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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
23 INVESTMENTS, INC.,

24 Relief Defendant.
25
26
27
28

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF SALE OF THE
SASKA'S RESTAURANT
PROPERTY AND ASSOCIATED
PERSONAL PROPERTY AND
LIQUOR LICENSE**

Date: April 27, 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 the Saska's Property and Associated Liquor
6 License and Personal Property ("Motion").

7 **I. BACKGROUND FACTS**

8 One of the assets included in the receivership estate is an approximately
9 2,500 square foot building and operating restaurant situated on a lot located at
10 3768 Mission Blvd., San Diego, California ("Property"). The restaurant known as
11 Saska's has been operating at the Property for many decades. On August 13, 2015,
12 the Receivership Entities paid \$2,000,000 to purchase the stock of Perils of Pauline
13 Food Productions, Inc., the entity that owned the Property and operated Saska's. On
14 June 7, 2018, title to the Property was transferred to an affiliated Receivership Entity,
15 3768 Mission Blvd., LLC. Freitag Decl., ¶ 2.

16 After reviewing the financials available to the Receiver at appointment, it was
17 determined that the restaurant could be operated at break-even or better, and the asset
18 as a whole (including real property, personal property and liquor license) would have
19 substantially greater value to the receivership estate if operations continued until a
20 sale occurred. Thus, the Receiver determined that the best course of action was to
21 continue operations at the restaurant, with guidance from Cohn Restaurant Group,
22 and prepare the Property (including personal property and liquor license) for sale in
23 the short-term, along with other restaurant properties included in the receivership
24 estate. Freitag Decl., ¶ 3.

25 For all of the restaurant-related properties included in the receivership estate,
26 the Receiver and her staff interviewed three licensed brokers with experience selling
27 restaurants in San Diego. After considering their experience and qualifications, the
28 Receiver decided to use two brokers – Colliers International ("Broker") for stand-

1 alone concept restaurant-related properties owned (a leased parking lot was also
2 included in this grouping) by the Receivership Entities (including the Property) and
3 Next Wave for the Surf Rider Pizza and Bao Beach restaurant concepts operated at
4 leased and owned property locations. Freitag Decl., ¶ 4.

5 Broker publicized and advertised the restaurant-related properties owned by
6 the Receivership Entities, including the Property, on LoopNet and CoStar (two
7 widely used online databases for commercial property listings) and CREXi (Collier's
8 International propriety online database). Broker also caused a press release to be
9 issued, which was published in the San Diego Union-Tribune. Further, Broker sent a
10 series of direct emails about the restaurant properties to over 5,000 potential buyers
11 and investors. This activity generated 228 visitors to the CREXi webpage for the
12 portfolio of restaurants, which led to 142 signed confidentiality agreements and a
13 total of 28 offers for all of the properties marketed by Broker. Freitag Decl., ¶ 5.

14 In preparation for the sales, and as requested by the Broker, the Receiver
15 ordered various reports and provided relevant internal documents to create a typical
16 due diligence package specific to each asset. The Receiver also set a "Call for
17 Offers" deadline of February 3, 2020. The Broker used the CREXi website to host
18 the due diligence materials for the properties, an offering memorandum summarizing
19 various marketing points about the properties and detailing the Court sale process,
20 and a form of Purchase and Sale Agreement and Joint Escrow Instructions ("Form
21 PSA") prepared in advance by the Receiver, with assistance from her counsel. The
22 Form PSA has all contingencies removed and provides for the overbid, public
23 auction, and Court approval process. Prospective purchasers were instructed to
24 complete their due diligence and submit their executed Form PSA by the Call for
25 Offers deadline. Freitag Decl., ¶ 6.

26 For the Property, a total of seven executed Form PSA's were received. The
27 highest and best was from OMG 3768 Mission LLC ("Buyer") in the amount of
28

1 \$2,300,000. The Receiver finalized a Form PSA with Buyer and then countersigned
2 Buyer's PSA. Freitag Decl., ¶ 7.

3 The Property is encumbered by a deed of trust securing a loan issued by
4 American National Insurance Company ("ANICO"). The amount necessary to pay
5 off the loan is estimated to be approximately \$2,050,000. The ANICO loan also
6 encumbers a nearby parking lot owned by the Receivership Entities that is being sold
7 separately. In this instance, there are two escrows because a separate escrow is
8 required for the transfer of the liquor license. The real property escrow will close
9 first, within five business days of the date upon which both the Court order
10 approving the sale has been entered and the date Buyer has obtained a temporary
11 liquor license from the California Department of Alcoholic Beverage Control
12 ("ABC"). The liquor license escrow will close second, once ABC approval of the
13 transfer of the liquor license has been obtained, which is estimated to take three to
14 six months from Court approval. In any case, the Receiver expects the closing of the
15 sale of the real property will provide sufficient funds to pay off the loan, which will
16 then leave the parking lot property unencumbered. The Receiver anticipates filing
17 her motion for approval of the sale of the parking lot shortly. Freitag Decl., ¶ 8.

18 Depending on when the sale closes, the Receiver estimates that property tax
19 credit received at closing will likely be in the range of approximately \$3,500 to
20 \$4,500 (the second installment of property taxes for 2019-2020 is expected to be paid
21 prior to closing, so the receivership estate will actually receive a credit at closing for
22 the pro-rated portion of the taxes paid for the period from the date of closing through
23 June 30, 2020). Because Buyer has its own broker, Broker's commission pursuant to
24 the listing agreement is 4% of the sale price, or \$92,000, which amount will be split
25 with Buyer's broker. The costs of sale, including escrow, title and recording fees are
26 anticipated to be approximately \$11,500. While exact amounts will be determined at
27 closing, after all of the aforementioned amounts are paid out of both escrows, the net
28 sale proceeds for the receivership estate are estimated to be in the range of

1 approximately \$145,000 to \$155,000, the majority of which will be received after the
2 close of the liquor license escrow. In addition, the payoff of the ANICO loan will
3 remove the deed of trust from the parking lot property that is being sold separately,
4 meaning all net proceeds from the sale of the parking lot (after payment of property
5 taxes, closing costs, and broker commission) will go to the receivership estate.
6 Freitag Decl., ¶ 9.

7 **II. PROPOSED SALE**

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

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

13 **Purchase Price.** The purchase price is \$2,300,000, which will be paid in cash.

14 **Deposit.** Buyer has deposited \$100,000 into escrow (\$75,000 for the real
15 property escrow and \$25,000 for the liquor license escrow).

16 **Closing Date.** Closing of the sale of the real property shall occur within five
17 business days of the date upon which both the Court order approving the sale has
18 been entered and the date Buyer has obtained a temporary liquor license from the
19 California Department of Alcoholic Beverage Control ("ABC"). Closing of the sale
20 of the personal property and liquor license shall occur upon receipt of approval of the
21 transfer of the liquor license from the ABC.

22 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
23 a commission of 4% of the gross sales price, which amount is to be split with Buyer's
24 broker. In the proposed sale, the total commission would be \$92,000.

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 asset was broadly advertised and
12 marketed to prospective purchasers by Broker, seven offers were received, the
13 highest and best selected, and the Agreement signed. The purchase price therefore
14 reflects the market value for the Property. Freitag Decl., ¶ 10.

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

20 In the action pending in U.S. District Court for the
21 Southern District of California, Case No. 19-CV-01628-
22 LAB-AHG, Securities and Exchange Commission v.
23 Gina Champion-Cain, et al., notice is hereby given that
24 the court-appointed receiver will conduct a public auction
25 for the real and personal property located at 3768
26 Mission Blvd., San Diego, California 92109 in San Diego
27 County, California. Sale is subject to Court confirmation
28 after the auction is held. Minimum bid price is at least
\$2,350,000. The auction will take place on April 9,
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 \$110,000, and proof of funds. All bidders must be
qualified by 5:00 p.m. PT on April 7, 2020, by

1 submitting the required materials to the receiver at 501
2 West Broadway, Suite 290, San Diego, California,
3 92101. If interested in qualifying as a bidder, please
4 contact Geno Rodriguez at (619) 567-7223 or
5 grodriguez@ethreadvisors.com.

6 In order to conduct an orderly auction and provide sufficient time for the
7 publication of notices discussed above, the Receiver will require bidders to complete
8 the above steps by April 7, 2020 ("Bid Qualification Deadline") and conduct the live
9 public auction on April 9, 2020.

10 The Receiver, through Broker, will inform all interested persons of the
11 opportunity to overbid at the public auction, provided they qualify themselves to bid
12 by the Bid Qualification Deadline by (a) signing a purchase and sale agreement for
13 the properties on the same terms and conditions as Buyer, but with a purchase price
14 of at least \$2,350,000, (b) providing the Receiver with an earnest money deposit of
15 \$110,000, and (c) providing proof of funds necessary to close the sale transaction in
16 the form of a current bank statement, cashier's check delivered to the Receiver, or
17 other evidence deemed sufficient by the Receiver.

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

26 With respect to Broker's commission, Broker has broadly marketed and
27 advertised the asset for sale and diligently responded to inquiries from interested
28

¹ In the event that multiple qualified overbids are received and participate in the 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 parties. The listing agreement is consistent with the lower range of industry
2 standards for commissions paid to brokers for sales of commercial properties.
3 Accordingly, the Receiver requests authorization to pay Broker the commission
4 amount in accordance with the listing agreement. Freitag Decl., ¶ 11.

5 **V. CONCLUSION**

6 For the reasons discussed above, the Receiver requests (a) approval of the sale
7 of the Property (including real property, personal property and liquor license) to
8 Buyer (or its designee) pursuant to the Agreement attached to the Freitag Declaration
9 as Exhibit A, and (b) authority to take all steps necessary to close the sale, with the
10 net sale proceeds after all third-party payments are made from escrow going to the
11 receivership estate.

12
13 Dated: March 12, 2020

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