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

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

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OPPOSITION TO SECURED CREDITOR'S
MOTION TO DISMISS PURSUANT TO 11 U.S.C. § 1112

Raymond A, Yancey, the Chapter 11 Trustee (the "Trustee") for the bankruptcy estate of Min S. Kang and Man S. Kang (the "Kang Estate"), by and through its undersigned counsel, file this Opposition (the "Opposition") to 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"), and in support thereof, states:

INTRODUCTION

The Motion to Dismiss lacks merit and should be denied. The Trustee believes that this chapter 11 proceeding is necessary to protect the interest of the Kang Estate in Grand Centreville, LLC (the "Debtor" or "Grand Centreville"). As the Trustee previously has advised the Court, the Trustee believes that Grand Centreville is the "crown jewel" of the Kang Estate.

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Grand Centreville has never defaulted on its loan obligations, and its shopping center is nearly fully leased. Indeed, the Trustee is informed that at least since 2006 (and perhaps since the loan was taken out in 2005), Grand Centreville has never been even one day late in making any payment due under the loan. Grand Centreville's bankruptcy resulted from the aggressive actions of the Lender that 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. No explanation was given for declining to discuss a standstill agreement, other than such discussions were, in the view of the Lender, "premature." In light of the circumstances, doing anything other than protecting the crown jewel of the Kang Estate by encouraging the filing of a bankruptcy would have been foolish and inconsistent with the statutory requirements for management of an LLC.

Relying on the 2005 version of Grand Centreville's operating agreement, the Lender contends that there is no authority for a bankruptcy filing. As a threshold matter, no determination has been made as to which version of the operating agreement (2005 or 2009) is effective. That issue, among others, remains to be resolved as part of a separate adversary proceeding.[1] But regardless of what version of the operating the Court eventually determines to control, authority for the filing is governed by this Court's order appointing a receiver (the "Receiver Order") for both Grand Centreville and its sole managing member, Grand Formation,

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[1] Over and above the issue of the validity of the 2009 operating agreement, it is unclear whether the 2005 operating agreement relied upon by the Lender is, or ever was, correct or valid. The June 2005 Amended and Restated Operating Agreement, attached as an exhibit to the Motion to Dismiss, is signed by Grand Formation (the 0.5% owner of the Debtor). However, it is not signed by Grand Equity, the 99.5% owner. The purported signature page for Grand Equity on its face indicates that it is approval of an earlier March 17, 2004 operating agreement and specifically refers to Grand Equity as the sole 100% member (which it was not in 2005). As the Trustee has pointed out to the Court in previous pleadings, in many instances regarding transactions involving the Kangs, there are multiple and inconsistent versions of the same documents, some signed, partially signed, or unsigned. As a result, there remain open factual issues as to the correct version of many documents, including the Grand Centreville operating agreement. However, because the order appointing Grand Centreville's receiver provided the authority to file a voluntary petition, a determination of the correct operating agreement should not be at issue in the current motion.

LLC ("Grand Formation"). On June 3, 2013, with the consent of 100% of the putative owners of Grand Centreville and Grand Formation, this Court ordered that

> "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 an preservation of the Receivership Assets, . . ." As such, the Receiver was vested with the managerial authority over the Debtor that even the Lender acknowledges is necessary to place a company under bankruptcy protection.

The Lender further contends that Grand Centreville filed its Chapter 11 petition in bad faith because this is a two party dispute and, as such, dismissal is mandated. The Lender's argument utterly ignores applicable law and, more importantly, the facts. The petition surpasses the minimum criteria governing the filing of Chapter 11 petitions set forth by the Fourth Circuit in that reorganization of Grand Centreville is objectively viable, and that the petition was filed for the good faith purpose of protecting Grand Centreville's assets. Furthermore, this is hardly a "two party" dispute. Grand Centreville is the most valuable asset of the Kang Estate. The Trustee (and indirectly the Grand Centreville Receiver) is a fiduciary for creditors of that estate, whose filed claims exceed $100,000,000. The Kang Estate is insolvent by any measure, and

protection of its interest in Grand Centreville is paramount. Moreover, even if this case were somehow the result of a two party dispute, the concept that two party disputes in real estate cases are grounds for dismissal is an outdated concept, over-ridden by the enactment of Section 362(d)(3) of the Bankruptcy Code.

The exercise of the Grand Centreville Receiver's fiduciary obligation is consistent with the purpose of the Bankruptcy Code and was undertaken in good faith. Because the Debtor's business is operating as a going concern and its assets have sufficient equity, a viable rehabilitation is likely and the bankruptcy case is not objectively futile. Additionally, because the Debtor was forced to seek bankruptcy protection only *after* the Lender took aggressive actions that threatened the value of the Debtor to its creditors and equity holders, including the Kang Estate, the bankruptcy case was filed in subjective good faith.

Accordingly, the Motion to Dismiss should be denied.

STATEMENT OF FACTS

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 remains in possession of its assets and operates its business as a debtor-in-possession pursuant to §1107 of the Bankruptcy Code. No committee has been appointed in these proceedings.

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.

A. Related Chapter 11 Proceedings of the Kangs

3. This chapter 11 case is related to the Chapter 11 cases 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 the Trustee as chapter 11 trustee for the case, which appointment the Court subsequently approved on January 16, 2013.

5. 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, a Virginia corporation. 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.

6. 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.

7. The Kangs have indicated in the schedules of assets and liabilities filed in the Kangs' Bankruptcy Case that the Shopping Center has a value of $39,000,000. The Trustee

believes that the value of Grand Centreville far exceeds the scheduled value. 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 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

8. 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.

9. 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.

10. Following the closing, Sohn and Han in fact assumed operational control of the Debtor. They began using the entity and its assets for their personal benefit, to the detriment of

the Kangs, the Kangs' creditors and the Kang Estate. Sohn and Han developed a pattern of concerted actions for outrageously deceitful and unlawful ends in order to obtain value from Grand Centreville, to the exclusion of, and detriment to, the Kangs and the Kang Estate. They took these actions both prior and subsequent to the Kangs' Petition Date.

11. On October 18, 2012, the Kang Committee, as Plaintiff, and on behalf of the Kang 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 Trustee joined as a plaintiff in the Sohn/Han Adversary Proceeding.

12. As a result of the unlawful transfer of the Kangs' interests in the Debtor and the other unlawful actions related to the operation of the Shopping Center the Trustee and the Kang Committee filed 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 in the Debtor 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.

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

C. The Appointment of the Grand Centreville Receiver

14. As a result of the activities of Sohn and Han regarding the operations of the Debtor as outlined in the Amended Complaint, on May14, 2013, the 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 Trustee – litigate their disputes in the Sohn/Han Adversary Proceeding.

15. On June 3, 2013, and upon the consent of Grand 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, the Grand Centreville Receiver was appointed as an equity receiver for the Debtor and Grand Formation.

16. Since the entry of the Receiver Order and in accordance therewith, the Grand Centreville 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 Grand Centreville 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

17. 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.

18. 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

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

20. Promptly following the appointment of the Grand Centreville Receiver, Michael Schuett, the principal of the Grand Centreville 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 Trustee or the Grand Centreville Receiver.

21. On or about June 14, 2013, the Grand Centreville Receiver received notice that LNR Partners, LLC (the "Special Servicer") would be appointed as special servicer on behalf of the Lender.

22. On July 2, 2013, counsel for the Special Servicer contacted counsel for the 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 formal notice by the Kangs of the pendency of the Kangs' bankruptcy case.

23. Counsel for the Trustee arranged to meet with counsel for the Special Servicer. Such meeting took place on July 3, 2013. At the meeting, counsel for the Trustee delivered

notebooks with copies of hundreds of pages of pleadings (relating to both the Kang bankruptcy and the Sohn/Han Adversary proceeding) to counsel for the Special Servicer, and spent approximately two and one-half hours briefing them on the background of the Kang case. Counsel for the Trustee made it plain to counsel for the Special Servicer that the Trustee sought to assure the Special Servicer that all action would be taken to protect the Lender, and that the Trustee sought to discuss any concerns that the Lender or the Special Servicer might have with respect to Grand Centreville.

24. On July 29, 2013, counsel for the Special Servicer sent an e-mail to counsel for the Kang Committee and the 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 Trustee was delayed because counsel for the Special Servicer mis-addressed such email. A copy of the July 29, 2013 email is attached hereto as **Exhibit B**.

25. One day later, on July 30, 2013, counsel for the Special Servicer issued a notice of default to the Debtor (the "Default Letter"). A copy of the Default Letter is attached hereto as **Exhibit C.** The Default Letter asserted several "retroactive" defaults going back over four (4) years. 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 retroactive remedies including a claim for approximately $4 million 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 more than $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.

26. After receiving the Default Letter, counsel for the Trustee sought to confirm the 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 Trustee, in consultation with the Grand Centreville Receiver, arranged for a call with counsel for the Special Servicer to discuss entering into a standstill agreement to enable the Trustee and the Grand Centreville 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 and a call for such discussions was set for August 1, 2013.

27. However, on August 1, 2013, less than one (1) hour before the scheduled call between the counsel for the Trustee and counsel for the Special Servicer, counsel for the Special Servicer sent an e-mail abruptly cancelling the call. A copy of the August 1, 2013, e-mail is attached hereto as **Exhibit D**. No explanation for cancelling the call was given, other than the assertion that the Special Servicer considered such discussions to be "premature." The counsel for the Trustee immediately informed the Grand Centreville Receiver of the sudden cancellation of the meeting.

28. 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 Grand Centreville Receiver had no choice but to – and indeed, had the duty to – seek the protection of the bankruptcy court. (Under the Loan Documents, acceleration would have made the loan immediately due and payable, and because there is no grace period whatsoever, a 5% late fee, possibly in excess of $1.2 million, could arise merely by virtue of the delivery of a notice of acceleration.)

29. 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 from fee statements delivered by the Special Servicer that it had been working on a motion to dismiss since early September.

ARGUMENT

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

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 Grand Centreville Receiver has that broad managerial authority over both the Debtor and the Debtor's managing member, Grand Formation. 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 Assets[2] to the Grand Centreville 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 Grand

[2] 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."

Centreville Receiver as outlined in the Receiver Order, concludes with the "catch-all" phrase authorizing the Grand Centreville 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 Grand Centreville 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 Grand Centreville 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 <u>one case</u>, *In re Am. Heartland Sagebrush Sec. Investments, Inc.*, which case merely mentions an order granting an SEC receiver the authority to 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 Grand Centreville 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 Trustee and the Special Servicer's positions are

aligned on the issue that the 2009 Operating Agreement may be void. The Trustee agrees 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% beneficial owners of Grand Centreville and Grand Formation. The Trustee would welcome the immediate ruling that this is the case. However, the Trustee recognizes that Sohn and Han have disputed the 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. The Court has not yet resolved this dispute.

The Trustee further notes 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 the Grand Centreville bankruptcy, Special Servicer must ignore the terms of the 2009 operating agreement, and instead insist that the 2005 version remains vital and effective.

At the end of the adversary proceeding, the Trustee believes that the Court will determine that Han and Sohn are interlopers and that they lack any legally cognizable interest in Grand Formation or Grand Centreville. But until the adversary proceeding has been resolved, the Court is left with the circumstance that all of the putative owners of any economic interest in Grand Centreville consented to the appointment of the Grand Centreville Receiver and the broad powers granted to the Grand Centreville Receiver.

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 Grand Centreville 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.

Ultimately, the Lender is asserting contorted technical roadblocks to the Debtor's ability to seek bankruptcy protection, not to protect the interests of the company, but somehow to prevent the bankruptcy filing so that it can proceed with its state court remedies and foreclose on the Debtor's assets. The Lender is not an owner or director of the Debtor raising issues of corporate authority, but merely a creditor that wants to keep its debtor from enjoying the full protections of bankruptcy law. The Lender's actions are all in the effort to prevent the Grand Centreville Receiver from exercising its fiduciary duty to protect the Receivership Assets. In doing so, the Lender overlooks Grand Formation's role and obligations as manager of the Debtor – and in turn the Grand Centreville 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 Grand Centreville 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.

B. The Debtor's Bankruptcy Case Was Filed in Good Faith

The Lender's argument that the chapter 11 case should be dismissed because it was not filed in good faith also is without merit. This case was filed in good faith and consistent with the well-established case law in this Circuit. Demonstrating a lack of good faith in filing a Chapter 11 petition requires a showing of "objective futility" and "subjective bad faith." *Carolin Corp. v. Miller*, 886 F.2d 693, 700-01 (4th Cir. 1989). The Lender cannot sustain its burden to establish either element of the standard set forth in *Carolin Corp*. The objective test focuses on whether "there exists the 'realistic possibility of an effective reorganization.'" *Id*. at 698 (quoting *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984). 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. At bottom, 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).

i. The Debtor's Bankruptcy Case is Not Objectively Futile and Has a High Likelihood of Success That the Debtor Will Emerge Rehabilitated in Accordance With the Underlying Policies of the Bankruptcy Code

There are two overriding policies of the Bankruptcy Code that must serve as the backdrop for any motion to dismiss a bankruptcy case. First, the Bankruptcy Code aims to preserve the going concern value of a debtor. *In re Landmark Atlantic Hess Farm, LLC*, 448 B.R. 707, 712 (Bankr. D. Md. 2011). Second, the Bankruptcy Code seeks to maximize property available to satisfy creditors. *Id.* The Debtor's bankruptcy case fulfills these two recognized policies. Granting the Motion to Dismiss opens the door for the Lender to accelerate the Loan imposing excessive penalties and interest and to foreclose on the Shopping Center and deprive the Debtor's creditors of the Debtor's going concern value while satisfying only the Lender. The Lender ignores both the basic policies of the Bankruptcy Code and the Grand Centreville Receiver's fiduciary duty to preserve and maximize the value of the Receivership Assets and instead focuses only on its selfish desire to obtain disproportionate and retroactive default interest and penalties to the detriment of all other parties in interest and to use the threat of foreclosure as leverage over the Grand Centreville Receiver.

The Lender argues that the Debtor's financial stability indicates that the Debtor's bankruptcy case was filed in bad faith. In making this argument the Lender is ignoring, of course, its threat to accelerate the Loan and impose millions of dollars in penalties and back interest. Contrary to the thrust of the Lender's contention, the Bankruptcy Code does not require that a debtor be insolvent or require any particular degree of financial distress as a condition precedent to seeking relief under its provisions. *In re General Growth Properties, Inc.*, 409 B.R. 43, 61 (Bankr. S.D.N.Y. 2009) (citing *U.S. v. Huebner*, 48 F.3d 376, 379 (9th Cir. 1994). The *General Growth* Court acknowledged situations similar to the predicament faced by the Debtor

prior to its filing where courts have denied motions to dismiss because, "despite being able to meet current expenses, the debtor had a 'huge financial liability which it [did] not have the ability to pay out of current cash flow, and without substantial liquidation of its assets.'" *Id.* at 60 (quoting *In re Century/ML Cable Venture*, 294 B.R. 9, 35-36 (Bankr. S.D.N.Y. 2003) (citing, *inter alia*, *In re Johns-Mansville Corp.*, 26 B.R. 727, 736-37 (Bankr.S.D.N.Y. 1984) (denying a section 1112 motion to dismiss filed by asbestos tort litigants based on contention that Manville had filed its chapter 11 case as a maneuver to curtail its liabilities, noting that Manville was a viable business and "must not be required to wait until its economic picture has deteriorated beyond salvation to file for reorganization"); *In re Central Jersey Airport Services*, 282 B.R. 176, 181 (D. N.J. 2002) (motion to dismiss denied when solvent debtor filed in order to reject an executory contract which was being enforced in the pending litigation; *In re Central Jersey Airport Services*, 282 B.R. 176, 181 (Bankr. D.N.J. 2002); *In re Chris-Marine U.S.A., Inc.*, 262 B.R. 118, 125 (Bankr. M.D. Fla. 2001).

Significantly, *In re SGL Carbon Corp.*, 200 F.3d 154 (3rd Cir. 1999), one of the cases that the Lender references in support of its argument that courts consistently dismiss petitions filed by financially healthy companies, is readily distinguishable from the case at hand. In *SGL*, the debtor was not in any sort of financial distress, imminent or otherwise. The debtor had a $240 million cash reserve and faced only $54 million in anti-trust claims and there was no evidence that these claims could force the debtor out of business. *Id*. Here, the Debtor does not have the cash on hand to satisfy an acceleration of the Loan or pay the penalties and interest necessary to stave off foreclosure, and would require liquidation to pay those purported obligations in the event the case was dismissed. *See Century/ML Cable Venture*, 294 B.R. at 36, n. 43 (distinguishing *SGL* and denying motion to dismiss where debtor did not have cash on hand

to pay its major liability, and "would face liquidation or dismemberment in the event of a judgment on the claim" and finding that there was "the requisite potential harm to the [debtor]").

In fact, the Debtor's favorable financial operations and equity above the Lender's secured claim supports the Debtor's good faith filing, not the opposite. The vast majority of cases that are dismissed for lack of good faith involved companies were "hopelessly insolvent" and a pending foreclosure was the "result of arrearages or default on the debt". *General Growth*, 409 B.R. at 56. Neither of these circumstances is present in the Debtor's case. As in the *General Growth* case, the Lender does not argue that the Debtor does not have the ability to reorganize, but rather appears to argue that the commencement of its bankruptcy case was "premature" because it was not yet in financial distress. *Id*. at 57. The *General Growth* Court rejected this argument and refused "to establish an arbitrary rule … that a debtor is not in financial distress cannot file a Chapter 11 petition. …" *Id*. at 60.

Moreover, the Lender argues that the Debtor had "no demonstrable need" to file for bankruptcy when it did. *See* Motion to Dismiss at p. 17. The primary case that the Lender cites in support of this argument, *In re Premier Automotive Services, Inc.*, 492 F.3d 274 (4th Cir. 2007), is readily distinguishable from the case at bar. First, the debtor in *Premier*, filed bankruptcy for the sole reason of invoking the automatic stay and forestalling eviction on an obviously expired lease. *Id*. at 277. Second, the debtor used the bankruptcy process for the purpose of "tying up the State in endless, fruitless litigation." *Id*. Moreover, because the debtor's primary relief and reorganization strategy involved resurrection of an expired lease – relief that could not be found in bankruptcy because the expired lease was not property of the estate – the debtor could not be rehabilitated through the bankruptcy process. *Id*. None of these circumstances exist in the Debtor's case. The Debtor sought bankruptcy protection to avoid the

penalties that would arise upon the acceleration of the Loan – which, despite its financial stability, it would have been unable to pay – and to forestall the foreclosure of the Shopping Center. Both of these threats from the Lender were real and apparent and the possibility of working around them was thwarted when the Lender canceled the Trustee's good faith attempt to negotiate a simple standstill agreement.

Additionally, unlike the debtor in *Premier*, the Debtor has valid reorganization options and the cash flow and equity in its assets around which to do so. 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. *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 Grand Centreville 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.

ii. The Grand Centreville Receiver Made the Decision to Place the Debtor in Bankruptcy in Subjective Good Faith

As set forth above, the Receiver made the decision to place the debtor in bankruptcy in good faith and to maximize the value of the Debtor and its property for the benefit of its estate and all parties in interest. The Trustee supports this decision and agrees that it was necessary to protect the value of the Debtor and the Kang Estate's interest in the Debtor. The 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 Trustee, and threatened to impose approximately $4 million in penalties, the Grand Centreville Receiver fulfilled its fiduciary duty to preserve, protect and maximize the value of the Receivership Assets and sought the protection of the bankruptcy Court. Accordingly, the Grand Centreville 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 Grand Centreville Receiver made the decision, in exercise of its fiduciary obligation, to file bankruptcy on behalf of the Debtor only *after* the Special Servicer canceled discussions of a simple standstill agreement.

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 substantially 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 is serving the intent 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.

Ultimately, the Lender cannot satisfy either requirement under *Carolin Corp.* that it establish the objective futility of the Debtor's bankruptcy case and that it demonstrate that the Chapter 11 filing was initiated for an improper purpose. The Debtor not only has sufficient equity in its assets, an opportunity to negotiate better terms for or restructure its secured debt, and pay off all of its creditors while maintaining its status as a going concern but it also filed its bankruptcy case when faced with millions of dollars in penalties and interest which it would be unable to pay when due. As a result, the Grand Centreville Receiver filed the Debtor's bankruptcy case in good faith and the Lender's Motion to Dismiss should be denied.

C. While the Debtor Expects to Incur Expenses During its Chapter 11 Case, Such Expenses are Minimal Compared to the Penalties and Interest the Lender Seeks to Impose

While the Trustee does expect that the Debtor's estate will incur some usual expenses over and above its normal operating expenses during its bankruptcy case, these expenses are dwarfed by the millions of dollars of improper penalty interest that the Lender seeks to impose. But more importantly, these costs do not impact the Lender. As the Lender repeatedly points out in its Motion to Dismiss, the Debtor is solvent and its assets exceed its liabilities. The Lender's argument on this point is specious at best because, as an over-secured creditor that is receiving adequate protection payments under a cash collateral order, its position is protected regardless of the minimal expenses the Debtor incurs as a result of its bankruptcy case – a bankruptcy case that was caused by the Lender's refusal to follow through on a previously scheduled meeting.

Because the Debtor is solvent, these costs do affect the value of the Trustee's equity interest. Despite these costs the Trustee supports the filing of the chapter 11 case (and opposes the Lender's Motion to Dismiss) because under the present circumstances, the bankruptcy case is the best way to preserve the value of the Debtor for the benefit of all creditors and equity holders.

Accordingly, the Lender's argument that the "dissipation of assets" of the Debtor caused by the prospective professional fees is unwarranted should be rejected because such expenditures pose no harm to the Lender.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Motion to Dismiss should be denied.

November 12, 2013

/s/ Bradford F. Englander

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2013, a copy of foregoing *Opposition* was served by first class mail, postage prepaid, to the following parties:

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