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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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF THE SURF
RIDER LA MESA PROPERTY AND
ASSOCIATED PERSONAL
PROPERTY AND LIQUOR LICENSE**

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 Surf Rider La Mesa Property and Associated
6 Liquor License and Personal Property ("Motion").

7 **I. BACKGROUND FACTS**

8 One of the assets included in the receivership estate is a 6,272 square foot
9 building and operating restaurant located at 8381 La Mesa Boulevard, La Mesa,
10 California 91942 ("Property"). On January 12, 2016, the Receivership Entities paid
11 \$1,025,000 to purchase the Property, title to which was taken in the name of
12 affiliated entity La Mesa Ventures I, LLC. The Property was then improved to
13 become the restaurant commonly known as Surf Rider Pizza Co. – La Mesa, which
14 has been operating at the Property since November 2018. Freitag Decl., ¶ 2.

15 After reviewing the financials available to the Receiver at appointment, it was
16 determined that the restaurant could be operated at break-even or better, and the asset
17 as a whole (including real property, personal property and liquor license) would have
18 substantially greater value to the receivership estate if operations continued until a
19 sale occurred. Thus, the Receiver determined that the best course of action was to
20 continue operations at the restaurant, with guidance from Cohn Restaurant Group,
21 and to prepare the Property (including personal property and liquor license) for sale
22 in the short-term, along with other restaurant properties included in the receivership
23 estate. Freitag Decl., ¶ 3.

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

1 grouping) by the Receivership Entities and Next Wave ("Broker") for the Surf Rider
2 Pizza and Bao Beach restaurant concepts operated at leased and owned property
3 locations. Freitag Decl., ¶ 4.

4 Broker created individual marketing flyers with professional photos for each
5 restaurant listing. The restaurant listings were sent out via email campaigns to a
6 targeted list of over 6,200 restaurant operators, restaurant buyers, brokers, and
7 investors. Online advertising was placed on key websites that included CoStar,
8 LoopNet, BizBuySell, and Next Wave Commercial, which produced over 150,000 ad
9 views. Press releases were distributed to the predominant news publications that
10 included The San Diego Union Tribune, San Diego Business Journal, Eater San
11 Diego, among others. Broker's initial efforts produced 43 signed confidentiality
12 agreements and a total of 11 offers for the properties and restaurant assets marketed.
13 Freitag Decl., ¶ 5.

14 Broker used an online-based document hosting website to host the due
15 diligence materials for the properties, prepared an offering memorandum
16 summarizing various marketing points about the properties and detailing the Court
17 sale process, and provided a form of Purchase and Sale Agreement and Joint Escrow
18 Instructions ("Form PSA") prepared in advance by the Receiver, with assistance from
19 her counsel. The Form PSA has all contingencies removed and provides for the
20 overbid, public auction, and Court approval process. Prospective purchasers were
21 instructed to complete their due diligence and submit their executed Form PSA by
22 the Call for Offers deadline. Three offers were initially received, only one of which
23 (in the amount of \$2,900,000) was sufficient to produce a net recovery for the
24 receivership estate. Freitag Decl., ¶ 6.

25 As a result of the global COVID-19 pandemic, on March 19, 2020, a statewide
26 "safer-at-home" order (SAH Order) was issued by California Governor Gavin
27 Newsom. Previously, on March 16, 2019, the City of San Diego had implemented
28 similar orders; and consistent with such orders, the Receiver promptly ceased dining

1 room operations at the restaurant. As a result of the pandemic, although the
2 prospective buyer at \$2,900,000 had signed a Form PSA with the Receiver, said
3 prospective buyer did not submit its earnest money deposit into escrow and
4 subsequently withdrew its offer. The Receiver, at the suggestion of Broker,
5 continued to list the property without a specific deadline to submit an offer. Freitag
6 Decl., ¶ 7.

7 The Property is encumbered by a deed of trust securing a loan issued by
8 American National Insurance Company ("ANICO"). The amount necessary to pay
9 off the loan alone is estimated to be approximately \$2,300,000. The Receiver,
10 through her counsel, contacted counsel for ANICO regarding the possibility of a
11 short sale of the Property that would provide a small recovery for the receivership
12 estate. ANICO reportedly stated that it was unwilling to consider a short sale.
13 Freitag Decl., ¶ 8.

14 After various efforts by Broker to solicit new offers or revive one of the
15 previous offers, a new offer was received from Davles, LLC ("Buyer") in the amount
16 of \$2,300,000. Davles, LLC is an affiliate of the Cohn Restaurant Group. Because
17 of the inability to proceed with a short sale, the Receiver ultimately countered Buyer
18 to increase the offer to \$2,425,000 in order for there to be a modest net recovery for
19 the receivership estate. Without the possibility for a net recovery for the receivership
20 estate, the Receiver would not continue the sale process as ANICO was unwilling to
21 consider a short sale. Buyer ultimately agreed to increase its offer to \$2,425,000.
22 Through counsel, the Form PSA with Buyer was finalized. Freitag Decl., ¶ 9.

23 In this instance, there are two escrows because a separate escrow is required
24 for the transfer of the liquor license. The real property escrow will close first, within
25 five business days of the date upon which both the Court order approving the sale has
26 been entered and the date Buyer has obtained a temporary liquor license from the
27 California Department of Alcoholic Beverage Control ("ABC"). The liquor license
28 escrow will close second, once ABC approval of the transfer of the liquor license has

1 been obtained, which is estimated to take three to six months from Court approval.
2 Freitag Decl., ¶ 10.

3 Depending on when the sale closes (assuming an August 2020 closing), the
4 Receiver estimates that property taxes will be owed in the approximate amount of
5 \$5,000 to \$6,000. Broker's commission pursuant to the listing agreement is 2.5% of
6 the sale price, or \$60,625. The costs of sale, including escrow, title and recording
7 fees are anticipated to be approximately \$14,500. While exact amounts will be
8 determined at closing, after all of the aforementioned amounts are paid out of both
9 escrows, the net sale proceeds for the receivership estate are estimated to be in the
10 range of approximately \$55,000 to \$65,000, which is anticipated to be received after
11 the close of the liquor license escrow. Freitag Decl., ¶ 11.

12 II. PROPOSED SALE

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

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

18 **Purchase Price.** The purchase price is \$2,425,000, which will be paid in cash.

19 **Deposit.** Buyer has deposited \$100,000 into the real property escrow and
20 \$10,000 into the liquor license escrow.

21 **Closing Date.** Closing of the sale of the real property shall occur within five
22 business days of the date upon which both the Court order approving the sale has
23 been entered and the date Buyer has obtained a temporary liquor license from the
24 California Department of Alcoholic Beverage Control ("ABC"). Closing of the sale
25 of the personal property and liquor license shall occur upon receipt of approval of the
26 transfer of the liquor license from the ABC.

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1 **III. LEGAL STANDARD**

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

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

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

22 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
23 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
24 and 'we generally uphold reasonable procedures instituted by the district court that
25 serve th[e] purpose' of orderly and efficient administration of the receivership for the
26 benefit of creditors."). Accordingly, the Court has broad discretion in the
27 administration of the receivership estate and the disposition of receivership assets.

28

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

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

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

22 Generally, when a court-appointed receiver is involved, the receiver, as agent
23 for the court, should conduct the sale of the receivership property. *Blakely Airport*
24 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
25 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
26 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
27 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
28 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are

1 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
2 354, 357 (9th Cir. 1925).

3 **B. 28 U.S.C. § 2001**

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

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

22 A public sale of realty or interest therein under any order,
23 judgment or decree of any court of the United States shall
24 not be made without notice published once a week for at
25 least four weeks prior to the sale in at least one
26 newspaper regularly issued and of general circulation in
27 the county, state, or judicial district of the United States
28 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
more of the counties, states, or districts wherein it is
situated, as the court directs. The notice shall be
substantially in such form and contain such description of
the property by reference or otherwise as the court

1 approves. The court may direct that the publication be
2 made in other newspapers.

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

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

14 **IV. DISCUSSION**

15 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
16 in the best interests of the receivership estate. The assets were broadly advertised
17 and marketed to prospective purchasers by Broker, four offers were received (three
18 prior to the COVID-19 pandemic and one thereafter), the best and only remaining
19 offer (which is sufficient to produce a modest net recovery for the receivership
20 estate) was selected, and the Agreement signed. The purchase price therefore reflects
21 the current market value for the Property (considering the effects of the COVID-19
22 pandemic on restaurant properties). Freitag Decl., ¶ 12.

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

28 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

1 the court-appointed receiver will conduct a public auction
2 for the real and personal property located at 8381 La
3 Mesa Blvd., La Mesa, California 91942 in San Diego
4 County, California. Sale is subject to Court confirmation
5 after the auction is held. Minimum bid price is at least
6 \$2,500,000. The auction will take place on July 16,
7 2020, at 1:30 p.m. in front of the entrance to the United
8 States Courthouse, 221 W. Broadway, San Diego,
9 California or as otherwise directed by the court. To be
10 allowed to participate in the auction, prospective
11 purchasers must meet certain bid qualification
12 requirements, including submitting a signed purchase and
13 sale agreement, an earnest money deposit of \$110,000,
14 and proof of funds. All bidders must be qualified by
15 5:00 p.m. PT on July 13, 2020, by submitting the
16 required materials to the receiver at 501 West Broadway,
17 Suite 290, San Diego, California, 92101. If interested in
18 qualifying as a bidder, please contact Geno Rodriguez at
19 (619) 567-7223 or grodriguez@ethreadvisors.com.

20 In order to conduct an orderly auction and provide enough time for the
21 publication of notices discussed above, the Receiver will require bidders to complete
22 the above steps by July 13, 2020 ("Bid Qualification Deadline") and conduct the live
23 public auction on July 16, 2020.

24 The Receiver, through Broker, will inform all interested persons of the
25 opportunity to overbid at the public auction, provided they qualify themselves to bid
26 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for
27 the properties on the same terms and conditions as Buyer, but with a purchase price
28 of at least \$2,500,000, (b) providing the Receiver with an earnest money deposit of
\$121,000, 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 \$25,000. 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

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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 **V. CONCLUSION**

6 For the reasons discussed above, the Receiver requests (a) approval of the sale
7 of the Property (including real property, personal property and liquor license) to
8 Buyer (or its designee) pursuant to the Agreement attached to the Freitag Declaration
9 as Exhibit A, and (b) authority to take all steps necessary to close the sale, with the
10 net sale proceeds after all third-party payments are made from escrow going to the
11 receivership estate.

12
13 Dated: June 24, 2020

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

15 DAVID R. ZARO
16 EDWARD G. FATES
17 NORMAN M. ASPIS
Attorneys for Receiver
18 KRISTA FREITAG

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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.