UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 0:18-cv-60171-RNS

THE BANCORP BANK, a Delaware chartered banking corporation,
Plaintiff,

vs.

550 SEABREEZE DEVELOPMENT LLC, a Florida limited liability company, and **JAWOF 515 SEABREEZE, LLC**, a Florida limited liability company,
Defendants.
_____/

EMERGENCY RELIEF REQUESTED AND HEARING REQUESTED

PLAINTIFF'S EMERGENCY VERIFIED MOTION FOR ENTRY OF ORDER APPOINTING RECEIVER AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiff, The Bancorp Bank, a Delaware chartered banking corporation ("Lender"), pursuant to Rule 66, Federal Rules of Civil Procedure, Title 28, Section 959, and applicable law and rules, moves this Court to enter an order against Defendants, 550 Seabreeze Development LLC, a Florida limited liability company ("Borrower"), and JAWOF 515 Seabreeze, LLC, a Florida limited liability company ("Pledgor"), appointing a receiver (the "Receiver") *pendent lite*, in the foreclosure action of Lender's construction loan mortgage and security agreements, in the current principal balance of approximately $37,000,000.00 (the "Loan"), encumbering a partially completed resort hotel project on Fort Lauderdale Beach, Florida, to possess, control, preserve, protect, manage, operate, oversee construction of the subject collateral, and if the project is completed during the receivership, to manage and oversee its operations, and sell the collateral if necessary to prevent its material devaluation (the "Motion"). This Motion and supporting evidence satisfies the requirements of the Eleventh Circuit for the appointment of the Receiver and warrants this Court granting the Motion. The facts and circumstances also justify

emergency consideration of the requested relief[1] this week, and Lender requests a hearing as soon as is available on the Court's calendar to consider this Motion. **The undersigned counsel certifies to the Court that this Motion qualifies for such emergency consideration consistent with the local rules of the Court.**

Summary of Complaint and Collateral

On or about January 25, 2018, Lender initiated this action by filing a Verified Complaint against Borrower and Pledgor to foreclose its first mortgage lien and security interests in the collateral more fully described in **Exhibit 1** attached hereto[2] and against Borrower for damages under the subject promissory note (the "Complaint").[3] The loan was in default and the sums due have been accelerated. The primary tangible portion of the Collateral is the partially constructed 12-story resort hotel project located at 550 Seabreeze Blvd., Fort Lauderdale, Florida, owned by Borrower (the "Hotel Parcel"), and a parcel of land across the side street on which a small building sits (the "Adjacent Parcel") that is owned by Pledgor (collectively, the "Project").[4] A copy of photographs of the Project taken by Lender's agents on or about December 21, 2017 are attached to the Affidavit of Mr. Michael McGrenra, Lender's project consultant,[5] who has visited and studied the Project and the operational and financial information

[1] The factual allegations provided hereunder are based upon information and knowledge, together with the annexed affidavits and the Verified Complaint.

[2] It is Lender's understanding that the revenue portion of the Collateral (e.g., Accounts, Rents and Payment Intangibles) is not being generated or collected at this time. At the time such revenues exist, the Receiver would be authorized to collect and expend the same as provided in the Order Appointing Receiver.

[3] The Complaint, including the terms defined therein, are incorporated as if fully set forth herein.

[4] The hotel is scheduled to have 136 rooms and 268 parking spaces. There are supposed to be common areas including a VIP lounge and a 700-square foot salon, lobby desk, fitness room, meeting rooms, and a full back-of-the-house utility area for guest services and mechanical/electric rooms. The hotel plan includes a four (4) level parking garage, which features a relatively new technology for automatically placing and stacking vehicles. As far the Adjacent Parcel is concerned, Lender understands that the property is not part of the hotel construction effort, and the Receiver's role with respect to this aspect of the Collateral is likely to be modest, or perhaps once the Receiver is in place, he will determine that he need not retain the Adjacent Parcel as part of the receivership.

[5] Dayhill Group, a construction consulting firm, was retained by Lender to evaluate and review the process of construction for the Project. Michael McGrenra, employed by Dayhill as a senior project manager, is the lead consultant assigned to the Project.

pertaining thereto, at least twice a month for over two years. A copy of Mr. McGrenra's Affidavit is attached hereto as **Exhibit 2**, which Dan Sacho has reviewed and confirms the discussions with Lender.

The Collateral also includes any and all tangible personal property, described in Exhibit 1, some of which is currently located in one or more offsite warehouses, and includes, without limitation, certain plumbing and other fixtures and goods intended for installation at the partially completed building on the Hotel Parcel. Borrower's mismanagement, incompetence, other conduct, and blanket breaches of the underlying loan documents described below threatens imminent harm to Lender and the Collateral.

Emergency Relief and Hearing Requested

Lender also requests emergency consideration of this Motion, as Lender is suffering and will likely continue to suffer material harm to its interest in the Collateral, as will Defendants and other creditors of Defendants, without such urgent relief being considered and granted. Time is of the essence. As detailed below, the general contractor and key subcontractors have notified Borrower and Lender that they will "walk off" the job as soon as this week and cease performance due to nonpayment by Borrower; Defendants and their principals have admitted they lack resources or the willingness to commit the same to the completion of the Project; Lender has lost confidence in Borrower as a result of its acts and omissions, including, but not limited to, gross mismanagement and incompetence; lack of candor and misinformation, and the existence today of an unfinished building which is subject to waste, theft, and security breaches. The facts evidencing this request for urgent relief are detailed below.

Summary of Grounds Supporting Receiver Appointment

The relief sought in this Motion is clearly warranted because the Mortgage expressly

authorizes the remedy, see Section 15(b)(3), which provides that Borrower consents to the appointment of a receiver upon default, and, in any event, because of the existence of one or more of the following factors:

1. Borrower's overall mismanagement of the Project and failure to satisfy material obligations under the Loan Agreement and Borrower's construction agreement with Straticon, LLC has caused the general contractor to send, on January 19, 2018, written notice of the intent to immediately stop working on the Project, imperiling the Project. A copy of the "Notice of Stopping Work for Nonpayment," attached hereto as **Exhibit 3.**

2. Borrower and their principals have severely and incompetently mishandled the construction process such that progress has slowed to a detrimental pace—the Project is approaching a year after the required March 2017 "Completion Date" under the Loan Agreement, with it projected to take over fifteen (15) months or more past such original date to complete the Project. During this period of time of mismanagement, Borrower paid itself a project administration fee of approximately $1.8 million;[6]

3. Claims of liens totaling more than **$5,000,000.00**, copies of which are attached hereto as **Composite Exhibit 4**, were recently recorded in Broward County against the Hotel Parcel as follows:

> a) Straticon, LLC filed a claim of lien, instrument number 114842583, for $5,323,431.37 in unpaid monies, recorded on January 22, 2018; b) Solution Construction, Inc. filed a claim of lien, instrument number 114841513, for $162,919.73 in unpaid monies, recorded on January 22, 2018;
>
> b) Central Broward Construction, Inc. filed a claim of lien, instrument number 114843000, for $126,442.14 in unpaid monies, recorded on January 22, 2018; and
>
> c) Plumbing Corporation of America filed an amended claim of lien, instrument 114825331, for $449,197.91 in unpaid monies, recorded January 11, 2018.

[6] While arguably permitted under the Loan Agreement, such fee did not have to be taken to benefit insiders.

4. Through its counsel, Rebecca S. Trinkler, who is a law partner of at least one of the guarantors, Borrower has admitted in writing to Lender, as recently as January 5, 2018, that the Project is on the verge of suffering material harm;

5. The Project is also at high risk of severe damage, waste and harm because unpaid contractors and subcontractors have (i) left the Project, (ii) reduced staff on the Project, (iii) threatened to remove fencing protecting the Project, and/or (iv) are poised to cease construction on the Project within days, all detrimental to the integrity and value of the Project, which materially affects Lender's interest in the Collateral.

6. Borrower has lost all credibility as manager of the Project. As recently as January 2018, Borrower submitted to Lender inflated or incompetent estimated costs needed to complete the Project, unsupported by a budget or any supporting documentation, and such costs exceeded the remaining approximate amount of $13 million in unfunded loan proceeds by $8 million to $10 million,[7] not including the seven-figure insurance claim Borrower is pursuing with its carrier (proceeds in which Lender holds a security interest). Lender's professional construction consultants have advised these numbers are overstated;

7. Borrower has stated it lacks the ability to pay for these additional costs and its principals have refused to commit to funding all sums necessary to insure the swiftest final completion date;

8. Based on the amounts undrawn under the Loan, the loan is "out of balance." Borrower has admitted that the cost to achieve Completion of Construction exceeds the available loan proceeds resulting in a "Deficiency," as defined under the Loan Agreement;

[7] Borrower's recent unexpected and unsupported assertion of a much higher difference as to cost to complete, coupled with the admitted lack of equity for the principals and Borrower's misconduct, raises concerns for Lender about Borrower's good faith and true intentions.

9. Borrower is in payment default for failing to pay interest payments, and has otherwise failed to comply with the material covenants under the Loan Documents;

10. Borrower's mismanagement includes requesting funding for dozens of material change orders in violation of the procedures established under the Loan Agreement and without prior approval of Lender (in all but a few instances);

11. Borrower has repeatedly and continuously failed to fully and timely provide detailed information of what remains to be completed and cost to complete the Project;

12. Borrower lost its contract with its original hotel management company and failed to provide Lender with documentation of an acceptable replacement, which could severely undermine the Project and seriously impair the ability to conform the Project to the specifications of the hotel operator, all without the approval of Lender in violation of the Loan Agreement;[8]

13. Borrower lost, and has not replaced, its original food concessionaire—"Senor Frog"—that was to operate the restaurant, bar, poolside, and room service operations; and

14. Borrower proposed a plan based upon its assertion of equity in the property to unnecessarily eliminate the $30 million debt of its parent (secured by a lien on its equity interest in Borrower), which Borrower has guaranteed, that is owed to Chinese investors under the federal government's "EB5" program, including by seeking Lender's support for a pre-packaged bankruptcy or other restructuring scheme that would, according to Borrower, subordinate or eliminate that debt.

The foregoing course of conduct, individually and collectively, raises the very real specter of imminent material damage to the Project and Collateral, and to Lender, militating in favor of the immediate appointment of disinterested receiver to preserve and protect the Project and Collateral, as detailed more particularly below.

[8] In any event, Borrower has not submitted to Lender any written agreement for new management.

Law Supports Receiver Appointment and Lender is Willing to Fund Receivership

Controlling law in this district supports granting this Motion. The facts and circumstances articulated in this Motion clearly establish the required elements. This requested relief is consistent with the clear terms of the Mortgage and Security Agreement (the "Mortgage"), attached to the Complaint as Exhibit 3, which (a) provides that a Receiver can execute the duties granted to the mortgagee, and (b) grants the mortgagee "full authority to do any act which Mortgagor could do in connection with the management and operation of the Property." See Sections 15(b)(3) and 15(b)(1), pp. 13-14. Borrower's "management and operation" of a project under construction necessarily includes its management of the construction process. Thus, a Receiver is empowered to exercise the same authority and take over the control and oversight of the Project.

Lender is not obligated to advance undisbursed funds under the Loan Agreement due to existing Events of Defaults, including the indisputable failure to pay interest owing within ten (10) days of its December 1, 2017 due date,[9] other breaches, failure to satisfy conditions to funding by Lender, and the Borrower's clear mismanagement and incompetence (if not worse) of the Project's development. However, subject to acceptable terms, Lender is willing to advance funds to preserve and protect the Project, including for construction if determined appropriate, in the event an independent Receiver is appointed for the Collateral who will properly oversee the deployment of those funds pursuant to agreements with a general contractor and subcontractors acceptable to Lender. The funds could be advanced through secured Receiver Certificates on financial terms acceptable to Lender and the Receiver.

[9] Borrower has also failed to pay the January payment.

Sale of Collateral

Lender further requests that the Receiver be authorized to sell the Collateral, upon separate motion, notice and hearing, and subsequent order of the Court, in the event the opportunity arises during the receivership and the sale of the Collateral is necessary to avoid waste and preserve its value for Lender and potentially other creditors of Borrower.

MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION

A. Key Loan Documents and Defaults

1. On or about November 1, 2013, Lender and Borrower entered into a construction loan agreement to fund up to $50,000,000.00 for the acquisition of land and construction of the Project (the "Loan Agreement"). On September 2, 2015, Lender and Borrower and Pledgor executed an Amended and Restated Loan Agreement (the "Amended Loan Agreement") which, among other things, amended the Original Loan Agreement. Copies of the Original Loan Agreement and Amended Loan Agreement (collectively, the "Loan Agreement") are attached to the Complaint as Composite Exhibit 1. The Project was required to be completed by the end of **March 2017**, pursuant to the Loan Agreement.

2. On or about November 1, 2013, Borrower executed and delivered to Lender a Promissory Note in the principal amount of $50,000,000.00 (the "Note"). On September 2, 2015, Borrower executed and delivered to Lender an Amended Promissory Note in the principal amount of $50,000,000.00 (the "Amended Note"). The Amended Note amended the Note. Copies of the Note and Amended Note are attached to the Complaint as Composite Exhibit 2. Borrower was required to make monthly payments under the Amended Note.

3. On or about November 1, 2013, Borrower and Pledgor executed and delivered to lender the Mortgage, see Complaint's Exhibit 3, recorded November 7, 2013, in the Official Records Book 50318, Pages 88-112, which granted Lender a security interest in (a) those certain

real property interests as described therein, including the 550 Parcel as to Borrower and the 515 Parcel as to Pledgor (collectively, the Real Property"), and (b) certain personal property as described therein on pages 2-4 defined as "Property" (the "Personal Property"). At Section 15(b)(3), the Mortgage authorizes, upon an Event of Default:

> Appointment of Receiver. Mortgagee may petition a court of competent jurisdiction to appoint a receiver of the Property. Such appointment may be made either before or after sale, with notice, except in the event of an emergency, without regard to the solvency or insolvency of Mortgagor at the time of application for such receiver, without regard to the then value of the Property or whether the Property shall be then occupied as a homestead or not, and without regard to whether Mortgagor has committed waste or allowed deterioration of the Property, and Mortgagee or any agent of Mortgagee may be appointed as such receiver. Mortgagor hereby agrees that Mortgagee has a special interest in the Property and absent the appointment of such receiver the Property shall suffer waste and deterioration and Mortgagor further agrees that it shall not contest the appointment of a receiver and hereby so stipulates to such appointment pursuant to this paragraph. Such receiver shall have the power to perform all of the acts permitted Mortgagee pursuant to Section 15(b)(1) above and such other powers which may be necessary or customary in such cases for the protection, possession, control, management and operation of the Property during such period. (Emphasis added)

Section 15(b)(1), in its language and intent, grants a receiver the additional powers, as follows:

> Possession. Mortgagee may enter upon and take possession of the Property ... . Mortgagee is given full authority to do any act which Mortgagor could do in connection with the management and operation of the Property. ... (Emphasis added)

4. Borrower caused or permitted "Events of Default" to occur under the terms of the Loan Agreement, the Note, and the Mortgage (together, the "Defaults"), which Defaults constitute material breaches under thereunder, as described in the Complaint. Generally, these Defaults include, but are not limited to, non-payment of interest, gross mismanagement including failure to timely and properly complete construction of the Project, loss of hotel management and food and beverage operation agreements, and putting the Project on the verge of collapse. In addition, through its conduct, Borrower was promoting the incurring of change orders that would result in significant cost overruns.

5. On December 19, 2017, Lender sent Borrower written notice of the Defaults, again described more specifically in the Complaint; however, the Defaults remained uncured.

6. On January 3, 2018, Lender sent Borrower a written Notice of Acceleration. The accelerated debt of more than $37 million, however, remains outstanding.

B. Harm to Collateral and Mismanagement Justify Receiver

7. Borrower failed to complete construction of the Project on time, specifically by March 2017, as mandated under the Loan Agreement, caused the costs of the Project to balloon out-of-control, without explanation as to the submission of inflated cost estimates, incurred significant change order liability without first getting Lender's consent, failed to infuse funds necessary to complete the Project as required by the Loan Documents, see Section 3.7 of the Loan Agreement, and has refused to submit timely and accurate information to Lender regarding cost of completion. During this time Borrower paid itself approximately one million eight hundred thousand dollars ($1,800,000.00) as a project administration fee. The delay by Borrower in completing the construction of the Project by the agreed Completion Date, currently projected some fifteen (15) months past that date (assuming the contractor and subcontractors do not walk off the job), has negatively impacted and continues to adversely affect the Project and Lender's interest in the Collateral. Most critical, Borrower's missteps have resulted in the imminent cessation of work on the Project by the general contractor and subcontractors, which will damage Lender's interest in the Collateral. Borrower's mismanagement and incompetence has also resulted in the loss of the approved hotel brand and food concessionaire. Finally, Borrower has planned to unnecessarily eliminate its mezzanine debt as its strategy to save the Project. There is no adequate legal remedy for these potential and continuing harms.

8. Borrower's delays and mismanagement has resulted in the general contractor and subcontractors notifying Borrower of their intent to cease performance on the Project. Specifically, on January 16, 2018, the Project's general contractor, Straticon, LLC, sent to

Borrower and Lender its official notice expressly stating its intent to immediately cease performance at the Project due to nonpayment by Borrower. More than $5 million exists in unpaid claims due to the general contractor and subcontractors, based upon the claims of lien recorded against the Hotel Parcel as of January 22, 2016.

9. Borrower's gross mismanagement, incompetence, failures, missteps, and delays, which facts are supported not only by this Motion but also by the Affidavit of Lender's project consultant, Mr. McGrenra attached hereto as Exhibit 2, include, without limitation, the following:

a. Unreasonable delay of the completion of the Project; the projected delay for completion of the Project is now in excess of fifteen (15) months, assuming no further delays[10];

b. Consistently slow progress in moving toward completion of the Project, as evidenced by the below facts and observations and findings of Lender's project consultant, Michael McGrenra;

i. Including, the concrete pour portion of the garage of the hotel, which should have taken approximately three (3) months to complete, has instead taken six (6) to seven (7) months to complete; and

ii. Borrower had represented to Lender that a Temporary Certificate of Occupancy was to be issued on March 31, 2017, which generally means that the building should have been finished sixty (60) days from that certificate; however, that temporary certificate was not obtained and the projected completion date of

[10] Lender's construction project consultant, Michael McGrenra, who has been inspecting the Project since at least mid-2015, says that Hurricane Irma should have caused no more than a four-week delay.

the Project is in excess of some fifteen (15) months past the required completion date of March 2017;

c. Lack of reasonable action by Borrower to mitigate potential damages caused by the 2017 hurricane season, including the failure to shrink wrap or otherwise protect electrical units and other fixtures, or to establish a protective barrier to guard the same from the elements and water, according to Mr. McGrenra;

d. Mismanagement of the Project by Borrower, including, but not limited to, the managing the budget and costs for the Project, where:

(i)The initial funds available to construct the Project were $55,000,000.00. However, as declared by Borrower's principals, the actual costs have ballooned another $8 million to $10 million above the remaining $13 million that Lender has not funded. Accordingly, the cost to construct the Project is now $65,000,000.00. Ken Bernstein sent Lender's agent, Dan Sacho, an email memorandum of December 11, 2017 (a copy of which is attached hereto as **Exhibit 5)** stating that Borrower needed an additional $8 million beyond the $13 million in unadvanced loan funds. Further, on January 3, 2018, during an in-person meeting attended by the Bank's consultant Mike McGrenra, Ken Bernstein, Eugene Kessler, Jack Kessler (the Borrower's principals), Jim Gamble of Tetra Tech, and agents of the general contractor, Straticon, LLC, Borrower claimed that Borrower needed $10 million, not the lower $8 million in Ken Bernstein's email memorandum, all the while failing to back up the assertion. In short, Borrower could not substantiate the need for such charges;

(ii)Through the life of the Project, Borrower authorized work to be performed on the basis of change orders, never approved by the Lender for which Borrower then

demanded funding, including funding for $1 million of unapproved changes in the December 2017 draw request that was provided to Mr. McGrenra, a copy of which is attached hereto as **Exhibit 6**;

(iii)Borrower prematurely burnt through the contingency budget of approximately $1.1 million, leaving little or no sums available to address potential unforeseen issues that in fact arose during construction or may occur in the remaining time to complete the Project;

e. And, mismanagement of the Project by Borrower's inability to properly manage work performance which resulted in pushback of the completion date of the Project from March 2017 to, as last determined, June 2018, fifteen (15) months late, assuming there is no stoppage in construction which is imminent. This is particularly disturbing given the usual and customary time to complete a project for a boutique hotel of this size and nature such as here is approximately sixteen (16) to eighteen (18) months in total; and

f. The failure or inability of Borrower to fund amounts necessary to cover any shortfalls needed for the Project, and maintain the Loan's "In Balance" requirement. For example, Borrower and its principals stated, in December 2017, that it made no sense for them to put more money in the project.[11]

g. Borrower lost its original proposed hotel management company and then decided to move ahead with another company, without approval of Lender in violation of the Loan Agreement (Based upon Dan Sacho's more than 30 years' experience as a

[11] Notably, during a December 18, 2017 telephone conference attended by Dan Sacho, Mark Connelly, and Don McGraw for Lender and principals and agents for Borrower, Ken Bernstein stated that the respective parties have no equity in the Project and questioned the notion of Borrower-generated funding of the Project. It is clear that the written and verbal conduct of Borrower reflects its acknowledgment that there is no equity in the Project for them.

commercial banker, securing and maintaining a well-regarded "flag" upfront is essential so that the construction conforms to the specifications and requirements of the hotel brand, absent which the property value can be undermined);[12]

h. Borrower has not replaced its food concessionaire contract—"Senor Frog"—that was to operate the restaurant, bar, poolside, and room service operations; and

i. Beyond Lender's loan proceeds, Borrower's parent took in $30 million dollars from Chinese investors under the federal government's "EB5" program in debt secured by a pledge of the parent's equity interest in Borrower. That debt was guaranteed by Borrower and remains outstanding, and Borrower's agents and principals have admitted that the value of the Project does not exceed unpaid obligations to Lender and the EB-5 investors. The EB-5 funds were spent by Borrower on top of funds loaned and disbursed by Lender. As recently as December 2017, Borrower and its principals have been trying, without success, to get those creditors (that are senior to the equity owners' interests) to subordinate their debt, ostensibly to raise new funds to cover construction shortfalls. However, Borrower's principal and agent, Ken Bernstein, sought Lender's support regarding a restructuring arrangement that would eliminate the mezzanine debt.

10. As acknowledged by Borrower's agent Jim Gamble in an email dated January 5, 2018, forwarding to Lender and its project consultant emails from the general contractor and the drywall subcontractor (See **Exhibit 7** attached hereto), the general contractor, Straticon, LLC, and key subcontractor told Borrower that if not immediately paid by Borrower the contractors were going to walk off the Project. The following adverse harms and consequences to the Project were stated likely will occur, without limitation:

[12] It cannot be seriously debated that a hotel without a branded hotel chain is simply not as valuable as one with a high-end recognizable mark. In addition, Borrower has not submitted to Lender has any written management agreement.

a. Master Plaster, Inc. ("MPI"), the stucco subcontractor performing work on the Project, will cease work on the Project;

b. Warranty for work performed to date will be voided;

c. The work performed by MPI will incur damage and destruction, which will ultimately damage and materially harm the Collateral, including, but not limited to: (i) any and all unfinished foam bands, left exposed, will create a condition for delamination of additional coatings; and (ii) any and all unfinished EPS boards will suffer discoloration and create a condition for delamination of additional coatings;

d. MPI indicated that it will dismantle any and all equipment related to their work, and remove the same from the job site; and

e. The costs to re-mobilize the construction for the Project will be substantial in the hundreds of thousands of dollars.[13]

11. Borrower, through their counsel, has admitted, as late as January 5, that the Project would suffer harm. She notes in an email to Lender's counsel, a copy of which is attached hereto as **Exhibit 8:**

> As we discussed, the partners do not want to see the value of their asset diminish because of a shutdown and as the project is on the ocean, the salt and elements can quickly erode the shell and exposed steel. Equally important, the partners do not want to lose their contractors and sub-contractors. Given the current building boom in South Florida it will be more expensive or possibly even impossible to get the contractors to return to the project.

12. Further, as explained by Mr. McGrenra in his Affidavit, if the Project is left unattended, the following adverse harm and consequences likely will occur, without limitation:

a. The value of the Collateral will diminish, due to saltwater and other elements eroding the shell of the building, including any and all exposed steel;

[13] Again, given Lender's real and present concerns with how Borrower is mismanaging the Project, Lender has no confidence in advancing any further funds so long as present management controls the Project.

b. The contractor and subcontractors currently performing work at the Project will cease performance and vacate the jobsite and remove equipment such as scaffolding;

c. Sabotage will likely occur at the site of the Project;

d. Theft of, among other things, equipment and copper piping will occur, and that risk will be greater if the fencing subcontractor removes security fencing; and

e. Lender will incur substantial additional costs to repair, remove, or correct any and all of the above.

C. Lender is Entitled to Appointment of a Receiver Under Applicable Law

13. The appointment of a receiver in a diversity action is governed by federal law. Nat'l P'ship Corp. v. Nat'l Housing Dev. Corp., 153 F. 3d 1289, 1291 (11th Cir. 1998) (citing Resolution Trust v. Fountain Circle, 799 F. Supp 48 (N.D. Ohio 1992) and Chase Manhattan Bank v. Turabo Shopping Center, 683 F.2d 25, 26 (1st Cir. 1982)). The federal standard for the appointment of a receiver may be less stringent than state law. Nat'l P'ship Corp. at 1291.

14. Rule 66 of the Federal Rules of Civil Procedure governs the appointment of a receiver in an action pending in a Federal action. Rule 66 provides that "[t]hese rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule."

15. Where a borrower expressly consents in the mortgage by the borrower to the appointment of a receiver in the case of default, such clause is entitled to great weight. Cadence Bank, N.A. v. East 15th St., Inc., Case No.: 8:12-CV-1833-T-17EAJ, 2013 U.S. Dist. LEXIS 69679, at *9 (M.D. Fla. April 19, 2013)(citing Sterling Sav. Bank v. Citadel Dev. Co., 656 F. Supp. 2d 1248, 1260 (D. Or. 2009)), *adopted by* 2013 U.S. Dist. LEXIS 72294 (M.D. Fla. May 16, 2013). Such an express provision exists in the Mortgage, and Defendants also expressly

agreed that the value of the Collateral is not relevant to the analysis of whether a receiver should be appointed for the Collateral upon an Event of Default. See Section 15(b)(3).

16. In addition to the language of the Mortgage, federal courts consider six factors when determining whether to appoint a receiver. See Nat'l P'ship Corp., 153 F. 3d at 1291 (citing Consolidated Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 326-27 (1st Cir. 1988)). These factors include: (i) fraudulent or inappropriate conduct on the part of Borrower, (ii) imminent danger that the property at issue will be lost or squandered, (iii) the inadequacy of available legal remedies, (iv) the probability that harm to the lender by denying are the appointment would be greater than the injury to the borrow, (v) the lender's likelihood of success on the merits, and (vi) whether the appointment of a receiver will in fact serve the interests of the lender. Cadence Bank, 2013 U.S. Dist. LEXIS 69679, *10-11 (citing Consolidated Rail Corp., 861 F.2d at 326-27). These factors are present here.

D. The Facts of The Instant Case Support the Appointment of a Receiver to Possess, Protect, Manage, Address Construction, and Operate the Collateral

17. The facts articulated herein support the appointment of a receiver to take control, possession and custody of the Collateral; preserve, protect and safeguard the Collateral and the parties' interests therein; manage, administer, and operate the Project, including addressing the construction status and process, all while the foreclosure action is pending.

18. It is undisputed that Borrower has defaulted under the Loan Documents (unpaid interest payments), and currently owes Lender approximately **$37 million**, with interest and default interest accruing daily. In addition, Borrower has otherwise defaulted by failing to complete the Project within the time mandated, blowing through the construction budget with cost overruns, and mismanagement, and millions in liens filed. These facts establish Lender's likelihood of success on the merits as do others described in this Motion.

19. Defendants have expressly consented to the appointment of a receiver in the event of a default. See Mortgage, Section 15(b)(3). Borrower's unambiguous consent in this case to the appointment of a receiver heavily weighs in favor of appointment, see Cadence Bank, 2013 U.S. Dist. LEXIS 69679, at *9 (citing Sterling Sav. Bank, 656 F. Supp. 2d at 1260). Further, Defendants expressly agreed Lender need not prove waste or lack of value and that Lender would be harmed if a receiver is not appointed. See Section 15(b)(3).

20. However, even without a provision consenting to a receiver, the facts here overwhelmingly support his appointment. Borrower has engaged in mismanagement of the Project, and taken other actions that adversely affect Lender's rights in the Collateral.

21. Further, there exists imminent risk that the Collateral will be substantially impaired or devalued without the appointment of a receiver, as the Collateral will suffer from waste, theft, destruction, or simply the effects of delayed completion, as described above. This is a classic case that cries out for the appointment of a receiver to protect the Collateral and prevent it from remaining exposed to such risks. Lender will be irreparably harmed should a receiver not be appointed. There is no adequate remedy at law for the types of harm that will occur if a Receiver is not appointed.

22. Any harm suffered by Borrower caused by the appointment of a receiver is far outweighed by the harm suffered by Lender by failing to appoint a receiver. Borrower will not be harmed by having a court-appointed receiver manage the Project, including permitting the construction status to be properly addressed, and to protect and preserve the Collateral. Rather, both the interests of Borrower and Lender will be greatly served by appointing an independent person to act as a receiver, allowing such person to protect the interests therein. Indeed, Lender

might be willing to advance additional funds for the Project if an independent receiver is in control of the Collateral, which would certainly protect and enhance the value of the Project.

E. Substantive Law Supports Granting the Receiver Broad Powers

23. Additionally, once a receiver is appointed under federal law, Title 28, section 959 governs actions a receiver may take, which provides the receiver should act in accordance with state law—here, Florida. More specifically, 28 U.S.C. § 959(b) states that:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

24. A court appoints a federal receiver "to manage and operate the property according to the laws of the state where the property is located." Fountain Circle, 799 F. Supp at 50.

25. Florida courts have approved a trial court granting broad powers to a collateral receiver in the context of a foreclosure action, including specifically during the pendency of an action to the foreclose a construction loan and mortgage. See Crestview II, Ltd. v. TotalBank, 87 So. 3d 10 (Fla. 3d DCA 2012).[14] Those powers include the ability to address the continuation of construction by a receiver of a partially built building.

26. Here, the Mortgage clearly grants the receiver the same powers as those of the mortgagee. See Mortgage, Section 15(b)(3). The mortgagee, under Section 15(b)(1), has all the same powers as that of the mortgagor. A mortgagor clearly has the power to engage in the development and construction of its property, which it has been doing, albeit badly. Thus, the mortgagee, here Lender, is entitled to do the same, and thus the Receiver is imbued with the same power under the express terms of the Mortgage agreed to by Defendants.

[14] This case is cited not for the elements necessary to appoint a receiver, which is a matter of federal law; rather, this opinion is relied upon with regard to the scope and authority of a collateral receiver once appointed.

Taking Control of Insurance Claim Process and Receipt of Funds

27. Lender understands Borrower has a currently pending insurance claim of approximately $2 million due to damages alleged as a result of the 2017 hurricane season (the "Insurance Claim").[15] The Receiver should be granted control over the Insurance Claim and all related the books and records, including the right to take control of the claim process and the receipt of any funds that are disbursed under Borrower's polices. This relief is consistent with the Mortgage, see Section 4, which states, in relevant part:

> All policies shall be in form reasonably satisfactory to Mortgagee, shall be maintained in full force and effect, shall be, or certificates evidencing such insurance shall be, delivered to Mortgagee, shall be endorsed with a non-contributory mortgagee clause in favor of Mortgagee (to whom loss shall be payable), ...

Further, again under Section 4 of the Mortgage, it states, in relevant:

> ... Except as set forth in the Loan Documents, each insurance company concerned is hereby authorized and directed to make payment under such insurance, including return of unearned premiums, directly to Mortgagee instead of to Mortgagor and Mortgagee jointly, and Mortgagor appoints Mortgagee, irrevocably, as Mortgagor's attorney-in-fact, to endorse any draft therefor. (Emphasis supplied)

28. The Mortgage clearly accounts for an event, where the mortgagor files an insurance claim on encumbered property, and expressly states that such claim will be paid to Lender. Again, a receiver is empowered under the Mortgage to exercise the same authority as the mortgagor. Thus, a receiver is imbued with the authority to control the claim process and receipt of any insurance proceeds. Lender also has concerns that proceeds may be taken by Borrower in violation of the terms of the Loan Agreement, based upon prior failures of Borrower to fully and timely disclose information.

[15] Lender has not evaluated the Insurance Claims and has not yet taken a position on that claim.

Lender Requests Appointment of Experienced Receiver with Necessary Powers

29. In view of the foregoing, Lender requests this Court to appoint a receiver for the Collateral and specifically approve Andrew J. Bolnick, who is eminently qualified[16] as the Receiver for the Collateral (the "Receiver"). Subject to the terms of the Loan Documents, the Court should grant the Receiver the authority and power necessary to possess, preserve, protect, manage the Collateral, including continuing construction of the Project, if appropriate in the exercise of his judgment subject obtaining funding for the same from Lender or other sources on commercially reasonably terms.

30. The Receiver's powers should include, among others (more particularly described in the proposed Order Appointing Receiver attached hereto as **Exhibit 10**):

a. Obtain a Receiver's Bond in the amount of $100,000.00;

b. Enter upon, receive, recover, and take complete and exclusive custody, possession, control, supervision and management of the Collateral. (As far the Adjacent Parcel is concerned, Receiver shall evaluate the extent to which he believes that parcel needs his control and supervision and may determine in his professional judgment that he need not retain the Adjacent Parcel as part of the receivership);

c. Protect, preserve, protect, maintain, repair, operate, and manage the Collateral;

d. Obtain possession, and control of all the original books, records, and documents pertaining to the Collateral;

e. Take control of the Insurance Claims;

f. Receive any cash, checks, monies and deposit into a bank account controlled by him;

g. Incur and pay expenses reasonably necessary to perform his powers that are contained in a written budget approved by the Lender, subject to Lender advancing funds under the Loan Documents or through receiver certificates;

h. Deal with vendors, contractors, and subcontractors;

[16] Mr. Bolnick's resume is attached hereto as **Exhibit 9** and information about him and his company can be found at www.andrewbolnick.com.

i. Address existing agreements, although he is not bound to perform them;

j. If appropriate in his professional judgment to preserve its value, oversee the continuing and perhaps completion of the construction of the Project;

k. Prevent employees or agents of Defendants from making decisions for the Collateral;

l. Hire employees or agents to assist in the carrying out of his powers;

m. Deal and communicate with any governmental regarding the Collateral;

n. Maintain or obtain in the appropriate amounts of insurance;

o. If and when they exist, collect any accounts or other sums due to Defendants;

p. If the hotel becomes operational during the receivership, engage a management company;

q. Pay the Receiver a reasonable fee (for the first 30 days of his services the sum of $9500.00, and for each 30 day period thereafter the sum of $7500.00) plus expenses, subject to that arrangement changing to a monthly fee or other arrangement once the Receiver has the opportunity to inspect the Collateral and assess the Project and its needs receiver certificates;

r. Engage and pay attorneys and accountants and other professionals as are reasonably necessary in the judgment of the Receiver to assist him in the performance of his duties;

s. Requiring Defendants and their members, managers, principals, employees, and agents to reasonably cooperate with the Receiver in terms of the exercise of his powers granted by this Court as requested by the Receiver, including turning over books and records and keys, and enjoining the same from interfering with the Receiver's exercise of his duties under the Order Appointing Receiver; and

t. Receiver shall be permitted to seek further instructions from the Court.

Receiver Authority to Sell Collateral

31. The Receiver should also be authorized to market the Collateral, and upon separate motion, notice and hearing, sell the Collateral in the event the opportunity arises during the receivership, and sale of the Collateral is necessary to preserve its value for Lender and

Borrower.[17] Here, while the remedy provision does not expressly state that the receiver may sell the property, the provision does, as stated above, clearly grant the receiver the same powers as that of the mortgagee. See Mortgage, Section 15(b)(3). Again, the mortgagee, under Section 15(b)(1), has all the same powers as that of the mortgagor. A mortgagor clearly has the power to sell the Collateral. Thus, the mortgagee, here Lender, under that assumption of that power, may also sell the Collateral. It follows, then, that the Receiver has same power and authority to sell the Collateral and preserve its value for Lender and Borrower.

WHEREFORE, Lender respectfully requests the Court enter its Order:

(A) appointing a receiver for all of the Collateral with the powers and duties as requested above, and specifically enter the proposed Order Appointing Receiver attached hereto as **Exhibit 10** or a substantially similar Order that is acceptable to Lender and the Receiver; and

(B) granting such other and further relief as the Court deems proper.

January 26, 2018 Foley & Lardner LLP One Biscayne Tower 2 South Biscayne Boulevard, Suite 1900 Miami, Florida 33131 Telephone: (305) 482-8414 Facsimile: (305) 482-860	*/s/ Mark J. Wolfson* Mark J. Wolfson (FBN 0352756) FOLEY & LARDNER LLP 100 N. Tampa Street, Suite 2700 Tampa, Florida 33602 (813) 229-2300 (telephone) (813) 221-4210 (facsimile) Primary email: mwolfson@foley.com Secondary email: crowell@foley.com

[17] While there are cases that have not allowed a receiver to sell the Collateral, these cases are based upon facts where the remedy provision does not allow for the same.

VERIFICATION

(Signature)

STATE OF DELAWARE
COUNTY OF NEW CASTLE

BEFORE ME, the undersigned authority, personally appeared Dan Sacho ("Verifier") who, after being duly sworn, stated that (a) Verifier's name is Dan Sacho; (b) Verifier works of The Bancorp Bank (the "Lender") as Director; (c) Verifier has personal knowledge of the factual statements set forth in the Plaintiff's Emergency Verified Motion for Entry of Order Appointing Receiver and Memorandum of Law in Support Thereof (the "Motion"), including, but not limited to, by virtue of Verifier's position and duties, including primary responsibility for the loan evidenced by the Loan Documents; (d) Verifier has read the Motion and the Verified Complaint and has reviewed the Exhibits attached to the Complaint and the Motion; (e) the facts stated in the Complaint and the Motion, and the Exhibits attached to the Complaint and this Motion, are true and correct to the best of my information and knowledge; and (j) Verifier is over the age of 18 and has executed the Motion on behalf of the Lender.

Sworn to and subscribed before me this 26 day of January, 2018, by DANIEL SACHO who:

☐ is personally known to me.
☐ produced a current _____ driver's license as identification.
☐ produced _____ as identification.

{Notary Seal must be affixed}

Signature of Notary

GEORGIANA CUMMINGS
Name of Notary (Typed, Printed or Stamped)

GEORGIANA CUMMINGS
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires Jan. 30, 2019

Commission Number (if not legible on seal):_____
My Commission Expires (if not legible on seal):___