

DISTRICT COURT, COUNTY OF DENVER,
STATE OF COLORADO
Court Address: 1437 Bannock Street, Room 256
Denver, CO 80202
Telephone: 720-865-8301

Plaintiff: CHRIS MYKLEBUST SECURITIES
COMM. FOR THE STATE OF COLORADO,

vs.

Defendant: GARY DRAGUL, et al.,

*Attorneys for Secured Creditors Victoria
Capital Trust, formerly known as Toorak Repo
Seller I Trust (“VCT”), and Patch of Land
Lending, LLC*

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

COURT USE ONLY

Case Number: 2018CV33011

Division : 424

**SECURED CREDITORS’ LIMITED OPPOSITION TO RECEIVER’S MOTION FOR
ORDER AUTHORIZING SALE OF ESTATE’S INTEREST IN ASH AND BELLAIRE
PROPERTIES**

Secured Creditors Victoria Capital Trust, formerly known as Toorak Repo Seller I Trust (“VCT”), and Patch of Land Lending, LLC (POL, collectively with VCT, “Secured Creditors”), by and through their attorneys of record, McCarthy & Holthus LLP, hereby file the following limited opposition to the motion for order authorizing sale of estate’s interest in the Ash and Bellaire properties (the “Motion”) filed by Receiver Harvey Sender (the “Receiver”), and in support thereof, state the following:

I. INTRODUCTION

Secured Creditors hold first deeds of trust on the six properties subject to the Receiver's Motion. No payments have been made on the loans since the Receiver was appointed, all of the loans are in default, and all of the loans have matured. Secured Creditors object to the sale of the six properties as currently structured because (i) the transaction is not feasible because the proceeds will be insufficient to pay the lienholders, (ii) the transaction's closing is highly uncertain as a result of its long (six month) closing period and material speculative closing conditions and minimal deposit and (iii) the claims of the Secured Creditors will be impaired if the transaction does not close and Secured Creditors need to begin a foreclosure process in six months.

The collateral value is eroding. The Receiver has indicated that two of the properties have been contaminated by methamphetamine. Three of the properties are boarded up and their condition will likely get worse after another Colorado winter. Given that the second lien is impaired even assuming that the proposed speculative transaction is completed, the only way for Secured Creditors to recover their long delayed claims is to complete a foreclosure which is currently prohibited by the receivership stay. Therefore Secured Creditors seek relief from the stay to commence foreclosure of their liens and request other relief as set forth herein. Assuming that the Receiver can demonstrate that the transaction is feasible and that Secured Creditors claims will be paid in full if it is completed, Secured Creditors are willing to agree to postpone the foreclosure sale until the earlier of February 9, 2020 or termination of the proposed contract in order to give the Receiver the opportunity to complete the sale.

II. BACKGROUND FACTS

The Receiver was appointed on August 30, 2018. On December 31, 2018, VCT submitted claims to the Receiver with respect to fifteen secured loans. POL filed claims for six secured loans on or about February 20, 2019. Relevant to the Motion, VCT is a secured creditor with respect to 2166 S. Ash, 2176 S. Ash, 2186 S. Ash and 2175 S. Bellaire in Denver Colorado (the “VCT Properties”) while POL’s liens encumber 2196 S. Ash and 2195 S. Bellaire, Denver, Colorado (the “POL Properties”). The VCT Properties and the POL Properties shall be referred to collectively as the “Properties.”

All of the loans referenced above are in default based upon the failure to make the monthly payments and the failure to pay the outstanding balance on the maturity date of the loans. Interest accrues at the default rate until the loans are paid in full. Pursuant to the loan documents, the accrual of interest is based upon the unpaid balance and unpaid charges combined. The Receiver has not made any payments or attempted in any other capacity to cure the outstanding defaults to Secured Creditor during the receivership case. For each of the loans, Gary Dragul, the guarantor, is the 100% owner of entities that own the Properties.

Based upon a title search and information provided by the Receiver in the Motion, the six Properties are also encumbered by a Second Deed of Trust in favor of WBF/CT Associates, LLC, securing a loan made to Gary Dragul, and a Statement of Mechanic’s Lien filed by an architectural company called Galloway & Company, Inc. (“Galloway”), in the amount of \$141,988.94, dated September 20, 2018. At this time, Galloway asserts that it has not been paid with regard to work commenced prior to recordation of Secured Creditors’ liens. Although Secured Creditors have not investigated this lien, if the Galloway assertions are true and if the

lien is otherwise valid, then the Galloway lien would rank senior to Secured Creditor's claims and would further impair Secured Creditor's position.

The contract entered into by the Receiver and Sognare Development LLC (the "Purchaser") is contingent upon a number of material conditions including court approval, inspections, the ability of the Purchaser to obtain financing in the amount of \$1,860,000, the right of the Purchaser to terminate based on "any title matter unsatisfactory to Buyer", a due diligence review of 14 different documents, any unsatisfactory zoning or use restrictions imposed by any governmental agency with jurisdiction over the property, satisfactory environmental site assessments, compliance with the Americans with Disabilities Act receipt of satisfactory estoppel statements and many others. Surprisingly, given that the Receiver is aware that certain of the Properties have been contaminated by methamphetamine, the contract also allows the Buyer to terminate based "Buyer's test results that indicate that the Property has been contaminated with methamphetamine, but has not been remediated to meet the standards established by the rules of the State Board of Health ...". Most of the conditions are subject to Buyer's "sole subjective discretion" and in the aggregate are so broad as to allow the Purchaser to easily terminate the contract with no penalty. The closing date is listed as 150 days following court approval of the contract and can be extended an additional 30 days. Thus, the closing date, assuming the court were to approve the contract in August, will be in February, 2020. The earnest money deposit of \$50,000 is minimal for a transaction of this size and represents approximately 1.6% of the sale price. Receiver estimates he will recover "between \$1,600 to \$600,000+ from a proposed sale, depending upon the outcome of the action to avoid the second deeds of trust and the validity of the mechanic's lien." However, Secured Creditors are unaware of any action being filed against the junior lien holders. The Receiver has filed two prior

motions to sell properties secured by Secured Creditor's deeds of trust. Each time, the contract was terminated before a sale could be consummated. For all of these reasons, the contract is essentially a six month option for Purchaser.

The Receiver states in its motion that "the Estate may receive between approximately \$1,600 to \$600,000+ from the proposed sale depending primarily on the outcome of the action to avoid the second deeds of trust and the validity of the mechanics lien." The Receiver does not provide any analysis in support of its assertion. Secured Creditor's detailed recovery analysis which is attached to this opposition contradicts this assertion and indicates a shortfall of approximately \$423,000 to the estate from the proposed sale based on completion at the end of the proposed six-month closing period. As this amount is insufficient to pay the lienholders, the transaction is not feasible. Secured Creditors have provided this analysis to the Receiver who has not responded despite repeated inquiries. A true and correct copy of the projections are attached hereto as Exhibit 1. Receiver refers to an "anticipated avoidance action" in its motion with regard to the \$500,000 second lien but it has not commenced such an action in over a year during the period of this receivership and, even if successful, the estate is still unlikely to recover any material proceeds after considering the likely substantial cost of Receiver's counsel given that the projected \$423,000 shortfall covers substantially all of the second lien debt. Thus, the sale cannot be completed unless the junior lien holders consent to a short sale and/or the liens are avoided.

III. LEGAL ARGUMENT

While Secured Creditors do not oppose the sale of the Properties by the Receiver, they want the Receiver to agree to pay, in full, the amounts owed to the Secured Creditors on the date of the closing. In *Hendrie v. Bolthoff Mfg. & Supply Co. v. Beck*, 72 Colo. 387 (Colo. 1922), the

Colorado Supreme Court held that the appointment of a receiver does not avoid contracts with secured creditors. In a later case, the Court confirmed a receiver holds property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities. *Tolland Co. v. First State Bank*, 95 Colo. 321 (Colo. 1934).

Secured Creditors take no position with respect to the validity of the second deed of trust and the mechanic's lien but is concerned the sale will not be completed unless the junior lien holders consent to a short sale and/or the liens are avoided. The process of avoiding the liens will further delay the sale as the Receiver has not yet started the process and is highly uncertain. Given the length of the contract, the contingent nature of the transaction, the reality that the proceeds are insufficient to pay the lienholders and the failure of the Receiver to make any payments to Secured Creditors, Secured Creditors request the Court to lift the injunction so that Secured Creditors may concurrently pursue their state law remedy of foreclosure. In order to facilitate the sale by the Receiver, Secured Creditors are willing to extend the sale date to the earliest of the contract termination date or mid-February 2020.

Secured Creditors estimate that the first liens on the Properties will be significantly impaired (meaning the debt owed to the Secured Creditors will exceed the fair market value) if the transaction does not proceed and Secured Creditor's foreclosure is further delayed. Secured Creditors should not have to sit back and wait 6-7 months while this latest sale is pursued by the Receiver.

IV. CONCLUSION

Based on the foregoing, Secured Creditors respectfully request the Court to authorize the sale on the condition that Secured Creditors' loans are paid in full (unless the Receiver and Secured Creditors otherwise agree), the injunction is terminated as to Secured Creditors and the

Properties so they may initiate non-judicial foreclosures, the Receiver agrees to use all rental proceeds from the Properties to pay tax, insurance and property maintenance expenses associated with the Properties. If Receiver can demonstrate that the transaction is feasible, then Secured Creditors will agree to not complete the foreclosures until the earliest of the termination of the contract or February 9, 2020. Otherwise Secured Creditors will seek to complete the foreclosures as soon as practicable.

Dated this 9th day of August 2019

McCarthy & Holthus, LLP

/s/ Holly R. Shilliday
Holly R. Shilliday, Attorney Reg. # 24423
7700 E. Arapahoe Road, Suite 230
Centennial, CO 80112
Phone: 303-952-6905
Fax: (866) 894-7369
Email: hshilliday@mccarthyholthus.com
Attorneys for Victoria Capital Trust, f/k/a
Toorak Repo Seller I Trust and Patch of
Land Lending, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 9, 2019 a copy of the foregoing document and exhibits were served via the court approved e-filing system and/or depositing a copy in the United States mail, postage prepaid, to the following:

Robert . W. Finke
Sueanna P.Johnson
Matthew J. Bouillon Mascarenas
CO ATTORNEY GENERAL
Ralph L. Carr Judicial Building
1300 Broadway, 8th Floor
Denver, CO 80203

Jeffrey A. Springer
SPRINGER AND STEINBERG, P.C.
1600 Broadway Street, Ste 1200
Denver, CO 80202

Patrick D. Vellone
Michael Thomas Gilbert
Rachel A. Sternlieb
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.
1600 Stout Street, Suite 1100
Denver, CO 80202

/s/ Holly R. Shilliday
MCCARTHY & HOLTHUS, LLP

Address	Purchase Price (\$3.1MM Allocated based on)			Closing Costs (2)	Property Taxes through February 5, 2020	Insurance through February 5, 2020 (4)	Mechanics Lien (3)	Estimated First Lien Payoff Amount As of August 9, 2019	Estimated First Lien Interest Through February 5, 2020	Total First Lien, Mechanics Lien and Closing Costs	2nd Lien Principal (3)	2nd Lien Interest Through February 5, 2019	Total Payoff Amount	Total Proceeds to Estate
	1st Lien Principal (1)	Toorak value	Broker Fees (2)											
2186 S Ash Street, Denver, CO 80222	280,000	474,914	14,247	7,124	1,648	2,120	23,665	354,941	27,790	431,534	83,333	4,167	519,034	(44,121)
2176 S Ash Street, Denver, CO 80222	320,000	519,635	15,589	7,795	4,318	2,120	23,665	401,172	31,761	486,420	83,333	4,167	573,920	(54,285)
2175 S Bellaire Street, Denver, CO 80222	440,000	563,301	16,899	8,450	1,716	2,120	23,665	543,048	39,980	635,877	83,333	4,167	723,377	(160,077)
2166 S Ash Street, Denver, CO 80222	320,000	506,575	15,197	7,599	1,983	2,120	23,665	390,617	29,075	470,256	83,333	4,167	557,756	(51,182)
Total Toorak / Victoria Capital Trust	1,360,000	2,064,424	61,933	30,966	9,665	8,480	94,659	1,689,778	128,606	2,024,088	333,333	16,667	2,374,088	(309,664)
2195 S Bellaire Street, Denver, CO 80222	420,000	593,642	17,809	8,905	2,220	2,120	23,665	501,219	37,800	593,737	83,333	4,167	681,237	(87,595)
2196 S Ash Street, Denver, CO 80222	260,000	441,934	13,258	6,629	1,658	2,120	23,665	309,742	23,400	380,472	83,333	4,167	467,972	(26,039)
Total Patch of Land	680,000	1,035,576	31,067	15,534	3,878	4,240	47,330	810,961	61,200	974,210	166,667	8,333	1,149,210	(113,634)
Total Toorak and Patch	2,040,000	3,100,000	93,000	46,500	13,543	12,720	141,989	2,500,739	189,806	2,998,298	500,000	25,000	3,523,298	(423,298)

(1) Figures per receiver motion, not reflecting additional interest accruals

(2) Broker fees and closing costs are off \$3.1m sale price and are consistent with other institutional portfolio sales

(3) 2nd and mechanics lien allocated evenly across each loan

(4) Estimated based on typical Toorak costs

Note: This spreadsheet is not a payoff letter. Actual payoff amounts are subject to audit and confirmation in a payoff letter. Projected amounts include interest only and not other lender expenses.

Exhibit 1