

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION :

Plaintiff,

vs.

Case No. 1:10-CV-457
(GLS/DRH)

McGINN, SMITH & CO., INC., :
McGINN, SMITH ADVISORS, LLC :
McGINN, SMITH CAPITAL HOLDINGS CORP., :
FIRST ADVISORY INCOME NOTES, LLC, :
FIRST EXCELSIOR INCOME NOTES, LLC, :
FIRST INDEPENDENT INCOME NOTES, LLC, :
THIRD ALBANY INCOME NOTES, LLC, :
TIMOTHY M. McGINN, AND :
DAVID L. SMITH, GEOFFREY R. SMITH, :
Individually and as Trustee of the David L. and :
Lynn A. Smith Irrevocable Trust U/A 8/04/04, :
LAUREN T. SMITH, and NANCY McGINN, :

Defendants,

LYNN A. SMITH and
NANCY McGINN,

Relief Defendants. and

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

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MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR AN ORDER APPROVING (I) SALE AND BIDDING PROCEDURES WITH RESPECT TO THE SALE OF CERTAIN FLORIDA CABLE, INTERNET AND PHONE SERVICE RIGHTS AND ASSETS AND RELATED INTERESTS AND THE ASSIGNMENT OF CERTAIN AGREEMENTS RELATED THERETO, (II) TIME, DATE, PLACE AND MANNER OF NOTICE FOR EACH OF THE AUCTION AND SALE HEARING, (III) AN ORDER APPROVING THE SALE OF THE RECEIVER’S INTERESTS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, AND RESOLUTION OF THE CLAIMS OF SHOMA GROUP

William J. Brown, as Receiver (“Receiver”) for the entity Defendants in this action and certain other entities, by his counsel, Phillips Lytle LLP, moves (the “Motion”) for an order (i) approving sale and bidding procedures with respect to the sale of cable, Internet and phone

service rights and assets and related interests (“Triple Play”) indirectly owned by TDM Cable Funding, LLC (“TDM”) and TDMM Cable Funding, LLC (“TDMM”) at specified locations in Florida (collectively, “Properties”) and related interests and assets and the assignment of certain agreements related thereto concerning those Triple Play rights (collectively, “Assets”), (ii) Time, Date, Place And Manner Of Notice For Each Of The Auction And Sale Hearing, (iii) an order approving the sale of the Receiver’s interests in the Assets free and clear of liens, claims, encumbrances, and other interests, and (iv) resolving the claims of Shoma Group (as defined in footnote 2 below), and in support thereof, represents as follows:

SUMMARY OF MOTION

Each of TDM and TDMM are Receivership entities. In each instance, TDM and TDMM indirectly own or control Triple Play Assets in the State of Florida. Those Triple Play Assets which are the subject of this Motion are operated by an unaffiliated business by the name of HControl Corporation (“HControl”) which had many pre-Receivership dealings with the MS Entities but is not a Receivership entity. The purpose of this Motion is to obtain approval for the sale of the Assets to an HControl nominee for \$2 million cash pursuant to the Asset Purchase Agreement substantially in the form attached as **Exhibit A**, while at the same time dealing with a 45% minority owner of a portion of those Assets and rights, Shoma Group, as more particularly described below. Shoma Group’s interest arises only in the TDM assets and not the TDMM assets. Because of Shoma Group’s 45% interest in the TDM entities which own the Triple Play Assets, Shoma Group is entitled to be paid its pro rata share for its equity interests in order to allow the remaining sale proceeds to be distributed upstream to the MS Entities for the benefit of McGinn Smith investors. At the same time, Shoma Group would surrender its minority interest in each of four entities to the Receiver or his nominee upon its receipt of the agreed-upon

payment. The net proceeds from the sale will be placed in the Receiver's account and used by the Receiver for the benefit of the estates of the MS Entities including repayment of creditors and investors.

BACKGROUND

A. General Background

1. On April 20, 2010, the Securities and Exchange Commission ("SEC") filed a Complaint initiating the above-captioned action (the "Complaint"). Also, on April 20, 2010, this Court granted a Temporary Restraining Order which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith (collectively, the "MS Entities"). Among the MS Entities are TDM Cable Funding, LLC ("TDM") and TDMM Cable Funding, LLC ("TDMM").

2. On July 22, 2010, the SEC amended the Complaint, and the Preliminary Injunction Order was entered appointing the Receiver as permanent receiver with the consent of defendants Timothy M. McGinn and David L. Smith. The Preliminary Injunction Order authorizes the Receiver to, among other things, "use, lease, sell, and convert into money all assets of the MS Entities, either in public or private sales or other transactions on terms the Receiver reasonably believes based on his own experience and input from his advisors to be most beneficial to the MS Entities and those entitled to the proceeds..." (Preliminary Injunction Order, Para. VIII(m), Docket No. 96).

B. Background Relating to TDM and TDMM

3. Cutler Cay. TDM, through a chain of intermediate entities displayed on attached **Exhibit B**, owns a 55% interest in PrimeVision Facilities of Cutler Cay, LLC ("Cutler

Cay Facilities”) and a 55% interest in PrimeVision Communications of Cutler Cay, LLC (“Cutler Cay Communications”). The other 45% ownership interest in each instance is owned by Old Cutler Cable Company, LLC (“Shoma Cutler Cay”)¹.

4. Shoma Cutler Cay appears to be unrelated to any of the MS Entities.

Shoma Cutler Cay has produced documents to the Receiver evidencing its acquisition of each of those 45% interests in 2004 and 2005.

5. Cutler Cay Facilities and Cutler Cay Communications own the rights to the Triple Play Assets at the Cutler Cay residential development in Cutler Bay, Florida.

6. Keys Cove. TDM, through a chain of intermediate entities displayed on attached **Exhibit C**, also owns a 55% interest in PrimeVision Facilities of Keys Cove, LLC (“Keys Cove Facilities”) and a 55% interest in PrimeVision Communications of Keys Cove, LLC (“Keys Cove Communications”). The other 45% ownership interest in each instance is owned by Keys Cove Cable, LLC (“Shoma Keys Cove”)². Shoma Keys Cove has produced documents to the Receiver evidencing its acquisition of each of those 45% interests in 2005.

7. Keys Cove Facilities and Keys Cove Communications own the rights to the Triple Play Assets at the Keys Cove condominium and townhouse development in Homestead/Florida City, Florida.

8. TDMM owns 100% of the Triple Play Assets at the locations listed on attached **Exhibit D**. Unlike TDM, TDMM owns 100% of those rights.

¹ According to a letter and documents delivered to the Receiver by Shoma Cutler Cay, Masoud Shojaee is the Managing Member of Old Cutler Cable Company, LLC which owns the 45% interest in Cutler Cay Facilities and the 45% interest in Cutler Cay Communications.

² According to a letter and documents delivered to the Receiver by Shoma Keys Cove, Masoud Shojaee is the Managing Member of Keys Cove Cable, LLC which owns the 45% interest in Keys Cove Facilities and the 45% interest in Keys Cove Communications. Masoud Shojaee is also President of Shoma Development Corp. Shoma Development Corp., Shoma Cutler Cay and Shoma Keys Cove are collectively referred to as “Shoma Group”.

9. Neither TDM nor TDMM has possession or control of the Triple Play Assets. Prior to the Receivership, TDM and TDMM granted to HControl Corporation the right to manage the Triple Play Assets. No current written agreement appears to be in place governing the terms of the arrangement with HControl. An affiliate of HControl, HControl Communities, LLC or its nominee (“Buyer”), is the party offering to purchase the Assets for \$2 million.

10. Pursuant to a Confidential Private Placement Memorandum dated November 13, 2006, TDM Cable Trust 06 raised \$3,550,000 to advance funds to TDM with respect to its acquisition of a preferred return cash flow stream arising out of the sale of Triple Play services to the homeowners associations of Cutler Cay and Keys Cove as well as its purchase of a promissory note made by PrimeVision Communications, LLC in favor of ADT Security Services, Inc. (described below). The investors in this offering received Contract Certificates with either 24 or 48 month maturities, some of which have been redeemed or rolled over to new maturities.

11. TDM purchased the ADT Note as a condition to the purchase by certain of TDM’s affiliates of an interest in the management companies which owned 55% of the operating companies which provided the Triple Play services to the homeowners associations of Cutler Cay and Keys Cove. TDM acquired the balance of the interests in the management companies as of May 31, 2008 by releasing PrimeVision Communications LLC from its remaining obligations under the ADT Note.

12. Pursuant to Confidential Private Placement Memoranda dated January 19, 2009 TDMM Cable Jr. Trust 09 raised \$1,300,000 and TDMM Cable Sr. Trust 09 raised \$1,525,000 to advance funds to TDM Cable Funding, LLC with respect to its acquisition of the operating assets and customer contracts of Broadband Solutions LLC and HipNET Industries

LLC. Although TDM Cable Funding, LLC was referred to as the purchaser, the actual purchaser was TDMM Cable Funding, LLC. The investors in these offerings received Contract Certificates with either 36 or 66 month maturities.

C. Background Relating to the Acquisition of TDM and TDMM ASSETS

13. The TDM and TDMM “investments” are among the more involved of all the MS Entity transactions. The following is the streamlined description of the facts without including detailed descriptions of the financial transactions.

14. Shoma Group Acquisitions.

a. Cutler Cay. In March 2004, Masoud Shojaee paid \$150,000 by check on behalf of Shoma Cutler Cay to PrimeVision Communications and in May 2005 Shoma Development Corp. paid another \$150,000 in two checks on behalf of Shoma Cutler Cay for a total contribution of \$300,000 to acquire a 45% interest in PrimeVision Communications of Cutler Cay, LLC and in PrimeVision Facilities of Cutler Cay, LLC. See attached **Exhibit B**.

b. In May 2005, Shoma Development Corp. paid \$125,000 in two checks on behalf of Shoma Keys Cove to purchase a 45% interest in PrimeVision Communications of Keys Cove, LLC and in PrimeVision Facilities of Keys Cove, LLC. See attached **Exhibit C**.

15. As a result of these purchases by Shoma Group in 2004 and 2005, the two entities which owned the Triple Play assets and provided the Triple Play services and equipment at each of the Cutler Cay real estate development (a detached 505 single family residential home development in Miami-Dade County, Florida developed by Shoma Development Corp.), and the Keys Cove real estate development (consisting of 974 condominiums and townhouses in Miami-Dade County, Florida developed by a Shoma Group affiliate), were owned jointly at the time by

Shoma Group (45%) and two PrimeVision entities (55%). A portion of the PrimeVision entities were acquired by TDM in 2006, and the remainder were acquired in 2008.

16. TDM Acquisition by MS Entities. The essential facts leading up to TDM's acquisition are as follows:

a. On or about August 1, 2005, PrimeVision Communications, LLC³ signed a Secured Promissory Note for \$5 million, wherein ADT Security Services, Inc. agreed to advance up to \$5 million to PrimeVision Communications, LLC for marketing and other purposes. This Promissory Note was secured via PrimeVision Communications, LLC's 55% ownership interest in PrimeVision Management of Keys Cove, LLC and PrimeVision Management of Keys Cove, LLC.

b. On or about October 6, 2006, PrimeVision Communications, LLC and ADT Security Services, Inc. terminated the above-described Secured Promissory Note and replaced it with a new Balloon Note in the amount of \$3,165,762.00 in connection with TDM's acquisition of an interest in Cutler Cay Management and Keys Cove Management. This principal balance represented the amount which had been advanced by ADT Security Services to PrimeVision Communications, LLC under the above-described Secured Promissory Note. The new Balloon Note was assigned by ADT Services to TDM sometime in October 2006.

c. On or about May 31, 2008, PrimeVision Communications, LLC sold all of its remaining ownership interest in PrimeVision Management of Keys Cove, LLC and in PrimeVision Management of Cuter Cay, LLC to TDM, following default by PrimeVision Communications, LLC on the Balloon Note. The Balloon Note was cancelled by TDM as part of this transaction.

³ This entity is a separate company which has no current ownership interest in PrimeVision Communications of Keys Cove, LLC or in PrimeVision Facilities of Keys Cove, LLC or in Prime Vision Communications of Cutler Cay, LLC or in PrimeVision Facilities of Cutler Cay, LLC.

d. The day-to-day maintenance and operation of the Triple Play systems at Keys Cove and Cutler Cay was transferred to HControl in approximately June 2008.

e. According to HControl and the Receiver's investigation, TDM proceeds collected by HControl from customer payments were used in part to support the operations of TDMM in which Shoma Group has no interest.

D. Resolution of Shoma Group Interests

17. In conjunction with this sale, the \$2 million in sale proceeds will partially be used to pay \$675,000 to Shoma Group for the acquisition of its 45% interest in Cutler Cay Facilities, in Cutler Cay Communications, in Keys Cove Facilities, and in Keys Cove Communications, plus \$191,250 representing reimbursement to Shoma Group for its share of monies owed to TDM by TDMM (in which Shoma Group has no interest). Shoma Group will release the MS Entities, the Receiver, HControl and Buyer from all claims but will preserve any rights it may have against Timothy McGinn and David Smith so long as any asserted claims by Shoma Group or any of its affiliates do not result directly or indirectly in any claims against the Receiver or the MS Entities.

18. This will allow the \$1,133,750 balance of the sales proceeds to be distributed upstream to the Receivership estate for eventual distribution to MS Entity creditors.

MOTION

19. This Motion seeks approval for the sale of the Assets to the Buyer for \$2 million. HControl currently operates and manages the Triple Play operations at all of the Properties. Mario Bustamante is the principal officer of HControl.⁴

⁴ Matthew Rogers, who was previously employed by McGinn, Smith & Co., Inc. and possibly various other McGinn Smith entities was, until recently, the Chief Financial Officer of HControl. Mr. Rogers has recently pled guilty to a criminal charge in connection with McGinn Smith in the Northern District of New York (Docket No. 1:11-cr-00545-DNH-1). Background information on the nature and circumstances surrounding the guilty plea can

20. Because of the overlapping involvement of Mr. Rogers at MS Entities including McGinn, Smith & Co, Inc. and at HControl, and because of other transactions involving Mario Bustamante all of which appear to be arms length with respect to Mr. Bustamante, the Receiver caused an independent forensic accountant to review the TDM and TDMM transactions and certain of the financial records thereof.⁵

21. While the TDM Properties operate as a profit, the TDMM Properties do not and operate at a monthly loss. For some period of time, both pre- and post-Receivership, HControl has caused monies to be advanced from the positive proceeds of the TDM operations to cover the losses at TDMM.

22. Because Shoma Group as a 45% interest holder in certain TDM interests but does not have an interest in TDMM, Shoma Group asserts that it is entitled to repayment of its proportionate share of TDM monies which were used to support the TDMM transactions. The Receiver and Shoma Group have agreed through negotiations that this number will be capped at \$191,250.

23. The sale transaction is structured as a \$2 million (without adjustment) sale. HControl is in the best position to buy these assets because it already operates them and is in contact with the real property developments where the Triple Play services are provided.

be found at announcement #18 on the website of the Receiver (www.mcginnsmithreceiver.com). Mr. Rogers is also purportedly a 33% owner (with Timothy McGinn and David Smith) of TDM. The Receiver reserves all of his rights in that respect.

⁵ The review did not include a formal audit of the financial records but was in the form of an independent forensic review.

24. The principal terms of the agreement are as follows:⁶

a. The purchase price is \$2 million;

b. Assets to be sold consist of all personal property, business and assets of every kind, character and description used in or for the benefit of the businesses of TDM and TDMM in Florida at the properties listed on attached **Exhibit D**.

c. The Buyer assumes all obligations and liabilities for the operation of the Triple Play businesses at the properties.

d. The Buyer shall pay a deposit of \$75,000 within three business days after the Effective Date which will be held in escrow by counsel for the Receiver, and \$1,925,000.

e. The closing shall occur on the 35th calendar day after entry of the Order approving this Motion or other date agreed to by the parties.

f. The sale is without recourse, representation or warranty by the Receiver. The Receiver will release the Buyer, HControl and certain specified employees (but expressly not including Matthew Rogers) for actions arising out of HControl's operation of the Triple Play business at the properties, HControl, its affiliates, and the Buyer will each release the MS Entities, the Receiver and Shoma Group, and Shoma Group will release the MS Entities, the Receiver, HControl and the Buyer and surrender its interests in each of the four entities to the Receiver or his nominee.

g. There are no brokers associated with the transaction.

25. Despite the belief that the Assets could be of interest to other purchasers, the Receiver has received no material inquiries with respect to the purchase of the Assets.

⁶ Reference should be made to the Asset Purchase Agreement for the exact terms of sale.

PROPOSED SALE PROCEDURES

26. To ensure the maximization of sale proceeds for TDM and TDMM which benefit the MS Entities and those entitled to the proceeds, the Receiver seeks approval of the following procedures to market and, if necessary, auction the Assets for the highest and best consideration:

a. Upon entry of the Order to Show Cause filed in conjunction with this Motion, the Receiver shall conspicuously post on the Receiver's website relating to this case (<http://mcginnsmithreceiver.com>) general details of the proposed sale of the Assets along with the deadline for submissions of competing bids for the Assets;

b. The Receiver will promptly distribute to individuals who have expressed, or who, in response to the Receiver's publication of the sale, express, interest in the Assets with any available due diligence package, subject to the signing by such individual of a confidentiality agreement;

c. Any competing offers for the Purchase of the Assets must be on the same terms as set forth in the Purchase Agreement;

d. To the extent that the Receiver receives one or more bona-fide offers to purchase the Assets in accordance with these procedures, an auction will be held at the offices of Phillips Lytle LLP, Omni Plaza, 30 South Pearl Street, Albany, New York 12207 two business days prior to the date and time set by the Court for this Motion;

e. There is no break-up fee if the Purchaser is not the highest and best bidder at the auction. There will be a minimum overbid at the auction of \$50,000;

f. The sale of the Assets to the Purchaser or, alternatively, the winning bidder at the auction, will be approved by this Court;

g. The Receiver, in his reasonable discretion, may take such other actions as necessary to ensure that the marketing, auction and sale procedures are in accordance with his duty to maximize the value of the Assets for the benefit of the MS Entities and those entitled to the proceeds.

27. Timing is of the essence in completing the sale of the Assets. The Purchaser has agreed to the Purchase Agreement on the condition that the sale close on or before May 7, 2012. This expedited timetable is necessary because an important component of the consideration for the sale is further investment by the buyer in the TDMM assets to improve their condition and performance and negate operating losses.

BASIS FOR RELIEF

28. The relief requested herein is authorized by the Preliminary Injunction Order and applicable law, and additionally is appropriate because it preserves the value of TDM and TDMM for the benefit of the MS Entities and those entitled to the proceeds.

29. This court clearly has the authority to freeze assets and to permit sales of such assets. That authority authorizes a court in cases such as this to exercise “broad equitable discretion.” S.E.C. v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997); see also SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (explaining the equitable powers granted to the district court and holding that when there is “a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy.”).

30. The Preliminary Injunction Order mandates that the assets be maintained without dissipation of their value. (Preliminary Injunction Order at page 5). Therefore, if the value of an asset is at risk of dissipation so that funds available to investors could be diminished in the event the SEC ultimately obtains a judgment, the Court may act to prevent such dissipation. S.E.C. v. Am. Bd. of Trade, Inc., 830 F.2d 431, 436 (2d Cir. 1987). In addition, the

Court also has the power to enter the proposed Order under § 21(d)(5) of the Securities Exchange Act of 1934, which provides that in SEC actions, "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." See also S.E.C. v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) ("federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws") (citations omitted).

31. In this case, the proposed sale is likely to maximize the value of TDM and TDMM, and, additionally to mitigate the risk that the value of the Assets further diminish to the detriment of the MS Entities and those entitled to the proceeds. The rights to operate the Triple Play Assets decline over time as individual property contracts expire. The proposed sale would monetize the value of TDM and TDMM, and the procedures set forth herein provide for higher and better offers to better ensure that the Assets are sold for the greatest consideration.

MEMORANDUM OF LAW

32. Since the basis for the relief requested herein under the Permanent Injunction Order and applicable law is set forth herein, the Receiver requests that any requirement for a separate memorandum of law be waived.

CONCLUSION

33. As such, for the reasons set forth herein, the Receiver requests entry of an Order (i) approving the procedures set forth herein for the marketing and auction of the Assets pursuant to the terms set forth herein, (ii) approving such procedures on an expedited basis to allow the Receiver to begin as soon as possible such marketing procedures, (iii) setting a hearing date for approval of the sale of the Assets to the Purchaser or the highest and best bidder at the auction, as the case may be, on or before March 19, 2012, and (iv) providing such other relief as is necessary and proper.

Dated: March 1, 2012

PHILLIPS LYTTLE LLP

By /s/ William J. Brown

William J. Brown (Bar Roll #601330)

Todd A. Ritschdorff (Bar Roll #512601)

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Doc # 01-2548412.7

Exhibit A

ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (the "Agreement") is made and entered into effective as of the 29th day of February, 2012 (the "Effective Date"), by and among HControl Communities, LLC, a Florida limited liability company or its designee ("HCC" or the "Buyer"), and William J. Brown, Receiver (the "Seller" and/or the "Receiver") for McGinn Smith & Co. *et al.* (the "McGinn Entities"), on the other hand.

RECITALS

WHEREAS, on or about April 10, 2010, a complaint was filed against McGinn Smith & Co. *et al.* ("McGinn") by the Securities and Exchange Commission in the United States District Court for the Northern District of New York (the "Receivership Proceeding");

WHEREAS, on July 26, 2010, the United States District Court for the Northern District of New York (the "Court") entered a Preliminary Injunction Order (Docket No. 96) appointing William J. Brown as the Receiver for the McGinn Entities;

WHEREAS, the Court has jurisdiction over the Receivership Proceeding;

WHEREAS, the Seller desires to enter into an agreement to sell the Assets (as defined below) to the Buyer;

WHEREAS, in order to proceed expeditiously with the sale, the Seller and the Buyer are entering into the Agreement at this time, subject to Court approval;

NOW, THEREFORE, in consideration of the foregoing and the respective covenants contained herein, the parties, intending to be legally bound, hereby agree as follows:

1. Purchase and Sale of Assets.

(a) Acquired Assets.

(1) The Buyer shall purchase and acquire from the Seller, without recourse, representation or warranty, all of the Seller's right, title and interest in and to the Assets.

(2) "Assets" means all of the personal property, businesses and assets of every kind, character and description, tangible and intangible, wherever located (except the Retained Assets defined below) used in or for the benefit of the businesses of TDM and TDMM (the "triple play business") in Florida at the properties listed on **Schedule 1.(a)** (collectively, "Properties") currently operated by HControl Corporation ("HCH") on behalf of TDM and TDMM including, but not limited to, those assets of TDM and TDMM used in the operation of cable television, alarm monitoring, telephone and internet systems in the State of Florida. Without limiting the generality of the foregoing, the Assets shall be deemed to include, but not be limited to:

(A) all trade accounts receivable and other rights to payment from customers of TDM and TDMM (collectively, the “Accounts Receivable”);

(B) any and all agreements, commitments and/or contracts identified on **Schedule 2** (collectively, the “Assumed Contracts”) including customer contracts, whether written or oral, relating to TDM and TDMM and/or the Business to which TDM and/or TDMM is a party or by which TDM or TDMM and/or the Assets is bound which the Buyer has as a Contract to be assumed by the Buyer;

(C) any and all customer security or prepaid deposits, refunds or other amounts due to TDM or TDMM with respect to the Assumed Contracts;

(D) to the extent transferable, all Licenses relating solely to the triple play business; and

(E) any and all legal and equitable claims and causes of action relating to the triple play business.

(b) Assets Retained by Seller. All other assets of TDM and TDMM other than: (i) claims against HCH arising out of HCH’s operation of the triple play businesses at the Properties; and (ii) the Assets.

(c) Assumed Obligations. At the Closing, the Buyer shall assume and agrees to pay those obligations and/or Liabilities under the Assumed Contracts and the operation of the triple play businesses at the Properties (the “Assumed Obligations”).

(d) No Assumption of Liabilities. Except for the Assumed Obligations as described in Section 1.(c) above, the Buyer shall not assume and shall have no Liability for any debts, obligations and/or Liabilities of any kind and whenever arising of the Seller, the McGinn Entities, TDM, TDMM and/or any predecessor of the Assets (collectively referred to herein as the “Seller Retained Liabilities”).

(e) Purchase Price for Assets. As consideration for the purchase of the Assets and the obligations of Seller, the purchase price shall be Two Million Dollars (\$2,000,000.00) (the “Purchase Price”). The Purchase Price shall be paid by the Buyer to the Seller in cash or immediately available funds as follows:

(1) the Buyer shall pay to the Seller a deposit in the amount of Seventy-Five Thousand Dollars (\$75,000) within 3 business days after the Effective Date (the “Deposit”). The Deposit will be held in escrow by counsel for the Receiver and shall be released only as provided in this Agreement; and

(2) the Buyer shall pay to Seller One Million, Nine Hundred, Twenty-Five Thousand Dollars (\$1,925,000) at the Closing.

[(f) Allocation of Purchase Price. The purchase price for the Assets shall be allocated as set forth on **Exhibit 1.(f)** attached hereto and incorporated herein by reference (the “Allocation”). The Allocation has not been finalized at the time of this Agreement, but shall be

completed no later than 90 days after Closing, and this section shall not create any independent obligation for any party to report this transaction for state or federal tax return purposes or to file IRS form 8594 or any other tax form or return.]

(g) The Buyer, with Seller's consent, which shall not be unreasonably withheld, shall have the right to revise or amend any of the Schedules to this Agreement through the date of the hearing to approve the Sale.

2. Closing and Closing Obligations.

(a) The Closing. Unless otherwise agreed to in writing by the parties, the closing of the transactions contemplated by this Agreement (the "Closing") shall take place at the offices of Phillips Lytle LLP or electronically, commencing at 11:00 A.M. Eastern Standard Time on the date of the first to occur (the "Closing Date"):

(1) the thirty-fifth (35th) calendar day after the order approving the Agreement becomes final and non-appealable; and/or

(2) the expiration of the appeal period with respect to the Court's approval of this Agreement and authorization of the Seller to perform hereunder and consummate the Closing, if an objection to such approval was made and not withdrawn at the hearing at which such approval was granted, subject in either case to satisfaction or waiver of the conditions to the parties' respective obligations to consummate the Closing as expressly set forth in this Agreement; and/or

(3) May 7, 2012.

(b) Closing Deliveries. In addition to any other documents to be delivered under other provisions of this Agreement, at the Closing:

(1) The Seller shall deliver to the Buyer:

(A) the following documents, to be executed by the Seller to evidence the transfer of the Assets without recourse, representation or warranty, in each case in a form satisfactory to the Seller and Buyer: (i) a bill of sale (the "Bill of Sale"), (ii) an assignment and assumption of contracts rights (the "Assignment and Assumption of Contract Rights") and (iii) an assignment of permits (the "Assignment of Permits");

(B) any such other deeds, bills of sale, assignments, certificates of title, documents and other instruments of transfer and conveyance regarding the Assets as may reasonably be requested by the Buyer, each executed by the Seller and in form and substance satisfactory to the Buyer;

(C) a release of the Receiver's claims against Buyer and HCH, its non-management employees set forth in **Schedule 2.(b)**, as well as the following management-level employees: Mario M. Bustamante Sr., Mario M. Bustamante Jr., Luis Rodriguez, Ruben Perez-Sanchez, Isabel Stegman, Wajid Iqbal, Dale Baker and Victor Vadia (but expressly not including Matthew Rogers) arising out of HCH's operation of the triple play business at the Properties; and

(D) a release of the Receiver's in favor of the entities listed in correspondence dated January 23, 2012, of any claims related solely to HCH's use of the Assets, including claims relating to commingling of funds of the McGinn Entities with these released entities based upon HCH's cash management system.

(2) The Buyer shall deliver to the Seller the Purchase Price by wire transfer to:

Wire to: HSBC BANK USA

Attention: Jennifer Poydock
716 841-7171

Address: 140 BROADWAY
NEW YORK, NY

ABA #: 021001088 (If this is a Wire Transfer)

SWIFT #: MRMDUS33 (To be used for International transfers)

To the Account of: PHILLIPS LYTTLE LLP (Attorney's Account)
3400 HSBC CENTER
BUFFALO, NY 14203

Account Number: 750-71423-9

(c) Transaction Costs. Each party hereto shall pay all of its own costs and expenses (including attorneys' fees and costs) incurred in connection with the transactions contemplated by this Agreement.

3. Representations and Warranties.

(a) The Seller represents and warrants to the Buyer that the statements contained in this Section are correct and complete as of the Effective Date and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the Effective Date):

(i) Authorization of Transactions Contemplated Under this Agreement. Subject to the Court's approval of this Agreement and authorization of the Seller to perform his obligations hereunder and consummate the Closing, (x) the Seller has all requisite power and authority to execute and deliver this Agreement, to perform his obligations under this Agreement and to consummate the transactions contemplated under this Agreement, and (y) this Agreement constitutes the valid and legally binding obligation of the Seller, enforceable in accordance with its terms and conditions, subject to principles of equity applicable to the Receivership Proceeding.

(ii) Brokers. Neither the Seller nor anyone acting on behalf of the Seller has employed, either directly or indirectly, or incurred any liability to, any broker, finder or other agent in connection with the transactions contemplated by this Agreement.

(iii) Title to Assets. The Seller shall transfer and convey to the Buyer all of Seller's interest in and to all of the Assets on an "as-is," "where-is" with all faults, but free and clear of all liens, claims or encumbrances on the Assets, including, but not limited to those set forth on **Schedule 3**. (the "Liens").

(b) Buyer represents and warrants to the Seller that the statements contained in this Section are correct and complete as of the Effective Date and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the Effective Date):

(i) Authorization of Transactions Contemplated Under this Agreement. Subject to the Court's approval of this Agreement and authorization of the Buyer to perform his obligations hereunder and consummate the Closing, (x) the Buyer has all requisite power and authority to execute and deliver this Agreement, to perform his obligations under this Agreement and to consummate the transactions contemplated under this Agreement, and (y) this Agreement constitutes the valid and legally binding obligation of the Buyer, enforceable in accordance with its terms and conditions.

(ii) Brokers. Neither the Buyer nor anyone acting on behalf of the Buyer has employed, either directly or indirectly, or incurred any liability to, any broker, finder or other agent in connection with the transactions contemplated by this Agreement.

(iii) HCH will continue to operate the triple play business at the Properties in the ordinary course of business.

4. Disclaimer of Additional Representations and Warranties. NOT WITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, THE ASSETS ARE BEING SOLD, TRANSFERRED, ASSIGNED AND CONVEYED "AS IS, WHERE IS AND WITH ALL FAULTS" AND THE SELLER HEREBY EXPRESSLY DISCLAIMS ANY REPRESENTATION, WARRANTY, COVENANT, CONDITION, GUARANTY OR ASSURANCE OF ANY KIND WHATSOEVER THAT OTHERWISE MIGHT BE IMPLIED BY THIS AGREEMENT OR UNDER APPLICABLE LAW, OR MIGHT ARISE OR BE IMPLIED FROM A COURSE OF PERFORMANCE OR A COURSE OF DEALING OR TRADE USAGE OR CUSTOM.

5. Pre-Closing Covenants. The parties agree as follows with respect to the period between the Effective Date and the Closing:

(a) General. Each of the parties will use its best efforts to take all action and to do all things necessary, proper or advisable in order to consummate and make effective the transactions contemplated by this Agreement.

(b) Efforts to Close. The parties shall use all of their respective commercially reasonable efforts to perform or cause to be performed each covenant made by it and to satisfy or cause to be satisfied all conditions to the other party's obligation to consummate the Closing as soon as practicable. If any party acquires knowledge after the date hereof of (i) any matter which, if existing, occurring or known at the date of this Agreement would have been required to be

disclosed pursuant to this Agreement and/or (ii) the occurrence of any event (including the failure of any event to occur) that is likely to result in a material breach of any covenant representation or warranty of the other party or a Material Adverse Effect to the Buyer, the Seller, the Assets, TDM, TDMM and/or the Business, the party acquiring such knowledge shall promptly notify the other parties thereof, in writing, in sufficient detail to permit a reasonable analysis thereof.

6. Receivership Proceedings.

(a) Court Filings. From the Effective Date until the Closing Date or the termination of this Agreement (in the absence of a Closing), the Seller shall deliver to the Buyer copies of all pleadings, motions, notices, statements, schedules, applications, reports and other papers that the Seller files in the Receivership Proceedings with respect to this Agreement within one business day after filing; however, with respect to any such papers that relate to the Buyer, the Seller shall deliver a copy thereof before such filing where practicable to afford the Buyer the opportunity to review and comment regarding all statements contained in such papers as they relate to the Buyer.

(b) Court Approval. The Seller agrees to file a motion or notice with the Court, in a form agreeable to the Buyer, seeking approval of this Agreement within fourteen (14) days of the Effective Date. If the Court approval of this Agreement is not obtained within thirty (30) days after the Effective Date, at any time thereafter before such Court approval is obtained, then either Seller or Buyer may elect to terminate this Agreement by providing written notice of termination to the other party, in which event this Agreement shall terminate without any further liability or obligation hereunder on the part of any party the obligations that survive termination as provided in Paragraph 8.(e).

(c) Certain Limitation on Liability. In no event shall Seller have any liability hereunder in excess of, and in no event shall the Buyer seek recourse or assert any claim hereunder (or execute any judgment obtained in respect of any breach hereof) against Seller or any assets held by Seller other than the Assets and the proceeds thereof.

7. Conditions Precedent to the Closing of the Agreement.

(a) Conditions Precedent to Buyer's Obligations. The obligations of Buyer under this Agreement are subject to the satisfaction of the following conditions on or prior to the Closing Date, all or any of which may be waived in writing by Buyer:

(1) The Agreement has not been terminated by the Buyer pursuant to its rights under this Agreement.

(2) The Seller shall have delivered to Buyer all documents required to be delivered by the Seller, and all such documents shall have been properly executed by the Seller.

(3) The Court shall have entered a final, non-appealable order in form and substance reasonably satisfactory to the Seller and the Buyer approving this Agreement and authorizing Seller to perform its obligations under this Agreement, including the sale of the Assets pursuant to this Agreement free and clear of all Liens (the "Sale Approval Order").

(b) Conditions Precedent to Seller's Obligations. The obligations of the Seller under this Agreement are subject to the satisfaction of the following conditions on or prior to the Closing Date, all or any of which may be waived in writing by the Seller:

(1) The Buyer shall have delivered to the Seller all documents required to be delivered by the Buyer, including Releases referred to in the Motion and all such documents shall have been properly executed by the Buyer.

(2) The Buyer shall have tendered the Purchase Price in accordance with the terms set forth in this Agreement.

(3) The Court shall have entered the Sale Approval Order.

8. Termination.

(a) Termination by the Buyer. This Agreement may be terminated and the transactions contemplated hereby abandoned by the Buyer as follows:

(1) by written notice to the Seller prior to the Sale Hearing based upon any material breach by the Seller of any covenant or agreement under this Agreement, which notice shall be effective as of the date of the delivery of said notice; or

(2) by written notice to the Seller prior to the Sale Hearing based upon any material breach of the representations or warranties of the Seller set forth herein, which notice shall be effective as of the date of the delivery of said notice.

(b) Termination by the Seller. This Agreement may be terminated and the transactions contemplated hereby abandoned by the Seller as follows:

(1) by written notice to the Buyer prior to the Sale Hearing based upon any material breach by the Buyer of any covenant or agreement under this Agreement, which notice shall be effective as of the date of the delivery of said notice;

(2) by written notice to the Buyer prior to the Sale Hearing based upon any material breach of the representations or warranties of the Buyer set forth herein, which notice shall be effective as of the date of the delivery of said notice; and/or

(c) Termination by Mutual Consent. The parties may terminate this Agreement at any time on or prior to the Closing Date pursuant to a written instrument signed by all parties.

(d) Effect of a Termination. In the event this Agreement is terminated, the parties shall have no further liability or obligation whatsoever under this Agreement.

(e) Limited Remedies.

(1) Prior to the consummation of the Closing, the Buyer's sole and exclusive remedy in the event of a material and non-curable breach of this Agreement by the Seller shall be either:

(A) to terminate this Agreement; or

(B) to obtain an order from the Court to compel consummation of the Closing.

(2) Prior to the consummation of the Closing, the Seller's sole and exclusive remedy in the event of a material and non-curable breach of this Agreement by the Seller shall be to retain the Deposit as liquidated damages.

(3) The parties agree that the Court will retain jurisdiction to determine any claim, dispute or controversy arising from or related to this Agreement, and each of the parties hereby waives any rights of appeal or review which it may otherwise have had in connection with such determination to the fullest extent permitted by law.

(4) No representation, warranty or covenant made by the Seller hereunder shall survive the Closing, and, accordingly, from and after the consummation of the Closing, the Buyer shall not have any claim against the Seller hereunder whatsoever.

9. Miscellaneous.

(a) Amendments and Waivers. No amendment of any provision of this Agreement shall be valid unless in writing and signed by the parties hereto. No waiver by any party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

(b) Construction. The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

(c) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument.

(d) Entire Agreement. This Agreement (including the documents referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements, or representations by or among the parties, written or oral, to the extent they related in any way to the subject matter hereof.

(e) Facsimile/Electronic Execution. Signatures on counterparts of this Agreement transmitted by facsimile or by electronic means are hereby authorized and shall be acknowledged as if any such signature included on any such counterpart and so transmitted was an original execution.

(f) Governing Law. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of New York without giving effect to any choice or conflict of law provision or rule that would cause the application of the laws of any jurisdiction other than the State of New York.

(g) Headings. The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

(h) Incorporation of Exhibits and Schedules. The Exhibits and Schedules identified in this Agreement are incorporated herein by reference and made a part hereof.

(i) No Assignment. Neither this Agreement nor any of the rights, interests or obligations under this Agreement shall be assigned by any party hereto without the prior written consent of the other parties, which shall not be unreasonably withheld.

(j) No Third-Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns.

(k) Notices. All notices shall be in writing and delivered to the parties at the following:

If to the Buyer:

HControl Communities, LLC
1360 S. Dixie Highway, Suite 200
Coral Gables, FL 33146

With a Copy to:

Jerry M. Markowitz, Esq.
Grace E. Robson, Esq.
Markowitz Ringel Trusty & Hartog, PA
9130 South Dadeland Boulevard, Suite 1800
Miami, FL 33156
Telephone: 305-670-5000
Facsimile: 305-670-5011

If to Seller:

William J. Brown, Receiver
Omni Plaza
30 South Pearl Street
Albany, NY 12207

With a Copy to:

Gary F. Kotaska, Esq.
Phillips Lytle LLP
3400 HSBC Center
Buffalo, NY 14203
Telephone: 716-847-7027
Facsimile: 716-852-6100

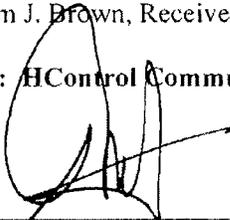
(l) Severability. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

**Seller: William J. Brown, Receiver for McGinn
Smith & Co. *et al.***

William J. Brown, Receiver

Buyer: HControl Communities, LLC

By: 

Mario M. Bustamante
Its: Chief Executive Officer

292243v2

**Schedule 1.(a)
Properties**

Schedule 2

Contracts or Other Obligations to be Assumed by the Buyer

- A. Vendor Contracts
None

- B. All Customer Contracts for Properties referenced in Schedule 1.(a)

Schedule 2.(b)

List of Employees

Exhibit 1.(f)
Allocation

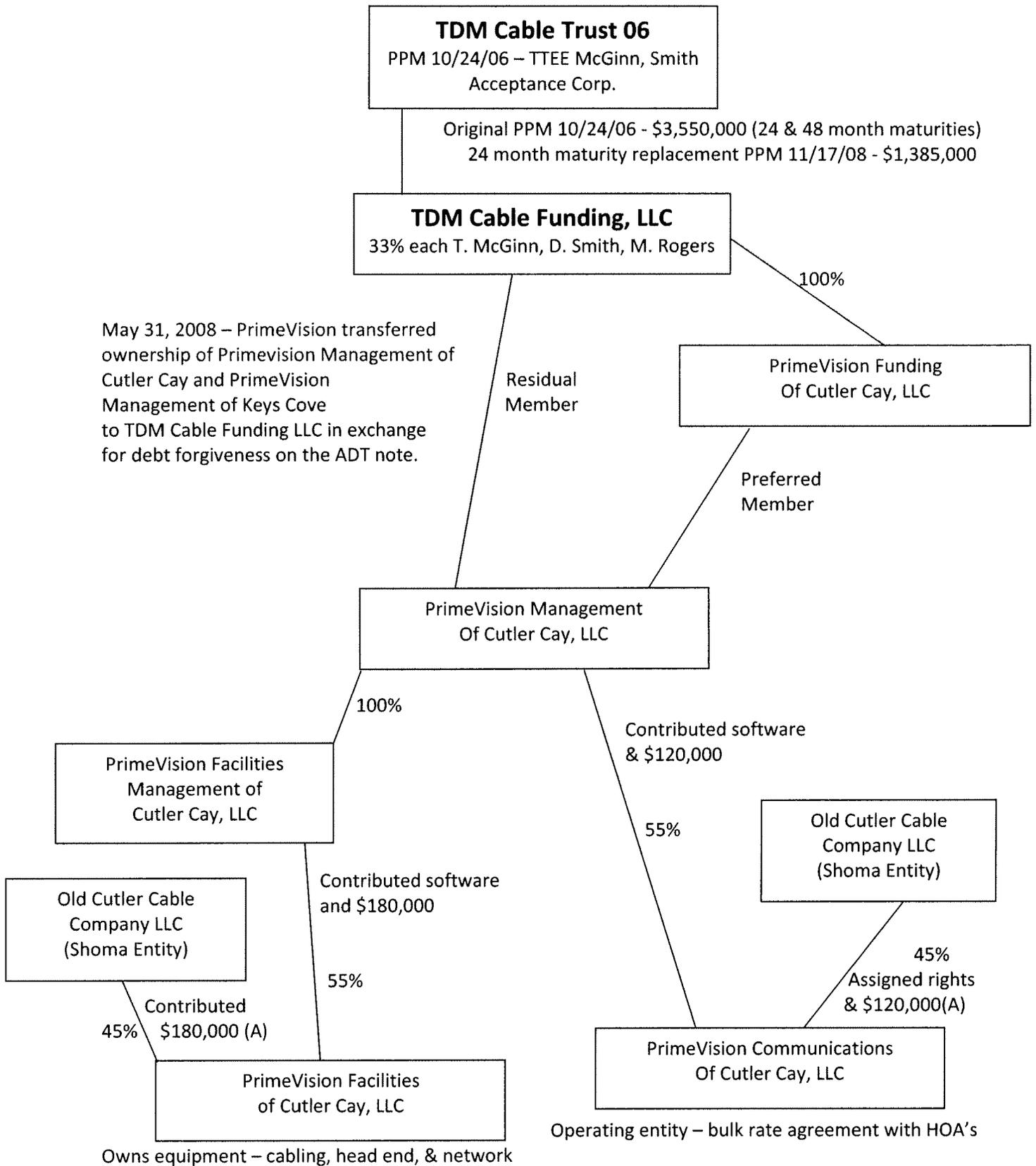
[To Be Determined]

Schedule 3.

Liens, Claims or Encumbrances On Assets

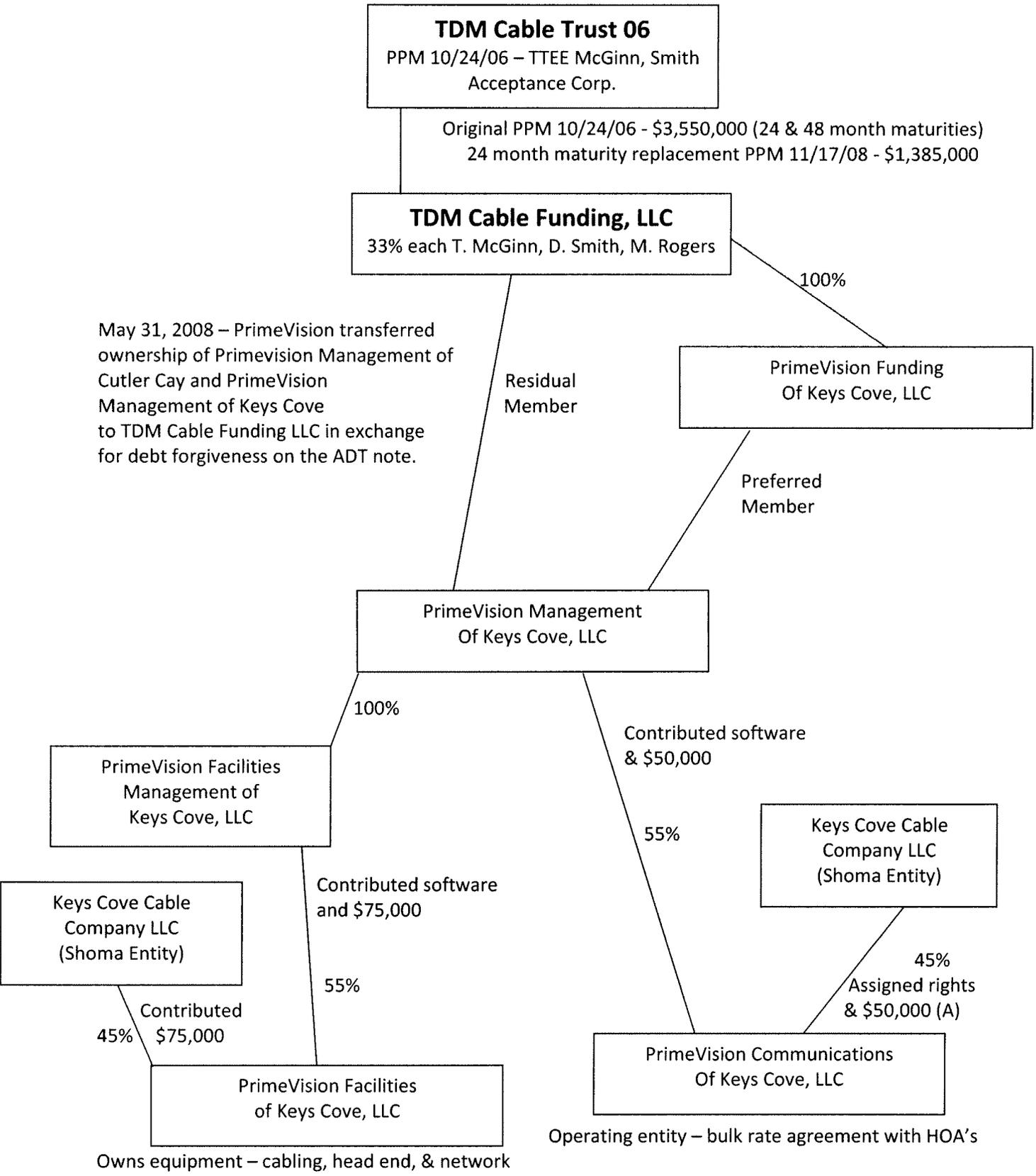
1. Shoma Homes
2. Old Cutler Cable Company, LLC
3. Keys Cove Cable, LLC
4. Shoma Development Corp.

Exhibit B



A.) The Operating Agreements reflect Shoma contributing \$120k to Communications and \$180k to Facilities. Shoma's records reflect the amounts were identical but reversed with \$180k contributed to Communications and \$120k to Facilities.

Exhibit C



May 31, 2008 – PrimeVision transferred ownership of Primevision Management of Cutler Cay and PrimeVision Management of Keys Cove to TDM Cable Funding LLC in exchange for debt forgiveness on the ADT note.

Original PPM 10/24/06 - \$3,550,000 (24 & 48 month maturities)
24 month maturity replacement PPM 11/17/08 - \$1,385,000

TDM Cable Funding, LLC
33% each T. McGinn, D. Smith, M. Rogers

**PrimeVision Funding
Of Keys Cove, LLC**

**PrimeVision Management
Of Keys Cove, LLC**

**PrimeVision Facilities
Management of
Keys Cove, LLC**

**Keys Cove Cable
Company LLC
(Shoma Entity)**

**Keys Cove Cable
Company LLC
(Shoma Entity)**

**PrimeVision Facilities
of Keys Cove, LLC**

**PrimeVision Communications
Of Keys Cove, LLC**

Owns equipment – cabling, head end, & network

Operating entity – bulk rate agreement with HOA's

Exhibit D

TDM / TDMM Property List

	ADDRESS_1	ADDRESS_2	CITY	STATE	ZIP
TDM Cable Funding LLC					
Cutler Cay	7755 SW192nd St		Cutler Bay	FL	33157
Keys Cove	1600 SE 20th CT		Florida City	FL	33034
TDMM Cable Funding LLC					
Brickell Bay Club	2333 Brickell Ave		Miami	FL	33129
Brickell Key II	540 Brickell Key Dr		Miami	FL	33131
Granada Park	720 Coral Way		Coral Gables	FL	33134
Hamilton on the Bay	555 NE 34th St	Ste #100	Miami	FL	33137
La Hacienda	1400 Salzedo St		Coral Gables	FL	33134
Marina Village Condo #1	625 Casa Loma Blvd	Ste #104	Boynton Beach	FL	33435
Marina Village Condo #2	625 Casa Loma Blvd	Ste #104	Boynton Beach	FL	33435
Marina Village Condo #3	625 Casa Loma Blvd	Ste #104	Boynton Beach	FL	33435
Marina Village Townhomes	625 Casa Loma Blvd	Ste #104	Boynton Beach	FL	33435
Montecito at City Place	616 Clearwater Park Road		West Palm Beach	FL	33401
Moorings at Lantana, Condo #1	806 E Windward Way	Ste #122	Lantana	FL	33462
Moorings at Lantana, Condo #2	806 E Windward Way	Ste #122	Lantana	FL	33462
Moorings at Lantana, Condo #3	806 E Windward Way	Ste #122	Lantana	FL	33462
Moorings at Lantana, Townhomes	806 E Windward Way	Ste #122	Lantana	FL	33462
TDMM Cable Funding LLC - Retail Only					
Country Club Villas	18231 NW 73 Avenue		Miami	FL	
Golfside Villas	6850 N W 179 th Street		Miami	FL	
Golfside Villas at Sable Palm	5900 NW 46th Terr		Ft. Lauderdale	FL	
Midway Point	8270 NW 5th Lane		Miami	FL	
Palm Lakes Apartments	2615 NW 115th Street		Miami	FL	
Serenity On the River	1740 NW North River Dr		Miami	FL	
Summerlake Apartments	5941 Summerlake Dr		Davie	FL	
Village East Condominiums	2001 S E 10 th Avenue		Ft. Lauderdale	FL	
Waterside Apartments	6763 SW 88 Street		Miami	FL	
Winston at Pembroke Pines	11100 SW 6th Street		Pembroke Pines	FL	
Belmont			North Lauderdale	FL	
Carrington	4804 N. State Road 7		Coconut Creek	FL	33073