

**“LEGAL ISSUES FOR RECEIVERSHIPS:
AN ANNOTATED SAMPLE ORDER” ©**

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[Court]

) Case No.:

Plaintiff,

) ORDER APPOINTING RECEIVER AND
) TEMPORARY RESTRAINING ORDER

vs.

Defendant(s).

Plaintiff _____ (“**Plaintiff**”) has applied for the appointment of a receiver in this action pursuant to the provisions of South Carolina Code §§ 15-65-10 through 15-65-130 (1976).^{1 2}

¹ There are two basic types of non-bankruptcy receivers: (i) a general (or liquidating) receiver; and (ii) a special (or limited) receiver. A general receiver is analagous to a bankruptcy trustee in that the receiver controls all the assets and operates the businesses with the intent to either sell such assets as a going concern or liquidate the businesses’ assets. Not all states authorize the appointment of a general receiver. A special receiver (described in this order) only takes possession of designated assets and/or businesses of the defendant debtor and operates and/or sells only those assets or businesses leaving the remainder of the debtor’s assets and businesses in the debtor’s possession. A limited receiver has no authority over the components of the debtor’s assets or businesses not subject to a receivership. See notes 13 and 22, *infra*. The nature of the lender’s collateral will often be determinative as to the contents of the receivership estate for the limited receiver.

² Federal receiverships are particularly useful if the receivership assets are located in more than one jurisdiction since the federal court order can cross state boundaries. See *Livingstone v. Adler*, No. 03-11934-DPW, No. 03-11935-DPW, 2004 WL 438927 (D. Mass., March 10, 2004).

In conection with a federal court action, 28 U.S.C § 754 provides that a receiver must, within ten (10) days of appointment, file copies of the complaint and the order appointing the receiver in each district in which receivership property is located. This statute further provides that failure to file such copies in any district divests the receiver of jurisdiction and control over property in that district. 28 U.S.C § 754. A panel of the Third Circuit Court of Appeals considering section 754, however, has held that failure of a receiver to file the required documents timely does not divest the court of jurisdiction once the documents are properly filed. See *S.E.C. v Equity Service*

1 This action was commenced on _____ by the Plaintiff by the filing of an
2 Amended Lis Pendens, Summons and Complaint. On _____, Plaintiff filed the
3 instant motion and the supporting affidavit of _____, the _____ of the
4 Plaintiff.³ All of these pleadings together with a Notice to the Defendants of the hearing on the
5 instant motion were served on counsel for Defendants _____ (“**Borrower**”) and _____
6 _____ [other defendants]. Proper notice of the hearing on the motion was
7 therefore provided in accordance with the South Carolina Rules of Civil Procedure and with the
8 provisions of South Carolina Code §15-65-20 (1976).⁴
9

10
11 *Corp.*, 632 F. 2d 1092, 1095 (3d Cir. 1980); *but see S.E. C. v. Vision Commc’n, Inc.*, 74 F. 3d 287 (D.C. Cir. 1996)
(receiver’s failure to file complaint and order of appointment before commencing action to enjoin interference with
12 sale was fatal, and late filing would not revive court’s jurisdiction).

13 ³ The affidavit must be signed by a representative of the lender or servicer who has knowledge of
14 defaults, the collateral and the consequences of the failure to obtain a receiver. The legal standard for appointment
15 under various state statutes will be discussed below.

16 South Carolina Rule of Civil Procedure 6(d) also requires the supporting affidavits which ordinarily
17 accompany a motion for the appointment of a receiver be served not later than two (2) days before the hearing,
18 unless the Court permits them to be served at some later time.

19 ⁴ A prime example of the absence of well-developed law regarding the appointment of a state court
20 receiver is the notice required to be given to adverse parties by the petitioning lender. Lenders are usually in a hurry
21 to have a receiver appointed but too much speed can have serious adverse consequences for the lender and actually
22 slow the process of obtaining a receiver. Even within a particular state, the rules and case law regarding proper
23 notice of a hearing to appoint a receiver may be contradictory. For example, S.C. Code Ann. § 15-65-40 (1976)
24 appears to authorize ex parte orders.

25 On the other hand, many other South Carolina Rules of Civil Procedure and statutes inconsistently mandate
four (4) and ten (10) day notice of any hearing on a motion to appoint a receiver. S.C. Code Ann. §15-65-20 (2005)
provides that no receiver shall be appointed “without notice of the application for such appointment to the party. . .”
This statute further provides that at “least four days’ notice of the application must be given, unless the court shall,
upon it being made to appear that delay would work injustice prescribe a shorter time.” *Id.* Ordinarily four (4)
days’ notice must be given to the owner and any party to the action in possession of the property claiming an interest
therein under any contract, lease or conveyance from the owner pursuant to S.C. Code Ann. § 15-65-20 (1976).

Notice of motion for appointment of receiver can be served with summons and complaint or at any later
time, but must be accompanied by a supporting affidavit pursuant to South Carolina Rule of Civil Procedure 6(d).

On the other hand, South Carolina Rule of Civil Procedure 6(d) and case law, *e.g. Loftis v. S.C. Elec. &*
Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d
110 (2001); *Dedes v. Strickland*, 307 S.C. 152, 414 S.E.2d 132 (1992), require that motions must ordinarily be heard
only upon giving at least ten (10) days notice. In other words, the four (4) day notice authorized by S.C. Code Ann.
§ 15-65-20 (1976) is insufficient.

1 The Court having considered the Complaint filed in this case, [list of documents filed in
2 support of the Motion for the Appointment of a Receiver and Temporary Restraining Order], and
3 good cause appearing therefore, now orders as follows:

4
5 **APPOINTMENT OF RECEIVER**

6 IT IS HEREBY ORDERED that _____ (“**Receiver**”)⁵ with _____
7 _____ as its agent, is qualified to act as Receiver in this action, to take possession,
8 custody, and control of the property described below (“**Property**”).⁶
9

10
11 If a lender couches the order as a temporary restraining order, state law often imposes a requirement that
12 the lender post a bond in order to obtain the appointment of a receiver. *E.g.*, South Carolina Rule of Civil Procedure
13 65(c) (“no restraining order or temporary injunction shall issue except upon the giving of security by the applicant,
14 in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by
15 any party who is found to have been wrongfully enjoined or restrained”). Further, the Court may require a
16 subsequent hearing in order to make a temporary restraining order permanent. South Carolina Rule of Civil
17 Procedure 65(a) provides that no temporary injunction shall be issued without notice to the adverse party. Rule
18 65(b) provides that no temporary restraining order shall be granted without notice of motion for the order to the
19 adverse party unless “it clearly appears from specific facts shown by the affidavit or by a verified complaint that
20 immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a
21 hearing had thereon.” S.C.R.C.P. 65(b).

22 According to S.C. Code Ann. § 15-65-30 (1976), if the owner cannot be found, notice to the party in
23 possession is sufficient. If no one is in possession, notice is not necessary and the person claiming property may be
24 served by publication.

25 The problem regarding proper notice often manifests itself in the appealability of an order appointing a
receiver. S.C. Code Ann. §§ 18-9-150 and 160 and South Carolina Appellate Court Rule 225 make the appointment
of a receiver immediately appealable without requiring the borrower to post a bond to stay the appointment of a
receiver. An appeal is immediately available to the Supreme Court of South Carolina appointing or refusing the
appointment of a receiver. S.C. Code Ann. § 14-3-330.

⁵ The petitioning lender in a receivership proceeding can propose as receiver any person or entity it
believes is best suited to manage the receivership assets instead of relying on a standing panel of bankruptcy
trustees.

Courts are not required to accept the petitioning lender’s recommendation. The petitioning lender must
also consider the benefits of displacing existing management as opposed to allowing the debtor to remain in
possession of the property under Chapter 11 of the federal bankruptcy code.

Selection of an independent, qualified receiver candidate is important in light of the independent duty of the
receiver to the court. To the extent specialized knowledge of the business or assets is required or advisable, it is
preferable to propose a candidate who possesses such specialized knowledge and /or experience. Such experience,
along with a history of prior appointments by courts to serve as a receiver or trustee, will make a candidate more
inviting to the court and increase the likelihood that the court will approve and appoint the candidate as the receiver.
Ultimately, however, the receiver’s duties run to the court and the court will choose who will serve as receiver.

1 **1. Description of the Property:**

2 **2. Findings of Fact⁷**

3 a. From the pleadings before me it appears to my satisfaction that Plaintiff is the
4 holder of the note (the "**Note**") and the mortgage which are the subject of this
5 Complaint.

6 b. The Property which is the subject of these proceedings is located in _____.⁸

7 c. Defendant Borrower executed and delivered to the Plaintiff the Note and the
8 Mortgage more particularly described in Plaintiff's Complaint.

9 d. It appears that the Note is in default due to _____.

10 e. Defendant Borrower in this action has been provided proper notice of this
11

12 Some courts will only appoint an individual as a receiver as opposed to a corporation for whom the
13 individual works.

14 ⁶ The order must specify the real and personal property which will be subject to the receivership
estate. The foreclosing lender must carefully consider what property will constitute the receivership estate and
15 whether giving possession of this property to a receiver makes economic sense. For example, giving possession of a
hotel's underlying real and personal property makes little sense when the hotel is being managed under the terms of
16 a management agreement. In such circumstances, the manager, rather than the owner of the individual hotel
condominium units, effectively controls the hotel's income stream.

17 ⁷ Many jurisdictions require that a Court make specific findings of fact in order to support the
appointment of a receiver. The findings incorporated into this form order are typical findings contained in a
mortgage foreclosure suit. The findings are generally not considered to be an adjudication on the merits.

18 ⁸ Usually, the court in which the action is pending has jurisdiction over the property which
constitutes the receivership estate. *See generally Federal and State Court Receiverships as Alternatives to*
19 *Bankruptcy— Pros and Cons*, American Bankruptcy Institute, Best of Mid-Atlantic Bankruptcy Workshop ABI-
CLE 2 (2005). Whether one files the underlying action in federal or state court may be influenced by whether the
20 court can assert jurisdiction over the underlying assets. If the underlying action is filed in federal court, the plaintiff
must satisfy the requirements of federal subject matter jurisdiction. Because creditor's rights claims are not
21 typically based upon a federal question, diversity of citizenship and the minimum amount in controversy under 28
U.S.C. § 1332 must exist in order to invoke federal court jurisdiction. *See Inland Empire Ins. Co. v. Freed*, 239 F.
22 2d 289, 290 (10th Cir. 1956). Once federal court jurisdiction over the substantive dispute is established, the federal
court has ancillary jurisdiction to appoint a receiver and ancillary subject matter jurisdiction over actions
23 commenced by the receiver in the carrying out of the receiver's duties. *Haile V. Henderson Nat'l Bank*, 657 F. 2d
816, 822 (6th Cir. 1981). The minimum contacts analysis of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) and
24 its progeny is inapplicable to ancillary actions and proceedings brought by a federal receiver to execute his duties in
districts other than the district in which he was appointed. 28 U.S. C. § 1692. Section 1692 allows nationwide
25 service of process in a federal receivership proceeding, and the territorial jurisdiction of the appointing court extends
to any judicial district in which receivership property is found.

1 hearing. A further delay to provide additional time prior to the appointment of a
2 receiver would work an injustice to the Plaintiff.

3 f. The Mortgage contains a specific provision consenting to the appointment of a
4 receiver upon the occurrence of an event of default under the provisions of the
5 Note.⁹

6 g. There is a significant possibility that the Property is in imminent danger of
7 waste, deterioration and/or destruction.¹⁰ In the event that a receiver is not
8

9
10 ⁹ In some jurisdictions, the presence of language in a mortgage authorizing the appointment of a
11 receiver automatically gives the lender the right to the appointment of a receiver. For example, some courts have
12 appointed a receiver where in the absence of such an express agreement between the parties, the appointment would
13 have been denied. 55 Am. Jur. 2d *Mortgages* § 972 (1971) (“[I]f the mortgage contains a provision for a receiver in
14 case of default, the appointment will be made upon a less clear showing than is ordinarily required.”).

15 Some jurisdictions provide that a borrower’s consent to the appointment of a receiver in a loan document
16 automatically entitles the lender to the appointment of a receiver. *See, e.g., Metropolitan Life Ins. Co. v. Liberty
17 Center Venture*, 437 Pa. Super. 544, 650 A. 2d 887 (Super. Ct. 1994) (court will enforce contractual provision in
18 mortgage granting lender right to appointment of receiver upon borrower’s default); *Philadelphia Trust Co. v.
19 Northumberland County Traction Co.*, 258 Pa. 152, 167, 101 A. 2d, 974 (1917) (parties have right to provide
20 contractual remedies within their agreements).

21 In other jurisdictions, such as South Carolina, this language is not controlling. *See infra* note 10.

22 ¹⁰ A majority of states have enacted statutes authorizing the appointment of a receiver under various
23 circumstances. *See generally Federal and State Court Receiverships as Alternatives to Bankruptcy— Pros and
24 Cons*, American Bankruptcy Institute, Best of Mid-Atlantic Bankruptcy Workshop ABI-CLE 3 (2005).
25 Circumstances authorizing the appointment of a receiver may include waste or material injury to property of the
debtor, insolvency, fraud or misof corporate assests. *See e.g.,* Del. Code Ann. tit. 8 § 291 (appointment of receiver
for insolvent corporation); N. J Stat. Ann. 14A:14-2 (same); N.Y. Bus. Corp. Law §§ 1201, *et sep.* and N.Y. Not-
for-Profit Corp Law §§ 101, *et seq.* (authorizing appointment of receiver for corporate assets upon, *inter alia*,
commencement of dissolution proceeding, proceeding by judgment creditor for sequestration, action by shareholder
or member to preserve assets of corporation in absence of in-state corporation officer, or action to preserve in-state
assests of out-of-state dissolved or terminated corporation); Md. Corps. & Ass’ns Code, § 3-418 (authorizing
appointment of receiver upon corporate dissolution); Ohio Rev. Code. Ann. § 2735.01 (receivership authorized in
pending action where corporation is insolvent or in imminent danger of becoming insovent) and *Ohio Broadcasting
Corp. v. Williamson*, 1933 WL 221 (Ohio Ct. App. Aug. 25, 1933) (necessity is required for appointment of
receiver, in addition to insolvency of corporation); 39 Pa. Cons. Stat. § 1, *et seq.* (permitting appointment of
receiver for insolvent corporation upon showing of cause as specifically set forth in such statute); 15 Pa. Cons. Stat.
§ 1767 (permitting appointment of receiver when corporation is deadlocked). *See also* Revised Model Business
Corporations Act, § 14.32 (a) authorizing appointment of receiver in judicial proceeding to dissolve corporation;
S.C. Code Ann. §15-65-10 (2005) (permitting the appointment of a receiver when the plaintiff establishes an
“apparent right to property which is the subject of the action and which is in the possession of an adverse party and
the property, or its rents and profits, are in danger of being lost or materially injured or impaired. . .”).

1 appointed to take possession of the Property as soon as possible and that delay in
2 appointing a receiver would work an injustice. Should waste, deterioration
3 and/or destruction occur on the Property, Plaintiff shall suffer immediate and
4 irreparable injury, loss and damage.

5 h. Defendant Borrower _____ is in possession of the Property.

6 i. This Order is not and shall not be construed as an Order adjudicating a default
7 under the Note, Mortgage or loan documents involved herein; nor it is an
8 adjudication of any issue involved in the case; any and all issues, defenses,
9 counterclaims and set-offs being hereby specifically preserved for hearing and
10 adjudication at a later date or dates.
11

12 **3. Conclusions of Law¹¹**

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15 Many states also provide for appointment of a receiver on general equitable principles, whether the debtor
16 is solvent or insolvent, *See e.g.*, Pa. R. Civ. P. 1533 and *Tate v. Philadelphia Transp. Co.*, 410 Pa. 490, 499-500, 190
17 A. 2d 316, 321 (1963) (receiver may be appointed upon showing of right to such appointment, irreparable damage
18 will in all probability result absent appointment, appointment will not substantially injure or interfere with rights of
19 others, and greater damage will occur absent appointment; Receiver may be appointed if gross mismanagement,
20 fraud or similar circumstances); *Grant v. Allied Dev., Inc.*, 44 Md. App. 560, 409 A. 2d 1123 (Md. Ct. Spec. App.
21 1980) (court may appoint receiver on equitable grounds to preserve solve corporation's assests where actions of
22 directors, officers, or other are ultra vires, fraudulent, or otherwise illegal).

23 This order has been prepared on the basis of satisfying the requirements of the applicable South Carolina
24 statute and case law.

25 ¹¹ The very purpose of a receiver "is to take property. . . out of the possession of the person in whose
possession it is found and place it in the hands of a third party pending litigation." *Truesdell v. Johnson*, 144 S.C.
188, 197, 142 S.E. 343, 345 (1928).

Appointment rests in the court's discretion regardless of the standard provision in most mortgages calling
for the appointment of a receiver as a matter of right. *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E. 2d 764 (1964);
Andrick Dev. Corp. v. MacCaro, 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). *But see* notes 9 and 10 *supra*.

Language in some cases suggests that the appointment of a receiver is a drastic remedy, to be exercised
with great circumspection. *See Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 345 (1928); *Pelzer v. Hughes*, 27
S.C. 408, 3 S.E. 781, 784-85 (1887).

The appointment of a receiver lies exclusively in equity. *Pelzer v. Hughes*, 27 S.C. 408, 3 S.E. 781, 785
(1887). Equitable courts view an express agreement between the parties as one factor weighing heavily in favor of
the appointment of a receiver. *See* note 9 and 10, *supra*, and cases cited therein.

1 a. South Carolina Code Section 15-65-10(1) authorizes the appointment of a
2 receiver before judgment if:

- 3 i. the moving party establishes an apparent right to the property which is
4 the subject of the action;
- 5 ii. the subject property is in the possession of an adverse party; and
- 6 iii. the property or its rents and profits are in danger of being lost, materially
7 injured or impaired.

8 South Carolina Code Section 15-65-10(1) (1976); *see Andrick Development Corp.*
9 *v. Maccaro*, 180 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). Plaintiff has satisfied
10 all of the statutory requirements for the appointment of a receiver.¹²

11
12
13 In federal court proceedings, the determination of whether to appoint a receiver will be made under federal
14 law. *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998). Appointment of a receiver is an extraordinary
15 remedy and is granted only in cases of clear necessity to protect a plaintiff's interest in property. *Commodity Future*
Trading Comm'n v. Convest Trading Corp., 481 F. Supp. 438, 440, 441 (D. Mass. 1979). *See also Federal and*
State Court Receiverships as Alternatives to Bankruptcy—Pros and Cons, American Bankruptcy Institute, Best of
Mid-Atlantic Bankruptcy Workshop ABI-CLE 3 (2005).

16 Some courts have appointed a receiver when current management or ownership is hopelessly deadlocked,
17 has demonstrated a lack of trustworthiness, or has acted in a manner not in the best interest of the business. *Witters*
v. Hicks, 338 Ill. App. 2d 751, 273 Ill. Dec. 863 (Ill. App. Ct. 2003); *ARC Mfg. Co. v. Konrad*, 321 Pa. Super. 72,
467 A. 2d 1133 (Super. Ct. 1983).

18 As a practical matter, trial judges in some jurisdictions routinely appoint receivers where there is an
19 assignment of leases, a provision in a mortgage authorizing the appointment of a receiver as a matter of right, and an
20 issue relating to rents or to the condition of the property. Trial judges in other jurisdictions are extremely reluctant
21 to appoint receivers.

22 ¹² As noted previously, state law often requires specific conclusions of law in order to support the
23 appointment of a receiver. The order should contain these conclusions. The language contained in the text herein
24 satisfies these requirements in South Carolina.

25 Courts will commonly consider various additional factors in determining whether to appoint a receiver,
some of which are not cited in applicable statutes. These factors include:

- the existence of a valid claim of the moving party;
- fraudulent conduct on the part of the defendant;
- imminent danger that property will be lost, concealed, injured, diminished in value, or squandered;
- inadequacy of available legal remedies;

1 b. Plaintiff has an apparent right to the Property and its rents as evidenced by the
2 executed loan documents and the defaults of the obligated Defendant Borrower.

3 No independent third party possesses, cares for or manages the Property.

4 c. The very purpose of a receiver “is to take property. . . out of the possession of the
5 person in whose possession it is found and place it in the hands of a third party
6 pending litigation.” *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343 (1928).¹³

7
8 d. It is clear from the record in the case that the Property is in danger of being
9 materially injured or impaired.¹⁴

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- 10
- 11 - the probability that the harm to the plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment;
 - 12 - plaintiff’s probable success in the action; and
 - 13 - the possibility of irreparable injury to plaintiff’s interest in the property.

14 *See, e.g., Waag*, 10 F. Supp. 2d at 1193; *Hamzavi v. Bown*, 126 Md. App. 492, 497. 730, A. 2d 274 (Md. Ct. Spec. App. 1999); *Tate*, 410 Pa 1090, 190 A. 2d 316, *Roach v. Marguillies*, 42 N.J. Super. 243, 126 A.2d 45 (Super. Ct. App. Div. 1956).

15 ¹³ South Carolina case law permits a receiver only to maintain the status quo of the real and personal property subject to the lender’s liens. In jurisdictions with similar restrictions, a receiver may only preserve the status quo while the collection action proceeds. *See supra* note 10. If applicable law permits only the appointment of such a receiver, the receiver is a “special” receiver as discussed in note 1 *supra*. Preserving the status quo limits the receiver’s power with respect to borrowing monies, *see* notes 25 and 26 *infra*, and to sell the estate’s assets, *see* note 22 *infra*.

16
17
18 ¹⁴ In most cases, the portion of the property which is usually in danger is the income stream being generated by the property. The lender’s initial documentation is therefore critical. If the collateral package does not include all items necessary to generate the project’s income, the appointment of a receiver may be of little value to the petitioning lender. For example, problems often arise if a lien has not been granted on necessary computer software where consents to assignment of licenses may be required but may not have been obtained.

19
20
21 In the case of a hotel, the income stream is generated by the operating business. In the case of a shopping center or apartment complex, the income stream is the rents. If the plaintiff lender cannot establish an “apparent right to the property,” *see* South Carolina Code Section 15-65-10(1) and note 10 *supra*, because the property was not included in the lender’s collateral package, the lender ay not be able to capture this income stream.

22
23 Other factors important in evaluating the decision to appoint a receiver are actual physical deterioration of the estate’s assets, impairment of security, character of the property and inadequacy of the value of the assets in proportion to the debt. *See generally* Annotation, *Propriety of Appointing Receiver, at Behest of Mortgagee, to Manage or Operate Property During Foreclosure Action*, 82 A.L.R.2d 1075 (1962); 55 Am.Jur. 2d *Mortgages* §§ 989-93 (1971). Involuntary bankruptcy petitions do not possess the same problems but have their own set of potential pitfalls, not the least of which is the potential liability of lenders and other petitioning creditors for filing an involuntary petition under the Bankruptcy Code which is later dismissed.

1 **2. Receiver's Oath and Bond:**¹⁵

2 The Receiver shall execute a Receiver's Oath. Within three days of this appointment, the
3 Receiver shall also post a Bond from an insurer in the sum of \$_____, conditioned upon the
4 faithful performance of the Receiver's duties.¹⁶ The Receiver's Bond and Oath may be filed by
5 facsimile transmission and this Order shall become effective upon the Court's receipt of such
6 facsimile transmission provided, however, that the Receiver replace the facsimiles with originals
7 within seven days of filing.¹⁷

8 **3. Receiver's Fees:**¹⁸

9 All fees and costs of the Receiver and employees of the Receiver shall be accounted for
10 in the monthly financial report. Upon submission of the monthly report, without further Order of
11 the Court, the Receiver shall be entitled to fees and reimbursement of all expenses, from funds of
12 the Receivership Estate for such time as is reasonable and necessary for the Receiver to
13 accomplish the purposes and tasks set forth in this Order, at the rate described in Exhibit "A".
14 Receiver expenses shall include, but not be limited to travel, mileage, faxes, copies, photographs,
15 printing and similar Receiver-provided benefits.

16 **4. Receiver's Authority and Duties:**¹⁹

18 ¹⁵ Not all states require the receiver to post a bond in order to serve.

19 ¹⁶ If the applicable jurisdiction does not require the posting of a receiver's bond, the Order should be
made effective upon filing.

20 ¹⁷ If no bond is required by applicable state law, the Order should provide that the appointment of
21 the receiver becomes effective upon the filing of the order, not of the bond.

22 ¹⁸ Many orders appointing a receiver do not set a fee for the receiver but instead leave the fee's
determination to a subsequent hearing. S.C. Code Ann. § 15-65-100 (1976) provides that compensation of receivers
23 shall be set by the Court appointing the receiver. The receiver's fee is left to sound discretion of Court, based on
value of receiver's services determined by considering nature, extent and value of administered property; complexity
24 and difficulty of work; time spent; knowledge, experience, diligence, labor and skill required of or devoted by
receiver; thoroughness displayed; results accomplished; amount of money coming into receiver's hands; and fair
25 value of services rendered measured by conservative, private business standards. *Ex Parte Simons*, 289 S.C. 1, 344
S.E.2d 151 (1986).

It is generally accepted that the receiver's fees are prior to any lien.

1 (A) The Receiver shall take immediate and exclusive possession, custody and control
2 of all real and personal property including, without limitation, any related
3 business operated by Defendant Borrower (whether such business be managed by
4 the named Defendant Borrower or its agents) and all monies therefrom,
5 equipment, fixtures, furnishings, records, inventory, assets, royalties, rents,
6 receivables, accounts, deposits, equities, and profits (the “**Receivership**
7 **Estate**”).²⁰ Receiver shall care for, preserve and maintain the Property, and may
8 incur any expenses necessary for this purpose. All such expenses shall be paid
9 from funds of the Receivership Estate.

10 (B) The Receiver is hereby given the power and authority usually held by Receivers²¹
11 and reasonably necessary to accomplish the purpose of this Receivership
12 including, without limitation, the specific power to:

- 13 i. Change any and all locks on the Property and limit access thereto;
- 14 ii. Maintain, protect, collect, sell, liquidate, or otherwise dispose of
15 property;²² provided, however, that the Receiver shall not sell or otherwise
16

17
18 ¹⁹ As a general proposition, the authority of a receiver, particularly a limited receiver, is limited by
19 the terms of the order. In other words, carefully delineating the scope of a receiver’s authority in the order is
20 essential. *See infra* note 21.

21 ²⁰ One of the oft-overlooked items in the documentation of many loans is the need of the lender or
22 the receiver to have access and rights to software, such as the reservation system of a hotel or the management
23 software of a shopping center. Parking rights are also often a problem. *See* note 14 *supra*. Courts are generally
24 extremely reluctant to extend the receivership estate to items which do not constitute collateral for the underlying
25 loan.

26 ²¹ As noted previously, most jurisdictions do not define powers usually granted to a receiver. A
27 receiver’s powers are strictly governed by the terms of the order appointing the receiver, particularly a limited
28 receiver. *See Peppertree Resorts, Ltd. v. Cabana Ltd. Partnership*, 315 S.C. 36, 431 S.E.2d 598 (S.C. Ct. App.
29 1993) (receiver has those powers given to him by his order of appointment).

30 ²² The laws varies among jurisdictions regarding whether a receiver can sell assets free and clear of
31 liens, claims and encumbrances absent consent or satisfaction of such claims. *Federal and State Court*
32 *Receiverships as Alternatives to Bankruptcy— Pros and Cons*, American Bankruptcy Institute, Best of Mid-Atlantic
33 Bankruptcy Workshop ABI-CLE 9 (2005). *See, e.g. Frye v. MacWilson*, 39 Ohio App. 158, 177 N.E. 232 (1931);

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2
3 *Novor v. Fourth St. Bargain Store Co.*, 16 Del. Ch. 259, 145 A. 119 (1929); N. J. Stat. Ann. § 14A:14-7 (receiver
4 may sell assets free of encumbrances only if sale may be reasonable expected to benefit general creditors of the
5 corporation without adversely affecting the interest of the holders of the encumbrances); *In re Valley Road*
6 *Sewerage Co.*, 685 A. 2d 11, 18 (N. J. Super. 1996) (receiver can sell assets free and clear of liens satisfied from sale
7 proceeds); *Bogosian v. Foerderer Tract Comm.*, 264 Pa. Super. 84, 9b, 399 A. 2d 408,414 (1979) (receiver can sell
8 assets free and clear only if there is a “reasonable prospect” that a surplus will be left after the sale for use by the
9 general creditors); *but see* Md. Code Ann. Corp. & Ass’ns, § 3-418 (absent agreement otherwise, receiver can sell
10 (a) equity of redemption or (b) only what could be sold absent insolvency proceeding).

11
12 In a federal court action, 28 U.S.C. §§2001, 2002, and 2004 govern sales of assets by a receiver. One Ninth
13 Circuit opinion has held that the right to sell estate assets is within the scope of a receiver’s complete control over
14 receivership assets under § 754, a conclusion firmly rooted in the common law of equity receiverships. *S.E.C.v.*
15 *American Capital Inv., Inc.*, 98 F. 3d 1133, 1144 (9th Cir. 1996).

16
17 A federal court receiver may sell real property by either public or private sale. A public sale must occur in
18 the district where the receiver was appointed, unless otherwise approved by the court. In addition, the terms and
19 conditions of the sale will be as directed by the court. 28 U.S.C. § 2001. The court must approve the form of notice
20 of any public sale, and such notice must be published at least once a week for four weeks prior to the sale. 28
21 U.S.C. § 2002.

22
23 Presumably, the sale of personal property assets encumbered under Article 9 of the Uniform Commercial
24 Code (the “**UCC**”) would need to satisfy the provisions of Part 6 of Article 9. In particular, the receiver would need
25 to pay careful attention to the notice requirements of Sections 9-611, *et seq.* of the UCC.

Real property may be sold by private sale in the federal court determines that such private sale is in the best
interest of the estate. As in a public sale, the terms and conditions of the sale are set by the court. In a private sale,
however, the court must appoint three disinterested appraisers to appraise each parcel of property. The private sale
of real estate will not be confirmed by the court unless the sale price is at least two-thirds of the *property’s* appraised
value, or if a competing offer for the property is received in an amount at least 10% greater than the amount of the
original offer. Notice of a proposed private sale must also be approved by the court and published in a newspaper of
general circulation at least ten days prior to the hearing on the confirmation of the sale. 28 U.S.C. §2001.

The law is not well developed as to the interrelationship of sales of real estate and specialized protections
granted by the laws of individual states. For example, some states have statutory appraisal rights designed to protect
a borrower from “fire sales” of real property. *E.g.* S.C. Code Ann. §§ 29-3-680 through 29-3-760
(2007)(authorizing the reduction of a deficiency judgment against the mortgagor by the “true value” of the real
property sold at a foreclosure sale “taking into consideration sale value, cost and replacement value of
improvements, income production and all other proper elements.”). The sale of personal property is governed by
both Article 9 of the Uniform Commercial Code and the same rules as that for the sale of real property, unless the
court orders otherwise. 28 U.S.C. § 2004.

Federal courts appear to be liberal with respect to receivership sales. A judicial sale “made with notice and
in the manner prescribed by law will not be denied confirmation or be set aside for mere inadequacy in price unless
the price is so gross as to sock the conscience of the court, coupled with slight additional circumstances indicating
unfairness such as chilled bidding.” *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance Corp.*, 172 F.2d
416, 424 (10th Cir. 1949) (citations omitted). Further, a panel of the United States Court of Appeals for the Third
Circuit, in *Tanzer v. Huffiness*, 412 F. 2d 221 (3rd Cir. 1969), upheld the expedited sales of corporate property by a
receiver which did not comply with the statutory appraisal and notice requirements due to the extraordinary
circumstances of the case and the poor financial condition of the company.

Many jurisdictions do not permit the receiver to dispose of property. These jurisdictions charge the
receiver with maintaining the status quo and preventing the deterioration of the receivership estate. *See supra* notes
10 and 13.

1 dispose of any property, other than in the ordinary course of business,
2 except as provided in section 10 of this order.

- 3 iii. Take possession of all bank and other deposit accounts of the Defendant
4 Borrower; open, transfer and change all bank and trade accounts relating to
5 the Property, so that all such accounts are in the name of the Receiver; and
6 make disbursements in payment of expenses incurred by the Receiver in
7 accordance with this Order;
- 8 iv. Hire, on a contract basis, professionals, employees; real estate brokers,
9 general contractors and other personnel necessary to manage, preserve,
10 market and sell²³ the Receivership property;
- 11 v. Retain existing employees of the Defendant Borrower(s) or related parties
12 as Defendant Borrower's employees in order to continue any business
13 operations, in which case payroll taxes, workers compensation insurance,
14 and related costs will be carried and reported as those of the Defendant
15 Borrower, and not of the Receivership Estate. The Receiver may, in the
16 alternative at his sole discretion, carry all employees as those of any
17 management company or other entity hired by the Receiver;
- 18 vi. Hire, employ, pay and terminate servants, agents, employees, clerks and
19 accountants; purchase materials, supplies, advertising, and other services at
20 ordinary and usual rates and prices using funds that shall come into the
21 Receiver's possession in order to preserve the status quo; collect or
22 compromise debts of the Receivership Estate; incur risks and obligation
23 ordinarily incurred by owners, managers, and operators of similar

24
25 ²³ See *supra* note 22.

1 enterprises, which in the Receiver's reasonable judgment, are necessary for
2 the operation of the business, and no such risk or obligation incurred shall
3 be the personal risk or obligation of the Receiver but only that of the
4 Receivership Estate.

- 5 vii. Reject any leases or unexpired contracts of the Defendant Borrowers that
6 are, in the Receiver's judgment, burdensome on the Receivership Estate;
- 7 viii. Make and enter into leases for a term not exceeding one year,²⁴ obtain and
8 eject tenants, and set or modify rents and terms of rent without prior Court
9 approval.
- 10 ix. Borrow from Plaintiff or third parties, funds required to continue the
11 operation of the existing business and/or when current income is
12 insufficient to meet expenses, upon such terms as deemed reasonable by
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24 ²⁴ Many courts are reluctant to authorize a receiver to execute leases which will extend beyond the
25 term of the receivership. A good practice in the preparation of a receivership order is to authorize the receiver
specifically to execute leases that extend beyond the term.

1 the Receiver.²⁵ Nothing in this Order shall obligate Plaintiff to provide
2 such funds unless, and Plaintiff, or other lending party, shall be entitled to
3

4
5 ²⁵ The priority of any such borrowings must be reviewed carefully to ensure compliance with state
6 law. There is no judicial consensus among the states on this often critical topic. Bankruptcy law is clear on the
7 subject.

8 Where a construction loan is foreclosed and the project is not complete or revenues are insufficient to keep
9 an operating business running, the lender's attorney should consider whether the court's inherent equity power will
10 empower the court to authorize the receiver to contract to finish construction and to borrow additional funds secured
11 by receiver's certificates or a judicial lien having priority over all other liens except costs. See 66 Am.Jur.2d
12 *Receivers* § 378, et seq. (1973).

13 "A receiver has no authority to borrow . . . money, unless specifically authorized by the court. However,
14 the power of the court, . . . generally is extensive enough to authorize the receiver to borrow money necessary for the
15 preservation and management of the property in receivership." 66 Am.Jur. 2d *Receivers* § 205 (1973), 75 C.J.S.
16 *Receivers*, § 175(a) (1952) ("a receiver is limited in his power to borrow money. . . , but the court in a proper case
17 may confer the power on him").

18 Receivers may borrow to complete construction projects which comprise the funds in the hands of the
19 receiver and which, without completion, are of little or no value. 75 C.J.S. *Receivers*, § 292(d)(3)(cc) (1952) (citing
20 as authority *Guimarin v. S. Life & Trust Co.*, 100 S.C. 12, 84 S.E. 298 (1915)).

21 Counsel should note whether the jurisdiction distinguishes between funds necessary to maintain daily
22 operations and funds needed to prevent waste. Is this a valid or proper distinction?

23 In *Koester v. Citizens' Pub. Co.*, 154 S.C. 154, 151 S.E. 452, 460 (1930), the South Carolina Supreme
24 Court observed:

25 There is one circumstance which will justify a court in authorizing the issuance of
receiver's certificates [the receiver incurring debt] in the case of a *private* corporation and
displacing prior liens thereby. In a case in which the money is required, not for the
purpose of operating the business, but for the purpose of saving the property from
destruction. . . .

Id. (citation omitted). The *Koester* court actually denied the receiver the power to borrow because of lack
of notice. *Koester* stands for the proposition that threat of destruction of the estate's assets justifies allowing the
receiver to borrow. Regarding priority disputes between the receiver's creditors and pre-receiver creditors, the South
Carolina Supreme Court implicitly recognized a super priority for the receivers borrowing where the funds were
used to save the property from destruction. *Koester*, 154 S.C. at 175-76, 151 S.E. at 460. The *Koester* court
distinguished between borrowing to operate an ongoing business and borrowing to save assets from depreciation-
favoring the latter and discouraging the former.

What is the "threat of destruction?"

A plaintiff lender should consider whether an involuntary Chapter 11 bankruptcy petition is a better method
to preserve the assets if the appropriate state court does not authorize borrowing by a receiver.

In *Guimarin v. S. Life & Trust Co.*, 100 S.C. 12, 84 S.E. 298 (1915), the South Carolina Supreme Court
acknowledged that it was proper for a receiver to be appointed to complete the construction of two Y.M.C.A.
buildings left incomplete by a failed contractor. There, the receiver was authorized to take all steps necessary,
including hiring subcontractors, to complete the projects. The Supreme Court stated: "[C]onstruction companies
[are] wound up by receivers, and it is frequently necessary to . . . complete contracts in order to prevent utter ruin."
100 S.C. at 17, 84 S.E. at 299.

1
2
3 As noted above, federal bankruptcy law is clear on the subject of borrowing by either a Chapter 11 debtor
4 in possession or a bankruptcy trustee. 11 U.S.C. § 364, authorizes a debtor in possession (a “**DIP**”) to operate its
5 business under 11 U.S.C. § 1108 and obtain unsecured credit and secured debt in the ordinary course of business.
6 The lenders of such credit or debt will have administrative expense priority under 11 U.S.C. § 503(b)(1). 11 U.S.C.
7 § 364(a).

8 After notice and hearing, the bankruptcy court may authorize a DIP authorized to operate under 11 U.S.C. §
9 1108 to obtain unsecured credit and secured debt *other than* in the ordinary course of business and the lenders of
10 such credit or debt will have administrative expense priority under 11 U.S.C. § 503(b)(1). 11 U.S.C. § 364(b).

11 If the DIP is unable to obtain unsecured credit or secured debt by giving the lender administrative expense
12 priority, then after notice and hearing, the bankruptcy court may authorize the DIP to obtain credit or incur debt
13 under increasingly favorable terms to the lender, the most favorable being to give the lender a senior or equal lien on
14 property of the estate already subject to a lien.

15 A DIP may give a lender a senior or equal lien on property of the estate if, and only if, (1) the DIP is unable
16 to obtain credit under any other terms provided for in 11 U.S.C. § 364, and (2) there is adequate protection of the
17 party already holding a lien on the property. 11 U.S.C. § 364(d)(1). The burden of proof on the issue of adequate
18 protection lies with the DIP or trustee. 11 U.S.C. § 364(d)(2).

19 11 U.S.C. § 361 provides the following examples of adequate protection:

- 20 1. requiring the DIP to make a cash payment or periodic cash payments to the effected entity to the
21 extent the use of the cash collateral results in a decrease in the value of the effected entity’s
22 interest in the cash collateral; or
- 23 2. providing the affected entity with an additional or replacement lien to the extent the use of the
24 cash collateral results in a decrease in the value of the affected entity’s interest in the cash
25 collateral; or
3. any other relief giving the affected entity the equivalent of that entity’s interest in the property
other than administrative expense priority under 503(b)(1) of the Code.

Other examples of adequate protection are (1) limiting or conditioning the debtor’s authority to conduct its
business, such as restricting salaries or limiting the debtor’s ability to purchase inventory; (2) requiring increased or
reinstated insurance coverage; (3) requiring the debtor to inspect the collateral periodically or maintain an auditor on
the debtor’s premises; (4) requiring the debtor to furnish frequent accounting information; (5) requiring the debtor to
discharge or bring current senior liens; (6) requiring the debtor to segregate and account for cash collateral; (7) an
entity which already has an equity cushion in the collateral; or (8) a secured guaranty. *Collier Bankruptcy Practice
Guide*, Vol. 3, 41.06 (2008); *In re J.K.J. Chevrolet, Inc.*, 190 B.R. 542, 545 (Bank. E.D. Va. 1995); *In re T.H.B. Corp.*,
85 B.R. 192 (Bank. D. Mass. 1988).

In determining if there is sufficient adequate protection, or even if adequate protection is necessary, three
things the bankruptcy court may consider are (i) if the debtor’s request presents a threat to the status quo; (ii) if the
affected lender has sufficient protection against decline in the value of its collateral; and (iii) a balancing of the
equities between the debtor and the affected lender. *Collier on Bankruptcy*, 361.03[5] (2008).

In a non-bankruptcy context, the priority of borrowings is often a hotly contested issue where the real or
personal property is encumbered by junior liens.

“Expenses of a receiver appointed to preserve property from destruction and waste, pending the outcome of
litigation. . . are a first charge against property so held.” 75 C.J.S. *Receivers* § 292(d)(3)(bb) (1952) (emphasis
added). “Creditors who have contributed to the completion of a construction project [which] without completion is
of little or no value, have priority over preexisting liens.” *Id.* at 292(d)(3)(cc) (emphasis added).

1 the issuance of a Receiver's Certificate, in accordance with Section 18 of
2 this order;

- 3 x. Collect all rents, profits and income, which now or hereafter may be due
4 from the operation of any business connected with the Receivership Estate,
5 including such rents, license fees, income and profits currently held in bank
6 accounts for the property.
- 7 xi. Employ and compensate unlawful detainer attorneys or eviction services
8 with respect to the operation of the Property without prior Court approval.
- 9 xii. With prior court approval, abandon property the Receiver considers to be
10 of little or no value to the Receivership Estate.
- 11 xiii. *[Remove if Order is not for project with HOA/COA]* The Receiver is not
12 being appointed as a Receiver for any homeowners' associations of which
13 the real property portion of the Subject Property may be a part. The
14 Receiver, however, shall have the right to attend, participate in and vote the
15

16
17 In West Virginia, "[t]he principle is well established that. . . a court of equity has the power to authorize
18 and direct issuance and sale of certificates of a receiver [receiver-incurred debts] and prefer them to prior subsisting
19 liens for the preservation of the property affected from waste, impairment or loss until such time as may be required
20 to put the property in salable condition. . . ." *State v. Iman Mining Co.*, 144 W.Va. 46, 106 S.E.2d 97 (1958).

21 In *Guimarin*, the South Carolina Supreme Court recognized a similar rule but went even further to allow
22 liens incurred during the receiver's construction activity to prime prior mechanics liens incurred during the insolvent
23 debtor's construction efforts. "Where a receiver is appointed to operate property for the benefit of the lien holder
24 thereon, he may make the operating expenses a first charge, upon not only the current earnings, but the corpus of the
25 estate." *Guimarin*, 100 S.C. at 17, 84 S.E. at 299 (emphasis added) (*quoting* Am. & Eng. Ency. of Law, p. 1120).

22 In other areas of the law, certain fiduciary agents are routinely entitled to a super priority for debts incurred
23 during the administration of an estate. See 11 U.S.C. § 364(d)(1) (1976) (The court. . . may authorize. . . the
24 incurring of debt secured by a senior or equal lien on property of the estate)(emphasis added). The Court of Appeals
25 for the Fourth Circuit has recognized and applied § 364(d)(1), the bankruptcy super priority provision in the case of
In re Snowshoe Co., Inc., 789 F.2d 1085 (4th Cir. 1986). In *Snowshoe*, the Court of Appeals agreed that a
bankruptcy trustee's operating capital loans were entitled to a super priority because a ski resort's value would have
declined severely if it failed to open because of capital constraints.

A receiver's ability to borrow may depend on his being able to insure subsequent creditors a priority over
existing liens or to obtain a legal opinion stating that it can do so.

1 interest applicable to any unsold lots, dwelling units and condominiums
2 permitted to participate or vote in meetings of any homeowner association
3 or master association having jurisdiction over all or any portion of the
4 Subject Property. The Receiver shall have the discretion, but not the
5 obligation, to exercise such rights as Receiver deems necessary to preserve
6 and protect the Receivership Estate.

7
8 (C) The Receiver shall not be obligated to file any federal or state income tax,
9 returns, schedules or other forms, which continue to be an obligation of the
10 Defendant Borrower.

11 **5. Overhead Expenses of Receiver:**

12 All fees and expenses incurred by the Receiver, which pertain solely to the Receiver's
13 general office administration and/or overhead, including, but not limited to office supplies,
14 employee wages, taxes and benefits and other charges shall not be an expense of the Receivership
15 Estate unless incurred directly and solely for the benefit of the Receivership Estate.

16 **6. Inventory:**

17 Within thirty (30) days after entry of this order hereunder, the Receiver shall file an
18 inventory of all of the Property taken into possession pursuant to this Order. It is further ordered
19 that the Receiver employ such assistants and accountants as it may deem necessary to
20 accomplish such inventory properly and pay them the reasonable value of their services from
21 funds received by him as such Receiver.

22 **7. Security Deposits:**

23 Any security or other deposits which tenants have paid to Defendant Borrowers or their
24 agents and which are not paid to the Receiver, and over which the Receiver has no control, shall
25 be obligations of the Defendant Borrowers and may not be refunded by the Receiver without an

1 order of this Court. Any other security or other deposits that tenants have paid or may pay to the
2 Receiver, if otherwise refundable under the terms of their leases or agreements with the
3 Receiver, shall be refundable by the Receiver in accordance with the leases or agreements.

4 **8. Monthly Reports:**

5 The Receiver shall prepare and serve on Plaintiff and Defendant Borrower interim reports
6 of the condition and operation of the property in the Receivership Estate within thirty (30) days
7 of the closing of each accounting period or month. These interim reports shall include the
8 Receiver's fees and expenses of the Receivership Estate, including fees and costs of accountants
9 and attorneys authorized by the Court, incurred for each reporting period in the operation and
10 administration of the Receivership Estate. The Receiver shall follow accounting standards
11 typical for similar properties, and may enlist the aid of accountants for preparation of Receiver's
12 reports to the Court. Upon service of each report, if no objections are received, the Receiver may
13 disburse from estate funds, the amount of each statement. Notwithstanding periodic payment of
14 fees and expenses, all fees and expenses shall be submitted to the Court for approval at the
15 hearing to discharge the Receiver.

16 **9. Management of the Property and/or Business Entity:**

17 Receiver shall operate and manage the Property including, but not limited to, collecting
18 rent, and operating any related business entity. The Receiver may employ such agents,
19 independent contractors, employees and management companies to assist the Receiver in
20 managing the Receivership Estate including, but not limited to, a company in which Receiver is
21 a principal, provided the amount of compensation paid to any such agent or firm is comparable
22 to that charged by similar entities for similar services. Subject to any limitations contained
23 within this Order, Receiver may undertake the risks and obligations ordinarily incurred by
24 owners, managers and operators of similar businesses and enterprises and Receiver shall pay for
25 these services from the funds of the Receivership Estate. No such risk or obligation so incurred

1 shall be the personal risk or obligation of this Receiver, but shall be the risk and obligation of the
2 Receivership Estate. All who are acting, or have acted, on behalf of the Receiver at the request
3 of the Receiver are protected and privileged with the same protections of this Court as the
4 Receiver has.

5 **10. Sale of the Receivership Property:²⁶**

6 (A) The Receiver is authorized and directed, and the Court appoints and makes
7 the Receiver the Defendant Borrower's attorney in fact, for the sole
8 purpose of selling the Property on behalf of, and in the name of, Defendant
9 Borrower, subject to the following conditions:

10 i. No sale shall be made to a former entity or owner of the property;

12
13 ²⁶ Such a power is not permitted in many jurisdictions where a receiver may only be appointed to
preserve the status quo. *See supra* notes 9 and 25.

14 Under bankruptcy law, 11 U.S.C. § 363(c)(2) authorizes a DIP to operate its business under 11 U.S.C. §
15 1108 and to use cash collateral only if it has the consent of each entity which has an interest in the cash collateral, or
if the court after notice and hearing pursuant to Rule 4001(b), authorizes the use of such cash collateral.

16 Bankruptcy court approval of the use of cash collateral under 11 U.S.C. § 362(c) (2) requires the debtor to
17 prove that the creditor whose rights are effected has "adequate protection." *In re JKJ Chevrolet, Inc.*, 190 B.R. 542,
545 (Bank. E.D. Va. 1995). The Bankruptcy Code sets forth examples of adequate protection in 11 U.S.C. § 361,
which include:

- 18 1. requiring the DIP to make a cash payment or periodic cash payments to the effected entity to the
extent the use of the cash collateral results in a decrease in the value of the affected entity's
interest in the cash collateral; or
- 19 2. providing the affected entity with an additional or replacement lien to the extent the use of the
20 cash collateral results in a decrease in the value of the affected entity's interest in the cash
collateral.

21 These are not the exclusive means of providing adequate protection, but the DIP may not give the affected
22 party an administrative expense priority under 11 U.S.C. § 503(b) (1) as a form of adequate protection.

23 In addition to the examples of adequate protection set forth in § 361, bankruptcy courts have also found that
24 a creditor's first priority security interest in virtually all of a debtor's assets was sufficient and did not require
25 additional adequate protection. *In re JKJ Chevrolet, Inc.*, 190 B.R. 542, 545 (Bank. E.D. Va. 1995). Bankruptcy
courts have likewise found that a creditor's equity cushion in property, depending upon the amount of the cushion,
can be sufficient adequate protection. *In re Holladay House, Inc.*, 387 B.R. 689 (Bank. E.D. Va. 2008); *See also, In*
re McCombs Prop. VI, Ltd., 88 B.R. 261 (Bank. C.D. Cal. 1988); and *In re Donato*, 170 B.R. 247 (Bank. D.N.J.
1994). *See note 21* for additional examples of adequate protection.

- 1 ii. The sale, and contracts for sale, shall be subject to approval by this
2 Court;
3 iii. The sale of the Receivership Estate shall be free and clear of all
4 liens and encumbrances.

5 **(B)** The Receiver has the following authority with respect to the sale of
6 Receivership Estate:

- 7 i. To do and perform all and every act desirable, proper or necessary
8 including, without limitation, to convey title, execute and deliver
9 deeds of conveyance, bills of sale, closing statements, certificates
10 and affidavits, all other documents necessary or desirable to
11 transfer to the Receivership Property and obtain title insurance, all
12 on behalf of, and in the name of, Defendant Borrower.
13 ii. Present a closing statement to this Court for approval of such
14 proposed sale, including all closing costs, prorations, sales
15 commissions, and any other adjustments to the purchase price,

16 **(C)** The Receiver shall be the exclusive disposition agent, but may retain the
17 services of one or more real estate agents (“**Brokers**”) to assist in the
18 marketing and sale of the property, so long as the total real estate
19 commissions paid to all Brokers (and the Receiver, if applicable) is within
20 the industry norms for the sale of similar properties. If no Broker
21 participated in the sale, the Receiver shall be entitled to a “Transaction
22 Fee” of two percent (2%) if the sale price. No Transaction Fee will be due
23 if Receiver is paid any portion of the brokers commission.

24 **(D)** The Receiver, Plaintiff or Defendant Borrower may petition the Court for
25 approval, by either motion or letter addressed to the appointing court, of

1 any contract for sale of the Receivership Estate, and any such order of
2 approval of sale shall be a final appealable order.

3 After closing on the sale of any of the Receivership Estate, the Receiver shall
4 include in the Monthly Report, with respect to the property which was sold, sale price and the
5 date of the sale.

6 (E) The “Net Proceeds of the Sale of the Receivership Property” shall be the
7 gross sales price of the Receivership Property less closing costs, title
8 insurance, prorations, sales commissions and other adjustments approved
9 by the Receiver and Plaintiff.

10 (F) The Net Proceeds of the Sale of the Receivership Property shall be
11 disbursed as follows:

- 12 i. First, for payment of any unpaid fees and expenses, of the Receiver,
13 if any; and
14 ii. Second, to Plaintiff, for amounts due under the Loan.
15 iii. Any remaining sums shall be held by the Receiver pending further
16 order of the court.

17 **11. Police Assistance:**

18 The Receiver may request assistance of law enforcement officials when taking
19 possession, or at any other time during the term of the Receivership, if in the opinion of
20 Receiver, such assistance is necessary to preserve the peace and protect the Receivership assets.

21 **12. Bank Accounts:**

22 The Receiver shall take possession of, and receive from all depositories, banks,
23 brokerages and otherwise, any money on deposit in such institutions belonging to or arising from
24 the operation of the property, whether such funds be in accounts titled in the name of the
25

1 Defendant Borrower or not. Such funds shall be included within the Receivership Estate.
2 Receiver may indemnify the institution upon whom such demand is made but shall not be
3 required to do so. The Receiver is empowered to open or close any other accounts. Receiver
4 shall deposit monies and funds collected and received in connection with the Receivership Estate
5 at federally-insured banking institutions or savings associations which are not parties to this case.
6 Monies coming into the possession of the Receiver and not expended for any purposes herein
7 authorized shall be held by the Receiver pending further orders of this Court.

8 **13. Use of Funds:**

9
10 The Receiver shall pay only those bills that are reasonable and necessary for the
11 operation of the protection of the Receivership property and shall allocate funds in the following
12 order of priority: (1) the costs and expense of the Receivership Estate including; (2) utilities,
13 insurance premiums, general and special taxes or assessments levied on the real property and
14 improvements thereon; (3) the creation and retention by the Receiver of a reasonable working
15 capital fund; (4) amounts due to Plaintiff.

16 **14. Utilities:**

17 Any utility company providing services to the Property, including gas, electricity, water,
18 sewer, trash collection, telephone, communications or similar services, shall be prohibited from
19 discontinuing service to the Property based upon unpaid bills incurred by Defendant Borrower.
20 Further, such utilities shall transfer any deposits held by the utility on behalf of Defendant
21 Borrower to the exclusive control of such Receiver and be prohibited from demanding that the
22 Receiver deposit additional funds in advance to maintain or secure such services. The Receiver
23 may, but shall not be required to, establish new accounts under the name of the Receivership
24 within thirty (30) days of the effective date of this Order. Utility companies are prohibited from
25 discontinuing service while the new Receivership accounts are in process of being established.

1 **15. Mail:**

2 Receiver may issue demand that the United States Postal Service grant exclusive
3 possession and control of mail including postal boxes as may have been used by Defendant
4 Borrower and may direct that certain mail related to the Property and its business be re-directed
5 to Receiver.

6 **16. Insurance:**

7 The Receiver shall determine upon taking possession of the Property whether in the
8 Receiver's judgment, there is sufficient insurance coverage for the Receivership Estate. With
9 respect to any insurance coverage in existence or obtained, the Receiver, Plaintiff and the
10 property management company, if any one exists, shall be named as an additional insured on the
11 policies for the period of the Receivership. If sufficient insurance coverage does not exist, the
12 Receiver shall immediately notify the parties to this lawsuit and shall have thirty (30) calendar
13 days to procure sufficient all-risk and liability insurance on the Property (excluding earthquake
14 and flood insurance) provided, however, that if the Receiver does not have sufficient funds to do
15 so, the Receiver shall seek instructions from the Court with regard to insuring the property
16 adequately. The Receiver shall not be responsible for claims arising from the lack of
17 procurement or inability to obtain insurance.

18 **17. Legal Counsel:²⁷**

19 _____
20 ²⁷ A guiding principle in the receiver's discharge of his duties must be that he serves as an officer of
21 the Court and not as the agent of any of the parties to the litigation. *See Ex parte Citizens' Exch. Bank of Denmark*,
140 S.C. 471, 139 S.E. 135 (1927); *Virginia-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 66 S.E. 177 (1909); 65
Am.Jur.2d *Receivers* § 136 (1971). *See also Jeffcoat v. Morris*, 300 S.C. 526, 389 S.E.2d 159 (Ct. App. 1989).

22 A receiver, whether in a state or federal case, in an officer of the court that appoints it and the receiver's
23 fiduciary duties run to the court, not to any particular creditor, not to the defendant debtor, and not to any other party
24 in interest. *Federal and State Court Receiverships as Alternatives to Bankruptcy— Pros and Cons*, American
25 Bankruptcy Institute, Best of Mid-Atlantic Bankruptcy Workshop ABI-CLE 5 (2005). *Waag*, 10 F.Supp. 2d at
1193. As a matter of law, the appointment of a receiver puts all the property subject to the receivership in the
custody of the court. *See R. Clark, Clark on Receivers* § 36 (1959) (receiver is an arm or administering hand of the
court); *Atl. Trust Co. v. Chapman*, 208 U.S. 360, 372 (1908) (receiver is officer of court, and its property is in
custodia legis are the same as if actual possession is with an officer of the court.

1 Receiver may hire independent legal counsel if needed by the Receiver, and pay such
2 persons for their services at such rates as the Receiver deems appropriate for the services
3 provided, and subject to court approval.

4 **18. Receiver's Certificates:**

5 In the event that income from the operation of the properties is insufficient to meet
6 normal operating expenses and costs, the Receiver is authorized to borrow money and to issue
7 Receiver's Certificates to secure such indebtedness.²⁸ The total amount of all monies borrowed
8 and Receiver's Certificates issued shall not exceed _____ Thousand
9 Dollars (\$ _____) without further order of this court.

10 **19. Plaintiff to notify Receiver of the Appearances of all Parties.**

11 Plaintiff is ordered to promptly notify the Receiver of the names, addresses, and
12 telephone numbers of all parties and their counsel who appear in the action, so that the Receiver
13 may give notice to all parties of any matters affecting the Receivership.

14 **20. Instructions in the Event of a Bankruptcy Filing:²⁹**

15 **(A) Defendant Borrower's Duty to Give Notice of Bankruptcy:**

16 In the event that a bankruptcy case is filed by any Defendant Borrower during the
17 pendency of this Receivership, Defendant Borrower must give notice of sale to this Court, to all
18 parties, and to the Receiver, within twenty-four (24) hours of the bankruptcy filing.

19 **(B) Receiver's Duties if Bankruptcy is Filed:**

20
21 A receiver is entitled to retain his own counsel if authorized by the court. It would be a conflict of interest
22 for the attorney for the mortgagee or other parties to be the attorney for the receiver. *See* 66 Am.Jur.2d *Receivers* §
190 (1973).

23 *See Ex parte Citizens' Exch. Bank of Denmark*, 140 S.C. 471, 139 S.E. 135 (1927) (attorney actively
engaged in securing or opposing receivership should not ordinarily be appointed receiver).

24 ²⁸ *See supra* notes 9 and 21 and accompanying text.

25 ²⁹ Federal bankruptcy law likely preempts this section of the form order.

1 Upon receipt of notice that a bankruptcy has been filed which includes as part of
2 the bankruptcy estate any property which is the subject of this Order, the Receiver shall do the
3 following:

- 4 i. Immediately turn over the Property if no relief from stay or motion to
5 dismiss the Bankruptcy is filed:

6 The Receiver shall immediately contact the Plaintiff, and determine whether that
7 party intends to move in the Bankruptcy Court for an order for both: (a) relief from the automatic
8 stay or motion to dismiss and (b) relief from the Receiver's obligation to turn over the property
9 (11 U.S.C. Section 543).

10 If the Plaintiff indicates no intention to file such a motion within ten (10) days,
11 then the Receiver shall immediately turn over the Property (to the trustee in bankruptcy, or if one
12 has not been appointed, then to the Defendant Borrower), and otherwise comply with 11 U.S.C.
13 Section 543.

- 14 ii. Remain in possession and preserve the Property, pending resolution of any
15 motion for relief from stay and turnover, or motion to dismiss:

16 If the Plaintiff notifies the Receiver of its intention to seek relief from the
17 automatic stay immediately or file a motion to dismiss, then the Receiver is authorized to remain
18 in possession and preserve the property pending the outcome of those motions pursuant 11
19 U.S.C. Section 543 (a). The Receiver's authority to preserve the Property is limited as follows:
20 The Receiver may continue to collect rents, issues, and profits. The Receiver may make
21 disbursements, but only those which are necessary to preserve and protect the Property. The
22 Receiver shall not execute any new leases or other long-term contracts. The Receiver shall do
23 nothing that would effect a material change in circumstances of the Property.

- 24 iii. The Receiver is authorized to retain legal counsel to assist the Receiver
25 with the Bankruptcy Proceedings.

1 **21. Bond³⁰**

2 As required by the provisions of *South Carolina Code Section 15-65-60 (1976)*, the value
3 of the properties sought to be placed in the hands of the Receiver is fixed at the sum of \$ _____
4 _____. This sum represents one and one-half times the value of the Property. If the
5 obligated Defendant Borrower shall within ten (10) days after the date hereof file a good and
6 sufficient bond to and approved by the Clerk of this Court in double the value of said property
7 with sufficient surety as provided by law, then so much of this Order as appoints _____
8 as Receiver hereunder shall thereupon be vacated and of no effect.

9 **22. Receiver's Final Report and Account:³¹**

10 As soon as is practicable after the Receivership terminates, the Receiver shall file, serve,
11 and set for hearing in this Court his Final Report and Account. Notice shall be given to all
12 persons whom the Receiver has received notice of potential claims against the Receivership
13 Estate.

14 The motion to approve the final report and accounting, and for discharge of the Receiver,
15 shall contain a summary of the Receivership accounting including enumeration, by major
16 categories, of total revenues and total expenditures, the net amount of any surplus or deficit with
17 supporting facts, a declaration under penalty of perjury of the basis for the termination of the
18 Receivership, and evidence to support an order for the distribution of any surplus, or payment of
19 any deficit, in the Receivership Estate.

20 The bond of the Receiver shall be canceled upon the Court's discharge of the Receiver.
21 _____

22 ³⁰ Some jurisdictions allow for a borrower to vacate the appointment by posting a bond. *E.g.* S.C.
23 Code Ann. §§ 15-65-50 and 60 (2005). In such jurisdictions, the Court is often required to make a finding of the
24 value of the property which is being subjected to the receivership in order to calculate the amount of any bond.

25 ³¹ Where a receiver has been appointed, after the purchaser has received a deed the receiver should
file petition for discharge, make final accounting and be discharged and his bond cancelled. Suits against receivers
should be terminated prior to the termination of the receivership. Only after the final accounting has been accepted
by the court should the receiver be discharged and an order discharging a receiver be filed with the court.

1 **23. Instructions from the Court:**

2 The Receiver and the parties to this case may at any time apply to this Court for
3 instructions or orders. The Court may grant any order requested by the Receiver, without further
4 notice of hearing, if no objection is filed with the Court and served on the Receiver, and the
5 parties within twenty (20) days after filing and service of the Receiver's request.

6 **24. General Provisions.**

7 **A.** No person or entity shall file suit against the Receiver, or take other action against
8 the Receiver, without an order of this Court permitting the suit or action provided,
9 however, that no prior court order is required to file a motion in this action to
10 enforce the provisions of this Order or any other order of this Court in this
11 action.³²

12 **B.** The Receivership Estate and its employees, agents, attorneys and all professionals
13 and management companies retained by the Receiver shall have no liability for
14 any obligations, or debts incurred by Defendant Borrowers. The Receiver and its
15 employees, agents and attorneys shall have no personal liability, and they shall
16 have no claim asserted against them relating to the Receiver's duties under this
17 Order, without prior authority from this court as stated in (A) above.

18 **C.** Nothing contained in the order of the Court shall be construed as obligating or
19 permitting the Receiver to advance its own funds to pay any costs and expense of
20 the Receivership Estate.

21 **D.** Plaintiff shall indemnify, defend and hold the Receiver harmless from all suits in
22 connection with the Property and from any and all liability, including for damages
23
24

25 ³² Not enforceable in most jurisdictions.

1 to property and injury or death related to the Property, except for liability arising
2 out of the Receiver's willful misconduct or gross negligence that is not the result
3 of Defendant Borrower or Plaintiff's instruction of direction.
4

5 **TEMPORARY RESTRAINING ORDER**

6 **25.** It Is Further Ordered that Defendant Borrowers, and each of them, and their respective
7 agents, partners, property managers, employees, assignees, successors, representatives, and all
8 persons acting under, in concert with, or for them are ordered to:

9 **(A) Turnover of Property:**

10 Relinquish and turn over possession of the Property to the Receiver upon his
11 appointment becoming effective;

12 **(B) Turnover of Keys, Books, and Records:**

13 Turn over to the Receiver and direct all property managers and other third parties
14 in possession thereof to turn over all keys, leases, books, records, books of account, banking
15 records, statements and cancelled checks, and provide Receiver with all passwords needed to
16 access all records and files maintained on any computer located on the Receivership property, or
17 any other computers on which such information is stored, together with passwords needed to
18 access Defendant Borrower's e-mail account, and all other business records relating to the
19 Property, wherever located, and in whatever mode maintained.
20

21 **(C) Turnover of Licenses, Permits, and Taxpayer ID Number:**

22 Turn over to the Receiver all documents that pertain to all licenses, permits, or
23 government approvals relating to the Property and immediately advise the Receiver of federal
24 and state taxpayer identification numbers used in connection with the operation of the Property.
25

(D) Notification of Insurance:

1 Shall immediately advise the Receiver as to the nature and extent of insurance
2 coverage on the Property. Defendant Borrowers shall immediately name the Receiver as an
3 additional insured on the insurance policy (ies) for the period that the Receiver shall be in
4 possession of the Property. Defendant Borrowers are prohibited from canceling, reducing, or
5 modifying any and all insurance coverage currently in existence with respect to the Property; and

6 **(E) Turnover of Monies and Security Deposits:**

7 Immediately turn over to the Receiver any monies including, but not limited to,
8 rent, security deposits, prepaid rent, or funds in property management bank accounts or other
9 depository accounts for the Property, The tenants occupying, using or leasing the Property, or
10 any portion thereof, shall now make payments to the Receiver.

11 **26.** It is Further Ordered that pending further Order of this Court, the Defendant Borrowers,
12 and each of them, and their agents, partners, property managers and employees, and all other
13 persons acting in concert with them who have actual or constructive knowledge of this Order,
14 and their agents and employees, shall not:

15 **(A) Commit Waste:**

16 Defendant Borrowers shall not commit or permit any waste on the Property or any
17 part thereof, or suffer, commit or permit any act on the Property or any part thereof in violation
18 of law, or remove, transfer, encumber or otherwise dispose of any of the Property or the fixtures
19 presently on the Property or any part thereof;

20 **(B) Collect Rents:**

21 Defendant Borrower shall not demand, collect, receive, discount, or in any other
22 way divert or use any of the Rents from the Property.

23 **(C) Interfere with Receiver:**

24
25

1 Defendant Borrowers shall not directly or indirectly interfere in any manner with
2 the discharge of the Receiver's duties under this Order or the Receiver's passions of and
3 operation or management of the Property;

4 **(D) Transfer or Encumber the Property:**

5 Defendant Borrowers shall not expend, disburse, transfer, assign, sell, convey,
6 devise, pledge, mortgage, create a security interest in, encumber, conceal or in any manner
7 whatsoever deal in or dispose of the whole or any part of the Property, including, but not limited
8 to, the Rents, without prior Court Order; and

9 **27.** It is Further Ordered that, except by leave of this Court, all lessors, lessees, customers,
10 principals, investors, suppliers, and or creditors seeking to enforce any claim, right, or interest
11 against Defendant Borrower, be barred by this Order from using any "self-help" or doing
12 anything whatsoever to interfere in any way with the Receiver in the conduct of the Receivership
13 Estate.

14 **28.** As to the injunctive relief granted herein, this Order shall be binding on the parties to this
15 action, their officers, agents, servants, employees, and attorneys, and on those persons in active
16 concert or participation with them who Receiver actual notice of this injunction,
17

18 This Order is not and shall not be construed as an Order adjudicating a default under the
19 Note, Mortgage or loan documents involved herein; nor it is an adjudication of any issue
20 involved in the case; any and all issues, defenses, counterclaims and set-offs being hereby
21 specifically preserved for hearing and adjudication at a later date or dates.
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IT IS SO ORDERED.

Dated: _____