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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. GINA CHAMPION-CAIN and ANI DEVELOPMENT, LLC, Defendants, AMERICAN NATIONAL INVESTMENTS, INC., Relief Defendant.	Case No. 3:19-cv-01628-LAB-AHG **CHARLES M. RIHARB'S LIMITED OPPOSITION TO RECEIVER'S MOTION TO AMEND ORDER FOR SALE OF 737 WINDEMERE COURT PROPERTY FREE AND CLEAR OF HIS RECORDED DEED OF TRUST; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: September 18, 2020 Time: 2:00 p.m. Courtroom TBD Mag. Judge: Hon. Allison H. Goddard

Third-party creditor Charles M. Riharb respectfully submits this Memorandum of Points and Authorities in limited opposition to the Motion by the Receiver for an Amended Order for Sale of 737 Windemere Court (the "Windemere Property") free and clear of Mr. Riharb's recorded deed of trust securing his investment.

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I.

INTRODUCTION

Mr. Riharb is a secured creditor of Gina Champion-Cain and the limited liability company that holds title to the Windemere Property. He was an investor in ANI Development, LLC's liquor license loan funding program, and defrauded out of his investment by Ms. Champion-Cain and Chicago Title Company.

Mr. Riharb does not contest the Court's power with respect to the Windemere Property or its ability to order its sale, but submits this limited opposition for two reasons:

- First, to request that Mr. Riharb's current lien on the Windemere Property attach in the same validity and priority to the proceeds of its sale that are to be maintained in a separate bank account by the receiver, with monthly statements sent to Mr. Riharb pending final adjudication of Mr. Riharb's claim thereto (or settlement with the receiver subject to approval by this Court); and
- Second, to set the record straight as to the genesis of Mr. Riharb's security interest and dealings with Ms. Champion-Cain.

Contrary to the quadruple hearsay assertions of the receiver in the moving papers, Ms. Champion-Cain had agreed to collateralize the principal amount of Mr. Riharb's investment by giving him a deed of trust on real property some *six months before the S.E.C.'s commencement of the present action*. He obtained and recorded a deed of trust on the Windemere Property *before* the receiver was appointed, and did not coerce Ms. Champion-Cain into signing said deed of trust. Rather, she continued her con, telling Mr. Riharb that there was plenty of money for all investors to be repaid and that she was happy to live up to her commitment to collateralize his investment.

Also contrary to the moving papers, the receiver has been aware of Mr. Riharb and his recorded deed of trust on the Windemere Property (and

Yarmouth Property) for at least 11 months – since October 2019, when her counsel interviewed Mr. Riharb at length about his claimed security interests, served a subpoena on him, and received his documents. *See* receiver's counsel's billing statements attached as Exhibit "A" to the Request for Judicial Notice filed herewith. The receiver had knowledge of Mr. Riharb's recorded deed of trust independent of a preliminary title report. The original motion to sell the Windemere Property was brought without notice to Mr. Riharb. The current motion to sell the Windemere Property free and clear of Mr. Riharb's lien was filed without his knowledge or consent—and he only learned about it after the Court ordered the receiver to provide formal notice. Any offers by the receiver to Mr. Riharb's prior counsel were not communicated to him.

II.

FACTUAL BACKGROUND

On behalf of himself and his family trust, Mr. Riharb made loans to what he believed were legitimate liquor license transfer applications as part of ANI's purported liquor license loan funding program. On a number of occasions, Mr. Riharb allowed what he believed to be matured loans to "roll over" into new loans. In or about March 2019, Mr. Riharb's then-current loan was set to mature, and he was considering cashing out. When he advised Ms. Champion-Cain of his intentions, she convinced Mr. Riharb to roll over his funds one more time and make a loan she anticipated would pay out in six months, *i.e.* by August 2019. Riharb Decl. ¶ 2.

On or about March 12, 2019, Mr. Riharb spoke with Ms. Champion-Cain by phone and they verbally agreed that she would secure the principal amount of his loan of $1,574,762.00 by executing promissory notes and deeds of trust in his favor on two pieces of real property that she was authorized to pledge, namely (1) 737 Windemere Court, San Diego, California 92109 (the "Windemere Property") and (2) 750 Yarmouth Court, San Diego, California 92109 (the "Yarmouth Property").

In that March 12, 2019 call, Ms. Champion-Cain agreed that she and ANI were obligated to secure Mr. Riharb's principal by entering into such security instruments if he was not repaid in full by August 15, 2019, the expected payout date of the new loan. Riharb Decl. ¶ 2.

Mr. Riharb's security arrangement with Ms. Champion-Cain only covered the principal amount of his investment, *i.e.* $1,574,762.00. It did not cover the supposed appreciated value of his investment with ANI or interest, which was close to $3 million. Mr. Riharb has never received any of the amounts that he deposited with Chicago Title in connection with ANI's purported liquor license loan funding program. Riharb Decl. ¶ 3.

The August 15, 2019 payout date came and went without any payment to Mr. Riharb by ANI or Ms. Champion-Cain. At or about the end of the last week of August 2019, Mr. Riharb saw a news article referencing fraud allegations against Ms. Champion-Cain. Mr. Riharb had a pre-planned visit to San Diego scheduled after Labor Day on unrelated business, so he called Ms. Champion-Cain on or about September 1, 2019, and asked if she would meet him the following day on his arrival in San Diego to discuss his investment. She agreed to meet with him. Riharb Decl. ¶ 4.

On or about Labor Day, September 2, 2019, Mr. Riharb met with Ms. Champion-Cain, asked about the fraud charges he had read about, and asked whether she would honor her commitment to secure the principal amount of his loan as they had discussed in March. Ms. Champion-Cain told Mr. Riharb that the allegations against her were not true, that there might be a delay but that she would see to it that all investors would be made whole and that she had no problem formalizing the security instruments to which she had earlier agreed. Riharb Decl. ¶ 5.

In the event she was amenable, Mr. Riharb had prepared form promissory notes and deeds of trust for the Windemere and Yarmouth Properties and presented

them to Ms. Champion-Cain during their September 2, 2019 meeting. When she said that she was willing to sign them, Mr. Riharb called a mobile notary service so that Ms. Champion-Cain's signatures on the instruments would be notarized. Mr. Riharb did not pressure Ms. Champion-Cain to sign the documents. She was more than happy to sign them at the time. Riharb Decl. ¶ 6.

On September 3, 2019, before his other meetings, Mr. Riharb took the two signed deeds of trust to the San Diego County Recorder's office, paid the fees and had them recorded against the Windemere and Yarmouth Properties at 8:25 a.m. Riharb Decl. ¶ 7 and Exhibits "1" and "2" thereto (recorded deeds of trust).

At the time that he had the deeds of trust recorded, Mr. Riharb was unaware that the Securities and Exchange Commission had filed a motion to have Krista Freitag appointed as receiver. He only later learned that an order on the SEC's motion was entered sometime in the afternoon of September 3, 2019, after Mr. Riharb had already recorded the two deeds of trust. Riharb Decl. ¶ 8.

On or about October 14, 2019, Mr. Riharb received an email and voice message from Ted Fates, who identified himself as counsel for the receiver. Mr. Fates indicated that he wanted to have a conversation with Mr. Riharb. On or about November 8, 2019, Mr. Riharb spoke with Mr. Fates, along with his then counsel, Andrew Holmes, and explained the nature of the loans he had made in the ANI liquor license loan funding program and the liens he had obtained on the Windemere and Yarmouth Properties. Riharb Decl. ¶ 9.

Thereafter, Mr. Riharb received a subpoena from the receiver through his then attorney, Mr. Holmes. In or about December 2019, Mr. Riharb provided Mr. Holmes with copies of documents pertaining to his liquor license investment and security instruments for the Windemere and Yarmouth Properties, which he sent to Mr. Fates. Riharb Decl. ¶ 10.

Until the present motion, Mr. Riharb was unaware that the receiver had filed motions to sell the Windemere and Yarmouth Properties without his consent and

despite his deeds of trust having been recorded against them. Riharb Decl. ¶ 11.

As he explained to the receiver's counsel approximately 10 months ago, Mr. Riharb received the security instruments in good faith based on Ms. Champion-Cain's commitment to him back in March 2019 to secure the principal of his investment being rolled-over into a new loan and Ms. Champion-Cain's willingness in September 2019 to reconfirm her commitments to Mr. Riharb and sign the security instruments. Riharb Decl. ¶ 12.

III.

LAW AND ARGUMENT

A. Mr. Riharb's lien should attach to the proceeds of the sale of the Windemere Property

In moving to sell another property in the receiver's portfolio with a disputed tax lien, the receiver agreed that the government's lien would attach to the proceeds of the sale, as follows:

> With respect to the Federal Tax Lien, the Receiver asks that the Court approve the sale free and clear of the lien and order that the lien shall attach to the net sale proceeds in the same validity and priority as it had with respect to the 3415 Mission Blvd. Property. The taxes that are allegedly owed by Fireside – if, in fact, any taxes are actually owed – have no direct connection to the 3415 Mission Blvd. Property, so there appears to be no basis for the lien to attach to the property.

Dkt. 350.

In granting the receiver's motion regarding the Mission Boulevard Property, this Court noted as follows:

> Significantly, the Court's approval of the sale does not purport to extinguish the federal tax lien and convey legal title to Buyer. As explained above, a judicial sale of receivership assets instead conveys "'good,' equitable title enforced by an injunction against suit." *Am. Capital Investments, Inc.*, 98 F.3d at 1145 n.17 (citing *Clark on Receivers* §§ 342, 344, 482(a), 487, 489, 491). Therefore, the Receiver's proposed solution of ordering the lien to attach to the proceeds of the sale of the Property (rather than extinguishing the lien) is fair, reasonable, consistent with the goals of equity, and properly within the Court's authority in the equitable receivership context. *See Mellen*, 131 U.S. at 370 (transferring the creditor's rights from the property to the proceeds of the sale); *see also Capital Cove*, 2015 WL 9701154, at *8 (protecting the interests of a creditor by

> attaching the interests to the proceeds of the sale); *In re Clark*, 266 B.R. 163, 171 (explaining that in the analogous bankruptcy context, to protect disputed interests, "[t]ypically, the proceeds of sale are held subject to the disputed interest and then distributed as dictated by the resolution of the dispute; such procedure preserves all parties' rights by simply transferring interests from property to dollars that represent its value.").

Dkt. 425, p. 10.

In making its Order, the Court, in fact, allowed the tax lien to "attach to the net sale proceeds received by the Receiver from escrow in the same validity and priority as it had with respect to the Property." Dkt. 425, p. 11. Mr. Riharb asks for the same treatment here with respect to his lien on the Windemere Property.

Mr. Riharb is a defrauded investor who received a commitment from Ms. Champion-Cain to provide security for the principal amount of his investment well in advance of the S.E.C.'s allegations that she was running a Ponzi scheme. The Ninth Circuit has recognized that the victim of a Ponzi scheme has a valid defense to a fraudulent transfer claim as to the actual amounts invested, but not illusory profits. *Donell v. Kowell* (9th Cir. 2008) 533 F.3d 762, 772 ("Payments up to the amount of the initial investment are considered to be exchanged for 'reasonably equivalent value,' and thus not fraudulent, because they proportionally reduce the investors' rights to restitution.")

The court in *Peters v. Mutual Ben. Life Ins. Co*. (Minn.Ct.App. 1988) 420 N.W.2d 908 held that an investor's decision to reinvest can constitute adequate consideration, as follows:

> Even if additional consideration were required, that consideration was provided by Peters' reinvestment of his profits into the agency. Reinvestment was not contractually required, was beneficial to Mutual Benefit and detrimental to Peters, and was what the program was intended to encourage. . . .

The court in *Sequoia Partners, LLC v. Rogue River Mortgage, LLC* (*In re Sequoia Partners, LLC*) (Bankr. D.Or. July 31, 2012, Nos. 10-67547-fra11, 10-06270-fra) 2012 Bankr. LEXIS 3529, at *21-22, also found that a creditor's delay

or forbearance in pursuing a debtor raised sufficient triable issues of fact to defeat summary judgment on a fraudulent transfer claim involving the provision of a security instrument, as follows:

> Sequoia executed a bargain and sale deed transferring its interest in the lots subject to RRM's and the individual lenders' trust deeds to PRLD. Sequoia argues that the bargain & sale deed executed by it as a requirement of the Standstill Agreement was made for no consideration and thus constitutes a fraudulent transfer under Bankruptcy Code § 548, as made for less than reasonably equivalent value. In fact, consideration for the bargain and sale deed was given by RRM and the individual lenders in their forbearance in foreclosing on the property. Sequoia was in default under the terms of the notes and deeds of trust and RRM and the individual lenders had a legal right to foreclose on their interests in the property. The bargain & sale deed induced RRM and the individual lenders to forbear by saving them the time and expense of foreclosure under their respective trust deeds should Sequoia default under the terms of the Standstill Agreement. The evidence presented is not adequate to sustain a finding that the transfer was for less than reasonably equivalent value. Summary judgment will be denied for Count 6.

Two cases noted in *In re Bayou* – which investors seeking to retain interest payments from a Ponzi scheme promoted as a defense – involved transfers of contractual loan repayments and commission payments that were considered made for value. *See Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P.*, 362 B.R. 624, 636–38 (Bankr. S.D.N.Y. 2007) (transfers of contractual loan repayments), *citing Sharp Int'l Corp. v. State St. Bank Trust Co.*, 403 F.3d 43, 47–48 (2d Cir. 2005)); *In re Bayou*, 362 B.R. at 637 (*citing Balaber-Strauss v. Sixty-Five Brokers* (*In re Churchill Mortg. Inv. Corp.*, 256 B.R. 664, 679 (Bankr. S.D.N.Y. 2000) (commission payments). One court has even held that interest payments to investors in a Ponzi scheme were made for value where the debtor promised a specific rate of return. *In re Carrozzella & Richardson*, 286 B.R. 480, 489 (D. Conn. 2002) ("[P]ayment of interest to innocent investors pursuant to a contractual obligation clearly constitute[s] the satisfaction of an antecedent debt and, therefore, based upon the clear language of [the Bankruptcy Code], should be considered as the receipt of value by the debtor."), citing *Lustig v. Weisz & Assocs., Inc.* (*In re Unified Commercial Capital, Inc.*), 260 B.R. 343, 350 (Bankr. W.D.N.Y. 2001).

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Finally, in *SEC v. Whitworth Energy Res. Ltd*. (9th Cir. 2002) 26 F.App'x 723, 725, the appellate court remanded back to the district court with orders to confirm a creditor's lien to the extent of $50,000 based upon "the pre-existing debt [which] is sufficient to support a lien to the extent of the amount of the $ 50,000."

Here, no one disputes that Mr. Riharb made an investment of more than $1.5 million out of pocket and has a claim for restitution of this amount that also provides a valid defense to prosecution for a voidable transfer. His reinvestment of funds into a new purported loan in the ANI liquor license loan program (or his agreement to permit Ms. Champion-Cain to hold his funds and not return them in March 2019) was adequate consideration to support her collateralizing his investment. The value to ANI is that Mr. Riharb would otherwise have insisted on cashing in on his investments, which would have depleted assets of what became the receivership estate. And Mr. Riharb's agreement to obtain the deed of trust in exchange for a further delay in payment that was not made in August 2019 provides further consideration for Ms. Champion-Cain's provision of collateral. As in *Sequoia Partners, LLC v. Rogue River Mortgage, LLC*, there are triable issues that must be adjudicated (and not in a summary fashion in the context of the present motion of which Mr. Riharb received belated notice) to determine Mr. Riharb's entitlement to the proceeds of the Windemere Property based upon his lien. *See SEC v. Ross*, 504 F.3d 1130, 1144 (9th Cir. 2007) (disapproving the receiver employing summary proceedings against a third party to recover alleged receivership property as a due process violation).

IV.

CONCLUSION

For the foregoing reasons, if this present motion is granted, it should be conditioned upon Mr. Riharb's lien attaching in the same validity and priority to the proceeds of its sale that are to be maintained in a separate bank account by the receiver, with monthly statements sent to Mr. Riharb pending final adjudication of

Mr. Riharb's claim thereto (or settlement with the receiver subject to approval by this Court). Mr. Riharb requests such other and further relief as the Court deems just and proper.

DATED: September 11, 2020

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