

DELBELLO DONNELLAN WEINGARTEN  
WISE & WIEDERKEHR, LLP  
*Attorneys for the Debtor*  
One North Lexington Avenue  
White Plains, New York 10601  
(914) 681-0200

HEARING DATE:  
2/23/2017 @ 2:30 P.M.

Jonathan S. Pasternak, Esq.  
Dawn Kirby, Esq.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
In re:

Chapter 11

SHIROKIA DEVELOPMENT LLC,  
  
Debtor.

Case No. 16-45568-NHL

-----X

**DEBTOR’S MOTION IN SUPPORT OF ENTRY OF STIPULATION AND  
ORDER AUTHORIZING THE DEBTORS’ USE OF CASH  
COLLATERAL PURSUANT TO 11 U.S.C. §363(c)(2) AND  
BANKRUPTCY RULE 4001 AND  
PROVIDING ADEQUATE PROTECTION THEREFOR  
PURSUANT TO 11 U.S.C. §§361 AND 362**

Shirokia Development LLC, the above captioned debtor and debtor-in-possession (the "Debtor"), by its attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, files this motion (the "Motion") for approval and entry of the attached Stipulation and Order Authorizing Debtor’s Use of Cash Collateral Pursuant to 11 U.S.C. §363 and Providing Adequate Protection Therefor Pursuant to 11 U.S.C. §§361 and 362, respectfully state and represent as follows:

**Jurisdiction**

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion is proper in this District pursuant to 28 U.S.C. §§1408 and 1409.

2. The statutory bases for the relief requested herein are §§ 105(a), 361, 362 and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”), and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

### **BACKGROUND**

3. On December 9, 2016 (the “Filing Date”), the Debtor filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code and were continued in possession of their property and management of their affairs as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. No committee, trustee or examiner has been appointed heretofore in these Chapter 11 cases.

5. The Debtor is a single asset real estate company with its only asset being certain real property identified as 142-28 38<sup>th</sup> Avenue, Flushing, NY 11354 (the “Property”). The Property consists of 23 non-regulated residential units, 4 commercial units, and 47 parking spaces. According to representations made by the Debtor, none of the residential units are being leased or occupied, and 2 of the commercial units are leased and occupied and generate rental income.<sup>1</sup> Approximately 12 of the parking spaces are being leased on a month to month basis, generating additional rental income.

6. The Debtor values the Property at an estimated fair market value of no less than \$35,000,000.

7. The Debtor intends to ultimately market and sell the residential units in the Property while retaining the commercial spaces after paying off all allowed secured claims. The Debtor believes there is ample equity in the Property to pay all of the Debtor’s creditors in full,

---

<sup>1</sup> A third commercial unit was leased to the Debtor’s insiders; however, the space has not been built out, is not currently occupied and generates no rent as of this time.

as well as to pay all of Shirokia Mezz I LLC's creditors in full.

8. The Debtor previously filed a voluntary Chapter 11 case, *In re Shiokia Development LLC*, EDNY Chapter 11 Case No. 14-44373 (NHL). Prior to the filing of that case, the debtor and its principals worked very hard to repair and improve the Property and was working to finalize the residential units and had submitted paperwork to the NYS Attorney General's Office seeking approvals as a Condominium building. However, in the downturn in the economy the Debtor fell into arrears on its mortgage with Cathay Bank. Cathay Bank commenced a foreclosure action and a receiver was appointed. In April 2015, the Debtor successfully refinanced its mortgage and was allowed back in possession of the Property. Unfortunately, the Debtor discovered that during the receivership period it appears the receiver's managing agent allowed or caused a great deal of damage to the Property (kitchen cabinets and appliances disappeared, equipment for an entire grocery store disappeared) and appears to have collected a vast amount of rent in cash from tenants without delivering same to the receiver.

9. In December 2015, the Debtor's prior chapter 11 case was successfully confirmed and closed by virtue of a refinance done with Madison Realty Capital. Shortly thereafter, the Debtor refinanced again, obtaining a loan with more reasonable rates. In that refinance, the Debtor obtained a mortgage loan (the "Mortgage Loan") in the amount of \$18,000,000 from W Financial Fund L.P. ("W Financial").

10. The membership interest in the Debtor was transferred to a newly created entity, Shirokia Mezz I, LLC ("Shirokia Mezz"), of which Hong Qin Jiang is the sole member. Shirokia Mezz obtained a mezzanine loan (the "Mezzanine Loan") in the amount of \$2,000,000 from 38<sup>th</sup> Avenue Mezz LLC ("38<sup>th</sup> Avenue Mezz"), an entity unrelated to W Financial.

11. After said refinance, major improvements and repairs were done to the Property by the Debtor, including restoration of all of the residential units, preparation of the commercial units for rental, obtaining tenants for the commercial units and again preparing the appropriate paperwork for the NYS Attorney General's office seeking approval of the Property as a Condominium building. This substantially increased the value of the Property and its attractiveness as a good investment to the open market.

12. Almost immediately after the transaction, the Debtor and Shirokia Mezz were alleged to be in default. In an attempt to address the alleged defaults, in July 2016 a pay-off quote was requested. In response, the Debtor and Shirokia Mezz received a pay-off letter that lumped together the principal, interest and other charges related to the Mortgage Loan and the Mezz Loan. There was no way for Shirokia Mezz to pay off the Mezz Loan because it was impossible to discern from the pay-off letter what alleged charges related to the Mezz Loan. Likewise, the amounts due solely on the Mortgage Loan could not be determined from the pay-off letter.

13. Moreover, the Debtor disputes the alleged default called by W Financial and believes that W Financial is not entitled to *any* default interest.

14. Only one day later, 38<sup>th</sup> Avenue Mezz served Shirokia Mezz with a Notice of Sale of Pledged Membership Interests. In response, on August 16, 2016, Shirokia Mezz filed a chapter 11 case before this Court, *In re Shirokia Mezz LLC*, EDNY Chapter 11 Case No. 16-43666 (nhl). In that case, the Debtor's principal escrowed substantially all funds required to pay-off the \$2,000,000 principal of the Mezz Loan. 38<sup>th</sup> Avenue Mezz asserted, however, that the Mezz Loan cannot be paid without also paying in full the Debtor's obligations under the Mortgage Loan. Shirokia Mezz strongly disputed that position. The matter has been briefed and

submitted to the Court for determination.

15. With the filing of the Shirokia Mezz chapter 11, the Debtor experienced renewed interest from parties who are interested in either refinancing and/or purchasing the Property. While the initial intention of filing a chapter 11 case for Shirokia Mezz was to protect the status quo while seeking a refinance, in light of the level of interest in the Property the Debtor determined that the best course of action may be to sell all or a portion of the Property. The Debtor therefore intends to pursue *both* options - a refinance or sale within six (6) months.

16. By this Chapter 11 filing, the Debtor intends to resolve and/or adjudicate its objections to the claim amounts asserted by W Financial and 38<sup>th</sup> Avenue Mezz, refinance and/or sell the Property for in an amount sufficient to pay all creditors of the Debtor, all creditors of Shirokia Mezz, and a substantial return is expected for the member of Shirokia Mezz..

**The W Financial Obligations**

17. On or about December 23, 2015, W Financial entered into certain loan arrangements with Debtor for loans in the sums of \$18,000,000 and \$4,000,000 respectively.

18. on or about December 23, 2015, W Financial loaned the Debtor the sum of \$18,000,000 (the “First Loan”).

19. The First Loan is evidenced by a Consolidated Amended and Restated Mortgage Note dated December 23, 2015 given by Debtor to W Financial (the “First Note”).

20. The First Loan is secured by an Consolidated, Amended and Restated Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing in the amount of \$18,000.000 dated as of December 23, 2015 (the “First Mortgage” and together with the First Note, the “First Loan Documents”) given by Debtor to W Financial which First Mortgage encumbers the Property.

21. The First Mortgage contains, inter alia, an assignment of leases and rents.

22. On or about December 23, 2015 the Debtor executed a Gap Note dated December 23, 2015 in favor of W Financial in the amount of \$4,000,000 (the “Gap Note”).

23. The Gap Note is secured by a Gap Mortgage in the amount of \$4,000,000 dated as of December 23, 2015 (the “Gap Mortgage” and together with the Gap Note, the “Gap Documents”; the First Loan Documents, together with the Gap Documents, collectively, the “Loan Documents”) given by Debtor to W Financial which Gap Loan Mortgage encumbers the Property. Copies of the Loan Documents are annexed hereto as **Exhibit “A”**.

24. The Gap Note is further secured by, within the Gap Mortgage, an assignment of leases and rents.

25. W Financial has heretofore alleged, and the Debtor disputes that the Debtor has failed to comply with the terms and provisions of the First Note, the First Mortgage, the Gap Note and Gap Mortgage, respectively, and sent a notice of default to the Debtor on February 8, 2016 (the “Existing Default”).

26. W Financial is the owner and holder of the First Note and First Mortgage, Gap Note and Gap Mortgage, respectively.

27. W Financial commenced a foreclosure action on or about March 17, 2016 seeking to foreclose on the First Mortgage and Gap Mortgage, respectively (the “Foreclosure Action”).

28. On or about April 11, 2016, the State Court appointed Joseph Risi, Jr. as receiver for the Property (the “Receiver”), but the Receiver never took possession of the Property.

29. The Foreclosure Action was stayed by virtue of the Debtor’s bankruptcy case.

30. W Financial claims that the Debtor is indebted to the W Financial in the aggregate amount of \$19,119,846.02 (the “Prepetition Indebtedness”) as of December 9, 2016. The Debtor

disputes the amount owed to W Financial.

31. W Financial has heretofore filed a motion with the Bankruptcy Court seeking, *inter alia*, the appointment of a trustee in the Debtor's Chapter 11 case (the "Trustee Motion").

32. The Debtor acknowledges that W Financial holds a valid, perfected and enforceable first priority blanket lien on, and a security interest in, all or substantially all, of the Debtor's assets and proceeds therefrom including but not limited to the Property and all rents and accounts collected or generated therefrom (collectively, the "Pre-Petition Collateral"), which Pre-Petition Collateral secures W Financial's claims, to the extent allowed, pursuant to and in accordance with the First Note, First Mortgage, Gap Note and Gap Mortgage, respectively;

33. After conducting arms' length negotiations, the Debtor and W Financial, subject to Court approval, have reached a consensual arrangement concerning, *inter alia*, use of cash collateral during the Chapter 11 case as well as a timeline for refinance or sale of the Property in furtherance of a plan of reorganization.

34. To that end, the Debtor and W Financial, through respective counsel, executed the Stipulation and Order Authorizing Debtor's Use of Cash Collateral, Etc. (the "Stipulation"), a conformed, executed copy of which is annexed hereto as **Exhibit "B"**.

### **The Cash Collateral Stipulation**

35. The Stipulation permits the Debtor's limited use of cash collateral in accordance with the budget annexed to the Stipulation (**Exhibit "C"** annexed hereto; the "Budget")) pending the anticipated refinance or sale of the Property in the time frames permitted under the Stipulation.

36. The Stipulation provides, in pertinent part, as follows:

- (a) The Debtor shall provide W Financial with reasonable access to the Property;
- (b) The Debtor shall be authorized to use cash collateral in accordance with the Budget, subject to 10% variation, through and including April 15, 2017, subject to extension by consent of W Financial or approval by the Court;
- (c) The Debtor shall remain current on all post-petition real estate tax obligations;
- (d) No cash collateral may be used to challenge W Financial's liens or claims;
- (e) W Financial shall receive replacement liens in all of the Debtor's assets except the Avoidance Actions and subject to the Carve-Outs (as defined in the Stipulation);
- (f) The Debtor shall not seek to surcharge W Financial's collateral under Section 506(c) of the Code, subject, however, to the Carve-Out;
- (g) To the extent there is any diminution in value of the collateral, W Financial shall be entitled to a super priority claim under Section 507(b) of the Code, subject again to the Carve-Out;
- (h) W Financial shall receive monthly adequate protection payments, commencing in February, 2017, in the amount of \$32,500 per month;
- (i) The Debtor shall have until April 15, 2017 to close on a refinance of the Property. In the event the Debtor fails to close on such refinance by such date, the Debtor shall



have an additional 60 days to enter into a stalking horse contract of sale for the sale of the Property subject to higher and better bids and W Financial's and Mezz Lender's rights to credit bid at auction pursuant to section 363(k) of the Code. In the event that the Debtor fails to enter into such stalking horse contract by June 15, 2017, the Debtor shall enter into a stalking horse contract with W Financial for an auction sale to be held on or before July 15, 2017. The Debtor shall memorialize all of the foregoing terms into a plan of reorganization to be filed with the Court on or before February 15, 2017.

**Relief Requested**

37. The Debtor submits this Motion pursuant to Bankruptcy Code §363(c)(2)(B) and 361 and 362 and Bankruptcy Rule 4001(b) with respect to the Debtor's request for approval of the Stipulation which permits the Debtor's use of property which may constitute cash collateral ("Collateral") in which W Financial asserts a security interest, substantially in accordance with the terms and conditions set forth in the Stipulation and Budget annexed hereto.

38. The proposed Stipulation grants the Debtor authority to use the Collateral pursuant to Bankruptcy Code §§363 (c)(1) and (2) and Bankruptcy Rule 4001(c) to the extent necessary to maintain and preserve the Property pending the contemplated refinance and/or sale of the Property and confirmation of a plan.

39. Section 363(a) of the Bankruptcy Code state as follows:

"In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of properties subject to a security interest as provided in Section 552(b) of this title, whether existing before or after the commencement of a case under this title."

40. Section 363(c)(1) of the Bankruptcy Code provides as follows:

"(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing".

41. Section 363(d) of the Bankruptcy Code provides as follows:

"(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(e), or 362(f) of this title".

42. Accordingly, pursuant to § 363(c)(2) of the Bankruptcy Code, the consent of W Financial authority from this Court is required to use Collateral in which it holds a perfected security interest.

#### **Adequate Protection**

43. The purpose of adequate protection is to ensure that the secured creditor receives the value for which it bargained pre-bankruptcy. In re Swedeland Development Group, Inc., 16 F.3d 552 (3<sup>rd</sup> Cir. 1994); In re Dunes Casino Hotel, 69 B.R. 784, 793 (Bankr. D.N.J. 1986), citing In re Coors of the Cumberland, 19 B.R. 313 (Bankr. M.D. Tenn. 1982). See also, In re 495 Central Park Ave. Corp., 136 B.R. 626 (Bankr. S.D.N.Y. 1992). Adequate protection is designed to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization. In re Nice, 355 B.R. 554, 563 (Bankr. N.D. Va. 2006) (“adequate protection is solely a function of preserving the value of the creditor’s secured claim as of the petition date due to a debtor’s continued use of the collateral”).

44. Because the term “adequate protection” is not defined in the Bankruptcy Code, the precise contours of the concept are necessarily determined on a case-by-case basis. MBank Dallas, N.A. v. O’Connor (In re O’Connor), 808 F.2d 1393 (10<sup>th</sup> Cir. 1987). In re Snowshoe Co., 789 F.2d 1085, 1088 (4<sup>th</sup> Cir. 1086); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996);

In re Beker Industries Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986); see also In re JKJ Chevrolet, Inc. 190 B.R. 542, 545 (Bankr. E.D.Va. 1995) (adequate protection is a flexible concept that is determined by considering the facts of each case).

45. The Stipulation provides that, as adequate protection for the Debtor's use of W Financial's Collateral, in consideration for the use of the cash Collateral and for the purpose of adequately protecting them from Collateral Diminution<sup>2</sup>, the Debtor shall grant W Financial replacement liens in all of the Debtors' pre-petition and post-petition assets and proceeds, including the cash Collateral and the proceeds of the foregoing, to the extent that it had a valid security interest in said pre-petition assets on the Petition Date and in the continuing order of priority that existed as of the Filing Date (the "Replacement Liens").

46. The Replacement Liens shall be subject and subordinate only to: (a) United States Trustee fees payable under 28 U.S.C. Section 1930 and 31 U.S.C Section 3717; (b) professional fees of duly retained professionals in this Chapter 11 cases, as may be awarded pursuant to Sections 330 or 331 of the Code or pursuant to any monthly fee order entered in the Debtors' Chapter 11 cases; (c) the fees and expenses of a hypothetical Chapter 7 trustee to the extent of \$20,000; and (d) the recovery of funds or proceeds from the successful prosecution of avoidance actions pursuant to sections 502(d), 544, 545, 547, 548, 549, 550 or 553 ("Avoidance Actions") of the Bankruptcy Code (collectively, the "Carve-Outs").

47. In addition, W Financial shall receive monthly adequate protection payments in the agreed upon amount of \$32,000 per month.

---

<sup>2</sup> For purposes of this Order, "Collateral Diminution" shall mean any diminution in value of the Secured Creditor's interest in Debtor's property as of the Filing Date by reason of Debtor's use of Cash Collateral in accordance with this Order.

48. The Debtor submit that, in order to maintain the status quo between the parties during the final stage of the Chapter 11 case, W Financial should be granted these protections as well as the other protections afforded them under the Stipulation..

#### **The Budget**

49. The Debtor proposes to use Collateral only for ordinary and necessary operating expenses substantially in accordance with the operating budget annexed hereto as **Exhibit “C”** (the “Budget”). The Debtors believes that the Budget includes only the reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of maintaining and up keeping of the Property for the Chapter 11 period set forth in the Stipulation. The Debtors believe that the use of Collateral in accordance with the Budget, subject to a standard 10% variance, will provide the Debtor with adequate liquidity to pay administrative expenses as they become due and payable during the period covered by the Stipulation.

#### **Notice Requirement**

50. This Motion is being served on notice to all of the Debtor’s creditors as well as the United States Trustee and all other parties entitled to notice pursuant to Bankruptcy Rule 4001(d), including but not limited to the Debtor’s respective twenty (20) largest unsecured creditors.

**WHEREFORE**, the Debtor respectfully requests approval and entry of the Stipulation, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York  
February 3, 2017

Respectfully submitted,  
DELBELLO DONNELLAN WEINGARTEN  
WISE & WIEDERKEHR, LLP  
*Attorneys for the Debtor*

By: /s/ Jonathan S. Pasternak  
Jonathan S. Pasternak  
One North Lexington Avenue  
White Plains, New York 10601  
(914) 681-0200