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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

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

**NOTICE OF MOTION AND
 MOTION FOR APPROVAL OF SALE
 OF STOCK IN VIVA VISION, INC.;**
**MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: August 2, 2010
 Time: 8:30 a.m.
 Ctrm: 9D
 Judge: Hon. David O. Carter

1 **TO ALL INTERESTED PARTIES:**

2 PLEASE TAKE NOTICE that on August 2, 2010, 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 the sale of stock in Viva Vision, Inc.
9 ("Motion").

10 The Motion is based on the Memorandum of Points and Authorities below,
11 and the Declaration of Thomas A. Seaman filed herewith. The Motion and
12 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
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 briefly summarize, the Receiver
24 requests an order approving the sale of stock in Viva Vision, Inc. for a purchase
25 price of \$1,250,000 cash. The Receiver will retain certain assets and liabilities of
26 the company, i.e. the cash, accounts receivable and accounts payable, which will
27 result in an estimated additional recovery of approximately \$600,000.

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1 This Motion is made following the conference of counsel pursuant to
2 L.R. 7-3. Counsel for the Securities and Exchange Commission, Mr. Bulgozdy,
3 advised that he does not oppose the Motion, but has another hearing on August 2,
4 2010, and therefore will be unable to attend this hearing.

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

7
8 Dated: July 2, 2010

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

9
10 By: /s/ Ted Fates

11 TED FATES
12 Attorneys for Receiver
13 Thomas A. Seaman
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Receivership Entities own substantially all of the outstanding stock in
4 Viva Vision, Inc. ("Viva"), a privately-held California corporation whose business is
5 to provide visual entertainment programming to mobile devices. The Receivership
6 Entities are also owed approximately \$7.2 million on a loan made to Viva.

7 Since Medical Capital's investment in Viva, Viva has never been profitable.
8 During Medical Capital's ownership of the Viva stock (i.e. 2005 through 2009),
9 Viva has lost more than \$11.2 million. Viva's sales revenue has been declining
10 since August 2008. The company's revenues declined approximately 64% between
11 September 2008 and May 2010. Viva's only substantial assets are contracts with
12 content providers and accounts receivable. The contracts have declining sales
13 revenues due to Viva's technological inability to provide content to newly released
14 mobile devices, which drastically reduces the pool of potential customers. Viva is
15 not financially capable of repaying the loan from Medical Capital.

16 Subject to Court approval, the Receiver has agreed to sell the Receivership
17 Entities' stock in Viva for a purchase price of \$1,250,000 cash from the buyer. The
18 Receiver will retain certain assets and liabilities of the company, i.e. the cash and
19 accounts payable, which will result in an additional recovery of approximately
20 \$600,000. Details of the sale are discussed below.

21 The Viva stock is not registered. Federal and state securities laws do not
22 allow for a public auction of unregistered stock. Accordingly, the proposed sale is a
23 private transaction, not subject to overbid. The Receiver, however, has analyzed
24 Viva's financial condition and, based on his analysis, believes that the proposed sale
25 will produce the highest and best recovery for the receivership estate.

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II. FACTS

A. The Stock Purchases

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3 On September 22, 2005, Medical Capital entered into a Series A-2 Preferred
4 Stock Warrant Purchase Agreement with Inetcam, Inc., whereby Medical Capital
5 purchased a preferred stock warrant for \$300,000. On November 3, 2005,
6 January 6, 2006 and March 8, 2006, Medical Capital (Medical Provider Financial
7 Corporation III), exercised its right to purchase 7,500,000 shares in three equal
8 purchases of 2,500,000 shares each, for a total purchase price of \$7,500,000, which
9 price included the \$300,000 paid for the warrant. On May 17, 2006, Inetcam, Inc.
10 filed an Amended and Restated Articles of Incorporation, changing its name to Viva
11 Vision, Inc.

12 On September 12, 2006, Medical Capital purchased an additional 4,925,590
13 shares of Viva for \$4.5 million. Of the additional 4,925,590 shares, 4,493,449 are
14 preferred stock and 432,141 are common stock. By virtue of its original acquisition
15 of 7.5 million shares and the subsequent acquisition of 4,925,590 shares
16 (collectively, the "Viva Stock"), Medical Capital owns approximately ninety nine
17 (99%) percent of Viva's outstanding shares.

B. The Loan

18
19 On October 20, 2006, Medical Capital agreed to loan Viva up to \$5 million in
20 the form of a revolving line of credit ("Loan"). As collateral for the Loan, Medical
21 Capital took a security interest in all existing and after acquired assets of Viva.
22 Medical Capital filed a UCC-1 financing statement on November 1, 2006. On
23 January 29, 2008, Medical Capital agreed to increase the line of credit to \$7 million.

24 Viva regularly made draws on the line of credit and used the funds to, among
25 other things, make the monthly interest payments. Viva made its last interest
26 payment on October 27, 2008. From October 27, 2008 until June 27, 2009, Medical
27 Capital made book entry draws on the line of credit. Without actually advancing the
28 funds to Viva, Medical Capital debited the principal loan balance in the amount of

1 the due and owing interest payment and then made the corresponding credit for the
2 interest payment.

3 The Loan matured on January 29, 2010, and is now fully due and payable.
4 Viva drew a total of \$6,375,165.68 from the line of credit and has only made a total
5 of \$1,550,451.09 in interest payments. Viva owes the receivership estate a total of
6 approximately \$7.2 million in principal and accrued interest. Pre-Receiver
7 Efforts to Sell the Viva Stock

8 Prior to the Receiver's appointment, Medical Capital, in coordination with
9 Viva management, attempted to find a buyer of the Viva Stock. Medical Capital
10 and Viva contacted other companies in the industry to attract interest in the
11 opportunity. Several companies expressed interest, although it was already
12 recognized in the industry that the technology used by Viva would likely be obsolete
13 within a few years. An interested competitor informally discussed a purchase price
14 of \$6 million (\$3 million at closing and \$3 million within 12 months thereafter), but
15 no formal offer was ever made. These discussions took place in April 2009 and
16 Medical Capital elected not to pursue them.

17 **C. Post-Receivership Actions**

18 Shortly after his appointment, the Receiver sent invoices to Viva for interest
19 payments due on the Loan. Viva's President and Chief Executive Officer, Nicholas
20 Montes, sent an e-mail to the Receiver stating that Viva would not make any
21 payments on the Loan. On November 5, 2009, the Receiver met with Mr. Montes
22 and Mr. Stockton to discuss Viva's business, financial condition, efforts to find
23 buyers over the preceding year, and prospects to grow the company's business.

24 On January 6, 2010, the Receiver received a written offer from Pivot Forge,
25 LLC for the purchase of all of the assets of Viva for \$250,000. The Receiver
26 immediately determined that this offer was too low.

27 The Receiver reviewed reports regarding Viva's revenues, accounts payable
28 and accounts receivable. The Receiver considered various strategies for maximizing

1 the value of the Viva Stock, and determined that a sale would be in the best interests
2 of the receivership estate, provided an adequate price could be obtained. The
3 Receiver also determined that heightened oversight of Viva's operations was
4 warranted. Accordingly, on February 26, 2010, at the Receiver's direction, Medical
5 Capital, as majority shareholder, removed the two remaining directors on the board,
6 Defendant Joseph Lampariello and Mr. Montes, and elected three new directors.
7 The three new directors are the principals of Diablo Management Group,
8 experienced experts in the turnaround management field. The new board then
9 resolved to establish financial controls over the business, including putting the
10 company bank accounts and books under the Receiver's control.

11 On March 3, 2010, Mr. Montes resigned as CEO and President, and
12 terminated his employment with Viva. Mr. Montes was not replaced. The Receiver
13 determined that Mr. Stockton's history with the company, understanding of its
14 business, and knowledge of the industry would be beneficial to Viva's continued
15 operations and in finding a buyer of the Viva Stock. Accordingly, Mr. Stockton has
16 continued to serve as Viva's COO under the direction of the Receiver. The Receiver
17 instituted other fiscal controls and cost reductions to make Viva's operations cash
18 positive.

19 Over the last 120 days, the Receiver, Viva's board of directors and Viva's
20 management have aggressively marketed the Viva Stock. Using a broad database of
21 venture capital and private equity firms provided by Diablo Management, the
22 Receiver and Viva contacted more than 900 potential buyers. In addition, Viva
23 management contacted all companies in the industry that had previously expressed
24 interest, including the competitor with whom the \$6 million amount had been
25 informally discussed in April 2009. Eighteen (18) companies requested information
26 packages, seven (7) of which then executed non-disclosure agreements and received
27 more detailed information.

28

1 Three offers were received, including the transaction proposed herein. The
2 two offers that were ultimately rejected were as follows: (1) \$375,000 cash at
3 closing from Pivot Forge, LLC for all of Viva's assets, and (2) \$100,000 cash at
4 closing from Mr. Stockton, plus a transfer from Viva of all company cash as May 1,
5 2010 (approximately \$1.35 million) and accounts receivable of approximately
6 \$150,000. The Receiver negotiated with all three potential buyers and gave each the
7 opportunity to increase their bids. Based on the offers received, the historic
8 unprofitability of Viva's operations, its declining revenue stream, and the near
9 obsolescence of its products, the Receiver determined that the sale proposed herein
10 would generate the highest and best recovery for the receivership estate.

11 **D. The Stock Purchase Agreement**

12 Subject to Court approval, the Receiver executed a Stock Purchase
13 Agreement ("Agreement") with Viva Media, Inc. ("Buyer"). Under the Agreement,
14 which is attached to the Seaman Declaration as Exhibit B, Buyer will pay
15 \$1,250,000 cash for the Viva Stock, consisting of \$250,000 already deposited into
16 escrow and \$1 million to be deposited at closing. In addition, all Viva cash
17 remaining after payments of the accounts payable listed on Schedule B of the
18 Agreement will be paid to the Receiver (estimated to be \$600,000).

19 Prior to closing, the Receiver must cause Viva to pay the accounts payable
20 listed on Schedule B to the Agreement. Finally, under the Agreement, the
21 receivership estate will take responsibility for certain Viva obligations and potential
22 claims against Viva by Mr. Montes and Mr. Stockton. The persons and entities to
23 whom these obligations are owed, to the extent the obligations are valid, will have
24 claims against the receivership estate, subject to review and objection by the
25 Receiver.

26 Buyer is not related to Viva. However, one of Buyer's principals, Curtis
27 Hutten, was previously the Chief Executive Officer and President of Viva.
28 Mr. Hutten resigned from Viva in June 2007.

1 **E. Highest and Best Recovery**

2 Federal and state securities laws do not allow for the sale via public auction of
3 stock that is not publicly registered.¹ Such sales may only be conducted in a private
4 transaction. Accordingly, the proposed sale is not subject to overbid and auction.
5 The Receiver, however, has analyzed Viva's assets and liabilities, income and
6 expenses, and general financial condition and, based on his analysis, and experience
7 operating and selling other privately-held companies, the Receiver believes that the
8 Agreement will generate the highest and best recovery for the receivership estate.

9 The Viva Stock is a rapidly depreciating asset in that:

10 (a) Revenue has been trending down at the rate of five (5%) percent to
11 ten (10%) percent per month. Revenue peaked in August 2008 at \$869,868,
12 and in May 2010 was down to \$314,413, a decline of nearly 64% in only
13 21 months.

14 (b) Debt has increased while revenue has declined. Between
15 April 2009 and April 2010, accounts payable increased from \$1,015,043 to
16 \$1,928,963. During the same time period, the amount owed to Medical
17 Capital increased from \$6,307,850 to \$7,113,899, and accounts receivable
18 dropped from \$842,480 to \$400,667.

19 (c) Several critical vendors are making demands for payment and have
20 refused to work with Viva until past due amounts are paid. Collection efforts
21 by vendor attorneys have become more frequent.

22 (d) The decline in revenue is not likely to reverse without significant
23 additional capital and investment, as a result of fundamental changes in the
24

25
26 ¹ The assets of Viva could be sold by public auction. Other than cash and
27 accounts receivable, the most valuable assets, however, are contracts with
28 content providers, which contracts are not assignable without the content
provider's consent. The content providers are owed money by Viva and would
be unlikely to consent to an assignment. A sale of assets, therefore, would likely
yield a lesser recovery for the receivership estate.

1 way consumers access wireless content and the removal of Viva's iPhone
2 applications from Apple's distribution channel.

3 (e) Viva is no longer developing new products and key personnel have
4 left the company, reducing the staff from 25 to seven.

5 The Receiver has analyzed the value of the Viva Stock. Considering the
6 company's historic unprofitability, rapidly declining revenues, and nearly obsolete
7 product, it is difficult to discern any value at all. Whatever value could be assigned
8 to the Viva Stock, based on revenues, operating expenses and other financial
9 indicators, assuming a reasonably accurate appraisal were possible, would be well
10 less than the purchase price proposed herein.

11 The delay and expense associated with obtaining independent appraisals of
12 the Viva Stock are not warranted under these circumstances. The Receiver has
13 obtained estimates from local appraisers and believes that to obtain three
14 independent appraisals of the Viva Stock will cost between \$75,000 and \$90,000,
15 and delay the sale process by six weeks or more. This delay and expense is not
16 warranted considering the relatively low overall value of the Viva Stock and the fact
17 that the company's revenue is declining rapidly. Buyer may elect to walk away from
18 the proposed sale if it is not promptly approved. Accordingly, the Receiver requests
19 that the Court exercise its discretion to waive the general requirement under
20 28 U.S.C. §§ 2001 and 2004 that personal property sold by a receiver via private
21 sale be accompanied by three independent appraisals.

22 III. THE SALE

23 The Agreement is attached to the Seaman Declaration. Its terms are
24 summarized as follows:²

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² The terms of the Agreement are summarized herein for convenience only. In the
28 event of any conflict between the Agreement and the summary provided herein,
the Agreement governs and controls.

1 **Court approval.** All aspects of the Agreement and the sale are subject to
2 approval by the Court.

3 **Deposit.** Buyer has deposited \$250,000 into escrow.

4 **Purchase Price.** \$1,250,000. Buyer must pay the remainder of the full
5 purchase price (\$1 million) in cash on before the closing date. In addition, Viva will
6 pay to the Receiver all cash in its accounts as of the closing, after payment of the
7 accounts payable listed on Schedule B of the Agreement.

8 **Closing Date.** Closing will occur no later than five (5) days following entry
9 of an order confirming the sale.

10 **As Is Purchase.** Buyer purchases the Viva Stock on an "AS IS," "WHERE
11 IS," and "WITH ALL FAULTS" basis, and the Receiver makes no representations
12 or warranties regarding the Viva Stock.

13 **IV. ARGUMENT**

14 "The power of a district court to impose a receivership or grant other forms of
15 ancillary relief does not in the first instance depend on a statutory grant of power
16 from the securities laws. Rather, the authority derives from the inherent power of a
17 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
18 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
19 and efficient administration of the estate by the district court for the benefit of
20 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
21 of a receiver is authorized by the broad equitable powers of the court, any
22 distribution of assets must also be done equitably and fairly. *See S.E.C. v. Elliot*,
23 953 F.2d 1560, 1569 (11th Cir. 1992).

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

28 A district court's power to supervise an equity receivership
and to determine the appropriate action to be taken in the

1 administration of the receivership is extremely broad. The
2 district court has broad powers and wide discretion to
3 determine the appropriate relief in an equity receivership.
4 The basis for this broad deference to the district court's
5 supervisory role in equity receiverships arises out of the
6 fact that most receiverships involve multiple parties and
7 complex transactions. A district court's decision
8 concerning the supervision of an equitable receivership is
9 reviewed for abuse of discretion.

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

11 Accordingly, the Court has broad equitable powers and discretion in
12 formulating procedures, schedules and guidelines for administration of the
13 receivership estate and disposition of receivership assets.

14 **A. The Proposed Sale**

15 It is generally conceded that a court of equity having custody and control of
16 property has power to order a sale of the same in its discretion. *See, e.g., S.E.C. v.*
17 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
18 and wide discretion to determine relief in an equity receivership). "The power of
19 sale necessarily follows the power to take possession and control of and to preserve
20 property." *See also S.E.C. v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144
21 (9th Cir. 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds)
22 (*citing* 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed.
23 1992) (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))). "When a court of
24 equity orders property in its custody to be sold, the court itself as vendor confirms
25 the title in the purchaser." 2 Ralph Ewing Clark, Treatise on Law and Practice of
26 Receivers § 487).

27 "A court of equity, under proper circumstances, has the power to order a
28 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*

1 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
2 Clark, Treatise on Law & Practice of Receivers § 500 (3rd ed. 1992). To that end, a
3 federal court is not limited or deprived of any of its equity powers by state statute.
4 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
5 (state statute allowing time to redeem property after a foreclosure sale not applicable
6 in a receivership sale).

7 Generally, when a court-appointed receiver is involved, the receiver, as agent
8 for the court, should conduct the sale of the receivership property. *Blakely Airport*
9 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
10 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
11 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
12 Clark, Treatise on Law and Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
13 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
14 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
15 354, 357 (9th Cir. 1925).

16 Here, the proposed purchase price reflects the market value of the Viva Stock.
17 The Viva Stock has been marketed both pre-receivership and, more broadly, since
18 the Receiver's appointment. With the assistance of the Viva's management and the
19 new directors from Diablo Management, the Receiver has contacted more than 900
20 potential buyers and promptly responded to all inquiries. The Receiver provided
21 information packages to all who requested them, and upon execution of a non-
22 disclosure agreement, provided more detailed information.

23 The proposed sale is the highest and best offer received. It will generate a
24 gross return to the receivership estate of approximately \$1.85 million in cash. Buyer
25 has deposited \$250,000 into escrow.

26 The Receiver has analyzed the financial condition of the company, including
27 its declining revenues and accounts receivable, increasing accounts payable, and
28 nearly obsolete product. Based on his experience and expertise as an accountant and

1 federal and state court receiver, including in selling other privately-held companies,
2 the Receiver believes that the proposed purchase price will generate the highest and
3 best recovery for the receivership estate.

4 **B. Private Transaction**

5 Federal and state securities laws do not allow for the sale via public offering
6 of stock that is not publicly registered. In particular, Section 5 of the Securities Act
7 of 1933 prohibits "the use of any means or instrumentality of transportation or
8 communication in interstate commerce or of the mails to sell" a security that is not
9 registered. Such sales may be conducted in a private transaction under Section 4(2)
10 of the Securities Act. The proposed sale is not subject to overbid and public auction
11 as such a public offering/auction process would violate federal and state securities
12 laws. However, as discussed above, the Receiver has contacted more than 900
13 potential buyers and has analyzed the value of the Viva Stock.

14 **C. Waiver of Appraisal Requirement**

15 28 U.S.C. § 2004 requires that sales of personal property be conducted in
16 accordance with 28 U.S.C. § 2001, "unless the court orders otherwise." 28 U.S.C.
17 § 2004. This language grants the Court discretion to waive the general requirement
18 under 28 U.S.C. § 2001(b) to obtain three independent appraisals of property being
19 sold by private sale. *See Tanzer v. Huffines*, 412 F.2d 221, 222-23 (3d Cir. 1969)
20 (court did not abuse its discretion in approving private sale of stock without strict
21 adherence to 28 U.S.C. § 2001(b)).

22 Considering the relatively low overall value of the Viva Stock and the fact
23 that sales revenues are rapidly declining, the cost associated with obtaining three
24 independent appraisals, which Receiver estimates will be between \$75,000 and
25 \$90,000 is not warranted. Furthermore, obtaining such appraisals would delay sale
26 approval by six weeks or more, which could cause the Buyer to walk away from the
27 transaction. The opportunity to buy the Viva Stock has been made available to more
28 than 900 potential buyers. The Receiver is qualified to evaluate the company, the

1 offers received, and determine the highest and best recovery . Accordingly, the
2 Court should exercise its discretion under 28 U.S.C. § 2004 to waive the appraisal
3 requirement.

4 **V. CONCLUSION**

5 WHEREFORE, the Receiver requests entry of an order granting the Motion
6 and approving the Agreement.

7
8 Dated: July 2, 2010

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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10 By: /s/ Ted Fates

11 TED FATES
12 Attorneys for Receiver
13 Thomas A. Seaman
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