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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

EMILIO FRANCISCO; PDC CAPITAL GROUP, LLC; CAFFE PRIMO INTERNATIONAL, INC.; SAL ASSISTED LIVING, LP; , SAL CARMICHAEL, LP; SAL CITRUS HEIGHTS, LP; SAL KERN CANYON, LP; SAL PHOENIX, LP; SAL WESTGATE, LP; SUMMERPLACE AT SARASOTA, LP; SUMMERPLACE AT CLEARWATER, LP; SUMMERPLACE AT CORRELL PALMS, LP;TRC TUCSON, LP; CLEAR CURRENTS WEST, LP; CAFFE PRIMO MANAGEMENT, LP; CAFFE PRIMO MANAGEMENT 102, LP; CAFFE PRIMO MANAGEMENT 103, LP; CAFFE PRIMO MANAGEMENT 104, LP; CAFFE PRIMO MANAGEMENT 105, LP; CAFFE PRIMO MANAGEMENT 106, LP; CAFFE PRIMO MANAGEMENT 107, LP; and CAFFE PRIMO MANAGEMENT 108, LP,

Defendants.

Case No.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDERS (1) FREEZING ASSETS; (2) PROHIBITING DESTRUCTION OF DOCUMENTS; (3) GRANTING EXPEDITED DISCOVERY; (4) REQUIRING ACCOUNTINGS; (5) REPATRIATING ASSETS; (6) APPOINTING A TEMPORARY RECEIVER, AND (7) TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND APPOINTMENT OF A PERMANENT RECEIVER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

Securities Act of 1933

Securities Exchange Act of 1934

FEDERAL REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURE

I. INTRODUCTION

Plaintiff Securities and Exchange Commission ("SEC") requests that this Court issue a temporary restraining order to stop an ongoing fraudulent scheme, involving multiple offerings and entities, through which Defendants Emilio Francisco and his company, Defendant PDC Capital Group, LLC ("PDC Capital"), have misappropriated at least $9.5 million of investors' funds. Francisco has personally reaped over $2.1 million from the misappropriation, which he has used to support his luxury lifestyle including the purchase a yacht and payment of its expenses, and payment of hundreds of thousands of dollars of credit card bills for himself, his daughter, and his brother. Defendants are continuing to raise funds, with over $1.6 million in new funds received in August and September 2016. Since 2013, Defendants have raised about $72.05 million through offerings in the nineteen limited partnership Defendants.

Francisco and PDC Capital put together and market offerings under the federal EB-5 foreign investment program. The nineteen limited partnership Defendants are offerings to build and operate assist living facilities, build and launch Caffe Primo restaurants, and renovate a manufacturer of environmentally friendly products. Defendants offered and sold the limited partnerships as part of the "EB-5 Immigrant Investor Program," which grants visas to foreign investors to stimulate and encourage foreign investment in the United States. Defendants disclosed that the investors' capital contributions of $500,000 would be used for the specific project identified in the particular offering, and that an additional administration fee ranging from $45,000 to $55,000, depending on the offering, would be used to pay expenses of the limited partnership, consistent with regulations promulgated by the U.S. Citizenship and Immigration Service ("USCIS").

Defendants raised $72.05 million from approximately 131 investors which was deposited into escrow, including approximately $6.55 million in administration fees. While at most the $6.55 million in administration fees could have been paid to PDC

Capital, in fact over $19.2 million of investors' funds was paid from escrow to accounts of PDC Capital. Of that $19.2 million, at least $9.5 million of that amount was misappropriated from the investors' capital contributions.

Defendants perpetrated their complex scheme through multiple offerings. In some cases, Defendants diverted investors' capital contributions from escrow to PDC Capital using multiple transactions through several bank accounts. In other cases, funds from one offering were diverted to accounts of other offerings, as well as to PDC Capital. Francisco controlled and approved all the monies coming into and going out of the various bank accounts of PDC Capital and the limited partnership Defendants.

The SEC requests that the Court enter a temporary restraining order to stop the Defendants' ongoing conduct, and issue an order for Defendants to show cause why a preliminary injunction should not issue. To preserve any remaining funds and assets, the SEC also requests that the Court issue an asset freeze, and order the Defendants to provide an accounting to identify the location of assets. The SEC also requests that the Court order Defendants to repatriate any funds held in foreign bank accounts, and prohibit the destruction of documents. Finally, the SEC requests that the Court appoint a receiver over the entity Defendants to marshal, preserve, and protect the remaining assets, as well as recover misappropriated assets, for the benefit of the defrauded investors.

II. STATEMENT OF FACTS

A. Francisco Owns and Controls PDC Capital, and Controls CPI, the Assisted Living LPs, Clear Currents LP, and the Caffe Primo LPs

Francisco is a resident of Costa Mesa, California. He is admitted to the State Bar of California, and was subject to disciplinary action by the Bar in 1994 and again in 2012. (Gurley Dec. Ex. 26 at pp. 1104-1105.) In addition to the various EB-5 offerings, Francisco has a contract at $100,000 a year to provide marketing services to the Law Offices of Marilyn Thomassen & Associates ("MTA"). Francisco and

Thomassen have worked together for a number of years. (Gurley Dec. Ex. 47 at pp. 1378-80.)

Francisco owns, controls, and is the CEO of PDC Capital, headquartered in Costa Mesa. (*Id*. at pp. 1377, 1384, 1390-92.) Francisco describes PDC Capital as a marketing firm and a vehicle for managing EB-5 program investments. (*Id*. at pp. 1381-82.) PDC Capital solicits investors through its website, which states in part: "PDC Capital Group is a private equity firm that specializes in EB-5 investment projects. PDC identifies and develops investment opportunities for EB-5 investors." (Gurley Dec. Ex. 27 at p. 1107.) PDC Capital also touts its success on its website: "Currently, PDC and its affiliates, partners and associates are in the process of developing 25 senior assisted living and memory care residences in six states in the U.S. These projects will produce $2 billion in development in the U.S., with capital from China and the Middle East." (*Id*. at p. 1110.) PDC Capital also has a marketing staff in China that works with Chinese marketing agencies to solicit EB-5 investors in China. (Gurley Dec. Ex. 45 at p. 1351-52.) Francisco approves all marketing and offering materials that are provided to investors. (Gurley Dec. Ex. 47 at pp. 1403-06.)

Francisco and PDC Capital control the Defendant assisted living limited partnerships through Summerplace Management, LLC ("Summerplace Management"), a Delaware limited liability company headquartered in Costa Mesa, California. (Gurley Dec. Ex. 2 at p. 10.) Summerplace Management is the general partner of Defendants SAL Carmichael, LP; SAL Kern Canyon, LP; SAL Assisted Living, LP; SAL Citrus Heights, LP; SAL Westgate LP; SAL Phoenix, LP; and TRC Tucson, LP (collectively, the "Assisted Living LPs"). (*Id*.) As shown in PDC Capital's organization chart, each of the Assisted Living LPs has associated with it a limited liability company ("Assisted Living LLC") that is the operational company. (*Id*.)

Francisco and PDC Capital also control Defendant Clear Currents West, LP ("Clear Currents, LP") through Clear Currents Management, LLC. (Gurley Dec. Ex. 2 at p. 10.) PDC Capital is a member of Clear Currents West Management, LLC, and has

a majority voting and profit interest in the company. (Gurley Dec. Ex. 17 at p. 773.)

Francisco and PDC Capital control Defendant CPI, and through them the Defendants Caffe Primo Management, LP and Caffe Primo Management 102 through 108, LPs (collectively, the "Caffe Primo LPs"). CPI is 50% owned by PDC Capital. (Gurley Dec. Ex. 19 at p. 838.) Francisco is the CEO of Defendant CPI. (Gurley Dec. Ex. 46 at p. 1365.) CPI is the voting General Partner of each of the Caffe Primo LPs. (Gurley Dec. Ex. 7 at p. 266; *see also* Exs. 18-24.) Francisco is the signatory on the subscription agreements for the Caffe Primo LPs. (*See*, *e.g.*, Gurley Dec. Ex. 7 at p. 366.)

Francisco testified that he controlled and was aware of all deposits and withdrawals into the various bank accounts of PDC Capital and the limited partnerships, which include the Assisted Living LPs, Clear Currents LP, and the Caffe Primo LPs. (Gurley Dec. Ex. 47 at pp. 1415-19.)

B. The Offerings

PDC Capital offered EB-5 investors three different types of projects in which to invest: assisted living facilities, Caffe Primo restaurants, and the Clear Currents business.

1. Assisted Living LPs Offerings

Francisco and PDC Capital made nine offerings in limited partnerships that were tied to individual assisted living facilities located in California, Arizona, and Florida, each of which had the same general structure as described in the PPMs for each offering. Francisco and one other individual provided the information on each offering to attorneys who prepared the PPMs. (Gurley Dec. Ex. 47 at pp. 1426-27.) Francisco was responsible for determining the information that would be highlighted to investors in marketing presentations. (*Id*. at pp. 1403-06.)

PDC Capital provides investors with a package of offering materials, which includes a PPM, an investor questionnaire, a limited partnership agreement, a spousal consent form, a subscription agreement, an escrow agreement, a term sheet, and in some case, a sample promissory note. (*See*, *e.g.*, Gurley Dec. Ex. 6 at pp. 72 at 262.)

While the terms of the Assisted Living LPs offerings varied somewhat from project to project, typically the PPMs stated that the project will either "develop, construct, lease and operate (and eventually sell)," or "build out and renovate," an assisted living facility. (*See, e.g.*, Gurley Dec. Ex. 6 at p. 104; *see also* Gurley Dec. Exs. 8-16.) The PPMs described the number of jobs that each project was expected to generate, which was important for the EB-5 aspect of the investment. For example, the SAL Kern Canyon, LP offering was for 10 units, and term sheet states that the project is expected to create 130 direct jobs. (Gurley Dec. Ex. 6 at p.104.)

The Assisted Living PPMs and other offering documents also disclosed the use of investor funds. In general, the PPMs stated that the proceeds of the offering, "except for all Administrative fees, will be loaned to the Project Company to fund the purchase of the land as well as some of the components of the Development." (*See, e.g.*, Gurley Dec. Ex. 6 at p. 104.) The PPMs expressly distinguished between the acceptable uses of the $500,000 capital contribution and the $50,000 administration fee. The PPMs made clear that the administration fee "is in addition to the cost of each Limited Partnership Unit," and "shall be used to pay various expenses of the Partnership, in the discretion of the General Partner(s)." (*See, e.g., id.* at p. 87.) The PPMs expressly stated that the General Partner would not be paid out of the capital contributions: "Any remuneration paid by the Partnership to the General Partner(s) pursuant to the Limited Partnership Agreement shall be paid out of Administration fees, loan interest proceeds, or through dividends paid from the Project Company to the Partnership as its parent, so as to comply with USCIS requirements."[1] (*See, e.g., id.* at p. 96.)

[1] The limitation on the use of the investors' capital contribution is consistent with the regulations governing the EB-5 program. *See* Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5), and 8 C.F.R. § 204.6 (requiring that the investor's $500,000 be placed at risk for the purposes of creating jobs in one "new commercial enterprise").

For each of the Assisted Living LPs, the PPMs disclosed that the investors would receive an accrued distribution on their investment with a rate of return of 1.5% to 2%, and after 5 years, repayment of their $500,000 principal with any accrued interest. (*See, e.g., id*. at p. 86. *See also* Ex. 9 at p. 434.)

An investor could purchase on limited partnership unit in an offering for a $500,000 capital contribution and an administration fee of between $45,000 and $50,000.[2] Investors were required to deposit both their capital contribution and administration fee into an escrow account. (Gurley Dec. Ex. 6 at p. 159. *See also* Exs. 28-37.) All of the escrow accounts were owned by either MTA or Thomassen individually. (Conte Dec. ¶¶ 8, 16.)

The PPMs and escrow agreements also were explicit concerning how the investors' money was protected in the subscription process. Investors were instructed to deposit the $500,000 capital contribution and $50,000 administration fee into the escrow account at MTA or Thomassen. The escrow agent was then to "release one hundred percent (100%) of the Subscription Price and Administration Fee to the account of [the specific limited partnership making the offering] when the prospective investor has been accepted and approved by the Partnership." (*See, e.g.*, Gurley Dec. Ex. 30 at p. 1174.) Thus, under the express terms of the escrow agreements, no investor funds were to be paid from escrow to any third parties such as PDC Capital.

Defendants raised at least $57.2 million from 109 investors in the nine offerings of the Assisted Living LPs from February 2013 through September 2016. (Conte Dec. ¶ 18.) As of May 2016 Defendants had not started construction on any of the facilities, although thirteen pieces of land were purportedly purchased for the

[2] Bank records show that almost all investors paid a $50,000 Administration Fee. (Conte Dec. ¶ 12.) Therefore we are using that amount for the Administration Fee for the Assisted Living LPs.

assisted living centers. (Gurley Dec. Ex. 47 at p. 1407.) Construction may have begun on one of the assisted living facilities in November 2016. (Gurley Dec. Ex. 45 at p. 1353.)

2. The Caffe Primo offerings

Francisco, PDC Capital, and CPI made eight offerings of limited partnerships that were to invest in the build out and launch of eight Caffe Primo restaurants in California. Each offering was for funds to develop a specific Caffe Primo restaurant that would generate the necessary jobs for the EB-5 program. Investors in the Caffe Primo offerings received a PPM, an investor questionnaire, a limited partnership agreement, a spousal consent form, a subscription agreement, an escrow agreement, and a promissory note. (*See, e.g.*, Gurley Dec. Ex. 7 at pp. 263-383.)

The PPMs for the Caffe Primo LPs offered investors the opportunity to purchase a limited partnership unit for $500,000 plus an administration fee of between $45,000 and $50,000.[3] The PPMs state that the limited partnerships would then lend the funds to a specific limited liability company ("LLC") associated with the offering, and provide a chart showing this organizational structure. (Gurley Dec. Exs. 7, 18-24.) The PPMs stated that the funds were to be used to "build out and launch" a restaurant associated with the offering, for "legal and fees," "corporate operations and administration," and $500,000 was payable to CPI for various services. (*See, e.g.*, Ex. 7 at pp. 280-81.) Francisco testified that PDC Capital was not entitled to use any of the investors' capital contributions to support PDC Capital's operations, and was limited to the Administration Fees. (Gurley Dec. Ex. 47 at pp. 1412-14, 1432.)

The PPMs for the Caffe Primo LPs represent that investors will receive a preferred rate of return of 1.5% per year, with the remaining distributions to the

[3] The bank records show that Caffe Primo investors each paid $550,000, indicating a $50,000 Administration Fee. (Conte Dec. ¶ 12.)

General Partners. After five years, investors will receive distributions until they have received a return of their $500,000 investment, and thereafter the General Partners receive 85% of the remaining distributions. (Gurley Dec. Exs. 7, 18-24.)

As with the Assisting Living offerings, an investor subscribed to the offering by depositing funds into an escrow account pursuant to an escrow agreement, and MTA or Thomassen. Under the terms of the Caffe Primo escrow agreements, the investment monies were to "be immediately wired to the account of the Company for the investment in the EB-5 project and the relevant Subscriber's Administration Fee as the Attorney may direct." (*See*, *e.g.*, Gurley Dec. Ex. 38 at p. 1258.)

Francisco signed the subscription agreements for the Caffe Primo LPs. (*See*, *e.g.*, Gurley Dec. Ex. 7 at p. 366.) PDC Capital controlled the bank accounts for the Caffe Primo LPs associated with each Caffe Primo offering. (Gurley Dec. Ex. 47 at pp. 1415-19.)

Defendants raised a total of $12.1 million in the eight Caffe Primo offerings from 22 investors. (Conte Dec. ¶ 18.) Defendants have leased space and built out several Caffe Primo operating restaurants.

3. Clear Currents LP Offering

Francisco and PDC Capital offered limited partnership units in Clear Currents LP to EB-5 investors. The PPM for Clear Currents LP offered a partnership unit for $500,000, plus a $45,000 to $50,000 administration fee. (Gurley Dec. Ex. 17 at p. 746.) The proceeds of the Clear Currents LP offering were to be used to lease certain land in California, to build out and renovate a production facility for Clear Currents' environmentally friendly agriculture and cleaning products, and for initial operational costs. (*Id*. at pp. 753-54.)

Investors purchased an interest by delivering their $500,000 capital contribution and $45,000-$50,000 administration fee to the escrow agent. Under the terms of the escrow agreement, the entire escrowed amount was to be released to the Clear Currents LP account. (Gurley Dec. Ex. 37 at p. 1247.) According to the PPM,

Clear Currents LP would loan the proceeds of the offering, except for the administration fee, to the Clear Currents West, LLC for the project. (Gurley Dec. Ex. 17 at p. 753.) The administration fee was to be used to pay various expenses of the partnership. (*Id*. at pp. 758-59.)

C. Defendants' Misappropriation and Misuse of Investor Funds

Defendants represented to investors that the investors' $500,000 capital contributions would be used only for the development of the specific investment that was the subject of the offering, while the $50,000 administration fees would be available to pay expenses of the limited partnership. Several of the Assisted Living PPMs and the Clear Currents LP PPM state that this sequestration between the capital contributions and the administration fees was required by USCIS regulations: "Any remuneration paid by the Partnership to the General Partner(s) pursuant to the Limited Partnership Agreement shall be paid out of Administration fees, loan interest proceeds, or through dividends paid from the Project Company to the Partnership as its parent, so as to comply with USCIS requirements." (*See* Gurley Dec. Ex. 7 at p. 96; Ex. 8 at p. 410; Ex. 9 at p. 444; Ex. 11 at p. 528; Ex. 12 at p. 566; Ex. 17 at p. 769.) The other PPMs for the Assisted Living LPs contain similar restrictions concerning remuneration to the General Partners, although without expressly referencing USCIS requirements. (*See* Gurley Dec. Ex. 10 at p. 484; Ex. 13 at p. 620; Ex. 14 at p. 656; Ex. 15 at p. 697; Ex. 16 at p. 738.)

Francisco testified that prior to the projects being completed, the only funds available to PDC Capital from the offerings were the administration fees of $45,000 to $50,000 paid by the investors. (Gurley Dec. Ex. 47 at p. 1412-19.) Francisco testified that if PDC Capital were short a month or two, he would personally contribute capital. So the administration fees and Francisco's personal funds were the only sources of funds available to PDC Capital. (*Id*.)

Despite the plain language of the PPMs and Francisco's understanding that only administration fees could be used to pay expenses of PDC Capital, Francisco

and PDC Capital misappropriated at least $9.5 million of investors' funds. PDC Capital received far more than the $6.55 million of administration fees paid by the investors. Between March 2013 and November 21, 2016, over $19.2 million in investor funds was transferred from the escrow accounts to bank accounts of PDC Capital. (Conte Dec. ¶ 23.) Of that $19.2 million, a net of approximately $1.6 million was then transferred to bank accounts of various projects. (Conte Dec. ¶¶ 27, 31, 50.) In addition, PDC Capital paid $1.36 million to CPI. (Conte Dec. ¶¶ 34, 51.) Francisco also deposited a total of $114,700 into the PDC Capital accounts during the relevant period. (Conte Dec. ¶ 28.) Giving PDC Capital credit for the $6.55 million of administration fees to which it may have been entitled, the $1.6 million transferred to project accounts, the $1.36 million transferred to CPI, and the $114,700 contributed by Francisco, PDC Capital misappropriated at least $9.5 million of investors' funds from the offerings. (Conte Dec. ¶¶ 51, 52.)

Francisco used at least $2.1 million of the misappropriated funds for his personal luxury lifestyle. He spent $560,000 for a yacht, and another $213,839 for a membership at the exclusive Balboa Bay Club. (Conte Dec. ¶ 32.) Francisco used at least $108,000 for his personal credit cards, $61,000 to pay for his brother's credit cards, and another $283,000 to pay for credit cards in the name of his daughter. (*Id.*) Francisco also used substantial amounts to pay commissions and business expenses of PDC Capital. (Conte Dec. ¶ 31.)

Defendants also diverted substantial investor funds from their intended investments. For example, in November 2015, an investor in the TRC Tucson project wired $499,975 to the escrow accounts. The next day, $500,000 was transferred to another of the escrow accounts; and then a week later $523,500 was transferred from that escrow account to yet another of the lawyer's escrow accounts. Then, on November 12, a total of $151,300 was disbursed to about six different entities, including $56,000 to PDC Capital. (Conte Dec. ¶ 37(a)-(d).) The next day, $375,200 was wired to the Summerplace at Orlando LP account. (*Id.*, ¶ 37(e).) Thus, none of

the investors' money in TRC Tucson found its way to the TRC Tucson limited partnership accounts. (*Id*. Exhibit 2 (chart showing the flow of this investor's funds).)

On February 8, 2016, another investor deposited $500,000 into escrow for the TRC Tucson offering. The funds were then moved to a second escrow account, and then in a series of three wires, $350,000 was moved to yet another escrow account. (Conte Dec. ¶ 38(a)-(b).) On February 10, 2016, that third escrow account transferred $100,000 to PDC Capital's account; on February 10 and 11, $202,800 was transferred to SAL Carmichael, LP. (*Id*., ¶ 38(c).) Then, on February 16, 2016, another $100,000 of the investors' money was transferred to yet another escrow account, and then on the 16th and 17th, a total of $53,500 was transferred to PDC Capital. (*Id*., ¶ 38(e).) Once again, none of the TRC Tucson investor's funds were deposited into the accounts of the TRC Tucson limited partnership. Instead, at least $150,000 of the funds was transferred to PDC Capital in a series of stepped transactions.

At least $1.5 million of investors' funds from the Caffe Primo Management 107 and 108 offerings were not transferred from the escrow accounts to the limited partnership accounts for Caffe Primo 107 and 108. (Conte Dec. ¶¶ 40-45.) It is unclear at present where those funds went. In addition, funds were commingled among the different Caffe Primo limited partnership accounts. For example, in September 2015, at least $40,000 was transferred from the Caffe Primo 106 bank account to accounts for Caffe Primo 102 and 104. (Conte Dec. ¶47.) In July 2016, a total of about $270,000 was transferred into the Caffe Primo 106 bank accounts from the accounts of Caffe Primo 101, 102, and 104, and then a total of $368,576 was transferred from the Caffe Primo 106 account, in eleven separate transfers, to the CPI account. (Conte Dec. ¶ 48.)

III. ARGUMENT

A. The SEC Is Seeking Emergency Relief In The Public Interest

Section 20(b) of the Securities Act and Section 21(d) of the Exchange Act authorize the SEC to obtain a preliminary injunction or restraining order without a

bond. *See* 15 U.S.C. §§ 77t(b) & 78u(d). In the Ninth Circuit, preliminary injunctive relief is warranted if there is "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in the applicant's favor." *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) (quotations and citations omitted).

The SEC appears before the Court "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). Because this enforcement action is brought in the public interest, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) (*quoting FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982)); *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 358 (9th Cir. 1973) (in SEC enforcement action, "[a] *prima facie* case of the probable existence of fraud … is sufficient to call into play the equitable powers of the court").

Several district courts in the Ninth Circuit have interpreted the preliminary injunctive relief standard in SEC emergency actions to require that the SEC make only make a two-prong showing: (1) a *prima facie* case that the defendants have violated the federal securities laws, and (2) a reasonable likelihood that the defendants will repeat their violations. *See, e.g., SEC v. Schooler*, 902 F. Supp. 2d 1341, 1345 (S.D. Cal. 2012); *SEC v. Eadgear, Inc.*, No. 3:14-CV-04294-RS, 2014 WL 6900938, at *1 (N.D. Cal. Dec. 8, 2014); *SEC v. Homestead Props., L.P.*, No. SACV09-01331-CJC(MLGx), 2009 WL 5173685, at *2 (C.D. Cal. Dec. 18, 2009); *SEC v. Trabulse*, 526 F. Supp. 2d 1008, 1012 (N.D. Cal. 2007).

B. The Assisted Living and Caffe Primo Offerings Involve the Offer and Sale of Securities

The Defendants are selling securities in the form of units in limited partnerships. The Assisted Living PPMs contain similar cautionary language about

the "securities offered hereby...." (*See, e.g.*, Gurley Dec. Ex. 6 at pp. 73-75.) The front page of the Caffe Primo PPMs list for a section titled "Securities Offered." (*See, e.g.*, Gurley Dec. Ex. 7 at p. 263.) By Defendants' own admission, these are offerings of securities.

Section 2(a)(1) of the Securities Act and Section 3(a)(1) of the Exchange Act define a "security" to include, among other things, any "investment contract. The Supreme Court set out a three prong test to determine whether a financial interest constitutes an "investment contract" in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946): (1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others. *See, e.g., SEC v. R.G. Reynolds Enter., Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991). As the Ninth Circuit has recognized, a limited partnership generally is a security because, by definition, it involves investment in a common enterprise with profits to come solely from the efforts of others. *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980).

All the offerings sought an investment of cash. Each offering was a common enterprise among the investors in that offering. Each offering was a common enterprise between the investors and the General Partners, with the profits of both based on the management of the General Partners. *See SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463 (9th Cir. 1985) (vertical commonality may be established by showing "that the fortunes of the investors are linked with those of the promoters"). The General Partners exercised complete control over the investment funds and the management of the respective entities, thus satisfying the third prong of Howey which is met when "'the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.'" *R.G. Reynolds*, 952 F.2d at 1130 (*quoting Hocking v. Dubois*, 885 F.2d 1449, 1455 (9th Cir. 1989) (*en banc*)). *See also SEC v. Liu*, SACV 16-00974-CJC (AGRx), Docket Numbers 139 & 140 (C.D. Cal. Aug. 17, 2016) (order denying motion to dismiss and holding investor interests in EB-5 investment

vehicle to be securities). Thus, the limited partnership units offered by Defendants are securities for the purposes of the federal securities laws.

C. The SEC Has Made a *Prima Facie* Showing That Defendants Are Violating The Federal Securities Laws

1. Defendants are violating the antifraud provisions of Section 17(a), Section 10(b) and Rule 10b-5

Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), prohibits fraud in the offer or sale of securities, and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, prohibit fraud in connection with the purchase or sale of any security. *See SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855 (9th Cir. 2001). Defendants have violated both antifraud provisions.

a. Defendants engaged in a scheme to defraud in connection with the offer and sale of securities

Defendants have engaged in a scheme to defraud the investors. Sections 17(a)(1) and 17(a)(3) of the Securities Act prohibit any person, "in the offer or sale of any securities," from employing "any device, scheme, or artifice to defraud," 15 U.S.C. § 77q(a)(1), or from engaging in "any transaction, practice, or course of business which operates, or would operate, as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). Likewise, Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder make it unlawful for any person, "in connection with the purchase or sale of any security," "[t]o employ any device, scheme or artifice to defraud," or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 15 U.S.C. § 78j(b); 17 C.F.R. §§ 240.10b-5(a), (c). To be liable for a scheme to defraud, a defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), v*acated on other grounds sub nom., Avis Budget Group Inc. v. Cal. State Teachers' Ret. System*, 552 U.S. 1162 (2008); *see also SEC v.*

Sells, No. C-11-4941, 2012 WL 3242551, at *7 (N.D. Cal. Aug. 10, 2012).

Defendants Francisco and PDC Capital are engaging in a scheme to defraud investors by creating the false appearance that they are using investors' capital contributions to build assisted living facilities, create jobs, generate returns, and otherwise comply with the representations made to investors, as well as relevant USCIS regulations. In fact, Defendants are misappropriating investors' funds for themselves to support Francisco's luxury lifestyle and their continuing marketing efforts. While Defendants used some of the investors' funds to purchase properties on which the assisted living centers are supposed to be built, these activities were to create the false appearance of progress, and that Defendants were making legitimate EB-5 offerings. Defendants then marketed themselves as successful, experienced managers of EB-5 offerings, and misappropriated substantial investor funds to fund their continuing marketing operations to raise yet more money to perpetuate their scheme and line their pockets.

Similarly, defendants Francisco, PDC Capital, and CPI are engaging in a scheme to defraud investors by creating the false appearance that investors' capital contributions are being used to build out Caffe Primo restaurants, create jobs, generate returns, and otherwise comply with representations to investors concerning EB-5 eligibility. Defendants are misappropriating and diverting the investors' funds, including misappropriating at least $1.5 million of investors' funds from two offerings. While Defendants used some of the investors' funds to launch Caffe Primo restaurants, these activities were similarly designed to create the false appearance that Defendants were making legitimate EB-5 offerings, and using investors' funds as represented rather than diverting and misappropriating the funds.

Defendants Assisted Living LPs, Clear Currents LP, and the Caffe Primo LPs, are active participants in the ongoing fraudulent scheme. The limited partnerships make the representations to investors in the PPMs and other offering documents about the use of investors' capital contributions. Contrary to those representations,

the limited partnerships allowed the diversion of millions of dollars of investors' capital contributions to PDC Capital. The limited partnerships also allowed investors' capital contributions to be diverted to other offerings, where the funds were misused or misappropriated by PDC Capital. Francisco, PDC Capital, and CPI controlled the limited partnerships, and aided and abetted their fraudulent conduct.

Defendants are continuing to raise funds from investors, with at least $1.65 million raised in August and September 2016. (Conte Dec. ¶ 18.) Defendants have misappropriated at least $9.5 million of investors' funds through November 2016. *See SEC v. Zandford*, 535 U.S. 813, 821-22 (2002) (finding that a scheme to defraud can be established by showing misappropriation of client's funds).

b. Defendants' materially false statements and omissions

To establish a *prima facie* case that a person made false or misleading statements in connection with the offer, purchase, or sale of securities under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, the SEC must prove by a preponderance of the evidence four basic elements: (1) a material misrepresentation or omission; (2) in connection with the offer, purchase, or sale of a security; (3) with scienter; and (4) in interstate commerce. *SEC v. Platforms Wireless*, 617 F.3d 1072, 1092 (9th Cir. 2010); *see also SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993).

Violations of the antifraud provisions require that the misstatements and omissions concern material facts. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See TSC Indus.*, 426 U.S. at 449; *Platforms Wireless*, 617 F.2d at 1092. Liability arises not only from affirmative representations but also from failures to disclose material information. *SEC v. Dain Rauscher, Inc.*, 254 F.3d at 855-56. The antifraud provisions impose "'a duty to disclose material facts that are necessary to make disclosed statements, whether

mandatory or volunteered, not misleading.'" *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (*quoting Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992)). *See also SEC v. Murphy*, 626 F.2d at 653 (profitability of an issuer was material to investors).

Defendants Francisco, PDC Capital, CPI, and the limited partnerships made material misrepresentations to investors that the investors' $500,000 capital contributions would be used to build a specific project, create jobs, generate returns for the investors, and qualify under EB-5 regulations. These representations were false because Defendants Francisco and PDC Capital misappropriated at least $9.5 of the $72.05 million raised from investors, or about 13% of the total funds raised. (Conte Dec. ¶ 54.) These representations were also false because funds were transferred between offerings, such as the diversion of funds raised for the TRC Tucson to other assisted living projects. (Conte Dec. ¶¶ 37-38.) Similarly, funds from one Caffe Primo project were diverted and transferred among the different offerings. (Conte Dec. ¶¶ 46-48.)

Defendants Francisco, PDC Capital, CPI, and the limited partnerships also made material misrepresentations to investors that only the administration fee would be used to pay for offering and other expenses, so that the entire $500,000 investment would be put "at risk" consistent with USCIS guidelines. As stated in the PPMs, "any remuneration paid by the Partnership to the General Partner(s) pursuant to the Limited Partnership Agreement shall be paid out of Administration fees, loan interest proceeds, or through dividends paid to the Partnership as its parent, so as to comply with USCIS requirements." (*See, e.g.*, Gurley Dec. Ex. 7 at p. 96.) Defendants showed a complete disregard for these representations and limitations, transferring about $19.2 million of the total funds raised to PDC Capital, which was far in excess of the administration fees of $6.55 million collected by the escrow agent from investors.

c. Defendants acted with scienter

While claims under Section 10(b) and Section 17(a) (1) require a showing of scienter, Sections 17(a)(2) and (3) only require a showing of negligence. *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980); *Vernazza v. SEC*, 327 F.3d 851, 859-60 (9th Cir. 2003). Scienter is proven with "'knowing or reckless conduct,' without a showing of 'willful intent to defraud.'" *Vernazza*, 327 F.3d at 860; *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990). Further, recklessness may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91, n.30 (1983); *SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987).

Francisco acted with a high level of scienter in carrying out the scheme to defraud, and in his material misstatements and omissions in connection with the offer and sale of units in the limited partnerships. Francisco testified that he knew that he could not use any of the investors' capital contributions to pay the expenses of PDC Capital. (Gurley Dec. Ex. 47 at pp. 1412-19.) Indeed, Francisco testified that the investors' capital contributions were "sacred," and could not even be moved between offerings. (*Id*. at pp. 1432-34.) Francisco also admitted that approved all the movements of funds in and out of the bank accounts of the limited partnership. (*Id*. at p. 1415-19.) Nonetheless, Francisco took millions of dollars of investors' capital contributions to buy himself a yacht, pay for his yacht club membership, and pay personal credit cards for himself, his brother, and his daughter. (Conte Dec. ¶ 32.) Given Francisco's knowledge that such use of investors' capital contributions was not allowed, his complete disregard of the representations to investors in this regard shows a high level of deliberate misconduct.

The stepped transactions used to route investor funds from the escrow accounts through a limited partnership account to PDC Capital also show an intent to deceive. Francisco controlled all the accounts of the various limited partnerships, and PDC Capital benefitted from these transactions. For example, on July 29, 2016, $100,000 was wired from an escrow account to the SAL Kern Canyon LP account, then to the

SAL Kern Canyon LLC account, and then to PDC Capital. (Conte Dec. ¶ 35(a).) Less than a month later on August 18, 2016, another $100,000 made the same trip from the escrow account, to SAL Kern Canyon LP, to SAL Kern Canyon LLC, and then to PDC Capital. (Conte Dec. ¶ 35(b).) Less than 7 days later, $230,000 made the same trip from escrow through two SAL Kern Canyon accounts to PDC Capital. (Conte Dec. ¶ 35(c).) Similarly, defendants routed TRC Tucson funds through several escrow accounts before finally diverting them to several other projects and to PDC Capital. (Conte Dec. ¶ 37 and Exhibit 2.)

Francisco's mental state is imputed to the companies he controls, including PDC Capital, CPI, and the Defendant limited partnerships. *SEC v. Platforms Wireless Intern. Corp.*, 559 F. Supp. 2d 1091, 1096 (S.D. Cal. 2008), *aff'd*, 617 F.3d 1072 (9th Cir. 2010) (*citing SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1972) (a defendant's knowledge may be imputed to the entities that he controlled).

d. Defendants were negligent

To establish negligence, the SEC must show that the defendants failed to conform to the standard of care that would be exercised by a reasonable person. *See Dain Rauscher*, 254 F.3d at 856; *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453–54 (3d Cir.1997) (defining negligence in the securities context as the failure to exercise reasonable care or competence). Here, the failure to have and exercise reasonable controls over the investors' capital contribution evidences a failure to exercise reasonable care.

e. In interstate commerce

Defendants used means and instrumentalities of interstate commerce to solicit investors, including through their website. (Gurley Dec. Ex. 27 at pp. 1107-52.) Defendants used email to communicate with investors. In addition, investors' funds were wired from overseas to United States bank accounts, and then wired between bank accounts. In addition, Defendants used interstate commerce to wire payments to

persons in the U.A.E. and China. (Conte Dec. ¶ 31.)

2. Francisco is liable as a Control Person

Francisco exercises control over PDC Capital, CPI, and the defendant limited partnerships, and can be held secondarily liable for their misstatements under Section 20(a) of the Exchange Act. *See* 15 U.S.C § 78t(a); *SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011) (*citing Howard v. Everex Sys., Inc.*, 228 F.3d 1065 (9th Cir. 2000)) (to establish Section 20(a) liability, SEC must prove "(1) there is a violation of the Act and (2) the defendant directly or indirectly controls any person liable for the violation"). As set forth above, the SEC has established that PDC Capital, CPI, and the limited partnership Defendants violated Section 10(b) and Rule 10b-5. Accordingly, Francisco has liability for his direct participation and involvement in violations of the federal securities laws, and, alternatively, as a control person over those entities which violated the federal securities laws.

D. The Court Should Grant The Relief Sought By The SEC

1. A temporary restraining order is appropriate

A temporary restraining order is appropriate in this case because the SEC has made a *prima facie* showing that Defendants violated the federal securities laws, and that there is a likelihood that Defendants' conduct will be repeated. Courts may consider a number of factors to determine the likelihood of future violations based on the totality of the circumstances. *See, e.g.*, *Murphy*, 626 F.2d at 655; *SEC v. Fehn*, 97 F.3d at 1295-96. The existence of past violations may give rise to an inference that there will be future violations. *See Murphy*, 626 F.2d at 655; *SEC v. United Financial Group, Inc.*, 474 F.2d at 358-59; *see also United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9th Cir. 1987). Courts also consider factors such as the degree of scienter involved, the isolated or recurrent nature of the violative conduct, the defendant's recognition of the wrongful nature of the conduct, the likelihood that, because of the defendant's occupation, future violations may occur, and the sincerity of defendant's assurances (if any) against future violations.

See Murphy, 626 F.2d at 655.

Francisco and PDC Capital have conducted their fraudulent scheme since 2013, and have obtained funds from investors as recently as August and September 2016. Indeed, several large transfers of investors' funds to PDC Capital occurred in July and August 2016, as did large transfers of funds to CPI. (Conte Dec. ¶¶ 35, 48.) Moreover, Defendants' use of stepped transactions in an effort to conceal their fraudulent misappropriation of investors' capital demonstrates that a temporary restraining order is necessary to put a halt to Defendants' efforts to conceal their fraudulent conduct. Because the SEC has shown a strong likelihood of success on the merits, the Court may presume that the SEC has met the irreparable injury prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public. *Nutri-Cology*, 982 F.2d at 398.

In addition, the SEC's showing meets the second point on the sliding scale standard enunciated by the Ninth Circuit, because "serious questions" about Defendants' conduct are raised by the SEC's motion, and the balance of hardships tips in the SEC's favor. *Nutri-Cology*, 982 F.2d at 397. The SEC brings this action in the public interest to protect investors. Given Defendants' ongoing solicitation of investors, a temporary restraining order is in the public interest to put a halt to this fraudulent scheme.

2. Defendants' assets should be frozen

Federal courts have inherent equitable authority to freeze assets under its "inherent equitable power to issue provisional remedies ancillary to its authority to provide final equitable relief." *Reebok Int'l, Ltd v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 559 (9th Cir. 1992); *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). These powers include the authority to freeze assets of both parties and nonparties. *SEC v. Hickey*, 322 F.3d 1123, 1131 (9th Cir. 2003); *SEC v. Int'l Swiss Invs. Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990). Courts use freeze orders to prevent waste and dissipation of assets and to ensure their availability for disgorgement for the benefit

of victims of the fraud. *See, e.g., Hickey*, 322 F.3d at 1132 (affirming asset freeze over nonparty brokerage firm controlled by defendant to effectuate disgorgement order against defendant); *Manor Nursing*, 458 F.2d at 1105-06. Indeed, the Ninth Circuit has found that "the public interest in preserving the illicit proceeds (of a defendant's fraud) for restitution to the victims is great." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999). Courts have similarly recognized that a disgorgement order will often be rendered meaningless unless an asset freeze is imposed prior to the entry of final judgment. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990).

"A party seeking an asset freeze must show a likelihood of dissipation of the claimed assets, or other inability to recover monetary damages if relief is not granted." *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). Courts consider a defendant's prior unlawful acts and the location of the assets in considering whether an asset freeze is warranted. *See, e.g., id*. at 1085; *Affordable Media*, 179 F.3d at 1236; *Manor Nursing*, 458 F.2d at 1106 ("uncertainty existed with respect to the total amount of proceeds received and their location," thus asset freeze was warranted).

Francisco has been and is dissipating investors' assets on personal expenses. Indeed, given the numerous stepped transactions and commingling of assets between different offerings, it is unclear if additional funds have been misappropriated. Moreover, Defendants have purchased several pieces of property for the assisted living centers, and those assets should be preserved. The SEC requests that the Court issue an asset freeze to preserve the status quo and prevent the ongoing dissipation of the assets of the Defendants. The SEC requests that the Court freeze bank accounts of Francisco, PDC Capital and entities which it manages, CPI and entities it manages, and all accounts associated with the Defendant limited partnerships including the accounts of the project LLCs.

3. A receiver is necessary to protect the assets

The SEC seeks the appointment of a receiver over PDC Capital and its subsidiaries and affiliates, CPI and its subsidiaries and affiliates, and the Defendant limited partnerships. The SEC recommends Thomas Seaman to the Court.

The Court has broad discretion to appoint an equity receiver in SEC enforcement actions. *See Wencke*, 622 F.2d at 1365. The breadth of this discretion "arises out of the fact that most receiverships involve multiple parties and complex transactions." *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (quotation omitted). A receiver plays a crucial role in preventing further dissipation and misappropriation of investors' assets. *Wencke*, 783 F.2d at 836-37 n.9. Factors such as the integrity of management and the likelihood of future misuse of assets are critical in determining whether a receiver should be appointed. *See SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970).

This case involves twenty offerings, multiple bank accounts and entities, and complex transactions with funds flowing among and between Defendants' accounts. A receiver is necessary to marshal the assets, protect the existing assets, and seek to recover assets. A receiver can rationalize the investors' interests, manage a claims process, and assist the Court to make sure assets are distributed fairly to legitimate claimants, under the supervision and direction of the Court. The SEC also requests that the receiver be excused from posting a bond. *See SEC v. Universal Financial*, 760 F.2d 1034, 1039 (9th Cir. 1985).

4. It is necessary to issue orders prohibiting the destruction of documents, requiring accountings, granting expedited discovery, and ordering repatriation of assets

The Court's broad equitable powers in SEC enforcement actions include the ability to order ancillary relief, such orders prohibiting the destruction of documents and ordering the preparation of accountings. *See Wencke*, 622 F.2d at 1369. In view of the egregious nature of the Defendants' fraudulent scheme, and the amounts of

money involved, an order prohibiting the destruction of documents will protect important evidence from possible spoliation. The SEC also requests that the Court require Defendants to prepare accountings to help identify all available assets, ensure that funds and assets are frozen, and that assets are available to satisfy any future order of disgorgement or civil penalties. *See Int'l Swiss Invs. Corp.*, 895 F.2d at 1276

The SEC also requests that the Court allow discovery on an expedited basis. Expedited discovery is authorized by Rules 30 and 34 of the Federal Rules of Civil Procedure, and a court's broad equitable powers in SEC enforcement actions to order all necessary ancillary relief. *See Wencke*, 622 F.2d at 1369. In an effort to bring this complicated action as quickly as possible, the SEC has focused on the bank records for the numerous Defendants. If Defendants identify witnesses who may testify at a hearing in opposition to the SEC's motion for a preliminary injunction, then the SEC should be permitted to depose such witnesses on an expedited basis.

Finally, the Court should order Francisco and the entity Defendants to repatriate any investor assets they have in foreign-based accounts. *See FTC v. Affordable Media, LLC*, 179 F.3d at 1238-39 (affirming finding of contempt for order to repatriate assets). Francisco and PDC Capital have transferred at least $160,000 to Hong Kong Faithrise Investments, over $2 million to a bank account in the U.A.E., and $150,000 to All Growth Limited in China. (Conte Dec. ¶¶ 31, 32.) In view of the massive amount of investors' money that has been misappropriated by Defendants, and the substantial amounts that have been transferred outside of the United States, it is appropriate to order Defendants to transfer any investors' assets back to the United States. *See, e.g., SEC v. Private Equity Management Group, LLC*, No. CV 09-2901 PSG EX, 2009 WL 1310984, at *7 (C.D. Cal. April 27, 2009) (ordering defendants to "transfer to the registry of this Court all assets, funds, and other property held in foreign locations"); *SEC v. Eadgear, Inc.*, No. 3:14-CV-04294-RS, 2014 WL 6900938, at *2 (similar).

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court grant the requested relief, issue a temporary restraining and related orders, appoint a temporary receiver, and order Defendants to show cause why a preliminary injunction should not be entered and a permanent receiver appointed over PDC Capital, CPI, and the Defendant limited partnerships.

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Respectfully submitted,

/s/ John B. Bulgozdy

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