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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 THE OCEAN
BEACH SURF RIDER
RESTAURANT**

Date: October 26, 2020

Time: 9:00 a.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 Ocean Beach Surf Rider
7 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 known as Ocean Beach
11 Surf Rider, which operated at the leased premises located at 2163 Abbott Street, San
12 Diego, California. The assets, which are owned by affiliated receivership entity
13 2163 Abbott Street, LP, include personal property (furniture, fixtures, and
14 equipment), a liquor license, contracts, and a leasehold interest in the restaurant
15 premises ("Assets"). Freitag Decl., ¶ 2.

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

25 For all of the restaurant-related properties included in the receivership estate,
26 the Receiver and her staff interviewed three licensed brokers with experience selling
27 restaurants in San Diego. After considering their experience and qualifications, the
28 Receiver decided to use two brokers – Colliers International for stand-alone concept

1 restaurant-related properties owned (a leased parking lot was also included in this
2 grouping) by the Receivership Entities and Next Wave ("Broker") for the Surf Rider
3 Pizza and Bao Beach restaurant concepts operated at leased and owned property
4 locations. Freitag Decl., ¶ 4.

5 Broker created individual marketing flyers with professional photos for each
6 restaurant listing. The restaurant listings were sent out via email campaigns to a
7 targeted list of over 6,200 restaurant operators, restaurant buyers, brokers, and
8 investors. Online advertising was placed on key websites that included CoStar,
9 LoopNet, BizBuySell, and Next Wave Commercial, which produced over 150,000 ad
10 views. Press releases were distributed to the predominant news publications that
11 included The San Diego Union Tribune, San Diego Business Journal, Eater San
12 Diego, among others. Broker's efforts produced 43 signed confidentiality
13 agreements and a total of nine (9) initial offers for the properties and restaurant assets
14 marketed. Freitag Decl., ¶ 5.

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

28

1 After the Call for Offers deadline, the three offers received prior to the
2 deadline were subsequently withdrawn, likely due to the uncertainties of the COVID-
3 19 pandemic. Therefore, the Receiver, through her brokers, continued to market the
4 Assets without a specific deadline. Since March 2020, multiple interested parties
5 have shown interest in the Assets, however the highest accepted offer received
6 resulted in a Purchase and Sale Agreement and Joint Escrow Instructions
7 ("Agreement") from G Boys Holdings LLC ("Buyer") in the amount of \$85,000.
8 The Agreement allowed the Buyer to perform their requested due diligence and
9 provided for the overbid, public auction and Court approval process. The Receiver,
10 through counsel, finalized and then countersigned the Agreement. Freitag Decl., ¶ 7.

11 Because Buyer has its own broker, Broker's commission pursuant to the listing
12 agreement is 10% of the sale price, or \$8,500, which amount will be split with
13 Buyer's broker. The costs of sale, including escrow, title and recording fees are
14 anticipated to be approximately \$1,000. There is one UCC security interest on the
15 Assets in favor of a food supplier, Jacmar Foodservice Distribution, resolution of
16 which is likely to be approximately \$27,500. While exact amounts will be
17 determined at closing, after all of the aforementioned amounts are paid out of
18 escrow, the net sale proceeds for the receivership estate are estimated to be in the
19 neighborhood of approximately \$48,000. The sale of the Assets will not close until
20 the California Department of Alcoholic Beverage Control has approved the transfer
21 of the liquor license (estimated to take three to six months). Freitag Decl., ¶ 8.

22 II. PROPOSED SALE

23 The key terms of the proposed Agreement, a copy of which is attached to the
24 Freitag Declaration as Exhibit A, are summarized as follows:

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

27 **Purchase Price.** The purchase price is \$85,000, which will be paid in cash.
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
 newspaper regularly issued and of general circulation in
 the county, state, or judicial district of the United States
 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
 the property by reference or otherwise as the court
 approves. The court may direct that the publication be
 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
 appointed by the Comptroller of the Currency.

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

26 **IV. DISCUSSION**

27 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
 28 in the best interests of the receivership estate. The Assets were broadly advertised

1 and marketed to prospective purchasers by Broker, multiple offers were received,
2 and the highest accepted PSA was signed by both parties. The purchase price
3 therefore reflects the market value for the Assets. Freitag Decl., ¶ 9.

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 Ocean Beach Surf Rider restaurant business and
16 personal property located at 2163 Abbott Street, San
17 Diego, California 92107 in San Diego County,
18 California. Sale is subject to Court confirmation after the
19 auction is held. Minimum bid price is at least \$95,000.
20 The auction will take place on October 19, 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 \$16,500, and
27 proof of funds. All bidders must be qualified by
28 5:00 p.m. PT on October 12, 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 October 12, 2020 ("Bid Qualification Deadline") and conduct the
25 live public auction on October 19, 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 \$95,000, (b) providing the Receiver with an earnest money deposit of
3 \$16,500, 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 \$10,000. 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.¹ In the event no prospective purchasers qualify themselves to
11 bid by the Bid Qualification Deadline, the Receiver will notify the Court and seek
12 entry of an order approving the sale to Buyer.

13 **V. CONCLUSION**

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

19

20 Dated: September 16, 2020

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

21

By: s/Edward G. Fates

22

DAVID R. ZARO
EDWARD G. FATES
NORMAN M. ASPIS
Attorneys for Receiver
KRISTA FREITAG

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27 ¹ In the event that multiple qualified overbids (in addition to Buyer's offer) are
28 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.