

1 DAVID R. ZARO (BAR NO. 124334)  
NORMAN M. ASPIS (BAR NO. 313466)  
2 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
3 865 South Figueroa Street, Suite 2800  
Los Angeles, California 90017-2543  
4 Phone: (213) 622-5555  
Fax: (213) 620-8816  
5 E-Mail: dzaro@allenmatkins.com  
naspis@allenmatkins.com

6 EDWARD G. FATES (BAR NO. 227809)  
7 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
8 One America Plaza  
600 West Broadway, 27th Floor  
9 San Diego, California 92101-0903  
Phone: (619) 233-1155  
10 Fax: (619) 233-1158  
E-Mail: tfates@allenmatkins.com

11 Attorneys for Receiver  
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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
RECEIVER'S MOTION FOR  
APPROVAL OF SALE OF  
PERSONAL PROPERTY AND  
ASSIGNMENT OF COMMERCIAL  
LEASE ASSOCIATED WITH BAO  
BEACH RESTAURANT**

Date: April 27, 2020  
Time: 2:00 p.m.  
Courtroom: 3B  
Mag. Judge: Hon. Allison H. Goddard

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

I. BACKGROUND FACTS .....5

II. PROPOSED SALE.....7

III. LEGAL STANDARD .....7

    A. The Court's Authority to Approve Sale .....8

    B. 28 U.S.C. § 2001 .....9

IV. DISCUSSION.....11

V. CONCLUSION .....12

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

1

2

3

4 *Beet Growers Sugar Co. v. Columbia Trust Co.*

5 3 F.2d 755 (9th Cir. 1925)..... 9

6 *Blakely Airport Joint Venture II v. Federal Sav. and Loan Ins. Corp.*

7 678 F. Supp. 154 (N.D. Tex. 1988)..... 9

8 *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance Corp.*

9 172 F.2d 416 (10th Cir. 1949)..... 10

10 *CFTC. v. Topworth Int'l, Ltd.*

11 205 F.3d 1107 (9th Cir. 1999)..... 8

12 *First Nat'l Bank v. Shedd*

13 121 U.S. 74 (1887) ..... 8

14 *Gockstetter v. Williams*

15 9 F.2d 354 (9th Cir. 1925)..... 9

16 *Miners' Bank of Wilkes-Barre v. Acker*

17 66 F.2d 850 (2d Cir. 1933)..... 9

18 *Regions Bank v. Egyptian Concrete Co.*

19 2009 U.S. Dist. LEXIS 111381, at \*8 (E.D. Mo. 2009) ..... 11

20 *SEC v. American Capital Invest., Inc.*

21 98 F.3d 1133 (9th Cir. 1996)..... 8

22 *SEC v. Capital Consultants, LLC*

23 397 F.3d 733 (9th Cir. 2005)..... 8

24 *SEC v. Capital Cove Bancorp LLC*

25 2015 U.S. Dist. LEXIS 174856, at \*13 (C.D. Cal. 2015)..... 10

26 *SEC v. Elliot*

27 953 F.2d 1560 (11th Cir. 1992)..... 7, 8

28 *SEC v. Goldfarb*

2013 U.S. Dist. LEXIS 118942, at \*5 (N.D. Cal. 2013)..... 9

*SEC v. Hardy*

803 F.2d 1034 (9th Cir 1986)..... 7

*SEC v. Kirkland*

2007 U.S. Dist. LEXIS 45353, at \*5 (M.D. Fla. 2007) ..... 10

*SEC v. Wencke*

622 F.2d 1363 (9th Cir. 1980)..... 7

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Statutes**

28 U.S.C. § 2001..... 9  
 28 U.S.C. § 2001(a)..... 9, 10, 11  
 28 U.S.C. § 2001(b)..... 9  
 28 U.S.C. § 2002..... 10

**Treatises**

2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 342  
 (3d ed. 1992)..... 9  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 344  
 (3d ed. 1992)..... 9  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482  
 (3d ed. 1992)..... 8  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers  
 § 482(a) (3d ed. 1992). ..... 9  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 487  
 (3d ed. 1992)..... 9  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 489  
 (3d ed. 1992)..... 9  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 491  
 (3d ed. 1992)..... 9  
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 500  
 (3d ed. 1992)..... 9

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 Personal Property and Assignment of  
6 Commercial Lease Associated with Bao Beach Restaurant ("Motion").

### 7 **I. BACKGROUND FACTS**

8 The assets that are part of the receivership estate include the assets associated  
9 with the restaurant known as Bao Beach, which operated at the leased premises  
10 located at 3735 Mission Blvd., San Diego, California. The assets include personal  
11 property (furniture, fixtures, and equipment), contracts, intellectual property, and a  
12 leasehold interest in the restaurant premises ("Assets"). Freitag Decl., ¶ 2.

13 After reviewing the financials available to the Receiver at appointment, it was  
14 determined the Bao Beach restaurant should be closed and the Assets prepared for  
15 sale in the short-term, along with other restaurant properties included in the  
16 receivership estate. Although the Receiver has authority to sell personal property  
17 assets through licensed auctioneers, after consultation with multiple brokers, it was  
18 determined that the net recovery from the Assets associated with the Bao Beach  
19 restaurant would likely be greater if the Assets were sold as a package, including an  
20 assignment of the lease for the restaurant premises to the buyer. Freitag Decl., ¶ 3.

21 For all of the restaurant-related properties included in the receivership estate,  
22 the Receiver and her staff interviewed three licensed brokers with experience selling  
23 restaurants in San Diego. After considering their experience and qualifications, the  
24 Receiver decided to use two brokers – Colliers International for stand-alone concept  
25 restaurant-related properties owned (a leased parking lot was also included in this  
26 grouping) by the Receivership Entities and Next Wave ("Broker") for the Surf Rider  
27 Pizza and Bao Beach restaurant concepts operated at leased and owned property  
28 locations. Freitag Decl., ¶ 4.

1 Broker created individual marketing flyers with professional photos for each  
2 restaurant listing. The restaurant listings were sent out via email campaigns to a  
3 targeted list of over 6,200 restaurant operators, restaurant buyers, brokers, and  
4 investors. Online advertising was placed on key websites that included CoStar,  
5 LoopNet, BizBuySell, and Next Wave Commercial, which produced over 150,000 ad  
6 views. Press releases were distributed to the predominant news publications that  
7 included The San Diego Union Tribune, San Diego Business Journal, Eater San  
8 Diego, among others. Broker's efforts produced 43 signed confidentiality  
9 agreements and a total of nine (9) offers for the properties and restaurant assets  
10 marketed. Freitag Decl., ¶ 5.

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

23 One executed Form PSA was received for the Assets from Oswaldo Rodriguez  
24 and Consulelo Rodriguez ("Buyer") in the amount of \$28,000. The Receiver,  
25 through counsel, finalized a Form PSA with Buyer and then countersigned Buyer's  
26 PSA. Freitag Decl., ¶ 7.

27 Because Buyer has its own broker, Broker's commission pursuant to the listing  
28 agreement is 10% of the sale price, or \$2,800, which amount will be split with

1 Buyer's broker. The of sale, including escrow, title and recording fees are anticipated  
2 to be approximately \$2,000. While exact amounts will be determined at closing,  
3 after all of the aforementioned amounts are paid out of escrow, the net sale proceeds  
4 for the receivership estate are estimated to be in the range of approximately \$23,000.  
5 Freitag Decl., ¶ 8.

## 6 **II. PROPOSED SALE**

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

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

12 **Purchase Price.** The purchase price is \$28,000, which will be paid in cash.

13 **Deposit.** Buyer has deposited \$1,000 into escrow.

14 **Closing Date.** Closing of the sale of the real property shall occur within five  
15 business days of the date upon which both the Court order approving the sale has  
16 been entered.

## 17 **III. LEGAL STANDARD**

18 "The power of a district court to impose a receivership or grant other forms of  
19 ancillary relief does not in the first instance depend on a statutory grant of power  
20 from the securities laws. Rather, the authority derives from the inherent power of a  
21 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369  
22 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly  
23 and efficient administration of the estate by the district court for the benefit of  
24 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment  
25 of a receiver is authorized by the broad equitable powers of the court, any  
26 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,  
27 953 F.2d 1560, 1569 (11th Cir. 1992).

28

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

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

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

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

18 It is widely accepted that a court of equity having custody and control of  
19 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*  
20 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers  
21 and wide discretion to determine relief in an equity receivership). "The power of sale  
22 necessarily follows the power to take possession and control of and to preserve  
23 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.  
24 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*  
25 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)  
26 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))). "When a court of equity  
27 orders property in its custody to be sold, the court itself as vendor confirms the title  
28



1 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of  
2 Receivers § 487 (3d ed. 1992).

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

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

20 **B. 28 U.S.C. § 2001**

21 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real  
22 property under subsection (a) and specific requirements for private sales of real  
23 property under subsection (b). Although both involve significant cost and delay, the  
24 cost and delay of a public sale are significantly less than those for a private sale.  
25 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at \*5 (N.D. Cal. 2013)  
26 ("Section 2001 sets out two possible courses of action: (1) property may be sold in  
27 public sale; or (2) property may be sold in a private sale, provided that three separate  
28 appraisals have been conducted, the terms are published in a circulated newspaper

1 ten days prior to sale, and the sale price is no less than two-thirds of the valued  
2 price."). Therefore, by proceeding under Section 2001(a), the receivership estate can  
3 avoid the significant costs and delay of (a) the Court having to appoint three  
4 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

11 A public sale of realty or interest therein under any order,  
12 judgment or decree of any court of the United States shall  
13 not be made without notice published once a week for at  
14 least four weeks prior to the sale in at least one  
15 newspaper regularly issued and of general circulation in  
16 the county, state, or judicial district of the United States  
17 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  
23 the property by reference or otherwise as the court  
24 approves. The court may direct that the publication be  
25 made in other newspapers.

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

29 The notice of sale is sufficient if it describes the property and the time, place,  
30 and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*  
31 *Corp.*, 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to  
32 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and  
33 binding offer to purchase the [property]; and (ii) demonstrate . . ., to the satisfaction  
34 of the Receiver, that it has the current ability to consummate the purchase of the

1 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*, 2009 U.S.  
2 Dist. LEXIS 111381, at \*8 (E.D. Mo. 2009).

3 **IV. DISCUSSION**

4 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is  
5 in the best interests of the receivership estate. The Assets were broadly advertised  
6 and marketed to prospective purchasers by Broker, an offer was received, and the  
7 Agreement signed. The purchase price therefore reflects the market value for the  
8 Assets. Freitag Decl., ¶ 9.

9 Moreover, although a public sale of personal property assets is not statutorily  
10 required, the proposed sale is subject to overbid to further ensure the highest and best  
11 price is obtained. The Receiver proposes to conduct a public auction consistent with  
12 the requirements of Section 2001(a). Specifically, the Receiver will publish the  
13 following notice of the sale once a week for four weeks in the San Diego Union-  
14 Tribune, a newspaper of general circulation in the San Diego area:

15 In the action pending in U.S. District Court for the  
16 Southern District of California, Case No. 19-CV-01628-  
17 LAB-AHG, Securities and Exchange Commission v.  
18 Gina Champion-Cain, et al., notice is hereby given that  
19 the court-appointed receiver will conduct a public auction  
20 for the Bao Beach restaurant business and personal  
21 property located at 3735 Mission Blvd., San Diego,  
22 California 92109 in San Diego County, California. Sale  
23 is subject to Court confirmation after the auction is held.  
24 Minimum bid price is at least \$30,500. The auction will  
25 take place on April 23, 2020, at 1:30 p.m. in front of the  
26 entrance to the United States Courthouse,  
27 221 W. Broadway, San Diego, California. To be allowed  
28 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 \$1,000, and proof of funds. All  
bidders must be qualified by 5:00 p.m. PT on April 21,  
2020, by submitting the required materials to the receiver  
at 501 West Broadway, Suite 290, 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 April 21, 2020 ("Bid Qualification Deadline") and conduct the  
4 live public auction on April 23, 2020.

5 The Receiver, through Broker, will inform all interested persons of the  
6 opportunity to overbid at the public auction, provided they qualify themselves to bid  
7 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for  
8 the properties on the same terms and conditions as Buyer, but with a purchase price  
9 of at least \$30,500, (b) providing the Receiver with an earnest money deposit of  
10 \$1,000, and (c) providing proof of funds necessary to close the sale transaction in the  
11 form of a current bank statement, cashier's check delivered to the Receiver, or other  
12 evidence 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 \$1,000. 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.<sup>1</sup> 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 V. CONCLUSION

22 For the reasons discussed above, the Receiver requests (a) approval of the sale  
23 of the Assets to Buyer (or their designee) pursuant to the Agreement attached to the  
24 Freitag Declaration as Exhibit A, and (b) authority to take all steps necessary to close  
25  
26

---

27 <sup>1</sup> 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 close the sale for any reason, the  
Receiver can proceed to close the sale with the back-up bidder without delay.

1 the sale, with the net sale proceeds after all third-party payments are made from  
2 escrow going to the receivership estate.

3  
4 Dated: March 27, 2020

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

5 By:           s/Edward G. Fates          

6 DAVID R. ZARO  
7 EDWARD G. FATES  
8 NORMAN M. ASPIS  
9 Attorneys for Receiver  
10 KRISTA FREITAG  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28