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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

▲ COURT USE ONLY ▲

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Case Number: 2018CV33011

Division/Courtroom: 424

**WELLS FARGO BANK'S OBJECTION TO RECEIVER'S SUPPLEMENTAL MOTION
FOR ORDER AUTHORIZING SALE OF ESTATE'S INTEREST IN HAGSHAMA
PROJECTS, FILED ON FEBRUARY 15, 2019.**

Wells Fargo Bank, National Association, as Trustee for the Benefit of the Registered Holders of UBS Commercial Mortgage Trust 2017-C2, Commercial Mortgage Pass-Through Certificates, Series 2017-C2 ("Wells Fargo" or "Lender"), acting by and through Midland Loan Services, a division of PNC Bank, N.A., in its capacity as special servicer ("Special Servicer"), by and through its attorneys, Dickinson Wright PLLC, hereby objects (the "Objection") to the

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Receiver's Motion for Order Authorizing Sale of Estate's Interest in Hagshama Projects (the "Sale Motion"),¹ and respectfully states as follows:²

I. RELEVANT BACKGROUND

A. The Loan Documents and Wells Fargo's Interest in the Delta Property (as defined below)

1. On May 26, 2017, Rialto Mortgage Finance, LLC ("Original Lender"), entered into a loan agreement with Delta 17 A, LLC, ("Borrower") (the "Loan Agreement" attached hereto as Exhibit A), under which a Promissory Note in the original principal amount of \$13,700,000.00 (the "Note" attached hereto as Exhibit B) was issued and payable to Original Lender.

2. The proceeds from the Loan Agreement and Note were used in connection with the commercial real property located at, and commonly known as, the Marketplace at Delta Township, 416-647 S. Marketplace Boulevard, Lansing, Michigan 48917 (the "Delta Property").

3. The Loan Agreement is secured, in part, by a mortgage on the Delta Property. (See "Mortgage" attached hereto as Exhibit C).

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

² Counsel for Lender attempted to file these objections electronically on February 25, 2019, at approximately 4:15 pm, MST. The E-filing system would not allow Counsel for Lender to E-file these objections or the Entry of Appearance. Counsel for Lender contacted the e-filing support, and attempted to contact the Court. E-filing support instructed counsel that the Court had to add Lender as a Party to enable e-filing. Counsel for Lender attempted, in good faith, to file these objections timely, but due to technological constraints was unable to do so until February 26, 2019. No Party has suffered any prejudice by the less than 24 hour delay in filing, and the Receiver was aware that objections of this nature were forthcoming. Lender asks that the Court accept these objections as being timely filed given that a technological constraint prevented their filing until now.

4. As further security for the repayment of the proceeds from the Loan Agreement and Note, Gary Dragul (“Dragul”) provided the Lender with a personal guaranty (“Guaranty” attached hereto as Exhibit D), signed May 26, 2017.³

5. The Loan Agreement, Note, Mortgage, CMA, EIA, Lockbox Agreement, and the Guaranty, including all other documents delivered in connection with Loan Agreement and the Delta Property, and as may be later amended, are collectively called the “Loan Documents.”

6. Following the execution of the Loan Documents, the Original Lender assigned the Note to Lender. Special Servicer is now acting on behalf of Lender.

B. The Delta Property

7. The Delta Property is a commercial open marketplace located in Lansing, Michigan consisting of approximately 519,681 square feet and includes approximately twenty-two different retail and consumer stores. In short, it is a substantial, open shopping mall.

8. GDA Management Services, LLC (“GDA Mgmt”), with the assistance of Mid-America Real Estate-Michigan, Inc. (“Leasing Agent”), was responsible for the rent, lease, operation, and management of the Delta Property pursuant to the Management Agreement dated May 2017, and continued to do so until August 2018.

9. However, beginning in August 2018, and continuing to present, Borrower, Dragul, and GDA Mgmt ceased to comply with the governing terms of the Loan Documents and, therefore, defaulted thereunder.

C. The Defaults under the Loan Documents

³ In addition to the Loan Agreement, Note and Mortgage, and as additional security for the loan, on May 26, 2017, Borrower also executed and delivered to Original Lender, a Cash Management Agreement (“CMA”), an Environmental Indemnity Agreement (“EIA”), and a Lockbox – Deposit Account Control Agreement (“Lockbox Agreement”).

10. Pursuant to the Loan Documents, Borrower was responsible for making monthly rent payments on the 6th day of each month in the amount of \$71,135.75 in addition to other costs and interest as further detailed in the Loan Documents.

11. Borrower, however, defaulted by failing to make timely and consistent payments for each month starting on August 6, 2018 and continuing through at least October 2018. As further discussed below, these monetary defaults are in the process of being resolved.

12. Thereafter, on August 15, 2018, Plaintiff filed a Complaint in this Court seeking relief against Defendants for violations of the Colorado Securities Act (the "Complaint") and for the appointment of a Receiver over Defendants' assets, which included, among other things, the Delta Property.

13. The Complaint and appointment of a Receiver alone are further defaults under the Loan Documents entitling Lender to all contractual, legal, and equitable remedies pursuant to the Loan Documents. (Ex. A Sec. 7.1 and 7.2).

14. In total, Borrower is currently in default under the Loan Documents as follows: (i) Borrower has failed to make timely payments due under the Note since August 2018 and continuing thereafter to the present, (ii) Borrower is in default under the terms and conditions of the CMA, specifically Borrower has failed to abide by Section 9 of the CMA, and (iii) Pursuant to Section VII of the Loan Agreement and under the terms and conditions of the Loan Documents, an existing default has occurred due to the filing of the Complaint and the entering of the Receivership Order (these continuing defaults are collectively referred to as the "Specified Defaults").

D. The Present Action

15. On August 30, 2018, Plaintiff filed, and the Court entered, the Receivership Order for purposes of appointing the Receiver to collect and manage Defendants' respective properties

and assets, and interests and management rights in related affiliated and subsidiary business, including, but not limited to, the Delta Property (the "Receivership Estate"). Following entry of the Order Appointing a Receiver, Harvey Sender of Sender & Smiley LLC ("Receiver"), took possession of the Receivership Estate.

16. On October 31, 2018, Lender, through counsel, notified Borrower and Dragul of the continuing defaults and further reminded both parties of Lender's remedies against them collectively and individually in the event of such material breaches of the Loan Documents.

17. In light of the Receivership, Lender, while reserving all rights to exercise its remedies under the Loan Documents, has been cooperatively working with the Receiver to protect its interest and security in the Delta Property and under the Loan Documents and otherwise resolve, albeit partially,⁴ Defendants' defaults under the Loan Documents.

18. Recently, however, on February 14, 2019, the Receiver filed the Sale Motion, seeking to sell the Receivership Estate's interest in all Hagshama Projects (including the Delta Property) to Odyssey for the collective price of one million dollars (\$1,000,000.00) (See Sale Motion ¶15).

19. A forced sale/transfer of Borrower's interest in the Delta Property, as the Receiver is currently requesting, is another default under the Loan Documents unless Lender has the opportunity to review and approve the sale in accordance with the terms of the Loan Documents.

20. Counsel for Lender has communicated the same to the Receiver and requested that the Sale Motion be postponed or modified to accommodate Lender so that it can conduct its due diligence of the proposed sale as required and set forth in the Loan Documents.

⁴ Lender and Receiver have partially resolved the monetary defaults under the Loan Documents through release of funds collected under the CMA and held in the LockBox. However, the ongoing Receivership is still a continuing material default under the Loan Documents.

21. Until Lender is permitted such contractual rights to review and approve the proposed sale—or any transfer for that matter—in accordance with the Loan Documents, Lender does not consent to the sale of the Receivership Estate’s interest in the Delta Property.

22. The sale, as currently arranged, does not afford Lender the protections contractually bargained for in the Loan Documents, including the recognition by such assignee or transferee of the request to be a replacement guarantor, as well as the bargained for Guaranty and the consent to transfer provisions.

23. Further, the sale is not in the best interest of the Estate’s Creditors as it risks severely hindering the protections provided for in their respective loan agreements. In fact, the Receiver’s proposed course of action in the Sale Motion and enclosed proposed Master Agreement runs directly contrary to the interests of the Creditors such as Lender.

24. Particularly, the Receiver’s request does not provide any assurances that the Loan Documents and Lender’s rights thereunder will be protected, honored, or fully complied with.

25. Additionally, there remains a question as to whether this Court, and its appointed Receiver, have jurisdiction sufficient to order the sale of property located outside of Colorado.

26. Therefore, for these reasons, and as further explained below, Lender objects to the Sale Motion and respectfully requests that the Court deny the same. To the extent that the Receiver wishes to continue with a potential transfer to Odyssey, Lender respectfully request that the Receiver can only do so in accordance with the Loan Documents and as approved by Lender.

II. OBJECTION

A. **The Sale Motion fails to Honor the Process and Procedure Provided in the Loan Documents Regarding any Transfer of Interest in the Delta Property**

27. As provided for in the Loan Agreement, Borrower was obligated to manage and maintain the Delta Property. (Ex. A Sec. 4.13). However, following the filing of the Complaint

and pursuant the Receivership Order, that obligation became that of the Receiver pursuant to a Court Order and without the consent of the Lender. (Receivership Order ¶13(f)).

28. Lender and the Receiver are currently working to resolve the issues associated with Borrower's failure to make timely payments due under the Note in addition to other issues raised in this Objection.

29. In the midst of those discussions, however, the Receiver has requested that this Court approve a sale of the Receivership Estate's interest in the Delta Property, including the management of a shopping center valued at twenty million dollars (\$20,000,000.00) and located across the country in Michigan. In doing so, the Receiver has given Lender little to no opportunity to conduct due diligence or review the potential purchaser, certainly not to the extent provided in the Loan Documents, and only a ten-day window to object the sale at all. (Receivership Order ¶34).

30. The Loan Agreement provides, "*Without the prior written consent of Lender, which shall not be unreasonably withheld, neither the Borrower nor any Restricted Party shall...sell, transfer, convey, assign, mortgage, pledge, encumber, alienate, grant a Lien on, grant any option with respect to or grant any other interest in the Property, any part thereof or any interest therein...directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise...*" (Ex. A, Sec. 4.1.12).

31. As part of providing its consent to sell, Lender is entitled to the following protections, including, but not limited to:

- a. A 45-day notice period;
- b. That no Event of Default (as set forth in Sec. 7.1 of the Loan Agreement) shall have occurred and remain outstanding;
- c. Certain restrictions upon the Transferee, including, but not limited to, the requirement that it is a Single Purpose Entity; that the Organizational

Documents of the Transferee or any managing member or general partner thereof are reasonably satisfactory to Lender; that neither the Transferee nor its Sponsor shall have been a party to any Bankruptcy Action; that neither the Transferee nor its sponsor shall have defaulted on any loan obligations in a manner not reasonably acceptable to Lender; that Transferee and its Sponsor shall have an aggregate net worth and liquidity reasonably satisfactory to Lender; and that Transferee and its Sponsor (together with its proposed property manager) shall be experienced owners and operators of properties similar in size, class, use, operation, and value as the Property;

- d. Transferee shall have assumed all obligations of Borrower under the Loan Documents in a form and substance reasonably satisfactory to Lender; and
- e. One or more Transferee Sponsors reasonably acceptable to Lender shall have assumed all obligations of Guarantor under the Guaranty and the Environmental Indemnity or executed replacement agreements in form and substance reasonably satisfactory to Lender. (Ex. A. Sec. 4.1.12(d)).

32. While the Lender is under absolutely no obligation to consent to a sale of the Delta Property (as evidenced by the provisions outlined above), it is aware that a potential transfer may be beneficial. Despite the Specified Defaults, the occurrence of which expressly prevents any transfer of the Estate's interest in the Delta Property, Lender is not opposed to investigating the potential benefits of a transfer to a third party. However, in doing so, the Receiver must allow Lender to exercise the diligence procedures outlined in the Loan Documents in order to protect its interests and not to be forced into a blanket transfer without conformity to the Loan Documents. (See Ex A. Sec. 4.1.12(d)).

33. As proposed in the Sale Motion, "for any acquired Hagshama Project, Buyer will take subject to all debts associated with that Project, including all mortgages, mechanics' liens, unpaid taxes, etc." (Sale Motion ¶18).

34. The Sale Motion effectively reduces any protections provided by the Loan Documents into one assertion that "Buyer will take subject to all debts." In short, the Receiver wishes to hand over the Estate's interest in the Delta Property to the Buyer and expects Lender to fend for itself as it relates to insuring that Buyer honors the covenants contained in the Loan

Documents. This vague representation does not qualify as an assumption of Borrower's obligations that is, in form and substance, reasonably satisfactory to Lender and is certainly not in conformity with the Loan Documents.

35. Lender is concerned with the fact that this sale is being conducted by a Court approved motion with a ten-day objection window. Rather, the Receiver should negotiate the sale of the respective property interests in a manner that allows for Creditors, such as the Lender, to go through the process for such transfers contained in their respective Loan Agreements.

36. Therefore, Lender objects to the transfer of interests in the Delta Property as outlined in the Sale Motion.

B. The Sale Motion makes no Mention of Odyssey Assuming Dragul's Personal Guaranty

37. Dragul's Guaranty serves to provide increased security regarding Lender's interest in the Loan Documents. (Ex. C).

38. Further, as part of the protections provided within the Loan Agreement, any transfer of Borrower's interest in the Delta Property is conditioned upon the Transferee designating a Sponsor, satisfactory to Lender, which will assume Dragul's obligations under the Guaranty, or enter into a similar agreement. (Ex. A Sec. 4.1.12(d)(xvi)).

39. As drafted, the Sale Motion makes no mention of Buyer making a similar Guaranty; rather, it merely states that they "will take subject to all debts associated with that Project." (Sale Motion ¶18).

40. Not only would this remove any personal security Lender has in the Loan Agreement, it places their interest in the Delta Property entirely at the mercy of Odyssey, a party with which they have little or no background information. (Sale Motion n. 2).

41. As mentioned above, Lender is not unreasonably withholding its consent to the sale of Borrower's interest; however, Lender must be afforded protection in the manner provided for in the Loan Documents, which remain valid and enforceable agreements.

42. This requires that Buyer designate a Sponsor, suitable to Lender, which will assume Dragul's obligations under the Guaranty, or enter into a similarly satisfactory agreement, before Lender accepts any transfer of the Receivership's interest in the Delta Property.

43. Therefore, Lender objects to the transfer of interests in the Delta Property as outlined in the Sale Motion.

C. Lender has No Knowledge of Odyssey or its Ability to Properly Manage and Protect Lender's Interest in the Delta Property

44. As evidenced by the conditions outlined in the Loan Agreement, of primary concern to Lender is the ability and experience of the Buyer. Particularly in managing and operating properties similar to the Delta Property. (See Ex. A Sec. 4.1.12(d)(ix)).

45. Lender has no prior business dealings with Buyer and beyond the information provided within the Sale Motion, no knowledge of their business practices or ability to properly manage the Delta Property.

46. Without an adequate opportunity to meet with the Buyer and perform proper due diligence, Lender is left very uncertain as to whether the Delta Property will be properly managed and protected in compliance with all obligations under the Loan Documents.

47. This is particularly true because Lender is unsure whether Buyer has any experience managing and operating properties at all, let alone those of similar size and value as the Delta Property. Further, Lender's presence in Michigan is largely unknown and raises questions as to its ability to cope with issues specific to that region.

48. Once again, Lender wishes to pursue an outcome that benefits all Creditors and the Receivership Estate as a whole, however, it must be afforded time to follow the diligence procedures outlined in the Loan Agreement. (Ex A Sec. 4.1.12(d)). This includes the assurance that the Delta Property will be properly managed by an entity with experience managing similar properties.

49. Therefore, Lender objects to the transfer of interests in the Delta Property as outlined in the Sale Motion.

D. The Sale is not in the Best Interests of the Receivership Estate or its Creditors

50. As a fiduciary, the Receiver represents the interests of the Receivership Estate and its Creditors.

51. The Sale Motion, however, completely disregards the interests of each Creditor forced to accept this deal without having the opportunity of ensuring the Buyer will honor their respective Loan Documents.

52. The Receiver claims that the sale will result in a \$6,495,086 reduction in claims against the estate following its execution. (Sale Motion ¶ 19).

53. Further, Buyer and the Receivership Estate have both insulated themselves against any claims by Creditors resulting from the Sale Motion. (See ¶¶12-13 of "Master Agreement" attached as Exhibit A to the Sale Motion). The Receiver, however, has provided no protection for the Creditors for whose interests it supposedly represents.

54. Stated plainly, the Receiver represents Lender's interest in the Delta Property up until and throughout the execution of any proposed sale of the Hagshama Projects.

55. By entering into the sale without providing Lender any assurance that the Loan Documents will be honored in their entirety, the Receiver is acting directly contrary to the interests of the Creditor it is supposed to represent.

56. Regardless of the benefits that may result from a potential sale, the Receiver still represents the interests of the Creditors to the Receivership Estate and cannot disregard those interests throughout the sale process.

57. Further reiterating, Lender is not unreasonably withholding its consent to a sale of the Estate's interest in the Delta Property. Despite the fact that the Loan Documents expressly prohibit the sale of that interest due to the Specified Defaults, Lender is willing to work with the Receiver to reach an outcome that is beneficial to all parties. However, Lender must be given time to exercise the diligence provisions outlined in the Loan Agreement. (Ex. A Section 4.1.12(d)).

58. Therefore, Lender objects to the transfer of interests in the Delta Property as outlined in the Sale Motion.

E. This Court Lacks Jurisdiction to Order a Sale Regarding a Property Interest Located in Michigan and implicating a Contract Negotiated in New York and Containing a New York Forum Selection Clause

59. It is a century-old rule, affirmed by the United States Supreme Court, that the powers of an equity receiver appointed by a state court only extend so far as that court's jurisdiction. *Booth v. Clark*, 58 U.S. 322, 334 (1854) (Receiver appointed by New York state court only has power over property within New York); See also *First Nat. Bank v. Robinson*, 107 F.2d 50, 54 (1939) ("the power of an equity receiver is coextensive only with that of the territorial jurisdiction appointing him." "Such a receiver has no extraterritorial jurisdiction or power of official action.").

60. As admitted in the Complaint and Motion for Sale, the Delta Property is located in Lansing, Michigan. Further, the Loan Documents contain a forum selection clause designating New York as the proper forum for any dispute stemming from the agreement. (Ex. A Section 9.4)

61. Accordingly, Lender reserves the right to further raise the objection that the Court lacks jurisdiction over the Receivership Estate's interest in the Delta Property under C.R.S. § 13-1-124, and the Loan Documents due to the forum selection clause contained therein.

62. Lender has been reluctant to raise this challenge because its ongoing negotiations with the Receiver and its belief that the two parties can resolve the Specified Defaults involved with the Loan Documents in a manner that serves the interests of both parties. However, one cannot expect Lender to sit by idly while an asset valued at twenty million dollars (\$20,000,000.00) is at risk of falling into jeopardy. Accordingly, while Lender is willing to work cooperatively with the Receiver in the orderly and timely transfer of the Delta Property if necessary, Lender must expressly raise the objection regarding jurisdiction to preserve such objections.

63. However, for sake of this Objection, Lender notes that the sale of the Receivership Estate's interest in the Delta Property may still be possible, however, Lender must be given the opportunity to exercise the protections outlined in this Objection.

III. CONCLUSION

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

Dated: February 26, 2019

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Samuel L. Lofland

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CERTIFICATE OF SERVICE

I certify that on February 26, 2019, I served a true and correct copy of the foregoing **WELLS FARGO BANK'S OBJECTION TO RECEIVER'S SUPPLEMENT MOTION FOR ORDER AUTHORIZING SALE OF ESTATE'S INTEREST IN HAGSHAMA PROJECTS FILED ON FEBRUARY 15, 2019** via CCE and/or electronic mail to the following:

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