

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-02594-RM-SKC

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MEDIATRIX CAPITAL INC., et al.,

Defendants,

And

MEDIATRIX CAPITAL FUND LTD., et al.,

Relief Defendants.

**UNOPPOSED MOTION FOR ORDER APPROVING AND CONFIRMING SALE OF
REAL PROPERTIES COMMONLY KNOWN AS: (1) 7349 E. CASITAS DEL RIO DRIVE,
SCOTTSDALE, ARIZONA; AND (2) 8221 E. SHERIDAN ST., SCOTTSDALE, ARIZONA;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
[SUPPORTING DECLARATION OF BRICK KANE FILED CONCURRENTLY
HEREWITH]**

Brick Kane of Robb Evans & Associates LLC (“Receiver”), the receiver appointed pursuant to the Order Appointing Receiver (Doc. 153) (“Receiver Order”), hereby moves the Court for an order providing the following relief (**which is unopposed**):

7439 E. Casitas Del Rio Drive, Scottsdale, Arizona

1. Authorizing and confirming the sale of the real property commonly known as 7439 E. Casitas Del Rio Drive, Scottsdale, Arizona (“Casitas Property”), Assessor’s Parcel Id: 212-03-697, and legally described as:

Lot 89, Silverstone Parcel F, according to Book 1314 of Maps,

Page 14, records of Maricopa County, Arizona

on an “as is” basis, as more fully described in the sale contract documents, by private sale to William P. Korbin Trustee of the Korbin Living Trust and Gayle S. Korbin Trustee of the Korbin Living Trust (collectively, “Casitas Buyer”), an arm’s length buyer, at a purchase price of \$540,000, pursuant to the Residential Resale Real Estate Purchase Contract, Counter Offer One, Seller’s Addenda, Addendum No. 1a, Additional Terms, “AS-IS” Purchase, Counter Offer 2, and Addendum 3, (collectively, the “Casitas Sale Contract”), collectively attached as Exhibit 1 to the accompanying declaration of Brick Kane (“Kane Declaration”) filed in support of this Motion.

2. Authorizing that, pursuant to the Exclusive Right to Sell/Rent Listing Contract Legal Language (“Casitas Listing Agreement”) dated December 24, 2020, attached as Exhibit 2 to the Kane Declaration, a sales commission in the amount of 5% of the purchase price paid by the Casitas Buyer shall be paid from the proceeds of the sale at close of escrow, and providing that no other sales commission shall be paid from the proceeds of the sale or shall be paid by or be the responsibility of the Receiver under any circumstances.

3. Providing that the sale of the Casitas Property by private sale to the Casitas Buyer under the Casitas Sale Contract is approved and confirmed by said order without further notice, hearing or additional order.

4. Authorizing the Receiver to sell and convey the Casitas Property and to execute all documents and instruments necessary or appropriate to complete, implement, effectuate and close the sale of the Casitas Property to the Casitas Buyer, including but not limited to the deed conveying title to the Casitas Property as provided herein.

5. Providing that the sale of the Casitas Property to the Casitas Buyer is being sold in an “as is” condition, without any warranties or representations, with all faults known and unknown, as more particularly set forth in the Casitas Sale Contract.

6. Providing that any licensed title insurer and the Casitas Buyer may rely on said order as authorizing the Receiver to transfer legal title to the Casitas Property free and clear of all liens and encumbrances.

7. Authorizing the Receiver to permit and/or cause to be paid from the proceeds of sale all ordinary and customary closing costs, all costs and expenses required to be paid pursuant to the terms of the Casitas Sale Contract by the Receiver from the proceeds of sale, the sales commission pursuant to the Casitas Listing Agreement, all real property tax liens and prorated real property taxes due up to the date of closing, any unpaid and delinquent homeowner's association dues and charges, and the balance due under the obligation secured by the deed of trust in favor of New Horizons 401(k) PSP, Brad A. Gilbertson, Trustee as to a 50% interest, and Arnold N. Hirsch PSP as to a 50% interest ("Casitas Encumbrance"), subject to an agreed upon and fixed amount for unpaid late fees and default interest of \$12,121.10, as more particularly set forth in this Motion.

8. Providing that, after payment of the sums set forth in the preceding paragraph, all net proceeds from the sale of the Casitas Property shall be disbursed to the Receiver and be the sole and exclusive property of the receivership estate, free and clear of all other liens and encumbrances, if any exist.¹

9. Providing for such additional relief as may be necessary or appropriate to allow the Receiver to effectuate the sale of the Casitas Property, including without limitation the entry of any modified, supplemental or additional order authorizing such sale in form acceptable to the title company insuring title in connection with the sale of the Casitas Property.

¹ The Receiver has established a qualified Settlement Fund to hold the proceeds from the liquidation of receivership assets designated as SEC v MEDIATRIX CAPITAL et al Receivership QSF Brick Kane of Robb Evans & Associates LLC, Receiver.

8221 East Sheridan Street, Scottsdale, Arizona

1. Authorizing and confirming the sale of the real property commonly known as 8221 East Sheridan Street, Scottsdale, Arizona (“Sheridan Property”), Assessor’s Parcel Id: 131-33-078, and legally described as:

Lot 455, Village Grove Eleven, according to the Plat recorded in

Book 85 of Maps, Page 25, Records of Maricopa County, Arizona

on an “as is” basis, as more fully described in the sale contract documents, by private sale to Black Canyon Equity, LLC (“Sheridan Buyer”), an arm’s length buyer, at a purchase price of \$520,000, pursuant to the Residential Resale Real Estate Purchase Contract, Counter Offer One, Seller’s Addenda, Addendum No. 1a, “AS-IS” Purchase, Compliance Notice, Additional Terms, and Addendum 2, (collectively, the “Sheridan Sale Contract”), collectively attached as Exhibit 3 to the Kane Declaration.

2. Authorizing that, pursuant to the Exclusive Right to Sell/Rent Listing Contract Legal Language (“Sheridan Listing Agreement”) dated December 14, 2020, attached as Exhibit 4 to the Kane Declaration, a sales commission in the amount of 5% of the purchase price paid by the Sheridan Buyer shall be paid from the proceeds of the sale at close of escrow, and providing that no other sales commission shall be paid from the proceeds of the sale or shall be paid by or be the responsibility of the Receiver under any circumstances.

3. Providing that the sale of the Sheridan Property by private sale to the Sheridan Buyer under the Sheridan Sale Contract is approved and confirmed by said order without further notice, hearing or additional order.

4. Authorizing the Receiver to sell and convey the Sheridan Property and to execute all documents and instruments necessary or appropriate to complete, implement, effectuate and

close the sale of the Sheridan Property to the Sheridan Buyer, including but not limited to the deed conveying title to the Sheridan Property as provided herein.

5. Providing that the sale of the Sheridan Property to the Sheridan Buyer is being sold in an “as is” condition, without any warranties or representations, with all faults known and unknown, and without permits, as more particularly set forth in the Sheridan Sale Contract.

6. Providing that any licensed title insurer and the Sheridan Buyer may rely on said order as authorizing the Receiver to transfer legal title to the Sheridan Property free and clear of all liens and encumbrances.

7. Authorizing the Receiver to permit and/or cause to be paid from the proceeds of sale all ordinary and customary closing costs, all costs and expenses required to be paid pursuant to the terms of the Sheridan Sale Contract by the Receiver from the proceeds of sale, the sales commission pursuant to the Sheridan Listing Agreement, all real property tax liens and prorated real property taxes due up to the date of closing, and the balance due under the obligation secured by the deed of trust in favor of SWH Funding LLC (“SWH Funding”).

8. Providing that, after payment of the sums set forth in the preceding paragraph, all net proceeds from the sale of the Sheridan Property shall be disbursed to the Receiver and be the sole and exclusive property of the receivership estate, free and clear of all other liens and encumbrances, if any exist.

9. Providing for such additional relief as may be necessary or appropriate to allow the Receiver to effectuate the sale of the Sheridan Property, including without limitation the entry of any modified, supplemental or additional order authorizing such sale in form acceptable to the title company insuring title in connection with the sale of the Sheridan Property.

This Motion is made pursuant to 28 U.S.C. § 2001 and the Receiver Order.

STATEMENT REGARDING DUTY TO CONFER PURSUANT TO D.C. COLO. LCivR

7.1(a)

Receiver's counsel discussed this Motion and the relief sought herein several times with Vivian Drohan, counsel for Defendant Michael Stewart, Relief Defendant Victoria Stewart, and Relief Defendant Keystone Business Trust (as well as Defendant Bryant Sewell and several of the other Relief Defendants), most recently on March 31, 2021. **They have no objection to the relief sought in this Motion.** However, Ms. Drohan indicated that Michael Stewart and Victoria Stewart reserve the right to file a subsequent motion seeking a release of funds from the receivership estate in payment for construction and property management work they personally performed on the Sheridan Property. However, she advised that her clients are not seeking to have money set aside from the escrow for this purpose, do not oppose the relief sought in this Motion and will not be filing opposition to this Motion.

Counsel for the United States Securities and Exchange Commission ("SEC") advised the Receiver's counsel on March 31, 2021 that the SEC has no objection to the relief sought herein.

Counsel for Defendant Michael Young and Relief Defendant Maria Young advised the Receiver's counsel on March 31, 2021 that the Youngs take no position on the relief sought herein.

Based on the foregoing, **this motion is unopposed.**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

A. Background Facts

On September 11, 2020, the Court entered the Receiver Order, appointing Brick Kane of Robb Evans & Associates LLC as Receiver over the (1) Entity Defendants; (2) the Receivership Assets of the Individual Defendants; and (3) the Recoverable Assets of the Receivership Relief Defendants, as those terms are defined therein. (*Id.* at p. 2.) The Receiver Order provides that “[t]he Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers and general and limited partners of the Receivership Defendants and the Receivership Relief Defendants under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, and Federal Rule of Civil Procedure 66.” (*Id.* at ¶ 1.)

The Receiver Order further provides: “[s]ubject to Paragraph 32 [*sic*], immediately below, the Receiver is authorized to locate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the true and proper value of such real property.” (*Id.* at ¶30). Additionally, the Receiver Order provides that: “[u]pon further Order of this Court, pursuant to such procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, all real property in the Receivership Estate.” (*Id.* at ¶31).

On October 15, 2020, the Court entered the Order Granting Plaintiff's Motion to Compel the A.L.A. Trust to Transfer Real Property to Relief Defendant Keystone Business Trust (Doc. 174) ("Arizona Property Order"). Pursuant to the Arizona Property Order, the Court found that the Casitas Property and Sheridan Property had been frozen pursuant to the Court's Preliminary Injunction Order (Doc. 38) and that the Casitas Property and Sheridan Property are Receivership Assets or Recoverable Assets as defined in the Receiver Order. Therefore, the Casitas Property and Sheridan Property may be sold under the provisions set forth in the Receiver Order.

Pursuant to the Arizona Property Order and in response to the Receiver's subsequent demands, both the Casitas Property and Sheridan Property were deeded back to Defendant Michael Stewart and Relief Defendant Victoria Stewart in their capacities as Trustees of the Keystone Business Trust. The deeds returning the Casitas Property and the Sheridan Property to the receivership estate were recorded in Maricopa County, Arizona on March 3, 2021.

Pursuant to the Receiver Order, the Receiver has marketed both of the Arizona properties through Coldwell Banker Realty, a leading national real estate firm, and entered into sale contracts on each of the properties with arm's length buyers which are highly beneficial to the receivership estate. Below, the Receiver describes his successful efforts in locating the Casitas Buyer and Sheridan Buyer and his compliance with 28 U.S.C. §2001.

II. CASITAS PROPERTY

A. Description of the Casitas Property

The Casitas Property is a two-story condominium comprised of 1957 square feet of living space. It was built in 2018. The Casitas Property has three bedrooms, two and one-half bathrooms, a two-car garage and is located in a planned community with a common swimming pool.

B. Valuing the Property, Marketing the Property, Pre-Motion Sale Process and Sale Agreement with the Proposed Casitas Buyer

In order to value the Casitas Property for the purpose of marketing and selling it, the Receiver obtained two formal appraisals on the property and three written broker's opinions of value. It was appraised as of November 10, 2020 by Michael J. Roedl, a Certified Residential Real Estate Appraiser, with Affiliated Appraisal Services. It was also appraised as of December 8, 2020 by Ryan Graffius of Lyons Valuation Group. Graffius is also a Certified Residential Real Estate Appraiser.

One broker's opinion of value, dated October 27, 2020, entitled Comparative Market Analysis, was prepared by Michael O'Malley of Venture REI. A second broker's opinion of value, dated as of November 4, 2020, entitled Broker's Price Opinion, was prepared by David Schrand of Coldwell Banker Realty. A third broker's opinion of value dated as of November 10, 2020, entitled Broker Price Opinion, was prepared by Susanne Efnor of RE/MAX Fine Properties. Importantly, the purchase price obtained for the Casitas Property equals or exceeds the average of the valuations of the two appraisals and equals or exceeds the suggested list prices in all three broker's opinions of value.²

The Receiver next determined to retain a real estate listing broker, concluding that the best way to maximize value for the Casitas Property was to sell it at private sale using an established, national brokerage firm. The Receiver interviewed and obtained proposals from

² The Receiver has not filed or disclosed these valuations or the valuations on the Sheridan Property, discussed below, in this Motion. Given the pending status of the two sales, there is a need to keep these valuations confidential should the sales fail to close for any reason. If the Court requires the valuations to be presented, the Receiver would request that the valuations be presented to the Court alone for *in camera* inspection or filed under seal. However, the key fact is that the purchase price under the proposed Casitas Sale Contract equals or exceeds the average of the valuations in the two appraisals and equals or exceeds the suggested listing prices in the three broker's opinions of value.

three qualified real estate brokerage firms and ultimately entered into the Casitas Listing Agreement with Coldwell Banker Realty (“Coldwell Banker”), with David Schrand and Kerri Schrand (collectively, “Schrand”), as his listing agent. Schrand is an experienced real estate agent specializing in the Scottsdale area, working in Coldwell Banker’s “Scottsdale at 101” office. Coldwell Banker is a prestigious national real estate brokerage firm. The Casitas Listing Agreement provides for an aggregate 5% commission as is typical in the residential real estate community in Arizona.

The Receiver, in consultation with Schrand, determined to list the Casitas Property at \$544,000, which equals or exceeds all of the appraisals and broker’s opinions of value. The Listing Agreement was entered into on December 24, 2020. Thereafter, Coldwell Banker undertook extensive marketing of the Casitas Property. It was prominently posted in the Arizona Regional Multiple Listing Service (“MLS”). Coldwell Banker used DotSignal Mobile Brochure Technology for the property, which allowed prospective purchasers to obtain important information about the Casitas Property from their mobile phones. The Casitas Property was professionally photographed and an on-line virtual tour was accessible on a single property website which features only the subject property. It was advertised in eFlyer, promoted online on YouTube, and advertised in the print publication View Magazine. Coldwell Banker had professionally printed property brochures created, along with a mobile brochure, and implemented targeted online advertising. The Casitas Property was advertised on over 800 on-line real estate websites, including Zillow, Realtor.com and Trulia. There were over 30 in-person showings of the property.

As a result of these efforts, the Receiver obtained four written offers for the Casitas Property. Two were full price offers. In response, the Receiver asked each prospective full price

offeror for a “highest and best offer.” The Receiver accepted the highest offer, but it fell out of escrow because the offeror’s lender’s appraisal did not support the offering price. The second full price offer was withdrawn after the highest offeror fell out of escrow. Subsequently, the proposed Casitas Buyer offered \$540,000, which is 99% of the list price, all cash. The Casitas Buyer made the only offer received without any financing or other unacceptable contingency. The cash necessary to close the transaction has been verified by the Receiver. The Casitas Sale Contract was finalized on February 8, 2021. Because this is part of an Internal Revenue Code 1031 exchange (Title 26 U.S.C. §1031) by the Casitas Buyer, they have included as part of the Casitas Sale Contract that no overbids be entertained. The Casitas Buyer removed all contingencies to the Casitas Sale Contract on February 19, 2021. In light of the fact that the highest offer obtained for the Casitas Property fell out of escrow because the lender’s appraisal did not support the offering price and the fact that all other written offers contained financing or other unacceptable contingencies, the Receiver does not believe it is cost effective or worthwhile to seek any further overbids, and the Casitas Buyer has required that there be no overbidding in light of the need to make the transaction part of a 1031 exchange. In addition, as described below, further delay erodes the equity in the property because the Casitas Encumbrance has an outstanding principal balance of \$325,000 and is a high interest rate (13.99%) hard money loan. There is also the continued accrual of real estate taxes and insurance expense.

The Casitas Sale Contract consists of the Residential Resale Real Estate Purchase Contract, Counter Offer One, Seller’s Addenda, Addendum No. 1a, Additional Terms, “AS-IS” Purchase, Counter Offer 2, and Addendum 3, attached as Exhibit 1 to the Kane Declaration. All contingencies have been removed and the Casitas Buyer, an arm’s length buyer, has elected to proceed with the transaction upon Court approval. The deposit of \$10,000 will become property

of the receivership estate should the Court grant the Motion and the Casitas Buyer fail to close escrow for any reason not the fault of the Receiver.

C. Resolution of the Casitas Encumbrance

The Casitas Encumbrance is a hard money loan that contains onerous default provisions, including a 10.01% increase in the interest rate upon default (to 24% per annum) and a **daily** late fee assessment of 2% **for each** overdue monthly payment amount. This resulted in a very large accrual of late fees and default interest. In a notice received on January 27, 2021, the loan servicer on the Casitas Encumbrance asserted that unpaid late fees of \$42,967.26 and default interest of \$18,332.93 had accrued, for a total of \$61,300.19. The Receiver asserts that the late fees and default interest are likely unenforceable under Arizona state law and federal receivership law, however the holder of the Casitas Encumbrance strongly disagrees. After extensive negotiations, the Receiver has reached an agreement with the holder of the Casitas Encumbrance whereby unpaid late fees and default interest were reduced, in the aggregate to \$12,121.10,³ provided that the Receiver maintains current payments until close of escrow. The Receiver believes this is an extremely fair resolution of his dispute with the holder of the Casitas Encumbrance, representing less than 20% of the disputed late fees and default interest.

III. SHERIDAN PROPERTY

A. Description of the Sheridan Property

The Sheridan Property is a single-story single family residence with 2499 square feet of living space on an 8948 square foot lot. It has four bedrooms, three bathrooms, a two-car garage and a swimming pool. Of particular importance is the fact that the Sheridan Property is in the midst of a substantial, significantly unfinished renovation process. As described below, one of

³ The Receiver has previously paid late fees of \$378.90.

the Receiver's most important determinations was to undertake a cost-benefit analysis as to whether the renovations should be completed before the Sheridan Property was marketed for sale. As explained below, the Receiver determined that the renovations should not be completed before marketing and selling the property.

B. Valuing the Property, Marketing the Property, Pre-Motion Bidding Process, and Sale Agreement with the Proposed Sheridan Buyer

In order to determine whether to market the Sheridan Property on an "as is" basis or to complete the improvements of the property that had been undertaken before sale, it was necessary to obtain valuations on both an "as is" and completed basis. This required the appraisers and brokers who valued the property to provide an estimate to complete. The Receiver and his firm, Robb Evans & Associates LLC, based on extensive experience overseeing and completing partially completed real estate construction projects, independently evaluated the estimated cost to complete. The Receiver obtained two formal appraisals of the property and four written broker's opinions of value. One appraisal, as of November 9, 2020, was made by Michael J. Roedl, who also appraised the Casitas Property. The other appraisal, as of December 2, 2020, was made by Ryan Graffius, the other appraiser who appraised the Casitas Property.

The Receiver obtained a broker's opinion of value, entitled Seller's Report, from Joseph Mastrilli of Keller Williams Realty Biltmore Partners dated October 30, 2020. Mastrilli is also a licensed real estate appraiser. A second broker's opinion of value, entitled Brokers Price Opinion, dated November 5, 2020, was prepared by Schrand. A third broker's opinion of value, entitled Broker Price Opinion, dated November 6, 2020, was prepared by Beth Jo Zeitzer and Joey Hasselbring of ROI Properties. A fourth broker's opinion of value, entitled Broker Price Opinion, was prepared by Susanne Efnor of RE/MAX Fine Properties, dated as of November 20, 2020.

All but one of the valuations contained “as is” values and an estimated value upon completion of the renovations, along with an estimate to complete. While several of the valuations from the appraisers and brokers determined that the value, when completed, was slightly more than the sum of the current “as is” value plus the cost to complete, the Receiver determined that it was most beneficial to market and sell the property in its “as is” condition for several reasons. First, the Receiver concluded that the estimate to complete in the appraisals and broker’s opinions of value, which ranged from \$75,000 to \$100,000, was understated when utilizing licensed third party contractors. Among other reasons for this, the Receiver learned that all of the renovation work to date has been done without permits, which means that there will be an even greater expense to complete the renovations, since drywall may have to be removed for inspections that were not previously completed. The valuations did not take into account the absence of building permits. Second, the Receiver concluded that it would take more time and legal expense to seek Court approval to expend receivership funds to complete the renovations. Third, the actual time to complete the renovations would cause substantial delay before the property could be marketed and sold. The Receiver determined that these additional expenses and significant delay would likely eliminate any possible benefit to the estate, particularly since the first trust deed loan in the principal amount of \$364,700 in favor of SWH Funding, a hard money lender, is an interest-only loan accruing interest at a substantial above-market interest rate of 12%. There is also the continued accrual of real property taxes and insurance expense. In sum, as an equity receiver tasked with preserving estate value, the Receiver determined that any slight potential increase in net value that might be achieved in completing the renovations would be eradicated by expense and delay and that the risks far outweighed any theoretical benefit to the estate.

As with the Casitas Property, the Receiver concluded that the best way to maximize value for the Sheridan Property was to sell it at private sale using an established, national brokerage firm. The Receiver interviewed and obtained proposals from three qualified real estate brokerage firms and entered into the Sheridan Listing Agreement with Coldwell Banker, with Schrand as his listing agent. The Sheridan Listing Agreement provides for an aggregate 5% commission.

The Receiver, in consultation with Schrand, listed the Sheridan Property at \$530,000, which equals or exceeds all of the “as is” appraisals and the broker’s opinions of value. The Listing Agreement was entered into on December 14, 2020. Thereafter, Coldwell Banker undertook extensive marketing of the Sheridan Property. As with the Casitas Property, it was prominently posted in the MLS. Coldwell Banker used DotSignal Mobile Brochure Technology for the property. The Sheridan Property was professionally photographed and an on-line virtual tour was accessible on a single property website. It was advertised in eFlyer, promoted online on YouTube, and advertised in the print publication View Magazine. Coldwell Banker had professionally printed property brochures created, along with a mobile brochure, and implemented targeted online advertising. The Sheridan Property was advertised on over 800 on-line real estate websites, including Zillow, Realtor.com and Trulia. There were over 70 in-person appointments to show the property.

In response to these marketing efforts, there were seven offers made on the Sheridan Property. The Receiver undertook an informal overbidding process, requesting that each offeror come back with a “highest and best” offer on the property. There were two matching high offers. The first one accepted by the Receiver declined to proceed given the requirements of the receivership process and the need for Court approval. The second one accepted by the Receiver

canceled escrow too because of the fact that there were no permits pulled for the construction that had been undertaken. The proposed Sheridan Buyer, an arm's length buyer, submitted three different offers for the property and ultimately entered into the Sheridan Sale Contract for \$520,000. The purchase price reflected in the Sheridan Sale Contract equals or exceeds the average of the valuations of the two appraisals and exceeds the suggested list prices or valuations in the three broker's opinions of value which provided an "as is" valuation.

The Sheridan Sale Contract consists of the Residential Resale Real Estate Purchase Contract, Counter Offer One, Seller's Addenda, Addendum No. 1a, "AS-IS" Purchase, Compliance Notice, Additional Terms, and Addendum 2, attached as Exhibit 3 to the Kane Declaration. All contingencies have been removed and the Sheridan Buyer has elected to proceed with the transaction upon Court approval. The deposit of \$10,000 will become property of the receivership estate should the Court grant the Motion and the Sheridan Buyer fail to close escrow for any reason not the fault of the Receiver.

IV. THE SALES OF THE CASITAS AND SHERIDAN PROPERTIES SHOULD BE APPROVED AND CONFIRMED UNDER 28 U.S.C. §2001, THE RECEIVER ORDER AND APPLICABLE RECEIVERSHIP LAW

Title 28 U.S.C. § 2001 sets forth the procedures pertaining to the sale of real property. Subsection (a) pertains to procedures for the public sale of real property and provides for the sale of real property by public sale at the courthouse where the Receiver was first appointed, at the courthouse where most of the property is located or at such other premises as the Court directs. 28 U.S.C. § 2001(a). Section § 2001(b) of Title 28 pertains to the sale of real property at private sale. That statute provides, in part:

After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest therein by private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be served thereby.

The time, manner, terms of sale and notice thereof are regulated by the court appointing the receiver. Courts are granted discretion in setting the terms and conditions for judicial sales and the Court's discretion will not be disturbed on appeal except where abuse of discretion is shown. *United States v. Branch Coal Corp.*, 390 F. 2d 7 (3rd Cir. 1968), *cert. den. Sun Protection Co. v. United States*, 391 U.S. 966, 88 S. Ct. 2034 (1968). The Court has substantial discretion in receivership matters in setting the overbidding procedures applicable to sales of real property. *See Pewabic Mining Co. v. Mason*, 145 U.S. 349, 356 (1891) (the provisions for notice and other conditions shall be determined by the Court "as will in his judgment best protect the rights of all interested, and make the sale most profitable to all"); *see also Breeding Motor Freight Lines v. R.F.C.*, 172 F.2d 416, 422 (10th Cir. 1949); *Cumberland Lumber Co. v. Tunis Lumber Co.*, 171 F. 352 (4th Cir. 1909); *Bidwell v. Huff*, 176 F. 174 (5th Cir. 1909). The terms and conditions of the judicial sale that the Court may adopt are based on the facts and circumstances of each case. The discretion granted in connection with sales of assets is consistent with the broad discretion accorded to the Court sitting in equity in receivership proceedings to make orders concerning the administration and supervision of the estate that will promote equity, efficiency and cost-effectiveness in the estate's administration. *See generally, Broadbent v. Advantage Software, Inc.*, 415 F. App'x 73, 78 (10th Cir. 2011); *Securities and*

Exchange Commission v. Hardy, 803 F.2d 1034 (9th Cir. 1986); *Securities and Exchange Commission v. Black*, 163 F.3d 188, 199 (3rd Cir. 1998); *Securities and Exchange Commission v. Elliot*, 953 F.2d 1560 (11th Cir. 1992).

There are four components for the approval of a private sale under §2001(b). First, the property is to be appraised by three appraisers. The statute does not define what constitutes an “appraisal” for the purpose of §2001. As to the Casitas property, the Receiver has obtained two appraisals and three broker’s opinions of value. As to the Sheridan Property, the Receiver has obtained two appraisals and four broker’s opinions of value, one of which was prepared by an appraiser. Given the prices obtained for the two properties, those valuations should be sufficient.

Second, a private sale must be for a price at least two-thirds the amount of the average of the appraised values, or approximately 67% of the appraised value. Here, the Casitas Property sale price equals or exceeds the average of the Casitas Property appraisals and the Sheridan Property sale price equals or exceeds the average of the Sheridan Property appraisals. In addition, the sale prices for both of these properties equal or exceed the values or suggested list prices in the broker’s opinions of value. Therefore, these sale prices are at or above 100% of the appraised value.

The third and fourth provisions call for publication of the terms of the sale in a newspaper of general circulation at least ten days before sale, with the private sale to be confirmed unless an overbidder bids at least 10% more than the price offered. The spirit of these provisions have been met and the expense and delay attendant to strict compliance with these provisions outweigh any possible benefit to the receivership estate. Both the Casitas Property and Sheridan Property were listed for sale in the MLS, which is published to a huge number of real estate agents and prospective purchasers and were promoted online on hundreds of real estate websites.

This advertising and publication generated two full price offers for the Casitas Property, one of which was withdrawn and one of which could not proceed because the offeror's lender's appraisal did not support the purchase price. Ultimately, the Casitas Buyer has offered a price that is 99% of the listing price, all cash and without any financing or other contingencies.

This advertising and publication process generated seven offers for the Sheridan Property which was followed with an informal "highest and best" overbidding session. This generated two offers at \$525,000, each of which was withdrawn. Ultimately, the Sheridan Buyer has offered \$520,000, agreeing to purchase at that price despite the lack of permits on the property for the renovations in process, which is a price that exceeds the average of the appraised valuations and equals or exceeds the valuations or suggested list prices provided in the broker's opinions of value. In light of these factors, the Receiver believes that no further publication or bidding is necessary or appropriate and that the time and expense of entering into a formal publication and bidding process is not warranted and will not generate any overbidding, let alone a 10% overbid, which would justify the additional expense. Delay continues to erode the equity in these properties for the receivership estate, in light of the high interest rates on both first trust deed hard money loans. In addition, the Casitas Buyer has negotiated for a waiver of any overbidding requirement in light of the need to acquire the property as part of a 1031 exchange, so the Receiver will lose this sale opportunity if an overbid session is mandated. Finally, there is no opposition to the sales from any party to the litigation.

Therefore, it is appropriate for the Court to approve the sales of the Casitas Property and the Sheridan Property to their respective buyers as set forth herein and the proposed order which accompanies this motion.

V. **CONCLUSION**

Based on this motion, supporting memorandum of points and authorities and the accompanying declaration of Brick Kane and exhibits attached thereto, it is respectfully requested that the Court grant the relief requested in the Motion and enter the proposed order submitted herewith.

DATED: April 6, 2021

/s/ Gary Owen Caris
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-02594-RM-SKC

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MEDIATRIX CAPITAL INC., et al.,

Defendants,

And

MEDIATRIX CAPITAL FUND LTD., et al.,

Relief Defendants.

**DECLARATION OF BRICK KANE IN SUPPORT OF UNOPPOSED MOTION FOR
ORDER APPROVING AND CONFIRMING SALE OF REAL PROPERTIES
COMMONLY KNOWN AS: (1) 7349 E. CASITAS DEL RIO DRIVE, SCOTTSDALE,
ARIZONA; AND (2) 8221 E. SHERIDAN ST., SCOTTSDALE, ARIZONA**

I, Brick Kane, declare:

1. I am the President of Robb Evans & Associates LLC. I have been appointed Receiver in this action pursuant to the Order Appointing Receiver (“Receiver Order”) entered in this action on September 11, 2020. As Receiver, I have had primary responsibility for the supervision and management of this receivership estate, and have been one of the members of Robb Evans & Associates LLC actively involved in the administration of the receivership. I was principally responsible for the preparation of the Report of Receiver’s Activities From September 11, 2020 Through December 31, 2020 (“Receiver’s First Report”) which was filed on January 29, 2020 and which describes in detail the primary work undertaken by me and my

deputies at Robb Evans & Associates LLC for the period from the inception of the receivership estate on September 11, 2020 through December 31, 2020. Deputies at Robb Evans & Associates LLC under my supervision have assisted me in discharging my duties under the Receiver Order, including steps to take possession and control of real property which is property of the receivership estate and marketing such real property for sale pursuant to subsequent Court approval. Hereafter, I sometimes refer to “Receiver” or “we” in this declaration when describing services performed by my deputies and/or performed by me. I have personal knowledge of the matters set forth in this declaration or I have gained knowledge of these matters based on information which has been obtained by my deputies or me during the course of my administration of this receivership estate. If I were called upon to testify to these matters I could and would competently testify thereto.

2. On October 15, 2020, the Court entered the Order Granting Plaintiff’s Motion to Compel the A.L.A. Trust to Transfer Real Property to Relief Defendant Keystone Business Trust (“Arizona Property Order”). Pursuant to the Arizona Property Order, the Court found that the real property commonly known as 7349 E. Casitas Del Rio Drive, Scottsdale, Arizona (“Casitas Property”) and 8221 E. Sheridan St., Scottsdale, Arizona (“Sheridan Property”) had been frozen pursuant to the Court’s Preliminary Injunction Order and that the Casitas Property and Sheridan Property are Receivership Assets or Recoverable Assets as defined in the Receiver Order. Therefore, the Casitas Property and Sheridan Property may be sold under the provisions set forth in the Receiver Order.

3. Pursuant to the Arizona Property Order and in response to the Receiver’s subsequent demands, both the Casitas Property and Sheridan Property were deeded back to Defendant Michael Stewart and Relief Defendant Victoria Stewart in their capacities as Trustees

of the Keystone Business Trust. The deeds returning the Casitas Property and the Sheridan Property to the receivership estate were recorded in Maricopa County, Arizona on March 3, 2021.

4. The Casitas Property is a two-story condominium comprised of 1957 square feet of living space. It was built in 2018. The Casitas Property has three bedrooms, two and one-half bathrooms, a two-car garage and is located in a planned community with a common swimming pool.

5. In order to value the Casitas Property for the purpose of marketing and selling it, we obtained two formal appraisals on the property and three written broker's opinions of value. It was appraised as of November 10, 2020 by Michael J. Roedl, a Certified Residential Real Estate Appraiser, with Affiliated Appraisal Services. It was also appraised as of December 8, 2020 by Ryan Graffius of Lyons Valuation Group. Graffius is also a Certified Residential Real Estate Appraiser.

6. One broker's opinion of value, dated October 27, 2020, entitled Comparative Market Analysis, was prepared by Michael O'Malley of Venture REI. A second broker's opinion of value, dated as of November 4, 2020, entitled Broker's Price Opinion, was prepared by David Schrand of Coldwell Banker Realty. A third broker's opinion of value dated as of November 10, 2020, entitled Broker Price Opinion, was prepared by Susanne Efnor of RE/MAX Fine Properties.

7. I decided to retain a real estate listing broker because I concluded that the best way to maximize value for the Casitas Property was to sell it at private sale using an established, national brokerage firm. We interviewed and obtained proposals from three qualified real estate brokerage firms and ultimately entered into a listing agreement with Coldwell Banker Realty

(“Coldwell Banker”), with David Schrand and Kerri Schrand (collectively, “Schrand”), as listing agent. Schrand is an experienced real estate agent specializing in the Scottsdale area, working in Coldwell Banker’s “Scottsdale at 101” office. Coldwell Banker is a prestigious national real estate brokerage firm. Attached hereto as Exhibit 2 is a true and correct copy of the Exclusive Right to Sell/Rent Listing Contract Legal Language (“Casitas Listing Agreement”). The Casitas Listing Agreement provides for an aggregate 5% commission as is typical in the residential real estate community in Arizona.

8. The Receiver, in consultation with Schrand, decided to list the Casitas Property at \$544,000, which equals or exceeds all of the appraisals and broker’s opinions of value. The Casitas Listing Agreement was entered into on December 24, 2020. Thereafter, Coldwell Banker undertook extensive marketing of the Casitas Property. It was prominently posted in the Arizona Regional Multiple Listing Service (“MLS”). Coldwell Banker used DotSignal Mobile Brochure Technology for the property, which allowed prospective purchasers to obtain important information about the Casitas Property from their mobile phones. The Casitas Property was professionally photographed and an on-line virtual tour was accessible on a single property website which features only the subject property. It was advertised in eFlyer, promoted online on YouTube, and advertised in the print publication View Magazine. Coldwell Banker had professionally printed property brochures created, along with a mobile brochure, and implemented targeted online advertising. The Casitas Property was advertised on over 800 on-line real estate websites, including Zillow, Realtor.com and Trulia. There were over 30 in-person showings of the property.

9. As a result of these efforts, I obtained four written offers for the Casitas Property. Two were full price offers. In response, we asked each prospective full price offeror for a

“highest and best offer.” I accepted the highest offer, but it fell out of escrow because the offeror’s lender’s appraisal did not support the offering price. The second full price offer was withdrawn after the highest offeror fell out of escrow. Subsequently, William P. Korbin Trustee of the Korbin Living Trust and Gayle S. Korbin Trustee of the Korbin Living Trust (collectively, the “Casitas Buyer”) offered \$540,000, which is 99% of the list price, all cash. The Casitas Buyer made the only offer received without any financing or other unacceptable contingency. We have verified that the Casitas Buyer has the cash necessary to close the transaction. The Casitas Sale Contract was finalized on February 8, 2021. Because this is part of an Internal Revenue Code 1031 exchange by the Casitas Buyer, they have included as part of the Casitas Sale Contract, described in detail below, that no overbids be entertained. The Casitas Buyer removed all contingencies to the Casitas Sale Contract on February 19, 2021. The purchase price obtained for the Casitas Property equals or exceeds the average of the valuations of the two appraisals and equals or exceeds the suggested list prices in all three broker’s opinions of value. In light of the fact that the highest offer obtained for the Casitas Property fell out of escrow because the lender’s appraisal did not support the offering price and the fact that all other written offers contained financing or other unacceptable contingencies, I do not believe it is cost effective or worthwhile to seek any further overbids, and the Casitas Buyer has required that there be no overbidding in light of the need to make the transaction part of a 1031 exchange. In addition, as described below, further delay erodes the equity in the property because the property is encumbered by a \$325,000 hard money loan with a high interest rate (13.99%). There is also the continued accrual of real estate taxes and insurance expense.

10. The “Casitas Sale Contract” consists of the Residential Resale Real Estate Purchase Contract, Counter Offer One, Seller’s Addenda, Addendum No. 1a, Additional Terms, “AS-IS” Purchase, Counter Offer 2, and Addendum 3, a true and correct copy of which is attached hereto as Exhibit 1. All contingencies have been removed and the Casitas Buyer, an arm’s length buyer, has elected to proceed with the transaction upon Court approval. The deposit of \$10,000 will become property of the receivership estate should the Court grant the Motion and the Casitas Buyer fail to close escrow for any reason not the fault of the Receiver.

11. The first trust deed loan against the Casitas Property (“Casitas Encumbrance”) is a hard money loan that contains onerous default provisions, including a 10.01% increase in the interest rate upon default (to 24% per annum) and a daily late fee assessment of 2% for each overdue monthly payment amount. This resulted in a very large accrual of late fees and default interest. In a notice we received on January 27, 2021, the loan servicer on the Casitas Encumbrance asserted that unpaid late fees of \$42,967.26 and default interest of \$18,332.93 had accrued, for a total of \$61,300.19. The Receiver asserts that the late fees and default interest are likely unenforceable under Arizona state law and federal receivership law, however the holder of the Casitas Encumbrance strongly disagrees. After extensive negotiations, the Receiver has reached an agreement with the holder of the Casitas Encumbrance whereby unpaid late fees and default interest were reduced to the aggregate amount of \$12,121.10, provided that the Receiver maintains current payments until close of escrow. We previously paid late fees of \$378.90. I believe this is an extremely fair resolution of our dispute with the holder of the Casitas Encumbrance, representing less than 20% of the disputed late fees and default interest.

12. The Sheridan Property is a single-story single family residence with 2499 square feet of living space on an 8948 square foot lot. It has four bedrooms, three bathrooms, a two-car

garage and a swimming pool. The Sheridan Property is in the midst of a substantial, significantly unfinished renovation process. One of my most important determinations regarding the Sheridan Property was to undertake a cost-benefit analysis as to whether the renovations should be completed before the Sheridan Property was marketed for sale. As explained below, we determined that the renovations should not be completed before marketing and selling the property.

13. In order to determine whether to market the Sheridan Property on an “as is” basis or to complete the improvements of the property that had been undertaken before sale, it was necessary to obtain valuations on both an “as is” and completed basis. This required the appraisers and brokers who valued the property to provide an estimate to complete. My firm and I, based on extensive experience overseeing and completing partially completed real estate construction projects, independently evaluated the estimated cost to complete. We obtained two formal appraisals of the property and four written broker’s opinions of value. One appraisal, as of November 9, 2020, was made by Michael J. Roedl, who also appraised the Casitas Property. The other appraisal, as of December 2, 2020, was made by Ryan Graffius, the other appraiser who appraised the Casitas Property.

14. We obtained a broker’s opinion of value, entitled Seller’s Report, from Joseph Mastrilli of Keller Williams Realty Biltmore Partners dated October 30, 2020. Mastrilli is also a licensed real estate appraiser. A second broker’s opinion of value, entitled Brokers Price Opinion, dated November 5, 2020, was prepared by Schrand. A third broker’s opinion of value, entitled Broker Price Opinion, dated November 6, 2020, was prepared by Beth Jo Zeitzer and Joey Hasselbring of ROI Properties. A fourth broker’s opinion of value, entitled Broker Price Opinion, was prepared by Susanne Efnor of RE/MAX Fine Properties, dated as of November 20,

2020.

15. All but one of the valuations contained “as is” values and an estimated value upon completion of the renovations, along with an estimate to complete. While several of the valuations from the appraisers and brokers determined that the value, when completed, was slightly more than the sum of the current “as is” value plus the cost to complete, we determined that it was most beneficial to market and sell the property in its “as is” condition for several reasons. First, we concluded that the estimate to complete in the appraisals and broker’s opinions of value, which ranged from \$75,000 to \$100,000, was understated when utilizing licensed third party contractors. Among other reasons for this, we learned that all of the renovation work to date has been done without permits, which means that there will be an even greater expense to complete the renovations, since drywall may have to be removed for inspections that were not previously completed. The valuations did not take into account the absence of building permits. Second, I concluded that it would take more time and legal expense to seek Court approval to expend receivership funds to complete the renovations. Third, the actual time to complete the renovations would cause substantial delay before the property could be marketed and sold. I concluded that these additional expenses and significant delay would likely eliminate any possible benefit to the receivership estate, particularly since the first trust deed loan of \$364,700 in favor of SWH Funding LLC, a hard money lender, is an interest-only loan accruing interest at a substantial above-market interest rate of 12%. There is also the continued accrual of real property taxes and insurance expense. As an equity receiver tasked with preserving estate value, I determined that any slight potential increase in net value that might be achieved in completing the renovations would be eradicated by expense and delay and that the risks far outweighed any theoretical benefit to the estate.

16. As with the Casitas Property, I concluded that the best way to maximize value for the Sheridan Property was to sell it at private sale using an established, national brokerage firm. We interviewed and obtained proposals from three qualified real estate brokerage firms and entered into the Exclusive Right to Sell/Rent Listing Contract Legal Language (“Sheridan Listing Agreement”) with Coldwell Banker, with Schrand as his listing agent. The Sheridan Listing Agreement provides for an aggregate 5% commission. A true and correct copy of the Sheridan Listing Agreement is attached hereto as Exhibit 4.

17. The Receiver, in consultation with Schrand, listed the Sheridan Property at \$530,000, which equals or exceeds all of the “as is” appraisals and the broker’s opinions of value. The Listing Agreement was entered into on December 14, 2020. Thereafter, Coldwell Banker undertook extensive marketing of the Sheridan Property. As with the Casitas Property, it was prominently posted in the MLS. Coldwell Banker used DotSignal Mobile Brochure Technology for the property. The Sheridan Property was professionally photographed and an on-line virtual tour was accessible on a single property website. It was advertised in eFlyer, promoted online on YouTube, and advertised in the print publication View Magazine. Coldwell Banker had professionally printed property brochures created, along with a mobile brochure, and implemented targeted online advertising. The Sheridan Property was advertised on over 800 on-line real estate websites, including Zillow, Realtor.com and Trulia. There were over 70 in-person appointments to show the property.

18. In response to these marketing efforts, there were seven offers made on the Sheridan Property. I undertook an informal overbidding process, requesting that each offeror come back with a “highest and best” offer on the property. There were two matching high offers. The first one I accepted declined to proceed given the requirements of the receivership

process and the need for Court approval. The second one I accepted canceled escrow too because of the fact that there were no permits pulled for the construction that had been undertaken. Black Canyon Equity, LLC (“Sheridan Buyer”), an arm’s length buyer, submitted three different offers for the property and ultimately entered into the Sheridan Sale Contract, described below, for \$520,000. The purchase price reflected in the Sheridan Sale Contract equals or exceeds the average of the valuations of the two appraisals and exceeds the suggested list prices or valuations in the three broker’s opinions of value which provided an “as is” valuation.

19. The “Sheridan Sale Contract” consists of the Residential Resale Real Estate Purchase Contract, Counter Offer One, Seller’s Addenda, Addendum No. 1a, “AS-IS” Purchase, Compliance Notice, Additional Terms, and Addendum 2, a true and correct copy of which is attached as Exhibit 3 hereto. All contingencies have been removed and the Sheridan Buyer has elected to proceed with the transaction upon Court approval. The deposit of \$10,000 will become property of the receivership estate should the Court grant the Motion and the Sheridan Buyer fail to close escrow for any reason not the fault of the Receiver.

20. I do not think further overbidding is necessary or appropriate for these properties. Both the Casitas Property and Sheridan Property were listed for sale in the MLS, which is published to a huge number of real estate agents and prospective purchasers and were promoted online on hundreds of real estate websites. This advertising and publication generated two full price offers for the Casitas Property, one of which was withdrawn and one of which could not proceed because the offeror’s lender’s appraisal did not support the purchase price. Ultimately, the Casitas Buyer has offered a price that is 99% of the listing price, all cash and without any financing or other contingencies.

21. This advertising and publication process generated seven offers for the Sheridan Property which was followed with an informal “highest and best” overbidding session. This generated two offers at \$525,000, each of which was withdrawn. Ultimately, the Sheridan Buyer has offered \$520,000, agreeing to purchase at that price despite the lack of permits on the property for the renovations in process, which is a price that exceeds the average of the appraised valuations and equals or exceeds the valuations or suggested list prices provided in the broker’s opinions of value. In light of these factors, I believe that no further publication or bidding is necessary or appropriate and that the time and expense of entering into a formal publication and bidding process is not warranted and will not generate any overbidding, let alone a 10% overbid, which would justify the additional expense. Delay continues to erode the equity in these properties for the receivership estate, in light of the high interest rates on both first trust deed hard money loans. In addition, the Casitas Buyer has negotiated for a waiver of any overbidding requirement in light of the need to acquire the property as part of a 1031 exchange, so the Receiver will lose this sale opportunity if an overbid session is mandated. Finally, there is no opposition to the sales from any party to the litigation.

22. Therefore, I believe it is appropriate for the Court to approve the sales of the Casitas Property and the Sheridan Property to their respective buyers as set forth in the Motion and in this declaration.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on April 5, 2021 at Alhambra, California.



BRICK KANE