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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.
27
28

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

NOTICE OF MOTION AND
MOTION OF RECEIVER, 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

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

2 **PLEASE TAKE NOTICE** that on August 14, 2017, 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 will and hereby does move the Court for
6 authority to market and, subject to a further order from this Court, sell the real
7 property and/or other assets comprising the real estate and real estate developments
8 owned by the Receivership Entities (the "Motion"), including but not limited to
9 those properties and developments owned or controlled by: SAL Assisted Living
10 LLC ("SAL Lincoln"); Lincoln Village II, LLC; SAL Carmichael, LLC ("SAL
11 Carmichael"); SAL Westgate, LLC ("SAL Westgate"); SAL Citrus Heights, LLC
12 ("SAL Citrus Heights"); SAL Kern Canyon, LLC ("SAL Kern Canyon"); SAL
13 Phoenix, LLC ("SAL Phoenix"); TRC Tucson, LLC ("Tucson"); Snug Harbor;
14 Summerplace at Sarasota, LLC ("Satasota"); Summerplace at Clearwater, LLC

15
16 _____
17 ¹ As used herein, "Receivership Entities" refers to the following specifically named entities:
18 PDC Capital Group, LLC; Caffe Primo International, Inc.; SAL Assisted Living, LP; SAL
19 Carmichael, LP; SAL Citrus Heights, LP; SAL Kern Canyon, LP; SAL Phoenix, LP; SAL
20 Westgate, LP; Summerplace at Sarasota, LP; Summerplace at Clearwater, LP; Summerplace at
21 Correll Palms, LP; TRC Tucson, LP; Clear Currents West, LP; Caffe Primo Management, LP;
22 Caffe Primo Management 102, LP through Caffe Primo Management 108, LP (collectively,
23 "**Named Entities**"); and their subsidiaries and affiliates Summerplace Management, LLC;
24 PDC Partners Management, Inc.; FDC Partners Management, Inc.; KPF Capital, LLC; FDC
25 Capital Partners, LLC; MSL US Fund I, LLC; MPoint Land & Development, INC; Woodcrest
26 Construction Management, INC; Professional Loading Service, LLLP; WDC Capital Group,
27 LLC; WDC Capital Partners, LLC; KPF Investment Management, INC; Meridian
28 Summerplace at Snug Harbor, LLC ("Snug Harbor"); Meridian Summerplace at Snug Harbor,
LP; Summerplace at Correll Palms, LLC ("Correll Palms"); Summerplace at Correll Palms,
LP; Summerplace at Winter Haven, LLC; Summerplace at Winter Haven, LP; Summerplace at
Sun City, LLC; Summerplace at Sun City, LP ("Sun City"); Meridian at Sun City, LLC;
Summerplace at Orlando-Summerfield, LLC; Summerplace at Orlando-Summerfield, LP
("Orlando"); Summerplace at Kissimmee, LLC; Summerplace at Kissimmee, LP
("Kissimmee"); Summerplace at Merced, LLC ("Merced"); Summerplace at Merced, LP;
SAL-PDC, LLC; SLALMC, LLC; SAL Lincoln Village, IL; Lincoln Village IL, LLC; Lincoln
Village IL, LP; Lincoln Village SNF, LLC; Lincoln Village SNF, LP; FCM Development
Group, LLC; ADC Capital Group, LLC; NCDC Capital Partners, LLC; Summerplace at
Bonney Lake MC, LLC; Summerplace at Bonney Lake MC, LP; Summerplace Management,
LLC; Summerplace Development, LLC; Defiance Charters, LLC; and Red Sunshine Holdings,
Ltd. (collectively, "**Affiliates**").

1 ("Clearwater"); Correll Palms; Kissimmee; Merced; Orlando and Sun City
2 (collectively, the foregoing are sometimes referred to as the "Properties" or the
3 "Projects.")

4 The Receiver also seeks authority to retain real estate brokers pursuant to
5 agreements reflecting market rates of commissions, subject to Court approval at the
6 time of the sales.

7
8 Dated: July 6, 2017

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

9
10 By: /s/ David R. Zaro

11 David Robert Zaro
12 Attorneys for Receiver
13 THOMAS A. SEAMAN
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND RELEVANT BACKGROUND**

3 **A. The Receiver's Appointment, Investigation and Analysis of the**
4 **Projects.**

5 On January 5, 2017, the Receiver was appointed temporary receiver for the
6 Receivership Entities², with full powers of an equity receiver, including, but not
7 limited to, full power over all assets and property belonging to, being managed by or
8 in the possession or control of the Receivership Entities, and was immediately
9 authorized, empowered and directed to take certain actions as set forth in the
10 Temporary Restraining Order ("TRO"). Dkt. No. 17. On January 23, 2017, the
11 Court entered its Preliminary Injunction Against All Defendants ("PI Order"),
12 which, among other things, made the Receiver's appointment permanent. Dkt.
13 No. 36.

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

22 As explained herein and as reflected in the Receiver's Second Interim Report
23 and Recommendations as of May 31, 2017 (the "Report"), [Dkt. No. 68, p. 8-16]
24 after reviewing the Projects, the immigration status of the EB-5 investors whose
25 funds were used to acquire and develop each of the Projects, and consultation with
26 appropriate real estate professionals, the Receiver determined, in his reasoned
27

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

1 business judgment, that the marketing, sale or transfer of the Properties is reasonable
2 and prudent and will likely return the highest value to the receivership estate, the
3 investors and claimants. Declaration of Thomas A. Seaman in Support of Motion of
4 Receiver for Order Authorizing Receiver to Market Receivership Assets For Sale,
5 Establishing Sales Procedures and Engage Brokers ("Seaman Decl.") ¶¶ 8, 11, 15.

6 **B. The Projects.**

7 Since his appointment, the Receiver has acted to secure and preserve each of
8 the Projects. At the outset of the case, the Receiver's primary focus, after securing
9 the Properties (i.e. confirming insurance, preserving entitlements and permitting and
10 providing for the physical maintenance of the properties), was to explore prospects
11 for concluding transactions that were in process as of the date of the Receiver's
12 appointment. Specifically, this involved the Receiver's in depth evaluation of
13 proposed bond financing for SAL Lincoln as well as proposed transactions for
14 Summerplace at Clearwater, and SAL Phoenix.

15 A description of the Receiver's work and analysis of each of the Projects is set
16 forth in the Report at pages 8-16. [Dkt. No. 68.] The Receiver continues to evaluate
17 each of the Projects and explore both the viability of development and preservation
18 of EB-5 Investor immigration goals. As discussed in further detail in the Report and
19 below, the Receiver recommends that the Projects be sold in lieu of development.

20 **C. Recommendation For Sale of Project Assets.**

21 The Receiver has worked to address various pressing issues relating to the
22 Projects and evaluate the viability of development and disposition options. Seaman
23 Decl. at ¶ 7, 12, 14. To assist him in this process, the Receiver consulted with a land
24 use and development consultant with regard to the status and viability of the
25 development options for the Projects. Id. The Receiver engaged real estate brokers
26 in California and Arizona to provide preliminary valuation and marketing advice³.

27
28 _____
³ Brokers commissions are all subject to Court approval.

1 The Receiver met with Mr. Ferrante, Mr. Fox and considered their input as to the
2 viability and approach to the Projects. He also conferred with others who were
3 previously associated with the Receivership Entities and third party partners and
4 proposed joint venturers with regard to the Tucson, Phoenix and Lincoln projects.
5 Id.

6 As part of his work, the Receiver considered the following three disposition
7 options: (1) proceed with development as originally conceived and described in the
8 offering memoranda with regard to certain of the Projects, which offering
9 memoranda were used to raise funds from investors seeking qualification as EB-5
10 investor applicants under the United States Customs and Immigration Service
11 ("USCIS"); Immigrant Investor Program (the "EB-5 Investors"); (2) sell a
12 controlling interest in the Projects to a new financial partner with or without regard
13 to the impact on the applications or petitions of EB-5 Investors that are pending
14 before USCIS; and (3) sell the Projects in their current "as-is" condition, including
15 all entitlements and project documents. Seaman Decl. ¶ 15. In addition, the
16 Receiver considered his role as a third party federal equity receiver, the nature of
17 these proceedings and the proprietary of a equity receiver engaging in a lengthy and
18 complex development of real estate projects. All of this would also involve the
19 Court's oversight of the financing and construction of a significant number of such
20 projects.

21 The Receiver reviewed and analyzed and continues to review the Project
22 related documents, data relating to senior assisted living ("SAL"), residential and
23 other markets in the areas around the Projects, both current and projected, as well as
24 available projected construction costs for completing the Projects under the different
25 scenarios. Id. at ¶¶ 12, 13. The Receiver has identified a number of factors
26 impacting the risks associated with continued development of certain of the Projects,
27 including but not limited to the significant pipeline of SAL and residential projects,
28 the rising costs of construction, and the likely moderation of the growth in rental

1 rates in the coming years. *Id.* The Receiver has also explored the short and long-
2 term costs of maintaining the Properties and any associated entitlements, the
3 availability of financing, timing and risks associated with continued development of
4 the SAL projects by the Receiver and the expected return from the sale of partial
5 ownership interests to a financial partner and leaving the current EB-5 Investors in
6 place. *Id.* The Receiver has also considered the secured liens encumbering several
7 of the projects and the associated debt service. *Id.* at ¶ 14. Overall, while he will
8 continue to explore and consider all options, the Receiver has concluded that the
9 sale of the Properties with existing entitlements will most likely yield the highest
10 value with the least amount of risk. *Id.* at ¶ 15.

11 In addition to the unfavorable risk/reward projections associated with the
12 Receiver developing the Projects himself, all of the Projects are substantially
13 underfunded in addition to the substantial debt already in place. (*See*, Report
14 (Dkt. No. 68)). That is, the Projects were to be financed with a combination of
15 funds from prospective EB-5 Investors, capital from PDC, and third party financing.
16 Instead, EB-5 Investor funds and proceeds of third party financing were diverted
17 from the Projects and used elsewhere or paid to, or on behalf of, various Affiliates
18 and Mr. Francisco, Mr. Ferrante and Mr. Fox (collectively, the "Principals.") *Id.*, at
19 p. 8-16/Seaman Decl. ¶ 7-10. Accordingly, it is not feasible to develop the Projects
20 in accord with the offering materials. Seaman Decl. ¶ 14-15.

21 More specifically, in addition to purchasing several of the Properties with
22 seller financing, the Principals also encumbered certain of the Projects with over
23 \$7.5 million of debt in December 2016, effectively eliminating much of the project
24 equity and destroying any prospect of obtaining market rate financing. Seaman
25 Decl. ¶ 13-14. Given the current circumstances and the Receiver's role as a federal
26 equity receiver, the Receiver does not believe it would be cost-effective, appropriate
27 or feasible for him to attempt to raise new equity in the market, and it is unlikely the
28 amount of funds needed to complete construction of each of the Projects can be

1 borrowed based on the amount of equity in the Projects. Id. Even if such funding
2 could be secured, the continued development of the Projects represents a far greater
3 risk and a potentially lower return to the receivership estate than an immediate sale
4 of the Projects, as well as considerable additional time before any such return would
5 be realized. Seaman Decl. ¶ 14-15.

6 In light of the foregoing, the Receiver believes that the marketing and sale of
7 the Projects, on an "AS-IS, WHERE-IS" basis, will return the highest value for the
8 receivership estate. Seaman Decl. ¶ 15. Therefore, the Receiver recommends that
9 the Court authorize the Receiver to proceed with the marketing and sale or transfer
10 of the Projects out of receivership pursuant to the procedures identified below,
11 including the engagement of an experienced real estate brokers to market the
12 Projects for sale. Id.

13 **D. EB-5 Issues.**

14 The Receiver understands that a primary goal of the EB-5 Investors is to
15 obtain permanent United States ("U.S.") residence through participation in the EB-5
16 Program administered by the USCIS, and that a sale of the Projects could be deemed
17 a "material change" and a failure to sustain the planned investment that could
18 jeopardize the EB-5 Investors' eligibility for U.S. permanent residence. Seaman
19 Decl. at ¶ 11. Even if it were feasible for the Receiver to continue development of
20 the Projects himself, denial and/or revocation of the EB-5 Investors' USCIS
21 petitions has, in many cases, already occurred. That is, as described in the Report,
22 the prior actions of the Principals and defendants in contravention of the rules and
23 regulations governing EB-5 immigration related projects, suggests that more USCIS
24 denials will be forthcoming and appeals of existing denials will be unsuccessful.
25 Dkt. 68/ Report, p. 7. Indeed, USCIS recently issued denials based on defendants'
26 prior actions. Id. Based on the USCIS actions and communications to date, it
27 appears more likely than not that USCIS will deny the remaining EB-5 Investors'
28 petitions based on, among other things, failure to put capital at risk, failure to invest

1 all of applicants investment into the project, and the diversion of funds, even if the
2 Receiver were to continue the development and construction or sell the assets under
3 arrangements designed to preserve those benefits.

4 Given the low likelihood that the Receiver can salvage the Projects'
5 qualifications with USCIS, as well as the economic analysis discussed above, the
6 Receiver believes that selling the Properties is the appropriate course of action.⁴
7 Seaman Decl. at ¶ 15.

8 **E. Proposed Engagement Of Broker, Notice To Interested Parties,**
9 **And Proposed Sale Procedures**

10 The Receiver's proposed sale process contemplates working with real estate
11 brokers to locate a purchaser for each property and then seek the Court's approval of
12 an auction in this Court, pursuant to a further noticed motion in accordance with the
13 provisions of 28 U.S.C. § 2001. In doing so, the Receiver will work with brokers to
14 market and sell the Properties through the use of customary marketing platforms for
15 commercial real properties in order to encourage overbids in accordance with 28
16 U.S.C. 2001.

17 Initially, the Receiver proposes the engagement of Hamlin Gooding for the
18 California properties, Blueprint Healthcare Realty Advisers ("Blueprint") for the
19 Phoenix, Arizona property, and an as yet unidentified broker or brokers for the
20 Florida Properties (collectively, the "Brokers"), to serve as his real estate brokers.
21 Id. at ¶¶ 16-28. The Brokers are licensed real estate firms in good standing within
22 their state jurisdictions and have extensive experience in marketing and selling
23 similar commercial properties. Id. at ¶¶ 16-18.

24 Hamlin Gooding has agreed to accept a 4.5% commission if they represent
25 both seller and buyer, and 6% if the buyer has a broker. Blueprint has agreed to a
26

27 ⁴ Note, while the Receiver is not optimistic concerning immigration issues, he is
28 equally open to proposals from prospective buyers wishing to pursue
immigration goals with USCIS.

1 3% commission. Based on the Receiver's extensive experience in selling real
2 properties, these commission rates are commercially reasonable, consistent with
3 local customary rates, and the size of the transactions. Id. The Receiver will
4 negotiate proposed commissions with a broker or brokers retained in Florida which
5 are also consistent with local customary rates taking into consideration the nature
6 and size of the transaction.

7 The Receiver and the Brokers will engage with prospective purchasers and
8 once the Receiver has a signed purchase and sale agreement and is in receipt of an
9 earnest money deposit, the Receiver will apply to the Court, on further noticed
10 motion, for approval of the sale of the subject property and the Broker's commission
11 ("Motion for Approval of Sale.") Such sales will be on an "AS-IS, WHERE-IS"
12 basis. The Receiver may determine that certain of the Properties will benefit from a
13 process involving: a "stalking horse" buyer who has executed a purchase and sale
14 agreement, subject to overbid and Court approval; or an auction, with a minimum
15 bid price set by the Receiver and an approved form of purchase and sale agreement
16 to be included in the Motion for Approval of Sale. The Receiver requests authority
17 to pursue the marketing of the Properties under each method. After the due
18 diligence period discussed below, and based on his negotiations with prospective
19 purchasers, the Receiver will decide whether to proceed with a public auction, either
20 with or without a "stalking horse" buyer. The selected method will be identified in
21 the Motion for Approval of Sale.

22 Notice of the hearing on the Motion for Approval of Sale will be published
23 for four (4) consecutive weeks in accordance with 28 U.S.C. § 2002 and provided to
24 all parties to this action, all prospective purchasers who express to the Receiver an
25 interest in the Projects, and all third parties whose contracts with the Projects might
26 be assigned by the Receiver in connection with the proposed sale. In addition, the
27 Receiver proposes that notice of the Motion for Approval of Sale also be provided to
28

1 as many EB-5 Investors as is practicable by providing notice to their representatives
2 and/or counsel, with whom the Receiver has already been in contact. Id.

3 With regard to the overbid/auction process, the Receiver requests that the
4 following procedures be approved:

5 (a) **Due Diligence.** Within thirty (30) days of entry of an order approving
6 this Motion, the Receiver will establish and populate a data room ("Data
7 Room") containing due diligence materials for each of the Projects. Provided
8 they execute the Receiver's Non-Disclosure Agreement, prospective bidders
9 shall be given access to the Data Room to conduct due diligence on the
10 Projects. All due diligence must be completed no longer than 90 days
11 following the Receiver entering into the purchase and sale agreement.⁵

12 (b) **Qualified Bidders.** After filing the Motion for Approval of Sale, the
13 Receiver will seek overbidders and identify those parties qualified to bid on a
14 specific Project. To be determined a qualified bidder ("Qualified Bidder"), a
15 prospective purchaser must: (i) provide a fully executed non-contingent
16 purchase and sale agreement in a form substantially similar to the agreement
17 (A) entered into with the "stalking-horse" bidder, or (B) provided by the
18 Receiver with the Motion for Approval of Sale in the event of an auction;
19 (ii) provide evidence, in a form reasonably acceptable to the Receiver, that the
20 qualified bidder has the present ability to pay at least the minimum overbid
21 amount, or minimum bid amount, to be established by the Receiver;
22 (iii) provide an earnest money deposit by wire transfer or cashier's check
23 payable to the Receiver equal to 10% of the minimum bid amount, as
24 applicable, which amount shall be non-refundable to the qualified bidder with
25 the highest overbid/bid at the auction if, for any reason, (a) the high bidder
26

27 ⁵ The Receiver anticipates sales occurring on a rolling basis but that most, if not
28 all, sales transactions will occur in the proposed time-frames. Delays may occur
as a result of specific issues associated with each property such as the need to
resolve local entitlement or environmental issues or title disputes.

1 fails to close the sale or (b) the high bidder fails to provide the balance of the
2 purchase price to the Receiver one day prior to the closing. Each Qualified
3 Bidder must provide an executed purchase and sale agreement, evidence of
4 ability to pay, and earnest money deposit as described herein to the Receiver
5 no later than ten (10) calendar days before the sale hearing. The Receiver will
6 file a report with the Court setting forth whether overbids have been received
7 and if there is a need for an auction, or seek Court confirmation of the sale to
8 the Stalking Horse. Qualified Bidders shall appear at the sale hearing or
9 auction in person, or through a duly authorized representative. At that
10 hearing, the Court or the Receiver at the Court's request will conduct an
11 auction of each Project among any Qualified Bidders. The high bidder's
12 deposit shall be applied to the purchase price, if the sale is approved by the
13 Court. The sale price shall be deposited into escrow within two (2) business
14 days following the entry of the order approving the sale and the closing shall
15 be thirty (30) days or sooner following Court approval.

16 (c) **Overbids.** The initial overbid or minimum bid price shall be in an
17 amount to be established by the Receiver based, in part, on the amount of the
18 "stalking-horse" bid or the minimum value of the assets. Subsequent overbids
19 shall be in additional increments to be established by the Receiver. The bid
20 amounts described herein will be identified in the Motion for Approval of
21 Sale. In the event of a "stalking horse" sale, if no Qualified Bidder submits a
22 bid in the amount of the initial overbid or higher, the sale to the "stalking-
23 horse" bidder will be deemed submitted to the Court for approval.

24 (d) **No Contingencies.** The sale to any Qualified Bidder shall not be subject
25 to any contingencies, including without limitation, for financing, due
26 diligence or inspection.

27 (e) **Break-Up Fee.** Prospective buyers may incur out of pocket expenses for
28 conduction due diligence. The Receiver requests approval to establish a

1 break-up fee no greater than 20% of the minimum overbid payable to the
2 Stalking Horse in the event that they are bid by an overbidder.

3 **II. LEGAL ARGUMENT**

4 **A. This Court Has Inherent Authority To Order The Disposition Of**
5 **Receivership Assets.**

6 "The power of a district court to impose a receivership or grant other forms of
7 ancillary relief does not in the first instance depend on a statutory grant of power
8 from the securities laws. Rather, the authority derives from the inherent power of a
9 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
10 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
11 and efficient administration of the estate by the district court for the benefit of
12 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986).

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); *see also*
16 *CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court
17 affords 'broad deference' to the court's supervisory role, and 'we generally uphold
18 reasonable procedures instituted by the district court that serve th[e] purpose' of
19 orderly and efficient administration of the receivership for the benefit of creditors.").
20 In the estate administration context, courts are deferential to the business judgment
21 of bankruptcy trustees, receivers, and similar estate custodians. *See, e.g., Bennett v.*
22 *Williams*, 892 F.2d 822, 824 (9th Cir. 1989) ; *Southwestern Media, Inc. v. Rau*, 708
23 F.2d 419, 425 (9th Cir. 1983) ; *In re Thinking Machines Corp.*, 182 B.R. 365, 368
24 (D. Mass. 1995) (rev'd on other grounds, *In re Thinking Machines Corp.*, 67 F.3d
25 1021 (1st Cir. 1995)).

26 The Court's powers to administer the receivership and, specifically, to sell
27 receivership assets, are not limited by the terms of private contracts. The Court's
28 authority over the assets of a receivership estate derives from the Court's inherent

1 power to exercise jurisdiction over assets taken into the receivership, rather than
2 from underlying contracts. *SEC v. American Capital Investments, Inc.*, 98 F.3d
3 1133, 1143-45 (9th Cir. 1996)(approving sale of property over limited partners'
4 objections based on court's equitable powers, irrespective of state law or contract
5 rights).

6 Here, the Receiver has determined, in his reasonable business judgment and
7 after consultation with qualified professionals, that the course of action representing
8 the highest likely return to the Receivership Entities and the receivership estate, with
9 the least risk, is the sale or transfer of the Properties. Based on the foregoing, the
10 Receiver respectfully requests that the Court authorize him to market and sell the
11 Properties pursuant to the procedures outlined herein.

12 **B. The Brokers' Engagement Should Be Approved.**

13 The Receiver is a licensed real estate broker in California, but does not have
14 the capacity to properly market senior living real estate projects, and does not have a
15 Arizona or Florida real estate license. Here, in the context of the proposed sale, the
16 services of experienced commercial real property brokers are required to
17 appropriately market the Projects and ensure competitive bidding among
18 prospective purchasers. Based on the Receiver's extensive experience with real
19 estate transactions, the Receiver believes that the proposed commissions are
20 commercially reasonable and consistent with real estate industry standards in this
21 market area. Accordingly, the Receiver respectfully requests that this Court
22 authorize the engagement of the Brokers, and that Brokers' commission as described
23 herein be tentatively approved, subject to final approval in connection with each
24 sale.

25 **C. The Overbid Procedures Set Forth Herein Should Be Approved.**

26 It is generally conceded that a court of equity having custody and control of
27 property has power to order a sale of the same in its discretion. *See, e.g., Elliott,*
28 *supra*, 953 F.2d at 1566 (finding that the District Court has broad powers and wide

1 discretion to determine relief in an equity receivership). "The power of sale
2 necessarily follows the power to take possession and control of and to preserve
3 property." *See, supra, American Capital Invest., Inc.*, 98 F.3d at 1144. "When a
4 court of equity orders property in its custody to be sold, the court itself as vendor
5 confirms the title in the purchaser." 2 Ralph Ewing Clark, *Treatise on Law and*
6 *Practice of Receivers* § 487).

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

16 Pursuant to 28 U.S.C. § 2001, the Receiver may conduct an auction sale
17 following notice as called for in 28 U.S.C. § 2002. The proposed procedures
18 identified above are designed to (a) comply with the process and notice
19 requirements as called for in §§ 2001 and 2002; (b) induce a prospective purchaser
20 to act as the "stalking horse" bidder or, if appropriate, to induce participation at an
21 auction, (c) entice competitive bidding by qualified bidders, and (d) generate the
22 highest and best price for the Projects. The initial overbid/minimum bid and
23 subsequent minimum increases will be established by the Receiver at amounts
24 sufficient to ensure competitive bidding, and to ensure an orderly and efficient
25 auction at the hearing. The Receiver submits that the procedures set forth herein are
26 reasonable and fair to all interested parties, and as such, should be approved by the
27 Court.

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III. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court enter an Order:

1. Authorizing the marketing of the Projects for sale out of receivership;
2. Authorizing the engagement of Broker and approving Broker's commission as set forth herein;
3. Affirming that the sale, notice and publication requirements pursuant to 28 U.S.C. §§ 2001 and 2002, are satisfied by the proposed sale process set forth herein; and
4. Approving the proposed sale and overbid procedures set forth herein.

Dated: July 6, 2017

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