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7 RECEIVER

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

10
11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 v.

14 LAMBERT VANDER TUIG (a/k/a/
15 LAMBERT VANDER TAG a/k/a
DEAN I. VANDER TAG), THE
16 CAROLINA DEVELOPMENT
COMPANY, INC. (a/k/a THE
17 CAROLINA COMPANY AT
PINEHURST, INC.), AND
18 JONATHAN CARMAN,

19 Defendants.
20

Case No. SACV06-172AHS(MLGx)

Complaint Filed: February 16, 2006

**RECEIVER'S NOTICE OF
MOTION AND MOTION FOR
APPROVAL OF SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; and DECLARATION
OF THOMAS A. SEAMAN IN
SUPPORT THEREOF.**

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as counsel may be heard in Department 10A of the above-named court, located at 411 West Fourth Street, Santa Ana, California, the court-appointed Receiver for The Carolina Development Company, Inc. ("Carolina Development"), Thomas A. Seaman ("Receiver") hereby moves the Court for an order approving the proposed settlement agreement between the Receiver on behalf of the receivership estate on the one hand, and Fountainhead Partners IV, LLC, Frank Perna, Jr., and The Fountainhead Company, LLC (the "Fountainhead Parties"), on the other (the "Proposed Settlement Agreement"). (*See* Seaman Decl. to *Ex Parte* Application filed concurrently herewith, Proposed Settlement Agreement, Ex. "A".)

This motion is based upon this Court's inherent authority and the accompanying memorandum of points and authorities, supporting declarations, and upon such additional evidence and oral argument as the Court may consider in connection with this motion.

DATED: February 25, 2008

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By

ALAN H. MARTIN
NORMA V. GARCIA
Attorneys for the Receiver
THOMAS A. SEAMAN

1 the Fountainhead Parties will not be able to cure the alleged defaults under the
2 existing financing.

3 The Receiver further believes that failure to obtain approval for the
4 Proposed Settlement Agreement before March 15, 2008 not only jeopardizes the
5 settlement with the Fountainhead Parties, but ultimately means the foreclosure will
6 go forward and the estate will lose its \$2,000,000 investment. (Seaman Decl. to *Ex*
7 *Parte* Application, ¶ 12.) As such, after much negotiation and careful consideration,
8 the Receiver is confident this Proposed Settlement Agreement will render a
9 favorable result for the estate and is in the estate's best interest.

10
11 **II. STATEMENT OF FACTS**

12 FPIV is the developer of a condominium project known as Galileo (the
13 "Project") located on approximately 18 acres of land near Lake Las Vegas in
14 Henderson, Nevada (the "Land"). In or about December 2005, FPIV offered to
15 grant Carolina Development a "Class C" membership interest in FPIV in
16 consideration of Carolina Development agreeing to provide funds for the Project in
17 the aggregate amount of \$15,000,000 as set forth in the Memorandum of
18 Understanding dated December 27, 2005 (the "MOU"). (*See* Ex. "E" to Seaman
19 Decl., *Ex Parte* Application.)

20 Carolina Development paid FPIV \$2,000,000 of the \$15,000,000 in
21 December 2005. Carolina Development was scheduled to pay FPIV the remaining
22 \$13,000,000 on February 10, 2006, on the eve of the Receiver's appointment, but
23 did not. Shortly after the Receiver's appointment, the Receiver caused a Notice to
24 be recorded against the Land to impart constructive notice of the estate's interest to
25 third parties. (Ex. "C" to Seaman Decl., *Ex Parte* Application.) As a result of the
26 Notice and Carolina Development's inability to fund the remaining \$13,000,000,
27 FPIV contends that it has been unable to renegotiate its loan terms and has defaulted
28 on its loan.

1 On or about January 10, 2008, the holder of the first deed of trust
2 initiated foreclosure proceedings by filing a Notice of Breach and Election to Sell
3 Under Deed of Trust ("Notice of Foreclosure"). (Ex. "D" to Seaman Decl., *Ex Parte*
4 Application.) The Fountainhead Parties are negotiating a refinance loan, the
5 proceeds of which would repay the foreclosing lender. Such refinancing, however,
6 cannot proceed without the Receiver releasing the Notice currently encumbering the
7 Land. Understandably, the Receiver does not want to release the Notice without
8 receiving appropriate compensation for the interest held by the estate. The deadline
9 for the performance by the Settling Parties of their respective obligations is March
10 15, 2008, as set forth in section 3.1.1. of the Proposed Settlement Agreement.

11 The Fountainhead Parties and the Receiver have negotiated the
12 following terms as set forth in the Proposed Settlement Agreement:

- 13 • Subject to Court approval of the settlement terms, on or before
14 March 15, 2008, the Fountainhead Parties will deliver into
15 escrow the sum of \$400,000 for benefit of the receivership
16 estate;
- 17 • Upon receipt of fully executed original counterparts of the
18 Proposed Settlement Agreement, the escrow agent will deliver
19 complete originals to the parties, and the \$400,000 to the
20 Receiver;
- 21 • The Receiver shall execute a full release of the Notice in a form
22 reasonably acceptable to the escrow agent and the title company
23 to allow FPIV to proceed with its refinancing;
- 24 • The Receiver will move the Court for approval of the Proposed
25 Settlement Agreement;
- 26 • The Fountainhead Parties generally release the Receiver and the
27 estate; and
- 28 • The Receiver, on behalf of the estate, specifically releases the

1 Fountainhead Parties.

2 (Ex "A" to Seaman Decl., *Ex Parte* Application.)

3 The Receiver is confident that the terms of the Proposed Settlement
4 Agreement appropriately compensate the receivership estate for its interest in FPIV.

5
6 **III. THE LEGAL STANDARD**

7 The Proposed Settlement Agreement embodies a voluntary undertaking
8 by the Settling Parties to achieve two common goals: avoiding FPIV's risk of losing
9 its interest in the Land, and avoiding the receivership estate potentially losing its
10 interest in the Land and in FPIV. The potential loss is attributed to FPIV's inability
11 to refinance its loan due to the Notice recorded by the Receiver. FPIV contends
12 that, as a result it has defaulted on its loan – causing the filing of the Notice of
13 Foreclosure.

14 Given the potential loss of the receivership's interest, the \$2,000,000
15 investment made in December 2005 by Carolina Development in FPIV, and the
16 consequences to the individual investors, the legal principles governing court
17 approval of consent decrees are relevant to this Court's review of the Proposed
18 Settlement Agreement and ruling on the instant motion for approval. As the Court
19 is aware, a "consent decree is essentially a settlement agreement subject to
20 continued judicial policing. It is not a decision on the merits or the achievement of
21 the optimal outcome for all parties, but is the product of negotiation and
22 compromise." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (citation
23 and internal quotation omitted). Approval of a proposed consent decree is
24 committed to the informed discretion of the district court. *Id.*; *SEC v. Randolph*,
25 736 F.2d 525, 529 (9th Cir. 1984).

26 In reviewing this Proposed Settlement Agreement, this Court is to
27 exercise its discretion taking into account the strong public policy favoring the
28 voluntary settlement of litigation, *Ahern v. Central Pac. Freight Lines*, 846 F.2d 47,

1 48 (9th Cir. 1988), especially where, as here, a court appointee is charged with
2 protecting public (the investors) rights have taken an active role in crafting the
3 settlement. *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir.
4 1995); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990);
5 *Montrose*, 50 F.3d at 746 (quoting *Cannons Engineering Corp.*, 899 F.2d at 84); *see*
6 *also Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961) (absent
7 malfeasance or bad faith, courts are not to "assess the wisdom of the Government's
8 judgment in negotiating and accepting ... [a] consent decree"); *United States v.*
9 *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (the balancing of interests "must
10 be left, in the first instance, to the discretion of the Attorney General.").

11 Here, the Proposed Settlement Agreement embodies a commitment by
12 the Receiver to salvage as much as possible of the \$2,000,000 Carolina
13 Development investment for benefit of the estate, that will ultimately benefit the
14 1,400+ Carolina Development investors. This is certainly of great public benefit.
15 The fact that none of the Carolina Development investors, defendants to this action,
16 Lambert Vander Tuig and Jonathan Carman, and none of the noticed third parties
17 have objected to the terms of the proposed settlement weighs heavily in favor of
18 Court approval of the Proposed Settlement Agreement. Additionally, the plaintiff in
19 this action, the Securities and Exchange Commission (the "Commission"), has not
20 objected to the Proposed Settlement Agreement, which also weighs heavily in favor
21 of Court approval.

22 Further, in considering the Proposed Settlement Agreement, it is
23 important for the Court to recognize that it consists of a number of carefully
24 negotiated clauses that serve the broader purpose of protecting the investors' rights
25 in the monies invested by Carolina Development in FPIV. "[T]he court's intrusion
26 upon what is otherwise a private consensual agreement negotiated between the
27 parties to a lawsuit must be limited to the extent necessary to reach a reasoned
28 judgment that the agreement is not the product of fraud or overreaching by, or

1 collusion between, the negotiating parties, and that the settlement, taken as a whole
2 is fair, reasonable and adequate to all concerned.'" *Hanlon v. Chrysler Corp.*, 150
3 F.3d 1011, 1027 (9th Cir. 1988) (quoting *Officers for Justice v. Civil Service Com.*,
4 688 F.2d 615, 625 (9th Cir. 1982)). All such conditions are satisfied here.

5 In performing its review of the Proposed Settlement Agreement, this Court is not
6 required to make the same in-depth analysis that would otherwise be required to
7 enter a judgment on the merits after trial:

8 The trial court in approving a settlement need not inquire
9 into the precise legal rights of the parties nor reach and
10 resolve the merits of the claims or controversy, but need
11 only determine that the settlement is fair, adequate,
12 reasonable, and appropriate under the particular facts and
 that there has been valid consent by the concerned parties.

13 *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983)
14 (quoting *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,
15 616 F.2d 1006, 1014 (7th Cir. 1980)); *see also United States v. Rohm & Haas Co.*,
16 721 F. Supp. 666, 686 (D.N.J. 1989) (lengthy evidentiary hearings not required
17 when deciding whether to enter a consent decree).

18 Rather, "[a]s long as [a] consent decree comes within the general scope
19 of the case made by the pleadings, furthers the objectives upon which the law is
20 based, and does not violate the statute upon which the complaint was based, the
21 parties' agreement may be entered by the court." *Sierra Club, Inc. v. Electronic*
22 *Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) (internal quotations and
23 citations omitted).

24 The Proposed Settlement Agreement clearly is within the scope of the
25 action brought by the Commission, and the scope of the Receiver's responsibilities
26 as set forth in this Court's Order Appointing Receiver entered on February 16, 2008
27 (Docket No. 13) and the Order Expanding the Scope of the Receivership entered on
28

1 April 7, 2008 (Docket No. 43), and furthers such objectives. The Proposed
2 Settlement Agreement provides, among other things, for the Fountainhead Parties to
3 generally release and remise the receivership estate on the one hand, but only for a
4 specific release by the Receiver of the Fountainhead Parties. (Ex. "A" to Seaman
5 Decl., *Ex Parte* Application.) The purpose of these clauses was to protect the estate
6 from waiving any claims as to the Fountainhead Parties that do not relate to the
7 Land.

8 Not only do none of the terms and conditions of the Proposed
9 Settlement Agreement violate any of the statutes on which the Commission's action
10 was based or upon which the Receiver's appointment was made, the Proposed
11 Settlement Agreement specifically provides that it shall be implemented subject to
12 Court Approval and the Receiver retains any potential claims against the
13 Fountainhead Parties, outside of the claims relating to the Land. *Id.* The Proposed
14 Settlement Agreement represents the agreements of the Settling Parties reached after
15 intensive and difficult settlement negotiations over the past nearly 24 months.
16 (Seaman Decl., ¶¶ 6-7.) Far from being the product of "fraud, overreaching, or
17 collusion," the Proposed Settlement Agreement is the product of the Settling Parties'
18 good faith efforts to negotiate a global resolution of this complex litigation.

19 In short, viewed as a whole, the Proposed Settlement Agreement is fair,
20 reasonable, and adequate to the Settling Parties and to the Carolina Development
21 investors.

22 23 **IV. THE SETTLEMENT**

24 To assist the Court in its review of the Proposed Settlement Agreement,
25 in light of the legal standard set forth in the preceding section, the Receiver provides
26 the following summary of its material terms and conditions:

27 The Fountainhead Parties and the Receiver have negotiated the
28 following terms as set forth in the Proposed Settlement Agreement:

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- Subject to Court approval of the settlement terms, on or before March 15, 2008, the Fountainhead Parties will deliver into escrow the sum of \$400,000 for benefit of the receivership estate;
- Upon receipt of fully executed original counterparts of the Proposed Settlement Agreement, the escrow agent will deliver complete originals to the parties, and the \$400,000 to the Receiver;
- The Receiver shall execute a full release of the Notice in a form reasonably acceptable to the escrow agent and the title company to allow FPIV to proceed with its refinancing;
- The Receiver will move the Court for approval of the Proposed Settlement Agreement;
- The Fountainhead Parties generally release the Receiver and the estate; and
- The Receiver, on behalf of the estate, specifically releases the Fountainhead Parties.

(Ex. "A" to Seaman Decl. in support of *Ex Parte* Application.)

///
///

1 **V. CONCLUSION**

2 For the foregoing reasons, the Receiver respectfully requests that this
3 Court approve the Proposed Settlement Agreement.

4
5 Dated: February 25, 2008

6 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

7
8 By _____

9 ALAN H. MARTIN
10 NORMA V. GARCIA
11 Attorneys for THOMAS A. SEAMAN,
12 RECEIVER
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1 provided by Fountainhead (including a Memorandum of Understanding) that
2 Carolina Development was also supposed to invest an additional \$13 million cash in
3 early February 2006, just prior to my appointment as Receiver. This amount vastly
4 exceeded the amount of funds I seized upon my appointment and this payment was
5 never made.

6
7 5. Fountainhead contends that Carolina Development breached its
8 agreement to invest funds in Fountainhead. As a result of the alleged breach,
9 Fountainhead contends that it defaulted on the debt used to acquire the land and was
10 allegedly forced to obtain substitute financing to repay the seller's loan. Shortly
11 following my appointment as receiver, over two years ago, I contacted Fountainhead
12 for the purpose of determining exactly what ownership interest (if any) Carolina
13 Development had obtained in Fountainhead and pursuing a return of all or part of
14 Carolina Development's investment. Fountainhead was not willing to return any of
15 the \$2,000,000 invested by Carolina Development, and no progress was made
16 toward resolving this dispute. Shortly following my appointment as Receiver, I
17 recorded Notices of Pendency of Receivership (collectively, the "Notice") on the
18 Fountainhead Land which essentially act as *lis pendens*. I recorded the Notice to
19 protect Carolina Development's interest in the Fountainhead Land by giving third
20 parties constructive notice of Carolina Development's interest. A true and correct
21 copy of a representative Notice is attached to the declaration I submitted in support
22 of the *Ex Parte* Application as Exhibit "C."

23
24 6. Over the course of the receivership, I made several attempts to
25 resolve this dispute. Some attempts to resolve this dispute were initiated by
26 Fountainhead when prospective lenders would see the Notice on title reports.
27 Typically, Fountainhead would demand that I remove the Notice and threaten a
28 lawsuit seeking damages from Carolina Development. While it was clear to me that

1 Carolina Development made an ill-fated original \$2,000,000 investment, my only
2 means of protecting Carolina Development's interest was to keep the Notice in
3 place.

4
5 7. More recently, I was approached by Frank Perna, Jr. of
6 Fountainhead who informed me that he had bought out his other partners and was
7 now the sole managing member of Fountainhead. He again demanded that I remove
8 the Notice so that financing of the Project could be obtained, but expressed some
9 understanding of my position for the benefit of the investors in the instant action.
10 He also expressed more openness to resolve this dispute. Mr. Perna suggested some
11 sort of small equity position in Fountainhead for Carolina Development if I would
12 release the Notice. The long term nature of an equity interest did not appear
13 consistent with my duties to conclude the affairs of the receivership estate and I
14 responded with a "put/call" proposal designed to both induce Fountainhead to buy-
15 out Carolina Development's position in the short term and to provide an exit strategy
16 for Carolina Development if our position did not get purchased. Instead, Mr. Perna
17 proposed a cash buy-out of Carolina Development. After negotiating with Mr.
18 Perna over the buy-out price, I ultimately agreed to \$400,000 with mutual releases
19 in exchange for my release of the Notice, subject to Court approval. A true and
20 correct copy of the settlement agreement is attached to the declaration I submitted in
21 support of the *Ex Parte* Application as Exhibit "A".

22
23 8. Prior to this latest round of settlement discussions, my attorneys
24 and I have explored filing actions for partition, declaratory relief, and unjust
25 enrichment, among other claims. However, given the tenuous nature of Carolina
26 Development's interest in Fountainhead, and the potential liabilities of not removing
27 the Notice, together with the immediate cash benefit to the estate, I believe that it is
28 in the best interest of the receivership for this Court to approve the settlement

1 proposed in the attached settlement agreement (Ex. "A" to Seaman Decl., *Ex Parte*
2 Application).

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I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on February 25, 2008.

//S//THOMAS A. SEAMAN
THOMAS A. SEAMAN

1 PROOF OF SERVICE

2 I, the undersigned, declare that I am, and was at the time of service of
3 the papers herein referred to, employed in the County of Orange; over the age of
4 eighteen years and not a party to the within entitled action or proceeding. My
business address is 650 Town Center Drive, 4th Floor, Costa Mesa, California
92626-1993.

5 On February 28, 2008, I served the following document described as
6 **RECEIVER'S NOTICE OF MOTION AND MOTION FOR APPROVAL OF**
7 **SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
8 **SUPPORT THEREOF; and DECLARATION OF THOMAS A. SEAMAN IN**
SUPPORT THEREOF on the interested party(ies) in this action by placing true
copies/ originals thereof enclosed in sealed envelopes and/or packages addressed
as follows:

9 **BY MAIL:** I am "readily familiar" with the firm's practice of collection and
10 processing correspondence for mailing. Under that practice it would be
11 deposited with the U.S. postal service on that same day with postage thereon
12 fully prepaid at Costa Mesa, California in the ordinary course of business. I
am aware that on motion of the party served, service is presumed invalid if
postal cancellation date or postage meter date is more than one day after date
of deposit for mailing in affidavit.

13 **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile
14 pursuant to Rule 2008 of the California Rules of Court. The telephone
15 number of the sending facsimile machine was 714-513-5130. The name(s)
16 and facsimile machine telephone number(s) of the person(s) served are set
17 forth in the service list. The sending facsimile machine (or the machine used
to forward the facsimile) issued a transmission report confirming that the
transmission was complete and without error. Pursuant to Rule 2.306(g)(4), a
copy of that report is attached to this declaration.

18 **BY OVERNIGHT DELIVERY:** I served such envelope or package to be
19 delivered on the same day to an authorized courier or driver authorized by the
overnight service carrier to receive documents, in an envelope or package
designated by the overnight service carrier.

20 **SEE ATTACHED LIST**

21 **FEDERAL:** I declare that I am employed in the office of a member of the
22 bar of this Court at whose direction the service was made. I declare under
23 penalty of perjury under the laws of the United States of America that the
foregoing is true and correct.

24 Executed on February 28, 2008 at Costa Mesa, California.

25 //S// PAULA L. GLUCK
26 PAULA L. GLUCK

SERVICE LIST

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