
13 disbursements authorized by the Court. (Dkt. 53.) Rogue Black required this relief
14 because it was expecting significant monetary returns from films that it had produced,
15 and it needed to deposit those returns in order to protect them, as well as to pay
16 ongoing expenses in order to maximize the value of other outstanding film projects.
17 *Id.* Specifically, Rogue Black also acknowledged that it expected “to incur additional
18 business expenses in the future,” and that it would need “further relief from this
19 Court.” (Dkt. 53 Declaration of Anya J. Goldstein at ¶ 13.)

20 Horwitz’s partner and member-manager in Rogue Black has also had to incur
21 significant out of pocket expenses in running Rogue Black and has not been able to
22 receive his contractually approved salary despite continuing to operate the company
23 and bring value. Esbenshade Decl. at ¶ 2. Specifically, at this time, the remaining
24 member-manager of Rogue Black has incurred or will incur before the end of the year
25 approximately \$49,115 in expenses for business items such as bookkeeping services,
26 tax preparation, company expenses such as phone and internet, film storage, and legal
27 expenses and fees. *Id.* at ¶ 3. This same member-manager has indicated that he
28 supports the SEC’s request for a receiver in this action. *Id.* at ¶ 4.

1 **III. LEGAL ARGUMENT**

2 **A. The SEC’s Relief Sought is Necessary to Protect and Maximize**
3 **Existing Assets**

4 The appointment of a receiver over assets held by Horwitz and 1inMM is
5 necessary and appropriate in these circumstances. District courts generally have
6 broad discretion to appoint an equity receiver in Commission actions. *See SEC v.*
7 *Wencke*, 622 F.2d 1363, 1365 (9th Cir. 1980). The breadth of this discretion “arises
8 out of the fact that most receiverships involve multiple parties and complex
9 transactions.” *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005)
10 (quotation omitted). Courts look to several factors in determining whether to appoint
11 a receiver, including marshaling and preserving the assets and clarifying the financial
12 affairs of the entities. *Wencke*, 622 F.2d at 1372. Other courts have also looked to
13 the integrity of management, the collection of revenue, and the need for proper
14 distribution of investor funds. *See, e.g., SEC v. Credit First Fund*, 2006 U.S. Dist.
15 LEXIS 96697, *49-50 (C.D. Cal. Feb. 13, 2006); *SEC v. Fifth Ave. Coach Lines, Inc.*,
16 289 F. Supp. 3, 42 (S.D.N.Y. 1968).

17 A receiver may be appointed over assets held by, for the benefit of, or under
18 the control of an individual defendant, as well as over a corporate entity. *See, e.g.,*
19 *SEC v. Stanford, et al.*, No. 09-CV-0298 (N.D. Tex. Feb. 17, 2009) (appointing
20 receiver to oversee assets owned or controlled jointly or individually by business
21 entities and individual defendants); *see also In re Sanctuary Belize Litigation*, 408 F.
22 Supp. 3d, 650, 663 (D. Md. 2019) (ordering receiver to take exclusive custody,
23 control, and possession of all assets held by or for the benefit of individual defendants
24 that the receiver values at \$1,000 or more); *FTC v. Business Card Experts, Inc.*, 2007
25 WL 1266636 at *8 (Apr. 27, 2007) (ordering transfer of assets to receiver held
26 individually or jointly by any individual defendant, for the benefit of any individual
27 defendant, or that are under the direct or indirect control of any individual defendant).

28 Here, a receiver is necessary to identify and manage assets held by Horwitz and

1 1inMM that may provide additional recovery for investors, including the interests
2 Horwitz obtained in LayJax and Rogue Black by providing a total of more than \$23
3 million in funds to those entities, most of which came directly from the 1inMM
4 business bank accounts. Horwitz is not an acceptable custodian of those interests,
5 given his fraudulent conduct and his guilty plea in the criminal proceedings against
6 him. However, without this relief, Horwitz who remains out of custody on a bond,
7 could decide to take advantage of his contractual rights over these assets.

8 Specifically, in the case of LayJax, a receiver is necessary to assess and
9 marshal the value of LayJax's investments through the exercise, as needed, of
10 Horwitz's rights and interests as a half-owner, member, and manager entitled to
11 priority distributions. For Rogue Black, a receiver is necessary to assess and
12 maximize the value of the films already produced by Rogue Black, to assist in the
13 judicious use of resources to complete two films in the late stages of production, and
14 to monetize those assets for investors using Horwitz's rights as a half-owner, member
15 and manager.

16 **B. The SEC's Relief Sought Is Also Necessary to Identify Other Assets**
17 **for Recovery**

18 A receiver is further justified by the potential to recover from third-parties who
19 received funds from 1inMM, including any net-winners in Horwitz's scheme, and to
20 identify and pursue other significant assets that may be available for recovery. *See,*
21 *e.g., SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) (primary purpose of equity
22 receivership is to promote orderly and efficient administration of the estate for the
23 benefit of investors) (citations omitted).

24 A receiver is also justified to assist with pursuing an efficient collection and
25 distribution of assets to the hundreds of victims of Horwitz's scheme, some of whom
26 are proceeding independently in investor suits to recover available assets. Since the
27 Commission filed its emergency action, certain of Horwitz's investors have already
28 filed lawsuits against 1inMM and other investors in an effort to recover funds for

1 themselves. *See Blake Michael Whitmore, et al. v. Zachary Horwitz, et al.*, Case No.
2 21-cv-3393 (C.D. Cal); *see also Gould v. Crookston*, Case No. 2021-L-010149, in the
3 Circuit Court of Cook County.

4 Finally, a receiver would be able to take over management and distribution of
5 the funds held in the Court Registry after the sale of Horwitz’s home purchased with
6 investor funds.

7 **C. The Relief Sought Is Consistent with the Purpose of the Asset Freeze**
8 **and Stay of the Civil Action against Horwitz**

9 The appointment of a receiver over assets held by Horwitz and 1inMM is
10 consistent with the purpose of the Court’s ongoing asset freeze and the stay of the
11 civil action against Horwitz. First, the Court’s asset freeze remains ongoing, freezing
12 all of Defendants’ assets. The purpose of the asset freeze is to protect assets and
13 preserve them for collection. *See* Dkt. 50 at fn. 3 (“[T]he Court’s prior orders
14 freezing all of defendants’ assets, which ameliorate the risk that Horwitz could
15 dissipate assets during a stay.”) Here, a receiver over assets obtained through
16 investor funds will continue to protect, preserve, and maximize those assets.

17 Second, appointment of a Receiver over assets held by Horwitz and 1inMM
18 would be consistent with the terms of the stay of the civil action against Horwitz.
19 Horwitz’s counsel has confirmed that Horwitz does not oppose the appointment of a
20 Receiver. Wanner Decl. at ¶ 10. Moreover, by appointing a receiver over these
21 assets, the Court can take Horwitz out of the assessment of how to protect and
22 maximize the funds, and avoid situations where Horwitz could be required to weigh
23 in on business decisions, but may not do so due to his Fifth Amendment concerns.

24 **IV. THE SEC’S RECEIVER RECOMMENDATION**

25 The SEC recommends that Michele Vives of Douglas Wilson Companies be
26 appointed receiver in this action. Attached as Exhibit 6 to the Wanner Declaration is
27 a copy of a letter which sets forth her qualifications, the qualifications of her firm, a
28 proposal to provide services as a receiver, and additional information on her firm and

1 their services.

2 Ms. Vives sent the information attached as Exhibit 6 to the Wanner Declaration
3 to the SEC at the request of counsel for the SEC in this action, who solicited this
4 information in conformity with internal SEC procedures for selecting candidates to
5 recommend for appointment by federal district courts as receivers in SEC actions.
6 The SEC obtained proposals from two other qualified receiver candidates and
7 evaluated all three proposals before selecting Ms. Vives as its recommended
8 candidate for receiver in this action. If the Court desires, the SEC will provide
9 information regarding these or other candidates.

10 The SEC is recommending Ms. Vives for several reasons. Ms. Vives is an
11 experienced receiver with significant experience who has also addressed receivership
12 matters with smaller asset values. Ms. Vives is associated with Douglas Wilson
13 Companies, which provides services including receivership, forensic accounting,
14 business planning, consulting and other related work. Douglas Wilson Companies
15 has on staff a certified public accountant and other team members who can quickly
16 analyze the value of investments and assist with determining how to maximize value.
17 In the SEC's experience, it is more economical to have a receiver that has such
18 capabilities in-house, in contrast to a receiver that would need to hire, for example, an
19 outside or separate forensic accounting firm or other professionals to perform
20 necessary receivership duties. Moreover, Ms. Vives and her firm have extensive
21 experience with managing receivership entities, as is stated in the attached
22 information. Ms. Vives' regular hourly rate as a receiver is \$450 per hour. However,
23 Ms. Vives has agreed to discount her rate for this matter to \$405 per hour, which is
24 reasonable, particularly in view of her substantial experience.

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1 For these reasons, and given Ms. Vives' impressive qualifications, as set forth
2 in the proposal attached as Exhibit 6, the SEC respectfully recommends that the Court
3 appoint Ms. Vives as receiver in this matter.

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5 Dated: December 8, 2021

Respectfully submitted,

6 /s/ Kathryn C. Wanner

7 Kathryn C. Wanner
8 Counsel for Plaintiff
9 Securities and Exchange Commission
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1 **PROOF OF SERVICE**

2 I am over the age of 18 years and not a party to this action. My business address is:

3 U.S. SECURITIES AND EXCHANGE COMMISSION,
4 444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

5 On December 8, 2021, I caused to be served the document entitled
6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
7 **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S MOTION**
8 **THAT RECEIVER BE APPOINTED** on all the parties to this action addressed as
9 stated on the attached service list:

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

15 **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s),
16 which I personally deposited with the U.S. Postal Service. Each such envelope was
17 deposited with the U.S. Postal Service at Los Angeles, California, with first class
18 postage thereon fully prepaid.

19 **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility
20 regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los
21 Angeles, California, with Express Mail postage paid.

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

24 **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated
25 by United Parcel Service (“UPS”) with delivery fees paid or provided for, which I
26 deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at
27 Los Angeles, California.

28 **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 under penalty of perjury that the foregoing is true and correct.

Date: December 8, 2021

/s/ Kathryn C. Wanner

KATHRYN C. WANNER

1 ***SEC v. Zachary Horwitz, et al.***
2 **United States District Court – Central District of California**
3 **Case No. 2:21-cv-02927-CAS-GJS**
4 **LA-5212**

5 **SERVICE LIST**

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14 ***(served via CM/ECF)***