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21 KRISTA FREITAG

22 UNITED STATES DISTRICT COURT
23 SOUTHERN DISTRICT OF CALIFORNIA

24 SECURITIES AND EXCHANGE
25 COMMISSION,

26 Plaintiff,

27 v.

28 GINA CHAMPION-CAIN and ANI
DEVELOPMENT, LLC,

Defendants,

AMERICAN NATIONAL
INVESTMENTS, INC.,

Relief Defendant.

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

**REPLY TO CHARLES M. RIHARB'S
LIMITED OPPOSITION TO
RECEIVER'S MOTION TO AMEND
ORDER GRANTING RECEIVER'S
MOTION FOR APPROVAL OF SALE
OF 737 WINDEMERE COURT
PROPERTY**

Date: September 21, 2020
Time: 4:00 p.m.
Courtroom: Via Zoom
Mag. Judge: Hon. Allison H. Goddard

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 Reply to Charles M. Riharb's Limited Opposition to Receiver's Motion
5 to Amend Order Granting Receiver's Motion for Approval of Sale of 737 Windemere
6 Court Property ("Motion").

7 There is no dispute that the 737 Windemere Court Property ("Windemere
8 Property") should be sold free and clear of Mr. Riharb's lien. This is the most
9 important point as there is a Court-approved sale pending and a buyer who is ready
10 to close the sale.

11 Where the Receiver and Mr. Riharb disagree is as to what the order should
12 provide for in terms of preserving the status quo during the interim period between
13 when the sale closes and when Mr. Riharb's disputed liens are resolved, either by
14 settlement or Court order. Fortunately, this issue is relatively easy to resolve. The
15 Receiver is a Court-appointed fiduciary and all receivership funds in her possession
16 and control are subject to the Court's oversight and supervision. The Receiver is also
17 holding over \$13 million in cash, so there is no risk that the funds in the receivership
18 estate will be insufficient to satisfy Mr. Riharb's claims even if he successfully
19 establishes liens on both the Windemere Property and the 750 Yarmouth Court
20 property ("Yarmouth Property").

21 What the Receiver has proposed is that the Axos Bank portfolio loan be
22 apportioned among the nine receivership properties serving as collateral for the loan
23 based on the release prices provided in the loan documents, and that the net proceeds
24 from the Windemere Property and the Yarmouth Property, based on the principal
25 balances extrapolated from the release prices established at the origination of the loan
26 for each collateral property (*i.e.*, 74% of the release prices)¹ and the costs of sale, be

27 _____
28 ¹ Recall that Axos Bank set release prices at an amount totaling \$10.665 million for a

1 set aside by the Receiver subject to Mr. Riharb's disputed claims. Using this
2 methodology, the estimated net sale proceeds for the Windemere Property are
3 \$599,000 and the estimated net sale proceeds for the Yarmouth Property are
4 \$506,000. Accordingly, the Receiver proposed to set aside \$599,000 once the
5 Windemere Property sale closes. Then, depending on the actual sale price and costs
6 of sale for the Yarmouth Property, and using the same methodology, the Receiver
7 would propose to set aside the net sale proceeds from the Yarmouth Property when
8 that sale closes.

9 Because the Receiver is a Court-appointed fiduciary who already accounts for
10 all funds in the receivership and provides quarterly reports to the Court and all
11 interested parties, there is no need to establish a separate bank account or have bank
12 statements sent to Mr. Riharb. It is sufficient that the Court and the parties
13 understand that Mr. Riharb has disputed liens on the Windemere Property and
14 Yarmouth Property and that the net sale proceeds (using the methodology described
15 above) will be set aside by the Receiver on account of his disputed liens.
16 Considering the Receiver's role as a fiduciary and the Court's supervision of the
17 receivership, these steps adequately protect Mr. Riharb from prejudice and allow him
18 to have his claims adjudicated by the Court (if necessary) without imposing
19 unnecessary costs on the receivership estate.

20 Regarding the amounts to be set aside, it would be inequitable to hold that
21 Mr. Riharb's disputed lien applies to the entire net sale proceeds from the Windemere
22 Property and the Yarmouth Property as he proposes. This would potentially result in
23 a windfall to Mr. Riharb based solely on the fact that the two properties are two of
24 the last properties subject to the Axos Bank loan to be sold, and therefore the loan
25 will be likely be substantially paid off before the Windemere Property sells and fully
26 paid off before the Yarmouth Property is sold. Considering that there are different
27

28 \$7.9 million principal balance loan (the loan principal being 74% of the total
release price).

1 liens and claims to the different properties that are subject to the Axos Bank loan
2 (including, for example, the claims of James Lance to the 809 San Rafael and
3 812 San Rafael properties), the net sale proceeds from each sale should not be
4 dictated by the order in which the properties happen to sell. Rather, the methodology
5 the Receiver has proposed – *i.e.* apportioning the loan among the nine properties
6 based on the principal balances extrapolated from the release prices established at the
7 origination of the loan for each collateral property (*i.e.*, 74% of the release prices)
8 and provided for in the loan documents – treats the different claimants as to the
9 different properties, including Mr. Riharb, fairly and equitably.

10 Finally, the Receiver will briefly address two factual points raised in
11 Mr. Riharb's limited opposition. First, the Receiver did not suggest in her Motion
12 that she was unaware of Mr. Riharb's disputed liens. Rather, the Receiver stated that
13 the lien was not reflected on the title report for the Windemere Property that the
14 Receiver's staff had previously obtained. This could have been for several reasons,
15 including that perhaps the Deed of Trust had not been properly recorded or perfected.
16 Regardless, the Receiver was aware of Mr. Riharb's disputed liens and expected that
17 they would be asserted by Mr. Riharb and resolved as part of the claims process in
18 the receivership.

19 Second, when the Receiver learned the Deed of Trust did show up on title to
20 the Windemere Property, she, through her counsel, immediately contacted
21 Mr. Riharb's prior counsel, attorney Andrew Holmes, to try and resolve the issue.
22 Mr. Holmes stated he would convey the information to Mr. Riharb, but apparently he
23 did not. As stated in the Motion, the Receiver's counsel followed up with
24 Mr. Holmes several times before the Motion was filed. Considering that the buyer of
25 the Windemere Property is waiting to close the Court-approved sale, the Receiver
26 could not wait indefinitely for Mr. Holmes to respond. Therefore, the Receiver filed
27 the Motion and served it on Mr. Holmes. It was not until the Receiver's counsel was
28 subsequently contacted by Mr. Riharb's new counsel, Russell Allyn of the Buchalter

1 firm, that the Receiver became aware that Mr. Holmes had not been communicating
2 with Mr. Riharb.

3 For the foregoing reasons, the Receiver requests that (a) the Motion be
4 granted, (b) the Sale Order (Dkt. 434) be amended to provide that the sale of the
5 Windemere Property is free and clear of Mr. Riharb's disputed lien (with the lien
6 being removed from title to the Property at closing of the sale), and (c) the Receiver's
7 proposal to set aside, upon closing of the sale, \$599,000 of receivership funds subject
8 to Mr. Riharb's disputed lien on the Windemere Property be approved.

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Dated: September 17, 2020

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