

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 RESPONSE TO RECEIVER'S
EMERGENCY AMENDED MOTION FOR
CLARIFICATION AND OTHER RELIEF**

Non-Party, BENWORTH CAPITAL PARTNERS LLC, as mortgage servicer ("Benworth"), by and through undersigned counsel, hereby files its opposition response to Receiver, Katherine C. Donlon's ("Receiver") Emergency Amended Motion for Clarification and Other Relief ("Emergency Motion")

[ECF No. 145], as follows:¹

Notwithstanding the Receiver’s inappropriate and improper disclosure of settlement communications despite there being no good cause or basis to admit same as evidence under Federal Rule of Evidence 408(d),² there is absolutely nothing stopping the Receiver from closing the Property as previously approved by this Court, free and clear of Benworth’s Mortgage which should be – as represented by the Receiver – **“satisfied at the closing.”** [ECF No. 111, p.5].

The Receiver seeks to assign blame to Benworth for allegedly “stymieing” the sale [Em. Mot., ¶11]; however, it has been eight months since the Purchase and Sale Agreement was executed [ECF No. 111-1] and five months since the sale was approved [ECF No. 118], and the Property still has not closed under the terms of the Court’s original sale order, and now there is apparently both a new lender *and* title company further complicating this transaction. [Em. Mot., ¶5].³

Instead of engaging in a needless dispute with Benworth regarding the

¹ All capitalized terms not otherwise defined herein shall have the same meaning as set forth in Benworth’s Amended Response to the Receiver’s Motion for Clarification [ECF No. 142].

² “[T]he policy behind Rule 408 is to encourage freedom of discussion with regard to compromise.” *Affiliated Mfrs., Inc. v. Aluminum Co. of Am., Inc.*, 56 F.3d 521, 526 (3d Cir.1995); *Ins. Servs. v. U.S. Fire Ins. Co.*, 119 F.3d 1505, 1512 (11th Cir.1997).

³ The Receiver refers to the opinions of the “buyer's new private mortgage broker” regarding Benworth’s rejection of an inequitable reduction to its mortgage debt without any hint of irony. Notably, Choice Mortgage, like Benworth, also operates as a private lender. [ECF No. 145-4].

outstanding mortgage debt, the Receiver could have closed the Property in October 2022 at a payoff of \$2,493,742.01 when the sale was first approved. [ECF No. 125-12]. Now, as anticipated, the default interest and fees accrued to date are considerably higher.⁴ To resolve this matter without resorting to further litigation, Benworth proposed a conditional, discounted payoff of \$2,472,973.96⁵ which would allow for an extended closing date and still generate significant net sale proceeds for the benefit of the receivership estate without the Receiver having to incur additional fees and costs to achieve the same outcome. Indeed, the proposed discounted payoff was, as of March 7, 2023, approximately \$20,769 less than the October 2022 payoff and approximately \$305,963 less than the actual payoff as of that date.⁶ However, despite reasonable proposals being presented, the Receiver rejected all compromise and is determined to litigate this matter to the bitter end – to the detriment of the estate and its creditors.

The Receiver's position up until now is perplexing, as she previously claimed that Benworth's "consent" is unnecessary because Benworth is a non-party and has not intervened in this matter. [ECF No. 141, p.15]. However, the Receiver is now demanding that Benworth "confirm in writing" a sale it never

⁴ Approximately \$2,787,566 with 25% default interest as of the date of this Response.

⁵ Good through March 7, 2023, subject to adjustment for additional interest, fees, and costs incurred through the actual date of closing. [ECF No. 145-3, p.4].

⁶ The payoff with 25% default interest would have been \$2,778,936.50 as of March 7, 2023.

agreed to in the first place and affirmatively “[acknowledge] that the disputed portion of the proceeds will be held in escrow pending further order of the court.” [Em. Mot., ¶¶6-7]. Clearly, this is no longer the same sale the Court approved back in October 2022.

Contrary to the Receiver’s representations, there are *insufficient* proceeds to escrow “150% of remaining disputed interest, fees, and costs.” [Em. Mot., ¶15(f)]. First, the contractual interest rate in the Note is 10%, not 9.75%. See **Exhibit “A”** attached. Second, 150% of the “disputed” amounts would equal \$888,945.28 as of March 22, 2023,⁷ which exceeds the anticipated net sale proceeds:

| | |
|---|----------------|
| Principal Balance: | \$1,800,000.00 |
| 10% Interest @ 493.15/per diem [5/1/2021 to 3/22/2023] | \$340,767.12 |
| Unpaid Charges | \$1,022.82 |
| Other Fees | \$138.75 |
| Trust Balance | \$(21,979.73) |
| Filing Fees/SOP/Title Search | \$3,371.00 |
| <i>Subtotal</i> | \$2,213,319.96 |
| Attorneys' Fees - Albert D. Rey, P.A. | \$33,390.00 |
| Attorneys' Fees - Becker & Poliakoff | \$3,851.00 |
| Attorneys' Fees - Cole, Scott & Kisane | \$6,759.00 |
| Attorneys' Fees - Carlyle Appellate Law Firm | \$18,495.00 |
| Attorneys' Fees - Emmanuel Perez, Esq. | \$3,240.00 |
| Attorneys' Fees - Read Law PLLC | \$15,744.50 |
| <i>Subtotal</i> | \$81,479.50 |

⁷ Although not entirely clear from the Receiver’s Emergency Motion, it appears the targeted closing date is now March 22, 2023. [Em. Mot., ¶12].

| | |
|------------------------------------|----------------|
| Total Payoff @ 10% Interest + Fees | \$2,204,799.46 |
|------------------------------------|----------------|

Disputed Amounts

| | |
|---|----------------|
| 25% Default Interest @ 1,232.88/ <i>per diem</i> [5/1/2021 to 3/22/2023] | \$851,917.81 |
| (less 10% Interest Received at Closing) | \$(340,767.12) |
| Total Disputed Interest | \$511,150.68 |
| | |
| Total Disputed Attorneys' Fees | \$81,479.50 |
| | |
| Total Disputed Amounts | \$592,630.18 |
| <i>150% of Disputed Amounts</i> | \$888,945.28 |

With a proposed purchase price of \$2,925,000, after payment of Benworth's principal (\$1,800,000) and 10% interest (\$340,767.12) plus payment to the homeowners' association (\$11,852), Central Florida Product Installation (\$12,333.15), Dream Docks (\$4,000), real estate professionals (\$118,000), and the Receiver (\$150,000)⁸ [ECF No. 145-2 p.5], the estimated net sale proceeds will be approximately \$488,000. Therefore, the Receiver's proposed escrow solution of 150% is simply not feasible.

Accordingly, if the Court is inclined to grant the Receiver's newly proposed sale procedures and allow the Receiver to escrow the entirety of the "disputed interest, fees and costs" over Benworth's objection, then the total sum of \$888,945.28 must be escrowed or a bond issued to protect Benworth's lien rights. In addition, there must be a firm scheduling order in place

⁸ The basis for the Receiver's entitlement to \$150,000 at closing is not evident from the docket.

concerning any ancillary or summary proceeding to be brought by the Receiver to adjudicate the “disputed amounts” owed to Benworth, including the reasonableness of attorneys’ fees, entitlement to contractual default interest, and the Receiver’s interest, if any, in the escrowed sums.

WHEREFORE, for the reasons more particularly set for above, Benworth respectfully requests the Court enter an Order denying the Receiver’s Emergency Amended 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, extent, and priority as it currently exists, (ii) instructing the title company to disburse to Benworth all undisputed sums (*i.e.*, unpaid principal, contract interest at 10%, *and* pre-receivership attorney fees and costs), and (iii) escrow the balance with the title company pending the Receiver’s filing of an appropriate 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.⁹

Dated: March 14, 2023

Respectfully Submitted,

READ LAW PLLC

*Co-Counsel for Benworth Capital
Partners LLC*

25 SE Second Ave, Eighth Floor

Miami, Florida 33131

Phone: (305) 209-2131

asr@alexisreadlaw.com

By: /s/ Alexis S. Read

Alexis S. Read, Esq.

Fla. Bar No. 98084

⁹ Benworth expressly reserves the right to amend or supplement this Response in the future.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 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
Alexis S. Read, Esq.
Fla. Bar No. 98084

EXHIBIT “A”

PROMISSORY NOTE

March 13th, 2021

\$1,800,000.00

FOR VALUE RECEIVED the undersigned, **CELTIC ENTERPRISES, LLC**, a Wyoming limited liability company, whose mailing address, 143 LANSING ISLAND DRIVE, INDIAN HARBOUR BEACH, FL 32937 (hereinafter referred to as the "Maker"), residing in the State of Florida, promises to pay to the order of **BENWORTH CAPITAL PARTNERS, LLC**, a Florida limited liability company (hereinafter referred to as "Lender"), at 7000 SW 97th Avenue, Suite 201, Miami, Florida 33173, or such other location or address as the Lender may direct from time to time, the principal sum of — **ONE MILLION EIGHT HUNDRED THOUSAND AND 00/100 DOLLARS (\$1,800,000.00)**—together with interest thereon at the rate of **NINE AND SEVENTY-FIVE HUNDREDTHS (9.75%)** percent per annum upon the principal balance outstanding from time to time, said principal and interest being payable as follows:

This Note shall be payable interest only in the amount of \$14,625.00 commencing on May 1st, 2021 and on the first day of each month thereafter until April 1st, 2022 at which time the entire unpaid principal balance plus any and all accrued interest shall be due and payable in full.

Lender hereby agrees to extend this Note for an additional twelve (12) months upon satisfactory review of Maker's payment history. Satisfactory is defined as Maker's payment history being current (12) months preceding the maturity date. Additionally, the Note extension will only be granted if the Maker has maintained the Property insured and has been current on all real estate property taxes for the preceding year.

This Promissory Note is secured by that certain Mortgage of even date herewith executed by **CELTIC ENTERPRISES, LLC**, a Wyoming limited liability company encumbering real property located **BREVARD** County, Florida.

At the option of the Lender, all sums advanced hereunder together with accrued interest thereon shall become immediately due and payable, without notice or demand, upon the occurrence of any one or more of the following events of default: (a) the Maker's failure to promptly pay in full any payment of principal or interest due under the Promissory Note; (b) the failure to pay when due any premium or homeowner's or flood insurance or Condominium association fees and/or assessments; (c) the death, dissolution, termination of existence, insolvency of, business failure appointment of a Receiver of any part of the property or assignment for the benefit of creditors by, or the commencement of any proceedings under any bankruptcy or insolvency laws, by or against any maker or guarantor hereof; (d) any breach by the Maker of the terms, covenants or conditions set forth in the Mortgage or any instrument, document or agreement which secures, collateralize or otherwise pertains to the loan evidenced by this Promissory Note.

Any deposits credited by the Lender or other property of any maker or guarantor hereof now or hereafter in the possession of the Lender, may at all times be held and treated as collateral and security for the payment of this Promissory Note, and all other indebtedness of liability, direct or indirect, joint and several, absolute or contingent, now existing or hereafter created, acquired or contracted, of the Maker to the Lender. The Lender may apply or set-off such deposits or other sums against said liabilities at any time in the case of makers, but only with respect to maker's liabilities in the case of guarantors.

No delay or omission on the part of the Lender in the exercise of any right hereunder shall operate as a waiver of such right or of any other right under this Promissory Note. A waiver by the Lender of any right or remedy conferred to it hereunder on any one occasion shall not be construed as a bar to, or waiver of, any such right and of any right or remedy conferred to it hereunder on any one occasion shall not be construed as a bar to, or waiver of, any such right and or remedy as to any future occasion.

The Maker agrees that in the event of a default in the payment of any installment of principal or interest or, if each and every of the terms and conditions of this Promissory Note or any instrument which secures or collateralize the payment of the sums hereunder are not duly performed, complied with, or

CELTIC

COMPOSITE EXHIBIT A

abided by, the whole of said indebtedness then outstanding shall thereupon, at the option of the Lender, become immediately due and payable. If this Promissory Note becomes in default and is placed in the hands of an attorney, the Maker agrees to pay 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.

The Maker and all persons now or hereafter becoming obligated or liable for the payment, do jointly and severally waive demand, notice of non-payment, protest, notice of dishonor and presentment.

The Maker does not intend or expect to pay, nor does the Lender intend or expect to charge, collect or accept, any interest greater than the highest legal rate of interest which may be charged under any applicable law. Should the acceleration hereof or any charges made hereunder result in the computation or earning of interest in excess of such legal rate, any and all such excess shall be and the same is hereby waived by the Lender, and any such excess shall be credited by the Lender to the balance hereof.

Each Maker, endorser, or any other person, firm or corporation now or hereafter becoming liable for the payment of the loan evidenced by this Promissory Note, hereby consents to any renewals, extensions, modifications, release of security or any indulgence shown to or any dealings between the Lender and any party now or hereafter obligated hereunder, without notice, and jointly and severally agree that they shall remain liable hereunder notwithstanding any such renewals, extensions, modifications or indulgences, until the debt evidenced hereby is fully paid.

The Maker agrees to pay a late charge equal to TEN (10.0%) percent of each payment of principal and or interest which is not paid within five (5) days of the date on which it is due. In the event that any payment is returned on account of insufficient or uncollected funds, maker shall additionally be liable for a return check charge of 5.0% of the amount of the check.

This Note does not contain a Prepayment Penalty. Borrower irrevocably waives the right to direct the application of any and all payments at any time hereafter received by Lender from or on behalf of Borrower, and Borrower irrevocably agrees that Lender shall have the continuing exclusive right to apply any and all such payments against the then due and owing obligations of Borrower in such order of priority as Lender may deem advisable.

Any payment of principal and or interest due under this Promissory Note which is not promptly paid on the date such payment becomes due, shall bear interest at the highest rate allowable by law commencing on the date immediately following the day upon which the payment was due. Upon the occurrence of any event of default as defined herein, all sums outstanding under this Promissory Note shall thereon immediately bear interest at the highest rate allowable by law, without notice to the Maker or any guarantor or endorser of this Promissory Note, and without any affirmative action or declaration on the part of the Lender.

This Promissory Note shall be construed and enforced according to the laws of the State of Florida, excluding all principles of choice of laws, conflict of laws or comity.

This Promissory Note and corresponding mortgage is hereby made for investment purposes only and is not intended for the use of a primary or homestead residence as defined by the Article X of the Florida Constitution.

The terms of this Promissory Note may not be changed orally.

From time to time, this Note may be extended or renewed in whole or in part; and at the time of any such extension or renewal, the rate of interest hereunder may be changed and/or fees in consideration thereof may be imposed and any related right or security may be waived, exchanged, surrendered or otherwise dealt with, all without affecting the liability of the maker, endorsers and guarantors, each of whom shall remain liable hereunder until the debt represented hereby is paid in full to the holder. The release of any party liable upon or in respect to this Note shall not release any other such party.

The purpose of this Promissory Note is for either business, commercial or agricultural purposes and as such is exempt from the provisions of the Real Estate Settlement and Procedures Act, Truth in Lending Act and Regulations X and Z.

INITIALS 

THE LENDER AND EACH BORROWER (MAKER), ENDORSER AND GUARANTOR OF THIS PROMISSORY NOTE HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT WHICH HE, SHE OR IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THIS PROMISSORY NOTE, OR ANY LOAN DOCUMENTS EXECUTED IN CONNECTION HERewith, OR THE FINANCING CONTEMPLATED HEREBY, OR ANY COURSE OF CONDUCT, COURSE OF DEALINGS, STATEMENTS (WHETHER ORAL OR WRITTEN) OR THE ACTIONS OF ANY PARTY HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE MORTGAGEE EXTENDING THE LOAN EVIDENCED BY THIS PROMISSORY NOTE.

CELTIC ENTERPRISES, LLC,
a Wyoming limited liability company



Date 3/13/2021

BY: JONATHAN PAUL ("JP") MARONEY, Manager

INITIALS 

**ACH RIDER TO PROMISSORY NOTE
(Interest Only)**

Rider To: Interest Only Note

Loan Number: 21-2379

THIS RIDER to Interest Only Note ("The Rider") is made on March 13th, 2021 and is incorporated into and shall be deemed to amend and supplement that certain Promissory Note of even date herewith (The "Note") given by CELTIC ENTERPRISES, LLC, a Wyoming limited liability company (The "Borrower(s)") to BENWORTH CAPITAL PARTNERS, LLC., a Florida limited liability company (hereinafter the "Lender") which Note is secured by that certain Mortgage (The "Mortgage") of even date herewith and covering the property more particularly described therein and located at:

LOT 32, LANSING ISLAND, PHASE ONE, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 36, PAGE 13, PUBLIC RECORDS OF BREVARD COUNTY, FLORIDA, LESS THE NORTH FOUR FEET THEREOF.

TOGETHER WITH:

A PARCEL OF LAND BEING A PORTION OF LOT 32 OF LANSING ISLAND, RECORDED IN PLAT BOOK 36, PAGE 13, OF THE PUBLIC RECORDS OF BREVARD COUNTY, FLORIDA, MORE PARTICULARLY DESCRIBED AS FOLLOWS: COMMENCE AT THE SOUTHEAST CORNER OF SAID LOT 32 AND RUN NORTH 12 DEGREES 19 MINUTES 34 SECONDS WEST ALONG THE EAST LINE OF SAID LOT, A DISTANCE OF 77.83 FEET TO THE POINT OF CURVATURE OF A 1738.81 FOOT RADIUS CURVE TO THE LEFT; THENCE NORTHWESTERLY ALONG THE ARC OF SAID CURVE AND SAID EAST LINE OF LOT 32, THRU A CENTRAL ANGLE OF 02 DEGREES 15 MINUTES 26 SECONDS, A DISTANCE OF 68.50 FEET TO THE POINT OF BEGINNING; THENCE DEPARTING SAID EAST LINE, RUN SOUTH 81 DEGREES 45 MINUTES 51 SECONDS WEST, A DISTANCE OF 276.35 FEET TO A 4 INCH BY 4 INCH CONCRETE MONUMENT STAMPED LS NO.3353 ON THE NORTH LINE OF SAID LOT 32; THENCE SOUTH 22 DEGREES 50 MINUTES 46 SECONDS EAST, A DISTANCE OF 4.12 FEET TO A POINT ON THE SOUTH LINE OF THE NORTH 4 FEET OF SAID LOT 32; THENCE NORTH 80 DEGREES 56 MINUTES 05 SECONDS EAST, ALONG SAID SOUTH LINE, A DISTANCE OF 275.34 FEET TO THE POINT OF BEGINNING.

A/K/A 143 LANSING ISLAND DRIVE, INDIAN HARBOUR BEACH, FL 32937

In addition to the terms and conditions contained in the Note, the Borrower acknowledges and agrees that Borrower will execute an Agreement for Preauthorized Loan Payments via ACH DEBIT (with a financial institution of their choosing) for the purpose of automatically debiting monthly mortgage payments between the first (1st) and sixth (6th) days of every month for the life of the loan. If any automatic payment is not made then the loan discount provided will be null and

void. In the event the loan discount provided is null and void the interest rate will increase to the base rate of 10.00 percent.

CELTIC ENTERPRISES, LLC,
a Wyoming limited liability company

 Date 3/13/2021
BY: JONATHAN PAUL ("JP") MARONEY, Manager