SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

AFP 108 CORP., a Delaware corporation, Plaintiff, -against- DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE SECURITIES INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2014-GC23; and RIALTO CAPITAL ADVISORS, LLC, Defendants.	Index No. **SUMMONS**

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff an Answer to the Complaint in this action within 20 days after the service of this summons, exclusive of the day of service, or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the Complaint.

The basis of the venue designated is that in the parties' loan documents, which contain a venue provision, the parties agreed that any action against either should be instituted in any federal or state court in the City of New York, County of New York, pursuant to N.Y. General Obligations Law § 5-1402. Further, venue is proper pursuant to § 501 of New York Civil Practice Law and Rules.

4819-3483-7206

Dated: January 7, 2021

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TO:

Deutsche Bank Trust Co Americas, as Trustee
c/o Midland Loan Services, a Div of PNC Bank, NA
10851 Mastin, Suite 300
Overland Park, Kansas 66210
Attention: Treasury Department

Rialto Capital Advisors, LLC
730 NW 107 Avenue, Suite 400
Miami, Florida, 33172
Attention: Liat Heller, General Counsel

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Plaintiff, AFP 108 Corporation, a Delaware corporation ("Plaintiff"), by and through its attorneys, Baker & Hostetler LLP, as and for its Complaint against defendants, Deutsche Bank Trust Company Americas, as Trustee, for the benefit of the registered Holders of Citigroup Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through Certificates, Series 2014-GC23 ("Lender" or "Deutsche Bank""), and Rialto Capital Advisors, LLC ("Rialto") (Lender and Rialto collectively are referred to as "Defendants"), alleges as follows:

Nature of the Action

1. This action arises out of Defendants' bad faith efforts to leverage a worldwide pandemic to obtain control and possession of a hotel in Rochester, New York that is owned by Plaintiff, and which collateralizes an $18 million loan made by Lender. Due to its proximity to the Rochester Institute of Technology and the University of Rochester, the hotel at issue in this action experienced robust occupancy rates prior to the Covid-19 pandemic – when these educational institutions were fully operative and hosting various academic, sporting and alumni events. Moreover, for six years prior to the pandemic, Plaintiff was current on its debt service

obligations, and in full compliance with all other obligations under the loan documents at issue. In other words, prior to the worldwide pandemic and consequent economic shutdown, Plaintiff fulfilled all of its obligations as borrower and would have continued to do so, but for extraordinary circumstances beyond its and Defendants' control.

2. In mid-March 2020, when both universities were forced to close their campuses due to the increasing rate of Covid-19 infections – and Governor Cuomo implemented lockdowns across the state, including in Monroe County where the hotel is located – the bookings and occupancy rate at Plaintiff's hotel plummeted. Indeed, the economic shutdowns that state and federal governments have imposed on businesses and individuals as a result of the Covid pandemic have caused a precipitous reduction in business and personal travel, thus triggering an existential crisis in the hospitality industry. Consistent with the foregoing, as Defendants well know, the downturn in occupancy at Plaintiff's property is not the byproduct of mismanagement, nor misapplication of funds, but rather due to the seismic impact of a global pandemic that no one could have predicted and that no one can control.

3. In the face of these unprecedented circumstances, Plaintiff has attempted, in good faith, to work with Defendants, in an effort to preserve the value of the property and to protect Defendants' investment therein. Rather than meeting Plaintiff half-way, or attempting to compromise, Defendants, instead, have sought to turn crisis into opportunity, and to contort Plaintiff's loan obligations into a stranglehold ultimately designed to wrest control of the hotel from Plaintiff.

4. At all relevant times, Plaintiff has relied on the ongoing credit that is extended each month by vendors and suppliers who provide Plaintiff with the goods and services necessary for it to operate and manage its hotel. Historically, Plaintiff has maintained these

valuable relationships by timely paying all vendors' invoices according to terms. If Plaintiff were to lose the credit that these vendors provide to its business, it would be unable to operate its hotel. Defendants are fully aware of the expenses that are paid in this manner, as they receive an annual operating budget for the hotel.

5. In or about October 2020, Defendants alleged that there were Events of Default that triggered a cash management procedure prescribed by the loan documents. Under that procedure, Defendants have the right to take control of all cash generated by the hotel, but are obligated to disburse necessary operating funds to Plaintiff as outlined in the property's operating budget. Such funds are necessary for payroll, insurance, franchise fees and other such payments that must be made by Plaintiff in order to maintain operations, and to retain valuable relationships with vendors, notwithstanding the nosedive in hotel bookings and occupancy caused by the pandemic. Such funds also include sales and occupancy taxes that Plaintiff receives in trust, on behalf of the state or county tax authorities, but that are now being swept by Defendants, as collateral, into a cash management account that Defendants exclusively control.

6. Plaintiff has followed all required cash management procedures to obtain these necessary operating funds, and has made a series of concessions after being lulled into complacency by Defendants that Plaintiff's acquiescence to various initiatives, including the amendment of the cash management agreement, would pave the way for the regular release of funds needed to operate and manage the hotel. But Defendants have failed, and continue to fail, to carry out their disbursement obligations under the loan documents, thereby damaging Plaintiff's relationships with its vendors and other contracting parties, and, by extension, damaging the value of the hotel, *i.e.*, Defendants' collateral.

7. Defendants have made it abundantly clear that their purpose in withholding funding is to force Plaintiff to agree to the appointment of a receiver, even though a receiver would provide no benefit to the operations or financial health of the property, but would merely be a means for Defendants to wield complete control over the property. Most recently, Defendants have ratcheted up the stakes with the extortionate proposition that no further cash disbursements will be made unless and until Plaintiff "agrees" to the appointment of a receiver. Upon information and belief, Defendants have taken the predatory actions described above and herein in order to make a grab for Plaintiff's hotel, in violation of Defendants' ongoing duties of good faith and fair dealing, in violation of their contractual duties, and in tortious interference of Plaintiff's existing and prospective economic relations.

8. For all these reasons and those set forth herein, Plaintiff is entitled to relief to permit the ongoing operation of its hotel during the remaining months of this pandemic, until it can resume normal operations once a Covid vaccine is widely available to the general public, which undoubtedly will increase business and personal travel, and thus bookings and occupancy at Plaintiff's hotel.

Parties

9. Plaintiff AFP 108 Corp. is a Delaware corporation with a principle place of business at 9 Park Place, Great Neck, New York, 11021.

10. Upon information and belief, defendant Deutsche Bank Trust Company Americas (defined above as "Lender" or "Deutsche Bank"), is a national banking association, with its principal place of business at 60 Wall Street, New York, New York 10005.

11. Upon information and belief, defendant Rialto Capital Advisors, LLC (defined above as "Rialto") is a limited liability company organized under the laws of the State of

Delaware, with its principal place of business at 730 NW 107 Avenue, Suite 400, Miami, Florida, 33172, and is the Special Servicer under the Pooling Agreement defined below.

Venue

12. Pursuant to Section 11.3(B) of the Loan Agreement, defined below, the state and federal courts located in New York County, New York are the exclusive venue of disputes under that agreement and the other loan documents: "ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE NOTE OR THE OTHER LOAN DOCUMENTS MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW . . ."

13. Similarly, venue is proper in this County pursuant to New York Civil Practice Law and Rules § 501 inasmuch as the parties have agreed in the loan documents described above and below that any action against either should be instituted in any federal or state court in the New York County, New York, pursuant to N.Y. General Obligations Law § 5-1402.

Statement of Relevant Facts

The Loan Documents

14. Plaintiff is the Borrower under a Loan Agreement dated as of June 26, 2014 (the "Loan Agreement"), originally between Plaintiff, as borrower, and Rialto Mortgage Finance, LLC, as the original Lender ("Original Lender"), pursuant to which Original Lender extended a

loan in the original principal amount of $18,000,000 (the "Loan"), a true and correct copy of which is attached hereto as Exhibit A.[1]

15. The Loan is a securitized commercial mortgage loan – an asset of a commercial mortgage-backed security ("CMBS") – and the real property that is primary collateral for the Loan bears the address, Doubletree by Hilton, 1111 Jefferson Road, Rochester, NY 14623 (the "Property"). The Property carries the brand name of DoubleTree by Hilton pursuant to a franchise agreement between Plaintiff and Hilton Worldwide, through its subsidiary DoubleTree Franchise, LLC. The "DoubleTree by Hilton" brand name enhances the Property's value, and thus remaining current on its franchise fees is a priority for Plaintiff.

16. In connection with the Loan Agreement, the parties also entered into related loan documents, including an Assignment of Leases and Rents dated as of June 26, 2014, between Plaintiff and Original Lender (the "Assignment of Rents"), a true and correct copy of which is attached hereto as Exhibit B, and a Mortgage Modification, Extension and Restatement Agreement dated as of June 26, 2014, between Plaintiff and Original Lender (the "Security Agreement"), a true and correct copy of which is attached hereto as Exhibit C.

17. Upon information and belief, on or about August 1, 2014, Original Lender assigned the Loan to Deutsche Bank.

18. Deutsche Bank serves as Trustee of the CMBS trust created under that certain Pooling and Servicing Agreement dated as of August 1, 2014 (the "Pooling Agreement"), by and between, *inter alia*, Citigroup Commercial Mortgage Securities Inc., as Depositor; Midland Loan

[1] In the interests of not inundating the docket, voluminous attachments to the Loan Agreement have not been included as part of Exhibit A, other than a relevant franchise agreement, but will be provided for review upon the Court's request.

Services, a Division of PNC Bank, National Association, as Master Servicer; and Rialto, as Special Servicer.

19. The Loan Agreement includes terms that apply during a time period defined as a Cash Management Trigger Event Period (a "CMA Period"), which is triggered by any Event of Default, or related events, such as the Borrower's bankruptcy filing. A cure of the Event of Default, or other triggering event, brings the CMA Period to an end.

20. Section 2.7.2(b) of the Loan Agreement establishes a waterfall of payment priorities that apply during a CMA Period, listing ten categories of payments to establish how funds "shall be applied," beginning with required tax and insurance payments, and followed by categories such as the monthly debt service, necessary repairs, and operating payments. (*See* Ex. A, § 2.7.2(b).)

21. Section 2.7.2(c) of the Loan Agreement states that, notwithstanding other terms in the Loan Agreement, after the occurrence of an Event of Default, Defendants may apply funds however they choose, subject to their discretion. (*See* Ex. A, § 2.7.2(c).)

22. In connection with the Loan Agreement, Plaintiff and Original Lender were among the parties that entered into that certain Cash Management Agreement dated as of June 26, 2014 (the "CMA"), a true and correct copy of which is attached hereto as Exhibit D, which, in addition to cash management terms set out in the Loan Agreement, establishes terms for the parties' operations during a CMA Period. The CMA relies on the terms of the Loan Agreement to establish when a CMA Period is triggered, such as by an Event of Default, and sets out in Section 3.2 thereof a near-identical waterfall provision that establishes how the agreement's Cash Management Bank "shall apply all funds on deposit" during a CMA Period, unless there is another Event of Default, which then operates to terminate the CMA Period. (*See* Ex. D, § 3.2.)

The Triggering of the CMA Period

23. In March 2020, the State of New York shut down on-campus learning at institutions of higher education, including the Rochester Institute of Technology and the University of Rochester, which devastated the occupancy rates and income of all hotels in the State, including Plaintiff's Property.

24. Thereafter, on or about July 8, 2020, Rialto delivered to Plaintiff a pre-negotiation letter setting out terms for discussions between Plaintiff and Defendants concerning the Loan Documents.

25. On or about August 6, 2020, counsel to Lender, acting by and through Rialto "in its capacity as Special Servicer for Lender," declared that an Event of Default had occurred.

26. By letter to Plaintiff dated September 15, 2020 (the "Acceleration Letter"), Lender, acting by and through Rialto, declared the entire Loan due and payable on the purported ground that the alleged Event of Default declared on August 6, 2020 had not been cured.

27. In a letter dated October 23, 2020, Midland, in its capacity as the Master Servicer of the Loan on behalf of Lender, informed Plaintiff that a cash management triggering event had occurred as a result of an alleged Event of Default constituting a Cash Sweep Event, thereby obligating Plaintiff to take various actions required under the Loan Agreement upon commencement of a CMA Period. At the same time, Midland forwarded an amendment to the CMA, dated October 23, 2020 (the "CMA Amendment") for Plaintiff's signature, a true and correct copy of which is attached hereto as Exhibit E.

28. The CMA Amendment modified and amended the CMA, but did not replace it. Among other terms, the CMA Amendment replaced Wells Fargo with Midland as the Cash Management Bank under the CMA. (*See* Ex. E, ¶ 1.) The CMA Amendment also made non-

material amendments to the first sentence of Section 3.2 of the CMA, requiring the Cash Management Bank to disburse funds according to the waterfall provisions, on each Monthly Payment Date. (*Id*., at ¶ 2(d).) The term "Monthly Payment Date" is defined in Section I of the Loan Agreement as the sixth (6th) day of every calendar month, unless amended by Lender in writing to Plaintiff. Defendants have not amended the Monthly Payment Date in accordance with Section 3.2 of the CMA, as amended.

29. Plaintiff executed the CMA Amendment with the understanding and expectation, based on representations by Defendants, that the parties were establishing a cash management procedure that would ensure the continued funding of the Property. However, once the CMA had been amended and triggered, Defendants seized control of Plaintiff's operational income.

30. Indeed, on November 6, 2020, Plaintiff received an email from Midland informing Plaintiff that Midland had sent notice to the Cash Management Bank to sweep funds into the Cash Management Account rather than Plaintiff's operating account.

31. Defendants' rights under the CMA to sweep cash during a CMA Period are joined with obligations to disburse the swept cash pursuant to waterfall procedures, by each Monthly Payment Date. Despite the triggering of a CMA Period, and the execution of the CMA Amendment, Defendants did not forward any operating funds to Plaintiff on November 6, 2020, in accordance with Defendants' responsibilities under the Loan Agreement and the CMA, as amended.

Defendants' Withholding of Operating Funds to Secure Control of the Property

32. In an email sent to Plaintiff by Midland on November 18, 2020, Midland informed Plaintiff that Rialto, as Special Servicer, rather than Midland as Master Servicer, would

be advising the "Cash Management Analyst" on how to apply the funds swept by Defendants into the cash management account.

33. On November 20, 2020, Gino Ammirati of Argon Real Estate, an advisory firm retained by Plaintiff, emailed Javier Callejas of Rialto, explaining that they needed to speak about Plaintiff's Property:

> Payroll, benefits and franchise fees and other expenses required to operate the hotel will need to have funds appropriated to them in order for them to get paid otherwise there will be significant negative consequences for the operations of the hotel.
>
> It seems as though the bank is unaware of how to run the cash management for the hotel and there are insufficient funds to pay these essential parties.
>
> Let me know when you can speak.

34. Mr. Callejas responded by asking Plaintiff to "[s]end us a funding request (preferably in excel) listing the invoices with the invoices attached. We will review and submit for approval."

35. On November 23, 2020, Mr. Ammirati, on behalf of Plaintiff, sent an email to Mr. Callejas at Rialto, attaching Plaintiff's funding request for $64,874.94, and supporting documents, which reflected funds due for invoices received in September and October, for a single week of payroll, and for New York State taxes that were due (the "First Funding Request"). The supporting documents included the Property's annual budget for 2020, a spreadsheet of the invoices, and the invoices themselves, providing Defendants with direct knowledge of the goods and services that Plaintiff had obtained on credit, the operating expenses that required prompt payment, and the identity of each vendor. The expenses itemized in the invoices comported with the annual operating budget for the Property.

36. On November 30, 2020, Rialto sent a letter to Plaintiff in its capacity as Special Servicer on behalf of Lender, taking conflicting positions on its obligations under the Loan Agreement and CMA (the "Reservations Letter"). Rialto stated in the Reservations Letter that the parties were operating in a "Cash Management Period under the Loan Agreement," and acknowledged Plaintiff's First Funding Request. But Rialto went on to state that, under Section 2.7.2, Defendants were "not obligated to release or disburse any funds to you after the occurrence of a Default or an Event of Default." Rialto's position was not based upon any mismanagement of the Property by Plaintiff, nor any misuse of income, but was an aggressive and predatory attempt to use the Covid-19 pandemic to take over Plaintiff's business, and obtain control of, and title to, Plaintiff's Property.

37. Rialto required Plaintiff to countersign the Reservations Letter in order for its First Funding Request to be approved. Plaintiff's countersignature of the Reservations Letter was made under duress, and without alternatives that would have permitted Plaintiff to protect the Property and mitigate its damages.

Defendants' Efforts to Install a Receiver Under Duress

38. In related discussions during November and December, representatives of Defendants explained to Plaintiff that they wanted to install a receiver to take over the management not only of the Property, but of other hotel properties owned by affiliates of Plaintiff, which properties are collateralized by CMBS loans for which Rialto also acts as Special Servicer. Rialto's representatives contended that Plaintiff's "consent" to the installation of a receiver for all these hotel properties would ensure a flow of operating funds to the receiver chosen by Rialto.

39. Upon information and belief, Defendants are exploiting the revenue shortfalls caused by the pandemic to secure control of Plaintiff's Property. Upon information and belief, Defendants have intentionally delayed, and failed to follow, the necessary process for cash management required under the Loan Agreement and CMA, as amended, in order to impose significant economic pressure on Plaintiff. Defendants have launched this receivership gambit, even though Plaintiff had dutifully fulfilled its obligations for nearly six years under the loan documents and has not mismanaged the Property or placed it in danger of imminent or irreparable harm.

40. Defendants know that if they deprive Plaintiff of necessary operating funds, they will destroy Plaintiff's ongoing contractual relationships, and, concomitantly, Plaintiff's ability to obtain credit for goods and services, thereby paving the way for Defendants to obtain control of the Property.

41. On December 1, 2020, Mr. Ammirati, on behalf of Plaintiff, emailed Mr. Callejas at Rialto to explain that, in addition to the First Funding Request that had not yet been approved, another payroll required funding that week. Mr. Ammirati explained that "it has been a week since we first emailed you on this Funding Request, we need to get this process streamlined as it will hamper hotel operations. Please let me know when you can speak as this is an urgent matter."

42. On December 6, 2020, a Monthly Payment Date, Defendants failed to satisfy their obligations under the Loan Agreement and the Amended CMA, to disburse operating funds to Plaintiff pursuant to the waterfall provisions.

43. On December 6, 2020, Mr. Ammirati, on behalf of Plaintiff, again reached out to Mr. Callejas and Mr. Stone at Rialto, following up on a voicemail message, to explain the increasing difficulties that were being created by Defendants' failure to fund operating expenses:

> The lockbox account for Rochester is overdrawn due to credit card fees &/or chargebacks hitting the account. Rialto will need to return funds to cover it. We would like to propose leaving a higher balance going forward or this is going to recur. The property and will incur additional expenses unnecessarily if this isn't remedied.
>
> Additionally, there is over $211K in the cash management account.
>
> We have not been reimbursed by you in almost 3 weeks. Payroll will not be made this week without them funding our operating account. Payroll occurs weekly and sales tax needs to be paid monthly so we need a better way or the penalties will undoubtedly continue to pile up which may cause additional long term problems for the property.
>
> The property cannot operate like this. These additional costs are unnecessary and only exist as a result of the negligence and lack of management of the cash for the property.
>
> This needs to be remedied as soon as possible

44. On December 10, 2020, Plaintiff reached out to Mr. Stone at Rialto, seeking confirmation that funds would be released, and explaining that Plaintiff "may have more serious problems with operations at the hotel if money is not released." Mr. Stone replied on the same date to state that the "request is currently with . . . compliance," and that there were a "few more approvals to go then it will go to the Master Servicer."

45. On December 14, 2020, Plaintiff's payroll service, ADP, contacted Plaintiff to inform it that the debit for its payroll and payroll tax deposits had been returned due to insufficient funds, even though the sweep account held several times the $21,000 that was needed to defray the week's payroll covered in the First Funding Request. On the same date, Mr. Ammirati, acting on behalf of Plaintiff, forwarded ADP's communication to Rialto to demand

resolution, and explained that "[Plaintiff] cannot run a hotel like this. Please let us know when this will be resolved. It has been weeks since this request was sent."

46. On December 16, 2020, Mr. Ammirati, on behalf of Plaintiff, emailed Mr. Stone at Rialto to state:

> I just left you a voicemail regarding the same. Payroll for the property is today. It's been weeks since we submitted the release of funds. You mentioned that you were waiting for one signature two days ago.
>
> As I've mentioned in virtually all of my emails since we submitted our request, this is essential for hotel operations to continue. This is exactly the opposite of what the hotel needs during a pandemic.
>
> Please release the funds today.

Mr. Callejas, of Rialto, who had been copied on Mr. Ammirati's email, replied on behalf of Rialto to state that they were "working to get the funds out asap."

47. On December 21, 2020, Plaintiff received an email from Mr. Callejas at Rialto, which included the statement that "Request for AFP 108 CORP | DOUBLETREE ROCHESTER | Reserve Disbursement for loan number 030307335 has been approved," but further stated in a forwarded email that the status of the wire was unclear as it had been delivered close to the wire deadline for that date.

48. Repeatedly, on December 22 and 23, 2020, Plaintiff reached out to Rialto by email, through Mr. Ammirati, seeking an update on the "approved" First Funding Request, repeating the understanding (based on Mr. Callejas' December 21 email, *see supra*) that Rialto had instructed the Master Servicer to release funds, and had sent a rush request.

49. Late on December 23, 2020, Plaintiff finally received the funds sought in the First Funding Request, a month after Plaintiff had submitted the request, more than two weeks after the required Monthly Payment Date, after a hold had been placed on its payroll account, and after delays in payroll during the holiday season. While Plaintiff's receipt of funding for the

First Funding Request on December 23, 2020 enabled it to pay invoices that had been received in September and October, and to pay overdue payroll and taxes, such payment was, in many cases, more than two months beyond the due date of such outstanding debts.

50. The First Funding Request simply addressed the needs for one month of outstanding invoices and one week of payroll at the Property. By December 29, 2020, Plaintiff had made four additional funding requests totaling $227,600.39, to defray payroll, taxes, franchise fees, and other amounts due to its creditors arising from the ordinary operations of the Property – none of which has been fulfilled.

51. On December 28, 2020, Mr. Ammirati, on behalf of Plaintiff, emailed Mr. Callejas of Rialto to inquire about an outstanding funding request for a separate hotel property that is owned by Plaintiff's affiliate, and for which Rialto is the Special Servicer to the lender. Rather than make any assurances that Defendants would abide by their obligations under the Loan Agreement and CMA to disburse operating funds and other funds according to the Loan Agreement's waterfall provisions, Rialto simply responded with:

> Gino,
>
> Per our last discussion, will you allow the lender to appoint a receiver in all three defaulted loans?
>
> Please advise. Thanks.

52. Defendants have continued with their aggressive demands that Plaintiff agree to a receivership as the only means to obtain the funding necessary for operation of the Property.

53. At no time have Defendants acknowledged their obligations under the Loan Agreement and CMA to disburse funds as they "shall" do according to the Loan Agreement's waterfall provisions during a CMA Period. Instead, Defendants have disavowed any such

obligations on the grounds that the alleged Event of Default that created a CMA Period supposedly erased all obligations to be performed during a CMA Period.

54. Further, Defendants, intentionally and in bad faith, have delayed the processing and payment of Plaintiff's requests for funding of operations expenses, including payroll and taxes. This includes Defendants' bad faith sweep of sales and occupancy taxes that are received in trust for the benefit of state and county tax authorities, but which Defendants have retained as their collateral, along with payroll taxes that are owed. And Defendants repeatedly have reissued their demand that Plaintiff consent to the appointment of a receiver, not only at the subject Property, but at other hotel properties managed by Plaintiff's affiliates, *see supra* paragraph 38, where Rialto, as Special Servicer to other lenders, is carrying out the same bad faith tactics to secure control of these properties during a pandemic.

AS AND FOR A FIRST CAUSE OF ACTION
(For Breach of the Covenant of Good Faith and Fair Dealing)

55. Plaintiff repeats and realleges the allegations in Paragraphs 1 through 54 as though fully set forth herein.

56. Defendants' actions that are alleged herein are not merely those of a lender exercising its right to withhold funding, but rather an attempt to leverage a worldwide pandemic and use extreme economic pressure in a malicious and predatory manner to force Plaintiff to hand over control of its Property to a receiver and/or to Defendants.

57. Prior to the pandemic, Plaintiff successfully had managed its Property and met all of its debt service and other obligations under the Loan Documents. The operating expenses, payroll and taxes for which Plaintiff sought funding were within the scope of Plaintiff's annual operating budget. The revenue shortfalls being experienced by Plaintiff do not arise out of circumstances caused by Plaintiff, or that could be addressed and remedied by a receiver.

58. If Defendants were successful in their bad faith efforts to force Plaintiff to accept the appointment of a receiver in order to obtain necessary operating expenses, Defendants would still have to fund the same operating expenses, *e.g.*, taxes, services, payroll, franchise fees, etc. to maintain the business and the Property, on the same schedule of monthly payments—except that Defendants would have to do so in a timely manner, along with the additional expense of a receiver.

59. The appointment of a receiver is wasteful and unnecessary, because the same operations by a receiver would not ameliorate the widespread, but temporary, economic shutdown caused by the Covid-19 pandemic. Defendants' actions are not aimed at protecting their investment; rather, they are intentionally and maliciously aimed at gaining control of Plaintiff's Property by taking advantage of the Covid-19 pandemic, so that they will own a valuable asset once the pandemic eases.

60. Defendants appear to be willing to damage the Property in the short term by compromising Plaintiff's relationship with, *inter alia*, its vendors, franchisor and tax authorities because they hope to exploit these circumstances as a predicate for seeking the appointment of a receiver—even though this damage to the Property is caused by their own predatory actions.

61. Defendants insist that they are not obligated to fund operating expenses under the CMA. But the terms of the CMA that Defendants rely on—if they even apply—require that Defendants must exercise their "discretion" in determining whether to advance operating funds to Plaintiff under the Loan Agreement.

62. Where, as here, a contract requires that a party exercise discretion, there is an implied covenant of good faith and fair dealing requiring that such exercise of discretion may not be exercised arbitrarily or irrationally, nor maliciously or in bad faith.

63. By failing to honor their obligations during a CMA Period under the Loan Agreement and CMA, by deliberately delaying Plaintiff's proper requests for necessary operational funding to pay payroll, taxes, and other such expenses, and by tying performance of their own contractual, good faith obligations to pressure Plaintiff to acquiesce to the appointment of a receiver for its Property, Defendants have acted in a malicious and predatory manner, attempting to leverage an unprecedented worldwide pandemic and economic shutdown in an effort to gain control and possession of Plaintiff's Property.

64. In so doing, Defendants have violated their duties of good faith and fair dealing that are incorporated into the Loan Agreement and CMA.

65. Defendants' actions described herein have damaged Plaintiff, and are continuing to damage Plaintiff in an amount no less than $2 million, the exact amount of which will be determined at trial.

66. Plaintiff therefore is entitled to judgment and damages arising out of Defendants' breach of the covenant of good faith and fair dealing incorporated in the Loan Agreement and CMA.

AS AND FOR A SECOND CAUSE OF ACTION
(Tortious Interference with Prospective Business Relations)

67. Plaintiff repeats and realleges the allegations in Paragraphs 1 through 66 as though fully set forth herein.

68. As the owner and operator of the Property, Plaintiff is engaged in business relationships and contractual relationships with customers, vendors, insurers, employees, its franchisor, and other parties, in which its ability to pay invoices on customary terms, and perform other financial obligations in a timely manner, is a critical component of such relationships. Historically, Plaintiff has paid such parties on a timely basis to ensure that it

would continue to receive the credit of monthly services and deliveries, as vendors may terminate their advancement of goods and services on credit if they do not receive timely payment.

69. Such critical relationships include Plaintiff's acquisition of food and kitchen supplies on credit from Sysco Food Services; its ongoing cleaning services from Alsco, Inc.; its regular pick-up of waste by Suburban Disposal Corporation, and, more recently, its acquisition of PPE and protective face masks from Ecolab Food Safety Specialties, among dozens of other such relationships that are based on Plaintiff's good credit.

70. Defendants had actual knowledge of these relationships, and had knowledge of Plaintiff's need to obtain such goods and services on credit each month to permit operation of the Property, as they were listed expenses in Plaintiff's annual operating budget, submitted to Defendants, and included in Plaintiff's submission of outstanding invoices to Defendants as part of its First Funding Request.

71. As a result of Defendants' actions with the First Funding Request, including Defendants' attempted linking of their disbursement of operating funds to Plaintiff's agreement to the appointment of a receiver,

a) Plaintiff was unable to pay the Property's cleaning service, Alsco, Inc., until two months beyond the due date,

b) Plaintiff was unable to pay its supplier of protective face masks, Ecolab Food Safety Specialties, until two months past the due date,

c) Plaintiff was a month late in payment of amounts due to Suburban Disposal Corporation for waste removal services, and

d) Plaintiff was one to two months late (depending on the invoice) in paying Sysco Food Services for its food and kitchen supplies.

72. Moreover, a material component of the Property's value is its branding as a DoubleTree by Hilton, which it possesses under the terms of a franchise agreement. Until the actions of Defendants described herein, Plaintiff had paid its franchise fees due under the franchise agreement when due, and has been a franchisee in good standing since the execution of the franchise agreement. Without the brand name provided by the franchise agreement, Plaintiff would be unable to charge the rates that it presently charges, as it would lose the preapproval with prospective customers that a franchised brand name such as "DoubleTree by Hilton" provides to a property, and Plaintiff would lose clientele who would be drawn to competing hotel properties that maintain competing brand names. Maintenance of the franchise agreement, and of Plaintiff's relationship with DoubleTree Franchise LLC and Hilton Worldwide is critical to Plaintiff's ability to operate the Property as a profitable hotel, even in non-pandemic times.

73. In the same vein, Plaintiff's ability to run a profitable hotel hinges on more than just available guests. It requires maintenance of contractual relationships with vendors and contracting parties who will continue to extend goods and services on credit because they trust Plaintiff's ability to pay their invoices in a timely manner—something Plaintiff had been able to do before Defendants put a stranglehold on Plaintiff's operating funds.

74. Defendants knew that a delay in disbursement of operating funds meant a direct and corresponding delay in payments to vendors and contracting parties, as Defendants were in possession of copies of the overdue invoices and thereby had direct knowledge of the amounts due and the dates required for payment. Defendants had received the invoices in advance of the required Monthly Payment Date for disbursement of operating funds, and Defendants were in

possession of an approved operating budget that demonstrated the necessity of such expenses for the Property's continued operation. Further, Defendants have actual knowledge of Plaintiff's franchise relationship with DoubleTree Franchise LLC and Hilton Worldwide, as the franchise agreement is an attachment to the Loan Agreement, and the requirement that it remain paid according to terms and in full force is woven throughout the Loan Agreement.

75. By delaying disbursement of operating funds, Defendants were intentionally and knowingly preventing Plaintiff from maintaining critical contractual relationships that are necessary to its present and future operations. Defendants actions were directed at such third parties, in a deliberate attempt to hamper Plaintiff's business operations by interfering with its ability to obtain future goods and services on credit. Such effect on Plaintiff's vendors and contracting parties was the sole purpose behind Defendants' actions, as it would facilitate (and expedite) Defendants' improper attempts to gain control of the Property.

76. Defendants' actions as alleged herein constitute an intentional and tortious campaign to disrupt and destroy Plaintiff's business by exerting extreme and unfair economic pressure during a time of unprecedented economic stress not caused by Plaintiff, yet designed to improperly gain control of Plaintiff's hotel Property.

77. Defendants' delays in the disbursement of operating funds in accord with the schedule required in the CMA, and their consequent demand that Plaintiff agree to the appointment of a receiver, has damaged and delayed Plaintiff's ability to pay employees, and has prevented Plaintiff from paying vendors and contractors on a timely basis.

78. By acting in the manner described herein, Defendants have tortiously interfered with Plaintiff's prospective business relations, causing damages to Plaintiff in an amount no less than $2 million, the exact amount of which will be proven at trial.

79. Plaintiff therefore is entitled to judgment and damages for Defendants' tortious interference with prospective business relations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks the Court to enter a judgment in its favor and against Defendants as follows:

A. On the first cause of action for breach of the covenant of good faith and fair dealing, a judgment in its favor and damages in an amount no less than $2 million, the exact amount to be proven at trial;

B. On the second cause of action for tortious interference with prospective business relations, a judgment in its favor and damages in an amount no less than $2 million, the exact amount to be proven at trial;

C. Awarding Plaintiff its costs in bringing this action and reasonable attorneys' fees; and

D. Granting to Plaintiff such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 7, 2021

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