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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CHARLES P. COPELAND, COPELAND
WEALTH MANAGEMENT, a financial
advisory corporation, and COPELAND
WEALTH MANAGEMENT, a real estate
corporation,

Defendants.

Case No. 2:11-cv-08607-R-DTB

**SECURED CREDITOR'S OPPOSITION TO
RECEIVER'S MOTION FOR
(A) DIRECTING DISTRIBUTION OF
FUNDS IN ESCROW ACCOUNT;
(B) DIRECTING THE RETURN OF FUNDS
BY LENDER; AND (C) DIRECTING
PAYMENT BY LENDER OF ATTORNEYS'
FEES**

Date: March 18, 2013
Time: 10:00 a.m.
Place: Dept. 8, 2nd Floor
The Honorable Manuel R. Real

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SBMS 2000-C3 Landmark Center, LLC (“Landmark” or “Secured Creditor”) hereby submits its opposition to Thomas C. Hebrank’s, the court-appointed receiver (the “Receiver”) motion for (a) directing distribution of funds in escrow account; (b) directing the return of funds by lender; and (c) directing payment by lender of attorneys’ fees (the “Motion”)¹ as follows:

I. PRELIMINARY STATEMENT

Once you cut through the Receiver’s rhetoric and personal attacks, his unauthorized disclosure of confidential settlement discussions and misplaced reliance on inapplicable legal authority, what is before this Court is a premature and misguided motion. What happened here is very different than what the Receiver depicts. It was the Receiver, not the Secured Creditor, who was aggressive, uncooperative and demanding.

First and foremost, Secured Creditor was not involved in any of the underlying and alleged bad acts that led to the Receiver’s appointment. Despite this, the Receiver refuses to pay certain amounts that are contractually and legally owed to Secured Creditor. Secured Creditor’s secured claim was approximately \$5,800,000 at the closing date of the sale, with the sale price being approximately \$8,550,000. Even if Secured Creditor is paid in full, the receivership estate stands to receive over \$2,500,000. Yet apparently this is not good enough for the Receiver who refuses to pay Secured Creditor agreed upon contractual amounts due under the loan, including accrued default interest, which are allowable under Ninth Circuit law and North Carolina state law.² Instead this Receiver would rather fight, litigate, and file unnecessary motions like the present Motion, which only forces the parties to incur additional and unnecessary legal fees.³

¹ It should be noted that the Receiver did not contact Secured Creditor prior to filing the Motion on February 15, 2013 in accordance with Local Rule of Court 7-3 entitled “Conference of Counsel Prior to Filing of Motions.” [Declarations of P. Wang, ¶12 and M. Colabianchi, ¶8]. Accordingly, the notice of motion filed in support of the Motion fails to include the required statement per Local Rule 7.3 since such a conference never took place. [Docket 219]. The notice also does not comport with Local Rule 7-9 in that it states that opposition to the Motion is due 14 days prior to the hearing instead of the requisite 21 days before the hearing per Local Rule 7-9.

² Section 3.06 of the Promissory Note provides that for interpretation and enforcement shall be in accordance with laws of the State of North Carolina. A true and correct copy of the Note is attached to the Declaration of Jorge Rodriguez as Exhibit A [Docket 116].

³ Although Secured Creditor has not formally objected to the Receiver’s and his counsel’s fee applications to date, Secured Creditor reserves the right to object to the final fee applications brought by each in this case.

1 The Motion itself is procedurally improper in that it avoids the Receiver's own established
 2 procedures for claims set forth in the Order Granting Receiver's Motion for Entry of An Order:
 3 (1) Establishing Bar Date for Claims; (2) Approving Form and Manner of Notice Thereof;
 4 (3) Approving Proof of Claim Form and Procedures For Submitting Proofs of Claim (the "Claim
 5 Procedure Order") [Docket No. 214].⁴ In the Claim Procedure Order, the Court established, at the
 6 request of the Receiver, the manner in which claims were to be submitted to the Receiver and
 7 resolved. [Docket 214 at pp. 7-12]. Secured Creditor is at a loss as to why this Receiver would
 8 incur unnecessary legal expenses to bring the present Motion when he already established, through
 9 another motion, the claim procedure process for this case. Any dispute the Receiver has with the
 10 Secured Creditor's claim should be resolved in connection with a claim objection, and not the
 11 present, premature Motion.

12 With regard to the factual statements in the motion, they are skewed, one-sided and
 13 inaccurate. The Order Granting Receiver's Motion for Order (A) Approving Sale of Real Property
 14 Free and Clear of Liens; (B) Authorizing the Receiver to Pay Certain Liens and Claims From the
 15 Sale Proceeds entered on October 3, 2012 ("Sale Order") allowed the Receiver to sell the property
 16 and authorized the "Receiver To Pay Certain Liens and Claims From the Sale Proceeds, including
 17 the lien of secured lender SBMS 2000-C3 Landmark Center, LLC, which shall have the right to
 18 bring a motion for the Court to determine the proper amount of the lien." [Docket 126]. The Sale
 19 Order contemplated, in the Secured Creditor's view, that payment of an agreed upon and/or
 20 undisputed portion of the lien could be paid through escrow.⁵

21 At no time did the Receiver ever challenge or object to the validity of Secured Creditor lien
 22 against the property but only took issue with approximately \$700,000 of the Secured Creditor's
 23

24 ⁴ All references to Docket Numbers are to documents filed in this case, of which the Court is requested to take judicial
 notice pursuant to Secured Creditor's request for judicial notice filed herewith under Federal Rule of Evidence 201.

25 ⁵ While the Sale Order makes reference that the Secured Creditor has the "right to bring a motion for the Court to
 26 determine the proper amount of the lien", the Sale Order was entered prior to Claim Procedure Order. [Docket 126 and
 27 214]. Further, the discussions between the Receiver and Secured Creditor were confidential settlement discussions with
 the parties attempting to resolve the issues over the claim amount. Secured Creditor viewed the Claim Procedure Order
 as the appropriate process for which the amount of its claim (*i.e.*, lien) would be determined with, or without court
 intervention.
 28

1 \$5,800,000 claim – namely the accrued default interest and third party expenses. In the guise of
 2 “creating incentive to cooperate without Court intervention”, what the Receiver proposed was to
 3 hold the entire amount of Secured Creditor’s claim of \$5,800,000 hostage pending a subsequent
 4 agreement or court order [Motion at 5:20-26]. This, in the Secured Creditor’s view, was not the
 5 intent of the Sale Order and was not an effort by the Receiver to create cooperation but rather an
 6 effort to apply maximize leverage against the Secured Creditor so that it would agree to abandon a
 7 significant portion of its claim, *i.e.*, its claim to the accrued default interest. [Motion at 6:3-7].

8 Secured Creditor’s counsel, Marcus O. Colabianchi⁶ and Phillip K. Wang, engaged in
 9 several of what they believed were confidential settlement discussions in an attempt to resolve the
 10 parties’ differences on the amount of the Secured Creditor’s claim. The Agreement Regarding
 11 Receiver’s Proposed Sale Of Property (the “Distribution Agreement”) and the Escrow Agreement
 12 signed by the Secured Creditor and Receiver were the product of those discussions. And contrary
 13 to the Receiver’s assertion, Secured Creditor did not revise the terms. In fact, counsel for the
 14 Secured Creditor drafted the Distribution Agreement consistent with the parties’ discussions. It was
 15 the Receiver who changed and attempted to modify the terms.⁷ The entire Motion seems to be an
 16 attempt by the Receiver to drag the Secured Creditor through the mud, which is unfortunate to say
 17 the least.

18 As will be discussed more thoroughly below, Secured Creditor is legally entitled to the full
 19 amount of its secured claim, including all accrued default interest. The Receiver cites to the United
 20 States Court of Appeals for the Ninth Circuit decision in the *In re Entz-White Lumber and Supply*,

21 ⁶ As noted in Mr. Colabianchi’s declaration filed herewith, after receiving information on the proposed title/escrow
 22 company and the buyer’s attorney information from receiver’s counsel John Stephens, Mr. Colabianchi reached out to
 23 Mr. Stephen Bolles, the purported title/escrow officer, to inquire whether the title company would require a release of
 24 Secured Creditor’s mortgage to which Mr. Bolles answered that a release would likely be necessary. Mr. Colabianchi
 also advised Mr. Bolles that the Secured Creditor and the Receiver dispute the amounts Secured Creditor is owed. At
 no time did Mr. Colabianchi demand that he or other attorneys at his law firm would have to “pre-approve the payoff
 figure” as Mr. Bolles incorrectly recalls. [Declaration of M. Colabianchi, ¶4].

25 ⁷ In addition to Local Rule of Court 7-3 entitled “Conference of Counsel Prior to Filing of Motions,” the Receiver also
 26 promised in the Distribution Agreement that the “parties shall in good faith agree to a procedure to adjudicate or
 27 otherwise resolve Lender’s claim.” [Declaration of P. Wang, ¶9, Exhibit F (Distribution Agreement at ¶2.7)]. The
 Receiver, however, not only violated the Local Rules of Court but also his own covenant in the Distribution Agreement
 as the Receiver unilaterally decided to file his Motion without meeting or conferring with Secured Creditor.

1 *Inc.* case for the proposition that the Receiver does not need pay the contractual default rate of
 2 interest, late fees or any other penalties. *In re Entz-White Lumber and Supply, Inc.*, 850 F.2d 1338,
 3 1342 (9th Cir. 1988); *see* Motion at 12:15-24. The *Entz-White* decision is inapplicable here. Rather,
 4 the 2008 Ninth Circuit decision in *GE Capital Corp. v. Future Media Prods.*, 536 F.3d 969 (9th Cir.
 5 2008) is more on point and instructive.

6 In *Future Media*, the Ninth Circuit held that where a creditor's oversecured claim was paid
 7 out of the proceeds of an asset sale, rather than pursuant to a Chapter 11 plan (as was done in *Entz-*
 8 *White*), the oversecured creditor is entitled to a default rate of interest if allowable under applicable
 9 state law. *Id.* at 973. Because the Receiver's sale of the Property was a liquidation sale and not
 10 done pursuant to a Chapter 11 bankruptcy plan, the holding in *Future Media* (and not *Entz-White*)
 11 applies here.

12 Secured Creditor respectfully requests this Court deny the Motion and allow the parties to
 13 engage in the claim procedure process in accordance to the Receiver's own Claims Procedure
 14 Order.

15 **II. FACTUAL BACKGROUND⁸**

16 **A. Loan Documents**

17 On October 3, 2000, Wendover Greensboro, Ltd. ("Wendover"), as borrower, and
 18 Continental Wingate Capital Corporation ("Continental"), as lender, entered into a Promissory Note
 19 (the "Note") in the principal amount of \$7,100,000. Pursuant to Section 3.06 of the Promissory
 20 Note, the choice of law for interpretation and enforcement shall be in accordance with laws of the
 21 State of North Carolina. Moreover, the Promissory Note defines an Event of Default of a "payment
 22 not made within five (5) days of the date such payment is due (except that no grace or notice period
 23 is provided from the payment of the principal and interest due on the Maturity Date)." A true and
 24 correct copy of the Note is attached to the Declaration of Jorge Rodriguez as Exhibit A [Docket
 25 116].

26
 27 ⁸ The factual support for this statement is contained in the Declaration of Jorge Rodriguez previously filed with this
 Court. [Docket 116].

1 The Note is secured by, among other things, a certain Deed of Trust, Assignment of Leases
2 and Rents and Security Agreement (the "Deed of Trust") given by Wendover to James S. Hassan as
3 trustee for the benefit of Continental, recorded on October 3, 2000, in Book 5091, Page 0004,
4 Guilford County Registry. A true and correct copy of the Deed of Trust is attached to the
5 Declaration of Jorge Rodriguez as Exhibit B [Docket 116]. The property subject to the Deed of
6 Trust is, among other things more particularly described in the Deed of Trust, the real property and
7 improvements located at 6103 Landmark Center Boulevard, Greensboro, North Carolina 27407 (the
8 "Property"), which is commonly referred to as the Garden Ridge Property, and all rents and profits
9 generated therefrom (collectively with the Property, the "Collateral").

10 On April 11, 2002, Continental, as assignor, executed an Assignment of Deed of Trust,
11 Assignment of Leases and Rents and Security Agreement ("Assignment of Deed of Trust No. 1"),
12 for the benefit of the assignee, Wells Fargo Bank Minnesota, N.A., as trustee for the registered
13 holders of Salomon Brothers Mortgage Securities VII, Inc. Commercial Mortgage Pass-Through
14 Certificates, Series 2000-C3 (the "Trust"), recorded in Book 5485, Page 0426 of the Guilford
15 County Registry. A true and correct copy of the Assignment of Deed of Trust No. 1 is attached to
16 the Declaration of Jorge Rodriguez as Exhibit C [Docket 116].

17 On March 2, 2007, pursuant to an Assignment and Assumption Agreement with Holder's
18 Consent ("Assumption Agreement") by and among Wendover, Copeland Properties 18, L.P.
19 ("CP18" and as the "Assuming Borrower"), and Charles P. Copeland, Donald E. Copeland, Bruce
20 Taber and Maureen Taber, as recorded in Book 6685, Page 1238, in the Guilford County Registry,
21 CP18, as assuming borrower, assumed all of Wendover's rights, obligations and interests under the
22 loan documents, including, but not limited to, the Note dated October 3, 2000 in the principal
23 amount of \$7,100,000.00, and deed of trust of the same date as thereafter assigned. A true and
24 correct copy of the Assumption Agreement is attached to the Declaration of Jorge Rodriguez as
25 Exhibit D [Docket 116].

26 The Trust, as assignor, executed an Assignment of Deed of Trust, Assignment of Leases and
27 Rents and Security Agreement and Other Loan Documents ("Assignment of Deed of Trust No. 2"),
28 for the benefit of the assignee, Landmark, as recorded on April 4, 2011, in Book 7228, Page 2645,

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1 of the Guilford County Registry. A true and correct copy of the Assignment of Deed of Trust No. 2
 2 is attached to the Declaration of Jorge Rodriguez as Exhibit E [Docket 116].

3 CP18 defaulted under the Note for, among other things, failing to make payments when the
 4 loan matured in September 2010, almost two and one-half years ago. Specifically, CP18 failed to
 5 pay the final principal and interest payment due under the loan upon maturity, which is an Event of
 6 Default pursuant to 2.01 of the underlying Promissory Note. As a result of the default, by letter
 7 dated April 29, 2011, Secured Creditor declared a default, and informed CP18 of its intent to
 8 enforce the attorneys' fees provisions of the loan documents if payment was not received within
 9 five days of the letter. A true and accurate copy of the April 29, 2011 letter is attached to the
 10 Declaration of Jorge Rodriguez as Exhibit F [Docket 116]. It is undisputed that CP18 never made
 11 the maturity payment.

12 **B. The Parties' Negotiations**

13 Beginning in early October 2012, the Receiver and Secured Creditor began to discuss the
 14 amount of Secured Creditor's claim and the pending sale transaction. In particular, Secured
 15 Creditor's counsel, Marcus O. Colabianchi, asked Receiver's counsel as early as immediately
 16 following the hearing on the Receiver's sale motion held on October 1, 2012 whether the Receiver
 17 and/or the title company handling the sale transaction would require a release of the Secured
 18 Creditor's mortgage or would the Sale Order be sufficient to close the transaction. The response
 19 from Receiver's counsel, John Stephens, was that he did not know whether such a release would be
 20 necessary or required. [Declaration of M. Colabianchi, ¶2].

21 There were subsequent discussions between Mr. Colabianchi and Mr. Stephens. According
 22 to Mr. Stephens there was a tenant estoppel issue that the Receiver and the buyer had to work
 23 through before the sale could close. Mr. Stephens also made clear that the Receiver had no
 24 intentions of paying any accrued default interest to the Secured Creditor and that there was a back-up
 25 buyer for the Property should the present sale transaction fell through. [Declaration of M.
 26 Colabianchi, ¶3].

27 During one of these conversations, Mr. Stephens provided information to Mr. Colabianchi on
 28 the proposed title/escrow company and the buyer's attorney. Mr. Colabianchi reached out to

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1 Mr. Stephen Bolles, the purported title/escrow officer, on or about October 22, 2012 to inquire
2 whether the title company would require a release of Secured Creditor's mortgage to which Mr.
3 Bolles responded that a release would likely be necessary. Mr. Colabianchi also advised Mr. Bolles
4 during this conversation that the Secured Creditor and the Receiver disputed the amounts Secured
5 Creditor was owed under the loan. Mr. Bolles advised Mr. Colabianchi of an inspection contingency
6 removal date of November 1, 2012 for the buyer. At no time did Mr. Colabianchi demand that he or
7 other attorneys at his law firm would have to "pre-approve the payoff figure". [Declaration of M.
8 Colabianchi, ¶4].

9 On or about November 9, 2012, Mr. Stephens sent Mr. Colabianchi an email proposing that
10 the sale be allowed to close with all sale proceeds held in escrow until the Court rules on the
11 amount to be paid. Mr. Colabianchi responded – ten (10) minutes after receipt of Mr. Stephens'
12 email – with an alternative approach of releasing the principal amount outstanding (or the non-
13 disputed amount) with only the disputed amount being held in escrow pending either an agreement
14 or court order. In Mr. Colabianchi's email, he specifically advised Mr. Stephens that he would need
15 to discuss all of this with the Secured Creditor. [Declaration of M. Colabianchi, ¶5, Exhibit A].

16 On Sunday, November 11, 2012, Mr. Colabianchi fractured the fifth metatarsal in his left
17 foot and was non-ambulatory for several weeks. In Mr. Colabianchi's absence, Phillip K. Wang,
18 who was already involved and familiar with the matter, assumed the position of lead counsel for the
19 Secured Creditor. [Declaration of M. Colabianchi, ¶6].

20 On November 12, 2012 and after a telephone conversation between Mr. Stephens and Mr.
21 Wang, Mr. Stephens sent an email in which he offered, on behalf of the Receiver, to pay from the
22 pending sale proceeds the current principal amount due (approximately \$5,100,000) and all out-of-
23 pocket expenses as listed on the October 1, 2012 Payoff Statement in the amount of \$78,149.62 but
24 would not pay any accrued default interest. [Declaration of P. Wang, ¶3, Exhibit A]. The accrued
25 default interest totaled over \$570,000. The Secured Creditor rejected the Receiver's offer on
26 Wednesday, November 14, 2012. [Declaration of P. Wang, ¶3, Exhibit A].

27 On Friday, November 16, 2012, an all-hands conference call occurred with Mr. Wang and
28 Secured Creditor's representative on the one side, and Mr. Stephens and the Receiver on the other

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1 side. At the conclusion of that call, Mr. Wang and the Secured Creditor's representative understood
2 that a compromise had been reached wherein Receiver would agree to release the principal amount
3 due and the third party expenses directly from escrow with the accrued default interest amount to be
4 held in escrow pending further agreement by the parties and/or court order. [Declaration of P.
5 Wang, ¶4].

6 In accordance to Secured Creditor's understanding of the agreed upon terms, Mr. Wang
7 prepared the Agreement Regarding Receiver's Proposed Sale Of Property (defined above as the
8 "Distribution Agreement"), which included the terms discussed and agreed upon on the all-hands
9 conference call. A draft of the Distribution Agreement was sent to Mr. Stephens on Tuesday,
10 November 20, 2012 at 9:48 a.m., and Mr. Wang received Mr. Stephens' response on Wednesday,
11 November 21, 2012. Mr. Stephens' response contained significant modifications to the Distribution
12 Agreement and the agreed upon terms. The Receiver was apparently attempting to renegotiate the
13 terms of the deal. At or around this time, Mr. Stephens advised Mr. Wang that the closing date of
14 the sale transaction had been pushed to November 30, 2012. [Declaration of P. Wang, ¶5, Exhibit
15 B].

16 There were subsequent emails exchanged between Mr. Wang and Mr. Stephens.
17 Throughout these exchanges, the Receiver made clear that he intended to proceed with the closing
18 and that the Receiver did not need a release of the Secured Creditor's mortgage in order to close.
19 Also during these exchanges, Secured Creditor made clear that it stood ready to proceed with the
20 Distribution Agreement, which reflected the terms that were agreed upon during the conference
21 call. The parties ultimately signed the Distribution Agreement and Escrow Agreement, which
22 reflected what the Secured Creditor understood all along to be the terms the Receiver had agreed to.
23 [Declaration of P. Wang, ¶¶8-9].⁹

24
25
26 ⁹ The Distribution Agreement signed by the Receiver and counsel expressly includes an integration clause. Thus, the
27 Receiver's insistence on delving into details of the parties' confidential negotiations prior to the written agreement are
28 irrelevant. [[Declaration of P. Wang, ¶9, Exhibit F (Distribution Agreement at ¶ 9)].

1 **C. Sale of the Property**

2 On or about December 7, 2012, the Secured Creditor received \$5,244,241.77 and
3 \$54,241.02 from the sale escrow with the remaining amount, *i.e.*, the accrued default interest, to be
4 held in escrow per the Distribution Agreement and Escrow Agreement. [Declaration of P. Wang,
5 ¶11, Exhibits F and G]. Then, the court granted the Receiver's motion for claim procedures on
6 December 17, 2012 and entered the Claims Distribution Order on January 2, 2013 [Docket 204 and
7 214].

8 **D. Submission of Secured Creditor's Claim Pursuant to Claims Procedure Order**

9 On February 15, 2013 – the same day the Receiver filed the Motion – Secured Creditor
10 submitted its claim pursuant to the Claims Procedure Order. The total remaining amount of the
11 Secured Creditor's claim as submitted to the Receiver is equal to at least \$597,114.36.¹⁰
12 [Declaration of M. Colabianchi, ¶7].

13 **III. RECEIVER'S RELIANCE ON *ENTZ-WHITE* IS MISPLACED; SECURED**
14 **CREDITOR IS ENTITLED TO ACCRUED AND OUTSTANDING DEFAULT**
15 **INTEREST AS PART OF ITS SECURED CLAIM**

16 Receiver points to the *Entz-White* decision for authority that an oversecured creditor is not
17 entitled to interest at the default rate. [Motion 12:11-13:17]. One critical difference between what
18 happened here and in the *Entz-White* case is that the oversecured creditor in *Entz-White* was paid
19 pursuant to the terms of a confirmed Chapter 11 plan. *In re Entz-White Lumber and Supply, Inc.*,
20 850 F.2d 1338 (9th Cir. 1988). The fact that the claim was paid through a Chapter 11 plan is the
21 seminal and critical fact in *Entz-White* and is why many debtors proceed through the bankruptcy
22 process in order to reap this benefit. However, the sale of the Property here was certainly not
23 through a Chapter 11 plan but rather a simple asset sale. As such, *Entz-White* is not applicable but
24

25 ¹⁰ As stated in the claim submitted to the Receiver on February 15, 2013, this amount is calculated as of the Closing
26 Date for the sale of the Property on December 7, 2012 and does not include amounts such as certain accrued but
27 unbilled fees that may have been incurred on and after November 1, 2012. Certain other costs and charges as of the
28 date of the Payoff Statement may not have been calculated and therefore are not included in the above figure, and
additional amounts continue to accrue such as ongoing interest at the regular and default rates, ongoing attorneys' fees,
and other costs, expenses and charges that are payable under the Loan Documents. Secured Creditor reserved all rights
to amend the Claim to assert additional amounts, if necessary.

1 rather the Ninth Circuit decision in *Future Media* provides the proper guidance. *GE Capital Corp.*
 2 *v. Future Media Prods.*, 536 F.3d 969 (9th Cir. 2008).

3 Local Rule of Court 66-8 states that “[e]xcept as otherwise ordered by the Court, a receiver
 4 shall administer the estate as nearly as possible in accordance with the practice in the administration
 5 of estates in bankruptcy” for the administration of permanent or temporary receivership estates.
 6 Although the following legal authority centers on bankruptcy law, it seems that such authority is
 7 most on point with the issues facing the Court in regards to whether Secured Creditor is entitled to
 8 recover the accrued default interest.

9 Bankruptcy Code §506(b) provides that the claim of an oversecured creditor “shall be
 10 allowed . . . interest . . . and any reasonable fees, costs, or charges provided for under the agreement
 11 or State statute under which such claim arose.” 11 U.S.C. §506(b). It is without dispute that the
 12 Secured Creditor here is an oversecured creditor by over \$2,500,000.

13 In *Future Media*, the bankruptcy court extended *Entz-White* to a claim that was paid in full
 14 as a result of a series of asset sales outside of a Chapter 11 plan. Because a Chapter 11 plan
 15 implicates provisions of the Bankruptcy Code that an asset sale outside of a Chapter 11 plan does
 16 not, the Ninth Circuit concluded that the bankruptcy court's extension of *Entz-White* was in error.
 17 *GE Capital Corp. v. Future Media Prods.*, 536 F.3d at 973.

18 The *Future Media* court started its analysis from a general premise recently articulated by
 19 the Supreme Court: “[c]reditors’ entitlements in bankruptcy arise in the first instance from the
 20 underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary
 21 provisions of the Bankruptcy Code.” *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*,
 22 549 U.S. 443 (2007). The *Future Media* court read *Travelers* to mean that the default rate should
 23 be enforced, subject only to the substantive law governing the loan agreement, unless a provision of
 24 the Bankruptcy Code provides otherwise. The *Future Media* court noted that in *Entz-White*, the
 25 Ninth Circuit identified a ‘qualifying or contrary provision’ of the Bankruptcy Code. *GE Capital*
 26 *Corp. v. Future Media Prods.*, 536 F.3d at 973.

27 In *Entz-White*, the debtor's proposed treatment of the oversecured creditor's claim was
 28 presented in a Chapter 11 plan. A creditor's claim is considered “impaired” for purposes of voting

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on a Chapter 11 plan unless the plan leaves the creditor's legal, equitable, and contractual rights unaltered, or the debtor "cures" any default that occurred prior to or during the bankruptcy case under Bankruptcy Code §§1124(1)-(2). In *Future Media*, the court noted that it had explained in prior decisions that the provision allowing "cures" under Bankruptcy Code §1124(2)(A) "authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest." *GE Capital Corp. v. Future Media Prods.*, 536 F.3d at 973 citing *In re Southeast Co.*, 868 F.2d 335, 338 (9th Cir. 1989). Because the Bankruptcy Code allows the debtor to "cure" defaults under a Chapter 11 plan, the Ninth Circuit permitted the debtor to nullify the interest owed at the default rate in *Entz-White*. And since, there was no implication of the "qualifying or contrary provision" in the applicable Bankruptcy Code provisions to a simple sale of the debtor's assets, the *Future Media* court held that the bankruptcy court's extension of *Entz-White* to the loan agreement's default rate was error and that the parties' arms-length bargain controls. *GE Capital Corp. v. Future Media Prods.*, 536 F.3d at 974.

The court remanded the case to allow the bankruptcy court to decide whether the default rate should apply under the rule adopted by the majority of federal courts, which is simply that "the bankruptcy court should apply a presumption of allowability for the contracted for default rate, 'provided that the rate is not unenforceable under applicable nonbankruptcy law.'" *GE Capital Corp. v. Future Media Prods.*, 536 F.3d at 974 citing 4 Collier on Bankruptcy, ¶506.04[2][b][ii] (15th Ed. 1996).

As a result and contrary to the Receiver's view, there was not an *Entz-White* cure here. [Motion at 13:14-16]. The Receiver simply sold the Property in an asset sale. Thus, the *Future Media* holding is more applicable to the events that occurred in this case.

Applying the holding of *Future Media* and the choice of law provision in the Promissory Note that the laws of the State of North Carolina control interpretation and enforcement, recovery of default interest is allowable here if available under North Carolina law.

In *In re Harvest Oaks Drive Associated, LLC*, 2011 Bankr. Lexis 146 (U.S.B.C. Eastern Dist. of N.C. 2011), a North Carolina bankruptcy court, in a claim objection context, applied applicable North Carolina state law and allowed the recovery of interest at the default rate from the

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1 date of the payment default. *In re Harvest Oaks Drive Associated, LLC*, 2011 Bankr. Lexis 146 at
2 *23. The secured creditor asserted that an Event of Default had occurred by reason of nonpayment
3 in the *Harvest Oaks* case. *Id.* at *19. Here and as noted above, the underlying Promissory Note
4 includes as an Event of Default a “payment not made within five (5) days of the date such payment
5 is due (except that no grace or notice period is provided from the payment of the principal and
6 interest due on the Maturity Date).” [Declaration of Jorge Rodriguez at Exhibit A] [Docket 116].
7 Receiver argues that somehow the notice of default sent to CP18 was defective. [Motion 10:1-14].
8 Despite what the Receiver argues, failing to make the payment of the remaining principal and
9 interest due upon maturity, which was due in September 2010, is indeed an Event of Default and a
10 significant one and the default notice sent provided sufficient notice to CP18 as a payment upon
11 maturity is a payment default under the loan.

12 Secured Creditor is entitled to collect accrued default interest. Secured Creditor requests
13 this Court deny the Receiver’s request for the funds presently held in escrow be turned over to him.
14 The escrow and the Escrow Agreement serve to protect Secured Creditor’s interests. The parties,
15 especially the Receiver, should be made to follow the established claim procedure process.

16 **IV. SECURED CREDITOR COMPLIED WITH THE SALE ORDER AND PROCEEDED**
17 **WITH SETTLEMENT DISCUSSIONS**

18 In its motion, the Receiver cites to a United States Court of Appeals for the Sixth Circuit to
19 encourage this Court to rule in his favor by exercising this Court’s broad powers and wide
20 discretion. [Motion at 13:20-24]. The Receiver then argues that the Secured Creditor somehow
21 rejected the Sale Order. [Motion at 13:20-24]. As noted above, the Secured Creditor believes that
22 the Sale Order contemplated the Receiver paying what the parties believed were undisputed funds.
23 Further, and as noted in Mr. Wang’s declaration filed herewith, the Distribution Agreement was
24 prepared on terms that Secured Creditor understood were agreed to by the Receiver on the all-hands
25 conference call on November 15, 2012. [Declaration of P. Wang ¶5]. Receiver’s one-sided and
26 bald assertions that Secured Creditor somehow circumvented the Sale Order is preposterous and
27 disingenuous.

V. RECEIVER'S REQUEST FOR ATTORNEYS' FEES IS WITHOUT MERIT

Receiver argues that it was because of the Secured Creditor's actions that significant fees were incurred. [Motion at 14:15-15:5]. That too is not accurate. It was the Receiver who was demanding and uncooperative and because of that, both sides incurred additional legal fees. At no time did the Receiver argue the validity of Secured Creditor's lien but only challenged the amount of the lien. It was the Receiver who demanded that the Secured Creditor abandon approximately \$570,000 in accrued default interest with little to no reason given by the Receiver, and then state that if the Secured Creditor did not agree to do so, the entire amount of the Secured Creditor claim should be held in escrow notwithstanding that approximately \$5,100,000 of the Secured Creditor's lien was clearly undisputed. In this instance, the Receiver was extremely aggressive and using his position to hold funds rightfully owed to the Secured Creditor hostage to apply maximum leverage to force the Secured Creditor to walk-away from significant funds that are rightfully owed.

Receiver's request for an award of \$15,000 of attorneys' fees is without merit and Secured Creditor respectfully requests this Court deny this request as well.

WHEREFORE, Secured Creditor requests that the Court deny the Receiver's motion and allow the parties to resolve the issues over the Secured Creditor's claim in connection with the claim procedure process provided for in the Claim Procedure Order.

Dated: February 25, 2013

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By: /s/ Marcus O. Colabianchi

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