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U.S. DISTRICT COURT
U.S. BANKRUPTCY COURT
BOISE, IDAHO

JUN 24 2004

LOGGED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability
company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Defendant.

Civil No. 04-229-S-BLW

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO STRIKE**

Defendant has moved this Court for its order striking portions of the Affidavit of Brian Naeve, filed previously in support of plaintiff's motion for preliminary injunction and expungement of lis pendens, and which has been placed on the Court's docket at Dkt. No. 10. In support of its motion, defendant claims that Mr. Naeve's affidavit "makes certain statements that are inadmissible under the Federal Rules of Evidence." See Motion to Strike Portions of Brian Naeve's Affidavit in Support of Motion for Preliminary Injunction (Dkt. No. 14), p. 2.

**PLAINTIFF'S MEMORANDUM IN
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Unfortunately, defendant has not indicated which of the Federal Rules of Evidence it is relying upon in making this argument. Based upon the objections presented, however, it appears that the thrust of defendant's objection is that Mr. Naeve's affidavit is "speculative" or otherwise consists of "opinion" testimony. *See id.* In short, defendant objects to the affidavit on the grounds that the first sentence of paragraph 9 contains an "improper legal conclusion to which the Affiant is not qualified to testify," and that the remainder of that paragraph is "a speculative veiled attempt without reciting any specific facts to boot strap the Plaintiff into some claim of damage." *Id.*

Defendant first contends that Mr. Naeve is "unqualified" to affirm that the improperly recorded liens are causing and will continue to cause immediate and substantial harm. It is well-settled that a plaintiff is deemed competent to testify regarding the extent of damages suffered in a particular case. Defendant seemingly has focused upon Mr. Naeve's use of the term "caused," and would suggest that "causation" is a purely legal issue which Mr. Naeve is not qualified to discuss. However, as Mr. Naeve's affidavit establishes, he is an asset manager for AMRESCO Commercial Finance, the servicing agent for plaintiff, and in that capacity he has been intimately involved in the sale negotiations on the subject property.

Federal Rule of Evidence 701 plainly states that a witness who "is not testifying as an expert" may offer "testimony in the form of opinions or inferences" which are "rationally based on the perception of the witness, helpful to a clear understanding of . . . [a] fact in issue, and not based on scientific, technical, or other specialized knowledge. . . ." Here, Mr. Naeve has offered testimony which, even if considered to be an "opinion" for which he must be qualified to offer, it is clear that his experience, particularly with the underlying transaction, places the damages which plaintiff is currently experiencing, and which it is expected to continue to experience,

firmly within his rational perception. As such, the "first sentence" of paragraph nine is admissible.

For similar reasons, the "remainder of the paragraph" to which defendant takes exception is also admissible. Defendant claims that the remaining portion of paragraph nine is "speculative," lacks "specific facts," and suffers from a want of "express statements of the title company and the alleged buyer." See Dkt. No. 14, p. 2. However, Mr. Naeve has provided sufficient facts which are rationally based upon his own perception, are helpful to a clear understanding of the facts at issue, and are not based upon scientific or other technical knowledge. See F.R.E. 701, *supra*. Specifically, Mr. Naeve has testified that in the course of negotiating a sale of the subject properties, the recording of the lis pendens has caused the title company and the buyer to seek additional assurances from plaintiff, and that the new buyer has already extracted additional financial and contractual concessions, and is attempting to extract even more concessions. Although no specific figures are provided, the information contained in Mr. Naeve's affidavit is sufficiently based upon his personal knowledge to be admissible. To the extent that defendant seeks to exclude such testimony as improper opinion testimony, the defendant's argument is unpersuasive and the testimony clearly meets the requirements set forth in F.R.E. 701.

Finally, the balance of paragraph nine simply states that the real estate transaction has been threatened by the filing of the lis pendens, that if the sale did not go through plaintiff would be substantially damaged, and that even if the sale were ultimately consummated, because of the additional concessions which have been required by the buyer, plaintiff has suffered, and likely will continue to suffer, "material adverse consequences." As discussed in the preceding

paragraphs, the testimony offered by Mr. Naeve is based not only upon personal knowledge, but is also rationally based on the perceptions held by the Affiant. Accordingly, the defendant's motion to strike should be denied in its entirety.

DATED this 24th day of June, 2004.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By  _____
Michael O. Roe – Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2004, I caused a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE** to be served by the method indicated below, and addressed to the following:

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