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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 CROWN
POINT PROPERTY**

Date: June 24, 2020
Time: 2:00 p.m.
Courtroom: TBD
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 Crown Point Property ("Motion").

6 **I. BACKGROUND FACTS**

7 One of the assets included in the receivership estate is a 0.027 acres property
8 with a building of approximately 1,029 square feet of space (with personal property
9 contents) located in the Crown Point neighborhood of Pacific Beach at 3445-3453
10 Ingraham Street, San Diego, California ("Crown Point Property"). The Crown Point
11 Property was purchased in May 2016 for \$525,000 and title was taken in the name of
12 one of the affiliated Receivership Entities, 3445 Ingraham Street, LLC. The
13 Receivership Entities operated a Surf Rider Pizza location at the Crown Point
14 Property (take-out and delivery only). Freitag Decl., ¶ 2.

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

21 For all the restaurant-related properties included in the receivership estate, the
22 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 ultimately, a total of 11 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. Two offers were received.
23 Freitag Decl., ¶ 6.

24 Subsequently, due to the COVID-19 global pandemic, on March 19, 2020,
25 while the Receiver was finalizing an offer received for the Crown Point Property,
26 California Governor Gavin Newsom issued a "Safer-At-Home" Order ("SAH
27 Order"). Among other things, the SAH Order directed the closure of dine-in
28 operations at all restaurants within the state. The prospective buyers who previously

1 expressed interest in the property and were in the process of negotiating the final
2 points of the Form PSA withdrew their offer. The other offer initially received also
3 withdrew same. Accordingly, the Receiver, at the suggestion of her Brokers,
4 continued to list the property without a specific deadline to submit an offer. Freitag
5 Decl., ¶ 7.

6 After marketing the Crown Point Property during the new economic
7 environment under the SAH Order, an offer was received from Greg R. Velasquez
8 and Cynthia L. Velasquez, as Trustees of the C & G Velasquez Family Trust, Under
9 Declaration of Trust dated October 19, 2005 ("Buyer") in the amount of \$525,000.
10 This offer is better than the previous highest and best offer which was proceeding to
11 contract prior to the issuance of the SAH Order, and is only for the real property
12 associated with the Crown Point Property. Buyer has indicated that they intend to
13 convert the Crown Point Property into office space and has requested that the
14 Receiver remove the furniture, fixtures and equipment from the property prior to
15 closing. Assuming there are no overbidders who intend to operate the Crown Point
16 Property as a restaurant, the Receiver intends to conduct an in-place auction of the
17 personal property at the Crown Point Property and will complete such auction prior
18 to closing. Under these conditions, the Receiver finalized a Form PSA with Buyer
19 and then countersigned Buyer's PSA. Freitag Decl., ¶ 8.

20 The Crown Point Property is encumbered by a deed of trust securing a loan
21 issued by the prior owner of the property, the Renken Shaw Family Trust. Assuming
22 a June 2020 sale, the Receiver anticipates the amount needed to pay off the loan will
23 be approximately \$272,000. Depending on when the sale closes, a small property tax
24 credit may be received at closing (the second installment of property taxes for 2019-
25 2020 has been paid, so the receivership estate will actually receive a credit at closing
26 for the pro-rated portion of the taxes paid for the period from the date of closing
27 through June 30, 2020). In the event the sale closes after June 30, 2020, a small
28 amount of property taxes will be owed. Because Broker also represents Buyer,

1 Broker's commission pursuant to the listing agreement is 2.5% of the sale price, or
2 \$13,125. The costs of sale, including escrow, title and recording fees are estimated
3 to be approximately \$2,500. While exact amounts will be determined at closing,
4 after all the aforementioned amounts are paid out of escrow, the net sale proceeds
5 (from the sale of the real property) for the receivership estate are estimated to be in
6 the range of approximately \$230,000 to \$240,000. Freitag Decl., ¶ 9.

7 **II. PROPOSED SALE**

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

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

13 **Purchase Price.** The purchase price for the real property is \$525,000, which
14 will be paid in cash.

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

16 **Closing Date.** Closing shall occur within five business days of entry of the
17 Court order approving the sale.

18 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
19 a commission of 2.5% of the gross sales price. In the proposed sale, the total
20 commission would be \$13,125.

21 **III. LEGAL STANDARD**

22 "The power of a district court to impose a receivership or grant other forms of
23 ancillary relief does not in the first instance depend on a statutory grant of power
24 from the securities laws. Rather, the authority derives from the inherent power of a
25 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
26 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
27 and efficient administration of the estate by the district court for the benefit of
28 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment

1 of a receiver is authorized by the broad equitable powers of the court, any
 2 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
 3 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

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

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

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

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

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

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

22 **B. 28 U.S.C. § 2001**

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

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

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

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

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

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

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

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

4 **IV. DISCUSSION**

5 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
6 in the best interests of the receivership estate. The Crown Point Property was
7 broadly advertised and marketed to prospective purchasers by Broker, three offers
8 were received, the ultimate highest and best offer available selected, and the
9 Agreement signed. The purchase price therefore reflects the market value for the
10 Crown Point Property. Freitag Decl., ¶ 10.

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

16 In the action pending in U.S. District Court for the
17 Southern District of California, Case No. 19-CV-01628-
18 LAB-AHG, Securities and Exchange Commission v.
19 Gina Champion-Cain, et al., notice is hereby given that
20 the court-appointed receiver will conduct a public auction
21 for the real property located at 3445-3453 Ingraham
22 Street, San Diego, California 92109 in San Diego
23 County, California. Sale is subject to Court confirmation
24 after the auction is held. Minimum bid price is at least
25 \$535,000. The auction will take place on June 11, 2020,
26 at 1:30 p.m. in front of the entrance to the United States
27 Courthouse, 221 W. Broadway, San Diego, California.
28 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 \$27,500, and
proof of funds. All bidders must be qualified by
5:00 p.m. PT on June 8, 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 June 8, 2020 ("Bid Qualification Deadline") and conduct the live
4 public auction on June 11, 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 \$535,000, (b) providing the Receiver with an earnest money deposit of
10 \$27,500, and (c) providing proof of funds necessary to close the sale transaction in
11 the form of a current bank statement, cashier's check delivered to the Receiver, or
12 other 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 \$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.¹ 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 Crown Point Property to Buyer (or their designee) pursuant to the Agreement
24 attached to the Freitag Declaration as Exhibit A, and (b) authority to take all steps
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 close the sale for any reason, the
Receiver can proceed to close the sale with the back-up bidder without delay.

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

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Dated: May 11, 2020

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