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The Honorable Leon Ruchelsman
Supreme Court, Kings County
360 Adams Street
Brooklyn, NY 11201

Re: ***Evergreen Gardens I LLC et al v. MREF REIT Lender 9 LLC*, No. 502742/2021 (Kings Cnty. Sup. Ct.)**

Dear Justice Ruchelsman:

We represent defendant MREF REIT Lender 9 LLC ("Mezzanine Lender") and write in response to Plaintiffs Yoel Goldman and Evergreen Gardens I LLC's ("Plaintiffs") Emergency Order to Show Cause and Request for Injunction. Mezzanine Lender respectfully submits that the factual and legal context surrounding the actual borrower's failure to repay the loan at issue precludes the issuance of any equitable or legal relief sought by the Plaintiffs. Plaintiffs' request should be denied and the UCC sale set for tomorrow should proceed as scheduled.

The Mezzanine Loan

On February 12, 2019, Mezzanine Lender extended a $65 million mezzanine loan to Evergreen Gardens Mezz LLC ("Borrower") (which loan was amended on June 10, 2019, the "Mezzanine Loan"). The Mezzanine Loan is subordinate to a $170,000,000 mortgage loan between Plaintiff Evergreen Gardens I LLC—a subsidiary of the Borrower—and JPMorgan Chase Bank, N.A.

Under the Mezzanine Loan, the Borrower granted Mezzanine Lender a first-priority lien on Borrower's membership interests in Plaintiff Evergreen Gardens I LLC (the "Equity Interests"). Evergreen Gardens I LLC's principal asset is the real property developed at 123 Melrose Street, Brooklyn, New York (the "Property" or "Denizen II"). The fee interest in the Property itself is not part of the scheduled auction, and after the auction, the Property will remain owned by Plaintiff Evergreen Gardens I LLC. The auction involves only the Equity Interests in Evergreen Gardens I LLC currently owned (and pledged) by the Borrower.

Neither Plaintiff to this action is the Borrower, and the Borrower is not a party to this action. We have attached an organization chart for the Borrower and selected affiliates as Exhibit A. Yoel Goldman does not own any interest in the Borrower or the other Plaintiff in this case (Evergreen Gardens I LLC). Goldman may own equity in an upstream parent which has intervening corporate entities and creditors.

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See Goldman Aff. ¶ 1. However, given the many challenges faced by Goldman's businesses, it is unclear whether he manages any entity related to Borrower or controls the actions of the Borrower's affiliates.[1]

Goldman has personally guaranteed payment and Borrower's performance of certain obligations, including losses incurred by the Mezzanine Lender, if certain actions are taken by the Borrower. Goldman's status as guarantor is separate from and unrelated to the scheduled UCC auction and sale, and that guaranty survives the auction and sale. But, as of the current date, Mezzanine Lender has not demanded payment under Goldman's guaranty.

Borrower's Defaults

In July 2020, Borrower defaulted on the Mezzanine Loan when it failed to make a required interest payment when the payment was due. Since July 2020, Borrower has made no payments on the Mezzanine Loan. Those defaults have been noticed, not cured and default interest is accruing.

At the same time that Borrower stopped making payments on the Mezzanine Loan, the Property apparently also stopped making payments to contractors and vendors. In December 2020 and January 2021, Mezzanine Lender was made aware of, and also provided notice to Borrower and Plaintiff of over a million dollars in mechanics liens encumbering the Property. These liens themselves constitute a material breach of the underlying Mezzanine Loan, are a separate Event of Default and remain uncured and unpaid.

Mezzanine Lender Dealings with Borrower & Goldman

Mezzanine Lender has repeatedly attempted to resolve Borrower's default without resorting to foreclosure. Despite having the right to accelerate the debt and notice a foreclosure after a default, in response to Borrower's failure to pay in July 2020, Mezzanine Lender and Borrower entered into a Temporary Forbearance Agreement. Neither Plaintiff was a party to that Forbearance Agreement, under which Mezzanine Lender agreed to (i) forebear from exercising its right to accelerate the debt and foreclose until August 31, 2020; and (ii) waive all accrued default interest, so long as Borrower made the required payment by August 3, 2020. Borrower failed to make that interest payment, and then failed to make its regular required payments between August and October 2020. As a result, on November 2, 2020, Mezzanine Lender sent to Borrower and Goldman a Notice of Acceleration indicating that Mezzanine Lender had accelerated the debt, and all amounts owed were due and payable.

The parties executed two Pre-Negotiation Agreements dated April 7, 2020 and July 13, 2020 (attached hereto as Exhibits C and D). Pursuant to those Agreements, Borrower and Goldman (as guarantor) agreed that negotiations between the parties concerning obligations under the loan agreement "may not be used

[1] *See* Inside the International Drama Consuming All Year Management, Commercial Observer, *available at* https://commercialobserver.com/2021/02/inside-the-international-drama-consuming-all-year-management/ (last visited February 3, 2021) (attached hereto as Exhibit B).

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for any other purpose, including without limitation proof of admissions of liability or for other evidentiary purposes." Exhibit C at ¶ 7; Exhibit D at ¶ 7. The parties further agreed that "[a]ll evidence of conduct and communications of any nature whatsoever (whether verbal or nonverbal, express or implied) of any Party hereto" (*i.e.*, Goldman or Mezzanine Lender) in connection with such negotiations "or in any meetings or correspondence which relate to possible modification of the Loan and/or the Guaranties or Environmental Indemnity shall be inadmissible for any purpose whatsoever in any judicial or similar proceeding." *Id.* Finally, the parties agreed that they would not assert any claim (such as bringing a lawsuit) against another party arising out of such negotiations. *Id.*[2]

Despite this express agreement, Plaintiffs now assert that at some unspecified date, "we" (although it is unclear who that is meant to include) "tried to pay-off the loan" but "received inaccurate payoff statements" and were "rebuffed." Goldman Aff. ¶ 10. Plaintiffs proffer no evidence that a payoff was requested, objected to or disputed, or that Mezzanine Lender provided inaccurate information at any time.

Plaintiffs further claim that on December 2, 2020, Mezzanine Lender "offered to reinstate the loan for a payment of $7,500,000.00 by December 3, 2020, but when we tried to make the payment, [Mezzanine Lender] did not accept it." *Id.* ¶ 13. Plaintiffs submit a December 2, 2020 email from Mezzanine Lender to Goldman in which, "as an accommodation" for the parties' "strong relationship," Mezzanine Lender offered to reinstate the loan if it received payment no later than 5:00 PM the following day. *See* Plaintiffs' Exhibit E. Again, however, Plaintiffs submit no evidence to substantiate the assertion that either Plaintiff attempted to make any $7.5 million payment to Mezzanine Lender.

The evidence shows that they did not make any payment. Mezzanine Lender sent wire instructions to Borrower. *See* Exhibit E. Mezzanine Lender never sent the money, even after Borrower inquired as to the status of the promised payment. *See id.* In any event, attached is a revised payoff statement for February 4, 2021 (some fees are estimates given the ongoing process), and an updated statement of sources and uses of a $7.5 million payment. Exhibits F and G.

Mezzanine Lender Noticed a Foreclosure Auction and Has Conducted a Commercially Reasonable Foreclosure Sale Process

On December 2, 2020, five months after Borrower stopped making payments and defaulted on the loan and a month after sending the Notice of Acceleration, Mezzanine Lender provided notice to Borrower (and directed to Goldman's attention) that the foreclosure sale would take place on February 5, 2021, enclosing the terms of sale. Mezzanine Lender engaged Jones Lang LaSalle Americas, Inc. ("JLL"), a nationally recognized commercial real estate advisory firm with extensive experience marketing property interests, including during the recent COVID-19 pandemic, to assist with the sales process and auction.

[2] The Pre-Negotiation Agreements themselves are admissible, per the terms of those agreements. *Id.*

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Plaintiffs do not dispute that Mezzanine Lender and JLL have assiduously conducted a process that is both what Mezzanine Lender "deems best in its commercially reasonable judgment"—all that is required by the loan agreement—and objectively "commercially reasonable" under the UCC. *See generally* Plaintiffs' OSC. Mezzanine Lender, together with JLL, commenced marketing of the sale on December 3, 2020, shortly after sending out the Notice of Disposition. JLL sent an electronic teaser to a targeted list of approximately 6,607 investors. JLL records indicate that at least 3,658 investors viewed that email. The sale was also advertised and marketed in multiple rounds of national advertisements in the New York Times, the Wall Street Journal, and the Commercial Mortgage Alert. Consistent with the terms of sale, Mezzanine Lender agreed to (and did) provide prospective bidders that executed a confidentiality agreement access to an online database (the "Data Room"), where they had access to relevant information concerning, among other things, the Borrower, the Equity Interests, the Property, and various documents related to the Mezzanine Loan. The marketing process has now been ongoing for 64 days. 140 potential bidders have requested and executed a confidentiality agreement to gain access to the Data Room in advance of the scheduled sale. In preparation for the February 5, 2021 sale, Mezzanine Lender and JLL also engaged a third-party auctioneer with extensive experience conducting UCC sales (including during the COVID-19 pandemic). As of the date of this letter, there are at least two registered bidders. Mezzanine Lender also reserves the right to bid.

This marketing and sale process that has consumed thousands of hours and hundreds of thousands of dollars has proceeded without any feedback, resistance or even communication from Plaintiffs, despite the fact that they have known of the February 5, 2021 sale date since December. Only now, literally the day before the process is scheduled to proceed to closure, have Plaintiffs asserted that the sale is a scheme to "wrest the Property from Plaintiff Evergreen I LLC at a steep discount." Goldman Aff. ¶ 12. Such a last minute, self-induced, self-declared "emergency" tactic seeking *ex parte* relief should be seen for what it is: a last minute desperate attempt to avoid foreclosure, and it should be rejected.

* * *

Under these circumstances, Plaintiffs' auction-eve request for injunctive relief should be denied because it literally fails to meet any one of the prongs that would justify such relief.[3]

Initially, Plaintiffs lack standing to bring this action. *See Hill v. Reynolds*, 589 N.Y.S.2d 461 (1st Dep't 1992) (holding that, without an "injury in fact," Supreme Court was "precluded from adjudicating" plaintiff's request for a preliminary injunction). Neither Plaintiff is the Borrower. With respect to

[3] To the extent Plaintiff asserts that UCC sales are subject to any moratorium, courts have routinely rejected such an argument. *See, e.g.*, *WWML96 De Mezz, LLC v. Series 2020A of Nahla Capital, LLC*, No. 656721/2020 (N.Y. Cnty. Sup. Ct. Dec. 7, 2020) (Dkt. No. 37, attached hereto as Exhibit H) ("mezzanine foreclosures have been proceeding under current conditions"); *1258 Assoc Mezz II LLC v. 12E48 Mezz II LLC*, No. 651812/2020 (N.Y. Cnty. Sup. Ct. May 18, 2020) (Dkt. No. 58, attached hereto as Exhibit I) (Executive Order does not prohibit UCC sales).

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Goldman, he is not the Borrower or any affiliate thereof. Plaintiffs do not own the Equity Interests being auctioned—to the contrary, those interests belong to the Borrower. After the auction, Plaintiffs will retain all ownership interests that they currently possess. Indeed, there are creditors of intermediate affiliates who may or may not consent or object to the foreclosure auction, and there is no reason allow a distant owner to project his wishes onto the Borrower. If Plaintiffs wanted to control the Borrower, who could then bring this action, they could use their equity rights (to the extent they have any) to bring the claim. Plaintiffs cannot simply skip the corporate formality and at the same time avail themselves of the any protection from the corporate form. Put simply, the Borrower can object to the sale of its assets or not; a distant owner in an upstream entity cannot.

Aside from standing, Plaintiffs have no prospect of success on the merits and will not suffer any irreparable harm from the auction. Plaintiffs' entire argument hinges on unsubstantiated claims that, "[u]pon information and belief," Mezzanine Lender "has refused to proffer an accurate payoff, or accept payment under its [alleged] reinstatement agreement" as part of a "scheme to unlawfully obtain the Property." Goldman Aff. ¶ 12. There is no evidence that Plaintiff was entitled to make a $7.5 million payment, that any modification was agreed to, that acceleration was inappropriate or that the loan is anything other than due and owe, in full. Plaintiffs have not proffered a single document evidencing that Borrower attempted to make a payoff, that Mezzanine Lender failed to provide accurate payoff information, or that Mezzanine Lender refused to accept Plaintiffs' supposed reinstatement payment—indeed, Plaintiffs do not offer any documents or records in support.

The only evidence that Plaintiffs submit—an email between the parties and Goldman's conclusory testimony concerning those negotiations—does not support that argument and is inadmissible. Mezzanine Lender offered to extend the Loan if payment was made. It was not, and now the loan is due and payable. While Plaintiffs' reliance on any alleged reinstatement negotiations is improper and a breach of the parties' agreement, it simply does not support the relief requested.

To the extent Plaintiff contends the "pay off amount" is in dispute, that dispute is a monetary issue that can be resolved after the auction is concluded. The UCC has procedures for accounting of funds from the sale of collateral, and there is no reason to enjoin the sale to resolve those disputes prior to sale. In fact, an injunction is inconsistent with those very provisions dictating how a sale proceeds given the fluidity of a sale process.

Plaintiffs will also not suffer any irreparable harm. Plaintiffs claim that, if the sale goes forward, they "stand to suffer grave irreparable injury because they will forever lose valuable, unique and irreplaceable real property." Kalish Aff. ¶ 18. This is patently untrue. The only thing being auctioned at the sale are the Equity Interests—not the Property itself. Where, as here, the "Plaintiff's interest in the real estate is commercial, and the harm it fears is the loss of its investment, as opposed to loss of its home or a unique piece of property in which it has an unquantifiable interest," such losses "are ordinarily compensable by damages, and do not necessarily amount to an irreparable harm as a matter of law." *Atlas MF Mezzanine*

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Borrower, LLC v. Macquarie Texas Loan Holder, LLC, 2017 WL 729128, at *3, (S.D.N.Y. Feb. 23, 2017) (quoting *SK Greenwich LLC v. W–D Grp. (2006) LP*, 2010 WL 4140445, at *3 (S.D.N.Y. Oct. 21, 2010)); *1258 Assoc Mezz II LLC v. 12E48 Mezz II LLC*, No. 651812/2020 (N.Y. Cnty. Sup. Ct. May 18, 2020) (Dkt. No. 58) (no irreparable harm because "the loss of investment as opposed to a loss of an unquantifiable interest"). And to the extent any claim exists (and for which Plaintiff has standing to assert) that the sales process somehow failed to produce a commercially reasonable value, that claim is likewise a monetary damage claim compensable in dollars. *See WWML96 De Mezz, LLC v. Series 2020A of Nahla Capital, LLC*, No. 656721/2020 (N.Y. Cnty. Sup. Ct. Dec. 7, 2020) (Dkt. No. 37) (no irreparable harm if there is a deficiency in the sale process that affected sale price because of monetary remedy). Further, Plaintiffs filed this motion for temporary restraining order and preliminary injunction only one day before the sale was scheduled to take place, even though it has known about the sale for many months. Plaintiffs' own delay in seeking to enjoin the sale is evidence that Plaintiffs themselves cannot possibly consider the potential harm to be irreparable.

Finally, the balance of the equities plainly favors the Mezzanine Lender. The Mezzanine Lender has patiently tried to resolve these issues despite not being paid for months. The Mezzanine Lender has expended hundreds of thousands of dollars, engaged experienced professionals, noticed the sale process with sufficient time to market the Interests, and done more than what could be required to be commercially reasonable. During the entire sales process, Plaintiffs have said nothing, objected to nothing, nor made any demand for more time. Plaintiffs have never indicated that the process was flawed, that the process ought to proceed differently, or that he had any objection to any component of the sales process. Literally, Plaintiffs delayed until the very last moment to attempt to block the sale and are now using their own delay to inject urgency and emergency to challenge the sale—and to seek *ex parte* relief on the basis of such urgency. Compounding this, in seeking the requested relief, Plaintiffs rely ***exclusively*** on inadmissible evidence of the parties' negotiations in breach of their Pre-Negotiation Agreements. Such obvious gamesmanship demonstrates the lack of good faith and that the equities favor the Mezzanine Lender. *See WWML96 De Mezz, LLC v. Series 2020A of Nahla Capital, LLC*, No. 656721/2020 (N.Y. Cnty. Sup. Ct. Dec. 7, 2020) (Dkt. No. 37) ("The balance of the equities, moreover, weighs heavily in favor of defendant, which has been paying the carrying costs of the property for almost a year.").

Mezzanine Lender respectfully requests that the Court reject Plaintiffs' last minute request to enjoin the auction of the Equity Interests and, in turn, permit the UCC sale to proceed as scheduled for months on February 5, 2021.

Respectfully submitted,

/s/ Brian D. Hail

Brian D. Hail

Counsel for Defendant MREF REIT Lender 9 LLC