1824184

8054-001

SHARTSIS FRIESE LLP
RONALD HAYES MALONE (Bar #51087)
rmalone@sflaw.com
FRANK A. CIALONE (Bar #172816)
fcialone@sflaw.com
One Maritime Plaza, Eighteenth Floor
San Francisco, CA 94111
Telephone: (415) 421-6500
Facsimile: (415) 421-2922

Attorneys for Receiver
THOMAS A. SEAMAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MEDICAL CAPITAL HOLDINGS, INC.; MEDICAL CAPITAL CORPORATION; MEDICAL PROVIDER FUNDING CORPORATION VI; SIDNEY M. FIELD; and JOSEPH J. LAMPARIELLO,

Defendants.

Case No. SACV 09-818 DOC (RNBx)

RECEIVER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT WITH WELLS FARGO AND BANK OF NEW YORK MELLON;

Date: August 27, 2012
Time: 3 p.m.
Ct Rm: 9D
Judge: Hon. David O. Carter

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

Docket

6/11/12

TABLE OF CONTENTS

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE STATUTES

RULES

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

I. INTRODUCTION

Plaintiff Thomas A. Seaman, Federal Equity Receiver, brings this Motion For Approval of a settlement agreement entered into with Wells Fargo Bank, N.A. ("Wells Fargo") and with Bank of New York Mellon ("BNYM") (collectively, the "Trustees") – the financial institutions that served as indenture trustees for certain receivership entities. The settlements, if approved and once effective, will provide an economic benefit of more than $130 million to the Receivership Estate, by adding $106 million in cash and eliminating indemnity claims in the tens of millions of dollars (and growing) that the Trustees have asserted. The settlements will more than double the amounts available for distribution to over $200 million, while avoiding the considerable costs, risks and delays associated with continued litigation against the Trustees. These settlements arise from the Receiver's pursuit of claims on behalf of the receivership entities for the Trustees' breaches of Note Issuance and Security Agreements (the "NISAs"), as authorized by the Court, and represent the Receiver's successful effort to hold the Trustees accountable for those breaches and to recover funds that will ultimately compensate the Noteholders. To the Receiver's knowledge, these settlements would be the largest recovery against indenture trustees to date.

The Receiver, having weighed all of the factors relevant to the value of his claims against the Trustees, including the benefit to Noteholders of an immediate and significant infusion of cash into the Receivership Estate, the difficulty in pursuing the claims, the likelihood of establishing liability, the range of recoverable damages, the costs and delays inherent in continued litigation, and the risk that, in the worst-case scenario, the Trustees' indemnity claims could reduce the Receivership Estate by tens of millions of dollars, has determined that the settlements are in the best interests of the Noteholders and the Receivership Estate. Accordingly, the Receiver respectfully requests that the Court approve the settlements and grant this Motion.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

II. STATEMENT OF FACTS

A. The Appointment of the Receiver.

The factual background of this case is well-known to the Court. Medical Capital Holdings Inc. ("MCH") raised money by setting up Special Purpose Corporations (collectively, the "MPFCs"), which sold notes to investors. Declaration of Thomas A. Seaman ("Seaman Decl."), ¶ 2. The MPFCs were administered by Medical Capital Corporation ("MCC"), a wholly owned subsidiary of MCH. *Id.* According to the applicable governing documents, each MPFC was authorized to invest Noteholder funds in eligible medical receivables and other income-generating assets. *Id.* Instead, capital was underdeployed and money was invested in risky assets which became uncollectible. *Id.* Worthless or impaired assets were then transferred to other MPFCs at full or higher value, and even fake assets were purportedly sold between MPFCs. *Id.* This Ponzi-like scheme enabled the earlier MPFCs, using the money paid by later MPFCs for overvalued assets, to pay interest and return principal to their Noteholders. *Id.* The scheme also enabled MCC to draw excessive administrative fees from the MPFCs. *Id.* When the entities collapsed, the investors suffered massive losses. *Id.*

On July 16, 2009, the Securities and Exchange Commission ("SEC") brought claims in the Central District of California against MCH, MCC, MPFC VI, Sydney Field, and Joseph Lampariello, alleging that Field and Lampariello, the principals behind the companies, had engaged in a scheme to defraud investors in the MPFCs. *Id.*, ¶ 3; *SEC* Doc. No. 1.[1] On August 18, 2009, the Court entered a Preliminary Injunction and Order Appointing a Permanent Receiver. *SEC* Doc. No. 44. The Court appointed Plaintiff Thomas Seaman as the Permanent Receiver for MCH, MCC, and the MPFCs (collectively, the "Receivership Entities" or "Receivership

[1] In this brief, the Receiver cites documents from Case No. 8:09-cv-00818-DOC-RNB as "*SEC* Doc. No. 1", from Case No. 8:09-cv-01048-DOC-RNB as "*Masonek* Doc. No. 1", from Case No. 2:10-cv-06561-DOC-RNB as "*Abbate* Doc. No. 1", and from Case No. 8:10-ML-02145-DOC-RNB as "MDL Doc. No. 1."

Estate"), with duties and responsibilities that include (i) investigating of the financial condition of the Receivership Entities and disposition of investor funds; (ii) identifying, administering, and liquidating all assets of the Receivership Entities so the proceeds will be available to satisfy Noteholders' and creditors' claims; (iii) pursuing and resolving claims against third parties so the proceeds will be available to satisfy Noteholders' and creditors' claims; and (iv) developing a Distribution Plan for distribution of assets and value to creditors and Noteholders. *Id.*

B. The Claims Against the Trustees.

The Trustees served as indenture trustees for the various MPFCs pursuant to Note Issuance and Security Agreements ("NISAs"). Seaman Decl., ¶ 4. Wells Fargo was the trustee for MPFC III, which issued notes in January 2004 and April 2007, and for MPFC V, which issued notes in October 2007. *Id.* BNYM became the trustee for MPFC II in September 2005, replacing Zions First National Bank ("Zions"). *Id.* MPFC II issued notes in January 2004. *Id.* BNYM was also the trustee for MPFC IV, which issued notes in October 2006 and May 2007, and for MPFC VI, which issued notes in August 2008. *Id.*

The NISAs specified the obligations of the Trustees regarding the control and disbursement of funds. *Id.*, ¶ 5. Among other things, the Trustees were required to hold all funds of each MPFC. *Id.* The Trustees could disburse those funds for various reasons, including paying administrative fees and acquiring assets, but only upon the receipt of certain documents and certifications. *Id.* The Trustees were required to review certain certifications and opinions provided by the MPFCs under the NISAs to ensure that they conformed to the form and content required by the NISAs before disbursing funds or taking other actions requested. *Id.*

The Trustees' duties, however, were expressly limited by the NISAs. *Id.*, ¶ 6. The NISAs provided that the Trustees were entitled to rely on representations made by MCC and the MPFCs in certifications, provided those certifications were consistent with the form called for in the NISAs and provided that such reliance

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

was not in bad faith. *See, e.g.*, *id.*, Ex. A, § 5.06(a)(ii). The NISAs also provided that the Trustees had no obligation to investigate or confirm the accuracy of any facts or calculations stated in the documentation submitted by the MPFCs. *Id.*

On May 20, 2010, the Court authorized the Receiver to retain Shartsis Friese LLP as Conflicts Counsel to the Receiver to investigate potential claims against the Trustees. *Id.*, ¶ 7. *SEC* Doc. No. 260. In light of the contractual limits on the Trustees' duties, the Receiver and his counsel concluded early in their investigation that the Receiver could not hold the Trustees liable for the full amount of monies lost by the MPFCs. Seaman Decl., ¶ 7. The Court's rulings in the lawsuits brought by Noteholders (the "Class Action" and "Mass Actions") reinforced that view, as the Court noted the narrow scope of the Trustees' duties and rejected various tort theories of liability. *Id.*; *see, e.g.*, *Masonek* Doc. No. 166. Accordingly, the Receiver and his counsel focused on determining (i) whether the documentation provided to the Trustees in connection with requests for the release of funds was adequate under the terms of the NISAs, (ii) whether the content of those documents was sufficient to give the Trustees actual knowledge of improprieties in the transactions or misconduct by the officers of MCC, and (iii) whether the content of those documents was such that the Trustees otherwise could not have relied on them in good faith. Seaman Decl., ¶ 7.

After a careful review of records from the Receivership Entities, the Receiver and his counsel concluded that the Receiver had grounds to bring claims on behalf of the MPFCs against the Trustees and sought Court approval to do so. *Id.*, ¶ 8. On October 12, 2010, the Court issued an order authorizing the Receiver to file claims against the Trustees, if deemed proper by the Receiver. *Id.*; *SEC* Doc. No. 428. The Receiver's counsel drafted a complaint alleging claims based on the Trustees' breaches of duties under the NISAs, which focused on payments of administrative fees and acquisition of purported Eligible Receivables and Non-Receivable Assets where a plausible argument could be made that the relevant documentation was

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

deficient under the NISAs or that documentation demonstrated that the asset was worthless or could not be acquired consistent with the terms of the NISAs. Seaman Decl., ¶ 8.

C. The Receiver Enters into Settlement Discussions and Reaches Settlements with the Trustees.

In December 2010, after consulting with the SEC, the Receiver and his counsel decided to explore potential settlement with the Trustees rather than proceed immediately with litigation as authorized by the Court. *Id.*, ¶ 9. The Receiver was concerned about the costs and risks of litigating against the Trustees. *Id.* In addition, given the Trustees' assertion that they were entitled to full indemnification for all legal fees they incurred relating to their roles as trustees, the Receiver was also concerned that the ongoing Class and Mass Actions against the Trustees were exposing the Receivership Estate to the Trustees' ever-mounting indemnity claims. *Id.* The Receiver was also concerned that the Class and Mass Action plaintiffs had made little progress after fifteen months of litigation and were still pursuing tort claims that appeared to lack merit (and that the Court ultimately dismissed). *Id.* The Receiver's Conflicts Counsel contacted the Trustees' counsel to propose settlement discussions, to negotiate agreements tolling the Statute of Limitations, and to obtain documents through informal production rather than through time-consuming and costly discovery. *Id.*

Over the next few months, the Receiver and his counsel continued their analysis of the facts and the law, including review of documents received from the Trustees, documents that the SEC had obtained through its investigation, documents already within the Receiver's records, and the results of the Receiver's ongoing forensic accounting. *Id.*, ¶ 10. In May and June 2011, the Receiver held initial discussions with each of the Trustees. *Id.* Shortly before those meetings, the Receiver provided each Trustee with a draft Complaint, and during the meeting the Receiver provided basic financial data about the losses suffered by the MFPCs

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

(information that was largely if not entirely set forth in the Receiver's Monthly Reports). *Id.* The parties also discussed how a settlement between one or both Trustees and the Receiver might affect the Class and Mass Actions. *Id.*

Through these initial discussions, the Receiver and the Trustees determined that further discussions might be fruitful, but only if the parties could be more open and forthright about the merits of various claims and defenses. *Id.*, ¶ 11. To facilitate this, the Receiver and the Trustees agreed to mediation and engaged a mediator, Charles Bakaly, Jr. of JAMS. *Id.* Over the next several months, counsel for the Receiver and the Trustees exchanged additional information, had numerous telephone conversations, and had several lengthy in-person meetings (which the Receiver attended personally).[2] *Id.* The purpose of these communications was to discuss the factual and legal grounds for the Receiver's claims and the Trustees' defenses substantively and in detail. *Id.* The Receiver (and, the Receiver believes, the Trustees) believed that these discussions were privileged settlement discussions and that they were also subject to the mediation privilege. *Id.*

In January 2012, after a day-long in-person mediation session, the Receiver and Wells Fargo agreed to settlement terms under which Wells Fargo would pay $49 million and waive its indemnity claims against the Receivership Estate. *Id.*, ¶ 12. In March 2012, after another day-long in-person mediation session, the Receiver and BNYM agreed to settlement terms under which BNYM would pay $57 million and waive its indemnity claims. *Id.* In each case, the settlement terms included an understanding that the settlement would be contingent on, among other things, the Court approving the settlements, the Court finding that they constitute good faith settlements, the Court granting the Trustees' Motions for Summary Judgment in the Class and Mass Actions, and the Court enjoining all Noteholders from instituting new actions against the Trustees. *Id.* These terms were

[2] The Receiver held separate discussions with each Trustee and did not condition settlement with one Trustee on settlement with the other. Seaman Decl., ¶ 11.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

memorialized in the final settlement agreement executed on June 7, 2012 (the "Settlement"), which is attached as Exhibit B to the Seaman Declaration. *Id.*

As noted above, the decision to approach the Trustees was made only after consultation with, and the support of, lead trial counsel from the SEC, John Bulgozdy. *Id.*, ¶ 13. Due to the confidentiality of the mediation process, the Receiver could not disclose details to the SEC, but the Receiver and his counsel did inform Mr. Bulgozdy generally of the discussions that occurred and of their view of the likelihood of ultimately reaching a settlement. *Id*. In February 2012, the SEC signed a mediation confidentiality agreement so that the Receiver could disclose the terms agreed to with Wells Fargo and, later, with BNYM. *Id*.

By avoiding litigation, the Receiver has kept the attorneys' fees incurred in connection with pursuing these claims to less than $2 million. *Id.*, ¶ 14. The net cash proceeds will exceed $104 million, and the Receiver proposes to the Court that only Noteholders, to the exclusion of other creditors, will receive distributions from these proceeds. *Id.* The net benefit of the Settlement is significantly greater than $104 million, as it eliminates the risk to the Receivership Estate of having to pay the Trustees' legal fees should the Class Action or Mass Actions ultimately fail – an indemnity claim that the Receiver estimates currently exceeds $25 million, and would likely exceed $50 million if those cases are tried. *Id.*

D. <u>The Receiver's Settlement Analysis.</u>

In deciding to enter into the Settlement, the Receiver considered a range of complicated legal and factual issues. Seaman Decl., ¶ 15. These included the damages for which the Trustees could potentially be liable, the strength of the Receiver's claims and the Trustees' defenses, the cost and risk of litigating against the Trustees, and the risks to the Receivership Estate posed by the Trustees' indemnity claims. *Id*.

A threshold determination was that the "damages" to which the Trustees were potentially exposed were not equal to, but rather substantially less than, the

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

"loss" that the Receivership Entities or the Noteholders suffered. *Id.*, ¶ 16. This case does not involve securities fraud or fraudulent inducement, for example.[3] *Id.* Rather, the Receiver's claims – and the claims in the Class and Mass Actions, now that the motions to dismiss have been resolved – arise from specific individual breaches of the NISAs. *Id.* The Receiver therefore focused on a transaction-by-transaction analysis of potential claims and damages, by reviewing the documents that were provided to the Trustees in connection with each request for the release of funds and assessing whether the documents provided, and not provided, to the Trustees would support a damages claim against the Trustees for breach of the NISAs. *Id.*

Through this analysis, the Receiver identified suspect transactions that could potentially support valid claims. *Id.*, ¶ 17. But the Receiver did not believe that he (or anyone else) was likely to recover all potential damages relating to each of those transactions. *Id.* Rather, the Receiver recognized that the range of potential outcomes was broad. *Id.* In the worst-case scenario, the Trustees could prevail entirely, either on summary judgment or at trial. *Id.* This was a possibility: the Trustees were successful in eliminating tort claims; indenture trustees have successfully defended themselves in many published cases; and the Trustees have significant defenses, as discussed below. *Id.* In this worst case scenario, if the Trustees prevailed (or if this Settlement is not consummated and the Trustees prevail in the future), the Receivership Estate would recover nothing, ***and*** would face indemnity claims that, if approved in full, could well exceed $50 million, wiping out half of the Receivership Estate. *Id.*

In what the Receiver viewed as a likely, "middle-ground," scenario, he would prevail only on the claims for Administrative Fees. *Id.*, ¶ 18.While the total

[3] In contrast, Noteholders' claims against broker-dealers (including the case against Ameriprise referenced by the Noteholders during the May 16 hearing) were based on unlawful inducement to invest in Medical Capital notes, and the potential damages therefore included the entire investment loss. Seaman Decl., ¶ 16.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

Administrative Fees paid from the MPFCs to MCC exceeded $325 million, much of that would likely not be recoverable against the Trustees, including fees that were paid by MPFC I, which paid all Noteholders in full; fees that were paid by Zions, the original trustee of MPFC I and MPFC II; and fees that were later refunded to the pertinent MPFC. *Id.* When those amounts are subtracted, the potential damages from payment of Administrative Fees is reduced to about $151 million. *Id*. That amount is potentially subject to defenses discussed below, such as causation and the Trustees' limited duties under the NISAs. *Id*. It is also potentially subject to a significant offset, because at least $64 million of that $151 million was used to pay commissions to brokers (many of whom the Noteholders have sued and/or settled with), expenses that the MPFCs were obligated to pay and could have paid directly. *Id.*, ¶ 18 and *e.g.*, Ex. A, § 5.08(a)(ii)(D). Thus, the Receiver viewed this likely middle-ground scenario as one in which he could recover damages ranging from approximately $60 million to $151 million (plus interest – but minus the substantial fees and costs incurred to proceed through trial) depending on (1) whether he could establish liability for all or only some payments of Administrative Fees, and (2) whether and to what extent the Trustees could establish offsets based on the use of Administrative Fees to pay broker commissions. Seaman Decl., ¶ 18.

At the high end, the Receiver could also prevail on most of the claims based on disbursement of funds to acquire purported Eligible Receivables and Non-Receivable Assets. *Id.*, ¶ 19. The Receiver identified suspect transactions in the aggregate amount of approximately $400 million. *Id.* Potential damages based on those transactions, however, would likely be substantially lower because many, if not most, of the transactions were between MPFCs. *Id.* The Trustees, then, would assert that any damage such transactions caused to the purchasing MPFC or its Noteholders was fully offset by the benefit to the selling MPFC and its Noteholders. *Id*. Certain assets, moreover, were sold multiple times in such inter-

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

MPFC transactions, so that the damage MPFC-III, for example, suffered by buying a worthless or impaired asset from MPFC-II was reduced or eliminated when MPFC-III later sold that same worthless or impaired asset to MPFC-IV. *Id.* The Trustees would also assert that they had no liability at all for such transactions based on the defenses discussed below. *Id.*

The Receiver took into account the factual and legal arguments that the Trustees might assert to reduce or eliminate their liability, or that the Trustees had already asserted in their filings in the Class and Mass Actions. *Id.*, ¶ 20. These potential arguments – which the Receiver can and will contest if necessary and therefore does not concede, but which he was required to consider – include but are not limited to the following:

- *Limiting and/or Potentially Exculpatory Contract Provisions*: The Trustees would assert that various provisions in the NISAs would provide a defense to substantial portions of the Receiver's claims. *Id.*, ¶ 21. Relevant provisions (using the NISA for MPFC IV Series 1 as an example) include, but are not limited to, the following:
  - Section 5.06(a) ("Except during the continuance of an Event of Default of which an officer in the Corporate Trust Department of Trustee has actual knowledge, the Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Note Agreement . . . and no implied covenants or obligations shall be read into this Note Agreement against the Trustee.");
  - Section 5.06(b) ("In the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certifications or opinions furnished to the Trustee and conforming to the requirements of this Note Agreement (it being understood that the Trustee shall have no obligation to investigate or confirm the accuracy of any

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

mathematical calculations or other facts stated therein).");

- Section 5.06(f) ("The Trustee shall have no liability for actions taken at the direction of the Debtor, *except* for negligence or willful misconduct in the performance of its express duties hereunder.");
- Section 5.06(g) ("The Trustee shall not be liable for any error of judgment made in good faith, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts.");[4]
- Section 5.06(m) ("The Trustee shall not be liable for any action taken, suffered, or omitted to be taken by it in good faith and reasonably believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Indenture."); and
- Section 4.02(c) ("The Trustee shall have no duty to conduct any affirmative investigation as to … the eligibility of any item of Collateral for purposes of this Note Agreement.").

Id., Ex. A (Emphases added).

- *Disputes Over The NISAs' Requirements And The Impact Of The Mutual Course Of Performance By The MPFCs And The Trustees*: The Trustees would dispute the Receiver's view of the requirements of the NISAs and the insufficiency of documents submitted to the Trustees, and assert that they were entitled to rely and did rely in good faith on those documents. *Id.*, ¶ 22. The Trustees might further assert that the mutual course of performance by the parties to the NISAs modified the requirements of the NISAs in the Trustees' favor. *Id.*

[4] In the Wells Fargo NISAs, Section 5.06(g) instead provides:

> The Trustee shall be protected and shall incur no liability to the Debtor or any Noteholder in relying upon the accuracy, acting in reliance upon the contents, and assuming the genuineness of any notice, demand, certification, signature, instrument or other document reasonably believed by the Trustee to be genuine and to have been duly executed by the appropriate signatory, and, except to the extent the Trustee has actual knowledge to the contrary, the Trustee shall not be required to make any independent investigation with respect thereto. Seaman Decl., ¶ 21, Ex. A (NISA for MPFC III Series I).

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

- *Disputes Over Actual And Proximate Causation*: The Trustees would assert that the Receiver could not establish legal causation for damages to the MPFCs. *Id.*, ¶ 23. They might argue, for example, that some losses were caused by market conditions, mismanagement by MCC, or other factors unrelated to the Trustees' conduct. *Id.* The Trustees might further argue that the alleged breaches were not material, or were not the cause of losses where agents of MCC were willing to falsify documents to secure payments. *Id.*
- *Disputes Regarding Offsets To Damages*: The Trustees might claim significant offsets that would reduce any damages the Receiver could obtain. *Id.*, ¶ 24. These include the broker commissions discussed above, other expenses that administrative fees were used to pay, the alleged benefit to the MPFCs (and Noteholders in those MPFCs) that sold worthless or impaired assets to other MPFCs in many of the transactions at issue, alleged double-counting of claims because many of the assets were sold in two or more of the transactions at issue, and the Receiver's own ability to sell or generate income from certain assets. *Id.*

The Receiver also took into account the costs, delays, and other risks of continued litigation. *Id.*, ¶ 25. The legal fees incurred in pursuing these complicated and challenging claims against well-funded defendants could easily exceed $10 million, including millions of dollars for expert witnesses. *Id.* Those legal fees would reduce the net value of any judgment, or of any settlement that might be obtained after more protracted litigation. *Id.* And the continued litigation would further delay, perhaps for years, a recovery by the Noteholders from the Trustees, who would likely appeal any judgment in the Receiver's favor. *Id.*

The Receiver also considered the risk posed by the Trustees' indemnity claims, which create significant risk to the Receivership Estate should the Trustees prevail in the Class and/or Mass Actions. *Id.*, ¶ 26. As of June 2011, the Trustees claimed they were entitled to indemnity for more than $15 million in fees and costs; those claimed amounts are certainly much higher now. *Id.*; *SEC* Doc. No. 588 at 9

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

and 18. The Trustees contend that they are entitled to priority over the Noteholders against the Receivership Estate, under terms of the NISAs. Seaman Decl., ¶ 26. The Trustees would also likely assert, in the absence of a settlement, that the Receiver must hold back a substantial portion of the funds that he has collected from other sources and hopes to distribute soon, in order to secure the Trustees' indemnity claims. *Id.* The Receiver considered all of these factors in determining whether to enter into the Settlement. *Id.*, ¶ 28.

E. The Receiver's Decision Not to Involve Class and Mass Action Plaintiffs Earlier in the Negotiations.

As the Court knows, the Receiver did not involve the Class and Mass Action counsel in the settlement process until after the Receiver and the Trustees agreed to the major settlement terms (but before the Settlement itself was executed). *Id.*, ¶ 29. The Receiver, however, publicly disclosed his intent to pursue claims against the Trustees by seeking Court approval to do so in October 2010. *SEC* Doc. No. 416. The Receiver also publicly disclosed that he was pursuing settlement discussions with the Trustees and that he had entered into tolling agreements with them, in his monthly Reports to the Court beginning in April 2011 – before the settlement discussions even began. *E.g.*, *SEC* Doc. No. 499 at 7, *SEC* Doc. No. 506 at 7.[5]

The Receiver did not rely on the work of Class and Mass Action counsel (though the Receiver certainly considered the allegations made in the Class and Mass Actions, and the Trustees' responses to those allegations). Seaman Decl., ¶ 30. At the time the Receiver initiated discussions with the Trustees, the Class and Mass Action counsel had not taken any depositions of the Trustees or any other person with relevant knowledge. *Id.* Their pleadings contained allegations "on information and belief" that were contradicted by documents that were available to

[5] As stated at the May 16, 2012 hearing, the Receiver contacted Class Counsel in early May, before the settlements with the Trustees were finalized or signed. Seaman Dec., ¶ 29.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

them. *Id*. They appeared to have focused on trying to preserve tort claims and on disputes between counsel. *Id*. And while the substantive factual allegations in the Class and Mass Action complaints were potentially helpful to the Receiver, to the extent those allegations were accurate, many of those allegations were drawn from the Receiver's own investigation and findings. *Id.* For example, the Class Action plaintiffs' Third Amended Complaint expressly relies on the Receiver's reports in 39 instances. *See, e.g.*, MDL Doc. No. 147, ¶ 67, 86-87, 100-102, 106-108, 133, 137-141.

The Receiver, moreover, viewed the Trustees' liability and the potential for damages against the Trustees very differently than did the Class and Mass Action counsel. Seaman Dec., ¶ 31. In December 2010, when the Receiver first decided to approach the Trustees, the Class and Mass Action counsel were continuing to pursue tort theories (*see, e.g.*, *Masonek* Doc. No. 104, ¶¶ 183-187, 194-198) and were arguing that the Trustees were not indenture trustees, but had the duties of common-law trustees (*see, e.g.*, *Abbate* Doc. No. 147-1, ¶¶ 25-62). Their pleadings focused heavily on the Private Placement Memoranda for the MPFCs, documents that do not bind or impose duties upon the Trustees. *See, e.g.*, *Masonek* Doc. No. 104, ¶¶ 5-8, 44, 54, 58-60; *Abbate* Doc. No. 147-1, ¶¶ 21, 28-30, 67-72, 1822-23**.** Even after their tort claims were dismissed – which did not occur in *Abbate* until November 2011 – the Class and Mass Action plaintiffs continued to make claims that the Receiver and his counsel viewed as overbroad and unrealistic. Seaman Decl., ¶ 31. For example, the Class and Mass Action counsel continue to assert that the claim for Administrative Fees paid by the MPFCs exceeds $325 million. *E.g.*, MDL Doc. No. 147, ¶ 64. As discussed above (*see* pp. 8-9), that figure is far too high, and includes amounts – such as fees paid by Zions, which is not a defendant in any action – for which the Trustees are certainly not liable.[6] Seaman Decl., ¶ 18.

[6] The pending Class and Mass Action complaints provide many other examples of claims that the Receiver and his counsel concluded were overstated or unsupported by the facts or law. Seaman Decl., ¶ 31. The Receiver believes it is unnecessary to

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

The Receiver was also concerned that the Class and Mass Action counsel did not fully appreciate the indemnity risks that their claims posed. *Id.*, ¶ 32. For example, they consistently asserted negligence claims that, if successful, could ultimately have been charged to the Receivership Estate. *See, e.g., Id.*, Ex. A, § 5.07 (Trustees entitled to indemnity on all claims if they acted in good faith).[7]

Finally, the Receiver was concerned about the disputes between Class Action and Mass Action counsel over their roles in the litigation, which were delaying resolution of claims against the Trustees, increasing the Trustees' legal fees (and therefore their indemnity claims against the Receivership Estate), potentially increasing legal fees that would ultimately be paid by Noteholders, and imposing burdens on the Court. *Id.*, ¶ 33. As the Court knows, those disputes, involving counsel in *Masonek* on the one hand, and counsel for *Abbate* and the *Abbate* litigation manager, Waverton Group LLC ("Waverton") on the other, went on for more than two years and involved heated accusations and numerous motions, applications and motions for reconsideration to this Court and one appeal to the Ninth Circuit. *See, e.g., Masonek* Doc. Nos. 22-2, 38, 62, 63, 73, 95, and 219; *Abbate* Doc. Nos. 156 and 168; MDL Doc. Nos. 132 and 132-9. In sum, the Receiver had ample reason to believe that trying to involve all counsel in settlement discussions would only prevent any meaningful discussions from taking place. Seaman Decl., ¶ 33.

Nor did the Receiver believe it would be prudent to involve only Class Action counsel in the settlement discussions or mediations. *Id.*, ¶ 34 Representatives of Waverton had repeatedly accused the Receiver and his counsel

---

identify all such examples in this motion but will provide additional examples if so directed by the Court or if otherwise necessary. *Id.*

[7] Class Action counsel asserted a negligence claim, that could ultimately have been subject to full indemnification by the Receivership Estate, until the claim was dismissed with prejudice in February 2011. *See* MDL Doc. No. 143. Mass Action counsel asserted such a negligence claim until it was dismissed with prejudice in November 2011. *See Abbate* Doc. No. 227.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

of "colluding" with Class Action counsel in order to discredit Waverton and to disrupt the *Abbate* action. *Id.*; Declaration of Frank A. Cialone ("Cialone Decl."), ¶ 2. They even threatened to seek sanctions against the Receiver for this alleged (and entirely imaginary) conduct. Cialone Decl. ¶ 2, Ex. A.. Involving only Class Action counsel would have exposed the Receiver to such wasteful collateral attacks. *Id.*, ¶ 2.[8]

III. ARGUMENT

The Settlement with Wells Fargo and BNYM is fair, equitable, and reasonable. Under any applicable standard for approval of a settlement by an equity receiver, the Court should approve the Settlement and grant this Motion.

A. Legal Standard

A federal equity receiver's power to compromise claims is subject to court approval. As noted by the Ninth Circuit in *S.E.C. v. Hardy*, "[a] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." 803 F.2d 1034, 1037 (9th Cir. 1986). With regard to settlements entered into by a federal equity receiver, the Court's supervisory role includes reviewing and approving those settlements in light of federal court policy to promote settlements before trial. *See* Fed. R. Civ. P. 16(c), Advisory Committee Notes.

Unlike in class actions, the Federal Rules do not prescribe standards for approving settlements in an equity receivership. *Gordon v. Dadante*, 335 F. App'x 540, 549 (6th Cir. 2009). However, federal courts of equity often look to bankruptcy law for guidance in the administration of receivership estates. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005); *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1140 (9th Cir. 1996); *see also* Local Civil

[8] The Receiver was also unwilling to involve only *Abbate* counsel, because that would have rewarded Waverton's threats and because the Receiver had found Waverton's representatives extremely difficult to deal with after they caused the Receiver to incur tens of thousands of dollars in legal fees to deal with a simple matter arising from a subpoena. Cialone Decl., ¶ 3.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

Rule 66-8 ("a receiver shall administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy"). A bankruptcy court may approve a compromise of claims asserted by or against the estate if the compromise is "fair and equitable." *Woodson v. Fireman's Fund Insurance Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). The approval of a proposed compromise negotiated by a court-appointed fiduciary "is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interest of the estate nor fair and equitable for the creditors." *In re MGS Marketing*, 111 B.R. 264, 266-67 (B.A.P. 9th Cir. 1990).

The Court has great latitude in approving compromise settlements. The Receiver's burden is to "demonstrat[e] that the proposed settlements fall within the range of reasonableness and were negotiated in good faith." *SEC v. Ruderman*, 2011 U.S. Dist. LEXIS 134653 at *2 (C.D. Cal. Nov. 21, 2011). The Court should consider the following factors: "(a) the probability of success in litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises." *Id.* at *8 (citing *United States v. Edwards*, 595 F.3d 1004, 1012 (9th Cir. 2010)). And, as this Court recognized in *In re Solafide, Inc.*, 2008 U.S. Dist. LEXIS 74851 (C.D. Cal. Sept. 22, 2008), its responsibility when considering these factors "is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *Id.* at *1 (quoting in part *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983)); *accord In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007); *see also Ruderman*, 2011 U.S. Dist. LEXIS 134653 at *9-10 (the Court "need not conduct an exhaustive investigation, hold a mini-trial on the merits … or require

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

that the settlement be the best that could possibly be achieved.")(citing *In re Walsh Constr., Inc.*, 669 F. 2d 1325, 1328 (9th Cir. 1982)).

District courts, likewise, have the broad power of a court of equity to determine the appropriate action in the administration and supervision of an equity receivership. *See Capital Consultants*, 397 F.3d at 738. The Ninth Circuit explained:

> A district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership. The basis for this broad deference to the district court's supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions. A district court's decision concerning the supervision of an equitable receivership is reviewed for abuse of discretion.

Id. (citations omitted); *see also Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role, and 'we generally uphold reasonable procedures instituted by the district court that serve th[e] purpose' of orderly and efficient administration of the receivership for the benefit of the creditors."). Accordingly, the Court here has broad equitable powers and discretion in the administration of the Receivership Estate and the disposition of Receivership assets effected by the Settlement.

B. The Receiver's Settlement with the Trustees Is Fair and Equitable, and Should Be Approved.

The facts here support the Court's approval of the Settlement with Wells Fargo and BNYM. The Settlement is in the best interest of the Receivership Estate and is fair and equitable for the Noteholders. First, it is beyond dispute that the settlement was reached in good faith. The Receiver was represented by experienced counsel appointed with Court approval, and his only interest was in maximizing the benefits to the Estate. He and his counsel devoted months to arms'-length negotiations with the Trustees that resulted in settlements where the

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

Trustees are paying more than any indenture trustees have ever paid in any case of which the Receiver is aware. As discussed below, moreover, the settlements are more than reasonable.

1. The Settlement Amounts Are More Than Reasonable in Light of the Receiver's Potential Recovery at Trial.

Any assessment of the probability of the Receiver's success in litigation against the Trustees must take into account the significant limitations placed on the potential liabilities of the Trustees. First, as this Court has held repeatedly, the duties of an indenture trustee are limited to the terms of the indenture agreement. *See, e.g.*, *Masonek* Doc No. 143 at 5; *Abbate* Doc No. 227 at 11; *see also, e.g.*, *Elliot Assocs. v. J. Henry Schroeder Bank & Trust Co.*, 838 F. 2d 66, 71 (2d Cir. 1998) ("the duties of an indenture trustee are . . . limited to the terms of the indenture . . . ."). This Court has repeatedly dismissed all non-contract-based claims from the Class and Mass Actions, including claims for breach of fiduciary duty, negligence, aiding and abetting breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, violation of Section 17200 of the California Business and Professions Code, and violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. *See, e.g.*, *Masonek* Doc No. 53 at 8-11; *Masonek* Doc. No. 143 at 13-14; *Abbate* Doc. No. 227 at 3-8, 10-14. Given the Court's rulings, it is unlikely that any such claims are viable here.

Second, indenture agreements in general, and the NISAs in particular, are drafted to insulate the indenture trustees from liability and to minimize the factual situations giving rise to a claim for breach of the indenture agreement. As described in detail above, numerous provisions of the NISAs limit the Trustees' duties, including, among others, provisions allowing Wells Fargo and BNYM to rely on the representations made in the MPFCs' certifications – even if those representations were, as was the case here, fraudulent – as long as the certifications were consistent with the form called for in the NISAs and as long as that reliance

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

was in good faith. The Receiver, then, could only consider claims where the certifications were facially inadequate, or where the Receiver could credibly claim that the Trustees had actual knowledge that the certifications were false – and even then, the ability to establish liability, causation and damages was far from certain.

The amounts to be paid by the two Trustees comport with any reasonable approximation of the likely range of recovery. The MPFCs, in the aggregate, lost more than $800 million, but much of that cannot be attributed to the conduct of the Trustees. As discussed above, there is a risk that the Receivership Estate could recover nothing at all, ***and*** be liable for $50 million or more of legal fees that the Trustees could incur defending the Class and Mass Actions. The Receiver viewed damages ranging from $60 million to $151 million (plus prejudgment interest, but minus the considerable legal costs it would take to get those damages) as a likely outcome. Seaman Decl., ¶ 18. Certainly, there is some possibility of a "grand-slam" resulting in substantially higher damages – a possibility the Trustees certainly considered in agreeing to pay $106 million despite having significant defenses and contractual indemnity rights. But there is also the possibility of a "strikeout," one that could actually cost the Receivership Estate – and thus the Noteholders – tens of millions of dollars.

In light of these costs and risks, the merits of the claims and defenses, and all of the other factors discussed above, the Settlement plainly "falls within the reasonable range of possible litigation outcomes." *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d at 426. It will provide $106 million in cash to the estate (less legal costs of under $2 million), and will remove the threat of large indemnity claims. In light of the factual and legal challenges of litigating against an indenture trustee in general, and against these Trustees under these NISAs in particular, the Receiver views this amount as a very successful outcome for the Receivership Estate. There is no reasonable basis to contend that the Settlement impermissibly

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

"fall[s] below the lowest point in the range of reasonableness." *In re Solafide, Inc.*, 2008 U.S. Dist. LEXIS at *1.

The differing individual cash payment amounts reflected in the Settlement are also reasonable in light of the different liability risks faced by Wells Fargo and BNYM. The Receiver believes that the damages suffered by the MPFCs for which BNYM was Trustee were higher than those suffered by the MPFCs for which Wells Fargo was Trustee. Seaman Decl., ¶ 27. This assessment is based in part on the fact that BNYM released more funds for the payment of administrative fees than Wells Fargo, and in part on the number and dollar amount of transactions the Receiver and his counsel concluded were potentially at issue. *Id.* The settlement amounts by each of the two Trustees are therefore reasonable and rationally based.

2. The Settlement Allows the Receiver to Avoid Substantial Fees, Costs, Delays and Claims.

The Settlement provides substantial benefits beyond the $106 million to be paid by the Trustees. It allows the Receiver to avoid the substantial costs of continued litigation against the Trustees, which would likely exceed $10 million given the factual and legal complexities of this case. It also avoids the significant delay in securing recovery that continued litigation would entail, while securing substantial funds that will benefit the Noteholders. Finally, the Settlement requires the Trustees to release their indemnity claims (and any other claims they might have) against the Receivership Entities – which could reach $50 million or more, which the Trustees assert have priority over the Noteholders' claims against the Receivership Estate, and which the Trustees may assert require the Receiver to hold back a substantial portion of the funds that he wants to distribute to Noteholders and other creditors as soon as the Court allows.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

3. The Proceeds from the Settlement Will Be Distributed to Noteholders Pursuant to the Distribution Plan.

The Settlement with the Trustees does not present a situation where a settling plaintiff seeks to improperly allocate settlement proceeds among certain plaintiffs. As the Settlement expressly recognizes, the cash proceeds will be distributed, along with all other funds recovered by the Receiver, according to the Distribution Plan to be mandated by the Court. Seaman Decl., Ex. B, §3.05. Subject to Court approval, the Receiver's proposed Distribution Plan will call for distributions from the Settlement funds to be made solely to Noteholders. The Receiver does not seek to have the proceeds of the Settlement benefit any other creditor of the Receivership Entities such as trade creditors – and certainly does not seek to have those proceeds "trickle down" to the Trustees themselves, as the *Abbate* plaintiffs recently claimed. *See Abbate* Doc. No. 248 at 3.

4. It Is Necessary And Proper For The Court To Enjoin Continuing And Future Suits By Noteholders Against The Trustees That Are Based On The Indirect Injuries The Noteholders Suffered As A Result Of Direct Injuries To The Receivership Entities.

In exchange for the substantial payments the Trustees have agreed to make, they reasonably have demanded that the Settlement provide them with real assurance of complete peace. Part of that assurance will come from the granting of their motions for summary judgment in the Class and Mass Actions, and from the granting of a good faith settlement motion in the Receiver's action against the Trustees, both of which are conditions to effectiveness of the Settlement. Another part of that assurance will come from the releases provided by the Receiver, and the future dismissal with prejudice of the Receiver's action against the Trustees.

However, a critical third part of that assurance must come from the Court granting as part of this Motion a permanent injunction enjoining all creditors of the Receivership Entities (including the Noteholders), and anyone acting in concert with them, from pursuing existing actions or instituting new actions that assert

claims against Wells Fargo and/or BNYM seeking damages allegedly suffered as a result of (i) Wells Fargo's or BNYM's disbursement of funds from the trust accounts established for each of the MPFCs, (ii) any other alleged loss of or injury to the collateral securing the promissory notes, or (iii) any other injury to any of the Receivership Entities or their property. *See* Seaman Decl., Ex. B, § 6.01(b)(vi) and 6.02(b)(vi).[9] This too is a condition to effectiveness of the Settlement, and is fair and equitable.

The Trustees required the injunction as a condition of the Settlement for two principal reasons. First, a number of Noteholders with substantial claims for unpaid principal have opted out of the Class Action and do not appear as plaintiffs in either of the Mass Actions. While those opt-outs might not be bound by the summary judgments the Trustees seek in the Class and Mass Actions, they will be bound by the requested injunction because they are claimants against the Receivership Estate and have been provided notice of this motion. Seaman Decl., ¶ 35. Second, enjoining the Noteholders who are party to the Class or Mass Actions will ease the Trustees' enforcement burden should anyone attempt to initiate a new action against them.

The requested injunction is proper. *See, e.g., SEC v. Sharp Capital, Inc.*, 315 F.3d 541, 544, 546-47 (5th Cir. 2003) (affirming injunction, issued in SEC receivership action as condition to settlement between SEC receiver and depository bank, barring continued prosecution of investor suits against depository bank for, *inter alia*, alleged wrongful release of investor funds deposited by receivership entity into a custody account at the depository bank). As set forth in detail in the Trustees' Motions for Summary Judgment, an equity receiver, like a bankruptcy trustee, has *exclusive* authority to bring and settle claims against third-parties for

[9] The requested injunction expressly provides that it will *not* restrict any party from responding to the Trustees' summary judgment motions and motions to stay discovery in the Class and Mass Actions, or to the good faith settlement motion that will be filed in the Receiver's action against the Trustees, once approval of the Settlement is granted here. *See* Seaman Decl., Ex. B, §§ 6.01(b)(vi), 6.02(b)(vi).

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

injuries to the entity in receivership. *See Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250 (9th Cir. 2010) ("When the trustee does have standing to assert a debtor's claim, *that standing is exclusive and divests all creditors of the power to bring the claim*." (emphasis added)); *CarrAmerica Realty Corp. v. Nvidia Corp.*, 302 F. App'x 514, 516 (9th Cir. 2008) ("The trustee's standing to sue on behalf of the estate is *exclusive*; a debtor's creditors cannot prosecute such claims belonging to the estate *unless the trustee first abandons such claims*." (emphasis added)); *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005) ("If the debtor suffered an injury, the trustee has standing to pursue a claim seeking to rectify such injury."). This exclusive authority precludes creditors or claimants from suing the same third parties for the indirect injuries they suffered as a result of the injury to the receivership entity, even if the creditors or claimants otherwise could have sued absent the receivership, unless and until the equity receiver chooses not to pursue the receivership entity's claims. *See, e.g., CarrAmerica*, 302 F. App'x at 516.

Here, the plaintiffs in the Class and Mass Actions seek damages based on the same dissipation of funds belonging to the MPFCs, and on the basis of breach of the same NISAs, as does the Receiver.[10] As such, their injuries are merely derivative of the injury to the Receivership Estate. The Receiver therefore has the exclusive authority to bring these claims, and the Receiver's decision to pursue and settle those claims precludes the Noteholders, and other creditors, from continuing to advance their claims and/or asserting new claims against the Trustees that derive from injuries suffered by the Receivership Estate. Such a result flows fairly and directly from the equitable principles governing receiverships – the Court controls all the assets of the entity in receivership, including choses in action, so that those assets can be efficiently liquidated and the proceeds equitably distributed to all creditors of the entity. *See SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1172

[10] In contrast, claims that Noteholders brought or may still bring against broker-dealers do not arise from any injury to any of the Receivership Entities or their property and would not be subject to the injunction sought here.

(9th Cir. 2006) ("distributing [the entity's] assets equitably is one of the central purposes of the receivership"); *Hardy*, 803 F.2d at 1038 ("[A] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors."). And the requested injunction is a proper way to maintain that control, including by making possible the settlement of the Receiver's claims against the Trustees. *See SEC v. Kaleta*, 2012 U.S. Dist. LEXIS 1480 at *28-30 (S. Dist. Texas Feb. 7, 2012) (approving settlement by SEC receiver that included bar order, despite objections by investors, because bar order was "appropriate to enable the Receiver to collect as many assets as possible for distribution among all defrauded investors" without "litigation costs and delay"); *In re A.G. Financial Service Center, Inc.*, 395 F.3d 410, 415 (7th Cir. 2005) (affirming injunction against creditors suing debtor's parent, issued as part of settlement of debtor's tort claim against parent for causing debtor's insolvency: "[Creditors] lost nothing when the district judge blocked them from trying to appropriate a claim belonging to [debtor] – a claim that had, moreover, been settled and released with the court's approval. [Parent] was not going to provide the creditors with full compensation [pursuant to the settlement] if they could then file separate suits for more; *peace is essential to settlement*." (emphasis added)).

IV. CONCLUSION

For the foregoing reasons, the Receiver's Motion to Approve the Settlement should be GRANTED and the Court should approve the Receiver's Settlement with Wells Fargo and BNYM.

DATED: June 11, 2012.

SHARTSIS FRIESE LLP

By: /s/ *Frank A. Cialone*
FRANK A. CIALONE

Attorneys for Plaintiff THOMAS A. SEAMAN, Federal Equity Receiver

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

8054\001\1823013.5