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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
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
SUMMERFIELD, 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
SANTE OF TUCSON; (2) SALES
COMMISSION; AND (3) POST
CLOSING SERVICES
AGREEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: March 25, 2019
Time: 1:30 p.m.
Ctrm: 7C
Judge: Hon. Cormac J. Carney

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

2 **PLEASE TAKE NOTICE** that on March 25, 2019, at 1:30 p.m. in
3 Courtroom 7C of the above-entitled Court, located at 350 W. 1st Street, Los
4 Angeles, California 90012, Thomas A. Seaman ("Receiver"), the Court-appointed
5 receiver for the entity Defendants and their subsidiaries and affiliates
6 ("Receivership Entities"), will and hereby does move the Court for an order
7 approving the transfer and sale of that 103 bed skilled nursing facility commonly
8 known as "Santé of Tucson" located at 2040 N. Wilmot Rd., Tucson, Arizona
9 ("Motion"). The real property and associated facilities of Santé of Tucson are
10 owned by Set Real Co., LLC ("Real Co.") and the associated personal property
11 and intangible property used in the operation of Santé of Tucson is owned by Set
12 Op Co., LLC ("OpCo") (the real property, associated facilities and personal and
13 intangible property collectively the "Facility"). Both Real Co. and OpCo are
14 subsidiaries of TRC Tucson, LP.

15 By this Motion, the Receiver requests the Court approve the sale and
16 transfer of the Facility to Sapphire Estates Properties, LLC ("Buyer") subject to an
17 existing loan in the original amount of \$17,181,200 payable to Barings
18 Multifamily Capital LLC ("Barings") and guaranteed by the United States
19 Department of Housing and Urban Development (the "HUD Loan"), in accordance
20 with the terms of the Asset Purchase Agreement dated February 13, 2019 (the
21 "Purchase Agreement"). The Receiver also requests the Court approve the
22 payment of a broker's sales commission of \$109,600 and a Post Closing Services
23 Agreement, pursuant to which, among other things, existing manager, Santé
24 Operations, LLC ("Santé"), shall receive compensation during a transitional
25 period.

26 This Court's approval of the Purchase Agreement and transaction are a
27 condition of closing. However, it should be noted that the benefits of this
28 transaction to the Receivership Entities can only be realized if HUD approves of

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Receiver moves this Court for an order authorizing him to sell the 103
4 bed skilled nursing facility located at 2040 N. Wilmot Rd., Tucson, Arizona
5 commonly known as "Santé of Tucson" on the terms generally described below
6 and more specifically set forth in the Asset Purchase Agreement, dated February
7 13, 2019 (the "Purchase Agreement"). A true and correct copy of the Purchase
8 Agreement is attached as Exhibit A to the concurrently filed Declaration of
9 Thomas A. Seaman ("Seaman Declaration" or "Seaman Decl.").

10 The Receiver has worked diligently to locate a buyer for the enterprise
11 through commercially reasonable and customary channels, including, but not
12 limited to, engaging a broker and specifically targeting buyers reasonably believed
13 to be interested or specializing in the operation of skilled nursing facilities. During
14 the sale process, numerous parties expressed an interest and the Receiver engaged
15 in a number of negotiations to sell Santé of Tucson, all of which were
16 unsuccessful. Ultimately, the Receiver accepted the offer from Sapphire Estates
17 Properties, LLC ("Buyer") to purchase Santé of Tucson for \$1,368,000 and assume
18 the HUD Loan ("Purchase Price"), on an "as-is, where-is" basis, in accordance
19 with the terms of the Purchase Agreement. The closing is conditioned upon
20 HUD's timely approval of Buyer's application to assume the HUD Loan. The
21 Receivership Entities will most likely recover a net of \$430,000 from the Purchase
22 Price after all closing costs, operating costs, loan expenses and commissions are
23 paid.

24 Based upon the present facts and circumstances, the Receiver believes the
25 Purchase Price is the best price attainable for Santé of Tucson and respectfully
26 requests the Court grant this Motion and approve: (1) the sale of Santé of Tucson
27 to Buyer subject to the HUD Loan, pursuant to the terms of the Purchase
28

1 Agreement; (2) payment of the Broker's commission; and (3) approval of the Post
2 Closing Services Agreement.

3 **II. RELEVANT FACTS**

4 **A. The Receiver's Appointment And Authority To Sell Santé Tucson**

5 On January 5, 2017, the Receiver was appointed temporary receiver for the
6 Receivership Entities,¹ with full powers of an equity receiver, including, but not
7 limited to, full power over all assets and property belonging to, being managed by
8 or in the possession or control of the Receivership Entities, and was immediately
9 authorized, empowered and directed to take certain actions as set forth in the
10 Temporary Restraining Order ("TRO"). (Dkt. No. 17.) On January 23, 2017, the
11 Court entered its Preliminary Injunction Against All Defendants ("PI Order"),
12 which, among other things, made the Receiver's appointment permanent. (Dkt.
13 No. 36.)

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

22 **B. The Santé of Tucson Facility**

23 The property now operated as Santé of Tucson was purchased in or around
24 2014 by TRC Tucson, LP, a Delaware limited partnership, through its subsidiaries
25 Set Real Co., LLC, an Arizona limited liability company and Set Op Co, LLC, an
26 Arizona limited liability company (collectively "Seller" or "Owner.") The Facility

27 _____
28 ¹ Terms previously defined in the Motion will be used and have the same
meaning in this Memorandum of Points and Authorities.

1 opened in early 2017 and is managed on a day-to-day basis by Santé Operations,
2 LLC, pursuant to an Agreement to Provide Management Services. TRC Tucson,
3 LP is owned, in part, by an affiliate of Santé Operations, LLC.

4 After his appointment, the Receiver evaluated the viability of operating as
5 well as disposition options for Santé of Tucson. At the outset, the Receiver
6 discovered that the enterprise was essentially a start-up business with too little
7 operating capital, too many operating expenses, and too much overhead, including
8 but not limited to the HUD Loan. The Receiver spent significant time working
9 with Santé to curtail expenses and increase revenues. The Receiver and Santé
10 concurrently explored an assortment of borrowing and joint venture options in an
11 effort to preserve the EB-5 Investor interests and goals. Unfortunately, while
12 significant improvements in operations were attained, the Receiver and Santé were
13 having to continue to invest money to keep the doors open and the HUD Loan
14 current. Seaman Decl., ¶ 5.

15 Given the existing circumstances and the Receiver's role as a federal equity
16 receiver, the Receiver determined that it would not be cost effective, appropriate,
17 or feasible for him to continue to hold and finance Santé of Tucson from
18 receivership assets in the hope that a joint venture or sale transaction would
19 someday materialize in which the interests of the EB-5 Investors would be
20 preserved. As previously noted, the Receiver has no ability to raise new equity in
21 the market, nor is it possible to borrow funds based on the lack of available capital
22 or equity for such a venture. Even if such funding could be secured, the pursuit of
23 this start-up venture and funding of ongoing operations presents a far greater risk
24 of further losses with only the prospect of speculative returns at some future date.
25 In light of the foregoing, the Receiver believes the sale of Santé of Tucson, on an
26 "as-is, where is" basis, will return the highest value for the receivership estate.

27 Therefore, the Receiver engaged Blueprint Healthcare Realty Advisors
28 ("Broker"), who conducted a marketing campaign specifically targeting

1 prospective buyers reasonably believed to be interested or specializing in the
2 operation of skilled nursing facilities. The Broker was selected for their significant
3 experience in marketing assisted living facilities and related real property assets in
4 various stages of development. Due to the unique nature of this sale, in which the
5 buyer is assuming the HUD Loan, meaning the net proceeds to the receivership
6 estate are very limited, the Receiver could not pay a broker a customary
7 percentage commission based on the value of the underlying asset. Accordingly,
8 the Receiver negotiated to pay Broker 20% of the net recovery from the
9 transaction for the receivership estate. Here, the net recovery is \$548,000, so the
10 proposed commission to be paid is \$109,600. If, for example, the property were
11 deemed to be valued at \$21.5 million, \$109,600 would be a commission of 0.6%,
12 which is far less than a customary broker's commission. Seaman Decl. ¶ 12.

13 **C. The Proposed Sale**

14 The sale of the Facility is structured as an asset purchase whereby the Buyer
15 will acquire the real property with all improvements and all tangible assets used in
16 connection with the operation of the Facility, assume certain agreed upon
17 contracts, receive the security deposits and patient trust accounts, succeed to the
18 debt service and replacement reserves required under the HUD Loan, and assume
19 the loan from Barings which is guaranteed by HUD. The Receiver will retain all
20 rights to revenues from operations prior to the Closing Date and will be
21 responsible for all expenses, claims and liabilities which accrued prior to the
22 Closing Date. The Receiver, Santé and the Buyer will enter into an Operations
23 Transfer Agreement as part of the transaction pursuant to which the Receiver and
24 Santé will provide certain assistance necessary for the orderly transition of the
25 nursing facilities operation for a 90-day period after the Closing.

26 The purchase price for the facility is \$1,368,000 plus the assumption of the
27 HUD Loan. After deducting repayment of the HUD debt service reserve of
28 \$280,000 and a discounted payoff of \$100,000 of the \$440,000 Sante note, the

1 gross proceeds of the sale to the receivership estate will be \$988,000. Advances
2 from the receivership estate totaling \$440,000 will also be repaid from the
3 transaction, making the net proceeds from the sale \$548,000. After deducting the
4 Broker's commission and title fees, the net benefit to the receivership estate will be
5 approximately \$430,000. The Receiver is required to hold \$150,000 of the
6 Purchase Price in a segregated account for 18 months following the Closing Date
7 to cover (a) any reimbursements/repayments required by Medicare with regard to
8 payments received for services prior to the Closing Date, (b) the payment of
9 patient or employee claims (including deductibles) arising out of services provided
10 prior to the Closing Date, and (c) any obligations for operations prior to the
11 Closing Date. Seaman Decl., ¶ 14.

12 As of the Closing Date, the Agreement to Provide Management Services
13 will terminate, but Santé will continue to collect the revenues and pay the expenses
14 attributable to the period prior to the Closing Date and assist in the transition of
15 nursing home operations to the Buyer pursuant to the Post Closing Services
16 Agreement. It is expected that revenues to be collected for the period before the
17 Closing Date will exceed the unpaid expenses, and Santé will receive from such
18 surplus (and from any amounts remaining under the Holdback after the Holdback
19 Period has expired) its unpaid management fees for the period prior to the Closing,
20 up to the amount of the total of such surplus and remaining Holdback.

21 The closing of the sale is contingent upon (i) the Court's approval, (ii) the
22 consent of Barings and HUD to the Buyer's assumption of the HUD Loan, and
23 (iii) Buyer's obtaining the licenses and permits required to operate the Facility. If
24 the Buyer cannot obtain approval from HUD to assume the HUD Loan prior to
25 April 30, 2019, then the Receiver may terminate the Purchase Agreement. If no
26 closing occurs by June 30, 2019, the Purchase Agreement terminates by its terms
27 without notice.

28

1 **D. Asset Purchase Agreement**

2 A copy of the Purchase Agreement for the sale to Buyer is attached as
3 Exhibit A to the Seaman Declaration. Its terms are summarized as follows:²

4 **Court Approval.** All aspects of the Purchase Agreement and the sale are
5 subject to Court approval.

6 **Purchase Price.** \$1,368,000. As noted above, after deducting repayment of
7 the HUD debt service reserve of \$280,000 and a discounted payoff of \$100,000 of
8 the \$440,000 Sante note, the gross proceeds of the sale to the receivership estate
9 will be \$988,000. Advances from the receivership estate totaling \$440,000 will
10 also be repaid from the transaction, making the net proceeds from the sale
11 \$548,000. After deducting the Broker's commission and title fees, the net benefit
12 to the receivership estate will be approximately \$430,000. I am required to hold
13 \$150,000 of the Purchase Price in a segregated account for 18 months following
14 the Closing Date to cover (a) any reimbursements/repayments required by
15 Medicare with regard to payments received for services prior to the Closing Date,
16 (b) the payment of patient or employee claims (including deductibles) arising out
17 of services provided prior to the Closing Date, and (c) any obligations for
18 operations prior to the Closing Date.

19 **Closing Date.** The sale to close within 5 business days after the later of the
20 date (a) the Court's approval has been obtained, and (b) Barings and HUD have
21 consented to the assignment and assumption of the HUD Loan.

22 **Deposit.** Buyer delivered to the Receiver a deposit of \$300,000 ("Earnest
23 Money Deposit"). The Earnest Money Deposit is nonrefundable unless (i)
24 Receiver fails to obtain Court Approval as required by the terms herein set forth,
25

26 _____
27 ² The terms of the Purchase Agreement are summarized herein for convenience
28 only. In the event of any conflict between the Purchase Agreement and the
summary provided herein or any ambiguity as to the language used herein, the
Purchase Agreement shall govern and control.

- 1 (ii) HUD does not consent to the assignment and assumption of the HUD Loan; or
2 (iii) the Receiver defaults in its obligations under the Purchase Agreement.

3 **As Is/Where Is Purchase.** Buyer agrees to purchase the Facility on an
4 "as-is, where is" basis, with no representations or warranties made by the Receiver,
5 his professionals, or the Receivership Entities.

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

8 **III. BROKER'S COMMISSION**

9 By separate agreement, the Receiver has agreed, subject to Court approval,
10 to pay Broker a commission of \$109,600. Seaman Decl. ¶ 12.

11 **IV. NOTICE OF THE PROPOSED SALE**

12 The Receiver's counsel is serving this Motion by mail on all parties to the
13 action who do not already receive electronic service. The Receiver is also posting
14 a copy of this Motion on the receivership website and will send email notice to the
15 EB-5 Investors in TRC Tucson of the Motion and the transaction. Seaman Decl.
16 ¶ 15.

17 **V. ARGUMENT**

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

28

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

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

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

22 It is also widely accepted that a court of equity having custody and control
23 of property has power to order a sale of property in its discretion. *See, e.g., SEC v.*
24 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
25 and wide discretion to determine relief in an equity receivership). "The power of
26 sale necessarily follows the power to take possession and control of and to
27 preserve property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144
28 (9th Cir. 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds)
(*citing* 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d
ed. 1992) (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))). "When a
court of equity orders property in its custody to be sold, the court itself as vendor
confirms the title in the purchaser." 2 Ralph Ewing Clark, Treatise on Law &
Practice of Receivers § 487 (3d ed. 1992)).

1 "A court of equity, under proper circumstances, has the power to order a
2 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
3 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
4 Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992)). To that end,
5 a federal court is not limited or deprived of any of its equity powers by state
6 statute. *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir.
7 1925) (state statute allowing time to redeem property after a foreclosure sale not
8 applicable in a receivership sale).

9 Generally, when a court-appointed receiver is involved, the receiver, as
10 agent for the court, should conduct the sale of the receivership property. *Blakely*
11 *Airport Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154,
12 156 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced
13 by an injunction against the owner and against parties to the suit. *See* 2 Ralph
14 Ewing Clark, Treatise on Law & Practice of Receivers §§ 342), 344), 482(a)),
15 487), 489), 491) (3d ed. 1992). "In authorizing the sale of property by receivers,
16 courts of equity are vested with broad discretion as to price and terms."
17 *Gockstetter v. Williams*, 9 F.2d 354, 357 (9th Cir. 1925).

18 After marketing Santé of Tucson for two years and exploring a myriad of
19 development and sales options without success, the Receiver does not believe that
20 a public auction of this business enterprise or the property would result in a higher
21 offer. Seaman Decl., ¶ 11. To the contrary, in light of the complexities of the
22 business, the HUD Loan and the risks attendant to the enterprise, it is unlikely that
23 any offers would be received, much less a higher offer.

24 The Receiver's proposed asset sale pursuant to a purchase agreement which
25 is not subject to an overbid is permissible under 28 U.S.C. § 2004, which gives the
26 Court discretion to approve a private sale in circumstances such as this.
27 Particularly where a public auction would provide no material benefits to the
28 receivership estate.

