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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 MOTION FOR
APPROVAL OF SALE OF
TENNYSON STREET PROPERTY**

Date: March 16, 2020

Time: 2:00 p.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 Tennyson Street Property ("Motion").

6 **I. BACKGROUND FACTS**

7 One of the residential real properties included in the receivership estate is a
8 single-family residence located at 3548 Tennyson Street, San Diego, California
9 ("Tennyson Property"). The Tennyson Property is 1,502 square feet with
10 four bedrooms and two bathrooms. The Tennyson Property was purchased on
11 August 20, 2019 for \$840,000 and title was taken in the name of American National
12 Investments, Inc. Freitag Decl., ¶ 2.

13 Having been purchased only about two weeks prior to the Receiver's
14 appointment, the Tennyson Property was not occupied and while habitable, was in
15 need of various repairs, including repairs to a non-functioning elevator to make the
16 property wheelchair accessible. Upon her appointment, the Receiver and her staff
17 performed an analysis of the value of the Tennyson Property, including a review of
18 automated valuation scores for the property and a survey of the market comparable
19 properties. The Receiver also consulted with multiple licensed brokers about the
20 value of the property and terms of a potential listing agreement. Ultimately, the
21 Receiver selected Resonate Real Estate ("Broker") and had the Tennyson Property
22 listed for sale at \$865,000. Freitag Decl., ¶ 3.

23 The Broker held two open houses and shortly thereafter two offers were
24 received, both near the listing price. After countering both offers for their highest
25 and best price, the highest offer was from Matthew Minnick and Peyton Shealy
26 ("Buyer") in the amount of \$885,000. The Receiver and Buyer then signed a
27 Residential Purchase Agreement and Joint Escrow Instructions, along with an
28 Addendum that provides for the overbid, public auction, and Court approval process.

1 Buyer has now removed all contingencies other than Court approval. Freitag Decl.,
2 ¶ 4.

3 The Tennyson Property is encumbered by a deed of trust in favor of Seattle
4 Funding Group ("SFG"). The outstanding principal balance on the interest-only loan
5 is \$546,000, and the loan is being paid current. Depending on when the sale closes
6 (assuming a late March/early April 2020 closing), the amount required to pay off the
7 loan will likely be in the range of approximately \$546,000 to \$550,000. Depending
8 on when the sale closes, the Receiver estimates that property taxes paid at closing
9 will likely be in the range of approximately \$6,700 to \$8,600 (these numbers include
10 a supplemental tax bill stemming from the August 2019 purchase). The Broker's
11 commission pursuant to the listing agreement is 4% of the sale price, or \$35,400,
12 which amount will be split with Buyer's broker. The costs of sale, including escrow,
13 title and recording fees are estimated to be approximately \$7,200. Finally, the
14 Receiver agreed to give Buyer a credit for repairs, including repairs to the sewer line
15 and some termite damage in the amount of \$4,000, which amount will be paid from
16 escrow. While exact amounts will be determined at closing, after all of the
17 aforementioned amounts are paid out of escrow, the net sale proceeds for the
18 receivership estate are estimated to be in the range of approximately \$280,000 to
19 \$285,000. Freitag Decl., ¶ 5.

20 There is also a lien on the Tennyson Property recorded by the California
21 Employment Development Department ("EDD") for unpaid payroll taxes for the
22 ownership entity from 2016, together with interest and penalties, for a total of
23 approximately \$6,000. After investigating the lien, it appears that payroll tax
24 obligations were underpaid by \$764.05, in total, in the second and third quarter of
25 2016. The Receiver also found that the payroll tax obligations for the subject entity
26 were subsequently overpaid in the aggregate amount of \$13,353.08 through the first
27 quarter of 2019; however, the penalties and fees for failure to pay the original
28 \$764.05 amount have added up to a reported \$19,261.37. The Receiver has made a

1 \$934.36 payment (includes the interest due on the \$764.05 for the period in which
2 the underpayment was made) to the EDD and has begun negotiations with them to
3 release the lien, waive the outstanding amount and to recover the overpayment of
4 \$13,353.08 and potentially the additional penalties and fees. It may take some time,
5 however, to get the EDD to release the lien. Accordingly, the Receiver requests that
6 the EDD lien, in the event it has not been released prior to closing of the sale, be
7 removed from the Tennyson Property such that the sale can close without delay, and
8 attach to the net sale proceeds until such time as the EDD has released the lien.
9 Freitag Decl., ¶ 6.

10 **II. PROPOSED SALE**

11 The key terms of the proposed Residential Purchase Agreement and Joint
12 Escrow Instructions, including Addendum thereto ("Agreement"), a copy of which is
13 attached to the Freitag Declaration as Exhibit A, are summarized as follows:

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

16 **Purchase Price.** The purchase price is \$885,000, which will be financed.

17 **Deposit.** Buyer has deposited \$8,450 into escrow.

18 **Closing Date.** Closing shall occur upon entry of the Court order approving
19 the sale.

20 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
21 a commission of 4% of the gross sales price, which amount will be split with Buyer's
22 broker. In the proposed sale, the total commission would be \$35,400.

23 **III. LEGAL STANDARD**

24 "The power of a district court to impose a receivership or grant other forms of
25 ancillary relief does not in the first instance depend on a statutory grant of power
26 from the securities laws. Rather, the authority derives from the inherent power of a
27 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
28 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly

1 and efficient administration of the estate by the district court for the benefit of
2 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
3 of a receiver is authorized by the broad equitable powers of the court, any
4 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
5 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

16 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
17 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
18 and 'we generally uphold reasonable procedures instituted by the district court that
19 serve th[e] purpose' of orderly and efficient administration of the receivership for the
20 benefit of creditors."). Accordingly, the Court has broad discretion in the
21 administration of the receivership estate and the disposition of receivership assets.

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

23 It is widely accepted that a court of equity having custody and control of
24 property has power to order a sale of the same in its discretion. *See, e.g., SEC v.*
25 *Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (the District Court has broad powers
26 and wide discretion to determine relief in an equity receivership). "The power of sale
27 necessarily follows the power to take possession and control of and to preserve
28 property." *See SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir.

1 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds) (*citing*
2 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482 (3d ed. 1992)
3 (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887)). "When a court of equity
4 orders property in its custody to be sold, the court itself as vendor confirms the title
5 in the purchaser." 2 Ralph Ewing Clark, Treatise on Law & Practice of
6 Receivers § 487 (3d ed. 1992).

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

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

24 **B. 28 U.S.C. § 2001**

25 Specific requirements are imposed by 28 U.S.C. § 2001 for public sales of real
26 property under subsection (a) and specific requirements for private sales of real
27 property under subsection (b). Although both involve significant cost and delay, the
28 cost and delay of a public sale are significantly less than those for a private sale.

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

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

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

22 If such realty is situated in more than one county, state,
23 district or circuit, such notice shall be published in one or
24 more of the counties, states, or districts wherein it is
25 situated, as the court directs. The notice shall be
26 substantially in such form and contain such description of
27 the property by reference or otherwise as the court
28 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.

 The notice of sale is sufficient if it describes the property and the time, place,
and terms of sale. *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance*
Corp., 172 F.2d 416, 422 (10th Cir. 1949). The Court may limit the auction to

1 qualified bidders, who "(i) submit to the Receiver . . . in writing a bona fide and
2 binding offer to purchase the [property]; and (ii) demonstrate . . . , to the satisfaction
3 of the Receiver, that it has the current ability to consummate the purchase of the
4 [property] per the agreed terms." *Regions Bank v. Egyptian Concrete Co.*, 2009 U.S.
5 Dist. LEXIS 111381, at *8 (E.D. Mo. 2009).

6 **IV. DISCUSSION**

7 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
8 in the best interests of the receivership estate. The Tennyson Property was listed on
9 the MLS with a licensed broker and shown to interested parties. The property was
10 properly marketed, two offers were received, terms negotiated, and the Agreement
11 signed. The purchase price therefore reflects the market value for the Tennyson
12 Property, and is \$45,000 greater than the purchase price from when it was acquired
13 in August 2019. Freitag Decl., ¶ 7.

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

19 In the action pending in U.S. District Court for the
20 Southern District of California, Case No. 19-CV-01628-
21 LAB-AHG, Securities and Exchange Commission v.
22 Gina Champion-Cain, et al., notice is hereby given that
23 the court-appointed receiver will conduct a public auction
24 for the real property located at 3548 Tennyson Street,
25 San Diego, California 92106-1847 in San Diego County,
26 California. Sale is subject to Court confirmation after the
27 auction is held. Minimum bid price is at least \$910,000.
28 The auction will take place on March 12, 2020, 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 \$9,295, and
proof of funds. All bidders must be qualified by
5:00 p.m. PT on March 10, 2020, by submitting the
required materials to the receiver at 501 West Broadway,
Suite 290, San Diego, California, 92101. If interested in

1 qualifying as a bidder, please contact Geno Rodriguez at
2 (619) 567-7223 or grodriguez@ethreadvisors.com.

3 In order to conduct an orderly auction and provide sufficient time for the
4 publication of notices discussed above, the Receiver will require bidders to complete
5 the above steps by March 10, 2020 ("Bid Qualification Deadline") and conduct the
6 live public auction on March 12, 2020.

7 The Receiver will inform all interested persons of the opportunity to overbid at
8 the public auction, provided they qualify themselves to bid by the Bid Qualification
9 Deadline by (a) signing a purchase and sale agreement for the properties on the same
10 terms and conditions as Buyer, but with a purchase price of at least \$910,000,
11 (b) providing the Receiver with an earnest money deposit of \$9,295, and
12 (c) providing proof of funds necessary to close the sale transaction in the form of a
13 current bank statement, cashier's check delivered to the Receiver, or other evidence
14 deemed sufficient by the Receiver.

15 In the event one or more prospective purchasers qualify themselves to bid, the
16 auction will be conducted by the Receiver as noted above and bids will be allowed in
17 increments of at least \$5,000. The Receiver will then file a notice advising the Court
18 of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
19 confirming the sale.¹ Earnest money deposits provided by bidders who are
20 unsuccessful will be promptly returned to them. In the event no prospective
21 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
22 will notify the Court and seek entry of an order approving the sale to Buyer.

23 With respect to Broker's commission, Broker has broadly marketed and
24 advertised the Tennyson Property for sale and diligently responded to inquiries from
25 interested parties. The listing agreement is consistent with the lower range of
26

27 ¹ In the event that multiple qualified overbids are received and participate in the
28 auction, the Receiver will seek Court approval of the highest bid and the back-up
bid, such that if the highest bidder fails to close the sale for any reason, the
Receiver can proceed to close the sale with the back-up bidder without delay.

1 industry standards for commissions paid to brokers for sales of residential properties.
2 Accordingly, the Receiver requests authorization to pay Broker the commission
3 amount in accordance with the listing agreement. Freitag Decl., ¶ 8.

4 **V. CONCLUSION**

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

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Dated: February 21, 2020

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