

HONORABLE JAMES L. ROBERT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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; and POTALA
VILLAGE KIRKLAND, LLC,

Relief Defendants.

Civil Action No. C-15-1350-JLR

SECURITIES AND EXCHANGE
COMMISSION'S MOTION FOR
THE APPOINTMENT OF A
RECEIVER

NOTED ON MOTION CALENDAR:
October 9, 2015

1 The Securities and Exchange Commission hereby moves for an order appointing a
2 Receiver over the entity Defendants Path America, LLC; Path America SnoCo LLC; Path
3 America Farmer’s Market, LP; Path America KingCo LLC; Path America Tower, LP; Path
4 Tower Seattle, LP; and Potala Tower Seattle, LLC to ensure that their remaining assets are not
5 dissipated or unnecessarily subject to loss in value during the pendency of this litigation. In
6 addition, the Commission also requests that the appointed Receiver have the same powers to
7 maintain control of the assets of Relief Defendants Potala Shoreline, LLC and Potala Village
8 Kirkland, LLC.

9 The Commission’s motion is brought pursuant to Section 20(b) of the Securities Act
10 of 1933, 15 U.S.C. § 77t(b), and Section 21(d) of the Securities Exchange Act of 1934, 15
11 U.S.C. § 78u(d), and pursuant to this Court’s inherent equitable authority, which empowers
12 the Court to make ancillary orders to effect complete equitable relief in an SEC enforcement
13 matter. The motion is also made in conformity with Federal Rule of Civil Procedure 66 and
14 Local Civil Rule 66. The Commission’s motion is supported by the attached brief, the
15 Declaration of Michael D. Foley and the exhibits thereto; the Declaration of Bernard B.
16 Smyth and the exhibits thereto; the Declaration of Susan F. LaMarca and the attachment
17 thereto; and the accompanying [Proposed] Order Appointing a Receiver.

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I. INTRODUCTION

1 On August 24, 2015, the Securities and Exchange Commission (“SEC” or
2 “Commission”) brought this action and sought and obtained a temporary restraining order to halt
3 the fraud by Defendants Lobsang Dargey, Path America, LLC (“Path America”), and the other
4 entity Defendants they control. Since that time, the Commission has learned that the
5 mismanagement of the entity Defendants is even more widespread, encompassing not only the
6 allegations of misappropriation and misrepresentations identified in the complaint, but further
7 and extensive misuse of investor funds and mishandling of the companies’ assets. The
8 appointment of a receiver is necessary to unwind the inappropriate transactions and appropriately
9 address the damage done by Defendants.
10

11 As demonstrated in the SEC’s moving papers in support of the temporary restraining
12 order and preliminary injunction, Defendants defrauded Chinese nationals into purchasing
13 securities in the form of limited partnership interests, claiming that their money would be used
14 for the development of a specific real estate project. Defendants further claimed that these
15 unique investment/development opportunities would generate new American jobs and would
16 provide the investors with the opportunity to obtain United States residency through the “EB-5
17 Program,” administered by the United States Customs and Immigration Services (“USCIS”).
18 From February 2012 through July 30, 2015, Defendants raised a total of approximately \$125
19 million from more than 250 individuals in this manner. Defendants represented to investors and
20 USCIS that they would use the money for two distinct real estate projects in the Seattle area: the
21 Farmers Market Project and the Tower Project. However, Defendants failed to use the funds as
22 promised, and instead, Defendant Dargey – using other entity Defendants – has siphoned off
23 more than approximately \$17.6 million for personal uses, and for other, unrelated projects held in
24 the names of Relief Defendants. Defendants’ misappropriation has imposed serious risks to the
25 viability and profitability of the projects, and it has also jeopardized the investors’ opportunity
26 for obtaining United States residency.

27 The new information that has come to light since the Court issued the TRO makes it
28 imperative that a receiver now be appointed over the Defendant entities and the assets of Relief

1 Defendants to ensure that investor funds are not further dissipated. Notably, Defendants' fraud
2 has been enabled and exacerbated by mismanagement, and there appears to be no one associated
3 with the entity Defendants who can assure that assets are used in the best interests of investors.
4 For instance, documents from Defendants' businesses reveal that from the outset of the projects,
5 significant amounts of investor funds have been used for purposes that were neither disclosed to
6 investors, nor consistent with the mandates of the EB-5 Program, including payments to overseas
7 persons as commissions for finding the investors and substantial payments classified as
8 "developer fees" despite disclosures to investors that none of their money would be used for such
9 fees.

10 The internal bookkeeping records of Path America that the SEC has received to date
11 further demonstrate the company's mismanagement and misuse of investor funds. For example,
12 the records include entries listing as purported company assets approximately \$15.8 million
13 loaned to Lobsang Dargey and payments for attorney fees, commissions, and other "syndication
14 costs" totaling more than \$7.5 million. Internal bookkeeping records for Path America Farmers
15 Market show as "developer fees" personal credit card purchases made by Lobsang Dargey at
16 places such as Bloomingdales, Neiman Marcus, Nordstrom, and Whole Foods. In addition,
17 apparently unable to prepare an accounting in-house and in order to comply with the Court-
18 ordered requirement that an accounting be performed, Defendants have had to hire an outside
19 party.

20 Accordingly, the SEC requests the appointment of a receiver to preserve the assets
21 against further misappropriation and dissipation, handle the financial affairs of the entities, and
22 determine the appropriate course of action for the projects for which investor funds were raised,
23 including whether proceeding with such projects is viable and in the best interests of investors.

24 **II. FACTUAL BACKGROUND NECESSITATING RECEIVERSHIP**

25 **A. Defendant Dargey Misused His Control of the Entities to Misappropriate Funds**

26 As set forth in the Commission's motion and supporting materials seeking first a TRO,
27 and then a preliminary injunction, Defendant Dargey controls each of the entity Defendants
28 and both of the Relief Defendants. Smyth Decl. (Dkt No. 5), Exs. 35, 36, 37, 42, 43 and 44.

1 Dargey also wholly owns and controls Dargey Development, LLC, an entity that is not a
2 defendant. *Id.*, Ex. 44.

3 The entity Defendants' corporate structure is highly intertwined. Defendant Path
4 America is the parent and managing member of Defendants Path America KingCo LLC and
5 Path America SnoCo LLC, which are both Washington limited liability companies with their
6 principal place of business in Everett, Washington. *Id.*, Exs. 36 and 37. Both Path America
7 SnoCo and Path America KingCo obtained designation as a "Regional Center" from the
8 USCIS, which allows each of them to "sponsor" specific EB-5 Program investments. *See*
9 Buchholz Decl. (Dkt No. 4), Exs. 19 and 20. Path America SnoCo is thus the sponsor of the
10 Path America Farmer's Market offering, which is a mixed-use development located at 2900
11 Grand Avenue, Everett, Washington. Smyth Decl. (Dkt. No. 5), Ex. 28 (Sect. 2.2). Path
12 America KingCo is, in turn, the sponsor of the two other securities offerings, issued by
13 Defendants Path America Tower, LP and Path Tower Seattle, LP, both of which are described
14 as offered for the purpose of developing the 40-story Potala Tower, to contain residences and
15 a hotel, to be located at 2116 4th Avenue, Seattle, Washington. *See id.*, Exs. 21, 23 and 25
16 (Sections 2.3 and 3.1).

17 For each entity, Dargey acts as the signatory for important agreements and on their
18 bank accounts. Foley Decl. (Dkt. No. 3), Exs. 5, 7, 9, 12, and 15. And, as also set forth in the
19 Commission's previously-filed papers, Dargey has abused his control of the entity Defendants
20 over the past two years by misappropriating approximately \$17.6 million of investor funds.
21 Motion for Temporary Restraining Order (Dkt. No. 2) at pp. 4-8.

22 **B. Defendants' Misuse and Mismanagement of Funds Began at Projects' Inception**

23 Since the Commission's original moving papers were filed, additional facts have
24 surfaced that further demonstrate the need for a receiver to unravel the Defendants'
25 expenditures and misuses of investor funds. At approximately the time this case was filed,
26 federal criminal authorities executed a search warrant upon Path America's offices, and the
27 SEC has obtained copies of certain documents that were seized from the business.

28 Declaration of Bernard B. Smyth filed herewith ("Second Smyth Decl.") ¶ 3.

1 According to documents obtained from Path America's offices, Defendants Dargey,
2 Path America, Path America Farmers Market, and Potala Tower Seattle have been improperly
3 using investor funds that had been deposited into U.S. bank accounts for the purpose of
4 building the respective projects to pay "commissions" to persons in China who apparently
5 solicited the Chinese investors. These payments are entirely contrary to the representations
6 Defendants made to lure persons to invest, and to obtain approval for the projects from
7 USCIS through the Regional Centers. Thus, the private placement memoranda for the Tower
8 Project (Smyth Decl. (Dkt. No. 5), Ex. 21 at p. 14 and Ex. 23 at p. 14) state:

9 None of the \$500,000 Capital Contributions of Limited Partners will be used for
10 anything except to fund the Loan to finance the project. The proceeds of the Loan
11 will be used to finance the construction, marketing and operations, financing,
12 improvements, and sale of the Project: specifically, no part of such capital
contributions of Limited Partners shall be used for any type of organizational
expenses of the General Partner or Regional Center, developer fees, or investor sales
commissions.

13 Yet, despite this explicit prohibition, Dargey repeatedly ordered the payment of
14 "commissions" to persons in China from investors' \$500,000 capital contributions. *See*
15 *Second Smyth Decl., Ex. 5* (documenting three separate transfers of \$90,000, \$225,000 and
16 \$200,000 to account in Hong Kong for "commissions" Potala Tower investors). These
17 amounts were in addition to the separate administrative fees that investors paid directly into
18 an account in Hong Kong.

19 Not only did the private placement memoranda supplied to the Tower Project
20 investors prohibit the use of any investor funds to pay "investor sales commission," they also
21 prohibited the use of investor funds for "developer fees." *Smyth Decl. (Dkt. No. 5), Ex. 21 at*
22 *p. 14 and Ex. 23 at p. 14* ("specifically, ***no part of such capital contributions*** of Limited
23 ***Partners shall be used for any type of*** organizational expenses of the General Partner or
24 ***Regional Center, developer fees, or investor sales commissions.***") (emphasis supplied).
25 Nevertheless, between May 2014 and June 2015, more than \$5.1 million was transferred from
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1 the operating account for the Tower Project to Dargey Development. Declaration of Michael
2 D. Foley filed herewith (“Second Foley Decl.”) ¶¶ 3-4 and Ex. 1.¹

3 Internal records for the Farmers Market Project further raise questions regarding
4 Defendants’ accounting for certain expenditures as so-called “developer fees.” Printouts of
5 QuickBooks reports for the Farmers Market Project describe expenditures totaling \$2,386,703
6 as “developer fees.” Second Smyth Decl., Ex. 3. But the transactions included in this
7 category range from credit card purchases attributed to Lobsang Dargey at specialty stores,
8 department stores, and grocery stores; to large checks made out to Dargey Development
9 Dargey Enterprises, and Lobsang T. Dargey. *Id.* (e.g., \$14,000 credit card charge on Jan. 22,
10 2013, for purchase at Tourneau; several labeled “Lobsang personal” for Bloomingdales,
11 Neiman Marcus, Nordstrom, and Whole Foods purchases).

12 A QuickBooks printout of the June 26, 2015 balance sheet for Defendant Path
13 America Tower, LP (an entity funded solely by EB-5 investors) highlights the scope of
14 Defendants’ mismanagement and misuse of investor funds. Included in the company’s assets
15 is an approximately \$15.8 million “loan” to Lobsang Dargey. Second Smyth Decl., Ex. 2.
16 Also included as assets are “syndication costs” totaling more than \$7.5 million. Incredibly,
17 these “assets” include the payment of attorney fees, commissions, gifts/entertainment, meals,
18 and travel. *Id.*

19 Defendants knew, or should have known, that these significant and material departures
20 from what was disclosed to investors (and included in investor EB-5 petitions filed with
21

22 ¹ Defendants may argue that, despite the clear disclosure in the PPM that no investor funds
23 would be used to pay developer fees, it was disclosed in the business plan for the Tower
24 Project that developer fees would be paid. However, the PPM states that “[i]f conflicts arise
25 between information presented in the Company’s business plan and the Memorandum, the
26 information in this Memorandum will prevail.” Smyth Decl. (Dkt. No. 5), Ex. 21 at p. 5.
27 Moreover, even under the business plan, the total amount of developer fees to be paid during
28 the life of the project is approximately \$6.8 million (to be paid in monthly installments of
\$262,450). Second Smyth Decl., Ex. 7. Yet Dargey Development has already received \$5.1
million for a project that is still in the excavation stage, including \$4.4 million received prior
to April 2015 when the excavation work apparently began. Second Foley Decl., ¶¶ 3-4 and
Ex. 1; Second Smyth Decl., Ex. 8.

1 USCIS) regarding the use of investor funds also put in jeopardy the investors' EB-5 petitions.
2 In fact, among the documents seized from Path America's offices was a USCIS policy
3 memorandum that makes clear that pending EB-5 petitions would be rejected if the facts
4 included in the petition differed materially from what was actually done with investor funds,
5 and that any changes or deviations could not be cured by revisions to the petition, but rather
6 require that an entirely new EB-5 petition be filed.² Second Smyth Decl., Ex. 4 at pp. 24-25
7 (“[a] deficient Form I-526 petition may not be cured by subsequent changes to the business
8 plan or factual changes made to address any other deficiency that materially alter the factual
9 basis on which the petition was filed.”).

10 Moreover, the economic analysis prepared for the Tower Project and submitted with
11 investors' EB-5 petitions makes clear that, without EB-5 investor money, the project is not
12 economically viable. Indeed, the report states that “[a]s the capital raised from the immigrant
13 investors is a critical enabling factor for this project to proceed in the current business climate,
14 the new economic and job creation impacts such as that predicted by this study will not occur
15 without the capital raised from immigrant investors.” Second Smyth Decl., Ex. 6 at p.1 fn. 2.
16 The Tower Project's viability thus appears to depend on EB-5 money that, as alleged in the
17 Commission's complaint and as demonstrated in the motion for preliminary injunction, was
18 fraudulently obtained.

19 Finally, the Commission has also learned that, apparently because current company
20 employees are unable to complete the Court-ordered accounting, Defendants have retained an
21 outside party to prepare the accounting. *See* Fourth Stipulation Modifying Temporary
22 Restraining Order (Dkt. No. 25), at pp. 2-3 (“WHEREAS, ... Path America LLC lacks
23 employees or regular outside accountants with the capability to perform the accounting ...
24 Path America LLC has retained Navigant Consulting to assist the staff of affiliates to perform
25 such accounting....”).

26
27 ² All of the I-526 petitions (for temporary visas) submitted by investors in the Tower Project
28 are currently pending. None have yet been approved. Second Smyth Decl., ¶ 2.

1 **III. ARGUMENT**

2 **A. The Court Has Broad Discretion to Appoint a Receiver**

3 The Court has broad discretion to appoint an equity receiver in Commission
4 enforcement actions. *See SEC v. Wencke*, 622 F.2d 1363, 1365 (9th Cir. 1980) (“*Wencke I*”).
5 The breadth of this discretion “arises out of the fact that most receiverships involve multiple
6 parties and complex transactions.” *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th
7 Cir. 2005) (quoting *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986)). A receiver plays a
8 crucial role in preventing further dissipation and misappropriation of investors’ assets. *SEC v.*
9 *Wencke*, 783 F.2d 829, 836-37 n.9 (9th Cir. 1986) (“*Wencke II*”). As the Ninth Circuit
10 described in *Wencke I*, a receiver can be the means to achieve the “ultimate goals of SEC
11 intervention,” which are “protection of innocent shareholders and enhancement of investor
12 confidence in the securities markets.” 622 F.2d at 1372. A receiver may also be the means of
13 satisfying subsidiary policies of the securities laws, as was the case in *Wencke I*:

14 Appointment of the receiver in this case furthered several subsidiary policies of the
15 securities laws. The assets of the corporate entities were marshalled and preserved
16 against further misappropriation and dissipation; the financial affairs of the entities
17 needed to be clarified for the benefit of innocent shareholders; the receiver and his
18 staff could conduct independent investigation of claims the entities might have against
19 former management or other parties, prosecution of which would benefit investors and
20 deter future violations; and defenses against possibly fraudulent or collusive actions
21 brought against the entities could be discovered and asserted. As we held in *Wencke I*,
22 these are legitimate justifications for the district court’s imposition of a receivership.

19 *Id.*

20 Critical to the determination of federal courts in weighing the need for a receiver are
21 facts putting at issue the integrity of management, and thus the likelihood of future misuse of
22 assets. As the Fifth Circuit has observed:

23 The district court’s exercise of its equity power in this respect is particularly necessary
24 in instances in which the corporate defendant, through its management, has defrauded
25 members of the investing public; in such cases, it is likely that, in the absence of the
26 appointment of a receiver to maintain the status quo, the corporate assets will be
27 subject to diversion and waste to the detriment of those who were induced to invest in
28 the corporate scheme and for whose benefit, in some measure, the SEC injunctive
action was brought.

1 *SEC v. First Financial Group of Texas*, 645 F.2d 429, 438 (5th Cir. 1981). *See also SEC v.*
 2 *Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968), *aff'd* 435 F.2d 510 (2d Cir.
 3 1970); *SEC v. Credit First Fund*, 2006 WL 4729240, at *15 (C.D. Cal. Feb. 13, 2006).³

4 **B. Appointment of a Receiver Is Necessary to**
 5 **End the Dissipation and Waste**

6 As described above, Defendant Dargey sits atop and controls each of the entity
 7 Defendants, and he has used this control to siphon off more than \$17 million in investor funds
 8 for his own purposes. A receiver is necessary because it is imperative that a person other than
 9 Dargey make an informed decision about the projects that were begun with investor money
 10 and whether they can and should be completed as originally described. Given the inability of
 11 Path America to find anyone in-house who could conduct the Court-ordered accounting, in
 12 addition to the significant irregularities included in the Defendants' own accounting records,
 13 the evidence strongly suggests that there is not another person currently working for the entity
 14 Defendants ready to run their affairs in a manner that serves the best interests of the investors.
 15 This is thus a case where it is "particularly necessary" to appoint a receiver, since otherwise
 16 only Dargey will be left to make decisions about their assets and business. *See SEC v. First*
 17 *Financial Group of Texas*, 645 F.2d at 438.

18 A receiver is also necessary in this case to understand the multiple parties and their
 19 transactions using investor funds among themselves. *See SEC v. Manor Nursing Centers,*
 20 *Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972) (receiver was necessary to help preserve the status
 21 quo while unraveling various transactions to obtain an accurate picture of what transpired).
 22 As the First Foley Declaration (Dkt No. 3) describes, simply to use investor funds to pay for a
 23 new home, Dargey briefly parked more than a million dollars in the account of Dargey
 24 Development. *Id.*, ¶¶ 9-10 and Ex. 8. Similarly, as Dargey diverted investor funds for his own
 25 purposes, such as purchasing property for the unrelated projects that the Relief Defendants

26 _____
 27 ³ Because posting of a bond by the receiver would only serve to deplete further the
 28 resources available to investors, the Commission requests that the Court not require the
 receiver to post a bond. *See SEC v. Universal Fin.*, 760 F.2d 1034, 1039 (9th Cir. 1985).

1 hope to develop, internally such money movements were characterized as “loans.” Second
2 Smyth Decl., Ex. 2 (handwritten note on balance sheet classifying \$15.8 million owed from
3 Lobsang Dargey as “loan”). As described above, more recent documentation has called into
4 question many more transactions, including millions of dollars sent overseas to pay persons
5 “commissions” for finding investors, although investor funds were to be put to use
6 exclusively in the United States. Other bookkeeping entries suggest that Dargey may have
7 misappropriated or misused millions of dollars in addition to the amounts described in the
8 SEC’s initial moving papers. All of these transactions need to be closely examined.

9 A receiver is necessary to run the day-to-day operations of the two projects. As the
10 Court is aware, the parties have entered into several stipulations since the TRO was entered to
11 permit for payments to persons who are legitimate creditors, and to allow for payroll. *See*,
12 *e.g.*, Dkt Nos. 15, 19, 23 and 25. But a person independent of Dargey’s organization is
13 needed to determine whether it is feasible, and in the best interests of the investors, to proceed
14 with projects as originally conceived and described to investors, or alternatively, whether they
15 would be better off with a return of their remaining assets so that they can reinvest them in an
16 honest enterprise that may give them the opportunity to achieve their investment and
17 residency goals.

18 An independent determination as to the viability of the projects given Defendants’
19 substantial diversions of EB-5 investors’ funds for other purposes is particularly important
20 here because Defendants’ actions have seriously jeopardized investors’ EB-5 petitions. As
21 discussed above, because investor funds were used for purposes materially different from
22 what was disclosed to investors (*i.e.*, the purchase of Dargey’s personal residence, the
23 payment of commissions to finders in China, and transfers to unrelated real estate projects),
24 the EB-5 petitions that are currently pending may well be denied, and the investors whose
25 temporary visa have already been approved may not be able to demonstrate the job creation
26 needed to ultimately receive their permanent residency. Second Smyth Decl., Ex. 4 at pp. 24-
27 25. The economic policy and job creation analyses on which the projects were based need to
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1 be reassessed given Defendants' misuse of funds to determine whether new analyses can be
2 obtained that would potentially support new USCIS petitions by investors.

3 Accordingly, an independent and thoughtful analysis of both projects, and the value of
4 the investors' remaining assets, is crucial. Included as a part of the Commission's Proposed
5 Order Appoint a Receiver is the Commission's recommendation that the Court appoint a
6 highly qualified, and experienced person as the receiver, Michael A. Grassmueck of the
7 Grassmueck Group. Mr. Grassmueck has significant experience as a receiver, and as a
8 trustee, including for entities that managed and owned significant real estate assets. The
9 Grassmueck Group is located in the Pacific Northwest, and has experience both in SEC cases
10 and in cases in the Western District of Washington. A representative sample of cases is
11 appended to the Declaration of Susan F. LaMarca filed in support of this motion.

12 **IV. CONCLUSION**

13 For the reasons set forth above, the Commission respectfully requests the Court grant
14 the Commission's Motion to Appoint a Receiver over Defendants Path America, Path
15 America SnoCo, Path America Farmer's Market, Path America KingCo, Path America
16 Tower, Path Tower Seattle, Potala Tower Seattle, and Relief Defendants Potala Shoreline and
17 Potala Village Kirkland.

18
19 Dated: September 22, 2015

Respectfully submitted,

20
21 /s/ Susan F. LaMarca
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