SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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EROS MANAGEMENT AND REALTY, LLC, PIONEER MANAGEMENT AND REALTY, LLC, and JOHN SHARMA,

Plaintiffs,

INDEX NUMBER _____

-against-

AC35 HOTEL PARTNERS LLC,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted by the Plaintiffs EROS MANAGEMENT AND REALTY, LLC ("EROS"), PIONEER MANAGEMENT AND REALTY LLC ("Pioneer") and JOHN SHARMA ("Sharma") (collectively referred to as "Plaintiffs") in support of their Motion for a Preliminary Injunction to restrain and enjoin the Defendant AC35 HOTEL PARTNERS LLC ("AC35") from enforcing a Settlement Agreement (*see,* **Exhibit A**, a copy of the Settlement Agreement) and Purchase and Sale Agreement (*see,* **Exhibit B**, a copy of the Purchase and Sale Agreement) between the parties that, because of the effects of COVID-19 is impossible for the Plaintiffs to perform under the Settlement Agreement and there has been a frustration of purpose with respect to the Settlement Agreement.

EROS is the owner of the real property located at 345 West 35th Street, New York, New York ("Real Property") and owns the TRYP by Wyndham New York City Times Square South hotel ("TRYP Hotel"), which operates on the Real Property. *See,* Affidavit of John Sharma, sworn to on the 10th day of November 2020, at ¶ 2 ("Sharma Affidavit")

As a result of COVID-19, the TRYP Hotel's business has dropped between 98% and 100%, depending upon the New York State regulations imposed by the Governor's Executive Orders and depending upon regulations placed upon hotels and gatherings by the Mayor of New York and the availability of guests. *See,* Sharma Affidavit, at ¶ 3.

COVID-19 has devasted the TRYP Hotel's business. *See,* Sharma Affidavit, at ¶ 4. *See,* **Exhibit C**, a cop of the Travel Weekly article dated September 30, 2020. The devastating effects of almost the complete shutdown of the TRYP Hotel from March 7, 2020 through today has made keeping any financial commitments impossible for the Plaintiffs. *See,* Sharma Affidavit, at ¶ 4.

The effects of COVID-19 can best be shown as it relates to July 2020 bookings at the TRYP Hotel. As July 2020 approached, the TRYP Hotel was reflecting what was going to be a ten percent (10%) occupancy rate. However, in July 2020, Governor Cuomo issued travelling warnings and quarantine regulations requiring people from out-of-State to quarantine for two weeks upon arrival

into New York. This quarantine requirement also placed a burden on hotels, like the TRYP Hotel, to monitor its guests to ensure proper quarantining. In fact, the TRYP Hotel was required to create a log of all guests and contact tracers regularly contacted the TRYP Hotel to make sure any guests were properly quarantining. Once the quarantine requirements were imposed, the TRYP Hotel's occupancy crashed to zero percent (0%) occupancy. *See,* Sharma Affidavit, at ¶ 5.

In addition, the TRYP Hotel obtains a lot of business from international travelers. *See,* Sharma Affidavit, at ¶ 6. However, since international travel is essentially non-existent, but to the extent it is on-going there are quarantine mandates, the TRYP Hotel has not had any international guests since essentially March 2020. *See,* Sharma Affidavit, at ¶ 6.

But AC35 knows about the effects the COVID-19 pandemic has had on the TRYP Hotel because its hotels, the Even Hotel, Marriot Courtyard on 30th Street, and the Hotel Shocard have all been shut down and are not accepting reservations. *See,* Sharma Affidavit, at ¶ 7.

In fact, the Hotel Shocard's website, a hotel owned by the owners of AC35 (*see,* Sharma Affidavit, at ¶ 8) states that they "look forward to welcoming you back to our hotel on May 1st, 2021!" **Exhibit D**, a copy of the Hotel Shocard's website.

What happened to the TRYP Hotel as a result of COVID-19 has been devastating.

If the pandemic effects were not bad enough, in the Summer of 2020, riots broke out in Manhattan. Since the TRYP Hotel sits next to the Midtown South Police Precinct on 35th Street, between 8th and 9th Avenues, the street was barricaded for approximately three months because the police precinct received bomb threats. *See,* Sharma Affidavit, at ¶ 9. While it is unclear how much effect the street closing had on business since business did not really even exist in the Summer of 2020 because of the travel restrictions and quarantine orders imposed by the New York State Governor, the closing was just another problem faced by the TRYP Hotel that makes it impossible for the Plaintiffs to live up to their contractual obligation.

Before the COVID-19 pandemic was ever known or expected, on or about October 31, 2019, the Plaintiffs entered into a Settlement Agreement and Release and a Purchase and Sale Agreement with AC35. *See,* **Exhibit A**. *See,* **Exhibit B**.

The Settlement Agreement and the Purchase and Sale Agreement required Pioneer to purchase AC35's 32.5% membership interest in EROS for the total sum of $8,150,000.00. The payment schedule in the Settlement Agreement required Pioneer to pay $1,000,000 on or before November 1, 2019; $337,593.13 on or before December 15, 2019; $500,000 on or before March 15, 2020; $500,000 on or before July 15, 2020; and $6,150,000 on or before November 15, 2020. *See,* **Exhibit A**, at ¶ 2. *See,* **Exhibit B**, at ¶ 1(b).

Once the $1,000,000 was paid on November 1, 2019, AC35 no longer owned any membership interests in EROS. *See,* **Exhibit A**, at ¶ 2.

The Plaintiffs made timely payments for November 2019, December 2019, March 2020, and July 2020. *See,* Sharma Affidavit, at ¶ 11.

The Plaintiffs, however, cannot make the November 15, 2020 payment in the amount of $6,150,000.00 because COVID-19 closed down the TRYP Hotel. *See,* Sharma Affidavit, at ¶ 12.

When the deal was struck in October 2019, AC35 knew that the Plaintiffs needed to borrow the money for the November 15, 2020 payment. AC35 knew that the Plaintiffs did not have the cash to make a $6.15 million payment in November 2020. *See,* Sharma Affidavit, at ¶ 13.

Despite have conversations with EROS' lender beginning in February 2020 to structure a borrowing enabling the Plaintiffs to make the November 15, 2020 payment, as a consequence of the COVID-19 pandemic, all the conversations ceased and there is no likelihood that the Plaintiffs will be able to borrow the money to pay AC35 for the November 15, 2020 payment of $6.15 million.

As a result of COVID-19, the mortgage and financing market has dried up. The Plaintiffs own a hotel in Manhattan with no "light at the end of the tunnel" when the operations of the hotel will get back to normal. There is simply no one lending money to the Plaintiffs because the business prospects are so speculative. *See,* Sharma Affidavit, at ¶ 14.

Despite every effort by the Plaintiffs it has become clear that it will be impossible for the Plaintiffs to make the $6.15 million payment on November 15, 2020. As a result of the COVID-19 pandemic, there has been a frustration of purpose with respect to the Settlement Agreement.

The Plaintiffs are not trying to evade or never pay AC35 the $6.15 million. *See,* Sharma Affidavit, at ¶ 15.

The Plaintiffs just need time to pay and request that the Court delay the enforcement of the Settlement Agreement and its default provisions, including the: (1) Promissory Note issued by the Plaintiffs (*see,* **Exhibit E**); (2) Confessions of Judgment executed by the Plaintiffs (*see,* **Exhibit F**); and (3) reclaiming an interest in EROS. *See,* **Exhibit B**, at ¶ 7.

The Plaintiffs are not asking the Court to void the Settlement Agreement or the Purchase and Sale Agreement, only to delay the enforcement of the default provisions to enable the Plaintiffs to make payment, either by a payment schedule or delaying the lump sum payment of $6.15 million until the COVID-pandemic's effects on the TRYP Hotel's business becomes clearer.

For the reasons argued in this Memorandum of Law and in the Sharma Affidavit, the Plaintiffs request the Court issue a Preliminary Injunction enjoining AC35 from enforcing the Settlement Agreement's default provisions.

POINT I. THE DOCTRINE OF IMPOSSIBILITY REQUIRES THE COURT TO ISSUE A PRELIMINARY INJUNCTION

It is impossible for the Plaintiffs to make the $6.15 million payment on November 15, 2020 as required by the Settlement Agreement and the Purchase and Sale Agreement. *See,* **Exhibit A**, at ¶ 2.d. *See,* **Exhibit B**, at ¶ 1(b)5. *See,* Sharma Affidavit, at ¶ 16.

A. The Doctrine Of Impossibility

In *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987), the Court held:

> Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome; until the late nineteenth century even impossibility of performance ordinarily did not provide a defense (Calamari and Perillo, Contracts § 13-1, at 477 [2d ed 1977]). While such defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances *(see*, Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 Notre Dame Law 203, 207 [1979]). Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract *(see, 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275; *Ogdensburg Urban Renewal Agency v Moroney*, 42 AD2d 639).

In *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968) the Court held: "Generally, however, the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, *vis major*, or by law."

"[T]he law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable." *A&S Transp. Co. v. County of Nassau*, 154 A.D.2d 456, 459 (2d Dept 1989).

"There is ample authority holding that where performance becomes impossible because of action taken by government, performance is excused. (See 10 NY Jur, Contracts, § 373, and cases there cited.)." *Metpath, Inc. v. Birmingham Fire Ins. Co.*, 86 A.D.2d 407, 411 (1st Dept 1982).

The facts relating to the underlying dispute meet the elements of the doctrine of impossibility.

B. Facts As Applied To The Law

1. COVID-19 Pandemic Was Act Of God That Was Not Foreseeable

There can be no dispute that on October 31, 2019 when the Settlement Agreement and the Purchase and Sale Agreement were executed, the COVID-19 pandemic was an unanticipated event that could not have been foreseen or guarded against in the Settlement Agreement.

In addition, there can be no dispute that the COVID-19 pandemic was an act of God.

2. Governor's Orders And Mayor's Restrictions Were Intervening Governmental Activities That Were Unforeseeable

There can be no dispute that the Governor's Executive Orders and the Mayor's restrictions placed upon businesses and gatherings beginning in March 2020 were acts of law that made performance of the Settlement Agreement and the Purchase and Sale Agreement impossible because the TRYP Hotel was shut down by orders of the Governor and the Mayor and when the restrictions were partially lifted, the business of the TRYP Hotel has remained very weak and to some extent non-existent. *See,* Sharma Affidavit, at ¶ 17.

The government actions taken by the New York State Governor and the New York City Mayor as a result of the COVID-19 pandemic were not foreseeable.

3. The COVID-19 Pandemic And Government Actions Made The Plaintiffs' Means Of Performance Of Objectively Impossible

AC35 knew that the Plaintiffs needed to obtain financing and borrowing to make the November 15, 2020 payment. *See,* Sharma Affidavit, at ¶ 13.

In February, 2020, knowing that the Plaintiffs needed to obtain financing to make the November 15, 2020 payment, the Plaintiffs began the process of seeking borrowing from EROS's current lender to obtain cash to fund the November 15, 2020 payment. *See,* Sharma Affidavit, at ¶ 18. In February 2020, the Plaintiff had extensive conversations with EROS's lender and had actually began the application process to obtain the funding to pay for the November 15, 2020 payment. *See,* Sharma Affidavit, at ¶ 19.

However, once the March 20, 2020 shut down of the New York economy occurred (*see,* **Exhibit G**, a copy of Governor Cuomo's March 20, 2020 Executive Order), all conversations with the lender ceased, the loan was transferred to a new loan servicer, and EROS began to be in technical default of the loan as a result of the lack of business at the TRYP Hotel. *See,* Sharma Affidavit, at ¶ 20.

Through the months of March, April, May, June, July, August, September, October, and November 2020, the Plaintiffs have been working tirelessly to obtain the financing to pay the November 15, 2020 payment in the amount of $6.15 million.

Despite all efforts made by the Plaintiffs, as a consequence of the effects of the COVID-19 pandemic, all funding sources have dried up and the Plaintiffs have been unable to obtain financing to fund the November 15, 2020 payment in the amount of $6.15 million.

The COVID-19 pandemic along with the State and City governments' restrictions and regulations caused a highly significant downturn in the TRYP Hotel's business, which has made borrowing objectively impossible.

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The Plaintiffs can meet each of the elements of the doctrine of impossibility sufficiently for the Court to issue a Preliminary Injunction, enjoining AC35 from declaring a default under the Settlement Agreement and taking any actions to file the Promissory Notes, the Confessions of Judgment, reclaim any interest in EROS or any other judgment enforcement mechanisms.

The Plaintiffs are looking for a delay and time to make the payment. Granting the Plaintiffs time to make the payment at a time when the COVID-19 pandemic has eased sufficient to permit the TRYP Hotel's business to rebound so that the Plaintiffs can obtain the necessary funding to pay AC35 the $6.15 million.

POINT II. THE DOCTRINE OF FRUSTRATION OF PURPOSE REQUIRES THE COURT TO ISSUE A PRELIMINARY INJUNCTION

A. Doctrine Of Frustration

In *Crown IT Servs. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dept 2004), the Court held that the doctrine of frustration of purpose

> is a narrow one which does not apply "unless the frustration is substantial" (*Rockland Dev. Assoc. v Richlou Auto Body, Inc.*, 173 A.D.2d 690, 691, 570 N.Y.S.2d 343 [1991]). In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense (*see* Restatement [Second] of Contracts § 265 [1981]).

In *Rebell v. Trask*, 220 A.D.2d 594, 597-598 (2d Dept 1995), the Court held:

> In view of these strong policy considerations, settlement agreements may only be set aside on relatively narrow grounds. Hence, "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation [of settlement] made during litigation" (*Hallock v State of New York*, 64 NY2d 224, 230, *supra; see, Serna v Pergament Distribs.*, 182 AD2d 985, *supra*). We find unpersuasive Rebell's contention that the settlement agreement should be set aside because its purpose was frustrated by circumstances beyond his control. While the doctrine of frustration of purpose may constitute a valid ground for vacating a settlement (*see, Central Val. Concrete Corp. v Montgomery Ward & Co.*, 34 AD2d 860; *Monasebian v Du Bois*, 30 AD2d 839), that doctrine is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence (*see, 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275,

282; *Fifth Ave. of Long Is. Realty Assocs. v KMO-361 Realty Assocs.*, 211 AD2d 695, 696; *Beagle v Parillo*, 116 AD2d 856, 857; *Frenchman & Sweet v Philco Discount Corp.*, 21 AD2d 180, 182).

B. Facts As Applied To The Law

As discussed above at Point II.B., the COVID-19 pandemic, which resulted in the New York State Governor's and New York City Mayor's Executive Orders, regulations, and restrictions placed upon the TRYP Hotel's business strongly adversely impacted the TRYP Hotel's business.

COVID-19 and its effects on the TRYP Hotel's business were not foreseeable on October 31, 2019 when the Settlement Agreement was executed. There was no way for the parties to the Settlement Agreement to have made provision for a pandemic and the subsequent effects on the TRYP Hotel's business.

AC35 knew that in order for the Plaintiffs to make the November 15, 2020 payment under the Settlement Agreement, the Plaintiffs had to borrow money from a lender because the Plaintiffs did not have $6.15 million in cash. *See,* Sharma Affidavit, at ¶ 13.

As a result of the COVID-19 pandemic and the effects the New York State Governor's and New York City Mayor's regulations and restrictions had upon the TRYP Hotel's business, the mortgaging and lending market has completely dried up. *See,* Sharma Affidavit, at ¶ 21.

As a consequence of the lack of a borrowing market, the complete basis of the Settlement Agreement, *i.e.,* the November 15, 2020 payment of $6.15 million has been frustrated by the COVID-19 pandemic and its effect on the TRYP Hotel's business. Without the lump sum payment of $6.15 million, the transaction made little sense.

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The Plaintiffs can meet each of the elements of the doctrine of frustration of purpose sufficiently for the Court to issue a Preliminary Injunction, enjoining AC35 from declaring a

default under the Settlement Agreement and taking any actions to file the Promissory Notes, the Confessions of Judgment or any other judgment enforcement mechanisms.

The Plaintiffs are looking for a delay and time to make the payment. The Plaintiffs are requesting time to make the payment at a time when the COVID-19 pandemic has eased sufficient to permit the TRYP Hotel's business to rebound so that the Plaintiffs can obtain the necessary funding to pay AC35 the $6.15 million.

POINT III. PROMISSORY ESTOPPEL BARS AB35 FROM HOLDING THE PLAINTIFFS IN DEFAULT OF THE SETTLEMENT AGREEMENT

The Settlement Agreement required the Plaintiffs to make payments as follows: (1) $1,000,000 on or before November 1, 2019; (2) $337,593.13 on or before December 15, 2019; (3) $500,000 on or before March 15, 2020; (4) $500,000 on or before July 15, 2020; and (5) $6,150,000 on or before November 15, 2020. *See,* **Exhibit A**, at ¶ 2.

The Plaintiffs made the November payment on time. *See,* Sharma Affidavit, at ¶ 22.

The Plaintiffs made the December payment on time. *See,* Sharma Affidavit, at ¶ 11.

The Plaintiffs made the March payment on time, despite the fact that it was due right at the beginning of the COVID-19 pandemic and after the TRYP Hotel was closed down by the New York State Governor's Executive Order. *See,* Sharma Affidavit, at ¶ 23. *See also,* **Exhibit G**.

The Plaintiffs made the July payment on time, despite it being paid in the midst of COVID-19, when the TRYP Hotel was closed down. *See,* Sharma Affidavit, at ¶ 24. But it was made under the assumption and based upon promises made by AC35 that the November 2020 payment would be re-negotiated. *See,* Sharma Affidavit, at ¶ 25.

In conversations and negotiations over the Plaintiffs' attempts to postpose and extend or pay out the July payment, AC35 promised that if the July payment was made, AC35 would work with the Plaintiffs to extend and modify the November 2020 payment. *See,* **Exhibit H**, copies of

email relating to the July 2020 payment and promises to negotiate over the November 2020 payment.

Now that the November 2020 payment is due, AC35 has not acted in good faith in negotiating a reasonable deal to avert a default under the terms of the Settlement Agreement. *See,* Sharma Affidavit, at ¶ 26. AC35 has demanded financial records, an exorbitant down payment, and monthly payments while the TRYP Hotel's business struggles under the weight of the COVID-19 pandemic.

The doctrine of promissory estoppel should be imposed by the Court to estop AC35 from holding the Plaintiffs in default because the Plaintiffs relied upon AC35's promises and made the July 2020 payment. *See,* Sharma Affidavit, at ¶ 27.

In *Ripple's of Clearview, Inc. v. Le Havre Assoc.*, 88 A.D.2d 120, 122 (2d Dept 1982), the Court held: "[t]he elements of promissory estoppel are: a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance."

The Plaintiffs can meet each of these elements.

There was a clear and unambiguous promise by AC35 that if the Plaintiffs made the July 2020 payment in full timely, then AC35 would negotiate an extension of deadline to make the payment. *See,* **Exhibit H**.

Relying upon this promise, the Plaintiffs made the July 2020 payment of $500,000.00 timely. *See,* Sharma Affidavit, at ¶ 28. The Plaintiff's reliance upon AC35's promise was foreseeable by AC35.

In essence, AC35 induced the Plaintiffs to make the July 2020 payment with the promise that they would negotiate an extension of the November 2020 payment. *See,* Sharma Affidavit, at ¶ 29.

However, AC35 has not acted in good faith. *See,* Sharma Affidavit, at ¶ 30. AC35 has made unreasonable demands like financial statements and information regarding the Plaintiffs financial condition as a pre-condition to the discussion regarding an extension of the November 2020 deadline. AC35 has made unreasonable down payment demands and payment terms that it knows the Plaintiffs cannot afford and cannot agree to under the current economic struggles effecting the TRYP Hotel during COVID-19. *See.* Sharma Affidavit, at ¶ 31. All of these demands is not acting in good faith, but backing the Plaintiffs into a corner without a way out.

As a result of AC35's promise and the Plaintiffs' reasonable reliance upon the promise, the Plaintiffs will be injured if AC35 does not negotiate in good faith in negotiating an extension of the November 15, 2020 deadline. This injury will be devastating because it will result in a judgment and enforcement proceedings despite a promise not to take on these undertakings if the Plaintiffs paid the July 2020 payment and AC35 knows it. *See,* **Exhibit I**, a copy of Chip Weiss' July 1, 2020 email.

This Court should issue a Preliminary Injunction to protect the Plaintiffs from suffering a devastating loss just because the Plaintiffs reasonably relied upon AC35's promise to modify and/or extend the November 2020 payment.

POINT IV. AC35'S BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

"Implicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318, 662 NE2d 763, 639 NYS2d 283 [1995]; *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389, 663 NE2d 289, 639 NYS2d 977 [1995]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304, 448 NE2d 86, 461 NYS2d 232 [1983]; *Outback/Empire I, Ltd. Partnership v Kamitis, Inc.*, 35 AD3d 563, 825 NYS2d 747 [2006]). Even if a party is not in breach of its express contractual obligations, it "may be in breach of the implied duty of good faith and fair dealing . . . when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit (or benefit) of its bargain" (*Marion Scott Real Estate, Inc. v Rochdale Vil., Inc.*, 23 Misc 3d 1129[A], 886

NYS2d 68, 2009 NY Slip Op 50997[U], *8 [2009]; *see Moran v Erk*, 11 NY3d 452, 456, 901 NE2d 187, 872 NYS2d 696 [2008]; *Dalton v Educational Testing Serv.*, 87 NY2d at 389)." *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 A.D.3d 781, 784 (2d Dept 2012).

AC35 has not acted in good faith in its dealings with the Plaintiffs. *See*, Sharma Affidavit, at ¶ 33.

The Plaintiffs have made every payment due and owing under the Settlement Agreement and the Purchase and Sale Agreement. The Plaintiffs made payments at the beginning of COVID-19 in March 2020 and at the height of COVID-19 in July 2020. *See*, Sharma Affidavit, at ¶ 11. The Plaintiffs have acted in good faith since the October 31, 2019 contracts were executed.

AC35 has promised to extend the November 2020 payment if the July 2020 payment was made timely and in full. *See*, **Exhibit H**. Now, when it comes time to negotiate the November 2020 extension, AC35 has made unreasonable demands for financial disclosure and financial documents before addressing offer to extend the November 2020 payment. AC35 has demanded that the Plaintiffs make a large lump sum payment to obtain a new payment schedule in amounts that AC35 knows the Plaintiffs cannot meet.

AC35 threatened the Plaintiffs with immediate default if payment was not made, while at the same time offering condolences for the loss of one of the members of EROS. AC35 threatened to force a sale of the property if it was not paid. AC35 threatened to not even wait the default cure period (*see*, **Exhibit A**, at ¶ 4.b.) before destroying the Plaintiffs. *See*, **Exhibit I**.

AC35 has not acted in good faith despite the Plaintiffs' good faith actions (by making every payment timely under the Settlement Agreement and the Purchase and Sale Agreement) and by making offers to AC35 to extend the November 2020 payment. AC35's bad faith has hindered any negotiation for an extension of the November 2020 payment.

Accordingly, there is sufficient evidence that AC35 has breached the covenant of good faith and fair dealing and therefore, the Court should issue a Preliminary Injunction.

POINT V. THE PLAINTIFFS CAN SET FORTH THE NECESSARY ELEMENTS FOR A PRELIMINARY INJUNCTION

In *Aetna Insurance Company v. Capasso*, 75 N.Y.2d 860, 862 (1990), the Court held: "in order to be entitled to a preliminary injunction, plaintiffs had to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor."

The Plaintiffs can meet each of the elements entitling them to a preliminary injunction.

A. Probability Of Success On The Merits

As discussed throughout this Memorandum of Law and in the Sharma Affidavit, the Plaintiffs can set forth the elements for the doctrine of impossibility, the doctrine of frustration and promissory estoppel.

The Plaintiffs have a high likelihood of success on the merits on each of these doctrines which excuse the Plaintiffs' performance of the November 15, 2020 payment due under the Settlement Agreement. In addition, the Plaintiffs have a high likelihood of success on the merits on their claim for a breach of the covenant of good faith and fair dealing.

Accordingly, the Plaintiffs can meet the element of probability of success on the merits.

B. Irreparable Harm

If the Court does not issue a Preliminary Injunction and AC35 is permitted to hold the Plaintiffs in default under the Settlement Agreement, AC35 will be able to file a judgment by confession against EROS, Pioneer, and Sharma. *See,* **Exhibit A**, at ¶ 4. In addition, AC35 will be able to commence an Action for payment on its Promissory Notes. *See,* **Exhibit A,** at ¶ 4. Additionally, AC35 will be able to seize approximately 24.5% of EROS. *See,* **Exhibit B**, at ¶ 7.[1]

[1] The Settlement Agreement permits AC35 to recover the percentage of unpaid interest then outstanding if there is a default by the Plaintiffs under the terms of the Settlement Agreement. *See,* **Exhibit B**, at ¶ 7. The $6.15 million out

This will cause the Plaintiffs irreparable harm. A judgment against Sharma will trigger defaults under mortgages and other agreements Sharma has with third parties. *See,* Sharma Affidavit, at ¶¶ 35 through 37. *See, Reiser v. Sutton Manor Apts., Inc.*, 2017 NY Slip Op 30097[U], *4 (Sup Ct, NY County 2017) (holding "Lederer has shown that enforcement of the judgments would cause him irreparable harm in the form of the loss of his home.").

Accordingly, the Plaintiffs can meet the element of irreparable harm.

C. Balance of The Equities

AC35 will not suffer any harm if the Court delays the enforcement of the Settlement Agreement. However, if the enforcement of the Settlement Agreement is not stayed, the Plaintiffs will suffer irreparable harm.

The Plaintiffs inability to make the November 2020 payment is not their fault, but as a direct consequence of the severe business downturn of the TRYP Hotel as a result of the COVID-19 pandemic and the government orders barring the TRYP Hotel from operating.

Accordingly, the balance of the equities balances in the Plaintiffs' favor.

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The Plaintiffs are entitled to a Preliminary Injunction delaying the enforcement of the Settlement Agreement between the Plaintiffs and AC35.

Accordingly, the Plaintiffs' Motion for a Preliminary Injunction should be granted.

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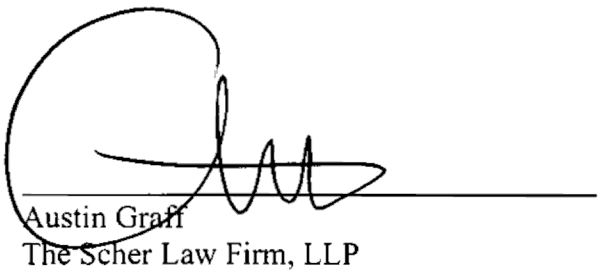
of the $8.15 million is approximately 75.46% of the purchase price. AC35 owned 32.5% of EROS at the time of the sale. Accordingly, 75.46% of 32.5 is approximately 24.5.

CONCLUSION

For the reasons argued in this Memorandum of Law and in the Sharma Affidavit, the Plaintiffs' Motion for a Preliminary Injunction should be granted.

Dated: Carle Place, New York
November 10, 2020



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