

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

**CERTAIN MORTGAGEES' OBJECTION TO RECEIVER'S (1) SECOND MOTION
FOR RESTORATION OF FUNDS EXPENDED FOR THE BENEFIT OF OTHER
PROPERTIES; AND (2) NINTH MOTION TO CONFIRM THE SALE OF CERTAIN
REAL ESTATE AND FOR THE AVOIDANCE OF CERTAIN MORTGAGES, CLAIMS,
LIENS, AND ENCUMBRANCES**

Federal National Mortgage Association ("Fannie Mae") and Citibank, N.A., as Trustee for the registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48 ("Citibank as Trustee", collectively the "Mortgagees")¹ submit this objection ("Objection") to the Receiver's (1) Second Motion for Restoration of Funds Expended for the Benefit of Other Properties; and (2) Ninth Motion to Confirm the Sale of Certain Real Estate and for the Avoidance of Certain Mortgages, Claims, Liens, and Encumbrances [Dkt. 749] ("Motion"). In support of their Objection, the Mortgagees respectfully state as follows:

¹ Federal Home Loan Mortgage Corporation ("Freddie Mac") and UBS AG join this objection even though they do not have a property subject to the Motion in order to preserve their rights to object to the process going forward with respect to additional properties coming up for sale confirmation in the future.

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SUMMARY OF ARGUMENTS

The Receiver's Motion must be denied for no less than the following five reasons. First, the Receiver may not sell the properties at issue free and clear of the Mortgagees' liens where (a) there is no equity obtained for the Receivership Estate, (b) the sale constitutes an impermissible taking, (c) the stripping of mortgages violates due process, and (d) the Receiver's Motion tries to create federal common law as an end-run around Illinois state law regarding secured mortgages. Second, the Receiver has failed to act with due regard to the realization of the true and proper value of the properties. Third, the credit bid process is illusory and violates Fannie Mae's and Citibank as Trustee's security interests. Fourth, sales to affiliates of the current property manager should be barred as they violate the Receiver Order prohibiting conflicts of interests and are not arm's length transactions. Fifth, even if the sale process could be approved – which it cannot – it fails to immediately disburse proceeds to Fannie Mae and Citibank as Trustee.

FACTUAL BACKGROUND

The Parties

The Receiver & The SEC

On August 15, 2018, the U.S. Securities and Exchange Commission (the "SEC") filed a complaint against EquityBuild, Inc., Equitybuild Finance, LLC, Jerome Cohen, and Shaun Cohen (collectively, "Receivership Defendants"). On August 17, 2018, the Court appointed Kevin B. Duff as the equity receiver ("Receiver") over the estates of the Receivership Defendants ("Receivership Estate").

The Mortgagees

Fannie Mae holds prior perfected security interests in the commercial real estate located at 1113-41 East 79th St., Chicago, Illinois and the rents generated from the commercial property

(collectively, the “Fannie Mae Property”). Citibank as Trustee holds perfected security interests in the commercial real estate located 6250 S. Mozart Avenue, Chicago, Illinois and the rents generated from the commercial property (collectively, the “Citibank Property”). Collectively, the Fannie Mae Property and the Citibank Property are referred to as the “Properties.” Both Properties are the subject of the Receiver’s Motion and this Objection.

The Borrowers

SSDF 2 1139 E 79th LLC is the borrower with respect to the Fannie Mae Property. SSDF4 6250 S. Mozart, LLC is the borrower with respect to the Citibank Property. SSDF 2 1139 E 79th LLC and SSDF4 6250 S. Mozart, LLC are herein referred to collectively as the “Borrowers.”

The Property Management Companies

Prior to the Receiver’s appointment, the Properties were managed by WPD Management LLC (“WPD”). The Receiver has continued to employ WPD to operate, manage, make improvements, collect rent, and interface with tenants and potential buyers for the Properties. Receiver’s First Status Report [Dkt. 107], p. 10. The Receiver’s Motion seeks to sell both Properties to Longwood Development LLC, an affiliate of WPD. Motion, ¶¶33, 36.

Investors & Lien Priority Disputes

Certain investors have claimed competing secured interests with respect to the Citibank Property through proofs of claim submitted against the Receivership Estate. Receiver’s Eighth Status Report [Dkt. 757], Exhibit 8. With respect to the Fannie Mae Property, there are no recorded mortgages that are either prior or subsequent to Fannie Mae’s mortgage. Motion, ¶34.

On March 13, 2019 (17 months ago), multiple mortgagees requested that any disputes regarding lien priority between the Mortgagees and the investors be immediately addressed, as they are threshold determinations in the case. *See* Certain Mortgagees’ (I) Response to Motion for

Entry of and Order (1) Establishing Claims Bar Date; (2) Finding That the Receiver Gave Fair, Adequate, and Sufficient Notice to All Interested Parties and (3) Approving Proof of Claim Form and Summary Procedures and (II) Cross Motion to Set Discovery Schedule and Hearing on Lien Priority on an Expedited Basis and for Related Relief [Dkt. 285]; *see also*, Reply In Support of Motion of Creditor Federal Home Loan Mortgage Corporation Concerning Rents Collected by the Equity Receiver [Dkt. 140]. Those requests were denied, and over two years after the case was commenced, no process or procedures have been approved to address lien priority disputes.²

Status of the Mortgages & Payments

The Receiver has not made any mortgage payments to Fannie Mae or Citibank as Trustee since the Receiver's appointment over two years ago. In addition, at the outset of the case, the Receiver commingled multiple properties' rental income and used Fannie Mae's and Citibank as Trustee's cash collateral/rents to pay for expenses of and prop up the operations and expenses of unrelated properties of other lenders. Receiver's Opposition to Motion by Federal Home Loan Mortgage Corporation Concerning Rents Collected by the Equity Receiver [Dkt. 115], pp. 5-7. The Mortgagees were forced to take action and seek relief from the Court. On February 13, 2019, the magistrate judge recognized that the rents were cash collateral and ordered the Receiver to cease commingling rents and to restore the Properties' rents that the Receiver had impermissibly utilized and dissipated. Memorandum Opinion and Order [Dkt. 223], pp. 8-9.

² The Mortgagees also urged that the Mortgagees be permitted to file state foreclosure actions and name competing lien claimants as defendants to prevent the incurrance of unnecessary administrative expenses involving secured claim priority disputes in the receivership. That request was denied. Memorandum Opinion and Order [Dkt. 223], p. 8. Absent approval to commence foreclosures, the Mortgagees proposed that declaratory judgment actions serve as an efficient and streamlined vehicle to address lien priority. That request was denied, and the Receiver has tendered his own Motion and protocols for resolving lien priority, which is now the subject of ongoing litigation. *See* Receiver's Motion for Approval of Process for Resolution of Disputed Claim [Dkt. 638]; Mortgagees' Response to Receiver's Motion for Approval of Process of Resolution of Disputed Claims [Dkt. 708].

Solvency of the Estate

The mortgagees in this case advised the Court as early as of November 13, 2018, that the Receivership Estate was likely insolvent. *See Reply In Support of Motion of Creditor Federal Home Loan Mortgage Corporation Concerning Rents Collected by the Equity Receiver* [Dkt. 140], pp. 2, 14, 17. The Receiver initially and repeatedly disputed the Mortgagees' contention, assuring the Court that the proceeds from unencumbered properties and other properties would provide ample funds. *See Receiver's Combined Response to Objections to Fee Applications* [Dkt. 527], pp. 4-6, 16; *Receiver's Combined Response to Objections to Fee Applications* [Dkt. 607], pp. 3-4; *Receiver's Combined Response to Objections to Fifth and Sixth Fee Applications* [Dkt. 703], p. 10; Transcript of October 8, 2019 Proceedings at 6-7.

However, the Receiver has now acknowledged that the Receivership Estate is insolvent. *See Receiver's Seventh Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals* [Dkt. 755], pp. 18-25; *Receiver's Eighth Status Report* [Dkt. 757], pp. 22-23. Indeed, as pointed out in multiple fee application objections filed by the Mortgagees, the Receiver and his counsel had been spending over \$7,000.00 a day to administer an insolvent estate for which no recoveries will be made to unsecured creditors and where the Receiver is demanding discounted payoffs to secured creditors. *See Objections of Certain Mortgagees to Receiver's First Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals* [Dkt. 438]; *Objections of Certain Mortgagees to Receiver's Second Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals* [Dkt. 509]; *Objections of Certain Mortgagees to Receiver's Third Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained*

Professionals [Dkt. 581]; *contra* Receiver's Seventh Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals [Dkt. 755], pp. 18-25 (wherein the Receiver concedes unsecured creditors will likely receive no distributions).

In fact, the Receivership Estate is so grossly insolvent that the Receiver has made multiple requests to allow him to surcharge and/or place a first priority lien on the lenders' collateral (including both the institutional lenders' and individual investors' collateral) to pay himself and his counsel before providing any recoveries to any creditors. *See* Receiver's Motion for Approval of Process for Resolution of Disputed Claims [Dkt. 638], pp. 13-14; Receiver's Combined Response to Objections to Fifth and Sixth Fee Applications [Dkt. 703], p. 10; Seventh Interim Fee Application [Dkt. 755], pp. 18-25; Receiver's Eighth Status Report [Dkt. 757], pp. 22-23. Through and including March 31, 2020, the Receiver and his counsel have incurred an astounding \$3,261,017.54 in fees. *See* Seventh Interim Fee Application [Dkt. 755]. Compare this to the cash on hand held by the Receiver as of June 30, 2020 which is \$258,592.90. Receiver's Eighth Status Report [Dkt. 757], p. 16. As of June 30, 2020, there was a total of \$1,249,837.09 in unpaid fees and expenses for all professionals approved by the Court but not yet paid because the Receiver lacks the funds to pay these amounts. *Id.* The Receiver has accrued *additional* fees in the four-month period since March 31, 2020 in an undetermined amount. The Receiver and his counsel have yet to submit a fee application for work performed since March 31, 2020.

In fact, the receivership is so far under water that certain mortgagees had to advance payment for real estate taxes to protect their collateral and avoid the imposition of tax liens – even though it is the Receiver (a) who has custody and control of the properties, (b) denied certain mortgagees' request to foreclose, and (c) himself who (i) was obligated to pay these taxes and (ii)

is obligated to comply with state law when operating commercial properties, but has failed to do so. 28 U.S.C.A. § 959 (“[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.”).

During the case, no creditor has received any interim distributions, even those creditors for whom no dispute regarding lien priority has been asserted.³ The Mortgagees have repeatedly questioned the efficiency and efficacy of the Receiver administering lien priority hearings while continuing to incur crushing fees and expenses for himself and his law firm. *See e.g.*, Objections of Certain Mortgagees to Receiver’s Second Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver’s Retained Professionals [Dkt. 509], pp. 3-5; Motion of Certain Lenders for Leave to Permit Bankruptcy Cases for Receivership Entities

³ The Receiver contends that he may have fraudulent transfer and/or equitable subordination claims against lenders whose lien priority is not contested by investors. However, over two years into the case, the Receiver has not filed any actions or motions to subordinate or void any parties’ liens. In fact, had this been a bankruptcy case, the statute of limitations to bring such fraudulent transfer avoidance actions by the Receiver would have passed. *See, e.g.*, 11 U.S.C. 546(a). Yet, the Receiver Order entered on August 17, 2018 tolls all statutes of limitation indefinitely. Order Appointing Receiver [Dkt. 16], ¶34.

The Mortgagees were so troubled by the lack of progress by the Receiver, that they requested that the case be transferred to the bankruptcy court for the Northern District of Illinois for a more efficient administration and for oversight by the Office of the United States Trustee. *See* Motion of Certain Lenders for Leave to Permit Bankruptcy Cases for Receivership Entities [Dkt. 538], p. 8. This request was denied. Minute Order [Dkt. 597].

The SEC has repeatedly represented to the Court that it is the institutional lenders that have needlessly caused delay in this case. The Mortgagees strongly dispute this. At the outset of the case, the Receiver took such actions that were clearly not permitted (such as commingling rents and refusing to allow lenders to credit bid) that necessitated action by the Mortgagees. Moreover, Fannie Mae points out that this Court has two different SEC receivership cases concurrently pending before it: Equitybuild and *U.S. Securities and Exchange Commission v. Northridge Holdings, Ltd., et al.*, Case No. 19-cv-05957. The Receiver in the Northridge case is N. Neville Reid. Fannie Mae is involved in both cases. Note that Fannie Mae has not filed a single objection in the Northridge case. In fact, not a single objection has been filed in the Northridge case by *any* party since that case was filed on September 5, 2019. Moreover, unlike this case, the Northridge receiver sold Fannie Mae’s property without dispute and paid Fannie Mae’s indebtedness in full.

[Dkt. 538], p. 8; Mortgagees' Response to Receiver's Motion for Approval of Process of Resolution of Disputed Claims [Dkt. 708], pp. 18-19.⁴

Sale Motion's Request to Sell Properties for Less Than the Mortgagees' Indebtedness

Fannie Mae filed its proof of claim on June 28, 2019 in the amount of \$1,319,255.08.⁵ The Receiver's Motion proposes to recover only \$1,058,212 with respect to the Fannie Mae Property, resulting in a substantial shortfall and "discounted payoff" of the Borrower's debt to Fannie Mae. The Motion admits that Fannie Mae's security interest is the only security interest in the Fannie Mae Property and that there are no other secured interests recorded against the property. *See*

⁴ Indeed, the Receiver is taking the exact opposite approach of a chapter 7 bankruptcy trustee who will not administer or sell assets where there is no recovery beyond recovery for secured creditors. Instead, the chapter 7 trustee abandons those assets that are "under water" – which is exactly the case here. Moreover, a bankruptcy trustee will call a chapter 7 case a "no asset" case when there is no recovery for unsecured creditors. Equitybuild is a "no asset" case. As the District Court for the District of Utah noted in an SEC receivership almost identical to the case before this Court, "Indeed, "[a] receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Consequently, a receivership must be monitored to ensure it is still serving the function for which it was created." *SEC v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271, 1275 (D. Utah 2009). Moreover, the fees incurred by the Receiver and others in this case cannot prime the Mortgagees' security interests as the Receiver has utterly failed to establish how his \$7,000 a day in fees benefitted the Properties over what could have been achieved in a state law foreclosure proceeding, as requested by the Mortgagees. Indeed, the Mortgagees have objected to the Receiver's interim fee applications for this very reason and have made numerous requests and arguments to the Court to allow them to pursue their remedies outside of the receivership. *See e.g.*, Reply In Support of Motion of Creditor Federal Home Loan Mortgage Corporation Concerning Rents Collected by the Equity Receiver [Dkt. 140], pp. 17-18; Objections of Certain Mortgagees to Receiver's First Interim Fee Application [Dkt. 438], p. 4; Objections of Certain Mortgagees to Receiver's Second Interim Fee Application [Dkt. 509], pp. 3-5; Transcript of Record at 17, 23, *SEC v. EquityBuild, Inc.*, No. 18-cv-05587 (August 22, 2019). Furthermore, the Receiver has not reasonably discharged his duties in light of the current procedural posture of this case in which no objections to claims have been filed, no lien avoidance actions have been filed, the utter lack of progress regarding lien priority two years into the case, the failure to pay real estate taxes, and the clear abrogation of the state mortgage law and federal law as identified herein and throughout the case, particularly with respect to properties for which no equity exists.

⁵ During the 13 months since filing its proof of claim, Fannie Mae has incurred additional interest, fees and costs and as of August 17, 2020, the Borrower's indebtedness to Fannie Mae is no less than \$1,804,699.37. Fannie Mae will be submitting an amended proof of claim for these additional amounts, all of which are due under the loan documents.

Motion, ¶¶32-34. In the 13 months since filing its proof of claim, the Receiver has not filed any objection to Fannie Mae's claim proof of claim.⁶

Citibank as Trustee filed its proof of claim on June 28, 2019 in the amount of \$1,461,176.83.⁷ The Receiver's Motion proposes to recover only \$831,324.00 with respect to the Citibank Property, also resulting in a substantial shortfall and "discounted payoff" of the Borrower's debt to Citibank as Trustee. In fact, the aggregate amount of Citibank as Trustee's mortgage and just one of the other investor claimed mortgages is \$2,739,578.83 and completely exceeds the entire amount of the \$831,324 in sale proceeds proposed by the Receiver.⁸

The Letter of Credit Requirement as Part of the Sale Process

At the outset of the case, the Receiver refused to provide Mortgagees with the right to credit bid their debt with respect to the sale of the Properties. Again, the Mortgages were forced to take action and sought relief from the Court. The magistrate judge agreed with the Mortgagees that the Mortgagees were entitled to credit bid. Memorandum and Order [Dkt. 352], p. 7. However, the magistrate judge conditioned the Mortgagees' right to credit bid based on the Mortgagees' posting of a letter of credit in the event the Receiver notified the Mortgagees that the Receiver identified a "bona fide dispute" as to the validity of any lender's debt and provides sufficient support for the bona fide nature of the dispute." *Id.* at p. 7. The court further stated the Receiver "must still

⁶ In fact, the Receiver has not objected to *any* proofs of claim by any creditor in the case. The Receiver has had in his possession the proofs of claim since July 1, 2019. As such, he has been well-appriized that the Receivership Estate is insolvent.

⁷ During the 13 months since filing its proof of claim, Citibank as Trustee has incurred additional interest, fees and costs. Citibank as Trustee will be submitting an amended proof of claim for these additional amounts, all of which are due under the loan documents.

⁸ The Receiver has tried to sell scores of properties for less than the total secured indebtedness. *E.g.*, 6751-57 S. Merrill Ave. sold with net sale proceeds of \$1,384,437.44, while the institutional lender's proof of claim as of June 2019 totaled \$1,604,962.42; 5001 S. Drexel Blvd. sold with net sale proceeds of \$2,579,171.14, while the institutional lender's proof of claim as of June 2019 totaled \$2,879,601.67.

provide adequate information showing that there are competing liens covering the same property to be sold or that the Lenders' liens may not be enforceable.” *Id.* at n.2. Mortgagees objected to the letter of credit requirement, noting that a lender could be forced to pay twice for the same property – once at origination when the loan proceeds were disbursed to the borrower and a second time in the event the lien priority was not upheld. As such, a lender would be placed in the position of extending a \$2 million loan for the acquisition of a property by the Borrower only to have to pay another \$2 million to the Receiver if the lien priority was not upheld.⁹

ARGUMENT

I. THE RECEIVER MAY NOT SELL THE PROPERTIES FREE AND CLEAR WHERE NO EQUITY IS OBTAINED FOR THE RECEIVERSHIP ESTATE.

A. The District Court for the Northern District of Illinois Has Already Recognized that the Proposed Relief Requested by the Receiver's Motion May Not Be Granted.

The Receiver's Motion seeks to sell the Properties “free and clear” with the Mortgagees' liens attaching to the sale proceeds. Motion, pp. 41-42. As the District Court for the Northern District of Illinois has already conclusively held, a sale may not be approved where no equity beyond the secured indebtedness is generated for the estate. *See Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015).¹⁰ Both Fannie Mae and Citibank as Trustee have filed proofs of claim asserting secured mortgages well in excess of the sale proceeds. With respect to the Citibank Property, investors have also asserted secured claims through proofs of claim. With respect to both Properties, no equity will be generated for the Receivership Estate as evidenced below, much less substantial equity:

⁹ The Receiver contends that mortgage insurance will cover this “double” payment by any mortgagees or investors. However, the Receiver has not read the policies and cannot establish that the mortgage insurance will cover the full amount of the letter of credit required to be posted by a Mortgagee.

¹⁰ In fact, the *Pennant* decision is a decision that this Court has previously cited with favor. Order [Dkt. 540], p. 4.

<u>Fannie Mae Property</u>		<u>Citibank Property</u>	
Fannie Lien (as of June 28, 2019)	\$1,319,255.08	Citibank as Trustee Lien (as of June 28, 2019)	\$1,461,176.83
Other Unsecured Claims	\$ 631,739.82	Other Investor Claimed Lien ¹¹	\$2,684,539.00
Proposed Sale Proceeds	(\$1,058,212.00)	Proposed Sale Proceeds	(\$831,324.00)
Shortfall	\$892,782.90	Shortfall	\$1,908,254.83

Moreover, to date, the Receiver has neither objected to the Mortgagees' proofs of claims nor sought to avoid any of the parties' liens. In fact, no party in this case has objected to either Fannie Mae's or Citibank as Trustee's proofs of claim. As such, no basis for disallowance or ignoring the parties' liens currently exists.¹²

The Mortgagee's Objection is squarely on point with the Northern District of Illinois' *Pennant* decision. In *Pennant*, federal receivers sought to sell certain commercial hospitality properties "free and clear of liens, claims, and encumbrances" with such liens, claims, and

¹¹ Note this chart does not even include all of the investor liens asserted against the property, only the largest investor lien. See Receiver's Eighth Status Report [Dkt. 757], Ex. 8.

¹² The Local Rules for the Northern District of Illinois provide that the U.S. Bankruptcy Rules should inform this Court's decisions about administering the receivership. N.D. Ill. L.R. 66.1(a). As 11 U.S.C. § 501(a) provides, a claim or interest for which a proof of claim is filed is deemed allowed unless a party in interest has objected to such claim. In fact, unless and until an objection is filed to the proofs of claim specifying the grounds for such disallowance, there can be no basis for disallowance of such claims against the receivership estates. Generally averring that a party's liens are the subject of investigation by the Receiver is not sufficient to disallow, much less disprove such claims. Indeed, the Receiver's Motion does the opposite of disallowance – it simply asks that the liens attach to the sale proceeds. Moreover, the Northern District of Illinois notes that when a lien is challenged, the Court retains jurisdiction to adjudicate that claim "in connection with" a request to sell the property. See *Pennant*, at *8. See also *Madison Real Estate Grp., LLC*, 647 F. Supp. 2d at 1277-1283 (where court reviewed and addressed receiver's allegations before allowing disposition of property by receiver and lack of evidence presented by receiver). No such adjudication is occurring here.

encumbrances “attaching to the proceeds of the sale.” *Pennant* at *2. *Pennant* expressly rejected sales that did not satisfy all secured liens, absent a consensual agreement by the impacted parties:

A leading treatise on receiverships states as follows with respect to whether a court should permit a receiver to sell real property free from liens:

In a sale free from liens, the rights of the parties who are lienholders must be preserved and transferred from the property sold to the proceeds of the sale, with the same rank and dignity which such rights or liens bore to the original property.

Persons who have an interest in the res, and creditors who are secured by a lien or mortgage on the res, cannot have their interests, liens or rights in the res or its proceeds cut off or foreclosed without being properly notified and summoned to appear in the receivership court for that purpose ...

The property should not be sold free of liens unless it is made to appear that there is a reasonable prospect that a surplus will be left for general creditors or, in other words, that a substantial equity is to be preserved.

Id. at *4-5. (quoting 2 Clark on Receivers (3d ed. 1959) § 500(b)) (bold and underling added).

In fact, the Seventh Circuit previously espoused the same view: “The Seventh Circuit has also held, albeit in the bankruptcy context, that ‘[a]s a general rule,’ a 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 ... estate.’” *Id.* at *5 (quoting *Matter of Riverside Inv. P’ship*, 674 F.2d 634, 640 (7th Cir. 1982)). This view was reiterated again by the Northern District in its 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). As the chart above demonstrates, no such “substantial equity” – or any equity – for that matter— is preserved for the Receivership Estate by the Receiver’s Motion. *Pennant*, 2015 WL 4511337 at *6; *Pennant*, 2015 WL 5180678 at *5.

Other jurisdictions – in cases involving SEC receivers – are in accord. Indeed, a case that is exactly on point is the *SEC v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271 (D. Utah

2009). In *Madison*, the District Court concluded that the SEC Receiver may not keep a commercial real estate property hostage in a receivership where the value of the property is less than the loan amount owed to the secured lender. *Id.* at 1284. Instead, the Receiver was required to lift the receivership order's stay and allow the lender to foreclose, where the commercial property had no equity for the receivership estate and the lenders' liens exceeded the value of the property. *Id.* at 1277-78. The court denied the Receiver's sale motion and lifted the stay to allow the secured lenders to commence foreclosure proceedings. *Id.* at 1278. The court reasoned:

“It is well-established that a ‘receiver appointed by a federal court takes property subject to all liens priorities or privileges existing or accruing under the laws of the State.’ Consequently, the [secured lenders’] priority interest remains intact despite the Receivership . . . **While this court may have broad powers to carry out the purpose of the Receivership, the court is disinclined to put the interests of the buyers and the Receivership over the interests of secured creditors.**”

Id. at 1277 (quoting *In re Real Property Located at Jupiter Drive, Salt Lake City, Utah*, No. 2:05–cv–1013, 2007 U.S. Dist. LEXIS 65276, at *10, 12) (D. Utah June 7, 2007)) (brackets and bold added).

Not only did the *Madison* court hold that the Receiver was required to pay debt service to Fannie Mae – something that has never been done by the Equitybuild Receiver since his appointment on August 17, 2018 – the Court also refused to allow the receiver to retain Fannie Mae's property in the receivership, holding:

With respect to Casa Rio, Fannie Mae has provided evidence that the value of the property is less than the loan balance. The Receiver also has provided evidence regarding the property's value. While the Receiver's range in value exceeds that provided by Fannie Mae, the range is still less than the purported loan payoff amount. **The court therefore concludes that the advantages of retaining Casa Rio in the Receivership do not outweigh the disadvantages to Fannie Mae, and the stay should be lifted for this property.**

Id. at 1284 (internal citations omitted; bold added).

Other SEC receivers before this Court have taken the same position as the Mortgagees. By way of example – unlike the Equitybuild case – Fannie Mae, as the secured mortgagee, received a full payoff as a result of the SEC receiver’s sale of the borrower’s commercial real estate in the Northridge SEC receivership concurrently pending before this Court. *SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957 (N.D. Ill. May 19, 2020), Order [Dkt. 147]. Another example is found on the SEC’s own website, which attaches an SEC Receiver’s status report detailing the disposition of property in *SEC v. Bravata*, No. 09-cv-12950 (E.D. Mich. Mar. 19, 2010). *SEC v. Bravata*, No. 09-cv-12950 (E.D. Mich. Mar. 19, 2010) (Receiver’s Second Interim Status Report and Accounting for BBC Equities, LLC and Bravata Financial Group, LLC), *available at* <https://www.sec.gov/divisions/enforce/claims/bbcequitiessecondinterimstatusreportfiledcopy.pdf> A copy of this report is attached as Exhibit A. In *Bravata*, the Receiver “requested authority to abandon 53 of the properties based, among other things, **generally upon a lack of equity in those properties over and above the mortgage debt.**” *Id.* at 2 (bold added). With respect to other properties, the Receiver and the Court authorized the lenders’ previously and newly appointed state court receivers to market and sell the commercial properties with oversight from the Receiver.¹³ *Id.* at 3. Throughout the *Bravata* report, the Receiver notes that properties with no

¹³ Note that the Equitybuild Mortgagees made the same proposal to the Receiver (that the Receiver allow the Mortgagees and investors to (a) commence foreclosures to sell the real property in Illinois state foreclosure court with sale oversight by the Receiver and (b) allow any equity above the mortgage debts to the lenders and investor lenders to be returned to the Equitybuild Receivership Estate for distribution by the Receiver). This reasonable proposal was summarily rejected by the Receiver.

By rejecting this proposal, all the Receiver has achieved to date is to have incurred \$3,261,017.54 in fees to recreate a process that is already readily available to the litigants in state court. The Receiver has yet to point to any benefit to either the Mortgagees or the investors as to how his administration is maximizing value – particularly when there is no equity in any of the Properties and the Receiver is forced to try to surcharge the sale proceeds to cover his own legal expenses.

Again, the Receiver contends that he *may* try to avoid mortgage liens, but after 2 years, the Receiver should be required to take some basic action if he truly believes any parties’ liens can be avoided. Moreover, it is the Receiver who has had in his custody and control all of the Equitybuild documents and has used the difficulty of reviewing such documents as the pretext for not commencing such actions. As noted by the SEC’s Investor Bulletin: 10 Things to Know About Receivers, however, “A receiver must act in “good faith” and perform his or her duties with ‘reasonable diligence.’” United States Securities and Exchange Commission, 10 Things to Know About Receivers (Aug. 27,

equity value will be abandoned, and properties where the sale proceeds exceed the lenders' debt will be marketed for sale. *Id.* at 6, 8, 10, 11. As such, courts throughout the country recognize – including this very District – that a Receiver cannot sell properties free and clear with liens to attach to sale proceeds when there is no equity for the Receivership Estate. *See Pennant*, 2015 WL 4511337, at *4-5; *Pennant*, 2015 WL 5180678, at *4-5; *Madison Real Estate Grp., LLC*, 647 F. Supp. 2d at 1277; *Bravata*, No. 09-cv-12950, Docket 269; *compare SEC v. Credit Bancorp, Ltd.*, 386 F.3d 438 (2d Cir. 2004) (receiver “takes the property subject to all liens, priorities, or privileges existing or accruing under the laws of the state.”); *U.S. Commodity Futures Trading Comm’n v. AlphaMetrix, LLC*, No. 13 C 7896, 2017 WL 5904660, at *2, n.3 (N.D. Ill. Mar. 9, 2017) (noting that regarding a secured creditor’s interests that “[a] pre-existing contractual remedy between creditor and debtor would bind the receiver....”); Magistrate Kim’s Memorandum Opinion and Order dated February 13, 2019, [Dkt. 223] (which prevents the Receiver from the continued practice of commingling rents and requires restoration of the rents to their respective properties and notes that the Seventh Circuit has “ruled that ‘the rights of the receivers can be no greater than those of their predecessor in title.’”); *Cf. SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957 (N.D. Ill. May 19, 2020), Order [Dkt. 147] (ordering that on the closing of the sale of the mortgagee’s collateral property, the “Receiver is authorized *and*

2015), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_receivers.html. To date, no such reasonable diligence has been undertaken.

As a related matter, the SEC has repeatedly contended and represented to the Court that the investors at issue are “small” investors who need to be protected – even though (a) the estate is hemorrhaging cash and (b) ultimately the value of the investors’ recoveries, if any, diminish as the Receiver’s fees continue to mount. When pressed by this Court at the August 13, 2020 oral argument, the SEC did not know the median claim of investors and surmised that the average claim of an investor was “\$10,000.” Counsel for the Receiver disputed this amount noting that the median number was actually in the “five or six figures”, while another investor appeared and contended that he lost \$1.3 million, (which is more than the indebtedness owed to certain institutional lenders with respect to many of the commercial properties). In fact, the investor also noted that he was aware of multiple investors with claims in excess of \$1 million. This dispute has prompted the Court to request that the SEC and the Receiver produce documentation regarding the amounts of individual investor claims. This exchange belies the SEC’s pretext for the ongoing accrual of administrative fees by the Receiver to protect “small” investors. Transcript of Record at 33-36, *SEC v. EquityBuild, Inc.*, No. 18-cv-05587 (August 13, 2020)

directed to pay *all* amounts due under the loan documents to Federal National Mortgage Association... including but not limited to principal, interest, default interest, advances, attorneys’ fees, and all other indebtedness and amounts due under the Loan documents.”) (emphasis added).

The Mortgagees requested over 21 months ago that the Receiver abandon these properties because there will be no benefit to the estate. *See* Reply In Support of Motion of Creditor Federal Home Loan Mortgage Corporation (“Freddie Mac”) Concerning Rents Collected by the Equity Receiver [Dkt. 140], p. 16-18, 23. Undeterred, the Receiver plowed ahead selling underwater properties. As the Mortgagees predicted, the sale of these properties has generated no benefit for the estate. Indeed, the Receiver admits in his Seventh Interim Fee Application [Dkt. 755] that there are not enough funds in the estate to pay the Receiver’s or his professionals’ fees, let alone any funds leftover to pay unsecured creditors.¹⁴

B. Granting the Receiver’s Motion Constitutes an Impermissible Taking of Both the Mortgagees’ and Investors’ Property and State Law Property Rights.

Selling these Properties without objecting to the proofs of claims or asserting any avoidance actions adjudicating these issues is tantamount to, and is an impermissible taking of all of the parties’ (both Mortgagees and investors) state law entitlements under their asserted mortgages. Notwithstanding the breadth of the Receiver’s powers granted under the Receiver Order, those powers remain subject to the Fifth Amendment’s prohibition against taking private property without just compensation. The Takings Clause prohibits the federal government from taking “private property . . . for public use . . . without just compensation.” U.S. Const. amend. V.

The United States Supreme Court has held that the Fifth Amendment’s prohibition against uncompensated takings and deprivation of private property without due process of law operates as

¹⁴ In fact, the Court – as early as April 8, 2019 – issued a Memorandum Report and Recommendation [Dkt. 311] on the Receiver’s motion to approve the sale of certain real estate, in which the Court urged the Receiver to “explore ways to stop the accrual of fees, costs, and interest.” (Memo. Report and Rec. at 7 n.2.).

a limit on Congress' bankruptcy power. See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 580 (1935). The Supreme Court reaffirmed *Radford* when it decided *United States v. Security Industrial Bank*, 459 U.S. 70, 76-78 (1982) (noting that the creditor's state law nonpossessory, nonpurchase-money security interests were "property" entitled to Fifth Amendment protection). Thus, if a government—in this case, the Court, pursuant to any orders it enters in this case empowering the Receiver to use and dispose of property—appropriates a secured creditor's collateral that is subject to that creditor's lien, the government has taken the secured creditor's property, which necessitates the payment of just compensation. See *id.* at 77 ("The total destruction by the government of all compensable value of [] liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) ("[T]he government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property.")).

The above-described constitutional principles apply with equal force to a federal equity receivership such as this one. *SEC v. Wing*, 599 F.3d 1189 (10th Cir. 2010) (courts often look to analogous principles found in bankruptcy in equitable receiverships). Like bankruptcy proceedings, receivership proceedings are remedial collective proceedings that provide for an efficient forum wherein a court can process the competing rights of numerous creditors and other parties in interest. An important hallmark of both bankruptcy and receivership proceedings is that a debtor's property and the various claims against such property are taken as they are found. *Butner v. United States*, 440 U.S. 48, 54-55 (1979). Here, the Properties are subject to the Mortgagees' security interests, a property right created and defined by Illinois law. See, e.g., *In re J.D. Monarch Dev. Co.*, 153 B.R. 829, 832 (Bankr. S.D. Ill. 1993) ("Illinois law recognizes the

validity of an assignment of rents included in a mortgage of real estate. Such an assignment creates a security interest in rents that is perfected as to third parties upon recording of the mortgage in the real estate records.”). Selling the Properties without satisfying the Mortgagees’ indebtedness is an impermissible taking – especially in a situation where none of the Mortgagees’ liens have been adjudicated or even objected to.

C. The Stripping of the Mortgages by the Receiver Violates Due Process.

The Receiver’s Motion violates the Mortgagees’ Fourteenth Amendment’s due process rights. U.S. Const. amend. XIV. The Receiver is stripping the Mortgagees of their lien rights as prior secured lenders under state law without even requiring the Receiver to make a concrete showing of either equity in the property above and beyond the Mortgagees’ debt or the invalidity or unenforceability of their mortgages, as detailed throughout this Objection. In fact, in an SEC receivership, the 11th Circuit Court of Appeals held, “Due process requires notice and an opportunity to be heard.” *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (*citing, inter alia, Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503 (1985)). “Summary proceedings are inappropriate when parties would be deprived of a full and fair opportunity to present their claims and defenses.” *Id.* at 1567.

Here, the Receiver contends that he is investigating whether the Mortgagees’ lien priority is subordinate or avoidable. This hardly rises to the grounds to allow the Receiver to proceed with a motion to sell the Properties free and clear, and in no way shows a bona fide dispute:

[T]he Schutzmans were entitled to more procedural protections. We note that the Receiver did assert facts from which the district court could make an independent decision [regarding a fraudulent transfer], but the Schutzmans had no opportunity to dispute these facts. **The Receiver’s procedure was not adequate to protect the Schutzmans’ interests.** This procedure required claimants to complete blank forms setting out the grounds for their objections. Although this procedure might have been sufficient for other claimants whose claims were not as complicated, **the Schutzmans asserted claims that required an evidentiary hearing.** It may turn out that the facts are undisputed, but this has not been

determined. **The Schutzmans should have their chance to rebut the characterization of the transfer and present affirmative defenses pursuant to the Florida statute.**

Id. at 1568 (bold and brackets added); see *also* Mortgagees' Response to Receiver's Motion for Approval of Process of Resolution of Disputed Claims [Dkt. 708], pp. 3-15. In fact, the Mortgagees' have not even been afforded an opportunity yet to dispute these facts with evidence or testimony before this Court regarding this Motion, as the Receiver has not raised – much less proffered evidence – by avoidance actions or objections to proofs of claim. As such, due process requires that this Motion be denied.

D. The Receiver Cannot Use the Sales and Sale Process to Create Federal Common Law in Derogation of State Law.

Rather than following Illinois statutory law, the Receiver's Motion cites to his equitable powers to make an end-run around Illinois state law and to create federal common law. Here, the Receiver asks the Court to ignore state law lien and security interests and create new federal common law which allows a receiver to dispose of property with liens only attaching to the proceeds all without (1) avoidance of those liens, (2) payment of those liens in full, and (3) any benefit to the Receivership Estate. Such a result cannot be countenanced under the Supreme Court's February 25, 2020 decision in *Rodriguez v. Fed. Deposit Ins. Corp.*:

As this Court has put it, there is “no federal general common law.” These areas have included admiralty disputes and certain controversies between States In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. The Sixth Circuit correctly identified one of the most basic: In the absence of congressional authorization, common lawmaking must be ““necessary to protect uniquely federal interests.””

Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 717 (2020) (bold added; internal citations omitted). In *Rodriguez*, a bank's holding company was in chapter 7, and a chapter 7 trustee was appointed. The bank's subsidiary was taken over by the FDIC, as receiver. Both the chapter 7

trustee and the FDIC – as receiver – claimed a \$4 million tax refund payable to the parent. The 10th Circuit adopted the *Bob Richards* rule, which made a presumption under federal common law that the subsidiary with losses is entitled to a tax refund absent a tax allocation agreement that clearly gives the refund to the parent. At issue before the Supreme Court was: “Should federal courts rely on state law, together with any applicable federal rules, or should they devise their own federal common law test?” *Id.* at 716.

In *Rodriguez*, two separate entities were claiming rights to the same property. *Id.* The Supreme Court noted that, “As this Court has long recognized, ‘Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law.’” *Id.* at 718 (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)). So too with the Internal Revenue Code—it generally “‘creates no property rights.’” *United States v. National Bank of Commerce*, 472 U.S. 713, 722 (1985) (quoting *United States v. Bess*, 357 U.S. 51, 55 (1958)). Similarly, the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* and Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (collectively, the “Act”) confer no rights with respect to state law mortgage liens, and the use of the Receiver’s equitable powers under the auspices of his selection under the Act in no way allow him to create federal common law in derogation of the parties’ state law rights under their mortgages. This includes the Receiver’s Motion pursuant to which he seeks to extinguish liens without payment in full and without any judicial adjudication of any lien validity. Furthermore, the Seventh Circuit has embraced the *Rodriguez* decision, noting that there is no federal law regarding real property easements and that state law is used to determine property interests. *West v. Louisville Gas & Elec. Co.*, 951 F.3d 827, 832 (7th Cir. 2020). Yet, the Receiver’s use of the Motion does exactly what the *Rodriguez* and *West* cases admonish: the creation of equitable

common law in derogation of carefully defined state law mortgage rights. Such a result cannot be countenanced.

Moreover, the Receiver “takes the property subject to all liens, priorities, or privileges existing or accruing under the laws of the state.” *SEC v. Credit Bancorp, Ltd.*, 386 F.3d 438 (2d Cir. 2004; *see also Marshall v. People of New York*, 254 U.S. 380, 385 (1920)). In fact, this Court agreed with this principle when ruling on the Rents Motion and most recently in its Memorandum Report and Recommendation [Dkt. 311]. *See SEC v. EquityBuild, Inc.*, No. 18-cv-5587, 2019 WL 587414, *3 (N.D. Ill. Feb. 13, 2019) (Magistrate Kim’s Memorandum Opinion and Order [DKT. 223] citing with favor the *Madison* decision for proposition that “the rights of receivers can be no greater than those of their predecessors in title.”); *see also* Memorandum Report and Recommendation, pp. 7-8 [Dkt. 311] (stating “a court does not have the authority to extinguish a creditor’s pre-existing state law security interest” and clarifying the issue by stating “[t]o be sure, a receiver appointed by the federal court takes property subject to all liens, properties, or privileges existing or accruing under the laws of the state.”) (internal citation omitted); *See also* Magistrate Kim’s Memorandum Opinion and Order, pp. 9-10 [Dkt. 352] (“Opinion and Order”) (reaffirming the foregoing rulings). In fact, “[i]t is well-established that a receiver appointed by a federal court takes property subject to all liens priorities or privileges existing or accruing under the laws of the State.” *Madison Real Estate Grp., LLC*, 647 F. Supp. 2d at 1277 (emphasis added). To hold otherwise and approve the Motion is to create a federal common law regarding receivership without abiding by applicable state law.

II. THE RECEIVER HAS FAILED TO ACT WITH DUE REGARD TO THE REALIZATION OF THE TRUE AND PROPER VALUE OF THE PROPERTIES.

In addition to violating the law as noted above, the Receiver has provided no evidence that the sales have generated the true and proper value of the properties. The Motion fails to disclose

the amounts of the competing bids received and fails to provide any evidence that the accepted bids are the highest and best offers. Motion, ¶¶33, 36. The Receiver cites Paragraph 38 of the Receiver Order (“Receiver Order”) as grounds for the contemplated sale, noting he is authorized to sell “all real property in the Receivership Estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.” Motion, ¶19. However, the Receiver has not met his evidentiary burden of showing why these bids were the highest and best offers and why they are in the best interest of the estate as required by the Receiver Order.

In approving prior unrelated sales, Magistrate Kim noted that the Receiver Order provides that the Receiver must act “with due regard to the realization of the true and proper value of such real property.” *SEC v. EquityBuild, Inc.*, No. 18-cv-5587, 2019 WL 1953117, at *3 (N.D. Ill. May 2, 2019). No testimony has been proffered by the Receiver, no affidavits, no recitation of the bidding, no broker opinions of value or even appraisals. Not even a recitation as to how many parties bid, how many rounds of bidding occurred, or even how many property tours were taken is provided. Indeed, the Receiver relies on his “equitable powers” to avoid providing any information to the Court. How can the Court determine if “due realization” was achieved and make an informed ruling when no such information is provided? Compare this utter lack of information to the detailed recitation of facts provided to Judge St. Eve by the receiver in the *Pennant* case, particularly when the parties objected to the sale. *Pennant*, 2015 WL 4511337, at *2- 5 (court found sale price fair where valuations were provided, testimony of valuation experts, and multiple declaration of various parties, number of visits, etc.).

As a corollary, certain mortgagees offered to help market or generate interest in the properties to maximize value. Those offers were rebuffed by the Receiver. In fact, Judge Kim

encouraged the Receiver to work with the mortgagees regarding the sale process. Order [Dkt. 447], n. 3. The only things the Receiver has done to “work with” the Mortgagees is to file the sale motion and notify the Mortgagees of the accepted bid price after the sale process was concluded.

Furthermore, recent Court filings call into question the Receiver’s exercise of his sound business discretion, which all the more highlights the importance of requiring evidentiary proof that the accepted bids are the highest and best offers. The Motion of Ventus Holdings, LLC to Intervene [Dkt. 721] and its Reply to the Receiver’s Eighth Motion to Confirm Sale of Certain Real Estate [Dkt. 746] bring to light a dispute that could cost the Receivership Estate nearly \$1,000,000.

Ventus Holdings, LLC was a prospective purchaser of three properties. Due to COVID-19, Ventus was unable to timely secure financing. The Receiver decided to terminate Ventus’ three purchase contracts and accept three lower bids resulting in a *discount* of \$945,200 from the prior bids. Ventus has since secured financing to close at the higher sale prices and has conveyed this to the Receiver. Notwithstanding, the Receiver has actually argued *against* accepting the higher purchase prices resulting in a nearly \$1,000,000 loss to the estate. *See* Receiver’s Reply in Support of Eighth Motion to Confirm Sale of Certain Real Estate [Dkt. 739]. The Receiver’s Seventh Interim Fee Application admits this estate is insolvent. It is beyond reason why the Receiver would forego nearly \$1,000,000 for the estate. The Receiver’s actions severely call into question his ability to exercise sound business discretion. Therefore, the Mortgagees request the Motion be denied and that the Receiver be required to provide evidence as to why the accepted bids are the highest and best offers.

Also not evident in the Motion is the fact that the Receiver allowed the Receivership Defendants that own each of the Properties, SSDF4 6250 S. MOZART LLC and SSDF2 1139 E

79TH LLC, to become administratively dissolved with the Illinois Secretary of State in June 2019. This is a direct violation of the Mortgagees' loan documents, which the Receiver takes subject to. These entities are also the entities that entered into the sales contracts for these properties. This dereliction of duty is yet another example of this Receiver's inability to manage this estate and related disregard for the law, the Mortgagees' rights, and this Court's orders.

III. THE CREDIT BID PROCESS IS ILLUSORY AND VIOLATES THE MORTGAGEES' SECURITY INTERESTS.

The ability to credit bid does not cure the Receiver's improper conduct. As other mortgagees previously pointed out, the credit bid procedures are illusory. *See* Consolidated Motion to Amend May 2, 2019 Memorandum Opinion and Order [Dkt. 418] ("Motion to Amend May 2 Order"). The credit bid procedures require the Mortgagees to submit a credit bid prior to a determination on lien priority and lien amount. The Mortgagees cannot rationally credit bid if the Court has not adjudicated the amount of the lien or whether their lien is first priority. This is because the lien amount sets the amount the creditor can credit bid. *FDIC v. Meyer*, 781 F.2d 1260, 1264-65 (7th Cir. 1986) (stating "the judicial finding of the amount due determines the amount the foreclosing lender can credit bid"). Here, no adjudication of the Mortgagees' priority – or even the amount allowed to be credit bid – has occurred. Adjudication of priority status, similar to determination of the debt amount, is necessary because it identifies the priority structure, sets the limits of the senior lienholders credit bid amount, determines how much cash a junior lienholder must pay to eliminate a senior lienholder, and determines the amount a foreclosing lienholder must pay in cash if it bids more than its mortgage debt. *Partel, Inc. v. Harris Trust and Sav. Bank*, 106 Ill App. 3d 962 (1st Dist. 1982). Requiring the Mortgagees to blindly guess their priority status and adjudicated lien amount exposes the Mortgagees to such risk and liability that it results in a chilling of credit bidding.

The credit bid process is further flawed because it requires the posting of a letter of credit and paying closing costs, including broker commissions, attorneys' fees, and paying back rents the Receiver improperly pilfered to pay expenses on unrelated properties. The letter of credit is improper because it runs afoul of a secured lender's right to credit bid. *FDIC v. Chicago Title Ins. Co.*, No. 12-CV-05198, 2015 WL 5276346, at *4 (N.D. Ill. Sept. 9, 2015) (stating a lender is not required to pay cash to bid, but is instead allowed to credit bid up to the amount of its debt.) The requirement that the Mortgagees pay closing costs for a property on which they have a first lien security interest is not only unconscionable but absolutely contrary to Illinois law. The typical costs associated with a commercial foreclosure include publication costs and the selling agent's nominal commission (e.g., \$600).¹⁵ Lake County Sheriff's Office, Foreclosure Information-Plaintiff Requirements (last visited August 17, 2020), <https://www.lakecountyil.gov/2017/Plaintiff-Requirements>. Any other costs in a commercial foreclosure beyond publication and the selling agent's nominal commission is generally at the election of the lender. *Id.* The unreasonableness of paying closing costs is further exacerbated by the fact that the Receivership Estate will not benefit from the sales. The Court's May 2, 2019 Order explicitly requested the Mortgagees to petition the Court if closing costs would "diminish the sale proceeds such that any Lender's preexisting security interest would be extinguished." May 2, 2019 Memorandum Opinion and Order [Dkt. 352], n.4. That is exactly what is occurring with each of these sales. The Receiver is incurring unnecessary closing costs at the expense of the Mortgagees' liens and security interests. Such action should not be countenanced. Simply put, the sale process simply eviscerates the Mortgagees' security interest by wrongfully selling their

¹⁵ Compare this to the selling commissions being charged in this case: (a) commission for Fannie Mae property is \$44,500.00; (b) commission for Citibank Property is \$37,000.00.

collateral, requiring a letter of credit, requiring the payment of closing costs, and forcing a discounted payoff—all of which prohibit the Mortgagees from exercising their right to credit bid.

IV. SALES TO AFFILIATES OF THE CURRENT PROPERTY MANAGER SHOULD BE BARRED, AS THEY VIOLATE THE RECEIVER ORDER'S PROHIBITION OF CONFLICTS OF INTEREST AND ARE NOT ARM'S LENGTH TRANSACTIONS.

This Court should deny approval of the sales to an affiliate of the current property manager. First, such a transaction is not an arm's length transaction. Second, the Receiver's proposal to sell the property to an affiliate of the current property manager is a direct violation of the Receiver's ongoing duty ordered in the Receiver Order to ensure that no conflicts of interest arise between the Receiver, his Retained Personnel, and the Receivership Estate. Receiver Order, ¶ 45. Yet, notwithstanding this requirement, the Receiver proposes to sell the property, without factual support, to an affiliate of the very property manager who currently manages the property. *See* Motion, Exhibit 30, 31 (Longwood Development LLC is an affiliate of WPD Management LLC, the current property manager). The property manager seeks to purchase the 1131 E. 79th Pl. property for \$100,000 below the asking price of \$1,250,000. This fact alone raises suspicion that the property manager is getting a "sweetheart deal" at the expense of Fannie Mae.

Moreover, the property manager is in a unique and favored position whereby it can utilize the rents (which constitute the collateral of the Mortgagees) to improve the property and then ultimately purchase the property. The property manager also controls the type of units that may be seen and inspected by potential third party purchasers as well as related access to property information, including rents, operating expenses, tenant delinquencies, property condition, etc. Moreover, the Receiver has not shared with the Mortgagees what due diligence has been provided to any of the prospective purchasers versus the affiliate.

Such an ostensible and egregious conflict of interest also places the Mortgagees' collateral at risk. In fact, various financial institutions – including Fannie Mae – have established safeguards that expressly prohibit property managers from buying the properties they manage to avoid the appearance of impropriety and to avoid self-dealing by property managers at the lenders' expense. No such safeguards are utilized here. This Court should not sanction this improper conduct and certainly should not find that it is with “due realization” of the value without additional information from the Receiver. *In re Roussos*, 541 B.R. 721, 730 (Bankr. C.D. Cal. 2015) (stating “*A sale to insiders is fundamentally different from a sale at arms-length. In an arms-length transaction, the asset’s exposure to the marketplace insures that the price is reasonable. Insider sales, by their very nature, lack this characteristic. Insiders do not have an incentive to aggressively market the assets to obtain the highest price. Their incentive is just the opposite– the less marketing, and the lower the price, the better*”) (emphasis added); see also *In re Family Christian, LLC*, 533 B.R. 600 (Bankr. W.D. Mich. 2015) (sales to insiders are subject to higher scrutiny).

V. EVEN IF THE SALE PROCESS COULD BE APPROVED – WHICH IT CANNOT – THE PROCEEDS SHOULD IMMEDIATELY BE DISBURSED.

Fannie Mae is entitled to immediate disbursement of the sale proceeds because it holds an undisputed first lien security interest on the Fannie Mae Property. *Herman v. First Farmers State Bank of Minier*, 73 Ill. App. 3d 475, 477 (3d Dist. 1979). Withholding immediate payment is a violation of Fannie Mae's security interests, which the Receiver takes subject to and cannot diminish or extinguish. See February 13, 2019 Memorandum Opinion and Order [Dkt. 223], p. 5-6; Memorandum Opinion and Order [Dkt. 352], p. 10. Moreover, withholding payment is detrimental to the estate because the amounts due to Fannie Mae continue to increase daily, resulting in a larger amount due Fannie Mae from the estate.

Fannie Mae undeniably has a first priority lien on the property that is superior to any claim

of an Equitybuild investor or other third party. In fact, the Motion evidences there are no other security interests in this property besides Fannie Mae's mortgage. *See* Motion, ¶¶32-34.

This property is a unique property in that no Equitybuild affiliate acquired an interest in the property until four years after Fannie Mae's interest attached. Motion, ¶34. The original borrower and mortgagor, 81st Street LLC, granted a mortgage on this property in December 2013. Fannie Mae is now the holder of this mortgage. *Id.* Thus, Fannie Mae's secured interest attached in December 2013. *Fannie Mae v. Kuipers*, 732 N.E.2d 723, 728-30 (2d Dist. 2000) (holding that original lien and priority of same remains after assignment of mortgage; assignee "stands in the shoes of the [original] mortgagee" and has the right to enforce the lien via the assignment). The original borrower/mortgagor, 81st Street LLC, is wholly unrelated to the Receivership Defendants or their affiliates¹⁶. Thus, the loan made and security interest created cannot be challenged by the Receiver as a fraudulent transfer because no Equitybuild affiliate was part of this transaction. Therefore, the Receiver lacks standing to challenge Fannie Mae's lien.

Moreover, no Equitybuild investor or claimant can claim a superior interest because it was not until February 2018 that an Equitybuild affiliate obtained an interest in this property when SSDF2 1139 E 79th LLC executed an Assumption and Release Agreement assuming all liabilities of 81st Street LLC. (Motion, ¶ 34). In fact, there are no recorded mortgages against the property in favor of any Equitybuild investor or claimant. Fannie Mae's mortgage is the only mortgage of record. Motion, ¶34. Any claim by an Equitybuild investor or claimant would be in SSDF2 1139 E 79th LLC, not the property itself. Given this timeline and the fact there is no mortgage, there is no possible way any Equitybuild investor could have received an interest in the property that trumps Fannie Mae's interest. The Motion ignores this significant detail. Because Fannie Mae's

¹⁶ The Receiver provides no evidence that suggests 81st Street LLC is part of the Receivership Defendants, and he has not asked the Court to deem 81st Street LLC a Receivership Defendant.

security interest attached to the property *four years before* any Equitybuild affiliate obtained an interest in the property, Fannie Mae's interest is senior to any Equitybuild affiliate's interest and cannot be validly challenged by the Receiver, SEC, or any third party. Thus, any result other than a full payoff of Fannie Mae on the sale date runs afoul of Fannie Mae's security interest and established law. *See Madison Real Estate Group, LLC*, 647 F. Supp. 2d at 1277. In fact, no bona fide dispute exists with respect to Fannie Mae's lien.

If the Court grants the Motion, then Fannie Mae respectfully request that this Court direct the Receiver to immediately disburse the sale proceeds to Fannie Mae based on the foregoing.

VI. REQUEST FOR ORAL ARGUMENT

The Mortgagees respectfully request oral arguments on the Motion and this Objection.

CONCLUSION

For the foregoing reasons, the Mortgagees object to the Motion and respectfully request that the Motion be denied.

Dated: August 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jill L. Nicholson, hereby certify that on August 24, 2020, I caused to be electronically filed the CERTAIN MORTGAGEES' OBJECTION TO RECEIVER'S (1) SECOND MOTION FOR RESTORATION OF FUNDS EXPENDED FOR THE BENEFIT OF OTHER PROPERTIES; AND (2) NINTH MOTION TO CONFIRM THE SALE OF CERTAIN REAL ESTATE AND FOR THE AVOIDANCE OF CERTAIN MORTGAGES, CLAIMS, LIENS, AND ENCUMBRANCES which is being served electronically via the Court's ECF system on all counsel of record.

/s/ Jill L. Nicholson
Jill L. Nicholson

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION

Plaintiff,

Case No. 09-12950
Hon. David M. Lawson

v.

JOHN J. BRAVATA, RICHARD J.
TRABULSY, ANTONIO M. BRAVATA,
BBC EQUITIES, LLC, BRAVATA
FINANCIAL GROUP, LLC, and SHARI A.
BRAVATA,

Defendants.

**RECEIVER'S SECOND INTERIM STATUS REPORT AND ACCOUNTING
FOR BBC EQUITIES, LLC AND BRAVATA FINANCIAL GROUP, LLC**

On October 19, 2009, Earle I. Erman, the Receiver in these proceedings ("Receiver") filed his First Interim Status Report and Accounting for BBC Equities, LLC and Bravata Financial Group, LLC (the "First Interim Report") [Docket No. 100]. Among other things, the First Interim Report set forth a summary of the Receiver's operations since his appointment by this Court on September 2, 2009, including the existence, value, and location of all Receivership Property and the liabilities of the Receivership Entities. This Second Interim Report is intended to supplement the First Interim Report and summarize the Receiver's operations subsequent to the filing of the same.

Summary of the Operations of the Receiver

1. The Receiver was appointed on September 2, 2009. Upon his appointment, the Receiver engaged the services of Bodman LLP as his attorney for specific matters (subject to conflict clearance) and the services of O’Keefe & Associates Consulting, LLC as financial advisors and accountants. Bodman LLP has a conflict of interest in representing the Receiver in connection with matters relating to Comerica Bank and Huntington Bank. The Receiver and his law firm have been acting as counsel in connection with those matters.

2. The Receiver and his professionals continue to spend significant time and resources analyzing the real estate interests of the Receivership Entities. The First Interim Report identified 39 properties in which the Receivership Entities or their affiliated entities held an interest prior to the Receivership. Since the First Interim Report was filed, 41 additional properties were identified, for a total of 70 properties in which the Receivership Entities might hold, or have held, an interest. See Docket No. 189, Third Amended Exhibit D to First Interim Status Report (“Third Amended Exhibit D”).

3. On December 4, 2009 the Receiver filed his Motion to Abandon Huntington Real Property and Request to Expedite the Date by Which any Party Must Object to the Requested Relief to December 11, 2009 (the “Huntington Motion”) [Docket No. 168]. On December 22, 2009, the Receiver filed his Motion to Abandon Certain Real Property (the “General Abandonment Motion”) [Docket No. 186]. Together, the Motions requested authority to abandon 53 of the properties based, among other things, generally upon a lack of equity in those properties over and above mortgage debt.

4. The Huntington Motion was granted on January 13, 2010 [see Orders at Docket Numbers 206, 207 and 208], and allowed the Receiver to abandon 29 of the 70 identified

properties and allowed the Receiver to abandon, with conditions, two properties which will be marketed by the respective lending institution's previously appointed state court receiver with oversight from the Receiver. To the extent that these two properties sell for prices in excess of the loan obligation they secure, additional proceeds would be turned over to the Receiver. The Orders also allows the Receiver to turn over certain rents in his possession to the Huntington National Bank, which had a security interest in the same.

5. The Court also granted the General Abandonment Motion which sought authority to allow the Receiver to abandon 23 additional properties. The Court entered an order on February 10, 2010, which allowed the Receiver to abandon, with conditions, one of these properties which will be marketed by the respective lending institution's previously appointed state court receiver with oversight from the Receiver [Docket No. 239]. On March 10, 2010, the Court entered an order allowing the Receiver to abandon the other 22 properties addressed by the General Abandonment Motion [Docket No. 257]. This Order also allows the Receiver to turn over certain rents in his possession to the lending institutions who had security interests in the same.

6. Of the sixteen properties not addressed by the foregoing Motions and Orders, the Receiver has fully investigated six of them and has determined that there is a possibility that they may have equity and therefore may provide value to the Receivership Estate. The Receiver has received court authority to list three of these properties for sale [Docket No. 192] and will request authority to list the remaining three. The Receiver is in the process of investigating the remaining properties in order to determine whether they represent any value to the Receivership Estate.

7. The Receiver has also investigated numerous life insurance policies owned by the Receivership Entities and/or the individual defendants, which policies insure the lives of certain principals of the Receivership Entities and/or members of their families. Some of these policies were owned by BBC Equities and had present cash surrender values. The Receiver requested and was granted authority to surrender such policies for their cash value [Docket No.'s 190 and 246]. The Receivership Estate received \$47,582.38 in proceeds from the surrender of these policies and the same has been deposited in the BBC Equities Receivership account.

8. The Receiver also took possession of the office furniture and equipment located at the Receivership Entities' offices in Southfield, Michigan and Perrysburg, Ohio. The office furniture and equipment were sold with the Court's approval [Docket No. 159], and the sale proceeds of \$23,500.00 have been deposited in the Receivership accounts. The Landlord for the BBC Equities' Florence, Kentucky offices has taken possession of the furniture and office equipment located at those premises and asserts a landlord lien on the same due to non-payment of rent. The Receiver has investigated the Landlord's lien and has determined that it is valid under Kentucky state law. The furniture and office equipment have value in excess of the amount of the landlord's lien and the Receiver is currently discussing with the Landlord its purchase of the furniture and office equipment which will result in modest sale proceeds received by the Receivership Estate.

9. The Receiver has also arranged for IRS W-2 Forms ("W-2s") to be prepared and delivered to former employees of the Receivership and related entities.

10. The Receiver has also demanded turnover of all funds on hand from the financial institutions at which the Receivership Entities were known to hold accounts. A majority of these accounts contained little or no cash, or had been closed, or the respective financial institution

asserted a security interest in funds contained therein due to certain loans extended to the Receivership Entities. To date, less than \$6,000.00 has been turned over, however, the Receiver has sought court approval for the turnover of a portion of proceeds held in accounts at Comerica Bank and in which Comerica has asserted a security interest. In this regard, there is potential for approximately \$24,000.00 to be turned over to the Receivership Estate.

11. In the First Interim Report, the Receiver identified a number of entities that are related to the Receivership Entities and recommended that the Court include these entities in the Receivership Estate at a later date. Some of these entities are wholly owned subsidiaries of one of the Receivership Entities or are owned by one or more of the former principals of the Receivership Entities. Based upon further review of the asset and liability structure of these entities, the Receiver has since withdrawn his recommendation that the Receivership Estate be expanded to include them [Docket No. 244]. Instead, the Receiver will review, on a case-by-case basis, the value of any such entities to the Receivership Estates and address such inclusion as and when necessary.

12. The Receiver has continued to communicate with creditors, investors, and former employees of the Receivership Entities regarding the ongoing status of the Receivership as well as with regard to certain tax issues, including the issuance of W-2s, and IRS 1099 and K-1 Forms.

**The Amount of Cash on Hand, the Amount of Accrued
Administrative Expenses, and Schedule of Receipts and Disbursements**

13. The Receivership account for BBC Equities currently contains \$177,801.68 and the Receivership account for Bravata Financial Group currently contains \$1,781.02, for a total cash on hand of \$179,582.70. However, \$69,368.59 in the BBC Equities account represents rent

that is currently subject to security interests of certain lending institutions. Accordingly, the Receivership currently has \$110,214.11 in unencumbered funds.

14. A schedule of the Receiver's Receipts and Disbursements is attached as **Exhibit A**.

15. Substantial administrative expenses in the nature of unpaid professional fees and costs of the Receiver, his counsel, and his financial advisors, have accrued in the approximate amount of \$550,000.00.

Description of all Known Receivership Property

16. As stated above, 19 of the original 70 real estate interests of the Receivership Entities remain subject to the Receiver's control. The Receiver currently has three properties for sale under listings approved pursuant to court order. They are as follows:

- a. 8680 West Grand River Avenue, Brighton, Michigan 48116. This property housed the former offices of Bravata Financial Group. The property is currently listed with a recognized broker for \$300,000.00 and has a mortgage balance of approximately \$235,259.00. The Receiver is working cooperatively with the Lender to sell this property. It is not certain that the property will sell for its current list price and any sale must be approved by the Court.
- b. 2511 West M-43 Highway, Hastings, Michigan 49058. This property is currently listed with a recognized broker for \$300,000.00. Although the property is currently unencumbered by a security interest, it may be difficult to market as it is vacant land that has been commercially zoned. In addition, the Receiver will be filing a proceeding to quiet title to this property in order resolve a title defect and be in a position to transfer title. That action will be filed in the near future. It is

not certain that the property will sell for its current list price and any sale must be approved by the Court.

- c. 810 Fourth Street, Three Rivers, Michigan 49093. This property is a single family home which was formerly rented out by the Receivership Entities. It is unencumbered by a security interest and is currently listed with a recognized broker for \$34,900.00. It is not certain that the property will sell for its current list price and any sale must be approved by the Court.

The Receiver will also request authority to list the following properties for sale, all of which are unencumbered by a security interest:

- a. 5815 Livingston Drive, Toledo, Ohio 43613. This property is vacant land that has been commercially zoned.
- b. 5819 Livingston Drive, Toledo, Ohio 43613. This property is vacant land that has been commercially zoned.
- c. 1746 West Alexis Road, Toledo, Ohio 43613. This property is commercially zoned. There is a structure located on the property which will need to be demolished as it sustained significant fire damage prior to appointment of the Receiver.

The foregoing properties are adjacent to each other and are located on the corner of Livingston Drive and West Alexis Road. The Receiver has been advised that the properties value will be maximized if they are sold together. However, because the parcels, taken together, form an odd shape, with two of the properties fronting a residential street, their marketability may be limited. Accordingly, the Receiver intends to initially list the properties for approximately \$95,000.00. It is not certain that the properties will ultimately sell for this price.

17. Pursuant to this Court's orders [Docket No.s 207 and 239], three properties are being maintained and marketed by The Huntington National Bank's state court receiver, who was appointed pursuant to previously filed state court lawsuits to foreclose on such properties. The order requires the state court receiver to use his best efforts to market these properties, provided however, that the listing and sale of the two properties is subject to the Receiver's prior approval, that any offers to purchase such properties be submitted to the Receiver, and that no sale be consummated without prior consent of the Receiver and this Court. These properties are as follows:

- a. 1470 Ford Street, Maumee, Ohio 43537. This property is a shopping center with a debt balance of approximately \$841,000.00. As of September 10, 2008, this property was appraised with a retail value of \$1,920,000.00, assuming the full occupancy of the shopping center. The property's liquidation value as of September 10, 2008 was \$1,420,000.00.
- b. 3750 Silica Road, Sylvania Township, Ohio 43560. This property is a vacant industrial site with a debt balance of approximately \$782,000.00. As of June 4, 2008, the "as is" appraisal of the property was \$886,000.00.
- c. Timberstone Drive, Findlay, Ohio 45840. This property is comprised of three parcels. The debt balance is approximately \$1,400,000.00. As of March 31, 2009, the property was appraised as high as \$1,800,000.00 assuming retail prices and that the parcels are sold individually. Conversely, the parcels have a forced liquidation value of \$585,000.00 if sold in bulk. Due to the potential value to the Receivership Estate, the Receiver has elected to retain oversight of the marketing of this property. However, given current market conditions, the Receiver has

been advised that the parcels may need to be sold at the bulk liquidation value, which would result in no recovery to the Receivership Estate.

18. The Receiver continues to investigate the following property in order to determine whether it represents any value to the Receivership Estate:

- a. 101-111 East Maumee, Adrian, Michigan 49221. This property is subject to a mortgage held by Old Fort Bank. The debt balance on this property is approximately \$232,000.00. The property is comprised of office and storefront properties located in down town Adrian. The property is in significant disrepair and despite its best efforts, Old Fort Bank has indicated that it is unable to either sell or donate the property, and intends to abandon its interest in the same. The Receiver has been advised by a realtor familiar with the property that it may take one to two years to sell the property, with a price ceiling of approximately \$100,000.00. The Receiver is evaluating this information in order to determine whether to retain and market the property.

19. The following properties are believed to have been acquired by BBC Equities through a related entity, BBC Timberstone, LLC ("BBC Timberstone"). Pursuant to a certain Operating Agreement, BBC Equities and DJM Enterprises, LLC ("DJM") formed BBC Timberstone, with BBC Equities holding an 80% interest. Pursuant to a certain Subscription and Contribution Agreement, BBC Timberstone acquired interests in the following properties through assignment of DJM's membership interests in certain limited liability companies. Because these properties were acquired through the transfer of an LLC interest, which owned the properties subject to an underlying existing mortgage, it appears they were acquired without the need to obtain new financing and in some cases, without obtaining the required consent or

knowledge of the underlying lender. Information regarding these properties was incomplete, with some properties having no information other than a location and apparent owner. The Receiver elected not to abandon them in order to investigate their value to the Receivership Estate and in some cases will be required to serve subpoenas on lenders to obtain their appraisal and debt information, and their cooperation:

- a. 5340 Centennial Road, Sylvania, Ohio 43560. This property appears to be titled in the name of Milestone Investments, Ltd. It is subject to a mortgage held by Old Fort Bank. The Receiver has been in contact with the Bank's attorney, who indicates that the Bank disputes that BBC Equities has any interest in the property and therefore will not provide appraisal or debt balance information to establish this unless subpoenaed to do so. The Receiver's counsel is in the process of subpoenaing this information.
- b. 8120 Secor Road, Lambertville, Michigan 48144. This property appeared to be titled in the name of Milestone Investments, Ltd and was subject to a mortgage held by First Federal Bank. The attorney for First Federal Bank has provided the debt balance and appraisal information and has advised that foreclosure proceedings were instituted on or about July 24, 2009, which resulted in the Bank receiving a deed in lieu of foreclosure on October 13, 2009. The attorney advised that the Bank was informed by various sources that the property was not a part of any business involvement of BBC Equities. The debt balance at the time the suit was instituted was approximately \$1,078,523.00 with the property having an appraised value of approximately \$590,000.00. Accordingly, the Receiver will recommend abandonment of this property.

- c. 10670 Colonial Boulevard, Fort Myers, Florida 33905. This property appeared to be titled in the name of TGI Fort Myers – Treeline, LLC and was subject to a mortgage held by Regions Bank. It is a strip center with only two tenants. The attorney for Regions Bank has advised that a judgment of foreclosure was entered on November 30, 2009. The attorney advised that the Bank did not know of BBC Equities' interest in the property at the time the suit was filed. Irrespective of the validity of the foreclosure proceedings, the debt balance was approximately \$14,800,000.00 with the property having an appraised value of approximately \$7,000,000.00. The Receiver is obtaining the appraisal information as well as information regarding the disposition of the property subsequent to entry of the judgment and is likely to recommend abandonment of this property.
- d. Heatherdowns and Cass Road, Toledo, Ohio 43614. This property appears to be titled in the name of Parkstone Cass, LLC and is subject to a mortgage held by Old Fort Bank. The Receiver has been in contact with the Bank's attorney, who indicates that the Bank disputes that BBC Equities has any interest in the property and therefore will not provide appraisal or debt balance information to establish this unless subpoenaed to do so. The Receiver's counsel is in the process of subpoenaing this information.
- e. 6814 Spring Valley Drive, Holland, Ohio 43528. This property appears to be titled in the name of TGI MCCord, LLC and is subject to a mortgage held by Wells Fargo Bank. The Receiver has been in contact with the Bank who disputes that BBC Equities has any interest in the property and therefore will not provide

appraisal or debt balance information to establish this unless subpoenaed to do so.

The Receiver's counsel is in the process of subpoenaing this information.

- f. Pearl and Whitney Roads, Strongsville, Ohio 44136. This property appears to be titled in the name of TGI Pearl Road Investors, LLC. Through a search of the Cuyahoga County Recorder's Office website, the Receiver has learned that this property is comprised of three parcels located on the corner of Pearl and Whitney Roads in Strongsville, Ohio. The Receiver has also learned that the property is subject to a mortgage held by Integra Bank. The Receiver is in the process of obtaining the debt balance information as well as the property's current value.
- g. 2600 Sylvania Avenue, Toledo, Ohio 43613. This property may have been listed on the Third Amended Exhibit D in error due to the Receivership Entities' records. It appears that the property is duplicative of the property listed as property number 42 on the Third Amended Exhibit D, which has been abandoned to The Huntington National Bank. The Receiver is currently verifying this information with the Bank's attorneys.
- h. 2130 Richards, Ottawa Hills, Ohio 43606. This property appears to be titled in the name of Timberstone Condominiums, LLC and is subject to a mortgage held by Henry County Bank. The Receiver has been in contact with the Bank's attorney, who indicates that the Bank disputes that BBC Equities has any interest in the property and therefore will not provide appraisal or debt balance information to establish this unless subpoenaed to do so. The Receiver's counsel is in the process of subpoenaing this information.

- i. 2032-2034 Byrne Road, Toledo, Ohio 43614. This property is subject to a mortgage held by Old Fort Bank. As with the Centennial Road property discussed in sub-paragraph (a) above, the Bank's attorney indicates that the Bank disputes that BBC Equities has any interest in the property and therefore will not provide appraisal or debt balance information unless subpoenaed to do so. The Receiver's counsel is in the process of subpoenaing this information.

20. As stated above, the landlord of BBC Equities' Florence, Kentucky offices has taken possession of the furniture and office equipment located at those premises and asserts a landlord lien in the amount of \$5,420.00 on the same due to non-payment of rent. The Receiver has investigated the value of the furniture and office equipment and has determined its current liquidation value is approximately \$7,000.00. The Receiver is currently discussing with the landlord the sale of the furniture and office equipment, which will result in net sale proceeds of approximately \$2,000.00 received by the Receivership Estate after account is made for the landlord's lien.

21. The Receiver has received an accounting and schedule of the funds held at Comerica Bank together with documentation concerning its secured claims in various funds on hand at Comerica Bank. Under the lending relationship between the Receivership Entities and Comerica Bank, Comerica Bank has a valid right of set off and/or rights as a secured creditor in connection with two certificates of deposit. In one instance the bank is owed \$301,641.98 and holds a certificate of deposit in the amount of \$302,805.15. The bank also holds a certificate of deposit in the amount of \$113,499.26 to secure a letter of credit issued by the bank relating to lease defaults with an Ohio landlord, which leases are in default. The Receiver, Comerica Bank, and the Ohio landlord have reached an agreement with regard to disposition of the referenced

accounts and letter of credit. The Receiver filed a motion on March 9, 2010 [Docket No. 256] requesting, among other things, that Comerica Bank be authorized to exercise its right of set off in connection with the outstanding loan and to distribute a portion of the proceeds of that certificate of deposit that secures the letter of credit to the Ohio landlord, with the remaining balance to be distributed to the Receiver. This tri-partite transaction would resolve and “clean up” Comerica Bank’s and the Ohio landlord’s asserted interests in certain Receivership Entity accounts held at Comerica Bank and would free up and allow distribution of proceeds in the amount of approximately \$24,000.00, to the Receivership Estate. This motion is presently pending.

**Liquidated and Unliquidated Claims and
Anticipated or Proposed Methods of Enforcing such Claims**

22. In the First Interim Report, the Receiver specifically identified a number of potential claims against third parties, including claims against the individual defendants. The Receiver continues to investigate such claims. To the extent such claims are viable and are not covered by the present SEC action, the Receiver intends to request Court authority for these claims to be pursued by highly qualified outside counsel on a contingency fee basis since pursuit of these claims will be costly, and the Receivership Estate does not have sufficient funds to undertake the same on any other basis.

**Tax issues regarding and the issuance of
IRS W-2 Forms, IRS 1099 Forms, and K-1 Forms**

23. As stated above, the Receiver arranged for preparation of IRS W-2 Forms for the former employees of Bravata Financial Group, LLC, BBC Management, Inc., and related entities. The Receiver has also received phone calls regarding whether the Receiver will be

preparing IRS 1099 Forms. The Receiver is not able to prepare IRS 1099 Forms due to the state of the Receivership Entity records that were recovered. However, the Receiver has been, and will continue to provide, on a case by case basis, and to the extent that the records permit, specific relevant information requested by parties who may need such information for tax return preparation.

24. The Receiver has also received inquiries from certain investors regarding 2009 IRS K-1 Forms. 2008 IRS K-1 Forms and 2008 tax returns were never completed by the former accountants. Additionally, the Receivership Entity records do not contain sufficient information to calculate 2009 K-1s. Accordingly, the Receiver will not prepare 2009 tax returns or IRS K-1 Forms, nor will the 2008 IRS K-1 Forms be distributed.

**The Receiver's Recommendations for the Continuation
or Discontinuation of the Receivership and Prospects for Recovery**

25. The Receiver's First Interim Report contained a number of recommendations, and with the exception of the recommendation to expand the Receivership to include the various related entities identified in the First Interim Report, the Receiver adopts those recommendations here.

26. Currently the receivership is ongoing and the Receiver continues his work with the assistance of his counsel, Bodman, LLP and his financial advisors O'Keefe & Associates Consulting, LLC.

27. The claims against the Receivership Entities are in excess of \$47,600,000.00 and approximately \$100,000.00 in unencumbered funds has been recovered to date. Although there are certain assets to be liquidated and claims to pursue which may generate additional funds, taking into consideration the remaining assets, including potential claims against third parties,

and the combined debt including the expense of administration, at this time there does not appear to be a reasonable prospect of any significant recovery for creditors and investors. Until such time as it no longer appears feasible or practical, the Receiver and his professionals are committed to continue to work on this matter to maximize whatever value is available in the best interest of creditors.

WHEREFORE, the Receiver requests that the recommendations contained herein be adopted by the Court and that an appropriate order enter.

ERMAN, TEICHER, MILLER,
ZUCKER & FREEDMAN, P.C.

By: /s/ Earle I. Erman
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DATED: March 19, 2010

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EXHIBIT A

Receiver's Account, Estate of BBC Equities, LLC

3/19/2010 2:24 PM

Register: BBC Equities

From 01/01/2009 through 03/19/2010

Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Payment	C	Deposit	Balance
09/14/2009			Proceeds of Bank Accounts	Genoa Banking		X	4,960.00	4,960.00
09/23/2009	DEP		Proceeds of Bank Accounts	Fifth Third Lexington KY		X	1,181.00	6,141.00
09/30/2009	Dep		Rent	Amplex		X	1,752.66	7,893.66
09/20/2009	Dep		Rent	Prof Pump & Irrigation		X	1,545.00	9,438.66
10/05/2009			Bank Service Charges	Net Teller Set Up	50.00	X		9,388.66
10/06/2009			Contempt Sanction	John Bravata		X	32,745.68	42,134.34
10/09/2009	1001	R.J. Montgomery & Assoc., Inc.	Auctioneer	Inv. #RJM 2048	600.00	X		41,534.34
10/16/2009	1002	Inuit	check order	Inv. 100749493	92.74	X		41,441.60
10/19/2009			miscellaneous income	Deborah A. Davis		X	412.66	41,854.26
10/21/2009			Petty Cash	Deposit		X	23.30	41,877.56
10/21/2009			Rent	Amplex		X	876.33	42,753.89
10/29/2009			x-insurance policy proceed	Trabulsy		X	1,086.59	43,840.48
11/04/2009			Utility Refund	Bonita Springs Utilities		X	123.70	43,964.18
11/06/2009			Sec 8 Warrants	State of Michigan		X	426.00	44,390.18
11/09/2009			Rent	Amplex		X	876.33	45,266.51
11/11/2009			Rent	Several		X	44,471.74	89,738.25
11/13/2009			Bank Service Charges	Return check fee	10.00	X		89,728.25
11/13/2009	1003	Lincoln Financial Group	Insurance Expense Life	Policy #JP-5569936	6,236.88	X		83,491.37
11/16/2009			miscellaneous income	Ceridian Cobra Services		X	2,283.36	85,774.73
11/16/2009			Returned check	Stop payment - Rocklan	500.00	X		85,274.73
11/16/2009			Bank Service Charges	Return check fees	50.00	X		85,224.73
11/17/2009			Returned check	Stop Payment - BL Rec..	341.10	X		84,883.63
11/17/2009			Returned check	Stop Payment - BL Rec..	500.00	X		84,383.63
11/17/2009			Returned check	Stop Payment - Albert	650.00	X		83,733.63
11/17/2009			Returned check	Stop Payment - Guy Tru..	1,326.00	X		82,407.63
11/17/2009			Returned check	Stop Payment - Amplex	876.33	X		81,531.30
11/20/2009			reversal of bank charges	Net Teller Fees		X	50.00	81,581.30
11/30/2009			Sale of Furniture	RJ Montgomery		X	23,500.00	105,081.30
12/01/2009	1004	Midland Title and Escrow Ltd	Title Work	Inv 9321-6024697	400.00	X		104,681.30
12/01/2009	1005	Erman Teicher Miller Zucker & F..	Reimbursement of Costs		1,236.00	X		103,445.30
12/08/2009			Rent	Amplex		X	876.33	104,321.63
12/10/2009	1006	Ceridian Cobra Services	miscellaneous income		2,283.36	X		102,038.27
12/11/2009			Rent	Dollar Tree Stores		X	10,881.32	112,919.59
12/17/2009	1007	Oakland County Treasurer	Personal Property Tax claim/fee		3,000.00	X		109,919.59
12/23/2009			miscellaneous income	Wood County OH - cler..		X	28.41	109,948.00
12/23/2009	1008	Roger Leach	Winterize building	Inv 1	150.00	X		109,798.00
12/29/2009			-split-	Deposit		X	31,357.53	141,155.53
01/06/2010			Rent	Amplex		X	876.33	142,031.86
01/06/2010	1009	Lincoln Financial Group	Insurance Expense Life	Policy #JP-5569936	4,306.26	X		137,725.60
01/12/2010			-split-	Deposit		X	8,554.27	146,279.87
01/14/2010	1010	Paycor	payroll expense		599.25	X		145,680.62
01/19/2010	1011	The Huntington National Bank	Rent	VOID: Rents		X		145,680.62
01/19/2010	1012	The Huntington National Bank	Rent	VOID: rents		X		145,680.62
02/03/2010			Rent	Dollar Tree		X	10,881.32	156,561.94
02/10/2010			Rent	Grace and Wild		X	6,962.99	163,524.93
02/19/2010			Joanne Bravata Prem Reimb	Law office of Gregory B..		X	11,588.14	175,113.07
02/19/2010	1013	Paycor	payroll expense	W-2 Form Processing	442.00	X		174,671.07
02/19/2010	1014	Paycor	payroll expense	W-2 form Processing	430.00	X		174,241.07
02/23/2010			Insurance Policy Cash Surrende	Minnesota Life		X	47,582.38	221,823.45
03/02/2010			Rent	Dollar Tree		X	10,881.32	232,704.77
03/04/2010	1015	The Huntington National Bank	Rent	Rents	26,555.79	X		206,148.98
03/12/2010			Rent	Grace & Wild		X	4,296.66	210,445.64
03/15/2010	1016	The Huntington National Bank	Rent	Rent - Dollar Tree Stores	32,643.96	X		177,801.68
03/16/2010	1017	Lincoln Financial Group	Insurance Expense Life	VOID		X		177,801.68

Receiver's Account, Estate of Bravata Financial Group LLC

3/18/2010 9:36 AM

Register: Fidelity Bank
 From 01/01/2009 through 03/18/2010
 Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Payment	C	Deposit	Balance
09/15/2009			Commission Income	Sequoia		X	1,355.90	1,355.90
10/05/2009			Bank Service Charges	Net Teller Charges	50.00	X		1,305.90
10/09/2009	1001	R.J. Montgomery & Assoc., Inc.	Auctioneer	Inv #RJM 2048	600.00	X		705.90
10/12/2009			Sales Earnings	Sequoia		X	75.60	781.50
10/16/2009			Commission Income	Ing		X	97.70	879.20
10/16/2009			Sales Earnings	Sequoia		X	182.70	1,061.90
10/16/2009	1002	Intuit	check order	Inv. 100749493	92.74	X		969.16
10/20/2009			Commission Income	Minnesota Life		X	1,750.58	2,719.74
10/20/2009			Bank Service Charges	Wire fee	12.00	X		2,707.74
11/06/2009			Sales Earnings	Sequoia		X	182.70	2,890.44
11/16/2009			Commission Income	ING		X	88.17	2,978.61
11/20/2009			reversal of bank charges	Net Teller charges		X	50.00	3,028.61
12/11/2009			Commission Income	ING		X	34.56	3,063.17
01/12/2010			Commission Income	ING		X	88.17	3,151.34
01/14/2010	1003	Paycor	payroll expense	VOID		X		3,151.34
01/14/2010	1004	Paycor	payroll expense	VOID		X		3,151.34
01/14/2010	1005	Paycor	payroll expense	preparation of W-2's	460.00	X		2,691.34
01/14/2010	1006	Paycor	payroll expense	preparation of W-2's	1,003.62	X		1,687.72
02/11/2010			Commission Income	ING		X	87.30	1,775.02
02/26/2010			Wage Garnishment Fee	O'Reilly Rancilio PC		X	6.00	1,781.02