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Hearing Date: October 13, 2016
Hearing Time: 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

97 GRAND AVENUE, LLC,

Chapter 11
Case No. 15-13367 (SHL)

Debtor.

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**DEBTOR’S MOTION REQUESTING USE OF CASH COLLATERAL
PURSUANT TO BANKRUPTCY CODE SECTION 363(c)(2) AND
BANKRUPTCY RULE 4001 AND PROVIDING ADEQUATE
PROTECTION THEREFOR PURSUANT TO §§361 AND 362**

**TO: HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:**

97 Grand Avenue, LLC, the above-captioned debtor and debtor-in-possession (the “Debtor”), by its attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP , hereby submits this motion (the “Motion”) for authority to, *inter alia*, use the cash collateral of 97 Grand Avenue Brooklyn First LLC, as successor in interest to AB Commercial Real Estate Debt – B.S.A.R.L and Berkadia Commercial Mortgage LLC (“Lender”) pursuant to Bankruptcy Code §363(c)(2) and Bankruptcy Rule 4001 and providing adequate protection therefor pursuant to Bankruptcy Code §§361 and 362. In support of this Motion, the Debtor respectfully states as follows:

JURISDICTION

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

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

BACKGROUND

3. On December 28, 2015 (the “Involuntary Petition Date”), Chun Peter Dong, an alleged creditor of the Debtor, caused an involuntary petition under Chapter 7 of the Bankruptcy Code to be filed against 97 Grand Avenue, LLC (the Debtor in the United States Bankruptcy Court Southern District of New York (the “Bankruptcy Court”), in the above captioned involuntary Chapter 7 case (the “Involuntary Bankruptcy Case”).

4. The time for the Debtor to respond to the Petition was adjourned on consent from time to time. On February 26, 2016, the Debtor timely answered the Petition (ECF Docket No. 17). No order for relief was entered in the Involuntary Case.

5. On April 13, 2016 (the “Chapter 11 Filing Date”), the Bankruptcy Court, upon application by the Debtor, entered an order converting the Involuntary Case to a voluntary proceeding under Chapter 11 of the Bankruptcy Code (the “Chapter 11 Case”).

6. The Debtor is a debtor in possession with authority to conduct its business affairs and act as statutory trustee of the estate pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

7. As of the date hereof no trustee or committee has been appointed in the Chapter 11 Case.

8. The Debtor is a single asset real estate company with its primary asset being certain real property identified as 97-101 Grand Avenue and 96 Steuben Street, Brooklyn, New York 11205 (collectively, the “Property”).

THE DEBTOR’S PRE-PETITION SECURED DEBT

9. On or about on October 15, 2013, Berkadia Commercial Mortgage LLC (“Berkadia”) entered into certain loan arrangements with Debtor for loans in the sums of \$20,577,491, \$2,603,608.00, and \$1,818,901 respectively:

- a. On or about October 15, 2013, Berkadia loaned Debtor the sum of \$20,577,491.00 (the “First Loan”). The First Loan is evidenced by an Amended, Restated and Consolidated Acquisition Loan Promissory Note dated October 15, 2013 given by Debtor to Berkadia (the “First Loan Note”). The First Loan is secured by an Amended, Restated and Consolidated Acquisition Loan Mortgage and Security Agreement, in the amount of \$20,577,491.00, dated as of October 15, 2013 (the “First Loan Mortgage” and together with the First Loan Note, the “First Loan Documents”) given by Debtor to Berkadia which First Loan Mortgage encumbers the Property. The First Loan is further secured by, among other documents, an Assignment of Leases and Rents, each of which are dated October 15, 2013, except for the Assignment of Leases and Rents dated May 8, 2015, and each of which is included in the defined term “First Loan Documents”. On December 20, 2013, Berkadia Commercial Mortgage LLC assigned the First Loan and First

Loan Documents to AB Commercial Real Estate Debt- B S.A' R.L. pursuant to an Assignment of Mortgage (the "1st Berkadia Assignment"). The 1st Berkadia Assignment was recorded with the Kings Register's Office on December 27, 2013 as CRFN: 2013000528833. On May 8, 2015, AB Commercial Real Estate Debt- BS.A' R.L. assigned the First Loan and First Loan Documents to Lender pursuant to an Assignment of Mortgage (the "1st 97 Grand Ave Brooklyn Assignment"). The 1st 97 Grand Ave Brooklyn Assignment was recorded with the Kings Register's Office on June 5, 2015 as CRFN: 2015000190773.

- b. On or about October 15, 2013, Berkadia loaned Debtor the sum of \$2,603,608.00 (the "Second Loan"). The Second Loan is evidenced by a Building Loan Promissory Note dated October 15, 2013 given by Debtor to Lender (the "Second Loan Note"). The Second Loan is secured by a Building Loan Mortgage and Security Agreement in the amount of \$2,603,608.00 dated as of October 15, 2013 (the "Second Loan Mortgage" and together with the Second Loan Note, the "Second Loan Documents") given by Debtor to Berkadia which Second Loan Mortgage encumbers the Property. the Second Loan is further secured by, among other documents, (i) a Building Loan Agreement; (ii) a Limited Recourse Guaranty given by Guarantor (the "Second Loan Guarantee"), (iii) an Assignment of Leases and Rents, each of which are dated October 15, 2013, except for the Assignment of Leases and Rents dated May 8, 2015, and each of which is included in the defined term "Second Loan Documents". On December 20, 2013, Berkadia assigned the Second Loan and Second Loan Documents to AB

Commercial Real Estate Debt- B.S.A' R.L. pursuant to an Assignment of Mortgage (the "2nd Berkadia Assignment"). The 2nd Berkadia Assignment was recorded with the Kings Register's Office on December 27, 2013 as CRFN: 2013000528837. On May 8, 2015, AB Commercial Real Estate Debt- B.S.A' R.L. assigned the Building Mortgage to Lender pursuant to an Assignment of Mortgage (the "2nd 97 Grand Ave Brooklyn Assignment"). The 2nd 97 Grand Ave Brooklyn Assignment was recorded with the Kings Register's Office on June 5, 2015 as CRFN: 2015000190779.

- c. On or about October 15, 2013, Berkadia loaned Debtor the sum of \$1,818,901.00 (the "Third Loan"). The Third Loan is evidenced by a Project Loan Promissory Note dated October 15, 2013 given by Debtor to Lender (the "Third Loan Note"). The Third Loan is secured by a Project Loan Mortgage and Security Agreement in the amount of \$1,818,901.00 dated as of October 15, 2013 (the "Third Loan Mortgage" and together with the Third Loan Note, the "Third Loan Documents") given by Debtor to Berkadia which Second Loan Mortgage encumbers the Property. The Third Loan is further secured by, among other documents, (i) a Project Loan Agreement; and (ii) an Assignment of Leases and Rents, each of which are dated October 15, 2013, except for the Assignment of Leases and Rents dated May 8, 2015, and each of which is included in the defined term "Third Loan Documents". On December 20, 2013, Berkadia assigned the Third Loan and Second Loan Documents to AB Commercial Real Estate Debt- B.S.A' R.L. pursuant to an Assignment of Mortgage (the "3rd Berkadia Assignment"). The 3rd

Berkadia Assignment was recorded with the Kings Register's Office on December 27, 2013 as CRFN: 2013000528835. On May 6, 2015, AB Commercial Real Estate Debt- B S.A' R.L. assigned the Building Mortgage to Lender pursuant to an Assignment of Mortgage (the "3rd 97 Grand Ave Brooklyn Assignment"). The 3rd 97 Grand Ave Brooklyn Assignment was recorded with the Kings Register's Office on June 5, 2015 as CRFN: 2015000190776.

10. Lender is the owner and holder of the First Loan Note and First Loan Mortgage, Second Loan Note and Second Loan Mortgage, and the Third Loan Note and Third Loan Mortgage, respectively.

11. A copy of the First Loan Documents, Second Loan Documents, Third Loan Documents (collective, the "Loan Documents") are annexed hereto as **Exhibit "A"**.

12. The Debtor acknowledges that Lender holds a valid, perfected and enforceable first priority blanket lien on and security interest in all or substantially all the Debtor's assets and proceeds therefrom including but not limited to the Property and all rents and accounts collected or generated therefrom (collectively, the "Pre-Petition Collateral"), which Pre-Petition Collateral secures Lender's claims, pursuant to and in accordance with the First Loan Note and First Loan Mortgage, Second Loan Note and Second Loan Mortgage, and the Third Loan Note and Third Loan Mortgage, respectively. The Debtor acknowledges that Lender has properly perfected its first priority liens and security interests in the Pre-Petition Collateral by virtue of the filing and recording of the First, Second and Third Loan Mortgage and Assignment of Rents, and that its liens in the Pre-Petition Collateral are duly perfected, valid, existing, and legally enforceable.

13. The Debtor and Lender agree that all cash equivalents, whether in the form of

cash, rents, accounts generated therefrom, security deposits, deposit accounts, or in any other form, whenever acquired, which represent income, proceeds, products, rents, or profits of the Pre-Petition Collateral that are now in the possession, custody or control of the Debtor (or persons in privity with the Debtor), or in which the Debtor will obtain an interest during the pendency of the Chapter 11 case, are and shall be treated as the “cash collateral” in which Lender has asserted a security interest for the purposes, and within the meaning, of Bankruptcy Code § 363(a) (collectively, the “Cash Collateral”)

14. On June 23, 2016, Lender filed its secured proof of claim in the Court’s Claims Register [Claim No. 9-1] indicating that on the Petition Date, in connection with the First Loan Note and First Loan Mortgage, Second Loan Note and Second Loan Mortgage, and the Third Loan Note and Third Loan Mortgage, it was owed the sum of \$31,174,000.64 (the “Claim”), which Claim shall be subject to increase in accordance with the Loan Documents.

RELIEF REQUESTED AND BASIS FOR RELIEF

15. The Debtor submits this Motion for authority to use property which may constitute cash collateral in which Lender may asserted a security interest in said cash collateral, substantially in accordance with the terms and conditions set forth in the proposed Stipulation and Order Authorizing Debtor’s Use of Cash Collateral Pursuant to 11 U.S.C. §363 and Providing Adequate Protection Therefor Pursuant to §§361 and 362 (the “Stipulation”) attached hereto as **Exhibit “B”**. The Debtor believes that Lender is the only party that has a perfected security interest in the Debtor’s property which may constitute Cash Collateral.

16. The proposed Order grants the Debtor the authority to use cash collateral pursuant to 11 U.S.C. §§363 (c)(1) and (2) and Bankruptcy Rule 4001(c) to the extent necessary to

continue the operation of its business and to preserve the value of its estate pending a final hearing.

17. § 363(a) of the Bankruptcy Code states as follows:

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

18. § 363(c)(1) of the Bankruptcy Code provides as follows:

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

19. § 363(d) of the Bankruptcy Code provides as follows:

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

20. Accordingly, pursuant to § 363(c)(2) of the Bankruptcy Code, the consent of Lender or authority from this Court is required to use cash collateral in which the Lender holds a perfected, first priority security interest.

21. The purpose of adequate protection is to ensure that the secured creditor receives the value for which it bargained pre-bankruptcy. In re Swedeland Development Group, Inc., 16 F.3d 552 (3rd Cir. 1994); In re Dunes Casino Hotel, 69 B.R. 784, 793 (Bankr. D.N.J. 1986), citing In re Coors of the Cumberland, 19 B.R. 313 (Bankr. M.D. Tenn. 1982) See In re 495 Central

Park Ave. Corp., 136 B.R. 626 (Bankr. S.D.N.Y. 1992). Adequate protection is designed to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization. In re Nice, 355 B.R. 554, 563 (Bankr. N.D. Va. 2006) (“adequate protection is solely a function of preserving the value of the creditor’s secured claim as of the petition date due to a debtor’s continued use of the collateral”).

22. Because the term “adequate protection” is not defined in the Bankruptcy Code, the precise contours of the concept are necessarily determined on a case-by-case basis. MBank Dallas, N.A. v. O’Connor (In re O’Connor), 808 F.2d 1393 (10th Cir. 1987). In re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1086); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); In re Beker Industries Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986); see also In re JKJ Chevrolet, Inc. 190 B.R. 542, 545 (Bankr. E.D.Va. 1995) (adequate protection is a flexible concept that is determined by considering the facts of each case).

23. The Stipulation provides that in addition to the existing rights and interests of Lender and for the purpose of adequately protecting Lender from Collateral Diminution¹, Lender is hereby granted replacement liens ("Replacement Liens") in the Collateral, to the extent that said liens were valid, perfected and enforceable as of the Petition Date in the continuing order of priority of the Pre-Petition Liens without determination herein as to the nature, extent and validity of said pre-petition liens and claims and to the extent Collateral Diminution occurs during the Chapter 11 case, subject to: (a) fees payable under 28 U.S.C. Section 1930 and 31 U.S.C Section 3717; (b) professional fees of duly retained professionals in this Chapter 11 case

¹ For purposes of this Order, “Collateral Diminution” shall mean any diminution in value of the Secured Creditors’ interests in Debtor’s property as of the Filing Date by reason of Debtor’s use of Cash Collateral in accordance with this Order.

as may be awarded pursuant to Sections 330 or 331 of the Code or pursuant to any monthly fee order entered in the Debtor's Chapter 11 case (with the exception of any duly retained real estate brokers); (c) the fees and expenses of a hypothetical Chapter 7 trustee to the extent of \$20,000; and (d) the recovery of funds or proceeds from the successful prosecution of avoidance actions pursuant to sections 502(d), 544, 545, 547, 548, 549, 550 or 553 ("Avoidance Actions") of the Bankruptcy Code (collectively, the "Carve-Outs").

24. As noted above, the balance due Lender under the Loan Documents totals approximately \$31,174,000.64. Lender is the sole creditor having a lien on the Debtor's Property, which is valued at approximately \$42 million. Lender's lien is the more than adequately protected by the Debtor's Property. Thus, Lender is abundantly protected by the Property alone.

25. In addition to the liens and security interests proposed to be granted pursuant hereto, the Debtor proposes to make monthly adequate protection payments to Lender in the amount of \$80,000. The Debtor submits that the proposed adequate protection payment to Lender is appropriate because it is designed to protect the Lender against diminution in the value of Lender's interest in the Property.

26. Based upon the foregoing, the Debtor submits that the terms and provisions of the Order and Lender's interest in the Cash Collateral is adequately protected.

27. The Debtor proposes to use the Cash Collateral only for ordinary and necessary operating expenses substantially in accordance with the operating budget annexed hereto as **Exhibit "C"** (the "Budget"). The Debtor believes that the Budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of business for the period set forth in the Budget. The Debtor believes that the use of Cash Collateral in accordance

with the Budget will provide the Debtor with adequate liquidity to pay administrative expenses as they become due and payable during the period covered by the Budget.

REQUEST FOR WAIVER OF STAY

28. The Debtor further seeks a waiver of the stay of the effectiveness of the Stipulation that may be imposed by any applicable Bankruptcy Rule. As set forth above, the use of Cash Collateral is essential to prevent potentially irreparable damage to the Debtor's operations, value and ability to reorganize. Accordingly, the Debtor submits that sufficient cause exists to justify a waiver of any stay imposed by the Bankruptcy Rules, to the extent applicable.

NOTICE

29. This Motion will be served on notice to all parties asserting secured claims against the Debtor, and all other parties entitled to notice pursuant to Bankruptcy Rule 4001(d) via first class mail.

WHEREFORE, the Debtor respectfully requests entry of the proposed Stipulation, approving and authorizing the use of Cash Collateral pursuant to and in accordance with this Motion and the proposed Stipulation, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York
September 26, 2016

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