

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

RECEIVER MICHAEL A. GRASSMUECK'S
MOTION FOR FINAL APPROVAL OF
DISPOSITION OF POTALA TOWER
RELATED ASSETS

NOTE ON MOTION CALENDAR: July 8, 2016

1 **TO ALL PARTIES, THEIR COUNSEL OF RECORD, AND THIS HONORABLE**
2 **COURT:**

3 In accordance with this Court's May 20, 2016 Order, Michael A. Grassmueck (the
4 "Receiver"), the Court-appointed receiver for Path America, LLC; Path America SnoCo, LLC;
5 Path America Farmer's Market, LP; Path America KingCo, LLC; Path America Tower, LP; Path
6 Tower Seattle, LP; Potala Tower Seattle, LLC ("Tower LLC"); Potala Shoreline, LLC; and Potala
7 Village Kirkland, LLC (collectively, the "Receivership Entities" or "Entities"), hereby moves this
8 Court for final approval of the terms of a proposed restructuring transaction for the commercial
9 development project ("Tower Project") located at 2116 Fourth Avenue, Seattle, Washington
10 ("Land") submitted by Binjiang Tower Corp. ("Binjiang"), PH Seattle Tower I, LLC ("Molasky"),
11 and Lobsang Dargey and certain affiliated companies.

12 **I. INTRODUCTION AND RELEVANT BACKGROUND**

13 **A. The Receiver's Appointment.**

14 The Receiver was appointed pursuant to the Order Appointing Receiver entered on
15 October 22, 2015 ("Appointment Order"), as permanent receiver for each of the Receivership
16 Entities, including Tower LLC. (Dkt. No. 88.) Pursuant to the terms of the Appointment Order,
17 the Court took "exclusive jurisdiction and possession of the assets, of whatever kind and wherever
18 situated," of the Receivership Entities, which assets include the Tower Project and related interests
19 (collectively, the "Tower Project Assets"). (*Id.* at ¶ 2.) The Appointment Order further authorized
20 the Receiver to take immediate possession of all real and personal property of the Receivership
21 Entities, wherever located, and to engage brokers to sell or dispose of these assets, "in the manner
22 the Receiver deems most beneficial to the Receivership Estate" without further order from the
23 Court, subject to procedures that the Court may establish to administer any planned disposition.
24 (*Id.* at ¶¶ 16-17, 33-35.)

1 **B. The Tower Project And The Receiver's Recommendation For Final Approval**
2 **Of Restructuring Transaction.**

3 The Tower Project is a planned commercial development in downtown Seattle intended to
4 be a mixed-use facility comprised of residential apartment units, a hotel, and other retail facilities.
5 (Declaration of Michael A. Grassmueck ("Grassmueck Decl.") ¶ 3.) The land for the Tower
6 Project development was acquired in 2013 by Tower LLC, whose members are Dargey Holdings,
7 LLC ("Dargey Holdings") and Binjiang. (*Id.*)

8 Based on his review of the financial condition of the Tower Project, the Receiver
9 determined, in his reasonable business judgment, that completion of the development would not
10 feasible absent a source of alternative funding, and that it would not be cost effective or
11 appropriate for him to attempt to raise equity in the market to complete the development. (Dkt.
12 No. 183.) Thus, on February 4, 2016, the Receiver filed a motion recommending that the Tower
13 Project Assets be sold out of receivership, and sought authorization from the Court to begin the
14 process for marketing the Tower Project for sale. (*Id.*) Following the submission of substantial
15 further briefing by interested parties and the Receiver regarding the Receiver's recommendation,
16 and after having conducted a hearing on April 18, 2016, the Court entered an order on April 20,
17 2016 granting the Receiver's request to market the Tower Project Assets for sale, and directing the
18 Receiver to solicit proposals from prospective purchasers for both an "AS-IS, WHERE-IS" sale of
19 the Land, and proposals that contemplate a restructuring of the Tower Project where the project
20 would be completed in a manner consistent with EB-5 investors' goals. (Dkt. No. 282.)

21 After having solicited and evaluated a number of proposals, on May 13, 2016, the Receiver
22 filed a memorandum providing the Court with his recommendations for the: (1) best offer
23 proposal for sale of the Land only; (2) the best proposal for restructuring of the Tower Project; and
24 (3) the best overall proposal. (Dkt. No. 303.) As described in the Receiver's memorandum, the
25 Receiver recommended the proposal submitted by Binjiang and PH, LLC (a Molasky affiliate) to
26 acquire the Tower Project Assets for continued development of the Tower Project
27 ("Binjiang/Molasky Proposal") as the best overall proposal. (*Id.*)

1 Following further briefing by interested parties and the Receiver, and after conducting a
2 hearing on the matter on May 19, 2016, the Court entered an Order on May 20, 2016
3 ("Preliminary Approval Order") approving the Receiver's recommendation to select the
4 Binjiang/Molasky Proposal. (Dkt. No. 336.) The Preliminary Approval Order further established
5 relevant deadlines for final approval and closing of the transaction contemplated by the
6 Binjiang/Molasky Proposal (the "Restructuring Transaction"), including a June 23, 2016 deadline
7 for the Receiver to submit this Motion for the Court to consider and approve the final terms of the
8 Restructuring Transaction, including: (i) the fully executed deal documents memorializing the
9 agreement between the parties, (ii) a form of proposed notice to EB-5 investors of the
10 Restructuring Transaction and their choice to opt-in or opt-out of the transaction ("Notice to
11 Investors"), and (iii) the method(s) by which the Notice to Investors will be delivered. (*Id.*)
12 Should this Motion be granted, the Preliminary Approval Order also requires the Notice to
13 Investors to be sent by no later than July 25, 2016 and investor responses to be returned to the
14 Receiver by no later than August 24, 2016, with the Restructuring Transaction to close on or
15 before August 31, 2016. (*Id.*)

16 **C. Proposed Notice To Investors.**

17 In connection with the Restructuring Transaction and pursuant to the terms of the
18 Preliminary Approval Order, the Receiver has prepared a Notice to Investors detailing the terms of
19 the contemplated Restructuring Transaction and setting forth the terms of the investor opt-in/opt-
20 out process, a true and correct copy of which is appended as Exhibit A to the Receiver's
21 declaration filed concurrently herewith. (Grassmueck Decl. ¶¶ 4-5, Exhibit A.) The Notice to
22 Investors explains in detail the process by which investors may elect to either opt-in or opt-out of
23 the restructuring. (*Id.*) As specified therein, and in accordance with the final terms of the
24 Restructuring Transaction, investors who opt-in to the restructuring will consent to the
25 restructuring as an accord and satisfaction of all prior claims, and will further release any and all
26 claims as a result of the proposed transaction and any claims relating to any potential denials of
27 their EB-5 petitions. (*Id.*) Investors who opt-out of the restructuring will receive an opt-out
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1 payment of \$250,000, due within five days after closing, and an allowed claim against the
2 receivership estate for the remaining amount of their investment. (*Id.*) In exchange for payment,
3 opting-out investors will provide releases of claims as specified in an exhibit to the Notice to
4 Investors. (*Id.*) Any investors who do not affirmatively respond to the Notice to Investors will be
5 deemed to have opted-in to the transaction. (*Id.*)

6 The Receiver proposes that the Notice to Investors be sent to investors by mail and
7 electronic mail based on investor addresses in available investor records. (*Id.* at ¶ 6.) The
8 Receiver will also send the Notice to Investors to all counsel who have identified themselves to
9 the Receiver as representing one or more investors in the Tower Project, and will further post an
10 electronic copy of the Notice to Investors on the Receiver's Path America receivership website at
11 <http://grassmueckgroup.com/pathamerica.php>. (*Id.*) The Receiver will further publish a notice
12 regarding the Notice to Investors and the response process in a newspaper regularly issued and of
13 general circulation in Seattle, Washington at least two times between July 20, 2016 and August
14 20, 2016. (*Id.*) In order to further assist investors in responding to the Notice to Investors, the
15 Receiver will also establish and operate a help line in English and Mandarin. (*Id.*) EB-5 investors
16 will be allowed to submit their responses by electronic mail, facsimile or regular mail to the
17 Receiver, or submit their responses online at the Path America receivership website through a
18 web-based form to be created by the Receiver. (*Id.*)

19 The Receiver believes the form of the Notice to Investors submitted herewith contains
20 sufficient information to appropriately inform EB-5 investors of the contemplated Restructuring
21 Transaction and the ramifications of their opt-in/opt-out decision, and that the procedures outlined
22 above for delivery of the Notice to Investors provides the best opportunity to reach the investors
23 and maximize the number of responses to the Notice to Investors. (*Id.* at ¶ 7.)

24 **D. Final Terms Of The Tower Project Restructuring Transaction.**

25 As previously summarized for this Court, the final terms of the Restructuring Transaction
26 presented for approval herein generally entail a restructuring of the Tower Project so the project
27 may be completed in a manner consistent with EB-5 investors' goals, with funding to be provided
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1 through a combination of the infusion of new capital to be contributed by Binjiang and Molasky, a
 2 construction loan, and a commitment to secure additional funding through loans as needed. The
 3 final terms of the Restructuring Transaction are as memorialized in a fully executed Master
 4 Agreement ("Master Agreement"), a true and correct copy of which is appended as Exhibit B to
 5 the Receiver's declaration filed concurrently herewith. (Grassmueck Decl., ¶¶ 8-9.) The Master
 6 Agreement, in turn, includes as exhibits forms of all related additional agreements¹ necessary for
 7 completion of the transaction (these additional agreements, along with the Master Agreement, are
 8 referred to herein as the "Final Agreements"). (*Id.*) The forms of the related additional
 9 agreements appended as Exhibit B have not been executed but the parties have agreed to the
 10 majority of the agreements, with minor revisions needed for the remaining documents. The parties
 11 anticipate all related agreements will be finalized prior to the hearing on this Motion, and Receiver
 12 will submit such documents to the Court when finalized.

13 The key terms of the Final Agreements² are as summarized below for the Court's
 14 reference:

- 15 • New Capital Contribution: \$30 million (Binjiang: \$20 million | Molasky: \$10 million)
- 16 • Assets Transferred:
 - 17 ○ Redemption of Dargey Holdings' membership interest and reorganization of
 - 18 membership interests in Tower LLC resulting in an 85% interest for Binjiang
 - 19 and 15% for Molasky pursuant to amendment and restatement of Tower LLC's
 - 20 operating agreement.

21 _____
 22 ¹ The exhibits to the Master Agreement include Exhibit A which is the form of an amendment
 23 and restatement of Tower LLC's operating agreement ("A&R LLC Agreement"), and Exhibit
 24 C which is the form of a new development agreement for the Tower Project by and between
 25 Tower LLC and Molasky ("New Development Agreement"). (Grassmueck Decl., ¶¶ 8-9.)
 26 Copies of the A&R LLC Agreement and the New Development Agreement are specifically not
 27 included in the copy of the Master Agreement attached as Exhibit B to the Receiver's
 28 Declaration submitted herewith because these agreements contain confidential and proprietary
 operational information for the companies, and are not currently part of the public judicial
 record in this matter. (*Id.*) Accordingly, these agreements should be filed under seal, and the
 Receiver is meeting and conferring with the parties and anticipates filing these agreements
 under seal pursuant to a stipulated motion in the next few days, well before the noted hearing
 date for this Motion. (*Id.*)

² To the extent any terms described herein differ or conflict with the terms of the Final
 Agreements, the terms in the Final Agreements prevail.

- 1 ○ All of Tower LLC's assets as specified in its balance sheet attached to Final
2 Agreements except:
 - 3 ▪ Actual cash will be amount of cash per balance sheet less expenses
4 incurred up to closing.
 - 5 ▪ Tower LLC will be paid 50% of net proceeds from sale of Lobsang
6 Dargey's Bellevue residence (after payment of applicable taxes,
7 commissions, and related closing costs), with the rest remaining in the
8 receivership.
 - 9 ▪ Intercompany receivable due from Path America Farmer's Market LP
10 will be reduced to an allowed claim for \$500,000.
 - 11 ▪ Intercompany receivable due from Path Othello, LLC ("Othello") will
12 be settled by payment from Othello to Tower LLC of \$1,023,594.67.
 - 13 ▪ Intercompany receivable from Potala Shoreline LLC ("Shoreline") will
14 be settled by payment from Shoreline to Tower LLC of \$7,745,075.72.
 - 15 ▪ Intercompany receivable from Potala Village Kirkland LLC will be
16 reduced to allowed claim for full amount of receivable and paid
17 following sale of the pertinent property.
 - 18 ▪ Assets identified as "Other Loans" and "Other – Syndication Costs, etc."
19 on the balance sheet, with some exceptions, will be assigned to Receiver
20 and not constitute assets of Tower LLC, but Tower LLC will be paid
21 30% of net proceeds from sale of such assets by the Receiver.
- 22 ○ All cash held by Path America Tower, LP and Path Tower Seattle, LP
23 (together, "Tower LPs") in the approximate aggregate amount of \$2,000,000,
24 and all EB-5 investment funds held in escrow for the Tower Project in the
25 approximate amount of \$16,500,000, will be paid to Tower LLC with offsetting
26 payments by Tower LLC to EB-5 investors pursuant to opt-in/opt-out
27 procedures described above.

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1 o Molasky's affiliate will be issued 100% ownership interest in Path America
2 KingCo, LLC ("KingCo LLC") and will be responsible for continued
3 prosecution of the appeal relating to termination of the KingCo as an approved
4 regional center in the EB-5 program.

- 5 • Disposition of Dargey Interest: All Tower Project ownership or management interest
6 currently held by Dargey Holdings, Dargey Management Services, Inc., Dargey
7 Development, LLC, and Lobsang Dargey will be extinguished, and Dargey Holdings'
8 current membership interest in Tower LLC will be redeemed in full in exchange for
9 payment of \$1.8 million by Tower LLC.
- 10 • Rescission of Binjiang Interest In Path Othello, LLC and Payment: Binjiang Othello
11 Corp.'s ("Binjiang Othello") existing investment in Othello will be rescinded in
12 exchange for payment to Binjiang Othello of approximately \$13,200,000³ by Othello
13 and issuance from Othello to Binjiang Othello a promissory note in an amount
14 representing the remainder of Binjiang Othello's investment, plus interest and fees.
- 15 • Rescission of Binjiang Interest In Potala Shoreline LLC and Payment: Binjiang
16 Shoreline Corp.'s ("Binjiang Shoreline") existing investment in Shoreline will be
17 rescinded in exchange for payment to Binjiang Shoreline of approximately \$4,900,000
18 and a claim against the receivership estate for remainder of Binjiang Othello's
19 investment, to be paid following sale of the pertinent property.
- 20 • Othello Intercompany Debt: Othello will repay Path America Farmer's Market LP
21 \$270,000 relating to a prior intercompany transfer.
- 22 • Confirmation of EB-5 Investments: Tower LLC's obligation for EB-5 loans made by
23 the Tower LPs will be confirmed by execution of amended and restated loan
24 agreements and promissory notes.
- 25 • Priority of EB-5 Investors Post-Restructuring: EB-5 investors' investment will be
26 confirmed pursuant to amended and restated loan documents as described above.

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28 ³ Such cash is not a receivership asset but is held in a frozen account. The parties intend to
request that the Court order a lift of the freeze for the purposes of this transaction.

1 Following the restructuring, this debt obligation will be subordinate to a construction
2 loan (est. at \$100 million), and any mezzanine or other debt financing provided by
3 Binjiang or Molasky, or their affiliates, under specified circumstances.

- 4 • Investor Consent: A minimum of 80% of investors must opt-in (or be deemed to have
5 opted-in) to the proposed restructuring, with releases to be provided by consenting
6 investors and payments to opting-out investors as explained in Section I(C) above.
- 7 • Administrative Fees Paid to Receiver: \$1.5 million, for the benefit of the receivership
8 estate.
- 9 • PCL and Other Third-Party Claims: Binjiang and Molasky will pay the Receiver an
10 amount equal to any final payment for claims brought by PCL. Separately, Binjiang
11 and Molasky will pay the Receiver for any third-party claims settled by the Receiver,
12 up to \$1 million.
- 13 • Contingencies: Approval by Court, confirmation of close of construction loan, EB-5
14 investor opt-ins above threshold amount, confirmation of absence of material claims
15 other than a claim by PCL, and satisfaction that budget will cover full costs of
16 completion.
- 17 • Releases. In addition to the releases from EB-5 Investors, Receiver and Binjiang
18 provide mutual releases, as do Dargey and Binjiang parties.

19 (See Grassmueck Decl., ¶ 8, Exhibit B.)

20 The basic terms of the Restructuring Transaction do not differ in any significant manner
21 from the terms as previously presented to this Court and approved pursuant to the Preliminary
22 Approval Order. In the Receiver's reasonable business judgment, these final terms, as
23 memorialized in the Final Agreements, present the best opportunity for a successful restructuring
24 of the Tower Project in line with EB-5 investors' interests, and should thus be approved.

1 **II. LEGAL ARGUMENT**

2 **A. This Court Has Inherent Authority To Order The Disposition Of Receivership**
 3 **Assets.**

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).

10 District courts have the broad power of a court of equity to determine the appropriate
 11 action in the administration and supervision of an equity receivership. *See SEC v. Capital*
 12 *Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005); *see also CFTC. v. Topworth Int'l, Ltd.*, 205
 13 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory
 14 role, and 'we generally uphold reasonable procedures instituted by the district court that serve th[e]
 15 purpose' of orderly and efficient administration of the receivership for the benefit of creditors.").
 16 In the estate administration context, courts are deferential to the business judgment of bankruptcy
 17 trustees, receivers, and similar estate custodians. *See, e.g., Bennett v. Williams*, 892 F.2d 822, 824
 18 (9th Cir. 1989) ; *Southwestern Media, Inc. v. Rau*, 708 F.2d 419, 425 (9th Cir. 1983) ; *In re*
 19 *Thinking Machines Corp.*, 182 B.R. 365, 368 (D. Mass. 1995) (rev'd on other grounds, *In re*
 20 *Thinking Machines Corp.*, 67 F.3d 1021 (1st Cir. 1995)).

21 The Court's powers to administer the receivership and, specifically, to sell receivership
 22 assets, are not limited by the terms of private contracts. The Court's authority over the assets of a
 23 receivership estate derives from the Court's inherent power to exercise jurisdiction over assets
 24 taken into the receivership, rather than from underlying contracts. *SEC v. American Capital*
 25 *Investments, Inc.*, 98 F.3d 1133, 1143-45 (9th Cir. 1996)(approving sale of property over limited
 26 partners' objections based on court's equitable powers, irrespective of state law or contract rights).

1 Accordingly, this Court has broad equitable powers and discretion to grant this Motion and
2 authorize and approve the terms of the Restructuring Transaction.

3 Here, final approval of the Restructuring Transaction should be granted. In the Receiver's
4 reasonable business judgment, the final terms of the Restructuring Transaction provide the best
5 opportunity to complete the Tower Project development and achieve the immigration goals of the
6 EB-5 investors, and are consistent with the Preliminary Approval Order. (Grassmueck Decl.,
7 ¶ 10.)

8 Based on the foregoing, the Receiver respectfully requests that the Restructuring
9 Transaction be approved and that he be authorized to complete the closing of the Restructuring
10 Transaction in accordance with the terms of the Final Agreements, and that the Court execute and
11 enter an approval order in the form filed concurrently herewith. (*Id.*)

12 In addition, as all of Receiver's interests in Tower LLC, KingCo LLC, and the Tower LPs
13 will be transferred in connection with the consummation of the Restructuring Transaction, except
14 as set forth in the Final Agreements, these entities should be removed from the receivership
15 following the closing of the transaction. (*Id.* at ¶ 11.) Thus, following the Closing of the
16 Transactions, Receiver intends to file a stipulated supplemental motion to inform this Court of the
17 closing of the Restructuring Transaction, and respectfully request that an order be entered at that
18 time to designate these entities as non-receivership entities. (*Id.*) Receiver will request that such
19 order be substantially in the form of the [Proposed] Order Amending Order Appointing Receiver
20 attached as Exhibit C to the Receiver's Declaration filed concurrently herewith. (*Id.*, Exhibit C.)

21 **III. CONCLUSION**

22 For the foregoing reasons, the Receiver respectfully requests that the Court grant this
23 Motion and enter an Order authorizing and approving the Restructuring Transaction and the Final
24 Agreements.

1 Dated: June 23, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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By: s/ Michael R. Farrell
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(Pro Hac Vice Granted Oct. 26, 2015)
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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2016, 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: June 23, 2016

s/ Michael R. Farrell
Michael R. Farrell, Esq. #173831 (CA)
(Pro Hac Vice Granted Nov. 6, 2015)