Daniel J. McDonald (#07935)
dan@mcdonaldfielding.com
Kyle C. Fielding (#12088)
kyle@mcdonaldfielding.com
MCDONALD FIELDING, PLC.
The Mill at Dry Creek
175 W. Canyon Crest Rd., #205
Alpine, UT 84004
Telephone (801) 610-0010

Attorneys for Holbrook Farms, LC; Scott and Michelle Beeville, LLC; and Holbrook J3, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. MANAGEMENT SOLUTIONS, INC., a Texas Corporation; WENDELL A. JACOBSON; ALLEN R. JACOBSON, Defendants.	**HOLBROOK PARTIES' REPLY BRIEF IN SUPPORT OF USING THE BUYER ALLOCATION TO ALLOCATE PROCEEDS FROM THE CORTLAND SALE** Civil Action No. 2:11-cv-01165 Judge Bruce S. Jenkins

Intervenors Holbrook Farms, LC, Scott and Michelle Beeville, LLC, and Holbrook J3, LLC (collectively, the "Holbrook Parties" or "Holbrooks"), by and through their undersigned counsel, hereby submit the Holbrook Parties' Reply Brief in Support of Using the Buyer Allocation to Allocate Proceeds From the Cortland Sale.

ARGUMENT

The Amended Second Liquidation Plan of Receiver was filed on August 26, 2013 (Doc. 1226) and approved by the Court on September 23, 2013 (Doc. 1277). The order approving the plan provides, "The Court directed the Receiver, at this time, to not deal with tenant-in-common interests that are not of record and to deal with those interests on a case by case basis." (Doc. 1277 at 4.) The order then provides, "The Amended Liquidation Plan is approved, ***subject to the directions and instructions noted above***." (*Id.* (emphasis added).) As far as the Holbrooks know, this charge from the Court to "deal with [TIC] interests on a case by case basis" remains unchanged. Additionally, in equitable receiverships, the Court always maintains the power to modify prior or existing orders, as needed, in order to more fully achieve equity and benefit the Receivership Estate.

And that is the question: What is the right thing to do for the Receivership Estate based upon the principles the Court has previously set forth? The Receiver's opposition brief confirms what the Holbrooks have asserted—that the Receivership Estate actually stands to *gain* money under the Buyer Allocation as compared to the Receiver Allocation, under the current status quo. The Receiver's current analysis admits that, assuming "none of the parties claiming TIC ownership will prevail[,]" (Receiver's Resp. Br., Doc. 2162, at 11), "the Buyer's Allocation would likely produce approximately $612,000.00 more as compared to the Receiver's Allocation" (Doc. 2162 at 11 & Ex. C) for the Receivership Estate.

It is only "if ***all*** of the parties claiming TIC ownership interests prevail, the Receiver's Allocation would likely result in approximately $1.1 million more in proceeds to the receivership

estate as compared to the Buyer's Allocation." (Doc. 2162 at 11 (emphasis added) & Ex. B.) In other words, any potential harm to the Receivership Estate by adopting the Buyer Allocation is purely speculative at this time and is based upon putative TIC interests that have not yet been recognized and may never be recognized. In contrast, based upon the current status quo, recognition of the Buyer Allocation in accordance with the Court's prior directive to only deal with TIC interests on a case-by-case basis presents a known benefit to the Receivership Estate of at least $612,000.00 above and beyond the Receiver Allocation. In short, the Receiver is essentially urging the Court to trade a presently known and tangible benefit to the Receivership Estate (the Buyer Allocation) for a purely speculative and future one (Receiver Allocation). Under the current status quo, there is no good reason for the Receiver to be fighting the Buyer Allocation because it actually benefits the Receivership Estate.

The Receiver points out that some properties do worse under the Buyer Allocation than under the Receiver Allocation. However, unless the Court (for reasons unexplained by the Receiver) *should* favor one property above another, this is not so much an argument for or against the equities of the Buyer vs. Receiver Allocation as it is a truism, because the converse is also true. The Holbrooks and others are harmed by the Receiver Allocation just as much, if not more so, than others are benefitted by it. As the McDermott Family keenly observed in their opposition to the original sale motion:

> The McDermott Family is concerned the Receiver's allocation of the proceeds … will unfairly prejudice some and unjustly reward others. For example, rather than specifically designate $16,800,000 of the Purchase Price to Retama Ranch as the Buyer has done, the Receiver has instead allocated $19,023,700, resulting in an over-allocation of $2,223,700. . . . Similarly, with DeZavala Oaks,

> the Buyer has set a purchase price of $20,500,000, whereas the Receiver has allocated $22,882,600 to the property, resulting in an over-allocation of $2,382,600. With respect to Toscana/Tuscany Gardens, the Buyer has designated a purchase price of $23,000,000 while the Receiver has allocated $25,184,400 to the property, which again results in an over allocation by the Receiver of more than $2,000.000. . . .
>
> In comparison, there are numerous properties where the Receiver has significantly under-allocated the Purchase Price. For example, in dealing with the Retreat at Stonebridge Randy, although the Buyer has listed a purchase price of $51,000,000, the Receiver has only allocated $46,780,700 to the Property, resulting in an under-allocation of $4,219,300. Likewise, with the Reserve at Abbie Lakes, the Buyer has set $26,500,000 as the purchase price, whereas the Receiver has allocated only $22,882,600, resulting in an under-allocation to the property of $3,617,400. Stonebridge suffers from a similar plight, with the Buyer paying $18,416,000 but the Receiver only allocating $15,130,950, causing an under-allocation to the property of more than $3,200,000.

(Doc. 1759 at 3-4.) The Holbrooks share those same concerns. A chart prepared by the McDermott Family showing the over-and-under allocations resulting from the Receiver Allocation is attached hereto as **Exhibit 1**. (Doc. 1759-2.) In short, both the Buyer Allocation and the Receiver (Median Appraisal) Allocation produce individual gains or losses, which merely begs the question: Which method is the most equitable?

To answer this question, the Holbrooks agree with the Receiver on at least one premise: "The sale must be analyzed in this context [as a portfolio sale], as opposed to analyzing each individual property in isolation," (Doc. 2162 at 7), which is why the Court should ignore the Receiver's argument about the Reese Road property being $157,733 "under water."[1] The

[1] As the Holbrooks pointed out in their opening brief, in order for any single property to be "under water" the Receiver would have to treat each property as an individual sale, yet the Receiver continues to assert that the individual closings on each property are actually just part of one continuous, ongoing closing in one single sales transaction. The individual closings, the Receiver asserts, are pragmatic solutions to a single continuous transaction. If that is true, how can any single property be under water? It cannot. If this is

Receiver's claimed reliance interests are also beside the point because, when viewed as a bulk sale, more money currently flows to the Receivership Estate under the Buyer Allocation than under the proposed Receiver Allocation. As the matter currently stands, how can there be any detrimental reliance upon the Amended Second Liquidation Plan when the money flowing to the Receivership Estate *increases* under the Buyer Allocation method? Finally, when viewed in the context of what this was supposed to be—a bulk sale—the inescapable reality is that, under the parties' agreement, the bulk sales price is ultimately reduced not by a median appraisal but by the Buyer Allocation.

The agreement, itself, provides, "If any of the Properties are excluded from the sale as provided in the Purchase Agreement ("Excluded Property"), the purchase price will be reduced by the allocated value of such Excluded Property." (Doc. 1645 at 7, ¶ 7.b.) The Altman Declaration admits the Buyer's Allocation "was designed ***to reduce the total purchase price of the Purchase Agreement*** in the event that a property was excluded from the sale contemplated by the Purchase Agreement." (Doc. 2159-5 at 2, ¶5.) Finally, the Receiver's Motion to Confirm a Private Sale of Multifamily Properties and to Approve Sale Free and Clear of Liens With Valid Liens to Attach to Proceeds (Doc. 1645) admits the bulk sales price is ultimately reduced not by a median appraisal but by the Buyer Allocation, stating, "For purposes of determining the amount of the purchase price in the event one or more of the Properties are excluded, ***the Receiver and the Buyer agreed to an allocated value***, which is indicated on Schedule 2.1(a) of the Purchase Agreement and

truly a single sales transaction with a single ongoing closing, then either all the properties are under water, or none are. Moreover, there is an easy solution for Reese Road, which is to pay the $157,731 shortfall from the proceeds of the Receivership Estate.

column G of the Property Chart attached as Exhibit 3." (Doc. 1645 at 7 n.3 (emphasis added).)

The parties to the agreement can say what they want about their subjective intentions or their claimed reliance interests, but the purchase agreement speaks for itself. The stark reality is that if the Receiver is right, he is asking the Court to condone reductions in the sales price (and thus reductions in money flowing to the Receivership Estate) under the Buyer Allocation by nothing more than sheer random and arbitrary factors that only have meaning to the Buyer and that are not based upon market forces—not even the median appraisals. If the Receiver is right, it is equitable to reduce the purchase price by the Buyer Allocation but inequitable to let the Buyer Allocation affect what anyone else receives from the transaction. The Buyer Allocation can benefit the buyer but no others.

The Holbrooks are simply saying that what is good for the goose is good for the gander. If it is fair to reduce the money coming in to the Receivership Estate by the Buyer Allocation then certainly it is fair to distribute the sales proceeds accordingly. If the Buyer Allocation is as illegitimate a market/value indicator as the Receiver says it is, then why are we allowing the overall purchase price to be altered by it? If we are looking out for the best interests of the Receivership Estate, why should the purchase price be reduced by anything other than the fair market value of excluded properties? It shouldn't. And that is why the unavoidable conclusion is this: if the Buyer Allocation (as opposed to, say, a median appraisal reduction) is good enough to affect the purchase price, it is good enough to be the most accurate measure of fair market value on a property-by-property basis.

Accordingly, the Court should reject the proposed Receiver Allocation and order that

proceeds from the sale of the multifamily properties be distributed to those entitled to a distribution according to the Buyer Allocation.

DATED October 20, 2014.

MCDONALD FIELDING, PLLC

/s/ Daniel J. McDonald
Attorneys for the Holbrook Parties

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2014, I caused a true and correct copy of the foregoing **HOLBROOK PARTIES' REPLY BRIEF IN SUPPORT OF USING THE BUYER ALLOCATION TO ALLOCATE PROCEEDS FROM THE CORTLAND SALE** to be served by electronic court filing notification through the Court's CM/ECF system to all participants of record and upon the following by email at the address listed below:

Greg B. Bailey
P.O. Box 298
Fountain Green, UT 84632
Pro Se
gbailey435@gmail.com

Douglas M. Durbano
Jacob D. Briggs
DURBANO LAW FIRM
476 W. Heritage Park Blvd., Suite 200
Layton, UT 84041
doug@durbanolawfirm.com

/s/ Daniel J. McDonald

Holbrook Parties' Reply Brief in Support of Using the Buyer Allocation

Exhibit 1

(McDermott Analysis of Over-and-Under Allocations

Under Median Appraisal Approach)

Property	CBRE Appraisal 2012	BBG 2013 Appraisal (CBRE Affiliate) Appraisal	Integra / Cushman Valbridge 2013 Appraisal	Average of Three	Receiver Debt Exhibit 3 Docket 1650 filed 3/14/14	Receiver Other Claims PP etc. Exhibit 3 Docket 1650	Receiver's Allocation %	Receiver's Allocation $	Cortland Buyer Allocation $	Difference between
Brooksedge Apartments	10,890,000	12,100,000	12,000,000	11,663,333	8,418,225	1,951,544	3.53%	11,949,050	11,500,000	(449,050)
Cleburne Terrace	7,850,000	6,900,000	6,800,000	7,183,333	5,514,208	1,046,656	2.03%	6,871,550	5,500,000	(1,371,550)
Jefferson Chase	12,980,000	14,900,000	15,425,000	14,435,000	9,514,581	1,707,220	4.38%	14,826,300	13,551,000	(1,275,300)
Retama Ranch	17,100,000	19,100,000	20,800,000	19,000,000	10,894,174	2,510,555	5.62%	19,023,700	16,800,000	(2,223,700)
Retreat at Stonebridge Ranch	46,440,000	51,000,000	47,000,000	48,146,667	28,659,615	3,562,099	13.82%	46,780,700	51,000,000	4,219,300
Charlestonian at Lake Charles	16,430,000	18,200,000	19,500,000	18,043,333	12,572,664	2,868,489	5.35%	18,109,750	18,500,000	390,250
				Loan Assumed Pre-Payment		13,646,563				
Buffalo Run	730,000	525,000	680,000	645,000	558,431	11,075	0.20%	677,000	496,471	(180,529)
City View	970,000	1,010,000	1,100,000	1,026,667	-	-	0.30%	1,015,500	955,115	(60,385)
Lake Ridge	7,590,000	8,750,000	8,900,000	8,413,333	7,175,111	1,265,510	2.57%	8,699,450	7,810,000	(889,450)
Madison Chase	2,660,000	2,400,000	2,480,000	2,513,333	-	-	0.73%	2,471,050	2,000,000	(471,050)
Oak Hill	7,600,000	5,500,000	5,600,000	6,233,333	3,905,272	643,715	1.65%	5,585,250	5,201,123	(384,127)
Smokey Trails (of Limon)	1,150,000	1,340,000	1,600,000	1,363,333	838,399	41,392	0.39%	1,320,150	1,323,922	3,772
Stonebrook Apartment Homes I&II	27,350,000	26,100,000	25,450,000	26,300,000	18,283,700	195,733	7.68%	25,996,800	27,500,000	1,503,200
Toscana/Tuscany Gardens	21,900,000	25,300,000	25,300,000	24,166,667	14,825,634	1,060,900	7.44%	25,184,400	23,000,000	(2,184,400)
Abbie Lakes Luxury Apartments	11,030,000	11,860,000	11,850,000	11,580,000	7,842,135	200,722	3.49%	11,813,650	12,600,000	786,350
DeZavala Oaks	22,600,000	23,000,000	25,100,000	23,566,667	13,945,788	49,568	6.76%	22,882,600	20,500,000	(2,382,600)
Lake's Edge	11,180,000	11,600,000	11,700,000	11,493,333	7,949,456	1,361,326	3.41%	11,542,850	11,000,000	(542,850)
Meadow Walk	2,700,000	3,300,000	3,800,000	3,266,667	2,285,762	454,544	0.97%	3,283,450	3,120,674	(162,776)
Providence Estates	12,100,000	12,800,000	12,400,000	12,433,333	8,119,483	161,888	3.65%	12,355,250	12,190,000	(165,250)
Pryor Creek	8,750,000	8,500,000	9,600,000	8,950,000	6,068,109	403,293	2.57%	8,699,450	8,038,100	(661,350)
Reese Road	3,050,000	2,800,000	3,130,000	2,993,333	2,514,686	8,130	0.90%	3,046,500	2,458,713	(587,787)
Reserve at Abbie Lakes	22,010,000	23,000,000	23,500,000	22,836,667	13,646,680	38,182	6.76%	22,882,600	26,500,000	3,617,400
Seneca Place	1,000,000	725,000	660,000	795,000	653,242	42,653	0.21%	710,850	685,603	(25,247)
Stonebridge	15,210,000	16,500,000	15,200,000	15,636,667	11,893,301	1,470,866	4.47%	15,130,950	18,416,000	3,285,050
Sunbury Ridge	10,580,000	12,400,000	12,000,000	11,660,000	9,483,126	196,682	3.53%	11,949,050	13,000,000	1,050,950
Town Plaza	1,400,000	1,700,000	1,300,000	1,466,667	890,057	198	0.41%	1,387,850	1,607,620	219,770
Valley View	1,000,000	1,060,000	1,100,000	1,053,333	939,928	73,807	0.31%	1,049,350	945,659	(103,691)
Wyndsor Court	20,520,000	23,300,000	23,500,000	22,440,000	12,486,469	124,559	6.85%	23,187,250	22,300,000	(887,250)
				Loan Not assumed & Liens		7,804,744				
	324,770,000	345,670,000	347,475,000	339,305,000	219,878,236	21,451,307	99.98%	338,500,000	338,500,000	
Appraisal Value Total	324,770,000	345,670,000	347,475,000	339,305,000						
Cortland Offer 2014	338,500,000	338,500,000	338,500,000	338,500,000						
Difference	13,730,000	(7,170,000)	(8,975,000)	(805,000)						
% Increase	4.23%	-2.07%	-2.58%	-0.24%						
Net Equity before Pre-Payment (Receiver)	118,621,764									
Net Equity after Pre-Payment (Receiver)	110,817,020									