

<p>DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street, Room 256 Denver, CO 80202 Telephone: 720-865-8301</p> <hr/> <p>Plaintiff: GERALD ROME SECURITIES COMM. FOR THE STATE OF COLORADO,</p> <p>vs.</p> <p>Defendant: GARY DRAGUL, et al.,</p> <hr/> <p><i>Attorneys for Secured Creditor:</i> Holly R. Shilliday, Attorney Reg. #24423 McCarthy & Holthus, LLP 7700 E. Arapahoe Road, Suite 230 Centennial, CO 80112 Phone: (877) 369-6122, Ext. 1903 Fax: (866) 894-7369 Email: hshilliday@mccarthyholthus.com</p>	<p>2019 FEB 27 PM 3:47 DATE FILED: February 27, 2019 CASE NUMBER: 2018CV33011</p> <hr/> <p>COURT USE ONLY</p> <hr/> <p>Case Number: 2018CV33011 Division : 424</p>
<p style="text-align: center;">SECURED CREDITORS' MOTION TO PROHIBIT AND/OR LIMIT THE RECEIVER'S USE OF CASH COLLATERAL</p>	

Secured Creditor Victoria Capital Trust, formerly known as Toorak Repo Seller I Trust (“VCT”), and Normandy Capital Trust (NCT, collectively with VCT, “Secured Creditors”), by and through their attorneys of record, McCarthy & Holthus LLP, hereby moves the Court for an order prohibiting the Receiver from using Secured Creditors’ cash collateral or, alternatively, limiting the use of cash collateral.

1. Counsel for Secured Creditors met and conferred with Michael Gilbert, the attorney for receiver Harvey Sender (“Receiver”) to discuss the relief requested by Secured Creditors. Mr. Gilbert indicated the Receiver has not segregated the rental income from the

properties and lacks sufficient funds to make any payments to Secured Creditors. Therefore, the relief requested is opposed by the Receiver.

2. On December 31, 2018, Secured Creditors filed claims with the Receiver with respect to fifteen secured loans. Attached hereto as **Exhibit 1** is a Loan Summary showing general information regarding the loans. In each of the claims, Secured Creditors stated the following:

Pursuant to the Deed of Trust, Secured Creditor has a lien on leases and rents generated by the Property. Secured Creditor does not consent to the use of the rents by the receivership estate.

3. NCT is a secured creditor with respect to 41 South Fairway 17, LLC, and the real property located at 41 South Fairway, Beaver Creek, CO 81620. The loan matured October 1, 2018, and as of December 31, 2018, the total amount of \$1,829,320.39 was due and owing to NCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 2**.

4. VCT is a secured creditor with respect to the following entities and properties:
- a. 2176 South Ash 16, LLC and the property commonly known as 2176 South Ash St., Denver, CO 80222. The loan matured October 1, 2018, and as of December 31, 2018, the total amount of \$ 356,066.85 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 3**.
 - b. 2186 South Ash 16, LLC and the property commonly known as 2186 South Ash St., Denver, CO 80222. The loan matured October 1, 2018, and as of December 31, 2018, the total amount of \$ 314,641.30 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 4**.
 - c. 2175 South Bellaire 16, LLC and the property commonly known as 2175 South Bellaire St., Denver, CO 80222. The loan matured August 1, 2018, and as of December 31, 2018, the total amount of \$ 481,358.65 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 5**.

- d. 5455 Landmark Place 17, LLC and the property commonly known as 5455 Landmark Pl. #509, Greenwood Village, CO 80111. The loan matured November 1, 2018, and as of December 31, 2018, the total amount of \$ 585,548.25 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 6**.
- e. 2166 South Ash 17, LLC and the property commonly known as 2166 South Ash Street, Denver, CO 80222. The loan matured September 1, 2018, and as of December 31, 2018, the total amount of \$ 345,626.50 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 7**.
- f. 7517 East Davies 17, LLC and the property commonly known as 7517 E. Davies Pl., Centennial, CO 80112. The loan matured September 1, 2018, and as of December 31, 2018, the total amount of \$ 327,949.77 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 8**.
- g. 3593 South Hudson 17, LLC and the property commonly known as 3593 South Hudson Street, Denver, CO 80237-1044. As of December 31, 2018, the total amount of \$ 476,479.44 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 9**.
- h. 891 Fourteenth Street 17, LLC and the property commonly known as 891 14th Street #2417, Denver, CO 80202. The loan matured November 1, 2018, and as of December 31, 2018, the total amount of \$ 586,574.62 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 10**.
- i. 5788 South Lansing 17, LLC and the property commonly known as 5788 South Lansing Way, Englewood, CO 80111-4116. As of December 31, 2018, the total amount of \$ 410,849.79 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 11**.
- j. 1777 Larimer 17, LLC and the property commonly known as 1777 Larimer Street #703, Denver, CO. As of December 31, 2018, the total amount of \$ 402,168.85 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 12**.
- k. 1660 North LaSalle 16, LLC and the property commonly known as 1660 North LaSalle, Chicago, IL. The loan matured September 1, 2018, and as of December 31, 2018, the total amount of \$ 277,025.87 was due and owing to

VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 13**¹.

- l. 1002 Scottsdale East 6th 17, LLC and the property commonly known as 6937 E. 6th Street #1002, Scottsdale, AZ. The loan matured January 1, 2019, and as of December 31, 2018, the total amount of \$ 378,581.38 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 14**.
- m. 1004 Scottsdale East 6th 17, LLC and the property commonly known as 6937 E. 6th Street #1004, Scottsdale, AZ. The loan matured September 1, 2018, and as of December 31, 2018, the total amount of \$ 374,995.66 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 15**.
- n. 1005 Scottsdale East 6th 17, LLC and the property commonly known as 6937 E. 6th Street #1005, Scottsdale, AZ. The loan matured September 1, 2018, and as of December 31, 2018, the total amount of \$ 374,995.66 was due and owing to VCT. True and correct copies of the Deed of Trust and Assignment thereof are attached collectively hereto as **Exhibit 16**.

5. All of the loans referenced above are in default based upon the failure to make the monthly payments and/or the failure to pay the outstanding balance on the maturity date of the loans. Interest accrues at the default rate of 18% per annum until the loan is paid in full. Pursuant to the loan documents, the accrual of interest is based upon the unpaid balance and unpaid charges combined.

6. The deeds of trust described in paragraph 4 above provide the loans are cross-collateralized. With respect to the properties in Colorado, paragraph 19.(b) states, in part, the following:

19.(b). **Cross-collateralization; Lender's Options.** In addition to the Note, all liens, security interests, assignments . . .rights and remedies granted to the Lender in the Loan Documents shall secure all obligations, debts and liabilities, plus interest thereon, of the Borrower, Guarantor(s) and any Affiliate to the Lender, as well as Related Loans and claims by the Lender against the Borrower, Guarantor(s) or any Affiliate . . .

¹ With respect to the properties located in Arizona and Illinois (described in paragraphs 4(k) – (n)), the Receiver lacks *in rem* jurisdiction over these properties as they are not located in the State of Colorado. See *First Nat'l Bank v. Robinson*, 107 F.2d 50, 54 (10th Cir. 1939) (equity receiver has no extraterritorial jurisdiction outside of the jurisdiction where receiver was appointed).

19.4 Borrower or its affiliates shall have the right to sell or release any cross-collateralized property and repay all associated loans, liens and debts only upon Lender's approval, in its sole and absolute discretion, which shall not be unreasonably withheld.

7. According to the Receiver's Preliminary Report, the following properties may generate rental income.

- a. 2175 South Bellaire 16, LLC - \$1,600 per month/\$3,200 total;
- b. 2166 South Ash 17, LLC - \$1,800 per month/\$1,800 total;
- c. 2176 South Ash 16, LLC - \$1,750 per month/\$5,250 total;
- d. 2186 South Ash 16, LLC - \$1,500 per month/\$1,500 total;
- e. 7517 East Davies 17, LLC - \$2,080 per month/\$2,250 total; and
- f. 1777 Larimer 17, LLC - \$0.00 per month/\$0.00 total

8. Pursuant to the express terms of the Deeds of Trust, the borrowers "irrevocably" granted, transferred and assigned existing and future Rents (as defined therein) to the Secured Creditors to secure the full and timely performance by borrowers of the obligations and covenants in the deeds of trust [Deed of Trust, pps. 1-2] Rents is defined in Section 1.28 as "all rents, issues, revenues, income, proceeds, royalties, profits . . . to which Borrower or the record title owners of the Mortgaged Property may now or later be entitled from or which are derived from the Mortgaged Property." [Deed of Trust, Section 1.28]

9. Pursuant to Paragraph 8, Secured Creditors granted the borrower permission to collect Rents from the property subject to automatic revocation "on default by borrower in payment of any Indebtedness secured by the Deed of Trust." Section 8 further states the following:

Lender grants permission to Borrower to collect and retain the Rents of the Mortgaged Property as they become due and payable; however, such permission shall be automatically revoked on default by Borrower in payment of any

Indebtedness secured by this Deed of Trust or in the performance of any of the Obligations; and Lender shall immediately have all rights, powers and authority. . . Lender shall be entitled to all Rents as they become due and payable, including Rents then due and unpaid. During the continuance of an Event of Default, Borrower authorizes Lender to collect, sue for and compromise Rents and direct each tenant of the Mortgaged Property to pay all Rents to, or as directed by, Lender, and Borrower shall, upon Borrower's receipt of any Rents from any sources, pay the total amount of such receipts to Lender. Although the foregoing rights of Lender are self-effecting, at any time during the continuance of an Event of Default, Lender may make a demand for all Rents, and Lender may give, and Borrower hereby irrevocably authorizes Lender to give, notice to all tenants of the Mortgaged Property instructing them to pay all Rents to Lender.

10. Section 49.3 of the deeds of trust allow Secured Creditors to exercise remedies to enforce the terms of the Deed of Trust. In addition, pursuant to Section 50, Secured Creditors are entitled to the *ex parte* appointment of a receiver upon default.

11. Even though Secured Creditors are not named as defendants in this lawsuit, the orders entered by this Court appear to prohibit Secured Creditors from initiating foreclosures and taking other steps to enforce the terms of their loan documents outside of the receivership case.

12. Inasmuch as Secured Creditors' are automatically entitled to rents and income generated by the property upon default, Secured Creditors hereby request the Court to enter an order requiring the Receiver to segregate the rents received from the properties, and apply such rents in the following order: (1) payment of property taxes on the applicable property; (2) payment of insurance premiums on the applicable property; (3) payment of property maintenance and management expenses on the applicable property pursuant to a budget approved by Secured Creditors; and (4) application to amounts due under the applicable note as determined by Secured Creditors.

13. Pursuant to Colorado law, an absolute assignment of rents is enforceable if the instrument demonstrates an intent to have the rents applied in reduction of the assignor's debt. Wynn v. Adams County Bank, 761 P.2d 234 (Colo. App. 1988).

14. It is not necessary for assignee to be in possession of the property before seeking to enforce an assignment of rents. Great-West Life Assurance Co. v. Raintree Inn, 837 P.2d 257, 271 (Colo. App. 1992). In Raintree, the non-borrower owner of a hotel challenged the secured creditor's right to income generated by the hotel on the grounds the secured creditor did not have a perfected interests in the income. The Court of Appeals disagreed based upon the self-executing language in the deed of trust. Raintree at 271. The Court stated, in part, the following:

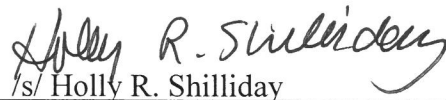
Here, by taking the property subject to the underlying debt, Raintree agreed to an absolute assignment of rents which did not require placing the collection of hotel revenues with the court's jurisdiction to protect plaintiff's claim. The assignment was intended to be presently effective and contained provisions to assure payment of the debt out of the rentals. Furthermore, it was not contingent on having a receiver appointed to perfect an interest in the rentals and expressly conditioned assignee's right to collect rentals upon the existence of default. Given these provisions, the intent to create an absolute assignment of rents was sufficiently clear.

Raintree at 272.

Wherefore, based on the foregoing, Secured Creditors respectfully request entry of the Order lodged concurrently with this Motion.

Dated this 25th day of February 2019

McCarthy & Holthus, LLP


/s/ Holly R. Shilliday

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 25, 2019 a copy of the foregoing document and exhibits were served via depositing a copy in the United States mail, postage prepaid, to the following:

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