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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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF THE
SWELL COFFEE RESTAURANT
PROPERTY AND ASSOCIATED
PERSONAL PROPERTY**

Date: April 27, 2020
Time: 2:00 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 Approval of Sale of the Swell Coffee Restaurant Property and
6 Associated Personal Property ("Motion").

7 I. BACKGROUND FACTS

8 One of the assets included in the receivership estate is a 1,225 square foot
9 property with a 600 square foot building (with personal property contents) located at
10 3833 Mission Blvd., San Diego, California ("Property"). The Property was
11 purchased on February 5, 2015 for \$615,000 and title was taken in the name of one
12 of the affiliated Receivership Entities, The Swell Coffee Roasting Company, LLC,
13 and was transferred on April 22, 2015 to another affiliated Receivership Entity, 3833
14 Mission Blvd., LLC. At the time of the Receiver's appointment, a coffee shop
15 known as Swell Coffee was being operated at the Property. Freitag Decl., ¶ 2.

16 As reflected on the financials available to the Receiver at appointment, this
17 operation was not profitable (even after adding back intercompany rent to the year-
18 to-date 2019 net loss). Thus, the Receiver determined that the best course of action
19 was to close the coffee shop and prepare the Property for sale in the short-term, along
20 with other restaurant properties included in the receivership estate. Freitag Decl.,
21 ¶ 3.

22 For all of the restaurant-related properties included in the receivership estate,
23 the Receiver and her staff interviewed three licensed brokers with experience selling
24 restaurants in San Diego. After considering their experience and qualifications, the
25 Receiver decided to use two brokers – Colliers International ("Broker") for stand-
26 alone concept restaurant-related properties owned (a leased parking lot was also
27 included in this grouping) by the Receivership Entities (including the Property) and
28

1 Next Wave for the Surf Rider Pizza and Bao Beach restaurant concepts operated at
2 leased and owned property locations. Freitag Decl., ¶ 4.

3 Broker publicized and advertised the restaurant properties owned by the
4 Receivership Entities, including the Property, on LoopNet and CoStar (two widely
5 used online databases for commercial property listings) and CREXi (Collier's
6 International proprietary online database). Broker also caused a press release to be
7 issued, which was published in the San Diego Union-Tribune. Further, Broker sent a
8 series of direct emails about the restaurant-related properties to over 5,000 potential
9 buyers and investors. This activity generated 228 visitors to the CREXi webpage for
10 the portfolio of restaurants, which led to 142 signed confidentiality agreements and a
11 total of 28 offers for all of the properties marketed by Broker. Freitag Decl., ¶ 5.

12 In preparation for the sales, and as requested by the Broker, the Receiver
13 ordered various reports and provided relevant internal documents to create a typical
14 due diligence package specific to each asset. The Receiver also set a "Call for
15 Offers" deadline of February 3, 2020. The Broker used the CREXi website to host
16 the due diligence materials for the properties, an offering memorandum summarizing
17 various marketing points about the properties and detailing the Court sale process,
18 and a form of Purchase and Sale Agreement and Joint Escrow Instructions ("Form
19 PSA") prepared in advance by the Receiver, with assistance from her counsel. The
20 Form PSA has all contingencies removed and provides for the overbid, public
21 auction, and Court approval process. Prospective purchasers were instructed to
22 complete their due diligence and submit their executed Form PSA by the Call for
23 Offers deadline. Freitag Decl., ¶ 6.

24 For the Property, a total of five executed Form PSA's were received. The
25 highest and best was from Jane Cohen and Mordechai Ami Cohen ("Buyer") in the
26 amount of \$825,000. The Receiver finalized a Form PSA with the buyers and then
27 countersigned Buyer's PSA. Freitag Decl., ¶ 7.

28

1 The Property is encumbered by a deed of trust securing a Small Business
2 Association ("SBA") loan issued by First Choice Bank. As of March 1, 2020, the
3 balance due on the loan, including principal and unpaid interest, is
4 approximately \$598,000. There is also a separate SBA loan secured by the personal
5 property located at the Property (which is included in the proposed sale), the balance
6 of which, including principal and unpaid interest, is approximately \$62,000.
7 Depending on when the sale closes, the Receiver estimates that property tax credit
8 received at closing will likely be in the range of approximately \$1,400 to \$1,700 (the
9 second installment of property taxes for 2019-2020 is expected to be paid prior to a
10 closing, so the receivership estate will actually receive a credit at closing for the pro-
11 rated portion of the taxes paid for the period from the date of closing through
12 June 30, 2020). Because Broker also represents Buyer, Broker's commission
13 pursuant to the listing agreement is 2.5% of the sale price, or \$20,625. The costs of
14 sale, including escrow, title and recording fees are estimated to be approximately
15 \$4,000. While exact amounts will be determined at closing, after all of the
16 aforementioned amounts are paid out of escrow, the net sale proceeds for the
17 receivership estate are estimated to be in the range of approximately \$130,000 to
18 \$140,000. Freitag Decl., ¶ 8.

19 **II. PROPOSED SALE**

20 The key terms of the proposed Purchase and Sale Agreement and Joint Escrow
21 Instructions ("Agreement"), a copy of which is attached to the Freitag Declaration as
22 Exhibit A, are summarized as follows:

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

25 **Purchase Price.** The purchase price is \$825,000, which will be paid in cash.

26 **Deposit.** Buyer has deposited \$25,000 into escrow.

27 **Closing Date.** Closing shall occur with five business days of entry of the
28 Court order approving the sale.

1 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
 2 a commission of 2.5% of the gross sales price. In the proposed sale, the total
 3 commission would be \$20,625.

4 **III. LEGAL STANDARD**

5 "The power of a district court to impose a receivership or grant other forms of
 6 ancillary relief does not in the first instance depend on a statutory grant of power
 7 from the securities laws. Rather, the authority derives from the inherent power of a
 8 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
 9 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
 10 and efficient administration of the estate by the district court for the benefit of
 11 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
 12 of a receiver is authorized by the broad equitable powers of the court, any
 13 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
 14 953 F.2d 1560, 1569 (11th Cir. 1992).

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

19 A district court's power to supervise an equity
 20 receivership and to determine the appropriate action to be
 21 taken in the administration of the receivership is
 22 extremely broad. The district court has broad powers and
 23 wide discretion to determine the appropriate relief in an
 24 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.

25 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
 26 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
 27 and 'we generally uphold reasonable procedures instituted by the district court that
 28 serve th[e] purpose' of orderly and efficient administration of the receivership for the

1 benefit of creditors."). Accordingly, the Court has broad discretion in the
2 administration of the receivership estate and the disposition of receivership assets.

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

4 It is widely accepted that a court of equity having custody and control of
5 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
6 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
7 and wide discretion to determine relief in an equity receivership). "The power of sale
8 necessarily follows the power to take possession and control of and to preserve
9 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
10 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
11 *2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers* § 482 (3d ed. 1992)
12 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))). "When a court of equity
13 orders property in its custody to be sold, the court itself as vendor confirms the title
14 in the purchaser." *2 Ralph Ewing Clark, Treatise on Law & Practice of*
15 *Receivers* § 487 (3d ed. 1992).

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

24 Generally, when a court-appointed receiver is involved, the receiver, as agent
25 for the court, should conduct the sale of the receivership property. *Blakely Airport*
26 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
27 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
28 injunction against the owner and against parties to the suit. *See 2 Ralph Ewing*

1 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
2 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
3 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
4 354, 357 (9th Cir. 1925).

5 **B. 28 U.S.C. § 2001**

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

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

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

If such realty is situated in more than one county, state,
district or circuit, such notice shall be published in one or

1 more of the counties, states, or districts wherein it is
2 situated, as the court directs. The notice shall be
3 substantially in such form and contain such description of
4 the property by reference or otherwise as the court
5 approves. The court may direct that the publication be
6 made in other newspapers.

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

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

18 **IV. DISCUSSION**

19 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
20 in the best interests of the receivership estate. The Property was broadly advertised
21 and marketed to prospective purchasers by Broker, five offers were received, the
22 highest and best selected, and the Agreement signed. The purchase price therefore
23 reflects the market value for the Property and is more than \$200,000 greater than the
24 purchase price from when it was acquired in 2015. Freitag Decl., ¶ 9.

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

30 In the action pending in U.S. District Court for the
31 Southern District of California, Case No. 19-CV-01628-
32 LAB-AHG, Securities and Exchange Commission v.
33 Gina Champion-Cain, et al., notice is hereby given that

1 the court-appointed receiver will conduct a public auction
2 for the real property located at 3833 Mission Blvd., San
3 Diego, California 92109 in San Diego County,
4 California. Sale is subject to Court confirmation after the
5 auction is held. Minimum bid price is at least \$850,000.
6 The auction will take place on April 9, 2020, at 1:30 p.m.
7 in front of the entrance to the United States Courthouse,
8 221 W. Broadway, San Diego, California. To be allowed
9 to participate in the auction, prospective purchasers must
10 meet certain bid qualification requirements, including
11 submitting a signed purchase and sale agreement, an
12 earnest money deposit of \$27,500, and proof of funds.
13 All bidders must be qualified by 5:00 p.m. PT on April 7,
14 2020, by submitting the required materials to the receiver
15 at 501 West Broadway, Suite 290, San Diego, California,
16 92101. If interested in qualifying as a bidder, please
17 contact Geno Rodriguez at (619) 567-7223 or
18 grodriguez@ethreadvisors.com.

19 In order to conduct an orderly auction and provide sufficient time for the
20 publication of notices discussed above, the Receiver will require bidders to complete
21 the above steps by April 7, 2020 ("Bid Qualification Deadline") and conduct the live
22 public auction on April 9, 2020.

23 The Receiver, through Broker, will inform all interested persons of the
24 opportunity to overbid at the public auction, provided they qualify themselves to bid
25 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for
26 the properties on the same terms and conditions as Buyer, but with a purchase price
27 of at least \$850,000, (b) providing the Receiver with an earnest money deposit of
28 \$27,500, and (c) providing proof of funds necessary to close the sale transaction in
the form of a current bank statement, cashier's check delivered to the Receiver, or
other evidence deemed sufficient by the Receiver.

In the event one or more prospective purchasers qualify themselves to bid, the
auction will be conducted by the Receiver as noted above and bids will be allowed in
increments of at least \$5,000. The Receiver will then file a notice advising the Court
of the result of the auction (*i.e.*, the highest bid) and seek entry of an order

1 confirming the sale.¹ Earnest money deposits provided by bidders who are
2 unsuccessful will be promptly returned to them. In the event no prospective
3 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
4 will notify the Court and seek entry of an order approving the sale to Buyer.

5 With respect to Broker's commission, Broker has broadly marketed and
6 advertised the Property for sale and diligently responded to inquiries from interested
7 parties. The listing agreement is consistent with the lower range of industry
8 standards for commissions paid to brokers for sales of commercial properties.
9 Accordingly, the Receiver requests authorization to pay Broker the commission
10 amount in accordance with the listing agreement. Freitag Decl., ¶ 10.

11 **V. CONCLUSION**

12 For the reasons discussed above, the Receiver requests (a) approval of the sale
13 of the Property to Buyer (or his/her/its designee) pursuant to the Agreement attached
14 to the Freitag Declaration as Exhibit A, and (b) authority to take all steps necessary
15 to close the sale, with the net sale proceeds after all third-party payments are made
16 from escrow going to the receivership estate.

17
18 Dated: March 12, 2020

ALLEN MATKINS LECK GAMBLE
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19 By: s/Edward G. Fates

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24
25
26
27 ¹ In the event that multiple qualified overbids are received and participate in the
28 auction, the Receiver will seek Court approval of the highest bid and the back-up
bid, such that if the highest bidder fails to the close the sale for any reason, the
Receiver can proceed to close the sale with the back-up bidder without delay.