

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' MEMORANDUM IN SUPPORT OF
MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

I. INTRODUCTION

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") by and through their counsel, Foley & Lardner LLP respectfully move this Court to certify its Order [Dkt. 825] ("Order") pursuant to 28 U.S.C. §1292(b). The Order raises the following controlling questions of law:

1. Can the Receiver sell real properties encumbered by the Mortgagees' liens when sales of these properties will not generate any net proceeds for the estate over and above the amount of the mortgage liens?
2. Can the Receiver sell real properties encumbered by the Mortgagees' liens free and clear without first objecting to the Mortgagees' proofs of claim or lien priority through a formal objection or avoidance action?
3. Can the Receiver require the Mortgagees to post a letter of credit in order to submit a credit bid to purchase the property secured by their security interests without first objecting to the Mortgagees' proofs of claim or lien priority through a formal objection or avoidance action?

4. Does the Receiver violate his ongoing duty ordered in the Order Appointing Receiver to ensure that no conflicts of interest arise by selling real properties to affiliates of the current property managers and the property managers in place when the original Ponzi scheme allegedly occurred?
5. Did the Receiver violate his duties to sell real properties “with due regard to the realization of the true and proper value of such real property” as required by the Order Appointing Receiver when the Receiver failed to provide any evidence, testimony, or affidavits as to (a) the due regard to the realization of the true and proper value of such properties and (b) why the sales are in the best interest of the estate as required and (c) without allowing the Mortgagees’ to present evidence to the Court to the contrary?

As set forth below, the Order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). That is particularly true given the issues raised in the 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 [Dkt. 769] (“Objection”) and Motion to Stay Sales Pending Appeal to the United States Court of Appeals for the Seventh Circuit (“Motion to Stay”). The need for certification is further evident from the procedural posture of this case, which has unfolded over the course of over two years and undoubtedly centered on the effect of the Receiver’s actions, and inactions, on the Mortgagees pre-existing security interests. Certification of the Order and these novel questions therefore is proper and could “head off protracted, costly litigation.” *Ahrenholz v. Bd of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (citing *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000)). This motion is timely because it is filed within 1 day

of the Court's October 26, 2020 Order. *Sandifer v. U.S. Steel Corp.*, 2010 WL 61971, at *5 (N.D. Ind. Jan. 5, 2010). A proposed order is attached as Exhibit A.¹

II. RELEVANT BACKGROUND

The Mortgagees incorporate by reference the Factual Background set forth in their Objection and their Motion to Stay (collectively, the "Facts"). The Mortgagees claim secured interests in the Properties and the rents generated thereby.² From the outset of this case, the Mortgagees requested this Court make a determination on lien priority as this issue is a threshold determination for the entire case. The Receiver has actively fought such a determination, choosing instead to plow ahead with the case in total disregard of the Mortgagees' liens, including attempting to sell properties free and clear and extinguishing such liens for less than the indebtedness due to the Mortgagees. Moreover, the Receiver has neither objected to the Mortgagees' proofs of claims nor sought to avoid any of the parties' liens. These issues are ripe for appeal and the Mortgagees' respectfully request their Motion be granted.

The Mortgagees filed concurrently with this Motion, their Notice of Appeal to the United States Court of Appeals for the Seventh Circuit ("Notice of Appeal") of their direct appeal of this Court's October 26, 2020 Order [Dkt. 825] pursuant to 28 U.S.C. §1292(a)(2). The Mortgagees believe they have a proper basis for direct appeal under 28 U.S.C. §1292(a)(2), but file this Motion in the alternative to their Notice of Appeal.

¹ This Court has previously acknowledged that the Mortgagees have standing to appeal orders from this Court, and the United States Securities and Exchange Commission and Kevin B. Duff, receiver both agreed that they each do not and will not contest the Mortgagees' standing to appeal orders from this Court (Transcript of August 13, 2020 Hearing at 5:15-25; 6:1-13; 6:21-25; 7:1-9; 8:14-21 *SEC v. EquityBuild, Inc.*, No. 18-cv-05587). *See also S.E.C. v. Enter. Tr. Co.*, 559 F.3d 649, 652 (7th Cir. 2009) (holding parties affected by a receiver's plan of distribution may appeal adverse distribution decisions without intervening.)

² Capitalized terms not otherwise defined herein, shall have the meaning as set forth in the Facts.

III. ARGUMENT

The Mortgagees' Motion and questions presented satisfy all criteria necessary to certify the Order for appeal. 28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order

Id. A party moving to certify an interlocutory order for immediate appeal pursuant to 28 U.S.C. §1292(b), must satisfy four criteria: (1) the question presented must be controlling; (2) it must be a question of law; (3) there must be substantial grounds for difference of opinion; and (4) its resolution must have the potential to speed up resolution of the litigation. *Armada Sing. PTE Ltd. v. Amcol Int'l Corp.*, 2017 WL 1862836, at *2 (N.D. Ill. May 9, 2017) (granting certification under § 1292(b)); *see also Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012). The Mortgagees' Motion satisfies each of the four criteria.

A. The Questions Presented are "Controlling."

The questions presented are ones that controls this entire receivership. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Resolution of the Mortgagees' questions presented will undoubtedly affect the entire course of litigation in this case. The Receivership Estate consist of almost exclusively commercial real property. *See*, Receiver's Sixth Status Report, Exhibit 4 [Dkt. 624]. The questions presented address the Mortgagees' rights and interests in these properties and what

rights, if any, the Receiver has in relation to these assets and the related disposition of those assets for less than what is due and owing the Mortgagees. More specifically, the questions request clarification on, among other issues, (i) whether the Receiver has a right to keep these properties in the estate and sell said properties when no equity will be obtained for the benefit of the estate; (ii) whether the Receiver has a right to sell these properties free and clear of liens that have not been challenged by the Receiver through objections to proofs of claim or avoidance actions; (iii) whether the Receiver has a right to require the Mortgagees to post a letter of credit to credit bid when the Receiver has not challenged the Mortgagees' liens through objections to proofs of claim or avoidance actions; (iv) whether the Receiver's sales of properties to affiliates of the property managers violates his ongoing duty ordered in the Order Appointing Receiver to ensure that no conflicts of interest arise between the Receiver, his retained personnel, and the estate, and (v) whether the Receiver violated his duties to sell real properties "with due regard to the realization of the true and proper value of such real property" when the Receiver failed to provide any evidence, testimony, or affidavits in connection with the motion to approve the sales of the properties encumbered by the Mortgagees' liens regarding why these bids were the highest and best offers and why they are in the best interest of the estate as required by the Order Appointing Receiver. These questions go to the heart of this case. If it is determined on appeal that the Receiver cannot retain these properties, cannot sell these properties, or otherwise took action against these properties in violation of the Mortgagees' liens and applicable law, then the course of this litigation will take a complete 180-degree turn. To date, the Receiver has completely ignored the strenuous objections of the lienholders by selling the properties which are encumbered by liens free and clear and totally disregarded their liens and rights under both state and federal law, including the Fifth Amendment, the Fourteenth Amendment, 28 U.S.C. § 959(b), the Illinois

Mortgage Foreclosure Law, the Illinois Conveyances Act, the Illinois Mortgage Act, and Illinois common law. Put simply, the questions presented seeks to determine whether the Receiver's conduct violates the Mortgagees' rights.

B. The Mortgagees Present "Pure" Questions of Law.

The questions presented are purely questions of law. A question of law is "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz*, 219 F.3d at 676. The questions presented here directly relate to and are controlled by the Mortgagees' state law security interests and the laws regarding a federal equity receiver's rights in the same collateral. The Mortgagees' security interests attached to the properties prior to this receivership. As such, the Receiver took possession of all receivership property subject to the pre-existing liens. *Madison Real Estate Grp., LLC*, 647 F. Supp. 2d at 1277 ("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."); *see also* 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."). In fact, this Court has already held in a prior order that "a court does not have the authority to extinguish a creditor's pre-existing state law security interest" and clarified 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." *see also* Memorandum Report and Recommendation, pp. 7-8 [Dkt. 311]. Notwithstanding this established law and this Court's prior rulings, the Receiver's actions violate the Mortgagees'

security interests. The Motion requests that these questions of law be resolved now because these issues are central to this case.

Moreover, the Receiver's Sale Motion and sale of the Mortgagees' properties involve constitutional issues. The Mortgagees argued in their Objection that the Sale Motion violates the Mortgagees' Fourteenth Amendment's due process rights. U.S. Const. amend. XIV. Specifically, the Receiver is stripping the Mortgagees' of their lien rights as prior secured lenders under state law without proper due process. *See* Objection, Sec. I(B), I(C). This constitutional issue is grounds to find the Mortgagees' present a question of law. *Dahlstrom v. Sun-Times Media, LLC*, 39 F. Supp. 3d 998, 1002-03 (N.D. Ill. 2014).

C. There Is Substantial Grounds For Difference Of Opinion.

The questions presented have not been directly resolved in the Seventh Circuit and there is clearly a division of authority. A court may find there is substantial grounds for difference of opinion if: (1) "there are substantial conflicting decisions regarding the claimed controlling issue of law" or (2) "the question is 'not settled by controlling authority' and there is a 'substantial likelihood ... that the district court ruling will be reversed on appeal.'" *Gamboia v. City of Chicago*, No. 03 C 219, 2004 WL 2877339, at *4 (N.D. Ill. Dec. 13, 2004) (internal citation omitted). The questions presented show there are substantial conflicting decisions regarding the claimed controlling issues of law.

In *Pennant*, federal receivers sought to sell certain commercial hospitality properties "free and clear of liens, claims, and encumbrances" with such liens, claims, and encumbrances "attaching to the proceeds of the sale." *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015). *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). The *Pennant* decisions are the exact opposite of what has occurred in this matter. Here, the Receiver has sold scores of properties for less than the amount of the secured debt, including both of the Properties at issue in this Motion.

Indeed, there are differences of opinion before this very court. *SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957 (N.D. Ill.) also involves an SEC receivership over an estate involved in a commercial real estate Ponzi scheme. Unlike in *EquityBuild*, the Receiver in *Northridge* has continued to make debt service payments on loans secured by property held in the

estate. *SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957, Receiver’s Report for the Period of January 1, 2020 through March 31, 2020 [Dkt. 141], ¶2 (stating “the Receiver has satisfied his duty to manage the Receivership’s real property assets [by] timely paying lenders principal and interest (for the properties that have loans associated with them)”). Moreover, in *Northridge*, 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. *SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957 (N.D. Ill. May 19, 2020), Order [Dkt. 147]. In fact, in confirming the sale of Fannie Mae’s collateral, this Court ordered that on the closing of the sale of the mortgagee’s collateral property, the “Receiver is authorized *and 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.” *Id.* (emphasis added.)

Similarly, the *Madison* case further highlights the division of authority outside this district but applicable to SEC receiverships. In *Madison*, the defendants ran a Ponzi scheme involving commercial real property, whereby the defendants sold interests in the properties to investors and promised high rates of return from the operation of the properties. *Madison Real Estate Grp., LLC*, 647 F. Supp. 2d at 1274. The properties were encumbered by mortgages in favor of institutional lenders. *Id.* The SEC filed its complaint against the defendants and obtained the appointment of a receiver. *Id.* The institutional lenders moved to lift the automatic stay created by the appointment so they could enforce their state law security interests. The holdings of *Madison*, summarized below, are in conflict with the rulings in the present case.

<i>Madison</i>	<i>EquityBuild</i>
<ul style="list-style-type: none"> • SEC receiver may not keep a commercial real estate property in a 	<ul style="list-style-type: none"> • The Receiver has kept underwater properties in the estate since inception

<p>receivership where the value of the property is less than the loan amount owed to the secured lender. <i>Id.</i> at 1284; <i>see also Pennant</i>, 2015 WL 4511337, at *4-5 (receiver cannot sell properties for amounts that did not satisfy all secured liens, absent a consensual agreement by the impacted parties).</p>	<p>and sold scores of properties free and clear of liens for less than the amount of the secured debt, including the Mortgagees’ Properties, which are each currently under contract for sale for an amount less than the amount owed the Mortgagees.³</p>
<ul style="list-style-type: none"> • SEC 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. <i>Id.</i> at 1277-78. 	<ul style="list-style-type: none"> • The Court denied the Mortgagees’ requests to foreclose the Properties⁴ under state law and the Receiver has continuously fought to keep all properties in the estate, even properties that were not producing sufficient income to pay expenses in the ordinary course and properties that were valued at significantly less than the amount of the secured debt.
<ul style="list-style-type: none"> • The SEC Receiver must make monthly principal and interest payments and bring current any outstanding amounts for loans secured by property held in the estate. <i>Id.</i> at 1284-85. 	<ul style="list-style-type: none"> • The Receiver has not made a single debt service payment since the inception of this case in August 2018, despite numerous requests to do so.

The differences in law between *Madison* and *EquityBuild* are the exact issues the Mortgagees’ request to be resolved on appeal. Although this Court has cited the *Madison* case with favor, the Receiver’s actions contradict *Madison*. Memorandum Opinion and Order, pp. 5-6 [Dkt. 223]. The differences on the issues presented are stark and material. These issues go to the very heart of this case and must be resolved in an expedient manner.

³ The Receiver has sold other properties for less than the total amount of the 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.

⁴ Memorandum Opinion and Order, p. 8 [Dkt. 223].

D. Resolution Of The Questions Of Law Will Materially Advance The Ultimate Termination Of The Litigation.

Resolution of the Mortgagees' questions presented would benefit all parties involved. The 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. Resolution of these issues will save judicial resources and millions of dollars in litigation and estate expenses. "Interlocutory appeal is favored where reversal would substantially alter the course of the district court proceedings or relieve the parties of significant burdens." *Sandifer v. U.S. Steel Corp.*, 2010 WL 61971, at *5 (N.D. Ind. Jan. 5, 2010). From the outset, the Mortgagees have requested this court to rule on the issues presented. *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]. Instead of directly addressing and resolving the issues, the case has proceeded with a result of ever increasing administrative costs and delay in the foreclosure process. Order [Dkt. 540], pp. 5-6. The Mortgagees' respectfully request that this Court take advantage of this opportunity to have these issues resolved now instead of saving resolution until the end of the case at which point harm to the Mortgagees' rights and interests cannot be undone and the proverbial bell cannot be unrung.

E. The Petition for Certification of Interlocutory Appeal Was Filed Within a “Reasonable Time.”

A petition for leave to file an interlocutory appeal must be filed within a reasonable time after entry of the order sought to be appealed. *Cima v. Wellpoint Health Networks, Inc.*, 2008 WL 4449531, at *2 (S.D. Ill. Sept 29, 2008). The Mortgagees filed their Motion on the same date the Order was entered.

IV. CONCLUSION

For the reasons set forth above, the Mortgagees respectfully request that the Court enter an Order certifying for 28 U.S.C. § 1292(b) review by the United States Court of Appeals for the Seventh Circuit pure questions of law raised by the Court’s October 26, 2020 Order.

WHEREFORE, for all of the reasons set forth in the attached memorandum in support, the Mortgagees respectfully moves the Court to certify for 28 U.S.C. § 1292(b) review by the United States Court of Appeals for the Seventh Circuit the pure questions of law raised by the Court’s October 26, 2020 Order.

Dated: October 27, 2020

Respectfully submitted,

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Certificates, Series 2018-SB48*

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
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UNITED STATES SECURITIES AND
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Defendants.

Case No. 1:18-cv-5587

Hon. John Z. Lee

**ORDER GRANTING MOTION UNDER 28 U.S.C. § 1292(B)
TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

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”) ask this court to certify for interlocutory appeal its conclusions and Order (Dkt. 825) (“Order”) that the Receiver can properly sell the properties subject to the Mortgagees’ pre-existing liens and that the Receiver can sell said properties using the means and manner identified in the Receiver’s Ninth Motion to Confirm the Sale of Certain Real Estate and for the Avoidance of Certain Mortgages, Claims, Liens, and Encumbrances [Dkt. 749] (“Sale Motion”) and over the Mortgagees’ Objection (the “Objection”) [Dkt. 769].

On October 26, 2020, the Court overruled the Mortgagees’ Objection and granted the Sale Motion. Dkt. 825. As requested in the Mortgagees’ motion to certify for interlocutory appeal

(Dkt. 833)¹, the Court now finds that the Order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” The Mortgagees timely filed their motion to certify for interlocutory appeal the Order. For the reasons stated below, the Court **GRANTS** the Mortgagees motion to certify order for interlocutory appeal.

Pursuant to 28 U.S.C. § 1292(b), a district judge who is of the opinion that an order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” may certify the order for interlocutory appeal. The Court considers four criteria: (1) the question presented must be controlling; (2) it must be a question of law; (3) there must be substantial grounds for difference of opinion; and (4) its resolution must have the potential to speed up resolution of the litigation. *Armada Sing. PTE Ltd. v. Amcol Int’l Corp.*, 2017 WL 1862836, at *2 (N.D. Ill. May 9, 2017). The Mortgagees have satisfy each criteria.

The questions presented in the motion to certify are ones that control this entire receivership. “A question of law may be deemed ‘controlling’ if its resolution is quite likely to affect the further course of the litigation.” *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Resolution of the questions presented will affect the course of this litigation. The Receivership Estate consist of almost exclusively commercial real property. The questions presented address the Mortgagees’ rights and interests in these properties and what rights, if any, the Receiver has in relation to these assets and the related

¹ The Mortgagees also filed their Notice of Appeal of their direct appeal pursuant to 28 U.S.C. §1292(a)(2). Notwithstanding the Notice of Appeal, the Court believes the motion to certify is proper and is granted for the reasons stated herein.

disposition of those assets for less than what is due and owing the Mortgagees. Resolution of these questions goes to the heart of this case and can and will affect the outcome of this litigation.

Moreover, the questions presented are purely questions of law. A question of law is “a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine.” *Ahrenholz*, 219 F.3d at 676. The questions presented here directly relate to and are controlled by the Mortgagees’ state law security interests and the laws regarding a federal equity receiver’s rights in the same collateral. This Court has already held the Receiver takes his interests in the Properties subject to the Mortgagees’ pre-existing security interests and neither the Receiver nor the Court can extinguish the Mortgagees’ pre-existing security interests. (Dkt. 311). The Receiver’s Sale Motion and sale of the Mortgagees’ properties also involve constitutional issues. The Mortgagees argued in their Objection that the Sale Motion violates the Mortgagees’ Fourteenth Amendment’s due process rights. This constitutional issue is grounds to find the Mortgagees present a question of law. *Dahlstrom v. Sun-Times Media, LLC*, 39 F. Supp. 3d 998, 1002-03 (N.D. Ill. 2014).

Likewise, the Court finds the questions presented have not been directly resolved in the Seventh Circuit and there is clearly a division of authority. A court may find there is substantial grounds for difference of opinion if: (1) “there are substantial conflicting decisions regarding the claimed controlling issue of law” or (2) “the question is ‘not settled by controlling authority’ and there is a ‘substantial likelihood ... that the district court ruling will be reversed on appeal.’” *Gamboa v. City of Chicago*, No. 03 C 219, 2004 WL 2877339, at *4 (N.D. Ill. Dec. 13, 2004) (internal citation omitted). The questions presented show there are substantial conflicting decisions regarding the claimed controlling issues of law.

The *Pennant* decision expressly rejected sales that did not satisfy all secured liens, absent a consensual agreement by the impacted parties. *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015). Moreover, there are differences of opinion before this very Court. *SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957 (N.D. Ill.) also involves an SEC receivership over an estate involved in a commercial real estate Ponzi scheme. In *Northridge* has continued to make debt service payments on loans secured by property held in the estate. Furthermore, in *Northridge*, Fannie Mae received a full payoff as a result of the SEC receiver's sale of the borrower's commercial real estate and this Court ordered that on the closing of the sale of the mortgagee's collateral property, the "Receiver is authorized *and 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." *SEC v. Northridge Holdings, Ltd., et al.*, No. 19-cv-05957 (N.D. Ill. May 19, 2020), Order [Dkt. 147]. Finally, the Court notes the division of authority outside this district as provided in *SEC v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271 (D. Utah 2009). In *Madison*, the Court held (i) the receiver may not keep a commercial real estate property in a receivership where the value of the property is less than the loan amount owed to the secured lender, the receiver was required to lift the receivership order's stay and allow the lender to foreclose, (ii) where the commercial property had no equity for the receivership estate and the lenders' liens exceeded the value of the property, and (iii) the receiver must make monthly principal and interest payments and bring current any outstanding amounts for loans secured by property held in the estate.

Finally, the Court finds that resolution of the questions of law will materially advance the ultimate termination of the litigation. Interlocutory appeal is favored where reversal would

substantially alter the course of the district court proceedings or relieve the parties of significant burdens.” *Sandifer v. U.S. Steel Corp.*, 2010 WL 61971, at *5 (N.D. Ind. Jan. 5, 2010). The questions presented by the Mortgagees are reoccurring issues presented in this litigation. The Court finds that granting the motion to certify and resolving the issues presented will benefit all parties and potentially save judicial resources and millions of dollars in litigation and estate expenses.

Accordingly, the Court **FINDS** the questions presented by the Mortgagees are controlling questions of law, that there are substantial grounds for difference of opinion, and the resolution of which would speed up this litigation.

CONCLUSION

For the above-stated reasons, the Court **GRANTS** the Mortgagees motion to certify order for interlocutory appeal (Dkt. 833) and **CERTIFIES** the Order granting the Sale Motion (Dkt. 825) for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Mortgagees may proceed to seek interlocutory appeal, pursuant to Federal Rule of Appellate Procedure 5.

IT IS SO ORDERED

Dated:

Entered:

The Honorable John Z. Lee