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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14
15 SECURITIES AND EXCHANGE
COMMISSION,
16 Plaintiff,

17 v.

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

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

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION OF
RECEIVER, THOMAS A.
SEAMAN, FOR ORDER:
(1) APPROVING FINAL
REPORT AND ACCOUNTING;
(2) AUTHORIZING PAYMENT
OF FINAL FEE APPLICATIONS
OF RECEIVER AND
PROFESSIONALS;
(3) AUTHORIZING
DESTRUCTION OF RECORDS;
AND (4) DISCHARGING AND
RELEASING RECEIVER**

Date: January 24, 2022
Time: 1:30 p.m.
Ctrm: 7C
Judge: Hon. Cormac J. Carney

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

1
2
3 Thomas A. Seaman (the "Receiver"), the Court-appointed permanent receiver
4 for PDC Capital Group, LLC and its subsidiaries and affiliates (collectively, the
5 "Receivership Entities" or "Entities"), hereby submits the present memorandum of
6 points and authorities in support of the motion for an order: (1) Approving Final
7 Report and Accounting; (2) Authorizing Payment of Final Fee Applications of
8 Receiver and Professionals; (3) Authorizing Destruction of Records; and
9 (4) Discharging and Releasing Receiver (the "Motion"). As of the date of the instant
10 Motion, the Receiver believes he has – with the assistance of his Professionals¹ –
11 fulfilled each of his responsibilities to the fullest extent possible, and has exhausted
12 all reasonable efforts to recover the receivership assets ("Receivership Assets" or
13 "Assets") for the benefit of the estate of the Receivership Entities (the "Estate"). The
14 specific accomplishments of the Receiver and his Professionals are summarized
15 herein, and in the Receiver's periodic reports to the Court, and the Final Report and
16 Accounting of Receiver ("Final Report"), submitted concurrently with this Motion.

17 Accordingly, the Receiver recommends and requests that the Court authorize
18 him to close the receivership following the payment of Professionals and destruction
19 of records, and order that the Receiver be discharged.

II. STATEMENT OF FACTS AND RECEIVERSHIP STATUS.

20
21 The above-captioned enforcement action was commenced by the Plaintiff
22 Securities and Exchange Commission (the "Commission") on January 5, 2017. (ECF
23 No. 1.) The Commission's Complaint alleged that Defendants and its founder,
24 Emilio Francisco, ran a series of unregistered investment funds in which they raised
25 over \$70,000,000 from approximately 134 investors, each of whom invested
26 \$500,000 as EB-5 Immigrant Investor applicants ("EB-5 Investors"), and paid an
27

28 ¹ For the purposes of this Motion, the Receiver's "Professionals" are his attorneys, Allen Matkins
Leck Gamble Mallory & Natsis, LLP.

1 administrative fee of \$50,000 with the goal of obtaining permanent residency in the
2 United States. The Commission requested the appointment of a receiver and, on
3 January 5, 2017, this Court entered the Appointment Order. (ECF No. 8.)

4 Following his appointment, the Receiver administered the receivership in
5 accordance with the Court's instructions including, but not limited to: (1) marshaling
6 and preserving Receivership Assets; (2) performing accountings and analysis of the
7 Receivership Entities' financial activities and condition; (3) eliminating and
8 addressing the Entities' liabilities; (4) recommending the claims process, appropriate
9 treatment of claims, and making distributions; and (5) preparing reports for this
10 Court. (See concurrently filed Declaration of Thomas A. Seaman ["Seaman Decl."]
11 ¶ 2.) The Receiver successfully completed all of the work enumerated in the
12 Appointment Order including but not limited to:

- 13 • Completing a detailed review and analysis of the business and financial
14 activities of the Receivership Entities, including a review and analysis of
15 business operations, and a myriad of partially developed real estate projects
16 and assisted living facilities located primarily in California, Arizona and
17 Florida.
- 18 • Marshaling, preserving and selling all Receivership Assets; ultimately
19 recouping gross recoveries in the amount of \$17,359,648 for the benefit of the
20 Receivership Entities.
- 21 • Taking control over several operating assisted living facilities as well as
22 partially developed assisted living projects in California, Arizona and Florida.
23 In each case, the Receiver enhanced the value of the projects through, among
24 other things, operational changes and capital improvements, and then sold
25 these projects generating funds to pay off secured creditors and provide a
26 return to the Receivership Estate.
- 27 • Notwithstanding the significant secured loans encumbering the raw land
28 acquired by PDC, negotiating settlements with lenders which consistently

1 returned revenue to the Estate, even as to properties with no value above the
2 secured debt.

- 3 • Successfully selling unique assets including a yacht in Mexico and a
4 manufacturer of ammunition located in Stevensville, Montana.
- 5 • Resolving prospective tax claims and a contingent liability to the
6 purchaser of Tucson TRC, allowing the Receiver to make an additional
7 distribution of \$1.310 million to investors.
- 8 • Successfully filing all receivership Qualified Settlement Fund tax
9 returns as well as the 59 separate tax returns for pre-receivership periods with
10 no tax payments being required.

11 Seaman Decl. ¶ 3-4.

12 The Receiver also successfully administered the Receivership Estate, through
13 his staff and his communications with investors in order to keep them apprised of the
14 status of the receivership. He also managed the difficult claims and distribution
15 process in order to facilitate payment of investors in China and elsewhere.

16 The Receiver invites the Court and interested parties to review the Receiver's
17 Interim Receiver Reports [ECF Nos. 32, 68, 143, 194, 231, 268, 295, 313, 341, 356,
18 371, 398] and the Final Report for a more detailed description of the activities and
19 efforts of the Receiver and his Professionals.

20 The Receiver recovered \$17,359,648, and distributed \$10,687,108.67 to the
21 134 investors. Seaman Decl. ¶ 3. The Receiver believes he has – with the
22 assistance of his Professionals – fulfilled each of his responsibilities to the fullest
23 extent possible and has exhausted all reasonable efforts to recover Receivership
24 Assets for the benefit of the Estate. Seaman Decl. ¶ 5. Having fulfilled his
25 responsibilities under the Appointment Order, the Receiver believes it is now time to
26 close the receivership case and discharge and release the Receiver. *Id.*

27 For the reasons set forth herein, the Receiver respectfully requests that this
28 Court enter an Order approving the Receiver's Final Report; authorizing the payment

1 of the Final Fee Applications; authorizing the destruction of documents, and
2 discharging the Receiver.

3 **III. CLOSING RECOMMENDATIONS.**

4 The Receiver believes that he has now satisfied his obligations under the
5 Appointment Order and exhausted all reasonable efforts to recover Receivership
6 Assets. Accordingly, the Receiver recommends that the Court authorize him to close
7 the receivership. Specifically, the Receiver's recommendations are as follows:

8 **A. Approval of the Receiver's Final Report.**

9 The Receiver's Final Report (which also appends his final accounting for the
10 Estate) has been submitted to the Court concurrently with this Motion. The Final
11 Report briefly summarizes the actions of the Receiver and his Professionals during
12 the pendency of the receivership case, and provides brief descriptions of his
13 document review and analysis, accounting, Asset preservation and recovery, claims
14 administration, and reporting efforts. A copy of the Receiver's final accounting
15 summary, reflecting recoveries and expenditures during the pendency of the
16 receivership, is attached as **Exhibit 1** to the Final Report. As reflected in the
17 Receiver's Final Report and accounting, after payment of the Receiver and
18 Professionals, and the below-described closing costs, the Receiver will turn over
19 \$26,613.10 (the amount may vary depending upon the actual cost of tax preparation
20 and destruction of documents). The Receiver respectfully requests that the Court
21 approve his Final Report.

22 **B. Payment of Fees and Expenses of Receiver and His Professionals.**

23 Concurrently with this Motion, the Receiver and his Professionals have
24 submitted their respective Final Fee Applications, requesting payment of their
25 respective outstanding fees and expenses incurred during the most recent period, the
26 Holdback amount and anticipated fees and expenses required for destruction of
27 records.

28

1 The Receiver has \$976,122.11 of cash on-hand to cover the Receiver's and his
2 Professionals' administrative and professional fees, including for: (a) interim fees
3 and expenses of (b) Holdbacks of already-approved fees and expenses; and (c) funds
4 in the aggregate amount of \$21,219.50 to cover destruction of records, preparation of
5 2021 tax returns, and a \$5,019.50 holdback as to the digital forensics consultant
6 ("Digital Forensics") who provided assistance at the outset of the receivership.
7 (Seaman Decl. ¶ 7.)

8 Accordingly, the Receiver respectfully requests authorization to pay his, and
9 his Professionals': in the aggregate (1) \$374,900.50 reflecting the interim fees per
10 the Final Applications; (2) Expenses of \$8,026.58; (3) Holdbacks in the aggregate
11 amount of \$549,704.43; and (4) \$21,219.50 for the cost to destroy records, prepare
12 2021 tax returns and pay Digital Forensics' holdback. Seaman Decl. ¶ 7.

13 **C. Submission of Final Tax Returns.**

14 The Receiver is required to submit tax returns for each calendar year of the
15 pendency of the receivership. (Seaman Decl. ¶ 9.) Based on his discussions with his
16 accounting Professionals, the Receiver must file the Qualified Settlement Fund
17 returns for the Entities for the 2021 tax year on or before April 15, 2022. (Id.) As
18 noted above, while no taxes will be owed, the cost of tax preparation will be
19 approximately \$10,000.

20 **D. Abandonment or Destruction of Records.**

21 The Receiver requests that he be authorized to destroy all documents and
22 electronic records, except for those records, if any, that the SEC or the AUSA request
23 and take possession of within thirty (30) days. The cost of the destruction of records
24 is estimated to be \$6,200.

25 **IV. ARGUMENT.**

26 **A. The Proposed Final Closing Tasks Should Be Authorized.**

27 A court's power to administer an equity receivership is extremely broad. SEC
28 v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986); SEC v. Forex Asset Mgmt., LLC,

1 242 F.3d 325, 331 (5th Cir. 2001); SEC v. Basic Energy & Affiliated Res., 273 F.3d
2 657, 668 (6th Cir. 2001); SEC v. Elliot, 953 F.2d 1560, 1566 (11th Cir. 1992); SEC
3 v. Wang, 944 F.2d 80, 85 (2d Cir. 1991). In the absence of controlling authority, and
4 where applicable, district courts supervising equity receiverships routinely look to
5 bankruptcy law for guidance. SEC v. Am. Capital Invs., 98 F.3d 1133,1140 (9th Cir.
6 1996); CFTC v. Topworth Int'l, 205 F.3d 1107, 1116 (9th Cir. 1999) (Central District
7 local rules, for instance, "direct receivers, unless otherwise ordered ... to 'administer
8 the estate as nearly as possible in accordance with ... the administration of estates in
9 bankruptcy."); Fleet Nat'l Bank v. H&D Entm't, 926 F. Supp. 226, 240 n. 56 (D.
10 Mass. 1996) ("[W]hat is permitted under the Bankruptcy Code, generally is, a
11 fortiori, permissible under receivership law.").

12 In the case administration context, courts are deferential to the business
13 judgment of bankruptcy trustees, receivers, and similar estate custodians. See, e.g.,
14 Bennett v. Williams, 892 F.2d 822, 824 (9th Cir. 1989) ("[W]e are deferential to the
15 business management decisions of a bankruptcy trustee."); Sw. Media, Inc. v. Rau,
16 708 F.2d 419, 425 (9th Cir. 1983) ("The decision concerning the form of ... [estate
17 administration] ... rested with the business judgment of the trustee."); see also SEC
18 v. Health Maint. Ctrs., Inc., 2002 WL 34388014 (W.D. Wash. 2002) (Equating
19 bankruptcy trustees with receivers and finding that "the courts have overwhelmingly
20 applied a 'business judgment' test" to estate administration.); In re Thinking Machs.
21 Corp., 182 B.R. 365, 368 (D. Mass. 1995) ("The application of the business
22 judgment rule ... and the high degree of deference usually afforded purely economic
23 decisions of trustees, makes court refusal unlikely.") (rev'd on other grounds, 67 F.3d
24 1021 (1st Cir. 1995)).

25 As reported herein and in the concurrently-submitted Final Report, the
26 Receiver has made all reasonable and necessary efforts to: recover, review, and
27 analyze Receivership Entity business records and documents; assemble accounting
28 reports reflecting the Receivership Entities' financial activities; recover available

1 Receivership Assets; and develop and administer an equitable claims and distribution
2 process for victimized investors and creditors. The Receiver has concluded, in his
3 reasonable business judgment, that continued administration of the instant
4 receivership will not result in recovery of any additional Receivership Assets.
5 Accordingly, the Receiver has concluded that it is now appropriate for the Court to
6 close the case and discharge the Receiver.

7 **B. The Final Fee Applications Are Reasonable And Appropriate, And**
8 **Payment Of All Outstanding Fees and Expenses Should Be**
9 **Authorized At This Time.**

10 "As a general rule, the expenses and fees of a receivership are a charge upon
11 the property administered." Gaskill v. Gordon, 27 F.3d 248, 251 (7th Cir. 1994).
12 These expenses include the fees and expenses of the Receiver and his Professionals.
13 Decisions regarding the timing and amount of an award of fees and expenses to the
14 Receiver and his Professionals are committed to the sound discretion of the Court.
15 SEC v. Elliot, 953 F.2d 1560, 1577 (11th Cir. 1992) (rev'd in part on other grounds,
16 998 F.2d 922 (11th Cir. 1993)).

17 1. **The Fees and Expenses Requested in the Final Fee Applications**
18 **are Reasonable.**

19 In determining the reasonableness of fees and expenses requested in this
20 context, the Court should consider the time records presented, the quality of the work
21 performed, the complexity of the problems faced, and the benefit of the services
22 rendered to the receivership estate. SEC v. Fifth Ave. Coach Lines, Inc., 364
23 F.Supp. 1220, 1222 (S.D.N.Y. 1973).

24 Here, the Final Report and Final Fee Applications describe the nature of the
25 services that have been rendered, and where appropriate, the identity and billing rate
26 of the individuals performing each task. The Receiver and his Professionals have
27 endeavored to staff matters as efficiently as possible in light of the level of
28 experience required and the complexity of the issues presented. In general, the Final

1 Fee Applications reflect the Receiver's and his Professionals' customary billing rates
2 and the rates charged for comparable services in other matters, less any discounts or
3 reductions specifically identified in the respective applications. The total fees and
4 expenses incurred by the Receiver and Professionals since the inception of the
5 Receivership are \$3,808.644. These fees and expenses are approximately 21.9% of
6 the approximately \$17.3 million recovered. Both Receiver's and Counsel's rates
7 were discounted throughout the case. This percentage is within the range of
8 reasonableness established by courts on this Circuit and is otherwise reasonable in
9 light of the highly complex and far-reaching nature of this case. That is, the matter
10 involved a financial fraud that involved overseas investors seeking permanent status,
11 a restaurant chain, assisted living facilities in 3 states, properties in various degrees
12 of development located in 4 states, an ammunition manufacturing company in
13 Montana and a yacht in Mexico. In addition, to the Receiver's expertise in managing
14 the licensing, regulatory and collection issues associated with assisted living
15 facilities, the Receiver and the Professionals addressed complex administrative tax
16 and distribution issues which required specialized expertise in a variety of fields.

17 The Receiver has reviewed the Final Fee Applications, and believes the hourly
18 rates charged were reasonable and appropriate, given the requirements of the instant
19 receivership, that every effort was made to have tasks completed at the lowest
20 possible billing rate, and that the total fees for which the Receiver seeks
21 authorization for payment are fair and reasonable. (Seaman Decl. ¶¶ 6-7.) The
22 Receiver likewise believes that the Estate has benefited from the services identified.
23 (Id.)

24 As such, the Receiver requests the Court approve payment of the Holdback
25 amounts and the current interim Fee Applications.

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1 2. The Fees and Expenses Requested in the Final Fee Applications
2 have been Submitted to the Commission, Without Objection.

3 Courts often consider the judgment and experience of the Commission relating
4 to receiver compensation. "[I]t is proper to [keep] in mind that the [Commission] is
5 about the only wholly disinterested party in [this] proceeding and that ... its
6 experience has made it thoroughly familiar with the general attitude of the Courts
7 and the amounts of allowances made in scores of comparable proceedings." In re
8 Phila. & Reading Coal & Iron Co., 61 F. Supp. 120, 124 (D.C. Pa. 1945). Indeed,
9 the Commission's perspectives are not "mere casual conjectures, but are
10 recommendations based on closer study than a district judge could ordinarily give to
11 such matters." Finn v. Childs Co., 181 F.2d 431, 438 (2d Cir. 1950) (internal
12 quotation marks omitted). In fact, "recommendations as to fees of the [Commission]
13 may be the only solution to the 'very undesirable subjectivity with variations
14 according to the particular judge under particular circumstances' which has made the
15 fixing of fees seem often to be 'upon nothing more than an ipse dixit basis.'" Id.
16 Thus, the Commission's perspective on the matter should certainly be given "great
17 weight," as observed by the court in Fifth Ave. Coach Lines, Inc., 364 F. Supp. at
18 1222.

19 In order to ensure that the fees and expenses requested in the Final Fee
20 Applications are appropriate, the Receiver and his Professionals have submitted their
21 respective invoices to the Commission for review. The Commission has not
22 objected. The Commission's satisfaction with the subject invoices therefore merits
23 significant deference. As the Phila. & Reading Coal & Iron Co. court observed, the
24 Commission is "thoroughly familiar with ... the amounts of allowances made in
25 scores of comparable proceedings." 61 F.Supp. at 124.

26 The Receiver and his Professionals thus respectfully request that the Court
27 approve payment of all requested fees and expenses reflected in their respective Final
28 Fee Applications.

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V. CONCLUSION.

Based on the Receiver's cumulative findings and the fulfillment of his duties under the Appointment Order, the Receiver respectfully requests that this Court enter an Order:

1. Approving the Final Report in its entirety;
2. Authorizing the payment of the fees and expenses requested in the Final Fee Applications of the Receiver and his Professionals including but not limited to the Holdback amounts;
3. Authorizing and instructing the Receiver to destroy records and otherwise close the receivership; and
4. Discharging and releasing the Receiver and terminating the receivership.

Dated: December 17, 2021

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ David R. Zaro

DAVID R. ZARO
Attorneys for Receiver
THOMAS A. SEAMAN