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TRIGATE ALMADEN PE INVESTOR, LLC and
10 TRIGATE FREMONT PE INVESTOR, LLC

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

14 SECURITIES AND EXCHANGE
15 COMMISSION,

16 Plaintiff,

17 v.

18 SILICONSAGE BUILDERS, LLC aka
19 SILICON SAGE BUILDERS and SANJEEV
ACHARYA,

20 Defendants.

Case No. 3:20-cv-09247-SI

**TRIGATE PARTIES' REPLY IN
SUPPORT OF MOTION TO AMEND
RECEIVERSHIP ORDER AS IT
RELATES TO ALMADEN AND
OSGOOD PROJECTS**

Date: November 5, 2021

Time: 10:00 a.m.

Crtrm: 1 – 17th Floor (via Zoom)

Judge: Hon. Susan Illston

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1 After two months of briefing, the Receiver finally has come clean on two essential facts.
2 First, the Receiver concedes that the Osgood and Almaden Projects are fully impaired, and that
3 neither Project holds any construction or completion value for the Estate. Second, the Receiver
4 acknowledges that the final impairment to those Projects happened on the Receiver's own watch,
5 and more specifically during – and almost certainly because of – the hopelessly protracted
6 “budgeting” and negotiation process between the Receiver and Acres. These core facts – the
7 fundamental facts, when assessing whether the Receivership Order should continue to include the
8 Projects – were omitted from the Receiver's Second Quarterly Report, were omitted from the
9 Receiver's Second Interim Fee Applications, and even were omitted from the SEC's brief follow-
10 on filing in support of the Receiver (Dkt. 208). But they now are beyond dispute, and they are
11 determinative in assessing how the Projects should proceed. The Receivership Order should be
12 amended to remove Osgood, LLC and 1821 Almaden, LLC from the list of Receivership Entities.

13 To be sure, the Receiver does not use the language of “concession” when admitting these
14 facts. The papers, however, are clear. The Receiver's budget (Dkt. 203 at 14-15) discloses a
15 combined \$8.8 million deficit for the Projects, a deficit that wipes out TriGate's capital
16 completely (which is of course why TriGate is here) and any benefit for the Estate's legitimate
17 creditors. The papers likewise show that this deficit was run up during the Receivership. In the
18 Receiver's own words, “the focus of [his] efforts in the period from April through June” – *i.e.*, the
19 entirety of the Second Quarter, and the last period for which the Receiver has submitted any
20 report – was not completing construction, but “complet[ing] forensic reviews” for the purpose of
21 budgeting. Dkt. 203 at p. 24, Decl. of David Stapleton, ¶ 8. During this hands-off review period,
22 the Receiver has:

- 23 • continued to incur an exceptional amount of running interest (the Receiver
24 estimates paying more than \$7.5 million in interest to Acres over the now-
25 extended Receivership period (Dkt. 203 at 15:3-6 and 15:10-11));
- 26 • gone out-of-pocket for “soft costs” like insurance directly related to the extended
27 window before completion (*see, e.g.*, Dkt. 203 at p. 24, Stapleton Decl. ¶ 8
28 (acknowledging \$1.3 million in second-quarter “soft” costs, despite no

1 construction)); and

- 2 • absorbed the daily-increasing costs of construction materials and worker scarcity
3 (which the Receiver has chosen not to describe, much less quantify, for the
4 Court);¹ all while
- 5 • allowing project assets to waste in the elements or because of inaction. (*See, e.g.*,
6 Dkt. 203 at pp. 30-31, Decl. of David Kieffer, ¶ 5(f) (discussing just one parking
7 system left unused during delay: “As time passed, the equipment has been
8 damaged and will need to be fixed, increasing the costs by \$400,000.”)).

9 TriGate does not have access to the materials sufficient to provide an accounting of the cost the
10 Receivership has imposed on the Projects. What is clear, however, is that the Receiver’s three-
11 month pause from April to June alone cost the Projects *multiples* – likely 10x or more – of the
12 \$400,000 “guarantee” that the Receiver now reports Acres will provide to the Estate.

13 TriGate’s position in this matter is not academic. TriGate’s investors are the retirement
14 funds of teachers, state and municipal employees, and other everyday Americans, and TriGate
15 owes them a fiduciary duty to protect their assets. Those assets include the rights that were
16 stripped from TriGate when the TriGate-controlled Projects were named as Receivership Entities.
17 As discussed below, if TriGate is placed back in control of the Projects, TriGate will commit
18 \$500,000 to the Estate in exchange for a waiver of any other right to manage or control the
19 Projects (*e.g.*, any approval right or any right to contest a bankruptcy filing).

20 **I. TRIGATE’S PROPOSAL**

21 The Receiver has a long track record, and he likely has provided strong work on other
22 matters, and also when addressing other projects that have fallen within the SiliconSage
23 Receivership. As set forth in TriGate’s Omnibus filing before the last status conference (Dkt. 183
24 at 1-2), however, Osgood and Almaden are fundamentally different from the balance of the
25 SiliconSage Receivership in a half-dozen ways. Most notably, SiliconSage already had been

26
27 ¹ The California Construction Index increased by 13% between February and October
28 2021, an annualized increase of 17%. *See* <https://www.dgs.ca.gov/RES/RESOURCES/Content/Real-Estate-Services-Division-Resources-List-Folder/DGS-California-Construction-Cost-Index-CCCI>. Increases are larger in Northern California.

1 replaced by TriGate prior to the Receivership Order, and – even more notably – the only way to
2 get value from the Projects was for construction to be completed expeditiously. So while the
3 Receiver recites that he is “a fiduciary to all creditors and investors of the receivership estate”
4 (*e.g.*, Dkt. 203 at 1:23-24), the *only* creditor that has benefitted from the Receivership over the
5 Projects has been Acres. The only other parties that have benefitted are the Receiver himself,
6 who has budgeted himself and counsel \$1.8 million for their extended work on the Projects (Dkt.
7 203 at 12-15), and the contractors, sub-contractors and other vendors (*e.g.*, insurers) who are
8 advantaged by an extended and incomplete project, rather than a completed one.

9 To justify the delay, the steep fees and the continued designation of the Projects as
10 Receivership Entities, the Receiver represents that he has “reached an agreement with Acres
11 Capital” under which Acres will “guarantee that the receivership estate will receive at least
12 \$400,000.” Dkt. 203 at 1:14-17. The “at least” is of course rhetorical (the Projects are deeply
13 underwater) and the loan agreement memorializing the promise remains unseen, but the core
14 promise appears to be that the ongoing use of the extraordinary remedy of Receivership, the
15 continued and indefinite use of judicial resources, and the complete derogation of TriGate’s rights
16 are all worthwhile, because at some point down the road the Estate may benefit from a \$400,000
17 guarantee.

18 TriGate can better that number. While the Court no doubt prefers the parties negotiate
19 outside of the judicial setting, rather than in it, the Receiver’s opacity² has left little option. If
20 TriGate’s motion is granted and TriGate resumes control of the Projects, TriGate will commit
21 \$500,000 to the Receivership Estate in exchange for a waiver of any SiliconSage or Estate rights
22 to control the Projects or operating entities, specifically including the right to file bankruptcy.³

23 _____
24 ² TriGate was unaware of the proposed \$400,000 “guarantee” – or any similar construct –
25 until the Receiver’s filing. Nor has TriGate been made aware of any proposed terms of a new
26 agreement between the Receiver and Acres other than those in the Opposition and declarations –
27 despite the Receiver’s representation to the Court that the agreement was being “finaliz[ed]” last
28 April. *See* Dkt. 117 at 7:17-19.

26 ³ As with the Receiver/Acres “guarantee,” TriGate’s offer would be split between the two
27 Projects, \$250,000 each, reflecting the separate operating entities, agreements and issues.
28 Likewise, as TriGate presumes is the case with the Acres “guarantee,” the Estate could recover
additional economics above \$250,000 from one respective Project or the other, if any are
achieved.

1 The Estate would benefit directly and immediately, and TriGate – already the innocent creditor
 2 burdened with the largest losses, in addition to its loss of operating rights – would have at least
 3 some of its rights restored. The enforcement action would be one step closer to being resolved.

4 Acres and the Receiver may dislike this proposal – as might contractors, subcontractors or
 5 other vendors – but every other interested party should be advantaged. Why would TriGate do
 6 this, in an underwater project? To use the Receiver’s own words: precisely to “protect its own
 7 interest” (Dkt. 203 at 1:25), where TriGate’s interest is to do what is best for the retirement
 8 investors who have entrusted TriGate with their money. As discussed in some detail in TriGate’s
 9 Omnibus Response (Dkt. 183 at 3-12) and incorporated into TriGate’s instant Motion (Dkt. 197-1
 10 at 4-5), TriGate is a more than capable steward of the Projects, accomplishing more in its 44 days
 11 of control of the Projects between December 27 and February 10 than the Receiver has in the
 12 entire period up through and including the Receiver’s most recent report, the Second Quarterly
 13 Report.⁴ If in control, TriGate also has financial options, including self-funding, syndication and
 14 bankruptcy, that the Receiver either does not have or refuses to pursue.

15 **II. INDEPENDENT OF TRIGATE’S PROPOSAL, THE RECEIVERSHIP SHOULD**
 16 **BE AMENDED TO EXCLUDE THE PROJECTS.**

17 Even apart from TriGate’s proposal, which would materially benefit the Estate, the
 18 Receiver’s Opposition does much to confirm, and little to refute, the basis for TriGate’s motion.

19 For starters, the Receiver – and therefore the SEC as well, in its pro forma, follow-on
 20 filing – concedes TriGate’s position on the law. *See* Dkt. 203 at 8:16 (“The Receiver does not
 21 quarrel with the case law cited by TriGate.”). The Receiver does not dispute, for example, that
 22 the decision to remove a receiver is equitable and in the sound discretion of the district court. *See*
 23 Dkt. 183 at 12 (citing *S.E.C. v. Spence & Green Chemical Co.*, 612 F.2d 896, 904 (5th Cir.
 24

25 ⁴ TriGate’s stewardship included identifying “disguised loans” that had not been
 26 previously identified (Dkt. 190 at 11:3-16), dismissing SiliconSage as the contractor (*id.* at 6:16-
 27 18), identifying and engaging both a construction project manager and a general contractor (*id.* at 6:18-20),
 28 identifying and engaging dozens of subcontractors currently on site (*id.* at 6:18-28),
 discovering and scoping the mold issue that the Receiver now partially blames for its inaction (*id.*
 at 7:16-19) and identifying the railing issue that the Receiver likewise now partially blames for
 increased costs (*id.* at 8:12-13).

1 1980)). Nor does the Receiver dispute that “[a] receivership once imposed on a corporation
 2 should be terminated and control returned to those who own the business as soon as the reason for
 3 its imposition ceases.” *Id.* Likewise, the Receiver acknowledges, with his silence, that the
 4 standard for maintaining a receivership is not whether the receivership previously has had, or in
 5 the future may have, some beneficial effects; rather, a receivership is appropriate only when
 6 “clearly necessary to protect plaintiff’s interests in the property.” Dkt. 183 at 12 (quoting
 7 *Citibank, N.A. v. Nyland (CF8) Ltd.*, 839 F.2d 93, 97 (2d Cir. 1988) (internal quotation omitted)
 8 (emphasis added) and citing *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1406 (9th
 9 Cir. 1992)). Indeed, the only time the Receiver attempts to distinguish the law, specifically
 10 *S.E.C. v. ABS Manager, LLC*, 2013 WL 1164413 (S.D. Cal. 2013), and *C.F.T.C. v. Comvest*
 11 *Trading Corp.*, 481 F. Supp. 438 (D. Mass. 1979), his argument rests entirely on the proposition
 12 that the Receiver’s \$1.8 million in fees are worthwhile because “the receivership estate will
 13 receive at least \$400,000.” Dkt. 203 at 10:27-28. But of course the Receiver’s three-month pause
 14 for budgeting cost the Projects more than \$400,000 in interest alone, to say nothing of the fees,
 15 inflation and other burdens.⁵ Compare *ABS Manager, LLC*, 2013 WL 1164413, at *8 (denying
 16 appointment of same receiver as here, where “costs involved in appointing a receiver and hiring
 17 other professionals to investigate would only further dissipate the assets of the investors.”)

18 Indeed, the mechanisms that led to the Receiver’s now-announced \$400,000 reflect, if
 19 anything, a lack of candor in the months leading up to today. The Receiver’s Second Quarterly
 20 Report failed to disclose a significant, material fact that the Receiver knew at that time: that the
 21 Estate’s interests in the Projects were fully impaired, with no hope of recovery. *See* Dkt. 173, at
 22 6-7, 10-11 (describing increased costs without addressing impact on Estate). The impairment of
 23 the Estate was revealed only in TriGate’s Omnibus Response to that report (*see* Dkt. 183:2-3),
 24 just as the \$400,000 guarantee to the Estate was announced only after TriGate queried what value

25
 26 ⁵ The Receiver’s assertion that his fees will not burden the Estate because they “will be
 27 paid from the protective advances being made by Acres” (Dkt. 203 at 11:1) is, at best, a non-
 28 sequitur. The protective advances – and the interest on them – are a direct burden on the Projects,
 and therefore a direct burden on the Estate. The fact that the funds start with a lender does not
 make them any less of a liability, and of course that is precisely how they are budgeted. *See* Dkt.
 203 at 15:12-14 (listing Receiver fees) and 15:10-11 (listing interest on protective advances).

1 a Receiver added to a fully-impaired estate.

2 So, too, with the Receiver’s recitation of the fully-negotiated three-party agreement that
3 would have left TriGate in control of the Projects after February 10. As explained by the
4 Receiver, the Projects are burdened with “arrangements that were labeled as purchase agreements
5 but that the Receiver believes are better characterized as disguised unsecured loans” (Dkt. 203 at
6 13:10-12), and these loans are material to the economics of the Projects (*id.* at 13:23-14:5).⁶
7 According to the Receiver, the Receiver walked away from the fully-negotiated three-party
8 agreement – under which TriGate would have funded and managed further construction, effective
9 immediately – because TriGate wanted the right to recover its initial rescue capital ahead of a
10 series of disguised loans. Dkt. 203 at 4-5. *But the Receiver has now agreed to precisely that*
11 *condition with Acres.* Dkt. 203 at 14:1-5 (“Because of the circumstances under which these
12 agreements were entered into and the importance of freeing up these units for sale at market
13 prices, the terms of the proposed arrangement with Acres require the Receiver to seek a judicial
14 determination that these purchase agreements were really unsecured disguised loans and should
15 be unsecured claims against the receivership estate If the Receiver is unsuccessful in that
16 argument, the agreement contemplates that Acres will then have relief from the Receivership
17 Order to exercise its state law remedies to foreclose against the projects, which would have the
18 effect of eliminating these purchase agreements.”). If the Receiver has accurately characterized
19 the still-to-be-filed agreement with Acres, the Receiver’s decision to reject a term with TriGate in
20 March, only to allow it for Acres in December (if then), has cost the Projects nine months and
21 millions of dollars. Even more questionable – if the Receiver is making that relief a condition of
22 Acres’s financing – is that the Receiver has not yet pursued the “judicial determination” that he
23 now reports is essential. The Receiver conducted his review of the relevant books and records
24 seven months ago, in March. Dkt. 203 at p. 22, Stapleton Decl. ¶ 5.

25 Equally questionable is the Receiver’s decision to continue using the same title company

26 _____
27 ⁶ As the Receiver acknowledges, these disguised loans were uncovered by TriGate only
28 after TriGate ousted SiliconSage (Dkt. 203 at 13:21-22) and were concealed from TriGate when
TriGate advanced the \$20 million in rescue capital that saved the Projects from foreclosure in
2020 (*id.* at 13:24-25; *see also* Dkt. 173 at 7, Dkt. 183-1 at p. 6, Decl. of Adam Aultz ¶ 25).

1 today that SiliconSage used when it managed the Projects. The “disguised loans” that the
2 Receiver has committed to challenge were “disguised” because their terms were not reported by
3 the title company that SiliconSage had chosen for the Projects. *See* Dkt. 203 at 4:12-26 and Dkt.
4 183-1 at p. 6, Aultz Decl. ¶ 25 (explaining issues with Old Republic Title). But the Receiver has
5 not replaced the company, has not addressed any causes of action or other relief that the Estate
6 may have against the company, and has not offered a word of explanation for those decisions.
7 *Compare* Dkt. 197-1 at 4 n.1 (querying continued use). At a minimum, protection of the Estate
8 should involve using vendors that have not already harmed the Estate; a full advancement of the
9 interests of the Estate would address potential relief for those injuries.

10 Even the process that led to the \$400,000 guarantee has been unusual. While the Receiver
11 purports to be representing the interests of all investors and creditors, the Receiver appears
12 focused on protecting the interests of Acres (and the Receiver himself) alone. Nowhere in the
13 Receiver’s 70-page filing is there mention of the Receiver looking for alternative sources of
14 funding, or of sale of the Projects in their current state, or of alternatives to the lengthy
15 “budgeting” pause instigated by Acres. Nowhere, even, is there an explanation as to how
16 \$400,000 was identified as the appropriate amount of relief for the Estate. Certainly nowhere has
17 TriGate – not only a highly interested party and willing participant, but the most deeply-injured
18 party as well – been solicited for any proposal or even feedback. TriGate is making its \$500,000
19 proposal in these papers because this is the forum in which the Receiver chose to present his deal
20 with Acres.

21 The majority of the Receiver’s papers are, of course, dedicated to explaining why Projects
22 that TriGate could have completed by May and August 2021 instead are – according to the
23 Receiver – now slated for March and May 2022 (Dkt. 203 at p. 32, Kieffer Decl. ¶ 7). But on that
24 point, the papers are self-refuting. By the Receiver’s own admission, both in his Second
25 Quarterly Report and in these papers, the Receiver undertook no material construction work
26 between February 10 (his appointment) and June 30 (the end of the quarter described in the
27 second quarterly report). In the Receiver’s own explanation,

28 Acres and the Receiver agreed that before completing their

1 negotiations, they needed to finalize the construction budgets in
 2 order to evaluate the risks of taking the projects to completion.
 3 Acres wanted to make sure it was not making a bad business
 4 decision, and the Receiver needed to verify that proceeding was in
 5 the best interests of the receivership estate and then understand the
 6 economics in order to finalize the agreement about how to complete
 7 the projects. As explained below, the completion of the construction
 8 budgets was a significant undertaking.

9 Dkt. 203 at 5:19-25. The Receiver, by his own admission, walked away from a deal that could
 10 have completed Osgood by May in order to take longer – until June – just to budget whether to
 11 proceed. And he did so while carrying interest the whole time, adding new and unnecessary
 12 seven-figure costs (like extended insurance), and amidst the most significant inflationary period
 13 for construction in recent memory. Of course, construction issues – like the mold that TriGate
 14 identified for the Receiver in February – compound during the long idle periods, as well. *See*
 15 Dkt. 183-5 at p.2, Decl. at Jim Pritchard ¶¶ 5-8. As the Court observed at the last status
 16 conference, the Projects began in bad shape. But the record is unambiguous that during the
 17 Receivership, their status has grown worse.

18 **III. CONCLUSION**

19 For these reasons, the Court should enter an Order amending the Receivership Order (Dkt.
 20 63) to remove Osgood, LLC and 1821 Almaden, LLC from the Receivership Entities, and
 21 restoring TriGate to its position as of February 9, 2021.

22 Dated: October 21, 2021

23 Respectfully submitted,

24 JONES DAY

25 By: /s/ Brian G. Selden
 26 Brian G. Selden

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