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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
19 v.
20 GINA CHAMPION-CAIN and ANI
DEVELOPMENT, LLC,
21 Defendants,
22 AMERICAN NATIONAL
INVESTMENTS, INC.,
23 Relief Defendant.
24
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27
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Case No. 3:19-cv-01628-LAB-AHG
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF
3415 MISSION BOULEVARD
PROPERTY FREE AND CLEAR OF
FEDERAL TAX LIEN**

Date: August 3, 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 the 3415 Mission Boulevard Property Free and
6 Clear of Federal Tax Lien ("Motion").

7 I. BACKGROUND FACTS

8 The real properties that are part of the receivership estate include the 0.049
9 acre improved property located at 3415 Mission Boulevard, San Diego, California
10 ("3415 Mission Blvd. Property" or "Property"). The improved Property is comprised
11 of 2,250 square feet with a ground floor commercial unit and three residential units
12 above it. The Receivership Entities purchased the Property in January 2015 for
13 \$1,375,000 and title was taken in the name of The Gina Champion-Cain Revocable
14 Trust. The Receivership Entities used the ground floor retail unit for one of the two
15 Patio Express concepts (which operation was closed in the early stages of the
16 receivership). Since her appointment, the Receiver has been able to complete market
17 rate leases for the three residential units, but based on recommendations from various
18 brokers, did not spend the resources necessary to lease-up the ground floor retail
19 space. Freitag Decl., ¶ 2.

20 Upon her appointment, the Receiver and her staff performed an analysis of the
21 value of the Property. The Receiver also consulted with and interviewed licensed
22 brokers with expertise in selling mixed-use, multi-family properties in San Diego.
23 Ultimately, based on a combination of its experience and competitive listing
24 commission, the Receiver selected Marcus & Millichap ("Broker"). Starting in
25 March 2020, Broker listed the Property for sale on the Multiple Listing Service
26 (MLS), LinkedIn flyers, and Marcus & Millichap's proprietary MNET system.
27 Broker also sent periodic emails to over 1,900 agents and held approximately 20 in-
28 person showings. The list price was \$1,875,000. A total of seven offers were

1 received; three that were negotiated via purchase and sale agreement and four others
2 that were verbal/non-competitive. Freitag Decl., ¶ 3.

3 After terms were negotiated with the prospective buyers, the highest and best
4 offer was \$1,550,000 from Thomas Milton Funke, as trustee of the Thomas Milton
5 Funke Trust ("Buyer"). A Purchase and Sale Agreement and Joint Escrow
6 Instructions was signed, and the 3415 Mission Blvd. Property went into escrow in
7 June 2020. Freitag Decl., ¶ 4.

8 The 3415 Mission Blvd. Property is encumbered by a deed of trust in favor of
9 Pacific Premiere Bank. Assuming an August 2020 sale closing, the amount required
10 to pay off the loan is estimated to be \$1.2 million¹ and the property taxes that will be
11 owed at closing are estimated to be in the range of \$1,500 to \$3,000. Broker's
12 commission pursuant to the listing agreement is 3% of the purchase price, or
13 \$46,500. The costs of sale, including escrow, title and recording fees are anticipated
14 to be approximately \$7,750. While exact amounts will be determined at closing,
15 after all of the aforementioned amounts are paid out of escrow, the net sale proceeds
16 for the receivership estate (without factoring in the purported tax lien discussed
17 below) are estimated to be in the range of approximately \$275,000 to \$285,000.
18 Freitag Decl., ¶ 5.

19 After the initial preliminary title report for the 3415 Mission Blvd. Property
20 was received, the Receiver learned that a Federal lien for taxes assessed to
21 Receivership Entity Fireside by the Patio, LP ("Fireside") appeared on title even
22 though the property is owned by The Gina Champion-Cain Revocable Trust and has
23 no direct connection to Fireside. The Notice of Federal Tax Lien, a copy of which is
24 attached as Exhibit B to the Freitag Declaration ("Federal Tax Lien"), asserts that
25 \$50,420.44 is owed in income taxes by Fireside. The Receiver has not had enough
26 time to determine if any taxes are owed by Fireside, has reason to question the
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¹ This amount will be reviewed and verified prior to the close of escrow.

1 amounts due by Fireside based on her initial review of the limited information
2 available, and is not aware of any basis for a lien to attach to the 3415 Mission Blvd.
3 Property for income taxes owed by Fireside. Nevertheless, the Receiver has reason
4 to believe that the title company will not insure title to the 3415 Mission Blvd.
5 Property without an order removing the Federal Tax Lien from title. Freitag Decl.,
6 ¶ 6.

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 is \$1,550,000, which will be paid in all
14 cash.

15 **Deposit.** Buyer has deposited \$45,000 into escrow.

16 **Closing Date.** Closing shall occur upon entry of the Court order approving
17 the sale.

18 **III. LEGAL STANDARD**

19 "The power of a district court to impose a receivership or grant other forms of
20 ancillary relief does not in the first instance depend on a statutory grant of power
21 from the securities laws. Rather, the authority derives from the inherent power of a
22 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
23 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
24 and efficient administration of the estate by the district court for the benefit of
25 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
26 of a receiver is authorized by the broad equitable powers of the court, any
27 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
28 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

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

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

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

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

18 **B. 28 U.S.C. § 2001**

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

1 avoid the significant costs and delay of (a) the Court having to appoint three
2 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

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

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

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

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

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IV. DISCUSSION

The Receiver believes the proposed sale to Buyer pursuant to the Agreement is in the best interests of the receivership estate. The 3415 Mission Blvd. Property was listed on the MLS with a licensed broker and shown to interested parties. The marketing efforts yielded significant follow up interest, and subsequently, an offer was received, terms negotiated, and the Agreement signed. The purchase price therefore reflects the market value for the property. Freitag Decl., ¶ 7.

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

In the action pending in U.S. District Court for the Southern District of California, Case No. 19-CV-01628-LAB-AHG, Securities and Exchange Commission v. Gina Champion-Cain, et al., notice is hereby given that the court-appointed receiver will conduct a public auction for the real property located at 3415 Mission Boulevard in San Diego County, California. Sale is subject to Court confirmation after the auction is held. Minimum bid price is at least \$1,600,000. The auction will take place on July 24, 2020, at 1:30 p.m. in front of the entrance to the United States Courthouse, 221 W. Broadway, San Diego, California or as the court otherwise directs. 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 \$49,500, and proof of funds. All bidders must be qualified by 5:00 p.m. PT on July 21, 2020, by submitting the required materials to the receiver at 501 West Broadway, Suite, 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.

In order to conduct an orderly auction and provide sufficient time for the publication of notices discussed above, the Receiver will require bidders to complete the above steps by July 21, 2020 ("Bid Qualification Deadline") and conduct the live public auction on July 24, 2020.

1 The Receiver will inform all interested persons of the opportunity to overbid at
2 the public auction, provided they qualify themselves to bid by the Bid Qualification
3 Deadline by (a) signing a purchase and sale agreement for the properties on the same
4 terms and conditions as Buyer, but with a purchase price of at least \$1,600,000,
5 (b) providing the Receiver with an earnest money deposit of \$49,500, and
6 (c) providing proof of funds necessary to close the sale transaction in the form of a
7 current bank statement, cashier's check delivered to the Receiver, or other evidence
8 deemed sufficient by the Receiver.

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

17 With respect to the Federal Tax Lien, the Receiver asks that the Court approve
18 the sale free and clear of the lien and order that the lien shall attach to the net sale
19 proceeds in the same validity and priority as it had with respect to the 3415 Mission
20 Blvd. Property. The taxes that are allegedly owed by Fireside – if, in fact, any taxes
21 are actually owed – have no direct connection to the 3415 Mission Blvd. Property, so
22 there appears to be no basis for the lien to attach to the property. Moreover, the
23 Internal Revenue Service ("IRS") is not prejudiced by the relief sought herein
24 because the lien will attach to the net sale proceeds, so if taxes are actually owed and
25 there is a basis for the lien to attach to the 3415 Mission Blvd. Property, the IRS is
26 adequately protected. Notice of this motion has been provided to the IRS.

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V. CONCLUSION

For the reasons discussed above, the Receiver requests (a) approval of the sale of the 3415 Mission Blvd. Property to Buyer (or its designee) pursuant to the Agreement attached to the Freitag Declaration as Exhibit A and free and clear of the Federal Tax Lien, and (b) authority to take all steps necessary to close the sale, with the net sale proceeds after all third-party payments are made from escrow going to the receivership estate.

Dated: June 24, 2020

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