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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
Ctm: 14A
Judge Hon. Larry Alan Burns

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF
YARMOUTH COURT PROPERTY**

Date: November 30, 2020
Time: 9:30 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 Yarmouth Court Property ("Motion").

6 **I. BACKGROUND FACTS**

7 The residential properties in the receivership estate include a single-family
8 residence located at 750 Yarmouth Court in the Mission Beach neighborhood of San
9 Diego ("Yarmouth Court Property"). The Yarmouth Court Property is 1,454 square
10 feet with three bedrooms and three bathrooms. The Yarmouth Court Property was
11 purchased for \$1,005,000 on December 5, 2011 by ANI Commercial CA I LLC and
12 was ultimately transferred to Luv Surf Brands, LLC (an affiliated Receivership
13 Entity) in May 2015. The Yarmouth Court Property is used as a vacation rental
14 property. Freitag Decl., ¶ 2.

15 Upon her appointment, the Receiver and her staff performed an analysis of the
16 value of the Yarmouth Court Property, including a review of automated valuation
17 scores for the property and a survey of the market comparable properties. The
18 Receiver and her staff also consulted with and interviewed licensed brokers with
19 experience selling residential properties in the Mission Beach area. Ultimately,
20 based on a combination of its experience and low listing commission, the Receiver
21 selected Pacific Pines Real Estate ("Broker") and the Yarmouth Court Property was
22 listed for sale on the Multiple Listing Service (MLS) on or about January 3, 2020.
23 The original list price was \$1,599,900. Freitag Decl., ¶ 3.

24 To market the Yarmouth Court Property, Broker listed the property on the
25 local MLS and its website, held multiple open houses and showed the property to all
26 interested parties. After not getting any offers for the property at the \$1,599,900 list
27 price, and the fact that a global pandemic has negatively affected the short-term
28 economic prospects for hospitality properties, the Receiver, in consultation with

1 Broker, periodically reduced the list price until it reached its current list price of
2 \$1,399,900 on August 26, 2020. In compliance with guidance from the California
3 Association of Realtors, 3D marketing and socially distant property tours have been
4 enforced throughout the pandemic. A total of two offers were received. The first
5 offer was withdrawn after the Receiver was unable to meet the buyer's demands and
6 timeline. Shortly thereafter, the Receiver negotiated terms with the current
7 prospective buyers and the Yarmouth Court Property went into escrow on or around
8 September 30, 2020 with a purchase price of \$1,350,000 and a \$5,000 credit to the
9 buyer. The buyer is Matthew G. Ball and Justine Tideman ("Buyer"). Freitag
10 Decl., ¶ 4.

11 Like the 1617 Thomas Avenue, 805 Brighton Court, 724 Zanzibar Court, and
12 809 San Rafael properties previously sold by the Receiver with approval from the
13 Court (as well as the 737 Windemere Court property, which sale is expected to close
14 soon, and 812 San Rafael, which sale motion is set for hearing on November 30,
15 2020), the Yarmouth Court Property is encumbered by a deed of trust in favor of
16 Axos Bank. With the 1617 Thomas Avenue, 805 Brighton Court, 724 Zanzibar
17 Court and 809 San Rafael properties now sold, the Axos Bank portfolio loan now
18 covers three residential properties included in the receivership estate (including the
19 737 Windemere Court Property and the 812 San Rafael Property). Assuming the
20 737 Windemere Court sale closes first, the Axos Bank loan will have been fully paid
21 off and nothing further will be owed to Axos Bank. If neither of these closes, the
22 Receiver will provide a loan payoff update when she notices the Court of whether or
23 not there is an overbid. Freitag Decl., ¶ 5.

24 Assuming a December closing (after December 10th), there will be a small
25 credit to the seller at closing for property taxes. The Broker's commission pursuant
26 to the listing agreement is \$12,000 plus 2.5% of the sale price, or \$33,750, which
27 amount is paid to Buyer's broker. The costs of sale, including escrow, title and
28 recording fees, are estimated to be approximately \$6,750. While exact amounts will

1 be determined at closing, after the aforementioned amounts are paid out of escrow or
2 otherwise credited to seller (but before rental deposits received for post-closing
3 reservations are credited to the buyer), the net sale proceeds for the receivership
4 estate are estimated to be in the neighborhood of approximately \$1,293,000.¹ Freitag
5 Decl., ¶ 6.

6 **II. PROPOSED SALE**

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

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

12 **Purchase Price.** The purchase price is \$1,350,000 - before application of a
13 \$5,000 buyer credit - which amount will be financed.

14 **Deposit.** Buyer has deposited \$30,000 into escrow.

15 **Closing Date.** Closing shall occur upon entry of the Court order approving
16 the sale.

17 **III. LEGAL STANDARD**

18 "The power of a district court to impose a receivership or grant other forms of
19 ancillary relief does not in the first instance depend on a statutory grant of power
20 from the securities laws. Rather, the authority derives from the inherent power of a
21 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
22 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
23 and efficient administration of the estate by the district court for the benefit of
24

25 _____
26 ¹ Like the Windemere Court Property, the Yarmouth Court Property also had a
27 disputed lien in favor of investor Charles Riharb on title to the property.
28 However, the Joint Motion for Approval of the Settlement with Mr. Riharb has
been approved by the Court (Dkt. 483). Pursuant to the settlement, the disputed
liens will be removed from title to the Windemere Court and Yarmouth Court
Properties and Mr. Riharb will be paid a total of \$100,000 from the receivership
estate.

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

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

9 A district court's power to supervise an equity receivership
 10 and to determine the appropriate action to be taken in the
 11 administration of the receivership is extremely broad. The
 12 district court has broad powers and wide discretion to
 13 determine the appropriate relief in an equity receivership.
 14 The basis for this broad deference to the district court's
 15 supervisory role in equity receiverships arises out of the
 16 fact that most receiverships involve multiple parties and
 17 complex transactions. A district court's decision
 18 concerning the supervision of an equitable receivership is
 19 reviewed for abuse of discretion.

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

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

27 It is widely accepted that a court of equity having custody and control of
 28 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
Elliot, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
 and wide discretion to determine relief in an equity receivership). "The power of sale
 necessarily follows the power to take possession and control of and to preserve
 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*

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

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

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

23 **B. 28 U.S.C. § 2001**

24 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real
 25 property under subsection (a) and specific requirements for private sales of real
 26 property under subsection (b). Although both involve significant cost and delay, the
 27 cost and delay of a public sale are significantly less than those for a private sale.
 28 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013)

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

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

14 A public sale of realty or interest therein under any order,
15 judgment or decree of any court of the United States shall
16 not be made without notice published once a week for at
17 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.

18 If such realty is situated in more than one county, state,
19 district or circuit, such notice shall be published in one or
20 more of the counties, states, or districts wherein it is
21 situated, as the court directs. The notice shall be
22 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.

23 This section shall not apply to sales and proceedings under
24 Title 11 or by receivers or conservators of banks 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

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

5 **IV. DISCUSSION**

6 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
 7 in the best interests of the receivership estate. The Yarmouth Court Property has
 8 been listed on the MLS with a licensed broker and shown to many interested parties.
 9 The property was properly marketed, two offers were received, highest and best
 10 terms negotiated, and the Agreement signed. The purchase price is fair and
 11 reasonable and reflects the current market value of the property. Freitag Decl., ¶ 7.

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

17 In the action pending in U.S. District Court for the
 18 Southern District of California, Case No. 19-CV-01628-
 19 LAB-AHG, Securities and Exchange Commission v. Gina
 20 Champion-Cain, et al., notice is hereby given that the
 21 court-appointed receiver will conduct a public auction for
 22 the real property located at 750 Yarmouth Court in San
 23 Diego County, California. Sale is subject to Court
 24 confirmation after the auction is held. Minimum bid price
 25 is at least \$1,365,000. The auction will take place on
 26 November 25, 2020, at 1:30 p.m. in front of the entrance to
 27 the United States Courthouse, 221 W. Broadway, San
 28 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 \$33,000, and
 proof of funds. All bidders must be qualified by 5:00 p.m.
 PT on November 20, 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.

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In order to conduct an orderly auction and provide sufficient time for the publication of notices discussed above, the Receiver will require bidders to complete the above steps by November 20, 2020 ("Bid Qualification Deadline") and conduct the live public auction on November 25, 2020.

The Receiver will inform all interested persons of the opportunity to overbid at the public auction, provided they qualify themselves to bid by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for the properties on the same terms and conditions as Buyer, but with a purchase price of at least \$1,365,000 (with a \$5,000 closing cost credit to match the current offer), (b) providing the Receiver with an earnest money deposit of \$33,000, and (c) providing proof of funds necessary to close the sale transaction in the form of a current bank statement, cashier's check delivered to the Receiver, or other evidence deemed sufficient by the Receiver.

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

V. CONCLUSION

For the reasons discussed above, the Receiver requests an order (a) approving the sale of the Yarmouth Court Property to Buyer (or their designee) pursuant to the Agreement attached to the Freitag Declaration as Exhibit A, and (b) authorizing the

1 Receiver to take all steps necessary to close the sale, with the net sale proceeds after
2 all third-party payments are made from escrow going to the receivership estate.

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Dated: October 27, 2020

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