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SDF81 45 JOHN STREET 1 LLC
and SDF81 45 JOHN STREET 2 LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

HS 45 John LLC,

Case No. 15-10368 (SHL)

Debtor.

Hearing Date: April 1, 2015

Hearing Time: 10:00 A.M.

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**REPLY OF SDF81 45 JOHN STREET 1 LLC AND SDF81 45 JOHN STREET 2 LLC
IN SUPPORT OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

SDF81 45 John Street 1 LLC (“SDF1”) and SDF81 45 John Street 2 LLC (“SDF2”) (collectively, the “Movant”), interested parties to this chapter 11 case, by and through their attorneys, Kriss & Feuerstein LLP, hereby submit this Reply in Support of their motion for an order granting relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) (the “Motion”) in order to commence an action to foreclose Movant’s Mortgages¹, naming Debtor as a Defendant therein solely to cut off any subordinate rights Debtor may have against the mortgaged property as a result of the Memorandum², and respectfully represent as follows:

1. The Debtor is the only party that opposed the motion by filing its Opposition thereto on March 26, 2015 (the “Opposition”) [ECF Doc. 25].

¹ As set forth in the Motion, the principal amount of Movant’s senior liens on the Property alone, exceeds \$48,000,000.00 and is accruing interest at the default rate of 24% per annum.

² Unless otherwise defined herein, the terms defined in Movant’s Application in Support of the Motion and the Debtor’s Opposition are utilized and incorporated by reference herein.

2. In the Opposition, Debtor argues that the automatic stay should not be lifted prior to a resolution of its Adversary Proceeding against the Seller (the obligor and mortgagor under Movant's defaulted Loans) which seeks, among other relief, specific performance of the Memorandum to purchase the Property encumbered by Movant's Loans.

3. While Debtor would like the Court to believe otherwise, the facts are simple and not subject to dispute. On September 19, 2014, with actual and constructive knowledge of the Loans, and in violation of the due on sale clause contained therein, without seeking or obtaining a written representation from Movant regarding the status of the Loan, Debtor entered into the Memorandum to purchase the Property from Movant's Borrower/Debtor's Seller, without the consent or knowledge of Movant.

4. Debtor alleges that it made a down payment and allegedly took "possession" of the Property (a construction site) in September 2014. According to Debtor, it did not pay the balance of the purchase price because the Seller falsely represented in the Memorandum that the Loans were not in default, when, in fact they were.

5. Movant was not aware of the Memorandum, was not a party to the Memorandum, is not in privity with Debtor and made no representations to Debtor whatsoever. To the contrary, Movant's records reflect Movant transmitted payoff statements for the loans to Borrower's principal on September 18, 2014, the day before the Memorandum was signed that showed the accrual of default interest. *See* Reply Affidavit of Brian Shatz, ¶ 5, Exhibit A thereto.

6. The Opposition baselessly claims stay relief should be denied because: (i) the accusations Debtor allegedly made against Movant in the Adversary Proceeding (to which Movant is not a party) give rise to the *possibility* that Movant contributed to the Seller's alleged misrepresentation in the Memorandum regarding the default under the Loans; (ii) the Debtor is a

vendee-in-possession with a right of redemption and allegedly the right to contest the amount due to Movant on account of the Loans³ and (iii) Movant is not prejudiced because “its alleged secured claims can be addressed during the bankruptcy case” (Opposition, ¶11) and are adequately protected by a purported “interest escrow” held by Debtor.

7. The Motion should be granted as Debtor has failed to articulate a single factual, legal or equitable basis for to justify the continuation of the automatic stay in connection with this bad faith Chapter 11 filing.

8. Debtor argues that Movant has mischaracterized it as a “nominal” party to the foreclosure action, as it holds greater rights to the Property as a contract vendee-in-possession. Debtor goes on to argue that a vendee-in-possession has the rights of an equitable owner, including the right to “object to the Lender’s entitlement to all aspects of its claim” as well as the right of redemption. Opposition, ¶¶ 11 and 12. No legal authority is cited in support of this contention.

9. For purposes of this motion, Movant does not dispute that Debtor is a contract vendee⁴. While it questions whether the Debtor is a contract *vendee-in-possession* (as discussed below), the distinction is inconsequential for the purpose of this Motion as in either case, the Debtor is a necessary party to a foreclosure action pursuant to RPAPL § 1311. Both a contract vendee and contract vendee-in-possession have the right to “redeem the mortgage prior to sale by tendering to the mortgagee the principal and interest due on the mortgage” prior to a foreclosure sale. *In re Oligbo*, 328 B.R. 619 (E.D.N.Y Bank., J. Stong, 2005).

³ Movant refers to the right to contest the Movant’s “secured claim”, but Movant is not a “secured creditor” of the Debtor and offers no support for this legal argument.

⁴ For purposes of this Motion, Movant takes no position regarding the validity, enforceability or Debtor’s ability to consummate the transaction that is the subject of the Adversary Proceeding as Debtor was not a party to the negotiation or execution of that contract.

10. The purpose of the instant motion is to obtain stay relief to commence a foreclosure action and name the Debtor for this purpose.

11. Debtor cites no law in support of its position that a contract vendee's rights include the ability to challenge the amount due to The Debtor does not own the Property, did not close and is not in privity of contract with Movant.

12. Debtor has failed to set forth any equitable basis to continue stay relief based on its alleged status as a contract "vendee-in-possession". This is particularly true because the Debtor has offered no proof of possession or the payment of any expenses associated with the Property, including but not limited to Movant, since signing the Memorandum.

13. Specifically, Movant not Debtor, has paid the taxes on the Property since the Debtor entered into the Memorandum. *See* Shatz Affidavit, ¶ 10. Upon information and belief, the Property is a stalled construction site. Thus, Debtor does not allege, nor could it be physically located at the Property. *See* Shatz Affidavit, ¶ 9. Moreover, in addition to the taxes, Movant was required to make a protective advance to keep construction permits in place at the Property, because if the permits expired it would have caused a materially adverse impact on the value of the Property. *See* Shatz Affidavit, ¶ 11. Moreover, Movant has received no funds on account of its Mortgage since the Debtor entered into the contract and allegedly took "possession". *See* Shatz Affidavit, ¶ 14.

14. Since, Movant is not in privity with Debtor, Movant is not a secured creditor⁵ of Debtor in this matter. Thus, Debtor's claim that the stay should not be lifted so that Debtor may challenge the default interest rate and seek equitable subordination is without merit. Accordingly, cause exists to lift the automatic stay.

⁵ To the extent that Movant claims to be in possession, it arguably should be obligated to pay for the use and occupancy, which income was assigned to Movant pursuant to the terms of the Loans.

15. The Debtor alleges in footnote 1 of the Opposition that the acceleration letter sent by Movant to *Seller* after the filing of Debtor's bankruptcy petition is a nullity and may be in violation of the automatic stay. Debtor again cites no case law in support of this argument. The notice of acceleration was not a pre-requisite to foreclosure and more importantly, it was not sent to Debtor nor would Debtor be entitled to such a notice. The fact that there was a delay between the default and the time of the notice, is not "symptomatic that the Lender is not operating at arm's length" as Debtor alleges. Instead, this delay demonstrates Movant exercising its rights and reasonable business discretion to make efforts to avoid foreclosure following Borrower's default. The accusation that there was a stay violation in light of the fact that Movant has come to this Court for approval before commencing litigation against the Debtor is unfounded.

16. Debtor baldly alleges that Movant will not be prejudiced as a result of the automatic stay, claiming Movant is adequately protected by a purported \$1,100,000.00 "interest reserve" Debtor claims to be holding. Debtor has not offered to pay this money to Movant. The Debtor offers no scenario as to the disposition of the funds if it were not to prevail on the Adversary Proceeding. The Debtor does not allege that it has the funds to pay the Mortgages in full, which is a precursor to closing on the Memorandum. In addition to the significant interest accrual Movant will be forced to pay the expenses associated with the Property eroding any equity it may have had in the Property.

17. In the absence of a legal basis for its Opposition, Debtor makes a desperate attempt to sway the Court by portraying Movant and its counsel as "bad actors". For instance, Debtor claims "the Adversary Complaint includes important allegations regarding the conduct of the Lender, which, among other things, is alleged to have confirmed prior to the execution of the Contract to the Debtor's representatives that the mortgages were current, only to subsequently

disavow these statements.” Objection, ¶ 8. This statement is misleading since Debtor fails to advise the Court that Movant is not a party to the Adversary Proceeding, does not provide any testimony from someone with personal knowledge or documentary evidence to support for the alleged communication “prior to the execution of the Contract”⁶, and does not cite to where such allegations against Movant are made in the Adversary Complaint. This is because no such evidence exists for the baseless false assertion.

18. In paragraphs 17 through 20 of the Opposition, Debtor discusses several unrelated publically recorded transactions between entities affiliated with Movant and entities and individuals affiliated with Seller, to wit, Sprei and Miller⁷.

19. Relying on these transactions, Debtor seeks to blame Movant for its own failure to discover the Default prior to entering into the Memorandum. For example, in ¶ 8 of the Opposition, Debtor reveals its mistaken belief that “Madison Realty is apparently dolling out millions of dollars to Miller at the same time as he is allegedly also in arrears of the mortgages raises obvious concerns that the alleged defaults here may have been orchestrated.”

20. Debtor’s characterization of the facts regarding these unrelated transactions is patently incorrect. Debtor’s belief that Movant’s Mortgages could not be in default because Miller was an interest holder in Borrower/Seller and also an interest holder in obligors

⁶ This is notable, as the Contract was allegedly signed in September 2014 and the default date under the Mortgages was July 1, 2014, just two months earlier.

⁷ These transactions are a matter of public record, and to the extent the information is not publically available it is irrelevant, privileged and confidential. Without waiving the foregoing, in ¶ 23 of the Opposition Debtor’s counsel infers that Kriss & Feuerstein LLP (“K&F”) represented Borrower and/or its principals because K&F’s name is on the deed transferring title from the former owner, 45 John LLC, to the Debtor’s Seller (45 John Loft LLC). K&F had represented Movant in the purchase of the Loans from the prior lender. As the transaction progressed, Movant was offered a deed from the former owner, 45 John LLC, (not the Seller). Movant then transacted to have the deed conveyed to the current owner (Seller) who in turn took the deed subject to the Loans purchased by Movant (which were then modified). K&F was the address on the deed solely because it was the point person in dealing with the seller of the Mortgage and the former owner of the Property. Sprei, Miller and the Debtor’s Seller were represented by Yisroel Schwartz, Esq.

concerning unrelated loans made by Movant's affiliate was not reasonable, **as any reasonable person entering into the Memorandum would ask for a written estoppel letter from the lender prior to executing the Memorandum.**

21. Thus, if Debtor did not know the Mortgages were in default it is the result of **Debtor's faulty due diligence.** Furthermore, the fact that Movant's affiliate made loans to other single purpose entities in which Miller or Sprei had an interest is not unusual, not a sign of wrongdoing, and not a financial representation regarding the financial wherewithal of any of Borrower's interest holders.

22. Debtor states that Movant has "oversimplified" the facts in the Motion and instead presents this case as complicated and warranting discovery and protracted litigation. Debtor further claims it will need a Rule 2004 Deposition to flesh out Madison Realty Capital's ("Madison") relationship with Seller's principals. Debtor's desire to embroil Movant in unnecessary discovery seeking to pry into confidential and unrelated business matters demonstrates that this case and the Opposition was not filed in good faith or with a legitimate purpose.

23. Moreover, a Rule 2004 deposition of Movant is not warranted as any information Debtor may seek regarding any alleged relationship with Madison can be obtained from Sprei and/or Miller, who are both parties to the Adversary Proceeding, directly. The transactions outlined in the Opposition are not at issue in this case and any claimed need to inquire into those transactions is an improper fishing expedition into Movant's proprietary business dealings.

24. The equities weigh in favor of granting relief from the automatic stay, because the Debtor is not a party to the Loans, any interest Debtor may hold in the Property is subordinate to the Loans and Debtor has no basis to fight the foregoing. Given that Debtor's rights are limited

to redemption, it is in all parties' best interests to promptly commence and prosecute the foreclosure action to mitigate the accrual of default interest. Debtor will not lost the right of redemption in a foreclosure action, instead that right will not accrue until a judgment of foreclosure and sale is entered and a foreclosure sale is scheduled. This is a long way off since a foreclosure action has not yet been commenced.

25. It is more likely than not, that by the time Movant obtains a judgment of foreclosure and sale the Adversary Proceeding will be decided. Thus, if Debtor is successful in the Adversary Proceeding it will have had ample time to redeem the Mortgages. Simply put, the denial of the instant Motion will not result in any reduction of default interest, but to the contrary will only prolong the time that default interest will accrue.

26. If stay relief is denied, indefinitely or pending disposition of the Adversary Proceeding, Movant, Debtor, and any other subordinate creditors will be severely prejudiced as default interest accrues and continues to go unpaid. Thus, if Movant is forced to wait to file a foreclosure action until resolution of the Adversary Proceeding, the redemption price will be significantly higher.

27. Debtor's sole basis for commencing this chapter 11 proceeding was a bad faith attempt to gain leverage over Movant and force it to compromise the amount due under its senior Mortgages. The Court cannot ignore that Debtor has not articulated a single legal reason for the instant filing, which now more clearly appears to have been filed for an improper purpose.

28. In this regard, the default interest that Debtor complains of (but lacks standing as a matter of law to do) will continue to accrue until Movant is paid in full. It is in all parties' best interest to enable Movant to commence and prosecute a foreclosure action to mitigate the default interest accrual simultaneous with adjudication of the Adversary Proceeding.

29. In all likelihood, by the time a foreclosure sale will be held, Adversary Proceeding will be resolved. If the Debtor has been able to close on the transaction to purchase the Property it will be able to exercise its rights of redemption.

30. Simply, the Debtor offers no legal authority to support its contention that it may obtain title in violation of the clear terms of recorded Mortgages, and in doing so has the rights of the obligor and mortgagor. Instead, Debtor incorrectly argues that it has the rights of a vendee-in-possession, which in any event are clearly subordinate to Movant's rights under the Mortgages. While Debtor argues a right to "object" to Movant's claim, Movant has no claim in this case and would only have a claim to the extent that Debtor claims to be in occupancy and is therefore obligated to pay rents, which were clearly assigned to Movant pursuant to the recorded Mortgages.

31. Debtor was free to conduct his due diligence in connection with the Memorandum and to the extent that Debtor has failed to allege a single fact to support the false and speculative claim that Movant participated in any misrepresentation made by the Seller is self-serving, argumentative and an obvious attempt to unjustifiably frustrate Movant's right to foreclose.

32. Accordingly cause exists to grant Movant relief from the automatic stay as (i) Debtor is not in privity of contract with Movant and not entitled to challenge the amounts due under the Loans; (ii) the Debtor has proffered no evidence to support its claim it is a vendee-in-possession; (iii) the Debtor will not be prejudiced if the stay is lifted as Movant has yet to commence a foreclosure action and the right of redemption the Debtor *may be entitled* as a result of its litigation over the "stalled" Memorandum is subject and subordinate to Movant's rights under the Loans which it should be permitted to enforce.

WHEREFORE, SDF81 45 John Street 1 LLC and SDF81 45 John Street 2 LLC respectfully request that this Court enter an order pursuant to 11 U.S.C. § 362 granting relief from the automatic stay to pursue their rights and remedies under the Loans, waiving the fourteen (14) day stay imposed by Fed. R. Bank. P. 4001(a)(3), and any such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 30, 2015

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