UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:21-cv-694-CEM/DCI

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

HARBOR CITY CAPITAL CORP., *et al.*,

Defendants,

and

CELTIC ENTERPRISES, LLC and TONYA L. MARONEY,

Relief Defendants.
_____/

BENWORTH'S *AMENDED* RESPONSE TO RECEIVER'S MOTION FOR CLARIFICATION AND OTHER RELIEF[1]

Non-Party, BENWORTH CAPITAL PARTNERS LLC, as servicer for Mira Capital LLC, ZF Capital LLC, LN Investments LLC, Capital Partners 2 LLC, and Maria L. Santayana Living Trust (collectively, "Mira Lenders") (together with the Mira Lenders, "Benworth"), by and through undersigned counsel, hereby files its opposition response to Receiver, Katherine C. Donlon's

[1] Amends and replaces Benworth's initial response [ECF No. 140].

("Receiver") Motion for Clarification and Other Relief ("Motion") [ECF No. 137], and states:

I. PRELIMINARY STATEMENT

Benworth is a non-party to these proceedings and is neither named nor mentioned in the SEC's Complaint. Yet, in violation of Benworth's due process rights, the Receiver now seeks authority to force an involuntary dismissal of Benworth's foreclosure action (which includes *in personam* relief), compel satisfaction of Benworth's loan instruments, and hold the sale proceeds in the Receiver's trust account indefinitely without a proposed resolution as to disbursement of the amounts Benworth is contractually entitled to.

Both the United States Constitution and Florida Constitution specifically state that contractual rights are not to be impaired. Notwithstanding, the Receiver's Motion seeks to impermissibly interfere with Benworth's constitutionally protected property rights and satisfy Benworth's mortgage for less than the full amount of the secured indebtedness. In short, neither the Receiver's appointment nor equitable nature of these proceedings imbue Receiver with unfettered authority to reduce, impair, or eliminate Benworth's property rights.

II. BRIEF BACKGROUND

On or about April 20, 2021, the Securities and Exchange Commission (SEC) filed its Complaint for Injunctive and Other Relief against Harbor City

Capital Corp., Harbor City Ventures LLC, HCCF-1 LLC, HCCF-2 LLC, HCCF-3 LLC, HCCF-4 LLC, HCCF-5 LLC, Harbor City Digital Ventures Inc., HCC Media Funding LLC, and Jonathon P. Maroney ("JPM"), as Defendants, and Celtic Enterprises LLC ("Celtic") and Tonya L. Maroney, as Relief Defendants ("Complaint"). [ECF No. 1].

The Mira Lenders are the owner and holder of a certain Promissory Note, dated March 13, 2021, in the original principal amount of $1,800,000.00 ("Note"), executed by Celtic, as borrower, in favor of Benworth, as lender. As security for the Note, Celtic also executed and delivered a certain Mortgage Deed and Security Agreement ("Mortgage"), dated March 13, 2021, in favor of Benworth, as well as a Collateral Assignment of Leases, Rents and Profits, all of which encumbers certain real property located at 143 Landing Island Drive, Indian Harbour Beach, Florida 32937 (the "Property"). A further security, JPM also executed a Guaranty of payment and performance in favor of Benworth. Contemporaneously with Note, Mortgage, and other collateral loan documents, including the Guaranty (collectively, "Loan Documents"), Benworth executed an Assignment of Deed of Trust/Mortgage to the Mira Lenders. Pursuant to a Master Mortgage and Servicing Agreement between Benworth and each of the Mira Lenders, Benworth is authorized to enforce the terms of the Loan Documents and foreclose upon same. *See* ECF No. 133-1, pp.16-64.

Celtic and JPM defaulted under the Loan Documents by failing to make the payment due on June 1, 2021 and all subsequent payments. As a result, unpaid principal and interest due under the Note bore "interest at the highest rate allowable by law commencing on the date immediately following the day upon which the payment was due." *See* ECF No. 133-1, p.17. The outstanding amounts accrue interest at a default rate of 25% per annum. *See* Fla. Stat. §§ 687.071(2) & 687.02(1). Additionally, in the event of default, the borrower is liable for "all and singular the costs, charges, and expenses incurred by the Lender in the enforcement of its rights hereunder, including, but not limited to reasonable attorneys' fees." *See* ECF No. 133-1, pp.16-17.

As a result of Celtic and JPM's default under the loan documents, on October 19, 2021, Benworth commenced foreclosure proceedings in the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida ("Foreclosure Action") [ECF No. 133-1].[2] Contemporaneously with the foreclosure complaint, Benworth also filed its *lis pendens*, dated October 18, 2021, which was docketed on November 8, 2021 and recorded on November 12, 2021. [ECF No. 133-3].

[2] Due to a processing issue with the Brevard County Clerk of Courts, the foreclosure complaint was not docketed until November 8, 2021. The filed date and timestamp of the original submission are clearly reflected in the top left hand margin. *See* ECF No. 133-1 ("E-Filed 10/19/2021 09:35:32 PM").

On June 16, 2021, the SEC sought appointment of the Receiver on an "unopposed" basis, which was ultimately granted by the Court on November 8, 2021 ("Receivership Order") [ECF No. 75].

On October 25, 2022, *nearly a year after entry of the Receivership Order*, the Court entered an order granting the Receiver's Verified "Unopposed" Motion to Approve Private Sale of the Property ("Sale Motion") [ECF Nos. 111, 118].[3] While the Receiver's "Unopposed" Sale Motion sought authority to "transfer title to the Property by Receiver's Deed to the Buyer, free and clear of all claims, liens, and encumbrances" [ECF No. 111, p.9], none of the orders on the Sale Motion include such specific language. [ECF Nos. 113, 118].

On December 13, 2022, the Receiver filed her Motion to Determine Interest and Fees as to Non-Party Mortgage Holder for Receivership Property ("Capping Motion") [ECF No. 125], which Benworth opposed on January 10, 2023. [ECF No. 133].

On January 1, 2023, this Court entered an Order to Show Cause concerning Benworth's Foreclosure Action and the Capping Motion [ECF No. 136], which prompted the Receiver to subsequently file a Motion for Clarification and Other Relief ("Motion for Clarification") [ECF No. 137], seeking authority to force a dismissal of Benworth's Foreclosure Action *in toto*,

[3] The Receiver's "Unopposed" Sale Motion was never noticed for hearing in contravention of 28 U.S.C. § 2001(b).

compel satisfaction of Benworth's Mortgage, and hold the proceeds generated from the sale of the Property in the Receiver's trust account indefinitely *without* offering a proposed resolution as to the amounts Benworth is contractually entitled to.

III. LEGAL ARGUMENT AND INCORPORATED MEMORANDUM OF LAW

Florida law recognizes that a mortgage is a constitutionally protected property right. *City of Panama City v. Head*, 797 So.2d 1265, 1267 (Fla. 1st DCA 2001); *see* Fla. Const. Art. I, § 10; U.S. Const. Art. I, § 10, cl. 1. "It is axiomatic that security interests in property are determined by state law, *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979), and 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, *Marshall v. New York*, 254 U.S. 380, 385, 41 S.Ct. 143, 145, 65 L.Ed. 315 (1920)." *Sec. & Exch. Comm'n v. Wells Fargo Bank, N.A.*, 848 F.3d 1339, 1344 (11th Cir. 2017); *accord, e.g.*, *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (observing that, as a general matter, "property" and "interests in property" are creatures of state law) (citations omitted).

"First and foremost, the appointment of a receiver in equity is not a substantive right; rather, it is an ancillary remedy." *Nat'l P'ship Inv. Corp. v. Nat'l Hous. Dev. Corp.*, 153 F.3d 1289, 1291 (11th Cir. 1998). As a general matter, a creditor's right to receivership property is determined by reference

to whether the alleged interest arose before or after a receiver's appointment. *See Maxi Sales Co. v. Critiques, Inc.,* 796 F.2d 1293, 1297 n.2 (10th Cir.1986) ("appointment of a receiver does not determine any rights nor destroy any liens"); *Modart, Inc. v. Penrose Indus. Corp.,* 404 F.2d 72, 74 (3d Cir.1968) (holding creditors' rights to property *in custodia legis* are fixed at time of receiver's appointment); *Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 60 S.E.2d 615, 617 (S.C.1950) ("A primary concept of the law of receivers is that a receiver stands in the shoes of the debtor with respect to the property of the latter and in his possession it is subject to valid liens and other contractual obligations."). It is undisputed that Benworth, as servicer for the Mira Lenders, holds a first-priority Mortgage in the Property which was perfected prior to the Receivership Order.

While Benworth recognizes that "it has long been recognized that under appropriate circumstances, a federal court presiding over a receivership may authorize the assets of the receivership to be sold free and clear of liens and related claims", *S.E.C. v. Capital Cove Bancorp LLC*, 2015 WL 9701154, at *4 (C.D.Cal. Oct. 13, 2015), such a sale cannot be with prejudice to Benworth's secured interests. *See In re Real Prop. Located at Redacted Jupiter Drive, Salt Lake City, Utah*, 2007 WL 7652297 (D.Utah Sept. 4, 2007) ("Just as the state law right of Lenders to the relative priority of their liens does not change because of the creation of a receivership, the general rule is that the right of

the Lenders to receive interest on the loans that are secured by those liens also is not affected. The appointment of a receiver of the property of the litigant by a court of equity ... does not deprive a claim of any interest bearing rights it may have.")[4] (quotations omitted); *Grubb v. FDIC,* 833 F.2d 222, 226 (10th Cir.1987) ("[A] secured creditor is entitled to interest on its claim to the extent of its security, regardless of whether that interest accrues before or after insolvency."); *Ticonic National Bank v. Sprague,* 303 U.S. 406, 412 (1938) (holding that "liens, equities or rights arising prior to insolvency and not in contemplation thereof, are not invalidated.").

Although the Court can authorize the sale of real estate within the receivership estate, this power is limited by the requirements for sale set forth in 28 U.S.C. § 2001. *United States v. Brewer*, 2009 WL 1313211, at *1 (M.D.Fla. May 12, 2009). At minimum, the Receiver must sufficiently establish that the proposed sale and distribution of the sale proceeds are consistent with principles of equity and the goal of a receivership to ensure the orderly and efficient administration of the estate for the benefit of creditors. *Sec. & Exch.*

[4] "Florida law expressly recognizes a lender's right to charge default interest if it is provided for in the underlying loan documents, and courts in Florida generally may not alter the lender's contractual right to default interest based on equitable considerations." *In re Heritage Hotel Associates, LLC*, 2021 WL 2646533, at *7 (Bankr.M.D.Fla. June 28, 2021). "The institution of a receivership does not stop the running of interest contracted for by a secured party … A general call on the 'equitable' powers of the court is insufficient to override clear state law entitlements." *Jupiter Drive,* 2007 WL 7652297, at *7 (citing *Grubb,* 833 F.2d at 225) (noting that "appointment of a receiver cannot deprive a party to the suit or a claimant of his contractual rights").

Comm'n v. Champion-Cain, 2020 WL 2309270, at *6 (S.D.Cal. May 8, 2020) (citing *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)) ("[A] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors."). "[T]he rights of creditors of a receivership must be balanced against the need for expeditious administration of the receivership; a district court in overseeing a receivership must 'make rules which are practicable as well as equitable.'" *Hardy*, 803 F.2d at 1039 (quoting *First Empire Bank-New York v. Fed. Deposit Ins. Corp.*, 572 F.2d 1361, 1368 (9th Cir.1978)).

While the Receiver struggles with a solution for disposing of the Property with hopes to pay Benworth less than what it is contractually entitled to, Benworth continues to suffer pecuniary loss without receiving rents or adequate protection, to its detriment.[5] Despite entry of the Receivership Order in November 2021, the Receiver has yet to liquidate the Property. Nearly a year passed before the Receiver finally filed her Sale Motion. [ECF No. 111]. The delays and accruing costs bemoaned by the Receiver are largely a result of her own actions. Now, *over fifteen months* since entry of the Receivership Order and four months since this Court approved the proposed sale with a stale

[5] *See Sec. & Exch. Comm'n v. Nadel*, 2018 WL 965834, at *2 (M.D.Fla. Feb. 20, 2018) ("Wells Fargo's secured rights, including the right to rents, in the Rite Aid property existed pursuant to the terms of the loan documents before the receivership was formed. The provision in the Assignment of Rents automatically terminating the borrower's right to collect rents upon an event of default was triggered … the day the receivership was filed.").

purchase price, the Receiver seeks to unjustifiably impair Benworth's constitutionally protected property rights to increase the Receiver's share of the pie, even though "the proceeds from the approved sale exceed the alleged value of Benworth's lien." [ECF No. 136, p.15]. *See Seaboard Nat. Bank v. Rogers Milk Products Co.*, 21 F.2d 414, 417 (2d Cir.1927) ("We wish to condemn in no uncertain terms the practice of permitting the receiver to sell free of liens and without the consent of the lienors, under such circumstances.").

More concerning is that a hearing on the Sale Motion was never conducted pursuant to 28 U.S.C. § 2001(b) which would have afforded Benworth the opportunity to be heard on the Receiver's proposed sale procedures. "Due process requires notice and an opportunity to be heard. … Due process essentially requires that the procedures be fair. … Generally, if government action will deprive an individual of a significant property interest, that individual is entitled to an opportunity to be heard." *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir.1992) (citations omitted). Rule 2001(b) provides that "*[a]fter a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs*, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration ..." 28 U.S.C. § 2001(b) (emphasis added).

The Court previously found good cause to relieve the Receiver from *some* of the judicial sale requirements of Rule 2001(b);[6] however, there must still be a "*hearing with adequate notice given to all interested persons*." *Fed. Trade Comm'n v. E.M. Sys. & Servs., LLC*, 2016 WL 11110381, at *3 (M.D.Fla. Mar. 4, 2016) (citing 28 U.S.C. § 2001(b)) (emphasis added). "While the Court may not waive the mandatory requirements of § 2001(b), the parties may. … Within a stipulated receivership order, the parties may confer broad powers upon the receiver up to and including the private sale of real property without § 2001(b)'s formalities. However, in this case, … the parties have not waived the mandatory requirements of § 2001(b)." *Sec. & Exch. Comm'n v. EB5 Asset Manager,* 2016 WL 7508252, at *2 (S.D.Fla. Mar. 25, 2016) (citations omitted); *see also Sec. & Exch. Comm'n v. Gity*, 2022 WL 832388, at *2 (S.D.Fla. Jan. 4, 2022).

"While this Court has broad discretion over the terms and conditions of the sale, the notice requirement for a judicial sale of property is more strict." *United States v. Little*, 2008 WL 2676808, at *2 (E.D.Cal. June 30, 2008). "Congress … considered deviating from the rigors of § 2001(b)'s procedures in relaxing the process for the sale of personalty. The absence of any such

[6] The cases cited in the Report and Recommendation in support of deviating from the judicial sale procedures of Rule 2001(b) involved disposition of personal property, not real estate. [ECF No. 113, p.2]. Benworth has been unable to find any case law which allows a Receiver to waive the notice *and* hearing requirements for sale of real property under Rule 2001(b).

authorization in the sale of realty suggests that Congress intended the more stringent procedures to be the rule when ordering the sale of real property." *S.E.C. v. T-Bar Res., LLC*, 2008 WL 4790987, at *3 (N.D.Tex. Oct. 28, 2008); *see also Sec. & Exch. Comm'n v. Wang*, 2015 WL 13950300, at *3 (C.D.Cal. Apr. 28, 2015). "The Court does not have discretion to waive the requirements of § 2001(b) … The purpose of the safeguards in 2001(b) is to prevent the opportunity for frauds in private sales." *Huntington Nat. Bank v. JS & P,* 2014 WL 4374355, at *2 (E.D.Mich. Sept. 4, 2014) (quoting *Acadia Land Co. v. Horuff,* 110 F.2d 354, 354–355 (5th Cir.1940)) (citations omitted); *see Sec. & Exch. Comm'n v. EB5 Asset Manager, LLC*, 2016 WL 7508252, at *2 (S.D.Fla. Mar. 25, 2016) ("[T]he Court may not waive the mandatory requirements of § 2001(b)").[7] The stringent requirements of Rule 2001(b) "are, by the express terms of the statute, made conditions precedent to a valid sale. … A sale made without compliance to these requirements is void." *S.E.C. v. Kirkland*, 2007 WL 624278, at *2 (M.D.Fla. Feb. 23, 2007) (quoting *Acadia Land Co.,* 110 F.2d at 354-55).

[7] *See SEC v. Yin Nan "Michael" Wang, et al.*, 2015 WL 13950300, at *2 (C.D.Cal. Apr. 28, 2015) ("Numerous courts, including the Ninth Circuit, have recognized that the procedural provisions of section 2001(b) are mandatory and may not be waived by the court."); *United States v. Brewer*, 2009 WL 1313211, at *1 (M.D.Fla. May 12, 2009) (court's power to authorize sale of real estate within a receivership estate is "limited" by the "requirements for sale set forth in 28 U.S.C. § 2001").

The nature and substance of the Receiver's Sale Motion [ECF No. 111], and subsequent Capping Motion [ECF No. 125] and Motion for Clarification [ECF No. 127], invariably prejudice Benworth's interests. As a non-party, due process affords Benworth the right to be heard on the merits. A hearing is necessary "to determine whether the Receivers' requests are in the best interest of the receivership estates" and "also provide entities with an [i]nterest in the [property] the opportunity to object to the sale, and to the Receivers' proposal." *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, 2015 WL 4511337, at *6 (N.D.Ill. July 24, 2015).

Here, the Receiver's proposal for clearing title to the Property includes, among other things, forcing a dismissal of the entire Foreclosure Action which unconstitutionally deprives Benworth of its *in personam* claims on the Note and Guaranty. [Mot, pp.7-8]. *See Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 843 (5th Cir.2019) ("*in rem* jurisdiction over the receivership estate imbues the district court with broad discretion to shape equitable remedies necessary to protect the *estate*. They do not support that a district court's *in rem* jurisdiction over the estate may serve as a basis to permanently bar and extinguish independent, non-derivative third-party claims that do not affect the *res* of the receivership estate.").

Benworth submits the following offers a more practical and equitable solution to the Receiver's proposed sale procedures:

(1) Allow the private sale of the Property to close by a date certain, after full compliance with 28 U.S.C. § 2001(b), unless waived in writing;

(2) Instruct the title company to disburse to Benworth all *undisputed* amounts its owed (*i.e.*, principal, contract interest, and pre-receivership attorney fees and costs);

(3) Escrow the entire net balance with the title company or other authorized party[8] pending the Receiver's appropriate filing of an action in either state court or this Court to adjudicate the disputed sums by a date certain.[9]

Benworth would also fully cooperate with the title company to clear the Schedule B-I requirements for closing, including partially dismissing the *in rem* counts in the Foreclosure Action, discharging the *lis pendens*, and tendering a satisfaction of Mortgage consistent with the procedures outlined herein. Any supplemental sale order should clearly state that Benworth's secured interests attach to the sale proceeds as substitute collateral for the Mortgage with the same extent, force, and priority as it currently exists, subject to the filing of an appropriate action by the Receiver to adjudicate the

[8] Given the Receiver and her counsel's antagonistic position to date, Benworth does not consent to the Receiver's law firm holding any portion of the sale proceeds, especially without an escrow agreement in place. *See Watkins v. NCNB Nat. Bank of Florida, N.A.*, 622 So.2d 1063, 1064 (Fla. 3d DCA 1993) ("escrow holders have a fiduciary duty to exercise reasonable skill and ordinary diligence"). An alternative solution is to have the disputed portion of the sale proceeds held in escrow by an agreed-upon escrow agent, title company or title underwriter.

[9] "[T]he use of summary proceedings to determine appropriate relief in equity receiverships, as opposed to plenary proceedings under the Federal Rules, is within the jurisdictional authority of a district court." *Hardy*, 803 F.2d at 1040; *see Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 552 (6th Cir.2006) ("The district court may require all such claims to be brought before the receivership court for disposition pursuant to summary process consistent with the equity purpose of the court.") (citations omitted).

amounts she disputes within a specific timeframe. Or, alternatively, the Court should grant Benworth leave to return to state court for sole purpose of reducing the amounts owed to final judgment. "This promotes judicial efficiency and reduces litigation costs to the receivership." *Hardy*, 803 F.2d at 1040.

In either scenario, in the event the Receiver fails to timely close on the Property by date certain, Benworth should be automatically entitled to relief from the Receivership Order to continue its Foreclosure Action in state court to allow Benworth to liquidate its collateral through public auction with any surplus proceeds inuring to the benefit of the receivership estate.

The Receiver makes much ado about undersigned's meet and confer email on February 1, 2023 [ECF No. 137-6], which was not intended to interfere with the Receivership Order or any other orders of this Court. Albeit over Benworth's objection, the Receiver is indeed authorized to sell the Property free and clear of Benworth's Mortgage; *however, the Mortgage must be paid at closing to satisfy it*. [ECF No. 111, p.5 – "the Property is mortgaged and will be satisfied at the closing"]. Over $2.5 million owed to Benworth cannot languish in escrow while the Receiver delays in obtaining an adjudication on the total amounts owed. Undersigned's February 1, 2023 email objected to any efforts by the title company *and* the Receiver to unilaterally escrow the entirety of the sale proceeds and then proceed to obtain a comfort

order after the fact via the Motion for Clarification. *See The Florida Bar v. Hines*, 39 So.3d 1196, 1200 (Fla.2010) ("closing and escrow agent[s], owe a fiduciary duty to all of the principal parties … a closing agent has a duty to supervise the closing in a 'reasonably prudent manner.' ").

Benworth did not have the benefit of the earlier e-mail exchange between the Receiver and title company wherein the title company expressly stated that it could not close the transaction because, among other things, *"[t]he original order authorizing the sale did require that the mortgage be paid and satisfied at closing, and we still need that to be accomplished"* [ECF No. 137-5, p.2] and that *"interest and attorney fees cannot be held in escrow this needs to be negotiated prior to closing final payoff to reflect total due."* [*Id*. at p.5] (emphasis added). Thus, if the buyers' selected title company is unwilling to close the transaction in escrow, then it is unclear why the Receiver is seeking such relief now.

To the extent there are Schedule B-I requirements on the title commitment which necessitate Benworth's involvement, then Benworth will cooperate to resolve them so long as it does not prejudice Benworth's interests. However, Benworth is not obligated to dismiss all of its *in personam* claims on the Note and Guaranty[10] or provide a satisfaction of mortgage without

[10] Which would also potentially subject Benworth to fees and costs pursuant to Fla.R.Civ.P. 1.420 and Fla. Stat. § 57.105 as the loan instruments contain a prevailing party clause. *See*

receiving a single penny of the sale proceeds. In her Fifth Quarterly Status Report filed a day after her Motion for Clarification, the Receiver represented that *"absent an agreement as to the attorney's fees and interest vis-à-vis the foreclosure proceeding, the title agent cannot close on the sale of this transaction."* [ECF No. 138, p.12].[11] Thus, if the Receiver just agreed to the payoff provided by Mr. Rey in October 2022, the Property could have been sold already instead of the Mortgage continuing to accrue interest and fees. Rather, the Receiver has opted to maintain the steadfast stance that Benworth is not entitled to full repayment of its mortgage loan.[12]

"The United States Constitution specifically states that contractual rights are not to be impaired. U.S. Const. Art. I, § 10, cl. 1. That does not mean that contractual rights trump all, but it does mean that they are not to be lightly disregarded. … The consequences may be harsh for the Investors, but the law is clear. Equity has its limits[.]" *Jupiter Drive,* 2007 WL 7652297, at

Boca Airport, Inc. v. Roll-N-Roaster of Boca, Inc., 690 So.2d 640, 641 (Fla. 4th DCA 1997) ("a voluntary dismissal by the claimant makes the opposing party a 'prevailing party' as to the issue of entitlement to fees").

[11] In her Fourth Quarterly Status Report filed November 1, 2022, the Receiver represented that *"The Receiver, her real estate broker, and her counsel are working to schedule the closing on the property, but remain concerned as to the substantial sums being sought in attorneys' fees and interest vis-à-vis Celtic Enterprise's mortgage with Benworth."* [ECF No. 120, p.10]. The Capping Motion was filed over a month later on December 13, 2022 [ECF No. 125].

[12] There appears to be other contingencies preventing the closing which are unrelated to the dispute with Benworth. Not all payoffs have been received by the title company and the proposed sale is financed, and thus it is unclear if the transaction is cleared to close. *See* ECF No. 137-5, p.4.

*9; *see S.E.C. v. Madison Real Estate Group, LLC*, 647 F. Supp.2d 1271, 1277 (D.Utah 2009) ("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.").

Accordingly, to the extent this Court is inclined to grant the Receiver's Motion for Clarification, Benworth respectfully requests that the proposed sale and distribution of the sale proceeds be consistent with principles of equity and in conformity with 28 U.S.C. § 2001(b). As discussed above, fashioning a sale and disbursement procedure which will still provide a financial benefit to the receivership estate and Benworth without prejudicing either party's rights, while also preserving the Receiver's purported challenges to Benworth's indebtedness, will accomplish the goal of receivership: to ensure the orderly and efficient administration of the estate for the benefit of creditors. *Champion-Cain*, 2020 WL 2309270, at *6; *Hardy*, 803 F.2d at 1038.

WHEREFORE, for the reasons more particularly set for above, Benworth respectfully requests the Court enter an Order denying the Receiver's Motion for Clarification, or in the alternative, in accordance with the proposed procedures outlined above, (i) permitting the private sale of the Property, in full compliance with 28 U.S.C. § 2001(b), by a certain closing date, free and clear of the Mortgage with such secured interest attaching to the proceeds of the sale with the same force and extent, (ii) instructing the title

company to disburse to Benworth all *undisputed* sums (*i.e.*, principal, contract interest, and pre-receivership attorney fees and costs), and (iii) escrow the balance with the title company or underwriter pending the Receiver's appropriate filing of an action to adjudicate the disputed sums within a time certain or granting Benworth leave to reduce the amounts owed to final judgment, further requiring that if the Property does not close by a date certain that Benworth be granted leave to finalize its Foreclosure Action, and for such other relief as the Court deems just and proper.[13]

Dated: February 16, 2023

Respectfully Submitted,

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By: /s/ *Alexis S. Read*
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[13] Benworth expressly reserves the right to amend or supplement this Response in the future.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 16, 2023, a true and correct copy of the foregoing was served via Notice of Electronic Filing (CM/ECF) to all parties on the Court's Service List.

By: /s/ *Alexis S. Read*
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