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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SOUTHERN DIVISION

12 SECURITIES AND EXCHANGE
COMMISSION,

13 Plaintiff,

14 v.

15 MEDICAL CAPITAL HOLDINGS,
16 INC.; MEDICAL CAPITAL
CORPORATION; MEDICAL
17 PROVIDER FUNDING
CORPORATION VI; SIDNEY M.
18 FIELD; and JOSEPH J.
LAMPARIELLO,

19 Defendants.
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Case No. 8:09-cv-0818-DOC (RNBx)

**NOTICE OF MOTION AND
MOTION FOR ORDER APPROVING
(A) SALE OF LOANS MADE TO
TRACE LIFE SCIENCES, INC. AND
(B) BROKER'S FEE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: May 2, 2011
Time: 8:30 a.m.
Ctrm: 9D
Judge: Hon. David O. Carter

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1 **TO ALL INTERESTED PARTIES:**

2 PLEASE TAKE NOTICE that on May 2, 2011, at 8:30 a.m., in Courtroom 9D
3 of the above-entitled Court located at 411 West Fourth Street, Santa Ana, California
4 92701, a hearing will be held on the motion of Thomas A. Seaman ("Receiver"),
5 Court-appointed permanent receiver for Medical Capital Holdings, Inc., Medical
6 Capital Corporation, Medical Provider Funding Corporation VI, and their
7 subsidiaries and affiliates (collectively, "Medical Capital" or the "Receivership
8 Entities"), for an Order Approving (a) Sale of Loans Made to Trace Life Sciences,
9 Inc., and (b) Broker's Fee ("Motion").

10 The Motion is based on the Memorandum of Points and Authorities below,
11 and the Declarations of Thomas A. Seaman, Matthew Arno and Mark J. Chandler
12 filed herewith. The Motion and supporting papers are available at the Receiver's
13 website, <http://www.medicalcapitalreceivership.com>, or may be reviewed at the
14 Clerk's Office during normal business hours at 411 West Fourth Street, Santa Ana,
15 California 92701.

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

20 IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the
21 above date, the Court may grant the requested relief without further notice.

22 **Requested Relief:** The relief requested is discussed in detail in the
23 Memorandum of Points and Authorities below. To summarize, the Receiver
24 requests an order approving (a) the proposed sale of loans made by the Receivership
25 Entities to Trace Life Sciences, Inc., and (b) a flat fee of \$29,000 to Invotex
26 Services, the broker retained by the Receiver to market the Loans. The proposed
27 purchase price for the loans is \$1.5 million in cash. The proposed buyer has made a
28 non-refundable deposit of \$250,000.

1 This Motion is made following the conference of counsel pursuant to
2 L.R. 7-3.

3 WHEREFORE, the Receiver requests that the Court grant the relief requested
4 herein and such other relief as may be appropriate under the circumstances.

5
6 Dated: April 1, 2011

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

7
8 By: /s/ Ted Fates

9 TED FATES
10 Attorneys for Receiver
11 Thomas A. Seaman
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1 property rights (collectively, the "Collateral"). The Loans matured and became due
2 in full on March 2, 2009. Medical Capital also holds 30% of all stock issued by
3 Trace (the "Stock"), which is subject to a Stockholders' Agreement.²

4 When the Receiver was appointed, Trace was already in an inactive state and
5 its Radioactive Materials License issued by the Texas Department of State Health
6 Services ("DSHS") had been amended to only permit storage of existing hazardous
7 waste, and not permit production of radiochemicals or radiopharmaceuticals. Trace
8 had not manufactured products since around September 2008, and at all times since
9 the Loans were issued, operated at a loss. Therefore, Medical Capital was in the
10 position of holding non-performing Loans "secured" with environmentally impaired
11 collateral of questionable value.

12 The Receiver considered all available options for maximizing the recovery on
13 the Loans for the receivership estate. Restoring Trace to a position where it could
14 manufacture products would require a substantial infusion of new capital. Trace had
15 never generated a profit. The Receiver determined that having the receivership
16 estate make the necessary investment in Trace involved an unacceptably high degree
17 of risk, and therefore did not seek permission from the Court to do so. Furthermore,
18 the hazardous waste at the facilities requires special storage and disposal. As
19 discussed further below, the costs to clean up and remove the hazardous waste likely
20 exceeds the value of the Collateral. Accordingly, the Receiver determined that
21 foreclosing on the Collateral was unlikely to generate a recovery for the receivership
22 estate.

23 The Receiver determined, therefore, that marketing the Loans for sale was the
24 best approach to maximizing the recovery for the receivership estate. The Receiver
25

26 ² As part of the purchase of the Loans, NuView will have an option to purchase
27 the Stock for \$100 after it has acquired the remaining stock in Trace. In addition,
28 NuView has submitted an irrevocable offer to purchase the Stock for \$100 on
December 1, 2011, subject to the Stockholders' Agreement, if it has not already
exercised its option.

1 also approached the owner of the majority of Trace's stock, Darren Brown, about a
2 discounted payoff of the Loans. Unfortunately, Darren Brown was not interested in
3 negotiating a discounted payoff, and NuView/Purchaser is the only potential
4 purchaser that has signed a letter of intent, let alone made an offer.

5 The Receiver believes there are several reasons for the lack of interest from
6 other potential purchasers: (a) Trace has a history of lack of performance and
7 unreliable production that is known in the industry, (b) the Loans are in default, and
8 the buyer will have to foreclose in order to get control of the Collateral, (c) Trace's
9 business is unusual, highly regulated and highly specialized, (d) as discussed below,
10 Darren Brown has asserted litigation claims against Medical Capital, NuView and
11 NuView's principal Paul Crowe, (e) Trace has not generated revenue for a
12 considerable time and requires a substantial infusion of capital in order to be in a
13 position to manufacture products, (f) the license issued by DSHS is currently in
14 "storage only" status, meaning that Trace cannot manufacture radiochemicals or
15 radiopharmaceuticals without an amendment to the license, and (g) the costs to
16 clean up and remove hazardous waste at the facilities are unknown, but are believed
17 to be significant. Furthermore, the monthly cost to maintain the facilities in their
18 current state for public safety/regulatory compliance purposes is substantial and has
19 been borne by Medical Capital as lender since the Receiver's appointment. For
20 these reasons, and considering that the Receiver has broadly marketed the Loans
21 since April 2010, it is very unlikely that any other offers will be received.

22 Subject to Court approval, the Receiver, NuView and Purchaser have
23 executed an Amended and Restated Purchase and Sale Agreement ("Agreement")
24 under which Purchaser will purchase Medical Capital's interests in Trace, including
25 the Loans and rights to acquire the Stock, for \$1.5 million cash. The receivership
26 estate will also receive five (5%) percent of Purchaser's outstanding shares of stock.³

27

28 ³ The shares of stock transferred to the receivership estate must be redeemed or
repurchased by Purchaser on the occurrence of certain events discussed further

1 Purchaser has deposited \$250,000 with the Receiver, which amount is non-
2 refundable. Nuview and Purchaser will indemnify the Receiver and Medical Capital
3 from all litigation with Darren Brown, including counterclaims pending in Texas
4 state court discussed below. Purchaser stated that it could not obtain the necessary
5 financing if the sale were subject to overbid. Due to the factors discussed above,
6 including the extensive marketing efforts and lack of other offers, the Receiver
7 agreed, subject to Court approval, that the sale would not be subject to overbid.⁴
8 Nevertheless, the Receiver is confident that the proposed sale represents the highest
9 and best recovery on the Loans for the receivership estate.

10 After engaging in direct talks with a number of potentially interested parties,
11 including NuView, the Receiver hired Invotex Services ("Broker") in April 2010 to
12 more broadly market the Loans. The marketing agreement provides that, subject to
13 Court approval, Broker will be paid a flat fee of \$29,000 if the Loans are sold to
14 NuView/Purchaser. The Receiver, therefore, requests approval of and permission to
15 pay the \$29,000 flat fee from the sale proceeds. Broker has spent significant time
16 since April 2010 marketing the opportunity to potential buyers.

17 II. FACTUAL BACKGROUND

18 A. The Loans

19 On November 10, 2006, Medical Capital (Medical Provider Financial
20 Corporation III) issued two loans to Trace and executed an accounts receivable
21 purchase agreement with Trace. The Loans, which were amended by Medical
22 Capital and Trace a total of four times to, among other things, increase the available
23 amount of credit and extend the maturity dates, consist of a term loan, the principal
24 balance of which is \$9.8 million, a non-revolving line of credit, under which a total
25 of \$18.7 million was advanced, and an accounts receivable purchase agreement,
26

27
28 ⁴ below and provided in Section 4.8 of the Agreement.

Section 11.1 of the Agreement provides Purchaser with the right to terminate the Agreement if the Court requires that the sale be subject to overbid.

1 under which Medical Capital advanced \$3.48 million, collected \$2.94 million, and is
2 owed \$536,000 from Trace.⁵ The Loans, which matured and became due in full on
3 March 2, 2009, are secured by the real property and improvements located at the
4 two Trace facilities in Denton, Texas, all personal property of Trace, including a
5 linear accelerator, two cyclotrons, and all of Trace's intellectual property rights. The
6 aggregate amount due under the term loan, line of credit and accounts receivable
7 purchase agreement, including accrued interest, is approximately \$40.5 million.
8 Seaman Declaration, ¶ 2.

9 Trace is owned 70% by AMBO99, Inc. ("AMBO99") and 30% by Medical
10 Capital. AMBO99 is owned 100% by Trace Holdings (US), Inc. ("Trace
11 Holdings"), which in turn is owned 100% by Darren Brown. AMBO99, Trace
12 Holdings and Darren Brown executed guarantees for the Loans and pledged their
13 interests in Trace as additional security. The Receiver's investigation indicates that
14 Darren Brown, AMBO99 and Trace Holdings do not have any assets of value other
15 than their interests in Trace. Seaman Declaration, ¶ 3.

16 **B. Trace's Default**

17 In April 2008, Trace defaulted, failing to pay interest due on the Loans. In
18 May 2008, Trace and Medical Capital executed a forbearance agreement, under
19

20 ⁵ Under the Purchase Agreement, each batch of accounts receivable was assigned
21 an Estimated Net Receivable or "ENR" value that Medical Capital expected to
22 collect. Medical Capital advanced a percentage of the ENR and retained a
23 reserve balance. The amount owed (\$536,000) is not the result of lower than
24 expected collections, however. Instead, it appears that all accounts receivable
25 were collected to at least their ENR, but Medical Capital made advances to Trace
26 in excess of accounts receivable purchases. These over-advances were made
27 between December 2008 and March 2009, and were described as "reserve
28 releases" on Medical Capital's books. In reality, the entire reserve balance had
been released as of early December 2008. Therefore, it appears that Medical
Capital was providing funding to Trace during this period under the guise of
releasing reserves. The Receiver's investigation also indicates, as the SEC
alleges in its Second Amended Complaint, that Medical Capital, while under the
control of Defendants Field and Lampariello, fabricated accounts receivable
purchases from Trace, listed the fabricated receivables on collateral coverage
reports, and sold them from Medical Provider Financial Corporation IV ("MPFC
VI") and MPFC V to MPFC VI in order to move MPFC VI investor funds to
earlier MPFC offerings.

1 which Medical Capital made an emergency loan to Trace in the amount of \$300,000
2 for the purpose of allowing Trace time to find new investors or a purchaser. Seaman
3 Declaration, ¶ 4.

4 In September 2008, Trace defaulted again. Trace had exhausted the funds
5 advanced by Medical Capital and was unable to obtain other funding. Medical
6 Capital exercised proxy rights over Trace's stock under the pledge agreement, and
7 elected new officers of Trace, AMBO99 and Trace Holdings. The new officers
8 retained NuView to replace Trace's existing management and manage the two
9 facilities. Medical Capital agreed to indemnify NuView and its officers from any
10 and all liabilities arising from their management of the Trace facilities, unless such
11 actions or omissions were negligent or willful.⁶ Seaman Declaration, ¶ 5.

12 **C. Litigation with Trace and Darren Brown**

13 In addition to exercising the proxy rights discussed above, on September 19,
14 2008, Medical Capital sued Trace, AMBO99, Trace Holdings and Darren Brown to
15 collect the amounts owed under the Loans. The action was filed in Nevada, the
16 forum specified under the loan documents (the "Nevada Action"). Seaman
17 Declaration, ¶ 6.

18 After Medical Capital caused Trace to elect new officers, and NuView had
19 been retained, Darren Brown and certain other employees of Trace refused to allow
20 NuView to enter the Trace premises and manage the facilities. Therefore, on the
21 same day as the Nevada Action was filed, Medical Capital filed an emergency
22 petition in Texas state court to obtain immediate injunctive relief necessary to secure
23 the Collateral and protect Trace's operations (the "Texas Action"). The requested
24 Temporary Restraining Order was entered by the Texas court on the same day the
25 emergency petition was filed, and Darren Brown was ordered not to interfere with
26

27 _____
28 ⁶ The Receiver has found no evidence linking NuView or its principal Paul Crowe
to Trace or Medical Capital prior to NuView's engagement as manager of the
facilities.

1 NuView's management and operation of Trace. Darren Brown contested the
2 validity of the Loan default and the actions taken by Medical Capital, among other
3 things, and asserted counterclaims in the Texas Action against Medical Capital,
4 NuView and NuView's principal Paul Crowe. Seaman Declaration, ¶ 7.

5 **D. Trace Ceases Operations**

6 Trace was unable to operate on a cash positive basis. Accordingly, with
7 NuView managing the facilities, Trace's staff and operations were scaled back to
8 four scientists who maintain the facility, and keep the license in compliance with the
9 DSHS. As a result, the license was amended by the DSHS from permitting
10 production of radiochemicals and radiopharmaceuticals to simply allowing storage
11 of existing hazardous waste and maintenance of the linear accelerator, cyclotrons
12 and other equipment in an inactive state. Seaman Declaration, ¶ 8.

13 **E. The Receiver's Appointment**

14 After his appointment, the Receiver was promptly contacted by NuView and
15 advised that Trace had failed to pay, and was unable to pay its power bills, and that
16 Trace had been warned that power to the facilities would soon be shut off. Loss of
17 power to the facilities would likely result in loss of Trace's license, triggering a
18 "decommissioning" requirement (discussed further below), and posing a potential
19 public safety issue. NuView also advised that the four scientists maintaining the
20 facilities had not been paid by Trace for several pay periods and would likely resign
21 if they were not promptly paid. The lack of qualified scientists to maintain the
22 facilities would also likely have resulted in a loss of the license. Seaman
23 Declaration, ¶ 9.

24 After several meetings with NuView, the four scientists at the facilities, and
25 conversations with authorities from the City of Denton and DSHS, and having
26 visited and toured the facilities in person, the Receiver agreed to pay the power bills
27 and payroll for the four scientists from the receivership estate in order to preserve
28 the value of the Collateral. The Receiver has continued to pay utility bills, payroll

1 and other bills necessary to maintain the facilities and preserve the value of the
2 Collateral while pursuing options for maximizing the recovery for the receivership
3 estate. Seaman Declaration, ¶ 10.

4 The Court's Preliminary Injunction enjoins and restrains the counterclaims
5 asserted by Darren Brown in the Texas Action. That action remains open, but has
6 been inactive since the Receiver's appointment. The Nevada Action only involved
7 claims asserted by Medical Capital; no claims were asserted against the receivership
8 entities. Darren Brown moved to dismiss the Nevada Action. The motion was
9 granted, and the Nevada Action was dismissed without prejudice. Seaman
10 Declaration, ¶ 11.

11 **F. Determination Not to Foreclose**

12 Foreclosing on the Collateral and then selling the real estate, equipment and
13 intellectual property to one or more third parties would likely trigger an instruction
14 from the DSHS that the facilities be fully "decommissioned", i.e. all hazardous
15 waste cleaned and removed. There is no way to precisely calculate the costs of
16 decommissioning until the work is done. The Receiver consulted with Dr. Matthew
17 Arno, a Nuclear Engineer with a Ph.D. in Health Physics. Dr. Arno's firm, Foxfire
18 Scientific, Inc., is located in Arlington, Texas. Dr. Arno toured the Trace facilities
19 and reviewed documents pertaining to Trace's operations and license. Dr. Arno
20 estimates that the costs to decommission the two facilities would be in the
21 \$2 million to \$4 million range. Declaration of Matthew Arno, ¶ 4. In addition,
22 Trace owes more than \$1.1 million in unpaid property taxes, and has accounts
23 payable of approximately \$2.1 million. Seaman Declaration, ¶ 12.

24 The Receiver contacted two real estate brokers in the Denton, Texas area.
25 Based on his discussions with these brokers, the Receiver believes that the
26 combined value of the real property and improvements at the two facilities is in the
27 \$1.25 million to \$2.2 million range. These estimated values assume that the
28 facilities are in a fully decommissioned state. Seaman Declaration, ¶ 13. Dr. Arno

1 estimates that the raw materials and equipment at the facilities, if sold in the near
2 future, would generate an aggregate gross sales price between \$105,000 and
3 \$150,000. Arno Declaration, ¶ 4.

4 Based on these estimates, and considering the broker commissions and other
5 costs of sale that would have to be paid, the Receiver determined that foreclosure
6 was unlikely to generate a recovery for the receivership estate, and could well result
7 in a significant loss. Seaman Declaration, ¶ 14.

8 **G. Efforts to Sell the Loans**

9 In September 2009, NuView/Purchaser made an offer to purchase the Loans.
10 Over the course of several months, the Receiver evaluated the offer and the parties
11 negotiated sale terms. In April 2010, subject to Court approval, the parties executed
12 a Purchase and Sale Agreement with a purchase price of \$2.5 million. The sale was
13 subject to overbid by qualified bidders. Purchaser was required to deposit \$250,000
14 within 30 days of executing the agreement, upon receipt of which, the Receiver
15 would seek Court approval of the sale. Seaman Declaration, ¶ 15.

16 At the same time as the agreement with NuView and Purchaser was executed,
17 the Receiver retained Broker to market the Loans. At that time, the sale agreement
18 with Purchaser was subject to overbid. Accordingly, the marketing agreement with
19 Broker provided that, subject to Court approval, Broker would be paid a flat fee of
20 \$29,000 as consideration for its marketing efforts to potential overbidders if the
21 Loans were sold to NuView/Purchaser. If the Loans were sold to an overbidder,
22 Broker would be paid a commission equal to fifteen (15%) percent of the portion of
23 the purchase price that exceeded \$2.5 million, up to a maximum of \$200,000. This
24 provided a significant financial incentive for Broker to generate offers for the Loans.
25 Seaman Declaration, ¶ 16.

26 Broker broadly marketed the opportunity to its existing database of clients
27 and contacts, targeting companies and investors in the radiopharmaceutical industry,
28 companies that buy and sell the types of specialized equipment at the Trace

1 facilities, and buyers of distressed debt. Broker separately marketed Medical
2 Capital's interest in the equipment at the Trace facilities to more than 200
3 institutions, including hospitals and universities in the United States and Canada.
4 Broker promptly responded to all inquiries, including providing due diligence to all
5 parties who executed a confidentiality agreement. Chandler Declaration, ¶¶ 3-4.

6 Purchaser did not make the \$250,000 deposit within the 30-day period
7 required under the agreement, and explained that it was unable to obtain necessary
8 financing. Purchaser requested and the Receiver granted two extensions of
9 Purchaser's deadline to make the deposit. When Purchaser still did not make the
10 deposit, the Receiver decided not to further extend the deadline. Seaman
11 Declaration, ¶ 17.

12 Despite Broker's efforts to market the Loans, no one other than
13 NuView/Purchaser signed a letter of intent or made an offer for the Loans.
14 Purchaser had not demonstrated the ability to close a sale at \$2.5 million. The costs
15 to maintain the Trace facilities continued to be borne by the receivership estate.
16 Seaman Declaration, ¶ 18.

17 Therefore, on December 8, 2010, pursuant to instructions from the Receiver,
18 Trace issued NuView a 90-day notice of termination of the NuView management
19 agreement. At the same time, the Receiver told NuView/Purchaser that he would,
20 subject to Court approval, reduce the price for the Loans to \$1.5 million, provided
21 (a) Purchaser was able to close the sale within the 90-day period before the
22 management agreement terminated,⁷ and (b) NuView and Purchaser released
23 Medical Capital from any and all indemnity claims, and indemnified Medical
24 Capital from all litigation with Darren Brown.⁸ Purchaser expressed its continued
25

26 ⁷ Although the sale did not close within the 90-day window, the Receiver agreed to
27 instruct Trace to extend the termination of the management agreement until this
28 motion could be heard, and if approved, until after the closing date.

⁸ The original purchase and sale agreement with Purchaser at the \$2.5 million
purchase price did not include a release of the Medical Capital indemnity of
NuView and its officers, or an indemnity in favor of Medical Capital. Therefore,

1 desire and intention to purchase the Loans, but stated that it would not be able to
2 obtain necessary financing if the sale were subject to overbid. The parties continued
3 to discuss terms. On March 4, 2011, Purchaser made a \$250,000 deposit with the
4 Receiver. The Receiver, NuView and Purchaser then executed an Amended and
5 Restated Purchase and Sale Agreement, a copy of which is attached to the Seaman
6 Declaration as Exhibit A. Seaman Declaration, ¶ 19.

7 **H. Loss Resulting From the Loans**

8 Medical Capital will suffer a direct loss of approximately \$39 million as a
9 result of the Loans made to Trace. The Receiver believes that the loss is attributable
10 to the lack of adequate collateral and the high level of risk associated with the
11 Loans. Trace never generated a profit and never operated on cash positive basis. In
12 its biggest month in terms of gross revenue, it generated less than \$150,000. Trace's
13 monthly gross revenue when it was manufacturing products was generally in the
14 \$50,000 range. Therefore, the value of Trace as a business, if it had any value, was
15 highly speculative. The value of the real estate and equipment was impaired as a
16 result of Trace's use and storage of hazardous materials, and even if the real estate
17 and equipment were not so impaired, they would be inadequate security for loans in
18 the principal amount of \$28.5 million. Seaman Declaration, ¶ 21.

19 The loss is exacerbated by Medical Capital's decisions to advance additional
20 funds. As noted above, the Loans were amended by Medical Capital and Trace a
21 total of four times to, among other things, increase the available amount of credit
22 and extend the maturity dates. Moreover, beginning with the first interest payment
23 in January 2007, in lieu of receipt of an actual payment from Trace, Medical Capital
24 would at times capitalize the interest payment due on the term loan (adding the
25 interest payment to the principal balance), or draw down the line of credit and
26

27
28 had the original sale been approved and closed, it is very possible that NuView
and its principal Paul Crowe would have asserted indemnity claims against the
receivership estate as a result of having to defend Darren Brown's claims.

1 record a payment of interest on the term loan in the same amount. In these
2 instances, the funds never actually left Medical Capital and were simply accounting
3 entries on the books. Seaman Declaration, ¶ 22.

4 **III. THE SALE**

5 The basic terms of the Agreement are summarized as follows:

6 **Court approval.** All aspects of the Agreement and the sale are subject to
7 approval by the Court.

8 **Purchase Price.** \$1,500,000.

9 **Closing Date.** The earlier of (a) a date agreed upon by the Receiver and
10 Purchaser or, and (b) five days from entry of an order approving the sale.

11 **Deposit.** Purchaser has deposited \$250,000 with the Receiver, which amount
12 is non-refundable if the Court approves the sale and Purchaser fails to perform.

13 **Indemnity.** NuView and Purchaser will release Medical Capital from any
14 and all indemnity claims, and indemnify Medical Capital and the Receiver from,
15 among other things, all litigation with Darren Brown.

16 **Acquisition of Purchaser's Stock.** The receivership estate will also acquire
17 five (5%) percent of the outstanding stock of Purchaser. Under certain
18 circumstances, including if Purchaser goes public or sells more than fifty (50%)
19 percent of its assets, Purchaser must redeem or repurchase the stock from the
20 receivership estate. The method for calculating the redemption/repurchase price, as
21 well as other terms and conditions, are provided in Section 4.8 of the Agreement.

22 **IV. ARGUMENT**

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

24 "The power of a district court to impose a receivership or grant other forms of
25 ancillary relief does not in the first instance depend on a statutory grant of power
26 from the securities laws. Rather, the authority derives from the inherent power of a
27 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
28 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly

1 and efficient administration of the estate by the district court for the benefit of
2 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
3 of a receiver is authorized by the broad equitable powers of the court, any
4 distribution of assets must also be done equitably and fairly. *See S.E.C. v. Elliot*,
5 953 F.2d 1560, 1569 (11th Cir. 1992).

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

10 A district court's power to supervise an equity receivership
11 and to determine the appropriate action to be taken in the
12 administration of the receivership is extremely broad. The
13 district court has broad powers and wide discretion to
14 determine the appropriate relief in an equity receivership.
15 The basis for this broad deference to the district court's
supervisory role in equity receiverships arises out of the
fact that most receiverships involve multiple parties and
complex transactions. A district court's decision
concerning the supervision of an equitable receivership is
reviewed for abuse of discretion.

16 *Id.* (citations omitted); *see also Commodities Futures Trading Comm'n. v. Topworth*
17 *Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference'
18 to the court's supervisory role, and 'we generally uphold reasonable procedures
19 instituted by the district court that serve th[e] purpose' of orderly and efficient
20 administration of the receivership for the benefit of creditors."). Accordingly, the
21 Court has broad equitable powers and discretion in the administration of the
22 receivership estate and disposition of receivership assets.

23 **B. The Sale**

24 It is generally conceded that a court of equity having custody and control of
25 property has power to order a sale of the same in its discretion. *See, e.g., S.E.C. v.*
26 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
27 and wide discretion to determine relief in an equity receivership). "The power of
28 sale necessarily follows the power to take possession and control of and to preserve

1 property." *See also S.E.C. v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144
2 (9th Cir. 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds)
3 (citing 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed.
4 1992) (citing *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of
5 equity orders property in its custody to be sold, the court itself as vendor confirms
6 the title in the purchaser." 2 Ralph Ewing Clark, Treatise on Law and Practice of
7 Receivers § 487.

8 "A court of equity, under proper circumstances, has the power to order a
9 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
10 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
11 Clark, Treatise on Law & Practice of Receivers § 500 (3rd ed. 1992). To that end, a
12 federal court is not limited or deprived of any of its equity powers by state statute.
13 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
14 (state statute allowing time to redeem property after a foreclosure sale not applicable
15 in a receivership sale).

16 Generally, when a court-appointed receiver is involved, the receiver, as agent
17 for the court, should conduct the sale of the receivership property. *Blakely Airport*
18 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
19 (N.D. Tex. 1988. The receiver's sale conveys "good" equitable title enforced by an
20 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
21 Clark, Treatise on Law and Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
22 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
23 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
24 354, 357 (9th Cir. 1925) .

25 Here, the Receiver has investigated the history and status of the Loans,
26 reviewed financial statements and reports for Trace, toured the Trace facilities,
27 reviewed the status of Trace's license, had conversations with representatives of the
28 DSHS, and reviewed the litigation with Darren Brown. In considering options for

1 maximizing the recovery for the receivership estate, the Receiver has consulted with
2 two real estate brokers and a nuclear engineer in Texas regarding the value of the
3 Collateral and potential decommissioning costs, and considered the substantial
4 ongoing costs to maintain the facilities and the license. Based on all of these
5 factors, the extensive marketing efforts by Broker, and the lack of other offers for
6 the Loans, the Receiver believes that the proposed sale is in the best interests of the
7 receivership estate. Seaman Declaration, ¶ 23.

8 If the sale is not approved, the prospects of a recovery from Medical Capital's
9 interests in Trace are low. Even if the high end of estimated values of the Collateral
10 and the low end of estimated decommissioning costs are attained, there would likely
11 be no recovery for the receivership estate. Considering the costs to foreclose on the
12 Collateral, broker commission and other costs of selling the real estate, auctioneer
13 commission and other costs of selling the equipment, and the ongoing costs to
14 maintain the facilities until they could be sold, the receivership estate would most
15 likely bear a significant loss. Seaman Declaration, ¶ 24.

16 Finally, the receivership estate will receive a five (5%) percent interest in
17 Purchaser. In the event that Purchaser successfully revives Trace, makes it a
18 profitable business, and either goes public, sells it or recapitalizes it, the receivership
19 estate stands to recover from the redemption/repurchase of its interest in Purchaser.
20 Seaman Declaration, ¶ 25.

21 **C. Payment of Broker's Commission**

22 The Receiver requests authority to pay a flat fee of \$29,000 to Broker from
23 the proceeds of sale. Broker has invested substantial time into locating potential
24 purchasers and providing them with due diligence materials. Although Broker was
25 not able to locate any other parties willing to make an offer for the Loans, the
26 Receiver believes this is not a reflection of Broker's skill or effort in marketing the
27 Loans, but rather the unusual nature of Trace's business, concerns regarding
28 hazardous waste at the facilities, and the pending litigation with Darren Brown.

1 Based on his experience with similar transactions, the Receiver believes that the
2 proposed fee is commercially reasonable, and consistent with what brokers with
3 similar experience and expertise would charge for the same services. Seaman
4 Declaration, ¶ 26.

5 **V. CONCLUSION**

6 WHEREFORE, the Receiver requests entry of an order (a) approving the
7 Agreement; (b) approving the sale of the Loans to Purchaser, and (c) authorizing the
8 Receiver to pay Broker a fee of \$29,000 from the proceeds of sale.

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10 Dated: April 1, 2011

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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12 By: /s/ Ted Fates

13 TED FATES
14 Attorneys for Receiver
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