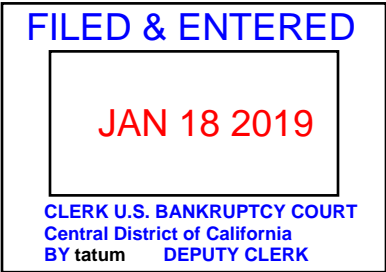


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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
8800 LLC,

Debtor.

Case No. 2:18-bk-17263-RK
Chapter 11

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEBTOR'S MOTION TO ASSUME LEASE

Trial Date: October 25, 2018
Time: 9:30 a.m.
Place: Courtroom 1675
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

The contested matter of the Motion of Debtor 8800 LLC ("Debtor" or "Tenant") to Assume Lease (the "Motion"), Electronic Case Filing Number ("ECF") 67, filed in this bankruptcy case on September 11, 2018, came on for trial before the undersigned United States Bankruptcy Judge on October 25, 2018. David B. Golubchik and Jeffrey S. Kwong, of the law firm of Levene, Neale, Bender, Yoo & Brill LLP, appeared for Debtor. Robert H. Platt and Carl L. Grumer, of the law firm of Manatt, Phelps & Phillips, LLP, appeared for TMC Realty, LLC ("TMC" or "Landlord").

On November 30, 2018, Debtor lodged its proposed findings of fact and conclusions of law for this matter, see ECF 112, and TMC lodged its proposed findings of fact and conclusions of law, see ECF 114. On December 14, 2018, Debtor filed its objections to TMC's proposed findings of fact and conclusions of law, ECF 115, and TMC

1 filed its objections to Debtor's proposed findings of fact and conclusions of law, ECF 116.
2 The court then took the matter under submission, and it is ripe for decision.

3 Having considered the evidence admitted at trial, the oral and written arguments of
4 the parties, and other admissible and relevant pleadings filed in this matter filed by Debtor
5 and TMC, the court makes the following findings of fact and conclusions of law pursuant
6 to Rule 52 of the Federal Rules of Civil Procedure, made applicable here by Rules 7052
7 and 9014(c) of the Federal Rules of Bankruptcy Procedure.

8 As set forth in detail below, the court determines that Debtor cannot assume the
9 Lease because it was terminated under California law before the date of the filing of the
10 bankruptcy petition, and Debtor is not entitled to relief from forfeiture as a matter of law.
11 Accordingly, the court need not decide the issue whether the Debtor is not the Tenant
12 under the Lease and thus would be precluded from assuming the Lease. If it was
13 necessary for the court to determine this issue in order to resolve the Motion, the court
14 would find that Debtor is the Tenant under the Lease because, among other reasons,
15 (i) TMC (through its agents) induced Debtor and Debtor's principal, Mr. Nathan, to
16 "change its name" and is estopped from asserting otherwise, (ii) Debtor's principal, Mr.
17 Nathan, believed creation of the Debtor entity was the equivalent of what TMC was
18 directing (i.e., changing the name), (iii) Debtor and 8800 Sunset, LLC have all the same
19 attributes, i.e., the same assets, the same liabilities, the same principals and the same
20 business, (iv) TMC waived its objection to the assignment of the Lease to Debtor by,
21 among other things, sending invoices in the name of and receiving rent payments from
22 Debtor from the Lease commencement date of December 1, 2015 to April 2018, and
23 (v) the unauthorized assignment of the Lease from 8800 Sunset to Debtor would
24 constitute an "Event of Default" under Section 14.1(g) of the Lease, and Debtor could
25 likely get relief from such a forfeiture caused by Debtor's default, see California Code of
26 Civil Procedure § 1179.

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1 I. **FINDINGS OF FACT**

2 **A. Background and Parties**

3 1. On June 22, 2018 (the "Petition Date"), Debtor filed a voluntary petition for
4 relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Declaration of Alan Nathan
5 ("Nathan Declaration"), ECF 98, ¶ 4. Debtor is a California limited liability company
6 operating its business, managing its financial affairs and operating its bankruptcy estate
7 as a debtor in possession. *Id.*; see TMC's Exhibit YY (Debtor's complaint for damages
8 and declaratory relief).

9 2. TMC is a Delaware limited liability company, and it owns and operates an
10 office building located at 8800 Sunset Boulevard, West Hollywood, California (the
11 "Building"). Declaration of Jason Stewart ("Stewart Declaration"), ECF 99, ¶ 4.

12 3. IAC/InterActiveCorp is the parent company of IAC Group, LLC (collectively,
13 "IAC"), which is the parent company of TMC. Stewart Declaration, ¶ 1.

14 4. Debtor currently operates its business within a portion of the Building (the
15 "Premises"), and purports to occupy the Premises pursuant to the "*Restaurant Lease*"
16 dated December 13, 2013 (as amended, the "Lease"). Nathan Declaration, ¶ 7; Debtor's
17 Exhibit 1 and TMC's Exhibit A (Lease).¹

18 5. Debtor owns and operates an entertainment facility on the Premises that
19 includes a fine dining restaurant specializing in Italian-American fare, known as "Estrella";
20 a semi-secret lounge for cocktail receptions, social events, and live entertainment, known
21 as the "Ma Lounge"; and a state-of-the-art theatre that was used for private screenings
22 and events, known as the "Ma Theatre" (collectively, the "Entertainment Facility"). Nathan
23 Declaration, ¶ 5.

24 6. Debtor has approximately 34 employees, a loyal customer base, and has
25 invested substantial amounts of money (over \$2 million) into its business and improving
26 the Premises. *Id.*, ¶ 6.

27 _____
28 ¹ The Lease was admitted into evidence at trial as Debtor's Exhibit 1 and as TMC's Exhibit A and is
referenced and cited to herein simply as "Lease."

1 7. Alan Nathan is the managing member of both Debtor and another limited
2 liability company with a similar name, 8800 Sunset, LLC ("8800 Sunset"). *Id.*, ¶¶ 2 and 7.
3 Mr. Nathan is the person at Debtor and 8800 Sunset in charge of any final decisions with
4 regard to lease documents, and he is the primary person at Debtor and 8800 Sunset that
5 corresponded with TMC and its agents with regard to the Lease. *Id.*, ¶ 3.

6 8. The Lease was entered into between TMC and 8800 Sunset. Lease at page
7 "i". The Lease has an initial term of ten years, with two five-year options to extend. *Id.*,
8 §§ 3.1 and 3.2.

9 9. Debtor's principal and managing member, Mr. Nathan, negotiated the Lease
10 on behalf of 8800 Sunset along with its attorney, Andrew Kirsch, of the law firm of Sklar,
11 Kirsch, LLP. Stewart Declaration, ¶ 5. Landlord TMC was represented in the negotiations
12 by its attorney, Patrick Ramsey, of the law firm of Paul Hastings, LLP. *Id.* Throughout the
13 Lease negotiation process, Mr. Nathan's business contact at TMC was Christian Bryan.
14 Nathan Declaration, ¶ 8. Mr. Nathan did not negotiate Lease terms with anyone at TMC
15 other than Mr. Bryan. *Id.* Mr. Bryan told Mr. Nathan that he was the Landlord TMC's
16 authorized agent for purposes of the Lease and the operations related thereto. *Id.* Mr.
17 Bryan executed the Lease on behalf of the Landlord TMC. Lease at p. 24. During the
18 negotiations, Mr. Nathan represented that he had successfully operated or managed
19 many restaurants during his career. Stewart Declaration, ¶ 8. The Lease was signed on
20 behalf of 8800 Sunset LLC by Mr. Nathan as its Managing Member. Lease at p. 24.

21 10. The Lease contains several provisions prohibiting amendments, changes, or
22 modifications, as well as assignments or transfers, without, among other things, a written
23 amendment signed by both parties. Stewart Declaration, ¶ 10; Lease, § 21.1 ("This Lease
24 shall not be amended, changed or modified in any way unless in writing executed by
25 Landlord and Tenant.").

26 11. The Lease also contains a provision for the Landlord TMC to "recapture" and
27 terminate the Lease, but only upon the satisfaction and occurrence of several conditions
28 required therein (the "Recapture Provision"). Lease, §§ 13.2-13.4. Under the Recapture

1 Provision, if the tenant under the Lease requests TMC's consent to assign or transfer the
2 tenant's interest under the Lease, TMC, "in the exercise of its sole and absolute
3 discretion," has the option (the "Recapture Right") to terminate the Lease and recapture
4 the Premises. *Id.*, § 13.3.

5 12. Specifically, Section 13.3 of the Lease provides that "[a]t any time within
6 twenty (20) business days after Landlord's receipt of all (but not less than all) of the
7 information and documents described in Section 13.2, Landlord may . . . terminate this
8 Lease." *Id.* The "information and documents described in Section 13.2" of the Lease
9 include:

- 10 a. the name and address of the proposed Transferee;
- 11 b. current financial statements of the proposed Transferee certified by an
12 officer, partner, manager or owner thereof, and any other information and
13 materials (including, without limitation, credit reports, business plans,
14 operating history, bank and character references) required by Landlord to
15 assist Landlord in reviewing the financial responsibility, character, and
16 reputation of the proposed Transferee;
- 17 c. the nature of such Transferee's business, restaurant plan and proposed
18 use of the Premises;
- 19 d. the proposed effective date of the proposed Transfer;
- 20 e. all of the principal terms of the proposed Transfer (including a calculation
21 of the Transfer Profits (defined in Section 13.5, below));
- 22 f. description of such Transferee's track record and experience in operating
23 restaurants of comparable scope and quality; and
- 24 g. such other information and materials as Landlord may in good faith
25 request (provided, that if Landlord requests such additional information or
26 materials, the Transfer Notice shall not be deemed to have been
27 received until Landlord receives such additional materials).

28

1 *Id.*, § 13.2. Section 13.2 of the Lease also provides that "[i]f Tenant modifies any of the
2 terms and conditions relevant to a proposed Transfer specified in the Transfer Notice,
3 Tenant shall re-submit such Transfer Notice to Landlord for its consent pursuant to all of
4 the terms and conditions of this Article 13." *Id.*

5 **B. The Tenant's Name Controversy**

6 13. Not long after the execution of the Lease, an incident occurred that
7 prompted Mr. Nathan to consider changing the name of the Tenant under the Lease.
8 Stewart Declaration, ¶ 11. On behalf of 8800 Sunset, Mr. Nathan received a state court
9 complaint against the Landlord and 8800 Sunset related to a slip-and-fall injury in the
10 Building but not on the Premises (the "Slip and Fall Lawsuit"). Nathan Declaration, ¶ 9.
11 Mr. Nathan was advised by Mr. Bryan of TMC that the Landlord TMC would handle the
12 Slip and Fall Lawsuit on behalf of 8800 Sunset, which was likely named as a defendant in
13 the lawsuit because its name contained the building address and may have appeared to
14 others as the owner of the building. *Id.* Although Landlord TMC obtained a dismissal of
15 the Slip and Fall Lawsuit against 8800 Sunset, see Debtor's Exhibit 2 (Los Angeles
16 Superior Court's entry of dismissal of the lawsuit), Mr. Bryan of TMC nevertheless advised
17 Mr. Nathan to change the name of the tenant entity operating on the Premises so that a
18 similar incident would not occur again in the future. *Id.*; Debtor's Exhibit 3 and TMC's
19 Exhibit D (emails dated 3/5/14 regarding name change); Transcript Regarding Hearing
20 Held 10/25/18 ("Trial Transcript"), ECF 111, 117:13-16 ("Q. Now, he says, it will be good
21 to do this. You respond, 'I filed to get the name.' . . . Without the Sunset. And then he
22 responds, "Either way, your call. Will likely need to do a short amendment to the lease."").
23 Specifically, Mr. Bryan wrote to Mr. Nathan, "It would be good for going forward to not
24 make mention of the address in your company name to avoid this type of issue." Debtor's
25 Exhibit 3 and TMC's Exhibit D (emails dated 3/5/14 regarding name change); see Nathan
26 Declaration, ¶ 11.

27 14. Mr. Nathan was "happy" to continue having "8800 Sunset LLC" operate the
28 restaurant, and he had no intention of or reason for creating the Debtor entity but for the

1 fact that Mr. Bryan, Landlord TMC's representative, advised that he change the name of
2 "8800 Sunset LLC" after the Landlord successfully obtained dismissal of the Slip and Fall
3 Lawsuit. Nathan Declaration, ¶ 10; Trial Transcript 116:22-24 (Mr. Nathan's
4 testimony)("There's no reason I need to change the name without the landlord asking me
5 to do so."); Trial Transcript 174:17-21 ("THE COURT: All right. So the only purpose was
6 just to please the landlord and accommodate the landlord's suggestion? THE WITNESS
7 [Mr. Nathan]: Yeah, he seemed to think that lawsuits happen –"); Trial Transcript 174:24-
8 25 to 175:1 ("THE COURT: You – right. You wouldn't have changed the name otherwise,
9 right? THE WITNESS: No, I was happy with that.").

10 15. In a subsequent email sent to Mr. Nathan by Mr. Bryan of TMC on March 5,
11 2014 at 8:58 a.m., Mr. Bryan reiterated, "Maybe [a name change] without the address.
12 From what I gather this is what people look for when suing and then name the[m] in the
13 suit regardless of the cause. Either way your call. We'll likely need to do a short
14 amendment to the lease." Nathan Declaration, ¶ 12; Debtor's Exhibit 3 and TMC's Exhibit
15 D (emails dated 3/5/14 regarding name change).

16 16. Relying on Mr. Bryan's directive, Mr. Nathan almost immediately and on the
17 same day as Mr. Bryan's March 5, 2014 emails created the Debtor entity (dropping
18 "Sunset" from the name) with the intention of having Debtor operate the Entertainment
19 Facility on the Premises. Nathan Declaration, ¶ 13; Debtor's Exhibit 4 (Debtor's Articles of
20 Organization of a Limited Liability Company).

21 17. Mr. Nathan notified the Landlord's representative, Mr. Bryan, of Debtor's
22 creation and sent an email to Mr. Bryan on March 5, 2014 at 11:50 a.m. stating that "I filed
23 to get the name 8800 without the sunset." Nathan Declaration, ¶ 13; Debtor's Exhibit 3
24 and TMC's Exhibit D (emails dated 3/5/14 regarding name change); Trial Transcript
25 171:23-25 ("A: No, it was just, 'Will you change the name?' I sent an email to say that I
26 filed for a new company and the address is out of it and he was happy with it.").

27 18. Upon creation of Debtor, the 8800 Sunset entity was not used for any
28 purpose and did not conduct any business on the Premises or otherwise. Trial Transcript

1 173:9-21 ("THE COURT: So did 8800 Sunset have any purpose after you created 8800,
2 LLC? THE WITNESS [Mr. Nathan]: No purpose at all THE COURT: So the only
3 purpose was – it was just a replacement for . . . 8800 Sunset? THE WITNESS: That's
4 correct.").

5 **i. Communications About the Tenant's Name**

6 19. The following matters are relevant in assessing Landlord TMC's
7 understanding regarding the identity of its tenant under the Lease:

8 a. **The Liquor License.** Section 6.4(c) of the Lease provides that "[o]n
9 or about the date of the Business Opening . . . Landlord or its Affiliate shall assign,
10 sell and transfer the Liquor License [(the "Liquor License")] . . . to Tenant for use in
11 connection with Tenant's operation of the Restaurant within the Premises." Lease,
12 § 6.4(c). On March 31, 2014, Mr. Bryan of TMC described a two-step process of
13 transferring the Liquor License once from TMC's affiliate "to TMC . . . and then
14 again to the new owners, 8800, LLC." Nathan Declaration, ¶ 22; Debtor's Exhibit 8
15 (email dated 3/31/14 regarding transfer plans for the Liquor License). The Liquor
16 License was transferred to Debtor pursuant to the receipt of certain documents—
17 escrow instructions, a demand note, the California Department of Alcoholic
18 Beverage Control's notice of intended transfer of liquor license form, a license
19 transfer request form, and the Rule 64(b) Request letter—all of which were
20 prepared by TMC and show that the buyer or transferee applicant was Debtor.
21 Nathan Declaration, ¶ 22; Debtor's Exhibit 10 (escrow package submitted by TMC
22 for the transfer of the Liquor License to Debtor). Thus, the Liquor License was
23 transferred from TMC's affiliate to Debtor, and the Liquor License is currently in
24 Debtor's name. Nathan Declaration, ¶ 25; Debtor's Exhibit 11 (Debtor's Liquor
25 License).

26 b. **Common Use Letter.** In response to a request from the Public
27 Health Department on June 18, 2014, see Debtor's Exhibit 15, Mr. Bryan signed a
28 common use letter under IAC letterhead stating in pertinent part, "the food facility to

1 be operated by 8800, LLC." Nathan Declaration, ¶ 30; Debtor's Exhibit 16 (IAC
2 Common Use Letter). A subsequent and revised common use letter signed by Mr.
3 Bryan under TMC letterhead also represented that Debtor would operate on the
4 Premises. Nathan Declaration, ¶ 31; Debtor's Exhibit 17 (email from Mr. Bryan to
5 Mr. Nathan to "Pls [sic] use this shared use restroom letter."); Debtor's Exhibit 18
6 (revised common use letter under TMC letterhead).

7 c. **The Termination Option.** Several months after the Liquor License
8 was transferred to Debtor, Mr. Bryan asked Mr. Nathan to confirm that he was
9 willing to waive the termination option related to the Liquor License. Nathan
10 Declaration, ¶ 26. As a result, on October 29, 2014, Mr. Nathan sent Mr. Bryan an
11 email stating that "8800 LLC . . . as the tenant under that certain Restaurant Lease
12 entered into with TMC REALTY, LLC . . . hereby waives any right to terminate said
13 lease pursuant to Section 6.4." *Id.*; Debtor's Exhibit 12 (emails dated 10/29/14
14 regarding waiver of the termination option). Mr. Nathan's response was
15 subsequently forwarded by Mr. Bryan to Jason Stewart, Senior Vice President and
16 Chief Administrative Officer of IAC/Interactive Corp., the parent of IAC Group, LLC
17 (referred to collectively as "IAC"), which is the parent of Landlord TMC. Debtor's
18 Exhibit 12A (email dated 10/29/14 forwarding Mr. Bryan's waiver email); Stewart
19 Declaration, ¶ 1 ("I am Senior Vice-President and Chief Administrative Officer of
20 IAC/Interactive Corp"). In response to Mr. Nathan's October 29, 2014 email, Mr.
21 Bryan sent an email replying to Mr. Nathan, which stated: "Thanks . . . I'm going to
22 have legal draft a letter for us to counter sign on this point to make it official."
23 Debtor's Exhibit 12 (emails dated 10/29/14 regarding waiver of the termination
24 option).

25 d. **First Lease Amendment.** On October 30, 2014, Mr. Bryan of TMC
26 sent an email to Mr. Nathan with the subject "First Amendment of Restaurant
27 Lease (IAC)" with the attachment of a proposed version of the first amendment to
28 the Lease to waive the termination option pursuant to Section 6.4 of the Lease if

1 the tenant could not obtain a Liquor License (the "First Amendment"). Nathan
2 Declaration, ¶ 27; Debtor's Exhibit 14 and TMC's Exhibit C (email dated 10/30/14
3 with the proposed version of the First Amendment); Debtor's Exhibit 13 and TMC's
4 Exhibit B (First Amendment). Despite the fact that Mr. Nathan's email regarding
5 waiver of the termination option referenced "8800, LLC . . . as tenant," and that the
6 Liquor License was transferred to Debtor, the First Amendment that was sent by
7 Mr. Bryan of TMC to Mr. Nathan, and executed by Mr. Nathan and Mr. Bryan,
8 references 8800 Sunset as the tenant. Debtor's Exhibit 12 (emails dated 10/29/14
9 regarding waiver of the termination option); Debtor's Exhibit 11 (Debtor's Liquor
10 License); Debtor's Exhibit 13 and TMC's Exhibit B (the First Amendment). Prior to
11 signing the First Amendment, Mr. Nathan was asked to review a draft of the First
12 Amendment and to advise TMC if it was acceptable. Debtor's Exhibit 14 and
13 TMC's Exhibit C (email dated 10/30/14 with the proposed version of the First
14 Amendment).

15 e. On October 20, 2015 at 7:20 a.m., Shane Trent, Director of LA
16 Facilities at IAC, sent an email to Brian Murphy of IAC to inform him that he sent a
17 "commencement notice to Choice Hospitality (Estrella Restaurant tenant) last
18 month [and] . . . a reminder that payment in the amount of \$69,300 was due."
19 Nathan Declaration, ¶ 32; Debtor's Exhibit 19 (emails dated 10/20/15 from Mr.
20 Trent to Mr. Murphy). Mr. Trent then replied to this email with a clarification that
21 "[t]hey operate under the name 8800, LLC" at the Premises. *Id.* In response to Mr.
22 Trent's reminder, Debtor made the payment with a check in Debtor's name, and
23 TMC cashed the check on October 27, 2015. Nathan Declaration, ¶ 33; Debtor's
24 Exhibit 20 (delivery date check in the amount of \$69,300).

25 f. On November 11, 2015 at 8:22 a.m., shortly before Debtor opened for
26 business and the Lease commenced on December 1, 2015, Mr. Nathan thought
27 that he had misplaced the document showing that Debtor was the tenant under the
28 Lease and decided to email Mr. Trent (successor to Mr. Bryan) for him to draft a

1 "small amendment to this agreement and the [L]ease so that the company is 8800
2 llc not 8800 sunset llc." Nathan Declaration; ¶ 14; Debtor's Exhibit 3 and TMC's
3 Exhibit D (emails dated 11/11/15 regarding name change). In an email response
4 on November 30, 2015 at 8:33 a.m., Mr. Trent told Mr. Nathan that he would "work
5 on th[e amendment]." Debtor's Exhibit 3 and TMC's Exhibit D (emails dated
6 11/11/15 regarding name change). In that same email Mr. Trent also requested
7 from Mr. Nathan a "wet copy of the lease commencement letter." *Id.* Under the
8 "lease commencement letter" referred to in Mr. Trent's email, Mr. Nathan signed on
9 behalf of "8800 Sunset LLC" and not "8800 LLC." TMC's Exhibit VVV (Notice of
10 Lease Term Dates).

11 g. **Second Lease Amendment.** As time went by, Debtor desired to
12 lease additional office space on the Premises (the "Additional Office Space").
13 Nathan Declaration, ¶ 57. The purpose for the Additional Office Space was so that
14 Debtor's affiliated entity Sweetfin Holdings, LLC ("Sweetfin") could use it as an
15 office, and this was communicated by Mr. Nathan to Elizabeth McDonald of IAC.
16 Trial Transcript 210:5-9 ("THE WITNESS [Mr. Nathan]: Yes. So there were two
17 other ones, [Sweetfin] Holdings, which we wanted to rent the – an office and
18 occupied [Sweetfin] Holdings. From that amendment, that portion of the office,
19 [Sweetfin] Holdings and a check to the landlords."); Trial Transcript 113:5-8 ("A.
20 [Sweetfin] Holdings and – yes, I had conversation with Elizabeth in regards to it so I
21 asked her if they would be okay if [Sweetfin] Holdings rented an office."). Mr.
22 Nathan engaged in negotiations with TMC for the payment of rent related to
23 Sweetfin's usage of the Additional Office Space. Nathan Declaration, ¶ 57. After
24 TMC and Debtor finalized the essential terms regarding the Additional Office
25 Space, the Landlord formalized these terms and drafted the Second Amendment to
26 the Lease dated October 13, 2016 (the "Second Amendment"). *Id.*, ¶ 58; Debtor's
27 Exhibit 45 and TMC's Exhibit F (the Second Amendment). When the Second
28 Amendment was emailed to Mr. Nathan from Ms. McDonald for signature on

1 October 7, 2016, the body of the email stated that the company name "used [in the
2 Second Amendment was] 8800LLc," and asked for Mr. Nathan's confirmation that
3 "8800LLc" could be used in the Second Amendment instead of the "requested
4 [Choice Hospitality Group, or] CHG" name. Nathan Declaration, ¶ 59, Debtor's
5 Exhibit 46 and TMC's Exhibit I (emails dated 10/7/16 regarding the Second
6 Amendment). However, like the First Amendment, the Second Amendment recited
7 that "8800 Sunset LLC" was the Tenant under the Lease and was again signed on
8 behalf of "8800 Sunset LLC" by Mr. Nathan. Debtor's Exhibit 45 and TMC's Exhibit
9 F (the Second Amendment).

10 h. **Third Lease Amendment.** Starting in early 2017, Debtor was facing
11 financial difficulties. Nathan Declaration, ¶ 60. The Lease had provisions for
12 increases in yearly rent. Lease, § 4.1. Mr. Bryan and Mr. Shane were no longer
13 employed by TMC. Nathan Declaration, ¶ 60. Their superior, Mr. Stewart, became
14 Mr. Nathan's contact. *Id.* In an email dated February 15, 2017 with the subject
15 "RE: Copy of Estrella 2016 PL w rent increase.xlsx," Mr. Nathan asked Mr. Stewart
16 to "push [the] rent increase [back] till next year." *Id.*; Debtor's Exhibit 47 (email
17 dated 2/15/17 regarding rent increase). Mr. Stewart told Mr. Nathan that he agreed
18 to delay the rent increase. Nathan Declaration, ¶ 61; see Debtor's Exhibit 48 (email
19 dated 3/20/17 from Ms. McDonald regarding deferment of the rent increase). In an
20 email from Ms. McDonald to Mr. Nathan with the subject "Third Amendment of
21 Restaurant Lease (IAC)_8906924_2.doc" on March 20, 2017, she told Mr. Nathan
22 that Mr. Stewart asked that the Landlord and Debtor "memorialize the deferment of
23 the rental increase so please see attached amendment." Debtor's Exhibit 48 (email
24 dated 3/20/17 from Ms. McDonald regarding deferment of the rent increase). The
25 third amendment to the Lease dated December 1, 2016 (the "Third Amendment")
26 was signed by Mr. Nathan and sent bank to Ms. McDonald. Debtor's Exhibit 49
27 and TMC's Exhibit J (the Third Amendment). The Third Amendment, like the two
28 previous amendments that Mr. Nathan signed, once again recited that "8800

1 Sunset LLC" was the tenant under the Lease and was signed on behalf of "8800
2 Sunset LLC" by Mr. Nathan. *Id.*

3 i. Even after the date of the Third Amendment, the Landlord sent a
4 check payable to Debtor in the amount of \$30,172.50 for tenant reimbursement
5 owed to the tenant pursuant to the Lease. Nathan Declaration, ¶ 64; Debtor's
6 Exhibit 30 (check dated 1/9/17 for reimbursement). Further, the Landlord
7 continued to send Lease invoices to Debtor, and Debtor continued to send Lease
8 payments that were cashed by the Landlord until April 2018 – approximately fifteen
9 months after the Third Amendment was entered into and just two months before
10 the Petition Date. Nathan Declaration, ¶ 65; Debtor's Exhibit 36 (IAC lease
11 invoices from 12/2/15 to 3/26/18); Debtor's Exhibit 38 (rent checks sent by Debtor
12 to TMC from 12/4/15 to 9/5/18).

13 j. Landlord TMC worked with Debtor (regarding Landlord approval,
14 consent, or signoff) to apply for and obtain several permits and licenses for Debtor
15 to operate the Entertainment Facility on the Premises, Nathan Declaration, ¶ 34:

16 (i) TMC applied for an Industrial Waste Permit on behalf of Debtor under the
17 name "8800, LLC." *Id.*; Debtor's Exhibit 21 (emails regarding the
18 Industrial Waste Permit). Debtor issued a check in the amount of
19 \$1,226.00 to the "LA County Department of Public Works Industrial
20 Waste Department" for fees related to Industrial Waste Permit, and TMC
21 paid Debtor back for such fees. Nathan Declaration, ¶ 34; Debtor's
22 Exhibit 21 (check to the Industrial Waste Department from Debtor).

23 (ii) With TMC's permission and authorization, Debtor submitted an
24 application to the County Sanitation Districts of Los Angeles to allow for,
25 among other things, the "change in use of [part of the Premises] from
26 office to restaurant." Nathan Declaration, ¶ 35; Debtor's Exhibit 22
27 (application submitted to the County Sanitation Districts of Los Angeles).
28 The application states that the owner of the Premises is "TMC REALTY

1 HOLDINGS CO," and that the applicant is "IAC – 8800 LLC." Debtor's
2 Exhibit 22 (application submitted to the County Sanitation Districts of Los
3 Angeles).

4 (iii) To obtain authorization for the demolition and remodel of the Premises
5 for Debtor's tenant improvements ("Tenant Improvements" or "TI"), a
6 form was submitted to the City of West Hollywood listing the project
7 name as "8800 LLC," and it was signed by Mr. Bryan of TMC. Nathan
8 Declaration, ¶ 36; Debtor's Exhibit 23 (City of West Hollywood's
9 Construction and Demolition Waste Management Short Form). After
10 certain of the Tenant Improvements were completed, Mr. Nathan had to
11 submit requests to, and obtain approval for, reimbursements from the
12 Landlord for Debtor's qualifying Tenant Improvements to the Premises.
13 Nathan Declaration, ¶ 37.

14 k. In preparation for Lease commencement, Debtor did all the following
15 under the name "8800 LLC": obtained the necessary business and restaurant
16 permits and licenses, see Debtor's Exhibit 33 (8800 LLC Business License,
17 Alcoholic Beverage License, and Public Health Permit); applied and obtained
18 utilities to operate the Entertainment Facility on the Premises, pursuant to Section
19 7.1 of the Lease, see Debtor's Exhibit 34 (8800 LLC's bills from AT&T and
20 SoCalGas); obtained insurance for the Premises, as required by Section 10.2 of
21 the Lease, see Debtor's Exhibit 35 (Certificate of Liability Insurance from ACORD);
22 and filed all tax returns, as it relates to business operations for the Entertainment
23 Facility on the Premises. Nathan Declaration, ¶ 47.

24 I. **Tenant Improvements.** In an email dated April 24, 2015, Mr. Nathan
25 for Debtor confirmed "Yes , that is correct" to Mr. Trent's request for Landlord that
26 he "verify the remit to info for the [Tenant Improvements] check: 8800, LLC 1301 N.
27 Harper Avenue, . . . Los Angeles, CA 90046." Nathan Declaration, ¶ 38; Debtor's
28 Exhibit 24 (email dated 4/24/15 regarding the address for the TI check). On May 5,

1 2015, at 8:45 a.m., Mr. Bryan sent an email with the subject "RE: Check Request -
2 Tenant Improvement reimbursement - Estrella Restaurant - 4/24/15" stating that
3 the Tenant Improvements reimbursement check "should be made out to 8800LLC
4 since that is the entity in which we have a lease." Nathan Declaration, ¶ 39;
5 Debtor's Exhibit 25 (email dated 5/5/15 regarding TI reimbursement check request).
6 This email also stated that Mr. Bryan would attempt to get a W9 tax form from Mr.
7 Nathan. *Id.* As a result, Mr. Bryan sent Mr. Nathan a subsequent email on May 5,
8 2015 at 8:46 a.m., requesting that Mr. Nathan send him a "W9 version 2014 for
9 8800 LLC . . . [so that he could] have a check cut for the reimbursement." Nathan
10 Declaration, ¶ 40; Debtor's Exhibit 26 (email dated 5/5/15 from Mr. Bryan to Mr.
11 Nathan requesting a W9). Mr. Trent of IAC then sent an email to the accounts
12 payable department at IAC stating that Debtor's "Updated w9 [is] attached."
13 Nathan Declaration, ¶ 41; Debtor's Exhibit 26A (email dated 5/6/15 from Mr. Trent
14 with 8800 LLC's W9 attached). In an email correspondence chain with the subject
15 "Check Request - Tenant Improvement reimbursement - Screening Room -
16 8/20/15," Mr. Trent stated that he was "submitting this check request for Tenant
17 Improvements to 8800, LLC (Estrella Restaurant tenant) for improvements made to
18 the 8800 Screening Room. . . in the amount of \$135,000." Nathan Declaration,
19 ¶ 42; Debtor's Exhibit 27 (email chain dated from 8/20/15 to 8/25/15 regarding TI
20 reimbursement check request). Mr. Bryan of TMC responded, "Approved. I've
21 reviewed the detail back up," and Mr. Stewart of IAC replied by stating, "Ok." *Id.* In
22 another email from Mr. Trent dated August 31, 2015, he stated that he was
23 "submitting this request for Tenant reimbursement to 8800, LLC (Estrella
24 Restaurant tenant) for improvements" in the amount of \$71,766. Nathan
25 Declaration, ¶ 43; Debtor's Exhibit 28 (email dated 8/31/15 regarding TI
26 reimbursement check request). In a subsequent email from Mr. Trent dated
27 October 6, 2015, he attached a copy of a TI reimbursement check and informed
28 Kate Sigman of IAC "[t]he vendor is 8800 LLC – this is a TI reimbursement to our

1 restaurant tenant." Nathan Declaration, ¶ 44; Debtor's Exhibit 29 (email dated
2 10/6/15 from Mr. Trent with attached check request). In a further email dated
3 December 22, 2015 from Mr. Trent to Michael Cheah related to TI reimbursements,
4 Mr. Trent notified Mr. Cheah about "a notice of intent on lien related to our
5 restaurant tenant's recent construction work." Nathan Declaration, ¶ 45; Debtor's
6 Exhibit 31 (email dated 12/22/15 regarding notice of intent to record a mechanics'
7 lien). The email asked for guidance on "next steps if any" given that the "restaurant
8 tenant, dba 8800, LLC, received 2 separate TI disbursements related to their
9 construction project earlier this year." *Id.* In this email, Mr. Trent of IAC stated, "I
10 submitted a check request for Tenant Improvement reimbursement to 8800, LLC
11 (Estrella Restaurant tenant) for improvements made to the 8800 Screening Room
12 on 8/20." *Id.* Mr. Trent of IAC also stated in the same email, "I submitted a check
13 request for Tenant Improvement disbursement to 8800, LLC (Estrella Restaurant
14 tenant) for improvements made to the restaurant space on 4/24." *Id.*

15 m. Attorney Randall Fink replaced Mr. Kirsch as Debtor's counsel. See
16 TMC's Exhibit N (letter to counsel for TMC dated 11/27/17 from Mr. Fink). On
17 November 27, 2017, Mr. Fink sent a letter to counsel for TMC stating that his firm
18 "represents 8800 Sunset LLC." *Id.* As late as May 3, 2018, after TMC had given
19 notice of its termination of the Lease and recapture of the Premises, Mr. Fink wrote
20 another email with the subject line: "8800 Sunset LLC (Estrella)." TMC's Exhibit
21 HH (email dated 5/3/18 between Mr. Fink and Mr. Platt).

22 n. On May 16, 2018, Landlord TMC filed an unlawful detainer action
23 against 8800 Sunset LLC and Doe Defendants in the Los Angeles Superior Court
24 (the "Unlawful Detainer Action"). Stewart Declaration, ¶ 36; TMC's Exhibit ZZ
25 (Complaint – Unlawful Detainer dated 5/16/18). The Complaint in that action
26 named as a defendant, and was served upon, 8800 Sunset LLC, the entity named
27 in the Lease as Tenant and each of the three Lease Amendments. *Id.* After the
28 Unlawful Detainer Action was filed, Mr. Fink, Debtor's counsel, told TMC that the

1 Tenant under the Lease was "8800, LLC" rather than "8800 Sunset LLC" TMC's
2 Exhibit AAAAA (emails dated 5/18/18 regarding the name change). When asked
3 whether this contention was supported by a written assignment of the Lease, Mr.
4 Fink, counsel for Debtor, responded "[w]hether there is a more formal amendment
5 or not, I do not know. I don't have one." *Id.* In response, on May 22, 2018, TMC
6 filed an Amended Complaint in the Unlawful Detainer Action, adding Debtor as a
7 Defendant. TMC's Exhibit BBB (first amended Complaint – Unlawful Detainer
8 dated 5/22/18).

9 **ii. Invoices and Rent Payments**

10 20. From the date the lease commenced on December 1, 2015, to April 2018,
11 TMC sent Lease invoices addressed to Debtor. Debtor's Exhibit 36 (IAC lease invoices
12 from 12/2/15 to 3/26/18). None of the Lease invoices were addressed to 8800 Sunset. *Id.*

13 21. On December 2, 2015, Mr. Trent of IAC sent an email to TMC stating that
14 TMC's "8800 Restaurant tenant (Estrella/Choice Hospitality/8800 LLC) should receive the
15 first monthly invoice asap. Their lease agreement states rent commences Dec 1st."
16 Nathan Declaration, ¶ 49; Debtor's Exhibit 37 (email dated 12/2/18 regarding first monthly
17 invoice for Debtor).

18 22. Upon receiving monthly Lease invoices from the Landlord addressed to
19 Debtor, it was Debtor—and not 8800 Sunset—who paid rent, as provided for in the Lease,
20 to the Landlord. Nathan Declaration, ¶ 50; Debtor's Exhibit 38 (rent checks sent by
21 Debtor to TMC from 12/4/15 to 9/5/18). From the date the lease commenced on
22 December 1, 2015 to April 2018, Debtor sent checks (which were signed by Mr. Nathan)
23 to the Landlord for rent pursuant to the Lease, which the Landlord cashed without
24 objection. *Id.* When Debtor's checks were returned, Ms. McDonald of IAC notified Mr.
25 Nathan, on behalf of Debtor, that this was the case. Nathan Declaration, ¶ 50; Debtor's
26 Exhibit 39 (email from Ms. McDonald forwarding to Mr. Nathan an email dated 12/27/17
27 from another IAC employee stating that "our cash deposit for December rent from 8800
28 LLC has been returned.").

1 23. Excluding the payments for the usage of the Additional Office Space
2 described in the Second Amendment, see Debtor's Exhibit 45 (the Second Amendment),
3 Lease payments were always made by Debtor. Trial Transcript 210:12-16 ("THE COURT:
4 So how many – what percentage of checks were. . . made out by other parties other than
5 8880 to pay the rent? THE WITNESS [Mr. Nathan]: To pay the rent for the restaurant,
6 only 8800, LLC.").

7 24. With respect to the check in the name of "SMOKEYARD, INC." in the
8 amount of \$22,466.00 and dated December 1, 2016 that was addressed to TMC, this
9 check was "[r]eplaced by check 11837," a check written by Debtor. TMC's Exhibit L
10 (SMOKEYARD, INC. rent check); Debtor's Exhibit 38 (Debtor's replacement check dated
11 12/1/16 for \$22,466.00). The Smokeyard check was inadvertently sent from Debtor's
12 accountant (and not Debtor) to the Landlord. Trial Transcript 111:4-9 (Mr. Nathan's
13 testimony) ("Q. Sure. You sent rent checks into the tenant using different names,
14 correct? A. For the main restaurants we – sent from 8800, LLC there was a mistaken
15 check that came from the accountant called Smokeyard, which is not my company. I've
16 nothing to do with it.").

17 25. With respect to the checks addressed and sent to the Landlord from
18 Sweetfin that were cashed by the Landlord, these were payments made by Sweetfin for its
19 usage of the Additional Office Space pursuant to the Second Amendment. Trial
20 Transcript 111:9-11 ("And [Sweetfin] Holdings checks specifically for the second
21 amendment and the office on the first floor."); Trial Transcript 210:5-9 ("THE WITNESS
22 [Mr. Nathan]: . . . [Sweetfin] Holdings, which we wanted to rent the – an office and
23 occupied [Sweetfin] Holdings. From that amendment, that portion of the office, [Sweetfin]
24 Holdings and a check to the landlords.").

25 26. Prior to the execution of the Second Amendment, Mr. Nathan notified Ms.
26 McDonald of IAC that it was Sweetfin that desired to use the Additional Office Space.
27 Trial Transcript 105:23 to 106:3 (Mr. Nathan's testimony) ("A. I actually asked for the
28 lease to be in the [Sweetfin] for the holdings. There's an email before this for Elizabeth

1 and she said that Barry Diller is making a decision and they got – wanted an outside
2 tenant that they don't know already. And then she's asking me instead of Sweet –"); Trial
3 Transcript 113:5-13 ("A. [Sweetfin] Holdings and – yes, I had conversation with Elizabeth
4 in regards to it so I asked her if they would be okay if [Sweetfin] Holdings rented an office.
5 Again, she came back to say that Barry Diller did not want to rent to anyone who he's not
6 aware of and she's happy to rent it to us. And again, you saw the two names: Choice
7 Hospitality Group, which is a management group that they're comfortable with that runs
8 Estrella and 8800, LLC, which is the tenant's name.").

9 27. Section 1 of the Second Amendment provides that the "Base Rent for the
10 Additional Premises shall be \$7,800.00 per annum," i.e., monthly payments of \$650.
11 Debtor's Exhibit 45 and TMC's Exhibit F, § 1 (the Second Amendment). From December
12 2016 through April 2018, the Lease Invoices had separate line item descriptions with a
13 notation "Additional space" for those amounts billed for the Additional Office Space.
14 Debtor's Exhibit 36 (IAC lease invoices from 12/2/15 to 3/26/18). Each of the "Base Rent
15 Charge[s]" that were billed for the Additional Office space from December 2016 through
16 April 2018 was in the amount of \$650.00. *Id.* Fifteen out of the seventeen Sweetfin
17 Checks that were sent to the Landlord were in the amounts of either \$631 or \$650. See
18 TMC's Exhibit K (Sweetfin Holdings, LLC rent checks).

19 28. Of the remaining two Sweetfin checks that were not in the amount of \$631 or
20 \$650: (1) Check No. 1493 was "[r]eplaced by Check 11837" that was in Debtor's name,
21 see Debtor's Exhibit 38 (Debtor's replacement check dated 12/1/16 for \$22,466.00); and
22 (2) Check No. 110070 in the amount of \$1,383.06 is in the exact amount invoiced by the
23 Landlord in invoice numbers 2018-02 (C), 2018-02 (D), 2018-03 for the "Base Rent
24 Charge (Additional space)," "Rent Late Fees (Additional space)," and "Base Rent Interest
25 (Additional space)" for the Additional Office space. Debtor's Exhibit 36 (the \$1,383.06
26 aggregate amount).

27 29. At one point, one of the rent checks of Debtor to TMC was cashed by an
28 individual or entity other than TMC. As a result, Mr. Nathan worked with Ms. McDonald of

1 IAC to submit a notarized Affidavit of Forged or Missing Endorsement Client Declaration
2 to Union Bank, N.A. Nathan Declaration, ¶ 51; Debtor's Exhibit 40 (Mr. Nathan's Affidavit
3 of Forged or Missing Endorsement Client Declaration submitted to Union Bank); Debtor's
4 Exhibit 41 (email dated 11/3/16 from Ms. McDonald regarding the notarized declaration).
5 In an email with the subject "RE: notarized declaration by 8800 LLC" dated November 3,
6 2016, Ms. McDonald informed Union Bank and Mr. Nathan (among other parties) that she
7 was "working on [her notarized declaration regarding 8800 LLC's check]" and asked
8 where it should be sent. Nathan Declaration, ¶ 51; Debtor's Exhibit 41 (email dated
9 11/3/16 from Ms. McDonald regarding the notarized declaration).

10 **iii. Mail Addressed to Debtor and Received By TMC**

11 30. Mail addressed to Debtor was generally sent to the Premises. Nathan
12 Declaration, ¶ 53. On several instances where Debtor's mail was incorrectly delivered to
13 Landlord TMC, such mail was subsequently forwarded by TMC to Mr. Nathan on behalf of
14 Debtor. *Id.*

15 31. In an email from Mr. Trent with the subject line "Estrella mail" dated
16 February 29, 2016, he informed "Mailroom8800" that "incoming mail that is addressed to
17 8800 LLC is for Estrella. That is their business name for tax purposes. I've been re-
18 delivering it to them for a few months now but you should cut me out of the loop going
19 forward. It's usually tax or utilities related mail." Nathan Declaration, ¶ 54; Debtor's
20 Exhibit 42 (email dated 2/29/16 from Mr. Trent regarding incoming mail addressed to 8800
21 LLC).

22 32. In a subsequent email from Mr. Trent to other employees of the Landlord
23 dated April 7, 2016, Mr. Trent stated "REMEMBER – any incoming mail addressed to
24 '8800 LLC' belongs to Estrella – that's their legal tax ID name . . . be careful not to process
25 and pay for invoices related to 8800 LLC . . . I see that can be tricky and easily look like a
26 bill for us." Nathan Declaration, ¶ 55; Debtor's Exhibit 43 (email dated 4/7/16 from Mr.
27 Trent regarding incoming mail).

28

1 33. Further, in an email from Ms. McDonald for Landlord with the subject "RE:
2 check" dated June 16, 2016, she told Mr. Nathan that she "received a check that [she
3 thought] actually might be for [Mr. Nathan] It's made out to 8800 LLC which Shane
4 [Trent] had noted was Estrella." Nathan Declaration, ¶ 56; Debtor's Exhibit 44 (emails
5 dated 6/16/16 regarding the 8800 LLC check Ms. McDonald had received). Mr. Nathan
6 responded to Ms. McDonald's email and confirmed that Debtor's check was for him. *Id.*

7 **C. Debtor's Attempt to Assign the Lease**

8 34. In late 2017, 1st Avenue Enterprises, LLC (the "Proposed Assignee") offered
9 to purchase Debtor's business and take assignment of the Lease for, among other things,
10 approximately \$1,000,000. Nathan Declaration, ¶¶ 66, 69.

11 35. Debtor entered into a tentative purchase agreement with the Proposed
12 Assignee (the "1st Avenue Agreement"). Nathan Declaration, ¶ 72; Debtor's Exhibit 55
13 (Debtor's tentative purchase agreement with the Proposed Assignee). TMC's Exhibit GG
14 (Business Purchase Agreement and Joint Escrow Instructions).

15 36. Throughout this period, Debtor kept TMC apprised of the developments of
16 the transaction with the Proposed Assignee. Nathan Declaration, ¶ 73.

17 **D. The Transfer Notice**

18 37. On March 15, 2018, Mr. Fink, counsel for Debtor, sent an email (the
19 "Transfer Notice") to Mr. Platt, counsel for TMC, requesting TMC's consent to an
20 assignment of the Lease to the Proposed Assignee. *Id.*, ¶ 74; Debtor's Exhibit 54C and
21 TMC's Exhibit RRR (email dated 3/15/18 from Mr. Fink to Mr. Platt).

22 38. The Transfer Notice attached a presentation regarding the Proposed
23 Assignee and its proposed restaurant. Debtor's Exhibits 54 and TMC's Exhibit RRR
24 (presentation for the proposed restaurant on 8800 W. Sunset).

25 39. The Transfer Notice revealed that the Proposed Assignee, 1st Avenue
26 Enterprises, LLC, was composed of three partners: Joseph Miller, the Michelin rated
27 executive chef; Joel Herzer, the restaurateur/operator; and Tom Buttgenbach, Ph.D., the
28 financial partner. Nathan Declaration, ¶ 70; Debtor's Exhibit 54A and TMC's Exhibit RRR

1 (description of the management team for the proposed restaurant). It also revealed that
2 the financial backer, Mr. Buttgenbach, is a wealthy individual who made his fortune in
3 solar energy and other endeavors but who did not have prior experience in the restaurant
4 industry. Debtor's Exhibit 54A and TMC's Exhibit RRR (description of the management
5 team for the proposed restaurant). Mr. Buttgenbach's lack of experience in the restaurant
6 industry was subsequently confirmed by the Proposed Assignee's General Manager, Mr.
7 Herzer. See TMC's Exhibit VVVV (email dated 4/18/18 from Mr. Herzer regarding the final
8 items he was requested to submit for the lease) ("Tom Buttgenbach does not have a
9 history of operating restaurants and as mentioned in our telephone conversation is our
10 financial backer."). The Proposed Assignee purported to have a balance sheet asset
11 value of over \$28 million. Nathan Declaration, ¶ 70; Debtor's Exhibit 52 (the Proposed
12 Assignee's financial statements); Debtor's Exhibit 53 (the Proposed Assignee's Wells
13 Fargo bank statement).

14 **E. TMC's Due Diligence**

15 40. On March 20, 2018, at 12:33 p.m., Mr. Platt, counsel for TMC, sent an email
16 to Mr. Fink, counsel for Debtor, requesting additional information regarding the Proposed
17 Assignee and indicating that he had "heard back from [his] client and they are concerned
18 that the documentation that [Debtor] provided to the landlord was deficient." Debtor's
19 Exhibit 57 and TMC's Exhibit CCCC (email dated 3/20/18 from Mr. Platt to Mr. Fink
20 requesting additional information). In that same email, Mr. Platt also requested the
21 following additional items that, "at minimum," had to be submitted to the Landlord:

- 22 a. All of the information/documentation required to be provided by the
23 tenant to the landlord by Section 13.2 of the lease;
- 24 b. Documentation supporting the information contained on the Balance
25 Sheet and Profit & Loss Statement;
- 26 c. Most recent bank statements that show the cash on hand, including
27 when the cash was deposited in the bank;

28

- 1 d. Residential address, social security number and date of birth of each of
- 2 the investors;
- 3 e. Financial statements of each of the investors;
- 4 f. Description of the "Other Assets" on the Balance Sheet. Please explain
- 5 the basis of the \$28 million in assets in 1st Avenue Capital Holding, LLC;
- 6 g. What entity is actually acquiring the lease? Is it a single purpose entity?
- 7 Does that entity have any assets? What are the assets? When and how
- 8 did it acquire these assets?
- 9 h. There are dozens of entities somehow related to 1st Avenue Capital
- 10 Holding, LLC. Is this the entity acquiring the lease? Does it have assets?
- 11 Please describe the assets and provide bank statements for the entity
- 12 that will be the signatory to the documents; We also need a full financial
- 13 statement (balance sheet, income statement, cash flow statement) for
- 14 the actual assignee.
- 15 i. Who are the owners of the entity that will be assigned the lease; We
- 16 need financial information on the owners.
- 17 j. What is the source of the \$4.25 million in income for 1st Avenue Capital
- 18 Holding, LLC for the first 2 months of 2018; and
- 19 k. Who contributed the \$21.5 million in capital to 1st Avenue Capital
- 20 Holding, LLC.
- 21 l. The balance sheet for 1st Avenue Capital Holding, LLC lists
- 22 "Accumulated Depreciation" of \$671,068. What assets were the subject
- 23 of that depreciation? Where are those assets on the balance sheet?

24 *Id.*

25 41. The next day, on March 21, 2018, at 5:43 p.m., Mr. Fink, counsel for Debtor,

26 responded by email, providing additional financial information of the Proposed Assignee

27 and responses to the questions posed by Mr. Platt, counsel for TMC. TMC's Exhibits V

28 and DDDD (email chain dated from 3/20/18 to 3/21/18 between Mr. Fink and Mr. Platt).

1 Those responses were provided by Liz Roz, the Controller for the Proposed Assignee. *Id.*
2 In that email, Mr. Fink suggested "a call between the business people as soon as possible
3 to hash out any questions." *Id.*

4 42. On March 22, 2018, at 4:07 p.m., Mr. Platt responded for Landlord TMC,
5 stating that such a telephonic meeting could be scheduled once TMC had received the
6 additional documents and other information that TMC had requested. Debtor's Exhibit 58
7 and TMC's Exhibit CC (email chain dated 3/22/18 between Mr. Platt and Mr. Fink).

8 43. On March 22, 2018, at 4:11 p.m., Mr. Fink, Debtor's counsel, stated in an
9 email to Mr. Platt, Landlord TMC's counsel, "[i]f there is anything you need - I am sure [the
10 Proposed Assignee] will provide - but I think you have everything at this point." TMC's
11 Exhibit CC (email chain dated 3/22/18 between Mr. Platt and Mr. Fink). Both Debtor and
12 the Proposed Assignee in their communications with TMC expressed a sense of urgency
13 to TMC to review the transfer request in their efforts to close their transaction. Debtor's
14 Exhibit 58 (email dated 3/22/18 from Mr. Fink, counsel for Debtor, to Mr. Platt, counsel for
15 TMC) ("Any chance at getting a call with the new potential operator and the business
16 people? They are chomping at the bit to talk to someone at the Landlord.").

17 44. On March 23, 2018, at 8:23 a.m., Mr. Fink, Debtor's counsel, sent an email
18 to Mr. Platt, Landlord TMC's counsel, providing a draft of the proposed Lease Assignment
19 and reiterating that the Proposed Assignee would like to speak with TMC. Debtor's
20 Exhibit 59 and TMC's Exhibit OOOO (email dated 3/23/18 from Mr. Fink to Mr. Platt
21 regarding the lease assignment draft).

22 45. On March 23, 2018, at 10:49 a.m., in another email from Mr. Platt, Landlord
23 TMC's counsel, to Mr. Fink, Debtor's counsel, Mr. Platt reiterated that "the proposed
24 assignee did not provide [his] client with everything required to be provided under Section
25 13.2 of the lease" but nevertheless requested a date and time when the Proposed
26 Assignee would be available to speak with TMC. Nathan Declaration, ¶ 79; Debtor's
27 Exhibit 59 and TMC's Exhibit FFFF (email dated 3/23/18 from Mr. Platt to Mr. Fink asking
28 about the Proposed Assignee's availability for a call).

1 46. On March 26 and 27, 2018, there was an exchange of email
2 correspondence between Ben Gildin (IAC's in-house counsel), Mr. Fink (Debtor's
3 prepetition counsel), and representatives of the Proposed Assignee to schedule a
4 conference call. TMC's Exhibit Y (email chain dated 3/26/18-3/27/18). A date and time
5 were initially established. *Id.* Mr. Herzer for the Proposed Assignee emailed Mr. Gildin for
6 IAC on March 26, 2018 and asked that the call be moved up to enable Mr. Buttgenbach,
7 one of the principals of the Proposed Assignee, to participate in the call. *Id.* The call was
8 rescheduled to accommodate Mr. Buttgenbach. *Id.*

9 47. The conference call proceeded as planned on March 28, 2018. Stewart
10 Declaration, ¶ 55. Notwithstanding the fact that the conference call was specifically
11 rescheduled to accommodate Mr. Buttgenbach's schedule, Mr. Buttgenbach failed to
12 participate. *Id.*

13 48. TMC subsequently followed up with an email to the Proposed Assignee in
14 an effort to reschedule a telephone conference with Mr. Buttgenbach. *Id.*; Debtor's Exhibit
15 61 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Gildin). Notwithstanding TMC's
16 efforts, Mr. Buttgenbach never responded, and he ultimately never spoke to anyone from
17 TMC. Stewart Declaration, ¶¶ 56, 61.

18 49. On March 29, 2018, at 1:17 p.m., Mr. Herzer for the Proposed Assignee sent
19 Mr. Gildin, IAC's counsel, for Landlord, a list of several proposed changes to the Lease
20 that the Proposed Assignee sought, apparently as a condition to accepting assignment of
21 the Lease. TMC's Exhibit EE (email dated 3/29/18 regarding "8800 Sunset Lease"). The
22 joint escrow instructions gave the Proposed Assignee the right to terminate the
23 assignment in the event that TMC failed to agree to the Proposed Assignee's requested
24 changes. TMC's Exhibit GG, Addendum ¶ 12 (business purchase agreement and joint
25 escrow instruction). The Escrow Instructions also gave the Proposed Assignee the right

26 ///
27 ///
28 ///

1 to cancel the assignment if TMC refused to waive its right to receive the Transfer Profits it
2 was entitled to pursuant to Section 13.5 of the Lease. *Id.*²

3 50. On March 30, 2018 at 3:27 p.m., in response to Mr. Nathan's inquiry about
4 outstanding documents from the Proposed Assignee regarding the proposed assignment,
5 Mr. Gildin, IAC's counsel, on behalf of Landlord, told Mr. Nathan, Debtor's principal, that
6 "[t]hey have not yet provided everything we requested." Debtor's Exhibit 60 and TMC's
7 Exhibit LLLL (email dated 3/30/18 from Mr. Gildin to Mr. Nathan).

8 51. Landlord TMC continued to obtain further documents and information from
9 the Proposed Assignee; Mr. Gildin, IAC's counsel, on behalf of Landlord, corresponded
10 with Mr. Herzer from the Proposed Assignee to obtain the required information. Debtor's
11 Exhibit 64; TMC's Exhibit DD.

12 **F. TMC Deems Transfer Notice Submitted**

13 52. On April 3, 2018, at 5:31 p.m., Mr. Gildin of IAC on behalf of Landlord sent
14 an email to Mr. Herzer for the Proposed Assignee, Mr. Fink, Debtor's counsel, Mr. Nathan,
15 Debtor's principal, and others, in which he stated: "Although we have not received
16 everything technically required under Section 13.2 of the lease, we nevertheless will
17 consider the Transfer Notice to be fully and formally submitted as of today." Debtor's
18 Exhibit 61 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Gildin considering the
19 Transfer Notice to be fully and formally submitted). Mr. Gildin went on to note that the
20 clock on the 20-day deadline by which TMC had to make its decision regarding the
21 transfer request would begin that day. *Id.* ("Pursuant to Section 13.2 of the lease we will
22 provide a response within 20 business days (i.e., by end of day on May 1, 2018).").

23
24 _____
25 ² Section 13.5 of the Lease provides that Landlord TMC is entitled to 50% of the "Transfer Profits" (including
26 all rent and other consideration) paid from the Proposed Assignee to Debtor. Mr. Nathan testified that the
27 Proposed Assignee offered to purchase Debtor's business for approximately \$1,000,000. Nathan
28 Declaration, ¶ 69. The Business Purchase Agreement and Joint Escrow Instructions show a purchase price
of \$900,000. See TMC's Exhibit GG. Accordingly, it appears the Proposed Assignee was requesting that
TMC forego its right to approximately \$450,000 in Transfer Profits. See Proposed Assignment Agreement,
TMC's Exhibit OOOO, ¶ 4 ("Landlord acknowledges and agrees that it waives any 'Transfer Profits' from
Assignor with respect to this Assignment.").

1 53. In emails to Mr. Gilden (IAC's in-house counsel) as Landlord's agent, both
2 Mr. Nathan (Debtor's principal) and Mr. Herzer (as the agent of the Proposed Assignee)
3 thanked Mr. Gildin for his email on behalf of Landlord deeming the Transfer Notice
4 submitted. TMC's Exhibit PPPP (email dated 4/4/18 from Mr. Nathan thanking Mr. Gildin);
5 Debtor's Exhibit 62 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Herzer thanking Mr.
6 Gildin). Mr. Nathan stated, "Thanks for the update. What do you still need from the
7 buyers according to 13.2? I will make sure they provide." TMC's Exhibit PPPP (email
8 dated 4/4/18). Mr. Herzer stated, "Thank you Ben. Can you please let us know what else
9 you need as far as financials. We can move this forward quickly." Debtor's Exhibit 62 and
10 TMC's Exhibit Z (email dated 4/3/18). At no point did Mr. Nathan, Debtor's principal,
11 Debtor's counsel, or the Proposed Assignee object to Landlord's determination that the
12 Debtor's Transfer Request was fully and formally submitted and the deadline by which
13 Landlord had to determine whether to accept the assignment request, reject the
14 assignment request, or exercise one of its other options under Section 13.3 of the Lease
15 was set. See TMC's Exhibit PPPP (email dated 4/4/18 from Mr. Nathan); Debtor's Exhibit
16 62 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Herzer). On the contrary, the
17 statements by Mr. Nathan on behalf of Debtor and Mr. Herzer on behalf of the Proposed
18 Assignee indicate that they wanted to facilitate an expeditious decision by Landlord TMC
19 so they could proceed with their proposed purchase agreement.

20 **G. Landlord TMC Obtains All the Required Documents**

21 54. Even though Landlord TMC considered the Transfer Notice to be fully and
22 formally submitted and no further documentation was required, TMC indicated that it was
23 willing to consider additional information provided by the Proposed Assignee. Debtor's
24 Exhibit 61 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Gildin). In his April 3, 2018,
25 5:31 p.m. email, Mr. Gildin on behalf of Landlord invited the Proposed Assignee to "feel
26 free to pass along any additional information [they would] like [TMC] to consider." *Id.* Mr.
27 Herzer (the General Manager of the Proposed Assignee) sent an email to Mr. Gildin
28 asking him "what else [he] need[ed] as far as financials." on April 3, 2018 at 6:02 p.m.

1 Debtor's Exhibit 62 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Herzer asking Mr.
2 Gildin what additional information he needs to provide).

3 55. Following Mr. Gildin's email of April 3, 2018, the Proposed Assignee elected
4 to accept Mr. Gildin's offer to submit additional due diligence materials to TMC. Debtor's
5 Exhibit 63 and TMC's Exhibits QQQQ, RRRR (email dated 4/5/18 from Mr. Herzer asking
6 Mr. Gildin for clarification so that "[he] could get those answers to [Mr. Gildin] quickly.").
7 There followed a number of additional emails between TMC and Proposed Assignee
8 aimed at providing this additional information. TMC's Exhibit SSS (email dated 4/11/18
9 with the following attachments: Certificate of Registration from the State of California
10 stating that the Proposed Assignee could transact intrastate business, Application to
11 Register a Foreign LLC, Operating Agreement of the Proposed Assignee, Certificate of
12 Formation from the City of Delaware for LLC, bank statement from Wells Fargo, LLC
13 Agreement of the Proposed Assignee, and Articles of Organization for LLC in the State of
14 California); TMC's Exhibit TTT (Mr. Buttgenbach's balance sheet, DE Certificate of Good
15 Standing, and driver's license); TMC's Exhibit TTTT (email dated 4/15/18 from Mr. Herzer
16 with part of what Mr. Gildin asked for); TMC's Exhibit UUUU (email dated 4/16/18 with
17 CAR Business Purchase Agreement attached); TMC's Exhibit VVVV (email dated 4/18/18
18 with subject "Final items asked for 8800 Sunset); TMC's Exhibit YYYYY (email dated
19 4/18/18 with copy of Mr. Miller's driver's license attached).

20 56. On April 5, 2018, at 1:15 p.m., Mr. Herzer for the Proposed Assignee sent
21 another email to Mr. Gildin on behalf of Landlord asking him to "let [the Proposed
22 Assignee] know what points regarding the financials [Mr. Gildin] need addressed [so the
23 Proposed Assignee] can get those answers to [Mr. Gildin] quickly." Debtor's Exhibit 63
24 and TMC's Exhibit QQQQ. In a response sent from Mr. Gildin to Mr. Herzer on April 5,
25 2018, at 12:02 p.m., he indicated, "Yes, we can put that together for you." *Id.*

26 57. On April 11, 2018, at 8:24 p.m., Mr. Gildin, IAC in-house counsel, on behalf
27 of Landlord, sent an email to both Mr. Nathan of Debtor and Mr. Herzer of the Proposed
28 Assignee, requesting the following additional and/or outstanding items:

- 1 a. A certified certificate of organization of the proposed assignee entity and
- 2 the parent/guarantor entity
- 3 b. The operating agreement for the proposed assignee entity
- 4 c. A certificate of good standing in the state of California for the proposed
- 5 assignee entity and the parent/guarantor entity
- 6 d. A summary of Thomas Buttgenbach's history operating restaurants
- 7 e. A copy of the Business Purchase Agreement referenced in Section 1 of
- 8 the draft assignment
- 9 f. Evidence that the proposed Assignee has reviewed and agreed to sign
- 10 the draft assignment
- 11 g. The material terms of the transfer of the liquor license
- 12 h. A copy of the driver's license/id of each of Thomas Buttgenbach/Joel
- 13 Herzer/Joseph Miller in order to run background checks
- 14 i. A credit report for Thomas Buttgenbach
- 15 j. Certified copies of the bank statement/balance sheets provided (each
- 16 updated as of April 1, 2018)
- 17 k. An operating budget

18 Debtor's Exhibit 64 and TMC's Exhibit DD (email dated 4/11/18 from Mr. Gildin with a list
19 of outstanding items). Mr. Gildin's requests for additional and/or outstanding items came
20 after he purportedly considered the "Transfer Notice to be fully and formally submitted" on
21 April 3, 2018. Debtor's Exhibit 61 and TMC's Exhibit Z (email dated 4/3/18 from Mr. Gildin
22 considering the Transfer Notice to be fully and formally submitted).

23 58. Ultimately, Landlord TMC acquired all the information and documents
24 required by the Lease to satisfy the Transfer Notice. See Stewart Declaration, ¶ 62;
25 TMC's Exhibit S (Chart of Due Diligence Documents Received). Debtor's counsel, Mr.
26 Fink, also confirmed that Landlord TMC received all the information, stating, "If there is
27 anything you need – I am sure they will provide – *but I think you have everything at this*
28

1 *point.*" TMC's Exhibit CC (email dated 3/22/18 regarding remaining information to be
 2 submitted) (emphasis added).

3 59. Specifically, the following information received by Landlord TMC
 4 corresponds to the information required under Section 13.2 of the Lease:

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§ 13.2	Information Requested	Information Received
i(a)	The name and address of the proposed Transferee.	<ul style="list-style-type: none"> - Identity of principals included in 8800 W. Sunset Overview and Estrella Business Plan 2018 PowerPoint [TMC's Exhibit RRR] - Told name of Transferee is First Avenue Enterprises LLC [TMC's Exhibit DDDD] - Address of First Avenue Enterprises LLC provided in Articles of Incorporation [TMC's Exhibit SSS]
i(b)	Current financial statements of the proposed Transferee certified by an officer, partner, manager or owner thereof, and any other information and materials (including, without limitation, credit reports, business plans, operating history, bank and character references) required by Landlord to assist Landlord in reviewing the financial responsibility, character, and reputation of the proposed Transferee.	<ul style="list-style-type: none"> - First Avenue Capital Holdings, LLC Balance Sheet [TMC's Exhibit RRR] - First Avenue Capital Holdings, LLC Profit & loss Statement [TMC's Exhibit RRR] - First Avenue Capital Holdings, LLC Wells Fargo Analyzed Business Checking Statement [TMC's Exhibit DDDD] - 1st Avenue Enterprises, LLC WellsOne Account Statement as of March 1, 2018 [TMC's Exhibit SSS] - First Avenue Capital Holdings, LLC Income and Assets [TMC's Exhibit DDDD] - First Avenue Enterprises, LLC "does not yet hold any assets" [TMC's Exhibit DDDD] - Buttgenbach Balance Sheet [TMC's Exhibit ZZZ] - Buttgenbach Personal Companies Org Chart [TMC's Exhibit AAAA]
i(c)	The nature of such Transferee's business, restaurant plan and proposed use of the Premises.	<ul style="list-style-type: none"> - 8800 W. Sunset Overview [TMC's Exhibit RRR] - Estrella Business Plan 2018 PowerPoint [TMC's Exhibit RRR] - Estella Project 2018 Menu [TMC's Exhibit RRR] - Tentative Plans for Estrella Remodel [TMC's Exhibit IIII] - 8800 Sunset Reopening Costs [TMC's Exhibit TTTT] - Forecast Statement of Operations [TMC's Exhibit TTTT]

§ 13.2	Information Requested	Information Received
i(d)	The proposed effective date of the proposed Transfer.	- Business Purchase Agreement/ Escrow Documents [TMC's Exhibit UUUU]
i(e)	All of the principal terms of the proposed Transfer (including a calculation of the Transfer Profits (defined in Section 13.5, below)).	<ul style="list-style-type: none"> - Business Purchase Agreement/ Escrow documents [TMC's Exhibit UUUU] - Assignment and Assumption and Consent to Assignment and Assumption of Lease [TMC's Exhibit OOOO]
i(f)	Description of such Transferee's track record and experience in operating restaurants of comparable scope and quality.	<ul style="list-style-type: none"> - 8800 W. Sunset Overview [TMC's Exhibit RRR] - Estrella Business Plan 2018 PowerPoint [TMC's Exhibit RRR] - Buttgenbach has no "history of operating restaurants" [TMC's Exhibit VVVV]
i(g)	Such other information and materials as Landlord may in good faith request (provided, that if Landlord requests such additional information or materials, the Transfer Notice shall not be deemed to have been received until Landlord received such additional materials).	<ul style="list-style-type: none"> - Delaware Certificate of Good Standing (1st Avenue Capital Holding, LLC) [TMC's Exhibit TTT] - State of California Certificate of Registration (1st Avenue Capital Holding, LLC) [TMC's Exhibit SSS] - Application to Register a Foreign Limited Liability Company (1st Avenue Capital Holding, LLC) [TMC's Exhibit SSS] - Operating Agreement of 1st Avenue Enterprises, LLC Capital Contributions by Member (1st Avenue Enterprises, LLC) [TMC's Exhibit SSS] - Delaware Certificate of Formation (1st Avenue Capital Holding, LLC) [TMC's Exhibit SSS] - Limited Liability Company Agreement of 1st Avenue Capital Holding, LLC [TMC's Exhibit SSS] - Capital Contributions by Member (1st Avenue Capital Holding, LLC) [TMC's Exhibit SSS] - Form of Certificate – Membership Interest Certificate (1st Avenue Capital Holding, LLC) [TMC's Exhibit SSS] - California Secretary of State Doing Business Registration Confirmation [TMC's Exhibit SSS] - California Secretary of State Articles of Organization (1st Avenue Enterprises, LLC) [TMC's Exhibit SSS] - Buttgenbach, Herzer and Miller driver's licenses [TMC's Exhibits TTT, VVVV, YYYY]

§ 13.2	Information Requested	Information Received
ii	Proposed assignment and a consent to sublease form.	- Assignment and Assumption and Consent to Assignment and Assumption of Lease [TMC's Exhibit OOOO

See Stewart Declaration, ¶ 62; TMC's Exhibit S (Chart of Due Diligence Documents Received).

60. As for Debtor's specific contentions that certain information was not received, see Debtor's Proposed Findings of Fact and Conclusions of Law, ECF 113, ¶ 90, the court finds that TMC received the information it needed as described below:

Allegedly Missing Information and Debtor's Argument for Inadequacy	Court's Finding
<ul style="list-style-type: none"> - "[C]urrent financial statements of the proposed Transferee certified by an officer, partner, manager or owner thereof . . ." [Lease § 13.2(b)] - Full financial statement (balance sheet, income statement, cash flow statement) for the actual assignee [Requested by TMC's counsel Mr. Platt via email on March 20, 2018. See Debtor's Exhibit 57, request #8] - Certified copies of the bank statement/ balance sheets provided (updated as of 4/1/18) [Requested by IAC's in-house counsel Mr. Gildin via email on April 11, 2018. See Debtor's Exhibit 64, request #10] <p><u>Debtor Argues:</u> The Proposed Assignee's financial statements were not provided. Only uncertified copies of the balance sheet and profit and loss statements of 1st Avenue Capital Holding, LLC were provided.</p>	<p><u>TMC received all the information it needed because it was told the Proposed Assignee was a shell entity formed to purchase the Restaurant and the rights to the Lease. See TMC's Exhibit Z (Email dated 3/21/18 from Debtor's counsel (Mr. Fink) to TMC's counsel (Mr. Platt) stating, in response to questions 6 and 7: "1st Avenue Enterprises is the entity formed for the restaurant(s). . . . 1st Avenue Enterprises will acquire the lease. It is 100% owned by 1st Avenue Capital Holding. It does not yet hold any assets.").</u> <u>Moreover, TMC received the following information:</u></p> <ul style="list-style-type: none"> - First Avenue Capital Holdings, LLC Balance Sheet [TMC's Exhibit RRR] - First Avenue Capital Holdings, LLC Profit & loss Statement [TMC's Exhibit RRR] - First Avenue Capital Holdings, LLC Wells Fargo Analyzed Business Checking Statement [TMC's Exhibit DDDD] - 1st Avenue Enterprises, LLC WellsOne Account Statement as of March 1, 2018 [TMC's Exhibit SSS]

Allegedly Missing Information and Debtor's Argument for Inadequacy	Court's Finding
<p>1</p> <p>2 - Documentation supporting the information contained on the</p> <p>3 Balance Sheet and Profit & Loss</p> <p>4 Statement [Requested by TMC's</p> <p>5 counsel Mr. Platt via email on March</p> <p>6 20, 2018. See Debtor's Exhibit 57,</p> <p>7 request #2]</p> <p>8 <u>Debtor Argues:</u> None or insufficiently</p> <p>9 provided.</p>	<p>- First Avenue Capital Holdings, LLC Income and Assets [TMC's Exhibit DDDD]</p> <p>- First Avenue Enterprises, LLC "does not yet hold any assets" [TMC's Exhibit DDDD]</p> <p>- Buttgenbach Balance Sheet [TMC's Exhibit ZZZ]</p> <p>- Buttgenbach Personal Companies Org Chart [TMC's Exhibit AAAA]</p>
<p>10 - Calculation of the Transfer Profits [Lease § 13.2(e)]</p> <p>11</p> <p>12 <u>Debtor Argues:</u> None provided.</p>	<p><u>The calculation is \$0. The Transfer Profits under the proposed assignment would have been \$0 because the Proposed Assignee required that TMC waive its right to collect transfer profits on the transaction. See Proposed Assignment Agreement, TMC's Exhibit OOOO, ¶ 4 ("Landlord acknowledges and agrees that it waives any 'Transfer Profits' from Assignor with respect to this Assignment.")</u></p>
<p>13 - Credit Reports [Lease § 13.2(b)]</p> <p>14 - Bank and Character References [Lease § 13.2(b)]</p> <p>15 - Residential address, social security number and date of birth of each of the investors [Requested by TMC's</p> <p>16 counsel Mr. Platt via email on March</p> <p>17 20, 2018. See Debtor's Exhibit 57,</p> <p>18 request #4]</p> <p>19 - A credit report for Thomas</p> <p>20 Buttgenbach [Requested by IAC's in-</p> <p>21 house counsel Mr. Gildin via email</p> <p>22 on April 11, 2018. See Debtor's</p> <p>23 Exhibit 64, request #9]</p> <p>24 <u>Debtor Argues:</u> None provided.</p>	<p><u>TMC received all the information it needed about the financial condition of the Proposed Assignee and its members, including Tom Buttgenbach, the "financial backer."</u> In an email forwarded to TMC from Mr. Fink (Debtor's counsel), Mr. Herzer (the general manager for the Proposed Assignee) wrote "We can provide more information directly with landlord as noted. Please get this meeting set up with landlords. <i>Our [the Proposed Assignee's] financial viability is beyond question.</i>" See Email dated March 21, 2018, at 1:04 p.m., TMC's Exhibit DDDD (emphasis added). Later, Mr. Herzer wrote to Mr. Gildin, IAC's in-house counsel, "Tom Buttgenbach . . . is our financial backer. He has built his solar company from a start up to an organization that provides 10% of the power to the Los Angeles area. He has</p>

1 2 3 4 5 6 7 8	Court's Finding
<p>2 - Financial statements of each of the investors [Requested by TMC's counsel Mr. Platt via email on March 20, 2018. See Debtor's Exhibit 57, request #5]</p> <p>3 - Financial information of the owners of the entity that will be assigned the Lease [Requested by TMC's counsel Mr. Platt via email on March 20, 2018 See Debtor's Exhibit 57, request #9]</p> <p>8 <u>Debtor Argues:</u> Information requested for Mr. Joel Herzer and Joseph Miller (i.e., the other partners) were not provided.</p>	<p>brokered deals resulting in over 5 billion dollars in revenue <i>We won't be providing a credit report regarding his worthiness.</i>" See Email dated April 18, 2018, at 9:36 a.m., TMC's Exhibit VVVV (emphasis added).</p>
<p>11 - Certificate of good standing in California for the Potential Assignee and parent/guarantor entity [Requested by IAC's in-house counsel Mr. Gildin via email on April 11, 2018. See Debtor's Exhibit 64, request #3]</p> <p>15 <u>Debtor Argues:</u> The California certificates of good standing were not in the trial exhibits admitted into evidence.</p>	
<p>19 - Material terms of the transfer of the liquor license [Requested by IAC's in-house counsel Mr. Gildin via email on April 11, 2018. See Debtor's Exhibit 64, request #7]</p> <p>22 <u>Debtor Argues:</u> None provided.</p>	<p>All material terms were included in the submitted information. According to the <u>Business Purchase Agreement, the proposed sale of Debtor's business to the Proposed Assignee included the Liquor License, which the parties valued at \$85,000.</u> See Business Purchase Agreement and Joint Escrow Instructions, TMC's Exhibit GG at 3, § 6 ("Assets Transferred" includes "transferable government licenses and permits"); at 4, § 14(A) (requiring Debtor's compliance with Alcohol Beverage Control Act); at Addendum, § 1(E) (if government does not approve transfer before sale closes, purchase price is reduced \$85,000); at Addendum, § 6(a) ("Assets Transferred . . . shall include . . . [i]n addition to the Liquor License, all other transferable permits and licenses.").</p>

1 **H. Landlord TMC's Decision to Terminate the Lease and Invoke Recapture**
2 **Provision of the Lease**

3 61. In the second half of 2017, Landlord TMC began to consider plans to
4 renovate and develop for its own use the portion of the ground floor of the Building that
5 was not part of the restaurant premises. Stewart Declaration, ¶¶ 63. Once it became
6 evident that the restaurant was experiencing financial difficulties, TMC also began to
7 consider ways to expand its development of the ground floor into the Premises and
8 associated theater space in the event that the Debtor went out of business. *Id.*

9 62. After Landlord TMC received the Transfer Notice on March 15, 2018, TMC
10 personnel began in earnest to create a proposal to renovate the entire ground floor, for
11 TMC to consider as a possible alternative to permitting a new tenant to take over the
12 Lease. *Id.*, ¶¶ 64. A final plan was proposed to IAC. *Id.* The plan was designed to serve
13 as both a revenue generating event space and a much-needed common area for
14 employees of IAC and its subsidiary businesses who occupy the floors above the
15 restaurant in the Building. *Id.*

16 63. IAC's management as TMC's parent then considered whether to grant the
17 Debtor's assignment request or to recapture the space for its own use, and they identified
18 numerous reasons not to assign or sublease the Lease and instead exercise the
19 Recapture Right: (1) the Proposed Assignee required material modifications in the Lease
20 that impaired TMC's substantive rights under the Lease; (2) the Tenant required TMC to
21 forfeit the Transfer Profits it was entitled to under the Lease, *see supra*, fn. 2; (3) Mr.
22 Buttgenbach refused to speak with TMC, *see Findings of Fact, ¶¶ 47-48, supra*; (4) the
23 Proposed Assignee was a shell entity, without assets, a balance sheet, financial
24 statements, employees, or a bank account; (5) Mr. Buttgenbach had no prior experience
25 in the restaurant business; and (6) TMC believed that the Proposed Assignee was unlikely
26 to succeed as the majority of the changes to the business plan that the Proposed
27 Assignee suggested had already been tried unsuccessfully by the Tenant. Stewart
28 Declaration, ¶¶ 65 and 67.

1 64. Ultimately, Landlord TMC determined not to approve Debtor's Transfer
2 Notice and instead elected to exercise the Recapture Right "in the exercise of its sole and
3 absolute discretion." Lease, § 13.3; Stewart Declaration, ¶ 67.

4 65. On April 18, 2018, Landlord TMC gave written notice of its decision to
5 terminate the Lease and recapture the Premises effective May 1, 2018, in accordance
6 with the notice provision in the Lease (the "Recapture Letter"). Debtor's Exhibit 66 and
7 TMC's Exhibit AA (the Recapture Letter).

8 66. Two days later, on April 20, 2018, Mr. Fink, counsel for Debtor, sent a reply
9 letter to Mr. Platt, counsel for TMC, threatening to file for bankruptcy protection if TMC did
10 not reconsider exercising the Recapture Right, saying, "As any bankruptcy attorney will
11 tell you, the Bankruptcy Court can strike contract provisions that are so restrictive that
12 they constitute a de facto anti-assignment provision," and that "[w]hile the Lease requires
13 the Landlord to be reasonable with respect to a proposed assignment, the recapture
14 provision is in the Landlord's sole and absolute discretion." Debtor's Exhibit 69 and TMC's
15 Exhibit YYY (letter from Mr. Fink to Mr. Platt regarding TMC's exercise of the Recapture
16 Right).

17 67. On April 25, 2018, Mr. Platt, Landlord TMC's counsel, sent a letter to Mr.
18 Fink, Debtor's counsel, stating that the Landlord would terminate the Lease pursuant to
19 the Recapture Provision effective immediately, instead of on May 1, 2018 as previously
20 stated (the "Second Recapture Letter"). Debtor's Exhibit 70 and TMC's Exhibit WWWW
21 (the Second Recapture Letter).

22 68. Since May 1, 2018, Debtor has been tendering checks to Landlord TMC for
23 the monthly rent, in the approximate amount of \$27,000 each month. Trial Transcript
24 167:10-19 ("Q. . . . Since May 1st of 2018 the debtor has been tendering checks to the
25 landlord for rent each month, is that true?. A. That's correct."). TMC has not cashed any
26 of those checks. Trial Transcript 167:15-17 ("Q. And the landlord hasn't cashed them, is
27 that true? A. That's correct.").

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II. CONCLUSIONS OF LAW

A. Jurisdiction

1. This court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b). Venue is proper pursuant to 28 U.S.C. § 1408. This is a contested matter within the meaning of Federal Rule of Bankruptcy Procedure 9014. This contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

B. Standard for Lease Assumption Under 11 U.S.C. § 365

2. A chapter 11 debtor in possession may "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. §§ 365(a), 1107(a); *see also, In re Waterkist Corp.*, 775 F.2d 1089, 1091 (9th Cir. 1985).

3. A debtor in possession may not assume a lease under which it is in default unless, at the time of the assumption, the debtor (A) cures, or provides adequate assurance that it will promptly cure, such default; (B) compensates, or provides adequate assurance that it will promptly compensate, a party other than the debtor to such lease, for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such lease. 11 U.S.C. § 365(b)(1); *see also, In re Windmill Farms, Inc.*, 841 F.2d 1467, 1473 (9th Cir. 1988) (all three requirements must be met).

4. Moreover, a debtor "may not assume or assign any executory contract or unexpired lease of the debtor . . . if . . . such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief." 11 U.S.C. § 365(c)(3). "Applicable nonbankruptcy law" means applicable state law. *In re Windmill Farms, Inc.*, 841 F.2d at 1469 (citing *In re Waterkist Corp.*, 775 F.2d at 1091). "Simply put, if a lease of nonresidential real property has been terminated under state law before the filing of a bankruptcy petition, there is nothing left for the trustee to assume." *Id.* (citing *Kearny Mesa Crossroads v. Acorn Investments (In re Acorn Investments)*, 8 B.R. 506, 510 (Bankr. S.D. Cal.1981)).

1 5. Even though a lease may have been terminated before the filing of a
2 bankruptcy petition, a debtor in possession may be entitled to be relieved from forfeiture of
3 the lease under California law, in which case assumption of the lease would be proper. *In*
4 *re Windmill Farms, Inc.*, 841 F.2d at 1471-1472 (citing *In re Waterkist Corp.*, 775 F.2d at
5 1091). When a motion to assume a lease pertains to an allegedly terminated lease, the
6 court must apply a two-part test:

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8 The first part of the test is to determine whether the lease
9 terminated before the petition in bankruptcy was filed. . . . The
10 second part of the test requires the court to 'determine *whether the*
11 *termination could have been reversed under a state anti-forfeiture*
 provision or other applicable state law.' . . . This second step in the
 analysis 'permits the debtor-in-possession the same opportunities
 to avoid forfeiture of a lease . . . that it would have received under
 state law absent the bankruptcy proceedings.'

12 *In re Windmill Farms, Inc.*, 841 F.2d at 1472 (quoting *In re Waterkist Corp.*, 775 F.2d at
13 1091) (emphasis in *Windmill*) (internal citations omitted).

14 6. Because Debtor brings this Motion to assume the Lease pursuant to 11
15 U.S.C. § 365, Debtor has the burden of proving "that the lease is one subject to
16 assumption and that all requirements for assumption have been met." *In re Rachels*
17 *Industries, Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990).

18 7. TMC contends that the Lease was terminated under California law before
19 the Petition Date because TMC properly exercised the Recapture Right. Debtor argues
20 that (i) TMC did not properly exercise the Recapture Right because it had not received all
21 the required information enumerated in Section 13.2 of the Lease, and (ii) even if TMC
22 had properly exercised the Recapture Right, Debtor is entitled to relief from forfeiture
23 under California law. For the reasons discussed below, the court finds that (i) the Lease
24 was terminated under California law before the Petition Date because TMC properly
25 exercised the Recapture Right after receiving all the required information enumerated in
26 Section 13.2 of the Lease, and (ii) Debtor cannot use any of California's relief from
27 forfeiture statutes to modify the Lease.

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1 i. **The Lease Was Terminated Before the Petition Date.**

2 8. Recapture provisions are valid and enforceable under California law. *Carma*
3 *Developers (California), Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 353-
4 354 (1992).

5 9. Under California law, "[i]t is the public policy of the state and fundamental to
6 the commerce and economic development of the state to enable and facilitate freedom of
7 contract by the parties to commercial real property leases." California Civil Code
8 § 1995.270. The parties to a commercial lease are therefore free to allocate the future
9 economic benefits of the lease to the landlord or to the tenant. *Carma Developers*
10 *(California), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th at 362.

11 10. TMC argues that under *Carma Developers (California), Inc. v. Marathon*
12 *Development California, Inc.*, its termination right pursuant to the Recapture Provision is
13 not subject to a reasonableness requirement. In *Carma*, the California Supreme Court
14 reversed a judgment of the trial court and Court of Appeal and held that a landlord's
15 exercise of its recapture right in response to an assignment request from the tenant was
16 not an unreasonable restraint on alienation. *Id.* at 376. The lease in *Carma* contained
17 both a recapture provision and a prohibition on the landlord unreasonably withholding
18 consent to an assignment of the lease. *Id.* at 351-352. The court found that the latter did
19 not impose a reasonableness requirement on the landlord's recapture rights. *Id.* at 364-
20 366. However, although the California Supreme Court so held, it further explained that
21 the implied covenant of good faith and fair dealing applied to the recapture provision
22 because the covenant applies to all contracts:

23
24 Every contract imposes upon each party a duty of good faith and
25 fair dealing in its performance and its enforcement. . . . This duty
26 has been recognized in the majority of American jurisdictions, the
27 Restatement, and the Uniform Commercial Code. . . . It has been
28 consistently applied in this state to commercial leases. . . . The
 covenant of good faith finds particular application in situations
 where one party is invested with a discretionary power affecting the
 rights of another. Such power must be exercised in good faith.

1 2 Cal. 4th at 372 (internal citations and quotations omitted). Thus, TMC's Recapture Right
2 was subject to the implied covenant of good faith and fair dealing.

3 11. The California Supreme Court in *Carma Developers (California), Inc. v.*
4 *Marathon Development California, Inc.*, also explained the policy behind and the function
5 of a lessor's recapture right:

6 It is not difficult to understand why parties might agree to such an
7 arrangement. In a rising market, a potential lessee might wish to
8 secure a long-term lease and avoid higher rent over the coming
9 years. By contrast, because of escalating costs, a lessor may be
10 unwilling to make a long-term commitment. To induce the lessor,
11 the lessee may have to offer rent in excess of current market rates.
12 Instead, the lessor may be willing to forego all or part of such
13 increased rent in exchange for a termination and recapture clause
14 similar to that at issue here. Such clause holds out the possibility
15 that the premises can be reclaimed before expiration of the lease
16 term. At the same time, the power to trigger this discretionary right
17 remains exclusively with the lessee.

18 . . .

19 Termination of a lease and refusal to consent to a transfer differ
20 both in purpose and effect. A sublease or assignment leaves the
21 lessee liable as a surety for performance of the original lease while
22 the sublessee/assignee takes over primary responsibility.
23 Termination, on the other hand, releases the lessee from all further
24 obligations and permits the lessor to pursue a completely new
25 lease.

26 2 Cal. 4th at 364.

27 12. Debtor has argued that TMC requested certain additional documents not
28 expressly required by Section 13 of the Lease and, by virtue of these requests, such
documents became incorporated into Section 13 through its catchall subsection (g), which
references "such other information and materials as TMC may in good faith request."
See, e.g., Debtor's Opposition to TMC's Proposed Findings of Fact and Conclusions of
Law, ECF115 at 7.

13. As set forth above, the court finds that TMC received all the documents and
information required under Section 13.2 of the Lease prior to electing to exercise the
Recapture Provision. See Findings of Fact, ¶¶ 59-60, *supra*. To the extent that TMC did
not timely receive a de minimis number of requested documents, those documents were

1 not material, and TMC received the equivalent information through other requests or its
2 own due diligence.

3 14. The court also finds that TMC acted in good faith when it exercised its
4 Recapture Right under the Lease. The purpose of the required information set forth in
5 Section 13.2 of the Lease was to allow TMC to make a well-reasoned decision whether to
6 consent to a proposed assignment or sublease or to exercise its Recapture Right. The
7 Recapture Provision allowed TMC to determine that it wanted to capture the future value
8 of the Lease before its natural termination date, and the power to trigger the Recapture
9 Right rested solely with Debtor by submitting a Transfer Notice, which it did. See *Carma*
10 *Developers (California), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th at 364.
11 Moreover, TMC had multiple bases on which to decide to exercise its Recapture Right
12 and terminate the Lease, including that (i) the Proposed Assignee required material
13 modifications to the Lease, including that TMC would forfeit the Transfer Profits it was
14 entitled to under the Lease, (ii) the Proposed Assignee's financial backer, Mr. Buttgenbach
15 failed to follow through with numerous attempts by TMC to speak with him, (iii) the
16 Proposed Assignee was a shell entity, without assets, a balance sheet, financial
17 statements, employees, or a bank account, (iv) Mr. Buttgenbach had no prior experience
18 in the restaurant business, and (v) TMC believed that the Proposed Assignee was unlikely
19 to succeed as the majority of the changes to the business plan that the Proposed
20 Assignee suggested had already been tried unsuccessfully by the Tenant.

21 15. Because TMC properly exercised its Recapture Right when its counsel gave
22 notice to Debtor of such termination in the Recapture Letter dated April 18, 2018, see
23 TMC's Exhibit AA; Debtor's Exhibit 66, the Lease was terminated as of May 1, 2018.³

24 **ii. The Debtor is Not Entitled to Relief From Forfeiture.**

25 16. The Lease did not terminate as a result of Debtor's default or its breach of a
26 covenant or condition under the Lease; rather, the Lease terminated after Landlord TMC's

27 _____
28 ³ Although TMC later purported to accelerate the termination date in its Second Recapture Letter to Debtor dated April 25, 2018, see TMC's Exhibit WWWW; Debtor's Exhibit 70, TMC has not demonstrated the basis under which it is entitled to accelerate the date from May 1, 2018.

1 exercise of a unilateral right to terminate the Lease for a specific nondefault situation, that
2 is, upon Debtor's request to assign the Lease.

3 17. Even though a lease may have terminated before the filing of a bankruptcy
4 petition, a debtor in possession may be entitled to be relieved from forfeiture of the lease
5 under California law, in which case assumption of the lease would be proper. *In re*
6 *Windmill Farms, Inc.*, 841 F.2d at 1471-1472 (citing *In re Waterkist Corp.*, 775 F.2d at
7 1091).

8 18. In California, "[t]here are three separate statutes that may create an avenue
9 of equitable relief to a tenant who has defaulted under the terms of the lease." 10 Miller
10 and Starr, California Real Estate § 34:224 (Relief from forfeiture) (4th ed. 2018) (citing
11 California Code of Civil Procedure §§ 1174, 1179; California Civil Code § 3275).

12 19. None of these statutes apply to a situation where a landlord is exercising its
13 contractual right to terminate a lease and the tenant has not defaulted or breached the
14 lease. See 12 Witkin, Summary of California Law, Real Property § 697, Relief from
15 Forfeiture (11th ed. 2018) ("The general statutory declaration of the right to relief from
16 forfeiture ([Civil Code §] 3275) is supplemented by [Code of Civil Procedure §] 1179,
17 establishing a special proceeding **for the relief of a defaulting tenant.**) (emphasis
18 added).

19 20. California Code of Civil Procedure § 1179 ("Section 1179") provides that a
20 court may relieve a tenant against a forfeiture of a lease or rental agreement in case of
21 hardship "as provided in [Code of Civil Procedure] Section 1174." Code of Civil Procedure
22 § 1174 ("Section 1174"), subsection (a), in turn, provides that the court shall declare
23 forfeiture of a lease if a proceeding be for unlawful detainer "after neglect, or failure to
24 perform the conditions or covenants of the lease . . . or after default in the payment of
25 rent." Section 1174, subsection (c), in turn, provides that when an unlawful detainer
26 proceeding is filed after a default in the payment of rent, and the Notice to Quit provided to
27 the tenant has not stated the election of the landlord to declare the forfeiture of the lease,
28 a court may stay execution of the judgment for five days, during which time the tenant or

1 other party in interest may pay into court the back rent, along with interest, damages, and
2 costs. If the court so orders and such amounts are paid within the five days, the tenant
3 will be restored to its estate.

4 21. Section 1179 states in pertinent part as follows:

5 The court may relieve a tenant against a forfeiture of a lease or
6 rental agreement, whether written or oral, and whether or not the
7 tenancy has terminated, and restore him or her to his or her former
8 estate or tenancy, in case of hardship, as provided in Section 1174.
9 The court has the discretion to relieve any person against forfeiture
on its own motion. An application for relief against forfeiture may
be made at any time prior to restoration of the premises to the
landlord.

10 California Code of Civil Procedure § 1179.

11 22. "Section 1179 is a specific statutory procedure that vests a trial court with
12 the authority to affect a judgment after its entry. The provision applies solely in unlawful
13 detainer actions." *Gill Petroleum, Inc. v. Hayer*, 137 Cal.App.4th 826, 832-833 (2006); see
14 *Pehau v. Stewart*, 112 Cal.App.2d 90, 99 (1952). It vests the court with discretion to
15 relieve a tenant from forfeiture and restore him or her to his or her former estate or
16 tenancy. Section 1179 "provides the court with broad equitable discretion to determine
17 the conditions upon which relief will be granted to the end that exact justice may be done."
18 *Gill Petroleum, Inc. v. Hayer*, 137 Cal.App.4th at 828; see *Olympic Auditorium, Inc. v.*
19 *Superior Court*, 81 Cal.App. 283, 287 (1927). "The proposition that Section 1179, Cal.
20 C.C.P., is applicable in and by the Bankruptcy Courts is so plain, that the point need not
21 be further labored." *In re Burke*, 76 F. Supp. 5, 8 (S.D. Cal. 1948).

22 23. Sections 1179 and 1174 of the California Code of Civil Procedure have no
23 applicability here for a number of reasons. Section 1174 by its terms applies in the case
24 of an unlawful detainer proceeding for neglect, failure to perform the conditions or
25 covenants of a lease, or failure to pay rent. The termination of the Lease in this case was
26 unrelated to any failure by the Debtor to pay rent or any other breach of the Lease by the
27 Debtor. Rather, the termination was the result of TMC's exercise of an expressly
28 bargained-for right granted to it under the Lease, which right accrued to TMC regardless

1 of whether or not the Debtor was in breach of the Lease. The evident purpose of Sections
2 1179 and 1174 is to afford the tenant an opportunity to pay the defaulted rent or otherwise
3 cure any breach under the lease. Here, there is no breach for the Debtor to cure, so
4 those statutes do not apply. Indeed, Debtor's principal Mr. Nathan testified that he
5 believed Debtor was not in default of the Lease as of the trial date. See Nathan
6 Declaration, ¶¶ 102-104.

7 24. Moreover, the explicit language of Section 1179 of California Code of Civil
8 Procedure makes clear that it does not apply unless there has been some failure by the
9 tenant to perform a condition or covenant under the lease:

10
11 **In no case** shall the application or motion be granted except on
12 condition that full payment of rent due, or full performance of
conditions or covenants stipulated, so far as the same is
practicable, be made.

13 California Code of Civil Procedure § 1179 (emphasis added). In other words, the court
14 may not grant Debtor relief from forfeiture under Section 1179 unless it conditions such
15 relief on Debtor curing whatever breach or default led to the forfeiture. Here, because the
16 termination was the result of TMC's proper exercise of its Recapture Right, there is
17 nothing that Debtor could cure that could unwind the termination on May 1, 2018.

18 25. The application of California Code of Civil Procedure §§ 1179 and 1174,
19 would, under the guise of avoiding hardship, effectively rewrite the Lease to delete the
20 Recapture Provision, which provision was the agreed-to result of extensive negotiations
21 by two sophisticated parties and is perfectly enforceable.

22 26. Debtor is also not entitled to any relief from forfeiture under California Civil
23 Code § 3275. That statute is conditioned upon a forfeiture arising as a result of a
24 contractual party's breach:

25 Whenever, by the terms of an obligation, a party thereto incurs a
26 forfeiture, or a loss in the nature of a forfeiture, **by reason of his**
27 **failure to comply with its provisions**, he may be relieved
therefrom, upon making full compensation to the other party, except
28 in case of a grossly negligent, willful, or fraudulent breach of duty.

1 California Civil Code § 3275 (emphasis added.); see *Hayward Lumber and Investment*
2 *Co. v. Construction Products Corp.*, 117 Cal.App.2d 221, 228 (1953) (relief from forfeiture
3 under Section 3275 only available if "the party seeking relief is in default.").

4 27. Nor would Section 365 of the Bankruptcy Code, 11 U.S.C., provide such
5 relief. Even assuming *arguendo* that the Debtor could assume the Lease notwithstanding
6 its prior termination (which is prohibited by 11 U.S.C. § 365(c)(3)), a debtor must assume
7 a lease or executory contract *cum onere*. Debtor may not delete provisions in a lease that
8 it deems undesirable as part of the assumption process but must accept the lease as is.
9 *In re SCCC Associates II*, 158 B.R. 1004, 1015 (Bankr. N.D. Cal. 1993) (citations omitted).
10 3 Levin and Sommer, *Collier on Bankruptcy* ¶ 365.03[3] at 365-29 (16th ed. 2018)(relating
11 to executory contracts in general, but includes leases), *citing inter alia*, *In re Abitibowater*
12 *Inc.*, 418 B.R. 815, 822-823 (Bankr. D. Del. 2009).

13 28. Moreover, parties have the freedom of contract, and a party may even waive
14 its right to seek the remedy of relief from forfeiture. *In re Art & Architecture Books of the*
15 *21st Century*, 518 B.R. 43, 49 (Bankr. C.D. Cal. 2014). Freedom of contract in
16 commercial real property leases is well established in California law. *Id.* The California
17 legislature enacted Civil Code § 1995.270(a)(1) to declare it the public policy of the State
18 of California to "enable and facilitate freedom of contract by the parties to commercial real
19 property leases." California Civil Code § 1995.270(a)(1); see also *250 L.L.C. v.*
20 *Photopoint Corp. (USA)*, 131 Cal.App.4th 703, 718 (2005) (quoting California Civil Code
21 § 1995.270(a)(1). Consistent with this public policy, California courts have generally held
22 that commercial tenants may waive their rights under the California Civil Code. *250 L.L.C.*
23 *v. Photopoint Corp. (USA)*, 131 Cal.App.4th at 718 (citing *Lee v. Placer Title Co.*, 28
24 Cal.App.4th 503, 512-513 (1994) (right to quiet enjoyment) and *Folberg v. Clara G.R.*
25 *Kinney Co.*, 104 Cal.App.3d 136, 140 (1980) (right to notice of rent default)).

26 29. The public policy that equity abhors forfeiture is also well represented in
27 California law. *In re Art & Architecture Books of the 21st Century*, 518 B.R. at 50 (citing
28 California Civil Code § 1442; *Petersen v. Hartell*, 40 Cal.3d 102, 112 (1985); *Reed v.*

1 *South Shore Foods, Inc.*, 229 Cal.App.2d 705 (1964); *Deutsch v. Phillips Petroleum Co.*,
2 56 Cal.App.3d 586 (1976)). California Civil Code § 1442 specifically provides: "A
3 condition involving a forfeiture must be strictly interpreted against the party for whose
4 benefit it is created." The policy of abhorring forfeitures has been followed in the caselaw
5 wherein courts have strictly construed the language of contracts to avoid forfeiture. See,
6 e.g., *Randol v. Scott*, 110 Cal. 590, 595-596 (1895) (strictly construing language of a
7 contract calling for forfeiture of a lease upon the assignment by the co-lessees not to be
8 triggered upon an assignment by operation of law by the bankruptcy of one co-lessee;
9 opinion stating that forfeiture clauses are to be "restrain[ed] ... to the most technical limits
10 of the terms and conditions upon which the right is to be exercised").

11 30. However, courts have also held that California Civil Code § 1442 does not
12 warrant a strained or overly technical construction or artificial distinction where forfeiture is
13 plainly required by the express language of a written instrument:

14
15 The rule that a forfeiture clause is to be strictly construed means
16 simply that no wider scope is to be given to the language employed
17 than is plainly required. It does not require the court to put a
18 strained or overtechnical construction upon the language
19 employed, ignoring the essence of the condition imposed upon the
20 legatee and refusing to give effect to the lawful intention of the
21 testatrix, to enable a legatee to affirm a will so far as it is to her own
22 profit and at the same time repudiate the validity of its provisions
23 which are for the benefit of others. No artificial distinctions are to be
24 taken advantage of or quibbling indulged in to the end that a person
25 plainly and palpably coming within the scope of the forfeiture clause
26 may by "some hook or crook" escape the penalty of forfeiture.

21 In *In re Kitchen*, 192 Cal. 384, 389-390 (1923); see also *Urban Properties Corp. v.*
22 *Benson, Inc.*, 116 F.2d 321, 323 (9th Cir.1940) (quoting, at length, *In re Kitchen*, 192 Cal.
23 at 389).

24 31. This case is a situation where the landlord is not terminating the lease due to
25 a default by the tenant. Rather, the landlord is exercising its right under the Recapture
26 Provision in its sole and absolute discretion to terminate the lease upon the tenant's
27 request to assign the lease. The Recapture Provision is a contractual right bargained for
28

1 by the parties to a commercial real estate lease represented by counsel in an arm's length
2 negotiation.

3 32. Because of the parties' freedom of contract, recapture provisions are valid
4 and enforceable under California law and do not present an unreasonable restraint on
5 alienation. *Carma Developers (California), Inc. v. Marathon Development California, Inc.*,
6 2 Cal.4th at 353-354.

7 33. Because the California relief from forfeiture provisions relate to situations
8 where the tenant is in default, such provisions do not apply here. Allowing equitable relief
9 to grant relief from forfeiture would nullify the express contractual right of the Landlord to
10 terminate the Lease under the recapture provision. *See In re Kitchen*, 192 Cal. 384, 389-
11 390. In this case, to allow relief from forfeiture upon the exercise of the landlord's express
12 right to terminate unilaterally would mean that there would be no situation where the
13 landlord could exercise such right, which would render the provision meaningless.

14 34. An analogous situation involves a tenant's failure to timely exercise its option
15 to renew a commercial lease, in which case the tenant is not entitled to relief from
16 forfeiture because a landlord's "refusal to give effect to an acceptance that is one minute
17 late results in no forfeiture." *Simons v. Young*, 93 Cal.App.3d 170, 182 (1979) (quoting
18 and adopting *Sheveland v. Reed*, 159 Cal.App.2d 820, 822 (1958)). In *Simons v. Young*,
19 a tenant sought relief from forfeiture from the termination of a lease by expiration of its
20 term when it sought to exercise an option to purchase after the deadline to exercise due to
21 inadvertent neglect. Reversing the trial court, the appellate court held that allowing
22 equitable relief in such situation would nullify the express terms of the contract regarding
23 the timely exercise of the option.

24 35. A commercial lease may give one party the option to terminate the lease by
25 notice upon the happening of a certain event. *See, e.g., Grand Prospect Partners, L.P. v.*
26 *Ross Dress for Less, Inc.*, 232 Cal.App.4th 1332, 1367 (2015) (tenant's option to
27 terminate if anchor tenant ceased operations); *Lewis v. Agoure*, 8 Cal.App. 146 (1908)
28 (landlord's option to terminate lease in the event of his sale of demised premises).

1 36. "The option is valid and enforceable even though it results in a termination of
2 the contract and the rights of the other party." 10 Miller and Starr, California Real Estate
3 § 34:163 (Exercise of an option to terminate) (4th ed. 2018) (citing *Maas v. Standard Oil*
4 *Co. of California*, 220 Cal.App.2d 913, 915-916 (1963)).

5 37. In such a situation, "[t]here is no forfeiture of the tenant's rights under the
6 lease but merely an agreed termination on the happening of a certain contingency not
7 related to any act or default by one of the parties." *Id.* (citing *C.M. Staub Shoe Co. v.*
8 *Byrne*, 169 Cal. 122, 129 (1915); *11382 Beach Partnership v. Libaw*, 70 Cal.App.4th 212,
9 218 (1999) (right to terminate upon destruction of the premises); *Maas v. Standard Oil Co.*
10 *of California*, 220 Cal.App.2d 913, 916-917 (1963) (option of tenant to terminate service
11 station lease if it became impracticable to operate the station); *Alpern v. Mayfair Markets*,
12 118 Cal.App.2d 541, 542-547 (1953) (option of tenant to terminate commercial lease if
13 premises destroyed by fire); *Chanan Singh v. Cross*, 60 Cal.App. 309, 315 (1922) (option
14 to terminate by lessee if it became impracticable for the landlord to commence to supply
15 water to the demised land to be planted to rice by a specified date); *Lewis v. Agoure*, 8
16 Cal.App. 146, 147-148 (1908) (option of landlord to terminate lease in the event of his sale
17 of demised premises)).

18 38. In *Grand Prospect Partners v. Ross Dress for Less*, a commercial lease
19 provided the tenant with an ongoing option to terminate the lease upon 30 days' notice if
20 the anchor tenant ceased operations and reduced occupancy was not cured in 12 months.
21 232 Cal.App.4th at 1367. The court reviewed the relevant caselaw, held that the
22 termination provision was not an unenforceable forfeiture, and announced the rule "that
23 when a commercial lease contains a clause allowing termination upon the occurrence of
24 contingencies that (1) are agreed upon by sophisticated parties and (2) have no relation to
25 any act or default of the parties, *no forfeiture results from the exercise of the termination*
26 *clause.*" *Id.* (emphasis added). Similarly here, the Lease was negotiated by sophisticated
27 commercial parties, represented by counsel, TMC was given the option to terminate the
28 Lease upon the occurrence of an event—namely, upon receipt of a Transfer Notice by

1 Debtor—not upon default or breach by Debtor. Accordingly, such a termination was not a
2 "forfeiture" from which Debtor can seek relief.

3 39. Here again, there is no breach for Debtor to cure in order to avoid forfeiture.
4 Rather, there was simply an exercise by TMC of an enforceable contractual right that it
5 was granted under the Lease. There was no forfeiture, and thus there is no relief from
6 forfeiture.

7 **C. All Remaining Issues are Moot.**

8 40. Because the Lease was terminated before the Petition Date and Debtor is
9 not entitled to relief from forfeiture under California law, the court need not decide whether
10 the Debtor is not the Tenant under the Lease and is thus precluded from assuming the
11 Lease. Either (i) the Debtor is not the Tenant under the Lease, in which case it could not
12 assume the Lease because the Lease was not a "lease of the debtor," see 11 U.S.C.
13 § 365(a), or (ii) the Debtor was the Tenant under the Lease, but it is precluded from
14 assuming the Lease because the Lease is "of nonresidential real property and has been
15 terminated under applicable nonbankruptcy law prior to the order for relief," see 11 U.S.C.
16 § 365(c)(3). As indicated on page 2 above, however, if a determination of this issue was
17 necessary to resolve the Motion, the court would find that Debtor is the Tenant under the
18 Lease.

19 41. Similarly, the court need not rule on Debtor's ability to (A) cure any default in
20 rent payments; (B) compensate TMC for any actual pecuniary loss resulting from any
21 default; or (C) provide adequate assurance of future performance under the Lease.

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III. CONCLUSION

For all the foregoing reasons, the court determines that Debtor cannot assume the Lease because it was terminated before the Petition Date, Debtor cannot get relief from forfeiture under California law, and the court should deny Debtor's motion to assume lease under 11 U.S.C. § 365. A separate final order on the Motion consistent with the findings of fact and conclusions of law set forth herein is being filed and entered concurrently herewith.

IT IS SO ORDERED.

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Date: January 18, 2019



Robert Kwan
United States Bankruptcy Judge