

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: February 4, 2019 11:46 AM FILING ID: 1AE4C7693FD71 CASE NUMBER: 2018CV33011
Plaintiff: Chris Mykelbust, Securities Commissioner for the State of Colorado v. Defendant: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com	Case Number: 2018CV33011 Division/Courtroom: 424
RECEIVER’S REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SALE OF HAPPY CANYON SHOPPES	

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities (collectively, “Dragul and the GDA Entities”), submits this reply in

support of his Motion for Order Authorizing Sale of Happy Canyon Shoppes (“Sale Motion”); filed January 16, 2019).

I. The Court should authorize an auction for the Shoppes.

1. Three objections have been filed to the Sale Motion: (1) BPI, Inc. filed an objection on January 21, 2019; (2) Greeley Asset Funding, LLC filed on January 25th; and (3) AFF II, Denver, LLC (“Ardent”) filed on January 28th.¹ Naturally, each objector seeks to advance its own interest. On the other hand, the Receiver seeks to protect all interested parties and creditors. The Receiver is not in a position, and does not perceive his duties to be, to continue to operate Dragul’s business of developing and holding commercial real estate properties. Instead, the Receiver intends to liquidate the assets of the Estate and to use funds from that process to pay Dragul’s creditors. The Estate needs cash to fund that effort and believes selling the Shoppes is a step toward that end.

2. Time is of the essence here. Dragul and now the Receiver manages 8 retail shopping mall properties in which an Israeli investment firm, Hagshama, is directly or indirectly, the majority owner. One of those properties is the Happy Canyon Box in which Hagshama owns an 83.71% interest. Lenders on two of the Hagshama properties – Prospect Square and Hickory Corners – have commenced foreclosures. The Receiver has negotiated with the lenders on those properties to

¹ The Receiver was not aware of Ardent’s Objection until January 31, 2019, when Greeley sent a copy to the Receiver’s counsel.

stave off foreclosure, but the forbearance period on Hickory is at an end, and the Receiver has until February 14th to submit a proposed sale of Prospect Square to the Court for approval or abandon the Estate's interest in the property. The Receiver has also been negotiating with other parties to purchase the Hagshama properties and the pending Sale Motion is integral to the Receiver's decision-making process with respect to other proposed transactions.

3. The Receiver agrees with both Greeley and Ardent that selling the Box and the Shoppes together is the best solution here and is likely to yield the best return to the Estate. Hagshama has however informed the Receiver that Hagshama will object to any sale of the Box, which makes a combined transaction more problematic. To date, the Receiver has not received an acceptable offer on the Box. Approving the Shoppes auction and sale as proposed herein will hopefully generate an offer for the Box acceptable to the Receiver and Hagshama and lead to the best result for the Estate.

4. **BPI's Objection and Proposed Auction Process.** BPI's Objection is straightforward. It wants to buy the Shoppes for \$24 million, \$375,000 more than the Alberta offer that is the subject of the Sale Motion and on similar terms. After receiving BPI's Objection, the Receiver received a third offer to buy the Shoppes for \$24.1 million from Gart Properties, LLC, on virtually the same terms as the Alberta PSA but with the Inspection Period during which Gart could terminate the agreement for any reason shortened from 30 to 20 days.

5. To achieve the maximum sales price for the Estate, the Receiver proposes to conduct a closed auction on February 13, 2019, among Alberta, BPI, and Gart, and any other qualified bidder that submits a signed LOI to the Receiver by February 6, 2019, and an earnest money deposit by February 8, 2019, pursuant to the Auction Procedures submitted as **Exhibit 1**. After the auction, the Receiver will submit the proposed contracts from both the winning and the backup bidder to the Court for approval. This will moot BPI's Objection as to fair market value and in the Receiver's opinion result in the highest and best offer for the Shoppes. The Receiver anticipates that the bidders at the auction may also be interested in submitting offers for the Box which may result in a resolution acceptable to all parties and yield the maximum return to the Estate.

6. **Greeley's Objection.** Greeley's Objection is more complicated and raises issues the Receiver fronted in the Sale Motion. As set forth in Greeley's Objection, Ardent partially financed the Shoppes Entities' purchase of the Shoppes Property with a \$19.5 million loan secured by a first deed of trust on the Property. Greeley lent DBHC, the sole member of the Shoppes Entities an additional \$2.75 million to purchase the Shoppes.² Dragul is the sole member of DBHC. Greeley's loans

² In addition, on July 27, 2018, DBHC signed an additional promissory note for \$1,375,000 payable to Greeley as "Additional Interest" for Greeley's \$2.75 million mezzanine loan. Although \$1.375 million note calls for a fixed payment of 50% of the original loan amount, in its Objection Greeley characterizes it as an "equity kicker." Greeley Objection ¶ 4.

are secured only by Dragul's membership interest in DBHC, not by the Shoppes Property.

7. After Greeley made its \$2.75 mezzanine loan, Dragul took out an additional \$8.9 million loan from Ardent to buy the adjacent Box property. Ardent and Dragul then agreed to amend the \$19.5 million deed of trust on the Shoppes to include the Box loan amount. So now both the Shoppes and the Box are encumbered by a deed of trust in favor of Ardent for up to \$28.4 million. *See* Greeley Objection ¶¶ 9-10.

8. The Ardent Forbearance Agreement submitted to the Court on December 6, 2018, states that as of September 15, 2018, Ardent was owed \$18,684,402.57 on the Shoppes loan, and \$4,085,461.25 on the Box loan,³ a total of \$22,769,864.82, "plus lender's fees, expenses, and other charges and costs of Lender as permitted under its Loan documents."⁴ In its Objection, Ardent now claims to be owed \$25,619,175.65 – \$2,849,310.83 more than itemized in the Forbearance Agreement. Ardent has not provided any backup, itemization, or explanation as to how its debt has increased by more than \$2.8 million from four-and-a-half months ago, during which time interest on its loans has been paid from a reserve account and is now being paid from the Shoppes rents.

³ The Box is just a shell. Ardent's Box loan financed both the acquisition and proposed construction costs; not all of the construction financing has been advanced.

⁴ Forbearance Agreement, Schedule 3 (attached to the Receiver's Motion to Approve Forbearance Agreement with AFF II Denver, LLC; filed December 6, 2018).

9. The gist of Greeley's Objection is that if the Shoppes is sold and Ardent's \$25 million lien paid at closing, all net sales proceeds will go to Ardent and Greeley will be out of the money. Greeley essentially asks the Court to order the Receiver to marshal assets of the Estate for Greeley's benefit to ensure Greeley gets paid. To that end, Greeley argues the Ardent cross-collateralization violated the terms of the Shoppes Entities' operating agreements (which Ardent had copies of when Dragul agreed to the cross-collateralization), constituted a fraudulent transfer, and therefore should be avoided.⁵ So, Greeley argues that before selling the Shoppes the Receiver should first sue Ardent under Colorado's Uniform Transfer Act to avoid the \$8.9 cross-collateralization lien on the Shoppes to protect Greeley. Greeley Objection ¶¶ 25-29. Greeley is a creditor harmed by the cross-collateralization; there is nothing to prevent it from suing Ardent under CUFTA to avoid the lien. And it could do so unencumbered by defenses Ardent might assert specifically against the Receiver such as *in pari delicto*.⁶ The Receiver cannot wait for the results of such litigation given

⁵ Attached as **Exhibit 2** is Ardent's Consent to Greeley's Mezzanine Loan. Although the Consent is not dated, the Receiver understands Ardent signed it before the Shoppes acquisition was consummated on July 27, 2017. Ardent thus knew about the Greeley mezzanine loan and the prohibitions in the Shoppes Entities' operating agreements when it cross-collateralized the Box and the Shoppes properties some 10 days later.

⁶ In its Objection, Ardent argues that because this Court's order approving the Forbearance Agreement reaffirmed the validity of the Ardent lien, "the opportunity to challenge the legality of the cross-collateralization" has passed. Ardent Objection ¶ 10. When the Receiver entered into the Forbearance Agreement, he was not aware of the Greeley loan or that Greeley was a creditor. Ardent failed to mention Greeley during the six weeks the Forbearance Agreement was being negotiated.

the impending deadlines under the Ardent Forbearance Agreement, which requires the Receiver to close a sale of both the Shoppes and Box by August 30, 2019.

10. Alternatively, Greeley suggests the Court: (1) avoid Ardent's cross-collateralization lien; (2) postpone the Shoppes sale and require the Receiver to sell the Shoppes and the Box together; (3) or allocate the sales proceeds among Greeley and Ardent "in proportion to their respective contributions to the overall debt." Greeley Objection ¶ 34(a-d).

11. **Ardent's objection.** Ardent's Objection is more straightforward. Ardent argues the Court should deny the Sale Motion because the net sale proceeds will not be sufficient to pay it the \$25.6 million it claims it is owed. But if the Ardent debt is instead close to the \$22.7 million represented in the Forbearance Agreement, the currently projected net sales proceeds would likely be enough to pay off its loan (\$24.1 million – commission of \$301,250 = \$23,798,750). Ardent argues this and hiring a broker to list the Property without its consent violate the terms of its Forbearance Agreement with the Receiver,⁷ which allows it to immediately foreclose both the Shoppes and Box without further Court order. Ardent Objection ¶¶ 11-15. But Ardent hasn't indicated it wants to foreclose. Under the Forbearance Agreement, as of January 1, 2019, Ardent began to sweep rents from the Shoppes to apply to its

⁷ The Receiver informed Ardent he was hiring Marcus & Millichap to market the Shoppes and Box properties, and Ardent agreed. Also, on November 15, 2018, the Receiver filed his Notice Concerning Employment of Marcus & Millichap providing notice that Marcus & Millichap had indeed been hired to sell the Shoppes. Ardent did not object.

loan at 15% interest, while agreeing to release funds sufficient to pay the operating expenses of the Property and a management fee to the Estate. Apparently Ardent wants the Receiver to hold onto the Shoppes until a joint sale with the Box can be consummated to ensure it too is paid in full.

II. Proposed resolution

12. The Receiver asks the Court to approve the proposed auction process, which the Receiver believes will result in the Estate obtaining the best price and terms for the Shoppes. The Receiver also believes this is likely to result in the Estate obtaining an acceptable offer for the Box.

13. Unless the Box is sold simultaneously with the Shoppes, the Receiver proposes that the net proceeds from the Shoppes sale be paid first to satisfy the balance of Ardent's Shoppes loan, and the remainder be held in a segregated account until the cross-collateralization issue is resolved or the Box sold, and Ardent's Box loan paid. This will allow the sales process to unfold and the Receiver to make informed decisions about the remaining Hagshama properties.

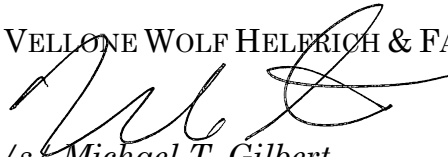
14. The Receiver, Greeley, and Ardent have been discussing a proposed solution to the issues raised in the Sale Motion and the Greeley and Ardent Objections. The Receiver is hopeful these negotiations will result in an agreement resolving the present issues. In the meantime, the Receiver asks the Court to approve the auction process as soon as possible so that the auction can occur on February 13, 2019. After the auction, the Receiver will submit final sales contracts to

the Court for approval along with a proposed order addressing the distribution of the Shoppes sales proceeds.

WHEREFORE, the Receiver asks the Court to approve the proposed auction process for the Shoppes Property and to enter such other relief as the Court deems appropriate under the circumstances.

Dated: February 4, 2019.

ALLEN VELLONE WOLF HELERICH & FACTOR P.C.



By: /s/ Michael T. Gilbert

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I certify that on February 4, 2019, I served a true and correct copy of the foregoing **RECEIVER'S REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SALE OF HAPPY CANYON SHOPPES** via CCE or by email to the following:

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By: /s/ Rachel A. Sternlieb

Allen Vellone Wolf Helfrich & Factor P.C.

AUCTION PROCEDURES

The auction shall take place at 10:00 a.m. (MST) on February 13, 2019, at the offices of Allen Vellone Wolf Helfrich & Factor P.C., 600 17th Street, Suite 1100 South, Denver, Colorado 80202, or such later date and time as selected by the Receiver. The auction shall be conducted in a timely fashion according to the following procedures.

A. The Receiver shall conduct the auction.

The Receiver and his representatives shall direct and preside over the auction. The auction shall be closed and limited to Alberta Development Partners, LLC (“Alberta”), BPI, Inc. (“BPI”), and Gart Properties, LLC (“Gart”), each of which has submitted a qualified purchase offer for the Happy Canyon Shoppes Property (the “Property”) to the Receiver. At the Receiver’s discretion, the auction may be opened to any additional bidder who submits a qualified purchase offer to the Receiver on or before February 6, 2019. Individually each is a “Bidder,” collectively the “Bidders.” Any Bidder wishing to participate in the auction, shall tender its proposed earnest money deposit to the Receiver on or before February 8, 2019.

The starting bid at the auction shall be Gart’s \$24.1 million bid as set forth in Gart’s previous offer to the Receiver and as embodied in the Purchase and Sale Agreement Gart tendered to the Receiver on or about January 23, 2019 (the “PSA”). All incremental bids thereafter must be Overbids and shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all other Bidders.

B. Terms of overbids.

“**Overbid**” means any cash bid made at the auction that complies with the following conditions.

1. *Minimum overbid increment.* Any Overbid shall be in cash increments of at least \$100,000.00 (the “Overbid Increment”).
2. *Acceptance of contract terms.* By submitting an Overbid, each bidder agrees to be bound and to subsequently execute a Purchase and Sale Agreement that is no less favorable to the Receivership Estate than the terms in the PSA, a copy of which shall be provided to each bidder on or before February 6, 2019.
3. *Bidding order.* Bidding shall begin with Alberta, followed by BPI, and finally by Gart. Bidders shall have the time determined by the Receiver in his discretion to submit bids. Bidding shall continue in the same order until the highest bid is received, which shall be accepted by the Receiver so long as it is on terms that are in the Receiver’s reasonable business judgment no less favorable to the Receivership Estate than the PSA.

3. *Overbid alterations.* Each Overbid must contain the Overbid Increment, but may contain alterations, modifications, additions, or deletions of any terms of the PSA that are no less favorable to the Receivership Estate than any prior Overbid, as determined in the Receiver's sole reasonable business judgment.

C. Consideration of Overbids.

The Receiver reserves the right, in its reasonable business judgment to adjourn the auction one or more times to, among other things (i) facilitate discussions between the Receiver and the Bidders, (ii) allow Bidders to consider how they wish to proceed, and (iii) provide Bidders the opportunity to provide the Receiver with such additional evidence as the Receiver, in its reasonable business judgment may require, that the Bidder has sufficient internal resources or has received sufficient non-contingent funding commitments to consummate the proposed transaction at the prevailing Overbid amount.

D. Closing the auction.

1. The auction shall continue until there is only one bid that the Receiver determines, in his reasonable business judgment to be the highest or otherwise best bid for the Property. This shall be declared the "Successful Bid," and such Bidder the "Successful Bidder" at which point the auction will be closed. The auction shall not close unless and until all Bidders have been given a reasonable opportunity to submit an Overbid to the then prevailing highest bid. Such acceptance by the Receiver of the Successful Bid is conditioned upon approval by the Court of the Successful Bid.
2. Nothing in these bid procedures shall prevent the Receiver from exercising his fiduciary duties under applicable law.
3. The Receiver shall not consider any bids or Overbids submitted after the conclusion of the auction without further order of the Receivership Court, and any such bids or Overbids shall be deemed untimely absent further Court order.
4. As soon as reasonably practicable after closing the auction, the Receiver shall cause the sale contract for the Successful Bid and Backup Bid (defined below) to be filed with the Court.

E. No Collusion; Good-Faith *Bona Fide* Offer.

Each Bidder shall be required to (1) disclose at the auction any agreement it has or is contemplating with any other Bidder with respect to the auction or the Property, (2) confirm it has not engaged in any collusion with respect to the Sale or

bidding designed to control the price, and (ii) confirm its Bid is a good-faith *bona fide* offer and that it intends to consummate the proposed transaction if selected as the Successful Bidder.

F. Backup Bidder.

1. Notwithstanding anything in these bid procedures to the contrary, the Bidder with the next-highest or otherwise second-best bid at the auction, as determined by the Receiver in his reasonable business judgment (the “Backup Bid”), shall be required to serve as a backup bidder (the “Backup Bidder”), and each Bidder shall agree and be deemed to agree to be the Backup Bidder if so designated by the Receiver.
2. The identity of the Backup Bidder and the amount and material terms of the bid the Backup Bidder shall be announced by the Receiver, at the conclusion of the auction at the same time the Receiver announces the identity of the Successful Bidder. The Backup Bidder shall be required to keep its final Overbid open and irrevocable until the closing of the transaction with the Successful Bidder. The Backup Bidder’s deposit as provided for in the terms agreed to by the Backup Bidder shall be held by the Receiver until the closing of the transaction with the Successful Bidder.
3. If the Successful Bidder fails to consummate the transaction, the Receiver may select the Backup Bidder as the Successful Bidder, and such Backup Bidder shall be deemed a Successful Bidder for all purposes. The Receiver will be authorized, but not required, to consummate all transactions contemplated by the Bid of such Backup Bidder without further order of the Court or notice to any party. In such case, the defaulting Successful Bidder’s Deposit shall be forfeited to the Receiver, and the Receiver specifically reserves the right to seek all available remedies against the defaulting Successful Bidder, including with respect to specific performance.

G. Reservation of rights

The Receiver reserves his rights to modify these Bid Procedures in his reasonable business judgment in any manner that will best promote the goals of the bidding process, or impose, at or prior to the auction, additional customary terms and conditions on the sale of the Property, including, without limitation: (a) extending the deadlines set forth in these Bid Procedures; (b) adjourning the auction at the auction and/or adjourning the Sale Hearing (as defined below) in open court without further notice; (c) adding procedural rules that are reasonably necessary or advisable under the circumstances for conducting the auction; (d) canceling the auction; and (e) rejecting any or all Bids.

H. Consent to jurisdiction.

All Bidders at the auction shall be deemed to have consented to the jurisdiction of the Receivership Court and waived any right to a jury trial in connection with any disputes relating to the auction, the construction and enforcement of these bid procedures, and/or the bid documents, as applicable.

CONSENT TO MEZZANINE LOAN

DATE FILED: February 4, 2019 11:46 AM
FILING ID: 1AE4C7693FD71
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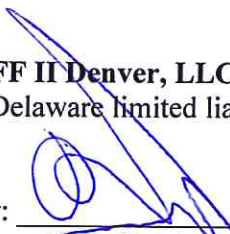
AND NOTICE AGREEMENT

AFF II Denver, LLC, a Delaware limited liability company (“**Senior Lender**”) is making a loan in the original principal amount of \$19,500,000 to HC Shoppes 18 A, LLC, a Delaware limited liability company and HC Shoppes 18 B, LLC, a Delaware limited liability company (jointly, severally and collectively, the “**Borrower**”) (the “**Senior Loan**”). Simultaneously therewith, Greeley Asset Funding, LLC, a Delaware limited liability company (“**Mezzanine Lender**”) is making a loan to Borrower in the principal amount of \$2,750,000 (“**Mezzanine Loan**”). Senior Lender hereby consents to the Mezzanine Loan.

Each of Senior Lender and Mezzanine Lender shall endeavor to provide notice to the other, at their respective address set forth below or at such other address provided by such party to the other from time to time, following an Event of Default (as defined in the loan documents evidencing each of the Senior Loan and Mezzanine Loan) that is continuing; provided, however, that neither party will be under any legal obligation to do so.

Dated: July __, 2018.

AFF II Denver, LLC,
a Delaware limited liability company

By: 
Name: Dror Bezalet
Title: Authorized Signatory

Address for notices:
2100 Powers Ferry Road SE
Suite 350
Atlanta, GA 30339

Greeley Asset Funding, LLC,
a Delaware limited liability company

By: _____
Name:
Title:

Address for notices:
Greeley Asset Funding, LLC
c/o Stacy L. Sokol, Esq.
1875 Century Park East, Suite 600
Los Angeles, CA 90067

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: February 4, 2019 11:46 AM FILING ID: 1AE4C7693FD71 CASE NUMBER: 2018CV33011
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	▲ COURT USE ONLY ▲
Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com	Case Number: 2018CV33011 Division/Courtroom: 424
ORDER APPROVING HAPPY CANYON SHOPPES AUCTION PROCEDURES	

THIS MATTER is before the Court on the Receiver’s Motion for Order Authorizing Sale of Happy Canyon Shoppes (the “Sale Motion”) filed by Harvey Sender, the duly-appointed Receiver (the “Receiver”), the objections filed by BPI, Inc., Greeley Asset Funding, LLC (“Greeley”), and AFF II, Denver, LLC (“Ardent”) (collectively, the “Objections”), as well as the Receiver’s Reply in Support of Motion for Order Authorizing Sale of Happy Canyon Shoppes (the “Reply”). The Court has

reviewed the Sale Motion, the Objections, the Reply, and the file, and being otherwise advised:

THE COURT HEREBY FINDS THAT: On August 30, 2018, the Court entered a Stipulated Order Appointing Receiver (the “Receivership Order”) appointing Harvey Sender of Sender & Smiley, LLC as receiver for Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities, their respective properties, assets, and interests, including Happy Canon Shoppes and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Happy Canyon Shoppes (the “Property”) is property of the Estate the Receiver is authorized to sell under the Receivership Order.

THE COURT FURTHER FINDS THAT sale of the Property is in the best interest of the Estate and its creditors, and accordingly the

COURT HEREBY ORDERS that the Receiver is authorized to conduct the auction of the Shoppes Property proposed in the Reply in accordance with the Auction Procedures attached to the Reply as **Exhibit 1**, and thereafter shall submit the proposed sale contracts entered into by the Successful and Backup Bidders to the Court for final approval, along with a proposed order that addresses the proposed distribution of net sales proceeds.

The Auction shall take place at 10:00 a.m. MST on February 13, 2019, at the offices of Allen Vellone Wolf Helfrich & Factor P.C., 1600 Stout Street, Suite 1100, Denver, Colorado 80202 in the manner set forth in the Auction Procedures.

Dated: February __, 2019.

BY THE COURT:

District Court Judge