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9 Possession, Sarkis Investments Co., LLC

FILED & ENTERED

DEC 03 2013

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gae DEPUTY CLERK

10 **UNITED STATES BANKRUPTCY COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

12 **LOS ANGELES DIVISION**

13 In re

14 SARKIS INVESTMENTS COMPANY, LLC,
15 a Delaware limited liability company,

16 Debtor.

Case No.: 2:13-bk-29180-RK

Chapter 11

**Stipulated Order Pursuant to 11 U.S.C.
§ 543(d)(1) Maintaining Patrick Galentine as
Receiver**

Date: September 17, 2013

Time: 2:30 p.m.

Place: U.S. Bankruptcy Court
255 East Temple Street
16th Floor, Courtroom 1675
Los Angeles, CA 90012

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20 The Motion for Entry of Order Pursuant to 11 U.S.C. § 543(d)(1) Maintaining Patrick
21 Galentine as Custodian in Possession and Control of Debtor's Property, and Excusing Custodian
22 from Compliance with 11 U.S.C. §543(a) and (b) ("Motion") came on for hearing before The
23 Honorable Robert Kwan on September 17, 2013 at 2:30 p.m. Ron M. Oliner, Duane Morris LLP
24 appeared on behalf of Movant. Ashley M. McDow, Baker & Hostetler LLP appeared on behalf of
25 debtor Sarkis Investments Company, LLC ("Debtor" or "Sarkis"). Alvin Mar, Office of The
26 United States Trustee appeared on behalf of The United States Trustee ("UST"). Patrick Galentine,
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1 Receiver (“Receiver”), together with attorney Reed Waddell, Frandzel Robins Bloom & Csato,
2 L.C., appeared. The Court reviewed and considered the Motion, as well as oppositions filed by the
3 Debtor and UST, and considered argument made by counsel, including counsel for the Receiver.
4 The parties having further met and conferred during and after the hearing on the Motion, and so
5 stipulating, it is hereby ordered as follows:
6

7 **RECITALS**

8 A. The above bankruptcy case (the “Bankruptcy Case”) was commenced on July 29,
9 2013 (“Petition Date”), when Debtor filed a voluntary petition under Chapter 11 of Title 11 of the
10 United States Code (the “Bankruptcy Code”).

11 B. Debtor’s primary asset is commercial real property commonly known as Plaza
12 Continental, located at 3700-3760 Inland Empire Boulevard and 3550, 3640 and 3660 Porsche
13 Way, Ontario, California (the “Property”).
14

15 C. The Property is allegedly encumbered by a lien in favor of MSC I 2007-IQ13
16 ONTARIO RETAIL LIMITED PARTNERSHIP, a Delaware limited partnership (“Movant” or
17 “MSCI”). Prior to the Petition Date, MSCI initiated litigation against Sarkis in the Superior Court
18 of California, County of San Bernardino, Case No. CIV-RS-1109905 (“Prepetition Litigation”).

19 D. In the Prepetition Litigation, MSCI sought, and was granted, the appointment of
20 Receiver, for the express purposes described in that Court’s Order Granting Ex Parte Application
21 for Appointment of Receiver and Issuance of Temporary Restraining Order, dated November 11,
22 2011 and a subsequent order confirming the appointment of the Receiver (collectively, the “State
23 Court Orders”).
24

25 E. Pursuant to the Receiver Order, after filing his oath and bond, Receiver took
26 possession, custody and control of the Property, and began to collect the rents, issues and profits
27 (collectively the “Rents”) arising therefrom.
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1 F. MSCI commenced a non-judicial foreclosure, and a foreclosure sale was continued
2 to a date in late July; however, that sale has now been stayed by virtue of the filing of the
3 Bankruptcy Case.

4 G. In or about January, 2013, Sarkis received an offer to sell the Property, pursuant to
5 which the prospective purchaser deposited five hundred thousand dollars and zero cents
6 (\$500,000.00) with Sarkis (the "Non-Refundable Deposit"). The prospective purchaser was not
7 able to close the transaction, and pursuant to the terms of the contract governing the relationship
8 between Sarkis and the prospective purchaser, the Non-Refundable Deposit was forfeited. Sarkis
9 is currently in possession of the Non-Refundable Deposit.

10 H. The parties are willing to stipulate, subject to the provisions contained herein, to
11 temporarily excuse the Receiver from compliance with the turnover requirements set forth in 11
12 U.S.C. §543(a) and (b), provided that nothing contained herein shall prohibit Debtor, Movant,
13 and/or the Office of the United States Trustee (the "UST") from filing a further motion to compel
14 turnover or excuse turnover in the future, or the Court on its own motion to compel turnover or
15 excuse turnover in the future, or any non-moving party's right to object to the same.

16 I. Receiver requires the use of certain funds currently in his possession, as well as any
17 further Rents that may be collected after entry of this Order for the purposes of funding expenses
18 with respect to the operation and maintenance of the Property, and also the payment of quarterly
19 fees to the Office of The United States Trustee.

20 J. Movant claims that the Rents from the Property constitute cash collateral within the
21 meaning of 11 U.S.C. §363(a) ("Cash Collateral"). Movant and Debtor are willing to expressly
22 consent to Receiver's use of Cash Collateral for the limited purposes and for the terms set forth and
23 under the terms set forth, and otherwise in accordance with the terms and subject of the conditions
24 of this stipulation.
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AGREEMENT

Now, therefore, it is hereby stipulated (the “Stipulation”) and agreed as follows:

1. While this Stipulation is in effect, Receiver shall be excused from compliance with 11 U.S.C. §543(a) and (b).

2. Receiver may continue to possess and operate the Property, and utilize the Cash Collateral generated therefrom on the terms set forth herein.

3. Without agreeing to the character or amount of Movant’s claim, and reserving any rights to object to the same on any grounds, Debtor acknowledges for purposes of this Stipulation only that the claim of Movant is secured by a lien on substantially all of the Debtor’s assets. Such acknowledgment shall in no way be construed as or deemed a waiver of the right of the Debtor to challenge the amount and/or assert that any claim, or portion thereof, in favor of Movant, is unsecured if and when this Stipulation is no longer in force and effect.

4. Without any admission by Debtor that the Rents constitute Cash Collateral, and without any admission by Movant that its interests are adequately protected, Debtor and Movant propose that Movant be granted adequate protection in the form of: (i) a first priority replacement lien in the Cash Collateral and security interest with the same extent, validity, scope and priority as any prepetition liens and security interests held by Movant (unless otherwise agreed to by Debtor and Movant); and (ii) cash payments as provided below. While this Stipulation is in effect, and provided there is no uncured default by Debtor under the terms of this Stipulation, Movant shall not be able to assert that its interest(s) are not adequately protected. However, in the event Receiver is dispossessed of the assets of the Debtor and/or there is an uncured default by the Debtor under the terms of this Stipulation, nothing contained in this Stipulation shall be construed as or deemed a waiver of Movant’s right to claim that its interests are not adequately protected on a going forward basis.

1 5. Upon entry of an order approving this Stipulation, the rights, duties, and
2 responsibilities of the Receiver and Coreland Companies, the Receiver's property manager
3 ("Coreland") shall be defined as follows:

- 4 (a) Coreland shall remain as the property manager.
- 5 (b) Coreland shall operate and manage the day-to-day operations of the
6 Property.
- 7 (c) Receiver's powers and duties to collect monies are expressly limited to the
8 Rents.
- 9 (d) Receiver shall maintain possession of any and all depository accounts over
10 which he currently has power, duty or control (the "Receiver Accounts").
11 Receiver shall be required to ensure that any account(s) in which any Rents
12 are held compl(ies) with the requirements set forth in 11 U.S.C. §345 as well
13 as the applicable guidelines of the Office of the United States Trustee.
- 14 (e) In the event Debtor and/or the UST becomes aware that the Receiver
15 Accounts, or any of them, or any other accounts which are subsequently
16 opened by the Receiver, are not in compliance with applicable bankruptcy
17 law, the governing bankruptcy statutes and/or the Guidelines of the Office of
18 the United States Trustee for more than five (5) business days, the Debtor
19 and/or the UST shall immediately notify MSCI and the Receiver in writing
20 of such default(s) (the "Cure Notice"). If the Receiver or MSCI does not
21 cure the default within ten (10) business days of the date of the Cure Notice,
22 the Debtor and/or the UST shall be permitted to seek intervention of the
23 Court on shortened notice.
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1 (f) Any and all depository accounts over which the Receiver does not currently
2 have power, duty or control shall be expressly excluded from the terms
3 contained herein. MSCI expressly acknowledges that the Non-Refundable
4 Deposit is not Cash Collateral, and that they will not contest the
5 characterization of it as Cash Collateral at any time. Receiver shall
6 periodically furnish to the Debtor, Movant and/or the UST any additional
7 information regarding funds held by the Receiver as they shall reasonably
8 require.
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10 (g) Neither Receiver nor Coreland has authority to sell the Property, or to
11 employ a broker to sell the Property.

12 (h) The power to resolve claims and bring and/or defend lawsuits shall belong
13 solely to the Debtor.
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15 (i) Neither Receiver nor Coreland shall be entitled to enter into any lease(s) for
16 the Property, or any portion thereof, without first obtaining the express
17 written consent of the Debtor, Movant, and the Bankruptcy Court as
18 necessary. The consent of the Debtor and Movant shall not be unreasonably
19 withheld.
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21 (j) Receiver may receive any mail addressed to Debtor at the Property, for the
22 sole purpose of opening that mail, taking receipt of any payments
23 constituting Cash Collateral and attending to any issues related to operation
24 of the Property. Receiver shall, within three business days of receipt of any
25 mail other than as described above, turnover said mail to Debtor's counsel
26 with all envelopes and enclosures.
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1 (k) If funds in the Receiver's Accounts are not sufficient to cover the costs of
2 the Receiver's bond, MSCI shall be responsible for the payment of any and
3 all premiums necessary to maintain the Receiver's bond, and any such
4 payment shall not be added to the balance of the loan between the Debtor
5 and the Movant.
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7 6. Each month, Receiver shall send notice to the parties identified in paragraph 25
8 below of his fees and costs, and the fees and costs of Coreland, together with reasonable detail.
9 This notice shall also clearly and specifically provide information regarding the fees and costs for
10 the month. Coreland's fees shall be calculated consistent with the formula set forth in the State
11 Court Orders. If, within three (3) business days of sending the notice no party objects to the same,
12 which objection shall be by email, the Receiver shall be entitled to pay the reasonable fees and
13 costs identified in the notice from funds available in the Receiver's Accounts. If any party objects,
14 all parties hereby stipulate to have the matter heard on shortened time in the Bankruptcy Court to
15 resolve any such dispute. Receiver may use the Cash Collateral in which Movant asserts an
16 interest to pay the operating expenses set forth in the projected budget (the "Budget"), which is
17 attached hereto as Exhibit "A," and expressly incorporated herein by reference. In the event that
18 there is a need for expenditure to be made which is either not included in the Budget, not deemed
19 by the Receiver to be an ordinary or customary operating expense for a like kind property, or not
20 deemed by the Receiver to be an expense necessitated by an emergency or governmental
21 requirement, the Receiver shall provide both the Debtor and MSCI with email notice of the
22 proposed expenditure, and the justification for the same. If the Debtor agrees that the expenditure
23 is a necessary one, and the Debtor determines that the proposed expenditure is outside the ordinary
24 course of business as contemplated by 11 U.S.C. §363, the Debtor will immediately seek the
25 authority of the Bankruptcy Court (on whatever notice period the parties deem appropriate based
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1 upon the circumstances) to make the expenditure. If and when the Bankruptcy Court enters an
2 order approving the proposed expenditure, Receiver shall make the payment no later than three (3)
3 business days thereafter. If the Debtor or MSCI does not believe that the proposed expenditure is
4 necessary to maintain and/or preserve the Property, and/or does not otherwise desire the
5 expenditure to be made, the expenditure shall not be made. If MSCI and/or Receiver believe that
6 the proposed expenditure is necessary to maintain and/or preserve the Property, and the Debtor is
7 unwilling to consent to the payment of such expenditure, either MSCI or Receiver may petition the
8 Bankruptcy Court for authorization to make the proposed expenditure. Such expenditures shall not
9 be made unless and until an order authorizing the expenditures has been entered by the Bankruptcy
10 Court. Notwithstanding the above Receiver shall at all times be authorized to make expenditures
11 of an emergency nature prior to receiving consent or Court approval to do so. However, if the
12 Debtor and MSCI do not ratify the expenditure within three (3) calendar days after it is made,
13 Receiver shall request *nunc pro tunc* approval from the Court for the expenditure. Neither the
14 consent nor the ratification shall be unreasonably withheld by the Debtor or MSCI

17 7. The Debtor shall be entitled to use Cash Collateral only with the express written
18 consent of Movant or the approval of the Bankruptcy Court, irrespective of whether the proposed
19 expenditure is included in the Budget.

21 8. Receiver shall pay quarterly fees owing to the Office of The United States Trustee
22 (the "UST") on or before the date on which they are due provided there are available funds in the
23 Receiver's Accounts. Debtor's counsel shall advise Receiver of any amounts due. In the event the
24 Debtor becomes aware that Receiver has not made the foregoing payments, the Debtor shall
25 immediately notify MSCI and the Receiver in writing of such default(s) (the "Payment Notice").
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1 9. Receiver shall provide the UST with proof of insurance coverage if and when the
2 current coverage lapses. Receiver shall ensure that the UST is added as a party to be notified in the
3 event the insurance lapses or is terminated.

4 10. On or before the tenth of each month, Receiver shall provide the Debtor with the
5 information necessary to enable the Debtor to complete the monthly operating reports, which shall
6 comply with the monthly operating form currently available on the website of the UST (the
7 “Report Information”). The Debtor shall prepare two monthly operating reports – one for the
8 account controlled by the Receiver and one for the account controlled by the Debtor (the “Debtor
9 Report”). In preparing the report for the account controlled by the Receiver, the Debtor shall rely
10 on the contents of the monthly receiver report prepared by Receiver (the “Receiver Report”), which
11 shall be executed under penalty of perjury by Receiver and filed with the Court on or before the
12 fifteenth of each month. The Debtor shall execute the Debtor Report under penalty of perjury
13 regarding the contents thereof. In the event the Receiver fails to timely provide the Debtor with the
14 Report Information, the Debtor shall immediately notify MSCI and the Receiver in writing of such
15 default(s), and shall be permitted to seek the intervention of the Court to address this issue on
16 shortened notice.

17 11. Receiver shall maintain any and all Cash Collateral which is available after payment
18 of amounts provided for above, and shall not make any payments to MSCI without the express
19 written consent of Debtor. In the event Debtor decides, in its sole discretion, to make payments to
20 MSCI, it shall inform Receiver in writing of its intent to do so. Within five (5) business days of
21 having received such a notification, Receiver shall pay MSCI the amount specified by Debtor in
22 the notice less a reasonable operating reserve as determined by Receiver, which payments shall be
23 applied solely to reduce the principal balance.
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1 12. Debtor and Movant reserve all rights regarding how Movant applies any such
2 payment and Debtor does not, by virtue of this provision, agree that default rate interest is accruing
3 or appropriate.

4 13. Each and all security interests in, and liens on, any post-petition collateral, shall be
5 deemed effective on or after the Petition Date, and will continue in full force and effect only while
6 this Stipulation is in force and effect, unless otherwise ordered by the Bankruptcy Court.
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8 14. Neither the entering into or approval of this Stipulation, nor any actions taken as
9 contemplated, including without limitation any amounts paid to or applied by Movant, shall
10 constitute an “action” or a violation of the “security first principal” or otherwise a violation of
11 California Code of Civil Procedure § 726.

12 15. Absent written agreement of the Parties to the contrary, this Stipulation shall
13 terminate upon the earlier of ninety (90) days after the date of entry of an order approving this
14 Stipulation, the date of entry of an order approving the sale of the Property, the date of entry of an
15 order confirming a plan of reorganization proposed by the Debtor, the dismissal or conversion of
16 the Bankruptcy Case to one under Chapter 7 of the Bankruptcy Code, or the appointment of a
17 Chapter 11 trustee.
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19 16. The occurrence of any of the following shall, unless Movant otherwise agrees in
20 writing, terminate Movant’s consent to Receiver’s use of Cash Collateral as set forth herein (each a
21 “Termination Event”):
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23 (a) Debtor knowingly furnishes or knowingly makes any false, inaccurate, or
24 incomplete representation, warranty, certificate, report, or summary in
25 connection with or under this Stipulation;

26 (b) Debtor fails to be in compliance with any of the terms or conditions of this
27 Stipulation; or
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1 (c) Debtor's case is converted to one under Chapter 7 of the Bankruptcy Code.

2 17. If Movant believes that a Termination Event has occurred, Movant shall provide
3 notice to Debtor as set forth below that it believes a Termination Event has occurred (the
4 "Termination Notice"). Debtor shall have ten (10) business days from receipt of: (i) the
5 Termination Notice to: (a) cure the Termination Event to Movant's reasonable satisfaction as set
6 forth in the Termination Notice; or (b) contest that a Termination Event has occurred or that the
7 proposed cure is inappropriate and file a motion seeking a determination by the Court as to whether
8 a Termination Event has occurred or the proposed cure is inappropriate. Unless and until a final
9 determination has been made by the Court, the terms of the Stipulation shall remain in full force
10 and effect.
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12 18. In the event the Court enters an Order adjudicating the occurrence of a Termination
13 Event (the "Termination Order"), and the Debtor does not: (1) appeal the Termination Order and
14 obtain a stay pending the outcome of that appeal; (2) file a motion to reconsider the Termination
15 Order following the entry of the Termination Order; or (3) cure the default(s) giving rise to the
16 Termination Event in the manner set forth in the Termination Order within ten (10) business days
17 following the entry of the Termination Order, the Movant may seek relief from the automatic stay
18 to enforce its rights and remedies as against the Property.
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20 19. Except as set forth herein, and while the Stipulation is in force and effect, neither
21 the Receiver nor the Movant, as applicable, shall be permitted to seek or support relief from the
22 automatic stay as against the Property, seek or support the conversion or dismissal of the
23 Bankruptcy Case, or seek the appointment of a Chapter 7 or 11 trustee in the Bankruptcy Case.
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25 20. Except as expressly set forth herein, no failure or delay on the part of any party in
26 the exercise of any other right, power, or remedy shall constitute a waiver of such right or remedy.
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1 21. This Stipulation constitutes the sole agreement of Debtor, Movant, and Receiver
2 with respect to the subject matter hereof and supersedes all oral negotiations and prior writings
3 with respect to the subject matter hereof. No amendment or extension of this Stipulation, and no
4 waiver of any one or more of the provisions hereof, shall be effective unless set forth in writing and
5 signed by Debtor, Movant, and Receiver.
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7 22. This Stipulation: (i) shall be binding upon Debtor, Debtor's bankruptcy estate,
8 Movant, and Receiver and, where applicable, their respective predecessors, successors, agents, and
9 permitted assigns (including, as to Debtor, any trustee appointed or elected in this case or in a case
10 under Chapter 7); and (ii) shall inure to the benefit of Debtor, Movant and Receiver, and, where
11 applicable, their respective predecessors, successors, agents, and permitted assigns; provided,
12 however, that Debtor may not assign its rights hereunder without the written consent of MSCI or
13 order of the Bankruptcy Court after notice and a hearing, and any such assignment or attempted
14 assignment by Debtor shall be void and of no effect with respect to Movant.
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16 23. Neither this Stipulation, nor any order approving this Stipulation on an interim or
17 final basis, may be amended, modified, supplemented or superseded without the written approval
18 of each of Debtor, Movant, and Receiver, absent order of the Court. However, nothing in this
19 Stipulation shall prevent Debtor from seeking an order of the Court authorizing the use of Cash
20 Collateral following suspension, expiration, or termination of the right to use Cash Collateral under
21 this Stipulation, nor preclude Movant from opposing the same.
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23 24. No rights are intended to be created hereunder for the benefit of any third party,
24 donee, creditor, or incidental beneficiary.

25 25. Unless otherwise specified herein, notices required hereunder shall be delivered by
26 hand or Federal Express other overnight courier, or email transmission to:

27 **Movant:** Aron M. Oliner
28 roliner@duanemorris.com

DUANE MORRIS LLP

One Market Plaza
Spear Street Tower, Suite 2200
San Francisco, CA 94105-1127
Telephone: 415.957.3000
Facsimile: 415.957.3001

Debtor: Ashley M. McDow
amcdow@bakerlaw.com
Baker & Hostetler LLP
12100 Wilshire Boulevard, 15th Floor
Los Angeles, CA 90025
Telephone: 310.820.8800
Facsimile: 310.820.8859

Receiver: Patrick Galentine, State Court Receiver
pgalentine@coreland.com
Executive Vice President
Coreland Companies
17542 East 17th Street, Suite 420
Tustin, CA 92780
Telephone: 714.573.7780
Facsimile: 714.573.7790

UST: Alvin Mar
alvin.mar@usdoj.gov
Office of The United States Trustee
725 South Figueroa Street, Suite 2600
Los Angeles, CA 90017-5418
Telephone: 213.894.4219
Facsimile: 213.894.2603

26. This Stipulation shall governed by and construed in accordance with Title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules, and the parties agree that this Court shall have exclusive jurisdiction to interpret and enforce this Stipulation.

27. The undersigned are authorized to enter into this Stipulation on behalf of their respective clients, such that this Stipulation is duly and validly executed and constitutes a valid and binding obligation upon the respective parties hereto, subject only to the approval of the Bankruptcy Court.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (specify): **STIPULATED ORDER PURSUANT TO 11 U.S.C. § 543(d)(1) MAINTAINING PATRICK GALENTINE AS RECEIVER** was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of **December 2, 2013**, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Mark Domeyer mdomeyer@mileslegal.com
- Richard T Egger richard.egger@bbklaw.com, cheryl.madaris@bbklaw.com
- Geoffrey A Heaton gheaton@duanemorris.com
- Alvin Mar alvin.mar@usdoj.gov
- Ashley M McDow amcdow@bakerlaw.com, rojeda@bakerlaw.com;gharris@bakerlaw.com
- Aron M Oliner roliner@duanemorris.com
- Martha E Romero Romero@mromerolawfirm.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov
- Reed S Waddell rwaddell@frandzel.com, efileing@frandzel.com;sking@frandzel.com
- Craig A Welin cwelin@frandzel.com, efileing@frandzel.com;bwilson@frandzel.com

Service information continued on attached page

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

3. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an Entered stamp, the party lodging the judgment or order will serve a complete copy bearing an Entered stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

U.S. Trustee

Alvin Mar
725 S. Figueroa Street, Suite 2600
Los Angeles, CA 90017

Patrick Galentine
17542 E 17th St Ste 420
Tustin, CA 92780