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12 KRISTA FREITAG

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 REAL
PROPERTY LOCATED AT 724
ZANZIBAR COURT**

Date: April 27, 2020

Time: 2:00 p.m.

Courtroom: 3B

Mag. Judge: Hon. Allison H. Goddard

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. BACKGROUND FACTS5

II. PROPOSED SALE.....6

III. LEGAL STANDARD7

 A. The Court's Authority to Approve Sale8

 B. 28 U.S.C. § 20019

IV. DISCUSSION.....10

V. CONCLUSION12

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Beet Growers Sugar Co. v. Columbia Trust Co.*

5 3 F.2d 755 (9th Cir. 1925)..... 8

6 *Blakely Airport Joint Venture II v. Federal Sav. and Loan Ins. Corp.*

7 678 F. Supp. 154 (N.D. Tex. 1988)..... 9

8 *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance Corp.*

9 172 F.2d 416 (10th Cir. 1949)..... 10

10 *CFTC. v. Topworth Int'l, Ltd.*

11 205 F.3d 1107 (9th Cir. 1999)..... 8

12 *First Nat'l Bank v. Shedd*

13 121 U.S. 74 (1887) 8

14 *Gockstetter v. Williams*

15 9 F.2d 354 (9th Cir. 1925)..... 9

16 *Miners' Bank of Wilkes-Barre v. Acker*

17 66 F.2d 850 (2d Cir. 1933)..... 8

18 *Regions Bank v. Egyptian Concrete Co.*

19 2009 U.S. Dist. LEXIS 111381, at *8 (E.D. Mo. 2009) 10

20 *SEC v. American Capital Invest., Inc.*

21 98 F.3d 1133 (9th Cir. 1996)..... 8

22 *SEC v. Capital Consultants, LLC*

23 397 F.3d 733 (9th Cir. 2005)..... 7, 8

24 *SEC v. Capital Cove Bancorp LLC*

25 2015 U.S. Dist. LEXIS 174856, at *13 (C.D. Cal. 2015)..... 9

26 *SEC v. Elliot*

27 953 F.2d 1560 (11th Cir. 1992)..... 7, 8

28 *SEC v. Goldfarb*

2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. 2013)..... 9

SEC v. Hardy

803 F.2d 1034 (9th Cir 1986)..... 7

SEC v. Kirkland

2007 U.S. Dist. LEXIS 45353, at *5 (M.D. Fla. 2007) 9

SEC v. Wencke

622 F.2d 1363 (9th Cir. 1980)..... 7

1
2
3
4
5
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8
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11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Statutes

28 U.S.C. § 2001..... 9
 28 U.S.C. § 2001(a)..... 9, 10
 28 U.S.C. § 2001(b)..... 9
 28 U.S.C. § 2002..... 9

Treatises

2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 342
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 344
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 482
 (3d ed. 1992)..... 8
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers
 § 482(a) (3d ed. 1992). 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 487
 (3d ed. 1992)..... 8
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 489
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 491
 (3d ed. 1992)..... 9
 2 Ralph Ewing Clark, Treatise on Law & Practice of Receivers § 500
 (3d ed. 1992)..... 8

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 Real Property Located at 724 Zanzibar Court
6 ("Motion").

7 **I. BACKGROUND FACTS**

8 The real properties that are part of the receivership estate include a single-
9 family residence located at 724 Zanzibar Court, San Diego, California ("Zanzibar
10 Court Property"). The Zanzibar Court Property is 1,978 square feet with three
11 bedrooms and three bathrooms. The Zanzibar Court Property was purchased by Luv
12 Surf Brands LLC, an affiliated Receivership Entity, for \$1,660,000 on February 27,
13 2015. Freitag Decl., ¶ 2.

14 Upon her appointment, the Receiver and her staff performed an analysis of the
15 value of the Zanzibar Court Property, including a review of automated valuation
16 scores for the property and a survey of the market comparable properties. The
17 Receiver also consulted with and interviewed licensed brokers with experience
18 selling residential properties in the Mission Beach area. Ultimately, based on a
19 combination of its experience and low listing commission, the Receiver selected
20 Pacific Pines Real Estate ("Broker") and the Zanzibar Court Property was listed for
21 sale on the Multiple Listing Service (MLS) on or about January 26, 2020. The list
22 price was \$1,899,900. Freitag Decl., ¶ 3.

23 To market the Zanzibar Court Property, Broker listed the property on the local
24 MLS and its website, held two open houses and showed the property to all interested
25 parties.¹ In February, an offer was received near the full list price. The Receiver
26

27 _____
28 ¹ Broker reported that the listing received an average of approximately 75 digital
views per day and over 500 real estate agents viewed the listing, including
forwarding it to approximately 73 unique clients for their review.

1 negotiated terms with the prospective buyer and the property went into escrow on or
2 around February 22, 2020 with a purchase price of \$1,875,000. The buyer is
3 Laurie J. Stone ("Buyer"). Freitag Decl., ¶ 4.

4 The Zanzibar Court Property is encumbered by a deed of trust in favor of Axos
5 Bank. The Axos Bank portfolio loan covered seven residential properties included in
6 the receivership estate, two of which have already been sold (1617 Thomas Avenue
7 and 805 Brighton Court). Assuming a May 2020 sale closing with the May 2020
8 monthly payment having been made in the ordinary course, the release price for the
9 Zanzibar Court Property is estimated to total \$1.54 million.² Freitag Decl., ¶ 5.

10 Depending on when the sale closes, the Receiver estimates that property tax
11 credit received at closing will likely be in the range of approximately \$1,800 to
12 \$3,600 (the second installment of property taxes for 2019-2020 is expected to be paid
13 prior to closing, so the receivership estate will actually receive a credit at closing for
14 the pro-rated portion of the taxes paid for the period from the date of closing through
15 June 30, 2020). Broker's commission pursuant to the listing agreement is \$58,875,
16 which amount will be split with Buyer's broker. The costs of sale, including escrow,
17 title and recording fees are anticipated to be approximately \$9,500. While exact
18 amounts will be determined at closing, after all of the aforementioned amounts are
19 paid out of escrow, the net sale proceeds for the receivership estate are estimated to
20 be in the range of approximately \$265,000 to \$275,000. Freitag Decl., ¶ 6.

21 II. PROPOSED SALE

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

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

27
28 ² The estimated principal balance outstanding for the Axos portfolio loan prior to the
sale of the Zanzibar Court Property is \$3.07 million.

1 **Purchase Price.** The purchase price is \$1,875,000, which will be paid in all
2 cash.

3 **Deposit.** Buyer has deposited \$37,500 into escrow.

4 **Closing Date.** Closing shall occur upon entry of the Court order approving
5 the sale.

6 **Broker's Commission.** Pursuant to the listing agreement, Broker is to be paid
7 a commission of \$12,000, with 2.5% of the gross sales price to be paid to Buyer's
8 broker. In the proposed sale, the total commission would be \$58,875.

9 **III. LEGAL STANDARD**

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

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

24 A district court's power to supervise an equity receivership and to
25 determine the appropriate action to be taken in the administration of the
26 receivership is extremely broad. The district court has broad powers
27 and wide discretion to determine the appropriate relief in an equity
28 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.

1 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
2 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
3 and 'we generally uphold reasonable procedures instituted by the district court that
4 serve th[e] purpose' of orderly and efficient administration of the receivership for the
5 benefit of creditors."). Accordingly, the Court has broad discretion in the
6 administration of the receivership estate and the disposition of receivership assets.

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

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

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

28

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

10 **B. 28 U.S.C. § 2001**

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

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

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

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

13 This section shall not apply to sales and proceedings under Title 11 or
14 by receivers or conservators of banks appointed by the Comptroller of
15 the Currency.

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

24 **IV. DISCUSSION**

25 The Receiver believes the proposed sale to Buyer pursuant to the Agreement is
26 in the best interests of the receivership estate. The Zanzibar Court Property was
27 listed on the MLS with a licensed broker and shown to interested parties. The
28 property was properly marketed, an offer was received, terms negotiated, and the
Agreement signed. The purchase price therefore reflects the market value for the
property. Freitag Decl., ¶ 7.

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

1 publish the following notice of the sale once a week for four weeks in the San Diego
2 Union-Tribune, a newspaper of general circulation in San Diego County:

3 In the action pending in U.S. District Court for the Southern District of
4 California, Case No. 19-CV-01628-LAB-AHG, Securities and
5 Exchange Commission v. Gina Champion-Cain, et al., notice is hereby
6 given that the court-appointed receiver will conduct a public auction for
7 the real property located at 724 Zanzibar Court in San Diego County,
8 California. Sale is subject to Court confirmation after the auction is
9 held. Minimum bid price is at least \$1,900,000. The auction will take
10 place on April 16, 2020, at 1:30 p.m. in front of the entrance to the
11 United States Courthouse, 221 W. Broadway, San Diego, California.
12 To be allowed to participate in the auction, prospective purchasers must
13 meet certain bid qualification requirements, including submitting a
14 signed purchase and sale agreement, an earnest money deposit of
15 \$41,250, and proof of funds. All bidders must be qualified by 5:00 p.m.
16 PT on April 14, 2020, by submitting the required materials to the
17 receiver at 401 W. A Street, Suite 1830, San Diego, California, 92101.
18 If interested in qualifying as a bidder, please contact Geno Rodriguez at
19 (619) 567-7223 or 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 April 14, 2019 ("Bid Qualification Deadline") and conduct the
23 live public auction on April 16, 2019.

24 The Receiver will inform all interested persons of the opportunity to overbid at
25 the public auction, provided they qualify themselves to bid by the Bid Qualification
26 Deadline by (a) signing a purchase and sale agreement for the properties on the same
27 terms and conditions as Buyer, but with a purchase price of at least \$1,900,000,
28 (b) providing the Receiver with an earnest money deposit of \$41,250, and
29 (c) providing proof of funds necessary to close the sale transaction in the form of a
30 current bank statement, cashier's check delivered to the Receiver, or other evidence
31 deemed sufficient by the Receiver.

32 In the event one or more prospective purchasers qualify themselves to bid, the
33 auction will be conducted by the Receiver as noted above and bids will be allowed in
34 increments of at least \$1,000. The Receiver will then file a notice advising the Court
35 of the result of the auction (*i.e.*, the highest bid) and seek entry of an order
36 confirming the sale. Earnest money deposits provided by bidders who are

1 unsuccessful will be promptly returned to them. In the event no prospective
2 purchasers qualify themselves to bid by the Bid Qualification Deadline, the Receiver
3 will notify the Court and seek entry of an order approving the sale to Buyer.

4 **V. CONCLUSION**

5 For the reasons discussed above, the Receiver requests (a) approval of the sale
6 of the Zanzibar Court Property to Buyer or 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.

10 Dated: March 19, 2020

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