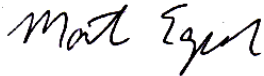


DISTRICT COURT, DENVER COUNTY, COLORADO	
Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	
<b>Plaintiff(s)</b> GERALD ROME SECURITIES COM FOR THE ST OF CO et al. v. <b>Defendant(s)</b> GARY DRAGUL et al.	DATE FILED: February 12, 2019 10:18 AM CASE NUMBER: 2018CV33011  <p style="text-align: center;"><b>△ COURT USE ONLY △</b></p> Case Number: 2018CV33011 Division: 424      Courtroom:
<b>Order: Receiver's Motion for Order Authorizing Sale of Happy Canyon Shoppes (w/attach)</b>	

The motion/proposed order attached hereto: GRANTED.

The Court has considered the objections filed in response to the motion but, for the reasons stated in the reply, overrules them.

Issue Date: 2/12/2019



MARTIN FOSTER EGELHOFF  
District Court Judge

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO  Denver District Court  1437 Bannock St.  Denver, CO 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>Plaintiff: Chris Mykelbust, Securities Commissioner for the State of Colorado</b></p> <p>v.</p> <p><b>Defendant: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC</b></p>	
<p>Attorneys for Receiver:  Patrick D. Vellone, #15284  Michael T. Gilbert, #15009  Rachel A. Sternlieb, #51404  ALLEN VELLONE WOLF HELFRICH &amp; 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</p>	<p>Case Number: 2018CV33011  Division/Courtroom: 424</p>
<p style="text-align: center;"><b>RECEIVER’S MOTION FOR ORDER AUTHORIZING SALE OF HAPPY CANYON SHOPPES</b></p>	

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”), asks the Court to enter an order approving the sale of real property known as the Happy Canyon Shoppes to

Alberta Development Partners, LLC for \$23,625,000 pursuant to the Purchase and Sale Agreement submitted as **Exhibit 1** with this motion (the “Alberta PSA”).

**I. The Receivership Order gives the Receiver the authority to sell the Shoppes.**

1. On August 15, 2018, Gerald Rome, Securities Commissioner for the State of Colorado (the “Commissioner”), filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities.

2. On August 29, 2018, the Commissioner, Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver, consenting to the appointment of a receiver over Dragul and the GDA Entities pursuant to COLO. REV. STAT. § 11-51-602(1), C.R.C.P. 66.

3. 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 and the GDA Entities, and their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Receivership Order at 2, ¶ 5.

4. The Receivership Order grants the Receiver the authority to sell or otherwise dispose of Estate property and obtain Court approval for any sale for greater than \$10,000 (Receivership Order at 12, ¶ 13(t)).

5. Pursuant to paragraph 10 of the Receivership Order, Court approval of any motion filed by the Receiver shall be given as a matter of course within 10 days after the motion is filed and served. As reflected by the certificate of service below,

this Motion is being served on all parties who have appeared in this case and on all currently known creditors of the Estate.

**II. The Shoppes and the adjacent Happy Canyon Box were acquired in 2018 shortly before the Receiver was appointed.**

6. The Happy Canyon Shoppes is a retail shopping center located at E. Hampden Avenue and Happy Canyon Road in Denver, Colorado. Its address is 4820, 4992, and 5011-5058 E. Hampden Avenue, Denver, CO 80222 (the “Shoppes” or the “Property”). The Shoppes is owned by HC Shoppes 18 A, LLC and HC Shoppes 18 B, LLC, both Delaware limited liability companies (the “Shoppes Entities”). The sole member of the Shoppes Entities is DBHC Holdings, LLC (“DBHC”), another Delaware limited liability company whose sole member is Gary J. Dragul. The Shoppes is managed by GDA Real Estate Management, Inc., whose president and sole-owner is Gary J. Dragul. The Shoppes is therefore property of the Estate the Receiver is authorized to sell.

7. The Shoppes has approximately 70,000 square feet of retail space and is over 90% leased. The Shoppes Entities acquired the Shoppes on July 27, 2018, for \$21,300,000. Acquisition funding was obtained from AFF II, Denver, LLC (“Ardent”), which provided a \$19,500,000 loan to the Shoppes Entities, and from Greeley Asset Funding, LLC which provided a \$2,750,000 mezzanine loan to DBHC. Both loans were made July 27, 2018. Ardent’s loan was secured by a first deed of trust on the Shoppes.

8. The Greeley \$2.75 million loan is interest only at 10% per year and is scheduled to mature on July 31, 2019. An interest reserve of \$143,611.11 for this note was set aside at closing to pay Greeley interest through February 1, 2019. Starting on March 1, 2019, DBHC is obligated to make monthly interest payments of \$22,916.67 to Greeley on the \$2.75 million note.

9. 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. Together, this represents a 60% interest rate on the Greeley loan. The \$2.75 million note and the \$1.375 million note are referred to as the “Greeley Loan.” Greeley claims its Loan is properly secured by Gary Dragul’s interest in DHBC but not by the Shoppes Property itself.

10. The Shoppes is adjacent to another Estate property known as Happy Canyon Marketplace a/k/a the Happy Canyon Box, or the “Box.” Ardent financed the acquisition of the Box with a \$8.9 million loan made August 7, 2018, about ten days after the Shoppes Entities acquired the Shoppes, three weeks before the Receiver was appointed. About \$4.8 million of the \$8.9 million was reserved to fund construction. This August 7, 2018, Box loan was secured by a first deed of trust on the Box and cross-collateralized with a first deed of trust on the Shoppes.

11. The Box will have about 35,000 of retail space upon build out. When the Receiver was appointed, construction had been halted on the Box and due to the appointment of the Receiver, Ardent had declared both of its loans to be in default,

and it stopped financing construction on the Box. On December 31, 2018, the Court approved a Forbearance Agreement between the Estate and Ardent that provides for continued construction funding for the Box. As set forth in the Forbearance Agreement, as of October 1, 2018, Ardent was owed approximately \$4.067 million on its Box loan and \$18.684 million on its Shoppes loan.

**III. Sale of the Shoppes is in the best interests of the Estate and its creditors.**

12. There exists little Colorado authority with respect to factors the Court should consider regarding whether to approve a Receiver's proposed sale. In analogous bankruptcy contexts, approval of a sale of property pursuant to Section 363 of the Bankruptcy Code is warranted where there exists a "sound business reason." *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). "In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a 'business judgment test.'" *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999).

13. Factors bearing on whether a sound business reason or purpose supports a proposed sale of estate property include (where applicable): (1) the proportionate value of the asset to the estate as a whole; (2) the amount of elapsed time since the filing; (3) the likelihood that a plan of reorganization will be proposed and confirmed in the near future; (4) the effect of the proposed disposition on the

future plans of reorganization; (5) the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property; (6) which of the alternatives of use, sale or lease the proposal envisions; and (7) most importantly perhaps, whether the asset is increasing or decreasing in value. *In re Medical Software Solutions*, 286 B.R. 431, 441 (Bankr. D. Utah 2002) (quoting *Lionel*, 722 F.2d at 1071) (emphasis omitted). Bankruptcy courts are granted considerable discretion in evaluating proposed sales. *Montgomery Ward*, 242 B.R. at 153; see *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 168 (B.A.P. 9th Cir. 2001) (recognizing that “[r]ulings on motions to sell property of the estate other than in the ordinary course of business pursuant to section 363 are reviewed for abuse of discretion”).

14. In the Receiver’s judgment, the proposed sale of the Shoppes is in the best interest of the Estate and its creditors. The Receiver has hired the nationally-recognized firm of Marcus & Millichap to market the Property. Marcus & Millichap obtained several letters of intent from unrelated third-party buyers. The Receiver accepted the offer from Alberta Development Partners, LLC for \$23,625,000. Alberta is well-funded, well-known, and has extensive experience in the Colorado market, and the proposed Alberta PSA contemplates closing within approximately 60 days after it is executed. Although subsequent to accepting Alberta’s offer the Receiver received an amended offer from another potential purchaser for \$125,000 more than the Alberta offer, that competing offer in the Receiver’s judgment contains conditions that make it less attractive to the Estate than the Alberta offer.

15. Presently, the Ardent loans are in default and the Estate lacks cash flow to service them. Under the Ardent Forbearance Agreement, as of December 1, 2019, Ardent obtained the right to collect the rents from Shoppes tenants which will further diminish the Estate's cash position. The Forbearance Agreement also requires the Receiver to enter into a binding agreement to sell the Shoppes and the Box by April 15, 2019, and to sell both properties by August 30, 2019 (or refinance the properties and payoff the entire balance of the Ardent loans). Unless one of those conditions occurs, under the Forbearance Agreement Ardent is entitled to foreclose on both properties without further orders from this Court.

16. It is presently uncertain what if any cash the Estate will receive from the proposed sale of the Shoppes. A commission of 1.25% (\$295,312.50) is due at closing, which will reduce the sales proceeds to \$23,329,687.50. The total Ardent lien against the Property is \$22.7 million. Estimated closing costs and potential other encumbrances that may need to be paid at closing are currently unknown, but the Receiver expects that only about \$500,000 in proceeds would be available for distribution if Ardent's entire lien must be paid at closing.

17. Greeley, however, has asserted that the Shoppes Entities were prohibited under their operating agreements from encumbering the Shoppes with Ardent's \$8.9 million loan on the Box. The outstanding amount of the Box loan is about \$4.067 million. If Ardent's cross collateralization is invalid, or if Ardent agrees to release its \$4+ million Box lien on the Shoppes, there is likely to be more than \$4



million in net sales proceeds from the proposed sale. Buyer anticipates contacting Ardent to discuss Ardent releasing its cross-collateralization of the Shoppes. The Receiver is also actively marketing the Box property, the sale of which would generate additional proceeds for the Estate and resolve the Ardent cross collateralization issue.

18. Under the Shoppes Entities' operating agreements, equity from the proposed sale would flow to DHBC. Thus, pursuant to its Lien, and subject to the release of Ardent's cross-collateralization lien on the Shoppes with the Box loan, Greeley may be entitled to receive at least \$2.75 million, which, if Ardent's cross collateralization is avoided or released, may leave more than \$1.25 million in net proceeds. The Receiver intends to challenge Greeley's right to collect an additional \$1.375 million in interest because it violates Colorado's usury statute and would unjustly enrich Greeley.

19. Regardless of the net proceeds the Estate may receive from the proposed sale, absent a timely sale the Shoppes property will be lost to foreclosure and the Estate may receive nothing. In addition, approval of the Alberta PSA may promote a sale offer for the Box, which would result in proceeds being paid to the Estate. For these reasons, the Receiver believes the proposed Shoppes sale is in the best interest of the Estate.

WHEREFORE, the Receiver asks the Court to grant this Motion, approve the proposed sale of the Shoppes Property in accordance with the terms of the Alberta

PSA, and authorize the Receiver to take any and all further actions necessary to consummate the sale.

Dated: January 16, 2019.

ALLEN VELLONE WOLF HELFRICH & FACTOR  
P.C.

By: /s/ Michael T. Gilbert

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ATTORNEYS FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

I certify that on January 16, 2019, I served a true and correct copy of the foregoing **RECEIVER'S MOTION FOR ORDER AUTHORIZING SALE OF HAPPY CANYON SHOPPES** via CCE to the following:

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Sueanna P. Johnson  
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A copy of the Motion will be sent out by electronic mail and/or U.S. Mail first-class, postage-prepaid on all currently known creditors of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.

By: /s/ Savanna B. Chavez  
Allen Vellone Wolf Helfrich & Factor P.C.