

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**NORTH HILLS VILLAGE LLC,**

Plaintiff,

v.

**LNR PARTNERS, LLC, and  
WELLS FARGO BANK, N.A.,**

Defendants.

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: Case No: 2:20-cv-00431-MRH  
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: Chief Judge Hornak  
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**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**I. INTRODUCTION**

Plaintiff’s request for injunctive relief must be denied because Plaintiff cannot establish the required preliminary injunction factors of: i) a likelihood of success on the merits; and ii) irreparable harm. As to the likelihood of success, the plain language of the controlling agreements demonstrates that all of Plaintiff’s claims are unfounded because Plaintiff did not renew the Burlington Coat Factory lease as was required by the Loan Agreement. Plaintiff’s actions triggered a Cash Sweep, during which excess cash from the Property is to be placed in a Rollover Reserve Account, rather than being distributed to Plaintiff. In other words, the implementation of the Cash Sweep that Plaintiff now complains about *was exclusively a situation of Plaintiff’s own making.*

Importantly, Plaintiff could have stopped the Cash Sweep by properly executing various cures offered in the Loan Agreement. However, Plaintiff squandered those cure opportunities as

well by once again failing to act in accordance with the plain language of the applicable contract. Accordingly, the Cash Sweep has not been cured.<sup>1</sup>

Finally, Plaintiff cannot demonstrate irreparable harm because Plaintiff improperly seeks to recover monetary damages for alleged breaches of contract before an adjudication on the merits. Moreover, Plaintiff relies on pure conjecture and speculation in asserting that it might suffer an asset short-fall and the potential loss of the Property absent the termination of the Cash Sweep, or a Rollover Reserve Account disbursement. However, neither monetary damages nor highly speculative future damages qualify for injunctive relief.

## **II. FACTUAL BACKGROUND**

### **A. The Applicable Agreements And The Parties Thereto**

In 2016, North Hills Village, LLC (“NHV” or “Plaintiff”) entered a Loan Agreement with JPMorgan Chase, National Association (“JPMorgan”) whereby JP Morgan extended Plaintiff a loan (the “Loan”) secured by the property commonly known as North Hills Village (the “Property”). (Am. Compl., ECF No. 32, ¶ 10 & Ex. A, ECF No. 32-1 (Loan Agreement).) Plaintiff also entered into a Cash Management Agreement (the “CMA”) with JPMorgan and Wells Fargo Bank, N.A. (“Wells Fargo”). (Am. Compl. ¶ 11 & Ex. B, ECF No. 32-1 (CMA).)

JPMorgan assigned its rights in the Loan to Wilmington Trust, National Association, as Trustee For the Benefit of the Registered Holders of JPMCC Commercial Mortgage Securities Trust 2016-JP4, Commercial Mortgage Pass-Through Certificates, Series 2016-JP4 (“Lender”). (Am. Compl. ¶ 12.) Defendant LNR Partners, LLC (“LNR”) specially services the Loan but is not the Lender. Further, LNR is not a party to the Loan Agreement, the Loan, or the CMA, nor

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<sup>1</sup> Plaintiff is also unlikely to succeed on the merits for the reasons set forth in the Defendants’ Motion to Dismiss which is incorporated herein in its entirety.

is it otherwise alleged to have privity of contract with Plaintiff. Similarly, Wells Fargo is not the Lender or a party to the Loan Agreement.

**B. The Relevant Provisions of the Applicable Agreements**

**1. The Rental Payments Under The Loan Agreement and the CMA**

The Loan Agreement and the CMA (collectively, “Agreements”) require that Plaintiff’s tenants make monthly rental payments into an account managed by Wells Fargo (the “Lockbox Account”). (Am. Compl. ¶ 13; Loan Agreement, Section 2.7.1; CMA, Section 3.4.) Section 3.4 of the CMA provides that the Lockbox Account funds are to be distributed in a waterfall order, meaning that funds will be paid sequentially for: (1) taxes and insurance; (2) agent fees, (3) debt service; (4) replacement reserve; (5) rollover reserve; and then (6) interest and any other amounts due under the Agreements. If funds remain after the sequential waterfall distribution, *and absent a default or Cash Sweep*, then Plaintiff will receive any remaining funds (the “Excess Cash Flow”). (CMA, Section 3.4.)

**2. The Cash Sweep Provisions In The Loan Agreement**

**a. “Cash Sweep Event”**

The Loan Agreement defines “A Cash Sweep Event” as, among other things, “(d) a Tenant Trigger Event.” (Am. Compl. ¶ 24; Loan Agreement, Section 1.1.) A “Tenant Trigger Event” includes a “Burlington Trigger Event.” A Burlington Trigger Event occurs if Plaintiff does not renew the Burlington Lease, under the same terms and conditions (the “Burlington Renewal Criteria”), upon the earlier of six months prior to the expiration of that Lease or the earliest date on which Burlington is permitted to renew the Burlington Lease.

**b. “Cash Sweep Period”**

The Cash Sweep Period spans from the beginning of a Cash Sweep Event until the earlier of either: (a) a payment date next occurring after a Cash Sweep Event Cure, or (b) payment in

full of all principal and interest under the Loan. (Loan Agreement, Section 1.1.) During the Cash Sweep Period, Excess Cash Flow from the Property is placed in the Rollover Reserve Account, rather than distributed to Plaintiff. (Am. Compl. ¶ 23; Loan Agreement, Section 7.4; CMA, Section 3.4(j).)

**c. “Cash Sweep Event Cure”**

The Loan Agreement allows Plaintiff to cure a Cash Sweep Event by satisfying the Burlington Renewal Criteria or Burlington Replacement Lease Criteria. (Am. Compl. ¶ 25; Loan Agreement, Section 1.1.) Plaintiff can cure under the Burlington Renewal Criteria by providing “evidence reasonably satisfactory to [Lender] that Burlington has renewed the Burlington Lease **in accordance with the terms and conditions set forth in the Burlington Lease.**” (*Id.*) (emphasis added). In other words, Plaintiff must show that it renewed the Burlington Lease under the same material terms and conditions set forth in the original Burlington Lease. Plaintiff can also cure under the Burlington Replacement Lease Criteria by finding another tenant to rent the space occupied by Burlington at the Property under the same terms and conditions, including the same amount of annual gross rent, as the Burlington Lease. (*Id.*)

**d. The Rollover Reserve Account**

The Loan Agreement provides for a Rollover Reserve Account (“Rollover Reserve”). (Loan Agreement, Section 7.4.) The Rollover Reserve was funded with \$2.6 million at the closing of the Loan. (*Id.*) If the Rollover Reserve balance falls below \$1 million, Plaintiff is required to fund the account at a rate of \$30,378.34 per month for the remainder of the Loan, with no ceiling on the amount in the account. (*Id.*) Provided that no default or Cash Sweep exists, and subject to the Lender’s approval of the expenses, Plaintiff is entitled to use the funds from the Rollover Reserve exclusively for tenant improvement and leasing commissions. (*Id.*)

**e. Lender's Security Interest in Rollover Reserve and Cash Managed Accounts**

Section 5.1 of the CMA gives Lender a security interest in “the Cash Management Account (including the Subaccounts”). The Subaccounts include the Rollover Reserve Account. Section 2.7.1 of the Loan Agreement gives the Lender a security interest in the funds in the Lockbox Account. The Deposit Account Control Agreement (“DACA”)<sup>2</sup> also gives Lender a security interest in the Lockbox Account. (Loan Agreement, Section 2.7.1; DACA, Section 2, attached as Exhibit 1.)

**C. Plaintiff Triggered a Cash Sweep Event**

Under the Loan Agreement, a Cash Sweep Trigger Event occurred, and the Cash Sweep Period commenced, because Plaintiff failed to renew the Burlington Lease six months before its May 1, 2020 expiration (i.e., by November 1, 2019). In fact, Burlington did not renew its lease until March, 2020 and even then it did so on worse conditions than those in the original Lease. (Am. Compl. ¶ 16.) This untimely renewal was a Cash Sweep Trigger Event.

**D. Plaintiff Failed To Cure Under the Burlington Renewal Criteria**

Plaintiff failed to cure the Cash Sweep Trigger Event because it did not satisfy the Burlington Renewal Criteria by renewing the lease under the same terms and conditions as the original Lease. Indeed, Plaintiff chose to and did renew the Burlington Lease (the “Third Amendment”) under materially different and less favorable terms than the original Lease. (Am. Compl. ¶ 19; Third Amendment, attached as Exhibit 2.) For example, the Third Amendment reduced the rent from \$7 per square foot to \$5.50 per square foot for the Third Option Period, extending from June 1, 2020 through May 31, 2025. (Third Amendment, Ex. 2, Section 5.) The rent reduction also applied to rental rates for the two remaining future optional renewal periods

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<sup>2</sup> The DACA is a corollary agreement to the CMA that establishes the Lockbox Account. CMA Section 2.1.

(e.g. Fourth Option Period – 5 years; Fifth Option Period – 4 years). (*Id.*) Accordingly, Plaintiff had the opportunity to but did not meet the Cash Sweep cure criteria.

**E. Plaintiff Executed the Burlington Lease Amendment Despite Having Notice That the Lease Did Not Cure the Cash Sweep.**

Plaintiff sought Lender’s consent to the Third Amendment. In a March 10, 2020 letter, Lender consented to the Third Amendment but that consent was expressly subject to five separate and independent conditions. (March 10 Letter, attached as Exhibit 3.) In that letter Lender also confirmed that Plaintiff had triggered a Cash Sweep Event and that Lender was not waiving Plaintiff’s obligations to meet “all Loan requirements.” Lender also made clear to Plaintiff that consent to the Third Amendment did not constitute “a waiver, modification, relinquishment or forbearance of any right or remedy under the Loan Documents ... [or] “a modification of any of the Loan Documents.”<sup>3</sup> (*Id.*)

Despite the express and unequivocal language in the conditional consent, Plaintiff chose to and did execute the Third Amendment, at its own peril, under materially different terms than the original Burlington Lease. (Third Amendment, Ex 1, Section 5.)

**F. NHV Requests \$1.5 Million From the Rollover Reserve Purportedly to Prevent a Cash Sweep.**

On March 26, 2020, Plaintiff requested a \$1.5 million distribution from the Rollover Reserve. (Am. Compl. ¶ 32.) Plaintiff purportedly requested the funds for the purpose of providing Defendants with “additional security” for the Loan to avoid the Cash Sweep. (*Id.*; Pl. Brief, ECF. No. 4, pp. 4-5.) Defendants did not disburse the funds because the plain language of

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<sup>3</sup> This language is consistent with Section 10.5 of the Loan Agreement which provides that any modifications to the Agreement must be in writing and signed by the party against whom enforcement of the modification is sought. (Loan Agreement, Section 10.5.)

the parties bargained for Agreements do not require the disbursement. (Loan Agreement, Section 1.1.)

### III. LEGAL STANDARD

To obtain injunctive relief, a plaintiff must “demonstrate (1) that they are reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief. If these two threshold showings are made the District Court then considers, to the extent relevant, (3) whether an injunction would harm the [defendants] more than denying relief would harm the plaintiffs and (4) whether granting relief would serve the public interest.” *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013).

Where the relief sought is a mandatory affirmative act that will alter the status quo, the plaintiff “bears a particularly heavy burden in demonstrating its necessity.” *See Lane v. New Jersey*, 725 Fed.Appx. 185, 187 (3d Cir. 2018) (internal quotation omitted); *see also Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 179 (3d Cir. 2008). “[I]njunctive relief is ‘an extraordinary remedy,’ [granted] only ‘upon a clear showing that the plaintiff is entitled to such relief.’” *Rep. Party of Penns. v. Cortes*, 218 F.Supp.3d 396, 404 (E.D. Pa. 2016).

### IV. ARGUMENT

#### A. Plaintiff Cannot Demonstrate a Likelihood Of Success

##### 1. The Plain Language of the Agreements Controls.

“Under well-settled New York law<sup>4</sup>, ... a contract that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 957 F.3d 337, 344 (2d Cir. 2020) (internal quotations omitted); *see also Edwards v. Sequoia Fund, Inc.*, 938 F.3d 8, 13 (2d Cir. 2019). “[T]he best

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<sup>4</sup> Under the Agreements, New York law applies. (Loan Agreement, Section 10.3; CMA, Section 8.9: DACA.)

indicator of intent is what the parties say in their agreement.” *Gaines Marina & Services, Inc. v. CMS Marine Storage, LLC*, 176 A.D.3d 1534, 1535, 111 N.Y.S.3d 462, 463 (N.Y. App. Div. 2019). Moreover, the plain language of the Agreements “does not become ambiguous merely because [Plaintiff urges]...different interpretations in the litigation.” *Fuller Landau Advisory Servs. Inc. v. Gerber Fin. Inc.*, 333 F.Supp.3d 307, 312 (S.D.N.Y. 2018) (internal quotation omitted). The Court must therefore analyze the Agreements based only on their plain terms.

## 2. The Cash Sweep Is Proper Under the Plain Terms of the Agreements.

### a. Plaintiff Created A Cash Sweep Trigger Event

Because the Burlington Lease was scheduled to expire on May 1, 2020, Plaintiff had until November 1, 2019 to renew the Lease and avoid a Cash Sweep Trigger Event. Plaintiff did not timely renew the Lease thereby: i) causing a Cash Sweep Trigger Event; and ii) commencing the Cash Sweep Period.<sup>5</sup>

### b. Plaintiff Failed to Cure the Cash Sweep Trigger Event

Plaintiff can only cure the Cash Sweep by satisfying the Burlington Replacement Lease Criteria or Burlington Renewal Criteria. (Am. Compl. ¶ 25; Loan Agreement, Section 1.) Plaintiff did neither. First, Plaintiff did not satisfy the Burlington Lease Replacement Criteria because it did not timely enter a lease **with a new tenant** under the same material terms and conditions of the Original Burlington Lease. (Loan Agreement, Section 1.1.) Second, it is undisputed that Plaintiff did not satisfy the Burlington Renewal Criteria because it did not enter a new lease **with Burlington** that had the same material terms as the Original Burlington Lease.

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<sup>5</sup> Plaintiff did not address the plain terms of the Loan Agreement or its conduct which solely caused the Cash Sweep. Instead, Plaintiff invites the Court to disregard the plain terms of the Loan Agreement and/or to rewrite it; neither of which is permitted by law. *See Utica Mut. Ins. Co. v.* 957 F.3d at 344 (stating that a Court should enforce an agreement by its plain terms); *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992) (“A court may neither rewrite, under the guise of interpretation, a term of a contract when the terms are clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case.”) (citing New York law).



(*Id.*) For example, the Third Amendment reduces the rental rate from \$7 per square foot to \$5.50 per square foot over the next five-year renewal period, **a 21.4% reduction**. (Third Amendment, Ex. 2, Section 5.) Moreover, the rent reduction continues over the two remaining future optional renewal periods (from \$7.25 to \$6.00 per square foot (a **17.3% reduction**) and from \$7.50 to \$6.25 per square foot (a **16.7% reduction**)). (*Id.*)

Plaintiff's undisputed failure to satisfy the Burlington Renewal Criteria ends the need for any further analysis because it conclusively demonstrates that Plaintiff cannot show a likelihood of success. In fact, Plaintiff has no claim at all. Indeed, even if the Court chooses to consider Plaintiff's factually and legally unsupported arguments, the result is the same. For example, while Plaintiff concedes that the terms of the controlling agreements are "plain" and "clear," it nonetheless ignores those terms in claiming that the *intent* of a Cash Sweep is to secure the loss of a large tenant so a Cash Sweep necessarily ends when a potentially "lost tenant" renews its lease. (Pl. Brief, p. 7.) Yet, that is not what the Loan Agreement that Plaintiff negotiated and agreed to states, and the Court should not look past the plain language of the parties' bargained for agreement. *See Karol v. Polsinello*, 127 A.D.3d 1401 (N.Y. App. 2015) ("Unless a contract is ambiguous, a court must look to the plain language of the instrument itself to give effect to the parties' intentions.")

**c. Plaintiff's Myriad "Fairness" Arguments Should Be Rejected**

Ironically, Plaintiff's "fairness" arguments demonstrate how manifestly unfair it would be to allow Plaintiff to ignore the law confirming that the Court should not look to intent in these circumstances, to ignore the plain language of the Agreements, to deprive Lender of the benefit of its bargain, or to create arbitrary new contract terms (or unsupported interpretations or those terms) just because it is expedient for Plaintiff to do so. The Court should decline Plaintiff's invitation to disregard the law in the name of "fairness."

Plaintiff also asserts in the name of fairness that it can no longer cure the Cash Sweep until December 2021. But even if true, Plaintiff put itself in that position, knowing it was doing so.<sup>6</sup> For example, Plaintiff's claims that LNR's "approval" of the Third Amendment makes it unfair to institute a Cash Sweep are belied by the March 10 Letter providing such "approval." In its March 10 letter to Plaintiff, LNR reaffirmed the existence of the Burlington Trigger Event and the implementation of the Cash Sweep until that event was cured. (March 10 Letter, Ex. 3.) LNR also clearly and unequivocally memorialized that the conditional consent to the Third Amendment did not constitute: "a waiver, modification, relinquishment or forbearance of any right or remedy under the Loan Documents or under law; and [] a modification of any of the Loan Documents."<sup>7</sup>

Having this clear notice, Plaintiff could have sought LNR's non-conditional approval of the Third Amendment or an agreement to otherwise remove the Cash Sweep before executing the Lease. Plaintiff could have also negotiated for Burlington to renew on the same terms of the original Burlington Lease. Instead, Plaintiff executed the Third Amendment despite knowing that the material rent reduction in the Third Amendment was not in accordance with the terms and conditions of the original Burlington Lease and that it would thereby put itself in the very position which it now claims is unfair.

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<sup>6</sup> Without citing to any of the operative provisions, Plaintiff argues that the Agreements must mean something different than what they say because their enforcement would lead to an absurd result. Any absurdity (there is none) in Plaintiff's current situation is not the result of the terms of the Agreements or a breach by Defendants. Instead, it is the result of Plaintiff's misguided decision to execute the Third Amendment rather than cure the Cash Sweep.

<sup>7</sup> This language is consistent with Section 10.5 of the Loan Agreement which provides that any modifications to the Loan Agreement must be in writing and signed by the party against whom enforcement of the modification is sought. (Loan Agreement, Section 10.5.)

### 3. Plaintiff Is Not Entitled to Excess Funds or Money in the Rollover Reserve.

Plaintiff's request to use \$1.5 million in funds from the Rollover Reserve "for the express purpose of providing Defendants with additional security for the Loan in order to prevent a Cash Sweep" is not only extra-contractual, it is nonsensical. (Pl. Brief, p. 4.). Plaintiff is essentially requesting that Wells Fargo release \$1.5 million of the Lender's security to Plaintiff so that Plaintiff can give that same money back to Lender...as security. This absurdity is not supported by the plain language of the Agreements. Indeed, as a matter of contract, the Lender is already secured by the \$1.5 million.<sup>8</sup> (CMA, Section 5.1; Loan Agreement, Section 2.7.1; DACA, Ex. 1, Section 2.)

Although the funding of the Rollover Reserve is governed by Section 7.2 of the Loan Agreement, Plaintiff's sole argument to avoid its contractual promises is that it is somehow entitled to a \$1.5 million distribution from the Rollover Reserve pursuant to Section 4.2 of the CMA. Section 4.2 actually supports *Defendants'* position and provides:

**If no Cash Sweep Period exists** and sufficient funds are in the Cash Management Account on or after the tenth (10th) calendar day of any month to make the distributions required pursuant to Section 3.4(g) through (i) hereof for the next following Payment Date, Agent shall, at Borrower's request, make a single disbursement to Borrower to the following account of Borrower or such other account as may be specified in writing by Lender....

(CMA, Section 4.2.)(emphasis added.) By its plain language, Section 4.2 only applies *if no Cash Sweep Period exists*. But as demonstrated above, Plaintiff caused a Cash Sweep Trigger Event

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<sup>8</sup> Plaintiff's unfounded position on the use of the Rollover Reserve funds to avoid the Cash Sweep also directly conflicts with Section 7.4.2 of the Loan Agreement which provides that the Rollover Reserve funds are to be distributed for purposes of tenant improvements and leasing commissions (with no mention of them being used to avoid a Cash Sweep). (Loan Agreement, Section 7.4.2.)

and did not cure it. Plaintiff is not entitled to Rollover Reserve funds for this reason alone and no further inquiry is warranted.<sup>9</sup>

**B. Plaintiff Will Not Suffer Immediate, Irreparable Harm.**

**1. No Injunctive Relief for Monetary Damages**

“Unless the Plaintiffs are able to establish a realistic threat of immediate irreparable harm, the court may not grant preliminary injunctive relief ‘**regardless of what the equities seem to require.**’” *Med. Mktg. Consultants, LLC v. Cardiac Telecom Corp.*, CIV.A.06-00274, 2007 WL 1811188, at \*7 (W.D. Pa. May 31, 2007), *report and recommendation adopted*, CIV A 06-00274, 2007 WL 1815479 (W.D. Pa. June 20, 2007)(emphasis added); *Home Line Furniture Indus., Inc. v. Banner Retail Mktg., LLC*, 630 F.Supp.2d 527, 540 (E.D. Pa. 2009). Further, injunctive relief is inappropriate where, as here, monetary damages can compensate the alleged harm. *See ASI Bus. Sols., Inc. v. Otsuka Am. Pharm., Inc.*, 233 F.Supp.3d 432, 437 (E.D. Pa. 2017) (finding no irreparable harm where projected losses from alleged contract breach could be compensated by money damages). A plaintiff cannot convert monetary harm from a breach of contract into irreparable harm for the purposes of injunctive relief. *See Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 178-179 (3d Cir. 2008) (“[t]he availability of adequate monetary damages belies a claim of irreparable injury”).

For example, in *In re Arthur Treacher's Franchisee Litigation*, the Third Circuit disavowed injunctive relief for “the payment of monies when the underlying contract is in dispute.” 689 F.2d 1137, 1145 (3d Cir. 1982). There, the Third Circuit overturned an order requiring the payment of past royalties allegedly owed to a party in a franchise dispute because

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<sup>9</sup> Plaintiff also has no claim to the \$1.5 million even if there was no Cash Sweep (which there is). Plaintiff’s argument that Section 4.2 allows access to excess funds in the Rollover Reserve is inconsistent with the funding requirements for the Rollover Reserve. Borrower attempts to impose a ceiling or limit on the funds in the Rollover Reserve Account when there is none. Borrower’s theory that it is somehow entitled to funds in excess of some threshold amount is simply not supported by the Loan Documents.

the order amounted to a damages award. *Id.* at 1144. The court questioned how it was even possible to seek an injunction solely for monetary relief, holding that “a preliminary injunction which ordered the payment of monies where the underlying contract is disputed, misconceives the equitable nature and purpose of an injunctive proceeding.” *Id.* at 1145.

Recently, in *Tracey v. Recovco Mortgage Mgmt., LLC*, --- F.Supp.3d ---, 2020 WL 1666603 (D.N.J. April 3, 2020), the District Court of New Jersey denied injunctive relief for the disbursement of mortgage funds. There, an 81-year-old plaintiff sued a mortgage servicer for failing to fund a mortgage loan and, simultaneously, moved for an injunction forcing the loan to be immediately funded. *Id.* at \* 2. The plaintiff claimed absent injunctive relief she would lose her “dream house” and be forced to find housing during the COVID-19 pandemic, placing her health at risk. *Id.* at \*5. The court found that the plaintiff failed to establish irreparable harm because her alleged losses were compensable by monetary damages or, with regard to her health concerns, entirely speculative. *Id.* at \*6.

Here, Plaintiff’s alleged loss is simply money; money that is allegedly owed because of Defendants’ supposed contractual breach. Thus, Plaintiff’s claimed harm can be compensated through future monetary damages. Similarly, Plaintiff demands an immediate end to the Cash Sweep because Plaintiff will allegedly otherwise lose “critical income” and suffer “liquidity issues.” (Pl. Brief, p. 9.) Again, these are purely financial losses that are not compensable through injunctive relief as a matter of law.

## **2. Plaintiff’s Claimed Harm is Purely Speculative.**

Plaintiff speculates that a continued Cash Sweep could put Plaintiff “at risk of default on the Loan, potentially allowing Defendants to take control of the North Hills Village Mall.” (Pl. Brief, pp. 9-10.) This is rank speculation about multiple “possible” events. To be clear, Plaintiff is not averring to this Court that Plaintiff *will go into default*. Instead, Plaintiff only notes it as a

“risk.” Similarly, Plaintiff is not averring *that Defendants intend to and will be able to take control of the property*. Instead, Plaintiff can only offer that if there is a default, and if Defendants choose to try to take over the property, and if they actually have the means (whatever those may be) to actually take over the property, then Plaintiff will suffer damages. This goes beyond reading tea leaves and is certainly not a sufficient basis to obtain an injunction. *See Dice v. Clinicorp. Inc.*, 887 F.Supp. 803, 809 (W.D.Pa. 1995) (“[T]he claimed injury cannot merely be possible, speculative or remote.”); *ASI Bus. Sols., Inc.*, 233 F.Supp.3d at 437 (finding that risk of irreparable harm is not enough to warrant a preliminary injunction); *Tracey*, 2020 WL 1666603.

### **3. Plaintiff’s Claimed Harm as to Excess Cash Flow Does Not Exist.**

Plaintiff believes the Lockbox Account will have a *temporary shortfall* from May through June 2020. Thus, Plaintiff cannot suffer any immediate irreparable harm from a Cash Sweep because there are no excess funds available for distribution. Because there is no Excess Cash Flow, there can be no actual harm because there are no funds available to Plaintiff even if the Cash Sweep was terminated.

### **4. Plaintiff Does Not Allege Irreparable Harm Related to the Reserve Rollover.**

Although Plaintiff requests mandatory injunctive relief in the form of a forced \$1.5 million distribution from the Rollover Reserve, it fails to assert that it will suffer irreparable harm without a distribution. Presumably, this is because Plaintiff has requested Rollover Reserve funds to pledge them as security to halt the Cash Sweep period. (Am. Compl., ¶ 32.) Accordingly, any claims of harm from the failure to distribute from the Rollover Reserve fail for the same reasons as Plaintiff’s claims under the Cash Sweep.<sup>10</sup>

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<sup>10</sup> The Court need not weigh the remaining injunction factors because Plaintiff has not met its burden on likelihood of success and irreparable harm. *See K.A. ex rel. Ayers*, 710 F.3d at 105. In any event those factors would be neutral and not support an injunction.

**V. CONCLUSION**

WHEREFORE, Plaintiff's TRO and preliminary injunction motion should be denied and the Court should award Defendants such other and further relief that the Court deems appropriate.

May 28, 2020

Respectfully,

/s/ Joel M. Walker

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*Attorneys for Defendants LNR Partners,  
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**CERTIFICATE OF SERVICE**

I certify that on May 28, 2020 a copy of the foregoing was served on all counsel of record  
via the court's ECF/CM system.

*/s/ Joel M. Walker*

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Joel M. Walker





## DEPOSIT ACCOUNT CONTROL AGREEMENT

### (Hard Lockbox)

This **Deposit Account Control Agreement** (the "Agreement") is made as of November 4, 2016, by and among **NORTH HILLS VILLAGE LLC**, a Delaware limited liability company ("Borrower"), **JPMORGAN CHASE BANK, NATIONAL ASSOCIATION**, a banking association chartered under the laws of the United States of America ("Lender") and **WELLS FARGO BANK, NATIONAL ASSOCIATION** ("Bank") and sets forth the rights and obligations of the parties with respect to the DACA Account (defined below).

#### 1. Establishment of Account.

- a. Borrower and Bank acknowledge and confirm that Borrower has established with Bank an account or accounts with account number(s) as set forth on the signature page to this Agreement (individually or collectively, the "DACA Account"), and that the DACA Account is subject to lockbox services provided by Bank in accordance with Section 7 of this Agreement and Bank's standard lockbox policies and procedures.
- b. The DACA Account shall be in the name of Borrower for the benefit of Lender (or in such other name as Lender may direct in writing and agreed to by Bank).
- c. Each account designated as a DACA Account includes, for purposes of this Agreement, and without the necessity of separately listing subaccount numbers, all subaccounts presently existing or hereafter established for deposit reporting purposes and integrated with the DACA Account by an arrangement in which deposits made through subaccounts are posted only to the DACA Account.
- d. The DACA Account (Account No. 4288395338) shall at all times have a minimum balance of \$5,000 (the "Minimum Balance").
- e. Each DACA Account is an Eligible Account. As used herein, (i) "Eligible Account" shall mean a separate and identifiable account from all other funds held by the holding institution that is either (i) an account or accounts maintained with a federal or state-chartered depository institution or trust company which complies with the definition of Eligible Institution or (ii) a segregated trust account or accounts maintained with a federal or state chartered depository institution or trust company acting in its fiduciary capacity which, in the case of a state chartered depository institution or trust company is subject to regulations substantially similar to 12 C.F.R. §9.10(b), having in either case a combined capital and surplus of at least \$50,000,000 and subject to supervision or examination by federal and state authority. An Eligible Account will not be evidenced by a certificate of deposit, passbook or other instrument and (ii) "Eligible Institution" shall mean a depository institution or trust company insured by the Federal Deposit Insurance Corporation the short term unsecured debt obligations or commercial paper of which are rated at least "A-1" by Standard & Poor's Ratings Group ("S&P"), "P-1" by Moody's Investors Service, Inc. ("Moody's"), and "F-1" by Fitch, Inc. ("Fitch") in the case of accounts in which funds are held for thirty (30) days or less or, in the case of Letters of Credit or accounts in which funds are held for more than thirty (30) days, the long term unsecured debt obligations of which are rated at least "A" by Fitch and S&P and "A2" by Moody's.

2. Lender's Interest in DACA Account. Borrower represents that it has granted, or intends to grant, a security interest in the DACA Account to Lender. Borrower hereby confirms the security interest

granted, or to be granted, by Borrower to Lender in all of Borrower's right, title and interest in and to the DACA Account and all sums now or hereafter on deposit in or payable or withdrawable from the DACA Account (the "DACA Account Funds", which includes, if applicable, all financial assets, security entitlements, investment property, and other property and the proceeds thereof now or at any time hereafter held in the DACA Account). Lender hereby appoints Bank as agent for Lender solely for the purpose of perfecting the security interest of Lender in the DACA Account and the DACA Account Funds.

3. **Lender Control.** Except as otherwise provided in this Agreement, Borrower agrees that the DACA Account and the DACA Account Funds are subject to the sole dominion, control and discretion of Lender. Bank, Lender and Borrower each agrees that Bank will comply with instructions given to Bank by Lender directing disposition of funds in the DACA Account (collectively "Disposition Instructions") without further consent by Borrower or any other person. Except as otherwise required by law, Bank will not agree with any third party to comply with instructions for disposition of funds in the DACA Account.
4. **No Access to DACA Account.** Borrower acknowledges and agrees that (a) subject to the terms hereof, neither Borrower nor any other person claiming on behalf of, or through, Borrower shall have any right, title or interest, whether express or implied, in the DACA Account or to withdraw or make use of any amounts from the DACA Account, and (b) unless required by applicable law, Borrower shall not be entitled to any interest on amounts held in the DACA Account.
5. **Disbursements from DACA Account.**

- a. Unless otherwise instructed by Lender in writing in accordance with Section 3 above, Bank will transfer the full amount of the collected and available balance in the DACA Account (after deduction of the Minimum Balance and other amounts permitted under Section 6 hereof), on each Business Day by wire transfer (or other means in Bank's sole discretion) of immediately available funds to the following account of Lender or such other account specified by Lender in writing:

Bank Name:	Wells Fargo Bank, N.A.
Bank Address:	San Francisco, California
ABA Number:	121 000 248
Account Number:	4288395346
Account Name:	North Hills Village LLC

"Business Day" means any day on which Bank is open to conduct its regular banking business, other than a Saturday, Sunday or public holiday.

- b. Unless Bank separately agrees in writing to the contrary, Bank will have no obligation to disburse funds or assets under this Agreement other than by automatic standing wire. Any disposition of funds or assets which Bank makes pursuant to this Agreement is subject to Bank's standard policies, procedures and documentation governing the type of disposition made; provided, however, that in no circumstances will any such disposition require Borrower's consent. Furthermore, Bank will have a reasonable opportunity to act upon any instructions (including Disposition Instructions) provided pursuant to this Agreement.
- c. Funds available for disbursement from the DACA Account in accordance with this Section 5 shall not include any rents or additional rents which are paid for more than one month in advance, which shall be retained in the DACA Account and not released without Lender's written consent until payment thereof is due under the applicable lease or agreement. Lender and Borrower agree to notify Bank in writing as to the amount of any such rents and/or additional rents that should be retained in the DACA Account and the date such funds may be

disbursed from the DACA Account in such manner as to afford Bank a reasonable opportunity to act upon such notice.

6. **Partial Subordination of Bank's Rights.** Bank hereby subordinates to the security interest of Lender in the DACA Account (i) any security interest which Bank may have or acquire in the DACA Account, and (ii) any right which Bank may have or acquire to set off or otherwise apply any DACA Account Funds against the payment of any indebtedness from time to time owing to Bank from Borrower; provided, however, that, Bank retains the right to set off against and to charge the DACA Account for (A) any Bank Fees (as defined in Section 9), (B) all items deposited in and credited to such account and subsequently returned unpaid or with respect to which Bank fails to receive final settlement and (C) all items deposited in and credited to such account in error. If amounts in the DACA Account are insufficient to fully reimburse Bank for such amounts, Borrower agrees to pay such deficiency to Bank in immediately available funds, without setoff or counterclaim, within five (5) calendar days after demand of Bank.
7. **Bank Obligations with respect to DACA Account.**
  - a. To the extent items deposited to a DACA Account have been received in one or more post office lockboxes maintained for Borrower by Bank (each a "Lockbox") and processed by Bank for deposit, Borrower acknowledges that Borrower has granted Lender a security interest in all such items (the "Remittances"). Lender alone will have the right and ability to so instruct Bank regarding the receipt, processing or deposit of Remittances. Borrower and Lender acknowledge and agree that Bank's operation of each Lockbox, and the receipt, retrieval, processing and deposit of Remittances, will at all times be governed by Bank's Master Agreement for Treasury Management Services and the relevant lockbox service description, and by Bank's procedures set forth on Exhibit A attached hereto.
  - b. The parties agree that items deposited in the DACA Account shall be deemed to bear the valid and legally binding endorsement of the payee and to comply with all of Bank's requirements for the supplying of missing endorsements, now or hereafter in effect. As between Borrower and Lender, any deposit made by or on behalf of Borrower into the DACA Account shall be deemed deposited into the DACA Account when the funds in respect of such deposit shall become collected funds.
  - c. Any item deposited by or on behalf of Borrower in the DACA Account which is returned for insufficient or uncollected funds will be re-deposited by Bank one time.
8. **Balance Reports and Bank Statements.** Borrower agrees that it shall, at its sole cost and expense, make available to Lender information directly related to the DACA Account, including granting Lender online access to Borrower's treasury reporting with Bank (if any). Bank will, at the telephone or written request of Lender, provide Lender such information by a transmission method determined by Bank, in Bank's sole discretion, which may include granting Lender online access to Borrower's treasury reporting (if any), and Borrower consents to the provision of such information to Lender.
9. **Bank Fees.** Borrower agrees to pay all Bank's fees and charges for the maintenance and administration of the DACA Account and for the treasury management and other account services provided with respect to the DACA Account and any Lockboxes (collectively, the "Bank Fees"), including, but not limited to, the fees for (a) treasury reporting (including online access thereto) provided on the DACA Account, (b) funds transfer services received with respect to the DACA Account, (c) lockbox processing services, (d) funds advanced to cover overdrafts in the DACA Account (but without Bank being in any way obligated to make any such advances), (e) duplicate bank statements, (f) any treasury management service(s) that may be required to block the DACA Account as contemplated hereunder, and (g) the Acceptance Fee, as described in Exhibit B, attached hereto, in each case, to the extent applicable. The Bank Fees will be paid by Bank debiting one or more of the DACA Account on the Business Day that the Bank Fees are due, without notice to Lender or Borrower. If there are not sufficient funds in the DACA Account to

cover fully the Bank Fees on the Business Day Bank attempts to debit them from the DACA Account, such shortfall or the amount of such Bank Fees will be paid by Borrower to Bank, without setoff or counterclaim, within five (5) calendar days after demand from Bank.

10. **Account Documentation.** Except as specifically provided in this Agreement, Lender and Borrower agree that the DACA Account will be subject to, and Bank's operation of the DACA Account will be in accordance with, the terms of Bank's applicable deposit account agreement and other related service documentation governing the DACA Account (the "Account Documentation"). Borrower agrees, upon Bank's request, to promptly execute and deliver the Account Documentation to Bank. For the avoidance of doubt, the parties hereto acknowledge and agree that pursuant to the Account Documentation, the DACA Account may be subject to Bank's sweep product services. The parties agree that, in the event of a conflict between this Agreement and the Account Documentation with respect to the DACA Account, this Agreement shall control.
11. **Legal Compliance.**
- a. If Bank at any time receives notice of the commencement of a bankruptcy case or other insolvency or liquidation proceeding by or against Borrower, Bank will continue to comply with its obligations under this Agreement, except to the extent that any action required of Bank under this Agreement is prohibited under applicable bankruptcy laws or regulations or is stayed pursuant to the automatic stay imposed under the United States Bankruptcy Code or by order of any court or agency.
  - b. Bank will comply with any legal process, legal notice or court order it receives in relation to the DACA Account if Bank determines in its sole discretion that the legal process, legal notice or court order is legally binding on it.
  - c. If at any time Bank, in good faith, is in doubt as to the action it should take under this Agreement, Bank shall have the right (i) to commence an interpleader in the United States District Court in the State of New York, and/or (ii) to take no further action, except, in each case, in accordance with joint instructions from Lender and Borrower or in accordance with the final order of the court in such action.
12. **Indemnification.** Borrower will indemnify, defend and hold harmless Bank and its officers, directors, employees, and agents (collectively, the "Indemnified Parties") from and against any and all claims, demands, losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees) (collectively "Losses and Liabilities") Bank may suffer or incur as a result of or in connection with (a) Bank complying with any binding legal process, legal notice or court order referred to in the immediately preceding Section of this Agreement, (b) Bank following any instruction or request of Lender, including but not limited to any Disposition Instructions, or (c) Bank complying with its obligations under this Agreement, except, in each case, to the extent such Losses and Liabilities are directly caused by Bank's gross negligence or willful misconduct.
13. **Termination.** This Agreement may be terminated by Lender or Bank at any time by either of them giving thirty (30) calendar days prior written notice of such termination to the other parties to this Agreement at their contact addresses specified after their signatures to this Agreement; provided, however, that this Agreement may be terminated (i) immediately upon prior written notice from Bank to Borrower and Lender (x) should Borrower or Lender fail to make any payment when due to Bank from Borrower or Lender under the terms of this Agreement or (y) should Bank close the DACA Account pursuant to applicable law, regulation or policy, or (ii) immediately upon prior written notice from Lender to Bank on termination or release of Lender's security interest in the DACA Account; provided that any notice from Lender under clause (ii) of this sentence must contain Lender's acknowledgement of the termination or release of its security interest in the DACA Account. Borrower's payment obligations hereunder, as well as the indemnifications made, and the limitations on the liability of Bank accepted by Borrower and Lender under this Agreement will continue after the termination of this Agreement with

respect to all the circumstances to which they are applicable, existing or occurring before such termination, and any liability of any party to this Agreement, as determined under the provisions of this Agreement, with respect to acts or omissions of such party prior to such termination will also survive such termination. Upon any termination of this Agreement, Bank will transfer all collected and available balances (less any deductions permitted under Section 6 hereof) in the DACA Account on the date of such termination in accordance with Lender's written instructions.

14. **Modifications, Amendments, and Waivers.** This Agreement may not be modified or amended, or any provision thereof waived, except in a writing signed by all the parties to this Agreement.
15. **Notices.** All notices from one party to another must be in writing, must be delivered to Borrower, Lender and/or Bank at their contact addresses specified after their signatures to this Agreement, or any other address of any party communicated to the other parties in writing, and will be effective on receipt. Any notice sent by a party to this Agreement to another party must also be sent to all other parties to this Agreement. Bank is authorized by Borrower and Lender to act on any instructions or notices received by Bank if (a) such instructions or notices purport to be made in the name of Lender, (b) Bank reasonably believes that they are so made, and (c) they do not conflict with the terms of this Agreement as such terms may be amended from time to time, unless such conflicting instructions or notices are supported by a court order.
16. **Successors and Assigns.** Neither Borrower nor Lender may assign or transfer its rights or obligations under this Agreement to any person or entity without the prior written consent of Bank, which consent will not be unreasonably withheld or delayed. Notwithstanding the foregoing, Lender may transfer its rights and duties under this Agreement to (i) a transferee to which, by contract or operation of law, Lender transfers substantially all of its rights and duties under the financing or other arrangements between Lender and Borrower, or (ii) if Lender is acting as a representative in whose favor a security interest is created or provided for, a transferee that is a successor representative; provided, that, in any case, as between Bank and Lender, Lender will not be released from its obligations under this Agreement unless and until Bank receives any such transferee's binding written agreement to assume all of Lender's obligations hereunder. Bank may not assign or transfer its rights or obligations under this Agreement to any person or entity without the prior written consent of Lender, which consent will not be unreasonably withheld or delayed; provided, however, that no such consent will be required if such assignment or transfer takes place as part of a merger, acquisition or corporate reorganization affecting Bank.
17. **Governing Law.** This Agreement will be governed by and be construed in accordance with the laws of the State of New York, without regard to conflict of laws principles. This state will also be deemed to be Bank's jurisdiction for purposes of Article 9 of the Uniform Commercial Code as it applies to this Agreement.
18. **Severability.** To the extent that the terms of this Agreement are inconsistent with, or prohibited or unenforceable under, any applicable law or regulation, they will be deemed ineffective only to the extent of such prohibition or unenforceability, and will be deemed modified and applied in a manner consistent with such law or regulation. Any provision of this Agreement which is deemed unenforceable or invalid in any jurisdiction will not affect the enforceability or validity of the remaining provisions of this Agreement or the same provision in any other jurisdiction.
19. **Counterparts.** This Agreement may be executed in any number of counterparts each of which will be an original with the same effect as if the signatures were on the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by telecopier or electronic image scan transmission (such as a "pdf" file) will be effective as delivery of a manually executed counterpart of the Agreement.
20. **Entire Agreement.** This Agreement, together with the Account Documentation, contains the entire and only agreement among all the parties to this Agreement and between Bank and Borrower, on the one hand, and Bank and Lender, on the other hand, with respect to (a) the interest of Lender in the DACA

Account and DACA Account Funds, and (b) Bank's obligations to Lender in connection with the DACA Account and DACA Account Funds.

21. **Waiver of Jury Trial.** To the extent permitted by law, the parties hereto hereby waive all rights to a trial by jury in any action or proceeding relating to the DACA Account or this Agreement.

22. **Certain Matters Affecting Bank.**

- a. Bank may rely and shall be protected in acting or refraining from acting upon any notice, request, consent, order, certificate, report, opinion or document (including, but not limited to, electronically confirmed facsimiles thereof) believed by it to be genuine and to have been signed or presented by the proper party or parties. Bank shall have no obligation to review or confirm that actions taken pursuant to the foregoing in accordance with this Agreement comply with any other agreement or document to which it is not a party.
- b. The duties and obligations of Bank set forth in this Agreement shall be determined solely by the express provisions of this Agreement. Bank shall not be liable except for the performance of its duties and obligations as are specifically set forth herein. No implied covenants or obligations shall be read into this Agreement against Bank. Bank makes no express or implied representations or warranties with respect to its obligations under this Agreement, except for those expressly set forth herein.
- c. Bank will not be liable to Borrower, Lender or any other person for any Losses and Liabilities caused by (i) circumstances beyond Bank's reasonable control (including, without limitation, computer malfunctions, interruptions of communication facilities, labor difficulties, acts of God, wars, or terrorist attacks) or (ii) any other circumstances, except, in each case, to the extent that such Losses and Liabilities are directly caused by Bank's gross negligence or willful misconduct.
- D. **IN NO EVENT WILL BANK BE LIABLE FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, WHETHER OR NOT THE LIKELIHOOD OF SUCH DAMAGES WAS KNOWN TO BANK, AND REGARDLESS OF THE FORM OF THE CLAIM OR ACTION, OR THE LEGAL THEORY ON WHICH IT IS BASED.**
- e. Any action against Bank by Borrower or Lender under or related to this Agreement must be brought within twelve (12) months after the cause of action accrues.

[SIGNATURE PAGES FOLLOW]

This Agreement has been signed by the duly authorized officers or representatives of Borrower, Lender and Bank on the date specified below.

Date: November, 2016

DACA Account Number(s):

4288395338

**NORTH HILLS VILLAGE LLC**, a Delaware  
limited liability company, as **Borrower**  
**TIN: 81-4167338**

By: NORTH HILLS VILLAGE SHOPPING  
CENTER TRUST, DATED FEBRUARY 1,  
1985, its member

By: 


Name: Ira J. Gumberg

Title: Trustee

**Address for Notices:**

North Hills Village LLC  
c/o J.J. Gumberg Co.  
1051 Brinton Road  
Pittsburgh, Pennsylvania 15221  
Attention: General Counsel  
Facsimile No.: (412) 244-4018

**JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,**  
a banking association chartered under the  
laws of the United States of America, Lender

By:   
Name: Brian P. Foley  
Title: Vice President

**Address for Notices:**

JPMorgan Chase Bank, National Association  
383 Madison Avenue, 31<sup>st</sup> Floor  
New York, New York 10179  
Attention: Thomas Nicholas Cassino  
Facsimile No.: (212) 834-6029

with a copy to:

JPMorgan Chase Bank, National Association  
SPG Middle Office, CIB  
383 Madison Avenue, 26th Floor  
New York, New York 10178  
Attention: Nancy S. Alto  
Facsimile No.: (917) 546-2564



**WELLS FARGO BANK, NATIONAL  
ASSOCIATION, as Bank**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Jill Selden

Title: \_\_\_\_\_

Vice President

**Address for Notices:**

1901 Harrison Street, 2<sup>nd</sup> Floor  
Oakland, California 94612

Attn: CMS Cash Management

Facsimile No.: (866) 359-5954

**EXHIBIT A**

**Lockbox Procedures**

(Capitalized terms used in this Exhibit A have the same meaning stated in the Agreement to which this Exhibit A is attached.)

1. Inspections of Items. Items to be deposited in the DACA Account will be inspected and handled as follows:
  - a. Payees. An item not bearing an acceptable payee designation, as set forth in the specifications, or a reasonable variation thereof, will not be deposited in the DACA Account. If a necessary endorsement of a payee other than Borrower is missing, the item will not be deposited into the DACA Account.
  - b. Dates. An item will be deposited into the DACA Account whether it is stale-dated, post-dated or does not bear a date.
  - c. Amounts. If the written and numeric amounts of an item differ, the written amount shall control over the numeric amount unless the written amount is ambiguous. If the amount of an item cannot be determined from application of the preceding sentence, or if the amount is missing altogether, the item will not be deposited into the DACA Account.
  - d. Drawer's Signatures. For an item in which the drawer's signature is missing, Bank will deposit it into the DACA Account and affix a stamp requesting the drawee bank or other payor to contact the drawer for authority to pay the item.
  - e. Alterations. An item which appears to Bank to have been materially altered will not be deposited into the DACA Account; provided, however, Bank shall have no liability to Borrower or Lender for depositing any such item.
  - f. Other Language. Bank will not examine the front and backsides of items to detect handwritten or typed "paid in full" or similar language. Such items will be deposited into the DACA Account and Bank shall have no liability to Borrower or Lender for depositing such items.
  - g. International Payments. An item denominated in foreign currency and drawn on a foreign bank will not be deposited into the DACA Account but will be submitted for collection only. An appropriate advice will be forwarded to Borrower. Bank shall not be responsible for fluctuation in exchange rates.
2. Processing Procedures. Items found acceptable for deposit under Section 1 above will be accepted for deposit into the DACA Account. Upon request by Borrower, Bank will send to Borrower documentation in accordance with Bank's customary and standard practices for maintenance of a DACA Account.
3. Microfilm. All deposited items will be microfilmed in processing sequence for reference purposes. Bank will retain such microfilm for at least two years and will provide photocopies of deposited items to Borrower within said time upon request and payment of Bank's retrieval and photocopying charges.

**EXHIBIT B**

**ACCEPTANCE FEE NOTICE**

**Acceptance Fee.....\$1,000.00**

This one-time fee is payable upon closing and includes the review of this Agreement and supporting documentation. Bank may debit the Acceptance Fee from the DACA Account on the Business Day that the Bank Fees are due, without notice to Lender or Borrower. If there are not sufficient funds in the DACA Account to cover fully the Acceptance Fee on the Business Day Bank attempts to debit such fee from the DACA Account, such shortfall or the amount of such fee will be paid by Borrower to Bank, without setoff or counterclaim, within five (5) calendar days after demand from Bank.

**THIRD AMENDMENT TO LEASE**

**THIS THIRD AMENDMENT TO LEASE** (this “**Third Amendment**”) is made and dated as of the \_\_\_\_ day of \_\_\_\_\_, 2020 (the “**Third Amendment Effective Date**”), by and between NORTH HILLS VILLAGE LLC, a Delaware limited liability company, successor by assignment of the North Hills Village Shopping Center Trust Dated February 1, 1985 (“**Landlord**”), by J.J. Gumberg Co., its Agent, and **BURLINGTON COAT FACTORY WAREHOUSE CORPORATION**, a Florida corporation, successor by merger of Burlington Coat Factory of Pennsylvania, LLC which in turn succeeded Burlington Coat Factory Warehouse of Pennsylvania, Inc. (“**Tenant**”). Landlord and Tenant each may be referred to individually as a “**Party**” and collectively as the “**Parties**.”

**RECITALS:**

WHEREAS, Landlord and Tenant are parties to that Lease Agreement dated November 30, 2004, as amended by that First Amendment to Lease Agreement dated December 23, 2004 and by that Second Amendment to Lease dated March 23, 2005, (together, with any and all other amendments or assignments, are hereinafter collectively referred to as the “**Lease**”), for premises with a street address of Rm #42, 4801 McKnight Road, Pittsburgh, PA 15237 located in the North Hills Village Mall in Pittsburgh, PA, as more particularly described in the Lease (“**Demised Premises**”); and

WHEREAS, the Parties mutually desire to amend the terms of the Lease as set forth herein;

NOW, THEREFORE, for good and valuable consideration including the mutual agreements contained herein, it is hereby agreed as follows:

1. **Recitals.** The above recitals are true and correct and are hereby incorporated by this reference.
2. **Definitions.** All capitalized terms, if not defined in this Third Amendment, shall have the meanings ascribed to them in the Lease.
3. **Exercise of Option, Extension of Term.** Landlord and Tenant confirm by this Third Amendment that Tenant is exercising its Third Option, upon the same terms and conditions as set forth in the Lease, except as otherwise provided in this Third Amendment so that the Term of the Lease shall be extended upon the same terms and conditions as set forth in the Lease for a period of five (5) years commencing June 1, 2020 and expiring May 31, 2025 (the “**Third Option Period**”), unless sooner terminated in accordance with Section 6 below.
4. **Remaining Options.** In addition to the Third Option Period, Tenant shall retain the two remaining successive options to extend the Term of the Lease upon the same terms and conditions as set forth in the Lease, the Fourth Option to extend the Term of the Lease for five (5) years and the final Fifth Option to extend the Term of the Lease for four (4) years. Except as expressly set forth herein, no other options or extensions are available or granted to Tenant.
5. **Minimum Rent.** Effective June 1, 2020, the annual per square foot Minimum Rent amounts set forth in Article 29 of the Lease are hereby amended as follows:

<u>Option</u>	<u>Annual Rent per Sq. Ft.</u>
Third	\$5.50
Fourth	\$6.00
Fifth	\$6.25

6. Termination. Tenant shall retain its right to terminate the Lease on three hundred sixty-five days (365) days prior written notice to Landlord under Article 42 of the Lease but hereby agrees that the termination date shall not occur prior to December 31, 2021.

7. Ratification. The foregoing terms and conditions are hereby incorporated into the Lease effective as of the Third Amendment Effective Date. Except as specifically amended by the provisions of this Third Amendment, the terms and provisions of the Lease shall continue to control the rights and obligations of the parties. The Lease, as amended, contains the entire agreement between Landlord and Tenant as to the Demised Premises, and there are no other agreements, oral or written, between Landlord and Tenant relating to the Demised Premises.

8. Conflict. In the event of a conflict between the provisions of this Third Amendment and the provisions of the Lease, the provisions of this Third Amendment shall control.

9. Final Agreement. This Third Amendment constitutes the final agreement between the Parties. It is the complete and exclusive expression of the Parties' agreement on the matters contained in this Third Amendment. All prior and contemporaneous negotiations, correspondence and agreements between the Parties on the matters contained in this Third Amendment are expressly superseded by this Third Amendment.

10. Brokers. Landlord and Tenant each represents and warrants to the other that it has not had any contacts or engaged in any actions, which would give rise to any claim from any broker in connection with the negotiation or execution of this Third Amendment. Each party hereby indemnifies the other from and against any and all claims for brokers' commissions relating to the negotiation or execution of this Third Amendment and alleged to be due because of an agreement of the indemnifying party.

11. Counterparts. This Third Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Furthermore, any counterpart that is signed and returned by facsimile or electronic transmission shall be deemed properly signed and delivered.

12. Authority. Each of Landlord and Tenant represents to the other Party that the person executing this Third Amendment on its behalf is duly authorized to execute and deliver this Third Amendment on its behalf and for its benefit.

[Signature Page Follows]

**IN WITNESS WHEREOF**, the Parties hereto have executed this Third Amendment on the date first written above.

**LANDLORD:**

**North Hills Village LLC**, a Delaware limited liability company

By: J.J. Gumberg Co., its Agent

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**TENANT:**

**Burlington Coat Factory Warehouse Corporation**, a Florida corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_



VIA OVERNIGHT MAIL & ELECTRONIC MAIL

March 10, 2020

NORTH HILLS VILLAGE LLC  
1051 Brinton Road  
Pittsburgh PA 15221

Attention: Ira J. Gumberg

Re: Loan ('Loan') made to NORTH HILLS VILLAGE LLC ('Borrower'), evidenced by a Note in the original principal amount of \$44,100,000, dated 11/04/2016 ('Note'), now held by Wilmington Trust, National Association, as Trustee for the benefit of the registered holders of JPMCC Commercial Mortgage Securities Trust 2016-JP4, Commercial Mortgage Pass-Through Certificates, Series 2016-JP4 ('Lender') and serviced by LNR Partners, LLC ('Special Servicer'), and secured by a Mortgage or Deed of Trust ('Mortgage') of property known as North Hills Village, located at 4801 McKnight Road, Pittsburgh, PA, 15237 ('Property'), and certain other documents (collectively, 'Loan Documents') / Loan No.: M307080007 / Reference No.: NT49916 / Request for approval of proposed Third Amendment to Lease ('Lease') between Borrower and Burlington Coat Factory Warehouse Corporation ('Tenant') (hereinafter referred to as the 'Request')

Dear Borrower:

Special Servicer, on behalf of Lender, has reviewed your above referenced Request. On behalf of the Lender, we hereby consent to the Lease and the related terms and conditions thereof in the form and substance of the copy of said agreement(s) attached hereto, subject to the conditions set forth below:

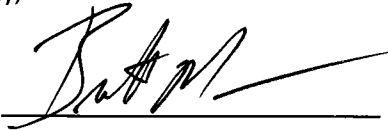
- 1.) Borrower has represented that the costs for tenant improvements will be \$0 and the leasing commission expense will also be \$0. Accordingly, no funds shall be released from Lender held Reserves in connection with this Request;
- 2.) Pursuant to Section 1.1 of the Loan Agreement, a Burlington Trigger Event has commenced as Tenant is not renewing in accordance with the terms and conditions set forth in the Burlington Lease. Accordingly, a Cash Sweep Event shall be implemented immediately and shall continue until Borrower satisfies all of the conditions required to end the Burlington Trigger Event, as specified in the Loan Agreement;
- 3.) Receipt of fully executed Lease without material variation from the version reviewed by Lender within 30 days;
- 4.) Notwithstanding approval of this Request, Lender is not waiving Borrower's obligations to meet all Loan requirements;
- 5.) Notwithstanding any other provision contained herein, Lender does not consent to any provision whatsoever in the Lease allowing or providing for any right or option to Tenant, any affiliate of Tenant or any successor or assignee of Tenant to purchase, in whole or in part, either the Property or the Loan and neither Lender nor any assignee of or successor to Lender shall be bound in any way by any such right or option;

Neither such approval nor any discussions by Lender or Special Servicer with Borrower or its representatives constitutes (a) a waiver by Lender or Special Servicer of any default by Borrower under the Loan Documents, (b) a waiver, modification, relinquishment or forbearance by Lender or Special Servicer of any right or remedy under the Loan Documents or under law, all of which are reserved by Lender and Special Servicer, (c) a modification of any of the Loan Documents, or (d) an agreement by Lender or Special Servicer to grant further approvals, or to take other action in addition or similar to the action specified herein or to continue discussions with Borrower.

Should you have any questions, please feel free to contact Elena Gonzalez at: (305) 695-5389.

Sincerely,

By:

A handwritten signature in black ink, appearing to read "Brett Mann", is written over a solid horizontal line.

Name: Brett Mann

Title: Manager of Consents  
REIS

cc: Wells Fargo Bank, N.A.  
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