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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**
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U.S. Bank National Association, as Trustee, Successor-in-Interest to Bank of America, N.A. as Trustee, Successor to Wells Fargo Bank, N.A., as Trustee for the Credit Suisse First Boston Mortgage Securities Corp. Commercial Mortgage Pass-Through Certificates, Series 2006-TFL2, Plaintiff, v. RFC CDO 2006-1, Ltd., Defendant.	CV 11-664 TUC DCB **ORDER**

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17 The Court grants the Plaintiff's Motion for Preliminary Injunction because the
18 express terms and conditions of the Intercreditor Agreement reflect the Plaintiff's likely
19 success on the merits, Plaintiff has established it is likely to suffer irreparable harm in the
20 absence of preliminary relief, the balance of equities tips in favor of the Plaintiff, and the
21 injunction is in the public interest.
22 Overview:
23 On August 11, 2006, Borrower, Star Pass Resort Developments LLC (the Resort),
24 the owner of JW Marriott Star Pass Resort, borrowed $145 million dollars from Plaintiff (the
25 Senior Lender). The Plaintiff's loan (the Senior loan) was secured by a deed of trust lien and
26 security interests in the assets of the Borrower, essentially the Resort and related real
27 property (the Collateral).
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The same date, Borrower's sole member, Starr Pass Resort Holdings LLC (the Mezzanine Borrower), obtained a $20 million loan (the Mezzanine Loan) from the Defendant (the Mezzanine Lender), which was secured by a pledge of 100 % ownership interest in the Borrower (the Equity Collateral).

Plaintiff, the Senior Lender, and Defendant, the Mezzanine Lender, entered into an Intercreditor Agreement, which makes the Mezzanine Loan subordinate to the Senior Loan. The Guarantor for the Senior Loan is F. Christopher Ansley, the ultimate primary owner of the entities which own the Borrower, the Resort.

Both the Borrower and Mezzanine Borrower defaulted on the respective loans. On October 12, 2011, Plaintiff notified Borrower and Defendant that it intended to initiate foreclosure proceedings, which will take at least 90 days to complete. Defendant also noticed its intent to foreclose on the Equity Collateral by a UCC sale, which is set December 13, 2011.

Plaintiff seeks a preliminary injunction to enjoin the UCC sale because it alleges the Defendant is attempting to circumvent its obligations under the Intercreditor Agreement. Specifically, the Plaintiff argues that if the Mezzanine Lender takes possession of the Equity Collateral through the UCC sale, it in effect becomes the owner of the Borrower and obtains control of the Resort. Plaintiff alleges that the personal Guarantor, Ansley, will be removed, and Defendant will place the Borrower into bankruptcy to block the Senior Lender's foreclosure proceedings.

It is undisputed that the Intercreditor Agreement calls for New York law to apply to the substantive claims of the parties. (Intercreditor Agreement (IA) § 24.) A claim for breach of contract under New York law requires: 1) existence of an agreement; 2) adequate performance of the contract by the plaintiff; 3) breach of contract by the defendant; and 4) damages. *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 177 (2nd Cir. 2004). "If an agreement is 'complete, clear and unambiguous on its face [it] must

be enforced according to the plain meaning of its terms.'" *Eternity Global Master Fund Ltd v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004). The Court's analysis properly starts with the four corners of the agreement to determine whether the meaning is unambiguous. *RJE Corp. v. Northville Indus. Corp.,* 329 F.3d 310, 314 (2d Cir.2003). A contract should be interpreted so as to give full meaning and effect to all of its provisions. *Trump–Equitable Fifth Ave. Co. v. H.R.H. Construction Corp.,* 106 A.D.2d 242, 244 (N.Y. 1985), *aff'd* 488 N.E.2d 115 (1985).

The Court finds that the Intercreditor Agreement is clear and unambiguous in relevant parts, sections 5(a), 8, 9(c), 11(b), 30 and 33.

The Intercreditor Agreement:

Section 5(a), Foreclosure of Separate Collateral, expressly requires that the Mezzanine Lender "shall not exercise" any rights to the Equity Collateral or otherwise sell the collateral without a Rating Agency Confirmation "unless i) the transferee is a Qualified Transferee; ii) the Premises will be managed by a Qualified Manager promptly after the transfer of title to the Equity Collateral, and iii) if not in place prior to the transfer of the Equity Collateral, hard cash management and adequate reserves for taxes, insurance, debt service, ground rents, capital repair and improvement expenses, tenant improvement expenses and leasing commissions and operating expenses will be implemented under the Senior Loan promptly after the transfer of title to the Equity Collateral; provided, that the implementation of such hard cash management and reserves would not cause a 'significant modification' of the Senior Loan, as such term is defined in Treasury Regulations Section 1.860G-2(b)."

It seems clear and unambiguous that a Rating Agency Confirmation is a condition precedent to any UCC sale. Subsection 6 provides that the "Mezzanine Lender promptly shall notify Senior Lender of any intended action relating to the Mezzanine Loan which would require Rating Agency Confirmation pursuant to this Agreement and shall cooperate

with Senior Lender in obtaining such confirmation. . . . ." Both parties agree the sale will be without Rating Agency Confirmation and, accordingly, the alternative UCC sale provisions apply. The Court finds the alternative provisions for the UCC sale set out in subsections (i) through (iii) are equally binding conditions to the exercise of any rights by the Mezzanine Lender it may have with respect to a foreclosure or other realization upon the Equity Collateral.

In addition to expressly providing that the Mezzanine Lender "shall not exercise any rights to the Equity Collateral" unless the conditions in subsections (i) through (iii) are met, section 5(a) requires: "[a]dditionally if a non-consolidation opinion was delivered in connection with the closing of the Senior Loan, the transferee of the Equity Collateral shall deliver a new non-consolidation opinion relating to the transferee acceptable to the Rating Agencies within ten (10) business days of the transfer of the title to the Equity Collateral. Most importantly, section 5(a) requires the Mezzanine Lender *shall provide notice* of the transfer and an officer's certificate from an officer of Mezzanine Lender certifying that all conditions set forth in this Section 5(a) have been satisfied to Senior Lender and the Rating Agencies *upon consummation* of any transfer of the Equity Collateral pursuant to this Section 5(a). Senior Lender may request reasonable evidence that the foregoing requirements *have been* satisfied." (emphasis added).

The provisions and rights afforded the Senior Lender in section 5(a) are express conditions of the UCC sale, whether or not they are conditions precedent to the sale. They must be satisfied upon consummation of any transfer of the Equity Collateral.

Section 11(b) provides that "to the extent any Qualified Transferee *acquires the Equitable Collateral in accordance with the provisions and conditions of the Agreement*, it acquires such collateral "subject to the Senior Loan and the terms, conditions and provisions of the Senior Loan for the balance of the term thereof, which shall not be accelerated by Senior Lender solely due to such acquisition and shall remain in full force and effect;

"provided, however, that the Qualified Transferee *shall have caused* the Borrower to reaffirm the Senior Loan provisions which Borrower is to perform and "all defaults under the Senior Loan which remain uncured as of the date of such acquisition *have been cured* by such Qualified Transferee or waived by the Senior Lender, ..."

There is no ambiguity in section 11. For any Qualified Transferee, including the Mezzanine Lender, that acquires the Equity Collateral in accordance with the provision and conditions of the Agreement, the Qualified Transferee *shall have* caused two things to happen– one being that "*as of the date of the acquisition*" the Qualified Transferee *shall have* cured all defaults under the Senior Loan. The Qualified Transferee must have cured the defaults *as of the date of the acquisition*.

There is no support in the express language of section 11(b) to support the Defendant's position that the section is only relevant to prevent acceleration of a loan due to a default, but irrelevant in the event a default has been accelerated. If the parties had intended to limit the Senior Lender's right to have its default cured to instances where cure would result in reinstatement of the defaulted loan, they could have done so. Instead section 11(b) applies "to the extent any Qualified Transferee acquires the Equity Collateral in accordance with the provisions and conditions of the agreement," which is precisely what Defendant proposes shall occur by the UCC sale scheduled on December 13, 2011. The parties provided that in such an event, the Qualified Transferee "shall have caused" "all defaults" to "have been cured."

Sections 8 and 9 contain strong and all encompassing subordination language which supports the Court's interpretation of sections 5(a) and 11(b).

Finally, section 30 provides: "Continuing Agreement. This Agreement is a continuing agreement and shall remain in full force and effect until the earliest of (a) payment in full of the Senior Loan, (b) transfer of the Premises by foreclosure of the Senior Mortgage . . . , (c) transfer of title to the Mezzanine Lender of the Separate Collateral or (d)

payment in full of the Mezzanine Loan; provided, however, that any rights or remedies of either party hereto arising out of any breach of any provision hereof occurring prior to such date of termination shall survive such termination."

Transfer of title to the Mezzanine Lender of the Separate Collateral terminates the Intercreditor Agreement, meaning that if sections 5(a) and 11(b) are not satisfied as conditions of the UCC sale they provide no meaningful protection for the Senior Lender. The Court must interpret the contract "in such a way that no language is rendered superfluous," *Aeronautical Indus. Dist. Lodge 91 v. United Technologies Corp.,* 230 F.3d 569, 576 (2d Cir.2000), and will not interpret it to "render any portion meaningless," *Beal Sav. Bank v. Sommer,* 8 N.Y.3d 318, 324 (App. 2007).

Preliminary Injunction:

The proper standard for granting or denying a preliminary injunction is as follows:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008); *American Trucking Associations, Inc. v. City or Los Angeles*, 559F.3d1046 (9th Cir. 2009).

Prior to *Winter*, the Ninth Circuit recognized an alternative sliding-scale standard requiring a plaintiff to demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). Post-*Winter*, there is no lesser standard than "likely to suffer irreparable harm," but the sliding scale test remains a viable concept within the context of the four prong test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). To be in harmony with the "likelihood standard" adopted in *Winter* and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), "serious questions going to the merits" means that there is at least a reasonable probability of success on the merits. *Winnemucca Indian Colony v. United States*

ex rel. Dept. of Interior, 2001 WL 4377§§932 * 4 (Nev. September 16, 2011) (relying on *Black's Law Dictionary* 1012 (9th ed.2009) (defining the "likelihood-of-success-on-the-merits test" more leniently as "[t]he rule that a litigant who seeks [preliminary relief] must show a reasonable probability of success....").

Injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *American Trucking,* at * 4 (citing *Winter*, 129 S.Ct. at 375-76).

Plaintiff is Likely to Succeed on the Merits: There is little support for Defendant's assertion that section 11(b) is solely limited to a provision to prevent acceleration of the Senior Loan in the event of a default. The "cure provisions" in section 11(b) expressly require any Qualified Transferee acquiring the Equity Collateral to pay all defaults under the Senior Loan that remain uncured as of the date of such acquisition. Consequently, the UCC sale of the Equity Collateral is subject to the Senior Loan being paid off by the Qualified Transferee; the Qualified Transferee's acquisition depends on it having cured the default.

The provisions in section 5(a) providing for foreclosure of the Equity Collateral expressly provide that the Mezzanine Lender, "*shall not exercise*" any rights to the Equity Collateral "*unless:*" (i) the transferee is a Qualified Transferee; (ii) the Premises will be managed by a Qualified Manager promptly after transfer of the title, and (iii) if not in place prior to the transfer, hard cash management and adequate reserves will be implemented promptly after the transfer of the title of the Equity Collateral. Section 5 also requires the Mezzanine Lender, to "*upon consummation* of any transfer of the Equity Collateral" to certify that all conditions in section 5 "*have been*" satisfied to Senior Lender and Rating Agencies. Section 5 gives the Senior Lender the right to request reasonable evidence that the foregoing requirements "*have been*" satisfied.

The clear and express contract terms in the Intercreditor Agreement support the Plaintiff's assertion that the default must be cured as a condition to the acquisition of the

Equity Collateral by a Qualified Transferee and that upon consummation of the transfer, the Mezzanine Lender is required to certify the conditions set out in section 5 have been met to the satisfaction of the Senior Lender.

Likelihood of Irreparable Harm: Although the Court concludes that petitioner is likely to prevail on the merits, it is not entitled to preliminary relief unless it can also show the likelihood of irreparable harm.

Both parties agree, pursuant to the Intercreditor Agreement section 33, that "monetary damages are not an adequate remedy to redress a breach" by either party under the Intercreditor Agreement such that injunctive relief is an appropriate remedy in the event of breach." Defendant's Response confirms that bankruptcy is at least one real possibility resulting from the UCC sale, which will free it from the prohibition that "so long as the Senior Loan shall remain outstanding from soliciting, direction or causing the Borrower or any entity which controls the Borrower to commence bankruptcy. (IA § 10(c)). Plaintiff argues it will be hindered from the full enjoyment of the remedies to which it is entitled under the Intercreditor Agreement and stands to lose millions during either a bankruptcy "cram down" action or "renegotiation of the Senior Loan, which Defendant admittedly intends to undertake upon acquisition of the Equity Collateral.

Balance of Equities; The Public Interest: The Court rejects the Defendant's argument that Plaintiff's injuries are speculative because Defendant refuses to acknowledge its obligation to ensure that any transfer of the Equity Collateral to a Qualified Transferee will satisfy the terms and conditions found in the Intercreditor Agreement's provisions, sections 5(a) and 11(b). Because the Intercreditor Agreement terminates, pursuant to section 30, upon transfer of the Equity Collateral, Plaintiff faces real injury if the UCC sale proceeds without the Mezzanine Lender taking measures necessary to ensure the sale results in a transfer that does not satisfy the conditions of sections 5(a) and 11(b).

In comparison, Defendant argues it is harmed as follows: 1) it did not cause the harm to which Plaintiff is subjected (non-payment or partial payment of its loan) and Plaintiff bargained for the risk that a bankruptcy was a possibility in the event of a default; 3) Plaintiff is protected by the bankruptcy code which minimizes protections for secured lenders. The Court finds to the contrary because the express terms of the Intercreditor Agreement reflects the opposite: the Plaintiff bargained for the first position and complete subordination.

At oral argument the Defendant explained, if it is enjoined from proceeding with the UCC sale that it will be precluded from its only right under the Intercreditor Agreement: the right of control. The right to take control of the Borrower and terminate the Intercreditor Agreement, which allows it to circumvent the Senior Lender's foreclosure sale of the property by placing the Borrower in bankruptcy. It is undisputed that subsequent to the Senior Lender's foreclosure, the Mezzanine Lender is without relief.

Both parties agree that it is in the public interest to "support[] permitting commercial entities to act pursuant to their bargained for rights in a written contract." (Response at p. 19.)

Additionally, the Senior Loan at issue in this case is part of a larger pool of securitized loans placed in a trust securing the investments of investors, which involves complex financial and regulatory obligations for the Plaintiff. "In short, multiple parties, including investors, are negatively impacted if mezzanine lenders such as Defendant are not required to satisfy their obligations under the Intercreditor Agreement. (Reply at 20.)

The Court finds that given the strong support found in the express terms of the Intercreditor Agreement for the Plaintiff's claims and because public policy favors permitting commercial entities to act pursuant to their bargained for rights, the balance of hardship tips in favor of granting the preliminary injunction.

Conclusion:

The UCC Sale is enjoined unless the sale is structured to ensure full compliance with section 5(a), subsections (i) through (iii) and the requirements for full cooperation and

certification of satisfaction of those conditions. The sale must also ensure that upon acquisition of the Equity Collateral the Qualified Transferee shall have caused the default to be cured in full in compliance with section 11(b).

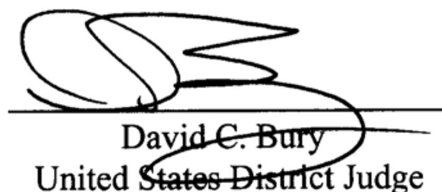
Accordingly,

IT IS ORDERED that the Motion for Preliminary Injunction (doc. 17) is GRANTED and the UCC Sale Scheduled for December 13, 2011, is enjoined.

IT IS FURTHER ORDERED that the Clerk of the Court shall correct the parties to reflect them to be as named in the Verified Amended Complaint (doc. 15).

IT IS FURTHER ORDERED that the Clerk of the Court shall correct the docket to reflect that the Lodged Proposed Reply (doc. 36) is filed, pursuant to this Court's Minute Entry (doc. 40), granting Plaintiff's Motion for Leave to File Excess Pages (doc. 35).

DATED this 6th day of December, 2011.



David C. Bury
United States District Judge