

**IN THE
SUPREME COURT OF OHIO**

CLEVELAND INTERNATIONAL FUND-)
MEDICAL MART HOTEL, LTD., *et al.*,)

Plaintiffs,

V.

OPTIMA 777, LLC, *et al.*,

Defendant-Appellant,

TIM L. COLLINS, RECEIVER,

Appellee.

Case No. 2023-0540

On Appeal from the Cuyahoga County
Court of Appeals, Eighth District

Court of Appeals Case No. CA-111616

**MEMORANDUM OF APPELLEE / RECEIVER TIM L. COLLINS
OPPOSING JURISDICTION**

Ezio A. Listati (0046703)
Elizabeth E. Collins (0091032)
THRASHER, DINSMORE & DOLAN, LPA
1282 West 58th Street
Cleveland, OH 44102
(216) 255-5431 | (216) 255-5450 (fax)
elistati@tddlaw.com | ecollins@tddlaw.com

Attorneys for Appellee Tim L. Collins, Receiver

Amanda J. Martinsek (0058567)
Gregory C. Djordjevic (0095943)
Katherine M. Poldneff (0088529)
ULMER & BERNE LLP
1660 West 2nd Street, Suite 1100
Cleveland, OH 44113
(216) 583-7000
amartinsek@ulmer.com | gdjordjevic@ulmer.com
kpoldneff@ulmer.com

*Attorneys for Cleveland International Fund
Medical Mart Hotel, LTD. and Huntington
National Bank, As Trustee*

David A. Kunselman (0073980)
Steven J. Miller (0014293)
BUCKLEY KING LPA
600 Superior Avenue East, Suite 1400
Cleveland, OH 44114
(216) 363-1400 | (216) 579-1020 (fax)
stevemiller@buckleyking.com
kunselman@buckleyking.com

*Attorneys for Appellant Optima 777,
LLC*

Scott D. Simpkins (0066775)
Patricia M. Ritzert (0009428)
CLIMACO, WILCOX, PEGA AND GAROFOLI Co., LPA
55 Public Square, Suite 1950
Cleveland, OH 44113
(216) 621-8484
sdsimp@climacolaw.com

*Attorneys for Cleveland-
Cuyahoga County Port Authority*

Kelli Kay Perk (0068411)
Mark R. Musson (0081110)
CUYAHOGA COUNTY PROSECUTOR'S OFFICE
1200 Ontario Street, 8th Floor
Cleveland, OH 44113
(216) 443-7800
kperk@prosecutor.cuyahogacounty.us
mmusson@prosecutor.cuyahogacounty.us

Attorneys for Cuyahoga County

David M. Douglass (0068411)
DOUGLASS & ASSOCIATES CO., LPA
4725 Grayton Road
Cleveland, OH 44135
(216) 362-7777
d.douglass@douglasslaw.com

Attorneys for City of Cleveland

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST	1
II. STATEMENT OF THE CASE AND FACTS	2
III. LAW & ARGUMENT	3
A. <u>Response to Proposition of Law No. 1</u> : A trial court that assesses whether a proposed receiver's sale is (1) fair to the owner of the property and all other parties with an interest in the property, (2) reasonable under the circumstances, and (3) would maximize the return from the property to the receivership estate, taking into account the potential cost of holding and operating the property complies with the clear mandate of R.C. 2735.04(D)(1)(a)	8
a. The terms of this sale were fair to Optima and all parties with an interest in the Hotel.	9
b. The terms of this sale were reasonable under the circumstances.	10
c. The sale maximized the return from the Hotel to the Receivership Estate, taking into account the potential cost of holding and operating the Hotel	12
B. <u>Additional Legal Considerations on Appeal</u>	13
a. Optima's Memorandum contains new legal arguments and unsworn statements of fact not properly before this Court.	13
b. Optima's appeal is moot.	14
IV. CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Avondale Comm. Council v. Galarza</i> , 5th Dist. Hamilton No. C-110221, 2012-Ohio-186	9
<i>E. Ohio Gas Co. v. Walker</i> , 59 Ohio App. 2d 216, 394 N.E.2d 348 (Ohio Ct. App. 1978)	13
<i>Huntington Bank, L.L.C. v. Prospect Park, L.L.C.</i> , 8th Dist. Cuyahoga No. 97720, 2012-Ohio-3261	9
<i>Lucas, Tr. for Miriam C. Lucas Tr. v. Reywal Co. Ltd. Partnership</i> , 10th Dist. No. 17AP-479, 2019-Ohio-27, 118 N.E.3d 505.	9
<i>Miner v. Witt</i> , 82 Ohio St. 237, 92 N.E. 21 (1910)	14
<i>Ohio Patrolmen's Benevolent Assn. v. McFaul</i> , 144 Ohio App. 3d 311, 760 N.E.2d 31 (8th Dist. 2001)	14
<i>Schloss v. McGinness</i> , 16 Ohio App.3d 96, 474 N.E.2d 666 (8th Dist.1984)	9
<i>State ex rel. Yost v. Summer Rays, Inc.</i> , 10th Dist. Franklin Nos. 18AP929 and 19AP-133, 2019-Ohio-3907	9
<i>Williamson v. Rubich</i> , 171 Ohio St. 253, 168 N.E.2d 876 (1960)	1
 <u>Statutes</u>	
R.C. 2735.04	Passim
 <u>Constitutional Provisions</u>	
Ohio Constitution, Article IV, Section 2	1

I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This appeal arises from the trial court’s well-reasoned and well-informed decision to approve the terms of a receiver’s sale of the Cleveland Westin Hotel (the “Hotel”). The sale was proposed by court-appointed receiver Tim L. Collins (“Receiver”) with court supervision at each step of the process in compliance with the guidelines set forth in the Ohio Receivership Statute, a review of which does not warrant this Court’s use of judicial resources. The trial court did not issue the June 9, 2022 Journal Entry (the “Sale Order”) approving the sale of the Hotel, previously owned by Appellant Optima 777, LLC (“Optima”), unreasonably, arbitrarily, or unconscionably. The Eighth District unanimously agreed below. The trial court oversaw the Receiver’s bidding procedures, sales process, stalking horse agreement, and ultimate purchase and sale agreement at every phase, and the Receiver worked with leading experts from CBRE and business representatives from each of the Hotel’s key stakeholders before finalizing any contract or process.

This appeal does not belong before this Court. This appeal is a thinly veiled attempt by Optima to have this Court act as fact finder, which is not this Court’s mandate. Optima’s individual displeasure with the trial court’s order applying settled law does not afford this Court jurisdiction under Article IV, Section 2 of the Ohio Constitution, nor does it warrant this Court’s use of judicial resources. *See Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960) (“[T]he sole issue for determination . . . is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties.”).

No need exists for this Court to “clarify the standards for judicial oversight of forced sales of property under Ohio’s receivership statute . . .” as Optima claims. (Jurisdictional Memo., p. 1). The Ohio Receivership Statute, R.C. 2735.04, contains clear standards for trial courts to apply when determining whether a proposed receiver’s sale is: (1) “fair to the owner of the property and

all other parties with an interest in the property”, (2) “reasonable under the circumstances”, and (3) one that would “maximize the return from the property to the receivership estate, taking into account the potential cost of holding and operating the property.” R.C. 2735.04(D)(1)(a). The Eighth District unanimously found that the trial court appropriately applied these clear standards and did not abuse its discretion when approving the sale terms here.

Optima attempts to mischaracterize the record below and includes new arguments and unsupported evidence and law in its Memorandum in Support of Jurisdiction (“Memorandum”) in hopes that this Court will review the Eighth District’s opinion below. Optima’s Memorandum primarily focuses on conspiracy theories and statements of fact not in the record because addressing the standards for this Court to accept jurisdiction removes any doubt whether there is a novel issue for this Court to review. Optima’s request that this Court accept jurisdiction in this case should respectfully be denied.

II. STATEMENT OF THE CASE AND FACTS

The underlying case began when two of Optima’s many creditors, Plaintiffs Cleveland International Fund-Medical Mart Hotel, Ltd. and the Huntington National Bank (collectively “Plaintiffs”), filed a foreclosure Complaint against Optima, seeking payment of amounts due on bonds and a note with a principal amount of up to \$36,000,000.00 used by Optima to purchase and refurbish the Hotel. (R. 1, Complaint at ¶ 14).

While Optima claims that Plaintiffs “intended to use the legal action and the [COVID-19] pandemic’s consequences to strip Optima 777 of ownership of the Hotel[,]” this is easily disproven. (Memorandum, p. 6). The reality is that Optima’s investors found themselves in serious financial and legal trouble around the time that the US Government filed allegations that Optima was involved in a money laundering scheme. (Receiver’s Appellee’s Brief, p. 1 and fn.

1). Optima’s financial troubles necessitated two forbearance agreements between Plaintiffs and Optima in 2019, well before the “pandemic’s consequences” impacted Optima or the hospitality industry. (R. 1, Complaint at ¶¶ 46, 50). Optima and its minority co-investor and Hotel management company, Sage Hospitality Group (“Sage”), attempted to sell the Hotel in 2019 but ultimately were unable to complete a sale while the money laundering charges were pending. (May 23, 2022 Hearing Tr. (hereinafter “Sale Hg. Tr.”) Ex. 3, p. 8).

Thereafter, Optima failed to make mortgage payments and defaulted on those forbearance agreements, causing Plaintiffs to file the underlying lawsuit. (R. 1, Complaint ¶¶ 44-62). Optima also failed to make other payments, including past-due property taxes, payments due to the City of Cleveland, and other debts. (R. 1, at Ex. 1). Optima has not made a single \$262,500 monthly mortgage payment since before the Complaint was filed in 2020. (Sale Hg. Tr., p. 45-58).

The trial court appointed a receiver because the Hotel was on the verge of shutting down in approximately one week after Optima failed to make contributions to fund essential Hotel operations in March of 2021. (R. 98, Order Appointing Receiver; March 17, 2021 Hg. Tr. p. 21-23, 29-30). With the Receiver in place to ensure that funds would be spent for the benefit of the Receivership Estate and to operate the Hotel, a new lender, JDI, agreed to “infuse capital into this property” so the Receiver could adequately fund Hotel operations and keep the doors open. (March 17, 2021 Hg. Tr. p. 29; Sale Hg.Tr. p. 47).

With court oversight, the Receiver then began a multiple step process to market and eventually sell the Hotel, which was the Receivership Estate’s most valuable, and also most costly, asset.¹ To begin, the Receiver sought to establish a sales process. To do so, the Receiver invited

¹ This sales process, as laid out in the Bidding Procedures, can be found at Exhibit I to the Bidding Procedures approved by the trial court. (R. 145 at Exhibit A). This court-approved process included: (1) due diligence with equal information access among bidders; (2) initial non-binding

and obtained written proposals from, and then held meetings with, four experienced hotel brokerages, which the Receiver, Plaintiffs, Sage, a representative from Optima and Optima's counsel all attended. (R. 161, p. 9-10; Sale Hg. Tr. p. 23-24). All attendees **including Optima** "concluded that . . . a targeted sale was better for this kind of hotel" and agreed the Receiver should hire CBRE because they "have a hotel group that is pretty much universally regarded as the best commercial brokerage for specializing in hotel sales," despite Optima's after-the-fact arguments to the contrary. (Sale Hg. Tr. p. 24, 27). The brokers provided opinions of value for the Hotel, which ranged from \$38,000,000 to \$48,500,000. (Procedures Hg. Tr. p. 75). The Receiver then negotiated and signed a Listing Agreement with CBRE. (R. 145 at Exhibit B).

The Receiver, through counsel, then negotiated a Stalking Horse Contract with a potential purchaser that "was willing to step in when statistics were horrific for the hotel and put a very material offer on the table to purchase the hotel," to "create [a] floor" price and ensure a successful bidding process. (Procedures Hg. Tr. p. 75; R. 145 at Exhibit A). As a result, the Receiver and CBRE were able to set an opening bid price of \$40,700,000 for prospective purchasers to bid on the Hotel, which was squarely within the brokers' range of values. (*Id.* p. 75). The Receiver waited to sign the CBRE Listing Agreement and Stalking Horse Agreement until after working with all key stakeholders, including Optima, and allowing them an opportunity to review and comment on the proposed agreements. (*Id.* p. 49-50).

On August 9, 2021, the Receiver filed a Motion to Approve Stalking Horse Contract and CBRE Listing Agreement and to Establish Bidding Procedures ("Procedures Motion") (the

indications of interest; (3) submission of bids; (4) evaluation of qualified bids; (5) selection of a starting, qualified binding bid; (6) an opportunity to submit over bids; (7) subsequent negotiation where appropriate; (8) final selection of a successful bid; and the requirement for (9) subsequent court approval. (*Id.*).

“Bidding Procedures”). (R. 145). After receiving briefing, expert declarations, and expert deposition testimony, the trial court held the Procedures Hearing on September 20, 2021 and granted the Procedures Motion on September 22, 2021. (R. 168). At the hearing, the trial court noted: “[w]e know that the parties have worked very diligently, especially the Receiver. . . .” (Procedures Hg. Tr. p. 45). Optima filed an objection, supported only by Optima’s purported expert Mr. Wilk’s Declaration, which contained nothing but unsupported criticisms of the sales process written by a man with little to no experience with similar sales. (R. 160).

Optima then sought to delay the sales process by filing an appeal of the September 22, 2021 Procedures Order, which the appellate court dismissed for a lack of a final, appealable order. (R. 199). Optima also sought jurisdiction in this Court, which this Court declined on March 1, 2022 (R. 219), whereupon the case returned to the trial court for further proceedings. Optima’s appeal was the sole reason for the delay in scheduling the Sale Hearing.

Despite Optima’s delay tactics, the Receiver continued operating the Hotel, marketing the Hotel with CBRE according to the Bidding Procedures, and ultimately received four non-binding preliminary bids, plus a fifth bid from the Stalking Horse, during the first round of bidding. (R. 161, Reply in Support of Bidding Procedures, p. 5). At the conclusion of the second round of the bidding process, the Receiver received three bids. (Sale Hg. Tr. p. 40-42).

Optima asked the Receiver to delay the proposed sale and continue to operate the Hotel at the Receivership Estate’s expense because Optima allegedly believed that the Hotel might sell for a higher price at some unspecified later date post pandemic. (R. 193). Optima’s attempt to delay the sale was nothing more than a request to spend its **creditors’ money**, not its own, because the Hotel continued to operate at a loss until it was sold. (Sale Hg. Tr. p. 45-47). The Hotel was losing \$1.2 million per year in holding costs, which would have been substantially higher if the Hotel

paid: (1) receivership costs, (2) the Plaintiffs' mortgage, (3) the State Energy Loan, (4) the City of Cleveland Loan, (5) payments on past due real estate taxes, (6) \$570,000 worth of past due payments to service providers and vendors, and (7) other unsecured creditors, which were paid out of the JDI Loan or would have remained unpaid. (*Id.*).

At the final stage of the bidding process, the Stalking Horse Bidder, HEI Management, LLC ("HEI"), submitted a final offer in the form of an Amendment to the Stalking Horse Agreement, which included a \$600,000 increase to its previously-offered stalking horse purchase price, and removed the requirement that the Receivership Estate pay HEI a break-up fee. (R. 187, Motion for Order Authorizing Sale). HEI agreed to purchase the Hotel for \$40,200,000 and agreed to assume several of Optima's debts costing over \$2,000,000, for a total purchase price of \$42,947,000 (the "HEI PSA"). (Sale Hg. Tr. p. 44 and Hg. Ex. 1). At no point did Optima or its "expert" provide an alternative valuation for the Hotel. (Sale Hg. Tr.).

The Receiver, in his business judgment, deemed this to be the only qualified bid and believed that accepting the HEI PSA was in the best interest of the Receivership Estate. The Receiver and HEI then executed several subsequent amendments to the HEI PSA to extend the closing deadline to account for the delays Optima caused with its appeal of the Procedures Order and to reflect the increased consideration HEI would pay for the Hotel. (Sale Hg. Ex. 1). At the Sale Hearing, the Receiver testified that he believed, in his business judgment, the proposed \$42,947,000 HEI PSA was in the best interest of the Receivership Estate for several reasons, including:

1. The Hotel had an appraised value of \$40,700,000 on March 15, 2021. (Sale Hg. Ex. 2).
2. JLL, the broker that Optima used to market the Hotel for sale on its behalf in 2019, provided a broker's opinion of value to the Receiver estimating the Hotel's value to be between \$37,500,000 and \$43,979,000. (Sale Hg. Tr. p. 25 and Ex. 3).

3. The range of the four broker's opinions of value provided to the Receiver for the Hotel was between \$37,500,000 and \$47,500,000. (Sale Hg. Tr. p. 29).
4. The terms of the HEI offer complied with the Bidding Procedures and included other assurances of closing, such as a non-refundable deposit and did not include the ability for the buyer not to close on the sale after further due diligence like the BCG offer included. (Sale Hg. Tr. p. 40-42, Hg. Ex. 14).
5. HEI had a demonstrated ability to close, as the largest operator of Westin Hotels in the United States other than Marriott, and demonstrated that it had sufficient funds to do so. (Sale Hg. Tr. p. 44).
6. As of the time of the Sale Hearing, the Hotel was losing \$101,213 per month, or more than \$1,200,000 per year, in operations costs. The amount of that loss does not take into account Optima's failure to make any of its \$262,500 monthly mortgage payments since at least 2020, \$570,000 worth of vendor costs Optima failed to pay, \$1,200,000 in past-due property taxes, current property tax payments made by the Receiver using the JDI loan and not the Hotel's budget until June 2022, a city loan that was not paid by the Hotel, and a \$771,218 state energy loan that was not paid by the Hotel, in addition to other unpaid unsecured creditors. (Sale Hg. Tr. p. 45-48).
7. The Receivership Estate would need to recover \$51,890,593, plus per diem interest of \$8,466.61 after May 23, 2022, to make each of Optima's secured creditors to date whole as defined in the Ohio Receivership Statute as of the date the property sold. (Sale Hg. Tr. p. 48). Optima did not rebut this evidence. (*Id.*).

Because the Receiver received a bid from a qualified bidder with a demonstrated ability to close that was squarely within the range of values for the Hotel, and because the Hotel cost the Receivership Estate approximately \$1.2 million annually in holding costs above operational cash flow not including other key expenses, the Receiver executed the PSA with HEI and filed a Motion for an Order Authorizing Sale. (R. 187). After reviewing the above-described evidence and more, the trial court issued the Sale Order, and found that a prompt sale of Receivership Assets with the proposed terms in the HEI PSA was in the best interest of the Receivership Estate. (R. 202, ¶ J “[t]he Sale must be approved promptly in order to preserve the value of the Acquired Assets.”).

Optima filed a Notice of Appeal of the Sale Order on June 10, 2022. (R. 263). No other party appealed the Sale Order. Optima then filed a Motion to Stay Execution of the Sale Order in the trial court, which the trial court denied because Optima offered to post little to no bond. (R. 265, 269). Optima then filed a similar motion before the appellate court, which was granted upon the posting of a supersedeas bond in the amount of \$43,000,000.00. (June 15, 2022 Entry). Optima next sought relief from this Court to overturn the appellate court's June 15, 2022 Entry, which was denied. (06/21/2022 Case Announcements #3, 2022-Ohio-2083).

Optima did not post the bond ordered by the Eighth District to obtain a stay, and the Receiver sold the Hotel to HEI pursuant to the terms of the Sale Order on June 16, 2022. (R. 277). The Eighth District unanimously affirmed the trial court's Sale Order on March 9, 2023. Despite the fact that the Hotel was sold to HEI nearly a year ago, Optima now asks this Court to somehow undo the sale and asks this Court to require the trial court to establish new bidding procedures, which are not even the subject of the Order appealed herein.

III. LAW & ARGUMENT

A. Response to Proposition of Law No. I: A trial court that assesses whether a proposed receiver's sale is (1) fair to the owner of the property and all other parties with an interest in the property, (2) reasonable under the circumstances, and (3) would maximize the return from the property to the receivership estate, taking into account the potential cost of holding and operating the property complies with the clear mandate of R.C. 2735.04(D)(1)(a)

R.C. 2735.04(D)(1)(a) provides the framework under which a trial court may authorize a receiver's sale of property. Pursuant to that subsection, a trial court may approve such a sale when the terms are: (1) fair to the owner of the property and all parties with an interest in the property; (2) reasonable under the circumstances; and (3) will maximize the return from the property to the receivership estate, taking into account the potential cost of holding and operating the property.

R.C. 2735.04(D)(1)(a); *see also State ex rel. Yost v. Summer Rays, Inc.*, 10th Dist. Franklin Nos. 18AP929 and 19AP-133, 2019-Ohio-3907. All three conditions were squarely met here.

It should be noted that Optima only appealed the Sale Order herein and not the Procedures Order or any other trial court decision, so the only legal question on appeal here is whether the trial court acted unreasonably, arbitrarily, or unconscionably when it issued the Sale Order. (R. 263, Notice of Appeal); *Schloss v. McGinness*, 16 Ohio App.3d 96, 474 N.E.2d 666 (8th Dist.1984). A difference of opinion, or a proposed different sales method, does not constitute an abuse of discretion when the final sale terms are reasonable. *Lucas, Tr. for Miriam C. Lucas Tr. v. Reywal Co. Ltd. Partnership*, 118 N.E.3d 505, ¶ 20. Whether one trial court's well-informed Sale Order constitutes an abuse of discretion is not a novel legal issue for this Court to review. Here, Optima's appeal is based on factual disputes related solely to Optima and its claims. Optima received its day in court with full appellate review afforded by the Eighth District.

a. The terms of this sale were fair to Optima and all parties with an interest in the Hotel.

Under the first prong of the Ohio Receivership Statute's analysis of proposed receiver's sales, a receiver is appointed to carry out a court's orders and may sell receivership assets with court approval when the sale is in the best interest of the entire receivership estate. *See Avondale Comm. Council v. Galarza*, 5th Dist. Hamilton No. C-110221, 2012-Ohio-186. Ohio courts are clear that a receiver "is appointed for the benefit of all the creditors of the property subject to the receivership." *Huntington Bank, L.L.C. v. Prospect Park, L.L.C.*, 8th Dist. Cuyahoga No. 97720, 2012-Ohio-3261, ¶ 19 (internal quotation omitted). Here, the Sale Order authorized a sale to a qualified bidder, in a timely fashion, for a fair price, for an asset that cost the Receivership Estate a substantial amount of money on a daily basis, in an uncertain market. This standard application of law to the facts by the trial court, detailed below, does not warrant this Court's judicial review.

In both the Procedures and Sale Hearing, the trial court analyzed this prong and provided all parties with an interest in the Hotel the opportunity to object to the proposed sale terms. (Procedures Hg. Tr. and Sale Hg. Tr.). All other parties agreed that the proposed sale was in the best interest of the Receivership Estate, even though most parties would not be paid in full for Optima's outstanding debts. Optima's argument that the sale deprives Optima of money or rights makes no practical sense, when the purchase price in the Sale Order did not allow even the Plaintiffs to be made whole, let alone many other unsecured creditors. (Sale Hg. Tr. p. 46). As of the date of the Sale Hearing nearly one year ago, Optima's redemption price was \$51,890,593, plus per diem interest of \$8,466.61 each day after May 23, 2022. (*Id.* p. 48). This means nearly \$9 million of secured and unsecured claims were not paid and would have to be paid before any proceeds went to Optima. Of that redemption price, \$43,126,702 and \$8,390.41 of the daily interest constituted the amount owed to Plaintiffs, who agreed to the transaction knowing they would lose millions of dollars as a result. (*Id.* p. 47).

Plaintiffs would not logically to agree to the proposed sale terms if the Hotel could have sold at a higher price. (*Id.* p. 47). In light of the redemption price, Optima's incessant arguments that the Sale Order harms Optima are nonsensical. The Hotel was appraised for far less than the sum of Optima's debts, and those appraisals all accounted for projected financial improvements after the initial effects of the pandemic. (*Id.* p. 29). If the Hotel's value materially increased by the Sale Hearing date, why did Optima elect not to provide an appraisal, or another potential purchaser, for the trial court to consider? (*Id.*).

In truth, Optima's request to delay the sale was nothing more than a request to spend "somebody else's \$100,000 a month. Meaning \$1.2 million a year" and is not evidence of any unfair treatment toward Optima or any impropriety in the Sale Order. (*Id.* p. 45-47). The Sale

Order authorized a sale to a qualified bidder, in a timely fashion, for a fair price, for an asset that cost the Receivership Estate money, in an uncertain market. Nothing about the trial court's application of this clear statutory standard, or the Eighth District's ruling that the trial court did not abuse its discretion, warrants this Court's exercise of its discretionary jurisdiction.

b. The terms of this sale were reasonable under the circumstances.

This appeal also begs this Court to act as fact finder when analyzing the trial court's application of the second prong for reviewing proposed receiver's sale terms under Ohio's Receivership Statute. The applicable law is well-settled, and the reasonableness of a proposed sale, or appellate review for an abuse of discretion in approving a proposed sale, is not a novel legal issue warranting this Court's review.

As stated above, the trial court made a well-informed decision when issuing the Sale Order, followed all steps, and undertook the necessary analysis to comply with the Ohio Receivership Statute. The trial court received briefing from the Receiver, Optima, the Plaintiffs, expert declarations from Optima and the Plaintiffs, held a Sale Hearing, a hearing related to the redemption price, and received hundreds of pages of exhibits during and after the Sale Hearing. (R. 187, 193, 226, 242, 243, 248, 250, 261; Sale Hg. Tr.). There was overwhelming evidence supporting the reasonableness of the Sale Order. The trial court also heard testimony and reviewed briefing related to the Procedures Order in the fall of 2021. (*See* Statement of Facts, *supra*).

The Receiver submitted un rebutted evidence that the Sale Order was in the best interest of the Receivership Estate and was reasonable under the circumstances. Importantly, the Purchase Price was higher than the \$40,700,000 Hotel appraisal (Sale Hg. Ex. 2) and was squarely within the range of the four broker's opinions of value, between \$37,500,000 and \$47,500,000. (Sale Hg. Tr. p. 29). When the court asked whether "there are some bidders that Optima had that the Receiver

did not consider,” Optima’s counsel responded, “[n]ot that I’m aware of.” (Procedures Hg. Tr. p. 85). All other stakeholders agreed to the sale, evidenced by the lack of any other objections at the Sale Hearing. (See Sale Hg. Tr.). Finally, the terms of the HEI offer complied with the Bidding Procedures and included other assurances of closing, such as a non-refundable deposit (Sale Hg. Tr. p. 40-42, Sale Hg. Ex. 14), and HEI had a demonstrated ability to close, as the largest operator of Westin Hotels in the United States other than Marriott, with demonstrated sufficient funds to do so. (Sale Hg. Tr. p. 44).

Further, at the time that it issued the Sale Order, the trial court was also aware of the changing lending landscape and a recent failed comparable hotel sale in Cleveland. (R. 250 and Ex. A thereto) (May 30, 2022 Crain’s Cleveland Business article announcing that VM Hotel Acquisition Corp. announced that it had “decided to drop the deal, blaming funding issues” to acquire the Cleveland Renaissance Hotel and Hyatt Regency Hotel in downtown Cleveland, two of the Hotel’s largest competitors). Analysis of the trial court’s application of the facts to the law in reviewing this prong does not warrant this Court’s discretionary review.

c. The sale maximized the return from the Hotel to the Receivership Estate, taking into account the potential cost of holding and operating the Hotel.

The trial court’s analysis of this well-settled third prong, and the Eighth District’s finding that the trial court did not abuse its discretion, does not present any novel legal issue. There is no valid argument that the Receiver should have continued to hold and operate the Hotel at the expense of the Receivership Estate with the hope that the Hotel might become profitable or sell at a higher price at some uncertain future date to some unidentified buyer when the Receiver had the HEI PSA, which was well within the range of values for the Hotel with a qualified buyer, HEI.

As described above, the Hotel’s operating cost was no secret to Optima. (See Optima’s Exhibits 1-65 to Sale Hg.; R. 250). At the Sale Hearing, the Receiver submitted **unrebutted**

evidence that the Hotel was “losing . . . \$101,213 a month” in 2022. (Sale Hg. Tr. p. 45-57). Optima’s request to delay the sale was a request to spend “somebody else’s \$100,000 a month” to run the Hotel. (*Id.*). Had the Hotel paid for receivership costs, the mortgage, the State Energy Loan, the City of Cleveland Loan, past due real estate taxes, \$570,000 worth of past due payments to service providers and vendors, and Optima’s unsecured debts, this \$1.2 million per year cost would have increased drastically. (*Id.*). Optima’s attempts to rewrite history are transparent and do not support jurisdiction with this Honorable Court.

At the Procedures Hearing, counsel for the City of Cleveland agreed that “delay is not in anyone’s best interest” and “allowing the bidders to grow cold while we further delay this opportunity . . . doesn’t help the process of getting the highest price.” (Procedures Hg. Tr. p. 70). Plaintiffs’ counsel stated: “we believe that interjecting delay for delay’s sake would be a mistake.” (*Id.* p. 51). There is no valid argument that the trial court abused its discretion in finding that a prompt sale of the Hotel for fair terms following a calculated and court-supervised bidding and sales process was in the best interest of the Receivership Estate. (R. 202, ¶ J “[t]he Sale must be approved promptly in order to preserve the value of the Acquired Assets.”). The trial court’s implementation and analysis of this well-settled legal standard was proper and is not novel.

B. Additional Legal Considerations on Appeal

a. Optima’s Memorandum contains new legal arguments and unsworn statements of fact not properly before this Court.

A significant portion of Optima’s Memorandum filed herein fails to comply with Ohio evidentiary rules. Optima’s Memorandum is rife with unsworn statements of operative fact, many of which are not supported by the record below. Those statements have no value and should be disregarded. *See E. Ohio Gas Co. v. Walker*, 59 Ohio App. 2d 216, 220, 394 N.E.2d 348, 351 (Ohio Ct. App. 1978) (unsworn allegations of operative fact may not form the basis for a court to

grant a motion). Optima's Memorandum also contains charts and graphs that have never appeared in the record below. These unsupported and improper insertions in Optima's Memorandum should be disregarded.

b. Optima's appeal is Moot.

Finally, it should be noted that Optima's appeal is moot under Ohio law. Because Optima did not post the court-ordered bond to obtain a stay, the Receiver sold the Hotel to HEI pursuant to the terms of the Sale Order on June 16, 2022. (R. 277). Despite the fact that the Hotel was sold to HEI nearly a year ago, Optima now asks this Court to somehow undo the sale and asks this Court to require the trial court to establish new bidding procedures, which are not even the subject of the Order appealed herein.

Importantly, Optima did not request the Eighth District or this Court to award Optima monetary damages resulting from the Sale Order but asks only that the sale itself and the Bidding Procedures that Optima did not appeal herein be reversed and remanded. This relief is not available under Ohio law, and the basis for Optima's appeal is therefore moot. *See Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910) (appeal is moot if it is impossible for the appellate court to grant any effectual relief) (internal quotation omitted).

The judgments Optima requests are not capable of enforcement, as HEI has paid for and obtained control of the Hotel pursuant to a valid court order, which Optima did not stay by posting a bond, and Optima did not even appeal the Bidding Procedures that it asks this Court to overturn. *Ohio Patrolmen's Benevolent Assn. v. McFaul*, 144 Ohio App. 3d 311, 314, 760 N.E.2d 31, 33 (8th Dist. 2001). ("The duty of this court is to decide actual controversies between parties and to enter judgments capable of enforcement. We are not required to give mere advisory opinions or to rule on questions of law which cannot affect the matters in issue in the case before us."). Because

the Hotel sold and Optima is not seeking monetary damages from the sales proceeds, the relief Optima seeks is impossible for this Court to grant, making Optima's appeal moot. *Solon v. Solon*, 5th Dist. Stark No. 2017CA00210, 2018-Ohio-3147

IV. CONCLUSION

The facts and law of this case are not of great public interest or importance. Optima simply brings its fact disputes before this Court in an impermissible attempt to use a court of last resort as another layer of direct appellate review and continue to delay the proceedings and cause the parties additional expense. The standards for a trial court to analyze a proposed receiver's sale of Property are clearly provided in R.C. 2735.04(D)(1)(a), and appellate review of whether a trial court abused its discretion in applying those standards is not novel. For the foregoing reasons, this Court should decline jurisdiction in this case.

Respectfully submitted,

/s/ Ezio A. Listati

Ezio A. Listati (0046703)

Elizabeth E. Collins (0091032)

THRASHER, DINSMORE & DOLAN, LPA

1282 West 58th Street

Cleveland, OH 44102

(216) 255-5431 | (216) 255-5450 (fax)

elistati@tddl.com | ecollins@tddl.com

Attorneys for Appellee Tim L. Collins, Receiver

CERTIFICATE OF SERVICE

I certify that I am sending a copy of the foregoing on the 15th day of May, 2023 to the following via email in compliance with S.Ct.Prac.R. 3.11(C):

Amanda J. Martinsek (0058567)
Gregory C. Djordjevic (0095943)
Katherine M. Poldneff (0088529)
ULMER & BERNE LLP
1660 West 2nd Street, Suite 1100
Cleveland, OH 44113
(216) 583-7000
amartinsek@ulmer.com | gdjordjevic@ulmer.com
kpoldneff@ulmer.com

*Attorneys for Cleveland International Fund
Medical Mart Hotel, LTD. and Huntington
National Bank, As Trustee*

Kelli Kay Perk (0068411)
Mark R. Musson (0081110)
CUYAHOGA COUNTY PROSECUTOR'S OFFICE
1200 Ontario Street, 8th Floor
Cleveland, OH 44113
(216) 443-7800
kperk@prosecutor.cuyahogacounty.us
mmusson@prosecutor.cuyahogacounty.us

Attorneys for Cuyahoga County

David A. Kunselman (0073980)
Steven J. Miller (0014293)
BUCKLEY KING LPA
600 Superior Avenue East, Suite 1400
Cleveland, OH 44114
(216) 363-1400 | (216) 579-1020 (fax)
stevemiller@buckleyking.com
kunselman@buckleyking.com

Attorneys for Appellant Optima 777, LLC

Scott D. Simpkins (0066775)
Patricia M. Ritzert (0009428)
CLIMACO, WILCOX, PEGA AND GAROFOLI CO., LPA
55 Public Square, Suite 1950
Cleveland, OH 44113
(216) 621-8484
sdsimp@climacolaw.com

*Attorneys for Cleveland-Cuyahoga County
Port Authority*

David M. Douglass (0068411)
DOUGLASS & ASSOCIATES CO., LPA
4725 Grayton Road
Cleveland, OH 44135
(216) 362-7777
d.douglass@douglasslaw.com

Attorneys for City of Cleveland

/s/ Ezio A. Listati
Ezio A. Listati (0046703)
*One of the Attorneys for Appellee Tim L. Collins,
Receiver*