UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN Defendants.	Case No. 1:18-cv-5587 Hon. John Z. Lee Magistrate Judge Young B. Kim

REPLY IN SUPPORT OF MOTION OF CERTAIN MORTGAGEES TO STAY SALES PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The mortgagees identified below[1] (collectively, "Mortgagees," and each individually a "Mortgagee") file this reply in support of their Motion to Stay Sales Pending Appeal to the United States Court of Appeals for the Seventh Circuit ("Motion") [Dkt 832], and state as follows:

INTRODUCTION

The Receiver's Opposition to the Motion ("Opposition") [Dkt 854] and the SEC's Response to Motion to Stay Property Sales Pending Appeal [Dkt 862][2] fail to refute the irreparable harm the Mortgagees will suffer if the sales are not stayed and fail to refute the Mortgagees' right to a stay pending appeal. The Opposition both mischaracterizes the issues and misinterprets the law. The Mortgagees' appeal is timely and the issues are ripe and appealable under Section 1292(a)(2).

[1] (1) Federal National Mortgage Association ("Fannie Mae") and (2) Citibank, N.A., as Trustee for the registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48

[2] The SEC's Response merely adopts and reiterates the same arguments advanced by the Receiver. This Reply applies equally to the Receiver's Opposition and the SEC's Response.

ARGUMENTS

1. The Mortgagees Risk Having Their Appeal Mooted in the Absence of a Stay.

The case law is clear—if the stay is not granted, then the Mortgagees risk having their appeal mooted. *S.E.C. v. Janvey*, 404 F. App'x 912, 915 (5th Cir. 2010); *In re CGI Industries, Inc.*, 27 F.3d 296, 301 (7th Cir. 1994); *Out of Line Sports, Inc. v. Rollerblade, Inc.*, 213 F.3d 500, 501 (10th Cir. 2000) (stating "[a]n appeal is moot if the court of appeals can no longer grant effective relief because the object of the suit has been transferred."). In fact, in *Antiques* the Seventh Circuit noted that "in the absence of a stay…a closed sale (that is, a sale that has been executed, not just contracted for) of a debtor's assets can't be reopened." *United States v. Antiques Ltd. P'ship*, 760 F.3d 668, 673 (7th Cir. 2014). This is precisely the outcome the Mortgagees seek to avoid.

The Mortgagees will suffer at least two forms of irreparable harm if the Motion is denied. The first irreparable harm is mootness of their appeal. As one court noted, failing to grant a stay resulting in the mooting of an appeal is "the 'quintessential form of prejudice.'" *In re Country Squire Assocs. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996); *see also E.E.O.C. v. Quad/Graphics, Inc.*, 875 F. Supp. 558, 560 (E.D. Wis. 1995) (holding appellant will be irreparably harmed if stay is not granted while appeal is pending). The Mortgagees will undoubtedly be prejudiced if the Motion is denied because the sales will be consummated as stated by the Receiver's counsel at the November 5 hearing. The second irreparable harm is disposal of the Mortgagees' collateral. Once the collateral is sold, the Mortgagees can no longer recover the collateral in partial satisfaction of their loans. In other words, the Receiver's sale process authorizes the sale of properties free and clear of all liens, claims, and encumbrances. If the Properties are sold, the Mortgagees' sole recourse for recovery is to fight over the finite (and potentially diminishing) amount of the sale proceeds. Compare this with the Mortgagees' ability to either own outright or foreclose the property to satisfy its debt in full. As detailed in the Motion, this destroys

the basis of the bargain for which the Mortgagees agreed to extend these loans, is in derogation of the existing loan documents, and contravenes state law foreclosure process regarding real property disposition..

The Receiver contends there is no irreparable harm because the Mortgagees' liens attach to the sale proceeds. (Opp. p. 7.) This is a disingenuous argument at best as the Receiver does not concede that any party has a lien against any of the properties. First, the order seeks to sell the properties free and clear of the Mortgagees' liens without providing a full payoff. *Pennant* prohibits this inequitable result, absent consent of the Mortgagees, which the Receiver lacks. *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015) (rejecting sales that did not satisfy all secured liens, absent a consensual agreement by the impacted parties). Second, the Receiver is forcing the Mortgagees to take a discounted payoff by stripping their liens without a full payoff. After the sales, the Mortgagees' sole recourse for recovery is to fight over the finite (and potentially diminishing) amount of the sale proceeds. Since the amount of the sale is less than the amount of the Mortgagees' debt, the Mortgagees are forced to accept a discounted payoff (i.e., the sale proceeds). Compare this with the Mortgagees' ability to foreclose on the property, take title to the property, and ultimately dispose of the collateral in such a way and such a time as to satisfy the Mortgagees in full.

The Receiver postures there is no irreparable harm because the Mortgagees were entitled to credit bid. (Opp., pp. 7-8.) As explained in the Mortgagees' Objections (Dkt 769), the Court approved credit bid process was illusory and this is a basis of the Mortgagees' appeal. The court-approved process exposes the Mortgagees to such substantial liability it results in a chilling of credit bidding. Moreover, the requirements of posting a letter of credit is equally improper and resulted in chilled credit bidding. Additionally, this process creates the paradigm where a lender

pays *twice* for the same collateral: (1) the loan proceeds were undisputedly received by Equitybuild from the Mortgagees and (2) the draw on a letter of credit would require further payment to the Equitybuild estate above and beyond the initial loan proceed. Moreover, the Receiver has requested priming liens of the Mortgagees' collateral. Such priming liens, if granted, would automatically trigger a draw on any letter of credit pursuant to the Receiver's proposed process, forcing the Mortgagees to collateralize the fees incurred by the Receiver in this case. Such a result clearly constitutes harm to the Mortgagees and makes the Receiver's concept of "credit bidding" illusory.

2. The Mortgages Have Shown the Necessary Likelihood of Success.

The Mortgagees did not cite the wrong legal standard for their requested stay. In fact, it is the Receiver who misrepresents to the Court the standard by which this motion must be adjudicated. (Opp., p. 9.) The standard articulated in *Forty-Eight Insulations, Inc.*, 115 F.3d 1294 (7th Cir. 1997), applies to the *Seventh Circuit's* review of an order denying a motion to stay pending appeal, not the district court's review of a motion to stay pending appeal. The *Forty-Eight Insulations* court articulated ***the standard for a reviewing court*** in determining whether to reverse a district court's order denying a motion to stay pending appeal. There, the appellant appealed an order denying a motion to stay pending appeal. The Seventh Circuit stated, "[I]n the context of a stay pending appeal, ***where the applicant's arguments have already been evaluated on the success scale***, the applicant must make a stronger threshold showing of likelihood of success to meet his burden." *Id.* at 1301 (emphasis added). The court further clarified the standard by stating, "Thus, in the instant case, the Claimants need to demonstrate a substantial showing of likelihood of success, not merely the possibility of success, ***because they must convince the reviewing court that the lower court, after having the benefit of evaluating the relevant evidence, has likely committed reversible error***." *Id.* (emphasis added).

In fact, *Forty-Eight Insulations, Inc.* confirms and upholds that the Mortgagees' only burden is only to show their chance of success is better than negligible. *Id.* at 1300-01. *Fort-Eight Insulations* also confirms that the standard this Court must apply to a motion to stay pending appeal "mirror[s] the factors to be considered in ruling on an application for preliminary injunction." *Id.* at 1300. The Seventh Circuit confirmed this standard stating "To meet the threshold burden on likelihood of success in the preliminary injunction context, the applicant need only demonstrate that his chance of success on the merits at trial is "**better than negligible**." *Id.* (emphasis added). Thus, the Receiver's position on the Mortgagees' burden of proof is flat wrong.

Indeed, the Mortgagees have clearly met their burden. In *Matter of Riverside Inv. P'ship*, 674 F.2d 634, 640 (7th Cir. 1982), the Seventh Circuit found that "As a general rule, the bankruptcy court should not order property sold 'free and clear of' liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate." This principle was later confirmed in *Pennant* when the District Court for this very district expressly rejected a federal receiver's sales of property that did not satisfy all secured liens, absent consensual agreement by the impacted parties. *Pennant*, 14-CV-7581, 2015 WL 4511337, at *4-5.

The Receiver's citation of *Pennant* is also improper. (Opp., p. 11.) The Receiver erroneously claims *Pennant* stands for the proposition that a receiver can sell property for less than the amount of all liens and free and clear of those liens if the liens attach to the sale proceeds.[3] (*Id.*) This is flat out wrong. *Pennant* articulates the standard that absent consent of all interested parties, estate property should not be sold free and clear of liens unless the proceeds will fully compensate the secured lienholders and produce equity for the estate. *Pennant*, 14-CV-7581, 2015

[3] It's noteworthy that the Receiver's citation to *Pennant* does not contain a pincite to support his position.

WL 4511337, at *4-5. This standard was confirmed in the subsequent *Pennant* decision. *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, No. 14-CV-7581, 2015 WL 5180678, at *4–5 (N.D. Ill. Sept. 4, 2015).

The standards articulated in *Pennant* and *Riverside* both support the Mortgagees' appeal and evidence that their likelihood of success is "better than negligible." Moreover, the Mortgagees likelihood of success is clearly supported by the *Madison* decision – a case that is on all fours with this case – and where the District Court held (1) an SEC receiver may not keep a commercial real estate property in a receivership where the value of the property is less than the loan amount owed to the secured lender and (2) an SEC Receiver is required to lift the receivership order's stay and allow a lender to foreclose, where the commercial property has no equity for the receivership estate and the lenders' liens exceeded the value of the property. *SEC v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271, 1284 (D. Utah 2009).

3. <u>The Mortgagees Have Not Previously Sought a Stay Pending Appeal</u>.

Contrary to the Receiver's mischaracterizations, the Mortgagees have never sought a stay pending appeal. The Receiver incorrectly posits this is the Mortgagees' fourth attempt to stay the sales. This is a flat mischaracterization of the facts. As an initial matter, the Mortgagees **<u>must</u>** seek a stay pending appeal otherwise their appeal may become moot. *In re CGI Industries, Inc.*, 27 F.3d at 301; *Out of Line Sports, Inc. v. Rollerblade, Inc.*, 213 F.3d 500, 501 (10th Cir. 2000) (stating "[a]n appeal is moot if the court of appeals can no longer grant effective relief because the object of the suit has been transferred.") *Janvey*, 404 F. App'x at 915. This makes logical sense since an appellate court may be deprived from providing effective relief if the sale is consummated before the appeal. *In re CGI Industries, Inc.*, 27 F.3d at 301; *Out of Line Sports, Inc.*, 213 F.3d at 501. Here, the harm of rendering the appellants' appeal moot by denying a stay of the sale is alone

justification for the stay of the sale. *Quad/Graphics, Inc.*, 875 F. Supp. at 560 (holding appellant will be irreparably harmed if stay is not granted while appeal is pending); *In re Country Squire Assocs. of Carle Place, L.P.*, 203 B.R. at 183 (stating failure to grant a stay resulting in the mooting of an appeal is "the 'quintessential form of prejudice.'").

Moreover, the Receiver's citation to prior motions as a reason to deny the current Motion is misleading and baseless. (Opp., p. 1.) First, the Receiver cites a July 2019 motion and characterizes this motion as a motion to stay. This is false. The referenced motion is actually a Consolidated Motion to Amend May 2, 2019 Memorandum Opinion and Order ("Consolidated Motion"). The Consolidated Motion was filed *at the direction* of Magistrate Judge Kim after the Mortgagees when the parties could not reach a consensual agreement regarding credit bidding. *See* Order dated May 22, 2019 (stating "If UBS and the other non-party creditors cannot reach an agreement with the Receiver by May 31, 2019, then UBS and the other creditors have until June 7, 2019, to file a joint motion to amend this order to establish procedures for submitting credit bids."). The motion sought to amend Magistrate Judge Kim's May 2, 2019 order and was not a motion to stay.

Second, the Receiver's citation to a March 2020 motion is inaccurate and equally unavailing. The referenced motion is actually a Motion of Certain Mortgagees for Stay of Ruling and for Oral Arguments [Dkt 668]. That motion is simply a request for the Court to schedule and consider oral arguments on the Receiver's consolidated sale motion [Dkt 618] and objections to the same [Dkt 628] before ruling.

Third, the Receiver's citation to the Motion to Stay Marketing and Sales of Properties [Dkt 694] plays fast and loose with the Motion. That motion was filed on May 22, 2020 and as a result of Cook County and state law lock downs and shelter in place orders stemming from the COVID

pandemic. Interested parties who may have been bidders would have been unable to take tours of properties for sale or visit occupied units as is customary in competitive bidding for commercial properties. The motion requested the Receiver adjust his marketing and sale strategy in response to the pandemic to maximize sale potential. Indeed, the Mortgagees' request in that motion is consistent with the marketing strategy taken by another SEC receivership currently pending before this very Court.[4] In the *Northridge* case, the Receiver sought to sell commercial properties pursuant to his appointment as an SEC Receiver. Due to COVID-19, the Receiver modified his sale and marketing procedures because physical tours and bringing people to the property "likely constituted a violation of Illinois' Stay at Home Order instituted by Governor Pritzker." The receiver delayed the public marketing process and instead targeted strategic active purchasers, created a virtual tour, and culled a database of over 11,000 potential buyers. Notwithstanding, the prior motion did not involve an appeal or the irreparable harm that may result if the sales are not stayed pending appeal. Simply put, the issues and facts presented in the current Motion are unique and have not previously been considered by this Court. There is no support to deny the Motion based on prior unrelated filings.

4. <u>The Mortgagees Have a Good Faith Desire to Put The Present Legal Issues before the Seventh Circuit.</u>

The Mortgagees' appeal is based on their good faith desire to have the Seventh Circuit resolve the disputed legal issues presented before this Court as indicated in the disparity in treatment in the Northern District itself and before this Court in two SEC receiverships as to how commercial real estate may be sold pursuant to an SEC receivership. It is in no way a delay tactic.

[4] *See SEC v. Northridge Holdings, Ltd.*, et al., No. 19-cv-05957 (N.D. Ill.) Receiver's Motion for Order: (1) Authorizing Sale of Real Estate and Related Relief (Timber Lake Property); (2) Approving Agreement as to Distribution of Proceeds of Sale and (3) Modifying Receivership Order to Add Receivership Defendants [Dkt 183] (SEC receiver detailing adjustments made in the marketing and sale of real estate due to the COVID-19 pandemic, including extending the marketing period).

In fact, it is the Appellants who have urged an expeditious and fair claims process and determination of lien priority and who have had to craft and negotiate an information and document sharing protocol with a third-party vendor to obtain access to information in the Receiver's possession for over 26 months. Indeed, two years and almost three months into this case: (1) no documents have been shared by the Receiver; (2) no lien priority process has been implemented; (3) not a single proof of claim has been objected to by the Receiver; and (4) no funds have been tendered to any lender or investor all the while the Receiver's fees continue to amass and continue to be paid 100% on the dollar. The Mortgagees believe resolution by the Seventh Circuit of the issues presented will help streamline this more than two-year old stagnant case. At the end of the day, a receivership's ultimate goal is designed to return funds to injured parties, not to fund ongoing administrative expenses for issues that could have easily been addressed by state foreclosure courts. Indeed, the very investors - whom the SEC has noted as the reason for this receivership – have expressed its frustration at the fees incurred in this case and attendant delays most recently at the October 27, 2020 hearing. Zero funds have been tendered to any of the parties, and the Receiver has not even given an estimate when he believes any distribution may occur.

The Receiver's authority to sell property is not unlimited or unfettered. Among the specific issue presented here is whether the Receiver can sell encumbered real estate without the Mortgagees' consent, for less than the balance due under the mortgages, and without first determining validity, amount and priority of liens. As shown in *Pennant*, limits exist on the Receiver's authority to sell estate property. *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015) (rejecting sales that did not satisfy all secured liens, absent a consensual agreement by the impacted parties.) In *Pennant*, federal receivers sought to sell certain commercial hospitality properties "free and clear of liens, claims,

and encumbrances" with such liens, claims, and encumbrances "attaching to the proceeds of the sale." *Pennant* at *2. The sale prices were less than the amount owed the secured lienholders. The District Court expressly rejected the sales that did not satisfy all secured liens, absent consent by the interest parties. This is precisely the issue presented and precisely the issue resolved in *Pennant*.

5. The Mortgagees Have a Good Faith Basis to Appeal Under 28 U.S.C. §1292(a)(2)

Contrary to the Receiver's *ad hominem* attacks related to the Mortgagees' appeal, the appeal is proper under 28 U.S.C. §1292(a)(2). *S.E.C. v. Janvey* is directly on point to the issues and should not be disregarded by the Court. First, the Mortgagees citation to *Janvey* is perfectly appropriate. Federal Rule of Appellate Procedure 32.1 provides that decisions after January 1, 2007 should not be disregarded merely because they are labeled as non-precedential. Fed. R. App. P. 32.1; *see also Passmore v. Josephson*, 376 F. Supp. 3d 874, 882 n.3 (N.D. Ill. 2019) (in citing FRAP 32.1, the court stated "Although not precedential, the order's reasoning is persuasive and provides a useful point of comparison here.")

The facts of *Janvey* are directly on point and are useful to this Court's consideration of the issues. In *Janvey*, an appeal was taken under 1292(a)(2) of the district court's order approving an SEC receiver's sale of estate property. *Janvey*, 404 F. App'x at 915. The Fifth Circuit held its jurisdiction was proper under 1292(a)(2). *Id.* at 914. In so finding, the court relied on and confirmed its prior holding in the published decision *United States v. "A" Manufacturing Co.*, 541 F.2d 504 (5th Cir. 1976) where it held "[s]ection 1292(a)(2) provides for appeals from interlocutory orders which take steps to accomplish the purpose of receiverships such as directing the sale or disposal of property. It logically follows that if an order directing a sale is appealable then an order confirming a sale after the fact is likewise appealable." The Receiver ignores *"A" Manufacturing Co.* in his Opposition.

Although the Fifth Circuit found its jurisdiction was proper, the Fifth Circuit further held the appeal was moot because the appellant did not seek a stay before the sale was consummated and the property sold to a third party. *Janvey*, 404 F. App'x at 916. These are the exact same facts presented before this Court. The Mortgagees appeal under 1292(a)(2) an order confirming an SEC receiver's sale of estate property. However, the Mortgagees attempt to avoid the conclusion of *Janvey* by seeking a stay now before the sales are completed. The facts and reasoning of *Janvey* are directly on point to the issues presented in the Motion and provide useful comparison in this Court's analysis. *Passmore*, 376 F. Supp. 3d at 882 n.3. Thus, *Janvey* should not be ignored.

Moreover, the cases relied on by the Receiver are inapposite. (Opp., p. 5.) Most importantly, unlike *Janvey*, none of these cases involve a stay of the sale of estate property pending an appeal under Section 1292(a)(2). The Receiver's loose references to these cases should not be countenanced.

In *Commodity Futures Trading Comm'n v. Walsh*, a party appealed four separate orders: (1) an order granting a temporary restraining order; (2) an order converting a prior issued temporary restraining order to a preliminary injunction; (3) an order granting another preliminary injunction; and (4) the district court's referral to the court-appointed receiver of the appellant's request for release of funds to pay living expenses and legal fees. The Second Circuit stated in a footnote that the fourth order (release of funds to pay for living expenses and legal fees) was not appealable under §§ 1292(a)(1) or 1292(a)(2). *Walsh*, 618 F.3d 218, 225 n. 3 (2d Cir. 2010). No other mention or analysis of § 1292(a)(2) is present in the opinion and a stay pending appeal was not considered.

In *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010), a receiver was appointed over the California Department of Corrections to construct additional hospital beds for inmates. *Plata*

addressed whether the construction additional hospital beds was appealable under 1292(a)(2). The Ninth Circuit determined it did not have jurisdiction because an order refusing to block the construction plan did not amount to an order refusing to terminate the receiver or to take steps to accomplish the windup of the receivership. *Id.* at 1099. Again, no stay pending appeal was considered.

In *SEC v. Black*, 163 F.3d 188 (3d Cir. 1998), the court held it lacked jurisdiction under § 1292(a)(2) regarding an appeal of an order approving the payment of attorneys fees and expenses to the receiver. The jurisdictional issue decided in *Black* did not involve the sale of estate property nor was a stay pending appeal considered.

Finally, *State St. Bank & Tr. Co. v. Brockrim, Inc.*, 87 F.3d 1487 (1st Cir. 1996) is wholly inapposite and actually supports the Appellants and highlights why the Mortgagees' appeal is proper. In *Brockrim*, a receiver was appointed over a business located in Michigan and Ohio to liquidate the defendant's assets to satisfy a debt owed to the plaintiff. *Id.* at 1488. The court approved the sale of the Michigan business. *Id.* at 1489. It was not clear whether the sale proceeds of the Michigan business would satisfy plaintiff's debt, so the court conditionally approved the sale of the Ohio assets, subject to a later determination on the issue of satisfaction. *Id.* at 1489. The court certified this order of conditional approval pursuant to Federal Rule of Civil Procedure 54. *Id.* On appeal, the defendant challenged the appropriateness of the Rule 54 certification. *Id.* The First Circuit found the certification was not appropriate. Moreover, it held the order was also not appealable under 1292(a)(2). *Id.* at 1491. The order at issue was effectively a conditional approval of the sale because the sale was "contingent on a later determination of its necessity." *Id.* at 1489. Unlike *Brockrim*, the order subject to appeal in the present case is neither conditional nor subject

to a later determination of necessity. In fact, absent a stay as requested by the Mortgagees, the Receiver may close on the sale of the properties at any time.

United States v. Antiques Ltd. Partnership, 760 F.3d 668 (7th Cir. 2014), is inapposite. A key distinction ignored in the Receiver's Opposition is that the *Antiques* receiver was appointed for "postjudgment collection proceeding[s]" to sell the defendants' assets to satisfy tax liens in favor of the United States government. *Id*. at 671. Importantly, ***before*** the receiver was appointed, the district court entered an order finding the tax assessments were valid and likewise so were the tax liens. *Id*. at 670. Moreover, the district court held that the tax liens attached to the defendants' property. Based on this judicial determination, the federal government moved for the appointment of the receiver to sell the property on which the government had a previously determined valid lien. *Id.* The sole purpose of selling the property was to satisfy the government's liens. *Id.* at 672 (stating the liens attached to the defendants' property "thus entitling the receiver to sell those interests in order to realize cash from the liens to satisfy the Zabkas' tax obligations.") No such finding has been made in this case. In fact, the Mortgagees have asserted that the Receiver lacks a right to sell their collateral on the terms and conditions that have been approved. This key factual distinction illustrates why *Antiques* cannot be viewed on the same footing as the present case. Moreover, the issues raised in the Mortgagees' Objections to the Ninth Sale Motion relate to the steps necessary to accomplish the "wind up." *U.S. v. Sylacauga Prop., Inc.*, 323 F.2d 487 (5th Cir. 1963) (holding that order which rejected government's motion to foreclose on chattel mortgages and sell real estate pertaining to a housing project was immediately appealable because it was in reality a refusal to wind up the receivership). By overruling the Objections, this court entered a "refusing order[]" to take steps to accomplish the purpose of the wind up of the estate, which is an

enumerated category of appealable order under Section 1292(a)(2). 28 U.S.C. §1292(a)(2). A refusing order is a proper appealable order under 1292(a)(2). *Antiques*, 760 F.3d at 672.

6. There is No Harm to the Public or Investors

Contrary to the Receiver's continued *ad hominem* attacks, there will be no harm to the public if the Motion is granted. The Receiver's parade of horribles related to carrying costs and unknown risks is simply unfounded. (Opp. pp. 12-13.) Each of these Properties operates at a significant profit. Indeed, the Receiver's most recent year-to-date financials show 1131-41 E. 79th has a net profit of over $80,000 and 6250 S. Mozart has a net profit of over $27,000. There is simply no risk of harm as alleged by the Receiver because each property generates more than sufficient income to pay its expenses.

The Mortgagees have demonstrated neither of these properties have any equity to benefit the estate or the investors.[5] This is because the Mortgagees have a first priority lien on each of these properties. This fact will be apparent whenever the yet-to-be-established claims process, which must comply with Illinois law on lien priority, determines the validity, priority and amount of secured debt. Each purchase price is significantly below the amount of the debt owed the Mortgagees.[6] Thus, since the Mortgagees' liens must be satisfied before the estate can recover any funds, there is no economic interest in the properties on the part of any party other than the Mortgagees. Therefore, there can be no economic harm to Equitybuild investors or the public.

7. No Bond is Required.

No bond should be required in this instance. There is no economic risk to any party other than the Mortgagees. The Receiver cites "a host of other interested stakeholders" who "may be

[5] *See* Objections [Dkt 769], p. 15. The sale of 1131-41 E. 79th will result in a shortfall of at least $892,782.90. The sale of 6250 S. Mozart will result in a shortfall of at least $1,908,254.83.

[6] As of June 28, 2019, Fannie Mae's claim totaled at least $1,319,255.08, while the anticipated sale proceeds are less than $1,058,212.00. As of June 28, 2019, Citibank as Trustee's claim totaled at least $1,461,176.83, while the anticipated sale proceeds are less than $831,324.00.

impacted" but does not provide any specifics of real risk of economic harm. (Opp. p. 14.) This is unavailing. The issues on appeal are threshold issues that affect all interested parties. Resolution of these issues will provide much needed clarity to that all parties have been seeking and will help streamline this case. Moreover, as detailed in the Motion, the Mortgagees bear the economic risk in this instance. Furthermore, if the buyer does terminate the purchase contract, the real property will still remain and can be sold at a later date (if appropriate). The Receiver presents no evidence this will cause any prejudice to any parties other than the Mortgagee. Additionally, there is $207,500 in earnest money pledged to protect the estate if the contracts are terminated. The Receiver has already indicated he intends to pursue earnest money if a contract is terminated. *See* Motion for Order Directing Release of Earnest Monies to Receiver [Dkt 739]. Finally, contrary to the case cited by the Receiver, this is not a situation where a money judgment was entered and the court must take steps to protect the plaintiff's judgment. (Opp. p. 14.) Therefore, the Mortgagees request that a bond be waived. In the event the Court determines a bond is necessary, the amount should be nominal. The estate is protected by the earnest money and the fact that the property will remain in existence for resale even if the current contracts are terminated.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Motion, the Mortgagees' respectfully request that their Motion to Stay Sales Pending Appeal be granted.

Dated: November 12, 2020

Respectfully submitted,

/s/ Jill Nicholson

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CERTIFICATE OF SERVICE

I, Jill Nicholson, hereby certify that on November 12, 2020, I caused to be electronically filed the ***Reply in Support of Motion of Certain Mortgagees to Stay Sales Pending Appeal to the United States Court of Appeals for the Seventh Circuit*** which is being served electronically via the Court's ECF system on all counsel of record.

/s/ Jill Nicholson
Jill Nicholson