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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.
20

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

**EX PARTE APPLICATION FOR
APPROVAL OF (A) OVERBID
PROCEDURES FOR SALE OF
SOUTHWEST ATLANTA MEDICAL
CENTER AND (B) NOTICE OF SALE**

Ctrm: 9D
Judge: Hon. David O, Carter

1 Thomas A. Seaman ("Receiver"), Court-appointed permanent receiver for
2 Medical Capital Holdings, Inc., Medical Capital Corporation, Medical Provider
3 Funding Corporation VI, and their subsidiaries and affiliates, including Georgia
4 Medical Provider Financial Corporation (collectively, "Medical Capital" or the
5 "Receivership Entities"), applies for an order approving (a) overbid procedures to be
6 used in connection with the proposed sale of Southwest Atlanta Medical Center and
7 (b) notice of the sale provided by the Receiver ("Application").

8 I. INTRODUCTION

9 The Southwest Atlanta Medical Center property in Atlanta, Georgia
10 ("Property") has been on the market since April 2009. The Receiver has twice
11 sought approval of a proposed sale of the Property at a purchase price of
12 \$9.5 million. In both instances, the buyer's intended use of the Property was as a
13 hospital, and ultimately the buyers walked away from the transaction. It has been
14 more than two years since the last proposed sale, during which time numerous
15 interested parties have looked at the Property.

16 The Receiver has recently executed a Purchase and Sale Agreement for the
17 Property with Arberg Properties, LLC ("Buyer")¹ with a purchase price of
18 \$5 million, subject to overbid and Court approval. This Application seeks approval
19 of proposed overbid procedures and notice of the sale. The concurrently-filed, fully
20 noticed motion ("Sale Motion"), and the supporting Declarations of Thomas Seaman
21 ("Seaman Declaration") and Thomas W. Tift, III, which are all attached hereto as
22 Exhibit A (without the voluminous exhibits to the declarations), seek approval of the
23 sale. The Purchase and Sale Agreement ("Agreement") is attached as Exhibit 1 to
24 the Seaman Declaration (as filed and served with the Sale Motion).

25

26

27 ¹ The Purchase and Sale Agreement was executed by 1161 Ridge Avenue, LLC
28 ("1161 Ridge") as buyer. 1161 Ridge then assigned its interests in the Purchase
and Sale Agreement, as permitted under Section 14.4 of the Agreement, to
Buyer.

1 **II. EX PARTE NOTICE**

2 On November 14, 2012, pursuant to Local Rule 7-19.1, the Receiver's counsel
3 circulated this Application to counsel for the Securities and Exchange Commission
4 ("Commission") and counsel for Defendants Field and Lampariello. The Receiver
5 was informed by counsel for the Commission that the Commission has no
6 opposition. Counsel for Defendants Field and Lampariello had not responded at the
7 time of filing.

8 **III. FACTUAL BACKGROUND**

9 The lengthy background pertaining to the Property and Medical Capital's
10 loans to the prior owner is discussed in the Sale Motion.

11 **IV. THE AGREEMENT**

12 The Agreement is attached to the Seaman Declaration and its terms are
13 summarized in the Sale Motion (all of which are attached hereto as Exhibit A). This
14 Application does not seek approval of the sale, which is addressed in the Sale
15 Motion set for hearing on December 17, 2012. Rather, this application merely seeks
16 approval of proposed overbid procedures and notice of the sale.

17 **V. OVERBID PROCEDURES²**

18 The Receiver requests that the overbid procedures provided in Article 15 of
19 the Agreement be approved. These procedures are summarized as follows:

- 20 (a) **Qualified Bidders.** To be determined a qualified bidder (the "Qualified
21 Bidder"), one must: (i) provide a fully executed purchase and sale agreement
22 for the Property in form substantially similar to the Agreement ("Qualified
23 Bid PSA"), acceptable to the Receiver, (ii) provide evidence, in the form of a
24 cashier's check, a deposit of immediately available funds, an irrevocable letter
25 of credit in favor of the Receiver, or other evidence acceptable to the Receiver
26

27 ² The proposed overbid procedures are laid out in Article 15 of the Agreement, and
28 are summarized herein for convenience only. In the event of any conflict
between the Agreement and the summary provided herein, the Agreement
governs and controls.

1 that the Qualified Bidder has the ability to pay at least the minimum overbid
2 amount, (iii) provide an earnest money deposit (the "Overbid Deposit") in
3 immediately available funds in the amount of \$262,500 payable to the
4 Receiver, which amount shall be non-refundable to the qualified bidder with
5 the highest bid at the Auction (the "High Bidder") if for any reason (a) the
6 High Bidder fails to finally close the sale such that title transfers by no later
7 than the closing date or (b) the High Bidder fails to provide the balance of the
8 cash portion of the purchase price to the Receiver when and as required under
9 the Qualified Bid PSA. Buyer is a Qualified Bidder. Each Qualified Bidder
10 (other than Buyer) must provide the Qualified Bid PSA and the Overbid
11 Deposit to the Receiver no later than five (5) days prior to the hearing date on
12 the Sale Motion. The Qualified Bidders shall appear at the hearing in person
13 or through a duly authorized representative. The High Bidder's deposit shall
14 be applied to the purchase price, if the sale is approved by the Court.

15 (b) **Overbids.** Initial overbids must be at least \$5,250,000. Subsequent
16 overbids shall be in increments of at least \$25,000. If no Qualified Bidder
17 submits a bid in the amount of the initial overbid or higher, the Agreement
18 will be submitted to the Court for approval in its current form.

19 (c) **No Contingencies.** The sale to any qualified bidder shall not be subject
20 to any contingencies, including without limitation, for financing, due
21 diligence or inspection.

22 (d) **Break-Up Fee.** Pursuant to Section 13.2 of the Agreement, if Buyer is
23 not the high bidder, the Receiver shall pay Buyer a break-up fee in the amount
24 of its actual out-of-pocket costs paid to third parties, up to \$75,000.

25 These overbid procedures are designed to (a) induce Buyer to act as the initial
26 "stalking horse" bidder, (b) allow qualified bidders to overbid, (c) ensure that the
27 sale closes in a timely manner, and (d) generate the highest and best price for the
28 Property.

1 **VI. NOTICE OF THE SALE**

2 The Receiver served the Sale Motion by mail on (i) the parties,
3 (ii) Wells Fargo Bank and Bank of New York Mellon, (iii) the Buyer and all known
4 potential bidders,³ (iv) all known lienholders and claimants with respect to the
5 Property, and (v) all investors and other creditors who have requested service by
6 mail. The Receiver also posted the Sale Motion on his website
7 (www.medicalcapitalreceivership.com), causing an e-mail notice to be sent
8 electronically to all investors and other creditors that have registered to receive such
9 e-mails. Furthermore, as required by 28 U.S.C. § 2002, the Receiver will cause the
10 following notice of sale and opportunity to overbid to be published in the Atlanta
11 Journal-Constitution on November 20 and 27, and December 4 and 9, 2012:

12 In the action pending in U.S. District Court for the Central
13 District of California, Southern Division, Case
14 No. SA CV09-0818 DOC (RNBx), Securities and
15 Exchange Commission v. Medical Capital Holdings, Inc.,
16 et al., notice is hereby given pursuant to 28 U.S.C. § 2002
17 that the Court-appointed Receiver has contracted to sell
18 the real property located at 501 Fairburn Road SW,
19 Atlanta, Georgia, known as the Southwest Atlanta
20 Medical Center, for the amount of \$5,000,000. Sale
21 subject to overbid and Court confirmation. Hearing
22 currently set for December 17, 2012 at 8:30 a.m.,
23 courtroom of the Honorable David O. Carter, United
24 States Courthouse, 411 West Fourth Street, Santa Ana,
25 California. Minimum overbid is \$5,250,000. Overbids
26 must be received by 5:00 p.m. Pacific Standard Time, five
27 days prior to the hearing by the Receiver at 3 Park Plaza,
28 Suite 550, Irvine, California. If interested in submitting
an overbid, please contact Thomas Tift at (404) 869-2666
or at ttift@healthamrealty.com for the form of Purchase
and Sale Agreement and other information.

3 Notice to potential bidders for whom the Receiver and his broker do not have a physical address has been provided by e-mail and/or facsimile.

1 **VII. ARGUMENT**

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

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

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

26 Id. (citations omitted); see also Commodities Futures Trading Comm'n. v. Topworth
27 Int'l, Ltd.; 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference'
28 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, this
Court has broad equitable powers and discretion in formulating procedures,
schedules and guidelines for administration of the receivership estate.

1 The Ninth Circuit has confirmed a district court's broad authority to approve a
2 sale of assets under the control of an equity receiver. SEC v. American Capital
3 Investments, Inc., 98 F.3d 1133, 1143-1145 (9th Cir. 1996) abrogated on other
4 grounds by Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998);
5 Gockstetter v. Williams, 9 F.2d 354, 357 (9th Cir. 1925) ("In authorizing the sale of
6 property by receivers, courts of equity are vested with a broad discretion as to price
7 and terms."); see also Mellen v. Moline Malleable Iron Works, 131 U.S. 352 (1889)
8 (under its general equity authority, the court has the power to order a sale of
9 property); Broadway Trust v. Dill, 17 F.2d 486 (3d Cir. 1927) (in a receivership
10 proceeding, the court has both the power and jurisdiction to order a sale of the
11 property).

12 **A. The Proposed Overbid Procedures Should Be Approved**

13 The proposed overbid procedures are designed to (a) induce Buyer to remain
14 in place as the initial "stalking horse" bidder, (b) allow qualified bidders to overbid,
15 (c) ensure that the sale closes in a timely manner, and (d) generate the highest and
16 best price for the Property. Break-up fees are commonly used in court-approved
17 sales to induce potential purchasers to serve as stalking horse bidders and to protect
18 such purchasers from the substantial loss in the event they are not the highest bidder.
19 The proposed initial overbid (\$5,250,000) is an increase of 5% of the initial
20 purchase price, and the subsequent overbid increments (\$25,000) are 0.5% of the
21 initial purchase price. The Receiver submits that these amounts are within
22 customary ranges for a sale of this size and are reasonable and fair to all interested
23 parties. Accordingly, the Receiver requests that the overbid procedures be
24 approved.

25 **B. The Notice of Sale Should Be Approved**

26 The notice of sale provided by the Receiver by mail and publication is
27 reasonable and should be approved. The Property has been extensively marketed
28 for sale both pre-receivership and post-receivership. Notice of prior sales was

1 published on four occasions in the Atlanta Journal-Constitution, the newspaper of
2 greatest circulation in the Atlanta area. Notice of the current sale will again be
3 published on four occasions in the Atlanta Journal-Constitution. All persons that
4 have expressed interest in the Property have been served by mail. Further mailing
5 or publication of notice imposes significant costs on the receivership estate with
6 little or no benefit to those holding allowed claims.

7 **VIII. CONCLUSION**

8 WHEREFORE, the Receiver requests entry of an order approving the overbid
9 procedures provided in Article 15 of the Agreement and the notice of sale described
10 herein.

11
12 Dated: November 16, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

13
14 By: /s/ Ted Fates

15 TED FATES
16 Attorneys for Receiver
17 Thomas A. Seaman
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