

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

June 23, 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 \$50,000,000.

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 \$50 million loan and mortgage from a different lender on the leasehold premises. When WHR initially applied for the mortgage consent, the proposed amount of the loan was \$54 million and the application stated that \$48 million would be applied toward the principal of the existing loan with the additional \$6 million going toward "Covid Loan/Interest Payments."<sup>1</sup>

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:

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<sup>1</sup> 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 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

**X 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:

**X 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 exception of additional interest charges and late fees for February and March 2022 in the amount of \$2,194.61.<sup>2</sup>

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<sup>2</sup> A COVID-related rent deferral approved by the Board at its meeting of May 28, 2021, Item D-4, as



**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 <sup>3</sup>	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 (UBS), 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

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amended, created some challenges for Land Division’s billing system. The Fiscal Office has now calculated the outstanding interest and late fees and is issuing an invoice to the lessee for the amount due.

<sup>3</sup> 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.

that exceeds the amount consented to by the landlord,<sup>4</sup> what is the expected loan balance due at maturity, etc.). Therefore, because of this uncertainty and WHR's inability to provide written proof of loan approval or the specific loan terms as had been repeatedly requested by staff, staff's analysis and recommendation continued to be to deny WHR's request for consent to mortgage.

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,

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<sup>4</sup> When WHR sought Board consent to a mortgage in 2022, it was only when asked at the Board meeting of June 24, 2022, under agenda Item D-9, that WHR admitted the loan provides for the partial payment of interest. In other words, under the loan that was proposed in 2022 the unpaid interest would have been added to the loan balance at the end of the loan term.

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.

WHR's request for consent to mortgage finally came before the Board on its merits at the Board's meeting of May 12, 2023, under agenda Item D-3, with staff recommending denial of consent. For reasons discussed in further detail below, the Board deferred action on the item, requesting that WHR work with Land Division staff to provide additional details on the loan transaction and a proposal to transfer a controlling interest in WHR to a potential new manager of the company, Benjamin Rafter.

#### 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.<sup>5</sup> 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.<sup>6</sup>

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<sup>5</sup> In 2022, the Board would later learn at least a portion of the funds was a withdrawal of profits by the principals of WHR.

<sup>6</sup> 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.

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.<sup>7</sup> 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 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.<sup>8</sup> 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,<sup>9</sup> 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

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

8 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.

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

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 annum<sup>10</sup> 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 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.<sup>11</sup> In recent past, WHR/debtor had difficulty keeping current on the State 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,<sup>12</sup> the Wells Fargo/Wilmington Trust and the Olson/Naniloa LLC<sup>13</sup> filed separate lawsuits against management asserting various

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10 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.

11 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.

12 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.

13 According to the Operating Agreement attached to the First Amended Complaint, Olson/Naniloa LLC contributed **\$7.6 million** cash to and owns **35.48% of class A membership** of WHR, and the remaining 64.51% of class A membership is owned by Tower Hotels Fund LLC; however, Tower did not contribute cash; only services and a personal guaranty. Class A and Class B members each own a 50% interest in

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.

#### 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 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. WHR made the same representations to the Board at its meeting of May 12, 2023, under agenda Item D-3, when WHR was questioned about the interest rate. 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.

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WHR, with only Olson/Nanioloa LLC making a cash contribution while all other Class A members and Class B members only contributing services or a guaranty. 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/Nanioloa LLC lawsuit on September 23, 2021), is attached as Exhibit 4.

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.<sup>14</sup> 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 \$50 million UBS loan requested, noting it is \$15 million short of the \$65 million the existing lender, Wilmington Trust, has claimed is due in its court filings. In response, WHR stated:

We have no obligation to pay any \$65M that the Bank is claiming and their attorneys are from east coast and are claiming many "fake" items that will be cleaned up prior to the closing in a full settlement agreement as a condition to escrow closing of the New Loan. The Hote[I] 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. It was not until the Board meeting of May 12, 2023, when WHR conceded that it would need to pay at least \$14 million on top of the principal loan balance to obtain a release of mortgage from Wilmington Trust.<sup>15</sup>

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14 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.

15 The shortage between the new loan amount of \$50 million is now more like \$23 million considering the new lender is requiring a set aside of \$2.0 million or so from the new loan proceeds for needed



The Gauer 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.<sup>16</sup> The Order interestingly noted that the Court "*was not determining the amount of default judgment at this time.*" Wilmington's proposed Order has been filed with the Court requiring a public auction to be held and the amounts due to Wilmington and the commissioner to be determined at the confirmation hearing, post auction.

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, as the lender, has the right to unilaterally divide the mortgage/loan to another new mortgage/loan and other mezzanine loans at the "rate" and "debt service" or payments as provided for in the loan documents, but other terms and conditions of the loan and new mortgage appear to be at the discretion of the UBS 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, this information did not allay staff's concerns.

At its meeting of May 12, 2023, under agenda Item D-3, the Board received extensive written and oral testimony from WHR, its managers and members, its counsel, its mortgage broker, the receiver in the mortgage foreclosure action filed by Wilmington Trust against WHR, and others. The Board members asked many questions including:

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improvements and repairs to the hotel and borrower is needing \$6 million to repay COVID loans and interest per the consent application which leaves \$42 million funds available to pay the existing 1<sup>st</sup> mortgage and settlement amount of more than \$64 million. We take note that WHR has never had an owner/investor contribute cash of \$20+ million. Out of all the owners of WHR, only Mr. Ed Olsen contributed cash of \$7.646 million initially in the past but has since been paid back his capital investment, in full.

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



- Who are the owners of WHR?
- Who is putting capital into WHR and how much in terms of real money as opposed to a contract to pay into the company?
- Will Wilmington Trust accept \$50 million in satisfaction of its claim in the foreclosure action? If not, where are the funds coming from to make up the shortfall?
- What is Mr. Rafter’s involvement in WHR and his capital commitment to the company? Will he make a capital investment or a loan to WHR?
- Will Mr. Rafter obtain 51% interest in WHR? How will that affect the corporate structure and capital investment in the company?
- Is there any working capital in WHR at the present time?
- To the extent the UBS loan proceeds are insufficient to pay off Wilmington Trust’s claim, are the representations that any shortfall will be made up representations of WHR or Mr. Rafter? How is the shortfall being financed?
- Who will manage the hotel after the proposed reorganization of WHR?
- What is the interest rate of the UBS loan?
- Is the UBS mortgage a reverse mortgage?
- How can the Board feel comfortable that rent and other lease defaults will not continue in the future based on WHR’s track record?

The Board deferred action on the matter, directing WHR to discuss and work out with Land Division and the Department of the Attorney General answers to the questions raised by the Board.

After the May 12, 2023 Board meeting, WHR represented in a letter from its counsel dated May 31, 2023, that it was reducing the amount of its loan request from \$54 million to \$50 million and had reached an agreement with UBS to delete the “New Mezzanine Loans” provision from the loan agreement. However, staff has not seen a revised version of the loan agreement deleting this provision. Under cover of the same letter, WHR provided staff with a post-reorganization organization chart for WHR, which shows an undetermined percentage interest for “Benjamin Rafter entity”, and additionally provided its responses to Land Division’s staff’s questions. A copy of the letter and selected enclosures is attached as Exhibit 9.<sup>17</sup>

By a separate email to the Land Division dated May 31, 2023, WHR, through counsel, provided responses to Land Division’s requests for information on the transaction consistent with the Board’s questions listed above. The requests and responses from WHR, which are often incomplete or evasive, are attached as Exhibit 10.

By letter dated June 1, 2023, WHR, through counsel, additionally provided a copy of a heavily redacted version of a Settlement Agreement between Wilmington Trust, WHR, Mr. Bushor and Mr. Miller purporting to fully and finally resolve the “Litigation,” a defined term whose definition seems to have been redacted in the document provided to Land Division. A copy of the June 1, 2023 letter and redacted Settlement Agreement is

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<sup>17</sup> The page count of the May 31, 2023 letter is 220 pages and would be too large to attach to this submittal in full.

attached as Exhibit 11. Significantly, staff is unable to determine what claims the Settlement Agreement resolves and whether a satisfaction of judgment or a release of mortgage will be recorded as part of the settlement. Without the recording of these instruments, the lien of the Wilmington Trust mortgage remains on the leasehold interest in the land.<sup>18</sup>

On its own initiative, on June 7, 2023 staff pulled three filings from the docket of the Third Circuit foreclosure action.<sup>19</sup> These filings include: (i) Order Granting Plaintiff's Motion for Summary Judgment, Decree of Foreclosure and Order of Sale filed June 6, 2023 (Order Granting MSJ),<sup>20</sup> a copy of which is attached hereto as Exhibit 12; (ii) Stipulated Foreclosure Judgment and Order filed June 6, 2023 (Stipulated Judgment), a copy of which is attached hereto as Exhibit 13; and (iii) Stipulation for Dismissal with Prejudice of All Claims Against Plaintiff and Order (Stipulation for Dismissal), copy attached as hereto Exhibit 14. Based on these filings, it appears that the Settlement Agreement only dismisses the counterclaims filed by WHR against Wilmington Trust. From this, staff surmises that WHR will not be able to pay all amounts Wilmington Trust claims as due in the foreclosure action even if the Board were to consent to the UBS mortgage. Rather, the Stipulated Judgment will be Wilmington Trust's backup to collect outstanding sums later — in effect making the Stipulated Judgment a lien on the leasehold interest in property.<sup>21</sup> This lien will not be a lender's security interest under a mortgage but a judgment lien — same effect/result as a mortgage lien.

In addition, staff notes that WHR's lowering of the requested loan amount from \$54 million to \$50 million widens the delta between the payoff calculated by Wilmington Trust and the funds available to WHR to settle the debt. As noted above, WHR explains it will need to pay \$6 million in COVID interest, leaving \$44 million in loan proceeds. Another \$2.5 million of that amount will need to be paid toward closing costs and hotel improvements required by UBS leaving \$41-42 million in loan proceeds, which is about \$23-24 million short of the approximately \$65 million Wilmington Trust claims is due to it. Furthermore, while WHR and its managers and members testified at the May 12, 2023 meeting to the effect that they can pay for the delta through member contributions and

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18 By email dated June 7, 2023, counsel for WHR offered to allow an "in camera" review of the unredacted Settlement Agreement by the Department of the Attorney General and the Land Division Administrator, provided that the State agree to maintain the confidentiality of the agreement. In staff's view, there is nothing confidential about the Settlement Agreement or any of the attachments like the Stipulation to Dismiss the Counterclaim or Stipulated Judgment. The burden is on the proponent claiming a document is confidential to prove its confidential. WHR voluntarily chose to enter the public forum by leasing public lands and must abide by the State's laws on open records law and open public meetings.

19 Neither WHR nor its counsel notified staff that these documents had been filed and were part of the public record in the foreclosure action.

20 The Order Granting MSJ is the formal record entry of the substance of the minute order attached hereto as Exhibit 8.

21 A certified copy of the Stipulated Judgment can simply and easily be recorded at the Bureau of Conveyances, State of Hawaii to effectuate the lien.

investment from Mr. Rafter, a look at WHR's Operating Agreement (see Exhibit 4 attached), shows that only Olson/Nanioloa LLC as a capital investor in the company, with the investments of other members appearing to be "in-kind" for services rendered or guarantees made. Accordingly, staff continues to question how the \$23 million delta will be addressed.

None of the additional information WHR has provided since the May 12, 2023 Board meeting has changed staff's recommendation on the consent to mortgage. The loan is not sustainable and WHR has not shown the ability to pay off the loan at maturity. Staff continues to have concerns that the UBS loan is substantially short of paying off the existing \$65 million plus attorneys' fees and costs, and without the ability to review an unredacted version of the Settlement Agreement with a satisfaction of judgment and release of the Wilmington Trust mortgage, staff is concerned Board approval of the UBS loan could 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.<sup>22</sup>

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<sup>22</sup> 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. WHR submitted to Land Division an application for consent to the transfer and staff intends to present a recommendation to the Board under a separate item on today's agenda.

RECOMMENDATION:

Based upon the totality of the circumstances and the issues and concerns noted above, and the foregoing points and authorities, that the Board deny the request for consent to the mortgage between WHR LLC, Mortgagor, and UBS AG, Mortgagee.

Respectfully Submitted,

*Russell Tsuji*

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Russell Y. Tsuji  
Administrator

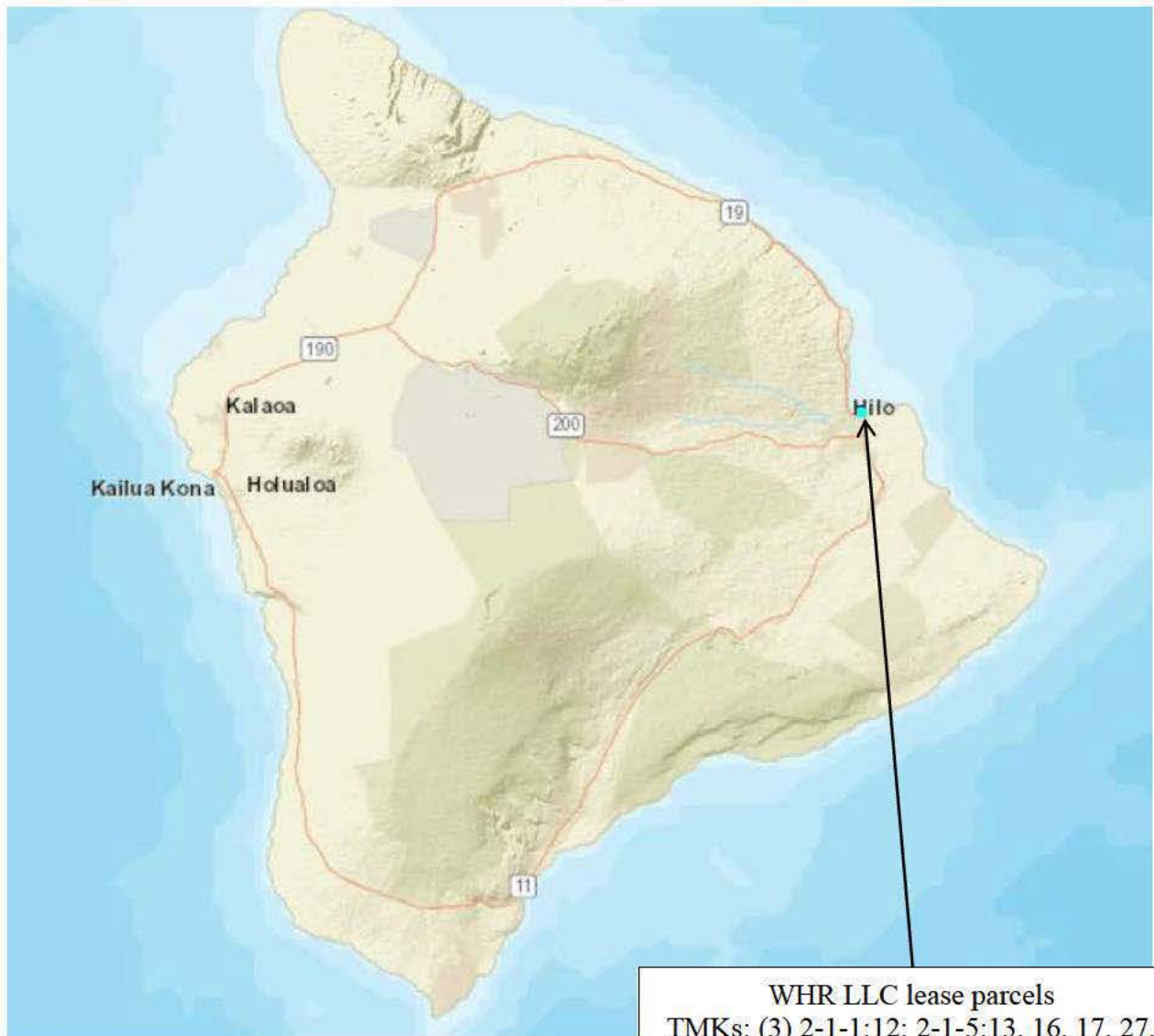
APPROVED FOR SUBMITTAL:

*et*  


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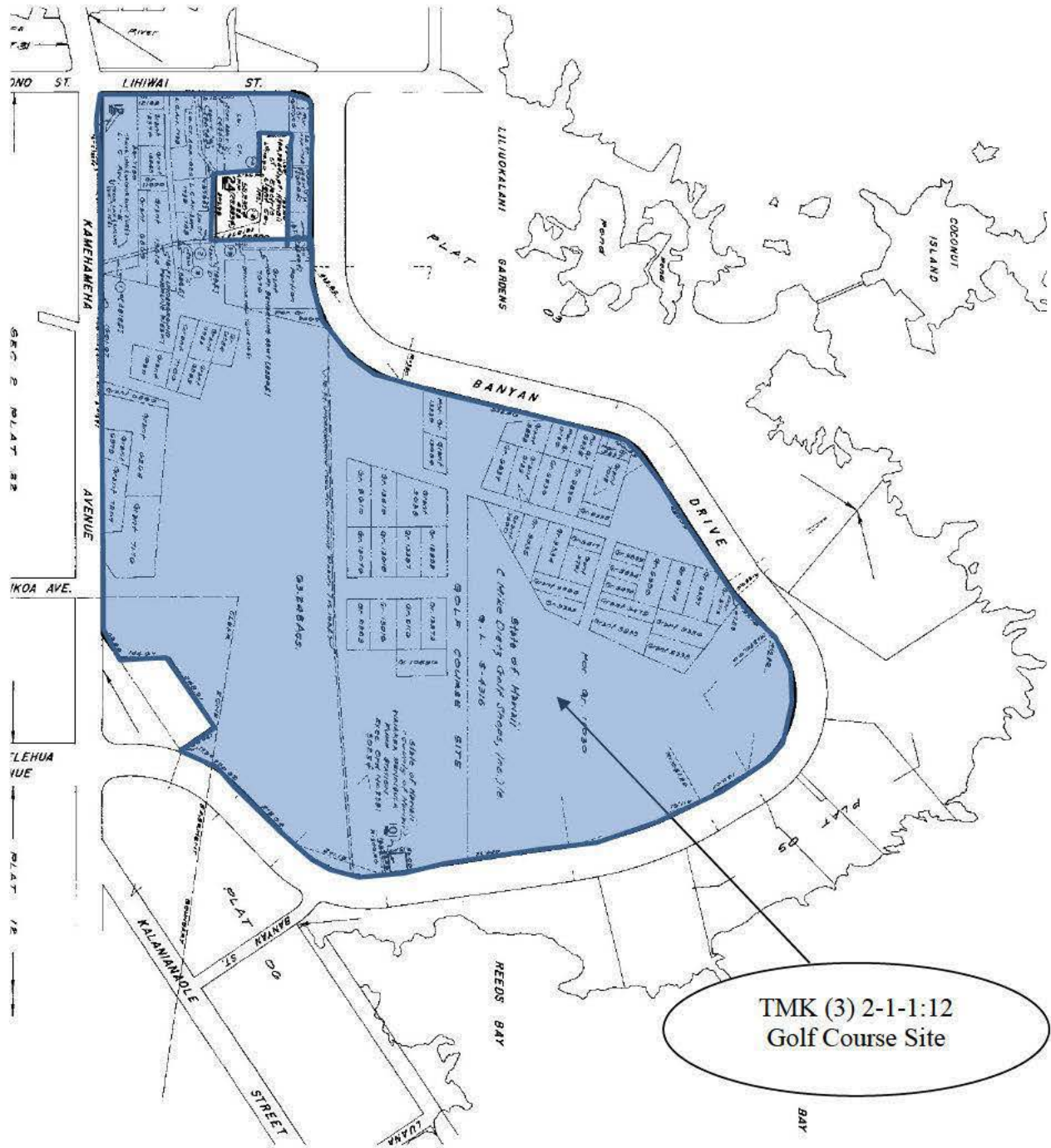
Dawn N. S. Chang, Chairperson

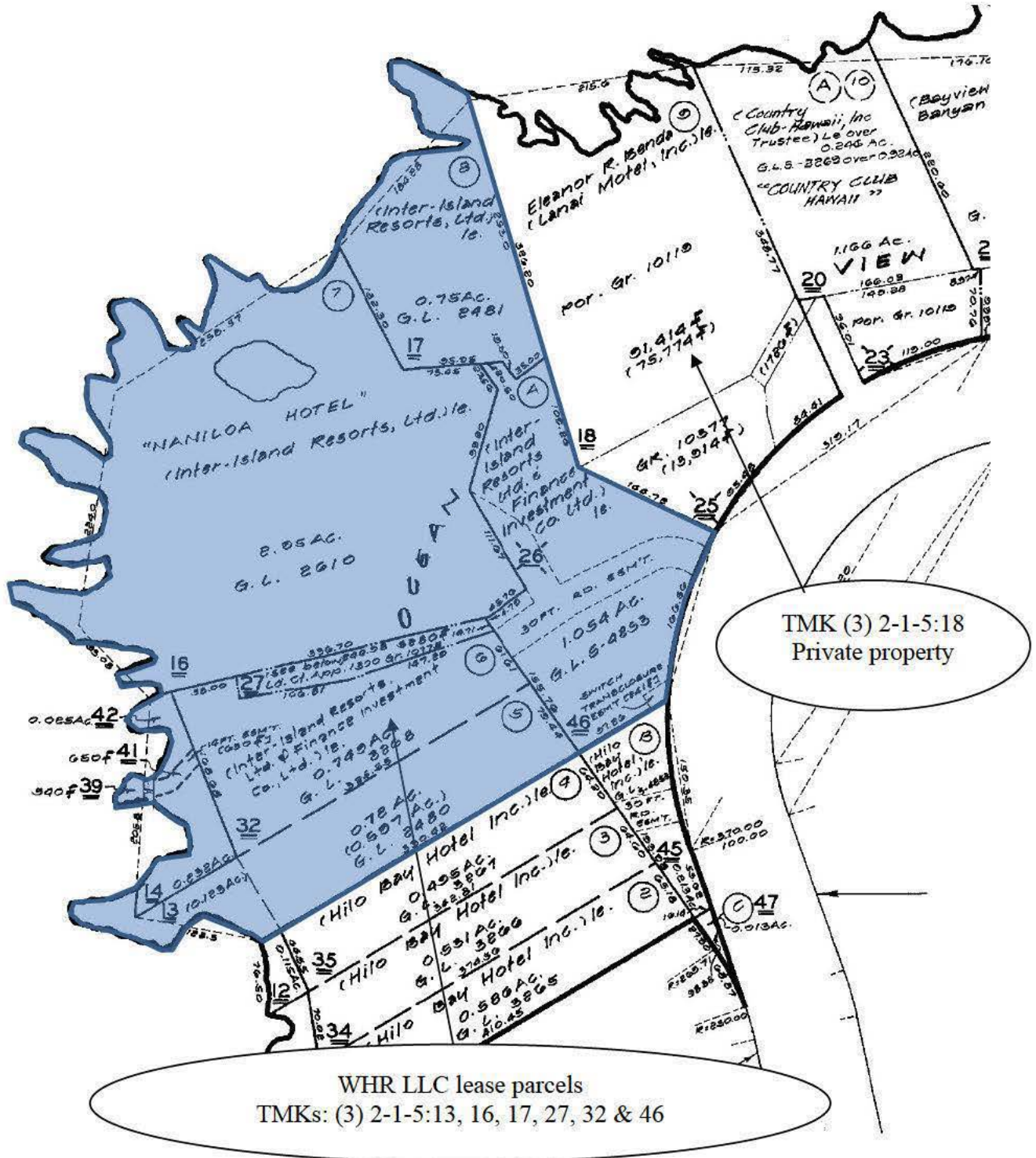
# EXHIBIT 1



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









# EXHIBIT 2

**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

  
[www.towerdevcon.com](http://www.towerdevcon.com)

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

# EXHIBIT 3

**EXHIBIT 3**

**DOCUMENTS FROM ED BUSHOR 4/20/2023**

**EXHIBIT 3**

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 ihiger 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% higher 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 condition to the 2023 New Loan closing.
10)	Has this Borrower been fantasitic 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: [REDACTED]

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: [REDACTED]

with a copy to:

McGuireWoods LLP  
1251 Avenue of the Americas, 20th Floor  
New York, New York 10020  
Attention: Dennis W. Mensi, Esq.  
Email: [REDACTED]

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 4<sup>th</sup> 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 4

**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
<b>CLASS A CAPITAL MEMBERS</b>				
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%
<b>Subtotals</b>	<b>10,000,000</b>	<b>\$21,551,554</b>	<b>100%</b>	<b>50%</b>
<b>CLASS B MEMBERS</b>				
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%
<b>Subtotals</b>	<b>10,000,000</b>	<b>See Note 1 below</b>	<b>100%</b>	<b>50%</b>
<b>TOTAL</b>	<b>20,000,000</b>			<b>100%</b>

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.

# EXHIBIT 5

## 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.

# EXHIBIT 6



SULLIVAN MEHEULA LEE  
A Limited Liability Law Partnership

WILLIAM MEHEULA (2277)  
NATASHA L.N. BALDAUF (9620)  
D. KAENA HOROWITZ (9836)  
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**Electronically Filed**  
**THIRD CIRCUIT**  
**3CCV-21-0000360**  
**06-DEC-2021**  
**05:00 PM**  
**Dkt. 1 CMPS**

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 23<sup>rd</sup> 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

# EXHIBIT 7

MEHEULA LAW, LLLC  
A Limited Liability Law Company

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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

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
<b>Subtotal</b>	<b>\$65,046,024.61</b>
Less Reserve Balance:	<u>(\$) 28,946.44</u>
<b>Total</b>	<b>\$65,017,078.17</b>

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

# EXHIBIT 8

## 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.



# EXHIBIT 9

CASE LOMBARDI  
A LAW CORPORATION

David G. Brittin  
Lisa K. Broulik  
Michelle J. Chapman  
Matthew A. Cohen  
Stacey W.E. Foy  
Adelbert Green

Michael L. Lam  
Dennis M. Lombardi†  
Jon M.H. Pang  
Lauren R. Sharkey  
Mark G. Valencia

† A Law Corporation  
Daniel H. Case (1925-2016)

PACIFIC GUARDIAN CENTER, MAUKA TOWER  
737 BISHOP STREET, SUITE 2600  
HONOLULU, HAWAII 96813-3283

TELEPHONE: (808) 547-5400  
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Ka'ōnohiokalā J. Aukai IV  
Madlaine N. Farmer  
Kenneth V. Go  
Samuel W. King, II  
James W. Rooney  
Steven E. Tom

Of Counsel  
Gregory M. Hansen  
Michael R. Marsh  
Frederick W. Rohlfing III

May 31, 2023

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

Via email to:

[REDACTED]  
[REDACTED]  
*blnr.testimony@hawaii.gov*

Re: June 9, 2023 Meeting Agenda Item TBD  
Support for Lessee's Request for Consent to Mortgage and Security Agreement,  
General Lease No. S-5844, WHR LLC, Lessee; Waiakea, South Hilo, Hawaii,  
Tax Map Keys: (3) 2-1-01:012 and 2-1-05:013, 016, 017, 027, 032, and 046

Dear Chairperson Chang, Board Members, and Mr. Tsuji:

On behalf of WHR LLC ("**Lessee**"), as Lessee under the above-referenced Lease ("**Lease**"), we write to you in support of WHR's Request for Consent to Mortgage and Security Agreement. This letter supplements our prior letter and testimony dated May 11 and 12, 2023.

**Executive Summary:**

- Under the Lease, the narrow question before the Board of Land and Natural Resources ("**Board**") is whether to provide its reasonable consent to the proposed mortgage, a copy of which is attached hereto as **Exhibit A** ("**Mortgage**").
- Lessee believes the factors to consider in analyzing a loan of this type are provided on the chart attached hereto as **Exhibit B**, prepared by Colliers, showing the proposed loan is reasonable and consistent with the 2018 loan.
- Lender has agreed to remove "mezzanine loan" provision from the loan agreement.
- Lessee has executed a settlement agreement with the existing lender and will provide a redacted copy of that agreement as soon as possible.
- Lessee has provided an organizational chart showing the post-loan ownership structure of Lessee, attached hereto as **Exhibit C**.
- Lessee has determined to reduce the loan amount to \$50 Million, in order to provide greater comfort to the Board in consenting to the Mortgage. See **Exhibit D**.
- Lessee resolved to additional questions presented by Administrator Russell Tsuji. See **Exhibit E**.

EXHIBIT 9

## Reasonable Consent Factors in respect of Mortgage

The Lease provides that Lessee may mortgage the leasehold interest underlying the Hotel, with the consent of the Chairperson:

Notwithstanding anything to the contrary contained in this lease, Lessee may from time to time with the prior written consent of the Chairperson, which consent shall not be unreasonably withheld, assign this lease by way of mortgage (an "Authorized Mortgage") to any bank, insurance company, or other lending institution legally permitted to make mortgage loans in the State of Hawaii, as mortgagee (an "Authorized Mortgagee").

Lease, Covenant 20.a.

We understand the mission of the Department of the Land and Natural Resources ("**Department**") and the Board is to "Enhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of the people of Hawaii nei, and its visitors, in partnership with others from the public and private sectors."<sup>1</sup>

According to the provision of Lease Covenant 20.a, therefore, the Board may require a mortgage to contain "reasonable" protections of the State's underlying fee interest. When such reasonable protections are present, the Chairperson should approve the Mortgage.

The Mortgage does not impair or endanger the State's underlying fee interest because the Mortgage does not attach to that interest. See Section 1.1(a) of the Lease, defining the mortgaged Property in relevant part as "*all leasehold estates, leasehold interest or other rights in and to that certain real property described in Exhibit A attached hereto, and made a part hereof (the "Land") under and in accordance with that certain ground lease more fully described on Exhibit B.*"

A lender proceeding in foreclosure pursuant to rights under the proposed Mortgage cannot obtain more than the Lessor's position. That is a true because of the definition of Property within the Lease quoted above, under the provision of the proposed Mortgage, and under Hawaii law. Therefore, state's fee interest in the land underlying the Naniloa Hotel is protected.

The remaining provisions of the Mortgage are typical: it describes the obligation that is being secured; it includes promises by the Mortgagor, including among other promises, to maintain the mortgaged property; and - most importantly from a lender's perspective - allows the mortgagee to proceed against the leasehold property in the event of a Borrower default.

We are not aware of any staff comments in respect of the Mortgage that would indicate its form or any provision thereof is not reasonable. We take that to mean staff does not object to the Mortgage.

---

<sup>1</sup> <https://dlnr.hawaii.gov/> (May 10, 2023).

Accordingly, we ask that the Chairperson and/or the Board to consent to the Mortgage.

### **Reasonable Consent Factors in respect of the proposed Loan**

Colliers International prepared a chart of "Factors to consider in determining whether the terms of a commercial loan to resort property are reasonable," attached as Exhibit B. As shown on the chart, the proposed loan is consistent with the 2018 loan approved by the Board.

The chart demonstrates that an analysis by an expert in commercial loans to resort property would conclude that the proposed loan is reasonable.

Please also see Lessee's response to additional comments from staff on page 6 of 9 within Exhibit E. Specifically, staff had made certain comments in respect of a "mezzanine loan" provision in the proposed loan agreement. In response to those comments, and notwithstanding that Lessee disputes that the loan agreement permitted the acts or results indicated by staff, the lender has agreed to remove that provision of the loan agreement.

### **Settlement with Existing Lender**

Lessee has executed a settlement agreement with foreclosing lender that will provide a final payoff amount and will result in the release of all litigation. Lessee will provide evidence of the agreement as soon as possible.

### **Organizational Chart of Lessee**

In response to concerns raised by the Board at the May 12, 2023 meeting, Lessee is providing an organization chart showing the ownership interests in Lessee as it will be structured after the closing of the loan. See Exhibit C.

In addition, Lessee is negotiating with its various members to provide a redacted person of the proposed post-closing operating agreement, to be provided to the Board as soon as possible.

### **Reduction in Loan Amount to \$50 Million**

Lessee has determined to reduce the loan amount to \$50 Million, in order to provide greater comfort to the Board. See the Letter from Benjamin Rafter, delivered to Chairperson Chang and Administrator Tsuji on May 31, 2023, attached hereto as Exhibit D.

**Response to Administrator**

Lessee resolved the additional questions presented by Administrator Tsuji. See Exhibit E.

Thank you for your consideration. Please contact us if you have any further questions. We remain willing to meet with Mr. Tsuji and/or the AG to discuss the pending request and/or to provide additional information.

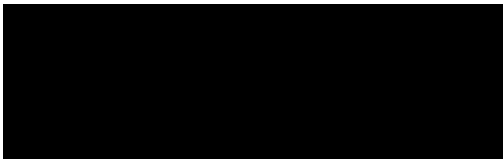
Very truly yours,  
CASE LOMBARDI

*/s/ Michael L. Lam*  
**Michael L. Lam**  
**Matthew A. Cohen**

MLL/MAC/erh

Enclosures

cc: Client



## EXHIBIT B

**Colliers International Guidance**

**Factors to consider in determining whether the terms of commercial loan to a resort property are reasonable**

	Factors	2023 New Loan (DLNR Reviewing)	2018 Loan (DLNR Approved)	Reasonable?	Comments
1	UBS Lender Qualifications?	UBS	Wells Fargo	Very Reasonable	Two of the top CMBS Lenders in the World.
2	Loan Structure?	CMBS	CMBS	Very Reasonable given CMBS structure is the standard often used for hotels	2023 proposed loan has the Exact Same CMBS Loan structure: 5 Year, Fixed Rate Loan (Note: CMBS Loans have the Highest Level of Underwriting B/C the loan is in a Securitized Pool and Subject to Rating Agency Review)
3	Term of the Loan	5 Years	5 Years	Reasonable since 5 years is the common CMBS loan term for hotels	80% of all commercially reasonable loans are 5 years or less. The loan approved in 2018 has the same term as 2023.
4	Loan to Value (LTV) ?	57% = \$54M/\$94.6M	49.5% = \$50M/101M	Very Reasonable given anything under 60% is very conservative	Hotel Loans Historically Average 70%+/- LTV and are "reasonable", but the 2018 and 2023 Loan are both lower than 60% LTV, which makes them more than reasonable.
5	Debt Coverage Ratio (DCR)	1.40	1.40	Very Reasonable given 1.25 is rough standard in the industry	A 1.25 DCR is the industry norm. The lower the ratio, the riskier the loan becomes. In this instance, a 1.4 DCR simply means the hotels income Must be 140% greater than the total annual loan payments. Income from 2022 makes the income coverage over the debt service easily reasonable at a DCR of 1.4 today based on 2022 revenues. A DCR of 1.25 (lower than 1.4) is also known by Mr.Tsuji as a commercial norm which was stated in DLNR Meeting Minutes on 6.9.2022 (7 hours 23 mins.)
6	Does the Income support the Loan Payments	Yes	Yes	Very Reasonable given \$7.7M 2022 Net Income covers the less than \$4M Loan Payments	There is Annual Net Income of approx. \$2-3M per year surplus over the loan payments during the loan term. UBS and Wells Fargo would not approve a loan that does not have income to support loan payments.
7	Is the Interest Rate Reasonable?	7.25%	5.72%	Reasonable given the market and any rate between 7-8% is reasonable in this market	The Market has changed since 2018 which has led to increase market rates. After Jordi Dehoyas (Colliers) shopped the loan to 60 different Lenders, UBS was the most reasonable loan for WHR in 2023.
8	Is the Interest Rate Fixed?	Yes	Yes	Very Reasonable	This is a 5 year SOFR Swap rate. Mr. Tsuji's prior report illustrates confusion between SOFR and a SOFR Swap rate. What is a SOFR Swap: "SOFR Swap rate is a swap where a counterparty pays a fixed-rate on an annual basis...This rate is a common benchmark for pricing fixed-rate CMBS and other fixed-rate loans" (Source: Chatham Financial).
9	Appraiser Qualifications	HVS	HVS	Very Reasonable especially given same appraiser as 2018	Same Institutional Qualified Appraiser in 2018 and 2023. Independently hired by UBS and Wells Fargo due to HVS's market expertise.
10	Manager of WHR Experience	Yes	Yes	Very Reasonable	WHR has been a leader in taking Naniloa to \$7.7M in revenues post Covid. WHR is now appointing Benjamin Rafter and Springboard to take the Naniloa to even greater heights.
11	Cash Commitment to Cure the Foreclosure	Yes	NA	Very Reasonable	The companies that own the Naniloa are committed to invest the difference between the loan amount and payoff of Rialto \$65M, which means the Naniloa company owners are willing to invest \$10-15M. Moreover, Ben Rafter testified, he will backstop this amount. Thus, the ownership is behind the Naniloa 100%.
12	Is the loan sustainable?	Yes	Yes	Very Reasonable	Given all factors above, this is a term/question Mr. Tsuji uses, albeit, the factors that dictate this are 1-11 above. Naniloa Employees and Ownership worked tirelessly to turn Covid into a successful operation over the last two years. To have anyone opine it is not sustainable is misinterpreting the plain facts.

## EXHIBIT C



**Pending Organization Chart for Lessee WHR LLC - post-closing of UBS loan**

<b>WHR LLC, a Hawaii limited liability company</b> (Manager: a Benjamin Rafter-controlled entity)					
↓					
<b>Class A Members</b> (Capital/Equity Members)			<b>Class B Members</b> (Promote Class)		
	<u>Class A %</u>	<u>WHR %</u>		<u>Class B %</u>	<u>WHR %</u>
Tower Hotels Fund 2013 LLC	64.5191%	32.2595% <sup>1,4</sup>	Tower Hotels Hilo LLC	75.0000%	37.5000% <sup>5</sup>
Olson/Nanihoa LLC	35.4810%	17.7405% <sup>2,4</sup>	Pele Hilo LLC	20.0000%	10.0000% <sup>6</sup>
[Benjamin Rafter entity - TBD]	<i>TBD</i>	<i>TBD</i> <sup>3,4</sup>	Miller Realty Inc.	4.0000%	2.0000% <sup>7</sup>
<b>Total</b>	100.0000%	50.0000%	MR Delaware SPE LLC	1.0000%	0.5000% <sup>8</sup>
			<b>Total</b>	100.0000%	50.0000%

**Notes:**

- <sup>1</sup> Members of Tower Hotels Fund 2013 LLC are Michael Paulin, Edward Bushor, Kim Taylor Reece, Peter Hershon, and other individuals and entities whose names are confidential pursuant to the operating agreement.
- <sup>2</sup> The identity of the members of Olson/Nanihoa LLC are confidential.
- <sup>3</sup> Benjamin Rafter entity plans to contribute a minimum of \$2,000,000 and may backstop any further needed contribution. See Note 4, below.
- <sup>4</sup> Percentage Interest(s) of the Class A Members are shown as of May 31, 2023. The Percentage Interest of each of the Class A members after the closing of the UBS loan are subject to actual Class A Member contributions in response to an expected capital call necessary to payoff existing lender.
- <sup>5</sup> Members of Tower Hotels Hilo LLC: Tower Hotels LLC (Edward Bushor-controlled entity), Michael Paulin, Stuart Miller, and other individuals and entities whose identities are confidential pursuant to the operating agreement.
- <sup>6</sup> The member of Pele Hilo LLC is Michael Paulin.
- <sup>7</sup> The shareholder of Miller Realty Inc. is Stuart Miller.
- <sup>8</sup> MR Delaware SPE LLC is controlled by Stuart Miller and Julia McCullough.

## EXHIBIT D

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

*Via email to: [blnr.testimony@hawaii.gov](mailto:blnr.testimony@hawaii.gov)*

Re: May 12, Meeting Agenda Items D-2  
Support for Lessee's Request for Consent to Mortgage and Security  
Agreement, General Lease No. S-5844, WHR LLC, Lessee;

Dear Chairperson Chang, Board Members and Mr. Tsuji:

It was nice meeting most of you on the 12<sup>th</sup> and I'm looking forward to working with you on the Grand Naniloa. I've reviewed several of the correspondences as well as Mr. Tsuji's investigative notes. While I can't speak in depth to the history of the current ownership group, I am aware the previous approved loan was for \$50 million in 2018 when the hotel had significantly lower cash flow (albeit at a lower interest rate).

We have received our Term Sheet from UBS for a \$54million loan on a mid \$90million valuation. The lender believes this is a reasonable loan.

However, given the history with the \$50million loan and an offer of good faith, I would like to offer to BLNR a loan cap at \$50million. Hopefully this helps in analyzing the reasonableness of the loan. Not only would it make it consistent with the previous loan, it would increase the coverage and make the LTV approximately 52.85% which I believe to be below market.

At time of closing we are required to put in the requisite cash to pay off all outstanding amounts, which will put the Covid chapter and subsequent events fully behind us.

I myself am hoping that reducing the loan amount and increasing equity might be construed by BLNR as a sign of good faith towards launching a positive working relationship between me, investors and BLNR and DLNR. My long term goal is not to just make Grand Naniloa a great hotel, but to use it as a catalyst to work with you in recreating Banyan Drive, thus benefiting the entire state.

Mahalo nui,

Benjamin Rafter



## EXHIBIT E

CASE LOMBARDI  
A LAW CORPORATION

David G. Brittin  
Lisa K. Broulik  
Michelle J. Chapman  
Matthew A. Cohen  
Stacey W.E. Foy  
Adelbert Green

Michael L. Lam  
Dennis M. Lombardi†  
Jon M.H. Pang  
Lauren R. Sharkey  
Mark G. Valencia

PACIFIC GUARDIAN CENTER, MAUKA TOWER  
737 BISHOP STREET, SUITE 2600  
HONOLULU, HAWAII 96813-3283

Ka'ōnohioikalā J. Aukai IV  
Madlaine N. Farmer  
Kenneth V. Go  
Dominic S. Jancaterino

Samuel W. King, II  
James W. Rooney  
Steven E. Tom

† A Law Corporation  
Daniel H. Case (1925-2016)

TELEPHONE: (808) 547-5400  
FACSIMILE: (808) 523-1888  
E-mail: [info@caselombardi.com](mailto:info@caselombardi.com)  
<http://www.caselombardi.com>

Of Counsel  
Gregory M. Hansen  
Michael R. Marsh  
Frederick W. Rohlifing III

May 25, 2023

State of Hawaii  
Department of Land and Natural Resources  
Administrator Russell Y. Tsuji

Via email to: [REDACTED]

Re: Response to Additional Comments delivered May 18, 2023  
In connection with 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 2-1-05:013, 016, 017, 027, 032, and 046

Dear Mr. Tsuji:

On behalf of WHR LLC ("**Lessee**"), as Lessee under the above-referenced Lease ("**Lease**"), we write to you in support of WHR's Request for Consent to Mortgage and Security Agreement. We have reviewed the additional staff comments delivered by you on May 18, 2023 ("**Additional Comments**"). Below, we provide general responses, followed by specific responses to the Additional Comments.

**General Comments:**

1. The Lease, together with relevant statutory provisions, defines the rights and obligations of the Lessee and of the State of Hawaii, by and through the DLNR and BLNR. As of February 1, 2006, the Lease stands as a prior recorded encumbrance to any party dealing with the leasehold interest created by the Lease. Therefore, any lender that seeks collateral security that derives from the leasehold interest necessarily accepts such security subject to the rights and obligations provided in the Lease, as a matter of law.

We note that certain of the Additional Comments appear to take position that a lender's collateral security instrument could take priority over the Lease. It is Lessee's position that Hawaii law would not allow such as result, and therefore that such risks described in the Additional Comments are not present.

2. Pursuant to the Covenant 20.a of the Lease, the leasehold interest may not be mortgaged without the consent of the Chairperson, "which consent shall not be unreasonably withheld." We interpret that to permit the Board to require a mortgage instrument to contain "reasonable" protections of the state's underlying fee interest, and further that when such reasonable protections are present, the Chairperson should approve the Mortgage.

We note that we are not aware of any staff comments in respect of the form of mortgage instrument. We take that to mean staff does not object to the form of mortgage instrument.

For convenience, the form of mortgage instrument, previously provided on March 22, 2023, is attached hereto as **Exhibit A**.

3. Pursuant to Covenant 13 of the Lease, and in accordance with HRS 171-36(a)(5), BLNR approval is required for an assignment of the Lease, which is defined to include the sale or transfer of more than 20% of the ownership interest. We do not read that provision to prohibit a pledge of the ownership interest, or the Lease to define or imply "sale or transfer" to mean "pledge."

Accordingly, the Lease permits a present pledge of the ownership interest as collateral for a loan. A lender would accept such a pledge with the risk that future BLNR approval is required in order for the lender to access the collateral, and further that BLNR may deny such approval.

*Remainder of this page is blank. General Comments continue on next page*

May25, 2023

4. Except as to a mortgage of the leasehold interest, or an actual and present assignment of the Lease, no provision of the Lease grants a right to the State, BLNR, or DLNR staff to review or approve financial or loan agreements entered into by Lessee.

All of the Additional Comments concern the financial structure of the Lessee or the loan agreement. Lessor is responding to the Additional Comments in an effort to provide transparency and engage with DLNR staff and BLNR, but maintains that the responses are not relevant to the request to approve the mortgage instrument currently before the Board.

Thank you for this opportunity to respond. Please circulate this letter and the enclosures to the members of the BLNR.

Please contact us if you have any further questions and if we can provide further information. We are willing to meet with you and/or the AG to discuss the pending request.

*Specific responses to the Additional Comments are provided in the enclosure attached hereto together with Exhibits A - E.*

Very truly yours,

**CASE LOMBARDI**

/s/ Michael L. Lam

MICHAEL L. LAM

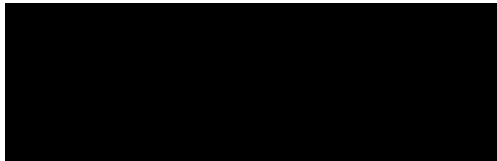
MATTHEW A. COHEN

MLL/MAC/erh

Enclosures

cc: (w/enclosures)

Client



Lessee's Specific Responses to Additional Comments

May 25, 2023

Page 1 of 9

DLNR Staff comments	Lessee's Specific Response
<p><i>Notwithstanding anything herein to the contrary, staff has a fundamental belief that ceded or public trust lands should not be used or utilized for profiteering, and that mortgaging State leased lands should be limited or restricted to improvements on the State leased property or the lessee's authorized operations on the State leased property.</i></p>	<p>The Lease explicitly mandates commercial use, stating as follows:</p> <p>The Lessee shall use or allow the premises leased, on all parcels, except the golf course parcel, <b>to be used solely for hotel and hotel-related uses</b> (including retail, restaurant, banquet, commercial office, and spa facilities), but excluding condominium or hotel condominium.</p> <p>Lease Covenant No. 12, page 8 (emphasis added).</p> <p>The existence of a Hotel on the demised premises predates the Lease. A hotel may have first been constructed on the Naniloa site in 1939. Hotel uses have been contemplated on state lands since the first state legislature. 1962 Sess. Laws Act 32, §2, Part II.B, § 42 (currently codified at HRS 171-42).</p>



DLNR Staff comments	Lessee's Specific Response
<p><b>WHR Reorganization</b> and change in ownership/controlling interest to be legally complete now or before (not after) the Board revisits the request for consent to mortgage—legally show Ben Rafter with controlling interest and owner or majority interest in WHR, with the number of shares or membership interests owned by Rafter and the total number of outstanding shares or membership interests owned by others (identify the others). We are requesting full disclosure of the individual owners or members of WHR and its affiliates who have an interest in WHR or the affiliates. Probably easiest shown on a chart down to individual owners/members and not limited to an LLC or other entity. Identify the individual owners or members of any such affiliate LLC or entity.</p> <p>Show the paid in capital of WHR or identity individual investors who have committed to contributing to WHR upon a capital call.</p>	<p>Concurrent with the closing of the \$54,000,000 UBS Loan, Lessee's current members and a membership entity owned and managed solely by Ben Rafter will execute an amended and restated operating agreement for Lessee, pursuant to which a management entity owned and managed solely by Ben Rafter will manage the LLC.</p> <p>Under the amended and restatement operating agreement, the manager will generally have the exclusive power to manage the Lessee, except for certain "major decisions" that require the consent of all of the members that are typical for a company of this complexity, e.g., the merger of Lessee, the dissolution of the Lessee, changing the business of Lessee, etc.</p> <p>Note that the foregoing examples of major decisions would also likely require the concurrence of the BLNR.</p> <p>The change in ownership and the effectiveness of the draft operating agreement are required by lender and contingent upon the closing of the proposed loan. If the loan does not close, the reorganization will not occur.</p> <p>Lessee is willing to provide redacted copies of the proposed Amended and Restated Operating Agreement and an organizational chart showing the paid-in capital of WHR or identity individual investors who have committed to contributing to WHR upon a capital call to the BLNR for review in executive session. Please provide a procedure for confidential review.</p>

DLNR Staff comments	Lessee's Specific Response
<p><u>Even if the Lessee must pay \$500K for Lener's legal fees to document the loan, lender needs to provide <b>assurances and clarity</b> on the following loan terms, and the <b>loan documents revised and finalized</b> to clearly state:</u></p> <p>a. Confirmation from the lender that the loan is approved prior to Board consent.</p>	<p>Please see our General Comments 1-4 above. The Lease does not grant the State the right to review or approve loans or loan agreements entered into by Lessee.</p> <p>The loan will not be approved until after the State gives its consent to the form of the mortgage instrument. The form of loan agreement was provided on March 22, 2023, and is attached hereto as <b>Exhibit B</b> for convenience. The loan agreement will be modified consistent with the Term Sheet at Closing.</p>
<p>b. Lender disclosure or assurances (prior to Board consent) or revise and finalize the loan documents to clearly address:</p>	<p><i>Please see responses below.</i></p>
<p>i. The exact interest rate [annual percentage rate] throughout the term of the loan;</p>	<p>The rate of the loan will be fixed, but the interest rate will be determined at closing. See letter from counsel for UBS dated April 11, 2023, attached hereto as <b>Exhibit C</b>. That letter states as follows:</p> <p style="padding-left: 40px;">[T] he proposed Loan is, in fact, going to be a fixed rate loan.</p> <p>UBS also authorized the following statement (emphasis added):</p> <p style="padding-left: 40px;">While certain aspects of the proposed UBS loan are still being underwritten and negotiated, any loan to borrower, if and when approved by UBS internally and subsequently funded, <b>will be at a fixed rate of interest for the term of such loan</b> (subject to the typical caveat regarding a higher fixed interest rate during the continuance of a loan default), which fixed interest rate would be determined immediately prior to closing.</p> <p>Based on current market conditions, Lessee expect the interest rate to be 7.25%</p>

Lessee's Specific Responses to Additional Comments

May 25, 2023

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DLNR Staff comments	Lessee's Specific Response
ii. The minimum required debt service payments throughout the term of the loan;	Please see attached "UBS Loan Payments + Sources and Uses" prepared by Colliers, assuming a \$54,000,000.00 loan at 7.25%, attached hereto as <b>Exhibit D</b> .  For the "Interest Only period," annual debt service would be \$3,915,000.00. For the amortization period, annual debt service would be \$ 4,420,502.00
iii. Clarify in writing 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. If full 100% of accrued interest is required to be paid in the debt service payments, please clearly revise the loan documents to state the same.	The draft loan agreement is unambiguous in its requirement that debt service payments include 100% of the accrued interest.
iv. What is the expected amount due at loan maturity?	See <u>Exhibit D</u> .  Based on a \$54,000,000 loan at 7.25% interest, the loan balance at the maturity of the loan will be \$52,311,606.

DLNR Staff comments	Lessee's Specific Response
<p>v. The debt service payments should be revised to include principal and interest payments amortized over 5 years or if borrower would not qualify under the loan because of too high debt service payments, then at least amortize the loan/mortgage over 30 years like years 3 to 5 under the proposed loan/mortgage. WHR and its owners ought to provide a plan we can present to the Board for the liquidation of the principal and interest debt over the next 10, but not longer than 20 years.</p>	<p>Please see our General Comments 1-4 above. The Lease does not grant the State the right to review or approve loans or loan agreements entered into by Lessee.</p> <p>Colliers further informed us that an interest-only payment period is a benefit that may be conferred on a commercial borrower that is anticipated to have high debt service coverage. It is not a reflection of a poorly performing asset.</p>
<p>Footnote 1: If the proposed loan/mortgage is approved, at loan maturity in 5 years, 10 years would have passed since the 2018 loan was taken out to pay others, yet the loan balance would be higher than the 50 million 2018 loan/mortgage. Commercial loans generally mature in 20 years, sometimes 30 years but usually not longer</p>	<p>Please see our General Comments 1-4 above. The Lease does not grant the State the right to review or approve loans or loan agreements entered into by Lessee. This is not a relevant consideration to whether the mortgage instrument is reasonable.</p>



Lessee's Specific Responses to Additional Comments

May 25, 2023

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DLNR Staff comments	Lessee's Specific Response
<p><u>Mezzanine Loan/Mortgage Out or revise Loan documents</u> (mainly the Loan Agreement) to provide a <u>prohibition</u> on any mezzanine loans and mortgages and the sale and assignment of those mezzanine loans and mortgages without <u>prior Land Board approval</u>, which approval may be withheld for any reason in the Land Board's sole and absolute discretion. Add provision lender and borrower acknowledge the hotel sits on ceded or public trust lands.</p>	<p>Please see our General Comments 1-4 above. The Lease does not grant the State the right to review or approve loans or loan agreements entered into by Lessee.</p> <p>The lender has agreed to remove Section 11.29 from the Loan Agreement.</p> <p>We note, however, that Section 11.29 of the Loan did not purport to give the lender a right to impose a new mortgage on state property, or to assign the ownership interests of Lessee. Staff's comments in respect of this section are not correct.</p> <p><i>See also Exhibit C</i>, Letter from Counsel for UBS dated April 11, 2023 (making comments in respect of the mezzanine provision of the loan agreement).</p> <p>Additionally, as a matter of law, this provision cannot and does not supersede the rights of the State under the Lease. See General Comment 1, above.</p>
<p>Footnote 2: There is a belief that private individuals ought not to profit off ceded or public trust lands. The State has an obligation to protect the public and public trust lands. The mezzanine loan/mortgage provision would allow the lender to unilaterally breakup and sell off the loan/mortgage into multiple mezzanine loans and mortgages, conceivably for a profit even before the 5-year loan/mortgage term is up. This fact may explain why the appraiser ignored Hilo comps for Kona and Oahu comps in the income and land valuation analysis which led to the ultimate opinion that the Naniloa was worth in the \$900 million range. The breakup and sale of the loan and mortgage may be more imminent than theoretical.</p>	<p>See comment above, regarding the explicitly commercial nature of the Lease and the permitted uses of the premises.</p> <p>The comments regarding the appraisal is a gross mischaracterization of the work of professional State-licensed appraisers that have conducted 1,000s of similar evaluations, employed by HVS, a global consulting firm. The comparison properties used in the appraisal were selected because no other branded resort properties are located in Hilo area. The comparison properties located in Kona and Oahu were selected because they represent similarly-situated branded resort facilities.</p>

Lessee's Specific Responses to Additional Comments

May 25, 2023

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DLNR Staff comments	Lessee's Specific Response
<p>Show either a <u>signed settlement agreement</u> has been reached with the Foreclosing Lender (Wilmington or Rialto) and terms thereof; or <u>show cash by WHR or liquid investors</u> with at least \$17 million to cover short from \$52 mil loan and \$65 million (as of October 2022) plus attorney fees and costs.</p>	<p>Please see our General Comments 1-4 above. The Lease does not grant the State the right to review or approve loans or loan agreements entered into by Lessee.</p> <p>The focus on settlement with the foreclosing lender is misplaced because the new loan cannot proceed unless and until the foreclosing lender is paid to their satisfaction and releases the existing mortgage. That is, if the new loan occurs, the foreclosing lender will necessarily have been satisfied.</p> <p>Lessee is negotiating a settlement agreement with foreclosing lender that will provide a final payoff amount and will release all pending litigation. Lessee will provide evidence of the agreement by June 6, 2023.</p>
<p>Show who is holding and amount of so-called profit of 7 million or so from 2022, and show available as supplement to the aforesaid \$17 million to cover loan shortfall to pay off existing 1<sup>st</sup> mortgage. State whether this amount is encumbered, and if so, itemize the encumbrances; or whether the amount is restricted and available for loan closing and costs.</p>	<p>All cash proceeds from the hotel are held in lender-controlled bank accounts and will be contributed to the payoff of the current loan to foreclosing lender, as a part of the settlement agreement referenced above.</p> <p>Financial statements of the Lessee were prepared in accordance with GAAP standards by a professional hotel management company that operates hundreds of hotels.</p>
<p>Provide evidence and assurances that WHR's history of repeated defaults will cease under new management and ownership by Rafter, e.g., show Rafter has cash to cure annual lease rents, performance bond and other defaults under the Lease</p>	<p>In respect of the prior defaults, please see narrative attached as <b><u>Exhibit E</u></b>.</p> <p>Lessee will maintain all lease rents and performance bonds required under the Lease.</p>

Lessee's Specific Responses to Additional Comments

May 25, 2023

Page 8 of 9

DLNR Staff comments	Lessee's Specific Response
<p><u>Personal Guaranty</u> on Lease terms and on lessee's representations and warranties on interpreting the loan documents—Ben Rafter</p>	<p>Lessee will maintain all lease rents and performance bonds required under the Lease. The Lease does not require a personal guarantee by any controlling party, and none of the current controlling parties of Lessee currently provide a guaranty.</p> <p>We are informed that Mr. Rafter declines to provide a financial guarantee. Mr. Rafter nonetheless agrees with Lessee's representations and warranties on interpreting the loan documents.</p>
<p>Explain why State should not be concerned with a default situation if the Naniloa does not meet the minimum debt yield of 12% if net operating income drops below \$6,480,000.</p>	<p>State's risk is limited to default on Lease payments, and has the existing option to call performance bond or to foreclose on the lease.</p> <p>Minimum Debt Yield is a lender-imposed covenant that measures "Net Operating Income" over total principal. Although it is measured annually, the draft loan agreement provided by UBS only sets a minimum Debt Yield. in the event of a "Major Casualty." It is principally a measure used by lenders to determine whether to make a loan, not to measure on-going performance.</p> <p>The Manager can also exercise a capital call to make up any funding shortfall. Under a capital call, if certain members do not make the required contribution, the contributing members can provide the difference, resulting in a corresponding increase in their equity interest.</p>

Lessee's Specific Responses to Additional Comments

May 25, 2023

Page 9 of 9

DLNR Staff comments	Lessee's Specific Response
<p>Explain why State should not be concerned with a default situation if the Naniloa does not meet the minimum debt service charge if EBIDTA<sup>4</sup> drops below the minimum 1.4% amount (debt service amount<sup>5</sup> over the \$54 million loan/mortgage).</p>	<p>State's risk is limited to default on Lease payments, and has the existing option to call payment/performance bond or to foreclose on the lease.</p> <p>A Debt Service Coverage Ratio of 1.4 means that EBITDA is 140% of debt service; that is, there is still more than enough to pay the Loan and continue operations.</p> <p>Failure to meet the Debt Service Coverage Ratio is <u>not</u> a default under the loan agreement. Rather, it is a "Trigger Event" that permits the lender to activate certain cash and bank account control mechanisms. Specifically, the mechanisms are triggered by a DSCR of 1.2. See <u>Exhibit B</u>, definition of "Cash Management DSCR Trigger Event" (p.4).</p> <p>The Manager can also exercise a capital call to make up any funding shortfall. Under a capital call, if certain members do not make the required contribution, the contributing members can provide the difference, resulting in a corresponding increase in their equity interest.</p>

*-End of specific responses-*



## **SCHEDULE 9.1(b)**

### **UPDATED INFORMATION**

1. Any proposed program for the renovation, improvement or development of the Property, or any part thereof, including the estimated cost thereof and the method of financing to be used.
2. The general competitive conditions to which the Property is or may be subject.
3. Management of the Property.
4. Occupancy rate expressed as a percentage for each of the last five (5) years.
5. Principal businesses, occupations and professions carried on, in or from the Property.
6. Number of tenants occupying ten percent (10%) or more of the total rentable square footage of the Property, the principal business of each such tenant, and the principal provisions of the Leases with such tenants (including, but not limited to: rent per annum, expiration date, and renewal options).
7. The average effective annual rent per square foot or unit for each of the last three (3) years.
8. Schedule of the lease expirations for each of the following ten (10) years stating:
  - (a) The number of tenants whose leases will expire.
  - (b) The total area in square feet covered by such Leases.
  - (c) The annual rent represented by such Leases.
  - (d) The percentage of gross annual rent represented by such Leases.

April 11, 2023

VIA EMAIL

Michael L. Lam, Esq.  
Case Lombardi, a Law Corporation  
Pacific Guardian Center, Mauka Tower  
737 Bishop Street, Suite 2600  
Honolulu, Hawaii 96813-3283

Re: WHR LLC (the "Borrower") /Grand Naniloa Hotel, South Hilo, Hawaii (the "Property") - proposed loan (the "Loan") to Borrower by UBS AG, by and through its branch at 1285 Avenue of the Americas, New York, New York ("Lender")

Dear Michael:

As you know, we represent Lender in connection with the Loan.

We have reviewed the recommendation of the Staff of the Department of Land and Natural Resources of the State of Hawaii ("DLNR") dated April 14, 2023 (the "Recommendation"), as to the requested consent to a leasehold mortgage securing the Loan, as required under the related ground lease.

As correctly noted in the final paragraph of page 8 of the Recommendation, the Loan is still being underwritten and negotiated, and thus the terms of the Loan (were it to be approved by Lender) are not final. As such, this correspondence is not intended to (and shall not be deemed to) obligate Lender to provide the Loan, or as to the terms of any financing that may be offered.

That said, I want to clarify that the proposed Loan is, in fact, going to be a fixed rate loan. Assuming approval of the Loan, acceptance of the terms by the Borrower, and satisfaction of all conditions to closing, the fixed interest rate for the Loan would be set immediately prior to closing; the fixed interest rate for the Loan would be based on a spread above the five (5) years SOFR swap rate, subject to a floor, but the rate would be fixed for the term of the Loan (except if there were to be one or more "Events of Default" by the Borrower, in which case a higher, fixed, default interest rate would apply while the Event(s) of Default remained outstanding.

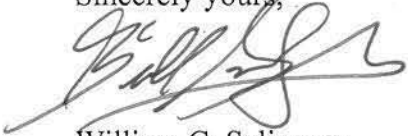
Further, with regard to the concern in the Recommendation regarding "New Mezzanine Loans", I want to make it clear that any such "New Mezzanine Loan" would not be secured by the leasehold mortgage encumbering the Property for which consent is now sought, but instead by a pledge of the ownership interests in the Borrower. Creation of a New Mezzanine Loan would reduce the

Michael L. Lam, Esq.  
April 11, 2023  
Page 2

amount secured by the leasehold mortgage, by shifting a portion of the original Loan to the New Mezzanine Loan.

Please feel free to share this letter with DLNR and the Board of Land and Natural Resources.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'William C. Seligman', written over a horizontal line.

William C. Seligman  
Partner

cc: Client  
Katie Baskin, Esq.

## PROPERTY ECONOMICS

LOAN TYPE	CMBS
U/W NOI	\$7,893,561
UNDERWRITTEN: NET CASH FLOW	\$6,900,873

## LOAN SIZING

(USES) EXISTING LOAN BALANCE + OUTSTANDING FEES	\$65,000,000
(USES) NEW ESTIMATED LOAN CLOSING COSTS	\$2,000,000
(USES) TOTAL	\$67,000,000
(SOURCES) NEW LOAN	\$54,000,000
(SOURCES) REMAINING OWNER EQUITY CASH	\$13,000,000
(SOURCES) TOTAL	\$67,000,000

## LOAN TERMS

TERM (YEARS)	5 Years
INDEX UTILIZED	5-YR SOFR SWAP
INDEX RATE	3.22%
INDEX FLOOR (ESTIMATED)	3.85%
CREDIT SPREAD	3.40%
SPREAD RANGE	3.40%
Interest Rate	7.25%
INTEREST RATE RANGE	7.25%
RATE TYPE	Fixed
AMORTIZATION	30
INTEREST ONLY PERIOD	24 Months
PREPAYMENT	Defeasance

EXHIBIT D

## LOAN METRICS

LOAN-TO-VALUE	57.1%
DEBT YIELD (NET OPERATING INCOME) BEFORE RESERVES	14.20%
DEBT YIELD (UNDERWRITTEN: NET CASH FLOW)+RESERVES	12.78%
DEBT SERVICE COVERAGE RATIO (PRINCIPAL+INTEREST)	1.73x
DEBT SERVICE COVERAGE RATIO (INTEREST ONLY PAYMENTS)	1.96x
ANNUAL DEBT SERVICE PAYMENTS (PRINCIPAL+INTEREST)	\$4,420,502
ANNUAL DEBT SERVICE PAYMENTS (INTEREST ONLY)	\$3,915,000
NET CASH FLOW AFTER DEBT SERVICE PAYMENTS (PRINCIPAL+INTEREST)	\$3,248,082
NET CASH FLOW AFTER DEBT SERVICE PAYMENTS (INTEREST ONLY)	\$3,753,585
ESTIMATED SECURITIZATION DATE	Jun-23
LOAN MATURITY DATE	May-2028
LOAN BALANCE @ MATURITY	\$52,311,606 \$134,824/Unit



**Exhibit E** – Lessee's narrative explanation regarding prior lease defaults.

**General response:** All prior events of default have been cured.

<b>Event of Default</b>	<b>Lessee's Specific Response</b>
Notice of Default [sent 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)	Unprecedented COVID pandemic travel and health related restrictions shut down tourism and resort-related activities across the globe, including eliminating hotel revenues at the Naniloa.  Default was cured by use of PPP funds.
Notice of Default [sent] by certified mail dated January 19, 2021 for: Failure to post required performance bond (Expired: 11/07/2020)	Unprecedented COVID pandemic travel and health related restrictions shut down tourism and resort-related activities across the globe, including eliminating hotel revenues at the Naniloa.  Default was cured by use of PPP funds.
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	Unprecedented COVID pandemic travel and health related restrictions shut down tourism and resort-related activities across the globe, including eliminating hotel revenues at the Naniloa.  Default was cured June 3, 2021.
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.)	Due to loss of revenues resulting from unprecedented COVID pandemic travel and health related restrictions, existing lender took over cash management accounts, locking Lessee out of ability to pay vendors. As a result, accounts payable to exceeded \$2,000,000. Existing lender and Lessee reached agreement to pay all accounts payable, including DLNR.
Notice of Default [served] by certified mail dated, January 13, 2023, for: Failure to post required liability insurance policy	Existing lender and Receiver control the operating cash management account. Lessee coordinated cure by having Receiver authorize the payment for the liability insurance.
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)	Existing lender and Receiver control the operating cash management account. Receiver testified on May 12, 2023 stating that the failure was an accounting error and that Lessee was not at fault.

# EXHIBIT 10

**Note: WHR LLC responses are in bold underline.**

Dear Counsel:

In connection with counsel's email to you below, please advise me if you will be supplementing your responses to me in your letter dated May 25, 2023, in particular the documents and information requested that you claimed were confidential. Examples include:

- The amended and restated operating agreement showing the manager and individual members (and their respective shares or interest);

**This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. Ben Rafter has been appointed as the new Manager, as is in evidence in testimony of both Mr. Bushor and Mr. Rafter. The reasonable consent may be conditioned upon the Operating Agreement being finalized showing Ben Rafter as Manager. This Operating Agreement shall be finalized along with the loan documents and signed in conjunction with the loan closing and you may condition the AG with the right to approve of this representation during the loan closing process. The WHR Organizational Chart has been provided to DLNR as additional explanation. Note, the letter explaining appointment of Mr. Rafter is also already in the testimony provided to BLNR with the representation the Manager is Mr. Rafter as clearly stated in the appointment letter previously submitted to BLNR.**

- The total outstanding shares/interests of WHR and the names and number of shares issued and owned by the individual members/owners/investors;

**This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. The ownership is as set forth on the Organizational Chart and the ownership interests are in the companies listed on the Organizational Chart. This is unnecessary information to the issue at hand, but irrespective of the request, WHR is the one that has committed to fund the capital to fund the difference between the loan amount and the amount to payoff the existing loan. Testimony also exists that Ben Rafter is the backstop to the company in the event the owners listed on the Org Chart don't all pay their exact percentage interests.**

- The paid-in-capital of each individual member/owner/investor in the form or cash contribution, the amount of cash contribution and to the extent applicable, the amount of shares issued for services rendered or goodwill in lieu of a cash contribution.

**This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. The amounts each owner of WHR is committed to fund are listed on the Exhibit A attached hereto. Thus, there is \$21M that is committed to be funded to pay any outstanding amounts on the loan, and WHR and its members are committed to fund the amount well below this amount. Also, Ben Rafter has testified he is the backstop to the company in the event the owners listed on the Org Chart don't all pay their exact percentage interests.**



- The amount of paid-in-capital and cash contribution of Ben Rafter;

**This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. Mr. Rafter has stated in testimony he will, upon closing of the loan, contribute a minimum \$2,000,000 as he testified. We need the Consent of the Mortgage as a condition to the loan closing and all owners contributing the amount capital to be paid in as of the closing.**

- The number of shares/interests issued to Ben Rafter (and the total number of shares outstanding at the time of said issuance), and any other information to show Ben Rafter has the controlling interest or ownership of WHR and is the managing member/owner/investor.

**This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. The interests are equal to the \$2,000,000. There are not separate shares, but instead his interests will be equal to the minimum \$2,000,000 or such higher number of capital invested as a backstop per his testimony previously provided.**

We will note WHR's decision not to amend or revise the loan documents that conflict or otherwise are prohibited under the lease.

**WHR has never stated it would not amend the loan documents and in fact, WHR has agreed as a condition to the reasonable consent to the Mortgage to amend all provisions that are inconsistent with the lease, and this may be a condition to the consent of the Mortgage, as we agree the AG and the lender and WHR counsel will all revise the loan documents to be consistent with the Lease.**

[Counsel's note: Additionally, please note that the Lessee WHR already confirmed that the Lender has agreed to remove the Mezzanine Loan provision (Section 11.29) of the Loan Agreement. See Letter dated May 25, 2023. - MAC]

Attached is an article from 2013 showing Ben Rafter's involvement with Naniloa. Confirm date Rafter admitted as a member/owner/investor, and the amount of his cash contribution, if any, from 2013 to current.

**A 2013 Article is not factual information. Ben Rafter has not been a member/owner/investor before the current appointment and current closing of the new loan in 2023, which is being closed in conjunction with Mr. Rafter being the new Manager of WHR and investing \$2,000,000 minimum for the first time into WHR.**

Further, your letter dated May 25, 2023 and attachments refer to the manager making a capital call to members/owners/investors in the event of a financial shortfall or other difficulty or to resolve financial defaults.

**WHR has the right to mandate a capital call for the needs of WHR, which for the Mortgage closing, WHR has notified all Members and will require the funding of the capital call for the difference of the \$54,000,000 loan and the payoff amount \$65M (estimate), and the Members of WHR have a legal**

**obligation to contribute in the capital all such amounts, but note, Mr. Rafter has agreed to be the backstop. That is why this is non-issue, as WHR has the right to call the capital from the Members.**

As you know, WHR has had difficulty keeping current under the lease. Attached to this email are significant default situations WHR faced that went before the Board in 2021 and 2022. Please confirm manager Bushor *did not make a capital call* to resolve the 2021 and 2022 financial difficulties and lease default situation, *or if he did make a capital call*, identify the date of the capital call, and : (i) those individual members/owners/investors who did not contribute cash to the capital call; and (2) those individual members/owners/investors who did contribute cash, and the specific date and amount of cash contribution of each member/owner/investor.

**Any defaults in 2021 and 2022 related to Covid, and in 2022, testimony of the Receiver noted the default was from a “snafu” of Evolution and processing a check that was 5 days late, but this was not WHR responsibility as the Receiver has authorization to make all lease payments at this time. This confirms that no capital calls have been required before this new UBS loan closing as the cash flow has been adequate since June 2021 to pay all lease payments and honor all lease obligations.**

# EXHIBIT 11

CASE LOMBARDI  
A LAW CORPORATION

David G. Brittin  
Lisa K. Broulik  
Michelle J. Chapman  
Matthew A. Cohen  
Stacey W.E. Foy  
Adelbert Green

Michael L. Lam  
Dennis M. Lombardi†  
Jon M.H. Pang  
Lauren R. Sharkey  
Mark G. Valencia

† A Law Corporation  
Daniel H. Case (1925-2016)

PACIFIC GUARDIAN CENTER, MAUKA TOWER  
737 BISHOP STREET, SUITE 2600  
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Ka'ōnohiokalā J. Aukai IV  
Madlaine N. Farmer  
Kenneth V. Go  
Samuel W. King, II  
James W. Rooney  
Steven E. Tom

Of Counsel  
Gregory M. Hansen  
Michael R. Marsh  
Frederick W. Rohlfing III

June 1, 2023

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

Via email to:

[REDACTED]  
[REDACTED]  
blnr.testimony@hawaii.gov

Re: June 9, 2023 Meeting Agenda Item TBD  
**Copy of Redacted Settlement Agreement with Existing Lender**  
Support for Lessee's Request for Consent to Mortgage and Security Agreement,  
General Lease No. S-5844, WHR LLC, Lessee; Waiakea, South Hilo, Hawaii,  
Tax Map Keys: (3) 2-1-01:012 and 2-1-05:013, 016, 017, 027, 032, and 046

Dear Chairperson Chang, Board Members, and Mr. Tsuji:

On behalf of WHR LLC ("**Lessee**"), as Lessee under the above-referenced Lease ("**Lease**"), we write to you in support of WHR's Request for Consent to Mortgage and Security Agreement. This letter supplements our prior letter and testimony dated May 11 and 12, 2023, and letter dated May 31, 2023.

For your review, I have enclosed a redacted fully-executed copy of a Settlement Agreement dated May 31, 2023, between Lessee and the existing lender, pursuant to which:

1. Lessee and existing lender have agreed to a "Payoff Amount" of exactly \$64,002,872.35; and
2. The existing lender will release the existing mortgage and dismiss all foreclosure-related litigation, if the Payoff Amount is delivered to the existing lender by June 30, 2023.

As previously testified, the sources of the Payoff Amount are (i) a proposed \$50,000,000 loan to be secured by the proposed Mortgage; and (ii) contributions from WHR and its Member investors of at least \$14,002,872.35.

That is, the foreclosure litigation will be fully and completely extinguished upon the satisfaction of the terms of the Settlement Agreement.

EXHIBIT 11

Board of Land and Natural Resources

June 1, 2023

Page 2 of 2

Accordingly, the resolution of the foreclosure litigation pursuant to the Settlement Agreement is a factor that supports the Chairperson's and/or the Board's reasonable consent the proposed "New Mortgage."

Thank you for your consideration. Please contact us if you have any further questions. We remain willing to meet with Mr. Tsuji and/or the AG to discuss the pending request and/or to provide additional information.

Very truly yours,  
CASE LOMBARDI

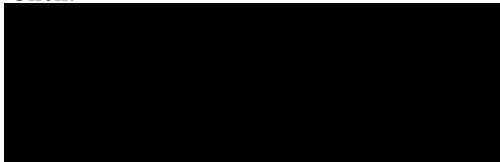
*/s/ Matthew A. Cohen*

**Michael L. Lam**  
**Matthew A. Cohen**

MAC

Enclosures: Redacted copy of Settlement Agreement dated May 31, 2023

cc: Client



REDACTED copy of  
Settlement Agreement dated May 31, 2023  
between Lessee and existing lender

**SETTLEMENT AGREEMENT**

This Settlement Agreement (the “**Agreement**”) is dated and effective as of May 31, 2023 (the “**Effective Date**”), by and among 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 (the “**Lender**”), on the one hand, and WHR LLC, a Hawaii limited liability company (the “**Borrower**”), and Edward Bushor and Stuart L. Miller (collectively, the “**Guarantors**” and together with the Borrower, the “**Borrower Parties**”), on the other hand. The Lender and the Borrower Parties are collectively referred to herein as the “**Settling Parties**” and each is individually referred to herein as a “**Party**.”

RECITALS

A. On or about August 31, 2018, Wells Fargo Bank, National Association (“**Original Lender**”) made a loan (the “**Loan**”) to Borrower in the original principal amount of Fifty Million Dollars (\$50,000,000.00).

B. In connection with the Loan, Borrower executed (i) that certain Promissory Note dated August 31, 2018, in favor of Original Lender in the original principal sum of Fifty Million Dollars (\$50,000,000.00) (the “**Note**”); and (ii) that certain Loan Agreement dated August 31, 2018 (the “**Loan Agreement**”).

C. Concurrently with the execution of the Note and Loan Agreement, Borrower executed that certain Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated August 31, 2018 (the “**Security Agreement**”), in favor of the Original Lender, encumbering, among other things, that certain real property located at 93 Banyan Drive and 1713 Kamehameha Avenue in Hilo, Hawaii, as more particularly described in the Security Agreement (the “**Real Property**”). The Security Agreement was recorded in the Bureau of Conveyances of the State of Hawaii as Document No. A-68220552 and in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. T-10474133.

D. On or about August 31, 2018, Guarantors executed that certain Guaranty of Recourse Obligations (the “**Guaranty**”) in favor of Original Lender.

E. The Note, the Loan Agreement, the Security Agreement, the Guaranty and all other documents which evidence, secure, or relate to the Loan are hereinafter collectively referred to as the “**Loan Documents**”. Lender is now the payee of the Note, the mortgagee under the Security Agreement and the holder of the Original Lender’s interests under the other Loan Documents.

F. [REDACTED]

G.

[Redacted text block G]

H.

[Redacted text block H]

I.

[Redacted text block I]

J.

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K.

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L.

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M.

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N.

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O.

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[REDACTED]

P. In order to avoid the continuing expense and uncertainties of litigation, the Settling Parties have reached an agreement to settle the claims, counterclaims and third-party claims that are the subject of the Litigation subject to the express terms and conditions set forth in this Agreement.

Q. Capitalized terms utilized but not defined herein shall have the meaning ascribed to them in the Loan Agreement.

NOW, THEREFORE, in consideration of the mutual covenants herein and benefits derived here from, the receipt and sufficiency of which are hereby acknowledged, the Settling Parties, intending to be legally bound, agree as follows:

1. Affirmation of Recitals. The Settling Parties reaffirm and incorporate the foregoing recitals into this Agreement as if restated in full herein.

2. The Payoff Statement. Upon the execution of this Agreement, Lender shall provide Borrower with a written payoff statement reflecting the amounts due and owing under the Loan Documents as of June 30, 2023, which will include, but is not limited to, (i) interest at the Default Rate from April 11, 2020 through June 30, 2023; (ii) a Yield Maintenance Premium in accordance with Section 2.7(c) of the Loan Agreement; and (iii) a liquidation fee in accordance with Section 17.6 of the Loan Agreement (the “**Payoff Statement**”).

3. The Loan Payoff. Borrower shall have until June 30, 2023 in which to pay Lender, by wire transfer of immediately available funds in accordance with the wire instruction set forth on Exhibit 1 attached hereto, the amount of \$64,002,872.35 (the “**Payoff Amount**”) as reflected on the Payoff Statement. [REDACTED]

[REDACTED] Receipt of the Payoff Amount and completion of the Reconciliation shall constitute full and final satisfaction of the indebtedness due under the Loan Documents.

[REDACTED] Provided, however, that notwithstanding anything in this Agreement to the contrary, at any time after June 30, 2023 but before the Sale (as defined below), Borrower may pay Lender the Payoff Amount plus the required per diem and unreimbursed advances as

provided in the Stipulated Judgment attached as Exhibit 3 (collectively, the “**Stipulated Judgment Amount**”) and, upon Lender’s receipt of the Stipulated Judgment Amount, Lender will: (a) immediately instruct the Commissioner to cancel the Sale; and (b) comply with and be bound by Paragraphs 3, 5(d) and (e), 6 and 7 of this Agreement, as if Lender had received the Payoff Amount on or before June 30, 2023.

[REDACTED]

5. The Litigation. With respect to the Hawaii Action and the New York Action, the Settling Parties agree as follows:

- a. Upon the execution of this Agreement, Lender and Borrower shall execute, and Lender is thereafter authorized to file with the Hawaii Court, a stipulated judgment in the form attached hereto as Exhibit 3 (the “**Stipulated Judgment**”), causing a judgment in the amount of the Payoff Amount to be entered against Borrower in the Hawaii Action;
- b. Upon the execution of this Agreement, Lender and Borrower shall execute, and Lender is thereafter authorized to file with the Hawaii Court, a stipulation of dismissal in the form attached hereto as Exhibit 4, causing the Counterclaims to be dismissed with prejudice, with each party bearing its own costs and attorneys’ fees (the “**Hawaii Stipulation of Dismissal**”);
- c. Upon the execution of this Agreement, Lender, Rialto and Guarantors shall execute, and Rialto is thereafter authorized to file with the SDNY Court, a stipulation of voluntary dismissal in the form attached hereto as Exhibit 5, causing the Third-Party Complaint to be dismissed with prejudice, with each party bearing its own costs and attorneys’ fees (the “**NY Stipulation of Dismissal**”);
- d. Within two (2) business days of Lender’s receipt of the Payoff Amount, Lender and Borrower shall execute, and Borrower is

thereafter authorized to file with the Hawaii Court, a Stipulation for Discharge of the Receiver and Dismissal with Prejudice of All Claims and Parties, in the form attached hereto as Exhibit 6, as to the Hawaii Action (the “**Foreclosure Stipulation of Dismissal**”); and

- e. Within two (2) business days of Lender’s receipt of the Payoff Amount, Lender and Guarantors shall execute, and Guarantors are thereafter authorized to file with the SDNY Court, a Stipulation of Dismissal with Prejudice of All Claims and Parties, in the form attached hereto as Exhibit 7, as to the New York Action (the “**Guaranty Stipulation of Dismissal**”).

[REDACTED]

[REDACTED]

7. Release of Security Agreement. Upon Lender’s receipt of the Payoff Amount on or before June 30, 2023, Lender shall: (i) consider the Note satisfied; and (ii) deliver a satisfaction and release of the Security Agreement (the “**Mortgage Satisfaction**”).

8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Suite 3550  
Miami, FL 33131

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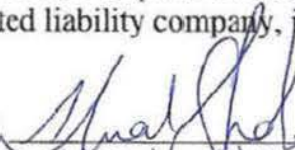
[Redacted text block]

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the day and year first above written.

**LENDER:**


**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: Rialto Capital Advisors, LLC, a Delaware limited liability company, its attorney in fact


By:   
Name: Nisal Shah  
Title: Managing Director

**BORROWER:**

**WHRLLC,**  
a Hawaii limited liability company

By:   
Name: Edward Bushor  
Title: CEO

**GUARANTORS:**

  
**EDWARD BUSHOR**, an individual

\_\_\_\_\_  
**STUART L. MILLER**, an individual

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the day and year first above written.

**LENDER:**

**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: Rialto Capital Advisors, LLC, a Delaware limited liability company, its attorney in fact

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

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

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

**BORROWER:**

**WHRLLC,**  
a Hawaii limited liability company

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

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

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

**GUARANTORS:**

\_\_\_\_\_  
**EDWARD BUSHOR, an individual**



\_\_\_\_\_  
**STUART L. MILLER, an individual**

EXHIBITS REDACTED

# EXHIBIT 12

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

Electronically Filed  
THIRD CIRCUIT  
3CCV-21-0000360

06-JUN-2023

02:38 PM

Dkt. 183 ORDG

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

Case No: 3CCV-21-0000360  
(Foreclosure)

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT, DECREE OF  
FORECLOSURE AND ORDER OF  
SALE**

**Remote Hearing**

**Date:** Monday, March 20, 2023

**Time:** 8:00 a.m.

**Judge:** Honorable Henry T. Nakamoto

**Trial:** None

WHR LLC, a Hawaii limited liability  
company,

Counterclaimant,

vs.

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,

Counterclaim Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,  
DECREE OF FORECLOSURE AND ORDER OF SALE**

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 ("Plaintiff"), filed Plaintiff's Motion for Summary Judgment, Decree of Foreclosure, and Order of Sale on January 4, 2023, as Docket No. 163 (the "Motion for Summary Judgment").

Defendant WHR LLC ("Defendant") filed Defendant's Opposition to Plaintiff's Motion for Summary Judgment, Decree of Foreclosure and Order of Sale on March 10, 2023 as Docket No. 172 (the "Opposition").

Plaintiff filed its Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, Decree of Foreclosure and Order of Sale on March 15, 2023, as Docket No. 174 (the "Reply").

On March 20, 2023, the Motion for Summary Judgment came on for hearing before the Honorable Judge Henry T. Nakamoto. Gregory Cross, Esq. and Heather Deans Foley, Esq. appeared via Zoom on behalf of Plaintiff. Ted Pettit, Esq. appeared via Zoom on behalf of Defendant.

On March 20, 2023, the Court entered a Minute Order as Docket No. 176, pursuant to which the Court granted Plaintiff's Motion for Summary Judgment, but stayed entry of the order for sixty (60) days or until May 22, 2023.

After considering the written submissions and the arguments of counsel, the files herein, and other good cause appearing therefor,

**ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED  
THAT:**

1. Plaintiff's Motion for Summary Judgment is hereby GRANTED.
2. The Note, Loan Agreement and Mortgage are valid loan documents.
3. There is no dispute regarding the existence of a monetary default beginning in April of 2020, which remains uncured.
4. George W. Van Buren (the "Commissioner"), whose business address is Hawaii Kai Corporate Plaza, 6600 Kalaniana'ole Highway, Suite 212, Honolulu, Hawaii 96825, and whose telephone number is 808-599-3800, is hereby APPOINTED Commissioner by this Court, and is granted all the rights and powers available therefor, and is authorized and directed to sell all of the Defendant's interest in the real and personal property (collectively, the "Mortgaged Property") identified in that certain Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated August 31, 2018, and recorded September 5, 2018 in the Bureau of Conveyances of the State of Hawaii as Document No. A-68220552 and in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. T-10474133 (the "Mortgage").
5. The Mortgaged Property shall be sold at a public auction and shall be sold in an "as is", "where is" condition without warranties of any nature, express or implied, and there shall be no upset price. The Commissioner shall accept the highest bid and shall require a down payment of ten percent (10%) of the bid price at the fall of the hammer in cash or certified or cashier's check, the balance of the purchase price to be paid concurrently with the conveyance of the Mortgaged Property to the purchaser. The purchaser shall pay the costs of conveyancing, recordation, and conveyance taxes and shall pay for and be responsible for securing possession of the Mortgaged Property. The sale shall not be final until approved and confirmed by the Court.
6. The Commissioner shall give notice of the foreclosure sale by publication once in



each of three (3) successive weeks, three (3) publications, with the last publication to be not less than fourteen (14) days before the date of sale, in a newspaper having general circulation in the county in which the Mortgaged Property lies. The notice need not contain the full legal description of the Mortgaged Property. The notice shall give the date, time, and place of sale and an intelligible description of the Mortgaged Property, disclosing all terms of the sale as mentioned above. Except for the liens of real property taxes, the Mortgaged Property shall be sold free and clear of all liens and encumbrances of any kind or nature arising upon the Mortgaged Property that are subsequent and subordinate to the Plaintiff's first mortgage lien. The sale shall perpetually bar Defendant and all persons or institutions claiming by, through or under Defendant from any and all right, title and interest in the Mortgaged Property.

7. The Consent Order Granting Plaintiff's *Ex Parte* Motion for Appointment of a Receiver (the "Receivership Order") is hereby modified so that the Receiver, acting as the Commissioner, shall assume Court authority for any auction or private sale of the Mortgaged Property and shall conduct any such auction pursuant to terms, conditions and procedures established by the Commissioner at or prior to the auction, in his sole and absolute discretion. The Receivership Order shall remain unchanged in all other respects. The Receivership Order, as modified herein, shall remain in full force and effect until the Receiver is discharged in these proceedings.

8. The Commissioner shall file an accurate accounting of all receipts and expenses.

9. The Commissioner shall be awarded such hourly fees and reimbursement of expenses as the Court shall determine to be reasonable for his services as foreclosure commissioner.

10. Plaintiff is authorized to be a purchaser at said auction sale or private sale and the

amount determined by this Court to be due and owing to Plaintiff under the Note may be credited against the total bid price which Plaintiff shall make at said auction or private sale. If Plaintiff is the successful bidder at said sale, the ten percent (10%) down payment will not be required of Plaintiff up to the amount of its secured indebtedness.

11. A hearing shall be held to confirm the foreclosure sale, the amounts due to Plaintiff, including its attorneys' fees and costs, the Commissioner's fees and expenses, the amounts due and the priorities of the liens of the parties to this action. The Commissioner's fees and costs shall be determined to be secured by Plaintiff's first mortgage lien on the Mortgaged Property. The bidding may be reopened at the confirmation hearing provided that the reopening bid exceeds the highest bid accepted at the foreclosure auction or by private sale by at least five percent (5%).

12. The Court shall retain jurisdiction over the claims and the interests of the parties.

JUN 6 2023

DATED: Hilo, Hawai'i, \_\_\_\_\_

  
\_\_\_\_\_  
JUDGE OF THE ABOVE-ENTITLED COURT

HENRY T. NAKAMOTO

Div. 2

APPROVED AS TO FORM:

\_\_\_\_\_  
TED N. PETTIT  
Attorney for Defendant  
WHR LLC, a Hawaii limited liability company

/s/ George W. Van Buren  
George W. Van Buren  
Proposed Commissioner

Case No: 3CCV-21-0000360 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 vs. WHR LLC, a Hawaii limited liability company ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

# EXHIBIT 13

MEHEULA LAW, LLLC  
A Limited Liability Law Company

WILLIAM MEHEULA (2277)  
Three Waterfront Plaza, Suite 499  
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**Electronically Filed**  
**THIRD CIRCUIT**  
**3CCV-21-0000360**  
**06-JUN-2023**  
**02:40 PM**  
**Dkt. 185 JDG**

GREGORY A. CROSS (*pro hac vice*)  
HEATHER DEANS FOLEY (*pro hac vice*)  
Venable LLP  
750 East Pratt Street, Suite 900  
Baltimore, Maryland 21202  
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Facsimile No.: (410) 244-7742  
Email: [REDACTED]

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

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

Case No: 3CCV-21-0000360  
(Foreclosure)

**STIPULATED FORECLOSURE  
JUDGMENT AND ORDER**  
(*case caption continued on next page*)

**Trial:** None  
**Judge:** Honorable Henry T. Nakamoto

**EXHIBIT 13**

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

Defendants

WHR LLC, a Hawaii limited liability company,

Counterclaimant,

vs.

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,

Counterclaim Defendant.

**STIPULATED FORECLOSURE JUDGMENT AND ORDER**

IT IS HEREBY STIPULATED, by and between 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 (“**Plaintiff**”), and Defendant WHR LLC, a Hawaii limited liability company (“**Defendant**”), by and through their respective attorneys, pursuant to Rule 58 of the Hawaii Rules of Civil Procedure, that final judgment be entered in favor of Plaintiff and against Defendant, in the amount of \$64,002,872.35 (the “**Judgment Amount**”) in accordance with the terms of the Settlement Agreement dated May 31, 2023. The Judgment Amount shall accrue interest at the rate of \$14,216.66 per diem from July 1, 2023 until the Loan is paid in full or the Mortgaged Property foreclosed upon. Any unreimbursed advances made in order to protect

the lien of the judgment and preserve the real estate, such as, but not limited to, real estate taxes or assessments, property maintenance and insurance premiums, incurred by the Plaintiff after the date this judgment is entered and prior to the foreclosure sale shall become an additional indebtedness secured by the judgment lien and bear interest from the date of the advance at the mortgage rate of interest.

DATED: Honolulu, Hawai'i, May 31, 2023.

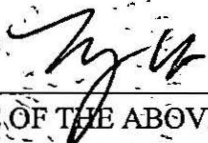
/s/ William Meheula  
WILLIAM MEHEULA  
GREGORY A. CROSS  
HEATHER DEANS FOLEY

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.

/s/ Ted N. Pettit  
TED N. PETTIT

Attorney for Defendant  
WHR LLC, a Hawaii limited liability company

APPROVED AND SO ORDERED:

  
\_\_\_\_\_  
JUDGE OF THE ABOVE-ENTITLED COURT  
HENRY T. NAKAMOTO Div. 2

**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 v. WHR LLC, a Hawaii limited liability company;  
Civil No. 3CCV-21-0000360; STIPULATED FORECLOSURE JUDGMENT AND ORDER**



# EXHIBIT 14

MEHEULA LAW, LLLC  
A Limited Liability Law Company

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**Electronically Filed  
THIRD CIRCUIT  
3CCV-21-0000360  
06-JUN-2023  
02:41 PM  
Dkt. 187 SFDW**

GREGORY A. CROSS (*pro hac vice*)  
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Attorneys for Plaintiff/Counterclaim Defendant  
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

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-

Case No: 3CCV-21-0000360  
(Foreclosure)

**STIPULATION FOR DISMISSAL  
WITH PREJUDICE OF ALL CLAIMS  
AGAINST PLAINTIFF and ORDER**

Judge: The Honorable Henry T. Nakamoto  
Trial Date: None  
(*case caption continued on next page*)

**EXHIBIT 14**



50 and DOE GOVERNMENTAL UNITS 1-50,

Defendants

WHR LLC, a Hawaii limited liability company,

Counterclaimant,

vs.

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,

Counterclaim Defendant.

**STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST PLAINTIFF AND ORDER**

IT IS HEREBY STIPULATED by and between 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 (“Plaintiff”), and Defendant WHR LLC (“Defendant”), by and through their respective undersigned counsel, that all counterclaims asserted in (i) the Counterclaim Against 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 [Dkt. 87] and (ii) Defendant WRH LLC’s Supplement to Counterclaim in Support of its Counterclaim Against 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 [Dkt. 97] are hereby dismissed with prejudice pursuant to Rule 41(a)(1)(B), Rule 41(c) and Rule 41.1(a)(1) of the Hawaii Rules of Civil Procedure, each party to bear their own costs, expenses and attorneys' fees.

All other remaining claims and parties shall not be affected by this Stipulation. The claims remaining in this action are the claims contained in Plaintiff's Complaint for Foreclosure [Dkt. 1]. Nothing herein shall act as a dismissal or compromise in any manner of any other claim or cause of action asserted by Plaintiff against Defendant.

SEEN, AGREED AND CONSENTED TO:

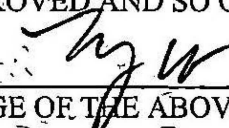
DATED: Honolulu, Hawai'i, May 31, 2023

/s/ William Meheula  
WILLIAM MEHEULA  
GREGORY A. CROSS\*  
HEATHER DEANS FOLEY\*  
Attorneys for Plaintiff/Counterclaim Defendant  
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

/s/ Ted N. Pettit  
TED N. PETTIT  
Attorney for Defendant/Counterclaim  
Plaintiff WHR LLC

\*Admitted *pro hac vice*

APPROVED AND SO ORDERED:

  
JUDGE OF THE ABOVE-ENTITLED COURT  
HENRY T. NAKAMOTO Div. 2

**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 v. WHR LLC, a Hawaii limited liability company; Civil No. 3CCV-21-0000360; STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST PLAINTIFF and ORDER**



# EXHIBIT 15

**Excerpt from Appraisal Review by  
Fernando Benavente, MAI, SRA,  
MRICS of the Benavente Group, LLC  
dated June 9, 2023—pp. 9-13.**

**“The Draft Appraisal Report represents a work in progress that is subject to change. Consequently, this review is preliminary and subject to change.”**



## APPRAISAL REVIEW

The following Appraisal Review is divided into two parts.

1. Part One: the USPAP Requirements checklist, outlines those items that must be included within an Appraisal Report in order to be in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP).
2. Part Two: of the Appraisal Review addresses inconsistencies and whether the analyses, opinions, and conclusions in the report under review are appropriate and reasonable.

### Part One - USPAP Standard 2

USPAP Appraisal Standards	Yes	No	N/A
1. Clearly and accurately sets forth the appraisal in a manner that is not misleading	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Contains sufficient information to enable the intended users of the appraisal to understand it properly: <i>The draft report contains numerous incomplete sentences and missing paragraphs.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3. Clearly and accurately discloses all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Identifies type of report	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Identifies Client and Intended Use/Users	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Identifies real estate appraised	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Identifies real property interest appraised	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. States correct definition of Market Value	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. States effective date(s) of appraisal	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. States date of report	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Appropriately describes scope of work	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. States the use of significant real property appraisal assistance	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Summarizes the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

# EXHIBIT 15



- |  |                                     |                          |                                     |
|--|-------------------------------------|--------------------------|-------------------------------------|
| 14. States reasons for excluding the sales comparison, cost, or income approaches(s) if any have not been developed  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 15. Summarizes the results of analyzing the subject sales, agreements of sale, options, and listings in accordance with Standards Rule 1-5                           | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 16. States the value opinion(s) and conclusion(s): <i>The draft report is a work in process and has not been finalized.</i>  | <input type="checkbox"/>            | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| 17. Summarizes the information analyzed and the reasoning that supports the analyses, opinions, and conclusions, including reconciliation of the data and approaches | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 18. States the use of the real estate existing as of the effective date and the use of the real estate reflected in the appraisal                                    | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 19. Summarizes the support and rationale for the opinion of highest and best use   | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 20. Clearly and conspicuously states all extraordinary assumptions and hypothetical conditions and state their use might have affected the assignment results        | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 21. Includes appraiser's state certification, license number and expiration  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 22. Includes appraiser(s) qualifications   | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 23. Includes appraiser's statement regarding inspection in certification   | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| 24. Includes signed certification in accordance with Standards Rule 2-3  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |

**Comments**

Subject to the above exceptions, the Draft Appraisal Report is deemed to be compliant with the Uniform Standards of Professional Appraisal Practice (USPAP).

**Part Two – Analyses, Opinions, and Conclusions**

The Appraisal Report was prepared with an effective valuation date as of March 17, 2023. The Benavente Group LLC has reviewed the analysis, opinions, and conclusions presented in the Appraisal Report and any suggested clarifications and discrepancies noted are described in the following table:



Report Section	Reviewer's Comment
Description of Real Estate: - Neighborhood (28)	<ul style="list-style-type: none"> <li>The last two paragraphs are incomplete and incoherent. It mentions multiple recent events and transactions in the direct subject neighborhood without providing details how they may relate to the subject property and appraisal problem.</li> <li>The Draft Appraisal Report does not discuss the challenges that the cited hotels have historically faced to maintain viable operations and property maintenance.</li> </ul>
Projection of Occupancy and Average Rate (107):	<ul style="list-style-type: none"> <li>Except for the subject historical information, the competitive is <u>not represented</u> by any hotel in Hilo and aggressively includes superior projects like the Hilton Waikoloa Village, Hilton Beach, Marriott Resort &amp; Spa, Outrigger Kona Resort &amp; Spa, and Royal Kona Resort.</li> <li>Operating data from <u>Hilo hotels</u> like the neighboring Hilo Hawaiian Hotel and SCP Hilo Hotel (formerly Hilo Seaside), <u>are not considered</u>.</li> <li>The Draft Appraisal Report <u>optimistically</u> projected occupancy in 2023 of 82%, stabilizing at 84% in 2026. However, only once since 2014 has the project achieved occupancy meaningfully above 80% (2017). Prior periods ranged from 53.3% to 80.4%, averaging 69.4%.</li> <li>In 2018, the Grand Naniloa only achieved a RevPar of \$133.85, which fell to \$109.42 in 2019. Post-pandemic, it reached \$105.80 in 2021 and \$154.14 in 2022. The Draft Appraisal Report <u>assumes that pent-up visitor demand</u> that generated the surge in rates statewide would continue at a rate of 3.0% to 5.8%. In consideration of prior achieved levels, the projection appears to be assertively optimistic.</li> <li>Similarly, the average rate is projected to increase to circa \$200 per night this year when it fell to \$154.30 in 2019 and has only recently recovered.</li> </ul>

## Sales Comparison

- Comp selections are all in superior visitor markets situated on Maui, Waikiki, Keauhou, and Kona.
- The sale of the Hilo Seaside Hotel on Bayan Drive was identified on Figure 10-4 (160) as a pertinent transaction, but not employed as a comparable or its exclusion explained.
- There is insufficient discussion to understand the basis for material quantitative adjustments made to the comparables that vary from 5% to 72% of the purchase prices for differences attributable to property rights, RevPar, Revenue Sources, and Physical Conditions.
- The magnitude of adjustments substantially diminishes the reliability of the approach.

## Income Capitalization Approach (121)

- The comparable set considered in the projection of operating forecasts are not identified and could not be evaluated for appropriateness. Their relative locations are also not mentioned.
- Following the global shutdown of travel, the Hawaii visitor market experienced a surge of visitors toward the end of 2021 through 2022. The resurgence and recovery are not expected to continue in 2023 as interest rates increase and government efforts to control inflation continue to be implemented.
- The Draft Appraisal Report largely continues the extraordinary growth rate experienced in 2021/2022, without recognizing a potential slowdown or decline near pre-2020 stabilized levels. As noted above, 2022/2023 subject occupancy levels already recognized a reduction in hotel occupancy.
- Discount and terminal capitalization rates extracted from local transactions, and specifically those encumbered by ground leases (which would be higher than fee properties), were not considered.



- A discount rate of 9.50% and terminal capitalization rate of 7.50% do not appear to be supported given the subject's location and leasehold tenure. We note that the rates are at the mid-point or lower range of the surveys presented.

#### Cost Approach (169)

- Considering the economics of operating a hotel in the Hilo visitor market, which lags all other Hawaii visitor markets, a new hotel has not been constructed in Hilo since the 70's. Coupled with the age of the subject improvements, this approach is considered to be largely unreliable in concluding a value for the subject property.
- The value of the underlying land, assuming it were hypothetically vacant and held in fee simple, is not appropriate in valuing the leasehold value of the subject property. Additionally, comparable fee simple land transactions were not analyzed.

#### Conclusion

Subject to the preceding observations, based on the quality of comparables presented, the Draft Appraisal Report employs projections that appear to be overstated considering the subject's historical operating performance.

The Draft Appraisal Report represents a work in progress that is subject to change. Consequently, this review is preliminary and subject to change.