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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.
24
25
26

Case No. 3:19-cv-01628-LAB-AHG
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
(A) APPROVAL OF SALE OF REAL
PROPERTY LOCATED AT
132 KELLER STREET FREE AND
CLEAR OF MECHANIC'S LIEN;
AND (B) AUTHORITY TO PAY
BROKER'S COMMISSION**
Date: December 9, 2019
Time: 11:15 a.m.
Courtroom: 14A (14th Flr)
Judge: Hon. Larry Alan Burns

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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 (A) Approval of Sale of Real Property Located at 132 Keller Street
6 Free and Clear of Mechanic's Lien; 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 commercial properties include a non-operating restaurant
11 located at 132 Keller Street, Petaluma, California ("Keller Street Property"). The
12 Keller Street Property is approximately 5,481 square feet of restaurant space. The
13 Keller Street Property, along with the neighboring property (140 Keller Street) was
14 purchased by one of the Receivership Entities, 132 & 140 Keller Street, LLC, for
15 \$2,900,000 on November 2, 2015. Freitag Decl., ¶ 2.

16 After the 132 and 140 Keller Street property was purchased, the lot, which
17 had two buildings on it – a restaurant located at 132 Keller Street and a co-working
18 office space located at 140 Keller Street – was split into two lots. The restaurant
19 closed, but the co-working office space continued to operate (and now operates
20 under the Receiver's supervision). Freitag Decl., ¶ 3.

21 Prior to the Receiver's appointment, in September 2018, the Keller Street
22 Property (132 Keller Street only) was listed for lease on the Multiple Listing Service
23 (MLS) with a licensed broker, Keegan & Coppin Co., Inc. ("Broker"). In
24 February 2019, the Keller Street Property (including the restaurant equipment
25 contained therein) was listed on the MLS for sale with a list price of \$2,000,000.
26 Broker reportedly toured the property with prospective tenants and purchasers a
27 total of 23 times. An offer of \$1,750,000 was received in March 2019. A counter-
28 offer in the amount of \$1,800,000 was made and accepted. It is important to note

1 that the sale of the liquor license associated with the Keller Street Property is not a
2 part of this transaction. A Standard Commercial/Investment Purchase Agreement
3 (the "Purchase Agreement") was signed and the property went into escrow on
4 April 6, 2019. The buyer is Petaluma Restaurant Services Holdings, LLC
5 ("Buyer").¹ Freitag Decl., ¶ 4.

6 At the same time the Purchase Agreement was signed, the parties entered into
7 a lease allowing Buyer to store equipment and non-alcohol inventory at the space
8 rent-free pending sale closing. The lease commenced upon approval of the lot split,
9 which occurred on August 12, 2019. In June 2019, Defendant Champion-Cain, on
10 behalf of the Seller, and Buyer executed a First Amendment, which allowed Buyer
11 to conduct a Phase 2 environmental test at the property. In September 2019, Buyer
12 received the Phase 2 results and approved them. Freitag Decl., ¶ 5.

13 Upon her appointment and after learning of the pending sale, the Receiver
14 performed her own analysis of the value of the Keller Street Property, including
15 review of the appraisal procured by Buyer (with an appraised value of \$1,750,000
16 for the property and \$50,000 for the restaurant equipment contained therein) and
17 determined that the proposed purchase price is fair and reasonable. The Receiver
18 and Buyer then executed a Second Amendment to Standard Commercial/Investment
19 Purchase Agreement ("Second Amendment") which makes Court approval of the
20 sale a condition to closing and provides for the overbid and auction process
21 described below. The Second Amendment was signed on October 11, 2019. Freitag
22 Decl., ¶ 6.

23 The Keller Street Property, together with the neighboring 140 Keller Street
24 property, which is also included in the receivership estate, is encumbered by a
25 mortgage. The principal balance due on the interest-only mortgage is \$2,700,000.
26
27

28 ¹ The buyer under the Purchase Agreement was initially "David Ducommun or his assignee" and was subsequently assigned to Buyer.

1 Assuming the subject transaction closes in December 2019, the net proceeds
2 from the sale of the Keller Street Property will be used to pay down the mortgage
3 such that approximately \$1.1 million will be owed on the mortgage after the sale
4 closes. Freitag Decl., ¶ 7.

5 The approval of the subject transaction is important given the projected net
6 proceeds (estimated to be in the high six figures or low seven figures with a late first
7 quarter 2020 closing) from a sale of the 140 Keller Street Property to be realized for
8 the benefit of the receivership estate. As previously mentioned, the 140 Keller
9 Street property is an operating co-working business. In anticipation of listing the
10 140 Keller Street property for sale, the Receiver's staff has met with Broker.
11 Because Petaluma is a small market (population is approximately 60,000), Broker
12 has comprehensive knowledge of the overall asset pre and post lot split, Broker has
13 thus far performed a market transaction of the sister property, and Broker has been
14 integral through the receivership transition process, the Receiver is negotiating a
15 new listing agreement and intends to proceed with marketing 140 Keller Street with
16 Broker at \$2,500,000 (subject to overbid and Court approval of the sale). This
17 anticipated list price does not include the value of the co-working business, which is
18 currently being assessed. Freitag Decl., ¶ 8.

19 Finally, prior to the Receiver's appointment, a contractor, Adam Lewis
20 Construction ("ALC"), performed work on the Keller Street Property and the
21 neighboring property (140 Keller Street). Then, after the Receiver's appointment
22 and after being made aware of the receivership, ALC recorded a mechanic's lien on
23 both properties (132 and 140 Keller Street) in violation of Section XIII of the
24 Appointment Order. The Receiver, through her counsel, notified ALC that its
25 recording of the mechanic's lien violated the Appointment Order. Thus far,
26 however, ALC has refused to release the mechanic's lien. Freitag Decl., ¶ 9.

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1 **II. PROPOSED SALE**

2 The key terms of the proposed Standard Commercial/Investment Purchase
3 Agreement, including First and Second Amendments thereto ("Purchase
4 Agreement"), a copy of which is attached to the Freitag Declaration as Exhibit A,
5 are summarized as follows:

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

8 **Purchase Price.** The purchase price is \$1,800,000, which is being financed
9 by Buyer.

10 **Deposit.** Buyer has deposited \$50,000 into escrow.

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

13 **Broker's Commission.** Pursuant to the listing agreement, because Broker
14 represents both sides to the sale, it is to be paid a commission of 6% of the final sale
15 price. In the proposed sale, the total commission would be \$108,000.

16 **III. LEGAL STANDARD**

17 "The power of a district court to impose a receivership or grant other forms of
18 ancillary relief does not in the first instance depend on a statutory grant of power
19 from the securities laws. Rather, the authority derives from the inherent power of a
20 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
21 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
22 and efficient administration of the estate by the district court for the benefit of
23 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
24 of a receiver is authorized by the broad equitable powers of the court, any
25 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
26 953 F.2d 1560, 1569 (11th Cir. 1992).

27 District courts have the broad power of a court of equity to determine the
28 appropriate action in the administration and supervision of an equity receivership.

1 See *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth
2 Circuit explained:

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

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

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

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

28

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

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

18 **B. 28 U.S.C. § 2001**

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

1 can avoid the significant costs and delay of (a) the Court having to appoint three
2 disinterested appraisers, and (b) obtaining three appraisals from such appraisers.

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

9 A public sale of realty or interest therein under any order,
10 judgment or decree of any court of the United States shall not
11 be made without notice published once a week for at least
12 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.

13 If such realty is situated in more than one county, state,
14 district or circuit, such notice shall be published in one or
15 more of the counties, states, or districts wherein it is situated,
16 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 approves. The court may direct that
the publication be made in other newspapers.

17 This section shall not apply to sales and proceedings under
18 Title 11 or by receivers or conservators of banks 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.*,
26 2009 U.S. Dist. LEXIS 111381, at *8 (E.D. Mo. 2009).

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IV. DISCUSSION

A. The Proposed Sale

The Receiver believes the proposed sale to Buyer pursuant to the Purchase Agreement is in the best interests of the estate. The Keller Street Property was listed with a licensed broker and shown to all interested parties. Offers were received, terms negotiated, and the Purchase Agreement signed. The Receiver has found no evidence that the proposed sale is anything other than an ordinary arm's length transaction. The purchase price is fair and reasonable and is supported by an appraisal that estimates the value of the Keller Street Property and the personal property located therein to be \$1,800,000. Freitag Decl., ¶ 10.

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 consistent with the requirements of Section 2001(a). Specifically, the Receiver will publish the following notice of the sale once a week for four weeks in the Santa Rosa Press Democrat, a newspaper of general circulation in Sonoma County:

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 the court-appointed receiver will conduct a public auction for the real property located at 132 Keller Street, Petaluma in Sonoma County, California. Sale is subject to Court confirmation after the auction is held. Minimum bid price is at least \$1,850,000. The auction will take place on December 5, 2019, at 1:30 p.m. in front of the entrance to the United States Courthouse, 221 W. Broadway, San Diego, California. 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 \$55,000, and proof of funds. All bidders must be qualified by 5:00 p.m. PT on December 2, 2019, by submitting the required materials to the receiver at 401 W. A Street, Suite 1830, San Diego, California, 92101. If interested in qualifying as a bidder, please contact Geno Rodriguez at (619) 567-7223 or grodriguez@ethreadvisors.com.

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

1 the above steps by December 2, 2019 ("Bid Qualification Deadline"), and conduct
2 the live public auction on December 5, 2019.

3 The Receiver will inform all interested persons of the opportunity to overbid
4 at the public auction, provided they qualify themselves to bid by the Bid
5 Qualification Deadline by (a) signing a purchase and sale agreement for the
6 properties on the same terms and conditions as Buyer, but with a purchase price of
7 at least \$1,850,000, (b) providing the Receiver with an earnest money deposit of
8 \$55,000, and (c) providing proof of funds necessary to close the sale transaction in
9 the form of a current bank statement, cashier's check delivered to the Receiver, or
10 other evidence deemed sufficient by the Receiver.

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

19 **B. Broker's Commission**

20 With respect to Broker's commission, Broker appears to have broadly
21 marketed the Keller Street Property for sale, to include its posting on the MLS and
22 its own website. The listing agreement is consistent with industry standards for
23 commissions paid to brokers for sales of commercial properties. Accordingly, the
24 Receiver requests authorization to pay Broker the commission amount in accordance
25 with the listing agreement. Freitag Decl., ¶ 11.

26 **C. The ALC Mechanic's Lien**

27 Although the Receiver believes the mechanic's lien in favor of ALC was
28 recorded in clear violation of the Appointment Order, it is suffice to say at this point

1 that the lien is the subject of a bona fide dispute. Therefore, the sale of the Keller
2 Street Property should be approved free and clear of the lien. As noted above, the
3 full net proceeds of the sale will be used to pay down the mortgage, which is senior
4 to the mechanic's lien regardless. The mechanic's lien will remain on the 140 Keller
5 Street property until such time as it is released by ALC or the dispute over the lien is
6 resolved by the Court.

7 **V. CONCLUSION**

8 For the reasons discussed above, the Receiver requests (a) approval of the sale
9 of the Keller Street Property to Buyer pursuant to the Purchase Agreement attached
10 to the Freitag Declaration as Exhibit A and free and clear of the mechanic's lien
11 recorded by ALC, (b) authority to take all steps necessary to close the sale, and
12 (c) authority to pay Broker's commission as described above.

13
14 Dated: October 31, 2019

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