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	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

This Memorandum of Law ("Summary Judgment Motion") is filed on behalf of TCG Debt Acquisitions 2 LLC (hereinafter, "Lender"),[1] in support of its motion for partial summary judgment on certain issues raised by the Objection (the "Objection") of 1141 Realty Owner, LLC (the "Debtor") (ECF Doc. No. 198) to the Lender's Proof of Claim (ECF Doc. No. 129) (the "Proof of Claim").

PRELIMINARY STATEMENT

Lender seeks a determination as a matter of law that it is entitled to interest at the Default Rate under the Loan Agreement[2] as a result of certain "Events of Default" for which neither notice nor any opportunity to cure were required, and that such Default Interest accrues as of the date of the Events of Default. The facts underlying the defaults and Events of Default are unequivocal and undisputed, include: (a) failure to timely pay New York City water and sewer charges resulting in statutory liens against the subject property; (b) allowing the Liquor Licenses to no longer be in full force and effect relating to the Property as a result of the expiration or termination of a Management Agreement from no later than January 1, 2016; and (c) issuing

[1] Lender is 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).
[2] Shah SJ Decl. Ex. 1

false Certifications requesting disbursement of significant, additional funds by the Lender at a time when there were outstanding defaults and Events of Default under the Loan Documents, including the concealed termination of the Management Agreement and the failure to pay substantial sums owed for sales tax and occupancy tax. Even after the Debtor and its new principals have been made aware of ***hundreds of thousands*** of pages of discovery produced in the preceding foreclosure lawsuit,[3] and the true extent of the prior principals' deceitful and concealing behavior, the Debtors have not even attempted to dispute the factual basis of the Lender's default interest claims – indeed, the Debtors' have not even requested to see this discovery.

Lender further seeks a determination that its declarations of defaults and Events of Default are not limited by the "mend the hold" doctrine or estoppel by reason of its contractual and explicitly stated reservations of rights in the Loan Documents and the declarations themselves. The Debtor's defense falsely and unconvincingly asserts that Lender cannot recover default interest because these defaults were supposedly not the basis of the acceleration of debt and resulting prior foreclosure action. This defense must fail as a matter of law.Finally, Lender seeks a determination that its contractual attorneys' fees and expenses, both pre-petition and post-petition, are due and owing and will be reimbursed under the Loan Documents, subject to this Court's determination as to their reasonableness.

BACKGROUND

Lender was the holder of a first mortgage loan (the "Debt") against the Debtor with a lien on, *inter alia*, the premises located at 9 West 26th Street, a/k/a 1141 Broadway, New York, New

[3] The hundreds of thousands of pages of discovery were produced by Wilmington Trust, N.A., its special server (Midland Loan Servicers), and Lender's predecessor counsel (Sidley Austin LLP), the borrower (1141 Realty Owner LLC), and its former principals (Vaswani and Chan). The Debtor showed its plain ignorance of the extent of discovery and the contested nature of the prior foreclosure suit by claiming that "virtually no discovery had occurred, except for mandatory initial disclosures . . . ." Debtor's Claim Objection, Docket No. 186, pg. 27.

York (the "Property"), also doing business as the Flatiron Hotel (the "Hotel").[4] On April 16, 2015, the Debtor borrowed an aggregate of $25 million from Lender's predecessor in interest, Rialto Mortgage Finance LLC, as evidenced by two Promissory Notes (Notes A and B), a Loan Agreement, and Loan Documents as defined therein. The principals of the Debtor are Jagdish Vaswani ("Vaswani") and Robert K.Y. "Toshi" Chan ("Chan"). Chan's wholly owned entities held liquor licenses which were utilized by the Hotel under a Management Agreement which was assigned to Lender's predecessor as additional collateral security.

As noted, during the course of the operation of the Hotel, there were numerous defaults and "Events of Default" under the Loan Agreement and Loan Documents, which culminated in a Notice of Default and Notice of Acceleration by letter of September 15, 2017, and commencement of a mortgage foreclosure action by Verified Complaint filed on September 18, 2017.[5] A Notice of Additional Defaults was issued on October 11, 2017, and an Amended Verified Complaint was filed on December 7, 2019. During the Foreclosure Action, Magistrate Judge Pittman conducted a four-day contested evidentiary hearing on the Debtor's civil contempt in connection with the failure to comply with funding stipulations, and issued an eighty-page Certification of Facts, Conclusions of Law and Proposed Remedies on July 11, 2018 recommending contempt sanctions and that the Debtor reimburse the Lender's attorneys' fees and expenses for a significant period, but the Debtor (and an affiliate) filed their chapter 11 cases on July 31, 2018.

Lender filed a Proof of Claim on November 2, 2018 stating a claim of no less than $32,048,285.28, updated claims based on Lender's acquisition of an additional promissory note,

[4] The Debtor confirmed a Chapter 11 plan of reorganization by Order of May 9, 2019. Pursuant to the Debtor's chapter 11 plan of reorganization, the lien was removed and a fund set aside to pay the anticipated claims of Lender.
[5] The Foreclosure Action was captioned Wilmington Trust, N.A.. v. 1141 Realty Owner LLC, Civ. No. 17-7081 filed in United States District Court for the Southern District of New York.

and an Administrative Proof of Claim filed on June 14, 2019. Once the Lender purchased the A Note from its predecessor, Lender provided an updated payoff amount per request to the Debtor prior to the confirmation of its chapter 11 plan and its Effective Date.

The Debtor filed objections to the Lender's Proof of Claim, and Lender submitted opposition. Lender incorporates by reference the opposing Declaration of Michael K. Shah with Exhibits filed October 22, 2019 as well as its Proof of Claim with Exhibits and Administrative Claim with Exhibits. In support of this motion for partial summary judgment, Lender also relies on a Declaration of Michael K. Shah filed contemporaneous herewith as well as documents annexed or referred to in that Declaration.

I. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[6] The movant bears the initial burden of demonstrating that the undisputed facts entitle it to judgment as a matter of law.[7]

"If the movant carries this initial burden, the nonmoving party must set forth specific facts that show triable issues, and cannot rely on pleadings containing mere allegations or denials."[8] In determining whether triable factual issues exist, "all ambiguities must be resolved and all inference must be drawn in favor of the nonmoving party."[9]

[6] Fed. R. Civ. P. 56(a); *see* Fed. R. Bankr. P. 7056(a).
[7] *In re Sultan Realty, LLC*, 2012 WL 661845*3 (Bankr. S.D.N.Y. 2012).
[8] *Id*., citing *Matushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-97 (1986).
[9] *Id*., citing *Matushita Elec.*, 475 U.S. at 587.

Based upon the undisputed material facts, Lender is entitled to partial summary judgment as a matter of law for interest at the Default Rate as of January 6, 2016[10] and contractual attorneys' fees and expenses, subject to this Court's review of reasonableness.

II. LENDER IS ENTITLED TO DEFAULT INTEREST AS A MATTER OF LAW FROM JANUARY 1, 2016 BASED UPON THE OCCURRENCE OF NUMEROUS EVENTS OF DEFAULT FOR WHICH NO NOTICE OF DEFAULT OR OPPORTUNITY TO CURE WAS REQUIRED

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 and not on a later Notice of Default or acceleration of the Debt.[11] Here, Lender is entitled to interest at the Default Rate from January 1, 2016 as a matter of law based on automatic Events of Default including (i) the failure to pay water charges which resulted in a lien against the Property; (ii) the failure to maintain the Liquor Licenses in full force and effect; and (iii) making false Certifications in requests made to the Lender to disburse funds, as described herein. There is no triable fact as to the occurrence of these Events of Default. Thus, the Lender should be granted partial summary judgment for interest at the Default Rate from January 1, 2016.

In *In re 1111 Myrtle Ave. Group, LLC*, the Bankruptcy Court allowed default interest which accrued upon an "event of default," notwithstanding that no notice was required under the loan documents.[12] " The Bankruptcy Court noted that "Default interest is triggered immediately upon the event of default, because that event represents a shift in risk for repayment of the debt, which cannot subsequently be 'cured.'"[13]

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[10] Lender's Proof of Claim relied upon January 6, 2016 as a conservative date by which the earliest Event of Default occurred. Reference herein is to January 1, 2016, which is the actual date of such Event of Default.
[11] Section 2.2.1 of the Loan Agreement provides: "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."
[12] 598 B.R. 729 (Bankr. S.D.N.Y. 2019).
[13] *Id*. 737.

Here, it is clear that Events of Default existed under the Loan Agreement as of January 1, 2016, which did not require notice of default or opportunity to cure,[14] and based upon the occurrence of any one of the Events of Default, Lender is entitled to interest at the Default Rate as a matter of law both pre-petition and post-petition. In considering the lender's entitlement to pre-petition default interest in *In re 785 Partners LLC*, this Court stated that "an event of default or the maturity of the debt will often trigger a higher interest rate . . . . [and] a higher default interest rate reflects the allocation of risk as part of the bargain struck between the parties, a bargain that benefits the obligor as well as the obligee."[15]

Regarding the applicable interest rate, Section 1.1.2 of the Loan Agreement separately defines the "Note A Default Rate" and the "Note B Default Rate," but each provides that it is the "the lesser of (i) the Maximum Legal Rate, or (ii) five percent (5%) above the [Note A or Note B] Applicable Interest Rate." In *785 Partners*, this Court considered the binding effect of the agreement between sophisticated parties, and concluded:

> Here, there is no basis in law to disturb the parties' bargain. The Debtor and the Original Lenders were sophisticated parties that entered into an $84 million real estate loan agreement. Each was represented by counsel, and there is no evidence of overreaching. They agreed to allocate the risk by, among other things, including an unambiguous provision ***that increased the non-Default rate by 5% in the event of a default***.[16]

The increase of 5% over the non-Default rate in the event of default was enforced in *785 Partners*, and the Court noted that "under New York Law, the 5% differential between the non-

[14] Section 9.11 of the Loan Agreement is a waiver of notice. except as specifically provided in the Agreement.
[15] 470 B.R. 126, 131-132 (Bankr. S.D.N.Y. 2012); *see also Sultan Realty*, 2012 WL 6681845 *6.
[16] 470 B.R. at 132 (Emphasis added).

Default and Default Rate falls within the range of reasonableness."[17] The same contractual increase in the applicable interest rate exists in the instant Loan Agreement.[18]

In *785 Partners*, this Court rejected the debtor's contention that the imposition of default interest pre-petition would be inequitable.[19] This Court held that the debtor's "appeal to equitable considerations has no place under New York law."[20] Focusing upon the equities concerning the assignee's purchase of the loan, and time and effort expended in enforcing the loan was also improper because an assignee simply stands in the shoes of the assignor.[21] This Court continued that, "[e]ven where the default rate strikes the judge as high, a court cannot rewrite the parties' bargain based on its own notions of fairness and equity."[22] Accordingly, as in *785 Partners*, there is no triable issue of fact as to Lender's entitlement to pre-petition default interest.

Lender herein is also entitled to interest at the Default Rate post-petition as a matter of law. This Court has indicated several times that there is "a rebuttable presumption that the over-secured creditor is entitled to default interest at the contract rate, subject to adjustment based solely on equitable considerations."[23] This Court explained the narrow exception for adjustment as follows:

> [t]he power to modify the contract rate based on notions of equity should be exercised sparingly and limited to situations where the secured creditor is guilty of misconduct, the applicable of the contractual interest rate would harm the unsecured creditors or impair the debtor's fresh start or the contractual interest rate constitutes a penalty.[24]

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[17] 470 B.R. at 135.
[18] Debtor's attorney, Silverman Acampora LLP was also the debtor's attorney in *785 Partners*, thus it should be aware of this Court's rulings and clear guidance with respect to the applicability of the contract rate of interest.
[19] 470 B.R. at 131-133.
[20] 470 B.R. at 132; *see also Sultan Realty*, 2012 WL 6681845 *6.
[21] 470 B.R. at 133; *see also Sultan Realty*, 2012 WL 6681845 *6.
[22] 470 B.R. at 132.
[23] 470 B.R. at 134; *see also Sultan Realty*, 2012 WL 6681845 *6; *see also In re Madison 92nd St. Assocs. LLC*, 472 B.R. 189, 198 (Bankr. S.D.N.Y. 2012)
[24] 470 B.R. at 134; *see also Sultan Realty*, 2012 WL 6681845 *6; *see also Madison 92nd St. Assocs.*, 472 B.R. at 198-199

In *785 Partners*¸ the debtor failed to offer proof that the Default Rate "would harm the unsecured creditors or impair its fresh start,"[25] and continued: "[t]o the contrary, the Debtor proposes to pay the unsecured creditors in full and permit equity to retain their interests. Thus, the Debtor is solvent, and the reluctance to modify the contract interest rate is especially strong where the debtor is solvent."[26] The sum to cover the default rate of interest is currently on deposit in escrow. There is no basis to adjust the Default Rate of interest rate post-petition. As stated by this Court in *785 Partners* and *Sultan Realty*, "[r]educing the contract rate of interest payable by a solvent debtor would unfairly grant a windfall to its equity."[27]

Accordingly, Lender is entitled to default interest as early as January 1, 2016 as asserted in its claim.[28]

To the extent Debtor argues that the Lender breached the Loan Agreement and is not entitled to default interest, such argument fails as a matter of law. Lender did not breach the Loan Agreement by declaring an Event of Default or accelerating the loan because, in fact, defaults and Events of Default had occurred under the Loan Agreement as described herein,[29] and again, no notice or opportunity for cure was required for such defaults. As stated above, it is also clear as a matter of law that the Lender reserved its rights and did not waive its rights to assert additional defaults.

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[25] 470 B.R. at 134.
[26] *Id*.
[27] *Id*.; *see also Sultan Realty*, 2012 WL 6681845 *7.
[28] Although the Lender is entitled to default interest from as early as August 2015, the Lender's predecessors asserted default interest from January 6, 2016, as a conservative date. The Court would be well-justified to award default interest from before that date.
[29] Lender reserves the right to assert other defaults and Events of Default that occurred almost immediately after origination of the loan which are not relied upon herein in order to narrow the issues for this Motion for Summary Judgment.

The Debtor has made conclusory assertions in this matter that Lender's "bad faith" and "predatory practices" are equitable reasons to deny default interest.[30] Lender, however, accelerated the debt based upon *inter alia*, the Debtor's failure to maintain the Liquor Licenses with respect to the Property, and failure to pay outstanding Taxes and Other Charges when due. As of August 2017, when the Lender accelerated the loan, numerous Events of Defaults had occurred. There was no "concocted"[31] default or delay; rather, Debtor withheld and concealed its failure to maintain the Liquor Licenses in full force and effect and pay Taxes and Other Charges ***for nearly two years***! The Lender was even forced to make unanticipated and significant out-of-pocket advances for taxes and insurance as demonstrated in its Proof of Claim. In *785 Partners*, this Court indicated that the Lender minimized the Debtor's risks, which included monitoring the effects of the Debtor's default and making protective advances without assurance they would be paid.[32] Lender's acceleration was the last resort in a reasonable attempt to secure its collateral position.

Accordingly, it is clear that Lender is entitled to pre-petition and post-petition interest at the Default Rate as a matter of law. The Debtor cannot demonstrate a triable issue of fact with respect to the narrow grounds identified by this Court for modifying the contract default interest rate.

A. MULTIPLE DEFAULTS OCCURRED FOR WHICH NO NOTICE WAS REQUIRED AND WHICH DID NOT REQUIRE A CURE PERIOD AS EARLY AS JANUARY 6, 2016

[30] Objection, ¶67. Debtor's argument that the Lender's predecessor "intentionally withheld funds" as a show of bad faith ignores the fact that a Cash Sweep Event occurred under the Cash Management Agreement and the Loan Agreement. . The Debtor's undue reliance on the decision of the District Court in connection with the Lender's emergency motion for a receiver is misplaced. As this Court observbed in the most recent hearing, the granting or denial of a provisional remedy is not an adjudication on the merits and will not be given res judicata or collateral estoppel effect. *Coinmach Corp. v. Fordham Hill Owners Corp*., 3 A.D.3d 312, 314 (1st Dep't 2004).

[31] Objection, ¶67. There was no need to "concoct" a default when several defaults and Events of Default did, in fact, exist.

[32] 470 B.R. at 136, ftn. 6.

1. THE FAILURE TO PAY WATER CHARGES CONSTITUTE AN EVENT OF DEFAULT FOR WHICH NO NOTICE OR TIME TO CURE IS REQUIRED

The documentary evidence clearly establishes that the Debtor failed to pay water charges that were due for the Property 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 was finally brought to a zero balance as a result of the confirmed Plan of Reorganization. The law is clear that such water charges are a lien upon the Property from the moment when they are ***assessed***, not when unpaid. The Debtor's failure to pay such water charges was an Event of Default under the Loan Agreement that required no notice or cure period. As such, the Loan Agreement and applicable law requires the imposition of default interest from the earliest date of such Event of Default, which is March 22, 2016.

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 . . . ."

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."

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. . . ." No prior notice or opportunity to cure is required for this Event of Default, and default interest accrues as of the date of such failure to pay Taxes and Other Charges.

Importantly, there is no "materiality" qualifier or requirement with respect the default for failure to pay real estate and personal property taxes, assessments, water rates or sewer rents. While other default provisions in Section 7.1 impose a "materiality" requirement on certain

Events of Default,[33] Section 7.1(ii) contains no such limitation with respect to unpaid water charges.

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, sewer surcharges and water rents, 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.[34](emphasis added).

New York Public Authorities Law, Article 5, Title 2-A, § 1045-j (5) also provides that such water and sewer charges, if not paid when due, shall constitute a lien upon the subject real property and "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."[35]

Accordingly, all unpaid water and sewer charges on the Property constituted a lien on the Property as a matter of law. Moreover, such water charges clearly fall within the definition of "Taxes" set forth in Section 1.1.2 of the Loan Agreement.

The Declaration of Theresa Sparano of S.J. Carroll Jr., Inc.[36] attached Accounts Receivable Transaction History for the water charges due upon the Property ("Water Account History").[37] The Water Account History is for the account of the Debtor with the New York City

[33] For example, the Event of Default concerning false certifications requires such false certification to be "materially false," thus evidencing the ability of the drafters to distinguish between the intent to use material thresholds, and where such intent was absent.
[34] New York City Administrative Code, § 11-301.
[35] New York Public Authorities Law, Article 5, Title 2-A, 1045-j.
[36] Shah SJ Decl. Ex. 7.
[37] For ease of reference, Lender has numbered the pages of said Water Account History.

Department of Environmental Protection ("NYC DEP") and relates to charges for water service at the Property. The Water Account History shows the charges, payments and running balance of unpaid charges for the period June 15, 1995 through December 4, 2019.

As shown by the Water Account History, the Debtor's account with the NYC DEP had an unpaid balance of $7,784.90 as of March 22, 2016, which amount was a lien upon the Property and ballooned up to $44,283.98 thereafter.[38] At all times in the relevant period between March 22, 2016 and July 12, 2019 the Debtor's account for water charges remained past due.[39] Based upon the forgoing, Lender is entitled to default interest from March 22, 2016.

The NYC 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."[40](emphasis added). This amount 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 as early as March 22, 2016. Thus, water and sewer charges on the Property were overdue and constituted a lien on the Property as early as March 22, 2016.

The Debtor continually failed to pay such water and sewer charges, eventually necessitating it to enter into a Payment Agreement with the NYC DEP on December 13, 2017.[41] The Payment Agreement stated the then outstanding balance of $44,283.98 for the service period from September 9, 2016 through September 14, 2017. This figure corresponds precisely to the amount shown as past due as of November 21, 2017 on page 9 of the Water Account History. The Payment Agreement also expressly indicated that "[u]npaid water and sewer charges

[38] Water Account History p. 13.
[39] Water Account History p. 2-13.
[40] Shah Decl. Ex. 3.
[41] Shah SJ Decl. Ex. 9.

constitute a lien against the property."[42] 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."[43]

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 thus constituting an Event of Default for purposes of calculating Lender's claim. 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. Moreover, the New York City Department of Environmental Protection ("DEP") invoice, dated August 28, 2017[44] clearly states that the Debtor was ***more than*** six months overdue on its water and sewer bill. The failure to pay such liens constitutes an Event of Default under the Loan Agreement and requires the imposition of default interest from the earliest date of such default, March 22, 2016.

2. <u>THE LIQUOR LICENSE DEFAULT CONSTITUTES AN EVENT OF DEFAULT FOR WHICH NO NOTICE OR TIME TO CURE IS REQUIRED</u>

The first Event of Default under the Loan Agreement was in August 2015, as soon as Vaswani (secretly) terminated the Management Agreement and removed Chan as the Original Manager,[45] or, at the latest, December 31, 2015 when the Management Agreement expired, and Chan was no longer the Original Manager. At that point, the Liquor Licenses held or controlled by Chan[46] were no longer "in full force and effect" "relating to the Property." Vaswani admitted that the Hotel was thereafter selling liquor using Chan's Liquor Licenses,[47] but Chan, whose

[42] Shah SJ Decl., Ex. 9, p. 2, para. 2.
[43] Shah SJ Decl., Ex. 9, page 2, para. 5.
[44] Shah SJ Decl. Ex. 8.
[45] See Declaration of Chan, 9/27/2017, annexed as Shah SJ Decl. Ex. 13.
[46] The Liquor Licenses are defined in Section 1.1.2 of the Loan Agreement to mean three separate liquor licenses held by two Chan Liquor Licensees: 9 West 26th St. Rest. LLC, and Toshi's Penthouse, Inc. They are collectively referred to herein as "Chan Liquor Licenses."
[47] Shah SJ Decl. Ex. 16.

management role was terminated, did not supervise or oversee the liquor sales. This constituted unlawful "availing" under the New York Alcoholic Beverage Control Law ("ABCL).

The Debtor's contention that the Chan Liquor Licenses may not yet have been revoked does not provide any viability of those Liquor Licenses for the Property because only Chan's direct supervision and control of the use of the Liquor Licenses was permissible under the ABCL Any other use of the Liquor Licenses by another entity is unlawful "availing" prohibited under Section 111 of the ABCL even if, as contended by the Debtor, Chan held a 10% interest in the successor manager who purported to serve liquor using Chan's Liquor Licenses. An absentee owner who does not directly supervise or control the liquor operations does not satisfy the ABCL. The Chan Liquor Licenses cannot be "in full force and effect" if their use is unlawful "relating to the Property."

Section 7.1(xii) of the Loan Agreement states that the Debtor shall be in 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.***

(emphasis added). Section 9.11 of the Loan Agreement provides for a "Waiver of Notice" except as to matters in which notice is specifically required by the Loan Agreement or any other Loan Documents. Thus, no notice was required for the declaration of default under Section 7.1(xii) with respect to the Chan Liquor Licenses, and default interest is properly imposed as of the date of the termination of the Management Agreement.[48]

New York ABCL §111 is captioned "License to be confined to premises licensed."[49] Violations of ABCL §111 are called "availing." As described in the statute, the license is not

[48] Section 7.2 of the Loan Agreement provides a broad reservation of rights and remedies available to the Lender.

[49] Section 111 of the ABCL provides:

> A license issued to any person, pursuant to this chapter one hundred eighty of the laws of nineteen hundred thirty-three or this chapter, for any licensed premises ***shall not be transferrable*** to any other

transferrable and "it shall be available only to the person therein specified, and only for the premises licensed, and no other except if authorized by the authority . . . ."

The website of the New York State Liquor Authority ("SLA") describes availing as follows:

> Availing occurs when the licensee turns control of the business over to an undisclosed party without any direction, supervision or oversight by the licensee, even if the undisclosed party does not profit from the use of the license. Availing may involve a failure to disclose an individual's interest in the business at the time the application is submitted to the Authority or failure to disclose the transfer of an interest.[50]

An application for a liquor license elicits very specific information, including, as to a corporation, the name, place of incorporation, place of business, other names known, addresses of its directors, officers and shareholders, the street and number of the premises to be used and drawings or photographs of the interior where the liquor will be sold.[51] Additionally, the SLA must "carefully evaluate the character, fitness, experience, maturity and financial responsibility of each applicant in determining whether public convenience and advantage would be served by approve of the application."[52]

In *Cleveland Place Neighborhood Ass'n v. New York State Liquor Auth.*, the First Department made it clear that "a license to sell liquor at retail for consumption where sold is issued to a ***specified person*** solely for use upon specified premises."[53] Here, the SLA issued liquor licenses to specified entities wholly owned by Chan, for ***use by Chan alone***.

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person or to any other premises or to any other part of the building containing the licensed premises except in the discretion of the authority. ***It shall be available only to the person therein specified***, and only for the premises licensed and no other except if authorized by the authority.
(emphasis added).

[50] *https://sla.ny.gov/frequent-violations-abc-law-retailers*

[51] ABCL §110.

[52] 9 CRR-NY §48.7. Background and criminal checks are conducted on underlying principals.

[53] 288 A.D.2d 6, 9 (1st Dep't 2000) (emphasis added).

The Third Department recently construed the "availment" provision of ABCL Section 111. In *Matter of Alla Capital Dev. Corp. v. New York State Liq. Auth.*, a Russian citizen hired an attorney to help her obtain an "investor visa" to enable her to move to New York.[54] The attorney formed a restaurant and applied to the SLA on behalf of the Russian citizen for a liquor license. The SLA later determined that the attorney had "availed himself" of the liquor license by managing the business without permission of the Authority. The Appellate Court held: "[c]ontrary to petitioner's assertions, a licensee may not make its liquor license available to another by leaving the licensed premises under the control of an individual or entity without 'direction, supervision or oversight,' even where that person receives no financial benefit."[55] The license was cancelled. Here, Chan was similarly uninvolved in the Hotel's sale of liquor after his termination no later than December 31, 2015. Chan provided no "direction, supervision or oversight" of liquor sales.

In *Happy Landing Lounge v. State Liquor Auth.*, the owner of a small bar left two individuals "in total control" while he left the country to care for his ailing mother in Jamaica.[56] The owner "provided no direction, supervision or oversight of the business during his sojourns, leaving the affairs and finances of the bar in the unfettered discretion of [his friends],"[57] and, though they tended the bar as volunteers without compensation, the owner was held to permit his friends "to avail themselves of its liquor license in contradiction of Alcohol Beverage Control Law 111."[58] The Appellate Court affirmed cancellation of the liquor license and a $1,000 penalty forfeiture of the bond.

[54] 160 A.D.3d 270 (3d Dep't 2018).
[55] 160 A.D.3d at 1271.
[56] 219 A.D.2d 786 (3d Dep't 1995).
[57] 219 A.D.2d at 786.
[58] 219 A.D.2d at 787.

In *De Leon v. New York State Liquor Authority*,[59] the petitioner-licensee contracted to sell the licensed premises, and, prior to the closing, the contract purchaser "was in possession of and operating the premises without petitioner's involvement." The First Department found the petitioner (owner) guilty of availing; his license was revoked and the State Liquor Authority imposed a $1,000 bond forfeiture.

Contrary to the Debtors' assertions, applicable case law concerning liquor licenses and availment makes clear that the Chan Liquor Licenses need not to have been suspended or revoked for the Debtor's use of such licenses to constitute "availing". In *Happy Landing*, the owner of the liquor license was still the owner while his friends were tending the bar as volunteers in the owner's absence, and in *De Leon*, the contract purchaser was operating the premises without the owner's involvement. In each case, these acts were held an unlawful availing. Vaswani's liquor sales were just as unlawful, and the contention that Chan still held a 10% interest in the new manager does not save Vasawani because, as in *Happy Landing* and *De Leon*, the Hotel's liquor sales were availed by another entity while Chan had no personal supervision or control of the liquor sales.

As noted, Section 111 of the ABCL prohibits the transfer of a license issued to any person "except in the discretion of the authority." In *Cleveland Place Neighborhood Ass'n*, the First Department explained that "the principal purpose of section 111 has been said to be the prevention of undesirable persons, ineligible to secure a license, from operating a liquor business through another licensee as a 'blind.'"[60] The act of availing undermines the State Liquor Authority's regulation and oversight over who enjoys the privilege of benefitting from the liquor

[59] 181 A.D.2d 546 (1st Dep't 1992)
[60] 268 A.D.2d at 11.

license.[61] Indeed, a formal transfer of the license to Vaswani after Chan's Management Agreement was terminated had been discussed, but not made, as the Borrower was counseled against an attempt to transfer the license.[62]

There are cases which recognize that until the State Liquor Authority suspends or revokes a liquor license, the ***licensee*** may continue to operate under the license.[63] ***However, neither the Debtor nor Vaswani was a licensee between the summer of 2015 and September 2017***. Further, not only did the Borrower ***not*** have Chan's permission to use the Liquor Licenses, Chan could ***not*** have legally given Vaswani permission.[64] Yet, that is exactly what Vaswani admitted: "***We are still operating under the hotel license issued to Robert Chan under 9 W 26th LLC***."[65]

By reason of the Borrower's unlawful sales of liquor, it placed the Hotel at risk of a two-year proscription by the SLA which would prohibit any liquor sales at the premises.[66] Further, the Debtor was not free from criminal liability for illegally selling alcoholic beverages, as such a violation is a criminal misdemeanor.[67]

Lender should not, and cannot, be forced to be complicit to a crime and look the other way while the Debtor illegally sold alcoholic beverages, thereby risking a two-year proscription on relicensing, greatly diminishing the value of its collateral, the Hotel and the Property. It would be an absurd result if the Court were to rule that the Debtor and its white knight capital could evade the payment of Default Interest, despite the blatant and admitted commission of a

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[61] 9 CRR-NY §48.7. Background and criminal checks are conducted on underlying principals.
[62] *See* Chan Declaration , Shah Exhibit 49 ¶8
[63] *See, e.g.*, *Brenner v. Bruckman*, 253 A.D. 607, 609 (1st Dep't 1938). The Debtor also cites to *Kelly v. Casale*, but fails to appreciate the distinction that only the designated licensee may continue to serve liquor. *See Kelly v. Casale*, 263 A.D.2d 889. Vaswani was not a licensee at the time in question.
[64] That would be unlawful "availing" as described in *Happy Landing Lounge v. State Liquor Auth*., *supra*, in which the bar-owner-licensee left operations in the hands of volunteer-friends.
[65] *See* Shah SJ Decl. Ex. 16 (emphasis added).
[66] *See, e.g., 17 Cameron St. Restaurant Corp. v. N.Y. State Liquor Auth*., 48 N.Y. 2d 509 (1979).
[67] Section 130 of the ABCL provides that, "[a]ny person who . . . sells alcoholic beverages . . . without having an appropriate license therefore . . . shall be guilty of a misdemeanor . . . ." and subject to fine or imprisonment.

crime, simply because the Debtor and Vaswani weren't caught in the act. Without the Management Agreement and Chan's active involvement, the Debtor had no effective liquor license "in full force and effect" that was "relating to the Property." Thus, the Event of Default was properly declared by the Lender, and Default Interest is properly imposed from the date of the termination of the Management Agreement, which clearly marked the end of Chan's direct supervision of the food and beverage operations, including the liquor sales.

The Debtor also argues that it was not ***obligated*** to serve alcoholic beverages at the Hotel.[68] Yet, ***Vaswani himself admitted that he did, in fact, serve alcoholic beverages using Chan's Liquor Licenses***, implicitly admitting such illegality since 2015.[69] Further, such argument ignores the plain language requirement in Section 4.1.9 of the Loan Agreement, which states that the "Borrower shall cause the hotel located on the Property to be operated as a boutique hotel and other appurtenant and related uses, ***in substantially the same manner as operated as of the Closing Date***,." Such language is not mere surplusage, as the Debtor suggests,[70] but corroborates the continued valid use of Liquor Licenses, consistent with applicable state laws and regulations, in furtherance of the legal sale of alcoholic beverages to preserve the Lender's collateral and the underwritten revenue stream associated with liquor sales.[71] The Debtor could not have ceased liquor sales at the Property, which was projected to

[68] *See* Objection, ¶55.

[69] In response to a question by Wells Fargo as to who is operating the food and beverage operations at the Hotel, Vaswani responded: "1141 Broadway Restaurant and Penthouse Operations LLC is the entity operating the F&B 90% owned by Jagdish 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." (emphasis added). *See* Shah SJ Decl. Ex. 16.

[70] *See* Objection, ¶ 56. As aforementioned, the Court should be hesitant to blue pencil words out of an arms'-length agreement, especially as negotiated between sophisticated parties that were represented by counsel. *U.S. Bank N.A. v. GreenPoint Mtg. Funding, Inc*., 157 A.D.3d 93,100 (1st Dep't 2017).

[71] The purpose of the Liquor Licenses, as described in the Agreement Regarding Liquor Licenses (defined to mean two Liquor Licenses held by 9 West 26 and one by Toshi's Penthouse, Inc., Loan Agreement §1.1.1), was to provide "additional consideration for the making of the Loan by Lender," by which "the Borrower and Licensee have agreed to provide cooperation and assistance to Lender to (1) continue to utilize the Existing Liquor Licenses. . . ." Loan Agreement, Recital F. Further, section 4.1.1 of the Loan Agreement provides that "Borrower will continuously . . .

account for 30% of the Hotel's revenue, and yet continue to operate in a "substantially similar" manner.[72] The Debtor's proposed result would also be in direct violation of the Section 4.1.1(iv) of the Loan Agreement, which prohibited the Debtor from engaging in or knowingly permitting any illegal activities at the property.

Thus, the termination of Chan's active involvement as manager no later than year-end 2015 caused Chan's Liquor Licenses to no longer be "in full force and effect" "with respect to the Property." Vaswani's unlawful continued use of Chan's licenses cannot save the Borrower from the Event of Default for which no notice was required or cure permitted and the imposition of Default Interest from at least December 31, 2015.

Lender was not aware that the existing Management Agreement had been terminated or replaced until its servicer questioned Vaswani by email of September 8, 2019 that "I still do not have clarity as to the F&B management and operations," and the first question was "Who is operating the F&B at the hotel and provide a copy of the license of this entity or individual to sell liquor?"[73]

Further, the Loan Agreement at Section 9.5 contained a "no waiver" clause which provides that "Neither any failure nor delay on the part of Lender in . . . exercising any right, power, remedy or privilege hereunder . . . shall operate as or constitute a waiver thereof." Such "no waiver clauses" are routinely enforced under New York law." *Chase Manhattan Bank v. Motorola, Inc.*[74] Further, Loan Agreement Section 9.20 provides that "such Loan Documents shall not be subject to the principle of construing their meaning against the party which drafted

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keep in full force and effect all material licenses . . . . necessary for the continued use and enjoyment of the Property." Without Chan and his Licenses, the Debtor lacked a necessary legal license for the "continued use and enjoyment" of the Property.

[72] Shah SJ Decl. Ex. 20 is the "Annual Budget" submitted as part of the Borrower's Certification at the origination of the Loan projected beverage revenues to constitute 30.6% of the Hotel's revenues.

[73] Shah SJ Decl. Ex. 16.

[74] 184 F.Supp.2d 384, 395 (S.D.N.Y. 2002).

same." Thus, the doctrine of c*ontra proferentem* does not apply. The status of the Management Agreement and its termination was concealed from Lender, and Lender has not waived any rights to enforce remedies under the Loan Agreement arising from such a concealed act.

As such, no later than January 1, 2016, the Chan Liquor Licenses were no longer in full force and effect relating to the Property (*i.e*., the Hotel), and that lapse constituted an Event of Default which was not curable and for which no notice was required.

3. <u>THE FALSE CERTIFICATIONS CONSTITUTE AN EVENT OF DEFAULT FOR WHICH NO NOTICE OR TIME TO CURE IS REQUIRED</u>

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.

The Borrower executed documents captioned "Disbursement Request and Certification" periodically to obtain disbursement from the reserve account maintained by the loan servicer, Wells Fargo. The earliest such document that can be located is dated January 26, 2016[75] previously filed as Shah Exhibit 21 (ECF Doc. No. 196-21), signed by Robert Chan to "induce Wells Fargo Bank N.A. as master servicer of the Loan for the Lender ("Lender") to make this disbursement; [$36,140.00] Borrower hereby certifies as follows:

* * *

- No [d]efault or Event of Default as defined in the Loan Document(s) currently exists.

[75] Shah Decl. Ex. 7, Bates No. 1965

Subsequent Disbursement Requests and Certifications were executed by the Borrower and transmitted to Wells Fargo on April 5, 2016[76]; September 26, 2016[77]; January 17, 2017[78]; and February 17, 2017 making disbursement requests as a high as $210,179.94. Yet each such Certification falsely represented that there was "No Default or Event of Default".[79]

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 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 Borrower (a non-curable Event of Default). The false Certifications signed by the Borrower include both a representation of no "Default" as well as no "Event of Default." Thus, there were many defaults which had not yet become "Events of Default" (in addition to certain automatic Events of Default) but came within the express scope of the representation and warranty of the Certificate signed by the Borrower.

In *Chase Manhattan Bank v. Motorola, Inc*., 184 F. Supp.2d 384 (S.D.N.Y. 2002), the lender was held entitled to judgment against a guarantor on a $300 million obligation where the borrower made false certifications as to the status of the credit agreement. The certification that the borrower was obligated to sign represented, inter alia, that "No default under the Credit Agreement had occurred and was continuing."[80] The borrower falsely certified that there was no such default, but that was materially misleading.[81] The District Court held that the Event of

[76] Bates No. 617.
[77] Shah Decl. Ex 25, Bates No. 2157.
[78] Shah Decl. Ex 48, Bates 14029.
[79] Shah Decl. Exhibit 56, Bates 2105.
[80] 184 F.Supp.2d at 387.
[81] 184 F.Supp.2d 384.

Default would occur under the loan documents in said case if the certification or representations "shall prove to be incorrect in any material respect when made or deemed made."[82] Addressing materiality, the District Court held:

> A matter is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question"; or "(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Restatement of the Law 2d, Torts, § 538.*[83]

The District Court also held that "Iridium's issuance of a materially false Certificate itself was an Event of Default, triggering Motorola's duty to perform on its Guaranty." *Id*.

Unlike the complex issue in *Motorola* in which the borrower had to assess financial projections, the fact that the Borrower herein received occupancy tax and sales tax notices which it did not pay (and which it did not report) was a simple "black and white" issue.

In *Motorola*, the District Court cited to *State Street Trust v. Ernst*, 278 N.Y. 104 (1938) as to whether a certification was intentionally false:

> A representation certified as true to the knowledge of the [maker] when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the [representation]. In other words, heedlessness and reckless disregard of consequence may take the place of deliberate intention.[84]

Further, the District Court held that the lender in *Motorola* "had an unqualified right to an accurate Certificate" and was not obligated to do its own due diligence:

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[82] 184 F.Supp.2d at 388.
[83] 184 F. Supp.2d at 394.
[84] Id at 394.

> Chase had no obligation to perform due diligence, and was neither "responsible for nor had any duty to ascertain or inquire into (i) any statement, warranty, or representation made in or in connection with this Agreement or any other Credit Document, (ii) the contents of any certificate . . . delivered hereunder . .. [or] (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set herein."[85]

The District Court held that such "no waiver" clauses are routinely enforced under New York law. *Id*. Likewise, the Loan Agreement herein provides at Section 9.5 that "Neither any failure nor delay on the part of Lender in . . . exercising any right, power, remedy or privilege hereunder . . . shall operate as or constitute a waiver thereof."

The materiality of a false representation by the Borrower that sales taxes and occupancy taxes are not in default is almost self-evident. The Borrower sought leave of Wells Fargo to authorize disbursement of funds in amounts ***as high as $210,179.94***, and the improvidence of the Borrower in not paying substantial sums owed to taxing authorities would affect Wells Fargo "in determining his choice of action in the transaction in question."[86]

Further, the need for the Debtor's transparency and honesty as required in the Disbursement Request and Certification is also self-evident. The Court should not countenance the Debtor's deceitful efforts to conceal the lack of its compliance with Loan Document requirements, the concealment of which enabled the Debtor to plunge further into defaulting and duplicitous territory. A Borrower should not benefit by concealment of its misconduct or its omission to timely pay its obligations.

[85] 184 F.Supp.2d at 395.
[86] *Motorola*, 184 F.Supp.2d at 394.

A. **FALSE REPRESENTATION AS TO MANAGEMENT AGREEMENT**

It is undisputed that as of January 6, 2016, there was no effective Management Agreement.[87] The Declaration of Chan dated September 27, 2017[88] recites that he was terminated as manager in August 2015. The Debtor and Vaswani contend that the Management Agreement simply expired on December 31, 2015 – and no replacement Manager was approved. The removal of Chan as manager is fatal to the viability of the liquor licenses being "in full force and effect" as "relating to the Property," and constitutes an incurable Event of Default. Further, the substitution of someone other than a "Qualified Manager" is impermissible under the Management Agreement.

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 supervise the management and operation of the Property. The Management Agreement further provided in Section 1.03(A)(10)(11) that the Original Manager would provide food and beverage services" and "obtain and keep in full force and effect. . . any and all operating licenses and permits" which included liquor licenses.

As a condition of making the loan, and as additional collateral, the Lender required the Borrower to assign all right title and interest in the Management Agreement to the Lender. The Loan Agreement and the Assignment of Management Agreement prohibited the Borrower from terminating the Management Agreement without the Lender's consent, except upon the occurrence of a "bona, fide, material event of default" by Original Manager. Loan Agreement Section 4.1.11 and Assignment of Management Agreement, ¶3 provides, in part:

[87] Shah Decl. SJ Ex. 4..
[88] Shah SJ Decl. Ex. 13.

> 3. Manager and Borrower agree not to amend, modify, replace, substitute, cancel or terminate the Management Agreement without Lender's prior written consent . . .

Moreover, Section 4.1.8 of the Loan Agreement expressly provides that if the Management Agreement expires in accordance with its terms, the Borrower is required to promptly enter into a Replacement Management Agreement with a Qualified Manager.

The terms "Qualified Manager" as well as "Rating Agencies" and "Rating Agencies Confirmation" are defined terms under the Loan Agreement. Thus, a "Qualified Manager" is one who has experience in managing similar properties and is approved by a specific "Ratings Agency" and must receive an "Insolvency Opinion."

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

Chan's Declaration asserts that he was terminated as manager in August 2015.[89] But 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 Borrower 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.

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 Borrower, if there was such a written agreement. The termination of the Original Manager was concealed from the Lender, however. Vaswani admitted in an email dated September 11, 2017 to loan servicer:

[89] Shah SJ Decl. Ex. 13.

> 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 Jagdish 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.[90]

Chan stated in his Declaration, under penalty of perjury, that he had absolutely nothing to do with the entity 1141 Broadway Restaurant and Operations LLC.[91] The concealed 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. 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.

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. 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. 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.

[90] Shah SJ Decl. Ex. 16.
[91] Shah SJ Decl. Ex. 49, paragraph 10.

B. **FALSE CERTIFICATION AS TO OVERDUE OCCUPANCY TAX AND SALES TAX**

The Borrower's own Accounts Payable Aging Report as of August 15, 2017,[92] is an admission of unpaid occupancy taxes due to the New York City Department of Finance as of 2015[93] 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

In addition, the Borrower's Accounts Payable Report admitted the non-payment of the invoice dated November 30, 2015, with a due date of December 1, 2015 in the amount of $23,282.10 in sales tax owed to the New York State Department of Taxation and Finance.[94]

These amounts, due in 2015, still had not been paid as of August 15, 2017, thus the Borrower's representation on January 26, 2016 that there was no default under the Loan Documents was false.

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 Borrower in the Certification requesting disbursement of funds on January 26, 2016 that there were no "Defaults or Events of Default" as of that date was demonstrably false—by the Borrower's own admission.

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:

[92] Shah SJ Decl. Ex. 10, Bates 2108 et al.
[93] Bates No. 2117.
[94] Bates No. 2118.

Occupancy Tax:

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

The sales tax was understated by the Borrower in its accounts payable report. In the Department of Taxation and Finance Consolidated Statement of Tax Liabilities dated November 15, 2017,[95] 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.

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

> 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).[96]

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 defaulting party failure to cure such default without twenty (20) days after the due date thereof.

[95] Shah SJ Decl. Ex. 26, Bates No. 10970.
[96] Shah SJ Decl. Ex. 5.

Thus, the Debtor's failure to timely pay sales tax and occupancy tax constitutes an "Event of Default." The Certifications of the Debtor requesting the Lender to disburse funds to the Debtor were false as there was a "Default and Event of Default" under the Loan Documents.

III. NEITHER THE "MEND THE HOLD" DOCTRINE NOR PRINCIPLES OF ESTOPPEL PRECLUDE THE LENDER'S ASSERTION OF MULTIPLE EVENTS OF DEFAULT AS A BASIS FOR ACCELERATION OF THE LOAN

The Lender is entitled to assert all applicable remedies including all Events of Default and is not limited to those Events of Default identified in its September 15, 2017 Notice of Default and Notice of Acceleration, *i.e.,* the breach of the liquor license provision in Section 7.1(xii) and the failure to pay state and local taxes in Section 7.1(ii), automatic and non-curable Events of Default.

The Debtor cites, in error, to the doctrines of "mend the hold" as well as estoppel which it asserts would preclude the Lender's subsequent assertions of defaults. These doctrines, however, have no application because of the Lender's reservation of rights in the Loan Documents and in the initial declaration of default on September 15, 2017 which stated "the specific enumeration of default(s) contained in this Letter shall not constitute a waiver of any other default(s) which may not or hereafter exist under the Loan Documents." Similar reservations of rights and non-waiver are contained in Sections 7.2, 7.3 and 9.5 of the Loan Agreement and Article 6 of the Promissory Notes.

The "mend the hold" doctrine was first articulated in an 1877 decision by the United States Supreme Court in *Railway Co. v. McCarthy*.[97] The doctrine is described as prohibiting a party to a contract from taking one position, and, after litigation has begun, changing its ground.

[97] 96 U.S. 258 (1877).

In *Daiwa Special Asset Corp. v. Desnick*,[98] the lender terminated a lending agreement based on two grounds for default, but, when suit against the guarantor was later filed, the lender asserted an additional ground for termination. The guarantor argued that the lender was precluded from asserting such additional grounds based on the "mend the hold doctrine" The District Court questioned the viability of that doctrine but held that "Daiwa explicitly reserved its right to assert additional 'Defaults' or 'Events of Default' and thus the doctrine of 'mend the hold' is inapplicable."[99]

The Court in *Daiwa* also cited with approval to *Primetime 24 Joint Venture v. DirecTV, Inc.*,[100] in which that Court likewise noted that "DirecTV also expressly reserved its right to assert other grounds for terminating the agreement,"[101] and, thus, DirecTV was held not precluded from asserting multiple events of default "[102] Additionally, the District Court held that there was no prejudice by such action:

> In our case, ***given the defendant's reservation of other grounds at the time of termination***, the absence of any indication of adverse reliance by plaintiffs, and the reluctance of New York courts to indicate their acceptance of the mend-the-hold doctrine in such circumstances, we decline to preclude DirecTV from pleading additional grounds for having terminated the Agreement.[103]

An estoppel doctrine was recognized in *Leventhal v. New Valley Corp.*,[104] which held that a former employer's reasons for denial of a severance payment could not be later expended in defense of a lawsuit. Unlike the matter at bar, however, there was no reservation of rights in the original agreement or in the termination letter in *Leventhal*.

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[98] 2002 U.S. Dist. LEXIS 16164, * 13, fn. 1 (S.D.N.Y. 8/28/2002).
[99] 2002 U.S. Dist. LEXIS 16164, * 13-14.
[100] 2000 U.S. Dist. LEXIS 5022 (S.D.N.Y. 2000)
[101] 2000 U.S. Dist. LEXIS 5022, * 5.
[102] 2000 U.S. Dist. LEXIS 5033 at *30.
[103] 2000 U.S. Dist. LEXIS 5022, * 34-35 (Emphasis added).
[104] 1992 U.S. Dist. LEXIS 458 (S.D.N.Y. 1/17/1992)

The Debtor cited to *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*,[105] for a similar estoppel principle, but that holding by the Supreme Court was reversed by the Fourth Department, and, in any event, the underlying defaults in *Destiny USA* required notice and the opportunity to cure the Loan Agreement. In the instant action, there is no such notice requirement or opportunity to cure for the asserted Events of Default.

The mend-the-hold doctrine or similar principles of estoppel also has been considered in insurance litigation as applied to the insurer's defenses to coverage, but a reservation of rights preserves the option of the carrier. "As a matter of law, where an insurer reserves its rights, it can later disclaim on a different ground than the one set forth in its reservation of rights."[106]

Here, the explicit reservation of rights in the September 15, 2017 letter and in the Loan Documents preserved the right of the Lender to assert any and all additional events of default that may be applicable. To the extent that certain Events of Default were automatic, *i.e.*, could not be cured and no notice period was required, the Debtor suffered no prejudice. Certain other Events of Default were asserted in the Amended Verified Complaint only after the Debtor failed to cure defaults after applicable notice. Thus, the Debtor was not prejudiced by those assertions of defaults either.

In any event, the Lender's explicit reservation of rights permits it to assert all applicable Events of Default against the Debtor for purposes of fixing Lender's claim in the chapter 11 claims reconciliation and determination process, which is a critical distinction that the Debtor fails to appreciate.

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[105] 24 Misc.3d 1222(A), 897 N.Y.S.2d 669 (Sup. Ct. Onondaga Co. 1/17/2009), *mod.* 69 A.D.3d 212 (4th Dep't 2009)

[106] *Bovis Lend Lease (LMB) Inc. v. Lower Manhattan Dev. Corp.*, 2015 N.Y. Misc. LEXIS 1347, *23 (Sup. Ct. N.Y. Co. 4/16/2015) citing, *inter alia*, *Federated Department Stores, Inc., v. Twin City Fire Ins. Co.*, 28 A.D.3d 32, 38 (1st Dep't 2006).

IV. LENDER IS ENTITLED TO FULL RECOVERY OF ITS PRE-PETITION AND POST-PETITION ATTORNEYS' FEES

The reimbursement of Lender's pre-petition and post-petition attorneys' fees is contractually required as a matter of law, and such fees were reasonably incurred by Lender and its predecessors in protecting their interests; accordingly, they should be allowed in full under the relevant Loan Documents, Sections 502 and 506(b) of the Bankruptcy Code, and under common law. Such allowance should be subject only to the Court's review of reasonableness. In its opposition to the Lender's proof of claim, the Debtor did not challenge Lender's post-petition counsel, but, rather, focused on the reimbursement of attorneys' fees requested by Sidley Austin, LLP.

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).[107]

Similarly, under Section 5.6 of the Mortgage:

> 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 incurred by Lender until such expenses are paid by Borrower***." (emphasis added).[108]

The myriad and numerous efforts expended by Lender's predecessor and counsel undoubtedly evidence that the Lender was simply trying to protect its interest in the collateral.

[107] Shah SJ Decl. Ex. 1, Section 9.13.
[108] Shah SJ Decl. Ex. 3, Section 5.6.

The Debtor failed to comply with the express terms of the Loan Agreement and other Loan Documents for over two years. Also, when Lender learned of the defaults relating to the Liquor Licenses and failure to pay Taxes and Other Charges, it felt compelled to exercise its right to enforce its remedies to protect the value of its collateral, given the potential precipitous decline in its collateral that would result from a loss of the Liquor Licenses or priming liens from city or state municipal agencies from overdue taxes.

The Debtor has conveniently chosen to ignore all of the Debtor's scorched-earth litigation tactics from the commencement of the Foreclosure Action;[109] it was the Debtor's and controlling principal's behavior that led to the significant attorneys' fees incurred.

A. LENDER IS ENTITLED TO REIMBURSEMENT OF ITS PRE-PETITION ATTORNEY'S FEES UNDER THE LOAN DOCUMENTS AND STATE LAW

Lender's contractual right to pre-petition attorney's fees under Section 9.3 of the Loan Agreement and Section 5.6 of the Mortgage should be allowed pursuant to 11 U.S.C. §502 as part of the Lender's pre-petition claim, and is determined by the agreement of the parties and state law. . As described in *In re South Side House, LLC*, "interest, fees, costs and charges arising pre-petition are part of the secured creditor's claim in the first instance and are therefore not governed by §506(b)".[110] In *South Side House*, the Bankruptcy Court likewise held that "[c]ollection costs may be recovered under New York law if they are provided for in the parties' agreement, and are proven by the creditor."[111]

[109] *See* docket sheet in the Foreclosure Action, Shah Decl., Ex. 52.
[110] 451 B.R. 248 (Bankr. E.D.N.Y. 2011), *aff'd* 20212 U.S. Dist. LEXIS 10824 (E.D.N.Y. 1/24/2012); *see also, In re Vanderveer Estates Holdings, Inc*., 263 B.R. 122, 131 (Bankr. E.D.N.Y. 2002).
[111] 451 B.R. at 273.

It is the Debtor's burden of proof to present rebutting evidence to challenge a creditor's claim for pre-petition attorneys' fees, as described in *Woodmere Investors* in which the debtor conceded the enforceability of the fees under the contract.[112]

In this matter, the Debtor has merely asserted that Sidely Austin's fees were "unreasonable" and "excessive."[113] Debtor's conclusory assertions are insufficient to overcome the Lender's *prima facie* proof of claim, including its Exhibits (which included all of Sidley Austin's 'day notes' and time entries, redacted for attorney-client privilege).[114] As a mere sampling of the work performed by Lender's counsel, Sidley Austin LLP, the following is a short overview of the substantive issues forced by the Debtor: (i) multiple demand and/or default letters; (ii) dispute over jurisdiction of the Southern District of New York; (iii) multiple receiver motions; (iv) issues relating to cash management and disbursement requests, and, tellingly, (v) contempt motion and resulting report relating to the Debtor's main principal, Vaswani. [115] The Debtor has claimed that the Foreclosure Action was "straight-forward" and "routine," but a mere glance at the docket in the Foreclosure Action reveals anything but. With similar ignorance, the Debtor has asserted that "no discovery" had been taken in the Foreclosure Action, but Wilmington Trust alone produced ***over forty-five thousand documents***. Indeed, the Debtor and controlling principal were well aware of the Lender's choice of counsel (Sidley Austin), and ***their obligation to reimburse Lender's legal fees***, from almost the very outset of their relationship and

[112] *See Woodmere Investors*, 179 B.R. at 354.
"The Debtor instead argues that the amount claimed by Connecticut Mutual is unreasonable and thus, should be disallowed. However, it is the Debtor which bears the burden of proof. Here, the Debtor merely asserts that Connecticut Mutual failed to provide justification for its fees. Based upon the evidence submitted, this Court finds that the Debtor has not met this burden. In the absence of persuasive evidence, this Court finds that the legal fees charged by Connecticut Mutual to be reasonable."

[113] *See* Objection, ¶¶85-92.

[114] The Debtor has also raised an issue of the redactions within the admittedly-provided invoices, which goes to show the length to which the Debtor wants to go to avoid paying the Lender's attorneys' fees. It goes without saying that the attorney-client privilege is a time-honored and statutorily-protected legal matter, and as such, the Debtor is not entitled to anything more. Nonetheless, the current Lender does not even possess unredacted invoices for Sidley Austin LLP to provide to the Debtor.

[115] *See* Docket Sheet of the Foreclosure Action, Shah Decl., Ex. 52 as of October 17, 2019.

first formal default letter, and ***never once in four years*** raised issue with the concomitant fees associated with hiring such a reputable law firm to defend its rights ***until well into these chapter 11 cases***.[116]

The Loan Agreement, Mortgage, and Promissory Notes each individually obligates the Debtor to pay for reasonable attorneys' fees and disbursements incurred by Lender, not only for prosecuting or defending any action and enforcing or collecting Obligations owed by Debtor and Guarantor, but also for monitoring and enforcing ongoing performance and compliance with all Loan Documents. The Debtor has not disputed this obligation and contractual right, nor could it.

Instead, the Debtor has challenged the fees incurred during the Foreclosure Action—but much of those fees were precipitated by the Debtor's litigation tactics, including Vaswani's blatant contempt in violating Court-ordered stipulations and other misconduct, as documented in an eighty-page decision rendered by Magistrate Judge Pittman[117] after a detailed and exhaustive evidentiary hearing. The Debtor's categorization of the receivership motions as "baseless" and "unnecessary," is undoubtedly belied by Judge Pittman's Contempt Report and years of the Debtor's deceitful behavior. The Magistrate Judge found "***intentional and deliberate violation***" of a Court-ordered Stipulation, awarded reasonable attorney's fees in favor of Lender, and certified the contempt to District Judge Lorna G. Schofield presiding over the Foreclosure Action.[118]

The Debtor has suggested that its own bankruptcy counsel charged more reasonable rates, but this is irrelevant because it is not the legal standard for either pre- or post-petition entitlement

[116] Indeed, Sidley Austin remitted the very first official default letter to the Debtor and the Guarantors on March 7, 2016, which put all parties on notice of the Lender predecessor's choice of counsel. Shah Decl., Ex. 3, Bates No. 755.
[117] Shah Decl., Ex. 53.
[118] However, no order was entered by Judge Schofield by reason of the filing of these chapter 11 cases.

to attorneys' fees.[119] Lender was not restricted in its choice of counsel, particularly in a multi-million-dollar, highly-regulated securitized loan transaction, especially in light of the fact that Wilmington Trust was acting as a fiduciary to the beneficiary holders of the CMBS certificates.[120] The Lender's contractual right to reimbursement of attorneys' fees is based on the various sections of the Loan Agreement, Mortgage, and Promissory Notes, and not whether, in the ***Debtor's*** opinion (and without citing any legal authority), the fees were "necessary."[121] A borrower may not second-guess the Lender's good-faith need to protect its interests and enforce its rights.

Lender decided to accelerate the debt, given the potential precipitous decline in its collateral that would result from a loss of the Liquor Licenses and liens being filed with respect to the Property. Considering the numerous defaults and gross mismanagement uncovered by the Lender,[122] Lender simply acted to protect its interests in the Property. Lender was forced to react swiftly in enforcing its rights through acceleration, and the related Foreclosure Action, including its motion for a receiver.

To the extent Debtor maintains its assertion, without legal authority, that an alleged "wrongful acceleration" should bar imposition of pre-petition attorney's fees, this fails as a matter

[119] In the bankruptcy proceeding, the Debtor has attempted to throw the kitchen sink at the Court to avoid the express contractual reimbursement of the Lender's attorneys' fees, which were, in fact, incurred and paid by both the Lender and its predecessors. Assertions reregarding the face amount of the accrued fees, time spent on the various matters, and hourly rates are equally meritless, and are utterly belied and contravened by even a cursory review of the Foreclosure Action's docket (Shah Decl., Ex. 52) and the thousands upon thousands of pages produced in discovery in the same case.

[120] With respect to the selection of Robinson, Brog, Leinwand, Greene, Genovese & Gluck, P.C., the Lender and its predecessors were not constrained in their choice as to counsel that was equipped to advise on sophisticated issues relating to fiduciary law, defaults, foreclosure law, and yield maintenance premiums– a sophisticated provision that was known to be a central issue in these chapter 11 cases, with correspondingly complex foreclosure and bankruptcy case law.

[121] *See* Objection, ¶94.

[122] Including failing to name Lender as insured on insurance policy, circumvention of the Cash Management Agreement, failing to provide required financial information, and failing to pay Taxes and Other Charges.

of law.[123] There is no such legal authority; and in any event, numerous Events of Default existed as discussed herein, which were each individually a proper basis for good faith acceleration of the loan based on an incurable Event of Default. The ***Debtor's own cited case law*** made this definitively clear: a lender's good faith assertion of its enforcement rights requires the reimbursement of its attorneys' fees.[124] "Even if the Court ruled against [the lender] with respect to default interest, the Court would nevertheless conclude that [the lender] pursued the Motion ***in good faith*** and is entitled to recover its legal fees as provided for in the Agreement."[125]

B. LENDER IS ENTITLED TO REIMBURSEMENT OF ITS POST-PETITION ATTORNEYS' FEES UNDER SECTION 506(B)

Bankruptcy Code Section 506(b) permits payment to an oversecured creditor, such as Lender, of post-petition "reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." 11 U.S.C. § 506(b). "To recover under § 506(b), a party must establish: '(1) that its claim is over secured in excess of the fees requested; (2) that the fees are reasonable; and (3) that the agreement giving rise to the claim provides for attorney's fees.'"[126]

Bankruptcy courts have discretion in awarding attorney's fees and expenses, and the reasonableness of such fees and expenses depends on the particular facts and circumstances of the case.[127] Bankruptcy courts attempt to determine "whether the ***creditor*** reasonably believed the services were necessary to protect its interest in the debtor's property."[128] Here, the Lender's good faith enforcement of its rights, from the creditor's perspective, should yield reimbursement of its post-petition attorneys' fees.

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[123] *See* Objection, ¶81.
[124] *In re Residential Capital, LLC*, 508 B.R. 851 (Bankr. S.D.N.Y. 2014) (hereinafter, *ResCap*).
[125] *Id*. at 862.
[126] *In re Glazier Group, Inc*., 2013 Bankr. LEXIS 1795, *7 (Bankr. S.D.N.Y. 2013).
[127] *Id*. at *8. In considering general reasonableness, "courts attempt to determine whether the ***creditor*** reasonably believed the services were necessary to protect its interest in the debtor's property." *Id.*(emphasis added).
[128] *Id*. (internal citations omitted) (emphasis added).

Here, elements one and three are undisputed.[129] Accordingly, the Lender is entitled to attorney's fees as a matter of law – subject only to this Court's review for reasonableness under element two. In this regard, element two is satisfied because Lender's attorney's fees in these chapter 11 cases were clearly reasonably incurred to protect its interests in its collateral (the Property and the Hotel), over vigorous and zealous opposition by the Debtor. The post-petition services rendered by Lender's counsel to protect the Lender's interest in the property, included, but are not limited to: (i) responding to the first day orders; (ii) reviewing and negotiating the DIP financing, including offering financing at better terms than originally proposed; (iii) analyzing Debtor's operational issues; (iv) preparing, organizing and filing the Proof of Claim, including the relevant Exhibits; (v) analyzing bankruptcy issues in the Proof of Claim, including analyzing, preparing for and defending the objection to the Yield Maintenance Default Premium provision in the Loan Agreement (including a contested hearing); (vi) analyzing exclusivity issues; and (vii) reviewing and objecting to the Debtor's plan of reorganization.

During the course of these chapter 11 cases, for example, the Debtor litigated the Yield Maintenance Default Premium in an earlier phase of the Debtor's Objection to Proof of Claim, which required Lender's counsel's participation in sophisticated and complex legal issues, at a contested hearing. The partner at Sidley Austin handling this matter, Michael Burke, has particular expertise in this field of bankruptcy law (having authored several articles and notes), and obviously the Lender's predecessor's choice of counsel and Burke's tireless efforts were justified, given the Court's enforcement of such provision.

[129] Lender is oversecured (as stipulated at the confirmation hearing in these chapter 11 cases), and its Loan Documents indisputably provide for the recovery of its attorneys' fees requested herein. As aforementioned, Section 9.13 of the Loan Agreement and Section 5.6 of the Mortgage provide for the reimbursement of the Lender's attorneys' fees, and also provides for the payment of default interest on such fees.

Debtor's assertion that Lender's attorney's post-petition fees are "exorbitant" or "excessive" under Section 506(b) is conclusory and unsupported. Section 506(b) allows "reasonable attorney's fees, costs, or charges provided for ***under the agreement***. . . ." (emphasis added). The Debtor itself has cited to *ResCap*, where the Bankruptcy Court held that the lender was entitled to post-petition interest at the default rate under its loan documents, and the lender was entitled to legal fees for pursuing that relief.[130] Perhaps even more pertinent, Judge Glenn held that, ***even if default interest had been denied***, "the court would nevertheless conclude that [the lender] pursued the Motion [for default interest] ***in good faith*** and [would be] entitled to recover its legal fees ***as provided for in the Agreement***."[131] Assuming, *arguendo*, that the Court found that there was not a ***single*** default in the myriad of the Debtor's subversive behavior for over two years, such holding in *ResCap* is persuasive authority for this Court to grant to Lender reimbursement of its post-petition attorneys' fees, given Lender's good faith.

CONCLUSION

For the foregoing reasons, partial summary judgment should be granted in favor of Lender, together with such other relief as is just and equitable.

Dated: December 13, 2019

Respectfully,

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[130] 508 B.R. 851 (Bankr. S.D.N.Y. 2014).
[131] *Id.* at 862. (emphasis added).