

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

April 14, 2023

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

GL S-5844

Hawai'i

Deny Lessee's Request for Consent to Mortgage and Security Agreement,
General Lease No. S-5844, WHR LLC, Lessee; Waiakea, South Hilo, Hawaii,
Tax Map Keys: (3) 2-1-01:012 and 2-1-05:013, 016, 017, 027, 032, and 046

APPLICANT AND REQUEST:

WHR LLC, requesting consent to mortgage from UBS AG, Mortgagee, in an amount not to exceed \$54,000,000.

LEGAL REFERENCE:

Chapter 171, Hawaii Revised Statutes, as amended (HRS), including but not limited to sections 171-6, and -22; terms and conditions of the subject lease.

LOCATION:

Portion of Government lands situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: (3) 2-1-01:012 and 2-1-05:013, 016, 017, 027, 032, and 046, as shown on the attached map labeled Exhibit 1.

AREA:

68.926 acres (net area after exclusions), more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CHARACTER OF USE:

Hotel and golf course purposes.

TERM OF LEASE:

65 years, commencing on February 1, 2006 and expiring on January 31, 2071.

ANNUAL RENTAL:

\$580,270.44 minimum base rent, or 2% of gross revenues, whichever is greater, due in semi-annual payments.

USE OF LOAN PROCEEDS:

Lessee WHR LLC (WHR) has indicated it needs to settle the current mortgage on the property with a new \$54 million loan and mortgage from a different lender on the leasehold premises. WHR's application for the mortgage consent states that \$48 million will be applied toward the principal of the existing loan with the additional \$6 million going toward "Covid Loan/Interest Payments."¹

PRIOR LEASE DEFAULTS:

Pursuant to the authority granted the Chairperson by the Board of Land and Natural Resources (Board) at its meeting of January 11, 1980 and the breach provision contained in General Lease S-5844, WHR was served a Notice of Default by certified mail dated November 5, 2020 for:

- ☒ **Failure to keep lease rental payments current
(\$290,135.22 lease rent 8/01/2020 – 1/31/2021) plus late fees and interest charges**
- ☐ Failure to post required performance bond
- ☐ Failure to post required fire insurance policy
- ☐ Failure to post required liability insurance policy

Said notice for lease rent, accepted by WHR on November 10, 2020, offered WHR a thirty-day cure period to correct the default. This cure period expired on December 10, 2020.

WHR was served a second Notice of Default by certified mail dated January 19, 2021 for:

¹ Lessee did not articulate the breakdown the additional \$6 million beyond "Covid Loan/Interest Payments." As discussed below, staff questions why Lessee makes no provision for penalties and late fees, attorneys' fees and costs as well as loan fees and closing costs of the new loan. Additionally, the Preliminary Title Report Lessee submitted with its application shows that the principal balance of the existing mortgage of record is \$50 million, not \$48 million.

☐ Failure to keep lease rental payments current

☒ **Failure to post required performance bond
(Expired: 11/07/2020)**

☐ Failure to post required fire insurance policy

☐ Failure to post required liability insurance policy

Said notice, accepted by WHR on January 25, 2021, offered WHR a sixty-day cure period to correct the default. This cure period expired on March 25, 2021.

A third Notice of Default was served by certified mail dated, April 30, 2021, for:

☒ **Failure to keep lease rental payments current
(\$290,135.22 lease rent 2/01/2021 – 7/31/2021) plus late fees and interest
charges**

☐ Failure to post required performance bond

☐ Failure to post required fire insurance policy

☐ Failure to post required liability insurance policy

Said notice, accepted by WHR on May 3, 2021, offered WHR a thirty-day cure period to correct the default. This cure period expired on June 2, 2021.

Lengthy negotiations followed the issuance of these Notices of Default culminating in a proposed settlement that was approved, as amended, by the Board at its meeting of May 28, 2021, under agenda Item D-4. Specifically, the Board waived of two months' interest and late fees and gave WHR until June 4, 2021 to bring its rent and remaining interest and late fees current. The Board also gave WHR until June 30, 2021 to post its performance bond. The approved Board action specified that if WHR missed either deadline, the lease would be forfeited. WHR brought the rent current (with interest and late fees) on June 3, 2021 and posted the required performance bond on June 23, 2021.

By email dated January 21, 2022, WHR requested that it be allowed to pay its semi-annual lease payment in the amount of \$290,135.22 due on February 1, 2022 in six monthly installments from February 1 to July 1, 2022, instead of a full payment on February 1, 2022. At its meeting of February 25, 2022, under agenda Item D-1, the Board approved WHR's request to pay rent in monthly installments. However, WHR failed to make its March 1, 2022 rental payment under the approved monthly schedule and a fourth Notice of Default was served by certified mail dated March 4, 2022, for:

☒ **Failure to keep lease rental payments current
(\$50,062.36 lease rent 3/01/2022 – 3/31/2022) plus late fees and interest
charges.)**

- ☐ Failure to post required performance bond
- ☐ Failure to post required fire insurance policy
- ☐ Failure to post required liability insurance policy

Said notice, accepted by WHR on March 7, 2022, offered WHR a thirty-day cure period to correct the default. On March 28, 2022, WHR paid the full semi-annual installment under the lease explaining it no longer needed to make the monthly payments the Board approved.

A fifth Notice of Default was served by certified mail dated, January 13, 2023, for:

- ☐ Failure to keep lease rental payments current
- ☐ Failure to post required performance bond
- ☐ Failure to post required fire insurance policy
- ☒ **Failure to post required liability insurance policy**

Said notice, accepted by WHR on January 19, 2023, offered WHR a sixty-day cure period to correct the default. The default was cured on January 24, 2023.

A sixth Notice of Default was served by hand delivery February 9, 2023, for:

- ☒ **Failure to keep lease rental payments current**
(\$290,185.22 lease rent 2/01/2023 – 7/31/2023)
- ☐ Failure to post required performance bond
- ☐ Failure to post required fire insurance policy
- ☐ Failure to post required liability insurance policy

Said notice, accepted by WHR on February 9, 2023, was cured the same day. However, interest of 1% was assessed on the overdue rent installment along with a \$50 late fee resulting in a charge of \$2,951.35 that has not been paid.

As of March 30, 2023, the status of all lease compliance items is as follows:

RENT: WHR is current with rent obligations, with the exception of the interest and late fee of \$2,951.35.

INSURANCE: WHR has posted the required liability and fire insurance policy.

PERFORMANCE BOND:

WHR has posted the required performance bond.

In addition to the defaults noted above, in the past five years default notices have been sent to General Lease No. S-5844 on two other occasions as indicated in the table below. Copies of the default notices were sent to the mortgagee via regular mail.

DATE	TYPE OF DEFAULT	RESULT
6/25/18	Unauthorized improvements ²	7/17/18 improvements were removed
11/13/20	Delinquent Wastewater account	12/28/20 – Repayment plan w/County of Hawaii Wastewater Branch

REMARKS:

In 2018, Wells Fargo Bank, National Association (Wells Fargo) approved a \$50 million loan and mortgage to WHR. Only a portion of the loan proceeds was used to pay off the existing construction loan and mortgage in the amount of approximately \$18.5 million and an equipment financing loan in the amount of approximately \$2 million; although staff had inquired, WHR refused to disclose what the roughly \$29.5 million would be used for, or where it was going.³ Nevertheless, the Board consented to this new \$50 million loan and mortgage on Naniloa Hotel's leasehold that allowed WHR to pull \$29.5 million cash for other purposes.⁴

After obtaining the consent to the Wells Fargo mortgage in 2018, WHR went into default under the lease multiple times as shown in the foregoing section of this submittal for failure to keep rent current and maintain a performance bond. On December 6, 2021, Wilmington Trust National Association, as Trustee for the Benefit of the Holders of Bank 2018-BNK14, Commercial Mortgage Series 2018-BNK14 (Wilmington Trust) filed a foreclosure action against WHR for default on the Wells Fargo loan.⁵ Then Ed Olson

2 On June 18, 2018, County of Hawaii, Planning Department notified the Hawaii District Land Office of a SMA violation resulting from the construction of a large deck along the shoreline fronting the Hula Hula restaurant. This action triggered a Notice of Default with the lease.

3 In 2022, the Board would later learn at least a portion of the funds was a withdrawal of profits by the principals of WHR.

4 Board meeting of August 10, 2018, under agenda Item D-1, as amended, the Board consented to a mortgage of the leasehold interest in the subject property from WHR to Wells Fargo Bank, National Association (Wells Fargo) in the amount of up to \$55 million in part to refinance the renovation costs of the Grand Naniloa Hotel Hilo. The Board additionally approved the issuance of an Estoppel Certificate/Forbearance Agreement to facilitate the loan from Wells Fargo.

5 The mortgage was assigned from Wells Fargo to Wilmington Trust.

through Olson/Naniloa LLC also filed suit against the Naniloa management (Ed Bushor and Stuart Miller) on September 21, 2021 for inter alia, allegedly breaching the operating agreement for WHR and fiduciary duties owed to its members by submitting proposals to redevelop the former Uncle Billy's Hilo Bay Hotel and former Country Club Condominium Hotel near the Naniloa Hotel and in competition with it.

2022 Mortgage Consent Request:

On May 17, 2022, WHR requested the Board's expedited consent to a new mortgage to be granted by WHR to Hilo Hotel Funding LLC (HHF) by or before May 27, 2022. According to WHR, the proceeds of the new mortgage loan from HHF would have been used to pay off the existing mortgage loan held by Wilmington Trust on the subject property by May 31, 2022 to avoid the sale of the lease in foreclosure and the commencement of bankruptcy proceedings involving WHR. According to WHR, the existing loan had gone into default due to losses the hotel on the property experienced from the many COVID-19-induced shutdowns and travel industry reductions.⁶ Thus, WHR requested the Consent to Mortgage of General Lease No. S-5844 with Estoppel Certificate and Pledge and Security Agreement be approved by May 27, 2022 to allow closing of the HHF loan by May 31, 2022.

According to the mortgage consent application submitted by the agent for WHR,⁷ the initial term of the loan was for twenty-four (24) months. WHR had the option to extend the term for two twelve (12) month periods subject to certain conditions. The interest rate would have been comprised of (a) current interest of Index + 725 basis points and (b) paid-in-kind interest of 4.5%, both calculated on an actual/360 convention, with interest payments due and payable (or compounding) on a monthly basis. The "Index" was equal to the greater of (a) one-month Term SOFR (as recommended by the Federal Reserve Bank of New York) and (b) 25 basis points. Collateral: WHR would have secured its obligations to HHF with, among other things, (i) a recorded and insured leasehold mortgage on the property, (ii) a pledge from WHR's members of all of the membership interests in WHR. Staff was not able to review the actual loan agreement and therefore was unable to ascertain the actual amount WHR would have paid on this note, but by staff's calculations the interest rate would have been over 12% per annum⁸ for two years with over \$1.24 million in closing costs.

When staff presented the loan request to the Board at its meeting of June 24, 2022, under

⁶ Although the impacts of COVID-19 was felt statewide, WHR is the only lessee to claim the impacts of COVID-19 caused or resulted in the lessee defaulting on a loan and mortgage (in addition to defaulting on its lease) encumbering State public trust lands and having a Court enter summary judgment in favor of the lender/mortgagee.

⁷ The 2022 application for consent to mortgage was submitted to Land Division by email on May 17, 2022 at 7:04 P.M.

⁸ Without reviewing the loan agreement, it was unclear how often the one-month SOFR would adjust, whether monthly or sooner. Staff understands the SOFR is published daily. Interest rates are expected to climb at least in the near future.

agenda Item D-9, staff explained that the proposed transaction was an extremely short-term bailout type loan on a distressed property (not merely a threat of foreclosure but in an actual foreclosure action) on distressed terms (high adjustable interest rates in a climbing interest rate market). The foreclosure action had already been filed and the property in in a court-ordered receivership—meaning a receiver had been appointed to operate the hotel under court supervision.

As part of the proposed 2022 loan transaction, HHF was required to sign a Pledge and Security Agreement (PSA). This document basically would have put up the membership interests in WHR (a Hawaii limited liability company) as collateral for the HHF loan. The PSA required the membership interests be accompanied by duly executed instruments of transfer or assignment in blank. If WHR were to default on the HHF loan, the ownership of WHR could change instantly without the Board having any information on the new owners of WHR. This is inconsistent with the lease for the property that requires prior written consent of the Board for lease assignments or transfers of interests of 20% or more in lessees that are entities.

Staff further explained at the June 24, 2022 Boarding meeting that current market conditions are not suitable for a short-term jumbo loan/mortgage on distressed real estate in foreclosure proceedings.⁹ In recent past, WHR/debtor had difficulty keeping current on the State's lease payments; and the terms and conditions of the 2022 proposed \$62 million loan and mortgage were likely less favorable than the existing \$50 million loan and mortgage, which may have resulted in WHR/debtor having more difficulty in keeping current on the new loan/mortgage or the State lease, or both. Two significant investors into the Naniloa Hotel venture,¹⁰ the Wells Fargo/Wilmington Trust and the Olson/Naniloa LLC¹¹ filed separate lawsuits against management asserting various claims such as breach of fiduciary duty, breach of contract, loan acceleration and foreclosure. A single large investor, Wells Fargo/Wilmington Trust at \$50+ million, apparently wants out, but wants its money back first. Accordingly, staff advised the Board that it did not believe it was in the State's best interest to allow WHR/debtor to further encumber and mortgage State public trust lands with more and higher debt, especially since WHR/debtor was already in foreclosure and on the verge of bankruptcy. Whether in either foreclosure or bankruptcy proceedings, the State would be better off

⁹ As noted above, the 2022 proposed \$62 million loan and mortgage had a very short term, with a high variable interest rate in a climbing interest rate market.

¹⁰ The Naniloa Hotel venture refers to the Naniloa Hotel that is leased by WHR, a limited liability company (LLC) that is affiliated, owned, managed, or operated by various member/owners that are also LLCs or entities, who likewise may be affiliated, owned, managed, or operated by other entities such as another LLC, corporation, partnership, association, or individuals.

¹¹ According to the Operating Agreement attached to the First Amended Complaint, Olson/Naniloa LLC contributed **\$7.6 million** and owns **35.48% of class A membership** into WHR, and the remaining 64.51% of class A membership is owned by Tower Hotels Fund LLC. Class A and Class B members each own a 50% interest in WHR, with Class A contributing capital and Class B apparently contributing services and guarantees. A copy of the WHR LLC Operating Agreement (copied from the First Amended Complaint filed in the Olson/Naniloa LLC lawsuit on September 23, 2021) is attached as Exhibit 2 and includes a list of membership interests in WHR LLC at Exhibit A thereto.

with the existing \$50 million loan/mortgage encumbering the leasehold than \$62 million encumbering the leasehold. The Board denied the request for consent to the mortgage between WHR LLC, WHR/Mortgagor, and Hilo Hotel Funding LLC, Mortgagee, and denied the request for Estoppel Certificate and Pledge and Security Agreement.

2023 Mortgage Consent Request:

On March 3, 2023, WHR contacted staff about a new request for consent to mortgage and submitted an application for consent on March 6, 2023, but despite staff's repeated requests, WHR has not provided sufficient information for staff to determine whether the loan terms are commercially reasonable. WHR provided a Term Sheet that indicates the loan is would be from UBS AG for a 5-year term and payments for the first two years will be applied toward interest only. WHR represented in its application that the interest rate is fixed, although the Term Sheet states the interest rate is equal to:

340 basis points plus the five (5) year SOFR swap rate, as determined by Lender. However, in no event shall the interest rate be less than 7.25% per annum.

By definition, the interest rate appears to be variable because it is tied to an index that fluctuates daily. WHR's counsel assured staff that despite this definition, the interest rate will be fixed at the time of the closing of the loan. See Exhibit 2 attached, question 3 and answer. Staff notes that if the requested consent is truly for a fixed rate loan, the SOFR should be deleted as irrelevant, because inclusion of that term makes the document ambiguous.

Beginning in loan year 3, payments will include principal and interest on a 30-year amortization schedule. The loan will not be paid off at the end of five years, which will result in a large balloon payment due. WHR states in its application that the balloon amount will be \$52.5 million and that it will refinance the loan at that time. See Exhibit 2, question 2 and answer. The short-term financing proposal seems intended to only "kick the can down the road" without offering a long-term solution to the financial woes of the hotel.

Another issue with the Term Sheet for the proposed loan is that it expressly states that it is not an offer, commitment, or an agreement by lender to make the loan, which means the Department cannot rely on that document to reflect that actual terms and conditions of the loan or mortgage.¹² While WHR and its counsel also provided the forms of the Loan Agreement, Promissory Note, and Leasehold Mortgage, Security Agreement, Financing Statement and Fixture Filing, these documents are not signed and do not contain some key terms such as the interest rate.

¹² The Term Sheet that WHR provided on its face makes clear it is not a loan approval, commitment or even an offer of a loan. It appears that WHR may have only applied for a loan, and such loan is still subject to the lender's due diligence and review and approval, and the terms and conditions of the loan are subject to change, including but not limited to the interest rate, the term, whether amortized or interest or partial interest only payments, the minimum required monthly payments, etc.

Staff questioned WHR about the \$54 million loan requested, noting it is about \$11 million short of the \$65 million the existing lender, Wilmington Trust, has claimed is due in its court filings. In response, WHR stated:

We have no obligation to pay any \$65M that the Bank is claiming and their attorneys are from east coast and are claiming many "fake" items that will be cleaned up prior to the closing in a full settlement agreement as a condition to escrow closing of the New Loan. The Hote[l] has been profitable in 2022 and covers most of the amounts due above the New Loan, and all of these obligations are required to be paid current out of the Hotel prior to the escrow closing. DLNR may condition the consent to having all of the "actual amounts" as compared to the Bank "alleged amounts" (inaccurate amounts). Ownership/Ground WHR has the cash flow to make up the difference between the total amounts owed by cash flow and the New Loan and cash on hand in ownership. We are extremely grateful for a great recovery the last 18 months.

However, Wilmington Trust has extensive documentation on the amounts it claims are due. Attached as Exhibit 3 is a copy of the Complaint for Foreclosure filed in the Third Circuit Court on December 6, 2021, less the exhibits referenced in the Complaint. Additionally, attached as Exhibit 4 is a copy of the Declaration of Joao Gauer, Asset Manager with Rialto Capital Advisers, LLC (the special servicer on the loan) submitted in support of Wilmington Trust's motion for summary judgment filed on January 4, 2023 in the Third Circuit Court foreclosure action, less the exhibits referenced in the declaration (Gauer Declaration). The total due under the Wilmington Trust mortgage as of the date of the declaration was \$65,017,078.17, including principal, interest, default interest, late fees and other fees and charges. According to the Gauer Declaration, per diem interest/default interest accruing in the principal balance is \$14,463.46. The declaration also details how loans and advances were taken out of the mortgage proceeds in favor of the principals of WHR in violation of the parties' loan agreement. These defaults and others described in the Gauer Declaration led to the court's appointment of a receiver for the operation of the hotel, which continues to this day. Wilmington Trust's motion for summary judgment and a decree of foreclosure was granted on Monday, March 20, 2023. The Court appointed the Receiver to be the commissioner but stayed entry of the Order for 60 days.¹³ The Order interestingly notes that the Court "*was not determining the amount of default judgment at this time.*" A default judgment would occur if the sales proceeds were insufficient to cover the existing debt and mortgage. Accordingly, there seems to be an issue of whether the Naniloa is even worth the amount of the existing debt and mortgage.

Staff has many of the same concerns that were conveyed to the Board when the 2022 mortgage consent was under consideration; and now, even more concerns. If WHR is unable to meet its monthly payment obligations, or pay off the balloon due at the end of the 5-year term of the loan, the mortgage will end up in foreclosure again, which will likely result in ownership of the lease changing hands in a way that does not require Board consent. Staff is concerned the loan proposal may be an attempt to bypass the

¹³ The written order is pending but the clerk's minutes of the summary judgment hearing is attached as Exhibit 5.

requirement for Board approval of assignments. Another concern staff has about the loan is an unusual provision in the Loan Agreement for "New Mezzanine Loans."

Apparently, UBS AG, as the lender, has the right to unilaterally divide the mortgage/loan to another new mortgage/loan and other mezzanine loans at the "rate" and "debt service" or payments as provided for in the loan documents, but other terms and conditions of the loan and new mortgage appear to be at the discretion of the UBS AG to decide, including but not limited to the amortization rate, the accrual of interest due at maturity (if any), partial or full interest-only, etc. Staff has concerns about the Board consenting to the current mortgage request because the Board may be barred from later raising an objection to any such new or mezzanine loan with different terms and conditions as aforesaid that would encumber State public trust lands. WHR responded that any such mortgage would still require consent as required by the State lease. See Exhibit 2, question 7 and answer. However, staff's concerns have not been allayed.

The loan is not sustainable and WHR has not shown the ability to pay off the loan at maturity. Staff suspects WHR seeks approval of this loan and mortgage that is substantially short of paying off the existing \$65 million plus attorneys' fees and costs to somehow be used later against Wilmington Trust in the foreclosure action or as a weapon in bankruptcy court by seeking a cramdown order against Wilmington Trust. Staff does not believe interjecting the State into this loan dispute or lawsuit between the WHR and the Wilmington Trust is good public policy. Significant public trust assets are at stake. Staff does not believe it is appropriate to allow the leveraging or mortgaging of a public trust asset involving ceded lands to fund a "settlement" involving the WHR and its owners and the Wilmington Trust where the allegations are more than the delinquency and collection of a debt. Here, an auditor found among other improprieties, evidence of significant self-dealing between WHR and its affiliates at a time when loan was in default and no payments were being made to Wilmington Trust; the diversion of hotel revenues for other uses away from hotel operations and in violation of the express terms of the loan documents.

Based on the foregoing, staff therefore recommends denial of the March 2023 mortgage consent request.

RECOMMENDATION:

That the Board deny the request for consent to the mortgage between WHR LLC, Mortgagor, and UBS AG, Mortgagee.

Respectfully Submitted,

Russell Tsuji

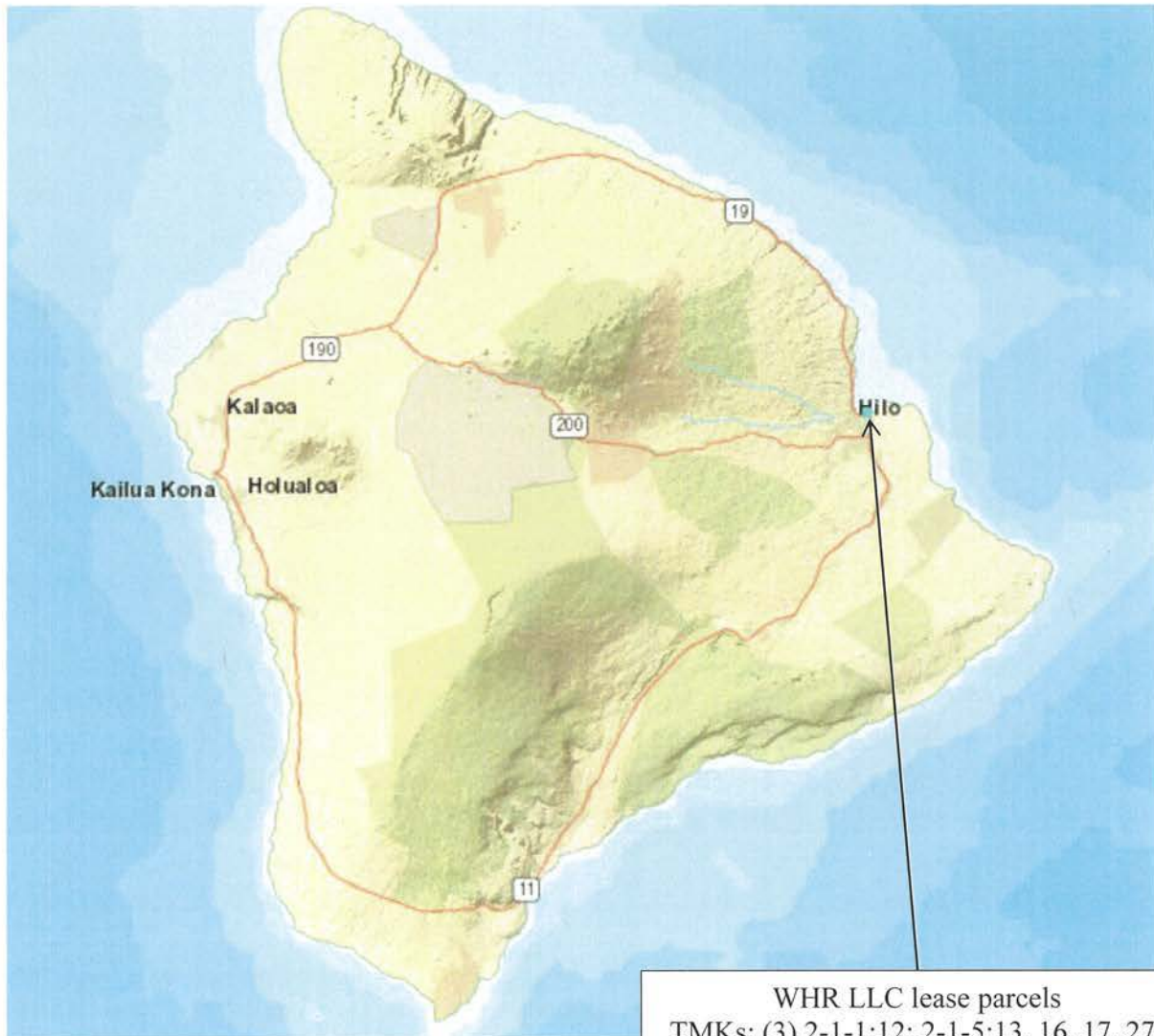
Russell Y. Tsuji
Administrator

APPROVED FOR SUBMITTAL:



RT

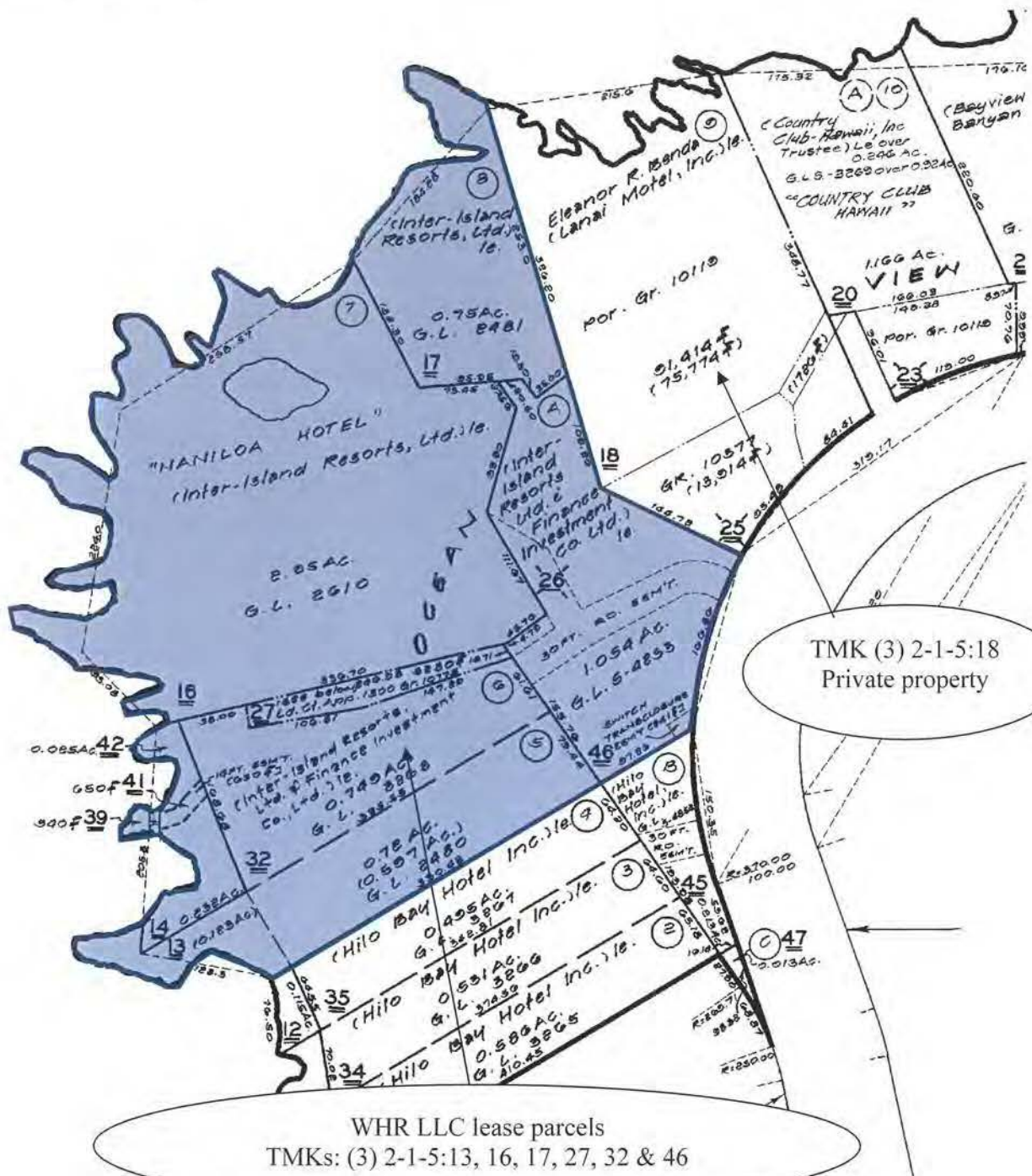
Dawn N. S. Chang, Chairperson



WHR LLC lease parcels
TMKs: (3) 2-1-1:12; 2-1-5:13, 16, 17, 27,
32 & 46

EXHIBIT 1





DLNR Questions on UBS Loan and Responses Received from WHR LLC or its Counsel

	Source	Question from DLNR	Response from WHR LLC/Counsel
1.	3/7, 3/24 email	What good faith efforts was made by the hotel "ownership" to liquidate and cure the delinquent loan and mortgage? The bank's moving papers and declarations show at least \$65 million due and owing that includes accrued interest and default interest, plus attorneys' fees and costs. Provide evidence the hotel or owners have available liquid assets (not tied to on-going litigation) pay off the existing loan and mortgage, and attorneys' fees and costs.	In respect of the good faith efforts made by borrower, WHR ownership disputes the bank/existing lender's allegations as inaccurate. The bank/existing lender will be paid off and all items cured as a condition of the new loan. Certain WHR owners will guaranty all amounts under the loan. We do not currently have financial statement in respect of the guarantors, but we will request that any financial information provided by the guarantors to the new lender also be provided to DLNR, on a confidential basis.
2.	3/7, 3/24 email	If the hotel was and is profitable, why isn't the proposed loan a principal and interest payment type loan that is fully amortized over the term (5-years)? Why is the loan interest-only with a 5-year balloon? Provide evidence the hotel can pay off the loan balance at the 5-year loan maturity date.	In respect of the 5-year term and interest-only payment structure and planned repayment structure at the end of the term, owner responds that 5-year, interest only terms are provided to profitable hotels and was offered by Lender. Commercial Mortgage-Backed Securities (CMBS) loans such as this one are typically structured with 5-year terms. This structure is advantageous to borrower in that more net income is received by ownership in the first two years; ownership plans to use the extra dollars for improving items that were deferred during COVID, such as new furniture items that will improve the hotel. Ownership would accept a Board condition that any profits or excess cash will be used to improve the hotel and not paid out to owners. At the end of the 5-year term, the UBS loan will be refinanced with a new loan.
3.	3/9, 3/22 email	Isn't it true the loan described in the term sheet is an adjustable rate loan and mortgage? Doesn't the 5-year SOFR (secured overnight financing rate) change daily, monthly, or other frequency	Regarding the interest rate, the Lender has confirmed that the loan is a fixed rate loan. Final loan documentation will confirm this. From the UBS's perspective, the term sheet and draft loan agreement already confirm this.
4.	3/9, 3/22 email	Please explain the minimum debt yield of 12%. How is this related to the interest rate or default interest rate, required monthly payments, deferred interest due at loan maturity?	Minimum Debt Yield is a lender-imposed covenant that measures "Net Operating Income" over total principal. IN this transaction, that percentage may not fall under 12% or the lender may be entitled to call a default. Generally, this measurement takes the net operating income of a

EXHIBIT 2

DLNR Questions on UBS Loan and Responses Received from WHR LLC or its Counsel

			commercial property into account to determine how quickly the lender could recoup their funds in the event of default. Some lenders prefer this method to other ways of measuring loan risk, which might otherwise be obscured by low interest rates or lengthy amortization terms. It is not directly related to interest rate or default interest rate, required monthly payments, or deferred interest due at loan maturity.
5.	3/9, 3/22 email	Please explain and the minimum debt service charge of 1.4x. Is that a 1.4% service charge off the loan balance? Is that due monthly?	Minimum Debt Service Coverage is another type of lender-imposed covenant that measures available cash flow over required debt service. In this transaction, that ratio may not be less than 1.4. Generally, a higher ratio means that a borrower is more likely to be able to make their loan payments; a ratio of 1.0 would mean that all available cash was being used to service debt. It is not in itself a debt service charge or a monthly payment.
6.	3/9, 3/22 email	The Term Sheet contains conditions very similar to those imposed by the current lender/mortgagee when the loan was in default and ultimately foreclosure, such as the requirements for Cash Management, Operating Reserves, FF&E Reserves...Property Management... Guaranteed Obligations...Restrictions on financing, etc. What the difference if anything?	Regarding the general term sheet conditions, the ownership responds that they are generally the same as the Wells Fargo loan.
7.	3/28 email	What is the purpose and effect of Section 11.29 of the Loan Agreement? Can the lender cause new or mezzanine mortgages to be executed by New Mezzanine Borrowers or New Mortgage Borrowers using the leasehold interest in the State property as security without Board consent?	Regarding Loan Agreement Section 11.29: No, the loan agreement will not supersede Section 20 of the General Lease S-5844 which requires prior written consent of the Chairperson in order to mortgage the Leasehold interest. Notwithstanding, we will include in the Loan Agreement a reference to the Lease and a statement in Section 11.29 that the Lender's rights in respect of the "New Mezzanine Loan" to collateralize such loans with a security interest in the Leasehold interest remain subject to the applicable provisions of the Lease, including without limitation, Section 20 thereof.

EXHIBIT 2

SULLIVAN MEHEULA LEE
A Limited Liability Law Partnership

WILLIAM MEHEULA (2277)
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THIRD CIRCUIT
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Attorneys for Plaintiff
WILMINGTON TRUST NATIONAL ASSOCIATION
AS TRUSTEE FOR THE BENEFIT OF THE
HOLDERS OF BANK 2018-BNK14, COMMERCIAL
MORTGAGE SERIES 2018-BNK14, by and through
its Special Servicer Rialto Capital Advisors, LLC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
HILO DIVISION
STATE OF HAWAII

WILMINGTON TRUST NATIONAL
ASSOCIATION AS TRUSTEE FOR THE
BENEFIT OF THE HOLDERS OF BANK
2018-BNK14, COMMERCIAL MORTGAGE
SERIES 2018-BNK14, by and through its
Special Servicer Rialto Capital Advisors,
LLC,

Plaintiff,

vs.

WHR LLC, a Hawaii limited liability
company, JOHN DOES 1-50, JANE DOES
1-50, DOE PARTNERSHIPS 1-50, DOE
CORPORATIONS 1-50, DOE ENTITIES
1-50 and DOE GOVERNMENTAL UNITS
1-50,

Defendants.

CIVIL NO.: _____
(Foreclosure)

COMPLAINT FOR FORECLOSURE;
EXHIBITS A-J; SUMMONS

EXHIBIT 3

COMPLAINT

Plaintiff WILMINGTON TRUST NATIONAL ASSOCIATION AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF BANK 2018-BNK14, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-BNK14, by and through its Special Servicer Rialto Capital Advisors, LLC (“**Plaintiff**” or “**Lender**”), for its Complaint against the above-named Defendants, alleges as follows:

PARTIES

1. Plaintiff is and was, at all times relevant, a New York common law trust for which Wilmington Trust National Association is the Trustee (“**Wilmington Trust**”) and Rialto Capital Advisors, LLC (“**Rialto**”) is the Special Servicer. Wilmington Trust is a national banking association, having its principal office located in Delaware. Rialto is a limited liability company organized and existing under and by virtue of the laws of the State of Delaware, having its principal office located at 200 South Biscayne Boulevard, Suite 3550, Miami, Florida 33131.

2. Rialto files this action on behalf of the Trust pursuant to the authority granted in that certain Pooling and Servicing Agreement dated as of September 1, 2018.

3. Defendant WHR LLC (“**Borrower**”) is a limited liability company organized and existing under and by virtue of the laws of the State of Hawaii, having its principal office located at 93 Banyan Drive, Hilo, Hawaii 96720.

4. Defendant JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50 (collectively “**Doe Parties**”) may claim an interest in the mortgaged property and other collateral described herein, and their identities are

unknown to Plaintiff despite Plaintiff's diligent efforts to learn their identities by obtaining a title report on the subject property and conducting other investigation.

JURISDICTION AND VENUE

5. This Court has jurisdiction to hear and decide this case pursuant to Haw. Rev. Stat. § 667-1.

6. The property which is the subject of this foreclosure action is situated in the County of Hawaii, State of Hawaii.

7. This action may be brought in this circuit pursuant to Haw. Rev. Stat. § 603-36(5).

THE LOAN AND RELEVANT DOCUMENTS

8. On or about August 31, 2018, Wells Fargo Bank, National Association ("**Original Lender**") and Borrower entered into a Loan Agreement (the "**Loan Agreement**"), pursuant to which the Original Lender agreed to lend to the Borrower and the Borrower agreed to borrow from the Lender the principal amount of \$50,000,000.00 (the "**Loan**") for the purpose of financing the purchase of certain real property and improvements located in the County of Hawaii, State of Hawaii, subject to the terms and conditions stated therein. A true and correct copy of the Loan Agreement is attached hereto as **Exhibit "A."**

9. On or about August 31, 2018, as an inducement for the Original Lender to make the Loan to the Borrower, Borrower executed and delivered to the Original Lender a Promissory Note (the "**Note**") in the principal amount of \$50,000,000.00, pursuant to which the Borrower promised to pay the Lender the payments specified therein, subject to the terms and conditions stated therein, together with any late charges, additional interest, attorneys' fees, costs and other expenses incurred by the Lender in the event of a default and any enforcement of the Note or any

of the loan documents referred to therein. A true and correct copy of the Note is attached hereto as **Exhibit “B.”**

10. On or about August 31, 2018, the Borrower executed and delivered to the Lender a Leasehold Mortgage, Assignment of Leases And Rents, Security Agreement and Fixture Filing (the “**Mortgage**”), which was recorded in the Bureau of Conveyances of the State of Hawaii (the “**Bureau**”) as Document No. A-68220552 and in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the “**Land Court**”) as Document No. T-10474133, to secure full payment of all amounts due under the Note and the performance by the Borrower of all obligations under the Loan Agreement, Note, Mortgage, and other loan documents specified in the Loan Agreement. The property to which the lien of the Mortgage attached and in which a security interest was granted includes the leasehold interest in certain real property located at 93 Banyan Drive and 1713 Kamehameha Avenue in Hilo, Hawaii, identified by Tax Map Key Nos. (3) 2-1-001: 012 and (3) 2-1-005: 013,016, 017, 032, 046 & 027, pursuant to the terms of that certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844 dated January 20, 2006, together with the buildings and other improvements constructed thereon, all agreements and contracts pertaining to the use, maintenance, leasing, and management of said real property, all leases, rents, revenues, issues and profits of said real property, and other collateral described in the Mortgage (collectively, the “**Mortgaged Property**”). A true and correct copy of the Mortgage is attached hereto as **Exhibit “C.”**

11. In order to induce the Original Lender to make the Loan, and as further security for the Loan, on or about August 31, 2018, Edward Bushor and Stuart L. Miller (collectively, the “**Guarantors**”) executed that certain Guaranty of Recourse Obligations (the “**Guaranty**”) in favor of Original Lender. A true and correct copy of the Guaranty is attached hereto as **Exhibit “D.”**

12. On or about August 31, 2018, the Borrower, Original Lender and Evolution Hospitality, LLC entered into a Cash Management Agreement (the “**Cash Management Agreement**”), as provided under Section 9.1 of the Loan Agreement, pursuant to which Rents (as that term is defined in the Mortgage) were to be swept into a Cash Management Account upon an Event of Default and the Borrower granted the Lender and its successors and assigns a first priority security interest in the Cash Management Account and all deposits at any time contained therein and the proceeds thereof, among other things, to secure full payment of all amounts due under the Loan Agreement and other loan documents specified therein. A true and correct copy of the Cash Management Agreement is attached hereto as **Exhibit “E.”**

13. On or about September 4, 2018, the Borrower authorized the Original Lender to record a UCC-1 Financing Statement, which was recorded in the Bureau as Document No. A-68210662 and subsequently amended as Document No. A-68240947 (collectively, the “**UCC-1**”), covering and granting Original Lender a perfected security interest in the Mortgaged Property and other collateral described therein, to secure payment by the Borrower of all amounts due under the Note, the Loan Agreement and other loan documents specified in the Loan Agreement. A true and correct copy of the UCC-1 is attached hereto as **Exhibit “F.”**

14. The Note, Loan Agreement, Mortgage, Guaranty, Cash Management Agreement, UCC-1 and all other loan documents specified or referred to in the Loan Agreement, including but not limited to all assignments thereof, are collectively referred to hereinafter as the “**Loan Documents.**”

15. Effective as of September 27, 2018, all right, title and interest of the Original Lender under the Loan Documents was assigned to Plaintiff pursuant to the terms of that certain (i) Allonge made by Original Lender to and for the benefit of Plaintiff (the “**Allonge**”); (ii)

Assignment of Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing effective as of September 27, 2018, made by Original Lender to and for the benefit of Plaintiff and recorded in the Bureau as Document No. A-69290683 and filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. T-10581298 (the “**Assignment of Mortgage**”); and (iii) General Assignment, effective as of September 27, 2018, made by Original Lender to and for the benefit of Plaintiff (the “**General Assignment**”). True and correct copies of the Allonge, which is affixed to the Note, the Assignment of Mortgage and the General Assignment are attached hereto as **Exhibits “B, G and H,”** respectively.

16. On or about November 5, 2018, the Lender filed an Amendment of the UCC-1 (the “**UCC-1 Assignment**”), assigning all collateral under the UCC-1 to Plaintiff, which UCC-1 Assignment was recorded in the Bureau as Document No. A-68830483. A true and correct copy of the UCC-1 Assignment is attached hereto as **Exhibit “I.”**

DEFAULTS BY THE BORROWER

17. Commencing in April of 2020, and continuing each consecutive month thereafter, the Borrower defaulted in its obligations under the Loan Documents by failing to make the required monthly loan payments, among other things.

18. As a consequence of the Borrower’s default, by letter dated July 23, 2021, Borrower was given written notice that an Event of Default existed under the Loan Documents as a result of Borrower’s failure to pay the Monthly Debt Service Payment Amount and the Reserve Funds due on the April 11, 2020 Monthly Payment Date and each month thereafter. Plaintiff accelerated the maturity date of the Loan and demanded that the Borrower pay the Debt in full (including, without limitation, accrued interest calculated at the “Default Rate,” as such term is defined in the Loan Agreement). A true and correct copy of the July 23rd letter is attached hereto as **Exhibit “J.”**

19. After the Loan was accelerated, the Borrower made partial payments on September 13th, October 8th and November 9th of 2021, which totaled \$1,226,881.53 in the aggregate.

20. As of December 1, 2021, the unpaid principal balance of the Loan was \$47,962,517.38. Interest (including default interest), late charges, servicing and administrative fees, expenses, attorneys' fees and costs continue to accrue under the Loan Documents. Borrower has failed to pay the Loan in full and remains in default under the terms of the Loan Documents.

21. In addition to the monetary defaults, as disclosed on financial reports provided by the Borrower to Plaintiff, the Borrower is also in violation of Section 5.1 of the Loan Agreement as a result of the existence of unauthorized debt obligations, including, but not limited to, a \$4 million mezzanine loan, two (2) Paycheck Protection Program loans and an Economic Injury Disaster Loan totaling in excess of \$3.6 million, and a \$2 million note payable to an unidentified party.

22. In violation of Section 4.12(a) of the Loan Agreement, the Borrower has failed to provide the Property's third quarter 2021 operating statements within thirty (30) days after the end of the calendar quarter.

23. In violation of Section 4.12(c) of the Loan Agreement, both the Borrower and the Guarantors have refused to produce copies of their Federal income tax returns, including all schedules and statements, for calendar years 2018, 2019 and 2020 despite repeated requests since September 15, 2021.

24. The Borrower also failed to provide evidence that it had maintained flood insurance during the period from August 27, 2021 through October 27, 2021 as required by Sections 3.11(i) and 7.1(a)(vii) of the Loan Agreement. As a result thereof, and in accordance with Section 7.1(g)

of the Loan Agreement, Plaintiff force placed insurance to cover the gap in coverage and advanced \$3,417.60 to fund the cost of the premium.

COUNT I
(For Judicial Foreclosure)

25. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 24 of the Complaint as though fully set forth herein.

26. The mortgage lien and security interests of Plaintiff under the above-described Loan Documents, including without limitation the Note, Mortgage and UCC-1, are valid, and senior and superior to each of every party defendant's interest, if any, in the Mortgaged Property and other collateral described in the Loan Documents (except as to any paramount lien pursuant to statute).

27. Plaintiff has observed and performed all agreements, terms, covenants, provisions, and conditions to be observed and performed by them under the Loan Documents.

28. Despite demands by Plaintiff, the Borrower has failed to pay, perform, and observe the Borrower's obligations under the Loan Documents by, among other defaults, (i) failing to pay the monthly debt service payments when due and owing under the Note and Loan Agreement; (ii) failing to pay the Loan in full after acceleration; (iii) incurring unauthorized debt obligations totaling in excess of \$9.6 million; (iv) failing to produce tax returns and quarterly financial statements as required by the Loan Agreement; and (v) failing to provide evidence of insurance as required by the Loan Agreement.

29. By reason of each of the foregoing defaults, the entire indebtedness evidenced by the Note is immediately due and payable.

30. Pursuant to the Loan Documents, as of December 1, 2021, Borrower is indebted to Lender the principal amount of \$47,962,517.38, plus accrued and unpaid interest at the default

rate, late charges, advances, expenses, and attorneys' fees incurred to be incurred, inter alia, in connection with the collection of the amounts due and unpaid under the Loan Documents.

31. Pursuant to the terms of the Loan Documents, the Lender may proceed against the Borrower for payment of the sums due and owing under the Loan Documents, without first resorting to or exhausting any other security or collateral and without first having recourse to any other remedy.

32. Doe Parties may claim an interest in the Mortgaged Property, or have other obligations to Plaintiff in connection with Mortgaged Property.

33. NOTICE IS HEREBY GIVEN THAT THIS ACTION IS AN ATTEMPT TO COLLECT A DEBT, THAT ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE, AND THAT THE DEBT MAY BE DISPUTED.

COUNT II
(For Specific Performance - Appointment of Receiver)

34. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 33 of the Complaint as though fully set forth herein.

35. The Mortgage provides, at Section 8.1, as follows:

Section 8.1 REMEDIES. Upon the occurrence and continuance of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, . . .

* * *

(g) apply for the appointment of a receiver . . . of the Property, without notice to the Borrower, *which notice Borrower expressly waives*, and without regard for the adequacy of the security for the Debt and without regard for the solvency of the Borrower, any guarantor or indemnitor under the Loan or any other Person liable for the repayment of the Debt and *whose appointment Borrower expressly consents* to take possession of and to operate the Property and to collect the Rents and to otherwise protect and preserve the Property; . . .

Exhibit C, Mortgage at § 8.1(g) (emphasis added).

36. Immediate appointment of a receiver to take possession, custody, and control of the Mortgaged Property is necessary and appropriate in order to ensure that the Mortgaged Property is properly maintained, managed, and preserved during the pendency of this litigation and foreclosure.

37. Plaintiff has no plain, adequate or speedy remedy at law, and will suffer irreparable injury and harm unless the Court grants the relief sought by Plaintiff and appoints a receiver as provided in the Mortgage.

38. Plaintiff is entitled to specific performance of the terms, conditions, and provisions of the Mortgage, and the contemplated appointment of a receiver, pending resolution of this matter, in order to care for, operate, and maintain the Mortgaged Property, borrow funds as necessary should the rents, issues, and profits prove to be insufficient, and otherwise take all actions in accordance with applicable law and the Court's orders.

WHEREFORE, Plaintiff prays that the Court:

A. Enter judgment in Plaintiff's favor and against Borrower for the amounts due under the Loan Documents, together with interest, costs and attorneys' fees;

B. Declare the Mortgage to be a lien upon the Mortgaged Property described therein securing payment of the amounts owed to Plaintiff senior and superior to each party defendants' interest, if any, in the Mortgaged Property;

C. Declare the assignment of leases and rents contained in the Mortgage to be a lien on the rents and other property described therein securing payment of the amounts owed to Plaintiff under the Note and the other Loan Documents, senior and superior to each party defendants' interest, if any, in the rents;

D. Upon Plaintiff's request therefore, appoint a receiver to take possession of the Mortgaged Property, maintain and manage the same, and to operate the same and any related accounts, to collect the rents, issues and profits, and to keep an accounting thereof, pursuant to the Court's order;

E. Enter an order and decree of foreclosure of the lien against and security interest or other interest in the Mortgaged Property held by Plaintiff, as well as other junior or subordinate liens against or security or other interests in the Mortgaged Property, which order and decree shall, inter alia:

1. Determine the total amount due at the time of judgment to Plaintiff under Loan Documents, including principal, interest, late charges, collection costs, reasonable attorneys' fees, and such other amounts as may be proven.
2. Declare that the sums due and owing to Plaintiff under the Loan Documents, together with interest thereon, late charges, collection costs, reasonable attorneys' fees, and such other amounts, as may be proven, are a lien upon the Mortgaged Property.
3. Ascertain the total number of liens on the Mortgaged Property, the total amount due in respect of each said lien, and the relative priority thereof.
4. Appoint a commissioner to take possession of the Mortgaged Property, authorize said commissioner to sell the Mortgaged Property, or any part thereof, for cash and lawful currency of the United States of America in a manner by law and by order of this Court, and authorize and direct such commissioner, upon confirmation of said sale by this Court, to make and deliver to the purchaser or purchasers such instruments of conveyance of the Mortgaged Property, as may be appropriate.
5. Decree that all parties herein, including all persons claiming any interest in or liens upon the Mortgaged Property under or through all parties herein, except those persons, if any, determined to hold interests superior to Plaintiff, shall be barred and foreclosed from all

right, title, interest, claim, and lien (at law or in equity) in and to the Mortgaged Property.

6. Authorize and direct such commissioner, after payment of all necessary expenses of such sale, and after payment of attorneys' fees fixed and determined by this Court, to apply all proceeds thereof, so far as the same may be necessary, in payment of the amounts found due and owing Plaintiff under the Loan Documents, including all principal, interest, late fees, collection costs, reasonable attorneys' fees and such other amounts, as may be as may be proven, and, if any proceeds shall then remain, to apply such remaining proceeds in favor of other parties as the Court shall determine to be entitled thereto in the order of priority determined by the Court, and to apply the balance of the proceeds thereof, if any, as the Court shall deem appropriate.
7. Authorize Plaintiff to be a purchaser at any said sale of the Mortgaged Property, and authorize the amount, which the Court determines to be due and owing, to be credited against any down payment or purchase price in respect of any bid or purchase by Plaintiff, provided that the same shall be without prejudice to any prior lienholder.

F. Direct that upon foreclosure of the Mortgage, that the Court issue a Writ of Ejectment, which shall authorize removal of all persons from the Mortgaged Property and put the Plaintiff and a confirmed successful purchaser in full possession of the Mortgaged Property.

G. Direct that if the proceeds of the sale of the Mortgaged Property are insufficient to pay the amount due to Plaintiff and it appears that a deficiency exists, that judgment be entered against Borrower, and any other party shown to be liable therefor, including Doe Additional Cross-Claim Defendants if appropriate, jointly and severally, for such deficiency.

H. Direct that if the proceeds of the sale of the Mortgaged Property exceed the amount due to Plaintiff under the Loan Documents, that Plaintiff shall be awarded such additional sums as it may be entitled to receive under the Loan Documents;

I. Award Plaintiff its attorneys' fees and costs incurred herein, and such other and further relief as is just and equitable.

DATED: Honolulu, Hawai'i, December 6, 2021.

/s/William Meheula

WILLIAM MEHEULA

NATASHA L.N. BALDAUF

D. KAENA HOROWITZ

Attorneys for Plaintiff

WILMINGTON TRUST NATIONAL

ASSOCIATION AS TRUSTEE FOR THE

BENEFIT OF THE HOLDERS OF BANK 2018-

BNK14, COMMERCIAL MORTGAGE SERIES

2018-BNK14, by and through its Special Servicer

Rialto Capital Advisors, LLC

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WILMINGTON TRUST NATIONAL ASSOCIATION
AS TRUSTEE FOR THE BENEFIT OF THE
HOLDERS OF BANK 2018-BNK14, COMMERCIAL
MORTGAGE SERIES 2018-BNK14, by and through
its Special Servicer Rialto Capital Advisors, LLC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

HILO DIVISION

STATE OF HAWAII

WILMINGTON TRUST NATIONAL
ASSOCIATION AS TRUSTEE FOR THE
BENEFIT OF THE HOLDERS OF BANK
2018-BNK14, COMMERCIAL MORTGAGE
SERIES 2018-BNK14, by and through its
Special Servicer Rialto Capital Advisors,
LLC,

Plaintiff,

vs.

WHR LLC, a Hawaii limited liability
company, JOHN DOES 1-50, JANE DOES

CIVIL NO.: 3CCV-21-0000360
(Foreclosure)

DECLARATION OF JOAO GAUER

EXHIBIT 4

1-50, DOE PARTNERSHIPS 1-50, DOE
CORPORATIONS 1-50, DOE ENTITIES
1-50 and DOE GOVERNMENTAL UNITS
1-50,

Defendants.

DECLARATION OF JOAO GAUER

I, JOAO GAUER, under penalty of perjury, state of my own personal knowledge as follows:

1. I am an Asset Manager with Rialto Capital Advisors, LLC ("**Rialto**"). I am over the age of 18 years and I am competent to make this Declaration and do so based on my personal knowledge, except where otherwise indicated.

2. Rialto is the Special Servicer for Plaintiff Wilmington Trust National Association as Trustee for the Benefit of the Holders of Bank 2018-BNK14, Commercial Mortgage Pass-Through Certificates, Series 2018-BNK14 ("**Lender**"), who is the owner and holder of that certain loan in the original principal amount of \$50,000,000.00 (the "**Loan**") owed by Defendant WHR LLC, a Hawaii limited liability company ("**Borrower**"), which Loan is the subject of Plaintiff's Motion for Summary Judgment, Decree of Foreclosure and Order of Sale (together with the supporting memorandum, the "**Motion and Memorandum in Support**") filed by Lender.

3. I am authorized to make this Declaration in support of the Lender's Motion and Memorandum in Support.

4. Lender is in the business of, among other things, managing, administering, and collecting loans it holds. My responsibilities as an Asset Manager for Rialto include the administration of certain loans held by Lender that are in default. In order to do my job, I am required to have, and I do have, personal knowledge of how and where Lender's business records are maintained and of how to access those business records.

5. It is the Lender's regular practice in the regular course of its business to keep certain records in connection with the loans that it owns or services, including the Loan at issue in this matter. The Lender's business records are made at or near the time of the occurrence of a subject event, and, in most cases, contemporaneously with the event.

6. The Lender's business records include, among other things, documents such as promissory notes and loan agreements which evidence the terms of the loans, mortgages or deeds of trust which evidence a borrower's agreement to secure repayment of the loans with certain real property, and documents evidencing the transfer or assignment of the loans to the Lender.

7. The Lender also keeps records of the payments made by a borrower and other records of a borrower's compliance with the terms of the loan documents. The Lender maintains those records as its regular practice and in the regular course of its business because the Lender could not conduct its business without them, because it is prudent business practice to do so, and because the documents may be required by bondholders of the Lender, investors, or rating agencies.

8. As an Asset Manager with Rialto, the Special Servicer authorized to act on behalf of the Lender in connection with the Loan, I have access to and have reviewed the business records with respect to the Loan. Specifically, I have reviewed: (a) many of the documents executed in connection with, or related to, the Loan, including, specifically, the original promissory note in this matter, (b) the payment records related to the Loan, and (c) information supporting the Lender's Motion and Memorandum in Support due to, among other things, non-payment.

9. From my review of the Lender's business records and from my involvement in this matter, I have personal knowledge of the facts set forth in this Declaration.

10. **Exhibits A through H** that are attached hereto are true and exact copies of documents that are kept in the course of a regularly conducted activity of the Lender, and which

the Lender, through its designated custodian and for a period of time by Rialto, maintains as a regular practice.

11. On or about August 31, 2018, Wells Fargo Bank, National Association (“**Original Lender**”) and Borrower executed a Promissory Note in the original principal amount of \$50,000,000 (the “**Note**”) and a Loan Agreement (the “**Loan Agreement**”), pursuant to which Original Lender agreed to make the Loan to Borrower for the purpose of financing the purchase of certain real property and improvements located in Waiakea, District of South Hilo, Island and County of Hawaii, State of Hawaii. True and correct copies of the Note and Loan Agreement are attached as **Exhibits A and B**, respectively.

12. The Note is secured by a Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated August 31, 2018 (the “**Mortgage**”). A true and correct copy of the Mortgage is attached as **Exhibit C**.

13. The Mortgage was recorded on September 5, 2018, in the Bureau of Conveyances of the State of Hawaii (the “**Bureau**”) as Document No. A-68220552 and in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the “**Land Court**”) as Document No. T-10474133, to secure full payment of all amounts due under the Note and the performance by the Borrower of all obligations under the Loan Agreement, Note, Mortgage, and other loan documents specified in the Loan Agreement.

14. The Mortgage grants the holder of the Note a first lien on Borrower’s leasehold interest in certain real property located at 93 Banyan Drive and 1713 Kamehameha Avenue in Hilo, Hawaii, identified by Tax Map Key Nos. (3) 2-1-001: 012 and (3) 2-1-005: 013,016, 017, 032, 046 & 027, pursuant to the terms of that certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844 dated January 20, 2006, together with the buildings and other improvements constructed thereon, all agreements and contracts pertaining to the use,

maintenance, leasing, and management of said real property (collectively, the “**Property**”) and all deposits, rents, profits, and revenues generated by the Property (“**Rents**”).

15. On or about September 4, 2018, the Borrower authorized the Original Lender to record a UCC-1 Financing Statement, which was recorded in the Bureau as Document No. A-68210662 and subsequently amended as Document No. A-68240947 (collectively, the “**UCC-1**”), covering and granting Original Lender a perfected security interest in the Rents, personal property and other collateral described therein. A true and correct copy of the UCC-1 is attached hereto as **Exhibit D**.

16. The Note, Loan Agreement, Mortgage, UCC-1 and all other loan documents specified or referred to in the Loan Agreement, including but not limited to all assignments thereof, are collectively referred to hereinafter as the “**Loan Documents**.”

17. Effective as of September 27, 2018, all right, title and interest of the Original Lender under the Loan Documents was assigned to the Lender pursuant to the terms of that certain (i) Allonge (the “**Allonge**”); (ii) Assignment of Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing recorded in the Bureau as Document No. A-69290683 and filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. T-10581298 (the “**Assignment of Mortgage**”); and (iii) General Assignment (the “**General Assignment**”). True and correct copies of the Allonge, which is affixed to the Note, the Assignment of Mortgage and the General Assignment are attached hereto as **Exhibits A, E and F**, respectively.

18. On or about November 5, 2018, an Amendment of the UCC-1 was recorded in the Bureau as Document No. A-68830483 (the “**UCC-1 Assignment**”), assigning all collateral under the UCC-1 to the Lender. A true and correct copy of the UCC-1 Assignment is attached hereto as **Exhibit G**.

19. The Lender is the current holder of the Note.

20. The Lender has complied with all terms of the Note.

21. Article 2 of the Note, Section 7.1 of the Mortgage, and Section 10.1 of the Loan Agreement provide that an Event of Default occurs if any portion of the monthly debt service or required reserve funds are not paid when due.

22. Pursuant to the Loan Agreement, until the Note is repaid in full, the Borrower is obligated to pay monthly installments of principal and interest, together with required reserve payments, on the eleventh (11th) day of each calendar month.

23. Beginning with the payment due on April 11, 2020, and continuing each month thereafter, the Borrower failed to pay the monthly installment of principal and interest, together with the required deposit into the reserve accounts (collectively, the “**Monetary Defaults**”).

24. Each of Borrower’s failures to punctually perform the obligations and conditions of the Note, Loan Agreement and Mortgage is an independent Event of Default.

25. By letter, dated July 23, 2021, Borrower was given notice that an Event of Default existed under the Loan Documents as a result of Borrower’s failure to pay the monthly debt service and reserve payments due on April 11, 2020 and on each monthly payment date thereafter (the “**Default Notice**”). The Lender also accelerated the maturity date of the Loan and demanded that the Borrower pay the Debt in full (including, without limitation, accrued interest calculated at the “Default Rate,” as such term is defined in the Loan Agreement). A true and correct copy of the Default Notice is attached as **Exhibit H**.

26. After the Loan was accelerated, the Borrower made partial payments on September 13th, October 8th, November 9th and December 9th of 2021, which totaled \$1,635,842.04 in the aggregate. No other payments have been made since April of 2020 and the Loan remains in monetary default.

27. In addition to the Monetary Defaults, the Borrower also violated Section 5.1 of the Loan Agreement and Section 17.2 of the Amended and Restated Operating Agreement of WHR LLC (the “**Operating Agreement**”) by entering into the following unauthorized debt obligations without the Lender’s knowledge and consent: (i) \$4 million in member loans and advances beginning in August of 2018; (ii) a Paycheck Protection Program loan in the amount of \$1,525,790 on May 4, 2020; (iii) a Paycheck Protection Program loan in the amount of \$1,956,066 on February 26, 2021; and (iv) an Economic Injury Disaster Loan in the amount of \$159,900 in July of 2020 (collectively, the “**Non-Monetary Defaults**”).

28. By letter dated January 20, 2022, the Lender notified the Borrower that it had engaged FTI Consulting, Inc. (“**FTI**”) to conduct a review and audit of the Borrower’s financial affairs.

29. In addition to the defaults noted above, FTI’s audit of the Borrower’s books and records revealed disbursements, in violation of Sections 5.1(a)(iv) and 13.1(a)(viii) of the Loan Agreement and Section 6.15.1.3 of the Operating Agreement, to Borrower-affiliated entities of more than \$430,000 (the “**Disbursement Defaults**”) during 2020 and 2021 -- a time when no payments were being made to the Lender, and the Borrower was hundreds of thousands of dollars past due on its payments under its hotel franchise agreement and owed thousands of dollars to various utility providers.

30. The audit also uncovered the fact that the Borrower was no longer adhering to the terms of the Hotel Restaurant Lease dated as of April 13, 2018 (the “**Restaurant Lease**”), pursuant to which the Borrower had leased the Hula Hulas Restaurant at the Property (the “**Restaurant**”) to HH Hilo LLC, an affiliate of Borrower.

31. Without notice to or approval from the Lender, control of the Restaurant was shifted to another borrower affiliate in the Fall of 2019. In connection therewith, the Borrower entered

into a new arrangement whereby the Borrower was to receive 51% of the profits as its “rent,” while the affiliate would receive 49% of the profits plus an additional 3.25% management fee and a “consulting fee” in the amount of \$10,471.20 per month.

32. In violation of the Loan Agreement, none of the foregoing changes with respect to the control, operation or lease terms of the Restaurant were disclosed to or approved by the Lender (collectively, the “**Restaurant Defaults**”).

33. Although the Lender has documented multiple Events of Default dating back to 2018, including, but not limited to, the Non-Monetary Defaults, the Disbursement Defaults and the Restaurant Defaults, for purposes of its summary judgment motion, and without waiving any of the other defaults, the Lender is relying upon the Monetary Defaults. Based on the foregoing and calculating default interest as of the date of the Monetary Defaults, and without waiving the default interest attributable to the other Events of Default, the total amount due and outstanding under the Loan Documents as of October 11, 2022, was at least \$65,017,078.17. This amount is itemized as follows:

Unpaid principal balance:	\$48,917,177.03
Accrued Interest (from 6/11/20 - 10/11/22):	\$ 6,622,081.31
Default Interest (from 4/11/20 - 10/10/22):	\$ 5,501,060.46
Late Fees:	\$ 613,530.50
Special Servicing Fee:	\$ 287,286.07
Tax and Insurance Advances:	\$ 285,818.16
Property Protection Advances:	\$ 261,462.99
Interest on Advances:	\$ 364,651.23
Liquidation Fee:	\$ 643,211.83
Yield Maintenance/Prepayment:	\$ 1,467,515.31
Payoff Processing Fee:	\$ 600.00
Audit:	\$ 81,629.72
Subtotal	\$65,046,024.61
Less Reserve Balance:	(\$) 28,946.44
Total	\$65,017,078.17

34. Interest continues to accrue at the contract rate of 5.72% per annum, which is \$7,772.40 per diem, and the default rate of 4% per annum, which is \$6,691.06 per diem.

35. Attorneys’ fees, costs and expenses also continue to accrue.

36. As of October 11, 2022, the Lender was holding \$4,951,643.90 in suspense. This was, however, prior to the requested disbursement of operating expenses for the months of November and December, which totaled \$3,857,307.86. To the extent that the balance of the funds held in suspense are not disbursed to cover future operating expenses or capital needs at the Property, they will be applied to reduce the Borrower's Debt (as that term is defined in the Loan Agreement) in accordance with the terms of the Loan Documents.

37. As of the filing of the Motion and Memorandum in Support, Borrower has failed to cure the Events of Default and remains in breach of the Loan Documents.

I, JOAO GAUER, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: Miami, Florida, December 21, 2022



JOAO GAUER

Minutes

DATE: MARCH 20, 2023 JUDGE: HONORABLE HENRY T. NAKAMOTO, JUDGE PRESIDING CLERK: JAMIE AINA REPORTER: JAVS BAILIFF/LAW CLERK: OLIVIA STEVENS 3CCV-21-360; WILMINGTON TRUST NATIONAL ASSOCIATION VS. WHR, LLC RE: MOTION FOR SUMMARY JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE CONVENED 8:03 A.M. APPEARANCES: GREGORY CROSS & HEATHER FOLEY, ATTYS FOR PLTF, VIA ZOOM TED PETTIT, ATTY FOR DEFT, VIA ZOOM COURT STATED REVIEWED PLEADINGS. G. CROSS HAD NOTHING FURTHER. STRAIGHT FORWARD. ENTITLED TO PROCEED UNDER FORECLOSURE. WILLING TO GO 60 DAYS FROM TODAY TO GET FORECLOSURE ORDER. T. PETTIT MADE ARGUMENT. ASKED COURT DENY MOTION AS TO ANY DETERMINATION OF AMOUNT OF DEBT. ASKED FOR ITEMIZED PAYOFF STATEMENT FOR REASONS STATED. MOVING FORWARD W/ REFINANCING. ASKED TO CONTINUE FOR 60 DAYS. G. CROSS MADE ARGUMENTS. ASKED FOR ORDER TO CONDUCT SALE. AGREE TO NOT CONDUCT SALE UNTIL 60 DAY FROM TODAY. **COURT STATED REVIEWED PLEADINGS, UNDERSTAND SITUATION. FINDING THERE WAS VALID LOAN DOCUMENTS IN THIS MATTER, NO DISPUTE THAT THERE WAS A DEFAULT AND DEFAULT NOT CURED. UNDERSTAND THERE ARE ISSUES REGARDING THE COUNTERCLAIM AND AMOUNTS OWING BUT DEFT WILL NOT BE PREJUDICED AS THERE ARE STILL COUNTERCLAIMS PENDING. COURT GRANTED MOTION, APPOINTED RECEIVER VAN BUREN AS THE COMMISSIONER, NOT DETERMINING THE AMOUNT OF DEFAULT JUDGMENT AT THIS TIME, STAY ENTRY OF THAT ORDER FOR 60 DAYS FROM TODAY. G. CROSS TO DRAFT ORDER FOR TODAY.** T. PETTIT ASKED THAT ORDER TODAY DOES NOT INTERFERE W/ THE RECEIVERS WORK TO HELP THE BORROWER REFINANCE THE PROPERTY. G. CROSS STATED WANT THAT AS WELL. COURT STATED RECORD TO SO REFLECT.