

1 DAVID R. ZARO (BAR NO. 124334)
2 NORMAN M. ASPIS (BAR NO. 313466)
3 ALLEN MATKINS LECK GAMBLE
4 MALLORY & NATSIS LLP
5 865 South Figueroa Street, Suite 2800
6 Los Angeles, California 90017-2543
7 Phone: (213) 622-5555
8 Fax: (213) 620-8816
9 E-Mail: dzaro@allenmatkins.com
10 naspis@allenmatkins.com

11 EDWARD G. FATES (BAR NO. 227809)
12 ALLEN MATKINS LECK GAMBLE
13 MALLORY & NATSIS LLP
14 One America Plaza
15 600 West Broadway, 27th Floor
16 San Diego, California 92101-0903
17 Phone: (619) 233-1155
18 Fax: (619) 233-1158
19 E-Mail: tfates@allenmatkins.com

20 Attorneys for Receiver
21 KRISTA FREITAG

22 UNITED STATES DISTRICT COURT
23 SOUTHERN DISTRICT OF CALIFORNIA

24 SECURITIES AND EXCHANGE
25 COMMISSION,
26
27 Plaintiff,
28
29 v.
30 GINA CHAMPION-CAIN and ANI
31 DEVELOPMENT, LLC,
32
33 Defendants,
34
35 AMERICAN NATIONAL
36 INVESTMENTS, INC.,
37
38 Relief Defendant.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION TO AMEND
ORDER GRANTING RECEIVER'S
MOTION FOR APPROVAL OF SALE
OF 737 WINDEMERE COURT
PROPERTY**

Date: September 18, 2020
Time: 2:00 p.m.
Courtroom: TBD
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 to Amend Order Granting Receiver's Motion for Approval of Sale of
6 737 Windemere Court Property ("Motion").

7 I. INTRODUCTION

8 The Receiver previously moved for approval of the sale of the property located
9 at 737 Windemere Court, San Diego ("Prior Sale Motion"), which motion was
10 recently granted ("Sale Approval Order"). Dkt. 367, 434. However, after filing the
11 Prior Sale Motion, the Receiver learned that a disputed Deed of Trust recorded
12 against the property located at 737 Windemere Court ("Windemere Court Property")
13 and another receivership vacation rental property located at 750 Yarmouth Court,
14 San Diego (also in the Mission Beach neighborhood) by investor Charles Riharb is
15 now showing up on title to the Windemere Court Property (a prior preliminary title
16 report the Receiver obtained did not show the disputed Deed of Trust). The title
17 company has advised that it will not insure clear title if the disputed Deed of Trust is
18 not released by Mr. Riharb or removed from title to the Windemere Court Property
19 by Court order. Declaration of Krista Freitag filed herewith ("Freitag Decl."), ¶ 2.

20 The Receiver, through her counsel, reached out to counsel for Mr. Riharb to
21 discuss an interim resolution pursuant to which the Receiver would agree to set aside
22 a certain amount of the proceeds from the sales of the Windemere Court and
23 Yarmouth Court Properties pending resolution of the disputed Deed of Trust.
24 However, despite several follow up attempts to reach Mr. Riharb through his
25 counsel, Mr. Riharb has not yet responded to this proposal. Accordingly, the
26 Receiver now seeks to amend the Sale Approval Order such that the sale is free and
27 clear of Mr. Riharb's disputed Deed of Trust. Fortunately, Buyer has agreed to
28

1 extend the closing date for the sale to allow time for this Motion to be decided by the
2 Court. Freitag Decl., ¶ 3.

3 **II. BACKGROUND FACTS**

4 Mr. Riharb is an investor in the ANI liquor license lending scheme. The
5 disputed Deed of Trust, which purports to secure a loan from Mr. Riharb to ANI in
6 the amount of \$1,574,762.60, was recorded by Mr. Riharb *after* the Securities and
7 Exchange Commission ("SEC") had publicly filed its Complaint in this action and on
8 the same day the Receiver was appointed (September 3, 2019). After learning of the
9 purported Deed of Trust, the Receiver's counsel discussed it with counsel for Gina
10 Champion-Cain. During that discussion, Ms. Champion-Cain's counsel explained
11 that Ms. Champion-Cain had told Mr. Riharb that the SEC had filed this action
12 against her and that there would soon be a receiver appointed. Nevertheless,
13 Mr. Riharb prepared the Deed of Trust using a form filled in by hand, drove to San
14 Diego on September 2, 2019 (Mr. Riharb resides in Goleta, California according to
15 the Deed of Trust), confronted Ms. Champion-Cain (with a mobile notary public
16 present) and insisted that she immediately sign the Deed of Trust. Ms. Champion-
17 Cain advised that she felt pressured and signed reluctantly. Freitag Decl., ¶ 4. A
18 copy of the recorded Deed of Trust is attached to the Freitag Decl. as Exhibit A.

19 The Receiver's counsel also spoke to Mr. Riharb and his counsel about the
20 Deed of Trust. Mr. Riharb claims Ms. Champion-Cain previously agreed to provide
21 him with the purported Deed of Trust to secure his investment with ANI if he had not
22 been paid back on his investment by August 2019. Mr. Riharb claims he was not
23 repaid by August 2019 and therefore is entitled to the purported Deed of Trust based
24 on that agreement. Freitag Decl., ¶ 5.

25 In an effort to reach an interim resolution, the Receiver, through her counsel,
26 has offered to set aside the amount of \$1,105,000 in receivership estate funds, which
27 represents her reasonable estimate of the hypothetical net sale proceeds from the
28 pending sale of the Windemere Court Property (approximately \$599,000) and the

1 anticipated sale of the Yarmouth Court Property (approximately \$506,000), based on
2 the release prices for the two properties in the Axos Bank loan agreement, less the
3 premium added to each principal release price.¹ As noted above, despite several
4 follow-up communications with Mr. Riharb's counsel, Mr. Riharb has not yet
5 responded to this proposal. Freitag Decl., ¶ 6.

6 The Receiver proposes that \$1,105,000, which represents an estimate of the
7 maximum Mr. Riharb could recover if he were successful in establishing a valid
8 Deed of Trust on both properties, be set aside by the Receiver and not distributed
9 pending the resolution of the dispute with Mr. Riharb, either through settlement or
10 Court order. Accordingly, with an amount sufficient to eliminate any potential
11 prejudice to Mr. Riharb being set aside, the Sale Order should be amended such that
12 the sale is free and clear of Mr. Riharb's disputed Deed of Trust. This will allow the
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14

15 ¹ Both the Windemere Court Property and the Yarmouth Court Property are
16 encumbered by the Axos Bank portfolio mortgage that applies to several other
17 receivership properties and originally encumbered nine properties. It is common
18 for portfolio loans with multiple properties serving as collateral to include
19 property specific release prices which incorporate a built in premium over and
20 above the principal amounts allocated to each property. In this instance, Axos
21 Bank set release prices at an amount totaling \$10.665 million for a \$7.9 million
22 principal balance loan (the loan balance being 74% of the total release price).
23 Due to the release price premiums and the fact that most of the properties in the
24 portfolio have now been sold, after the sale of the 809 San Rafael Property is
25 completed (which is pending Court approval), the Axos Bank mortgage will be
26 nearly paid off and thus release prices will no longer be paid when the final few
27 sales close. Ignoring the benefit of the principal payoff by the previously sold
28 properties, however, would be a windfall to Mr. Riharb (if he is able to establish a
valid Deed of Trust) and would not be fair to the receivership estate.
Alternatively, subtracting the release price (which includes the lender determined
premium) also would not be fair in terms of allocating the total loan balance
(\$7.9 million) among the various collateral properties. Rather, using an
extrapolated principal loan amount (74% of the release price) and making that
amount attributable to each property is the only fair method. Therefore, when
calculating the appropriate amount to be set aside pending the resolution of the
disputed Deed of Trust, the Receiver disregarded the order in which the properties
have been sold and the lender determined release price premiums. Using the
extrapolated principal loan amount and factoring in the other payments that will
need to be made from escrow, at closing the hypothetical loan proceeds would be
\$599,000, which is the amount the Receiver proposes to set aside for the
Windemere Court Property (with \$506,000 being set aside for the Yarmouth
Court Property using the same methodology).

1 Receiver to complete the approved sale of the Windemere Court Property without
2 further cost or delay and without prejudice to Mr. Riharb.

3 **III. LEGAL STANDARD**

4 "The power of a district court to impose a receivership or grant other forms of
5 ancillary relief does not in the first instance depend on a statutory grant of power
6 from the securities laws. Rather, the authority derives from the inherent power of a
7 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
8 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
9 and efficient administration of the estate by the district court for the benefit of
10 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
11 of a receiver is authorized by the broad equitable powers of the court, any
12 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
13 953 F.2d 1560, 1569 (11th Cir. 1992).

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

18 A district court's power to supervise an equity
19 receivership and to determine the appropriate action to be
20 taken in the administration of the receivership is
21 extremely broad. The district court has broad powers and
22 wide discretion to determine the appropriate relief in an
23 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.

24 *Id.* (citations omitted); *see also CFTC. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
25 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
26 and 'we generally uphold reasonable procedures instituted by the district court that
27 serve th[e] purpose' of orderly and efficient administration of the receivership for the
28

1 benefit of creditors."). Accordingly, the Court has broad discretion in the
2 administration of the receivership estate and the disposition of receivership assets.

3 The Receiver disputes the validity of the Deed of Trust. The facts strongly
4 suggest Mr. Riharb's actions in getting the Deed of Trust signed and recorded
5 represent an intentional, last-minute attempt to put himself ahead of all other
6 investors and unsecured creditors by encumbering receivership assets with a lien in
7 his favor. The issues surrounding the disputed Deed of Trust need to be further
8 investigated and, if they cannot be resolved through settlement, then the issues will
9 need to be decided by the Court.

10 However, the sale of the Windemere Court Property (and the Yarmouth Court
11 Property, which the Receiver hopes to sell soon) should not be held up by the
12 resolution of the dispute with Mr. Riharb. As reflected in the Court's orders, it is
13 important to sell receivership real properties in a prompt and efficient manner;
14 holding properties comes with significant costs, including mortgage payments,
15 property taxes, insurance, and maintenance. *See* Dkt. 126 ("the Receiver shall ...
16 endeavor to liquidate unproductive or minimally productive assets clearly belonging
17 to Defendants as early as feasible."). Therefore, the sale of the Windemere Court
18 Property (and the anticipated sale of the Yarmouth Court Property) should not be
19 held up by the dispute concerning Mr. Riharb's disputed Deed of Trust. The
20 Receiver's proposal to set aside receivership funds pending resolution of Mr. Riharb's
21 disputed Deed of Trust is fair, reasonable and will allow the sale of the Windemere
22 Court Property to close without prejudice to Mr. Riharb.

23 **IV. CONCLUSION**

24 For the foregoing reasons, the Receiver requests an order (a) amending the
25 Order Granting Receiver's Motion for Approval of Sale of 737 Windemere Court
26 Property (Dkt. No. 434), (b) specifically providing that the sale of the Windemere
27 Court Property is free and clear of Mr. Riharb's disputed Deed of Trust (with the
28 Deed of Trust being removed from title to the property at closing of the sale), and

1 (c) approving the Receiver's proposal to set aside and not distribute a total of
2 \$1,105,000 in receivership funds pending resolution of Mr. Riharb's disputed Deed
3 of Trust.

4
5 Dated: August 28, 2020

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

6
7 By: s/Edward G. Fates

8 DAVID R. ZARO
9 EDWARD G. FATES
10 NORMAN M. ASPIS
11 Attorneys for Receiver
12 KRISTA FREITAG
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