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11 Attorneys for Receiver
12 KRISTA FREITAG

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15
16 SECURITIES AND EXCHANGE
COMMISSION,
17 Plaintiff,
18
19 v.
20 GINA CHAMPION-CAIN and ANI
DEVELOPMENT, LLC,
21 Defendants,
22 AMERICAN NATIONAL
INVESTMENTS, INC.,
23 Relief Defendant.
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25
26
27
28

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
(A) APPROVAL OF SALE OF REAL
PROPERTY LOCATED AT 4205
LAMONT STREET, #12; AND
(B) AUTHORITY TO PAY
BROKER'S COMMISSION**

Date: December 5, 2019
Time: 1:30 p.m.
Chambers: 3B
Mag. Judge: Hon. Allison H. Goddard

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 (A) Approval of Sale of Real Property Located at 4205 Lamont
6 Street, #12; and (B) Authority to Pay Broker's ("Motion").

7 I. BACKGROUND FACTS

8 As reflected on Exhibit A to the Receiver's Verified Initial Report (Dkt. 76-1,
9 Exhibit A), the receivership estate includes numerous residential and commercial
10 real properties. The residential properties include a condominium located at
11 4205 Lamont Street, #12, San Diego, California ("Lamont Street Property"). The
12 Lamont Street Property is 553 square feet with one bedroom and one bathroom.
13 The Lamont Street Property was purchased by one of the Receivership Entities,
14 2466 1st Avenue, LLC, for \$350,000 on September 23, 2016. Freitag Decl., ¶ 2.

15 Prior to the Receiver's appointment, on May 14, 2019, the Lamont Street
16 Property was listed for sale on the Multiple Listing Service (MLS) with a licensed
17 broker, Pacific Sotheby's International Realty ("Broker"). The list price was
18 \$399,000. The property was on the market for 89 days before it went into escrow on
19 August 10, 2019 with a purchase price of \$409,000. The buyer is Misty Swetland
20 ("Buyer"). Freitag Decl., ¶ 3.

21 Upon her appointment and after learning of the pending sale, the Receiver
22 performed her own analysis of the value of the Lamont Street Property, including a
23 review of automated valuation scores for the property and a review of the appraisal
24 procured by Buyer (with an appraised value of \$410,000) and determined that the
25 proposed purchase price is fair and reasonable. The Receiver and Buyer then
26 executed a First Amendment to Residential Purchase Agreement and Escrow
27 Instructions ("First Amendment") which makes Court approval of the sale a
28 condition to closing and provides for the overbid and auction process described

1 below. The First Amendment was signed on September 26, 2019. Freitag Decl.,
2 ¶ 4.

3 The Lamont Street Property is encumbered by a Small Business
4 Administration loan and deed of trust in favor of First Choice Bank. The SBA loan
5 is associated with Receivership Entity 2163 Abbott Street, LP, which owns Surf
6 Rider Pizza Co. The balance due on the loan is approximately \$800,000. The
7 collateral for the SBA loan includes the personal property located at Surf Rider
8 Pizza Co. in Mission Beach, the Lamont Street Property, and two other residential
9 properties – 4364 Valle Vista, San Diego, California as well as Defendant
10 Champion-Cain's residence located in the Mission Hills area of San Diego.¹ Freitag
11 Decl., ¶ 5.

12 The Valle Vista property is effectively controlled by the Receivership Entities
13 as landlord and is held in a trust for which Champion-Cain is the sole remaining
14 Grantor and Trustee. Although the Valle Vista property is encumbered by two loans
15 – a first position mortgage (debt service payments for which have been made by the
16 Receivership Entities) and the SBA loan discussed above in second position – with
17 the reduction of the balance due on the SBA loan from the proceeds from the
18 proposed sale of the Lamont Street Property, the Receiver anticipates the
19 receivership estate will recover approximately \$100,000 from the sale of the Valle
20 Vista property. These sales and the resulting payoff of the SBA loan will allow the
21 Receiver to sell the personal property located at the Surf Rider Pizza Co. in Mission
22 Beach, the expenditures for which were substantial and recovery from which is also
23 expected to be material.. Freitag Decl., ¶ 6.

24 II. PROPOSED SALE

25 The key terms of the proposed Residential Purchase Agreement and Joint
26 Escrow Instructions, including First Amendment thereto ("Agreement"), a copy of
27

28 ¹ It is unclear at this point whether the receivership estate has claims to or will be
able to recover any value from Champion-Cain's residence.

1 which is attached to the Freitag Declaration as Exhibit A, are summarized as
2 follows:

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

5 **Purchase Price.** The purchase price is \$409,000, which is being financed by
6 Buyer.

7 **Deposit.** Buyer has deposited \$12,270 into escrow.

8 **Closing Date.** Closing shall occur within 7 days of entry of the Court order
9 approving the sale.

10 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be
11 paid a commission of 5% of the gross sales price, which is to be split evenly with
12 Buyer's broker. In the proposed sale, the total commission would be \$20,450.

13 **III. LEGAL STANDARD**

14 "The power of a district court to impose a receivership or grant other forms of
15 ancillary relief does not in the first instance depend on a statutory grant of power
16 from the securities laws. Rather, the authority derives from the inherent power of a
17 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
18 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
19 and efficient administration of the estate by the district court for the benefit of
20 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
21 of a receiver is authorized by the broad equitable powers of the court, any
22 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
23 953 F.2d 1560, 1569 (11th Cir. 1992).

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

28 A district court's power to supervise an equity receivership
and to determine the appropriate action to be taken in the

1 administration of the receivership is extremely broad. The
2 district court has broad powers and wide discretion to
3 determine the appropriate relief in an equity receivership.
4 The basis for this broad deference to the district court's
5 supervisory role in equity receiverships arises out of the fact
6 that most receiverships involve multiple parties and complex
7 transactions. A district court's decision concerning the
8 supervision of an equitable receivership is reviewed for
9 abuse of discretion.

6 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
7 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
8 and 'we generally uphold reasonable procedures instituted by the district court that
9 serve th[e] purpose' of orderly and efficient administration of the receivership for
10 the benefit of creditors."). Accordingly, the Court has broad discretion in the
11 administration of the receivership estate and the disposition of receivership assets.

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

13 It is widely accepted that a court of equity having custody and control of
14 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
15 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
16 and wide discretion to determine relief in an equity receivership). "The power of
17 sale necessarily follows the power to take possession and control of and to preserve
18 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.
19 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
20 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
21 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))). "When a court of equity
22 orders property in its custody to be sold, the court itself as vendor confirms the title
23 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
24 Receivers § 487 (3d ed. 1992).

25 "A court of equity, under proper circumstances, has the power to order a
26 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
27 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
28 Clark, Treatise on Law & Practice of Receivers § 500 (3d ed. 1992). To that end, a

1 federal court is not limited or deprived of any of its equity powers by state statute.
2 *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925)
3 (state statute allowing time to redeem property after a foreclosure sale not applicable
4 in a receivership sale).

5 Generally, when a court-appointed receiver is involved, the receiver, as agent
6 for the court, should conduct the sale of the receivership property. *Blakely Airport*
7 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
8 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
9 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
10 Clark, Treatise on Law & Practice of Receivers §§ 342, 344, 482(a), 487, 489, 491
11 (3d ed. 1992). "In authorizing the sale of property by receivers, courts of equity are
12 vested with broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d
13 354, 357 (9th Cir. 1925).

14 **B. 28 U.S.C. § 2001**

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

27 The requirements of a public sale under Section 2001(a) are that notice of the
28 sale be published as proscribed by Section 2002 and a public auction be held at the

1 courthouse "as the court directs." 28 U.S.C. § 2001(a); *SEC v. Capital Cove*
2 *Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856, at *13 (C.D. Cal. 2015); *SEC v.*
3 *Kirkland*, 2007 U.S. Dist. LEXIS 45353, at *5 (M.D. Fla. 2007). In terms of
4 publication of notice, Section 2002 provides:

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

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

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

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

23 **IV. DISCUSSION**

24 The Receiver believes the proposed sale to Buyer pursuant to the Agreement
25 is in the best interests of the estate. The Lamont Street Property was listed on the
26 MLS with a licensed broker and shown to all interested parties. The property was
27 on the market for 89 days, offers were received, terms negotiated, and the
28 Agreement signed. The Receiver has found no evidence that the proposed sale is

1 anything other than an ordinary arm's length transaction. The purchase price is fair
2 and reasonable and exceeds what the property was purchased for in 2016 by
3 \$59,000. Freitag Decl., ¶ 7.

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

9 In the action pending in U.S. District Court for the Southern
10 District of California, Case No. 19-CV-01628-LAB-AHG,
11 Securities and Exchange Commission v. Gina Champion-Cain, et
12 al., notice is hereby given that the court-appointed receiver will
13 conduct a public auction for the real property located at
14 4205 Lamont Street, #12 in San Diego County, California. Sale
15 is subject to Court confirmation after the auction is held.
16 Minimum bid price is at least \$419,000. The auction will take
17 place on November 7, 2019, at 1:30 p.m. in front of the entrance
18 to the United States Courthouse, 221 W. Broadway, San Diego,
19 California. To be allowed to participate in the auction,
20 prospective purchasers must meet certain bid qualification
21 requirements, including submitting a signed purchase and sale
22 agreement, an earnest money deposit of \$29,550, and proof of
23 funds. All bidders must be qualified by 5:00 p.m. PT on
24 November 5, 2019, by submitting the required materials to the
25 receiver at 401 W. A Street, Suite 1830, San Diego, California,
26 92101. If interested in qualifying as a bidder, please contact
27 Geno Rodriguez at (619) 567-7223 or
28 grodriguez@ethreadvisors.com.

20 In order to conduct an orderly auction and provide sufficient time for the
21 publication of notices discussed above, the Receiver will require bidders to complete
22 the above steps by November 5, 2019 ("Bid Qualification Deadline"), and conduct
23 the live public auction on November 7, 2019, in front of the courthouse or in an
24 alternative location directed by the Court.

25 The Receiver will inform all interested persons of the opportunity to overbid
26 at the public auction, provided they qualify themselves to bid by the Bid
27 Qualification Deadline by (a) signing a purchase and sale agreement for the
28 properties on the same terms and conditions as Buyer, but with a purchase price of

1 at least \$419,000, (b) providing the Receiver with an earnest money deposit of
2 \$29,550, and (c) providing proof of funds necessary to close the sale transaction in
3 the form of a current bank statement, cashier's check delivered to the Receiver, or
4 other evidence deemed sufficient by the Receiver.

5 In the event one or more prospective purchasers qualify themselves to bid, the
6 auction will be conducted by the Receiver as noted above and bids will be allowed
7 in increments of at least \$5,000. The Receiver will then file a notice advising the
8 Court of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
9 confirming the sale. Earnest money deposits provided by bidders who are
10 unsuccessful will be promptly returned to them. In the event no prospective
11 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
12 will notify the Court and seek entry of an order approving the sale to Buyer.

13 With respect to Broker's commission, Broker appears to have broadly
14 marketed the Lamont Street Property for sale, to include its posting on the MLS and
15 its own website. The listing agreement is consistent with industry standards for
16 commissions paid to brokers for sales of residential properties. Accordingly, the
17 Receiver requests authorization to pay Broker the commission amount in accordance
18 with the listing agreement. Freitag Decl., ¶ 8.

19 **V. CONCLUSION**

20 For the reasons discussed above, the Receiver requests (a) approval of the sale
21 of the Lamont Street Property to Buyer pursuant to the Agreement attached to the
22 Freitag Declaration as Exhibit A, and (b) authority to take all steps necessary to
23 close the sale, and (c) authority to pay Broker's commission as described above.

24 Dated: October 11, 2019

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