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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 SOUTHERN DIVISION

15 Consumer Financial Protection Bureau
and Maria T. Vullo, Superintendent of
16 Financial Services of the State of
New York,

17 Plaintiffs,

18 v.

19 Pension Funding, LLC; Pension
20 Income, LLC; Steven Covey; Edwin
Lichtig; and Rex Hofelter,

21 Defendants.
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Case No. 8:15-cv-1329

**NOTICE OF MOTION AND
MOTION FOR APPROVAL OF SALE
OF LOAN PARTICIPATION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: June 2, 2017

Time: 2:30 p.m.

Ctrm.: 10A

Judge: Hon. Josephine L. Staton

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 2, 2017, at 2:30 p.m. in courtroom 10A of the above-entitled Court, located at 411 West Fourth Street, Santa Ana, California 92701-4516, Krista L. Freitag ("Receiver"), the Court-appointed permanent receiver for Pension Funding, LLC, Pension Income, LLC, and their subsidiaries, affiliates, and successors-in-interest, including PGR, LLC (collectively, "Receivership Entities"), will and hereby does move the Court for an order approving the sale of loan participation ("Motion").

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Krista L. Freitag, the documents and pleadings already on file in this action, and upon such further oral and documentary evidence as may be presented at the time of the hearing.

Procedural Requirements: If you oppose this Motion, you are required to file your written opposition with the Office of the Clerk, United States District Court, 411 West Fourth Street, Santa Ana, California 92701-4516, and serve the same on the undersigned not later than 21 days prior to the hearing.

IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the above date, the Court may grant the requested relief without further notice. This Motion is made following the conference of counsel pursuant to L.R. 7-3.

Dated: April 25, 2017

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ Edward Fates

EDWARD G. FATES
Attorneys for Receiver
KRISTA L. FREITAG

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND FACTS

As discussed in the Receiver's interim reports, the Receivership Entities invested in a participating interest in a loan secured by commercial real property ("Loan Participation"). The lead lender for the master loan is Lynk Investments, LLC, a Florida limited liability company, which is located at 1845 Town Center Boulevard, Building 100, Suite 110-D, Fleming Island, Florida 32003 ("Lynk"). The collateral for the master loan is a Commercial Deed of Trust over three separate pieces of real property located in Maryland. Declaration of Krista Freitag filed herewith ("Freitag Decl."), ¶ 2.

The Receivership Entities invested a total of \$1.6 million in the Loan Participation. As a participant only, the Receivership Entities have no control over the servicing or enforcement of the master loan, which is handled by Lynk. Freitag Decl., ¶ 3.

Prior to the Receiver's appointment, the Receivership Entities had received total payments on the Loan Participation of \$614,864.52, including interest payments of \$214,864.52 and principal payments of \$400,000.00, leaving a principal balance of \$1.2 million. Since her appointment, the Receiver has collected another \$210,086.78 in total payments on the Loan Participation, including \$110,086.78 of interest and \$100,000.00 of principal and, leaving a principal balance of \$1.1 million. Freitag Decl., ¶ 4.

The master loan has matured, but the borrower is reportedly not in a position to repay the balance and Lynk has elected to give the borrower additional time, deferring enforcement of its rights and remedies. As noted above, the Receivership Entities, as a participant, have no decision-making authority as to the servicing or enforcement of the master loan. The Receiver also cannot transfer or assign the Loan Participation without Lynk's consent and approval. Freitag Decl., ¶ 5.

1 Accordingly, the Receiver inquired with Lynk about the possibility of buying
2 out the Receivership Entities or locating a buyer for the Loan Participation. Lynk
3 indicated it was able to find a buyer, Willow Partners, LLC ("Buyer"), but Buyer
4 was not willing to pay the full principal balance on the Loan Participation due to the
5 loan maturity and the risks associated therewith. The parties entered into
6 negotiations and agreed, subject to Court approval, that Buyer will pay 80% of the
7 Loan Participation balance after an additional principal pay down of \$100,000 by
8 Lynk. As such, Buyer will pay \$800,000 to the Receiver in exchange for an
9 assignment of the Loan Participation, after Lynk pays down the Loan Participation
10 by an additional \$100,000 as part of the transaction, for a total recovery of \$900,000
11 for the receivership estate. Freitag Decl., ¶ 6. True and correct copies of the
12 Purchase and Sale Agreement and Escrow Agreement with Buyer, as well as the
13 Letter Agreement with Lynk regarding the \$100,000 payment, are attached to the
14 Freitag Declaration as Exhibit A.

15 Therefore, including pre-receivership and post-receivership interest and
16 principal payments, the Receivership Entities will have recovered a total of
17 \$1,724,951.30 in payments on the original \$1.6 million investment. Freitag Decl.,
18 ¶ 7.

19 **II. ARGUMENT**

20 "The power of a district court to impose a receivership or grant other forms of
21 ancillary relief does not in the first instance depend on a statutory grant of power
22 from the securities laws. Rather, the authority derives from the inherent power of a
23 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
24 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
25 and efficient administration of the estate by the district court for the benefit of
26 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
27 of a receiver is authorized by the broad equitable powers of the court, any
28

1 distribution of assets must also be done equitably and fairly. See *SEC v. Elliot*,
 2 953 F.2d 1560, 1569 (11th Cir. 1992).

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

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

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

18 Accordingly, this Court has broad equitable powers and discretion in
 19 formulating procedures, schedules and guidelines for administration of the
 20 Receivership Estate and disposition of receivership assets.

21 **A. The Proposed Sale**

22 It is generally conceded that a court of equity having custody and control of
 23 property has power to order a sale of the same in its discretion. See, e.g., *Elliot*,
 24 *supra*, 953 F.2d at 1566 (finding that the District Court has broad powers and wide
 25 discretion to determine relief in an equity receivership). "The power of sale
 26 necessarily follows the power to take possession and control of and to preserve
 27 property." See also *SEC v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144
 28 (9th Cir. 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other grounds)

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

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

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

23 Here, the Receiver seeks authority to sell the Loan Participation for the
24 benefit of the receivership estate. The Loan Participation is not necessary to the
25 Receivership Entities' remaining operations, which are limited to the collection of
26 Lump Sums owed by pensioners. The proposed sale will allow the Receivership
27 Entities to recover more than the \$1.6 million original investment in the Loan
28 Participation.

1 As discussed above, the Receivership Entities have no control over when and
 2 how Lynk enforces its rights and remedies under the master loan or when the
 3 borrower repays the master loan. The Receivership Entities also have no ability to
 4 market and sell the Loan Participation because it cannot be transferred or assigned
 5 without Lynk's consent and approval. Therefore, continuing to hold the Loan
 6 Participation not only involves risk due to the loan maturity, but would also delay
 7 the value of the Loan Participation being distributed to investors and could
 8 eventually delay closure of the receivership once collections from pensioners have
 9 been completed. Accordingly, the proposed sale is in the best interests of the
 10 receivership estate and should be approved.

11 **B. Further Notices/Appraisals Should Be Waived**

12 Sales of personal property out of receivership are governed by 28 U.S.C.
 13 § 2004, which provides that such property "shall be sold in accordance with
 14 section 2001, *unless the court orders otherwise.*" 28 U.S.C. § 2004 (emphasis
 15 added). Courts have recognized that Section 2004 gives the Court broad discretion
 16 to fashion the manner in which sales of personal property are conducted. *United*
 17 *States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996); *SEC v. Wilson*, 2013 WL

18 1283437, at *1 (E.D. Mich. Mar. 28, 2013).
 19 Here, the Receiver submits that the requirements under 28 U.S.C. § 2001(b)
 20 for three independent appraisals and separate publication of notices imposes a
 21 considerable financial burden on the receivership estate with no corresponding
 22 benefit given (a) the Loan Participation comes with no decision-making authority
 23 over the master loan, and (b) the requirement that Lynk consent to and approve any
 24 transfer of the Loan Participation. Accordingly, to the extent 28 U.S.C. §§ 2001 and
 25 2004 require publication of notice and independent appraisals, such provisions
 26 should be waived as having no bearing on the value of the Loan Participation or
 27 benefit to the receivership estate under the circumstances. Freitag Decl., ¶ 8.

28

1 **III. CONCLUSION**

2 For the reasons set forth herein, the Receiver respectfully requests an order
3 approving the sale of the Loan Participation to Buyer.

4
5 Dated: April 25, 2017

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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7 By: /s/ Edward Fates

EDWARD G. FATES
Attorneys for Receiver
KRISTA L. FREITAG