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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
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
Ctrm: 14A
Judge Hon. Larry Alan Burns

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF 737
WINDEMERE COURT PROPERTY**

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 737 Windemere Court Property ("Motion").

6 **I. BACKGROUND FACTS**

7 The residential properties in the receivership estate include a single-family
8 residence located at 737 Windemere Court in the Mission Beach neighborhood of
9 San Diego ("Windemere Court Property"). The Windemere Court Property is
10 1,308 square feet with three bedrooms and three bathrooms. The Windemere Court
11 Property was purchased by ANI Commercial CA I LLC for \$625,000 on August 12,
12 2011, was transferred to Luv Surf LLC in December of 2012, was transferred to
13 Windemere Court LLC in December of 2013, underwent a significant remodel in
14 2017 and is used as a vacation rental property. Freitag Decl., ¶ 2.

15 Upon her appointment, the Receiver and her staff performed an analysis of the
16 value of the Windemere Court Property, including a review of automated valuation
17 scores for the property and a survey of the market comparable properties. The
18 Receiver also consulted with and interviewed licensed brokers with experience
19 selling residential properties in the Mission Beach area. Ultimately, based on a
20 combination of its experience and low listing commission, the Receiver selected
21 Pacific Pines Real Estate ("Broker") and the Windemere Court Property was listed
22 for sale on the Multiple Listing Service (MLS) on or about September 30, 2019. The
23 original list price was \$1,699,900. Freitag Decl., ¶ 3.

24 To market the Windemere Court Property, Broker listed the property on the
25 local MLS and its website, held multiple open houses and showed the property to all
26 interested parties. Due to the lack of offers for the property at the \$1,699,900 list
27 price, and the fact that a global pandemic has negatively affected the short-term
28 economic prospects for hospitality properties, the Receiver, in consultation with

1 Broker, decided to reduce the list price to a range from \$1,499,000 to \$1,599,000.
2 Additionally, in compliance with guidance from the California Association of
3 Realtors, 3D marketing and socially distant property tours were enforced. A total of
4 four offers were received. The Receiver negotiated terms with the prospective
5 buyers and the property went into escrow on or around June 3, 2020 with a purchase
6 price of \$1,515,000. The buyer is Brent Zambon ("Buyer"). Freitag Decl., ¶ 4.

7 Like the 1617 Thomas Avenue, 805 Brighton Court and 724 Zanzibar Court
8 properties previously sold by the Receiver with approval from the Court, the
9 Windemere Court Property is encumbered by a deed of trust in favor of Axos Bank.
10 With 1617 Thomas Avenue, 805 Brighton Court and 724 Zanzibar Court properties
11 now sold, the Axos Bank portfolio loan now covers four residential properties
12 included in the receivership estate. Assuming an August 2020 sale closing with the
13 August 2020 monthly payment having been made in the ordinary course, (a) the
14 release price for the Windemere Court Property is estimated to total \$1,207,220, (b)
15 the property taxes owed at closing are estimated to be in the range of \$1,500 to
16 \$2,500, (b) the estimated costs for title, escrow, and recording are \$6,000, and (d) the
17 commission to be paid to Broker is \$12,000.¹ Accordingly, the net sale proceeds to
18 be paid to the receivership estate after payment of the above amounts (but before
19 vacation rental deposits received before closing for rental dates post-closing are
20 credited to Buyer at closing) are estimated to be in the range of \$285,000 to
21 \$290,000. Freitag Decl., ¶ 5.

22 II. PROPOSED SALE

23 The key terms of the proposed Residential Purchase Agreement and Joint
24 Escrow Instructions, including Addendum thereto ("Agreement"), a copy of which is
25 attached to the Freitag Declaration as Exhibit A, are summarized as follows:
26

27 ¹ Buyer's broker has agreed to waive its share of the commission (which would
28 have been \$37,875), so the total commission will be only \$12,000. This provides
for a reported market sale price of \$1,552,875, which help will support sale prices
for other properties in the vacation rental portfolio.

1 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
2 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
3 and 'we generally uphold reasonable procedures instituted by the district court that
4 serve th[e] purpose' of orderly and efficient administration of the receivership for the
5 benefit of creditors."). Accordingly, the Court has broad discretion in the
6 administration of the receivership estate and the disposition of receivership assets.

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

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

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

28

1 Generally, when a court-appointed receiver is involved, the receiver, as agent
2 for the court, should conduct the sale of the receivership property. *Blakely Airport*
3 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
4 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
5 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
6 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
7 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
8 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
9 354, 357 (9th Cir. 1925).

10 **B. 28 U.S.C. § 2001**

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

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

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

8 If such realty is situated in more than one county, state,
9 district or circuit, such notice shall be published in one or
10 more of the counties, states, or districts wherein it is
11 situated, as the court directs. The notice shall be
12 substantially in such form and contain such description of
13 the property by reference or otherwise as the court
14 approves. The court may direct that the publication be
15 made in other newspapers.

16 This section shall not apply to sales and proceedings
17 under Title 11 or by receivers or conservators of banks
18 appointed by the Comptroller of the Currency.

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

27 **IV. DISCUSSION**

28 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
in the best interests of the receivership estate. The Windemere Court Property was
listed on the MLS with a licensed broker and shown to interested parties. The
property was properly marketed, four offers were received, highest and best terms
negotiated, and the Agreement signed. The purchase price is fair and reasonable and
reflects the market value of the property. Freitag Decl., ¶ 6.

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

1 consistent with the requirements of Section 2001(a). Specifically, the Receiver will
2 publish the following notice of the sale once a week for four weeks in the San Diego
3 Union-Tribune, a newspaper of general circulation in San Diego County:

4 In the action pending in U.S. District Court for the
5 Southern District of California, Case No. 19-CV-01628-
6 LAB-AHG, Securities and Exchange Commission v.
7 Gina Champion-Cain, et al., notice is hereby given that
8 the court-appointed receiver will conduct a public auction
9 for the real property located at 737 Windemere Court in
10 San Diego County, California. Sale is subject to Court
11 confirmation after the auction is held. Minimum bid
12 price is at least \$1,540,000. The auction will take place
13 on July 24, 2020, at 1:30 p.m. in front of the entrance to
14 the United States Courthouse, 221 W. Broadway, San
15 Diego, California or as otherwise determined by the
16 Court. To be allowed to participate in the auction,
17 prospective purchasers must meet certain bid
18 qualification requirements, including submitting a signed
19 purchase and sale agreement, an earnest money deposit
20 of \$50,000, and proof of funds. All bidders must be
21 qualified by 5:00 p.m. PT on July 21, 2020, by
22 submitting the required materials to the receiver at 501
23 West Broadway, Suite 290, San Diego, California,
24 92101. If interested in qualifying as a bidder, please
25 contact Geno Rodriguez at (619) 567-7223 or
26 grodriguez@ethreadvisors.com.

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

20 The Receiver will inform all interested persons of the opportunity to overbid at
21 the public auction, provided they qualify themselves to bid by the Bid Qualification
22 Deadline by (a) signing a purchase and sale agreement for the properties on the same
23 terms and conditions as Buyer, but with a purchase price of at least \$1,540,000²,
24 (b) providing the Receiver with an earnest money deposit of \$50,000, and
25

26 _____
27 ² To be comparable to Buyer's offer and the projected net sale proceeds to the
28 receivership estate, if an overbidder is represented by a broker, the overbidder
will have to compensate their broker outside of escrow, increase their offer by
\$37,875 (above the \$1,540,000 minimum overbid), or the broker will have to
forego its commission.

1 (c) providing proof of funds necessary to close the sale transaction in the form of a
2 current bank statement, cashier's check delivered to the Receiver, or other evidence
3 deemed sufficient by the Receiver.

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

12 **V. CONCLUSION**

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

18
19 Dated: June 30, 2020

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