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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 7565-7571
UNIVERSITY AVENUE PROPERTY**

Date: September 18, 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 7565-7571 University Avenue Property
6 ("Motion").

7 **I. BACKGROUND FACTS**

8 The real properties that are part of the receivership estate include a mixed-use
9 property located at 7569-7571/7565 University Avenue, La Mesa, California, APN
10 469-620-11 & 12 ("University Ave. Property"). The University Avenue Property
11 was purchased in June 2018 for \$1.3 million and title was taken in the name of
12 American National Investments, Inc. Freitag Decl., ¶ 2.

13 SFG Income Fund VI and Home Assistance Services, Inc. ("SFG") issued two
14 interest-only loans that are secured, respectively, by a first and second trust deed
15 encumbering the University Ave. Property (the "University Ave. Loans"). The
16 University Ave. Loans matured on January 1, 2020. Given the physical status of the
17 property and various other factors discussed below, the Receiver initially determined
18 that very little, if any, equity in the University Ave. Property would likely be realized
19 for the benefit of the receivership estate. Thus, the Receiver has not made any debt
20 service payments to SFG on these loans. The combined outstanding principal
21 balance on the interest-only University Ave. Loans is approximately \$910,000 and
22 SFG asserted that, as of April 1, 2020, American National Investments, Inc. owed in
23 excess of \$1,072,588.69. Freitag Decl., ¶ 3.

24 Prior to the receivership, Defendants hired a contractor to make certain
25 improvements to the University Ave. Property in anticipation of tearing down most
26 (and at one point in their plans, all) of the improvements located on the parcels to
27 build a 16-unit apartment complex. The work stopped shortly before the Receiver's
28 appointment and the contractor was not paid for a portion of its work. As a result,

1 the Receiver is aware of mechanic's liens on the University Ave. Property in the
2 approximate amount of \$16,580. Accordingly, after incorporating the property taxes
3 owing, the total amount potentially owing to the secured creditors is in excess of
4 \$1.1 million. Freitag Decl., ¶ 4.

5 As part of their construction plans, the Defendants had also hired contractors
6 to consolidate what had previously been two separate legal parcels into one parcel
7 through a Parcel Map Waiver ("PMW"). However, prior to the receivership,
8 reportedly, the cost to complete the Defendant's 16-unit apartment plans was
9 prohibitive and those plans were abandoned without a clear direction for the project.
10 As the improvements currently stand (a four-unit partially renovated apartment
11 complex and three small commercial units previously on one parcel and a single-
12 family residence located on the other parcel), the Receiver believes it could have
13 been easier to sell the legal parcels separately. The City of La Mesa, however, does
14 not have a PMW process to separate parcels once joined. Freitag Decl., ¶ 5.

15 Given the secured (interest-only) debt balances and maturity dates, the
16 property's unresolved construction plans, and the combination of the two parcels into
17 one, the Receiver initially determined that very little, if any, equity in the University
18 Ave. Property would likely be realized for the benefit of the receivership estate.
19 Given the creditor amounts owing (potentially over \$1.1 million), the Receiver also
20 determined that engaging a broker to market the University Ave. Property, and
21 potentially paying the broker a commission of at least 4% of the purchase price (i.e.,
22 \$40,000 on a hypothetical \$1 million transaction), would not be feasible.
23 Accordingly, the parties and SFG filed a Joint Motion for Order Granting Seattle
24 Funding Group Relief from Preliminary Injunction to Foreclose on Real Property
25 ("Joint Motion") to allow SFG to proceed with a non-judicial foreclosure (Dkt. 303),
26 which was granted on April 23, 2020 (Dkt. 314). It was understood, however, that
27 the Receiver would market the property while the foreclosure was pending and
28 would discuss any prospective sales with SFG. Freitag Decl., ¶ 6.

1 Accordingly, to market the University Ave. Property, the Receiver had a
2 member of her staff, Geno Rodriguez, who is a licensed broker, list the property on
3 the local MLS and show the property to interested parties. Mr. Rodriguez agreed to
4 do so without charging a broker's commission. In his efforts to market the property,
5 Mr. Rodriguez fielded various inquiries regarding the property, provided due
6 diligence information to five interested parties and made the property available for
7 tours by interested buyers. Through Mr. Rodriguez, the Receiver negotiated terms
8 with the prospective buyers, discussed the prospective sale with SFG, and the
9 property went into escrow on or around May 14, 2020 with an ultimate purchase
10 price of \$1,290,000 and a \$25,000 credit to the buyer to use as required towards
11 closing costs or a price reduction. The buyer is the David and Natalie Kurniadi Trust
12 ("Buyer"). Freitag Decl., ¶ 7.

13 As discussed above, work was ongoing just prior to the Receiver's
14 appointment and subsequently two liens appear to have been filed by contractors for
15 unpaid expenses in the total amount of \$16,580, one in the amount of \$4,080 and one
16 in the amount of \$12,500. The Receiver and the smaller lien holder have agreed that
17 the \$4,080 lien will be released in exchange for a payment of \$2,040. The larger lien
18 holder, Iconik Builders ("Iconik"), alleges it is owed in excess of \$100,000 by the
19 Receivership Entities for work done on the University Ave. Property, the ANI
20 headquarters building located at 3515 Hancock Street, and the former Patio on
21 Goldfinch restaurant property. The Receiver and Iconik have agreed that Iconik will
22 release all liens and claims against the receivership estate in exchange for the
23 payment of \$12,500 (*i.e.*, the full amount of its mechanic's lien claim on the
24 University Ave. Property). Freitag Decl., ¶ 8.

25 Depending on when the sale closes (assuming a September 2020 closing), the
26 Receiver estimates that the amount required to pay off the University Ave. Loans
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1 will be in the range of \$1,025,000 to \$1,035,000¹ and the property taxes paid at
2 closing will likely be in the range of approximately \$20,000 to \$22,000. A
3 commission of 2% of the sale price, or \$25,800, will be paid in its entirety to Buyer's
4 broker (no commission is owing to Mr. Rodriguez). The costs of sale, including
5 escrow, title and recording fees are estimated to be approximately \$6,450. Finally,
6 the Receiver agreed to provide Buyer a \$25,000 credit towards closing costs or to
7 lower the price as needed. While exact amounts will be determined at closing, after
8 all the aforementioned amounts are paid out of escrow, the net sale proceeds for the
9 receivership estate are estimated to be in the range of approximately \$160,000 to
10 \$170,000. Freitag Decl., ¶ 9.

11 **II. PROPOSED SALE**

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

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

17 **Purchase Price.** The purchase price is \$1,290,000, which will be financed.

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

19 **Closing Date.** Closing shall occur with five days of entry of the Court order
20 approving the sale.

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
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¹ SFG agreed to remove nearly all of the more than \$80,000 of default interest.

1 and efficient administration of the estate by the district court for the benefit of
2 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
3 of a receiver is authorized by the broad equitable powers of the court, any
4 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
5 953 F.2d 1560, 1569 (11th Cir. 1992).

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

10 A district court's power to supervise an equity
11 receivership and to determine the appropriate action to be
12 taken in the administration of the receivership is
13 extremely broad. The district court has broad powers and
14 wide discretion to determine the appropriate relief in an
15 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.

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

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

23 It is widely accepted that a court of equity having custody and control of
24 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
25 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
26 and wide discretion to determine relief in an equity receivership). "The power of sale
27 necessarily follows the power to take possession and control of and to preserve
28 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.

1 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
2 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
3 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity
4 orders property in its custody to be sold, the court itself as vendor confirms the title
5 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
6 Receivers § 487 (3d ed. 1992).

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

15 Generally, when a court-appointed receiver is involved, the receiver, as agent
16 for the court, should conduct the sale of the receivership property. *Blakely Airport*
17 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
18 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
19 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
20 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
21 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
22 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
23 354, 357 (9th Cir. 1925).

24 **B. 28 U.S.C. § 2001**

25 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real
26 property under subsection (a) and specific requirements for private sales of real
27 property under subsection (b). Although both involve significant cost and delay, the
28 cost and delay of a public sale are significantly less than those for a private sale.

1 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013)
2 ("Section 2001 sets out two possible courses of action: (1) property may be sold in
3 public sale; or (2) property may be sold in a private sale, provided that three separate
4 appraisals have been conducted, the terms are published in a circulated newspaper
5 ten days prior to sale, and the sale price is no less than two-thirds of the valued
6 price."). Therefore, by proceeding under Section 2001(a), the receivership estate can
7 avoid the significant costs and delay of (a) the Court having to appoint three
8 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

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

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

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

 The notice of sale is sufficient if it describes the property and the time, place,
and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*
Corp., 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to

1 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and
2 binding offer to purchase the [property]; and (ii) demonstrate . . . , to the satisfaction
3 of the Receiver, that it has the current ability to consummate the purchase of the
4 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*, 2009 U.S.
5 Dist. LEXIS 111381, at *8 (E.D. Mo. 2009).

6 **IV. DISCUSSION**

7 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
8 in the best interests of the receivership estate. The University Ave. Property was
9 listed on the MLS and shown to interested parties. The purchase price therefore
10 reflects the market value for the property. Moreover, no commission is being paid to
11 Mr. Rodriguez as seller's broker, which saves the receivership estate at least \$25,000.
12 Freitag Decl., ¶ 10.

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

18 In the action pending in U.S. District Court for the
19 Southern District of California, Case No. 19-CV-01628-
20 LAB-AHG, Securities and Exchange Commission v.
21 Gina Champion-Cain, et al., notice is hereby given that
22 the court-appointed receiver will conduct a public auction
23 for the real property located at 7565-7571 University
24 Avenue, La Mesa, California 91942 in San Diego
25 County, California. Sale is subject to Court confirmation
26 after the auction is held. Minimum bid price is at least
27 \$1,340,000. The auction will take place on August 27,
28 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 \$25,000, and
proof of funds. All bidders must be qualified by

1 5:00 p.m. PT on August 24, 2020, by submitting the
2 required materials to the receiver at 501 West Broadway,
3 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.

4 In order to conduct an orderly auction and provide enough time for the
5 publication of notices discussed above, the Receiver will require bidders to complete
6 the above steps by August 24, 2020 ("Bid Qualification Deadline") and conduct the
7 live public auction on August 27, 2020.

8 The Receiver will, through Mr. Rodriguez, inform all interested persons of the
9 opportunity to overbid at the public auction, provided they qualify themselves to bid
10 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for
11 the properties on the same terms and conditions as Buyer, but with a purchase price
12 of at least \$1,340,000, (b) providing the Receiver with an earnest money deposit of
13 \$27,500, and (c) providing proof of funds necessary to close the sale transaction in
14 the form of a current bank statement, cashier's check delivered to the Receiver, or
15 other evidence deemed sufficient by the Receiver.

16 In the event one or more prospective purchasers qualify themselves to bid, the
17 auction will be conducted by the Receiver as noted above and bids will be allowed in
18 increments of at least \$5,000. The Receiver will then file a notice advising the Court
19 of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
20 confirming the sale.² Earnest money deposits provided by bidders who are
21 unsuccessful will be promptly returned to them. In the event no prospective
22 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
23 will notify the Court and seek entry of an order approving the sale to Buyer.

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27 ² 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.

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V. CONCLUSION

For the reasons discussed above, the Receiver requests an order (a) approving the sale of the University Ave. Property to Buyer (or their designee) pursuant to the Agreement attached to the Freitag Declaration as Exhibit A, (b) authorizing the Receiver 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: July 29, 2020

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