

DISTRICT COURT
DENVER, COLORADO

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CASE NUMBER: 2018CV33011

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiff: Chris Myklebust, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC</p>	
<p>Attorneys for AFF II Denver, LLC:</p> <p>Jeffrey M. Lippa, #36835 GREENBERG TRAUIG, LLP 1200 17th Street, Suite 2400 Denver, Colorado 80202 Phone Number: (303) 572-6500 E-mail: lippaj@gtlaw.com</p> <p>and</p> <p>Michael J. Baum Deborah W. Mintz Nancy A. Peterman GREENBERG TRAUIG, LLP 1200 17th Street, Suite 2400 Denver, Colorado 80202 Phone Number: (312) 456-8400 E-mail: baumm@gtlaw.com E-mail: petermann@gtlaw.com E-mail: mintzd@gtlaw.com</p>	<p>Case Number: 2018CV33011</p> <p>Division/Courtroom: 424</p>
<p>AFF II DENVER, LLC'S LIMITED OBJECTION TO RECEIVER'S MOTION FOR ORDER AUTHORIZING SALE OF ESTATE'S INTEREST IN CERTAIN HAGSHAMA PROJECTS</p>	

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 Estate’s Interest in Hagshama Projects* (the “Sale Motion”),¹ and respectfully states as follows:

PRELIMINARY STATEMENT

1. Pursuant to the Sale Motion, the Receiver (as defined below) seeks to sell the Estate’s equity interests in the Hagshama Projects (as defined below), including any equity or membership interests in the managing entities or the entities owning the underlying real property.

2. Ardent files this Objection solely with respect to the Receiver’s desire to sell the Estate’s equity interests in the Marketplace Entities (as defined below). Ardent takes no position with respect to the Receiver’s desire to sell the Estate’s equity interests in the other seven (7) Hagshama Projects.

3. A sale of the Estate’s interest in the Marketplace Entities, without Ardent’s prior written consent, is an event of default under the Marketplace Loan and breach of the Forbearance Agreement. Ardent has not consented to this proposed sale. If this sale is approved and closes, Ardent would be entitled to immediately foreclose on the real property referred to as “Happy Canyon Box” (which is owned by the Marketplace Entities) and pursue claims against both Dragul and the Receiver.

4. In addition, by the terms of the Master Agreement (as defined below), the proposed sale is subject to Ardent’s release of its lien on the Happy Canyon Box. As of the filing of this

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

Objection, Odyssey has not contacted Ardent regarding the release of its lien on Happy Canyon Box. In addition, absent payment in full, Ardent does not intend to release such lien.

RELEVANT BACKGROUND

5. On or around August 7, 2018, the Lender made a loan in the original principal amount of \$8,900,000.00 (the “Marketplace Loan”)² to the entities that own Happy Canyon Box as tenants-in-common (collectively, the “Marketplace Entities”) to fund the acquisition and improvement of the Happy Canyon Box.³ The Marketplace Loan is secured by, among other things, a first-priority lien on Happy Canyon Box in favor of the Lender. In addition, Gary Dragul (“Dragul”) guaranteed the Marketplace Entities’ obligations under the Marketplace Loan.

6. On August 30, 2018, the Court appointed Harvey Sender as the receiver (“Receiver”) for Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and their respective properties and assets, including, but not limited to, interests and management rights in related businesses, such as the Marketplace Entities (collectively, the “Receivership Estate” or the “Estate”). (Receivership Order, ¶¶ 5, 9).

² Copies of the Marketplace Loan and related security documents are attached hereto as **Exhibits 1-4**. Shortly before entering into the Marketplace Loan, the Lender made a loan to affiliates of the Marketplace Entities in the original principal amount of \$19,500,000.00 (the “Shoppes Loan” and together with the Marketplace Loan, the “Loans”). The Shoppes Loan is secured by a first-priority lien on separate real property in Denver, Colorado commonly known as Happy Canyon Shoppes (“Happy Canyon Shoppes”). While Happy Canyon Shoppes is not one of the Hagshama Projects for which the Receiver is seeking to sell the Estate’s interest pursuant to the Sale Motion, the Shoppes Loan is cross-defaulted with the Marketplace Loan and Happy Canyon Shoppes is cross-collateralized with Happy Canyon Box.

³ A copy of the Tenancy-in-Common Agreement among the Marketplace Entities is attached hereto as **Exhibit 5**.

7. Ardent and the Receiver entered into a forbearance agreement (the “Forbearance Agreement”)⁴ memorializing the terms and conditions attendant to Ardent’s agreement to refrain from exercising certain rights and remedies in connection with, but not limited to, the Marketplace Loan for a limited period of time in response to the occurrence of certain defaults under the Marketplace Loan, including, but not limited to, the appointment of the Receiver.

8. On December 31, 2018, the Court entered an order approving “each and every term” of the Forbearance Agreement.

9. On February 14, 2019, the Receiver filed the Sale Motion, seeking to sell the Estate’s equity interest in eight (8) properties (each, a “Hagshama Project” and collectively, the “Hagshama Projects”) to Odyssey Acquisitions III, LLC (“Odyssey”) for \$1 million pursuant to the Master Agreement.

10. The equity interests in the Marketplace Entities (which own Happy Canyon Box) are subject to the Sale Motion. Under the Master Agreement, Odyssey will purchase the Estate’s interests in all or certain of the Hagshama Projects, including the Receivership Estate’s direct or indirect interests in the Marketplace Entities. (Master Agreement, ¶ 1).

OBJECTION

I. The Proposed Sale of the Estate’s Interest in the Marketplace Entities Is Prohibited Under the Marketplace Loan

11. Section 6.1 of the Marketplace Loan prohibits any sale, conveyance, assignment or grant of any interest in the Marketplace Entities, including any direct or indirect legal, beneficial, economic or other direct or indirect ownership interest in the Marketplace Entities on every tier or

⁴ A copy of the Forbearance Agreement is attached hereto as **Exhibit 6**.

level without Ardent's prior written consent. Ardent has not consented to the proposed sale of the Estate's interests in the Marketplace Entities; therefore, a sale to Odyssey would constitute an event of default under the Marketplace Loan.⁵

12. In addition, subject to the prior written consent of Ardent, Section 6.3 of the Marketplace Loan prohibits (i) any change in the day-to-day control and management of any of the Marketplace Entities and (ii) any change in the organizational documents of the Marketplace Entities or any such entity relating to such control and management. The proposed sale of the Estate's interest in the Marketplace Entities would undoubtedly give rise to a change in control of the Marketplace Entities and/or their organizational documents. As Ardent has not provided its consent, the proposed sale would result in a separate event of default under the Marketplace Loan.

13. The occurrence of new defaults under the Marketplace Loan constitute a Forbearance Termination Event (as defined in the Forbearance Agreement) and entitle Ardent to immediately enforce any and all rights or remedies under the Marketplace Loan or applicable law without a court order. (Forbearance Agreement, ¶¶ 5.2, 9.3). Therefore, Ardent reserves its rights under the Marketplace Loan and the Forbearance Agreement to, among other things, accelerate the Marketplace Loan without presentment, notice, or demand and to foreclose on the Happy Canyon Box upon the sale by the Receiver of the Estate's interest in the Marketplace Entities.

⁵ Regardless of whether the Sale Motion included or named a particular entity, Ardent nevertheless objects to any attempt by the Receiver to sell, transfer, assign, or otherwise convey any direct or indirect interest in any of the Marketplace Entities to Odyssey pursuant to the Sale Motion.

14. Moreover, as Dragul provided Ardent with a guaranty of the Marketplace Entities' obligations under the Marketplace Loan, Ardent would be entitled to pursue a claim against Dragul for all outstanding liabilities under the Marketplace Loan.

II. The Proposed Sale of the Estate's Interest in the Marketplace Entities is Subject to Ardent's Release of the Receivership Estate with Respect to its Liability under the Marketplace Loan

15. The Sale Motion provides that to the extent Odyssey acquires the Estate's interest in any of the Hagshama Projects, including, but not limited to the Marketplace Entities, Odyssey will acquire such interest subject to all debts associated with the relevant Hagshama Project, including all mortgages. (Sale Motion, ¶ 18).

16. Under the Master Agreement, Odyssey has 30 days from the date the Sale Motion is submitted to the Receivership Court for approval (the "Due Diligence Period") to conduct a review of the Hagshama Projects, their respective managing and investing entities, and any other entities related to the Hagshama Projects or the Receivership Estate. (Master Agreement, ¶ 4). Odyssey is authorized to discuss the Hagshama Projects with their respective lenders and investors and to enter into negotiations to restructure loans and indebtedness encumbering such Hagshama Projects. (Id.). The Due Diligence Period may be extended by the Receiver following receipt of a written request from Odyssey for good cause, including to obtain the approval of a lender and related releases. (Id.).

17. The Master Agreement is contingent on the Receivership Estate being released from liability for any loans, guarantees, encumbrances, or known claims on or against the Hagshama Projects or the underlying properties. (Master Agreement, ¶ 12). Pursuant to the Master Agreement, Odyssey is to negotiate with the lenders and any other necessary parties to

obtain the required releases and must complete such efforts within the Due Diligence Period, as it may be extended. (Id.). Should Odyssey fail to obtain such releases, the Master Agreement “will expire and will be void and with no effect.” (Id.).

18. As noted above, Ardent holds a valid, perfected, first-priority lien on and mortgage against Happy Canyon Box. Subject to being paid in full with respect to the Marketplace Loan, Ardent does not intend to release its lien on Happy Canyon Box or withdraw or release the Receivership Estate of its claims against the Receivership Estate and Dragul.

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

Dated: February 25, 2019.

Respectfully submitted,

GREENBERG TRAURIG, LLP

/s/ Jeffrey M. Lippa

Jeffrey M. Lippa, # 36835

Attorneys for AFF II Denver, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2019, a true and accurate copy of the foregoing **AFF II DENVER, LLC'S LIMITED OBJECTION TO RECEIVER'S MOTION FOR ORDER AUTHORIZING SALE OF ESTATE'S INTEREST IN CERTAIN HAGSHAMA PROJECTS** was filed with the Clerk of the Court via hand delivery and a copy was served via E-Mail on the following:

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*(Original on file at offices of Greenberg Traurig,
LLP, pursuant to C.R.C.P. 121, § 1-26)*