

1 Marc S. Stern
1825 NW 65th Street
2 Seattle, WA 98117
(206) 448-7996
3 marc@hutzbah.com

Hon. Philip H. Brandt
Chapter 11
Hearing Date:
Hearing Time: 2:00 p.m,
Response Date:

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:	}	NO. 09-14122
Streamline Tower, LLC,	}	
Debtor.	}	BRIEF IN SUPPORT OF MOTION FOR DETERMINATION OF SECURED STATUS AND, ALTERNATIVELY, TO USE CASH COLLATERAL
_____	}	

FACTS

The debtor is the owner of a 275 unit condominium project in Las Vegas, NV. The unit is complete and has been in the selling process. Originally 148 units were sold and earnest moneys were collected for the sales.

Only 28 sales closed because the financing that had been arranged for the remainder of the units was not available when mortgage money dried up. Corus could have greatly ameliorated the problem by converting the construction loan to long term financing. This would have produced retail sales of approximately \$88,000.000 and would have virtually paid Corus off. There would still have been 130 units left.

When the buyers default on their Purchase and Sale Agreements, the debtor tried any number of other options to try to sell units. All of these were rejected by Corus.

The failure to close resulted in liquidated damages from forfeited earnest money deposits. This sum currently totals about \$9.2 million. Approximately 5.4 million is unrestricted, save a joint signature requirement from Corus that was put in place when the funds were deposited earnest money funds. The remaining approximately \$ 3.6 million is subject to a law suit in the

1 Clark County Superior Court. The debtor has won every motion and counsel for the defaulting
2 purchasers has now withdrawn.

3 The debtor and Corus bank essentially agree on the budget. Corus bank has moved the
4 court for an Order Authorizing it to advance the same funds so as to maintain the project. The
5 debtor submits that the payments should come from the forfeited earnest money receipts that
6 constitute its property instead of interest bearing cash advances from Corus. Additionally, the
7 debtor is prepared to use these funds to make interest payments on the note at the non-default
8 rate.

9 ISSUES PRESENTED

10 Are liquidated damages that result from a breach of contract between the debtor and a 3rd
11 party proceeds, and, consequently, collateral for Corus Bank's loan

12 Is it appropriate to use the forfeited earnest money funds to maintain and operate the
13 building (whether or not they are cash collateral) when 1) the bank has filed a motion allowing it
14 to pay the same obligations, 2) there is no dispute that the utilities, taxes, sales operation, etc.
15 need to be funded, and using these funds will not require the bank to make advances, arguably at
16 the default interest rate?

17 LEGAL ARGUMENT

18 The debtor submits that as all encompassing as this security agreement is, it does not
19 include the money from forfeited earnest money receipts after the buyer defaulted and the earnest
20 money was forfeited pursuant to the terms of the contract.

21 As with any contract, the place to begin is with the terms of the contract, itself. The deed
22 of trust grants a security interest in certain collateral. The grant of security in personal property
23 says:

24 **Security Agreement:** This Deed of Trust is both a real property
25 deed of trust and a "security agreement" within the meaning of the
26 Uniform Commercial Code. The Mortgaged Property includes both
27 real and personal property and all other rights and interests,
28 whether tangible or intangible in nature, of Grantor in the
Mortgaged Property. By executing and delivering this Deed of
Trust, Grantor hereby grants to Beneficiary and Trustee (for the
benefit of Beneficiary), as security for the Obligations, a security
interest in the Personal Property to the full extent that the Personal

1 Property may be subject to the Uniform Commercial Code. The
2 information contained in this Section 4 is provided in order that
3 this Deed of Trust shall comply with the requirements of the
4 Uniform commercial Code for mortgages to be effective as
5 financing statements filed as a fixture filing. The name of the
6 "debtor" is TOWER, LLC; and the name of the "secured party" is
7 CORUS BANK, N.A.; the mailing address of the "secured party"
8 from which information concerning the security interest may be
9 obtained and the mailing address of the "debtor" are as set forth in
10 Section 43 below. The debtors tax payer identification number is
11 51-0513971 and organizational number is LLC 14834-2004. The
12 types, or the items, of collateral covered hereby consist of the
13 Personal Property Randall other items set forth herein above in
14 Section 1 which constitute fixtures or personal property. Grantor is
15 the record owner of the Real Estate.

9 Personal property is defined in the agreement

11 **"Personal Property"** shall mean such of the Mortgaged Property
12 which constitutes personal property under the Laws of the State,
13 including the Intangibles and any and all proceeds of any and all of
14 the foregoing, including, without limitation, any and all cash and
15 non-cash consideration received from **the sale, exchange, lease,**
16 **collection or other disposition** of any and all of the foregoing, any
17 value received as a consequence of the possession of any of the
18 foregoing, any payment received from any insurer or other person
19 or entity as a result of the destruction, loss, theft, damage or other
20 involuntary conversion of whatever nature of any of the foregoing,
21 and all equipment, machinery, furniture, inventory, other goods,
22 fixtures, general intangibles, instruments, chattel paper, documents,
23 accounts and all other property of any kind or nature which are
24 acquired with any proceeds of any of the foregoing. [emphasis
25 supplied]

19 This is a fairly comprehensive list of personal property. However, it all relates to
20 amounts received from actual sales of units and equipment used in the building. It refers to
21 accounts and other property that are **proceeds** of sales of property. It incorporates Illinois law and
22 must be construed pursuant thereto. The agreement was drafted by the attorneys for Corus Bank
23 and must be strictly construed against them. *Myoda Computer Center, Inc. v. American Family*
24 *Mut. Ins. Co.* --- N.E.2d ----, 2009 WL 884902 (Ill. App. 1 Dist. 2009). *Lake Bluff Heating and*
25 *Air Conditioning Supply, Inc. v. Harris Trust and Sav. Bank*, 117 Ill. App. 3d 284, 72 Ill. Dec.
26 665, 452 N.E.2d 1361 (2d Dist. 1983).

1 In order to determine whether the funds held in escrow collateral for the obligation owed
2 to Corus bank, it is first necessary to determine what they are. Only then is it possible to
3 determine whether they are subject to the security agreement.

4 The declaration of Patrick McCourt makes it clear that the funds are the liquidated
5 damages that arose from a default of various purchasers of their obligation to purchase units in
6 the building. They are forfeited earnest money agreements. Thus, the question is, do these
7 liquidated damages received by the debtor constitute proceeds“the **sale, exchange, lease,**
8 **collection or other disposition**” of the property or any intangibles. There is no binding Illinois
9 precedent although in *Bank of Silvis v. Boultinghouse Auction Co.* 71 Ill.App.3d 98, 389 N.E.2d
10 267, 27 Ill.Dec. 455 a case involving an auctioneer selling property on behalf of a bank, the court
11 found that the auctioneer’s compensation could be paid from the bid deposit from a purchaser
12 who forfeited and did not close. That case is substantially different from this one because the
13 auctioneer was the agent of the bank, performing an agreed task for the bank and not the bank’s
14 debtor. The case is also substantially different because the auctioneer was to be paid from the
15 proceeds of the sale and the deposit was paid to the auctioneer as part of his services. In *In re*
16 *Vandevender* 87 B.R. 59,(Bkrcty S.D. Ill.,1988) used this analysis to extend a proceeds to a
17 forfeited earnest money with any reasoning whatsoever. It is impossible to tell from the case
18 whether the funds in question were liquidated damages or some other item. Arguably there was
19 no contract involved that contained a liquidated damage clause.

20 However in *In re Ladd* 106 B.R. 174, (Bkrcty.C.D.Ill.,1989) another Illinois Bankruptcy
21 Court came to a different result deciding whether disaster assistance payments could proceeds
22 because holdingt

23 This Court is of the opinion that they are not. Section 9-306 of the
24 Uniform Commercial Code defines proceeds as being “whatever is
25 received upon the sale, exchange, collection or other disposition of
the collateral.” Ill.Rev.Stat.1987, Ch. 26, para. 9-306.

26 The issue was addressed by the 9th Cir. BAP in *In re Shooting Star Enterprises, Inc.* 76
27 B.R. 154, 4 UCC Rep.Serv.2d 899 (9th Cir.BAP (Cal.),1987) the court held addressed the issue of
28 proceeds:

1 Although it is well recognized that the term “proceeds” is to be
2 given a broad and flexible interpretation, it is also recognized that
3 “[p]roceeds constitute whatever is *substituted* for the original
4 collateral.” *E.g. In re Judkins*, 41 B.R. 369, 372
5 (Bankr.M.D.Tenn.1984) (emphasis added); *In re SMS, Inc.*, 15
6 B.R. 496 (Bankr.D.Kan.1981).

7 Similarly, in *In re Vermont Knitting Co., Inc.* 111 B.R. 464, (Bkrcty.D.Vt.,1990) a case
8 identical to this one. The court did a complete analysis and concluded:

9 In order for the sale provisions of [UCC § 9-306](#) to be operative, it
10 is necessary that there be a transaction with respect to the collateral
11 that is a sale, exchange, collection, or other disposition of the
12 collateral or proceeds. Whether there has been a sale for the purpose
13 of Article 9 is determined by the definition of sale in Article 2. The
14 Code (UCC) does not define the term exchange and therefore its
15 prior meaning applies under which the difference between it and a
16 sale is ‘purely technical.’

17 Similarly, in *In re Hastie* 2 F.3d 1042 (10th Cir 1993) the court held that dividends from
18 stock held as collateral did not constitute proceeds of the stock finding that since there had been
19 no sale, there could be no proceeds.

20 “[P]roceeds” are defined as “whatever is received upon the sale,
21 exchange, collection or other disposition of the collateral or
22 proceeds.” [Okla.Stat. Ann. tit. 12A, § 9-306\(1\) \(West Supp.1993\)](#).
23 With respect to this definition, the term “sale” may be defined
24 generally as “[a] revenue transaction where goods or services are
25 delivered to a customer in return for cash or a contractual
26 obligation to pay. [The] [t]erm comprehends [a] transfer of
27 property from one party to another for valuable recompense.”
28 *Blacks Law Dictionary*, 5th ed. at 1200 (1979). Similarly, the term
“exchange” may be defined as “[the] [a]ct of giving or taking one
thing for another,” *id.* at 505, and the term “collect” in the context
of a debt or claim may be defined as “payment or liquidation of it,”
id. at 238. Lastly, the phrase “other disposition” may be defined
generally as the “[a]ct of disposing; [or] transferring to the care or
possession of another; [or] [t]he parting with, alienation of, or
giving up [of] property.” *Id.* at 423. Accordingly, each of the
foregoing events describes an event whereby one asset is disposed
of and another is acquired as its substitute. . .

There are other cases that take a contrary view. *See, inter alia, Old Stone Bank v. Tycon I*
Bldg. Ltd. Partnership 946 F.2d 271, (4th Cir. 1991) (relying on Virginia state law);

1 In this case, the security agreement was very carefully drafted to include that received
2 from **the sale, exchange, lease, collection or other disposition** or the property. The Purchase
3 and Sale agreements approved by Corus Bank, and, presumably this same law firm, provided that
4 there were **liquidated damages** from a forfeiture of the Purchase and Sale Agreement. This is
5 plainly different from a sale, exchange, lease, collection, or other disposition. The 9th Circuit
6 BAP has opined that in order for there to be proceeds, unless specifically is a substitution. *Ladd*,
7 *supra*.

8 What we have in this case is an attempt to bring under the terms of the agreement what
9 was an inchoate right to damages from a future violation of the contract. *Capital Nat. Bank of*
10 *New York v. McDonald's Corp.* 625 F. Supp. 87 (S.D.N.Y.,1986.) These funds are not covered
11 under the terms of the contract and are no longer collateral belonging to Corus Bank.

12 **The debtor should be able to used the funds to maintain the building and make**
13 **payments to Corus bank.**

14 Corus Bank has filed a motion seeking a super priority to pay to maintain the building.
15 The debtor agrees that the building needs to be maintained. The only question is the source of
16 the money to pay it. If the money comes from the forfeited earnest money, irregardless of
17 whether it the collateral of Corus Bank, the same obligations get paid. The difference, and it is a
18 substantial difference, is the Corus bank does not get to claim interest on its advances.

19 These expenses must be paid regardless of the source of the money. The funds can come
20 either from cash advances at a horrendous interest rate, as suggested by Corus Bank or they can
21 come from funds of the debtor at no interest. All the bank seeks to do is inflate the amount due
22 by the guarantors by advancing funds rather than using money already in the debtor's possession
23 and invested at a much lower interest rate.

24 Using the funds and allowing payment and modifying the terms to provied current
25 payments to Corus Bank will allow Corus to book this as a performing loan. Given Corus
26 Bank's situation, this will add \$100 million to its bottom line and be a substantial step in keeping
27 it from being placed in receivership by the FDIC. Entry into an agreement modifying the loan is
28 in Corus Bank's best interest.

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CONCLUSION

The funds are the debtors and were not received as a result sale of Corus Bank's collateral. They are the debtor's funds and are not described in the security agreement drafted by the bank's attorneys. The law requires the document be construed strictly against the bank and, co construed, the bank has no security interest in the funds.

The debtor should be able to use the funds to fund operations at the building. This is not a construction site. It is a fully completed operating building. The money will be used to pay the items that Corus Bank sought a super priority to pay. The difference is that by using the debtor's funds instead of the bank's the bank will not be able to tack interest onto the advances. The funds do not receive interest at anywhere near the amount charged by the bank and using the funds to keep the property current and make interest payments to the bank will substantially reduce the ultimate obligation.

Respectfully submitted this May 18, 2009

/s/ Marc S. Stern
Marc S. Stern
WSBA 8194
Attorney for Debtor