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

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

**RECEIVER'S REPLY TO
DEFENDANTS EMILIO
FRANCISCO, MCC US, INC.
AND LINCOLN INVESTORS'
OPPOSITION TO RECEIVER'S
MOTION FOR ORDER
AUTHORIZING THE
RECEIVER TO MARKET
RECEIVERSHIP ASSETS FOR
SALE, ESTABLISH SALE
PROCEDURES AND ENGAGE
BROKERS**

Date: August 14, 2017
Time: 1:30 pm
Ctrm: 9B, 9th Floor
Judge: Hon. Cormac J. Carney

1 **I. REPLY TO EMILIO FRANCISCO'S OPPOSITION**

2 **A. The Francisco Opposition Is Based On False Assumptions**

3 Defendant Emilio Francisco's ("Francisco") Opposition to Receiver's Motion
4 for Order Authorizing the Receiver to Market Assets ("Francisco Opposition"),
5 largely ignores the content of the Motion of Receiver for Order Authorizing the
6 Receiver to Market Receivership Assets for Sale, Establish Sale Procedures and
7 Engage Brokers ("Motion"), as well as the Receiver's Second Interim Report and
8 Recommendations as of May 31, 2017 ("Second Report") [Dkt. No. 68]. Instead,
9 the Francisco Opposition presupposes a set of facts and circumstances that simply
10 do not exist; namely that the 15 Properties¹ held by the Receiver are not
11 encumbered, are ready to be financed, and the Receiver is requesting to immediately
12 sell all of the Properties at "fire sale" prices.

13 As clearly set forth in the Receiver's Motion, the Receiver seeks authority to
14 market the Properties, locate purchasers, and then return to Court to conduct the
15 public auction in accordance with 28 U.S.C. section 2001. As also stated in the
16 Motion, many of the Properties at issue are encumbered with deeds of trust securing
17 hard money loans that are currently in default. Absent a sale, many of these
18 Properties may be lost to foreclosure. The Motion also notes that there are several
19 of the Properties that may be developed if financing can be obtained or replacement
20 partners located. The relief sought by the Receiver in the Motion allows for the
21 Receiver to pursue these parallel efforts: commence marketing of the Properties and
22 pursue proposed development transactions for certain of the Properties.

23 The Receiver cannot simply sit still in the hope that development
24 opportunities will arise with regard to these Properties. Many of the Properties are
25 encumbered with significant loans and creditors with secured loans have already
26 made demands for payment and, in the case of MCC US, Inc. ("MCC"), sought
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¹ The 15 Properties are those described in the Motion and the Second Report.

1 relief from this Court to pursue a foreclosure sale. While it is premature for such
2 foreclosure actions to commence, the Receiver cannot ignore the existence of the
3 liens or the fact that interest continues to accrue at high interest rates on many of
4 these loans. Information concerning the loans and encumbrances were described by
5 the Receiver in connection with the Motion. *See* Declaration of Thomas A. Seaman
6 in Support of Motion of Receiver for Order to Authorize Receiver to Market
7 Receivership Assets for Sale, Established Sale Procedures and Engage Brokers,
8 Exhibit "A" [Dkt. No. 81] ("Seaman Declaration"). These facts alone reflect
9 objectively strong reasons to start the orderly process of marketing the Properties in
10 order to avoid the "fire sale" scenario in which Francisco wrongfully accuses the
11 Receiver of engaging.

12 The orderly marketing and sale of the Properties does not preclude the
13 Receiver's effort to seek development of assets where possible. As previously
14 discussed in the Receiver's Second Report, the Receiver is exploring the possibility
15 of development of the Phoenix and Lincoln projects. The Tucson project is already
16 completed and so the Receiver is engaging in efforts to restructure that partnership
17 in order to preserve investors' interests.

18 **B. The Purported Investor Declarations Do Not Support The**
19 **Francisco Opposition**

20 The purported investor declarations in support of the Francisco Opposition
21 are entirely spurious. First, these are form declarations which are nonsensical. Of
22 the 17 form declarations, 7 are from investors in the Caffé Primo restaurants and
23 3 are from the Sarasota project. In the Second Report, the Receiver specifically
24 reported that all of the Caffé Primo restaurants have closed and have no prospect of
25 reopening. Moreover, none of the Caffé Primo projects involved the development
26 of real property. The 3 Sarasota project investor declarants were apparently not
27 advised by Francisco that he and the defendants sold 120 acres of the 134 acres of
28

1 the Sarasota property and then used the \$9 million in sale proceeds for other
2 unrelated projects. This left 14 acres of land and no capital for development.

3 As for the balance of the investor declarations, the Receiver questions
4 whether these declarants have any understanding whatsoever as to what they were
5 signing. The declarations are purportedly signed by investors at locations
6 throughout China. Yet, there is no indication that the Motion, Seaman Declaration,
7 or the investor declarations themselves were translated into Mandarin. Even
8 assuming the declarants understood what they were signing, nothing in the
9 declarations support the Francisco Opposition. The declarations simply say that
10 they wish the Properties would be developed. This is not inconsistent with the
11 Receiver's Motion. The Receiver's Motion leaves open the prospect of development
12 of all the Properties but, as noted above and in the Motion, the Receiver is facing the
13 reality that much of the land is encumbered and commencing the marketing and
14 sales process now is an important step in preserving the value of the Properties.

15 **C. The Sales Procedures Are Consistent With The Mandatory**
16 **Procedural Requirements And Common Business Practices**

17 Francisco appears to be proposing and/or favors a sales process which is not
18 consistent with the rules set forth in 28 U.S.C. sections 2001 and 2002.
19 Interestingly, the private sale process that Francisco is advocating is strongly
20 opposed by MCC in their opposition to the Motion. In either event, the Receiver
21 seeks approval of an auction process which is consistent with the foregoing statutes,
22 and is customary in federal equity receivership cases. The Receiver does not need
23 to prove that a public auction is in the best alternative because the auction process is
24 allowed by 28 U.S.C. section 2001. Moreover, nothing in the Motion precludes the
25 Receiver from applying to the Court for authority to conduct a private sale pursuant
26 to 28 U.S.C. section 2001(b).

27 Francisco's Opposition to the proposed break-up fee is again premised on his
28 misreading of the Motion. Francisco argues that the Receiver proposes to pay 20%

1 of the purchase price to the stalking horse buyer as a break-up fee. That is
2 obviously not the case. The Receiver is simply proposing to pay a break-up fee that
3 does not exceed 20% of the difference between the original stalking horse purchase
4 price and the initial overbid, if the stalking horse buyer is not ultimately the high
5 bidder at the auction. For example, if the original stalking horse purchase price is
6 \$1 million and the initial overbid is \$1,050,000, then the stalking horse buyer would
7 receive a break-up fee not to exceed 20% of the \$50,000 difference, or \$10,000.
8 This proposal falls well within the amount of customary break-up fees described in
9 the cases cited by Francisco. Moreover, such break-up fees will be part of the
10 purchase and sale agreement which will be presented to this Court and be the subject
11 of a further hearing before this Court.

12 **II. MCC US, INC.'S OPPOSITION**

13 As with the Francisco Opposition, MCC's Opposition and Objections by
14 MCC US, Inc. to the Receiver's Motion for Order Authorizing Receiver to Market
15 Receivership Assets, Establish Sale Procedures and Engage Brokers ("MCC
16 Opposition") is founded on fundamental misinterpretations of both the Receiver's
17 Motion and the law concerning the sale of receivership property under 28 U.S.C.
18 section 2001. Accordingly, the Receiver's Motion should be granted.

19 **A. Receiver's Proposed Sale Procedures Comply With 28 U.S.C.**
20 **Section 2001**

21 The Receiver has not proposed a "private sale" of either the Lincoln property
22 or the Sarasota property. As such, much of MCC's Objection is simply irrelevant.
23 The Receiver's Motion seeks approval of a sale process which complies with
24 28 U.S.C. section 2001. The Receiver is not proposing a private sale, but rather a
25 public auction process. The proposed auction process, with or without a stalking
26 horse buyer, calls for public notice to be published as required under 28 U.S.C.
27 section 2002.

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1 The purpose of the Motion is to establish general terms for the marketing, sale
2 and auction process so the Receiver can proceed in an orderly and efficient manner
3 and prospective purchasers have a general understanding of the process. The
4 Receiver has significant experience selling assets out of federal equity receiverships.
5 In most cases, buyers will not have had experience with 28 U.S.C. section 2001 and
6 the sales procedures. Obtaining an order in advance facilitates negotiations and
7 eliminates concerns of purchasers that might otherwise drive down sale prices.

8 **B. MCC's Objections Concerning Credit Bidding And Lack Of**
9 **Payment Are Both Irrelevant And Unfounded**

10 MCC wishes to preserve a right to credit bid at a judicial or non-judicial
11 foreclosure sale as well as the right to credit bid in a bankruptcy case under
12 section 363(k). Such concerns are not relevant to the present Motion. This Motion
13 does not concern a foreclosure sale and 11 U.S.C. section 363 is not applicable to a
14 receiver's sale pursuant to 28 U.S.C. section 2001.

15 The entire issue of credit bidding is also premature and not relevant to the
16 Motion. At such time as the Receiver proposes to sell the Lincoln property or the
17 Sarasota property, MCC may wish to interpose such objections. In the meantime,
18 this Court should grant the Receiver's Motion.

19 The Receiver also asserts that MCC's request to credit bid is meritless.
20 Neither California law nor the law applicable to the sale of assets by a federal equity
21 receiver require that secured creditors be allowed to make credit bids in connection
22 with the sale of real or personal property. Such credit bidding is not provided for
23 under 28 U.S.C. section 2001 nor does the case law mandate it.

24 Bankruptcy Code section 363(k) does not control sales of real property by
25 federal equity receivers. While the local rules call for receivers to administer
26 receivership cases in a fashion similar to the administration of bankruptcy cases, that
27 does not mean that the United States Bankruptcy Code applies to receiverships nor
28 that this Court must apply the Bankruptcy Code to asset sales. To the contrary, this

1 Court has wide discretion to administer this receivership as well as the Receiver's
2 proposed sale process in a manner that is most beneficial to the receivership estate.
3 Here, if MCC is able to ultimately prove that its loan was legitimate, there are other
4 mechanisms available to preserve MCC's interests upon the sale of the Properties
5 (*i.e.*, its lien could be transferred to the sale proceeds subject to further orders of this
6 Court or MCC could negotiate with the Receiver to credit bid a portion of its claim
7 at the auction.)

8 The case law cited by MCC regarding credit bids at trustee's foreclosure sales
9 is simply irrelevant. MCC has no present right to foreclose on any property. As
10 discussed in Section II.D. below, MCC's claim is disputed and, at a minimum, MCC
11 is required to exhaust all remedies against its borrower, MPoint Land and
12 Development, Inc., before pursuing claims against the guarantors of MCC's loan,
13 SLALMC, LLC and Summerplace at Sarasota LLC, the owners of the Lincoln
14 Property and Sarasota Property.

15 **C. MCC Misconstrues The Proposed Auction Process**

16 Like Francisco, MCC has misinterpreted the proposed auction process with
17 regard to the payment of stalking horse buyers. As noted in Section I.C. above, the
18 proposed break-up fee not to exceed 20% concerns the difference between the
19 original stalking horse purchase price and the initial overbid. As such, MCC's
20 concerns are without merit.

21 **D. MCC's Request To Modify The Preliminary Injunction Is**
22 **Without Merit And Irrelevant**

23 MCC's Opposition incorporates MCC's pending motion to modify the
24 preliminary injunction to allow it to pursue a foreclosure sale. [*See* Dkt. No. 79.]
25 The Receiver has filed an opposition to MCC's motion based on the fact that, among
26 other things, MCC's claim and right to foreclose are disputed. *See* Receiver's
27 Opposition to MCC US Inc.'s Motion for Orders and Relief From Stay [Dkt.
28 No. 88]; Declaration of Thomas A. Seaman in Support of Receiver's Opposition to

1 MCC U.S. Inc.'s Motion for Order and Relief From Stay [Dkt. No. 89]. Even if
2 MCC's claims were not disputed, it would be premature to allow MCC to pursue its
3 claim ahead of all other creditors.

4 As part of MCC's Opposition, MCC repeats its call for the Court to apply the
5 Bankruptcy Code to this receivership and grant MCC relief from the "Automatic
6 Stay." As noted above, this is not a bankruptcy case and there is no automatic stay
7 in place. Moreover, MCC has simply not presented any evidence that its claim is at
8 risk. To the contrary, according to MCC's evidence, MCC is over secured by
9 millions of dollars. Furthermore, in light of the fact that MCC's claim has been
10 disputed by the SEC and the Receiver, it would be inappropriate to consider lifting
11 the stay at this time under any circumstances.

12 **III. THE RECEIVER IS ALREADY ADDRESSING THE RELIEF**
13 **REQUESTED BY THE LINCOLN INVESTORS**

14 A group of investors in the Lincoln project ("Lincoln Investors") filed a
15 Limited Opposition to the Motion. The Lincoln Investors request that the Receiver
16 explore financing and development options for the Lincoln Project prior to selling
17 the Lincoln Project.

18 As noted in the Receiver's Motion, the Receiver continues to explore the
19 options for development of the Lincoln Project. However, the Receiver faces
20 significant obstacles in these efforts in light of the alleged \$5 million lien
21 encumbering the Lincoln Property in favor of MCC. If MCC's claim is allowed,
22 then the Receiver's ability to develop this project will be significantly impaired
23 because this outstanding debt reflects much of the equity in the project. In addition,
24 if MCC's claim is allowed, then interest and costs continue to accrue, further
25 diminishing the value.

26 With the foregoing in mind, the Receiver is pursuing development options;
27 however, the Receiver believes it is prudent to also consider a sale of this asset. In
28 light of the fact that the Receiver is already pursuing the relief sought by the Lincoln

1 Investors and the Motion does nothing to preclude further pursuit of development
2 options, the Receiver requests the Court grant the Motion.

3 **IV. CONCLUSION**

4 The Receiver believes it is prudent to commence the marketing and sales
5 process now. This will permit the Receiver to more efficiently and effectively
6 market the Properties and negotiate contracts with buyers of the approximately
7 15 Properties. Based on the foregoing, Receiver respectfully requests the Court
8 grant the Motion.

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10 Dated: July 28, 2017

ALLEN MATKINS LECK GAMBLE
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By: /s/ Edward Fates

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THOMAS A. SEAMAN

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