

SUPRME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Frank P. Neruo
~~ARLENE P. BLUTH~~

PRESENT: ~~ARLENE P. BLUTH~~ J.S.C.

-----X

1248 Associates Mezz II LLC Pre-Commencement: Y/N

INDEX NO. _____

-against-

1248 Mezz II LLC

-----X

Upon review of the papers submitted in support of the emergency application to designate this matter as an "essential matter" pursuant to UCS Administrative Order AO-78-20 (Exh. A (E)), it is hereby

[] ORDERED that the matter is "essential" under Section E of Administrative Order AO-278-20 and the movant is authorized to file the necessary papers in support of the relief sought, and it is further

ORDERED that County Clerk is directed to accept the papers presented for filing and issue an Index Number, if necessary, upon the payment of all fees, if any.

** with respect to the order to show cause of April 30, 2020 only.*

[] ORDERED that the matter is not "essential" under Section E of Administrative Order AO-278-20 and the movant's request to file is denied.

DATE: *April 30, 2020*



~~ARLENE P. BLUTH~~
J.S.C.

FRANK P. NERUO

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

1248 ASSOCIATES MEZZ II LLC,

Plaintiff,

v.

12E48 MEZZ II LLC,

Defendant.

x

: Index No.: _____/2020
: Date Index No. Purchased:
: April 22, 2020

SUMMONS

:
: Plaintiff designates New York
: County as the place of trial.

:
: Venue is based upon CPLR §
: 503.

x

TO THE ABOVE NAMED DEFENDANT

YOU ARE HEREBY SUMMONED to answer the Complaint in this Action and to serve a copy of your answer on Plaintiff’s attorneys, Allen & Overy LLP, within twenty (20) days after the service of the summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: April 22, 2020
New York, New York

ALLEN & OVERY LLP

By: /s/ Jacob. S. Pultman

1221 Avenue of the Americas
New York, New York 10020
Telephone: 212-610-6300
Facsimile: 212-610-6399

Attorneys for Plaintiff 1248 Associates Mezz II LLC

TO: 12E48 Mezz II LLC
c/o Silverman Real Estate Holdco LLC
527 Madison Avenue
New York, New York 10022
Attn: Tom Christopoul
Attn: James Gabriel

Paul Hastings LLP
200 Park Avenue
New York, New York 10166
Attn: Peter C. Olsen

3. Defendant's one and only advertisement of the sale to date—placed a mere two weeks before the scheduled sale date in a subscription-only newsletter—announces to the "public" that they must show up at an in-person auction at the Metlife Building on May 1 in order to bid on the Collateral. Paying lip service to the pandemic dominating the world with New York City at its epicenter, Defendant concedes that there might be a need for participation electronically through Webex. Thus, in its transparent effort to deter public interest in the Collateral, Defendant has told all potential buyers that the only way to bid on the Collateral is either to risk their own well-being and flout the legal restrictions entered to protect the public health in the face of the COVID-19 crisis to attend an in-person public gathering or at most try to use an electronic system that provides no real substitute.

4. In sum, with little or no public marketing or advertising, Defendant has designed a sale process that is intentionally commercially unreasonable and that intentionally closes off public access to the sale. Defendant is rigging the sale to guarantee that Defendant is the only bidder so that it can acquire the Collateral and take control of the Project for a pittance.

5. Defendant's commercially unreasonable non-judicial sale is a sham that plainly violates the UCC and various emergency Executive Orders entered by Governor Cuomo, including the moratorium on any foreclosure of commercial property. Plaintiff brings this action to prevent the irreparable, immediate and devastating harm that Plaintiff would suffer if the sale were to go forward, and to put a stop to Defendant's wrongful attempt to rob Plaintiff and its affiliates of their unique piece of real estate and more than \$33 million in capital investments.

PARTIES

6. Plaintiff 1248 Mezz II is a Delaware limited liability company with its principal place of business at 40 Wall Street, New York, New York 10005.

7. Defendant Junior Mezz Lender is a Delaware limited liability company with its principal place of business at 527 Madison Avenue, New York, New York 10022.

8. On information and belief, Defendant is ultimately beneficially owned and controlled by Henry R. Silverman and/or his affiliates.

9. On information and belief, Defendant is a single purpose entity created by Mr. Silverman and/or his affiliates to hold their security interest in the Collateral.

JURISDICTION AND VENUE

10. Defendant consented to jurisdiction in New York State in Section 14.14 of the Junior Mezzanine Loan Agreement (as defined below). In addition, Defendant maintains its principal place of business in New York County. As such, this Court has jurisdiction over Defendant pursuant to CPLR § 301.

11. Venue is proper in New York County pursuant to CPLR § 503 because (i) the parties selected New York County as the venue for this Action pursuant to Section 14.14 of the Junior Mezzanine Loan Agreement, (ii) Defendant maintains its principal place of business in New York County and (iii) the proposed sale of the Collateral is scheduled to take place in New York County.

STATEMENT OF FACTS

A. Background of the Financing

12. Plaintiff is the sole member of 1248 Associates Mezz LLC ("1248 Mezz"), which in turn is the sole member and owner of 100% of the equity interests in 1248 Associates LLC ("1248 Associates").

13. 1248 Associates is the owner of a fee simple interest in the Property. Plaintiff, 1248 Mezz and 1248 Associates are special purpose entities created to hold equity in the Property and the Project. As owner of the Collateral, Plaintiff holds control rights with respect to the development of the Property.

14. The Property was purchased in 2015 by a predecessor in interest to 1248 Associates. 1248 Associates is currently developing the Property with the construction of the Project, an approximately 125,000 gross square foot 31-story building consisting of (i) a Hilton Grand Vacations Club with 161 separately-keyed rooms and (ii) approximately 1,600 square feet of retail space.

15. The Hilton Grand Vacations Club will be run and operated by Hilton Grand Vacations, Inc. ("HGV"), a publicly-traded company whose subsidiary, Hilton Resorts Corporation, executed a Purchase and Sale Agreement on December 23, 2015, as amended, with a predecessor in interest to 1248 Associates for the 161 separately-keyed rooms for \$187,400,000.

16. Financing for the development of the Property closed on or about December 30, 2016, and is governed by a series of loan documents and amendments executed on that date and thereafter.

17. The original financing package consisted of two principal loans: a senior mortgage loan and a senior mezzanine loan. Midland National Life Insurance, an Iowa corporation doing business in New York, was the originating lender of the senior mortgage loan for \$100,470,500 (the "Senior Loan"), which is evidenced by three promissory notes totaling the same amount. 54M 12E48 LLC ("Senior Mezz Lender"), Defendant's affiliate, originated the senior mezzanine loan for \$23,179,500 (the "Senior Mezzanine Loan"), which is evidenced by a single promissory note for the same amount.

18. In addition to the Senior Loan and the Senior Mezzanine Loan, to date, Plaintiff's principals have invested \$33,373,346 of their own capital into the Project.

19. Subsequently, Plaintiff obtained a junior mezzanine loan (the "Junior Mezzanine Loan") from Defendant, an affiliate of the Senior Mezzanine Lender, pursuant to the Junior Mezzanine Loan Agreement entered into by and between Plaintiff and Defendant, dated as of April 17, 2019 (the "Junior Mezzanine Loan Agreement"). Under the Junior Mezzanine Loan Agreement, which provides for a maximum loan disbursement of \$7 million and a scheduled maturity date of March 30, 2022, Plaintiff received a \$5 million initial advance. Plaintiff executed a promissory note for \$7 million in favor of Defendant to evidence the Junior Mezzanine Loan Agreement. A true and correct copy of the Junior Mezzanine Loan is attached hereto as Exhibit 1.

20. Plaintiff is the borrower under the Junior Mezzanine Loan Agreement, which was executed to "fund a portion of the development costs" of the Property. This was to be done through a chain of investments by which Plaintiff made equity contributions to 1248 Mezz, which in turn made equity contributions to 1248 Associates that were then used to fund the Project. Ex. 1, Recitals.

21. Plaintiff executed a number of documents simultaneously with and in consideration for the Junior Mezzanine Loan, including a Junior Mezzanine Pledge and Security Agreement (the "Pledge Agreement") and a Junior Mezzanine Guaranty of Completion (the "Completion Guaranty"). True and correct copies of the Pledge Agreement and the Completion Guaranty are attached hereto as Exhibits 2 and 3 respectively.

22. The Completion Guaranty was entered into by two of Plaintiff's principals, as Guarantors, for the benefit of Defendant. Under the Completion Guaranty, the Guarantors guaranteed that Plaintiff "shall, in accordance with the provisions and requirements of the Loan Documents (a) construct, equip, complete and pay for all of the Improvements and the Construction Work in accordance with the Loan Agreement except for completion dates." Ex. 3 § 3.

23. Under Section 2(a)(i) of the Pledge Agreement, which was executed by Plaintiff for the benefit of Defendant, Plaintiff pledged its membership interests in 1248 Mezz as collateral for the Junior Mezzanine Loan. Pursuant to Section 1(f) of the Pledge Agreement, the entire agreement, including the disposition of the Collateral, is governed by the Uniform Commercial Code of the State of New York (the "UCC").

B. Construction of the Project

24. The development of the Project, which began in early 2017 following the execution of the Senior Loan Agreement and the Senior Mezzanine Loan Agreement, is a substantial undertaking.

25. Section 7.1(dd)(xii) of the Junior Mezzanine Loan provides that Plaintiff would achieve Substantial Completion of the Project by December 31, 2019. Substantial Completion is defined in the Junior Mezzanine Loan as occurring when:

a) the Architect and the Construction Manager shall have each delivered and executed a certificate of substantial completion for the portion of the Improvements consisting of the building shell in the form of AIA Document G704 (April, 1978 edition) or any successor or replacement certificates; (b) there has been issued a temporary certificate of occupancy for the Improvements; (c) Lender shall have received an affidavit of Borrower in form and substance reasonably satisfactory to the Lender certifying and warranting, to the best of Borrower's Knowledge that the Improvements have been constructed in a good and workmanlike manner substantially in accordance with the Plans and Specifications, subject to "punch list" items; (d) that all utilities, roads, sidewalks and other appurtenances necessary for the Improvements have been fully installed; and (e) all conditions of the Initial Phase Closing (as such term is defined in the Hilton PSA) to be satisfied by Mortgage Borrower under the Hilton PSA have been satisfied.

26. As of December 31, 2019, the Project was nearly complete and Plaintiff was close to achieving Substantial Completion under the Junior Mezzanine Loan Agreement. In fact, more than 80% of the Project had been completed as of that date.

27. Nonetheless, on January 16, 2020, Defendant and its affiliate, Senior Mezz Lender, issued notices of default under Sections 7.1(dd)(xii) and 12.1(j) of the Mezzanine Loans, which are substantially similar, to Plaintiff and 1248 Mezz for allegedly not achieving Substantial Completion by December 31, 2019 (the "Default Notices"). True and correct copies of the Default Notices are attached hereto as Exhibit 4.

28. As of March 30, 2020, Plaintiff had completed more than 90% of the essential elements of the Project. The remaining work needed to achieve Substantial Completion consists mainly of discrete building enclosures and inspections. This work can be completed in several months' time after the COVID-19 restrictions are lifted, and is work that Plaintiff had been ready, willing and able to do in short order before the COVID-19 pandemic hit.

29. Plaintiff is fully prepared to return to complete the work after the COVID-19 restrictions are lifted and there is legal clearance to continue the work. Once Plaintiff is able to get its construction team back in place, Plaintiff expects to complete the Project in as little as 6 months, with less than \$12 million in remaining construction costs.

C. Plaintiff Seeks Outside Financing

30. Plaintiff began searching for replacement financing in late 2019 that would satisfy the Senior Loan, Senior Mezzanine Loan and Junior Mezzanine Loan in full, and allow Plaintiff to complete the Project within this short period of time.

31. In early December 2019, Plaintiff began exchanging drafts of a term sheet to obtain such financing with Apollo Commercial Real Estate Finance, Inc. ("Apollo"), with the financing to be provided by Apollo or an affiliate thereof.

32. On January 8, 2020—prior to the issuance of the Default Notices—Plaintiff executed a Term Sheet with Apollo (the "Apollo Term Sheet"), pursuant to which Apollo was prepared to lend 1248 Associates and 1248 Mezz, with Hidrock Properties Inc., whose principals have an indirect ownership interest in Plaintiff, as Sponsor, approximately \$148 million to refinance the Project. The proceeds of Apollo's replacement financing were ultimately to be used to fund the remaining costs to complete construction and pay off the entirety of Plaintiff's existing indebtedness under the Senior Loan, the Senior Mezzanine Loan and the Junior Mezzanine Loan, removing the entirety of Defendant and its affiliates' interests in the Project, including Defendant's security interest in the Collateral under the Pledge Agreement. A true and correct copy of the Apollo Term Sheet is attached hereto as Exhibit 5.

33. Defendant and its affiliates were fully aware of the potential refinancing from Apollo, and, with Plaintiff's consent, Defendant and its affiliates actively participated in the negotiation process with Apollo. In an effort to foster goodwill with Defendant, Plaintiff permitted Defendant and its affiliates to be directly involved in the negotiation process for the refinancing in the months leading up to the Apollo Term Sheet in January 2020.

34. In advance of the negotiations with Apollo, on October 25, 2019, Plaintiff and Defendant entered into a Pre-Negotiation Agreement (the "PNA"). In the PNA, Plaintiff granted Defendant and its affiliates unfettered access to any potential lenders, including Apollo, once the refinancing discussions took place in December 2019. PNA § 14. Pursuant to Section 14 of the PNA, Defendant and its attorneys, agents and representatives were freely permitted to engage in discussions of any sort, and exchange drafts of documents and agreements, with both Apollo and HGV. The PNA was then ratified and reaffirmed by Plaintiff and Defendant on March 23, 2020, once again to help facilitate open discussions and good faith negotiations in relation to the financing of the Project. True and correct copies of the PNA and subsequent ratification are attached hereto as Exhibit 6.

35. Defendant and its affiliates took full advantage of the PNA, with employees of Defendant's affiliate 54 Madison Partners, LLC ("54 Madison") acting on behalf of Defendant, commenting on drafts of a subordination and assignment agreement to be executed between HGV and Apollo—a required aspect of the refinancing—and engaging in numerous discussions with both HGV and Apollo.

36. However, the impact of the COVID-19 pandemic struck with full force and interrupted any prospect of a refinancing of the Project, as on March 17, 2020, Apollo broke off negotiations with Plaintiff.

D. The COVID-19 Pandemic

37. Since March 27, 2020, Plaintiff has been unable to continue construction on the Project due to government restrictions put in place as a result of the COVID-19 pandemic, when New York Governor Andrew Cuomo outlawed all non-essential construction. By that point, construction of the Project had already slowed significantly due to the Project's contractors reducing their workforce over the course of March in response to the COVID-19 pandemic and to Defendant's refusal to fund requisition notices required to pay for construction costs.

38. New York City became the epicenter of the outbreak in the U.S., and has been dramatically and severely affected by the COVID-19 pandemic. In response, Governor Cuomo declared a state-wide emergency on March 7, 2020, effective through September 7, 2020. A true and correct copy of this executive order is attached hereto as Exhibit 7.

39. Through a series of executive orders issued by Governor Cuomo and in place through May 15, 2020, the State of New York has also banned non-essential in-person gatherings, ordered all non-essential businesses to reduce their in-person workforce by 100% and prohibited all non-essential construction projects.

40. On March 20, 2020, Governor Cuomo issued Executive Order 202.8, requiring all non-essential businesses to reduce their in-person workforce by 100% by March 22, 2020, with violations subject to section 12 of New York's Public Health Law. A true and correct copy of Executive Order 202.8 is attached hereto as Exhibit 8.

41. Then, on March 23, 2020, Governor Cuomo issued Executive Order 202.10, barring all "non-essential gatherings of individuals of any size for any reason." A true and correct copy of Executive Order 202.10 is attached hereto as Exhibit 9. As discussed in more detail below, Defendant has announced to public bidders that they must violate this restriction in order to bid on the asset.

42. The restrictions set forth in Executive Order 202.8 and 202.10 have since been extended through at least May 15, 2020 by Executive Order 202.18, with violations made punishable by fines of up to \$1,000. Exs. 8–9. A true and correct copy of Executive Order 202.18 is attached hereto as Exhibit 10.

43. Critically, Executive Order 202.8 also prohibited enforcement of all residential and commercial real estate foreclosures and evictions for a period of ninety days. Ex. 8. Thus, Governor Cuomo has absolutely barred all foreclosures of any commercial or residential property, such as the commercially unreasonable UCC foreclosure sale that this Action seeks to stop, until June 20, 2020.

44. The New York State Court system soon followed suit, prohibiting the filing of new non-essential matters through Administrative Order 78-20, issued by Chief Administrative Judge Lawrence K. Marks on March 22, 2020.

45. Finally, Governor Cuomo entered Executive Order 202.13 on March 30, 2020, which effectively prohibits continuing construction of the Project at this time. True and correct copies of Executive Orders 202.13 and 202.14 are attached hereto as Exhibit 11. The order modified a previous executive order, clarifying that construction projects were deemed non-essential as of March 28, 2020,

and thus prohibited unless exempted by the Empire State Development Corporation. As the Project has not received such an exemption, Plaintiff is prohibited by law from continuing construction.

E. Defendant's Attempt to Take Advantage of the COVID-19 Pandemic by Noticing a Sham In-Person "Public" Auction for May 1, 2020 at Paul Hastings' Midtown Law Offices

46. On March 31, 2020, Plaintiff received a Notification of Disposition of Collateral from Defendant (the "Foreclosure Notice") in which Defendant noticed its intention to conduct the commercially unreasonable UCC foreclosure sale that this Action seeks to stop. In the Foreclosure Notice, Plaintiff stated that it was going to sell the Collateral (the "Collateral Foreclosure") "to the highest qualified bidder in public" at 10:00 am, May 1, 2020 at the offices of Paul Hastings LLP, 200 Park Avenue, New York, NY 10166. A true and correct copy of the Foreclosure Notice is attached hereto as Exhibit 12.

47. Plaintiff's affiliate 1248 Mezz also received a substantially similar notice on March 31, 2020 from the Senior Mezz Lender noticing the Senior Mezz Lender's intention to conduct a foreclosure sale of the separate collateral pledged by 1248 Mezz to the Senior Mezz Lender, which included 1248 Mezz's membership and equity interests in 1248 Associates. The Senior Mezz Lender then withdrew and cancelled that foreclosure sale in a notice sent to 1248 Mezz on April 15, 2020 without explanation. True and correct copies of these notices are attached hereto as Exhibit 13.

48. On April 15, 2020, Plaintiff received a copy of the Notice of Sale and Terms of Sale from Defendant. True and correct copies of the Notice of Sale and Terms of Sale are attached hereto as Exhibits 14 and 15 respectively.

49. While the Notice of Sale states that there will be a "public auction," both the Notice of Sale itself and the Terms of Sale create a variety of restrictions and hurdles that make it virtually impossible for any potential bidder to participate in the proposed sale of the Collateral. .

50. The Terms of Sale provide that "[o]nly the bids of 'Qualified Bidders' will be considered by [Defendant]." Ex. 15 at 2, ¶ 4. To be a "Qualified Bidder" under the Terms of Sale, a party must deposit at least ten percent of the amount of the bid in escrow with Paul Hastings, attorneys for Defendant, prior to the sale. *Id.* ¶ 6.

51. The Terms of Sale provide Defendant with unlimited discretion to "modify the Terms of Sale and add additional terms by announcement made prior to or at the time of the public auction." *Id.* at 3, ¶ 12.

52. In addition, the Terms of Sale provide that Defendant "may reject any and all bids in its sole and absolute discretion and withdraw the Collateral from sale at any time and for any reason whatsoever." *Id.* ¶ 13.

53. The Terms of Sale further provide that Defendant "may cancel the public auction or cause the sale to be adjourned from time to time, without prior written notice or further publication, by announcement prior to or at the time and place appointed for the public auction or at any adjournment thereof." *Id.* ¶ 14.

54. Defendant also stated in the Terms of Sale that Defendant "reserves the right to bid at the time and place of the public auction, to become the purchaser of the Collateral and to credit bid against the purchase price of the Collateral any and all indebtedness of [Plaintiff] to [Defendant]." *Id.* ¶ 15.

55. Defendant exempted itself from the deposit requirement noted above, as the Terms of Sale provide that "[i]n the event [Defendant] is the successful bidder, it shall not be required to deposit any cash prior to or at the time of the public auction and, to the extent its bid exceeds the amount of the indebtedness of [Plaintiff] to it, the excess of the amount bid over the amount of such indebtedness shall be due and payable within ten (10) days of the conclusion of the public auction." *Id.*

56. The Terms of Sale also provide that "[i]n the event that [Defendant] is unable for any reason to consummate the sale of the Collateral to the successful bidder, its sole obligation to the proposed bidder shall be the return of the principal amount of the proposed bidder's deposit, without interest." *Id.* at 4, ¶ 21.

57. Finally, the Terms of Sale provide that "[i]n the event of the continuance of the mandate to avoid public assemblies due to the presence of the novel coronavirus COVID-19, the public action will take place virtually and telephonically via a Cisco Webex teleconference." *Id.* at 1, ¶ 1. However, as described below, Defendant's lone public advertisement makes no mention of the possibility of virtual bidding, leaving any potential bidder to believe that the Collateral Foreclosure is being conducted in-person at the midtown Manhattan law offices of Defendant's counsel, Paul Hastings LLP.

F. Defendant Has Engineered a Process That Is Intentionally Commercially Unreasonable and Intentionally Closes Off Public Access to the Collateral Foreclosure

58. Despite asserting that it was going to sell the Collateral to the "highest qualified bidder in Public," Defendant has done next to nothing to alert the public of the upcoming Collateral Foreclosure. Defendant has made no effort whatsoever to generate meaningful public access to the sale. Beyond the one solitary advertisement in a subscription-only newsletter (described below), Defendant has made no public announcements of the sale, has placed no public notices and has made no information regarding the sale available to any member of the public. There is no information available regarding the sale of the Collateral on any website or public medium maintained by Defendant or any of its affiliates.

59. In fact, Defendant has made only a single announcement regarding the May 1 Collateral Foreclosure, which was buried in the corner of page 7 of the April 17, 2020 version of the Commercial Mortgage Alert, a subscription-only newsletter not available to the public-at-large. In that announcement, Defendant did not include the Terms of Sale, making them available only on request. A

true and correct copy of the April 17, 2020 edition of the Commercial Mortgage Alert, including the announcement, is attached hereto as Exhibit 16.

60. The newsletter announcement occurred a mere two weeks before the May 1 Collateral Foreclosure, in the midst of the worst global pandemic in more than a century. Although the Terms of Sale allowed interested bidders to participate in the Collateral Foreclosure "virtually and telephonically via a Cisco Webex teleconference" (as in-person attendance would be illegal under Governor Cuomo's Executive Orders), that fact was not included in the newsletter announcement and sole public notice of the Collateral Foreclosure. Rather, the advertisement states that the Collateral Foreclosure will take place at the offices of Paul Hastings in the Metlife Building.

61. Defendant has carefully crafted a process designed to close off any meaningful public access to the proposed sale and guarantee that Defendant is the only bidder. Were a member of the public interested in bidding on the Collateral, it would first have to find out about the Collateral Foreclosure, which would require that the bidder (i) have a subscription to the Commercial Mortgage Alert, and then (ii) find the announcement, which was buried in the corner of page 7 of the April 17, 2020 edition and which announces that the sale will take place in person in midtown Manhattan on May 1, 2020.

62. Then, in the unlikely event that any such potential bidder had any interest in the UCC foreclosure sale, notwithstanding the fact that the sale is legally banned by Governor Cuomo's orders, the potential bidder would then have to clear the additional hurdles of: (i) requesting and receiving the Terms of Sale from Defendant's attorneys, at which point such potential bidder would become aware for the first time that the Collateral Foreclosure is being conducted virtually, (ii) somehow conduct due diligence on a massive Midtown commercial real estate project worth over \$150 million while the entire Project and the city in which it sits is closed, (iii) secure funding to bid on the Collateral, while the capital markets are under massive strain and (iv) transfer 10% of that money to Defendant's attorneys, all in the

span of two weeks, at a time when the foreclosure itself is unlawful and when it is unlawful to engage in non-essential gatherings, such as showing up to a Midtown Manhattan office as Defendant's notice in the private newsletter requested.

63. Then, even if a potential bidder somehow completed all of those steps, which, practically speaking, is an impossibility, Defendant would still have the right to (i) cancel the sale at any time for any reason, without any explanation and (ii) reject that bid in its sole discretion for any reason, without any explanation.

64. Simply put, Defendant has rigged the sale to ensure that there is no meaningful public access to the sale and to guarantee that Defendant or its affiliates are the only bidders.

65. Defendant's improper motivation is to create the farce that it is conducting a public sale while intentionally closing off public access. Every single action Defendant has taken with respect to the sale—from the lack of public notice to timing the sale to occur in the midst of the worst global pandemic in more than a century to the unreasonable Terms of Sale—has been designed to create a commercially unreasonable sale process that allows Defendant or its affiliates to acquire the Collateral at a fire sale price. None of this was a surprise to Defendant given that it issued the foreclosure notices in the last days of March 2020 when the full effects and impact of the COVID-19 pandemic were well known and after the Executive Orders were issued by Governor Cuomo.

66. Defendant's own statements confirm its illicit intentions and fly in the face of Defendant's assertion in the Foreclosure Notice and the Terms of Sale that it is conducting a "public auction" with no foregone conclusion as to the result. Just days after issuing the foreclosure notices, on an April 3 call between James Gabriel, an employee of Defendant's affiliate 54 Madison and agent for Defendant, and the Rinaldi Group LLC (the "Rinaldi Group"), Plaintiff's contractor for the Project, the Rinaldi Group asked Mr. Gabriel if Defendant would be making a requisition payment needed to continue construction

of the Project when permitted. Mr. Gabriel responded by informing the Rinaldi Group that Defendant would make the payment and fund the Project, but only after May 1, 2020 after "we take control of the asset."

G. Plaintiff Is Able to Obtain Financing and Complete the Project

67. Plaintiff needs less than \$12 million to complete the construction of the Project, and expects to be able to obtain such financing within three months once the COVID-19 restrictions are lifted and the capital markets are reopened.

68. Moreover, once New York's COVID-19 restrictions are lifted, allowing Plaintiff to work on the Project with a full workforce, Plaintiff expects to be able to obtain a Temporary Certification of Occupancy within approximately six months.

69. Plaintiff has made multiple requests to Defendant, both before and after Defendant issued the Notice of Sale, to delay the Collateral Foreclosure until after the State of New York's COVID-19 restrictions have been lifted, but Defendant has refused.

70. Granting Plaintiff a Temporary Restraining Order and Preliminary Injunction would provide Plaintiff with the short time needed to secure the necessary funding to satisfy the balance of the Junior Mezzanine Loan and perform the limited remaining work to achieve Substantial Completion.

71. In sharp contrast to the irreparable harm that would be visited upon Plaintiff if the foreclosure sale proceeds as scheduled, Defendant would not be harmed by this necessary delay. Even if Plaintiff was somehow unable to secure the necessary funding to satisfy the Junior Mezzanine Loan in full—and Plaintiff is able to do so—granting the relief requested in this Action would permit the Collateral Foreclosure to be held during a time when the public has access to the sale and the sale can be conducted in a commercially reasonable manner without violating the law.

COUNT I
VIOLATION OF THE UNIFORM COMMERCIAL CODE

72. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 71 hereof, as if fully stated herein.

73. The Junior 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 Uniform Commercial Code (the "UCC").

74. 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."

75. Additionally, under Section 9-610(c) of the UCC, a secured party conducting a non-judicial sale of collateral may only purchase the collateral if the sale is a public sale, or at a private sale if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations. The Collateral here is not collateral of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

76. Defendant's proposed May 1, 2020 non-judicial foreclosure sale of the Collateral is not commercially reasonable and violates the legal restrictions put in place to protect the public from the COVID-19 pandemic and the related legal prohibition on commercial property foreclosure sales.

77. Indeed, Defendant has intentionally designed a rigged sale process and Terms of Sale that are not commercially reasonable to deter public bidders and guarantee that Defendant and/or its affiliates will be the only bidders at the Collateral Foreclosure and can acquire the Collateral at a distressed, below-market price. Defendant made only a single announcement, buried in the corner of page 7 of a subscription-only newsletter, listing the location of the Collateral Foreclosure as the Midtown office of their attorneys—in the midst of the worst global pandemic in more than a century, where it would be

illegal, and a public health-risk, for any member of the public to physically go to that office—despite the fact that the Terms of Sale provide that the Collateral Foreclosure will be held virtually and telephonically. That announcement was made just fourteen days before the Collateral Foreclosure is scheduled to occur, prior to which any bidder was required to deposit 10% of the bid with Defendant's attorneys in order to be a "Qualified Bidder."

78. Even if an interested bidder were to see Defendant's lone advertisement, Defendant has deliberately deprived any interested bidders of the opportunity to conduct meaningful due diligence on the Collateral, to arrange financing and to demonstrate their ability to participate in the Collateral Foreclosure.

79. Moreover, the Terms of Sale permit Defendant to (i) "reject any and all bids in its sole and absolute discretion and withdraw the Collateral from sale at any time and for any reason whatsoever"; (ii) cancel the sale without any prior notice or further publication; and (iii) "modify the Terms of Sale and add additional terms by announcement made prior to or at the time of the public auction."

80. The May 1 Collateral 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 Collateral 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.

81. If the sale proposed by Defendant proceeds on the currently scheduled May 1 date under Defendant's proposed terms, and Defendant is allowed to purchase the Collateral at the sale, 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.

82. By reason of the foregoing, Defendant's May 1 Collateral Foreclosure is not commercially reasonable and violates the UCC.

COUNT II
DECLARATORY JUDGMENT

83. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 82 hereof, as if fully stated herein.

84. Section 9-610(c)(2) of the UCC provides that a secured lender may purchase its collateral at a private sale "only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations." The May 1 Collateral Foreclosure is not commercially reasonable under Section 9-610(b) of the UCC.

85. Comment 9 to Section 9-610 defines the term "recognized market" as "one in which the items sold are fungible and prices are not subject to individual negotiation." As set forth in Paragraph 76, the Collateral is not being sold in a "Recognized Market."

86. Comment 7 to Section 9-610 defines the difference between a "public" sale and a "private" sale as follows: "Although the term is not defined, as used in this Article, a 'public disposition' is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. 'Meaningful opportunity' is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition)."

87. As set forth above, Defendant has intentionally designed a commercially unreasonable sale process that closes off public access to the sale and guarantees that the only "Qualified Bidders" at the May 1 Collateral Foreclosure will be either Defendant or its affiliates or a party acting in collusion with them.

88. In addition, the May 1 Collateral 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, along with the 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.

89. By reason of the foregoing, Plaintiff is entitled to a judgment declaring that the May 1, 2020 UCC foreclosure sale that Defendant has scheduled (i) is commercially unreasonable and violates Article 9 of the UCC and (ii) violates Executive Order 202.8.

COUNT III
INJUNCTIVE RELIEF

90. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 89 hereof, as if fully stated herein.

91. If the Collateral Foreclosure proposed by Defendant proceeds on the currently scheduled date under Defendant's proposed terms, and Defendant is permitted to purchase the Collateral at the sale, 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.

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

93. The balance of the equities favors Plaintiff, which would suffer irreparable harm if the May 1 Collateral Foreclosure is allowed to occur. In contrast, a minimal delay would cause no harm to Defendant's legitimate interests, as Defendant could still foreclose on the Collateral after the COVID-19 restrictions are lifted, when it would be possible to hold a commercially reasonable collateral foreclosure that would maximize the price of the sale. Injunctive relief would also further the interests of public health and safety.

94. By reason of the foregoing, Plaintiff is entitled to a judgment preliminarily enjoining Defendant from selling the Collateral until 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.

COUNT IV
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

95. Plaintiff repeats and re-alleges each of the allegations set forth in Paragraphs 1 through 94 hereof, as if fully stated herein.

96. 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.

97. Here, Defendant has scheduled a rigged and commercially unreasonable UCC foreclosure sale in a malicious and unlawful effort to strip Plaintiff of its rights in the Collateral and under the Junior Mezzanine Loan Agreement.

98. 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 May 1, 2020 Collateral Foreclosure is not commercially reasonable and violates the UCC;
- (ii) On the Second Cause of Action, issuing a declaratory judgment that the May 1, 2020 Collateral 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 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 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) All costs and fees incurred in this Action; and
- (vi) Granting any and all such further and other relief as this Court deems just and proper.

Dated: April 22, 2020
New York, New York

Respectfully submitted,

By: /s/ Jacob. S. Pultman_____

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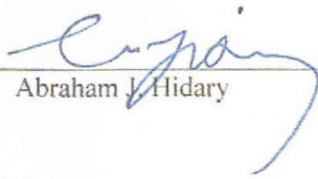
Attorneys for Plaintiff 1248 Associates Mezz II LLC

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

VERIFICATION

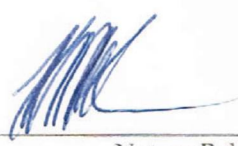
ABRAHAM J. HIDARY hereby affirms:

I am a Principal of Hidrock Properties Inc., and along with Hidrock Properties' other principals, I hold an indirect ownership interest in 1248 Associates Mezz II LLC, the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The contents are true to my own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.



Abraham J. Hidary

Affirmed to in front of me this
21st day of April, 2020



Notary Public

NOTARIZATION MADE PURSUANT TO
EXECUTIVE ORDER 202.7 IN PUTNAM COUNTY

KURT R. VELLEK
Notary Public, State of New York
No. 01VE4943090
Qualified in Putnam County
Certificate filed in New York County
Commission Expires Oct. 17, 2022