SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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CINEMA SQUARE, LLC,

Plaintiff,

-against-

JEFFRIES LOANCORE, LLC, LRES CORPORATION, as trustee or agent for WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Mortgage Pass Through Certificates, Series 2016-DC2, WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Pass Through Certificates, Series 2016-DC2, JOHN DOE d/b/a WELLS FARGO COMMERCIAL MORTGAGE SERVICING, and CW CAPITAL ASSET MANAGEMENT LLC, as special servicer,

Defendants.
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AFFIRMATION IN SUPPORT OF MOTION FOR A TEMPORARY AND PRELIMINARY INJUNCTION

Index No.

DAVID K. FIVESON, an attorney admitted to practice before the Courts of the State of New York, affirms under the penalties of perjury, as follows:

1. I am a member of the Bar of this Court and principal of the firm Butler, Fitzgerald, Fiveson & McCarthy, A Professional Corporation, attorneys for plaintiff, Cinema Square, LLC ("Plaintiff"). I have knowledge of the facts stated herein based on my review of the annexed exhibits, my firm's file for this matter and based on the annexed affidavit of Jeffrey C. Nelson, Esq. stated on personal knowledge. I therefore believe the facts stated herein to be true and correct.

2. I make this affirmation in support of Plaintiff's motion for an order which, pending the determination of a final declaratory judgment of this action: (i) temporarily and preliminarily restrains Defendants and/or their agents or assigns from

transferring or selling the premises pursuant to a Deed of Trust, foreclosing on the Loan Agreement or otherwise enforcing its default provisions relating to payment of monthly mortgage installments defaults regarding the real property known as 6917 El Camino Real, Atascadero, San Luis Obispo County, California 93422, APN/Parcel ID: 029-361-048 and 029-361-049 ("Premises") accruing since May 1, 2020; and (ii) grants Plaintiff such other and further relief as the Court deems just and proper.

3. Absent this Court restraining enforcement of the default provisions for non-payment accruing since May 1, 2020, plaintiff's title will be foreclosed out by the non-judicial sale of the premises pursuant to a deed of trust as early as February 15, 2021. Any such non-judicial sale to a bona fide purchaser for value would prevent Plaintiff from interposing its meritorious defenses set forth herein and cause an extinguishment of Plaintiff's title.

PRELIMINARY STATEMENT

4. This action seeks relief from a loan agreement, the performance of which is excused under California Statute and which has been rendered impossible and/or impracticable due to the COVID-19 pandemic and the subsequent prohibition against operating movie theaters in the State of California.

5. Plaintiff purchased the Premises in 2015 at which time it received a loan from Defendants' predecessors in interest in the amount of $7,800,000. The primary tenant (and rent payer) at the Premises is Galaxy Theaters ("Galaxy").[1] As of March 19, 2020, Galaxy has been prohibited by California law from operating its theaters. Consequently, it has not paid rent since March 2020. Without Galaxy's rental income, the

[1] Galaxy was under a Lease for space at the Premises at the time of purchase.

monthly installments owed Defendants on the loan commencing May 1, 2020 have not and cannot be paid. The March 2020 rent had been paid before the lockdown allowing the April payment to be made.

6. A monthly payment has never gone unpaid since the inception of its loan (December 31, 2015) until May 1, 2020 when the pandemic hit. Plaintiff is not in default under any other provision of the loan documents. Plaintiff, via this action, simply seeks a declaratory judgment that payment obligations since May 1, 2020 are excused and an injunction to prevent Defendants from selling or transferring the premises pursuant to a Deed of Trust in a non-judicial foreclosure or otherwise foreclosing the Premises until such time that the restrictions on movie theaters is lifted and/or the proposed Federal Government relief package is received and sufficient to make the loan current. Despite Plaintiff's numerous good faith attempts, Defendant has shown little interest in coming to a resolution, but rather it has moved forward with the preliminary notices to its non-judicial foreclosure and sale of the Deed of Trust.

7. Although the Premises are located in the State of California, the loan agreement chose New York State or Federal Courts as the venue for any litigation arising from the loan agreement. It is also submitted that by reason of the choice of law provisions in the loan agreement, California law applies to the extent that Defendants seek to **enforce** the lien on the Premises in California created by the loan documents.

BACKGROUND

8. The facts set forth herein are verified on personal knowledge of Jeffrey C. Nelson, Esq., the Vice President of Plaintiff, in his annexed affidavit. Plaintiff purchased the Premises on or about December 31, 2015.

9. The Premises consists of commercial space with seven stores and a movie theater, operated by Galaxy at the time of purchase and still occupied by Galaxy to this day. Galaxy's theaters occupy approximately 73% of the Premises. Likewise, Galaxy is by far the largest rent payer on the Premises. As of April 1, 2020, Galaxy paid $75,581 of the $89,958 total monthly rents from the Premises which represents 84% of the monthly rent roll.

10. To acquire the Premises, on December 31, 2015, Plaintiff borrowed $7,800,000 from defendant Jeffries Loancore LLC ("Jeffries") and entered into a loan agreement with Jeffries dated December 31, 2015 ("Loan Agreement"). Plaintiff paid $5.2 million toward the purchase price of $13,000,000, as equity in the Premises from its funds. The loan to value ratio is .60%. A copy of the Loan Agreement is annexed as Exhibit A.

11. The Loan Agreement required monthly installment payments in the amount of $41,013.52 plus funding for reserve accounts which were approximately $16,000 to $22,000 (or less when reserve accounts were full) ("Monthly Payments"). (See, Exhibit A, page 16, section 2.2). Paragraph 3.1 of the agreement required rents be paid by the tenants directly to a clearing account for the benefit of the Lender. The Loan Agreement was modified by a Deposit Account Agreement and a Lock Box and Deposit Agreement pursuant to these agreements, the Lender set up banking arrangements under which it required tenants to pay all rents **directly** into a lockbox and the Lender required banking arrangements under which Lender got paid **automatically** and directly for loan and reserve account amounts before any excess cash was distributed to Borrower. Therefore, as detailed herein, the continued operation of Galaxy at the Premises and its payments of rents to the Lender was the **fundamental purpose and consideration for the loan agreement**. This covenant and purpose has been rendered

impossible to perform by reason of California fiat that the use of the Premises by Galaxy as a movie theater is unlawful.

12. Pursuant to the Loan Agreement, Galaxy is described as a "Major Tenant" and the lease with Galaxy is described as a "Major Lease". (See, Exhibit A, page 7). Indeed, a review of the monthly rent roll of $91,526.27 for the Premises as of December 31, 2015, Galaxy paid $68,710.00, or essentially 75% of the monthly rent. (See, Exhibit A, Schedule 3).

13. The Loan Agreement at page 75, paragraph 10.6 "Governing Law" states, in pertinent part:

> (a) This agreement was negotiated in the State of New York, and made by lender and accepted by borrower in the State of New York, and the proceeds of the Note delivered pursuant hereto were disbursed from the State of New York, which state the parties agree has a substantial relationship to the parties and to the underlying transaction embodied hereby, and in all respects, including matters of construction, validity and performance, this Agreement and the obligations arising hereunder shall be governed by and construed in accordance with, the laws of the State of New York applicable to contracts made and performed in such State (without regard to principles of conflict of laws) and any applicable law of the United States of America, **except that at all times the provisions for the creation, perfection, and enforcement of the liens created pursuant to the Loan Documents shall be governed by, and construed according to, the Law of the State, Commonwealth or District, as applicable, in which the property is located,** it being understood that, to the fullest extent permitted by the law of such State, Commonwealth or District, as applicable, the Law of the State of New York shall govern the construction, validity and enforceability of all loan documents and the debt.
>
> **(b) Any legal suit, action or proceeding against lender or borrower arising out of or relating to this agreement shall be instituted in any Federal or State Court in New York County, New York and borrower waives any objection which it may now or hereafter have to the laying of venue of any such suit, action or proceeding . . .**

(Emphasis added). (See, Exhibit A, pages 75-76). By virtue of the foregoing, it is submitted that with respect to the enforcement of foreclosure of the lien, California Law applies.

14. Pursuant to the Loan Agreement, Jeffries was granted a Deed of Trust, Assignment of Leases and Rents and Security Agreement. A copy of the Deed of Trust, Assignment of Leases and Rents and Security Agreement is annexed as Exhibit B. The Deed of Trust, which names Jeffries as the Beneficiary, was recorded against the Premises on or about December 31, 2015. A copy of the recording page is annexed as Exhibit B. Under Cal. Civ. Code § 2924 the Lender can sell the Premises at a non-judicial sale pursuant to the Deed of Trust.

15. All of Plaintiff's obligations in the Loan Agreement were complied with from December 31, 2015 until May 2020 when it became impossible and/or impracticable for the Galaxy to make monthly payment of rent to the Lender as a result of the COVID-19 pandemic and the health restrictions imposed by the State of California making the operation of movie theaters unlawful. (See Exhibit C). As a result, Galaxy, by far the largest tenant at the Premises ceased paying rent. Galaxy last paid rent in March 2020. All obligations in the Loan Agreement had been complied with in all respects except for arrears in the Monthly Payments since May 1, 2020.

16. Also, San Luis Obispo County health officials also made it unlawful to operate a movie theater on March 19, 2020. (Exhibit D). Indeed, since the pandemic hit, the only tenants at the Premises still paying any rent area donut shop and partial operations of a Mexican food restaurant. Combined the rent paid by these tenants is approximately $7,100 of rent plus $3,000 for property expenses per month.

17. On or about April 17, 2020, Plaintiff wrote to the special servicer, defendant CW Capital Asset Management ("CW Capital") explaining the impossibility of performance of the Loan Agreement in light of the COVID-19 restrictions and requesting a suspension of Plaintiff's loan obligations. (Exhibit E).

18. While some attempts to negotiate a resolution were made, no resolution materialized. Instead, Defendants have taken steps to foreclose its lien through a non-judicial sale according to the deed of trust.

19. On or about October 27, 2020, LRES recorded a Notice of Default and Election to Sell Under Deed of Trust, Assignment of Leases and Rents and Security Agreement. (Exhibit F). Via the Notice of Default and Election to Sell, LRES seeks to sell the Premises in a non-judicial sale and otherwise enforce the lien pursuant to the default provisions of the Loan Agreement pertaining to payment of monthly installments; this, despite the fact that the COVID-19 restrictions issued by California officials has made it impossible to pay the Monthly Payments. A notice of sale can be recorded as early as January 27, 2020, and a non-judicial sale occur as early as February 15, 2021 under Cal. Civ. Code § 2924.

20. Importantly, in this action Plaintiff simply seeks to stay the enforcement of the lien until such time that the Federal Government provides relief to parties in Plaintiff's position, by grant or otherwise, or until such time that Galaxy (and the other tenants) can operate and pay rent. While fluid, it appears that movie theaters will be given a grant as part of the new proposed relief package which will enable the payment of arrears. (See, Affidavit of Jeffrey Nelson). In short, Plaintiff is not seeking to abrogate the Loan Agreement, it merely seeks to declare the defaults occurring since May 1, 2020 are not a basis to foreclose by a non-judicial sale.

21. Indeed, the harm to Plaintiff (essentially losing its investment) if the Premises are sold and the lien otherwise enforced through a non-judicial foreclosure, far outweighs a delay in Defendants enforcing their lien. Plaintiff would lose title to the Premises without an opportunity to have a court determine the merits of its defenses set forth herein.

PERTINENT PROVISIONS OF THE LOAN AND SUPPLEMENTAL AGREEMENTS

22. **The continued operation of the Galaxy Theaters Leases was a fundamental assumption and basis for the loan, without which Jeffries would not have made the loan nor would Plaintiff have purchased the Premises and accepted the loan.** This statement is supported by the Loan Agreement and the concomitant documents signed therewith and discussed below.

23. Jeffries LoanCore, the original Lender, made the loan on this property with the intent that it be sold or transferred in to a CMBS Trust. To qualify for the CMBS loan status, the Loan had to meet certain financial requirements. The Letter of Intent (Exhibit H) required the net rentals to be substantially above the operating costs and the loan payments. To qualify, the Lender had to determine that the net rent revenue from the property was 145% of the expenses and loan payments or a ratio of 1.45 to 1.00. Therefore, the amount of the rentals was fundamental to the loan agreement. Without this ratio of rent to expenses, the loan never would have been made.

24. Moreover, Jefferies apparently did not do a credit search of Plaintiff or its member, Jeffrey C. Nelson before granting the loan. The Lender required the Borrower to be a new separate entity with no history or other assets, and consequently no credit history. Plaintiff paid approximately $5.2 million toward the purchase price of $13,000,000 with the balance of the purchase monies being the $7.8 million loan proceeds. **Jefferies was therefore not looking**

to Plaintiff's credit worthiness to pay the loan payments. Jefferies and Plaintiff were looking solely to the rents from the continued operations of the Premises to pay the loan payments.

25. Paragraph 10.1 at page 71 of the Loan Agreement further demonstrates that Lender was looking to the rents for payment of the loan. Paragraph 10.1 states in pertinent part:

> . . . any judgment in any such action or proceeding shall be enforceable against borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender, and Lender shall **not** sue for, seek or demand any deficiency judgment against Borrower in any such action or proceeding under or by reason of or under or in connection with any Loan Document.

(Emphasis added).

26. The Galaxy Theaters Leases are identified as a "Major Lease" and Galaxy Theaters is identified as "Major Tenant". (Loan Agreement, p. 7). The November 19, 2015 rental statement attached to the Loan Agreement, reports Galaxy Theaters paying $68,710.68 of the total monthly rental of $91,526.27 from the Premises. See schedule 3 to Loan Agreement. Mr. Nelson verifies herewith that as of April 1, 2020 Galaxy Theaters paid $75,581of the $89,958 monthly rent. Indeed, on p. 34 of the Loan Agreement it was represented that: (ix) each Lease was a "binding and enforceable" obligation of Borrower and the applicable tenant thereunder; and (xv) **that all tenants under the Leases are open for business and paying full, unabated rent.**

27. The reason that the Galaxy Theater Leases being "open for business" and "paying full" rent was a fundamental basis to the Loan Agreement, is that all rents were **paid by the tenants directly to a lockbox required by the Lender, and Lender required banking arrangements under which Lender then got paid automatically for loan and reserve**

account amounts before any excess cash was distributed to Borrower. This direct payment of the loan by the tenants was set forth in a Deposit Account Agreement dated December 31, 2015, annexed as Exhibit I. The tenants were **irrevocably** notified to make all rent payments to Cinema Square LLC **for the benefit of** Jefferies Loancore LLC, as beneficiary and to send the rents to a lockbox at Union Bank, P.O. Box 45763, San Francisco, California 94145-0763. The Lender then arranged direct payment to itself for the Loan Agreement. See affidavit of Jeffrey C. Nelson.

28. Since the signing of the Loan Agreement on December 31, 2015, all rents were deposited by the tenants **directly** into a lockbox and Lender required banking arrangements under which Lender got paid automatically for loan and reserve account amounts **before** any excess cash was distributed to Borrower. See aff of Jeffrey C. Nelson.

29. Pursuant to the Three-Party Lockbox and Deposit Account Control Agreement (Exhibit J) dated January 21, 2016, the Lender had complete control over the application of the rents. The pertinent provision is as follows:

> 4. **Control of Special Account by Secured Party.** Bank, Secured Party and Borrower agree that Bank will comply with written instructions ("Orders") originated by Secured Party for the disposition of funds in the Special Deposit Account **without further consent from Borrower** and without regard to any inconsistent or conflicting Orders given by Borrower to Bank.

(Emphasis added).

30. The continued operation of the Premises as the source of direct rentals to the Lender from which the Lender paid itself, was further highlighted by the Lender's insistence in the Loan Agreement on the Plaintiff obtaining rental loss interruption insurance in an amount equal to 100% of the projected gross rents. See paragraphs 7.1(d), (m) and 7.2 of the Loan Agreement. Plaintiff obtained such insurance (approved by Lender) but the claim for lost rents

was denied on the basis the loss was not the result of any physical damage to the Premises. See Exhibit K.

31. In addition to declaring Galaxy Theaters as a "Major Tenant", with a "Major Lease", the Loan Agreement also required plaintiff to get pre-approval from the Lender before entering into, modifying or renewing any Material Lease. Paragraph 5.10.2, at page 41 of the Lease Agreement states:

> **5.10.2 Material leases. Borrower shall not enter into a proposed Material Lease or a proposed renewal, extension or modification of an existing Material Lease without the prior written consent of Lender,** which consent shall not, so long as no Event of Default is continuing, be unreasonably withheld or delayed. Prior to seeking Lender's consent to any Material Lease, Borrower shall deliver to lender a copy of such proposed lease (a "***Proposed Material Lease***") blacklined to show changes from the standard form of Lease approved by Lender and then being used by Borrower. Lender shall approve or disapprove each Proposed Material Lease or proposed renewal, extension or modification of an existing Material Lease for which Lender's approval is required under this Agreement within fifteen (15) Business Days of the submission by Borrower of Lender of a written request for such approval, accompanied by a final copy of the Proposed material Lease or proposed renewal, extension or modification of an existing Material Lease. If requested by Borrower, Lender will grant conditional approvals of Proposed Material Leases or proposed renewals, extensions or modifications of existing Material Leases at any stage of the leasing process, from initial "term sheet" through negotiated lease drafts, provided that Lender shall retain the right to disapprove any such Proposed Material Lease or proposed renewal, extension or modification of an existing Material Lease, if subsequent to any preliminary approval material changes are made to the terms previously approved by lender, or additional material terms are added that had not previously been considered and approved by Lender in connection with such Proposed Material Lease or proposed renewal, extension or modification of an existing Material Lease.

(Emphasis added). It is submitted that this is further indicia that the true purpose of the Loan Agreement was the rental income stream to be paid directly to the Lender.

32. These facts substantiate Plaintiff's claim that the ability of Galaxy to lawfully operate the Premises and pay rent directly to the Lender was the central consideration and purpose of the Loan Agreement as modified, which thereby allowed the loan to be sold or transferred into a CMBS trust. The consideration of *force majure*, impossibility of performance and frustration of purpose defenses caused by California's fiat outlawing operations at the Premises must therefore be in this light. Mr. Davidson verifies herewith that it would be impossible for Plaintiff to refinance the loan with the Galaxy shut down and not paying rent.

PLAINTIFF IS THEREFORE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

33. It can hardly be disputed that the restrictions put in place by California officials in light of the COVID-19 pandemic has made it impossible and/or impracticable for Galaxy the Major Tenant to make Monthly Payments to the Lender. Likewise, it can hardly be disputed that the pandemic and the resultant restrictions was an unforeseeable event that could not have been avoided with any amount of due diligence on December 31, 2015 when the Loan Agreement was signed or thereafter.

Impossibility, Frustration of Purpose and Force Majeure

34. Since Plaintiff is seeking to restrain the enforcement of the lien through a non-judicial foreclosure under California law where the premises are located, the Loan Agreement stipulates that California law applies. See par 13 supra; par 75(a) of loan agreement. The doctrine of impossibility or frustration of purpose and/or force majeure is codified in California Civil Code § 1511, which provides, in pertinent part:

> **The want of performance of an obligation,** or of an offer of performance, in whole or in part, or any delay therein, **is excused by the following causes,** to the extent to which they operate:

> 1. **When such performance** or offer is **prevented or delayed** by the act of the creditor, **or by the operation of law**, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just;
>
> 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary

(See, California Civil Code §1511; *emphasis added*). It is submitted that the obligation to make the Monthly Payments since April 1, 2020 is therefore excused both under sections 1 and 2 of this California Statute. Par. 3.1 of the Loan Agreement requires all rents be paid directly by the tenants to an account for the benefit of the Lender. Pursuant to the Deposit Account and Lock Box Deposit Agreement, from this account, the Lender paid its loan receivables. It is now unlawful for Galaxy to operate movie theaters in California by the operation of law since March 19, 2020, from which the rents paid directly to the Lender originate. (See, Exhibits C and D). Also the COVID-19 pandemic is clearly and irresistible and/or superhuman cause that has made Plaintiff's performance impossible and/or impracticable.

35. Accordingly, Plaintiff's largest tenant, paying 84% of the rental income generated by the Premises cannot operate and cannot pay rent in the Lender's special account. Under these circumstances, the loan obligations are excused under California Law. In Baird v. Wendt Enterprises, Inc., 248 Cal.App.2d 52 (Ct. Ap., 1967), the imposition of a new building code prevented performance of the contract. The Court held there is no liability for breach of contract whose performance has been made impossible by operation of law); see, also, Norcal Realty Partner v. Bakersfield Fitness Development, 2001 WL 36383253 (Ct. Ap. 2001); a

contract which contemplates the doing of a thing at first lawful, but which afterwards and during the running of the contract terms becomes unlawful . . . ceases to be operative upon the taking effect of prohibitory law. See, also, Industrial Development 12 and Co. v. Goldschmidt, 56 Cal. App. 507 (Sup. Ct. 1922) where a lease to use premises to conduct a liquor business was excused by passage of Eighteenth Amendment.

36. The Loan Agreement and concomitant agreements contemplated the continued operation of the Premises by the tenants to pay rentals directly to the Lender to satisfy the payment obligations in the Loan Agreement. Galaxy's operation of the premises is now unlawful. The payment obligations therefore cease to be operative upon the prohibitory law. See, Industrial Development, supra. The Court therefore need not even consider the common law defenses of frustration of purpose and impossibility of performance and plaintiff's motion should therefore be granted solely based on this California statute.

37. However, common law defenses also apply. Under California Law, impossibility as an excuse for nonperformance is not only "strict" impossibility but includes impracticability because of extreme and unreasonable difficulty. See, Autry v. Republic Productions, 30 Cal.2d 144 (1947). There therefore can be no doubt California's intervening prohibition applies as the operation of the Galaxy premises renders the payments of rentals to the Lender impossible and impracticable.

38. Likewise, California recognizes frustration of purpose as a reason to excuse performance. To invoke commercial frustration, one must show that the purpose of the agreement was frustrated by an event that was not reasonably foreseeable. Here, the very purpose of the Loan Agreement was for the Lender to receive its payments from the stream of rentals generated by the movie theaters which the Lender looked to as the source of loan

payments. Again, no one could have anticipated the COVID-19 pandemic, nor California's shut down of all but businesses deemed non-essential.

39. The common law doctrine of *force majeure* is also implicated. California courts have held that force majeure is the equivalent of the common law contract defenses of impossibility and/or frustration of purpose. See, Citizens of Humanity, LLC v. Caitac Int'l, Inc., No. B215233, 2010 WL 3007771 (Ct. App., 2010). *Force majeure* is not limited to the equivalent of an "Act of God". See, Pac. Vegetable Oil Corp. v. C.S.T., Ltd, 29 Cal.2d 238 (1946) (the test is whether under the circumstances there was an insuperable interference as could have been prevented by the exercise of prudence, diligence and care. To invoke *force majeure*, under California law, a party must show that despite that party's diligence and good faith and unforeseen event has made performance impossible or unreasonably expensive or impracticable. Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn., 4 Cal. App. 4th 1538 (Ct. Ap. 1992); see, also, U.S. Trading Corp. v. Newmark Grain Co.,56 Cal. App. 176 (Ct. Ap. 1922) (*force majeure* of temporary embargo suspended performance). Here, there can be no denying that the lockdowns instituted as a result of the COVID-19 pandemic was unforeseen at the time Plaintiff entered into the Loan Agreement and no diligence on Plaintiff's part could have prevented its largest tenant from being legally barred from conducting its business and paying rents to the Lender.

40. To the extent New York law may be applicable to the enforcement of the Loan Agreement, New York, likewise, recognizes the common law doctrine of impossibility to excuse performance of a contract when there have been extraordinary intervening events. New York will apply the doctrine when the means of performance have been destroyed such that performance is objectively impossible. See, Kel Kim Corp., 70 N.Y.2d 900 (1987); see, also,

Kolodin v. Valenti, 115 A.D.3d 197, 979 N.Y.S.2d 587 (1st Dep't 2014); Bush v. Protravel International, Inc., 746 N.Y.S.2d 587 (Civ. Ct., Richmond County 2002). Here, it is objectively impossible for the Lender to be paid from the Galaxy's rentals due to the prohibition on the continued business at the Premises. See In re Candado Plaza Acquisition LLC, 620 B.R. 820, 833 (U.S.B.C. S.D.N.Y. 2020), where COVID-19 restrictions found to excuse a breach of an agreement to "use commercially reasonable efforts" to maintain hotel operations.

41. New York also recognizes frustration of purpose as an excuse for lack of performance on a contract, if an unforeseen event renders a contract "virtually worthless." See, PPF Safeguard, LLC v. BCR Safeguard Holding, LLC, 85 A.D.3d 506, 924 N.Y.S.2d 391 (1st Dep't 2011); see, also, Gelita, LLC v. 133 Second Avenue, LLC, 42 Misc3d. 1216(A)(New County Sup. Ct., 2014). In order to be invoked, the frustrated purpose must be so completely the basis of the contract that as both parties understood, the transaction would have made little sense. There must be a showing that circumstances which induced the contract no longer exist. Pettinelli Glee Co. v. Bd of Ed of City of New York, 36 A.D.2d 520, 391 N.Y.S.2d 118, 119 (1st Dept. 1977). Here, the very basis of the Loan Agreement and the concomitant agreements was the direct payment of the obligations by the tenants' operations to the Lender. Those circumstances induced the Loan Agreement and without that circumstance the loan never would have been made.

42. The shutting down of Plaintiff's largest tenant has not just made the Loan Agreement more expensive or burdensome but impossible to perform. Rather, the entire purpose of Plaintiff's purchase of the Premises and, consequentially the Loan Agreement, was for Plaintiff to purchase property that had Galaxy as the anchor tenant which was to be the primary source of payments of the Loan Agreement. It was unforeseeable that it would become illegal

for Galaxy to operate and thus impossible to pay rent. See, A&E Television Networks, LLC v. Wish Factory, 2016 WL 8136110 (S.D.N.Y. 2016). With Galaxy legally prevented from operating, the entire purpose of the loan which looked to the rentals as the source of payments has been destroyed. See, Matter of Fontana D'Oro Foods, Inc., 122 Misc.2d 1091, 472 N.Y.S.2d 528 (Rich Co., Sup. Ct., 1983). Accordingly, the very purpose of the transaction has been defeated by Galaxy being shut down. See, Arons v. Charpentier, 36 A.D.3d 636, 828 N.Y.S.2d 482 (2nd Dep't 2007).

A Temporary Restraint On Foreclosing The Lien Is Appropriate

43. By restraining and/or enjoining Defendants from selling the deed of trust or otherwise foreclosing the Premises, the *status quo* will simply be preserved until a determination in this action is reached. See, CPLR § 6301.

44. As the facts demonstrate, through no fault of its own, but rather, by government fiat, Galaxy has been unable to make the Monthly Payments. It is submitted Plaintiff has established the likelihood of success on its *force majeure*, impossibility of performance and frustration of purpose defenses, and its defense that performance is excused under California Statute. It is therefore likely Plaintiff will succeed in its claim for a declaratory judgment that the defaults since May 1, 2020 are excused as a basis to enforce the lien.

45. It is well settled that a preliminary injunction will issue when a party can show (i) probability of success on the merits; (ii) danger of irreparable injury in the absence of the injunction and; (iii) a balance of equities in its favor. See, Aetna Insurance Company v. Capasso, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990). There is little doubt that if the non-judicial sale proceeds, Plaintiff's equity in the Premises will be extinguished without the benefit of its defenses being heard. Should Defendants be entitled to sell the Deed of Trust and otherwise foreclose the lien, Plaintiff will have lost title and a lifetime of investment. On the other hand,

Defendants will be barely inconvenienced by any delay. Accordingly, it is submitted that Plaintiff has met its initial burden and is entitled to a preliminary injunction. See, Hairman v. Jhawarer, 122 A.D.3d 570, 997 N.Y.S.2d 84 (2nd Dep't 2014).

46. A copy of Plaintiff's declaratory judgment complaint is annexed as Exhibit L.

47. Plaintiff has no adequate remedy at law.

48. No prior application for the same or similar relief has been made to this or any other Court.

WHEREFORE, Plaintiff requests this Court enter an order granting Plaintiff the following relief:

(i) Pending the determination of a declaratory judgment of this action, restraining Defendants and/or their agents or assigns from transferring or selling the Deed of Trust, foreclosing on the Loan Agreement or otherwise enforcing the default provisions in the Loan Agreement relating to non-payment since May 1, 2020; and

(ii) Granting Plaintiff such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 27, 2021

DAVID K. FIVESON

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
CINEMA SQUARE, LLC,

Plaintiff,

-against-

JEFFRIES LOANCORE, LLC, LRES CORPORATION, as trustee or agent for WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Mortgage Pass Through Certificates, Series 2016-DC2, WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Pass Through Certificates, Series 2016-DC2, JOHN DOE d/b/a WELLS FARGO COMMERCIAL MORTGAGE SERVICING, and CW CAPITAL ASSET MANAGEMENT LLC, as special servicer,

Defendants.
----------X

AFFIRMATION OF EMERGENCY PURSUANT TO NYCRR §202.7(F)

Index No.

DAVID K. FIVESON, an attorney admitted to practice before the Courts of the State of New York affirms under the penalties of perjury as follows:

1. I am a member of the Bar of this Court and principal of the firm Butler, Fitzgerald, Fiveson & McCarthy, A Professional Corporation, attorneys for plaintiff, Cinema Square, LLC ("Plaintiff"). I have knowledge of the facts stated herein based on my review of the annexed exhibits, my firm's file for this matter and based on the annexed affidavit of Jeffrey C. Nelson, Esq. stated on personal knowledge. I therefore believe the facts stated herein to be true and correct.

2. As set forth in my annexed affirmation, this matter seeks to temporarily and preliminarily restrain Defendants and/or their agents or assigns from transferring or selling the premises pursuant to a Deed of Trust, foreclosing on the Loan Agreement or otherwise

enforcing its default provisions relating to payment of monthly mortgage installments defaults regarding the real property known as 6917 El Camino Real, Atascadero, San Luis Obispo County, California 93422, APN/Parcel ID: 029-361-048 and 029-361-049 ("Premises") accruing since May 1, 2020.

3. While the Premises are located in the State of California, the Loan Agreement at issue designates New York State or Federal Court for the sole venue of any litigation arising thereunder. Moreover, with respect to the enforcement of the lien, California law is designated in the Loan Agreement is to apply to the parties' rights.

4. The emergency presented is that since Plaintiff gave a Deed of Trust in connection with the loan agreement, Defendants can transfer or sell the Premises without a judicial adjudication of Plaintiff's defenses. As Defendants recorded a Notice of Default on or about October 27, 2021 a potential sale can occur as early as February 15, 2021.

5. If Defendants transfer the Deed of Trust to a bona fide purchaser, Plaintiff will be foreclosed from any opportunity to assert its defenses set forth in the annexed affirmation and affidavit. Plaintiff has meritorious defenses to the enforcement of the Loan Agreement through a non-judicial foreclosure, which will result in the loss of Plaintiff's entire investment and the Premises.

6. As further set forth in my Affirmation, Plaintiff has compelling defenses to Defendants attempt to foreclosure the lien based upon non-payment of the mortgage obligations. Namely, the continued operation of the Galaxy Theatre (a movie theater at the Premises that was paying 84% of the rental income) was a fundamental assumption, purpose and basis for the loan, without which Defendants would not have made the loan nor would Plaintiff

have purchased the Premises and accepted the loan. As a result of the COVID-19 pandemic, it has been illegal to operate movie theaters in the State of California since March 19, 2020.

7. The defenses of *force majeure*, impossibility of performance and frustration of purpose as interpreted by California law will excuse Plaintiff's performance due to the outlawing of operations at the Premises.

8. Accordingly, without a temporary and preliminary restraint on Defendants and/or their agents or assigns from transferring or selling the Premises pursuant the Deed of Trust, foreclosing on the Loan Agreement or otherwise enforcing its default provisions relating to payment of monthly mortgage installments since May 1, 2020, Plaintiff will be significantly prejudiced (perhaps rendering any relief it may obtain herein moot). Plaintiff will have also lost his investment.

9. We have advised counsel for Defendants via email that we will be submitted this order to show cause and seeking a temporary injunction via email on January 27, 2021, a copy of which email is annexed hereto.

10. The e-mail addresses for counsel for defendant to enable the Court to schedule a Teams Virtual argument are:

Jeffries Loancore, LLC:
notices@loancorecapital.com

LRES Corporation and Wilmington Trust National Association:
mbirnbaum@perkinscole.com

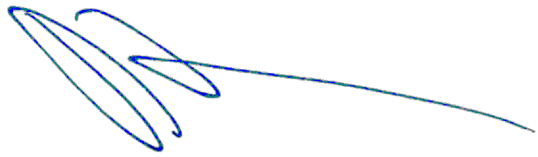
Wells Fargo Commercial Mortgage Servicing:
Daniel.B.Alexander@wellsfargo.com

CW Capital Asset Management:
kgreen@cwcapital.com

11. No prior application for the relief requested herein has been made to this or any other court.

WHEREFORE, your affirmant respectfully requests that this matter be set for an immediate hearing, and the Court issue a temporary injunction and/or restraining order restraining Defendants and/or their agents or assigns from transferring or selling the Premises pursuant the Deed of Trust, foreclosing on the Loan Agreement or otherwise enforcing its default provisions relating to payment of monthly mortgage installments since May 1, 2020, pending a determination of the within motion.

Dated: New York, New York
January 27, 2021



DAVID K. FIVESON