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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.
24
25
26
27
28

Case No. 3:19-cv-01628-LAB-AHG

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF SALE
OF REAL PROPERTY LOCATED
AT 4030-4034 RANDOLPH STREET,
SAN DIEGO**

Date: October 26, 2020
Time: 9:00 a.m.
Courtroom: 3B
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 Real Property Located at 4030-4034 Randolph
6 Street, San Diego ("Motion").

7 **I. BACKGROUND FACTS**

8 The properties in the receivership estate include two apartment buildings
9 located at 4030-4034 Randolph Street, San Diego, California 92103 ("Randolph
10 Property"). The Randolph Property contains five apartment units; however one unit
11 is a converted garage that was never permitted as a residential unit. That unit is
12 currently unoccupied with no current plans to re-lease the unit. Three units are one
13 bed/one bath apartments, and the fourth is a two bedroom/one bath apartment. The
14 Randolph Property was purchased by ANI on December 14, 2018 for \$1,800,000 and
15 title was taken in the name of The Gina Champion Cain Revocable Trust. Four days
16 later, title was transferred by quit claim deed to receivership entity 4030 Randolph
17 Street LLC. Freitag Decl., ¶ 2.

18 Upon her appointment, the Receiver and her staff performed an analysis of the
19 value of the Randolph Property, including a review of automated valuation scores for
20 the property and a survey of the market comparable properties. The Receiver also
21 consulted with multiple licensed brokers about the value of the property and terms of
22 a potential listing agreement. Ultimately, the Receiver selected Cushman &
23 Wakefield U.S., Inc. ("Broker") and had the Randolph Property listed for sale at
24 \$1,975,000. After several months of marketing without serious offers, the price was
25 lowered to \$1,725,000. Freitag Decl., ¶ 3.

26 To market the Randolph Property, Broker listed the property on LoopNet,
27 CoStar, Crexi, the Multiple Listing Service or "MLS" (as residential income and 2-4
28 units), MLS Affiliates, Virtual Office Websites, and Realtor.com. Email campaigns

1 were also sent out to a total of 3,769 of Broker's contacts. A total of eight offers
2 were received (six written and two verbal). The Receiver evaluated the offers and
3 determined the all-cash offer from Louisa Galbo and Evan Galbo ("Buyer") was the
4 highest and best. Through Broker, the Receiver negotiated terms with Buyer and the
5 property went into escrow on or around September 9, 2020 with a purchase price of
6 \$1,675,000. The Receiver then countered Buyer's request for a purchase price
7 reduction agreeing, via an addendum to the sale contract, to reduce the purchase
8 price by \$25,000 in order to partially offset some of Buyer's repair costs for a sewer
9 replacement (approximately \$16,000) and some foundational repairs (approximately
10 \$33,000). Through Broker, the prospective purchasers whose offers were not
11 selected have been invited to participate in the overbid/auction process discussed
12 below. Freitag Decl., ¶ 4.

13 The Randolph Property is encumbered by a Deed of Trust in favor of Axos
14 Bank ("Axos"). The loan payoff amount is estimated to be in the range of
15 approximately \$1,102,000 to \$1,107,000. The Receiver estimates that property taxes
16 owed at closing will likely be in the ballpark of approximately \$10,000; however,
17 this loan does have a tax impound account, which will offset the anticipated property
18 tax expense. The Broker's commission pursuant to the listing agreement is 4% of the
19 sale price, or \$66,000, which amount will be split with Buyer's broker. The costs of
20 sale, including escrow, title and recording fees, are estimated to be approximately
21 \$8,250. While exact amounts will be determined at closing, after all the
22 aforementioned amounts are paid out of escrow (assuming no impact from property
23 taxes), the net sale proceeds for the receivership estate are estimated to be in the
24 range of approximately \$470,000 to \$475,000. Freitag Decl., ¶ 5.

25 **II. PROPOSED SALE**

26 The key terms of the proposed Purchase and Sale Agreement and Joint Escrow
27 Instructions, including Addenda thereto ("Agreement"), a copy of which is attached
28 to the Freitag Declaration as Exhibit A, are summarized as follows:

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

3 **Purchase Price.** The purchase price is \$1,650,000, which will be paid in cash.

4 **Deposit.** Buyer has deposited \$100,000 into escrow.

5 **Closing Date.** Closing shall occur with 10 days of entry of the Court order
6 approving the sale.

7 **III. LEGAL STANDARD**

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

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

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

1 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
 2 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
 3 and 'we generally uphold reasonable procedures instituted by the district court that
 4 serve th[e] purpose' of orderly and efficient administration of the receivership for the
 5 benefit of creditors."). Accordingly, the Court has broad discretion in the
 6 administration of the receivership estate and the disposition of receivership assets.

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

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

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

28

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

10 **B. 28 U.S.C. § 2001**

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

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

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

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

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

27 **IV. DISCUSSION**

28 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
in the best interests of the receivership estate. The Randolph Property was listed
with a licensed broker and shown to interested parties for the last seven months. The
property was properly marketed, eight offers were received, highest and best terms
negotiated, and the Agreement signed. The purchase price is fair and reasonable and
reflects the market value of the property. Freitag Decl., ¶ 6.

Moreover, the proposed sale is subject to overbid to further ensure the highest
and best price is obtained. The Receiver proposes to conduct a public auction

1 consistent with the requirements of Section 2001(a). Specifically, the Receiver is
2 publishing the following notice of the sale once a week for four weeks in the
3 San Diego Union-Tribune, a newspaper of general circulation in San Diego County:

4 In the action pending in U.S. District Court for the
5 Southern District of California, Case No. 19-CV-01628-
6 LAB-AHG, Securities and Exchange Commission v.
7 Gina Champion-Cain, et al., notice is hereby given that
8 the court-appointed receiver will conduct a public auction
9 for the real property located at 4030-4034 Randolph
10 Street in San Diego County, California. Sale is subject to
11 Court confirmation after the auction is held. Minimum
12 bid price is at least \$1,725,000. The auction will take
13 place on October 30, 2020, at 1:30 p.m. in front of the
14 entrance to the United States Courthouse,
15 221 W. Broadway, San Diego, California or as otherwise
determined by the Court. 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 \$110,000, and proof of funds. All bidders must be
qualified by 5:00 p.m. PT on October 26, 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.

16 In order to conduct an orderly auction and provide sufficient time for the
17 publication of notices discussed above, the Receiver will require bidders to complete
18 the above steps by October 26, 2020 ("Bid Qualification Deadline") and conduct the
19 live public auction on October 30, 2020.

20 Through Broker, the Receiver has informed all interested persons of the
21 opportunity to overbid at the public auction, provided they qualify themselves to bid
22 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for
23 the properties on the same terms and conditions as Buyer, but with a purchase price
24 of at least \$1,725,000, (b) providing the Receiver with an earnest money deposit of
25 \$110,000, and (c) providing proof of funds necessary to close the sale transaction in
26 the form of a current bank statement, cashier's check delivered to the Receiver, or
27 other evidence deemed sufficient by the Receiver.

28

1 In the event one or more prospective purchasers qualify themselves to bid, the
2 auction will be conducted by the Receiver as noted above and bids will be allowed in
3 increments of at least \$10,000. The Receiver will then file a notice advising the
4 Court of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
5 confirming the sale. In the event no prospective purchasers qualify themselves to bid
6 by the Bid Qualification Deadline, the Receiver will notify the Court and seek entry
7 of an order approving the sale to Buyer.

8 **V. CONCLUSION**

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

14
15 Dated: October 5, 2020

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By: s/Edward G. Fates

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