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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.

Case No. 3:19-cv-01628-LAB-AHG  
Ctm: 14A  
Judge Hon. Larry Alan Burns

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
RECEIVER'S MOTION FOR  
(A) APPROVAL OF SALE OF REAL  
PROPERTY LOCATED AT 1617  
THOMAS AVENUE; AND  
(B) AUTHORITY TO PAY  
BROKER'S COMMISSION**

Date: December 9, 2019  
Time: 11:15 a.m.  
Courtroom: 14A (14th Flr)  
Judge: Hon. Larry Alan Burns

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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 (A) Approval of Sale of Real Property Located at 1617 Thomas  
6 Avenue; and (B) Authority to Pay Broker's Commission ("Motion").

### 7 I. BACKGROUND FACTS

8 As reflected on Exhibit A to the Receiver's Verified Initial Report (Dkt. 76-1,  
9 Exhibit A), the receivership estate includes numerous residential and commercial  
10 real properties. The residential properties include a single-family residence located  
11 at 1617 Thomas Avenue, San Diego, California ("Thomas Avenue Property"). The  
12 Thomas Avenue Property is 1,192 square feet with three bedrooms and two  
13 bathrooms. The Thomas Avenue Property was purchased by The Gina Champion-  
14 Cain Revocable Trust for \$775,000 on July 6, 2017.<sup>1</sup> Freitag Decl., ¶ 2.

15 Prior to the Receiver's appointment, on July 13, 2019, the Thomas Avenue  
16 Property was listed for sale on the Multiple Listing Service (MLS) with a licensed  
17 broker, Pacific Sotheby's International Realty ("Broker"). The list price was  
18 \$925,000. To market the property, Broker indicated it made the property available  
19 for brokers to tour and held two open houses. During the first few days it was listed,  
20 three credible offers were received. The property went into escrow on July 19, 2019  
21 with a purchase price of \$985,000. The buyer is Paul and Deborah Ludford  
22 ("Buyer"). Freitag Decl., ¶ 3.

23 Upon her appointment and after learning of the pending sale, the Receiver and  
24 her staff performed their own analysis of the value of the Thomas Avenue Property,  
25

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26  
27 <sup>1</sup> Although the Thomas Avenue Property is held by Defendant Champion-Cain's  
28 revocable trust, she does not dispute that the property is 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.

1 including a review of automated valuation scores for the property, a survey of the  
2 market comparable properties, and a review of the appraisal procured by Buyer as  
3 part of their due diligence (with an appraised value of \$990,000) and determined  
4 that the proposed purchase price is fair and reasonable. The Receiver and Buyer  
5 then executed a First Amendment to Residential Purchase Agreement and Escrow  
6 Instructions ("First Amendment") which makes Court approval of the sale a  
7 condition to closing and provides for the overbid and auction process described  
8 below. The First Amendment was signed on October 15, 2019. Freitag Decl., ¶ 4.

9 The Thomas Avenue Property is encumbered by a deed of trust in favor of  
10 Axos Bank. The Axos Bank portfolio loan covers seven residential properties  
11 included in the receivership estate.<sup>2</sup> According to the bank's records, the principal  
12 balance and accrued interest on the loan as of October 11, 2019 was  
13 approximately \$5,075,000 and \$171,000, respectively, and the release price for the  
14 sale of the Thomas Avenue Property was approximately \$684,000. The Receiver is  
15 in the process of reviewing the payment history regarding the Axos Bank loan and  
16 will complete her review and verify the principal and interest balances, as well as  
17 the release price prior to the sale closing. Freitag Decl., ¶ 5.

18 The approval of the subject transaction is important because not only is this  
19 transaction estimated to provide six figure net proceeds to the receivership estate,  
20 but the projected net proceeds from the sale of all of the properties (if sold within  
21 the next six months) encumbered by the portfolio loan are estimated to produce a net  
22 recovery to the receivership estate between \$3.5 million and \$4 million in the  
23 aggregate. This estimate does not include rental revenues realized in the meantime.  
24 Freitag Decl., ¶ 6.

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28 <sup>2</sup> The estimated market value of the other six properties that are subject to the  
Axos Bank loan is \$9,494,000 (See Dkt. 76-2, Exhibit A, Vacation Homes  
Owned, Numbers 4-9).

1 **II. PROPOSED SALE**

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

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

8 **Purchase Price.** The purchase price is \$985,000, which is being financed by  
9 Buyer.

10 **Deposit.** Buyer has deposited \$29,550 into escrow. Prior to the Receiver's  
11 appointment, half of this amount (\$14,775) was transferred to Mrs. Champion-  
12 Cain's personal account in exchange for an escrow extension requested by Buyer.  
13 After the Receiver's appointment, Mrs. Champion-Cain, the Securities and  
14 Exchange Commission, and the Receiver, through counsel, stipulated to unfreeze  
15 and turn over these funds to the receivership. Dkt. 36, 47.

16 **Closing Date.** Closing shall occur within 7 days of entry of the Court order  
17 approving the sale.

18 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be  
19 paid a commission of 5% of the gross sales price, which is to be split evenly with  
20 Buyer's broker. In the proposed sale, the total commission would be \$49,250.

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 receivership  
 9 and to determine the appropriate action to be taken in the  
 10 administration of the receivership is extremely broad. The  
 11 district court has broad powers and wide discretion to  
 12 determine the appropriate relief in an equity receivership.  
 13 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  
 18 the 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  
 25 sale 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  
 20 are vested with broad discretion as to price and terms." *Gockstetter v. Williams*,  
 21 9 F.2d 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  
 24 real 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  
5 can 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 not  
15 be made without notice published once a week for at least  
16 four weeks prior to the sale in at least one newspaper  
regularly issued and of general circulation in the county, state,  
or judicial district of the United States 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 situated,  
20 as the court directs. The notice shall be substantially in such  
form and contain such description of the property by reference  
or otherwise as the court approves. The court may direct that  
the publication be made in other newspapers.

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

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

1 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*,  
2 2009 U.S. Dist. LEXIS 111381, at \*8 (E.D. Mo. 2009).

3  
4 **IV. DISCUSSION**

5 The Receiver believes the proposed sale to Buyer pursuant to the Agreement  
6 is in the best interests of the receivership estate. The Thomas Avenue Property was  
7 listed on the MLS with a licensed broker and shown to interested parties. The  
8 property was on the market, offers were received, terms negotiated, and the  
9 Agreement signed. The Receiver has found no evidence that the proposed sale is  
10 anything other than an ordinary arm's length transaction. The purchase price is fair  
11 and reasonable, exceeds what the property was purchased for in 2017 by \$210,000,  
12 and is supported by an independent appraisal. Freitag Decl., ¶ 7.

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

18 In the action pending in U.S. District Court for the Southern  
19 District of California, Case No. 19-CV-01628-LAB-AHG,  
20 Securities and Exchange Commission v. Gina Champion-Cain, et  
21 al., notice is hereby given that the court-appointed receiver will  
22 conduct a public auction for the real property located at 1617  
23 Thomas Avenue in San Diego County, California. Sale is subject  
24 to Court confirmation after the auction is held. Minimum bid  
25 price is at least \$1,010,000. The auction will take place on  
26 December 5, 2019, at 1:30 p.m. in front of the entrance to the  
27 United 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 \$29,550, and proof of  
funds. All bidders must be qualified by 5:00 p.m. PT on  
December 2, 2019, by submitting the required materials to the  
receiver at 401 W. A Street, Suite 1830, 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 December 2, 2019 ("Bid Qualification Deadline"), and conduct  
4 the live public auction on December 5, 2019.

5 The Receiver will inform all interested persons of the opportunity to overbid  
6 at the public auction, provided they qualify themselves to bid by the Bid  
7 Qualification Deadline by (a) signing a purchase and sale agreement for the  
8 properties on the same terms and conditions as Buyer, but with a purchase price of  
9 at least \$1,010,000, (b) providing the Receiver with an earnest money deposit of  
10 \$29,550, and (c) providing proof of funds necessary to close the sale transaction in  
11 the form of a current bank statement, cashier's check delivered to the Receiver, or  
12 other evidence 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  
15 in increments of at least \$5,000. The Receiver will then file a notice advising the  
16 Court of the result of the auction (*i.e.*, the highest bid) and seek entry of an order  
17 confirming the sale. 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 the Thomas Avenue Property for sale, to include its posting on the MLS  
23 and its own website. The listing agreement is consistent with industry standards for  
24 commissions paid to brokers for sales of residential properties. Accordingly, the  
25 Receiver requests authorization to pay Broker the commission amount in accordance  
26 with the listing agreement. Freitag Decl., ¶ 7.

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**V. CONCLUSION**

For the reasons discussed above, the Receiver requests (a) approval of the sale of the Thomas Avenue Property to Buyer pursuant to the Agreement attached to the Freitag Declaration as Exhibit A, and (b) authority to take all steps necessary to close the sale, and (c) authority to pay Broker's commission as described above.

Dated: November 4, 2019

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:           s/Edward G. Fates          

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