JUDICIAL OFFICER: Brand
HEARING DATE: 4/1/22
DEPT: 22
CASE NAME and NO: People (Berkeley) v. Powell, RG15-762567
MOTIONS:

TENTATIVE RULINGS

Technically, the parties and the receiver have filed the following motions.[1]

1. Motion Of City for Legal Determination Re Receiver's Fees and Rehabilitation Costs.
2. Motion Of Receiver Regarding Quasi-Judicial Immunity, Effect of Prior Orders, And Scope of Future Hearings in This Case.
3. Motion Of Powell Regarding Monthly Accountings of Receiver.

The parties' and receiver's briefs, however, reflect the degree to which issues to be decided are interrelated. Embedded within each motion are various issues that require resolution for the upcoming fairness hearing scheduled for 5/27/22. To ensure that the Court's rulings serve as a guide to the fairness hearing, the Court sets forth the issues and provides tentative rulings in the order set forth below.

The court has considered the papers filed by the parties in the motions. The court has also considered all the filings in this case. (CCP 452.) The court has considered evidence, weighed evidence, and made inferences from the evidence. For the reasons detailed below, the Court makes the following rulings:

1. The Receiver and City's request with respect to the effect of prior order is GRANTED IN PART and DENIED IN PART.
2. The City's request for a legal determination re receiver's fees and rehabilitation costs, joined by the Receiver, is GRANTED IN PART and DENIED IN PART.
3. A determination of the Receiver's request for quasi-judicial immunity is RESERVED.
4. The City's request for immunity is DENIED.
5. Respondent's Motion to Exclude Monthly Accountings of Receiver is DENIED.
6. Respondent's request to exclude evidence not timely produced in discovery is GRANTED IN PART and DENIED IN PART.
7. Respondent's request to exclude evidence for which there was a complete failure to produce documents in discovery – GRANTED IN PART AND DENIED IN PART.

In addition, to these rulings the Court sets forth additional guidance for the scope and conduct of the fairness hearing.

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[1] As explained below, the parties to the action are the City of Berkeley (the City) and the Respondent, Leonard Powell. The Receiver, appointed by the Court, is not a party.

FACTUAL BACKGROUND

SUMMARY AND IDENTIFICATION OF PHASES

In broad strokes, the City of Berkeley filed this case in 2016 asserting that Powell, as the owner of the property located at 1911 Harmon Street in Berkeley, Alameda County, CA, had permitted the property to deteriorate to such a condition that it violated various City ordinances. Prior to the filing of this action, the City had made an effort to provide Powell with funds to rehabilitate his property. That effort failed and the City sought a receiver oversee the rehabilitation of the property pursuant to Health & Safety Code (H&S Code) 17980.7(c). The property was rehabilitated by 10/15/18. Following the rehabilitation, there have been three and a half years of disputes regarding the reasonableness of the cost of rehabilitation and who should pay those costs.

The court finds it useful to divide the case into three phases.

PHASE I – FILING OF THE ACTION TO THE APPOINTMENT OF THE RECIEVER

Phase I includes the City's involvement with the property prior to the filing of this case on 6/15/16 to the appointment of a receiver on 4/12/17. Phase I also includes the City's substantial efforts to assist Powell so he could rehabilitate his property on his own and without the need for a receiver.

On 8/13/14, Berkeley Code enforcement inspected the property and found it to be substandard. On 10/2/14, Berkeley issued a Substandard Order to Powell.

Powell did not file an appeal. On 11/3/14, Powell's time to appeal the Substandard Order expired.

On 1/8/15, Berkeley code enforcement re-inspected property. The substandard conditions remained.

On 3/16/15, Berkeley filed the complaint in this case. The Complaint alleges: "Respondents have failed to properly maintain the Property and have actively or passively allowed it to become a nuisance to the community. The existing conditions—particularly the electrical systems and lighting installed without required electrical permits, the exposed electrical lavatory, the deteriorated or ineffective waterproofing, the lack of adequate heating, the general dilapidation and improper maintenance, the illegal changes in use, and the improper termination of gas vent—endanger the Property, the life, safety, and welfare of the occupants, the neighbors and the neighboring structures." Paragraph 14. The complaint sought an order appointing a receiver under H&S Code 17980.7.

On 3/19/15, Powell, self-represented, filed a general denial to the complaint.

On 4/3/15, the City filed a motion for the appointment of a receiver.

On 4/23/15, Powell, still self-represented, sought a continuance of the motion to appoint a receiver so that he could retain counsel. The court (Judge Grillo, followed by Judge Colwell) repeatedly rescheduled the motion to permit the City and Powell to devise a solution to the case. (See orders of 6/15/15, 6/25/15, 9/24/15, 1/12/16, 7/14/16.)

On 11/2/16, the City's CMC statement stated: "following filing of action, City found possible alternative to receivership in the form of an $80K, interest-free, deferred payment loan, as part of the City's Senior/Disabled Home Rehab Loan Program. The Court has continued the matter while the parties determine whether the loan amount (and any additional financing) could abate the violations without receivership. However, given various issues, receivership may be the only option."

On 11/17/16, the court (Colwell) continued the motion to 3/16/16, stating: "Petitioner is to provide supplemental briefing on the status of the loan application for remediation, a current update on repair of the property, and provide the names of recommended receivers."

On 2/28/17, the City filed a supplemental memorandum for a receiver detailing its substantial efforts to assist Powell. The memorandum states:

> On November 17, 2016, the City reported to this Court that City staff had met extensively; internally and with respondent in an attempt to abate all violations documented in the Substandard Order using only the proceeds of the City's no-interest loan. Between respondent's approval into the loan program and the hearing date, the City's point person on the project, associate management analyst Raquel Molina, met with respondent approximately 20 times, met internally with City staff at least seven times, and spent at least 75 hours working on respondent's project. The City's Housing Inspector Supervisor Brent Nelson also inspected the property twice and reviewed the scope of work to abate the violations approximately four times. Since the hearing, Ms. Molina participated in two additional internal meetings on December 8 and 13, 2016, and a two-hour visit to the property with Mr. Nelson on December 22, 2016. These meetings involved devising a scope of work to abate the violations, narrowing that scope of work, and securing additional City funding for respondent when the City Council approved an increase in the City's loan program from $80,000 to $100,000.
>
> In the end, the City discovered that even the increased loan amount of $100,000 could not abate all violations documented in the Substandard Order — nearly all of which remain at the property — nor the additional violations that have arisen since 2015 — as documented in the City's most recent inspection...This is because, first, for the City to issue the loan, the property would need to be restored to its legally-conforming use as a

duplex, and the loan could only be used for the unit where respondent resides, which would not address all violations at the property. Second, despite the City's efforts to narrow the scope of work, it would exceed the loan amount.

As a courtesy, City staff researched the possibility of securing lower-interest sources of funding in addition to the City's no-interest loan to mitigate the financial impact of the receivership, if granted, on respondent. On January 27, 2017, Ms. Molina met for one hour with respondent, the City's proposed receiver Gerard Keena and his associate.

On 3/6/17, Powell (self-represented) filed an opposition. Powell agreed that the Property needed repair, but opposed the appointment of a receiver because of the additional costs. Powell stated:

I have signed for an interest-free loan from the City and I understand that it needs to be paid by those who inherit my estate. Nevertheless, I am asking the Court to help me preserve my house and not to overburden me or my family financially by increasing the costs to me by assigning a Receiver." (Paragraph 8)

...

I am grateful to the City Officials for trying to help me in getting my house back to city standards. Towards this purpose, I have met with the City Housing Officer on more than 20 occasions. I realize that a receiver does not work for free but I simply cannot afford him or her." (Paragraph 9)

...

I know that I can get a contractor, satisfactory to the City, at a reasonable budget, within my capabilities to pay back the loan and not make me unreasonably encumber or lose my property,. To that end I have taken necessary steps to get a reverse mortgage to cover costs beyond the limits of the City loan." (Paragraph 10)

...

I beg that the Court not assign a Receiver; one of the two potential Receivers I met at the behest of the City recommended that I take out a reverse mortgage solely to cover his fees. Court awarded receivership would give the receiver carte blanche to borrow against my house and spend as he sees fit, possibly far beyond my ability to pay. Granted, the City has found certain code violations. The Scope of work has changed at least three times in the last two years. Let the current scope of work be satisfied." (Paragraph 17)

On 3/16/17, Powell obtained counsel, Manuel A Juarez. On 3/16/17, and the court continued the motion to appoint a receiver until 4/13/17.

PHASE II – APPOINTMENT OF THE REVIEVER TO THE COMPLETION OF REHABILITATION

Phase II runs from the appointment of a receiver on 4/12/17 through 10/15/18 when the Property passed final inspection and the City granted a certificate of occupancy. Phase II was characterized by the receiver making reports that were not objected to by either Powell or the City.

On 4/13/17, the court (Colwell) ordered the appointment of a receiver. (H&S Code 17980.7(c).) The order states: "The Court orders that the Receiver conduct an initial investigation and prepare a proposal for rehabilitation of the Property by a licensed contractor for the repairs necessary to correct the offending conditions set forth in the City's October 2, 2014 Notice of Substandard and Unsafe Building and Public Nuisance and Order to Abate ("Substandard Order"), and an operating budget for use of the Property by Respondent Powell and his family during any period of rehabilitation, within 30 days from the date of this Order ("Rehabilitation Proposal'). The Receiver will waive the cost of the development of the Rehabilitation Proposal. The Receiver shall seek court approval of the Rehabilitation Proposal before incurring further expenses or undertaking further actions." Paragraph 9. Powell's attorney approved the order as to form.

On 6/7/17, the court (Judge Carvill) authorized the receiver to implement "the cleanout plan proposed by the receiver and to borrow $175,000 against the property."

On 6/7/17, Powell, represented by counsel, stated that he would seek "an additional $30,000.00 from the city of Berkeley for rebuilding my foundation as it is not meeting City standards."

On 11/6/17, the Receiver filed an application that sought approval of a rehabilitation plan. The application addressed the cost of rehabilitation: "Due to the new information about the foundation and other construction-related issues, the Receiver anticipates that up to an additional $435,000 in bridge financing may be required to complete the project. ... the Receiver cannot guarantee that after all the rehabilitation work is complete that Mr. Powell will be able to refinance up to $475,000 in debt. if this is the case, the Receiver has also considered selling the property as-is."

Regarding an "As-Is Sale," the application states: "Based on the appraisal performed by San Francisco Appraisals, the Receiver believes that Mr. Powell will receive between $375,000 to $575,000 based on a sale price range of between $500,000 to $700,000. For the Receiver to unilaterally recommend this option, given that Mr. Powell is a long-term Berkeley resident as well as an Army Veteran, is extremely disconcerting." (Application filed 11/6/17 at p5.) The application further states:: "Therefore, using $600,000 for the As-Is-Value and $1,300,000 as the improved value, the value will increase by $700,000 more than offsetting the anticipated rehabilitation costs of $535,000." *See* Application filed 11/6/17 at p6.)

The receiver's 11/6/17 application expressly noted the possibility that Powell might lose the house even if this course of action were followed: "doing the work will resolve the code violations and may allow Mr. Powell and his family to move back into his home of 43 years. That being said, if Mr. Powell cannot obtain financing to cover the costs of construction, the receivership, and the existing lien, he may not be able to move back into his home even after the construction is completed. That is true given what is known now and maybe even less likely should an unforeseen issue arise during construction or if the housing market were to decline during the course of construction. If anything like that happens, it is almost assured that Mr. Powell will not be able to obtain traditional financing to cover the costs associated with this project. Given the preceding, the Receiver intends to move forward pursuant to the Court's Order with the construction but, in so doing, wanted to make sure that the City, this Court and Mr. Powell were informed of the risks associated with this course of action." (Application filed 11/6/17 at pp. 8-9.)

The receiver's 11/6/17 application states what the receiver was proposing: "The Receiver believes that the actual cost of construction to remedy the code violations and rehabilitate the Property will be about $400,000 based on Habitat for Humanity Contract." (Page 6) "Attached as Exhibit C is a copy of the proposed contract and scope of work to be performed by Habitat for Humanity for a price of $400,000." (Page 7.) "By this Motion, the Receiver requests authorization to: engage Habitat for Humanity to rehabilitate the Property and for authorization to borrow money to fund the receivership and | construction." (Page 8)

On 11/9/17, the court (Colwell) approved the receiver's application. The order states: "The Receiver's scope of work to resolve the health and safety issues at 1911 Harmon Street, Berkeley CA 94703 described therein are hereby approved and ratified ... Receiver is authorized to employ Habitat for Humanity to perform the health and safety work at 1911 Harmon Street, Berkeley California 94703 are hereby approved and ratified ... The Receiver ... is empowered to increase the Receiver's certificate (the "Certificate"), secured by the Property ... in his official capacity as Receiver with a Super Priority lien by an amount not to exceed $260,000 for a total Certificate of $435,000."

On 1/8/18, the receiver filed an application to retain an attorney "to provide general legal advice and representation concerning this receivership matter, including, but not limited to, the construction, construction contracts, lien releases relating to the repairs at [the Property]."

On 1/9/18, the court (Commissioner Rasch) held a hearing. Powell appeared represented by counsel Juarez. The receiver appeared. The City appeared. On 1/9/18, the court authorized the receiver to retain counsel.

On 6/28/18, the receiver submitted a Third Report, which stated:: "Determining what is required to correct the code violations that were outlined in the City of Berkeley letter dated October 2, 2014, has been difficult and a moving target. Correcting the items

identified in the text of the City of Berkeley's letter with the level of specification required by the Building Department has been extremely challenging and costly. ... This necessitates borrowing an additional $80,000 in funds to complete construction." Report at p. 3.

The receiver's Third Report filed 6/28/18 identifies four separate construction estimates: (1) initial construction cost estimate to remediate the Code Violations, outlined in the City's October 2, 2014 letter – approximately $180,000; (2) second construction estimate to convert the property to two units, minimally disrupting the floors, ceiling and walls while containing the environmental issues (lead paint and asbestos) and using big-box store (Home Depot/Lowes/Ikea) quality appliances - approximately $430,000; (3) a third construction cost estimate addressed to incorporating all the above, with additional improvements - $500,000; and (4) a final construction estimate that includes all of the City and State Building Department Specifications: Energy Star appliances, solid-wood cabinetry, high-end plumbing fixtures, separate HVAC units per floor, paved driveway and parking area, and the cost to lower the basement - $660,000-$675,000 (including $10,000 in additional permit costs.) (Third Report filed 6/28/18 at pp3-4.)

The receiver's Third Report filed 6/28/18 also stated that the total projected construction cost was $572,000 and that "(This amount assumes the majority of the Specifications outlined by the City of Berkeley in the final estimate of costs; however, we do not anticipate a paved driveway, nor do we anticipate the lowering of the basement floor to accommodate a stand-up basement). (Report at 4-5) Added to the construction cost were ancillary costs, legal and management fees, and receiver fees. The receiver states the projected total cost of the project at $700,000. (Report at pp. 4-5.)

The receiver's Third Report filed 6/28/18 expressed concerns regarding Powell's ability to cover the debt service after the rehabilitation of the Property, observing that Powell would need to rent out the upper unit to make payments. The Report acknowledged that Powell did not want to rent out the upper units. (Report at pp. 6-7.)

The Third Report also noted that that "Powell (had) allowed his son to use this Property as collateral to obtain a loan in the amount of $40,000 to prevent the son's property from going into foreclosure." The Report stated: "It is incumbent upon Mr. Powell's son to remove this lien. In the event he fails to do so, this could affect the entire permanent financing and cause the sale of the Property."

On 6/29/18, the court (Judge Brand) held a hearing and approved the receiver's application. The order permitted increased borrowing against the property. The order authorized "a further amount of $80,00 to cover the additional construction change orders for the property...this increase will effectuate a total amount of authorized funds via receivership certificate at $515,000."

The scope of the authorized work is a significant dispute. The application suggests that the scope of work is "the majority of the Specifications outlined by the City of Berkeley in the final estimate of costs" but without a paved driveway or the lowering of the

basement floor to accommodate a stand-up basement). (Report at 4-5) The Senior Loan appears to have required that it be used only for certain kinds of repairs. The "Specifications outlined by the City of Berkeley in the final estimate of costs" and the Senior Loan would seem to be very relevant documents for determining the appropriate scope of work.
The expense of the work is a significant dispute. The application estimated that the total cost (construction and administration would be $700,000. It appears that the receivership's liabilities did not exceed $700,000 until several months after the Property passed final inspection from the City.

On 7/24/18, the receiver filed a monthly report. The report shows that as of 6/30/18 the receivership had total liabilities of $402,307.

On 8/15/18, the receiver filed a monthly report. The report shows that as of 7/31/18 the receivership had total liabilities of $420,513.

On 9/5/18, Powell's counsel Juarez withdrew and Powell again became self-represented.

On 9/17/18, the receiver filed a monthly report. The report shows that as of 8/31/18 the receivership had total liabilities of $470,430.

On 10/15/18, the Property passed final inspection from the City of Berkeley Building and Planning Department. On 10/15/18, the City granted a certificate of occupancy. (Receiver CMC Statement filed 1/23/19.)

PHASE III – COMPLETION OF REHABILITATION TO PRESENT – EFFORTS TO PERMIT POWELL TO REFINANCE AND DISPUTES OVER THE COSTS OF THE REHABILITATION

Phase III is from the completion of the rehabilitation until the present. Phase III is characterized by Powell's active representation by counsel and disputes over the need for the rehabilitation costs and the allocation of those costs.

On 10/16/18 the receiver filed a monthly report that showed that as of 9/30/18 the receivership had total liabilities of $521,303.

On 11/19/18 the receiver filed a monthly report that showed that as of 10/31/18 the receivership had total liabilities of $639,794.

On 12/3/18, a non-party Berkeley City Councilmember Bartlett filed a letter expressing concern about the case. There is no indication whether the Councilmember expressed those concerns at Council meetings or through the City Manager to either the City Attorney or to the City Building Department. On 12/4/18, a different non-party person also expressed concern with the case.

On 12/6/18, the court (Brand) held a CMC. Powell appeared, represented by new counsel Audrey Shields. The receiver appeared. The City appeared.

On 12/14/18, Powell's attorney Shields filed a CMC statement that stated at para 4: "ORIGINAL ESTIMAE OF COST WAS LESS THAN $200,000. RECEIVER INAPPROPRIATELY RAN THE REPAIR COST UP TO $700,000 WITHOUT APPROVAL OF THE OWNER AND NO MONITORING OR SUPERVISION BY THE CITY OF BERKELEY." CAPS in original.

On 1/10/19, the receiver filed a monthly report that showed that as of 11/30/18 the receivership had total liabilities of $672,490.

On 1/23/19, the receiver filed a CMC statement that set forth his view of the status of the case: "On September 18, 2018, The Receiver reported to this Court that Mr. Powell was unwilling to procure financing necessary to pay off the construction-related costs and wanted to sue the City of Berkeley. The Receiver once again explained that the longer Mr. Powell took to refinance his home the less likely Mr. Powell would be able to afford his home...On October 15, 2018, the Property passed final inspection from the City of Berkeley's Building and Planning Department and the certificate of occupancy was granted on October 15, 2018."

The CMC statement set out the steps required for Powell to refinance the property, but warned: "The Construction Loan matures on March 15, 2019. Should the balance of the loan remain unpaid at that time, the Bank may foreclose on the Property. ... It is the sincere hope of the Receiver that Mr. Powell is able to obtain his financing, the requisite capital to cover the shortfall, and obtain the City of Berkeley's approval for the subordination of the City's loan. However, the Receiver is also obligated to protect the Receivership Estate in the event that one or more of those requirements is not met." CMC statement at pp. 8-9.

On 1/29/19 and 2/4/19, non-party Berkeley City Councilmembers Harrison, Davila, Bartlett, and Robinson filed letters expressing concern about the case. There is no indication whether the Councilmembers in their role as Councilmembers expressed those concerns at Council meetings or through the City Manager to either the City Attorney or to the City Building Department.

On 2/7/19, the receiver filed an application to sell the Property. The application states: "Throughout this Receivership, the Receiver has repeatedly informed the Respondent that it was necessary for him to obtain the requisite financing to pay off the Receiver's Certificate and| apply for the subordination of the City of Berkeley's loans against the Property. Nevertheless, the requisite financing still has not been obtained thereby forcing the Receiver to bring this motion in advance of, and in the hopes of forestalling foreclosure proceedings against the Property. Additionally, a sale will put an end to the interest charges on the Receivership Certificate and will, therefore, be in the best interest of the Receivership estate. With respect to the Respondent's ongoing attempts to

refinance the Property, should those efforts be successful, then the sale of the Property will be cancelled."

On 2/22/19, the receiver filed a monthly report that showed that as of 1/31/19 the receivership had total liabilities of $838,701.

On 3/14/19, the receiver filed a monthly report that showed that as of 2/28/19 the receivership had total liabilities of $872,252.

On 4/10/19, the receiver filed a motion for approval of a final report and accounting, stating: "[T]he Respondent still has not made a formal objection to the work performed by the Receiver or by Habitat for Humanity even after conducting extensive inquiry into the documents relating to the construction. ... All documents relating to the Receivership and the construction were made available to counsel for the Respondent in or around early January of 2019, However, since that time, counsel for the Respondent has made no formal objection to any of the work or any of the items set forth in the Receiver's monthly reports or to any of the construction." 8:14-24.

On 4/17/19, Powell, represented by counsel Shields, opposed the receiver's motion for approval of a final report and accounting.

On 4/23/19 and 4/25/19 (and on other earlier dates), the court continued to postpone the still-pending motion to sell the Property that had been filed on 2/7/19.

On 5/10/19, the court (Brand) entered a negotiated order approved as to form by all parties that was "intended to provide a mechanism to resolve [the dispute] while, at the same time allowing for the close of escrow." At p. 1. The Introduction to the order set forth the mutual concerns of all parties:

> First, that the title company will decline to allow the close of escrow, in that there is a conflict between the Veterans Administration and the Receiver as to who should be the first-priority lienholder on the subject property. The Receiver has sought a super-priority lien to ensure payment for the amounts incurred and expended, a priority with California courts have long authorized in appropriate circumstances. (*Title Ins. & Trust Co. v. California Development Co.* (1915) 171 Cal. 227, 233.) The court, however, is also informed that for the closing to take place, the Veterans Administration, not the Receiver, must have a first priority lien subject property.
>
> A second concern shared by all parties is that a failure to close escrow forthwith will result in a continuing rise in costs to Powell, including the accrual of loan interest and Receiver costs." Order 5/10/19 at pp. 2-3.

The Court then ordered, in relevant part, the following "to achieve the common goal of restoring Powell to his home, and to address the parties' concerns":

1. The Receiver is discharged to the extent necessary to permit the close of escrow ... and to complete the refinancing of the subject property consistent with the terms of these orders.
2. The court sets a fairness hearing to permit it to make findings regarding the amount of compensation to be paid to the Receiver, how payment is to be made, and whether the acts of the Receiver were in the best interest of the Receivership Estate and the parties to this action. The court will hear evidence in the form of declarations and, if so requested, testimony by the Bay Area Receivership Group, Powell, and any other person with personal knowledge of the issues raised herein. The court will consult with the parties to find mutually agreeable dates for said hearing in Department 22.

On 5/23/19, the court (Brand) dropped the motion to sell the Property.

On 10/17/19, the court (Brand) set a settlement conference for 12/2/19. The City's settlement conference statement stated: "Neither the substandard condition determination in 2015 nor the propriety of the appointment of the receiver remains before this Court, and those issues will not be addressed at the fairness hearing. Thus, the City has no liability in this case. With respect to the remaining dispute between Mr. Powell and the receiver, the City encourages the parties to seek a final resolution that will avoid subjecting all parties to the time and expense of further litigation regarding these issues." At p. 2.

At some time in late 2019 or early 2020, Powell again became self-represented. Powell notified the Court of his unrepresented status on 1/23/20: "As of the date of this missive the Respondent does not have legal representation."

On 1/6/20, the receiver filed a second motion for approval of a final report and accounting, arguing:

> [The Motion for Approval of the Final Report and Motion to List the Property for Sale] were repeatedly continued by the Court as the parties, and, with the assistance of Judge Brand, attempted to reach a resolution of the issues outstanding in the case. ... During these months, there were many attempts to finalize this receivership and put an end to this litigation. Specifically, Respondent was repeatedly offered stipulations wherein the Receiver would waive his outstanding fees if the Respondent would stipulate to the final accounting and discharge of the Receiver. However, those requests were universally rejected as the Respondent wanted to keep the case open so that he could continue to contest the Receivership and the cost of the repairs to the Property. Respondent was repeatedly informed by Judge Brand that, should he choose to keep the case open, the Receiver would be seeking the recompense of his outstanding fees and that those fees could result in a lien against Respondent's house. Respondent acknowledged that the Receiver would be seeking his fees but chose to proceed anyways. Despite the intervening seven months, the exhaustive

production of documents, and Respondent's counsel's consultation with numerous individuals with purported knowledge of construction, the Respondent has yet to file any motion or objection specifying any issues with the work that was performed.

The Receiver sought fees in the amount of $147,600.00.

On 7/15/20, Powell filed notice that his new counsel was Gibson Dunn & Crutcher.

On 4/27/21, the court set a settlement conference for 5/3/21, which proved unsuccessful.

On 6/30/21, the court set trial for 12/3/21. The various motions now before ethe court followed. The court trial is now set for 5/27/22.

DISCUSSION

AN OVERVIEW OF THE ISSUES AND THE COURT'S TENTATIVE RULINGS

The motions of the parties and the Receiver are interrelated. An overview of the relationship of the various issues and a summary of the Court's tentative rulings provides useful context.

At bottom, the motions raise the following issues:

- The effect of prior orders of this Court with respect to the Receiver and the City.
- The powers of the Receiver generally and specifically with respect to the appointment of a receiver pursuant to H&S Code Sec. 17980.
- How the Receiver's costs are to be paid and specifically whether the City may be obligated to pay those costs, and,
- Whether the City or the Receiver enjoys immunity from the claims made by Powell.

Arguments found in some of the briefing, particularly those regarding the effect of the Court's interim orders and the City's liability for Receiver fees and costs, at times draw false dichotomies that potentially undermine orders made by at least 3 judges of this Court, create conflicts in the law that do not exist, and threaten to turn the Court ordered fairness hearing into a free-for-all in which essentially every fact in this complicated litigation now spanning almost six years is at issue.

Instead, the Court steers a course that protects the integrity of the prior orders of this Court and follows the mandates of CCP sections 564 and 568 as interpreted by the Court of Appeal as well as the mandate of H&S Code Section 17980.7(c) for the compensation of the Receiver. The tentative rulings also establish appropriate guidelines for the fairness hearing.

In sum, the Court finds the following:

1. The prior orders of this Court regarding permissible expenditures by the Receiver will not be relitigated. The Court finds unpersuasive and contrary to settled law Respondent's statement that "these unappealable orders were not based on a full factual record (and) are subject to later review at the final fairness hearing..." Respondent's Brief in Opposition at p. 13. The Court has spent considerable time resolving fully the myriad issues before it as well as attempting to resolve this matter.
2. General principles of statutory construction mandate that the scheme set forth in H&S Code 17980(c) for the payment of the fees and costs to the receiver do not envision or permit the enforcing agency (the City) to be responsible for such fees and costs while acting within the scope of the Court's orders. Rather, the payment of those fees costs shall be paid in in the manner and priority set forth in Section 17980.7(c).
3. *However*, at the fairness hearing, the parties may explore a specific area *not* resolved by the Court's prior orders: Whether the City or the Receiver in Respondent's words, "egregiously overstepped its enforcement role" by engaging in *ultra vires* acts contrary to the Court's orders. Reduced to its simplest terms, did the City and the Receiver act within the scope of the Court's orders? In this manner, the fairness hearing will allow the Court to exercise its broad equitable powers set forth in Sections 564 and 568 and in H&S Code sections 17980(c)(4)(H) and 17980.7(c)(15), while still applying the specific statutory scheme of H&S Code Section 17980.7(c) with respect to compensating the Receiver. The relevant sections of the CCP and the H&S Code are neither mutually exclusive nor inconsistent. Moreover, the Court's proposed path forward reflects the spirit of the Court of Appeal's holdings in *City of Chula Vista v. Gutierrez* (2012) 207 Cal.App.4th 681, and *City of Sierra Madre v. SunTrust Mortgage, Inc.* (2019) 32 Cal.App.5th 648. To the extent that additional costs and fees by either the City or the Receiver were incurred as the result of *ultra vires* acts beyond the scope of this Court's orders, Respondent may recover them should he prevail.
4. The City is not entitled to immunity from the limited scope of the hearing set forth above. Whether the Receiver is entitled to quasi-judicial immunity remains to be determined.
5. Various additional orders relating to discovery and evidence to be admitted or precluded from the hearing are also detailed below.

RESPONSIBILITIES OF THE PARTIES, THE RECIEVER, AND THE COURT

Before turning to a discussion of the various motions, the court reviews generally the responsibilities of the relevant actors.

The City

The City Attorney is in essence the enforcing agency, acting on behalf of the People of the State of California. As such, the City Attorney was seeking to abate the nuisance.

The City Attorney's role is not to assist Powell in the litigation of the case, despite its myriad efforts to do so.

The City's other operating units are not parties to the case, but their actions are relevant. The City appears to have a unit that in Phase I made an effort to provide Powell with a "Senior Loan" to rehabilitate the property. Powell asserts, "Through its Senior Loan Scope of Work, the City dictated a substantial amount of the unnecessary, and largely cosmetic, construction work to be done on Mr. Powell's home." (Respondent's Trial Brief at 6:23-24.) The Senior Loan requirements appear to be imposed by the City's terms of the Senior Loan and not necessarily sought by the City Attorney, required by the Court, or pursued by the receiver.

The City Building Department appears in Phase II to have provided the receiver with parameters or requirements for Title 24 compliance rehabilitation. The Receiver's Third Report filed 6/28/18 suggest that the scope of work was "the majority of the Specifications outlined by the City of Berkeley in the final estimate of costs" but without a paved driveway or the lowering of the basement floor. (Third Report filed 6/28/18 at 4-5) In this respect, the relationship between the receiver and the City's Building Department was equivalent to the relationship between any homeowner and the Building Department when the homeowner is seeking information on how to bring the building into Code compliance or to acquire building permits. Those actions of the City's operating units are distinct from the actions of the City Attorney or the receiver in the prosecution of the case.

Mr. Powell
Powell is the respondent and is responsible for representing his own interests. Powell, when self-represented or when represented by counsel, could seek to prevail by showing the Property did not need rehabilitation (Phase I), could seek to moot the case by rehabilitating the Property (Phase I), and could monitor the receiver's efforts to rehabilitate the property to ensure that the Receiver's actions complied with the various orders of the Court. (Phase II).

The Receiver
The receiver was appointed by the court to rehabilitate the property. "The receiver is the agent of the court and not of any party, and as such: (1) Is neutral; (2) Acts for the benefit of all who may have an interest in the receivership property; and (3) Holds assets for the court and not for the plaintiff or the defendant." (CRC 3.1179.) (See also CCP 568) "The receiver is also a fiduciary who must act for the benefit of all parties interested in the property." (*City of Chula Vista v. Gutierrez* (2012) 207 Cal.App.4th 681, 685.) The receiver reports to the Court, informing it of informing it of developments at the Property. The receiver follows the Court's instructions, rehabilitates the Property, and preserves its value for Powell, whether as a residence or as an asset to be sold.

The Court
The court is not a party to the case. The court manages the case. The court issues orders when needed to resolve disputes between and among the City, Powell, and the Receiver.

THE RULINGS

1. THE RECEIVER'S AND CITY'S REQUESTS WITH RESPECT TO THE EFFECT OF PRIOR ORDER IS GRANTED IN PART AND DENIED IN PART.

The Contentions of the Parties

The Receiver and the City
The receiver argues that the court should not use the fairness hearing as a procedural vehicle to revisit and reconsider the many orders entered by this court since it was filed in 2015. In support of its position, Receiver cites *In re Alberto* (2002) 102 Cal.App.4th 421, 427: "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge place the second judge in the role of a one-judge appellate court." The Receiver also cites *Greene v State Farm Fire & Casualty* (1999) 224 Cal.App.3d 1583, 1588: "The power of one judge to vacate an order made by another judge is limited." Finally, Receiver notes that the vast majority of the orders were signed by "another judge" Colwell and that to the extent this Court signed any orders, Respondent has never moved to reconsider them.

The City takes a similar stance, but from a slightly different angle. The City argues that the order appointing a receiver is immediately appealable (CCP 904.1(a)(7)). Since it was not appealed, "it becomes final and non-appealable." The City cites the text of the Order ("Receiver's costs will be paid out of a superpriority lien") and concludes that the issue of who and how receiver's costs are to be paid "has already been decided" and is "res judicata." The City also cites the principles set forth in *In re Alberto, supra,* regarding the inability of one Superior Court judge to overrule an order of another.

Respondent
The position of the Respondent is difficult to discern. On the one hand, Powell, in response to the City's motion, claims that "Mr. Powell is not asking this Court to review Judge Colwell's Appointment Order." However, in response to the Receiver, Respondent distinguishes the "appointment" order from the Court's subsequent orders, and argues that "[T]hese unappealble orders were not based on a full factual record, (and) are subject to later review at the final fairness hearing." Respondent's Brief at p. 13. Respondent takes issue with the City and the Receiver's interpretation of *In re Alberto* and *Greene, supra,* and concludes that "at final fairness hearings courts consider not only the propriety of a receiver's compensation, but also his underlying actions during the course of the receivership, which necessarily includes a closer look at actions otherwise 'approved of' in interim orders." Respondent's Brief at p. 14.

Discussion
At the fairness hearing, the Court will not reconsider its prior orders. The Court applies the clear mandate of *In re Alberto, supra,* and its progeny, most notably *Paul Blanco's*

Good Car Company Auto Group v. Superior Court (2020) 56 Cal.App.5th 86 (reversing an order of the trial for overturning the order of another trial judge, citing "weighty concerns compel this long-standing principle.") Rather, the court will consider the Receiver's and the City's actions in light of the Court's prior orders, including the amount and allocation of the Receiver's compensation.[2] This is consistent with Estate of Hilton (1996) 44 Cal.App.4th 890, 910, where the court held in the analogous context of a probate estate that after interim fees are approved that the court cannot retroactively revise the fees downward in a final accounting.

The Court's ruling does not preclude a consideration of other acts by the Receiver or the City that Respondent contends were beyond the scope of the Court's prior orders, so-called *ultra vires* acts discussed below.

[2] *See* the Court's 5/10/19 order regarding the scope of the fairness hearing: The Court will "make findings regarding the amount of compensation to be paid to the Receiver, how payment is to be made, and whether the acts of the Receiver were in the best interest of the Receivership Estate and the parties to this action."

2. THE CITY'S REQUEST FOR A LEGAL DETERMINATION RE RECEIVER'S FEES AND REHABILITATION COSTS, JOINED BY THE RECEIVER, IS GRANTED IN PART AND DENIED IN PART.

The City moves for a legal determination that the City is not liable for (1) Gerard Keena, II and Bay Area Receivership Group's ("BARG") (collectively, the "Receiver") fees; or (2) the costs to rehabilitate the real property at 1911 Harmon Street in Berkeley (the "Property")." (Motion at 2:3-6.)

The Motion of City filed 12/3/21 for legal determination re receiver's fees is GRANTED IN PART AND DENIED IN PART as set forth below.

The Contentions of the Parties
The City
The City's argument is primarily rooted in straightforward statutory analysis. The City contends that the Receiver was appointed pursuant to H&S Code Section 17980.6, which provides for the appointment of a Receiver if the "health and safety of the residents or the public is substantially endangered" by a failure to comply with the "State Building Standards Code." Section 17980.7, continues the City, sets forth an exclusive scheme for the funding of the Receiver and nowhere contemplates or provides for the "enforcing agency" (the City) to be responsible for any such fees or costs. The City argues that Judge Colwell's order of 4/13/17 appointing the Receiver tracks the language of Sec. 17980.7 and "decided **all** of the issues in the Receivership, from the identity of the Receiver, to what he could do, to who was going to pay for it, and how it was going to be paid. Mr. Powell's (then) attorney approved Judge Colwell's Order as to form. To the extent the Order was vague or unclear (and it is not), Mr. Powell should have appealed. He did not." *Emphasis* the City's, Reply Brief at p. 5.

The City also cites to Section 17980.7(d)(1)'s language that "upon entry of any order or judgment", the Court "shall" "order the owner to pay all reasonable and actual costs of the enforcement agency..." Thus, argues the City, ordering the City to pay Receiver costs would result in an "absurdity," requiring the enforcing agency to pay fees and costs when Section 17980.7(d)(1) allocates that responsibility to the Owner.

The City also maintains that requiring it pay the Receiver's fees and costs would violate public policy and "create a moral hazard, "incentivizing (property owners) "to leave their properties in disrepair, creating substantial dangers for its occupants and neighboring properties, and obtain a windfall..." Reply Brief, *supra,* at 8.

Respondent and the Receiver
Powell responds that the H&S Code supplements rather than supplants the broad equitable powers of a receiver set forth in Cal. Code Civ. Procedure Sections 564 and 568, enacted long before the relevant provision of the H&S Code. Respondent cites to the H&S Code itself to support its general proposition, including Section 17980(c)(4)(H) recognizing that the Receiver may "exercise powers granted to receivers under Sec. 568" and Section 17980.7(c)(15) stating "in addition to any other remedy authorized by law."

Concludes Respondent: It is "not that nothing in 17980 allows for the City to be held liable, but (that) nothing in it precludes the City from being held liable." In support, Respondent also invokes *Chula Vista* and *City of Sierra Madre v Suntrust. Suntrust, supra,* at 32: "...although the receiver's compensation is typically paid from the receivership estate, the court has considerable discretion to determine who must ultimately bear the cost of the receivership." *Chula Vista, supra,* at 686: "Courts may also impose the receiver costs on a party who sought the appointment of the receiver."

The Receiver echoes Respondent's arguments regarding the City's potential responsibility for fees and costs, citing *Suntrust* and *Chula Vista.* The Receiver states "...Court may impose the receiver costs on a party who sought the appointment of the receiver and on a party who benefitted from the receivership," and concludes that "It is disingenuous for the City to argue that the City received no benefit at all from the Receivership, arguing that the City had a property that was such a problem ... that it was deemed necessary to seek the appointment of a receiver." Receiver concludes: "[T]he City has realized the rehabilitation of a dangerous property as well as their goal of reinstating Mr. Powell to that property once it was fixed." Receiver Brief at pp. 5-6.

Discussion

As a matter of law, the City cannot be responsible for the receiver's fees. The court considers the general case law on receivers and the specific statute in this case regarding receivers.

The specific statue in this case, H&S 17980.7, sets out the remedies an enforcement agency may seek when the public is endangered by a building. H&S 17980.7(c) provides for the appointment of a receiver. The receiver here was appointed pursuant to that provision.

The full statutory scheme of H&S code section 17980 merits careful review. Sections 17980.7(c)(4)(F) and (G) state the receiver may collect rents and income from the building and may borrow funds with the property as security. If those funds are not sufficient for the receivership expenses, then H&S 17980.7(c)(15) provides: "Upon the request of a receiver, a court may require the owner of the property to pay all unrecovered costs associated with the receivership in addition to any other remedy authorized by law."

In addition, Section 17980 sets forth a specific scheme for the compensation of the receiver, including the specific sources and priority of funds from which the Receiver shall be paid. Section 17980.7(c)(4)(F) requires that the Receiver initially be compensated from rents and income of the subject property, followed by borrowing funds secured by a superior priority or junior lien, and finally, if those sources prove inadequate, Section 17980.7(c)(15) permits the receiver to seek unrecovered costs from the property owner directly.

Where a statute expressly permits one thing, the court can infer that the legislature intended to exclude other things. The specific statute never suggests that the enforcement agency can be liable for the expenses of the receivership.

Despite the language of H&S Code Section 17980, Respondent and Receiver rely on general statements in *City of Chula Vista* and *Suntrust* to argue that the Court has discretion to require the enforcing agency (the City) to pay the Receiver's fees and costs. "Generally, the costs of a receivership are paid from the property in the receivership estate. ... However, courts may also impose the receiver costs on a party who sought the appointment of the receiver or "apportion them among the parties, depending upon circumstances. ... Courts are vested with broad discretion in determining who is to pay the expenses of a receivership, and the court's determination must be upheld in the absence of a clear showing of an abuse of discretion." *Chula Vista, supra,* at 685-686. "Although the receiver's compensation is typically paid from the receivership estate, the court has considerable discretion to determine who must ultimately bear the cost of the receivership." *Suntrust, supra,* at 32.

The Court is not persuaded that the broad, general statements in either *City of Chula Vista* or *City of Sierra Madre* are applicable here. Neither held that the enforcing agency could be ordered to pay the fees of the Receiver. *Chula Vista* involved facts in which a foreclosing lender was held partially responsible for receiver costs. The Court explicitly stated that "we express no opinion regarding whether (the Receiver) could have recovered from the City through principles of unjust enrichment or otherwise." *Chula Vista, supra,* at 687. *Suntrust* simply affirmed the proposition that a superpriorty loan could be granted to the Receiver, a settled principle that is reaffirmed in Section 17980.7(c).

Nonetheless, *Chula Vista* is particularly instructive here. There, the receiver was also appointed pursuant to Section 17980. In considering whether the foreclosing lender might be held liable for the receiver's fees, the court focused on the "statutory language (which) is generally the most reliable indicator of legislative intent."

> We find nothing in the statute or its legislative history to suggest that it was intended to impose direct liability for a receiver's fees and costs on a foreclosing lender that ultimately acquires the property. To the contrary the statute specifically states that a receiver can, with court approval, obtain a lien on the real property upon which the substandard building located. This is exactly what the trial court in this case authorized (the Receiver) to do...If the Legislature had intended to impose direct liability or provide the receiver with a priority lien, it would have done so, just as it allowed the court to directly "[o]rder the *owner to pay* all reasonable and actual costs of the enforcement agency." Section 17980.7(d)(1)."
>
> Simply put, section 17980.7 does not in and of itself allow for the receiver to recover his expenses directly from the owner; rather recovery should be through a

lien on the property. *Any change in the law must come from the legislature not the Courts. Chula Vista, supra,* at 687-688. *Emphasis this Court's.*

The court finds that the specific statute of H&S 17980.7 regarding receivers takes precedence over the general statute of CCP 564 and related case law regarding receivers. Where there is a conflict, the court applies a specific statute rather than a general statute and the court applies a more recent statute rather than an older statute. The court will not use the general statute to amend the specific statute. The Motion of City filed 12/3/21 is GRANTED to the extent Powell might seek to allocate or apportion the receiver's fees to the City.

However, the Court emphasizes that the City and/or the Receiver may be responsible for Powell's fees and costs to the extent that either acted beyond the scope of the Court's orders. Powell provides a laundry list of such *ultra vires* acts including taking on the role of lender with strict requirement loan requirements; and, the City (including its Building Department) and Receiver requiring Powell to make repairs that were either beyond the scope of any notice of violation or not required to remedy the notice of violation.

Powell is entitled to address these issues at the fairness hearing. *See S. Cal. Sunbelt Developers, Inc. v Banyan Ltd. P'ship* (2017) 8 Cal.App.5th 910, 926 (*See e.g.:* "Before the court rules on the final accounting, the parties may question, and the court must consider, issues such as whether the receiver exceeded his or her authority, caused injury to others, or acted negligently in operating the receivership estate...The court may hold a receiver personally liable for neglect, misconduct, or mismanagement of the receivership estate.") To that extent, The Motion of the City is DENIED. (The scope of the hearing is further discussed below.)

In their briefs, the City and Receiver deny any such mismanagement or that they exceeded the authority granted by the Court's orders or engaged in any *ultra vires* acts. *See e.g.* City brief at p. 5. At this point, such assertions are premature. To the extent that there is any such evidence presented at the fairness hearing to support Respondent's claims, the City and the Receiver will have the opportunity to respond.

3. A DETERMINATION OF THE RECEIVER'S REQUEST FOR QUASI-JUDICIAL IMMUNITY IS RESERVED.

The motion of the Receiver regarding quasi-judicial immunity is RESERVED.

Powell has not filed a complaint or cross-complaint seeking tort damages from the receiver. (Powell Opposition at 10:18-19.) Rather, Powell "merely seeks to *surcharge* the Receiver personally for losses to the receivership estate for any costs of construction (and related fees) performed beyond the scope of the Notice as contemplated by California law." (Southern California Sunbelt Developers, Inc. v. Banyan Limited Partnership (2017) 8 Cal.App.5th 910, 922 ["A receiver, as any fiduciary, may be surcharged and his or her surety held liable for a failure to properly carry out the duties imposed by the order of appointment"]; *Aviation Brake Sys., Ltd. v. Voorhis* (1982) 133

Cal.App.3d 230, 235 ["the receiver in his personal capacity may be surcharged for losses to the receivership estate based upon his misconduct or mismanagement"].)

Powell's assertion is that the receiver should be "surcharged" for losses to the estate are equivalent to a tort claim against the receiver.

A receiver is personally liable only if the receiver was acting outside the scope of his authority. Powell asserts that the receiver acted outside the scope of his authority and engaged in misconduct or mismanagement of the receivership estate. If a third party makes a claim against the receiver based on actions within the scope of his authority, then any damages would be paid by the receivership estate. (Chiesur v. Superior Court in and for Los Angeles County (1946) 76 Cal.App.2d 198, 201.) Similarly, if the receiver's actions were within the scope of his authority, then any damages to the estate or to Powell would be absorbed by or paid by the receivership estate.

The anticipated hearing will concern a review of the Receiver's work for the receivership estate, a determination of the amount of compensation to be paid to the receiver, and a determination of who should pay that compensation. (Order of 5/10/19.) As detailed above, that inquiry will focus on whether the Receiver acted within the scope of the Court's orders or beyond the scope of the Court's orders.

The receiver can assert the defense of quasi-judicial immunity and argue at the hearing that it applies. California law on the quasi-judicial immunity appears settled. (Falls v. Superior Court (1996) 42 Cal.App.4th 1031, 1042-1045.) Caselaw suggests that receivers are covered by quasi-judicial immunity while serving in a quasi-judicial function. (New Alaska Development Corp. v. Guetschow (9th Cir. 1989) 869 F.2d 1298, 1303 ["cases from other circuits have held uniformly that state court-appointed receivers are entitled to absolute immunity"].) That in turn will likely depend on whether the actions of the Receiver were within the scope of the Court's orders. Whether the receiver is entitled to quasi-judicial immunity is a factual issue to be resolved at the hearing.

4. THE CITY'S REQUEST FOR IMMUNITY IS DENIED

The City's reliance on the statutory scheme for claims against a public entity is misplaced. First, as noted with respect to the Receiver's claims for quasi-judicial immunity, the proceedings herein involve not so much a new "claim" as a "surcharge" on the enforcing agency and the Receiver who had the responsibility to implelment the mandate of H&S Code 17980. While *Sunbelt, supra,* and *Aviation Brake, supra,* dealt with a "surcharge" in the context of the Receiver, a similar logic applies to the City.

In addition, Gov. Code Sections 810 *et. seq.* are intended to provide the governmental entity notice and the ability to investigate a claim. Here, notice to the City is not an issue. The City has been deeply involved in these proceedings for nearly six years, including prior to the Receiver's appointment, as the enforcing agency that sought and oversaw the receivership, and, for three years after the filing of the Receiver's request for a Final Accounting and Discharge in April of 2019 (actively engaging in settlement

negotiations.) For six years, the City has been party to countless discussions and hearings in which Respondent complained about the City's alleged transgressions.

In sum, Respondent's "claim" against the City is of like kind to that against the receiver – an allegation of acting beyond the scope of the Court's orders. The City will have its opportunity to respond to any evidence properly offered by Respondent involving circumstances with which the City is fully familiar.

MATTERS RELATING TO THE FAIRNESS HEARING: MOTIONS TO EXCLUDE EVIDENCE, THE SCOPE OF THE HEARING AND CASE MANAGEMENT

5. MOTION TO EXCLUDE EVIDENCE: RESPONDENT'S MOTION TO EXCLUDE MONTHLY ACCOUNTINGS OF RECEIVER IS DENIED.

The Motion of Powell filed 2/23/22 regarding monthly accountings of receiver is DENIED to the extent that it seeks to exclude evidence and is DENIED to the extent it seeks to preclude the Receiver from seeking fees and costs.

Powell moves "for a legal determination excluding from the fairness hearing in this action any evidence or argument regarding certain monthly accounting reports, financial reports, and time logs that Receiver Gerard F. Keena, II failed to timely or fully produce in this action and to prohibit the Receiver from seeking related fees and costs." (Motion at 2:3-9)

Backdrop

Throughout the receivership the receiver was required to file monthly reports. (CRC 3.1182.) Powell had the opportunity to object to those reports. (CRC 3.1183(b).)

On 5/10/19, the court entered a negotiated order that states "The court sets a fairness hearing to permit it to make findings regarding the amount of compensation to be paid to the Receiver, how payment is to be made, and whether the acts of the Receiver were in the best interest of the Receivership Estate and the parties to this action."

On 7/14/21, the court held an IDC and the receiver agreed to produce documents by 11/3/21. On 8/27/21, counsel for Powell requested specific documents. On 11/3/21, Powell deposed the receiver. (Powell brief at 5:22) On 11/8/21, the receiver produced documents. On 1/21/22, the parties discussed the allegedly missing or deficient documents at a pretrial conference. The Receiver apparently has not produced additional documents. (Ding Dec.)

Discussion

A receiver can arguably recover fees and expenses even if they were not disclosed in the monthly reports. In *People v. Riverside University* (1973) 35 Cal.App.3d 572, 586, the court held that a receiver could recover fees from the receivership property for receiver's post-discharge defense of a challenge to the receiver's account on appeal. The receiver

was presumably not filing monthly reports in the trial court when the case was post-discharge and on appeal.

On the facts of this case, the receiver's obligation to file CRC 3.1182 monthly reports arguably terminated at the time of the 5/10/19 partial discharge order. At that time the rehabilitation was complete and the order was designed to permit Powell to refinance the property. The only issues remaining after 5/10/19 were the resolution of "the amount of compensation to be paid to the Receiver, how payment is to be made, and whether the acts of the Receiver were in the best interest of the Receivership Estate and the parties to this action." The Court is unaware of any authority that requires a receiver to continue to file monthly reports when the only remaining issues relate to a party's challenge to the receiver's already completed administration of the receivership estate.

The receiver's financial records are relevant and arguably admissible evidence even if they were not produced in the CRC 3.1182 monthly reports. Powell may certainly argue that the receiver cannot recover fees or expenses unless they were identified in the monthly reports so that Powell could make timely objections under CRC 3.1183(b). The Court, however, will not *per se* exclude such evidence. The lack of a particular report goes to the weight the Court will give such evidence. It is not a basis for blanket exclusion.

6. MOTION TO EXCLUDE EVIDENCE: RESPONDENT'S REQUEST TO EXCLUDE EVIDENCE NOT TIMELY PRODUCED IN DISCOVERY IS GRANTED IN PART AND DENIED IN PART.

Powell seeks to exclude some of the receiver's financial records on the basis that the receiver did not timely produce them in discovery. The motion is DENIED.

First, a party cannot seek discovery from a court appointed receiver under the Civil Discovery Act (CCP 2016 et seq). "The receiver is the agent of the court and not of any party." (CRC 3.1179.) If a party could seek discovery from a court appointed receiver, any discovery directed to the receiver would be limited to the CCP 2020.010 procedures for non-party discovery.

However, the trial court as part of its supervision of the court appointed receiver pursuant H&S Code 17980.7(c)(7) could order the receiver to make reports to the court (and thus to the parties) in addition to the monthly reports. ("In addition to any reporting required by the court, ...") The trial court has not located any written order that required the receiver to produce information in addition to the CRC 3.1182 reports other than at conferences dated 7/14/21 and 1/21/22 when the Court told the receiver that certain document production was appropriate. (Ding Dec., para 4, 9.)

Trial courts have the power to exclude documents at trial that a party failed to produce in response to discovery requests. (*A&M Records v. Heilman* (1977) 75 Cal.App.3d 554, 565 [failure to produce documents during discovery barred their introduction at trial]; *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1453-1455 [same].)

The court will not exclude receiver's financial records on the basis that the receiver did not timely produce the documents in discovery. The receiver did produce the financial records on 11/8/21. (Ding Dec. para 8.) Powell attached them to the motion. Powell has had them for at least 5 months to prepare for the hearing. The exclusion of the financial records at the hearing would be a disproportionate evidentiary sanction for the receiver's late production of the financial records.

7. MOTION TO EXCLUDE EVIDENCE: RESPONDENT'S REQUEST TO EXCLUDE EVIDENCE FOR WHICH THERE WAS A COMPLETE FAILURE TO PRODUCE DOCUMENTS IN DISCOVERY – GRANTED IN PART AND DENIED IN PART

Powell seeks to exclude some of the receiver's financial records on the basis that the receiver did not produce them at all in discovery. The motion is GRANTED to the extent that the Court will exclude at trial any of the receiver's financial records not produced on or before 2/23/22. If a party has failed to produce documents in discovery following a proper request, then the court may order that the party may not present those documents as evidence at trial. (Pate v. Channel Lumber Co. (1997) 51 Cal.App.4th 1447, 1456.)

SCOPE OF THE HEARING, MISCELLANEOUS MATTERS RELATING TO THE HEARING, AND CASE MANAGEMENT

Scope of the Hearing: The Contentions of the Parties
The receiver argues that the court should limit the hearing to the issues identified in the order of 5/10/19. The order of 5/10/19 states: "The court sets a fairness hearing to permit it to make findings regarding the amount of compensation to be paid to the Receiver, how payment is to be made, and whether the acts of the Receiver were in the best interest of the Receivership Estate and the parties to this action."

Powell argues that the hearing should include not only the allegedly unwarranted compensation of the receiver but also the allegedly unwarranted costs of the rehabilitation (Powell trial brief filed 1/20/22 at 15-18), the receiver's costs (Powell trial brief filed 1/20/22 at 20), and the costs of the receiver's counsel (Powell trial brief filed 1/20/22 at 23).

Discussion
With regard to the scope of the fairness hearing, this order supplements and is to be read in conjunction with the Court's order of 5/10/19. The hearing on 5/27/22 will address two issues, the first focusing on the Receiver's fees and the second focusing on the scope of the work done a the property.

1. The hearing will address the Receiver's Motion to Approve Final Accounting and Discharge. The motion details the Receiver's actions and what it claims are the reasonable costs and fees for carrying out those acts. Respondent has filed its objections and responses to Receiver's request. The Court will determine the

reasonableness of the Receiver's request. Although not now before the Court, the Court makes these observations with regard to the Receiver's Motion for Final Approval: In making its determinations the Court will apply the two principal rulings from this order: (1) The prior orders of the Court are binding and (2) the manner of paying the Receiver's costs and fees is determined by H&S Code Section 17980.7(c) statutory scheme.

2. The hearing will also address the question of whether the Receiver *or* the City acted *ultra vires* and beyond the scope of the Court's orders and/or engaged in misconduct or mismanagement with respect to the receivership estate. To the extent that either the Receiver or the City engaged in such acts, the Court will order appropriate remedies. With respect to this issue, the court encourages Powell and the receiver to focus on the scope of work as defined and proposed by the Receiver and the City in the context of the work authorized by the Court in its orders of 4/13/17, 6/7/17, 11/9/17, and 6/29/18. Powell and the receiver can then compare the work that was authorized by the court to the work that was performed.
3. Given the complexity of the facts herein, the Court is concerned about the parties' and the Receiver's focus during the course of the hearing. The Court deems it most economic to focus on 1. and 2. above. To ensure such focus, the temporal scope of the hearing will be from the date of the appointment of the receiver on 4/12/17 to the Receiver's filing of his motion for a final report and accounting on 4/10/19. Thereafter, the Receiver may seek additional attorneys fee and costs, if appropriate. On or before 5/18/22 the Receiver will provide the Court with an accounting setting forth its requested fees and costs for the periods 4/12/17 to 4/10/19 (inception to request for final accounting) and from 4/10/19 to the present.

Evidence To Be Presented at The Hearing – Experts

The receiver argues that the court should limit the evidence presented at the hearing to "evidence in the form of declarations and, if so requested, testimony by the Bay Area Receivership Group, Powell, and any other person with personal knowledge of the issues raised herein." (Order of 5/10/19.) This is a de facto argument that the court should not permit expert testimony at the hearing.

The court ORDERS that the parties and the receiver may present expert testimony at the hearing. Expert testimony may be appropriate, if not required, to establish the standard of care for professionals. (O'Shea v. Lindenberg (2021) 64 Cal.App.5th 228, 236-237.) Although the fairness hearing is not a claim for receiver professional negligence, Powell's assertion that the receiver acted outside the scope of his authority and engaged in misconduct or mismanagement of the receivership estate presents substantially similar issues.

The court is not aware of any prior discussion of the issue of expert testimony. The court ORDERS the parties to meet and confer about whether the parties can appear at the hearing with undisclosed experts or whether the parties will agree to an exchange of expert information and depositions under CCP 2034.010 et seq.

Case Management
The pretrial conference is reset to 5/20/22 at 8:30 AM in D-22.

On or before 5/18/22, the parties are to submit trial briefs that state the legal claims (e.g. unauthorized costs and unnecessary fees) and defenses (e.g. acting within scope of the court's order and compliance with City Building Department scope of work directives,) the elements of the claims and defense, and the burdens of proof applicable to each.

The court will set time limits for the hearing. As should be evident from the recitation of facts above, the court is familiar with the record. The court will discuss time limits at the pretrial conference on 5/20/22. (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22-23; *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 148-152.)

In addition, as noted above, on or before the pretrial conference set for 5/18/22 the Receiver will provide the Court with an accounting setting forth its requested fees and costs for the periods 4/12/17 to 4/10/19 and from 4/10/19 to the present.