UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-16362

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In the Matter of the Application of

GREEN COURTE REAL ESTATE PARTNERS III, LLC

For Review of Action Taken by the New York Stock Exchange

GREEN COURTE'S OPENING BRIEF

Pursuant to the Order entered by the Securities and Exchange Commission (the "SEC" or the "Commission") on March 3, 2015, Green Courte Real Estate Partners III, LLC ("Green Courte") respectfully submits this opening brief.

In its Order, the SEC asked the parties to address (1) whether the challenged action by the New York Stock Exchange (the "NYSE") "prohibits or limits" "access to services offered by" the NYSE to Sun Communities, Inc. ("SUI") under Section 19(d) of the Securities Exchange Act (the "Exchange Act"), and (2) whether Green Courte is a "person aggrieved" entitled to review of such an action under Section 19(d) of the Exchange Act. For the reasons set forth below, the answer to each of these questions is YES.

I. Background[1]

On July 30, 2014, Green Courte entered into a Subscription Agreement (the "Agreement") with SUI and a subsidiary of SUI. (Record at 57-67.) The common stock of SUI is listed on the NYSE. When the Agreement was signed, it was contemplated by the parties that,

[1] Unless otherwise indicated, the statements of fact in this brief are taken from the letter that SUI and Green Courte submitted to the NYSE on December 30, 2014. (Record at 68-73.)

prior to the end of 2014, SUI would complete a bona fide public offering that would substantially increase the number of shares of SUI common stock outstanding. That public offering was in fact completed in September 2014.

Pursuant to the Agreement, on January 23, 2015, SUI was required to sell to Green Courte a block of common stock and securities convertible into common stock.[2] The block was to consist, on an as-converted basis, of the lesser of (a) 716,667 common shares or (b) the maximum number of shares that SUI could issue to Green Courte without a vote by the stockholders of SUI being required by Section 312.03 of the NYSE's Listed Company Manual.[3] That rule generally requires a stockholder vote if a listed company issues new shares of a listed class of securities equal (either in voting power or number) to 20 percent or more of the shares already outstanding. In the event that the full block of securities could be sold, the purchase price was to be $37.5 million.

In the weeks leading up to the January 23, 2015 closing, SUI sought confirmation from the NYSE that, in performing the 20-percent calculation, the denominator should be the number of shares outstanding, including shares issued in connection with the public offering. (Record at 68-84.) This would allow SUI to issue the full block of securities contemplated by the Agreement, to list all of the common shares on the NYSE, and to sell the full block of securities contemplated by the Agreement to Green Courte.

On January 12, 2015, however, the NYSE advised SUI that, for "purposes of the NYSE shareholder approval rules contained in Section 312.03 of the Listed Company Manual, the

[2] To be specific, the Agreement provided Green Courte with a "call" and SUI with a "put." Given that the securities of SUI have appreciate considerably in value, Green Courte exercised the "call."

[3] The Agreement referred generically to the number of shares that could be issued without a stockholder vote under Section 312.03 (as opposed to specifying an exact number of shares to be issued to Green Courte) because, at the time the Agreement was executed, the parties had no way of knowing for sure if SUI would be able to complete a bona fide public offering, or, if it did, how many shares would be sold.

relevant date for measuring the shares outstanding for purposes of the denominator is the date the definitive agreement is signed." (Record at 74.) As a result of this action, SUI was able to list only 40,872 additional common shares on the NYSE, as opposed to the 716,667 shares that the parties to the Agreement had contemplated. The effect of this action was to make it impossible for SUI sell the full block of securities contemplated by the Agreement to Green Courte. Instead of $37.5 million, SUI will receive only $2.1 million in sales proceeds. For its part, Green Courte lost the bargained-for opportunity to acquire a block of securities that subsequently has appreciated considerably in value. Thus, the interpretation of Rule 312.03 by the NYSE staff substantially frustrates the legitimate business intent of the parties when they signed the Agreement.

With all due respect to the staff of the NYSE, the interpretation of Section 312.03 that the NYSE articulated on January 12, 2015 is patently incorrect.[4] The relevant portion of Section 312.03, which is the first half of Subsection (c), states as follows:

> (c) Shareholder approval is required 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:
>
> (1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or
>
> (2) 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

[4] The January 23, 2015 closing was one in a series of closings pursuant to various agreements between the parties, the first of which did not take place until after the completion of the public offering. Given the "series of related transactions" language in Rule 312.03, SUI and Green Courte concede that the shares sold in all of the closings must be aggregated for purposes of the numerator, and that the denominator used in the 20-percent calculation must be the number of shares outstanding at the time of the first issuance in the series. What SUI and Green Courte object to is the NYSE's decision that they must go all the way back to July 30, 2014 and do the 20-percent calculation based on the number of shares outstanding when the parties first signed the Agreement, several months before SUI completed the public offering, thereby excluding shares that clearly were outstanding before the first issuance of shares to Green Courte.

> of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

(Emphasis added.) Paragraphs (1) and (2) both unequivocally refer to 20 percent "outstanding before the issuance." The rule does not say "outstanding before the issuance or on the earlier date when the parties executed the agreement pursuant to which the issuance is made," but that is how the staff of the NYSE is interpreting the rule. It is possible that the staff of the NYSE believes its interpretation is supported by the language "has, or will have upon issuance," which may suggest there are two different measurement dates. Upon a close reading, however, it is clear that language was included on account of the fact that the rule covers not only common stock, but securities convertible into common stock at some later date. The language that describes the 20-percent calculation, on the other hand, unequivocally refers to just one point in time: "before the issuance."

Companies with securities traded on the NYSE, and parties that deal with such companies, have a right to be able to structure business transactions in reliance on the plain language of the published rules. As described above, there was no reason for Green Courte and SUI to have believed, when they entered into the Agreement, that the number of securities that could be issued to Green Courte in January 2015 would depend, not on the number of shares outstanding "before the issuance," but on the smaller number of shares outstanding six months earlier when the parties signed the Agreement.

II. The SEC Has Jurisdiction Under Section 19(d) to Review the Action of the NYSE

As a result of the NYSE's action, SUI has had its "access to services offered by" the NYSE "prohibited or limited." Providing a public market for a listed company's shares is central to the function of the NYSE. Yet, as a result of the NYSE's patently incorrect interpretation of

Rule 312.03, hundreds of thousands of common shares of SUI, worth millions of dollars, that otherwise would have been issued and approved for listing on the NYSE, have never even been issued. Under such circumstances, the Commission has jurisdiction under Section 19(d). *See, e.g., William J. Higgins*, 1987 WL 757509, at *5 (SEC May 6, 1987) (stating that the Commission had jurisdiction to review a refusal by the NYSE refusing to allow a member to install a telephone on the exchange floor because it constituted a "limitation" on "access" to services of the SRO); *Scattered Corporation*, 1996 WL 284622, at *2 (SEC May 29, 1996) (stating that the Commission had jurisdiction to review a refusal by the Chicago Stock Exchange to process a firm's request for registration as a market maker because it constituted a "limitation" on "access" to services of the SRO); *Tower Trading, L.P.*, 2003 WL 1339179, at **4-5 (SEC March 19, 2013) (stating that the Commission had jurisdiction to review action by the Chicago Board Options Exchange terminating a firm's designation as a market maker because it constituted a "limitation" on "access" to services of the SRO).

Once it is established that SUI has a right to obtain review by the SEC pursuant to Section 19(d), it follows that Green Courte has that right as well. It is a party to a binding contract with SUI and has suffered a substantial financial loss because of the limitation that the NYSE has improperly imposed on SUI's access to the NYSE's services. As such, Green Courte is a "person aggrieved" by the action. *See Securities Industry & Financial Markets Association*, 2104 WL 1998525, at *6 (SEC May 16, 2014) (there "is no statutory requirement that a person aggrieved must itself be subject to a prohibition or limitation of access to SRO services").

III. The Precedents the Commission Asked the Parties to Address

In its Order of March 3, 2015, the Commission asked the parties to address three precedents that bear on the issue of jurisdiction. As explained below, to the extent that these

precedents are germane, they strongly support the conclusion that the Commission should review the action by the NYSE that Green Courte is challenging in this proceeding.

Securities Industry & Financial Markets Association

The first precedent that the parties were asked to address is *Securities Industry & Financial Markets Association*, 2014 WL 1998525 (SEC May 16, 2014). In that case, a trade association representing participants in the securities industry asked the SEC to review fees that the NYSE had recently imposed for the delivery of "non-core" data. Such data had previously been made available free of charge. Under the Exchange Act, such fees are subject to various requirements, including that they be "fair and reasonable." *Id.* at *2.

The trade association based its request for review on Section 19(d) of the Exchange Act. The NYSE argued that the SEC lacked jurisdiction under that section because (1) the trade association was not a "person aggrieved" by the fees, and (2) the fees did not "prohibit or limit" "access to services offered by" the NYSE. To resolve the first issue (*i.e.*, whether there was "associational standing" under Section 19(d)), the SEC adopted the following three-part test:

> "[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."

2014 WL 1998525, at *7 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). The SEC held that the second and third prongs of this test were satisfied, and that whether the first prong was satisfied turned on whether individual members of the trade association were themselves "persons aggrieved" by the fees. *Id.*

In order to answer that question, the SEC concluded that it was necessary to address the second argument advanced by the NYSE, namely, whether the fees "prohibited or limited"

"access to services offered by" the NYSE. *Id.* at *7. The NYSE argued that there was no denial of services because "anyone willing to pay the challenged fee" could still obtain "non-core" data. *Id.* The trade association, on the other hand, argued that a complete denial was not necessary. *Id.* The SEC agreed with the trade association, holding that charging a fee could indeed constitute a "prohibition or limitation" if three conditions were met. *Id.* at *8. First, the trade association had to show that the challenged fees were so high that they had caused "an actual limitation of access." *Id.* Second, the trade association had to present a colorable legal basis for the SEC to conclude that the fees were invalid under the Exchange Act. *Id.* at **8-9. Third, the fees had to prohibit or limit the ability of the members of the trade association "'to utilize one of the fundamentally important services offered by the SRO,'" which "'were not merely important to the applicant but were central to the function of the SRO.'" *Id.* at *9 (quoting *Morgan Stanley & Co.*, 1997 WL 802072, at *3 (SEC Dec. 17, 1997). The Commission held that the challenge before it satisfied the second and third prongs of this test, and it referred the case to an administrative law judge for the development of a factual record on the first of the three prongs.

The present case deals with a different situation than the one present in *Securities Industry & Financial Markets Association ("SIFMA")*. For example, the present case does not involve "associational standing." Rather, Green Courte itself is an aggrieved person. Nonetheless, several of the principles articulated in *SIFMA* are directly applicable here.

First, by holding that the mere charging of a fee can constitute a "prohibition or limitation" on "access to services offered by" the NYSE, *SIFMA* establishes that a flat denial of a service is not necessary. *Accord, Interactive Brokers LLC*, 1998 WL 117627, at *3 n.8 (SEC Mar. 17, 1998) (reviewing challenged SRO action; although the applicant had "not been denied

access entirely," its "access undeniably ha[d] been limited"). Rather, the imposition of a significant burden is all that is required. Here, the burden imposed by the NYSE is more than sufficient to meet the standard: The NYSE has put SUI in a position where it cannot obtain listing approval for the full block of shares contemplated in the Agreement unless it incurs the expense, delay and uncertainty resulting from a stockholder vote that plainly should never have been required by Rule 312.03.[5]

Second, in the course of endorsing "associational standing" in *SIFMA*, the SEC stated in so many words that there "is no statutory requirement that a person aggrieved must itself be subject to a prohibition or limitation of access to SRO services." 2014 WL 1998525, at *6. This disposes of any argument that might be made against Green Courte's standing based on the fact that it is SUI, rather than Green Courte itself, that has securities listed on the NYSE and has improperly been prohibited by the NYSE from issuing more than $35 million in securities unless it first holds a stockholder vote that plainly should never have been required by Rule 312.03.

Morgan Stanley & Co.

The second Commission precedent that the parties have been asked to address is *Morgan Stanley & Co.*, 1997 WL 802072 (SEC Dec. 17, 1997). In that case, an officer of a member of the National Association of Securities Dealers, Inc. (the "NASD") made a contribution to a political candidate in Massachusetts. As a result, the member was, by operation of rule, automatically suspended for two years from doing municipal securities business in Massachusetts. The member applied to the NASD for an exemption from the automatic

[5] Under the Agreement, SUI has no contractual obligation to hold a stockholder vote. In the wake of the NYSE's patently incorrect interpretation of Rule 312.03, SUI has consistently taken the position that it will forego more than $35 million in funding from Green Courte rather than incur the expense, delay and uncertainty resulting from a stockholder vote that plainly should never have been required by Rule 312.03.

suspension, but the application for an exemption was denied. The member asked the SEC to review the denial, but the Commission concluded that it lacked jurisdiction under Section 19(d).

The bulk of the opinion was devoted to portions of Section 19(d) other than the one at issue here. The opinion did devote one paragraph, however, to the portion of Section 19(d) dealing with actions that "prohibit or limit" "access to services" offered by the SRO. In that paragraph, the SEC held that, in order for this portion to apply, the applicant must be attempting "to utilize one of the fundamentally important services offered by the SRO," which "were not merely important to the applicant but were central to the function of the SRO." *Id.* at *3. (As mentioned previously, the Commission recently quoted this language in *SIFMA*.) In *Morgan Stanley*, the Commission held that this requirement was not met because the denial being challenged had "no impact on Morgan's access to any service offered by the NASD," much less access to a "fundamentally important" service that was "central to the function of the SRO." *Id.*[6]

The instant case could not be more different from *Morgan Stanley*. Of all the services the NYSE provides, the most "fundamentally important" one, and the one that is most "central to the function of the SRO," is access to a public market for a listed company's securities. By insisting on an clearly erroneous interpretation of Rule 312.03(c), the NYSE has denied SUI access to that market for a large block of its securities. On the authority of *Morgan Stanley*, the Commission clearly has jurisdiction to review that interpretation.

Allen Douglas Securities, Inc.

The third Commission precedent that the parties have been asked to address is *Allen Douglas Securities, Inc.*, 2004 WL 2297414 (Oct. 12, 2004). In that case, a member of the NASD was found to be in violation of the SRO's net capital requirement. In an effort to bring

[6] In *Morgan Stanley*, the Commission cited two of the cases upon which Green Courte relies – *Higgins* and *Scattered Corporation* – as examples of cases in which the Commission properly exercised jurisdiction. *Id.*

itself back into compliance, it entered into subordinated loan agreements ("SLAs") with several of its customers and other creditors. The NASD refused to take the SLAs into account in determining whether the member was in compliance with the net capital requirement. The member asked the Commission to review this action, but the Commission concluded that it lacked jurisdiction under Section 19(d). As in *Morgan Stanley*, the bulk of the opinion was devoted to portions of Section 19(d) other than the one at issue here. As in *Morgan Stanley*, however, the opinion did contain one passage devoted to the portion of Section 19(d) dealing with actions that "prohibit or limit" "access to services" offered by the SRO. *Id.* at *4. Even the member struggled to identify any "service" offered by the NASD that it had been denied. The best argument it could make was that it had been denied "access to the use of a reasonable subordinated loan agreement." *Id.* Not surprisingly, the SEC rejected this argument. *Id.* Specifically, as in *Morgan Stanley*, the SEC concluded that the member had not alleged a denial of a right "to utilize one of the fundamentally important services offered by the SRO." *Id.*[7]

The present case is completely distinguishable from *Allen Douglas*. Here, SUI is seeking access to a service offered by the NYSE – public trading for a large block of its common stock – that is "fundamentally important" and "central to the function of the SRO." Like *Morgan Stanley*, *Allen Douglas* compels the conclusion that the SEC has jurisdiction to review the action being challenged here.

IV. Conclusion

For all of the reasons stated above, the Commission should conclude that, under Section 19(d) of the Exchange Act, it has jurisdiction to review the action by the NYSE that is being challenged in this proceeding.

[7] In *Allen Douglas*, the Commission cited all three of the cases upon which Green Courte relies – *Higgins*, *Scattered Corporation* and *Tower Trading* – as examples of cases in which the Commission properly exercised jurisdiction. *Id.*

Date: March 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 19th day of March, 2015, I served the foregoing brief on the New York Stock Exchange by sending copies by email and first class mail to:

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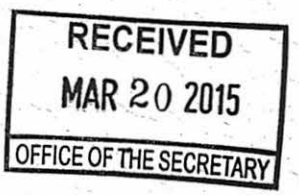

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RE: Green Courte Real Estate Partners III, LLC
Admin. Proc. File No. 3-16362

Dear Ms. Powalski:

Pursuant to the Order entered by the Securities and Exchange Commission on March 3, 2015, Green Courte Real Estate Partners III, LLC hereby respectfully submits its opening brief.

Thank you very much.

Yours truly,

David Clarke, Jr.
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cc: John Carey
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