

1 DAVID R. ZARO (BAR NO. 124334)
MICHAEL R. FARRELL (BAR NO. 173831)
2 TED FATES (BAR NO. 227809)
ALLEN MATKINS LECK GAMBLE
3 MALLORY & NATSIS LLP
515 South Figueroa Street, Ninth Floor
4 Los Angeles, California 90071-3309
Phone: (213) 622-5555
5 Fax: (213) 620-8816
E-Mail: dzaro@allenmatkins.com
6 mfarrell@allenmatkins.com
tfates@allenmatkins.com

7 Attorneys for Receiver Thomas A. Seaman
8

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.
20
21
22
23
24
25
26
27
28

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

**NOTICE OF MOTION AND
MOTION FOR APPROVAL OF
(A) SALE OF LOAN MADE TO THE
PARKWAY HOSPITAL, INC. AND
PARKWAY ACQUISITION I, LLC,
AND (B) PAYMENT OF BROKER'S
COMMISSION; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: March 5, 2012
Time: 8:30 a.m.
Ctrm: 9D
Judge: Hon. David O. Carter

1 **TO ALL INTERESTED PARTIES:**

2 PLEASE TAKE NOTICE that on March 5, 2012, at 8:30 a.m., in
3 Courtroom 9D of the above-entitled Court located at 411 West Fourth Street,
4 Santa Ana, California 92701, a hearing will be held on the motion of Thomas A.
5 Seaman ("Receiver"), Court-appointed permanent receiver for Medical Capital
6 Holdings, Inc., Medical Capital Corporation, Medical Provider Funding
7 Corporation VI, and their subsidiaries and affiliates (collectively, "Medical Capital"
8 or the "Receivership Entities"), for approval of (a) sale of loan made to The
9 Parkway Hospital, Inc. and Parkway Acquisition I, LLC, and (b) payment of
10 broker's commission ("Motion").

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

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

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

24
25
26
27
28

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

3
4 Dated: February 3, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

5
6 By: /s/ Ted Fates

7 TED FATES
8 Attorneys for Receiver
9 Thomas A. Seaman

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3 I.	INTRODUCTION..... 1
4 II.	BACKGROUND FACTS2
5	A. History of the Parkway Property.....2
6	B. The Parkway Hospital Bankruptcy3
7	C. The Berger Commission4
8	D. The Medical Capital Loans5
9	E. Confirmation of Parkway Hospital's Chapter 11 Plan.....7
10	F. The Capitol, Boro and Related Bankruptcy Cases8
11	G. The Parkway Hospital Bankruptcy Gets Converted to
12	Chapter 78
13	H. Appointment of a Chapter 11 Trustee for Capitol, Boro,
14	Lifeco and Related Entities9
15	I. The Receiver's Foreclosure Action10
16	J. Aquino Indictment11
17	K. Tax and Utility Liens on the Property.....11
18	L. Appraisals.....12
19	M. Conditions at the Property.....12
20	N. Efforts to Market and Sell the First Parkway Loan13
21	O. The Proposed Sale.....14
22	P. Losses Resulting From the Loans15
23	III. ARGUMENT17
24	A. Broad Equitable Powers of the Court17
25	B. The Sale.....18
26	C. Broker's Commission19
27	IV. CONCLUSION20
28	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
1 <i>Beet Growers Sugar Co. v. Columbia Trust Co.</i> , 2 3 F.2d 755 (9th Cir. 1925).....	18
3 <i>Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.</i> , 4 205 F.3d 1107 (9th Cir. 1999).....	17
5 <i>First Nat'l Bank v. Shedd</i> , 6 121 U.S. 74, 87 (1887).....	18
7 <i>Gockstetter v. Williams</i> , 8 9 F.2d 354 (9th Cir. 1925).....	19
9 <i>Miners' Bank of Wilkes-Barre v. Acker</i> , 10 66 F.2d 850 (2d Cir. 1933).....	18
11 <i>S.E.C. v. American Capital Invest., Inc.</i> , 12 98 F.3d 1133, 1144 (9th Cir. 1996).....	18
13 <i>S.E.C. v. Elliot</i> 14 953 F.2d 1560 (11th Cir. 1992).....	17, 18
15 <i>SEC v. Capital Consultants, LLC</i> , 16 397 F.3d 733 (9th Cir. 2005).....	17
17 <i>SEC v. Hardy</i> , 18 803 F.2d 1034 (9th Cir 1986).....	17
19 <i>SEC v. Wencke</i> , 20 622 F.2d 1363 (9th Cir. 1980).....	17
<u>Other Authorities</u>	
21 2 Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 342 22 (3d ed. 1992).....	19
23 2 Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 344 24 (3d ed. 1992).....	19
25 2 Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 482 26 (3d ed. 1992).....	18
27 2 Ralph Ewing Clark, <u>Treatise on Law & Practice of</u> 28 <u>Receivers</u> § 482(a) (3d ed. 1992).....	19
29 2 Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 487 30 (3d ed. 1992).....	18, 19
31 2 Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 489 32 (3d ed. 1992).....	19

	<u>Page(s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
2	Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 491 (3d ed. 1992)..... 19
2	Ralph Ewing Clark, <u>Treatise on Law & Practice of Receivers</u> § 500 (3d ed. 1992) 18

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This motion seeks Court approval of the sale of a loan secured by real
4 property, subject to overbid. The loan at issue, the First Parkway Loan (as defined
5 below), is one of a series of loans made by Medical Capital to Dr. Robert J. Aquino
6 ("Aquino"), and three entities owned and/or controlled by him located in
7 New York – The Parkway Hospital, Inc. ("Parkway Hospital"), Parkway
8 Acquisition I, LLC, formerly known as Parkway Hospital Associates ("Parkway
9 Acquisition"), and Capitol Health Management, Inc. ("Capitol"). Between
10 March 2006 and July 2007, Medical Capital made seven loans to Aquino, Parkway
11 Hospital, Parkway Acquisition and Capitol. The total principal loaned, including
12 amendments to the original loan agreements, exceeds \$61 million. Less than
13 \$3.6 million in loan payments were made. As of today, including accrued interest,
14 the total owed on the loans exceeds \$97 million. Aquino recently pled guilty to a
15 federal charge of conspiracy to commit bribery and is set to be sentenced in
16 May 2012. Declaration of Thomas Seaman in Support of Motion ("Seaman
17 Declaration"), ¶ 2.

18 Parkway Hospital and Capitol are in bankruptcy, their cases pending in the
19 Southern District of New York. Their assets, which are included in the collateral for
20 the loans, are being liquidated by bankruptcy trustees. The real property on which
21 Parkway Hospital operated, which is owned by Parkway Acquisition, is the subject
22 of a foreclosure action in New York initiated by the Receiver in January 2011.
23 Parkway Acquisition, whose only asset is the property, is not in bankruptcy.
24 Seaman Declaration, ¶ 3.

25 While pursuing the foreclosure action, the Receiver also marketed the First
26 Parkway Loan for sale. Twelve offers were received. The Receiver negotiated
27 terms with four potential purchasers at prices ranging from \$4.75 million to
28 \$5.05 million. Each of these potential purchasers elected not to pursue the

1 transaction after conducting their due diligence. The Receiver then received an
2 offer from PH Paper, LLC ("Purchaser") and negotiated and executed a Loan
3 Purchase and Sale Agreement, subject to Court approval. The proposed purchase
4 price is \$6.2 million, and the sale is subject to overbid by qualified bidders. By
5 separate Ex Parte Application, the Receiver has sought approval of proposed
6 overbid procedures and notice of the sale. By this Motion, the Receiver requests
7 approval of the sale to Purchaser or the highest qualified bidder. Seaman
8 Declaration, ¶ 4.

9 II. BACKGROUND FACTS

10 In order to understand the history of the First Parkway Loan, and the factors
11 affecting the proposed sale, it is necessary to put the loan in context with events
12 involving Parkway Hospital and Aquino's other entities, and the six other loans
13 issued by Medical Capital. Seaman Declaration, ¶ 5.

14 A. History of the Parkway Property

15 The real property securing the First Parkway Loan is located at
16 70-35 113th Street, Forest Hills, Queens, New York ("Property"). The Property is
17 owned by Parkway Acquisition and was leased to Parkway Hospital, which operated
18 a hospital. The exact ownership of Parkway Acquisition and Parkway Hospital are
19 not known, although the Receiver believes Aquino and/or Aquino's father has a
20 controlling interest in both entities. Seaman Declaration, ¶ 6.

21 Aquino also owns Capitol, which managed at least six medical practices in
22 the New York/Tri-State area owned by Aquino. One of these medical practice
23 entities, Lifeco Medical, P.C. ("Lifeco"), provided emergency room staffing services
24 to Parkway Hospital. Seaman Declaration, ¶ 7.

25 Beginning in 1961, Parkway Acquisition (then known as Parkway Hospital
26 Associates), or its predecessors in title to the Property, entered into five separate
27 loan agreements, which loans were secured by the Property. In 1994, Parkway
28 Acquisition entered into a Consolidation, Extension and Modification Agreement

1 with CoreStates Bank, which consolidated the five original loans into a single lien
2 on the Property. Thereafter, CoreStates Bank merged into First Union National
3 Bank, which became the holder of the consolidated mortgage. Seaman Declaration,
4 ¶ 8.

5 On August 8, 2001, First Union National Bank assigned the consolidated
6 mortgage to GE HFS Holdings, Inc., then known as Heller Healthcare
7 Financial, Inc. ("GE HFS"). At the same time, the consolidated mortgage was split
8 into two loans secured by the Property - a \$8,000,000 revolving loan and \$2,000,000
9 term loan. Parkway Acquisition and Parkway Hospital are co-borrowers under both
10 loans, which are secured by the Property and all other assets of both entities. In
11 August 2003, the \$2,000,000 term loan was paid off. However, the term loan
12 mortgage continues to secure full payment of all amounts owed under the
13 \$8,000,000 revolving loan. As discussed below, Medical Capital later purchased the
14 \$8,000,000 revolving loan and the \$2,000,000 term loan, which are referred to
15 herein as the First Parkway Loan. Seaman Declaration, ¶ 9.

16 In July 2004, Parkway Equities, LLC ("Parkway Equities") made a
17 \$3,000,000 loan to Parkway Acquisition secured by a mortgage deed of trust on the
18 Property. This loan appears to have been made in conjunction with an agreement to
19 sell the hospital to Parkway Equities, conditioned on New York State Department of
20 Health approval. Such approval was apparently not granted. In December 2004,
21 Parkway Equities sued Parkway Acquisition to foreclose on the Property. Parkway
22 Hospital was named as a defendant in order to terminate its leasehold interest.
23 Seaman Declaration, ¶ 10.

24 **B. The Parkway Hospital Bankruptcy**

25 On July 1, 2005, Parkway Hospital filed chapter 11 bankruptcy in the
26 Southern District of New York. In September 2005, Parkway Hospital filed an
27 adversary proceeding in bankruptcy court to enjoin Parkway Equities' foreclosure
28 action as a violation of the automatic stay. In February 2006, the bankruptcy court

1 ruled that the foreclosure action was stayed. Then, in May 2006, the bankruptcy
2 court granted relief from stay to allow the foreclosure action to proceed. Thereafter,
3 Aquino, or an entity controlled by him, apparently purchased the loan issued by
4 Parkway Equities and caused the foreclosure action to be dismissed. In
5 September 2006, the bankruptcy court approved a \$5 million loan from Boro
6 Medical, P.C. ("Boro"), a medical practice owned by Aquino, to Parkway Hospital
7 as Debtor-in-Possession ("Boro DIP Loan"). The Boro DIP Loan was secured by a
8 mortgage on the Property, junior in priority to the GE HFS loan. Seaman
9 Declaration, ¶ 11.

10 **C. The Berger Commission**

11 In April 2005, the State of New York established the Commission on Health
12 Care Facilities in the 21st Century, commonly known as the Berger Commission
13 after its chairman, Stephen Berger. The Berger Commission was established to
14 "rightsize" the healthcare delivery system in New York due to low occupancy levels
15 at hospitals and nursing homes. The Commission was charged with making
16 recommendations regarding the closure and reconfiguration of hospitals and nursing
17 homes. On November 28, 2006, the Berger Commission issued its final report
18 which recommended closure of 9 hospitals in New York (5 in New York City), and
19 reconfiguration of 48 other hospitals. Parkway Hospital was 1 of the 5 New York
20 City hospitals recommended for closure. On January 1, 2007, the Berger
21 Commission's recommendations were adopted, and the New York State
22 Commissioner of Health was directed to implement them. Seaman Declaration,
23 ¶ 12.

24 On December 29, 2006, Parkway Hospital, which had been in chapter 11
25 since July 2005, commenced an adversary proceeding in bankruptcy court
26 challenging the constitutionality of the Berger Commission and seeking to have the
27 New York State Commissioner of Health enjoined from implementing its
28 recommended closure of Parkway Hospital ("First Berger Adversary"). The

1 hospital continued to operate pending resolution of the First Berger Adversary.
2 Seaman Declaration, ¶ 13.

3 **D. The Medical Capital Loans**

4 The first loan issued by Medical Capital to Aquino and his entities was on
5 October 20, 2006, at which time Medical Capital (Medical Provider Financial
6 Corporation ("MPFC") III, series 1) issued a loan in the amount of \$500,000 to
7 Aquino ("First Aquino Loan"). The First Aquino Loan is secured by Aquino's
8 equipment, inventory, accounts receivable and ownership of seven
9 healthcare-related entities, including Capitol, Boro and Lifeco.¹ Payments totaling
10 \$76,000 were made between November 2006 and October 2007. This loan was sold
11 from MPFC III, series I to MPFC III, series 2 on August 30, 2007. Including
12 accrued interest, a total of \$862,367.67 is currently owed on the First Aquino Loan.
13 Seaman Declaration, ¶ 14.

14 On November 30, 2006, Medical Capital (MPFC III, series 1) issued a
15 \$1,050,000 loan to Capitol ("First Capitol Loan"). The First Capitol Loan is secured
16 by Capitol's inventory and equipment, and is personally guaranteed by Aquino. The
17 loan agreement was amended six times, and the principal amount was increased
18 to \$9,000,000. Payments totaling \$766,283.06 were made between January 2007
19 and July 2008. The loan was sold to MPFC III, series 2 on August 30, 2007.
20 Including accrued interest, a total of \$14,859,086.81 is currently owed on the First
21 Capitol Loan. Seaman Declaration, ¶ 15.

22 On December 18, 2006, about three weeks after the Berger Commission's
23 final report recommending Parkway Hospital for closure was issued, Medical
24 Capital (MPFC III, series 1) purchased the GE HFS loan for \$8,903,739.42, the full
25 balance owed at the time ("First Parkway Loan"). As noted above, Parkway
26

27 _____
28 ¹ The other four entities are Boulevard Surgical Center, Inc., Boro Medical of
New York, Inc., Boro Medical of Westchester, Inc., and Boro Healthcare of
Union, P.C.

1 Acquisition and Parkway Hospital are co-borrowers under this loan, which is
2 secured by the Property and all other assets of both entities. Payments totaling
3 \$937,551.39 were made between March and September 2007. No further payments
4 were made. The loan was sold to MPFC III, series 2 in three payments from
5 October 4 to October 9, 2007. Including accrued interest, a total of \$13,064,849.94
6 is currently owed on the First Parkway Loan. Seaman Declaration, ¶ 16.

7 On January 23, 2007, Medical Capital (MPFC III, series 1) issued a line of
8 credit to Aquino in the amount of \$12.8 million ("Second Aquino Loan"). Like the
9 First Aquino Loan, the Second Aquino Loan is secured by Aquino's equipment,
10 inventory, accounts receivable and ownership interest in the seven healthcare-related
11 entities, including Capitol, Boro and Lifeco. The loan agreement was amended once
12 in February 2007 and twice in March 2008 for a total of three times, and the line of
13 credit was increased to \$16,444,835.65. Payments totaling \$726,700.87 were made
14 between February and October 2007. In November 2011, this debt was reduced to
15 judgment in an action against Aquino filed by the Receiver in Nevada federal court.
16 Aquino was served, but did not respond to the complaint, and a default judgment
17 was entered. The total amount of the judgment is \$26,189,951.39, plus interest
18 accruing at the legal rate. Pursuant to Court order entered January 5, 2012, the
19 Receiver has engaged counsel in New York (the Forman Holt firm) to enforce the
20 judgment. Seaman Declaration, ¶ 17.

21 On March 15, 2007, Medical Capital (MPFC IV, series 1) issued a \$3 million
22 loan to Capitol ("Second Capitol Loan"). Like the First Capitol Loan, the Second
23 Capitol Loan is secured by Capitol's inventory and equipment, and is personally
24 guaranteed by Aquino. The loan agreement was amended seven times, and the
25 principal amount was increased to \$7,027,305.75. Payments totaling \$933,454.81
26 were made between March 2007 and July 2008. Including accrued interest, a total
27 of \$9,566,679.89 is currently owed on the Second Capitol Loan. Seaman
28 Declaration, ¶ 18.

1 On July 19, 2007, Medical Capital (MPFV IV, series 2) executed a loan
2 agreement in the amount of \$2,060,000 with Capitol ("Third Capitol Loan"). A total
3 of \$2,391,387.00 was advanced under the Third Capitol Loan. Like the First and
4 Second Capitol Loans, the Third Capitol Loan is secured by Capitol's inventory and
5 equipment, and is personally guaranteed by Aquino. Payments totaling \$66,191.98
6 were made between August 2007 and July 2008. Including accrued interest, a total
7 of \$3,153,755.03 is currently owed on the Third Capitol Loan.² Seaman
8 Declaration, ¶ 19.

9 On June 20, 2007, Medical Capital (MPFC IV, series 2) executed a loan
10 agreement with Parkway Hospital, as Debtor-in-Possession in bankruptcy, in the
11 amount of \$18.2 million ("Parkway DIP Loan"). The loan was approved by the
12 bankruptcy court on July 31, 2007, in connection with confirmation of Parkway
13 Hospital's chapter 11 plan (discussed below). The loan is secured by all of Parkway
14 Hospital's assets. A total of \$19,114,053.17 was advanced under the Parkway DIP
15 Loan. Payments totaling \$135,438.04 were made between July and
16 September 2007. Including accrued interest, a total of \$29,358,543.71 is currently
17 owed on the Parkway DIP Loan. Seaman Declaration, ¶ 20.

18 Adding all of the loans together, and including accrued interest, a total of
19 \$97,019,234.44 is currently owed on the loans to Aquino, Parkway Hospital,
20 Parkway Acquisition, and Capitol. Seaman Declaration, ¶ 21.

21 **E. Confirmation of Parkway Hospital's Chapter 11 Plan**

22 On July 31, 2007, while the First Berger Adversary was pending, the
23 bankruptcy court confirmed Parkway Hospital's First Amended Chapter 11 Plan. As
24
25

26 ² Two hundred thousand dollars of the funds advanced under the Third Capitol
27 Loan was used by Aquino to make a deposit towards the purchase of ambulance
28 licenses owned by Century Ambulance Services, Inc. The deposit, litigation
between Century Ambulance and Aquino, and settlement thereof are described in
a motion filed by the Receiver on May 11, 2011. The motion was granted and
the settlement was approved on June 8, 2011.

1 part of plan confirmation, the Parkway DIP Loan was approved and the Boro DIP
2 Loan was converted to equity in Parkway Hospital. Seaman Declaration, ¶ 22.

3 Parkway Hospital's efforts to operate on a cash-positive basis, challenge the
4 Berger Commission and its recommendations, and avoid closure by the State of
5 New York were unsuccessful. On October 3, 2008, the First Berger Adversary was
6 resolved by stipulation dismissing Parkway Hospital's claims with prejudice. The
7 hospital was closed on or about November 5, 2008. Seaman Declaration, ¶ 23.

8 **F. The Capitol, Boro and Related Bankruptcy Cases**

9 On October 7, 2008, Capitol, Boro, Lifeco and four other entities owned by
10 Aquino filed chapter 11 bankruptcy in the Southern District of New York. The
11 other four entities are Boulevard Surgical Center, Inc., Boro Medical of
12 New York, Inc., Boro Medical of Westchester, Inc., and Boro Healthcare of
13 Union, P.C. All seven cases are jointly administered. Medical Capital stipulated to
14 the debtors' use of cash collateral to support their operations through
15 December 2008. Certain of the entities continued to operate, while others ran out of
16 capital and ceased operations. Seaman Declaration, ¶ 24.

17 **G. The Parkway Hospital Bankruptcy Gets Converted to Chapter 7**

18 On May 6, 2009, six months after Parkway Hospital was closed, it filed an
19 adversary proceeding in bankruptcy court seeking funds from the State of New York
20 under a program known as HEAL, which was established to compensate healthcare
21 facilities for the costs of implementing the Berger Commission's recommendations
22 ("Second Berger Adversary"). Parkway Hospital also asserted a takings claim. The
23 State moved to dismiss the Second Berger Adversary on the grounds that the takings
24 claim was substantially similar to claims dismissed with prejudice in the First
25 Berger Adversary. The State also argued that Parkway Hospital failed to timely
26 apply for HEAL funds and, therefore, was not eligible to receive them. The State's
27 motion was granted by the bankruptcy court in August 2010, and the Second Berger
28 Adversary was dismissed. Seaman Declaration, ¶ 25.

1 On August 12, 2010, the bankruptcy court granted the United States Trustee's
2 motion to convert the Parkway Hospital bankruptcy case from chapter 11 to
3 chapter 7. Ian Gazes ("Parkway Trustee") was appointed chapter 7 trustee and is
4 charged with administering the assets of Parkway Hospital. The Parkway Trustee
5 had all medical records removed from the Property, and is in the process of pursuing
6 reimbursement claims from Medicare, "no fault" insurance claims, and other
7 collection actions. The amounts collected will be distributed to the Medical Capital
8 receivership estate after payment of bankruptcy court-approved administrative
9 expenses. The Receiver's counsel is in regular contact with the Parkway Trustee
10 and his counsel on the status of these matters. Seaman Declaration, ¶ 26.

11 **H. Appointment of a Chapter 11 Trustee for Capitol, Boro, Lifeco and**
12 **Related Entities**

13 On September 13, 2010, the bankruptcy court granted the United States
14 Trustee's motion to appoint a chapter 11 trustee for Capitol, Boro, Lifeco and the
15 other four entities. Mark Tulis ("Capitol Trustee") was appointed chapter 11 trustee
16 and is charged with administering the assets of the seven entities. On November 18,
17 2010, on the Capitol Trustee's motion, the bankruptcy cases for four of the entities -
18 Lifeco, Boro Medical of New York, Inc., Boro Medical of Westchester, Inc., and
19 Boro Healthcare of Union, P.C. - were converted to chapter 7. On February 2, 2011,
20 the Capitol and Boro cases were converted to chapter 7. The Capitol Trustee now
21 acts as chapter 7 trustee in these cases. Seaman Declaration, ¶ 27.

22 The Capitol Trustee determined that only one of the seven entities had value
23 as an operating business - Boulevard Surgical Center, Inc. ("Boulevard"). The
24 Capitol Trustee marketed Boulevard, proposed a sale to the bankruptcy court,
25 subject to overbid, and ultimately sold the entity for \$1 million. The sale proceeds,
26 after payment of bankruptcy court-approved administrative expenses, will be paid to
27 the Medical Capital receivership estate. The Receiver's counsel is in regular contact
28 with the Capitol Trustee and his counsel on the status of these matters. On

1 October 27, 2011, the Receiver received a partial distribution in the amount of
2 \$501,300 from the proceeds of the Boulevard sale. The Receiver expects to receive
3 another approximately \$200,000 from the Capitol bankruptcy estate. Seaman
4 Declaration, ¶ 28.

5 **I. The Receiver's Foreclosure Action**

6 As noted above, the Property is owned by Parkway Acquisition, which is not
7 in bankruptcy. The Receiver engaged counsel in New York, the Trachtenberg
8 Rodes & Friedberg firm, to commence a foreclosure action. In order to avoid any
9 claims that the foreclosure action violated the automatic stay in the Parkway
10 Hospital or Capitol bankruptcy case, the Receiver and the Parkway Trustee
11 stipulated to relief from the automatic stay to allow the Receiver to proceed with the
12 foreclosure action, including against any interests that Parkway Hospital might have
13 in the Property. Similarly, the Capitol Trustee stipulated to a cancellation of any
14 and all interests that Capitol, Boro, Lifeco or the related entities might have in the
15 Property. These stipulations were approved by the bankruptcy court in November
16 and December 2010. Seaman Declaration, ¶ 29.

17 On January 6, 2011, the Receiver commenced an action in New York state
18 court to foreclose on the Property ("Foreclosure Action").³ On or about
19 February 15, 2011, Parkway Acquisition served a verified answer with
20 counterclaims. The counterclaims are based on the false allegation that the Receiver
21 made a commitment to accept \$2.6 million in full satisfaction of the First Parkway
22 Loan. The Receiver demanded that these patently frivolous claims be withdrawn
23 under New York's equivalent of Rule 11 of the Federal Rules of Civil Procedure.
24 Parkway Acquisition refused. On March 28, 2011, the Receiver moved to dismiss
25 the counterclaims, to strike affirmative defenses based on the counterclaims, and for
26 sanctions. On May 17, 2011, the New York court granted the Receiver's motion to
27

28 ³ In New York, foreclosures are all conducted judicially and must be completed through the court system.

1 dismiss the counterclaims and strike the related affirmative defenses, but denied the
2 request for sanctions. On October 21, 2011, the Receiver moved for summary
3 judgment. Parkway Acquisition recently hired new counsel and requested
4 additional time to file opposition to the motion. The opposition was served on
5 January 25, 2012. The motion will be fully submitted on March 14, 2012. Seaman
6 Declaration, ¶ 30.

7 The New York court system moves slowly, and Parkway Acquisition has
8 made it clear that it will contest the foreclosure, including taking frivolous positions
9 in order to delay the process. The Receiver's counsel at Trachtenberg Rodes &
10 Friedberg believes that it could take as long as another nine months to complete the
11 foreclosure sale. At that point, the Receiver would need to undertake additional
12 efforts to market the Property, negotiate sale terms and move for Court approval of a
13 sale. This process generally takes between 120 and 180 days. Seaman Declaration,
14 ¶ 31.

15 **J. Aquino Indictment**

16 On March 10, 2011, the Manhattan U.S. Attorney announced the unsealing of
17 a complaint charging New York State Senator Carl Kruger and New York State
18 Assemblyman William Boyland, Jr. with taking bribes. The complaint charges
19 Aquino and four others - CEO of MediSys Health Network David Rosen, healthcare
20 consultant Solomon Kalish, real estate developer Aaron Malinsky, and lobbyist
21 Richard Lipsky – of bribing and conspiring to bribe Kruger, Boyland, Jr., and
22 former New York State Assemblyman Anthony Seminerio (now deceased).
23 Michael Turano is charged with, among other things, laundering money for his and
24 Kruger's benefit. On January 3, 2012, Aquino pled guilty to one count of conspiracy
25 to commit bribery. Sentencing is set for May 3, 2012. Seaman Declaration, ¶ 32.

26 **K. Tax and Utility Liens on the Property**

27 As of January 23, 2012, there was approximately \$5.36 million in liens on the
28 Property securing Parkway Acquisition's obligations to pay property taxes, water

1 and sewer charges. The utility charges date back as far as February 2006, and the
2 property taxes date back to January 2008. Interest on the amounts owed accrues at
3 the rate of more than \$50,000 per month. The interest compounds daily, and,
4 therefore, the monthly interest accrual grows each month. In addition, every six
5 months, another approximately \$220,000 is owed in property taxes and is added to
6 the obligations secured by the liens. The taxes and utility charges, including
7 accrued interest, must be paid from the proceeds of any sale of the Property, whether
8 through foreclosure or otherwise. The Receiver estimates that by June 30, 2012, the
9 total obligations secured by the liens will be \$5.64 million and by the end of 2012,
10 will be \$6.5 million. Seaman Declaration, ¶ 33.

11 **L. Appraisals**

12 Between August and November 2010, the Receiver obtained two appraisals of
13 the Property from licensed appraisers, and three opinions of value from licensed
14 brokers with expertise regarding healthcare properties in the New York area. The
15 average of these appraisals and opinions of value is approximately \$11.5 million. In
16 January 2012, the Receiver's staff contacted one of the brokers, who advised that his
17 opinion of value has not materially changed since August 2010. Seaman
18 Declaration, ¶ 34.

19 **M. Conditions at the Property**

20 The Receiver has visited the Property in person, and has had his counsel in
21 New York visit the Property. The Receiver's staff has reviewed financial statements
22 for the Property provided by Parkway Acquisition and also spoke to the last tenant
23 in the building about the conditions at the Property before she left in June 2011.
24 The Receiver believes that basic maintenance and repairs at the Property are not
25
26
27
28

1 being done and, therefore, conditions at the Property are deteriorating.⁴ Seaman
2 Declaration, ¶ 35.

3 Furthermore, the Receiver learned that Parkway Acquisition had not paid its
4 premiums for insurance on the Property, and, therefore, the Receiver has been
5 forced to insure the Property. To date, the Receiver has paid \$88,779.66 for
6 insurance. The insurance carrier has stated that it will not renew the policy, which
7 expires in July 2012, unless repairs are made to the roof and the sprinkler system is
8 serviced and tested. Seaman Declaration, ¶ 36.

9 **N. Efforts to Market and Sell the First Parkway Loan**

10 With the assistance of an experienced broker, the Receiver has marketed the
11 First Parkway Loan, which is in first lien position *vis-à-vis* the Property. The
12 Receiver engaged Kenneth Enos of Colliers International LI, Inc. ("Broker") to
13 market the First Parkway Loan. Seaman Declaration, ¶ 37. Starting in
14 January 2011, the Broker identified approximately 800 potential purchasers and sent
15 them a marketing teaser about the opportunity. The opportunity was also listed on
16 Broker's website. Broker received inquiries from 373 potential purchasers, 68 of
17 whom executed confidentiality agreements and were given access to due diligence
18 materials. Offers were received from 12 potential purchasers. Declaration of
19 Kenneth Enos in Support of the Motion, ¶¶ 2-4. As noted above, prior to receiving
20 the offer from Purchaser, the Receiver negotiated terms with four other potential
21 purchasers at prices ranging from \$4.75 million to \$5.05 million. Each of these
22 potential purchasers elected not to pursue the transaction after conducting their due
23 diligence. Seaman Declaration, ¶ 4.

24
25
26 _____
27 ⁴ If the Receiver were not proposing this sale, he would have moved the New York
28 court for appointment of a receiver for the Property in order to protect against
diminution of the Property value. As it stands, the short term costs of a receiver
would likely outweigh the benefits to the receivership estate. The proposed sale,
if approved, must close within 61 days of entry of the Court order.

1 Subject to Court approval, the Receiver agreed that Broker will be paid two
2 percent (2%) of the purchase price up to \$5.1 million, and three percent (3%) of the
3 portion of the purchase price that exceeds \$5.1 million. If the proposed sale to
4 Purchaser is approved, the broker's commission will be \$135,000. Seaman
5 Declaration, ¶ 37.

6 **O. The Proposed Sale**

7 The highest and best offer received was from Purchaser in the amount of
8 \$6.2 million. The Receiver negotiated and executed a Loan Purchase and Sale
9 Agreement with Purchaser, a copy of which is attached to the Seaman Declaration
10 as Exhibit A ("Agreement"). Seaman Declaration, ¶ 38. The basic terms of the
11 Agreement are summarized as follows:

12 **Court approval.** All aspects of the Agreement and the sale are subject to
13 approval by the Court.

14 **Purchase Price.** \$6,200,000.

15 **Closing Date.** The earlier of (a) a date agreed upon by the Receiver and
16 Purchaser, and (b) 61 days⁵ from entry of an order approving the sale.

17 **Deposit.** Purchaser has deposited \$1,000,000 with the Receiver, which
18 amount is non-refundable if the Court approves the sale and Purchaser fails to
19 perform.

20 **Overbid.** The sale is subject to overbid. The minimum initial overbid is
21 \$6,500,000, and subsequent overbids must be in increments of \$50,000. In order to
22 qualify, bidders must (a) deliver an executed Loan Sale Agreement in form
23 substantially similar to the Agreement, (b) provide evidence to the Receiver's
24 satisfaction of the ability to pay at least the minimum overbid amount, and
25 (c) deliver a deposit in immediately available funds of \$1,000,000. The Receiver
26

27 _____
28 ⁵ The title insurance company will not insure title to the First Parkway Loan until
the order approving the sale has become final. In this case, because the
Securities and Exchange Commission is a party, the appeal period is 60 days.

1 has sought approval of the proposed overbid procedures in the Ex Parte Application
2 filed herewith.

3 **Break-Up Fee.** Purchaser's actual costs in connection with the sale, up to a
4 maximum of \$75,000 will be paid to Purchaser if it is not the highest bidder.

5 **Costs of Foreclosure Action.** The costs of the Foreclosure Action between
6 the date of execution of the Agreement and the closing date will be paid by
7 Purchaser at closing.

8 **Rights to Parkway Hospital Assets.** As noted above, Parkway Hospital is a
9 co-borrower with Parkway Acquisition on the First Parkway Loan. Parkway
10 Acquisition owns the real property securing the First Parkway Loan. Under the
11 Agreement, the Receiver retains all rights to recover from Parkway Hospital's assets
12 and to receive distributions from the Parkway Hospital bankruptcy estate.

13 **P. Losses Resulting From the Loans**

14 It is not yet possible to quantify the total direct loss that will result from the
15 loans made to Aquino, Parkway Hospital, Parkway Acquisition and Capitol. The
16 Receiver continues efforts to collect from the Parkway Hospital and Capitol
17 bankruptcy estates, and from Aquino via a judgment obtained in Nevada federal
18 court.⁶ If the proposed sale is approved (and assuming no qualified overbids are
19 received), the direct loss resulting from the First Parkway Loan, the only loan
20 secured by real property, will be more than \$6.8 million. Seaman Declaration, ¶ 39.

21 The enormous losses are attributable to the high level of risk and lack of
22 adequate collateral for the loans. Parkway Hospital was already in chapter 11 at the
23 time Medical Capital began making loans to Aquino, Parkway Hospital and his
24 other entities. The hospital was then recommended for closure by the Berger
25 Commission. At this point, although the loan from GE HFS was clearly in a
26 distressed state, Medical Capital paid full price for it. Seaman Declaration, ¶ 40.

27
28 ⁶ The loan agreements with Aquino select Nevada as the forum for all actions to
enforce the loan agreements.

1 The Parkway DIP Loan, under which Medical Capital advanced another
2 \$18.2 million secured only by the assets of a hospital about to be closed, is difficult
3 to comprehend. Due to the Berger Commission's recommendation, the likelihood of
4 Parkway Hospital being able to operate into the future was low. The hospital had
5 been in bankruptcy and unable to pay its creditors since July 2005. The hospital's
6 assets were already security for the First Parkway Loan. Whatever value the assets
7 had was clearly insufficient to secure an additional \$18.2 million. The value of
8 Aquino and Capitol's assets at the time the loans were made is not known, but thus
9 far, only \$501,300 has been recovered on loans of approximately \$34.5 million.
10 Seaman Declaration, ¶ 41.

11 The losses from the loans are exacerbated by Medical Capital's decisions to
12 advance more funds and failure to enforce its rights. Medical Capital repeatedly
13 amended loan agreements with Aquino and Capitol increasing the principal loaned
14 despite the fact that no payments were being made. In the aggregate, the First
15 Capital Loan, Second Capitol Loan and Second Aquino Loan were amended
16 16 times, increasing the total principal loaned from \$16.85 million to
17 \$32.47 million. Moreover, unlike most secured creditors, Medical Capital rarely
18 asserted itself in the Parkway Hospital or Capitol bankruptcy case, and made no
19 attempts to push the cases forward or obtain relief from stay to foreclose on its
20 collateral. Medical Capital also never sued Aquino to collect on the loans made to
21 him or to enforce his personal guarantees. The failure to enforce the numerous
22 loans, security agreements and guarantees is difficult to comprehend considering
23 how much Medical Capital had advanced, the nominal payments made by the
24 borrowers, and the very low probability that Parkway Hospital or Aquino's other
25 entities would be able to pay off the debt. Seaman Declaration, ¶ 42. The proposed
26 sale, which secures an immediate cash recovery of \$6.2 million, will, to the extent
27 possible, minimize losses from the loans and provide at least a measure of recovery
28 for investors and creditors.

1 **III. ARGUMENT**

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

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

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

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

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

1 Court has broad equitable powers and discretion in the administration of the
2 receivership estate and disposition of receivership assets.

3 **B. The Sale**

4 It is generally conceded that a court of equity having custody and control of
5 property has power to order a sale of the same in its discretion. *See, e.g., S.E.C. v.*
6 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
7 and wide discretion to determine relief in an equity receivership). "The power of
8 sale necessarily follows the power to take possession and control of and to preserve
9 property." *See S.E.C. v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
10 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
11 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
12 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))). "When a court of equity
13 orders property in its custody to be sold, the court itself as vendor confirms the title
14 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
15 Receivers § 487.

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

24 Generally, when a court-appointed receiver is involved, the receiver, as agent
25 for the court, should conduct the sale of the receivership property. *Blakely Airport*
26 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
27 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
28 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing

1 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
2 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
3 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
4 354, 357 (9th Cir. 1925).

5 Here, as of December 31, 2011, the total owed on the First Parkway Loan was
6 \$13,064,849.94. As of late 2010, the Property was appraised at approximately
7 \$11.5 million (the average of two independent appraisals, and three broker opinions
8 of value). By the time the Receiver could complete a foreclosure on the Property,
9 the tax and utility liens, which must be paid first, would likely exceed \$5.5 million.
10 Therefore, the net recovery from the foreclosure sale would likely be approximately
11 \$6 million. However, the costs to continue to prosecute the foreclosure and to
12 insure the Property would further reduce the recovery. Parkway Acquisition has
13 made it clear that it will contest the foreclosure, including taking frivolous positions.
14 There is also risk that Parkway Acquisition will further delay the foreclosure by
15 filing bankruptcy. Moreover, the Receiver believes that conditions at the Property
16 are deteriorating, and, therefore, that the Property value may decrease before the
17 foreclosure is completed. Finally, the Receiver retains all rights under the First
18 Parkway Loan to recover from Parkway Hospital's assets and to receive distributions
19 from the Parkway Hospital bankruptcy estate. Seaman Declaration, ¶ 43.

20 Considering all of these factors, the Receiver believes that the proposed sale,
21 which will generate an immediate cash recovery of \$6.2 million, and is subject to
22 overbid to ensure that the highest and best price is obtained, is in the best interests of
23 the receivership estate. Seaman Declaration, ¶ 44. Accordingly, the sale should be
24 approved.

25 **C. Broker's Commission**

26 Subject to Court approval, the Receiver agreed that Broker will be paid a
27 commission equal to two percent (2%) of the purchase price up to \$5.1 million, and
28 three percent (3%) of the portion of the purchase price that exceeds \$5.1 million. If

1 the proposed sale to Purchaser is approved, the commission will be \$135,000.
2 Seaman Declaration, ¶ 37. Broker has spent substantial time marketing the Loans,
3 providing information to prospective purchasers, and assisting in the negotiation and
4 documentation process. The First Parkway Loan has been marketed by Broker since
5 January 2011. Enos Declaration, ¶¶ 2-4. The Receiver believes that the proposed
6 commission is in line with industry standards and is fair and reasonable under the
7 circumstances. Seaman Declaration, ¶ 45. Accordingly, the Receiver requests
8 authorization to pay Broker's commission from the sale proceeds.

9 **IV. CONCLUSION**

10 WHEREFORE, the Receiver requests entry of an order granting the Motion,
11 approving the Agreement, and authorizing the Receiver to pay Broker the
12 commission discussed above.

13 Dated: February 3, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

14
15 By: /s/ Ted Fates

16 TED FATES
17 Attorneys for Receiver
18 Thomas A. Seaman
19
20
21
22
23
24
25
26
27
28