

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

PATH AMERICA, LLC; PATH AMERICA
SNOCO LLC; PATH AMERICA FARMER'S
MARKET, LP; PATH AMERICA KINGCO
LLC; PATH AMERICA TOWER, LP; PATH
TOWER SEATTLE, LP; POTALA TOWER
SEATTLE, LLC; and LOBSANG DARGEY,

Defendants, and,

POTALA SHORELINE, LLC; POTALA
VILLAGE KIRKLAND, LLC; DARGEY
DEVELOPMENT, LLC; DARGEY
ENTERPRISES, LLC; and PATH OTHELLO,
LLC,,

Relief Defendants.

Case No. 2:15-cv-01350-JLR

NOTICE OF MOTION AND OMNIBUS
MOTION FOR ORDER APPROVING
RECEIVER'S RECOMMENDED
TREATMENT OF CLAIMS

NOTED ON MOTION CALENDAR:
DECEMBER 1, 2017

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1 **TO ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that Michael A. Grassmueck (the "Receiver"), the court-
3 appointed Receiver for Path America LLC; Path America SnoCo LLC; Path America Farmer's
4 Market, LP; Path America KingCo, LLC; Path America Tower, LP; Path Tower Seattle, LP;
5 Potala Tower Seattle, LLC; Potala Shoreline, LLC; Potala Village Kirkland, LLC; Dargey
6 Development, LLC; Dargey Enterprises, LLC; Path Farmer's Market, LLC; and Dargey Holdings,
7 LLC (collectively, "Receivership Entities"), hereby files this Omnibus Motion of Receiver
8 Approving Receiver's Recommended Treatment of Claims ("Motion").

9 The Motion is posted on the Receiver's website: ([http://www.grassmueckgroup.com/
10 pathamerica.php](http://www.grassmueckgroup.com/pathamerica.php)). A hard copy of the Motion can also be obtained by emailing a request to the
11 Receiver through the website or by sending a written request to the Receiver at Grassmueck
12 Group, PO Box 230091, Portland, Oregon 97281.

13 This Motion is made on the grounds that the Receiver has completed processing of all
14 claims against the Receivership Entities submitted in accordance with summary claims procedures
15 previously approved by this Court. The Receiver has made determinations regarding which
16 claims he believes should be allowed, and in what amounts, and which claims are subject to
17 objection and recommended for denial. Attached as Exhibits A and B to the Declaration of
18 Michael A. Grassmueck in Support of Omnibus Claims Motions ("Receiver Declaration") are
19 charts setting forth the Receiver's proposed allowed and disallowed claims and proposed claim
20 amounts. Those claims which are in dispute or require further explanation are also described in
21 greater detail in Section IV of the Memorandum of Points and Authorities.

22 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
23 Points and Authorities, the supporting Receiver Declaration, the documents and pleadings already
24 on file in this action, and upon such further oral and documentary evidence as may be presented at
25 the time of the hearing.

26 **If you oppose this Motion (i.e., the treatment of your claim), you are required to file a**
27 **written opposition with the Office of the Clerk, United States District Court, 700 Stewart**
28

1 **Street, Suite 2310, Seattle, Washington 98101, and serve the same on the undersigned no**
2 **later than four (4) calendar days prior to the hearing on this Motion. If you fail to serve a**
3 **written opposition by the above deadline, the Court may grant the Receiver's requested**
4 **relief without further notice.**

5
6 Dated: November 9, 2017

ALLEN MATKINS LECK GAMBLE MALLORY
& NATSIS LLP

7
8 By: /s/ David R. Zaro

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MEMORANDUM OF POINTS AND AUTHORITIES**I. EXECUTIVE SUMMARY.**

In August 2016, this Court approved claims procedures whereby persons and entities with claims for payment against the Receivership Entities could submit those claims for review and processing by the Receiver. The Receiver provided notice of the Court's approved claims procedures and claims bar date to prospective claimants and the claims bar date established by the Court has passed. The Receiver has completed his review and processing of all claims and is prepared to make his recommendations to the Court regarding which claims should be allowed, and in what amounts, and which claims are subject to objection and recommended for denial. For the sake of clarity, the Receiver notes that this Motion is solely addressing the allowed amount of each claim, if any. The Receiver will fill a separate motion seeking approval of a distribution plan which will address the amount to be paid to each claimant based on the allowed amount of their claim.

Attached as Exhibit A to the Declaration of Michael G. Grassmueck ("Receiver Declaration") is a table summarizing the nature and amount of claims received, and the Receiver's recommendation of whether to allow the claim and the proposed amount. Those claims still in dispute and claims requiring further explanation are described in Section IV below. In addition, attached as Exhibit B to the Receiver Declaration is a list of proposed allowed claims which were provided for in connection with the below described Tower Sale. Treatment of the claims listed on Exhibit B was the subject of prior agreements and orders of this Court.

The Receiver's general approach to claims review has involved verifying the contractual or legal basis for each claim through a review of the documents submitted by each claimant and comparing that information with the books and records of the Receivership Entities. In the case of investors, the Receiver used a "money in – money out" or "MIMO" approach. That is, the Receiver required a showing that those claiming to be investors actually put money into the enterprise in order to receive an allowed claim.

1 The Receiver submits that, having completed his processing of claims, it is now
 2 appropriate for the Court to enter an order on his recommended treatment of claims. Once this
 3 process has concluded and the Receiver has completed the remaining litigation to recover damages
 4 against third parties, the Receiver will file a motion to approve and authorize a distribution plan.

5 **II. RELEVANT FACTUAL BACKGROUND.**

6 **A. The Court-Approved Summary Claims Process.**

7 On July 28, 2016, the Receiver filed his Motion for Order: (1) Approving Claim Form For
 8 Non-EB-5 Investment Claims; (2) Setting Claims Bar Date; and (3) Establishing Summary Claims
 9 Procedures (the "Claims Procedures Motion"), proposing summary claims procedures to be
 10 employed in this matter. [Dkt. No. 385.] The Court entered an order granting the Claims
 11 Procedures Motion (the "Procedures Order") on August 30, 2016. [Dkt. No. 415.]

12 After the entry of the Procedures Order, the Receiver established a claims bar date of
 13 November 30, 2016 and notified the Court of this date. [Dkt. No. 423.] Notice of the bar date was
 14 published, posted on the Receiver's website, and provided to counsel, investors and creditors for
 15 whom the Receiver had a confirmed email address. (Receiver Declaration ¶ 5.) Court-approved
 16 claim forms were also provided to prospective claimants based upon addresses found in the
 17 records of Receivership Entities and were available for download via the Receiver's website.¹ Id.

18 **B. Processing Of Claims Received.**

19 Approximately 70 timely claims were submitted to the Receiver, not including certain tax
 20 and investor claims and certain claims containing multiple claims. (Grassmueck Decl. ¶ 6.)
 21 Thereafter, the Receiver commenced a review of claims intended to ensure that claims were
 22 complete, not duplicative of claims submitted by other persons or entities, and supported by
 23 documentation appropriate to the nature of the claim. As noted below, the Receiver and counsel

24
 25
 26 ¹ As provided for in the Claims Procedures Motion, the Receiver further delivered written notice
 27 of the claims process to overseas investors in the Receivership Entities confirming the amount
 28 of their investment, as reflected in the Receiver's records, advising that he intended to
 recommend their claim for allowance based on the records of the Receivership Entities and
 inviting the submission of claims in the event that investors disputed the amount of their claim.

1 actively engaged with claimants in an effort to resolve incomplete, inaccurate or disputed claims.

2 The general categories of claims processed by the Receiver are as follows:

3 1. EB-5 Investor Claims.

4 As provided for in the Receiver's Claims Procedures Motion, the EB-5 investors involved
5 with the Receivership Entities ("EB-5 Investors") were not asked to submit claims because the
6 Receiver had previously verified the amount of each of the EB-5 Investor claims. (Grassmueck
7 Decl. ¶ 7.) As such, overseas investors were not required to submit claims.

8 As the Court is aware, EB-5 Investors' interests were already addressed through the orders
9 entered in connection with the restructuring of Path America SnoCo, LLC, Path America Farmer's
10 Market LP (collectively, "Farmer's Market Entities") involving the project known as Everett
11 Farmers Market ("PAFM Project"), and Path America Tower, LP, Path America KingCo LLC,
12 and Path Tower Seattle, LP (collectively "Tower Project Entities") involving the proposed hotel
13 and condominium project in downtown Seattle ("Tower Project").² Nonetheless, some EB-5
14 investors submitted claims, in some cases seeking amounts in excess of their principal \$500,000
15 investment, including requests for agency fees, attorneys' fees, administrative, and other damages.
16 EB-5 Investor claims not otherwise addressed through the orders approving the restructuring of
17 the Farmer's Market Entities and the Tower Project Entities, have been allowed up to the investor's
18 confirmed \$500,000 principal investment. As discussed below, the Receiver recommends
19 allowing EB-5 Investor claims only in the amounts of actual principal invested, and denying those
20 portions claims that request reimbursement of administrative or other fees paid to third parties, or
21 consequential damages. Id.

22 2. Other Investors.

23 There were several other investors who invested with the Receivership Entities
24 independent of the EB-5 Investor programs. These investor claims were reviewed and the
25

26 ² Certain EB-5 Investors, whose funds were never transferred out of escrow, received full
27 refunds of their invested funds through proceedings unrelated to the foregoing restructuring
28 transactions, and the Receiver recommends that such investors be deemed to have no allowed
claims at this time.

1 Receiver conducted a MIMO analysis as to each of these claims based on the information supplied
2 by the claimant and contained in the Receivership Entities' records.

3 3. Taxing Entity Claims.

4 Over the course of the receivership, the Receiver received multiple requests for payment of
5 taxes from the United States Internal Revenue Service ("IRS"), the state and county tax authorities
6 in the State of Washington, and other taxing entities (collectively, the "Taxing Entities") in
7 connection with the purported business and financial activities of the Receivership Entities.
8 (Grassmueck Decl. ¶ 7(c).) The Receiver also received claims from the IRS based upon
9 Mr. Dargey's personal tax liabilities. The Receiver recommends treating claims received from the
10 Taxing Entities as timely received whether submitted before or after the Bar Date. As detailed
11 below and on Exhibit A to the Receiver Declaration, the Receiver has resolved all of the pre-
12 receivership tax claims through proposed settlement or payments made in connection with the sale
13 and restructuring transactions approved by the Court. Id.

14 4. Trade Creditor Claims.

15 The Receiver received a number of claims from vendors, professionals and trade creditors
16 (collectively "Trade Creditors"), that provided services in connection with the real estate
17 development projects owned and undertaken by the Receivership Entities. Id. at ¶ 7(d). In order
18 to maximize the likelihood that trade creditor claims recommended for allowance are legitimate,
19 the Receiver relied on, among other things, evidence of work performed, invoices for work
20 performed, and written contracts and service agreements governing performance. Id. Where
21 claims submitted were not supported with sufficient documentation but otherwise appeared to be
22 colorable, the Receiver contacted the claimants and secured additional documentation before
23 arriving at a conclusion regarding validity or invalidity of the claims. Id. Many of the trade or
24 vendor claims were addressed through the restructurings of the Tower Project and the Farmer's
25 Market Project, with the project liabilities passing through to the restructured entities.

1 **III. ARGUMENT.**

2 **A. This Court's Authority And The Legal Standard For Determining Validity Of**
 3 **Claims.**

4 "The power of a district court to impose a receivership or grant other forms of ancillary
 5 relief does not in the first instance depend on a statutory grant of power from the securities laws.
 6 Rather, the authority derives from the inherent power of a court of equity to fashion effective
 7 relief." SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of equity
 8 receiverships is to promote orderly and efficient administration of the estate by the district court
 9 for the benefit of creditors." SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986). As the
 10 appointment of a receivers is authorized by this Court's equitable powers, so too is any distribution
 11 of assets to be undertaken equitably and fairly. SEC v. Elliot, 953 F.2d 1560, 1569 (11th Cir.
 12 1992).

13 Moreover, District Courts have broad power to determine the appropriate method of
 14 administering a receivership estate. As the Ninth Circuit has explained:

15 A district court's power to supervise an equity receivership and to
 16 determine appropriate action to be taken in the administration of the
 17 receivership is extremely broad. The district court has broad powers
 and wide discretion to determine the appropriate relief in an equity
 receivership.

18 SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005) (citing SEC v. Hardy,
 19 803 F.2d 1034, 1037 (9th Cir. 1986) and SEC v. Lincoln Thrift Association, 577 F.2d 600, 606
 20 (9th Cir. 1978)); see also SEC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1115 (9th Cir. 1999) ("This
 21 court affords 'broad deference to the [district] court's supervisory role and 'we generally uphold
 22 reasonable procedures instituted by the district court that serve th[e] purpose' of orderly and
 23 efficient administration of the receivership for the benefit of creditors.")

24 In supervising the instant receivership, this Court must "make rules which are practicable
 25 as well as equitable." Hardy, 803 F.2d at 1039 (quoting First Empire Bank-New York v. FDIC,
 26 572 F.2d 1361, 1368 (9th Cir. 1978)). Where, as here, the funds recovered are insufficient to
 27 satisfy all claims in full, the Ninth Circuit and other courts have endorsed a so-called MIMO
 28

1 ("money-in / money-out") approach to claim evaluation, which enables a receiver to determine the
 2 net value of investor and creditor claims. See, e.g., Capital Consultants, LLC, 397 F.3d at 378
 3 (describing net claim calculus as "an administratively workable and equitable method of allocating
 4 the limited assets of a receivership"); Topworth, 205 F.3d at 1116; In re Tedlock Cattle Co., Inc.,
 5 552 F.2d 1351, 1354 (9th Cir. 1977); In re Taubman, 160 B.R. 964, 980-82 (Bankr. S.D. Ohio
 6 1993).

7 Here, there are insufficient funds available to pay 100% of each investor's principal
 8 investment and the base or principal amounts due to vendors and other creditors. Receiver
 9 Declaration ¶ 8-9. Accordingly, the so-called MIMO approach is appropriate when considering
 10 the amounts due to claimants with regard to investments or contracts. Id. All amounts claimed
 11 over investor principal or base amounts due on contracts should be disallowed (i.e. the Receiver
 12 intends to ask the Court to deny claims for lost profits, agency fees, consequential damages,
 13 attorneys' fees and interest.)

14 In the context of receivership and similar proceedings, it is a claimant's burden to establish
 15 a valid claim against a receivership estate. See Lundell v. Anchor Contr. Specialists, Inc., 223
 16 F.3d 1035, 1039 (9th Cir. 2000); Revere Copper & Brass, Inc. v. Adriance Machine Works, Inc.,
 17 76 F.2d 876, 878 (2d Cir. 1935). Accordingly, claims (or portions thereof) submitted without
 18 support for the amount claimed, and which cannot be reconciled with the Receiver's records and
 19 analysis, should be denied.³

20 Finally, in the context of receiverships and bankruptcies, courts are deferential to the
 21 business judgment of receivers and similar estate custodians. See, e.g., Bennett v. Williams, 892
 22 F.2d 822, 824 (9th Cir. 1989) ("[W]e are deferential to the business management decisions of a
 23 bankruptcy trustee."); Southwestern Media, Inc. v. Rau, 708 F.2d 419, 425 (9th Cir. 1983) ("The
 24 decision concerning the form of ... [estate administration] ... rested with the business judgment of
 25 the trustee."); In re Thinking Machines Corp., 182 B.R. 365, 368 (D. Mass. 1995) ("The
 26 application of the business judgment rule ... and the high degree of deference usually afforded
 27

28 ³ The Receiver has contacted those claimants whose claimed amount could not be reconciled
 with the Receiver's records, and allowed them an opportunity to respond.

1 purely economic decisions of trustees, makes court refusal unlikely.") (rev'd on other grounds, In
2 re Thinking Machines Corp., 67 F.3d 1021 (1st Cir. 1995)).

3 The Receiver respectfully submits that a MIMO, or netting, analysis of all claims
4 represents the best means for promoting an orderly, fair, and efficient administration of claims.
5 Indeed, considering the nature and amount of the claims received, including overstated claims,
6 claims submitted without evidentiary support, and claims requesting recovery of damages, agency
7 fees, or attorneys' fees, as detailed herein, a MIMO analysis of claims is critical to the equitable
8 treatment of all investors and creditors.

9 **IV. RECOMMENDATIONS FOR TREATMENT OF CLAIMS.**

10 The Receiver's recommended treatment of each timely claim received is summarized in
11 Exhibit A to the Receiver Declaration concurrently filed herewith. (Receiver Declaration ¶ 2,
12 Ex. A.) In addition, the Receiver requests the Court to allow the claims of the opt-out investors
13 related to the Tower transaction and the two claims of the Tower Entities as provided for in the
14 Tower Master Agreement and the Tower Sale Order. These claims are described in Exhibit B
15 attached to the Receiver Declaration. Below is a more detailed description of the Receiver's
16 analysis and recommended treatment of the two primary categories of claims followed by specific
17 objections to certain of the claims in dispute.

18 **A. Investors.**

19 Aside from the EB-5 Investors discussed below and those who have already received full
20 refunds of their invested funds, all EB-5 Investors will be treated pursuant to the order concerning
21 the restructuring of the Tower Project ("Tower Sale Order") [Dkt. No. 377] and the order
22 restructuring of the Farmer's Market Project ("PAFM Sale Order"). [Dkt. No. 546] Those EB-5
23 Investors who nonetheless submitted claims, including those claimants seeking reimbursement for
24 agency fees, attorneys' fees, and other damages, should be denied. Accordingly, the Receiver
25 recommends that all EB-5 Investor claims be allowed solely to the extent provided for in the
26 orders related to the restructuring of the Tower Entities and Farmer's Market Entities. [Dkt.
27 Nos. 377, 546] and the balance of such claims should be denied. The Receiver also requests the
28

1 Court to approve and allow the claims of the EB-5 opt-out investors and Tower Entity claims as
2 set forth in Exhibit B to the Receiver Declaration.

3 The other investor claims are addressed below in Section IV.D.

4 **B. Trade Creditors.**

5 The Receiver received claims from trade or vendor creditors, associated with services
6 provided in connection with the Receivership Entities and real property development projects
7 undertaken by the Receivership Entities. The Receiver diligently reconciled the amount of each
8 creditor's claim with evidence of work performed, verifiable invoices for work performed, and
9 written contracts and service agreements governing performance. On the basis of his review of
10 such materials, the Receiver has concluded that most trade creditor claims should be allowed as
11 reflected on Exhibit A to the Receiver's Declaration. Those claims that are the subject of disputes
12 are described below.

13 **C. Claims of the United States Securities and Exchange Commission.**

14 The SEC submitted a claim (Claim No. 239), based upon the SEC's underlying lawsuit
15 against Mr. Dargey and the Receivership Entities. The amount of the claim was not specified.
16 The SEC's claim is allowed, however, the claim will be entirely satisfied through the Receiver's
17 plan for distribution to investors and other creditors rather than through a direct payment to the
18 SEC.

19 **D. Specific Claim Objections**

20 1. Claim No. 243: Zizhen Shen (Jane)

21 Ms. Shen filed a claim seeking \$546,363.50. Receiver Declaration ¶ 11(a). The claim
22 arises out of the Priority Condominium, Unit Selection Agreement whereby Ms. Shen purchased
23 what appears to be a license or option to select a condominium to purchase at the Potala Village
24 Kirkland project. In connection with this agreement, Mr. Dargey signed a Promissory Note
25 calling for the repayment of \$500,000. It is not clear from the two agreements whether Ms. Shen
26 intended to loan \$500,000 to the Potala Village Kirkland Project or to Mr. Dargey personally, or
27 whether the \$500,000 was exchanged for consideration in the form of a license to purchase a
28

1 condominium. In either event, the Receiver has verified that Ms. Shen transfer \$500,000 to the
2 Receivership Entities and believes that her claim should be allowed in the amount of \$500,000,
3 reflecting the principal amount of the claim. *Id.* The \$46,363.50 balance of the claim reflects
4 interest, fees, penalties and other amounts which reflect consequential damages. Read together,
5 the Note and Agreement appear to be an investment agreement and therefore the Receiver
6 proposes to use a MIMO analysis and allow a claim to the extent of Ms. Shen's actual payment.
7 Accordingly, the Receiver proposes that the claim for interest, penalty and fees be denied. Only at
8 such time, if ever, that sufficient funds exist to satisfy all of the principal amount of claims, should
9 such damages be paid. In the meantime, the Receiver requests the Court allow Ms. Shen's claim
10 in the amount of \$500,000.

11 2. Claim Nos. 242a, 242b, 242c, 242d: Zhou-Yan

12 Individual Zhou Yan ("Zhou") submitted four claims in which she seeks an aggregate
13 amount of approximately \$1.6 million, as well as acknowledgement of certain entity ownership
14 rights. Given the scope and complexity of Zhou's claims, as well as the existence of separate
15 litigation between the Receiver and Zhou (*Grassmueck v. Zhou Yan*, Case No. 2:17-CV-00794
16 JLR), the Receiver addresses Zhou's claims in a concurrently filed motion. It should be noted that
17 the Receiver and Zhou are engaged in settlement discussions.

18 In short, barring a settlement, the Receiver recommends that each of Zhou's claims be
19 denied. Two of the monetary claims lack any supporting documentation showing a receivership
20 entity was obligated to reimburse Zhou. The third monetary claim for unpaid commissions is
21 based on an alleged oral contract with Lobsang Dargey (rather than a receivership entity) that has
22 no documentary support and is likely void as an agreement in violation of broker-dealer
23 registration laws. Finally, as to the ownership interest claim, the documents show that Zhou
24 contributed no funds in exchange for the interest, and the claim should therefore be denied based
25 upon a MIMO analysis.

1 3. Claims Related to the Potala Tower Project.

2 Pursuant to the Orders related to the restructuring of the Tower Project Entities, certain of
3 the pre-receivership claims are to be paid by the restructured Tower Entities. Receiver
4 Declaration ¶ 11.(c). However, the agreed upon process calls for the Receiver to address the
5 allowance of claims in the claims process. Based on the Receiver's review of the Trade Claims
6 arising out of or related to the Tower Entities, the Receiver has concluded that the claims of AAR
7 Testing (Claim No. 203), Cary Kopczynski (Claim No. 203), Moss Adams (Claim Nos. 231-
8 232e), Veris Law Group (Claim No. 245) and Perkins Coie (Claim No. 235) should be allowed.
9 Once approved by this Court, the Receiver will request Binjiang/Molasky to pay these claims
10 directly, in accordance with the Tower Sale Order and related contracts. The balance of the Tower
11 Entity related claims should be treated as follows:

12 a. Claim No. 206 - AMDO Construction, LLC.

13 AMDO Construction, LLC ("AMDO") submitted a claim in the amount of \$170,214.98.
14 Id. at ¶ 11. c. (i). AMDO asserts that it contracted with Potala Tower Seattle, LLC to provide
15 excavation and other services in exchange for payment of \$1,621,500 plus tax. AMDO asserts
16 that it completed 82% of the work contemplated by the contract and was therefore entitled to be
17 paid \$1,329,630.00 plus tax, but was only paid \$1,210,159.50. The Receiver has determined that
18 AMDO provided the services it claims, and therefore the claim should be allowed in the requested
19 amount, less the allowed claim amount of Pellco Construction discussed below. Accordingly, the
20 AMDO claim should be allowed in the amount of \$167,549.98.⁴ Id.

21 b. Claim No. 234 - Pellco Construction, Inc.

22 Pellco Construction, Inc. ("Pellco") submitted a claim in an unstated amount, and
23 subsequently clarified to the Receiver that its claim is in the amount of \$2,665.00. Id. at

24 _____
25 ⁴ Lobsang Dargey holds a 95% ownership interest in AMDO. As discussed below, the IRS has
26 asserted claims and recorded tax liens in an amount in excess of \$3 million relating to Lobsang
27 Dargey's personal unpaid income taxes related to the 2014 and 2015 tax years. Id. The IRS
28 asserts that its liens are secured by, among other things, Mr. Dargey's ownership interests in
various entities, including AMDO, and that it is entitled to priority. In light of the foregoing,
while the Receiver proposes that the AMDO claim be allowed, he acknowledges that the issue
of whether any future distribution payment on this claim should be made to AMDO or to the
IRS will be subject to further proceedings in this Court.

¶ 11.c.(ii). Pellco asserts that it provided trucking services to Overhus Dirt Services, a subcontractor to AMDO, and provided documentation establishing that it provided the services for which it seeks compensation. Accordingly, the Receiver proposes that Pellco's claim in the amount of \$2,665.00 be allowed.

c. Claim No. 233 - Newbanks, Inc.

Newbanks, Inc. ("Newbanks") submitted a claim in the amount of \$6,300.00 for construction consulting services it provided to Voya Insurance and Annuity Company ("Voya"), a prospective lender to the Tower Project. *Id.* at ¶ 11.c.(iii). It is the Receiver's understanding that Newbanks has been paid in full by Voya. The Receiver therefore objects to the Newbanks claim and proposes that it be denied.

d. Claim of Potala Tower Seattle.

In connection with the restructuring transaction involving the Tower Project Entities, a number of parties entered into that certain Master Agreement (as amended, the "Tower Master Agreement"), subsequently approved by the Court, which set forth the terms of the transaction. [Dkt. No. 357-2] With respect to an intercompany receivable in the amount of \$6,381,300.00 owed by Potala Village Kirkland, LLC ("Kirkland") to Potala Tower Seattle, LLC (Tower LLC"), section 4.1(b)(ii) of the Master Agreement states as follows:

...Tower LLC will have an allowed claim for the full intercompany receivable owed to Tower LLC by Kirkland. Within five (5) days of the issuance of the Claims Order (defined below) from the Court, assuming the Kirkland assets have been sold, the net proceeds of such sale shall be paid to Tower LLC on its allowed claim, pro rata with any other intercompany payments made to extinguish Kirkland intercompany debt and other unsecured allowed claims relating to the Kirkland property, if any. ... Any deficiency in the amount paid from those sale proceeds to Tower LLC will be an allowed claim of Tower LLC against the Kirkland-related assets in the receivership estate.

On or about August 14, 2017, the Receiver's sale of the real property owned by Kirkland was completed, and the net proceeds of the sale were \$1,485,277.52 ("Kirkland Proceeds"). If the Court adopts the Receiver's recommendations as to the proposed treatment of claims related to the Kirkland property, Tower LLC's pro rata share of the Kirkland Proceeds will be \$1,057,543.56,

1 which Receiver will pay to Tower LLC within five (5) days of the Court's issuance of its order on
 2 the present motion (i.e. the Claims Order defined in the Tower Master Agreement). Such payment
 3 will leave a deficiency of \$5,323,756.44 in favor of Tower LLC, which will be an allowed claim
 4 against Kirkland-related assets of the receivership estate, per section 4.1(b)(ii) above.⁵

5 4. Claims Related to the Everett Farmers Market Project.

6 Pursuant to the Court-approved restructuring transaction by which ownership of certain
 7 Farmers Market Entities was transferred to EB5 Group, LLC ("EB5G"), EB5G expressly agreed to
 8 assume liability for specific pre-receivership obligations of such entities ("Assumed Obligations").
 9 [See Dkt. No. 527, p. 20, 546.] A number of the listed obligations were paid, and releases
 10 provided by the claimants, as part of the closing of the transaction. The following entities
 11 submitted a claim seeking payment of obligations that are Assumed Obligations: 2812
 12 Architecture (Claim No. 202), Bargreen Ellingson (Claim No. 209), Comfort Systems (Claim
 13 No. 216), Glumac, Gogert & Sons (Claim No. 223), Goldfinch Bros. (Claim No. 225), KPFF
 14 (Claim No. 229), Pacific Coast Electrical Contractors (Claim No. 247), and Voya Insurance and
 15 Annuity Company (Claim Nos. 240a and 240b.) Since these obligations have either been paid and
 16 released, or have been assumed by EB5G, the Receiver objects to these claims and proposes that
 17 each of these claims be denied.

18 5. Claim No. 230. Lobsang Dargey and Tamara Dargey (sometimes the
 19 "Dargeys").

20 Mr. and Mrs. Dargey filed a series of claims both individually and on behalf of the
 21 Receivership Entities identified in the attachment to their proof of claim. Id. at ¶ 11.e. The
 22 Dargeys' proof of claim did not state a dollar amount.

23 The Dargeys' claims as stated in their proof of claim should be denied in their entirety. All
 24 of the Dargeys' interests in and claims against the Receivership Entities have been addressed
 25 through prior Court proceedings including but not limited to the Consent to Final Judgment as to
 26 Lobsang Dargey and Relief Defendant Path Othello, LLC ("Consent") (Dkt. No. 506.) Pursuant to
 27

28 ⁵ The Receiver does not believe that there are any other "Kirkland related assets."

1 this Consent, Mr. Dargey agreed that the Plea Agreement (the "Plea") filed January 4, 2017 was
2 incorporated into the Consent. [Dkt. Nos. 506, 509.] Pursuant to the Consent, Mr. Dargey agreed
3 to relinquish all legal and equitable right, title and interest in the Claimant Entities, except for
4 interests held by Tamara Dargey and Dargey Enterprises in the Everett Public Market. The
5 Dargeys claim and interest in the Everett Public Market was subsequently addressed in a
6 stipulation filed herein.

7 While the Dargeys' claims include a claimed interest by Tamara Dargey in Dargey
8 Holdings, LLC and Potala Shoreline, LLC, the Receiver contends that Ms. Dargey's claim should
9 not be allowed. Ms. Dargey did not personally invest any money into either Dargey Holdings
10 LLC or Potala Shoreline LLC. Id. Under the MIMO approach to claims applied by the Receiver
11 in this case, Ms. Dargey has no claim because she did not invest cash into either entity. For these
12 reasons, the Receiver asks the Court to affirm the Receiver's denial of the Dargeys' claims.

13 6. Claim No. 244 - David Myaskovsky

14 David Myaskovsky filed a proof of claim without stating a specific claim amount. Instead,
15 Mr. Myaskovsky claimed a 10% interest in Potala Village Kirkland, LLC, a Washington limited
16 liability company ("Kirkland") and requested payment equal to 10% "of the net value of the
17 assets" of Kirkland upon the sale of the property. The sole evidence presented in support of the
18 claim was the "Limited Liability Company Agreement of Potala Village Kirkland LLC", dated
19 June 6, 2010 ("Kirkland Agreement"). Receiver Declaration ¶ 11.f., Exhibit B to the Kirkland
20 Agreement shows that Mr. Myaskovsky did not make a cash capital contribution in exchange for
21 this 10% interest in Kirkland. Id. The Kirkland Agreement describes Mr. Myaskovsky's
22 contribution as, "Services, and In-Kind Contributions." Id.

23 The books and records of the Receivership Entities confirm that Mr. Myaskovsky invested
24 no money into Kirkland. Id. Mr. Myaskovsky did not provide evidence supporting any services
25 or "in-kind contributions" nor do the records of the Receivership Entities indicate that such
26 contributions were made. Id. Using the MIMO analysis applicable to all investor claimants,
27 Mr. Myaskovsky's claim should be denied because he did not invest any money in Kirkland.
28

1 It should also be noted that even if Mr. Myaskovsky had a claim, the sale of Kirkland did
2 not generate profits in excess of money owed to secured and unsecured creditors. In fact, no
3 creditor will be receiving full payment on its claim. As such, even if Mr. Myaskovsky were
4 entitled to 10% of the "net value of the assets," which he is not, there are no such funds available
5 because the property sold for less than amounts due to third-party secured and unsecured creditors.
6 Id.

7 Finally, Mr. Myaskovsky's claim should be denied because the Kirkland Agreement
8 presented by Mr. Myaskovsky does not appear to be the operative Limited Liability Agreement for
9 the Kirkland project. There appear to have been at least 3 versions of the limited liability
10 agreement. The latest version, and the one the Receiver believes is operative, is the First
11 Amended and Restated Limited Liability Company Agreement of Potala Village Kirkland, LLC,
12 dated August 19, 2014 ("Amended Kirkland Agreement"). Receiver Declaration ¶ 11.f., See
13 Exhibit C. Mr. Myaskovsky is not a party to or identified as an investor in the Amended Kirkland
14 Agreement.

15 For all the foregoing reasons, Mr. Myaskovsky's claim should be denied.

16 7. Claim No. 212 – Cansine (HK) LLC ("Cansine")

17 Cansine filed a proof of claim seeking reimbursement of \$57,330 for the
18 "application/petition fee" of \$630.00 which Cansine says it paid to USCIS on behalf of 91 of
19 Cansine's "clients." The proof of claim does not provide any supporting documentation aside from
20 a receipt for payment of \$630 for 91 people "c/o Darren Silver and Associates." Id. at ¶ 11.g.

21 The Receiver asks that the Cansine proof of claim for fees be denied because it is, at best, a
22 claim for indemnity or perhaps consequential damages allegedly suffered by Cansine (or perhaps
23 Darren Silver and Associates). Cansine is not asserting that it provided a service to Receivership
24 Entities or that Cansine had a contract with a Receivership Entity that required payment of such
25 fees. It has not even demonstrated that Cansine paid the fees. Id. In either case, the Receiver is
26 not proposing to pay any claims for indemnity or consequential damage claims at this time.
27 Accordingly, the Receiver asks the Court to deny the Cansine proof of claim.

1 8. Claim No. 211 - Beijing Jiajing Consulting Co., Ltd. ("BJC")

2 BJC filed a proof of claim for an unidentified amount based upon an alleged contract
3 entitled "Finder's Fee Agreement" dated December 1, 2014 between Path America KingCo LLC
4 and BJC ("BJC Agreement"). Id. at ¶ 11.h. It appears that BJC believes it is entitled to a payment
5 of \$10,000 per year for 5 years; which payment equals annual interest of 2% of the \$500,000
6 invested in the Tower Entities by each of the 47 investors listed on the spreadsheet attached to the
7 BJC Agreement ("BJC Spreadsheet"). Id. This claim should be denied as entirely spurious as a
8 matter of law and equity. In fact, by the terms of the BJC Agreement, BJC is not entitled to
9 interest and owes each investor the \$45,000 in fees BJC received from each investor.⁶

10 The Receiver's specific objections to the BJC proof of claim are as follows:

11 Mr. Dargey has acknowledged and this Court has found that Mr. Dargey perpetrated a
12 fraud upon the EB-5 Investors in connection with the Tower Project investment offering. The
13 EB-5 Investors were induced by Mr. Dargey and his agents to invest in the Tower Project based
14 upon false promises including the promises that Mr. Dargey would invest capital and the EB-5
15 Investor funds would be solely invested in the Tower Project in accordance with the business plan
16 submitted to USCIS. Per the Plea Agreement, Mr. Dargey has admitted that funds were diverted
17 and no independent capital investment was made by Mr. Dargey into the Tower Project. Id.

18 As a direct result of these actions and others described in the Plea Agreement, the USCIS
19 denied all I-5264 petitions related to the Tower Project. Id. Furthermore, the EB-Investors no
20 longer have a secured interest in the Tower Project pursuant to loan agreements as promised by the
21 original offering, and instead have received a subordinate interest in the Tower Project yielding a
22 more speculative return, which is more or less capped at their principal investment.

23 In the face of this, BJC is seeking \$50,000 in ongoing interest payments from each investor
24 based on finding and placing these EB-5 Investors into the Tower Project. It would be unjust to
25
26

27 ⁶ Receiver Declaration, ¶ 11.h. Exhibit E, BJC Agreement, ¶ 4. "Party B [BJC] shall return the
28 referral fee to the accredited investor within 10 business days if the applicant failed at the
I-526 application." All I-526 applications for the Tower Project EB-5 Investors were denied.

1 enrich BJC by allowing BJC claim finder's fee for referring victims of the fraud to the Tower
2 Project.

3 BJC is not entitled under the BJC Agreement to any interest payments and is obligated to
4 repay the \$45,000 it received from each investor. Sections 1 and 2 of the Additional Statement for
5 Path America EB-5 Program Agreement, which is attached to the BJC Agreement provides that
6 the 2% interest on "EB-5 capital" is to be paid based upon the USCIS' approval of the I-526
7 petition. On November 2, 2016, the USCIS sent a letter to the Receiver setting forth the decision
8 of the USCIS regarding the Receiver's appeal of the USCIS' termination of the Tower Project
9 regional center, Path America King Co., LLC. In that letter the USCIS stated that all of the EB 5
10 Investor's I-526 Petitions in connection with the Tower Project were "denied."

11 Since all of the I-526 Petitions have been denied by USCIS, there is no contract basis for
12 the payment of interest under the terms of the BJC Agreement. In addition to the foregoing, there
13 is no evidence presented by BJC and there are no records from Receivership Entities
14 demonstrating that BJC found and referred the EB-5 Investors listed on the BJC Spreadsheet to the
15 Tower Project.

16 In light of the foregoing, the Receiver requests the Court deny the BJC claim in its entirety.

17 9. Claim No. 221 – Eswar Eluri.

18 Eswar Eluri filed a claim asserting a 15% ownership interest in Path America LLC. The
19 Receiver has evaluated Mr. Eluri's claim based on the MIMO analysis used for all other investor
20 claims in this case.

21 According to the records of the Receivership Entities and documents obtained from
22 Mr. Eluri, the Receiver believes that Mr. Eluri invested approximately \$260,000 into the
23 receivership entities. Mr. Eluri received \$100,000 from the Receivership Entities. Id. at ¶ 11.i.

24 Based upon the foregoing, the Receiver proposes to allow Mr. Eluri's claim in the amount
25 of \$160,000.

1 10. Claim No. 208 – Bacchus Holdings, Inc.

2 Bacchus Holdings, Inc. ("Bacchus") filed a claim for \$10,000 based upon an alleged
3 consulting agreement between Bacchus and "Dargey Development." Id. at ¶ 11.j. Bacchus asserts
4 that they provided consulting services "well into November 2015" and had "submitted October
5 invoice end of September 15, 2015."

6 The Receiver objects to this claim and requests that the Court deny the Bacchus' proof of
7 claim in its entirety. There is no evidence of any consulting services being provided to or value
8 received by the period described in the proof of claim. Id. Bacchus provided no evidence
9 whatsoever of the services provided to the Receivership Entities. Moreover, the period at issue
10 appears after the Securities and Exchange Commission had filed its complaint, an injunction had
11 been entered and the Receiver appointed. It is also unclear who Bacchus provided consulting
12 services to since the Receiver did not request services. Absent any evidence of valuable services
13 being provided to the Receivership Entities prior to the filing of the SEC's lawsuit the Receiver
14 believes it is appropriate to deny the claim.

15 11. Claim No. 217 – United States Treasury/Internal Revenue Service.

16 The IRS filed a Proof of Claim dated November 22, 2016 for the unpaid taxes, interest and
17 penalties of Dargey for the tax year 2014. Id. at ¶ 11.k. The amount of the claim as of
18 November 30, 2016 is \$568,325.77. The IRS claim refers to the federal priority statute and states
19 as follows: "The IRS claim with respect to Mr. Dargey's 2014 tax liability attaches to all of
20 Mr. Dargey's property and rights to property, including, but not limited to, his personal interest in
21 the Receivership Estate, his personal assets that are part of the Receivership Estate, and any funds
22 or accounts of the Receivership Estate that constitute proceeds from the sale of Mr. Dargey's
23 personal assets."

24 In addition, the IRS has filed two tax liens against Dargey and his wife as follows:

25 2014: \$519,197 (filed 4/5/16)

26 2015: 2,577,994 (filed 1/4/17). Id.

1 The Receiver and IRS have been working together in order to address the IRS' lien claims.
2 The IRS claims are based upon Mr. and Mrs. Dargey's personal tax obligations rather than those of
3 the Receivership Entities. As such, the Receiver and IRS have agreed that the IRS shall have a
4 secured claim against the proceeds held by the Receiver in the amount of \$31,898.00. Id.
5 Accordingly, the Receiver will make a payment to the IRS of \$31,898.00 in full satisfaction of the
6 IRS' claims against the Receivership Entities.

7 12. Claim No. 238 – Thomas Baker.

8 Thomas Baker filed a claim for \$226,700.85 based upon an alleged Separation Agreement
9 and General Release between Mr. Baker, on the one hand, and Dargey Development LLC and
10 Path America LLC, on the other hand. Receiver Declaration ¶ 11.1. Mr. Baker was the Chief
11 Financial Officer for Path America LLC for the period October 7, 2013 until July 31, 2015. Id.
12 Mr. Baker's claim consists of a claim for \$200,000, representing the balance he claims is due
13 under the Separation Agreement, and \$26,700.85 for legal fees incurred by Mr. Baker for an
14 attorney to represent him in connection with Mr. Baker's dealings with the Federal Bureau of
15 Investigation ("FBI") and the United States Attorney's office. Id. As detailed below, the Receiver
16 requests that Mr. Baker's claim be denied in its entirety.

17 Mr. Baker's claim is not a claim for wages. Mr. Baker was paid the full amount of his
18 salary through the date of his separation, plus \$250,000 under the Separation Agreement. Id.
19 Mr. Baker now seeks payment of \$200,000 as damages for breach of the Separation Agreement.

20 Mr. Baker's claim is simply a claim for consequential damages. As with other such claims
21 for consequential damages, the Receiver requests the Court deny the claim. Id.

22 It appears that the primary consideration for this Separation Agreement was a
23 confidentiality, nondisclosure and non-solicitation agreement. Per the agreement, Mr. Baker was
24 receiving payment for 167 weeks of future work that he was not performing. The Receiver also
25 objects to this contract claim because it was an insider transaction which provided no benefit
26 whatsoever to the Receivership Entities. Id. Certainly the Receivership Entities and the EB-5
27
28

1 Investors received no benefit from Mr. Baker agreeing to remain silent. To the contrary,
2 Mr. Baker's agreement inured solely to Mr. Dargey's personal benefit.

3 Accordingly, the Receiver requests the Court deny Mr. Baker's claim for \$200,000.

4 The Receiver further requests the Court to deny Mr. Baker's claim for \$26,700.85 in
5 attorney's fees which Mr. Baker claims he incurred to defend himself when he was contacted by
6 the AUSA and the FBI. Id. The Receiver has denied all attorney's fees claims by all parties
7 associated with the Receivership Entities. Here, Mr. Baker is asking to be paid attorney's fees for
8 his personal legal defense. This is not an appropriate claim against the Receivership Entities.

9 Based upon the foregoing, the Receiver respectfully requests the Court to deny Mr. Baker's
10 claims in their entirety.

11 **V. CONCLUSION.**

12 For the foregoing reasons, the Receiver respectfully requests that this Court enter an order
13 approving the Receiver's recommended treatment of claims against the Receivership Entities, as
14 detailed herein and pursuant to the Exhibit A and Exhibit B to the Receiver Declaration.

15
16 Dated: November 9, 2017

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

17
18 By: /s/ David R. Zaro

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

Dated: November 9, 2017

s/ David R. Zaro
David R. Zaro, Esq. #124334 (CA)
(Pro Hac Vice Granted October 26, 2015)