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DISTRICT COURT  
DENVER, COLORADO

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CASE NUMBER: 2018CV33011

DISTRICT COURT, DENVER COUNTY, STATE OF  
COLORADO

Denver District Court  
1437 Bannock St.  
Denver, CO 80202

**Plaintiff:** CHRIS MYKLEBUST, SECURITIES  
COMMISSIONER FOR THE STATE OF COLORADO

v.

**Defendants:** GARY DRAGUL, GDA REAL ESTATE  
SERVICES, LLC, and GDA REAL ESTATE  
MANAGEMENT, LLC

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Case Number: 2018CV33011

Division/Courtroom: 424

**AFF II DENVER, LLC'S OBJECTION TO RECEIVER'S MOTION FOR ORDER  
AUTHORIZING SALE OF HAPPY CANYON SHOPPES**

18CV33011-14  
100.

AFF II Denver, LLC (“Ardent” or the “Lender”), by and through its undersigned counsel, hereby objects (the “Objection”) to the *Receiver’s Motion for Order Authorizing Sale of Happy Canyon Shoppes* (the “Sale Motion”),<sup>1</sup> and respectfully states as follows:

**RELEVANT BACKGROUND**

1. The Shoppes Entities and the Lender entered into a Loan and Security Agreement dated July 27, 2018 (as amended, the “Shoppes Loan Agreement”), pursuant to which the Lender made a loan to the Shoppes Entities in the original principal amount of \$19,500,000.00 (the “Shoppes Loan”) to fund the acquisition and improvement of the Happy Canyon Shoppes in Denver, Colorado (the “Shoppes Property”). The Shoppes Loan is secured by a first-priority lien on the Shoppes Property. Gary Dragul (“Dragul”) provided a guaranty with respect to the Shoppes Entities’ obligations under the Shoppes Loan.

2. Affiliates of the Shoppes Entities, Happy Canyon Box 17 A, LLC; Happy Canyon Box 17 B, LLC; and Happy Canyon Box 17 C, LLC (collectively, the “Marketplace Entities”) and the Lender entered into a Loan and Security Agreement dated August 7, 2018, pursuant to which the Lender made a loan to the Marketplace Entities in the original principal amount of \$8,900,000.00 (the “Marketplace Loan” and together with the Shoppes Loan, the “Loans”)<sup>2</sup> to fund the acquisition and improvement of property adjacent to the Shoppes Property, the Happy Canyon Marketplace (the “Marketplace Property”). The Marketplace Loan is secured by a first-priority lien on the Marketplace Property and cross-collateralized with a first-priority lien on the

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion.

<sup>2</sup> Copies of the Loans and related security documents are attached hereto as Exhibits 1-10.

Shoppes Property. Dragul provided a guaranty with respect to the Marketplace Entities' obligations under the Marketplace Loan.

3. The loan and security documents relating to the Shoppes Loan were amended to provide that the Shoppes Loan be cross-defaulted with the Marketplace Loan and the Shoppes Property be cross-collateralized with the Marketplace Property.

4. On August 30, 2018, the Court entered the Receivership Order, appointing Harvey Sender as the receiver ("Receiver") for Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses, including, but not limited to, the Shoppes Entities and the Marketplace Entities (the "Receivership Estate" or the "Estate").

5. Ardent and the Receiver entered into a forbearance agreement (the "Forbearance Agreement")<sup>3</sup> memorializing the terms and conditions attendant to Ardent's agreement to refrain from exercising certain rights and remedies in connection with the Loans for a limited period of time in response to the occurrence of certain defaults under the Loans including, but not limited to, the appointment of the Receiver. In Section 2.5 of the Forbearance Agreement, the Receiver stipulated to Ardent's perfected liens on the Shoppes Property and the Marketplace Property.

6. On December 31, 2018, the Court entered an order approving "each and every term" of the Forbearance Agreement (the "Forbearance Agreement Order").

7. On January 16, 2019, the Receiver filed the Sale Motion, seeking to sell the Shoppes Property to Alberta Development Partners, LLC ("Alberta") for \$23,625,000.00.

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<sup>3</sup> A copy of the Forbearance Agreement is attached hereto at Exhibit 11.

8. As of January 24, 2019, Ardent is owed \$25,619,175.65 plus legal fees under the Loans. Ardent does not consent to the sale of the Shoppes Property, and is not willing to release its liens.

### OBJECTION

#### **I. The Sale Proceeds Are Insufficient to Satisfy the Obligations Under the Loans and Ardent Does Not Consent to the Proposed Sale**

9. Under the Loans, Ardent advanced funds to the Shoppes Entities and the Marketplace Entities in the aggregate principal amount of \$28,400,000.00. As noted above and stipulated to by the Receiver in the approved Forbearance Agreement, as security for the Loans, Ardent holds, among other things, a valid, perfected, first priority security interest, lien and mortgage against the Shoppes Property. As of January 24, 2019, Ardent is owed \$25,619,175.65 plus legal fees under the Loans. In the event the proposed sale to Alberta is consummated, the net proceeds would be insufficient to pay Ardent the amount outstanding under the Loans, and as a result, Ardent is not willing to consent to and release its liens against the Shoppes Property.

10. Furthermore, Ardent rejects the assertion set forth in paragraph 17 of the Sale Motion that its cross-collateralization of the Loans is invalid. First, the Receiver reaffirmed all of the obligations under the Loans, including the cross-collateralization thereof, in the Forbearance Agreement. Second, the Receiver's motion for Court approval of the Forbearance Agreement, which provided the details of the Loans and the related collateral, was served on parties in interest of the Receivership Estate and no objections were filed. As such, the opportunity to challenge the legality of the cross-collateralization of the Loans has passed and the Court should not entertain such arguments.

**II. The Receiver's Actions in Connection with the Proposed Sale Constitute Defaults Under the Forbearance Agreement, Entitling Ardent to Immediately Foreclose on the Shoppes Property**

11. While the Receivership Order authorizes the Receiver to sell property of the Receivership Estate, the Receiver is subject to the following additional conditions with respect to the sale of the Shoppes Property and the Marketplace Property based upon the terms and conditions of the Forbearance Agreement:

- a. By April 15, 2019, the Receiver and/or Dragul and the Shoppes Entities and Marketplace Entities, as applicable, must enter into a listing agreement with an institutional sales or financing broker to sell and/or refinance the property secured by the Loans. The broker and the terms of any listing agreement are subject to the Lender's written approval. (Forbearance Agreement, ¶ 4).
- b. By August 30, 2019, the Receiver and/or Dragul and the Shoppes Entities and Marketplace Entities, as applicable, are to (i) enter into a binding agreement with a buyer or lender to sell and/or refinance the property secured by the Loans where the net proceeds or net refinance proceeds, as applicable, are sufficient to repay the indebtedness under the Loans in full; (ii) obtain the Court's approval of such transaction; and (iii) close such transaction. The buyer or lender and form of agreement must be acceptable to the Lender. (Forbearance Agreement, ¶ 4).

12. Paragraph 8 of the Forbearance Agreement Order provides that the occurrence of a breach or default by the Receiver, the Shoppes Entities, the Marketplace Entities or Dragul (i) under *any* provision of the Forbearance Agreement or (ii) under *any* term or condition of the Loan Documents, other than the Existing Defaults (as defined in the Forbearance Agreement), entitles Ardent to immediately enforce all rights and remedies under the Loans or applicable law to collect the entire unpaid balance of all amounts owing under the Loans, without any further order of the Court.

13. The Receiver is in breach of Section 4 of the Forbearance Agreement and therefore Ardent is entitled to immediately pursue recourse under the Loans without relief of the Court.

First, the Receiver hired Marcus & Millichap to market the Shoppes Property (Sale Motion, ¶ 14), however, Ardent did not provide its written approval of Marcus & Millichap or the terms of its agreement with the Receiver to market the Shoppes Property as required by Section 4 of the Forbearance Agreement. Significantly, Ardent was neither notified of the Receiver's hiring of Marcus & Millichap nor provided with the agreement between the Receiver and Marcus & Millichap prior to the filing of the Sale Motion.

14. In addition, pursuant to Section 4 of the Forbearance Agreement, (i) the buyer or lender and form of agreement must be acceptable to Ardent and (ii) the net proceeds or net refinance proceeds, as applicable, of the binding agreement must be sufficient to repay the indebtedness under the Loans in full. Ardent was not consulted by the Receiver about the proposed sale and was not provided with a copy of the Alberta PSA prior to the filing of the Sale Motion. A transfer of the Shoppes Property without Ardent's prior written consent also constitutes a default under the Shoppes Loan Agreement. Moreover, the projected net proceeds from a sale to Alberta following the payment of a commission to Marcus & Millichap would be insufficient to repay the indebtedness under the Loans in full.

15. As the Receiver failed to satisfy the conditions set forth in Section 4 of the Forbearance Agreement and the proposed sale constitutes a new default under the Shoppes Loan Agreement, Ardent has the right to immediately foreclose on the Shoppes Property.

### **III. The Proposed Sale is Not in the Best Interests of the Receivership Estate or its Creditors**

16. As a fiduciary, the Receiver is obligated to act in the best interests of the Receivership Estate and its creditors. Contrary to the Receiver's contention that the proposed sale

is in the best interests of the Estate and its creditors, the sale would likely yield little to no value to the Estate and increase the Estate's burden under the Marketplace Loan.

17. First, as discussed above, the net proceeds of the proposed sale are not projected to satisfy the Estate's obligations to Ardent. With a first-priority lien on the Shoppes Property, Ardent would be entitled to all of the proceeds of the sale, and nothing would remain for other creditors.

18. Second, the Shoppes Property is the Estate's primary source of capital to service the Loans as there are currently no operations at or revenue generated by the Marketplace Property. Therefore, in the event the Receiver was authorized to consummate the proposed sale, interest on the Marketplace Loan would continue to accrue, further burdening the Estate, and, without adequate means by which to service the Marketplace Loan, it would likely go into default.

19. Finally, paragraph 11 of the Sale Motion provides that upon build out, the Marketplace Property will have about 35,000 square feet of retail space. As the Marketplace Property is adjacent to the Shoppes Property in the same shopping center, a packaged sale of the two properties could yield proceeds that are more than sufficient to satisfy the obligations under the Loans, resulting in net proceeds available for distribution to Estate creditors.

20. Given Ardent's lien and the net proceeds projected to be insufficient to satisfy the Estate's obligations to Ardent, the current proposed sale of the Shoppes Property, by itself, will not likely yield value to the Estate.

WHEREFORE, for the reasons set forth above, Ardent respectfully requests that the Court deny the Sale Motion and grant such other relief as deemed appropriate.

Dated: January 28, 2019.

Respectfully submitted,

GREENBERG TRAURIG, LLP

A handwritten signature in cursive script, appearing to read "Jeff Lippa", written in black ink over a horizontal line.

Jeffrey M. Lippa, # 36835

*Attorneys for AFF II Denver, LLC*



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 28th day of January 2019, a true and correct copy of *AFF II Denver, LLC's Objection to Receiver's Motion for Order Authorizing Sale of Happy Canyon Shoppes* was filed and copies were served via U.S. Mail, postage prepaid, upon the following:

<p>Matthew J. Bouillon Robert W. Finke Sueanna P. Johnson Office of the Attorney General Colorado Department of Law Ralph L. Carr Judicial Building 1300 Broadway, 10th Floor Denver, CO 80203</p> <p><i>Attorneys for Plaintiff Chris Myklebust, Securities Commissioner for the State of Colorado</i></p>	<p>Rachel A. Sternlieb Michael T. Gilbert Patrick D. Vellone Allen Vellone Wolf Helfrich &amp; Factor P.C. 1600 Stout Street, Suite 1100 Denver, CO 80202</p> <p><i>Attorneys for Receiver</i></p>
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Jeffrey M. Lippa

*In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*