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22 UNITED STATES DISTRICT COURT
23 SOUTHERN DISTRICT OF CALIFORNIA

24 SECURITIES AND EXCHANGE
25 COMMISSION,
26
27 Plaintiff,
28
29 v.
30 GINA CHAMPION-CAIN and ANI
31 DEVELOPMENT, LLC,
32
33 Defendants,
34
35 AMERICAN NATIONAL
36 INVESTMENTS, INC.,
37
38 Relief Defendant.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
(A) APPROVAL OF SALE OF
RANCHO MIRAGE PROPERTY;
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 Rancho Mirage Property; and (B) Authority
6 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 83 Royal Saint Georges Way, Rancho Mirage, California ("Rancho Mirage
12 Property"). The Rancho Mirage Property is 9,180 square feet with six bedrooms and
13 eight bathrooms. The Rancho Mirage Property was purchased by American National
14 Investments, Inc. for \$3,200,000 on April 15, 2019. Freitag Decl., ¶ 2.

15 Upon her appointment, the Receiver and her staff performed an analysis of the
16 value of the Rancho Mirage Property, including a review of automated valuation
17 scores for the property, the length of time the property previously was on the market
18 (593 days),¹ and a survey of the market comparable properties. The Receiver and her
19 staff also consulted with and interviewed licensed brokers with experience selling
20 residential properties in the Rancho Mirage area, including a broker that was
21 previously involved in selling the property. Not only were the brokers initially slow
22 to respond, but two brokers opined that the April 15, 2019 purchase price was too
23 high, explaining that because the property recently was marketed for so long, in order
24 for it to sell again, a sale price of \$3,000,000 was recommended. One broker turned
25

26
27 ¹ The property was initially listed at \$3,995,000 in April 2017 and the price was
28 reduced approximately every six months, reportedly with little interest from
prospective buyers at those listing prices, until it went into escrow with American
National Investments, Inc. The property was taken off the market for
approximately 107 days in 2018 before being listed again.

1 down the potential listing because she did not think the property would ever sell at or
2 for more than the \$3,200,000 purchase price, also noting the length of time the
3 property was recently exposed to the market. Ultimately, based on a combination of
4 its experience and a negotiated low listing commission, the Receiver selected Keller
5 Williams Realty ("Broker") and the Rancho Mirage Property was listed for sale on
6 the Multiple Listing Service (MLS) on or about October 5, 2019. The list price was
7 \$2,999,000. Freitag Decl., ¶ 3.

8 To market the Rancho Mirage Property, Broker listed the property on the local
9 MLS and its website, held an open house and showed the property to all interested
10 parties. Two offers were received at the full list price for all cash a few weeks apart.
11 After negotiations with the first offeror fell through, the Receiver negotiated terms
12 with the second offeror and the property went into escrow on or around November
13 15, 2019 with a purchase price of \$2,999,000. The buyer is Paul Antle ("Buyer").
14 Freitag Decl., ¶ 4.

15 The Rancho Mirage Property is encumbered by a deed of trust in favor of
16 Seattle Funding Group ("SFG"). The outstanding principal balance on the interest-
17 only loan is approximately \$1.55 million and deferred interest through December 31,
18 2019 is \$26,666.69 (approximately \$3,229.17 per month).² The Receiver has
19 negotiated with and SFG has agreed that if the loan is brought current and taxes are
20 paid current (which has been done), the loan does not go into monetary default again
21 and the loan is paid in full on or before the maturity date in November 2020, that
22 SFG will waive default interest. The full balance owed to SFG will be paid directly
23 from escrow at closing and the estimated net proceeds from the sale transaction,
24
25

26 ² This interest only loan initially has two different interest rates, a short-term
27 payment rate (5.99%) and an actual note rate (8.49%). The variance in these two
28 rates creates a deferred interest component, which is due upon maturity or payoff
of the note. It is also important to note that the payment rate and note rate both
jump to 8.99% effective March 1, 2020, increasing the debt service payment from
\$7,737.08 per month (without deferred interest) to \$14,608.75 per month.

1 assuming the sale closes by the end of January 2019, is expected to be approximately
2 \$1.26 million. Freitag Decl., ¶ 5.

3
4 **II. PROPOSED SALE**

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

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

10 **Purchase Price.** The purchase price is \$2,999,000, which will be paid in all
11 cash.

12 **Deposit.** Buyer has deposited \$89,990 into escrow.

13 **Closing Date.** Closing shall occur upon entry of the Court order approving
14 the sale.

15 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
16 a commission of 4% of the gross sales price, which amount will be split with Buyer's
17 broker. As part of the Receiver's negotiations with Broker, it was agreed the Buyer's
18 broker would receive 2.5% of the gross sale price and Broker would receive 1.5% of
19 the gross sales price. This would ensure that the brokerage community would be
20 properly incentivized to show the property to prospective buyers, while keeping the
21 overall commission low. In the proposed sale, the total commission would be
22 \$119,960.

23 **III. LEGAL STANDARD**

24 "The power of a district court to impose a receivership or grant other forms of
25 ancillary relief does not in the first instance depend on a statutory grant of power
26 from the securities laws. Rather, the authority derives from the inherent power of a
27 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
28 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
and efficient administration of the estate by the district court for the benefit of

1 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
 2 of a receiver is authorized by the broad equitable powers of the court, any
 3 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
 4 953 F.2d 1560, 1569 (11th Cir. 1992).

5 District courts have the broad power of a court of equity to determine the
 6 appropriate action in the administration and supervision of an equity receivership.
 7 *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth
 8 Circuit explained:

9 A district court's power to supervise an equity
 10 receivership and to determine the appropriate action to be
 11 taken in the administration of the receivership is
 12 extremely broad. The district court has broad powers and
 13 wide discretion to determine the appropriate relief in an
 14 equity 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.

15 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
 16 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
 17 and 'we generally uphold reasonable procedures instituted by the district court that
 18 serve th[e] purpose' of orderly and efficient administration of the receivership for the
 19 benefit of creditors."). Accordingly, the Court has broad discretion in the
 20 administration of the receivership estate and the disposition of receivership assets.

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

22 It is widely accepted that a court of equity having custody and control of
 23 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
 24 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
 25 and wide discretion to determine relief in an equity receivership). "The power of sale
 26 necessarily follows the power to take possession and control of and to preserve
 27 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
 28 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*

1 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
 2 (citing *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity
 3 orders property in its custody to be sold, the court itself as vendor confirms the title
 4 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
 5 Receivers § 487 (3d ed. 1992).

6 "A court of equity, under proper circumstances, has the power to order a
 7 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
 8 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
 9 Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992). To that end, a
 10 federal court is not limited or deprived of any of its equity powers by state statute.
 11 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
 12 (state statute allowing time to redeem property after a foreclosure sale not applicable
 13 in a receivership sale).

14 Generally, when a court-appointed receiver is involved, the receiver, as agent
 15 for the court, should conduct the sale of the receivership property. *Blakely Airport*
 16 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
 17 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
 18 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
 19 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
 20 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
 21 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
 22 354, 357 (9th Cir. 1925).

23 **B. 28 U.S.C. § 2001**

24 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real
 25 property under subsection (a) and specific requirements for private sales of real
 26 property under subsection (b). Although both involve significant cost and delay, the
 27 cost and delay of a public sale are significantly less than those for a private sale.
 28 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013)

1 ("Section 2001 sets out two possible courses of action: (1) property may be sold in
2 public sale; or (2) property may be sold in a private sale, provided that three separate
3 appraisals have been conducted, the terms are published in a circulated newspaper
4 ten days prior to sale, and the sale price is no less than two-thirds of the valued
5 price."). Therefore, by proceeding under Section 2001(a), the receivership estate can
6 avoid the significant costs and delay of (a) the Court having to appoint three
7 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

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

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

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

25 The notice of sale is sufficient if it describes the property and the time, place,
26 and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*
27 *Corp.*, 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to
28 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and

1 binding offer to purchase the [property]; and (ii) demonstrate . . . , to the satisfaction
2 of the Receiver, that it has the current ability to consummate the purchase of the
3 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*, 2009 U.S.
4 Dist. LEXIS 111381, at *8 (E.D. Mo. 2009).

5 **IV. DISCUSSION**

6 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
7 in the best interests of the receivership estate. The Rancho Mirage Property was
8 listed on the MLS with a licensed broker and shown to interested parties. The
9 property was properly marketed, offers were received, terms negotiated, and the
10 Agreement signed. The purchase price therefore reflects the market value for the
11 property. Freitag Decl., ¶ 6.

12 Moreover, the proposed sale is subject to overbid to further ensure the highest
13 and best price is obtained. The Receiver proposes to conduct a public auction
14 consistent with the requirements of Section 2001(a). Specifically, the Receiver will
15 publish the following notice of the sale once a week for four weeks in the Desert
16 Sun, a newspaper of general circulation in the Rancho Mirage area:

17 In the action pending in U.S. District Court for the
18 Southern District of California, Case No. 19-CV-01628-
19 LAB-AHG, Securities and Exchange Commission v.
20 Gina Champion-Cain, et al., notice is hereby given that
21 the court-appointed receiver will conduct a public auction
22 for the real property located at 83 Royal St. Georges
23 Way, Rancho Mirage in Riverside County, California.
24 Sale is subject to Court confirmation after the auction is
25 held. Minimum bid price is at least \$3,049,000. The
26 auction will take place on January 9, 2020, at 1:30 p.m.
27 in front of the entrance to the United States Courthouse,
28 221 W. Broadway, San Diego, California. To be allowed
to participate in the auction, prospective purchasers must
meet certain bid qualification requirements, including
submitting a signed purchase and sale agreement, an
earnest money deposit of \$98,989, and proof of funds.
All bidders must be qualified by 5:00 p.m. PT on
January 7, 2020, by submitting the required materials to
the receiver at 401 W. A Street, Suite 1830, San Diego,
California, 92101. If interested in qualifying as a bidder,
please contact Geno Rodriguez at (619) 567-7223 or
grodriguez@ethreadvisors.com.

1 In order to conduct an orderly auction and provide sufficient time for the
2 publication of notices discussed above, the Receiver will require bidders to complete
3 the above steps by January 7, 2020 ("Bid Qualification Deadline") and conduct the
4 live public auction on January 9, 2020.

5 The Receiver will inform all interested persons of the opportunity to overbid at
6 the public auction, provided they qualify themselves to bid by the Bid Qualification
7 Deadline by (a) signing a purchase and sale agreement for the properties on the same
8 terms and conditions as Buyer, but with a purchase price of at least \$3,049,000,
9 (b) providing the Receiver with an earnest money deposit of \$98,989, and
10 (c) providing proof of funds necessary to close the sale transaction in the form of a
11 current bank statement, cashier's check delivered to the Receiver, or other evidence
12 deemed sufficient by the Receiver.

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

21 With respect to Broker's commission, Broker appears to have broadly
22 marketed the Rancho Mirage Property for sale, to include its posting on the MLS and
23 its own website and is posting the overbid notice to both websites. The listing
24 agreement is consistent with industry standards for commissions paid to brokers for
25 sales of residential properties. Accordingly, the Receiver requests authorization to
26 pay Broker the commission amount in accordance with the listing agreement.

27 Freitag Decl., ¶ 7.

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V. CONCLUSION

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

Dated: December 12, 2019

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