UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
	Case No. 18-12341 (SMB)
1141 Realty Owner, LLC, *et al.*,	(Jointly Administered)
Reorganized Debtors.	

STATEMENT OF MATERIAL UNDISPUTED FACTS
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

This Statement of Material Undisputed Facts pursuant to Rule 56, Federal Rules of Civil Procedure, Bankruptcy Rule 7056 and Local Rule 7056-1 is filed on behalf of TCG Debt Acquisitions 2 LLC (hereinafter, "Lender"), as successor to RMEZZ Flatiron, LLC, and Wilmington Trust, N.A. ("Wilmington Trust," solely in its capacity as Trustee for the benefit of the Registered Holders of Wells Fargo Commercial Mortgage Trust 2015-C28, Commercial Mortgage Pass-Through Certificates, Series 2015-C28) on a motion for partial summary judgment with respect to the Debtor's Objection to Lender's Proof of Claim ("POC"), ECF Doc. 129 etc. and the Administrative Proof of Claim filed on behalf of Lender.

Lender relies on the Declaration of Michael K. Shah filed October 22, 2019 (ECF Doc. No. 196) with Exhibits as supplemented by the Declaration of Michael K. Shah filed contemporaneously herewith (Shah SJ Decl.) and Exhibits annexed thereto. Additionally, Lender relies on the Exhibits annexed to (i) its POC as well as (ii) Debtor's Objection to the Lender's POC.

FACTUAL BACKGROUND

THE LOAN DOCUMENTS

1. On April 16, 2015, 1141 Realty Owner, LLC, ("Debtor" or "Borrower") borrowed an aggregate of $25 million from the originating predecessor lender, Rialto Mortgage Finance LLC ("Rialto") and executed a Loan Agreement with Rialto ("Loan Agreement"), setting forth certain rights and obligations of the Debtor and Rialto,[1] and Promissory Note A ("A Note") in the amount of $22.5 million and Promissory Note B ("B Note," and together with A Note, the "Notes") in the amount of $2.5 million, as well as other related financing documents.[2]

2. As described in Schedule II to the Loan Agreement, the principals of the Debtor were Jagdish "Jay" Vaswani (hereinafter, "Vaswani") and Robert K.Y. "Toshi" Chan (hereinafter, "Chan").

3. The Debtor also executed a Consolidated, Amended and Restated Mortgage, Assignment of Leases and Rents, Fixture Filing and Security Agreement with Rialto ("Mortgage"), which pledged the Hotel as collateral for the sums due under the Notes and the Loan Agreement, and which set forth certain rights and obligations of the Debtor and Rialto.[3]

4. The Debtor also executed an Assignment of Leases and Rents, and a UCC-1 financing statement (the "Financing Statement").[4]

5. The Mortgage, Assignment of Leases and Rents and the UCC-1 Financing Statement were recorded on June 17, 2015 with the New York City Register and ACRIS.[5]

[1] Shah SJ Decl. Ex. 1; POC, Ex. A, Loan Agreement.
[2] Shah SJ Decl. Ex. 2; POC, Ex. B, Promissory Notes.
[3] Shah SJ Decl. Ex. 3; POC, Ex. C, Mortgage.
[4] POC, Ex. D, Financing Statement.
[5] Shah SJ Decl. Ex. 3; , Mortgage; POC, Ex. F, Assignment of Leases and Rents; POC, Ex. G, Financing Statement Amendment.

6. Additionally, the Debtor entered into a Management Agreement (the "Management Agreement") with You Gotta Have Faith Realty, LLC (the "Original Manager"), executed on behalf of the Original Manager by its sole owner, Chan.[6]

7. The Debtor, Rialto, and the Original Manager executed an Assignment of Management Agreement and Subordination of Management Fees (the "Assignment of Management Agreement"), which assigned the Management Agreement to Rialto. [7]

8. In furtherance of the loan origination, relevant parties also entered into the Agreement Regarding Liquor Licenses (the "Liquor License Agreement").[8]

9. The Liquor License Agreement was executed between and among the Debtor, Rialto and two entities solely owned and controlled by Chan: 9 West 26th St. Rest., LLC ("9 West") and Toshi's Penthouse Inc. ("Toshi's Penthouse," and together with 9 West, the "Chan Liquor Licensees").[9]

10. The Loan Agreement defines "Loan Documents" as "collectively, this Agreement, the Note, the Security Instrument, the Assignment of Leases, the Environmental Indemnity, the Assignment of Management Agreement, the Guaranty, the Clearing Account Agreement, the Cash Management Agreement, the Liquor License Cooperation Agreement and all other documents executed and/or delivered in connection with the Loan."

[6] Shah SJ Decl. Ex. 4; Objection, Ex. G, Management Agreement.
[7] Shah SJ Decl. Ex. 5; Shah Decl. Ex. 55
[8] Shah SJ Decl. Ex. 6; Objection, Ex. P, Liquor License Agreement. Together, the Loan Agreement, A Note, B Note, Mortgage, Assignment of Leases and Rents, Financing Statement, Cash Management Agreement, Guaranties, Management Agreement, Assignment of Management Agreement, Liquor License Agreement, and all ancillary, collateral, financing, and security documents signed therewith, the "Loan Documents."
[9] Shah SJ Decl. Ex. 6. The Chan Liquor Licensees are defined in Section 1.1.2 of the Loan Agreement, and the term "Liquor License" is also defined in the Loan Agreement to mean three separate liquor licenses held by the two Chan Liquor Licensees.

11. On May 21, 2015, Rialto thereafter executed a series of assignments of the Loan Documents to Wilmington Trust, which also provided that Wells Fargo Bank, N.A. ("Wells Fargo") would service and administer the A Note under Section 8.3 of the Loan Agreement.[10]

12. The B Note was assigned to a different entity, RMEZZ Flatiron LLC.

13. On May 18, 2018, the B Note holder, RMEZZ Flatiron LLC, assigned its interest in the B Note and all corresponding Loan Documents to TCG Debt Acquisitions 2 LLC. On April 18, 2019, Wilmington Trust, as Trustee and on behalf of the underlying beneficial holders, assigned their interests in the A Note and the associated Loan Documents to TCG Debt Acquisitions 2 LLC.[11]

14. Under Section 2.2.1 of the Loan Agreement, interest at the Default Rate accrues upon the occurrence of an event of Default as provided in pertinent part:

> Upon the occurrence and during the continuance of an Event of Default, (a) the Note A Outstanding Principal Balance and, to the extent permitted by law, overdue interest in respect of the Note A, shall accrue interest at the Note A Default Rate, and (b) the Note B Outstanding Principal Balance and, to the extent permitted by law, overdue interest in respect of the Note A, shall accrue interest at the Note B Default Rate. The Default Rate shall be computed from the occurrence of the Event of Default until the earlier of the date upon which the Event of Default is cured or the date upon which the Debt is paid in full.

15. Section 7.1 of the Loan Agreement provides, in pertinent part, for certain Events of Default for which no notice is required and for which there is no opportunity to cure:

[10] All references to Wilmington Trust, N.A., are solely in its capacity as Trustee for the benefit of the Registered Holders of Wells Fargo Commercial Mortgage Trust 2015-C28, Commercial Mortgage Pass-Through Certificates, Series 2015-C28. Rialto sold its position in the A Note as commercial mortgage backed securities (commonly referred to as CMBS), and Wilmington Trust was to act as a fiduciary on behalf of the underlying investors in servicing the loan.

[11] A copy of this Assignment was filed at ECF Doc. No. 173.

> Section 7.1 Event of Default. Each of the following events shall constitute an event of default hereunder (an "Event of Default"): (i) if any portion of the Debt is not paid on or before the date the same is due and payable or if the entire Debt is not paid on or before the Maturity Date; (ii) if any of the Taxes or Other Charges is not paid prior to the date the same becomes delinquent except to the extent sums sufficient to pay such Taxes and Other Charges have been deposited with Lender in accordance with the terms of this Agreement; . . . (v) if any representation or warranty made by Borrower or any Guarantor herein or in any other Loan Document, or in any report, certificate, financial statement or other instrument, agreement or document furnished to Lender shall have been false or misleading in any material respect as of the date the representation or warranty was made; . . . (xii) if, without Lender's prior written consent, any required license, permit, including, without limitation the Liquor License, relating to the Property ceases to be in full force and effect;

16. Such automatic Events of Default have occurred as described below, and, as a result, interest at the Default Rate began to accrue upon the occurrence of such Event of Default.

ACCELERATION OF THE LOAN AND THE COMMENCEMENT OF THE FORECLOSURE ACTION AND BANKRUPTCY CASE

17. By letter of September 15, 2017, Lender issued a Notice of Default/Notice of Acceleration.[12]

18. Lender commenced an action in United States District Court for the Southern District of New York by filing a Verified Complaint on September 18, 2017 (Civ. No. 17-7081) ("the Foreclosure Action).

19. Lender issued a Notice of Additional Defaults by letter of October 11, 2017.[13]

20. Lender issued a Notice of Additional Events of Default by letter of December 7, 2017.[14]

[12] Shah SJ Decl. Ex. 27
[13] Shah SJ Decl. Ex. 28
[14] Shah SJ Decl. Ex. 29

21. Lender filed an Amended Verified Complaint in the Foreclosure Action on December 7, 2017.

22. The Debtor and its affiliate filed a Chapter 11 petition on July 31, 2018.

UNPAID TAXES AND OTHER CHARGES

23. The Debtor failed to pay water and sewer charges imposed on the Property, resulting in liens upon the property for such charges as early as March 22, 2016, and such unpaid charges and liens upon the Property continued at all times until July 12, 2019, when the Debtor's account with the New York City Department of Environmental Protection ("NYC DEP") was finally brought to a zero balance in conjunction with the Debtor's Confirmed Plan of Reorganization.

24. Section 4.1.2 of the Loan Agreement provides that "Borrower shall pay all Taxes and Other Charges nor or hereafter levied or assessed or imposed against the Property or any part thereof as same become due and payable . . . ."

25. Section 1.1.2 of the Loan Agreement defines "Taxes" as "all real estate and personal property taxes, assessments, water rates [sic] or sewer rents, now or hereafter levied or assessed or imposed against the Property or part thereof."

26. Section 7.1(ii) of the Loan Agreement further provides that it is an Event of Default "if any of the Taxes or Other Charges is not paid prior to the date the same becomes delinquent. . . ."

27. No prior notice or opportunity to cure is required for an Event of Default under Section 7.1(ii) of the Loan Agreement, and default interest accrues as of the date of such failure to pay Taxes and Other Charges.

28. There is no "materiality" qualifier or requirement with respect to an Event of Default under Section 7.1(ii) of the Loan Agreement for failure to pay real estate and personal property taxes, assessments, water rates or sewer rents.

29. While other default provisions in Section 7.1 of the Loan Agreement such as Section 7.1(v) relating to false representations or warranties that impose a "materiality" requirement on certain Events of Default, Section 7.1(ii) contains no such limitation with respect to unpaid water or sewer charges.

30. Under New York City Administrative Code Section 11-301, unpaid water and sewer charges shall be a lien on the assessed real property until such charges are paid. Specifically, Section 11-301 states:

> When taxes, assessments, sewer rents, sewer surcharges and water rents to be liens on land assessed. All taxes and all assessments and all sewer rents,[15] sewer surcharges and water rents,[16] and the interest and charges thereon, which may be laid or may have heretofore been laid, upon any real estate now in the city, **shall continue to be, until paid, a lien thereon**, and shall be preferred in payment to all other charges.[17]

31. New York Public Authorities Law, Article 5, Title 2-A, § 1045-j provides that such water and sewer charges, if not paid when due, shall constitute a lien upon the subject real property.[18] New York Public Authorities Law expressly provides that:

---

[15] The words "sewer rents" when used in this chapter shall mean any rents or charges imposed pursuant to section 24-514 of the code or pursuant to the New York City municipal water finance authority act, which is set forth in title two-A if article 5 of the public authorities law. New York City Administrative Code, § 11-301.

[16] The words "water rents" whenever they are used in this chapter shall include uniform annual charges and extra and miscellaneous charges for the supply of water, charges in accordance with meter rates minimum charges for the supply of water by meter, annual service charges and charges for meters and their connections and for their setting, repair and maintenance, penalties and fines and all lawful charges for the supply of water imposed pursuant to section 24-514 of the code or pursuant to the New York City municipal water finance authority act, which is set forth in title two-A if article 5 of the public authorities law. New York City Administrative Code, § 11-301.

[17] New York City Administrative Code, § 11-301 (Emphasis added).

[18] New York Public Authorities Law, Article 5, Title 2-A, 1045-j.

> [s]uch fees, rates, rents or other charges, if not paid when due, **shall constitute a lien upon the *premises* served** and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as would unpaid taxes of the city. Such lien shall take precedence over all other liens or encumbrances, except taxes, and may be foreclosed against the lot or building served in the same manner as a lien for such taxes.[19]

32. All unpaid water and sewer charges on the Property constitute a lien on the Property as a matter of law.

33. All unpaid water and sewer charges on the Property fall within the definition of "Taxes" set forth in Section 1.1.2 of the Loan Agreement.

34. The Affidavit of Theresa Sparano of S.J. Carroll Jr., Inc. with attached Accounts Receivable Transaction History for the water charges due upon the Property ("Water Account History") is annexed as Shah SJ Decl. Ex. 7.[20]

35. The Water Account History is for the account of the Debtor and relates to charges for water service at the Property for the Debtor's account with the NYC DEP.

36. The Water Account History shows the charges, payments and running balance of unpaid charges for the period June 15, 1995 through December 4, 2019.

37. As shown by the Water Account History, the Debtor's account had an unpaid balance of $7,784.90 as of March 22, 2016, which amount was a lien upon the Property, and which continuously increased up to $44,283.98 thereafter. Water Account History p. 13.

38. ***At all times between March 22, 2016 and July 12, 2019*** the Debtor's account for water charges remained past due. Water Account History p. 2-13.

[19] New York Public Authorities Law, Article 5, Title 2-A, 1045-j (Emphasis added).
[20] For ease of reference, Lender has numbered the pages of said Water Account History.

39. As a matter of law, such outstanding amounts constituted a lien from at least March 22, 2016, and based upon the forgoing, Lender is entitled to interest at the Default Rate from March 22, 2016.

40. The New York City Department of Environmental Protection ("DEP") invoice, dated August 28, 2017 states that the Debtor "is now ***more than six months overdue*** on [its] water and sewer bill. Our records show that as of August 28, 2017 you owe $34,445.72 in unpaid water and sewer charges."[21]

41. This amount represented by the DEP corresponds precisely to the amount shown as past due as of August 21, 2017 on page 9 of the Water Account History. Those charges were for the running balance of amount due, extending back to March 22, 2016. Thus, water and sewer charges on the Property were overdue and constituted a lien on the Property from at least March 22, 2016.[22]

42. The Debtor entered into a Payment Agreement with the NYC DEP, dated December 13, 2017 (“Payment Agreement”).[23]

43. The Payment Agreement stated the then-outstanding balance of $44,283.98 for the service period from September 9, 2016 through September 14, 2017.[24]

44. This figure corresponds precisely to the amount shown as past due as of November 21, 2017 on page 9 of the Water Account History.

---

[21] Shah SJ Decl. Ex. 8, marked FI 006973 in discovery (Emphasis added).

[22] The DEP's website, *https://www1.nyc.gov/site/dep/pay-my-bills/overdue-water-sewer-charges.page* with respect to "Overdue Water & Sewer Charges" – "Lien Sale and Payment Agreement FAQs"–"What is Lien Sale" states that "[a]ll overdue water and sewer charges are considered a lien against your property" and that lien may be sold in a lien sale. The DEP Invoice, dated August 28, 2017 also warns that failure to make payment may result in "inclusion in the City's next 90 Day lien sale list and/or other Collections enforcement actions."

[23] Shah SJ Decl. Ex. 9; Shah Decl., Exhibit 40.

[24] Based on this service period beginning September 9, 2016, the first overdue payment which constitutes a lien on the Property is no later than December 1, 2016, following the typical thirty (30) day service period and billing.

45. The Payment Agreement also expressly indicated that "[u]npaid water and sewer charges constitute a lien against the property."[25]

46. By signing the Payment Agreement, the Debtor acknowledged its "acceptance of these terms and agreed that the charges on this account are valid and cannot be disputed."[26]

47. By signing and accepting the Payment Agreement with the NYC DEP, dated December 13, 2017, the Debtor acknowledged that water charges were past due and that such charges were a lien upon the Property.

48. The Debtor's own Accounts Payable Aging Report, dated as of August 15, 2017 shows a payable for water charges totaling $33,654.41 for invoices dating back to December 2016.[27]

49. This amount varies slightly from the true amount then due, as shown on page 9 of the Water Account History.

50. When Lender requested explanation of this amount, Vaswani admitted that it was a valid payable for water which needed to be paid.[28]

51. The documentary evidence establishes that the above-referenced water and sewer charges were unpaid and were a lien on the Property as a matter of law.

52. The existence of unpaid water charges on the Property from March 22, 2016 constitutes an Event of Default under the Loan Agreement that requires no notice period or opportunity to cure and requires the imposition of interest at the Default Rate from the earliest occurrence of such default, March 22, 2016.

[25] Shah SJ Decl. Ex. 9, p. 2, para. 2.
[26] Shah SJ Decl. Ex. 9, page 2, para. 5.
[27] Shah SJ Decl. Ex. 10.
[28] Shah SJ Decl. Ex. 16, pp. 3-4.

THE TERMINATION OF THE MANAGEMENT AGREEMENT, DEPARTURE OF CHAN AS MANAGER, AND SUBSEQUENT LIQUOR SALES AT THE PROPERTY

53. The Management Agreement was either terminated or had expired by its own terms as of December 31, 2015.

54. After December 31, 2015, Chan did not directly supervise the sale of liquor at the Property.

55. On May 9, 2017, Chan emailed Wells Fargo, Loan Servicer for the Lender, stating that he has had no part in management for two years.[29]

56. In an email of August 7, 2017 to Wells Fargo, Chan stated that the Management Agreement had been terminated by Vaswani in late 2015, and he had not been allowed to operate or manage the hotel for two years.[30]

57. Chan also stated that, after 2015, Vaswani was in "full control" of the Hotel.[31]

58. Upon the termination or expiration of the Management Agreement on December 31, 2015, the Debtor did not thereafter engage a "Qualified Manager" as defined under Loan Agreement, Section 1.1.1.

59. Upon the termination or expiration of the Management Agreement, Vaswani began providing food and beverage service (including the sale of liquor) through his own manager.[32]

[29] Shah SJ Decl. Ex. 11; Shah Decl., Ex. 32, Bates No. 2296.
[30] Shah SJ Decl. Ex. 12; Shah Decl., Ex. 37, Bates No. 5498. This was also stated under penalty of perjury in Chan's Declaration filed September 29, 2017 in the Foreclosure Action. Shah SJ Decl. Ex. 13; Shah Decl., Ex. 49, ¶6.
[31] Shah SJ Decl. Ex. 11; *see also* Shah SJ Decl. Ex. 15*;*
Shah Decl., Ex. 57, Bates No. 2088.
[32] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801.

60. On September 11, 2017 Vaswani disclosed to Wilmington's Special Loan Servicer that the operator and new manager of the hotel was an entity named 1141 Broadway Restaurant and Penthouse Operations LLC ("New Manager").[33]

61. Said New Manager was not a "Qualified Manager" as defined under the Loan Agreement, Section 1.1.1.

62. Vaswani admitted that the New Manager was operating under Chan's Liquor Licenses.[34]

63. Vaswani admitted that for over two years the Debtor was using Chan's Liquor Licenses for sales of alcoholic beverages at the Hotel.[35]

64. Vaswani stated that "[the Debtor was] operating under a license issued to Robert Chan . . . . Discussions to add my name to the license are ongoing."[36]

65. Vaswani stated that 1141 Broadway Restaurant and Penthouse Operations, LLC, (an affiliate of the Debtor controlled by the Debtor's principal, Vaswani), was operating the food and beverage concessions at the Hotel.[37]

66. On August 4, 2017, the attorney for Chan and for the Hotel, Rod Biermann, Esq., advised Wells Fargo that, as a result of the termination of the Management Agreement and the cessation of Chan's management or involvement with the Hotel, the Hotel had been illegally selling liquor without an effective liquor license for over two years.[38]

---

[33] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801.
[34] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801.
[35] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801.
[36] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801. This was discovered through email by ***Vaswani's own admission***, on September 11, 2017.
[37] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801.
[38] *See* Shah SJ Decl. Ex. 17; Shah Decl., Ex. 29, Bates No. 2186; Biermann had previously reached out on July 25, 2017 to request an in-person meeting with Wells Fargo, likely to advise the servicer of these facts and issues. Shah SJ Decl. Ex. 18; Shah Decl., Ex. 33, Bates No. 2382.

67. Biermann provided details that there had been illegal sales of liquor since late 2015.[39]

68. In the Liquor License Agreement, the parties agreed that the Chan Liquor Licensees and Debtor would ***not*** transfer the Liquor Licenses without prior written notice and consent of Lender.[40]

69. Neither Vaswani, the Hotel, nor Vaswani's substitute New Manager held their own liquor license.[41]

70. At the time of the origination of the loan, the Debtor represented that beverage revenues constituted approximately one-third (30.6%) of the Hotel's annual expected revenue.[42]

71. Moreover, the parties agreed in the Liquor License Agreement, as additional consideration for the making of the Loan, "to continue to utilize the [Chan] Liquor Licenses and any other liquor, wine and beer licenses hereafter acquired under which alcoholic beverages are served at the Hotel or any portion thereof. . . ."[43]

72. The Debtors' sale of alcohol at the Property under the Chan Liquor Licenses is termed "availing," which is prohibited under Section 111 of the New York Alcoholic Beverage Control Law.

[39] *See* Shah SJ Decl. Ex. 17; Decl., Ex. 29, Bates No. 2186; *see also* Shah SJ Decl. Ex. 19; Shah Decl., Ex. 31, Bates No. 2199.
[40] *See* Shah Decl. SJ Ex. 6, Liquor License Agreement at ¶4.
[41] Shah SJ Decl. Ex. 16; Shah Decl., Ex. 41, Bates No. 6800-6801.
[42] Shah SJ Decl. Ex. 20; Shah Decl., Ex. 59. This Exhibit was the "Annual Budget" submitted as part of the Debtor's Certification, an exhibit to the Loan Agreement by the Debtor (signed and certified as true, complete, and accurate by Vaswani, as Debtor's manager) to the Lender's predecessors in connection with the origination of the loan, and projects 2015 year-end beverage revenue to be approximately $2,658,000 out of the Hotel's total revenue of $8,677,185, or 30.6%.
[43] Shah SJ Decl. Ex. 6, Liquor License Agreement, Recital ¶F.

73. Section 7.1(xii) of the Loan Agreement provides that it is an Event of Default "if, without Lender's prior written consent, any required license, permit, including without limitation the Liquor License, relating to the Property ceases to be in full force and effect."[44]

74. A default under Section 7.1(xii) of the Loan Agreement is an automatic Event of Default that requires no notice and requires no opportunity to cure to be furnished to the Debtor.

75. The absence of Chan as manager is fatal to the viability of the liquor license being "in full force and effect" as "relating to the Property." The Debtor's illegal use and availing of Chan's Liquor Licenses from at least January 1, 2016 was clearly and indisputably an Event of Default by reason of the Debtor's failure to maintain the Chan Liquor License "relating to the Property" in "full force and effect." Said default is automatic and no opportunity to cure was required to be furnished to the Debtor.

76. Accordingly, the Debtor was in default for failure to maintain Liquor Licenses relating to the Hotel in full force and effect from as early as August 2015 and, at the latest, January 1, 2016 and as a consequence Lender is owed default interest from January 6, 2016, as claimed.

FALSE CERTIFICATIONS

77. Section 7.1(v) of the Loan Agreement provides that the enumerated acts "shall constitute an event of default ('Event of Default')" including:

> (v) if any representation or warranty made by Borrower or any Guarantor herein or in any other Loan Document, or in any report, certificate, financial statement or other instrument, agreement or document furnished to Lender shall have been false or misleading in any material respect as of the date the representation or warranty was made.

[44] Shah SJ Decl. Ex. 1, Loan Agreement, §7.1 (Events of Default); §9.11 (Waiver of Notice).

78. The Debtor executed a number of documents captioned "Disbursement Request and Certification" to periodically obtain disbursement from the reserve account maintained by the loan servicer, Wells Fargo.

79. The Debtor executed a "Disbursement Request and Certification" dated January 26, 2016,[45] signed by "Robert Chan, CEO," to "induce Wells Fargo Bank N.A. as master servicer of the Loan for the Lender ("Lender") to make this disbursement [$36,140]; Borrower hereby certifies as follows:

* * *

- No Default or Event of Default as defined in the Loan Document(s) currently exists."

80. Subsequent Disbursement Requests and Certifications were executed by the Debtor and transmitted to Wells Fargo on April 5, 2016 seeking a disbursement of $36,140;[46] September 26, 2016 seeking a disbursement of $150,170;[47] January 17, 2017 seeking a disbursement of $1,555.81;[48] and February 17, 2017 seeking a disbursement of $210,179.94.[49]

81. The Certifications signed by the Debtor include both a representation of no "Default" as well as no "Event of Default."

82. Thus, any defaults which had not yet become "Events of Default" (in addition to certain automatic Events of Default) came within the express scope of the representation and warranty of the Certificate signed by the Debtor.

83. As early as January 26, 2016, there were defaults as well as "Events of Default" under the Loan Documents including the failure to pay sales taxes and occupancy taxes as

[45] Shah SJ Decl. Ex. 21, Bates No. 1965
[46] Shah SJ Decl. Ex. 22; Bates No. 617.
[47] Shah SJ Decl. 23; Shah Decl. Ex 26, Bates No. 2157.
[48] Shah SJ Decl. 24; Shah Decl. Ex 48, Bates 14029.
[49] Shah SJ Decl. 25; Shah Decl. Exhibit 56, Bates 2105.

required under the Management Agreement, Section 1.03(13). Additional defaults included the termination of the Management Agreement by year-end 2015 and failure to replace the manager with a "Qualified Manager," the resultant illegal sales of liquor and the "availing" of Chan's liquor license by the Debtor (a non-curable Event of Default), and the failure to comply with insurance sections of the Loan Agreement, as well as the failure to deposit cash in the cash management account.[50]

FALSE CERTIFICATION AS TO MANAGEMENT AGREEMENT

84. It is undisputed that as of December 31, 2015, there was no effective Management Agreement.

85. The Declaration of Chan dated September 27, 2017[51] recites that he was terminated as manager in August 2015.

86. Vaswani contends that the Management Agreement simply terminated according to its terms on December 31, 2015.

87. The absence of Chan as manager is fatal to the viability of the liquor license being "in full force and effect" as "relating to the Property," an incurable Event of Default. Further, the substitution of someone other than a "Qualified Manager" is impermissible under the Management Agreement.

88. The Management Agreement provided that "the operation of the Hotel shall be under the exclusive supervision and control of [Original] Manager, in consultation and oversight of Owner."[52]

89. Under the terms of the Management Agreement, the "Original Manager," You Gotta Have Faith LLC, controlled and directed exclusively by Chan, was to control and

[50] Shah SJ Decl. Ex. 30; Declaration of Kevin Semon ¶¶13-24 filed 9/25/17 in the Foreclosure Action
[51] Shah SJ Decl. Ex. 13; Exhibit 49.
[52] Shah SJ Decl. Ex. 4, Management Agreement, §1.02.

supervise the management and operation of the Property. This was important because Chan had been the person with experience in managing a hotel profitably.

90. The Management Agreement further provided in Section 1.03(A)(10)(11) that the Original Manager is obligated to provide food and beverage services" and to "obtain and keep in full force and effect. . . any and all operating licenses and permits" which included liquor licenses.

91. The Assignment of Management Agreement provided, *inter alia*, at Paragraph 3 that "[Original] Manager and Borrower agree not to amend, modify, replace, substitute, cancel or terminate the Management Agreement without Lender's prior written consent,"[53] except upon the occurrence of a "bona, fide, material event of default" by Original Manager, in which case the Borrower must replace the Manager with a "Qualified Manager." Assignment of Management Agreement, ¶3 provides, in part:

> 3. * * * Manager and Borrower agree not to amend, modify, replace, substitute, cancel or terminate the Management Agreement without Lender's prior written consent; provided, however, that Borrower may, without Lender's consent (A) terminate the Management Agreement in the event of a bona fide, material event of default by the Manger under the Management Agreement so long as the Borrower replaces Manager with a Qualified Manager in accordance with the Loan Agreement, or (B) replace Manager with a Qualified Manager pursuant to a Replacement Management Agreement or extend the term of any existing Management Agreement, in each case with no increase to the management fees payable for the property.

92. Moreover, the Loan Agreement expressly provides that if the Management Agreement expires in accordance with its terms, the Borrower is required to promptly enter into

[53] Shah SJ Decl. Ex. 5; Shah Decl., Ex. 55, Assignment of Management Agreement, §3**.** Although the Debtor was permitted to replace the Original Manager in the event of a *bona fide* material event of default, the Debtor was required to replace the Original Manager only with a defined "Qualified Manager." Shah SJ Decl. Ex. 1, Loan Agreement, §1.1.1.

a Replacement Management Agreement with a Qualified Manager. Loan Agreement Section 4.1.8 provides:

> In the event that the Management Agreement expires or is terminated (without limiting any obligation of Borrower to obtain Lender's consent to any termination or modification of the Management Agreement in accordance with the terms and provisions of this Agreement), Borrower shall promptly enter into a Replacement Management Agreement with a Qualified Manager.

93. The terms "Qualified Manager" as well as "Rating Agencies" and "Rating Agencies Confirmation" are defined terms under the Loan Agreement:

> **"Qualified Manager"** shall mean a reputable and experienced manager (which may be an Affiliate of Borrower) that is not a Prohibited Person and that, in the reasonable judgment of Lender, possesses experience in managing properties similar in location, size, class, use, operation and value as the Property; provided, that Borrower shall have obtained (a) a Rating Agency Confirmation from the Rating Agencies and (b) if such Person is an Affiliate of Borrower, an Insolvency Opinion reasonably acceptable to Lender and acceptable the Rating Agencies in their sole discretion.
>
> **"Rating Agencies"** shall mean any NRSRO, including those designated by Lender to assign a rating to the Securities.
>
> **"Rating Agency Confirmation"** shall mean written confirmation from each Rating Agency designated by Lender to assign a rating to any Securities that any particular act or omission shall not result in downgrade, withdrawal or qualification of the then current ratings assigned to any ratings of the Securities or the proposed rating of any Securities. In the event that, at any given time, no Rating Agency has elected to consider whether to grant or withhold such an affirmation, then the term "Rating Agency Confirmation" shall be deemed instead to require the written approval of Lender based on its good faith determination of whether the Rating Agencies would issue a Rating Agency Confirmation; provided that the foregoing good faith standard shall be inapplicable in any case in which Lender has an independent approval right in respect of the matter at issue pursuant to the terms of this Agreement.

94. Likewise, "Replacement Management Agreement" is a defined term in the Loan Agreement:

> **"Replacement Management Agreement"** shall mean, collectively, (a) either (i) a management agreement with a Qualified Manager substantially in the same form and substance as the Management Agreement, or (ii) a management agreement with a Qualified Manager, which management agreement shall be reasonably acceptable to Lender in form and substance, and (b) an assignment of management agreement substantially in the form of the Assignment of Management Agreement (or such other form reasonably acceptable to Lender), executed and delivered to Lender by Borrower and such Qualified Manager at Borrower's expense.

95. Even if the Management Agreement expired by its own terms on December 31, 2015, there is no dispute that there was no consent by the Lender to the termination, and the Debtor did not enter into a "Replacement Management Agreement" as required by the Loan Agreement including the requirement that Original Manager be substituted by "Qualified Manager" defined to require a Ratings Agency Confirmation and an Insolvency Opinion.

96. If the new manager operated under a different agreement, the Lender would have had to approve that new agreement (be reasonably acceptable to Lender in form and substance). Lender could not approve a new agreement that was concealed by the Debtor, if there was such a written agreement.

97. The termination of the Original Manager was concealed from the Lender, however. Mr.Vaswani admitted in an email dated September 11, 2017 to loan servicer:

> Q. Who is operating the F&B at the hotel and provide a copy of the license for this entity or individual to sell liquor?
>
> A. 1141 Broadway Restaurant and Operations LLC is the entity operating the F&B 90% owned by Jugdish Vaswani and 10% owned 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.[54]

98. The termination of the Management Agreement, whether in August 2015 or by year-end 2015, was a default under the Loan Agreement and Management Agreement and Assignment of the Management Agreement.

99. The termination of the Management Agreement by the end of 2015 without complying with requirements of notice and consent of the Lender and replacement by a "Qualified Manager" was a separate default under the Loan Documents.

100. The Debtor's certification on January 26, 2016 that "No Default or Event of Default as defined in the Loan Document(s) currently exists" was clearly false.

101. The false representation as it pertained to the Management Agreement was material. The efficacy of the management of the Hotel directly impacts the financial condition and operations of the Hotel and affects the Lender's collateral.

102. The Debtor's false certification was an Event of Default under Section 7.1(v) of the Loan Agreement, which required no prior notice or opportunity to cure.

FALSE CERTIFICATIONS AS TO OCCUPANCY TAX AND SALES TAX

103. Section 1.03 of the Management Agreement provides for "Management Responsibilities" with respect to the Hotel, including the payment of sales and occupancy taxes:

> 13. Collect and account for and remit to governmental authorities, at Manager's expense, all applicable excise, sales, occupancy and use taxes and all other taxes, assessments, duties, levies and charges imposed by any governmental authority and collectible by the Hotel directly from patrons or guests (including those based on the sales price of any goods, services, or displays, gross receipts or admission).[55]

[54] Shah SJ Decl. Ex. 16; Bates No. 6800-6801.

[55] Shah SJ Decl. Ex. 4; Shah Decl., Exhibit 55.

104. Section 9.01 of the Management Agreement captioned "Events of Default" provides that "Each of the following shall constitute an "Event of Default" under this Agreement:

> D. The failure of either party to make any payment required to be made in accordance with the terms of this Agreement, as of the due date as specified in this Agreement if the default party failure to cure such default without twenty (20) days after the due date thereof.

105. The Assignment of Management Agreement incorporates the Management Agreement which, itself, is one of the documents executed and delivered in connection with the Loan.

106. The term "Loan Documents" is defined in the Loan Agreement as:

> "Loan Documents" shall mean, collectively, this Agreement, the Note, the Security Instrument, the Assignment of Leases, the Environmental Indemnity, the Assignment of Management Agreement, the Guaranty, the Clearing Account Agreement, the Cash Management Agreement, the Liquor License Cooperation Agreement and all other documents executed and/or delivered in connection with the Loan.

107. The Debtor's own Accounts Payable Aging Report as of August 15, 2017,[56] is an admission of unpaid occupancy taxes due to the New York City Department of Finance as of 2015[57] including:

Due Date	**Invoice Date**	**Amount**
11/20/2015	10/20/2015	$25,135.95
12/20/2015	11/30/2015	$26,006.52
1/20/2016	12/21/2015	$20,152.28

[56] Shah SJ Decl. Ex. 10; Exhibit 24, Bates 2108 et al.
[57] Shah SJ Decl. Ex. 10; Bates No. 2117.

108. The Debtor's Accounts Payable Report admitted that by Invoice Number 112015 dated November 30, 2015, with a due date of December 1, 2015, the amount of $23,282.10 in sales tax was owed to the New York State Department of Taxation and Finance.[58]

109. These amounts, due in 2015, still had not been paid as of August 15, 2017.

110. A Financial Statement of Account issued by the New York City Department of Finance on September 6, 2017[59] notes that as of the date of that Statement, there was a balance due for Hotel Tax (Occupancy Tax) of $180,794.62 which was "warranted with the county clerk," *i.e.*, a lien. For the filing period of 11/30/2015, the Hotel Tax due was $70,292.23 of which there remains due (as of September 6, 2017) $56,709.53. This unpaid tax was a "warranted with the county clerk," *i.e.*, a lien which constituted an "Event of Default" under Section 7.1(ii) of the Loan Agreement.

111. The Debtor's failure to pay sales and occupancy taxes, as required under the Management Agreement (which is incorporated into the Loan Documents), is an Event of Default.

112. The Debtor's representation on January 26, 2016 that there was no default or Event of Default under the Loan Documents was false.

113. Thus, irrespective of whether the failure to pay almost $100,000 in sales tax and occupancy tax due in 2015 was a "default" or "Event of Default," the representation by the Debtor on January 26, 2016 that there were no defaults or Events of Default as of that date was demonstrably false—by the Debtor's own admission.

[58] Shah SJ Decl. Ex. 10; Bates No. 2118.
[59] Shah SJ Decl. Ex. 14.

114. Even as of April 5, 2016 and September 26, 2016, the next-dated Certifications, there were outstanding occupancy taxes and sales taxes including the unpaid taxes as of 2015 cited above:

Occupancy Taxes:

Due Date	**Invoice Date**	**Amount**
2/20/2016	1/20/2016	$25,819.75
3/20/2016	2/20/2016	$9,751.72
4/20/2016	3/20/2016	$14,072.75

Sales Taxes:

Due Date	**Invoice Date**	**Amount**
3/21/2016	3/20/16	$30,209.00
9/1/2016	8/31/2016	$9,775.88

115. The sales tax was understated by the Debtor in its accounts payable report.

116. In the Department of Taxation and Finance Consolidated Statement of Tax Liabilities dated November 15, 2017,[60] the assessed Sales Tax for the period ended August 31, 2016 was $109,775.88, and, as of November 15, 2017, there remained outstanding $89,861.29 after credits for interim payments.

117. The omission of such unpaid sales tax and occupancy tax from the Certifications submitted by the Debtor to Lender for disbursement of funds was a false representation of a material fact which was integral to the sound financial management of the hotel and preservation of the Lender's collateral.

[60] Shah SJ Decl. Ex. 26; Shah Decl. Exhibit 47, Bates No. 10970.

DEFAULT INTEREST BEGINS TO ACCRUE UPON AN EVENT OF DEFAULT

118. The Loan Agreement unambiguously provides that interest shall accrue at the Default Rate as of the date of the occurrence of any Event of Default. Section 2.2.1 of the Loan Agreement states: "the Default Rate shall be computed from the occurrence of the Event of Default until the earlier of the date upon which the event of default is cured or the date upon which the Debt is paid in full."

119. Section 1.1.2 of the Loan Agreement separately defines "Note A Default Rate" and "Note B Default Rate" and each provides that it is "the lesser of (i) the Maximum Legal Rate, or (ii) five percent (5%) above the [Note A or Note B] Applicable Interest rate.

LENDER IS ENTITLED TO REIMBURSEMENT OF REASONABLE ATTORNEYS FEES AND EXPENSES

120. Section 9.13 of the Loan Agreement requires the Debtor to pay Lender:

> for all reasonable costs and expenses (***including reasonable attorneys' fees*** and disbursements) incurred by Lender in connection with Borrower's ongoing performance of and compliance with Borrower's agreements and covenants contained in the Loan Documents . . . enforcing or preserving any rights [of the Lender] . . . enforcing any Obligations of or collecting any payments due from Borrower or Guarantor under the Loan Documents . . . in connection with any . . . Bankruptcy Action…(emphasis added).[61]

121. Section 5.6 of the Mortgage provides:

> Borrower agrees to pay ***all attorneys' fees and expenses incurred or paid by Lender*** in protecting its interests in the property, in collection of any amounts payable, or in enforcing its rights, whether or not a legal proceeding is commenced, ***together with interest thereon at the Default Rate from the date paid or***

[61] Shah SJ Decl. Ex. 1, Loan Agreement, Section 9.13.

incurred by Lender until such expenses are paid by Borrower."
(emphasis added).[62]

122. Lender has previously submitted the time charges and disbursements of Lender's Counsel Sidley Austin LPP, as well as Backenroth, Frankel & Krinskey LLP; Tarter Krinsky & Drogin LLP; and Woods Oviatt Gilman LLP.

123. Such submissions are subject to this Court's review and determination as to reasonableness as to both pre-petition services and post-petition services rendered.

Dated: Buffalo, New York
December 13, 2019

WOODS OVIATT GILMAN LLP

By: */s/ William F. Savino*
Williams F. Savino
Co-Counsel for
TCG Debt Acquisition 2 LLC
1900 Main Place Tower
Buffalo, New York 14202
(716-248-3200)

And

BACKENROTH FRANKEL & KRINSKY, LLP

By: /*s/Mark A. Frankel*
Mark A. Frankel
Co-Counsel for
TCG Debt Acquisition 2 LLC
800 Third Avenue
New York, New York 10022
(212) 593-1100

[62] Shah SJ Decl. Ex. 3, Mortgage Section 5.6.