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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  
20 ASSISTED LIVING, LP; SAL  
CARMICHAEL, LP; SAL CITRUS  
21 HEIGHTS, LP; SAL KERN  
CANYON, LP; SAL PHOENIX, LP;  
22 SAL WESTGATE, LP;  
SUMMERPLACE AT SARASOTA, LP;  
23 SUMMERPLACE AT  
CLEARWATER, LP; SUMMERPLACE  
24 AT CORRELL PALMS, LP;  
TRC TUCSON, LP; CLEAR  
25 CURRENTS WEST, LP; CAFFE  
PRIMO MANAGEMENT, LP; CAFFE  
26 PRIMO MANAGEMENT 102, LP; et al.,

27 Defendants.  
28

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

**NOTICE OF MOTION AND  
MOTION OF RECEIVER,  
THOMAS A. SEAMAN, FOR  
ORDER APPROVING: (1) SALE OF  
SARASOTA PROPERTY; AND  
(2) OVERBID PROCEDURES;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: December 4, 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 December 4, 2017, at 1:30 p.m. in Courtroom 9B  
3 of the above-entitled Court, located at 411 W. Fourth Street, Santa Ana, California  
4 92701, Thomas A. Seaman ("Receiver"), the Court-appointed receiver for the  
5 Receivership Entities,<sup>1</sup> will and hereby does move the Court for an order from this  
6 Court approving the sale of the Sarasota property, overbid procedures, and, if  
7 necessary, a real estate broker's commission ("Motion"). Pursuant to the sale and  
8 overbid procedures that were previously approved by the Court pursuant to the Order  
9 Granting Receiver's Motion for Order Authorizing the Receiver to Market  
10 Receivership Assets for Sale, Establish Sale Procedures, and Engage Brokers, ("Sale  
11 Procedures Order") (Dkt. No. 102), the Receiver requests the Court approve the sale  
12 of the Sarasota Property to Buyer free and clear of liens and encumbrances (with  
13 such liens attaching to the sale proceeds), pursuant to the purchase and sale  
14 agreement or to the highest bidder at the conclusion of the auction if qualified

15  
16  
17 <sup>1</sup> As used herein, "Receivership Entities" refers to the following specifically named entities:  
18 PDC Capital Group, LLC; Caffe Primo International, Inc.; SAL Assisted Living, LP; SAL  
19 Carmichael, LP; SAL Citrus Heights, LP; SAL Kern Canyon, LP; SAL Phoenix, LP; SAL  
20 Westgate, LP; Summerplace at Sarasota, LP; Summerplace at Clearwater, LP; Summerplace at  
21 Correll Palms, LP; TRC Tucson, LP; Clear Currents West, LP; Caffe Primo Management, LP;  
22 Caffe Primo Management 102, LP through Caffe Primo Management 108, LP (collectively,  
23 "**Named Entities**"); and their subsidiaries and affiliates Summerplace Management, LLC;  
24 PDC Partners Management, Inc.; FDC Partners Management, Inc.; KPF Capital, LLC;  
25 FDC Capital Partners, LLC; MSL US Fund I, LLC; MPoint Land & Development, Inc.;  
26 Woodcrest Construction Management, Inc.; Professional Loading Service, LLLP; WDC Capital  
27 Group, LLC; WDC Capital Partners, LLC; KPF Investment Management, Inc.; Meridian  
28 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 overbids are received. If there is overbidding, the Receiver may also request the  
2 Court to approve a real estate broker's commission.

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

7 **Procedural Requirements:** If you oppose this Motion, you are required to  
8 file your written opposition with the Office of the Clerk, United States District Court,  
9 411 W. Fourth Street, Santa Ana, California 92701, and serve the same on the  
10 undersigned not later than 21 days prior to the hearing.

11 IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the  
12 above date, the Court may grant the requested relief without further notice. This  
13 Motion is made following the conference of counsel pursuant to L.R. 7-3, which was  
14 initiated on October 2, 2017.

15 Dated: October 11, 2017

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:           /s/ Edward Fates

EDWARD G. FATES  
Attorneys for Receiver  
THOMAS A. SEAMAN

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

In accordance with the Sale Procedures Order, the Receiver moves this Court for an order authorizing him to sell the real property located at and commonly known as Summerplace at Sarasota, 5710 Draw Lane, Sarasota, Sarasota County, Florida ("Sarasota Property") on the terms generally described below and more specifically set forth in the Purchase and Sale Agreement and Joint Escrow Instructions, dated September 29, 2017 ("PSA"). A true and correct copy of the PSA is attached as Exhibit A to the concurrently filed Declaration of Thomas A. Seaman ("Seaman Declaration" or "Seaman Decl.>").

As permitted by the Sale Procedures Order, the Receiver has worked diligently to locate a buyer for the Sarasota Property through commercially reasonable and customary channels, including, but not limited to, specifically targeting buyers reasonably believed to be interested or specializing in the purchase of real properties like the Sarasota Property. As discussed below, the Receiver has secured a buyer, Sunrise Land Partners, LLLP ("Buyer"), and accepted an offer from Buyer to purchase the Sarasota Property for \$1,425,000 ("Purchase Price"), on an "as-is, where-is" basis, subject to the PSA. Buyer's offer is the highest and best offer received after considering offers from other prospective purchasers. Based upon the present facts and circumstances, and absent an overbid, the Receiver believes the Purchase Price is the best price attainable for the Sarasota Property and respectfully requests the Court grant this Motion and approve: (1) the sale of the Sarasota Property (either to Buyer or a successful overbidder) pursuant to the terms of the PSA; (2) the proposed overbid procedures described herein; (3) the release of the below described lien of MCC U.S., Inc. ("MCC") from the Sarasota Property and the attachment of such lien to the sale proceeds; and, if necessary, (4) payment of Broker's commission.

1 **II. RELEVANT FACTS**

2 **A. The Receiver's Appointment And Authority To Sell Sarasota**  
3 **Property**

4 On January 5, 2017, the Receiver was appointed temporary receiver for the  
5 Receivership Entities,<sup>2</sup> with full powers of an equity receiver, including, but not  
6 limited to, full power over all assets and property belonging to, being managed by or  
7 in the possession or control of the Receivership Entities, and was immediately  
8 authorized, empowered and directed to take certain actions as set forth in the  
9 Temporary Restraining Order ("TRO"). (Dkt. No. 17.) On January 23, 2017, the  
10 Court entered its Preliminary Injunction Against All Defendants ("PI Order"),  
11 which, among other things, made the Receiver's appointment permanent. (Dkt.  
12 No. 36.)

13 Pursuant to the terms of the PI Order, the Receiver was appointed as the  
14 permanent receiver of the Receivership Entities, "with full powers of an equity  
15 receiver, including, but not limited to, full power over all funds, assets,  
16 collateral, . . . and other property belonging to, being managed by or in possession of  
17 or control of the [Receivership Entities] . . ." *Id.* The PI Order authorized the  
18 Receiver to take immediate possession of all real and personal property of the  
19 Receivership Entities, wherever located, and to take such action as is necessary to  
20 preserve the assets of the Receivership Entities. *Id.*

21 On July 7, 2017, the Receiver filed the Motion of Receiver for Order  
22 Authorizing Receiver to Market Receivership Assets for Sale, Establish Sale  
23 Procedures and Engage Brokers ("Sale Procedures Motion") (Dkt. No. 81). On  
24 August 7, 2017 the Court granted the Sale Procedures Motion (Dkt. No. 102).

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28 <sup>2</sup> Terms previously defined in the Motion will be used and have the same meaning  
in this Memorandum of Points and Authorities.



1           **B. The Sarasota Property**

2           The Sarasota Property was part of a larger 134 acre tract of land purchased in  
3 June 2014 by PDC affiliates for \$7,463,800, or \$55,700 per acre. In March 2016,  
4 120 acres of the larger tract was sold to Buyer for \$9 million, or \$75,000 per acre.  
5 None of the \$9 million in sale proceeds went to the EB-5 Investors nor was any of  
6 the money retained for development. The Receiver's recent broker's opinion of  
7 value was \$710,000, or \$50,700 per acre. The sale price to Buyer is \$1,425,000, or  
8 \$101,700 per acre.

9           On December 2, 2016, MPoint Land and Development ("MPoint") borrowed  
10 \$5 million from MCC. The Receiver disputes the validity of this loan and related  
11 liens. As security for this loan, MCC was given security interests in two properties  
12 owned by the Receivership Entities, the Sarasota Property and the property located  
13 at 850 Red Rock Road, Lincoln, California ("Lincoln Property"). MPoint had no  
14 interest in these two properties. In connection with the foregoing loan, Seller  
15 executed a Mortgage, Assignment of Leases and Rents, Security Agreement and  
16 Fixture Filing dated as of December 2, 2016, and recorded on December 6, 2016, as  
17 Instrument No. 2016150091 in favor of MCC ("MCC Mortgage").

18           Since his appointment, the Receiver has worked to address various pressing  
19 issues relating to the Sarasota Property and evaluated the viability of development  
20 and disposition options for the Sarasota Property. Seaman Decl., ¶¶ 7, 12, 14.  
21 During his investigation, the Receiver learned of various issues impacting the value  
22 of the Sarasota Property, including ingress and egress issues, liabilities relative to  
23 constructing and maintaining a road to be built to access the Sarasota Property, and  
24 certain significant requirements for a setback or a buffer zone relative to an  
25 easement with adjacent properties.

26           Given the current circumstances and the Receiver's role as a federal equity  
27 receiver, the Receiver does not believe it would be cost effective, appropriate, or  
28 feasible for him to attempt to raise new equity in the market, and it is unlikely the

1 amount of funds needed to complete construction of the Sarasota Property can be  
2 borrowed based on the lack of equity in the property above the amount of debt.  
3 Even if such funding could be secured, the continued development of the Sarasota  
4 Property represents a far greater risk and a potentially lower return to the  
5 receivership estate than an immediate sale of the property. In light of the foregoing,  
6 the Receiver believes the sale of the Sarasota Property, on an "as-is, where is" basis,  
7 will return the highest value for the receivership estate. Seaman Decl. ¶ 15.

8 **C. EB-5 Issues**

9 The Receiver understands that a primary goal of the EB-5 Investors is to  
10 obtain permanent United States ("U.S.") residency through participation in the EB-5  
11 Program administered by the USCIS, and that a sale of the Sarasota Property will  
12 likely be deemed a "material change" and a failure to sustain the planned investment  
13 that will jeopardize the EB-5 Investors' eligibility for U.S. permanent residency.  
14 Seaman Decl. at ¶ 11. With regard to the Sarasota Property, the EB-5 Investors'  
15 I-526 petitions have already been denied or revoked by USCIS. The prior actions of  
16 Mr. Francisco, Mr. Ferrante, and Mr. Fox (collectively, "Principals"), including, but  
17 not limited to, the sale of 120 of the 134 acres of the original tract of land in  
18 Sarasota and diverting \$9 million away from the Sarasota project, were in  
19 contravention of the rules and regulations governing EB-5 immigration related  
20 projects. As such, there is no realistic prospect of reaching the investors'  
21 immigration goals and so the Receiver is pursuing the most financially viable option  
22 rather than pursuing a futile effort to reverse USCIS decisions by proposing a new  
23 development.

24 **D. The Proposed Sale**

25 The Receiver has considered three disposition options with regard to the  
26 Sarasota Property: (1) proceed with development as originally conceived and  
27 described in the offering memorandum, which offering memorandum was used to  
28 raise funds from investors seeking qualification as EB-5 investor applicants under

1 the United States Customs and Immigration Service ("USCIS"), Immigrant Investor  
2 Program ("EB-5 Investors"); (2) sell a controlling interest in the Sarasota Property to  
3 a new financial partner with or without regard to the impact on the applications or  
4 petitions of EB-5 Investors that are pending before USCIS; and (3) sell the Sarasota  
5 Property in its "as-is" condition, including all present entitlements and project  
6 documents. Seaman Decl. ¶ 15. The Receiver also considered his role as a federal  
7 equity receiver, the nature of these proceedings, the proprietary of an equity receiver  
8 engaging in a lengthy and complex development of real estate projects, and the fact  
9 that development of this project would also involve the Court's oversight of the  
10 financing, construction and start-up of an operating business.

11 Based upon his investigation and analysis, the Receiver believes the sale of  
12 the Sarasota Property is in the best interest of the receivership. Given the physical  
13 idiosyncrasies of the Sarasota Property, including unique ingress and egress and  
14 extraordinary set back requirements, the Receiver also believes Buyer is the most  
15 logical purchaser for the Sarasota Property. Buyer is in the unique position of being  
16 able to realize the full potential value of the Sarasota Property because Buyer owns  
17 the adjacent land and is therefore impacted less by the easements and set back  
18 requirements.

19 With the logical buyer already in hand and an offer exceeding a broker's  
20 opinion of value, the Receiver elected not to retain an exclusive real estate broker  
21 and instead save the approximately \$85,500 in broker commissions associated with  
22 a sale at this price. Instead, the Receiver has retained broker Marcus & Millichap  
23 ("Broker") to market the Sarasota Property to prospective overbidders and pay a  
24 highly incentivized commission of 20% of the amount that the overbid exceeds the  
25 stalking horse price of \$1,425,000. For example, if the overbid process were to  
26 bring the price to \$1,600,000, Broker would be paid a commission of 20% of  
27 \$175,000, the amount by which the price increased as a result of overbidding. In  
28

1 this manner, the Receiver believes he has established a mechanism to ensure the  
2 highest recovery possible from the Sarasota Property.

3 **E. Purchase and Sale Agreement**

4 A copy of the PSA for the sale to Buyer is attached as Exhibit A to the  
5 Seaman Declaration. Its terms are summarized as follows:<sup>3</sup>

6 **Court Approval.** All aspects of the PSA and the sale are subject to Court  
7 approval.

8 **Purchase Price.** \$1,425,000. The estimated net proceeds to the receivership  
9 estate assuming no broker commission, and deducting estimated escrow, tax,  
10 proration and other costs, will be approximately \$1.35 million (all subject to the  
11 MCC lien as provided in the proposed order.)

12 **Closing Date.** Escrow to close within 65 days after Court approval of the  
13 sale.

14 **Deposit.** Buyer has deposited \$150,000 ("Deposit") into escrow. This  
15 reflects a non-refundable Deposit to be applied to the Purchase Price, subject to the  
16 overbid procedures and other terms set forth in the PSA.

17 **Sale Free and Clear of MCC Mortgage.** The Sarasota Property will be sold  
18 free and clear of the MCC Mortgage, with MCC's lien attaching to the sale  
19 proceeds. The Receiver will hold the sale proceeds subject to MCC's lien interests  
20 pending further order of the Court either approving a settlement of MCC's claims or  
21 an adjudication of the same.

22 **As Is/Where Is Purchase.** Buyer agrees to purchase the Sarasota Property  
23 on an "as-is, where is" basis, with no representations or warranties made by the  
24 Receiver, his professionals, or the Receivership Entities.

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<sup>3</sup> The terms of the PSA are summarized herein for convenience only. In the event of any conflict between the PSA and the summary provided herein or any ambiguity as to the language used herein, the PSA shall govern and control.

1           **Buyer's Representations and Warranties.** Buyer represents and warrants  
2 that it is qualified and capable of closing the purchase and sale transaction.

3           **Overbid Procedures.** The sale is subject to the proposed overbid procedures  
4 detailed in the PSA and Section III below. Pursuant to these procedures, if Buyer is  
5 not the highest qualified bidder at the auction, its Deposit will be returned.

6           **Notice.** The Receiver has provided notice to investors, creditors and others in  
7 accordance with the Sale Procedures Order and 28 U.S.C. § 2002.

### 8 **III. PROPOSED OVERBID PROCEDURES**

9           The Receiver requests the following overbid procedures be approved:

10           (a) **Qualified Bidders.** All those appearing to bid at the auction must be  
11 Qualified Bidders as described herein. A Qualified Bidder is a prospective  
12 purchaser who: (i) provides a fully executed purchase and sale agreement for the  
13 Property in a form substantially similar to the PSA; (ii) provides evidence in a form  
14 reasonably acceptable to the Receiver that the qualified bidder has the present ability  
15 to pay at least the minimum overbid amount; and (iii) provides an earnest money  
16 deposit by wire transfer or cashier's check in the amount of 10% of the Purchase  
17 Price payable to the Receiver, which amount shall be non-refundable to the  
18 Qualified Bidder with the highest and best bid at the auction if for any reason (a) the  
19 highest and best bidder fails to timely close the sale or (b) the highest and best  
20 bidder fails to provide the balance of the purchase price to the Receiver [one day]  
21 prior to the Closing Date. Buyer is a Qualified Bidder. Each Qualified Bidder must  
22 provide the above-described executed PSA and earnest money deposit to the  
23 Receiver no later than 10 calendar days before the hearing date on the instant  
24 motion.

25           (b) **The Auction Process.** Qualified Bidders shall appear at the  
26 hearing/auction in person, through a duly authorized representative. At that hearing,  
27 the Court, or at the Court's request, the Receiver, will conduct an auction of the  
28 Sarasota Property among any Qualified Bidders. The highest and best bidder's

1 deposit shall be applied to the purchase price, if the sale is approved by the Court.  
2 The initial overbid shall be no less than \$100,000 over the Purchase Price, or at least  
3 \$1,525,100 ("Initial Overbid"). Subsequent overbids shall be in increments of at  
4 least \$15,000. If no Qualified Bidder submits a bid in the amount of the Initial  
5 Overbid or higher, the PSA will be submitted to the Court for approval in its current  
6 form. The Court may reject any and all bids following conclusion of the auction.

7 (c) **Due Diligence.** All prospective bidders shall have had the opportunity to  
8 inspect the Sarasota Property and any documentation relating thereto prior to the  
9 auction.

10 (d) **No Contingencies.** The sale to any Qualified Bidder shall not be subject  
11 to any contingencies, including, without limitation, for financing, due diligence, or  
12 inspection.

13 (e) **As Is/Where Is Purchase.** The sale to any Qualified Bidder shall be on  
14 an "as-is, where is" basis as described in the PSA.

15 These procedures were formulated by the Receiver with the goal of obtaining  
16 the highest and best price for the Sarasota Property, thus ensuring a maximum return  
17 to the receivership estate.

#### 18 **IV. BROKER'S COMMISSION**

19 By separate agreement, the Receiver has agreed, subject to Court approval, to  
20 pay a total commission of 20% of the amount of the total overbid (the difference  
21 between the base purchase price and the final purchase price. If there are no  
22 successful overbidders, the Receiver will pay Broker \$7,500. Pursuant to that  
23 agreement, Broker shall be solely responsible for and will compensate cooperating  
24 and referring brokers.

25 Since the PSA with Buyer was signed, the Receiver and Broker have sought  
26 out qualified overbidders for the Sarasota Property and promoted active overbidding  
27 at the auction. Based on the Receiver's extensive experience in real estate  
28 transactions, and in light of the challenges presented, the amount of the commission

1 to Broker represents commercially reasonable compensation for the work required  
2 in order to secure prospective overbidders.

3 **V. NOTICE OF THE PROPOSED SALE**

4 Prior to filing this Motion, the Receiver has transmitted the PSA to counsel  
5 for the Securities and Exchange Commission, Mr. Francisco's counsel, and several  
6 attorneys who appeared in the action, representing various investors. The PSA was  
7 also posted on the Receiver's website.

8 The Receiver's counsel is serving this Motion by mail on all parties to the  
9 action who do not already receive electronic service, and by electronic means on all  
10 known parties with potential interest in purchasing the Sarasota Property. The  
11 Receiver is also posting a copy of this Motion on the receivership website  
12 accompanied by the following notice of the proposed sale and the opportunity to  
13 overbid at the hearing:

14 In the action pending in U.S. District Court for the Central  
15 District of California, Case No. SACV 16-02257-CJC (DFMx),  
16 Securities and Exchange Commission v. Emilio Francisco,  
17 PDC Capital Group, LLC, et al., notice is hereby given that the  
18 court-appointed receiver for Summerplace at Sarasota, LP and  
19 Summerplace at Sarasota, LLC will seek confirmation of the sale  
20 of land located at 5710 Draw Lane, Sarasota, Sarasota County,  
21 Florida for \$1,425,000, subject to an overbid auction. The  
22 minimum bid price at the auction will be \$1,525,000, with  
23 incremental bids of \$15,000. The hearing to confirm the sale and  
24 the auction will take place on December 4, 2017, at 1:30 p.m.  
25 Pacific time in the courtroom of the Honorable Cormac J. Carney  
26 located at 411 W. Fourth St., Santa Ana, CA, 92701, Courtroom  
27 9B, 9th Floor (or at such time and place as the Court directs). To  
28 qualify as bidder at the auction, prospective buyers must:  
1) execute a non-contingent purchase and sale agreement, a copy  
of which may be obtained from the Receiver's broker Marcus &  
Millichap, attention Krone Weidler at (813) 387-4767 or  
Krone.Weidler@marcusmillichap.com or Louis Tsunis at  
(813) 387-4777 or Louis.Tsunis@marcusmillichap.com; 2) make  
a non-refundable earnest money deposit of \$150,000, which is  
applicable to the sale price and refundable immediately to

1 unsuccessful overbidders; and 3) provide proof of liquid funds  
2 sufficient to conclude the sale as soon as practicable following  
3 Court approval on or about December 4, 2017. All bidders must  
4 be qualified by 4:00 p.m. Pacific time on November 22, 2017, by  
5 submitting the foregoing to Thomas Seaman Company at 3 Park  
6 Plaza, Suite 550, Irvine, California, 92614.

## 7 VI. ARGUMENT

8 "The power of a district court to impose a receivership or grant other forms of  
9 ancillary relief does not in the first instance depend on a statutory grant of power  
10 from the securities laws. Rather, the authority derives from the inherent power of a  
11 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369  
12 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly  
13 and efficient administration of the estate by the district court for the benefit of  
14 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment  
15 of a receiver is authorized by the broad equitable powers of the court, any  
16 distribution of assets must also be done equitably and fairly. *See SEC v. Elliott*,  
17 953 F.2d 1560, 1569 (11th Cir. 1992).

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

22 A district court's power to supervise an equity receivership and  
23 to determine the appropriate action to be taken in the  
24 administration of the receivership is extremely broad. The  
25 district court has broad powers and wide discretion to determine  
26 the appropriate relief in an equity receivership. The basis for  
27 this broad deference to the district court's supervisory role in  
28 equity receiverships arises out of the fact that most receiverships  
involve multiple parties and complex transactions. A district  
court's decision concerning the supervision of an equitable  
receivership is reviewed for abuse of discretion.

26 *Id.* (citations omitted); *see also CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115  
27 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,  
28 and 'we generally uphold reasonable procedures instituted by the district court that



1 serve th[e] purpose' of orderly and efficient administration of the receivership for  
2 the benefit of creditors.").

3 Accordingly, this Court has broad equitable powers and discretion in  
4 formulating procedures, schedules and guidelines for administration of the  
5 receivership estate and sale of receivership assets.

6 **A. The Sale Subject To Overbid Should Be Approved**

7 It is generally conceded that a court of equity having custody and control of  
8 property has power to order a sale of the same in its discretion. *See, e.g., Elliott,*  
9 953 F.2d at 1566 (11th Cir. 1992) (finding that the District Court has broad powers  
10 and wide discretion to determine relief in an equity receivership). "The power of  
11 sale necessarily follows the power to take possession and control of and to preserve  
12 property." *See also SEC v. Am. Capital Invest., Inc.,* 98 F.3d 1133, 1144 (9th Cir.  
13 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (citing  
14 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)  
15 (citing *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity  
16 orders property in its custody to be sold, the court itself as vendor confirms the title  
17 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law and Practice of Receivers  
18 § 487).

19 "A court of equity, under proper circumstances, has the power to order a  
20 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*  
21 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also,* 2 Ralph Ewing  
22 Clark, Treatise on Law & Practice of Receivers § 500. To that end, a federal court  
23 is not limited or deprived of any of its equity powers by state statute. *Beet Growers*  
24 *Sugar Co. v. Columbia Trust Co.,* 3 F.2d 755, 757 (9th Cir. 1925) (state statute  
25 allowing time to redeem property after a foreclosure sale not applicable in a  
26 receivership sale).

27 Generally, when a court-appointed receiver is involved, the receiver, as agent  
28 for the court, should conduct the sale of the receivership property. *Blakely Airport*

1 *Joint Venture II v. Fed. Sav. and Loan Ins. Corp.*, 678 F.Supp. 154, 156 (N.D. Tex.  
2 1988). A receiver's sale conveys "good" equitable title enforced by an injunction  
3 against the owner and against parties to the suit. *See* 2 Ralph Ewing Clark, Treatise  
4 on Law and Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491. "In  
5 authorizing the sale of property by receivers, courts of equity are vested with broad  
6 discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d 354, 357 (9th Cir.  
7 1925).

8 The PSA provides that the Sarasota Property shall be sold free and clear of  
9 liens, including the MCC Mortgage. The facts of this case and the law support the  
10 sale of the Sarasota Property free and clear of the MCC Mortgage, with MCC's lien  
11 interest attaching to the proceeds of the sale of the Sarasota Property.

12 The MCC Mortgage is disputed by the SEC and the Receiver. MCC's role as  
13 a joint venturer with MPoint clearly makes it an insider and calls into question the  
14 entire MCC MPoint loan transaction. *See* Receiver's Request for Judicial Notice  
15 filed concurrently herewith, Exh. 2. At a minimum, the MCC Mortgage on the  
16 Sarasota Property should be set aside as a fraudulent conveyance. The borrower,  
17 MPoint, has no interest whatsoever in the Sarasota Property and there is absolutely  
18 no consideration for Sarasota granting MCC a security interest in the property. *Id.*  
19 at Exhs. 1-4.

20 The MCC Mortgage is also subject to the defenses described in detail in the  
21 Receiver's Opposition to MCC U.S., Inc.'s Motion for Orders and Relief From Stay  
22 [Dkt. No. 88, pp. 13-16] and the Declaration of Thomas A. Seaman in Support of  
23 Receiver's Opposition to MCC's Motion for Orders and Relief From Stay [Dkt.  
24 No. 89, ¶¶ 12-17, pp. 4-6.] *Id.* Among other things, as a joint venturer, MCC's so  
25 called loan should be treated as an equity investment and not as a loan. *Id.* Finally,  
26 the Receiver notes that the MCC Mortgage was, at best, a mere guaranty instrument,  
27 and therefore MCC must first exhaust all remedies against MPoint before pursuing  
28 its claim against the Sarasota Property. *Id.* ¶ 2, pp. 13-16.

1           Setting aside these disputes, MCC is in no way prejudiced by the sale of the  
2 Sarasota Property and release of the MCC Mortgage because MCC's lien will attach  
3 to the sale proceeds subject to a further order of this Court, with all parties reserving  
4 their rights and defenses. As such, MCC's real property collateral has merely been  
5 replaced with equivalent or better personal property collateral. MCC is not  
6 impacted by the sale any more than if the Receiver did not sell the Sarasota  
7 Property. To the contrary, MCC is potentially the beneficiary of the Buyer's  
8 willingness to pay in excess of the broker's opinion of value.

9           Here, the proposed sale to the Buyer for \$1,425,000, subject to the proposed  
10 overbid procedures, should be approved. Having addressed treatment of the  
11 MCC Mortgage, the only remaining issue concerns whether the sale to Buyer or an  
12 overbidder is appropriate under the facts and circumstances of this receivership.  
13 The proposed overbid procedures are designed to (a) induce the Buyer to remain in  
14 place as the initial, or "stalking horse" bidder; (b) allow qualified bidders to overbid;  
15 and (c) generate the highest and best price for the Sarasota Property. The proposed  
16 Purchase Price is sufficient to make the net proceeds to the estate approximately  
17 \$1,350,000, subject to adjudication of the MCC Mortgage. The subsequent bid  
18 increments of \$100,000 and then \$15,000 for each subsequent overbid is sufficient  
19 to ensure an orderly and efficient auction at the hearing. The Receiver submits these  
20 amounts are reasonable and fair to all interested parties.

21           The Receiver believes, as discussed herein, given the issues impacting the  
22 Sarasota Property and the property value, that the Purchase Price and terms of the  
23 proposed sale to Buyer, negotiated at arm's length and secured through the  
24 commercially reasonable manner, reflects the fair market value of the Sarasota  
25 Property. While the Receiver believes the sale price of \$1,425,000 exceeds the  
26 estimated fair market value of the Sarasota Property, this assumption will be tested  
27 through an auction process after notice and an opportunity for third parties to  
28 consider the Sarasota Property. Accordingly, the Receiver believes, in his

1 reasonable business judgment, that the proposed sale to Buyer, subject to overbid, is  
2 fair and reasonable, in the best interests of the receivership estate, and will generate  
3 the highest and best value for the Sarasota Property. (Seaman Decl., ¶ 9.)

4 Again, to ensure the highest and best price is obtained from sale of the  
5 Sarasota Property, the proposed sale to Buyer is subject to overbid, by potential  
6 purchasers that qualify themselves as Qualified Bidders. The Receiver, with the  
7 assistance of a Broker, will market the Sarasota Property with the goal of promoting  
8 active overbidding in accordance with the proposed overbid procedures described  
9 herein.

10 **B. Additional Relief**

11 The Receiver also requests authority to pay a total commission reflecting 20%  
12 of the overbid amount, reflecting the difference between the original Purchase Price  
13 and the final sale price paid to a successful overbidder. If there is no successful  
14 overbidder, Broker shall receive \$7,500 to cover expenses and efforts in locating  
15 overbidders. As explained above, Broker's commission is fair and reasonable given  
16 the facts and circumstances of this case and the Sarasota Property. (Seaman Decl.,  
17 ¶ 8.)

18 **VII. CONCLUSION**

19 For the reasons set forth herein, the Receiver respectfully requests entry of an  
20 order approving and authorizing: (1) sale of the Sarasota Property to Buyer or the  
21 highest and best bidder free and clear of the MCC Mortgage; (2) the proposed  
22 overbid procedures; and, if necessary, (3) payment of the proposed commission to  
23 Broker from the sale proceeds.

24  
25 Dated: October 11, 2017

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:           /s/ Edward Fates          

EDWARD G. FATES  
Attorneys for Receiver  
THOMAS A. SEAMAN