

1 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
2 DAVID R. ZARO (BAR NO. 124334)  
PETER A. GRIFFIN (BAR NO. 306201)  
3 865 South Figueroa Street, Suite 2800  
Los Angeles, California 90017-2543  
4 Phone: (213) 622-5555  
Fax: (213) 620-8816  
5 E-Mail: dzaro@allenmatkins.com  
pgriffin@allenmatkins.com

6 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
7 EDWARD G. FATES (BAR NO. 227809)  
8 One America Plaza  
600 West Broadway, 27th Floor  
9 San Diego, California 92101-0903  
Phone: (619) 233-1155  
10 Fax: (619) 233-1158  
E-Mail: tfates@allenmatkins.com

11 Attorneys for Receiver  
12 THOMAS A. SEAMAN

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15 SOUTHERN DIVISION

16 SECURITIES AND EXCHANGE  
COMMISSION,  
17 Plaintiff,

18 v.

19 EMILIO FRANCISCO; PDC CAPITAL  
GROUP, LLC; CAFFE PRIMO  
INTERNATIONAL, INC.; SAL ASSISTED  
20 LIVING, LP; SAL CARMICHAEL, LP; SAL  
CITRUS HEIGHTS, LP; SAL KERN  
21 CANYON, LP; SAL PHOENIX, LP; SAL  
WESTGATE, LP; SUMMERPLACÉ AT  
22 SARASOTA, LP; SUMMERPLACE AT  
CLEARWATER, LP; SUMMERPLACE AT  
CORRELL PALMS, LP; TRC TUCSON, LP;  
23 CLEAR CURRENTS WEST, LP; CAFFE  
PRIMO MANAGEMENT, LP; CAFFE  
24 PRIMO MANAGEMENT 102, LP; CAFFE  
PRIMO MANAGEMENT 103, LP; CAFFE  
25 PRIMO MANAGEMENT 104, LP; CAFFE  
PRIMO MANAGEMENT 105, LP; CAFFE  
26 PRIMO MANAGEMENT 106, LP; CAFFE  
PRIMO MANAGEMENT 107, LP; and  
27 CAFFE PRIMO MANAGEMENT 108, LP,  
28 Defendants.

Case No. 8:16-cv-02257-CJC-DFM

**NOTICE OF MOTION AND  
MOTION FOR TURNOVER OF  
FUNDS TRANSFERRED TO  
BIENERT, MILLER &  
KATZMAN, PLC;  
MEMORANDUM OF POINTS  
AND AUTHORITIES**

Date: October 23, 2017  
Time: 1:30 p.m.  
Ctrm: 9B, 9th Floor  
Judge: Hon. Cormac J. Carney

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on October 23, 2017, at 1:30 p.m. in  
3 Courtroom 9B of the above-entitled Court, located at 411 W. Fourth Street,  
4 Santa Ana, California 92701, Thomas A. Seaman ("Receiver"), the Court-appointed  
5 receiver for the Defendant entities<sup>1</sup> (collectively, "Receivership Entities"), will and  
6 hereby does move the Court for turnover of funds transferred from Receivership  
7 Entity KPF Capital, LLC to Bienert, Miller & Katzman, PLC ("Motion").

8 This Motion is based upon this Notice of Motion and Motion, the attached  
9 Memorandum of Points and Authorities, the Declaration of Thomas A. Seaman, the  
10 documents and pleadings already on file in this action, and upon such further oral  
11 and documentary evidence as may be presented at the time of hearing.

12

13

14 <sup>1</sup> The entities included in the receivership are PDC Capital Group, LLC ("PDC"); Caffè Primo  
15 International, Inc. ("Caffè Primo"); SAL Senior Living, LP ("SAL Senior Living");  
16 SAL Carmichael, LP ("SAL Carmichael"); SAL Citrus Heights, LP ("SAL Citrus Heights");  
17 SAL Kern Canyon, LP ("SAL Kern Canyon"); SAL Phoenix, LP ("SAL Phoenix");  
18 SAL Westgate, LP ("SAL Westgate"); Summerplace at Sarasota, LP ("Sarasota");  
19 Summerplace at Clearwater, LP ("Clearwater"); Summerplace at Correll Palms, LP ("Correll  
20 Palms"); TRC Tucson, LP ("TRC Tucson"); Clear Currents West, LP ("Clear Currents"); Caffè  
21 Primo Management, LP ("CPM"); Caffè Primo Management 102, LP ("CPM 102"); Caffè  
22 Primo Management 103, LP ("CPM 103"); Caffè Primo Management 104, LP ("CPM 104");  
23 Caffè Primo Management 105, LP ("CPM 105"); Caffè Primo Management 106, LP  
24 ("CPM 106"); Caffè Primo Management 107, LP ("CPM 107"); Caffè Primo  
25 Management 108, LP ("CPM 108"); and their subsidiaries and affiliates, including but not  
26 limited to, Summerplace Management, LLC ("Summerplace Management"); PDC Partners  
27 Management, Inc. ("PDC PM"); and FDC Partners Management, Inc. ("FDC PM")  
28 (collectively, "Named Entities"); and their subsidiaries and affiliates Summerplace  
Management, LLC; PDC Partners Management, Inc.; FDC Partners Management, Inc.;  
KPF Capital, LLC; FDC Capital Partners, LLC; MSL US Fund I, LLC; MPoint Land &  
Development, Inc.; Woodcrest Construction Management, Inc.; Professional Loading  
Service, LLLP; WDC Capital Group, LLC; WDC Capital Partners, LLC; KPF Investment  
Management, Inc.; Meridian Summerplace at Snug Harbor, LLC; Meridian Summerplace at  
Snug Harbor, LP; Summerplace at Correll Palms, LLC; Summerplace at Correll Palms, LP;  
Summerplace at Winter Haven, LLC; Summerplace at Winter Haven, LP; Summerplace at Sun  
City, LLC; Summerplace at Sun City, LP; Meridian at Sun City, LLC; Summerplace at  
Orlando-Summerfield, LLC; Summerplace at Orlando-Summerfield, LP; Summerplace at  
Kissimmee, LLC; Summerplace at Kissimmee, LP; Summerplace at Merced, LLC;  
Summerplace at Merced, LP; SAL-PDC, LLC; SLALMC, LLC; SAL Lincoln Village, IL;  
Lincoln Village IL, LLC; Lincoln Village IL, LP; Lincoln Village SNF, LLC; Lincoln  
Village SNF, LP; FCM Development Group, LLC; ADC Capital Group, LLC; NCDC Capital  
Partners, LLC; Summerplace at Bonney Lake MC, LLC; Summerplace at Bonney  
Lake MC, LP; Summerplace Management, LLC; Summerplace Development, LLC; Defiance  
Charters, LLC; and Red Sunshine Holdings, Ltd. (collectively, "Affiliated Entities").

1           **Procedural Requirements:** If you oppose this Motion, you are required to  
2 file your written opposition with the Office of the Clerk, United States District  
3 Court, 411 W. Fourth Street, Santa Ana, California 92701, and serve the same on  
4 the undersigned not later than 21 days prior to the hearing.

5           IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the  
6 above date, the Court may grant the requested relief without further notice. This  
7 Motion is made following the conference of counsel pursuant to L.R. 7-3.

8  
9 Dated: September 15, 2017

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:           /s/ Edward Fates          

EDWARD G. FATES  
Attorneys for Receiver  
THOMAS A. SEAMAN

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

**TABLE OF CONTENTS**

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

**Page**

I. INTRODUCTION ..... 1

II. BACKGROUND FACTS ..... 2

    A. KPF's Inclusion in the Receivership as an Affiliated Entity..... 2

    B. The Transfer from KPF to BM&K ..... 7

III. ARGUMENT ..... 8

    A. Immediate Turnover of the Funds..... 10

    B. Authority to Pursue Claims as Necessary ..... 11

IV. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

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

**Page**

**Cases**

*CFTC v. Topworth Int'l, Ltd.*,  
205 F.3d 1107 (9th Cir. 1999)..... 9

*Cohen (In re)*,  
199 B.R. 709 (9th Cir. 1996)..... 11

*Donell v. Kowell*,  
533 F.3d 762 (9th Cir. 2008)..... 11

*SEC v. Capital Consultants, LLC*,  
397 F.3d 733 (9th Cir. 2005)..... 9

*SEC v. Elliot*,  
953 F.2d 1560 (11th Cir. 1992)..... 9

*SEC v. Hardy*,  
803 F.2d 1034 (9th Cir 1986)..... 8

*SEC v. Wencke*,  
622 F.2d 1363 (9th Cir. 1980)..... 8

**Statutes**

California Civil Code § 3439.04(a) ..... 11

California Civil Code § 3439.04(a)(2) ..... 11

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

In December 2016, Robert Ferrante caused KPF Capital, LLC ("KPF"), an entity affiliated with the named receivership entities and therefore included in the receivership, to wire \$50,000 to the client trust account of law firm Bienert, Miller & Katzman, LLP ("BM&K"). The funds were a retainer for BM&K to represent Mr. Ferrante in personal legal matters. Neither KPF nor any of the other Receivership Entities received any benefit from the transfer, which only benefitted Mr. Ferrante personally.

When the Receiver learned of the transfer in May 2017, he contacted BM&K, through counsel, and demanded return of the funds. BM&K did not respond. When the Receiver's counsel followed up, BM&K acknowledged receipt of the \$50,000 transfer and stated that it represents Mr. Ferrante on personal legal matters. The firm also stated that some of the \$50,000 had been applied to legal fees, but some remained in its trust account. BM&K agreed that the funds would not be touched further and stated that it would discuss the matter with Mr. Ferrante and provide a response to the Receiver's demand. No response was provided, however. When the Receiver's counsel followed up again, BM&K eventually stated that \$27,000 remained in its trust account and \$23,000 had been applied to fees. BM&K offered to settle the matter, but did not agree to turn the funds over. The Receiver made a counter settlement offer, which was not accepted.

Accordingly, the Receiver now seeks an order compelling BM&K to turn over the \$50,000, including an order directing Mr. Ferrante to instruct BM&K to return the \$50,000 to the Receiver. The funds rightfully belong to KPF and therefore should be preserved and protected for the benefit of investors. Mr. Ferrante and BM&K are in violation of the Court's preliminary injunction order ("PI Order") by failing to turn the funds over.

1 If the Court believes that a separate action is required to recover the \$50,000,  
2 or any portion thereof, the Receiver seeks permission to bring an action against  
3 BM&K to recover such funds. The receivership estate, including KPF, received no  
4 value in exchange for the funds, which were taken from the company by  
5 Mr. Ferrante for his personal benefit shortly before this case was filed. Such relief  
6 is necessary to protect the receivership estate and investors.

7 **II. BACKGROUND FACTS**

8 **A. KPF's Inclusion in the Receivership as an Affiliated Entity**

9 At the outset of the receivership, the Receiver took possession and control of  
10 the Named Entities and those immediately identifiable subsidiaries and affiliates,  
11 including, but not limited to, each of the limited liability companies ("LLCs")  
12 associated with the limited partnerships ("LPs") named in the complaint. As  
13 discussed in the Receiver's First Report (Dkt. No. 32), the Receiver discovered  
14 additional LPs and LLCs that were managed and controlled by Defendant Emilio  
15 Francisco, Robert Ferrante, and Chris Fox ("Principals"). The Receiver and his  
16 counsel spent considerable time gathering and analyzing information as to these LPs  
17 and LLCs and their relationship to the Named Entities and the originally identified  
18 affiliates, including, but not limited to, issuing subpoenas to Mr. Ferrante, some of  
19 the Affiliated Entities, and third parties. Declaration of Thomas A. Seaman filed  
20 herewith ("Seaman Decl."), ¶ 2.

21 In addition, as discussed in the Receiver's Second Report (Dkt. No. 68), on  
22 several occasions, the Receiver and his counsel met with the Principals at the  
23 Receiver's office and at their offices. At these meetings, the Principals and their  
24 counsel provided the Receiver with some documents and information regarding their  
25 overall enterprise. Based on the totality of the information reviewed by the  
26 Receiver, it became apparent that the sole source of funding for the Affiliated  
27 Entities was EB-5 Investor money or the proceeds of transactions associated with  
28 EB-5 Investor money. Furthermore, Mr. Ferrante, Mr. Francisco and Mr. Fox were

1 the people who were principally responsible for directing the use of EB-5 Investor  
2 money with regard to these Affiliated Entities. On April 11, 2017, the Receiver  
3 advised Mr. Ferrante and Mr. Fox that the Affiliated Entities, including KPF, were  
4 within the scope of the receivership under the PI Order due to their status as  
5 affiliates of the Named Entities. The Receiver therefore demanded that Mr. Ferrante  
6 and Mr. Fox turn control of the Affiliated Entities over to the Receiver. Seaman  
7 Decl., ¶ 3.

8 Although Mr. Ferrante and Mr. Fox, through their counsel, stated that they  
9 dispute that the Affiliated Entities are in fact affiliates, they nevertheless agreed to  
10 turn control of them over to the Receiver. The transition in control took place on  
11 April 17, 2017, at the MPoint Land & Development offices at 15300 Barranca  
12 Parkway in Irvine, California. The Receiver and his counsel met with Mr. Ferrante  
13 and one of his attorneys, Eric Chess Bronk, imaged the computers used by the  
14 Affiliated Entities (with assistance from the Receiver's forensic computer specialist),  
15 gathered hard copy documents of the Affiliated Entities, and took control of their  
16 bank accounts. Seaman Decl., ¶ 4.

17 On June 29, 2017, Mr. Ferrante and Mr. Fox filed an *ex parte* application  
18 seeking to unfreeze a bank account of MPoint Capital Management ("MPoint"),  
19 arguing that MPoint was not affiliated with the Named Entities and therefore should  
20 not be included in the receivership. Dkt. No. 75. The Receiver and the SEC  
21 opposed the application, which the Court denied, finding that MPoint is controlled  
22 by Mr. Ferrante, "one of the three principals in Defendant Francisco's EB-5  
23 scheme," is directly owned by MPoint Partners, which holds controlling interests in  
24 "several of the corporate Defendants in this case," and therefore "is clearly an  
25 affiliate within the meaning in the injunction." Dkt. Nos. 76, 77, 80.

26 The affiliation between KPF and the Named Entities is even more clear. KPF  
27 was also controlled by Mr. Ferrante until he ceded control to the Receiver on  
28 April 17, 2017. Moreover, pursuant to the agreement signed between Defendant



1 Francisco and Mr. Ferrante in January 2016, KPF purported to hold controlling  
 2 interests in various assisted living projects that received EB-5 investor funds,  
 3 including projects named in the complaint and expressly included in the receivership  
 4 (SAL Phoenix, Summerplace at Sarasota, Summerplace at Clearwater,  
 5 Summerplace at Correll Palms, TRC Tucson). Seaman Decl., ¶ 5.

6 KPF was also the recipient of significant funds from the Named Receivership  
 7 Entities. As discussed in the Receiver's Second Report (Dkt. No. 68, pp. 20-24), in  
 8 December 2016, the Principals caused the Receivership Entities to encumber five  
 9 projects with deeds of trust reflecting a total \$7.7 million in debt. After the lenders  
 10 set aside \$496,000 in interest reserves, the net cash loan proceeds received by the  
 11 Principals were \$7.204 million. More specifically, in early December 2016, just  
 12 weeks before the Commission's case was filed, the Principals by and through KPF,  
 13 PDC, and MPoint, borrowed \$7.7 million using as collateral the SAL Assisted  
 14 Living, SAL Citrus, SAL Carmichael, SAL Kern Canyon and Sarasota properties.  
 15 These properties received little or no benefit from the loans. Seaman Decl., ¶ 6.

16 These were hard money loans made to MPoint bearing interest rates ranging  
 17 from 6%-11% and maturing at dates ranging from 3 months to 24 months. Neither  
 18 MPoint nor any of the five projects produce income or have other reserves available  
 19 to pay the loans. Nor has the Receiver discovered concrete plans for the repayment  
 20 of these short term debts, aside from the SAL Lincoln bond scheme. As such, the  
 21 business reasoning for taking out the loans is, at best, a mystery. Seaman Decl., ¶ 7.

22 The net loans proceeds after interest reserves were as follows:

23	SAL Lincoln	\$5,000,000.00
24	SAL Citrus	570,247.76
25	SAL Carmichael	566,452.34
26	SAL Kern Canyon	1,067,725.70
	<b>Total Loan Proceeds</b>	<b><u>\$7,204,425.80</u></b>

27 The following is a summary of how the foregoing net loan proceeds were  
 28 used:

	<b>Use of Net Loan Proceeds</b>	<b>\$ Millions</b>
1		
2	Used on collateral for loans	\$1.296
3	Used on non-collateral projects	.777
4	Used for Caffè Primo	.100
5	Used for purported expenses and unknown purposes	.252
6	Taken by KPF	1.025
7	Taken by Huttenheim	.398
8	Seized by Receiver	3.356
9	<b>Total Loan Proceeds</b>	<b><u>\$7.204</u></b>

10 Seaman Decl., ¶ 8.

11 Of the \$1,025,000 taken by KPF, only \$60,000 has been recovered by the  
12 Receiver. The Receiver has thus far traced the funds taken by KPF to both  
13 individuals and various projects. A review of KPF's December 2016 and  
14 January 2017 bank statements shows that KPF may have used some of the loan  
15 proceeds to purchase or improve various projects, as well as for payments to insiders  
16 and their personal expenses. For example, the bank records show that KPF made  
17 the following disbursements:

- 18 • Wire to Robert Ferrante for \$12,700;
- 19 • Payment of \$238,000 to Wallis Boyington who performed the architectural  
20 drawings for most of the named Summerplace projects in Florida, and  
21 Affiliated Entities' investments in other Florida projects;
- 22 • Wires to Mexico for the Beroca yacht owned by the Receivership Entities  
23 totaling \$40,627.48;
- 24 • Transfers to a Florida project identified as Summerplace at Stuart totaling  
25 \$9,939.76;
- 26 • Transfers to Spruce Creek Commercial Properties in Ocala Florida totaling  
27 \$100,000 to make mortgage payments for the Summerplace at Orlando  
28 project;
- The transfer at issue in this Motion to BM&K in the amount of \$50,000;  
and

- 1 • A transfer to William Wurch in the amount of \$12,500, which appears to  
2 be another legal retainer.

3 Seaman Decl., ¶ 9.

4 Even after the temporary restraining order was entered on January 5, 2017,  
5 KPF continued to disburse the loan proceeds. Specifically, on January 15, 2017,  
6 KPF received an additional \$25,000 and on January 19, 2017, KPF received \$60,000  
7 of the loan proceeds, which \$60,000 payment the Receiver then recovered. Post-  
8 receivership, KPF made various other payments using the loan proceeds, including  
9 the following:

10	01/05/2017	Jose Rafael Gastelum (yacht captain)	\$5,000.00
11	01/05/2017	Wright Credit Services (Chris Fox)	\$12,000.00
12	01/06/2017	Dennis Miller	\$18,800.00
13	01/06/2017	Chris Fox	\$25,000.00
14	01/06/2017	Eric Bronk	\$10,000.00
15	01/06/2017	Eric Bronk	\$10,000.00
16	01/06/2017	Robert Ferrante	\$25,000.00
17	01/06/2017	Robert Ferrante	\$25,000.00
18	01/06/2017	Tom Bienert	\$50,000.00
19	01/06/2017	Balboa Bay Club (Ferrante March rent)	\$9,000.00
20	01/06/2017	Balboa Bay Club (Ferrante April rent)	\$9,000.00
21	01/06/2017	Balboa Bay Club (Ferrante May rent)	\$9,000.00
22	01/06/2017	Rick Weintraub	\$25,000.00
23	01/06/2017	Chanel Ferrante	\$15,000.00
24	01/06/2017	Cash	\$2,500.00
25	01/13/2017	David Friedman	\$1,500.00
26	01/18/2017	Unknown payee	\$1,853.28
27	01/19/2017	Robert Ferrante	\$25,000.00
28	01/19/2017	Unknown payee	\$8,900.00

25 Seaman Decl., ¶ 10.

26 This is not a complete accounting of all loan proceeds disbursed by KPF. The  
27 Receiver is continuing his accounting work and, to the extent necessary, the  
28

1 Receiver may seek authority to pursue claims against additional recipients of these  
2 funds. Seaman Decl., ¶ 11.

3 In summary, KPF was an integral part of the Receivership Entities' enterprise,  
4 was controlled by the Principals, received and disbursed significant sums relating to  
5 the assisted living projects included in the receivership, and therefore should be  
6 confirmed as an Affiliated Entity subject to the Court's PI Order. Moreover,  
7 although the Receiver has been in control of KPF since April 2017, no evidence has  
8 been put forth by the Principals suggesting KPF is not an Affiliated Entity. Seaman  
9 Decl., ¶ 12.

10 **B. The Transfer from KPF to BM&K**

11 On December 9, 2016, KPF wired \$50,000 to BM&K. When the Receiver  
12 learned of the transfer in May 2017, he contacted BM&K, through counsel, and  
13 demanded return of the funds. BM&K did not respond. When the Receiver's  
14 counsel followed up, BM&K acknowledged receipt of the \$50,000 transfer and  
15 stated that it represents Mr. Ferrante on personal legal matters. The firm also stated  
16 that some of the \$50,000 had been applied to legal fees, but some remained in its  
17 trust account. BM&K agreed that the funds would not be touched further and stated  
18 that it would discuss the matter with Mr. Ferrante and provide a response to the  
19 Receiver's demand. No response was provided, however. When the Receiver's  
20 counsel followed up again, BM&K eventually stated that \$27,000 remained in its  
21 trust account and \$23,000 had been applied to fees.<sup>2</sup> Seaman Decl., ¶ 13.

22 As the Court noted in its order concerning MPoint, money is fungible and all  
23 assets of the Receivership Entities were frozen and put in receivership, so it is not  
24 necessary to establish that the source of the funds KPF wired to BM&K was EB-5  
25 investor funds. Dkt. No. 80. Nevertheless, the transfer to BM&K was made shortly  
26 after Woodcrest Construction, which received the net proceeds of the \$5,000,000  
27

28 \_\_\_\_\_  
<sup>2</sup> BM&K has not stated when the transfer(s) from its client trust account to itself occurred.

1 loan from MCC US, Inc. ("MCC Loan"), wired \$1,000,000 to KPF in early  
2 December 2016. The MCC Loan was made to MPoint Land & Development, which  
3 was also controlled by Mr. Ferrante and Chris Fox ("MPoint Land"), and was  
4 secured by mortgages on the Lincoln and Sarasota properties. Therefore, the funds  
5 wired to BM&K are derived from a loan taken by MPoint Land against properties  
6 purchased with EB-5 investor funds. The MCC Loan impairs the value of these  
7 properties and the amount the Receiver will be able to recover from them for the  
8 benefit of investors. Seaman Decl., ¶ 14.

9 As discussed above, Mr. Ferrante and BM&K have largely ignored the  
10 Receiver's demand that the funds be returned, finally making an offer<sup>3</sup> to settle the  
11 matter almost three months after the demand was made and only after numerous  
12 follow up communications from the Receiver's counsel. The Receiver determined  
13 that the settlement offer was unacceptable, but recognizing that some expense would  
14 be incurred in recovering the funds, offered to accept \$45,000 and allow BM&K to  
15 retain \$5,000. BM&K and Mr. Ferrante did not respond to the counter offer or to  
16 further follow up communications from the Receiver's counsel. Therefore, despite  
17 the Receiver's efforts, it does not appear the funds will be turned over or the matter  
18 consensually resolved. Seaman Decl., ¶ 15.

### 19 **III. ARGUMENT**

20 "The power of a district court to impose a receivership or grant other forms of  
21 ancillary relief does not in the first instance depend on a statutory grant of power  
22 from the securities laws. Rather, the authority derives from the inherent power of a  
23 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369  
24 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly  
25 and efficient administration of the estate by the district court for the benefit of  
26 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment  
27

---

28 <sup>3</sup> BM&K labeled its email communicating the offer as a "Confidential Settlement  
Communication," so the Receiver has not disclosed the amount of the offer herein.

1 of a receiver is authorized by the broad equitable powers of the court, any  
2 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,  
3 953 F.2d 1560, 1569 (11th Cir. 1992).

4 District courts have the broad power of a court of equity to determine the  
5 appropriate action in the administration and supervision of an equity receivership.  
6 *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth  
7 Circuit explained:

8 A district court's power to supervise an equity receivership  
9 and to determine the appropriate action to be taken in the  
10 administration of the receivership is extremely broad. The  
11 district court has broad powers and wide discretion to  
12 determine the appropriate relief in an equity receivership.  
13 The basis for this broad deference to the district court's  
14 supervisory role in equity receiverships arises out of the  
15 fact that most receiverships involve multiple parties and  
16 complex transactions. A district court's decision  
17 concerning the supervision of an equitable receivership is  
18 reviewed for abuse of discretion.

14 *Id.* (citations omitted); *see also CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115  
15 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,  
16 and 'we generally uphold reasonable procedures instituted by the district court that  
17 serve th[e] purpose' of orderly and efficient administration of the receivership for  
18 the benefit of creditors."). Accordingly, the Court has broad discretion in issuing  
19 orders regarding the administration of the receivership.

20 **A. Immediate Turnover of the Funds**

21 Here, the PI Order requires that all "officers, agents, servants, employees and  
22 attorneys, and any other persons who are in custody, possession or control of any  
23 assets" of the entities in receivership, including the Affiliated Entities, "shall  
24 forthwith give access to and control of such property" to the Receiver. Dkt. No. 36,  
25 Section X. Moreover, the PI Order requires the entities in receivership, including  
26 their "officers, agents, servants, employees, and attorneys" to cooperate with the  
27 Receiver and prohibits them from taking any "action, directly or indirectly, to  
28 hinder, obstruct, or otherwise interfere" with the Receiver's performance of his

1 duties, "or to interfere in any manner, directly or indirectly, with the custody,  
2 possession, management, or control" of the assets of the Receivership Entities by the  
3 Receiver. *Id.* at Section XIII.

4 These provisions dictate that (a) all entities in receivership, including KPF,  
5 and their officers, including Mr. Ferrante, immediately turn over all assets of the  
6 Receivership Entities to the Receiver, (b) KPF and Mr. Ferrante cooperate with the  
7 Receiver's requests in the performance of his duties, and (c) KPF and Mr. Ferrante  
8 take no action, directly or indirectly, to interfere with the Receiver's performance of  
9 his duties, including the taking control of assets of the Receivership Entities.

10 Despite these provisions, Mr. Ferrante and BM&K have refused to turn over  
11 the \$50,000 transferred to BM&K by KPF. There is no legitimate basis for  
12 Mr. Ferrante and BM&K to refuse to turn over these funds, which rightfully belong  
13 to KPF and therefore the receivership estate. Accordingly, BM&K and Mr. Ferrante  
14 are in violation of the PI Order and the Court should order BM&K to immediately  
15 turn over the \$50,000 to the Receiver or face contempt sanctions. The Court should  
16 also order Mr. Ferrante, as BM&K's client, to instruct the firm to turn over the funds  
17 to the Receiver. Mr. Ferrante should likewise be subject to contempt sanctions if he  
18 refuses to comply.

19 **B. Authority to Pursue Claims as Necessary**

20 The Receiver submits that there is more than sufficient grounds for the Court  
21 to order immediate turnover of the \$50,000. If, however, the Court determines that  
22 a separate action is necessary to recover the funds or any portion thereof, the  
23 Receiver requests authority to pursue claims, including fraudulent transfer claims,  
24 against BM&K and/or Mr. Ferrante to recover such funds. In that event, the  
25 Receiver also requests that BM&K be directed to provide an accounting reflecting  
26 the dates and amounts of the \$23,000 in fees incurred and the dates and amounts of  
27 payments from its client trust account to itself.

28



1 Under California's Uniform Voidable Transactions Act, a transfer is subject to  
2 avoidance and recovery when made with (1) actual intent to defraud, or  
3 (2) constructive fraudulent intent based on the lack of reasonably equivalent value  
4 provided in exchange. *See* Cal. Civ. Code § 3439.04(a); *see also Donell v. Kowell*,  
5 533 F.3d 762, 770-771 (9th Cir. 2008); *In re Cohen*, 199 B.R. 709, 715-716  
6 (9th Cir. 1996).

7 Constructive fraud is found where the transfer was made without receiving  
8 reasonably equivalent value in exchange and either:

9 (A) Was engaged or was about to engage in a business or a  
10 transaction for which the remaining assets of the debtor  
11 were unreasonably small in relation to the business or  
12 transaction. [Or,]

13 (B) Intended to incur, or believed or reasonably should  
14 have believed that the debtor would incur, debts beyond  
15 the debtor's ability to pay as they became due.

16 *See* Cal. Civ. Code § 3439.04(a)(2).

17 Here, KPF transferred the \$50,000 to BM&K's client trust account, \$23,000  
18 of which was then transferred to BM&K to pay Mr. Ferrante's personal legal  
19 expenses. KPF received nothing of value in exchange for the \$50,000, which only  
20 benefitted Mr. Ferrante personally.

21 Moreover, KPF is part of the overall EB-5 investment enterprise operated by  
22 the Principals. The enterprise raised approximately \$70 million from approximately  
23 140 investors. The assets of the receivership estate are woefully insufficient in  
24 value to compensate investors for their losses. There are also various creditors with  
25 mortgages and other secured obligations that cannot be kept current. Therefore, the  
26 enterprise as a whole is insolvent and is incapable of paying its debts as they  
27 become due. Seaman Decl., ¶ 16.

28 Accordingly, there are very strong claims against BM&K and Mr. Ferrante to  
recover the \$50,000. If the Court determines a separate action is necessary, the  
Receiver requests authority to pursue such claims (including claims for additional



1 amounts BM&K and Mr. Ferrante may have received) and to do so in a related  
2 action before this Court, which is already familiar with the facts and circumstances  
3 surrounding the Receiver's appointment, the Receivership Entities, Mr. Ferrante's  
4 role in the EB-5 enterprise, and the facts giving rise to the claims. Accordingly,  
5 judicial economy will be served by having the action adjudicated by this Court as a  
6 related case. In that event, the Receiver also requests that, as part of the order on  
7 this Motion, BM&K be directed to provide an accounting reflecting the dates and  
8 amounts of the \$23,000 in fees incurred and the dates and amounts of payments  
9 from its client trust account to itself.

10 **IV. CONCLUSION**

11 Based on the foregoing, the Receiver requests an order directing BM&K to  
12 turn over the \$50,000 to the Receiver within seven days of the Court's order,  
13 directing Mr. Ferrante, as BM&K's client, to instruct the firm to turn over the  
14 \$50,000 to the Receiver within seven days of the Court's order, and imposing  
15 appropriate sanctions on BM&K and Mr. Ferrante if they fail to comply with the  
16 Court's orders.

17  
18 Dated: September 15, 2017

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

19  
20 By:           /s/ Edward Fates          

EDWARD G. FATES  
Attorneys for Receiver  
THOMAS A. SEAMAN

21  
22  
23  
24  
25  
26  
27  
28