SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

D2 MARK LLC, Plaintiff, -against- OREI VI INVESTMENTS LLC, Defendant.	Index No. **COMPLAINT**

Plaintiff D2 Mark LLC (the "Plaintiff") by and through its undersigned attorneys, hereby alleges against Defendant OREI VI Investments LLC as follows:

NATURE OF THE ACTION

1. This Action seeks to halt Defendant's improper and predatory attempt to capitalize on the COVID-19 pandemic by conducting a commercially unreasonable UCC foreclosure aimed at taking the Mark Hotel on the Upper East Side of Manhattan (the "Property").

2. Defendant is a mezzanine lender with a relatively small junior loan position in the Property. Defendant is an entity advised by a small, California-based real estate investor Ohana Real Estate Investors LLC ("Ohana"). Ohana is not a large or well-known lender in New York City commercial real estate.

3. The Mark Hotel has been a highly profitable business for many years now. Prior to the COVID-19 pandemic, Plaintiff was in perfect financial health, was performing on all of its

obligations to Defendant and its other creditors, and had never missed a debt service payment to Defendant (or any other lender). The COVID-19 pandemic and related government restrictions resulted in a City-wide shutdown and a dramatic—although temporary—loss in revenue. As a result, Plaintiff missed one interest payment to Defendant in May 2020 (and, as discussed below, cured that missed payment at the Defendant's instruction and did so).

4. The Property is secured by a $230 million senior mortgage loan owned in part by a "CMBS" securitization trust and serviced by Wells Fargo Bank, N.A. ("Wells Fargo"). Up until Defendant's decision to notice a UCC foreclosure, Plaintiff had been engaged in negotiations with Wells Fargo and Defendant for temporary COVID-19 accommodations related to the loans.

5. Without warning, in the midst of those negotiations, on May 18, 2020, Defendant purported to send, pursuant to the New York Uniform Commercial Code ("UCC") Article 9, notice of a sale of Plaintiff's only asset, a 100% membership interest in D2 Mark Sub LLC, (the "Collateral"), which in turn wholly owns a series of subsidiaries that own and operate the Mark Hotel. Defendant's auctioneer also released a package of information about the foreclosure and the Property on May 18, which timing indicates that the foreclosure had been in the works long before such date. The sale was noticed for June 24, 2020 (*i.e.*, only 36 days from when the notice was given) at either a virtual auction or at the currently shuttered Manhattan law offices of Defendant's attorneys, Dentons US LLP.

6. Applicable Uniform Commercial Code and New York law requires that "all aspects" of any UCC foreclosure be conducted on commercially reasonable terms. This is because a debtor's property is effectively being sold without judicial process. To protect the debtor, the UCC requires that the "manner, time and place" of the auction be conducted on

commercially reasonable terms so that the maximum number of bidders will attend the auction, resulting in a full and fair price for the Collateral and allowing the Debtor to realize any surplus equity value in the property. Section 9-625(a) of the UCC empowers the Court to enjoin a commercially unreasonable UCC foreclosure.

7. In this case, Plaintiff will demonstrate that the Property has been appraised for approximately $427 million in 2017 and that its value has substantially improved since then, including by the addition of six large hotel suites, meaning that both Wells Fargo and Defendant are substantially over-secured and, therefore, well-protected from the current financial turmoil caused by the COVID-19 crisis. In this context, the legal requirement that all aspects of the UCC foreclosure be done on commercially reasonable terms provides critical protection to Plaintiff's interests in the Collateral.

8. But, here, Defendant is seeking to conduct a rushed auction on commercial terms obviously aimed at discouraging full and fair bidding. First, the determination to conduct an auction of a complex asset like the Mark Hotel in 36 days would be unreasonable even in ordinary times. Most UCC foreclosures are conducted 60-90 days after the notice, allowing interested bidders an adequate opportunity to conduct due diligence to assess the value of the collateral and either assume the senior mortgage loan (if assumable under the applicable intercreditor agreement) or obtain replacement third party financing necessary to refinance the senior mortgage loan. Second, the determination to conduct this auction during the height of the COVID-19 crisis is simply indefensible. New York City remains largely shuttered and it would be nearly impossible for bidders to fairly evaluate the Mark Hotel—when the hotel is not operational and the real estate and capital markets are largely frozen as investors and lenders wait for New York City and the rest of the world to reemerge from the crisis. Defendant has

created unreasonable bidding and payment procedures that are transparently engineered to ensure that no investor other than Defendant could win the auction. Finally, Defendant has denied Plaintiff the right to register as a bidder and participate in the auction, thus depriving Plaintiff of the ability to protect its Collateral by winning the auction.

9. Defendant's intent here is obvious. It seeks to exploit the pandemic by rigging the UCC foreclosure in favor of itself. In doing so, it seeks to seize control of the Mark Hotel and grab literally hundreds of millions of dollars in equity value built by Plaintiff over many years of successfully owning, improving and operating the Mark Hotel.

10. Plaintiff will be irreparably harmed if the sale is permitted to go forward. Under its agreement with Defendant, money damages are limited. Moreover, even if it could obtain money damages, there is no evidence that a relatively small entity like Defendant and its affiliate (Ohana) would have the ability to satisfy a judgment well in excess of $300 million. Finally, this asset is unique. If Defendant is successful in obtaining the Collateral, it will deprive Plaintiff of not only its sole asset but also its ownership and control rights in Plaintiff's wholly owned subsidiaries that own, operate, and manage the Mark Hotel, one of New York's most prestigious and iconic luxury hotels, and its unique and valuable brand.

11. Finally, while the public interest is often an afterthought in the injunction analysis, it is critically important here. It is almost as if Defendant decided to conduct an experiment to see whether a Court would bless the most aggressive UCC foreclosure it could imagine. With unduly limited notice and bid procedures aimed at eliminating competition on a Property where it is unambiguously over-secured—all in the midst of an unprecedented global pandemic that is disproportionately impacting New York City—Defendant seeks to grab a large, valuable and unique asset without even trying to comply with the protections afforded to Plaintiff

by the UCC. Defendant seeks to shutout Plaintiff and its affiliates, who have at least a $300 million equity stake to protect, from participating in the auction. Real estate lenders throughout the city will watch this case very closely because, if Defendant is successful here, other predatory junior lenders would surely seek to abuse the UCC foreclosure process using Defendant's tactics as a template.

THE PARTIES AND NON-PARTIES

12. Plaintiff D2 Mark LLC is a Delaware limited liability company with its principal place of business at 150 East 58th Street, 33rd Floor New York, New York 10155.

13. Non-party Alexico Group is a luxury real estate developer based in New York City and has owned and operated, through its affiliates, the Mark Hotel since 2006. Non-parties Izak Senbahar and Simon Elias own approximately 87% of Mark Hotel Member 2 LLC ("Mark Hotel Member"), whose sole asset is the Plaintiff. Non-Party Bahar-USA Developments LLC owns approximately 13% of Mark Hotel Member.

14. Plaintiff's wholly-owned affiliates own, control, and operate the Mark Hotel, the Mark Restaurant and the Mark Bar, certain cooperative units at the Mark Hotel, and certain retail along Madison Avenue and the building known as 1000 Madison Avenue. Plaintiff is the sole member and 100% equity owner of D2 Mark Sub LLC ("Mark Sub"), which in turn is the sole member and 100% equity owner of Mark Propco LLC ("Hotel Owner"), the leasehold owner of the real property on which the Mark Hotel rests pursuant to long-term ground leases. Plaintiff indirectly owns the other assets relating to the Mark Hotel through the following additional subsidiaries of Mark Sub: (a) Mark Opco LP ("Opco"), which is the company that operates the Mark Hotel, (b) Mark 2 Restaurant LLC ("Restaurant Owner"), which owns certain trademarks and other personal property in connection with the café, restaurant and bar known as "The Mark

Café", "the Mark Restaurant" and "the Mark Bar", (c) Mark Holding LLC ("Holdings"), which owns certain other personal property and (d) Mark Coop Sponsor LP ("Coop Sponsor"; together with Hotel Owner, Mark Sub and Holdings, "Mortgage Borrower"), which owns certain shares in The Mark Hotel Owners Corp., the governing body for the cooperative regime at the Property (the "Corporation"), and is the lessee under proprietary leases for the 37 hotel suites allocable to such shares in the Corporation.

15. The Mark Hotel is an iconic landmark building on the corner of Madison Avenue and 77th Street in Manhattan's Upper East Side. Originally built in 1927, Alexico Group acquired the Mark Hotel in 2006 and has been committed to its extensive redevelopment and reinvention. Alexico Group and its business partners have invested more than $110 million of their own funds into the improvement, refurbishment and renovation of the Mark Hotel. As a result, it has consistently been rated by a variety of publications as one of the finest luxury hotels in New York City. For example, among other accolades, the Mark Hotel has the highest RevPar (revenue per available room) in New York City for the last four years, as per the STAR reports, which is widely considered to be the most authoritative source for the ranking of hotels in the hospitality industry.

16. Defendant OREI VI Investments LLC is a Delaware limited liability company with its principal place of business at 1991 Broadway Street, Suite 100, Redwood City, California, 94063.

17. On information and belief, Defendant is ultimately beneficially owned and controlled by Ohana Real Estate Investors LLC ("Ohana").

18. On information and belief, Defendant is a single purpose entity created by Ohana to hold their security interest in the Collateral.

JURISDICTION AND VENUE

19. This Court has jurisdiction because, among other reasons, Plaintiff's claims arise under the New York UCC.

20. Venue is proper in New York County pursuant to CPLR § 503 because (i) the Plaintiff resides at East 58th Street, 33rd Floor, New York, New York 10155 and (ii) the proposed sale of the Collateral is scheduled to take place in New York County.

ALLEGATIONS

A. Background of Financing

21. Following a series of construction and permanent financings beginning in 2006 upon Alexico Group's acquisition of the Property, Plaintiff's current financing arrangements closed on or about May 19, 2017 (the "Loan Closing Date"). These financing arrangements consist of two loans: a mortgage loan in the aggregate principal amount of $230,000,000 (the "Mortgage Loan") and a subordinate mezzanine loan in the principal amount of $35,000,000 (the "Mezzanine Loan"). JPMorgan Chase Bank, N.A. ("JPM") was the originating lender for both loans. Wells Fargo acts as both the master servicer and the special servicer with respect to the Mortgage Loan, and the master servicer for the Mezzanine Loan.

22. In connection with the Mortgage Loan, Mortgage Borrower executed a senior note ("Note A") and a subordinate note ("Note B"), each in the principal amount of $115,000,000. The portion of the Mortgage Loan evidenced by the Note A was securitized and is currently held by Wilmington Trust, National Association, as trustee for the benefit of the holders of the pass-through certificates issued in connection with such securitization. Note B is not part of the securitization and is separately held by a Korean investor known as Vestas ("Vestas"). The Mortgage Loan is governed by, among other loan documents, a Loan Agreement between Mortgage Lender and Mortgage Borrower and its subsidiaries (the

"Mortgage Loan Agreement" and, together with the Mezzanine Loan Agreement (as defined below), the "Loan Agreements") and is secured by, among other things, (a) a first mortgage of all of Mortgage Borrower's right, title and interest in and to the Property, (b) a pledge by Mark Sub of its equity interest in Coop Sponsor, Opco and Mark 2 GP LLC, (c) a pledge by Coop Sponsor of its shares in the Corporation and (d) collateral assignments of the hotel, retail and restaurant management agreements for the Mark Hotel (the "Management Agreements").

23. The Mezzanine Loan is governed by, among other loan documents, a Mezzanine Loan Agreement (the "Mezzanine Loan Agreement" and, together with the other documents evidencing and/or securing the Mezzanine Loan, the "Mezzanine Loan Documents") and is evidenced by a Mezzanine Promissory Note, each dated as of the Loan Closing Date and by and between Plaintiff and JPM, as the original mezzanine lender. On or about September 21, 2018, JPM sold and assigned the Mezzanine Loan to OREI Fund I LP and OREI Fund I-A LP, which subsequently sold and assigned the Mezzanine Loan to OREI VI Investments LLC ("Mezzanine Lender"), all of which assignees are affiliates of Ohana. The Mezzanine Loan is secured by, among other things, (i) a Pledge and Security Agreement (the "Pledge Agreement") pursuant to which Plaintiff pledged its 100% equity interest in Mark Sub and (ii) a subordination of the Management Agreements and the management fees payable thereunder to Plaintiff's obligations under the Mezzanine Loan Documents.

24. The obligations of Plaintiff under the Mezzanine Loan Agreement and the obligations of Mortgage Borrower under the Mortgage Loan Agreement are substantially the same with respect to each of the relevant loans. The loans were made on a non-recourse basis, except that Simon Elias (the "Guarantor") executed a Guaranty Agreement in connection with each loan. Each loan is non-amortizing and requires the payment of monthly interest on the

loans on the first day of each calendar month, with the outstanding principal balance thereof due upon the maturity date of June 1, 2022. In addition to interest payments, each Loan Agreement requires that Mortgage Borrower deposit, on a monthly basis out of its own funds, into one or more reserves held by Mortgage Lender (a) one-twelfth ($1/12^{th}$) of the annual real estate taxes and assessments, escrowed by ground lessor, for the payment of such amounts as they become due and (b) an amount between three percent (3%) and four percent (4%) of the Mark Hotel's gross income from operations, to be used for refurbishments and replacements of furnishings, fixtures and equipment (the "FF&E Reserve"), all as more fully set forth in the Loan Agreements.

B. The COVID-19 Pandemic Causes Plaintiff to Default on its Loans

25. Starting in March 2020, New York City became the epicenter of the COVID-19 outbreak in the U.S., and has been dramatically and severely affected by the COVID-19 pandemic.

26. New York Governor Cuomo declared a state-wide emergency on March 7, 2020, effective through September 7, 2020.

27. Starting around March 12, 2020, Governor Cuomo issued a series of executive orders, still almost all in place in New York City, that banned non-essential in-person gatherings, closed Broadway theaters, closed restaurants for in-person dining, closed bars, closed non-essential retail shops, and ordered all non-essential businesses to reduce their in-person workforce by 100%, among other restrictions. In addition, Governor Cuomo issued Executive Order 202.8, which provides, among other things, that there "shall be no enforcement of . . . a foreclosure of any residential or commercial property for a period of ninety days." Executive Order 202.8 extends to June 20, 2020. On May 7, Governor Cuomo issued Executive Order 202.28, which provides, among other things, that there shall be no "no initiation of a proceeding

or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone . . . facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020."

28. Due to Executive Order, the Mark Restaurant and Mark Bar were closed to diners and patrons, and the retail shops that occupy space owned by Plaintiff and its affiliates were forced to close. Almost all of those retailers did not pay their rent. As a result, Plaintiff and its affiliates were unable to collect over $1 million in rental payments. Moreover, as the Mark Hotel is a travel destination for people residing elsewhere coming to visit New York City for business or leisure activities, stay-at-home orders and travel restrictions issued by other nations, by the U.S. federal government, and other state governments severely impacted the Mark Hotel's ability to operate as a hotel. These restrictions had a predictable impact on the Mark Hotel. Facing record declines in revenue for the month of March, and an uncertain reopening for New York City, like most of its competitors it was forced to close on March 27, 2020.

29. This closure was not in any way unique to the Mark Hotel. The hotel industry in New York City has been significantly affected in the short term by the COVID-19 pandemic and related government restrictions.

30. The Mark Hotel was—and will soon be again—a highly profitable business. In fact, Plaintiff is undertaking plans to reopen the Mark Hotel by June 15, 2020, on a limited basis because retail shops, restaurants, bars, and hair salons will remain closed pending further Executive Orders. For the period June 2017 until May 2020, Plaintiff did not miss a mortgage payment to the Mortgage Lender on the Mortgage Loan or a payment to Defendant on the

Mezzanine Loan. As a result of the COVID-19 pandemic, beginning in March 2020, the Mark Hotel expected to generate little to no revenue for at least April and May.

31. Beginning in the end of March and with the expectation that the effects of COVID-19 would persist for several months, if not more, Plaintiff and affiliates began negotiating for temporary COVID-19 relief under the Loan Agreements. Plaintiff and its affiliates put aside money to pay the ground leases, insurance, real estate taxes, utilities, and essential personnel payroll (including health care insurance, union dues, and benefits for over 300 employees), which was communicated to (and encouraged by) each of the Mortgage Lender and Defendant at the time. With encouragement of its lenders, Plaintiff dipped into its cash reserves and made the April interest payments on the Mortgage Loan and Mezzanine Loan, which amounted to approximately $922,000 and $200,000 respectively. On May 1, Plaintiff missed its May Mortgage Loan and Mezzanine Loan payments as per discussions with lenders. Defendant asserted that Plaintiff's missed May payment constituted an Event of Default under the Mezzanine Loan Agreement and demanded that Plaintiff make its May interest payment under the Mezzanine Loan, as well as additional amounts related to the alleged Event of Default, despite knowing that the Mortgage Loan payment was not made and that Defendant would be required under the intercreditor agreement that governs the relationship between the Mortgage and Mezzanine Lender (the "Intercreditor Agreement") to turn over to Mortgage Lender any payment made on the Mezzanine Loan if the Mortgage Loan debt service had not been paid. Plaintiff made the May interest payment to Defendant. Wells thereafter notified Plaintiff that such a payment must be credited to Mortgage Lender under the Intercreditor Agreement. Plaintiff is not a party to the Intercreditor Agreement and is not aware of the terms of the Intercreditor Agreement. In early June, Defendant sent Plaintiff a notice in which Defendant

purportedly exercised its right under the Intercreditor Agreement to cure the missed mortgage May payments on behalf of Mortgage Borrower and add such payments to the debt owed by Plaintiff to Defendant. As a result, Plaintiff's May interest payment on the Mezzanine Loan has been allegedly released to Defendant (minus a service fee).

C. Defendant Shamelessly Uses the COVID-19 Pandemic to Notice a Commercially Unreasonable Foreclosure Sale of the Collateral

32. On May 18, 2020, in the midst of afore-mentioned negotiations, Defendant sent via Fed-Ex and fax a Notice of Sale Under Article 9 of the Uniform Commercial Code (the "Foreclosure Notice") to the offices of Plaintiff, which Ohana knew to be closed due to the government restrictions in place by the Governor of New York. Plaintiff received no phone calls or messages from Defendant or Ohana that the fax would be coming, despite an express requirement in the Mezzanine Loan Agreement requiring such a phone call.

33. According to the Foreclosure Notice, Defendant seeks to sell at auction all of its interest in the Collateral on June 24, 2020 at 11 a.m. in a virtual auction or at the currently shuttered law offices of Dentons US LLP at 1221 Avenue of Americas, 25th Floor, New York, New York (the "Foreclosure"). Defendant purports it will advertise the sale in the *Wall Street Journal* and the weekly commercial real estate trade publication, *Commercial Mortgage Alert*. Defendant purports to sell the Collateral to the highest qualified bidder, but also reserves the right to "credit bid" for the Collateral before or after bidding has closed, modify the terms of sale, reject any bids, determine the qualifications of any bidder, terminate or adjourn the sale, and/or sell the Collateral at a subsequent private or public sale. Defendant requires the closing of the sale of the Collateral to the highest qualified bidder to close within 24 hours of the end of the auction.

34. The same day, on May 18, Defendant's auctioneer Jones Lang LaSalle published the Foreclosure sale, which indicates that Defendant began marketing the Property before notice was given under the Mezzanine Loan Agreement to Plaintiff. In the case of overnight Fed-Ex delivery and fax, notice is deemed "given" on the first attempted delivery on a Business Day, *i.e.*, May 19.

35. The Foreclosure, as structured by Ohana, is clearly designed to engineer the auction so Defendant minimizes competition and obtains the Collateral for itself for as little as possible.

36. The Foreclosure is commercially unreasonable for at least three reasons.

37. *First*, the Foreclosure is noticed for an unreasonably short time period. UCC foreclosure sales are typically noticed on 60 to 90 days' notice in non-COVID, ordinary times. A time period of that length permits market participants to learn about the asset up for sale, conduct appropriate due diligence (including inspecting the real property connected to the UCC sale, the leases and ground leases associated with it, title matters, environmental audits, property condition reports, and other critical due diligence), reviewing books and records regarding the financial performance of the hotel, assume the existing Mortgage Loan pursuant to the procedures set forth in the Intercreditor Agreement or obtain alternative financing to refinance the Mortgage Loan, and work with the relevant parties to consummate the sale. Defendant attempts to rush this foreclosure through in a mere 36 days. That would be unreasonably short in non-pandemic times. During the 36 days noticed by Defendant, no reasonable investor could conduct the appropriate level of due diligence, assume the Mortgage Loan or obtain financing, and receive necessary approvals to meaningfully participate in the auction of the Collateral and

decide to purchase an asset worth well in excess of $600 million. The predictable result will be that no one other than Defendant will even take the time to register to be a bidder at the auction.

38. *Second*, the deposit, payment, and closing procedures in the Terms of Sale are commercially unreasonable because they are rigged to ensure that no party other than Defendant could be the successful bidder. For example, under the terms of sale, the winning bidder is required to immediately deliver in cash a non-refundable deposit equal to 10% of the purchase price. The remaining balance of the purchase price must be paid within 24 hours. Within that time period, the winning bidder would also be required to comply with all of the conditions precedent to a UCC foreclosure sale of the Collateral specified in the Intercreditor Agreement. Because the Mortgage Loan cannot be paid off (it must be defeased), the winning bidder must assume the Mortgage Loan and, to do so, the Intercreditor Agreement will (presumably, since Plaintiff has been denied access to the auction and to the relevant terms of the Intercreditor Agreement) require the winning bidder, among other things, to (a) prove that it satisfies the customary "Qualified Transferee" test for deemed approval by the Mortgage Lender, or obtain the prior written approval of the Mortgage Lender (and likely a rating agency confirmation since the Mortgage Loan has been securitized), (b) cure all existing defaults under the Mortgage Loan, (c) cause a creditworthy guarantor to replace the existing Mortgage Loan guarantees and environmental indemnity agreement, and (d) perform "know your customer" and other background checks on the winning bidder and its guarantor. The 24 hour period is unreasonable because no winning bidder (except for Ohana who has a head start on the field) could possibly satisfy any of these conditions in 24 hours, particularly given the fact that the Mortgage Loan is a $230 million securitized mortgage loan that is serviced by Wells Fargo and bifurcated into an A/B Note structure where the consent of the B Note holder will also be required. That the

winning bidder will need to satisfy all the requirements of the Intercreditor Agreement is unreasonable because by definition no party other than Ohana will be able to satisfy such requirements. The non-refundable nature of the deposit makes it all the more likely that a prudent investor would not participate in the Foreclosure Sale, knowing that it will be impossible, particularly in the current environment, to close the sale and avoid the forfeiture of its significant deposit, and knowing that Defendant has the inside track to win the auction. Moreover, under the terms of sale, Defendant reserves the right to designate a "back-up bidder" and if the Defendant designates itself as the back-up bidder, and the winning bidder fails to meet the onerous requirements Defendant has imposed, Defendant can declare itself the winner without having to follow the same requirements it has for third party bidders. Finally, Defendant's reservation to credit bid *after* third-party bidding has closed makes it possible for Defendant to win by bidding $1 more than the winning bidder, even though the third-party might have bid more if the auction were still open.

39. *Third*, Defendant's denial of Plaintiff's ability to participate in the UCC foreclosure auction as a bidder results, by definition, in a commercially unreasonable sale. Under the Terms of Sale proposed by Defendant, a party must agree to a certain non-disclosure agreement before gaining access to a secure data room where Defendant and/or Jones Lang LaSalle is publishing information about the Foreclosure and the Collateral ("NDA"). It states, among other things, that the party agreeing to the NDA to "shall not be permitted to provide Confidential Information to Debtor [Plaintiff] or any of its representatives or affiliates" and that any person who gains access to the data room cannot communicate with "Debtor [Plaintiff] and/or its affiliates" without Defendant's prior written authorization. On May 22, Alexico Group attempted to gain access to the secure data room where Defendant is publishing

information about the particulars of the sale and the Intercreditor Agreement conditions that Plaintiff would have to satisfy to be a successful bidder at the sale. After agreeing to the terms of the non-disclosure agreement that was required before it could gain access, Alexico Group received a notification that it would be contacted shortly. At the time of this writing, no one from Defendant has contacted Alexico Group and it has been denied access. By denying access to Plaintiff and Alexico Group, Defendant is unreasonably preventing an interested party—in fact, the most interested party and the one that, because it knows the most about the Collateral and has a significant equity investment to protect, is the most likely successful bidder at the sale—from learning how Defendant is marketing the Collateral and what conditions under the Intercreditor Agreement a successful bidder would have to satisfy. There is no commercially reasonable reason for Defendant to deny Plaintiff or Alexico Group access to the data room and information about the foreclosure. In substance, that NDA restrictions have the effect of preventing any source of financing from seeking to work with Alexico Group on a bid in the Foreclosure.

40. All of these restrictions, coupled with the unreasonably short 36 day diligence period and 24 hour "sprint" to assume a Mortgage Loan which is not assumable in 24 hours or risk forfeiting a significant cash deposit, make it clear that Defendant is seeking to make this a UCC foreclosure sale with just one bidder—itself.

D. Plaintiff Will Be Irreparably Harmed if the Proposed Foreclosure Sale is Permitted

41. If the sale is permitted, Plaintiff will be irreparably harmed for at least three reasons.

42. *First*, Plaintiff has no other effective remedy besides an injunction to protect its rights because it cannot recover money damages from Defendant. The Mezzanine Loan Agreement § 10.2 provides:

> In the event that a claim or adjudication is made that Lender or its agents have acted unreasonably or unreasonably delayed acting in any case where by law or under this Agreement or the other Loan Documents, Lender or such agent, as the case may be, has an obligation to act reasonably or promptly, ***Borrower agrees that neither Lender nor its agents shall be liable for any monetary damages***, and ***Borrower's sole remedies shall be limited to commencing an action seeking injunctive relief or declaratory judgment.*** The parties hereto agree that any action or proceeding to determine whether Lender has acted reasonably shall be determined by an action seeking declaratory judgment.

43. *Second*, if § 10.2 is deemed unenforceable and/or waived, and Plaintiff were entitled to money damages, it is highly likely such a judgment would be so massive as to render it impossible to enforce. Plaintiff estimates the value of the Property to be in excess of $600 million. Plaintiff therefore estimates that at a commercially reasonable foreclosure sale, the Collateral would sell for well in excess of $350 million (net of the mortgage loan) using conservative estimates because the Mortgage Loan must, as a practical matter, be assumed by a successful purchaser. If such a sale took place, Defendant would be paid out its approximatley $36 million and Plaintiff would receive the rest. The money damages would therefore be over $300 million and there is no way Defendant, as a special purpose vehicle with no assets other than its interest in the Mezzanine Loan could pay such a judgment.

44. *Third*, Plaintiff faces the loss of more than its significant equity investment, but rather the loss of the Mark Hotel, a unique and world-renowned hotel that Alexico Group and its partners have spent almost 15 years owning and operating. They have invested more than $110 million of their funds in the Mark Hotel. Their efforts have resulted in the Mark Hotel routinely being among the top-rated hotels in New York City and the world. The winning bidder at the auction will not only step into the shoes of Plaintiff, but through Plaintiff's 100% ownership interest in the Mark Sub, will gain immediate rights to own, operate, and manage the Mark Hotel, numerous trademarks, branding rights, and goodwill associated with the Mark Hotel, and

other unquantifiable interests. At a minimum, the winning bidder will be able to terminate Plaintiff's affiliates' rights to operate and control the Mark Hotel.

E. Plaintiff is Working to Provide Refinancing of the Mezzanine Loan

45. It is obvious that Plaintiff cannot continue to work with a predatory junior lender seeking to take advantage of a public health crisis to foreclose on an otherwise performing loan. If the Foreclosure is enjoined, Plaintiff will have enough time to resume its profitable operations at the hotel and obtain replacement financing to pay off or refinance the Mezzanine Loan. The result will be that the Defendant will be paid in full and Plaintiff will avoid the irreparable harm that will occur if the sale goes forward on June 24. By contrast, the Defendant will suffer no harm if the Foreclosure is enjoined because Defendant's investment continues to be adequately protected – *i.e.*, its $35 million loan is secured by the 100% equity interest in Property worth in excess of $600 million.

FIRST CAUSE OF ACTION

VIOLATION OF THE UNIFORM COMMERCIAL CODE

46. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 45 hereof, as if fully stated herein.

47. The Mezzanine Loan Agreement and the Pledge Agreement are governed by the laws of the State of New York, and Defendant's proposed foreclosure sale is governed by the New York UCC.

48. Section 9-610(b) of the UCC requires that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable."

49. Defendant unreasonably proposed the Foreclosure on 36 days' notice during a period of unprecedented market turmoil and when New York City remains locked down. This

time period would be unreasonable during normal times, and it is patently unreasonable in the midst of a government shutdown and worldwide public health crisis. Defendant's schedule, the COVID-19 pandemic, and related government restrictions make it impossible for the sale of the Collateral to be on reasonable terms to reasonable investors.

50. In addition to the schedule, Defendant has imposed unreasonable procedures for the deposit, payment, and closing related to the Foreclosure. The result of these unreasonable procedures will be that no reasonable investor will seek to bid for the Collateral, and Defendant will be able to designate itself as the winning bidder with no competitive bidding. Even if there were competitive bidding, Defendant has given itself the power to designate itself as the back-up bidder and eventual winner because it will be impossible for a third party to satisfy the closing conditions established by Defendant. Defendant has unreasonably excluded Plaintiff, its affiliates, and representatives from participating in the auction.

51. The Foreclosure is also unlawful under Executive Order 202.8, which provides that there "shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days." The Foreclosure is merely a dressed-up foreclosure on the Property, which, along with development thereof, represents the sole asset held by the equity interests included in the Collateral. Defendant is attempting to deprive Plaintiff and its affiliates of its ownership of the Property based on a loan foreclosure.

52. If the Foreclosure proceeds on the currently scheduled June 24 date under Defendant's proposed terms, and Defendant is allowed to purchase the Collateral at the Foreclosure, Plaintiff will suffer irreparable harm with no adequate remedy at law and Plaintiff

will be deprived of unique real estate and related ownership interests that cannot be replaced or compensated.

53. By reason of the foregoing, the Foreclosure is not commercially reasonable and violates the UCC.

SECOND CAUSE OF ACTION

DECLARATORY JUDGMENT

54. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 53 hereof, as if fully stated herein.

55. As set forth above, Defendant has intentionally designed a commercially unreasonable sale process that will result in Defendant obtaining the Collateral for a fraction of its value.

56. In addition, the Foreclosure is unlawful under Executive Order 202.8, which provides that there "shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days." The Collateral Foreclosure is merely a dressed-up foreclosure on the Property, which represents the sole asset held by the equity interests included in the Collateral. Defendant is attempting to deprive Plaintiff and its affiliates of its ownership of the Property based on a loan foreclosure.

57. By reason of the foregoing, Plaintiff is entitled to a judgment declaring that the Foreclosure (i) is commercially unreasonable and violates Article 9 of the UCC and (ii) violates Executive Order 202.8.

THIRD CAUSE OF ACTION

INJUNCTIVE RELIEF

58. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 57 hereof, as if fully stated herein.

59. If the Foreclosure proceeds on the currently scheduled date under Defendant's proposed terms, Plaintiff will suffer immediate and irreparable harm for which there is no adequate remedy at law. The Property is a unique piece of real estate and neither the Property nor the Collateral can be replaced. Absent injunctive relief barring Defendant or its affiliates from disposing of the Property at Defendant's proposed commercially unreasonable sale, Plaintiff will suffer irreparable harm that cannot be remedied through monetary damages and cannot be reasonably calculated.

60. As such, Plaintiff lacks an adequate remedy at law, and injunctive relief should be entered to prevent irreparable harm to Plaintiff.

61. The balance of the equities favors Plaintiff. The current situation is not the result of Plaintiff's mismanagement. The COVID-19 pandemic and the related government restrictions are a once-in-a-century event. The Mark Hotel was profitable before the COVID-19 pandemic and only missed a payment on the Mezzanine Loan in May 2020, which it then attempted to cure by making the May interest payment to Defendant. A delay would cause no harm to Defendant's legitimate interests, as Defendant (who is continuing to earn interest) could still foreclose on the Collateral after the state of emergency has ended or when it would be possible to hold a commercially reasonable collateral foreclosure that would maximize the price of the sale. All the while, Defendant is adequately protected because the Collateral's value is far in excess of the amount Plaintiff owes under the Mezzanine Loan Agreement. Injunctive relief would also further the interests of public health and safety.

62. By reason of the foregoing, Plaintiff is entitled to a judgment preliminarily enjoining Defendant from selling the Collateral until at least September 8, 2020 and a permanent

injunction barring Defendant from conducting a sale of the Collateral under the terms described in the terms of sale issued by Defendant.

FOURTH CAUSE OF ACTION

BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

63. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 62 hereof, as if fully stated herein.

64. Under New York law, the implied covenant of good faith and fair dealing is inherent in every contract. The covenant is violated where a contract provides for a party's exercise of discretion and the discretion is exercised irrationally or arbitrarily or where a party exercises a contractual right malevolently for its own gain as part of a purposeful scheme to deprive a plaintiff of the benefits of a contract.

65. Here, Defendant has scheduled a commercially unreasonable UCC foreclosure sale in an unlawful effort to strip Plaintiff of its rights in the Collateral and under the Mezzanine Loan Agreement. After Plaintiff missed a single interest payment in the midst of a world-wide pandemic and a New York City shutdown, Defendant acted in bad faith by initiating the foreclosure of the Collateral. Even though its $35 million loan was adequately protected based on the value of the Collateral, Defendant acted as aggressively as possible once the COVID-19 pandemic caused Plaintiff to miss its payment. Most market participants recognize these extraordinary times and have been searching for commercially reasonable solutions to the predicaments caused by the COVID-19 pandemic. Defendant launched an inappropriate and unreasonable UCC sale in order to try to grab the Mark Hotel.

66. In this regard, Plaintiff notes that under the Mezzanine Loan Agreement, a force majeure is not an event of default. Moreover, an event of default occurs if the borrower ceases to do business as a hotel, *except* in circumstances where the "temporary cessation [is] in connection

with…a force majeure." Plaintiff ceased operations only temporarily in connection with an unprecedented and unexpected global pandemic—*i.e.*, a force majeure. Under the Mezzanine Loan Agreement, this temporary cessation was not and was not claimed to be an event of default. Nevertheless, Defendant attempted to circumvent this by noticing an Event of Default on the other grounds related to non-payment—*e.g.*, non-payment of the Mortgage Loan.

67. By reason of the foregoing, Plaintiff is entitled to a judgment that Defendant has breached the implied covenant of good faith and fair dealing under New York law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter final judgment in Plaintiff's favor as follows:

(i) On the First Cause of Action, ruling that Defendant's June 24, 2020 Foreclosure is not commercially reasonable and violates the UCC;

(ii) On the Second Cause of Action, issuing a declaratory judgment that the June 24, 2020 Foreclosure that Defendant has scheduled (i) is commercially unreasonable and violates the UCC and (ii) violates Executive Order 202.8;

(iii) On the Third Cause of Action, issuing (i) a preliminary injunction enjoining Defendant from selling the Collateral through and until at least the date on which Governor Andrew Cuomo's Executive Order No. 202 Declaring a Disaster Emergency in the State of New York expires (currently set for September 8, 2020) and (ii) a preliminary and permanent injunction enjoining Defendant from conducting a sale of the Collateral under the terms described in the terms of sale issued by Defendant;

(iv) On the Fourth Cause of Action, ruling that Defendant has breached the implied covenant of good faith and fair dealing and awarding damages incurred by Plaintiff as a result of Defendant's wrongful conduct;

(v) An order declaring that the Foreclosure Notice was defective, and therefore

void, and requiring that Defendant re-notice any commercially reasonable Foreclosure.

(vi) An order requiring that Plaintiff, its affiliates, and their representatives be permitted to participate in the Foreclosure, on commercially reasonable terms;

(vii) All costs and attorneys' fees incurred in this Action; and

(viii) Granting any and all such further and other relief as this Court deems just and proper.

Dated: June 5, 2020
New York, New York

MILBANK LLP

By: */s/ Daniel M. Perry*

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