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

**NOTICE OF MOTION AND
MOTION FOR APPROVAL OF
SETTLEMENT AGREEMENT WITH
ALVAREZ & MARSAL
HEALTHCARE INDUSTRY GROUP,
LLC; MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: September 13, 2010
Time: 8:30 a.m.
Ctrm: 9D
Judge: Hon. David O. Carter

1 **TO ALL INTERESTED PARTIES:**

2 PLEASE TAKE NOTICE that on September 13, 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, including Georgia Medical
8 Provider Financial Corporation (collectively, "Medical Capital" or the "Receivership
9 Entities"), for approval of a settlement agreement with Alvarez & Marsal Healthcare
10 Industry Group, LLC ("Motion").

11 The Motion is based on the Memorandum of Points and Authorities below,
12 and the Declaration of Thomas A. Seaman filed herewith. The Motion and
13 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.

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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 13, 2010

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 Alvarez & Marsal Healthcare Industry Group, LLC ("A&M") holds a
4 Promissory Note and first priority Deed of Trust on the Southwest Atlanta Medical
5 Center property ("Property"). Although the Property has not yet been sold, the Note
6 has matured and continues to accrue interest. By way of this Motion, the Receiver
7 asks the Court to approve a settlement agreement with A&M, including a mutual
8 release of claims.

9 As discussed in the Receiver's pending motion for approval of the sale of the
10 Property (Docket No. 263),¹ the hospital located on the Property ceased operations
11 in April 2007 when Southwest Doctors Group, LLC ("SDG"), to whom Medical
12 Capital had loaned approximately \$18.8 million, filed bankruptcy. Medical Capital
13 acquired the Property via credit bid in a sale approved by the bankruptcy court, and,
14 through its subsidiary company Georgia Medical Provider Financial Corporation
15 ("GMPFC"), hired A&M in August 2007 to oversee renovations to the Property,
16 reopen and operate the hospital. A&M undertook these substantial tasks, including
17 overseeing renovations, improvements and upgrades to the Property, hiring a staff of
18 doctors, nurses and administrators, obtaining the necessary permits, licenses and
19 approvals, opening and operating the hospital until January 2009. At that time,
20 Medical Capital was no longer able to fund the hospital's operations, and the
21 hospital closed.

22 Starting in August 2008, Medical Capital ceased paying A&M's bills. In
23 November 2008, Medical Capital Corporation executed a guaranty of GMPFC's
24 obligations to A&M. In February 2009, GMPFC executed a Promissory Note in
25 favor of A&M. The Note, a copy of which is attached as Exhibit A to the
26 Declaration of Thomas A. Seaman filed herewith ("Seaman Declaration"), is in the
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28 ¹ The hearing date on the sale motion was continued to September 13, 2010 by
order entered on June 22, 2010. Docket No. 308.

1 principal amount of \$1,705,918.12 with eighteen (18%) percent interest,
2 compounded annually. Retainer payments previously made by Medical Capital to
3 A&M were then applied to the Note, reducing the principal balance to
4 \$1,498,439.67. In May 2009, GMPFC executed a Deed of Trust on the Property in
5 favor of A&M. The Deed of Trust, a copy of which is attached to the Seaman
6 Declaration as Exhibit B, was recorded on May 20, 2009, and is in first position on
7 the Property.

8 The Note matured on July 1, 2010. Under the Note, based on GMPFC's
9 failure to pay the full amount owed as of July 1, 2010, A&M has a claim for an
10 additional fifteen (15%) percent of the total amount owed at such time as the Note is
11 fully paid ("Late Penalty").

12 The Receiver has reviewed Medical Capital's records relating to its dealings
13 with A&M, interviewed representatives of A&M that managed the hospital
14 renovations and operations, and investigated the circumstances surrounding Medical
15 Capital's execution of the Note and Deed of Trust. The Receiver believes that A&M
16 has a legitimate, enforceable claim against the receivership estate based on the
17 services A&M provided and the Note. The Deed of Trust, however, may be subject
18 to avoidance as a preferential transfer (i.e. it was granted at a time when GMPFC
19 was insolvent and results in A&M being preferred over GMPFC's other similarly
20 situated creditors). A&M disputes the Receiver's position, and also asserts that
21 applicable law in federal equity receivership cases does not provide the Receiver
22 with a cause of action for avoidance of preferential transfers.

23 Subject to Court approval, the Receiver and A&M have negotiated a
24 Settlement Agreement and Mutual Release ("Agreement"), under which A&M will
25 accept \$1,853,535.70 in full satisfaction of its claims against the receivership estate.
26 The settlement amount is approximately \$35,000 less than the amount owed under
27 the Note when in matured on July 1, 2010 (\$1,888,960.02). Additionally, the estate
28 will not pay any part of the interest that has accrued since July 1, 2010 or the Late

1 Penalty (together, approximately \$357,000). The Agreement is attached to the
2 Seaman Declaration as Exhibit C.²

3 If the Agreement is not approved, the Note will continue to accrue interest,
4 the Late Penalty will increase, and, unless the Deed of Trust is avoided, the
5 receivership estate's recovery from the Property will be substantially diminished.
6 Although the Property has not yet been sold (the sale motion is set to be heard
7 contemporaneously herewith), the sale price will be substantially higher than the
8 total owed to A&M. Accordingly, the Receiver requests approval of the Agreement
9 and authority to pay A&M \$1,853,535.70 from cash currently on hand in full
10 satisfaction of A&M's claims against the receivership estate.

11 II. FACTS

12 A. The Property

13 The Property is approximately 75 acres located at 501 Fairburn Road SW,
14 Atlanta, Georgia. The developed portion (approximately 17 acres) features a
15 114,297 square foot, four story, 125-bed acute care hospital building, and a 31,470
16 square foot, two-story medical office building. Declaration of Thomas Seaman filed
17 herewith ("Seaman Declaration") ¶ 2.

18 B. The Medical Capital Loans

19 In July 2005, Tracy L. Sayer Investments, LLC ("Sayer Investments") issued
20 a loan in the amount of \$12.85 million to Southwest Doctors Group, LLC ("SDG")
21 secured by the Property. The hospital was leased and operated by Legacy Medical
22 Center ("Legacy"). Seaman Declaration ¶ 3.

23 In January 2006, Medical Capital, as administrator for Medical Provider
24 Financial Corporation II ("MP II"), issued a loan in the amount of \$2.5 million to
25 SDG and took a security interest in the Property junior to Sayer Investments. In
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27 ² The terms of the Agreement have been agreed upon by the Receiver and A&M.
28 However, the signature of Mr. Winter, Managing Director of A&M, could not be
obtained by counsel for A&M in time for this filing. A copy including
Mr. Winter's signature will be provided upon request.

1 March 2006, with a foreclosure by Sayer Investments pending, Medical Capital
2 (MP II) purchased the promissory note in favor of Sayer Investments for
3 approximately \$15.5 million. At approximately the same time, Medical Capital
4 (MP IV, Series 1) issued a \$13 million line of credit to Legacy, which continued to
5 lease and operate the hospital. Seaman Declaration ¶ 4.

6 In October 2006, Medical Capital (MP II) and SDG agreed to increase the
7 loan purchased from Sayer Investments by \$3 million, bringing the total balance to
8 approximately \$18.8 million.³ In December 2006, the line of credit issued to
9 Legacy was increased to \$14 million. Seaman Declaration ¶ 5.

10 **C. The Bankruptcy Court-Approved Sale**

11 In April 2007, SDG filed for relief under chapter 11 of the Bankruptcy Code.
12 The hospital ceased operations at this time. In July 2007, Medical Capital (MP II)
13 purchased the Property via credit bid in a bankruptcy court-approved auction, and
14 created Georgia Medical Provider Financial Corporation ("GMPFC") to hold title to
15 the Property. Seaman Declaration ¶ 6.

16 In August 2007, Medical Capital (MP IV, Series 2) issued a \$500,000 loan to
17 GMPFC, which was later increased to \$2.5 million in November 2007, to \$9 million
18 in January 2008, to \$15 million in June 2008, and then to \$18 million later the same
19 month.⁴ GMPFC hired Alvarez & Marsal ("A&M") in August 2007 to oversee
20 renovations to the Property and operate the hospital, which was reopened in
21 April 2008. Seaman Declaration ¶ 7.

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³ In March 2008, MP II sold the original loan purchased from Sayer Investments to MP IV, Series 1 for approximately \$23 million.

⁴ These loans from Medical Capital (MP IV, Series 2) to GMPFC were not secured by a deed of trust on the Property when they were made. The Receiver is not aware of any reason why such a deed of trust was not recorded at the time. The deed of trust securing the loans, which is junior to the A&M deed of trust, was not recorded until July 2009.

1 **D. Services Provided by A&M**

2 A&M handled all aspects of operating the hospital, including renovating and
3 improving the Property; recruiting, hiring and training all staff members; obtaining
4 the necessary licenses, permits and approvals; book-keeping, accounting and billing;
5 negotiating and making arrangements with medical suppliers; developing and
6 implementing an information and technology infrastructure. A&M operated the
7 hospital until January 16, 2009, when it was closed due to lack of funding. Seaman
8 Declaration ¶ 8.

9 **E. The Note and Deed of Trust**

10 Starting in August 2008, Medical Capital did not pay A&M's bills. In
11 November 2008, Medical Capital Corporation executed a guaranty of GMPFC's
12 obligations to A&M. In February 2009, GMPFC executed a Promissory Note in
13 favor of A&M. The Note is in the principal amount of \$1,705,918.12 with eighteen
14 (18%) percent interest, compounded annually. Retainer payments previously made
15 by Medical Capital to A&M were then applied to the Note, reducing the principal
16 balance to \$1,498,439.67. In May 2009, GMPFC executed a Deed of Trust on the
17 Property in favor of A&M. The Deed of Trust was recorded on May 20, 2009, and
18 is in first position on the Property. Seaman Declaration ¶ 9.

19 The Note matured on July 1, 2010. Under the Note, based on GMPFC's
20 failure to pay the full amount owed as of July 1, 2010, A&M has a claim for an
21 additional fifteen (15%) percent of the total amount owed at such time as the Note is
22 fully paid ("Late Penalty"). Seaman Declaration ¶ 10.

23 **III. THE SETTLEMENT AGREEMENT**

24 Subject to Court approval, the Receiver and A&M have negotiated and agreed
25 on the terms of the Agreement, under which A&M will accept \$1,853,535.70 in full
26 satisfaction of its claims against the receivership estate. The settlement amount is
27 approximately \$35,000 less than the amount owed under the Note as of July 1, 2010
28 (\$1,888,960.02). Additionally, the estate will not pay any part of the interest that

1 has accrued since July 1, 2010 or the Late Penalty (together, approximately
2 \$357,000). If the Agreement is not approved, the Note will continue to accrue
3 interest, the Late Penalty will increase, and, unless the Deed of Trust is avoided, the
4 receivership estate's recovery from the Property will be substantially diminished.

5 The Agreement contains hard deadlines for payment of the settlement amount.
6 If the full payment is not made by September 15, 2010, interest at the rate of fifteen
7 (15%) percent from July 1 through the date of payment becomes immediately due
8 and payable. Similarly, if full payment is not made by September 30, the amounts
9 that would otherwise be due under the Note, including eighteen (18%) percent
10 interest through the date of payment and the fifteen (15%) percent late penalty,
11 become immediately due and payable. A&M would not agree to the settlement
12 without these hard deadlines. Accordingly, it is critical that the Motion be heard on
13 September 13, 2010, and an order entered immediately thereafter.

14 IV. ARGUMENT

15 A federal equity receiver's power to compromise claims is subject to court
16 approval. As noted by the Ninth Circuit Court of Appeals in *S.E.C. v. Hardy*, 803
17 F.2d 1034, 1037 (9th Cir. 1986), "[a] district court's power to supervise an equity
18 receivership and to determine the appropriate action to be taken in the
19 administration of the receivership is extremely broad." With regard to settlements
20 entered into by a federal equity receiver, the Court's supervisory role includes
21 reviewing and approving those settlements in light of federal court policy to
22 promote settlements before trial. *See* Fed. R. Civ. P. 16(c), Advisory Committee
23 Notes.

24 Federal courts of equity often look to bankruptcy law for guidance in the
25 administration of receivership estates. *See SEC v. Capital Consultants, LLC*, 397
26 F.3d 733, 745 (9th Cir. 2005); *SEC v. American Capital Investments, Inc.*, 98 F.3d
27 1133, 1140 (9th Cir. 1996); *SEC v. Basic Energy & Affiliated Resources*, 273 F.3d
28 657, 665 (6th Cir. 2001); *see also* Local Civil Rule 66-8 ("a receiver shall

1 administer the estate as nearly as possible in accordance with the practice in the
2 administration of estates in bankruptcy"). A bankruptcy court may approve a
3 compromise of claims asserted by or against the estate if the compromise is "fair
4 and equitable." *Woodson v. Fireman's Fund Insurance Co. (In re Woodson)*, 839
5 F.2d 610, 620 (9th Cir. 1988). The approval of a proposed compromise negotiated
6 by a court-appointed fiduciary "is an exercise of discretion that should not be
7 overturned except in cases of abuse leading to a result that is neither in the best
8 interest of the estate nor fair and equitable for the creditors." *In re MGS Marketing*,
9 111 B.R. 264, 266-67 (B.A.P. 9th Cir. 1990).

10 The Court has great latitude in approving compromises. In passing on the
11 proposed compromise, the Court should consider the following:

- 12 a. The probability of success in litigation;
- 13 b. The difficulties, if any, to be encountered in the matter of
14 collection;
- 15 c. The complexity of the litigation involved and the expense,
16 inconvenience, and delay necessarily attending; and
- 17 d. The paramount interest of the creditors and a proper
18 deference to their reasonable views in the premises.

18 *Woodson*, 839 F.2d at 620.

19 Here, the Receiver has reviewed Medical Capital's records relating to its
20 dealings with A&M, interviewed representatives of A&M that managed the hospital
21 renovations and operations, and investigated the circumstances surrounding Medical
22 Capital's execution of the Note and Deed of Trust. The Receiver believes that A&M
23 has a legitimate, enforceable claim against the receivership estate based on the
24 services A&M provided and the Note.

25 The dispute with A&M relates to whether the Deed of Trust is avoidable by
26 the Receiver as a preferential transfer. If the Deed of Trust were avoided, A&M
27 would only have an unsecured claim against the receivership estate. In different but
28 analogous contexts, the Bankruptcy Code and California law relating to assignments

1 for the benefit of creditors provide bankruptcy trustees and assignees with
2 preference causes of action. *See* 11 U.S.C. § 547; Cal. Code Civ. Proc. § 1800.
3 There are no statutes or rules, however, that expressly provide a federal equity
4 receiver with a cause of action to recover preferential transfers, and the Receiver is
5 not aware of any cases that address this issue. Accordingly, there is considerable
6 uncertainty as to whether the Receiver has a preference cause of action against
7 A&M.

8 Litigating this issue would involve risk, cost and delay. The delay is
9 particularly significant because interest continues to accrue on the Note, and the
10 Late Penalty continues to increase. The proposed Agreement eliminates the risk,
11 cost and delay, and generates a substantial savings for the estate in comparison to
12 what would be owed if the preferential transfer issue were resolved in A&M's favor.
13 Accordingly, the Receiver believes that the proposed settlement is fair and
14 equitable, and in the best interests of the receivership estate.

15 **V. CONCLUSION**

16 WHEREFORE, the Receiver requests entry of an order granting the Motion
17 and approving the Agreement.

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19 Dated: August 13, 2010

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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21 By: /s/ Ted Fates

22 TED FATES
23 Attorneys for Receiver
24 Thomas A. Seaman
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