

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re Bear Creek Partners II, LLC, <i>et al.</i> ¹ Debtors.	Chapter 11 Case No. 16-02553 Jointly Administered Honorable John T. Gregg
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**FINAL ORDER (I) AUTHORIZING THE USE OF CASH COLLATERAL
AND (II) GRANTING ADEQUATE PROTECTION**

THIS MATTER having come before the Court upon the motion (the “Motion”²) of the above captioned debtors and debtors in possession (collectively the “Debtors” or “Debtors in Possession”) in the above-captioned chapter 11 cases (collectively, the “Cases”), pursuant to sections 105, 361, and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the “Bankruptcy Code”) and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) seeking entry of a final order (this “Final Order”) *inter alia*³:

- (i) authorizing the Debtors’ use of “cash collateral” (as defined in section 363(a) of the Bankruptcy Code, “Cash Collateral”) of the Prepetition Lender;
- (ii) providing adequate protection to the Prepetition Lender for any diminution in value of their respective interests in the Prepetition Collateral (as defined herein), including the Cash Collateral; and

¹ The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: (i) Bear Creek Partners II, LLC [9959] and (ii) Bear Creek Retail Partners II, LLC [8183]. The mailing address for the Debtors is 5000 Northwind Drive, Suite 120, East Lansing, MI 48823.

² Capitalized terms not defined herein have the meanings ascribed to them in the Motion.

³ The court has included a substantive changes to the proposed order submitted by the Debtors and the Prepetition Lender (as defined below) at Paragraph I and Paragraph 25.

(iii) scheduling a final hearing (the “Final Hearing”) to consider the relief requested in the Motion and the entry of a Final Order (as defined herein), and approving the form of notice with respect to the Final Hearing.

The Court having considered the Motion, the *Declaration of Scott Chappelle In Support of Chapter 11 Petitions First Day Pleadings* (“First Day Declaration,” Doc. No. 29), and the evidence submitted or adduced and the arguments of counsel made at the interim hearing held on May 26, 2016 (the “Interim Hearing”) and the Final Hearing held on September 20, 2016; and notice of the Interim Hearing and the Final Hearing having been provided in accordance with Bankruptcy Rules 2002, 4001(b) and (d), and 9014; and the Interim Hearing and the Final Hearing to consider the relief requested in the Motion having each been held and concluded; and the entry of the Interim Order (as defined below) by this Court on May 27, 2016; and the entry of the First Amendment to Interim Order (as defined below) by this Court on June 9, 2016; and the entry of the Second Amendment to Interim Order (as defined below) by this Court on June 21, 2016; and the entry of the Third Amendment to Interim Order (as defined below) by this Court on July 7, 2016; and all objections, if any, to the relief requested in the Motion having been withdrawn, resolved or overruled by the Court; and it appearing to the Court that granting the relief requested is necessary to avoid immediate and irreparable harm to the Debtors and their estates, and otherwise is fair and reasonable and in the best interests of the Debtors, their estates, and their creditors and equity holders and is essential for the continued operation of the Debtors’ businesses; and after due deliberation and consideration, and for good and sufficient cause appearing therefor;

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARING, THE FINAL HEARING AND THE FIRST DAY DECLARATION, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. *Petition Date:* On May 6, 2016 (the “Petition Date”), each of the Debtors filed a voluntary petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Michigan commencing these Cases.

B. *Debtors in Possession.* The Debtors are continuing in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Cases.

C. *Jurisdiction and Venue.* This Court has jurisdiction, pursuant to 28 U.S.C. §§ 157(b) and 1334, over these proceedings, and over the persons and property affected hereby. Consideration of the Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue for the Cases appears proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

D. *Statutory Committee.* As of the date hereof, the United States Trustee for the Western District of Michigan (the “U.S. Trustee”) has not appointed an official committee of unsecured creditors in these Cases pursuant to section 1102 of the Bankruptcy Code (a “Statutory Committee”).

E. *Necessity of Relief Requested.* The ability of the Debtors to maintain their properties requires the use of Cash Collateral, absent which immediate and irreparable harm will result to the Debtors, their estates and creditors, and the possibility for successful chapter 11 cases. In the absence of the use of Cash Collateral, the continued maintenance of the Debtors’ properties would not be possible and serious and irreparable harm to the Debtors, their estates and their creditors would occur. The Debtors do not have sufficient available sources of working capital and financing to maintain their properties without the use of Cash Collateral. The relief requested in the Motion is therefore necessary, essential, and appropriate for the management and

preservation of Debtors' properties. Entry of this Final Order is in the best interests of the Debtors and their estates.

F. *Interim Order.* At the Interim Hearing, the Debtors sought interim approval of the relief requested in the Motion for the proposed use of Cash Collateral arrangements on an interim basis pursuant to the interim order entered by this Court on May 27, 2016 (the "Interim Order"), as subsequently amended by the amendment to Interim Order entered by this Court on June 9, 2016 (the "First Amendment to Interim Order"), as further amended by the second amendment to Interim Order entered by this Court on June 21, 2016 (the "Second Amendment to Interim Order"), as further amended by the third amendment to Interim Order entered by this Court on July 7, 2016 (the "Third Amended Interim Order").

G. *Final Hearing.* At the Final Hearing, the Debtors sought final approval of the relief requested in the Motion for the proposed use of Cash Collateral arrangements on a final basis pursuant to this Final Order, notice of which Final Hearing was provided in accordance with the Interim Order.

H. *Notice.* Notice of the Final Hearing and the relief requested in the Motion has been provided by the Debtors, by United States mail, first-class postage prepaid, on: (a) the parties having been given notice of the Interim Hearing; (b) the 30 largest unsecured creditors and (c) any Statutory Committee appointed in these Cases, in accordance with the Interim Order.

I. *Testimony.* During the evidentiary hearing regarding the Motion on September 29, 2016, Scott Chappelle, the manager of the Debtors, testified that the Debtors had made several "mistakes" regarding transfers, accounting practices, and disclosures. Mr. Chappelle further testified that monthly operating reports filed with the court were inaccurate and remain unamended. In light of these issues, among others, the court finds it to be in the best interests of

the Debtors, their estates, the creditors, the equity holders and all other parties in interest to require additional reporting requirements and other relief so as to ensure transparency with respect to the Debtors' operations.

Based upon the foregoing findings and conclusions, the Motion, the First Day Declaration and the record before the Court with respect to the Motion, including its bench opinion supplemented and incorporated herein, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED that:

1) Motion Granted. The Motion is granted to the extent provided for herein, and the use of Cash Collateral on a final basis is authorized, subject to the terms and conditions set forth in this Final Order.

2) Objections Overruled. All objections to the Motion to the extent not withdrawn or resolved are hereby overruled.

3) Authorization to Use Cash Collateral. Subject to the terms and conditions of this Order, the Debtors are authorized to use Cash Collateral as set forth herein for the period from the date of entry of this Order through the Termination Date (as defined below). Except as otherwise expressly provided herein, Cash Collateral may be solely used (a) in the ordinary course of business for working capital and general property maintenance purposes and (b) for the payment of expenses incurred in the ordinary course of business, in each case strictly in accordance with the terms and conditions of this Order and with the Budgets (as defined below), including but not limited to the amounts set forth therein for each line item identified in the Budget.

4) Budgets. Except as otherwise provided in this Order, Debtors may use Cash Collateral solely in accordance with the budgets (the "Budgets") annexed hereto.⁴ The Budgets

⁴ [Budgets should be revised to conform to requirements of Order.]

shall be cash flow budgets for each Debtor, sufficiently detailed for each line item so as to enable DOF IV REIT Holdings, LLC (the “Prepetition Lender”), the Office of the United States Trustee (the “UST”), and the Court to readily determine the type, nature, amount, and reasonableness of such expense or revenue item. Without limiting the foregoing, any general expense category (such as “Office Expense”) shall be broken down into subcategories, so as to enable Prepetition Lender, the Office of the United States Trustee, and the Court to readily determine the type, nature, amount and reasonableness of such expense or revenue item. In addition, each expense line item shall indicate whether such expense is an amount to be directly paid by the applicable Debtor or is an amount that will, subject to compliance with the terms and provisions of this Order, be reimbursed to Strathmore Development Company Michigan LLC (“Strathmore”).

5) Limitations on Certain Payments. Notwithstanding anything to the contrary set forth in any Budget, Debtors shall not use Cash Collateral to pay any of the foregoing: (a) fees and expenses of any professional retained by Debtors, to the extent that any objection to the retention of such professional or to the allowance of such fees and expenses (whether on an interim or final basis) is pending and has not been resolved either by agreement of the party or parties asserting such objection or by a final order of the Court; (b) any amount in respect of a claim incurred by such person prior to the Petition Date, other than adequate protection payments which may be ordered by the Court after notice and a hearing; or (c) any amounts to any Affiliate or Insider of Debtors (including, without limitation, Strathmore (except to the extent expressly permitted by this Order), Abbott Road Commons, L.L.C., Terra Holdings L.L.C. (“Terra”), Scott A. Chappelle and Charles W. Crouch. For purposes of clarity, the Debtors shall not reimburse Terra for any expenses or pay any management fee to Terra where payment of such fees and for

such expenses are subject to the terms of that certain management agreement between Strathmore and the Debtors.

6) Reimbursement of Strathmore for Expenses Incurred on Behalf of Debtors.

(a) To the extent provided for in the Budgets, Debtors may use Cash Collateral to reimburse Strathmore for actual, out of pocket expenses paid by Strathmore on behalf of Debtors, subject to compliance with the terms and conditions of this paragraph 6 and the other provisions of this Order. Notwithstanding the foregoing, Strathmore shall not be entitled to reimbursement for any amount for which Strathmore is not entitled to reimbursement under the applicable management agreement between Strathmore and the respective Debtor (i.e., Strathmore overhead). Any request for reimbursement (a "Reimbursement Request") by Strathmore shall include the following:

- (i) a schedule setting forth the amount, purpose and payee for each item to be reimbursed;
- (ii) a schedule comparing the aggregate amount of such items to the amounts budgeted for such items in the Budgets for the applicable period;
- (iii) cancelled checks or other proof of payment, actual invoices (in the case of vendors or contractors) and payroll records (in the case of employees) supporting each item to be reimbursed; and
- (iv) a sworn certification that such Reimbursement Request and the supporting documentation relating thereto is complete and accurate and in accordance with the Budgets and the terms and conditions of this Order and that such reimbursement is solely for expenses incurred on behalf of Debtors (and not on behalf of any other person or entity).

Each Reimbursement Request shall be served by email upon counsel for Prepetition Lender and for the UST. On or after the fifth business day following the service of such Reimbursement Request on counsel for Prepetition Lender and the UST, Debtors may use Cash Collateral to pay amounts requested in a Reimbursement Request to the extent that such Reimbursement Request

complies with the terms and conditions of this Order (including this paragraph) and to the extent that neither Prepetition Lender nor the UST have objected to the payment of any item or items set forth therein. To the extent any item is objected to by either the Prepetition Lender or the UST, Debtors shall not pay such item pending further agreement of Debtors and the objecting party or parties or order of the Court.

(b) Within two business days of the entry of this Final Order, Strathmore shall establish a segregated account for each of the Debtors, for use solely in connection with the applicable Debtor (the “Segregated Accounts”).

7) Reporting. As additional adequate protection in addition to Debtors’ monthly operating reports, Debtors shall also provide Prepetition Lender and UST with a written report, no later than the tenth (10th) business day of the following month, reporting actual expenditures and containing at least the following information:

- (a) Budget/scheduled income v. actual income;
- (b) Budget expenditures v. actual, by line item;
- (c) Actual expenditures are to be supported by actual invoices and check copies or other proof of payment;
- (d) DIP bank account(s) statements;
- (e) Segregated Accounts bank statements;
- (f) Accounts receivable and tenant delinquency reports; and
- (g) Aged accounts payable report.

The initial report shall also cover the period covered by the Interim Order. In addition to the foregoing, within fourteen (14) days of entry of this Order, Debtors shall provide a detailed reconciliation and substantiation (by means of bank statements or other acceptable documentation)

of the “starting cash” amounts for the Budget for each Debtor to the Prepetition Lender and the UST.

8) Additional Information. As additional adequate protection, upon the written request of either Prepetition Lender and/or the UST (which request may be made by email to Debtors’ counsel), Debtors shall promptly (but in no event more than five (5) business days later) provide such additional information as may be reasonably requested by such person. Without limiting the foregoing, Prepetition Lender and the UST shall have the right to audit (a) Debtors’ compliance with the Budgets and (b) any reimbursement paid by Debtors to Strathmore, pursuant to a Reimbursement Request or otherwise.

9) Taxes. Debtors shall timely deposit all post-petition taxes (whether federal, state or local) with the appropriate taxing authorities and timely file appropriate tax returns. Debtors shall timely pay all U.S. Trustee fees.

10) Insurance. Debtors shall maintain insurance with respect to all of the properties known as “Bear Creek Meadows Apartments” and “Bear Creek Crossings” (together, the “Properties”) for all the purposes and in accordance with the requirements of the Loan Documents. Prepetition Lender shall be named as an additional insured and Debtors shall furnish Prepetition Lender and the UST with proof of such insurance within five (5) business days after entry of this Order.

11) Adequate Protection Liens.

(a) *Adequate Protection Liens.* As adequate protection against any diminution in value, pursuant to sections 361 and 363(e) of the Bankruptcy Code, the Prepetition Lender is hereby granted additional and replacement continuing valid, binding, enforceable, non-avoidable, and automatically perfected postpetition security interests in and liens (the “Adequate Protection

Liens”) on any and all presently owned and hereafter acquired personal property, real property, and all other assets of the Debtors, together with any proceeds thereof (collectively, the “Collateral”) in and to the same extent, validity, and priority as they existed on the Petition Date on the Prepetition Collateral, including any of Debtors’ claims or causes of action arising under sections 502(d), 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code and any other avoidance or similar action under the Bankruptcy Code, and any recoveries thereunder (collectively, the “Avoidance Collateral”); provided however, that (a) Prepetition Lender’s Adequate Protection Liens on the Avoidance Collateral shall be subordinate to the prior payment in full of any allowed general unsecured, priority or administrative claims (other than a claim held by or of any Affiliate or Insider (as each such term is defined in section 101 of the Bankruptcy Code)); and (b) Prepetition Lender’s rights and liens remain subject to (i) any right of Debtors to assert any claims and causes of action as set forth in United States District Court, Western District of Michigan, Southern Division, Case Nos. 1:14-cv-309 and 1:14-cv-1336, and (ii) paragraph 11(b), below; provided further, however, nothing shall prejudice the right of Prepetition Lender or any other party in interest to object to the allowance of any claim in part or in full.

(b) *Priority of Adequate Protection Liens.* The Adequate Protection Liens shall be junior to the liens having priority over the Prepetition Lender’s liens on the Prepetition Collateral. To the extent valid, the Adequate Protection Liens shall otherwise be senior to all other security interests in, liens on, or claims against any of the Collateral, except as set forth in paragraph 11(a).

12) Superpriority Claim. To the extent that the adequate protection provided for in this order fails to protect Prepetition Lender against any post-petition diminution in value of the collateral securing Prepetition Lender’s claims, Prepetition Lender is hereby granted a superpriority claim as provided for in Bankruptcy Code § 507(b) with priority over any and all

other administrative expenses of any kind payable or allowed pursuant to any provision of the Bankruptcy Code, including without limitation, Bankruptcy Code §§ 105, 326, 328, 503(b), 507(a), and 507(b).

13) Segregation of Cash Collateral. To the extent that Cash Collateral is not used, any such Cash Collateral shall be deposited into a segregated account. Debtors shall promptly after receipt provide Prepetition Lender with written confirmation of any deposits to such account, as well as copies of monthly statements.

14) Termination Provisions. Debtors' right to use Cash Collateral pursuant to this Order shall terminate upon the first to occur of any of the following (the "Termination Date"): (a) November 30, 2016, or (b) an Event of Default (defined below) has been determined to have occurred in accordance with the provisions below.

15) Event of Default. Each of the following constitutes an Event of Default under this Order, unless waived in writing by Prepetition Lender:

(a) Prepetition Lender's determination that any warranty or representation made to Prepetition Lender in this Order, is materially false or misleading.

(b) The Debtors' breach of any of the terms of this Order or any other Order entered in the Case.

(c) Entry of an order

(i) dismissing this Case;

(ii) converting the Case to a case under Chapter 7 of the Code;

(iii) appointing an examiner to perform any duties of a trustee or debtor other than those set forth in § 1106(a)(3) or (4) of the Code;

(iv) appointing a trustee under § 1104 of the Code;

(v) granting a creditor relief from the automatic stay as to the Property or any other material assets of the Debtors; or

(vi) terminating the authority of the Debtors to conduct business.

16) Notice of Default. Upon the occurrence of one or more Events of Default under this Order, and after seven (7) business days have expired since Prepetition Lender's counsel has given notice of the Event of Default to Debtors' counsel at pigginsj@millerjohnson.com and wolfordr@millerjohnson.com, if the Event of Default has not been cured, Prepetition Lender may file a Notice of Default with the Court, setting forth the Event(s) of Default. Prepetition Lender will serve such Notice of Default upon the Debtors' counsel via email to pigginsj@millerjohnson.com and wolfordr@millerjohnson.com, whereupon the Debtors must immediately cease using the cash collateral and segregate and account for all cash collateral then or thereafter coming into the Debtors' possession, custody, or control for the benefit of Prepetition Lender. The Notice of Default must also be served by first class mail on counsel for any other secured creditor and the U.S. Trustee. Within three business days of receiving the Notice of Default, the Debtors may object and request that the Court conduct a hearing. If requested, the Court will hold the hearing promptly at its earliest convenience, upon notice to Prepetition Lender and the Debtors.

17) Default Objection. If either (a) the Debtors timely object, but the Court finds at the hearing that one or more Events of Default have occurred, or (b) the Debtors do not timely object, then Debtors must immediately cease using the cash collateral and segregate and account for all cash collateral then or thereafter coming into Debtors' possession, custody or control for the benefit of Prepetition Lender.

18) Reservation of Rights. Entry of this Order is without prejudice to any rights of Debtors, Prepetition Lender and the UST to seek such other or further relief that may be authorized by the Bankruptcy Code or by applicable non-bankruptcy law. Without limiting the foregoing, nothing set forth in this Order shall preclude Prepetition Lender from seeking (a) additional adequate protection, (b) relief from the automatic stay, (c) conversion or dismissal of these Cases,

(d) appointment of a chapter 11 trustee or an examiner with expanded powers or (e) termination of any exclusive rights of Debtors to file a chapter 11 plan or seek confirmation thereof. Any rights of Debtors to object to any such relief is preserved.

19) Surcharge. No expenses of administration of the Debtors' chapter 11 cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Code, may be charged against or recovered from collateral securing Secured Lender's Claim, pursuant to Code § 506(c) or any similar principal of law, without the prior written consent of Secured Lender or further Court order, and Secured Lender's consent to any such charge will not be implied from any action, inaction, or acquiescence of Secured Lender. If a chapter 7 trustee is appointed in the Debtors' bankruptcy case, such chapter 7 trustee may seek to surcharge or recover from the collateral securing Secured Lender's claims the expenses of administration that are incurred after such chapter 7 trustee's appointment; in such event, Secured Lender will be entitled to object to or otherwise contest any such surcharge or attempted recovery.

20) No Third Party Rights. Except as explicitly provided for herein, this Final Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect, or incidental beneficiary.

21) Binding Effect of Final Order. Immediately upon entry by this Court (notwithstanding any applicable law or rule to the contrary), the terms and provisions of this Final Order shall become valid and binding upon and inure to the benefit of the Debtors, the Prepetition Lender, all other creditors of any of the Debtors, any committee appointed in the Cases, and all other parties in interest and their respective successors and assigns, including any trustee or other fiduciary hereafter appointed in any of the Cases, any Successor Cases, or upon dismissal of any Case or Successor Case. In the event of any inconsistency between the provisions of this Final

Order and any other order (including any “First Day” order), the provisions of this Final Order shall govern and control. Any payments to be made under any order (including any “First Day” order) shall be made in accordance with this Final Order.

22) No Modification of Final Order. In the event any or all of the provisions of this Final Order are hereafter modified, amended, or vacated by a subsequent order of this Court or any other court, such modification, amendment, or vacatur shall not affect the validity, perfection, priority, allowability, enforceability, or non-avoidability of any advances previously made or made hereunder, or lien, claim, or priority authorized or created hereby. Any liens or claims granted to the Prepetition Lender hereunder arising prior to the effective date of any such modification, amendment, or vacatur of this Final Order shall be governed in all respects by the original provisions of this Final Order, including entitlement to all rights, remedies, privileges, and benefits granted herein.

23) Effect of this Final Order. This Final Order shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and shall take effect and be enforceable *nunc pro tunc* to the Petition Date immediately upon execution thereof. The Debtors have demonstrated that the entry of this order and its immediate effect is necessary to prevent immediate and irreparable harm, thereby allowing for its immediate entry and preclusive effect notwithstanding Bankruptcy Rules 4001, 6003, and 6004.

24) Retention of Jurisdiction. The Court has and will retain jurisdiction to enforce this Final Order according to its terms.

25) Further Restraint on Transfers. Notwithstanding anything to the contrary contained herein, the Debtors are restrained from making any transfers of property to Strathmore, whether directly or indirectly, while that certain judgment dated April 15, 2015 from the United States

District Court for the District of Connecticut (the “Collection Judgment”) in the civil action entitled *Avant Capital Partners, LLC v. Strathmore Development Company of Michigan, LLC* remains unsatisfied. Immediately upon the entry of this Order, any funds, whether in the form of management fees, reimbursements or otherwise, due from the Debtors to Strathmore shall be paid in accordance with that certain Order Supplementing Judgment and Requiring Management Fees and Other Monies Owed Be Paid to Plaintiff [USDC Dkt. No. 154] (the “Collection Order”) entered by the United States District Court for the Western District of Michigan in the case entitled *Avant Capital Partners, LLC v. Strathmore Development Company of Michigan, LLC*, Case No. 1:15-mc-00077 (W.D. Mich.). Within three (3) days of any such payment in accordance with this Paragraph 25, the Debtors shall file a notice of such payment on this court’s docket. In the event that the Collection Judgment is satisfied in full or the terms of the Collection Order modified, the Debtors may seek relief from the provisions of this Paragraph 25.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon David J. Gass, Esq., Jason M. Crow, Esq., Robert D. Wolford, Esq., John T. Piggins, Esq., Robert F. Wardrop II, Esq., Lawrence P. Gottesman, Esq., Eric D. Carlson, Esq., Robert DeJonge, Esq., Michelle M. Wilson, Esq., Matthew W. Cheney, Esq., and the creditor matrix maintained by the court in this case.

IT IS FURTHER ORDERED that the Clerk shall send a courtesy copy, without cover, of this Scheduling Order to the Honorable Janet T. Neff, United States District Court for the Western District of Michigan, 399 Federal Building, 110 Michigan Street, NW, Grand Rapids, Michigan 49503.

END OF ORDER

Order prepared and submitted by:

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Signed: October 3, 2016




John T. Gregg
United States Bankruptcy Judge