

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

ONH AFC CS INVESTORS, LLC, *et al.*,¹

Debtors.

Chapter 11 (Subchapter V)

Case No. 23-10931 (CTG)

(Jointly Administered)

ANNA PHILLIPS, in her capacity as the
Liquidating Trustee of the ONH Liquidating Trust,

Plaintiff,

v.

THE KATHY BERRIE REVOCABLE TRUST;
KATHY BERRIE, individually and as trustee of
THE KATHY BERRIE REVOCABLE TRUST;

Defendants.

Adv. Proc. No. 24-50084 (CTG)

NOTICE OF INTENT TO SERVE SUBPOENA

Defendants The Kathy Barrie Revocable Trust and Kathy Berrie, individually and as trustee of The Kathy Berrie Revocable Trust, by and through their undersigned counsel, hereby provide notice that they intend to serve the attached Subpoena directed to Elchonon Schwartz.

Dated: November 5, 2024
Wilmington, Delaware

BAYARD, P.A.

/s/ Steven D. Adler

Ericka F. Johnson (DE Bar No. 5024)

Steven D. Adler (DE Bar No. 6257)

600 North King Street, Suite 400

Wilmington, Delaware 19801

Telephone: (302) 655-5000

¹ The last four digits of the Debtors' federal tax identification numbers are 1199 (ONH AFC CS Investors LLC) and 6326 (ONH 1601 CS Investors LLC). The Debtors' mailing address is 3445 Peachtree Road, Suite 1225 Atlanta, GA 30326.

Facsimile: (302) 658-6395
Email: ejohnson@bayardlaw.com
sadler@bayardlaw.com

-and-

WILK AUSLANDER

Eric Snyder
Stuart Riback
Worldwide Plaza
825 Eighth Avenue, Suite 2900
Telephone: (212) 981-2326
Email: esnyder@wilkauslander.com
sriback@wilkauslander.com

Counsel for Defendants

UNITED STATES BANKRUPTCY COURT

District of Delaware

In re ONH AFC CS INVESTORS, LLC, et al.

Debtor

Case No. 23-10931 (CTG)

Chapter 11 (Subchapter V)

ANNA PHILLIPS, in her capacity as the Liquidating Trustee
of the ONH Liquidating Trust

Plaintiff

Adv. Proc. No. 24-50084 (CTG)

v.

THE KATHY BERRIE REVOCABLE TRUST; KATHY BERRIE,
individually and as trustee of the KATHY BERRIE REVOCABLE TRUST

Defendants.

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT
INSPECTION OF PREMISES IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: Elchonon Schwartz, 512 West 22nd Street, 8th Floor, New York, NY 10011

(Name of person to whom the subpoena is directed)

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

PLACE	Wilk Auslander LLP 825 Eighth Avenue, Suite 2900 New York, NY 10019	DATE AND TIME December 1, 2024 at 5:00 p.m. (ET)
-------	---	---

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

PLACE	DATE AND TIME
-------	---------------

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/7/2024

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Ericka F. Johnson

Attorney's signature

The name, address, email address, and telephone number of the attorney representing (name of party)
the Kathy Berrie Revocable Trust, who issues or requests this subpoena, are:

Bayard, P.A., 600 North King Street, Suite 400, Wilmington, DE 19801; (302) 655-5000

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (*name of individual and title, if any*): _____
on (*date*) _____ .

☐ I served the subpoena by delivering a copy to the named person as follows: _____
_____ on (*date*) _____ ; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true and correct.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information concerning attempted service, etc.:

Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)
(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)

(c) Place of compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

(A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises, at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

...
(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

ONH AFC CS INVESTORS, LLC, *et al.*,¹

Debtors.

Chapter 11 (Subchapter V)

Case No. 23-10931 (CTG)

(Jointly Administered)

ANNA PHILLIPS, in her capacity as the
Liquidating Trustee of the ONH Liquidating Trust,

Plaintiff,

v.

THE KATHY BERRIE REVOCABLE TRUST;
KATHY BERRIE, individually and as trustee of
THE KATHY BERRIE REVOCABLE TRUST;

Defendants.

Adv. Proc. No. 24-50084

Schedule Of Documents To Be Produced

TO: Elchonon 'Elie' Schwartz.

DEFINITIONS

- A. "Record," "records," "report," "reports," "document" or "documents" are defined to be synonymous in meaning and equal in scope to the usage of the term "document" in Federal Rule of Civil Procedure 34(a)(1)(A) and are intended to be as comprehensive as possible. In all cases where originals and/or non-identical copies are not available, "record," "records," "report," "reports," "document" and "documents" also mean identical copies of original documents and copies of nonidentical copies.

¹ The last four digits of the Debtors' federal tax identification numbers are 1199 (ONH AFC CS Investors LLC) and 6326 (ONH 1601 CS Investors LLC). The Debtors' mailing address is 3445 Peachtree Road, Suite 1225 Atlanta, GA 30326.

- B. “Concerning” means related to, referring to, reflecting, describing, evidencing, or constituting.
- C. Riverside. “Riverside” means Riverside Abstract, LLC and its employees, managers, agents, attorneys, accountants, and all other persons acting or purporting to act on its behalf, whether individually or collectively.
- D. Schwartz. “Schwartz” means Elchonon ‘Elie’ Schwartz, as well as (1) any entity he owns or controls, whether directly or indirectly, or any trust of which he is a trustee or beneficiary; and (2) his agents, attorneys, accountants and all other persons acting or purporting to act on his behalf, whether individually or collectively, and any agents, attorneys, accountants and all other persons acting or purporting to act on behalf of any entity he owns or controls, whether directly or indirectly, or any trust of which he is a trustee or beneficiary.
- E. Trust. “Trust” means the Kathy Berrie Revocable Trust, its affiliates, principals, members, officers, directors, employees, managers, agents, attorneys, accountants, and all other persons acting or purporting to act on its behalf, whether directly or indirectly, individually or collectively, including, but not limited to, Kathy Berrie, Scott Berrie, Richard Berrie, and Bruce Whitaker.
- F. NJ Property. “NJ Property” means the residential real property located at 320 Mountain Road, Englewood, New Jersey 07630.
- G. You. “You” means Elchonon ‘Elie’ Schwartz, as well as (1) any entity he owns or controls, whether directly or indirectly, or any trust of which he is a trustee or beneficiary; and (2) his agents, attorneys, accountants and all other persons acting or purporting to act on its behalf, whether individually or collectively, and any agents, attorneys, accountants and all other

persons acting or purporting to act on behalf of any entity he owns or controls, whether directly or indirectly, or any trust of which he is a trustee or beneficiary.

INSTRUCTIONS

- A. Unless otherwise specified, defendants request the production of documents authored in, or concerning, the time period from April 25, 2022 through July 14, 2023 (the “Relevant Period”).
- B. Produce all requested Documents in your actual or constructive possession, custody or control, wherever located, whether available to you through search of your electronic records databases or otherwise. A Document is deemed to be in your actual or constructive possession, custody or control if it is in your physical custody or if it is in the physical custody of any other Person and you have a right, by Control, contract, statute, order or otherwise, to use, inspect, examine, or copy such Document on any terms, or have an understanding, express or implied, that you may use, inspect, examine or copy such Document upon any terms, or have, as a practical matter, been able to use, inspect, examine or copy such Document when you sought to do so. Such other Persons include, without limitation, record retention or data storage vendors, or other third-party information technology, cloud, or other service providers.
- C. These are continuing requests for responsive documents. You are under a duty to supplement your production of documents if you obtain information on the basis of which you learn or have reason to believe (a) that the production was incomplete when made, or (b) that you have in your possession, custody, or control, documents responsive to these requests that have not been produced.

- D. In the event that any document called for has been destroyed, discarded, or otherwise disposed of, identify the document by stating its: (a) author or preparer; (b) recipients (whether indicated or blind copies); (c) date; (d) subject matter; (e) number of pages; (f) attachments or appendices; (g) all persons to whom distributed or shown (h) date of destruction or other disposition; (i) manner of destruction or other disposition; (j) reason for destruction or other disposition; (k) person authorizing destruction or other disposition; (l) person destroying or disposing of the document; and (m) the document request or requests to which the document is responsive.
- E. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
- F. If there are no documents responsive to a category in this request, so state in writing.

DOCUMENTS TO BE PRODUCED

1. All documents concerning the purchase of the NJ Property.
2. All communications with McDonnell & Whittaker, LLC in connection with the purchase of the NJ Property.
3. All documents concerning agreements with Riverside Abstract, LLC in connection with the NJ Property.
4. All correspondence to, from, or concerning Riverside Abstract, LLC related to the NJ Property.
5. All correspondence to, from, or concerning Royal Realty Services, LLC related to the NJ Property.

6. All communications or documents concerning any mortgage placed or to be placed on the NJ Property at any time after the closing of the purchase on the NJ Property.
7. All communications between the Debtor and Kathy Berrie or the Trust.
8. All communications between the Debtor and any representative of Kathy Berrie or the Trust, including but not limited to McDonnell & Whittaker, LLC.
9. All documents concerning contracts or agreements related to the NJ Property or its purchase.
10. All correspondence concerning the NJ Property.
11. All documents concerning communications, if any, between Kathy Berrie or the Trust and Riverside.
12. All documents concerning agreements, if any, between Kathy Berrie or the Trust and Riverside.
13. All documents concerning any transfer of funds from the account of the Debtor into the account of any of the following:
 - a. Schwartz
 - b. McDonnell & Whittaker, LLC
 - c. Kathy Berrie or the Trust
 - d. Riverside
14. All documents concerning any dealings between Schwartz and Kathy Berrie or the Trust.

CERTIFICATE OF SERVICE

I, Steven D. Adler, hereby certify that on November 5, 2024, a true and correct copy of the foregoing was served via the Court's CM/ECF system on all parties authorized to receive electronic notice in this case and upon the parties listed below via electronic mail and first-class mail (where indicated):

LANDIS RATH & COBB LLP

Adam G. Landis
Matthew B. McGuire
Matthew R. Pierce
919 Market Street, Suite 1800
Wilmington, Delaware 19801
Email: landis@lrclaw.com
mcguire@lrclaw.com
pierce@lrclaw.com

FIRST-CLASS MAIL AND ELECTRONIC MAIL

BAKER & HOSTETLER LLP

Jorian L. Rose
45 Rockefeller Plaza
New York, NY 10111
E-mail: jrose@bakerlaw.com

David J. Richardson
1900 Avenue of the Stars
Suite 2700
Los Angeles, CA 90067
E-mail: drichardson@bakerlaw.com

/s/ Steven D. Adler
Steven D. Adler (No. 6257)