

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

<b>In Re:</b>	)	<b>CHAPTER 11</b>
	)	
<b>H&amp;S JOURNAL SQUARE ASSOCIATES LLC,</b>	)	<b>CASE NO. 11-11623 (JMP)</b>
	)	
	)	<b>Hearing Date: August 16, 2011</b>
<b>Debtor.</b>	)	<b>at 10:00 a.m.</b>
	)	

**STIPULATION AND CONSENT ORDER FOR USE OF CASH COLLATERAL  
AND ACKNOWLEDGING VALIDITY AND PRIORITY OF LIEN**

**THIS MATTER** having been opened to the Court upon the: (i) the Notice of Perfection of Security Interest in Property Pursuant to 11 U.S.C. § 546(b) and Objection to use of Cash Collateral filed by CA 912-921 Bergen Avenue, LLC (“CA”) on May 24, 2011 (docket #9); and due notice having been given; and it appearing that CA and H&S Journal Square Associates LLC (the “Debtor” or “H&S”) have reached an agreement concerning the use of CA’s cash collateral as set forth in this Order, and the parties having specifically agreed to preserve the pre-petition status quo specifically authorizing and empowering first Oritani Bank (“Oritani”) (CA’s predecessor in interest), and then CA in its own right, to collect and disburse rents derived from the real property owned by the Debtor located at 912-921 Bergen Avenue, Jersey City, New Jersey, 924 Bergen Avenue, Jersey City, New Jersey and – Journal Square, Jersey City New Jersey (the “Journal Square Property”) and good and sufficient cause appearing for the entry of the Order and adequate notice having been given;

**THE PARTIES HEREBY STIPULATE THAT:**

A. On April 6, 2011 (the "Petition Date"), the Debtor filed a voluntary petition for relief under the Chapter 11 of the United States Bankruptcy Code (the “Code”).

B. The Debtor has remained in possession of its assets and is currently authorized to

continue in the operation and management of its business as a debtor-in-possession pursuant to Section 1107 and 1108 of the Code.

C. CA asserts and possesses a validly perfected first lien and security interest on Journal Square Property and, *inter alia*, the rents generated therefrom (the “Rents”) (collectively the “CA Collateral”) as set forth in the Notice of Perfection of Security Interest in Property Pursuant to 11 U.S.C. § 546(b) and Objection to use of Cash Collateral filed by CA on May 24, 2011 (docket #9) (the “Notice of Perfection”).

D. CA’s lien on the CA Collateral secures the Debtor’s obligations pursuant to the following promissory notes and loan agreements:

- (a) Mortgage Note dated June 23, 2008 in the original principal amount of \$14,250,000 from H&S to Oritani;

E. The Debtor’s obligations to CA pursuant to the Note are secured by the CA Collateral set forth in the following security agreements conveyed by the Debtor to Oritani.

- (a) Mortgage and Security Agreement dated June 23, 2008 recorded with the Hudson County Register of Deeds on June 27, 2008 at Mortgage Book 17015, Page 177, et seq. A copy of the Mortgage is annexed to the Notice of Perfection as **Exhibit “B”**;
- (b) Absolute Assignment of Leases and Rents dated June 3, 2008 and recorded on June 27, 2008 with the Hudson County Register of Deeds at Mortgage Book 17015, Page 208, et seq (the “Absolute Assignmemnt”). CA asserts that pursuant to the Absolute Assignment, the Debtor made a knowing contemporaneous transfer of the rents to the Oritani thereby rendering all rents derived from the CA Collateral to be the exclusive property of Oritani. The Debtor reserves the right to argue in this case that, by virtue of the within bankruptcy filing, the Absolute Assignment does not manifest a transfer of ownership in the rents to CA and CA reserves all rights to contest the Debtor’s argument(s) in this regard. A copy of the Absolute Assignment is annexed to the Notice of Perfection as Exhibit “C”;
- (c) The security interests granted to CA were perfected by Oritani by, among other things, the filing of UCC-1 Financing Statements filed with the Secretary of State for the State of New Jersey and with the Register of Deeds in Hudson County. Copies of the filed UCC-1 forms are annexed to the

Notice of Perfection as Exhibit “D”;

F. The Journal Square Property is the primary asset of the Debtor herein and there are no other assets of material consequence in the estate.

G. On or about September 22, 2009, Oritani initiated a complaint in foreclosure against the Debtor seeking to foreclose on the Journal Square Property (the “Foreclosure Action”). Thereafter, in that same action, Oritani filed an Application for the appointment of a Rent Receiver.

H. On or about November 9, 2009, the Superior Court entered a Consent Order in the Foreclosure Action resolving Oritani’s Application to appoint a Rent Receiver whereby H&S and Oritani agreed that all rents derived from the Journal Square Property would be paid directly to Oritani and would thereafter be disbursed by Oritani on account of sums due under the loan including interest due to Oritani, taxes and other charges (the “Rent Collection Order”). Oritani’s collection of the rents as manifested in the Rent Collection Order was simply mechanical and without liability or waiver of any default or any claim(s) under the Loan Documents. The Rent Collection Order contained a recitation that H&S’s license to collect the Rents had been revoked, however, H&S reserves the right to assert and argue that said revocation is no longer effective by virtue of H&S’ bankruptcy filing. CA by contrast, reserves the right to assert that the Rents are not cash collateral but rather are the property of CA pursuant to the Absolute Assignment and/or under other theories including *res judicata*, collateral estoppels, judicial estoppel.

I. On April 21, 2010, the Superior Court of New Jersey entered an Order awarding summary judgment to Oritani in the Foreclosure Action with the amounts due under the Note and Loan Documents to be determined by the Court at the time of entry of final judgment.

J. Prior to the entry of Final Judgment of Foreclosure, on March 10, 2011, Oritani sold its interest in the loan and loan documents to CA. The sale of the Loan Documents is memorialized by, among other things, an Assignment of Loan Documents dated March 10, 2011, which Assignment is recorded with the Hudson County Register of Deeds on April 8, 2011 in Book 1185, Page 52, et seq. whereby CA became the successor to the position of Oritani under the Loan Documents (including, but not limited to, the Note, Mortgage, Assignment of Rents and UCC filings) and further the successor to the position of Oritani in the foreclosure action and other proceedings pending between Oritani and the Debtor. A copy of the Assignment of Loan Documents is annexed to the Notice of Perfection as **Exhibit "E"**;

L. CA has a primary, perfected first lien position on the CA Collateral; however, the amount of the claim secured by this lien is disputed by the Debtor.

M. On June 2, 2011, CA filed a proof of claim in this bankruptcy proceeding asserting that, as of the Petition Date, the Debtor was indebted to CA in at least the amount of \$18,442,173.27. (Claim No. 2 on the Claim Register).

N. The Debtor hereby acknowledges the validity and priority of CA's lien, as described in paragraphs above, and further acknowledges an outstanding principal balance of \$14,077,715.02 as of the Petition Date and a non-default interest rate of 5.75% per annum. Among other things, the Debtor contests the applicability and the aggregate amount of the default rate of interest and the interest calculations set forth by CA in its proof of claim plus other charges and fees asserted by CA to be due. Both the Debtor and CA reserve all rights and objections to CA's proof of claim and the amount(s) therein asserted to be due.

O. H&S and CA have agreed to maintain the status quo with regard to the payment and collection of rents whereby the payments will be made directly to Oritani Bank, now as

servicer for CA, which funds, when collected, will be disbursed and/or applied by CA on account of the sums due under the Loan Documents including non-default interest, taxes, and other charges and expenses that may be budgeted as agreed by the parties. The parties have agreed that this understanding has been in effect since the inception of this bankruptcy case and the Debtor acknowledges that it has previously reaffirmed its consent to CA's collection of the Rents in the post-petition period, without waiver of either parties' rights or remedies.

P. Good cause has been shown for the entry of the Order and its terms are fair and reasonable.

It is therefore **ORDERED, ADJUDGED AND DECREED** as follows:

1. All rents, income, issue, profits and proceeds arising from the Journal Square Property and any and all of the CA Collateral and all cash, negotiable instruments, proceeds, product or profits arising therefrom, and any and all substitutions, replacements, additions and accessions fall within definition of the cash collateral as set forth in Sections 363(a) and 552(b) of the Bankruptcy Code.

2. All rents, income, issue, profits and proceeds arising from the Journal Square Property and any and all of the CA Collateral, and all cash, negotiable instruments, proceeds, product or profits arising therefrom, and any and all substitutions, replacements, additions and accessions are the property of CA pursuant to the Absolute Assignment and the Assignment of Loan Documents as set forth above, and said rents are not property of the estate within the meaning of 11 U.S.C. §541, nor were they property of the estate as of the Petition Date or at any time thereafter, subject to the Debtor's rights as set forth in paragraph E(b), *supra*.

3. The Debtor and CA wish to maintain the status quo whereby the Rents will be paid directly to Oritani as servicer for CA and CA and/or Oritani are authorized to disburse or

apply said rents to the amounts due under the Note and Loan Documents in accordance with this Stipulation and any further Budget as may be agreed to by the parties. By way of illustration and not limitation, the Rents may be applied to outstanding interest at the non-default rate of 5.75%, real property taxes and costs of insurance.

4. CA and/or Oritani may use and are permitted to collect, disburse, and/or apply the rents, and have been so authorized and permitted immediately as of the Petition Date, and any collection disbursements or application thereof since the Petition Date shall not manifest a violation of the automatic stay provisions of the United States Bankruptcy Code..

5. CA will generate a report reflecting rents collected and received, and the application thereof and provide said report to the Debtor on a monthly basis beginning with rents collected for the month of April 2011. The report for each month shall be due on the tenth (10<sup>th</sup>) day following the end of that respective month so that the Debtor may file its monthly operating reports. The reports for April and May 2011 shall be due no later than the tenth (10<sup>th</sup>) day after the entry of this Stipulation and Consent Order.

6. Other than the taxes, insurance and budgeted carrying costs that it will be paying out of collected rents, CA shall not be required to incur or fund any other expense on behalf of the Debtor. Nothing in this provision shall prevent CA from to incurring any expense, whether ordinary or extraordinary, in the maintenance, protection and preservation of the Journal Square Property and to add said expense to the amount due under the Loan Documents upon ten (10) days prior notice to the Debtor, unless in the case of an emergency in which case notice shall be as prompt and reasonable as possible.

7. CA will continue to fund and maintain hazard, loss and fire insurance on the Journal Square Property in an amount equal to the current insurable value of such assets as

determined by CA, which insurable value shall, in no circumstance be less than the insurable value previously agreed to between the Debtor and Oritani as prior lender, with CA designated as a loss payee on such asset to the extent of its interest therein.

8. Nothing contained herein shall be construed to obligate CA to make any loans or advances to the Debtor.

9. As partial adequate protection to CA for the Debtor's use of CA's cash collateral, CA may apply the Rents collected to interest on its claim at the non-default rate. Additionally, CA is hereby granted, pursuant to section 361(2) and 363 of the Bankruptcy Code, valid and existing first and senior replacement liens and security interests in all post-petition leases, rents, issues, profits and proceeds, arising from the CA Collateral and in all the cash collateral arising from the CA Collateral on and after the Petition Date to the extent and with the priority it would have received had the property been acquired pre-petition.

10. The Debtor stipulates and consents to the validity and first priority of the pre-petition liens and security interests of CA, (as indicated in paragraphs above), and this Court hereby allows CA a claim in at least the amount of \$14,077,715.02, as of the Petition Date, which claim is secured by a primary, perfected and first lien on the Journal Square Property and other CA Collateral. Despite this acknowledgment, the Debtor reserves all rights and objections to the non-principal and non-default portion(s) of the amount asserted to be due by CA on account of CA's first priority lien. These continuing liens and security interests shall be senior to all other liens and claims against the Debtor or the Debtor's Property, including having priority over all other administrative expenses of the kind specified in sections 503(b) of the Bankruptcy Code, but subject only to the fees of the United States Trustee pursuant to 28 U.S.C. § 1930 and the "Carve-Out" described in paragraph 21.

11. CA shall have the right upon three (3) business days telephone notice to the Debtor through its attorneys, at any time during the Debtor's normal business hours, to have their agents inspect and visit the Journal Square Property which visits shall be done in a manner so as to minimize the disturbance to the Debtor's business operations.

12. This Order shall be sufficient evidence of CA's interest in the Rents, perfected liens and security interests in and to the Journal Square Property and other CA Collateral, and in and to the collateral granted by way of adequate protection pursuant to this Order, without the necessity of CA taking possession, filing financing statements, mortgages or other documents. The Debtor is authorized to execute and deliver all instruments as may be necessary or appropriate to implement the terms and condition of this Order.

13. Any creditors' committee formed or trustee appointed shall have sixty (60) days from formation/appointment to contest, by filing and serving an objection to the foregoing or any part thereof on all interested parties under Bankruptcy Rule 2002, and in the absence of such action all creditors and all successors to the Debtor shall also be bound by the provisions of this Order as it relates to all of them. The right of any creditors' committee formed or trustee appointed to object under this Order shall terminate sixty-one (61) days from formation/appointment. Any creditor, on its own accord, shall have thirty (30) days from the entry of this Order to contest, by filing and serving an objection to the foregoing or any part thereof on all interested parties under Bankruptcy Rule 2002, and in the absence of such action all creditors shall be bound by the terms of this Order. After the applicable objection period set forth herein, all creditors, any committee formed or trustee appointed, successors in interest to the Debtor, and all other interested parties shall be bound by the provisions of this Order.

14. The Debtor's authorization to use cash collateral and CA's consent thereto, shall



immediately terminate without further Order on the earlier of (a) the entry of and Order granting CA, or any party other than CA, relief from the automatic stay with respect to any property of the Debtor in which CA claims a lien or security interest, whether pursuant to this Order or otherwise; (b) the entry of an Order dismissing the Chapter 11 proceeding or converting this proceeding to a case under Chapter 7 of the Bankruptcy Code; (c) the entry of an Order authorizing the appointment of a trustee; (d) the entry of an Order confirming a Plan of Reorganization; (e) the entry of an Order by which this Consent Order is reversed, revoked, stayed, rescinded, modified or amended without the consent of CA thereto; or (f) the closing of a sale transaction as to the Journal Square Property pursuant to 11 U.S.C. §363 or otherwise.

15. Nothing contained in this Order shall be deemed or construed to (a) limit or waive or release any and all of CA's objections to the Debtor's use of CA's property or CA's cash collateral in any manner of or for any period beyond that which is expressly authorized by the terms of this Order; (b) limit CA to the relief granted hereby; (c) limit or bar CA from seeking other and further relief (including, without limitation, relief from the terms of this Order) for cause on appropriate notice to the Debtor and other parties-in-interest entitled to notice of same; or (d) limit or waive any of CA's rights and remedies with respect to its interests in the Journal Square Property, the CA Collateral or proceeds therefrom, or any of CA's other collateral for the subject indebtedness, all of said rights and objections CA hereby expressly reserves. Likewise nothing contained in this Order shall be deemed to limit or waive any of the Debtor's rights to challenge or object to the amount of CA's claim(s) or any actions taken by CA or its predecessor, except for the Debtor's acknowledgement of the outstanding Principal amount and interest at the non-default rate.

16. Either party shall have the right to terminate its consent for the use of cash

collateral for “cause” as defined by a finding of the Court, after five (5) business days’ written notice to the other, that at any time the respective party has violated the terms of this Stipulation and Consent Order or the or that the Debtor has breached any representations, warranties and/or covenants contained in the Loan Documents which materially jeopardizes CA’s security. CA reserves its rights to move at any time for relief from the automatic stay, conversion or for the appointment of a trustee on any and all appropriate grounds.

17. The Debtor concedes that this case is a single asset real estate case (“SARE”) within the meaning of the Bankruptcy Code and further concedes the applicability of 11 U.S.C 362 (d)(3) without need of further application by CA or further Order of the Court. The parties further concede that the provisions of § 362 (d)(3)(b)(ii) will be satisfied as long as the monthly rental collections remain within 10% of \$100,000, which is the approximate amount of the monthly rents as of the Petition Date (the “Monthly Base Rent”). If the monthly rent collections in a given month are more than 10% less than the Monthly Base Rent, CA may move before the Bankruptcy Court for Stay relief on the basis that the Debtor is not satisfying the requirements of § 362 (d)(3)(b)(ii).

18. Nothing in this Order shall constitute a waiver of any event of default which has occurred under the Note, Mortgage or other Loan Documents to date or which may occur in the future.

19. To the extent the adequate protection provided for hereby proved insufficient to protect CA’s interest in and to the cash collateral, CA shall be entitled to the protections of Section 507(b) of the Bankruptcy Code upon appropriate application. CA will be entitled to assert an administrative expense claim pursuant to Sections 507(a)(2) and 503(b) of the Bankruptcy Code for the amount of diminution, if any, in the value of the CA Collateral

subsequent to the Petition Date, without waiver of any other rights or claims CA may possess. Any such administrative expense claim to which CA is allowed after appropriate application and notice pursuant to this paragraph shall have a super priority administrative expense claim, pursuant to Section 507(b) of the Bankruptcy Code, senior to any and all claims against the Debtor under Section 507(a) of the Bankruptcy Code, whether in this proceeding or in any superseding proceeding except that same shall be subordinated only to any outstanding fees allowed and payable to the United States Trustee and/or the Clerk of this Court.

20. CA is granted a replacement lien on and in all property acquired or generated post-petition by the continued operations of the Debtor to the same extent and priority and of the same kind and nature as CA would have had prior to the filing of this bankruptcy case; but excluding all proceeds of property recovered or transfers avoided by or on behalf of the Debtor, its estate or any subsequently appointed trustee under Sections 544 through 550, inclusive, of the Bankruptcy Code (the "Post-Petition Collateral"). This replacement lien and security interest in the Post-Petition Collateral granted to CA (the "Replacement Lien") is deemed to be valid and perfected without the need of CA to take possession, file financing statements, for the execution, filing or recording of any further documents or instruments, otherwise required to be executed or filed under non-bankruptcy law. The Debtor is, however, authorized to execute and deliver all instruments as may be necessary or appropriate to implement the terms of this paragraph.

21. The CA Collateral shall not be subject to any claim or charge of any of the Debtor's professionals, including attorneys and accountants, for any fees, costs, commissions or expenses, of whatever nature under Bankruptcy Code section 506(c) or otherwise except as otherwise agreed to in writing by CA and ordered by this Court. CA has agreed to a "Carve-Out" from its collateral as set forth on the Trustee's Motion to Compel the Sale of Real Property

(Docket No. 12). The Debtor's execution of this Stipulation shall not be deemed consent to the Trustee's Motion or a waiver of any defenses or objections thereto and the Debtor retains all rights in that regard. Any such "Carve-Out" that may be approved by the Court shall be available: (a) for the payment of fees and expenses that may be allowed to professionals retained by the Debtor or any Committee, as well as the statutory fees of the U.S. Trustee pursuant to 28 U.S.C. § 1930; and (b) fees and expenses of a chapter 7 trustee appointed upon any conversion of these cases to cases under chapter 7 of the Bankruptcy Code, in an aggregate amount not to exceed \$5,000; provided, however, that nothing contained herein shall constitute a waiver of any right of CA to object to the reasonableness of fees and expenses of professionals retained by the Debtors, the Committee, a chapter 7 trustee, or any other applicant. Except for the Carve Out, no costs or expenses of administration (or any other nature) shall be imposed against CA or the Pre-Petition Collateral or the Post-Petition Collateral under sections 105 or 506(c), or otherwise.

22. Notwithstanding any subsequent modification of this Order by this Court, the protections accorded to CA pursuant to this Order shall apply with regard to all cash collateral utilized prior to any further order by this Court.

The undersigned are authorized to and hereby do consent to the form and entry of this order

Goldberg Weprin Finkel Goldstein  
1501 Broadway – 22<sup>nd</sup> Floor  
New York, New York 10036

By: /s/ Kevin J. Nash  
Kevin J. Nash, Esq.

-and-

FORMAN HOLT ELIADES & RAVIN, LLC  
80 Route 4 East – Suite 290  
Paramus, New Jersey 07652

Attorneys for CA 912-921 Bergen

By: /s/ David S. Catuogno  
David S. Catuogno, Esq.

**SO ORDERED:**

Dated: New York, New York  
September 19, 2011

s/ James M. Peck  
Honorable James M. Peck  
United States Bankruptcy Judge