

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
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 SETTLEMENT
AGREEMENT WITH WILLIAM
ADAMS AND RELATED ENTITIES**

Date: May 3, 2021
Time: 11:15 a.m.
Courtroom: 14A
Judge: Hon. Larry Alan Burns

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 Settlement Agreement with William Adams and
6 Related Entities ("Motion").

7 **I. BACKGROUND FACTS**

8 The Receiver's duties under the preliminary injunction and receivership order
9 entered on September 3, 2019 (Dkt. 6), include, among other things, to investigate
10 and pursue claims and causes of action of the Receivership Entities against third
11 parties. The Receiver has investigated the role played by attorney William Adams,
12 William Adams, APC, and Norton Moore & Adams LLP (collectively, the "Adams
13 Parties") with respect to the facts, circumstances and events relating to the
14 Receivership Entities that are at issue in the SEC Action (collectively, the "ANI
15 Issues"), including issuing subpoenas to the Adams Parties for the production of
16 documents. Based on this investigation, the Receiver determined the Receivership
17 Entities have valid claims for damages against the Adams Parties relating to the ANI
18 Issues, including for breach of fiduciary duty, professional negligence, aiding and
19 abetting breach of fiduciary duty and aiding and abetting fraud (collectively, the
20 "Claims"). The Adams Parties have unequivocally denied any wrongdoing with
21 respect to the ANI Issues and deny that they have any liability with respect to the
22 Claims. Declaration of Krista Freitag filed concurrently herewith ("Freitag Decl."),
23 ¶ 2.

24 The Adams Parties have a professional liability insurance policy with a
25 maximum amount of \$1,000,000 in coverage, which amount is reduced to the extent
26 the insurer pays attorneys' fees for the Adams Parties to respond to subpoenas and
27 address claims. A portion of the available coverage has already been used in
28 responding to subpoenas issued to the Adams Parties by the Receiver, responding to

1 a subpoena issued to the Adams Parties by Chicago Title Company ("CTC") in the
2 investor actions brought against CTC, defending the deposition of William Adams
3 taken by CTC, attending mediation with the Receiver, and documenting the
4 Settlement Agreement (defined below), approval of which is sought herein. Freitag
5 Decl. ¶ 3.

6 **A. The Settlement Terms**

7 The Receiver and the Adams Parties attended mediation with Judge Leo Papas
8 (Ret.) in November 2020, and have agreed, subject to Court approval, to fully settle
9 and resolve the Claims. The key terms are as follows:¹

10 **Payment.** Under the proposed Settlement Agreement and Mutual Release, as
11 amended ("Settlement Agreement"), the full amount of coverage under the Adams
12 Parties' Lawyers Professional Liability Insurance Policy ("Policy") remaining as of
13 the date of entry of the Court's order approving the Settlement Agreement
14 ("Approval Order") will be paid to the Receiver within five (5) business days after
15 the Approval Order becomes a final order; provided, however, that \$150,000 of such
16 funds shall be held by the insurance carrier ("Insurance Holdback"). The Insurance
17 Holdback may be used to pay fees, costs and expenses of the Adams Parties for any
18 covered claims under the Policy. Within one year (365 days) after the Approval
19 Order becomes a final order, the Insurer shall pay to the Receiver any and all then-
20 remaining Insurance Holdback funds. The Adams Parties shall provide the Receiver
21 with a summary describing any use of, and the remaining balance of, the Insurance
22 Holdback on a quarterly basis (i.e., approximately 90 days, 180 days, 270 days, and
23 365 days) after the Approval Order becomes a final order.

24 **Financial Disclosures.** In connection with the negotiation and execution of
25 the Settlement Agreement, the Adams Parties have made certain confidential
26

27 ¹ The terms of the Settlement Agreement are summarized herein for ease of
28 reference only. In the event of a conflict between the summary provided herein
and the terms of the Settlement Agreement, the Settlement Agreement controls
and governs. Freitag Decl., Exs. A and B.

1 financial disclosures and provided certain confidential financial documents to the
2 Receiver. As discussed below, based on these confidential financial disclosures, the
3 Receiver believes that, in light of the litigation risk, the cost of pursuing the litigation
4 to judgment (which would further reduce the amount of insurance proceeds available
5 to satisfy a judgment) and the cost of pursuing judgment enforcement, the value of
6 the Adams Parties' assets does not justify rejection of the present settlement in favor
7 of pursuing litigation. Freitag Decl. ¶ 4.

8 **Bar Order.** The Settlement Agreement is conditioned not only on Court
9 approval, but also on entry of an injunction and order barring all claims against the
10 Adams Parties, their insurance carrier, and their related parties (as defined in the
11 Settlement Agreement) related to or involving any of the facts and matters described
12 in this action, and/or which were or could have been alleged by the Receiver,
13 including any claim by any investor, shareholder, partner, officer, director,
14 employee, member and/or agent of, and any lender to ANI Development, LLC or
15 American National Investments, Inc.

16 The Receiver believes the Settlement Agreement, which is the product of
17 extensive analysis and negotiations between the Receiver and the Adams Parties, is a
18 reasonable and fair compromise of the receivership estate's claims against the Adams
19 Parties and is in the best interests of the receivership estate and all its claimants.
20 Freitag Decl. ¶¶ 5-6. The Receiver therefore requests that it be approved.

21 **II. DISCUSSION**

22 **A. Settlement Approval**

23 A federal equity receiver's power to compromise claims is subject to court
24 approval. As noted by the Ninth Circuit Court of Appeals in *SEC v. Hardy*, 803 F.2d
25 1034, 1037 (9th Cir. 1986), "[a] district court's power to supervise an equity
26 receivership and to determine the appropriate action to be taken in the administration
27 of the receivership is extremely broad." With regard to settlements entered into by a
28 federal equity receiver, the Court's supervisory role includes reviewing and

1 approving those settlements in light of federal court policy to promote settlements
2 before trial. *See* Fed. R. Civ. P. 16(c), Advisory Committee Notes.

3 Federal courts of equity may look to bankruptcy law for guidance in the
4 administration of receivership estates. *See SEC v. Capital Consultants, LLC*,
5 397 F.3d 733, 745 (9th Cir. 2005); *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133,
6 1140 (9th Cir. 1996); *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 665
7 (6th Cir. 2001). A bankruptcy court may approve a compromise of claims asserted
8 by or against the estate if the compromise is "fair and equitable." *Woodson v.*
9 *Fireman's Fund Ins. Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). The
10 approval of a proposed compromise negotiated by a court appointed fiduciary "is an
11 exercise of discretion that should not be overturned except in cases of abuse leading
12 to a result that is neither in the best interest of the estate nor fair and equitable for the
13 creditors." *In re MGS Mktg.*, 111 B.R. 264, 266-67 (B.A.P. 9th Cir. 1990).

14 The Court has great latitude in approving compromises. In passing on the
15 proposed compromise, the Court should consider the following:

- 16 a. The probability of success in litigation;
- 17 b. The difficulties, if any, to be encountered in the matter of collection;
- 18 c. The complexity of the litigation involved and the expense,
19 inconvenience, and delay necessarily attending; and
- 20 d. The paramount interest of the creditors and a proper deference to their
21 reasonable views in the premises.

22 *In re Woodson*, 839 F.2d at 620.

23 Here, the Receiver has weighed the likely costs and benefits of pursuing legal
24 action against the Adams Parties and enforcing a judgment against them, including
25 carefully reviewing the confidential financial disclosures made by the Adams Parties.
26 The Receiver anticipates that the recovery under the proposed Settlement Agreement
27 will be in the range of \$725,000 (the estimated remainder of the insurance coverage
28 available under the Adams Parties' insurance policy). Freitag Decl., ¶ 5.

1 While the Receiver is confident she would prevail in an action against the
2 Adams Parties, all litigation involves some risk, particularly where, as here, the
3 defendants have vehemently denied liability and indicated an intent to vigorously
4 defend the claims, and the non-insurance assets available to satisfy a judgment
5 appear to be worth less than the value of this settlement. Obtaining and enforcing a
6 judgment would involve considerable time and expense, thereby depleting
7 receivership estate resources, and the defense of such litigation by the Adams Parties
8 would consume the majority, if not all, of the remaining insurance coverage available
9 under the Policy. There is no other insurance coverage available for the Claims. The
10 likelihood, therefore, is that the recovery under the proposed Settlement Agreement
11 would exceed the net recovery from litigation with the Adams Parties. Freitag Decl.,
12 ¶ 5.

13 **B. Injunction and Bar Order**

14 California federal courts have recognized the legitimacy—and, even, the
15 necessity—of settlement bar orders. *See Miller v. Christopher*, 887 F.2d 902, 906
16 (9th Cir. 1989) ("[d]enial of a settlement bar would interfere with policies favoring
17 settlement"); *In re Consol. Pinnacle W. Sec. Litig./Resolution Tr. Corp.-Merabank*
18 *Litig.*, 51 F.3d 194, 197 (9th Cir. 1995).

19 "Bar orders are appropriate so long as the court finds that (1) the settling
20 defendants are settling in good faith, and (2) a "proportionate share" approach is used
21 ... to determine the liability of non-settling defendants." *Renfrew v. Toms*, 109 F.
22 App'x 143, 146 (9th Cir. 2004); *accord In re U.S. Oil & Gas Litig.* 967 F.2d 489, 496
23 (11th Cir. 1992). Thus, where the claims that the district court seeks to extinguish
24 through the entry of a bar order arise out of the same facts as those underlying the
25 litigation, the district court may exercise its discretion to bar such claims. (*Id.*)

26 Here, the Settlement Agreement, including the condition that an injunction/bar
27 order be issued, was made in good faith and is fair and reasonable. The vast majority
28 of the Adams Parties' remaining insurance coverage will be paid to the receivership

1 estate in the short term and the remainder of the insurance coverage will be paid
 2 within 365 days of the Approval Order becoming final. To date, no investors or
 3 other third parties have asserted claims against the Adams Parties. With this case
 4 having been filed approximately 18 months ago, it does not appear any third parties
 5 intend to pursue claims against the Adams Parties, so there is no indication that the
 6 injunction will prevent anyone from asserting claims. Moreover, the investors who
 7 have suffered losses from the ANI scheme stand to benefit from the Settlement
 8 Agreement because the funds recovered by the Receiver will ultimately be
 9 distributed to those with allowed claims in the receivership. Further, the claims
 10 barred by the Settlement Agreement are sufficiently interrelated to the claims in the
 11 SEC Action. Paragraph (3)(d) of the Settlement Agreement provides that the
 12 injunction/bar order only applies to "claim[s]...related to or involving any of the
 13 facts and matters described in the SEC Action, and/or which were or could have been
 14 alleged by the Receiver." Accordingly, the Receiver believes the Settlement
 15 Agreement, including the required injunction/bar order, is fair and reasonable and in
 16 the best interests of the receivership estate and all claimants. The Receiver therefore
 17 asks that it be approved. Freitag Decl., ¶ 6.

18 **III. CONCLUSION**

19 For the foregoing reasons, the Receiver requests entry of the proposed order
 20 approving the Motion and the Settlement Agreement, including the injunction and
 21 bar order provision discussed above (as provided in the form of proposed order
 22 submitted to the Court).

23
 24 Dated: March 29, 2021

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