

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CASCADE FUNDING, LP – SERIES 6,

Plaintiff,

- against -

THE BANCORP BANK,

Defendant.

Index. No.

Date Filed: May 25, 2020

SUMMONS

Plaintiff designates New York
County as the place of trial.

Venue is proper in this County
pursuant to CPLR § 501

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer on Plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
May 25, 2020

KASOWITZ BENSON TORRES LLP

By: /s/ Michael A. Hanin
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To:

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COMPLAINT

Plaintiff Cascade Funding, LP – Series 6 (“Cascade”), as and for its complaint against defendant The Bancorp Bank (“Bancorp”), alleges as follows:

PRELIMINARY STATEMENT

1. This action arises out of Bancorp’s refusal to honor a contractual “Market Disruption” clause — triggered by the most significant market disruption since the Great Depression — entitling Cascade to terminate a contract between the parties in which Cascade was to purchase, for securitization, certain mortgage loan assets from Bancorp.

2. The coronavirus pandemic and resulting halt to everyday life plunged market participants — particularly in sectors that did not benefit directly from the government relief — into “nothing short of chaos” as “nearly every financial center across the world [was] simultaneously disrupted.”¹ As investors fled to safer assets, stocks plunged at record speeds, new debt issuance froze, and spreads widened in secondary markets for collateralized loan obligations and other asset-backed securities. The International Monetary Fund predicts the American

¹ Brian Chappatta, Coronavirus Sorts Bond Market Into Winners and Losers, BLOOMBERG (Mar. 27, 2020), available at <https://www.bloomberg.com/opinion/articles/2020-03-27/coronavirus-sorts-bond-market-into-winners-and-losers>.

economy will face its worst slump since 1946 and the global economy will experience its worst recession since the Great Depression.²

3. In the halcyon days immediately preceding these unprecedented events, Bancorp and Cascade negotiated and, on February 24, 2020 executed, a Purchase and Sale Agreement (the “PSA”) providing for Cascade to acquire a pool of \$900 million in mortgage loan assets from Bancorp and immediately repackage those assets into various tranches of securities to be marketed and sold to investors (a “securitization”) to close no later than April 15, 2020. Because Cascade’s acquisition was contingent on an economically viable securitization, the parties negotiated a “Market Disruption” clause permitting Cascade to terminate the PSA if market conditions significantly deteriorated as measured by an objective standard: that the most senior tranche in the securitization would price at a rate exceeding 200 basis points over LIBOR (LIBOR+200bp) (the “Pricing Trigger”).

4. On March 31, 2020 — in the midst of the extraordinary world events roiling credit markets — Cascade exercised the PSA’s “Market Disruption” clause, terminated the PSA, and demanded the return of Cascade’s \$12,469,316 deposit. As the requisite “written evidence” that the Pricing Trigger had been satisfied, Cascade provided Bancorp with written confirmation from J.P. Morgan Securities (“JPMS”) — the lead manager for the securitization and the established market leader for collateralized loan obligation securitizations of commercial real estate loans (“CRE CLOs”) — that the most senior tranche would price at LIBOR+300bp. JPMS’s expert determination — derived from market standard practices and based on JPMS’s unparalleled

² Allan Rappeport and Jeanne Smialek, I.M.F. Predicts Worst Downturn Since the Great Depression, THE NEW YORK TIMES (Apr. 14, 2020), available at <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-economy-recession-depression.html>.

knowledge and experience — was corroborated by overwhelming contemporaneous market evidence of spreads in the secondary market uniformly exceeding LIBOR+200bp by a substantial margin. Pricing in the new issue CRE CLO market was so extreme and non-economic that in the weeks before and after Cascade’s March 31, 2020 termination of the PSA, *no new CRE CLOs were issued.*

5. Refusing to acknowledge market conditions obvious to JPMS and every other market participant — but desperate to retain Cascade’s deposit given its own precarious financial condition — Bancorp adopted an indefensible position without support in the PSA or market practice: that only “actual bids” from investors “following a market standard process” would provide evidence “satisfactory” to Bancorp that the Pricing Trigger had been met. The “Market Disruption” clause, however, does not require “actual bids.” Such “actual bids” could have been obtained only by enlisting JPMS to initiate a sham offering process to solicit bids that, given known and obvious market conditions, Cascade would never accept. Bancorp’s insistence that Cascade defraud the market in order to exercise its bargained-for contractual rights was an egregious, objectively unreasonable abuse of its contractual obligations for a singular purpose: to illicitly retain Cascade’s multi-million dollar deposit.

6. Bancorp has refused to accept Cascade’s March 31, 2020 termination despite the clear written evidence of market disruption, and has refused to return Cascade’s deposit despite its express contractual obligation to do so. Cascade seeks damages, equitable relief, and declaratory relief requiring Bancorp to comply with its contractual obligations.

PARTIES

7. Plaintiff Cascade Funding, LP – Series 6 is a designated series of a Delaware limited partnership.

8. Defendant The Bancorp Bank is a Delaware state chartered commercial bank.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to CPLR § 301 and venue is proper in this Court pursuant to CPLR § 501 because each of the parties has contractually submitted to and waived any objection to the exclusive jurisdiction of any federal or state court sitting in the Borough of Manhattan in New York, New York.

FACTS

I. Commercial Mortgage Loan Securitizations

10. The contract underlying this action concerns the potential sale and securitization of commercial mortgage assets. Commercial real estate collateralized loan obligations, or CRE CLOs, are a form of securitization used by originators of commercial real estate loans or real estate funds to obtain financing. The CRE CLO is a hybrid of commercial mortgage-backed securities (“CMBS”) and collateralized loan obligations (“CLOs”) that combines feature of both instruments, including collateral with first lien priority, issuance of separate tranches of debt with different payment priorities and credit risk, structural features to protect senior classes of investors (such as interest coverage and overcollateralization tests), and loan servicing and operating advisor roles.

11. The CRE CLO’s “sponsor” transfers a pool of commercial mortgage assets (generally loans secured by properties) to a special purpose vehicle (“SPV”) that issues securities backed by the pool of loans. The lead manager for the CRE CLO markets and sells the securities in the CRE CLO by contacting investor accounts. Payments received by the sponsor/SPV on the underlying loans are used to pay the coupon to investors in the CRE CLO. The CLO is divided into separate tranches, or slices of the pool of loans, differentiated by priority of payouts. The ‘AAA’ tranche is the most senior and, thus, has the lowest credit risk. Any residual cash flow from the mortgage assets after investors have been paid in full is distributed to holders of CLO equity. Unlike certain other securitization types, the CRE CLO sponsor frequently takes a

significant position in the CLO's equity and/or junior tranches.

12. In 2019, the CRE CLO market experienced its third straight year of issuance growth, with twenty-nine CRE CLOs issued, securitizing a total of \$19.2 billion.

II. The Parties Enter Into The PSA

13. Bancorp originates commercial mortgage loans that are secured primarily by multifamily complexes, retail centers, office buildings, hotels, mixed-use buildings, and self-storage properties. Bancorp also acts as a sponsor of CRE CLOs, having issued six CRE CLOs in the aggregate amount of \$2.536 billion.

14. Cascade is an affiliate of Waterfall Asset Management, LLC ("WAM"), an asset manager focused on asset-backed securities, lending, and private equity investments. Cascade was formed for the purpose of purchasing and securitizing mortgage loans. WAM, through its affiliates, holds junior bonds in two prior securitizations sponsored by Bancorp and has invested a total of \$600 million in various CRE CLOs. As external manager to Ready Capital Corporation, a publicly traded mortgage REIT (NYSE: RC), WAM is also a repeat participant in the CRE CLO market, having brought three deals to market since 2017 for a total volume of \$842,925,285.

15. At the end of 2019, Bancorp offered to sell to Cascade a \$900 million pool of commercial mortgage loans (the "Mortgage Assets") secured by apartment complexes. Following extensive negotiations regarding the structure, terms and conditions of the deal, on February 24, 2020, Bancorp and Cascade (together, the "Parties") executed a Purchase and Sale Agreement (the "PSA") providing for Cascade to acquire the Mortgage Assets to facilitate a Cascade-sponsored CRE CLO. The PSA is governed by New York law.

A. Termination Under The Market Disruption Clause

16. The PSA provided that Cascade would purchase the Mortgage Assets and securitize the Mortgage Assets (the "Securitization") on the same day. J.P. Morgan Securities LLC

(“JPMS”), which was engaged as the sole structuring agent, book-runner, and lead manager for the securitization, would then sell the securities in the CRE CLO through its broad network of investor accounts. Cascade’s purchase of the Mortgage Assets would be financed in part through the Securitization.

17. Because Cascade’s purchase of the Mortgage Assets and the Securitization were linked inextricably, the Parties negotiated a provision entitling Cascade to terminate the PSA in the event of a material deterioration in the market. Instead of including a standard material adverse change clause that would permit termination upon the occurrence of non-specific adverse developments, the Parties drafted a provision permitting Cascade to terminate in the event of a defined market disruption in the CRE CLO marketplace.

18. The Parties agreed that a “market disruption” warranting termination of the PSA should be identified objectively based on how the ‘AAA’ grade bonds (or ‘AAA’ tranche) in the Securitization would price in the market. The coupon for a CRE CLO is set at a fixed spread over a base rate, typically the London Interbank Offered Rate (“LIBOR”), a benchmark interest rate widely used in a variety of financial instruments. In standard practice, a sponsor determines the spread at which it is willing to issue the CRE CLO, and the lead manager for the securitization determines — based on its market expertise, experience, and relationships and communications with investors — the spread at which accounts are willing to invest in the CRE CLO. A sponsor will only take a CRE CLO to market if, based on advice provided by the lead manager, it determines that the spread at which the securitization will price (*i.e.*, the spread for the coupon) falls within the spread at which the sponsor is willing to transact.

19. Accordingly, the Parties drafted a market-out clause (the “Market Disruption Clause” or “Market Out”) enabling Cascade to terminate the PSA in the event that “the ‘AAA’

grade bonds in the Securitization would . . . price,” based on levels provided by a rating agency, at a rate exceeding 200 basis points (*i.e.*, 2%) over LIBOR (LIBOR+200bp) in a static transaction (the “Pricing Trigger”).³ Once Cascade “provides written evidence to the Seller (satisfactory to the Seller in its reasonable good faith)” that the Pricing Trigger would be met, Cascade has the right to terminate the PSA.

20. Specifically, Section 7.5(c) of the PSA provides:

Market Disruption. Notwithstanding anything to the contrary in this Article VII, if (i) the Purchaser elects to pursue a Securitization to fund the purchase of the Closing Date Mortgage Assets and has been working in good faith to close such Securitization on a Target Closing Date and (ii) no earlier than fifteen (15) days prior to the scheduled closing date of the Securitization, the Purchaser provides written evidence to the Seller (satisfactory to the Seller in its reasonable good faith) that, based on levels provided by a retained rating agency for the Securitization, the ‘AAA’ grade bonds in the Securitization would, (1) if the Securitization is a static transaction, price at a rate higher than LIBOR+200bp or (2) if the Securitization is a managed transaction, price at a rate higher than LIBOR+220bp, then the Purchaser shall have the right to terminate the Transaction and will have no obligation to purchase the Mortgage Assets.

21. Pursuant to Section 8.1 of the PSA, Cascade may exercise its right to terminate the PSA under the Market Disruption Clause “at any time prior to the Initial Closing” set to occur on April 15, 2020 by “giv[ing] written notice of such termination to” Bancorp.

B. Return Of The Deposit Upon Termination

22. Pursuant to Section 2.5(a) of the PSA, Cascade agreed to (and did) pay Bancorp an initial deposit of \$12,469,316 (the “Deposit”) on February 24, 2020 in connection with executing the PSA. The PSA provided for the return of that Deposit, however, in the event the PSA was justifiably terminated by Cascade — or wrongfully terminated by Bancorp — under a variety of

³ The Securitization at issue in this action is a static transaction, meaning no new assets are added to the collateral pool, as opposed to a managed transaction, meaning the collateral manager can buy or sell assets post-issuance to maintain or improve the quality of the collateral pool. Accordingly, the pricing trigger for a managed transaction—LIBOR+220bp—is not relevant here.

circumstances. In the event of termination by Cascade pursuant to the Market Disruption Clause, the plain language of the PSA — including Sections 2.5(c) and 7.5(c), and Article VIII — obligates Bancorp to return the Deposit to Cascade. Bancorp’s obligation to return the Deposit to Cascade in the event of a “Market Out” termination was specifically negotiated by the Parties, with PSA drafts evidencing that the Parties deliberately struck language from the Market Disruption Clause that would have permitted Bancorp to retain the Deposit.

23. Pursuant to Section 11.9(a) of the PSA, “[t]he Parties agree[d] that irreparable damage would occur in the event that any of the provisions of this [PSA] were not performed by the Parties in accordance with their specific terms or were otherwise breached.” Accordingly, Cascade is “entitled to seek an injunction” to prevent breaches of the PSA and “seek to enforce specifically the terms and provisions of” the PSA.

III. Cascade Works In Good Faith To Close The Securitization

24. Cascade engaged JPMS as the sole structuring agent, book-runner, and lead manager for the Securitization. JPMS is widely regarded as the leading manager in the CRE CLO marketplace. Throughout March 2020 — and notwithstanding the unfolding market crisis — Cascade worked with JPMS and Bancorp towards closing the Securitization.

25. Among other things, Cascade worked to compile a preliminary offering memorandum to be provided to potential investors. On March 25, 2020, JPMS obtained feedback on the Securitization from DBRS Morningstar, a rating agency. Cascade forwarded this information to Bancorp on March 30, 2020. JPMS and Cascade also obtained feedback from Moody’s, another rating agency. On March 30, 2020, Cascade filed with the SEC an independent accountants’ report required under Section 15G of the Securities Exchange Act of 1934.

26. Cascade continued these good faith efforts even as it became clear based on market conditions that the Pricing Trigger of LIBOR+200bp would be exceeded by a wide margin. For

example, by March 27, 2020, JPMS was already using LIBOR+250bp as its projected spread for the ‘AAA’ bonds based on current market levels in order to obtain rating agency feedback.

IV. The Market Collapses

27. On or about March 11, 2020, the World Health Organization declared the Novel Coronavirus SARS-CoV-2, which causes the COVID-19 disease (the “Coronavirus”), a global pandemic. The United States government declared a state of emergency on March 13, 2020; by April 11, 2020, all 50 states were under a major disaster declaration for the first time in U.S. history.

28. Governors across the country issued executive orders suspending non-essential business and travel activity, imposing “social distancing” measures preventing people from gathering, and encouraging residents to stay at home. On March 22, 2020, the governor of New York announced the “New York State on Pause” executive order closing all “non-essential businesses” and prohibiting all “non-essential gatherings.” Unemployment predictably skyrocketed, with tens of millions of unemployment claims filed to date. The concomitant contraction in economic activity and uncertainty surrounding the Coronavirus has battered the U.S. economy and sent shock waves through the markets.

29. The CRE CLO and related CMBS markets were not spared. Forbearance requests from borrowers on the commercial mortgage loans underlying CRE CLO and CMBS transactions spiked, rendering the performance of loans increasingly uncertain and making it impossible to bring a deal to the market. In March 2020, multiple CMBS transactions and at least one CRE CLO transaction were pulled from the market. No CRE CLO was issued for over two months. More precisely, after XAN 2020-RS08 was priced on March 2 and settled on March 12, the next CRE CLO issued was AREIT 2020-CRE4, which priced on May 19, 2020, with the ‘AAA’ bonds pricing at LIBOR+265bp.

30. Unsurprisingly, in late March and early April 2020, spreads in the secondary market for CRE CLOs with ‘AAA’ grade bonds, including the ‘AAA’ grade bonds in Bancorp’s own 2018-CRE3 and 2019-CRE6 CRE CLOs, were substantially higher than LIBOR+200bp. Even as markets improved, the ‘AAA’ grade bonds in Bancorp’s 2019-CRE6 CRE CLO continued to price higher than LIBOR+200bp in early May 2020. By comparison, spreads in the secondary market for CRE CLOs with ‘AAA’ grade bonds prior to March 2020 were within a range of 90bp to 130bp over LIBOR.

31. CRE CLOs were *not* included in the Term Asset-Backed Securities Loan Facility program established by the Federal Reserve to facilitate the issuance of asset-back securities and restore liquidity to the market. Consequently, CRE CLOs received no direct benefit from the federal government’s unprecedented efforts to offer liquidity to the credit markets.

V. Cascade Exercises Its Contractual Right To Terminate The PSA Under The Market Disruption Clause

32. The PSA permitted Cascade to exercise the Market Out beginning fifteen days before the scheduled April 15, 2020 closing date for the Securitization. By March 31, 2020, it was readily apparent from market conditions that the ‘AAA’ bonds in the Securitization would price, if at all, substantially above LIBOR+200bp. To provide Bancorp the required written evidence that the Pricing Trigger was met, Cascade sought the expert determination of the party best situated to provide it: JPMS, the leading manager of CRE CLOs generally (thus deeply knowledgeable about general market PSA conditions) and the manager of the Securitization (thus deeply knowledgeable about the structure, assets, and other characteristics of the Securitization).

33. Informing a securitization sponsor of the spread at which its securitization would price is an essential component of the services provided by a lead manager for any CRE CLO. Sponsors of CRE CLOs regularly seek and rely on this type of pricing projection from lead

managers in the ordinary course of deciding whether and when to attempt to market and sell CRE CLO securities to investors.

34. On March 31, 2020, Cascade made the following request of JPMS in writing: “Based on the collateral enhancement levels we received from DBRS Morningstar and Moodys, what spread over LIBOR would you expect the AAA tranche to price (assuming a par purchase price) if we were to announce today?” To ensure an unbiased and objective response, Cascade did not inform JPMS that it intended to use JPMS’s response as written evidence of the Market Out.

35. JPMS’s Executive Director and Head of Primary CMBS Trading in North America responded in writing that the tranche would price at LIBOR+300bp, well in excess of the LIBOR+200bp Pricing Trigger in the PSA. JPMS also stated that with a 1% LIBOR floor, the tranche would price at LIBOR+250bp. Thus, even with a 1% LIBOR floor (a concession neither contemplated by the PSA nor typical in the industry), the Pricing Trigger was met by a wide margin.

36. After receiving JPMS’s determination unambiguously confirming that the Pricing Trigger was met, Cascade exercised its contractual right to terminate the PSA pursuant to the Market Disruption Clause and Section 8.1 of the PSA — and demanded the immediate return of the Deposit pursuant to Section 2.5(c) of the PSA — by letter dated March 31, 2020 (the “Termination Letter”).

37. The Termination Letter attached the contractually required “written evidence” that the ‘AAA’ grade bonds in the Securitization would price at a rate higher than LIBOR+200bp: the written determination by JPMS. There is no reasonable, good faith basis for Bancorp not to accept JPMS’s determination as satisfactory evidence that the Pricing Trigger was met.

VI. Bancorp Turns A Blind Eye to Dispositive Written Evidence And Market Realities to Withhold Cascade's Deposit

38. Flagrantly breaching its obligation to act reasonably and in good faith, Bancorp responded to the Termination Letter on April 1, 2020 by claiming that the only written evidence regarding the Pricing Trigger “satisfactory to the Seller in its reasonable good faith” was certification from Cascade that the ‘AAA’ grade bonds had priced over LIBOR+200bp “based on actual bids from investors obtained after contacting accounts and distribution of a Preliminary Offering Memorandum and the Structural and Collateral Term Sheet” (hereinafter, “Actual Bids Certification”). Adding insult to injury, Bancorp condemned the evidence provided—unbiased, expert pricing determinations from the institution most knowledgeable regarding the Securitization—as “the unsubstantiated and ambiguous opinion of one individual at” JPMS.

39. Bancorp’s purported construction of the Market Disruption Clause was unreasonable and in bad faith. Bancorp’s construction is negated by the plain text of the PSA, which requires “written evidence,” not “actual bids.” Bancorp’s construction disregards the overwhelming and unambiguous contemporaneous market evidence that the Pricing Trigger had been met; indeed, analogous securitizations were so uneconomic that no new CRE CLOs were being offered to the market.

40. Bancorp’s “actual bids” requirement was also commercially unreasonable and, as a practical matter, impossible to satisfy. To obtain “actual bids” from investors in a Securitization that Cascade was neither prepared nor required to close at prevailing market prices, Cascade would have needed to either deceive JPMS about its willingness to close the Securitization or JPMS would be required to deceive investors regarding the same. Cascade never would, or could, agree to defraud the market (or to enlist JPMS to do so) by engaging in a sham offering process, risking, among other things, irreparable harm to both Cascade’s and JPMS’s business relationships and

reputation. No prudent lead manager and no prudent securitization sponsor would ever take a CRE CLO to market after the lead manager determined that the spread at which the securitization would price exceeds the spread at which the sponsor would transact.

41. On April 2, 2020, Cascade's deal counsel provided Bancorp with a detailed explanation why the JPMS determination — which memorialized in writing what was obvious to Bancorp, Cascade, and every other market participant — triggered the Market Disruption Clause and why Bancorp's interpretation was nonsensical. As further support for JPMS's determination, Cascade's counsel identified numerous relevant market spreads in the secondary market for CRE CLO 'AAA' grade bonds, all of which substantially exceeded LIBOR+200bp. Bancorp's own deals traded in the secondary market in the LIBOR+300bp range. Cascade provided no contemporaneous primary market spreads because the market disruption was so complete that no new CRE CLOs had issued. Cascade's deal counsel reiterated Cascade's request for the return of the Deposit.

42. On April 9, 2020, after negotiations among the parties disintegrated, Bancorp wrote Cascade reiterating its position that only an Actual Bids Certification could trigger the Market Disruption Clause and refusing to return the Deposit in breach of the PSA.

43. On April 14, 2020, counsel for Cascade responded, reiterating that Cascade had terminated the PSA and provided satisfactory evidence to trigger the Market Disruption Clause. The letter notified Bancorp that Cascade would pursue any and all damages and remedies against Bancorp unless it immediately complied with its contractual obligation to return the Deposit.

44. On April 15, 2020, in a transparent attempt to posture for a litigation that Cascade could not commence due to ongoing New York State court closures, Bancorp wrote Cascade to advise that Cascade's refusal to consummate the purchase of the Mortgage Assets under the PSA

— a contract that Cascade had terminated two weeks earlier — constitutes a default pursuant to Section 8.2(a) of the PSA. Bancorp further claimed that, if Cascade did not purchase the Mortgage Assets within ten business days, the PSA would terminate and Cascade would forfeit its Deposit. Bancorp's April 15, 2020 demands were a legal nullity because Cascade terminated the PSA on March 31, 2020.

45. The explanation for Bancorp's bad faith refusal to comply with its obligation to return the Deposit is clear from its own disclosures: to improperly recognize the Deposit as income to artificially inflate their performance.⁴

46. Due to Bancorp's breach, Cascade has suffered damages in an amount not less than the Deposit plus interest, along with all costs and expenses, including attorneys' fees, associated with Bancorp's bad faith refusal to return the Deposit.

FIRST CAUSE OF ACTION

Breach of Contract

47. Cascade repeats all of the foregoing allegations as if fully set forth herein.

48. The PSA is a valid and enforceable contract.

49. Cascade has performed all conditions, covenants, and promises required by it to be performed under the PSA.

50. Cascade terminated the PSA pursuant to Sections 7.5(c) and Article VIII of the PSA, and demanded the return of the Deposit in accordance with Section 2.5(c) of the PSA.

51. Bancorp unreasonably and in bad faith refused to accept Cascade's written evidence that the Pricing Trigger in Section 7.5(c) had been met and to return the Deposit.

52. Cascade has suffered damages as a direct result of Bancorp's breaches.

⁴ See Bancorp, Inc. Form 8-K, Ex. 99.1, filed on April 30, 2020 (stating that "[t]he Bank intends to recognize the deposit [of \$12.5 million] as income").

53. By reason of the foregoing, Cascade is entitled to damages in an amount not less than \$12,469,316 plus interest, to be determined at trial.

SECOND CAUSE OF ACTION

Injunction and Specific Performance

54. Cascade repeats all of the foregoing allegations as if fully set forth herein.

55. The PSA is a valid and enforceable contract.

56. Cascade has performed all conditions, covenants, and promises required by it to be performed under the PSA.

57. Cascade terminated the PSA pursuant to Section 7.5(c) and Article VIII of the PSA, and demanded the return of the Deposit in accordance with Section 2.5(c) of the PSA.

58. Bancorp unreasonably and in bad faith refused to accept Cascade's written evidence that the Pricing Trigger in the Section 7.5(c) had been met and refused to return the Deposit.

59. The Parties agreed that irreparable damage would occur in the event that any of the provisions of the PSA were not performed by the Parties.

60. By reason of the foregoing, Cascade is entitled to an injunction and specific performance of Bancorp's obligation to return the Deposit.

THIRD CAUSE OF ACTION

Declaratory Judgment

61. Cascade repeats all of the foregoing allegations as if fully set forth herein.

62. The PSA is a valid and enforceable contract.

63. Cascade has performed all conditions, covenants, and promises required by it to be performed under the PSA.

64. On March 31, 2020, Cascade terminated the PSA pursuant to Section 7.5(c) and Article VIII of the PSA, and demanded the return of the Deposit in accordance with Section 2.5(c)

of the PSA.

65. Bancorp unreasonably and in bad faith refused to accept Cascade's written evidence that the Pricing Trigger in the Section 7.5(c) had been met and return the Deposit. Bancorp further sent Cascade a notice of default on April 15, 2020 claiming that if Cascade does not purchase the Mortgage Assets within ten business days, the PSA will terminate and Cascade will forfeit its Deposit.

66. There is therefore an actual and justiciable controversy between Cascade and Bancorp as to whether Bancorp's effort to terminate the PSA after Cascade's termination is valid and Cascade's right to the Deposit.

67. A declaration will have the immediate and practical effect of influencing Bancorp's conduct.

68. By reason of the foregoing, Cascade is entitled to a declaration that: (i) Cascade has validly terminated the PSA pursuant to Section 7.5(c) and Article VIII; (ii) Bancorp's effort to terminate the PSA after Cascade's termination is invalid; and (iii) Bancorp is required to return the Deposit to Cascade.

PRAYER FOR RELIEF

WHEREFORE, Cascade respectfully requests that the Court enter judgment against Bancorp for the following relief:

(i) An award of damages against Bancorp in an amount not less than \$12,469,316, plus prejudgment interest at no less than the 9% interest rate provided by CPLR 5004 and the maximum prejudgment interest otherwise permitted by law, as warranted by Defendants' bad faith conduct, to be determined at trial;

(ii) An order granting an injunction compelling Bancorp to return the Deposit, and specific performance of Bancorp's obligation to return the Deposit;

- (iii) An order declaring that:
 - a. Cascade validly and justifiably terminated the PSA pursuant to Section 7.5(c);
 - b. Bancorp is required to return the Deposit, plus interest, to Cascade;
- (iv) Costs, interest, expenses, and attorneys' fees; and
- (v) Such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 25, 2020

KASOWITZ BENSON TORRES LLP

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