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

**NOTICE OF MOTION AND
MOTION OF RECEIVER,
THOMAS A. SEAMAN, FOR
ORDER APPROVING: (1) SALE OF
YACHT; (2) BROKER
COMMISSION; AND
(3) SEVERANCE PAYMENT TO
CAPTAIN AND FIRST MATE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: September 10, 2018
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 September 10, 2018, at 1:30 p.m. in
3 Courtroom 9B of the above-entitled Court, located at 411 W. Fourth Street,
4 Santa Ana, California 92701, Thomas A. Seaman ("Receiver"), the Court-appointed
5 receiver for the Receivership Entities,¹ including Red Sunshine Holdings, Ltd,
6 ("Sunshine Holdings") will and hereby does move the Court for an order approving
7 the sale of the yacht owned by Sunshine Holdings and commonly known as the
8 Beroaca and payment of a broker's commission in connection with the sale
9 ("Motion"). The Receiver requests the Court approve the sale of the Beroaca yacht to
10 Carlos Gonzales ("Buyer") free and clear of liens and encumbrances, pursuant to the
11 Purchase and Sale Agreement. The Receiver also requests the Court approve a
12 broker's commission of \$20,000, as well as severance payments required under
13 Mexican law to the Yacht's captain and first mate in the total amount of \$10,800.

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

18 **Procedural Requirements:** If you oppose this Motion, you are required to
19 file your written opposition with the Office of the Clerk, United States District Court,
20 411 W. Fourth Street, Santa Ana, California 92701, and serve the same on the
21 undersigned not later than 21 days prior to the hearing.

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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, including Sunshine Holdings (collectively, "Receivership Entities").

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

4
5 Dated: July 27, 2018

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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7 By: /s/ Edward Fates
8 EDWARD G. FATES
9 Attorneys for Receiver
10 THOMAS A. SEAMAN
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Receiver moves this Court for an order authorizing him to sell the Sunseeker, 68' yacht known as the Beroqa, hull number XSK02164H203 ("Yacht") on the terms generally described below and more specifically set forth in the Purchase Agreement, dated as of May 3, 2018 ("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."). The Yacht is currently located in La Paz, Mexico. Seaman Decl. ¶ 2.

Gary Stevens of Stevens Yacht Group ("Broker") has worked diligently to locate a buyer for the Yacht through commercially reasonable and customary channels, including, but not limited to, specifically targeting buyers interested in the Yacht. The Yacht was exposed to the market place and was listed in Yacht World, Boat Wizard, and Boats.com, the most widely used yacht sales website. Broker showed the Yacht to six potential buyers and four different offers were received. The highest offer the Receiver was able to negotiate was from Carlos Gonzales ("Buyer"), and the Receiver agreed to a sales price of \$200,000 ("Purchase Price"), on an "as is" basis, subject to the PSA. Based upon the present facts and circumstances, the Receiver believes the Purchase Price is the best price attainable for the Yacht and respectfully requests the Court grant this Motion. Seaman Decl. ¶ 3.

II. RELEVANT FACTS

A. The Receiver's Appointment And Authority To Sell The Yacht

On January 5, 2017, the Receiver was appointed temporary receiver for the Receivership Entities,² with full powers of an equity receiver set forth in the Temporary Restraining Order ("TRO"). (Dkt. No. 17.) On January 23, 2017, the

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

1 Court entered its Preliminary Injunction Against All Defendants ("PI Order"),
2 which, among other things, made the Receiver's appointment permanent. (Dkt.
3 No. 36.)

4 Pursuant to the terms of the PI Order, the Receiver was appointed as the
5 permanent receiver of the Receivership Entities, "with full powers of an equity
6 receiver, including, but not limited to, full power over all funds, assets,
7 collateral, . . . and other property belonging to, being managed by or in possession
8 of or control of the [Receivership Entities] . . ." *Id.* The PI Order authorized the
9 Receiver to take immediate possession of all personal property of the Receivership
10 Entities, wherever located, and to take such action as is necessary to preserve the
11 assets of the Receivership Entities. *Id.*

12 The Receiver discovered transfers from accounts used by the Receivership
13 Entities to receive investor funds for the purchase of Sunshine Holdings, the entity
14 that owns the Yacht, as well as the payoff of a loan secured by the Yacht. It
15 appears the Receivership Entities paid approximately \$397,000 for the Yacht
16 (including ownership of Sunshine Holdings). The Receiver then discovered the
17 Yacht was located in La Paz, Mexico. The Receiver quickly took steps to secure
18 and preserve the vessel, including obtaining insurance and engaging Jose Rafael
19 Gastelum and Alan Gastelum, the existing captain and first mate, to maintain the
20 Yacht. Seaman Decl. ¶ 4.

21 The Receiver quickly determined the Yacht was not in condition to be
22 chartered and therefore kept it stored in port, thereby reducing the insurance cost.
23 The Receiver then engaged a yacht surveyor, who estimated the value of the Yacht
24 to be \$340,000, but only after considerable repairs costing in excess of \$100,000
25 were performed. The Receiver decided not to perform all of the repairs necessary
26 to obtain the estimated \$340,000 valuation of the Yacht, but had the captain and
27 first mate assist in making certain specific repairs designed to enhance the sale
28 value at a lesser overall cost. Seaman Decl. ¶ 5.

1 The Receiver then engaged Broker to market the vessel for sale. As noted
2 above, the Yacht was exposed to the market place by listing it in Yacht World,
3 Boat Wizard, and Boats.com, the most widely used yacht sales website. As a
4 result of these efforts, the Yacht was shown to six interested parties and the
5 Receiver received four offers for the Yacht. Ultimately, the highest and best offer
6 was from Carlos Gonzales ("Buyer") in the amount of \$200,000. Seaman Decl.
7 ¶ 6.

8 **B. Purchase and Sale Agreement**

9 A copy of the PSA for the sale to Buyer is attached as Exhibit A to the
10 Seaman Declaration. Its terms are summarized as follows:³

11 **Court Approval.** All aspects of the PSA and the sale are subject to Court
12 approval.

13 **Purchase Price.** \$200,000. The estimated net proceeds to the receivership
14 estate after tax, Broker's commission and other costs will be approximately
15 \$170,000.

16 **Closing Date.** The sale to close on a date that is mutually agreeable to the
17 parties upon entry of the order approving the sale.

18 **Deposit.** Buyer has deposited \$20,000 ("Deposit") into the Broker's trust
19 account. This reflects a non-refundable Deposit to be applied to the Purchase
20 Price, subject to the terms set forth in the PSA.

21 **As Is/Where Is Purchase.** After conducting a sea trial on July 10, 2018,
22 Buyer agreed to purchase the Yacht on an "as-is, where is" basis, with no
23 representations or warranties made by the Receiver, his professionals, or the
24 Receivership Entities.

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³ 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 **III. ARGUMENT**

2 **A. Broad Equitable Powers of the Court**

3 "The power of a district court to impose a receivership or grant other forms
4 of ancillary relief does not in the first instance depend on a statutory grant of
5 power from the securities laws. Rather, the authority derives from the inherent
6 power of a court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d
7 1363, 1369 (9th Cir. 1980). The "primary purpose of equity receiverships is to
8 promote orderly and efficient administration of the estate by the district court for
9 the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). As
10 the appointment of a receiver is authorized by the broad equitable powers of the
11 Court, any distribution of assets must also be done equitably and fairly. *See*
12 *S.E.C. v. Elliot*, 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

24 *Id.* (citations omitted); *see also Commodities Futures Trading Comm'n. v.*
25 *Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords
26 'broad deference' to the court's supervisory role, and 'we generally uphold
27 reasonable procedures instituted by the district court that serve th[e] purpose' of
28 orderly and efficient administration of the receivership for the benefit of

1 creditors."). Accordingly, the Court has broad equitable powers and discretion in
2 the administration of the receivership estate and disposition of receivership assets.

3 **B. The Proposed Asset Sale is Fair and Reasonable**

4 The marketing and sale steps of the Receiver and Broker were taken in an
5 effort to generate the highest possible net recovery from the Yacht for the investors
6 and creditors of the receivership estate. The Receiver and Broker marketed the
7 Yacht to potential buyers, responded to inquiries from interested parties, showed
8 the Yacht to six interested parties, and negotiated with potential purchasers. This
9 process allowed the Receiver to entertain competitive offers of qualified
10 purchasers. The Receiver executed three contracts subject to buyer's due
11 diligence; two of these buyers withdrew from the transaction after conducting their
12 due diligence. The two failed transactions were at sales prices of \$235,000 and
13 \$175,000. The latest sale contract at \$200,000 is now non-contingent. Through
14 this process, the Receiver believes the receivership estate is recovering an amount
15 reflecting the present value of the Yacht based upon all of the facts and
16 circumstances, including the considerable deferred maintenance. Seaman Decl.
17 ¶ 7.

18 After consulting with the Yacht broker and considering the location of the
19 Yacht, the length of time required to locate a buyer, and the physical condition of
20 the Yacht, the Receiver does not believe that a public auction would result in a
21 higher purchase price. To the contrary, an auction is likely to only give rise to
22 lower "fire sale" offers. As such, the Receiver believes the sale process achieved
23 the goal of obtaining the highest price for the Yacht. Seaman Decl. ¶ 8.

24 In light of the condition of the Yacht, its location, and the lack of any
25 prospect for a successful auction, the proposed sale is not subject to overbids or an
26 auction. This approach is permissible under 28 U.S.C. § 2004, which gives the
27 Court discretion to approve the private sale of personal property, such as an
28 automobile or yacht, without the need for publication of notice, appraisals, or an

1 auction if, as is the case here, such additional steps are unlikely to provide any
2 material benefit to the receivership estate. *See SEC v. Wilson*, 2013 WL 1283437
3 *1 (E.D. Mich. 2013); *SEC v. T – Bar Resources LLC*, 2008 WL 4790987 *3
4 (N.D. Tex. 2008).

5 **C. Payment to Broker**

6 The Receiver respectfully requests the Court approve payment of Broker's
7 commission of 10% of the purchase price, or \$20,000. As discussed above, Broker
8 has worked diligently to market the Yacht to potential purchasers. The standard
9 commission for a sale of a yacht by a licensed broker is 10% of the purchase price.
10 Accordingly, the Receiver requests authority to pay Broker a commission of
11 \$20,000, which will be split between Broker and the separate broker representing
12 Buyer. Seaman Decl. ¶ 9.

13 **D. Severance Payment to Captain and First Mate**

14 It is imperative the Yacht be maintained in working condition until the sale
15 is closed. The captain and first mate have provided valuable services to the
16 receivership estate in both maintaining the Yacht, performing repairs, and assisting
17 in showing it to potential purchasers. The Receiver has been advised that Mexican
18 law requires the payment of three months of severance pay when the captain and
19 first mate are terminated. The Receiver, therefore, requests authority to make
20 severance payments to the captain and first mate totaling \$10,800 (three months of
21 pay) so as to comply with Mexican law and incentivize the captain and first mate
22 to continue maintaining the Yacht through the sale closing. Seaman Decl. ¶ 10.

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1 **IV. CONCLUSION**

2 For the reasons set forth herein, the Receiver respectfully requests entry of
3 an order approving and authorizing: (1) sale of the Yacht to Buyer pursuant to
4 28 U.S.C. § 2004; (2) payment of the proposed commission to Broker from the
5 sale proceeds, and (3) payment of the proposed severance payments to the captain
6 and first mate.

7 Dated: July 27, 2018

ALLEN MATKINS LECK GAMBLE
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9 By: /s/ Edward Fates
10 EDWARD G. FATES
11 Attorneys for Receiver
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