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12 KRISTA FREITAG

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15
16 SECURITIES AND EXCHANGE
COMMISSION,
17
Plaintiff,
18
v.
19 GINA CHAMPION-CAIN and ANI
20 DEVELOPMENT, LLC,
21
Defendants,
22 AMERICAN NATIONAL
INVESTMENTS, INC.,
23
Relief Defendant.

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

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

Date: January 24, 2020
Time: 3:30 p.m.
Courtroom: 3B
Mag. Judge: Hon. Allison H. Goddard

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1 Krista Freitag ("Receiver"), the Court-appointed permanent receiver for
2 Defendant ANI Development, LLC, Relief Defendant American National
3 Investments, Inc., and their subsidiaries and affiliates ("Receivership Entities"),
4 submits this Memorandum of Points and Authorities in Support of her concurrently-
5 filed Motion for (A) Approval of Sale of Real Property Located at 805 Brighton
6 Court; and (B) Authority to Pay Broker's Commission ("Motion").

7 **I. BACKGROUND FACTS**

8 As reflected on Exhibit A to the Receiver's Verified Initial Report (Dkt. 76-1,
9 Exhibit A), the receivership estate includes numerous residential and commercial real
10 properties. The residential properties include a single-family residence located at
11 805 Brighton Court, San Diego, California ("Brighton Court Property"). The
12 Brighton Court Property is 1,037 square feet with three bedrooms and two
13 bathrooms. The Brighton Court Property was purchased by 6050 El Cajon
14 Blvd, LLC (a Receivership Entity) for \$950,000 on December 23, 2015. Freitag
15 Decl., ¶ 2.

16 Upon her appointment, the Receiver and her staff performed an analysis of the
17 value of the Brighton Court Property, including a review of automated valuation
18 scores for the property and a survey of the market comparable properties. The
19 Receiver also consulted with and interviewed licensed brokers with experience
20 selling residential properties in the Mission Beach area. Ultimately, based on a
21 combination of its experience and low listing commission, the Receiver selected
22 Pacific Pines Real Estate ("Broker") and the Brighton Court Property was listed for
23 sale on the Multiple Listing Service (MLS) on or about September 31, 2019. The list
24 price was \$1,249,900. Freitag Decl., ¶ 3.

25 To market the Brighton Court Property, Broker listed the property on the local
26 MLS and its website, held an open house and showed the property to all interested
27 parties. Two offers were received at or near the full list price. The Receiver
28 negotiated terms with the prospective buyers and the property went into escrow on or

1 around November 5, 2019 with a purchase price of \$1,275,000. The buyer is
2 Gregory John and JoAnne Bliss Armer ("Buyer"). Freitag Decl., ¶ 4.

3 Like the Thomas Street Property, the Brighton Court Property is encumbered
4 by a deed of trust in favor of Axos Bank. The Axos Bank portfolio loan covers
5 seven residential properties included in the receivership estate.¹ Assuming (a) a late
6 January 2020 sale closing with the January 2020 monthly payment having been made
7 in the ordinary course, and (b) the September 2019 through December 2019 monthly
8 payments of \$174,496 in total are made at closing of the 1617 Thomas Avenue sale
9 (see Dkt. 141), and the release price of \$657,572 from the 1617 Thomas Avenue sale
10 is applied to the portfolio loan's principal balance, the release price for the Brighton
11 Court Property is estimated to total \$1,183,000. The Receiver is in the process of
12 reviewing the payment history and conferring with Axos Bank on the subject loan
13 and will complete her review and verify the principal and interest balances, as well as
14 the release price prior to the sale closing. Freitag Decl., ¶ 5.

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

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26 ¹ The estimated market value of the other five properties that are subject to the
27 Axos Bank loan (not including 1617 Thomas Avenue or 805 Brighton Court) is
28 \$8,244,000 (*See* Dkt. 76-2, Exhibit A, Vacation Homes Owned, Numbers 4-8).
While the Receiver's thorough review of the history of the loan is still underway,
after the sale of 1617 Thomas Avenue and 805 Brighton Court, the principal
balance of the loan is estimated to be approximately \$3.2 million.

1 **II. PROPOSED SALE**

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

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

7 **Purchase Price.** The purchase price is \$1,275,000, which will be paid in all
8 cash.

9 **Deposit.** Buyer has deposited \$40,000 into escrow.

10 **Closing Date.** Closing shall occur upon entry of the Court order approving
11 the sale.

12 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
13 a commission of \$12,000 plus 2.5% of the gross sales price. The 2.5% portion will
14 be paid to Buyer's broker. In the proposed sale, the total commission would be
15 \$43,875.

16 **III. LEGAL STANDARD**

17 "The power of a district court to impose a receivership or grant other forms of
18 ancillary relief does not in the first instance depend on a statutory grant of power
19 from the securities laws. Rather, the authority derives from the inherent power of a
20 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
21 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
22 and efficient administration of the estate by the district court for the benefit of
23 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
24 of a receiver is authorized by the broad equitable powers of the court, any
25 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
26 953 F.2d 1560, 1569 (11th Cir. 1992).

27 District courts have the broad power of a court of equity to determine the
28 appropriate action in the administration and supervision of an equity receivership.

1 See *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth
2 Circuit explained:

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

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

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

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

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

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

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

16 **B. 28 U.S.C. § 2001**

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

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

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

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

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

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

29 **IV. DISCUSSION**

30 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
31 in the best interests of the receivership estate. The Brighton Court Property was
32 listed on the MLS with a licensed broker and shown to interested parties. The
33 property was properly marketed, offers were received, terms negotiated, and the

1 Agreement signed. The purchase price is fair and reasonable, and exceeds what the
2 property was purchased for in 2015 by \$325,000. Freitag Decl., ¶ 7.

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

8 In the action pending in U.S. District Court for the Southern District of
9 California, Case No. 19-CV-01628-LAB-AHG, Securities and
10 Exchange Commission v. Gina Champion-Cain, et al., notice is hereby
11 given that the court-appointed receiver will conduct a public auction for
12 the real property located at 805 Brighton Court in San Diego County,
13 California. Sale is subject to Court confirmation after the auction is
14 held. Minimum bid price is at least \$1,325,000. The auction will take
15 place on December 19, 2019, at 1:30 p.m. in front of the entrance to the
16 United States Courthouse, 221 W. Broadway, San Diego, California.
17 To be allowed to participate in the auction, prospective purchasers must
18 meet certain bid qualification requirements, including submitting a
19 signed purchase and sale agreement, an earnest money deposit of
20 \$44,000, and proof of funds. All bidders must be qualified by 5:00 p.m.
21 PT on December 17, 2019, by submitting the required materials to the
22 receiver at 401 W. A Street, Suite 1830, San Diego, California, 92101.
23 If interested in qualifying as a bidder, please contact Geno Rodriguez at
24 (619) 567-7223 or grodriguez@ethreadvisors.com.

17 In order to conduct an orderly auction and provide sufficient time for the
18 publication of notices discussed above, the Receiver will require bidders to complete
19 the above steps by December 17, 2019 ("Bid Qualification Deadline") and conduct
20 the live public auction on December 19, 2019.

21 The Receiver will inform all interested persons of the opportunity to overbid at
22 the public auction, provided they qualify themselves to bid by the Bid Qualification
23 Deadline by (a) signing a purchase and sale agreement for the properties on the same
24 terms and conditions as Buyer, but with a purchase price of at least \$1,325,000,
25 (b) providing the Receiver with an earnest money deposit of \$44,000, and
26 (c) providing proof of funds necessary to close the sale transaction in the form of a
27 current bank statement, cashier's check delivered to the Receiver, or other evidence
28 deemed sufficient by the Receiver.

1 In the event one or more prospective purchasers qualify themselves to bid, the
2 auction will be conducted by the Receiver as noted above and bids will be allowed in
3 increments of at least \$5,000. The Receiver will then file a notice advising the Court
4 of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
5 confirming the sale. Earnest money deposits provided by bidders who are
6 unsuccessful will be promptly returned to them. In the event no prospective
7 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
8 will notify the Court and seek entry of an order approving the sale to Buyer.

9 With respect to Broker's commission, Broker appears to have broadly
10 marketed the Brighton Court Property for sale, to include its posting on the MLS and
11 its own website and is posting the overbid notice to both websites. The listing
12 agreement is consistent with the lower end of industry standards for commissions
13 paid to brokers for sales of residential properties. Accordingly, the Receiver requests
14 authorization to pay Broker the commission amount in accordance with the listing
15 agreement. Freitag Decl., ¶ 8.

16 **V. CONCLUSION**

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

21 Dated: December 3, 2019

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