

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:) Chapter 11
)
GRAND CENTREVILLE, LLC) Case No. 13-13590-RGM
)
)
Debtor.)

DEBTOR’S OBJECTION TO MOTION TO DISMISS CASE

The above-captioned debtor and debtor-in-possession (the “Debtor” and/or “Grand Centreville”), by counsel, hereby objects (the “Objection”) to the relief requested in the Secured Creditor’s Motion to Dismiss (the “Motion to Dismiss”) filed by Wells Fargo Bank, N.A., as trustee for the registered holders of JP Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2005-CIBC13 (the “Lender”). Simply, this bankruptcy case was not filed in bad faith; to the contrary, it was filed to prevent an unjustified and unnecessary impairment to value that could have been caused by the Lender’s actions. Indeed, Grand Centreville has never defaulted on its payment obligations, and its shopping center is nearly fully leased. Grand Centreville’s bankruptcy was the result of the aggressive actions of the Lender, who remarkably has suffered no loss and is not at any risk of loss. Rather, the Lender made a strategic grab for a windfall, and declined even to discuss a simple standstill agreement that could have avoided the need for a bankruptcy filing. And now the Lender comes before this Court asserting that the case was filed in bad faith? In support of its Objection, the Debtor respectfully represents:

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Counsel for the Debtor

Background

1. On August 2, 2013, (the “Petition Date”) the Debtor filed a voluntary petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”). The Debtor, through Black Creek Consulting, Ltd. (the “Receiver”), a receiver appointed by this Court in an order dated June 3, 2013(the “Receiver Order”), is continuing in possession of its properties and is operating and managing its business, as a Debtor-in-Possession, pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

2. The Debtor’s principal asset is a retail shopping center known as the Old Centreville Shopping Center (the “Shopping Center”). The Shopping Center is a 171,631 square foot retail shopping center located at the corner of Braddock Road and Old Centreville Road, in Centreville, Virginia. Pursuant to the schedules filed in the Kangs’ Chapter 11 Case (as hereafter defined), the Shopping Center has a value of \$39,000,000. The Receiver believes that the value of Grand Centreville far exceeds the scheduled value.

A. Related Chapter 11 Proceedings of the Kangs

3. This chapter 11 proceeding is related to the Chapter 11 proceedings of Min S. Kang and Man S. Kang (the “Kangs”), Case No. 10-18839-RGM (the “Kangs’ Chapter 11 Case”) currently pending before this Court. On October 19, 2010 (the “Kangs’ Petition Date”), the Kangs filed a voluntary petition in this Court, initiating the Kangs’ Chapter 11 Case.

4. On January 7, 2013, this Court entered an Order directing the United States Trustee to appoint a chapter 11 trustee for the Kangs’ Chapter 11 Case. On January 7, 2013, the United States Trustee appointed Raymond A. Yancey (the “Kang Trustee”) as chapter 11 trustee for the Kangs’ Chapter 11 Case, which appointment the Court subsequently approved on January 16, 2013.

5. In connection with the Kangs' Chapter 11 case, the Receiver has been informed the following: The Kangs together own 100% of the membership interests in Grand Development, LLC, a Virginia limited liability company ("Grand Development"). Grand Development owns 100% of the membership interests in Grand Equity, LLC, a Virginia limited liability company ("Grand Equity"). Prior to March 16, 2009, Grand Equity owned 99.5% of the membership interests in the Debtor. Also, prior to March 16, 2009, the Kangs together owned 100% of the stock of Grand Formation, Inc. a Virginia corporation ("Grand Formation"). Prior to March 16, 2009, Grand Formation owned the remaining 0.5% of the membership interests in the Debtor and served as the managing member of the Debtor. As a result of the foregoing ownership and management structure, prior to March 16, 2009, the Kangs indirectly owned 100% of the economic interests in the Debtor and, through their 100% ownership of Grand Formation, controlled all management rights with respect to Grand Centreville. The Kang Estate's interest in the Debtor and the Shopping Center is the most valuable asset in the Kang Estate. Indeed, as discussed below, the Kang Trustee filed an adversary proceeding in the Kangs' Chapter 11 Case to protect and preserve the value of this important asset.

B. Disputes Regarding Ownership Interest In, And Management Of, The Debtor

6. The Receiver has also been informed the following: On March 16, 2009, prior to the Kangs' Petition Date, the Kangs and Grand Equity, as sellers, and James Sohn ("Sohn") and Yeon Han ("Han"), as buyers, purported to enter into a Sale of Membership and Stock Interest Agreement (the "Centreville Sale Agreement"). Sohn and Han intended to acquire 60% of the ownership and control of the Debtor and the Shopping Center under the Centreville Sale Agreement. The Centreville Sale Agreement provided that Sohn would acquire 51% and Han would acquire 9%, of the ownership of Grand Formation. The Centreville Sale Agreement

further provided that Grand Formation would remain the managing member of the Debtor. The transfer of the majority interest in Grand Formation to Sohn and Han gave them (in their view) complete control over the operations and finances of the Debtor and eliminated any ability of the Kangs to control the operations or finances of the Debtor. To enforce Sohn and Han's complete control over the Debtor, the parties purportedly amended and restated Grand Centreville's operating agreement to provide Sohn and Han with sole management of the Debtor and the Shopping Center, and to provide that Sohn and Han would receive 60% of all distributions. In this regard, upon the closing of the Centreville Sale Agreement on March 16, 2009, Sohn and Han purported to have day-to-day control over the Debtor's operations and finances. Following the closing, Sohn and Han in fact assumed operational control of the Debtor.

7. On October 18, 2012, the Kang Committee, as plaintiff, and on behalf of the Kangs' estate, initiated an adversary proceeding (the "Sohn/Han Adversary Proceeding") by the filing of a Complaint to Avoid Transfers and to Recover Property and for Related Relief against several defendants, including Sohn and Han. Subsequently, the Kang Trustee joined as a plaintiff in the Sohn/Han Adversary Proceeding. The Kang Trustee and the Kang Committee filed an amended complaint (the "Amended Complaint") against Sohn and Han on June 11, 2013. The Amended Complaint asserts seven (7) counts for relief against Sohn and Han related to the Debtor and the Shopping Center, including counts to avoid and recover fraudulent transfers of interest and unwind the purported transfer to Sohn and Han prior to the Kangs' Petition Date. The Amended Complaint also asserts counts of civil conspiracy, breach of the Debtor's operating agreement and fraud, primarily for acts by Sohn and Han subsequent to the Kangs' Petition Date. The Sohn/Han Adversary Proceeding is currently in discovery and on schedule to go to trial after May, 2014.

8. The Debtor understands that the fundamental disputes in the Sohn/Han Adversary Proceeding involve the ownership and control of the Debtor. The Kang Trustee asserts that the Kang Estate is the 100% beneficial owner of Grand Centreville and, accordingly, should be in complete control of its management. Sohn and Han have disputed the Kang Trustee's position.

C. The Appointment of the Grand Centreville Receiver

9. As a result of the activities of Sohn and Han regarding the operations of the Debtor as outlined in the Amended Complaint, on May 14, 2013, the Kang Trustee and the Kang Committee filed an Emergency Motion for Order Appointing Receiver, or, In the Alternative, Preliminary Injunction (the "Receiver Motion") in the Sohn/Han Adversary Proceeding. The Receiver Motion sought the appointment of a receiver for the Debtor and its managing member, Grand Formation, primarily to protect the value of the Debtor while those parties that assert a beneficial interest in, and a right to manage, the Debtor – Sohn, Han and the Kang Trustee – litigate their disputes in the Sohn/Han Adversary Proceeding.

10. On June 3, 2013, and upon the consent of Formation, Sohn and Han, this Court granted the Receiver Motion and entered the Receiver Order. The Receiver Order is attached hereto as **Exhibit A**. Pursuant to the Receiver Order,

Black Creek Consulting, Ltd. [(the "Grand Centreville Receiver")] is appointed as equity receiver . . . for Formation and Grand Centreville, including real property, personal property (including furniture, fixtures and equipment ("FF&E")), and all other assets (including accounts ("Operating Accounts") and general intangibles) of any and every kind, character and description wherever the same may be located or found of Formation and Grand Centreville (hereinafter the "Receivership Assets") and the Receivership Assets shall be subject to the exclusive control of the Receiver for the purpose of marshaling, preserving, accounting for such Receivership Assets in accordance with the provisions of this Order and subject to any and all further Orders of this Court.

The Receiver Order further provided that "[t] Receiver is hereby authorized and entitled to take

all such actions and exercise all such discretion and authority as may be necessary or desirable in connection with the ongoing operation, maintenance, management, protection and preservation of the Receivership Assets, . . .”

11. Since the entry of the Receiver Order and in accordance therewith, the Receiver has managed the Debtor and Grand Formation and their business operations, *i.e.*, the Shopping Center. In furtherance of its management duties under the Receiver Order to manage, preserve and protect the assets of the Debtor, the Receiver authorized the filing of the Debtor’s voluntary petition on the Petition Date (following the Lender’s aggressive actions, as discussed below).

D. The Lenders’ Secured Loan

12. The Debtor is the borrower under, and the Shopping Center was encumbered by a Deed of Trust, Assignment of Leases and Rents and Security Agreement dated June 6, 2005 (the “Deed of Trust”) and related loan documents (the Deed of Trust and other related loan documents are, together, the “Loan Documents”). The original principal amount of the loan evidenced and secured by the Deed of Trust was \$27,000,000. The principal balance outstanding under the Deed of Trust, as shown on the Debtor’s Schedules of Assets and Liabilities is \$24,424,924.

13. Pursuant to the Deed of Trust, the Lender asserts a first priority security interest in the Shopping Center.

E. The Pre-Petition Discussions with the Bank

14. There are currently no payment defaults under the Loan Documents, and the Debtor has been current on all payment obligations under the Loan Documents.

15. Promptly following the appointment of the Receiver, Michael Schuett, a principal of the Receiver, contacted the Lender to obtain copies of all of the loan documents governing the

loan to Grand Centreville. The complete loan documents had not previously been provided either to the Kang Trustee or the Receiver.

16. On June 14, 2013, the Receiver was informed that LNR Partners, LLC (the “Special Servicer”) was now servicing the Loan as special servicer on behalf of the Lender.

17. The Receiver was informed the following: On July 2, 2013, counsel for the Special Servicer (who also is the counsel for the Lender) contacted counsel for the Kang Trustee to discuss the status of Grand Centreville and the Kang bankruptcy case. The Kangs had not scheduled the Lender as a creditor in their bankruptcy case, and the Lender apparently had not been given notice of the pendency of the Kangs’ bankruptcy case. Counsel for the Kang Trustee arranged to meet with counsel for the Special Servicer. Such meeting took place on July 3, 2013 and lasted over two hours. At the meeting, counsel for the Kang Trustee delivered notebooks with copies of hundreds of pages of pleadings to counsel for the Special Servicer, and briefed them on the background of the Kang case. Counsel for the Kang Trustee made it plain to counsel for the Special Servicer that the Kang Trustee sought to assure the Special Servicer that all action would be taken to protect the Lender, and that the Kang Trustee sought to discuss any concerns that the Lender or the Special Servicer might have with respect to Grand Centreville. Notwithstanding the efforts of the Kang Trustee, on July 29, 2013, counsel for the Special Servicer sent an e-mail to counsel for the Kang Committee and the Kang Trustee indicating that the Special Servicer would be issuing certain default notices to the Debtor on the basis of multiple alleged defaults. The e-mail indicated that the Special Servicer had no “immediate” plan to accelerate the Loan or foreclose. Immediate delivery of such email to counsel for the Kang Trustee was delayed because counsel for the Special Servicer mis-addressed such email. One day later, on July 30, 2013, counsel for the Special Servicer issued a notice of default to the

Debtor (the “Default Letter”), which asserted several “retroactive” defaults going back over four (4) years.

18. Despite the lack of authorization in the Loan Documents for such retroactive defaults, the Special Servicer seeks to use these so-called defaults to assert a claim for millions in default interest (although an actual calculation of the claimed penalties was not set forth in the Default Letter). Incredibly, the Default Letter came at a time when there were no payment defaults under the Loan Documents, the Lender was over-secured by at least \$10 million and the Shopping Center was performing efficiently under the management of the Receiver, producing cash flow that ensured continued performance under the Loan Documents through the remainder of the term of the Loan. In short, the Special Servicer was shamelessly making a money grab.

19. The Receiver was also informed the following: After receiving the Default Letter, counsel for the Kang Trustee sought to confirm representation from the Special Servicer’s counsel that the Special Servicer did not intend to immediately accelerate the Loan or seek a foreclosure. On July 31, 2013, counsel for the Kang Trustee arranged for a call with counsel for the Special Servicer to discuss entering into a standstill agreement to enable the Kang Trustee and the Receiver to address their disputes regarding the alleged default issues with the Special Servicer without the need to prepare to take additional action to protect the Debtor and the Shopping Center from aggressive action by the Special Servicer. Counsel for the Special Servicer initially agreed to discuss a standstill agreement. On August 1, 2013, and less than one (1) hour before the scheduled call between the counsel for the Kang Trustee and counsel for the Special Servicer, counsel for the Special Servicer sent an e-mail abruptly cancelling the call. No explanation for cancelling the call was given, other than the assertion that the Special Servicer considered such discussions to be “premature.”

20. Suddenly faced with both the Special Servicer's unexpected and provocative decision to terminate discussions to reach a standstill agreement and the possibility of irreversible penalties and other damage to the value of the Debtor and the Shopping Center in the event the Special Servicer decided to accelerate the Loan, the Receiver had no choice but to – and indeed, had the duty to – seek the protection of bankruptcy. (Under the Loan Documents, acceleration could have made the loan immediately due and payable, and because there is no grace period whatsoever, a 5% late fee could arise merely by virtue of the delivery of a notice of acceleration.)

21. On October 25, 2013, almost three (3) months after forcing the Debtor to file its chapter 11 petition, the Special Servicer brought the current Motion to Dismiss. It is evident, however, from fee statements delivered by the Special Servicer contemporaneously with the filing of the Motion to Dismiss, that it had been working on the Motion to Dismiss since early September.

Legal Argument

Dismissal of the Debtor's Case is Neither Warranted Nor Justified.

Lender has failed to allege with supporting facts (let alone demonstrate) that (a) the Debtor's case was filed with the requisite subjective bad faith and (b) any plan for reorganization is objectively futile. Accordingly, under the standards articulated by the Fourth Circuit Court of Appeals in *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989), the relief requested in the Motion to Dismiss must be denied. As the Fourth Circuit stated: “a stringent test is necessary to accommodate the various and conflicting interests of debtors, creditors and the courts” *Carolin*, 886 F.2d at 701.

A. Lender Cannot Establish Subjective Bad Faith.

The subjective test inquires whether a Chapter 11 petition is motivated by an honest intent to effectuate a reorganization or for some other improper purpose. *Id.* at 702. The good faith test contemplates a policy assumption that it is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even the remote chance that the reorganization efforts might yield a successful rehabilitation. *In re Coleman*, 426 F.3d 719, 727 (4th Cir. 2005) (citing *Carolin Corp.*, 886 F.2d at 701. Dismissal on the ground of lack of good faith should be granted “only sparingly and with great caution.” *In re General Growth Properties, Inc.*, 409 B.R. 43, 56 (Bankr. S.D.N.Y. 2009).

Here the Receiver made the decision to place the Debtor in bankruptcy in good faith to maximize the value of the Debtor and its property for the benefit of its estate and all parties in interest. The Kang Trustee attempted to engage the Special Servicer in meaningful discussions to work out the non-monetary defaults under the Loan Documents. When, at the eleventh hour, the counsel for the Special Servicer canceled its meeting with representatives of the Kang Trustee, and threatened to impose over \$3 million in penalties, the Receiver fulfilled its fiduciary duty as prescribed by the Receiver Order to preserve, protect and maximize the value of the Receivership Assets and sought the protection of this Court. Accordingly, the Receiver’s decision to place the Debtor in bankruptcy was made in subjective good faith.

The Lender argues that the true issue in the Debtor’s bankruptcy case merely is a “two-party dispute” and that the Debtor is holding the Shopping Center “hostage” in an impermissible use of the bankruptcy process by filing in the face of potential foreclosure. *See* Motion to Dismiss at pp. 18-19. Each of these arguments is inapposite to the Debtor’s case and should be rejected. This Court has addressed the “two-party dispute” argument and found it to be lacking as support for dismissal finding that this common complaint was addressed by the enactment of

the 1994 Amendments to the Bankruptcy Code regarding single asset real estate debtors and the payments to secured creditors in single asset cases pursuant to §362(d)(3). *See In re WSG Dulles, L.P.*, Case No. 12-11149-BFK, 2013 Bankr. LEXIS 34, *17 (Bankr. E.D.V.A. Jan. 4, 2013). Similarly, the WSG Court found that filing “on the eve of a foreclosure sale” was “quite common” and not evidence of bad faith. *Id.* In fact, the Court considered the debtors’ bankruptcy filings before the foreclosure sales were effected to be timely. *Id.* The Receiver made the decision, in exercise of its fiduciary obligation, to file bankruptcy on behalf of the Debtor only *after* the Special Servicer canceled the negotiations and the imposition of millions of dollars of retroactive penalties and interest became more of a reality.

Contrary to the Lender’s argument, the bankruptcy was not filed to frustrate the Lender’s rights, but rather was done to preserve and protect the going concern of the Debtor, the Receivership Assets for the benefit of all parties in interest. Indeed, the Lender currently enjoys the benefits of §362(d)(3), as referenced in WSG, as the Debtor is paying adequate protection payments in excess of the amounts required for the single asset debtors under §362(d)(3). *See Carolin Corp.*, 886 F.2d at 705 (“A petitioner’s manifest ability to provide financial protection certainly points in the direction of an ability to carry through with reorganization efforts. Likewise, the debtor’s demonstrated willingness to provide interim protection would suggest a purpose to rehabilitate, rather than pervert the bankruptcy process for impermissible purposes.”). Indeed, the Debtor’s case promotes a basic and very appropriate use and tenet of bankruptcy protection, which is “to permit the debtor’s continued use, enjoyment and exploitation of property and assets essential to rehabilitation, but on terms which protect the rights of others,” *In re Victory Constr. Co., Inc.*, 9 B.R. 549, 558 (Bankr. C.D. Cal. 1981), and should be permitted to continue.

The Receiver's good faith in maximizing the value of the Debtor and its property for the benefit of the estate certainly does not constitute bad faith.

B. Lender Has Failed to Assert Any Fact to Demonstrate the Objective Futility of the Debtor's Case.

In addition to failing on the subjective prong, Lender also fails on the objective prong of the test established by the Fourth Circuit. Indeed, in the Motion to Dismiss, Lender does not even attempt to assert any fact which could demonstrate that a plan for reorganization of the Debtor is objectively futile as required under *Carolin*. To the best of the Debtor's knowledge, Lender has no evidence to demonstrate that the futility of the Debtor's case is immediately manifest. As the Lender readily admits, not only is the Debtor a solvent going concern, but also the Lender is over-secured which allows for several avenues for the Debtor's rehabilitation. Dismissal is therefore unwarranted. *See Coleman*, 426 F.3d at 727 (citing *Carolin Corp.*, 886 F.2d at 701). This is unlike the circumstances in *Carolin Corp.*, where the Fourth Circuit found objective futility because the debtor lacked financing and had no realistic chance to resuscitate its business and subjective bad faith because the debtor filed for bankruptcy fifty (50) minutes before the scheduled foreclosure sale and made no effort to effectuate a reorganization. Here, the Debtor has a realistic chance to reorganize around its business operations and has no ulterior, litigation motive in filing bankruptcy. Indeed, the Receiver was forced to file in order to preserve the going concern value of the Debtor and its assets and maintaining the Debtor's case will further the basic purposes of the Bankruptcy Code. *See Coleman*, 426 F.3d at 727.

C. The Receiver Had Authority to Place Grand Centreville in Bankruptcy

The Lender attempts to circumvent the Fourth Circuit requirements by maintaining, without even establishing its standing to assert the same, that the Receiver lacked authority to seek bankruptcy protection for Grand Centreville. As the Lender concedes in its Motion to

Dismiss, only a person or entity vested with managerial authority over a company has the authority to file for bankruptcy relief on its behalf. *See* Motion to Dismiss at pp. 12-13. In the instant case, the Receiver has that broad managerial authority over the Debtor. The entry of the Receiver Order on June 3, 2013 resulted in the members and managing member of the Debtor being relieved of any managerial responsibility they may have held under the Grand Centreville operating agreement. *See* Receiver Order at ¶¶ 4-9. The Receiver Order granted exclusive control of all Receivership Assets¹ to the Receiver for the “purpose of marshaling, preserving, accounting for such Receivership Assets...” *Id.* at ¶ 2. Moreover, the enumeration of specific powers, rights and duties of the Receiver as outlined in the Receiver Order, concludes with the “catch-all” phrase authorizing the Receiver to “[t]ake all such further actions and enter into all such other agreements as the Receiver, in its professional discretion deems appropriate or desirable to maintain, preserve, protect and maximize the value of the Receivership Assets.” *Id.* at ¶ 13(v). This sweeping grant of discretion over managerial decisions of the Debtor vested the Receiver with the authority to file for bankruptcy protection in order to protect and preserve the Receivership Assets – a decision it was forced to make when the Lender refused to negotiate a forbearance agreement to prevent acceleration or foreclosure of the Receivership Assets.

The Lender now seeks to deny to the Receiver the specific management authority and duties provided by this Court under the Receiver Order. In support of its argument that the filing was somehow not authorized because the Receiver Order does not specifically provide for the authority to file for bankruptcy, the Lender cites the case of *In re Am. Heartland Sagebrush Sec. Investments, Inc.*, which case merely mentions an order granting an SEC receiver the authority to

¹ Receivership Assets is defined in the Receiver Order as the “real property, personal property (including furniture, fixtures and equipment (‘FF&E’), and all other assets (including accounts (‘Operating Accounts’) and general intangibles) of any and every kind, character and description wherever the same may be located or found of Formation and Grand Centreville.”

file bankruptcy on behalf of certain entities. 334 B.R. 848 (Bankr. N.D. Tex. 2005). The Lender cites to no authority directly or tangentially supporting its position that a receiver, when vested with broad managerial authority over an entity and its assets by operation of a court order, lacks the power to file for bankruptcy on behalf of that entity.

The Lender attempts to confuse what is a very simple issue of authority granted to the Receiver under the Receiver Order by arguing over the validity and effectiveness of two possible operating agreements for the Debtor. Special Servicer's argument assumes the outcome of the pending adversary proceeding, in that it assumes that the 2005 operating agreement remains in effect. The Kang Trustee and the Special Servicer's positions appear to be aligned on this issue. The Kang Trustee asserts that there was a complete lack of authority for the transactions that purported to occur in March of 2009 and, as a result, the Kangs remain the 100% owners of Grand Centreville and Grand Formation. Sohn and Han have disputed the Kang Trustee's position in this regard, and contend that they own and control 60% of Grand Centreville as a result of the March 2009 transactions. This Court has not yet resolved this dispute.

However, there is a glaring inconsistency in the position taken by the Special Servicer. Special Servicer asserts a claim for default interest retroactive to March of 2009. Special Servicer's claim is based on the unauthorized transfer of ownership and control of Grand Centreville to Han and Sohn. Their putative ownership and control is effectuated by the 2009 amended and restated operating agreement of Grand Centreville. For the purpose of asserting its massive retroactive default interest claim, Special Servicer must embrace the 2009 version of the operating agreement. But for the sake of its Motion to Dismiss, Special Servicer must ignore the terms of the 2009 operating agreement, and instead insist that the 2005 version remains vital and effective.

Regardless of which operating agreement was effective at the time of the Petition Date, the Receiver had the authority to file bankruptcy by operation of the Receiver Order. Moreover, the Receiver was given broad management authority to protect the value of Grand Centreville while the owners litigate their dispute as to rightful ownership and management authority. It defies logic to suggest that the broad grant of management authority given under such circumstances would not include a fundamental management right – to petition for bankruptcy – needed to prevent an unjustified and unnecessary impairment to value that would be caused by the Lender’s actions.

The Lender, in its Motion to Dismiss, also overlooks Grand Formation’s role and obligations as manager of the Debtor – and in turn the Receiver’s role and obligations – which is to exercise its fiduciary duty to protect the assets of the Debtor. *See* Va. Code. Ann. § 13.1-1024.1 (“A manager shall discharge his or its duties as a manager in accordance with the manager’s good faith business judgment of the best interests of the limited liability company.”) To do anything other than seek the protection of bankruptcy under these circumstances likely would be a breach of fiduciary duty. *See In re General Growth Properties, Inc.*, 409 B.R. 43, 63 (Bankr. S.D.N.Y. 2009) (reaffirming that “managers owe their duties to the corporation” and not to some third party or secured creditor). The Receiver, as receiver of Grand Formation, the Debtor’s manager, had the duty to protect the assets under its control and to act in the best interests of the Debtor and fulfilled that obligation when it sought relief in bankruptcy

Conclusion

In its Motion to Dismiss, Lender seeks significant and, potentially, case altering relief. As the Fourth Circuit has stated, “[d]ecisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total shape of the debtor’s situation,

are inherently drastic and lightly to be made.” *Carolin*, 886 F. 2d at 700.

Lender comes before this Court seeking such significant relief, yet it has failed to establish that (a) the Debtor’s case was filed with the requisite subjective bad faith and (b) any plan for reorganization is objectively futile. Furthermore, the Lender comes before this Court with unclean hands. The Receiver made the decision, in exercise of its fiduciary obligation, to file bankruptcy on behalf of the Debtor only *after* the Special Servicer canceled the negotiations and the imposition of millions of dollars of retroactive penalties and interest became more of a reality. Contrary to the Lender’s argument, the bankruptcy was not filed to frustrate the Lender’s rights, but rather was done to preserve and protect the going concern of the Debtor and the Receivership Assets for the benefit of all parties in interest. Accordingly, the relief sought in the Motion to Dismiss should be denied.

WHEREFORE, the Debtor respectfully requests that the Court: (i) deny the relief sought in the Motion to Dismiss, (ii) award the Debtor its costs and attorneys fees expended herein, (iii) prohibit the Lender from assessing against the Debtor its costs associated with the drafting, filing and prosecution of the Motion to Dismiss, and (iv) grant such other and further relief as the Court may deem proper.

GRAND CENTREVILLE, LLC

By: /s/ Paula S. Beran
Counsel

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Counsel for the Debtor

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2013, a true and correct copy of the Debtor's Objection to Motion to Dismiss Case, was served via electronic delivery and/or first class mail, postage prepaid to the following:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

In re:

MIN SIK KANG and
MAN SUN KANG,

Debtors.

* * * * *

RAYMOND A. YANCEY
Chapter 11 Trustee

and

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS,

Plaintiffs,

v.

Adversary No. 12-01496-RGM

YEON K. HAN,
JAMES Y. SOHN,
JINHEE CHOO,
SUNGKYUN LIM,
7 INVESTMENT LLC,
236 INVESTMENT GROUP LLC,
GRAND INVESTMENT LLC,
KI YOON,
SEUNG M. PARK,

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Case No. 10-18839-RGM
(Chapter 11)

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HYO KYUNG PARK, *
OK SOON YANG, *
GRAND FORMATION, INC. and *
GRAND CENTREVILLE, LLC, *
Defendants. *

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ORDER APPOINTING RECEIVER

This matter is before the Court upon the Plaintiffs’ *Emergency* Motion for Order Appointing Receiver, Or, in the Alternative, Preliminary Injunction pursuant to Federal Rules Of Civil Procedure 64 and 65, made applicable to this proceeding by Federal Rules of Bankruptcy Procedure 7064 and 7065 (the “Motion”). After careful consideration of the record, including the Motion and any responses thereto, the Court concludes that cause exists for a receiver to be appointed to take immediate possession, custody and control of the assets of Grand Centreville, LLC (“Grand Centreville”) and Grand Formation, Inc. (“Formation”) to protect and preserve the value of those assets. Accordingly, by the United States Bankruptcy Court for the Eastern District of Virginia (the “Court”), it is hereby **ORDERED, ADJUDGED AND DECREED**, that:

1. The relief sought in the Motion is hereby **GRANTED**.
2. As of the date of this Order (the “Effective Date”) Black Creek Consulting, Ltd. (“Black Creek”) is appointed as equity receiver (the “Receiver”) for Formation and Grand Centreville, including real property, personal property (including furniture, fixtures and equipment (“FF&E”)), and all other assets (including accounts (“Operating Accounts”) and general intangibles) of any and every kind, character and description wherever the same may be located or found of Formation and Grand Centreville (hereinafter, the “Receivership Assets”) and the Receivership Assets shall be subject to the exclusive control of the Receiver for the purpose of marshaling, preserving, accounting for such Receivership Assets in accordance with the provisions of this Order and subject to any and all further Orders of this Court.

3. Black Creek is hereby ordered and directed to take immediate possession, custody and control of the Receivership Assets and all books, records and other documents related thereto until further order of this Court.

4. James Sohn (“Sohn”), Yeon Han (“Han”), Formation and Grand Centreville, (together, the “Defendants”), and their employees, agents and representatives are hereby ordered to comply in all respects with the terms and conditions of this Receivership Order, and are enjoined and restrained from impeding or interfering in any manner with the exercise or enforcement by the Receiver of its rights, powers and duties hereunder with regard to the Receivership Assets or otherwise.

5. The Defendants and their employees, agents and representatives shall not: (a) enter into any contract, lease, agreement or other arrangement of any kind or character relating to the Receivership Assets; or (b) grant any security interest, lien, claim or other encumbrance in, to or against the Receivership Assets, and are hereby enjoined and restrained from engaging in any such conduct.

6. Absent prior approval of this Court, no creditor of the Defendants or other person or entity shall seek, create or perfect a security interest, lien, claim or other encumbrance in, to or against the Receivership Assets or levy or execute upon the Receivership Assets.

7. The Defendants and their employees, agents and representatives shall immediately deliver to the Receiver and its authorized agents, representatives and/or attorneys unrestricted physical possession, custody and control of the Receivership Assets and all books, records and other documents related thereto.

8. The Defendants and their employees, agents and representatives shall, within ten (10) days of the Effective Date, deliver to the Receiver and its authorized agents, representatives and/or attorneys: (a) a list of all creditors of the Grand Centreville and Formation, including, to the

extent known by the Defendants, the names, addresses, telephone numbers and email addresses of each such creditor and the amount(s) due each such creditor; and (b) a list of all tenants of the Shopping Center¹ together with their addresses, contact persons, monthly rent and other charges due; (c) a copy of each lease for the Shopping Center, a copy of the current rent roll for the Shopping Center and a list of all past due rent and other charges that are due from any tenant of the Shopping Center; (d) a current operating statement for the Shopping Center listing current revenues and expenses of the Shopping Center on a monthly basis; and (e) a list and description of all claims and causes of action that Grand Centreville and/or Formation hold against all persons and entities in connection with the Receivership Assets, including, to the extent known by Defendants, the names, addresses, telephone numbers and email addresses of each such person and entity, and the amount(s) due or alleged to be due from each such person and entity.

9. The Defendants shall cause, and the Receiver shall be authorized on the Defendants' behalf to cause, the Receiver and its authorized agents and representatives to be named as an additional insured on any existing insurance policies covering the Receivership Assets, and the Receiver is hereby authorized and empowered, in its discretion, to obtain insurance covering the Receivership Assets, and all such insurance expenses shall be deemed a normal, ordinary and necessary operating expense of the Receivership Assets.

10. The Receiver is authorized and empowered to use any surety bonds, letters of credit, cash deposits and similar existing arrangements securing any obligation owing by the Defendants to any third party in connection with the Receivership Assets.

11. All tenants, bailees or other persons or entities in possession of the Receivership Assets or any portion thereof shall attorn to the Receiver and until further order of this Court: (a) subject to the rights of the Grand Centreville Lender with respect to payments as may be required to any lockbox for such lender, shall tender to the Receiver or its duly authorized agents and

¹ All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

representatives, in immediately available funds, all present and future unpaid rents, revenues, profits, proceeds and other sums that are due and payable with respect to the Receivership Assets; and (b) are enjoined and restrained from paying to the Defendants or their employees, agents or representatives any such rents, revenues, proceeds or other sums generated or derived from the Receivership Assets.

12. The Defendants and their employees, agents and representatives are enjoined and restrained from collecting or receiving any rents, revenues, proceeds or other sums payable with respect to the Receivership Assets, and should the Defendants or any of their employees, agents and representatives come into possession of any such rents, revenues, proceeds or other sums payable with respect to the Receivership Assets after the Effective Date, the Defendants and their employees, agents and representatives shall immediately tender such rents, revenues, proceeds and other sums to the Receiver in immediately available funds.

13. The Receiver is hereby authorized and entitled to take all such actions and exercise all such discretion and authority as may be necessary or desirable in connection with the ongoing operation, maintenance, management, protection and preservation of the Receivership Assets, including, without limitation, all of the powers, rights and duties provided to receivers under applicable law, and the power and authority to:

- a. Enter upon and take immediate possession, custody and control of any and all of the Receivership Assets;
- b. Immediately take and maintain possession, custody and control of all documents, books, records, papers and accounts relating to the Receivership Assets;
- c. Exclude the Defendants, their employees, agents and representatives from the Receivership Assets (provided, however, that Sohn may enter the Property

during business hours following at least 48 hours advance notice to the Receiver, and accompanied by the Receiver or the Receiver's designee, solely for the purpose of inspecting the operations and conditions of the Property; and further provided that if the Receiver agrees, Sohn may enter the Property on less than 48 hours notice, and without accompaniment, for the limited purpose of shopping or dining at the businesses of tenants of the Property, but neither Sohn nor any family member shall hold themselves out as having any official role with respect to Formation, Grand Centreville or the Property);

- d. Manage and operate the Receivership Assets and utilize the rent collections and other collections from the Receivership Assets to maintain the Receivership Assets and pay any carrying costs for the same;
- e. Borrow monies secured by a first-priority priming lien upon the Receivership Assets for the purposes of maintaining, preserving, or enhancing the value of the Receivership Assets, provided that the Grand Centreville Lender, as defined in the Motion, and the Plaintiffs have consented, in writing, to the borrowings and the priming lien, and the court has approved such borrowings and liens;
- f. Maintain, preserve, and protect the Receivership Assets, including making repairs and alterations thereto, and utilize rent collections and other collections from the Receivership Assets to pay for the same;
- g. Insure the Receivership Assets from fire, theft, liability and other hazards under insurance policies in amounts and containing such terms that are acceptable to the Receiver and the Plaintiffs, and utilize rent collections and other collections from the Receivership Assets to pay for the same;

- h. Conduct, or, with the consent of the Plaintiffs, employ a marketing or leasing agent or agents to conduct, a marketing or leasing program with respect to all or any portion of the Receivership Assets;
- i. With the consent of the Plaintiffs, retain such professionals as the Receiver deems necessary and appropriate to market the Receivership Assets for the sale and sell some or all of the Receivership Assets, at their fair market value;
- j. With the consent of the Plaintiffs, take all such other steps that are necessary to evaluate a possible sale of all of the Receivership Assets at their fair market value; provided that the Receiver shall not enter into any contract for the sale of the Receivership Assets, including but not limited to the Shopping Center, out of the ordinary course of business without the consent of the Plaintiffs, and any such sale agreement shall be subject to the approval of the Court on noticed motion;
- k. Execute and deliver, in the name of the Defendants or in its own name such documents and instruments as are necessary or appropriate to consummate any transactions authorized by the Receivership Order, applicable law or otherwise;
- l. Enter into such ordinary course contracts, leases and other arrangements, whether for real or personal property, or tenancy agreements, under such terms and conditions as the Receiver, in its discretion, may deem appropriate or desirable;
- m. Collect and receive all present and future rents, profits, revenues and other proceeds arising from the Receivership Assets, subject to the rights of the Grand Centreville Lender with respect to any lockbox or assignment of rents;

- n. Pay all expenses (including, without limitation, real estate taxes, utility bills, maintenance and repair bills, insurance, etc.) and other charges incurred or due in connection with the Receivership Assets from rent collections and other amounts collected or received by the Receiver from or as a results of the Receivership Assets, as set forth in paragraph 15 of this Receivership Order;
- o. Eject tenants or repossess personal property, as provided by law, for breaches of the condition of their leases or other agreements;
- p. Sue for any unpaid rents and profits, payments, income or proceeds in the name of Grand Centreville;
- q. Maintain actions in forcible entry and detainer, ejectment for possession and actions for distress for rent;
- r. Compromise or give acquittance for rents and profits, payments, income or other proceeds that may become due in connection with the Receivership Assets;
- s. Undertake variances with respect to the Receivership Assets, or take other action with respect to zoning, land use and permitting matters, and enter into any agreement, document or arrangement in connection with the foregoing, provided that the Grand Centreville Lender and the Plaintiffs have consented to such actions, in writing, and with court approval;
- t. Oversee the maintenance and management of the Receivership Assets;
- u. Engage any accountants, real estate agents, attorneys, appraisers, engineers, experts, consultants, contractors, property managers, and/or other persons and professionals, as appropriate, in order to advise and assist the Receiver in carrying out its duties under the Receivership Order and/or appear in court or

other proceedings on the Receiver's behalf; provided that, prior to the engagement of a property manager for the Shopping Center, the Receiver must obtain the written consent of the Plaintiffs;

- v. Take all such further actions and enter into all such other agreements as the Receiver, in its professional discretion, deems appropriate or desirable to maintain, preserve, protect and maximize the value of the Receivership Assets.

14. Subject to the consent of the Plaintiffs, or order of this Court, the Receiver is authorized and empowered to employ and compensate such accountants, attorneys, appraisers, engineers, experts, consultants, contractors, property managers and other professionals as the Receiver may deem necessary or appropriate to the performance of its duties under this Receivership Order.

15. The Receiver shall submit to the Plaintiffs all invoices and bills for fees, costs and expenses incurred in the ordinary course of business in connection with the operation, maintenance, management, protection and preservation of the Receivership Assets, including without limitation, reasonable expenses required to put the Receivership Assets in a rentable and/or saleable market-ready condition or otherwise necessary to realize the value thereof. Upon the Plaintiffs' approval of such invoices and bills, the Receiver is authorized and empowered to pay, from the Receivership Assets, all such invoices and bills. The Receiver shall not be liable for any expenses incurred with regard to the Receivership Assets prior to the Receiver taking possession of the Receivership Assets, nor shall the Receiver be required to use the Receivership Assets for payments of any expenses incurred with regard to the Receivership Assets prior to the Effective Date. Notwithstanding the foregoing, the Receiver may, in its discretion, and upon the prior written consent of the Plaintiffs, pay those expenses which were incurred in the normal and ordinary course of business of the Receivership Assets prior to the Receiver taking possession of

the Receivership Assets if, and only if, the Receiver determines that payment of such pre-existing expense is necessary and critical to the ongoing operation, maintenance, management, protection and preservation of the Receivership Assets. Otherwise, no pre-existing expenses shall be paid by the Receiver. The Receiver shall not be required to perform under any contract or lease entered into in connection with the Receivership Assets prior to the date on which the Receiver assumes possession of the Receivership Assets.

16. The Receiver is further authorized to be compensated from the proceeds of operation of the Receivership Assets at the Receiver's customary hourly rate, plus reimbursement of all reasonable and necessary out-of-pocket expenses incurred by the Receiver in the discharge of its rights and obligations under the Receivership Order. Such amounts may be paid without order of the court with the consent of Plaintiffs and Sohn. Absent such consent, order of the court shall be required prior to payment.

17. The Receiver shall: (a) prepare a detailed accounting of all rents and revenues collected and fees and expenses paid for the previous month; and (b) file such accounting with the Court on a monthly basis, and provide a copy to the Plaintiffs, Sohn and Han.

18. The Receiver shall: (a) prepare a detailed business plan on a monthly basis; and (b) provide a copy of such business plans to the Plaintiffs, Sohn and Han the first of each month for which the business plan is prepared.

19. The Receiver shall take reasonable action to ensure that it complies with all laws applicable to the possession, use, occupancy, management, operation and maintenance of the Receivership Assets as provided under any laws of the United States, the Commonwealth of Virginia, and otherwise.

20. The Receiver and its professionals, agents, representatives, employees, affiliates, successors and assigns are discharged and released from all liability for any acts or omissions in

connection with the Receivership Order, the receivership estate established pursuant to this Receivership Order, the Defendants or the Receivership Assets, provided that such acts and omissions are made in good faith, without gross negligence or willful misconduct; and the Receiver is authorized to obtain such insurance coverage as it may deem reasonable to protect itself and its professionals, agents, representatives, employees, affiliates, successors and assigns against any claims and/or liability which are covered, or not covered, by the foregoing exculpation; and provided that any premiums or fees for such insurance shall be paid from the Receivership Assets and constitute a fees or expense of the receivership estate.

21. The Receiver and its professionals, agents, representatives, employees, affiliates, successors and assigns are hereby released and held harmless from and against any and all claims, liabilities, damages, fees, costs, expenses, and charges incurred or arising from their respective acts or omissions in connection with the Receivership Order, the receivership estate established pursuant to the Receivership Order, the Defendants and/or the Receivership Assets, except to the extent that this Court determines by a final and non-appealable judgment that such acts or omissions resulted solely from such person's bad faith, gross negligence or willful misconduct.

22. All fees and expenses of the Receiver (including, without limitation, the indemnification provisions set forth above) shall constitute a first lien and charge against the Receivership Assets, with senior priority ahead of all other security interests and liens other than the security interests and liens of the Grand Centreville Lender.

23. The Receiver shall file a bond in the amount of \$1 million in this case within five (5) business days following the Effective Date, or such later date as authorized by this Court.

24. The Receiver is hereby authorized and empowered, in its sole discretion, to resign its office as Receiver by providing not less than thirty (30) days written notice to counsel for the Plaintiffs, and by filing such notice with this Court.

25. The Receiver is hereby authorized and empowered to cause a copy of the Receivership Order to be recorded in all applicable land records.

26. This Court shall retain jurisdiction and supervision of all matters concerning the Receiver, the Receivership Order, the receivership estate created by the Receivership Order, and the Receivership Assets, and authorizes and empowers the Receiver to seek further instructions and additional authority and/or direction from this Court upon written notice to counsel for the Plaintiffs, and the Defendants.

Entered: Jun 3 2013

/s/ Robert G. Mayer
United States Bankruptcy Judge

Entered on Docket: Jun 3 2013

WE ASK FOR THIS:

/s/ Bradford F. Englander
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*Counsel for the Official Committee of Unsecured Creditors
And Special Counsel to Raymond A. Yancey, Chapter 11 Trustee*

SEEN AND AGREED:

/s/ Madeline A. Trainor
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*Counsel for James Y. Sohn, and
Special counsel solely for the purposes
Of This Motion, for Grand Formation, Inc.
And Grand Centreville, LLC*

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Counsel for Yeon K. Han

LOCAL RULE 9022-1(C)(1) CERTIFICATION

In accordance with Local Rule 9022-1(C)(1), the foregoing proposed order has been endorsed by
or served upon all necessary parties.

/s/ Bradford F. Englander

Bradford F. Englander

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