UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTOR'S MEMORANDUM OF LAW IN OPPOSITION TO TCG ACQUISITIONS 2 LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Debtors.	:	Jointly Administered

DEBTOR'S MEMORANDUM OF LAW IN OPPOSITION TO TCG ACQUISITIONS 2 LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This memorandum of law is filed on behalf of 1141 Realty Owner LLC, the Reorganized Debtor (hereinafter, "Debtor"), in opposition to TCG Acquisitions 2 LLC's ("TCG" or "Lender") motion for partial summary judgment regarding certain issues raised in Debtor's Objection [ECF Doc. No. 186] to Lender's Proof of Claim [Claim No. 14] and Administrative Claim [Claim No. 17].

Preliminary Statement

In its current motion, TCG asks this Court to deny Debtor's Objection in its entirety by finding, as a matter of law, that the Debtor's default was conclusively established and that the acceleration and foreclosure of the loan by its predecessor-in-interest, Wilmington Trust ("Wilmington"), was proper. However, TCG's motion should be denied since it erroneously relies upon alleged actions of Debtor that did not fall within the definition of an "Event of Default", nor were even cited by Wilmington as defaults. TCG's shotgun approach fails as a matter of fact and law and cannot be the basis to sustain its claim for default interest back to early 2016.

First, as noted by Debtor in its Objection to TCG's Proof of Claim and at the hearing held on November 13, 2019, there was only one default cited by Wilmington as the basis for its

foreclosure in its Notice of Default and Acceleration, dated September 15, 2017. That was the alleged incurable violation of section 7.1(xii) of the Loan Agreement ("...if…the Liquor License, relating to the Property ceases to be in full force and effect;…"). As demonstrated previously and herein, it cannot be disputed that the defined Liquor License remained "active" and in full force and effect according to the New York State Liquor Authority.

Recognizing the flaw of Wilmington's acceleration of the loan on this specious basis, TCG attempts to retroactively change the previous litigation course and rely on other supposed defaults (not Events of Default) in an attempt to justify its claims for millions of dollars in default interest. In particular, TCG's new, post-acceleration allegation that Debtor was in violation of New York's liquor laws by "availing" does not fit the definition of a section 7.1(xii) "Event of Default." Rather, it alleges a different kind of *curable* default under the Loan Agreement, which required notice and a 30-day period to cure before it could rise to the level of an "Event of Default." TCG's rhetoric about the termination of the Management Agreement and Mr. Chan's lack of involvement in Debtor's management does not change these notice and cure opportunity requirements.

Furthermore, pursuant to the "mend the hold" doctrine under New York law, which the Southern District has repeatedly applied, TCG is estopped from retroactively claiming that the foreclosure of the loan was justified on other grounds not set forth in Wilmington's original Notice of Default and Acceleration. TCG's reliance on cases applying laws of other jurisdictions and on a reservation of rights statement by Wilmington is without merit. Furthermore, the new defaults that TCG now points to either were *not* defaults under the Loan Agreement (failure to pay water charges) or were clearly not considered to be defaults by Wilmington (termination of the management agreement or alleged false certifications). Even *if* such issues had been

contemporaneously raised by Wilmington, it is completely speculative for TCG to argue that they would have resulted in "Events of Default" justifying foreclosure or that the Debtor could not have found a way to address Wilmington's concerns, if any. Such *ex-post facto* speculation is precisely what the mend the hold and estoppel doctrines serve to prevent.

Looking past the estoppel principles, Debtor was in full compliance with the Loan Agreement regarding its obligation to pay "Taxes," which definition included water charges. Debtor's revenues were controlled by Wilmington and its predecessor lender in a lockbox account. Every month, reserves were taken by the lender from that account to fund tax and other escrows. There were always funds in those escrow reserves to pay the relatively small amount of unpaid water charges that TCG now seeks to invoke as a new justification for Wilmington's foreclosure.

Lastly, TCG's new argument that Debtor committed an incurable Event of Default by signing materially false certifications within loan disbursement requests should also be rejected. The pre-printed language in the forms stating that there were no "Defaults" is confusing and imprecise since such term is not defined in the Loan Agreement. Moreover, it is apparent that Wilmington was fully aware of the underlying facts (*i.e.*, unpaid sales or occupancy taxes, termination of the Management Agreement, etc.) now alleged by TCG to support its claim that the certifications were false. There never were any claims by Wilmington or its predecessor lender that Debtor had made a materially false statement in these disbursement requests prior to, or as a justification for, the foreclosure. Clearly, Wilmington did not believe it was misled.

In sum, TCG's allegations of new, additional defaults and "Events of Default" committed by Debtor as alternative bases to justify Wilmington's acceleration of the loan and TCG's claims for default interest should be rejected in their entirety.

Facts

Facts relevant to this motion are set forth in the accompanying: (i) Declaration of James Katchadurian, dated January 15, 2020, with exhibits, (ii) Declaration of Alan D. Zuckerbrod, Esq., dated January 15, 2020, with exhibits, (iii) Debtor's Counterstatement of Facts, dated January 15, 2020, and (iv) documents referenced herein by "ECF Doc. [#]" that were filed in this proceeding, including, but not limited to, Debtor's Objection [ECF Doc. 186], and Reply Memorandum [ECF Doc. 200], which are incorporated by reference herein.

ARGUMENT

I. TCG FAILED TO SHOW THAT THE LIQUOR LICENSES "CEASED TO BE IN FULL FORCE AND EFFECT," AS REQUIRED TO TRIGGER AN "EVENT OF DEFAULT" UNDER § 7.1(XII) OF THE LOAN AGREEMENT

A. Standards Governing Summary Judgment Under Fed. R. Civ. P. 56(c)

Under Rule 56(c) of the Federal Rules of Civil Procedure, "summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *In re Frankl*, 2019 WL 3060073, at *2 (Bankr. S.D.N.Y. 2019), *citing* Fed. R. Civ. P. 56(c). "The moving party bears the initial burden of showing that the undisputed facts entitle it to judgment as a matter of law." *In re Frankl*, 2019 WL 3060073, at *2, *citing Rodriguez v. City of New York*, 72 F.3d 1051, 1060-1061 (2d Cir. 1995).

"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." *In re Ampal-American Israel Corp.*, No. 12-13689 (SMB), 2015 WL 5176395, at *10 (Bankr. S.D.N.Y. Sept. 2, 2015), *aff'd*, No. 15-CV-7949 (JSR), 2016 WL 859352 (S.D.N.Y. Feb.

28, 2016), *aff'd*, 677 Fed.Appx. 5 (2d Cir. 2017) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586–87 (1986)). "In deciding whether material factual issues exist, all ambiguities must be resolved and all reasonable inferences must be drawn in favor of the nonmoving party." *In re Ampal-Amercian Israel Corp*., 2015 WL 5176395, at *10 (citing *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348).

B. There Was No Event of Default By the Borrower Regarding the Liquor Licenses; Wilmington Wrongfully Accelerated the Loan

In breach of the Loan Agreement,[1] on September 15, 2017, without notice and a chance to cure, Wilmington improperly declared an "Event of Default" under Section 7.1(xii) of the Loan Agreement on the *sole* ground that the Hotel's Liquor Licenses were no longer "in full force and effect." However, as demonstrated herein, the defined "Liquor Licenses" were active and in "full force and effect" according to the New York State Liquor Authority (Zuckerbrod Declaration, Exhibit H), when Wilmington served its Notice of Default/Notice of Acceleration, dated September 15, 2017 (hereinafter, "Notice of Default and Acceleration;" Ex. 27 to Shah Decl.). TCG now claims that the Borrower violated New York's liquor laws by "availing." However, this would have been a different default, *i.e*. under § 4.1.1. of the Loan Agreement, for which notice and opportunity to cure were required.

Under New York law, a lender must strictly comply with the contract provisions governing notice of default and acceleration of its loan. *See Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 24 Misc.3d 1222(A) at *15, 897 N.Y.S.2d 669 (Sup. Ct., Ond. Cty.), *aff'd in part and modified in part*, 69 A.D.3d 212 (4th Dep't 2009); *Dale v. Industrial Ceramics, Inc.*, 150 Misc.2d 935, 937, 571 N.Y.S.2d 185 (Sup. Ct., N.Y. Cty. 1991)

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[1] TCG attaches a copy of the Loan Agreement as Exhibit 1 to its moving Declaration of Michael K. Shah ("Shah Decl."). All references herein to the Loan Agreement shall refer to that Ex. 1 to the Shah Decl.

(holding that notice provisions under promissory note that trigger acceleration of loan must be strictly construed).

Where there is no basis to accelerate a mortgage obligation, an acceleration notice sent by the lender is a nullity and constitutes a material breach of the loan agreement. *Seidman v. Indus. Recycling Props., Inc*., 106 A.D.3d 983, 984-985, 967 N.Y.S.2d 77 (2d Dep't 2013) (lender's improper acceleration of mortgage loan and commencement of foreclosure action constituted a breach of loan agreement); *Luxonomy Cars, Inc. v. Citibank, N.A*., 65 A.D.2d 549, 550, 408 N.Y.S.2d 951 (2d Dep't 1978) (lender's wrongful acceleration of note as predicate for foreclosure action was an actionable breach of contract); *cf. Rocky Aspen Management 204 LLC v. Hanford Holdings LLC*, 16 Civ. 4270 (VM), 2018 WL 3471809, at *12 (S.D.N.Y. June 28, 2018), *subsequent determination*, 358 F.Supp.3d 279 (S.D.N.Y. Jan. 30, 2019), *aff'd in part, vacated in part*, 2019 WL 1447260 (S.D.N.Y., Mar. 8, 2019) (allegations that lender wrongfully accelerated loan by wrongfully declaring a default stated a breach of contract claim); *Household Fin. Realty Corp. of NY v. Dunlap*, 15 Misc.3d 659, 665, 834 N.Y.S.2d 438 (Sup. Ct., N.Y. Cty. 2007) (where "there was no basis for the acceleration of the mortgage, and the acceleration notice plaintiff sent was premature and therefore improper," "[i]t cannot form the predicate basis for this foreclosure action ….").

As shown below, because there was no valid Event of Default, Wilmington's wrongful acceleration of the loan and commencement of a foreclosure action constituted a breach of the Loan Agreement, which precludes TCG's entire claim for default interest and pre-petition (*i.e*., foreclosure action) attorneys' fees in this proceeding. Accordingly, the instant motion for summary judgment should be denied.

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1. The Liquor Licenses Remained in Full Force and Effect at Debtor's Hotel

In § 1.1 of the Loan Agreement, "Liquor License" is defined to be three specific licenses, two of which were held by 9 West 26th St. Rest., LLC, and one by Toshi's Penthouse Inc. Those entities were controlled by Robert Chan, who was the "Original Manager" of the Hotel under the Loan Agreement.[2] Debtor had an obligation under the Loan Agreement to "maintain" the liquor licenses (*see* §4.1.24(a)) and to comply generally with all Legal Requirements (*see* §4.1.1). Any alleged violation of these provisions required a notice to cure before an "Event of Default" existed and the loan could be accelerated (*see* Loan Agreement, §7.1(xvi)).

There were very few and specific defaults under the Loan Agreement for which no notice to cure was required. Under § 7.1(xii), one such "Event of Default" where no notice was required was "if, without Lender's prior written consent, any required license, permit, including, without limitation, the Liquor License[s], relating to the Property ***ceases to be in full force and effect***" [emphasis added].

Significantly, and it is not disputed that, until a liquor license is revoked by the New York State Liquor Authority ("SLA"), it remains in effect for the sale of liquor at the licensed premises. *See Kelly v. Casale*, 263 A.D.2d 889, 890, 695 N.Y.S.2d 184 (3d Dep't 1999), *lv. to appeal denied*, 94 N.Y.2d 754, 701 N.Y.S.2d 340 (Table) (1999) (during interim renewal of petitioner's liquor license, until it was revoked by SLA, petitioner was allowed him to continue to sell alcohol using license).

Before the SLA can determine whether to revoke, cancel, suspend a license or subject a licensee to a monetary penalty, a hearing must be held at which the SLA would have to find

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[2] At the time, Chan was the 10% owner of a portion of the equity of Debtor 1141 Realty Owner, through his entity, You Gotta Have Faith LLC, and Jagdish ("Jay") Vaswani was the 90% owner, through his entity, Main Team Hotels LLC.

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

Now, after Wilmington's improper acceleration of the loan based on an improper notice of an Event of Default, TCG is wrongfully attempting to pigeon-hole a more general alleged violation of the liquor laws by Borrower (which is nonetheless disputed), which would be a curable default under Sections 4.1.1 and 7.1(xvi) of the Loan Agreement, into an inapplicable, incurable default under §7.1(xii). TCG's purpose is clear – to try to now justify, retroactively, the recovery of millions of dollars in default interest. TCG ignores the indisputable facts undermining its argument that the Debtor was in violation of §7.1(xii): (i) the Liquor Licenses were "active," and in full force and effect according to the SLA on the date that Wilmington served its Notice of Default and Acceleration (*see* website printouts, Zuckerbrod Decl., Ex. H); (ii) the SLA never issued any violations against the Hotel; (iii) the SLA never held any hearing concerning the Liquor Licenses; (iv) the SLA never revoked, cancelled, suspended or imposed a monetary penalty concerning the Liquor Licenses; and (v) the SLA never determined that Debtor had violated the state liquor license laws.

Only the SLA could have determined that the Liquor Licenses were no longer in full force and effect, but it never did so. TCG cannot be the arbiter of that issue years after the fact.

2. The Liquor Licenses Remained in Full Force and Effect Regardless of Chan's Level of Involvement in the Hotel's Management

TCG argues that the Liquor Licenses were not in full force and effect at Debtor's Hotel solely because the original Management Agreement had been terminated *or* expired by its term. It is alleged that Chan was no longer acting as Original Manager and he did not supervise or oversee the Hotel's liquor sales. *See* TCG's Memorandum, p. 14. Regardless of Chan's

involvement or lack thereof, the Liquor Licenses remained in full force and effect at the Property, which is the narrow standard required under §7.1(xii) for an Event of Default. Chan's alleged lack of involvement did not cause their automatic revocation, cancellation or suspension. Only the SLA could make that determination.

The alleged "illegal sale of alcohol", "availing" and violation of the law generally do not fall within the scope of the default provision under § 7.1(xii) of the Loan Agreement, which must be strictly construed and strictly complied with for an incurable "Event of Default" to occur thereunder. Inasmuch as the Liquor Licenses never ceased to be "in full force and effect relating to the Property," no "Event of Default" occurred under § 7.1(xii). Wilmington wrongfully accelerated the loan in breach of the Loan Agreement.

II. TCG'S ALLEGATION THAT DEBTOR UNLAWFULLY "AVAILED" OF THE LIQUOR LICENSES IS WITHOUT MERIT AND NONETHELESS REQUIRED AN OPPORTUNITY TO CURE

To the extent TCG is arguing that Debtor improperly misused (*i.e.*, availed of) the Liquor Licenses in violation of New York law, that would have been a violation of § 4.1.1 of the Loan Agreement, which required Debtor to comply with all Legal Requirements, as defined. However, such a violation would be a non-enumerated default under § 7.1(xvi),[3] which entitled Debtor to a 30-day notice and an opportunity to cure before an "Event of Default" could be declared. The loan could be accelerated only after an Event of Default.

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[3] Section 7.1(xvi) of the Loan Agreement provides for notice and cure for defaults that were not enumerated in Section 7.1, subsections (i)-(xv) of the Loan Agreement. It states and an "Event of Default" will occur:

> if Borrower shall continue to be in default under any other term, covenant or condition of this Agreement, the Note, the Security Instrument or the other Loan Documents not specified above for more than (y) ten (10) days after notice from Lender, in the case of any default which can be cured by the payment of a sum of money, or (z) thirty (30) days after notice from Lender ,in the case of any other default, provided that, in the case of any default referred to in clause (z), if such default cannot reasonably be cured within such thirty (30) day period and Borrower shall have commenced to cure such default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for so long as it shall require Borrower in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of sixty (60) days.

It cannot be disputed that Wilmington never provided Debtor with any such notice of default with an opportunity to cure. Its belated October 11, 2017 Notice of Additional Defaults (Ex. 28 to Shah Decl.), which does reference certain cure periods under §7.1(xvi), was served *after* Wilmington accelerated the loan and commenced the foreclose action. Debtor had no opportunity to cure by this time. Accordingly, TCG's allegation that Debtor "illegally sold liquor" or "availed" of the Liquor Licenses could not have been grounds for its predecessor, Wilmington, declaring an incurable Event of Default under § 7.1(xii).

TCG relies primarily on two documents for its new allegation that Debtor "admitted" that it was illegally selling liquor using the Liquor Licenses: (i) the self-serving declaration of Robert Chan, dated September 27, 2017, filed in the foreclosure action; and (ii) an email (Ex. 16 to Shah Decl.) from Jagdish Vaswani to Wells Fargo, dated September 11, 2017, in which he states:

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

Contrary to TCG's argument, Mr. Vaswani's email is not an "admission" that the Hotel was in any way violating New York State liquor laws. All it appears to suggest is at that point in time, as of September 11, 2017, Mr. Vaswani and Mr. Chan were having discussions about adding Vaswani's name to the Liquor Licenses while 1141 Broadway Restaurant and Penthouse Operations LLC was operating the F&B (*i.e.*, Food and Beverage service) at the Hotel. This email does <u>not</u> contain any admission that any alcohol was illegally being sold using the Liquor Licenses, as TCG alleges.

TCG also relies on statements made by Mr. Chan's attorney (Rod Biermann, Esq.) to Wells' Fargo representative, Tim Teague (*see* Ex. 17 to Shah Decl.). Those statements constitute

inadmissible hearsay, and thus are insufficient to prove that Debtor was illegally selling alcohol. But even if they did, the "default" was a violation of failure to comply with Legal Requirements, not of §7.1(xii). No "Event of Default" under such circumstance, could have occurred in the absence of a notice of default from Wilmington and an opportunity to cure.

TCG makes additional arguments that are contrary to the express terms of the Loan Documents. It alleges that Debtor was obligated under the Loan Documents to serve (or sell) alcoholic beverages and could not have ceased serving alcohol because it was required under Section 4.1.1(iv) of the Loan Agreement to "operate in a 'substantially similar' manner as of the Closing Date" because its liquor sales accounted for 30% of the Hotel's total revenue. This argument is without merit.

First, there is no provision in the Loan Agreement, Management Agreement (Ex. 4 to Shah Decl.), or the Agreement Regarding Liquor Licenses (Ex. 6 to Shah Decl.) that obligated Debtor to serve or sell alcoholic beverages at the Hotel. The Management Agreement simply required the Manager to "[p]rovide food and beverage services." *See* Ex. 4 to Shah Decl., Management Agreement, at § 1.03(A)(10). Because Debtor had no contractual obligation to sell alcoholic beverages, it was not required to sell alcohol in order to operate in a " 'substantially similar' manner."

Second, Debtor's cessation of the sale of alcohol was not a default under the Management Agreement or an incurable Event of Default under § 7.1(xii) of the Loan Agreement. Certainly, if the original lender (Rialto Mortgage Finance LLC ("Rialto")) had desired to obligate Debtor to serve alcoholic beverages or make its failure to do so an enumerated, incurable Event of Default, it could have included such a provision in its Loan Documents. It did not. TCG is now precluded from blue-penciling the Loan Documents to

create that obligation, and from manufacturing a bogus default based on it.

III. THE "MEND THE HOLD" DOCTRINE ESTOPS TCG FROM BELATEDLY ASSERTING OTHER DEFAULTS AS A BASIS FOR ITS CLAIM FOR RETROACTIVE DEFAULT INTEREST ACCRUING SINCE JANUARY 2016

TCG argues that the "mend the hold"[4] doctrine is no longer viable and does not prevent it from declaring or relying upon defaults not previously noticed before Wilmington accelerated the loan and brought its foreclosure action. As explained below, its argument should be rejected, as contrary to the law in New York, which dictates that the mend the hold doctrine bars TCG, as a matter of law, from belatedly alleging other new defaults as alternative justifications for Wilmington's foreclosure action and its current effort to recover default interest from January 2016.

A. The "Mend The Hold" Doctrine

The seminal case enunciating the "mend the hold" doctrine was *Railway Co. v. McCarthy*, 96 U.S. 258 (1877) ("*McCarthy*"). At trial, the railroad's initial defense was that its failure to make a shipment of cattle required under its contract with McCarthy was excused by a lack of sufficient rail cars on a connecting railroad line. After the close of the evidence, the railroad tried to change its defense, alleging for the first time that it failed to ship in order to avoid violating the Sunday (Sabbath)-closing laws. The United States Supreme Court rejected this new defense as an impermissible "after-thought," holding that the defendant railroad was not permitted to change its defense to plaintiff's breach of contract claim because:

> Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

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[4] The term "mend the hold" is borrowed from a "nineteenth-century wrestling term, meaning to get a better grip (hold) on your opponent." *PrimeTime 24 Joint Venture v. DirecTV, Inc.*, No. 99 Civ. 3307, 2000 WL 426396, at *8, n. 14 (S.D.N.Y. April 20, 2000).

Railway Co. v. McCarthy, 96 U.S. at 267-268.

The "mend the hold" doctrine was more recently applied in New York in the context of a loan default, in *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp*., 24 Misc.3d 1222(A), 897 N.Y.S.2d 669 (Sup. Ct., Ond. Cty.), *aff'd in part and modified in part*, 69 A.D.3d 212 (4th Dep't 2009), *lv. to appeal denied*, 85 A.D.3d 1656 (4th Dep't 2011). There, the court held that "[o]nce a party declares a default on one ground under New York law, it may not subsequently defend the declaration of default on a different ground. *See Destiny USA*, 24 Misc.3d 1222(A) at *15, *citing Leventhal v. New Valley Corp*., No. 91 Civ. 4238 (CSH), 1992 WL 15989, at *5 (S.D.N.Y. Jan. 17, 1992). The rationale for its decision was identical to that stated by the Supreme Court in *McCarthy*:

> Equitable principles of estoppel prevent a party who has given a reason for its conduct and decision touching on anything involved in the controversy from changing its ground, after litigation has begun, and putting its determination upon another and different consideration. A party is not permitted, as it is said, to mend its hold."

Destiny USA, 24 Misc.3d 1222(A) at *15, citing, *O'Connor v. Board of Ed. of Central School Dist. No. 1 of Village of Ilion and Towns of German Flatts, et al.*, 65 Misc.2d 40, 42 (Sup. Ct. Herkimer Co. 1970) (*citing Littlejohn v. Shaw*, 159 N.Y. 188, 191 (1899); *Brink v. Hanover Fire Insurance Co.*, 80 N.Y. 108, 113 (1880)); *see also Thorne v. French,* 4 Misc. 436 (Superior Court, N.Y. Co. 1893), *aff'd*, 98 Sickels 679 (1894) (Court of Appeals of New York, 1894) (same); *Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258, 267-268 (1877) (same).

Shockingly, in both its opposition to Debtor's Objection, and in its moving papers for this motion, TCG misstates the law, by claiming that the "holding of the Supreme Court [in *Destiny USA*] was reversed by the Fourth Department" on appeal. This is misleading and simply untrue.

The Appellate Division only vacated the trial court's ruling that the lender's default notice and notice of deficiency were null and void, finding that the trial court had "exceeded the bounds of the requested relief" on a preliminary injunction motion (*see Destiny USA*, 69 A.D.3d at 223-224). However, the court did ***not*** reverse, vacate or modify the legal principle underlying the mend the hold doctrine, that "[o]nce a party declares a default on one ground under New York law, it may not subsequently defend the declaration of default on a different ground." *Destiny USA*, 24 Misc.3d 1222(A), at *15. The doctrine remains the law in New York.

In *Destiny USA*, the court cited to *Leventhal v. New Valley Corp.*, No. 91 Civ. 4238 (CSH), 1992 WL 15989, at *5 (S.D.N.Y. Jan. 17, 1992), in which the Southern District of New York held that the defendant was barred from belatedly asserting two new defenses in opposition to the plaintiff's motion for partial summary judgment, which was based on the defendant's breach of its severance agreement with plaintiff. Because the defendant's only justification given to the plaintiff for its decision to discontinue making severance payments was its "severe financial problems" that resulted in an "extremely tight cash position," the court held that the defendant's claims that the severance agreement was void for lack of consideration and unconscionable were precluded as a matter of law because:

> It is well settled that where a party to a contract terminates the contract and presents a specific reason for the termination, that party is estopped from raising a different reason upon the commencement of an action. *See*, *e.g.*, *Littlejohn v. Shaw*, 159 N.Y. 188, 191 (1899); *Rode & Brand v. Kamm Games, Inc.*, 181 F.2d 584, 587 (2d Cir. 1950); *Vernon Lumber Corp. v. Harcan Const. Co.*, 155 F.2d 348, 351 (2d Cir. 1946) (construing New York law).

Leventhal, No. 91 Civ. 4238 (CSH), 1992 WL 15989, at *5.

In 2010, the Southern District continued to apply the mend the hold doctrine in *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F.Supp.2d 450 (S.D.N.Y. 2010). That case involved a

credit default swap transaction involving plaintiff, a private equity investment fund, and defendants. In its motion for summary judgment against defendants, the plaintiff Fund asserted two new reasons, not asserted before the litigation, for its claims that the defendants breached their obligations under their agreement: that the defendant trustee prematurely and improperly valued and made a loss protection payment to another defendant because the trustee's credit event notice was defective and did not trigger the valuation for the payment. In denying the fund's motion for summary judgment, the court held that "because the Fund failed to object to the Trustee's payment of the settlement amount … on the ground that the valuation was untimely – or on any other ground having to do with the validity of the January 13 Credit Event notice – until the filing of the Second Amended Complaint, there is at least a question of fact as to whether the Fund has forfeited its right to assert its technical objection by failing to promptly raise it." *CFIP Master Fund*, 738 F.Supp.2d at 459.

In *CFIP Master Fund*, the court referenced *Rode & Brand v. Kamm Games, Inc.*, 181 F.2d 584 (2d Cir. 1950), in which the Second Circuit, relying on *McCarthy* and the mend the hold doctrine, acknowledged that "a party to a contract may not repudiate the contract on one ground and later assert entirely different grounds as a defense for such refusal to perform." *See Rode & Brand*, 181 F.2d at 587, *citing Vernon Lumber Corp. v. Harcen Const. Co.*, 155 F.2d 348, 351 (2d Cir. 1946). *See also National Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656 (S.D.N.Y. 1991), *aff'd*, *Yaeger v. National Westminster*, 962 F.2d 1 (2d Cir. 1992) (applying mend the hold doctrine to prevent borrower from asserting defense that bank breached loan agreement, where borrower admitted to bank, prior to litigation, that borrower defaulted under the loan agreements); *Corporacion De Mercadeo Agricola v. Mellon Bank Int'l*, 608 F.2d 43, 48-49 (2d Cir. 1979) (applying mend the hold doctrine, holding "when a bank offers one reason for

refusing a draft on a letter of credit, and that reason is later refuted, it cannot at trial point to an entirely different reason for sustaining the refusal").

B. TCG's Cited Legal Authority is Based on Inapplicable Illinois Law

The only legal authorities cited by TCG to support its argument that the mend the hold doctrine does not apply are *PrimeTime 24 Joint Venture v. DirecTV, Inc*., No. 99 Civ. 3307, 2000 WL 426396 (S.D.N.Y. April 20, 2000) (hereinafter, "*PrimeTime*"), and *Daiwa Special Asset Corp. v. Desnick*, 00 Civ. 3856, 2002 WL 1997922 (S.D.N.Y. Aug. 29, 2002) (hereinafter, "*Daiwa*"). Those cases do not support TCG's argument.

In *PrimeTime*, plaintiff sued defendant, Direct-TV, for wrongful termination of their agreement under which PrimeTime had been granted a non-exclusive license to distribute certain network television services to DirecTV's satellite subscribers. When Direct-TV terminated the agreement, it alleged as the basis for the termination certain changes in regulations. The letter contained a reservation of rights. When Direct-TV moved to amend its answer to assert additional defenses and counterclaims, including new reasons why it terminated the agreement that were not stated in its termination letter, Primetime opposed the motion, arguing, *inter alia*, that the mend the hold doctrine precluded Direct-TV from asserting grounds for terminating the agreement that were not asserted at the time of the purported termination.

The court in *PrimeTime* recognized that the mend the hold doctrine – considered "a cousin to judicial estoppel" – "prohibits a party to a contract from taking one position and, after litigation has begun, changing its ground." *PrimeTime*, 2000 WL 426396, at *8. The court questioned the continuing viability of the doctrine, noting that it "was first enunciated by the Supreme Court in *Railway Co. v. McCarthy*, 96 U.S. 258 (1877)" and "[t]he last New York case to invoke the doctrine by name was decided in 1970." *Id*., at *8-9.

The court further recognized that even *without* reference to the doctrine, "New York's

substantive law [of estoppel] … precludes asserting additional reasons for having terminated or repudiated a contract only if a party either relied on the reasons for non-performance originally given, or could have cured its performance had the true grounds for repudiation been asserted earlier." *See PrimeTime*, 2000 WL 426396, at *9 [emphasis added]; *see also Pollicino v. Allstate Indemnity Company*, 5:17-cv-824 (LEK/ATB), 2019 WL 4757467, at *12 (N.D.N.Y. September 30, 2019) (same). It emphasized that federal courts have applied this rule:

> where it would otherwise be unfair to the non-breaching party. For example, a contracting party's ability to assert new grounds for non-performance may be waived if the other party may have been able to cure any deficiencies in its performance had the "real" grounds for non-performance been asserted.

See PrimeTime, 2000 WL 426396, at *9. Nevertheless, the court declined to apply either doctrine because there was no showing that PrimeTime relied on the reason given by Direct-TV, or could have cured its non-performance if it had known the real reasons it terminated the contract. It found that Direct-TV's termination letter included a reservation of other grounds at the time of termination, and "there are no assertions that PrimeTime would have been able to remedy the situation had the "real" reasons for terminating been asserted by DirecTV, or that PrimeTime relied on the reasons actually given by DirecTV." *Id.*, at *10.

In the instant case, had Wilmington notified Debtor of the other grounds for the alleged default (*i.e.*, availing, non-payment of water charges, etc.), Debtor could have possibly cured or addressed those alleged defaults. Thus, the failure to specify these other grounds was prejudicial to Debtor, and TCG should be estopped from asserting these new defaults now.

The reasoning in *Daiwa Special Asset Corp. v. Desnick,* was similar to that in *PrimeTime*. Daiwa alleged that it properly terminated its revolving credit obligation under a loan and security agreement with the defendant hospital and its affiliates based on at least three "Events of

Default" committed by them, although only two of which were mentioned in its termination notice. *See Daiwa*, 2002 WL 1997922, at *5. Desnick, the guarantor under the agreement, contended that there were no defaults, and thus Daiwa terminated the credit improperly and in bad faith. *See id*. He also argued that Daiwa was precluded from giving alternate post-termination reasons the termination. *See id*.

While acknowledging that New York law "precludes the assertion of added reasons for the termination of a contract if a party relied on the reasons articulated or could have cured its performance had the additional grounds been disclosed earlier," the court in *Daiwa* declined to apply it to bar the mortgage holder from asserting new, alternative reasons for holding Daiwa in default under the mortgage. *Daiwa*, 2002 WL 1997922, at *5. Its rationale was that "(1) Daiwa reserved its rights to articulate other reasons for the termination, (2) there was no reliance by the parties, and (3) the viability of the doctrine is uncertain in New York law." *Id*.

Contrary to TCG's arguments, *Primetime* and *Daiwa* are not controlling authority in the present case, and do not support TCG's argument that the reservation of rights in Wilmington's September 15, 2017 Notice of Default and Acceleration automatically bars the application of the mend the hold doctrine. Moreover, a critical difference between the decisions in *Primetime* and *Daiwa* and this proceeding is that the courts in *Primetime* and *Daiwa* applied Illinois law – not New York law, which applies in the present case.

Under Illinois law, the doctrine only prevents a party from changing its position *during* the litigation, without reference to pre-litigation statements, unless there is a good faith basis for doing so. *See Harbor Ins. Co. v. Continental Bank Corp*., 922 F.2d 357, 364 (7th Cir. 1990) (citing *Larson v. Johnson*, 1 Ill.App.2d 36, 46 (Ill. App. First Dist. 1953) ("A party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at

some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith. *Larson* explicitly connects the "mend the hold" doctrine to considerations of good faith and ethical obligations in contract relations.").

In *Harbor Ins. Co. v. Continental Bank Corp*., 922 F.2d 357 (7th Cir. 1990), the insurers' alleged reason for declining coverage to the insured's directors was that the directors had never been shown to have committed any wrongful acts exposing them to liability. However, a year before, the insurers alleged in a prior action that the egregiousness of the directors' conduct was a bar to liability under the insurance policy. The insured appealed the lower court's refusal to admit the prior complaint into evidence, and the appellate court agreed, finding that, in light of the insurers' 180 degree change in reasoning, the lower court should have admitted into evidence the insurers' complaint filed in a prior action because "[t]he indications that the 'mend the hold' doctrine may apply here thus are strong," and the prior complaint was necessary to determine whether the mend the hold doctrine was applicable to bar the insurers from changing their reason for declining coverage. *See Harbor Ins. Co.*, 922 F.2d at 365. The court in *Primetime* relied on *Harbor Ins. Co.*, and the court in *Daiwa* merely cites to *Primetime*, adopting its approach based on Illinois law.

On the other hand, under New York law, the mend the hold doctrine is applied very differently. It is not limited to a party's change in positions made *during* litigation. Rather, consistent with *McCarthy*, it precludes a party from changing its pre-litigation explanation for its conduct once litigation has begun. *See Destiny USA Holdings*, 24 Misc.3d 1222(A) at *15; *see also CFIP Master Fund*, 738 F.Supp.2d at 459; *Rode & Brand*, 181 F.2d at 587. This interpretation is applicable in this case, and bars TCG from changing its reasons for accelerating Debtor's loan and commencing its foreclosure action to its belatedly asserted other defaults.

Another major distinction between *Primetime* and *Daiwa*, on the one hand, and this proceeding, on the other hand, are the facts. In *PrimeTime*, the court ruled the defaulting parties had not asserted or demonstrated that they either (i) had relied on the original reason(s) proffered for the default, or (ii) could have cured their defaults had the additional grounds been disclosed earlier. Likewise, in *Daiwa*, the court held that reliance had not been shown; it did not consider whether or not Daiwa could have cured its breach if the additional grounds had been disclosed before the litigation commenced.

In contrast, Debtor has sufficiently demonstrated herein (at Point IV below) that it was entitled to the opportunity to cure the newly alleged defaults – to the extent they even existed, which it disputes – *if* Wilmington had provided proper notice of default with the required cure period.

It also is unclear from the decisions in *Primetime* and *Daiwa* whether the courts would have applied the mend the hold doctrine to preclude the non-defaulting parties from belatedly asserted additional grounds to terminate the subject contracts *if* they had sufficiently demonstrated that the defaults could have been cured if notice had been given. Even in the absence of the mend the hold doctrine, the court in *PrimeTime* recognized that "New York's substantive law [of estoppel] … precludes asserting additional reasons for having terminated or repudiated a contract only if a party either relied on the reasons for non-performance originally given, or could have cured its performance had the true grounds for repudiation been asserted earlier." *PrimeTime*, 2000 WL 426396, at *9. TCG has overlooked this estoppel principle, which also applies here.

Although TCG criticizes the *Leventhal* decision on the ground that it does not involve any reservation of rights, TCG fails to cite any case in which there is ***both*** a reservation of rights

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made by the non-breaching party and a showing by the breaching party that it either relied on the reason given for the repudiation of the contract, or could have cured the alleged breach or default had it been given notice of it and an opportunity to cure.

A third reason why the decisions in *Primetime* and *Daiwa* are of dubious application is that they were decided before *Destiny USA Holding*. Although the courts in *Primetime* and *Daiwa* were concerned about the continuing viability of the doctrine after 1970, the 2009 decision in *Destiny USA Holding* and the abundant Second Circuit federal cases that follow *McCarthy* and apply the doctrine put that concern to rest. Indeed, the doctrine has never been overturned by the New York courts. It is still good law in New York.

In sum, TCG's after-the-fact effort to justify Wilmington's declaration of an Event of Default in order to expand its claim for default interest should be rejected. Because the *only* basis for TCG's claim for default interest is the acceleration of the loan on September 15, 2017 based on the alleged §7.1(xii) Liquor License "Event of Default," TCG is barred, as a matter of law, from "mending its hold" and changing the reasons for the acceleration of the loan by belatedly asserting new defaults as grounds for acceleration in order to obtain default interest prior to September 15, 2017.

IV. DEBTOR WAS NOT IN DEFAULT WITH RESPECT TO PAYMENT OF WATER CHARGES

Another after-the-fact attempt by TCG to justify retroactive default interest is the new assertion that the Debtor failed to timely pay water charges. Even though Wilmington never declared an Event of Default based on Debtor's failure to pay "Taxes" or any water and sewer charges, TCG now alleges for the first time that there was a failure that constituted an "Event of Default" under § 7.1(ii) of the Loan Agreement. However, TCG fails to inform the Court of the pertinent provisions in the Loan Agreement regarding the tax reserve controlled by Wilmington

cover such payments.

As demonstrated below and in the accompanying Declaration of James Katchadurian, dated January 15, 2020 ("Katchadurian Decl."), with exhibits, TCG's argument that Debtor failed to pay water and sewer charges, and that such failure was an incurable "Event of Default," is without merit as a matter of law and fact. It also is barred by the mend the hold doctrine because it was not asserted by Wilmington as a basis for its acceleration of the loan.

A. Debtor Deposited Funds in Escrow With Wilmington to Pay Taxes, Including Water Charges; Wilmington was Obligated to Pay Such Charges

The Loan Agreement provides that the "Lender" was required to pay "Taxes" from funds escrowed by Debtor and controlled *entirely by* Lender. In particular, § 4.1.2, entitled "Taxes and Other Charges," provides that "Borrower's obligation to directly pay **Taxes shall be suspended for so long as Borrower complies with the terms and provisions of Section 6.2**." (emphasis added). Section 6.2. of the Loan Agreement, entitled "Tax Funds," provides that the Lender was responsible for paying "Taxes," which are defined in § 1.1.2 of the Loan Agreement as "all real estate and personal property taxes, assessments, ***water rates or sewer rents***, now or hereafter levied or assessed or imposed against the Property or part thereof" [emphasis added].

Furthermore, § 6.2.1 of the Loan Agreement, entitled "Deposits," states:

> On the Closing Date, Borrower shall deposit with Lender an amount equal to the Initial Tax Deposit and, on each Payment Date, Borrower shall deposit with Lender an amount equal to one-twelfth (1/12) of the Taxes (the "Monthly Tax Deposit") that Lender from time to time estimates will be payable during the next ensuing twelve (12) months in order to accumulate sufficient funds to pay all such Taxes at least thirty (30) days prior to their respective due dates. Amounts deposited pursuant to this Section 6.2.1 are referred to herein as the "Tax Funds" and the account in which such amounts are held by Lender shall hereinafter be referred to as the "Tax Account." If at any time Lender reasonably determines that the Tax Funds will not be sufficient to pay the Taxes at least thirty (30) days prior to the respective due dates, Lender shall notify Borrower of such determination and the

> monthly deposits for Taxes shall be increased by the amount that Lender estimates is sufficient to make up the deficiency at least thirty (30) days prior to the respective due dates for the Taxes; provided that if Borrower receives notice of any such deficiency after the date that is thirty (30) days prior to the date that Taxes are due, Borrower will deposit such amount within two (2) Business Day after its receipt of such notice.

See Ex. 1 to Shah Decl., Loan Agreement, at § 6.2.1. Finally, § 6.2.2, entitled "Release of Tax Funds," states that:

> Lender will apply the Tax Funds to payments of Taxes required to be made by Borrower pursuant to Section 4.1.2 and under the Security Instrument.

Hence, it was Wilmington, as Lender, not Debtor, that was obligated to pay the water and sewer charges since Wilmington had collected the funds from Debtor and controlled them.

In addition, TCG disingenuously omits reference in its moving papers to a critical exception which is part of § 7.1(ii) of the Loan Agreement. That provision states that Debtor's failure to pay "Taxes" will constitute an "Event of Default"

> 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***.
> [emphasis in bold added]

TCG conveniently ignores and omits the bold-highlighted clause entirely from its recitation of § 7.1(ii), as well as the provisions of § 6.2 obligating the Lender to pay the Taxes from reserves. Because Debtor was required to, and did, escrow funds with Wilmington to pay its Taxes (which, by definition, includes water and sewer charges), those charges do not fall within the scope of § 7.1(ii) of the Loan Agreement. As a result, the alleged failure by Debtor to pay such water and sewer charges could not be considered an enumerated, incurable "Event of Default" under § 7.1(ii) because it was the Lender's responsibility to pay such charges.

In fact, during the entire period prior to acceleration of the loan that TCG claims Debtor failed to pay such water and sewer charges (March 2016 – September 2017), Wilmington was holding sufficient funds in a Tax Account, as well as in a separate general Reserve Escrow. Such funds had been deposited by Debtor into a Lockbox account controlled by Lender in accordance with a Cash Management Agreement, dated April 16, 2015 (Katchadurian Decl., Ex. A). Mr. Vaswani confirms in his October 19, 2017 ("10/9/17 Vaswani Decl.") Declaration filed in the foreclosure action that pursuant to the Cash Management Agreement, Debtor had been depositing its revenue into a Lockbox account maintained at Wells Fargo Bank, the servicer of the loan. *See* Zuckerbrod Decl., Ex. B, 10/19/17 Vaswani Decl. at ¶¶ 3, 4. The Lockbox was under the exclusive control of Wilmington and Wells Fargo. This has also been confirmed by Mr. Katchadurian, the Debtor's chief restructuring officer, who has knowledge of Debtor's financial records.

Monthly payment coupon/billing statements sent by Wells Fargo to Debtor confirm that Wilmington had Tax Escrow and General Reserves in the following amounts for the period when TCG now says the Debtor was in default for not paying water charges:

Date	Tax Escrow Balance	Reserve Escrow Balance
January 12, 2016	$7,242.87	$567,999.60
February 12, 2016	$46,487.54	$584,594.64
March 12, 2016	$85,732.21	$601,189.68
April 12, 2016	$124,976.88	$616,284.72
May 12, 2016	$164,221.55	$594,789.76
June 11, 2016	$203,466.22	$574,154.51
June 29, 2016	-$92,097.38	$574,154.51
July 12, 2016	-$28,940.28	$586,737.06
August 12, 2016	$34,216.82	$599,319.61
September 12, 2016	$97,373.92	$611,902.16
October 12, 2016	$160,531.02	$624,484.71
November 14, 2016	$223,688.12	$637,067.26
December 9, 2016	-$4,169.56	$649,649.81
January 13, 2017	$43,637.98	$662,232.36
February 10, 2017	$91,445.52	$674,814.91
March 10, 2017	$139,253.06	$687,397.46

April 7, 2017	$187,060.60	$699,980.01
May 12, 2017	$244,466.85	$712,562.56
June 9, 2017	$301,873.10	$725,145.11
July 7, 2017	$16,962.55	$833,577.02
August 11, 2017	$68,288.17	$929,832.62

(Katchadurian Decl., Ex. B).

These reserves were more than sufficient to pay Debtor's water and sewer charges at any time. Wilmington had an obligation under the Loan Agreement to pay these charges and could have used such reserves to pay any water and sewer charges that were due. Clearly, Wilmington's failure to notice a default on this issue speaks volumes, indicating that it did not believe Debtor to be in default. TCG should be estopped from now claiming otherwise. There was no incurable "Event of Default" under § 7.1(ii) of the Loan Agreement.

B. Due to Wilmington's Intentional, Bad-Faith Conduct of Withholding "Excess Cash Flow" from Debtor That Was Needed to Pay Operating Expenses, Debtor Did Not Default in the Payment of any Taxes

As previously shown in Debtor's Objection and in Mr. Vaswani's declaration, there is substantial evidence of Wilmington's intentional, bad faith conduct in 2017, as a result of its and its loan servicer's withholding of "Excess Cash Flow" funds from Debtor. Debtor desperately needed these funds to pay its operating expenses, including sales and hotel occupancy taxes. *See* Zuckerbrod Decl., Ex. D, 10/19/17 Vaswani Decl., ¶¶ 7-12. Such "Excess Cash Flow" – *i.e.*, funds exceeding the amount needed to pay the specific obligations listed in § 6(b) of the Cash Management Agreement – were supposed to be returned by Wilmington to Debtor from the Lockbox account on a monthly basis. *See* Katchadurian Decl., Ex. A, Cash Management Agreement, at ¶ 6(b)(xi). In bad faith and in breach of the Cash Management Agreement, Wilmington, refused to release those excess funds beginning in July 2017 as a tactic to coerce Debtor to consent to the appointment of a receiver for the Hotel. *See* Zuckerbrod Decl., Ex. D, 10/19/17 Vaswani Decl. ¶¶ 7-12.

The evidence of Wilmington's and Midland's bad faith misconduct is overwhelming. Before Wilmington accelerated the loan, on September 7, 2017, Mr. Semon, of Midland, sent an email to Debtor's principal, Mr. Vaswani, indicating that he would only release the Excess Cash Flow if Debtor agreed to the appointment of a receiver for the Hotel. Mr. Semon states:

> … I will not recommend a funding for the OPEX at this time. If the Borrower stipulates to the appointment of a receiver acceptable to lender, I would release funds as warranted to the receiver to assure an efficient operation of the hotel.

See Zuckerbrod Decl., Ex. E; *see also* Zuckerbrod Decl., Ex. D, 10/19/17 Vaswani Decl., at ¶ 13.

Thereafter, on September 28, 2017, shortly after the foreclosure action was commenced, but before Wilmington's motion for the appointment of a receiver was heard by the District Court, Mr. Semon sent another email to Debtor, again threatening to withhold operating funds from Debtor unless it agreed to a receiver. He states:

> Due to the identified events of default under the note, the Lender will not fund operating expenses until there is either a mutually acceptable third party or the appointment of a receiver to operate the F&B business.

See Zuckerbrod Decl., Ex. F; *see also* Zuckerbrod Decl., Ex. D, 10/19/17 Vaswani Decl., at ¶ 14. Later that same day, Mr. Semon sent another email to Debtor, stating that unless it agreed to a receiver, Mr. Vaswani would have to use his own monies to fund the Hotel's payment of its vendors and staff:

> The F&B concerns could be timely resolved via the receiver. I understand from our prior communications that you have supported the operating deficits at this hotel in the past noting advances totaling in excess of $200,000. I recommend that you continue to fund the operating deficits to assure the timely payment of vendors and staff.

See Zuckerbrod Decl., Ex. G; *see also* Zuckerbrod Decl., Ex. D, 10/19/17 Vaswani Decl., at ¶ 15.

Such bad faith, predatory tactics committed by Wilmington (through its agent Midland) against Debtor, directly impeded Debtor's ability to pay its operating expenses such as sales and hotel occupancy taxes, and, essentially, put Debtor out of business and into bankruptcy. As such, it was Wilmington's misconduct that was directly responsible for any failure by Debtor to pay any of its obligations, including its water and sewer charges, to the extent it had any obligation to do so.

V. TCG HAS FAILED TO PROVE THAT DEBTOR MADE MATERIAL FALSE CERTIFICATIONS CONSTITUTING AN INCURABLE EVENT OF DEFAULT

Another newly-alleged incurable "Event of Default" asserted by TCG as a basis for its claim for retroactive and improper post –acceleration default interest is that Debtor made "false certifications" in certain Disbursement Requests to Wilmington. These are claimed by TCG to be incurable Events of Default under § 7.1(v) of the Loan Agreement. The alleged "false certifications" consist of *pro forma, pre-printed* language in the signed Disbursement Request forms, which state: "No Default or Event of Default (as defined in the Loan Documents) currently exists." *See* Shah Decl. ¶ 69, and Ex. 21 thereto. However, the capitalized term "Default" is not defined in the Disbursement Request, the Loan Agreement or any other loan document. Therefore, the certification is not false.

In connection with this argument, TCG uses a kitchen-sink strategy by bundling various <u>curable</u> alleged "defaults" and accusing Debtor of having made such "false certifications" to Wilmington because it did not disclose such undefined "Defaults" when it submitted its Disbursement Requests. Those alleged "Defaults" include: (i) Debtor's failure to pay sales taxes and occupancy taxes, as required under the Management Agreement, (ii) Debtor's termination of the Management Agreement; (iii) Debtor's failure to replace the manager with a "Qualified Manager;" (iv) the alleged illegal sales of liquor and the 'availing' of Chan's liquor

license. *See* TCG Memo., p. 22; Shah Decl. ¶ 71.

Furthermore, because § 7.1(v) of the Loan Agreement provides that an enumerated, incurable "Event of Default" occurs if a representation or warranty made by Debtor in a certification ... shall have been false or misleading ***in any material respect*** as of the date of the representation or warranty" [emphasis added], TCG contends in a conclusory manner, that the alleged false certifications were "materially misleading." However, Wilmington was fully aware of all of the facts now alleged by TCG for support of its claims of false certifications. Yet Wilmington never alleged that the Debtor had made any materially misleading statement which could give rise to an Event of Default. TCG fails to establish that any of the alleged false statements materially affected Wilmington, as the recipient.

Furthermore, besides the fact that these allegations are barred by the mend the hold doctrine, what is especially galling and disingenuous about TCG's argument is that TCG does not have any first-hand personal knowledge concerning what Wilmington knew, did not know, or accepted concerning such allegedly concealed but undefined defaults. For that reason alone, its new "false certifications" argument should be rejected on its face.

In addition, as demonstrated below, none of the alleged underlying defaults, to the extent they existed, were defaults that could not be cured, or were falsely concealed from Wilmington. TCG's unsubstantiated allegations of default in an attempt to manufacture a "false certification" incurable "Events of Default" are nothing more than afterthoughts, wholly without merit.

A. Unpaid Sales and Use Taxes and Occupancy Taxes Were Not a Default Concealed from Wilmington

TCG alleges, without any proof, that Debtor concealed from Wilmington material information about Debtor's failure to pay sales and use taxes or occupancy taxes. To the contrary, such information was not concealed because each time Debtor submitted a

Disbursement Request, it was required to provide its accounts payable records and other backup to Wilmington's loan servicer to substantiate its requests for monthly disbursements of Excess Cash Flow funds needed to pay its operating expenses. *See* Shah Decl., Ex. 10.

At all times before the loan was accelerated, Wilmington was fully aware of what sales and use taxes or occupancy taxes had not been paid, even after Midland took over as special servicer with control of the Lockbox in July 2017. In fact, Debtor advised Midland on September 7, 2017 that Debtor had entered into an installment agreement with the City of New York to repay such outstanding sales and use and occupancy taxes. *See* Zuckerbrod Decl., Ex. E, September 7, 2017 email from Vaswani to Kevin Semon. Clearly, Wilmington was aware of the issue but never claimed that Debtor was in default as a result or had made a false certification.

Additionally, when Midland refused to release "Excess Cash Flow" funds to Debtor from the Lockbox, despite holding approximately $1 million in reserves in August 2017, it prevented Debtor from having sufficient funds to make required payments under its installment agreement with the City to pay any of its expenses, thus jeopardizing its entire business, and forcing Debtor into bankruptcy. Simply put, there is thus no merit to TCG's argument that Debtor falsely concealed its failure to pay its sales and use taxes or occupancy taxes.

B. The Termination or Expiration of the Management Agreement, and the Alleged Failure to Replace the Manager with a "Qualified Manager, Was Known to Wilmington

TCG now argues that the Debtor made false certifications because it failed to disclose to Wilmington in its Disbursement Requests that the Management Agreement *either* terminated in August 2015, ***or***, alternatively, had expired on December 31, 2015 by operation of its terms, which termination ***or*** expiration constituted another "Event of Default." Its argument is yet another belated, improper effort to concoct an "Event of Default" where none exists.

First, TCG neglects the fact that the Management Agreement expired by operation of its own terms on December 31, 2015, approximately eight (8) months after the loan closed. *See* Shah Decl., Ex. 4, Management Agreement at ¶ 2.01. Wilmington knew that the Management Agreement expired.

Second, although TCG asserts that Wilmington "was not aware that the existing Management Agreement had been terminated or replaced until its servicer questioned Mr. Vaswani by email of September 8, 2019," TCG gets the date wrong, which is September 8, 2017 – not 2019. In any event, *before the loan was accelerated*, Debtor *did* disclose to Wilmington that Mr. Vaswani as a principal of the Debtor, had taken over the role of "Manager" of the Hotel and that the Debtor was being self-managed. In Mr. Vaswani's September 25, 2017 Declaration (Zuckerbrod Decl., Ex. C), he attests to the following fact:

> I had numerous communications with Tim Teague, a representative of the Assignee Lender, concerning issues involving the financial operations of the Hotel as part of my management role. In addition, in February of this year [2017], I met with two of Rialto's officers to discuss the possible assumption of the Loan by a prospective buyer and based on our discussions I made it clear to them that I and not Mr. Chan was managing the Hotel. From that time until the service of the [Wilmington's] complaint, no objection was made to my management of the Hotel.

Significantly, both after Rialto became aware of the change in management and even after Wilmington became aware of Mr. Vaswani's involvement in management in early September 2017, Wilmington chose *not* to allege any default the loan based on the expiration of the Management Agreement on December 31, 2015, or on Mr. Vaswani's assumption of the Manager role. Wilmington did not object. Therefore, TCG should be estopped, under New York law principles of equitable estoppel, from arguing that Debtor defaulted by failing to replace the Management Agreement or the "Original Manager." *See Shondel J. v. Mark D.*, 7

N.Y.3d 320, 326 (2006) ("The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted."); *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P.*, 7 N.Y.3d 96, 106 (2006) ("estoppel 'is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.' ") (quoting *Nassau Trust Co. v Montrose Concrete Prods. Corp*., 56 N.Y.2d 175, 184 (1982)).

The case law upon which TCG relies is inapposite. In *Chase Manhattan Bank v. Motorola, Inc.*, 184 F.Supp.2d 384 (2002), the certificate at issue was provided by a borrower to a lender in order to cancel a $300 million loan guarantee by a third party. The certificate contained far more than just the boilerplate statement that "no defaults had occurred or were continuing." As required under the credit agreement, the borrower's certificate also certified: (i) "As of the date hereof, the Company is in compliance with Section 8.07 of the Credit Agreement," and (ii) "As of the date hereof, the Company has committed available funding to meet all projected costs to (but not including) the Maturity Date." The court's decision focused on such specific misrepresentations as they directly and materially impacted the borrower's financial ability to repay the loan, and not simply the boilerplate clause stating that "no defaults" had occurred or were continuing," as TCG's argument suggests. The court's finding that the "no defaults" clause was a misrepresentation was predicated on its specific findings that the borrower failed to disclose that it had failed "to satisfy the Financial Covenants" and "to maintain its [system] consistent with the Financial Projections," which constituted Events of Default that

rendered the entire certificate false and misleading. *Chase Manhattan Bank*, 184 F.Supp.2d at 393.

Unlike the facts in *Chase Manhattan Bank* decision, Debtor's Disbursements Requests did not contain specific material representations. The "No Default (undefined) or Event of Default" statement does not incorporate or refer to any specific financial or other representations made by Debtor in the Disbursement Requests. Without more, TCG's argument that the "No Default or Event of Defaults" certifications are *materially* false is entirely unsubstantiated and specious. TCG's attempt to render them "materially false" by alleging new "defaults" or "Events of Default" that are not based on actual misrepresentations appearing on the face of the certifications should be rejected.[5]

C. Allegations that Debtor's Illegal Sales of Liquor and "Availing" of Chan's Liquor License Were Concealed From Wilmington Are Unsubstantiated

As discussed in Point II above, TCG's unsubstantiated allegations that Debtor availed of the Liquor Licenses and illegally sold alcohol in violation of New York law cannot be the basis for an enumerated, incurable Event of Default under § 7.1(xii) of the Loan Agreement, which is very specific regarding the status of the license. Rather, "availing" would fall within § 7.1(xvi) of the Loan Agreement, as an alleged failure to comply with defined Legal Requirements, which would have entitled Debtor to a 30-day notice of cure before an "Event of Default" could be declared. Because it is indisputable that Wilmington never provided any notice or cure opportunity before it accelerated its loan, TCG's argument that Debtor's availing was an Event of Default that it concealed from Wilmington is without merit.

[5] TCG's reliance on *State Street Trust v. Ernst*, 278 N.Y. 104 (1938) is also misplaced. That case dealt with the extent to which accountants could be held liable for false certifications of financial conditions of a company. There is no "no default" certification clause at issue in that case, rendering it inapposite.

In conclusion, this Court should disallow TCG's Claim for any default interest retroactively dating back to the dates of the defaults belatedly alleged by TCG, none of which have merit or have been proven as a matter of law.

VI. TCG IS NOT ENTITLED TO PRE-PETITION ATTORNEYS' FEES

Due to Wilmington's wrongful acceleration of the loan, TCG's Claim for pre-petition attorneys' fees in an improper foreclosure action should be disallowed entirely. Debtor does not dispute that TCG would be entitled only to "reasonable" post-petition attorneys' fees if the acceleration of the Loan was justified. Debtor attaches and incorporates by reference herein the reasons set forth in its previously-filed Objection to TCG's Claims (ECF Docket No. 186) concerning the unreasonableness and excessiveness of TCG's attorneys' fees.

CONCLUSION

For the foregoing reasons, TCG's motion for summary judgment should be denied in its entirety.

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