IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. EQUITYBUILD, INC., et al., Defendants.	Case No. 1:18-cv-5587 Hon. Manish S. Shah Magistrate Judge Young B. Kim

THOROFARE'S GROUP 2 REPLY POSITION STATEMENT
FOR 6949-6959 S. MERRILL (PROPERTY NO. 101)

Thorofare Asset Based Lending REIT Fund IV, LLC ("Thorofare") holds the only recorded lien against the Group 2 property located at 6949-6959 S. Merrill, Chicago, Illinois (the "Merrill Property"). As a matter of state and federal law, that recorded lien creates a first priority claim against the net proceeds of sale of the Merrill Property (the "Net Proceeds"). Capital Investors LLC[1] ("CI") asserts otherwise on baseless equitable grounds. Although the Receiver acknowledges Thorofare's lien priority, it too relies on unsupported equitable arguments to recommend a reduction in the amount of Thorofare's lien. This Court should reject both challenges and order the Net Proceeds to be disbursed to Thorofare.

ARGUMENT

As set forth in Thorofare's Position Statement (Dkt. 1554), Thorofare recorded a purchase money mortgage against the Merrill Property on September 14, 2017, the proceeds of which were used to purchase the Merrill Property. The Receiver acknowledges that Thorofare has the only

[1]In its Position Statement, CI identified itself as "Capital Investors, LLC; 6951 S. Merrill Fund I LLC (d/b/a Capital Investors, LLC)." (Dkt. 1560 at 1). CI was the only one of the four other competing claimants to file a Position Statement.

recorded lien against the Merrill Property and is entitled to a first priority distribution of the Net Proceeds. (Dkt. 1571 at 10-11).

CI does not have a recorded claim against the Merrill Property. Instead, CI admits that "In relation to Merrill, Cl's interest was characterized as an equity interest." That interest not only post-dates the making of Thorofare's mortgage[2], but was made with actual knowledge of Thorofare's recorded mortgage[3] and was supposed "to be used to pay off any institutional loans on the property." (Dkt. 1560 at 1).

Notwithstanding, CI seeks priority over, or at least parity with, Thorofare in the distribution of the Net Proceeds, arguing (without foundation or legal support) that if Thorofare had "done a proper investigation into [Equitybuild] and the Cohens, [Thorofare] would likely have seen the issues underlying the ponzi [sic] scheme." (Dkt. 1560 at 2.). Based on similar unsupported allegations, the Receiver recommends that Thorofare's recovery should be limited to its principal and subject to the "netting rule." For the following reasons, these arguments lack merit.

I. There is No Evidence that Thorofare was on Notice of EquityBuild's Scheme.

In Illinois, "the first to record, without notice, has superior rights to those who record later." *In re Bruder*, 207 B.R. 151, 156 (N.D. Ill. Bankr. 1997) (citations omitted). A "purchaser is placed on 'inquiry notice' when facts revealed in the title search process would cause a reasonable individual to think twice about completing the transaction." *Stump v. Swanson Dev. Co. LLC*, 2014 IL App (3d) 110784 ¶ 104. As such, a mortgagee's constructive notice is based on matters found

[2] According to CI's Proof of Claim, its investment was made over a period of time beginning no earlier than November 12, 2017 (Dkt. #1554 at 4).

[3] CI's Proof of Claim contained a pro forma title policy and grantor/grantee search that disclosed Thorofare's recorded mortgage (Dkt. #1554 at 4).

in the public real estate records, not facts that can be obtained through searches of other publically available information. Both CI and the Receiver fail to point to any such record facts.

For its part, after describing Thorofare as a sophisticated lender and summarizing the SEC's Complaint against the Cohens, CI does nothing more than conclude that "Given the blatant issues noted by the SEC in the complaint, and Thorofare's experience in the industry, it is hard to believe that Thorofare was not at least on inquiry notice of EB's scheme." (Dkt. 1560 at 2.).

CI's purported disbelief and theoretical Google searches are not the standard by which mortgage lenders are judged.[4] Quite simply, CI's conclusion of law, without any factual basis – from the public real estate record or otherwise – does not merit consideration. *See R.J.R. Servs., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 280–81 (7th Cir. 1989).

Similarly, the Receiver's reference to a single email between Thorofare employees concerning a 24-year old, 2-week long "fugitive from justice" offense does not provide factual or legal support for the Receiver's argument that "having done due diligence that revealed sketchy business practices by EquityBuild and their owners, as a matter of equity, Thorofare's recovery should be limited to its principal investment lost as a result of the EquityBuild Ponzi scheme." (Dkt. 1571 at 10-11, citing Receiver Exs. 13-15.)

Respectfully, the Receiver's argument is a gross overstatement and misleading. The "fugitive from justice" comment refers to a background check obtained by Thorofare that reported on a 24-year old case against Jerome Cohen that lasted for only two weeks. In particular, the background check reported that "Research identified a felony case #11-1993-CF-001754-

[4]Further, even if Thorofare could be charged with knowledge of facts theoretically available through internet searches, the same holds true for CI, further undermining the notion that it is are entitled to assert priority over Thorofare's recorded mortgage lien.

AXX-XX filed in Collier County, Florida against "Jerome Harvey Cohen" on November 3, 1993. The Docket Sheet identified the offense as "fugitive from justice" warrant that originated in Philadelphia, Pennsylvania. The offense date is listed as November 1, 1993. The case was dismissed on November 15, 1993." (Dkt. 1571 at 55) (emphasis supplied).

In fact, as the nearby documents produced in the Group 2 discovery revealed, Thorofare did "investigate further." *See Stump*, 2014 IL App (3d) 110784 at ¶ 104. After the background check revealed outstanding tax liens, a felony matter, and 20+ year old bankruptcy filings by Cohen (Dkt. 1571 at 58), Equitybuild provided Letters of Explanation to Thorofare, at Thorofare's request. (*see* Ex. 1 hereto, THOROFARE_JUNEWAY0009078.) These letters explained (1) the tax liens were related to loans Cohen co-guaranteed for a family member, who failed to keep current on the taxes unbeknownst to Cohen (*see* Ex. 2 hereto, THOROFARE_JUNEWAY0009081); (2) the felony matter was based on a miscommunication concerning Cohen's move to Florida, and the felony charge was dropped after Cohen learned of and promptly resolved the matter (Ex. 3 hereto, THOROFARE_JUNEWAY0009083); and (3) the bankruptcy filing related to the same loans Cohen co-guaranteed with his family member and after all lenders were satisfied, Cohen concluded his dealings with the family member approximately 17 years prior (Ex. 4 hereto, THOROFARE_JUNEWAY0009082).

Accordingly, before making its mortgage loan, Thorofare received explanations for each questioned aspect of Cohen's background. Importantly, and contrary to the Receiver's assertion, *none* of the explanations "uncovered additional issues associated with the Cohens' fraud, including, *e.g.*, that Equitybuild's business model was to crowdfund its investments" or that "Equitybuild was doing so at the same time and on the same property that Thorofare was financing." (Dkt. 1571 at 9-10.)

II. Illinois Law does Not Permit CI to Claim Priority Absent a Showing of Equitable Subrogation, Which CI has Not Asserted, let Alone Proven.

Illinois law requires a party asserting equitable subrogation to show (1) words or conduct by the prior mortgagee amounting to a misrepresentation or concealment of a material fact; (2) knowledge by the prior mortgagee that the representations were untrue; (3) the truth respecting the representations was unknown to the subsequent mortgagee; (4) the prior mortgagee intended or expected that the subsequent mortgagee would act on the representations; (5) the subsequent mortgagee relied on the prior mortgagee's representations; and (6) the subsequent mortgagee acted because of the prior mortgagee's misrepresentations and is prejudiced as a result. *See Walker v. Ocwen Loan Servicing, LLC*, 2016 IL App (3d) 150034-U, ¶ 32 (citing *Chemical Bank v. American Nat'l Bank & Tr. Co*., 180 Ill. App. 3d 219, 226 (1st Dist. 1989).

CI does not state, even in a conclusory manner, any of these elements, let alone prove them. *See id*. ("Proof of these elements must be clear, previse and unequivocal."). Most importantly, these elements require some level of misconduct on the part of the prior mortgagee directed toward the subsequent lien claimant, which CI has not and cannot show. Indeed, there is no evidence that Thorofare had any relationship or contact with CI, let alone made representations to CI that would cause CI to believe its alleged interest would have priority over Thorofare's mortgage.

Moreover, equitable subrogation is available only where no prejudice results. *Id*. at ¶ 30 (citing *Detroit Steel Prods. Co. v. Hudes*, 17 Ill. App. 2d 514, 521 (4th Dist. 1958). Here, if equitable subrogation were applied, Thorofare as the first lender would be harmed—"[a]llowing [CI] to leapfrog over [Thorofare] would make [Thorofare's] mortgage subject to [CI's alleged interest] that was non-existent at the time of execution." *Id*. at ¶ 36; *see also Firstmark Standard Life Ins. Co. v. Superior Bank FSB*, 271 Ill. App. 3d 435, 439 (1st Dist. 1995) (a mortgage "becomes effective when it is recorded); *5210 Wash. Investors LLC & Arthur Bertrand v.*

Equitybuild, Inc., 2023 Ill. Cir. LEXIS 79, *10 ("[A] mortgage is not a lien on a property until it has been recorded.").

In addition, it is well established that "[w]here one of two innocent persons must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoing to commit the fraud or wrong." *M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233, ¶ 52. *see also Walker*, 2016 IL App (3d) 150034-(U), ¶ 34 ("The doctrine of equitable subrogation was created to place the loss on the party upon whom it should fall. In this case, the loss falls on defendant, who was in the best position to prevent it.") (citation omitted)). Here, if CI's funds truly were "to be used to pay off any institutional loans on the property" (Dkt. 1560 at 1), CI did nothing to ensure that result. Had it done so, Thorofare's loan would have been paid off and would no longer encumber the Merrill Property, so that CI could have tried to step into its shoes to claim a lien under the equitable subrogation doctrine. *See* Deutsche Bank Nat'l Tr. Co. v. Payton, 2017 IL App (1st) 160305, ¶ 20 ("One who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid.")

III. Thorofare is Entitled to Payment of the Entirety of its Secured Claim up to the Amount of the Net Proceeds.

The Receiver acknowledges that "the other claimants [including CI] do not hold secured interests in the property" and "recommends that any remaining amount in the 6949 Merrill account [after payment to Thorofare] be transferred to the Receiver's account." (Dkt. 1571 at 10-11). Yet, for the reasons set forth below, the Net Proceeds should be disbursed to Thorofare in their entirety, which will leave no remaining funds to be transferred to the Receiver.

The Receiver seeks to share in the Net Proceeds by arging that Post-Receivership interest, late fees, attorneys' fees, and other ancillary charges permitted by the applicable loan documents should be denied, even to the victorious priority secured creditor. (*See* Dkt. 1571 at 11-16.) In

addition, the Receiver contends "Thorofare's recovery should be limited to its principal investment lost as a result of the Equitybuild Ponzi scheme." (*Id*. at 11.) The Receiver's argument is grounded primarily in (i) general concepts of equitable discretion, and (ii) general assertions regarding the alleged Ponzi scheme. (Dkt. 1571 at 11-16.) There are fatal defects as well as procedural issues that preclude adopting the Receiver's propositions.

a. A Secured Creditor is Entitled to the Complete Recovery Authorized under Illinois Law.

The notion that the Court may override a secured mortgagee's rights violates the fundamental precept that equity follows law. *See, e.g.*, *In re BNT Terminals, Inc.*, 1991 Bankr. LEXIS 421, *20 (Bankr. N.D. Ill. Feb. 21, 1991) (declining to reinstate liens "premised upon 'basic concepts of equity'" because "equity follows law and [defendant's] lawyers have failed to articulate what the basic concepts of equity are that the Court should apply."). At least one court[5] has explicitly considered whether a court administering an equity receivership has "general authority to ignore state law in the name of equity" in order to distribute receivership proceeds on a pro rata basis, rather than in accordance with state law priority rules. *In re Real Prop. Located at [Redacted] Jupiter Drive*, No. 2:05-CV-01013-DB, 2007 U.S. Dist. LEXIS 65276 (Utah D. Ct. Jun. 7, 2007). In that case, the court confirmed it *did not* have such broad authority, rejecting an argument that the "the district court's discretion in supervising a receivership includes the ability to deny 'state law remedies' in dealing with receivership assets." *Id*. at *11 (quoting investor's

[5] To be clear, the substance of the opinion in *Jupiter* was drafted by a Special Master, whom the court appointed to determine which investors were entitled to what portion of what remained in the investment pool. After conducting "a de novo review of the [Special Master's] Report and Recommendation and the objections to it," the court adopted the Special Master's report. (*See In re Real Prop. Located at [Redacted] Jupiter Drive*, No. 2:05-CV-01013-DB, "Order Adopting the First Report and Recommendation of the Special Master," Dkt. 272 at 1-2.) In light of the district court's adoption of the Special Maser's report, and for ease of reference, Thorofare refers to the *Jupiter* opinion as coming from the court.

brief). Citing Supreme Court authority for the proposition that it is "well-established that a 'receiver appointed by a federal court takes [a] project subject to all liens, priorities or privileges existing or accruing under the laws of the State," the court agreed it was "governed by the general rule that state law regarding lien priorities is to be respected in receiverships." *Id*. at *12.

Here, too, the Court should honor state law regarding lien priorities. Illinois law is clear that the recording of a mortgage creates a security interest in real estate for the payment of the underlying indebtedness. *See* 765 ILCS 5/11 ("Such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient mortgage in fee to *secure the payment of the moneys therein specified*.") (emphasis added); *see also Ogle v. Koerner*, 140 Ill. 170, 179 (1892) ("A mortgage. . . vests in the party secured a lien upon the mortgage premises" and "[b]y virtue of that lien the mortgagee is entitled to . . . the proceeds of the sale [of the property in foreclosure] applied to the payment of the debt secured."). Illinois law further explicitly deems mortgages effective from and after the time of filing on the record, and "not before." *See* 765 ILCS 5/30 ("[M]ortgages . . . shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."). Accordingly, as the first to record its mortgage lien without notice, Illinois law entitles Thorofare to the payment of the amounts secured by its mortgage.

In addition to principal, Thorofare's promissory note and the mortgage secured thereby specify that it is entitled to interest and other customary loan charges. (*See, e.g.,* Dkt. 1554-1 at 6 - 8, Note, pars. 5.1 and 6; and Dkt. 1554-1 at 7, Mortgage, par. 1). The Receiver, however, contends "[a]s a general rule, in equity receiverships, interest on a debtor's obligations ceases to

accrue at the inception of the proceeding," relying on the Supreme Court's decision in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163 (1946). (Dkt. 1571 at 12 ("the *Vanston* Court made clear that interest is not permitted in a federal equity receivership. . . ").) Notably, the *Vanston* case was limited to a challenge to the potential recovery of interest on interest in which the subordinate creditors "concede[d] that the first mortgage bond holders should receive simple interest on the principal do them." *Vanston*, 329 U.S. at 159. The Receiver's other cited cases are similarly distinguishable.[6]

For its part, Bankruptcy Code Section 506(b)—which applies with full force in these proceedings[7]—also supports the payment of the amounts due under Thorofare's loan agreement, up to the value of its secured collateral. *See* 11 U.S.C. § 506(b) (dictating a secured claimant is allowed "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement . . . under which such claim arose."); *see also In re Cella III, LLC*, 625 B.R. 19, 25–26 (Bankr. E.D. La. 2020) (holding secured creditors are secured and entitled to recover interest up to the value of the property); *In re Croatan Surf Club, LLC*, No. 11-00194-8-SWH, 2012 WL 1906386, at *6 (Bankr. E.D.N.C. May 25, 2012) (holding same); *In re Broomall Printing Corp.*, 131 B.R. 32, 35–37 (Bankr. D. Md. 1991) (holding same); *Liberty Nat. Bank & Tr. Co. of*

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[6] *SEC v. Capital Cove Bancorp LLC*, 2015 WL 9701154 (C.D. Cal., Oct. 13, 2015) (concerning default interest); *In re Hollstrom*, 133 B.R. 535, 539 (Bankr. D. Colo. 1991) (concerning default interest); *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 844 (7th Cir. 2015) (involving question of whether a receivership court had the discretion to treat claimants' names as confidential, not whether the court could ignore state and federal rights of secured creditors in their collateral).

[7] Contrary to the Receiver's suggestion (*see* Dkt. 1571 at 14 n.6), "equitable considerations" should not serve as a basis to avoid the applicability of Local Rule 66.1, providing "the administration of estates by receivers or other officers shall be similar to that in bankruptcy cases," thus bringing 11 U.S.C. 506(b) reasonably into the Court's consideration. Notably, the Receiver contends Thorofare "know[] very much who they [were] doing business with" constitutes "inequitable conduct." (Dkt. 1571 at 15.) But, as described, this alleged "knowledge" applies with equal force to all Equitybuild investors. (*See infra*.)

Louisville v. George, 70 B.R. 312, 313 (W.D. Ky. 1987) (holding same). "When a specific [Bankruptcy] Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code." *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993).

In this regard, while *Vanston* "has never . . . been legislatively or judicially overruled," it has, however, been "superseded in the respects that section 506(b) provides." *In re Urban Communicators PCS Ltd. P'ship*, 379 B.R. 232, 252-53 (Bankr. S.D.N.Y. 2007), *rev'd on other grounds*. The *Jupiter* opinion is instructive on this point, as well. "Having reviewed the cases and the treatises . . . [the *Jupiter* Court held that the] institution of a receivership does not stop the running of interest contracted for by a secured party any more than it interferes with the priority afforded such a party by state law." 2007 U.S. Dist. LEXIS 65276 at *23 (citing Clark on Receivers, § 660 (noting that "appointment of a receiver cannot deprive a party to the suit or a claimant of his contractual rights."). Accordingly, Thorofare has a right to recover post-petition interest and other charges due on its loan.

b. The Receiver improperly seeks to Reduce Principal by Application of the "Netting Rule".

In addition to its erroneous attempt to deny Thorofare payment of the interest secured by its mortgage, the Receiver attempts to whittle down Thorofare's principal recovery from $1,540,000.00 to $854,398.94 by using the netting analysis set forth in Amended Exhibit 9 to its Position Statement. (Dkt. 1571 at 37, as amended at Dkt. 1577 at 3). According to the Receiver, the principal balance of Thorofare's loan should be paid only after "amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual." (Dkt. 1571 at 17). The Receiver's analysis is fatally flawed for several reasons.

First, the Receiver seeks to "net" the following payments received by Thorofare:

Loan origination fee:	$23,700.00
Loan processing fee:	$ 5,000.00
Prepaid interest (7/21/17 – 7/31/17):	$ 3,068.25
Interest reserve:	$60,000.00[8]
Subtotal payments from principal:	$91,768.25

Yet, these funds were paid out of the proceeds of the Merrill loan, not from "amounts transferred by the Ponzi scheme perpetrator." Thus, the netting rule has no application to the foregoing sums, as they were not paid out of the debtor's funds obtained from others as a result of its alleged Ponzi scheme. As a result, these funds should not be netted from the principal balance.

In addition to the interest reserve, the following reserves were established out of the proceeds of Thorofare's $1,540,000.00 loan, and stand as additional security for the loan[9]:

Capital Expenditure Reserve:	$535,845.00
Tax Reserve:	$ 11,300.00
Insurance Reserve:	$ 1,200.00
Other Reserves:	$125,000.00
Subtotal of reserves:	$673,345.00

The Receiver seeks to net these reserve funds from principal after adjustment for the following changes in the reserves during the course of the loan:

Capital Expenditures

Draw # 1:	$135,535.00
Draw # 2:	$111,200.00

[8]Per the loan documents, these funds were applied $5,000.00/month from the commencement of the loan. (Dkt. 1554-1 at 15, Mortgage, par. 5(a)).

[9]*See* Dkt. 1554-1 at 14-16, Mortgage reserve provisions.

Tax Payments post-closing:	$ 23,394.85
Title Fee:	$ 185.00
Less increase in interest reserve:	($19,048.26)
Subtotal reserve adjustments:	$251,266.59

The net adjustment in principal based on the figures proposed by the Receiver is $422,078.41 ($673,345.00 - $251,266.59).

For purposes of this analysis[10], Thorofare has no objection to the application of reserve funds held by it to the outstanding amounts due on the loan. However, this should not affect the calculation of interest due on the loan until this Court permits Thorofare to apply such funds.

In this regard, Thorofare has, and is entitled to, calculate interest on the full outstanding principal balance of the loan before application of any reserve funds because it was prevented from applying the funds earlier by virtue of the Court's Receivership Order. In particular, the Receivership Order has prevented such application as follows (Dkt. 16 at 3):

> Accordingly, all persons, institutions and entities with direct or indirect control over any Receivership Assets other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such Receivership Assets. This freeze shall include, but not be limited to, Receivership Assets that are on deposit with any financial institutions or other entities, including, but not limited to, banks, brokerage firms and mutual funds.

Given that Thorofare has not been allowed to setoff the reserve funds to date, the reserve funds should be included in the amount of principal advanced on the loan until they can be setoff.

[10] Thorofare believes that there are slight discrepancies in these numbers, but they are immaterial for purposes of this analysis.

Finally, Thorofare objects to the Receiver's attempt to further reduce the loan balance by $171,754.40, representing his estimate of pre-filing interest payments made on the Thorofare loan.

First, this purported interest figure runs from the inception of the Thorofare loan and, therefore, includes payments made out of the $60,000.00 interest reserve funded out of the proceeds of Thorofare's loan. As indicated above, at most, the netting rule only applies to third-party monies funded by the schemer, not to monies funded by the secured creditor.

Second, as indicated earlier in this Reply, a secured creditor is entitled to recover interest on its loan as a matter of state and federal law. Therefore, interest payments received should not be deducted from the outstanding principal balance of the loan.

Third, if for any reason this Court were to allow an interest deduction such as this, it should be based on actual amounts, rather than figures guesstimated by the Receiver. In this regard, the Receiver calculated interest from the inception of the loan using the per diem interest rate in Thorofare's Proof of Claim ("POC"). (Dkt. 1577 at 3) However, under paragraph 2(c) of the Holdback and Disbursement Agreement, the $535,845.00 CapEx Reserve did not begin to accrue interest until the earlier of disbursement to the debtor or six months after the date of that Agreement. (*See* Holdback and Disbursement Agreement at pages 164-177 of the POC, Ex. 5 hereto). Because Draw #1 on the CapEx reserve was not made within the first six months of the loan, the per diem interest rate as of the date of the POC was more than the rate applicable during that six month period. As a result, if the Court allows any interest deduction, it should be based on the amount of interest actual charged to and paid by the debtor, exclusive of the $60,000 paid out of the interest reserve funded by Thorofare out of the loan proceeds.

CONCLUSION

For the above reasons, and for those stated in Thorofare's Position Statement (Dkt. 1554), Thorofare's mortgage loan constitutes a first and prior lien against the Merrill Property. As a matter of state and federal law, Thorofare is therefore entitled to recover the amount due on its secured claim up to the amount of the Net Proceeds of the sale of the Merrill Property. Because the amount of that lien exceeds the Net Proceeds, the entire Net Proceeds should be disbursed to Thorofare.[11]

Dated: January 10, 2024

Respectfully submitted,

Thorofare Asset Based Lending REIT Fund IV LLC

By: /s/Ronald A. Damashek
One of its attorneys

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[11] Thorofare's claim is itemized in its Position Statement (Dkt. 1554 at 2-3; Dkt. 1554-3 at 2) as $1,468,968.05 plus interest to be calculated through the date of judgment (Dkt. 1554 at fn. 2). Once the Court has ruled on Thorofare's claim and the Receiver's response, Thorofare can submit an itemized calculation of the approved amount of Thorofare's claim to the Court.

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2024, I electronically filed the foregoing THOROFARE'S GROUP 2 REPLY POSITION STATEMENT FOR 6949-6959 S. MERRILL (PROPERTY NO. 101) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record, and further caused the foregoing to be served upon all members of Claims Group 2 by email to the distribution list ebgroup2service@rdaplaw.net.

/s/ Ronald A. Damashek
Ronald A. Damashek

EXHIBIT 1

From: Tyler DeRoo [tyler@equitybuild.com]
Sent: 3/31/2017 9:51:52 AM
To: Andrew Kim [andrew.kim@thorofarecapital.com]
CC: Stephen Lee [slee@thebscgroup.com]; Tyler Johnson [tyler.johnson@thorofarecapital.com]; Brendan Miller [brendan@thorofarecapital.com]
Subject: RE: Jerry Cohen Background Report
Attachments: LOE Philadelphia Tax Liens.pdf; LOE Bankruptcy Case.pdf; LOE Dismissed Case.pdf; Jerry REO - Completed.xlsx

Hi Guys,

Attached are the LOX's as well as the REO schedule. I just deleted the erroneous data on line 77, I believe that was just sample data from when this form was originally provided as a template a some time previously. Let me know if you have any questions, otherwise, please advise on any missing documentation.

From: Andrew Kim [mailto:andrew.kim@thorofarecapital.com]
Sent: Thursday, March 30, 2017 7:16 PM
To: Tyler DeRoo <tyler@equitybuild.com>
Cc: Stephen Lee <slee@thebscgroup.com>; Tyler Johnson <tyler.johnson@thorofarecapital.com>; Brendan Miller <brendan@thorofarecapital.com>
Subject: RE: Jerry Cohen Background Report

Sounds good, thanks. Let us review this management agreement. The REO was from the attachment you sent (re-attached), please look at row 77.

From: Tyler DeRoo [mailto:tyler@equitybuild.com]
Sent: Thursday, March 30, 2017 5:14 PM
To: Andrew Kim <andrew.kim@thorofarecapital.com>
Cc: Stephen Lee <slee@thebscgroup.com>; Tyler Johnson <tyler.johnson@thorofarecapital.com>; Brendan Miller <brendan@thorofarecapital.com>
Subject: Re: Jerry Cohen Background Report

Sorry, PMA attached. I'll have the signed LOX first thing AM.

The screen shot you attached references different buildings than the ones on ours, it doesnt look like its a screenshot of the REO i sent over?

Tyler DeRoo
C. 847.420.2095

On Mar 30, 2017, at 7:11 PM, Andrew Kim <andrew.kim@thorofarecapital.com> wrote:

Thanks, Tyler. Something looks off on the REO schedule – please see below. Additionally, appears that you attached a Management Profile, but this doesn't appear to be a draft management agreement form. Look forward to getting those LOX's on the background items we've discussed.

<image003.png>

From: Tyler DeRoo [mailto:tyler@equitybuild.com]
Sent: Thursday, March 30, 2017 2:46 PM
To: Andrew Kim <andrew.kim@thorofarecapital.com>
Cc: Stephen Lee <slee@thebscgroup.com>; Tyler Johnson <tyler.johnson@thorofarecapital.com>; Brendan Miller <brendan@thorofarecapital.com>
Subject: Re: Jerry Cohen Background Report

Hi Guys,

Please find attached:

Contingent Liability Cert
Updated Signed PFS
Updated REO Schedule
AML/KYC Form
2 months Tikkun bank statements (Jerry's personal liquidity holding account)
Rent Roll Cert
PMA Draft
Freddie Mac PM Profile
2013 Tax Return
2014 Tax Return

Im working on the LOX's currently and i cannot seem to find the bank reference sheet. Can you please send?

Tyler DeRoo
C. 847.420.2095

On Mar 30, 2017, at 11:04 AM, Andrew Kim <andrew.kim@thorofarecapital.com> wrote:

All – Following up on the below. Can we have a call at 1:45 PM PT / 4:45 PM ET to dicuss?

From: Andrew Kim
Sent: Wednesday, March 29, 2017 5:39 PM
To: Stephen Lee <slee@thebscgroup.com>; 'Tyler DeRoo' <tyler@equitybuild.com>
Cc: Tyler Johnson <tyler.johnson@thorofarecapital.com>; Brendan Miller <brendan@thorofarecapital.com>
Subject: Jerry Cohen Background Report

Steve/Tyler – Background report came from Jerry Cohen and a few things popped up. Can we discuss the topics highlighted below? Also, please send us a letter of explanation if available.

Research identified that Cohen has been the subject of at least 10 property tax liens by the City of Philadelphia, PA in the past calendar year. The active tax liens against Cohen
include:

o On March 22, 2017, the City of Philadelphia filed a Real Estate Tax Lien Petition against Commercial General Mortgage and Jerry Cohen in the amount of $5,447.17 in connection with the property located at 3046 Ruth Street. A hearing is scheduled for July 5, 2017.

o On March 16, 2017, the City of Philadelphia filed a Real Estate Tax Lien Petition against Jerry H. Cohen and Steven A. Cohen in the amount of $8,051.27 in connection with the property located at 20 South Ruby Street. A hearing is scheduled for June 20, 2017.
o On January 23, 2017, the City of Philadelphia filed a Real Estate Tax Lien Petition against Jerry H. Cohen and Steven A. Cohen in the amount of $11,811.37 in connection with the property located at 3857 Reno Street. An Affidavit of Service of the Complaint on Cohen and Steven A. Cohen was filed on March 1, 2017.
o On December 30, 2016, the City of Philadelphia filed a Real Estate Tax Lien Petition against Jerry H. Cohen and Steven A. Cohen in the amount of $14,203.47 in connection with the property located at 4976 Kershaw Street. An Affidavit of Service of the Complaint on Cohen and Steven A. Cohen was filed on March 20, 2017.

• In January 1995, Cohen filed the Chapter 11 Bankruptcy Petition in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania (Philadelphia). On June 21, 1995, Cohen converted the bankruptcy to a Chapter 7 (liquidation) filing. The bankruptcy process was fairly lengthy. On March 2, 2000, the court approved the Trustee's report and discharged the case. Documents from the bankruptcy were not readily available.

Research identified a felony case #11-1993-CF-001754-AXX-XX filed in Collier County, Florida against "Jerome Harvey Cohen" on November 3, 1993. The Docket Sheet identified the offense as "fugitive from justice" warrant that originated in Philadelphia, Pennsylvania. The offense date is listed as November 1, 1993. The case was dismissed on November 15, 1993. Please note that the date of birth listed on the Docket Sheet is October 4, 1954, which is one year different from the subject's October 4, 1953. The Collier County Clerk has no further information about this case. An in-person file request in Philadelphia would be required to identify additional information.

Regards,

Andrew Kim
Associate Director, Origination

O 213.873.4011
C 909.802.0818
E andrew.kim@thorofarecapital.com
vCard | **LinkedIn** | **Twitter**

Thorofare Capital, Inc.
633 West Fifth Street, Suite 2200
Los Angeles, California 90071
Directions | **Website** | BRE# 01940861

EXHIBIT 2

Jerome H. Cohen
1050 8th Ave N
Naples, FL 34145
Ph. (239) 537-5055
Email: jerryc@reagan.com

March 31, 2017

RE: 2016-17 Philadelphia Property Tax Liens

To Whom It May Concern:

This letter serves to explain the circumstances surrounding several tax lien filings in Philadelphia, PA from late 2016 to early 2017. In the early 1990's, my cousin, Stephen A. Cohen, began purchasing, renovating, and leasing smaller multifamily apartment buildings (4 units or less) and single family residences to build a portfolio of income producing assets. His financial means were limited and as such asked me to back him financially in a largely silent role, to which I agreed. Over the succeeding years in the early 1990's he built a small portfolio by purchasing and renovating assets, refinancing them into long term loans upon completion, for which I was a co-guarantor, but since I had moved to Florida in 1993, I was not actively involved in the management of the assets. After a couple years it became apparent to me that his underwriting assumptions for acquisition were wholly inaccurate; his renovation costs were consistently low, his construction timelines were consistently short, and rents and collections were lower than I was told at the onset, resulting in the net income of the portfolio being unable to sustain the debt service in the high interest rate environment at the time. This resulted in our selling off the portfolio as the negative cash flow was simply too great to absorb. The portfolio took some time to liquidate, but when it finally was, and all debts were released, there remained several assets that Stephen retained control and ownership of. We have not had any significant contact after the late 1990's, and this portfolio has subsequently never crossed my mind. Furthermore, as the remaining assets were not refinanced with other debt and no other transfers of ownership have occurred, my name has never been officially removed from title, and apparently my cousin has failed to keep current on his property tax payments, something that has not previously happened, and I am currently looking into methods by which I can remove myself from title without involving Stephen as I do not anticipate much co-operation from him. I trust that this letter will adequately answer any questions surrounding this case, and if there should be any further questions, please feel free to contact me at your convenience.

Sincerely,

Jerome H. Cohen

EXHIBIT 3

Jerome H. Cohen
1050 8th Ave N
Naples, FL 34145
Ph. (239) 537-5055
Email: jerryc@reagan.com

March 31, 2017

RE: Case #11-1993-CF-001754-AXX-XX

To Whom It May Concern:

This letter serves to explain the circumstances surrounding a felony case filed in Collier County, Florida, on or around November 3, 1993. In early 1993 I moved from Pennsylvania to Florida and despite my having filed a change of address with the post office, but not with the creditor directly, so bills from a creditor were not making it to my new address. After the move, I had forgotten about the debt which was still active. After not receiving any correspondence from me over the course of 6 months, and subsequently learning of my move, the creditor swore out a criminal complaint against me on the premise that I had left the state to skip out on the debt. This led to the issuance of a warrant out of a Philadelphia court which was served with a subsequent felony criminal complaint filed at my new residence in Collier County Florida. Upon learning of this, I immediately flew to Philadelphia and resolved the matter directly with the creditor after which the case was promptly dropped because of this simple miscommunication. I trust that this letter will adequately answer any questions surrounding this case, or if there should be any further questions, please feel free to contact me at your convenience.

Sincerely,

Jerome H. Cohen

EXHIBIT 4

Jerome H. Cohen
1050 8th Ave N
Naples, FL 34145
Ph. (239) 537-5055
Email: jerryc@reagan.com

March 31, 2017

RE: 1995 Chapter 11 Bankruptcy Case

To Whom It May Concern:

This letter serves to explain the circumstances surrounding a 1995 chapter 11 bankruptcy case filed in the Eastern District U.S. Bankruptcy court in Philadelphia, PA, filed on or around January 1995. In the early 1990's, My cousin, Stephen A. Cohen, began purchasing, renovating, and leasing smaller multifamily apartment buildings (4 units or less) and single family residences to build a portfolio of income producing assets. His financial means were limited and as such asked me to back him financially in a largely silent role, to which I agreed. Over the succeeding years in the early 1990's he built a small portfolio by purchasing and renovating assets, refinancing them into long term loans upon completion, for which I was a co-guarantor, and since I had moved to Florida in 1993, I was not actively involved in the management of the assets. After a couple years it became apparent to me that his underwriting assumptions for acquisition were wholly inaccurate; his renovation costs were consistently low, his construction timelines were consistently short, and rents and collections were lower than I was told at the onset, resulting in the net income of the portfolio being unable to sustain the debt service in the high interest rate environment at the time. As the cash flow issues accrued, lenders were unwilling to renegotiate the loans, and a chapter 11 filing became the only route to restructure the portfolio. Since both myself and my cousin were involved, we both filed bankruptcy, which compounded with multiple lenders attached to the portfolio, resulted in the bankruptcy becoming more complicated and we were forced to change the filling to chapter 7 on or around June of 1995. The portfolio took some time to liquidate, but when it finally was, and all lenders were satisfied, there remained several assets that Stephen retained control and ownership of, and the case was finally discharged in 2000, after which my dealings with Stephen were concluded and we have not had any significant contact since. I trust that this letter will adequately answer any questions surrounding this case, and if there should be any further questions, please feel free to contact me at your convenience.

Sincerely,

Jerome H. Cohen

EXHIBIT 5

HOLDBACK AND DISBURSEMENT AGREEMENT

THIS HOLDBACK AND DISBURSEMENT AGREEMENT (this "**Agreement**") is entered into as of July 21, 2017 by **SSPH 6951 S MERRILL LLC**, an Illinois limited liability company ("**Borrower**"), and **THOROFARE ASSET BASED LENDING REIT FUND IV, LLC**, a Delaware limited liability company ("**Lender**").

RECITALS

A. Lender has agreed to make a loan to Borrower (the "**Loan**") in the aggregate principal amount of One Million Five Hundred Forty Thousand and 00/100 Dollars ($1,540,000.00) to be evidenced by that certain Promissory Note Secured By Mortgage, Assignment of Leases and Rents and Security Agreement (the "**Note**") and secured by, among other things, that certain Deed of Trust, Assignment of Leases and Rents and Security Agreement (the "**Security Instrument**") encumbering the property located at 6949-59 South Merrill Avenue, Chicago, Illinois 60649 (the "**Property**").

B. Lender is retaining, and not disbursing to Borrower on the date hereof, a portion of the Loan proceeds equal to Five Hundred Thirty-Five Thousand Eight Hundred Forty-Five and 00/100 Dollars ($535,845.00) to be held as the Capital Improvement Work Holdback (as defined herein) hereunder, and which, subject to the terms hereof, shall be disbursed to Borrower for payment (or reimbursement) of costs incurred by Borrower in connection with the Capital Improvement Work (as defined herein).

D. Capitalized terms used but not otherwise defined herein shall have the meanings given to such terms in the Note.

NOW, THEREFORE, in consideration of the above recitals and for other good and valuable consideration, Lender and Borrower hereby agree as follows:

1. **Intentionally Omitted.**

2. **Capital Improvement Work Holdback**.

(a) Five Hundred Thirty-Five Thousand Eight Hundred Forty-Five and 00/100 Dollars ($535,845.00) of the Loan shall be retained and not funded by Lender on the date hereof (the "**Capital Improvement Work Holdback**"). Subject to the terms and conditions of this Agreement, the Capital Improvement Work Holdback shall be disbursed by Lender to Borrower for payment (or reimbursement) of costs incurred by Borrower in connection with certain capital improvements and repairs to be made by Borrower with respect to the Property, pursuant to the capital improvement schedule and budget approved by Lender (to the extent so approved, the "**Capital Improvement Work**").

(b) The Capital Improvement Work Holdback shall be disbursed in minimum amounts of at least Fifty Thousand and 00/100 Dollars ($50,000.00), in accordance with, and subject to the terms and conditions of **Exhibit "A**" hereto, and at a rate of $1.00 for every $1.00 spent on Capital Improvement Work.

(c) The Capital Improvement Work Holdback shall not bear interest in accordance with the Note unless and until disbursed by Lender to Borrower; from after the date of any such disbursement, interest shall accrue on the amount so disbursed at the Interest Rate (as defined in the Note) or Default Rate (as defined in the Note), as applicable, pursuant to the Note. Notwithstanding the foregoing, any undisbursed funds in the Capital Improvement Work Holdback as of the date that is six (6) months following the date of this Agreement shall be deemed disbursed by Lender to Borrower (without any further action by Lender or Borrower and without the consent or approval of Borrower) and all such funds shall thereafter accrue interest in accordance with the terms of the Note.

(d) Borrower hereby pledges to Lender, and grants a security interest in, any and all monies now or hereafter deposited in the Capital Improvement Work Holdback as additional security for the payment of the Loan. The Capital Improvement Work Holdback shall be held in Lender's name and may be commingled with Lender's own funds at financial institutions selected by Lender in its reasonable discretion. During the continuance of an Event of Default, Lender may apply any sums then present in the Capital Improvement Work Holdback to the payment of the Indebtedness in any order in its sole discretion. Until expended or applied as above provided, the Capital Improvement Work Holdback shall constitute additional security for the Loan. Lender shall have no obligation to release any of the Capital Improvement Work Holdback during the continuance of an Event of Default. In connection with a repayment of the Loan in full, the monies then remaining on deposit with Lender under this Section 1 shall be applied as a credit against the outstanding principal balance of the Loan at the time of such repayment.

(e) In the event the Capital Improvement Work is completed to Lender's satisfaction pursuant to the terms and provisions herein, Lender shall deposit any funds remaining in the Capital Improvement Work Holdback to the Delta Interest Reserve (as such term is defined in the Security Instrument).

(f) Borrower shall pay to Lender with each draw from the Capital Improvement Work Holdback an administrative fee in an amount equal $500.00.

3. **Intentionally Omitted.**

4. **Covenants Relating to Capital Improvement Work.** Borrower shall comply with the covenants set forth in **Exhibit "B"** hereto.

5 **Notices**. All notices to be given pursuant to this Agreement shall be in writing and given in accordance with Section 47 of the Security Instrument.

6. **Amendments and Waivers**. No failure by Lender to insist upon the strict performance of any covenant, agreement, term or condition of this Agreement, the Note, the Security Instrument, or any other document relating to the Loan (the "**Loan Documents**") or any other document or to exercise any right, power or remedy consequent upon a breach thereof shall constitute a waiver, express or implied, of any such breach or of such covenant, agreement, term or condition. No amendment or waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom enforcement is sought.

7. **Invalid Provisions**. If any provision of this Agreement or any other Loan Document is held to be illegal, invalid or unenforceable, such provision shall be fully severable; the Loan Documents shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part thereof; the remaining provisions thereof shall remain in full effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance therefrom; and in lieu of such illegal, invalid or unenforceable provision there shall be added automatically as a part of such Loan Document a provision as similar in terms to such illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

8. **Approvals; Third Parties; Conditions**. All approval rights retained or exercised by Lender with respect to contracts or other matters hereunder are solely to facilitate Lender's credit underwriting, loan servicing and loan administration, and shall not be deemed or construed as a determination that Lender has passed on the adequacy thereof for any other purpose and may not be relied upon by Borrower or any other person or entity. This Agreement is for the sole and exclusive use of Lender and Borrower and may not be enforced, nor relied upon, by any person or entity other than Lender and Borrower. All conditions of the obligations of Lender hereunder, including the obligation to make advances, are imposed solely and exclusively for the benefit of Lender, its successors and assigns, and no other person or entity shall have standing to require satisfaction of such conditions or be entitled to assume that Lender will refuse to make advances in the absence of strict compliance with any or all of such conditions, and no other person or entity shall, under any circumstances, be deemed to be a beneficiary of such conditions, any and all of which may be freely waived in whole or in part by Lender at any time in Lender's sole and absolute discretion.

9. **Lender Not in Control; No Partnership**. None of the covenants or other provisions contained in this Agreement shall, or shall be deemed to, give Lender the right or power to exercise control over the affairs or management of Borrower, the power of Lender being limited to the rights to exercise the remedies referred to in the Loan Documents. The relationship between Borrower and Lender is, and at all times shall remain, solely that of debtor and creditor. No covenant or provision of the Loan Documents is intended, nor shall it be deemed or construed, to create a partnership, joint venture, agency or common interest in profits or income between Lender and Borrower or to create an equity in the Property in Lender. Lender neither undertakes nor assumes any responsibility or duty to Borrower or to any other person with respect to the Property or the Loan, except as expressly provided in the Loan Documents; and notwithstanding any other provision of the Loan Documents: (a) Lender is not, and shall not be construed as, a partner, joint venturer, alter ego, manager, controlling person or other business associate or participant of any kind of Borrower or its stockholders, members, or partners and Lender does not intend to ever assume such status; (b) Lender shall in no event be liable for any debts, expenses or losses incurred or sustained by Borrower; and (c) Lender shall not be deemed responsible for or a participant in any acts, omissions or decisions of Borrower or its stockholders, members, or partners. Lender and Borrower disclaim any intention to create any partnership, joint venture, agency or common interest in profits or income between Lender and Borrower, or to create an equity in the Property in Lender, or any sharing of liabilities, losses, costs or expenses.

10. **Time of the Essence**. Time is of the essence with respect to this Agreement.

11. **Successors and Assigns**. This Agreement shall be binding upon and inure to the benefit of Lender and Borrower and their respective successors and assigns of Lender and Borrower, provided that Borrower shall not, without the prior written consent of Lender, assign any rights, duties or obligations hereunder.

12. **Waivers**. No course of dealing on the part of Lender, its officers, employees, consultants or agents, nor any failure or delay by Lender with respect to exercising any right, power or privilege of Lender under this Agreement or any of the other Loan Documents, shall operate as a waiver thereof.

13. **Exhibits**. Any exhibits attached to this Agreement are incorporated herein and shall be considered a part of this Agreement.

14. **Titles of Articles, Sections and Subsections**. All titles or headings to articles, sections, subsections or other divisions of this Agreement and the other Loan Documents or the exhibits hereto and thereto are only for the convenience of the parties and shall not be construed to have any effect or meaning with respect to the other content of such articles, sections, subsections or other divisions, such other content being controlling as to the agreement between the parties hereto.

15. **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois, and Borrower expressly consents and subjects itself to jurisdiction and venue in Los Angeles County, California.

16. **Entire Agreement**. This Agreement and the other Loan Documents embody the entire agreement and understanding between Lender and Borrower and supersede all prior agreements and understandings between such parties relating to the subject matter hereof and thereof. Accordingly, the Loan Documents may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

17. **Counterparts**. This Agreement may be executed in multiple counterparts, each of which shall constitute an original, but all of which shall constitute one document.

18. **Lender's Consent**. Whenever any provision of this Agreement requires Lender's consent, approval, determination or confirmation, such consent, approval, determination or confirmation shall be given, withheld or made, as applicable, by Lender in its sole discretion.

19. **Limitation on Liability of Lender's Officers, Employees, etc**. Any obligation or liability whatsoever of Lender which may arise at any time under this Agreement or any other Loan Document shall be satisfied, if at all, out of the Lender's assets only. No such obligation or liability shall be personally binding upon, nor shall resort for the enforcement thereof be had to, the property of any of Lender's shareholders, directors, officers, employees or agents, regardless of whether such obligation or liability is in the nature of contract, tort or otherwise.

EXECUTED as of the date first written above.

LENDER:

THOROFARE ASSET BASED LENDING REIT FUND IV, LLC,
a Delaware limited liability company

By: _____
Name: Ryan M. Hunt
Title: Authorized Signatory

BORROWER:

SSPH 6951 S MERRILL LLC,
an Illinois limited liability company

By: SSPH Holdco 1 LLC,
a Delaware limited liability company
its Managing Member

By: South Shore Property Holdings LLC,
a Delaware limited liability company
its Managing Member

By: _____
Jerome H. Cohen, Manager

Exhibit "A"

Each advance of funds from the Capital Improvement Work Holdback pursuant to this Agreement shall be subject to Lender's receipt, review, approval, determination and/or confirmation of the following, each in form and content satisfactory to Lender in its sole good faith discretion:

1. No Event of Default shall have occurred and be continuing.

2. No material adverse change shall have occurred in the financial condition of Borrower or any guarantor of the Loan or in the net operating income of the Property.

3. No condemnation or materially adverse, as determined by Lender, zoning or usage change proceeding shall have occurred or shall have been threatened against the Property such that the Property can no longer be used for its intended purpose; the Property shall not have suffered any damage by fire or other casualty which has not been repaired or is not being restored in accordance with the Security Instrument; no law, regulation, ordinance, moratorium, injunctive proceeding, restriction, litigation, action, citation or similar proceeding or matter shall have been enacted, adopted, or threatened by any governmental authority, which would have, in Lender's reasonable judgment, a material adverse effect on the Property such that the Property can no longer be used for its intended purpose, or a material adverse effect on Borrower's or any guarantor's ability to perform its obligations under the Note, Security Instrument or any guaranty or indemnity.

4. Borrower shall have submitted to Lender and Lender shall have approved a detailed scope and line item budget for the Capital Improvement Work. The parties hereby acknowledge and agree that the budget for the Capital Improvement Work approved by Lender that is attached to this Agreement as **Exhibit "C"** is preliminary in nature and Borrower shall promptly after the date of this Agreement, engage the proposed general contractor to review and update such budget and shall provide such budget for Lender's review and approval, not to be unreasonably withheld, conditioned or delayed (as so approved by Lender, the **"Capital Improvement Work Budget"**). In the event the cost of the Capital Improvement Work in the aggregate shall exceed $535,845, Borrower shall deposit with Lender such excess, and such excess shall be disbursed by Lender towards costs and expenses incurred by Borrower in connection with the Capital Improvement Work subject to terms and conditions of this Agreement prior to any disbursement of the Capital Improvement Work Holdback.

5. Borrower shall have submitted to Lender and Lender shall have (a) approved complete detailed plans and specifications for the Capital Improvement Work (as so approved by Lender, the "**Capital Improvement Work Plans**") and (b) determined in the exercise of Lender's sole discretion that the Capital Improvement Work Plans have received all applicable permits, licenses and other approvals required under laws, ordinances, rules and regulations of any governmental or quasi-governmental body with authority or jurisdiction over the Capital Improvement Work.

6. Borrower shall have submitted evidence satisfactory to Lender that the Capital Improvement Work Budget sets forth all estimated costs necessary to complete the Capital Improvement Work.

7. Borrower shall have submitted and Lender shall have approved the general contract (and the identity of the general contractor) for the completion of the Capital Improvement Work (the "**General Contract**"). Lender shall not unreasonably withhold, condition or delay its approval of the General Contract or the identity of the general contractor, provided, however, that the proposed general contractor is a third party licensed contractor in the State of Illinois with experience necessary to oversee, coordinate and complete the Capital Improvement Work.

8. Borrower shall have submitted and Lender shall have approved each other contract for the completion of the Capital Improvement Work unless such contract is a Compliant Capital Improvement Work Contract (as hereinafter defined). A "**Compliant Capital Improvement Work Contract**" shall mean a contract under which the labor, services, material, furnishings or fixtures to be provided corresponds to a specific Budget Line Item (as defined below) in the Capital Improvement Work Budget and which contract, alone or when taken together with any another contract corresponding to such Budget Line Item, does not cause the amount of such Budget Line Item to be exceeded.

9. In no event shall Lender be obligated to make advances of Loan proceeds hereunder with respect to the Capital Improvement Work which exceed, in the aggregate, an amount equal to $535,845.00.

10. With respect to Capital Improvement Work Holdback, Lender shall have determined or caused one of its consultants retained at the expense of Borrower to evaluate and determine, that the Capital Improvement Work Holdback (or remaining portion thereof) is sufficient to pay for all anticipated costs to be incurred by Borrower in connection with the Capital Improvement Work in accordance with the Capital Improvement Work Budget. If at any time Lender or its consultant shall have determined in the exercise of reasonable discretion that the projected costs for the Capital Improvement Work anticipated to be incurred for any individual Budget Line Item exceeds the amount set forth in the Capital Improvement Work Budget for such individual Budget Line Item (as the same may be adjusted in accordance with the terms of this Agreement), then the Loan shall be deemed out of balance (hereinafter an "**Out of Balance Loan**"); provided, however, so long as there are sufficient funds available in the contingency line item in the Capital Improvement Work Budget to pay for such excess cost, such funds shall be made available to pay the same and the Loan shall not be deemed an Out of Balance Loan. If the Loan is deemed an Out of Balance Loan (subject to the re-allocation of contingency as aforesaid) and there are insufficient funds available in the contingency line item in the Capital Improvement Work Budget to pay for such excess cost, then Borrower shall, at Borrower's option, within ten (10) business days after written notice from Lender: (a) deposit with Lender an amount sufficient to cover such Holdback deficiency (a "**Holdback Deficiency Deposit**"), (b) make one or more equity contributions to be used by Borrower to pay costs so as to remedy, as determined by Lender, the Out of Balance Loan status of the Loan (an "**Borrower Work Payment**") or (c) subject to Lender's prior approval as to the amount and subject further to the availability of funds, if any, in the Contingency Reserve, request that Lender disburse to the Capital Improvement Work Holdback from the Contingency Reserve funds in an amount, as determined by Lender, that shall

remedy the Out of Balance Loan status of the Loan. Lender shall not be required to authorize any disbursement from the Capital Improvement Work Holdback before receiving (i) payment of any such Holdback Deficiency Deposit and the prior application of such Holdback Deficiency Deposit to the payment of costs so as to remedy as determined by Lender the Out of Balance Loan status of the Loan, (ii) verification that a Borrower Work Payment has been made by Borrower to the applicable contractor or service providers and the proceeds thereof used for the payment of costs so as to remedy as determined by Lender the Out of Balance Loan status of the Loan, or (iii) a disbursement to the Capital Improvement Work Holdback from the Contingency Reserve funds in an amount, as determined by Lender, that shall remedy the Out of Balance Loan status of the Loan. Failure of Borrower to provide satisfactory verification of a Borrower Work Payment as required above shall be deemed Borrower's election to make a Holdback Deficiency Deposit. So long as the events referred to in the second sentence of this Section 11 do not exist as determined by Lender, the Loan shall not be deemed an Out of Balance Loan. If an Event of Default shall occur and be continuing, Lender may, at its option, in addition to exercising any other rights or remedies available under the Loan Documents, (A) apply any unexpended Holdback Deficiency Deposit to the costs of the Capital Improvement Work and/or (B) apply any unexpended Holdback Deficiency Deposit to the immediate reduction of any amounts due under the Note and the other Loan Documents.

11. Borrower shall have submitted for Lender's approval and Lender shall have approved any change order, amendment or modification to any contract or subcontract with respect to the Capital Improvement Work and any addendum, revision, modification to or amendment of the Capital Improvement Work Plans.

12. The Capital Improvement Work Budget includes as line items (collectively, "**Budget Line Items**") the cost of all labor, materials, equipment, fixtures and furnishings needed for the completion of all Capital Improvement Work. Lender shall not be obligated to disburse the Holdback proceeds for the payment of any cost if the amount of such cost, together with the amounts of other costs included within Budget Line Item for which requests for advances have previously been submitted and approved, exceeds the amount set forth in the Capital Improvement Work for such Budget Line Item, unless Borrower furnishes to Lender documentary evidence satisfactory to Lender that any such excess cost is offset by a reduction, in nature reasonably satisfactory to Lender, of at least an equal amount in another Budget Line Item, and Lender approves a revision to the Capital Improvement Work Budget. Notwithstanding anything to the contrary contained herein, if, upon completion of the work covered by any particular Budget Line Item, the actual cost of such work is less than the amount shown on such Budget Line Item in the Capital Improvement Work Budget, (a) Borrower shall have the right to apply the savings from that line item to increase either the hard cost or soft cost Budget Line Item, as applicable, (b) Borrower shall provide to Lender a revised Capital Improvement Work Budget reflecting such changes, and (c) Lender shall be deemed to have approved such revised Capital Improvement Work Budget upon receipt.

13. Each request for an advance shall be submitted to Lender at least fifteen (15) days prior to the date of the requested advance; provided, however, that Lender shall use its good faith efforts to make a requested advance in a prompt manner following satisfaction of all conditions to such advance set forth in this Agreement.

14. Each request for such an advance shall specify the amount requested, shall be on forms satisfactory to Lender, and shall be accompanied by appropriate invoices, bills paid affidavits, lien waivers or conditional lien waivers and releases from all parties furnishing materials and/or services in connection with the requested payment, title updates, endorsements to the title insurance, and other documents as may be reasonably required by Lender (provided, however, that title updates and endorsements may only be required by Lender in its reasonable discretion if the amount of the requested advance from the Capital Improvement Work Holdback exceeds $25,000). Each such advance shall include a certification from Borrower, in a form satisfactory to Lender, certifying that (a) such advance to be used for the payment of all or a portion of the Capital Improvement Work, and (b) all such work has been completed (x) in accordance with the Capital Improvement Work Plans and in a good and workmanlike manner, and (y) in accordance with applicable laws. All advances shall be part of the Loan and shall be secured by the Loan Documents. Borrower shall be responsible, at its sole cost and expense, for payment and/or reimbursement of any and all reasonable out-of-pocket costs and expenses incurred by Lender in connection with (i) the review, processing and administration of requests for advances made by Borrower, (ii) the performance of audits and inspections of the Property and/or any work done with respect to the Property, and (iii) confirmation of Borrower's completion of the Capital Improvement Work in accordance with this Agreement. Borrower shall pay such costs and expenses within ten (10) days of Lender's written demand, and Lender shall have the right to charge the Capital Improvement Work Holdback for payment of any such costs and expenses. For purposes of this Section, the phrase "costs and expenses incurred by Lender" shall be deemed to include, without limitation, reasonable out-of-pocket costs and expenses payable by Lender (or its affiliates) to third party consultants and a reasonable allocated portion of the compensation paid to in-house staff of Lender (or its affiliates). Borrower shall cooperate and shall cause all parties involved with the completion of the Capital Improvement Work to fully cooperate with Lender and its designees. Borrower shall have furnished to Lender evidence that all required inspections by governmental authorities have been satisfactorily completed.

15. Intentionally Deleted.

16. Lender, at its option and without further direction from Borrower, may disburse any advance to the person or entity to whom payment is due or through an escrow satisfactory to Lender or directly to Borrower for payment to such persons or entities.

17. Upon Lender's prior written request, Borrower shall immediately deposit all proceeds of the Loan proceeds by Lender hereunder in a separate and exclusive account to be used solely for the purposes specified in this Agreement, and upon Lender's request, shall promptly furnish Lender with evidence thereof.

18. Borrower shall provide access to the Property following reasonable prior written notice and during normal business hours to Lender and any agent, consultant or representative of Lender for the purpose of such party's oversight of work done and/or inspection of work done, if requested by Lender.

19. Lender and its consultants, representatives or agents shall have the right at all reasonable times during regular business hours and following reasonable prior notice (and at any time in the event of an emergency) to enter upon the Property and inspect any portion of the Capital

Improvement Work or other work at the Property. Lender shall not be required to undertake such inspections or reviews, and the making of any such inspections or reviews shall not create or impose any responsibility or liability of the Lender for the quality of construction or for the compliance of any improvements with any plans or specifications or any requirements of any governmental authority, and Borrower releases and holds Lender and its representative and agents from any responsibility with respect to any such inspections or reviews except claims or costs resulting from damage caused by the negligence or willful misconduct of Lender or its Agents during an inspection. Borrower understands and agrees that said inspections and reviews are for the sole purpose of protecting the advances under the Loan and Lender' security for the Loan and are made solely for the Lender' benefit; that such inspections may be superficial and general in nature, primarily to inform Lender of the progress of construction of the improvements and, that in any event, Borrower shall not be entitled to rely on any such inspection(s) as constituting Lender's approval, satisfaction or acceptance with respect to materials, workmanship, conformance to the plans submitted by Borrower or otherwise. Borrower hereby agrees to make its own inspections of the construction to determine that the quality of the improvements and all other requirements of the work of construction financed hereby are being performed in a manner satisfactory to Borrower, and to immediately notify Lender in writing should the same show any work to be unsatisfactory in any manner which is likely to or could result in material delay or material cost increase. Without limiting the foregoing, Borrower shall permit Lender and or Lender's representatives, agents and consultants to examine and copy all books and account records and other papers relating to the Property and the construction of any improvements, and Borrower will cause all contractors, subcontractors and materialmen to cooperate with the Lender and its agents or representatives.

20. Borrower shall not use any portion of any advance for payment of any other cost except as specifically set forth in a request for advance approved by Lender in writing.

21. Borrower shall not use any portion of any advance for any payment to any person or entity who is affiliated in any whatsoever with Borrower, including, without limitation, any direct or indirect owner of Borrower or any person or entity who directly or indirectly controls Borrower, unless such person or entity is the counterparty to a Compliant Capital Improvement Work Contract.

22. No funds will be advanced for materials stored at the Property unless Borrower furnishes Lender satisfactory evidence that such materials are properly stored and secured at the Property.

23. Borrower shall have furnished to Lender a list of names and addresses of all mechanics and materialmen who have performed labor or supplied materials the cost of which is to be paid from the disbursement of proceeds that is the subject of the advance requested.

24. Borrower shall have satisfied such other conditions as Lender may require in its reasonable discretion.

Exhibit "B"

1. Borrower covenants and agrees that it shall (a) abide by, perform and comply with all of Borrower's obligations under all agreements and contracts relating to the Capital Improvement Work, and Borrower, at its sole cost and expense, shall secure or enforce the performance of each and every material obligation, covenant, condition and agreement to be performed by the other parties under any such documents; (b) perform the Capital Improvement Work or cause the Capital Improvement Work to be performed, in a good and workmanlike manner and in compliance with all applicable laws, ordinances, rules and regulations; (c) prosecute the completion of the Capital Improvement Work with diligence in accordance with the Capital Improvement Work Budget, and the Capital Improvement Work Plans and cause the completion of the Capital Improvement Work on or before May 1, 2018 (the "**Capital Improvement Work Completion Date**"), free from any liens or claims of any and all persons or entities performing services or labor on the Property or furnishing materials thereto; (d) obtain, and deliver to Lender, in each case on or prior to the Capital Improvement Work Completion Date, certificates of occupancy to the extent required by applicable law, and (f) fully and punctually pay and discharge any and all costs, expenses and liabilities for, or incurred in connection with, the construction and completion of the Capital Improvement Work in accordance with the Capital Improvement Work Plans as and when the same become due and payable or which, if unpaid, are or may become liens on the Property and/or the Improvements. Upon completion of the Capital Improvement Work or any portion thereof, Borrower shall execute and deliver any documents required by the title company insuring Lender's security interest in the Property (the "**Title Company**") to remove any exception relating to pending disbursements or mechanic's liens in the policy of title insurance issued to Lender in connection with the Loan (the "**Lender's Policy**"), and shall cause the Title Company to remove any such exception.

2. Borrower shall submit for Lender's approval each contract for the Capital Improvement Work unless such contract is a Compliant Capital Improvement Work Contract. Borrower shall not enter into any such contract without Lender's written approval, which shall not be unreasonably withheld, conditioned or delayed.

3. Borrower shall submit for Lender's approval any change order, amendment or modification to any contract or subcontract with respect to the Capital Improvement Work and any addendum, revision, modification to or amendment of the Capital Improvement Work Plans. Borrower shall not execute or approve any such change order, amendment, modification or addendum without Lender's written approval, which shall not be unreasonably withheld, conditioned or delayed.

4. Borrower shall, on a monthly basis furnish reports to Lender in form reasonably acceptable to Lender on the progress of the Capital Improvement Work, the estimated completion date therefor, identifying the costs expended to date in connection therewith and the remaining costs to complete the Capital Improvement Work.

5. In the event Borrower has not completed the Capital Improvement Work free of all mechanic's and materialmen's liens to the reasonable satisfaction of Lender on or before the Capital Improvement Work Completion Date or has failed to obtain and deliver to Lender any

certificate of occupancy required to be obtained and delivered to Lender in accordance with Section 1 of this **Exhibit "B"** or has otherwise materially breached this Agreement, each of the same shall constitute an Event of Default under this Agreement, the Note, the Security Instrument and all other Loan Documents, in each case, without notice, grace or cure period.

Exhibit "C"

Preliminary Capital Improvement Work Budget

Hard Costs	Est. Cost
Roof	$81,712
Brick & Concrete	$16,397
Porch, Fencing, & Windov	$0
HVAC	$54,250
Plumbing	$74,250
Electrical	$105,523
Foundation and Framing	$0
Unit Updates	$155,000
Subtotal Cost	**$487,131**
Soft Costs	
Permits	$0
Architect Fees	$0
GC Fee @ 10%	$0
Contingency @ 10%	$48,713
Total Soft Costs	**$48,713**
Total Costs	**$535,845**