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12 THOMAS A. SEAMAN

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 SECURITIES AND EXCHANGE
COMMISSION,

16 Plaintiff,

17 v.

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

26 Defendants.
27
28

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF RECEIVER,
THOMAS A. SEAMAN, FOR ORDER
ESTABLISHING ALLOWED
CLAIMS; APPROVING OMNIBUS
AND SPECIFIC CLAIM
OBJECTIONS; AND
SUBORDINATION OF
RICHARDSON CLAIMS**

[Notice of Motion and Motion;
Supporting Declaration of Thomas A.
Seaman; and [Proposed] Order submitted
concurrently herewith]

Date: April 22, 2019
Time: 1:30 p.m.
Ctm: 7C, 7th Floor
Judge: Hon. Cormac J. Carney

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Thomas A. Seaman (the "Receiver"), the Court-appointed permanent
4 Receiver for PDC Capital Group, LLC and its subsidiaries and affiliates,
5 (collectively, the "Receivership Entities" or "Entities"), has completed his
6 investigation and analysis of claim forms submitted by investors and others
7 following the claims process previously approved by the Court per the Order
8 Granting Receiver's Motion: (1) Approving Proposed Claim Forms; (2) Setting
9 Claims Bar Date; and (3) Establishing Summary Claims Procedures ("Claim
10 Order"). (Dkt. No. 254.) By this motion ("Motion") the Receiver requests that the
11 Court approve the allowed amounts for each of the claims set forth on Exhibits "A"
12 and "B" attached to the Declaration of Thomas A. Seaman in Support of Motion for
13 Order Establishing Allowed Claims; Approving Omnibus and Specific Claims
14 Objections; and Subordination of Richardson Claims ("Seaman Decl.") ¶¶ 5-6. In
15 addition, the Receiver seeks approval to subordinate the claims of Neil Richardson
16 ("Richardson"), if any are allowed, to the payment of all other allowed claims. Id.

17 The Receiver has carefully reviewed all of the letters, claim forms and
18 supporting documentation submitted to the Receiver by the EB-5 investors
19 (sometimes, the "Investors") and those claim forms and back-up documentation
20 submitted by non-investor claimants (e.g., trade creditors, vendors, and others that
21 did business with or had claims against the Receivership Entities) (sometimes, the
22 "Non-Investors.") The Receiver has attempted to verify the amount of each claim,
23 in part, by trying to reconcile the submitted claim amounts with the information
24 contained in the books and records of the Receivership Entities.

25 The General Information and Instructions that accompanied the Claim Forms
26 mailed to each of the Investors and Non-Investors required that they provide
27 documents to support their claims. In the case of the Investors, they were not
28 required to submit documentary evidence in support of their claims, unless they

1 disagreed with amounts reflected in the Notice Letter Regarding Investor Claim
2 ("Investor Letter") sent to each Investor in accordance with the Claim Order. The
3 Non-Investors were obligated to submit evidence with regard to the basis for their
4 claims, such as contracts, invoices, and similar documentation.

5 The vast majority of Investors accepted the Receiver's statement of their claim
6 as reflected in the Investor Letter. With regard to Non-Investor claims, the Receiver
7 believes that he has successfully resolved all but a few claims, the most significant
8 of which are addressed in detail below. The Receiver respectfully requests that the
9 Court approve the Receiver's recommended treatment of the disputed claims.

10 This Motion is made solely to define the universe of the claims that will be
11 the subject of the Receiver's proposed distribution plan. Allowance of a claim does
12 not assure payment or any particular treatment under a distribution plan. Based
13 upon recoveries to date, there are not sufficient assets available to pay each
14 Investor's principal claim nor the amounts owed to Non-Investor claimants. The
15 Receiver anticipates that distributions will be less than 10% of the principal amount
16 of allowed claims.

17 Accordingly, the Receiver requests that the Court grant this Motion and enter
18 an order allowing Investor Claims in the amounts set forth in Exhibit "A" and Non-
19 Investor Claims in the amounts set forth in Exhibit "B". The Receiver also requests
20 the Court grant the Receiver's Motion to subordinate the claim, if any, of Richardson
21 to the payment in full of all other allowed claims.

22 **II. RELEVANT PROCEDURAL BACKGROUND.**

23 A permanent receiver for the Receivership Entities was appointed by this
24 Court on January 23, 2017, pursuant to its Preliminary Injunction Against All
25 Defendants ("Appointment Order"). (See Dkt. No. 36.) Pursuant to the terms of the
26 Appointment Order, the Receiver was, among other things, vested with exclusive
27 authority and control over the assets of the Receivership Entities, directed to
28 undertake an investigation and accounting of the Receivership Entities' assets, and

1 empowered to marshal and recover all available assets for the benefit and
2 administration of the Receivership Entities. On May 4, 2018, the Court entered the
3 Claim Order. (Dkt. No. 254.)

4 As of the date of this Motion, the Receiver has largely completed his
5 investigation and accounting. Most of the assets of the Receivership Entities have
6 been sold or abandoned to creditors and the Receiver has pursued all viable claims
7 against third parties. While the Receiver may recover some additional money from
8 a pending sale transaction and litigation, he has determined that it is now appropriate
9 to conclude the claims process and then make a distribution of the recovered funds
10 to Investors and Non-Investor creditors with allowed claims.

11 The Receiver believes that all Investors and Non-Investor claimants have had
12 a full and fair opportunity to present their claims and have their claims considered
13 by the Receiver and determined by the Court. Accordingly, the Receiver requests
14 that the Court approve this Motion and the Receiver's recommendations as to
15 allowed claims as set forth on Exhibits "A" and "B". Seaman Decl. ¶¶ 5-6.

16 **III. CLAIMS ANALYSIS AND PROPOSED TREATMENT OF CLAIMS**

17 **A. Investor Claims.**

18 The Receiver identified 138 unique Investor claims. Id. Using the bank
19 statements and other records of the Receivership Entities, the Receiver was able to
20 confirm the amount of each Investor's investment and any refunds or
21 reimbursements. The Receiver, in accordance with the Claim Order sent the
22 Investor Letter to each potential investor claimant. The Investor Letter stated the
23 Receiver's proposed allowed claim for each Investor and invited Investors to
24 respond if they disagreed with the Receiver's proposal claim amount. Through this
25 process the Receiver was able to validate the Investor claims.

26 The Receiver is proposing to allow the Investor claims based upon the
27 amount of money invested by each Investor claimant, less any distribution or refund
28 made to each Investor. See, Seaman Decl. ¶¶ 5, 7-8, Exhibit "A". In other words,

1 the Receiver is using the so-called "Money In Money Out" or "MIMO" analysis as
2 to each claimant.

3 **B. Non-Investor Claims.**

4 The Receiver reviewed and analyzed claims submitted by each of the Non-
5 Investor claimants. In each case, the Receiver looked at the backup documentation
6 submitted by the claimant as well as the Receivership Entities' records. Id. at ¶ 9.
7 The Receiver's proposed treatment of the Non-Investor claims is set forth on
8 Exhibit "B". The proposed treatment reflects claim amounts that could be verified
9 using the company records, as well as contracts, agreements and invoices of trade
10 creditors, service providers and/or vendors, provided by the claimants. Id. The
11 Receiver also considered whether the services were actually provided and benefitted
12 the enterprise. Id. As with Investor claimants, the Receiver proposes to not allow
13 any claims for interest, consequential damages, attorneys' fees, and other such
14 charges or claims unrelated to tangible benefits provided to Receivership Entities.

15 The Receiver has compiled his recommendation for the treatment of the Non-
16 Investor claims in the Non-Investor Claims Summary, attached as Exhibit "B"
17 hereto. The Claims Summary identifies:

- 18
- 19 • Each claimant;
 - 20 • Each claimed amount;
 - 21 • The Receiver's proposed allowed amount of each claim; and
 - 22 • Information uniquely relevant to each claim, if any.

23 In a number of cases, such as the StanShore Trust claim and the Pappas
24 Arizona and Pappas Gateway claims, the Receiver settled the claims in advance of
25 filing this Motion by agreement and the obtained a Court order confirming the
26 settlement. Aside from those previously satisfied or settled claims, most of the
27 balance of disputed claims, reflect claims for consequential damages, fees and
28 claims for which no value was received by the Receivership Entities.

1 As reflected in the Non-Investor Claims Summary, the claims fall into the
2 following two general categories:

- 3 • Non-Investor Vendor / Trade Creditor Claims: The Receiver received
4 claims from vendors and other trade creditors (collectively, "Trade
5 Creditors") of the Receivership Entities. Id. ¶ 10. The Receiver
6 recommends that the Trade Creditor claims identified in the Non-
7 Investor Claims Summary be allowed in the proposed amounts. The
8 Receiver requests the Court to approve the Receiver's recommendation
9 to deny claims as also reflected on the Non-Investor Claims Summary.
10 The Receiver has confirmed that all of the proposed allowed Trade
11 Creditor claims reflect goods or services which were of value to the
12 Receivership Entities during the pre-receivership period. Accordingly,
13 the Receiver recommends that the proposed Trade Creditor claims be
14 allowed in full as stated on Exhibit "B" and paid on the same priority as
15 allowed Investor claims, (on a *pro rata* basis), at such time as the
16 Receiver makes his distribution on allowed claims. Id.
- 17 • Tax Entity Claims: State and federal taxing entities (collectively, the
18 "Taxing Entities"), submitted claims for pre and post-receivership
19 periods. The Receiver recommends treating all of the taxing Entities'
20 claims, whether submitted formally or merely as bills for payment, as
21 timely claims, and allowing all such claims in full except as to interest
22 and penalties. For the reasons identified below, the Receiver also
23 recommends subordinating the Tax Entities' claims until such time as
24 all allowed Investors' and Trade Creditors' claims are paid in full. Id.

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1 **C. Objection to Specific Disputed Non-Investor Claims.**

2 1. Objection to WMB Claim.

3 Wallis Murphy Boyington Architects ("WMB") filed 6 Proofs of Claims
4 ("WMB Claims") seeking the total amount of \$283,478.74 against the Receiver
5 Entities (collectively the "WMB Claims") as follows:

6

7	1. Orlando-Summerfield Project	\$141,404.60
8	2. Correll Palms Project	\$3,286.94
9	3. Kissimmee Project	\$33,324.43
10	4. Clearwater Project	\$51,083.21
	5. Sarasota Project	\$15,083.25
	6. Sun City Project	\$39,296.31

11 Seaman Decl. ¶ 11.

12 In connection with its claims related to the Orlando-Summerfield Project,
13 WMB, in violation of the Appointment Order, recorded a Claim of Lien seeking
14 \$168,404.60 ("WMB Lien Claim"), on April 13, 2017. Id. at ¶ 12. The recording of
15 the WMB Lien Claim was in direct contravention of the prohibition in the
16 Appointment Order against self-help and collections by creditors. See Appointment
17 Order, Section XII. Moreover, the stated amount of the WMB Lien Claim is
18 unsupported and entirely inconsistent with the Proof of Claim submitted under
19 penalty of perjury by WMB concerning the Orlando-Summerfield project. When
20 the Orlando-Summerfield property was sold, the WMB Lien Claim was released
21 from the real property but attached to the sale proceeds pending further order of the
22 Court during the claims process. (See Dkt. No. 293.) The Receiver requests the
23 Court to disallow all 6 of WMB's claims and order that the WMB Lien Claim be
24 released and extinguished as to the proceeds of the Orlando-Summerfield sale.

25 The Receivership Entities paid \$1,121,551 to the WMB prior to the
26 appointment of a Receiver, including \$238,000 paid on December 6, 2016, one
27 month prior to the Receiver's appointment. Seaman Decl. ¶ 13. The December 6,
28 2016, payment to WMB was made using cash raised from secured loans obtained on

1 four California properties at the direction of KPF. The payments of \$1,121,551 also
 2 included retainers of \$20,000 for five properties.¹

3 Notwithstanding these payments of over \$1.2 million, WMB failed and
 4 refused to turn over plans and design drawings to the Receiver for use in marketing
 5 the Florida projects. ¶ 14. It is unclear what value, if any, was received by the
 6 Receivership Entities as a result of WMB's work. Id. None of the Florida projects
 7 were built and there do not appear to have been construction documents prepared
 8 which were sufficient to allow for building permits to be issued. Id. Having
 9 provided no supporting evidence to show that value was received by the
 10 Receivership Entities in consideration for the stated amount of each of the WMB
 11 Claims, there is no basis to pay the WMB Claims.

12 Equally important, even if value had been provided, WMB appears to have
 13 been overpaid as of the date of the Receiver's appointment. Seaman Decl., ¶ 15.
 14 Mr. Boyington stated in the July Letter that as of "August 2016...all payments were
 15 up to date, and there was no balance owed." Seaman Decl., ¶ 15, Exhibit "C".

16 WMB asserts that PDC fell behind on making payments for work performed in the
 17

18
 19 ¹ In a letter dated July 18, 2017 (the "July 18 Letter"), Mr. Boyington refers to
 20 the retainers and states that they have not been applied to the unpaid balance.
Seaman Decl., Exhibit "C". An accounting of the retainers paid is as follows:

21	04/13/2015	1029	Wallis Murphey Boyington Architects, Inc.	Summerplace Dev, LLC-BofA 0863	20,000.00
22	04/13/2015	1030	Wallis Murphey Boyington Architects, Inc.	Summerplace Dev, LLC-BofA 0863	20,000.00
23	08/26/2016	1022	Wallis Murphey Boyington Architects, Inc.	SAL Clearwater, LLC- BofA-8299	20,000.00
24	08/29/2016	1015	Wallis Murphey Boyington Architects, Inc.	SAL Kissimmee, LLC- BofA-4449	20,000.00
25	08/30/2016	5017	Wallis Murphey Boyington Architects, Inc.	Summerplace Dev, LLC-Chase 3255	20,000.00
26					
27					
28					

1 fall of 2016 as to the 6 Florida projects. WMB alleges that those arrearages
2 amounted to \$189,481 as of November 30, 2016. Seaman Decl. ¶ 15, Exhibit "D"
3 (Column 1 – "Amortized Amounts"). As previously noted, WMB received
4 \$238,000 in December 2016, which reflects an overpayment of almost \$50,000.
5 Moreover, WMB was holding \$100,000 in deposits. Seaman Decl. ¶ 16,
6 Exhibit "C".

7 WMB alleges that in December 2016, the parties agreed to convert the
8 pending contracts for the Florida projects to a "flat fee per month basis", creating an
9 entirely new resulting obligation of \$679,000. Seaman Decl. ¶ 16. Apparently the
10 terms of this new agreement provided that WMB would receive not only \$679,000
11 in flat monthly fees for future work but also \$27,000 per month for nine months
12 [\$243,000] to cover the above noted arrearage of \$189,481. These agreements were
13 apparently memorialized in a worksheet sent to the Receiver by WMB entitled,
14 "Summerplace Outstanding Balance Summary Thru Feb 10, 2017." Seaman Decl.
15 ¶ 16, Exhibit "D".

16 There is no evidence that any work was performed by WMB that would give
17 rise to an obligation to pay a flat fee or other claim based on work performed after
18 August 2016. In simplest terms, the Receivership Entities were current as of August
19 2016; WMB received \$238,000 in December 2016 for alleged arrearages for work
20 performed in the fall of 2016; and no material work was performed thereafter.
21 Accordingly, no amounts are owed to WMB. Seaman Decl. ¶¶ 16-17. If one
22 accounts for retainers paid to WMB, it appears that the Receivership Entities
23 overpaid WMB by \$146,563.76 as follows:

24	Amount owed to WMB as of November 30, 2016	\$189,481.73
25	Plus: Additional work performed in 2017	\$1,954.51
26	Less: Payment of December 5, 2016	(\$238,000.00)
27	Less: application of retainer	(\$100,000.00)
28	Equals: Overpayment by PDC to WMB	[\$146,563.76]

1 Id.

2 The Receiver also objects to WMB's claims for payment of any monthly flat
3 fees because no value was received by the Florida projects. Such claims reflect
4 consequential damages under their alleged contracts in contrast to value received by
5 the Receivership Entities.

6 Accordingly, the Receiver requests the Court to disallow the 6 WMB Claims
7 and order the release of WMB's Claim of Lien.

8 2. Correll Palms LLC.

9 Correll Palms LLC (the "Seller") has made a claim for \$57,619.50. This
10 claim arises out of or is related to Summerplace at Correll Palms LLC's
11 ("Summerplace") efforts to purchase land and develop an assisted living project in
12 Correll Palms, Florida. Seaman Decl. ¶ 19. Pursuant to the purchase and sale
13 agreement, Summerplace paid \$700,000 in non-refundable deposits to Seller.
14 Summerplace failed to close in a timely fashion and Seller retained the \$700,000 in
15 deposits.

16 There is no basis for a claim by the Seller for an additional \$57,619.50 or any
17 other amount. Id. As such, the Receiver respectfully request the Court to deny the
18 claim of the Seller.

19 3. Landmark Civil Services, LLC

20 Landmark Civil Services, LLC ("Landmark") has made a claim for
21 \$175,909.30 arising out of an alleged contract between Landmark and Summerplace
22 related to Correll Palms project. Seaman Decl. ¶ 20. As noted above, Summerplace
23 paid deposits to the Seller in excess of \$700,000 to secure the purchase of the land.
24 The Receivership Entities subsequently defaulted on the purchase and sale
25 agreement, losing the right to purchase the land and the \$700,000 deposit.
26 Landmark's claim is purely one for consequential damages. Id. The Receivership
27 Entities never owned the property nor is there evidence that Landmark performed
28

1 work that was of value to the Receivership Entities. Id. Accordingly, the Receiver
2 objects to the entirety of Landmark's claim.

3 4. Neil Richardson.

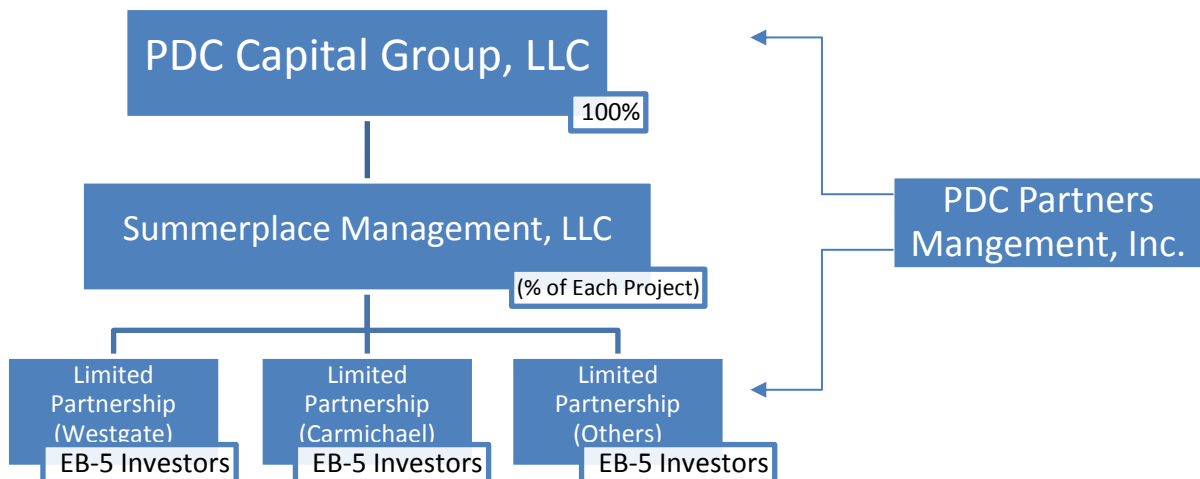
4 Neil Richardson was an insider and the president of various Receivership
5 Entities. Seaman Decl. ¶¶ 21-23. He filed two proofs of claims: (1) a \$2,200,000
6 claim in favor of the Richardson Family Trust, arising out of a \$2 million
7 promissory note and deed of trust (the "Lien") encumbering the real property and
8 improvements commonly known as SummerPlace at Westgate, located at 2305
9 Jefferson Blvd., West Sacramento, California (the "Westgate property") (the "Trust
10 Claim"); and (2) a claim for an unspecified amount for services rendered to the
11 Receivership Entities (the "Personal Claim"). Seaman Decl. ¶ 21. The Personal
12 Claim should be denied in its entirety because there is no stated amount nor any
13 legal or factual basis for the claim. As detailed below, the Trust Claim arising out of
14 the promissory note and deed of trust should be denied as a fraudulent transfer, no
15 value was received by the Receivership Entities to account for the Trust Claim and
16 Richardson was an insider whose work, at a minimum, facilitated or aided the fraud
17 upon the Investors. If and only if Richardson's claims are allowed, then they should
18 be equitably subordinated to the payment of all other allowed claims as a result of
19 Richardson's insider status and activities in aiding and abetting the fraud.

20 (a) Richardson Was An Insider to The Receivership Entities
21 and Controlled Their Operations.

22 By way of background, PDC was structured with PDC Capital Group, LLC as
23 the umbrella holding entity, which wholly owned Summerplace Management, LLC.
24 Seaman Decl. ¶ 22. In turn, Summerplace Management LLC held a significant
25 portion of interest in each of the underlying EB-5 Investor related projects through
26 separate limited partnership entities. Individual EB-5 Investor's money would flow
27 to each of the limited partnership entities, in exchange for which the Investors'
28 would receive a small ownership interest in the limited partnerships. Id. The

1 operation of the enterprise for each project was managed through PDC Partners
2 Management, Inc., a separate management company apparently established for that
3 purpose. A brief illustration of PDC's general organization and management
4 structure is depicted below:

5 The underlying evidence gathered by the Receiver, including documents
6 produced by Richardson in discovery and those he previously filed in other
7 proceedings, demonstrates that Richardson was an insider and member of the PDC
8 organization who was involved in all aspects of its operations. Not only did
9 Richardson receive several hundred thousand dollars in cash but he also appears to
10 have lived off company credit cards; charging over \$200,000 to his company credit
11 card. The evidence also shows:



- 21 • Richardson began working for PDC in early December 2013 (First
22 Amended Complaint for Damages and Injunctive Relief, (Seaman
23 Decl. ¶ 23, Exhibit E-1; Orange County Superior Court, Case No. 30-
24 2016-00851862-CU-BC-CJC], ¶ 16);
- 25 • Richardson held himself out as the "President" of PDC Capital Group,
26 LLC—the umbrella company—and its related entities in negotiations
27 with third parties and in communications with EB-5 Investors. (Id.,
28 Exhibit E-2);

- 1 • Richardson was elected as the President of PDC Partners Management,
2 Inc., the management company for PDC's EB-5 development projects
3 (Id., Exhibit E-3);
- 4 • Organizational charts produced by Richardson indicate he was also the
5 President of Summerplace Management, LLC, the 90% owner of all
6 PDC development projects, and the President of the related entities
7 Summerplace Development, LLC and PDC Capital Partners, LLC
8 (Seaman Decl., Exhibit E-4);
- 9 • Richardson was sending, responding to, and copied on numerous PDC
10 internal emails, including an email arranging for a conference call with
11 EB-5 investors and representatives in offices in Shanghai, Beijing, and
12 Xiamen, China (Id., Exhibit E-5);
- 13 • Richardson had a close relationship with PDC's former operator, Robert
14 Ferrante, and guaranteed and signed agreements to allow Ferrante to
15 rent an apartment, and Richardson used his credit to facilitate the
16 purchase of a speed-boat and Ferrari for Ferrante's use.
17 (Id., Exhibit E-1);
- 18 • Richardson ultimately leveraged his relationship with PDC's former
19 operators, and his prior lawsuit and unliquidated claims against FCM
20 and Chris Miller to hold PDC projects hostage, and ultimately obtained
21 a sweetheart deal from PDC's former operators that was never disclosed
22 to EB-5 Investors; and
- 23 • Richardson's deal with PDC's principals provided that he would receive
24 10% ownership interest in all PDC projects, 10% of any development
25 related fees, a monthly salary of \$8,666, and a secured, guaranteed
26 payment of \$2 million. Seaman Decl., Exhibit E-6.

27 Richardson was not just a third-party advisor or independent contractor, he
28 was intimately involved in all aspects of the Receivership Entities' business. In his

1 role as President, he signed agreements, authorized payments, participated in the
2 recruitment of EB-5 Investors, and had close relationships to PDC's operators.
3 Seaman Decl. ¶ 24. Richardson unjustly leveraged his insider position to extract
4 benefits for himself at the direct expense of EB-5 Investors, including commitments
5 from PDC's former operators to provide Richardson ownership interest in *all*
6 projects, a guaranteed salary, and secured an agreement to be paid \$2 million to
7 resolve Richardson's personal disputes with his former partner, Chris Miller and
8 FCM. (Id.)

9 Under such circumstances, it would be inherently unjust and inequitable to
10 allow Richardson to retain any claims or to maintain a priority or equal creditor
11 status to other, unknowing victims of the fraudulent enterprise. Accordingly,
12 Richardson's claims should be denied. If, and only if, they are allowed, they must
13 be subordinated to all other allowed Investor and Non-Investor claims.

14 (b) Richardson's \$2 Million Note and Deed of Trust Were
15 Fraudulent Transfers.

16 As noted above, the Trust Claim involves a \$2 million note and deed of trust
17 (the "Lien") encumbering the Westgate Property. After the Receiver sold the
18 Westgate Property, per the Order of the Court, the Lien attached to the sale
19 proceeds.

20 SAL Westgate, LLC ("Westgate LLC") owned the Westgate Property. In
21 2015, Richardson, through his family trust, was granted the Lien on the Westgate
22 Property, however, Westgate LLC did not reasonably receive equivalent value in
23 exchange. Seaman Decl. ¶¶ 25-27. Rather, the Lien was given to Richardson [the
24 "Family Trust"] by the Receivership Entities as a gift in order to facilitate
25 Richardson's settlement of personal disputes with his former business partner,
26 Christopher Miller, in connection with Richardson's purported investments in
27 Miller's companies, including First Capital Mortgage Properties, LLC ("FCM"). Id.
28 Since Westgate LLC received no value in exchange for the Lien, the transfer is

1 subject to avoidance pursuant to California's Uniform Voidable Transactions Act,
2 Cal. Code Civ. Proc. §§ 3439, et seq. ("CUVTA").

3 Under the CUVTA, there are two types of transfers subject to avoidance and
4 recovery. Specifically, a transfer is subject to avoidance and recovery when made
5 with (1) actual intent to defraud, or (2) constructive fraudulent intent based on the
6 lack of reasonably equivalent value provided in exchange. See Cal. Civ. Code
7 § 3439.04(a); see also, Donell v. Kowell, 533 F.3d 762, 770-771 (9th Cir. 2008); In
8 re Cohen, 199 B.R. 709, 715-716 (9th Cir. 1996). When seeking recovery of funds
9 fraudulently transferred under the CUVTA, "fraud, in the sense of morally culpable
10 conduct, need not be present in either category of fraudulent transfer. [Rather,] [a]n
11 actually fraudulent transfer could, in principle, occur without genuine fraud." In re
12 Cohen, 199 B.R. at 716. Thus, "[t]he focus in the inquiry into the actual intent is on
13 the state of mind of the debtor. Neither malice nor insolvency are required.
14 Culpability on the part of the dealer transferees is not essential." Id.

15 The evidence shows that the imposition of the Lien provided no benefit to
16 Westgate LLC and the Lien is subject to avoidance as a constructive or actual
17 fraudulent transfer.

18 (i) *Constructive Fraudulent Transfer*

19 Pursuant to section 3439.04(a)(2) of the CUVTA, a transfer is deemed
20 constructively fraudulent and subject to avoidance where the transferor makes the
21 transfer without receiving reasonably equivalent value in exchange and either:

22 (A) Was engaged or was about to engage in a business or a
23 transaction for which the remaining assets of the debtor
24 were unreasonably small in relation to the business or
25 transaction. [or,]

26 (B) Intended to incur, or believed or reasonably should
27 have believed that the debtor would incur, debts beyond
28 the debtor's ability to pay as they became due.

29 Here, the Lien encumbering the Westgate Property is subject to avoidance
30 because Westgate LLC received no value in exchange for the encumbrance. Rather,

1 the Lien was given to Richardson in order to resolve his prior disputes with Miller
2 and FCM, and to remove a *lis pendens* encumbering property held by a unrelated
3 development project, SummerPlace at Carmichael, located at 7411 Fair Oaks Blvd.,
4 Carmichael, CA (the "Carmichael Property"). Seaman Decl. ¶¶ 28-31. All of the
5 foregoing only benefitted Miller and FCM, not Westgate LLC or its Investors. (Id.,
6 Aug. 5, 2014 Lis Pendens, Sacramento County Doc. No. 20140805.)

7 The *lis pendens* on the Carmichael Property was recorded by Richardson
8 based on his prior disputes with Miller and FCM. The Carmichael Property was
9 apparently being developed by FCM, but was later purchased by SAL Carmichael,
10 LLC, ostensibly so SAL Carmichael, LLC could continue the development of the
11 project. (Jul. 11, 2015 Settlement Agreement.) Importantly, the development of the
12 Summerplace at Carmichael by SAL Carmichael LLC had no relation whatsoever to
13 the development of the Westgate Property. Seaman Decl. ¶ 35. Each project was a
14 separate and distinct development project funded by different investors pursuant to
15 the EB-5 Immigrant Investor Visa Program. The EB-5 Program provides strict
16 guidelines and restrictions on the use of investor funds and a transaction such as this
17 would completely undermine the EB-5 Investors' interests. Seaman Decl. ¶¶ 34-35.

18 Notwithstanding the lack of any financial connection between the projects
19 and the lack of any liability owed by PDC to Richardson, the former operators of
20 PDC entered into an agreement with Richardson in 2015 to remove the *lis pendens*
21 against the Carmichael Property. Id. Seaman Decl., Exhibit E, Jul. 11, 2015
22 Settlement Agreement. Westgate LLC was not even a party to the Settlement
23 Agreement, which was between Richardson and his entities, on the one hand, and
24 PDC and SAL Carmichael, on the other. (Id.) The Settlement Agreement provided
25 that the Lien would be placed on the Carmichael Property, however after the
26 Settlement Agreement was signed, PDC's all granted Richardson the Lien on the
27 Westgate Property, to the direct detriment of Westgate LLC and its EB-5 Investors.

28

1 Indeed, Richardson's own sworn declaration (Dkt. 154, Declaration of Neil
2 Richardson, Feb. 5, 2018, Par.11.) reflects his complete disregard as to the existence
3 of the separate corporate entities and that the Lien was provided solely in exchange
4 for a release of his claims against FCM and the *lis pendens* placed on the
5 Carmichael Property:

6 In consideration of the promissory note and the deed of
7 trust executed by the President of PDC Capital Group LLC
8 (hereinafter "PDC"), I released my claim for \$2,000,000
9 against FCM Capital which was a partner of PDC and
Emilio Francisco. I also release my lien against
Carmichael property which was another property
purchased by PDC.

10 Neither PDC nor SAL Carmichael (and certainly not Westgate LLC) owed
11 anything to Richardson at the time the Lien was granted. Richardson's claims were
12 against Miller/FCM, as Richardson has admitted. Richardson recorded the *lis*
13 *pendens* against the Carmichael Property because it was owned by FCM at the time.
14 The consideration given by Mr. Richardson for the Lien – the release of claims
15 against Miller/FCM – was entirely for the benefit of Miller and FCM. The *lis*
16 *pendens* was simply security for those claims – once the underlying claims against
17 FCM were released, the *lis pendens* could have been expunged (the claims
18 supporting it having been released). Therefore, neither PDC, SAL Carmichael, nor
19 Westgate LLC, received any value in exchange for the Lien.

20 As is well-established in California under the CUVTA, whether reasonably
21 equivalent value was provided is to be determined from the vantage of the
22 transferors' creditors. See Hansen v. Cramer, 39 Cal.2d 321, 324 (1952) ("What
23 constitutes 'a fair equivalent' or 'a fair consideration' under the Fraudulent
24 Conveyance Act must be determined from the stand point of creditors."); see also,
25 Patterson v. Missler, 238 Cal.App.2d 759, 766 (1965) (citing Hansen). Here, all of
26 the evidence, including Mr. Richardson's own sworn declaration and signed
27 agreements, demonstrate that Westgate LLC's investors and creditors received *zero*
28 value in exchange for the Lien given to Mr. Richardson. As Westgate LLC's and its

1 Investors and creditors received no value for the Lien, the lack of reasonably
2 equivalent value prong is clearly met here.

3 Further, at the time the Lien was placed on the Westgate Property in 2015,
4 Westgate LLC owed \$4 million in liability to its defrauded EB-5 Investors while
5 holding assets worth, at best, approximately \$2.9 million in value. Westgate LLC's
6 EB-5 Investors are treated as creditors because PDC and Westgate LLC had
7 represented to them that their funds would be used for the development and
8 operation of the Westgate Property, as required by the EB-5 Program. Instead,
9 however, their funds were commingled with funds raised from Investors in other
10 projects and a substantial portion was used for purposes unrelated to the Westgate
11 Property. Accordingly, Westgate LLC's liabilities well-exceeded its available assets
12 at the time of the imposition of the Lien, which clearly satisfies the insolvency
13 prong of the Receiver's constructive fraudulent transfer claim.

14 (ii) *Actual Fraudulent Transfer*

15 Under the actual fraud theory, a transfer is subject to avoidance if the transfer
16 was made "[w]ith actual intent to hinder, delay, or defraud any creditor of the
17 debtor." Cal. Civ. Code § 3439.04(a)(1). To find fraudulent intent, courts consider
18 the facts and circumstances underlying the transfer including those factors
19 enumerated in the Section 3439.04(b) as follows: whether the transfer was to an
20 insider, whether the transfer was concealed; the value of consideration given, and
21 whether the debtor was insolvent or would become insolvent post-transfer.

22 Richardson was an insider to PDC and its related entities, including Westgate
23 LLC. Richardson was president of many Receivership Entities and was intimately
24 involved in the operations of the entities as well as fundraising activities involving
25 EB-5 Investors. Westgate LLC received no consideration in exchange for the Lien,
26 and the imposition of the Lien for the benefit of Richardson was never disclosed to
27 Westgate LLC's EB-5 Investors. Westgate LLC was rendered insolvent by the
28

1 transfer as it had liabilities well in excess of its assets at the time the Lien was
2 granted.

3 Richardson was certainly aware that the use of Investor funds in each of the
4 project was restricted per the EB-5 program guidelines and the terms of the offering.
5 That is funds invested in Westgate LLC were to be used solely for the development
6 of the Westgate Property. The granting of the Lien by Westgate LLC for the benefit
7 of an unrelated project was not permitted and further harmed Westgate LLC's
8 Investors. In short, the imposition of the Lien substantially encumbered the sole
9 asset available to Westgate LLC to the direct detriment of Westgate LLC's EB-5
10 Investors and creditors, who received no benefit in return. The only parties who
11 benefitted from this transaction were Richardson and perhaps Miller/FCM.

12 In light of the foregoing, the Receiver requests that the Court find that the
13 Trust Claim is denied as a fraudulent conveyance and that both the Personal Claim
14 and Trust Claim be disallowed based upon Richardson's insider status and the lack
15 of any value received by the Receivership Entities attributed to Richardson's work.

16 (c) Mr. Richardson's Claims Are Subject to Equitable
17 Subordination.

18 Richardson submitted two proofs of claim, the Trust Claim and the Personal
19 Claim. With respect to the Trust Claim, the claim is based entirely on the Lien on
20 the Westgate Property which, as explained above, is subject to avoidance as a
21 fraudulent transfer.

22 The basis for the Personal Claim remains entirely unclear as the claim form
23 failed to provide any description for the claim and simply referred to a copy of a
24 First Amended Complaint for Damages and Injunctive Relief, filed September 21,
25 2016. As such, the Personal Claim is based on the allegations in a complaint with
26 no supporting evidence. Richardson failed to present evidence supporting the claim,
27 and the claim is subject to equitable subordination to the payment of all allowed
28

1 claims of other Investors and creditors of the Receivership Entities based on
2 Richardson's status as an insider who was involved in inequitable conduct.

3 The District Court has the power to use "summary procedures in allowing,
4 disallowing, and subordinating claims of creditors . . ." United States v. Arizona
5 Fuels Corp., 739 F.2d 455, 458 (9th Cir. 1984). The Court has the power to
6 subordinate one claim to another if it finds "the creditor's claim, while not lacking a
7 lawful basis, nevertheless results from inequitable behavior on the part of that
8 creditor." SEC v. American Board of Trade, 719 F. Supp. 186, 196 (S.D.N.Y.
9 1989). Equitable subordination is appropriate where a claimant has engaged in
10 inequitable conduct to advantage himself or herself to the disadvantage of other
11 claimants. See Henry v. Lehman Commercial Paper, Inc. (In re First Alliance
12 Mortgage Co.), 471 F.3d 977, 1006 (9th Cir. 2006). Equitable subordination is
13 particularly appropriate where the claimant involved is an insider of the debtor. Id.

14 Here, the evidence shows that Richardson was an insider to the Receivership
15 Entities and its various related companies, including Westgate LLC. Richardson
16 was President of PDC and many of its affiliated entities, signed contracts on their
17 behalf (including as "President" of numerous entities), and purported to have an
18 ownership interest in the assisted living projects, including Westgate LLC. Seaman
19 Decl. ¶ 23, Ex. E-1 (First Amended Complaint for Damages and Injunction Relief,
20 ¶¶ 14-22; Dkt. 154, Declaration of Neil Richardson, Feb. 5, 2018.) Richardson
21 further claims the services he provided included "the acquisition, the engineering,
22 the architect, the environmental studies, land surveyor, market study, and all
23 aspect[s] related to properties under development . . ." (Richardson Resp. to Special
24 Interrogatories, Nov. 19, 2018.) Mr. Richardson was clearly an insider of PDC and
25 its affiliates, including Westgate LLC, and had access to extensive information
26 about PDC and Westgate LLC that was not available to Investors and creditors.

27 Richardson also had a close personal relationship with PDC's former
28 operators. Richardson helped Robert Ferrante and Emilio Francisco purchase a

1 Ferrari automobile and a yacht under Richardson's name. (Seaman Decl. ¶ 23.)
2 Richardson has admitted that he allowed his credit to be used to fund the "lavish
3 lifestyles" of Francisco and Ferrante. Richardson's conduct reflects a strong bond of
4 trust and friendship with Ferrante, and Francisco.

5 As an insider and personal friend, Richardson took advantage of his position
6 to obtain the Lien on the Westgate Property, purporting to place himself in a
7 superior position to Westgate LLC's Investors and creditors. The conveyance of the
8 Lien transformed Richardson's original, unsecured and unliquidated claims against
9 FCM into a priority, secured lien against valuable real property to the detriment of
10 Westgate LLC's non-insider Investors and creditors. Richardson's role as an insider,
11 his acquisition of the undisclosed Lien, and the resulting harm to Westgate LLC's
12 Investors and creditors demonstrate that his Trust Claim and Personal Claim for
13 general damages are subject to equitable subordination.

14 **IV. ARGUMENT.**

15 **A. This Court Enjoys Broad Discretion In The Administration Of**
16 **Claims.**

17 It is well settled that District Courts supervising federal equity receiverships
18 have broad discretion to adopt Than appropriate procedures to administer the assets
19 of and claims asserted against receivership estates. See, e.g., SEC v. Capital
20 Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005); SEC v. Hardy, 803 F.2d 1034
21 (9th Cir. 1986); SEC v. Universal Financial, 760 F.2d 1034, 1037 (9th Cir. 1985).

22 The Ninth Circuit has explained that:

23 A district court's power to supervise an equity receivership
24 and to determine the appropriate action to be taken in the
25 administration of the receivership is extremely broad. The
26 district court has broad powers and wide discretion to
27 determine the appropriate relief in an equity receivership.
28 The basis for this broad deference to the district court's

1 supervisory role in equity receiverships arises out of the
2 fact that most receiverships involve multiple parties and
3 complex transactions.

4 Capital Consultants, 397 F.3d at 738 (citations omitted); see also CFTC v. Topworth
5 Int'l, Ltd., 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference'
6 to the court's supervisory role, and 'we generally uphold reasonable procedures
7 instituted by the district court that serve th[e] purpose' of orderly and efficient
8 administration of the receivership for the benefit of creditors"). Accordingly, this
9 Court has discretion to approve the claims as recommended here by the Receiver,
10 and the Receiver respectfully requests that it do so.

11 **B. The Court Has The Authority And Should Approve The Receiver's**
12 **Summary Processing Of Claims, The MIMO Calculation And The**
13 **Proposed Allowed Amount Of Claims.**

14 Receivership courts have the general power to employ summary procedures
15 in allowing, disallowing, and subordinating the claims of creditors. United States v.
16 Arizona Fuels, 739 F.2d 455, 458 (9th Cir. 1984); Hardy, 803 F.2d at 1040
17 (summary proceeding to approve categorization scheme for investors' claims was
18 reasonable; fair notice and a reasonable opportunity to respond was given); SEC v.
19 Elliot, 953 F.2d 1560, 1571 (11th Cir. 1992) (summary claim determinations upheld
20 where claimants cannot demonstrate their rights would have been better protected
21 by an extended proceeding).

22 In overseeing a receivership, the court may "make rules which are practicable
23 as well as equitable." Hardy at 1039, quoting First Empire Bank-New York v.
24 FDIC, 572 F.2d 1361, 1368 (9th Cir. 1978). The Receiver requests the Court set the
25 following rules and procedures in the interests of fairly and efficiently administering
26 claims against the receivership estate:

27 First, all claims should be resolved via summary proceedings. District Courts
28 have the power to use "summary procedures in allowing, disallowing, and

1 subordinating claims of creditors . . ." United States v. Arizona Fuels Corp.,
2 739 F.2d 455, 458 (9th Cir. 1984). Plenary proceedings to resolve a claim would
3 unduly delay the administration of the case and consume receivership estate
4 resources.

5 Second, all claims should be calculated using a simple, money-in/money-out
6 formula that limits claims to each investor's net loss from the Receivership Entities.
7 The money-in/money-out or "MIMO" formula has been endorsed by the Ninth
8 Circuit Court of Appeals and other courts in fraud cases where, like here, the assets
9 of the estate are insufficient to satisfy all claims in full. See Capital Consultants,
10 397 F.3d at 738 (describing a net claim calculation as "an administratively workable
11 and equitable method of allocating the limited assets of the receivership");
12 Topworth, 205 F.3d at 1116; In re Tedlock Cattle Company Inc., 552 F.2d 1351,
13 1354 (9th Cir. 1977); In re Taubman, 160 B.R. 964, 980-82 (Bankr. S.D. Ohio
14 1993).

15 Disputes over the use of MIMO often arise in the context of a distribution
16 plan. Here, the Receiver believes that establishing the amount of claims using
17 MIMO is an issue of fundamental fairness. In this case, Investor money was often
18 commingled such that Investor funds placed in project accounts based upon the
19 defendants needs for cash at the time rather than the terms of the agreements with
20 the Investors. Even if cash were placed into the appropriate account, the defendants
21 then used Investor's money on an as needed basis for personal and business uses
22 wholly unrelated to the project that was the subject of Investor's investment. In
23 other words, the money was used for projects that needed funding regardless of
24 whether the Investor had any interest in the subject project. Therefore, allowed
25 investor claims should be based upon the Receiver's analysis as to the amounts
26 invested by and distributed to investors in the Receivership Entities.

27 As to non-investor claimants, the Receiver proposes that all claims for
28 accrued or unpaid interest, late fees, attorney fees, consequential damages or lost

1 profits arising from non-payment, and punitive or tort damages be disallowed. This
2 proposed treatment places Investors and Non-Investors on similar footing limiting
3 all claims to what amounts to their losses of principal verses consequential damages.

4 Third, as in a bankruptcy case, it should be a claimant's burden to establish a
5 valid claim against the receivership estate. See Lundell v. Anchor Constr.
6 Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000); Revere Copper &
7 Brass, Inc. v. Adriance Machine Works, Inc., 76 F.2d 876, 878 (2d Cir. 1935)
8 (claimants failed to sustain burden of proving claims against receivership). Here,
9 creditors who failed to provide sufficient support and whose claims could not be
10 validated via company records should be disallowed.

11 The Receiver is aware that some investors or creditors may assert that their
12 claims should be allowed in full and paid out of the specific investment or project in
13 which they participated. In light of the commingling of funds by the defendants,
14 such a claims scheme would reward the lucky few to the detriment of the many.
15 Use of the MIMO approach attempts to fairly address the unfairness resulting from
16 the timing of each investment.

17 Overall, these rules promote an orderly, fair, and efficient administration of
18 claims. Indeed, considering the commingling of funds and the amount available for
19 distribution, the proposed rules and procedures for determining claims are fair and
20 equitable to all claimants. Without them, it would not be possible to determine
21 claims in a consistent, fair, and efficient manner and to distribute receivership estate
22 funds to those with allowed claims.

23 Thus, as described above, the Receiver requests only the amounts invested by
24 and distributed to Investors in the Receivership Entities be used to determine
25 Investors' allowed claim amounts and that all additional amounts claimed by
26 Investors be disallowed. Similarly, the Receiver proposes that any claims for
27 accrued or unpaid interest, late fees, attorneys' fees, consequential damages or lost
28

1 profits arising from non-payment, and punitive or tort damages asserted by
2 Non-Investor Claimants be disallowed.

3 **V. CONCLUSION.**

4 For the foregoing reasons, the Receiver respectfully requests that this Court
5 enter an order:

- 6 1. Granting the Motion in its entirety;
- 7 2. Approving allowance of claims as set forth on Exhibits "A" and "B" to
8 the Seaman Declaration;
- 9 3. Denying the WMB Claims;
- 10 4. Releasing the WMB Lien upon the Orlando-Summerfield sale
11 proceeds;
- 12 5. Denying the Correll Palms LLC and Landmark claims;
- 13 6. Denying Richardson's Personal Claim and Trust Claim;
- 14 7. Releasing the Lien on the sales proceeds from the sale of the Westgate
15 Property; and
- 16 8. Subordinating Richardson's claims, if any are allowed, to the payment
17 in full of all other claims.

18
19 Dated: March 6, 2019

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
DAVID R. ZARO

20
21 By: /s/ David R. Zaro
22 DAVID R. ZARO
23 Attorneys for Permanent Receiver
24 THOMAS A. SEAMAN
25
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PROOF OF SERVICE

Securities and Exchange Commission v. Emilio Francisco; PDC Capital Group, LLC, et al.,
USDC, Central District of California – Case No. 8:16-cv-02257-CJC-DFM

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 865 S. Figueroa Street, Suite 2800, Los Angeles, California 90017-2543.

On **March 6, 2019**, I caused to be served the document entitled: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF RECEIVER, THOMAS A. SEAMAN, FOR ORDER ESTABLISHING ALLOWED CLAIMS; APPROVING OMNIBUS AND SPECIFIC CLAIM OBJECTIONS; AND SUBORDINATION OF RICHARDSON CLAIMS** on all the parties to this action addressed as stated on the attached service list.

- OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.
- OVERNIGHT DELIVERY:** I deposited in a box or other facility regularly maintained by express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelope(s) or package(s) designed by the express service carrier, addressed as indicated on the attached service list, with fees for overnight delivery paid or provided for.
- HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.
- ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.
- E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.
- FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on **March 6, 2019** at Los Angeles, California.

/s/ Martha Diaz
Martha Diaz

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SERVICE LIST

Securities and Exchange Commission v. Emilio Francisco; PDC Capital Group, LLC, et al.,
USDC, Central District of California – Case No. 8:16-cv-02257-CJC-DFM

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