IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WOODBRIDGE GROUP OF COMPANIES, LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 17-12560 (KJC) (Jointly Administered) **Dkt. Nos. 929, 943, 1607 & 1620**

DEBTORS' OMNIBUS REPLY IN SUPPORT OF MOTIONS FOR ENTRY OF ORDERS AUTHORIZING THE SALES OF (I) 810 SARBONNE ROAD, LOS ANGELES, CALIFORNIA PROPERTY, AND (II) 1061 TWO CREEKS DRIVE, SNOWMASS VILLAGE, COLORADO PROPERTY

Woodbridge Group of Companies, LLC and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") hereby submit this reply (the "Reply") in support of the (i) *Debtors' Motion for Entry of an Order … Authorizing the Sale of 810 Sarbonne Road, Los Angeles, California Property … Free and Clear of Liens, Claims, Encumbrances, and Other Interests [Etc.]* [Docket No. 929] (the "810 Sarbonne Motion"), and (ii) *Debtors' Motion for Entry of an Order … Authorizing the Sale of 1061 Two Creeks Drive, Snowmass Village, Colorado Property … Free and Clear of Liens, Claims, Encumbrances, and Other Interests [Etc.]* [Docket No. 943] (the "Two Creeks Drive Motion" and, together with the 810 Sarbonne Motion, the "Motions"),[2] and in response to (i) the objection [Docket No. 1607] (the "Longo Objection") to the 810 Sarbonne Motion filed by

[1] The last four digits of Woodbridge Group of Companies, LLC's federal tax identification number are 3603. The mailing address for Woodbridge Group of Companies, LLC is 14140 Ventura Boulevard #302, Sherman Oaks, California 91423. Due to the large number of debtors in these cases, which are being jointly administered for procedural purposes only, a complete list of the Debtors, the last four digits of their federal tax identification numbers, and their addresses are not provided herein. A complete list of such information may be obtained on the website of the Debtors' noticing and claims agent at www.gardencitygroup.com/cases/WGC, or by contacting the undersigned counsel for the Debtors.

[2] Capitalized terms used but not defined herein shall have the meanings assigned to such terms in the applicable Motion.

Teresa A. Longo, and (ii) the objection [Docket No. 1620] (the "Onesko Objection" and, together with the Longo Objection, the "Objections") to the Two Creeks Drive Motion filed by Doug Onesko (together with Ms. Longo, the "Objecting Noteholders").

I. INTRODUCTION

1. As the Debtors have explained in connection with replying to previous sale objections, the Objections are built on a fiction: that the documents the Objecting Noteholders received and the representations made were true and that the money the Objecting Noteholders invested was actually channeled directly into the properties in which they thought they were investing. The reality is vastly different.[3]

2. The Longo Objection in particular illustrates the unfortunate disconnect between the representations made to investors and reality. The "Loan Agreement" attached to the Longo Objection indicates that Ms. Longo was granted a security interest in a loan purportedly extended by Woodbridge Mortgage Investment Fund 4, LLC ("Woodbridge Fund 4") to Powel House Investments, LLC ("Powel House"), which loan was purportedly secured by a first lien on the real property located at 778 Sarbonne Road in Los Angeles (the "778 Sarbonne Property").

3. However, Powel House, a non-debtor, never purchased the 778 Sarbonne Property (and never even contracted to). In fact, a different entity, Debtor Kirkstead Investments, LLC ("Kirkstead") – an entity not referenced in Ms. Longo's Loan Agreement – at one point did appear to execute a Purchase Agreement to acquire the 778 Sarbonne Property, but

[3] To be clear, solely for purposes of argument, the Debtors are engaging the Objecting Noteholders' arguments based on the assumption that the loan documents accurately reflect and describe the transactions to which they relate, which is not and should not be deemed or construed to be an admission as to the occurrence, nature, or character of these or any other transactions. Any description or characterization herein of loans or other transactions between any Woodbridge entities is solely for purposes of this Reply. The Debtors reserve all rights with respect to the loans purportedly made by the "Fund-level" Debtors to the "PropCo" and "MezzCo" Debtors, including, without limitation, the right to challenge or dispute that such loans were actually made or any liens related to those loans are valid.

that transaction was never consummated. The Debtors never acquired and do not own the 778 Sarbonne Property.

4. In any event (and even if the preceding facts were different, *i.e.*, even if the Debtors owned the 778 Sarbonne Property), as explained in greater detail below, that property, although in close proximity, is a completely different property than the property that is the subject of the 810 Sarbonne Motion (the "810 Sarbonne Property"). The 810 Sarbonne Property is owned by Debtor Silver Maple Investments, LLC, and was acquired by such Debtor in April 2016, nearly 18 months prior to Ms. Longo's entry into her Loan Agreement.

5. Unfortunately, Mr. Shapiro's conduct with respect to Ms. Longo's investment is consistent with what the Debtors' investigation has unearthed about the massive Ponzi scheme perpetrated by him. There was very substantial scrambling and commingling of assets and liabilities among the Debtors, and it is impossible to trace the flow of funds between any given "Fund Debtor" and any given "PropCo" or "MezzCo" Debtor, since all of the proceeds received were commingled and distributed without regard to corporate formalities. The result is that it is also impossible to ascertain whether the money invested by any given Noteholder was actually channeled into the property in which the Noteholder was led to believe it was investing.

6. These are regrettable circumstances and the Debtors and their professionals are working diligently (along with the three official committees) to maximize the return to all investors who were cheated. Nevertheless, the plain terms of the documents attached to the Longo Objection make clear that Ms. Longo has no interest in the 810 Sarbonne Property and her objection must be overruled.

7. The Onesko Objection, too, must be overruled. The Onesko Objection consists of the following statement:

> I object to the sale unless the following conditions are met:
>
> 14 Days subsequent to the closing of the sale I receive (per contract with Woodbridge dated 1-9-2016) reimbursement for the note of $181,000 plus the agreed upon past due interest in the amount of $6334.98 as of May 1.

8. While the Debtors have confirmed that Mr. Onesko was issued a note and loan documents purporting to grant him a security interest relating to the property that is the subject of the Two Creeks Drive Motion (the "Two Creeks Drive Property"), for the reasons stated below, the Onesko Objection must also be overruled.

II. REPLY TO LONGO OBJECTION

9. Pursuant to the "Loan Agreement" attached to the Longo Objection, Woodbridge Fund 4 purported to grant Ms. Longo a security interest in, *inter alia*:

> The certain loan in the principal amount of Twenty-One Million Two Hundred Ten Thousand and 00/100 Dollars ($21,210,000.00) (the "Pledged Loan") extended or to be extended to Powel House Investments, LLC (the "Borrower") secured by a first priority lien on the real property located at ***778 Sarbonne Road***, Los Angeles, California 90077 (the "Premises").

Loan Agreement, ¶ 2 (emphasis added). Nowhere in the documents attached to the Longo Objection is there any mention of a security interest (or any other interest) in the 810 Sarbonne Property, the property being sold.

10. The 810 Sarbonne Property and the 778 Sarbonne Property are entirely different properties. *See* Supp. Sharp Decl., ¶ 6.[4] The 810 Sarbonne Property is owned by Silver Maple Investments, LLC ("SMI"), a Debtor in these Chapter 11 Cases. *See Declaration of Bradley D. Sharp in Support of [810 Sarbonne Motion]* [Docket No. 930], at ¶ 3. SMI purchased the 810

[4] The "Supplemental Sharp Declaration" refers to the *Supplemental Declaration of Bradley D. Sharp in Support of Motions For Entry of Orders Authorizing the Sales Of (I) 810 Sarbonne Road, Los Angeles, California Property, And (II) 1061 Two Creeks Drive, Snowmass Village, Colorado Property*, filed concurrently herewith.

Sarbonne Property in April 2016 – approximately seventeen months before the date of the loan documents attached to the Longo Objection. *See id.*

11. The 778 Sarbonne Property, by contrast, is not owned by any Debtor. *See* Supp. Sharp Decl., ¶ 5. On or about June 28, 2017, Kirkstead, as buyer, and Robert H. Blumenfield, as seller, executed a Purchase Agreement for the sale of the 778 Sarbonne Property. *See id.*, ¶ 3. However, on January 16, 2018, the parties sent cancellation instructions to the escrow agent handling the sale, instructing the escrow company to cancel the escrow and the Purchase Agreement in its entirety. *See id.*, ¶ 4. The sale was never consummated, and neither Kirkstead nor any other Debtor owns the 778 Sarbonne Property. *See, e.g.*, Docket No. 1571 (Schedule A/B of Kirkstead, reflecting no ownership of real property).

12. Notably, the documents attached to the Longo Objection do not even refer to Kirkstead (which, at the time Ms. Longo made her investment, was under contract to purchase the 778 Sarbonne Property). Instead, the documents purport to grant Ms. Longo a security interest in a loan between Woodbridge Fund 4 and ***Powel House***, even though Powel House was not a party to the Purchase Agreement to acquire the 778 Sarbonne Property. This convoluted and deceitful transaction is part and parcel of Mr. Shapiro's Ponzi scheme.

13. Ms. Longo has no interest in the 810 Sarbonne Property proposed to be sold by the Debtors, and her objection must therefore be overruled.[5]

[5] Even if Ms. Longo had asserted a lien in the 810 Sarbonne Property (or a security interest in the loan documents between Woodbridge Fund 3 and SMI), the Longo Objection would nonetheless still fail because the 810 Sarbonne Property is a "Lender Property" (as defined in the Final DIP Order). Pursuant to Section 3.1.1 of the Final DIP Order, the Lender (as defined in the Final DIP Order) was granted a first priority priming lien on the Lender Properties. Pursuant to Section 5.3.2 of the Loan Agreement (as defined in the Final DIP Order), the net proceeds from the sale of any Lender Property must be used to prepay the DIP loan. Noteholders asserting liens in any of the Lender Properties were granted a robust adequate protection package, including conditional replacement liens on other real properties, *see* Final DIP Order § 3.1.2, and are barred from objecting to the sale of any Lender Property or the use of proceeds from the sale of any Lender Property to pay down the DIP loan, *see id.* § 3.1.2.4.

III. REPLY TO ONESKO OBJECTION

A. Mr. Onesko Fails to Meet His Burden of Proof

14. Bankruptcy Code section 363(p)(2) provides that "the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest." 11 U.S.C. § 363(p)(2). As such, "[b]efore reaching the question of whether the Noteholders' interests [are] adequately protected, the Bankruptcy Court ha[s] to identify the nature of those interests … and the Noteholders ha[ve] the burden of proof of establishing the nature of their interests." *In re Grant Broadcasting of Philadelphia, Inc*., 75 B.R. 819, 823 (E.D. Pa. 1987); *see also In re Exec. Assocs., Inc.*, 24 B.R. 171, 173 (Bankr. S.D. Tex. 1982) ("[The bank's] burden will be to establish a lien and initially demonstrate that the debtor is using cash collateral that is subject to such a lien. Only in that event would the bank be entitled to adequate protection."). If a creditor claiming that the right to adequate protection does not show that it has "a perfected security interest in the [property]," then "it is not entitled to adequate protection." *Callaway Cmty. Hos. Ass'n v. First N. Bank & Trust (In re Chama, Inc.)*, 265 B.R. 662, 669 (Bankr. D. Del. 2000); *see also Emplexx Software Corp. v. AGI Software, Inc. (In re AGI Software, Inc.)*, 199 B.R. 850, 861 (Bankr. D.N.J. 1995) ("It is beyond dispute that the moving party must present sufficient evidence that it holds a valid perfected security interest in the subject property to be entitled to relief under § 362(d) on the basis of a lack of adequate protection."); *In re Cabrillo*, 101 B.R. 443, 450–51 (Bankr. E.D. Pa. 1989) (concluding a creditor failed to establish an entitlement to adequate protection where "on the basis of the present record, [the court] cannot conclude that [the creditor] has proven that it holds a valid security interest in the [property]"); *In re Microwave Prods. of Am., Inc*., 94 B.R. 967, 970 (Bankr. W.D. Tenn. 1989) (concluding a creditor that "simply has an unperfected security

interest … is not entitled to adequate protection"); *In re Coors of Cumberland, Inc.*, 19 B.R. 313, 320 (Bankr. M.D. Tenn. 1982) ("If the [asserted interests in property] are unperfected, then [the creditor] has no interest in the property of the estate which is entitled to adequate protection since [the creditor's] interest would be limited to that of a general unsecured creditor of the estate.").[6]

15. In order to establish any right to adequate protection, Mr. Onesko must demonstrate ***both*** that his claim is secured by an interest in the Two Creeks Drive Property (or at least in the $2.45 million Note given by Clover Basin to Woodbridge Fund 3) ***and*** that his rights are senior to the estate's rights under Bankruptcy Code section 544(a). Under section 544(a), "a trustee obtains a ***status*** as well as an avoiding power as a hypothetical judicial lien creditor, unsatisfied execution creditor, or bona fide purchaser as of the commencement of a bankruptcy case. *In re Alexander*, No. 11-74515-SCS, 2014 WL 3511499, at *9 (Bankr. E.D. Va. July 16, 2014) (emphasis in original; citation and internal quotation marks omitted), *aff'd*, 524 B.R. 82 (E.D. Va. 2014); *In re Don Williams Constr. Co.*, 143 B.R. 865, 868-69 (Bankr. E.D. Tenn. 1992) (where unperfected creditor's rights are not superior to a trustee's rights under section 544(a), "the trustee is entitled to the lot or the proceeds from its sale ahead of [the creditor's] claim").[7]

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[6] *See also* Feb. 13, 2018 Tr., at 40:16-21 (THE COURT: "[A] party who claims to be secured carries the burden of proving that they're secured and the filing of a proof of claim is not sufficient, it seems to me, for this or adequate protection purposes for the Court to have a basis upon which to find that they're secured.").

[7] The case law is clear that non-perfection may be raised "defensively." *See, e.g., S. Bank & Tr. Co. v. Alexander (In re Alexander)*, 524 B.R. 82, 93 (E.D. Va. 2014) ("[T]he Trustee is entitled to raise her 'strong-arm powers' under § 544(a) as a defense to a superior claim to an asset of the estate, without regard to whether she has raised such powers in a lien avoidance adversary proceeding."); *In re Loewen Grp. Int'l, Inc.*, 292 B.R. 522, 528 (Bankr. D. Del. 2003) ("[T]he present action is essentially an attempt to recover on a claim asserted against the Mt. Nebo estate … [as] [t]he parties agreed by way of a … stipulated order that the dispute involved 'the entitlement to the net proceeds of the sale of the Mt. Nebo Property.' … Thus, Mt. Nebo is using § 544(a)(3) in opposition to a claim against the estate. In that context, Mt. Nebo is using § 544(a)(3) defensively and § 546(a) is not applicable."); *In re Ballard*, 100 B.R. 526, 527 (Bankr. D. Nev. 1989) (denying, notwithstanding there being no avoidance action, relief from stay where an error in the movant's UCC-1 did not make "its interest … valid as against a judicial lien creditor").

16. Here, the Onesko Objection falls short of meeting the requisite burden of proof. There is no showing that Mr. Onesko has either possession of Clover Basin's note or has filed a UCC-1 financing statement to perfect his security interest. (He did not.[8]) Mr. Onesko has simply not met his burden.

B. Mr. Onesko Does Not Have a Perfected Security Interest

17. The Onesko Objection does not explain how, if at all, Mr. Onesko holds a perfected lien or security interest in the Two Creeks Drive Property or the loan documents between Woodbridge Fund 3 and Clover Basin. Other Noteholders have suggested that their failure to perfect their security interests via possession of the applicable note or filing a UCC-1 financing statement as required by Article 9 of the Delaware Commercial Code is cured by section 10233.2 of the California Business and Professions Code ("Cal. B&P Code") and a Ninth Circuit case interpreting that section, *Neilson v. Chang (In re First T.D. & Investment, Inc.)*, 253 F.3d 520 (9th Cir. 2001). That argument lacks merit.

18. Even if the Onesko Objection had made the same suggestion here (it did not), the California statute simply would not apply here, where the borrower (Woodbridge Fund 3) is organized in ***Delaware*** and the real property that the Noteholders claim to have a lien in is located in ***Colorado***. As explained below, Cal. B&P Code § 10233.2 has no bearing on whether Mr. Onesko is perfected as the Delaware Commercial Code is the applicable law. Additionally, if the California statute were applicable, its requirements were plainly not met here.

19. Cal. B&P Code § 10233.2 provides that as a matter of ***California*** law, if the criteria set forth in the statute are satisfied, then a lender may be deemed to hold a perfected

[8] Attached as Exhibit E to the Supplemental Sharp Declaration are the results of an April 12, 2018 UCC-1 lien search of Woodbridge Fund 3, the borrower of Mr. Onesko and the lender to Clover Basin. It reveals that there are no active UCC-1 financing statements whatsoever that are on file against Woodbridge Fund 3.

security interest in promissory notes or collateral instruments and documents notwithstanding such lender's lack of possession of the collateral. The statute provides:

> For the purposes of Division 3 (commencing with Section 3101) and Division 9 (commencing with Section 9101) of the [California] Commercial Code, when a broker, acting within the meaning of subdivision (d) or (e) of Section 10131 or Section 10131.1, has arranged a loan or sold a promissory note or any interest therein, and thereafter undertakes to service the promissory note on behalf of the lender or purchaser in accordance with Section 10233, delivery, transfer, and perfection shall be deemed complete even if the broker retains possession of the note or collateral instruments and documents, provided that the deed of trust or an assignment of the deed of trust or collateral documents in favor of the lender or purchaser is recorded in the office of the county recorder in the county in which the security property is located, and the note is made payable to the lender or is endorsed or assigned to the purchaser.

Cal. B&P Code § 10233.2. *In re First T.D. & Investment* is the only published case that has cited Cal. B&P Code § 10233.2. On the facts present in that case, the elements of the statute were satisfied and the Ninth Circuit held that the lenders were perfected even in the absence of possession. 253 F.3d at 531.

20. Here, neither Cal. B&P Code § 10233.2 nor *In re First T.D. & Investment* has any application. By its express terms, Cal. B&P Code § 10233.2 modifies the perfection rules of only the ***California*** Commercial Code. *See* Cal. B&P Code § 10233.2 ("***For the purposes of*** Division 3 (commencing with Section 3101) and Division 9 (commencing with Section 9101) of ***the Commercial Code***….") (emphasis added). The California Commercial Code, however, is inapplicable for purposes of determining whether Mr. Onesko has a perfected security interest. Because Woodbridge Fund 3 is located in Delaware, the Delaware Commercial Code "governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral." DEL. CODE ANN. tit. 6, § 9-301(1); *see also* CAL. COMM. CODE, § 9301(1) (same). Because the Delaware Commercial Code is the applicable law and is unaltered by Cal. B&P

Code § 10233.2, the standard Uniform Commercial Code rules requiring perfection by possession or by the filing of a UCC-1 financing statement are fully applicable to the Objecting Noteholder. *See* DEL. CODE ANN. tit. 6, §§ 9-312(a) & 9-313(a). As noted, Mr. Onesko has not perfected by either of these means.

21. Even beyond the statute's dispositive inapplicability, Mr. Onesko fails to satisfy multiple elements of the statute. In *In re First T.D. & Investment*, the Ninth Circuit divided Cal. B&P Code § 10233.2 into a five-element test:

> (1) a "broker, acting within the meaning of" California Business and Professions Code §§ 10131 or 10131.1 possesses the security instrument; (2) the broker has "arranged a loan" or "sold a promissory note or any interest therein"; (3) the broker "undertakes to service the promissory note"; (4) the trust deed or collateral documents in favor of the lender are "recorded in the office of the county recorder in the county in which the security property is located"; and (5) "the note is made payable to the lender or is endorsed or assigned to the purchaser."

253 F.3d at 526 (quoting Cal. B&P Code § 10233.2).

22. Cal. B&P Code § 10233.2 plainly is intended to apply either where (1) a broker has arranged a loan for a third party where the third party is the lender and the broker's role is as the loan servicer, or (2) the broker has sold a loan to a loan purchaser and the broker's role is as the loan servicer. As neither of these fact patterns describes Mr. Onesko's investment – here, the Onesko Objection ostensibly asserts that Woodbridge Fund 3 made the loan to Clover Basin itself and, as noted, did not sell that loan to Mr. Onesko – it is unsurprising that many of the elements of Cal. B&P Code § 10233.2 are not met. Below are some more obvious examples.

23. ***First***, the statute applies only where "***a broker***, acting within the meaning of subdivision (d) or (e) of Section 10131 or Section 10131.1, … retains possession of the note or collateral instruments and documents." Cal. B&P Code § 10233.2 (emphasis added). Section

10012 of the Cal. B&P Code, which appears within the "Real Estate" division of the Cal. B&P Code, provides that "[b]roker, when used without modification, means a person ***licensed as a broker*** under any of the provisions of this part." Cal. B&P Code § 10012 (emphasis added).[9] Cal. B&P Code § 10233.2 applies to California licensed real estate brokers, not to "brokers" in any generic or colloquial sense. *See Neilson v. Dwyer (In re Cedar Funding, Inc.)*, 2011 Bankr. LEXIS 3487, at *28 (Bankr. N.D. Cal. Sept. 12, 2011) ("The court disagrees with the Chapter 11 Trustee's [Cal. B&P Code] analysis for the simple reason that no evidence has been offered demonstrating that CFI was a licensed broker. Section 10233.2 only applies to 'brokers,' which [Cal. B&P Code] §10012 defines as a 'licensed' broker."). There is no suggestion in the Onesko Objection that Woodbridge Fund 3 was a licensed real estate broker within the meaning of the statute, and, in fact, it was not.[10]

24. ***Second***, a mandatory element of Cal. B&P Code § 10233.2 is that the broker must "undertake[] to service the promissory note on behalf of the lender or purchaser in accordance with Section 10233." Section 10233, in turn, requires, *inter alia*, a "written authorization from the borrower, the lender, or the owner of the note or contract, that is ***included within the terms of a written servicing agreement*** that satisfies [certain requirements set forth in Cal. B&P Code § 10238]." Cal. B&P Code § 10233(a) (emphasis added). In *In re First T.D. & Investment*, this element was undisputed; the broker-debtor had entered into a "Servicing Agreement" with each investor that authorized the broker-debtor, acting as "servicing agent," to collect all loan payments from borrowers and to take other actions necessary or convenient to servicing of the

[9] Moreover, Cal. B&P Code § 10233.2 requires that the broker "undertakes to service the promissory note … in accordance with Section 10233." Section 10233, in turn, applies only to "[a] real estate ***licensee*** who undertakes to service a promissory note." Cal. B&P Code § 10233 (emphasis added).

[10] *See* Supp. Sharp Decl., ¶ 8 & Exh. E (showing that Woodbridge Fund 3 does not appear as a licensed broker on the website of the California Bureau of Real Estate).

note. 253 F.3d at 524. There is no such evidence of any written servicing agreements, and no such agreements exist. *See* Supp. Sharp Decl., ¶ 9.

25. ***Third***, Cal. B&P Code § 10233.2 requires that "the deed of trust or an assignment of the deed of trust or collateral documents in favor of the lender or purchaser is recorded in the office of the county recorder in the county in which the security property is located." Cal. B&P Code § 10233.2. Assuming *arguendo* that recordation of the collateral assignment of Clover Basin's note and deed of trust would even meet the requirement of Cal. B&P Code § 10233.2, as noted above, the Onesko Objection offers no evidence of any recordation.

* * *

26. For all of the foregoing reasons, Mr. Onesko does not hold a perfected lien in Clover Basin's note and deed of trust, and therefore holds no interest in the Two Creeks Drive Property that is being sold. Accordingly, he is not entitled to adequate protection, much less payment in full out of the sale proceeds, as requested in the Onesko Objection.

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IV. CONCLUSION

27. The Debtors respectfully request that the Court overrule the Objections and grant the relief requested in the Motions.

Dated: Wilmington, Delaware
April 27, 2018

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