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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

EMILIO FRANCISCO; PDC CAPITAL GROUP, LLC; CAFFE PRIMO INTERNATIONAL, INC.; SAL ASSISTED LIVING, LP; SAL CARMICHAEL, LP; SAL CITRUS HEIGHTS, LP; SAL KERN CANYON, LP; SAL PHOENIX, LP; SAL WESTGATE, LP; SUMMERPLACE AT SARASOTA, LP; SUMMERPLACE AT CLEARWATER, LP; SUMMERPLACE AT CORRELL PALMS, LP; TRC TUCSON, LP; CLEAR CURRENTS WEST, LP; CAFFE PRIMO MANAGEMENT, LP; CAFFE PRIMO MANAGEMENT 102, LP; et al.,

Defendants.

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

NOTICE OF MOTION AND MOTION OF RECEIVER, THOMAS A. SEAMAN, FOR APPROVAL OF SETTLEMENT AGREEMENT WITH MCC US, INC.; TRANSFER OF LINCOLN RED ROCK PROPERTY; AND ANCILLARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 30, 2018
Time: 1:30 p.m.
Ctrm: 9B, 9th Floor
Judge: Hon. Cormac J. Carney

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 30, 2018, at 1:30 p.m. in Courtroom 9B of the above-entitled Court, located at 411 W. Fourth Street, Santa Ana, California 92701, Thomas A. Seaman ("Receiver"), the Court-appointed receiver for the Receivership Entities,[1] will and hereby does move the Court for an order approving:

- The Settlement Agreement and Release (the "Settlement Agreement") dated as of March 12, 2018, by and between Thomas A. Seaman in his capacity as court-appointed federal equity Receiver and MCC US, Inc. ("MCC"), attached as Exhibit A to the Declaration of Thomas A. Seaman for Approval of Settlement Agreement ("Seaman Decl.");
- The transfer of the real property and improvements located at and commonly known as 850 Red Rock Road, Lincoln, California to MCC and/or its assignee pursuant to that Purchase and Sale Agreement ("PSA") attached as Exhibit A to the Settlement Agreement (Id.);

[1] As used herein, "Receivership Entities" refers to the following specifically named entities: PDC Capital Group, LLC; Caffe Primo International, Inc.; SAL Assisted Living, LP; SAL Carmichael, LP; SAL Citrus Heights, LP; SAL Kern Canyon, LP; SAL Phoenix, LP; SAL Westgate, LP; Summerplace at Sarasota, LP; Summerplace at Clearwater, LP; Summerplace at Correll Palms, LP; TRC Tucson, LP; Clear Currents West, LP; Caffe Primo Management, LP; Caffe Primo Management 102, LP through Caffe Primo Management 108, LP (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 ("SLALMC"); 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**").

- The payment of a real estate broker's commission to Hamlin and Associates with regard to the transfer of the Lincoln Red Rock Property in the amount of $312,000; and
- The payment of a breakup fee to Carefield SH Management, LLC or its designee of $175,000.

This Motion is based on this Notice of Motion and Motion, the attached memorandum of points and authorities, the Declaration of Thomas Seaman and the documents and pleadings already on file in this action, and upon such further oral and documentary evidence as may be present at the time of hearing.

Procedural Requirement: If you oppose this Motion, you are required to file your written opposition with the Office of the Clerk, United States District Court 411 W. 4th St., Santa Ana, CA 92701, and serve the same on the undersigned not later than 21 days prior to the hearing.

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

Dated: March 27, 2018

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: *\/s/ David R. Zaro*
DAVID R. ZARO
Attorneys for Receiver
THOMAS A. SEAMAN

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I. INTRODUCTION

Per previous notices and reports to this Court, the Receiver seeks approval of that Settlement Agreement and Mutual Release (the "Settlement Agreement") with MCC US, Inc. ("MCC"), resolving all claims and disputes between the parties arising out of or related to MCC's $5 million loan (the "Loan") to MPoint Land and Development, Inc. ("MPoint") and the claims and counter-claims of the Receiver and the Receivership Entities, on the one hand, and MCC and its affiliates, on the other hand. (Seaman Decl. ¶ 4.) The material terms of the proposed Settlement Agreement are generally as follows:

- The settlement is conditioned upon the Court's approval of the Settlement Agreement ("Approval Order");
- MCC has delivered $200,000 to the Receiver as a partial earnest money deposit. MCC shall deliver $500,000 to the Receiver within 2 business days following entry of the Approval Order. MCC will deliver to the Receiver $1,900,000 on or before the Closing of the sale pursuant to the PSA for a total settlement payment by MCC to Receiver of $2,600,000 ("Cash Payment");
- In exchange for the Cash Payment and recognition of MCC's alleged indebtedness of $6,100,000, the Receiver will transfer the Lincoln Red Rock Property at a sale price of $8,700,000 to MCC pursuant to the Purchase and Sale Agreement ("PSA") attached as Exhibit A to the Settlement Agreement; and
- Effective upon the Closing (as defined in the PSA), the Parties will release all claims against each other arising out of or related to the Loan, the Sarasota Property, the Lincoln Red Rock Property as well as all other claims and disputes arising out of or related to MCC's agreements with PDC Capital Group, LLC ("PDC") and its affiliates.

The Receiver has determined that the settlement with MCC is in the best interest of the receivership estate because the settlement resolves the largest secured claim against the receivership estate, resolves costly litigation with MCC, and yields a net recovery to the receivership estate which the Receiver estimates will be greater than the Receiver could have received had he proceeded with proposed bulk sale of the Lincoln Red Rock Property, the Citrus Heights Property, Sacramento Property and Carmichael Property (collectively, the "California Properties") and continued litigation against MCC.

The Receiver also requests the Court approve payments to those who contributed to the value of the settlement or are otherwise contractually entitled to payment (subject to approval by this Court). As such, the Receiver requests the Court approve the Receiver's payment of the real estate commission to Hamlin Gooding in the amount of $312,000, reflecting a commission on the transfer of the Lincoln Red Rock Property, and a breakup fee in the amount of $175,000 to Carefield SH Management, LLC ("Carefield") pursuant to the terms regarding breakup fees contained in that purchase and sale agreement executed by Receiver and Buyer with regard to the California Properties.

II. Background Facts

1. <u>MCC Transactions.</u>

PDC made offerings to investors in which they proposed to develop senior assisted-living developments. The offerings were primarily made to investors in China that purportedly qualified under the EB-5 Immigrant Investor Program administered by the United States Citizenship and Immigration Services.

Through the offerings, the Receivership Entities raised approximately $70 million from approximately 140 so-called "EB-5 Investors". Some of the money was used for the purchase of the California Properties, as well as others. Aside from one project in Tucson, Arizona (which is not performing well), none of the projects were developed. As described below, MCC became involved with several of the projects and principals of the Receivership Entities, giving rise to several disputed claims and transactions.

In or around November 2015, PDC entered into an agreement with MCC or its affiliate entitled "Engineering Procurement Construction Contract." Thereafter, PDC and MCC were engaged in ongoing discussions and/or agreements to concerning the development of certain projects located in California owned by Receivership Entities. The Receiver has alleged that the nature of MCC's interest in the projects was as a joint venture to which MCC has disputed. MCC was to provide engineering, procurement, and construction work for the projects, while PDC was to identify projects and provide development and management services.

In or around October 2016, MCC and an affiliate of PDC, MPoint, entered into a series of additional contracts with regard to the development and construction of assisted-living facilities. On or about December 2, 2016, MCC made a $5 million loan [the Loan] to MPoint. The maturity date for the Loan was March 2, 2017. The Loan was secured by a deed of trust (the "Deed of Trust") on the real property located at and commonly known as 850 Red Rock Road, Lincoln, California ("Lincoln Red Rock Property"). The Lincoln Red Rock Property was owned by SLALMC. The Loan was also secured by mortgage (the "Mortgage") recorded on real property and improvements located at 5710 Draw Line, Sarasota, Florida ("Sarasota Property") in favor of MCC. Summerplace at Sarasota, LLC ("Summerplace") was the owner of the Sarasota Property.[2] Pursuant to the Loan agreements, MCC also received security interests via pledges of membership interests in SLALMC, Summerplace, SAL Assisted-Living LP and PDC (collectively, "Personal Property Interests").

[2] The Sarasota Property was sold and the Mortgage attached to the net sale proceeds held by the Receiver per the Order of this Court. [Dkt. No. 142.]

The Receiver has alleged that MPoint has no direct interest in the Sarasota Property or the Lincoln Red Rock Property. Following the closing of the Loan, MCC disbursed the $5 million in loan proceeds, however, only a small portion of the loan proceeds were used for the Lincoln Red Rock Property. None of the MCC Loan proceeds were used for the Sarasota Property. Instead MCC disbursed $5 million dollars to another entity owned and controlled by the principals of the Receivership Entities. Based upon the foregoing, the Receiver had filed a Motion for Authority to Pursue Claims Against MCC for fraudulent/voidable transfer and equitable subordination of MCC's claims against the receivership estate. [Dkt. No. 190.]

MCC has unequivocally denied the Receiver's allegations and asserts the validity of the Loan, Deed of Trust, Mortgage and associated loan agreements. MCC further unequivocally denies that any of the transfers of the property interest to MCC were fraudulent transfers and claims that it is presently owed in excess of $6,100,000.

2. <u>Sale of California Properties.</u>

Pursuant to the sales and marketing procedures approved by the Court in the Order Granting Receiver's Motion for Order Authorizing Receiver to Market Receivership Assets for Sale, Establish Sale Procedures, and Engage Brokers (the "Sale Procedures Order") [Dkt. No. 102], the Receiver has been engaged in marketing of the real property assets owned by the Receivership Entities located in California and elsewhere including, but not limited to, the California Properties. After obtaining appraisals and considering offers and possible joint ventures with regard to the individual properties, the Receiver obtained several proposals from parties seeking to purchase all or portions of the portfolio of real properties owned by the Receivership Entities including, but not limited to, an offer from Carefield.

Carefield proposed to purchase the four California Properties for the sum of $8,400,000 subject to the overbid procedures and approval by the Court.

The Receiver and Carefield entered into negotiations with regard to a purchase and sale agreement (the "California Properties PSA"), which agreement provided for Carefield to receive a breakup fee in the event of a successful overbid. The California Properties PSA was also subject to Court approval. Based upon the foregoing, the Receiver filed the Motion of Receiver, Thomas A. Seaman for Order Approving: (1) Sale of Citrus Heights Property, Sacramento Property, Lincoln Red Rock Property, and Carmichael Property; (2) Overbid procedures; and (3) Real Estate Broker Commission ("Sale Motion"). The original hearing on the Sale Motion was set for February 26, 2018. Prior to the hearing on the Sale Motion, the Receiver received an overbid of $8,800,000 for the four properties (the "Overbid") and a proposal from MCC involving the transfer of the Lincoln Red Rock Property to MCC, a cash payment to the Receiver, and mutual releases concerning MCC's claims. Both of these offers potentially provided a significantly greater return to the receivership estate than the offer from Carefield. The Receiver notified the Court and all parties of these issues and requested a continuance of the hearing on the Sale Motion for several weeks pending further negotiations.

Over the next two weeks, the Receiver explored the MCC settlement proposal, prospective overbids at the auction, and re-noticing the Sale Motion with a higher minimum bid. Further negotiations included expressions of interests by several parties including a proposal by Carefield to pay $9.5 million for the four California Properties. However, Carefield refused to agree to re-notice the Sale Motion subject to an amended purchase and sale agreement reflecting the $9.5 million purchase price so that the Receiver could meet his obligations to conduct a public sale with certainty of that $9.5 million offer. That is, without a re-noticed hearing and an amended purchase agreement, there is no mechanism available to be assured of a minimum bid of $9.5 million (i.e. the Receiver could not engage in bid rigging with a side agreement).

The Receiver also considered the fact that the California Properties were being sold free and clear of the $6.1 million MCC Deed of Trust and Mortgage and a $2.0 million deed of trust encumbering the Sacramento Property ("Richardson Deed of Trust"). As such, the proceeds received by the Receiver would be subject to over $8.1 million in disputed secured claims (plus undisputed claims). While the Receiver disputes these claims, the Receiver would need to engage in protracted litigation in order to resolve the claims.

3. Valuation of the MCC Settlement Versus the Bulk Sale.

In considering how to proceed with regard to this matter, the Receiver analyzed in detail the pros and cons of pursuing the bulk sale of the California Properties versus approval the MCC Settlement Agreement.

The auction sale process provided the Receiver a significant opportunity to immediately realize a substantial sum of money for the four California Properties. As noted in the Sale Motion, the cumulative appraisals and the total amount of the individual offers made as to each of the California Properties were each less than the $8,400,000 offer from Carefield. As such, the bulk sale offered an immediate opportunity to realize more money for the California Properties than their appraisal values and represented the proverbial "Bird in the Hand".[3]

On the other hand, proceeding with the bulk sale and foregoing the MCC settlement also posed risks to the receivership's recovery of net proceeds. As noted above, there are over $8,100,000 in disputed claims that would need to be resolved in order for the Receivership to recover anything from the sale. In reviewing the

[3] As noted above, while the Receiver had a firm $8,800,000 overbid, any amounts in excess of the overbid were purely speculative. That is, while Carefield expressed a willingness to pay $9,500,000, Carefield balked at the prospect of re-noticing the sale or further auction of the California Properties.

disputed claims, the Receiver noted that there are litigation risks and costs associated with MCC litigation as well as the litigation over the Richardson Deed of Trust. That is, as previously noted, the Receiver is aware of MCC's defenses to the Receiver's claims. As such, the Receiver considered the cost of litigating against MCC, the time and resources dedicated to such litigation, and the prospects for prevailing. If MCC were to prevail in the litigation outright, almost 100% of the sale proceeds from the bulk sale would have gone to pay the MCC debt and litigation expenses. While the Receiver believes that his claims against MCC are strong, the downside risk was a factor to be considered.

The Receiver also prepared a net proceeds analysis in which he compared the MCC settlement to the net sale proceeds likely to be received from the bulk sale of the California Properties for $8,800,000. The net recovery from a bulk sale of the California Properties at $8,800,000 (or even $9,500,000), after taking into account the disputed secured claims, the undisputed secured claims, the closing costs, and litigation expenses, will yield less than the Receiver's estimate of recovery under the MCC Settlement.

While there are several ways to analyze the benefits to the receivership estate, a settlement with MCC would involve a net cash recovery to the receivership estate of $2.6 million from the sale of a <u>single</u> property, the Lincoln Red Rock Property. The Receiver is now free to sell the Carmichael, Citrus Heights and Sacramento properties, which the Receiver believes exceed $5.0 million in value. After payment of undisputed secured claims, debt service and other closing expenses, the Receiver expects to yield well over $2,000,000. At the same time, the Receiver has eliminated MCC's liens on both the Lincoln Red Rock Property, the $2.2 million of sales proceeds from the sale of the Sarasota Property, MCC's liens on other personal property, and MCC's unsecured claims against the receivership estate.[4] As such, the

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[4] Even if the Receiver had voided MCC's Deed of Trust, MCC may have had an

Receiver believes that the Receivership Entities, with some certainty, net over $1 million more from the MCC settlement than would be recovered from the bulk sale at $8,800,000. Assuming the Receiver sells the remaining three California properties as expected, the increase in total proceeds could be as high as $2.6 million. In other words, even if the overbidding process increased the bulk sale price to $10,000,000, it is reasonable to estimate that the estate would still be better off by $1.4 million by settling with MCC.

4. <u>Payment of the Broker Commission and Break-Up Fee.</u>

Hamlin Gooding ("Broker") was retained to be the real estate broker for the California Properties. Had the sale of the California Properties closed, the Broker would have received a commission of 6% (assuming the Court approved the sale transaction.)

The MCC settlement disrupted the sale process with regard to the California Properties, however, the MCC settlement still involves the transfer of the Lincoln Red Rock Property. The Receiver believes that the Broker played a role in generating MCC's settlement offer including the payment of $2.6 million in cash to the Receiver.

In light of the foregoing, the Receiver believes that the Broker should receive a commission of $312,000 (reflecting 3.6% of $8,700,000.)

Similarly, Carefield also played a role in prompting MCC to make a settlement offer and then to increase its settlement offer based on the overbid and expressions of interest. The California Properties PSA had a "break-up fee" of $175,000, payable to Carefield in the event Carefield was not the successful bidder at the auction. While no auction was conducted, Carefield's original offer prompted not only an overbid but also the MCC settlement offer. As noted above, the

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unsecured claim based upon its promissory note in excess of $6.1 million. The MCC claim would be by far the largest unsecured claim and would therefore significantly impact the recovery of all other investors.

Receiver estimates that the Settlement Agreement will ultimately result in more money being recovered by the Receiver than would have been received from the auction of the four California Properties. For its role in generating such proceeds, the Receiver believes it is fair and reasonable to pay Carefield $175,000 at the closing of the MCC Settlement Agreement and PSA.

III. DISCUSSION

A federal equity receiver's power to compromise claims is subject to court approval. As noted by the Ninth Circuit Court of Appeals in *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986), "[a] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." With regard to settlements entered into by a federal equity receiver, the Court's supervisory role includes reviewing and approving those settlements in light of federal court policy to promote settlements before trial. See Fed. R. Civ. P. 16(c), Advisory Committee Notes.

Moreover, a receiver's authority to settle claims is inherent in the charge to an equity receiver to collect assets:

> Since the court has authority to authorize a receiver to collect assets of a corporation, it has the further authority to authorize the receiver to sue to collect the assets of the corporation. It naturally flows, as a necessary corollary of the foregoing, that the receiver has the power, when su authorized by the court, to compromise claims either for or against the receivership and whether in suit or not in suit.

3 Clark, Ralph Ewing, *A Treatise on the Law and Practice of Receivers*, § 770, p. 1424 (3d ed. 1959) (cited in *Securities and Exchange Commission v. Credit Bancorp, Ltd.* 2002 (S.D.N.Y. August 2, 2002)).

Federal courts of equity often look to bankruptcy law for guidance in the administration of receivership estates. See *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005); *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1140 (9th Cir. 1996); *SEC v. Basic Energy & Affiliated Resources*, 273 F.3d 657, 665 (6th Cir. 2001); see also Local Civil Rule 66-8 ("a receiver shall administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy"). A bankruptcy court may approve a compromise of claims asserted by or against the estate if the compromise is "fair and equitable." *Woodson v. Fireman's Fund Insurance Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). The approval of a proposed compromise negotiated by a court appointed fiduciary "is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interest of the estate nor fair and equitable for the creditors." *In re MGS Marketing*, 111 B.R. 264, 266 67 (B.A.P. 9th Cir. 1990).

The Court has great latitude in approving compromises. In passing on the proposed compromise, the Court should consider the following:

a. The probability of success in litigation;

b. The difficulties, if any, to be encountered in the matter of collection;

c. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending; and

d. The paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Woodson, 839 F.2d at 620.

Here, the Receiver has weighed the costs and likely benefits of pursuing legal action against MCC versus selling the California Properties pursuant to a bulk sale as described in the Sale Motion. While the Receiver is confident he would prevail, at least partially, in the MCC litigation, obtaining such a judgment would involve considerable time, resources and expense, and likely not result in eliminating 100% of MCC's debt. That is, the Receiver faces certain defenses by MCC to the relief requested, which defenses may diminish the relief sought by the Receiver (i.e. MCC could have possibly established that it was owed some substantial portion of its $6.1 million claim or that it has an unsecured claim).

Moreover, the Receiver has compared the MCC settlement with the existing highest overbids for the California Properties and prospective estimates from overbidders to assess the highest price to be obtained at auction. The Receiver believes in his reasonable business judgment and experience that it is unlikely he would be able to collect more from a judgment against MCC plus the sale of the California Properties, than the Receiver is recovering from the MCC Settlement Agreement. Accordingly, the Receiver believes the MCC Settlement is in the best interests of the receivership estate, and therefore asks that it be approved.

IV. CONCLUSION

For the reasons set forth above, the Receiver requests an order approving the Settlement Agreement. The Receiver also requests that the Court approve the payment to Hamlin Gooding of $312,000 as a real estate commission and a payment to Buyer or its assigns of $175,000, both upon the closing of the Settlement Agreement and the PSA.

Dated: March 27, 2018

ALLEN MATKINS LECK GAMBLE
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By: */s/ David R. Zaro*
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THOMAS A. SEAMAN