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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
Ctm: 14A
Judge Hon. Larry Alan Burns

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF 809 SAN
RAFAEL PLACE 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 809 San Rafael Place Property ("Motion").

6 **I. BACKGROUND FACTS**

7 The residential properties in the receivership estate include a single-family
8 residence located at 809 San Rafael Place in the Mission Beach neighborhood of San
9 Diego ("809 San Rafael Property"). The 809 San Rafael Property is 1,503 square
10 feet with three bedrooms and three bathrooms. The 809 San Rafael Property was
11 purchased for \$1,430,000 on May 26, 2015. Attorney James Lance, a friend of
12 Defendant Gina Champion-Cain at the time, contributed \$200,000 of his personal
13 funds to the purchase price for the property and, after several changes, title was
14 ultimately taken jointly in the names of 809 San Rafael Place, LLC (an affiliated
15 Receivership Entity) and Con & Coop Beach Rentals, LLC (an entity owned by
16 Mr. Lance). The 809 San Rafael Property is used as a vacation rental property.
17 Freitag Decl., ¶ 2.

18 Upon her appointment, the Receiver and her staff performed an analysis of the
19 value of the 809 San Rafael Place Property, including a review of automated
20 valuation scores for the property and a survey of the market comparable properties.
21 The Receiver also consulted with and interviewed licensed brokers with experience
22 selling residential properties in the Mission Beach area. Ultimately, based on a
23 combination of its experience and low listing commission, the Receiver selected
24 Pacific Pines Real Estate ("Broker") and the 809 San Rafael Property was listed for
25 sale on the Multiple Listing Service (MLS) on or about January 5, 2020. The
26 original list price was \$1,699,000. Freitag Decl., ¶ 3.

27 To market the 809 San Rafael Property, Broker listed the property on the local
28 MLS and its website, held multiple open houses and showed the property to all

1 interested parties. Due to the lack of offers for the property at the \$1,699,900 list
2 price, and the fact that a global pandemic has negatively affected the short-term
3 economic prospects for hospitality properties, the Receiver, in consultation with
4 Broker, decided to reduce the list price to a range from \$1,499,000 to \$1,599,000.
5 Additionally, in compliance with guidance from the California Association of
6 Realtors, 3D marketing and socially distant property tours were enforced. A total of
7 two offers were received. The Receiver negotiated terms with the prospective buyers
8 and the property went into escrow on or around June 25, 2020 with a purchase price
9 of \$1,500,000. The buyer is Alan Peller, Shane McCool-Peller, Andrew Hannaman,
10 and Silvia Hannaman ("Buyer"). Furthermore, I am informed and believe that the
11 adjacent property, 807 San Rafael Place, has been listed for nearly the same amount
12 of time, is a model match for the 809 San Rafael Property, is currently listed for
13 \$1,545,000, is currently under contract and the broker for that property has informed
14 the Receiver's Broker that it is also expected to sell for \$1,500,000. Freitag Decl.,
15 ¶ 4.

16 Like the 1617 Thomas Avenue, 805 Brighton Court and 724 Zanzibar Court
17 properties previously sold by the Receiver with approval from the Court (as well as
18 the 737 Windemere Court Property, the proposed sale of which is pending Court
19 approval), the 809 San Rafael Property is encumbered by a deed of trust in favor of
20 Axos Bank. With 1617 Thomas Avenue, 805 Brighton Court and 724 Zanzibar
21 Court properties now sold, the Axos Bank portfolio loan now covers four residential
22 properties included in the receivership estate (including the 737 Windemere Court
23 Property). Assuming an August 2020 sale closing with the August 2020 monthly
24 payment having been made in the ordinary course, and assuming that the proposed
25 737 Windemere Court Property sale closes first, (a) the release price for the 809 San
26 Rafael Property is estimated to total \$315,000¹, (b) the property taxes owed at

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28 ¹ This estimate is not the actual release price for the property, but is the estimated

1 closing are estimated to be in the range of \$3,000 to \$3,500, (b) the estimated costs
2 for title, escrow, and recording are \$7,500, and (d) the commission to be paid to
3 Broker is \$49,500 (\$37,500 of which is to be paid to Buyer's broker). Accordingly,
4 the net sale proceeds to be paid to the receivership estate after payment of the above
5 amounts (but before rental deposits received for post-closing reservations are
6 credited to the buyer) are estimated to be in the range of \$1,115,000 to \$1,125,000.
7 Freitag Decl., ¶ 5.

8 Mr. Lance's claims to share in the net sale proceeds from the 809 San Rafael
9 Property are disputed by the Receiver. For one thing, the Receivership Entity's
10 accounting records show that the property operated at a net loss, but Mr. Lance never
11 contributed any funds necessary to cover operating expenses. An agreement has not
12 been reached regarding his share of liability for operating expenses or net losses
13 suffered. Around the same time as the purchase of the 809 San Rafael Property,
14 Mr. Lance advanced an additional \$237,000 of his personal funds to the Receivership
15 Entities, for which it appears he was later given a promissory note and an option to
16 acquire a 50% interest in 812 San Rafael Place, a neighboring vacation rental
17 property also owned by the Receivership Entities. This property is likewise listed for
18 between \$1,499,000 to \$1,599,000. After the Receiver's appointment, Mr. Lance
19 purported to exercise the option to acquire the 50% interest in 812 San Rafael Place.
20 Mr. Lance's interest in 812 San Rafael Place is also disputed by the Receiver.
21 However, the Receiver and Mr. Lance have agreed, subject to Court approval, that
22 809 San Rafael Place and 812 San Rafael Place may be sold in the near term and
23 \$635,000 in receivership funds will be held by the Receiver and not distributed until
24 such time as Mr. Lance's claims have been either settled (with Court approval of the
25 settlement) or resolved by the Court. Freitag Decl., ¶ 6.

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payoff amount for this portfolio loan after payment of the July and August
mortgage and net of escrowed funds held by lender.

1 **II. PROPOSED SALE**

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

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

7 **Purchase Price.** The purchase price is \$1,500,000, which will be financed.

8 **Deposit.** Buyer has deposited \$10,000 into escrow.

9 **Closing Date.** Closing shall occur upon entry of the Court order approving
10 the sale.

11 **III. LEGAL STANDARD**

12 "The power of a district court to impose a receivership or grant other forms of
13 ancillary relief does not in the first instance depend on a statutory grant of power
14 from the securities laws. Rather, the authority derives from the inherent power of a
15 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
16 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
17 and efficient administration of the estate by the district court for the benefit of
18 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
19 of a receiver is authorized by the broad equitable powers of the court, any
20 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
21 953 F.2d 1560, 1569 (11th Cir. 1992).

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

26 A district court's power to supervise an equity
27 receivership and to determine the appropriate action to
28 be taken in the administration of the receivership is
extremely broad. The district court has broad powers
and wide discretion to determine the appropriate relief in
an equity receivership. The basis for this broad

1 deference to the district court's supervisory role in equity
2 receiverships arises out of the fact that most
3 receiverships involve multiple parties and complex
4 transactions. A district court's decision concerning the
5 supervision of an equitable receivership is reviewed for
6 abuse of discretion.

7 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
8 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
9 and 'we generally uphold reasonable procedures instituted by the district court that
10 serve th[e] purpose' of orderly and efficient administration of the receivership for the
11 benefit of creditors."). Accordingly, the Court has broad discretion in the
12 administration of the receivership estate and the disposition of receivership assets.

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

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

26 "A court of equity, under proper circumstances, has the power to order a
27 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
28 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992). To that end, a
federal court is not limited or deprived of any of its equity powers by state statute.

1 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
2 (state statute allowing time to redeem property after a foreclosure sale not applicable
3 in a receivership sale).

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

13 **B. 28 U.S.C. § 2001**

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

26 The requirements of a public sale under Section 2001(a) are that notice of the
27 sale be published as proscribed by Section 2002 and a public auction be held at the
28 courthouse "as the court directs." 28 U.S.C. § 2001(a); *SEC v. Capital Cove*

1 *Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856, at *13 (C.D. Cal. 2015); *SEC v.*
2 *Kirkland*, 2007 U.S. Dist. LEXIS 45353, at *5 (M.D. Fla. 2007). In terms of
3 publication of notice, Section 2002 provides:

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

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

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

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

29 **IV. DISCUSSION**

30 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
31 in the best interests of the receivership estate. The 809 San Rafael Property was
32 listed on the MLS with a licensed broker and shown to interested parties. The
33 property was properly marketed, two offers were received, highest and best terms
34 negotiated, and the Agreement signed. The purchase price is fair and reasonable and

1 reflects the current market value of the property considering that the adjacent model
2 match property is expected to close for the same price. Freitag Decl., ¶ 7.

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

8 In the action pending in U.S. District Court for the
9 Southern District of California, Case No. 19-CV-01628-
10 LAB-AHG, Securities and Exchange Commission v.
11 Gina Champion-Cain, et al., notice is hereby given that
12 the court-appointed receiver will conduct a public auction
13 for the real property located at 809 San Rafael Place in
14 San Diego County, California. Sale is subject to Court
15 confirmation after the auction is held. Minimum bid
16 price is at least \$1,525,000. The auction will take place
17 on July 30, 2020, at 1:30 p.m. in front of the entrance to
18 the United States Courthouse, 221 W. Broadway, San
19 Diego, California or as otherwise determined by the
20 Court. To be allowed to participate in the auction,
21 prospective purchasers must meet certain bid
22 qualification requirements, including submitting a signed
23 purchase and sale agreement, an earnest money deposit
24 of \$10,000, and proof of funds. All bidders must be
25 qualified by 5:00 p.m. PT on July 27, 2020, by
26 submitting the required materials to the receiver at 501
27 West Broadway, Suite 290, San Diego, California,
28 92101. If interested in qualifying as a bidder, please
contact Geno Rodriguez at (619) 567-7223 or
grodriguez@ethreadvisors.com.

20 In order to conduct an orderly auction and provide sufficient time for the
21 publication of notices discussed above, the Receiver will require bidders to complete
22 the above steps by July 27, 2020 ("Bid Qualification Deadline") and conduct the live
23 public auction on July 30, 2020.

24 The Receiver will inform all interested persons of the opportunity to overbid at
25 the public auction, provided they qualify themselves to bid by the Bid Qualification
26 Deadline by (a) signing a purchase and sale agreement for the properties on the same
27 terms and conditions as Buyer, but with a purchase price of at least \$1,525,000,
28 (b) providing the Receiver with an earnest money deposit of \$10,000, and

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 \$1,000. 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 With respect to Mr. Lance's claims, as discussed above, the claims are
13 disputed, but the issues surrounding the claims have not yet been resolved and it is in
14 the best interests of the receivership estate to sell the 809 San Rafael Property.
15 Assuming the 737 Windemere Property closes first, this sale will payoff the portfolio
16 loan which provides for mortgage interest savings for the estate on a go forward
17 basis. Therefore, the Receiver requests approval of the proposal that \$635,000 in
18 receivership estate funds be held and not distributed until such time as Mr. Lance's
19 claims have been either settled (with Court approval of the settlement) or resolved by
20 the Court.

21 **V. CONCLUSION**

22 For the reasons discussed above, the Receiver requests (a) approval of the sale
23 of the 809 San Rafael Property to Buyer (or their designee) pursuant to the
24 Agreement attached to the Freitag Declaration as Exhibit A, (b) authority to take all
25 steps necessary to close the sale, with the net sale proceeds after all third-party
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1 payments are made from escrow going to the receivership estate, and (c) approval of
2 the proposal that \$635,000 in receivership estate funds be held and not distributed
3 until such time as Mr. Lance's claims have been either settled or resolved by the
4 Court.

5
6 Dated: July 9, 2020

ALLEN MATKINS LECK GAMBLE
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