The Changing and Evolving Landscape of Real Property Receiverships

August 18, 2011

Panelists

Taylor Grant-California Real Estate Receiverships
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California Receivers Forum

Los Angeles and Orange County

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How Receivers Can Maximize Returns in a Distressed Market

by:
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This current economic crisis is unlike any seen in recent memory and is affecting commerce from top to bottom. Lenders, special servicers and other financial institutions are now faced with a myriad of decisions as to how to maximize the value of distressed collateralized assets. Foreclosure, restructuring, Receivership, etc. once remedies of last resort are now terms readily used in the daily lexicon of these institutions. This financial "storm" is indiscriminate and, if a lender, servicer or financial institution does not protect its interests properly it can and will be exposed to additional costs and liabilities.

New Liabilities for Financial Institutions

Lenders, special servicers and financial institutions are now finding themselves in a very difficult position and with new potential liability exposures. Although they may hold a form of security, most lenders (and particularly financial institutions) are not in the business of being landlords, developers, contractors, operators or property managers.

The pending collapse of the commercial real estate market is going to further cripple CMBS servicers (and, for that matter, TIC lenders and/or managers are in the economic downturn's crosshairs as well). The biggest concern is that traditional foreclosure may trigger unforeseen problems including insurability, liability, claim exposure, tenant management (and retention) and construction management and construction defect issues.

While there is no cure-all solution, it has become apparent that the appointment of a Receiver is a viable avenue for preserving, managing, restoring, completing and, ultimately, disposing of certain real property assets. Further (and, if necessary) a Receiver can facilitate, through the court, the restructuring of existing debt—converting a non-performing loan into a new performing loan.

Non-judicial foreclosure guarantees that the lender will become fee title holder of the foreclosed distressed real property. All of the costs, liabilities and problems associated with that property will now become the burden of the lender. If the property is in the midst of construction, the burden and responsibility of completing construction or abandoning it, lies with the bank after a foreclosure.

After foreclosure, if the real property is a going concern, maintenance, tenant management and lease renegotiations (popular today) will be in the hands of the lender/servicer (or its designee). This creates multiple avenues of lawsuit exposure for servicers and lenders. While the laws are complex, it is unequivocal that lenders/servicers will be seen as target "deep pockets" in future litigation by plaintiffs' attorneys.

Protection to the Lender/Servicer Provided by a Receiver

The Receiver's role as an officer of the Court protects the asset by providing Court oversight and approval of the Receiver's business decisions—providing the lender or financial institution with insulation from many of the claims and hardships they would have inherited had they followed the traditional route of foreclosure and ownership.

In instances where there are multi-unit structures, multiple tenants, incomplete construction, code violations or other unique problems with a particular parcel and its structure, the appointment of a Receiver provides "insulation" to the lender/servicer from certain claims and responsibilities. Those responsibilities are shifted to the Court, through its neutral, the Receiver.

A Receiver can operate, under the Court's supervision to resolve these unique problems and, ultimately, "clean-up" collateral for foreclosure or sell the property through a court approved sale process. Each asset must be evaluated on a case by case basis to determine what avenue, including the appointment of a Receiver, is best for that particular asset.

As such, to protect the interests of the lenders and financial institutions, this firm, in many instances, has recommended that the lender seek the appointment of a Receiver. While a Receiver may not be appropriate in all cases, there are certain cases in which a Receiver will be beneficial to the financial institution.

Problems that Can be Avoided Through the Appointment of a Receiver

The appointment of a Receiver can facilitate the following:

- Provides the Court/Receiver the ability to sell real property "as is, where is" thus limiting exposure to the lender/servicer and the Receiver;

  A Receiver, with Court guidance, can manage complex CFD issues;

  A Receiver can acquire, confirm and/or reinstate insurance (including WRAP policies);

  Allows Receiver to hold assets to maximize value through improvements or through "time";

  Can limit or avoid potential SB 800 liability;

  Can avoid having the lender be an "owner" (and thus, limits exposure and liability to the lender/servicer);

  Provides experienced day to day management for the real property;

  Provides expertise in construction, property management and other skills (depending on each respective properties' needs);

  Allows for funding to complete projects through Receiver Certificates;

  Does not need to disrupt on-going construction or business;

  Encourages borrowers continued cooperation (motivated to see project through and avoid insolvency);

  Does not waive lender's rights against guarantors (and such claims may be raised in the same action);

  Gives lenders a non-judicial foreclosure "back door";

  Provides for equitable powers of the Court usually beyond those of a Bankruptcy Court; and (most importantly)

  Secures and maximizes the value of the asset.

Important Factors in Considering a Receiver

The preparation of a lawsuit and application to appoint a Receiver by a lender must be carefully crafted. Each case is different and the complaint and appointment order must be tailored to each situation. Some of the factors to be mindful of include:

- Is the borrower cooperative?
- Are the tenants cooperative?
- Are the tenants solvent and/or operating?
- If applicable, is the general contractor cooperative?
- Is there an equipment lease in place?
- Is the borrower an individual or legal entity?
- Is there a guaranty?
- Where is the property located? (Remember, a foreclosure action must be filed in the district in which the property lies. The Court's jurisdiction must be *in rem).*
- Are there any code violations, state regulatory concerns or other administrative or legal problems?
- What funds are available in the estate?
- Are there construction defect claims?
- Are there mechanics' liens?
- Are there other secured lenders? Are they priority or subordinate claims?
- Are there tax liabilities (recorded and unrecorded)?

These are just some of the concerns that may arise when deciding whether to seek the appointment of a Receiver. Each asset is different and requires a unique approach to limit a lender's liability and exposure and to maximize the value of that asset.

Richard P. Ormond is a Shareholder in Buchaller Nemer's Los Angeles office. Mr. Ormond is available to answer questions about Receiverships and to assist in training financial institution members in how to deal with distressed assets including real estate.

Mr. Ormond"s practice includes expertise in Receiverships, lender representation, remedies, and business litigation. He is a Board Member of the California Receivers Forum and is an officer of the Executive Committee of the Remedies Division of the L.A. County Bar Association. His clients include financial institutions. Receivers and other businesses.

Receivers Can Sell Real Estate Free and Clear of Mechanics Liens

By: David Wald, President, Wald Realty Advisors, Inc.

November 8, 2010

Yes, receivers can sell real estate free and clear of mechanics liens.

It's important now, though. Why? It's important because the vast majority of defaulted construction loans are for new subdivisions - particularly housing (think condos and housing tracts), but also for hotel, office and retail condos, and they all share one very big long-term liability in common - ten years of construction defects liability for the owners, developers and contractors. Kind of like breaking a mirror, but for a longer time period.

Of course this construction defect liability attaches to the lender once they've foreclosed on the loan and become the owner. Traditionally the easiest way to remove a mechanics lien was to foreclose, and that's what virtually all lenders did - the receiver held the property until the lender could foreclose it, and then the lender sold it post-foreclosure, free and clear of liens. Simple and clear-cut, and it gave the lender direct control of the real estate to boot. And who doesn't want control, after all?

However, as the result of long term construction defects liability that attaches to new subdivisions, lenders (both originating lenders and private note buyers) and their lawyers are now looking to receivers to sell subdivisions (both wholesale and unit by unit at retail) in order to avoid taking title to the property and taking on endless years of construction defects liability and related consumer protection issues.

For lenders (and their lawyers) seeking to get full value from non-performing condo or tract housing construction loans, and insulate themselves from construction defects liability associated with the sale of new subdivisions (particularly in California), the best path may be to use a court appointed receiver to complete the project and then sell the individual units on a retail basis -just as the original borrower/developer intended to do.

The concept is simple and equitable enough. Mechanics liens are nearly always subordinate to the lenders first trust deed anyway, which is why foreclosure eliminates them. So selling real property in receivership and paying off the first trust deed on a priority basis makes sense. To the extent that a mechanics lien has a legitimate priority over the first trust deed, that's typically a problem for the issuer of the lenders title policy, not the receiver.

The only issue arises when the lenders title insurance policy showed an exception at the time the loan was originated for construction contracts that commenced before the first trust deed was recorded - but even foreclosure won't eliminate those mechanics liens. Stop notices pose the same problems and foreclosure won't eliminate them either.

In its simplest form, the process works like this:

1. The first TD has priority over other most monetary claims of record (i.e. mechanics liens).
2. Mechanics liens that claim priority over the first TD are tendered to the lender's original title insurance policy to bond around or pay off.
3. The receivership court allows the receiver to sell free and clear of mechanics liens that don't have priority over the first TD - as would occur in a conventional foreclosure.
4. Relying on the court's order, the current title insurance company issues clean title insurance policies to the purchasers of individual units.

And, everyone lives happily ever after.... Of course, as we all know, in real life the devil always seems to be in the details.

The title insurance company has to have significant experience issuing title insurance on new subdivision developments, and confidence in the experience and reputation of the receiver completing and selling out the project. The mechanics lien holders may appear in court alleging that their lien has priority over the first TD, in which case the lender will either need to persuade the court to the contrary, or the court will require that the liens be bonded around until the priority of the lien can be sorted out. This is where the lender or the receiver should demand that the original lender's title insurer provide the bond to the court or pay off the lien. The lender paid for the title insurance policy - let the insurer sort it out.

There are other issues that need to be taken in to account as well, including the language of the original receivership order, when construction was completed, the timing of the filing of the Notice of Completion, providing adequate notice of the motion to sell free and clear, and the language of the order permitting free and clear sale.

The Completion and Sale of For-Sale Housing Projects in Receivership

I. Benefits of Using a Receiver to Complete and Sell Housing

- **Benefits of Using a Receiver**
  - Four Months to Foreclose
  - Receiver Insulates Lender from Risk of Converting from Lender to Partner
  - Allows Property and Project Information To Be Compiled and Evaluated
  - Allows Management of Mechanics Lien Claims

- **Allows Receiver to Identify, Protect, Maintain Property & Other Collateral**
  - Locate and Secure Offsite Equipment and Materials
  - Complete and Maintain Erosion Control and Drainage Improvements
  - Protect the Property from Vandalism and Unauthorized Occupants
  - Prevents Dismantling and Destruction of Building
    - Theft of Copper Wiring, Steel, Appliances, Etc.
    - Unprotected Vacant Buildings Self Destruct

- **Receiver Can Provide Protection from Pre-Foreclosure Claims**
    - Pre-Receivership Project Costs
    - Long-Term Construction Defects Claims (SB800)
    - Potential Environmental Liability

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The Completion and Sale of Housing Projects in Receivership (Continued)

II. What the Receiver Can Do

- **Receiver Controls the Property Subject to the Receivership Order**
  - Borrower Remains Fee Owner
  - Receiver May Be Appointed for Property and/or the Borrowing Entity
  - Recommended Authorities Within Order

- **Receiver Powers And Responsibilities - The Receivership Order**
  - Protect and Operate
  - Maintain & Obtain Insurance
  - Borrow Funds (Receiver's Certificates)
  - Due Diligence - Gather Project Documentation and Permits
  - Take Possession of Property and Borrower Bank Accounts
  - Take Control of Bonds and Deposits
  - Complete and Preserve Entitlements
  - Complete and Record Tract Maps
  - Prepare Cost to Complete and Budget and Sales Proceeds Projections
  - Complete Construction
  - Correct Substandard Construction
  - Obtain Certificates of Occupancy
  - Clear Liens
  - Resolve Easement Issues
  - Lease and Sell - Wholesale or Retail
  - Initiate and Defend Law Suits
  - Resolve Buyer / Homeowner's Construction Issues
  - Control of HOA and Other Associations

- **Receivership Funding**
  - Cash From the Property - Usually No Cash Flow on For-Sale Housing
  - Cash Borrowed From the Lender - Need Receiver's Certificate
  - Cash Borrowed From a Third-Party Lender - How Does It Get Repaid?
    - Super Priority Lien
    - Lease and Sale of Property
      - Bulk sale vs. Retail Sale

The Completion and Sale of Housing Projects in Receivership (Continued)

III. Insurance

- **Comprehensive Insurance Review**
  - Review By Experienced Agent or Broker
  - Obtain and Review Complete Policies
  - Obtain Certificates of Insurance and Endorsements
    - Receiver
    - Lender's Loss Payable
    - Other Additional Insured's

- **Property & Liability Insurance**
  - Developer's Property
    - Before Sale of First Unit
    - After Sale of First Unit
  - HOA Common Area Property
    - Directors and Officers Insurance
    - CopyoftheCC&R's
  - Homeowner's Property and Contents
  - Worker's Comp

- **Builders Risk / Course of Construction / WRAP Insurance**
  - Maintaining Existing Policy
    - Stand Alone Policy v. Master Developer Policy
    - Owner v. Contractor Sponsored Insurance Program (OSIP v. CSIP)
    - Conversion to Vacant Building Policy When Construction Stops
  - Obtaining New Builder's Risk / WRAP Policy
    - Construction Start Date Scheduled
    - Contractor Selected
    - Ten Year Tail Coverage
    - Nose Coverage

The Completion and Sale of Housing Projects in Receivership (Continued)

IV. Subdivision Issues

- **Long Term Construction Defects (SB800 Liability)**
  - Ten Year Liability for Construction Defects
    - Owner / Contractor(s) / Receiver

- **Status of Tract Map Approvals & Recordation of Final Tract Map**
  - Extend Tentative Map / Recent State Extension
  - Clearing Conditions of Approval to Record Final Map
  - Costs of Map Recordation
  - Receiver's Authority to Sign Final Map for Fee Owner
  - Importance of Conditions of Approval of Final Map

- **Standard Subdivision v. Common Interest Subdivisions**
  - DRE Reports and Amendments
  - DRE Homeowner's Association Issues

- **Extension / Recordation of Tentative Tract Map**
  - Tentative Map Extension / Recent State Extension
  - Requirement for Clean Title Report
    - Lender Indemnity for Title Company
    - Notice of Substantial Completion
  - Receiver's Authority to Sign Final Map for Fee Owner
  - Clearance for Recordation by City / County
  - Costs to Record Tract Map

- **DRE (California Department of Real Estate) Pre Approvals to Sell**
  - DRE Application
  - Pink / Yellow / White Report
    - CC&R's and Bylaws / Developer Bonds
    - HOA Budget - General Maintenance / Reserves
    - Form of Purchase Contract and Escrow Instructions
    - Sales Disclosures
    - Phasing

The Completion and Sale of Housing Projects in Receivership (Continued)

IV. Subdivision Issues (Continued)

- **Receiver's Maintenance and Repair Obligations**
  - Units vs. Common Areas

- **HOA (Homeowner's Association) Management**
  - Payment of Dues Upon First Unit Sale
  - Selection / Replacement of HOA Manager
  - Holding First Meeting of Homeowners
  - Election of Officers and Directors
  - Reconciliation of HOA Dues Payments and Delinquencies

V. Marketing & Sales (Title & Escrow)

- **Receiver May Insulate Lender from Construction Defects Liability**

- **Burden of Paying Existing Liens and Other Contractual Costs to Clear Title**

- **Market Analysis**
  - National, Regional and Local
  - Consumer Lending Market
  - Unit By Unit Analysis

- **Disposition Alternatives**

  - Wholesale/Bulk Project Sale:
    - As-Is vs. Completed Project
    - Cost of Resolving Entitlement / Contractual Issues

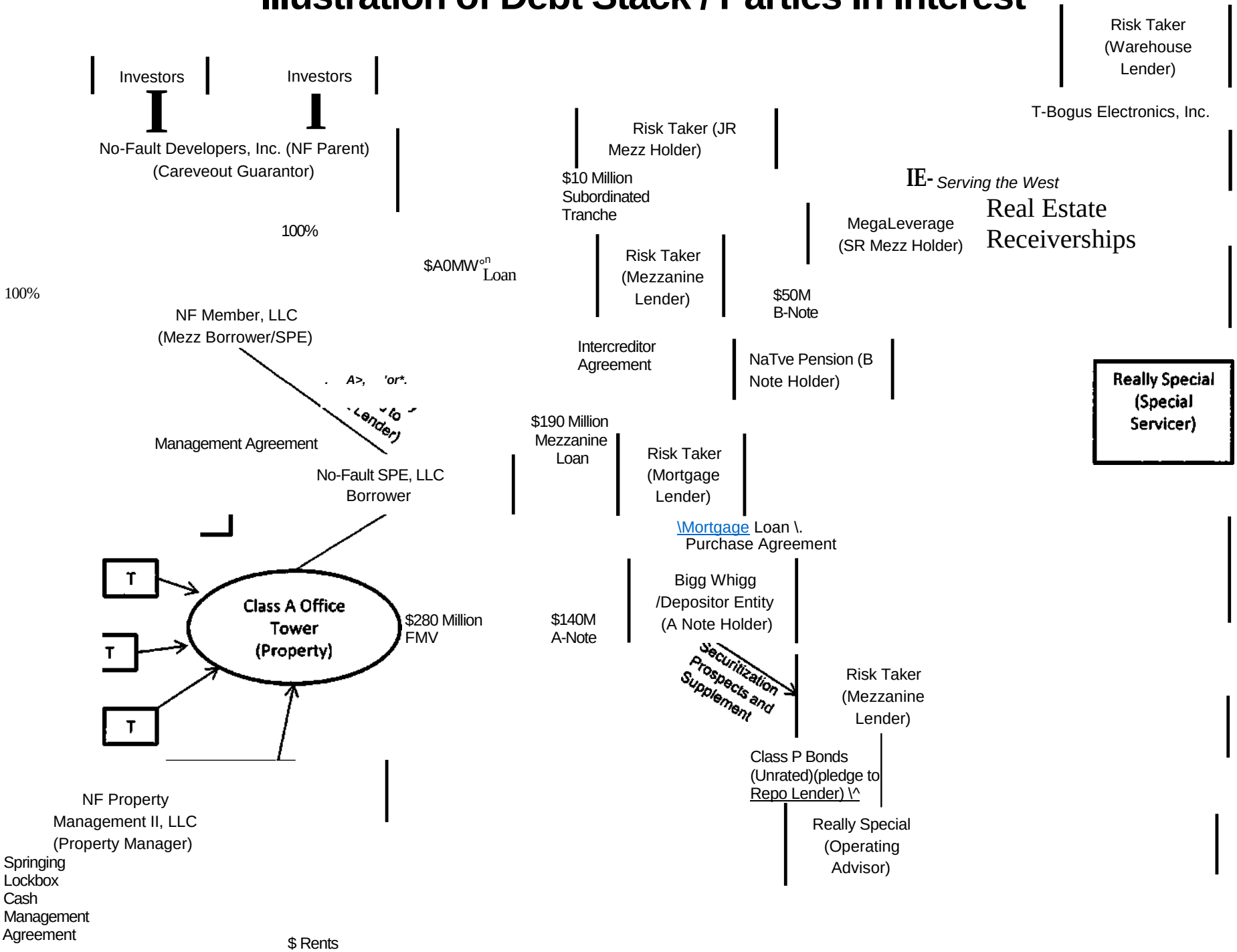
  - Retail Sale as Condos - Managing the Team
    - Auction vs. Conventional Brokerage
    - Lender Pre-Approval Requirements
      - Convention Lender & FHA / VA
    - Pre-Sale Hurdle Requirements By Mortgage Lenders
    - Preferred Lender vs. Outside Lender
    - Conformance with Affordable Housing Set Aside Covenants
    - Sales Disclosures
    - Receivership Disclosures in Purchase Contract
    - Requirement for Clear Title / Title Company Indemnity

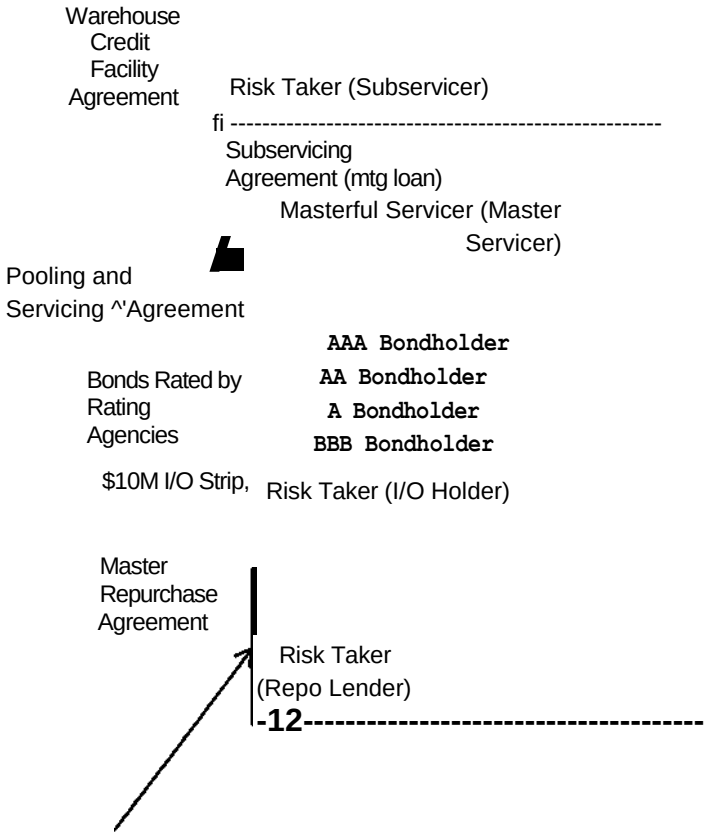
The Completion and Sale of Housing Projects in Receivership (Continued)

- **Disposition Alternatives (Continued)**
  - Retail Sale as Condos - Managing the Team (Continued)
    - Form of Conveyance Deed
    - Post Closing Mechanics Liens
    - HOA Management
    - Customer Service / Warranty Administration Issues

  - Complete, Rent & Sell as Apartment Project (with Condo Map)
    - Value vs. Lower Cost of Completion and Sale
    - Sell as Leased Apartment Investment
    - Ease of Execution - Lower Marketing Costs
    - Apartment Leasing
    - May Eliminate Need For WRAP Insurance
    - Ellis Act Issues - Demolition and New Construction v. Conversion
    - Subsequent Conversion to Condominiums

Illustration of Debt Stack / Parties In Interest

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A Bondholder
BBB Bondholder
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Risk Taker (I/O Holder)
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CALIFORNIA COURT FINDS PROTECTIONS AFFORDED BY CALIFORNIA FORECLOSURE LAWS PRECLUDE SALE OF PROPERTY BY RENTS, ISSUES AND PROFITS RECEIVERS.

[Our last issue featured a brief note about an Arizona case where a receiver was granted authority by the court to sell and convey legal title to receivership real property without prior foreclosure by the secured plaintiff and without borrower's consent. A California court has reached a different conclusion, as follows.]

A significant new law and motion ruling in the ongoing dispute about whether court officers - in this case receivers - appointed by the court to preserve secured lenders' collateral assets pending resolution of a foreclosure action may instead sell those assets at the behest of lenders so lenders may avoid having to foreclose on and take title to their collateral (and assume attendant liabilities) was made by Santa Clara County Superior Court Judge Peter H. Kirwan on June 6, 2011 in a dispute entitled Wachovia Bank, National Association v. Downtown Sunnyvale Residential, LLC (Case No. 1-09-CV-153447).

In brief summary, the issue was framed within conflicting motions to confirm the receiver's sale or to deny the sale and modify parts of an existing order (made earlier in the case by a different judge) that allowed such a sale to take place.

Chief argument by the objecting party against the sale was that California had enacted a careful statutory scheme governing foreclosures — how a lender might gain title to its collateral while ensuring due process to the defaulted borrower and safeguarding of the interests of other affected parties and entities (holders of other security interests in the property, mechanic's lienors, and the like). To allow the court's receiver to act as a surrogate for the lender to circumvent those due process considerations and statutory protections involved in the foreclosure process would do violence to this careful statutory structure, to the benefit the lender, it was argued.

Bank counsel seeking to confirm the receiver's sale argued that receivers appointed under many different statutes may sell property - to liquidate corporate property in a corporate dissolution action, as an example. The court's inherent equitable power could certainly be applied to allow a receiver's sale in the context of a rents, issues and profits receivership, it was argued.

Many additional arguments were made by counsel for both parties during the hearing on the motion, but these assertions were core to the positions espoused.

The hearing transcript discloses that the court found that the protections inherent in the statutory scheme governing judicial (and non-judicial) foreclosures by secured parties are paramount. Judge Kirwan stated:

> "I think that at the end of the day there are inherent statutory protections to the foreclosing process, whether it's by trustee sale, nonjudicial foreclosure or by judicial foreclosure. I think those protections are afforded in various code sections that counsel has alluded to in their briefs. Those are really there for a reason. In other words, to provide protection to everyone.

"....[A]t the end of the day, some of the protections afforded by statute, whether it's a judicial foreclosure, which is really what the lawsuit was filed for, or even a nonjudicial foreclosure, just are not addressed or referenced in [the prior order]."

The order in question also purported to allow the receiver's sale to be "free and clear of liens." Such a provision, if allowed, strips valid liens held by other persons and entities from the property to simplify the sale. This provision has formerly been allowed chiefly in bankruptcy courts, where there are many statutory qualifications that must be met before it can be used. This provision has recently come under close scrutiny even in bankruptcy courts in the Ninth Circuit (see extended discussion in the Summer, 2010 Issue 37 of the Receivership News commencing at page 24).

A recent California Court of Appeal decision dealt with another attempt to use a receiver's sale to bypass a protective statutory scheme — in this case a judgment levy on a judgment debtor's residence. In Wells Fargo Financial Leasing. Inc. v. D&M Cabinets et al. (Victoria Wolfe-Davis. Third party Claimant and Appellant). 177 Cal. App. 4th 59 (2009) the court below had appointed a receiver to sell the judgment debtor's residence without requiring compliance with requirements of California Code of Civil Procedure 704.740 "General Requirements for Sale of Dwelling."

The Third Appellate District Court disagreed with this approach, holding that:

"Section 704.740 unambiguously states that a dwelling subject to a homestead exemption 'may not be sold under this division [Enforcement of Money Judgments] to enforce a money judgment except pursuant to a court order for sale obtained under this article [Homestead Exemption].' The statute thus clearly and unambiguously makes a section 704.740 order a requirement for sale of a dwelling subject to a homestead exemption, without differentiation between a sale by a sheriff and a sale by a receiver." Wells Fargo v. D&M Cabinets. 177 Cal.App. 4th at 72.

The appellate court cited to People v. Riverside University (1973) 35 Cal.App.3d 572, 583 (1973) in discussing the power of the court to regulate sales by receivers, as follows:

"A receiver.. .is an agent of the court and the property in his hands is really under the control and continuous supervision of the court... Consequently, *unless regulated by statute,* the court has full power to order the receiver to dispose of property in such a manner as the court may deem to be in the best interest of the parties concerned.... (Riverside, supra, 35 Cal.App.3d at pp. 583-584, italics added.)" Wells Fargo v. D&M Cabinets. 177 Cal.App. 4th at 70.

In both the Wells Fargo case and the Wachovia case the plaintiff attempted to use sale by a court's receiver to bypass California protective statutory schemes benefitting the defendants - in the former the protections afforded a homeowner, in the latter the protections afforded a property owner (and others) by foreclosure statutes. In at least these two cases, the California Legislatures' intent was paramount.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA BEFORE THE

HONORABLE PETER H. KIRWAN, JUDGE DEPARTMENT 8

-- OOO ---

WACHOVIA BANK, NATIONAL ASSOCIATION,

PLAINTIFF, -VS-DOWNTOWN NO. 1-09-CV-153447

SUNNYVALE RESIDENTIAL, LLC,

DEFENDANTS.

-- OOO ---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LAW AND MOTION

JUNE 6, 2011

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OFFICIAL COURT REPORTER:	MELISSA CRAWFORD, CSR, RPR CSR NO. 12288

San Jose, California June 6, 2011

P R O C E E D I N G S

THE COURT: All right, good morning, everyone. Welcome to Department 8. We have a matter on calendar this morning that was specially set. I'm going to call that right now. It's Wachovia Bank versus Downtown Sunnyvale Residential, LLC, and the related cross-complaints. And I'm going to ask counsel to state your appearances. And let's start from my left here.

MR. SCHNITZLER: Justin Schnitzler on behalf of receiver.

MR. HOLLAND: Steven Holland on behalf of receiver.

MR. TRODELLA: Robert Trodella, of the Jones Day law firm, on behalf of Wells Fargo Bank.

MR. HUNTER: Chris Hunter, of Morgan Miller Blair, counsel for receiver.

MR. HANSEN: Chuck Hansen, Your Honor, representing the moving party.

MR. ROSSI: Ron Rossi, Your Honor, representing the moving party.

MS. FOX: Jill Fox representing the moving party.

THE COURT: All right. Good morning to everyone. I want to make a couple quick preliminary comments. Number one, as you all are aware this was on calendar last Thursday. It was on a normal law and motion calendar, which I had about 20 other matters. Under the circumstances, and given the voluminous pleadings that the Court needed to read and process and whatnot, I felt it was appropriate to specially set this matter so that

the parties didn't feel confined with respect to time, which is often what happens on our normal law and motion calendar. With that said, this is a motion — or there's a couple related motions that were really requested on an ex parte basis. The Court has set aside some time. But this is, and I want to make this clear, this is not a full-blown trial. It's a motion or motions. I have read all the papers carefully. And that includes, obviously, the moving papers, the opposition and replies, as well as the declaration, exhibits, etc. So I am familiar with that.

And, so, I am going to invite argument from counsel. But I want to remind you all that the Court is familiar with the content of what's in the papers. So I would strongly encourage you, to the extent you want to make argument, to make argument that's not going back over or redundant to what's already in the papers because I assure you we've carefully considered that, all right?

With that said, let me just take care of one preliminary procedural matter. And that is there was a request today to, in essence, make' a ruling on an application for — to — the sales agreement was submitted under seal, and for the Court to conduct an in camera review of that to make a determination. And that was not part of the ex parte order. That's not part of today's proceeding. There are procedural requirements for- pursuing that. I'm not going to rule on that today. I am going to deny that without prejudice. There are notice requirements and other requirements under the California Rules of Court Section 2.551, subsection b, that need to be

followed for the Court to consider that.

All right, with that said, there are two matters, related matters, before the Court today. One is a motion to modify the instructions to the receiver regarding the sale of the real property security for the Downtown Sunnyvale Center, Town Center. And the second request, or motion, is a motion brought by the receiver to confirm the proposed sale of the receivership property. All right? I'm going to turn it over to counsel for the moving party in the motion to modify instructions. And with the caveat that the Court has reviewed the papers carefully, is there anything else you want to add at this point in time? Mr. Hansen, Rossi and Ms. Fox?

MR. ROSSI: Yes, Your Honor. Chuck Hansen, who is testifying as an expert in Los Angeles and has to return to that wonderful place and to renew his passport and get back down there this afternoon, so he's going to go first on the 726 issues and then I'll follow.

MR. HANSEN: Good morning, Your Honor. Charles Hansen. And as Mr. Rossi said, I do need to leave a little bit early. So if I do leave about 11:30, please forgive me. I was ordered back this morning and I begged the Court to let me come this afternoon. And I've got a flight that if I miss I probably won't make it back on the stand. Aside from taking the Court very seriously about not repeating what's in the briefs, I'm under my own time constraints.

The issue I think that I'm addressing, which is a very focused issue about whether this Court could lawfully permit the receiver's sale is really quickly addressed. I think it was

very thoroughly addressed in the moving papers. I think it would be difficult not to -- if not repeat, at least not to touch on the same issues. So what I'm going to do is try to do a series of what I consider to be the key points and then invite questions. And certainly invite some comment by opposing counsel.

The most fundamental point is that normally when we're arguing issues like this we're talking about interpretations of cases. We're talking about nuances. We're really not here. Our strongest and most direct authority is the direct literal language of CCP 726, which says there shall be but one form of action for the enforcement of an obligation secured by a mortgage or a deed of trust. And as discussed at great length in our moving papers, California law has evolved, certainly since the Great Depression. And, actually, 726 goes back to the Field Code in 1872. And even before that the brothers Field brought it out. Stories they bought it out in their saddle bags when they came out from New York in the 1850s. So 726, in various amended forms, has been around even longer than the Field Code.

And from the very beginning of mortgage law in California it was clear that there were limits on the ways in which a secured creditor could resort to the security. And that's evolved into, essentially, three different aspects of 726. And, interestingly enough, the one we're talking about here is the least controversial and the least extensively discussed in the case law. Those three facets are as follows: One form of actual rule, which really is talking about the way

it's done in a court proceeding. As we pointed out in our papers, creditors, secured creditors, are given two choices. They can either go nonjudicial sale or go judicial. And they're given the ability to keep that decision their own until they make intellectual remedies relatively late in the process. We're not arguing here that intellectual remedies have been made. Although, I will point out in a minute some of the things that they've done that certainly suggest the way they should be doing it.

The two other aspects of 72 6, and I mention them only for completeness because it's not really what we're talking about today, is a one action rule. That was the way the statute was originally worded. It was amended in the 1930s and yet California courts have continued to impose. Sounds very similar, but it's a little different conceptually. The one action rule basically says one trip to the judicial well.

And then the final one is the security first or exhaustion rule or aspect of 726, which basically says apply the security to the debt before you pursue the debt in any other form. When you put them all together, 726 stands for the basic proposition that the creditor upon a default must pursue the security, first and foremost. Must do so all at the same time in a single action. And must do so in a procedurally proper form.

What we've got here is an attempt — and this is not the first time in the course of the State's history that this has come up. Lenders around the state are pushing the limits' on the permissible methods of foreclosure. So my involvement in

this case, and interest in this case, is certainly largely based on the interest of my client. But I also know that this is an issue of great moment in California in 2011, given the number of defaults and the number of foreclosures. Our proposition is as simple as saying you just can't do it this way.

Now let me briefly address some of the responses, some of the counter-arguments that you get in .sort of a concerted set of arguments by Wachovia and by the receiver. And I don't want to let the fact that it is concerted go without comment. So I'll address that as my first sort of subpoint. There are arguments in the papers to the effect that, oh, this isn't about something that Wachovia is doing. This is about something the receiver is doing and that takes it out of 726. There are a number of things wrong with that. First let me tell you the one thing that I think is correct. It is true that a receiver, any kind of receiver, is essentially an agent of the court and not an agent of the parties. That's the legal fiction that we indulge. And it's true today and it's been true for a hundred years.

But in the real world, as a guy who has been doing secured transactions for over 30 years, I can tell Your Honor, and I suspect Your Honor has seen the same thing from your vantage point on the bench, receivers and lenders typically march in lockstep. It's not a coincidence and it's not unusual that they are both here strongly advocating that they be permitted to go forward with this sale. That's very typical. And in the real world receivers have all kinds of entanglements with the lenders that they're appointed and on whose default —

claim of default they're appointed to act. There's interests about managing property later. There's interests about repeat business. There are all the kinds of things that can make a theoretically neutral person a little bit not neutral, unlike a Court, which is where neutrality is scrupulously maintained.

So to the proposition that this isn't a foreclosure, that this isn't really a creditor action, this isn't something the creditor is doing, the fundamental rebuttal of that is the fact that the creditor is not neutral. The creditor is very emphatically saying we need to do this. We want to do this. You can't stop us. And asking of the Court for permission to go forward.

The bottom line is that if you go back to 726, when a default occurs on a mortgage or deed of trust the lender must apply the security to the debt. So to say, oh, no, we're not applying the security to the debt, is something that can be correctly called a foreclosure, is really ignoring another aspect of 726, which is that's what the creditor must do.

And if you look at what would happen here, if this receiver of sale goes through, if the Court permits it to go through there will be nothing left to foreclose. There will be no sale in any sense. There will be no public auction. There will be a court-supervised sale based on the private negotiations, based on private deals, which Wachovia and the receiver are at great pains, as the Court addressed a minute ago, to keep somewhat quiet and somewhat confidential. That's in complete distinction from a public auction under either mortgage law or Article 9 of the California Commercial Code

where the emphasis is on an open, competitive, public sale where cash is king, where deals don't get cut in the back room. So this is a foreclosure sale.

And probably the most important point, and this is a repetition of what's in the papers, but I'll be very brief, if I were to pick one thing from our reply that I would stress it's that none of the rules we are talking about today are about disadvantaging lenders, punishing lenders or getting in the way of lenders when a default has occurred. What they're about is a carefully crafted — and you've got Supreme Court cases making this point — a carefully crafted and balanced set of remedies where everyone in the default situation knows if the lender goes down this road these consequences apply. If the lender goes down this road these consequences apply. Right of redemption, deficiency judgment, fair value hearing. Those kinds of things.

And for either a receiver or lender to try to sort of plow a third way, a middle way, a way that is not authorized by statute, completely confounds all of those carefully balanced choices. And as I mentioned in the papers, if you have a sale like this, what happens on issues of deficiency? What happens on issues of redemption? Does this buyer buy this property subject to a one year post-sale redemption that would apply under Code of Civil Procedure 729.010? We don't know. And the reason we don't know is because we don't have any law that guides us.

The next point I want to address briefly is there's a fundamental argument here by which both Wachovia and the receiver say, well, this isn't really something subject to 726.

It isn't really something subject to the case law we've cited because receivers have the power to do the things that the Court authorizes them to do. So it's essentially an argument based on the notion that they can have a derivative power derived from this Court's authority to direct its receiver. And there's no question that this Court has brought authority and responsibility to supervise, direct, require reporting and accounting by, and so forth, its receiver.

But the fallacy of the argument that they're making is the notion that this Court has unlimited power to authorize this receiver to do what they want him to do. And our basic proposition is, and I say this with complete respect for the Court, but there are — as we all know, there are some things that courts aren't authorized to do in California. And what they're trying to do here is one of those things.

THE COURT: With all due respect, let me be a little directive here in terms of your argument because I want to zero in on this. What you're alluding to, of course, is Judge Murphy's order October 2010; is that correct?

MR. HANSEN: Yes.

THE COURT: And what I want to hear from you is with respect to the language and the content of that order, how you feel that that goes beyond the scope of what the Court is authorized to allow a receiver to do. You're referring to general statutory requirements that the Court doesn't have inherent authority to override, so to speak. And I want to direct you to Judge Murphy's order.

MR. HANSEN: Yes.

THE COURT: Which I've carefully reviewed and taken a look at.

MR. HANSEN: I will. I will do that, Your Honor. Specifically, we believe that the parts of Judge Murphy's order that were duly authorized and lawful were those things that were authorized by the following: By, number one, the language of the deed of trust because it addresses this receivership. And it was a negotiated document between the parties that set the stage for what could and couldn't be done in the event of- a default.

The next thing that we think limited Judge Murphy's authority, and this Court's authority, generally, was the language of the complaint. As Your Honor knows, Wachovia properly sought judicial foreclosure. It also sought, properly, specific performance of the provisions of the receivership — I'm sorry, the provisions of the deed of trust about rents and profits and the receivership. None of those things were unauthorized. None of those things were inappropriate. And I represent they happen everyday in courts throughout the State of California. No problem.

Where things got off the track was when after having entered into a stipulation with RREEF, contemplating an unopposed trustee sale. After that stipulation was done and after the pleadings were filed and the original order was entered, I think believing that there wouldn't be any opposition, Wachovia and the receiver came back, and contrary to what they had stipulated to with RREEF, they came back and they authorized — they sought authorization and got it, initially,

to sell the property.

Now, what is it about selling the property that goes beyond the scope of what the receiver can properly do? Because there's no question here the receiver can manage the property. It can collect rents. It can do all of the things that 2938 of the Civil Code and CCP 568 permit. What it can't do is encroach on the methods by which the security is actually sold. Or in the language of a secured transactions lawyer, the property is applied to the debt because that is completely, exhaustively controlled by two bodies of law, one concerning trustee sale and one concerning judicial foreclosure. So it is only that additional sort of incremental authority that the receiver sought, which contradicts everything they had done previously, everything the documents had said, everything the pleadings had said. It's only that part that we're challenging. The part that says that they can sell.

And going back to the point, and I hope this is still within the focus of the Court's question, I'd like to cite some authority for the proposition that people can do things — the Court may have authority — receivers do sell property. Corporation's receivers, appointed somewhere under 564, when corporations are wound up they do sell corporate personal and real property. So what you've got here is a very subtle issue about, yes, but is this that kind of receivership? And if the Court permitted that in a foreclosure context with a judicial foreclosure pending with a stipulation for a trustee sale, would that be beyond the Court's authority? And isn't the Court's authority unlimited?

So, if I may, let me cite two cases that I think speak directory to this issue. They're not specifically — we. have cases —

THE COURT: Were these mentioned in your papers?

MR. HANSEN: Yes, but I don't think I really explained this point fully. The point is that courts sometimes do things that lead creditors to do things that are improper under 726. And let me specifically cite those two cases. In Aplanalp, which is cited in our papers, A-P-L-A-N-A-L-P, which was decided about a week before the State Supreme Court's decision, a bank had a $50,000, roughly, .jury verdict against it in favor of the borrower. The borrower was using it to kind of carry the bank. The bank went to the Court and said please offset this against what the borrower owes us to stop these collection — harassing collection efforts. And the Court did so.

Now the Court had the power to impose a judicial offset. So it isn't a question of the Court's power in that case. But the consequence in Aplanalp was that the lender violated 726 by way of the offset with the Court's assistance, with the Court's molesting, if you will, and incurred big trouble under 726. The first is true in the Supreme Court's decision earlier in *Walker versus Community Bank.* A creditor to a judgment in that case that it didn't have a right to take. It ignored some of it's security and so forth. The borrower didn't challenge it. The Court entered that judgment. The Court had power to enter that judgment. But it was a violation of 72 6 as the Supreme Court in *Walker* makes clear. I can cite other cases. There's a federal case called —

THE COURT: Let me ask you this, the opposition cites the *Riverside University* case.

MR. HANSEN: Yes, sir. Yes.

THE COURT: Do you want to respond to their — their

MR. HANSEN: Absolutely. In fact, I'd like to respond to that and also discuss the *Cal-Am* and the Turner case.

THE COURT: I want to be fair and up front here, but one of my responsibilities here is to manage time. I don't want to cut anyone off short. I want to give everyone an equal opportunity. And, so, I want to go back, after you talk about the *Riverside* case, I want to go back, specifically, to the order, my earlier question and the order, the portions, because you made some general statements. I want to look closely at that order, okay?

MR. HANSEN: Okay.

THE COURT: So that I fully understand your position as to language of that order and why the Court should not follow the language of that order.

MR. HANSEN: Fair enough, Your Honor.

THE COURT: And then I'll turn it over to the receiver and Wachovia to respond.

MR. HANSEN: All the issue of the scope of the receiver's authority generally — we've got the *Riverside* case, we've got *Turner* and we've got *Cal-Am.* And, specifically, our position here is that you can find case law permitting certain kinds of receivers appointed under certain statutory provisions with or without underlying documents, corporate documents, and

so forth, selling assets. Being authorized, and in many cases, lawfully authorized to sell the assets. And, so, essentially, our position on *Riverside* is, yes, you can find situations where courts have validly authorized the sale of property. And our response to that is, yes, but not in the mortgage foreclosure context.

And that's where Turner comes in. Turner didn't ultimately reach the ultimate issue before the Court today, as you know. But what *Turner* did do, and *Turner* is still good law, is that it made a very clear distinction between, what I call in the papers, a rents and profits receiver and a general equity receiver. That's spelled out in great detail in Turner. It isn't something that I made up. And the reason that matters so much is because it sounds like a buzz phrase. It sounds like, oh, rents and profits receiver, what does that mean? What it means is that this receiver could only be appointed to take over management of the real property security pursuant to the foreclosure and the mortgage law. In other words, this Court has never imposed a receivership on the borrower entities. So by analogy to the corporate failure or a bank failure where a receiver is put in charge, this rents and profits receiver was appointed under a deed of trust and put in charge of specified real property that stood as security under the deed of trust. It was not a general equity receiver.

So on *Riverside*, or any other case that says receivers may sell assets or receivers may sell real property, that's fine. And those cases may well be valid law for what they say. But if you look at them carefully they do not say a receiver

appointed pursuant to a deed of trust may, in lieu of a foreclosure, sell the property and apply the proceeds to the debt. They just don't.

THE COURT: *Riverside* includes language, effectively, that — and it's prefatory language — unless otherwise provided by statute the Court — or the Court may appoint the receiver. Is your point it's still governed by the statues that apply to judicial and nonjudicial foreclosure?

MR. HANSEN: Yes, but I'd be more specific. If you look at, and I know Your Honor has, at Civil Code 2938 and at 564, there are some very clear carve outs for what is not contrary to 726. And that's because there had been some case law. There had been this case that led to the federal *Bayside* decisions. And there had been *Turner* back in the late 70s. The legislature clearly said that this is okay, and this is okay, and this is okay. These things don't violate 726. And significantly, by argument, it's a difficult, difficult argument because it's based on the omission of other language. But when you look at the express statements about what's okay for a rents and profits receiver under 2938 and 564 of the CCP, what you don't see is a statement saying it's okay for a receiver appointed under a deed of trust to sell the security in lieu of foreclosure or it free and clear of liens. There is just no machinery to do that in California.

And turning, briefly — I'll make one last point and then I'll shut up. Let's address the —

THE COURT: I'm not asking you to shut up. I'm just going to direct you back to the order.

MR. HANSEN: That's me. Those are my words. Actually, two more points then. On *Cal-Am* — the Federal Court in *Bayside,* the 9th Circuit, said well *Cal-Am* addressed the issue not addressed in *Turner.* And it supports their position they claim. Well, if you look at the decision, in fact, it disapproved the sale. There is language suggesting that it sort of supports their position. But it's clearly dictum of their position. But it's clearly dictum because the only holding in the case was disapproving the sale. But most importantly in *Cal-Am* there wasn't one word about Section 726. *Turner* was cited. 726 was not mentioned. And I don't think the argument that we're making today even got cited in *Cal-Am.*

And then let's turn to the 9th Circuit decision and the District Court decision in the *Bayside* case. There is a very important distinction. We think the procedural history of those federal decisions under State Law actually supports our decision because the reason that the Feds had to remove those cases is because it didn't gb their way in this appellate district. But it's also very important to note when you read the *Bayside* federal decisions carefully that what the Court did in *Bayside* was authorized the receiver to complete sales that were already in escrow and entered into by the defaulting debtor and the buyers. It was essentially residential home sales.

And what the receiver was authorized to do was to complete transactions that had been consensually agreed to pre-receivership. Now I don't mean to endorse that. I'm not sure that's valid under 726. But it is a far cry from a situation where years after the default, and quite a large

number of months after the judicial foreclosure action is commenced, the lender, the secured lender, in working closely in conjunction with the receiver, tried to implement something that was not — that has no history or lineage back to the pre-default or back to the pre-receivership era. This receiver at the behest of Wachovia is not attempting to complete something started pre-default or pre-receivership. It's trying to do something entirely new. So even those federal cases in *Bayside* simply don't deal with the kind of facts you have here.

THE COURT: Let me ask you a question, is it your position — I mean, obviously, the second cause of action is a cause of action for judicial foreclosure. Is it your position today that under 726 et seq. that there needs to be some type of decree or judgment in the context of the judicial foreclosure before the Court can order the receiver to sell the property?

MR. HANSEN: Yes. But it isn't just a question of the form of the judicial process. The way a judicial foreclosure looks in the real world is dramatically different because here you're being asked to approve something where the bidding and the negotiating and the deals-were cut earlier. People were either ruled in or ruled out as potential bidders. Terms were worked out. And we haven't had an opportunity yet to begin to get discovery about what they were making in that sausage factory.

In a judicial foreclosure or a trustee sale, for that matter, you have — and, look, I'm not going to pretend the trustee sales are always lovely. You have people who are professional bidders and they're probably not the nicest people

in the world some of them. But the simple fact is a foreclosure saie, a judicial foreclosure sale, you have a Court order it. It is held as a public auction. It is open to everyone. No selection gets made about who can participate. And basically cash is king. It goes to the highest'bidder.

Here we've got a deal so complicated that the bank and the receiver don't even want it to become public information. You just wouldn't get that at either a judicial foreclosure or a trustee sale.

THE COURT: Here we've got, obviously, a very big piece of commercial property. One can argue the value but I believe I read in the papers it's in the 180 million to 200 million dollar range. And shouldn't there be — are they subject — is it your position they're subject to the same requirements of public auction as any other piece of property, no matter how —

MR. HANSEN: Yes. No matter how large. No matter how complicated.

THE COURT: And that was a question of clarification. Let me do this because, in fairness, I need to turn it over to counsel. Is there anything specifically — and I've looked closely at the order. I've read your papers and your position. Is there anything else in the order you want to address before I turn it over to counsel?

MR. ROSSI: I'd like to add one thing, Your Honor. The order specifically states —

THE COURT: Let me get the order, Mr. Rossi. I've got it here. And, just for the record, we're talking about the

October 2010 order signed by Judge Murphy; is that correct?

MR. ROSSI: Yes, Your Honor. Paragraph 17.

THE COURT: All right.

MR. ROSSI: Paragraph 17 of the order requires written consent of the borrower and Wachovia. As to why this is significant is this missing Exhibit 4 that we've got the day after the filing was the first time we've seen any written consent supposedly of the borrower. RREEF executed this document after we appeared for the borrower in this action. Because of the default we are allowed to take over the control. They have no voting rights. Take over control of the limited partnership. I mean the LLC. So we filed an answer on behalf of Downtown. We appeared. And we're not consenting to that. And we are in control of that LLC.

Now they have said all along that, oh, the borrowers always consented to that. We get this exhibit after the fact. If you take a look at their Exhibit 4 you will see it's dated and signed on May 24th of this year, after we've already appeared, purporting to give consent of Downtown signed by RREEF. And it's a stipulation regarding a sale of.property. Now, obviously, this was prepared long after the fact because the body of Exhibit 4 says the sale took place as of Aprii 12th. And it also says it's amended. So some time after April 12th they have this written agreement operative May 24th, long after we've answered the complaint on behalf of the LLC.

So there's no way that they can comply with Paragraph 17 of the order because they've lost their voting rights pursuant to the agreement. Section 10.1 subparagraph b, of that

agreement says if you default RREEF we get to take over. That is clear. Nobody disputes that. They just say we waited too long to take over. That's their only response to that in their papers. So they can't come in here as of May 24th and say, oh, well, now the borrower is consenting, when the borrower has no more power to consent.

Furthermore, that missing Exhibit 4 clearly specifies that this isn't — they say it's a short sale. A short sale being there is not enough money to pay the lender. An expedited short sale process. Well, in a short sale you have to have consent of the borrower. And the borrower signs — was also the owner, signs a deed to the buyer. These short sales are going on more than we'd like to see at this period of our history.

So they say it's a short sale. But by their own admission, Mr. Pau's bid, and any other reasonable bid, is not going to make it a short sell. They're accepting a bid that would net the receiver — the estate, supposedly 181 million dollars. They say the loan, as of May 20th, was 184,700,000. Our bid is 185 million and presumably at an open fully-noticed foreclosure sale. Whether it be judicial or nonjudicial, there will be bidders there who will bid on this property. They're trying to make it go to someone on their approved list with the way they have approved.

There are code words that I want to point out in their moving papers. They say they analyzed all these bidders and had all these stages of bidding. And they always say that we wanted to omit outliers and analyze each bid on a qualitative and quantitative method. They say it two or three times. I think

that's a code word because I don't know what their standards are. Whoever is paying the most who is going to — subject to -approval of the Redevelopment Agency, the receiver has a duty to maximize the return to the estate. If there's an overbid, that overbid is going to go to our client, not to RREEF, because RREEF's in default. RREEF stopped paying in July.

This is all part of a plan. If you look at Exhibits G and H to Mr. Pau's declaration, these two letters, same date, purport to be the same from Wachovia. One we got. And the one we didn't get. And the one we didn't get in July of '09 says you're going to market this through Eastdil Securities, a company wholly owned by Wells Fargo. You're going to give them all the material. And, by the way, keep everything secret and don't tell Mr. Pau or anybody else. And don't talk to the City. And that secret notion was carried on through the confidentiality agreement up to today where they don't even want to show us the sale agreement.

They purport that the Court would be the only person to see a sale agreement of property probably worth in the 200 million dollar range. Nobody else gets to see it. You get to decide whether all the terms are fair. And nobody else gets to vet this whole procedure when we're dealing with 50 million dollars, potentially, of taxpayer money out there on a property of this scale. Aside from the legal aspects, the control by the lender, wrongful control I think, is significant in this case as we've outlined in our papers.

THE COURT: All right. I'm going to turn it over now to counsel to respond.. And, counsel, I don't know if — counsel

for the receiver, if you want to respond first I'll let you decide how you want to.

MR. HUNTER: Sure. And, Your Honor, if I may? We made a binder of all the exhibits in here. And it's just for ease of reference. I can hand one to you. I think it might speed the process along.

MR. HANSEN: More paper.

MR. HUNTER: That's right, more paper. And, Your Honor, I'm Chris Hunter, counsel for the receiver, and I won't be addressing any of the 726 issues because as a receiver we simply followed court orders and we've obtained court orders and been in the process of following them. So. Mr. Trodella, from Jones Day, represents the lender and to the extent there's questions on that end. I can speak to the receiver sale process.

And really, in terms of responding to some of the questions that were raised, the challenges that were presented in the sale is that we were not able to simply sell the property to the highest bidder. There were the ARDDOPA, which is the new agreement governing the entitlements, has four requirements for a transfer to take place. Otherwise a buyer would take it without having the entitlements in place, which is one of the significant pieces of value.

So the starting point is the four basic criteria, which you're aware of. The other piece is that in addition to the financing for the purchase price, in order to meet the minimum project requirements, it was estimated that purchaser would need another 150 million dollars in capital. For this

reason it was very important to vest the purchasers and their capital structure. We could not simply accept the highest bidder. We had to dig much deeper.

The number one priority for the process of marketing was we wanted to maximize the bidders to create competition. This is a complicated asset. And the only way to do that is to ensure people that if they were going spend hundreds of thousands of dollars on feasibility, plus thousands of hours of . time, that all the bids would be on an equal playing field. We could not give the appearance of any preferences to any parties.

Now one of the things that — it appears as though our factual statements are passing like ships in the night. If we walked through this the — one of the points they make is that they wrote that one of the big problems with the confidentiality agreement is that we were allowed to terminate a buyer in our sole discretion. And if you look at tab 36, these issues were first raised in November by Mr. Pau's former counsel. And he wrote to us and talked about how the principal confidentiality agreement has issues. He asked for six concessions and we gave four.

So if you go to tab number 36 there is a markup of the confidentiality. But below it is my letter dated December 22nd, 2010. It's about the third or fourth page in tab 36. It's highlighted in orange. This is my' letter to Tom Larsen, who at the time was the counsel for Sand Hill. "First we can revise the language to state that the receiver will have the right to approve or reject offers in accordance with the terms of the order, which is a defining term that means the sale order, as

opposed to the receiver's sole discretion."

We also, on the pink tab two pages before, we sent a redline of confidentiality and highlighted in pink, is we in accordance with the terms of the sale order and any other order issued by the Court to follow the approval. Now one of the most noteworthy things about this, Your Honor, is that we haven't received a response to this. And it appears as though, from reading the reply brief, which I'd like to touch on because we haven't had the opportunity to respond to, is that perhaps the wordsmithing wasn't perfect or it could have been done in a different way because it was described as not being meaningful. But we negotiated 170 confidentiality agreements with some of the biggest hedge funds, with some of the biggest law firms in the country who were very aggressive, and we were able to get to the bottom of these. They never responded to this.

So in terms of that issue we saw repeatedly in the reply briefs that they say that the sale order that we would be able to reject people on our sole discretion, we offered this in December of 2010 in this letter. The second piece was that Mr. Pau had asked for confirmation that he could speak to other bidders and we said absolutely. We wrote in this letter in the yellow highlighted section that he can speak to any prospective bidders about joint ventures. If you go — and that's highlighted at the bottom of the December 22nd letter.

If you turn to tab 37, in addition to that on the receiver's letterhead we wrote a letter that — Jerry Hunt, the receiver, wrote a letter that says, "You've expressed a desire to speak with various prospective bidders and by this

communication I am confirming to you that I have no objection to any party to a PCA having discussions with you regarding any such potential venture." At the bottom it says, "You are authorized to provide a copy of this communication to any third party under a PCA," meaning confidentiality by confirmation. "You can show this letter to whoever you'd like."

The next item is that they requested saying, well, he might not want to sign a confidentiality because he knows all about the property. He was a developer. Will he still accept a bid? If you go to the second page of my letter at the bottom highlighted in blue it says, "However, you have also suggested that your client is considering not executing a PCA because your client would not benefit from the confidential information since your client actively participated in the development of the Sunnyvale Town Center. And, as you know, is therefore already very informed regarding the project. By this letter the receiver confirms it will consider any offer from your client, regardless of whether he signs the PCA in a form acceptable to the receiver."

So there were four items that they asked for that we agreed on. We would agree that instead of sole discretion for limiting bids, in accordance of a sale order, we provided that he can speak to any of the other parties. We were trying to manage the process, but that he could speak to any other parties about bids. And we also wrote him a letter to that effect. And we — one other piece that we also noted, that we would be making all of the parties — look at the first page of the letter highlighted in yellow is that the — with 170 prospective

bidders we did not want to have the City, the RDA, Nokia inundated with requests. We told all the bidders the reason why we're saying you can't contact these people is because we're going to manage the process, funnel down. And then we're going to endeavor to make all these parties available for you to speak with. And that's what we said here.

Now there were two items that we did not agree to that he asked for. It's on the second page of the December 22nd letter on tab 36 highlighted in pink. He asked for, in a couple of different ways, for the right to overbid, which he's asking for here. And what he said in the letter in December was that in consultation with Eastdil, our broker, that any appearance that a party has a favored right would chill bidding and would cause, in our belief, people not to expend the time and money. So we can't do that. We are also not going to write a letter to all of the people who signed confidentiality agreements saying it's okay to talk to one party because that would be the appearance.

And one of the things that is — that needs to be noted here is on the last page of this letter we noted in the section highlighted in blue, "As I said before, we are trying to maximize the number of bidders and to maximize the aggregate sale price for the property. We believe we have complied with California law, the order and the sale order' in responding to the requests of you and your client and we want your client to bid. Nonetheless, if you disagree then we would invite you to seek an amendment to the sale order from the Court, which of course would be binding on the receiver."

So one of the items was that they asked for six different items. On four we agreed. Two we said we can't and here's why. If you disagree, we're just starting the sales process. We invite you. Go forward and ask for instructions. If the Court grants them, we'll be bound by them. We think it's not the appropriate approach, but it's open." It's just noteworthy that instead of seeking what they're seeking now at the start of the process before, this process had started with 170 confidentiality agreements and was eventually funneled down to a bidder who was enthusiastically accepted by the Redevelopment Agency. They waited until after the contract was signed and after the feasibility period expired. There is a 10 million dollar deposit, which is now nonrefundable. And they waited until this time to come forward with the arguments that they are, in fact, controlling the entity and that they do not consent.

The other piece that came through here is this notion that we did not somehow reach out to Mr. Pau appropriately. And if we walk through this, there were multiple attempts to reach out. Under tab 39 there is an e-mail of mine to Mr. Larsen, who was Mr. Pau's former lawyer, which basically says that I tried to reach him several times and wanted to know if Mr. Pau would be making a bid, that whether he intended to bid.

In addition, at tab 41, this was part of the process of maximizing the number of bids. Jeff Weber is the broker from Eastdil who was hired. As we were getting closer to the March 3rd deadline for best and final offers we had already gone through the rounds. There hadn't been a prior bid from Mr. Pau.

Then the -- there was an outreach by multiple parties to make sure that Mr. Pau was aware of these. This tab 41 is an e-mail from Jeff Weber to Mr. Pau saying, "Peter, I just wanted to follow up on the voicemail I left you last week. We were obviously hoping to receive a bid. I'm disappointed we did not hear you from. We have asked for best and final bids on March 3rd and would, again, encourage you to participate."

There is multiple statements that there was no awareness on their side about the deadline for best and final bids. I also reached out to Mr. Larsen. And after exchanged voicemails, spoke to him on or about February 25th, two weeks before, and inquired whether Mr. Pau would be submitting a bid. He said he was not and he was simply determining who was going to be suing him for how much. That was the message we got. But to make the argument that he wasn't aware of the deadlines and there wasn't substantial effort to accommodate his requests on the confidentiality agreement, as well as to keep him informed on the entire process of how the process was moving along, is simply not true.

And then one other thing that we note from the reply papers is a discussion about the public interests and what's out there in terms of the City and the Redevelopment Agency. As you know, the executive director of the Redevelopment Agency had submitted a declaration in support of the motion approving the sale. In addition, David Kahn, who is both the City attorney and the attorney for the Redevelopment Agency is here. And I think he's the best person to address to the extent that there are any questions about what's in the public interest on this.

He can address issues about the approval of parties, who is an approved bidder and what is in the best public interest. It's not for me to say. It's not for either side to argue. But I would encourage you, Your Honor, if you have any further questions about what is in the public interest to invite Mr. Kahn to approach and he can answer any questions you may have.

THE COURT: Let me hear from counsel for Wachovia..

MR. TRODELLA: Thank you, Your Honor. Robert Trodella on behalf of Wells Fargo Bank, successor to Wachovia, secured lender on this project. Your Honor, I was interested in what Mr. Rossi had to say because as I read his briefs, and Mr. Hansen's briefs, they're chalked full of conspiracy theories. And Mr. Rossi continues that theme this morning. Much like conspiracy theories, they're inevitably short on facts. And to resolve today's issue, to resolve authority to authorize the sale, we are constrained by admissible fact and we are constrained by relevant case law and statute.

And if you look at Mr. Pau's briefs, in that context, they're incredibly short. They don't cite not one case. Not one on point. They don't cite one statute on point. And there is absolutely no admissible evidence. There is only speculation, hearsay, lack of foundation and testimony from people that aren't even parties. We, on the other hand, have a slew of declarations. Most notably, from the receiver himself that is in support of this sale and on the credibility of the process.

Your Honor asked that we not focus too much on the

papers. But there are some facts I think that were raised in the papers and then some facts that were raised in the papers that I think need to be discussed very quickly.

The Sunnyvale Town Center is a single asset entity. That's not discussed in the briefs. And what I mean by that is the owners, DSMU and DSR, they own one asset. That's it. The Town Center. So to take control over the Town Center is to take control of the entirety of the business. That's it.

In the summer of 2009 the owners had effectively abandoned that business. No one disputes that. They weren't putting any further money into the project. They weren't paying property taxes. They weren't paying their contractors. There's over 20 million dollars in mechanic lien claims. They weren't weatherizing the project. They weren't dealing with public safety issues. And so in the fall of that year I drafted a motion to appoint a receiver. We were very concerned that this project was whipping out of control. Our collateral was eroding on a daily basis. And so I drafted a motion and I set it for a noticed basis.

THE COURT: There was a lawsuit that preceded that.

MR. TRODELLA: We filed an action. We filed a complaint as a platform to appoint the receiver. We set this on a noticed basis. I drafted a very broad order, which Your Honor has seen, which was to appoint the receiver for, quote, all purposes. And I previewed that order with the parties. And, in addition, I previewed it with Mr. Pau's counsel, who provided some minor comments to me and I incorporated them into the order. And then before the hearing we became aware of further

public safety issues. So I reset it on a ex parte basis and got the consent of all the parties that they wouldn't object. Came here before Judge Murphy. As you know on an ex parte basis you go into chambers. The deputy came out and said that the parties can now come in.

THE COURT: I know the process.

MR. TRODELLA: Well, the important point here is when the deputy came out and said the parties can now come in, I went in, RREEF's counsel went in. Mr. Pau's counsel stayed in the hallway. It wasn't surprising. He wasn't a party. Judge Murphy asked us some questions, entered the order. It's a very broad order that you've seen. What it's not is a rents and profits order. To say that it's a rents and profits order is to completely ignore the facts that existed in the fall of '09. This project, very much like today, didn't have any tenants. Not one. It didn't generate a dollar of rent. In fact, it wasn't until January of this year that any rent was produced at all. That's not why he was appointed.

In Mr. Pau's brief you would also almost think that Mr. Hunt was sitting in his office collecting rent checks on a monthly basis. He managed the property. He entered into leases. And he borrowed money. Up to 70 million dollars from Wachovia. I came back to this court two or three weeks after we got the receiver appointed and sought authority to make loans to the receivership estate. And this is important because what the cases say is when the estate is not self-sufficient that's a reason why you would authorize the sale.

Judge Murphy — there were two objections, both my

mechanic lien claimants. Mr. Pau did not object. Judge Murphy authorized us to make loans. And over the next two years we loaned 70 million dollars. And after Mr. Hunt received those monies he was able to start to stabilize the project. He was able to start to weatherize the project. And now a project that was completely imbalanced and impaired starts to look like a decent project.

Mr. Hunt then, in his business judgment, a third party fiduciary agent of the court, made a decision that probably makes more sense to sell this asset through a receivership sale rather than to let it just go to a nonjudicial foreclosure sale. He didn't just make that determination and decide to sell the asset based on the existing order. Like some cases say it's alright. He went in, as we know, and sought authority. Mr. Pau didn't object.

And at that point he hired Eastdil. Had authority to do so. And as I looked at the receiver's declarations, these are the numbers that jumped out to me, 500, 30, 10, 6 and 1. 500, 30, 6, 10 and 1. After he received Judge Murphy's order he still sent out 500 solicitations. 500 to purchase this asset. That's a remarkable number. But it's even more remarkable when you think about the level of sophistication you need to be able to complete this project and the amount of money that is necessary to go into this project. 500.

30. 30 is the number of bids he received. 30 bids to purchase this project. He distilled those down to the 10. In his view, the highest and best. Invited them to make further bids. And then narrowed it down to 6. Invited those 6 to come

to the project once again. There were over 100 project visits. Over 100. Invited them to view the project one more time. And then, ultimately, 1. He picked the bid by Starwood Hines because in his opinion, in his business judgment, and ultimately that's all that matters in his business judgment, not the bank's, that's the highest and best offer.

Now, Mr. Pau, again, offers no admissible evidence. He has no personal knowledge. But what is just completely odd to me, and what I found surprising in the briefs, is there's no explanation, whatsoever, why they would say the bank would somehow colluded the process to drive down the purchase price on an outfit that we have over 180 million dollars loaned against. That makes no sense. It makes no sense.

They also don't explain three weeks into this process why they haven't served RREEF. They're claiming that RREEF is not the managing member. Now we know from the briefs that Mr. Pau, after the period of time when he says RREEF was in breach, that Mr. Pau told the vice mayor of this City that he can't — he can't control the borrower. The vice mayor said why don't you just pay off the loan? The bank will reconvey and you'll own the property. All of these issues go by the wayside. That's what I would do if someone was trying to take away my house. I'd just pay off the darn loan. He said I can't do that because I don't control DSMU.

He said in his verified complaint, again after the period of time, filed with the Court of Chancery in Delaware, he identifies, quote, RREEF is the managing member of DSMU. And then in a response to a subpoena by Chris Hunter he says — his

counsel, Steve Taylor, says, well, we're not subject to the TRO of the order because we're not a party. In other words, we're not the borrower who is a party. So he not only has no admissible evidence, the facts are completely in contrast to what he's now asserting, essentially three days before the receiver was to come in and seek' confirmation of the sale.

But when you look at the legal issues, even though his arguments are not credible, in terms of whether he controls the borrower, because they're just not. But they're also irrelevant. Because when you look at the law there's two issues. There's whether the Court has the authority to authorize the sale. Did Judge Murphy have the authority back in October? That's issue number one. And issue number two, as Mr. Hansen has addressed, is did somehow allowing that sale trigger CCP 726? Candidly, the answers to those questions aren't even close. They're not.

In terms of the first issue, their own declarant, Greg Sterling, who is not a party, but for some reason they thought it was appropriate for him to make a declaration, he says at Paragraph 4 of this declaration that, "I've been a receiver lots and lots of times. And guess what? Over 50 of those times I've sold real property in my receivership." Well, apparently their own declarant thinks it's appropriate to sell.

At Paragraph 11 in that declaration he says that he worked with the very receiver of this property of the Town Center before Mr. Hunt was appointed and they embarked on a marketing process too. So he wasn't challenging whether you could have a sale. He just quibbled with the process that was

followed. And in terms of the law, Mr. Pau doesn't cite to a single case, not one, that says this Court doesn't have authority to sell the asset, to authorize the receiver to sell the asset. Instead they equivocate. They say again that Mr. Hunt is just a rents and profits receiver.

And then they make distinctions between equity receiverships and rents and profit receiverships. And they go paragraph after paragraph. But never once, even in making those distinctions, did they ever cite to a case that says a rents and profits receiver can't sell. The reason they can't do that is because it's not true. There's lots of cases out there that say rents and profits receivers can sell. We're not a rents and profits receiver. We're just not.

But what the cases say, the *Turner* case which you cite to, the *Turner* case, first of all, doesn't get to this very issue. In fact, makes a very clear point that we're not going to make a determination whether a rents and profits receiver"can sell. But in terms of Mr. Hansen's comment that what is important is that you look at the deed of trust. Well, what the Court said there is, no, we don't need to look at the deed of trust. You don't look to private agreements. What you look to is whether — you look at the statute, 568. And you look to the inherently equitable powers of the Court. And at the end of the day what's important is what the Court thinks is in the best interest of the receivership estate.

And so we know from the *Cal-American* case, although the sale wasn't approved in that case, the Court was clear that even under a rents and profits receiver it was appropriate to

sell under the right circumstances. What are those circumstances? *Cal-American* and *Lesser & Son,* California Supreme Court case, 1950, both say the following circumstances are appropriate for a sale: Where there's imminent foreclosure. We have that here. And where the property is not self-sufficient. Doesn't cash flow. We have that here. We had to make 70 million dollars in loans to the property. So there is no — there is no case law that says we can't do it. 568, 568.5, *Cal-American — Cal-American, RTC* v. *Bayside,* all these cases say you can do it. Their own declarant says you can do it.

THE COURT: Well, let me stop you for a brief moment just so I can ask a question for clarification. I don't understand Mr. Hansen and Mr. Rossi and Ms. Fox taking the position that the receiver — the Court can't authorize the receiver to sell it, per se. As I understood their argument is that it still has to be compliant with all the statutory requirements. And I think that's the issue that's raised in Judge Murphy's order is whether it truly complies with the statutory requirements set forth for a judicial foreclosure. There are notice requirements. I think it's 701.540.570. There's a series of requirements.

• And with all due respect to your points, I think that taking a position that the receiver has authority to sell it, I'm not sure that is necessarily contested. I think it's just in this particular case, given the language of this order. And some of what is' argued to be the limiting language or the language that arguably doesn't address the statutory

requirements or maybe inconsistent with them, we can't — the receiver can't come to court and sell the property under the language of this order.

MR. TRODELLA: If they're limiting their argument, as you've just --

THE COURT: I'm not trying to limit their argument. I'm just addressing a point you made earlier, a somewhat broad statement.

MR. TRODELLA: Let's address that because I understood — whether we narrow it or whether it's a broader issue, the answer is still the same. Let's say that their argument is simply that, well, Judge Murphy expanded his authority. Instead he had to follow 568.5, which in turn followed the execution phase. We know from case law that courts are not constrained by 568.5. The *Riverside* case says as much. It says it explicitly. And we also know from the *Cal-American* case that courts have equitable powers to do what they think makes sense. It's what the courts say, unless a statute specifically prescribes a different way, or prohibits you from selling a different way I should say. Then the court's authorized --

THE COURT: Like the inherent equitable powers don't necessarily override the statutory requirements, correct?

MR. TRODELLA: Correct. The important point is the Court must be nimble to deal with the facts and circumstances of the case. So even if that is the narrow focus of their arguments, it still must fail because Judge Murphy's order was sufficient. And we all know that Mr. Hunt followed that order

and invited Mr. Pau to seek further instruction if he thought that there should be a different path that was followed. And Mr. Pau chose, specifically, not to do that. He chose not to do that after over 500 people had relied on the Court's order. After 30 people had made bids on the order. After literally millions of dollars, my guess, have been spent to follow a process, to follow the very rules that Judge Murphy put into place. It wasn't until only after the fact that Mr. Pau decided to come running in and say, you know what, I should have a right of first refusal. Well, that's ridiculous. Of course you shouldn't have a right of first refusal. You should play by the rules like everyone else and like you were invited to do. And in terms — does that answer your question?

THE COURT: Let me ask you a couple of specific questions- And I'm going to refer to the order, okay? So Paragraph 10 of Judge Murphy's order. And I'll give you a moment to refer to it.

MR. TRODELLA: Got it right here, Your Honor.

THE COURT: Do you have it? I'll read the specific language here. Paragraph 10 of the order indicates that the receiver's authorized to select a purchase offer for the sale of any portion of the property that the receiver believes would serve the best interest of the receivership estate, which will be subject to final Court approval through the expedited process and related prerequisites.

And my question is that the standard foreclosure sale states, and I'm going to refer to 701.570, subdivision b, "The sale shall be made at auction to the highest bidder." Now that

language, as well as any other language, doesn't refer to that statutory requirement. I don't know where in the order, if ever, it's inferred that it's going to go to the highest bidder. We're talking about the best interest. You can argue that that may be the highest bidder. I don't know. That's a requirement by statute that when I looked at it I said where is it contained in this order?

MR. TRODELLA: A requirement by statue for foreclosure. Very different. We're not dealing with foreclosure here. And to say that we are changes the facts. We are not dealing with foreclosure. This is a receivership sale. This is a sale. It's an absolute sale. To start getting into distinctions as to whether —

THE COURT: But you sued for judicial foreclosure.

MR. TRODELLA: We had sued for judicial foreclosure but we hadn't gone to judgment. There is nothing to stop us from dismissing the action after this piece of property has sold.

THE COURT: Wasn't this order obtained in the context of the lawsuit for judicial foreclosure?

MR. TRODELLA: This order was obtained to allow — specifically allow a process if we wanted to pursue judicial foreclosure, certainly. But more particularly it was filed to allow a receiver be appointed so that the lender could make a determination whether to pursue nonjudicial foreclosure or judicial foreclosure. We don't hide behind that fact. Those would have been the two options that we would have followed. And, indeed, those were the two options we were thinking of.

To be perfectly candid, what we thought we would have been doing at the end of the day would have been to pursue nonjudicial foreclosure. And that's why we entered into the foreclosure agreement and the settlement agreement because we ultimately thought nonjudicial foreclosure is where we would have ended up. Probably not judicial.

THE COURT: Let me ask you this, is your position then that some of the requirements set forth in CCP that address judicial and nonjudicial foreclosures are irrelevant because the Court's extended authority to the receiver?

MR. TRODELLA: That's correct, Your Honor. What the Court has allowed, what the Court has authorized, is a process. And the Court gets comfortable because there's a marketing process. To say that the borrower would have been more protected if you would have pursued foreclosure really ignores the facts because all you have there is a small — a publication with a small advertisement of a sale. And that's essentially it. You don't have a broad marketing process that Mr. Hunt embarked on. You just don't have that at all.

THE COURT: And I understand. The papers did a good job of really detailing that process, which I think was a very involved process. I want to direct you to my issue is that this order, as I understand it, there hadn't really been an appearance or answer filed at the time. There were people present, as you noted and I'm aware of that, that appeared ex parte. This order was obtained in the context of a lawsuit that, among other things, alleged judicial foreclosure. Clearly there are statutory requirements for judicial foreclosure,

correct?

MR. TRODELLA: Correct.

THE COURT: Clearly in my mind, looking carefully through Judge Murphy's order, that order doesn't address many of the statutory requirements. Okay? It is what it is. In other words, it's an order that I wasn't aware of until you folks came forward with your ex parte request. I have now had a chance to look at it. I've now had a chance to look at what the statutory requirements are. And correct me if I'm wrong, but is your position that since the Court authorized the receiver to sell this property those statutory requirements, that are really absent in this order, don't necessarily prevent the sale from going forward?

MR. TRODELLA: Correct. If you look at the cases, none of the cases say that, well, we're constrained by statute. So, so long as the statute doesn't say you can't do it then it's alright. So long as it's in the best interest of the receivership estate it's alright. What the courts are saying is we don't need — not one case says we still need to follow the foreclosure process because the process that's put in place is, again, an open process where there is structure in place, where there's an opportunity to bid, where there's marketing in place. All of the concerns that you would have in a foreclosure are addressed.

But not one of the cases say, the cases that authorize receivership sales, not one of them say that you still need to follow the foreclosure process because it's not a foreclosure. It's not a tricky way to get around or circumvent the

foreclosure process. It's a sale. It's a sale that's authorized by the Court through a third party fiduciary.

THE COURT: In the context of a lawsuit that seeks judicial foreclosure.

MR. TRODELLA: Absolutely. Absolutely. But none of the cases make that distinction and say, well, because you sued for judicial foreclosure somehow that means you still need to follow the foreclosure path. Not one case says that.

THE COURT: Right. You can still pursue a trustee sale, can't you?

MR. TRODELLA: Of course. And that's what we would have done. But had we pursued nonjudicial foreclosure the asset would have received a fraction of the interest. A fraction of the interest. But, again, none of the cases say you need to pursue any of the foreclosure paths.

THE COURT: Let me address your attention to the *Riverside* case, which you cite and rely on in your papers. And there is preliminary language that I alluded to earlier that says, "In the absence of a statute otherwise providing, the Court may authorize a receiver to sell property in his hands at either private or public sale." And it doesn't talk about whether that's real property or just property that's subject in the lawsuit. But in this particular case, in the absence of a statute providing otherwise or unless required by statute. So the way I read that is you've got to go back and look at the statutes that govern sales of property in a foreclosure context.

MR. TRODELLA: I understand that that's what Your Honor is saying. But I go back to the cases. And that same

passage has been cited in other cases. And not one of those cases went to the foreclosure statutes because none of the cases are interpreting this, a sale by receiver as following foreclosure. Again, it's an absolute sale. It's not a lender action. What the cases are interpreting that passage to mean is -- 568.5 doesn't mean you have to follow 701. In other words, the execution sales. Those cases aren't saying that you need to then follow foreclosure because it's quite clear in all of these places that it's not foreclosure that we're pursuing.

I think the one action rule cases are helpful here too because none of -- the cases -- again, on one action they don't cite the one case that says what they're saying here in court. It's just Mr. Hansen saying the sale by the receiver is similar to — it's in violation of one action. And so, therefore, there should be a sanction of that period. There's no cases and cites to say this.

If you look at the reply brief you can go to multiple paragraphs, even in the legal argument section where there's no cases cited. The only cases that are cited are if you were to offset a non-pledge bank account you could be sanctioned. That's the *Wozab* case. If you got a prejudgment with an attachment against non-pledged assets you can be sanctioned. That's the *Shin* case. And then the *Walker* case, which Mr. Hansen mentions today, and which was also mentioned in his brief, involved a situation where the lender didn't put all of his collateral into the action and then later tried to foreclose.

We have none of that. We have none of that here.

What we have here is a receiver selling the collateral. Selling a piece of property that no one has ever challenged as having — that we had valid security in. And the one case —

THE COURT: Well, they did challenge it, obviously, when they came in and appeared in the litigation. They've challenged it recently.

MR. TRODELLA: I'm not aware of anyone challenging the validity of our deed of trust. And maybe that's because this is a new complaint and I just haven't delved into it. But if the validity of our deed of trust has been challenged, that's the first I'm aware of it. But the point is, in each of those cases you're dealing with some sort of lender action, lender overreaching, a lender looking to non-collateral.

The one case that is very similar to the facts that we have here in the brief, in Mr. Pau's brief, he simply cites it and then says it's not binding. And that's the *RTC v. Bayside* case. And he's right. It's a 9th Circuit case. In that case the Superior Court, the District Court and the Appellate Court all said that under very similar facts, not completely identical facts, but very similar facts, that there is no action and there is no violation of 726 because it's the receiver — which is similar to your question a little bit ago about foreclosure -T it's the receiver who is doing everything. It's the receiver who is making the decision all under the watchful eye of the Court.

THE COURT: Let me ask you this along those lines. Under what authority, other than the inherent power of the Court, can the receiver deviate from the order of distribution

of proceeds that sets forth 701.810, which is the liens and whatnot? I mean there's specific requirements for distributing that. That's not addressed anywhere in this order. And, in fact, the order says, "free and clear of all liens and encumbrances."

MR. TRODELLA: Your Honor, that is somewhat of a red herring as we say in our brief. And I'll let Mr. Hunter talk to you in terms of how the order was structured in terms of the free and clear of liens. And I'll say why this is a red herring because the bank, Bank of America and Wachovia Wells, are the only two secured lenders. There are no longer any mechanic liens. There's no other liens against this property.

THE COURT: Isn't that an evidentiary issue though that — I mean I can accept your representation. But let's assume that's true.

MR. TRODELLA: Well, certainly no one's challenged that. I'm not aware of any mechanic lien claimant that's come in. And certainly --

THE COURT: But let's assume that's true.

MR. TRODELLA: Okay.

THE COURT: Does that still give the Court authority to issue this order? What happens if there's a lien that someone's not aware of or a tax lien?

MR. TRODELLA: There is a notice basis, right? So you would give notice to the parties who would have filed liens on the property.

THE COURT: Right. But this order doesn't contemplate that.

MR. TRODELLA: It doesn't contemplate that because — well, I'm not sure, specifically, what would happen in terms of if there was a higher sale price. I would suspect that you would need to make an argument higher than what the debt amount is. I suspect you would make an argument that those monies should go into escrow to be resolved if there were competing claimants. But we're not aware of competing claimants. There was notice given to parties. And what would happen is the security interest would then transfer from the asset itself, there then being a lien in the proceeds. And then those proceeds would go to pay off your first lien, your second lien, and third lien, etc.

So although those are — I understand the question. None of that is applicable here though because, from what I understand, the sale price is less than what the debt amount is. So even if there was a hypothetical, third-party lien creditor they would be, essentially, out of the money. If the amounts were higher then, again, there would be monies in an escrow. And if there was a hypothetical, third-party lien creditor and there was a question as to lien priority, then those monies would have to go into escrow and there would have to be a resolution.

THE COURT: Is Wachovia pursuing a deficiency?

MR. TRODELLA: We are not. We do not get a personal judgment and we're not pursing a deficiency.

MR. ROSSI: Your Honor, Mr. Hansen is on a tight —

THE COURT: Yeah, I need to start wrapping it up anyway. What time do you need to leave?

MR. HANSEN: About 20 till.

THE COURT: I plan on wrapping it up by then. Mr. Trodella, I'm.going to ask, respectfully, that if you can wrap it up maybe in the next five minutes or so. Because the order of events is I was going to give the moving parties one last chance to reply and then I was going to have it submitted.

MR. TRODELLA: Okay, Your Honor. I believe we've addressed the two issues, the legal issues that were before the Bench. And I'm not sure if you have any other questions of me.

THE COURT: I think you've articulated your position well. I think, with respect to the order, I understand now that the content and the language in the order, your argument is the Court has inherent, equitable authority to authorize that to a receiver under the circumstances.

MR. TRODELLA: Correct.

THE COURT: And that the requirements for judicial or nonjudicial foreclosure are, essentially, superceded by this order to the receiver, given the unique facts of this case.

MR. TRODELLA: I wouldn't say they're superceded because that makes it almost sound as if they're directly on point. What I would say is it's just different. Just like if I were to sell a piece of property I wouldn't need to follow the foreclosure rule.

MR. HUNT: Your Honor, if I may with one final point? You addressed Section 10 of the receivership order that says you're authorized to follow this expedited process. The reason that this order came into being this way is we had numerous stipulations between the borrower and lender to get the Nokia

lease done, get the ARDDOPA, get the Target settlement, everything that was in my stipulation. And RREEF's position was we pulled out of the project, we're out of the money. As long as there's no liability on us then, you know, bank, do with it what you will. At all times we make clear in our papers. It's been clear that RREEF was the manager, which is clearly stated in the operating agreement, and that RREEF has the sole discretion to operate the borrowing entity.

THE COURT: I think that's being challenged factually. I think there's some factual disputes that probably are going to, if necessary, be adjudicated at a later proceeding whether RREEF had control the entire time or Mr. Pau, at some point, did. I mean that's alleged. I'm not ruling on that today.

MR. HUNT: Okay.

MR. TRODELLA: Your Honor, that's why I've steered away from saying, listen, we have borrower consent. I realize that's at issue. But I also realize that it's irrelevant in terms of --

THE COURT: For purposes of today it is.

MR. TRODELLA: For purposes of today's hearing. But before we move on I just want to address one more thing because you asked this and I don't want it to be lost. We're not seeking a deficiency and we've never sought a personal judgment. Everything that's being sold is our personal collateral.

THE COURT: Okay. Appreciate it. Thank you.

MR. TRODELLA: Thank you.

THE COURT: Let me turn it over. I'm going to give you ten minutes and then I'm going to submit the matter, all

right?

MR. HANSEN: Thank you, Your Honor. The suggestion that the sale here wouldn't be a foreclosure sale is breathtaking and broad. When you take a step back and you ask really basic questions like when we say foreclosure, what do we mean? Where does that word come from? What is being foreclosed? The answer is the most fundamental point in mortgage law. And that is that a person who covers their property with a mortgage or a deed of trust retain something that has been recognized in Anglo-American jurisprudence for centuries, which is called the equity of redemption. It is, essentially, the right to own the property, subject to the lien or the deed of trust.

What it is that — what a foreclosure does is cut off that equity of redemption. So for the suggestion to be made that this sale wouldn't be a foreclosure is tantamount to saying that it wouldn't cut off the borrower's rights in the security. But of course it would. It wouldn't do anybody any good if it didn't. And, so, of course it's a foreclosure sale.

What's happening here is a little bit of verbal slight of hand where the phrase "free and clear of liens" is being substituted for foreclosure. But, in fact, whether or not factually there were junior security interests, they have forgotten one critical point here, which is that there is always -- because of that equity of redemption until foreclosed --there is always the equity position that gets wiped out. So in any foreclosure you have a situation in which all of the rights of everybody downstream from the foreclosing deed of trust or

mortgage will be wiped out. Ending with equity. Ending with the people at the bottom of the totem pole. There is no question that the order was drafted in a way to cut off the owner's equity. That's foreclosure. Call it what you may.

Point number two. I heard a bit of equivocation because at one point I heard Mr. Trodella say, well, it's really a consensual sale. It's really not something being done to the borrowers. It's being done sort of by the borrower's. It's really sort of the nature of a sale in which the borrower is cooperating.

Well, later in his points I heard him say he's not really representing to the Court that the borrower authorizes this. And, in fact, that's not before the Court. If the borrower, RREEF, isn't authorized because of what's in the Nokia company agreement as the only non-defaulting member of that LLC, we definitely do not consent. So if you look at it grammatically, is this something being done by the borrower? Or is it something being done to the borrower? There is no question it's being done to the borrower. It's got lots of pretty pink ribbons in terms of being a receiver sale, free and clear of liens instead of a foreclosure. But foreclosure is exactly what it is.

Next point. Early in his comments Mr. Trodella said something that I think is very revealing. When you asked about whether a pleading had been filed, a compliant had been filed before the application for the receiver, he said yes. I agree with that. That's factually correct. He said yes. But what was interesting is he said, yes, as a platform for our

receivership.

And that's a critical concept because what this receiver can do, and what the Court can authorize this receiver to do is based on the documents, the pleadings, and what is sought in terms of a prayer. And, as Your Honor just pointed out, what's sought is judicial foreclosure. And the imposition of a receivership I would agree that it wasn't only about collecting rents. It was about waste or alleged waste. That's under 564 sub 2. But it wasn't a general equity receivership. Or more importantly, it wasn't a receivership of the borrower entities.

And that's where I'd like to leave my comments by making one final point. The whole suggestion that this is something other than a foreclosure is based on the fundamental notion that the receiver, in some sense, is acting for the borrowers in selling the property pursuant to the somewhat exotic mechanism with the Court's approval. But the basic idea that you're being asked to accept is that the receiver is in some sense acting for the borrowers. That would make sense in a corporate receivership where a receiver was appointed to take possession of the affairs of the corporation and, for example, wind it up. Sell assets off. Complete the performance of contract. That happens all the time. And courts are well empowered to do that.

The critical distinction here is that this receiver wasn't appointed as a receiver for the borrowers. He has no power to act for the borrowers. He was appointed as a receiver for the property for certain purposes. And, in a sense, in

trying to sell this property he's acting from — the property can't sell itself. He's authorized to act for the property, not for the people that have the power to sell it consensually, which is the borrowers.

There is only two choices here. Either it's being done to the borrowers as a foreclosure by the bank, perfectly lawful. There are ways to do it. We all know that. That's not what they're doing. And the alternative is a sale by someone who has power to act for the borrowers. And that's simply not this receiver. That's not what this receiver does. He does not speak for the borrowers. He was appointed by this Court to do a number of things: To preserve, protect, gather rents from. No problem. It's absolutely permitted under 564 and 2938. But nowhere is he authorized in the pleadings, loan documents, statutes, nowhere is he authorized to sell.

And I'll say one final thing. I don't want to stick my neck in the noose under rule 977, so I'm not going to go into great detail about this. But it is simply not a correct statement to say that no court has said what — that -- stood precisely for the proposition that we are arguing here. Yes, a court has. It was removed after that decision was published. And there was an issue, as you know, in the Federal Courts about whether that rendered the decision not citable. I'm not going to cite it because that's ambiguous. But a decision does exist that addresses that.

And as an evidentiary matter, we brought that decision on the 6th Appellate District to the attention of Wachovia in our *Wozab* letter, in our one-action warning letter. And it is

in this record. I can't cite it as a binding precedent. Although, I think there's still an issue with the State Courts as to whether it became final, notwithstanding the removal. But there is such a case. And Mr. Trodella knows it.

THE COURT: All right. I know you want to speak.

MR. TRODELLA: Two minutes.

THE COURT: Just very briefly and then I've got to cut it off.

MR. TRODELLA: Absolutely. Especially after what Mr. Hansen said.' So the case he's so constrained not to cite and what my statement was is, and what I think is amazing, is not one case has been cited per the authority, in authority to what they're saying. Both you can't sell and that there's a violation of the one action rule. He hasn't cited to any.

And although Mr. Hansen has spoken quite eloquently for a half an hour about why he doesn't think you can, he's yet to cite to one case to say why you can't do this. And yet we've cited several that say you can. The case that he's alluding to right now is the *Cal-Am* case in the Bayside. And not only was that overruled by the District Court in the 9th Circuit, it's also been statutorily overruled by 2938. There was this distinction as to whether — whether the receiver were to apply proceeds from nine townhomes and then give them to the bank to apply to the debt, was that analogous to a rental offset, which *Wozab* said you can't do.

Well, not only did the courts later say, well, that's ridiculous because they're proceeds, they're part of your security interest. 2938 says, in fact, that an assignment of

rents clause gives you a security interest. So it's just silly to go down that path. The fact is, they do not cite to a case to say -- to stand for the proposition that they're asserting. I just wanted to make that point. I know we're short on time. That's my final point.

THE COURT: All right. Submitted?

MR. HANSEN: Submitted.

THE COURT: All right. Let me tell you what my thoughts are, having spent a good amount of time with this this weekend and over the past few days. A lot of my questions, as you both know today, were directed to the order that was issued by Judge Murphy because I think even though there are a lot of pertinent and relevant factual background information, at the end the day the Court is asked today to confirm a sale that's been presented before. And I would say in a similar sense, from the other side, the Court's asked to modify the instruction to the receiver that were granted. But really the request is to halt the sale or stop the sale. So they're interrelated motions. Different in parts. Similar in parts.

I think that at the end of the day there are inherent statutory protections to the foreclosure process, whether it's by trustee sale, nonjudicial foreclosure or by judicial foreclosure. I think those protections are afforded in various code sections that counsel has alluded to in their briefs. Those are really there for a reason. In other words, to provide protection to everyone.

If I look closely at Judge Murphy's order, and I want to make this comment as well, I think the receiver did what the

order authorized them to do, in large part. They certainly exercised due diligence in going out and soliciting a number of buyers. But, at the end of the day, some of the protections afforded by statute, whether it's a judicial foreclosure, which is really what the lawsuit was filed for, or even a nonjudicial foreclosure, just are not addressed or referenced in Judge Murphy's order. And for that reason I'm going to deny, without prejudice right now, the motion to confirm the proposed sale of the receivership. I am going to grant the motion to modify the instructions. I'm going to need to take a look at that and make sure that that complies and conforms to the statutory requirements before I do that. But that will be my order today, all right?

MR. ROSS: Thank you, Your Honor.

MR. TRODELLA: Thank you, Your Honor.

THE COURT: Thank you, everyone.

(Whereupon, this matter concluded.)

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, MELISSA CRAWFORD, HEREBY CERTIFY: That I was the duly appointed, qualified shorthand reporter of said court in the above-entitled action taken 0V1 the above-entitled date; that I reported the same in machine shorthand and thereafter had the same transcribed through computer-aided transcription as herein appears; and that the foregoing typewritten pages contain a true and correct transcript of the proceedings had in said matter at said time and place to the best of my ability.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted, if applicable.

DATED: JUNE 10, 2011

MELISSA CRAWFORD, CSR, RPR
CSR No. 12288

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Ask The Receiver

By PETER A. DAViDson*

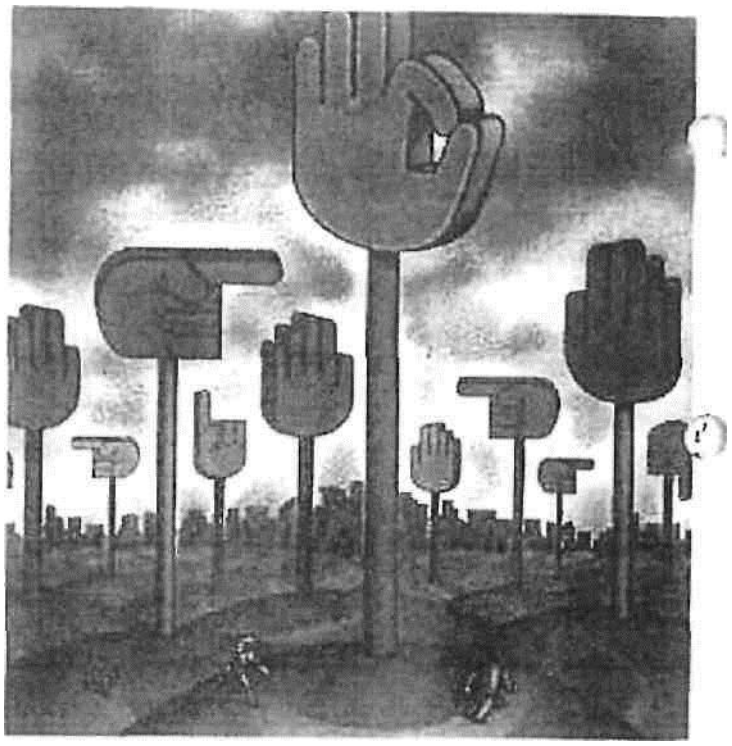
MAY STATE COURTS CONFIRM RECEIVERS' SALE OF REAL PROPERTY FREE AND CLEAR OF LIENS AND ENCUMBRANCES?

\2, A receiver is preparing to sell some real property in receivership "free and clear liens" with the liens attaching to the proceeds of the sale, believing this is something receivers can do. Counsel for the title company he was going to use said it would not write the policy because it had concerns about the court's power to issue such an order; especially with respect to its jurisdiction over claimants whose rights would be affected by a sale. The title company referred to "due process" considerations, which it believes means that a court cannot change or alter anyone's rights, including property rights, without at least providing all affected parties "due process."

The title company said the court must have jurisdiction over a party to affect its rights and believed jurisdiction can only be obtained by serving such claimant as one would serve a summons and complaint. The title company acknowledged the rules are different under the Bankruptcy Code [Sec. 363(f) specifically authorizes such sales under certain terms and conditions]. Because the case is in state court, the title company didn't see how a state court could alter lien holders' rights by selling property free and clear of their liens, even if the liens attached to the proceeds. Certainly not without providing each affected person and entity with full notice. Is this right? Can receivers sell property free and clear of the liens?

A. The attorney who gave this advice apparently has forgotten there are a number of ways for a court to obtain jurisdiction and issue orders affecting parties' rights. He is focused on personal jurisdiction. However, a court can have jurisdiction over property by taking the property under its custody and control. In such situations, the court has quasi in rem jurisdiction. That is what occurs when the court appoints a receiver for property.

The property is taken into the custody of the court (it is "in custodia legis" - which, by the way, is the motto of the Receiver's Forum). Because the property is in the custody of the court, the court has quasi in rem jurisdiction and can deal with the property and affect everyone's rights to the property. All lien holders should, however, be given notice of the sale motion. Title company's counsel's statement that the rules in bankruptcy court are different is incorrect. Indeed, the section in bankruptcy code authorizing a debtor or bankruptcy trustee to sell property free and clear of liens, with the liens attaching



to the proceeds is modeled after the old equity receivership practice where courts of equity often authorized the sale of property under their control free and clear of existing hens. See Spreckles v. Spreckles Sugar Corp., 79 F.2nd 332 (2nd Cir. 1935) where the court points out the courts of equity have had the power to sell property free and clear of liens, including/^ taxes, from the earliest times. Indeed, the Supreme Court ha^ p held that this power "must be implied from the general equity..,') powers of the court." Van Huffel v. Harkelrode, 284 U.S. 225 (1931); see also 65 Am. Jur. 2nd "Receiver" Section 343 ["The majority view is that a court has the inherent power to authorize the sale of property in custodia legis free and clear of liens, the liens being imposed upon the proceeds of the sale."].

In Chapman v. Schiller, 95 Utah 514, 83 C. 2nd 249 (1938) the court indicated that some courts "following the rule in bankruptcy cases" will not order a sale free and clear of liens unless there is equity for the estate in the property. However, it notes: "The rule wherever adopted has been held to be discretionary."

The receivership court, therefore, can sell property in receivership, free and clear of liens, with the liens attaching to the proceeds. This is how most of the "busted" condominium projects are operating. The receiver will get court authority to '•' sell a unit free and clear of any liens, with the liens attaching to* '• the proceeds. The court will work out later who is entitled to the proceeds based on their liens.

If there are not sufficient funds in the estate when all the condominiums are sold, it is likely the bank holding the senior lien position will foreclose, wiping out all the junior liens and obtaining all of the sale proceeds (less of course the administrative expenses owed to the receiver and his professionals). If there are.. sufficient proceeds to pay off the bank, then the court will have to determine who is entitled to the balance of the proceeds based on the liens that have been filed.

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The court clearly, however, does have the power to sell receivership property free and clear of liens. It should be noted, and this may clear up some confusion expressed by some counsel as to how a receiver can sell property and pass title prior to a bank's foreclosure. Receiver's sales do not convey "legal" title; they convey "good", equitable title. When a court orders property in its custody sold, the court confirms title in the purchaser. A court of equity acts by injunction against the r-.owner and third parties and protects the purchaser against /interference and assures the purchaser quiet title. SEC v. American Capital Investment, Inc., 98 F. 3d 1133 (9th Cir. 1996) citing Clark on Receivers Section 487.

[Editor's note: There is a split of opinion on how broad the sweep is of a state court's right to strip perfected lien rights from real property to sell it free and clear of such stripped liens. The argument begins with the express prohibition against states passing any law impairing the obligation of contracts - presumably including lien rights arising pursuant to contractual terms (the Federal government ,|?s not so prohibited). An article in the California Law Review [76 b"""'"f. *L. Rev. 267, 1988] sets out James Madison's explanation for press ban, which is found in Section 10 of Article One of the* L/.C>'. *Constitution ("No state shall...pass any...Law impairing the Obligation of Contracts....). Madison said, in brief, that laws impairing the obligation of contracts are contrary to the first principles of the "social compact" and to every principal of sound legislation.'*

The argument goes that a state court's equitable power to sell real property free and clear of liens does not emanate from a specific law or statute, however, but rather from the time-honored usages of equity, and the Constitutional ban against states impairing rights of contract is inapplicable. Case law generally supports this distinction, as Peter's article states. But even so there are restrictions on any court's equitable powers.

In Spreckles v. Speckles Sugar Corporation, 79 F.2d 332 (1935) Judge Learned Hand wrestled with the sale free and clear)issue, and commented:

"We have no doubt that the power exists; the question is only as to the propriety of, and the proper conditions upon, its exercise. It is quite true, although there is perhaps no rigid ride about it, that ordinarily a court will not sell property free of liens unless it can see that there is a substantial equity to be preserved. [cites]"[i.e. sufficient equity to pay the stripped iiens in full.]) The Spreckles case revolved around relative priority of federal \axes and city taxes.

The leading treatise on receiverships, Clark on Receivers, at Se *~/\00(b) echoes this in addressing court decrees directing sales* }/rtu» *property free and clear of liens, concluding "The property should not be sold free and clear of liens unless it is made to appear that there is a reasonable prospect that a surplus wilt be left for general creditors li.e. all liens paid in full] or, in other words, that a substantial equity is to be preserved."*

This general, but not absolute, requirement that in order for liens to be stripped from real property prior to sale it must appear that the sale proceeds will be sufficient to pay all such liens appears frequently in case law and treatise materials, and does not seem to work a liardship. All secured creditors already have ample and well-defined rights of recovery at law ~ i.e. through foreclosure — with respect to their collateral. Indeed, most attempts to sell free and clear of liens arise in tandem with an ongoing judicial foreclosure }rroceeding. The associated issue of when the court may allow a sale of real property in receivership - liens stripped or not - is quite another issue not treated here.

As Peter states, only equitable, rather than legal, tide may thus be conveyed by equity, leaving it up to title insurers to determine the scope and certainty of title they will insure.] Peter Replies:

While the Editor is correct that some state courts exercise their power to sell property free and clear of liens (with the liens attaching to the proceeds)'generally only when there is I equity in the property to be I preserved, that is not a hard I and fast rule and is I discretionary with the court.

V ! The problem with such a *fp^. -* J rule is that is allows a junior I secured creditor, with no] equity in the property, to, in effect, blackmail the Court, the receiver and senior secured creditors, by holding up development and sale of property in receivership.

Take the typical "busted condo" project. The bank has die first deed of trust. There might be some mechanics liens junior to the bank. The developer, a LLC or LLP with no other assets, has walked away from the project because it has determined that the value of the completed project is less than it owes to the bank.

The property is unguarded, sixty percent finished, and the construction loan has likely been exhausted. The bank has had a receiver appointed who was instructed by the court to safeguard the property, to finish construction and to sell the finished units to protect the bank's collateral. The bank's interest is in maximizing the value of the collateral and limiting its liability. Indeed, the bank often will advance funds, through receiver certificates, so that the property can be secured, protected and the construction finished. [Remember: receiver's certificates are a promise by the court that the lender will be paid.]

Should a junior secured creditor, with no equity in the property, be allowed to prevent a court of equity from having its receiver finish construction, to maximize the collateral's

Continued on page 26

Continued from page 25.

value, and sell the collateral for the benefit of whomever the court may later determine is entitled to the funds? Courts of equity have often said no and allowed such sales.

The Clear Channel bankruptcy decision, cited by the Editor, is not as broad as the Editor implies, should have no effect on receiverships, and has not been followed by other courts, even courts in this circuit. See, In Re Jolan, Inc., 403 B.R. 866 (Bankr. W.D. Wash. 2009) ["I conclude that Clear Channel ... does not preclude a §363(b) sale free and clear for an amount less than enough to satisfy all liens ..."]

The court in Jolan found that there are other legal and equitable proceedings where a sale could be allowed free and clear of junior liens, even if the sale was for less than the amount to satisfy all liens, and, therefore, a bankruptcy trustee could sell property free and clear of junior liens under 11 U.S.C. §363(b)(5).

The Clear Channel court was focused on §363(b)(3) and did not discuss subsection (b)(5). The proceedings cited by the court that will allow a sale free and clear of liens is a Washington statute, RCW 7.60.260, which allows a receiver to sell free and clear of liens, with the liens attaching to the proceeds, and a federal tax lien sale, 26 U.S.C. §6335, 6339(c) and 6342(c).

Because a federal tax lien sale can take place in California, bankruptcy trustees in California should be able to use §363(b)(5) to sell property free and clear of liens, even if there is no equity for a junior creditor in spite of the Clear Channel decision.

Too often counsel and courts look to bankruptcy cases when they are deciding receivership issues. While the remedies and procedures may often seem similar, the rights and powers of a receiver and a court of equity arc not governed or controlled by what happens in a bankruptcy courts. Bankruptcy courts arc bound to follow the bankruptcy code and the federal rules of bankruptcy procedure, none of which apply in receivership cases.

Receiverships, unless a specific statute applies, follow the practices of courts of equity which go back to the rein of Elizabeth in the 17th Century.

[Editor's note: "Blackmail" is such a harsh word. Junior lien creditors receive a bundle of rights when lending against real property, including the right to block a sale of that real property for an amount less than that required to pay their junior lien in full. Under California law the bank in first position has the ability to avoid this situation - by foreclosing on its collateral and wiping title clean of such junior liens. The fact that some lenders would rather not foreclose and take title to their collateral hardly seems a reason to strip such a valuable, bargained-for right from junior lien creditors. This ability to block a sale for an amount insufficient to pay junior liens has undoubtedly led to many junior lien creditors receiving at least some payment on their otherwise no-equity liens.

A receiver is never allowed to improve property it has been asked to seize and preserve. The receiver may take steps to "protect" such property, however. Using Peter's example, many courts are being asked to appoint receivers to take possession of unfinished real property construction projects and, if lenders are willing to advance * funds, to "protect" such projects through build-outs. The right of the lender to this interim remedy is usually contract-based (rather than equivy-based): the bank's security agreement typically covers all assets and property of the borrower and contains the right to seize and protect its collateral. Such agreements also include a right in the bank to advance funds to "protect" its collateral, often the source of build-out funds.*

Selling the completed units after build-out is quite another issue, however. Legal title to the properties remains in the defendant/tapped-out builder until the bank completes its foreclosure. As Peter states, only equitable (not legal) title may be passed, and die "seller" (as defined by statute) has a ten-year liability for any construction defects pursuant to California statutes. See the Receivership News article "Impact of California's Subdivided Lands ■ Act and Right to Repair Law on Foreclosing Lenders" in Issue 33: | Summer 2009. Whether this liability attaches to the receiver and/or^ ' the appointing court is unresolved.

Peter is certainly correct that the effect of the Clear Chanel decision is unsettled. The Jolan court's use of a federal tax lien as an instance of "applicable nonbankruptcy law" permitting sale of property free and clear of liens is questionable, since it renders the Bankruptcy Code's Section 363(b)(3)'s statutory qualifier moot -such a federal tax sale is possible in all jurisdictions. "It is *a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)). All the more so where the redundant interpretation abo strains common sense. 5"* CFTC *v. White Pine Trust Corp., 574 F.3d 1219, 1225 (9th Or. 2009), citing to TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, l51L.Ed.2d339(2001)."*

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Citation: **21 F2d 414**

*21 F.2d414, *; 1927 U.S. App. LEXIS 2731, ***

SEABOARD NAT. BANK v. ROGERS MILK PRODUCTS CO., Inc., et al.

No. 323

Circuit Court of Appeals, Second Circuit

21 F.2d 414; 1927 U.S. App. LEXIS 2731

August 18, 1927

PRIOR HISTORY: [1]**

Appeal from the District Court of the United States for the Southern District of New York.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant trustee challenged an order from the District Court of the United States for the Southern District of New York, which approved appellee receivers' sale of mortgaged land and proposed to distribute the bulk of the proceeds for the payment of administration expenses rather than the payment of mortgage bondholders.

OVERVIEW: Mortgaged property of an estate in receivership was sold under an order of sale in district court. Appellee receivers sought to distribute less than a third the proceeds for payment of the mortgage bondholders and the rest for administration expenses. Appellant trustee challenged the distribution. The court reversed and held that only appellees profited by the sale under the receivership, instead of by foreclosure of the mortgage in the usual manner. A sale should not have been approved without a reasonable expectation that the general estate would have benefitted. The district court had possession of the proceeds but did not have the power to disburse the funds because all parties in interest had not been given proper notice of appellees' intent to divert the fund to improper uses. When distribution was threatened in utter disregard of the rights of bondholders appellant was allowed to assert his lien to protect their rights and had standing to appeal from an order that disregarded it. The court remanded for redistribution and for a determination whether the district court had jurisdiction over the matter since the property in question was in a different jurisdiction.

OUTCOME: The court reversed, except as to the payment of franchise taxes, and remanded for a determination of jurisdiction over the matter and for redistribution of the proceeds of the sale. Because the general estate had not benefitted from the sale it should not have been approved.

CORE TERMS: mortgage, receiver, bondholders, order of sale, receivership, lienor, proceeds of sale, mortgage lien, realized, notice, ascertain, franchise, asserting, selling, plant, general creditors, order appealed, trust mortgage, general estate, subject-matter, incumbrance, preserving, mortgaged, estopped, ordering, unauthorized, repaid

LexisNexis(R) Headnotes • Hide Headnotes

Civil Procedure > Remedies > Receiverships [B,1]
ft.viAA court of equity has the power under proper circumstances to sell property free of

liens, transferring the lien to the proceeds. But generally this power should not be exercised unless there is a reasonable prospect that a surplus will be left for general creditors. More Like This Headnote

Civil Procedure > Remedies > Receiverships "*«

Authority for selling free of liens is found in the general equity powers of the bankruptcy court, and the principle is equally applicable to equity receiverships. More Like This Headnote

Civil Procedure > Remedies > Receiverships »"

A fund created by sale may not be charged with general expenses of administering the estate. There is doubt whether even the expenses of the sale should be charged to the lienor if he did not consent to the sale. Nor is it material that no general estate remains to compensate the receiver or the trustee in bankruptcy or their attorneys, where the fund realized is less than the amount of the valid incumbrance. This is no hardship, for the sale should not be asked unless there is a reasonable expectation that the general estate will be benefited. More Like This Headnote

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:r. The procedure by which a lienholder should assert his claim to the fund is by filing an intervening petition. He may be ordered on reasonable notice to come in and assert his rights. More Like This Headnote

Civil Procedure > Remedies > Receiverships *m)*

When the court has possession of a fund realized by the sale of property, with possession goes the power to disburse it, unlawfully as well as lawfully, provided the parties in interest are before the court. This can be accomplished by notice. If entered without notice to parties interested in the fund, an order allowing compensation for services or expenses of a receivership may be set aside at any time before the estate is Closed. MoreJJke This .Headnote

Civil Procedure > Remedies > Receiverships *>

//.vt;^Franchise taxes are paid ahead of a mortgage on a sale of property free of liens, even though levied after the mortgagor has created the mortgage lien. More Like This Headnote

Civil Procedure > Remedies > Receiverships *u

..r;If some of the bondholders fail to come in to claim a share in a fund created by sale, that is immaterial to the receivers. The share of the absent bondholders must be held for them. The trustee may assert his lien to protect their interest, and may appeal from an order which disregards it. tyore UkeThis Headnote

OPINIONBY: SWAN

OPINION: Before L HAND and SWAN, Circuit Judges, and CAMPBELL, District Judge.

[*416] SWAN, Circuit Judge. There is no doubt of the power of a court of equity under proper circumstances to sell property free of liens, transferring the lien to the proceeds. But generally this power should not be exercised unless there is a reasonable prospect that a surplus will be left for general creditors. See In re Franklin Brewing Co.. 249 F. 333, 335 (CCA. 2); In re National Grain Corp., 9 F.(2dl 802, 803 (CCA. 2); In re Harralson, 179 F. 490. 492, 29 L.R.A. (N.S.) 737 (CCA. 8); Remington, Bankruptcy (3d Ed.)

§ 2583. These cases relate to sales in bankruptcy, but [wl]7authority for selling free of liens is found in the general equity powers of the bankruptcy court, and we think the principle is equally applicable to equity receiverships. The case at bar illustrates the wisdom of such rule. Here a fund of $ 37,000 was realized from the mortgaged premises, and under the distribution which the receivers seek to sustain less than $ 10,000 of it is to be paid to the mortgage bondholders, **[**2]** although their bonds exceed many times the **[*417]** total fund. The rest is to be eaten up by expenses of administration, principally fees for receivers and attorneys. They are the only ones to profit by having sold the property under the receivership, instead of allowing the mortgage to be foreclosed in the usual manner. It is a shocking result, and such as justly brings receiverships into disrepute in the popular mind.

Even if there was a dispute about the validity of some of the bonds, as is suggested in one of the affidavits, that dispute was not alleged in the petition for sale, and there is no doubt but that there were enough valid bonds, so that no equity could remain for general creditors. We can conceive of no benefit which the estate in receivership could obtain by selling free of liens, and of no interest which the receivers could have in so selling, except to get fees for themselves and their attorneys. 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.

The impropriety of ordering the sale free of liens in this particular instance appears to be **[**3]** the more egregious, because, so far as this record discloses, the District Court for the Southern district of New York had absolutely no jurisdiction of the subject-matter. The land was located in the Northern district of New York. The only conceivable basis for jurisdiction In the District Court for the Southern district is to be found in section 55 of the Judicial Code (Comp. St. § 1037 [28 USCA 8 116]), and is limited to a case where part of the property is located in that district. There is no suggestion in the record that any of the defendant's property was located in the Southern district, and it would seem that the order of sale was void for lack of jurisdiction. See Primos Chemical Co. v. Fulton Steel Corp. fD.C.^ 254 F. 454 (N.D.N.Y.); Equitable Trust Co. v. Washington-Idaho Water Co. *(D.C.)* 300 F. 601 (E. D. Wash.). Whether the District Court for the Northern district entered an order of sale does not appear.

However, the appellant does not question the validity of the order of sale, but has chosen to pursue the proceeds. We are not disposed to throw him out of court on the theory that it does not affirmatively appear that the lien of his mortgage has been discharged. **[**4]** The record is not complete, and we shall assume in the remainder of this opinion that the District Court in some manner obtained lawful custody of the proceeds of sale, subject to the lien of the mortgage. If it did not, the remedies of the appellant would be very different. See Hawes v. First Nat. Bank. 229 F. 51. 59 (CCA. 8). Whether the court's order of sale had any validity whatever, and whether the mortgage trustee may be estopped by his pursuit of the proceeds, are, therefore, questions upon which we do not pass.

We come, then, to the distribution of the proceeds of sale. The order of sale transferred the mortgage lien to the proceeds, and they should have been ordered paid to the lienors, subject at most only to deduction of the actual expenses of preserving the property and creating the fund by sale. ""^^*The* fund may not be charged with general expenses of administering the estate. AEtna Life Ins. Co. v. Leonard. 186 F. 148 (CCA. 5); Guoel v. New Orleans Nat. Bank. 239 F. 676 (CCA. 5); In re Williams' Estate. 156 F. 934. 939 (CCA. 9); In re Utt. 105 F. 754 (CCA. 7). There is doubt whether even the expenses of the sale should be charged to the lienor if he did **[**5]** not consent to the sale. AEtna Life Ins. Co. v. Leonard, supra: In re Vulcan Foundry, etc.. Co., 180 F. 671 (CCA. 3). Nor is it material that no general estate remains to compensate the receiver or the trustee in bankruptcy or their attorneys, where the fund realized Is less than the amount of the valid incumbrance. In re Williams, supra; Smith v. Township of Au Gres. 150 F. 257. 9 L.R.A. (N.S.) 876 (CCA. 6); In re Cutler & John (D.C) 228 F. 771 (E.D.N.C). This is no hardship, for the sale should not

have been asked unless there was a reasonable expectation that the general estate would be benefited.

•i?w<?The procedure by which a lienholder should assert his claim to the fund is by filing an intervening petition. He may be ordered on reasonable notice to come in and assert his rights. In re T. A. Mclntvre & Co.. 176 F. 552 (CCA. 2); In re Lathrop. Haskins & Co.. 223 F. 912 (CCA. 2). The general order obtained upon the appointment of receivers, directing creditors to file their claims within 90 days, was not such an order. It affected only creditors of the defendant, not claimants of a fund created long afterward. The refusal to allow Spence & Co., Inc., to file its claim **[**6]** as a general creditor adjudicated nothing with respect to the rights of the appellant, or of its rights to share in the fund held subject to the lien of the mortgage. See N. Y. Security 8t Trust Co. v. Lombard Inv. Co. fC.C.) 75 F. 172 (W.D. Mo.), cited by this court in Re Lathrop. Haskins 8iCo., supra. There was no bar of any sort to the lienor asserting his rights, unless **[*418]** it be the order entered November 13, 1924, from which no appeal was taken.

That order makes no allusion to the lien of the Spence mortgage. It approved disbursements shown in the preliminary report of the receivers, which had apparently been filed either the day before or the same day as the order. It also authorized payments to the receivers, to attorneys, and to others who had rendered services to the receivers, which, if paid out of the fund held subject to the Spence lien, would impair it by more than $ 10,000. No other fund was available. The receivers' report showed that they had collected some $ 88,000, of which about $ 51,000 was derived from the Booneville plant, and about $ 37,000 from the Pulaski plant and the feeding stations. The Booneville plant was subject to several incumbrances **[**7]** other than the Spence mortgage, and the order now under discussion recognized these liens and gave the lienors the entire proceeds. This left, as the only property remaining in the receivers' hands, the fund of $ 37,000, and this was subject to the Spence lien. While the order does not say from what source the receivers are to procure the money for the payments authorized by the order, it is apparent that the only source available is the Spence fund.

The inequity of putting the entire expense of administration upon this fund is so obvious that we cannot understand upon what theory the order was entered. It should be allowed to stand only if the bondholders and their trustee, Spence, are estopped to question it. The order recites that "due notice of this hearing had been given to all mortgagees and bondholders under the trust mortgage herein." If proper notice was given to the bondholders and their trustee that it was proposed to divert their fund to improper uses, we do not see how the payments can now be attacked. HA15:SThe court had possession of the fund, and with possession went the power to disburse it, unlawfully as well as lawfully, provided the parties in interest were before **[**8]** the court. This could be accomplished by notice. If entered without notice to parties interested in the fund, an order allowing compensation for services or expenses of a receivership may be set aside at any time before the estate is closed. See Rugglesv. Patton. 143 F. 312 (CCA. 6); In re De Ran. 260 F. 732 (CCA. 6); In re Lahonorais. 5 F,(2d) 899 (CCA. 1).

At the date of the order of distribution of March 4, 1925, which is the order appealed from, there apparently still remained some $ 13,000 of the fund realized from the mortgaged property. From what has been said above, it is plain that that order was wrong, except in respect to ordering payment of the franchise taxes due to the state of New York. •w*?1'he franchise tax comes ahead of the mortgage, even though levied after the mortgagor had created the mortgage lien. See N. Y. Terminal v. Gausf 204 N.Y. 512. 98 N.E. 11; In re rgntiiry Steel Co.. 17 F.f2d) 78 (CCA. 2).

It is urged that the mortgage trustee has not such an interest as entitles him to maintain this appeal, and that Fitkin v. Century Oil Co.. 16 F.(2d) 22 (CCA. 2), so decides. That case held

that the trustee was not a creditor, and could not prove the **[**9]** claims of mortgage bondholders who had not appeared for themselves. There the property had not been sold free of Hens; the trustee was insisting upon the validity of the mortgage, and was attempting to prove a claim as creditor in order to protect bondholders in case there should be a deficiency after the security was realized. It was held merely that he was not a creditor. Accord: Brant, etc., Co. v. Palmer, 262 F. 370 (CCA. 8); In re U. S. Leatheroid Co., 285 F. 884 (D.C Mass.). Compare Lane v. Equitable Trust Co.. 262 F. 918 (CCA. 8). Here the trustee is not claiming as a creditor. He Is asserting his lien upon the fund, claiming that he holds such lien in trust to secure all valid bonds, just as before the sale he held the mortgage lien upon the land. The distinction between asserting rights to his lien and claiming as a creditor is recognized by dictum in Mackay v. Macon Coal Co., 178 F. 881 884 (CCA. 8). Doubtless the court may in its discretion distribute the fund directly to the bondholders, Instead of turning it over to the mortgage trustee for distribution. United States Trust Co. v. Gordon, 216 F. 929 (CCA. 6); In re Chambersbura Silk Mfg. Co. fD.C) 190 **r**101** F. 411 (M.D. Pa.). But we see no reason why the trustee, when distribution is threatened, in utter disregard of the rights of bondholders, may not assert his lien to protect their rights. Neither the Fitkln Case nor any other authority which has come to our attention is adverse to this view.

We are satisfied that the trustee *is* a proper party to bring to our notice the errors In the order appealed from. The terms of the trust mortgage do not appear, but the receivers have themselves recognized Spence as trustee, and the mortgage as creating a valid lien far in excess of the amount of the proceeds of sale. H,v;"*"If some of the bondholders have failed to come In to claim a share in the fund, that is immaterial to the receivers. The share of the absent bondholders must be held **[*419]** for them. Drascovich v. Equitable Trust Co., 3 F. (2m 724 (CCA. 9): Brown v. Penn. Canal Co.. 279 F. 417 (CCA. 3). We think the trustee may assert his lien to protect their interest, and may appeal from an order which disregards it.

It is therefore necessary to reverse the order and remand the cause. It should be referred to a competent master. He should first ascertain whether the court has **[**11]** any jurisdiction of the subject-matter of the fund. We will not attempt on this record to direct what shall be done, if he finds that the court was without jurisdiction. If he finds In favor of jurisdiction, he should ascertain the amount of the lien upon the proceeds of sale of the premises mortgaged to Spence, and what items of expense are properly chargeable against this fund. Certain items of expense it may be proper to charge solely to the Booneville fund, or solely to the Spence fund, or to apportion between the two. He should then ascertain to what extent, if at all, payments authorized by the order of November 13, 1924, may be impeached. Any impeachable payments which have impaired the fund must be repaid. Any payments made under the order of March 4, 1925, except the payment of franchise taxes, are unauthorized, and must be repaid. The master should ascertain and report the extent of the impairment of the fund, and to whom unauthorized payments which are subject to recovery have been made. Such payees should be required to repay. The Spence fund, replenished by such repayments, should be distributed to the bondholders; but we think, under the circumstances, there **[**12]** should be deducted therefrom a reasonable fee to the trustee for his services in preserving the mortgage lien upon it.

The order is reversed, except in so far as it authorizes payment of the franchise taxes, and the cause is remanded for further proceedings in conformity with the foregoing.

* Signal Legend:
: J - Warning: Negative treatment is indicated
- Caution: Possible negative treatment <£
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Citation information available
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*76 Calif. L Rev. 267, **

California Law Review

MARCH, 1988

76 Calif. L Rev. 267

LENGTH: 16755 words

ARTICLE: Contract Rights and Property Rights: A Case Study In the Relationship Between Individual Liberties and Constitutional Structure.

... [*2S3] compensation clause applied only to the federal government. n4 States were free to take property without providing compensation, unless the taking happened to violate some other provision of law. On the other hand, the contracts clause of **article I, section 10,** prohibits **laws "impairing the Obligation of Contracts."** This provision applies only to the states. The federal government may impair the obligation of contracts without constitutional restraint unless the impairment is also a taking of property or a violation of some other provision of the Constitution.

A mere glance at the Constitution suffices to show that this difference in treatment was not inadvertent. **Section 10 of article I** contains certain limitations on state powers; section 9 of the same Article contains [*262] parallel limitations on the powers of Congress. Section 10 provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or **Law impairing the Obligation of Contracts."** Section 9, which applies only to Congress, provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." The omission of a contracts clause from section 9 is too obvious to be anything but...

... **[*276]** adoption of the Constitution and Bill of Rights casts little direct light on the question here. Although Madison commented in a letter to Jefferson that the contracts clause, along with two other prohibitions on state action in **article I, section 10,** "created more enemies than all the errors in the System positive and negative put together," n46 we have little record of this controversy. Records concerning adoption of the just compensation clause are even more sparse. Nonetheless, it is useful to ...

... **[*284]** restrained by a national control," would become both "serious sources of animosity and discord" and "injurious impediments to the intercourse between the different parts of the Confederacy." n82

The reason for the contracts clause, then, was not merely that **laws impairing the obligation of contract** are "atrocious breaches of moral obligation and social justice" — though Hamilton also believed this to be true. n83 The principal motivating factor was the effect of such laws on citizens of other states, on commerce throughout the country, and even on peaceful relations ...

... **[*287]** debts, were much more likely to travel across state lines. n95 It therefore seems reasonable ~ if the purpose of the contracts clause is to protect against interstate hostility

and the disruption of interstate commerce - that the Framers would prohibit the states from passing **[*288] laws impairing the obligation of contract,** while leaving property rights to the protection of state law.

B. The "Madisonian" Explanation

Madison's explanation of the purpose of the contracts clause in *Federalist* No. 44 differs markedly from Hamilton's in No. 7. Madison explains that "[b]ills of attainder, *ex post facto* laws, and **laws impairing the obligation of contracts,** are contrary to the first principles of the social compact and to every principle of sound legislation." n96 The reason for the clause, then, is perhaps not its impact on interstate commerce, but the prevention of injustice. If so, it is difficult to see why **laws impairing the obligation of contracts** should not be forbidden at the federal as well as the state level, as are bills of attainder and ex post facto laws.

Madison himself posed, and answered, this very question. In a letter to Jefferson explaining why Congress should be given the authority to ...

... **[*289]** contracts clause solely to the states, then, is that an extended republic, deliberative representation, and the network of checks and balances that characterize the federal scheme make further provision against interference with contracts unnecessary. Moreover, since an absolute ban on **laws impairing the obligation of contracts** would produce "inconveniences," nl02 it made sense to preserve flexibility by rejecting the application of the contracts clause to the federal government. Bills of attainder and ex post facto laws (assuming the latter are confined to criminal statutes) are ...

FOOTNOTES:

... [*295] *Powers, 1801-1835,* 49 U. CHI. L. REV. 887, 895 (1982); Hale, *The Supreme Court and the Contract Clause,* 57 HARV. L. REV. 512, 512-13 (1944); Hutchinson, ***Laws Impairing the Obligation of Contracts,*** 1 S.L REV. (n.s.) 401, 409-10 (1875); Johnson, *The Contract Clause of the United States Constitution,* 16 KY. L.J. 222, 223-24 (1928); McKinney, *The Constitutional Protection of the Obligation of...*

... **[*295]** *id.* at 31.

nlOO. THE FEDERALIST NO. 44, *supra* 9, at 282-83.

nlOl. *See also* 1 ANNALS OF CONGRESS, *supra* note 74, at 458. Madison stated that the restrictions on state power in **article I, section 10,** were "wise and proper restrictions in the Constitution. I think there is more danger of those powers being abused by the State Governments than by the Government of the United States." *Id.*

nl02. *See supra* text accompanying ...

Source: My Sources > California > Law Reviews & Journals > **California Law Reviews, Combined**
Terms: (article i) w/5 (section 10) and "law impairing the obligation of contracts" (Edit Search) View: KWIC±25 Date/Time: Wednesday, August 4, 2004 -1:00 PM EDT

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Attorneys for Receiver Taylor B. Grant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

U.S. BANK, N. A., as assignee of the FDIC, receiver of CALIFORNIA NATIONAL BANK,,

Plaintiff,

vs.

CFRI-GREENLAW DYER ROAD, LLC; COMMONFUND REALTY INVESTORS, LLC; and DOES 1 through 50, inclusive,,

Defendant.

CASE NO. 30-2010-00348716-CU-CL-CJC

Assigned to: Hon. David R. Chafee

NOTICE OF APPLICATION AND *EX PARTE* APPLICATION OF RECEIVER TAYLOR B. GRANT FOR SUPPLEMENTAL CONFIRMATION ORDER TO SELL RECEIVERSHIP PROPERTY

Date: February 17, 2011
Time: 1:30 p.m.
Dept.: C20

(Declaration of Matthew L. Seror and Stipulation filed concurrently herewith)

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

Taylor B. Grant, the duly-appointed Receiver, in the above-referenced case (the "Receiver") hereby applies on an *ex parte* basis for an order confirming the stipulation by and between the parties and for the entry of an order authorizing his sale of the receivership property. Good cause exists for the entry of this *ex parte* application as follows: This Court has already granted the Receiver the authority to sell the real property of the receivership estate located at 2001 Dyer Road, Santa Ana, California, and improved with an

industrial building containing approximately 366,600 square feet (the "Property"), by either auction or direct sale. Based thereon, the Receiver has negotiated a sale with Alliance Commercial Partners, LLC ("Alliance") on the terms set forth in a Purchase and Sale Agreement and Joint Escrow Instructions, a true and correct copy of which is attached as Exhibit 1 to the Stipulation filed concurrently herewith. By this application, the Receiver seeks the Court's confirmation of the sale pursuant to California Civil Code § 568.5.

The parties to this lawsuit do not object to the Receiver's sale of the Property to Alliance *(See* Stipulation).

Plaintiff and the Receiver believe that the relief sought serves the best interest of the estate inasmuch as it will allow for the sale of the Property without delay, and will assist the Receiver in beginning the wind down of the receivership estate.

INFORMATION RE NOTICE: By an e-mail to counsel for the parties, notice of this *ex parte* application was given to the parties on February 14, 2011. (Declaration of Matthew L. Seror, ^ 4, Exhibit "1.") Given the fact that the Receiver is seeking stipulated relief, there will not be any opposition to the relief sought herein.

The Receiver's *ex parte* application is based on this notice and memorandum of points and authorities, together with the stipulation of the parties, and the declaration of Matthew Seror filed concurrently herewith, as well as all of the pleadings, records, and documents on file in this action and such other evidence and argument as may be presented at or before the hearing of the application.

DATED: February 15,2011

BUCHALTER NEMER
A Professional Corporation

By: _____
MATTHEW L. SEROR
Attorneys for TAYLOR B. GRANT,
Court Appointed Receiver

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Taylor B. Grant, the duly appointed Receiver, in the above referenced case (the "Receiver") hereby applies on an *ex parte* basis for an order approving the stipulation by and between the parties and for the entry of an order authorizing the Receiver's sale of the receivership property.

II. THE PARTIES JOINTLY REQUEST AN ORDER APPROVING. AUTHORIZING AND CONFIRMING THE RECEIVER'S SALE OF THE PROPERTY ON THE TERMS SET FORTH IN THE PURCHASE AND SALE AGREEMENT AND JOINT ESCROW INSTRUCTIONS

This Court has already granted the Receiver the authority to sell the Property, in that certain court order entitled STIPULATION AUTHORIZING RECEIVER TO RESUME AUCTION, SETTING SALE CONFIRMATION HEARING; ORDER THEREON and entered on or about October 18, 2010. Based thereon, the Receiver has entered into a Purchase and Sale Agreement and Joint Escrow Instructions (the "PSA") to sell the Property to Alliance Commercial Partners, LLC ("Alliance"), and by this application seeks Court approval and confirmation of the sale and the terms thereof pursuant to California Civil Code § 568.5.

The Receiver has provided the parties with the pertinent terms of the PSA and Plaintiff and Defendant, through the concurrently filed stipulation, do not object to the terms of the sale of the Property to Alliance. Accordingly, Plaintiff and the Receiver jointly request the Court confirm the sale of the Property to Alliance on the terms set forth in the PSA and enter the SUPPLEMENTAL CONFIRMATION ORDER TO SELL RECEIVERSHIP PROPERTY, lodged concurrently herewith.

III. GOOD CAUSE EXISTS TO GRANT THE APPLICATION

Good cause exists to grant this application inasmuch as the parties have stipulated to the sale of the Property on the terms set forth in the PSA and the terms of the sale are reasonable. Moreover, the sale of the Property, which is the primary asset of the receivership estate, will assist the Receiver in preparing for the wind down of the estate and the filing of a motion for the

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termination of the receivership estate, the discharge of the Receiver and for approval of his final report and accounting.

Ex parte relief is warranted insofar as the expected closing date for the sale is February 22, 2011, and, therefore, seeking the relief sought herein on a noticed motion would require the escrow period to be extended, which may jeopardize the sale.

IV. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court grant this application, and confinn the sale of the Property on the terms set forth in the PSA and enter an order thereon, the form of which has been stipulated to by the parties.

DATED: February 15, 2011

BUCHALTER NEMER
A Professional Corporation

By: _____
MATTHEW L. SEROR
Attorneys for TAYLOR B. GRANT,
Court Appointed Receiver

BN 8206624v I

BUCHALTER NEMER A Professional Corporation RICHARD P. ORMOND (SBN: 207442) MATTHEW L. SEROR (SBN: 235043) 1000 Wilshire Boulevard, Suite 1500 Los Angeles, CA 90017-2457 Telephone: (213) 891-0700 Facsimile: (213) 896-0400 Email: ronnond@buchalter.com

Attorneys for Receiver Taylor B. Grant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

U.S. BANK, N.A., as assignee of the FDIC, receiver of CALIFORNIA NATIONAL BANK,, Plaintiff, vs. CFRI-GREENLAW DYER ROAD, LLC; COMMONFUND REALTY INVESTORS, LLC; and DOES 1 through 50. inclusive,, Defendant.	CASE NO. 30-2010-00348716-CU-CL-CJC Assigned to: Hon. David R. Chafee **[PROPOSED! ORDER GRANTING *EXPARTE* APPLICATION, APPROVING STIPULATION AND SUPPLEMENTAL CONFIRMATION ORDER TO SELL RECEIVERSHIP PROPERTY**

Taylor B. Grant, court appointed Receiver was granted, by this Court, authority to sell the real property of the Receivership Estate located at 2001 Dyer Road, Santa Ana, California, and improved with an industrial building containing approximately 366,600 square feet (the "Property"), in that certain court order entitled STIPULATION AUTHORIZING RECEIVER TO RESUME AUCTION, SETTING SALE CONFIRMATION HEARING; ORDER THEREON and entered on or about October 18, 2010 ("Sale Order"). The complete legal description of the Property is attached hereto as **Exhibit** "A."

This Court having received and considered the Receiver's *Ex Parte* Application for a Supplemental Confirmation Order to Sell Receivership Property (the "Application"), the Stipulation of the parties filed in support thereof; the supporting Declaration of Matthew L. Seror

and all exhibits attached thereto, and having considered the pleadings and other documents on file herein and having heard any argument of counsel, and good cause appearing therefor: **IT IS ORDERED, ADJUDGED AND DECREED** that:

1. The Receiver's Application is granted and the sale of the Property is confirmed pursuant to California Civil Code § 568.5.

2. The Receiver is authorized to sell the Property to Alliance Commercial Partners, LLC, or its assignee ("Alliance") on the terms set forth in the Purchase and Sale Agreement and Joint Escrow Instructions ("PSA"), a copy of which is attached to the Stipulation as Exhibit "1";

3. Any licensed title insurer may rely on this Court Order as authorizing the Receiver to transfer legal title to the Property to Alliance;

4. The sale procedure used by the Receiver to obtain the best offer and result to consummate the sale of the Property is adequate and is approved;

5. The PSA is approved. The Receiver is authorized to modify terms of the PSA as necessary to complete the sale of the Property if the Receiver in good faith believes such modification is reasonable and required to serve the interests of the receivership estate. The Receiver may not modify the PSA in any manner which would render the documents inconsistent with this or any order of this Court in this matter. The Receiver may sell the Property at a reduced price provided that the reduced price is acceptable to Plaintiff in its sole and absolute discretion. The Receiver will provide notice to the parties if the PSA changes as follows: (1) if there is a sales price reduction in excess of $200,000, and/or (2) if the closing date changes in excess of 30 days;

6. The Receiver may proceed to close the pending sale with Alliance for the Property. The sale of the Property shall close on terms and conditions substantially similar to those set forth in the PSA, and on such terms and conditions as are likely to avoid any further liability to the receivership estate;

7. The Receiver is hereby authorized to sell the Property to Alliance for the sum of $23,100,000.00 ("Gross Proceeds");

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8. The Gross Proceeds are fair and reasonable and represent fair market value;

9. Alliance is purchasing the Property on an "as is, where is" basis, without any representations or warranties whatsoever by the Receiver, the Receiver's agents and/or attorneys, including, without limitation, any representations or warranties as to the physical condition of the Property;

10. The Receiver's sale of the Property as set forth herein is in conformity with all applicable orders of this Court;

11. The Receiver is authorized to pay out of the sale proceeds at the close of escrow, any unpaid real estate taxes and assessments, recordation fees, transfer taxes, closing costs and similar and customary costs and reimbursement of any costs of sale incurred in connection with the sale of the Property, and other expenses set forth in the PSA, or as may be modified pursuant to the terms of the Stipulation. In addition, the Receiver is authorized to retain any portion of the sales proceeds he deems necessary for the payment of any administrative expenses of the estate pending approval of the Receiver's final report and accounting and the discharge of the Receiver;

12. The net proceeds resulting from the sale of the Property after payments of the amounts set forth in paragraph 11 of this Order shall be remitted to Plaintiff. Plaintiff shall apply said distribution(s) in any manner it deems appropriate. Any such distribution of proceeds shall not constitute a violation of California Code of Civil Procedure Section 726;

13. The closing of escrow for the sale shall take place as set forth in the PSA, or as soon thereafter as the Receiver and Alliance may otherwise agree in writing;

14. The Receiver is authorized to take all actions to execute the documents necessary to carry out and effectuate the sale of the Property including, but not limited to, escrow instructions, the FIRPTA Affidavit, the Grant Deed, the Declaration of Documentary Transfer Tax, the Bill of Sale and General Assignment, the Assignment of Leases and any related documentation and conveyance documents consistent with selling and conveying title to the Property. The Receiver shall execute all documents necessary to carry out and effectuate the sale of the Property as "Taylor B. Grant in his sole capacity as Receiver" (not in his individual capacity) on behalf of Defendants CFRI-Greenlaw Dyer Road, LLC and Commonfund Realty

Investors, LLC, the current owner of the Property as grantor, and shall use the tax identification number for the grantor in connection with the sale.

15. The Receiver and Alliance acted in good faith in connection with the negotiation, execution, delivery and execution of the sale of the Property;

16. A certified copy of this Order may be recorded concurrently with the Grant Deed or at any time before the close of escrow of the Property, provided however that failure to record this Order will not affect the enforceability of this Order or the validity of the Deed;

17. This Court retains jurisdiction over any dispute that may arise involving the Receiver with respect to the sale of the Property authorized by this Order; and

18. Notice of the Application was adequate.

Dated: _____

_____
DAVID R. CHAFEE
JUDGE OF THE SUPERIOR COURT

BN 8206758vI

Taylor B. Grant, Receiver

Taylor B. Grant is a founding principal of Real Estate Receiverships. Mr. Grant completed his first receivership in 1989 and completed his first lender assignment in 1978. He has, since, served regularly as a receiver for courts across California, Arizona, Nevada, Idaho, and Colorado. Mr. Grant has also been appointed as a Federal Bankruptcy Court Custodian and as a California Superior Court Referee.

Appointing parties include Wells Fargo Bank, Bank of America, US Bank, HSBC, Citi Bank, ING, Rialto Capital, OneWest Bank, and Continental Illinois Bank (amongst many others). As a court appointed receiver, Mr. Grant holds various California licenses, including liquor, lottery and tobacco licenses, and he speaks regularly on real estate topics at Cornell University, John Hopkins University, USC, UCLA and UC Irvine, as well as before the Urban Land Institute, RealShare, the California Receivers Forum and other professional organizations.

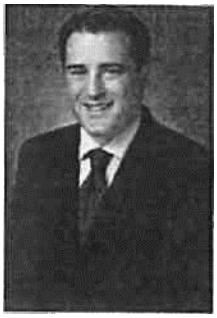
This is Mr. Grant's seventh adjusting economy in the real estate industry. He has extensive "ground up" development experience including office, industrial, retail, self storage, for sale housing and multifamily up to 30 stories. In addition, he served on the board of directors of a New York Stock Exchange REIT for ten years.

Mr. Grant recently sold over $207,000,000 worth of real property from various receivership estates, including properties in California, Arizona and Colorado, and is currently acting as a court appointed referee or receiver on an additional $77,000,000 worth of properties located in Idaho, Nevada and California.

Using the authority of the court Mr. Grant and his legal counsel settled lien claims, bond claims, tax liens, and claims for profit participations saving the respective receivership estates and parties to the various receiver actions millions of dollars, much to the satisfaction of these parties. Other favorable results include the transfer of declarant rights, use of existing building permits, obtaining extensions for various entitlements, reductions of city lien claims and the resolution of other complex real estate issues.

Mr. Grant and his staff believe strongly in the neutrality of receiverships and the receiver's role as a fiduciary of the court. Mr. Grant believes in the full transparency of the receivership process and the approval, by the court, of the receiver's actions—particularly those in which a parties rights may be affected.

Mr. Grant believes that a receiver is most effective when his role is limited to that of being receiver and, as such, his firm does not act as a property manager, broker or contractor in a receivership case. Rather, Mr. Grant identifies those businesses and agents that are best suited for each case based on property type, location and other critical factors.



Richard Ormond
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Richard Ormond is a Shareholder in the firm's Litigation Practice Group in Los Angeles. He is a member of the firm's Marketing and Recruiting Committees, and serves as the firm's Hiring Shareholder.

His practice includes expertise in:

- Receivers and Provisional Directors (and other Remedies);
- Real Estate Litigation;
- Commercial/Business Litigation;
- Corporate and Partnership Disputes;
- Alternatives to Bankruptcy; and
- Intellectual Property Litigation (including patent, copyright and, trademark).

Mr. Ormond has tried cases before the Los Angeles Superior Court as lead trial counsel, the United States District Court, Central District of California and the Bankruptcy Court of the United States District Court, Central District of California, and has arbitrated before JAMS, Alternative Dispute Resolution and the American Arbitration Association.

Representative clients include national lending and financial institutions, state and federal receivers, and small to large companies. Mr. Ormond also serves as outside general counsel for small to medium-sized businesses. Mr. Ormond is also fluent and literate in Spanish.

Mr. Ormond is Chair of the Remedies Division of the Los Angeles County Bar Association and is a board member of the California Receivers Forum. He is also a senior legal advisor for the LARTA Institute, a premier technology commercialization non-profit assistance organization. Mr. Ormond has been selected as a Southern California *Super Lawyer Rising Star* six times from 2005 to 2010, and was also selected as one of "L.A.'s Top 100 Lawyers" by the *Los Angeles Business Journal.*

Richard founded and co-chairs the firm's Diversity committee and is co-chair of the firm's Pro Bono committee.

He teaches Continuing Legal Education courses on Receivership Law and Practice, Intellectual Property Issues, Considerations for Complex Litigation, and Lender Security in Intellectual Property.

Recent Presentations and Publications

- "'Zip It' on Asking for ZIP Codes: New Supreme Court Decision," *Client Alert,* February 2011
- "Receiver Neutrality, Rights, Risks, Compensation," Loyola IV Receivership Law and Practice Conference, Los Angeles, CA, January 22, 2011
- "A Bank's Options for Disposing of Distressed Real Property: Analysis of the Benefits and Risks of Note Sales, Deeds in Lieu, Foreclosure and Other Available Remedies," Buchalter Nemer Teleseminar, July 29, 2010
- "The Effective Use of Receivership with Distressed Hospitality Property Assets," San Francisco, CA, July 22, 2010
- "Shelter From the Storm: Dealing with Distressed Loans and Assets," CCIM Los Angeles, CA July 20, 2010
- "Commercial Property Receiverships," Los Angeles, CA June 23, 2010
- "Receivers' Rights, Risks and Compensation," California Receivers Forum Insolvency Conference, Monterey, CA, May 22, 2010

- "The Effective Use of Receivership with Distressed Hospitality Property Assets," Los Angeles, CA, April 22, 2010
- "Fundamentals of Intellectual Property Management" 2009-10 National Institutes of Health Commercialization Assistance Program, Marina Del Ray, CA, November 17-18, 2009
- "How To Maximize Value With Distressed Loans: Myths, Magic and Money-Making," ULI Urban Land Expo, November 6, 2009, San Francisco, CA
- "Decoding CMBS: Who? What? Where? Why? How? A Primer for Borrowers and Buyers," NAIOP CRE Breakfast Series, October 7, 2009, Newport Beach, CA
- "Receiverships 101," Realshare Distressed Assets Conference, September 15, 2009, Dallas, TX
- "How to Get a Receiver Appointed," California Receiver's Forum, August 26, 2009, Los Angeles, CA
- "Receiverships: Maximizing Returns From Distressed Real Estate Property," *Points & Authorities,* Summer 2009
- "Deeds in Lieu, Foreclosures, Receivers and Other Remedies in a Difficult Economy," Urban Land Institute, February 24, 2009, Orange County, CA
- "Private Practice Court Rules Regarding Private Information in Filings and Pleadings," *Remedies Newsletter,* November 28, 2007
- "Is the House Getting it Right on Patent Reform?" *Computerworld Management,* July 20, 2007
- "Be Proactive in Protecting Your Intellectual Property: Strategic Trademark Enforcement and Protection Program [STEPP]," *Points & Authorities,* Summer 2006
- "Reasonable Security Procedures and Practices (RSPP): Security Requirements on Companies That Own or License Personal Information," *Points & Authorities,* Spring 2006

Mr. Ormond earned his J.D. at the University Of San Diego School Of Law, and received his B.A. at the University of California, Los Angeles. He studied International and Business Law at the University of Buenos Aires and the University of Belgrano in Argentina.

Areas of Practice:
Litigation
Alternative Dispute Resolution
Commercial Litigation
Intellectual Property Litigation
Real Estate Litigation
Receivers

Bar Admissions:
California
U.S. District Court Central District of California
U.S. District Court Southern District of California
U.S. Court of Appeals 9th Circuit

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OF COUNSEL
EDYTHE L. BRONSTON, ESQ.

Biographical Statement of Kirk Rense

Mr. Rense is a solo practitioner engaged in the representation of federal court and state court receivers, representation of bankruptcy trustees and, more generally, is engaged in the practice of financial and insolvency law.

He has been a partner with two regional law firms that specialized in commercial and financial law and was formerly an officer with the Enforcement Division of the U.S. Commodity Futures Trading Commission, specializing in the prevention of and policing of commodities fraud.

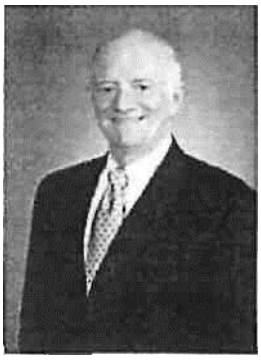
He has represented nearly a dozen bankruptcy trustees in matters before the United States Bankruptcy Court, Central District of California. He has represented receivers appointed by the superior courts in Los Angeles, Orange, San Bernardino and Ventura counties as well as receivers appointed by the United States District Court, Central District of California.

Mr. Rense has represented many financial institutions and private parties in litigation before the California Superior Courts, Federal Bankruptcy Courts and Federal District Courts, with an emphasis on financial and commercial law.

Mr. Rense has served as counsel to a national title insurance company, specializing in the collision of real property laws, title insurance laws and the Bankruptcy Code. He has also appeared as a lecturer and/or panelist on programs dealing with aspects of insolvency, receivership and real property law sponsored by LA County and Orange County Bar Association sections as well as by many professional organizations.

He was graduated from the University of Southern California Law Center with a Juris Doctor degree in 1980. He also holds a Bachelor of Arts degree in journalism from the California State University at Los Angeles.

Michael Wachtell is a Shareholder in the Los Angeles office practicing in the Litigation, Real Estate, Entertainment, Hospitality and Intellectual Property Practice Groups.



Michael Wachtell
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Shareholder

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Mr. Wachtell has a broad base of experience in complex commercial, corporate and business transactions and litigation in California and Nevada. While devoting a substantial portion of his practice to commercial litigation matters, Mr. Wachtell also focuses on complex commercial transactions, film finance, intellectual property, labor, real estate, securities and environmental law and receiverships. During his years of practice, he has developed an extensive background and expertise in real estate, real estate and film finance, hospitality law, banking, commercial and secured transactions, mergers and acquisitions, securities, insurance, proprietary rights, environmental, patent and trademark law, trade regulation matters and debtor-creditor representation.

Most recently, in addition to complex litigation and receivership matters, Mr. Wachtell has been lead counsel in film finance disputes for clients involving amounts in dispute well over $100M, has been lead counsel for a Federal Court appointed Receiver in a major mortgage fraud case and is advising several clients and/or serving as lead counsel on several significant trademark, patent and entertainment finance cases. Mr.Wachtell is also currently serving as a Receiver in a state regulatory receivership and as corporate counsel to several privately held companies.

Mr. Wachtell has and continues to serve as a Court appointed receiver, referee, provisional director, arbitrator and mediator in connection with complex business cases. He also is on the Mediator/Arbitrator panel of Alternative Resolution Centers in Los Angeles and formerly served as an arbitrator for the American Arbitration Association. He currently serves as a director of the Los Angeles/Orange County Chapter of the California Receivers Forum and is a past member of the board of the Forum's statewide parent organization. Mr. Wachtell also serves as General Counsel to and is a co-founder of an independent hotel company which owns and operates more than 14 hotel properties in several states. Mr. Wachtell lectures extensively in his fields of specialty to clients, bar associations and trade organizations.

He is a member of the Los Angeles County and American Bar Associations and various other trade organizations related to his fields of practice. He serves as an active member of the American Bar Association Real Property Section, Hotel and Hospitality Sub-Committee. Mr. Wachtell also lectures extensively in his areas of practice and actively participates in various charitable and civic organizations. Mr. Wachtell has been selected as one of Southern California's *Super Lawyers* five times from 2006 to 2010.

Mr. Wachtell is admitted to the State Bars of California, Nevada and Virginia, the Bar of the District of Columbia, and is licensed to practice before the United States Patent and Trademark Office. He also holds a California real estate broker's license.

Mr. Wachtell earned his J.D. *with honors* at George Washington University School of Law in 1968, where he was a member and contributor to *The George Washington Law Review.* He received a Bachelor of Electrical Engineering at the City College of New York in 1964.

Areas of Practice:
Litigation
Financial Institutions Litigation
Intellectual Property Litigation
Real Estate Litigation
Receiverships

Bar Admissions:
California
Nevada
Virginia
District of Columbia
U.S. Patent and Trademark Office
U.S. Tax Court

David D. Wald
Receivership Biography

David Wald is the President of Wald Realty Advisors, Inc., which he founded in 1990. Since that time, the firm has gone on to complete assignments for more than 200 clients, including more than 65 lenders.

The Firm's experience encompasses most property types including office buildings, condominiums, tract homes, apartments, industrial, retail, senior care, hotel, motel, recreational facilities and historic properties along with highly specialized niche properties such as golf courses, public schools, oil and gas fields, gas stations, car washes, marina and marine industrial facilities, ranch land and mixed-use specialty entertainment retail.

Mr. Wald is a member of the Board of Directors of the California Receiver's Forum (LA/OC Chapter); a licensed California real estate broker; a licensed California general contractor; a Certified Shopping Center Manager (CSM) as designated by the International Council of Shopping Centers (ICSC); has been a speaker at the USC Crocker Symposium, ICSC, the California Receiver's Forum and various distressed asset conferences; has written published articles on various aspects of the real estate industry and writes the commercial real estate blog, *As We See It.* Mr. Wald has taught programs for law firms on receivership and related workout and OREO issues. He has been a faculty member at three California Receiver's Forum Loyola Receivership Law and Practice Seminars on the subjects of Construction Development Projects, Mechanics Liens, HOA Matters and Unique Insurance Issues; Completion and Sale of Housing Projects in Receivership; and Operational Issues in Receivership. Mr. Wald has also been a speaker on two California Bankers Association webinars on the completion and sale of residential subdivisions in receivership.

Mr. Wald has been appointed receiver for the California Superior Courts of Los Angeles County, Orange County, Santa Barbara County, Ventura County, San Luis Obispo County, San Bernardino County, Riverside County, Imperial County, San Diego County, Monterey County and Santa Clara County; as well as Washoe County in Nevada; and the United States District Court Central Division; and has acted as a rents, issues and profits receiver, an equity receiver and as a referee.

Representative Plaintiffs

Citicorp Wells Fargo Guaranty Bank iStar Financial Pacific Western Bank Chinatrust Safeco Life Insurance State Street Bank

Bank of America Situs Special Servicing Bank of the West Vineyard Bank Colony Advisors Prudential Realty Group Union Bank of California National Bank of Canada

Wachovia JE Robert Rabobank Cathay Bank East West Bank Ford Motor Credit First Bank & Trust Franklin Life Insurance

WALD REALTY ADVISORS, INC., 775 WILDOMAR STREET. PACIFIC PALISADES. CALIFORNIA 90272

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Partial List of Representative Receiverships

660 S. Figueroa Office Tower - Downtown Los Angeles, California (JE Robert w/ Jeffer Mangels) ♦>
Twenty eight story / 281,000 square foot Class 'A' high rise office tower.

2600 Olive Media Tower - Burbank. California (Situs w/ Brian Cave)
♦> Ten story, 151,000 square foot class 'A' high rise office tower with significant leasing activity.

500 North Central Office Tower - Glendale. California (Ford Motor Credit w/ Severson Werson) ♦♦♦
150,000 square foot class 'A' high-rise office tower in Federal Court receivership.

1400 Page Mill Office Park - Palo Alto. California (Union Bank of California w/ Jeffer Mangels) ♦♦♦
102,000 square foot / 3 building office park renovated and re-leased in receivership.

2500 Wilshire Office Building - Los Angeles. California (Prudential Realty w/ Frandzel & Share) •*♦
220,600 square foot mid-rise office building requiring significant document reconstruction.

Redlands Spectrum Office Park - Redlands. California (Cathay Bank w/ Locke Lord)
♦t* 14 building / 105,000 SF office condo business park involving marketing project for sale.

Scripps Corporate Center - San Diego, California (w/ Allen Matkins) *♦♦
35,000 square foot office building involving leasing of vacant space.

Woodland Park Apartment Portfolio - East Palo Alto. California (Wachovia w/ Gibson, Dunn) ♦♦♦
101 building / 1,800 unit apartment portfolio with occupancy, maintenance and litigation issues.

San Marco & Rapallo Apartments - Santa Monica. California (Bank of America w/ SneU Wilmer)
♦♦♦ 2 building / 100 unit apartment with mold abatement and extensive construction completion.

PPA Apartment Portfolio - Riverside & Long Beach. California (w/ Allen Matkins)
♦•♦ 12 building / 177 unit apartment portfolio with significant maintenance and occupancy issues.

750 S. Garland Apartments - Downtown Los Angeles. California (Chinatrust w/ Jeffer Mangels) ♦♦♦
206 unit apartment building and restaurant.

Santa Maria Apartments - Santa Maria, California (State Street Bank with Frandzel & Share) •♦♦
153 unit apartment complex with extensive deferred maintenance and tenant retention issues.

Cypress Park Condominiums - Monterey, California (iStar Financial w/ Holland & Knight) ♦♦♦ 2
story, 128 unit condominium project with unit sales, construction and complex HOA issues.

Manhattan Place Condominiums - Los Angeles. California (Bank of the West w/ Miller Starr) ♦> 6
story / 30 unit condominium requiring re-marketing and unit sales.

Sherman Place Townhomes - West Hills. California (Bank of America w/ Croudace & Dietrich) *♦♦
9 building / 39 unit town home development involving construction completion.

Via Lucero Condominiums - Santa Barbara. California (Builder's Bank w/ Holland &. Knight) **» *2* story / 13 unit upscale condominium development with construction completed in receivership.

Ambrose Villas Condominiums - Los Felix. California (Bank of the West w/ Pillsbiuy) **»* 3 story / 17 unit condominium, including unit sales and resolution of construction issues.

Fuller Lofts Condominiums — Downtown Los Angeles. California (Citicorp w/ Paul 11 **as** tings) *t* 6 storv / 109 unit partially completed adaptive reuse development.

Sherman Falls Condominiums - Sherman Oaks. California (Builder's Bank w/ Holland & Knight) ♦♦♦ 2 story / 22 unit condominium, including unit sales and resolution of construction issues.

The Marketplace Condominiums - Simi. California (Rabobank w/ Morgan Rosen)
♦♦♦ 55 unit partially completed mixed-use retail and residential condominium development.

Hilltop Colony Condominiums - Los Angeles, Ca (Cnv of LA & Wells Fargo Bank w/ Pillsbury) ♦♦• 155 unit condominium project, including project completion, marketing and unit sales.

Valle Dc Pro **Townhomes** - Santa Clarita. California (Bank of the West w/ Miller Starr) ♦♦* 19 acre development with standing inventor)' involving bulk and retail sale of property.

Spring Mountain Ranch - Riverside. California (iStar Financial w/ Kattan)
♦ 785 acre housing subdivision planned for 1,458 homes, with complex land management issues.

College Park - Chino. California (iStar w/ Katin)
♦♦• 350 acre subdivided tract home development involving complex development issues.

Gallery Heights - Riverside. California (Guaranty Bank w/ Nossaman)
♦♦♦ 25 acre /23 lot housing subdivision, including completion of storm drain construction.

The Hideaway and Bungalows — Port liueneme, California (Wells Fargo \w/ Jones Day)
! 13 acre/101 lot home tract with standing inventor)' including retail and bulk sale of property.

Town Square West - Palmdale, California (Union Bank w/ Pillsbury)
♦♦♦ 53,000 square foot shopping center requiring resolution of lease and construction issues.

Photo **Club Building** - Los Angeles. California (Wells Fargo Bank w/ Pillsbury)
*♦♦ 70,750 square foot industrial building requiring receiver to conduct judicial foreclosure sale.

Parthenia Industrial Park- Northridge. California (w/ Allen Matkins) ♦I* 3 building / 55,000 square foot industrial park.

Storage **Club** - Gardena. California (Republic Bank)
*!• 50,000 square foot mini-storage facility requiring receiver to conduct judicial foreclosure sale.

Could Wells Lose Its Claim to the Sunnyvale Town Center?

Sharon Simonson

Sand Hill Property Co.'s Peter Pau could be forgiven for gloating—though he is definitely not the gloating type.

In a stunner of a court victory, the Menlo Park developer and native of Shanghai in June improbably beat back an attempt by Wells Fargo & Co.—a bank with $1.3 trillion in assets—to sell the Sunnyvale Town Center against Pau's will.

WELLS FARGO

But the surprises do not stop there.

Pau's attorneys—Ron Rossi of San Jose's Rossi, Hamerslough, ReischI and Chuck, and Charles Hansen of Oakland's Wendel, Rosen, Black & Dean—are now on a mission to force Wells to swallow close to $190 million in financial losses and to lose its claim to the Town Center to boot.

It all has to do with what some might call an arcane segment of California's Code of Civil Procedure and what real estate lawyers call a Wozab warning. The label and statutory interpretation are based on a 1990 state Supreme Court ruling involving business borrowers Anton and Dorothea Wozab. The law and the ruling define how banks and other creditors must go about trying to recover their loses when a debt has been secured by real estate and the borrower has defaulted.

Under the California code, a bank that accepts a deed of trust to secure a loan must look first to the real property to try to recover its losses in the event of the borrower's default. This provision is called "security first." The bank can foreclose through a court and seek a deficiency judgment for any sum owed above the property's worth. Or it can go straight to a trustee sale, accepting as final payment whatever sum it can raise through the property's disposition.

What a bank cannot do when a debt is secured by real estate is pursue foreclosure on the property while also going after the borrower's assets that were never declared as security for the loan. Doing so violates the state's so-called "one-form-of-action" rule. The principle, according to the Wozab opinion, is that banks should not be allowed to use their power to grind borrowers by hitting them on multiple fronts at once.

But here is where the law gets interesting. If a bank accepts a deed of trust as security for its loan, but in the event of default turns to the borrower's other assets, it may lose both its right to the real estate and its right to be repaid the balance of the loan.

In the Wozab case, the couple's business owed a bank more than $1 million. When the bank became alarmed about the company's finances, the couple pledged their home as collateral. The bank's concern escalated, and it seized more than $110,000 from their business and personal bank accounts. The California Supreme Court held that despite the vast disparity between what was owed and what was in the accounts, the bank lost its right to go after their home when it went after the money in the accounts.

Further, though the facts of the Wozab case took the court majority in a different direction, a dissent makes clear that a creditor that violates the security-first rule can also lose its right to collect the balance of the debt. That, the dissent said, is "the classic sanction" under California law. The majority of the court held that this could happen only if the bank ignored a warning. Either way, the purpose is to keep creditors from violating the security-first and one-form-of-action rules.

In the Sunnyvale Town Center case, Wachovia Bank and Bank of America, lent $108.8 million to a corporation in which RREEF LLC and Pau were co-owners. When RREEF stopped servicing the debt in 2009, the bank filed a notice of default and secured a court-appointed receiver to oversee the Town Center. The bank and the receiver ultimately moved to sell the Town Center, but the bank never sought to foreclose through the courts or to sell the property at a trustee sale.

Rossi told Wells in a May 16 letter that he labeled a Wozab warning that the bank was violating California law by seeking to sell the property without foreclosing first. Rossi told the bank that it was at risk of losing not only its right to have the Town Center but also its right to have the debt repaid.

At a June 6 hearing, the bank continued to push the receiver's sale but was overruled by Santa Clara County Superior Court Judge Peter Kirwan at Hansen's and Rossi's urging. "Lenders around the state have been running these receiver's sales, and I have been saying and writing that you can't do them under California law," Hansen said after the hearing. "I got calls from a lot of bank lawyers when the [Kirwan ruling] was published, and it was striking to me how shocked they were. They said, 'We need these receivers sales,' and I said to them, 'The law is the law.'"

Hansen is co-author of a primary guide for attorneys, California Mortgage, Deed of Trust and Foreclosure Practice. He has studied and taught the law in question for more than two decades at the University of California, Berkeley Boalt Hall School of Law.

The bank's continued intransigence may in the end prove to be fatal, despite the bank's decision to take the Town Center to foreclosure sale on Aug. 17.

In a separate but related action, Pau also is challenging the bank's contention that it is legally owed the full amount it now claims, $187.5 million. When the receiver took control of the Town Center in October 2009, the development was mid-way through construction. Wachovia, by now a part of Wells Fargo, plowed another nearly $80 million into the center. The bank said it needed to stabilize the property to prevent a loss in value and for public-safety purposes.

But Pau's attorneys say that it is unclear how much of that spending was related to stabilizing the center as opposed to preparing it for receiver's sale. Given that the court has now ruled that the receiver is not legally allowed to sell the property, it is improper that sums spent to prepare the center for sale be added to the cost of paying the debt and freeing the center of the mortgage lien, they say.

In a July 21 letter to the bank's attorney, Katherine Ritchey of Jones Day in San Francisco, Rossi said, "The liens that have been filed recently are highly suspect." From April 18 through June 16, approximately $40 million of additional liens were recorded against the property, Rossi noted.

On July 28, Rossi successfully persuaded Judge Kirwan to allow him to depose receiver Jerry Hunt before the foreclosure auction to determine how much of the $80 million was related to stabilization and how much to preparation for the receiver's improper sale.

In his letter to Ritchey, Rossi reminded her that Pau planned to continue his suit regardless of the auction's outcome. He also underlined the threat that the bank stood to lose everything. "Your continued violation of [California law] despite two warnings clearly announce the bank's chosen tactic to make it as expensive and frustrating as possible for our clients," Rossi wrote.

Through a spokeswoman, Wells and its attorneys declined comment for this story