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Appellants Cheri Fu and the Estate of
7 Thomas Fu, Deceased

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9 **UNITED STATES COURT OF APPEALS**
10 **FOR THE NINTH CIRCUIT**

11 CHERI FU and THOMAS FU,

12 Appellants,

13 v.

14 CITY NATIONAL BANK, N.A.,

15 Appellee.

16
17 In re:

18 CHERI FU and THOMAS FU,

19 Debtors.

20 CITY NATIONAL BANK, N.A.,

21 Plaintiff,

22 v.

23 CHERI FU and THOMAS FU,

24 Defendants.

Ninth Circuit Case No. 15-56800
(Consolidated With No. 17-55530)

[On Appeal From A Nondischargeable
Money Judgment Entered By Judge
Theodor Albert, U.S. Bankruptcy Court,
Central District Of California, Southern
Division, In Adversary No. 8:13-ap-
01255-TA, Arising In Case No.
8:09-bk-22699-TA (Jointly
Administered with 8:09-bK-22695-TA)]

**APPELLANTS' RESPONSE TO
APPELLEE'S MOTION FOR
JUDICIAL NOTICE (DCK ENTRY
NO. 60)**





1 Appellants Cheri Fu and the Estate of Thomas Fu, deceased ("Appellants" or
2 the "Fus") agree that this Court properly may take judicial notice, as requested by
3 Appellee City National Bank, N.A. ("Appellee"), of: (A) the "Order Re Trustee's
4 Emergency Motion for Order (1) Authorizing Sale of Certain Personal Property Free
5 and Clear of Liens, Claims, Interests and Encumbrances, and (2) Approving
6 Employment of Great American Group, LLC as Trustee's Liquidation Agent and
7 Auctioneer in Connection Therewith" [*In re Galleria USA, Inc.*, Bank. Case No.
8 8:09-bk-20651-TA – Dkt. No. 148, dated 1/13/2010], and (B) the "Final Accounting
9 and Settlement Report of Great American Group re Sale of Certain Personal
10 Property of Galleria USA, Inc." [*In re Galleria USA, Inc.*, Bank. Case No. 8:09-bk-
11 20651-TA – Dkt. No. 274, dated 3/25/2010].

12 Appellants, however, take issue with Appellee's characterization of the
13 import, meaning and effect of these two documents, and their argument that
14 Appellants' failure-to-mitigate affirmative defense regarding CNB's obligations as a
15 secured creditor were raised for the first time on appeal (and, by implication, have
16 been waived).

17 First, the Fus' failure-to-mitigate defense, their challenge to CNB's claimed
18 100% loss as if not one penny of inventory or A/R existed for the 100%
19 collateralized loan, their contention that CNB failed to exercise reasonable efforts to
20 locate and monetize the GUSA collateral securing its loans, their request for
21 discovery concerning the location, possession, custody, control, and monetization of
22 GUSA collateral *before* the bankruptcy cases were filed, and the Bankruptcy Court's
23 denial of the Fus' requested discovery on those critical issues, all were raised
24 repeatedly in the proceedings below. (*See, e.g.*, AER Vol. X, Tab 79, at
25 AER002381, ll. 3-10; AER002380, ll.16-21; Tab 78 at AER002234, ll. 4-27; Vol.
26 IX, Tab 69, AER001882, ll. 9-15; AER001887, ll. 3-8; Vol. IX, Tab 76,
27 AER002040, ll.10-21; Vol. VIII, Tab 68, AER001807-1810, AER001820-1821,
28 AER001849-1850.)

1 The Fus' repeated assertion, in multiple forms, orally at hearings and in
2 several briefs -- that CNB should not be allowed to foist upon them 100% of
3 GUSA's guaranteed losses under a 100% secured loan, as if not one dime of
4 collateral ever existed and that the Fus should be entitled to broad discovery
5 regarding the amount and disposition of the collateral securing the loans they
6 guaranteed -- was sufficient to preserve the Fus' co-extensive U.C.C. Article 9
7 mitigation argument on appeal. *See Simkins v. NevadaCare, Inc.*, 229 F.3d 729, 736
8 (9th Cir. 2000) (cautioning against reading the waiver rule too broadly; it is
9 sufficient if the record below shows that same issue was raised generally).

10 Second, the legal impact of the Bankruptcy Court's approval of the Chapter 7
11 Trustee's liquidation of GUSA collateral, with respect to Appellants' failure-to-
12 mitigate defense under common law and the Commercial Code, is simply irrelevant
13 and has zero impact on the pre-bankruptcy activities of the GUSA Chief
14 Reorganization Officer John Pelton and the subsequent pre-bankruptcy activities of
15 the bank creditors' receiver, William Granger. Discovery under Fed. R. Civ. Proc.
16 56(d) should have been permitted regarding what they did or did not do to locate
17 and monetize GUSA collateral securing the 2008 BofA ABL Facility, that is the
18 subject of Judgment No. 3 at issue in this appeal, which the Fus' guaranteed; and,
19 further, discovery should have been permitted regarding their role as agents for the
20 bank creditors who had security interests in the collateral, including Appellee CNB.

21 The Bankruptcy Court' imprimatur on the Trustee's post-bankruptcy
22 disposition and liquidation of GUSA collateral does not resolve, or even elucidate in
23 the slightest, those key issues, which require reversal of the Bankruptcy Court's
24 rulings and Judgment No. 3 which resulted from them.

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9th Circuit Case Number(s) 15-56800

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