Dated: November 05, 2009
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re 460 TENNESSEE STREET, LLC, Debtor.	Case No. 09-28169-L Chapter 11
Telesis Community Credit Union, Creditor, vs. 460 Tennessee Street, LLC, Debtor.	(Motion to Lift Stay)

MEMORANDUM OPINION GRANTING
TELESIS COMMUNITY CREDIT UNION'S MOTION TO LIFT STAY

BEFORE THE COURT is the motion of Telesis Community Credit Union ("Telesis") for relief from stay and, in the alternative, motion for determination of application of "single asset real estate" provisions of 11 U.S.C. § 362(d)(3). A hearing was held on the motion on September 9, 2009. The motion to lift stay was consolidated for hearing with Telesis's motion and amended motion to prohibit use of cash collateral and with the Debtor's motion for authorization to use cash

collateral.[1] After hearing arguments of counsel, carefully considering the motions, and reviewing the case file, the court has determined that Telesis's motion to lift the automatic stay should be granted. The court finds that the parties' motions regarding cash collateral are moot in that the rents are not property of the estate and, therefore, not "cash collateral" available to the Debtor. This is a core proceeding. 28 U.S.C.§157(b)(2)(A) and (G).

FACTS

The Debtor-in-Possession (the "Debtor") filed this chapter 11 case on July 29, 2009. Doc. No. 1.[2] It is undisputed that Telesis is the holder of a promissory note made by the Debtor in the original principal amount of $3,000,000.00. Doc. No. 52. It is also undisputed that Telesis holds a deed of trust on real property known as 460 Tennessee Street in Memphis, Tennessee (the "Real Property"), which secures this indebtedness. Doc. No. 52. The Debtor is the lessee on the Real Property, and the property is owned by the Memphis Center City Revenue Finance Corporation. (Testimony of Mr. Robert G. Williams, Jr., the Debtor's operating manager).[3] The parties stipulated at the hearing that the following trial exhibits are authentic and could be admitted into evidence:

1. The promissory note dated December 5, 2007, between Telesis and the Debtor (the "Promissory Note");

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[1] By order of September 10, 2009, the Court granted Telesis' motion to consolidate all of these motions to be heard on September 9, 2009.

[2] References to the court's docket are abbreviated "Doc. No." for "docket number."

[3] There were no documents introduced at the hearing to establish the Debtor's status as a tenant of the Real Property. Mr. Williams testified that he had owned the Real Property personally and that he had conveyed it to the Memphis Center City Revenue Finance Corporation which, in turn, leased the Real Property to the Debtor. The Debtor's Schedule A shows that it owns no real property, but the Court notes that in the response to the motion to lift stay, the Debtor states that it "holds title" to the Real Property. Doc. Nos. 1 and 26. The exact nature of the Debtor's interest in the Real Property is not relevant to the Court's decision.

2. The "Deed of Trust, Assignment of Rents, and Security Agreement (Including Fixture Filing)" dated December 5, 2007, between Telesis and the Debtor (the "Deed of Trust"); and
3. The "Assignment of Leases and Rents" dated December 5, 2007, between Telesis and the Debtor (the "Assignment of Rents").

Doc. No. 52.

The Debtor does not deny that it is in default, but it denies the amount of the payoff as alleged by Telesis. Telesis claims that the outstanding principal balance is approximately $2,970,040.19 with an approximate payoff balance of $3,155,055.71. Doc. No. 14. Telesis believes that the value of the real property is $3,225,000.00, but the Debtor contends that the property has a fair market value in the range of $3,700,000.00 to $4,000,000.00. Doc Nos. 14 and 26. The Debtor's sole business is the operation and collection of rents from tenants at the Real Property. Doc. No. 26. Debtor's Schedule G lists nine tenants. Doc. No. 1.

The dispositive question before the court is whether the Debtor conveyed an absolute assignment of rents to Telesis or granted a security interest in the Debtor's rental revenues.

DISCUSSION

As a preliminary matter, the court will address the Debtor's argument that Telesis is not licensed to do business in Tennessee and is, therefore, without standing to bring this action. The Debtor cites Tennessee Code Annotated § 48-25-102(a) which provides that "[a] foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority." The court concludes that this statute has no application to Telesis's actions to protect its interests in the bankruptcy court. See *Leeds Homes, Inc. v. National Acceptance Co.*, 332 F.2d 648, 650 (6th Cir. 1964) (holding that "under Tennessee case law contracts and transactions of non-qualifying foreign corporations are not

void, but are merely unenforceable in the state courts in actions initiated by the offending corporation," and the fact that a state court may refuse to enforce the foreign corporation's claim "has no bearing in the bankruptcy proceeding.").

Moreover, even if the statute was applicable, Telesis correctly points out that its actions are expressly excluded from the definition of "transacting business." The statute excludes:

> (1) Maintaining, defending, or settling any proceeding, claim, or dispute;
> * * *
> (7) Creating or acquiring indebtedness, deeds of trusts, mortgages, and security interests in real or personal property;
> (8) Securing or collecting debts or enforcing mortgages, deeds of trust, and security interests in property securing the debts;
> (9) Owning, without more, real or personal property; provided, that for a reasonable time the management and rental of real property acquired in connection with enforcing a mortgage or deed of trust shall also not be considered transacting business if the owner is attempting to liquidate the owner's investment and if no office or other agency therefor, other than an independent agency, is maintained in this state.

Tenn.Code. Ann. § 48-25-101 (2002).

As to the substantive question of whether the Debtor made an absolute assignment of rents as opposed to the conveyance of a security interest, the determination "requires a thorough analysis of the language and provisions of the assignment." *In re 5877 Poplar, L.P.*, 268 B.R. 140, 146 (Bankr. W.D. Tenn. 2001), citing *In re Kingsport Ventures, L.P.*, 251 B.R. 841, 847 (Bankr. E.D. Tenn. 2000).

Both the Deed of Trust and the Assignment of Rents provide that they are governed by the laws of the jurisdiction in which the land is located, *i.e.*, Tennessee. Courts in Tennessee distinguish grants of security interests and absolute assignments as two entirely distinct methods for securing credit. *5877 Poplar, L.P.*, 268 B.R. at 146, citing *Kingsport Ventures*, 251 B.R. at 846 and *American Trust & Banking Co. v. Twinam*, 187 Tenn. 570, 216 S.W.2d 314, 319 (1948) (other

citations omitted). Under Tennessee law, an assignment of rents is presumed to be a pledge of rents as security, but this presumption can be rebutted. *In re Kingsport Ventures*, at 846-47 (other citations omitted).

In the present case, the parties entered into a separate Assignment of Rents in addition to the Deed of Trust. Trial Exhibit No. 3. Paragraphs (3)(a) of both the Assignment of Rents and the Deed of Trust contain, in pertinent part, the following language:

> **ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION.**
> As part of the consideration for the Indebtedness, Borrower **absolutely and unconditionally assigns and transfers to Lender all Rents**. **It is the intention of Borrower to establish a present, absolute and irrevocable transfer and assignment to Lender of all Rents** and to authorize and empower Lender to collect and receive all Rents without the necessity of further action on the part of Borrower. Promptly upon request by Lender, Borrower agrees to execute and deliver such further assignments as Lender may from time to time require. Borrower and Lender intend this assignment of Rents to be immediately effective and to constitute an absolute present assignment and not an assignment for additional security only. For purposes of giving effect to this absolute assignment of Rents, and for no other purpose, Rents shall not be deemed to be a part of the "Mortgaged Property" as that term is defined in the Security Instrument.[4]

(Emphasis added).

The Debtor argues that because this same language appears in both the assignment and the deed of trust, an ambiguity is created as to whether the parties intended to accomplish an absolute assignment of rents. The court respectfully disagrees. The pertinent language is clear, and it appears that the drafter was quite intentional with the wording, using the terms "absolute," "irrevocable" and "unconditionally" to describe the "assignment to Lender of all rents." It is a well

[4] The term "Security Instrument" is defined at paragraph (1)(q) of the assignment as "that certain mortgage, deed of trust, or deed to secure debt of even date herewith, executed by Borrower in favor of Lender as security for the Indebtedness and constituting a first lien on the Mortgaged Property."

established principle of contract interpretation that courts must interpret contracts as written, even where their terms appear "harsh or unjust", unless there is proof of fraud or mistake. *In re 5877 Poplar*, 268 B.R. at 147, citing *Gray v. Estate of Gray*, 993 S.W.2d 59, 64 (Tenn. Ct. App. 1998), *permission to appeal denied* (Tenn. 1999). Ambiguity results " when the terms in the contract or contracts may fairly be understood more ways than one." *5877 Poplar*, 268 B.R. at 147, citing *Empress Health and Beauty Spa, Inc. v . Turner*, 503 S.W.2d 188, 190-91 (Tenn. 1973).

As the court noted at the hearing, the following provision appears to explain why the assignment language is included in both the Assignment of Rents and the Deed of Trust.

> However, if this present, absolute and unconditional assignment of Rents is not enforceable by its terms under the laws of the Property Jurisdiction, then the Rents shall be included as a part of the Mortgaged Property and it is the intention of the Borrower that in this circumstance this Assignment and the comparable Security Instrument provisions create and perfect a lien on Rents in favor of Lender, which lien shall be effective as of the date of this Assignment. Lender may, at its option and discretion, elect to enforce this Assignment, or the comparable Security Instrument provisions, or both, and such election shall not diminish or affect Lender's available remedies under any other Loan Document provisions.

Paragraph (3)(a) of the Assignment.

The court considers it significant that the Deed of Trust incorporates virtually identical language to that cited immediately above except that where the Assignment of Rents references provisions of the "Security Instrument," the Deed of Trust references its own terms. The pertinent language in paragraph (3)(a) of the Deed of Trust provides that,

> [I]f this present, absolute and unconditional assignment of Rents is not enforceable by its terms under the laws of the Property Jurisdiction, then the Rents shall be included as a part of the Mortgaged Property and it is the intention of the Borrower that in this circumstance ***this Instrument*** create and perfect a lien on Rents in favor of Lender, which lien shall be effective as of the date of ***this Instrument***.

(Emphasis added). In other words, the differing language reconciles the two agreements. Instead of utilizing identical language, the language is slightly modified to fit each particular agreement.[5] These provisions regarding the possibility that a jurisdiction would not recognize an absolute assignment would also explain why the term "all Rents and Leases" is specifically included in the definition of "Mortgaged Property" at paragraph (1)(y) of the Deed of Trust.

The court also finds it significant that both the Assignment of Rents and the Deed of Trust contain "integration" or "merger" clauses. Paragraph (12) of the Assignment of Rents provides that,

> **SEVERABILITY; AMENDMENTS.** The invalidity or unenforceability of any provision of this Assignment shall not affect the validity or enforceability of any other provision, and all other provisions shall remain in full force and effect. This Assignment and the comparable provisions of the Security Instrument contain the entire agreement among the parties as to the rights granted and the obligations assumed in this Assignment and in the comparable provisions of the Security Instrument. This Assignment may not be amended or modified except by a writing signed by the party against whom enforcement is sought.

Similarly, paragraph (37) of the Deed of Trust provides,

> **SEVERABILITY; ENTIRE AGREEMENT; AMENDMENTS.** The parties intend that the provisions of this Instrument and all other Loan Documents shall be legally severable. If any term or provision of this Instrument, or any other Loan Document, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Instrument or of such other Loan Document shall not be affected thereby, and each term and provision shall be valid and be enforceable to the fullest extent permitted by law. This instrument contains the entire agreement among the parties as to the rights granted and the obligations assumed in this Instrument. This Instrument may not be amended or modified except by a writing signed by the party against whom enforcement is sought.

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[5] Likewise, in the first part of paragraph (3)(a) cited above under the heading "ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION", the language in the Deed of Trust reads, "[r]ents shall not be deemed to be a part of the Mortgaged Property" as that term is defined in Section 1." This is slightly different from the wording used in paragraph (3)(a) of the Assignment.

As the Tennessee Court of Appeals has noted, "the cardinal rule for interpretation of contracts is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles." *Kingsport Ventures*, 251 B.R. at 847, citing *Gray*, 993 S.W.2d at 64, and *Union Planters Nat'l Bank v. American Home Assurance Co.*, 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993), *permission to appeal denied* (1993). In doing so, the court "does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written." *Kingsport Ventures*, 251 B.R. at 847, citing *Union Planters Nat'l Bank*, 865 S.W.2d at 912. The words used in the contract are "given their usual, natural and ordinary meaning." *Kingsport Ventures*, 251 B.R. at 847, citing *Union Planters Nat'l Bank*, 865 S.W.2d at 912, and *Gray*, 993 S.W.2d at 64.

At the hearing, the Debtor's counsel wished to introduce the testimony of Mr. Robert G. Williams, Jr., the Debtor's operating manager, regarding the course of dealing between the Debtor and Telesis. The court allowed the Debtor's counsel to make an offer of proof of Mr. Williams' testimony to be considered by the court in the event that any ambiguities were found in the documents. As discussed above, the court does not find any ambiguities. In its supplemental post-trial brief, the Debtor argues that Tennessee Code Annotated §§ 47-2-202 and 47-2-208[6] allow "usage of trade, the course of performance or course of dealing to be considered to explain or supplement a contract even if unambiguous."

Section 47-2-202 provides as follows:

> **Final written expression – Parol or extrinsic evidence**.
> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression

[6] T.C.A. § 47-2-208 was repealed as of July 1, 2008, per Acts 2008, chpt. 930, § 3.

> of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (a) By course of performance, course of dealing or usage of trade, pursuant to § 47-1-303; and
>
> (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

(Emphasis in original). Tennessee Code Annotated §47-2-202 is part of the chapter known and cited as the Uniform Commercial Code, and Tennessee Code Annotated §47-2-102 addresses the "scope" of the chapter as applying to "transactions in goods" unless the context of the statute requires otherwise. Section 47-2-105(1) defines "goods" as,

> [A]ll things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 8 of this title) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 47-2-107).[7]

This statute does not apply to the assignment of rents in this case. Even if it did, the court finds no need to have the documents "explained" or "supplemented" by any course of performance or prior course of dealing. The proffered testimony of Mr. Williams was properly excluded.

In addition to the unambiguous language of the separate Assignment of Rents, further evidence of an absolute assignment is the fact that the Debtor is only granted a "revocable license to collect and receive all rents."

> After the occurrence of an Event of Default, Borrower authorizes Lender to collect, sue for and compromise Rents and directs each tenant of the Mortgaged Property to

[7] Tennessee Code Annotated § 47-2-107 addresses the sale of "minerals or the like including oil and gas or a structure or its materials to be removed from realty"; "growing crops or other things attached to realty and capable of severance without material harm" to the land; and "timber to be cut."

> pay all Rents to, or as directed by, Lender. However, until the occurrence of an Event of Default, Lender hereby grants to Borrower a revocable license to collect and receive all Rents, to hold all Rents in trust for the benefit of Lender and to apply all Rents to pay the installments of interest and principal then due and payable under the Note and the other amounts then due and payable under the other Loan Documents, including Imposition Deposits, and to pay the current costs and expenses of managing, operating and maintaining the Mortgaged Property, including utilities, Taxes and insurance premiums . . ., tenant improvements and other capital expenditures.

Paragraph (3)(b) of the Assignment of Rents and the Deed of Trust.

In the case of *In re Kingsport Ventures*, 251 B.R. at 847-848, the court concluded that an absolute assignment existed due to four items present in the assignment; the analysis is persuasive, and the court finds that all four items are present here. *Kingsport Ventures*, 251 B.R. at 847-848. First, as discussed above, the court finds that the language of the assignment is clear and unambiguous in its stated intent to create an absolute assignment. Second, the Assignment of Rents provides that the Debtor retains nothing more than a revocable license as expressly described in the parties' documents.[8]

Third, the assignment does not require the assignee to take any action in order to collect the rents after an event of default. Paragraph (3)(b) of the Assignment and the Deed of Trust provides as follows:

> From and after the occurrence of an Event of Default, and without the necessity of Lender entering upon and taking and maintaining control of the Mortgaged Property directly, or by a receiver, Borrower's license to collect Rents shall automatically

[8] Following this quoted passage in paragraph 3(b), the assignment provides that "[s]o long as no Event of Default has occurred and is continuing, the Rents remaining after application pursuant to the preceding sentence may be retained by Borrower free and clear of, and released from, Lender's rights with respect to Rents under this Assignment. The same language appears in paragraph (3)(b) of the Deed of Trust with the exception of the word "Instrument" being used at the end of the sentence instead of the word "Assignment."

> terminate and Lender shall without notice be entitled to all Rents as they become due and payable, including Rents then due and unpaid.

Fourth, the assignment gives the assignee discretion regarding the application of rents collected by it after default. The Debtor has argued that, on this particular point, the language of the present Assignment of Rents differs significantly from the pertinent language in the *Kingsport Ventures* case. The assignment in *Kingsport Ventures* provided that any rents collected after the revocation of the license "may be applied toward payment of the [d]ebt in such priority and proportion as Assignee, in its discretion, shall deem proper." *Id.* at 844.

The present Assignment of Rents provides in paragraph (3)(d) that,

> If an Event of Default has occurred and is continuing, Lender may, regardless of the adequacy of Lender's security or the solvency of Borrower and even in the absence of waste, enter upon and take and maintain full control of the Mortgaged Property in order to perform all acts that Lender in its discretion determines to be necessary or desirable for the operation and maintenance of the Mortgaged Property, including the execution, cancellation or modification of Leases, the collection of all Rents, the making of repairs to the Mortgaged Property and the execution or termination of contracts providing for the management, operation or maintenance of the Mortgaged Property, for the purposes of enforcing the assignment of Rents pursuant to Section 3(a), protecting the Mortgaged Property or the security of this Assignment,[9] or for such other purposes as Lender in its discretion may deem necessary or desirable.

The Debtor argues that this provision establishes specifically what the lender may do in the event of default as opposed to giving the lender the level of discretion provided in *Kingsport Ventures.* The court notes, however, that the majority of this provision does not address the collection of rental proceeds but the maintenance and operation of the physical property, *i.e.*, the "Mortgaged Property." By definition, rents are not included in the "mortgaged property." Moreover, even if Telesis's discretion is more limited here than was the lender's in the *Kingsport*

[9] This same language appears in paragraph (3)(d) of the Deed of Trust except that the term "Instrument" is used rather than "Assignment."

Ventures case, this was only one factor suggested as pertinent in the overall analysis of assignment versus security interest.

The court in *5877 Poplar* found it significant that the deed of trust contained language under a heading "Release" providing that "upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument." *5877 Poplar*, 268 B.R. 150. In the present case, paragraph (45) of the Deed of Trust also contains a bold heading "RELEASE" and provides similarly that "[u]pon payment of the Indebtedness, Lender shall release this Instrument. Borrower shall pay Lender's reasonable costs incurred in releasing this Instrument."

The court agrees with Telesis's counsel that this language is customarily found in deeds of trust. This language must also be read to apply to the "Mortgaged Property" and not only to the assignment of rents. Given the other strong language in the documents referring to the absolute nature of the assignment of rents, the court does not find the "release" language to require a change in its decision.

CONCLUSION

Considering a totality of the particular facts and circumstances, the court finds that Telesis has rebutted the legal presumption that the parties intended to create a security interest in rents. The court finds that the effect of the Assignment and the Deed of Trust is an absolute assignment of rents. The Debtor acknowledges that it has no source of income other than the rental revenues from the Real Estate. (Doc. No. 26). The Debtor has not indicated how it could effectively reorganize under Chapter 11 without the benefit of the rental revenues. In its "Supplemental Post-Trial Brief," the Debtor argues that even if the court finds that the parties have created an absolute assignment of rents, the stay should not necessarily be lifted. The Debtor suggests a scenario whereby Telesis

would "retain the assignment of rents" to the extent necessary to service the monthly mortgage installment and allow the Debtor to retain the balance of the rent payments to "pay ongoing operating expenses such as utilities, repairs, maintenance, taxes, insurance and other miscellaneous expenses." Doc. No. 55. The problem with the Debtor's proposal is that the rental revenues are not property of the estate and, therefore, not "cash collateral" as defined in 11 U.S.C.§363(a).[10] The court cannot order Telesis to permit the Debtor to utilize the rental revenues.

Accordingly, Telesis's motion to lift stay is hereby **GRANTED** for cause, pursuant to 11 U.S.C. §362(d)(1), to allow Telesis to proceed with foreclosure of the Debtor's interest in the Real Estate and to allow Telesis to collect the rental payments generated from the real property and to otherwise enforce the provisions of the Promissory Note, the Assignment, and the Deed of Trust.

As to Telesis's request for attorney fees, no proof was presented at the hearing on the amount of attorney fees requested nor whether there is sufficient equity in the property to assess the fees pursuant to 11 U.S.C. §506(b). In its motion, Telesis requests attorney fees "if the court determines that there is equity in the real property." Doc. No. 14. The court will not award attorney fees to Telesis at this time, but this opinion shall be without prejudice to Telesis renewing that request in the future.

Telesis's request for waiver of the ten-day stay period contained in Federal Bankruptcy Rule 4001(a)(3) is hereby **GRANTED,** for cause. The Debtor has no interest in the rents and no funds with which to protect Telesis's interest in the real property. Telesis could suffer additional injury if it is not permitted to take steps to protect its interests.

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[10] Section 363(a) defines "cash collateral" as certain types of property in which "the estate and an entity other than the estate have an interest."

Given the court's finding that the Debtor conveyed an absolute assignment of rents to Telesis, the parties' motions regarding cash collateral are moot. The court will enter separate orders to that effect on the Debtor's motion to use cash collateral and on Telesis' motion and amended motion to prohibit the use of cash collateral.

cc: Debtor
Attorney for Debtor
Creditor Telesis Community Creditor Union
Attorney for Telesis Community Credit Union
United States Trustee
Matrix