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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 Securities and Exchange Commission,
13 Plaintiff,

14 v.

15 SiliconSage Builders, LLC aka SiliconSage
16 Builders and Sanjeev Acharya,
17 Defendant.

Case No. 3:20-cv-09247-SI

**STATEMENT OF POSITION OF
MARWAN AND RANA NABOULSI
REGARDING PURCHASE AND SALE
AGREEMENTS FOR ALMADEN
UNITS 222 AND 423**

Date: March 25, 2022
Time: 3:00 p.m.
Dept: 1 -17th Floor (Zoom Hearing)
Judge: The Hon. Susan Illston
Trial Date: TBD

19
20 **TO THE HONORABLE SUSAN ILLSTON, THE COURT APPOINTED RECEIVER**
21 **DAVID STAPLETON, HIS COUNSEL OF RECORD, AND ALL PARTIES IN**
22 **INTEREST:**

23 Pursuant to the Court’s scheduling order dated December 21, 2021 Marwan and Rana
24 Naboulsi (“Naboulsi”) submit this non-binding statement of their position with respect to their
25 purchase agreements with 1821 Almaden, LLC (“Almaden”) for the condominium units 222 and
26 423 at the project owned by Almaden.

27 **The Receiver Lacks Standing to Bring an Action Against the Naboulsis**

28 Had a complaint been brought by the Receiver to enforce Acres rights there would have

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1 been the process under the Federal Rules to challenge the Receiver’s standing to take the action it
 2 now proposes to accomplish by motion. There are immediate constitutional issues under Article
 3 III as to the Receiver’s standing to act as Acres agent. Article III requires that for a court to take
 4 jurisdiction over a dispute the dispute must be a justiciable case or controversy. The claimant
 5 must have a cognizable injury that is traceable to the responding party and redressable under the
 6 cause of action asserted and remedy sought. That is not the case here.

7 Receivers are officers of the court appointing them and so are not agents of any side of the
 8 dispute. Receivers can only bring suits that an entity in receivership could have brought because it
 9 is the entity in receivership that has been injured. The Receiver’s claims have to be able to trace a
 10 clear injury back to the receivership entity, not third-party standing for a creditor. The stated
 11 objective of a receivership may be to preserve the estate for the benefit of creditors, that does not
 12 equate to a grant of authority to pursue claims belonging to creditors.

13 The Receiver is unilaterally favoring one creditor, Acres, over another by the proposed
 14 motions to “recharacterize” the Naboulsis’ deposit agreements with Almaden for the purchase
 15 and sale of units 222 and 423. The Receiver favors creditor Acres over the Naboulsis, and others
 16 similarly situated, because he has been paid to do so by Acres, even when there is no benefit to
 17 the estate for the Receiver’s actions. Acres is the real-party-in interest regarding claims by the
 18 depositors. Acres is the only entity that would benefit from the Receiver’s proposed
 19 recharacterizations. If the deposits were to be recharacterized as anything other than deposits
 20 Acres would not have to honor the deposits, or the contractual sales, all to their profit and benefit
 21 as they could sell to others for more money. But for Acres payments to the Receiver the
 22 recharacterization motions would never be brought. The Receiver is not in privity of contract with
 23 the depositors and obtains no benefit from any recharacterization of the transactions. Acres is not
 24 in privity of contract with the depositors either and avoids that issue by hiring the Receiver.

25 The Receiver lacks standing to bring its proposed motions to recharacterize the purchase
 26 and sale agreements between the Naboulsis and Almaden. There is no statutory or other authority
 27 for the Receiver’s actions favoring a secured creditor over junior lienholders for the sole benefit
 28 of the senior lienholder. The Receiver brings its motions as the paid agent of Acres, a secured

1 creditor on Almaden. The Receiver, having been paid by Acres, is taking action against the
 2 Naboulsis, and others similarly situated, to remove their vendee liens and invalidate their
 3 purchase money deposits so that Acres may profit and not have to honor the deposits, and
 4 subsequent sales, when the condominium units are completed and the sales to Naboulsis are to be
 5 completed. Acres could not have taken such action against the vendee liens and has hired the
 6 Receiver to file these motions on its behalf, replacing an inability to take action itself with the
 7 Receiver's perceived authority.

8 As admitted by the Receiver his actions against Naboulsi have no benefit to the
 9 receivership estate. The Receiver's actions are for the sole benefit of Acres. The Receiver has no
 10 standing or authority to alter the deposit contracts between the Naboulsis' and Almaden for the
 11 sole benefit of Acres. In the past, in motions to this Court in these proceedings, the Receiver has
 12 steadfastly taken the position that he cannot act for the benefit of any one creditor. He acts as a
 13 fiduciary to all the creditors of the receivership estate. That no longer seems to be the case.

14 **The Naboulsis' Deposit Agreements are Valid Purchase and Sale Agreements and**
 15 **Not Disguised Loans**

16 The Receiver lists a number of supposed "factors" that allegedly determine if a transaction
 17 is a sale or a disguised loan between parties. The authorities cited by the Receiver are rife with
 18 admonishments that these "factors" are not solely determinative of any characterization and rely
 19 upon a review of all of the facts of the transactions. The Naboulsis' purchase agreement for units
 20 222 and 423 at Almaden are valid contracts for the purchase of the two condominiums at
 21 commercially reasonable prices compared to the value of the units. The Naboulsis are at risk if
 22 the sales do not go through, not Almaden or the eventual owner of the project, Acres. By the
 23 terms of the contracts Almaden had until December 15, 2020 to repurchase the units and it failed
 24 to do so, thus the "option to repurchase" issues are irrelevant. The deposits are valid amounts and
 25 contractual agreements between the buyers and seller. The "factors" listed or claimed by the
 26 Receiver to suggest that the transactions were disguised loans are not supported by any evidence
 27 and certainly no clear and convincing evidence, the standard Acres must meet. The
 28 Receiver's/Acres' claims that the Naboulsis' purchase and sale agreements violate the terms

1 between Almaden and TriGate ignore the fact that such an agreement between Almaden and its
2 financiers is not an issue that is the responsibility of the buyers or a contract that they would be
3 privy to, nor is TriGate a party to these proceedings.

4 The Naboulsis' reserve their rights to raise all relevant issues in their defense to Acres and
5 the Receiver's actions.

6 **CONCLUSION**

7 The Court should hear and decide the issues of standing before evidentiary hearings
8 commence.

9 Dated: February 11, 2022

ROPERS MAJESKI PC

11 By: /s/ David B. Draper
12 DAVID B. DRAPER
13 Attorneys for Marwan and Rana Naboulsi

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