

1 DAVID R. ZARO (BAR NO. 124334)  
NORMAN M. ASPIS (BAR NO. 313466)  
2 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
3 865 South Figueroa Street, Suite 2800  
Los Angeles, California 90017-2543  
4 Phone: (213) 622-5555  
Fax: (213) 620-8816  
5 E-Mail: dzaro@allenmatkins.com  
naspis@allenmatkins.com

6 EDWARD G. FATES (BAR NO. 227809)  
7 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
8 One America Plaza  
600 West Broadway, 27th Floor  
9 San Diego, California 92101-0903  
Phone: (619) 233-1155  
10 Fax: (619) 233-1158  
E-Mail: tfates@allenmatkins.com

11 Attorneys for Receiver  
12 KRISTA FREITAG

13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA

15  
16 SECURITIES AND EXCHANGE  
COMMISSION,

17 Plaintiff,

18 v.

19 GINA CHAMPION-CAIN and ANI  
20 DEVELOPMENT, LLC,

21 Defendants,

22 AMERICAN NATIONAL  
INVESTMENTS, INC.,

23 Relief Defendant.  
24  
25  
26

Case No. 3:19-cv-01628-LAB-AHG

Ctrm: 14A  
Judge Hon. Larry Alan Burns

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
RECEIVER'S MOTION FOR  
APPROVAL OF SALE OF CARMEL  
PROPERTY**

Date: March 16, 2020  
Time: 2:00 p.m.  
Courtroom: 3B  
Mag. Judge: Hon. Allison H. Goddard

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1 Krista Freitag ("Receiver"), the Court-appointed permanent receiver for  
 2 Defendant ANI Development, LLC, Relief Defendant American National  
 3 Investments, Inc., and their subsidiaries and affiliates ("Receivership Entities"),  
 4 submits this Memorandum of Points and Authorities in Support of her concurrently-  
 5 filed Motion for Approval of Sale of Carmel Property ("Motion").

## 6 I. BACKGROUND FACTS

7 One of the residential real properties included in the receivership estate is a  
 8 single-family residence located at SE CNR Casanova & Palou, Carmel by the Sea,  
 9 California 93921 ("Carmel Property"). The Carmel Property is 1,562 square feet  
 10 with three bedrooms and two bathrooms. The Carmel Property was purchased on  
 11 September 30, 2016 for \$1,395,000 and title was taken in the name of The Cain  
 12 Family Trust.<sup>1</sup> Freitag Decl., ¶ 2.

13 Prior to the Receiver's appointment, Defendant Gina Champion-Cain and her  
 14 husband Steven Cain, as Trustees of The Cain Family Trust, engaged licensed broker  
 15 Carmel Realty Company ("Broker") to list the Carmel Property for sale.<sup>2</sup> The  
 16 property was put on the market in May 2019 and list price was \$1,950,000. Freitag  
 17 Decl., ¶ 3.

18 Upon her appointment, the Receiver and her staff performed an analysis of the  
 19 value of the Carmel Property, including a review of automated valuation scores for  
 20 the property and a survey of the market comparable properties. The Receiver also  
 21 consulted with Broker and reviewed the listing agreement with Broker. After  
 22

---

23 <sup>1</sup> Although the Carmel Property is held by The Cain Family Trust, Defendant Gina  
 24 Champion-Cain and her husband Steven Cain do not dispute that the property is  
 25 an asset of the receivership estate and may be sold by the Receiver. The title  
 company has also confirmed that the Receiver can sign closing documents for the  
 sale on behalf of the trust.

26 <sup>2</sup> Because the Carmel Property was already subject to a listing agreement with a  
 27 licensed broker at the time of the Receiver's appointment, the Receiver did not  
 28 (and could not) consider other licensed brokers for the listing. Therefore, the  
 Receiver requests relief from this aspect of the Court's Order Establishing  
 Uniform Property Sale Procedures.

1 detailed discussions with the broker, and the passage of time with no offers, the  
2 Receiver determined that Broker had properly marketed and advertised the Carmel  
3 Property for sale,<sup>3</sup> but that the list price was too high to garner an offer.  
4 Additionally, closed sales comparisons in the market pointed towards a significant  
5 reduction in price. Accordingly, the Receiver instructed the Broker to lower the  
6 price intermittently to generate more interest from prospective buyers. Freitag Decl.,  
7 ¶ 4.

8 In early December 2019, an offer in the amount of \$1,450,000 was received  
9 from Michael Ward McColl and Gwyn Fawcett McColl ("Buyer"). The Receiver  
10 and Buyer negotiated terms and ultimately agreed on a price of \$1,550,000. The  
11 Receiver and Buyer signed a California Residential Purchase Agreement and Joint  
12 Escrow Instructions, along with an Addendum thereto that provides for the terms of  
13 the sale of the Carmel Property from the receivership estate, including the overbid  
14 and auction process and Court approval. Freitag Decl., ¶ 5.

15 The Carmel Property is encumbered by a deed of trust in favor of Select  
16 Portfolio Servicing, Inc. ("SPS"). The outstanding principal balance on the loan as  
17 of February 1, 2020, was approximately \$908,000, and the loan is being paid current.  
18 Depending on when the sale closes (assuming a late March/early April 2020 closing),  
19 the amount required to pay off the loan will likely be in the range of \$905,000 to  
20 \$915,000. Depending on when the sale closes, the Receiver estimates that property  
21 taxes paid at closing will likely be in the range of \$4,000 to \$6,000. The Broker's  
22 commission pursuant to the listing agreement is 5% of the sale price, or \$77,500,  
23 which amount will be split with Buyer's broker. The costs of sale, including escrow,  
24 title and recording fees are estimated to be approximately \$8,000. Finally, the cost to  
25

26 \_\_\_\_\_  
27 <sup>3</sup> According to information provided by Broker, the Carmel Property was  
28 advertised through (a) multiple real estate websites and databases, including the  
MLS, Realtor.com, and a custom website, (b) print media (a local newspaper and  
luxury magazine), (c) holding a total of 21 open houses and 21 private showings,  
and (d) multiple broker tours.

1 fix the sewer line and install carbon monoxide detectors, both statutorily mandated  
2 repairs, plus a few additional minor maintenance items are expected to total  
3 approximately \$9,000, which will also need to be paid from escrow. While exact  
4 amounts will be determined at closing, after all of the aforementioned amounts are  
5 paid out of escrow, the net sale proceeds for the receivership estate are estimated to  
6 be in the range of \$535,000 to \$545,000. Freitag Decl., ¶ 6.

## 7 **II. PROPOSED SALE**

8 The key terms of the proposed Residential Purchase Agreement and Joint  
9 Escrow Instructions, including Addendum thereto ("Agreement"), a copy of which is  
10 attached to the Freitag Declaration as Exhibit A, are summarized as follows:

11 **Overbid and Court Approval.** The sale is subject to qualified overbids  
12 pursuant to the public sale process laid out below and approval by the Court.

13 **Purchase Price.** The purchase price is \$1,550,000, which will be paid in all  
14 cash.

15 **Deposit.** Buyer has deposited \$43,500 into escrow.

16 **Closing Date.** Closing shall occur upon entry of the Court order approving  
17 the sale.

18 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid  
19 a commission of 5% of the gross sales price, which amount will be split with Buyer's  
20 broker. In the proposed sale, the total commission would be \$77,500.

## 21 **III. LEGAL STANDARD**

22 "The power of a district court to impose a receivership or grant other forms of  
23 ancillary relief does not in the first instance depend on a statutory grant of power  
24 from the securities laws. Rather, the authority derives from the inherent power of a  
25 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369  
26 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly  
27 and efficient administration of the estate by the district court for the benefit of  
28 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment

1 of a receiver is authorized by the broad equitable powers of the court, any  
 2 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,  
 3 953 F.2d 1560, 1569 (11th Cir. 1992).

4 District courts have the broad power of a court of equity to determine the  
 5 appropriate action in the administration and supervision of an equity receivership.  
 6 *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth  
 7 Circuit explained:

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

14 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115  
 15 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,  
 16 and 'we generally uphold reasonable procedures instituted by the district court that  
 17 serve th[e] purpose' of orderly and efficient administration of the receivership for the  
 18 benefit of creditors."). Accordingly, the Court has broad discretion in the  
 19 administration of the receivership estate and the disposition of receivership assets.

20 **A. The Court's Authority to Approve Sale**

21 It is widely accepted that a court of equity having custody and control of  
 22 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*  
 23 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers  
 24 and wide discretion to determine relief in an equity receivership). "The power of sale  
 25 necessarily follows the power to take possession and control of and to preserve  
 26 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.  
 27 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*  
 28 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)



1 (citing *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity  
2 orders property in its custody to be sold, the court itself as vendor confirms the title  
3 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of  
4 Receivers § 487 (3d ed. 1992).

5 "A court of equity, under proper circumstances, has the power to order a  
6 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*  
7 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing  
8 Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992). To that end, a  
9 federal court is not limited or deprived of any of its equity powers by state statute.  
10 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)  
11 (state statute allowing time to redeem property after a foreclosure sale not applicable  
12 in a receivership sale).

13 Generally, when a court-appointed receiver is involved, the receiver, as agent  
14 for the court, should conduct the sale of the receivership property. *Blakely Airport*  
15 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156  
16 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an  
17 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing  
18 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491  
19 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are  
20 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d  
21 354, 357 (9th Cir. 1925).

22 **B. 28 U.S.C. § 2001**

23 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real  
24 property under subsection (a) and specific requirements for private sales of real  
25 property under subsection (b). Although both involve significant cost and delay, the  
26 cost and delay of a public sale are significantly less than those for a private sale.  
27 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at \*5 (N.D. Cal. 2013)  
28 ("Section 2001 sets out two possible courses of action: (1) property may be sold in

1 public sale; or (2) property may be sold in a private sale, provided that three separate  
2 appraisals have been conducted, the terms are published in a circulated newspaper  
3 ten days prior to sale, and the sale price is no less than two-thirds of the valued  
4 price."). Therefore, by proceeding under Section 2001(a), the receivership estate can  
5 avoid the significant costs and delay of (a) the Court having to appoint three  
6 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

7 The requirements of a public sale under Section 2001(a) are that notice of the  
8 sale be published as proscribed by Section 2002 and a public auction be held at the  
9 courthouse "as the court directs." 28 U.S.C. § 2001(a); *SEC v. Capital Cove*  
10 *Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856, at \*13 (C.D. Cal. 2015); *SEC v.*  
11 *Kirkland*, 2007 U.S. Dist. LEXIS 45353, at \*5 (M.D. Fla. 2007). In terms of  
12 publication of notice, Section 2002 provides:

13 A public sale of realty or interest therein under any order,  
14 judgment or decree of any court of the United States shall  
15 not be made without notice published once a week for at  
16 least four weeks prior to the sale in at least one  
17 newspaper regularly issued and of general circulation in  
18 the county, state, or judicial district of the United States  
19 wherein the realty is situated.

17 If such realty is situated in more than one county, state,  
18 district or circuit, such notice shall be published in one or  
19 more of the counties, states, or districts wherein it is  
20 situated, as the court directs. The notice shall be  
21 substantially in such form and contain such description of  
22 the property by reference or otherwise as the court  
23 approves. The court may direct that the publication be  
24 made in other newspapers.

21 This section shall not apply to sales and proceedings  
22 under Title 11 or by receivers or conservators of banks  
23 appointed by the Comptroller of the Currency.

24 The notice of sale is sufficient if it describes the property and the time, place,  
25 and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*  
26 *Corp.*, 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to  
27 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and  
28 binding offer to purchase the [property]; and (ii) demonstrate . . . , to the satisfaction

1 of the Receiver, that it has the current ability to consummate the purchase of the  
2 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*, 2009 U.S.  
3 Dist. LEXIS 111381, at \*8 (E.D. Mo. 2009).

4 **IV. DISCUSSION**

5 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is  
6 in the best interests of the receivership estate. The Carmel Property was listed on the  
7 MLS with a licensed broker and shown to interested parties. The property was  
8 properly marketed, an offer was received, terms negotiated, and the Agreement  
9 signed. The purchase price therefore reflects the market value for the property, and  
10 is \$155,000 greater than the original purchase price. Freitag Decl., ¶ 7.

11 Moreover, the proposed sale is subject to overbid to further ensure the highest  
12 and best price is obtained. The Receiver proposes to conduct a public auction  
13 consistent with the requirements of Section 2001(a). Specifically, the Receiver will  
14 publish the following notice of the sale once a week for four weeks in the Monterey  
15 Herald, a newspaper of general circulation in the Carmel area:

16 In the action pending in U.S. District Court for the  
17 Southern District of California, Case No. 19-CV-01628-  
18 LAB-AHG, Securities and Exchange Commission v.  
19 Gina Champion-Cain, et al., notice is hereby given that  
20 the court-appointed receiver will conduct a public auction  
21 for the real property located at SE CNR Casanova &  
22 Palou, Carmel by the Sea, California 93921 in Monterey  
23 County, California. Sale is subject to Court confirmation  
24 after the auction is held. Minimum bid price is at least  
25 \$1,600,000. The auction will take place on March 12,  
26 2020, at 1:30 p.m. in front of the entrance to the United  
27 States Courthouse, 221 W. Broadway, San Diego,  
28 California. To be allowed to participate in the auction,  
prospective purchasers must meet certain bid  
qualification requirements, including submitting a signed  
purchase and sale agreement, an earnest money deposit  
of \$47,850, and proof of funds. All bidders must be  
qualified by 5:00 p.m. PT on March 10, 2020, by  
submitting the required materials to the receiver at 501  
West Broadway, Suite 290, San Diego, California,  
92101. If interested in qualifying as a bidder, please  
contact Geno Rodriguez at (619) 567-7223 or  
grodriguez@ethreadvisors.com.

1 In order to conduct an orderly auction and provide sufficient time for the  
2 publication of notices discussed above, the Receiver will require bidders to complete  
3 the above steps by March 10, 2020 ("Bid Qualification Deadline") and conduct the  
4 live public auction on March 12, 2020.

5 The Receiver will inform all interested persons of the opportunity to overbid at  
6 the public auction, provided they qualify themselves to bid by the Bid Qualification  
7 Deadline by (a) signing a purchase and sale agreement for the properties on the same  
8 terms and conditions as Buyer, but with a purchase price of at least \$1,600,000,  
9 (b) providing the Receiver with an earnest money deposit of \$47,850, and  
10 (c) providing proof of funds necessary to close the sale transaction in the form of a  
11 current bank statement, cashier's check delivered to the Receiver, or other evidence  
12 deemed sufficient by the Receiver.

13 In the event one or more prospective purchasers qualify themselves to bid, the  
14 auction will be conducted by the Receiver as noted above and bids will be allowed in  
15 increments of at least \$5,000. The Receiver will then file a notice advising the Court  
16 of the result of the auction (*i.e.*, the highest bid) and seek entry of an order  
17 confirming the sale.<sup>4</sup> Earnest money deposits provided by bidders who are  
18 unsuccessful will be promptly returned to them. In the event no prospective  
19 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver  
20 will notify the Court and seek entry of an order approving the sale to Buyer.

21 With respect to Broker's commission, Broker appears to have broadly  
22 marketed and advertised the Carmel Property for sale and diligently responded to  
23 inquiries from interested parties. The listing agreement is consistent with industry  
24 standards for commissions paid to brokers for sales of residential properties.

25

26

27 <sup>4</sup> In the event that multiple qualified overbids are received and participate in the  
28 auction, the Receiver will seek Court approval of the highest bid and the back-up  
bid, such that if the highest bidder fails to close the sale for any reason, the  
Receiver can proceed to close the sale with the back-up bidder without delay.

1 Accordingly, the Receiver requests authorization to pay Broker the commission  
2 amount in accordance with the listing agreement. Freitag Decl., ¶ 8.

3 **V. CONCLUSION**

4 For the reasons discussed above, the Receiver requests (a) approval of the sale  
5 of the Carmel Property to Buyer (or his/her designee) pursuant to the Agreement  
6 attached to the Freitag Declaration as Exhibit A, and (b) authority to take all steps  
7 necessary to close the sale with the net sale proceeds after all third-party payments  
8 are made from escrow going to the receivership estate.

9  
10 Dated: February 13, 2020

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:           s/Edward G. Fates          

DAVID R. ZARO  
EDWARD G. FATES  
NORMAN M. ASPIS  
Attorneys for Receiver  
KRISTA FREITAG

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