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SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of GREEN COURTE REAL ESTATE PARTNERS III, LLC For Review of Action Taken by New York Stock Exchange	Admin. Proc. File No. 3-16362

RESPONSE OF NYSE REGULATION, INC. TO THE COMMISSION'S ORDER REGARDING PRELIMINARY MATTERS

On behalf of the New York Stock Exchange LLC (the "Exchange"), NYSE Regulation, Inc. ("NYSE Regulation") respectfully submits this memorandum in response to the Order Directing the Filing of Briefs, dated March 3, 2015 (the "Order") issued by the United States Securities and Exchange Commission (the "Commission") in the above captioned application for review (the "Application") filed by Green Courte Real Estate Partners III, LLC ("Green Courte"). The Application relates to a determination made by NYSE Regulation that Exchange rules required Sun Communities, Inc. ("Sun") to obtain the approval of its shareholders prior to the issuance of securities to Green Courte in a proposed transaction.

For the reasons stated herein, NYSE Regulation submits that the Application is fundamentally flawed and should be summarily dismissed. Section 19(d) ("Section 19(d)") of the Securities Exchange Act of 1934 (the "Act")[1] provides a mechanism for "persons aggrieved" by a self-regulatory organization ("SRO") action to seek Commission review. The Exchange has not denied Sun access to its services and Green Courte does not have standing as a person aggrieved under Section 19(d). Instead, Green Courte is attempting to exploit this statutory scheme of review in order to force Sun's performance under a third-party agreement. Accordingly, NYSE Regulation respectfully requests that the Commission deny Green Court's Application and dismiss this matter.

BACKGROUND

Sun is a real estate investment trust with its common stock listed on the Exchange. In July 2014, Sun entered into agreements (the "Acquisition Agreements") to acquire certain properties from affiliates of Green Courte. As partial consideration for the properties to be acquired, Sun

[1] 15 U.S.C. § 78s(d).

agreed to issue shares of its common stock and other securities convertible into shares of its common stock (the "Acquisition Securities") to Green Courte. Further, under the terms of a Subscription Agreement, dated July 30, 2014 (the "Subscription Agreement") tied to the acquisitions, Sun agreed to issue additional shares of its common stock and other securities convertible into shares of its common stock to Green Courte in exchange for cash.

Under the terms of the Subscription Agreement, a portion of the securities to be issued by Sun were mandatorily issuable (the "Mandatory Subscription Securities") and a portion were issuable in the event either party exercised a two-way option (the "Optional Subscription Securities"). However, Sun was only obligated to issue up to the number of Optional Subscription Securities that could be issued without triggering a requirement for it to obtain shareholder approval under Exchange rules.

Section 312.03(c) of the Exchange's Listed Company Manual (the "Manual") states that listed companies must obtain shareholder approval "prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock." It has been the Exchange's longstanding policy that for purposes of determining whether a transaction will require shareholder approval under this rule, the appropriate date on which to measure the shares outstanding is the date that the listed company enters into a definitive agreement to issue shares. The Exchange has adopted this policy because it believes that it is appropriate to look to the date on which a listed company irrevocably commits itself to issue shares to determine whether such issuance will result in dilution to existing shareholders.

Sun and Green Courte entered into the Acquisition Agreements and the Subscription Agreement on July 30, 2014. In the aggregate, the Acquisition Securities and the Mandatory Subscription Securities represented 19.9% (on an as converted basis) of Sun's shares of common stock outstanding on such date. Including the issuance of the Optional Subscription Securities, however, increased the aggregate potential share issuance under the Acquisition Agreements and Subscription Agreement to 21.6% (on an as converted basis) of Sun's shares of common stock outstanding on such date.

Applying Section 312.03(c) of the Manual to the proposed transactions, NYSE Regulation informed Sun that it could issue the Acquisition Securities and the Mandatory Subscription Securities to Green Courte without seeking a vote of its shareholders as the aggregate issuance of those securities represented only 19.9% of Sun's securities outstanding on July 30, 2014. If Green Courte exercised its option to require Sun to issue the Optional Subscription Securities, however, NYSE Regulation informed Sun that it would need to obtain shareholder approval for the incremental issuance as the aggregate number of shares to be issued under the Acquisition Agreements and Subscription Agreement would then be greater than 20% of Sun's shares outstanding on July 30, 2014.

Under the terms of the Subscription Agreement, Sun is only obligated to issue the Optional Subscription Securities to Green Courte if such issuance will not require Sun to seek a vote of its shareholders under Exchange rules. As detailed above, NYSE Regulation has informed Sun that such issuance would require shareholder approval. Accordingly, Sun has declined to issue the Optional Subscription Securities to Green Courte.

Green Courte's Application asks the Commission to review and overturn NYSE Regulation's application of Section 312.03(c) of the Manual to the proposed transactions in order to force Sun to issue the Optional Subscription Securities. Green Courte claims that the relevant determination date for purposes of determining whether shareholder approval is required should be the date of issuance rather than the date of the definitive agreement. However, it is not necessary for the Commission to consider this issue. Rather, for the reasons set forth below, NYSE Regulation respectfully submits that the Application should be dismissed because (i) Sun has not had its "access to services offered by" the Exchange "prohibited or limited" and (ii) Green Courte is not a "person aggrieved" within the meaning of Section 19(d).

ARGUMENT

I. SUN HAS NOT HAD ITS ACCESS TO SERVICES OFFERED BY THE EXCHANGE PROHIBITED OR LIMITED

Green Courte's Application should be dismissed because NYSE Regulation has not taken any action that prohibits or limits Sun's access to services offered by the Exchange. Green Courte claims that NYSE Regulation's enforcement of its rule mandating shareholder approval as a prerequisite to Sun's issuance of the Optional Subscription Securities has resulted in Sun's access to Exchange services being prohibited or limited. As will be discussed, applying a long-held and consistent interpretation of Exchange rules that require shareholder approval prior to the issuance of the Optional Subscription Securities in no way amounts to a denial of access to Exchange services.

The Commission has previously held that action taken by a self-regulatory organization ("SRO") "is not reviewable merely because it adversely affects the applicant." Instead, in order to overturn an SRO's action under Section 19(d), the Commission must find that an SRO has

"denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO."[2]

Based on precedent, the Commission has typically looked for a denial of services that directly and significantly impacts the applicant's core business. For example, in *The Matter of the Application of Morgan Stanley & Co., Inc.*, the Commission found that an SRO's termination of a member firm's status as a market-maker and decision not to process a member firm's application for registration to be a denial of SRO services.[3] Similarly, the Commission found that denying a member's request to install a telephone link between a trading floor and its non-member customers limited such member's access to a principal SRO service, namely access to the trading floor.[4]

Here, by contrast, NYSE Regulation's action has not resulted in any denial of access to Exchange services. As an initial matter, no Exchange services have been denied to Sun. The Exchange provides Sun with a regulated venue for the listing and trading of its securities. This service has not been limited or denied. Sun remains listed on the Exchange with full access to the Exchange's listing and trading services. When a company applies to list on the Exchange, it contractually agrees to abide by the Exchange's listing rules as set forth in the Manual. Once listed, if a company decides not to undertake a specific corporate action because such action would run afoul of Exchange rules, it cannot then claim that it has had its access to Exchange services prohibited or limited. Green Courte's case is analogous to *Morgan Stanley* where the Commission found that the NASD Regulation, Inc.'s denial of Morgan Stanley's request to be

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[2] See *In the matter of the Application of Morgan Stanley & Co., Inc.*, Release No. 34-39459, December 17, 1997.
[3] See *In the matter of the Application of Allen Douglas Securities, Inc. for Review of Action taken by NASD*, Release No. 34-50513, October 12, 2004.
[4] *Id.*

exempted from a two year prohibition on engaging in the municipal securities business in Massachusetts did "not constitute a denial of access to services offered by the NASD because it ha[d] no impact on Morgan's access to services offered by the NASD."[5]

Even if permitting Sun to issue the Optional Subscription Securities somehow could be considered a service of the Exchange, the Exchange has not prevented Sun from issuing these securities. Sun is perfectly free to issue the Optional Subscription Securities upon obtaining shareholder approval. Notably, Sun has neither objected to NYSE Regulation's determination that shareholder approval is a prerequisite to issuance of the Optional Subscription Securities nor asserted in any forum that its access to Exchange services has been prohibited or limited. Accordingly, there is simply no basis to find that NYSE Regulation prohibited or limited Sun's access to Exchange services and Green Courte's Application should therefore be dismissed for this reason alone.

II. GREEN COURTE DOES NOT HAVE STANDING AS A PERSON AGGRIVED TO SEEK COMMISSION REVIEW OF NYSE REGULATION'S DECISION

Green Courte's Application should also be denied because Green Courte lacks standing to seek review of the Exchange's action. Green Courte is not a "person aggrieved" who can seek Commission review of NYSE Regulation's decision under Section 19(d).

Where the Commission has granted relief under Section 19(d) "an SRO ha[s] denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO." This statement implies that a direct relationship exists between the applicant seeking Commission review and the SRO that has taken action against it. No direct relationship exists between the applicant in this matter, Green Courte, and the Exchange. In fact, Green Courte has

[5] See *Morgan Stanley* at p. 6.

no relationship with the Exchange at all, and it has neither sought nor been denied access to Exchange services.

In situations where an applicant seeking Commission review under Section 19(d) is unable to show a direct relationship between itself and the subject SRO—as is the case here—the Commission has nonetheless granted such applicant associational standing as a "person aggrieved" under very limited circumstances. Thus, in *The Matter of the of the Application of Securities Industry and Financial Markets Association for Review of Action taken by Self-Regulatory Organizations*, the Commission held that SIFMA had standing to seek review of an SRO action because it "represents identified members who are themselves persons aggrieved within the meaning of Section 19(d)(2)."[6] This exception is clearly inapplicable here. First, Green Courte is not an association of which Sun is a member. Second, Green Courte does not represent Sun in this matter. To do so, Green Courte and Sun's interests would have to be aligned. In actuality, however, their interests are completely counter to one another. Green Courte's interest is having Sun sell to it the Optional Subscription Securities.[7] Sun, on the other hand, apparently is relying on the Exchange's interpretation of its rules and has, accordingly, determined that issuance of the Optional Subscription Securities is not required under the terms of the Subscription Agreement.

Green Courte and Sun expressly conditioned issuance of the Optional Subscription Securities upon application of the Exchange's rules exempting the issuance from a shareholder vote. Green Courte is now upset that Sun is relying on this contractual provision in its

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[6] See *In the matter of the Application of Securities Industry and Financial Markets Association for Review of Action taken by Self-Regulatory Organizations*, Release No. 34-72182, May 16, 2014 ("[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

[7] Green Courte effectively acknowledges this point in its Application. See Application at pg. 2 ("The effect of [NYSE Regulation's] action, if it is not overturned, will be drastically to limit the number of securities that SUI can issue to Green Courte.").

determination not to issue additional securities. Notably, neither party ever consulted with the Exchange to confirm it correctly understood how Section 312.03(c) of the Manual is applied to multi-stage share issuances until several months after the Subscription Agreement was already signed. Green Courte cannot claim to be "aggrieved" by NYSE Regulation's determination simply because it had a flawed understanding of Exchange rules and did not conduct even the minimum level of due diligence to correct it. At best, this matter is a contractual dispute between Green Courte and Sun. The Exchange should not be held accountable to every contractual counterparty involved in a dispute with a listed company. To grant Green Courte standing in this matter would open the floodgates to limitless applications from disgruntled third parties who exploit the Commission's Section 19(d) scheme of review when they are unable to enforce their contract as written. The Commission should not countenance Green Courte's attempt to misuse Section 19(d) to convert what is clearly an ordinary contractual dispute into a regulatory matter. Green Courte's Application should be dismissed for lack of standing.

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CONCLUSION

In its Application, Green Courte has failed to meet the minimum standards necessary to obtain Commission review of NYSE Regulation's determination under Section 19(d). Green Courte has not made any credible argument that NYSE Regulation denied Sun access to the Exchange's core services and does not have standing as a "person aggrieved" to seek Commission review. Consequently, NYSE Regulation believes Green Courte's Application should be dismissed as a matter of law.

Dated: March 19, 2015

NYSE REGULATION, INC.

By: _____
Patrick J. Troy
Chief Counsel, Issuer Regulation

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015, I caused a copy of the foregoing Response of NYSE Regulation, Inc., on behalf of New York Stock Exchange LLC, to the Commission's Order Directing the Filing of Briefs to be served upon the parties listed below via an overnight delivery. A courtesy copy was served upon Green Courte by electronic mail to its counsel.

Ms. Lynn M. Powalski
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Office of the Secretary
U.S. Securities and Exchange Commission
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Patrick J. Troy

Dated: March 19, 2015

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Re: In the Matter of the Application of Green Courte Real Estate Partners III, LLC
Admin. Proc. File No. 3-16362

Dear Ms. Powalski:

In connection with the above captioned matter, please find enclosed a copy of NYSE Regulation, Inc.'s response brief to the Commission's March 3, 2015 Order Directing the Filing of Briefs.

Sincerely,

Enclosure