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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.
24
25
26
27
28

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF
3792 MISSION BLVD. PROPERTY**

Date: December 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 3792 Mission Blvd. Property ("Motion").

6 **I. BACKGROUND FACTS**

7 One of the commercial properties included in the receivership estate is an
8 office condominium located at 3792 Mission Blvd., San Diego, California, 92109
9 ("3792 Mission Blvd. Property"). The 3792 Mission Blvd. Property is 454 square
10 feet with an attached garage. The 3792 Mission Blvd. Property was purchased by
11 Receivership Entity San Jose Parking Lot LLC on August 26, 2015 for \$375,000.
12 Freitag Decl., ¶ 2.

13 Upon her appointment, the Receiver and her staff performed an analysis of the
14 value of the 3792 Mission Blvd. Property, including a review of automated valuation
15 scores for the property and a survey of the market comparable properties. The
16 Receiver also consulted with multiple licensed brokers about the value of the
17 property and terms of a potential listing agreement. Ultimately, the Receiver
18 selected Compass Realty ("Broker") and had the 3792 Mission Blvd. Property listed
19 for sale at \$450,000. Freitag Decl., ¶ 3.

20 To market the 3792 Mission Blvd. Property, Broker created marketing flyers
21 with professional photos. The listing was sent out via email campaigns to a targeted
22 list of brokers, and investors. Online advertising was placed on key websites that
23 included local MLS and LoopNet. Post COVID-19, in compliance with guidance
24 from the California Association of Realtors socially distant property tours were
25 enforced. Due to the lack of buyer interest at higher prices, the list price was reduced
26 to \$425,000 in late August 2020. Subsequently, two offers were received. Through
27 Broker, the Receiver negotiated terms with the prospective buyers and the property
28

1 went into escrow on or around October 26, 2020 with a purchase price of \$399,000.
2 The proposed buyer is Paul Becker ("Buyer"). Freitag Decl., ¶ 4.

3 The 3792 Mission Blvd. Property, along with two other remaining receivership
4 estate assets,¹ is encumbered by a deed of trust in favor of Seattle Funding Group
5 ("SFG"). The outstanding principal balance on the interest-only loan is \$692,000,
6 and the loan is being paid current. Lender has agreed to extend the maturity date of
7 this loan from December 1, 2020 to March 1, 2021. Once the sales of the
8 7940 University and 7243 Camino Degrazia properties close, the principal balance of
9 the loan will decrease to \$11,150 (\$1,100,000 less \$408,000 less \$298,350 less
10 \$382,500). Freitag Decl., ¶ 5.

11 Depending on when the sale closes (assuming a January 2021 closing), the
12 amount required to pay down the loan will likely be in the range of approximately
13 \$11,150 (assuming the sales of 7940 University and 7243 Camino Degrazia close
14 first). Depending on when the sale closes (assuming a January 2021 closing), a small
15 amount of property taxes will be owed by the receivership estate. The Broker's
16 commission pursuant to the listing agreement is 4% of the sale price, or \$15,960,
17 which amount will be split with Buyer's broker. The costs of sale, including escrow,
18 title and recording fees are estimated to be approximately \$2,000. While exact
19 amounts will be determined at closing, after all the aforementioned amounts are paid
20 out of escrow, the net sale proceeds for the receivership estate are estimated to be in
21 the range of approximately \$368,000 to \$370,000. Freitag Decl., ¶ 6.

22 **II. PROPOSED SALE**

23 The key terms of the proposed Purchase and Sale Agreement and Joint Escrow
24 Instructions ("Agreement"), a copy of which is attached to the Freitag Declaration as
25 Exhibit A, are summarized as follows:

26
27 ¹ This loan previously covered a total of four receivership estate assets, but one of
28 the properties – the Bella Pacific property – was sold with Court approval and
\$408,000 of the sale net proceeds were applied to pay down the principal balance
of the loan.

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 3792 Mission Blvd. Property was
listed with a licensed broker and shown to interested parties since June 2020. The
property was properly marketed, two 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., ¶ 7.

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 will
2 publish the following notice of the sale once a week for four weeks in the San Diego
3 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 3792 Mission Blvd. in San
10 Diego County, California. Sale is subject to Court
11 confirmation after the auction is held. Minimum bid
12 price is at least \$409,000. The auction will take place on
13 December 18, 2020, at 1:30 p.m. in front of the entrance
14 to the United States Courthouse, 221 W. Broadway, San
15 Diego, California or as otherwise determined by the
16 Court. To be allowed to participate in the auction,
17 prospective purchasers must meet certain bid
18 qualification requirements, including submitting a signed
19 purchase and sale agreement, an earnest money deposit
20 of \$11,000, and proof of funds. All bidders must be
21 qualified by 5:00 p.m. PT on December 14, 2020, by
22 submitting the required materials to the receiver at 501
23 West Broadway, Suite 290, San Diego, California,
24 92101. If interested in qualifying as a bidder, please
25 contact Geno Rodriguez at (619) 567-7223 or
26 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 December 14, 2020 ("Bid Qualification Deadline") and conduct
19 the live public auction on December 18, 2020.

20 The Receiver will inform all interested persons of the opportunity to overbid at
21 the public auction, provided they qualify themselves to bid by the Bid Qualification
22 Deadline by (a) signing a purchase and sale agreement for the properties on the same
23 terms and conditions as Buyer, but with a purchase price of at least \$409,000,
24 (b) providing the Receiver with an earnest money deposit of \$11,000, and
25 (c) providing proof of funds necessary to close the sale transaction in the form of a
26 current bank statement, cashier's check delivered to the Receiver, or other evidence
27 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 3792 Mission Blvd. Property to Buyer (or Buyer’s designee) pursuant to the
11 Agreement attached to the Freitag Declaration as Exhibit A, and (b) authority to take
12 all steps necessary to close the sale, with the net sale proceeds after all third-party
13 payments are made from escrow going to the receivership estate.

14
15 Dated: November 18, 2020

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