

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
19 v.
20 GINA CHAMPION-CAIN and ANI
DEVELOPMENT, LLC,
21 Defendants,
22 AMERICAN NATIONAL
INVESTMENTS, INC.,
23 Relief Defendant.
24
25
26
27
28

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 4364
VALLE VISTA PROPERTY**

Date: November 30, 2020
Time: 9:30 a.m.
Courtroom: 3B
Mag. Judge: Hon. Allison H. Goddard

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I.	BACKGROUND FACTS.....	5
II.	PROPOSED SALE.....	7
III.	LEGAL STANDARD.....	7
	A. The Court's Authority to Approve Sale.....	8
	B. 28 U.S.C. § 2001.....	9
IV.	DISCUSSION.....	10
	A. Authority to Act for the Trust for Purposes of the Sale.....	12
V.	CONCLUSION.....	13

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Beet Growers Sugar Co. v. Columbia Trust Co.*

5 3 F.2d 755 (9th Cir. 1925)..... 9

6 *Blakely Airport Joint Venture II v. Federal Sav. and Loan Ins. Corp.*

7 678 F. Supp. 154 (N.D. Tex. 1988) 9

8 *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance Corp.*

9 172 F.2d 416 (10th Cir. 1949) 10

10 *CFTC. v. Topworth Int'l, Ltd.*

11 205 F.3d 1107 (9th Cir. 1999) 8

12 *First Nat'l Bank v. Shedd*

13 121 U.S. 74 (1887) 8

14 *Gockstetter v. Williams*

15 9 F.2d 354 (9th Cir. 1925)..... 9

16 *Miners' Bank of Wilkes-Barre v. Acker*

17 66 F.2d 850 (2d Cir. 1933)..... 9

18 *Regions Bank v. Egyptian Concrete Co.*

19 2009 U.S. Dist. LEXIS 111381, at *8 (E.D. Mo. 2009)..... 10

20 *SEC v. American Capital Invest., Inc.*

21 98 F.3d 1133 (9th Cir. 1996)..... 8

22 *SEC v. Capital Consultants, LLC*

23 397 F.3d 733 (9th Cir. 2005)..... 7, 8

24 *SEC v. Capital Cove Bancorp LLC*

25 2015 U.S. Dist. LEXIS 174856, at *13 (C.D. Cal. 2015)..... 10

26 *SEC v. Elliot*

27 953 F.2d 1560 (11th Cir. 1992)..... 7, 8

28 *SEC v. Goldfarb*

 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013) 9

SEC v. Hardy

 803 F.2d 1034 (9th Cir 1986) 7

SEC v. Kirkland

 2007 U.S. Dist. LEXIS 45353, at *5 (M.D. Fla. 2007)..... 10

SEC v. Wencke

 622 F.2d 1363 (9th Cir. 1980) 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Statutes

28 U.S.C. § 2001..... 9
 28 U.S.C. § 2001(a)..... 9, 10, 11
 28 U.S.C. § 2001(b)..... 9
 28 U.S.C. § 2002..... 10

Treatises

2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 342
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 344
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482
 (3d ed. 1992)..... 8
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers
 § 482(a) (3d ed. 1992). 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 487
 (3d ed. 1992)..... 8
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 489
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 491
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 500
 (3d ed. 1992)..... 9

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 4364 Valle Vista Property ("Motion").

6 **I. BACKGROUND FACTS**

7 The residential properties in the receivership estate include a single-family
8 residence located at 4364 Valle Vista in the Mission Hills neighborhood of San
9 Diego ("Valle Vista Property"). The Valle Vista Property is 1,412 square feet with
10 three bedrooms and one and a half bathrooms. The Valle Vista Property was
11 purchased for \$840,000 on July 18, 2014 by Joseph Alex Himmelberg and on
12 March 10, 2015, it was transferred to the Joseph Alex Himmelberg and Gina
13 Champion-Cain Trust Dated January 26, 2015 ("Trust"). Ms. Champion-Cain is the
14 sole remaining Grantor and Trustee of the Trust. The property is effectively
15 controlled by the Receivership Entities as landlord and was occupied by a former
16 employee of the Receivership Entities until she agreed to move out in July 2020.
17 Freitag Decl., ¶ 2.

18 Upon her appointment, the Receiver and her staff performed an analysis of the
19 value of the Valle Vista Property, including a review of automated valuation scores
20 for the property and a survey of the market comparable properties. The Receiver and
21 her staff also consulted with and interviewed licensed brokers with experience selling
22 residential properties in the Mission Hills area. Ultimately, based on a combination
23 of its experience and low listing commission, the Receiver selected Pacific Pines
24 Real Estate ("Broker") and the Valle Vista Property was listed for sale on the
25 Multiple Listing Service (MLS) on or about August 3, 2020. The original list price
26 was \$1,349,000. Freitag Decl., ¶ 3.

27 To market the Valle Vista Property, Broker listed the property on the local
28 MLS and its website, and reportedly showed the property to over 20 interested

1 parties. Additionally, in compliance with guidance from the California Association
 2 of Realtors, 3D marketing and socially distant property tours were enforced. After
 3 an initial early offer was withdrawn during negotiations, the Receiver, in consultation
 4 with Broker, reduced the list price to the current range of \$1,199,900 to \$1,279,900
 5 on September 9, 2020. A total of two offers were received. The Receiver negotiated
 6 terms with the prospective buyers and the property went into escrow on or around
 7 September 16, 2020 with a purchase price of \$1,150,000 and a \$19,000 credit to the
 8 buyer. The buyer is Kirsten Worley ("Buyer"). Freitag Decl., ¶ 4.

9 The Valle Vista Property is encumbered by two loans – a first position
 10 mortgage in favor of Nations Direct Mortgage, LLC ("Nations Direct") and a Small
 11 Business Administration loan and deed of trust in favor of First Choice Bank in
 12 second position. Assuming a December 2020 sale, the amount required to pay off
 13 the Nations Direct loan is estimated to be approximately \$493,000 (includes accrued
 14 interest) and the amount required to pay off the First Choice loan is estimated to be
 15 approximately \$495,000.¹ Assuming the sale closes in December (after December
 16 10th), there will be a small credit to the seller at closing for property taxes. The
 17 Broker's commission pursuant to the listing agreement is \$12,000 plus 2.5% of the
 18 sale price, or \$40,775, which amount will be split with Buyer's broker. The costs of
 19 sale, including escrow, title and recording fees, are estimated to be approximately
 20 \$5,650. While exact amounts will be determined at closing, after the aforementioned
 21 amounts are paid out of escrow or otherwise credited to seller, the net sale proceeds
 22

23
 24 ¹ The First Choice Bank loan, which was previously partially paid down in
 25 connection with the sale of the property located at 4205 Lamont Street, #12, also
 26 encumbers the personal property associated with the Mission Beach Surf Rider
 27 restaurant (the sale of which is currently pending Court approval) as well as the
 28 residence of Ms. Champion-Cain and her husband, Steven Cain, located at 4014
 Bandini Street, San Diego. Therefore, the proposed sale of the Valle Vista
 Property, assuming it closes before the sale of the personal property associated
 with the Mission Beach Surf Rider restaurant (which sale requires ABC approval
 for the transfer of the liquor license), will mean the net proceeds from the sale of
 the Mission Beach Surf Rider personal property and liquor license go to the
 receivership estate.

1 for the receivership estate are estimated to be in the neighborhood of approximately
2 \$95,000. Freitag Decl., ¶ 5.

3 **II. PROPOSED SALE**

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

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

9 **Purchase Price.** The purchase price is \$1,150,000 - before application of a
10 \$19,000 buyer credit - which amount will be financed.

11 **Deposit.** Buyer has deposited \$10,000 into escrow.

12 **Closing Date.** Closing shall occur upon entry of the Court order approving
13 the sale.

14 **III. LEGAL STANDARD**

15 "The power of a district court to impose a receivership or grant other forms of
16 ancillary relief does not in the first instance depend on a statutory grant of power
17 from the securities laws. Rather, the authority derives from the inherent power of a
18 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
19 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
20 and efficient administration of the estate by the district court for the benefit of
21 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
22 of a receiver is authorized by the broad equitable powers of the court, any
23 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
24 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

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

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

20 It is widely accepted that a court of equity having custody and control of
 21 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
 22 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
 23 and wide discretion to determine relief in an equity receivership). "The power of sale
 24 necessarily follows the power to take possession and control of and to preserve
 25 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
 26 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
 27 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
 28 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity
 orders property in its custody to be sold, the court itself as vendor confirms the title
 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
Receivers § 487 (3d ed. 1992).

"A court of equity, under proper circumstances, has the power to order a
 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*

1 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
2 Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992). To that end, a
3 federal court is not limited or deprived of any of its equity powers by state statute.
4 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
5 (state statute allowing time to redeem property after a foreclosure sale not applicable
6 in a receivership sale).

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

16 **B. 28 U.S.C. § 2001**

17 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real
18 property under subsection (a) and specific requirements for private sales of real
19 property under subsection (b). Although both involve significant cost and delay, the
20 cost and delay of a public sale are significantly less than those for a private sale.
21 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013)
22 ("Section 2001 sets out two possible courses of action: (1) property may be sold in
23 public sale; or (2) property may be sold in a private sale, provided that three separate
24 appraisals have been conducted, the terms are published in a circulated newspaper
25 ten days prior to sale, and the sale price is no less than two-thirds of the valued
26 price."). Therefore, by proceeding under Section 2001(a), the receivership estate can
27 avoid the significant costs and delay of (a) the Court having to appoint three
28 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

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

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

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

25 The notice of sale is sufficient if it describes the property and the time, place,
 26 and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*
 27 *Corp.*, 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to
 28 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and
 binding offer to purchase the [property]; and (ii) demonstrate . . ., to the satisfaction
 of the Receiver, that it has the current ability to consummate the purchase of the
 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*, 2009 U.S.
 Dist. LEXIS 111381, at *8 (E.D. Mo. 2009).

29 **IV. DISCUSSION**

30 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
 31 in the best interests of the receivership estate. The Valle Vista Property has been

1 listed on the MLS with a licensed broker and shown to many interested parties. The
2 property was properly marketed, three offers were received, highest and best terms
3 negotiated, and the Agreement signed. The purchase price is fair and reasonable and
4 reflects the current market value of the property. Freitag Decl., ¶ 6.

5 Moreover, the proposed sale is subject to overbid to further ensure the highest
6 and best price is obtained. The Receiver proposes to conduct a public auction
7 consistent with the requirements of Section 2001(a). Specifically, the Receiver will
8 publish the following notice of the sale once a week for four weeks in the San Diego
9 Union-Tribune, a newspaper of general circulation in San Diego County:

10 In the action pending in U.S. District Court for the
11 Southern District of California, Case No. 19-CV-01628-
12 LAB-AHG, Securities and Exchange Commission v.
13 Gina Champion-Cain, et al., notice is hereby given that
14 the court-appointed receiver will conduct a public auction
15 for the real property located at 4364 Valle Vista in San
16 Diego County, California. Sale is subject to Court
17 confirmation after the auction is held. Minimum bid
18 price is at least \$1,175,000. The auction will take place
19 on November 13, 2020, at 1:30 p.m. in front of the
20 entrance to the United States Courthouse,
21 221 W. Broadway, San Diego, California or as otherwise
determined by the Court. 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 \$11,000, and proof of funds. All bidders must be
qualified by 5:00 p.m. PT on November 9, 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.

22 In order to conduct an orderly auction and provide sufficient time for the
23 publication of notices discussed above, the Receiver will require bidders to complete
24 the above steps by November 9, 2020 ("Bid Qualification Deadline") and conduct the
25 live public auction on November 13, 2020.

26 The Receiver will inform all interested persons of the opportunity to overbid at
27 the public auction, provided they qualify themselves to bid by the Bid Qualification
28 Deadline by (a) signing a purchase and sale agreement for the properties on the same

1 terms and conditions as Buyer, but with a purchase price of at least \$1,175,000 (with
2 a \$19,000 closing cost credit to match the current offer), (b) providing the Receiver
3 with an earnest money deposit of \$11,000, and (c) providing proof of funds
4 necessary to close the sale transaction in the form of a current bank statement,
5 cashier's check delivered to the Receiver, or other evidence deemed sufficient by the
6 Receiver.

7 In the event one or more prospective purchasers qualify themselves to bid, the
8 auction will be conducted by the Receiver as noted above and bids will be allowed in
9 increments of at least \$1,000. The Receiver will then file a notice advising the Court
10 of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
11 confirming the sale. In the event no prospective purchasers qualify themselves to bid
12 by the Bid Qualification Deadline, the Receiver will notify the Court and seek entry
13 of an order approving the sale to Buyer.

14 **A. Authority to Act for the Trust for Purposes of the Sale**

15 As noted above, title to the Valle Vista Property is held by the Trust, which is
16 not named in the Court's September 3, 2019 order that appoints the Receiver. Dkt. 6.
17 Accordingly, the Receiver has discussed the language of the proposed order with the
18 title company involved in the sale. The title company will require that the Receiver
19 be expressly authorized and directed in the sale approval order to act on behalf of the
20 Trust for all purposes related to the sale of the Valle Vista Property. The Receiver,
21 through her counsel, has discussed this matter with counsel for Ms. Champion-Cain
22 and has been advised that Ms. Champion-Cain, who is the sole remaining Grantor
23 and Trustee of the Trust, has no objection to this language being included in the sale
24 approval order. Accordingly, the Receiver has submitted a form of proposed order
25 that authorizes and directs the Receiver to act on behalf of the Trust for all purposes
26 related to the sale of the Valle Vista Property.

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. CONCLUSION

For the reasons discussed above, the Receiver requests an order (a) approving the sale of the Valle Vista Property to Buyer (or their designee) pursuant to the Agreement attached to the Freitag Declaration as Exhibit A, (b) authorizing the Receiver to take all steps necessary to close the sale, with the net sale proceeds after all third-party payments are made from escrow going to the receivership estate, and (c) authorizing and directing the Receiver to act on behalf of the Trust for all purposes related to the sale of the Valle Vista Property pursuant to the form of proposed order submitted.

Dated: October 14, 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