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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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF WEST
WASHINGTON 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 West Washington Property ("Motion").

6 I. BACKGROUND FACTS

7 One of the assets included in the receivership estate is a retail shopping center
8 located at 901-915 West Washington Street, San Diego, California ("West
9 Washington Property"). The West Washington Property is approximately
10 2,700 square feet with three rental units. The property was purchased by
11 Receivership Entity American National Investments, Inc. on March 22, 2018 for
12 \$2,100,000. At transition, the property was occupied by three tenants. One long
13 time tenant had a month-to-month lease, another tenant was not paying rent and a
14 third tenant was paying far below market rent. That third tenant, a) claimed that the
15 lease on file had a forged signature and, b) did not acknowledge that she was
16 operating under an existing, valid lease. Freitag Decl., ¶ 2.

17 Upon her appointment, the Receiver and her staff performed an analysis of the
18 value of the West Washington Property, including a survey of the market comparable
19 properties. They also consulted with multiple licensed brokers about the value of the
20 property and terms of a potential listing agreement. Because the West Washington
21 Property is encumbered by a mortgage and it was not clear there would be any
22 recovery from a sale for the receivership estate, the Receiver obtained an appraisal
23 for the property dated as of December 31, 2019. The appraised value of the West
24 Washington Property at that time was \$2.1 million. Thereafter, the Receiver
25 received an unsolicited offer for the property in the same amount (\$2.1 million). The
26 Receiver negotiated terms with the prospective buyer and prepared a draft Purchase
27 and Sale Agreement (subject to overbid and Court approval), but the deal had not
28 been signed when the COVID-19 pandemic hit, and the prospective buyer then

1 withdrew its offer. The prospective buyer subsequently submitted an offer for
2 \$1,178,100 in early May 2020. As that offer would not satisfy the debt on the
3 property, it was rejected at that time. Freitag Decl., ¶ 3.

4 The consensus from the brokers with whom the Receiver consulted was that
5 the pandemic had substantially impacted the value of the West Washington Property.
6 Therefore, it appeared unlikely that a recovery for the receivership estate from a sale
7 could be achieved. Accordingly, in July 2020, the Receiver stipulated to relief from
8 the litigation stay to allow the lender, Seattle Funding Group ("SFG"), to foreclose
9 on the property. Dkt. 379. Freitag Decl., ¶ 4.

10 Thereafter, the Receiver received an unsolicited offer for the West Washington
11 Property at an amount that would produce a small recovery for the receivership
12 estate. Based on that offer and on the Receiver's further discussions with SFG, the
13 Receiver engaged in negotiations with the buyer. After initial indications that they
14 would continue their interest, the buyer withdrew their offer. Shortly thereafter, and
15 unsolicited, Next Wave ("Broker") approached the Receiver with a potential
16 interested buyer. Based on their previous experience with the restaurant properties,
17 the Receiver agreed to list the West Washington Property for \$1,650,000 through
18 Broker. Immediately after listing the property, an offer was received for the list
19 price. An additional offer at list price was also received. Through Broker, the
20 Receiver negotiated terms with the prospective buyers and the property went into
21 escrow on or around November 5, 2020 with a purchase price of \$1,650,000.¹ Based
22 on SFG's requirement for a short timeframe to complete the transaction, the buyer's
23 short due diligence timeframe was a significant factor in the selection as Buyer.
24 The proposed buyer is Soheil Nakhshab ("Buyer"). Freitag Decl., ¶ 5.

25
26 ¹ While the marketing process and sale negotiations were taking place, and
27 pursuant to the order granting it relief from the litigation stay (Dkt. 392), SFG had
28 scheduled a foreclosure sale for the West Washington Property for November 30,
2020. However, once the sale contract with Buyer was signed and earnest money
deposit placed into escrow, SFG agreed to postpone the foreclosure sale to
February 2021.

1 As noted above, the West Washington Property is encumbered by a deed of
2 trust in favor of SFG, which has not been paid current. The outstanding principal
3 balance on the interest only loan is \$1.365 million. Depending on when the sale
4 closes (assuming a January 2021 closing), the amount required to pay off the loan
5 will likely be in the range of approximately \$1.442 million. Depending on when the
6 sale closes (assuming a January 2021 closing), property taxes are estimated to be
7 approximately \$48,000. Broker's commission pursuant to the listing agreement is
8 3% of the sale price, or \$49,500, one third of which will be paid to Buyer's broker.
9 The costs of sale, including escrow, title and recording fees are estimated to be
10 approximately \$16,000. While exact amounts will be determined at closing, after all
11 the aforementioned amounts are paid out of escrow, the net sale proceeds for the
12 receivership estate are estimated to be in the range of approximately \$95,000.
13 Freitag Decl., ¶ 6.

14 II. PROPOSED SALE

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

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

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

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

23 **Closing Date.** Closing shall occur upon entry of the Court order approving
24 the sale.

25 III. LEGAL STANDARD

26 "The power of a district court to impose a receivership or grant other forms of
27 ancillary relief does not in the first instance depend on a statutory grant of power
28 from the securities laws. Rather, the authority derives from the inherent power of a

1 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
2 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
3 and efficient administration of the estate by the district court for the benefit of
4 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
5 of a receiver is authorized by the broad equitable powers of the court, any
6 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
7 953 F.2d 1560, 1569 (11th Cir. 1992).

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

12 A district court's power to supervise an equity
13 receivership and to determine the appropriate action to be
14 taken in the administration of the receivership is
15 extremely broad. The district court has broad powers and
16 wide discretion to determine the appropriate relief in an
17 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.

18 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
19 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
20 and 'we generally uphold reasonable procedures instituted by the district court that
21 serve th[e] purpose' of orderly and efficient administration of the receivership for the
22 benefit of creditors."). Accordingly, the Court has broad discretion in the
23 administration of the receivership estate and the disposition of receivership assets.

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

25 It is widely accepted that a court of equity having custody and control of
26 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
27 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
28 and wide discretion to determine relief in an equity receivership). "The power of sale

1 necessarily follows the power to take possession and control of and to preserve
2 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
3 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
4 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
5 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity
6 orders property in its custody to be sold, the court itself as vendor confirms the title
7 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
8 Receivers § 487 (3d ed. 1992).

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

17 Generally, when a court-appointed receiver is involved, the receiver, as agent
18 for the court, should conduct the sale of the receivership property. *Blakely Airport*
19 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
20 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
21 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
22 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
23 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
24 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
25 354, 357 (9th Cir. 1925).

26 **B. 28 U.S.C. § 2001**

27 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real
28 property under subsection (a) and specific requirements for private sales of real

1 property under subsection (b). Although both involve significant cost and delay, the
2 cost and delay of a public sale are significantly less than those for a private sale.
3 *SEC v. Goldfarb*, 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013)
4 ("Section 2001 sets out two possible courses of action: (1) property may be sold in
5 public sale; or (2) property may be sold in a private sale, provided that three separate
6 appraisals have been conducted, the terms are published in a circulated newspaper
7 ten days prior to sale, and the sale price is no less than two-thirds of the valued
8 price."). Therefore, by proceeding under Section 2001(a), the receivership estate can
9 avoid the significant costs and delay of (a) the Court having to appoint three
10 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

17 A public sale of realty or interest therein under any order,
18 judgment or decree of any court of the United States shall
19 not be made without notice published once a week for at
20 least four weeks prior to the sale in at least one
21 newspaper regularly issued and of general circulation in
22 the county, state, or judicial district of the United States
23 wherein the realty is situated.

24 If such realty is situated in more than one county, state,
25 district or circuit, such notice shall be published in one or
26 more of the counties, states, or districts wherein it is
27 situated, as the court directs. The notice shall be
28 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.

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

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

9 IV. DISCUSSION

10 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
11 in the best interests of the receivership estate. The West Washington Property was
12 listed with a licensed broker and shown to interested parties. The property was
13 properly marketed, three offers at comparable prices were received, highest and best
14 terms negotiated, and the Agreement signed. The purchase price is fair and
15 reasonable and reflects the market value of the property. Freitag Decl., ¶ 7.

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

21 In the action pending in U.S. District Court for the
22 Southern District of California, Case No. 19-CV-01628-
23 LAB-AHG, Securities and Exchange Commission v.
24 Gina Champion-Cain, et al., notice is hereby given that
25 the court-appointed receiver will conduct a public auction
26 for the real property located at 901-915 West Washington
27 Street in San Diego County, California. Sale is subject to
28 Court confirmation after the auction is held. Minimum
bid price is at least \$1,660,000. The auction will take
place on December 28, 2020, at 1:30 p.m. in front of the
entrance to the United States Courthouse,
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

1 of \$275,000, and proof of funds. All bidders must be
2 qualified by 5:00 p.m. PT on December 21, 2020, by
3 submitting the required materials to the receiver at 501
4 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.

5 In order to conduct an orderly auction and provide sufficient time for the
6 publication of notices discussed above, the Receiver will require bidders to complete
7 the above steps by December 21, 2020 ("Bid Qualification Deadline") and conduct
8 the live public auction on December 28, 2020.

9 The Receiver will inform all interested persons of the opportunity to overbid at
10 the public auction, provided they qualify themselves to bid by the Bid Qualification
11 Deadline by (a) signing a purchase and sale agreement for the properties on the same
12 terms and conditions as Buyer, but with a purchase price of at least \$1,660,000,
13 (b) providing the Receiver with an earnest money deposit of \$275,000, and
14 (c) providing proof of funds necessary to close the sale transaction in the form of a
15 current bank statement, cashier's check delivered to the Receiver, or other evidence
16 deemed sufficient by the Receiver.

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

24 V. CONCLUSION

25 For the reasons discussed above, the Receiver requests (a) approval of the sale
26 of the West Washington Property to Buyer (or Buyer's designee) pursuant to the
27 Agreement attached to the Freitag Declaration as Exhibit A, and (b) authority to take
28

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

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Dated: December 2, 2020

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