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	

TCG DEBT ACQUISITIONS 2 LLC'S
REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

Dated: January 31, 2020

WOODS OVIATT GILMAN LLP
William F. Savino, Esq.
1900 Main Place Tower
Buffalo, New York 14202
716.248.3200

BACKENROTH FRANKEL & KRINSKY, LLP
Mark A. Frankel, Esq.
800 Third Avenue
New York, New York 10022
212.593.1100

Attorneys for TCG Debt Acquisitions 2 LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

This Reply Memorandum of Law ("Reply") is filed on behalf of TCG Debt Acquisitions 2 LLC (hereinafter, "Lender")[1] in response to Debtor's Opposition ("Response") and in further support of Lender's 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

The Debtor's Response fails to refute the reality that the Debtor failed to comply with its contractual obligations for years resulting in several defaults and Events of Default that now require the payment of Default Interest to the Lender. Yet again, the Debtor attempts to manufacture a factual dispute through unsupported refutations in its Response, all while shockingly admitting facts in its moving papers that support the grant of summary judgment in favor of the Lender.

In a last-ditch attempt to refute the fact that the Debtor failed to pay necessary water charges (an Event of Default), the Debtor claims that Lender was supposedly responsible for making such payments based on its view of the monthly invoices; however, such claim is utterly refuted by the Declaration of Timothy Teague, Wells Fargo's asset manager assigned to this Loan, as well as the transaction history reprinted by the Debtor's Chief Restructuring Officer ("CRO"), which show that the Tax Reserve never, in fact, held funds escrowed for water charges, and, in any event, the escrow was insufficient even to pay real property taxes. The Debtor's failure to pay water charges was, and remains, an Event of Default.

[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).

With respect to the liquor license issues, the Debtor shockingly admits that Robert "Toshi" Chan,[2] the **sole licensee** entitled to sell liquor at the Property, had absolutely ***nothing*** to do with hotel management or its food and beverage operations as of January 1, 2016. As a matter of law, the "Chan Liquor Licenses" could not be used to sell alcoholic beverages at the Hotel as of that date, and, thus, the Licenses could not be "in full force and effect" "relating to the Property," another Event of Default.

With regard to the Debtor's myriad false representations, the Debtor makes an absurd argument that the word "Default" contained in the Disbursement Requests is undefined, and therefore the Debtor should be relieved of its obligation to be forthright with its Lender. Even more shockingly, the Debtor admits, in its own supporting Declaration of Mr. Katchadurian, that it was in default of the Cash Management Agreement ("CMA") from almost the inception of the loan, as it was not depositing all revenue into the lockbox account, another Event of Default as of the making of the first false certification on January 26, 2016.

Lender is entitled as a matter of law to interest at the Default Rate under the Loan Agreement[3] as a result of "Events of Default" for which neither notice nor any opportunity to cure was required and that such Default Interest accrues as of the date of the Events of Default as described in Lender's Motion papers and herein Lender also seeks approval of its Pre-Petition and Post-Petition Attorneys' fees and disbursements.

[2] Chan was the owner of 9 West 26th St. Rest. LLC and Toshi's Penthouse, Inc. ("the Chan Liquor Licensees", and the licenses granted to those entities, the "Chan Liquor Licenses").
[3] Shah SJ Decl. Ex. 1

ARGUMENT

POINT I

DEBTOR FAILED TO COMPLY WITH SECTION 6.2 OF THE LOAN AGREEMENT; NO FUNDS WERE PAID, ESCROWED OR AVAILABLE TO LENDER FOR THE PAYMENT OF WATER OR SEWER CHARGES

The Debtor admits that there were unpaid water charges as shown in the water account history (Shah SJ Decl. Exh. 7); however the Debtor claims that the Lender held money for payment of those charges in the tax escrow and therefore the unpaid water charges are not an Event of Default under Sections 7.1(ii) and 4.1.2 of the Loan Agreement. Section 7.1(ii) of the Loan Agreement states 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 *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 added). Notably, sums sufficient to pay those charges were never paid to or deposited with Lender in accordance with the terms of the Loan Agreement.

The Debtor's novel attempt to evade its contractual and administrative obligations with respect to the payment of water charges in fact bolsters the Lender's showing that the unpaid water charges were the responsibility of the Debtor. The monthly invoices relied on by the Debtor in fact establish that the amounts escrowed in the Tax Reserve were never sufficient to pay for even real property taxes themselves, let alone other forms of Taxes or Other Charges.

In response to this last-ditch argument, Lender relies on the Declaration of Timothy Teague, the asset manager at Wells Fargo Commercial Mortgage Servicing who personally serviced the Debtor's account ("Teague Declaration") including the loan's full transaction history and monthly escrow analyses sent by the Lender during the period in question. The Teague Declaration further establishes that: (i) water charges were never, in fact, deposited by

the Debtor with the Lender; (ii) water charges were never, in fact, escrowed for by the Lender; (iii) water charges were never billed to, or paid by, the Lender (despite being paid by another party, presumably the Debtor, from the origination of the loan in April 2015 through the first delinquency in March 2016); (iv) the escrow analyses sent to the Debtor on a monthly basis never included a reference to water charges; and (v) the various references to "Tax Escrow" in Wells Fargo's records and billing statements referred only to real property taxes.

The Katchadurian Declaration, based on conjecture, is completely refuted by the Teague Declaration that confirms, based on first-hand knowledge, that the Lender held no escrow funds which were or could be used for payment of the water and sewer charges.

Attached to the Shah Reply Declaration as Exhibit A is the transaction history for the Debtor's loan ("Transaction History") (Exhibit G is an account history showing similar information in a clearer format), which reveals various disbursements from the tax escrow for payment of real property taxes, including as follows:

Date of Disbursement:	**Amount Paid:**
June 13, 2016	$295,563.60
December 5, 2016	$291,014.78
June 13, 2017	$342,316.80
December 7, 2017	$338,432.00

Stunningly, the Debtor's own analysis[4] of the tax escrow balance, when compared to the payments shown in Transaction History, confirms ***that at no time*** did the Lender hold funds in the escrow account for payment of water or sewer charges. The Debtor's analysis confirms that, after each payment of real property tax in June and December of each year, the Tax Reserve subsequently had a negative balance. This occurred in June 2016,[5] December 2016,[6] and June

[4] Declaration of James Katchadurian, ¶ 10.
[5] The Debtor's analysis of the tax escrow balance shows that on June 13, 2016, when the real property tax payment in the amount of $295,563.60 was paid, the balance in the tax escrow was only $203,466.22.

2017.[7] Each tax payment advanced by the Lender required ***all of the available funds*** in the tax escrow, and each time the Lender still had to advance additional funds because there was a shortfall.

Clearly, as shown by the Debtor's own analysis of the tax escrow balance, there was ***never*** a sufficient balance in the tax escrow to cover even the real property taxes that had to be paid each year; consequently, there were no excess funds on deposit in the tax escrow at any relevant time for the payment of water or sewer charges.

The Transaction History further establishes that the only payments from the tax escrow were payments (labeled "TAX DISB") for real property taxes. A review of the account history attached as Exhibit G confirms this fact, specifically designating those payments as "NY, NYC Manhattan (Halves)." Attached to the Shah Reply Declaration as Exhibit B is an ESCROW ANALYSIS AND NOTICE OF PAYMENT CHANGE issued from the Lender to the Debtor ("Escrow Analysis") confirming the bi-annual real property tax payments (referred to as "NY, NYC Manhattan (Halves)") and shortfalls, as shown in the Transaction History.

Attached to the Shah Reply Declaration as Exhibit C are copies of all water bills issued by the NYC DEP for the Property over the relevant period, ***all addressed to the Debtor***, not the Lender. Attached to the Shah Reply Declaration as Exhibit D is an account summary for the Debtor's water account ("Water Account Summary"), confirming (in the right-hand column under Bill Details – Type) that the bills were issued to the owner. By contrast, the Property Tax Bill Quarterly Statements issued by the New York City Department of Finance (Shah Reply

[6] The Debtor's analysis of the tax escrow balance shows that on December 5, 2016, when the real property tax payment in the amount of $291,014.78 was paid, the balance in the tax escrow was only $223,688.12 (November 14, 2016 balance). As shown by the account history attached to the Shah Reply Declaration as Exhibit A, there were no payments into the tax escrow between November 7, 2016 and December 5, 2016.

[7] The Debtor's analysis of the tax escrow balance shows that on June 13, 2017, when the real property tax payment in the amount of $342,316.80 was paid, the balance in the tax escrow was only $301,873.10.

Decl. Exh. E) specifically reference the real property tax payment as coming from "Wells Fargo Comm. Mort-Servg." Clearly, the water bills were issued directly to the Debtor, and the Debtor failed to pay them, or alternatively, to supply those to the Lender as required.

The Water Account Summary attached to the Shah Reply Declaration as Exhibit D establishes that, over the course of the loan, occasional partial payments were made on the water bills, ***but not one of those payments was made by the Lender***. Presumably, those payments came from the Debtor. In addition, the Debtor has admitted that it made a payment agreement directly with the New York City Department of Environmental Protection for the repayment of water charges.[8] The Debtor has also admitted that the past due notice for the payment of water charges was issued directly to the Debtor, not the Lender.[9] Clearly, rather than supply the unpaid water bills to the Lender as required under Section 6.2.2 of the Loan Agreement, the Debtor undertook the responsibility to pay the water charges directly and failed to do so.

The Katchadurian Decl. ¶¶ 10 and 13 includes references to the Reserve Escrow Balance held by Lender, with a suggestion that those funds could have been expended for the unpaid water charges. However, those reserve funds were specifically held for payment of future capital expenditures, not for payment of the taxes, insurance or water charges.

The separate reserve account for capital expenditures, established pursuant to Section 6.4 and Section 6.4.1 of the Loan Agreement, specifically provides that such funds are to be held for "Planned Capital Expenditures" and "Approved Capital Expenditures." Section 6.4 of the Loan Agreement does not permit the use of the Capital Expenditure Funds for payment of the Debtor's

[8] Counterstatement of 1141 Realty Owner, LLC in Response to Rule 56.1 Statement of Material Undisputed Facts of TCG Debt Acquisitions 2 LLC ¶ 42 (Shah SJ Exh. 9).
[9] Counterstatement of 1141 Realty Owner, LLC in Response to Rule 56.1 Statement of Material Undisputed Facts of TCG Debt Acquisitions 2 LLC ¶ 40 (Shah SJ Exh. 8).

tax, insurance or water charges relating to the Property. The Teague Declaration further confirms that these funds were not available for payment of the unpaid water charges.

Lender also notes that pursuant to Section 6.10.1 of the Loan Agreement, the Lender has no obligation to release Reserve Funds while any Event of Default has occurred and remains outstanding. Four letters from the Lender to the Debtor (dated March 7, 2016, June 17, 2016, December 12, 2016 and February 3, 2017) informed it that the loan was in default for failing to provide financials (including for the quarter and year ending December 31, 2015). Attached to the Shah Reply Declaration as Exhibit F is a copy of the February 3, 2017 letter summarizing the defaults and prior notices.

Finally, Debtor claims that Lender refused to release Excess Cash Flow to the Debtor in 2017, in bad faith. Pursuant to Section 6.8.2 of the Loan Agreement and Section 6(b) of the Cash Management Agreement, Lender was not required to release Excess Cash Flow to the Debtor if an Event of Default had occurred. Pursuant to the Cash Management Agreement, a "Cash Sweep Event" is defined to include an Event of Default. Thus, Lender was not obligated to release such funds to the Debtor in 2017 due to the Events of Default that had occurred, such as the failure to pay Taxes or Other Charges, the failure to maintain the Chan Liquor Licenses in full force and effect, or the making of false representations. Moreover, Debtor's claims do not explain Debtor's failure to pay the water charges in 2016, or the Debtor's failure to supply the unpaid water bills to the Lender as required under Sections 6.2.2 and 4.1.2 of the Loan Agreement, or the Debtor's admitted failure[10] to deposit all income from the Property into the Clearing Account Lockbox.

The Debtor's failure to pay the water charges was an Event of Default. Debtor failed to provide the water bills to the Lender, as required under the Loan Agreement, and even if the

[10] Declaration of James Katchadurian, ¶ 3.

Lender were aware of the water charges, the Lender held no funds in the Tax Escrow for the payment of water charges at any time and the other reserves were not for the payment of water bills. Immediately upon non-payment of the water charges those charges became a statutory lien. It is beyond dispute that the existence of the lien for unpaid water charges was an Event of Default under § 7.1(ii) of the Loan Agreement from March 22, 2016 through July 12, 2019.

POINT II

THE "MEND THE HOLD" DOCTRINE DOES NOT APPLY, IF AT ALL, BECAUSE OF THE LENDER'S RESERVATION OF RIGHTS

While the Debtor devotes an extensive portion of the Debtor's Memorandum of Law in Opposition ("Debtor's MOL") (pp. 12-21) addressing the "mend the hold" doctrine, none of the federal or state court decisions cited by the Debtor except *PrimeTime 24 Joint Venture v. DirecTV, Inc.*,[11] and *Daiwa Special Asset Corp. v. Desnick*[12] (both of which were cited in Lender's initial Memorandum of Law (ECF Doc. 209) ("Lender's MOL")), address the effect of a reservation of rights such as those expressly provided in the Loan Documents herein and in the Default Letters served on the Debtor.

The Debtor's MOL correctly states that the District Court in DirecTV declined to apply the "mend the hold" doctrine because, inter alia, "**It found that Direct-TV's termination letter included a reservation of other grounds at the time of termination,"** and "there are not 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."[13] The Debtor then tentatively and speculatively argues:

[11] 2000 U.S. Dist. LEXIS 5022 (S.D.N.Y. 4/20/2000).
[12] 2002 U.S. Dist. LEXIS 16164 (S.D.N.Y. 8/29/2002).
[13] Debtor's MOL p. 16 (emphasis added), citing to 2000 U.S. Dist. LEXIS 5022, *34.

> 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*.**[14]

The fallacy with Debtor's argument is that the Events of Default upon which Lender relies for this motion, *i.e.*, (i) the "the Liquor License, relating to the Property, ceas[ing] to be in full force and effect," (ii) the failure to pay water charges, and (iii) the false certifications, were not required to be noticed and were ***not curable***. The Debtor does not assert that it relied on the assertion of these Events of Default nor could it have relied, and ***it was impossible for the Debtor to remedy these incurable events of default.***

The reference to "availing" in Lender's MOL is not an asserted Event of Default. The principle cited by Lender is simply that the Debtor illegally sold alcoholic beverages at the Hotel (*i.e.*, the "Property") by "availing" itself of the Chan Liquor Licenses, acts that are prohibited by Alcoholic Beverage Control Law §111. Without Chan's active management and control of the alcoholic beverage sales (after December 31, 2015), the Chan Liquor Licenses were no longer in full force and effect "**relating to the Property**" and the continued liquor sales **at the Hotel** were unlawful. This Event of Default was not curable.

Like Primetime, the District Court in *Daiwa* declined to apply the "mend the hold" doctrine where there was, *inter alia*, a reservation of rights."[15]

Debtor, however, incorrectly asserts that *PrimeTime* and *Daiwa* are not "controlling authority" because each decision purportedly applied Illinois law, not New York law.[16] The District court in *PrimeTime*, explicitly applied New York law."[17] Likewise, in *Daiwa*, the Court

[14] Debtor's MOL p. 17 (emphasis added).
[15] Debtor's MOL p. 18, citing to *Daiwa*, 2002 U.S. Dist. LEXIS 16164, *15.
[16] Debtor's MOL p. 18.
[17] 2000 U.S. Dist. 5022, *32, fn. 15.

explicitly applied New York law.[18] Debtor's MOL asserts, however, that because *Primetime* cited the Seventh Circuit decision, *Harbor Ins. Co. v. Continental Bank Corp.*,[19] it thereby applied Illinois law. The District Court in *Primetime* cited *Harbor Ins. Co.*, with a "*see also*" signal,[20] among numerous decisions including the seminal *Railway Co. v. McCarthy*[21] that described the "mend the hold" doctrine. That citation to other authority did not mean the *PrimeTime* or *Daiwa* cases were decided under Illinois law.

Next, the Debtor purports to be "shocked" (Debtor's MOL p. 13) that Lender claimed that the holding of *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*,[22] was reversed. It was. Then, the Debtor backtracks at Debtor's MOL p. 14 by admitting that the Fourth Department had vacated the preliminary injunction and had ruled that the notice of deficiency was "null and void," but that, nonetheless, the Fourth Department did not reverse the "principal of law" and (according to the Debtor), the trial court's decision is "the law in New York." That analysis is wrong.

In *Towley v. King Arthur Rings, Inc.*,[23] the Court of Appeals held that "The court's opinion is a statement of the reasons on which the judgment rests . . . . Since it is only what a court adjudicates, not what it says in an opinion, that has any direct legal effect, a judgment of the court controls over an opinion, and if they are at variance, the former prevails and determines the rights of the parties."[24] The Fourth Department's reversal leaves the lower court's opinion in *Destiny USA* as *dicta*, at best.

---

[18] 2002 U.S. Dist. LEXIS 16164, *12.
[19] 922 F.2d 357 (7th Cir. 1990).
[20] The "*see also*" signal means "additional source material that supports the proposition." *Bluebook, Uniform System of Citation*, 17th ed. at p. 25.
[21] 96 U.S. 258 (1877).
[22] 24 Misc.3d 1222(A), 897 N.Y.S.2d 669 (Sup. Ct. Onondaga Co. 2009) mod. 69 A.D.3d 212 (4th Dep't 2009).
[23] 40 N.Y.2d 129 (1976).
[24] 40 N.Y.2d at 132.

Further, the First Department has held that "the doctrine of stare decisis does not compel a judge at Special Term to follow a decision of a Special Term in another judicial district. . . ."[25] Thus, even if it were not reversed, the decision of the Onondaga Supreme Court would not be binding on the Supreme Court of any other judicial district in the State. It certainly would not be the "good law in New York." (Debtor's MOL p. 21) and would not be binding on the federal courts. "Absent law from a state's highest court, a federal court sitting in diversity has to predict how the state court would resolve an ambiguity in state law. In determining how the Court of Appeals would rule on this legal question the decisions of New York State's Appellate Division are helpful indicators."[26] The Debtor places unwarranted reliance on the reversed Onondaga County Supreme Court decision in *Destiny USA.*

Finally, none of the decisions cited by the Debtor pertain to a bankruptcy proceeding in which determination of defaults and resulting the calculation of a Lender's claim is at issue. Here we are simply looking to the Loan Documents to calculate the interest rate in effect on certain dates, not foreclosing.

Thus, even if the "mend the hold" doctrine has been recognized by some New York and Second Circuit courts, it has never been applied when a party has reserved its rights under applicable notices and the contract documents, and when the other party has not been prejudiced or has not relied (and cannot rely) on any declared default.

POINT III

THE LIQUOR LICENSE WAS NOT IN FULL FORCE AND EFFECT RELATING TO THE PROPERTY AFTER DECEMBER 2015, AND, THUS, DEFAULT INTEREST WAS PROPERLY ACCRUED FROM DECEMBER 31, 2015

[25] *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep't 2014).
[26] *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116 (2d Cir. 2000).

Importantly, the Debtor finally admits that Robert “Toshi” Chan – the sole person authorized by the New York State Liquor Authority ("SLA") by virtue of his sole ownership of the Chan Liquor Licenses to sell liquor on the premises – had absolutely nothing to do with management of the hotel or its food and beverage business after December 31, 2015; yet the Debtor still attempts to maintain with a straight face that it did not flout its Loan Agreement obligations or plainly violate civil and criminal law by serving liquor illegally after that date. However, as a matter of law, once Toshi had no relation to the Property, the Chan Liquor Licenses were not in full force and effect, and had no relation to the Property. The Debtor continues to argue, in error, that, since the Chan Liquor Licenses had not been formally revoked by the SLA, they remained in "full force and effect." The Debtor, however, omits the key phrase of Section 7.1(xii) of the Loan Agreement --"relating to the Property"-- defining an Event of Default:

> if, without the 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**.

As argued in in the Lender's MOL, a liquor license "is issued ***to a specified person*** solely for upon use upon specified premises,"[27] and the licensee may not leave someone else in charge without his own "direction, supervision or oversight."[28]

Debtor cited to Shah SJ Decl. Exh. 16, an email from Vaswani, in which he admitted that the Food and Beverage ("F&B") was being operated by 1141 Broadway Restaurant and Penthouse Operations LLC, and "discussions to add my name to the license are still ongoing." (Debtor's MOL p. 10).[29] Vaswani's email was an admission that the Debtor violated Alcoholic

[27] *Cleveland Place Neighborhood Assn. v. New York State Liquor Auth*., 268 A.D.2d 6, 9 (1st Dep't 2000) (emphasis added).
[28] *Happy Landing Lounge v. State Liquor Auth*., 219 A.D.2d 786 (3d Dep't 1995).
[29] A statement made by a party in an individual or representative capacity is not hearsay. Fed. R. Evid. 801(d)(2)(A).

Beverage Control Law ("ABCL") §111.[30] 1141 Broadway Restaurant and Penthouse Operations LLC was not the Licensee, and only the actual Licensees, i.e., 9 West 26th St. Rest. LLC and Toshi's Penthouse, Inc., were permitted to lawfully conduct beverage sales. Once Chan had no relation to the property, the Chan Liquor Licenses no longer had any relation to the Property either. Any other use of the Chan Liquor Licenses by another person was unlawful "availing."[31]

The Debtor incorrectly argues that "only the SLA could have determined that the Liquor Licenses were no longer in full force and effect, but never did so" (Debtor's MOL p. 8).[32] That is not true. The SLA is not authorized to construe contract provisions. ABCL §17 grants to the State Liquor Authority ("SLA") the authority to "revoke, cancel or suspend for cause any license or permit." There is no statutory authority for the SLA to determine that a particular license is "in full force and effect," particularly as it is "relating to the Property." The SLA search annexed as Exhibit E to the Zuckerbrod Declaration (ECF Doc. 215), merely states that the licenses are "active," not that they are "in full force and effect." That is a matter of contract construction over which the SLA has no statutory authority.

The Debtor cites (again) at Debtor's MOL p. 7 to *Kelly v. Casale*,[33] which affirmed the revocation of a liquor license for drug trafficking although the final adjudication of the Article 78 petition took six years, and the Court observed that delay "inured to his benefit as it enabled him to continue to operate his business." The petitioner in *Kelly* was, however, ***the owner of the liquor license***. ***Neither Vaswani nor 1141 Broadway Restaurant and Penthouse Operations***

[30] A statement by an agent of an adverse party is admissible pursuant to Evidence Rule 801(d)(2)(D).
[31] ABCL §111 also provides that the liquor license is available "only for the premises licensed and no other . . . ." Chan's Liquor Licenses were not "portable". They could only be used for the Hotel—***and only under the direction and control of Chan***.
[32] The SLA may ***revoke*** a license. Here, the Debtor concealed the availing from the SLA, and it should not be rewarded for such concealment. Nonetheless, whether revoked or not, the Chan Liquor Licenses were not "in full force and effect" "relating to the Property" because Chan no longer had control or oversight of the liquor sales at the Hotel after December 31, 2015.
[33] 263 A.D.2d 889, 890 (3d Dep't 1999), *lv. den*., 94 N.Y.2d 754 (1999).

LLC was ever the owner of the Chan Liquor Licenses, the only licenses issued for use at the Property, or any other liquor license (Debtor's MOL p. 10). Whether the licenses were revoked by the SLA or not, they could never have been lawfully utilized by another person. Only the actual Licensees (*i.e.*, the Chan Licensees) were permitted to sell liquor at the Hotel under ABCL §111.[34]

The Debtor contends that after expiration of the Management Agreement on December 31, 2015, the Debtor itself "continued self-management." (Counterstatement ¶ 53). Purported "self-management" by Vaswani still could never confer any legal authority on him to use the Chan Liquor Licenses in contravention of ABCL §111. After Chan's undisputed departure from management as of December 31, 2015, any liquor sales by Vaswani or another entity were accomplished only through the subterfuge of "availing." Vaswani admitted in the September 11, 2017 email that 1141 Broadway Restaurant and Penthouse Operations LLC is operating the "F&B" and that "**We are still operating under the hotel license issued to Robert Chan** . . . . Discussions to add my name to the license are still ongoing" (Shah SJ Decl. Exh. 16). (emphasis added). That email of September 11, 2017 is undisputed. (Counterstatement to Undisputed Facts ¶97).

Although Debtor argues that there was no "evidentiary" support that Chan no longer supervised liquor sales after December 31, 2015 (Counterstatement ¶54), the Debtor seemingly ignores Chan's numerous emails, and his unequivocal Declaration, all of which state that he had no further part in management as of January 1, 2016 (Shah SJ Ex. 13; SJ Ex. 12). Biermann, an authorized agent of Chan, a principal of the Debtor, admitted to Wells Fargo that the Hotel had

[34] The Debtor argues that it was not contractually required to sell alcohol (Debtor's MOL p. 11). While that is a misreading of the Loan Agreement, the incurable Event of Default was that the Chan Liquor Licenses were no longer effective to make legal sales at the Hotel given Chan's departure, ***not*** whether the Debtor was actually selling alcoholic beverages.

been illegally selling liquor without an effective liquor license (SJ Decl. Ex. 17).[35] Further, the Debtor admits the statement at ¶6 of the Chan Declaration that "Management Agreement was terminated in August 2015 when Mr. Vaswani removed me as manager of the Flatiron Hotel" (Undisputed Facts ¶85).

Thus, whether Chan's role ended in August 2015, or upon the lapse of the Management Agreement on December 31, 2015 (Undisputed Facts ¶86), the Debtor fully admits that Chan no longer had any involvement with, or operational control of, the Chan Liquor Licenses or the food and beverage sales at that point. Therefore, the Chan Liquor Licenses were no longer "in full force and effect" relating to the Property. That Event of Default was the proper basis for application of Loan Agreement Section 7.1(xii), permitting accrual of Default Interest (as well as acceleration of the Loan).

POINT IV

THE DEBTOR'S FALSE CERTIFICATIONS CONSTITUTE AN EVENT OF DEFAULT

The Debtor continues to fail to appreciate that the underlying defaults relating to false certifications ***do not need to be noticed, nor an opportunity to cure need be afforded, due to the fact that the Debtor lied to the Lender about its dealings, which is an Event of Default***. The Debtor incredulously tries to escape its plain liabilities by citing the lack of a definition of the word “Default” in its false certifications, despite such word having an obvious and plain meaning.[36] Additionally, in yet another stunning turn of events, the Debtor’s own Chief

[35] Statements of an attorney, as agent for an adverse party, within the scope of his agency, are admissible under Evidence Rule 801(d)(2)(D). See *United States v. Amato*, 356 F.3d 216, 220 (2d Cir. 2004).

[36] It is incumbent on the court, when interpreting a contract, to give the words and phrases contained therein their ordinary, plain meaning. *Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 208 (1st Dep't 1994); *see also*, *U.S. Bank N.A. v. Greenpoint Mtg. Funding, Inc.*, 157 A.D.2d 93, 100 (1st Dep't 2017) (the court should not blue pencil words out of an arms-length agreement).

Restructuring Officer admitted to yet another default in the Debtor's Response: the Debtor failed to deposit all of its revenues with the lender, as required by the Cash Management Agreement.

As noted, 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.

Lender has cited to numerous documents captioned "Disbursement Request and Certification" ("Disbursement Request") each of which, on its face, was made "to induce [Lender]" to make a requested disbursement." Each such document included a certification that "No Default or event of Default as defined in the Loan Document(s) currently exists."

The Debtor absurdly argues that because there is no definition of "Default" with a capital "D" in any of the Loan Documents, there can be no false certification of a "Default" with a capital "D." There is no definition of "Event of Default" either. Section VII of the Loan Agreement, entitled "DEFAULTS" defines Defaults, providing "the following events shall constitute an event of default hereunder . . . ." Certain enumerated "events of default" are "Events of Default," that require no notice or opportunity to cure, including Section 7(iv) relating to false or misleading representations. Other defaults with a lower-case "d" ripen into "Events of Default" after the passage of time and after notice and the opportunity to cure, i.e. §7.1(xvi).[37]

Certain "defaults" with a lower-case "d" that had not yet ripened into "Events of Default" were concealed from the Lender, including the failure to pay sales and occupancy tax and the

[37] "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 form Lender, in the case of any other default . . .."

termination and non-renewal of the Management Agreement which should have been reported, and the failure to deposit food and beverage revenues into the CMA. These "defaults" with a lower-case "d" were concealed by the false certification in the Disbursement Requests.

The Debtor argues (at Debtor's MOL p. 27) that the Disbursement Request forms are simply "pro forma, pre-printed language" inferring some lesser efficacy to these documents granting to the Debtor a dispensation from truthfulness. In *In re Victory Markets*,[38] the Bankruptcy Appellate Panel held that "boilerplate" language must be given effect:

> But even if the operative provisions were to be considered boilerplate, we cannot accept the contention that language of that character is to be disregarded. . . . Rather, each word is to receive its customary meaning and natural interpretation, whether inserted as boilerplate or by particularized design.[39]

Debtor contends in a conclusory assertion that "Wilmington was fully aware of all of the facts now alleged [concerning false certifications]." (Debtor's MOL p. 27). That unsupported conclusion, however, does not overcome the Lender's prima facie proof of claim. Further, Section 9.5 of the Loan Agreement captioned "Delay Not a Waiver" 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 . . . ." Lender relies on the books and records of Wilmington as well as emails from Vaswani, Chan and their attorneys, to prove the certifications were false.

Significantly, the Debtor does not dispute the fact that there were various unpaid taxes.[40] These concealed unpaid tax obligations which Section 9.01 of the Management Agreement

[38] 221 B.R. 298 (B.A.P. 2d Cir. 1998).

[39] 221 B.R. at 308.

[40] Debtor does not dispute that there were: (1) unpaid occupancy taxes, including $25,135.95 as early as November 20, 2015 (Undisputed Facts ¶107, although Debtor disputes the "characterization" of this fact as an admission); (2) unpaid sales taxes of $23,282.10 owed as early as December 2015 (Undisputed Facts ¶108 and 109, although Debtor states that there was a "payment arrangement regarding sales tax"); (3) other accrued hotel taxes aggregating

required to be paid (Undisputed Facts ¶104), were defaults,[41] if not yet an "Event of Default," because the accruing obligations were concealed by the Debtor. The non-disclosure of those unpaid tax obligations in the Disbursement Requests was "false or misleading in any material respect," as provided in Loan Agreement §7.1(v) and as term "material" is defined and described in Lender's MOL, and, as a result, **each of these false certifications** was an Event of Default under Loan Agreement §7.1(v).

Although the Debtor admits the provisions of the Loan Agreement regarding the Management Agreement, including the requirement that there can be no substitution or termination without consent of the Lender and that the Manager be replaced by a "Qualified Manager" under a "Replacement Management Agreement" including provisions of approvals by a Rating Agency (Undisputed Facts ¶¶90-94), the Debtor contends that the Debtor, itself, "assumed the role of "Qualified Manager" (Response to Undisputed Facts ¶95) and that a Replacement Management Agreement was not necessary because of the Debtor's "self-management" (Counterstatement to Undisputed Facts ¶¶95 and 96). There is, however, no recognized status in the Loan Documents as "self-management," and the after-the-fact rationale that the Debtor itself was a "Qualified Manager" contradicts the carefully crafted procedures and

---

$180,794.72, including $56,709.53 for the filing period of November 30, 2015, although the Debtor disputes that the filed Warrant for this unpaid tax was an "Event of Default" (Counterstatement of Undisputed Facts ¶110); (4) unpaid occupancy tax due in 2016 of about $50,000 (Undisputed Facts ¶114); and (5)unpaid sales taxes of $109,775 for the period ending August 31, 2016 (Undisputed Facts ¶116).

[41] Loan Agreement §3.1.17 captioned "Taxes" provides that "Borrower has filed all federal, State, county, municipal, and city income and other tax returns required to have been filed by it **and has paid all taxes** and related liabilities which have become due pursuant to such returns or **pursuant to any assessments received by it**. Borrower knows of no basis for any additional assessment in respect of any such taxes and related liabilities for prior years." (Emphasis added). The covenant survives the closing as provided in Loan Agreement §3.2 "Survival of Representations" in which "Borrower agrees that all of the representations and warranties of Borrower set forth in Section 3.1 and elsewhere in this Agreement and in the other Loan Documents shall survive for so long as any amount remains owing to Lender under this Agreement or any of the other Loan Documents by Borrower."

authorizations required in the Loan Agreement to assure the continued responsible management of the Hotel.

Additionally, under the Loan Agreement, the Borrower is obligated to deposit food and beverage revenues into the CMA. However, Debtor's Chief Restructuring Officer, James Katchadurian admits in his Declaration that the Debtor failed to do so:

> 3. Upon information and belief, starting several months after the inception of this loan in April 2015 (originally made by Rialto Mortgage Finance, LLC), through the time it was accelerated by Wilmington in September 2017, the Lender had access to, and control of, all of the revenue of the Debtor, ***with the exception of certain revenue from food and beverages.***

(emphasis added). Failing to deposit all revenues was yet another default rendering the Disbursement Request a false and misleading statement in a material respect as provided in Loan Agreement §7.1(v). The Mortgage specifically granted a lien on "all income. . . profits, revenues, deposits . . .from the operation of the hotel . . . including . . . restaurants, bars . . . ." The Debtor's admitted failure to deposit food and beverage revenues into the CMA was a default in the Debtor's obligation and deprived Lender of its critical collateral. This omission from the Disbursement Request was material and was an Event of Default under Loan Agreement §7.1(v).

The Debtor's omissions of these critical defaults (i.e., the failure to abide by covenants in the Loan Agreement) in the Certifications requesting the Lender to make disbursements was false and misleading in a material respect, as described in *Chase Manhattan Bank v. Motorola, Inc.*,[42] discussed in Lender's MOL at p. 22-23.

POINT V

LENDER IS ENTITLED TO REIMBURSEMENT OF ITS PRE-PETITION AND POST-PETITION ATTORNEYS' FEES AND DISBURSEMENTS

In opposition to Lender's motion, the Debtor incorporates by reference its previously filed objection to Lender's proof of claim. It does not dispute the request for post-petition fees and

[42] 184 F.Supp.2d 384 (S.D.N.Y. 2002).

disbursements. Rather, it asserts that the pre-petition fees were improperly incurred because the acceleration of the loan was "wrongful." Section 5.6 of the Mortgage obligates the Debtor to pay all attorneys' fees and expenses incurred or paid by Lender "***in protecting its interests in the Property***". This is a very broad standard. As the Debtor itself has admitted multiple defaults, it is axiomatic that a lender would justifiably incur legal costs in "protecting its collateral" once such defaults are identified. As set forth in Lender's MOL,[43] "[e]ven if the Court ruled against [the Lender] with respect to the 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 in the Agreement." Here, regardless of how the Court rules with respect to the Events of Default and default interest, Lender should be reimbursed for its attorneys' fees incurred in unquestionably protecting its interest in the Property given the Debtor's own admissions of various defaults..

Lender's request for pre-petition contractual fees and disbursements is governed by 11 U.S.C. §502. As noted herein, Lender properly accelerated the Debt for various reasons, including its discovery in the fall of 2017 of various concealed defaults, including the liquor license Event of Default and because of the precipitous decline in its collateral which would result from the Debtor's inability to lawfully sell liquor at the Property. As described in detail in the Lender's MOL, the fees that were incurred by Lender's counsel were largely caused by Debtor's own obstructive behavior in the pending litigation in District Court, so much so that Magistrate Judge Pittman issued a Report and Recommendation of Contempt against the Debtor (and approving Lender's request for fees). Thus, Lender's request for reimbursement of attorneys' fees and disbursements should be granted.

[43] In re Residential Capital, LLC, 508 B.R. 851, 862 (Bankr. S.D.N.Y. 2014).

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: January 31, 2020

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

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