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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
4829 BELLA PACIFIC ROW
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 4829 Bella Pacific Row Property ("Motion").

6 **I. BACKGROUND FACTS**

7 The residential properties in the receivership estate include a single-family
8 residence located at 4829 Bella Pacific Row, Unit 215, San Diego, California ("Bella
9 Pacific Property"). The Bella Pacific Property is 1,094 square feet with two
10 bedrooms and two bathrooms. The Bella Pacific Property was purchased by
11 affiliated Receivership Entity 2466 1st Avenue LLC for \$475,000 on April 5, 2019.
12 The property is part of The Bella Pacific Homeowners Association with HOA dues
13 of \$412 per month. Former ANI employee Joelle Hanson resided at the property
14 until shortly after the Receiver's appointment, at which time she agreed to move out.
15 Freitag Decl., ¶ 2.

16 Upon her appointment, the Receiver and her staff performed an analysis of the
17 value of the Bella Pacific Property, including a review of automated valuation scores
18 for the property and a survey of the market comparable properties. The Receiver
19 also consulted with multiple licensed brokers about the value of the property and
20 terms of a potential listing agreement. Ultimately, the Receiver selected Resonate
21 Real Estate ("Broker") and had the Bella Pacific Property listed for sale at \$495,000.
22 Freitag Decl., ¶ 3.

23 To market the Bella Pacific Property, Broker listed the property on the local
24 MLS and its website in January 2020. Post COVID-19, in compliance with guidance
25 from the California Association of Realtors, 3D marketing and socially distant
26 property tours were enforced. A total of two offers were received – one pre-COVID
27 that was cancelled during due diligence and one post COVID-19, which is the
28 current offer. Through Broker, the Receiver negotiated terms with the prospective

1 buyer and the property went into escrow on or around July 9, 2020 with a purchase
2 price of \$490,000. As part of their due diligence review, the buyer undertook the
3 expense of getting the condominium project approved for financing by the Veteran's
4 Administration. That approval was subsequently received on July 28, 2020. The
5 buyer is Shawn Reed ("Buyer"). Freitag Decl., ¶ 4.

6 The Bella Pacific Property, along with three other receivership estate assets, is
7 encumbered by a deed of trust in favor of Seattle Funding Group ("SFG"). The
8 outstanding principal balance on the interest-only loan is \$1,100,000, and the loan is
9 being paid current. SFG has agreed to extend the maturity date of this loan from
10 December 1, 2020 to March 1, 2021 and a release price of 85% of the sales price less
11 the buyer credit, or \$408,000. The release price represents 37% of the loan's
12 principal balance, which will be reduced to \$692,000 after this pay down; the
13 remaining three receivership assets encumbered by this loan have estimated market
14 values exceeding \$1 million in the aggregate. Depending on when the sale closes
15 (assuming a September 2020 closing), the amount required to pay down the loan will
16 likely be in the range of approximately \$411,000 to \$414,000. Depending on when
17 the sale closes (assuming a September 2020 closing), the Receiver estimates that
18 property taxes paid at closing will likely be in the range of approximately \$1,400 to
19 \$1,800. The Broker's commission pursuant to the listing agreement is 4% of the sale
20 price, or \$19,600, which amount will be split with Buyer's broker. The costs of sale,
21 including escrow, title and recording fees are estimated to be approximately \$4,900.
22 Additionally, the Receiver has agreed to give the buyer a credit of \$10,000 towards
23 recurring and non-recurring closing costs. While exact amounts will be determined
24 at closing, after all the aforementioned amounts are paid out of escrow, the net sale
25 proceeds for the receivership estate are estimated to be in the range of approximately
26 \$40,000 to \$43,000. Freitag Decl., ¶ 5.

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1 **II. PROPOSED SALE**

2 The key terms of the proposed California Residential Purchase Agreement and
3 Joint Escrow Instructions, including Addendum thereto ("Agreement"), a copy of
4 which is 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 \$490,000, which will be financed.

8 **Deposit.** Buyer has deposited \$7,500 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 be
28 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 deference to

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

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

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

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

25 "A court of equity, under proper circumstances, has the power to order a
 26 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
 27 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
 28 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.
Beet Growers Sugar Co. v. Columbia Trust Co., 3 F.2d 755, 757 (9th Cir. 1925)

1 (state statute allowing time to redeem property after a foreclosure sale not applicable
2 in a receivership sale).

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

12 **B. 28 U.S.C. § 2001**

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

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

1 *Kirkland*, 2007 U.S. Dist. LEXIS 45353, at *5 (M.D. Fla. 2007). In terms of
2 publication of notice, Section 2002 provides:

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

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

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

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

22 **IV. DISCUSSION**

23 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
24 in the best interests of the receivership estate. The Bella Pacific Property was listed
25 on the MLS with a licensed broker and shown to interested parties for the last seven
26 months. The property was properly marketed, two offers were received, pre and post
27 COVID-19 with comparable prices, highest and best terms negotiated, and the
28

1 Agreement signed. The purchase price is fair and reasonable and reflects the market
2 value of the property. Freitag Decl., ¶ 6.

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 4829 Bella Pacific Row 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 \$500,000. The auction will take place on
17 September 10, 2020, at 1:30 p.m. in front of the entrance
18 to 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 \$8,250, and proof of funds. All bidders must be
25 qualified by 5:00 p.m. PT on September 7, 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 September 7, 2020 ("Bid Qualification Deadline") and conduct
23 the live public auction on September 10, 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 \$500,000,
28 (b) providing the Receiver with an earnest money deposit of \$8,250, 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 **V. CONCLUSION**

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

18
19 Dated: August 11, 2020

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