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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

National Bank of Anguilla (Private Banking  
& Trust) Ltd.,

Debtor.

Chapter 11

Case No.: 16-11806 (MG)

**MOTION FOR AN ORDER PURSUANT TO FEDERAL RULE OF BANKRUPTCY  
PROCEDURE 2004 AUTHORIZING DEBTOR AND DEBTOR IN POSSESSION TO  
CONDUCT DISCOVERY REGARDING NATIONAL BANK OF ANGUILLA LTD.**

National Bank of Anguilla (Private Banking & Trust) Ltd. (the “Debtor”), as debtor and debtor in possession, moves this Court (the “Motion”) for entry of an Order pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (“Rule 2004”) authorizing the Debtor to examine National Bank of Anguilla Ltd. (“NBA”). In support of the Motion, the Debtor, by and through its undersigned proposed counsel, respectfully represents as follows:

**Preliminary Statement**

1. The Debtor is wholly-owned by NBA, which, at all times relevant to the wrongdoing addressed herein, was under private ownership. As discussed below, significant funds deposited with the Debtor by its customers were upstreamed (either without going through

the Debtor's account or, in some instances, after being deposited in the Debtor's account) to NBA without reasonably equivalent value being given to the Debtor in exchange for the transfer of such funds.

### **Jurisdiction and Venue**

2. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157(b)(2) and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

3. Venue of this case and the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The predicates for the relief sought herein are sections 105(a) of the Bankruptcy Code and Rule 2004.

### **Background**

#### **A. The Debtor's Business and the Chapter 11 Case**

5. The Debtor is a commercial bank incorporated and licensed in Anguilla, with its headquarters located at the Conrad W. Fleming Corporate Building on St. Mary's Road in The Valley, Anguilla. The Debtor is wholly-owned by NBA, a privately owned entity.

6. On August 12, 2013, the Eastern Caribbean Central Bank (the "ECCB"), which was the regulator of NBA, placed the affairs of NBA into conservatorship pursuant to the Eastern Caribbean Central Bank Agreement Act.

7. As of August 12, 2013, the Debtor's affairs were conducted in accordance with instructions given by, and under the management control of, individuals appointed from time to time by the ECCB as conservators of NBA (collectively, the "Conservator Directors"). The Conservator Directors included Messrs. Martin Dinning, Hudson Carr, and Shawn Williams.

8. The Debtor failed to provide the Anguillian Financial Services Commission (the "FSC") with audited accounts of its banking business for the financial year ended October 31,

2014 by April 30, 2015, thereby violating section 30(2) of Trust Companies and Offshore Banking Act, R.S.A. c. T60.

9. On December 23, 2015, the FSC advised ECCB of its intention to apply for the appointment of an administrator over the Debtor.

10. By order dated February 22, 2016, the Eastern Caribbean Supreme Court in the High Court of Justice Anguilla Circuit (the “High Court”) granted the FSC’s application and (a) placed the Debtor’s operations under administration (the “Anguillian Proceeding”) pursuant to section 31(2)(b) of the Financial Services Commission Act, R.S.A. c. F28 (the “FSC Act”) and (b) appointed William Tacon as the administrator of the Debtor (the “Administrator”).

11. On April 22, 2016, the ECCB appointed a receiver to NBA and, on that date (at 4:00 p.m. local time), NBA ceased banking operations in Anguilla. According to a press release issued by the ECCB, the decision was made to “transfer the operations of the NBA” to a newly established bank, National Commercial Bank of Anguilla Ltd. (“NCBA”). *See* <http://www.anguillanews.com/enews/index.php/permalink/5489.html>.

12. At the close of business on April 25, 2016, the Debtor ceased accepting new deposits.

13. By an Order dated May 19, 2016, the High Court conferred upon the Administrator the powers of a liquidator under the Companies Act, R.S.A. c C65, as permitted by section 31(3) of the FSC Act.

14. On May 26, 2016, the Administrator filed in this Court a petition under Chapter 15 of the Bankruptcy Code seeking recognition of the Anguillian Proceeding as a foreign main proceeding (Case #16-11529-mg). On June 17, 2016, the Bankruptcy Court entered an *Order Granting Verified Petition for Recognition of Foreign Proceeding Under Chapter 15 and Motion*

*in Support of Verified Petition and for Related Relief* (the “Recognition Order”), thereby recognizing the Anguillian Proceeding as a foreign main proceeding and the Administrator as the Debtor’s foreign representative. *See* Recognition Order, Case #16-11529-mg, ECF No. 17.

15. On the date hereof (the “Petition Date”), the Administrator filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to manage its affairs as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or committee has been appointed in this Chapter 11 case.

**B. Upstreaming of the Debtor’s Deposits and Need for Discovery**

16. On or about August 15, 2013, the ECCB or Mr. Dinning, as Conservator Director acting on behalf of NBA, dismissed the appointed directors of the Debtor. Thereafter, the Debtor had no *de jure* directors and acted solely in accordance with the instructions of, and under the management control of, the Conservator Directors acting from time to time.

17. As discussed in the Tacon Declaration, from and after August 12, 2013, the Debtor is believed to have been insolvent on a balance sheet test. At that same time, it is believed that NBA was illiquid, dependent upon the Debtor for its liquidity (at least in part), and unable to settle the large amount NBA owed to the Debtor.

18. In November 2013, ECCB imposed withdrawal restrictions on the depositors of NBA and the Debtor, with such restrictions stated to be effective as of September 2013.

19. The Conservator Directors (acting on behalf of the Debtor) procured or permitted the transfer or payment to NBA of (i) all monies denominated in U.S. Dollars received by the Debtor from depositors and (ii) the proceeds of all assets of the Debtor realized or collected, also denominated in U.S. Dollars (together, the “Funds”).

20. The Conservator Directors paid or otherwise transferred to NBA an amount equivalent to approximately \$175 million in U.S. dollars. Upon information and belief, the

Funds were deposited into an account at Bank of America in New York City, and a portion of such Funds may still remain in the account.

21. Despite multiple requests, none of NBA, NCBA, ECCB, or the Conservator Directors have provided the Administrator with an adequate explanation relating to the transfer of the Funds to NBA (while it was insolvent). In addition, despite repeated requests, the Administrator has received no indication that NBA or NCBA will repay any of the Funds, no apparent provision has been made for NCBA to repay the Funds, and NBA is insolvent and in receivership.

22. Based on his investigations, including discussions with representatives of NBA and NCBA, the Administrator believes that the Debtor did not receive reasonably equivalent value in exchange for the transfer of the Funds, and the Debtor was insolvent (or was rendered insolvent) by the transfer of the Funds to NBA.<sup>1</sup>

### **Relief Requested**

23. The Debtor respectfully requests that the Court enter an Order, substantially in the form annexed hereto as Exhibit A, authorizing it to elicit document discovery from NBA and to conduct an oral examination of NBA with respect to the subject matter of the document requests.

24. Pursuant to Rule 2004, the Debtor proposes to serve NBA with a subpoena and accompanying document requests substantially in the form of Exhibit “B”<sup>2</sup> hereto (the “Document Requests”) and requests authorization to issue said subpoena, and any necessary related process, to NBA.

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<sup>1</sup> The Administrator has commenced legal proceedings in Anguilla against NBA, ECCB and NCBA for return of monies paid into NBA on behalf of the Debtor from and after August 12, 2013.

<sup>2</sup> The draft Document Requests attached hereto as Exhibit B are intended as exemplars. They are subject to modification and are not intended to preclude such other discovery as may be appropriate for the purposes set forth in this Rule 2004 Motion. The Debtor expressly reserves all of its rights with respect to the scope of discovery sought herein.

25. The Document Requests seek to obtain documents from NBA relating to the Funds transferred to NBA and the value that the Debtor received in exchange therefor and any oral examination of NBA would be related to the subject matter of the document requests.

**Basis For Relief**

26. Rule 2004(a) states that on “motion of any party in interest, the court may order the examination of any entity.” Fed. R. Bankr. P. 2004(a). The examination may be compelled by the issuance of a subpoena, as provided by Bankruptcy Rule 9016. *See* Fed. R. Bankr. P. 2004(c).

27. “[R]equests for a 2004 examination are usually considered ex parte.” *In re J & R Trucking, Inc.*, 431 B.R. 818, 820 (Bankr. N.D. Ind. 2010). The granting of a motion under Rule 2004 is within the discretion of the Court. *See In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (“As the permissive language of the rule suggests, the Court has the discretion to grant a request for a 2004 examination . . .”) (citations omitted).

28. “The purpose of a Rule 2004 examination is to assist a party in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions, and assessing whether wrongdoing has occurred.” *In re Recoton Corp.*, 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004).

29. The scope of an examination sought under Rule 2004 may relate to “the acts, conduct, or property or to the liabilities and financial condition of the debtor.” *See* Fed. R. Bankr. P. 2004(b). Rule 2004 is “debtor-centric and allows considerable leeway for all manner of so-called fishing expeditions provided that there is a reasonable nexus to the debtor and the administration of the debtor’s case”. *In re Hilsen*, 2008 WL 2945996, at \*1. Rule 2004 requires a court to “balance the competing interests of the parties, weighing the relevance of and necessity

of the information sought by examination.” *In re Drexel Burnham Lambert Group*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991). Thus, a “party in interest may use Rule 2004 to . . . ascertain whether wrongdoing has occurred”, *In re Hilsen*, 2008 WL 2945996, \*4 (Bankr. S.D.N.Y., July 25, 2008) (citations omitted), or whether avoidable transfers were made, *see In re Brooke Corp.*, No. 08-22786, 2013 WL 3948866, at \*2 (Bankr. D. Kan. July 29, 2013) (“[T]he Trustee seeks the records defined in the motion for an order allowing a Rule 2004 records examination from VGM and VGM Group for the purpose of determining whether to pursue DB and VGM as parties liable for allegedly avoidable transfers. The purpose clearly affects the administration of the estate and is within the scope of examination allowed under Rule 2004.”).

30. Here, an examination of NBA is particularly appropriate because none of NBA, NCBA, or ECCB has provided meaningful responses to the Administrator regarding the transfer of the Debtor’s Funds and NBA’s or NCBA’s means of repaying the Funds to the Debtor. Thus, the proposed examination will provide the Debtor with important information regarding the amount and location of the Funds, the purpose for which any of the Funds have been used, and the potential that the Debtor will be able to recover some or all of the Funds.

#### **Notice**

31. The Debtor will provide notice of this Motion to the Office of the United States Trustee. The Debtor submits that no other or further notice need be provided.

#### **No Prior Request**

32. No prior motion for the relief requested herein has been made to this Court or any other court.

**WHEREFORE**, the Debtor respectfully requests this Court enter an Order, substantially in the form annexed as Exhibit A, granting the relief requested in this Motion and such further relief as is appropriate.

Dated: June 22, 2016  
New York, New York

Respectfully submitted,

REED SMITH LLP

/s/ James C. McCarroll  
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*Proposed Counsel for the Debtor and Debtor  
in Possession*



# **EXHIBIT A**

**(Proposed Order)**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

National Bank of Anguilla (Private Banking  
& Trust) Ltd.,

Debtor.

Chapter 11

Case No.: 16-11806 (MG)

**[PROPOSED] ORDER GRANTING MOTION OF DEBTOR AND DEBTOR  
IN POSSESSION FOR AN ORDER PURSUANT TO FEDERAL  
RULE OF BANKRUPTCY PROCEDURE 2004 AUTHORIZING  
EXAMINATION OF NATIONAL BANK OF ANGUILLA LTD.**

Upon consideration of the Debtor's Motion (the "Motion")<sup>1</sup> for an Order, pursuant to Federal Rule of Bankruptcy Procedure 2004, authorizing and directing the production of documents by National Bank of Anguilla Ltd. ("NBA"), the Court finds that (i) it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York Any and All Proceedings Under Title 11, dated July 10, 1984 (Ward, Acting C.J.), as amended by the Standing Order dated January 31, 2012 (Preska, C.J.); (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) venue of this case and the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; (iv) notice of the Motion was sufficient under the circumstances; and (v) upon the record herein and after due deliberation, good and sufficient cause exists for the relief requested herein. Accordingly, it is hereby:

**ORDERED that:**

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<sup>1</sup> Capitalized terms used but not defined in this Order shall have the meanings ascribed to such terms in the Motion.

1. The Motion is granted;
2. The Debtor is authorized to serve a subpoena, document requests, and other necessary related process upon NBA to obtain the documents within the scope of the Document Requests attached as Exhibit B to the Motion and NBA is directed to produce responsive documents within twenty (20) calendar days of service, in accordance with Rule 2004 and this Order.
3. The Debtor is further authorized to serve, in due course, pursuant to Rule 2004, without further Order of the Court, such additional discovery requests upon any person as the Debtor may deem appropriate for the purposes of effectively evaluating and analyzing the subject matters addressed in or related to the Discovery Requests, subject, however, to the right of persons receiving such requests to raise objections and be heard with respect to the resolution of the same;
4. The Debtor is authorized to conduct an oral examination of NBA with respect to the subject matter of the document requests, the documents produced or withheld by NBA, the Funds, NBA's receipt or use of the Funds, the value provided to the Debtor in exchange for the Funds, or any other transfers or transactions between the Debtor and NBA;
5. The Court retains jurisdiction to resolve any disputes arising under or related to this Order, including any discovery disputes that may arise between or among the parties, and to interpret, implement, and enforce the provisions of this Order;

6. This Order is without prejudice to the rights of the Debtor to apply for further discovery of NBA, or of any other entity or individual; and
7. This Order shall be immediately effective and enforceable upon its entry.

Dated: \_\_\_\_\_, 2016  
New York, New York

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UNITED STATES BANKRUPTCY JUDGE

# **EXHIBIT B**

**(Documents to Be Produced)**

**DOCUMENTS TO BE PRODUCED**

**BY NATIONAL BANK OF ANGUILLA LTD.**

**Definitions**

1. “Bank of America” shall mean Bank of America, N.A., and its affiliates.
2. “Communication” refers to the transmittal of information (in the form of facts, ideas, inquiries or otherwise).
3. “Concerning” means relating to, referring to, describing, evidencing or constituting.
4. “Conservator Directors” shall mean Messrs. Martin Dinning, Hudson Carr, and Shawn Williams, and each of their agents, and employees.
5. “Debtor” shall mean National Bank of Anguilla (Private Banking & Trust) Ltd., its agents and employees.
6. “Document(s)” is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a)(1)(A). A draft or non-identical copy or a copy of the same document from another source is a separate document within the meaning of this term. In addition, for the avoidance of doubt a written “Communication” is a “Document.”
7. “ECCB” shall mean Eastern Caribbean Central Bank including its parent companies, subsidiary companies, predecessors, successors, affiliates, member firms, network members, agents, and employees.
8. “Funds” shall mean (i) all monies denominated in U.S. Dollars received by the Debtor from its depositors and (ii) the proceeds, also denominated in U.S. Dollars, of all assets of

the Debtor realized or collected that were paid or transferred, at any time on or after June 1, 2010, to NBA.

9. “NBA” shall mean National Bank of Anguilla Ltd. including its parent companies, subsidiary companies, predecessors, successors, affiliates, member firms, network members, agents, and employees.

10. “NCBA” shall mean National Commercial Bank of Anguilla Ltd. including its parent companies, subsidiary companies, predecessors, successors, affiliates, member firms, network members, agents, and employees.

11. “Request” or “Requests” refers to this Request for Production of Documents, including all requests for production contained herein, both individually and collectively.

12. “You” or “Your” shall mean the entity upon whom these Document Requests are propounded, including such entity’s parent companies, subsidiary companies, predecessors, successors, affiliates, member firms, network members, agents, and employees, as well as the Person(s) answering this Request on behalf of such entity.

### **Instructions**

1. All words and phrases shall be construed as singular, plural, masculine, feminine or gender neutral as necessary to bring within the scope of these Requests any information discoverable under the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) or the Federal Rules of Civil Procedure (the “Rules”).

2. Unless otherwise stated herein, the time period applicable to these Requests shall be June 1, 2010, through the present.

3. The terms “all,” “any,” and “each” shall each be construed as encompassing any and all.

4. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside of the scope.

5. The term “including” shall be construed also to mean including but not limited to.

6. Documents are to be produced in their full and unexpurgated form, together with all drafts and non-identical copies of each.

7. In producing the documents requested herein, You should include the specific Request in response to which each Document is being produced. Each Request shall be construed independently and not with reference to any other Request for the purpose of limitation.

8. You must produce the Documents in the manner in which the Documents are kept in the ordinary course of business, indicating the file or files from which the Documents were taken.

9. These Requests call for the production of the described Documents that are in Your possession, custody or control, including those in the possession, custody or control of Your respective agents, representatives, accountants or attorneys.

10. The fact that a Document is produced by another party or non-party does not relieve you of the obligation to produce your copy of the same Document, even if the two Documents are identical.

11. If any Document requested herein was formerly in Your possession, custody or control, or Your respective agents’, representatives’, accountants’ or attorneys’ control, and has been lost or destroyed or otherwise disposed of, You are requested to submit in lieu of any such Document, a written statement:



- (a) describing the nature of the Document and its contents;
- (b) identifying the person(s) who prepared or authored the Document and, if applicable, the person(s) to whom the Document was sent;
- (c) specifying the date on which the Document was prepared or transmitted; and
- (d) specifying the date on which the Document was lost or destroyed and, if destroyed, the reasons for such destruction and the person(s) requesting and performing the destruction.

12. If and when a Document responsive to any of these Requests for production is being withheld by You based on any claim of privilege, provide, in writing, the following information with respect to each Request to which You are asserting the privilege:

- (a) the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, the state's privilege law being invoked;
- (b) the type of Document, *e.g.*, letter or memorandum;
- (c) the general subject matter of the Document;
- (d) the date of the Document; and
- (e) such other information as is sufficient to identify the Document for a subpoena *duces tecum*, including, where appropriate, the author of the Document, the addressees of the Document, and any other recipients shown in the Document, and, where not apparent, the relationship of the author, addressees and recipients to each other.

13. If you object to any request or any part of a request, you should state the objection and specify the ground(s) for the objection.

14. These Requests are continuing in nature and require the supplemental production of Documents if, after producing the requested Documents, you obtain or discover additional

responsive Documents. Such supplemental production of Documents should be served within ten (10) days after you discover or learn of the existence of such additional responsive Documents.

**Documents Requested**

1. All Documents concerning the decision by the Conservator Directors or any other person to transfer, or to cause the transfer, of the Funds from the Debtor to NBA.
2. All Documents concerning the payment or transfer of Funds from the Debtor to NBA.
3. All Documents concerning the value or consideration given by NBA, or any other person, in exchange for the payment or transfer of the Funds to NBA.
4. All Documents identifying the person or entity in control or possession of any or all of the Funds at any time, including the present.
5. All Documents between NBA, on the one hand, and any of (a) the ECCB, (b) NCBA, (c) Debtor, or (d) any other person, on the other hand, concerning the Funds.
6. All Documents concerning NBA's payment or transfer of the Funds back to the Debtor or paid out on its behalf..
7. All Documents concerning NBA's ability or inability to pay or transfer the Funds back to the Debtor.
8. All Documents concerning ECCB's placement of NBA into a receivership or conservatorship.
9. All Documents concerning the sale or other transfer of any portion of NBA's banking operations to NCBA.

10. All account statements and detailed daily transaction records between the Debtor and NBA.
11. All general ledgers regarding claims or balances between the Debtor and NBA.
12. All account statements for any deposit or other account in which the Funds were deposited or transferred.
13. All communications between the Conservator Directors, on the one hand, and any officer, director, or administrator (including, without limitation, William Tacon) of Debtor, or any of the ECCB or NCBA, on the other hand, regarding the Funds.
14. All Documents concerning whether NBA was solvent or insolvent on a balance sheet test.
15. All Documents concerning whether NBA was generally paying its debts as they fell due.
16. All Documents concerning whether the Debtor was solvent or insolvent on a balance sheet test.
17. All Documents concerning whether the Debtor was generally paying its debts as they fell due.
18. All Documents concerning any agreements to which the Debtor and NBA were or are both a party.
19. All Documents evidencing any indebtedness, and the classification of same, between the Debtor and NBA.
20. All Documents evidencing NBA's transfer of any Funds to a person or entity other than the Debtor.

21. All Documents regarding the beneficiaries of NBA's account at Bank of America into which the Funds were deposited, and all ledgers or other documents regarding such beneficiaries' respective interests in the Funds in such account.

22. All Documents identifying the authorized signatories for the Bank of America account(s) into which the Funds were deposited.

23. All Documents regarding other bank accounts where Funds were deposited.

24. All Documents concerning the decision to remove and the removal of the Debtor's directors on or about August 12, 2013 and their subsequent replacement with the Conservator Directors.

25. All Documents governing the agreement between the Debtor and NBA pursuant to which the Funds were paid to NBA.

26. All Documents concerning the classification, as deposits or otherwise, of the Funds held at NBA from inception of the Debtor to date.

27. Documents concerning the decision by NBA, the Conservator Directors and/or the ECCB to continue the practice of upstreaming Funds from the Debtor to NBA from August 12, 2013 to the present.

28. Documents concerning any communication to the Debtor's customers regarding the treatment of their deposits from August 12, 2013 to the present.

29. Documents concerning the steps taken by the Conservator Directors and/or the ECCB to ensure that the interests of the Debtor or its depositors were considered and protected during the course of the conservatorship.

30. Documents concerning when each of NBA, the Conservator Directors and/or the ECCB were first aware that the Funds of the Debtor upstreamed to NBA may not be repaid in full.

31. Documents concerning any consideration given by NBA, the Conservator Directors or the ECCB as to the appropriateness of continuing to cause the Debtor's funds to be upstreamed to NBA.

32. Documents concerning when any of NBA, the Conservator Directors or the ECCB were first aware of the terms of any proposed resolution or other plan pursuant to which the Debtor would be afforded no protection for the monies it held at NBA.