

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

May 12, 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) 2-1-001:012 and 2-1-005:013, 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) 2-1-001:012 and 2-1-005:013, 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 was paid on March 16, 2023.

As of April 24, 2023, the status of all lease compliance items is as follows:

RENT: WHR is current with rent obligations, with the possible exception of additional interest charges and late fees for February and March 2022.²

² A COVID-related rent deferral approved by the Board at its meeting of May 28, 2021, Item D-4, as amended, created some challenges for Land Division's billing system. The Fiscal Office is currently auditing the account to determine whether any outstanding amounts are owed.

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 ³	7/17/18 improvements were removed
11/13/20	Delinquent Wastewater account	12/28/20 – Repayment plan w/County of Hawaii Wastewater Branch

REMARKS:

Introduction:

This matter was previously scheduled to be taken up at the Board's April 14 and April 28, 2023 meetings, but was withdrawn at WHR's request. To address concerns WHR had with the staff submittal, WHR requested a meeting with the Chairperson and the Land Division Administrator by an undated letter received by the Department on April 18, 2023. See Exhibit 2 attached. At that meeting, Ed Bushor of WHR distributed the documents attached as Exhibit 3 and used the meeting time to apprise the Chairperson of all the good things he has done for Hilo and Hawaii.

Upon the Land Division Administrator's questioning, Mr. Bushor did admit the proposed lender, UBS AG, has not provided (or will not provide) anything in writing to say WHR's loan is approved or provide any more definitive specificity on the loan terms (i.e., no confirmation from the lender that the loan is approved or lender disclosure or assurances as to certain specific terms and conditions of the loan such as what is the exact interest rate [annual percentage rate], what are the minimum required debt service payments throughout the term of the loan, whether the debt service payments include 100% of the accrued interest or only partial interest with the remaining accrued interest being added to the back-end increasing loan balance due at loan maturity to an amount that exceeds the amount consented to by the landlord, what is the expected loan balance due at maturity, etc.). Therefore, because of this uncertainty and WHR's inability to

³ 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.

provide written proof of loan approval or the specific loan terms as had been repeatedly requested by staff, staff's analysis and recommendation to deny the instant request remains unchanged.

Another item that was raised at the meeting with Mr. Bushor was the potential withdrawal of the golf course property from the subject lease. That item came before the Board at its meeting of May 28, 2021, under agenda Item D-4, when the Board was considering the withdrawal of the golf course as part of a workout of WHR's default in the lease rent. GL5844 was sold by public auction and, as a result, it cannot be amended. However, the auction lease specifically provides for the withdrawal of the golf course:

12. Character of use. The Lessee shall use or allow the premises leased, on all parcels, except the golf course parcel, to be used solely for hotel and hotel-related uses (including retail, restaurant, banquet, commercial office, and spa facilities), but excluding condominium or hotel condominium uses. The golf course parcel (tax map key no. (3) 2-1-01:12) shall be used for golf course and golf course related uses (including clubhouse, restaurant and bar, cart barn and driving range) and other recreational and parking uses as may be permitted under the county zoning ordinances or land use permits obtained from the county; provided, however, that in the event the golf course parcel is withdrawn or deleted from the lease, any rights to use the golf course parcel to serve the hotel parcels shall terminate. The Lessee, with the consent of the Department of Land and Natural Resources, may sublease portions of the subject property for uses not permitted above (e.g., telecommunication antennas), provided that the Department of Land and Natural Resources shall have the right to revise the rent based on the rent to be charged the sublessee.

(Emphasis added.)

Additionally, there is authority for the Board to withdraw lands from a State lease pursuant to Section 171-61, HRS, with consent of the lessee and each hold of record having a security interest:

§171-61 Cancellation, surrender. When public land is disposed of with a building requirement and, thereafter, prior to the erection of the building, the land becomes or is discovered to be unfit for the erection of the building, or by change of conditions it becomes impossible or impractical to erect the building, the board of land and natural resources may cancel the disposition, repossess the land, and return to the party from the special land and development fund, notwithstanding the order of priority set forth, the aggregate amount of principal and interest theretofore paid by the party.

Whenever land or a portion thereof under lease can be re-leased or sold for a higher and better use, or for the existing use to a greater economic benefit to the State, the board, subject to the consent of the lessee, the lessee's successors, or assigns, and each holder of record having a security

interest, may cancel the lease without compensation to the lessee or withdraw a portion of the land from the lease and re-lease or sell the same; provided that in the event of withdrawal of a portion, the board may in its discretion allow a proportionate reduction in rent; and provided further that in the event buildings and improvements have been erected by the lessee, as permitted under the lease, on the land or portion thereof under lease affected by the cancellation or withdrawal, the board shall pay to the lessee a sum not to exceed the replacement value, less depreciation at the rates used for real property tax purposes.

As expressly stated in Section 12 of the lease, any rights WHR has to use Parcel 12 in conjunction with the hotel terminate after withdrawal. The Board deferred action on the withdrawal aspect of the submittal at its May 28, 2021 meeting. Any potential withdrawal of the golf course in the future would need to be negotiated with WHR and the holder of any mortgage to which the Board has consented.

Loan History:

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.⁴ 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.⁵

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.⁶ Then Ed Olson 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

⁴ In 2022, the Board would later learn at least a portion of the funds was a withdrawal of profits by the principals of WHR.

⁵ 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.

⁶ The mortgage was assigned from Wells Fargo to Wilmington Trust.

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.⁷ 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,⁸ 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 annum⁹ 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 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

7 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.

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

9 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.

property 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 Board meeting that current market conditions are not suitable for a short-term jumbo loan/mortgage on distressed real estate in foreclosure proceedings.¹⁰ 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,¹¹ the Wells Fargo/Wilmington Trust and the Olson/Naniloa LLC¹² 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 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.

10 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.

11 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.

12 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 schedule of Membership Interests in WHR, which is included as Exhibit A of the WHR LLC Operating Agreement (excerpted from the First Amended Complaint filed in the Olson/Naniloa LLC lawsuit on September 23, 2021), is attached as Exhibit 4.

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 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 5 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 5, 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.¹³ 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.

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:

¹³ 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.

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 6 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 7 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.¹⁴ 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 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"

¹⁴ The written order is pending but the clerk's minutes of the summary judgment hearing is attached as Exhibit 8.

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 5, 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.

In other words, WHR is seeking not only a bailout of its monetary default under the mortgage, but a bailout of Mr. Bushor and other WHR affiliates who allegedly funneled hotel revenues away from payment of the debt service on the Washington Mutual/Wilmington Trust mortgage, instead directing the funds to WHR affiliates. In staff's view, the State should avoid any action that would give the appearance of ratifying the alleged actions of WHR and its affiliates in this case. Based on the foregoing, staff therefore recommends denial of the March 2023 mortgage consent request.¹⁵

¹⁵ On April 26, 2023, WHR notified Land Division that WHR may request Board consent to assign a 20% membership interest in WHR to a third party as part of a workout of its loan with its current lender. However, as of the date of the writing of this submittal, Land Division has not received a formal application for consent to the transfer and does not have enough details to properly analyze the proposal or make a recommendation to the Board.

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

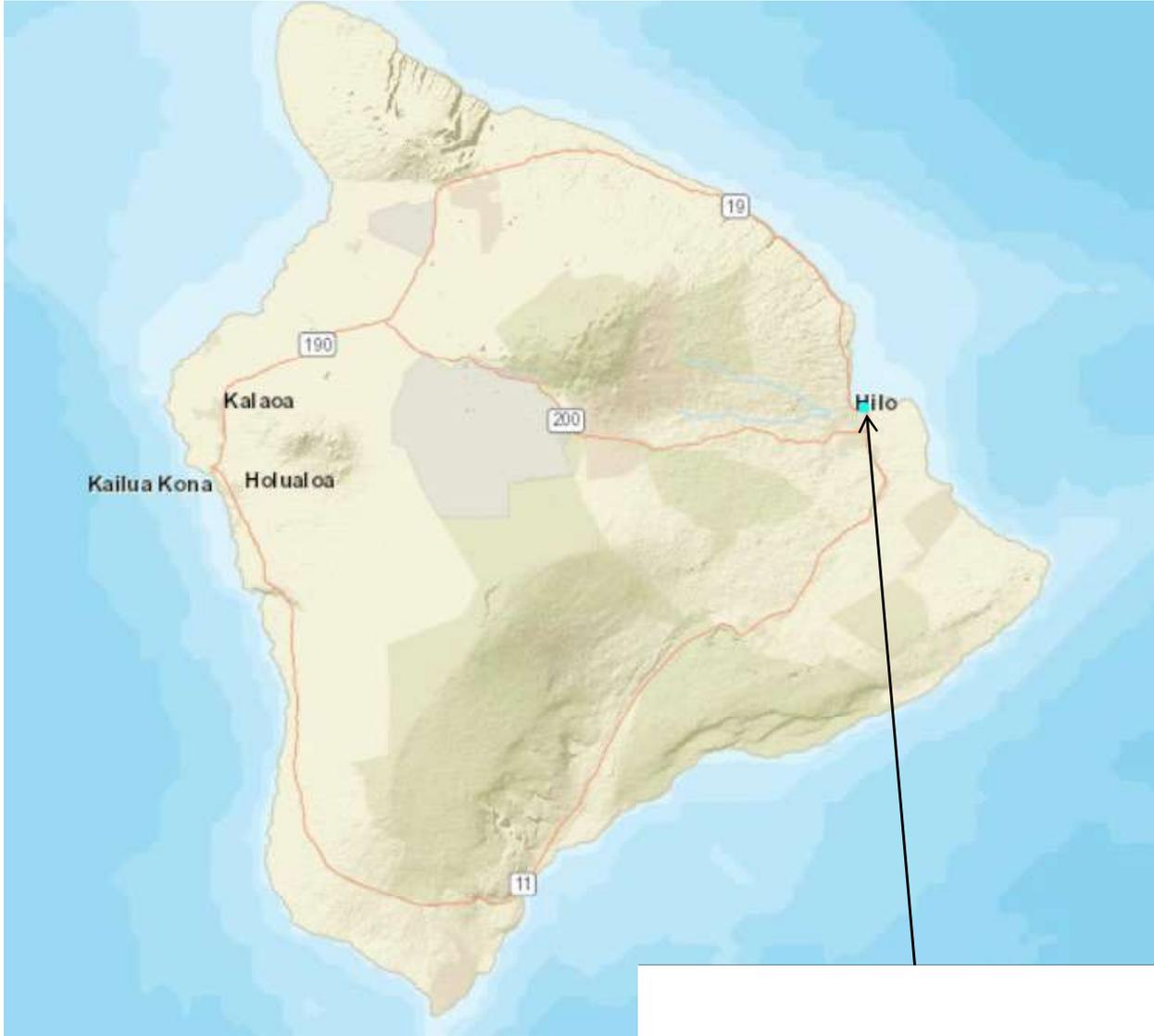
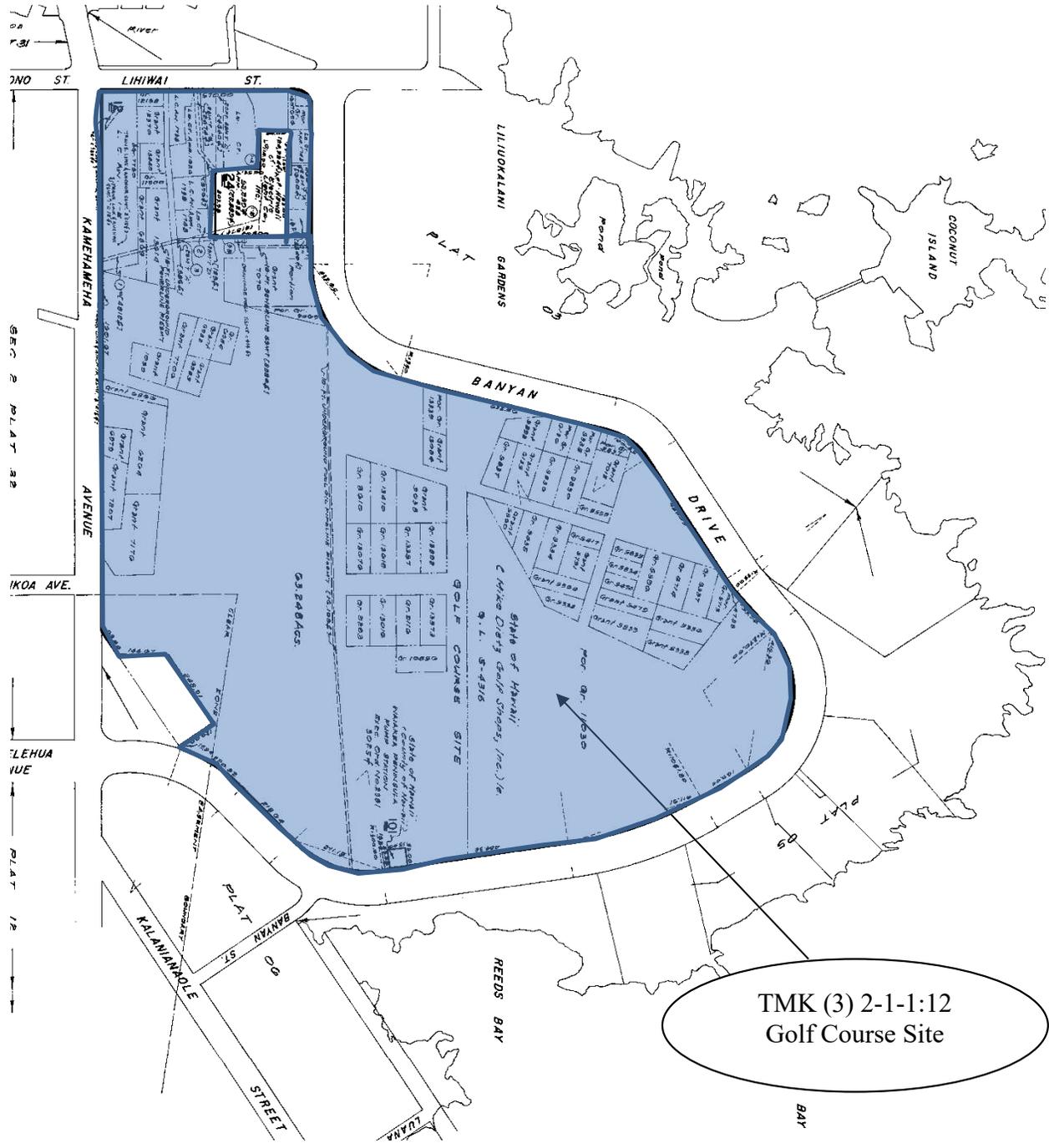


EXHIBIT 1



TMK (3) 2-1-1:12
Golf Course Site

**GRAND NANILOA RESORT
A DOUBLETREE BY HILTON
WHR, LLC
93 BANYAN DRIVE
HILO HAWAII 96720**

Chairperson, Dawn N.S. Chang
State of Hawaii Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl St. Room 132
Honolulu, Hawaii 96813

Re: Grand Naniloa Resort, DoubleTree by Hilton, Hilo, Hawaii (“**Naniloa**”)
April 28, 2023 Meeting Agenda Lessee’s Request for Consent to Mortgage
General Lease No. S-5844, WHR LLC, (“**Lessee**”)

Aloha Chairperson Chang:

Congratulations on your new appointment as Chair of Department of Land and Natural Resources. I would enjoy personally meeting with you and discussing the Naniloa’s great future and commitment to this great State of Hawaii.

May I meet with you and Russell Tsuji this week to insure you both have an update from me personally well before our Agenda item. I will make any day or time work in accordance with your schedule.

The Naniloa’s positive impact on the community has been huge, and but for Covid pains of losses, we have been a catalyst for cultural and community benefits for the last 7 years. Only Covid caused our “prior loss issues” that we have now resolved. Our new loan cures all past negatives.

We also hope to continue our commitments to support Naniloa’s cultural alliances with Hokule’a and Polynesian Voyaging Society (Naniloa has greatly supported Hokule’a, Nainoa and Kalani (later being Hilo based captain), The Merrie Monarch Festival (we have supported for years Merrie Monarch and Aunty Luana Kawelu), Reeds Bay Park improvements (Naniloa’s 7+ year commitment to Mayor Billy, Mayor Kim and now Mayor Roth to provide additional parking) and many other Banyan Drive improvements.

We have heard from our Naniloa employees about a recent article in the Hawaii Tribune-Herald. It is unfortunate our Naniloa employees now fear (caused solely by inaccurate information) losing their jobs when we are in record profits and able to secure a new loan to put Covid storm in the past. In 2022, Naniloa posted \$7.7M in profit, which is what the Article should have told the employees. For our employees to produce \$2M higher profits than any previous year in history of the Naniloa deserves gratitude from ownership and the public. For clarity, our prior record was \$5.4M in profit in 2018, pre-Covid. Our employees represent the only Hilton employees not to be subject to a Hilton shut-down during Covid. This is based on our decision to

EXHIBIT 2

stay open during the entire pandemic—and “serve”. Our employees worked so diligently to maintain a safe hotel for the National Guard and all the nursing community that stayed at the hotel. We kept the Hotel open to enable our employees to retain their jobs when every other Hilton hotel shut down. Why? It was the right thing to do for our employees who we deem part of our Naniloa family. We knew we could overcome the storm and we have. We lost over \$10M due to Covid, but the State and ownership can now move past the storm and work together to assure a continuing success of the Hilo community.

Our hope is to accurately summarize to you as the newly appointed Chair what the Naniloa has in store for the future. And we need to work with DLNR to improve Banyan Drive and our positive future. We are excited about our new loan, and our future and we need the Board and yourself as Chair to have accurate facts about the Naniloa and our commitment to the Hilo Bay and Hilo Community.

All we ask is DLNR to understand our positive facts in order that Chair and the Board may accurately review and make great decisions in the best interest of the public good and interests of the Hawaiian communities.

Aloha and blessings,



Ed “Z” Bushor
CEO

Tower Development, Inc.
1050 Bishop 530
Honolulu, Hawaii 96813
Ph. 808.268.1903
ed@towerdevcon.com
www.towerdevcon.com

cc: Russell Tsuji
Governor Josh Green
Mayor Mitch Roth
Ryozo Ariyoshi
Governor George Ariyoshi

EXHIBIT 3
DOCUMENTS FROM ED BUSHOR 4/20/2023

Sustainable Loan Payments in 2018 Loan Versus 2023 -2027								
	Actual	Actual	Budget	Budget	Budget	Budget	Budget	Comments
	2018	2022	2023	2024	2025	2026	2027	
Item	DLNR Approved 2018 CMBS Loan	Sample Based on 2022 Net Income	DLNR Request 2023 UBS Loan	2023 UBS Loan	2024 UBS Loan	2025 UBS Loan	2026 UBS Loan	
Gross Revenues	\$ 22,199,649	\$ 28,211,599	\$ 27,596,012	\$ 27,596,012	\$ 27,596,012	\$ 27,596,012	\$ 27,596,012	Note, Budget has ihigher budgeted items but we maintained lower consevative budget for DLNR during 2024-2027
Net lincome	\$ 5,370,616	\$ 7,870,423	\$ 7,700,000	\$ 7,700,000	\$ 7,700,000	\$ 7,700,000	\$ 7,700,000	Reduced Bdget to be extra conservative in Budget for DLNR
Loan Payments (Assuming 2023 Loan)	\$ 3,915,000	\$ 3,915,000	\$ 3,915,000	\$ 3,915,000	\$4,420,502	\$4,420,502	\$4,420,502	UBS Loan for Years 1-2 & Years 3-5, the payments increase to \$4,420,502
Excess Cash Flow	\$ 1,455,616	\$ 3,955,423	\$ 3,785,000	\$ 3,785,000	\$ 3,279,498	\$ 3,279,498	\$ 3,279,498	Easily Sustainable



Factors Expert Would Consider to Determine Reasonable Consent (Per Section 20.a Naniloa Ground Lease)

Item	REASONABLE FACTORS 20.a. Authorized Mortgages...Lessee may from time to time with the prior written consent of the Chairperson, consent shall not be unreasonably withheld, assign this way of mortgage (an Authorized Mortgage	2018 CMBS Loan	New 2023 CMBS Loan	Comments
Background Factors	What type of Property?	1. Ground Lease 2. Outer Island 3. Hilton Branded 4. T-12 Cash Flow	1. Ground Lease 2. Outer Island 3. Hilton Branded 4. T-12 Cash Flow 5. Foreclosure	Factors That Dictate What Lenders will Bid (there are many factors but this list includes some of the primary factors experts would use.
Background Factors	What type of Lenders/Loans are Reasonably Attainable for this type of Property (Ground Lease/Outer Island/Hilton Hotels) ?	CMBS Loans	Bridge Loans & CMBS Loans	Due to the Foreclosure, and type of Property, experts would state that reasonable, primary lenders would be Bridge or CMBS finance. After Colliers marketed loan for 4 months, the Mortgage Expert for Colliers Bid over 30 companies and received 6 proposals of which Colli recommended UBS as a good choice of many good reasonable choices.
Background Factors	What lenders were the top bidders that submitted proposals in the bid process conducted by the expert at Colliers?	Wells Fargo CMBS	Wells Fargo CMBS, UBS CMBS, Citi CMBS, B of A CMBS	We also received bridge proposals but they were not advantageous as the CMBS proposals. See attached I
1)	Is the 2023 New Loan the Same Type of Loan Already Reasonably Consented to by DLNR in 2018?		Yes	Exact Same CMBS Loan type, 5 Years, Fixed Rate Loan
2)	Is the Lender an Institutional Qualified Lender?	Yes	Yes	2018 Wells Fargo & 2023 UBS
3)	Is the Loan-to-Value Less Than 70%?	Yes, equal to or Less 60%	Yes, Equal to or Less 60%	Loans Historically Average 70%+/- LTV and are "reasonable", but the 2018 and 2023 Loan a 60% LTV, which are beyond reasonable.
4)	Is the Value of DLNR Asset greater than 160% of the Loan? Meaning Very Secure Loan for DLNR	Yes	Yes	If DLNR need to assess value to get the property back, DLNR could sell at or close to the apprai could range from \$90M to potentially above \$100M potentially in 3 -5 years based on experts independent of owner, meaning the appraisal is 60% high amount. Again, this is a very reasonable protection for DLNR.
5)	Is the loan sustainable? Value and Income dictate this factor. See above for value and LTV discussion. Second discussion is, does the Income of Hotel support the new 2023 Loan? Note, Russell Tsuji missed many key factors, both market and underwriting related, so to provide an intent to deny, would be premature at best until understanding all of the facts involved with the proposed refinance.	Yes, experts would opine the 2018 loan was sustainable, and today the new loan is also sustainable due to LTV and Cash Flow of Hotel.	Yes, any expert in the U.S. would conclude that UBS's proposed 2023 loan is very reasonable & sustainable.	Note, only Covid was a blemish. Ownersh 2020, and made \$7.7M two years later. Manager worked tirelessly to create a miracle rebound of over \$7.7M over 2020, in just two years. Also, when Chair C the Consent for 2018 CMBS Loan, the net revenue was \$5,370,000. Today, the net revenue is \$7.7M for 2022, which is \$2.3M+ more than 2018. Thus, DL is more sustainable today than in 2018! Th the loan is very sustainable, and is very reasonable, and even moreso than in 2018.
6)	Is the Interest Rate Reasonable?	Yes	Yes	Our fixed rate is extremely reasonable and would be reasonable even at a higher rate under othe loan marketplace in U.S today. Our fixed rinterest rate is based on the closing date calculation of the SOFR Swap (As of April 20, is 3.416%) +3.40 the Term Sheet has a minimum 7.25% fixed interest rate.
7)	Interest Only for 2 Years	No	Yes	Lenders compete for this Loan and in order loan, some lenders sought to win the loan a of the 6 bidders sought interest only for 2-3 Years. We we liked those terms the best although the other loan to perform, as to avoid having to take a bridge loan, pay thereafter.
8)	Amortization Years 3-5 (Amortized over 30 Years)	Yes	Yes	the 2023 New Loan, but the difference is the amortization payments are only for Years 3-5 in the 2023 New Loan. Both are reasonable in the industry.
9)	is settled and released, which solely relating to the Covid Defaults.	Covid Didn't Exist	to Closing	as a conditon to the 2023 New Loan closing.
10)	Has this Borrower been fantasitc for the Community of Hilo prior to Covid, during Covid and is State of Hawaii?	Yes	Yes	No other Lessee along Banyan Drive has done more than this Borrower, to help restore Banyan Drive, help provide cultural benefits including helping Polynesion Voyaging Society, Merrie Monarch, local music and arts, and bring back the historical beauty of the Naniloa to its glory days.

Respectfully,
 Jordi deHoyos
 Vice President
 Colliers Mortgage, LLC

LAND COURT SYSTEM

REGULAR SYSTEM

Return by Mail () Pickup () or Recorded Electronically ()

To:

Total Number of Pages:

Affects Certificates of Title
Nos. 106,776 and 108,763

Tax Map Key Nos.(3) 2-1-005-
013, 016, 017, 027, 032, 046
and(3) 2-1-001-012

CONSENT TO MORTGAGE OF GENERAL LEASE NO. S-5844

This Consent is dated _____ ("**Effective Date**").

CONSENT is hereby given by the STATE OF HAWAII, by the Chairperson of the Board of Land and Natural Resources ("**Lessor**"), acting pursuant to Section 171-22, Hawaii Revised Statutes, as amended, in connection with that certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844 dated January 20, 2006, recorded in the State of Hawaii Office of Assistant Registrar ("**Land Court**") as Document No. 3385990 and in the State of Hawaii Bureau of Conveyances ("**Bureau**") as Document No. 2006-021241 (the "**Lease**"), leased by Lessor to WHR LLC, a Hawaii limited liability company ("**Lessee**"), as successor in

interest to Hawaii Outdoor Tours, Inc., pursuant to that certain Quitclaim Assignment and Assumption of Ground Lease recorded in the Land Court as Document No. T-8751081 and in the Bureau as Document No. A-50990611 ("**Quitclaim Assignment**"), executed by David Farmer, duly appointed Trustee of the Bankruptcy Estate of Hawaii Outdoor Tours, Inc., in the United States Bankruptcy Court for the District of Hawaii in that certain proceeding entitled "In re Hawaii Outdoor Tours, Inc." designated as Case No. 12-02279 (Chapter 11), and which such Lease and Quitclaim Assignment were duly noted on Certificates of Title No. 106,776 and 108,763.

Lessor hereby consents to that certain Mortgage and Security Agreement dated on or about even date herewith, in substantially the form attached hereto and made a part hereof as Exhibit A and to be recorded concurrently herewith in the Bureau and in the Land Court and noted on Certificates of Title No. 106,776 and 108,763 ("**Leasehold Mortgage**"), executed by Lessee for the benefit of UBS AG, a Swiss banking corporation, by and through its Branch Office at 1285 Avenue of the Americas, New York, New York and its successors and assigns ("**Lender**"), which secures that certain loan (the "**Loan**") from Lender to Lessee, which Leasehold Mortgage encumbers the "Property" (as defined in the Leasehold Mortgage and which includes the Resort Site (as defined in the Lease), the Golf Course and Allied Facilities Site (as defined in the Lease), the buildings and the Improvements (as defined in the Leasehold Mortgage) located thereon). Lessor reaffirms the terms of the Lease with respect to the Lender named herein. Lessor acknowledges that Lessor has approved the plans and specifications for the renovation of the Improvements. The Leasehold Mortgage (as the same may be amended or modified from time to time) is an "Authorized Mortgage" under the Lease and Lender is an "Authorized Mortgagee" under the Lease.

This Consent shall serve as evidence that Lessor has received a copy of the Leasehold Mortgage and the notice address for purposes of the notices under the Lease shall be sent to Lender as follows, or such other address as may be designated by Lender in writing from time to time:

UBS AG, by and through its branch office
at 1285 Avenue of the Americas, New York, New York
1285 Avenue of the Americas
New York, New York 10019
Attention: Transaction Management - Naja Armstrong
E-mail: naja.armstrong@ubs.com

with a copy to:

UBS AG, by and through its branch office
at 1285 Avenue of the Americas, New York, New York
1285 Avenue of the Americas
New York, New York 10019
Attention: Transaction Management - Racquel Small
E-mail: racquel.small@ubs.com

with a copy to:

McGuireWoods LLP
1251 Avenue of the Americas, 20th Floor
New York, New York 10020
Attention: Dennis W. Mensi, Esq.
Email: dmensi@mcguirewoods.com

Lessor hereby confirms that:

(a) Until the Loan has been paid in full, Lessor shall not:

(i) Agree to any mutual termination or cancellation or accept any surrender of the Lease, except upon the expiration of the term of the Lease or its termination pursuant to any express provision of the Lease; or

(ii) Permit any amendment, alteration or modification of the Lease (including, without limitation, any amendment or other modification to the economic terms of the Lease, any provisions addressed in this Consent, any provisions relating to Lender's rights under the Lease, the term of the Lease and/or any material increase in Lessee's obligations or material decrease in Lessee's rights under the Lease), unless Lender has given its prior written consent to such amendment or modification, which consent shall not be unreasonably withheld and shall be deemed given if a written refusal to consent together with a written explanation of the reasons for such refusal to consent is not received from Lender within ten (10) Business Days after receipt by Lender of a written request for Lender's consent to a proposed amendment, alteration or modification.

(iii) As used herein, "Business Day" shall mean any day other than a Saturday, a Sunday or a legal holiday in the State of Hawaii or day on which national banks are not open for general business in the State of New York or in the State of Hawaii.

(b) The Loan may be transferred or assigned without the consent of Lessor and any such transferee or assignee shall also be deemed an "Authorized Mortgagee" under the Lease.

(c) Until the Loan has been paid in full, Lessor will not exercise any lien rights it may have pursuant to Section 19 of the Lease on any buildings and improvements owned or placed on the Property by Lessee, any property kept or used on the Property, or any sublease rents of the improvements and buildings located on the Property; provided, however, that the foregoing shall in no way affect Lessor's reversionary interest in the Property as a result of, among other things, expiration of the Lease term or earlier termination of the Lease.

(d) With respect to Section 20.d. of the Lease, any new ground lease entered into between Lessor and any successor Lessee, Lessor shall assign to the successor Lessee all space leases and subleases under which the tenants have attorned to Lessor (if any), or which are deemed by their terms to continue in effect, within 10 days following execution of the new ground lease.

(e) The renting of rooms in the ordinary course of Lessee's business does not constitute renting or subletting for purposes of Section 14 of the Lease.

Lessor hereby certifies that, the following statements are true and correct, recognizing that Lender and its successors and assigns will rely on such statements:

(1) As of the date of execution of this document, Lessee is the current lessee under the Lease.

(2) As of the Effective Date, the following events have occurred and remain uncured which with the passage of time and/or the giving of notice may constitute a default:

NONE.

(3) Except as set forth in Paragraph (2) above, as far as Lessor is aware, the Lessee is not in default in any respect as of this date nor has any event occurred which with the passage of time or the giving of notice would constitute a default.

(4) Except as set forth in Paragraph (2) above, there are no claims for damages, rents due, or other liability Lessor is aware of against Lessee arising out the Lease or performance of the

terms, covenants or conditions of the Lease.

(5) The Lease is in full force and effect and has not been modified, supplemented, extended or amended as of this date.

(6) As of the date hereof, no Base Rent is due from Lessee under the Lease.

(7) Base Rent has been paid through July 31, 2023. The Base Rent currently payable by Lessee under the Lease is \$580,270.44 per annum. The next installment of Base Rent, in the amount of \$290,135.22, is due on August 1, 2023. Base Rent escalates 1.5% per year, effective February 1 of each year, and will re-set in accordance with Exhibit D to the Lease as of each of February 1, 2037, February 1, 2047 and February 1, 2057.

(8) Percentage Rent due under the Lease for 2021 in the amount of \$_____ has been paid. Percentage Rent due under the Lease for 2022, in the amount of (a) two percent (2%) of the annual gross revenue from the Property minus (b) the annual Base Rent for 2022, is due not later than June 29, 2023.

(9) The term of the Lease commenced on February 1, 2006, and expires on January 31, 2071, unless sooner terminated as provided in the Lease.

(10) The proceeds of any insurance coverages maintained by Lessee shall, until the Loan has been paid in full, be paid to Lender, as the primary loss payee as contemplated by Section 20(c) of the Lease, and held by Lender for application as required pursuant to Section 42 of the Lease.

(11) If the Lease is terminated in accordance with Section 42 of the Lease, the payment of the balance owing on any mortgage loan (including, without limitation, the Loan) shall be made prior to the allocation of the insurance proceeds between Lessor and Lessee.

(12) Section 22 of the Lease does not prohibit Lessee from making a separate claim against any condemning authority for the full value of Lessee's interest in the premises demised by the Lease and the improvements thereon and the business operated thereon by Lessee.

(13) The fee and leasehold estate in the premise and improvements referenced in the Lease shall not merge, even if owned

by the same party, for so long as the Loan remains outstanding.

(14) Lessor shall, with not less than thirty (30) days' prior written notice (but not more frequently than once in any 12-month period if no default is continuing under the Lease, and not more frequently than twice in any 12-month period otherwise), deliver a certification to the then-current (or any prospective) Authorized Mortgagee, substantially in the form of items (1) through (13) above, together with such revisions as are reasonably necessary so as to make the statements set forth therein true, correct and complete.

[Signature Page to Follow]

IN WITNESS WHEREOF, the STATE OF HAWAII, by the Chairperson of the Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be duly executed this _____ day of _____, 20____.

STATE OF HAWAII

Approved by the Chairperson of the Board of Land and Natural Resources on _____.

By _____
Chairperson
Board of Land and
Natural Resources

APPROVED AS TO FORM:

Deputy Attorney General

Dated: _____

Exhibit A To Consent Form

The following conditions must be satisfied prior to the closing of the Mortgage and are conditions to the BLNR's Recommendation to Approve the Mortgage in favor of UBS in the amount of \$54M 5-year loan at a fixed interest rate.

1. The Loan is fixed interest rate with a "locked in rate" not to exceed 340 plus 5-year SOFR swap (currently at 3.416, which today would be 6.816% but with a minimum fixed interest rate of 7.25%.
2. Written Letter from Appraiser that the value appraised by an independent appraiser hired by the Lender is 160% higher than the Mortgage amount. By example, if the loan is \$54M, then the appraised value may not be lower than \$86,400,000.
3. Written confirmation by WHR, LLC that the 2022 Net Income from hotel operations was in excess of \$7M and is sufficient to pay the Mortgage amount of \$3,915,000 annually for years 1 and 2, and years 3 through 5 equal to \$4,420,502 annually.
4. Evidence from WHR, LLC, that no litigation, no foreclosure, and no other liens or claims exist upon the Loan Closing, and that all matters in any prior foreclosure or other claims are fully released and settled.

SAMPLES OF CULTURAL & COMMUNITY SUPPORT THAT DID NOT EXIST IN PRIOR OWNERSHIP

1. Dedicated Entire Waterfront and Waterfront Dock to Kalani Kahalioumi (Hokule'a Captain) and Polynesian Voyaging Society to build canoes, assist in education and use waterfront during our ownership for Non-Profit Events and Education of Keiki & community. Kalani built a canoe on the waterfront and educated guests as an example.
2. Dedicated Kahele Point at Naniloa dock to honor Gil Kahele for all the community help with Ownership at Naniloa and Banyan Drive. Kai Kahele was grateful for our unsolicited idea to do this for his father.
3. Dedicated entire Hotel Property to all Hilo Halaus to use as they deem fit for education and training. Kumu Mele continues use the hotel for her Halau Ke 'Olu Makani O Mauna Loa.
4. Polynesian Voyaging Society - 2014 hosted blessing of Hokule'a to embark on worldwide voyage. Naniloa sponsored all crew staying at the hotel and participating in historical blessing of the canoe and crews before their journey.
5. Merrie Monarch - Coordinated Merrie Monarch Marketplace with Auntie Luana's blessing to highlight more local vendors as an extension of Merrie Monarch craft fair and hosting hula halaus at Naniloa since 2016 and growing each year with more community partnerships such as OHA and Polynesian Voyaging Society to participate in Marketplace with workshops and educational booths.
6. Polynesian Voyaging Society - Return of Hokule'a during Merrie Monarch 2018 with grand ceremony and workshops throughout the week for schools to participate in field trips to Naniloa for educational tours of the Hokule'a and workshops on the Grand Lawn with over 6,000 keiki having an amazing opportunity to talk story with the crew.
7. Merrie Monarch - Merrie Monarch Fashion Show highlighting designers from Hawaii continued to grow with community support since 2017 and in 2021 the fashion show televised along with Merrie Monarch to stimulate the economy and support the Mayor's goal for sustainable tourism. After the premiere of the fashion show, local designer, Designs by Kamohoalii was then invited to New York Fashion week. Followed by 3 more local designers being invited to New York Fashion week.
8. Assisted Local Designers. Local fashion designers featured in Naniloa fashion shows have now opened retail stores on Big Island and Oahu.
9. Fashion Fridays was created to host monthly fashion shows and support the success with local designers, models, and musicians.
10. Sponsored free fireworks for the community to enjoy during 4th of July and New Years Eve.
11. Kama'aina Days during Memorial Day weekend was a free event for the community to bring keiki and enjoy bouncy slides, animal petting zoo, and free zip lining
12. Christmas with Santa, giving away 100s of toys to keiki in need coordinated with local church
13. Movie on the lawn is a free monthly event for community members to enjoy watching a family friendly movie on the lawn at Naniloa
14. Sponsored Miss Hawaii Island USA pageants
15. Dedicated Crown Room in Honor of Willie K. Brought in many top local musicians for concerts in the Willie K Crown Room such as Willie K, Amy Hanaialii, Kimie Miner, Anuhea, Maoli, Kapena, and many more. Also Support local musicians for daily music and hula in lobby and at restaurant
16. Partnered with Tsunami Museum for charity events in Crown Room

EXHIBIT A

MEMBERSHIP INTERESTS

WHR LLC Members	Units/ Interests	Capital Contribution	Percentage Interests/Units in Class A and B Members	Percentage Interests in the Company
CLASS A CAPITAL MEMBERS			Portion of Class A Interests 50%	
1. Olson/Nanihoa LLC		\$7,646,663	35.4807950%	17.7403975%
2. Tower Hotels Fund 2013 LLC See Note 1 below		\$13, 904,891	64.5192050%	32.2596025%
Subtotals	10,000,000	\$21,551,554	100%	50%
CLASS B MEMBERS			Portion of Class B Interests 50%	
1. Tower Hotels Hilo LLC	7,500,000	See Note 1 below	75%	37.5%
2. Pele Hilo, LLC	2,000,000	See Note 1 below	20%	10.0%
3. Miller Realty, Inc.	400,000	See Note 1 below	4%	2.0%
4. MR Delaware SPE, LLC	100,000	N/A See Note 2 below	1%	0.5%
Subtotals	10,000,000	See Note 1 below	100%	50%
TOTAL	20,000,000			100%

Managers:

Tower Development, Inc.

Tower Hotels Hilo LLC

Note 1: Value of services in connection with (i) providing loan guaranty during the ownership of the Real Property, Manager services (to the extent provided), Project consulting (to the extent provided), and (ii) servicing as the Initial Manager/Manager (to the extent provided).

Note 2: Effective upon the closing of the Wells Fargo Loan on or about August 28, 2018, 100,000 Units were transferred to MR Delaware SPE, LLC from Miller Realty, Inc. MR Delaware SPE, LLC is a single member limited liability company formed in Delaware and its sole member is Miller Realty, Inc. MR Delaware SPE, LLC is the SPE Component Entity as defined in the Agreement.

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 5

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.

SULLIVAN MEHEULA LEE
A Limited Liability Law Partnership

WILLIAM MEHEULA (2277)
NATASHA L.N. BALDAUF (9620)
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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

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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SERIES 2018-BNK14, by and through its
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WHR LLC, a Hawaii limited liability
company, JOHN DOES 1-50, JANE DOES

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

DECLARATION OF JOAO GAUER

EXHIBIT 7

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.