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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 v.

14 SILICONSAGE BUILDERS, LLC aka
15 SILICON SAGE BUILDERS and
16 SANJEEV ACHARYA,

17 Defendants.

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

**OMNIBUS REPLY TO THE
OPPOSITIONS TO THE MOTION OF
RECEIVER FOR ORDER APPROVING
CONSTRUCTION FUNDING
AGREEMENT WITH ACRES CAPITAL;
DECLARATION OF DAVID STAPLETON
IN SUPPORT THEREOF**

Date: December 3, 2021
Time: 10:00 a.m.
Crtrm.: 1 – 17th Floor (hearing via Zoom)
Judge: Susan Illston

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TABLE OF CONTENTS

Page

I. TriGate's Opposition Contains Material Inaccuracies..... 3

 A. The Receiver Is Not "Rewarding" Himself 3

 B. The Receiver Did Investigate Other Sources of Funding for the Construction Project and Negotiated with TriGate for Nearly Three Months 4

 C. The Receiver Is Neither Doing Acres' Bidding Nor Favoring One Creditor Over Another 5

 D. The Receiver Is Not "Picking and Choosing Winners" 8

 E. TriGate Has What It Needs to Evaluate the Motion..... 8

II. The Receiver Believes That the Construction Funding Agreement with Acres Is In the Best Interests of the Receivership Estate 9

III. Miscellaneous Issues 11

IV. Conclusion 11

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1 **TO THE HONORABLE SUSAN ILLSTON, SENIOR DISTRICT JUDGE, TRIGATE**
2 **ALMADEN PE INVESTOR, LLC, TRIGATE FREMONT PE INVESTOR, LLC,**
3 **SANGEETH PERURI, AND MARWAN NABOULSI:**

4 David Stapleton, the receiver (the "Receiver") appointed by the Court for
5 SiliconSage Builders, LLC, and its affiliates and subsidiaries, is an experienced receiver
6 who takes seriously his fiduciary duty to the Court to whom he reports and to the
7 creditors for whose benefit he serves. When the Receiver was appointed, construction at
8 the Projects had ceased, mold damage was occurring because the buildings had been
9 left exposed to the elements, there was uncertainty about how the remaining construction
10 would be funded and completed, and TriGate was leading the way without knowing two
11 critical things. First, there was investor debt that it did not know about and that was
12 senior in priority to TriGate's equity position. Second, its projections for the cost to
13 complete construction on the projects and its estimated timeline for completion were
14 wrong.

15 After the Receiver understood the true debt structure of the entities that own the
16 projects and was unable to reach an agreement with TriGate regarding construction
17 funding that was fair for the other creditors whose interests the Receiver is required to
18 consider, the Receiver took over the projects and learned why TriGate's numbers were
19 wrong. TriGate was not relying on bids from subcontractors who had determined what
20 the scope of the work was and had then submitted a bid for that work, but was instead
21 relying largely on inaccurate estimates from SiliconSage from when SiliconSage was self-
22 performing that work. TriGate does not contest that fact. Because TriGate had not done
23 so, the Receiver, through protective advances provided by Acres and a tentative
24 agreement to reduce the contract rate of interest on both the existing debt and new debt,
25 deployed subcontractors to perform forensic reviews of the work remaining at the
26 Projects. Then, based on those forensic reviews, he obtained bids for the work, selected
27 the winning bids, and then used those numbers, which were based in reality, to formulate
28 accurate construction budgets that were significantly higher than TriGate's estimated

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1 budgets based on inaccurate assumptions. Acres, which has the most at risk, is in
2 substantial agreement with the Receiver's figures. Unfortunately, before the
3 subcontractors could begin work on things like plumbing, electrical, and drywall, the mold
4 issues had to be remedied. That process took a few months but, once it was complete,
5 the subcontractors were deployed and construction has been in full swing ever since.

6 The Receiver wishes that the financial outlook for the projects was more favorable
7 for the receivership estate, but the Acres Agreement is based on reality, including the
8 distressed condition of these projects when the Receiver was appointed and the current
9 economic climate with its supply-chain disruptions, and represents the best outcome
10 possible under difficult circumstances. The Acres Agreement puts everyone on a level
11 playing field, does not prefer one creditor to another, and guarantees a benefit to the
12 receivership estate. TriGate's offer to remove the Osgood and Almaden entities (as
13 opposed to just the Projects) from the receivership estate potentially impacts the
14 unsecured noteholders and other creditors of Almaden and Osgood (which would include
15 any parties whose purchase agreements may be recharacterized as loans) by removing
16 the potential for additional recoveries from these entities, which could occur if the
17 financial outlook for the Projects improves because of higher sale prices and lower costs
18 or if the Receiver identifies and recovers assets, including cash, fraudulently transferred
19 by Osgood and Almaden. Moreover, TriGate has no plan, as acknowledged in its
20 opposition and evidenced by the many "TBDs" in its charts and as demonstrated by the
21 fact that it has apparently neither accessed the database that stores all of the
22 construction information, including costs and forecasts, in order to get information about
23 the current status of the projects nor reached out to Acres to start a dialogue of any sort.
24 TriGate's only actual plan seems to be to try to unfairly and inaccurately place the blame
25 for its failed investment on the Receiver.

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1 **I. TriGate's Opposition Contains Material Inaccuracies**

2 TriGate's opposition lobs numerous accusations at the Receiver that
3 mischaracterize the facts and that are, at best, misleading.

4 **A. The Receiver Is Not "Rewarding" Himself**

5 TriGate accuses the Receiver of "rewarding" himself with \$1.8 million while
6 proposing that every other creditor share in the \$400,000 recovery, because the
7 Construction Funding Agreement contains an allocation for up to \$1.8 million in the fees
8 and costs of the Receiver and his special real estate counsel related to the day to day
9 management of the construction projects.

10 Although serving as a receiver is considered a public service for defrauded
11 investors, receivers are entitled to be compensated for their work. Because it is a form of
12 public service, receivers and their professionals typically charge receivership estates a
13 discounted rate, which is what the Receiver and his counsel are doing here. TriGate
14 retained Suffolk Construction as the construction manager for the Projects, and the
15 Receiver has continued to use Suffolk during his tenure. Suffolk requires direction on a
16 daily basis and providing that direction requires personnel familiar with the projects and
17 who handle the fiscal aspects of the projects. The Receiver has a team of several
18 employees that has been performing this work and that is responsible for having gotten
19 construction underway and in full swing. The estimate of fees is for a period of
20 approximately a year and for two projects, and these fees and costs remain subject to the
21 approval of the Court prior to their payment. In addition, the Receiver has obtained the
22 agreement of Acres Capital to pay these fees and costs without adding them to the
23 amount due under its loans. This agreement is reflected in the final Construction Funding
24 Agreement being submitted with this reply. Also, to put TriGate's objection into its
25 context, it is worth noting that under the original agreement with TriGate that was
26 ultimately jettisoned, TriGate was requiring that its fees and costs in connection with the
27 projects, including the fees and costs of its construction consultant, Pritchard Consulting,
28 and TriGate's legal fees, be included as part of its secured claim against the projects.

1 The Receiver is not "rewarding" himself. He is being compensated for the
 2 services that he is providing to the receivership estate, and only after the Court finds that
 3 the fees and costs are reasonable.

4 **B. The Receiver Did Investigate Other Sources of Funding for the**
 5 **Construction Project and Negotiated with TriGate for Nearly Three**
 6 **Months**

7 TriGate accuses the Receiver of not adequately investigating other means for
 8 funding the projects and, after nearly three months of negotiation with the Receiver, has
 9 the temerity to accuse the Receiver of having "failed to approach *TriGate*, an investor
 10 with \$20 million at risk in the Projects" Not only did the Receiver first reach out to
 11 TriGate and go so far as to document a draft agreement, but after that agreement was
 12 shelved, continued a dialogue with TriGate, which would not retreat from its insistence
 13 that it receive priority for all of the amounts that it put into the projects, including its
 14 preferred equity investment, over the unsecured creditors (comprised mostly of investors
 15 holding unsecured notes) of Osgood and Almaden. The Receiver responded by pointing
 16 out that TriGate's new proposal had the same deficiencies as its last: namely, that it still
 17 required preferential treatment for TriGate's claim.¹ The Receiver's email exchange is
 18 attached as Exhibit "1."

19 The Receiver also investigated other sources of financing, but was faced with
 20 several hard realities that TriGate ignores. First, Acres was in senior position with a
 21 significant amount of secured debt against the project and loans in default and accruing
 22 interest at the default rate of 15.625%.² Second, construction had stalled at the projects
 23 for several months and the projections that the Receiver had at the time were from

24 _____
 25 ¹ It should be noted that in this email, the Receiver did not foreclose the possibility that
 26 there might be some equitable reason TriGate should receive priority, but told TriGate
 27 that at this stage of the case and until the forensic accounting was further underway, the
 28 Receiver could not agree to recommend the priority of one unsecured claim versus
 another.

² The nondefault rate is 10.625%.

1 TriGate and not accurate so that the Receiver could not provide reliable projections to
 2 potential lenders at that time. Third, the Projects were in receivership, limiting the arena
 3 of lenders who would consider funding. Given these hurdles together with Acres'
 4 willingness to fund the costs to complete construction at rates lower than those contained
 5 in its loans with Osgood and Almaden and lower than would be charged by other lenders,
 6 there is no question that the Agreement with Acres represents the best financing deal for
 7 the receivership estate. TriGate offered nothing remotely comparable.

8 **C. The Receiver Is Neither Doing Acres' Bidding Nor Favoring One**
 9 **Creditor Over Another**

10 TriGate characterizes the portion of the Agreement pertaining to the
 11 recharacterization of the purchase agreements as "deputiz[ing]" the Receiver "for the
 12 benefit of Acres alone." Mr. Peruri, who has ten units under contract under agreements
 13 that the Receiver would seek to recharacterize, argues that recharacterization favors one
 14 creditor over another.

15 The purchase agreements that are at issue gave preferable treatment to the
 16 purported buyers and were not permissible purchase agreements under the loan
 17 agreements with Acres. The agreements with Mr. Peruri put ten units at the Osgood
 18 Project under contract for below market prices totaling \$5 million, but gave Osgood the
 19 right to cancel the agreement for \$6,415,000. The agreement with Marwan Naboulsi,
 20 whose son was an executive with SiliconSage, put two units at Almaden under contract
 21 for the discounted price of \$1,132,000 and gave Almaden the right to cancel the
 22 agreement by paying the Naboulsis \$1,299,000. There are other factors that the
 23 Receiver contends support the argument that these transactions were intended to be
 24 loans and not true purchase agreements that will be addressed at a later point in time.³

25 _____
 26 ³ There are a handful of other purchase agreements but each one is slightly different and
 27 will need to be considered on their facts. The common thread, however, is that were they
 28 to be enforced according to their terms, the "buyers" would acquire units without paying
 fair market value for those units.

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1 In California, whose law would appear to govern this issue, a party asserting that a
2 sale is a disguised loan bears the burden of proving their claim by clear and convincing
3 evidence. *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 7 (1944). To determine whether a
4 sale is actually a disguised loan, the intention of the parties governs no matter "the
5 particular form the transaction may take." See *Beeler*, 24 Cal. 2d at 20. "Simply calling
6 transactions 'sales' does not make them so. Labels cannot change the true nature of the
7 underlying transactions." *Fireman's Fund Ins. Co. v. Grover (In re Woodson Co.)*, 813
8 F.2d 266, 272 (9th Cir. 1987); see also *Beeler*, 24 Cal. 2d at 20-21 (stating that an
9 affidavit declaring the transaction was not intended as a mortgage is not conclusive).
10 Rather, in order to determine whether the parties intended a sale or a loan, courts look to
11 "all facts and circumstances surrounding the transactions at issue." See *Bear v. Coben*
12 (*In re Golden Plan of California, Inc.*), 829 F.2d 705, 709 (9th Cir. 1986).

13 Courts look at a variety of factors when determining whether the parties intended a
14 sale or a loan. Where there is a difference between the value of the property and the
15 amount of the consideration for the property, courts have found the disparity to be a
16 "'strong circumstance' tending to show that the deed was intended to operate as a
17 mortgage." *Beeler*, 24 Cal. 2d at 17. Transactions where the "seller" retains the risks of
18 loss and ownership related to the property, rather than the "buyer," have been found to
19 result in a "debtor-creditor relationship in *most* cases." *In re Woodson Co.*, 813 F.2d at
20 271 (emphasis added). Further, "[i]t is well recognized that a sale subject to an option to
21 repurchase is, in some circumstances, a disguised loan." *Swallow Ranches, Inc. v.*
22 *Bidart*, 525 F.2d 995, 997 (9th Cir. 1975); see also *Fox v. Peck Iron & Metal Co., Inc.*, 25
23 B.R. 674, 689 (Bankr. S.D. Cal. 1982) (stating that a repurchase option is a "strong
24 indicator" that transaction was a disguised loan). Ultimately, all circumstances must be
25 considered, "for individuals bent on disguising the true nature of their business dealings
26 can hardly be expected to reveal their unstated intentions, especially in their writings."
27 See *Fox*, 25 B.R. at 690.

28

1 If the Receiver successfully recharacterizes these agreements, then Mr. Peruri
 2 and Mr. Naboulsi will hold unsecured claims against the receivership estate for the
 3 amounts that they loaned (the Receiver does not dispute that Osgood and Almaden
 4 received the funds). Mr. Peruri and Mr. Naboulsi would receive the same treatment as
 5 other investors. If the Receiver is unsuccessful in recharacterizing them and Acres
 6 forecloses, the purchasers are not without a potential alternative remedy because both
 7 Osgood and Almaden posted bonds in the amount of \$1.8 million with the California
 8 Department of Real Estate in order to permit them to obtain the early release of deposits.
 9 Claims for a return of the deposits paid may be able to be made against these bonds.⁴

10 Regardless of what occurs with these Projects, these purchase agreements will
 11 need to be addressed because if enforced as purchase agreements according to their
 12 terms, they would enable the buyers to acquire units for less than their fair market value.
 13 Rather than preferring one creditor over another, the Receiver is seeking to equalize
 14 them. Moreover, there is a potential benefit to parties other than Acres. Under the
 15 arrangement with Acres, it is possible that if sales are higher than expected and costs are
 16 lower than budgeted, Acres may be paid in full, in which case the junior lienholders would
 17 receive the proceeds from the unit sales until they are paid in full. Once they are paid in
 18 full, the proceeds from unit sales would flow to the receivership estate.

19 _____
 20 ⁴ Naboulsi notes that the Receiver did not cite any authority in the Motion for the
 21 proposition that a foreclosure by Acres Capital would eliminate all junior interests,
 22 including purchase agreements. Upon signing a purchase agreement, the buyer has an
 23 interest in the property, but that interest is junior to all prior liens and encumbrances. See
 24 Miller & Starr, 4 Cal. Real Estate §§ 10:118, 10:50 (4th ed.). The foreclosure of a senior
 25 lien by a trustee's sale extinguishes all junior interests in the real property. See *Zieve,*
 26 *Brodnax & Steele, LLP v. Dhindsa*, 49 Cal. App. 5th 27, 36 (2020); *Valley Investments,*
 27 *L.P. v. BancAmerica Comm. Corp.*, 88 Cal. App. 4th 816, 925 (2001). Because the
 28 purchase agreements were entered into after Acres' liens were recorded, they are junior
 to the interest of Acres such that a foreclosure would eliminate these junior interests.
 This is similar to the case law in the context of leases, which provides that absent a
 subordination agreement, leases that are junior to a deed of trust will be terminated upon
 foreclosure of that deed of trust. See *Nativi v. Deutsche Bank Nat'l Trust Co.*, 223 Cal.
 App. 4th 261, 272 (2014) (“[T]here is no dispute that the general rule is that foreclosure of
 a senior encumbrance terminates subordinate liens, including leases.”).

1 **D. The Receiver Is Not "Picking and Choosing Winners"**

2 Referring again to the portion of the agreement pertaining to the recharacterization
3 of the loans disguised as purchase agreements, TriGate argues that the Receiver is
4 "picking and choosing winners" because the Receiver reneged on the original agreement
5 with TriGate which TriGate contends "contemplated that TriGate's interests would be
6 accelerated to address this very issue. But the Receiver reneged on the three-party
7 agreement because, he says, he could not prioritize TriGate when he had to consider the
8 interests of "all creditors." This argument is nonsensical. Under the tri-party agreement
9 between Acres, TriGate, and the Receiver that was never completed, the Receiver was
10 still going to be charged with taking the laboring oar in recharacterizing the agreements.
11 The recharacterization issue had nothing to do with TriGate's proposed treatment and,
12 with respect to this issue, there is no difference between the current proposal and the one
13 that involved TriGate. What is different is that the Receiver is not elevating \$20 million
14 that was put in as equity to the level of a second priority lien against the Projects. The
15 estate would not have been millions of dollars better off—instead TriGate would have
16 been given a \$20 million advantage over the junior lienholders and the investors holding
17 unsecured debt.

18 **E. TriGate Has What It Needs to Evaluate the Motion**

19 TriGate complains that it has not received progress reports, loan and sale
20 documents, or budgeting information, and that the Receiver has not filed a recent status
21 report. The Receiver has endeavored to provide a significant amount of information, and
22 TriGate has access to a significant amount more of which it appears to have not availed
23 itself. TriGate has had continuous access to the software database maintained by
24 Suffolk Construction on which resides all of the information related to the construction at
25 the projects, including the costs, forecasts, subcontracts, and budget. It has apparently
26 not taken advantage of this database of information. Second, as the Receiver learned of
27 the existence of investors with notes issued by Almaden and Osgood that had not been
28 subordinated to TriGate's preferred equity interest, the Receiver shared those documents

1 with TriGate. TriGate and the attorney then representing it have had this information
2 since April 2021, although in response to the inaccurate statement in the opposition,
3 counsel for the Receiver forwarded the prior emails with these documents to current
4 counsel for TriGate. Third, the Receiver is due to file his next status report with the Court
5 on December 3, 2021, in advance of the status conference scheduled by the Court for
6 January 7, 2022, at 3:00 p.m.

7 The Receiver and TriGate are having ongoing discussions about TriGate's
8 requests for emails and documents obtained from Old Republic Title Company that are
9 subject to a confidentiality agreement.

10
11 **II. The Receiver Believes That the Construction Funding Agreement with Acres**
12 **Is In the Best Interests of the Receivership Estate**

13 Relying on an overly-simplified chart at the beginning of its Opposition and
14 Appendix A, TriGate argues that its \$500,000 offer to remove Osgood and Almaden from
15 the receivership estate is better than the \$400,000 that the receivership estate is
16 guaranteed from the Acres Agreement. Setting aside the fact that TriGate's side of the
17 chart is replete with items that are "to be determined," this comparison does not take into
18 account a variety of other factors.

19 Under TriGate's proposal, the maximum that the receivership estate will receive is
20 \$500,000 and Osgood and Almaden (and not just the Projects) would be removed from
21 the receivership estate. Under the Acres Agreement, the receivership estate is
22 guaranteed \$400,000, plus the fees and costs incurred by the Receiver and his special
23 counsel in connection with the day to day management of the Projects, up to \$1.8 million.
24 Acres has agreed since the Receiver's filing of the Motion that this \$1.8 million will not be
25 added to its debt. In addition to this guaranteed amount, the receivership estate retains
26 any claims held by Osgood or Almaden against third parties, including the ability to
27 pursue any fraudulent transfers of assets belonging to Osgood and Almaden and to
28 preserve them for the benefit of the receivership estate. The receivership estate also

1 retains the possibility, albeit remote, that there may be excess proceeds from the unit
 2 sales after the payment of the liens if the sales estimates are higher than expected and
 3 the costs are lower than budgeted. In the Receiver's view, an increase of \$100,000 is not
 4 sufficient consideration to justify removing these entities from the receivership estate,
 5 thereby eliminating these potential assets. It also does not adequately compensate the
 6 receivership estate for the fees and costs it would incur transitioning the Projects to
 7 TriGate.⁵

8 Second, as evidenced by the opposition, TriGate has no concrete plan for what
 9 would happen if it successfully removes Osgood and Almaden from the receivership
 10 estate. What is certain is that unless it reaches an agreement with Acres in short order,
 11 Acres will cease making protective advances and declare a default and TriGate will either
 12 have to find a way to pay off the Acres debt or lose the projects to foreclosure.⁶ Acres
 13 will also charge interest at its contract rate, which is currently 15.625%. What is also
 14 certain is that construction at the project will again stall while TriGate figures out its plan.
 15 All of this is to the detriment of the parties who have entered into purchase agreements
 16 and placed deposits on units and been patiently waiting for their completion. It is worth
 17 noting that according to Acres, it has had no communications with TriGate since the
 18 negotiations between the parties broke down in the spring.

19
 20
 21 ⁵ In the Motion and at the initial hearing on TriGate's motion, one of the Receiver's
 22 arguments against the relief TriGate is seeking was that the removal of Osgood and
 23 Almaden from the receivership estate would potentially harm investor noteholders of
 24 Osgood and Almaden because they would no longer be creditors of the receivership
 25 estate. However, based on tracing of their investments, it appears that although most of
 26 them sent their loan proceeds to Osgood or Almaden, the proceeds were quickly sent by
 Osgood or Almaden to other Receivership Entities, including SiliconSage Builders and
 SiliconSage Construction. Thus, it is likely that even if Osgood and Almaden were
 removed from the receivership estate, these investors could still assert claims against the
 receivership estate because of how their loan proceeds were used.

27 ⁶ Putting the entities into bankruptcy does not appear to be a viable option because
 28 TriGate has a contractual agreement with Acres not to take any such action.

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1 **III. Miscellaneous Issues**

2 This section addresses some miscellaneous issues related to the Motion. First,
3 since the filing of the Motion, the Receiver and Acres finalized the Acres Agreement. The
4 only change is that Acres has agreed that the \$1.8 million allocation for the fees and
5 costs of the Receiver and his real estate counsel and the fees incurred seeking
6 recharacterization of the purchase agreements that the Receiver alleges are loans will
7 not be added to the amount owed to Acres. The final Acres Agreement is attached to the
8 concurrently filed *Notice of Submission* as Exhibit 1.

9 Second, the Receiver has agreed to clarify his proposed treatment of liens by
10 adding language that makes clear that the sales will be free and clear of liens but the
11 liens will attach to the proceeds from the sales with the same priority, validity, and to the
12 same extent as they attached to the property. This addresses a concern that was raised
13 by Whirlpool Corporation, one of the mechanic's lienholders whose claim is expected to
14 be paid in full as part of the construction costs. The redlined order is attached to the
15 *Notice of Submission* as Exhibit 3.

16 Third, there are mechanic's liens that were recorded against both Projects by
17 SiliconSage Construction, one of the Receivership Entities, shortly before the Receiver
18 was appointed. The Receiver does not intend for any proceeds of the sales of the units
19 to be paid to SiliconSage Construction and will release this lien as an encumbrance.

20 Last, the Receiver has verified that the lien on the Almaden Project in favor of
21 Yeong-Sae Kim, et al., has been paid in full. It appeared on the preliminary title report
22 because of a typographical error in the reconveyance.

23

24 **IV. Conclusion**

25 Stepping into a project midstream is always difficult. But stepping into distressed
26 construction projects with construction at a halt presents an even bigger task. Under the
27 stewardship of SiliconSage Builders, the ship had gone off course and was sinking.
28 Although TriGate's equity contributions helped get the ship back afloat, it was still off

1 course because of reliance on inaccurate information and TriGate's failure to deploy
2 contractors to perform forensic reviews. Since the Receiver took the helm, the ship is
3 now on course and moving full steam ahead. Taking into full consideration the fiduciary
4 duty that he owes to the Court and the beneficiaries of the receivership estate and
5 exercising his business judgment with this duty in mind, the Receiver believes that the
6 Acres Agreement is in the best interests of the receivership estate and requests that the
7 Court grant the Motion as prayed.

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10 DATED: November 19, 2021

Respectfully submitted,

SMILEY WANG-EKVALL, LLP

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14 By: /s/ Kyra E. Andrassy
15 KYRA E. ANDRASSY
16 Counsel for David Stapleton, Receiver
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DECLARATION OF DAVID STAPLETON

I, David Stapleton, declare as follows:

1. I am a party in the above-entitled action. I know each of the following facts to be true of my own personal knowledge, except as otherwise stated and, if called as a witness, I could and would competently testify with respect thereto. I make this declaration in support of the reply to the oppositions filed to my motion to approve the construction funding agreement with Acres. Unless otherwise defined in this declaration, all terms defined in the opposition are incorporated herein by this reference.

2. As set forth in my prior declarations, when I was first appointed, one of the first meetings that I had was with Adam Aultz from TriGate, who had done due diligence of the records of Osgood and Almaden in mid-2020 and who was heavily involved in the Projects when I was appointed. Unfortunately, it appears that a number of things were either concealed from TriGate during its due diligence or somehow overlooked. TriGate believed that the only security interest against the two projects was the construction loan in favor of Acres Capital and that it had entered into subordination agreements with all holders of unsecured debt where those creditors agreed to subordinate their debt to the interests of TriGate as a preferred equity holder. Relying on TriGate's understanding and because it had the most at stake and was willing to fund the projects, I entered into negotiations with TriGate and Acres about how to complete the project.

3. Absent any agreement between the parties and setting aside equitable considerations, proceeds from the sale of the condominium units would be distributed as follows:

1	Acres Capital, until paid in full for principal, interest, and any exit fee
2	Junior Liens (Recorded after TriGate did its due diligence and without its knowledge)
3	Unsecured debt, which would include the amount owed under the unsecured notes held by investors of which TriGate was apparently unaware. This would also include the claims of the parties to the purchase agreements that I believe should be recharacterized as disguised loans if I prevail in that argument
4	TriGate's preferred equity, until paid in accordance with the terms of the operating agreement

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5	After certain items are paid to TriGate on account of its preferred equity interest, there was a sharing agreement between TriGate and the common member(s), with the portion to be paid to the common members to be paid instead to the subordinated debt until the subordinated debt was paid in full.
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4. Based on TriGate's understanding of the debt structure, the proposed order of priority for the distribution of proceeds under the tri-party agreement with TriGate and Acres looked like this:

1	Acres Capital on account of principal and legal fees, but not interest
2	TriGate in an amount equal to the money it put in as preferred equity (number 4 in the chart above), plus amounts funded by it to complete construction, its administrative expenses, and its legal fees
3	Junior Liens
4	Proceeds remaining were shared with TriGate, Acres until it was paid all of its interest at 10.625%, and the estate. The unsecured creditors of Osgood or Almaden would only share in the estate's portion

Once I learned of the existence of the junior liens and the investors who loaned money pursuant to unsecured notes, I was not comfortable elevating TriGate from its preferred equity position to a lienholder second in priority because it would have given it preferential treatment at the expense of both the junior lienholders and the investors holding unsecured notes. Attached as Exhibit "1" is a true and correct copy of an email exchange that I was copied on and that I authorized my counsel to send to counsel for TriGate.

5. Under my arrangement with Acres, the distribution of proceeds is as follows:

1	Acres Capital, until paid in full for principal, interest at a reduced rate, and any exit fee
2	Junior Liens in order of priority
3	Unsecured debt, which would include the amount owed under the unsecured notes held by investors of which TriGate was apparently unaware. This would also include the claims of the parties to the purchase agreements that I believe should be recharacterized as disguised loans if I prevail in that argument. Although TriGate is a preferred equity holder, it would most likely be treated on par with the unsecured debt, although that is subject to revision and Court approval.

6. Under TriGate's proposal, the maximum that the receivership estate will receive is \$500,000 and Osgood and Almaden (and not just the Projects) would be

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1 removed from the receivership estate. Under the Acres Agreement, the receivership
 2 estate is guaranteed \$400,000, plus the fees and costs incurred by my team and my
 3 special real estate counsel in connection with the day to day management of the
 4 Projects, up to \$1.8 million. Acres has agreed since the filing of the Motion that this \$1.8
 5 million will not be added to its debt. In addition to this guaranteed amount, the
 6 receivership estate retains any claims held by Osgood or Almaden against third parties,
 7 including the ability to pursue any fraudulent transfers of assets belonging to Osgood and
 8 Almaden and to preserve them for the benefit of the receivership estate. I am still
 9 investigating the flow of funds and have not completed my analysis of these potential
 10 claims. The receivership estate also retains the possibility, albeit remote, that there may
 11 be excess proceeds from the unit sales after the payment of the liens if the sales
 12 estimates are higher than expected and the costs are lower than budgeted. In my view,
 13 an increase of \$100,000 is not sufficient consideration to justify removing these entities
 14 from the receivership estate, thereby eliminating these potential assets. It also does not
 15 adequately compensate the receivership estate for the fees and costs it would incur
 16 transitioning the Projects to Trigate.

17 I declare under penalty of perjury under the laws of the United States of America
 18 that the foregoing is true and correct.

19 Executed on this 19th day of November, 2021, at Solana Beach, California.

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21 _____
 22 David Stapleton

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EXHIBIT "1"

Kyra Andrassy

From: Kyra Andrassy
Sent: Wednesday, May 12, 2021 4:12 PM
To: Selden, Brian G.
Cc: jwielebinski@winstead.com; David Stapleton
Subject: RE: SiliconSage proposal

Brian:

While we are sympathetic to TriGate's position in this case and share some of its concerns, the proposal remains problematic for the following reasons:

- (1) It seems to require that TriGate's claim as a creditor (to be treated pari passu with what the proposal calls the "Other Creditors") be senior to non-TriGate investors. At this stage in the case and until we have a better understanding of the flow of money into and out of Osgood and Almaden, we cannot agree to the priority of one unsecured claim versus another.
- (2) It requires that we take the position that money put in by creditors or investors that did not go directly to Osgood or Almaden but instead went to another entity not participate in any distributions from Osgood or Almaden (at least until TriGate is paid in full). Again, we are not prepared to make that commitment. One of the things that we will be looking at is whether some or all of the receivership entities should be treated separately or whether one or more of them should be determined to be a unitary enterprise. We don't know how that analysis will play out. We cannot make the decision that Osgood and Almaden should be treated as standalone entities right now. This proposal seeks to resolve the issue of how the net proceeds after Acres is paid off are distributed and the Receiver does not believe that is appropriate at this early stage in the case.
- (3) It is requiring that we increase the amount of Acres' secured debt against the property by nearly \$3 million to pay TriGate for the amount TriGate has apparently spent since the SEC filed its case. This raises a few issues, including that some portion of this is pre-receivership and would have the effect of elevating what is currently a potential unsecured claim to a secured claim.
- (4) It seems to require that the Receiver exercise his business judgment and discretion in consultation with TriGate. TriGate's motivation is to be repaid. The Receiver's is to do equity. These goals may not be aligned and that could create issues with the Receiver fulfilling his fiduciary duty to all of the interest holders.

Our goal right now is to get construction back on track and to get these units sold and completed. While this occurs, the Receiver will proceed with the forensic accounting and formulate his recommendations about how proceeds should be distributed when he has more information.

Kyra

From: Selden, Brian G. <bgselden@JonesDay.com>
Sent: Tuesday, May 11, 2021 12:46 PM
To: Kyra Andrassy <kandrassy@swelawfirm.com>
Cc: jwielebinski@winstead.com
Subject: RE: SiliconSage proposal

Hi Kyra –

We have not gotten a response to this proposal.

Do you expect to send comments or questions? Would it be worthwhile to schedule another call?

Brian

Brian Selden (bio)
Partner-in-Charge – Silicon Valley Office
JONES DAY® - One Firm WorldwideSM
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Office +1.650.687.4142
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From: Selden, Brian G.
Sent: Thursday, May 6, 2021 11:42 AM
To: 'Kyra Andrassy' <kandrassy@swelawfirm.com>
Cc: jwielebinski@winstead.com
Subject: SiliconSage proposal

Kyra –

Thanks again for taking the time to talk this morning.

I am attaching the proposal that TriGate sent to Acres. We look forward to your thoughts.

Brian

Brian Selden (bio)
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PROOF OF SERVICE

STATE OF CALIFORNIA, DISTRICT COURT, NORTHERN DISTRICT

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 3200 Park Center Drive, Suite 250, Costa Mesa, CA 92626.

On **11/19/2021**, I served true copies of the following document(s) described as **OMNIBUS REPLY TO THE OPPOSITIONS TO THE MOTION OF RECEIVER FOR ORDER APPROVING CONSTRUCTION FUNDING AGREEMENT WITH ACRES CAPITAL; DECLARATION OF DAVID STAPLETON IN SUPPORT THEREOF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

(X) (BY COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”)) – Pursuant to United States District Court, Northern District of California, the foregoing document will be served by the court via NEF and hyperlinked to the document. On **11/19/2021**, I checked the CM/ECF docket for this case and determined that the aforementioned person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated.

(X) (BY U.S. MAIL). I enclosed the document(s) in a sealed envelope or package and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Smiley Wang-Ekvall, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with USPS in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Costa Mesa, California.

() (BY E-MAIL). By scanning the document(s) and then e-mailing the resultant pdf to the e-mail address indicated above per agreement. Attached to this declaration is a copy of the e-mail transmission.

() (BY FACSIMILE). I caused the above-referenced documents to be transmitted to the noted addressee(s) at the fax number as stated. Attached to this declaration is a "TX Confirmation Report" confirming the status of transmission. Executed on _____, at Costa Mesa, California.

() STATE I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

(X) FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 19, 2021, at Costa Mesa, California.

/s/ Lynnette Garrett

Lynnette Garrett

SERVICE LIST**BY COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):**

- 1
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Via U.S. Mail:

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