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21 KRISTA FREITAG

22 UNITED STATES DISTRICT COURT
23 SOUTHERN DISTRICT OF CALIFORNIA

24 SECURITIES AND EXCHANGE
25 COMMISSION,

26 Plaintiff,

27 v.

28 GINA CHAMPION-CAIN and ANI
DEVELOPMENT, LLC,

Defendants,

AMERICAN NATIONAL
INVESTMENTS, INC.,

Relief Defendant.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S SECOND MOTION
FOR APPROVAL OF SALE OF
3816 MISSION BLVD. PROPERTY**

Date: June 2, 2021

Time: 3:00 p.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 Second Motion for Approval of Sale of 3816 Mission Blvd. Property
6 ("Motion").

7 The property that is the subject of this Motion was also the subject of a prior
8 sale approval motion, overbid, auction, notice of results of the auction, and Court
9 order approving the sale. Dkt. 586, 596, 604, 614. However, both the winning
10 bidder at the auction (Mauricio Schwartzman with a bid of \$1,590,000) and the
11 approved back-up bidder (Steven Ozbun with a bid of \$1,580,000) failed to close
12 their respective sale transactions. Accordingly, their earnest money deposits totaling
13 \$105,000 were forfeited and paid from escrow to the receivership estate and the
14 Receiver put the property back on the market. This Motion is the result of those
15 further marketing efforts.

16 I. BACKGROUND FACTS

17 One of the commercial properties included in the receivership estate is a
18 1,413 square foot, mixed-use building containing one commercial unit and one
19 residential unit ("3816 Mission Blvd. Property"). The address for the commercial
20 unit is 3816 Mission Boulevard, San Diego, California 92109 and the address for the
21 residential unit is 733 Salem Court, San Diego, California 92109. The 3816 Mission
22 Blvd. Property was purchased by The Gina Champion Cain Revocable Trust on
23 March 2, 2015 for \$618,000. In April 2016, title was transferred to 3816 Mission
24 Blvd., LLC, the current owner. Declaration of Krista Freitag filed herewith ("Freitag
25 Decl."), ¶ 2.

26 Upon her appointment, the Receiver and her staff performed an analysis of the
27 value of the 3816 Mission Blvd. Property, including a review of automated valuation
28 scores for the property and a survey of the market comparable properties. The

1 Receiver also consulted with multiple licensed brokers about the value of the
2 property and terms of a potential listing agreement. Ultimately, the Receiver
3 selected Compass Realty ("Broker") and had the 3816 Mission Blvd. Property
4 initially listed for sale at \$1,250,000. Freitag Decl., ¶ 3.

5 To market the 3816 Mission Blvd. Property, Broker created marketing flyers
6 with professional photos. The listing was sent out via email campaigns to a targeted
7 list of brokers and investors. Online advertising was placed on key websites that
8 included local MLS and LoopNet. Post COVID-19, in compliance with guidance
9 from the California Association of Realtors socially distant property tours were
10 enforced. There was significant interest in the property throughout its marketing and
11 a total of four (4) offers were received, although three (3) were subsequently
12 withdrawn due to buyer's reported inability to secure acceptable financing. Through
13 Broker, the Receiver negotiated terms with the prospective buyers. Finally, the
14 property went into escrow on or around December 30, 2020 with a purchase price of
15 \$1,210,000. The proposed buyer was Mauricio Schwartzman ("Buyer"). Freitag
16 Decl., ¶ 4.

17 As noted above, an overbid was received and an auction was conducted. The
18 winning bid was from Buyer in the amount of \$1,590,000 and the second
19 highest/back-up bid was from Steven Ozbun in the amount of \$1,580,000. The
20 Receiver filed the notice of the results of the auction and the Court approved the sale
21 to Buyer and also approved and authorized the Receiver to close the sale with
22 Mr. Ozbun if Buyer failed to close the sale transaction. In the following weeks, first
23 Buyer and then Mr. Ozbun declined to close the respective sale transactions at the
24 prices they had bid at auction. Accordingly, their earnest money deposits totaling
25 \$105,000 were forfeited and paid from escrow to the receivership estate and the
26 Receiver, through Broker, put the property back on the market. Freitag Decl., ¶ 5.

27 Buyer continued to express serious interest in the Property, albeit at a price
28 lower than his prior bid at auction. Several other prospective purchasers expressed

1 interest in the Property through submitted Letters of Intent to Purchase or through
2 emails confirming their interest. Through Broker, the Receiver negotiated terms with
3 the prospective buyers and gave all interested parties an opportunity to submit a
4 highest and best offer subject to overbid. Finally, the property went into escrow
5 again with Buyer (Mr. Schwartzman) on or around April 19, 2021 with a purchase
6 price of \$1,360,000. Freitag Decl., ¶ 6.

7 The 3816 Mission Blvd. Property is encumbered by a loan and deed of trust in
8 favor of AXOS Bank. The amount required to pay off the loan (assuming a
9 May 2021 closing) is estimated to be \$485,000. Depending on when the sale closes
10 (assuming a May 2021 closing), property taxes in the neighborhood of \$1,000 are
11 estimated to be owed to the receivership estate. The Broker's commission pursuant
12 to the listing agreement is 4% of the sale price, or \$54,400. The costs of sale,
13 including escrow, title and recording fees are estimated to be approximately \$9,000.
14 While exact amounts will be determined at closing, after all the aforementioned
15 amounts are paid out of escrow, the net sale proceeds for the receivership estate are
16 estimated to be approximately \$812,000. Freitag Decl., ¶ 7.

17 **II. PROPOSED SALE**

18 The key terms of the proposed Purchase and Sale Agreement and Joint Escrow
19 Instructions ("Agreement"), a copy of which is attached to the Freitag Decl. as
20 Exhibit A, are summarized as follows:

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

23 **Purchase Price.** The purchase price is \$1,360,000, which amount will be paid
24 in cash.

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

26 **Closing Date.** Closing shall occur upon entry of the Court order approving
27 the sale.

28

III. LEGAL STANDARD

1
2 "The power of a district court to impose a receivership or grant other forms of
3 ancillary relief does not in the first instance depend on a statutory grant of power
4 from the securities laws. Rather, the authority derives from the inherent power of a
5 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
6 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
7 and efficient administration of the estate by the district court for the benefit of
8 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
9 of a receiver is authorized by the broad equitable powers of the court, any
10 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
11 953 F.2d 1560, 1569 (11th Cir. 1992).

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

16 A district court's power to supervise an equity
17 receivership and to determine the appropriate action to be
18 taken in the administration of the receivership is
19 extremely broad. The district court has broad powers and
20 wide discretion to determine the appropriate relief in an
21 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.

22 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
23 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
24 and 'we generally uphold reasonable procedures instituted by the district court that
25 serve th[e] purpose' of orderly and efficient administration of the receivership for the
26 benefit of creditors."). Accordingly, the Court has broad discretion in the
27 administration of the receivership estate and the disposition of receivership assets.
28

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

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

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

22 Generally, when a court-appointed receiver is involved, the receiver, as agent
23 for the court, should conduct the sale of the receivership property. *Blakely Airport*
24 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
25 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
26 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
27 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
28 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are

1 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
2 354, 357 (9th Cir. 1925).

3 **B. 28 U.S.C. § 2001**

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

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

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

If such realty is situated in more than one county, state,
district or circuit, such notice shall be published in one or
more of the counties, states, or districts wherein it is
situated, as the court directs. The notice shall be
substantially in such form and contain such description of
the property by reference or otherwise as the court

1 approves. The court may direct that the publication be
2 made in other newspapers.

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

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

14 **IV. DISCUSSION**

15 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
16 in the best interests of the receivership estate. The 3816 Mission Blvd. Property was
17 listed with a licensed broker and shown to all interested parties. The property was
18 properly marketed on two separate occasions, various offers were received on both
19 occasions, highest and best terms negotiated, and the Agreement signed. The
20 purchase price is fair and reasonable and reflects the market value of the property.
21 Furthermore, \$105,000 of forfeited earnest money deposits have been realized for the
22 benefit of the receivership estate. Freitag Decl., ¶ 8.

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

28 In the action pending in U.S. District Court for the
Southern District of California, Case No. 19-CV-01628-
LAB-AHG, Securities and Exchange Commission v.
Gina Champion-Cain, et al., notice is hereby given that

1 the court-appointed receiver will conduct a public auction
2 for the real property located at 3816 Mission Blvd. in San
3 Diego County, California (also known as 733 Salem
4 Court, San Diego, California). Sale is subject to Court
5 confirmation after the auction is held. Minimum bid
6 price is at least \$1,400,000. The auction will take place
7 on May 20, 2021, at 1:30 p.m. in front of the entrance to
8 the United States Courthouse, 221 W. Broadway, San
9 Diego, California or as otherwise determined by the
10 Court. To be allowed to participate in the auction,
11 prospective purchasers must meet certain bid
12 qualification requirements, including submitting a signed
13 purchase and sale agreement, an earnest money deposit
14 of \$33,000, and proof of funds. All bidders must be
15 qualified by 5:00 p.m. PT on May 17, 2021, by
16 submitting the required materials to the receiver at 501
17 West Broadway, Suite 290, San Diego, California,
18 92101. If interested in qualifying as a bidder, please
19 contact Geno Rodriguez at (619) 567-7223 or
20 grodriguez@ethreadvisors.com.

21 In order to conduct an orderly auction and provide sufficient time for the
22 publication of notices discussed above, the Receiver will require bidders to complete
23 the above steps by May 17, 2021 ("Bid Qualification Deadline") and conduct the live
24 public auction on May 20, 2021.

25 The Receiver will inform all interested persons of the opportunity to overbid at
26 the public auction, provided they qualify themselves to bid by the Bid Qualification
27 Deadline by (a) signing a purchase and sale agreement for the properties on the same
28 terms and conditions as Buyer, but with a purchase price of at least \$1,400,000,
29 (b) providing the Receiver with an earnest money deposit of \$33,000, and
30 (c) providing proof of funds necessary to close the sale transaction in the form of a
31 current bank statement, cashier's check delivered to the Receiver, or other evidence
32 deemed sufficient by the Receiver.

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

1 by the Bid Qualification Deadline, the Receiver will notify the Court and seek entry
2 of an order approving the sale to Buyer.

3 **V. CONCLUSION**

4 For the reasons discussed above, the Receiver requests (a) approval of the sale
5 of the 3816 Mission Blvd. Property to Buyer (or Buyer's designee) pursuant to the
6 Agreement attached to the Freitag Declaration as Exhibit A, and (b) authority to take
7 all steps necessary to close the sale, with the net sale proceeds after all third-party
8 payments are made from escrow going to the receivership estate.

9
10 Dated: April 23, 2021

ALLEN MATKINS LECK GAMBLE
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