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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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF
PERSONAL PROPERTY, LIQUOR
LICENSE, AND ASSIGNMENT OF
COMMERCIAL LEASE
ASSOCIATED WITH MISSION
BEACH SURF RIDER
RESTAURANT**

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 Personal Property, Liquor License, and
6 Assignment of Commercial Lease Associated with the former Mission Beach Surf
7 Rider Restaurant ("Motion").

8 **I. BACKGROUND FACTS**

9 The assets that are part of the receivership estate include the leasehold interest
10 and personal property assets associated with the restaurant formerly known as
11 Mission Beach Surf Rider, which operated at the leased premises located at 3772-
12 3774 Mission Blvd., San Diego, California. The assets, which are owned by
13 affiliated receivership entity 2163 Abbott Street, LP, include personal property
14 (furniture, fixtures, and equipment), a liquor license, contracts, and a leasehold
15 interest in the restaurant premises ("Assets"). Freitag Decl., ¶ 2.

16 After reviewing the financials available to the Receiver at appointment, it was
17 determined the Mission Beach Surf Rider restaurant should be closed and the Assets
18 prepared for sale in the short-term, along with other restaurant properties included in
19 the receivership estate. Although the Receiver has authority to sell personal property
20 assets through licensed auctioneers, after consultation with multiple brokers, it was
21 determined that the net recovery from the Assets would likely be greater if they were
22 sold as a package, including an assignment of the lease for the restaurant premises to
23 a buyer. Freitag Decl., ¶ 3.

24 For all of the restaurant-related properties included in the receivership estate,
25 the 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 efforts produced 43 signed confidentiality
12 agreements and a total of nine (9) initial offers for the properties and restaurant assets
13 marketed. Freitag Decl., ¶ 5.

14 In preparation for the sales, and as requested by Broker, the Receiver ordered
15 various reports and provided relevant internal documents to create a typical due
16 diligence package specific to each asset. The Receiver also set a "Call for Offers"
17 deadline of February 3, 2020. Broker used an online-based document hosting
18 website to host the due diligence materials for the properties, prepared an offering
19 memorandum summarizing various marketing points about the properties and
20 detailing the Court sale process, and provided a form of Purchase and Sale
21 Agreement and Joint Escrow Instructions ("Form PSA") prepared in advance by the
22 Receiver, with assistance from her counsel. The Form PSA has all contingencies
23 removed and provides for the overbid, public auction, and Court approval process.
24 Prospective purchasers were instructed to complete their due diligence and submit
25 their executed Form PSA by the Call for Offers deadline. Freitag Decl., ¶ 6.

26 After the Call for Offers deadline, one offer was received and subsequently
27 withdrawn due to the uncertainties of the COVID-19 pandemic. The Receiver,
28 through her brokers, continued to market the property without a specific deadline

1 until interest in the property renewed. The earliest and highest offer received
2 resulted in a Form PSA from Grind and Prosper Hospitality Group LLC, ("Buyer") in
3 the amount of \$375,000. The Receiver, through counsel, finalized a Form PSA with
4 Buyer and then countersigned Buyer's PSA. Freitag Decl., ¶ 7.

5 Broker is acting as the sole agent for this transaction, which means its
6 commission pursuant to the listing agreement is 6% of the sale price, or \$22,500.
7 The of costs of sale, including escrow, title and recording fees are anticipated to be
8 approximately \$1,875. The assets of 2163 Abbott Street, LP (including the Assets
9 being sold herein) are subject to a UCC security interest in favor of First Choice
10 Bank as security for an SBA loan. The First Choice Bank loan is also secured by a
11 second Deed of Trust on the real property located at 4364 Valle Vista, San Diego
12 ("Valle Vista Property"). The balance due on the First Choice Bank loan is
13 approximately \$475,000. Freitag Decl., ¶ 8.

14 The Receiver was recently able to negotiate terms under which the tenant at
15 the Valle Vista Property agreed to terminate her lease and vacate the property so the
16 Valle Vista Property can be marketed for sale. If the Valle Vista Property is sold
17 before the proposed sale of the Assets closes, the sale proceeds from the Valle Vista
18 Property are expected to pay off the First Choice Bank loan in full, meaning the full
19 net sale proceeds from the proposed sale of Assets, which are estimated to be
20 approximately \$350,000, would go to the receivership estate. This scenario is
21 reasonably likely to occur because the sale of the Assets will not close until the
22 California Department of Alcoholic Beverage Control has approved the transfer of
23 the liquor license (estimated to take three to six months). However, if the sale of the
24 Assets closes before the Valle Vista Property is sold, the net sale proceeds from the
25 Assets will be paid to First Choice Bank to pay down the loan and there would be no
26 recovery from this sale for the receivership estate.¹ Freitag Decl., ¶ 9.

27
28 ¹ The net sales proceeds from the Valle Vista Property would then increase by
approximately \$350,000 accordingly.

1 **II. PROPOSED SALE**

2 The key terms of the proposed Purchase and Sale Agreement and Joint Escrow
3 Instructions ("Agreement"), a copy of which is attached to the Freitag Declaration as
4 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 \$375,000, which will be paid in cash.

8 **Deposit.** Buyer has deposited \$50,000 into escrow.

9 **Closing Date.** Closing of the sale shall occur within ten business days of the
10 date upon which both the Court order approving the sale has been entered and the
11 California Department of Alcoholic Beverage Control has approved the transfer of
12 the liquor license.

13 **III. LEGAL STANDARD**

14 "The power of a district court to impose a receivership or grant other forms of
15 ancillary relief does not in the first instance depend on a statutory grant of power
16 from the securities laws. Rather, the authority derives from the inherent power of a
17 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
18 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
19 and efficient administration of the estate by the district court for the benefit of
20 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
21 of a receiver is authorized by the broad equitable powers of the court, any
22 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
23 953 F.2d 1560, 1569 (11th Cir. 1992).

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

28

1 A district court's power to supervise an equity
 2 receivership and to determine the appropriate action to be
 3 taken in the administration of the receivership is
 4 extremely broad. The district court has broad powers and
 5 wide discretion to determine the appropriate relief in an
 6 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.

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

1 Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992). To that end, a
2 federal court is not limited or deprived of any of its equity powers by state statute.
3 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
4 (state statute allowing time to redeem property after a foreclosure sale not applicable
5 in a receivership sale).

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

15 **B. 28 U.S.C. § 2001**

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

28

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

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

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

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

25 The notice of sale is sufficient if it describes the property and the time, place,
26 and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*
27 *Corp.*, 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to
28 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and
binding offer to purchase the [property]; and (ii) demonstrate . . ., to the satisfaction
of the Receiver, that it has the current ability to consummate the purchase of the
[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 Assets were broadly advertised

1 and marketed to prospective purchasers by Broker, an offer was received, and the
2 Agreement signed. The purchase price therefore reflects the market value for the
3 Assets. Freitag Decl., ¶ 10.

4 Moreover, although a public sale of personal property assets is not statutorily
5 required, the proposed sale is subject to overbid to further ensure the highest and best
6 price is obtained. The Receiver proposes to conduct a public auction consistent with
7 Section 2001(a). Specifically, the Receiver will publish the following notice of the
8 sale once a week for four weeks in the San Diego Union-Tribune, a newspaper of
9 general circulation in the San Diego area:

10 In the action pending in U.S. District Court for the
11 Southern District of California, Case No. 19-CV-01628-
12 LAB-AHG, Securities and Exchange Commission v.
13 Gina Champion-Cain, et al., notice is hereby given that
14 the court-appointed receiver will conduct a public auction
15 for the Mission Beach Surf Rider restaurant business and
16 personal property located at 3772-3774 Mission Blvd.,
17 San Diego, California 92109 in San Diego County,
18 California. Sale is subject to Court confirmation after the
19 auction is held. Minimum bid price is at least \$400,000.
20 The auction will take place on September 3, 2020, at
21 1:30 p.m. in front of the entrance to the United States
22 Courthouse, 221 W. Broadway, San Diego, California.
23 To be allowed to participate in the auction, prospective
24 purchasers must meet certain bid qualification
25 requirements, including submitting a signed purchase and
26 sale agreement, an earnest money deposit of \$55,000, and
27 proof of funds. All bidders must be qualified by
28 5:00 p.m. PT on August 31, 2020, by submitting the
required materials to the receiver at 501 West Broadway,
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.

22 In order to conduct an orderly auction and provide sufficient time for the
23 publication of notices discussed above, the Receiver will require bidders to complete
24 the above steps by August 31, 2020 ("Bid Qualification Deadline") and conduct the
25 live public auction on September 3, 2020.

26 The Receiver, through Broker, will inform all interested persons of the
27 opportunity to overbid at the public auction, provided they qualify themselves to bid
28 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for

1 the properties on the same terms and conditions as Buyer, but with a purchase price
2 of at least \$400,000, (b) providing the Receiver with an earnest money deposit of
3 \$55,000, and (c) providing proof of funds necessary to close the sale transaction in
4 the form of a current bank statement, cashier's check delivered to the Receiver, or
5 other evidence deemed sufficient by the Receiver.

6 In the event one or more prospective purchasers qualify themselves to bid, the
7 auction will be conducted by the Receiver as noted above and bids will be allowed in
8 increments of at least \$25,000. The Receiver will then file a notice advising the
9 Court of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
10 confirming the sale.² Earnest money deposits provided by bidders who are
11 unsuccessful will be promptly returned to them. In the event no prospective
12 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
13 will notify the Court and seek entry of an order approving the sale to Buyer.

14 **V. CONCLUSION**

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

20

21 Dated: August 3, 2020

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

22

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23

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² In the event that multiple qualified overbids (in addition to Buyer's offer) are received and participate in the 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.

27

28