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7 Attorneys for Receiver
8 THOMAS A. SEAMAN

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

Case No. SA CV09-0818 DOC (RNBx)

**NOTICE OF MOTION AND MOTION
FOR ORDER APPROVING (1) SALE
OF ASSETS OF NATIONAL HEALTH
BENEFITS CORPORATION AND
(2) PAYMENT OF BROKER'S
COMMISSION; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: September 10, 2012
Time: 8:30 a.m.
Ctrm: 9D
Judge: Hon. David O. Carter

1 **TO ALL INTERESTED PARTIES:**

2 **PLEASE TAKE NOTICE** that on September 10, 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, the "Receivership
8 Entities"), for approval of (1) sale of assets of National Health Benefits Corporation
9 and (2) payment of broker's commission ("Motion").

10 The Motion is based on the Memorandum of Points and Authorities below,
11 and the Declarations of Thomas A. Seaman and Andy Peters filed herewith. The
12 Motion and supporting papers are available at the Receiver's website,
13 <http://www.medicalcapitalreceivership.com> or may be reviewed at the Clerk's
14 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 file
17 your written opposition with the Office of the Clerk, United States District Court,
18 411 West Fourth Street, Santa Ana, California 92701 and serve the same on the
19 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. This
22 Motion is made following the conference of counsel pursuant to L.R. 7-3.

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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.

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4 Dated: August 3, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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6 By: /s/ Ted Fates

7 TED FATES
8 Attorneys for Receiver
9 THOMAS A. SEAMAN
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 National Health Benefits Corporation ("NHBC") is a wholly owned
4 subsidiary of Medical Capital Holdings, Inc. ("MCH") located in Scottsdale,
5 Arizona. NHBC is known as a healthcare cost containment company. It helps
6 self-insured employers, third-party administrators ("TPAs"), and other healthcare
7 payors reduce healthcare costs and increase operational efficiency. NHBC contracts
8 with self-insured employers, TPAs, and insurers to give them access to preferred
9 provider organization ("PPO") networks and receives a percentage of the healthcare
10 savings received by its clients. NHBC also contracts with PPO networks and pays
11 fees to access the networks for their clients. NHBC owns proprietary claims
12 processing software which it uses to process hundreds of thousands of healthcare
13 claims per month for its clients.

14 During the months leading up to the Receiver's appointment, MCH had been
15 seizing NHBC's revenues without paying its operating expenses. As a result, at the
16 time of the Receiver's appointment, NHBC was experiencing a liquidity crisis. The
17 Receiver promptly evaluated and stabilized the business, which has significant
18 revenues, but has large debts arising from litigation with a competitor in the
19 industry. The Receiver resolved issues relating to the litigation, is operating and
20 managing NHBC, and has marketed its assets for sale. The Receiver now seeks
21 Court approval of a sale of substantially all of NHBC's assets, including its contracts
22 with clients and networks, and its proprietary software ("Assets").

23 **II. BACKGROUND FACTS**

24 **A. Formation and Acquisition of NHBC**

25 The Receivership Entities' books and records reflect the following regarding
26 the formation and acquisition of NHBC:

27 Before it was acquired by MCH, the company was called Carlmont Capital
28 Group, Inc. ("CCG") and was owned by Blaine Pollock. In March 2000, MCH

1 purchased CCG from Pollock for \$1.832 million, \$1.5 million of which represented
2 assumption of CCG debt. MCH formed NHBC in May 2001 as a Nevada
3 corporation. The assets and operations of CCG were then transferred to NHBC.
4 Declaration of Thomas Seaman filed herewith ("Seaman Declaration"), ¶ 2.

5 **B. Pre-Receivership Operations of NHBC**

6 Between May 2001 and the end of 2008, MCH and MCC had to advance
7 funds to NHBC in order for NHBC to meet its operational cash needs. As of the
8 Receiver's appointment, NHBC owed MCH and MCC just over \$6.1 million. The
9 amount NHBC owed MCH and MCC had been even greater, but in 2009, MCH
10 began taking large sums out of NHBC without advancing further funds. Between
11 January 2009 and August 2009, MCH took approximately \$725,000 more from
12 NHBC than it transferred to NHBC. As noted above, the resulting lack of funding
13 put NHBC in a liquidity crisis. Seaman Declaration, ¶ 3.

14 **C. Litigation with Stratose**

15 In 2001, Scott Arlotta began working for NHBC (at that time, CCG).
16 In 2003, John Morris and Melitta Hauser joined NHBC. In 2003, a company then
17 called Coalition America, Inc., now called Stratose, Inc. ("Stratose"), sued NHBC,
18 Morris, Hauser, and Arlotta in Georgia state court alleging, among other things, that
19 the defendants misappropriated Stratose's trade secrets. The action was removed to
20 the United States District Court for the Northern District of Georgia (Atlanta
21 Division). Morris, Hauser and Arlotta were subsequently dismissed from the case.
22 Seaman Declaration, ¶ 4.

23 In May 2009, a jury trial was held on Stratose's misappropriation of trade
24 secrets claims against NHBC. On June 1, 2009, a jury verdict was entered awarding
25 Stratose \$2,192,169 in compensatory damages. On July 29, 2009, the court awarded
26 Stratose an additional \$500,000 in punitive damages. Seaman Declaration, ¶ 5.

27 The Receiver was appointed on August 3, 2009. His counsel immediately
28 advised the District Court in Atlanta of his appointment over NHBC and the

1 injunction prohibiting actions by creditors against the Receivership Entities. On
2 August 5, 2009, the District Court in Atlanta issued an order stating that the
3 receivership injunction did not apply to its own acts. It then entered the judgment
4 against NHBC in the amount of \$2,692,169.00 ("Judgment"). Counsel for Stratose
5 and counsel for the Receiver entered into stipulations extending (a) Stratose's
6 deadline to bring a post-trial motion for attorneys' fees and costs, and (b) NHBC's
7 deadline to appeal the Judgment. Seaman Declaration, ¶ 6.

8 The law firm of Alston & Bird had represented NHBC in the litigation with
9 Stratose. Alston & Bird had unpaid bills in excess of \$1.2 million. On July 8, 2009,
10 Alston & Bird moved to withdraw as counsel for NHBC. The motion was granted
11 on August 6, 2009. The Receiver retained counsel at the Atlanta office of Kilpatrick
12 Townsend & Stockton LLP ("Kilpatrick") to review the litigation files and evaluate
13 NHBC's likelihood of success on appeal. After reviewing the files, Kilpatrick
14 discovered that, during the period in which NHBC did not have counsel in the case,
15 it failed to timely renew certain motions for Judgment as a Matter of Law
16 ("JMOL"), and, therefore, the issues raised in those motions had not been preserved
17 for appeal. Without the issues raised in the JMOL motions, an appeal was unlikely
18 to succeed. However, with the issues raised in the JMOL motions, there was a
19 legitimate chance the Judgment would either be reversed or reduced on appeal.
20 Accordingly, the Receiver sought relief from the deadline to renew the JMOL
21 motions from the District Court in Atlanta. The motion was denied. At that point,
22 the Receiver determined that the anticipated costs outweighed the likely benefits of
23 pursuing the appeal further. Seaman Declaration, ¶ 7.

24 Stratose provided the Receiver with its bills from the trial court litigation.
25 After reviewing the bills, the Receiver and Stratose stipulated that Stratose's
26 recoverable fees were \$1,300,000 and recoverable costs were \$50,000. The
27 stipulation was approved by this Court on February 9, 2011, and a judgment
28 awarding Stratose \$1,350,000 in attorneys' fees and costs was entered by the District

1 Court in Atlanta on March 1, 2011. This brought Stratose's total claim arising from
2 the litigation to \$4,042,169. Alston & Bird also has an allowed claim in the amount
3 of \$1,206,238.82. Seaman Declaration, ¶ 8.

4 **D. The Receiver's Operation of NHBC**

5 As noted above, at the time of the Receiver's appointment, NHBC had
6 significant revenues, but was experiencing a liquidity crisis because MCH had been
7 taking its revenues without paying its operating expenses. NHBC's July 31, 2009,
8 payroll had not been paid, nor had a significant portion of its July 15, 2009 payroll.
9 None of the July 15, 2009, payroll taxes had been paid. Health insurance premiums
10 and 401(k) contributions were not paid even though the Receivership Entities had
11 taken such deductions from employees' paychecks. Certain key outside contractors
12 had not been paid since May 2009. Seaman Declaration, ¶ 9.

13 Several key provider networks had terminated NHBC's services due to its
14 failure to pay certain fees for extended periods of time. The deterioration of its
15 provider network relationships made it difficult for NHBC to sell its services.
16 NHBC also owed client fees and refunds of approximately \$200,000. The client
17 fees represent revenue sharing which is an essential component of attaining and
18 retaining clients. Seaman Declaration, ¶ 10.

19 After evaluating NHBC, the Receiver determined that it could be a profitable
20 business if certain issues were addressed. The Receiver paid the unpaid payroll and
21 payroll taxes, procured a new health insurance policy for employees, paid essential
22 accounts payable, and negotiated discounts and installment payment plans with PPO
23 networks. The Receiver has also paid current operating expenses, negotiated
24 discounts of past due bills, and resolved numerous issues related to NHBC's
25 non-payment of bills prior to his appointment. These actions have stabilized the
26 financial condition of the company. Seaman Declaration, ¶ 11.

27 In addition, in order to increase efficiency, reduce costs, and enhance the
28 value of the Assets, the Receiver (a) supervised the continued development of

1 NHBC's proprietary software, (b) worked with NHBC to establish and enhance its
2 HIPAA compliance program, (c) worked with NHBC to improve its information
3 technology security and disaster recovery program, (d) improved its human
4 resources department, including reducing payroll and worker's compensation costs,
5 revising the employee handbook, completing personnel files on all employees, and
6 having all employees execute a Confidentiality and Inventions Assignment
7 Agreement, (e) purchased Errors & Omissions and Cyber Liability coverage,
8 (f) negotiated and executed a new employment agreement with the company's
9 President, including a bonus upon completion of the sale to ensure his assistance in
10 completing the sale process, (g) established an employee bonus program to retain
11 and incentivize employees, and (h) established systems and procedures such that
12 NHBC can perform its own accounting (all accounting functions were previously
13 performed by Medical Capital). Seaman Declaration, ¶ 12.

14 **E. Marketing NHBC's Assets for Sale**

15 The industry in which NHBC operates is fairly small in terms of the number
16 of competitors who provide the same services. Word spread quickly that NHBC
17 was in receivership, and the Receiver was contacted by several parties interested in
18 acquiring the company or its assets. Due to NHBC's large debts, the Receiver
19 determined that a sale of the Assets, the most valuable of which are its contracts
20 with clients and networks, and its proprietary claims processing software, would
21 produce the best recovery for the receivership estate. By the time the Receiver was
22 in a position to negotiate terms, twelve (12) interested parties had contacted the
23 Receiver. The Receiver provided them with financial information about the
24 company and instructed them to submit an offer no later than October 24, 2011.
25 The Receiver reviewed the offers, the highest and best of which came from Premier
26 Healthcare Exchange, Inc. ("Purchaser"). Purchaser conducted extensive due
27 diligence and then negotiated terms with the Receiver. Seaman Declaration, ¶ 13.

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1 The Receiver also engaged The Independence Group, Inc. ("Broker") to
2 market the Assets to potential overbidders. Seaman Declaration, ¶ 14. Broker
3 created a targeted list of potential buyers, which included (1) interested parties who
4 previously contacted the Receiver; (2) strategic acquirers in the healthcare industry;
5 (3) private equity groups with platform companies or an expressed interest in
6 healthcare services; and (4) private equity groups interested in businesses of
7 NHBC's size. In total, over 200 entities were targeted and contacted via e-mail and
8 direct phone contact. Those who expressed interest were instructed to sign a
9 Non-Disclosure Agreement. Twenty-four (24) Non-Disclosure Agreements were
10 signed, fifteen (15) of which came from parties determined to be financially
11 qualified. Each of the financially qualified potential overbidders have been given
12 access to the same due diligence materials provided to Purchaser. Peters
13 Declaration, ¶ 2-3.

14 **F. Appraisals**

15 The Receiver had two licensed appraisers review NHBC's financial
16 statements and other key documents, interview NHBC's President, and provide a
17 valuation of the company. Although the valuations are of the company as opposed
18 to the Assets, the assumptions built into them (*i.e.*, that the buyer would not have to
19 assume NHBC's largest debts) make them analogous to valuations of the Assets.
20 Under these assumptions, one appraiser valued the company at \$1.9 million, and the
21 other valued it at \$3.4 million. Seaman Declaration, ¶ 15.

22 **III. THE PROPOSED SALE¹**

23 The Receiver executed an Asset Purchase Agreement with Purchaser, a copy
24 of which is attached to the Seaman Declaration as Exhibit A ("Agreement"). The
25 basic terms of the Agreement are summarized as follows:

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¹ The proposed sale terms are summarized herein for ease of reference only. In the event of a conflict between the summary herein and the Agreement, the Agreement governs and controls.

1 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
2 and efficient administration of the estate by the district court for the benefit of
3 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
4 of a receiver is authorized by the broad equitable powers of the court, any
5 distribution of assets must also be done equitably and fairly. *See S.E.C. v. Elliot*,
6 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

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

29 **B. The Sale**

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

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

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

17 Generally, when a court appointed receiver is involved, the receiver, as agent
18 for the court, should conduct the sale of the receivership property. *Blakely Airport*
19 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
20 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
21 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
22 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
23 (3d ed. 1992)))))). "In authorizing the sale of property by receivers, courts of equity
24 are vested with broad discretion as to price and terms." *Gockstetter v. Williams*,
25 9 F.2d 354, 357 (9th Cir. 1925).

26 Here, the proposed sale will maximize the recovery from the Assets.
27 Licensed appraisers valued the company at \$1.9 million and \$3.4 million,
28 respectively. The proposed purchase price of \$3.2 million is at the high end of this

1 spectrum. Furthermore, the Assets have been broadly marketed and the sale is
2 subject to overbid to ensure that the highest and best price is obtained. Because of
3 NHBC's large debts, the value the Receiver could obtain through a sale of the
4 company would be vastly less than the proposed purchase price for the Assets.
5 Accordingly, the proposed sale is in the best interests of the receivership estate and
6 should be approved.

7 **C. Broker's Commission**

8 Subject to Court approval, the Receiver and Broker agreed that Broker would
9 be paid a consulting fee of \$30,000, plus, in the event of a qualified overbid, twenty
10 (20%) percent of the delta between the proposed purchase price and the successful
11 bid. Prior to engaging Broker, the Receiver contacted four (4) licensed brokers with
12 experience selling businesses and business assets. One turned down the
13 opportunity. Of the three proposals received, Broker's proposal was on the most
14 favorable terms. Broker has put in substantial time and effort in identifying
15 potential overbidders, contacting them, and providing them with information.
16 Seaman Declaration, ¶ 14. Accordingly, the Receiver requests authority to pay
17 Broker the commission described above.

18 **V. CONCLUSION**

19 WHEREFORE, the Receiver requests entry of an order granting the Motion,
20 approving the Agreement, and authorizing the Receiver to pay Broker the
21 commission described above.

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23 Dated: August 3, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

24
25 By: /s/ Ted Fates

26 TED FATES
Attorneys for Receiver
THOMAS A. SEAMAN