UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	:	Chapter 11
In re:	:	Case No. 18-12341 (SMB)
	:	
1141 REALTY OWNER, et al.,	:	
	:	
Debtors.	:	Jointly Administered
	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE OBJECTION OF REORGANIZED DEBTOR, 1141 REALTY OWNER LLC, TO PRE-PETITION CLAIMS AND ADMINISTRATIVE CLAIMS OF TCG ACQUISITIONS 2 LLC

This memorandum of law is filed on behalf of 1141 Realty Owner LLC, the Reorganized Debtor (hereinafter, "Debtor"), in further support of Debtor's Objection to Claims asserted by TCG Acquisitions 2 LLC ("TCG").

Preliminary Statement

1. In response to Debtor's Objection, TCG in essence asks this Court to now fully adjudicate the vigorously contested mortgage foreclosure action commenced by its predecessor-in-interest in September 2017. That action was stayed and never resolved as a result of the Chapter 11 filing by Debtor on July 31, 2018. Yet, TCG now wants this Court to conclude, as a matter of law, that the Debtor's default has been fully established. That is incorrect. The only time that the District Court addressed the issue of whether Debtor violated § 7.1(xii) of the Loan Agreement resulted in a finding in favor of the Debtor, when the court denied Wilmington's motion for a receiver, concluding that "[b]ecause the New York State Liquor Authority has not revoked the liquor license, … [Wilmington] has not shown … that the borrower [Debtor] has defaulted on its obligation under the loan agreement …." *See* Ex. J, October 2, 2017

Order/Transcript, at p. 20.[1]

2. TCG misreads and ignores the very specific and narrow definition of § 7.1(xii), which states that an Event of Default occurs when the defined Liquor License "ceases to be in full force and effect." This was the only alleged "Event of Default" upon which the loan was accelerated. TCG would have this Court read that provision much more broadly than its plain language, to the point of invoking other loan provisions and documents.

3. TCG also improperly introduces new allegations and an irrelevant opinion of an expert to say what *could* have happened and what other defaults *might* have existed in order to retroactively justify its claim. But the original lender (Rialto) and its successor (Wilmington) never made the arguments or asserted the facts TCG now alleges as the basis for claiming there was a valid Event of Default justifying the drastic remedy of foreclosure. The reason for that is obvious – those other claims were not incurable defaults or Events of Default under the Loan Agreement. In the absence of any valid Event of Default, most of TCG's Claims should be disallowed.

ARGUMENT

I. TCG'S DEFAULT INTEREST CLAIMS SHOULD BE DISALLOWED BECAUSE THERE WAS NO EVENT OF DEFAULT UNDER SECTION 7.1(XII) OF THE LOAN AGREEMENT, WHICH WAS THE ONLY PREDICATE FOR THE ACCELERATION OF THE LOAN

4. The *only* basis for Wilmington's acceleration of the loan and commencement of its foreclosure action was the alleged "Liquor License" default under § 7.1(xii) of the Loan Agreement. Wilmington's Notice of Default/Notice of Acceleration, dated September 15, 2017 (the "Default and Acceleration Notice"), states:

[1] All references to exhibits herein are those attached to the Zuckerbrod Declaration, dated September 11, 2019, unless otherwise stated herein. The defined terms used herein are those defined in Debtor's Objection or in the Loan Documents.

> Borrower is in default of its obligations under the Loan Documents in that, among other things, Borrower has failed to maintain valid and effective liquor licenses issued by the New York Liquor Authority permitting Borrower to serve alcoholic beverages at the Property.

See Ex. D, Default and Acceleration Notice. The precise language of § 7.1(xii) of the Loan Agreement is important. It states that an "Event of Default" is deemed to occur:

> if, without Lender's prior written consent, any required license, permit, including, without limitation, the Liquor License[s], relating to the Property ***ceases to be in full force and effect***."

See Ex. F [emphasis added].

5. The term "Liquor License" is specifically defined in section 1.1.2 of the Loan Agreement to mean, collectively, two licenses issued to 9 West 26th St. Rest., LLC, and one issued to Toshi's Penthouse Inc. By invoking § 7.1(xii) and nothing else, Wilmington only declared an "Event of Default" under that provision – not because the Management Agreement was terminated, and *not* based on any speculation that the Debtor was selling liquor illegally or that the Liquor Licenses *should have* been revoked. Because it is an indisputable fact – which neither TCG nor its expert disputes – that the Liquor Licenses had not been revoked, cancelled or suspended by the SLA (*see* Ex. O, SLA printouts), they never "ceased to be in full force and effect" as of the date Wilmington delivered its Default and Acceleration Notice to Debtor.

6. Accordingly, the Debtor was not in default of the Loan Agreement under this provision. Wilmington breached the Loan Agreement by improperly declaring an "Event of Default" and accelerating the loan on that basis alone.[2] Therefore, TCG's Claim for default interest should be disallowed in its entirety.

[2] *See Seidman v. Indus. Recycling Props., Inc.*, 106 A.D.3d 983, 984-985, 967 N.Y.S.2d 77 (2d Dep't 2013) (lender's improper acceleration of mortgage loan and commencement of foreclosure action constituted a breach of loan agreement); *Luxonomy Cars, Inc. v. Citibank, N.A.*, 65 A.D.2d 549, 550, 408 N.Y.S.2d 951 (2d Dep't 1978) (lender's wrongful acceleration of note as predicate for foreclosure action was an actionable breach of contract);

7. TCG's argument in its opposition that Debtor incorrectly interpreted the phrase "in full force and effect" in § 7.1(xii) because it ignored the phrase "relating to the Property" is a red herring. It is not the Debtor who ignores the phrase "relating to the Property" in § 7.1(xii), but rather, TCG that misreads that phrase. It modifies and connects the generic terms "any required license" and "permit" to the Property, not the term "Liquor License," which is specifically defined.[3]

8. Debtor's *only* obligations under the Loan Documents concerning the Liquor Licenses were to "maintain" them (*see* § 4.1.24(a) of the Loan Agreement),[4] and "keep [them] … in full force and effect" (*see* § 1.03(A)(11) of the Management Agreement). Debtor satisfied those requirements.

9. TCG engages in an *ex-post facto* attempt to re-write the Loan Documents and retroactively concoct an "Event of Default," on the basis that Debtor could not *use* the Liquor Licenses since the Management Agreement was terminated. TCG further argues that Debtor "could not have ceased liquor sales at the Property, which is projected to account for 30% of the Hotel's revenue, and yet continue to operate in a 'substantially similar' manner" (as required under Section 4.1.1(iv) of the Loan Agreement). *See* TCG's Memorandum, at pp. 11-12. That argument is baseless.

Daniel Perla Assocs. LP v. ZLD Realty LLC, 277 A.D.2d 115, 115, 716 N.Y.S.2d 298 (1st Dep't 2000) (upholding lower court's decision dismissing complaint and reducing principle of mortgage based on lender's bad faith breach of mortgage).

[3] Citing to *Hart v. Socony-Vacuum Oil Co*., 291 N.Y. 13, 16 (1943), TCG further argues that because the term "in full force and effect" has no recognized meaning as a matter of law, it must mean that the Liquor Licenses were no longer in full force and effect solely because the Management Agreement was terminated. Its argument is not supported by any case law, and should be rejected.

[4] Section 4.1.24(a) of the Loan Agreement, entitled "Liquor Licenses," expressly provides:

> Borrower (i) shall cause Licensee and/or its successor and/or assigns to maintain the Liquor License(s) and shall cause each Liquor License to be continuously renewed at all times, and (ii) shall deliver or cause to be delivered to Lender copies of each updated Liquor License as and when issued.

10. First, the basis for Wilmington's Default and Acceleration Notice was not Debtor's inability to sell liquor or failure to "operate in a 'substantially similar' manner" (which, in any event, is not an enumerated Event of Default). Second, there is no provision in the Loan Agreement, Management Agreement or the Agreement Regarding Liquor Licenses that obligated Debtor to sell *alcoholic* beverages at the Hotel. *See* Ex. P, Agreement Regarding Liquor Licenses. The Management Agreement simply required the Manager to "[p]rovide food and beverage services." *See* Ex. G, Management Agreement, at § 1.03(A)(10). Because Debtor had no contractual obligation to sell alcoholic beverages, TCG's contention that Debtor *would have* violated the Loan Agreement *if* it had stopped selling alcoholic beverages is contrary to the terms of the Loan Documents and not an Event of Default under section 7.1(xii).

11. Certainly, if the original lender (Rialto) had desired to obligate Debtor to sell alcoholic beverages and wanted to make its failure to do so an incurable Event of Default, it could have included such a provision in its Loan Documents. It did not. TCG is now precluded from blue-penciling the Loan Documents to create that obligation. Similarly, if Wilmington, the foreclosing lender, believed that Debtor was illegally selling alcohol in violation of the law or the Loan Agreement, it would have so alleged. It did not. TCG is precluded from now asserting those allegations as bases for an Event of Default.

II. TCG'S ALLEGATION THAT DEBTOR UNLAWFULLY "AVAILED" OF THE LIQUOR LICENSES IS WITHOUT MERIT

12. TCG's "availing" argument should be rejected because it was not the basis for Wilmington's Default and Acceleration Notice, or its acceleration and foreclosure of the loan. If Wilmington's claim had been that Debtor improperly used the Liquor Licenses in violation of New York law, or allegedly allowed someone else to use them – *which it never asserted* – such claim would not have fallen within the enumerated "Event of Default" defined in § 7.1(xii) of the

Loan Agreement.

13. Instead, it would have fallen within the non-enumerated defaults under § 7.1(xvi), which would have entitled Debtor to a 30-day notice of default and an opportunity to cure before Wilmington could declare an "Event of Default" and accelerate the loan. In the absence of any such notice or opportunity to cure, TCG's argument that Wilmington properly declared an incurable "Event of Default" under § 7.1(xii) based on TCG's "availing" theory is contrary to the terms of the Loan Agreement.

14. Moreover, TCG's new theory is not based on any personal knowledge of the facts offered by Michael Shah, TCG's principal, in his declaration. His declaration and the prior declaration of Robert Chan, as well as the October 21, 2019 expert report of Kevin Kim, are irrelevant and of no evidentiary value. None of these so-called "facts" were alleged by TCG's predecessor-in interest in 2017 as a basis for declaring a default, nor have they been adjudicated or proven.

15. Furthermore, the alleged "facts" are directly contradicted by Mr. Vaswani's declaration filed on September 25, 2017 in response to Wilmington's motion to appoint a receiver. *See* 9/25/17 Vaswani Declaration.[5] Such facts include: (i) the "Liquor License" is a defined term under the Loan Agreement (¶ 6); (ii) the Loan Agreement does not mandate that the Hotel sell alcohol, only that the Liquor License "remain in full force and effect" (¶ 7); (iii) the printouts on the SLA websites show that the Liquor Licenses were "active," meaning they were in full force and effect when the Lender served its default notice (¶ 8); and (iv) Debtor did not terminate the Management Agreement; it expired by operation of its terms on December 31, 2015 (¶ 15).

[5] The 9/25/17 Vaswani Declaration was expressly incorporated by reference into his 10/19/17 Declaration (*see* Ex. H) and is annexed as Exhibit "FF" to the accompanying Declaration of Alan Zuckerbrod, dated November 1, 2019.

16. Notably, in the foreclosure action, the District Court never rendered any adjudication of Wilmington's claim that the Liquor Licenses ceased to be in full force and effect, or that it was a proper basis for Wilmington's declaration of an Event of Default" under § 7.1(xii). The only time the District Court addressed these issues was in connection with Wilmington's motion for the appointment of a receiver on October 2, 2017. At that time, the District court stated, as one of the main reasons for denying the motion, that:

> [b]ecause the New York State Liquor Authority has not revoked the liquor license, which remains active and in Mr. Chan's control, the trustee [Wilmington] has not shown either that the borrower [Debtor] has defaulted on its obligation under the loan agreement or a probability of success on the merits.

See Ex. J, October 2, 2017 Order/Transcript, at p. 20.

17. Another fallacious argument made by TCG is that Debtor made an admission, in an email (Ex. 41 to Shah Dec.) from Vaswani to Wells Fargo by stating:

> 1141 Broadway Restaurant and Penthouse Operations LLC is the entity operating the F&B 90% owned by Jagdish Vaswani and 10% by Robert Chan. We are still operating under the hotel license issued to Robert Chan under 9 W 26th Street LLC. Discussions to add my name to the license are still ongoing.

18. Contrary to TCG's argument, the email does not constitute an admission that the Hotel was in any way violating New York State liquor laws (which still would have required a notice of default and opportunity to cure before an "Event of Default" could be declared). All that it suggests is that, at that point in time, Vaswani and Chan were having discussions about adding Vaswani's name to the Liquor Licenses while they were operating the F&B (*i.e.*, Food and Beverage service) at the Hotel through an entity co-owned by both of them (*i.e.*, 1141 Broadway Restaurant and Penthouse Operations LLC).

19. For the same reasons set forth above, TCG's expert's so-called "conclusion" that the Debtor availed is also irrelevant as a matter of law and based on pure speculation. TCG's

expert opines as to whether he, as a former Commissioner of the SLA, *might have* revoked the Liquor Licenses based on his "Assumption of Facts" that TCG has provided to him. However, his conclusion as to what he *would have* done or what *could have* happened is entirely speculative and irrelevant since he completely avoids the critical question: whether the Liquor Licenses had "ceased to be in full force and effect." Glaringly, he does not contend that they were not in effect when the Default and Acceleration Notice was delivered to Debtor, or earlier, when the Management Agreement was allegedly terminated.

20. The SLA never issued any violations against the Hotel, and never determined that Debtor had violated the state liquor license laws. In order to revoke, cancel, suspend a license or subject a licensee to a monetary penalty, an SLA hearing must be held at which the SLA would have to find sufficient cause.[6] There were no SLA hearings or any revocation of the Liquor Licenses. The mere speculation by TCG's expert witness, years later, that the SLA, after a hearing, could have revoked the Liquor Licenses is not conclusive proof of an "Event of Default" under § 7.1(xii) of the Loan Agreement. His opinion should be entirely disregarded.[7]

III. THERE IS NO MERIT TO TCG'S CLAIM THAT "OTHER DEFAULTS" WERE "EVENTS OF DEFAULT" ENTITLING TCG TO DEFAULT INTEREST

21. Realizing the lack of merit of its "Liquor License" arguments, TCG bootstraps allegations of "other defaults" by Debtor to support its Claim for default interest accruing as far back as August 2015. These "other defaults," which TCG alleges (but which Rialto or Wilmington did not) were "Events of Default," are: (i) Debtor's failure to pay "Taxes and Other Charges," (ii) Debtor's false representations made in Disbursement Requests, (iii) Debtor's

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[6] *See* ABC § 119(1)-(3); *see also Brenner v. Bruckman*, 253 A.D. 607 (1st Dep't 1938), *appeal dismissed*, 278 N.Y. 503 (1938) (hearing required before license can be cancelled); *Yates v. Mulrooney*, 245 A.D. 146, 149 (4th Dep't 1935) (same).

[7] In the event the Court determines that it will hear testimony from TCG's expert, Debtor expressly reserves its right to offer its own expert's testimony on this issue.

failure to timely provide financial documentations, including financial reports and budgets, (iv) Debtor's insurance-related defaults, and (v) Debtor's circumvention of the Cash Management Agreement. *See* Shah Dec. ¶¶ 20-33.

22. TCG's allegations are fatally flawed for several reasons, the most important of which is that its allegations of "other defaults" are barred since none of them were the stated basis for Wilmington's acceleration of the loan and commencement of the foreclosure action. They were only noted *after* Wilmington accelerated the loan, when there was no longer an opportunity to cure, which would have existed (except with respect to tax defaults which allegation is incorrect as explained below).

A. TCG's "other defaults" arguments are barred by New York Law

23. TCG's assertion of alleged "other defaults" is contrary to New York law. In *Dale v. Industrial Ceramics, Inc*., 150 Misc. 2d 935, 571 N.Y.S. 2d 185 (Sup. Ct. N.Y. Co. 1991), the court emphasized that notice and acceleration provisions must be strictly complied with before a valid loan acceleration can be made. The court equated an acceleration clause in a note to the sword of Damocles, "hanging over a borrower's head as a constant threat to at least financial imposition, if not economic ruin." *Dale*, 150 Misc.2d at 937. Once the loan is accelerated, it is a final act. As such, TCG's alleged "other defaults" become irrelevant.

24. TCG also misinterprets *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp*., 24 Misc.3d 1222(A) at *15, 897 N.Y.S.2d 669 (Sup. Ct., Ond. Cty.), *aff'd in part and modified in part*, 69 A.D.3d 212 (4th Dep't 2009), where the court held that "[o]nce a party declares a default on one ground under New York law, it may not subsequently defend the declaration of default on a different ground. *See Destiny USA Holdings*, 24 Misc.3d at * 15, *citing Leventhal v. New Valley Corp*., No. 91 Civ. 4238 (CSH), 1992 WL 15989, at *5 (S.D.N.Y. Jan. 17, 1992) ("It is well settled that where a party to a contract terminates the contract and

presents a specific reason for the termination, that party is estopped from raising a different reason upon the commencement of an action."). TCG incorrectly argues that this rule "was vacated on appeal." *See* TCG's Memorandum, p. 20.

25. To the contrary, the Appellate Division, in *Destiny USA Holdings*, 69 A.D.3d 212 (4th Dep't 2009),[8] did *not* reverse, vacate or overrule the legal principle stated by the trial court, that "[o]nce a party declares a default on one ground under New York law, it may not subsequently defend the declaration of default on a different ground." *Destiny USA Holdings*, 24 Misc.3d 1222(A), at *15. Rather, it only vacated the trial court's ruling that the lender's default notice and notice of deficiency were null and void, finding that the trial court had "exceeded the bounds of the requested relief" on a preliminary injunction motion. *See Destiny USA Holdings*, 69 A.D.3d at 223-224.

26. The governing rule stated by the trial court – that a party cannot change the grounds for declaring a default after it has declared it – remains the law in New York, and it is applicable in this proceeding because TCG's default interest Claim is derived solely from Wilmington's claims arising from its New York foreclosure action. The rule bars TCG, as a matter of law, from asserting any of the alleged "other defaults" as alternative justifications for both the propriety of the acceleration of the loan and for obtaining any default interest, whether before September 15, 2017, or thereafter.[9]

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[8] This appellate decision was cited in Debtor's Objection, at p. 12.

[9] In a footnote, TCG argues that the "mend the hold" doctrine, as applied in *Destiny USA Holdings* and *Leventhal*, is not applicable in this case because Wilmington expressly reserved its rights in its Default and Acceleration Notice and did not waive any other defaults. But, the unreported cases cited by TCG specifically say that the doctrine *does* apply to bar a party from "asserting additional reasons for having terminated or repudiated a contract only if a party either relied on the reasons for non-performance originally given, or could have cured its performance had the true grounds for repudiation been asserted earlier." *See Primetime 24 Joint Venture v. DirecTV, Inc*., No. 99 Civ. 3307, 2000 WL 426396, at *9 (S.D.N.Y April 20, 2000); *Daiwa Special Asset Corp. v. Desnick*, 00 Civ. 3856, 2002 WL 1997922, at *5 (S.D.N.Y Aug. 29, 2002) (doctrine "precludes the assertion of

B. The alleged failure to pay "Taxes and Other Charges" was Not an Event of Default

27. TCG's allegations that Debtor's failed to pay "Taxes and Other Charges" since October 2015, and that such failures were automatic "Events of Default" under § 7.1(ii) of the Loan Agreement, are factually incorrect and contrary to the terms of the Loan Agreement.

28. TCG's Claim is specifically predicated on Debtor's alleged failure to pay certain defined "Taxes and Other Charges," which are alleged to be sales use and occupancy taxes as well as a small water charge. *See* Shah Dec. ¶ 21, and n. 39. While TCG accuses Debtor – *albeit, wrongfully* – of ignoring relevant Loan Agreement language (*i.e.*, the phrase "relating to the property"), TCG does just that, by disregarding the phrase "levied or assessed or imposed against the Property or part thereof" – which phrase is expressly within the definitions of both "Taxes" and "Other Charges." Under those definitions, "Taxes" and "Other Charges" must be those "levied or assessed or imposed against the Property or part thereof."[10]

29. Significantly, none of the sales and use taxes or occupancy taxes that TCG alleges Debtor failed to pay fall within the definition of "Taxes" because they are not "levied or assessed or imposed against the Property or part thereof." Nor do they become liens *against the property*

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added reasons for the termination of a contract if a party relied on the reasons articulated or could have cured its performance had the additional grounds been disclosed earlier").

As shown in Point III, none of the "other defaults" alleged by TCG were the basis for Wilmington's acceleration of the loan on September 15, 2017. All of the alleged "other defaults" were either not immediate Event of Default or were alleged failures for which a default notice and an opportunity to cure was required under the Loan Agreement before any "Event of Default" could be declared. Therefore, contrary to TCG's argument, the rule of law set forth in *Destiny USA* Holdings, does preclude TCG from subsequently relying on such alleged "other defaults" in support of its Claim for default interest prior to September 15, 2017 – the date that Wilmington accelerated the loan.

[10] Under the Loan Agreement, at § 1.1.2, "Taxes" are defined as "all real estate and personal property taxes, assessments, water rates or sewer rents, now or hereafter **levied or assessed or imposed against the Property or part thereof;**" and "Other Charges" are defined as "all ground rents, maintenance charges, impositions other than Taxes, and any other charges, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Property, now or hereafter **levied or assessed or imposed against the Property or any part thereof**"[emphasis added]. The highlighted phrase is common because lenders do not want such outstanding taxes or other charges assessed against the mortgaged property to become a lien against the property that would be superior to, and thereby affect the security of, the lender's mortgage lien.

if not paid. Because they do not fall within definition of "Taxes," they cannot be the basis for an Event of Default under § 7.1(ii) of the Loan Agreement (which has no cure period), as TCG argues.[11] As a result, TCG's argument that the alleged tax defaults constituted an incurable "Event of Default," entitling it to default interest retroactively to October 2015 – 2 years *before* it served its Default and Acceleration Notice on September 15, 2017 – should be rejected.[12]

30. With regard to TCG's allegation that Debtor failed to pay water charges, which conceivably could be levied or assessed against the Property, TCG's allegation is based on Debtor's installment agreement dated December 13, 2017, for $44,298.93 between the New York City Water Board and the Debtor (*see* Ex. 40 to Shah Dec.), which was after the alleged acceleration. Yet, it is indisputable that Wilmington never declared a § 7.1(ii) "Event of Default" against Debtor based on this small amount of unpaid water charges, which New York City agreed to accept on an installment basis. TCG's improper attempt to concoct an automatic "Event of Default" to justify the allowance of its Claim for default interest accruing as far back as October 2015 should be rejected as baseless in law and in fact.

C. The alleged "False Representations" were Not Events of Default

31. A second "other default" newly alleged by TCG is that Debtor made "false representations" constituting Events of Default under § 7.1(v) of the Loan Agreement, consisting of Debtor's "certifications" made in numerous Disbursement Requests to Wilmington, that "no defaults or Events of Default (as defined in the Loan Agreements) currently exists." *See* Shah

[11] Instead, notice of default and an opportunity to cure would be required under § 7.1(xvi) of the Loan Agreement before any failure to pay sales and use and occupancy taxes could be the basis for declaring an Event of Default.

[12] Debtor also disputed the claim of unpaid sales and occupancy taxes in its email to Midland (*see* TCG's Ex. 41 to Shah Dec.), and in its Amended Answer to Wilmington's Complaint in the District Court Action, where it alleged, *inter alia*, that the alleged failure to pay taxes "was not a default because Debtor entered into an installment agreement with the respective governmental authorities and is fully current in its payment obligations under that agreement," and Wilmington "improperly refused to return funds to the Defendant and is itself the cause of any alleged default for the failure to pay taxes."

Dec. ¶¶ 23, 24. However, Wilmington never alleged the existence of any such "false representations," and never gave Debtor any notice of default or an "Event of Default" based on any false representations. Therefore, such allegations cannot now be used to justify TCG's recovery of default interest.

D. The alleged "Financial Reports" default was Not an Event of Default

32. As a third "other default," TCG alleges that Wells Fargo, Wilmington's loan servicer, issued "default notices to Debtor based on its failure to timely provide financial documentations, including financial reports and budgets" (*see* Shah Dec. ¶ 31), and that such failures justifies TCG's recovery of default interest in this proceeding.

33. However, a close review of TCG's notices reveals that most of them were not default notices with a request to cure (as required before they could become an "Event of Default"), and none of them were notices of an "Event of Default." Rather, they were emails from Wells Fargo requesting certain financial documents (*see* Exs. 5, 8, 9, and 22 to Shah Dec.), and "Notices of Non-Receipt of Financial Reporting" (*see* Exs. 43, 44, and 45 to Shah Dec.), which are not formal default notices. Three of the alleged notices, dated June 17, 2016, and February 7, 2017, were notices of default that provided Debtor with the requisite opportunity to cure (*see* Exs. 1, 3 and 27 to Shah Dec.), and Debtor did provide the financial reports and budgets.[13] Because no "Events of Default" were ever declared by Rialto or Wilmington based on the financials, as required before default interest is triggered, TCG's argument is baseless.

E. The alleged "Insurance" default was Not an Event of Default

34. A fourth "other default" allegation made by TCG is that Debtor committed insurance-related defaults and that Wilmington issued notices of default to Debtor. This is a

[13] In its Amended Answer to Wilmington's Complaint in the District Court Action, Debtor alleged: "Defendant did, in fact, submit an annual operating budget for 2017 to the Plaintiff and financial statements showing the actual revenues and expenses generated in 2016." *See* Ex. K, Answer, at ¶ 70.

blatant misstatement of fact. TCG points to three emails from Wells Fargo to Chan or Vaswani (*see* Exs. 4, 15, and 16 to Shah Dec.), but, yet again, none of them are default notices or a notice of an Event of Default concerning insurance.[14] Moreover, there is no proof that any alleged insurance-related defaults were not cured.

F. The alleged "Cash Management" default was Not an Event of Default

35. As a fifth "other default" argument, TCG similarly attempts to rewrite history by claiming that "Wells Fargo issued default notices to Debtor based on its circumvention of the Cash Management Agreement" (*see* Shah Dec. p. 13). Once again, no formal default notice or notice of an Event of Default were issued.

36. TCG's egregiously misstates the facts by alleging that "Vaswani even signed an acknowledgement of this default on September 11, 2015" (referring to Ex. 14 to Shah Dec.). In pertinent part, that document reads:

> Please accept this letter as confirmation that I, Jagdish Vaswani, understand obligations under the loan documents to deposit all property cash flows into the Clearing Account and I will immediately begin complying with this requirement for the duration of the life of the loan.

See 14 to Shah Dec. It does not contain any "acknowledgement" of any default.

37. In sum, this Court should disallow any default interest based on TCG's erroneous allegations of such "other defaults." In the event any default interest is allowed, based on a finding of a valid "Event of Default" in September 2017, it should be limited to such interest accruing after September 15, 2017 – the date the Default and Acceleration Notice was delivered to Debtor – not 2 years of retroactive default interest dating back to October 2015 based on TCG's spurious arguments of "other defaults."

[14] It is also noteworthy that those emails show that Chan was corresponding with Wells Fargo at that time, in July 2016, which undercuts TCG's allegation that Chan was no longer involved in the management of the Hotel by the end of 2015.

IV. DEBTOR IS NOT BARRED FROM ASSERTING ITS OBJECTION TO TCG'S CLAIMS FOR RETROACTIVE DEFAULT INTEREST

38. TCG argues that this Court's Memorandum Decision, dated March 18, 2019 (ECF Doc. No. 132), bars Debtor's present Objection to TCG's Claims for retroactive default interest based on its allegations of several pre-petition defaults dating back to 2015. Its argument is without merit for several reasons.

39. First, Debtor's First Objection to Wilmington's POC (ECF Doc. No. 84) was for a very limited purpose – to contest the POC on two legal grounds: (1) the Lender had not provided sufficient documentation to prove the amount due to the Lender with respect to the Claim; and (2) the Lender is not entitled to payment of the Yield Maintenance Default Premium as a matter of law, as that term is defined in the Loan Agreement. *See* Debtor's Reply Memorandum in Further Support of Objection to Claim No. 14, at ¶ 6 (ECF Doc. No. 105).

40. In its First Objection, Debtor advised the Court that it "will serve Claimant with discovery requests as a contested matter pursuant under Rule 9014 of the Bankruptcy Rules in order to ascertain how Claimant calculated the Claimed Amount." *See* Claim Objection, ¶ 9 (ECF Doc. No. 84). Because Debtor anticipated making a comprehensive objection after it obtained discovery from Wilmington substantiating its Claim, Debtor's First Objection *expressly* reserved its "right to further amend, supplement, revise, object or otherwise respond to the Claim on any and all additional factual or legal grounds relevant to the Claim, …." (ECF Doc. No. 84).[15]

[15] TCG's reliance on *Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009) is misplaced. There, the court held that "[f]acts admitted by a party "are judicial admissions that bind th[at] [party] throughout th[e] litigation." *Hoodho*, 558 F.3d at 91. In this case, Debtor did not admit in its Objection or Reply Memorandum that the alleged Liquor License default or the alleged "other defaults" occurred or were a valid basis to accelerate the loan. Debtor' expressly reserved its rights to assert any factual or legal grounds to TCG's Claims.

41. When this Court issued its March 18, 2019 Memorandum Decision overruling Debtors' objection to the Yield Maintenance Default Premium Claim on legal grounds, the Court stated that "The Claim Objection and Debtor's Reply in Further Support of Objection to Claim No. 14, dated January 22, 2019 ("Reply") (ECF Doc. # 105) do not contest the Debtor's defaults under the Loan Documents although the Debtor insists that its default was not intentional." (ECF Doc. No. 132). This statement should not be applied to bar Debtor from contesting TCG's alleged "other defaults." Since the Court's determination that the Yield Maintenance Default Premium provision was "enforceable under New York law" did not require any determination of whether any of the alleged defaults qualified as Events of Default, the statement (that Debtor did not contest the defaults) was *dicta* because it was not essential to its decision.

42. Furthermore, when Debtor withdrew the remainder of its First Objection, it expressly did so "without prejudice." (ECF Doc. No. 158). Debtors did not waive their right to object nor is it barred from objecting to TCG's Claims (except its entitlement to Yield Maintenance Default Premium), based on any of the alleged defaults.

V. TCG'S "UPDATED PAYOFF AMOUNT" CALCULATION SHOULD BE DISALLOWED

43. TCG's fails to provide a legitimate explanation for its failure to file an amendment to its POC, in violation of the bar date of November 5, 2018, and for improperly adding new categories of claims not previously sought in the POC by sending Debtor an unfiled "Updated Payoff Amount" calculation (Ex. C).

44. TCG's assertion that Wilmington's POC contained a general reservation of rights "to amend and supplement [its] Proof of Claim" does not excuse its noncompliance with this Court's Bar Date Order – which is equivalent to a "statute of limitations." *See In re Enron Creditors Recovery Corp*., 370 B.R. 90, 96 (Bankr. S.D.N.Y. 2007) (applying Fed. R. Civ. P.

15(c)). The entire Updated Payoff Amount calculation is time-barred and should be disallowed.

45. To the extent TCG's unfiled "Updated Payoff Amount" calculation added new Claims that Wilmington did not raise in its POC (*i.e.*, "Special Servicing Fees," "Insurance Advances," and interest and default interest on the alleged "Tax Advances" and attorneys' fees), those new Claims should be disallowed, especially in light of TCG's failure to file the updated calculation or an amended POC. *In re Enron,* 370 B.R. at 95 ("The bankruptcy court must take care that an amendment would truly amend a timely filed proof of claim rather than assert a new claim.").

VI. ATTORNEYS' FEES

A. Sidley Austin

46. Inasmuch as the entire foreclosure action was predicated on a contested and improper Event of Default and subsequent acceleration of the loan, all of Sidley Austin's pre-petition attorneys' legal fees incurred in connection with the foreclosure action should be disallowed.

47. First, the approximately $2 million billed by Sidley Austin as pre-petition attorneys' fees for an eleven-month period – an amount more than four times that of Debtor's counsel's fees – is blatantly excessive on its face and out of proportion to the nature of the foreclosure action.

48. Second, the invoices have not been authenticated by Sidley Austin, Wilmington, or anyone with personal knowledge of the services rendered. TCG offers no evidence that they are true and accurate, were sent to the client, and have been paid in full.

49. Third, Sidley Austin's heavy use of block redactions of large sections of the invoices prevented Debtor from fully reviewing the nature of the services and charges for reasonableness. TCG's contention that Sidley Austin was simply protecting attorney-client

privileged matters is contradicted by, and should be contrasted with, the Woods Oviatt invoices, which also contain attorney-client privilege redactions. Woods Oviatt's redactions were made only to the extent reasonably necessary, by removing client names and the subject matters of their communications, and not by obscuring the entire description of legal services rendered, as did Sidley Austin. For all of these reasons, TCG's entire Claim for Sidley Austin's attorneys' fees should be disallowed.

B. Other Attorneys' Fees – Objection Withdrawn

50. With regard to the Tarter Krinsky & Drogin LLP**,** Backenroth Frankel Krinsky, LLP, and Woods Oviatt attorneys' fees, Debtor's Objection had been based on TCG's failure to produce their invoices for review for reasonableness, despite Debtor's counsel's prior written request to TCG's counsel (Ex. Y) for their production. Now that Debtor has had an opportunity to review them, it withdraws its objection to those particular attorneys' fees.

VII. SPECIAL SERVICING FEES AND LIQUIDATION FEES (*I.E.*, WORKOUT FEE)

51. TCG's Claims for a 0.25% Special Servicing Fees ($129,843.75) and a 1% Workout/Liquidation Fee ($338,348.87) were asserted for the first time in its untimely "Updated Payoff Amount" calculation. For that reason alone, it should be disallowed.

52. A second reason is that TCG fails to provide any proof for its allegations that it actually paid the Special Serving Fee to its "predecessors" when it acquired its interests in the loan or that its predecessor paid the fee. Section 8.3 of the Loan Agreement only entitles the lender to be reimbursed for the fee. Without proof of payment of the fee, reimbursement by the Debtor (*i.e.*, Borrower) does not lie.

53. TCG also fails to show that the alleged "Special Servicing Fee Rate" is 0.25% of the outstanding loan amount. *See* Shah Dec. ¶ 48. There is nothing in the excerpt of the Pooling

and Servicing Agreement attached to TCG's opposition papers (Ex. 54 to Shah Dec.) that specifies this or *any* percentage. Its Claim is entirely unsubstantiated and should be disallowed.

54. TCG's Claim for a 1% Liquidation/Workout Fee is similarly deficient in the absence of any concrete proof that it or its predecessors-in-interest paid that fee. Moreover, since the foreclosure action was based on an improper acceleration of the loan, the Claim should be disallowed.

VIII. TAX AND INSURANCE ADVANCES

55. Debtor withdraws it Objection solely with regard to the portion of TCG's Claim for "Taxes Advances" in the amount of $299,360.93, which was set forth in its POC.

56. However, because TCG failed to properly amend its POC, Debtor objects to the additional amount of $350,883.14, which his set forth in TCG's "Updated Payoff Amount" calculation under the renamed category "Tax and Insurance Advances," which increased the Claim to $650,244.07.

IX. YIELD MAINTENANCE DEFAULT PREMIUM CALCULATION

57. Debtor withdraws it Objection to TCG's "Yield Maintenance Default Premium" ("YMDP") Claim calculation, based on TCG's recent assertion, in its opposition, that its approximate $1.2 million pay down from Debtor's Lockbox was applied against principal.

X. PAYOFF FEE

58. TCG fails to provide any evidence to support its Processing Fee Claim ($2,650.00), which was first asserted in its untimely "Updated Payoff Amount" calculation. The Claim should be disallowed.

XI. LATE FEES

59. In its opposition, TCG expressly waived its Late Fees Claim for $88,214.65.

XII. LOCKBOX

60. TCG expressly concedes that there are certain funds in Debtor's Lockbox account (including the Amex payments) held by Wells Fargo (which Debtor believes totals $209,000). TCG claims it does not control the account, but agrees to work with Debtor to release those funds, or stipulate in a Court order for Wells Fargo to release them, to Debtor (*see* TCG's Memorandum, p. 40).

61. TCG fails to address Debtor's Cash Management Account, which also is controlled and maintained by Wells Fargo Bank, in the amount of $146,368.35. If TCG does not control that account, it should cooperate with Debtor for the release of such funds by Wells Fargo to Debtor.

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SILVERMAN ACAMPORA LLP

By: /s/
Kenneth P. Silverman, Esq.
100 Jericho Quadrangle, Suite 300
Jericho, New York 11753
(516) 479-6300
KSilverman@SilvermanAcampora.com

- and –

WILK AUSLANDER LLP

By: /s/
Alan D. Zuckerbrod, Esq.
1515 Broadway, 43rd Floor
New York, New York 10036
(212) 981-2200
azuckerbrod@wilkauslander.com

Co-Counsel for Debtor, 1141 Realty Owner LLC