

# **DISTRESSED COMMERCIAL MORTGAGE LOAN WORKOUT: ANALYSIS AND FORMS**

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## I. INTRODUCTION TO CONSENSUAL RESOLUTION.

### A. Two Sides

In approaching the work out, a borrower will generally feel it has much to fear especially if there is recourse, even limited recourse, because even if the borrower is successful in reducing its obligation, it shall have cash payment obligation to the taxing authorities.

The mortgagee also has several shades of fear. One would be the proximate risk that by assuming more involvement with the collateral, its duty to the mortgagor increases to a fiduciary duty with greater arguments for lender liability. A second theoretical risk is whether out of court recoveries would be recharacterized as the equivalent of a judicial foreclosure deemed to inequitably clog the equity of redemption<sup>1</sup> and therefore be void. Another more remote risk is whether the failure to provide for a fair accounting of the value of the collateral against the outstanding debt would be deemed to discharge the debt by applying the same public policy which is the basis of the deficiency judgment act.<sup>2</sup> A fourth fear is that by participating too much in the management or disposition of the collateral, the mortgagee has engaged in inequitable conduct to the detriment of other creditors, and its interest should be equitably subordinated to them.

The mortgagor typically argues: that it will not give the mortgagee more than it would get in a formal foreclosure; that by waiving rights to defend and rights to claim lender liability it is providing mortgagee valuable savings in time and cost; that every drafting mistake and instance of lender control can be used against the mortgagee; and, that in any event, the mortgagor can always file for bankruptcy causing further delay and unpredictability.

The mortgagee typically argues: that the mortgagor cannot stop the ultimate repossession of the collateral, but can only cause delay and extra costs; that those costs of extra time and money are already factored as a component of mortgagee's projections for its business plan and not something that it fears; and, that to the extent a creditworthy guarantor is liable, then the mortgagee will recover regardless of delay.

At each step of the process, the mortgagor and mortgagee must ask and analyze what liability and cost may be triggered. With respect to third parties, that would typically be reflected in who should bear the cost for (1) taxes and municipal claims, (2) environmental responses, (3) covenants running with the land such as condominium assessments or reciprocal easement obligations, and (4) tort liabilities such as nuisance, encroachment and similar real property violations. As between the mortgagee and the mortgagor, it would primarily be a

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<sup>1</sup> "Following its original invention equity developed three doctrines which stem directly from it, all three of which may be grouped under the generic heading of clogging the equity of redemption and may be classified by the labels: (1) "Once a mortgage, always a mortgage"; (2) the mortgagee shall not have a "collateral advantage"; and (3) there must be no stipulation in the mortgage which will "fetter" the property on redemption \* \* \* § 16.61. Fettering. The third doctrine has been summed up as meaning "that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it." *Noakes and Co., Ltd. v. Rice*, [1902] A.C. 24, 33." 4 American Law of Property §16.58, §16.61.

<sup>2</sup> See Exhibit 8.1.

question of who has the better argument to broaden or narrow both lender's liability for misconduct, and borrower's and guarantor's liability for breach of contract.

A brief squint at the history of how these issues arose may be fun. Around 55 B.C.E. Julius Caesar conquered Gaul, stopped in Normandy, short of Britain, turned around, wrote a best seller about his experience, went back to Rome and launched the Empire. Other emperors followed and penetrated a bit north up to Hadrian's Wall and set up various Romano-British towns with Roman law that apparently disappeared when Rome gave up Britain around 310 C.E. The Mongols shoved the Huns, the Huns shoved the Franks and a bunch of other tribes, who in turn shoved the Angles and Saxons, and for 300 years they invaded and settled in Britain, imposing their Germanic laws, which survived as a basis for farm leases for feudal and canon estates. 700 to about 900 the Vikings and other North Germanic tribes from Norway, Denmark and Sweden ravaged Britain and Europe. The French gave the fiefdom of Normandy to appease one tribe of Norman attackers, whose Franco-Norman descendents, William the Bastard and his gang of bastards, conquered Britain and imposed his unique feudal system of estates in property upon it. Though it was a miserable failure, it was the template used to create subsequent real estate law in Britain and consequently imported to the United States. When he died, there was anarchy for two generations and massive land theft, or dispossession, which was finally controlled by Henry II who imposed the common law of the King on all subjects: Normans and natives. Parallel to that development of common law, usury was forbidden under both common and canon law, and was punishable by death and damnation. So giving land (with its rents, issues and profits) in exchange for a loan until it was paid off was a neat way for debtor's to secure their borrowings and lenders to get the equivalent of interest. The abuse by lenders of preventing borrowers from paying these contractual debts resulted in the creation of Henry's equity court to provide fairness where the law was solely driven by freedom of contract. Equity forced lenders to accept rights of redemption. The tension between freedom of contract and fairness of equity remains the critical dynamic in creating strategies for the retention or disposition of collateral.

The balance of this paper will analyze the stages of the consensual workout, from pre-negotiation agreements, through forbearance agreements, then extension agreements, modification agreements, settlement agreements, and deeds in lieu. It will examine the motivations of the parties and typical areas of compromise and conflict. Lastly, it will suggest applicable provisions for the issues raised and suggest illustrative forms, rather than negotiated forms, to frame an approach to the various agreements.

#### B. Kubler-Ross Model: Five Stages of Loss

1. Denial: "It cannot be happening."
2. Anger: "Why me? It is not fair."
3. Bargaining: "This will take care of itself if I promise not to complain."
4. Depression: "This is so sad. Why bother?"
5. Acceptance: "I can live with this."

- C. Essential Elements:Increasing or decreasing payment amounts,
2. lengthening or shortening timing,
  3. controlling or owning collateral,
  4. broadening or narrowing recourse,
  5. defining or diminishing tax effects,
  6. improving procedural and substantive remedies,
  7. crystallizing and confirming goals, strategies and tactics [i.e., hand back keys, stonewall and melodramatically object, answer every question with a question].

- D. Borrower Advantage.
1. Allows creative restructuring.
  2. Possible complete or partial release of Borrower parties.
  3. Avoids unnecessary expenses for defense.
  4. Postpones or cures need for future remedies.
  5. Avoids publicity of lawsuits.
  6. Allocates costs of exit between Lender and Borrower.
  7. Lender may pay “nuisance fee” for speedy resolution.
  8. Lender may grant amenities for Borrower: to maintain office, right to repurchase at FMV plus premium, or ROFR plus premium
  9. Lender may take collateral in full satisfaction of debt without taking a deficiency judgment for further recoveries, and release of Guarantor.

- E. Lender Advantages and Borrower Negotiation Points.
1. Faster procedure than arbitration or litigation.
  2. Release of Lender parties from Lender liability claims.
  3. Less expensive than contested foreclosure or bankruptcy.
  4. Protects maintenance of collateral value.
  5. Waiver of Borrower defenses and release of claims.

Property.

6. Transition is orderly and informed to sustain stable operations at the

7. Speeds immediate possession and marketable title.

8. Avoids public exposure of negotiating strategies for distressed loans.

F. Diligencing Loan Underwriting and Borrower Quality Assurances (“Quality Assurances”)

1. Accurate identification of parties in interest and organization charts.

2. Documentation and all amendments over time, including informal letters, course of conduct, and unanswered adverse positions.

3. Accurate identification of secured collateral: real estate as confirmed by updated survey.

4. Qualifying title supported by updated title reports.

5. Qualifying personal property UCC and judgment searches;

6. Qualifying personal property subject to liens not governed by the UCC collateral such as copyrighted material or liquor licenses by search of the regulator’s records; timber and crops by UCC or deed search depending on whether they are subject to harvest or stumpage agreements; coal and mineral rights by recorded or unrecorded leases; perishable commodities and their proceeds may be subject to trust under federal or state statutes if the commodities’ producers qualify

7. No litigation confirmed by searches.

8. No change in environmental status confirmed by reports.

9. Qualifying credit and other underwriting standards confirmed by financial audits, criminal background check and public information on principals, guarantors and inseminators.

10. Zoning, occupancy and local law compliance as confirmed by governmental approvals or legal opinion.

11. All necessary and appropriate operating and use permits as confirmed by governmental estoppel or by legal opinion.

12. No change in tax assessment and appeals.

13. Estoppels as to defaults, further unfinished performance, and consent: tenants, associations/entities, parties-in-interest (lien creditors and easement beneficiaries).

14. Physical structure in good repair and functions.

15. Property value consistent with Lender estimate as confirmed by appraisal (affects title insurance, deficiency judgment, representations of undercollateralized loan, transfer tax appeals, and income tax).

16. No misappropriation of funds.

## II. **PRE-WORK-OUT ISSUES.**

### A. **Default and Other Notices.**

1. Informal or undeclared default.

2. Contract default liability, negligence liability, statutory breach liability, common law liability:

a. Contract disputes correspondingly are buffered by notice and cure periods negotiated into the loan documents. However in some instances newly minted public policy may require true impairment as the pre-conditions for enforcement of contract defaults<sup>3</sup> notwithstanding that courts would traditionally support the principle of freedom of contract.<sup>4</sup>

b. Tortious acts can arise, as to a borrower, when a borrower makes a negligent or fraudulent representation, or in a commercially unreasonable fashion attempts to better its position as to the lender. It can arise as to a lender when a lender advances sums to a third party, such as to a contractor based on obviously fraudulent draw requests, or when the lender breaches a fiduciary duty.

c. Statutory defaults can occur as to a borrower when it fails to comply with local use and occupancy requirements, such as meeting more stringent fire and safety codes, it can occur to a lender by improper actions such as by attempting to recover possession of the mortgaged premises through self-help in the face of borrower's protest resulting in breach of the peace.

d. Common law defaults can arise as to the borrower where it lets the property suffer waste, though some cases hold that if it does not result in impaired value of the mortgaged premises, no default occurs.<sup>5</sup> There have been efforts to use common law defaults to prevail over non-recourse contract defaults.<sup>6</sup> Some common law "waste" prohibitions have been codified into statute, such as in New Jersey.

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<sup>3</sup> In the era of "stagflation" and "deflation", courts bridled at enforcing due-on-sale clauses. See *Bank of Pennsylvania v. G/N Enterprises, Inc.*, 463 A.2d 4 (1983).

<sup>4</sup> *New Home Federal Savings & Loan Association v. Trunk*, 22 Pa. D.&C.3d 399 (C.P. Lancaser 1982, *aff'd*, 482 A.2d 625 (Pa. Super. 1984)

<sup>5</sup> *U.S. v. Angel*, 362 F. Supp. 445, 447 (E.D. Pa. 1973).

<sup>6</sup> *Travelers Insurance Company v. 633 Third Associates*, 973 F.2d 82 2<sup>nd</sup> Cir 1992), holding that the partners of a nonrecourse borrower were not liable for disgorging a distribution made to them when real estate taxes were past due, noting that waste was a claim for physical disrepair, not financial impairment of title.

3. Formal default and automatic designation within lending institution for 90-day non-accrual.

4. Notice:

a. For whom: Borrower; Guarantor; Tenants; Leasehold Mortgagees, lien holders, easement beneficiaries and other parties in interest.

b. For what: contractually required (i.e. SNDA's, guaranties, leases, condominium declarations); statutorily required for answer to a filed complaint

c. So what: comply with contract, comply with statute, perfect rent assignment under state law.

5. Inter-Creditor Agreements.

a. Subordinated Creditor: Blockage of debt service, stoppage of enforcement rights, assignment of contract rights, assignment of statutory rights such as voting.

b. Authorized parties: Syndication and agency with privity; to Borrower participation and lead with no-privity to Borrower.

**B. Settlement Negotiations and the Confidentiality or Pre-Negotiation Letter.**

1. Negotiations proceed, sometimes before litigation is filed, sometimes in parallel.<sup>7</sup> The pre-negotiation letter frames desire for and effect of free and open discussions.<sup>8</sup> The Lender's goal is for a full release<sup>9</sup> and waiver<sup>10</sup> as precaution to eliminate lender liability

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<sup>7</sup> Borrower has met previously with Lender and plans to meet again with Lender [to discuss certain litigation filed against Borrower by Lender in \_\_\_\_\_ County, \_\_\_\_\_] with respect to Borrower's existing defaults under the Loan including these defaults set forth on Exhibit "A" hereto. The listing of defaults on Exhibit "A" does not waive any other defaults that may exist.

<sup>8</sup> In connection with this request, Borrower and Lender contemplate meetings, discussions and possible negotiations between themselves or their agents or representatives (all of which are collectively referred to as the "Discussions"). Pursuant to the terms of this Agreement, the parties desire to encourage such Discussions without waiving any rights, remedies, or defenses they each may have or otherwise prejudicing or altering their respective position *vis-a-vis* the other.

<sup>9</sup> Although Lender regards its conduct as proper and does not believe Borrower has any claim, cause of action, offset, or defense against Lender, its participating lenders, subsidiaries, affiliates, nominees, assignees, officers, directors, agents, employees, servants, consultants, fiduciaries, officers, directors, partners, predecessors, subsidiaries, and affiliates, corporate divisions, attorneys and representatives, as well as their respective heirs, personal representatives, successors and assigns, or any and all of them (herein collectively called the "Released Lender Parties"), Lender wishes and Borrower agrees to eliminate any possibility or doubt that any conditions, acts, omissions, events, circumstances, or matters which occurred prior to the date hereof could impair or otherwise subject Lender or any of the Released Lender Parties to any liability other than is expressly stated in this Agreement and that Borrower unconditionally hereby releases and waives on account of any and all actions, conditions, acts, omissions, events, contracts, liabilities, obligations, indebtedness, claims, demands, suits, accounts, set offs, causes of action, defenses, circumstances, obligations, liabilities, suits, damages, expenses or matters of any kind whatsoever which existed, arose, or occurred at any time prior to or concurrently with the date hereof of any character whatsoever whether known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, including without implied limitation, such claims and defenses as fraud, mistake, duress and bad faith, and



claims, procedural defects, compulsory counterclaims, and other interference with remedies. The Borrower's goal is to preserve its rights.

2. Mutual conditions for negotiations:
  - a. Without prejudice of rights<sup>11</sup>;
  - b. Without waiver of rights<sup>12</sup>;
  - c. With full reservation of all rights and remedies<sup>13</sup>
  - d. Not be used for evidentiary purposes<sup>14</sup>;

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claims relating to which Borrower ever had or now has against the Released Lender Parties jointly or severally, for or by reason of any matter, cause or thing whatsoever occurring prior to the date hereof, which relates to, in whole or in part, directly or indirectly: (a) the Loan Documents; (b) the Loan; (c) the Property; (d) this Agreement; or (e) any other matter relating to this Agreement. In addition, Borrower agrees not to commence, join in, prosecute or participate in any suit or other proceeding in a position which is adverse to any of the Released Lender Parties arising directly or indirectly from any of the matters released in this Agreement. Notwithstanding anything to the contrary contained in this Section, or elsewhere in this Agreement, this release and the other provisions of this Section shall not apply to or otherwise prejudice (i) Borrower's Rights or (ii) any of Borrower's defenses (whether by offset or otherwise) to any claims that Lender may pursue against Borrower, whether relating to the [ ] or otherwise, and irrespective of whether Borrower is otherwise barred by this Agreement from pursuing an affirmative claim against Lender based on the conduct that is the subject of any of Borrower's defenses.

<sup>10</sup> Borrower and Lender each hereby waives any rights it may have at law in equity to object to or defend against the enforcement of this Agreement hereafter, whether on the basis of course of conduct, lack of consideration, lack of authorization, illegality, invalidity, change of circumstances, supervening causes, necessary implications or otherwise. If any one or more of the provisions of this Agreement is found to be invalid, illegal or unenforceable in any respect, such provision shall be deemed to be modified to the minimum extent necessary to make such provision legal, valid and enforceable, and the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

<sup>11</sup> No representation, offer, concession or statement made by any party during the course of the Discussions shall constitute a waiver by any party of rights, remedies, or defenses it may have, or in any way modify or terminate the Loan documents, in any way modify the legal relationship of the parties, or result in an admission against the interest of any party, except to the extent the parties otherwise agree in a duly executed and binding written agreement.

<sup>12</sup> As of the date of this Agreement, by entering into the Discussions: (i) Lender has not in any way waived any rights or remedies it may have in connection with any default in connection with the Loan, or any rights or remedies available to it under the Loan [Documents or otherwise under law or at equity; and (ii) Borrower has not waived any rights it may have under law or at equity to contest or defend actions of Lender if Lender should proceed against Borrower by reason of any default, subject, however, to the terms of this Agreement.

<sup>13</sup> The primary purpose of this letter agreement ("Agreement") is to preserve the Parties' claims to the right of Borrower to a [ ] and of Lender's claims to the right, so that there is no prejudice to the legal prosecution or defense of such rights as a result of this Agreement, and neither Lender nor Borrower releases, waives, relinquishes, diminishes or adversely affects any of its Loan Deposit Rights unless and until a further written agreement as described in the next succeeding Paragraph is executed and delivered by Borrower and Lender.

<sup>14</sup> The parties hereto have entered into this Agreement in order to encourage Discussions in an open, frank and direct manner without risk of exposure to liability as a result thereof, and in order to arrive at a resolution of the matters giving rise to the Discussions acceptable to the parties. All Discussions shall be deemed to be communications in the nature of settlement negotiations which neither party shall have the right to use in connection with the exercise of any right, remedy or defense under the Loan Documents or in any, action at law or in equity arising therefrom or otherwise arising from the relationship between Borrower and Lender, and no statement (oral or written) made by either party to the other in the course of the Discussions shall be deemed, in any proceeding at law

- e. Not to be admissible in any proceeding unless otherwise discoverable<sup>15</sup>; not to be the subject of discovery in any present or future litigation;
- f. Not to constitute a forbearance or agreement to forbear, waiver of defaults, or any amendment of the loan documents, until a full final written agreement is achieved;<sup>16</sup>
- g. No individual points are deemed resolved until all points are resolved, as well as similar points as would be used in confidentiality agreements and letters of intent to permit acts that would otherwise be deemed bad faith if not agree upon in advance.<sup>17</sup>
- h. No course of conduct within or parallel to discussion, to be deemed dispositive.<sup>18</sup>

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or in equity involving the Loan documents or the Loan described herein, (i) an admission of any fact; or (ii) evidence or probative of any act or omission to act, or intent of any party. It is expressly understood that each party reserves all legal and equitable rights and remedies and that any evidence which could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such evidence would otherwise be admissible, without regard to whether it was originally derived in the context of the Discussions pursuant to this Agreement.

<sup>15</sup> Any documents, correspondence or other written information received by either party from the other party during the Discussions which could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such evidence would otherwise be admissible.

<sup>16</sup> No statement made by either party in connection with the subject of this Agreement shall be relied upon by the other until any such agreement is reduced to writing and the Loan Documents are modified, if necessary. No agreements, representations or warranties shall be effective unless agreed to in writing by Borrower and Lender. In the event that a written agreement is presented to Borrower, such written agreement shall constitute an offer to assume or modify the Loan Documents by Lender, and shall cease to be effective if the written agreement is not executed by Borrower and returned to Lender, along with any sums and other matters to be tendered as conditions to closing, within five (5) business days of its receipt by Borrower or such other date as is provided in such agreement.

<sup>17</sup> Lender and Borrower agree that except as set forth herein, no agreement concerning the resolution of the Reinstatement and [ ] shall be final, enforceable or binding unless and until all matters concerning such Reinstatement and [ ] have been completely resolved and agreed to in definitive written agreements (collectively, the "Reinstatement Agreements") which have been executed and delivered by all parties to such agreements. Although the parties may reach an oral understanding or otherwise manifest mutual assent on one or more issues, neither party shall be bound by and no rights or liabilities, either express or implied, shall arise on the part of either party on account of any oral agreement, understanding, alleged course of conduct or other perceived or apparent manifestation of mutual assent. By way of example, and not limitation, (i) this Agreement is not an agreement either to negotiate or to reach further agreement, (ii) this Agreement is not an estoppel with respect to the Reinstatement or [ ], and (iii) the terms and conditions set forth in any discussions or negotiations between the parties shall be provided for discussion purposes only and shall not constitute an offer, agreement or commitment. Borrower further acknowledges and agrees that Lender and its Representatives may in their sole and absolute discretion reject any and all proposals made by Borrower or any of Borrower's Representatives with regard to the Reinstatement and [ ], refuse to compromise any issue, and terminate discussions and negotiations with Borrower at any time without notice to Borrower or any other person subject, however, to Borrower's Rights as set forth above. Neither this paragraph nor any other provision in this Agreement can be waived or amended except by written consent of Lender, which consent shall specifically refer to this paragraph (or such provision) and explicitly make such waiver or amendment. Any Reinstatement Agreements are subject to final approval and authorization by Lender in the exercise of its sole discretion and fiduciary duties.

<sup>18</sup> Acceptance of any partial payments by Lender, or its successors or assigns, of any past or future whole or partial payments, shall not be construed as a cure or waiver of any defaults that may exist under the Loan, nor shall such constitute a modification or extension, or any agreement to permit an assumption of the Loan. In the event Lender

3. The Pre-Negotiation Agreement, regardless of disputes over Loan Documents.<sup>19</sup>

4. To avoid mixed signals and to impose discipline, designated individuals should be specified as the exclusive representatives of each party for purposes of the settlement negotiations.<sup>20</sup>

5. Negotiations can be terminated at any time, for any reason or no reason without allegation of bad faith.<sup>21</sup>

6. Lender may seek to side step Borrower's resistance to release and waivers by Borrower acknowledgments and admissions from Borrower that the foundation for them does not exist: defaults exist, amount of debt due, confirmation of validity of loan documents, absence of defenses, receipt of proper notices.

7. Lender wants Borrower obligated to continue to comply with all loan documents<sup>22</sup> including payment of Lender costs, so as to indirectly imply current non-payment is unjustified.<sup>23</sup>

8. All loan document timing and milestones remain unaffected.<sup>24</sup>

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has provided Borrower with a Notice of Intent to Foreclose, has recorded a Notice of Default or posted a Notice of Sale, such notices) and proceedings shall continue in full force and effect notwithstanding execution of this Agreement, any discussions held pursuant hereto or any acceptance of any past or future partial payments.

<sup>19</sup> Borrower's compliance with the provisions set forth in this instrument ("Agreement") is a prerequisite to Lender agreeing to consider the discussion and negotiation of Reinstatement and Extension. Such compliance is Borrower's obligation and not merely Borrower's option.

<sup>20</sup> Lender hereby designates [ ] of the law firm of [ ] as its sole authorized agents ("Lender Representatives") to negotiate the terms of any Reinstatement and Extension. Borrower hereby designates [ ], as its sole authorized agents to negotiate and agree to any Reinstatement and Extension ("Borrower Representatives"). Each party may by prior written notice to the other party add or substitute other individuals as their respective Representatives.

<sup>21</sup> The parties further acknowledge that either party shall have the right to terminate the Discussions at any time, with or without cause, without notice to the other party, and any such termination shall not be deemed a violation of any applicable covenant of good faith and fair dealing.

<sup>22</sup> During Discussions, Borrower shall continue to make, and Lender shall continue to accept, payments of interest and principal under the Loan, in accordance with the terms of the Loan Documents. If no written agreement is reached pursuant to this Agreement and termination of this Agreement occurs, payments received during Discussions shall not be returned, but shall be used to pay down the late charges and made pursuant hereto, nor apply such funds pursuant to any negotiated proposal or Discussion until agreement is reached between the parties hereto and executed by both in writing.

<sup>23</sup> All reasonable costs and reasonable incidental expenses incurred by Lender, including but not limited to inspection fees, overnight delivery charges, long distance communication, photocopying, photographic service, shipping charges, delivery charges, postage and telex charges during Discussions relating to the Loan shall be paid by Borrower within ten (10) calendar days of presentation of an invoice for the same by Lender.

<sup>24</sup> The Discussions shall not operate as a waiver by Lender to demand full and timely performance of all obligations under the Loan Documents. Neither the execution of this Agreement nor any Discussions shall operate to toll any time period which otherwise might be applicable, including without limitation any time periods which may be provided for in the Loan Documents or by statute upon the filing of a Notice of Default or a Notice of Sale under the Loan Documents. Nothing contained in this Agreement is intended (i) to limit Lender in initiating, continuing or otherwise proceeding to exercise any rights or remedies it may have before, during or after the Discussions,

9. No third party beneficiaries intended.<sup>25</sup>
10. Borrower covenants to cooperate and to provide necessary and appropriate information.<sup>26</sup>
11. Reaffirmation that proceeding is based on knowledgeable and independent decisions, as such advice of counsel.<sup>27</sup>

### III. **LIFE DURING THE FORBEARANCE PERIOD.**

#### A. **Standstill.**

Lender agrees to “standstill” for a specific period of time (the “Forbearance Period”) and forbear from exercising remedies, or to postponement the threatened declaration of default, notice, procedural remedies, or substantive remedies pending the occurrence of a prohibited event, such as failure to cure within a time period, or the continuation of an event of default for some extended time period.

#### B. **Manager Control.**

1. Borrower is allowed to continue to operate and manage the Property. If financial ratios are not met or hurdles are not met, Borrower may need to agree on an informal private custodianship, Lender selected manager, or formal receiver. Borrower will seek a right of reinstatement if the tests are subsequently met. The Agreement may require the Borrowers to make efforts to refinance or sell the Property during the Forbearance Period. It would usually stop the Borrower from retaining fees. If the Borrower is unreliable, then Lender may request the Borrower’s consent to a court supervised receiver. Lender may impose the right to select management, appoint a Lender representative to the Borrower’s voting body, or simply require Lender’s approval of a Property budget. If results are not positive, these controls can sometimes lead to claims by Borrower of lender liability.

#### C. **Rent Control.**

Rents and revenues may be placed under Lender’s control, or in a lock-box arrangement where a predetermined “waterfall” of payment priority is administered by a third party. A cash collateral agreement standing alone or as a provision in the forbearance agreement can provide mechanics to collect and disburse revenues, and detail the treatment of excess revenues. Other

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including, but not limited to, giving notices of default or initiating foreclosure proceedings; or (ii) to relieve Borrower of any obligations it has under the Loan Documents.

<sup>25</sup> The parties acknowledge that the Discussions are entered into for the sole benefit of the parties hereto, and no other person or entity shall have any rights by reason of the Discussions or this Agreement.

<sup>26</sup> In order to proceed with the consideration of any modification of the Loan, Lender must have in its possession sufficient information to evaluate the Property and the financial condition of Borrower. Accordingly, Borrower agrees to provide to Lender complete information outlined by Lender, and such other documentation as Lender shall thereafter reasonably request.

<sup>27</sup> Each party signing below understands that this is a legally binding at may affect such party's rights, and each party has been advised to obtain independent counsel with respect to the upcoming Discussions as well as the meaning and legal effect of this Agreement.

arrangements may allow Borrower to continue to receive the revenues, subject to reporting requirements, segregating funds in separate accounts, and submitting to Lender's "clawback" of Borrower's prior receipts so as to disgorge compensation received prior to the termination of the forbearance agreement.

D. Distributions.

Distributions to Borrower's venturers or their affiliates, or withdrawal of capital, would be limited or prohibited.

E. Extension.

The maturity date may be extended, but extension may raise issues of Lender Risks.

F. Conditions.

Conditions to Lender forbearance can include: no further material defaults under and of (i) the loan documents, including the forbearance agreement, (ii) the Borrower's operative business contracts, including any third party litigation, (iii) the requirements of laws, (iv) rights of other parties in interest such as senior lienholders, or (v) any other event which threatens Lender's security or adversely affects the operations of the Property.

G. Representations.

Borrower representations and warranties can be qualified based on knowledge and interim post-origination disclosures.

H. Accrual.

Deferral of loan payments may be covered by negative amortization provisions balanced by hyper amortization in times of excess cash flow, increased interest rates with interest accrual, Lender participation in an equity position, or Lender entitlement to accrued interest, ballooned principal, and shared appreciation.

I. Lease Restrictions.

Future leasing and similar operations (lot sales, etc.) may be subject to an achievement formula.

J. Consent to Judgment.

Upon future default the Lender is entitled to recover the Property in an uncontested procedure by way of pre-signed consent and stipulation to judgment.

**IV. DOCUMENTATION OF SETTLEMENT AND TRANSFER AGREEMENT:  
FORBEARANCE, MORTGAGE MODIFICATION, DEED-IN-LIEU, OR DEED-  
IN-THE DRAW:**

**A. General Terms from the Lender's Point of View**

1. Borrower's acknowledgment of the outstanding debt, and validity of the Loan Documents,<sup>28</sup> the lien priorities<sup>29</sup> and the appropriateness of curative advances<sup>30</sup> to counter subsequent claims<sup>31</sup> of lender liability for misrepresentation, or repudiation, and to establish a fact record.

2. Borrower acknowledgement of default<sup>32</sup>, proper notice of default, initiation of agreement after inability to sell or refinance (to show it is voluntary and not coerced)<sup>33</sup>, acknowledgement of Lender's forbearance to counter potential claims of lender liability for duress, coercion, or undue influence.

3. Lender's consideration: forbearance, payments of operating cost (taxes, utilities, insurance) and transfer costs (transfer tax, title insurance, title clearance, diligence reports, sheriff fees).

4. Borrower waiver of defenses, and release of claims and counterclaims.

5. Borrower covenant not to seek a stay in bankruptcy,<sup>34</sup> or represents that any bankruptcy filing would be for the single purpose of stopping Lender's foreclosure; an

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<sup>28</sup> The Loan Documents were duly authorized and executed by Borrower and Guarantor, respectively, and were at the time of their execution and are now valid and enforceable in accordance with their terms.

<sup>29</sup> Without in any manner limiting the foregoing, Borrower and Guarantor hereby stipulates and agrees that Lender has a valid, perfected first priority mortgage lien on the Property and the leases of the Property, and the income from the Property, and that all rents heretofore received by Lender, and all rents hereafter collected from or payable by tenants on account of the Property are the sole property of Lender. Nothing herein shall give rise to any claim by Lender against Borrower with respect to any rents heretofore collected and retained by Borrower, except to the extent such retention by Borrower constitutes a breach of a representation or warranty by Borrower set forth in Paragraph [ ] below.

<sup>30</sup> Borrower confirms the necessity of all protective and/or curative advances made by Lender on account of the Property pursuant to the Loan Document.

<sup>31</sup> Borrower stipulates, admits and agrees that the principal, interest and other sums due Lender under and evidenced and secured by the Loan Documents as of \_\_\_\_\_ is \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (the "Outstanding Indebtedness").

<sup>32</sup> Borrower and Guarantors represent and warrant the Loans are in default, accelerated and matured, and have accrued interest at the rate of [ ] which has remained unpaid from [ ].

<sup>33</sup> All notice provisions contained in the Loan Documents have been complied with, all grace periods have either expired or been waived by the Borrowers and the Guarantors, and the Lender has declared the principal, interest and all other indebtedness (hereafter called the "Indebtedness") owing by the Borrowers to the Lender pursuant to the Loan Documents to be due and payable.

<sup>34</sup> Borrower does not have any intent to (i) file any voluntary petition under any Chapter of the Bankruptcy Code, Title 11, U.S.C.A. ("Bankruptcy Code"), or in any manner to seek any proceeding for relief, protection, reorganization, liquidation, dissolution or similar relief for debtors under any local, state, federal or other insolvency law or laws providing relief for debtors ("Debtor Proceeding"), or (ii) directly or indirectly to cause any involuntary petition under any Chapter of the Bankruptcy Code to be filed against Borrower, or (iii) directly or indirectly to cause the Property or any portion or any interest of Borrower in the Property to become the property of any bankrupt estate or the subject of any Debtor Proceeding. Borrower acknowledges that the filing of any petition or the seeking

acknowledgement that as Borrower has no equity; or Borrower's agreement to appoint an independent director to approve bankruptcy filing, taking the creditor into consideration.

6. Borrower covenants that Lender would be entitled to relief from the stay;<sup>35</sup> and Borrower negative covenants that it will not raise any defense or objection to Lender's motion for relief from an automatic stay;<sup>36</sup> it will not claim there is no business purpose would exist for classifying Lender's deficiency claims separately from other unsecured claims in any plan of reorganization.

7. Guarantor and Borrower Affiliates' consents and joinders, and assignment of any affiliated debt.

8. Guarantor reaffirmation of waiver of subrogation.<sup>37</sup>

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of any relief in a Debtor Proceeding by Borrower, whether directly or indirectly, would be in bad faith and solely for purposes of delaying, inhibiting or otherwise impeding the exercise by Lender of Lender's rights and remedies upon the occurrence of an Event of Default hereunder against Borrower and the Property pursuant to the Loan Documents.

<sup>35</sup> Without limiting the foregoing, Lender shall be and is entitled to and Borrower hereby consents to, relief from the stay imposed by Section 362 of the Bankruptcy Code, as amended, in any bankruptcy proceedings, and Borrower shall not object to, defend against or oppose any motions or proceedings by Lender seeking relief from the automatic stay; Borrower releases any claims or counterclaims relating to the automatic stay, and agrees not to seek; sue for or avail itself of any alternative stay or injunction whether under 11 U.S.C. §105 or otherwise. In addition, if any such stay, or injunction is granted, Borrower consents and agrees to the termination of such stay or injunction, and will consent to and support any motion filed by Lender from relief from the automatic stay or any other such injunction, to permit Lender to foreclose on the Mortgage as soon as possible.

<sup>36</sup> See *In re Citadel Properties, Inc.* supra; *In re Orange Park South Partnership*, 79 B.R. 79 (Bankr. M.D. Fla. 1987). Proposing that if no traditional state law basis exists to rescind an agreement containing a pre-bankruptcy waiver, the waiver would be enforceable. But see *Farm Credit of Central Florida, ACA v. Polk*, 160 B.R. 879 (M.D. Fla 1993). Proposing such an agreement is a factor to be considered in deciding whether to lift the stay.

<sup>37</sup> Notwithstanding any provisions of the Guaranties to the contrary, until the Loans have been paid in full to Lender, Guarantors hereby irrevocably waive any claims or other rights which they may now have or hereafter acquire against Borrowers or any other guarantor of the guaranteed obligations under the Loans that arise from the existence, payment, performance, or enforcement of Guarantors' obligations under the Guaranties, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution, indemnification, any right to participate in any claim or remedy of Lender against Borrowers or any other guarantor of the guaranteed obligations under the Loans or any collateral which Lender now has or hereafter acquires, whether or not such right, claims or remedy arises in equity or under contract, statute or common law, including, without limitation, the right to take or receive from Borrowers directly or indirectly, in cash or other property or by setoff or in any other manner, payment or security on account of such right, claim or remedy. If any amount shall be paid to Guarantors in violation of the preceding sentence and the guaranteed obligations under the Loan shall not have been paid in full, such amount shall be deemed to have been paid to Guarantors as the case may be, for the benefit, and held in trust for the benefit of Lender and shall forthwith be paid to Lender to be credited and applied upon the guaranteed obligations under the Loans whether matured or unmatured, in accordance with the terms of the Loan Document between Borrowers and Lender. Guarantors acknowledge that they will receive direct and indirect benefits from the Loans, this Agreement and the other transactions evidenced by and contemplated in the Loan Documents, and that the waiver set forth in this paragraph is knowingly made in contemplation of such benefits.

9. Lender's conditional, immediate or springing covenant not to sue<sup>38</sup> Borrower, guarantors, or Borrower affiliates (managers, construction contractors, brokers, etc.) for personal liability, subject to conditions subsequent<sup>39</sup>, including no Borrower default under the Settlement Agreement by some period (at a minimum the period to avoid transfer as preferential or as a fraudulent conveyance); no litigation adverse to Lender is commenced or supported by Borrower;<sup>40</sup> no avoidance of transfer<sup>41</sup>; no breach or default;<sup>42</sup> full access and disclosure;<sup>43</sup> continuing effectiveness of Lender release;<sup>44</sup> and no bankruptcy of Borrowers or Guarantors.<sup>45</sup>

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<sup>38</sup> Covenant Not to Sue Borrower Parties. Effective on the Closing Date and only if the transactions contemplated by this Agreement are consummated in accordance with the terms of this Agreement, the Lender does hereby covenant not to sue the Borrowers and the Guarantors, their shareholders, directors, partners, agents, trustees, beneficiaries and employees, as well as the respective heirs, personal representatives, successors and assigns of any and all of them (hereafter collectively called the "Borrower Parties") for up to an amount equal to the Discharge Consideration of any deficiency judgment liability or any personal liability which relates to, in whole or in part, directly or indirectly: (a) the Loan; (b) the Loan Documents; or (c) any agreement of the Borrowers or the Guarantors relating to the Project or the Indebtedness as reduced by a credit for the Discharge Consideration; EXCEPTING ONLY the obligations of the Borrowers and the Guarantors to perform the terms of this Agreement and the documents delivered pursuant to this Agreement which survive the Closing Date and liabilities, including the Indebtedness and New Indebtedness to the extent in excess of the Discharge Consideration, such covenant not to sue to be treated as a credit against liabilities due from Borrowers and Guarantors in such order and among such liabilities as Lender may determine in its sole discretion including, without limitation, to be applied as a credit only after all Indebtedness, except the Discharge Consideration, has been paid in full.

<sup>39</sup> Conditions Subsequent to Sue Borrowers. The covenant not to sue provided in paragraph [ ] of this Agreement will at Lender's election be void ab initio and will be of no force or effect and the Borrowers and the Guarantors will be jointly and severally and personally obligated to repay to the Lender the Indebtedness if any one or more of the matters described at Paragraphs [ ] of this Agreement occurs. The reinstatement of the obligations of the Borrowers and the Guarantors to pay the Indebtedness and the abrogation of the covenant provided by paragraph [ ] of this Agreement will not operate to affect or to alter the release given by the Borrowers and the Guarantors to the Lender pursuant to Paragraph [ ] of this Agreement. The conditions subsequent are as follows:

<sup>40</sup> Litigation. The Borrowers, the Guarantors, or any person claiming by or through the Borrowers or the Guarantors ever commence, join in, assist, cooperate in or participate as an adverse party or as an adverse witness (subject to compulsory legal process which requires testimony) in any suit or other proceeding against any Released Lender Party (defined in Section 10 below) relating to the Loan, the Loan Documents, the Indebtedness or the Project including in the event of foreclosure of the Project, the Borrowers or the Guarantors opposing, defending, or committing any act whatsoever which may delay, impede, or prohibit said foreclosure action.

<sup>41</sup> Avoidance. The deed or any other document evidencing a conveyance of the Project to the Lender is ever rendered void or is rescinded by operation of law, or by order of any state or federal court, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the Borrowers, the Guarantors or any person claiming by or through the Borrowers or the Guarantors or any of their respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

<sup>42</sup> Breach. The warranties contained in the deed or any other document evidencing a conveyance of the Project to the Lender are breached.

<sup>43</sup> Access. The Borrowers, the Guarantors or any person claiming by or through the Borrowers or the Guarantors deny the Lender, or the Lender's representatives, the right to inspect the Project, or to inspect, audit and transcribe the books, records, contracts, and insurance policies maintained by the Borrowers, the Guarantors or any person claiming by or through the Borrowers or the Guarantors in connection with the construction, operation or maintenance of the Project.

<sup>44</sup> No Release. The release of the Released Lender Parties set forth in paragraph [ ] of this Agreement is ever rendered void, is rescinded or adjudicated unenforceable by operation of law or by order of any state or federal court of competent jurisdiction, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the Borrowers, the Guarantors or any person claiming by or through the Borrowers or the Guarantors or any of their respective agents, employees,



Lender covenants: Covenant not to sue is preferred by some Lenders because a release may remain effective against Lender as an “executed contract” after a bankruptcy or avoidance of Borrower’s settlement agreement, whereas a covenant in a rejected “executory” contract may be rejected as part of the whole.

10. Lender retains certain claims outside of covenant not to sue: completion of intended transaction, reinstatement prior to an ending date<sup>46</sup> due to a trigger event such as a contest<sup>47</sup> or reversal<sup>48</sup> of the transaction.

11. Legal opinions of Borrower’s and Guarantor’s counsel.

12. Borrower’s and Guarantor’s acknowledgements and reaffirmations.<sup>49</sup>

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representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

<sup>45</sup> Insolvency or Bankruptcy. The Borrowers or Guarantors are the subject of a bankruptcy proceeding or insolvency or receivership proceeding after the Closing.

<sup>46</sup> “Conclusion Date” means the period ending on the latest of: (i) the One-Year Period; (ii) if a Contest Event is asserted during the One-Year Period, the date upon which such Contest Event is resolved without any of the Reversal Events having occurred; (iii) if at any time during the One-Year Period Borrower Parties is in or the subject of a Bankruptcy case, the earlier of (x) the date on which an order closing such Bankruptcy case is entered (after proper notice to all parties in interest) and becomes final and unappealable, without any of the Reversal Events having occurred, or (y) the date when any Contest Event which has occurred in such Bankruptcy case is dismissed with prejudice and resolved in favor of Lender, without any of the Reversal Events having occurred; [and (iv) the fifth (5th) business day after the last date on which a claim can be asserted under applicable law that the foreclosure and/or conveyance of title to the Property constituted a fraudulent transfer or conveyance, or may otherwise be rescinded; disaffirmed or avoided.]. The “One-Year Period” means the date which is 370 days after the earlier of (x) the date of recording of the Sheriff’s deed to the purchaser at the Foreclosure Sale held pursuant to the Stipulation of Judgment entered into in connection with this Agreement, or (y) the date of recording of the deed-in-lieu of foreclosure pursuant to subparagraph 5(d) above, if Lender elects to do so.

<sup>47</sup> “Contest Event” means Borrower, Loan Parties and their respective partners, heirs, administrators, personal representatives, successors and assigns, and party controlled by any of them, including without limitation \_\_\_\_\_ (and including any such party acting as “debtor in possession” in a bankruptcy case, or its trustee in a bankruptcy case), in any action or proceeding (including a bankruptcy case) which is commenced prior to the Conclusion Date, raises any claim or otherwise in any way challenges the Foreclosure, the transfer of the Property pursuant to the deed-in-lieu of foreclosure, this Agreement or the transactions contemplated by this Agreement, and the documents or instruments or funds executed and/or delivered or to be executed and/or delivered pursuant hereto or thereto, including without limitation, the validity of the conveyance of the title to the Property pursuant to the Foreclosure (or deed-in-lieu, if Lender so elects), or the adequacy or sufficiency of the consideration for such transfer.

<sup>48</sup> In the event a court or other tribunal having jurisdiction in a federal, bankruptcy or state proceeding, which is commenced on or before the Conclusion Date, or which is commenced on or before such longer period within which such claim can be asserted under applicable state law, thereafter declares the conveyance of title to the Property to be a preference or fraudulent transfer or conveyance or sustains a claim of a similar nature or otherwise declares this Agreement or any of the other documents executed in connection therewith to be void or voidable or rescindable or illegal; and, as a consequence thereof Lender, its nominee, or their successors or assigns, are ordered or compelled to reconvey any of the Property (whether to Borrower, its trustee in bankruptcy, or another party), or in lieu of a reconveyance to pay money to Borrower, its trustee in bankruptcy or another party on account of the conveyance of title (“Reversal Event”), all releases and covenants not to sue by Lender Parties in favor of the Borrower Parties, including with respect to the Personal Liability Claim, shall be automatically void *ab initio* and of no force and effect.

<sup>49</sup> Acknowledgements, Ramifications and Consents.

13. Guarantor's conditional ("exploding" upon a satisfaction of a condition subsequent when it then disappears or "springing" upon a condition subsequent when it springs into existence) guaranty for previously forgiven debt effective upon an Event of Default<sup>50</sup> or a specific extra event (i) such as fraud, misrepresentation, or lack of disclosure or other breach of the Settlement Agreement (ii) Borrower contests the Lender's rights, counterclaims, or alleges lender liability, or (iii) Borrower tries to file bankruptcy or otherwise void the transaction.<sup>51</sup> The

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(1) No Future Loans. Borrowers hereby acknowledge and agree Lender has no obligation either (i) to extend the maturity date of the Loans, or (ii) to advance any additional funds in connection with the Loans for any reason.

(2) Security Interests. All security interests in the collateral set forth in the Loan Documents, is and shall remain unchanged, in full force and effect, and shall continue to secure the payment and performance of all indebtedness and obligations under the Loan Documents and Borrowers' performance and obligations under the Loan Documents and hereunder.

(3) Guarantors' Reaffirmation and Consent. Guarantors hereby reaffirm the continuing validity of their Guaranties and Borrowers' obligations under the Loan Documents, notwithstanding the provisions of this Agreement and hereby consent to the terms and provisions provided for herein by signing their names where indicated at the end of this Agreement.

(4) Acknowledgment of No Claim. As of the date of this Agreement, each of Borrowers and Guarantors acknowledge and agrees that: (a) it has no claim or cause of action against Lender, (b) it has no offset or defense against any of its (or his or her) obligations, indebtedness, or contracts in favor of Lender; and (c) Lender has heretofore properly performed and satisfied in a timely manner all of its obligations to and contracts with Borrower and/or Guarantors.

(5) No Admission. Nothing in this Agreement shall be construed as (or shall be admissible in any legal action or proceeding as) any admission by Released Lender Parties that any defense, indebtedness, obligation, liability, contract, claim, or cause of action exists which is within the scope of those released within this Agreement, because Lender denies that any such matter exists and regards this release as unnecessary except to confirm its understanding of the position of the parties.

<sup>50</sup> Clawback. Notwithstanding the provisions of subsection (j) hereof, upon the occurrence of an Event of Default within one hundred eighty (180) days following the end of the Forbearance Period, all amounts previously forgiven hereunder shall once again be deemed to be obligations of the Borrower, and shall be reinstated and added to the Debt, all as if the forgiveness described in subsection (j) had never occurred.

<sup>51</sup> a. if Borrower or any partner, shareholder or member of Borrower, files or has filed against it, a petition or other proceeding in bankruptcy, insolvency, reorganization, debt arrangement, dissolution or other similar action under federal or state law now or hereafter in effect, or any such party consents to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official), of the assignment of all or substantially all of the affected party's property for the benefit of creditors, or the admission by Borrower of the inability to pay its debts generally as they become due, or the voting by the board of directors or consent of managers or partners to implement any of the foregoing;

b. if Borrower, any partner, shareholder or member of Borrower or any affiliate of either Borrower or any of partner, shareholder or member of Borrower (all the aforesaid parties being hereinafter collectively called an "Asserting Party") directly or indirectly either (A) asserts that either (x) the transfer of the Premises by foreclosure or execution sale or deed in lieu of mortgage foreclosure or (y) any waiver, release or other provision or covenant of this Agreement, the Settlement Agreement or any document executed in connection with the Settlement Agreement, was not for fair consideration or reasonably equivalent value, or (B) otherwise contests the validity of, or seeks to set-aside, rescind, disaffirm or otherwise avoid, the conveyance of good and marketable title to the Premises to Lender or its assignee or the purchaser at foreclosure or execution sale (or otherwise seeks to subject Lender or its assignee to any liability in order to cure the alleged cause of action);

c. if an Asserting Party breaches its agreements, or otherwise fails to comply with its obligations, under the Settlement Agreement (including, without limitation, the covenant not to oppose, request a stay or, impede, appeal from or otherwise delay or contest Lender's foreclosure or execution action and sale of the Premises or Lender's recordation of a deed in lieu of foreclosure) or any document executed in connection with the Settlement Agreement, or if any representation or warranty of an Asserting Party set forth in the Settlement Agreement or any

guaranty could explode when the Lender conveyed the Property without objection by the Borrower or its filing bankruptcy.

14. Borrowers' Loan Parties reaffirmation of intelligent and knowing acceptance of Agreement,<sup>52</sup> and acknowledgment of no admission by Lender.<sup>53</sup>

15. Borrower represents that Borrower is not insolvent (to counter arguments of fraudulent conveyance or voidable preferences)<sup>54</sup>; that the releases and other consideration granted to Lender are to address the shortfall in lowered interest and discount of principal; that no dispute for payment exists with any other creditor (to reveal possible involuntary bankruptcy).

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document executed in connection with the Settlement Agreement is untrue or incorrect in any material respect as of the date hereof or fails to state a material fact necessary to make it not misleading in any material respect; or

d. if any of the provisions of the Settlement Agreement, or any document executed in connection with the Settlement Agreement are either (A) challenged by an Asserting Party or (B) set-aside, disaffirmed, deemed a preference or fraudulent conveyance or transfer, rescinded or otherwise avoided in or by a court of law or by statute.

<sup>52</sup> Acknowledgements. Each of Borrower and Guarantor hereby acknowledges that it is or is owned by sophisticated and experienced real estate Operators, operators and investors, each of whom has a full understanding of the terms and conditions of this Agreement and the risks involved in entering into this Agreement, that this Agreement has been fully negotiated and that compromises on the part of Lender, Borrower and Guarantor were made before agreement was reached on the final terms hereof, that at all times each of Borrower and Guarantor have been represented by their own attorneys and such other competent counsel as each of them has chosen to engage in the negotiation of the terms and the preparation and execution of all documents, and has relied solely on the advice and instruction of its own attorney who has had the opportunity to review and analyze all of the documents for a reasonable period of time prior to the execution by the Borrower and Guarantor; that each of Borrower and Guarantor, is entering into this Agreement with the conviction that it is a fair agreement and that it represents an equitable compromise of the competing interests of the parties hereto and that, in addition, it was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any party, and that each of Borrower and Guarantor acknowledges this Agreement shall constitute a complete defense to any claim, cause of action, defense, liability or obligation released under this Agreement, and agrees that after the execution and delivery of this Agreement on the date hereof, the only claims or causes of action which it and/or he could possibly have against Lender or any of the Released Parties would be those arising under this Agreement, or a written contract hereafter executed by Lender in favor of Borrower and Guarantor and/or those arising from conduct occurring after the execution and delivery of this Agreement. Neither Borrower and Guarantor shall institute or prosecute (or, except to the extent required by law, in any way, assist or cooperate with the institution or prosecution of) any action, suit, hearing, or other proceeding of any kind, nature, or character at law or in equity against Released Parties in order to collect, enforce, declare, assert, establish, or otherwise raise any defense, claim, cause of action, contract, liability, indebtedness, or obligation which is within the scope of those released in this Section or which arise out of any fact, contract, condition, claim, cause of action, indebtedness, liability, obligation, event, action, omission, circumstance, or other matter or reason of any kind which is the basis for any such defense, claim, cause of action, liability, indebtedness or obligation which is released hereunder.

<sup>53</sup> It is agreed and understood that this Settlement Agreement is not an admission of liability on the part of Lender (it being understood and agreed that Lender expressly denies any such liability). Rather, Lender has agreed to enter into this Settlement Agreement solely for the purposes of terminating the dispute between the parties and concluding the Foreclosure as expeditiously as possible, settling claims between Lender, on the one part, and Borrower and its partners, on the other part, as set forth more fully in this Agreement, and avoiding the additional legal fees, expenses, and delay that would be incurred by further litigation.

<sup>54</sup> Solvency. The Borrowers represent and warrant, and Guarantors, to their best knowledge, represent and warrant, that the Borrowers are now and on the Closing Date will be solvent, the transfer of the Project to the Lender, its nominee or assignee will not render the Borrowers insolvent, and the Borrowers have made adequate provision for the payment of all creditors of the Borrowers other than the Lender. The Borrowers and Guarantors represent and warrant that they have not entered into this transaction to provide preferential treatment to the Lender or any other creditor of the Borrowers or the Guarantors in anticipation of seeking relief under the Bankruptcy Code.

16. Borrower covenants that agreement does not affect lien priority.<sup>55</sup>
17. Borrower covenant to pay Net Operating Income to Lender.<sup>56</sup>

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<sup>55</sup> Lien Priority. The parties hereto agree and acknowledge that this Agreement is in no way intended to constitute a novation of the Loan Documents. If it is determined that any other person or entity other than the Lender shall have a lien, encumbrance, or claim of any type which has a legal priority over any term of this Agreement, the original terms of the Notes and Mortgages shall be severable from this Agreement and separately enforceable from the terms thereof as modified hereby in accordance with their original terms, and Lender shall retain all legal or equitable priorities which were in existence before the date of execution of this Agreement. It is understood by and is the intention of the parties hereto that any legal or equitable priorities of the Lender over any party which were in existence before the date of execution of this Agreement shall remain in effect after the execution of this Agreement.

<sup>56</sup> Required Payments. Commencing on the Effective Date and on each and every payment date during the Forbearance Period, Borrower shall make a payment to Lender in an amount (such amount, the "Payment Amount") equal to the greater of (i) the Net Operating Income for the prior calendar month, and (ii) the amount required under the Loan Documents to be deposited into the Tax and Insurance Fund on such payment date, notwithstanding that Net Operating Income for the prior calendar month may be insufficient to make such payment.

Definitions. As used herein, the following terms shall have the meaning set forth below:

(i) "Deemed Approved" with respect to Operating Expenses shall mean amounts expended with respect to expenses described in the Budgets, provided that for each major category of expenses described in such Budgets, the amounts expended with respect to such major category of expenses shall not exceed five percent (5%) of the budgeted amount for such major category of expenses without the prior written approval of Lender, acting reasonably.

(ii) "Operating Expenses" shall mean for the period in question, the expenses incurred by Borrower for the operation and management of the Property in the ordinary course of business as provided for in the Budgets, provided, however, that all expenses incurred in the marketing and leasing of the Property ("Leasing Expenses"), including, without limitation, marketing costs, tenant improvement expenses, broker fees, leasing commissions and related legal expenses shall not constitute "Operating Expenses" for the purpose of calculating Net Operating Income hereunder, and further provided, that any payment to Borrower or any of its affiliates, including, but not limited to, management fees, professional services, or wages, or any Affiliate Loan Payments (as hereinafter defined), shall not constitute "Operating Expenses" for the purpose of calculating Net Operating Income hereunder.

(iii) "Operating Income" shall mean for the time period in question, all gross income, revenues and consideration received by or paid to or for the account or benefit of Borrower, resulting from or attributable to the operation of the Property, including, but not limited to, any and all rents, additional rents, percentage rents and/or other sums received by or paid to or for the account or benefit of Borrower under that certain lease between Borrower and NWL of Hunting Park, Inc., dated as of September 5, 2002 (the "NWL Lease") and/or under any and all other leases with respect to the Property, the categories of which are described more fully on the Budgets.

(iv) "Net Operating Income" shall mean, for the period in question, an amount equal to the positive difference, if any, between Operating Income and Deemed Approved Operating Expenses for such period.

Application of Payment Amounts. Lender shall apply the Payment Amount received each month to the extent thereof, in the following order: (i) to funding of the Tax and Insurance Fund, and (ii) to such portion of the Debt as it shall determine in its sole discretion.

Payment of Deferral Amount. The excess of the amount due Lender under the Loan Documents on each payment date over the Payment Amount received by Lender on such payment date shall be deferred and shall accrue interest at the Default Rate (such excess, together with such accrued interest, the "Deferral Amount"). Unless otherwise forgiven pursuant to subsection (j) below, the Deferral Amount shall be due and payable by Borrower on the first business day after the expiration of the Forbearance Period.

Operating Statements. In addition to Borrower's financial reporting obligations under the Loan Documents, on each payment date Borrower shall provide Lender with actual income and expense statements for the prior calendar month in a form satisfactory to Lender in its discretion (which statements shall include, but not be limited to, Borrower's Cash Deposit, Check Register, and Cash from Operations Summary), which shall include, inter alia, a reconciliation of actual Operating Income, Operating Expenses and Net Operating Income for such calendar month, with the respective amounts projected in the applicable Budget for such month. Moreover, Borrower shall provide

18. Lender's covenant to extend new value, thereby overcoming lack of consideration arguments.<sup>57</sup>

19. Borrower's covenant to install new management.<sup>58</sup>

B. Mortgage Loan Extension

An extension by itself does not ordinarily result in a "novation" and is not considered an impairment to subordinate creditors.<sup>59</sup>

C. Mortgage Loan Modification

1. General Rule. If subordinate creditors would be impaired their prior consent is required.

2. Types of modifications: extension of term, reset rate, deferral of amortization, reduction of interest rate, third party undertaking debt service

3. Risks. A modification of economic terms restructures the loan as a novation with priority from the restructuring date, not the initial mortgage date, because modification impairs actual or potential subordinate creditors:

- a. extension of time is usually not deemed problematic;
  - b. shortening of time, and increasing interest can cause impairment;
- and
- c. bankruptcy risk: voidable preference if payments are accepted while lender holds guaranty of insider.<sup>60</sup>

4. Documentary requirements:

- a. amendment of borrower loan documents;
- b. consent of guarantors;

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Lender with such documents and/or invoices as Lender may request in its discretion with respect to Borrower's operations during the relevant time period and/or any items set forth in such statements provided to Lender for such time period.

<sup>57</sup> Lender is prepared to extend additional credit of \$[ ] ("New Indebtedness") to Borrowers to pay the liabilities of Borrowers to the [Primary Liens] arising from the ownership of the Project through [ ], which shall reduce the credit for the covenant not to sue.

<sup>58</sup> Appointment of Manager. Borrower shall terminate the Management Agreement which Lender had previously approved and shall replace that Manager with a new Manager acceptable to Lender. At this time, Metro Commercial Management Services, Inc. is acceptable to Lender as the Manager. The form of management agreement acceptable to the Lender is attached hereto as Exhibit 2(b).

<sup>59</sup> In some ways it is considered the practical equivalent of a forbearance. A Lender does not have an obligation to a borrower or guarantor to foreclose or exercise remedies.

<sup>60</sup> *Levit v. Ingersoll Rand Financial Corporation*, 874 F.2d 1186 (7<sup>th</sup> Cir. 1989).

- c. consent of impaired subordinate creditors; and
- d. title insurance endorsement for modified terms

5. Cash Flow Note. Debt service payments may be reduced to interest only obligations, or a cash flow “slow” note, meaning required monthly payments on account of the loan are limited to net cash flow from the Property and the unpaid interest accrues. This can raise issues of the Lender Risks. Lenders sometimes are willing to reduce requirements so long as they can later recoup their accommodation from any rise in Property value. Two common techniques are for lenders to increase their right to interest upon appreciation of the net operating income or the equity of the Property. A second method is to have the lender granted an ownership interest in the Property or the Borrower. Each alternative tempts Borrower defenses of usury, of clogging the equity of redemption, and of recharacterization of the Lender as a joint Venturer rather than creditor.

#### D. Collection of Rents:

1. Rights to Rents by Mortgagee. If there is no contractual assignment of leases, rents, and profits (in “ALR”), then common law applies. In a title state, the grant of a mortgage is akin to the grant of the deed, and all rights to pre-existing leases are transferred with it. Subsequent leases, which are subordinate to the mortgage, however, are not deemed transferred and mortgagee has no direct entitlement to collect their rents.<sup>61</sup> A tenant may, however, voluntarily pay rent to the mortgagee without liability.<sup>62</sup> An equivalent result occurs for deeds-of-trust in lien theory states: the grantee/beneficiary could not claim rights to them until possession of the grantor’s estate. One commentator ascribed the emergence of the separate assignment of leases and rents as the pushback by mortgagees in the Depression of the 1930s when courts in lien theory states denied the mortgagees rights to rents.<sup>63</sup>

##### a. Title Theory.

The title theory is a present day throwback to English law at the time of the Colonies. The theory is founded on what is now the fiction that the grant of a mortgage is the grant of a mortgagor’s estate, subject to a right of redemption upon payment of the debt. The mortgagee becomes “seized” of the land, the proprietary interest in the land, with the attendant right to rents from antecedent leases based on the theory of privity of estates just as if it had been a grantee of a deed.<sup>64</sup> In some title states the right arises at signing.<sup>65</sup> There are several traditional exceptions

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<sup>61</sup> *Peoples-Pittsburgh Trust Co. v. Henshaw*, 15 A.2d 171 (1940).

<sup>62</sup> *Buloger v. Wilderman & Pleet*, 101 Pa. Super 168 (1931).

<sup>63</sup> “The assignment of leases and rents owes its existence to the experience of lenders during the Great Depression. At every turn courts sought to block the lender’s access to rents and to keep the mortgagor in possession. This was particularly true in the lien-farmer states. While it was devised originally as an instrument to fasten a lien on rents, other useful functions were added from time to time. It could serve, it was found, to prevent cancellation of valuable leases without the lender’s consent. It could prevent advance payment of rent. Other functions were added to it by lender’s lawyers. Every legal document, it seems, is like decorating a Christmas tree. New ornaments are constantly added.” Kratovil, MODERN MORTGAGE LAW § 20.07

<sup>64</sup> *Moss v. Gallimore*, 1 Doug. 279 (1779, Lord Mansfield opinion) see footnote [cite] in this Article; See also Kratovil, THE MODERN LAW OF MORTGAGES at 261 citing *Grether v. Nick*, 213 NW 304, 215 NW 571 (1924).

to the fiction that the mortgagee is the owner of the realty. The exceptions have aimed to prevent the theory from being a total absurdity.<sup>66</sup> The mortgagee is generally not entitled to rents from subsequent leases.<sup>67</sup> The rights of the mortgagee can rise no higher than the landlord's interest at the time of the grant.

Because the mortgagee has no privity of estate or contract with the subsequent tenant<sup>68</sup> the antecedent mortgagee cannot, without a direct agreement, recover the rent from the subsequent lease. Even a present assignment to the mortgagee of subsequent leases and rents in an ALR is technically only an obligation of the mortgagor to turn over rent, not a direct obligation of the future tenant to the prior mortgagee<sup>69</sup>, unless the tenant agrees under its lease to be bound to pay the prior mortgagee.

b. Lien Theory.

Under a lien theory, the mortgagee's entitlement to rents is severely cut back compared to the title theory. The grant to the mortgagee of the landlord's rights is a grant only of a lien. Under the lien theory, the mortgagee is generally not entitled to rents from a lease pre-dating the mortgage until the mortgagee possesses rents by a foreclosure, and is not entitled to rents from subsequent leases entered into after the existence of the mortgage. In general, the mortgagee under the lien theory is one member of the broad class of lien creditors. Its lien is no more distinguished or powerful than any other lien. There is no right to rents or possession until title passes by foreclosure, appointment of a receiver or as mortgagee-in-possession.<sup>70</sup> Some states

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<sup>65</sup> "Alabama, Maine, Maryland, and Tennessee, for example, the mortgagee, immediately upon execution of the mortgage, has the right to take possession and collect the rents of the mortgaged property. *Darling v. Nelson Realty Co.*, 79 So. 2d 793, 797 (Ala. 1954)..." Kratovil, MODERN MORTGAGE LAW, at 261

<sup>66</sup> Some of the exceptions to the mortgagee's power to act as the owner or be treated as the owner of the land, meaning that the mortgaged premises are deemed not included in the mortgagee's property, arise in the following instances: (1) the execution by a judgment creditor of the mortgagee against the mortgagee's property; (2) the voluntary conveyance by mortgagee of its property; (3) the transfer by operation of law of mortgagee's property; (4) the bequest or devise by the mortgagee of the mortgagee's property; (5) the estate of an intestate mortgagee does not include the mortgaged premises; and, (6) payment in full by mortgagor of its debt extinguishes the mortgagee's "ownership". *Steven v. Tublington*, 210 5t 210 (N.C. 1923).

<sup>67</sup> "...the lessee [of a subsequent lease] may refuse to make any agreement with the mortgagee [as to attornment] and in such case the mortgagee cannot hold him for rent as such for any period. (citations omitted) ...a mortgage transfers no reversion against subsequent tenants and therefore there is no privity of estate or contract between the mortgagee and mortgagor's tenant. Consequently the mortgagee 'cannot, by mere notice, compel the tenant to pay rent to him,' ..." Osborne, MORTGAGES at 235, S. 144.

<sup>68</sup> *People-Pittsburgh Trust Co. v. Henshaw*, 15 A.2d 711, 715 (1940 Sup.Ct. Pa.).

<sup>69</sup> "The mortgagee could not, as such, demand the rent reserved by the lease, as there was no privity between her [mortgagee] and the lessees." *Winnisimett Trust Inc. v. Libby*, 125 N.E. 599, 600 (1920).

<sup>70</sup> "The mortgagee, having no right to possession prior to foreclosure except where he acquires the status of a 'mortgagee in possession,' a matter discussed later, is not entitled to rents from the mortgagor's tenants regardless of whether the leases preceded or followed the giving of the mortgage." Osborne, MORTGAGES at 238, S. 146.

permit the mortgagor to grant rents and possession at default,<sup>71</sup> though some states deem that grant void.<sup>72</sup>

c. Intermediate Theory.

Under the intermediate theory, the mortgagee only after its possession of the rents is generally entitled to rents from a pre-existing lease. But possession can occur upon default by performance of an affirmative act of possession. The right to rent is not as early as the grant of the mortgage nor as late as the foreclosure of the mortgage. The intermediate theory gestures back to the historic trappings of the title theory, but substantially overrides its effects.<sup>73</sup> Intermediate theories recognize the effect of the mortgage is that of a lien, but enhance it with the title theory characteristic of early rights to rent, and possession of the property after mortgage default. A number of intermediate theory states permit the right to rent and possession upon default,<sup>74</sup> without express provisions in the mortgage agreement. But in most title states and intermediate states, the mortgage provision is upheld if it provides that the mortgagee is not entitled to rents prior to default, but is entitled upon default.<sup>75</sup>

2. Rents after Mortgagor's Bankruptcy. The mere right to rents is not the same as possession of rents for purposes of the mortgagee obtaining the use of rents after a mortgagor bankruptcy. Possession of rents is a mark of ownership and dominion, unlike the distinction between proprietary rights and possessory rights to land where possession is merely a permissive circumstance which need not be linked to ownership.<sup>76</sup> To obtain the use of rents under the mortgage, the mortgagee must first obtain possession of the rents.<sup>77</sup> As a general rule,

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<sup>71</sup> "In some lien theory states ... the mortgagor may give the mortgagee the right to take possession or the right to collect rents as soon as default occurs, and such provisions are valid." (citations to Nebraska, California and Wisconsin cases omitted) *Id.* at 261.

<sup>72</sup> "In other lien theory states the provisions...are considered void as against public policy. (citations to an Oklahoma case omitted)." *Id.* at 262.

<sup>73</sup> "Generally stated, the rule in Pennsylvania is that although in form a conveyance of title, a mortgage is in reality only a security for the payment of money, or performance of other collateral contract." *Bulger v. Wilderman and Pleet*, 101 Pa. Super. 168, 171 (1930).

<sup>74</sup> "In intermediate theory states, Illinois, New Jersey, North Carolina, and Ohio, for example, ...after default the mortgagee has the right to take possession [of rents]. *Kranz v. Uedelhofen*, 62 NE 239 (1901)." *Id.* at 261

<sup>75</sup> Kratovil, MODERN MORTGAGE LAW at 266 S 20.04.

<sup>76</sup> As pointed out earlier, possession by a tenant had been an important test of its rights to protection under the Bankruptcy Code, "[i]n most ground lease situations, such as those in connection with the Park Avenue Properties, the ground tenant is not in physical possession, nor is the tenant in physical possession anytime the property is subleased. What such tenant actually "possesses" is a leasehold estate. If the courts were to misinterpret this language to refer to physical possession, many lessees and leasehold mortgagees would have been in a worse position..." Robert Zinman, "Precision in Statutory Drafting: The Qualitech Quagmire and the Sad History of Section 365 (h) of the Bankruptcy Code", 38, John Marshall Law Review, 97, 114 (Fall 2004). "Some courts did misinterpret "possession" as "occupancy" forcing the passage of § 205 of the Bankruptcy Reform Act of 1994." *Id.* at footnote 69.

<sup>77</sup> "If, therefore, prior to bankruptcy, the mortgagee has secured possession, commenced foreclosure proceedings, secured the appointment of a receiver for the property or has in any other manner acceptable under the mortgage and applicable state law sequestered or attached the rents and profits, it is clear under the rule just stated that the mortgagor's trustee has no rights as to such rents and profits from the property when bankruptcy ensues." 4A COLLIER ON BANKRUPTCY (14<sup>th</sup> Ed.) at pp. 159-162.



possession is obtained by foreclosure or the appointment of a receiver.<sup>78</sup> Possession of rent requires a conspicuous exercise of dominion by the mortgagee. But if a mortgage contains an assignment of rents with respect to subsequent leases, notice of demand by the mortgagee may be sufficient.<sup>79</sup> The recurring question has been whether a separate assignment of leases and rents should be treated differently, unshackled from the baggage of mortgage law history. If a mortgagee is also an assignee under an ALR, its rights should not be so restricted by the formalities and the tradition of mortgage law. This appears to be the current direction.<sup>80</sup> Courts have distinguished between perfection of rights to rent, which can be achieved by providing adequate notice to third parties of its prior interest in rents such as filing an assignment of leases and rents, and enforcement of rights to rent which are the steps necessary to collect the rent.<sup>81</sup> Another tool to protect mortgagee's collection is to use a lockbox for tenants to pay rent directly to an account controlled by lender from which funds are used to pay expenses unless there is an event of default

Courts have historically recognized that an assignment of rents can be made separate from and to a different party, than the assignment of the reversionary interest, meaning the mortgage.<sup>82</sup> The assignment of rents can be separated from the assignment of lease.<sup>83</sup> They can each be assigned to or held by different parties.

### 3. Mortgagee in Possession.

a. Purpose. A "mortgage in possession" acquires possession to protect or enforce its security interest. Possession can be required as a condition to the right to collect rent, depending on the jurisdiction.<sup>84</sup> Once in possession, the mortgagee can remain until

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<sup>78</sup> "In most States, the mortgagee's right to rents is dependent upon his taking actual or constructive possession of the property by means of a foreclosure, the appointment of a receiver for his benefit, or some similar legal proceeding." *Butner v. U.S.*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

<sup>79</sup> "If the mortgagor goes into bankruptcy (*Bindseil v. Liberty Trust Co.*, 3 Cir., 248 F. 112, Woolley, J.), or an attachment execution is levied upon the rents in the hands of the tenant, (*Miners Savings Bank v. Thomas*, 140 Pa. Super. 5, 12 A.2d 810), and the rent, in consequence, comes into the custody or control of the law, the priority of the mortgagee will be recognized and the rents distributed to the mortgagee in preference to the general creditors or attaching creditor, as the case may be, at least where the mortgage conveys the rents, issues and profits accruing under subsequent leases and the mortgagee gives notice of his demand for their payment." *Peoples-Pittsburgh Trust Co. v. Henshaw et al.*, 15 A.2d 711, 716 (1940).

<sup>80</sup> *In re SeSide Company, Ltd.*, 152 B.R. 878 (E.D. Pa. 1993).

<sup>81</sup> *Commerce Bank v. Mountain View Village, Inc.*, 5 F.3d 34 (3<sup>rd</sup> Cir. 1993) reasserted that a recorded assignment of rents created a lien effective as of the date of recording.

<sup>82</sup> "When rent is reserved, it is incident, though not inseparably so, to the reversion. \* \* \* The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent, by special words. \* \* \* It was perfectly within the power of the plaintiff to have assigned the rent to one, and the reversion to another \* \* \*." *Demarest v. Willard*, 8 Cow. 206, 209 (N.Y. 1828).

<sup>83</sup> See Tiffany § 881. See *Commonwealth Memorial, Inc. v. Telphase Society of America*, 134 Cal. Rept. 58 (1976) "It is clear, therefore, that decedent retained title to the lease, the income producing corpus, and the interest of the assignees was merely in the nature of a right to receive the rentals as and if they accrued to their assignor." *Ward et al. v. Commissioner of Internal Revenue*, 58 F.2d 757, 760 (9<sup>th</sup> Cir. 1932).

<sup>84</sup> See also *In re Wright*, 128 Bankr. 838 (Bankr. ND Ga. 1991), which describes a creditor's rights to rents and profits under Georgia law as incorporeal hereditaments which were part of the possessory bundle of rights known as seizin and therefore were inextricably bound to the real property itself. The creditor could therefore collect rents and profits only upon default of the debtor and "entry upon the property." Entry upon the property describes the contract right of the creditor to take possession of the property after default.

the mortgagor redeems the property by paying the debt, or loses the property at foreclosure.<sup>85</sup> The mortgagee is not a successor owner, but rather a trustee.<sup>86</sup>

b. Intended Status. The mortgagee must be the holder of a mortgage.<sup>87</sup> The mortgagee must acquire possession either by implied or express consent of the mortgagor,<sup>88</sup> or by legal right under the title theory principle that a mortgagor is a grantor of the property to the mortgagee.<sup>89</sup> For the same reason there is some debate as to whether a mortgagee can become a mortgagee in possession in a lien theory state<sup>90</sup> unless there is a contractual right.

c. Unintended Status. The mortgagee may sometimes be deemed to be in possession if it either exercises physical possession, or it exercises sufficient “dominion and control” as to enjoy the equivalent of physical possession. Determining the existence of the status is a question of fact.<sup>91</sup> One indicia for possession by the mortgagee is for a mortgagee to grant a third party the privilege of possession through the mortgagee’s entitlement. Tenants or purchasers in possession would qualify.<sup>92</sup> A similar issue would be where the mortgagee took over management and control while exercising its rights under the assignment to rents.<sup>93</sup> A mortgagor who cooperates with a mortgagee and grants into possessory control to perspective buyers recommended by mortgagee does not create the equivalent of a mortgagee in possession.<sup>94</sup> When the mortgagee enters into the possessory contract, it is exercising rights of a mortgagee in possession.<sup>95</sup>

d. Rights. The rights of the mortgagee include (1) collecting rent,<sup>96</sup> (2) administering and operating the property in a reasonable manner,<sup>97</sup> (3) prosecuting breach of

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<sup>85</sup> *Valley Int’l Properties v. Brownsville Sav. & Loan*, 581 S.W.2d 22, 225 (Tex. Ct. App. 1979).

<sup>86</sup> When a mortgagee goes into possession, he does not become the owner of the real estate. *Provident Trust Co. of Philadelphia v. Judicial Building and Loan Asso.*, 112 Pa. Super. 352, 171 A.2d 87 (1934); *Malamut v. Haines*, 51 F. Supp. 837 (M.D. Pa. 1943). Rather, he becomes a quasi trustee, managing the property for the benefit of the mortgagor, but at the same time protecting his own interest. *Zisman v. City of Duquesne*, 143 Pa. Super. 263, 18 A.2d 95 (1941); *McNicholas’ Appeal*, 137 Pa. Super. 415, 9 A.2d 200 (1939).

<sup>87</sup> *Id.*

<sup>88</sup> *Nelson v. Bowen*, 12 P.2d 1083, 1086 (Cal. Ct. App. 1932).

<sup>89</sup> “Concededly, before default in payment of the mortgage debt, the right to possession of the mortgaged premises remains in the mortgagor and that right continues until after a sale of the premises under a judgment of foreclosure and sale unless the mortgage, by its terms, expressly gives the right to have a receiver appointed with authority to take possession of the premises from the mortgagor or unless a receiver is given that authority for reasons extrinsic to the agreement contained in the mortgage.” *Holmes v. Gravenhorst*, 263 N.Y. 148, 188 N.E. 285, 91 A.L.R. 1230.

<sup>90</sup> *In re Century Inv. Funds VIII Ltd. Partnership*, 937 F.2d 371 (7th Cir. 1991), Wisconsin is a lien theory state, and the mortgagor remains the legal owner of the mortgaged property until judgment of foreclosure and sale has been held. However, a right to rents and profits is an incident of possession of the real estate and not title, and an immediate assignment of rents on default is enforceable when it is clearly the intent of the parties.

<sup>91</sup> *Nettles v. First Nat’l Bank of Birmingham*, 388 So.2d 916, 920 (Ala. 1980).

<sup>92</sup> *Miami Gardens, Inc. v. Conway*, 102 So.2d 622 (Fla. 1958).

<sup>93</sup> *Zisman v. City of Duquesne*, 18 A.2d 95 (Pa. Super. 1941).

<sup>94</sup> *Nettles v. First Nat’l Bank of Birmingham*, 388 So.2d 916, 920 (Ala. 1980).

<sup>95</sup> *Nelson v. Bowen*, 12 P.2d 1083, 1086 (Cal. Ct. App. 1932).

<sup>96</sup> See, e.g., *In re Aloma Square, Inc.*, 85 Bankr. 623 (Bankr. MD Fla. 1988); *In re Butz*, 86 Bankr. 595 (Bankr. SD Iowa 1988). See also *In re Cooper*, 273 B.R. 297, 39 Bankr. Ct. Dec. (CRR) 26 (Bankr. D.D.C. 2002). Applying DC law, the court found that when a mortgagor remains in possession of the property, he is entitled to the rents even after default. The rule applies only to those rents which accrue prior to the foreclosure and sale of the mortgaged property. See also *Barclays Bank P.C., New York Branch v. 865 Centennial Ave. Associates Ltd. Partnership*, 26 F.

contract claims against misuse of the property,<sup>98</sup> (4) prosecuting negligence claims for damage to the property,<sup>99</sup> (5) enjoining waste, and (6) appointing a receiver.<sup>100</sup>

e. Accounting. The mortgagee, as trustee, has a duty to account for the income<sup>101</sup> as properly applied to taxes, maintenance, and the debt.<sup>102</sup> The privilege to collect rents is bound by a duty to apply the proceeds properly.<sup>103</sup>

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Supp. 2d 712 (D.N.J. 1998), appeal dismissed (3d Cir. July 27, 1999), a mortgagee-in-possession of leased premises assigned its landlord right to rent and the landlord stood in the shoes of the mortgagee-in-possession and was subject to any defenses and right of setoff the tenant had against the mortgagee-in-possession. The landlord also assumed the duties and liabilities of the mortgagee-in-possession with respect to the tenant's claims in action. See also *TMG Life Ins. Co. v. Ashner*, 21 Kan. App.2d 234, 898 P.2d 1145 (1995), assignment of rents as security does not automatically vest the mortgagee with title to the rents upon default; the mortgagee's right to the rents vests when it initiates proper legal action to enforce its right. See also *United Nat. Bank v. Parish*, 330 N.J. Super. 654, 750 A.2d 238 (Ch. Div. 1999). A mortgagee's right to collect rents does not arise until appointment of a receiver or the mortgagee's taking possession. See also *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150 (7th Cir. 1996), a trust beneficiary under a deed of trust trustor could recover rents paid the trustor following deed-in-lieu of foreclosure because the beneficiary owned the property prior to trustee's possession. See also *Fidelity Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 71 F.3d 1306 (7th Cir. 1995), Illinois common-law rents and profits rule requires the mortgagee to take possession of the property or a receiver must have been appointed to administer the property. See also *In re Riverside Nursing Home*, 100 Bankr. 683 (Bankr. SDNY 1989), which indicates that under New York law, a mortgagee is not entitled to rents and profits from the mortgaged premises until (1) the mortgagee takes actual possession of the mortgaged property; (2) a receiver is appointed; or (3) the mortgagee demands and is refused possession. See also *In re Thymewood Apartments, Ltd.*, 123 Bankr. 969 (SD Ohio 1991), under the lien theory, the mortgagee can succeed to the rights in the property and rents derived from the property only after foreclosure and sale.

<sup>97</sup> See *Florida Bahamas Lines, Ltd. v. Steel Barge Star 800 of Nassau*, 433 F.2d 1243 (11th Cir. 1970). See, e.g., *Essex Cleaning Contractors, Inc. v. Amato*, 127 N.J. Super. 364, 317 A.2d 411 (1974). But see *New York Life Ins. Co. v. Gulf States Utils. Co.*, 336 So.2d 320 (La. Ct. App. 1976). *Prince v. Brown*, 856 P.2d 589 (Okla. Ct. App. 1993), mortgagee in possession has a right and duty to collect rents and profits but must apply them to the mortgage debt and account for any surplus, must exercise care and diligence just as a prudent owner would, and is liable for any waste or gross mismanagement or wrongful or tortious acts that injure the property. For discussion of an issue related to a mortgagee in possession, see *Kerr v. Miller*, 159 Or. App. 613, 977 P.2d 438 (1999), review denied, 329 Or. 287, 994 P.2d 122 (1999). The mortgagee in possession who improved the property in good faith reliance on the mortgagor's inability and professed lack of desire to redeem, was entitled to restitution for the improvements.

<sup>98</sup> See, e.g., *Wheeler v. Peterson*, 331 SW2d 81 (Tex. Civ. App. 1960). See *Evans v. California Trailer Court, Inc.*, 33 Cal. Rptr. 646 (1994). The California antideficiency statutes precluded the deed of trust holders from maintaining a contract claim to recover a deficiency, but did not preclude tort claims. Specifically, antideficiency statutes do not apply when a deed of trust borrower has impaired the security bad faith waste which is reckless, intentional, or malicious injury to the property.

<sup>99</sup> *Kulp v. Trustees of Iowa College*, 217 Iowa 310, 251 NW 703 (1933); *Douglas v. Lowery*, 130 Ill. App.2d 910, 266 NE2d 107 (1971). But see *Frio Invs., Inc. v. 4M-IRC/Rohde*, 705 SW2d 784 (Tex. Ct. App. 1986), a mortgagee who does not own the property, cannot bring an action for damages to the property only for an injury to his security. Thus, if the property value remains greater than the debt, the mortgagee has suffered no injury.

<sup>100</sup> *Federal Land Bank of New Orleans v. Southmont Mfg. Co.*, 219 Fla. 447, 122 So. 426 (1929); *Fourth Ave. Amusement Co. v. Glenn*, 201 F.2d 600 (6th Cir. 1953); *American Medical Servs., Inc. v. Mutual Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 188 NW2d 529 (1971); cf. *Mutual Benefit Life Ins. Co. v. Frantz Klodt & Son, Inc.*, 306 Minn. 244, 237 NW2d 350 (1976).

<sup>101</sup> *Martinez v. Continental Enters.*, 697 P.2d 789 (Colo. Ct. App. 1984), where the mortgagee takes back peaceful possession of property subject to a mortgage but does not collect rent on the property, the mortgagor is entitled to an accounting and offset against the indebtedness in the amount of the property's fair market rental value during possession by the mortgagee.

f. Risks. The mortgagee has a fiduciary duty to the borrower and is therefore more exposed to traditional lender liability attacks.<sup>104</sup> Those duties may run not only to the mortgagor,<sup>105</sup> but to those parties claiming through the mortgagor, such as junior lien holders<sup>106</sup> and possibly tenants.<sup>107</sup> The duties can include (1) collecting rent,<sup>108</sup> (2) actively managing to obtain market rent,<sup>109</sup> (3) maintenance and repair to the standard of a reasonably prudent man,<sup>110</sup> (4) preventing vandalism,<sup>111</sup> and (5) protecting invitees from injury.<sup>112</sup> If the mortgagee does not take constructive ownership or actual possession, it is not tortiously liable for injury resulting from the condition of the premises.<sup>113</sup>

g. Environmental Liability. Each state may have different tests and safe harbors for lenders to avoid environmental liability. Under CERCLA, a mortgagee may, as an “owner and operator” become liable for clean-up, but only if it flunks several tests. A lender is exculpated if it is not (1) an owner or operator, or (2) even if it might otherwise be an owner or operator, does not participate in management and holds ownership primarily to protect its security interest, including owning the real estate if it seeks to divest itself of the property at the earliest commercially reasonable time taking into account current market conditions.<sup>114</sup> See Exhibit 2.7 for an excerpt of statutory safe harbors under Federal and Pennsylvania law. Unfortunately, CERCLA does not define “commercially reasonable.” EPA has stated that the test will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication. But it does not explore the consequences of the failure to sell within the 12 months and will depend upon the market conditions and fact findings of what business judgments are reasonable. Considering the unknown, the lender with possession of the property needs to evidence its efforts (1) to actively market the property; (2) to avoid managing or operating the property, except to preserve the

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<sup>102</sup> *Landau v. Western Pa. Nat'l Bank*, 445 Pa. 217, 282 A2d 335 (1971). See *Karnes v. Morrow*, 315 Ark. 37, 864 SW2d 848 (1993), mortgagee in possession of the mortgaged property is liable for all rents and profits collected or that could have been collected by ordinary diligence and must apply these amounts to the mortgaged debt.

<sup>103</sup> *Elliott v. Moffett*, 74 A2d 164, 365 Pa 247; A mortgagee who goes into possession of mortgaged land assumes responsibility for management and preservation of the property. *Zanzonico v. Zanzonico*, 66 A2d 530, 2 NJ 309. Equity treats a mortgagee lawfully in possession as a constructive trustee instead of as a grantee under a deed. *Armstrong v. Germain*, 98 NYS2d 946.

<sup>104</sup> *Johns v. Moore*, 336 P.2d 579, 581 (Cal. Ct. App. 1959); *Myers-Macomber Eng'rs v. M.L.W. Constr. Corp.*, 414 A.2d 357 (Pa. Super. Ct. 1979); *New York and Suburban Fed. Sav. & Loan Ass'n v. Sanderman*, 392 A.2d 635 (N.J. Super. Ct. Ch. Div. 1978).

<sup>105</sup> *Provident Trust Co. of Philadelphia v. Judicial Building and Loan Asso.*, 112 Pa. Super. 352, 171 A. 287 (1934); *Peugh v. Davis*, 113 U.S. 542, 28 L. Ed. 1127.

<sup>106</sup> *Id.*

<sup>107</sup> *Leeds v. Gifford*, 41 N.J. Eq. 464, 5 Atl. 795.

<sup>108</sup> *Id.*

<sup>109</sup> *Johns v. Moore*, 336 P.2d 579, 581 (Cal. Ct. App. 1959).

<sup>110</sup> *Landau*, 282 A.2d at 339.

<sup>111</sup> *Zanzonico v. Zanzonico*, 66 A.2d 530, 533 (N.J. 1949), *cert denied*, 338 U.S. 868 (1949).

<sup>112</sup> *City of Newark v. Sue Corp.*, 304 A.2d 567, 569 (N.J. Super. Ct. App. Div. 1973); *New York and Suburban Sav. & Loan Ass'n*, 392 A.2d at 638.

<sup>113</sup> In *Central Pennsylvania Savings Association v. Carpenters of Pennsylvania, Inc.*, 502 Pa. 17, 463 A.2d 414 (1983), the first mortgagee had every right to finish the construction project, particularly since it was a potential danger to third parties, (presumably trespassers), due to its unfinished condition. In this regard, the Supreme Court noted that a mortgagee-in-possession could bear tort liability to a third party (citing to *Sansotta v. City of Pittsburgh*, 330 Pa. 199, 199 A. 164 (1938). for support), if in control of real property.

<sup>114</sup> See Exhibit A.

property value and to prevent waste; and (3) and to document any decisions choosing to reject offers showing reasonable business judgment.

E. Deed-in-lieu; Deed in the Drawer

1. Purpose. The deed-in-lieu is designed to provide the mortgagee with ownership and control of the collateral before undertaking foreclosure.

2. Mortgagor's Position. The mortgagor's approach is to offer the minimum needed to provide the mortgagee with as close to the equivalent of a foreclosure result as the mortgagor can deliver. Consequently, the mortgagor proceeds under the principle that there should be no covenants, representations, warranties or indemnities, because upon a foreclosure, the mortgagee cannot obtain more than a sheriff's deed to the property in whatever condition it is in as to title, physical elements, and legal compliance. The mortgagor looks to surrender liability and ongoing operating costs.

3. Mortgagee's Position. The mortgagee's approach is to seek representations and warranties to dispose of ancillary issues as to title that would otherwise be achieved in a foreclosure. The benefit to the mortgagee is to accelerate its ability to control the property whether that adds value by avoiding waste, averting the loss of expiring permits, or preventing the accumulation of unsecured debt. Ordinarily speed of control over the collateral is a benefit. Sometimes a mortgagee will be uninterested in a deed in lieu when there are complications and disputes among the mortgagor's owners, because there may be a greater liability to the mortgagee being accused of interfering in a business dispute than the continuing incurrence of potentially priming liens and postponement of control.

4. Typical Terms. Typically, if there is a settlement agreement, it addresses the following contractual issues:

a. Deed Delivery. Borrower covenants to deliver a deed: either (i) currently delivered in lieu of foreclosure, (ii) promised to be delivered in future, or (iii) "in the drawer" and held in escrow until a condition subsequent occurs. Some Lender's refuse to take deeds-in-the-drawer fearing it could be recharacterized as an equitable mortgage and set the stage for another claim for clogging the equities or otherwise supervening the non-waivable protection of mortgage foreclosure statutes.

b. Further Cooperation. Borrower covenants to cooperate in summary remedies of mortgagee: (i) stipulate to and allow entry of judgment subject to suspension by Lender pending outcome of settlement agreement, (ii) waive rights (some waivers are unenforceable such as right to deficiency judgment) to contest, object, retrain, or appeal, (iii) waive and withdraw defenses, (iv) release claims and counterclaims.

c. Deed Absolute. Borrower acknowledgement in the case of deed-in-lieu that conveyance is absolute and not an equitable mortgage.<sup>115</sup>

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<sup>115</sup> Absolute Conveyance. The Borrowers and the Guarantors acknowledge and agree that: (a) the conveyance of the Project to the Lender, or its assignee or nominee, pursuant to the terms of this Agreement is an absolute conveyance

d. Merger. When a mortgagee takes a deed to the mortgage premises, the interest in the mortgage is presumptively deemed to merge into its fee estate, because the fee estate is more encompassing by including the right of redemption which is carved out of the mortgage estate. The presumption of merger can be overcome by express disclosure in the deed of the intent of the parties to sustain the separate existence of the two interest held by the mortgagee.<sup>116</sup> Without preserving that separation, the mortgagee would be unable to foreclose its mortgage and would necessarily take the deed subject to what otherwise would have been subordinate and divestible encumbrances.

e. Title Insurance. Mortgagee may choose to rely on its lender's title policy and take the risk that there are subsequent parties in interest to which it takes subject rather than insure the owner's title as of the deed delivery date. The mortgagee is more prone to this strategy if it anticipates obtaining title insurance at the subsequent foreclosure.

f. Transfer Tax. In Pennsylvania and some other jurisdictions, there is no transfer tax upon a deed-in-lieu conveyance by a mortgagor to the mortgagee who is the owner of the defaulted mortgage.<sup>117</sup>

g. Bulk Sales Tax. It is possible that a bulk sales tax will be imposed on the Borrower, Lender and real estate if the Borrower has past due taxes for labor and employment.<sup>118</sup>

## 5. Risks/Rewards.

a. Avoid Publicity. The lender and borrower may each have reasons to keep low profiles. The mortgagee may not want publicity about its bad loans being misinterpreted as market weakness. The Borrower may worry its other lenders will start to feel insecure about its creditworthiness.

b. Cost Savings: A deed-in-lieu negotiation may take time but it should take less time than the foreclosure process of obtaining a judgment, even if is

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of all of the Borrowers' and all of the Guarantors', right, title and interest in and to the Project in fact as well as in form and the deed, bill of sale and other conveyance documents are not intended to be a mortgage, trust conveyance, deed of trust or security instrument of any kind; (b) the consideration for such conveyance is exactly as recited in this Agreement; (c) after the Closing Date the Borrowers and the Guarantors will have no further interest (including rights of redemption) or claims in, to or against the Project or to the proceeds or profits that might be derived therefrom except for the accounting of Discharge Consideration after the Closing Date, (d) the conveyance herein is in consideration of the Lender's covenants and releases contained in this Agreement, (e) the conveyance is not intended to secure in any way whatsoever either the Indebtedness or the performance of any other obligation by Borrowers or Guarantors and (f) the negotiations which led to the consummation of this Agreement were conducted in good faith and purely from the standpoint of the Lender or its nominee or assignee holding title to the Project from Borrowers for a good and adequate consideration, with the intent to take and continue to hold full and complete possession of the Project as its new owner.

<sup>116</sup> Reid from Mortgagor to Mortgagee or from Purchaser to Vendor as Merger of Mortgage of Vendor's Lien as Regards Intervening Liens, 148 A.L.R. 816 (1944).

<sup>117</sup> 72 P.S. §8102-3(16) A transfer by a mortgagor to the holder of a bona fide mortgage in default in lieu of a foreclosure or a transfer pursuant to a judicial sale in which the successful bidder is the bona fide holder of a mortgage, unless the holder assigns the bid to another person.

<sup>118</sup> 72 Pa. Stat Ann. §§7240, 7321.1 and 1403; 43 Pa Stat. Ann. §788.3.

uncontested, then advertising, scheduling the sale on one the sheriff's scheduled days, and then taking the recorded sheriff's deed after any objections to the sale have been surfaced. The negotiation would also cost attorney's fees similar to negotiating a purchase agreement but should provide more information than a sheriff's foreclosure, and so the Borrower would take some time to gather data for schedules of its representations. A contested foreclosure would take more time and money. A Borrower may prefer to contest if it believes it can improve its position, or worsen the Lender's position, given enough time. But a Borrower contest would also likely provoke the Lender to sue the guarantor, whereas a deed-in-lieu frequently contemplates the release of the guarantor, and sometimes a premium or fee to the Borrower for its cooperation.

c. Borrower Cooperation: The Borrower's cooperation can provide valuable benefits to the Lender at several points. In addition to providing better information and more disclosure than in a foreclosure, a deed-in-lieu transaction can also provide better transition of control and transfer of information, contracts, warranties, escrows and permits. The cooperative transfer of software data, staff institutional knowledge, even keys and security codes, relieves stress on the value of the property and unnecessary costs. Tenant files, original leases, condominium books and records can all be more efficiently transferred, and with planning the transition can include estoppels from third parties and acknowledgment of assignments by governmental and third party entities. The parties usually include a mutual cooperation clause in the agreement to address items that were overlooked.

d. Premium or Deficiency: Depending on the various values of the transaction's components, the Borrower may expect to be paid a premium or cooperation fee, or to be saddled with a deficiency. The fee to Borrower may reflect that the value of the real estate is greater than the debt, or the Lender's quantification of the values of both the benefit of Borrower's cooperation and the avoidance of delay. Release of the Borrower and Guarantor from further liability is another common form of consideration provided to the Borrower. On the other hand, in some instances, the real estate value is so low, the Lender will require a further payment as a condition of closing.

e. Cleared Title: The mortgagee can prevent merger of estates by express disclosure, and preserve the mortgage. That allows the mortgagee to subsequently foreclose and divest any liens that arose after the recording of the mortgage and the issuance of the Lender's title policy. The Lender receives the benefit of current ownership and the back up benefit of being able to subsequently clear title of objections.

f. Releases: If, as is common, the Borrower asserts or intimates rights against the Lender, a deed-in-lieu allows the Lender to orchestrate a release by Borrower and Guarantor all claims against the Lender. Lenders will frequently negotiate for the release as a condition of entering into the deed-in-lieu. The Borrower and Guarantor may seek reciprocal releases from the Lender. But the Lender will condition that release, and reserve the right to sue, if the Borrower repudiates the agreement, files bankruptcy or supports any actions against Lender.

g. Recharacterized as Mortgage: If there is a chance the Lender would give the deed back to Borrower the deed could be recharacterized as a mortgage, and

Lender's interest would not be a fee estate but only a security interest in the fee estate. To prevent recharacterization the Lender would expressly state the deed is a deed absolute without any subsequent rights or conditions that it be returned to Borrower.

h. Mortgage Foreclosure Violation: If the Lender has been given both a deed and a mortgage prior to a default, the Lender should be concerned that the deed would be recharacterized as a mortgage and that recording impermissibly circumvents the mortgagor's right of redemption and other mortgagor protections built into the mortgage foreclosure statutes, such as notice to all third parties interest to promote bidding activity at a sale.

i. Subject to Subordinate Claims: The grantee of the deed takes subject to encumbrances arising after the date of the insured mortgage. If one of those is a subordinate lienholder who initiates foreclosure, that could instigate a need for the Lender to foreclose at an inopportune time or in a manner inconsistent with the Lender's strategy. In addition, in Pennsylvania, if the senior mortgage is subordinated to a non-mortgage lien, such as a slip-and-fall judgment creditor, a subordinate judgment lien foreclosure would divest all of the encumbrances starting with the most senior judgment lienholder. Lastly, if the pre-existing mortgage is deemed to have merged into the deed, then the mortgagee loses the ability to divest the subordinate claims by foreclosure

j. Voidable Transfer. The transfer may be subject to attack as voidable on two theories. One would be based on the premise that the property is worth more than the debt, and therefore is a fraudulent transfer to the detriment of Borrower's creditors.<sup>119</sup> The other theory is that the transfer may be a voidable preference to Lender if the Lender has received more than it would have received in a liquidation.<sup>120</sup>

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<sup>119</sup> 11 U.S.C. §548(a) "Fraudulent transfers and obligations (a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily— (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. (2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which— (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions."

<sup>120</sup> 11 U.S.C. §547(b) "(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property-- (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made-- (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year



k. Cancellation of Debt. A Borrower may have to recognize taxable income or gain if it is relieved of debt liability.

F. Deed in the Drawer

1. Procedure. The Lender will typically require the Borrower to execute a deed, deliver it into escrow, and upon a default, the Lender can record, or direct the escrow agent to record, the deed.

2. Clogging the Equity. When a deed is delivered with the intent that it will be returned to the grantor upon discharge of the debt, but will be recorded upon a default, there is a presumption that by recording the deed upon default that the Lender has interfered or prevented the Borrower from exercising the longstanding right to redeem the debt. Similarly if a deed is recorded, but subject to reconveyance to the Borrower, then it is the structure as a mortgage. This interference is the “clogging” of the equity of redemption, and subject to rescission by the court of equity. The common law rules relating to mortgages requires mortgagees to expose the property to reasonable sale with payment to be applied to the debt, and any excess paid to the Borrower.

3. Extending the Debt. When a mortgagor defaults on a mortgage, entitling the mortgagee to foreclose, the mortgagee may take an escrowed deed in exchange for extending the cure period and has a better argument against the defenses of clogging the equity or violating rules for foreclosure, because to take a deed in escrow and subsequently record it is a less oppressive and inequitable remedy than exercising the then available right to foreclose.<sup>121</sup>

V. **GUARANTY UNENFORCEABILITY**

A. Defenses.

1. Change in Status of Oblige. The traditional rule stands for the proposition that a change in the composition of a partnership obligee defeats its ability to enforce a guaranty given by an earlier incarnation of the obligee.<sup>122</sup>

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before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if-- (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.”

<sup>121</sup> “In sum, under the terms of the Conditional Extension Agreement and Escrow Agreement, the Plaintiff was given additional time to cure its continuing default on the Promissory Notes without the threat of a date-certain, impending foreclosure sale, and in exchange, the Plaintiff executed the Quit Claim Deeds, which were simply deeds in lieu of foreclosure to be placed into escrow during the agreed-upon forbearance period. Had the Plaintiff cured the default prior to or on the June 25, 2007 deadline, the conditions of the Conditional Extension Agreement would have been satisfied, and pursuant to those conditions and the Escrow Agreement, the escrowed Quit Claim Deeds would have been returned to the Plaintiff, and the previously scheduled and postponed foreclosure sale would have been canceled, as any authorization to foreclose would have been nullified by the cure.” *In re Webb Mtn, LLC*, 2009 WL 425033 (Bkrtcy.E.D.Tenn. (2009)).

<sup>122</sup> 38 AM. JUR. 2d Guaranty § 30. *Dozier v. Paterson Co., Inc.*, 648 So. 2d 610 (Ala. Civ. App. 1994); *Iola State Bank v. Biggs*, 233 Kan. 450, 662 P.2d 563 (1983); “In 45 A.L.R. 1426, it is stated: ‘The general rule seems to be

2. Assignment. Another ancient rule is that an assignment of a special guaranty without the guarantor's consent may not be enforceable, unless there is no material alteration of the guarantor's obligations.<sup>123</sup>

3. Invalidity. A proof of mistake, incompetency, coercion, fraud, concealment, misrepresentation, duress and the like can defeat the enforceability of a guaranty.

4. Void Obligation. If the principal obligation is void, such as because it is illegal or unenforceable, the guaranty would fail. But if the principal obligation is merely voidable, then the guarantor is not entitled to raise that defense.<sup>124</sup>

5. Death of Guarantor. Death does not automatically revoke a guarantor's obligation unless expressly provided, but it does revoke the liability as to subsequent advances. But contrary to the assumption that a guaranty would always continue with the estate of a deceased guarantor, it appears that if the amount and probability of liability is uncertain, the Pennsylvania Probate Court will fix the amount of the estate's obligation (which may be far less than the amount guaranteed), set that aside, and then permit the estate to distribute the balance of the assets free of the contingent liability. The policy purpose is to enable an estate to be liquidated rather than keep an estate open for an indefinite period of time until the amount and fact of liability becomes fixed. To avoid the uncertainty of local law and the risk of waiting until a borrower default occurs before attempting to collect from the guarantor's estate, lenders will commonly propose to list a guarantor's death among the events of default. The guarantor would contend that the default should only occur if the estate terminates this guaranty. Similarly, the note becomes due upon the death of any guarantor and thereby triggers the enforceability of the guaranty. The reason for this provision is to establish that there is a liability and the guaranty becomes fully operative upon default. It fixes the amount due as the obligations then due at death, preventing any uncertainty which would otherwise exist. Language addressing the death of an individual who is a guarantor as an event of default can be ameliorated to include some of the following concepts:

“Guarantor acknowledges that it shall be an Event of Default under this Guaranty if, within [ ] days after the death of the Guarantor, the estate of the Guarantor (“Estate”):

- (A) has not executed and delivered to Lender instruments in form and substance acceptable to Lender expressly providing (i) the assumption and reaffirmation of the terms and provisions of the Guaranty and any security instruments executed and delivered by the Guarantor; (ii) the waiver and

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that a surety or guarantor of a partnership is not liable in respect of transactions or defaults subsequent to its dissolution by a withdrawal from or an addition to its membership, whether the transaction or default is by a partnership which succeeds the original partnership, or by an individual member of the original partnership; and this, in a majority of the courts, without regard to the question of notice.” *Hunt Oil Co. v. Killion*, 299, 322 S.W.2d 316 (Tex. Civ. App. Texarkana 1957), writ refused n.r.e.

<sup>123</sup> 38 AM. JUR. 2d Guaranty § 32. See Attachment B.

<sup>124</sup> 38 AM. JUR. 2d Guaranty § 50. See Attachment B.

release of any defenses, set offs, or claims to which it is otherwise entitled; and (iii) the establishment of reserves reasonably sufficient to satisfy its obligations under the Guaranty or proof reasonably acceptable to Lender of the financial ability of the Estate to meet its obligation under the Guaranty for the period of the Guaranty's term; or

- (B) makes or intends to make any payment or distribution the result of which would leave the Estate with insufficient reserves to satisfy its obligations under the Guaranty.”

6. Implicit Release of Guarantor. A guarantor may be discharged if it proves it was released by the obligee. The release can be explicit or implicit. It can be the result of abandonment.<sup>125</sup> It can result from impairment of the guarantor's rights. Under the traditional rule, any modification of the underlying obligation resulted in a discharge.<sup>126</sup> But the Restatement of Suretyship 3<sup>rd</sup> (“Restatement”) adopts a more modern rule that the modification must be sufficiently substantial as to result in a substitute novation contract.<sup>127</sup> Acts or events caused by lender, or others, that can impair the guarantor, can include:

- a. impairment of right of subrogation,
- b. bad faith,
- c. fraudulent or negligent concealment of material facts or incomplete disclosure or risk,
- d. material alteration of the principal obligation<sup>128</sup> such as the increase of debt or extension of maturity<sup>129</sup>
- e. unjustifiable impairment or release of collateral<sup>130</sup>

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<sup>125</sup> 38 AM. JUR. 2d Guaranty § 80. See Attachment B.

<sup>126</sup> Restatement § 41. See Attachment A.

<sup>127</sup> Restatement § 41, comment e. See Attachment A.

<sup>128</sup> “However, it is well settled that a surety's consent to material modifications in the creditor-debtor relationship may be obtained as part of the suretyship contract. Where the surety has given such prior consent, the surety is contractually bound to accept the material modifications in the creditor-debtor relationship. A suretyship “contract must be given effect according to its own expressed intention as gathered from all the words and clauses used, taken as a whole, due regard being had also to the surrounding circumstances.” [citations omitted] \* \* \* “By the very terms of their suretyship contract, the Axlers consented to be obligated for the ‘Liabilities of any partnership, firm, corporation or other company which may be a successor to’ North Broad. Thus, the suretyship contract in the present case, unlike the suretyship contract in Pure Oil Co., fully encompasses the modification that occurred in the creditor-debtor relationship, and the Axlers remain contractually liable for the debtor's obligation.” *Continental Bank v. Axler*, 510 A.2d 726, 730 (Pa. Super. Ct. 1986). See also, *William Schluderberg-T.J. Kurdle Co. v. Trice*, 198 Va. 85, 92 S.E.2d 374 (1956). The guarantee explicitly stated that the guarantor would only provide the guarantee as long as the borrower's indebtedness remained less than or equal to \$2,500. Also see, 38 AM. JUR. 2d Guaranty §83. Alteration of principal obligation—Particular changes in contract. See Attachment B.

<sup>129</sup> see also Restatement §37. See Attachment A.

- f. taking a new note from debtor<sup>131</sup>
- g. failure to perfect borrower's security interest to which guarantor could become subrogated
- h. release, postponement or novation of substitute obligor<sup>132</sup>
- i. failure to comply with law, including breach of statute of frauds<sup>133</sup>
- j. impairment of right of recourse<sup>134</sup>
- k. failure to mitigate damages. To protect against these defenses, lenders will propose the following guarantor waiver:

“any application by Lender of funds which lawfully could be applied to the Guaranteed Obligations, but which Lender applied to other obligations. . .”

The lender may in turn have defenses to those claims of impairment based on (1) lender's anticipatory reservation of rights, (2) the independent indemnification of guarantor, (3) guarantor's consent, or (4) lender's lack of knowledge of guaranty at time of impairment.<sup>135</sup>

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<sup>130</sup> “[W]here the guaranty is absolute and unconditional and does not require the creditor to take any action to preserve the security, the creditor's failure to do so will not relieve the surety's obligation to pay upon default.” *McKeesport Nat. Bank v. Rosenthal*, 513 A.2d 434, 436 (Pa. Super. Ct. 1986). “At common law a surety was discharged of his obligation if and to the extent that the creditor voluntarily released the principal debtor from liability, unless the surety consented to such release or the creditor expressly reserved his rights against the surety. \* \* \* The very language and structure of section 3606 of the UCC clearly indicate that the provision codifies and preserves, with regard to commercial paper, protections which the common law gave to parties deemed to be sureties.” *Keystone Bank v. The Flooring Specialists, Inc.*, 518 A.2d 1179, 1185 (Pa. Super. Ct. 1986). “FDIC v. Blue Rock Shopping Ctr., Inc., 766 F.2d 744, 749 (3d Cir.1985) (“We agree with the Unum Court that 3-606 is meant to apply only to parties who act as sureties. We hold, however, that a co-maker who signs a Note to accommodate the primary obligor and who has a right of recourse against the primary obligor is a surety who can assert the defense of 3-606(1)(b).”); United States v. Unum, 658 F.2d 300, 304-05 (5th Cir.1981) (holding that 3-606 extends to sureties, but not co-makers).” \*\*\* First Fed. Sav. & Loan Ass'n of Pittston v. Reggie, 376 Pa.Super. 346, 353 n. 2, 546 A.2d 62 (1988) (“The Uniform Commercial Code as enacted in Pennsylvania codifies the common law grounds for discharge of a surety in relation to commercial paper.”)”

<sup>131</sup> “the creation of the Corporation and the Bank's consolidation of the Biggs' notes into a new note by the Corporation extinguished the 1974 guaranty agreement for credit extended for the Corporation and could not exceed the sum of \$150,000.00.” *Iola State Bank v. Biggs*, 662 P.2d 563 (Kan 1983).

<sup>132</sup> See *Venaglia v. Kropinak*, 956 P.2d 824, 833-835 (N.M. Ct. App. 1998) the guarantor was fully discharged from his guarantee because the settlement agreement between the borrower and the noteholder prejudiced his rights as guarantor, following section 44 of the Restatement. Article 3 of the UCC does not preclude the common law defenses preserved in section 44 of the Restatement.

<sup>133</sup> *C.I.T. Corp. v. Anwright Corp.*, 237 Cal. Rptr. 108, 3 UCC Rep.2d 1638 (Cal. App. 1987) confirming that with respect to the protections of UCC 9-504 that a creditor provide notice of the time and place of sale, a waiver by a guarantor is unenforceable as to the guarantor just as much as to a debtor, because the guarantor has the same rights as the debtor under 9-501(3)(b) which prohibits the waiver.

<sup>134</sup> *Union Bank v. Gradsky*, 265 Cal. App. 2d 40, 44-48 (1968);

<sup>135</sup> Restatement § 40, comment d. See Attachment A.

7. Discharge by Operation of Law. There are several circumstances where the guarantor can be discharged of liability based on operation of law, such as the following:<sup>136</sup>

- a. Debtor's assignment to creditors, as distinct from its bankruptcy
- b. Lender's failure to achieve a deficiency judgment on the recovered value of the collateral.
- c. Failure of lender to accept the guaranty.
- d. Foreclosure sale of collateral which destroys guarantor's right of subrogation.

8. Statute of Limitations. Generally, the guarantor is not released due to the lender's failure to take action against borrower before the expiration of the statute of limitations.<sup>137</sup> "[A]ccordingly, the principal obligor is discharged from duties to the secondary obligor ... and the secondary obligor is discharged from duties to the obligee. . .".<sup>138</sup>

## B. Defects.

### 1. Ineffective Waivers.

a. General Waivers. Lenders routinely provide for guarantors to give broad and unconditional waivers. Though frequently attacked, if guarantor's rights are clearly waived, the lender generally prevails.<sup>139</sup> Typical clauses resemble the following:

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<sup>136</sup> 38 AM. JUR. 2d Guaranty § 96. See Attachment B.

<sup>137</sup> RESTATEMENT, §50. "The secondary obligor's rights and duties with respect to the principal obligor and the obligee are the same as if, on the day that the statute of limitations expired, the obligee had released the principal obligor . . . without preserving the secondary obligor's recourse against the principal obligor."

<sup>138</sup> RESTATEMENT §43. Under Comment e to section 43, if the guarantor consents "expressly or impliedly" to the lender's action or waives suretyship defenses it prevents extinguishment of guarantor's obligations or decidedly against discharge (See *Bloom v. Bender*, 313 P.2d 568 (Cal. 1957)).

<sup>139</sup> RESTATEMENT §48(1) The *Comment d.* See Attachment A. See also subsection (i) of UCC §3-605 (which section replaced former section 3-606) which allows waiver of defense of impairment of collateral, either specifically by general language waiving suretyship defenses or defense of impairment of collateral, *but see further* Comment 8 to UCC §3-605 which notes that if an accommodation party is a debtor with respect to a note secured by personal property collateral, Article 9 also applies, including as to whether and to the extent the debtor's rights can be waived under Article 9. Section 9-602 (see below) forbids debtor's waiver, and may be equally applicable to guarantor. See Also *Federal Deposit Insurance Corporation v. Coleman*, 795 S.W.2d 706 (Tex. 1990) which held that a guaranty agreement is not a negotiable instrument and therefore is not subject to the rule of UCC 3-606 that a party to a negotiable instrument who does not consent to its impairment is then discharged from liability if it is impaired.

#### **§ 9-602. Waiver and variance of rights and duties**

Except as otherwise provided in section 9624 (relating to waiver), to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in: (1) section 9207(b)(4)(iii) (relating to expenses, risks, duties and rights when secured party in possession); (2) section 9210 (relating to request for accounting; request regarding list of collateral or statement of account); (3) section 9607(c) (relating to commercially reasonable collection and enforcement); (4) sections 9608(a) (relating to application of proceeds, surplus and deficiency if obligation secured) and 9615(c) (relating to application of noncash proceeds) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement or

“Guarantor waives any rights, defenses or claims, including, without limitation suretyship defenses,<sup>140</sup> bad faith, fraud, conspiracy, lender misconduct<sup>141</sup> those conditions, which might otherwise constitute a legal or equitable defense, discharge or release of a guarantor or surety. If Borrower defaults under the Loan Documents and Lender is prevented from accelerating or collecting payment under the Note and other Loan Documents (whether because of Borrower’s Bankruptcy or any other reason), Lender shall be entitled to receive from Guarantor, upon demand by Lender, the sums which would have otherwise been due and

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disposition; (5) sections 9608(a) and 9615(d) (relating to surplus or deficiency if obligation secured) to the extent that they require accounting for or payment of surplus proceeds of collateral; (6) section 9609 (relating to secured party’s right to take possession after default) to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace; (7) sections 9610(b) (relating to commercially reasonable disposition), 9611 (relating to notification before disposition of collateral), 9613 (relating to contents and form of notification before disposition of collateral: general) and 9614 (relating to contents and form of notification before disposition of collateral: consumer goods transaction); (8) section 9615(f) (relating to allocation of surplus or deficiency in disposition to person related to secured party); (9) section 9616 (relating to explanation of calculation of surplus or deficiency); (10) sections 9620 (relating to acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral), 9621 (relating to notification of proposal to accept collateral) and 9622 (relating to effect of acceptance of collateral); (11) section 9623 (relating to right to redeem collateral); (12) section 9624 (relating to waiver); and (13) sections 9625 (relating to remedies for secured party’s failure to comply with division) and 9626 (relating to action in which deficiency or surplus is in issue).

<sup>140</sup> “The majority and better rule is that a waiver of a suretyship defense should specifically refer to the suretyship defenses, rather than relying on the words “absolute and unconditional.” *Langeveld v. L.R.Z.H. Corp.*, 376 A.2d 931, 936 (NJ 1977) the court, construing UCC 3-606 language “the holder discharges any party to an instrument to the extent that without the party’s consent the holder...(b) unjustifiably impairs any collateral for the instrument given.” as a codification of common law that the guarantor has a defense to performance of the guaranty to the extent of the impairment of collateral to which the guarantor would be subrogated, the court further ventured that even if the characterization of “unconditional guarantor” had been in the text, it would have only meant that the guarantor was primary liable, but not that it waived a defense of impairment of collateral, unless express language so provided; cf. *Joe Heaston Tractor & Implement Co. v. Securities Acceptance Corp.*, 243 F.2d 196, 200 (10th Cir 1957) the court held that the simple characterization of the guaranty as “absolute” or “unconditional” thwarted a guarantor’s defense that the creditor failed to secure or properly secure the debt. The major exception to the general rule enforcing surety waivers concerns waivers of notice of an UCC Article 9 foreclosure and the defense of “commercial reasonableness.” The majority rule is that such a waiver is not enforceable, e.g. *C.I.T. corp. v. Answright Corp.*, supra; *Bank of China v. Chan*, 937 F.2d 780 (2d Cir. 1991) in which the Second Circuit concluded that a guarantor is treated as a debtor for the protective provisions of Article 9, and UCC 9-504(3) that the waiver of the right to a commercially reasonable disposition of collateral is null and void; *Marine Midland Bank v. Kristin Int’l, Ltd.*, 534 N.Y.S.2d 612, 614, 8 UCC Rep. 2d 265 (App. Div. 4<sup>th</sup> Dept. 1988) held that a guarantor is a debtor within the definition of UCC 9-105(1)(d) and cannot waive the defense of commercial reasonableness, which then set a precedent on which the court in Chan, above, relied. Contra: *Nat. Bank of Washington v. Pearson*, 863 F.2d 322 (4<sup>th</sup> Cir. 1988) interpolating Maryland case law as permitting a guarantor to waive commercial reasonableness; *First City Div. of Chase Lincoln First Bank. N.A., v. Vitale*, 510 N.Y.S.2d 766, 2 UCC Rep.2d 1736 (App. Div. 3d Dept. 1987) in this case the guarantor was denied the protection of UCC 9-501 which holds waivers of certain rights by debtor to be unenforceable. *Chan* and *Kirstin* above declined to follow *Vitale*.

<sup>141</sup> *National Westminster Bank NJ v. Lomker*, 649 A.2d 1328, 1332-1333 (N.J. Super. Ct. App. Div. 1994) the waiver by a guarantor of the defense of impairment of collateral, bad faith, fraud, conspiracy and other lender misconduct must be expressly waived.

payable had such acceleration occurred and had Lender been permitted to collect such sums from Borrower.”<sup>142</sup>

On the other hand, some waivers of defenses based on impairment or lack of commercially reasonable conduct of Lender cannot be waived in some jurisdictions where the UCC protection granted to the debtor is extended to its guarantor. In cases where it can be waived, the guarantor may prefer to be an accommodation co-borrower.

b. Waiver of Subrogation. The waiver of the surety’s right of subrogation to unimpaired collateral must be unequivocal before it will effectively preclude a guarantor from asserting the defense noting that such right does not originate in contract but in law. Express waiver of subrogation can resemble the following language:

“Guarantor agrees that it shall have no right to be subrogated to Lender’s interest in the Loan Documents until all amounts owing to Lender have been paid in full. [Guarantor’s aforesaid right of subrogation shall be Guarantor’s sole remedy against Borrower, and Guarantor hereby waives any right to indemnification that Guarantor may have against Borrower.] Guarantor understands and agrees that the exercise by Lender of certain rights and remedies contained in the Loan Documents may affect or eliminate Guarantor’s right of subrogation against Borrower and that consequently Guarantor’s liability may be partially or totally non-reimbursable; nevertheless, Guarantor authorizes and empowers Lender to exercise, in its sole discretion, any right and remedies, or any combination thereof, that may then be available to Lender, since it is the intent and purpose of Guarantor that the obligations hereunder shall be absolute, independent, and unconditional under any and all circumstances.”

2. Fraudulent Transfers. As a general matter, prohibited fraudulent transfers occur essentially in four different ways: (A) that the transfer was intentionally fraudulent; (B) that the transfer was in “reckless disregard” of the effect it would have on the debtor’s ability to service its debt; (C) that the transfer left the debtor with unreasonably small assets for the continuation of its business; and (D) that the transfer was made while the debtor was insolvent or which caused the debtor to become insolvent. The effect of fraudulent transfer in the world of guaranties is usually felt when one company, without getting equivalent value for it, provides a guaranty for the benefit of a related company, whether a parent, a subsidiary, or a sibling. There is usually no intent to deceive creditors of the guarantor, nor a reckless disregard, but rather a naïve insensitivity to the fact that the liability under the guaranty, if enforced, could render the guarantor insolvent. One way practitioners have attempted to address that is by stating that there is an integration of interests of guarantor and borrower, and guarantor benefits from borrower’s loan so that the amount of the loan is implicitly deemed the amount of value received by the

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<sup>142</sup> See RESTATEMENT, §44 as to enforceability of the guaranty notwithstanding lender’s impairment of guarantor’s recourse against the borrower.

guarantor, and therefore reasonably equivalent in value to the guaranty. Language such as the following can be used.

“Guarantor has a direct ownership interest of [ ]% and financial interest in Borrower, and Guarantor will benefit directly from the making of the Loan to Borrower.”

In a further effort to prevent constructive fraud, some lenders expressly create a formula for guarantor’s maximum recourse amount so that it stops short of triggering a fraudulent transfer by the guarantor. Sometimes they use language like the following:

“Notwithstanding the definition of Guaranteed Obligations herein, the liability of each guarantor hereunder (“Maximum Recourse Amount”) is limited to (i) the lesser of the lowest amount that would render this guaranty void, or otherwise unenforceable against creditors or creditors’ representative under any fraudulent transfer or similar act or under Sections 433 or 548 of the Bankruptcy Code or state laws, minus (ii) \$1 (one dollar),.”

a. Upstream Guaranty. This is generally considered the classic example of the guaranty subject to fraudulent transfer. The parent holding company typically is the borrower and its subsidiaries guaranty the parent’s debt. Some practitioners provide for intra-company subordinated notes by the parent to the guarantor for the amount of the guaranty advances. But most consider that device more of a contractual reflection of common law rights of subrogation and reimbursement rather than the transfer of assets of equivalent value.

b. Downstream Guaranty. A guaranty by parent or owner of borrower is usually more safe from claims of inadequate value to the guarantor than an upstream guaranty because payments by the guarantor increases its equity in the borrower by reducing debt of the borrower. But the theory has been successfully challenged where the subsidiaries’ debt exceeds the value of the parent, and therefore the parent never had meaningful equity. The issue can come to a head when the parent files bankruptcy after advancing payments to its insolvent subsidiary.<sup>143</sup> In order to avoid down-stream guaranty risks, some lenders make the guaranties limited to material percentage of what would otherwise trigger insolvency by using language similar to the following:

“Guarantor’s liability to Lender for payment of the Guaranteed Obligations shall in no event exceed the Maximum Recourse Amount. The Maximum Recourse Amount shall mean the greater of ninety percent of Guarantor’s Net Worth on the date of (a) this

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<sup>143</sup> *But see In re Alberto Duque Rodriguez*, 895 F.2d 725 (11<sup>th</sup> Cir. 1990); *see also In re Marquis Prods., Inc.*, 150 B.R. 487 (Bankr. D. Me. 1993) payments made by a corporate parent on behalf of an insolvent wholly-owned subsidiary within one year of the parent’s bankruptcy were held to be voidable fraudulent transfers. Had the subsidiary been solvent, the parent would have realized a dollar for dollar benefit via the improvement in the subsidiary’s net worth. However, since the subsidiary was insolvent even after the parent’s payments, the payments merely reduced the losses of the subsidiary’s creditors, without creating a positive value in the parent’s investment in the subsidiary.



Guaranty, or (b) the earlier of the date Lender makes demand upon Guarantor under this Guaranty or Guarantor becomes a debtor under the Bankruptcy Code. Guarantor's Net Worth shall mean, as of any relevant determination date, the amount of the fair saleable value of all assets of Guarantor in excess of the amount of all liabilities of Guarantor (excluding liabilities under this Guaranty), all such values to be determined in accordance with applicable Federal and state fraudulent transfer laws as such laws are in effect upon such relevant determination date. Guarantor warrants that its Net Worth on the date hereof is no less than \$[    ]."

c.        Cross-Stream Guaranty. The guaranty by one affiliate of another affiliate's obligations is subject to the same legal deficiencies as an upstream guaranty.

3.        Preferences. In general, a preference exists when a debtor makes a payment or other transfer to one or more, but not all, creditors. While outside of bankruptcy, there is nothing illegal or improper about that, in bankruptcy such favoritism is prohibited. The preference section the Bankruptcy Code imposes upon the debtor an obligation to treat its creditors fairly once the threat of an impending bankruptcy becomes apparent. To implement this policy, §547(b) of the Bankruptcy Code permits a bankruptcy trustee to avoid certain pre-bankruptcy transfers as preferences. The debtor's intent or motive is irrelevant as to whether a preference exists. Generally speaking, it is the effect of a transaction, rather than the debtor's intent, that matters. The effect of the doctrine of preferences on guaranties was heightened by the emergence of the position exemplified in the Deprezio case<sup>144</sup> that concluded the following: a stockholder who is a guarantor is benefitted by the corporate borrower paying down loan principal; the guarantor can be a creditor of the borrower based on the guarantor's rights to reimbursement or subrogation; the guarantor creditor is an insider; and, therefore the debtor can require lender to disgorge one year's worth of payments under the Bankruptcy Code.<sup>145</sup> As a counter to that, some practitioners adopt the "anti-Deprezio" waiver. The principle is that the Deprezio conclusion should not apply when a guarantor waives its rights to reimbursement or restitution. The purpose of the "anti-Deprezio" waiver is to effectively negate a guarantor's status as a "creditor." There are conflicts among the cases as to whether "anti-Deprezio" waivers are effective, because a guarantor can easily overcome its waiver by purchasing the lender's note rather than paying it, thus preserving its right to step into the shoes of the lender and becoming a creditor.<sup>146</sup>

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<sup>144</sup> *Levit v. Ingersoll Rand Financial Corp. (In re V.N. Deprezio Construction Co.)*, 874 F.2d 1186 (7<sup>th</sup> Cir. 1989).

<sup>145</sup> 11 U.S.C. § 547(b). "Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property-- (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made-- (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if--(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title."

<sup>146</sup> *In re USA Detergents, Inc.*, Case No. 08-10273 (BLS), US Bkrpty. DE.

## VI. RIGHTS OF AND RESPONSIBILITIES AMONG GUARANTORS

### A. As to Co-Guarantors

1. Common Law Right of Contribution. When multiple guarantors are obligated on a common debt, and one guarantor pays more than its “proportionate share,” it is entitled to contribution from the other guarantors.<sup>147</sup> The rule assumes that guarantors bear liability in equal shares per capita<sup>148</sup> among several guarantors,<sup>149</sup> even though they may have unequal interests or obligations with respect to the borrower.<sup>150</sup> On the other hand, where a guarantor is merely an accommodation party, then though he is liable to the lender he cannot be made liable to the accommodated party.

2. Equitable Liability. The Restatement subjects the general rule to countervailing express or implied agreements. The Restatement recognizes that some courts<sup>151</sup> find an implied agreement based on the shares of the principals in the underlying borrower<sup>152</sup> But there is no consensus that unequal shares must equate to unequal contribution obligations.<sup>153</sup> To address a contractual obligation to contribute other than on a per capita basis, a contractual provision akin to the following would be appropriate.

(a) If any Guarantor (an “Advancing Guarantor”) from time to time advances any payment (“Advancing payment”) in connection with its Guaranty for which it has not been reimbursed in full (such unreimbursed amount, a “Shortfall”), each other Guarantor (a “Contributing Guarantor”) will have an unconditional, absolute, and irrevocable obligation to pay to the Advancing Guarantor an amount (the “Required Contribution Amount”) necessary, when added to the Contribution Amounts of all other Guarantors received by the Advancing Guarantor, to reimburse the Advancing Guarantor in full. Each Guarantor’s percentage share for purposes of Required Contribution Amounts due under the Guaranty shall be as follows (“Contribution Share”): [[ ] percent as to Guarantor I and [ ] percent as to Guarantor II]

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<sup>147</sup> “The right to contribution among coguarantors arises from their implicit agreement upon executing the guaranty that each would contribute his just proportion of any liability, and stands on an equal footing with any other action found on an implied contract. The right to contribution is sometimes described as an equitable concept, subject to equitable defenses. A guarantor is entitled to contribution regardless of whether he and his coguarantors signed a single guaranty agreement or separate guaranty agreements.” (footnotes omitted) 38 AM. JUR. 2d Guaranty § 121; Restatement § 57(1). See Attachment A.

<sup>148</sup> *Layne v. Garner*, 612 S.2d 404 (Ala. 1992); *In re Drexel Burnham Lambert Group, Inc.*, 146 B.R. 98 (Bankr. S.D.N.Y. 1992).

<sup>149</sup> RESTATEMENT §57(a) See Attachment A.

<sup>150</sup> *Brill v. Swanson*, 674 P.2d 211 (1984).

<sup>151</sup> *Steele v. Grof*, 503 S.E.2d 92 (1948).

<sup>152</sup> Restatement 57(1) comment c. See Attachment A.

<sup>153</sup> *Brown v. Goldsmith*, 437 P.2d 247 (Okla. 1968) allocating contribution liability based on the underlying business.

(d) If any Guarantor is at any time reimbursed in whole or in part for any Advancing Payment as to which such Guarantor has collected a Required Contribution Amount from any other Guarantor, such other Guarantor shall be entitled to recover to preserve among the Guarantors their share of payments made under the Guaranty in the same proportion as their comparative Contribution Shares.

3. Subgroups. When guarantors are each comprised of an aggregation of individuals, the Restatement supports the argument that such aggregation should be counted as one guarantor. As a result, when a married couple or a partnership, for example, signs a guaranty, it is considered one guarantor,<sup>154</sup> but if each individual under the requirements of the Equal Credit Opportunity Act signs individually, they would each be guarantors. If a non-guarantor spouse signs as an accommodation, or a spouse signs as a guarantor but does not receive a corresponding benefit, the enforceability of the right to demand contributions from the spouse is as much at risk as the guaranty itself.<sup>155</sup> In order to address that issue, language such as the following can be used:

“Each married person who executes this Agreement expressly agrees that recourse under this Agreement may be had against his or her separate property and, to the greatest extent permitted by applicable law, against all marital property of such person and such person’s spouse (whether community property, entireties property or other form of marital property), and such person joins in below to enable Lender to recover the marital property, acknowledging that the estate of undersigned’s spouse and the marital estate are receiving a benefit for which this Guaranty is consideration.”

4. Partial and Full Guaranties Affecting Contribution. The Restatement directs that where there are both partial guaranties for less than the full amount of the obligation, and full guaranties, the obligation of the partial guarantor for contribution is accounted first, and the remaining liability is allocated among the full guaranties on a per capita basis. Consequently, the contribution agreement would need to reflect the equivalent issue with language similar to the following:

“In no event will Partial Guarantor’s aggregate Required Contribution Amounts exceed the Maximum Recourse Amount. If Partial Guarantor’s aggregate Required Contribution Amounts exceeds such Maximum Recourse Amount, then all remaining Payments under the Unlimited Guaranties by other Guarantors (the “Full Guarantors”) will be shared among the Full Guarantors pro rata on the basis of the ratio that each Full Guarantor’s Contribution Share bears to the total Contribution Shares of all the Full Guarantors.”

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<sup>154</sup> *Mansfield v. McCreary*, 497 P.2d 654 (1972), rehearing denied, 501 P.2d 69 (1972).

<sup>155</sup> See 15 U.S.C. §1691; Reg. B, 12 C.F.R. § 202.7(d)(2001).

5. Defenses to the Guaranty Affecting Contribution. Different guarantors may have different defenses to their guaranties. Where multiple documents may have been signed, there may be drafting defects in some and not others. Some guarantors may have equitable or procedural defenses in addition to substantive defenses. There are arguments that when guarantors have defenses to guaranty agreements, they have equivalent defenses to contribution agreements. On the other hand, if a guarantor incurs costs in defense, there are arguments that the other guarantors should not be obligated to contribute to that cost, regardless of whether the defense succeeds or fails. The guarantors may also agree that if any guarantor is released by the obligee it should be correspondingly released from the contribution agreement. Courts have differed on that principle.<sup>156</sup> To establish clarity, guarantors may want to provide language in the contribution agreements similar to the following:

“Non-Reimbursable Amounts. Notwithstanding anything to the contrary, a Guarantor shall not be entitled to contribution with respect to any Advancing Payment to the extent that such Advancing Payment arose out of any of the following acts of a Guarantor (“Defaulting Guarantor”) (a) gross negligence, willful misconduct or bad faith; (b) breach of any Loan Document provision; or (c) resistance or objection to payment under its Guaranty without the consent of the other Guarantors; provided, however, a Defaulting Guarantor may be entitled to contributions from other Defaulting Guarantors but prorated among them in the same ratio as their respective Contribution Shares.

Payment, Settlement or Defense of Guaranties. While each Guarantor will attempt to inform the other Guarantors of the change in status of the Guaranties due to its Payment or potential Payment, each Guarantor will be free to litigate, settle or otherwise satisfy or discharge such Guarantor’s Guaranty as such Guarantor deems appropriate, and any failure by a Guarantor to inform, advise, or consult with any other Guarantor will not be a defense to, or in any way diminish, discharge or derogate from such other Guarantor’s obligation to pay each Required Contribution Amount.

6. Indemnity of Lender. The Lender would seek to address the issue of disputes among co-guarantors with both a waiver of claims and an indemnity for loss from co-guarantor disputes akin to the following language:

“Guarantor agrees to protect, indemnify, defend, and hold Lender harmless from and against any loss, damage, claim, demand, cost or any other liability (including, without limitation, reasonable attorneys’ fees and costs) Lender may suffer as a result of any dispute between or among Guarantor and any other guarantor or

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<sup>156</sup> See *First American Bank of NY v. Fallora Shredder Co., Inc.*, 587 NYS2d119 (1992) [no waiver]; but see *United States v. Immordino*, 534 F.2d 1378 (10<sup>th</sup> Cir. 1976) [waiver].]

the Guaranteed Obligations concerning Guarantor's or any other guarantor's right to contribution or otherwise," .

7. Uncollectibility. The Restatement adopts the position that if a contribution cannot be collected, then the exposure should be allocated to the non-defaulting Guarantors. If the Guarantors intend a different outcome, they can agree upon language similar to the following:

“When the contribution obtained from a Guarantor (the “Diminished Guarantor”) under this Agreement after reasonable collection efforts is less than the Contribution Amount required under the other provisions of this Agreement, the Contribution Shares of the other Guarantors as among themselves will be recalculated omitting the Contribution Share of the Diminished Guarantor; provided, however the Diminished Guarantor shall remain liable for the full amount of its Contribution Share as if it were not a Diminished Guarantor.

8. Fees and Costs. As in most disputes, the prevailing party is not entitled to reimbursement of fees and costs.<sup>157</sup> But the prevailing party is a judgment creditor with rights to legal interest to the extent provided by state law. Obviously that right would not date back to the time the Advancing Guarantor had advanced those funds, nor would it provide full coverage of the cost of funds to the Advancing Guarantor seeking contribution.

9. Federal Tax Effect. A partner's tax basis in a partnership is based on its economic risk of loss.<sup>158</sup> Under the Restatement, if co-guarantors have no agreement to the contrary, they share the risk of loss on an equal basis, even if their interests in the partnership are unequal. The contribution agreement would re-order the tax basis in a way more consistent with the co-guarantors' economic expectations.

10. Amendments. The amendment of a guaranty, including its release or waiver, would ordinarily amend the obligations among the Contributing Guarantors if the contributors consent. Similarly releases or waivers between an obligor and obligee should not increase the contribution obligations of the other contributors without their consent.

11. Subsuretyship. An equivalent to contribution is subsuretyship, when as between two guarantors, the subsurety stands in primarily liability and the principal surety is secondarily liable to the obligee, notwithstanding suretyship principles otherwise stands for the proposition that all sureties and principals are primarily liable.<sup>159</sup> The principal surety has the same defenses as a surety in the face of the obligee's demands and the subsurety's failure to act.

12. Waivers. Guarantors are generally required to waive defenses and claims they may have against the lender, whether by asserting rights of borrower or rights against the borrower or a co-guarantor. In addition, it is common for the guarantor to waive rights of

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<sup>157</sup> *Wetzler v. Cantor*, 192 BR 119 (Bankr. D. Md. 1996).

<sup>158</sup> Treasury Regulation § 1.752-2.

<sup>159</sup> Restatement § 60. See Attachment A.

contribution; but the guarantor does not want to waive or release those rights, but rather postpone the right to contributions until the loan is discharged.

“All waivers contained in the Guaranties (whether of notice, procedural errors, jury trial, subrogation, reimbursement, restitution, contribution, indemnification, exoneration, suretyship defenses, or other rights of any Guarantor whether for counterclaims or otherwise) shall be deemed to be waivers only in favor of Lender and shall in not be in favor of the Borrower upon advances by an Advancing Guarantor or any Guarantor to prevent any claim by an Advancing Guarantor for payment of another Guarantor’s Required Contribution Amount pursuant to this Agreement. The provisions of any Guaranty shall not reduce the obligations of the Borrower under the Loan or any Guarantor under its Guaranty and each Guarantor shall remain fully liable for such Guarantor’s Required Contribution Amount notwithstanding any such provision.

13. Releases. A surety can be discharged by the acts of a creditor with respect to a co-surety because those acts can impair the co-surety’s right to reimbursement.<sup>160</sup> In such case, the discharges of liability is measured by the extent to which the power to recover from the co-surety is impaired.<sup>161</sup> If collateral is impaired, the liability is discharged to that extent. If a co-surety is released, the liability is reduced by the co-surety’s pro-rata share.<sup>162</sup> These rights relating to releases and to impairment, may be waived.<sup>163</sup> The strength of the

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<sup>160</sup> “In the same way that a surety can be discharged from his obligation to the creditor because of transactions between the creditor and the principal debtor which prejudice the surety’s rights, so too can one surety be discharged because of prejudicial transactions between the creditor and another surety for the same debt.” *Keystone Bank*, 518 A.2d at 1179.

<sup>161</sup> “Actions taken by a creditor with respect to one of several co-sureties do not provide a basis for discharging the other co-sureties of their liability as principals for their proportionate share of the debt. \* \* \* Thus, where one co-surety is discharged from his or her obligation, the effect on the other co-sureties may be to relieve them from their surety obligation for the discharged surety’s proportionate share of the debt, but not for their liability for the fraction of the debt for which they are liable as principals.” *In re Robert Bahara*, 219 B.R. 77, 81-82 (1998).

<sup>162</sup> “The distinction between impairment of collateral securing a co-surety’s obligation, thereby diminishing the amount that may be recovered in a contribution action, versus a release of a co-surety that destroys contribution rights, is vital to an understanding of these defenses available to sureties. Where one co-surety is personally released in a manner that destroys the other surety’s right of contribution, then in effect a principal has been released from his or her obligation. As such, the overall obligation is reduced by the released co-surety’s pro rata share of the debt. Where collateral is released, then the question becomes whether a creditor has impaired the ability of other co-sureties to seek contribution from the co-surety whose property was released. In such a situation, the impairment of the collateral would determine the extent of the release, with the ceiling being the pro rata share of the co-surety whose collateral has been released. \* \* \* In conclusion, when one of several co-guarantors on a note is completely released from his obligation by the holder, without an express reservation of rights, the release operates to discharge the remaining co-guarantors ... to the extent of their right to contribution from the co-guarantor so released.” *In re Robert Bahara*, 219 B.R. at 82.

<sup>163</sup> UCC 3-606.

impairment defense depends on the proof of the amount of impairment.<sup>164</sup> The use of the UCC 3-606 defense depends on the proof that the surety is not a co-borrower.

B. As to Lender: Subrogation

1. Rights of Subrogation.

A party who pays a borrower's debt is entitled to be subrogated to the rights of the holders of the debt.<sup>165</sup> A subrogee has all of the rights of the debt holder – including to sue on the debt and to recover collateral. Though the common law principle is that subrogation is conditioned upon complete discharge of the debt, it is common to find lenders explicitly repeating that principle in the guaranties. Sometimes lenders demand a waiver of the right of subrogation, but a guarantor looks to negotiate for the right to be reinstated upon discharge of the debt, with language equivalent to the following:

Notwithstanding that Lender's exercise of certain rights and remedies contained in the Loan Documents may adversely affect Guarantor's recovery under its right of subrogation against Borrower and that Guarantor's advances therefore may be partially or totally non-reimbursable, Guarantor waives any rights it may have for reimbursement, or to recover loss due to impairment from Lender's exercise of its rights and remedies. Without limiting the generality of the foregoing, Guarantor hereby expressly waives any and all benefits and defenses with respect to the failure to preserve claims against Borrower as a result of a deed in lieu of foreclosure, a failure to prosecute a deficiency judgment, or any private non-judicial sale.

b. Guarantor agrees that Guarantor subordinates all benefits and defenses under [cite local statute] and agrees that Guarantor's right of subrogation against Borrower shall be subordinate and suspended and no right of contribution against any other Guarantor until all Guaranteed Obligations have been indefeasibly paid and satisfied in full.

2. Equitable Subrogation. The guarantor becomes equitably subrogated if it advances funds to borrower who in turn uses them to pay the debt.<sup>166</sup> Equitable subrogation is conditioned upon the following requirements: (1) the subrogee was not a volunteer, (2) the payment was used to satisfy debt, (3) the subrogee was not directly liable for debt, (4) the entire

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<sup>164</sup> "... impairment of collateral defense under [UCC 3-606] subsection (a)(2) . . . applies where the co-surety is obligated to pay more than his proportionate share of the underlying debt and the creditor has taken some action with respect to collateral otherwise available to the co-surety to enforce contribution rights against other co-sureties. Under § 3606, the co-surety bears the burden of demonstrating that the creditor's alleged impairment of the collateral has resulted in the co-surety being liable for more than its pro rata share, i.e., the creditor's action in regard to collateral has impaired a co-surety's ability to recover full contribution for any amount in excess of the co-surety's proportionate share of the debt." *In re Bahara* at 84.

<sup>165</sup> Restatement § 27. See Attachment A.

<sup>166</sup> *French Lumber Co. v. Commercial Realty & Fin. Co.*, 195 N.E.2d 507 (Mass. 1964).

debt was paid, and (5) subrogation does not impair a third party.<sup>167</sup> Subrogation is deemed the equivalent of an assignment imposed by equity or by operation of law.<sup>168</sup>

C. As to Borrower: Reimbursement and Restitution.

1. Reimbursement.

The guarantor is entitled to reimbursement for payment of borrower's obligation, plus related expenses<sup>169</sup> including diligence, analysis, and professional fees.<sup>170</sup> The right to reimbursement applies to partial or complete payments of debt, as distinguished from subrogation only being applicable for complete discharge of the debt. The right to reimbursement may be lost or diminished if the lender releases the borrower, or the borrower's obligation is otherwise discharged, or the borrower has a meritorious defense to performing the obligation.<sup>171</sup> The exception to the exception is that even though the guarantor possessed a meritorious defense the guarantor was under a paramount business compulsion to pay such as it was in default of other loans for non-payment of this loan.<sup>172</sup>

a. Reimbursement as Unsecured Claim. Because a right to reimbursement is merely a narrow damages claim, it is less attractive than subrogation. Subrogation entitles the subrogee to the same rights as the creditor and if the creditor is secured, the subrogee obtains those rights but the party obtaining reimbursement rights does not.

“The Advances made hereunder by Guarantor may be repaid only from Available Cash in excess of Operating Expenses during the period commencing when the Advances are made and ending when such Advances have been repaid in full. The terms of this section shall survive the termination of the Loan and this Agreement.

b. Timing of Reimbursement Compared to Subrogation. Subrogation requires payment in full, though one case stands for the proposition that subrogation simply requires performance in full which could be limited to a partial payment.<sup>173</sup> Reimbursement can be claimed for partial payment. Therefore rights to reimbursement can occur sooner than those for subrogation.

“Guarantor agrees that its right to reimbursement of the Advances shall be subordinate and subject in all respects to any and all

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<sup>167</sup> See *In re Southwest Equipment Rental, Inc.*, 193 B.R. 276, 238-4 (E.D. Tenn. 1996).

<sup>168</sup> “[S]ubrogation is often referred to as equitable assignment or an assignment by operation of law.” (Restatement § 28, Comm. a., See Attachment A) “Except as provided by statute, when a secondary obligor is subrogated to rights of the obligee, the secondary obligor has the same priority with respect to those rights as the obligee.” (Restatement, § 29. See Attachment A).

<sup>169</sup> Restatement § 23. See Attachment A.

<sup>170</sup> Restatement § 23 Comment a. See Attachment A.

<sup>171</sup> Restatement § 24. See Attachment A.

<sup>172</sup> Restatement § Comment e. See Attachment A.

<sup>173</sup> **CHECK ATTACHMENTS** – See *Scarsdale Nat'l Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 264 N.Y. 159 (N.Y. 1934)



amounts owed by the Borrower to the Lender under the Loan Documents. Guarantor further agrees that it will not accept or retain any repayment of the whole or any part of the Advances made by Guarantor hereunder, nor any security therefor, and such amounts shall be deemed held by Guarantor in constructive trust for Lender, and Guarantor will deliver the payments to Lender in the form received until all indebtedness and obligations of the Borrower to the Lender shall have been indefeasibly paid in full; provided, however, that, notwithstanding any provision to the contrary, Guarantor shall have the right, so long as no Event of Default by Borrower is continuing, to receive and retain from the Borrower monies in repayment of the Advances due from the Borrower to Guarantor in accordance with such payment, (except payments received by Guarantor in repayment of the Advances while the Borrower is not in default in any respect on any of its indebtedness or obligations to the Lender) received by Guarantor with respect to the repayment of the Advances.

2. Restitution. If reimbursement is frustrated due to the exceptions referred to in 4.3, then the guarantor is entitled to restitution.<sup>174</sup> In that case, restitution is measured by borrower's unjust enrichment, not by guarantor's loss and expenses.

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<sup>174</sup> Restatement § 26 Reporter's Note a. See Attachment A.

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#### § 23. Measure Of The Reimbursement To Which Secondary Obligor Is Entitled

(1) When the principal obligor has a duty to reimburse the secondary obligor (§ 22), that duty is to reimburse the secondary obligor for the reasonable cost of performing the secondary obligation, including incidental expenses.

(2) If satisfaction of the principal obligor's duty to the obligee pursuant to the underlying obligation is limited to a particular fund or property, satisfaction of the duty of reimbursement is limited to the same fund or property.

**Comment a.** *Reasonable cost of performance.* Performance of the secondary obligation may involve, among other things, the payment of money, the performance of a nonmonetary obligation, or realization by the obligee from property of the secondary obligor in which the obligee has a security interest or lien. The secondary obligor's reasonable cost of performance includes the amount of money paid (including any interest or other charges imposed on the secondary obligor as a result of the principal obligor's default), the reasonable cost of performing the nonmonetary obligation, or the value of the property lost to the obligee's realization as to collateral. The secondary obligor's reasonable cost of performance also includes (1) reasonable expenses incurred in seeking to determine the existence of any defenses, (2) reasonable expenses incurred in asserting (whether or not successfully) colorable defenses of the principal obligor available to the secondary obligor in a suit by the obligee to enforce the secondary obligation, after the principal obligor has been given notice and opportunity to defend, and (3) any other incidental expenses reasonably incurred by the secondary obligor in connection with performing the secondary obligation. These incidental expenses may include reasonable attorneys' fees incurred in conjunction with performance of the secondary obligation. Attorneys' fees incurred by the secondary obligor to enforce the principal obligor's duty of reimbursement, however, are not recoverable as incidental expenses. Recovery of those fees, as well as the ability of the secondary obligor to recover prejudgment interest, is determined by the law of the applicable jurisdiction.

**Illustration:** 1. S becomes surety to C at P's request upon P's bond for \$5,000. At the maturity of the bond, P refuses to pay. C

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thereupon sues S, who defends that suit unsuccessfully after giving P an opportunity to defend. S then pays the amount of C's judgment. S is entitled to reimbursement for the amount of payment and the reasonable expenses of defending suit.

#### **§ 24. When The Duty To Reimburse Does Not Arise**

(1) Notwithstanding § 22, the principal obligor has no duty to reimburse the secondary obligor to the extent that:

- (a) bankruptcy law relieves the principal obligor of that duty;
- (b) if the underlying obligation is contractual, the principal obligor is not liable because of its lack of capacity to enter into that obligation;
- (c) the principal obligor had a defense to the underlying obligation that, pursuant to the terms of the secondary obligation, was not available to the secondary obligor;
- (d) pursuant to § 39, the obligee's release of the principal obligor with respect to the underlying obligation has discharged the principal obligor's duty to reimburse the secondary obligor; or
- (e) at the time of performance or settlement of the secondary obligation, the secondary obligor had notice of a defense of the principal obligor to the underlying obligation that was available to the secondary obligor as a defense to the secondary obligation (§ 34), unless it was a reasonable business decision for the secondary obligor to perform or settle the secondary obligation in light of factors, amounting to business compulsion, of which the principal obligor had notice at the time it incurred the underlying obligation; or
- (f) at the time of performance or settlement of the secondary obligation, the secondary obligor had notice of a defense to the secondary obligation that was not available to the principal obligor as a defense to the underlying obligation, unless it was a reasonable business decision to perform or settle the secondary obligation despite that defense.

(2) For purposes of subsection (1)(e), a secondary obligor has notice of a defense of the principal obligor to the underlying obligation available to the secondary obligor as a defense to the secondary obligation if that defense would be revealed to the secondary obligor by making such inquiry of the principal obligor as is reasonable under the circumstances to ascertain whether the principal obligor claims any defenses.

(3) Notwithstanding subsection (1)(e), if the secondary obligor gives the principal obligor notice of the obligee's claim and an opportunity to defend against it, the principal obligor may not assert, as a defense to its duty to reimburse the secondary obligor, any defense to the

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underlying obligation that was available to the secondary obligor as a defense to the secondary obligation.

**Comment e.** *Comment e is based on Restatement of Security § 108, Comment j.* Illustration 6 is based on Restatement of Security § 108, Illustration 11. The concept of business compulsion is explained in the Restatement of Restitution, § 78, Comment f:f. Payment under business compulsion. A person who becomes a secondary obligor with the consent or because of the fault of the primary obligor is entitled to restitution for a payment which business reasons practically required him to perform, although neither he nor the primary obligor was under a legal duty to make payment. Thus a person who, at the request of another, has orally contracted with a third person, and who would be excluded from his business organization or otherwise would suffer a business loss if he failed to perform the promise, is entitled to obtain indemnity from the other for a payment to a third person which he could have avoided on the ground that his promise was oral. Normally, a payment made with knowledge that the Statute of Limitations has run would not be under sufficient coercion to entitle the payor to restitution.

## **§ 26. Restitution**

The secondary obligor is entitled to restitution from the principal obligor to the extent that the secondary obligor's performance of the secondary obligation, or settlement with respect to it, relieves the principal obligor of its duty pursuant to the underlying obligation and the principal obligor has no duty to reimburse the secondary obligor for the cost of its performance.

**Reporter's Note:** *Comment a.* Restitution has been available to secondary obligors at least since *Morrice v. Redwyn*, 2 Barn. K.B. 26, 94 Eng.Rep. 333 (1731). See 1 G. Palmer, THE LAW OF RESTITUTION § 1.5 at 20-24 (1978). The necessity for this remedy is obviated by reimbursement, however, when that remedy is available. Hence, restitution is necessary as an independent remedy only when reimbursement is unavailable.

## **§ 27. When Secondary Obligor Has A Right Of Subrogation**

(1) Upon total satisfaction of the underlying obligation, the secondary obligor is subrogated to all rights of the obligee with respect to the underlying obligation to the extent that performance of the secondary obligation contributed to the satisfaction.

(2) For purposes of subsection (1), an underlying obligation that has been totally satisfied except to the extent of discharge of the secondary obligor from the secondary obligation pursuant to §§ 39-46 is treated as totally satisfied.

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## **§ 28. Rights Obtained Through Subrogation**

**Comment: a.** General principle. When a secondary obligor is subrogated to the rights of the obligee with respect to the underlying obligation, the result is essentially the same as if the obligee had assigned those rights to the secondary obligor. Indeed, subrogation is often referred to as equitable assignment or an assignment by operation of law. An obligee would be economically indifferent to a choice between receiving full performance of the obligation owed to it and assigning its claim in exchange for consideration equivalent to full performance. Thus, by giving the secondary obligor the equivalent of an assignment of the obligee's rights, the law, while leaving the rights of the obligee unharmed, effectuates the goal of causing the principal obligor to bear the cost of performance.

## **§ 29. Secondary Obligor Succeeds To Priority Status Of Obligee**

Except as provided by statute, when a secondary obligor is subrogated to rights of the obligee, the secondary obligor has the same priority with respect to those rights as the obligee.

## **§ 33. Secondary Obligor's Collateral Available To Obligee**

When the principal obligor supplies collateral securing its duty of performance or reimbursement to the secondary obligor, and the secondary obligor defaults on the secondary obligation, the obligee may elect to enforce for its benefit the rights of the secondary obligor with respect to the collateral to the extent of the secondary obligor's failure to perform the secondary obligation.

## **§ 36. Right Of Secondary Obligor To Set Off Claims Against Obligee Against Secondary Obligation**

A secondary obligor who has a claim against the obligee that is unrelated to the transaction giving rise to the secondary obligation may set off that claim against the secondary obligation. In such case, the secondary obligor's rights against the principal obligor are those that would exist if the secondary obligor had performed the secondary obligation to the extent of such set-off.

## **§ 37. Impairment Of Suretyship Status**

(1) If the obligee acts to increase the secondary obligor's risk of loss by increasing its potential cost of performance or decreasing its potential ability to cause the principal obligor to bear the cost of performance, the secondary obligor is discharged as described in subsections (2) and (3), and the secondary obligor has a claim against the obligee as described in subsection (4). An act that increases the secondary obligor's risk of loss by increasing its potential cost of performance or decreasing its potential ability to cause the principal obligor to bear the cost of performance is an "impairment of suretyship status."

(2) If the obligee fundamentally alters the risks imposed on the secondary obligor by:

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- (a) releasing the principal obligor from a duty other than the payment of money (§ 39(c)(iii)); or
  - (b) agreeing to a modification of the duties of the principal obligor that either amounts to a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed on the secondary obligor prior to modification (§ 41(b)(i)); the secondary obligor is discharged from any unperformed portion of the secondary obligation as more fully set forth in those sections.
- (3) If the obligee impairs the secondary obligor's recourse against the principal obligor by:
- (a) releasing the principal obligor from a duty to pay money (§ 39(c)(ii));
  - (b) granting the principal obligor an extension of time for performance of its duties pursuant to the underlying obligation (§ 40(b));
  - (c) agreeing to a modification of the duties of the principal obligor, other than a release or an extension of time, that does not amount to a substituted contract or impose risks on the secondary obligor fundamentally different from those imposed on the secondary obligor prior to modification (§ 41(b)(ii));
  - (d) impairing the value of an interest in collateral securing the underlying obligation (§ 42);
  - (e) failing to institute an action before expiration of the statute of limitations governing the underlying obligation (§ 43); or
  - (f) any other act or omission that impairs the principal obligor's duty of performance, the principal obligor's duty to reimburse, or the secondary obligor's right of restitution or subrogation (§ 44); the secondary obligor is discharged from its duties pursuant to the secondary obligation to the extent set forth in those sections in order to prevent the impairment of recourse from causing the secondary obligor a loss.
- (4) If the obligee impairs the secondary obligor's suretyship status
- (a) after the secondary obligor performs any portion of the secondary obligation; or
  - (b) before the secondary obligor performs a portion of the secondary obligation, if the secondary obligor then performs:
    - (i) without knowledge of such impairment;
    - (ii) for the benefit of an intended beneficiary who can enforce the secondary obligation notwithstanding such impairment; or
    - (iii) under business compulsion;

the secondary obligor has a claim against the obligee with respect to such performance to the extent that such impairment would have discharged the secondary obligor with respect to that performance.

### **§ 39. Release Of Underlying Obligation**

To the extent that the obligee releases the principal obligor from its duties pursuant to the underlying obligation:

(a) the principal obligor is also discharged from any corresponding duties of performance and reimbursement owed to the secondary obligor unless the terms of the release effect a preservation of the secondary obligor's recourse (§ 38);

(b) the secondary obligor is discharged from any unperformed duties pursuant to the secondary obligation unless:

(i) the terms of the release effect a preservation of the secondary obligor's recourse (§ 38);  
or

(ii) the language or circumstances of the release otherwise show the obligee's intent to retain its claim against the secondary obligor;

(c) if the secondary obligor is not discharged from its unperformed duties pursuant to the secondary obligation by operation of paragraph (b), the secondary obligor is discharged from those duties to the extent:

(i) of the value of the consideration for the release;

(ii) that the release of a duty to pay money pursuant to the underlying obligation would otherwise cause the secondary obligor a loss; and

(iii) that the release discharges a duty of the principal obligor other than the payment of money;

(d) the secondary obligor has a claim against the obligee to the extent provided in § 37(4).

### **§ 40. Extension Of Time**

If the obligee grants the principal obligor an extension of the time for performance of its duties pursuant to the underlying obligation:

(a) the extension also extends the time for performance of any corresponding duties of performance and reimbursement owed by the principal obligor to the secondary obligor, unless the extension effects a preservation of the secondary obligor's recourse (§ 38);

(b) to the extent that the secondary obligor has not performed its duties pursuant to the secondary obligation, it is discharged from those duties to the extent that the extension would otherwise cause the secondary obligor a loss;

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(c) to the extent that the secondary obligor is not discharged from its duties pursuant to the secondary obligation by operation of paragraph (b), the secondary obligor may perform the secondary obligation as though the time for performance had not been extended or, unless the extension effected a preservation of the secondary obligor's recourse, treat the time for performance of the secondary obligation as having been extended correspondingly; and

(d) the secondary obligor has a claim against the obligee to the extent provided in § 37(4).

#### **§ 41. Modification Of Underlying Obligation**

If the principal obligor and the obligee agree to a modification, other than an extension of time or a complete or partial release, of the principal obligor's duties pursuant to the underlying obligation:

(a) any duty of the principal obligor to the secondary obligor of performance or reimbursement is correspondingly modified;

(b) the secondary obligor is discharged from any unperformed duties pursuant to the secondary obligation:

(i) if the modification creates a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed pursuant to the transaction prior to modification;

(ii) in other cases, to the extent that the modification would otherwise cause the secondary obligor a loss;

(c) to the extent that the secondary obligor is not discharged by operation of paragraph (b) from its duties:

(i) the secondary obligation is correspondingly modified; but

(ii) if the modification of the underlying obligation changes the amount of money payable thereunder, or the timing of such payment, the secondary obligor may perform the secondary obligation as though there had been no modification;

(d) the secondary obligor has a claim against the obligee to the extent provided in § 37(4).

**Comment e. *Fundamental modifications.*** Under the law of contracts, a substituted contract is a new contract that is accepted by the obligee in satisfaction of the obligor's existing duty. The substituted contract discharges the original duty, and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty. Thus, if the obligee accepts a substituted contract from the principal obligor, the underlying obligation is satisfied, thereby discharging the secondary

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obligation. Any default of the principal obligor on the substituted contract does not revive the original underlying obligation or the secondary obligation. A modification of the underlying obligation that imposes risks on the secondary obligor fundamentally different from those present initially is the substantial equivalent of a substituted contract, and similarly discharges the secondary obligation. A series of modifications, no one of which may be fundamental, but which, in the aggregate, have such a fundamental effect, should be treated the same way.

**Illustration:** 4. P and O make a contract pursuant to which P promises to construct an office building on a designated site for \$1,500,000. S issues payment and performance bonds with respect to the contract. Later, before the contract is performed, P and O agree to change the contract to provide that P will construct a factory on the site for \$2,000,000. The change is so fundamental as to amount to a substituted contract. Therefore, S is discharged from its payment and performance bonds.

#### **§ 42. Impairment Of Collateral**

(1) If the underlying obligation is secured by a security interest in collateral and the obligee impairs the value of that interest, the secondary obligation is discharged to the extent that such impairment would otherwise increase the difference between the maximum amount recoverable by the secondary obligor pursuant to its subrogation rights (§§ 27-31) and the value of the secondary obligor's interest in the collateral.

(2) Impairing the value of a security interest in collateral includes:

- (a) failure to obtain or maintain perfection or recordation of the interest in collateral;
- (b) release of collateral without substitution of collateral of equal value or equivalent reduction of the underlying obligation;
- (c) failure to perform a duty to preserve the value of collateral owed to the principal obligor or the secondary obligor; and
- (d) failure to comply with applicable law in disposing of collateral.

#### **§43. Delay in Enforcement; Running of Statute of Limitations on Underlying Obligation**

Notwithstanding §50, if the obligee fails to institute action against the secondary obligor on the secondary obligation until after the obligee's action against the principal obligor on the underlying obligation is barred by the running of the statute of limitations as to that action, the secondary obligor's rights and duties with respect to the principal obligor and the obligee are the

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same as if, on the day that the statute of limitations expired, the obligee had released the principal obligor from its duties pursuant to the underlying obligation without preserving the secondary obligor's recourse against the principal obligor. Accordingly, the principal obligor is discharged from duties to the secondary obligor as provided in §39(a), and the secondary obligor is discharged from duties to the obligee as provided in §39(c)(ii) and §39(c)(iii).

**Comment e. *Consent; waiver.*** As is the case with all suretyship defenses, discharge of the secondary obligor that would otherwise occur as a result of the application of this section will not occur if the secondary obligor consents (expressly or impliedly) to the obligee's inaction or waives discharge based on this section or on any suretyship defense. See § 48.

#### **§44. Other Impairment of Recourse**

If otherwise than described in §§39-43, the obligee impairs the principal obligor's duty of performance (§21), the principal obligor's duty to reimburse (§§22-25), or the secondary obligor's right of restitution (§26) or subrogation (§§27-31), the secondary obligor is discharged from its duties pursuant to the secondary obligation to the extent that such impairment would otherwise cause the secondary obligor a loss.

#### **§48. Waiver of Suretyship Defenses; Consent**

(1) The secondary obligation is not discharged under §39(c)(ii)-(iii), §40(b), §41(b)(ii), §42(1), §43, or §44 to the extent that, in the contract creating the secondary obligation or otherwise, the secondary obligor consents to acts that would otherwise be the basis of the discharge, agrees that such discharges are unavailable to the secondary obligor, or waives such discharges. Consent may be express or implied from the circumstances. Such consent, agreement, or waiver, if express, may be effectuated by specific language or by general language indicating that the secondary obligor waives defenses based on suretyship.

(2) Unless the circumstances indicate otherwise, when the secondary obligor either controls the principal obligor or deals with the obligee on behalf of the principal obligor, consent by the principal obligor to an act that would lead to discharge under §37 constitutes consent to that act by the secondary obligor.

**Comment c. *Imputed consent.*** When the secondary obligor either controls the principal obligor or deals with the obligee on behalf of the principal obligor, it would be inequitable to the obligee if the principal obligor's agreement to an act by the obligee resulted in discharge of the secondary obligor. It is reasonable for the obligee to assume that when the secondary obligor, acting on behalf of the principal obligor, agrees to an act, the secondary obligor is also agreeing to that act in its capacity as secondary obligor. Similarly, when the principal obligor is controlled by the secondary obligor, it is reasonable to assume that the principal obligor's assent manifests assent by the secondary obligor. Thus, this section

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provides that, in these circumstances, the principal obligor's agreement to an act constitutes consent to that act by the secondary obligor.

**Comment d.** *Waiver of suretyship defenses.* Another mechanism that is commonly used to avoid discharges resulting from impairment of recourse is for the secondary obligor to forego, by agreement or waiver, the benefit of rules in §§ 39-44 that might otherwise result in such discharges. This may be accomplished in the contract creating the secondary obligation or otherwise. Some indication that suretyship rights are being foregone is required; thus, a statement to the effect that the duty of the secondary obligor is absolute or unconditional is ordinarily not sufficient to indicate that the secondary obligor is agreeing to forego discharges based on suretyship status. A statement to the effect that the secondary obligor does not have suretyship status, while inaccurate, is ordinarily sufficient, however, because by communicating the absence of that status, it communicates that the incidents of suretyship status, such as discharge resulting from impairment of recourse, are unavailable.

There is no requirement of specificity with respect to the language used to forego discharge. General language indicating that the secondary obligor waives defenses based on suretyship is sufficient. The secondary obligor need not waive separately each ground for discharge, nor must the contract describe them. Moreover, this section imposes on the obligee no special duty of disclosure or explanation to the secondary obligor. In particular, there is no duty of disclosure or explanation as to the legal effect of foregoing grounds for discharge; generally available protections against overreaching and abuse, such as doctrines of good faith and fair dealing and unconscionability, are sufficient. That the secondary obligor's agreement to forego possible grounds for discharge is usually denominated as a "waiver" does not impose any duties on the obligee beyond principles applicable to contracts generally. Indeed, analyzed closely, a clause in the contract creating the secondary obligation that foregoes the possibility of discharge due to the obligee's impairment of the secondary obligor's recourse is not, strictly speaking, a waiver but, rather, is simply a contract term that delineates the contours of the secondary obligation undertaken.

**Illustration:** 3. D borrows \$10,000 from C, payable on July 12. S agrees with C that, if D does not repay the loan on its due date, S will repay the loan. S's agreement states that S "waives all suretyship defenses." On July 11, C grants D, who is solvent, an

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extension of the due date of the loan to October 31. Even if the extension causes S a loss, S is not discharged from its guaranty.

#### **§49. Burden of Persuasion with Respect to Impairment of Recourse**

(2) Except as provided in subsection (3), the burden of persuasion with respect to loss or prejudice caused by an obligee's act impairing the secondary obligor's recourse against the principal obligor is allocated as follows:

(b) The burden of persuasion is on the secondary obligor if:

(i) The secondary obligor is in the business of entering into secondary obligations, received a business benefit for entering into the secondary obligation, or otherwise was induced to enter into the secondary obligation by separate consideration that directly benefits the secondary obligor; or

(ii) The act impairing recourse is a modification of the underlying obligation, unless the secondary obligor establishes that the modification is material;

(a) Otherwise, it is presumed that the act impairing recourse caused a loss or impairment equal to the secondary obligor's liability pursuant to the secondary obligation and the burden of persuasion as to the nonexistence or lesser amount of such loss is on the obligee.

(3) Notwithstanding subsection (2)(a), if:

(a) The secondary obligor demonstrates prejudice caused by the impairment of recourse; and

(b) The circumstances of the case indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable,

it is presumed that the act impairing recourse caused a loss or impairment equal to the secondary obligor's liability pursuant to the secondary obligation, and the burden of persuasion as to any lesser amount of such loss is on the obligee.

#### **§50. Effect on Secondary Obligation of Obligee's Lack of Action to Enforce Underlying Obligation**

(1) Delay by the obligee in taking action against the principal obligor with respect to the underlying obligation, or failure of the obligee to take such action, does not discharge the secondary obligor with respect to the secondary obligation except as provided:

(a) By applicable statute;

(b) By agreement of the parties;

(c) in Section 43 of this Restatement; or

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(d) In Subsection (2) of this section.

(2) If the failure of efforts by the obligee to obtain satisfaction of the underlying obligation is a condition of the secondary obligor's duty under the secondary obligation, the secondary obligor is discharged to the extent that the obligee's failure to act with reasonable promptness against the principal obligor is the cause of the obligee's inability to collect from the principal obligor.

### **§ 57. Cosurety's Contributive Share**

(1) Subject to subsection (2) and to any express or implied agreement between or among the cosureties, a cosurety's contributive share is the aggregate liability of the cosureties to the obligee divided by the number of cosureties.

(2) When the terms of a cosurety's secondary obligation limit the cosurety's liability to an amount less than its contributive share determined pursuant to subsection (1), or the contribution that can be obtained from a cosurety is less than that amount, the contributive shares of the cosureties are reapportioned as follows:

(a) When the secondary obligation of a cosurety limits the liability of that cosurety to an amount less than its contributive share determined pursuant to subsection (1), the contributive share of that cosurety is its maximum liability pursuant to the terms of the secondary obligation. The contributive shares of the other cosureties are recalculated by subtracting from the aggregate liability of the cosureties the contributive share of the secondary obligor whose obligation is so limited, and dividing by the number of cosureties whose obligations are not so limited.

(b) When, because of insolvency, lack of personal jurisdiction, or other reasonable circumstances, the contribution obtained from a cosurety after reasonable collection efforts is less than that cosurety's contributive share, the contributive shares of the other cosureties as among themselves are recalculated pursuant to subsection (2)(a) as though the secondary obligation of the former cosurety limited its liability to the contribution obtained from that cosurety.

**Comment c.** *Implied agreement as to contributive shares.* In many cases where there is no express agreement between cosureties, an agreement as to contributive shares can be implied by the circumstances. The circumstances justifying such a finding may relate either to the general relationship among the cosureties or to the circumstances surrounding the particular suretyship transaction.

**Illustrations:** 4. To induce C to lend D Corporation \$3,000, S<sub>1</sub>, S<sub>2</sub>, and S<sub>3</sub> agree to be cosureties with respect to this debt. S<sub>1</sub>, S<sub>2</sub>, and S<sub>3</sub> enter into no express agreement as to their contributive shares. S<sub>1</sub>, S<sub>2</sub>, and S<sub>3</sub> are the sole shareholders of D Corporation; S<sub>1</sub> owns 50 percent of the shares, S<sub>2</sub> owns 30 percent of the shares, and S<sub>3</sub>

ATTACHMENT A

Cited Sections from Restatement of Suretyship

owns 20 percent of the shares. D defaults having paid none of the debt, with the result that S<sub>1</sub>, S<sub>2</sub>, and S<sub>3</sub> are liable to C for a total of \$3,000. The fact finder may find an implied agreement that the cosureties' contributive shares are to be in proportion to their ownership interests.<sup>5</sup> To induce C to lend D \$3,000, S<sub>1</sub>, S<sub>2</sub>, and S<sub>3</sub> each agree to be secondary obligors with respect to D's obligation. Pursuant to S<sub>1</sub>'s secondary obligation, S<sub>1</sub>'s maximum liability to C is \$1,500; pursuant to S<sub>2</sub>'s secondary obligation, S<sub>2</sub>'s maximum liability to C is \$900; pursuant to S<sub>3</sub>'s secondary obligation, S<sub>3</sub>'s maximum liability to C is \$600. S<sub>1</sub>, S<sub>2</sub>, and S<sub>3</sub> enter into no express agreement among themselves as to their contributive shares. D defaults, owing \$100 to C. The fact finder may find an implied agreement from these circumstances that the cosureties' contributive shares are to be in proportion to their maximum individual liabilities, so that S<sub>1</sub>'s contributive share is \$50, S<sub>2</sub>'s contributive share is \$30, and S<sub>3</sub>'s contributive share is \$20.

#### **§ 60. Subsuretyship—Defenses Against Claim Of Subsurety**

- (1) As between a subsurety and a principal surety, the subsurety is in the position of an obligee and the principal surety is in the position of a secondary obligor to the extent that:
  - (a) a subsurety has a claim against the principal obligor pursuant to §§ 21-31;
  - (b) that subsurety has a claim against the principal surety pursuant to § 59; and
  - (c) the principal surety has a claim against the principal obligor pursuant to §§ 21-31;
- (2) To the extent that, pursuant to subsection (1), a subsurety is in the position of an obligee and a principal surety is in the position of a secondary obligor, the suretyship defenses set forth in §§ 37-49 are available to the principal surety.

## **ATTACHMENT B**

### **Cited Sections from 38 Am. Jur. 2d Guaranty**

#### **§ 30. Change in status of obligee; guaranty given to individual—Guaranty given to partnership**

The general rule is well settled that a guaranty given to a partnership will not be enforced against the guarantor with regard to transactions occurring after any material change in the status or composition of the partnership, whether by an increase or decrease in the number of partners, or by a change from the partnership form to some other form of business organization. There are cases, however, involving the addition or loss of partners or firm members that have reached the conclusion that in such circumstances a guarantor's liability is not released.

#### **§ 32. Generally**

The common-law rule that a chose in action was not assignable has generally been abolished, at least with respect to contract rights, and it is now generally accepted that a general guaranty may be assigned by the obligee under principles developed for contracts generally. In most instances a general guaranty of the payment of a note, indorsed on the note or attached to the note, without naming any person as the party to be guaranteed, may be enforced by any person advancing money on the note or acquiring it for valid consideration. Further, even though a contract of guaranty purports to be for the benefit of a specific person, it has frequently been held general and enforceable by an assignee, where the guaranty was for a negotiable instrument. Where a guaranty is conditional, however, and provides for specified action by the person named, it is not enforceable by anyone other than the guarantee.

Although it has been said that a special guaranty cannot be assigned without the guarantor's consent, other authority holds that a special guaranty is assignable as long as the assignment does not materially alter the guarantor's undertaking. And even though the guaranty may be classified as special, and therefore normally nonassignable under the law of a particular jurisdiction, the parties may intend it to be assignable within certain limits.

After a breach of a guaranty, the creditor is generally permitted to assign his cause of action against the guarantor even though the guaranty was special.

#### **§ 50. Defenses personal to debtor**

If the principal obligation is not void, but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty. Accordingly, for example, the guarantor may not successfully defend an action brought on the contract of guaranty on the basis that the principal obligation was obtained through fraud practiced on the debtor, or that the creditor was guilty of a

## **ATTACHMENT B**

### **Cited Sections from 38 Am. Jur. 2d Guaranty**

breach of warranty, or on the ground that the guaranteed debt or obligation, being the contract of a corporation, was ultra vires and for that reason was not enforceable by an action against the corporation.

### **§ 80. Abandonment of guaranty**

A guaranty contract may be abandoned by the creditor so far as it relates to future transactions, so that the guarantor is not liable for future advances to the principal debtor. However, a continuing guaranty does not expire through the mere passage of time or change in circumstances.

### **§ 83. Alteration of principal obligation—Particular changes in contract**

Alterations of the contract between the parties to the principal obligation which may cause the release or discharge of the guarantor include—

- the addition of a new party.
- a change in the place of payment.
- a change in the method of payment.
- a change in the rate of interest (whether an increase or decrease) which the debtor is obligated to pay to the creditor.
- restructuring the guaranteed debt after the guarantor had revoked the guaranty as to any new debt.
- an increase in the principal amount of a guaranteed mortgage note.
- an extension of credit beyond the limit stated in the underlying loan agreement.
- a renewal of the principal obligation.
- extending the time to pay the principal obligation. [Though this is generally considered benign or neutral.]
- requiring the debtor to make a prepayment not contemplated in the original underlying principal agreement.
- a change in the ownership of the principal creditor or party guaranteed.



— a change in the ownership of the principal debtor where the lender acquired the debtor then released the debtor from the guaranty without the guarantor's consent.

On the other hand, changes to the principal obligation held not to release the guarantor include

— formalistic changes in the identity of the principal obligor.

— changes made as part of a confirmed bankruptcy reorganization plan.

— a change in the way the creditor-bank calculated the “prime rate” upon which the interest rate on the guaranteed loan was based.

an extension of additional credit beyond that authorized in the note itself, where the lender did not attempt to collect more from the guarantor than the note's limit or where the creditor was aware the limit was being exceeded but did not protest.

a renewal loan to the incorporated successor of the partnership which was the debtor under the original

note, where the guaranty applied to renewals, although there is contrary authority.

**Observation:** In some situations involving consumer or commercial purchases on account, an individual may agree both to a line of credit in a stated amount and to guaranty the line of credit. In such cases, a question sometimes arises as to whether the individual is released from his guaranty when the stated credit limit is exceeded. Courts have reached different results; some hold that the guarantor remains liable if the guaranty is construed as a separate agreement covering all indebtedness to the creditor, while other courts consider the guaranty and the line of credit to state a single credit limit and discharge the guarantor.

A voluntary remission or waiver of part of the principal's obligation does not ordinarily release his guarantor as to the remainder, although there is some authority to the contrary.

As to the effect of the creditor's extension of credit in excess of the guaranteed amount, see § 89.

## **§ 96. Discharge of principal debtor by operation of law**

ATTACHMENT B  
Cited Sections from 38 Am. Jur. 2d Guaranty

As a general rule, the guarantor is released from liability if some act or omission on the part of the creditor discharges the principal debtor of the principal obligation by a rule of law, even if the principal obligation has not been paid. Thus, a guarantor is released upon the debtor's discharge from liability—

- in the event of a voluntary composition of creditors, as distinguished from a proceeding under the federal bankruptcy laws.

- by the lender's failure to proceed on a deficiency after the sale of collateral within the time period set out in a state law dealing with deficiency judgments.

- where the lender chooses to dispose of security by judicial sale, which destroys subrogation rights against the debtor, without a sufficient waiver of those rights from the guarantor.

Exceptions to the general rule are recognized, however. The guarantor has been held not to be released or discharged if—

- the principal debtor is discharged under the primary contract because of a defense personal to the debtor,] such as the debtor's minority.

- the obligation of a bankrupt or of a corporation under reorganization is discharged under federal bankruptcy laws.

- the nonrecourse character of the note precludes the holder of the note from collecting a foreclosure deficiency from the debtor.

The guarantor also remains bound if he acquiesced in or consented to the release of the principal debtor, or if the guaranty contract expressly provides for continuing liability in the event of the release of the debtor. However, if the language of the guaranty contract did not contemplate the type of discharge of the principal debtor that occurred, the guarantor is released from liability.

### **§ 121. Contribution between coguarantors**

If a principal obligation is guaranteed by two or more persons, each must pay his proportional share of the liability under the guaranty. In the event one guarantor has paid more than his share, he is entitled to contribution from the other or others and may bring a cause of action to enforce the right. While no action for contribution may be maintained unless the guarantor has paid more than his share of the obligation, it is not necessary that the guarantor have paid the entire debt. A guarantor may be entitled to interest on the contribution due, payable from the date of payment by the guarantor.

ATTACHMENT B  
Cited Sections from 38 Am. Jur. 2d Guaranty

The right to contribution among coguarantors arises from their implicit agreement upon executing the guaranty that each would contribute his just proportion of any liability, and stands on an equal footing with any other action found on an implied contract. The right to contribution is sometimes described as an equitable concept, subject to equitable defenses. A guarantor is entitled to contribution regardless of whether he and his coguarantors signed a single guaranty agreement or separate guaranty agreements

ATTACHMENT B  
Cited Sections from 38 Am. Jur. 2d Guaranty

**EXHIBIT 1**  
**DEFAULT NOTICE LETTER**

**[Lender Letterhead]**

[Date]

**VIA [Notice Protocol under the Loan Documents]**

Borrower

[Notice address under the Loan Documents]

**RE: \_\_\_\_\_ (“Borrower”); \_\_\_\_\_, as Lender  
 (“Lender”); for a loan (“Loan”) in the original principal face amount of  
 \$[ ]; dated [ ], as amended; secured by [ ] (“Property”)**

Dear Gentlemen:

This letter is notice by Lender<sup>175</sup> of default by Borrower of its obligations under the Loan, with a courtesy copy to [ ]. As you know, the Borrower is in various defaults under the Loan, including the following with respect to the identified loan document entered into by Borrower to evidence some of the terms of the Loan (“Loan Documents”):

- (1) failure under Section [ ] of the [ ] to pay the \$[ ] within 30 days after the Loan Commencement Date;
- (2) failure under Section [ ] of the [ ] to complete punch list items within 30 days after completion of the punchlist;
- (3) failure under Section [ ] of the [ ] to provide accurate Financial Documentation.

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<sup>175</sup> MANUFACTURERS & TRADERS TRUST v. KORNGOLD 618 N.Y.S. 2d 744 (New York Supreme Court, Rockland County, 1994). It is well settled that where a lease requires a notice of default to be sent by the “landlord” any notice sent by the landlord’s agent is ineffective unless accompanied by proof of the agent’s authority to bind the landlord (*see Siegel v. Kentucky Fried chicken of L.I., Inc.*, 67 N.Y. 2d 792, 501 N.Y.S. 2d 317, 492 N.E. 2d 390; *Paul Ruth Trading Co. v. Royal Yarn Dyeing Corp.*, 114 B.R. 852, and cases cited therein). The notice of default sent by Midcoast not only fails to include any proof of Midcoast’s agency, but in fact even fails to mention plaintiff. Inasmuch as payment to an agent who has neither possession of the note and mortgage nor express authority to receive payment does not relieve the mortgagor of the obligation to make payment to the mortgagee (*see* 2 N.Y. Jur 2d, Agency, Section 123, p. 561), a mortgagor making payment to any agent fails to provide any evidence of its authority does so at his peril.

Under the terms of the Loan Documents, if Borrowers shall fail to pay or perform its obligations within the stated cure period, then Lender may declare the entire amount of the Loan immediately due and payable. As a consequence of Borrowers' default, Lender may commence foreclosure proceedings and take such other action at law in equity for the enforcement of the Loan as Lender may choose.

This notice is delivered to you as a courtesy, and without prejudice to Lender in collecting any sums and enforcing any obligations now or hereafter arising under the Loan. This letter shall not be deemed to establish any course of conduct which would limit the Lender's rights, including, without limitation, any requirement or implication that Lender shall hereafter provide notice to Borrowers' default or of Lender's taking any action under the Loan of the [ ].

[However, without waiving Lender's rights to strict enforcement of the Loan in accordance with the Loan Documents evidencing such Loan, including, by way of example and not in limitation of its other rights, to proceed to confess judgment, accelerate payment of the Loan, repossess the Property, foreclose, demand payment of the [5]% late charge, and/or demand payment of interest at the higher rates ([4]% over the contract interest rate) permitted after maturity or acceleration under the Loan Documents, the Lender may consider, discuss, or negotiate Borrower's proposals for correcting those defaults and for entering into a modification of the Loan, provided such consideration, discussion or negotiations are subject to the conditions that (1) neither Lender nor the other parties to the Loan shall have any obligation to modify, amend and/or restructure the Loan or any document evidencing their terms, and that Lender and such parties may terminate the discussions without notice, without liability of any kind for termination, and without any effect upon the Loan Documents; (2) Lender may entertain such discussions and participate in them without waiving or relinquishing any rights or incurring any obligations, unless pursuant to the terms of a subsequent writing signed by Lender; and, (3) except as otherwise expressly provided in this letter, neither this letter nor any prior course of conduct shall be deemed an agreement by Lender or an obligation by Lender to extend the maturity date or otherwise modify the Loan whether based on legal or equitable theories, or otherwise.

If you wish us to proceed on this basis, kindly sign in the space provided below and then return this letter to me by [ ].

Sincerely,

LENDER

By: \_\_\_\_\_

AGREED TO AND ACCEPTED  
BORROWER

By:

By \_\_\_\_\_

EXHIBIT -1  
Page 2

DATE:\_\_\_\_\_

cc: [Required Copy Parties]  
[Courtesy Copy Parties under Loan Documents]  
[Borrower's Functional Address]

EXHIBIT -1  
Page 3

**EXHIBIT 2**  
**Response to Default Letter**

**[Borrower Letterhead]**

[Date]

VIA [Notice Protocol under the Loan Documents]

Lender

[Notice address under the Loan Documents]

**RE: \_\_\_\_\_ (“Borrower”); \_\_\_\_\_, as Lender  
 (“Lender”); for a loan (“Loan”) in the original principal face amount of  
 \$[ ]; dated [ ], as amended; secured by [ ] (“Property”)**

Dear [Attention Party from Loan Agreement]:

We received your letter of [ ] (“Default Letter”) and were both surprised and disappointed. We have been working diligently and constructively with you to manage the current issues.<sup>176</sup> We have been operating as you have instructed us based on your experience in these matters.<sup>177</sup> Your Default Letter was a reversal of all we have accomplished to date, and repudiates your prior position.<sup>178</sup>

In light of the present circumstances,<sup>179</sup> the Default Letter is a coercive effort to misuse rights and remedies of the Lender.<sup>180</sup>

Our conduct has consistently been reasonable and in the best interest of both preserving the Property and repaying the Loan. Declaring a default at this point can derail the delicate balance of resolved and to-be-resolved issues that we need to stabilize to bring the Loan current.<sup>181</sup> This behavior violates the implied and express covenants of good faith and fair dealing that are required of all parties in a commercial transaction.

The Default Letter is frustrating our ability to create stability for the Loan, and is an abusive use of Lender’s rights. We will be compelled to exercise all of our rights to defend and

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<sup>176</sup> Course of conduct can establish new standard of performance and amend the Loan.

<sup>177</sup> Lender management or control of Borrower can be the basis of lender liability both for duress and for losses caused by the actions under lender’s control. It can also reflect Borrower’s reliance and dependence on Lender heightening its duty to a fiduciary duty.

<sup>178</sup> Repudiation is one example of bad faith.

<sup>179</sup> *Force Majeure*, and unforeseen change of circumstances are used as an equitable argument for relief.

<sup>180</sup> Coercion and duress are frequently invoked as examples of unconscionable or as commercially unreasonable acts.

<sup>181</sup> Shifting bad acts to Lender can bolster claims of lender liability

**EXHIBIT -2**

Page 1

protect our ability to repay, and to exit the transaction without unnecessary losses.<sup>182</sup> We hold Lender liable for any losses caused by Default Letter and its related bad acts.<sup>183</sup>

Sincerely,

BORROWER

By:\_\_\_\_\_

cc: [Required Copy Parties]  
[Courtesy Copy Parties under Loan Documents]  
[Borrower's Functional Address]

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<sup>182</sup> this reasserts no waiver of defenses.

<sup>183</sup> This reasserts no release of claims.



## EXHIBIT 3

### FORM OF LOAN WORKOUT PRE-NEGOTIATION AGREEMENT

THIS PRE-NEGOTIATION AGREEMENT (this “Agreement”) is entered into as of \_\_\_\_\_, 20\_\_\_\_, (“Effective Date”) by and between [/among] \_\_\_\_\_, a \_\_\_\_\_ [bank] (“Lender”)<sup>184</sup> and \_\_\_\_\_, a \_\_\_\_\_ (“Borrower”), and \_\_\_\_\_, a \_\_\_\_\_ (“Guarantor” and, with Borrower and Lender, each a “Party” and collectively the “Parties”),<sup>185</sup> with reference to the following Recitals:

### RECITALS

A. On or about \_\_\_\_\_, \_\_\_\_\_, Borrower executed and delivered to Lender [or \_\_\_\_\_, Lender’s predecessor in interest<sup>186</sup>] that certain promissory note (the “Note”) dated \_\_\_\_\_, \_\_\_\_\_, evidencing a loan (the “Loan”)<sup>187</sup> in the original principal amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), which Note is secured by, among other things, that certain [Mortgage, Assignment of Leases and Rents and Security Agreement<sup>188</sup>] (the “Security Instrument”) dated \_\_\_\_\_, \_\_\_\_\_, and recorded in Deed Book \_\_\_\_\_, Page \_\_\_\_\_, Clerk’s Office of the \_\_\_\_\_ (the “Official Records”), which Security Instrument encumbers that certain real property (the “Property”) situated in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_, as more particularly described on Exhibit “A” attached hereto and by this reference incorporated herein.

B. The Note and the Security Instrument, together with any and all other documents executed and delivered to Lender in connection with the Loan and pursuant to that certain [Credit/Loan] Agreement by and [between/among] the Borrower, [Guarantor] and Lender dated \_\_\_\_\_, \_\_\_\_\_ (the “Loan Agreement”), and any and all extensions, modifications, guarantees and renewals thereof, shall hereinafter be referred to collectively as the “Loan Documents,” and all Borrower obligations under the Note and the other Loan Documents [and any obligations of Guarantor thereunder] shall hereinafter be referred to collectively as the “Obligations”.

<sup>184</sup> Correct characterization of Lender’s interest should be recited.

<sup>185</sup> Include guarantors if applicable, including parent and affiliate guarantors. Also, if there are multiple borrowers, lenders or guarantors, revise references accordingly. In the case of multiple borrower parties, a lender will likely propose express language re-affirming that all borrower parties are jointly and severally liable for the loan Obligations. A borrower will propose the opposite, that it is not re-affirming its obligations, and the inverse, that the lenders are re-affirming their obligations pursuant to the Loan Documents and this Agreement. But in a pre-negotiation agreement, there is typically no ratification of rights or liabilities.

<sup>186</sup> Add if lender has changed or original loan has been purchased or assigned.

<sup>187</sup> Ordinarily lender uses these recitals as an estoppel and a complete list of all documents comprising the Loan. In certain instances, that confirmation runs to Borrower’s benefit, such as in the instance where side letters contain waivers of Lender’s rights or remedies under the Loan.

<sup>188</sup> Identify appropriate loan and security documents, as applicable.

EXHIBIT -3

Page 1

C. [LENDER ADDITIONAL LANGUAGE: One or more Events of Default (as defined in the Loan Documents) have occurred and are continuing, or are threatened, or are anticipated to occur with notice or lapse of time or both.]

D. [BORROWER ADDITIONAL LANGUAGE: Pursuant to the terms of this Agreement, the parties desire to encourage such Discussions (defined below) without waiving any rights, remedies, or defenses they each may have or otherwise prejudicing or altering their respective position vis-à-vis the other.]<sup>189</sup>

## AGREEMENT

**NOW THEREFORE**, in consideration of the foregoing premises, and for other good and valuable consideration, the sufficiency and receipt of which are hereby mutually acknowledged, and intending to be legally bound hereby, the Borrower[, Guarantor] and Lender hereby agree and covenant as follows:

1. Request for Discussion. Borrower and Guarantor have requested that Lender consider modifying the Loan and the terms of Loan Documents and Obligations evidenced thereby.<sup>190</sup> The parties agree that meetings, discussions and possible negotiations, if any, in response to that request (all of which are collectively referred to as the “Discussions”) shall be subject to the terms set forth in this Agreement.

2. Settlement Discussions.

2.1. Settlement Negotiations. The Parties have entered into this Agreement in order to encourage Discussions in an open, frank and direct manner without risk of exposure to liability as a result thereof, and with the intent to arrive at a resolution acceptable to the Parties of the matters giving rise to the Discussions. All Discussions shall be deemed to be communications in the nature of settlement negotiations which no Party shall have the right to use in connection with the exercise of any right, remedy or defense under the Loan Documents or in any action at law or in equity arising therefrom or otherwise arising from the relationship between Borrower and Lender.

2.2. Alternative Opportunities. Because the Discussions may not result in an agreement among the Parties, the Borrower may engage in discussions of any alternatives during the Discussions, including, without limitation, refinancing, sale, leasing and equity-raising efforts. Such discussions with third parties shall not be deemed “Discussions” and such parties shall not be deemed “Other Parties.”

2.3. Discussions with Other Parties. The Borrower hereby acknowledges that Lender has the right to engage in Discussions with any other parties who now hold or in the

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<sup>189</sup> If a strongly pro-lender form is desired, change bracketed text to protect only Lender’s position and provide for a blanket release of all Borrower defenses. See e.g. paragraphs 5(a) and 5(f).

<sup>190</sup> Language would be proposed by a lender with a strong bargaining position.

future acquire a direct or indirect interest in the Property, including, without limitation, the holders of liens on the property and on the direct or indirect interest in Borrower (collectively, “Other Parties”); [BORROWER ADDITIONAL LANGUAGE: provided, however, notwithstanding the foregoing, the Lender agrees that it shall not engage in any Discussions with any Other Parties without first offering Borrower the reasonable opportunity to actively participate in such Discussions]. For the avoidance of doubt, the term “Other Parties” does not include [the Senior Lender]. The Borrower acknowledges and agree that no such discussions shall result in any liability or obligation on the part of Lender to any Borrower or any claim on the part of any Borrower Party provided such discussions take place in accordance with the provisions of this Agreement. Any such discussions shall constitute Discussions for all purposes under this Agreement.

2.4. No Change of Position. No representation, offer, concession or statement (oral or written) made by any Party to the other in the course of the Discussions shall be deemed, in any proceeding at law or in equity involving the Loan Documents or the Loan described herein: (i) to be an admission of any fact; (ii) to be evidence or probative of any act or omission to act, or intent of any Party; (iii) to be a waiver, release, or disclaimer by any Party of rights, remedies, or defenses it may have, or in any way to modify or terminate the Loan Documents; (iv) to in any way modify the legal relationship of the Parties; or, (v) to result in an admission against the interest of any Party, except as otherwise expressly set forth herein and to the extent the Parties otherwise agree in a duly executed and binding written agreement. It is expressly understood that each Party reserves all legal and equitable rights and remedies.

2.5. No Forbearance.<sup>191</sup> The Discussions shall not operate as a waiver by either Party of its right to demand full and timely performance of all obligations under the Loan Documents. Neither the execution of this Agreement nor any Discussions shall operate to toll any time period which otherwise might be applicable, including without limitation any time periods which may be provided for in the Loan Documents or by statute upon the issuance or filing of a notice of default or a notice of sale under the Loan Documents, unless specifically agreed in writing in a document signed by Lender. Nothing contained in this Agreement is intended (i) to limit either Party in initiating, continuing or otherwise proceeding to exercise any rights or remedies it may have before, during or after the Discussions, including, but not limited to, giving notices of default or, in the case of Lender, initiating foreclosure proceedings; or (ii) to relieve Borrower of any obligations it has under the Loan Documents (including the Obligations). As of the date of this Agreement, by entering into the Discussions: (i) Lender has not in any way waived any rights or remedies it may have in connection with any default in connection with the Loan, or any rights or remedies available to it under the Loan Documents or otherwise under law or at equity; (ii) Borrower has not waived any rights it may have under law or at equity to contest or defend actions of Lender if Lender should proceed against Borrower by reason of any default, except as otherwise set forth in this Agreement; and (iii) Guarantor has not waived any rights it may have under law or at equity to contest or defend actions of Lender if

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<sup>191</sup> The Borrower frequently expects to receive suspension of Lender remedies while working to come to a new resolution, but Lender seeks to continue to create pressure by reserving the right to pursue remedies while negotiating settlement terms.

Lender should proceed against Borrower or Guarantor by reason of any default, except as otherwise set forth in this Agreement.

2.6. Final Written Agreement. Although the Parties may reach an oral understanding on one or more issues, no Party shall be bound by any oral agreements, representations or warranties, and no rights or liabilities, either express or implied, shall arise on the part of any Party on account of any oral agreement or understanding, and no statement made by any Party in connection with the subject of this Agreement shall be relied upon by the other Party until any such agreement is reduced to writing and the Loan Documents are modified, if necessary. In the event that a written agreement is presented to the Parties for the Parties' signatures (effecting modification to the Loan Documents ("Resolution Agreement")), such Resolution Agreement shall constitute an offer to assume or modify the Loan Documents by the Party presenting it and shall cease to be effective if the Resolution Agreement is not executed by the other Parties, and returned to the presenting Party, along with any sums and other matters to be tendered as conditions to its effect and enforceability, within [five (5) business] days of its receipt by the receiving Party or such other date as is provided in such Resolution Agreement. Notwithstanding the foregoing, any Party may, in its sole discretion, prepare and deliver to the other Parties memoranda, written analyses or written term sheets (together with any term sheets sent prior to the Effective Date, "Discussion Memoranda") outlining or describing the Parties' discussions and/or proposals, or serving as the basis for further discussion and possibly for preparation of appropriate written agreements. Discussion Memoranda shall be deemed part of the Discussions for all purposes of this Agreement. [LENDER ADDITIONAL LANGUAGE. The terms and conditions set forth in any Discussion Memoranda shall be provided for discussion purposes only and, when provided by Lender, shall not constitute an offer, agreement or commitment by the Lender to extend, modify or otherwise forbear under the Loan Documents, unless otherwise specified by Lender in such written document.]<sup>192</sup>

2.7. Discussion Memoranda. Any Discussions prior or after the Effective Date relating to the subject matter of this Agreement or the modification of the Loan Documents after their effective date which any Party<sup>193</sup> hereto may have had or may hereafter have with any representative, employee, consultant, or any other agent of the Lender, shall constitute

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<sup>192</sup> If the undersigned Lender representative does not have the power to bind the Lender, or if a more specific method of communicating an offer is required, consider adding language to the following effect:

"The undersigned representative of Lender does not have the authority to bind Lender to any modification of or changes in the Loan Documents or the Loan structure. If the Parties reach a verbal agreement on proposed modifications to the Loan Documents, Lender will summarize such agreement for Borrower in a letter of intent ("Letter of Intent"), which will provide the basis for the undersigned's recommendation to the appropriate authorities of Lender for a loan modification. If the undersigned's recommendation is approved, Borrower will be notified in writing of such approval, and only after such notification, and full compliance by Borrower with all terms and conditions of the Letter of Intent, will any offer to enter into a modification agreement be considered binding on Lender."

<sup>193</sup> If there are guarantors, using "any Party" and the "Parties" here will include such Guarantor.

Discussions, and any written memoranda, written analyses or written term sheets relating thereto shall constitute Discussion Memoranda.

2.8. No Course of Conduct. Acceptance by Lender, or its successors or assigns, of any past or future whole or partial payments, shall not be construed as a cure or waiver of any defaults that may exist under the Loan, nor shall such constitute a modification or extension of the Loan or any Loan Document, or any agreement to permit an assumption of the Loan.

2.9. No Suspension of Actions. In the event Lender has posted, provided Borrower with, or recorded (as applicable) a notice of intent to foreclose, a notice of default or notice of sale, such notice(s) and proceedings shall continue in full force and effect notwithstanding execution of this Agreement, any negotiations held pursuant hereto (including the Discussions) or any acceptance of any past or future partial payments.<sup>194</sup> Specifically (but not in limitation hereof), Borrower agrees that it will not contest the exercise of Lender's rights to foreclose the liens of any mortgages held by Lender as security for the Loan, nor will Borrower contest the appointment of a receiver in connection with the operation of any mortgaged property.

2.10. Representatives. Lender hereby designates \_\_\_\_\_ [of the law firm \_\_\_\_\_] as its sole authorized agents ("Lender Representatives") to negotiate the terms of any forbearance, modification or extension. Borrower hereby designates \_\_\_\_\_ as its sole authorized agents to negotiate and agree to any forbearance, modification or extension ("Borrower Representatives"). [Guarantor hereby designates \_\_\_\_\_ as its sole authorized agents to negotiate and agree to any forbearance, modification or extension ("Guarantor Representatives").]

2.11. Payments During Discussions. [LENDER ADDITIONAL LANGUAGE: During Discussions, Borrower shall continue to make, and Lender shall continue to accept, payments of interest and principal under the Loan, in accordance with the terms of the Loan Documents.<sup>195</sup> Such funds shall not be applied pursuant to any negotiated proposal or Discussion until agreement is reached among the Parties and executed by them in writing.] If no Resolution Agreement is reached pursuant to this Agreement and this Agreement is terminated, payments received during the Discussions shall not be returned, but shall be used to pay down the Obligations, including any penalties or late charges, at the election of Lender.

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<sup>194</sup> Parties may agree that the execution of the Pre-Negotiation Agreement and the good faith commencement and continuation of Discussions does temporarily (and at the sole election of the Lender to resume) stay default or foreclosure proceedings (as opposed merely to the existence of an event of default, which should not be affected by the entering into of this Agreement). This concept would ordinarily be addressed in a Forbearance Agreement.

<sup>195</sup> A strong lender would seek reaffirmation of payment obligations by Borrower, but if Borrower believes it has a claim against payment, whether due to Lender liability, set-off rights or otherwise, Borrower would not agree. Sometimes a compromise is reached by identifying Borrower's specific claims.

### 3. Pre-existing Conditions and Claims.<sup>196</sup>

3.1. Ratification and Warranty.<sup>197</sup> (i) All of Borrower's [and Guarantor's] Obligations to the Lender as set forth in the Loan Documents are in full force and effect, (ii) the Loan Documents to which it is [they are] a party were all properly and duly executed and delivered, (iii) the Loan Documents to which it is [they are] a party are now, and at all times have been, in full force and effect in accordance with their terms and (iv) there are no amendments, waivers or modifications of the Documents, except for those made in writing and signed by the Lender and the Borrower [and Guarantor], and identified in the Recitals, and (iv) Lender has complied properly performed and satisfied in a timely manner with all of its obligations under the Loan Documents, including delivery of notice and time for Borrower [and Guarantor] to cure its [their] defaults, if any.

3.2. Waiver.<sup>198</sup> Borrower [and Guarantor] for itself [themselves] and its [their respective] successors and assigns, and by its [their] execution hereof hereby acknowledge[s], admit[s] and agree[s] that, as of the date of execution and delivery of this Agreement, the Borrower [and Guarantor] (i) have no defenses, counterclaims or offsets relating to its [their] obligations under or in respect of the Loan Documents or to the enforcement or exercise by Lender of any of its rights, powers or remedies under or in respect of the Loan Documents, or (ii) alternatively, hereby irrevocably waive[s], and relinquish[es], any and all such objections, claims, defenses, counterclaims or offsets, that may exist as of the date hereof including, without limitation, any and all such objections, claims, defenses, counterclaims or offsets that are unknown, unsuspected, unanticipated or undisclosed as of such date.

3.3. Release.<sup>199</sup> Although Lender regards its conduct as proper and does not believe Borrower [or Guarantors] have any claim, cause of action, offset, or defense against Lender, its participating lenders, co-lenders, subsidiaries, affiliates, parents, predecessors in interest, nominees, assignees, officers, directors, agents, employees, servants, attorneys and representatives, as well as their respective heirs, personal representatives, successors and assigns, or any and all of them (hereinafter collectively called the "Released Parties"), Lender wishes and Borrower and Guarantors agree to eliminate any possibility that any conditions, acts, omissions, events, circumstances, or matters which occurred prior to the effective Date could impair or otherwise subject Lender or any of the other Released Parties to any liability other than is expressly stated in this Agreement and the Loan Documents. Borrower [and Guarantor] on behalf of itself [themselves] and its [their respective] successors and assigns (collectively the "Releasing Parties") remise[s], release[s], acquit[s], satisfy[ies] and forever discharge[s] the Released Parties from any and all manner of debts, accounts, bonds, warranties, representations, covenants, promises, contracts, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands and causes of action of any nature

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<sup>196</sup> A Lender would typically seek the protections of the various releases and waivers contained in this Section 3 at each instance the Borrower seeks an accommodation or relief from the then current Loan Documents Provisions.

<sup>197</sup> The Lender seeks to pre-empt a Borrower challenge against the enforceability of the Loan Documents.

<sup>198</sup> The Lender seeks to extinguish any defenses Borrower may have to enforcement of the Loan Documents.

<sup>199</sup> The Lender seeks to extinguish any claims the Borrower may have for Lender liabilities.

whatsoever, which existed, arose, or occurred at any time prior to or concurrently with the date hereof of any character whatsoever whether known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, including without implied limitation, such claims and defenses as fraud, mistake, duress and usury, which Borrower [or Guarantors] ever had or now has against the Released Parties, jointly or severally, for or by reason of any matter, cause or thing whatsoever occurring prior to the date hereof, which relates to, in whole or in part, directly or indirectly: (i) the Loan, including the administration or funding thereof, (ii) the Loan Documents, (iii) the Obligations, (iv) the Property, including the financing and operation of same, and (v) any other agreement or transaction between any of Releasing Parties and any of Lender Parties concerning matters arising out of or relating to the items set forth in subsections (i) and (iv) above.]

3.4. Acknowledgments.<sup>200</sup> Each Borrower and Guarantor hereby acknowledges that it is or is owned by sophisticated and experienced real estate developers and investors, each of whom has a full understanding of the terms and conditions of this Agreement and the risks involved in entering into this Agreement, that this Agreement has been fully negotiated and that compromises on the part of Lender and Borrower were made before agreement was reached on the final terms hereof, that at all times each Borrower [and Guarantor] has [have] been represented by its [their] own attorneys and such other competent counsel as it [each of them] has [have] chosen to engage in the negotiation of the terms and the preparation and execution of all documents, and has relied solely on the advice and instruction of its own attorney who has had the opportunity to review and analyze all of the documents for a reasonable period of time prior to the execution by the Borrower [and Guarantor]; that Borrower [and Guarantor] is entering into this Agreement with the conviction that it is a fair agreement and that it represents an equitable compromise of the competing interests of the parties hereto and that, in addition, it was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any party, that Lender has no fiduciary, confidential or special relationship with Borrower or Guarantor, and no such relationship is created by the execution of this Agreement or the participation by any party in the Discussions, and that Borrower [and Guarantor] acknowledges this Agreement shall constitute a complete defense to any claim, cause of action, defense, liability or obligation released under this Agreement, and agrees that after the execution and delivery of this Agreement on the date hereof, the only claims or causes of action which it and/or he could possibly have against any of the Released Parties would be those arising under this Agreement, or a written contract hereafter executed by Lender in favor of Borrower and/or Guarantor those arising from conduct occurring after the execution and delivery of this Agreement. Neither Borrower nor Guarantor shall institute or prosecute (or, except to the extent required by law, in any way, assist or cooperate with the institution or prosecution of) any action, suit, hearing, or other proceeding of any kind, nature, or character at law or in equity against Released Parties in order to collect, enforce, declare, assert, establish, or otherwise raise any defense, claim, cause of action, contract, liability, indebtedness, or obligation which is within the scope of those released in this Section or which arise out of any fact, contract, condition, claim, cause of action, indebtedness, liability, obligation, event, action, omission, circumstance, or other

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<sup>200</sup> The Lender seeks to extinguish any common law or equitable claims that could be asserted as voiding the Loan Documents.

matter or reason of any kind which is the basis for any such defense, claim, cause of action, liability, indebtedness or obligation which is released hereunder.

3.5. No Admission.<sup>201</sup> Nothing in this Agreement shall be construed as (or shall be admissible in any legal action or proceeding as) any admission by Released Parties that any defense, indebtedness, obligation, liability, contract, claim, or cause of action exists which is within the scope of those released within this Section, because Lender denies that any such matters exist and regards this release as unnecessary except to confirm its understanding of the position of the Parties.

3.6. Indemnification.<sup>202</sup> Borrower hereby indemnifies, defends, and holds harmless Released Parties and all persons, firms, corporations, and organizations on their behalf (collectively, the “Indemnified Parties”) of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever that any third party may now have or claim to have against such Indemnified Parties, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way touching, concerning, relating to, arising out of or founded upon the [ADDITIONAL BORROWER LANGUAGE: The Borrower’s interest in and acts or omissions taken with respect to] the Loan, the Obligations or any of the Loan Documents, including all such loss or damage of any kind heretofore sustained, or that may arise as a consequence of the dealings between the Parties up to and including the Effective Date. [ADDITIONAL BORROWER LANGUAGE: except to the extent due to Lender’s [gross] negligence or intentional misconduct].

3.7. No Waiver.<sup>203</sup> Borrower acknowledges and confirms that by not exercising the rights, remedies and privileges available to Lender, for any reason whatsoever, including the negotiation and execution of this Agreement, Lender is not waiving and has not waived any of its rights to exercise them in accordance with the Loan Documents and this Agreement.

3.8. No Course of Conduct.<sup>204</sup> Borrower acknowledges and agrees that by negotiating and entering into this Agreement, Lender is not establishing a course of conduct nor a pattern of operation nor an implicit or explicit understanding that Lender may or will ever further revise or modify any term or condition of the Loan Documents or this Agreement or agree to forebear at any time in the future if an event of default should occur under and pursuant to the Loan Documents, this Agreement and/or any document or instrument contemplated or referred to herein.

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<sup>201</sup> The Lender seeks to prevent the claim that the act of seeking these protections under Section 3 Pre-Existing Conditions and Claims is due to the existence of the bad acts for which the Lender is being protected.

<sup>202</sup> The Lender seeks Borrower’s protection against claims by third parties.

<sup>203</sup> The Lender seeks to prevent the claim that the act of seeking to settle claims with Borrower is due to Lender’s waiver of rights.

<sup>204</sup> The Lender seeks to pre-empt any claim of a non-verbal modification of the obligations whether arising by performance or course of conduct.



3.9. No Cure.<sup>205</sup> Borrower hereby acknowledges and agrees that except as specifically set forth herein, neither this Agreement nor any actions pursuant to this Agreement nor any negotiations or discussions (including the Discussions) among Borrower, [Guarantor] any of [their respective] agents, officers or principals and any of the Lender Parties, shall be deemed or construed to cure any existing defaults under the Loan Documents, constitute a reinstatement, novation or release of the Loan or the Loan Documents or an extension of the maturity date of the Loan, or constitute a modification, amendment or waiver of the Loan or Loan Documents. In addition and not in limitation of the foregoing, it is expressly understood and agreed that Borrower's default(s) under the Loan Documents is/are not cured or waived by the acceptance of any funds paid by or on behalf of Borrower pursuant to this Agreement, including, without limitation, any Collateral Payment Amounts received hereunder.

3.10. Future Negotiations.<sup>206</sup> Borrower [and Guarantor] acknowledge[s] and agree[s] that Lender has no obligation whatsoever to discuss, negotiate or to agree to any restructuring of the Loan, or any modification, amendment, restructuring or reinstatement of the Loan Documents or to forbear from exercising its rights and remedies under the Loan Documents, except as expressly provided in this Agreement.

3.11. [BORROWER SUBSTITUTE LANGUAGE – No Change Of Position.<sup>207</sup> Borrower, [Guarantor] and Lender each acknowledge and agree that except as specifically set forth herein, none of Borrower, Guarantor[, Guarantor] nor Lender shall be deemed to have amended or waived any rights, remedies or obligations contained in any of the Loan Documents or otherwise at law or in equity nor shall any of Borrower[, Guarantor] or Lender be deemed to have released or discharged any claim, counterclaim or defense that any of them ever had, may now have or may hereafter have arising out of or relating to the Loan or the Loan Documents, or the administration thereof, all of which are hereby expressly reserved. This Agreement shall not operate as a waiver by either Party of its right to demand full and timely performance of all obligations under the Loan Documents. Neither the execution of this Agreement nor any conduct shall operate to toll any time period which otherwise might be applicable, including without limitation any time periods which may be provided for in the Loan Documents or by statute upon the issuance or filing of a notice of default or a notice of sale under the Loan Documents, unless specifically agreed in writing in a document signed by the Parties. Nothing contained in this Agreement is intended (i) to limit either Party in initiating, continuing or otherwise proceeding to exercise any rights or remedies it may have before, during or after this Agreement, including, but not limited to, giving notices of default or, in the case of Lender, initiating foreclosure proceedings; or (ii) to relieve Borrower of any obligations it has under the Loan Documents (including the Obligations).]

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<sup>205</sup> The Lender seeks to confirm that its undertaking the performance of the Agreement is not deemed to cure Borrower Defaults.

<sup>206</sup> The Lender seeks to reaffirm that by entering into this Agreement it has not obligation to enter into other settlements.

<sup>207</sup> The Borrower would seek to preserve the status quo as to its potential rights and remedies in exchange for the extra consideration it is providing, such as fees, surviving liability for limited claims, cooperation in providing a consensual deed, or refraining from filing bankruptcy.

4. Miscellaneous.

4.1. No Enterprise. The relationship between Borrower and Lender is that of debtor and creditor. Nothing in this Agreement shall be deemed to create a partnership, joint venture or other association between Borrower and Lender or between Lender and any other party, or cause Lender to be liable or responsible in any way for the actions, liabilities, debts or obligations of Borrower or any other party.

4.2. Counterparts. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which shall collectively constitute a single agreement, fully binding upon and enforceable against the parties hereto. No amendment or supplement to this Agreement shall be valid or binding unless made in writing and executed by all the parties hereto.

4.3. Binding Effect. This Agreement shall be binding upon the Borrower[, Guarantor] and Lender and their respective heirs, successors, and assigns.

4.4. Choice of Law. This Agreement shall be governed by the laws of the [State/Commonwealth] of \_\_\_\_\_, without giving effect to principles of conflicts of laws.

4.5. Jurisdiction. The state and federal courts located in the [State/Commonwealth] of [\_\_\_\_\_] shall have exclusive jurisdiction to hear and determine any claims or disputes between Borrower and Lender, pertaining to this Agreement. Borrower expressly submits and consents in advance to such exclusive jurisdiction in any action or proceeding commenced in such courts.

4.6. No Third Party Beneficiaries. The Borrower [and the Guarantors] acknowledge[s] and agree[s] that the acceptance by the Lender of the terms of this Agreement and the assignment to the Lender of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender to third parties which might have claims of any kind whatsoever against the Borrower[, or the Guarantor] or the Property and that the Lender does not assume or agree to discharge any liabilities pertaining to the Property now or hereafter arising. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

4.7. Time of Essence. Time is of the essence of this Agreement and each provision of this Agreement.

4.8. No Brokerage. The Parties represent and warrant each to the other that the transactions hereby contemplated are made without liability for any finder's, realtor's, broker's, agent's or other similar commission. The Parties mutually agree to indemnify and hold each the harmless from claims for commissions asserted by any party as a result of dealings claimed to give rise to such commissions.

EXHIBIT -3

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4.9. Lender's Expenses. In addition to payments at Closing under Section 3, within thirty (30) days of receipt of an invoice therefor, Borrower shall pay to Lender all of its costs and expenses incurred in connection with this Agreement and any other matters related to the Property, [including, but not limited to, the review and approval of any lease with respect to the Property and any related subordination, non-disturbance and attornment agreements,] all of which costs and expenses, shall include, but not be limited to, outside and in-house attorney's fees and disbursements.<sup>208</sup>

4.10. Additional Documents; Appointment of Lender As Attorney-In-Fact.<sup>209</sup> At all times following the execution of this Agreement, Borrower [and Guarantor] shall execute and deliver to Lender, or shall cause to be executed and delivered to Lender, and shall do or cause to be done, all such other instruments, documents and actions as Lender may reasonably deem necessary or desirable to assure Lender of the benefit of this Agreement and the other Loan Documents. In the event Borrower [or Guarantor] fails to execute and deliver any such instrument or document within ten (10) days of the request therefor, Borrower [, Guarantor and each of them] hereby irrevocably appoints any officer of Lender as [his, her and/or its] attorney-in-fact (which appointment is durable, irrevocable and coupled with an interest) for the purpose of executing and delivering such instruments or documents.

4.11. Notices. All notices which may be given pursuant to this Agreement or the Loan Documents shall be in writing and shall be personally delivered or sent by first-class certified or registered United States mail, postage prepaid, return receipt requested, and sent to the party at its address appearing above or such other address as any party shall hereafter designate by notice to the other party given as aforesaid. All notices shall be deemed effective upon receipt or, if mailed, upon the expiration of the third day following the date of mailing, whichever occurs first.

4.12. [Joint and Several Liability. The obligations, undertakings and agreements of each of the Borrower shall be joint and several.]

4.13. Severability. If any clause or provision of this Agreement is determined to be illegal, invalid or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Agreement will not be affected thereby if the essential terms of the Agreement upon which Lender relied remain in effect.<sup>210</sup> It is the intention of the parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar in terms to such provision as is possible and be legal, valid and enforceable.

4.14. Third Party Obligations. The Borrower and the Guarantors acknowledge and agree that the acceptance by the Lender, its nominee or assignee of ownership of the

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<sup>208</sup> If these expenses are material, and Borrower has cash flow issues (as is likely to be the case since the parties are discussing modification), Lender may consider adding these costs to the outstanding principal of the Loan, and giving them priority in respect of the order of application of payment amounts.

<sup>209</sup> If a clause equivalent to this is in the Loan Documents, this reaffirmation of Loan Documents may be surplus.

<sup>210</sup> Unlike most severability clauses, this recommends the Agreement be void if a material term is unenforceable.

Property and the power of attorney to sell the Property pursuant to the terms of this Agreement and the assignment to the Lender, its nominee or assignee of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender, its nominee or assignee, to third parties which might have claims of any kind whatsoever against the Borrower or the Guarantors, Property, or the Property and that the Lender for itself and its nominee or assignee does not assume or agree to discharge any liabilities pertaining to the Property or Property which originated prior to the Closing Date, or undertake any obligation to complete the leasing or sale of the Property. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

4.15. Counsel; Voluntary Agreement. The Parties represent and warrant that each of them is represented by legal counsel of its choice, that each of them has consulted with counsel regarding this Agreement (and has been advised to consult independent counsel with respect to the upcoming Discussions as well), that each of them is fully aware of the terms of this Agreement and understands that this is a legally binding contract that may affect such party's rights, and each of them has entered into this Agreement voluntarily and without coercion or duress of any kind.

4.16. Confidentiality. It is important to the Parties to maintain a reasonable confidentiality regarding the subject matter hereof. Accordingly, no Party shall disclose the undertaking of the terms or conditions of this Agreement, any materials, information (written, oral or observed) or incidents related to this Agreement, or any document executed or prepared in connection herewith, including, without limitation, correspondence, electronic transmissions, voice recordings, notes, analyses based on confidential material, budgets and projections, except as may be required by applicable law, pursuant to a court order or subpoena, to such Party's counsel or advisers a reasonably necessary to assist such Party in the conduct of any negotiations related to this Agreement, or to the extent such information could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such evidence would otherwise be admissible, without regard to whether it was originally derived in the context of the Discussions pursuant to this Agreement.

4.17. JURY TRIAL WAIVER. BORROWER[, GUARANTOR,] AND LENDER SHALL NOT SEEK A JURY TRIAL IN ANY ACTION BASED UPON OR ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT OR THE LOAN. TO THE EXTENT PERMITTED BY APPLICABLE LAW, [EACH OF] BORROWER [,GUARANTOR] AND LENDER HEREBY IRREVOCABLY AND EXPRESSLY WAIVES ANY AND ALL RIGHT TO ANY SUCH JURY TRIAL AND AGREES THAT NO SUCH ACTION WITH RESPECT TO WHICH A JURY TRIAL HAS BEEN WAIVED SHALL BE SOUGHT TO BE CONSOLIDATED WITH ANY OTHER ACTION WITH RESPECT TO WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF BORROWER [,GUARANTOR] AND LENDER AND ITS COUNSEL, AND SHALL NOT BE SUBJECT TO ANY EXCEPTIONS.

### EXHIBIT -3

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IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date set forth above.

**LENDER:**

[\_\_\_\_\_]

By: \_\_\_\_\_  
Name:  
Title:

**BORROWER:**

[\_\_\_\_\_]

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

**ACKNOWLEDGED AND AGREED**

**GUARANTOR:**

[\_\_\_\_\_]

By: \_\_\_\_\_

Its:

**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

[to be inserted]

## FORBEARANCE AGREEMENT

This **FORBEARANCE AGREEMENT** (this “Agreement”) is dated as of \_\_\_\_\_, 20\_\_\_\_, [but effective as of \_\_\_\_\_]<sup>211</sup> (“Effective Date”), and is by and among [/between] \_\_\_\_\_, a \_\_\_\_\_ [bank] (“Lender”) and \_\_\_\_\_, a \_\_\_\_\_ (“Borrower”), and \_\_\_\_\_, a \_\_\_\_\_ (“Guarantor” and, with Borrower and Lender, each a “Party” and collectively the “Parties”),<sup>212</sup> with reference to the following Recitals.

### RECITALS:

A. On or about \_\_\_\_\_, \_\_\_\_\_, Borrower executed and delivered to Lender [or \_\_\_\_\_, Lender’s predecessor in interest]<sup>213</sup> that certain promissory note (the “Note”) dated \_\_\_\_\_, \_\_\_\_\_, evidencing a loan (the “Loan”) in the original principal amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), which Note is secured by, among other things, that certain [Mortgage, Assignment of Leases and Rents and Security Agreement]<sup>214</sup> (the “Security Instrument”) dated \_\_\_\_\_, \_\_\_\_\_, and recorded in Deed Book \_\_\_\_\_, Page \_\_\_\_\_, Clerk’s Office of the \_\_\_\_\_ (the “Official Records”), which Security Instrument encumbers that certain real property (the “Property”) situated in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_, as more particularly described on Exhibit “A” attached hereto and by this reference incorporated herein. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Loan Agreement.

B. The Note and the Security Instrument, together with any and all other documents executed and delivered to Lender in connection with the Loan and pursuant to that certain [Credit/Loan] Agreement by and [between/among] the Borrower, [Guarantor] and Lender dated \_\_\_\_\_, \_\_\_\_\_ (the “Loan Agreement”), and any and all extensions, modifications, guarantees and renewals thereof, shall hereinafter be referred to collectively as the “Loan Documents,” and all Borrower obligations under the Note and the other Loan Documents [(and any Guarantor obligations thereunder)] shall hereinafter be referred to collectively as the “Obligations”. All capitalized terms not otherwise defined in the text or Glossary at Exhibit “B” shall have the meaning ascribed to them in the Loan Agreement.

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<sup>211</sup> DRAFTING NOTE: Include if the forbearance is to apply retroactively to the date of the first/last default under the subject loan documents.

<sup>212</sup> DRAFTING NOTE: Include guarantors if applicable, including parent and affiliate guarantors. Also, if there are multiple borrowers, lenders or guarantors, revise references accordingly. In the case of multiple borrower parties, a lender will likely propose express language re-affirming that all borrower parties are jointly and severally liable for the loan Obligations. A borrower will propose the opposite, that it is not re-affirming its obligations, and the inverse, that the lenders are re-affirming their obligations pursuant to the Loan Documents and this Agreement.

<sup>213</sup> DRAFTING NOTE: Add if lender has changed or original loan has been purchased or assigned.

<sup>214</sup> DRAFTING NOTE: Identify appropriate loan and security documents, as applicable.

EXHIBIT -4

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C. One or more Events of Default (as defined in the Loan Documents) have occurred and are continuing, or are threatened, or are anticipated to occur with notice or lapse of time or both.<sup>215</sup>

D. [ADDITIONAL LENDER LANGUAGE: Borrower has provided Lender with (i) [actual income and expense statements] for the months of \_\_\_\_\_ through \_\_\_\_\_ (such statements, the “Operating Statements”) and (ii) budgets for such months (the “Budgets”, and such period of time, the “Forbearance Period”).]<sup>216</sup>

E. The Borrower has requested that Lender forbear from exercising its enforcement remedies with respect to the Loan during the Forbearance Period. Lender has agreed to do so upon the terms and conditions set forth in this Agreement.

**NOW THEREFORE**, in consideration of the foregoing premises, and for other good and valuable consideration, the sufficiency and receipt of which are hereby mutually acknowledged, and intending to be legally bound hereby, the Borrower[, Guarantor] and Lender hereby agree and covenant as follows:

1. Current Default. Borrower agrees and acknowledges that (a) an Event of Default has occurred for [failure to pay interest and principal as required by the Loan Documents]<sup>217</sup>, (b) such Event of Default is continuing beyond any applicable cure period, (c) Borrower has no defenses or counterclaims to such Event of Default, (d) Lender is entitled to exercise any and all remedies provided in the Loan Documents, at law or in equity as a result of such Event of Default, and (e) that Lender has no obligation to extend the maturity date of any Loan(s) or advance any further funds in connection with any Loan(s) to Borrower.<sup>218</sup>

2. Terms of Forbearance.

2.1 General Provisions. So long as Borrower shall be in compliance with each and every term and condition of this Agreement and so long as no Termination

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<sup>215</sup> DRAFTING NOTE: Typically, by the time lender and borrower parties are ready to discuss forbearance, one or more material defaults have already occurred. However, it is possible parties will contemplate forbearance in anticipation of a default. See footnote number 8 for further discussion.

<sup>216</sup> DRAFTING NOTE: Adapt as necessary to reflect any financials delivered or required to be delivered by Borrower under the Loan Agreement or as a condition for the forbearance. If the Forbearance Period is to be calculated in some other manner (or is an arbitrarily agreed date), so state.

<sup>217</sup> DRAFTING NOTE: It is possible that borrower may be seeking lender’s agreement to forbear from exercising a remedy available to lender as a result of a non-monetary default or breach by borrower. Insert specific Events of Default that lender is permitting, to match Section 8(b).

<sup>218</sup> DRAFTING NOTE: In a typical case a forbearance agreement would only be sought after a default has already occurred. However, it is possible the parties may seek to address an anticipated, or even anticipatory, default. In such event, this entire Default paragraph may be substituted with a “Status of Loans” paragraph setting forth the current outstanding principal and interest on the loan and describing the anticipated default. The forbearance granted in this agreement should, in such event, only apply to the specific enumerated anticipated default, and the agreement should make clear that forbearance does not apply to other defaults.



Event (as hereinafter defined) shall have occurred, Lender shall forbear from exercising its enforcement remedies in respect of the Loan during the Forbearance Period.<sup>219</sup>

2.2 [Required Payments].<sup>220</sup> Commencing on the Effective Date<sup>221</sup> and on each and every payment date during the Forbearance Period, Borrower shall make a payment to Lender in an amount (such amount, the “Payment Amount”) equal to the greater of (i) the Net Operating Income for the prior calendar month, and (ii) the amount required under the Loan Documents to be deposited into the [Tax and Insurance Fund]<sup>222</sup> on such payment date, notwithstanding that Net Operating Income for the prior calendar month may be insufficient to make such payment.

2.3 Definitions. As used herein, the following terms shall have the meaning set forth below:

2.3.1 “Deemed Approved” with respect to Operating Expenses shall mean amounts expended with respect to expenses described in the Budgets, provided that for each major category of expenses described in such Budgets, the amounts expended with respect to such major category of expenses shall not exceed [five percent (5%)]<sup>223</sup> of the budgeted amount for such major category of expenses without the prior written approval of Lender, [acting reasonably].<sup>224</sup>

2.3.2 “Operating Expenses” shall mean for the period in question, the expenses incurred by Borrower for the operation and management of the Property in the ordinary course of business as provided for in the Budgets, provided, however, that all expenses incurred in the marketing and leasing of the Property (“Leasing Expenses”), including, without limitation, marketing costs, tenant improvement expenses, broker fees, leasing commissions and related legal expenses shall not constitute “Operating Expenses” for the purpose of calculating Net Operating Income hereunder, and further provided, that any payment to Borrower or any of its affiliates, including, but not limited to, management fees, professional services, or wages, or any Affiliate Loan Payments (as hereinafter defined), shall not constitute “Operating Expenses” for the purpose of calculating Net Operating Income hereunder.

2.3.3 “Operating Income” shall mean for the time period in question, all gross income, revenues and consideration received by or paid to or for the

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<sup>219</sup> DRAFTING NOTE: Can also indicate a specific remedy in respect of which forbearance is granted; if so make clear that all other remedies remain in full force and effect and remain available to lender.

<sup>220</sup> Modifying payment terms is technically a modification of debt which can trigger the risk of claims of impairment by intervening creditors, and defenses by title insurers.

<sup>221</sup> DRAFTING NOTE: If the Effective Date pre-dates the date of the forbearance agreement, lender may require borrower to become current on payments.

<sup>222</sup> DRAFTING NOTE: This could include all debt service, taxes, insurance, operating expense reserves, capital expense reserves, and other reserve requirements. Modify according to specific loan requirements (typically, the payment “waterfall” in a loan agreement should provide guidance here).

<sup>223</sup> DRAFTING NOTE: Change according to thresholds in Loan Agreement or other Loan Documents.

<sup>224</sup> DRAFTING NOTE: A strong lender may oppose this reasonableness requirement and a borrower will often require it, but the text should follow the standards of the loan documents themselves.

account or benefit of Borrower, resulting from or attributable to the operation of the Property, including, but not limited to, any and all rents, additional rents, percentage rents and/or other sums received by or paid to or for the account or benefit of Borrower under that certain lease between \_\_\_\_\_<sup>225</sup> and/or under any and all other leases with respect to the Property, the categories of which are described more fully on the Budgets.

2.3.4 “Net Operating Income” shall mean, for the period in question, an amount equal to the positive difference, if any, between Operating Income and Deemed Approved Operating Expenses for such period.

2.4 Payment of Deferral Amount.<sup>226</sup> The excess of (i) the amount due Lender under the Loan Documents on each payment date, over (ii) the Payment Amount received by Lender on such payment date, shall be deferred and shall accrue interest at the Default Rate (such excess, together with such accrued interest, the “Deferral Amount”). The Deferral Amount shall be due and payable by Borrower on the first business day after the expiration of the Forbearance Period.

2.5 Operating Statements. In addition to Borrower’s financial reporting obligations under the Loan Documents and to the Operating Statements and Budgets already provided as set forth in Recital E, on each payment date Borrower shall provide Lender with actual income and expense statements for the prior calendar month in a form satisfactory to Lender in its discretion (which statements shall include, but not be limited to, Borrower’s [Cash Deposit, Check Register and Cash from Operations Summary],<sup>227</sup>) which shall include, inter alia, a reconciliation of actual Operating Income, Operating Expenses and Net Operating Income for such calendar month, with the respective amounts projected in the applicable Budget for such month. Moreover, Borrower shall provide Lender with such documents and/or invoices as Lender may request in its discretion with respect to Borrower’s operations during the relevant time period and/or any items set forth in such statements provided to Lender for such time period.

3. Default and Termination Events. Each of the following shall constitute a termination event (“Termination Event”):

3.1 If Borrower fails to make any payment or to perform any other Obligation required under this Agreement after the expiration of written notice or cure period, if any.

3.2 The occurrence of an Event of Default under the Loan Documents other than the Event of Default described in Section 1 hereof.

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<sup>225</sup> DRAFTING NOTE: Specify if there are major leases.

<sup>226</sup> To the extent this concept is contained in the current Loan Documents, it does not need to be included in this Agreement.

<sup>227</sup> DRAFTING NOTE: Change according to Loan Agreement or other Loan Documents

4. Remedies. Upon the occurrence of a Termination Event [BORROWER ADDITIONAL LANGUAGE: during the period it is continuing] Lender may elect all or any of the following: (1) to resume exercising all available remedies under the Loan Documents or at law or in equity, (2) to terminate any of the subsections of Section 2 of this Agreement or any other modification, forbearance or forgiveness granted under this Agreement upon notice to Borrower [and Guarantor], (3) to terminate this Agreement without any further obligation of Lender to provide demand, notice or cure periods under this Agreement, and (4) exercise all rights and remedies under the Loan Documents and applicable law. Upon making such elections, Lender shall not have waived any rights except as described in this Agreement.

5. Conditions Precedent. As conditions precedent to Lender's obligation to enter into this Agreement, Borrower shall have satisfied (or cause to be satisfied) the following conditions:

5.1 Execution Documents. Borrower shall have executed and delivered the following documents:

5.1.1 This Agreement;

5.1.2 Borrowers' Corporate Resolution;

5.1.3 Borrower's Certificate of Good Standing;

5.1.4 Borrower's Incumbency Certificate;

5.1.5 Each Guarantor's Corporate Resolution;

5.1.6 Each Guarantor's Certificate of Good Standing;

5.1.7 Each Guarantor's Incumbency Certificate;

5.1.8 Subordination, Non-Disturbance and Attornment Agreements from tenants of the Real Property with demised premises of more than [ ] Square Feet ("Major Tenants");

5.1.9 Estoppel Certificates from Major Tenants;

5.2 Diligence Documents.

5.2.1 Borrower shall have delivered and Lender shall have approved the Operating Statements and the Budgets, all of which shall be in line item format and in form and substance acceptable to Lender.

5.2.2 Representatives of Lender shall have obtained a satisfactory inspection report of the Mortgaged Premises as to structure, environmental, value, and such other materials Lender requires.

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5.2.3 Borrower shall have delivered to Lender, at Borrower's expense a title bringdown endorsement issued by \_\_\_\_\_ ("Title Company") for Loan Policy No. \_\_\_\_\_ ("Title Policy") insuring that the status of title to the Mortgaged Premises has not changed since the date of the Title Policy and that upon recording this Agreement or a corresponding mortgage amendment in form reasonably satisfactory to Lender, the Mortgage, as amended, shall be a continuing first lien against the Mortgaged Premises.<sup>228</sup>

5.3 Fees and Payment. [Lender shall have received the following payments from Borrower:

5.3.1 A modification fee in the amount of \$\_\_\_\_\_.]<sup>229</sup>

5.3.2 [\$\_\_\_\_\_ representing Payment Amounts due for the months of \_\_\_\_\_.]

5.3.3 All costs and expenses incurred in connection with this Agreement including, without limitation, all Title Company charges and recording costs and the legal fees and disbursements of Lender's counsel in connection with this Agreement.

5.4 Loan Compliance. All of the representations and warranties contained herein and in the Loan Documents shall be true and correct and Borrower shall have delivered to Lender a certificate from [the chief financial officer of] Borrower to such effect.

6. Representations and Warranties.

6.1 Representations and Warranties of Lender. Lender does hereby represent and warrant to Borrower and Guarantor as follows:

6.1.1 Incorporation. Lender is a corporation organized, existing and in good standing under the laws of the state of its incorporation and if the state of incorporation is other than the state in which the Property is located, Lender is authorized to conduct the business of this Agreement in such state, to the extent required by applicable law.

6.1.2 Authority. Lender has and will through the Closing Date continue to have the right, power, and authority to execute this Agreement and to perform its obligations under this Agreement. The execution and delivery of this Agreement by Lender and the performance by Lender under this Agreement has been authorized by all necessary corporate action of Lender.

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<sup>228</sup> Title Company may resist issuing a no change endorsement because no document is recorded.

<sup>229</sup> If a modification fee is required but Borrower cash flow is restricted, Lender may consider relying solely on an Exit Fee.

6.2 Representations and Warranties of Borrower. In order to induce the Lender to enter into this Agreement, the Borrower and the Guarantors, each as to itself, as the case may be, hereby warrants and represents to the Lender, in addition to any other representations and warranties contained in this Agreement, that the following warranties and representations are true now and will be true at Closing and that the representations and warranties of the Borrower and the Guarantors shall survive the Closing and the delivery of the Deeds for the applicable period of the statute of limitations pertaining thereto. Borrower does hereby represent and warrant as follows:

6.2.1 Labor. There are no labor disputes pending, or to the best of Borrower's knowledge, contemplated pertaining to the operation or maintenance of the Property or any part thereof and no employee shall remain employed in connection with the Property after the Closing Date.

6.2.2 Contracts. Except as listed on Exhibit 6.2.2, there are no service, equipment, supply and maintenance contracts, nor any other undertaking and arrangements of Borrower including, but not limited to, agreements, commitments, licenses, franchise agreements, equipment leases, rental agreements, and guaranties with respect to the Property ("Contracts").

6.2.3 Condemnation. There is no condemnation or eminent domain proceeding pending with regard to any part of the Property and the Borrower does not know of any proposed condemnation or eminent domain proceeding with regard to the Property or any part thereof.

6.2.4 Assessments. Borrower has not received any notice of any assessments for public improvements against the Property and to the best of Borrower's knowledge no such assessment is pending or threatened.

6.2.5 Leases. Except as shown on Exhibit 6.2.5, there are no oral or written leases or rights of occupancy or grants or claims of right, title or interest in any portion of the Property ("Leases"), there are no claims, offsets, termination or cancellation related to such lease, and there are no security deposits, rent inducements.

6.2.6 Compliance with Law. [To Borrower's best knowledge, ]the Property and the continued maintenance, operation, and use of it comply with all requirements of law, federal, state and local, and all requirements of all governmental bodies or agencies having jurisdiction thereof.

6.2.7 Broker Fees. No brokerage or leasing commission or other compensation is now, or will at Closing be, due or payable to any person, firm, corporation, or other entity with respect to or on account of any lease, or any extensions or renewals thereof.

6.2.8 Permits. [To Borrower's best knowledge, ]all required certificates of occupancy and other permits licenses, approvals, certificates, necessary for

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the operation of the Property (“Permits”) have been validly issued and are in good standing and shall remain so upon consummation of Closing for all of the space subject to Leases. All charges and fees for such Permits have been paid in full for them to remain in full force and effect without any additional cost to Lender, its nominee or assignee, upon consummation of Closing. Borrower shall deliver to Lender at Closing all certificates of occupancy, underwriters, certificates relating to electrical work, all zoning, building, housing, safety, fire and health approvals and all Permits, together with any plans and specifications respecting the Property and the construction thereof.

6.2.9 Title. Borrower holds good and marketable title to the Property, free and clear of any charges, claims, liens, trusts, security interests, encumbrances, or other rights or interests other than the lien of security interests shown on Exhibit “6.2.9”.

6.2.10 Mechanic’s Lien. No work has been performed or is in progress at, and no materials have been furnished to the Property which, though not presently the subject of might give rise to mechanic’s, materialmen’s, or other liens against the Property or any portion thereof, except that for which full and complete releases have been obtained. If any lien for any such work is filed before or after Closing, Borrower shall immediately discharge the same.

6.2.11 Access. [To Borrower’s knowledge], No fact or condition exists which interferes with access, or could result in the termination of the current access, from the Property to any presently existing highways and public roads adjoining or situated on the Property.

6.2.12 Payables. Except as set for in Exhibit 3, There are no lienable claims against the Property and all other payables owing in connection with the Property including, without implied limitation, all trade payables, real and personal property taxes, employee wages (including accrued vacation and fringe benefits, if any), utility charges, insurance premiums, lease payments, license, franchise and royalty payments (herein collectively called the “Payables”) as of the dates therein stated. The term Payables is intended to include all additional payables incurred through the Closing Date.

6.2.13 Environmental. [To the best of Borrower’s knowledge, ]there is not present in any medium at the Property (a) any hazardous substances, pollutants or contaminants, as those terms are defined pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601-9657, as amended by the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986), or (b) any petroleum or petroleum products, as defined in title I to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6991-6991(i). Nothing contained in this Section 6.2.15 shall imply that Borrower has made or has had any duty to make any inquiry or investigation regarding the environmental condition of the Property since [ ].

6.2.14 Compliance. [To Borrower's knowledge,] Borrower and the Mortgaged Premises are in compliance in all material respects with all laws, regulations and requirements applicable to Borrower and/or the Mortgaged Premises, and Borrower has not received, and has no knowledge of, any order or notice of any governmental investigation or of any violations or claims of violation of any law, regulation or any governmental requirement applicable to Borrower or the Mortgaged Premises.

6.2.15 Commercial Business Purpose. The loan transaction consummated pursuant to the Loan Documents and this Agreement was and is a commercial business transaction and the entire proceeds thereof were [and/or will be] used exclusively for commercial business purposes.

6.2.16 Lien Effect. Except as expressly modified herein, all security interests in the collateral set forth in the Loan Documents, as Lender is willing to modify them, subject to the terms and conditions stated herein, are and shall remain unchanged and in full force and effect. The Mortgage shall continue to secure the payment and performance of all indebtedness and obligations under the Loan Documents (as modified herein) and Borrower's performance and obligations thereunder and hereunder.

6.2.17 No Default. Except as described in Section 1, as of the date hereof, no default or event of default exists under the Loan Documents, and no condition exists which, but for the passage of time or the giving of notice or both, would constitute a default or event of default under the Loan Documents.<sup>230</sup>

6.2.18 Indebtedness. The outstanding balance of the principal due Lender is \$[ ] as of [ ], with past due and unpaid interest of \$[ ] as of [ ] which together with late charges, default rate interests, and reimbursements of expenses due Lender total in excess of \$[ ] ("Indebtedness").

6.2.19 Ratification. The Loan Documents, the indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Borrower, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties [except as specifically set forth in \_\_\_\_\_].

6.2.20 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Borrower as of the date hereof, as if each such representation and warranty were set forth at length herein.<sup>231</sup> Borrower hereby acknowledges that such representations and warranties are being

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<sup>230</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

<sup>231</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.2.21 Due Formation. Borrower is a [corporation/partnership], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

OR

6.2.1 Due Power. Borrower is an individual with full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

6.2.2 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.2.3 No Conflict. [To Borrower's knowledge,] The execution and delivery of this Agreement by Borrower will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the [partnership agreement/articles of incorporation or by-laws] of Borrower; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Borrower is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.2.4 Binding Effect. [To Borrower's knowledge,] This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of Borrower, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.2.5 No Litigation. [To Borrower's knowledge,] There is no litigation or governmental proceeding pending or, to the knowledge of Borrower, threatened against Borrower which affects Borrower's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.2.6 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Borrower contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the



statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.2.7 Complete Copies. Where copies of any documents have been delivered by Borrower to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto;(ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

### 6.3 Representations and Warranties of Guarantor.

6.3.1 Ratification. The Loan Documents, the indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Guarantor, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties [except as specifically set forth in \_\_\_\_\_].

6.3.2 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Guarantor as of the date hereof, as if each such representation and warranty were set forth at length herein.<sup>232</sup> Guarantor hereby acknowledges that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.3.3 Due Formation. Guarantor is a [corporation/partnership], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

OR

6.3.4 Due Power. Guarantor is an individual with full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

6.3.5 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions

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<sup>232</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.3.6 No Conflict. [To Guarantor's knowledge] The execution and delivery of this Agreement by Guarantor will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the [partnership agreement/articles of incorporation or by-laws] of Guarantor; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Guarantor is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.3.7 Binding Effect. [To Guarantor's knowledge] This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of Guarantor, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.3.8 No Litigation. [To Guarantor's knowledge] There is no litigation or governmental proceeding pending or, to the knowledge of Guarantor, threatened against Guarantor which affects Guarantor's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.3.9 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Guarantor contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.3.10 Complete Copies. Where copies of any documents have been delivered by Guarantor to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto; (ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

7. Reaffirmation of Guarantor.

7.1 Guaranty Reaffirmation. In consideration of the agreements and amendments made by Lender in this Agreement and to induce Lender to take such action (acknowledging that Lender would not do so without this reaffirmation and consent), Guarantor hereby ratifies, reaffirms, and continues in full force and effect the Guaranty. The Guaranty shall continue for all purposes notwithstanding the amendments, modifications, and other actions embodied in the foregoing Agreement.

7.2 Guaranties Valid. The Guaranty constitutes the valid, legal and binding obligation of the Guarantor, enforceable against Guarantor in accordance with its terms.

7.3 Waiver of Indemnity and Contribution. Notwithstanding any provisions of the Guaranty to the contrary, until the Loan has been paid in full to Lender, Guarantor hereby irrevocably waives any claims or other rights which it may now have or hereafter acquire against any other guarantor of the guaranteed obligations under the Loan that arise from the existence, payment, performance, or enforcement of Guarantor's obligations under the Guaranty, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution, indemnification, any right to participate in any claim or remedy of Lender against such other guarantor of the guaranteed obligations under the Loan or any collateral which Lender now has or hereafter acquires, whether or not such right, claims or remedy arises in equity or under contract, statute, or common law, including, without limitation, the right to take or receive from any other guarantor, directly or indirectly, in cash or other property or by setoff or in any other manner, payment or security on account of such right, claim, or remedy. If any amount shall be paid to Guarantor in violation of the preceding sentence and the guaranteed obligations under the Loan shall not have been paid in full, such amount shall be deemed to have been paid to Guarantor, as the case may be, for the benefit, and held in trust for the benefit, of Lender and shall forthwith be paid to Lender to be credited and applied upon the guaranteed obligations under the Loan whether matured or unmatured, in accordance with the terms of the Loan Documents between Borrower and Lender. Guarantor acknowledges that it will receive direct and indirect benefits from the Loan, this Agreement and the other transactions evidenced by and contemplated in the Loan Documents, and that the waiver set forth in this paragraph is knowingly made in contemplation of such benefits.

8. No Bankruptcy Intent; Voidable Transfers.<sup>233</sup>

8.1 No Bankruptcy Intent. Borrower represents and warrants that it does not have any intent to (i) file any voluntary petition under any Chapter of the Bankruptcy Code, Title 11, U.S.C.A. ("Bankruptcy Code"), or in any manner to seek any proceeding for relief, protection, reorganization, liquidation, dissolution or similar relief for debtors under any local, state, federal or other insolvency law or laws providing relief for debtors ("Debtor Proceeding"), or (ii) directly or indirectly to cause or permit any

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<sup>233</sup> Provisions like this seeking to contractually circumvent the automatic stay may not be enforceable. Bankruptcy counsel should be consulted prior to including such provisions.

involuntary petition under any Chapter of the Bankruptcy Code to be filed against Borrower, or (iii) directly or indirectly to cause or permit the Property or any portion or any interest of Borrower in the Property to become the property of any bankrupt estate or the subject of any Debtor Proceeding. Borrower acknowledges that the filing of any petition or the seeking of any relief in a Debtor Proceeding by Borrower, whether directly or indirectly, would be in bad faith and solely for purposes of delaying, inhibiting or otherwise impeding the exercise by Lender of Lender's rights and remedies upon the occurrence of an event of default hereunder against Borrower and the Property pursuant to the Loan Documents. Without limiting the foregoing, Lender shall be and is entitled to and Borrower hereby consents to, relief from the stay imposed by Section 362 of the Bankruptcy Code, as amended, in any bankruptcy proceedings.

8.2 Voidable Transfers. Without limiting any of the foregoing, if any payments of money (including Payment Amounts) or other transfers made to Lender by the Borrower pursuant to this Agreement shall for any reason subsequently be declared to be "fraudulent" (within the meaning of any state or federal law relating to fraudulent conveyances), preferential, or otherwise voidable or recoverable, in whole or in part for any reason, under the Bankruptcy Code or any other state or federal law (collectively referred to as "Voidable Transfers") and Lender is required to repay or restore the amount of any such Voidable Transfers or any portion thereof, then, as to the amount repaid or restored (including all costs, expenses and attorneys' fees paid by Lender related thereto), the liability of Borrower shall automatically be revived, reinstated and restored in such amount or amounts, and shall exist as though such Voidable Transfers had never been made to Lender. Borrower expressly acknowledges and agrees that Lender may rely upon advice of counsel and, if so advised by counsel, may settle, without defending, any action to void any alleged Voidable Transfers, and that upon such settlement Borrower shall again be liable for any deficiency resulting from such settlement as provided in this Agreement

9. Pre-existing Conditions and Claims.<sup>234</sup>

9.1 Ratification and Warranty.<sup>235</sup> (i) All of Borrower's [and Guarantor's] Obligations to the Lender as set forth in the Loan Documents are in full force and effect, (ii) the Loan Documents to which it is [they are] a party were all properly and duly executed and delivered, (iii) the Loan Documents to which it is [they are] a party are now, and at all times have been, in full force and effect in accordance with their terms and (iv) there are no amendments, waivers or modifications of the Documents, except for those made in writing and signed by the Lender and the Borrower [and Guarantor], and identified in the Recitals, and (iv) Lender has complied properly performed and satisfied in a timely manner with all of its obligations under the Loan Documents, including delivery of notice and time for Borrower [and Guarantor] to cure its [their] defaults, if any.

<sup>234</sup> A Lender would typically seek the protections of the various releases and waivers contained in this Section 18 at each instance the Borrower seeks an accommodation or relief from the then current Loan Documents Provisions.

<sup>235</sup> The Lender seeks to pre-empt a Borrower challenge against the enforceability of the Loan Documents.

9.2 Waiver.<sup>236</sup> Borrower [and Guarantor] for itself [themselves] and its [their respective] successors and assigns, and by its [their] execution hereof hereby acknowledge[s], admit[s] and agree[s] that, as of the date of execution and delivery of this Agreement, the Borrower [and Guarantor] (i) have no defenses, counterclaims or offsets relating to its [their] obligations under or in respect of the Loan Documents or to the enforcement or exercise by Lender of any of its rights, powers or remedies under or in respect of the Loan Documents, or (ii) alternatively, hereby irrevocably waive[s], and relinquish[es], any and all such objections, claims, defenses, counterclaims or offsets, that may exist as of the date hereof including, without limitation, any and all such objections, claims, defenses, counterclaims or offsets that are unknown, unsuspected, unanticipated or undisclosed as of such date.

9.3 Release.<sup>237</sup> Although Lender regards its conduct as proper and does not believe Borrower [or Guarantors] have any claim, cause of action, offset, or defense against Lender, its participating lenders, co-lenders, subsidiaries, affiliates, parents, predecessors in interest, nominees, assignees, officers, directors, agents, employees, servants, attorneys and representatives, as well as their respective heirs, personal representatives, successors and assigns, or any and all of them (hereinafter collectively called the “Released Parties”), Lender wishes and Borrower and Guarantors agree to eliminate any possibility that any conditions, acts, omissions, events, circumstances, or matters which occurred prior to the effective Date could impair or otherwise subject Lender or any of the other Released Parties to any liability other than is expressly stated in this Agreement and the Loan Documents. Borrower [and Guarantor] on behalf of itself [themselves] and its [their respective] successors and assigns (collectively the “Releasing Parties”) remise[s], release[s], acquit[s], satisfy[ies] and forever discharge[s] the Released Parties from any and all manner of debts, accounts, bonds, warranties, representations, covenants, promises, contracts, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands and causes of action of any nature whatsoever, which existed, arose, or occurred at any time prior to or concurrently with the date hereof of any character whatsoever whether known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, including without implied limitation, such claims and defenses as fraud, mistake, duress and usury, which Borrower [or Guarantors] ever had or now has against the Released Parties, jointly or severally, for or by reason of any matter, cause or thing whatsoever occurring prior to the date hereof, which relates to, in whole or in part, directly or indirectly: (i) the Loan, including the administration or funding thereof, (ii) the Loan Documents, (iii) the Obligations, (iv) the Property, including the financing and operation of same, and (v) any other agreement or transaction between any of Releasing Parties and any of Lender Parties concerning matters arising out of or relating to the items set forth in subsections (i) and (iv) above.]

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<sup>236</sup> The Lender seeks to extinguish any defenses Borrower may have to enforcement of the Loan Documents.

<sup>237</sup> The Lender seeks to extinguish any claims the Borrower may have for Lender liabilities.

9.4 Acknowledgments.<sup>238</sup> Each Borrower and Guarantor hereby acknowledges that it is or is owned by sophisticated and experienced real estate developers and investors, each of whom has a full understanding of the terms and conditions of this Agreement and the risks involved in entering into this Agreement, that this Agreement has been fully negotiated and that compromises on the part of Lender and Borrower were made before agreement was reached on the final terms hereof, that at all times each Borrower [and Guarantor] has [have] been represented by its [their] own attorneys and such other competent counsel as it [each of them] has [have] chosen to engage in the negotiation of the terms and the preparation and execution of all documents, and has relied solely on the advice and instruction of its own attorney who has had the opportunity to review and analyze all of the documents for a reasonable period of time prior to the execution by the Borrower [and Guarantor]; that Borrower [and Guarantor] is entering into this Agreement with the conviction that it is a fair agreement and that it represents an equitable compromise of the competing interests of the parties hereto and that, in addition, it was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any party, and that Borrower [and Guarantor] acknowledges this Agreement shall constitute a complete defense to any claim, cause of action, defense, liability or obligation released under this Agreement, and agrees that after the execution and delivery of this Agreement on the date hereof, the only claims or causes of action which it and/or he could possibly have against any of the Released Parties would be those arising under this Agreement, or a written contract hereafter executed by Lender in favor of Borrower and/or Guarantor those arising from conduct occurring after the execution and delivery of this Agreement. Neither Borrower nor Guarantor shall institute or prosecute (or, except to the extent required by law, in any way, assist or cooperate with the institution or prosecution of) any action, suit, hearing, or other proceeding of any kind, nature, or character at law or in equity against Released Parties in order to collect, enforce, declare, assert, establish, or otherwise raise any defense, claim, cause of action, contract, liability, indebtedness, or obligation which is within the scope of those released in this Section or which arise out of any fact, contract, condition, claim, cause of action, indebtedness, liability, obligation, event, action, omission, circumstance, or other matter or reason of any kind which is the basis for any such defense, claim, cause of action, liability, indebtedness or obligation which is released hereunder.

9.5 No Admission.<sup>239</sup> Nothing in this Agreement shall be construed as (or shall be admissible in any legal action or proceeding as) any admission by Released Parties that any defense, indebtedness, obligation, liability, contract, claim, or cause of action exists which is within the scope of those released within this Section, because Lender denies that any such matters exist and regards this release as unnecessary except to confirm its understanding of the position of the Parties.

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<sup>238</sup> The Lender seeks to extinguish any common law or equitable claims that could be asserted as voiding the Loan Documents.

<sup>239</sup> The Lender seeks to prevent the claim that the act of seeking these protections under Section 18 Pre-Existing Conditions and Claims is due to the existence of the bad acts for which the Lender is being protected.

9.6 Indemnification.<sup>240</sup> Borrower hereby indemnifies, defends, and holds harmless Released Parties and all persons, firms, corporations, and organizations on their behalf (collectively, the “Indemnified Parties”) of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever that any third party may now have or claim to have against such Indemnified Parties, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way touching, concerning, relating to, arising out of or founded upon the [ADDITIONAL BORROWER LANGUAGE: The Borrower’s interest in and acts or omissions taken with respect to] the Loan, the Obligations or any of the Loan Documents, including all such loss or damage of any kind heretofore sustained, or that may arise as a consequence of the dealings between the Parties up to and including the Effective Date. [ADDITIONAL BORROWER LANGUAGE: except to the extent due to Lender’s [gross] negligence or intentional misconduct].

9.7 No Waiver.<sup>241</sup> Borrower acknowledges and confirms that by not exercising the rights, remedies and privileges available to Lender, for any reason whatsoever, including the negotiation and execution of this Agreement, Lender is not waiving and has not waived any of its rights to exercise them in accordance with the Loan Documents and this Agreement.

9.8 No Course of Conduct.<sup>242</sup> Borrower acknowledges and agrees that by negotiating and entering into this Agreement, Lender is not establishing a course of conduct nor a pattern of operation nor an implicit or explicit understanding that Lender may or will ever further revise or modify any term or condition of the Loan Documents or this Agreement or agree to forebear at any time in the future if an event of default should occur under and pursuant to the Loan Documents, this Agreement and/or any document or instrument contemplated or referred to herein.

9.9 No Cure.<sup>243</sup> Borrower hereby acknowledges and agrees that except as specifically set forth herein, neither this Agreement nor any actions pursuant to this Agreement nor any negotiations or discussions (including the Discussions) among Borrower, [Guarantor] any of [their respective] agents, officers or principals and any of the Lender Parties, shall be deemed or construed to cure any existing defaults under the Loan Documents, constitute a reinstatement, novation or release of the Loan or the Loan Documents or an extension of the maturity date of the Loan, or constitute a modification, amendment or waiver of the Loan or Loan Documents. In addition and not in limitation of the foregoing, it is expressly understood and agreed that Borrower’s default(s) under the Loan Documents is/are not cured or waived by the acceptance of any funds paid by or

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<sup>240</sup> The Lender seeks Borrower’s protection against claims by third parties.

<sup>241</sup> The Lender seeks to prevent the claim that the act of seeking to settle claims with Borrower is due to Lender’s waiver of rights.

<sup>242</sup> The Lender seeks to pre-empt any claim of a non-verbal modification of the obligations whether arising by performance or course of conduct.

<sup>243</sup> The Lender seeks to confirm that its undertaking the performance of the Agreement is not deemed to cure Borrower Defaults.

on behalf of Borrower pursuant to this Agreement, including, without limitation, any Collateral Payment Amounts received hereunder.

9.10 Future Negotiations.<sup>244</sup> Borrower [and Guarantor] acknowledge[s] and agree[s] that Lender has no obligation whatsoever to discuss, negotiate or to agree to any restructuring of the Loan, or any modification, amendment, restructuring or reinstatement of the Loan Documents or to forbear from exercising its rights and remedies under the Loan Documents, except as expressly provided in this Agreement.

9.11 [BORROWER SUBSTITUTE LANGUAGE – No Change Of Position].<sup>245</sup> Borrower, [Guarantor] and Lender each acknowledge and agree that except as specifically set forth herein, none of Borrower, Guarantor[, Guarantor] nor Lender shall be deemed to have amended or waived any rights, remedies or obligations contained in any of the Loan Documents or otherwise at law or in equity nor shall any of Borrower[, Guarantor] or Lender be deemed to have released or discharged any claim, counterclaim or defense that any of them ever had, may now have or may hereafter have arising out of or relating to the Loan or the Loan Documents, or the administration thereof, all of which are hereby expressly reserved. This Agreement shall not operate as a waiver by either Party of its right to demand full and timely performance of all obligations under the Loan Documents. Neither the execution of this Agreement nor any conduct shall operate to toll any time period which otherwise might be applicable, including without limitation any time periods which may be provided for in the Loan Documents or by statute upon the issuance or filing of a notice of default or a notice of sale under the Loan Documents, unless specifically agreed in writing in a document signed by the Parties. Nothing contained in this Agreement is intended (i) to limit either Party in initiating, continuing or otherwise proceeding to exercise any rights or remedies it may have before, during or after this Agreement, including, but not limited to, giving notices of default or, in the case of Lender, initiating foreclosure proceedings; or (ii) to relieve Borrower of any obligations it has under the Loan Documents (including the Obligations).]

## 10. Incorporation.

10.1 Incorporation of Recitals and Exhibits. Borrower [and Guarantor] acknowledge[s] that each of the Recitals is true and accurate, and each is incorporated herein by this reference as though fully set forth in the body of this Agreement [BORROWER SUBSTITUTE LANGUAGE: The foregoing Recitals are statements of estoppel made by Borrower [and Guarantor] and are to the actual knowledge of the individual signing below for [each of] the Borrower [and Guarantor] solely as its authorized officer, who hereby states that such officer would by custom and practice

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<sup>244</sup> The Lender seeks to reaffirm that by entering into this Agreement it has not obligation to enter into other settlements.

<sup>245</sup> The Borrower would seek to preserve the status quo as to its potential rights and remedies in exchange for the extra consideration it is providing, such as fees, surviving liability for limited claims, cooperation in providing a consensual deed, or refraining from filing bankruptcy.



ordinarily be apprised of the information stated, has submitted this estoppel after reviewing the current files and materials ordinarily in the possession or reasonably available to the undersigned but without taking any further investigation, or other measures which are out of the ordinary business activity of the undersigned]<sup>246</sup>

10.1.1 Incorporated Documents. The documents referred to in the Recitals and the exhibits attached hereto are incorporated herein by reference and made a part hereof with the same force and effect as if herein restated in full. However, the following provisions of this Agreement shall prevail over any inconsistent provisions contained in the materials incorporated herein:

10.1.2 Modification Paramount. In the event that any term or provision of any of the Loan Documents is inconsistent or contrary to a specific and express term or provision of this Agreement, the explicit and express term or provision of this Agreement shall apply and shall be paramount. To the extent that no such express inconsistency exists, the terms and provisions of the Loan Documents, as amended, shall continue in full force and effect.

10.1.3 No Novation; Continuing Validity. This Agreement is not intended to be nor shall it constitute a novation of the Loan Documents or the indebtedness and obligations evidenced or secured thereby, as the case may be.

10.1.4 Further Compliance with Loan Documents. Borrower hereby ratifies, reaffirms and agrees to all terms, conditions and remedies of and contained in the Loan Documents and the indebtedness and obligations evidenced and/or secured thereby, and warrants and agrees that Borrower shall fully and strictly comply with all such terms and provisions, with time being strictly of the essence.

## 11. Miscellaneous.

11.1 No Enterprise. The relationship between Borrower and Lender is that of debtor and creditor. Nothing in this Agreement shall be deemed to create a

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<sup>246</sup> Borrowers prefer to grant a certification/estoppel instead because there is no remedy of a statement in an estoppel is wrong, only if its is repudiated by the maker. Consequently, the Borrower may also prefer broad language limiting its liability, such as:

“The Borrower’s liability for the statements contained herein shall be limited to estoppel and it shall not be liable for any actual or purported negligence or inadvertent misstatement, omission or incomplete certification. The certifications shall not be deemed representations, warranties or covenants. Neither Borrower, nor any owner, partner, officer, agent, consultant, employee, director, or other party providing advice or services to Borrower shall be liable for the statements contained in this estoppel. This estoppel shall not act as a waiver, release, acquiescence, consent, acknowledgment, subordination or subjection by Borrower to any right, title, interest, lien, claim, covenant, restriction, duty or indemnification held or owed to any other party, including, without limitation, any rights relating to financing, collateral, sale, purchase or other disposition of the Property. This Borrower shall not act to waive any current or future requirement for consent to any such action or any other action required of the Lender. The sole purpose, intent, and effect of this estoppel is to estop the undersigned Borrower from making any statement, claim or assertion that is contrary to the statements contained in this estoppel.”

partnership, joint venture or other association between Borrower and Lender or between Lender and any other party, or cause Lender to be liable or responsible in any way for the actions, liabilities, debts or obligations of Borrower or any other party.

11.2 Counterparts. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which shall collectively constitute a single agreement, fully binding upon and enforceable against the parties hereto. No amendment or supplement to this Agreement shall be valid or binding unless made in writing and executed by all the parties hereto.

11.3 Binding Effect. This Agreement shall be binding upon the Borrower[, Guarantor] and Lender and their respective heirs, successors, and assigns.

11.4 Choice of Law. This Agreement shall be governed by the laws of the [State/Commonwealth] of \_\_\_\_\_, without giving effect to principles of conflicts of laws.

11.5 Jurisdiction. The state and federal courts located in the [State/Commonwealth] of [\_\_\_\_\_] shall have exclusive jurisdiction to hear and determine any claims or disputes between Borrower and Lender, pertaining to this Agreement. Borrower expressly submits and consents in advance to such exclusive jurisdiction in any action or proceeding commenced in such courts.

11.6 No Third Party Beneficiaries. The Borrower [and the Guarantors] acknowledge[s] and agree[s] that the acceptance by the Lender of the terms of this Agreement and the assignment to the Lender of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender to third parties which might have claims of any kind whatsoever against the Borrower[, or the Guarantor] or the Property and that the Lender does not assume or agree to discharge any liabilities pertaining to the Property now or hereafter arising. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

11.7 Time of Essence. Time is of the essence of this Agreement and each provision of this Agreement.

11.8 No Brokerage. The Parties represent and warrant each to the other that the transactions hereby contemplated are made without liability for any finder's, realtor's, broker's, agent's or other similar commission. The Parties mutually agree to indemnify and hold each the harmless from claims for commissions asserted by any party as a result of dealings claimed to give rise to such commissions.

11.9 Lender's Expenses. In addition to payments at Closing under Section 3, within thirty (30) days of receipt of an invoice therefor, Borrower shall pay to Lender all of its costs and expenses incurred in connection with this Agreement and any other matters related to the Property, [including, but not limited to, the review and approval of any lease with respect to the Property and any related subordination, non-

disturbance and attornment agreements,] all of which costs and expenses, shall include, but not be limited to, outside and in-house attorney's fees and disbursements.<sup>247</sup>

11.10 Additional Documents; Appointment of Lender As Attorney-In-Fact. At all times following the execution of this Agreement, Borrower [and Guarantor] shall execute and deliver to Lender, or shall cause to be executed and delivered to Lender, and shall do or cause to be done, all such other instruments, documents and actions as Lender may reasonably deem necessary or desirable to assure Lender of the benefit of this Agreement and the other Loan Documents. In the event Borrower [or Guarantor] fails to execute and deliver any such instrument or document within ten (10) days of the request therefor, Borrower [, Guarantor and each of them] hereby irrevocably appoints any officer of Lender as [his, her and/or its] attorney-in-fact (which appointment is durable, irrevocable and coupled with an interest) for the purpose of executing and delivering such instruments or documents.

11.11 Notices. All notices which may be given pursuant to this Agreement or the Loan Documents shall be in writing and shall be personally delivered or sent by first-class certified or registered United States mail, postage prepaid, return receipt requested, and sent to the party at its address appearing above or such other address as any party shall hereafter designate by notice to the other party given as aforesaid. All notices shall be deemed effective upon receipt or, if mailed, upon the expiration of the third day following the date of mailing, whichever occurs first.

11.12 [Joint and Several Liability. The obligations, undertakings and agreements of each of the Borrower shall be joint and several.]

11.13 Severability. If any clause or provision of this Agreement is determined to be illegal, invalid or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Agreement will not be affected thereby if the essential terms of the Agreement upon which Lender relied remain in effect.<sup>248</sup> It is the intention of the parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar in terms to such provision as is possible and be legal, valid and enforceable.

11.14 Third Party Obligations. The Borrower and the Guarantors acknowledge and agree that the acceptance by the Lender, its nominee or assignee of ownership of the Property and the power of attorney to sell the Property pursuant to the terms of this Agreement and the assignment to the Lender, its nominee or assignee of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender, its nominee or assignee, to third parties which might have claims of any kind whatsoever against the Borrower or the Guarantors, Property, or the

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<sup>247</sup> If these expenses are material, and Borrower has cash flow issues (as is likely to be the case since the parties are discussing modification), Lender may consider adding these costs to the outstanding principal of the Loan, and giving them priority in respect of the order of application of payment amounts.

<sup>248</sup> Unlike most severability clauses, this recommends the Agreement be void if a material term is unenforceable.

Property and that the Lender for itself and its nominee or assignee does not assume or agree to discharge any liabilities pertaining to the Property or Property which originated prior to the Closing Date, or undertake any obligation to complete the leasing or sale of the Property. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

11.15 Counsel; Voluntary Agreement. The Parties represent and warrant that each of them is represented by legal counsel of its choice, that each of them has consulted with counsel regarding this Agreement (and has been advised to consult independent counsel with respect to the upcoming Discussions as well), that each of them is fully aware of the terms of this Agreement and understands that this is a legally binding contract that may affect such party's rights, and each of them has entered into this Agreement voluntarily and without coercion or duress of any kind.

11.16 Confidentiality. It is important to the Parties to maintain a reasonable confidentiality regarding the subject matter hereof. Accordingly, no Party shall disclose the undertaking of the terms or conditions of this Agreement, any materials, information (written, oral or observed) or incidents related to this Agreement, or any document executed or prepared in connection herewith, including, without limitation, correspondence, electronic transmissions, voice recordings, notes, analyses based on confidential material, budgets and projections, except as may be required by applicable law, pursuant to a court order or subpoena, or to such Party's counsel or advisers a reasonably necessary to assist such Party in the conduct of any negotiations related to this Agreement, or to the extent such information could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such evidence would otherwise be admissible, without regard to whether it was originally derived in the context of this Agreement.

11.17 JURY TRIAL WAIVER. BORROWER[, GUARANTOR,] AND LENDER SHALL NOT SEEK A JURY TRIAL IN ANY ACTION BASED UPON OR ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT OR THE LOAN. TO THE EXTENT PERMITTED BY APPLICABLE LAW, [EACH OF] BORROWER [,GUARANTOR] AND LENDER HEREBY IRREVOCABLY AND EXPRESSLY WAIVES ANY AND ALL RIGHT TO ANY SUCH JURY TRIAL AND AGREES THAT NO SUCH ACTION WITH RESPECT TO WHICH A JURY TRIAL HAS BEEN WAIVED SHALL BE SOUGHT TO BE CONSOLIDATED WITH ANY OTHER ACTION WITH RESPECT TO WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF BORROWER [,GUARANTOR] AND LENDER AND ITS COUNSEL, AND SHALL NOT BE SUBJECT TO ANY EXCEPTIONS.

12. [ADDITIONAL LENDER PENNSYLVANIA PROVISION: Reaffirmation. The provisions of Section \_\_\_\_\_ of the [Mortgage], set forth below, are hereby reaffirmed and ratified in their entirety (all defined terms shall have the respective meanings ascribed to them in the [Mortgage]):

**FOR THE PURPOSE OF OBTAINING POSSESSION OF THE MORTGAGED PROPERTY IN THE EVENT OF ANY DEFAULT HEREUNDER OR UNDER THE NOTE, MORTGAGOR HEREBY AUTHORIZES AND EMPOWERS ANY ATTORNEY OF ANY COURT OF RECORD IN THE [COMMONWEALTH OF PENNSYLVANIA] OR ELSEWHERE, AS ATTORNEY FOR MORTGAGOR AND ALL PERSONS CLAIMING UNDER OR THROUGH MORTGAGOR, TO APPEAR FOR AND CONFESS JUDGMENT IN EJECTMENT AGAINST MORTGAGOR FOR POSSESSION OF THE MORTGAGED PROPERTY AND TO APPEAR FOR AND CONFESS JUDGMENT AGAINST MORTGAGOR, AND AGAINST ALL PERSONS CLAIMING UNDER OR THROUGH MORTGAGOR, IN FAVOR OF MORTGAGEE, FOR RECOVERY BY MORTGAGEE OF POSSESSION THEREOF, FOR WHICH THIS MORTGAGE, OR A COPY THEREOF VERIFIED BY AFFIDAVIT, SHALL BE A SUFFICIENT WARRANT; AND THEREUPON A WRIT OF POSSESSION MAY IMMEDIATELY ISSUE FOR POSSESSION OF THE MORTGAGED PROPERTY, WITHOUT ANY PRIOR WRIT OR PROCEEDING WHATSOEVER AND WITHOUT ANY STAY OF EXECUTION. IF FOR ANY REASON AFTER SUCH ACTION HAS BEEN COMMENCED IT SHALL BE DISCONTINUED, OR POSSESSION OF THE MORTGAGED PROPERTY SHALL REMAIN IN OR BE RESTORED TO MORTGAGOR, MORTGAGEE SHALL HAVE THE RIGHT FOR THE SAME DEFAULT OR ANY SUBSEQUENT DEFAULT TO BRING ONE OR MORE FURTHER ACTIONS AS ABOVE PROVIDED TO RECOVER POSSESSION OF THE MORTGAGED PROPERTY. MORTGAGEE MAY CONFESS JUDGMENT IN EJECTMENT THEREIN BEFORE OR AFTER THE INSTITUTION OF PROCEEDINGS TO FORECLOSE THIS MORTGAGE OR TO ENFORCE THE NOTE, OR AFTER ENTRY OF JUDGMENT ON THE MORTGAGE OR ON THE NOTE, OR AFTER A SHERIFF'S SALE OF THE MORTGAGED PROPERTY IN WHICH MORTGAGEE IS THE SUCCESSFUL BIDDER. THE AUTHORIZATION TO PURSUE SUCH PROCEEDINGS FOR OBTAINING POSSESSION IS AN ESSENTIAL PART OF THE ENFORCEMENT OF THE MORTGAGE AND THE NOTE,**

**AND SHALL SURVIVE ANY EXECUTION SALE TO  
MORTGAGEE.]<sup>249</sup>**

**[Signatures Commence on Following Page]**

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<sup>249</sup> DRAFTING NOTE: Sample language. Replace with confession of judgment provision found in the applicable mortgage or other security instrument securing the present loan or, if no such provision is found therein, delete.

**EXHIBIT -4**

**Page 24**

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed and delivered effective as of the date and year first above written.

**BORROWER:**

By: \_\_\_\_\_  
Name:  
Title:

**LENDER:**

By: \_\_\_\_\_  
Name:  
Title:

**GUARANTOR:**

By: \_\_\_\_\_  
Name:  
Title:

## **EXHIBIT A**

### **Property Description**



## **EXHIBIT B**

### **Glossary**

- “Agreement” shall have the meaning set forth in the Introduction.
- “Bankruptcy Code” shall have the meaning set forth in shall mean Title 11, U.S.C.A.
- “Borrower” shall have the meaning set forth in the Introduction.
- “Budgets” shall have the meaning set forth in Recital D.
- “Debtor Proceeding” shall have the meaning set forth in Section 8.1.
- “Deemed Approved” shall have the meaning set forth in Section 2.3.1
- “Deferral Amount” shall have the meaning set forth in Section 2.4.
- “Effective Date” shall have the meaning set forth in the Introduction.
- “Forbearance Period” shall have the meaning set forth in Recital D.
- “Indebtedness” shall have the meaning set forth in Section 6.2.20.
- “Indemnified Parties” shall have the meaning set forth in Section 9.6.
- “Leasing Expenses” shall have the meaning set forth in Section 2.3.2.
- “Lender” shall have the meaning set forth in the Introduction.
- “Loan Agreement” shall have the meaning set forth in Recital B.
- “Loan Documents” shall have the meaning set forth in Recital B.
- “Loan” shall have the meaning set forth in Recital A.
- “Major Tenants” shall have the meaning set forth in Section 5.1.8.
- “Net Operating Income” shall have the meaning set forth in Section 2.3.4.
- “Note” shall have the meaning set forth in Recital A.
- “Obligations” shall have the meaning set forth in Recital B.
- “Official Records” shall have the meaning set forth in Recital A.

“Operating Expenses” shall have the meaning set forth in Section 2.3.2.

“Operating Income” shall have the meaning set forth in Section 2.3.3.

“Operating Statements” shall have the meaning set forth in Recital D.

“Party” and “Parties” shall have the meaning set forth in the Introduction.

“Payables” shall have the meaning set forth in Section 6.2.12.

“Payment Amount” shall have the meaning set forth in Section 2.2.

“Property” shall have the meaning set forth in Recital A.

“Released Parties” shall have the meaning set forth in Section 9.3.

“Releasing Parties” shall have the meaning set forth in Section 9.3.

“Security Instrument” shall have the meaning set forth in Recital A.

“Title Company” shall have the meaning set forth in Section 5.2.3.

“Title Policy” shall have the meaning set forth in Section 5.2.3.

“Voidable Transfers” shall have the meaning set forth in Section 8.2.

Recording requested by and  
when recorded mail to

Klehr Harrison Harvey,  
Bransburg LLP  
1835 Market Street  
Philadelphia, PA 19103

## LOAN MODIFICATION AGREEMENT

This **LOAN MODIFICATION AGREEMENT** (this “Agreement”) is dated as of \_\_\_\_\_, 20\_\_\_\_, [but effective as of \_\_\_\_\_]<sup>250</sup> (“Effective Date”), and is by and among [between] \_\_\_\_\_, a \_\_\_\_\_ having its principal address at [ \_\_\_\_\_ ] (“Lender”) and \_\_\_\_\_, a \_\_\_\_\_ having its principal address at [ \_\_\_\_\_ ] (“Borrower”), and \_\_\_\_\_, a \_\_\_\_\_ having its principal address at [ \_\_\_\_\_ ] (“Guarantor” and, with Borrower and Lender, each a “Party” and collectively the “Parties”).<sup>251</sup>

### **RECITALS:**

B. On or about \_\_\_\_\_, \_\_\_\_\_, Borrower executed and delivered to Lender [or \_\_\_\_\_, Lender’s predecessor in interest]<sup>252</sup> that certain promissory note (the “Note”) dated \_\_\_\_\_, \_\_\_\_\_, evidencing a loan (the “Loan”) in the original principal amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), which Note is secured by, among other things, (i) [Open-End Mortgage, Assignment of Leases and Rents and Security Agreement]<sup>253</sup> (“Mortgage”) dated \_\_\_\_\_, \_\_\_\_\_, and recorded in Deed Book \_\_\_\_\_, Page \_\_\_\_\_, Clerk’s Office of the \_\_\_\_\_ (the “Official Records”), which Security Instrument encumbers that certain real property (the “Property”) situated in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_, as more particularly described on Exhibit “A” attached hereto and by this reference incorporated herein, (ii) an Assignment of Rents and Leases dated \_\_\_\_\_ from Borrower to Lender covering rents, leases and profits, and (iii) Financing Statements filed under the Uniform Commercial Code covering fixtures and personal property at the Property (sometimes individually or collectively the “Security”

<sup>250</sup> The Effective Date is usually retroactive as to prior defaults that are tolerated under the Agreement.

<sup>251</sup> Include Guarantors if applicable, including parent and affiliate guarantors. Also, if there are multiple borrowers, lenders or guarantors, revise references accordingly. In the case of multiple borrower parties, a lender will likely propose express language re-affirming that all borrower parties are jointly and severally liable for the loan Obligations. A borrower will propose the opposite: that liability is separate, and limited by share, not joint and several (See Section 12(l)), and that Borrower is not re-affirming its obligations and, the inverse, that the Lenders are re-affirming their obligations pursuant to the Loan Documents and this Agreement.

<sup>252</sup> Add if lender has changed or original loan has been purchased or assigned. See Section 2 for borrower reaffirmation.

<sup>253</sup> Identify appropriate loan and security documents, as applicable.

### EXHIBIT -5

Page 1

Instrument”). [The Guarantor has also executed a Guaranty dated \_\_\_\_\_ and in favor of Lender (the “Guaranty”).]

C. The Note and the Security Instrument, together with any and all other documents executed for and delivered to Lender in connection with the Loan and pursuant to that certain [Credit/Loan] Agreement by and [between/among] the Borrower[, Guarantor] and Lender dated \_\_\_\_\_, \_\_\_\_\_ (the “Loan Agreement”), and any and all extensions, modifications, guarantees and renewals thereof, shall hereinafter be referred to collectively as the “Loan Documents,” and all Borrower obligations under the Note and the other Loan Documents [(and any Guarantor obligations thereunder and under the Guaranty)] shall hereinafter be referred to collectively as the “Obligations”. All capitalized terms not otherwise defined in the text or Glossary at Exhibit “B” shall have the meaning ascribed to them in the Loan Agreement.

D. [LENDER ADDITIONAL/ALTERNATIVE LANGUAGE: Borrower has provided Lender with (i) [actual/audited income and expense statements] for the months of \_\_\_\_\_ through \_\_\_\_\_ (such statements, the “Operating Statements”) and (ii) budgets for such and future months (the “Budgets”) and, as evidenced by such Operating Statements and Budgets, attached hereto as Exhibit “C”, which reflect that the Property generates insufficient Net Operating Income (as hereinafter defined) to make required payments under the Loan Documents.]<sup>254</sup>

E. [ADDITIONAL LANGUAGE: The Borrower has requested that Lender forbear from exercising its enforcement remedies with respect to the Loan during a Forbearance Period defined, and upon the terms and conditions set forth, in a separate Forbearance Agreement between the Parties.]

F. The Borrower now requests that Lender agree to modify the terms of Loan and the Loan Documents in the manner set forth in this Agreement, and the Lender has agreed to modify such terms as set forth herein.

**NOW THEREFORE**, in consideration of the foregoing premises, and for other good and valuable consideration, the sufficiency and receipt of which are hereby mutually acknowledged, and intending to be legally bound hereby, the Borrower[, Guarantor] and Lender hereby agree and covenant as follows:

1. Current Default. Borrower agrees and acknowledges (i) one or more Events of Default (as defined in the Loan Documents) have occurred and are continuing, threatened, or anticipated to occur with notice or lapse of time or both<sup>255</sup> [including, without limitation: the failure to pay the debt due under the Obligations; failure of Borrower to invest the required equity in the Property; the portion of the Loan allocated to Interest Reserve failing to be sufficient to fund interest on the Loan; and failure of Borrower to provide funds to Lender to pay the projected interest shortfall prior to any further advances of the Loan] [failure to pay the

<sup>254</sup> Adapt as necessary to reflect any financials delivered or required to be delivered by Borrower under the Loan Agreement or as a condition for any forbearance separately agreed to between the Parties.

<sup>255</sup> Typically, by the time lender and borrower parties are ready to discuss modification, one or more material defaults have already occurred.

Indebtedness as required by the Loan Documents], (ii) such Event of Default is continuing beyond any applicable cure period, (iii) Borrower has no defenses or counterclaims to such Event of Default, (iv) Lender is entitled to exercise any and all remedies provided in the Loan Documents, at law or in equity as a result of such Event of Default, [including the right to foreclose on the Mortgage and execute on the Judgment<sup>256</sup>] [(v) Borrower will not appeal, protest, or contest the Judgment]<sup>257</sup> and (v) Lender has no obligation to extend the maturity date of any Loan(s) or advance any further funds in connection with any Loan(s) to Borrower, except as otherwise set forth in this Agreement.<sup>258</sup>

## 2. Loan Modification.

2.1 General Provision. [LENDER ADDITIONAL LANGUAGE: Except as otherwise provided in this Agreement,] So long as Borrower shall be in compliance with each and every term and condition of this Agreement and so long as no Termination Event (as hereinafter defined) shall have occurred, the terms of the Loan and Loan Documents [(including the Mortgage, as applicable)] shall be modified as set forth in this Section 2.<sup>259</sup>

2.2 Extension. The term of the Loan is hereby amended and extended for the period commencing on the original maturity date under the Loan Documents and ending on \_\_\_\_\_ (the “Extended Maturity Date”), at which time the outstanding principal balance of the Note, together with all accrued and unpaid interest thereon and all other sums due thereunder and under the other Loan Documents shall be due and payable in full, without notice or demand.<sup>260</sup>

2.3 Interest Rate. From and after [the Effective Date] and until the Extended Maturity Date or earlier occurrence of an Event of Default (including a Termination Event) under this Agreement or the Loan Documents as modified by this Agreement, the principal amount outstanding from time to time under the Note shall bear interest at an annual rate at all times equal to \_\_\_\_\_ percent (\_\_\_\_%) [LENDER ALTERNATIVE LANGUAGE: LIBOR

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<sup>256</sup> This would apply if Lender chose to anticipate the alternative of a friendly foreclosure.

<sup>257</sup> This would apply if Lender chose to anticipate the alternative of a friendly foreclosure.

<sup>258</sup> It is possible the parties may seek to address an anticipated default. In such event, this entire Default paragraph may be substituted with a “Status of Loans” paragraph setting forth, as of the Effective Date, the current anticipated default (if applicable). Any modification and/or forbearance granted in this Agreement (as opposed to in a separate Forbearance Agreement) should, in such event, only apply to the specific enumerated modification(s) and/or anticipated default(s), and the agreement should make clear that no other modification and/or forbearance is granted.

<sup>259</sup> Borrower position is that once the Loan is modified a subsequent default should be subject to traditional remedies not termination of modification. Lender may negotiate to terminate some provisions, such as extension of terms, but preserve others, such as increase of interest rate or increase of collateral.

<sup>260</sup> When drafting for a specific deal situation, this Modification Agreement can serve as an overarching document setting forth the modifications – e.g., the Note and Mortgage can be separately amended and/or restated to give effect to the modifications agreed herein or, alternatively, this Modification Agreement can be adjusted to serve as the actual amending instrument (since it is being recorded) and provide the specific note amendment language. For example, the drafter can say “The Note is hereby amended as follows: “The outstanding principal balance of this Note, together with all accrued and unpaid interest thereon and all other sums due hereunder shall be due and payable in full on [insert extended date].” The same concept applies to other modifications herein, including subparagraphs (c) (interest rate) and (d) (forgiveness, note modification).

Rate plus [two] percent ([ ]%); provided, however, that the Applicable Interest Rate shall not be less than [three] percent ([ ]%) per annum; provided, further however, that during any period during which the Loan has converted to a Prime Rate Loan, the 'Applicable Interest Rate' shall be deemed equal to the Prime Rate plus the Prime Rate Spread. Adjustments to the Applicable Interest Rate in conjunction with changes in the LIBOR Rate shall be made once each Rate Adjustment date. "Prime Rate" means the rate of interest established by Lender from time to time as its reference rate in making loans, but does not reflect the rate of interest charged to any particular class of borrowers. Borrower acknowledges that the Prime Rate is not tied to any external rate of interest or index. [LENDER ADDITIONAL LANGUAGE: Within ten (10) business days following the first date after the Effective Date that the LIBOR Rate is equal to or greater than the [ ]% ("Strike Rate"), the Borrower shall purchase a Rate Cap with a notional amount equal to then Principal Balance for the benefit of Lender which provides for payments to be made by the Rate Cap provider if, at any time during the remainder of the term of the Loan, the LIBOR Rate equals or exceeds the Strike Rate. Each Rate Cap required hereunder must (i) be issued by a Rate Cap Provider that satisfies the credit criteria set forth below in [ ], (ii) be fully effective on the first date after the Effective Date that the LIBOR Rate is equal to or greater than the Strike Rate; (iii) permit Borrower's interest in the Rate Cap to be assigned to Lender without the payment of fees or costs and without the Rate Cap Provider's consent; (iv) contain no cross defaults to other agreements among Borrower, Rate Cap Provider and Lender or any of their respective Affiliates; (v) contain no performance obligations of Borrower or Lender beyond Borrower's payment of a one (1)-time fee at the effective date of the Rate Cap; (vi) be evidenced by an agreement acceptable to Lender in all respects which shall be delivered to Lender along with a legal opinion from Rate Cap provider's counsel (which may be in-house counsel) as to the authorization, execution and delivery by the Rate Cap Provider and enforceability in accordance with its terms; (vii) comply with the criteria issued by any of the Rating Agencies regarding interest rate cap agreements, including, without limitation, the requirement for additional legal opinions from the Rate Cap Provider's counsel; and (viii) otherwise be satisfactory to Lender in all respects.]

2.4 Forgiveness of Principal; Note Modification. Lender hereby agrees during the Clawback Period (defined below) to forebear from exercising rights or remedies to collect the forgiven Loans, and if no Termination Event occurs during the Clawback Period to forgive a portion of the Obligations in the principal amount of \_\_\_\_\_ (the "Forgiven Loans"), which amount shall no longer constitute a portion of the Obligation of Borrower, provided (1) Borrower otherwise complies with the terms of this Agreement and Loan Documents, (2) no Termination Event (as defined below) has occurred, and (3) the Lender has not otherwise notified Borrower in writing of its intention to withdraw its agreement to defer and/or forgive any portion of the Obligations [LENDER ADDITIONAL LANGUAGE: ;provided further, upon the occurrence of a Termination Event (as hereinafter defined) within [ ] ( ) days] following the Effective Date ("Clawback Period"), all amounts previously forgiven hereunder, including the Forgiven Loans, shall be deemed to be unconditional portions of the obligations of the Borrower, and shall be reinstated as part of the Obligations, as if the forgiveness described had never occurred, and any amendment or modification made to the Loan Documents in respect of such forgiveness shall be deemed null and void.]

#### EXHIBIT -5

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## 2.5 Payments of Principal and Interest.<sup>261</sup>

2.5.1 Payment Requirements. Commencing on the Effective Date<sup>262</sup> and on each and every payment date until the full satisfaction of the Obligations, Borrower shall make a payment to Lender in an amount (such amount, the “Payment Amount”) equal to the greater of (i) the Net Operating Income for the prior calendar month, and (ii) the amount required under the Loan Documents to be deposited into the [Tax and Insurance Fund]<sup>263</sup> on such payment date, notwithstanding that Net Operating Income for the prior calendar month may be insufficient to make such payment.]<sup>264</sup>

2.5.2 Definitions. As used herein, the following terms shall have the meaning set forth below:

2.5.2.1. “Deemed Approved” with respect to Operating Expenses shall mean amounts expended with respect to expenses up to the amounts described in the Budgets, [BORROWER ADDITIONAL LANGUAGE: provided that for each category of expenses described in such Budget as “Major,” the amounts expended with respect to such Major category of expenses may exceed [five percent (5%)]<sup>265</sup> of the budgeted amount for such Major category of expenses without the prior written approval of Lender, [acting reasonably].<sup>266</sup>

2.5.2.2. “Operating Expenses” shall mean for the period in question, the expenses incurred by Borrower for the operation and management of the Property in the ordinary course of business as provided for in the Budgets, [LENDER ADDITIONAL LANGUAGE: provided, however, that none of the following expenses shall constitute “Operating Expenses” for the purpose of calculating Net Operating Income (“Affiliate Transfer Expenses”): marketing costs, tenant improvement expenses, broker fees, leasing commissions and related legal expenses made to Borrower or any of its affiliates, including, but not limited to, management fees, professional services, or wages, or any Affiliate Loan Payments (as hereinafter defined).]<sup>267</sup>

2.5.2.3. “Operating Income” shall mean for the time period in question, all gross income, revenues and consideration received by or paid to or for the account or benefit of Borrower, resulting from or attributable to the operation of the Property, including, but not limited to, any and all rents, additional rents, percentage rents and/or other sums received by or paid to or for the account or benefit of Borrower under that certain lease

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<sup>261</sup> If method of payments will continue as set forth in the Loan Documents without modification, so state.

<sup>262</sup> If the Effective Date pre-dates the date of the Agreement, Lender may require Borrower to become current on payments (See Section 3.(d).).

<sup>263</sup> This could be expanded to include all debt service, taxes, insurance, operating expense reserves, capital expense reserves, and other reserve requirements, and should be modified according to specific loan requirements such as the “waterfall” in a loan agreement.

<sup>264</sup> Modify to match the payment amounts applicable going forward, giving effect to this Agreement.

<sup>265</sup> Change according to thresholds in Loan Agreement or other Loan Documents.

<sup>266</sup> Lender may oppose this reasonableness requirement and Borrower will often require it, but the text should follow the standards of the loan documents themselves.

<sup>267</sup> Lender seeks to avoid distortion of income if the Transfer Expenses are paid directly or indirectly to Borrower.

between \_\_\_\_\_<sup>268</sup> and/or under any and all other leases with respect to the Property, the categories of which are described more fully on the Budgets. [BORROWER ADDITIONAL LANGUAGE: provided however income incurred as a result of transfers of all or any of the Property shall not be deemed Operating Income, but after paying transfer expenses, the remaining net balance shall be applied to reduction of the outstanding principal of the Obligations.]<sup>269</sup>

2.5.2.4. “Net Operating Income” shall mean, for the period in question, an amount equal to the positive difference, if any, between Operating Income and Deemed Approved Operating Expenses for such period.

2.5.2.5. “Affiliate Loan Payments” are loan payments by Borrower to and/or on behalf of certain of Borrower’s affiliates, which payments are reflected on its income statements as “Affiliated Loan”.

2.6 Late Charge.<sup>270</sup>

2.7 Default Interest Rate.<sup>271</sup>

2.8 Prepayment.<sup>272</sup> In addition to the monthly payments of interest on each payment Due Date, between the effective Date and the first anniversary of the Effective Date, Borrower shall have paid to Lender no less than [ ] Dollars (\$[ ]) in principal repayments the (“Mandatory Prepayment Amount”) such that the outstanding principal amount shall be no greater than [ ] Dollars (\$[ ]).

2.9 Mortgage Modification.<sup>273</sup> The Mortgage is hereby amended as follows:

(1)<sup>274</sup> To the extent permitted by applicable law, the Mortgage is hereby amended to provide that (i) THE MORTGAGE IS AN OPEN-END MORTGAGE and secures, among other things, present and future advances made by Lender pursuant to the Loan Documents, as amended hereby, (ii) the Mortgage secures all present or future advances made by Lender to or for the benefit of Borrower or the Mortgaged Premises for the payment of real estate taxes, assessments, maintenance charges, insurance premiums, and costs incurred by Lender for the enforcement and protection of the Mortgaged Premises or the lien of the Mortgage, and expenses

<sup>268</sup> This is intended to address major leases.

<sup>269</sup> Borrowers seek to have proceeds from a capital event applied directly to principal repayment rather than the waterfall of operating expenses, because reduction of principal immediately reduces debt service unless the Lender expressly provides otherwise.

<sup>270</sup> Insert standard provision if it has not previously been included in the Loan Documents or represents a change.

<sup>271</sup> Insert standard provision if not previously included in the Loan Documentation or represents a change. The default rate may also already be captured in Section 2(c).

<sup>272</sup> If Borrower is allowed or obligated to prepay the Loan, insert matching provision or new provision if not previously included in the Loan Documentation or represents a change). The illustrative text is for a mandatory prepayment.

<sup>273</sup> Mortgage modifications must be recorded to effect constructive notice. Provisions in an off-record amendment should be imported or at least incorporated by reference, into a recorded document.

<sup>274</sup> State law issues can be preserved or brought into current compliance.



incurred by Lender by reason of the occurrence of an event of default under the Mortgage or the other Loan Documents, as amended hereby, whether such advances are obligatory or made at the option of Lender, (iii) the lien priority of all of such future advances, costs and expenses shall relate back to the date of the Mortgage, or to such later date as required by applicable law, and (iv) the maximum principal amount (exclusive of accrued interest, payments for taxes, assessments, maintenance charges, insurance and other costs incurred by Lender for the protection of the Mortgaged Premises) of the Loan secured by the Mortgage, as amended hereby, shall not exceed \_\_\_\_\_ Dollars (\$\_\_\_\_\_).]<sup>275</sup>

(2) Notwithstanding anything to the contrary contained herein, Borrower agrees to pay on each monthly Due Date the Lender's estimate of 1/12th of the [Tax, Insurance, Operating Expense,] costs promptly upon receipt of Lender's request.

(3) The 'personal property' which is collateral secured by the Mortgage shall also include all of Borrower's accounts, contracts, documents, equipment, fixtures, instruments, inventory, records, pledged stock, and general intangibles, and such security includes, without limitation, all [of Borrower's] right, title and interest to the real estate described in Schedule [ ] attached hereto, pursuant to a certain lease purchase agreement dated [ ], by and between [ ], as optionor and Borrower as optionee. Borrower hereby assigns, transfers and sets over unto Lender as additional security all [of Borrower's] right, title, and interest in and to all sales contracts of any nature, whenever executed, covering any of the Property, together with any and all modifications thereof, and together with any and all deposits or other payments made in connection therewith and together with all products and proceeds of the foregoing of any nature whatsoever; provided, however, upon consummation of a sale in accordance with an approved agreement of sale, the assignment of this Section shall apply only to the "net proceeds" therefrom as defined in the Note. Borrower agrees that it will perform all of its obligations as seller under all such agreements of sale, and that it will enforce the performance by the purchasers under such agreements. At any time during the continuance of an Event of Default hereunder or under any other Loan Document, the Lender shall have the right (but no obligation) to exercise and enforce any of Borrower's rights under all or some of the agreements of sale. Nothing herein shall obligate the Lender to perform any obligation of Borrower under any agreement of sale (and all such agreements of sale shall be subordinate to the Mortgage), and Borrower hereby agrees to indemnify the Lender and save it harmless from and against any and all loss, liability, damage or expense arising from or as a result of any claim by any purchaser or any other party arising under or in connection with an agreement of sale, except where such claim was caused by Lender's gross negligence or willful misconduct. Neither the acceptance of this assignment, nor the collection by the Lender or any sums due or becoming due under any agreement of sale, shall constitute a waiver of any rights of the Lender under the Mortgage or any other Loan Document. The Lender shall have the right in its reasonable discretion to approve the form and content of all agreements of sale prior to their execution by Borrower. Borrower shall deliver to the Lender a copy of each such agreement as executed by the purchaser. The Lender shall have the right in its reasonable discretion to approve the terms of all

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<sup>275</sup> If this language cures the omission or defect in the recorded mortgage, the mortgage amendment would require a corresponding insertion on the first page of the mortgage amendment.

such agreements, including, but not limited to, the sale price and all concessions granted to the purchaser.

(4) WITHOUT LIMITING ANY OTHER PROVISION OF THE MORTGAGE, THIS MORTGAGE SECURES UNPAID BALANCES OF ADVANCES MADE, WITH RESPECT TO THE MORTGAGED PROPERTY, FOR THE PAYMENT OF TAXES, ASSESSMENTS, MAINTENANCE CHARGES, INSURANCE PREMIUMS OR COSTS INCURRED FOR THE PROTECTION OF THE MORTGAGED PROPERTY OR THE LIEN OF THE MORTGAGE, OR EXPENSES INCURRED BY THE LENDER BY REASON OF DEFAULT BY THE BORROWER UNDER THE MORTGAGE, IF ANY, AND TO ENABLE COMPLETION OF THE IMPROVEMENTS FOR WHICH THE LOAN WAS ORIGINALLY MADE IF NOT COMPLETED. SUCH ADVANCES INCLUDE, WITHOUT LIMITATION, ALL ADVANCES MADE AS PROVIDED IN THE LOAN DOCUMENTS.

(5) “Note” means that certain Promissory Note, dated as of [ ], as amended by the Modification Agreement dated as of [ ] by Borrower and Lender, among others, and all renewals, modifications or extension thereof.

2.10 [LENDER ADDITIONAL LANGUAGE:<sup>276</sup> Application of Payment Amounts. Lender shall apply the Payment Amount received each month to the extent thereof, [in the following order: (i) to funding of the Tax and Insurance Fund, and, otherwise, (ii)]<sup>277</sup> to such portion of the Obligations and in such order as it shall determine in its sole discretion].

2.11 [LENDER ADDITIONAL LANGUAGE:<sup>278</sup> Operating Statements. In addition to Borrower’s financial reporting obligations under the Loan Documents and to the Operating Statements and Budgets already provided as set forth in Recital [D,] on each payment date Borrower shall provide Lender with actual income and expense statements for the prior calendar month in the form [BORROWER ADDITIONAL LANGUAGE: as previously submitted to and accepted by Lender, or otherwise reasonably] satisfactory to Lender in its discretion (which statements shall include, but not be limited to, Borrower’s [Cash Deposit, Check Register and Cash from Operations Summary]),<sup>279</sup> which shall include, inter alia, a reconciliation of actual Operating Income, Operating Expenses and Net Operating Income for such calendar month, with the respective amounts projected in the applicable Budget for such month. Borrower shall provide Lender with such documents and/or invoices as Lender may request in its discretion with respect to Borrower’s operations during the relevant time period and/or any items set forth in such statements provided to Lender for such time period.]

2.12 Tenant Estoppel Certificates. Borrower shall use commercially reasonable efforts to deliver to Lender not more than [sixty (60)] days after the Effective Date executed

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<sup>276</sup> Include this provision to reinforce or change in light of the modification, as applicable, to the “waterfall” in the Loan Documents. Alternatively, can omit if application of payments post-modification is to remain unchanged from the existing loan documents.

<sup>277</sup> See footnote [12].

<sup>278</sup> Include this provision to reinforce or change in light of the modification, as applicable, financial reporting requirements already present in the Loan Documents.

<sup>279</sup> Change according to Loan Agreement or other Loan Documents

tenant estoppel certificates from each tenant of the Property [BORROWER ADDITIONAL LANGUAGE: occupying at least ten (10%) of the Property, or providing at least ten (10%) percent of the Operating Income], in form and substance satisfactory to Lender. In the event Borrower is unable to deliver any such estoppel certificates, Borrower shall deliver Lender copies of its written requests for the same together with certified mail receipts evidencing the delivery of such requests to the applicable tenant(s).<sup>280</sup>

2.13 Affiliated Loan Payments. Borrower shall not make any Affiliate Loan Payments at any time during the term of the Loan, and hereby assigns to Lender the right to any such payments, and agrees to hold such future payments, if any, in trust for Lender on account of the Obligations and promptly pay them to Lender until the Obligation are discharged in full.]<sup>281</sup>

2.14 [LENDER ADDITIONAL LANGUAGE: Covenant to Sell Certain Property. As a material inducement to Lender to enter into this Agreement, Borrower [and Guarantor] agree to market and to negotiate, in good faith with due diligence and in a commercially reasonable manner, for the sale or refinance of the [\_\_\_\_\_] (“Monetization Property”) on the following terms: (1) the refinance of the Monetization Property shall occur prior to any refinance of any other mortgage obligations of any Borrower affiliates (including the Affiliate Loans); (2) the sale of the Monetization Property shall be (a) pursuant to an agreement fully executed and binding prior to the refinance of any Affiliate Loans, for a sales price sufficient to repay [in full] the outstanding principal balance of the Obligations on or before the closing date thereunder without Lender entering into any other financing or forbearance arrangements and with evidence reasonably satisfactory to Lender of unconditionally committed or dedicated funding for such sale, (b) any deposits or escrow funds, if forfeited by the prospective buyer, to be paid immediately and directly to Lender on account of interest outstanding on the Loan, and the balance to principal, or in such other manner as the Lender may elect, and (c) satisfaction of the Loan and Obligations to be on or before closing thereunder. Borrower shall provide reports to Lender on a monthly basis of its ongoing efforts to sell or refinance the Monetization Property.]<sup>282</sup>

2.15 [LENDER ADDITIONAL LANGUAGE: Exit Fee. In connection with this Agreement, Lender shall be entitled to an exit fee of [ ] percent ([ ]%) of the outstanding principal balance of the Loan as of the Effective Date (the “Exit Fee”) in the amount of [\$ ]. The Exit Fee shall be deemed fully earned upon the execution and delivery of this Agreement by Lender, but shall be paid by Borrower on the earlier of the repayment of the Loan in full or the Maturity Date.]

2.16 [LENDER ADDITIONAL LANGUAGE: Net Worth Covenant. Until the Loan is paid in full, Guarantor shall maintain at all times an aggregate tangible net worth at least

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<sup>280</sup> Optional. Delete if property has no tenants (e.g. a borrower-owned and operated manufacturing facility).

<sup>281</sup> Revise as applicable. Even if no such payments have been made, a lender will typically seek to contractually restrict borrower’s ability to move cash to affiliates.

<sup>282</sup> A Lender may require this covenant where the Loan being modified by this Agreement is secured by a real property asset that may be sold to satisfy the loan, or if the security is composed of more than one real property, one or more of which may be sold, and the same is otherwise permitted by the Loan Documents (or is made permissible by this Modification Agreement).

equal to [ ] (exclusive of any direct or indirect interest in the Property), and, within ten (10) business days of Lender's request, Guarantor shall demonstrate in writing and to Lender's reasonable satisfaction, compliance with this Section. For purposes of this Section, 'tangible net worth' shall mean, as of a given date, Guarantor's equity calculated in accordance with generally accepted accounting principles, by subtracting total liabilities from total tangible assets.

2.17 [LENDER ADDITIONAL LANGUAGE: Liquidity Covenant. Until the Loan is paid in full, Guarantor shall maintain at all times liquidity in the aggregate at least equal to [ ], and, within ten (10) business days of Lender's request, Guarantor shall demonstrate in writing and to Lender's reasonable satisfaction, compliance with this Section. For purposes of this Section, 'liquidity' shall mean cash, cash equivalents, and unencumbered marketable securities.]

2.18 [LENDER ADDITIONAL LANGUAGE: Pledge and Security Interest in Equity. [Borrower shall amend its organizational documents to "opt-in" to have its ownership interests ("Equity") be characterized as certificated securities under UCC Article 8.] Guarantor agrees (a) to provide Lender with a collateral assignment of all right, title and interest in the Equity ("Guarantor Collateral") free and clear of all contractual claims, encumbrances, or reservations, by separate pledge and security agreement to be executed concurrently herewith, effective as follows: (1) as of the date hereof, such pledge and security interest shall attach to [ ] of Equity ("Initial Equity") owned beneficially and of record by Guarantor, and Guarantor shall deliver physical possession of such certificates of Initial Equity, together with assignments separate from certificate contemporaneously herewith, and (2) as of [*insert secondary benchmark or milestone*], such pledge and security interest shall attach to an additional [ ] of Equity owned beneficially and of record by Guarantor ("Supplemental Equity") and shall deliver such certificates of Supplemental Equity to Lender at that time. Borrower shall promptly, upon request of Lender, place a legend on the Equity certificates of Guarantor stating "This Certificate is subject to the restrictions set forth in the Agreement between Lender and Guarantor, among others, dated \_\_\_\_\_. " Guarantor represents it has good and marketable title to the Equity, and covenants it shall not assign, encumber, or otherwise transfer any of its interest in such Equity prior to the satisfaction of the Obligations. [GUARANTOR ALTERNATE LANGUAGE: Borrower's delivery of such [Initial Equity/Supplemental Equity] shall be into an escrow held by [ ] ("Escrow Agent") subject to (1) Escrow Agent's acknowledgment of notice of this Agreement and Lender's rights in connection with such Equity and (2) Lender's right to obtain possession of the Equity certificates upon delivery of notice to Escrow Agent and Borrower that a Termination Event has occurred entitling the Lender to obtain possession of such Equity. Guarantor may substitute cash for the Initial Equity or Supplemental Equity, provided such cash shall be in an amount ("Equity Value") equal to the value of the Equity being substituted calculated as the greater of either (i) the date of its delivery into escrow or (ii) the date of its substitution. In lieu of cash, Guarantor may deliver a letter of credit, provided in form and content attached as Exhibit [ ] hereto or otherwise reasonably satisfactory to Lender in the face amount of the Equity Value, issued by an institutional lender reasonably satisfactory to Lender, which letter of credit shall be held as the Guarantor Collateral. If Borrower has cash on deposit with Lender or Escrow Agent as the Guarantor Collateral, such cash will be returned to Borrower at the time such letter of credit is

received by Lender. Such letter of credit shall be renewed or replaced with a substantially identical letter of credit annually.]<sup>283</sup>

3. Default and Termination Events. Each of the following shall constitute a termination event ("Termination Event"):

3.1 If Borrower fails to make any payment or to perform any other Obligation required under this Agreement after the expiration of written notice or cure period, if any.

3.2 The occurrence of an Event of Default under the Loan Documents other than the Event of Default described in Section 1 hereof.

4. Remedies. Upon the occurrence of a Termination Event [BORROWER ADDITIONAL LANGUAGE: during the period it is continuing] Lender may elect all or any of the following: (1) to resume exercising all available remedies under the Loan Documents or at law or in equity, (2) to terminate any of the subsections of Section 2 of this Agreement or any other modification, forbearance or forgiveness granted under this Agreement upon notice to Borrower [and Guarantor], (3) to terminate this Agreement without any further obligation of Lender to provide demand, notice or cure periods under this Agreement, and (4) exercise all rights and remedies under the Loan Documents and applicable law. Upon making such elections, Lender shall not have waived any rights except as described in this Agreement.

5. Conditions Precedent. As conditions precedent to Lender's obligation to enter into this Agreement, Borrower shall have satisfied (or cause to be satisfied) the following conditions:

5.1 Closing Documents. Borrower shall have executed and delivered the following documents:

5.1.1 This Agreement;

5.1.2 Borrowers' Corporate Resolution;

5.1.3 Borrower's Certificate of Good Standing;

5.1.4 Borrower's Incumbency Certificate;

5.1.5 Each Guarantor's Corporate Resolution;

5.1.6 Each Guarantor's Certificate of Good Standing;

5.1.7 Each Guarantor's Incumbency Certificate;

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<sup>283</sup> If a pledge of equity in the Borrower or a Borrower subsidiary is not a feature of the Initial Loan a strong lender may propose such terms.

- 5.1.8 Change of name cards for the Account to rename it [ ];
- 5.1.9 Subordination, Non-Disturbance and Attornment Agreements from tenants of the Real Property with demised premises of more than [ ] Square Feet (“Major Tenants”);
- 5.1.10 Estoppel Certificates from Major Tenants;
- 5.1.11 Assignment of Rights under Option Agreement in recordable form, together with UCC-1 financing statements to perfect Lender’s interest in such assignments;
- 5.1.12 Modification Agreement of the Mortgage in recordable form;
- 5.1.13 Modification Agreement of the Assignment of Lease in recordable form;
- 5.1.14 Pledge by Guarantor of all of Borrower’s Equity, accompanied by assignments in blank separate from certificates, resignation of directors, and resignation of all officers;
- 5.1.15 UCC-3’s amending financing statements of Borrower to include security interests in documents referred to in Subsection [ ] and all agreements of sale, development agreements, deposits, permits, licenses, escrows, contract rights and general intangibles held by them;
- 5.1.16 Assignment and Subordination of Borrower’s debts to shareholder or affiliates for management, construction, leasing, development or construction fees;
- 5.1.17 Financial Statements of Borrower and Guarantors on an individual non-consolidated basis;
- 5.1.18 Assignment of [Third Party] Indemnification Obligations;
- 5.1.19 Assignment of all right, title, interest and claims to [Third Party] obligations for the purchase of interests in the Property; and
- 5.1.20 Disbursement Agreement as to funds in the Account.
- 5.1.21 Borrower shall have delivered to Lender such legal opinions, in form and substance satisfactory to Lender and its counsel, as Lender shall require.
- 5.1.22 Borrower shall have delivered to Lender, at Borrower’s expense, (i) a title bringdown endorsement issued by \_\_\_\_\_ (“Title Company”) for Loan Policy No. \_\_\_\_\_ (“Title Policy”) insuring that the status of title to the Mortgaged Premises has not changed since the date of the Title Policy and that upon recording this Agreement or a corresponding mortgage amendment in form reasonably satisfactory to Lender, the Mortgage, as amended, shall be a continuing first lien against the Mortgaged Premises, and

(ii) promptly following the recording of this Agreement or mortgage amendment, an updated title bringdown endorsement confirming that the Mortgage, as amended by this Agreement, is a continuing first lien against the Mortgaged Premises without intervening liens.

5.1.23 Lender shall have received copies of all executed leases currently affecting the Mortgaged Premises or any portion thereof, together with a current rent roll therefor certified as true, correct and complete by Borrower. [Such leases shall be in form and substance satisfactory to Lender.]

## 5.2 Diligence Documents.

5.2.1 Borrower shall have delivered and Lender shall have approved the Operating Statements and the Budgets, all of which shall be in line item format and in form and substance acceptable to Lender.

5.2.2 Representatives of Lender shall have obtained a satisfactory inspection report of the Mortgaged Premises as to structure, environmental, value, and such other materials Lender requires.

5.3 Fees and Payment. [Lender shall have received the following payments from Borrower:

5.3.1 A modification fee in the amount of \$\_\_\_\_\_.]<sup>284</sup>

5.3.2 [\$\_\_\_\_\_ representing Payment Amounts due for the months of \_\_\_\_\_.]

5.3.3 All costs and expenses incurred in connection with this Agreement including, without limitation, all Title Company charges and recording costs and the legal fees and disbursements of Lender's counsel in connection with this Agreement.

5.4 Loan Compliance. All of the representations and warranties contained herein and in the Loan Documents shall be true and correct and Borrower shall have delivered to Lender a certificate from [the chief financial officer of] Borrower to such effect.

## 6. Representations and Warranties.

6.1 Representations and Warranties of Lender. Lender does hereby represent and warrant to Borrower and Guarantor as follows:

6.1.1 Incorporation. Lender is a corporation organized, existing and in good standing under the laws of the state of its incorporation and if the state of incorporation is other than the state in which the Property is located, Lender is authorized to conduct the business of this Agreement in such state, to the extent required by applicable law.

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<sup>284</sup> If a modification fee is required but Borrower cash flow is restricted, Lender may consider relying solely on an Exit Fee.

6.1.2 Authority. Lender has and will through the Closing Date continue to have the right, power, and authority to execute this Agreement and to perform its obligations under this Agreement. The execution and delivery of this Agreement by Lender and the performance by Lender under this Agreement has been authorized by all necessary corporate action of Lender.

6.2 Representations and Warranties of Borrower. In order to induce the Lender to enter into this Agreement, the Borrower and the Guarantors, each as to itself, as the case may be, hereby warrants and represents to the Lender, in addition to any other representations and warranties contained in this Agreement, that the following warranties and representations are true now and will be true at Closing and that the representations and warranties of the Borrower and the Guarantors shall survive the Closing and the delivery of the Deeds for the applicable period of the statute of limitations pertaining thereto. Borrower does hereby represent and warrant as follows:

6.2.1 Labor. There are no labor disputes pending, or to the best of Borrower's knowledge, contemplated pertaining to the operation or maintenance of the Property or any part thereof and no employee shall remain employed in connection with the Property after the Closing Date.

6.2.2 Contracts. Except as listed on Exhibit 6.2.2, there are no service, equipment, supply and maintenance contracts, nor any other undertaking and arrangements of Borrower including, but not limited to, agreements, commitments, licenses, franchise agreements, equipment leases, rental agreements, and guaranties with respect to the Property ("Contracts").

6.2.3 Condemnation. There is no condemnation or eminent domain proceeding pending with regard to any part of the Property and the Borrower does not know of any proposed condemnation or eminent domain proceeding with regard to the Property or any part thereof.

6.2.4 Assessments. Borrower has not received any notice of any assessments for public improvements against the Property and to the best of Borrower's knowledge no such assessment is pending or threatened.

6.2.5 Leases. Except as shown on Exhibit 6.2.5, there are no oral or written leases or rights of occupancy or grants or claims of right, title or interest in any portion of the Property ("Leases"), there are no claims, offsets, termination or cancellation related to such lease, and there are no security deposits, rent inducements.

6.2.6 Compliance with Law. [To Borrower's best knowledge, ]the Property and the continued maintenance, operation, and use of it comply with all requirements of law, federal, state and local, and all requirements of all governmental bodies or agencies having jurisdiction thereof.



6.2.7 Broker Fees. No brokerage or leasing commission or other compensation is now, or will at Closing be, due or payable to any person, firm, corporation, or other entity with respect to or on account of any lease, or any extensions or renewals thereof.

6.2.8 Permits. [To Borrower's best knowledge, ]all required certificates of occupancy and other permits licenses, approvals, certificates, necessary for the operation of the Property ("Permits") have been validly issued and are in good standing and shall remain so upon consummation of Closing for all of the space subject to Leases. All charges and fees for such Permits have been paid in full for them to remain in full force and effect without any additional cost to Lender, its nominee or assignee, upon consummation of Closing. Borrower shall deliver to Lender at Closing all certificates of occupancy, underwriters, certificates relating to electrical work, all zoning, building, housing, safety, fire and health approvals and all Permits, together with any plans and specifications respecting the Property and the construction thereof.

6.2.9 Title. Borrower holds good and marketable title to the Property, free and clear of any charges, claims, liens, trusts, security interests, encumbrances, or other rights or interests other than the lien of security interests shown on Exhibit "6.2.9".

6.2.10 Mechanic's Lien. No work has been performed or is in progress at, and no materials have been furnished to the Property which, though not presently the subject of might give rise to mechanic's, materialmen's, or other liens against the Property or any portion thereof, except that for which full and complete releases have been obtained. If any lien for any such work is filed before or after Closing, Borrower shall immediately discharge the same.

6.2.11 Access. [To Borrower's knowledge], No fact or condition exists which interferes with access, or could result in the termination of the current access, from the Property to any presently existing highways and public roads adjoining or situated on the Property.

6.2.12 Payables. Except as set for in Exhibit 3, There are no lienable claims against the Property and all other payables owing in connection with the Property including, without implied limitation, all trade payables, real and personal property taxes, employee wages (including accrued vacation and fringe benefits, if any), utility charges, insurance premiums, lease payments, license, franchise and royalty payments (herein collectively called the "Payables") as of the dates therein stated. The term Payables is intended to include all additional payables incurred through the Closing Date.

6.2.13 Environmental. [To the best of Borrower's knowledge, ]there is not present in any medium at the Property (a) any hazardous substances, pollutants or contaminants, as those terms are defined pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601-9657, as amended by the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986), or (b) any petroleum or petroleum products, as defined in title I to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6991-6991(i). Nothing contained in this

Section 6.2.15 shall imply that Borrower has made or has had any duty to make any inquiry or investigation regarding the environmental condition of the Property since [ ].

6.2.14 Financial Capacity.<sup>285</sup> Borrower has made adequate provision for the payment of all creditors of the Borrower other than the Lender; and neither the Borrower nor the Guarantors have entered into this transaction to provide preferential treatment to the Lender or any other creditor of the Borrower or the Guarantors in anticipation of seeking relief under the Bankruptcy Code.

6.2.15 Solvency.<sup>286</sup> As of the date hereof, after giving effect to the transactions provided for herein, Borrower is Solvent (as herein defined).<sup>287</sup> Solvency shall

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<sup>285</sup> The purpose of this representation and the following one is to directly address the intent of the parties as to voidable transfers. It is more fully discussed in the footnotes to Section [15]. Avoidance, below. The bankruptcy of the mortgagor can also give rise to the risk the transfer will be set aside as a voidable preference. § 547. “Preferences. \*\*\* (b) \*\*\*, the trustee may avoid any transfer of an interest of the debtor in property - (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made - (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.” 11 U.S.C. §547(b). The debtor is presumed to be insolvent if the transfer occurs within the 90 day period before filing. Therefore, it is prudent for a mortgagee to obtain the mortgagor’s financial statements to evidence the mortgagor’s solvency on the closing date of the deed-in-lieu. Being deemed an insider will lengthen the period of risk in which a transfer would qualify as a preference from 90 days to 1 year. One example of this is if the security interest is defective, so that the trustee can set it aside. The mortgagee’s release of the guarantor is also a potential problem since some courts hold that a guarantor is equivalent to a creditor of the mortgagor by virtue of the guarantor’s conditional right of subrogation to the mortgagee’s rights. Thus, the release of the guarantor may mean the guarantor receives “greater percentage” than it would have if the property had been liquidated and the guarantor had been held liable for the deficiency. As in the case of fraudulent conveyance, the mortgagor should maintain the existence of the mortgage in case the deed in lien is voided.

<sup>286</sup> If the mortgagee and an insolvent mortgagor restructure the nonrecourse debt prior to the ultimate transfer of the project to the mortgagee, the mortgagor may obtain the benefit of converting income based on forgiveness of debt from capital gains to cancellation of debt/original issue discount income (See Internal Revenue Code § 1274 and § 108(e)(II)). The income tax consequences to a mortgagee-grantee are resolved within a single entity. The receipt of the real estate in exchange for forgiveness of debt will create net income or loss in the mortgagee; if two entities are used, the mortgagee would have a loss based on a bad debt, and the grantee would have income equal to the value of the real estate. But if the mortgagee and grantee file consolidated returns, this disparity should be resolved. In addition, the income tax effect may be different between the state revenue authority and the Internal Revenue Service.

<sup>287</sup> If Borrower were insolvent any additional consideration to Lender could be rescinded as a fraudulent conveyance. “The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily - (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to

mean that: (i) the sum of the debts and liabilities (including, without limitation, contingent liabilities) of Borrower is not greater than all of the assets of Borrower at a fair valuation; (ii) the present fair salable value of the assets of Borrower is not less than the amount that will be required to pay the probable liability of Borrower on its debts as they become absolute and matured; (iii) Borrower has not incurred, and does not believe that it will incur, debts as they become absolute and matured; (iii) Borrower has not incurred, and does not believe that it will incur, debts or liabilities (including, without limitation, contingent liabilities) beyond Borrower's ability to pay as such debts and liabilities mature; (iv) Borrower is not engaged in, and is not about to engage in, a business or a transaction for which Borrower's property constitutes or would constitute unreasonably small capital; and (v) Borrower is not otherwise insolvent as defined in, or otherwise in a condition which would in any circumstances then or subsequently render any transfer, conveyance, obligation or act then made, incurred or performed by it avoidable or fraudulent pursuant to, any law or other legal requirement that may be applicable to Borrower pertaining to bankruptcy, insolvency or creditors' rights.

6.2.16 Compliance. [To Borrower's knowledge,] Borrower and the Mortgaged Premises are in compliance in all material respects with all laws, regulations and requirements applicable to Borrower and/or the Mortgaged Premises, and Borrower has not received, and has no knowledge of, any order or notice of any governmental investigation or of any violations or claims of violation of any law, regulation or any governmental requirement applicable to Borrower or the Mortgaged Premises.

6.2.17 Commercial Business Purpose. The loan transaction consummated pursuant to the Loan Documents and this Agreement was and is a commercial business transaction and the entire proceeds thereof were [and/or will be] used exclusively for commercial business purposes.

6.2.18 Lien Effect. Except as expressly modified herein, all security interests in the collateral set forth in the Loan Documents, as Lender is willing to modify them, subject to the terms and conditions stated herein, are and shall remain unchanged and in full force and effect. The Mortgage shall continue to secure the payment and performance of all indebtedness and obligations under the Loan Documents (as modified herein) and Borrower's performance and obligations thereunder and hereunder.

6.2.19 No Default. Except as described in Section 1, as of the date hereof, no default or event of default exists under the Loan Documents, and no condition exists which, but for the passage of time or the giving of notice or both, would constitute a default or event of default under the Loan Documents.<sup>288</sup>

6.2.20 Indebtedness. The outstanding balance of the principal due Lender is \$[ ] as of [ ], with past due and unpaid interest of \$[ ] as of

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incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business." 11 U.S.C.

§548(a)(1)

<sup>288</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

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[ ] which together with late charges, default rate interests, and reimbursements of expenses due Lender total in excess of \$[ ] ("Indebtedness").

6.2.21 Ratification. The Loan Documents, the indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Borrower, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties [except as specifically set forth in \_\_\_\_\_].

6.2.22 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Borrower as of the date hereof, as if each such representation and warranty were set forth at length herein.<sup>289</sup> Borrower hereby acknowledges that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.2.23 Due Formation. Borrower is a [corporation/partnership], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

OR

6.2.1 Due Power. Borrower is an individual with full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

6.2.2 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.2.3 No Conflict. [To Borrower's knowledge,] The execution and delivery of this Agreement by Borrower will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the [partnership agreement/articles of incorporation or by-laws] of Borrower; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Borrower is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.2.4 Binding Effect. [To Borrower's knowledge,] This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of

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<sup>289</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

Borrower, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.2.5 No Litigation. [To Borrower's knowledge,] There is no litigation or governmental proceeding pending or, to the knowledge of Borrower, threatened against Borrower which affects Borrower's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.2.6 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Borrower contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.2.7 Complete Copies. Where copies of any documents have been delivered by Borrower to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto;(ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

### 6.3 Representations and Warranties of Guarantor.

6.3.1 Ratification. The Loan Documents, the indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Guarantor, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties [except as specifically set forth in \_\_\_\_\_].

6.3.2 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Guarantor as of the date hereof, as if each such representation and warranty were set forth at length herein.<sup>290</sup> Guarantor hereby acknowledges that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.3.3 Due Formation. Guarantor is a [corporation/partnership], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and

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<sup>290</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

OR

6.3.1 Due Power. Guarantor is an individual with full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

6.3.2 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.3.3 No Conflict. [To Guarantor's knowledge] The execution and delivery of this Agreement by Guarantor will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the [partnership agreement/articles of incorporation or by-laws] of Guarantor; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Guarantor is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.3.4 Binding Effect. [To Guarantor's knowledge] This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of Guarantor, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.3.5 No Litigation. [To Guarantor's knowledge] There is no litigation or governmental proceeding pending or, to the knowledge of Guarantor, threatened against Guarantor which affects Guarantor's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.3.6 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Guarantor contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.3.7 Complete Copies. Where copies of any documents have been delivered by Guarantor to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto;(ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the

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passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

7. Reaffirmation of Guarantor.

7.1 Guaranty Reaffirmation. In consideration of the agreements and amendments made by Lender in this Agreement and to induce Lender to take such action (acknowledging that Lender would not do so without this reaffirmation and consent), Guarantor hereby ratifies, reaffirms, and continues in full force and effect the Guaranty. The Guaranty shall continue for all purposes notwithstanding the amendments, modifications, and other actions embodied in the foregoing Agreement.

7.2 Guaranties Valid. The Guaranty constitutes the valid, legal and binding obligation of the Guarantor, enforceable against Guarantor in accordance with its terms.

7.3 Waiver of Indemnity and Contribution. Notwithstanding any provisions of the Guaranty to the contrary, until the Loan has been paid in full to Lender, Guarantor hereby irrevocably waives any claims or other rights which it may now have or hereafter acquire against any other guarantor of the guaranteed obligations under the Loan that arise from the existence, payment, performance, or enforcement of Guarantor's obligations under the Guaranty, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution, indemnification, any right to participate in any claim or remedy of Lender against such other guarantor of the guaranteed obligations under the Loan or any collateral which Lender now has or hereafter acquires, whether or not such right, claims or remedy arises in equity or under contract, statute, or common law, including, without limitation, the right to take or receive from any other guarantor, directly or indirectly, in cash or other property or by setoff or in any other manner, payment or security on account of such right, claim, or remedy. If any amount shall be paid to Guarantor in violation of the preceding sentence and the guaranteed obligations under the Loan shall not have been paid in full, such amount shall be deemed to have been paid to Guarantor, as the case may be, for the benefit, and held in trust for the benefit, of Lender and shall forthwith be paid to Lender to be credited and applied upon the guaranteed obligations under the Loan whether matured or unmatured, in accordance with the terms of the Loan Documents between Borrower and Lender. Guarantor acknowledges that it will receive direct and indirect benefits from the Loan, this Agreement and the other transactions evidenced by and contemplated in the Loan Documents, and that the waiver set forth in this paragraph is knowingly made in contemplation of such benefits.

8. No Bankruptcy Intent; Voidable Transfers.<sup>291</sup>

8.1 No Bankruptcy Intent. Borrower represents and warrants that it does not have any intent to (i) file any voluntary petition under any Chapter of the Bankruptcy Code, Title 11, U.S.C.A. ("Bankruptcy Code"), or in any manner to seek any proceeding for relief,

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<sup>291</sup> Provisions like this seeking to contractually circumvent the automatic stay may not be enforceable. Bankruptcy counsel should be consulted prior to including such provisions.

protection, reorganization, liquidation, dissolution or similar relief for debtors under any local, state, federal or other insolvency law or laws providing relief for debtors (“Debtor Proceeding”), or (ii) directly or indirectly to cause or permit any involuntary petition under any Chapter of the Bankruptcy Code to be filed against Borrower, or (iii) directly or indirectly to cause or permit the Property or any portion or any interest of Borrower in the Property to become the property of any bankrupt estate or the subject of any Debtor Proceeding. Borrower acknowledges that the filing of any petition or the seeking of any relief in a Debtor Proceeding by Borrower, whether directly or indirectly, would be in bad faith and solely for purposes of delaying, inhibiting or otherwise impeding the exercise by Lender of Lender’s rights and remedies upon the occurrence of an event of default hereunder against Borrower and the Property pursuant to the Loan Documents. Without limiting the foregoing, Lender shall be and is entitled to and Borrower hereby consents to, relief from the stay imposed by Section 362 of the Bankruptcy Code, as amended, in any bankruptcy proceedings.

8.2 Voidable Transfers. Without limiting any of the foregoing, if any payments of money (including Payment Amounts) or other transfers made to Lender by the Borrower pursuant to this Agreement shall for any reason subsequently be declared to be “fraudulent” (within the meaning of any state or federal law relating to fraudulent conveyances), preferential, or otherwise voidable or recoverable, in whole or in part for any reason, under the Bankruptcy Code or any other state or federal law (collectively referred to as “Voidable Transfers”) and Lender is required to repay or restore the amount of any such Voidable Transfers or any portion thereof, then, as to the amount repaid or restored (including all costs, expenses and attorneys’ fees paid by Lender related thereto), the liability of Borrower shall automatically be revived, reinstated and restored in such amount or amounts, and shall exist as though such Voidable Transfers had never been made to Lender. Borrower expressly acknowledges and agrees that Lender may rely upon advice of counsel and, if so advised by counsel, may settle, without defending, any action to void any alleged Voidable Transfers, and that upon such settlement Borrower shall again be liable for any deficiency resulting from such settlement as provided in this Agreement

## 9. Pre-existing Conditions and Claims.<sup>292</sup>

9.1 Ratification and Warranty.<sup>293</sup> (i) All of Borrower’s [and Guarantor’s] Obligations to the Lender as set forth in the Loan Documents are in full force and effect, (ii) the Loan Documents to which it is [they are] a party were all properly and duly executed and delivered, (iii) the Loan Documents to which it is [they are] a party are now, and at all times have been, in full force and effect in accordance with their terms and (iv) there are no amendments, waivers or modifications of the Documents, except for those made in writing and signed by the Lender and the Borrower [and Guarantor], and identified in the Recitals, and (iv) Lender has complied properly performed and satisfied in a timely manner with all of its obligations under the Loan Documents, including delivery of notice and time for Borrower [and Guarantor] to cure its [their] defaults, if any.

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<sup>292</sup> A Lender would typically seek the protections of the various releases and waivers contained in this Section 18 at each instance the Borrower seeks an accommodation or relief from the then current Loan Documents Provisions.

<sup>293</sup> The Lender seeks to pre-empt a Borrower challenge against the enforceability of the Loan Documents.



9.2 Waiver.<sup>294</sup> Borrower [and Guarantor] for itself [themselves] and its [their respective] successors and assigns, and by its [their] execution hereof hereby acknowledge[s], admit[s] and agree[s] that, as of the date of execution and delivery of this Agreement, the Borrower [and Guarantor] (i) have no defenses, counterclaims or offsets relating to its [their] obligations under or in respect of the Loan Documents or to the enforcement or exercise by Lender of any of its rights, powers or remedies under or in respect of the Loan Documents, or (ii) alternatively, hereby irrevocably waive[s], and relinquish[es], any and all such objections, claims, defenses, counterclaims or offsets, that may exist as of the date hereof including, without limitation, any and all such objections, claims, defenses, counterclaims or offsets that are unknown, unsuspected, unanticipated or undisclosed as of such date.

9.3 Release.<sup>295</sup> Although Lender regards its conduct as proper and does not believe Borrower [or Guarantors] have any claim, cause of action, offset, or defense against Lender, its participating lenders, co-lenders, subsidiaries, affiliates, parents, predecessors in interest, nominees, assignees, officers, directors, agents, employees, servants, attorneys and representatives, as well as their respective heirs, personal representatives, successors and assigns, or any and all of them (hereinafter collectively called the “Released Parties”), Lender wishes and Borrower and Guarantors agree to eliminate any possibility that any conditions, acts, omissions, events, circumstances, or matters which occurred prior to the effective Date could impair or otherwise subject Lender or any of the other Released Parties to any liability other than is expressly stated in this Agreement and the Loan Documents. Borrower [and Guarantor] on behalf of itself [themselves] and its [their respective] successors and assigns (collectively the “Releasing Parties”) remise[s], release[s], acquit[s], satisfy[ies] and forever discharge[s] the Released Parties from any and all manner of debts, accounts, bonds, warranties, representations, covenants, promises, contracts, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands and causes of action of any nature whatsoever, which existed, arose, or occurred at any time prior to or concurrently with the date hereof of any character whatsoever whether known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, including without implied limitation, such claims and defenses as fraud, mistake, duress and usury, which Borrower [or Guarantors] ever had or now has against the Released Parties, jointly or severally, for or by reason of any matter, cause or thing whatsoever occurring prior to the date hereof, which relates to, in whole or in part, directly or indirectly: (i) the Loan, including the administration or funding thereof, (ii) the Loan Documents, (iii) the Obligations, (iv) the Property, including the financing and operation of same, and (v) any other agreement or transaction between any of Releasing Parties and any of Lender Parties concerning matters arising out of or relating to the items set forth in subsections (i) and (iv) above.]

9.4 Acknowledgments.<sup>296</sup> Each Borrower and Guarantor hereby acknowledges that it is or is owned by sophisticated and experienced real estate developers and investors, each of whom has a full understanding of the terms and conditions of this Agreement

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<sup>294</sup> The Lender seeks to extinguish any defenses Borrower may have to enforcement of the Loan Documents.

<sup>295</sup> The Lender seeks to extinguish any claims the Borrower may have for Lender liabilities.

<sup>296</sup> The Lender seeks to extinguish any common law or equitable claims that could be asserted as voiding the Loan Documents.

and the risks involved in entering into this Agreement, that this Agreement has been fully negotiated and that compromises on the part of Lender and Borrower were made before agreement was reached on the final terms hereof, that at all times each Borrower [and Guarantor] has [have] been represented by its [their] own attorneys and such other competent counsel as it [each of them] has [have] chosen to engage in the negotiation of the terms and the preparation and execution of all documents, and has relied solely on the advice and instruction of its own attorney who has had the opportunity to review and analyze all of the documents for a reasonable period of time prior to the execution by the Borrower [and Guarantor]; that Borrower [and Guarantor] is entering into this Agreement with the conviction that it is a fair agreement and that it represents an equitable compromise of the competing interests of the parties hereto and that, in addition, it was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any party, and that Borrower [and Guarantor] acknowledges this Agreement shall constitute a complete defense to any claim, cause of action, defense, liability or obligation released under this Agreement, and agrees that after the execution and delivery of this Agreement on the date hereof, the only claims or causes of action which it and/or he could possibly have against any of the Released Parties would be those arising under this Agreement, or a written contract hereafter executed by Lender in favor of Borrower and/or Guarantor those arising from conduct occurring after the execution and delivery of this Agreement. Neither Borrower nor Guarantor shall institute or prosecute (or, except to the extent required by law, in any way, assist or cooperate with the institution or prosecution of) any action, suit, hearing, or other proceeding of any kind, nature, or character at law or in equity against Released Parties in order to collect, enforce, declare, assert, establish, or otherwise raise any defense, claim, cause of action, contract, liability, indebtedness, or obligation which is within the scope of those released in this Section or which arise out of any fact, contract, condition, claim, cause of action, indebtedness, liability, obligation, event, action, omission, circumstance, or other matter or reason of any kind which is the basis for any such defense, claim, cause of action, liability, indebtedness or obligation which is released hereunder.

9.5 No Admission.<sup>297</sup> Nothing in this Agreement shall be construed as (or shall be admissible in any legal action or proceeding as) any admission by Released Parties that any defense, indebtedness, obligation, liability, contract, claim, or cause of action exists which is within the scope of those released within this Section, because Lender denies that any such matters exist and regards this release as unnecessary except to confirm its understanding of the position of the Parties.

9.6 Indemnification.<sup>298</sup> Borrower hereby indemnifies, defends, and holds harmless Released Parties and all persons, firms, corporations, and organizations on their behalf (collectively, the “Indemnified Parties”) of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever that any third party may now have or claim to have against such Indemnified Parties, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way touching, concerning, relating to, arising out of or founded upon the [ADDITIONAL BORROWER LANGUAGE: The

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<sup>297</sup> The Lender seeks to prevent the claim that the act of seeking these protections under Section 18 Pre-Existing Conditions and Claims is due to the existence of the bad acts for which the Lender is being protected.

<sup>298</sup> The Lender seeks Borrower’s protection against claims by third parties.

Borrower's interest in and acts or omissions taken with respect to] the Loan, the Obligations or any of the Loan Documents, including all such loss or damage of any kind heretofore sustained, or that may arise as a consequence of the dealings between the Parties up to and including the Effective Date. [ADDITIONAL BORROWER LANGUAGE: except to the extent due to Lender's [gross] negligence or intentional misconduct].

9.7 No Waiver.<sup>299</sup> Borrower acknowledges and confirms that by not exercising the rights, remedies and privileges available to Lender, for any reason whatsoever, including the negotiation and execution of this Agreement, Lender is not waiving and has not waived any of its rights to exercise them in accordance with the Loan Documents and this Agreement.

9.8 No Course of Conduct.<sup>300</sup> Borrower acknowledges and agrees that by negotiating and entering into this Agreement, Lender is not establishing a course of conduct nor a pattern of operation nor an implicit or explicit understanding that Lender may or will ever further revise or modify any term or condition of the Loan Documents or this Agreement or agree to forebear at any time in the future if an event of default should occur under and pursuant to the Loan Documents, this Agreement and/or any document or instrument contemplated or referred to herein.

9.9 No Cure.<sup>301</sup> Borrower hereby acknowledges and agrees that except as specifically set forth herein, neither this Agreement nor any actions pursuant to this Agreement nor any negotiations or discussions (including the Discussions) among Borrower, [Guarantor] any of [their respective] agents, officers or principals and any of the Lender Parties, shall be deemed or construed to cure any existing defaults under the Loan Documents, constitute a reinstatement, novation or release of the Loan or the Loan Documents or an extension of the maturity date of the Loan, or constitute a modification, amendment or waiver of the Loan or Loan Documents. In addition and not in limitation of the foregoing, it is expressly understood and agreed that Borrower's default(s) under the Loan Documents is/are not cured or waived by the acceptance of any funds paid by or on behalf of Borrower pursuant to this Agreement, including, without limitation, any Collateral Payment Amounts received hereunder.

9.10 Future Negotiations.<sup>302</sup> Borrower [and Guarantor] acknowledge[s] and agree[s] that Lender has no obligation whatsoever to discuss, negotiate or to agree to any restructuring of the Loan, or any modification, amendment, restructuring or reinstatement of the Loan Documents or to forbear from exercising its rights and remedies under the Loan Documents, except as expressly provided in this Agreement.

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<sup>299</sup> The Lender seeks to prevent the claim that the act of seeking to settle claims with Borrower is due to Lender's waiver of rights.

<sup>300</sup> The Lender seeks to pre-empt any claim of a non-verbal modification of the obligations whether arising by performance or course of conduct.

<sup>301</sup> The Lender seeks to confirm that its undertaking the performance of the Agreement is not deemed to cure Borrower Defaults.

<sup>302</sup> The Lender seeks to reaffirm that by entering into this Agreement it has not obligation to enter into other settlements.

10. [BORROWER SUBSTITUTE LANGUAGE – No Change Of Position.<sup>303</sup> Borrower, [Guarantor] and Lender each acknowledge and agree that except as specifically set forth herein, none of Borrower, Guarantor[, Guarantor] nor Lender shall be deemed to have amended or waived any rights, remedies or obligations contained in any of the Loan Documents or otherwise at law or in equity nor shall any of Borrower[, Guarantor] or Lender be deemed to have released or discharged any claim, counterclaim or defense that any of them ever had, may now have or may hereafter have arising out of or relating to the Loan or the Loan Documents, or the administration thereof, all of which are hereby expressly reserved. This Agreement shall not operate as a waiver by either Party of its right to demand full and timely performance of all obligations under the Loan Documents. Neither the execution of this Agreement nor any conduct shall operate to toll any time period which otherwise might be applicable, including without limitation any time periods which may be provided for in the Loan Documents or by statute upon the issuance or filing of a notice of default or a notice of sale under the Loan Documents, unless specifically agreed in writing in a document signed by the Parties. Nothing contained in this Agreement is intended (i) to limit either Party in initiating, continuing or otherwise proceeding to exercise any rights or remedies it may have before, during or after this Agreement, including, but not limited to, giving notices of default or, in the case of Lender, initiating foreclosure proceedings; or (ii) to relieve Borrower of any obligations it has under the Loan Documents (including the Obligations).]

11. Incorporation.

11.1 Incorporation of Recitals and Exhibits. Borrower [and Guarantor] acknowledge[s] that each of the Recitals is true and accurate, and each is incorporated herein by this reference as though fully set forth in the body of this Agreement [BORROWER SUBSTITUTE LANGUAGE: The foregoing Recitals are statements of estoppel made by Borrower [and Guarantor] and are to the actual knowledge of the individual signing below for [each of] the Borrower [and Guarantor] solely as its authorized officer, who hereby states that such officer would by custom and practice ordinarily be apprised of the information stated, has submitted this estoppel after reviewing the current files and materials ordinarily in the possession or reasonably available to the undersigned but without taking any further investigation, or other measures which are out of the ordinary business activity of the undersigned]<sup>304</sup>

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<sup>303</sup> The Borrower would seek to preserve the status quo as to its potential rights and remedies in exchange for the extra consideration it is providing, such as fees, surviving liability for limited claims, cooperation in providing a consensual deed, or refraining from filing bankruptcy.

<sup>304</sup> Borrowers prefer to grant a certification/estoppel instead because there is no remedy of a statement in an estoppel is wrong, only if its is repudiated by the maker. Consequently, the Borrower may also prefer broad language limiting its liability, such as:

“The Borrower’s liability for the statements contained herein shall be limited to estoppel and it shall not be liable for any actual or purported negligence or inadvertent misstatement, omission or incomplete certification. The certifications shall not be deemed representations, warranties or covenants. Neither Borrower, nor any owner, partner, officer, agent, consultant, employee, director, or other party providing advice or services to Borrower shall be liable for the statements contained in this estoppel. This estoppel shall not act as a waiver, release, acquiescence, consent, acknowledgment, subordination or subjection by Borrower to any right, title, interest, lien, claim, covenant, restriction, duty or indemnification held or owed to any other party, including, without limitation, any rights relating to financing, collateral, sale, purchase

11.2 Incorporated Documents. The documents referred to in the Recitals and the exhibits attached hereto are incorporated herein by reference and made a part hereof with the same force and effect as if herein restated in full. However, the following provisions of this Agreement shall prevail over any inconsistent provisions contained in the materials incorporated herein:

11.2.1 Modification Paramount. In the event that any term or provision of any of the Loan Documents is inconsistent or contrary to a specific and express term or provision of this Agreement, the explicit and express term or provision of this Agreement shall apply and shall be paramount. To the extent that no such express inconsistency exists, the terms and provisions of the Loan Documents, as amended, shall continue in full force and effect.

11.2.2 No Novation; Continuing Validity. This Agreement is not intended to be nor shall it constitute a novation of the Loan Documents or the indebtedness and obligations evidenced or secured thereby, as the case may be.

11.2.3 Further Compliance with Loan Documents. Borrower hereby ratifies, reaffirms and agrees to all terms, conditions and remedies of and contained in the Loan Documents and the indebtedness and obligations evidenced and/or secured thereby, and warrants and agrees that Borrower shall fully and strictly comply with all such terms and provisions, with time being strictly of the essence.

## 12. Miscellaneous.

12.1 No Enterprise. The relationship between Borrower and Lender is that of debtor and creditor. Nothing in this Agreement shall be deemed to create a partnership, joint venture or other association between Borrower and Lender or between Lender and any other party, or cause Lender to be liable or responsible in any way for the actions, liabilities, debts or obligations of Borrower or any other party.

12.2 Counterparts. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which shall collectively constitute a single agreement, fully binding upon and enforceable against the parties hereto. No amendment or supplement to this Agreement shall be valid or binding unless made in writing and executed by all the parties hereto.

12.3 Binding Effect. This Agreement shall be binding upon the Borrower[, Guarantor] and Lender and their respective heirs, successors, and assigns.

12.4 Choice of Law. This Agreement shall be governed by the laws of the [State/Commonwealth] of \_\_\_\_\_, without giving effect to principles of conflicts of laws.

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or other disposition of the Property. This Borrower shall not act to waive any current or future requirement for consent to any such action or any other action required of the Lender. The sole purpose, intent, and effect of this estoppel is to estop the undersigned Borrower from making any statement, claim or assertion that is contrary to the statements contained in this estoppel.”

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12.5 Jurisdiction. The state and federal courts located in the [State/Commonwealth] of [\_\_\_\_\_] shall have exclusive jurisdiction to hear and determine any claims or disputes between Borrower and Lender, pertaining to this Agreement. Borrower expressly submits and consents in advance to such exclusive jurisdiction in any action or proceeding commenced in such courts.

12.6 No Third Party Beneficiaries. The Borrower [and the Guarantors] acknowledge[s] and agree[s] that the acceptance by the Lender of the terms of this Agreement and the assignment to the Lender of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender to third parties which might have claims of any kind whatsoever against the Borrower[, or the Guarantor] or the Property and that the Lender does not assume or agree to discharge any liabilities pertaining to the Property now or hereafter arising. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

12.7 Time of Essence. Time is of the essence of this Agreement and each provision of this Agreement.

12.8 No Brokerage. The Parties represent and warrant each to the other that the transactions hereby contemplated are made without liability for any finder's, realtor's, broker's, agent's or other similar commission. The Parties mutually agree to indemnify and hold each the harmless from claims for commissions asserted by any party as a result of dealings claimed to give rise to such commissions.

12.9 Lender's Expenses. In addition to payments at Closing under Section 3, within thirty (30) days of receipt of an invoice therefor, Borrower shall pay to Lender all of its costs and expenses incurred in connection with this Agreement and any other matters related to the Property, [including, but not limited to, the review and approval of any lease with respect to the Property and any related subordination, non-disturbance and attornment agreements,] all of which costs and expenses, shall include, but not be limited to, outside and in-house attorney's fees and disbursements.<sup>305</sup>

12.10 Additional Documents; Appointment of Lender As Attorney-In-Fact. At all times following the execution of this Agreement, Borrower [and Guarantor] shall execute and deliver to Lender, or shall cause to be executed and delivered to Lender, and shall do or cause to be done, all such other instruments, documents and actions as Lender may reasonably deem necessary or desirable to assure Lender of the benefit of this Agreement and the other Loan Documents. In the event Borrower [or Guarantor] fails to execute and deliver any such instrument or document within ten (10) days of the request therefor, Borrower [, Guarantor and each of them] hereby irrevocably appoints any officer of Lender as [his, her and/or its] attorney-in-fact (which appointment is durable, irrevocable and coupled with an interest) for the purpose of executing and delivering such instruments or documents.

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<sup>305</sup> If these expenses are material, and Borrower has cash flow issues (as is likely to be the case since the parties are discussing modification), Lender may consider adding these costs to the outstanding principal of the Loan, and giving them priority in respect of the order of application of payment amounts.

12.11 Notices. All notices which may be given pursuant to this Agreement or the Loan Documents shall be in writing and shall be personally delivered or sent by first-class certified or registered United States mail, postage prepaid, return receipt requested, and sent to the party at its address appearing above or such other address as any party shall hereafter designate by notice to the other party given as aforesaid. All notices shall be deemed effective upon receipt or, if mailed, upon the expiration of the third day following the date of mailing, whichever occurs first.

12.12 [Joint and Several Liability]. The obligations, undertakings and agreements of each of the Borrower shall be joint and several.]

12.13 Severability. If any clause or provision of this Agreement is determined to be illegal, invalid or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Agreement will not be affected thereby if the essential terms of the Agreement upon which Lender relied remain in effect.<sup>306</sup> It is the intention of the parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar in terms to such provision as is possible and be legal, valid and enforceable.

12.14 Third Party Obligations. The Borrower and the Guarantors acknowledge and agree that the acceptance by the Lender, its nominee or assignee of ownership of the Property and the power of attorney to sell the Property pursuant to the terms of this Agreement and the assignment to the Lender, its nominee or assignee of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender, its nominee or assignee, to third parties which might have claims of any kind whatsoever against the Borrower or the Guarantors, Property, or the Property and that the Lender for itself and its nominee or assignee does not assume or agree to discharge any liabilities pertaining to the Property or Property which originated prior to the Closing Date, or undertake any obligation to complete the leasing or sale of the Property. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

12.15 Counsel; Voluntary Agreement. The Parties represent and warrant that each of them is represented by legal counsel of its choice, that each of them has consulted with counsel regarding this Agreement (and has been advised to consult independent counsel with respect to the upcoming Discussions as well), that each of them is fully aware of the terms of this Agreement and understands that this is a legally binding contract that may affect such party's rights, and each of them has entered into this Agreement voluntarily and without coercion or duress of any kind.

12.16 Confidentiality. It is important to the Parties to maintain a reasonable confidentiality regarding the subject matter hereof. Accordingly, no Party shall disclose the undertaking of the terms or conditions of this Agreement, any materials, information (written, oral or observed) or incidents related to this Agreement, or any document executed or prepared in connection herewith, including, without limitation, correspondence, electronic transmissions,

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<sup>306</sup> Unlike most severability clauses, this recommends the Agreement be void if a material term is unenforceable.

voice recordings, notes, analyses based on confidential material, budgets and projections, except as may be required by applicable law, pursuant to a court order or subpoena, or to such Party's counsel or advisers a reasonably necessary to assist such Party in the conduct of any negotiations related to this Agreement, or to the extent such information could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such evidence would otherwise be admissible, without regard to whether it was originally derived in the context of the Discussions pursuant to this Agreement.

**12.17 JURY TRIAL WAIVER. BORROWER[, GUARANTOR,] AND LENDER SHALL NOT SEEK A JURY TRIAL IN ANY ACTION BASED UPON OR ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT OR THE LOAN. TO THE EXTENT PERMITTED BY APPLICABLE LAW, [EACH OF] BORROWER [,GUARANTOR] AND LENDER HEREBY IRREVOCABLY AND EXPRESSLY WAIVES ANY AND ALL RIGHT TO ANY SUCH JURY TRIAL AND AGREES THAT NO SUCH ACTION WITH RESPECT TO WHICH A JURY TRIAL HAS BEEN WAIVED SHALL BE SOUGHT TO BE CONSOLIDATED WITH ANY OTHER ACTION WITH RESPECT TO WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF BORROWER [,GUARANTOR] AND LENDER AND ITS COUNSEL, AND SHALL NOT BE SUBJECT TO ANY EXCEPTIONS.**

13. [ADDITIONAL LENDER PENNSYLVANIA PROVISION: Reaffirmation of Confession of Judgment. The provisions of Section \_\_\_\_\_ of the [Mortgage], set forth below, are hereby reaffirmed and ratified in their entirety (all defined terms shall have the respective meanings ascribed to them in the [Mortgage]):

**FOR THE PURPOSE OF OBTAINING POSSESSION OF THE MORTGAGED PROPERTY IN THE EVENT OF ANY DEFAULT HEREUNDER OR UNDER THE NOTE, MORTGAGOR HEREBY AUTHORIZES AND EMPOWERS ANY ATTORNEY OF ANY COURT OF RECORD IN THE [COMMONWEALTH OF PENNSYLVANIA] OR ELSEWHERE, AS ATTORNEY FOR MORTGAGOR AND ALL PERSONS CLAIMING UNDER OR THROUGH MORTGAGOR, TO APPEAR FOR AND CONFESS JUDGMENT IN EJECTMENT AGAINST MORTGAGOR FOR POSSESSION OF THE MORTGAGED PROPERTY AND TO APPEAR FOR AND CONFESS JUDGMENT AGAINST MORTGAGOR, AND AGAINST ALL PERSONS CLAIMING UNDER OR THROUGH MORTGAGOR, IN FAVOR OF MORTGAGEE, FOR RECOVERY BY MORTGAGEE OF POSSESSION THEREOF, FOR WHICH THIS MORTGAGE, OR A COPY THEREOF VERIFIED BY AFFIDAVIT, SHALL BE A SUFFICIENT WARRANT; AND THEREUPON A WRIT OF POSSESSION MAY IMMEDIATELY ISSUE FOR POSSESSION OF THE MORTGAGED PROPERTY, WITHOUT ANY PRIOR WRIT OR PROCEEDING WHATSOEVER AND WITHOUT ANY STAY OF EXECUTION. IF FOR ANY REASON AFTER SUCH ACTION HAS BEEN COMMENCED IT SHALL BE DISCONTINUED, OR**

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**POSSESSION OF THE MORTGAGED PROPERTY SHALL REMAIN IN OR BE RESTORED TO MORTGAGOR, MORTGAGEE SHALL HAVE THE RIGHT FOR THE SAME DEFAULT OR ANY SUBSEQUENT DEFAULT TO BRING ONE OR MORE FURTHER ACTIONS AS ABOVE PROVIDED TO RECOVER POSSESSION OF THE MORTGAGED PROPERTY. MORTGAGEE MAY CONFESS JUDGMENT IN EJECTMENT THEREIN BEFORE OR AFTER THE INSTITUTION OF PROCEEDINGS TO FORECLOSE THIS MORTGAGE OR TO ENFORCE THE NOTE, OR AFTER ENTRY OF JUDGMENT ON THE MORTGAGE OR ON THE NOTE, OR AFTER A SHERIFF'S SALE OF THE MORTGAGED PROPERTY IN WHICH MORTGAGEE IS THE SUCCESSFUL BIDDER. THE AUTHORIZATION TO PURSUE SUCH PROCEEDINGS FOR OBTAINING POSSESSION IS AN ESSENTIAL PART OF THE ENFORCEMENT OF THE MORTGAGE AND THE NOTE, AND SHALL SURVIVE ANY EXECUTION SALE TO MORTGAGEE.]<sup>307</sup>**

[Signatures Commence on Following Page]

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<sup>307</sup> Sample language. Replace with confession of judgment provision found in the applicable mortgage or other security instrument securing the present loan or, if no such provision is found therein, delete.

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## **EXHIBIT A**

### **Property Description**

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## **EXHIBIT B**

### **Glossary**

- “Affiliate Loan Payments” shall have the meaning set forth in Section 2.5.2.5.
- “Affiliated Loan” shall have the meaning set forth in Section 2.5.2.5.
- “Agreement” shall have the meaning set forth in the Introduction.
- “Bankruptcy Code” shall have the meaning set forth in shall mean Title 11, U.S.C.A.
- “Borrower” shall have the meaning set forth in the Introduction.
- “Budgets” shall have the meaning set forth in Recital C.
- “Clawback Period” shall have the meaning set forth in Section 2.4.
- “Debtor Proceeding” shall have the meaning set forth in Section 7.1.
- “Deemed Approved” shall have the meaning set forth in Section 2.5.2.1.
- “Effective Date” shall have the meaning set forth in the Introduction.
- “Equity Value” shall have the meaning set forth in Section 2.18.
- “Equity” shall have the meaning set forth in Section 2.18.
- “Escrow Agent” shall have the meaning set forth in Section 2.18.
- “Exit Fee” shall have the meaning set forth in Section 2.15.
- “Extended Maturity Date” shall have the meaning set forth in Section 2.2.
- “Forgiven Loans” shall have the meaning set forth in Section 2.4.
- “Guarantor Collateral” shall have the meaning set forth in Section 2.18.
- “Guarantor” shall have the meaning set forth in Recital A.
- “Guaranty” shall have the meaning set forth in Recital A.
- “Indemnified Parties” shall have the meaning set forth in Section 9.6.
- “Initial Equity” shall have the meaning set forth in Section 2.18.
- “Lender” shall have the meaning set forth in the Introduction.

“Loan Agreement” shall have the meaning set forth in Recital B.

“Loan Documents” shall have the meaning set forth in Recital B.

“Loan” shall have the meaning set forth in Recital A.

“Major Tenants” shall have the meaning set forth in Section 5.19.

“Mandatory Prepayment Amount” shall have the meaning set forth in Section 2.8.

“Monetization Property” shall have the meaning set forth in Section 2.14.

“Mortgage” shall have the meaning set forth in Recital A.

“Net Operating Income” shall have the meaning set forth in Section 2.5.2.4.

“Note” shall have the meaning set forth in Recital A.

“Obligations” shall have the meaning set forth in Recital B.

“Official Records” shall have the meaning set forth in Recital A.

“Operating Expenses” shall have the meaning set forth in Section 2.5.2.2.

“Operating Income” shall have the meaning set forth in Section 2.5.2.3.

“Operating Statements” shall have the meaning set forth in Recital C.

“Party” and “Parties” shall have the meaning set forth in the Introduction.

“Payment Amount” shall have the meaning set forth in Section 2.5.1.

“Prime Rate” shall have the meaning set forth in Section 2.3.

“Property” shall have the meaning set forth in Recital A.

“Released Parties” shall have the meaning set forth in Section 9.3.

“Releasing Parties” shall have the meaning set forth in Section 9.3.

“Security Instrument” shall have the meaning set forth in Recital A.

“Strike Rate” shall have the meaning set forth in Section 2.3.

“Supplemental Equity” shall have the meaning set forth in Section 2.18.

“Termination Event” shall have the meaning set forth in Section 3.

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“Title Company” shall have the meaning set forth in Section 5.1.22.

“Title Policy” shall have the meaning set forth in Section 5.1.22.

“Voidable Transfers” shall have the meaning set forth in Section 8.2.

## **EXHIBIT C**

### **Operating Statements and Budgets**

**EXHIBIT -6**

**Page 1**

**SETTLEMENT AGREEMENT**

**OF [ \_\_\_\_\_ ], AS BORROWER,**

**[ \_\_\_\_\_ ], AS GUARANTOR,**

**AND [ \_\_\_\_\_ ], AS LENDER**

**DATED [ \_\_\_\_\_ ]**



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## **SETTLEMENT AGREEMENT**

This **SETTLEMENT AGREEMENT** (this “Agreement”) is dated as of \_\_\_\_\_, 20\_\_\_\_, [but effective as of \_\_\_\_\_]<sup>308</sup> (“Effective Date”), and is by and among [between] \_\_\_\_\_, a \_\_\_\_\_ having its principal address at [ \_\_\_\_\_ ] (“Lender”) and \_\_\_\_\_, a \_\_\_\_\_ having its principal address at [ \_\_\_\_\_ ] (“Borrower”), and \_\_\_\_\_, a \_\_\_\_\_ having its principal address at [ \_\_\_\_\_ ] (“Guarantor” and, with Borrower and Lender, each a “Party” and collectively the “Parties”).<sup>309</sup>

### **RECITALS:**

A. On or about \_\_\_\_\_, \_\_\_\_\_, Borrower executed and delivered to Lender [or \_\_\_\_\_, Lender’s predecessor in interest]<sup>310</sup> that certain promissory note (the “Note”) dated \_\_\_\_\_, \_\_\_\_\_, evidencing a loan (the “Loan”) in the original principal amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), which Note is secured by, among other things, (i) [Open-End Mortgage, Assignment of Leases and Rents and Security Agreement]<sup>311</sup> (“Mortgage”) dated \_\_\_\_\_, \_\_\_\_\_, and recorded in Deed Book \_\_\_\_\_, Page \_\_\_\_\_, Clerk’s Office of the \_\_\_\_\_ (the “Official Records”), which Security Instrument encumbers that certain real property (the “Property”) situated in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_, as more particularly described on Exhibit “A” attached hereto and by this reference incorporated herein, (ii) an Assignment of Rents and Leases dated \_\_\_\_\_ from Borrower to Lender covering rents, leases and profits, and (iii) Financing Statements filed under the Uniform Commercial Code covering fixtures and personal property at the Property (sometimes individually or collectively the “Security Instrument”). [The Guarantor has also executed a Guaranty dated \_\_\_\_\_ and in favor of Lender (the “Guaranty”).]

B. The Note and the Security Instrument, together with any and all other documents executed for and delivered to Lender in connection with the Loan and pursuant to that certain [Credit/Loan] Agreement by and [between/among] the Borrower[, Guarantor] and Lender dated \_\_\_\_\_, \_\_\_\_\_ (the “Loan Agreement”), and any and all extensions, modifications, guarantees and renewals thereof, shall hereinafter be referred to collectively as the “Loan Documents,” and all Borrower obligations under the Note and the other Loan Documents [(and any Guarantor obligations thereunder and under the Guaranty)] shall hereinafter be referred to

<sup>308</sup> The Effective Date is usually retroactive as to prior defaults that are tolerated under the Agreement.

<sup>309</sup> Include Guarantors if applicable, including parent and affiliate guarantors. Also, if there are multiple borrowers, lenders or guarantors, revise references accordingly. In the case of multiple borrower parties, a lender will likely propose express language re-affirming that all borrower parties are jointly and severally liable for the loan Obligations. A borrower will propose the opposite: that liability is separate, and limited by share, not joint and several (See Section \_\_\_\_\_); that Borrower is not re-affirming its obligations; and, the inverse, that the Lenders are re-affirming their obligations pursuant to the Loan Documents and this Agreement.

<sup>310</sup> Add if Lender has changed or original loan has been purchased or assigned. See Section 2 for borrower reaffirmation.

<sup>311</sup> Identify appropriate loan and security documents, as applicable.

collectively as the “Obligations”. All capitalized terms not otherwise defined in the text or Glossary at Exhibit “B” shall have the meaning ascribed to them in the Loan Agreement.

C. [On [ ]], a judgment on the Note was entered [by confession] in favor of Lender in the Court of Common Pleas of [ ] County ([ ] Term [ ], Docket No. [ ]) against Borrower [and each of the Guarantors], which judgment was transferred to the Court of Common Pleas of [ ] County (Docket No. [ ]) on [ ] (the “Judgment”).<sup>312]</sup>

D. Lender is prepared to extend [pay] [additional credit] of \$[ ] (“New Value”) to Borrower to pay closing costs and the secured creditor’s liabilities of Borrower arising from the ownership of the Property through [ ], which shall reduce the credit for the Covenant Not to Sue (defined below).<sup>313</sup>

E. Because the Borrower has been unable either to obtain refinancing of the Indebtedness or to sell the Property, the Borrower [and the Guarantors] has requested that they provide Lender with both (i) a deed for subsequent conveyance of the Property and (ii) a power of attorney to sell Property in return for the Lender’s covenant to credit Borrower with payment of \$[ ] (“Total Credit Adjustment”) [less the New Value, for a balance of \$[ ] (“Covenant Consideration”)] of the Borrower outstanding principal amount of the Indebtedness and New Value due, subject to adjustment, on the terms and conditions set forth in this Agreement.

**NOW THEREFORE**, in consideration of the foregoing premises, and for other good and valuable consideration, the sufficiency and receipt of which are hereby mutually acknowledged, and intending to be legally bound hereby, the Borrower [, Guarantor] and Lender hereby agree and covenant as follows:

1. Current Default. Borrower agrees and acknowledges (i) one or more Events of Default (as defined in the Loan Documents) have occurred and are continuing, threatened, or anticipated to occur with notice or lapse of time or both<sup>314</sup> [including, without limitation: the failure to pay the debt due under the Obligations; failure of Borrower to invest the required

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<sup>312</sup> This would apply if Lender chose to anticipate the alternative of a friendly foreclosure.

<sup>313</sup> A number of state recording acts require a grantee to give present consideration in order to make the constructive notice provisions effective against some third parties; and, covenants not to sue for deficiencies, releases of grantor’s other liabilities to grantee, assumptions by grantee of grantor’s ownership obligations, and debt forgiveness, all of which are essential consideration of a deed-in-lieu transaction, are not considered to be present consideration in some states. In a deed-in-lieu, if the mortgagee does not give the mortgagor a present consideration in exchange for receiving the deed but instead only forgives the debt, then the mortgagee’s act of recording is not deemed to give notice to a prior unrecorded interest holder. Therefore, the mortgagee must give some cash or other “true” consideration in addition to the debt forgiveness in order to satisfy a recording act’s present consideration requirement. It is recommended that such consideration be in addition to the advances to cover mortgagor defaults. The making of such payment is a risk for the mortgagee if the mortgagor files for bankruptcy and the deed is deemed a fraudulent conveyance; then, as discussed below in the footnotes to Section 6.2.16 Value, though the unsecured claim of the mortgagee is legally recoverable, there may be no assets to provide for such recovery.

<sup>314</sup> Typically, by the time lender and borrower parties are ready to discuss modification, one or more material defaults have already occurred.

equity in the Property; the portion of the Loan allocated to Interest Reserve failing to be sufficient to fund interest on the Loan; and failure of Borrower to provide funds to Lender to pay the projected interest shortfall prior to any further advances of the Loan] [failure to pay the Indebtedness as required by the Loan Documents], (ii) such Event of Default is continuing beyond any applicable cure period, (iii) Borrower has no defenses or counterclaims to such Event of Default, (iv) Lender is entitled to exercise any and all remedies provided in the Loan Documents, at law or in equity as a result of such Event of Default, [including the right to foreclose on the Mortgage and execute on the Judgment<sup>315</sup>] [(v) Borrower will not appeal, protest, or contest the Judgment<sup>316</sup>] and (v) Lender has no obligation to extend the maturity date of any Loan(s) or advance any further funds in connection with any Loan(s) to Borrower, except as otherwise set forth in this Agreement.<sup>317</sup>

2. Deed; Power of Attorney; No Successor Liability.

2.1 Deed.<sup>318</sup> On the Closing Date (as hereafter defined) or on such later date as Lender may direct Borrower, Borrower agrees to deliver or cause to be delivered to the Lender, or its nominee or assignee, absolutely and free and clear of any right of redemption or other right or interest of the Borrower[, the Guarantors] or anyone claiming by or through the Borrower [or the Guarantors], the following real and personal property of the Property:

2.1.1 Real Property. All or such part as Lender may direct from time to time of the land situate in [ ] County, State of [ ], described at Exhibit “2.1.1” attached as a part hereof, together with all buildings, fixtures and other improvements now or hereafter located thereon and all appurtenances thereunto belonging.

2.1.2 Personal Property. All tangible and intangible personal property located on or in, or used in connection with the ownership, financing, operation and maintenance of the Property or the business conducted thereon.

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<sup>315</sup> This would apply if Lender chose to anticipate the alternative of a friendly foreclosure.

<sup>316</sup> This would apply if Lender chose to anticipate the alternative of a friendly foreclosure.

<sup>317</sup> It is possible the parties may seek to address an anticipated default. In such event, this entire Default paragraph may be substituted with a “Status of Loans” paragraph setting forth, as of the Effective Date, the current anticipated default (if applicable). Any modification and/or forbearance granted in this Agreement (as opposed to in a separate Forbearance Agreement) should, in such event, only apply to the specific enumerated modification(s) and/or anticipated default(s), and the agreement should make clear that no other modification and/or forbearance is granted.

<sup>318</sup> If the deed is delivered into escrow for presentation to Lender upon a subsequent event of default by Borrower, it would provide Lender the equivalent result of a mortgage foreclosure and could cause the transaction to be recharacterized as a mortgage, subject to all the protection normally afforded a mortgagor.



2.2 Power of Attorney.<sup>319</sup> Borrower hereby authorizes Lender, and Lender shall have the right, to procure a buyer and conduct the sale of such assets, which sale may be private or public, exclusive or by auction, or in any other manner selected by Lender in its sole, unfettered discretion. Borrower will, at any time hereafter upon the request of Lender, execute and deliver such documents as may be necessary, in Lender's sole, unfettered discretion, to effectuate such sale or auction, and to grant such rights to Lender. Consistent with this paragraph, Borrower shall execute and deliver to Lender together with this agreement a Special Power of Attorney in the form attached hereto as Exhibit "2.2" and such other powers of attorney, deeds in lieu of foreclosure, certificates and other documents necessary, in Lender's sole discretion, to permit Lender to sell, whether by auction or otherwise, all of Borrower's assets, including without limitation the Property.

2.3 No Successor Liability. It is specifically understood that the Lender has not and will not agree to assume or incur any liability or responsibility with respect to the "Payables" defined in Paragraph 6.2.14 below or any other accrued but unpaid obligation of the Borrower [or the Guarantors], and any or all of such Payables and/or other obligations as the Lender may hereafter designate shall be paid in full by the Borrower [or the Guarantors] at the time of transfer of the Property, or such portion thereto as is transferred.

3. Consideration. Subject to the satisfaction by the Borrower [and the Guarantors] of the conditions contained in this Agreement, the Lender agrees (i) to [lend] [pay] the Borrower the New Value] provided it is used solely to pay closing costs and secured creditors listed on

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<sup>319</sup> As with the deed in escrow, a power of attorney approaches the effect of a mortgage. In addition it may be considered a clog on Borrower's common law right to redeem prior to formal foreclosure. "Clogging" of the equity of redemption is any unconscionable attempt by the mortgagee to strip the mortgagor of its equitable redemption right. Historically, foreclosure evolved as the method by which a mortgagee could obtain title to real estate and extinguish the mortgagor's equity of redemption. In a deed-in-lieu transaction, the risk exists that a mortgagor may claim the mortgagee caused clogging, since foreclosure is avoided. Accordingly, a court may recharacterize the deed as an equitable mortgage: meaning a grant of title subject to redemption by the mortgagor upon payment of the debt. The result would be that the mortgagor retains ownership to the real estate. An equitable mortgage is a court created remedy to protect a mortgagor or to give effect to the court's belief that the intent of the parties was to have a mortgage loan rather than a defeasible deed-in-lieu or a sale subject to a buy-back. In deciding whether to fund an equitable mortgage, courts consider a number of factors, including: (1) good faith (i.e., fairness without fraud, no fear of foreclosure); (2) adequacy of consideration (meaning debt is equivalent to fair market value of property); (3) substance of the preliminary negotiation; (4) existence of obligor/obligee relationship; (5) intent to be a loan with security interest, (6) elimination of right of redemption, (7) delivery of possession to grantee, (8) continuation of debt. A prudent mortgagee should conduct the transaction so that the relevant factors are favorably addressed and recite the factors in the documents as evidence of the intent of the parties. "The doctrine of clogging the equity of redemption restricts the ways in which a mortgagee may cut off a mortgagor's equity of redemption; and, it could result in a deed-in-lieu being set aside. The "equity of redemption" refers to the estate which is held by a mortgagor before foreclosure, and it consists of the mortgagor's equitable right to pay the amount of the debt and have property which was previously taken by the mortgagee reconveyed. The equity of redemption is separate and distinct from the statutory right of redemption. The former arises by application of equitable principles and is pre-foreclosure, while the latter is postforeclosure and arises by statute. The doctrine of clogging the right of redemption is not absolute, and one court has sustained that "this doctrine of equity does not apply if the right is relinquished by "a subsequent agreement upon a further consideration." *Stovall v. Stokes*, 94 Fla. 717, 741, 115 So. 828, 837 (1928) (quoting *Skeels v. Blanchard*, 85 Vt. 288, 81 A. 913 (1911)). It is clear that this agreement was given to avoid foreclosure and that [Borrower] received valuable new consideration to relinquish its right of redemption." *Ringling Joint Venture II, v. The Huntington national Bank, et al.*, 595 So. 2d 180, 182 (1992)

Exhibit 3 solely for the discharge of their liens and judgments against the Property through the end of calendar year [ ], (ii) to forbear from suing Borrower Parties for any deficiency judgment liability<sup>320</sup> [for up to the amount of the Covenant Consideration with respect to the outstanding Loans] all in accordance with Section [10.1] (“Covenant Not to Sue”). Such [New Value] will be paid in two (2) installments with the first installment in the amount of [ ] Dollars (\$[ ]) to be paid on the Closing Date on account of Borrower’s share of closing costs including transfer taxes, recording, fees, apportioned lienable taxes and utilities for acquiring title and the balance of [ ] Dollars (\$[ ]) to be paid on the later of: (a) the satisfaction of all obligations owing by the Borrower [and the Guarantor] to

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<sup>320</sup> “If an owner hands the keys back or allows a lender to foreclose on a non recourse note, he is treated as selling the property for the amount of the debt. This is not cancellation of indebtedness (COD) income, it is gain on sale. For example, assume a tax basis in assets of \$20 million, a current fair market value of \$24 million and a loan balance of \$30 million. If the loan is non recourse, the owner has a \$10 million gain on foreclosure and no COD. If a loan is recourse and the lender takes back the property, the gain is the difference between fair market value and basis, or \$4 million in our example. To the extent the \$6 million recourse balance is compromised, there will be COD. Assuming that COD is preferable to gain income (discussed below), the tax consequences of a non recourse loan can be more severe than those of a recourse loan.

For a non recourse borrower to recognize COD, either the lender has to reduce the size of the debt or accept an amount less than face in satisfaction of the debt. In some instances, Lenders agree to a partial write down to gain borrower cooperation. In our example, the owner may ask the lender to reduce the size of the loan to \$24 million, and may pay something for this, to create \$6 million of COD and decrease ultimate taxation. But, for COD to be recognized by the IRS, there has to be a write down of the loan with the borrower having the chance to refinance the resized loan. If the resizing and the conveyance to the lender are linked or are too close in time, the IRS will not recognize any COD and will treat all gain as sale proceeds.

While it may seem counter intuitive, COD often is preferable to gain income. Gain income reduces NOL’s or incurs immediate taxation for individual owners. COD income can be delayed for all business taxpayers under special relief recently enacted. In addition, individual owners (not C corporations) can elect to apply COD to reduce the basis of other depreciable real estate assets. The basis exception only applies to debt to the extent the proceeds were invested in the property. To the extent the debt was used to make cash distributions to the owners, basis reduction is not available. Basis reduction is also recaptured at ordinary income rates upon a sale. However, this recapture “burns off” as the owner foregoes depreciation deductions on the reduced basis. Going back to our example, assume that \$4 million of the \$30 million financed distributions to partners. If the debt is compromised for \$24, there will be \$6 million of COD. However, only \$2 million of that debt will be eligible for the real estate basis reduction election. The election to delay gain until 2014 and then to spread out recognition over a 5 year period is open to C corporations and all business taxpayers. If a partnership of individuals rents a property, it is engaged in business and is eligible for the deferral. If the partnership holds raw land for development, the answer could be different. The delay election is made by the partnership or other entity, not by its owners. However, the election takes away the ability of individual owners of real estate partnerships to reduce basis. There are a number of procedural and substantive issues that have to be resolved concerning this election that the IRS needs to address. The potential conflict between a C corporation partner (which includes REITs) and individual partners over the benefit of a deferral election is just one of these issues.

To contrast the possibilities, and perhaps enable an owner to pick the lesser evil, foreclosure produces gain, some of which may be taxed at capital gains rates, although there undoubtedly will be depreciation recapture rate taxation. A basis reduction election spreads gain out over the depreciable life of the asset at the cost of the loss of ordinary income deductions. The deferral election produces ordinary income in the future, which contrasts with capital gain type taxation today.

In our experience, most owners will elect to defer taxation, even if the ultimate amount increases, at least in theory. If the owner intends to hold the realty for the rest of his or her lifetime and allow his or her estate to obtain a basis step at death, then deferral is elimination. Even if the hold time frame is not that long, in harsh economic times most clients prefer deferral to going out of pocket for immediate taxes. “Larry Arem, Client Alert: Cancellation of Debt Tax Consequences, May 11, 2009

the Lender under the terms of this Agreement; or (b) that date which is [four hundred (400) calendar] days after the Closing Date.<sup>321</sup> Each installment will be paid directly to the title company for closing costs, and the remainder to the secured creditors in the respective amounts listed on Exhibit “3”. Such Covenant Not to Sue shall be treated as a credit against liabilities due from Borrower in such order and among such liabilities as Lender may determine in its sole discretion including, without limitation, to be applied as a credit only after all other indebtedness of Borrower, except the Covenant Consideration, has been paid in full, subject to the following:

3.1 Net Proceeds Shortfall.<sup>322</sup> If the Property is sold or transferred within [twelve (12)] months of the date hereof for net proceeds to Lender of an amount less than Total Credit Adjustment, then the Loan shall be increased, and [the Guarantors shall be liable for] an additional amount equal to the difference between the net proceeds to Lender and Total Credit Adjustment;

3.2 Net Proceeds Exceed Covenant Consideration. If the Property is sold or transferred within [twelve (12)] months of the date hereof for net proceeds to Lender of an amount greater than the Total Credit Adjustment, then the Covenant Consideration shall be increased from Total Credit Adjustment by an amount equal to the net proceeds (defined below) received by Lender, to the extent such net proceeds exceed the Total Credit Adjustment, but in any event no greater than the Indebtedness;

3.3 Net Proceeds Exceed Indebtedness. In the event the net proceeds exceeds the Indebtedness, Lender shall pay any such excess it receives to Borrower, and otherwise will not make a claim to Borrower for payment of such excess to be applied on account of the Indebtedness.<sup>323</sup>

3.4 [Guarantor Deficiency Contribution. The Guarantor hereby agree to pay to Lender, on account of the Deficiency, an amount (the “Deficiency Contribution”) equal to the product of (a) all fees and commissions payable to the Guarantors pursuant to the Collateral Agreement (the “Collateral Agreement Proceeds”), multiplied by (b) [one-half (½)]. The Deficiency Contribution shall be payable to Lender if, as, and when the Collateral Agreement Proceeds are payable to the Guarantors, and the Guarantors hereby authorize such payee to pay the Deficiency Contribution directly to Lender. If the Deficiency Contribution shall in no event exceed the Covenant Consideration.]<sup>324</sup>

4. Closing Date. The transactions contemplated by this Agreement will be consummated on or before 5:00 p.m. eastern standard time on [ ] (the “Closing Date”) at the offices of [ ]. If for any reason, except the Lender’s material breach

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<sup>321</sup> The period should exceed both the ninety (90) day period for voiding a preference and the one-year period for voiding a preference to an “insider” under the Bankruptcy Code 11.U.S.C. §547 and 548. (See footnotes accompanying Section 6.2.17 Financial Capacity and Section 6.2.18 Solvency.)

<sup>322</sup> Lender would seek to match its right to recovery against the final sale value of the collateral, but Borrower would expect a full exculpation in exchange for “handing over the keys.”

<sup>323</sup> Lender would seek to pre-empt claims it was unjustly enriched by collateral with more than the debt.

<sup>324</sup> This type of provision can be used where Borrower Affiliates are earning income by providing operations or services to the Property, especially where it would otherwise be lost to Lender as “netted” from net proceeds.

of this Agreement, the conditions precedent to Closing required to be performed by the Borrower [and the Guarantors] under this Agreement have not been performed and the transactions consummated on or before the Closing Date, the Lender, at the Lender's sole option, may by written notice to the Borrower [and Guarantors]: (a) extend the Closing Date to a date provided in such written notice; or (b) terminate all of the obligations of the Lender under this Agreement and proceed to exercise or renew the exercise of all of the rights and remedies held by the Lender under the Loan Documents and applicable law.

5. Covenants. Borrower shall after the Effective Date and at all times prior to the Closing Date:

5.1 Maintain Structure. maintain the Property, including all improvements thereon, in the same repair and condition as their current condition, reasonable wear and tear and casualty damage excepted to the extent proceeds of insurance issue therefor by Closing;

5.2 No Alterations. not make or permit to be made any alterations, improvements or additions to the Property prior to the Closing Date;

5.3 No Contracts. not enter into or permit any other agreements or liabilities which affect the Property or the transactions contemplated by this Agreement other than real estate taxes, special assessments or utility charges;

5.4 Maintain Title. shall convey good, marketable and insurable title to the Property to Lender, its nominee or assignee as grantee of the Property, free and clear of all liens, encumbrances, judgments, claims and litigation, and subject only to the covenants, conditions, encumbrances, easements and restrictions shown on Exhibit "5.4";

5.5 Notice. promptly notify Lender of any written notice which Borrower may receive with respect to condemnation or eminent domain proceedings, assessments of the Property or violations of any contractual, legal or governmental requirements applicable to the Property;

5.6 Convey. promptly deliver any portion of the Property which remains in Borrower's possession after the Closing Date at Lender's direction; and

5.7 Market. immediately take, or cause to be taken, steps to market, advertise and publicize, the sale of the Property, including, without limitation, entering into a listing agreement for the sale of the Property with a listing agent or broker acceptable to Lender ("Broker"), provided that such listing agreement shall terminate no later than such time and date that Lender directs. Borrower shall cause Broker to inform Lender of the names of all potential purchasers of Property, names of parties responding with interest, the terms of any proposed sale, and any other information requested by Lender with respect to the sale of the Property. Such sale shall meet the following conditions: (1) the agreement shall be for a sale price satisfactory to Lender; (2) closing to occur on or before such time and date that Lender directs; (3) any deposit or escrow funds to be held by Lender, and if forfeited by the prospective buyer to be directly to Lender on account of accrued and unpaid interest of the Indebtedness, then its

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principal, (4) satisfaction of the Borrower Loans to be on or before closing thereunder, and (5) all net proceeds up to but not exceeding the Indebtedness shall be paid to Lender. "Net proceeds" means the gross sales price less closing costs of no more than 7% of the gross sales price for brokerage fees, prorated items and other customary closing costs of seller, such as realty transfer taxes, if any.

6. Representations and Warranties.

6.1 Representations and Warranties of Lender. Lender does hereby represent and warrant to Borrower and Guarantor as follows:

6.1.1 Incorporation. Lender is a corporation organized, existing and in good standing under the laws of the state of its incorporation and if the state of incorporation is other than the state in which the Property is located, Lender is authorized to conduct the business of this Agreement in such state, to the extent required by applicable law.

6.1.2 Authority. Lender has and will through the Closing Date continue to have the right, power, and authority to execute this Agreement and to perform its obligations under this Agreement. The execution and delivery of this Agreement by Lender and the performance by Lender under this Agreement has been authorized by all necessary corporate action of Lender.

6.2 Representations and Warranties of Borrower. In order to induce the Lender to enter into this Agreement, the Borrower and the Guarantors, each as to itself, as the case may be, hereby warrants and represents to the Lender, in addition to any other representations and warranties contained in this Agreement, that the following warranties and representations are true now and will be true at Closing and that the representations and warranties of the Borrower and the Guarantors shall survive the Closing and the delivery of the Deeds for the applicable period of the statute of limitations pertaining thereto. Borrower does hereby represent and warrant as follows:

6.2.1 Labor. There are no labor disputes pending, or to the best of Borrower's knowledge, contemplated pertaining to the operation or maintenance of the Property or any part thereof and no employee shall remain employed in connection with the Property after the Closing Date.

6.2.2 Contracts. Except as listed on Exhibit 6.2.2, there are no service, equipment, supply and maintenance contracts, nor any other undertaking and arrangements of Borrower including, but not limited to, agreements, commitments, licenses, franchise agreements, equipment leases, rental agreements, and guaranties with respect to the Property ("Contracts").

6.2.3 Condemnation. There is no condemnation or eminent domain proceeding pending with regard to any part of the Property and the Borrower does not know of any proposed condemnation or eminent domain proceeding with regard to the Property or any part thereof.

6.2.4 Assessments. Borrower has not received any notice of any assessments for public improvements against the Property and to the best of Borrower's knowledge no such assessment is pending or threatened.

6.2.5 Leases. Except as shown on Exhibit 6.2.5, there are no oral or written leases or rights of occupancy or grants or claims of right, title or interest in any portion of the Property ("Leases"), there are no claims, offsets, termination or cancellation related to such lease, and there are no security deposits, rent inducements.

6.2.6 Compliance with Law. [To Borrower's best knowledge, ]the Property and the continued maintenance, operation, and use of it comply with all requirements of law, federal, state and local, and all requirements of all governmental bodies or agencies having jurisdiction thereof.

6.2.7 Broker Fees. No brokerage or leasing commission or other compensation is now, or will at Closing be, due or payable to any person, firm, corporation, or other entity with respect to or on account of any lease, or any extensions or renewals thereof.

6.2.8 Permits. [To Borrower's best knowledge, ]all required certificates of occupancy and other permits licenses, approvals, certificates, necessary for the operation of the Property ("Permits") have been validly issued and are in good standing and shall remain so upon consummation of Closing for all of the space subject to Leases. All charges and fees for such Permits have been paid in full for them to remain in full force and effect without any additional cost to Lender, its nominee or assignee, upon consummation of Closing. Borrower shall deliver to Lender at Closing all certificates of occupancy, underwriters, certificates relating to electrical work, all zoning, building, housing, safety, fire and health approvals and all Permits, together with any plans and specifications respecting the Property and the construction thereof.

6.2.9 Title. Borrower holds good and marketable title to the Property, free and clear of any charges, claims, liens, trusts, security interests, encumbrances, or other rights or interests other than the lien of security interests shown on Exhibit "6.2.9".

6.2.10 FIRPTA. Borrower is not a "foreign person" as such term is defined in Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended (the "Code").

6.2.11 Mechanic's Lien. No work has been performed or is in progress at, and no materials have been furnished to the Property which, though not presently the subject of might give rise to mechanic's, materialmen's, or other liens against the Property or any portion thereof, except that for which full and complete releases have been obtained. If any lien for any such work is filed before or after Closing, Borrower shall immediately discharge the same.

6.2.12 Access. [To Borrower's knowledge], No fact or condition exists which interferes with access, or could result in the termination of the current access, from the Property to any presently existing highways and public roads adjoining or situated on the Property.

6.2.13 Payables. Except as set for in Exhibit 3, There are no lienable claims against the Property and all other payables owing in connection with the Property including, without implied limitation, all trade payables, real and personal property taxes, employee wages (including accrued vacation and fringe benefits, if any), utility charges, insurance premiums, lease payments, license, franchise and royalty payments (herein collectively called the “Payables”) as of the dates therein stated. The term Payables is intended to include all additional payables incurred through the Closing Date.

6.2.14 Environmental. [To the best of Borrower’s knowledge, ]there is not present in any medium at the Property (a) any hazardous substances, pollutants or contaminants, as those terms are defined pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601-9657, as amended by the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986), or (b) any petroleum or petroleum products, as defined in title I to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6991-6991(i). Nothing contained in this Section 6.2.15 shall imply that Borrower has made or has had any duty to make any inquiry or investigation regarding the environmental condition of the Property since [ ].

6.2.15 Value. Borrower [and Guarantor] have made an independent determination of the fair market value of the Property and as a result thereof, has concluded that: (i) the amount of the Indebtedness substantially exceeds the fair market value of the Property (ii) the Property is unable to generate sufficient income to repay the principal and interest in accordance with the terms of the Loan Documents; and (iii) the consideration to be received by the Borrower [and the Guarantors] pursuant to the terms of this Agreement represents the payment by the Lender of full, fair and adequate consideration to the Borrower.<sup>325</sup>

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<sup>325</sup> The market value of the real estate can affect the income tax position of the parties, the costs to the parties (such as closing costs), the mortgagee’s rights to deficiencies, and, if the mortgagor enters into bankruptcy, the mortgagee’s rights to proceed with foreclosure or to remain fully secured for the debt. If the value of the real estate given to the mortgagee exceeds the balance of the debt, then, for income tax purposes, the transfer results in a loss to the mortgagor and income to the mortgagee. Realty transfer taxes on the value of the asset will be commensurately higher. Other creditors who are unsecured as to the transferred asset might challenge and rescind the transfer as a fraudulent conveyance (see footnotes to Section 6.2.17 Financial Capacity; Section 6.2.18 Solvency; and Section 9.2.2 Avoidance) under state law because the mortgagor received less than fair consideration. The mortgagee may, therefore, more willingly entertain repaying the excess to the mortgagor, in the form of either (A) a fee, which could result in mortgagor realizing active ordinary income coupled to passive capital loss, or (B) shared participation in appreciation of the asset, which could result in mortgagor realizing phantom passive income or actual passive loss. There is the further problem of establishing whether the mortgagor’s two serial activities, as developer then investor, are aggregated or segregated for income tax purposes. If the mortgagor later files bankruptcy and the assets are drawn back into the estate under the doctrine of preference, the mortgagee with a secured lien on the assets or proceeds of the assets would be “oversecured”. One benefit to an oversecured creditor is that if the mortgage has a protective future advance clause the mortgagee may add its post-petition payment of property expenses to its secured claim ahead of administrative claims. A detriment is that the same facts establishing that the mortgagee is oversecured also support the debtor’s defense to lifting the automatic stay if the debtor has equity in the Property and it is necessary to effective reorganization. So long as the equity cushion has significant value, the debtor can defer periodic payments of debt service otherwise required, on the theory that the mortgagee’s collateral adequately protects the ultimate payment of deferred debt service. However, because the secured claim includes post petition claims, a creditor who is only slightly oversecured will have a strong position in insisting that the debtor provide

6.2.16 Financial Capacity.<sup>326</sup> Borrower has made adequate provision for the payment of all creditors of the Borrower other than the Lender; and neither the Borrower nor the Guarantors have entered into this transaction to provide preferential treatment to the Lender or any other creditor of the Borrower or the Guarantors in anticipation of seeking relief under the Bankruptcy Code.

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periodic cash payments to maintain that equity cushion. If the debtor succeeds in maintaining the stay and upon a later disposition of the mortgaged premises, the mortgagee's claim is not paid, the mortgagee can obtain a super-priority as to proceeds from other assets of the estate, but that helps only if there are other assets. If the collateral's value equals the debt, the income tax consequence to the mortgagor and mortgagee would be a wash. The closing costs are again established by the value. If the mortgagor enters into bankruptcy, the fully secured creditor could be compelled to accept the collateral as the "indubitable equivalent" of its claim and, thereupon, the liability of the general partner or guarantors, if any, is, in effect, cut off. If the value is less than debt, the cancellation of debt can result in the realization of income for the mortgagor and a bad loan loss for the mortgagee. An institutional mortgagee would probably already have written down the loss and reported the property as an "in substance foreclosure" for regulatory reporting purposes. An undersecured mortgagee's claim can be recharacterized as a partially unsecured claim. For purposes of lifting the automatic stay of a foreclosure or a settlement agreement, however, the undersecured creditor will be deemed adequately protected and the stay supported, if the value of the property is protected from depreciation during the course of reorganization to the extent the mortgagee is an unsecured creditor, it can disapprove a proposed plan based on the "Best Interest of Creditor's Test" or "Impairment Test" if the value of the mortgagee's interest in the estate under the plan is less than it would be upon liquidation. In connection with a "cram down" of the mortgagee, the debtor may prevail in confirming the plan as fair and equitable if the mortgagee either retains a lien against the collateral to the extent of the secured claim and a promise of deferred cash payments totaling the current amount of the debt (not its present value based on such deferred cash payments), or receives the indubitable equivalent of its claim. The indubitable equivalent can be provided by transfer of the Property to the creditor for partial satisfaction of the claim because the value of the Property is identical to the secured claim and the unsecured claim is paid to the extent of the mortgagee's share of proceeds from the liquidation of the other assets.

<sup>326</sup> The purpose of this representation and the following one is to directly address the intent of the parties as to avoidable transfers. It is more fully discussed in the footnotes to Section [15]. Avoidance, below. The bankruptcy of the mortgagor can also give rise to the risk the transfer will be set aside as a voidable preference. § 547. "Preferences. \*\*\* (b) \*\*\*, the trustee may avoid any transfer of an interest of the debtor in property - (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made - (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title." 11 U.S.C. §547(b). The debtor is presumed to be insolvent if the transfer occurs within the 90 day period before filing. Therefore, it is prudent for a mortgagee to obtain the mortgagor's financial statements to evidence the mortgagor's solvency on the closing date of the deed-in-lieu. Being deemed an insider will lengthen the period of risk in which a transfer would qualify as a preference from 90 days to 1 year. One example of this is if the security interest is defective, so that the trustee can set it aside. The mortgagee's release of the guarantor is also a potential problem since some courts hold that a guarantor is equivalent to a creditor of the mortgagor by virtue of the guarantor's conditional right of subrogation to the mortgagee's rights. Thus, the release of the guarantor may mean the guarantor receives "greater percentage" than it would have if the property had been liquidated and the guarantor had been held liable for the deficiency. As in the case of fraudulent conveyance, the mortgagor should maintain the existence of the mortgage in case the deed in lien is voided.



6.2.17 Solvency.<sup>327</sup> As of the date hereof, after giving effect to the transactions provided for herein, Borrower is Solvent (as herein defined).<sup>328</sup> Solvency shall mean that: (i) the sum of the debts and liabilities (including, without limitation, contingent liabilities) of Borrower is not greater than all of the assets of Borrower at a fair valuation; (ii) the present fair salable value of the assets of Borrower is not less than the amount that will be required to pay the probable liability of Borrower on its debts as they become absolute and matured; (iii) Borrower has not incurred, and does not believe that it will incur, debts as they become absolute and matured; (iii) Borrower has not incurred, and does not believe that it will incur, debts or liabilities (including, without limitation, contingent liabilities) beyond Borrower's ability to pay as such debts and liabilities mature; (iv) Borrower is not engaged in, and is not about to engage in, a business or a transaction for which Borrower's property constitutes or would constitute unreasonably small capital; and (v) Borrower is not otherwise insolvent as defined in, or otherwise in a condition which would in any circumstances then or subsequently render any transfer, conveyance, obligation or act then made, incurred or performed by it avoidable or fraudulent pursuant to, any law or other legal requirement that may be applicable to Borrower pertaining to bankruptcy, insolvency or creditors' rights.

6.2.18 Compliance. [To Borrower's knowledge,] Borrower and the Mortgaged Premises are in compliance in all material respects with all laws, regulations and requirements applicable to Borrower and/or the Mortgaged Premises, and Borrower has not received, and has no knowledge of, any order or notice of any governmental investigation or of any violations or claims of violation of any law, regulation or any governmental requirement applicable to Borrower or the Mortgaged Premises.

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<sup>327</sup> If the mortgagee and an insolvent mortgagor restructure the nonrecourse debt prior to the ultimate transfer of the project to the mortgagee, the mortgagor may obtain the benefit of converting income based on forgiveness of debt from capital gains to cancellation of debt/original issue discount income (See Code § 1274 and § 108(e)(II)). The income tax consequences to a mortgagee-grantee are resolved within a single entity. The receipt of the real estate in exchange for forgiveness of debt will create net income or loss in the mortgagee; if two entities are used, the mortgagee would have a loss based on a bad debt, and the grantee would have income equal to the value of the real estate. But if the mortgagee and grantee file consolidated returns, this disparity should be resolved. In addition, the income tax effect may be different between the state revenue authority and the Internal Revenue Service.

<sup>328</sup> If Borrower were insolvent any additional consideration to Lender could be rescinded as a fraudulent conveyance. "The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily - (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business." 11 U.S.C. §548(a)(1)

6.2.19 Commercial Business Purpose. The loan transaction consummated pursuant to the Loan Documents and this Agreement was and is a commercial business transaction and the entire proceeds thereof were [and/or will be] used exclusively for commercial business purposes.

6.2.20 Lien Effect. Except as expressly modified herein, all security interests in the collateral set forth in the Loan Documents, as Lender is willing to modify them, subject to the terms and conditions stated herein, are and shall remain unchanged and in full force and effect. The Mortgage shall continue to secure the payment and performance of all indebtedness and obligations under the Loan Documents (as modified herein) and Borrower's performance and obligations thereunder and hereunder.

6.2.21 No Default. Except as described in Section 1, as of the date hereof, no default or event of default exists under the Loan Documents, and no condition exists which, but for the passage of time or the giving of notice or both, would constitute a default or event of default under the Loan Documents.<sup>329</sup>

6.2.22 Indebtedness. The outstanding balance of the principal due Lender is \$[ ] as of [ ], with past due and unpaid interest of \$[ ] as of [ ] which together with late charges, default rate interests, and reimbursements of expenses due Lender total in excess of \$[ ] ("Indebtedness").

6.2.23 Ratification. The Loan Documents, the indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Borrower, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties [except as specifically set forth in \_\_\_\_\_].

6.2.24 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Borrower as of the date hereof, as if each such representation and warranty were set forth at length herein.<sup>330</sup> Borrower hereby acknowledges that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.2.25 Due Formation. Borrower is a [corporation/partnership], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

OR

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<sup>329</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

<sup>330</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

6.2.26 Due Power. Borrower is an individual with full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

6.2.27 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.2.28 No Conflict. [To Borrower's knowledge,] The execution and delivery of this Agreement by Borrower will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the [partnership agreement/articles of incorporation or by-laws] of Borrower; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Borrower is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.2.29 Binding Effect. [To Borrower's knowledge,] This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of Borrower, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.2.30 No Litigation. [To Borrower's knowledge,] There is no litigation or governmental proceeding pending or, to the knowledge of Borrower, threatened against Borrower which affects Borrower's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.2.31 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Borrower contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.2.32 Complete Copies. Where copies of any documents have been delivered by Borrower to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto;(ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

### 6.3 Representations and Warranties of Guarantor.

6.3.1 Ratification. The Loan Documents, the indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Guarantor, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties [except as specifically set forth in \_\_\_\_\_].

6.3.2 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Guarantor as of the date hereof, as if each such representation and warranty were set forth at length herein.<sup>331</sup> Guarantor hereby acknowledges that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.3.3 Due Formation. Guarantor is a [corporation/partnership], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

OR

6.3.1 Due Power. Guarantor is an individual with full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

6.3.2 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.3.3 No Conflict. [To Guarantor's knowledge] The execution and delivery of this Agreement by Guarantor will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the [partnership agreement/articles of incorporation or by-laws] of Guarantor; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Guarantor is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.3.4 Binding Effect. [To Guarantor's knowledge] This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of Guarantor, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

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<sup>331</sup> Borrower would object to this down-date if the agreement is simply to sustain status quo.

6.3.5 No Litigation. [To Guarantor's knowledge] There is no litigation or governmental proceeding pending or, to the knowledge of Guarantor, threatened against Guarantor which affects Guarantor's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.3.6 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Guarantor contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.3.7 Complete Copies. Where copies of any documents have been delivered by Guarantor to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto;(ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

7. Possession. Possession of the Property is to be given to Lender, its nominee or assignee, by delivery of all keys thereto on the Closing Date.

8. Deliveries.

8.1 Pre-Closing Deliveries. Borrower shall deliver, or cause to be delivered, within the time period stated, the following:

8.1.1 Lease Documents. No later than [ten (10)] days after the Effective Date. The rent roll of all Leases, duly certified as true by Borrower as of the Closing Date, together with all the Leases, including prior amendments, estoppels, and subordination, non-disturbance and attornment agreements, if any, and all material correspondence with each tenant thereof (including, without limitation, proposed letters of intent), and any material correspondence or agreements relating to tenancies or third party use or occupancy of the Property;

8.1.2 Land Use Agreements. No later than [ten (10)] days after the Effective Date, all land use agreements or material correspondence relating to the site plan tenancy, use, occupancy or development of the Property;

8.1.3 Contract Documents. No later than [ten (10)] days after the Effective Date, copies of all written Contracts, material correspondence (pertaining to Contracts), and written disclosure of all other contracts, relating to the ownership, leasing, operation, management, or maintenance of the Property;

8.1.4 Permit Documents. No later than [ten (10)] days after the Effective Date, certified copies of the Permits;

8.1.5 Design Documents. No later than [ten (10)] days after the Effective Date, all plans, specifications, project manuals, drawings, engineering reports, maps, plans and specifications and other similar matters; any surveys of the Property;

8.1.6 Guaranty Documents. No later than [ten (10)] days after the Effective Date, all guarantees, bonds and warranties with respect to the Property (together with original counterparts of such instruments);

8.1.7 Title Documents. No later than [ten (10)] days after the Effective Date, to the extent not delivered to Lender before the initial disbursement of the Loan, a legible copy of each underlying recorded title document affecting or relating to the Property;

8.1.8 Potential Tenant Statement. Not later than [ten (10)] days after the Effective Date, for those currently in existence, and within [one] business day for those created after the Effective Date, a certified statement executed by an authorized officer of Borrower's general partner listing all nonresidential tenant prospects for leases of portions of Property with whom Borrower has engaged in discussions concerning the Property, specifying in reasonable detail the status of such discussions, listing the brokers through whom the potential tenants were submitted, and the basis, if any, for payment of commissions for those brokers (that statement, together with its related deliveries, the "Potential Tenant Statement") together with certified copies of any commission agreements with those brokers and lease proposals and/or letters of intent pertaining to those potential tenants and drafts of leases submitted by, or to, those potential tenants. The Potential Tenant Statement will be accompanied by letters addressed to Lender from the brokers identified in the Potential Tenant Statement continuing the list of prospective tenants and commission arrangements and containing agreements releasing Lender, its designee, and the Property for commissions for said tenants if leases are not entered into with such tenants within days after the Closing Date;

8.1.9 Contractor Statements. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a sworn statement executed by an authorized officer of Borrower's general partner and its general contractor( s) listing all contractors and subcontractors (and other persons who under the mechanics' lien laws of may be entitled to a lien) who have performed work on the Property and who remain unpaid and the amounts due and owing each of those contractors or subcontractors (and other persons who under the mechanics' lien laws of [ ] may be entitled to a lien) (the "Contractor Statements");

8.1.10 Cash Flow Statement. On or before [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, all books and records pertaining to the Property; and all other documents, licenses, warranties, permits, certificates or other materials, required to be conveyed or transferred by Borrower to Lender, its nominee or assignee, pursuant to the provisions of this Agreement; and an accounting certified by the chief financial officer of Borrower's general

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partner of all cash receipts and disbursements, income and expenses relating to the Property for the time period commencing [ ] through and including (including, without limitation, true and correct copies of all bank statements and related bank reconciliations covered in such period of time) (together with the related deliveries, the “Cash Flow Statement”);

8.1.11 Expense Statement. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a reasonably detailed list certified by the chief financial officer of Borrower’s general partner of all expenses in any manner or respect relating to the operation, maintenance, management, and leasing of the Property (the “Expense Statement”) for the period;

8.1.12 Payable Statement. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a list (certified by the chief financial officer of Borrower’s general partner) of all Payables with respect to the Property or with respect to which Borrower is an obligor (the “Payable Statement”) of the period ending [ ];

8.1.13 Inventory. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, an inventory certified by an authorized officer of Borrower’s general partner of all of Borrower’s tangible personal property (the “Inventory”);

8.1.14 Employee Statement. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a list certified by the chief financial officer of Borrower’s general partner of all of Borrower’s employees, which list shall recite such employees’ then current salary and benefits (and the status of the then funding of such benefits), together with true and correct copies of all applicable union, collective bargaining, and employment agreements relating to those employees, and confirmation that employee withholding and employer taxes, pensions, vacation pay, and other benefits required by applicable law or agreements have been paid or reserved in a manner permitted by law (with the related deliveries, the “Employee Statement”);

8.1.15 Utility Account List. On or before [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a list certified by Borrower’s general partner of all account numbers for the gas, electric, and other utility companies that serve the Property, other than those relating to individual meters for apartments rented to third parties (the “Utility Account List”);

8.1.16 Contract Certification. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a list certified by an authorized officer of Borrower’s of all Contracts in existence for the Property together with true and correct copies of each such Contract (with the related deliveries, the “Service Contract Certification”); and

8.1.17 Manager/Leasing Agreement List. Not later than [ten (10)] days after the Effective Date for those currently in existence, and within one business day for those created after the Effective Date, a list certified by an authorized officer of Borrower's general partner of all management agreements and leasing agreements or brokerage contracts with respect to the Property, together with true and correct copies of all of those agreements (with the related deliveries, the "Manager/Leasing Agreement List").

8.2 Closing Deliveries. Borrower shall execute and deliver or cause to be executed and delivered to Lender, its nominee or assignee, as Lender may direct on or before the Closing Date; and, shall submit forms for Lender's review and approval at least [ten (10)] days prior to the Closing Date:

8.2.1 Deed. Special Warranty Deeds naming such grantee as Lender may direct<sup>332</sup> and conveying title to the portions of the Property that Lender may direct, and is given in lieu of foreclosure, in proper form for recording including, without limitation, the following statement;

"This Deed is executed, delivered and accepted as a deed in lieu of foreclosure, and not as additional security, for each of those certain Mortgages listed on Exhibit "B" attached hereto and made a part hereof all of which were recorded in the Office for the Recording of Deeds in and for [ ] County, State of [ ], and for each other loan of record which is in default. It is the intention of the Grantor to transfer absolute title to the above described premises to the Grantee free of any equity of redemption by the Grantor. It is the further intention of the Grantor and Grantee that the lien created by the above described Mortgages, and any other loans or encumbrances held by Grantee or its affiliates, will not merge into the fee title acquired by the Grantee pursuant to this Deed. No such merger will occur until such time as the Grantee executes a written instrument specifically effecting such merger and duly records the same."<sup>333</sup>

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<sup>332</sup> The Lender will customarily take conveyance of the property in an affiliated entity to protect the lender's operating assets from ownership liabilities which either may be uninsurable because of custom and practice or may become uninsurable, for example because of the freeze in the insurance market, as occurred in the middle 1980's. On the other hand, exclusions from realty transfer tax and other entitlements available to the originator of the Loan may not be available to its affiliate.

<sup>333</sup> If an affiliate of the mortgagee were the grantee, the mortgage could be preserved with an express provision denying merger, so that the mortgagee could subsequently foreclose on the property in order to clear the title and cleanse the fee ownership of subordinate pre-existing secured or unsecured claims. The doctrine of merger deems that interests in real estate are merged if the two interests are held by the same entity and one is derived from the other without an intervening interest; therefore, a transfer of the mortgagor's property to the mortgagee ordinarily operates as a merger of the mortgagee's security interest with the mortgagor's title. Such a merger causes a discharge of the mortgage and eliminates the lender's right to clear title in a subsequent foreclosure action because the mortgage does not survive. The general rule is that courts presume an intent of non-merger when it is in the best interest of the mortgagee to do so. However, since the presumption is rebuttable, the mortgagee should include



8.2.2 Bill of Sale. Warranty bill of sale for the personal property comprising the Project, specifying whether such property is owned or leased by the Borrower or by a person claiming by or through the Borrower and any insurance policies;

8.2.3 Tenant Letter. A letter to the respective tenant advising of the change in ownership and directing the payment of rent to such party as the Lender, its nominee or assignee, shall designate, said letter to be, in form reasonably satisfactory to Lender, and estoppel certificates from tenants in form and substance satisfactory to Lender;

8.2.4 Assignment of Leases. Assignment of lessor's interest in Leases duly executed, acknowledged and delivered [BORROWER ADDITIONAL LANGUAGE: together with assumption by grantee of post-closing liabilities];

8.2.5 Assignment of Permits. An assignment, duly executed and acknowledged by Borrower, of (and delivery to Lender or its assignee of originals or copies of) all Permits, and all fees and/or security funds, deposits and other sums heretofore paid to any governmental authority or other third party in connection with the Property listing them in detail as to the Permit issuer, the holder of the funds, the amount held, and any amounts in dispute;

8.2.6 Letter to Third Parties. A letter to parties in interest advising of the change in ownership and directing all refunds or other payments due Borrower to instead be made to the deed grantee;

8.2.7 Diligence Documents.

8.2.8 FIRPTA. Certificates required under Section 1445 of the Internal Revenue Code of 1986;

8.2.9 Title Affidavit. Such affidavit of title or other certifications as shall be required by the Title Company to insure Lender's or its nominee or assignee, title to the Property as set forth in Section 6.2.9;<sup>334</sup>

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antimerger language in any settlement agreement and all conveyancing documents. Therefore, the preservation of the mortgage helps protect the mortgagee if the deed-in-lieu is subsequently voided. The risk is that if a recourse loan has been converted to a non-recourse loan by the mortgagee's covenant not to sue, and the deed is set aside, then the mortgagee may have lost the ability to be an unsecured creditor to the extent the value of the debt exceeds the value of the property. This requires a close review of the loan documents, including questions of title, authority, and enforceability.

<sup>334</sup> In some jurisdictions the realty transfer taxes are avoided upon a conveyance to the mortgagee but not to its affiliate. Even in jurisdictions which exempt transfers to such affiliates from that tax, there are some which require the contemporaneous extinguishment of the mortgage for the exemption. In other jurisdictions deeds-in-lieu are taxable events for realty taxes, though "friendly foreclosures" are not. Some jurisdictions permit the loan documents, and the related judgment if foreclosure has been commenced, to be assigned to a single purpose entity which can then take the deed-in-lieu on a non-taxable basis, some limit the exemption to the case where the grantee of the deed was the purchase-money mortgagee. If the grantor is a single asset corporation, bulk sales tax liabilities may arise upon a deed-in-lieu. These local taxes are frequently imposed as liabilities of both the grantor and grantee of the property, and therefore the mortgagee can be at risk to pay them.

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8.2.10 Memorandum of Agreement of Sale. A Memorandum of Agreement of Sale reflecting Lender's beneficial interest as purchaser of the Property in form and substance as reflected in Exhibit 8.2.10, and otherwise on terms acceptable to Lender;

8.2.11 Borrower Organization Documents. Borrower's Corporate Resolution; Certificate of Good Standing; and Incumbency Certificate;

8.2.12 Guarantor Organization Documents. Corporate Resolution; Certificate of Good Standing; and Incumbency Certificate;

8.2.13 Bank Cards. Change of name cards for the Account to rename it [            ];

8.2.14 Estoppel. Current Estoppel Certificates from Major Tenants;

8.2.15 Assignment of Option. Assignment of Rights under Option Agreement in recordable form, together with UCC-1 financing statements to perfect Lender's interest in such assignments;

8.2.16 Assignment of Indemnities. Assignment of [Third Party] Indemnification Obligations;

8.2.17 Assignment of Contracts. Assignment of all right, title, interest and claims to [Third Party] obligations for the purchase of interests in the Property; and

8.2.18 Disbursement Agreement. Disbursement Agreement as to funds in the Account.

8.2.19 Special Power of Attorney. Borrower shall execute and deliver or cause to be executed and delivered to Lender, its nominee or assignee, in proper form for recording a Special Power of Attorney.

8.2.20 [Mortgage Modification]. Modification Agreement of the Mortgage in recordable form;]<sup>335</sup>

8.2.21 Assignment of Leases Modification. Modification Agreement of the Assignment of Lease and Rents in recordable form;

8.2.22 [Pledge by Guarantor]. Pledge by Guarantor of all of Borrower's Equity, accompanied by assignments in blank separate from certificates, resignation of directors, and resignation of all officers;]

8.2.23 [UCC -3 for Intangibles]. UCC-3's amending financing statements of Borrower to include security interests in documents referred to in Subsection [    ] and all

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<sup>335</sup> The Loan Document Modifications of 8.2.20 to 8.2.25 would apply if the Lender anticipated either (1) a protracted period before the Closing Date, or (2) deferral of recording the Deed after the Closing Date.

agreements of sale, development agreements, deposits, permits, licenses, escrows, contract rights and general intangibles held by them;]

8.2.24 [Subordination of Affiliated Debt]. Assignment and Subordination of Borrower's debts to shareholder or affiliates for management, construction, leasing, development or construction fees;]

8.2.25 [Foreclosure Filings]. Such answers, stipulations and affidavits as Lender may reasonably request to facilitate foreclosure of the liens and security interests against the Property created by certain of the Loan Documents[ ].<sup>336</sup>

8.2.26 [BORROWER ADDITIONAL LANGUAGE].<sup>337</sup> Assumed Liabilities. Assumption and Indemnity of Liabilities shall be set forth on Exhibit 8.2.26 ("Assumed Liabilities").]

### 8.3 Ancillary Documents.

8.3.1 Opinions. Borrower shall have delivered to Lender such legal opinions, in form and substance satisfactory to Lender and its counsel, as Lender shall require.

8.3.2 Title Insurance. Borrower shall have delivered to Lender, at Borrower's expense, a title bringdown endorsement issued by \_\_\_\_\_ ("Title Company") for Loan Policy No. \_\_\_\_\_ ("Title Policy") insuring that (i) the status of title to the Mortgaged Premises has not changed since the date of the Title Policy upon execution of this Agreement, (ii) the Mortgage, as amended, has not merged with the Deed; (iii) insured coverage of the Property is based on replacement value; and (iv) insured coverage of the Property includes removal of any "creditors rights" exception.<sup>338</sup>

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<sup>336</sup> A provision addressing foreclosure would be appropriate if Lender wished to retain the right as an alternative remedy.

<sup>337</sup> Borrower may negotiate for an express assumption of liabilities and indemnification from Lender for Property related claims arising post-closing. Lender may seek to limit that to liabilities disclosed to Lender in an exhibit.

<sup>338</sup> In some jurisdictions, the mortgagee's title insurance can be converted to an owner's policy by the mortgagee or the assignee of the loan documents as of the original effective date of the loan policy; however, that loan policy would not insure against the effect of subsequent activity, whether it is priming the mortgage, such as a junior lien holder who pays priming real estate taxes and becomes subrogated to the taxing authority's position, or defects in the deed-in-lieu. The risks of relying on the "converting" loan policy also apply in a foreclosure. Some jurisdictions require a full premium for an owner's policy which is effective from the date of transfer. Other jurisdictions permit a discounted premium based on the predecessor owner's policy. It may be necessary to obtain special endorsements to the new owner's policy to insure over claims of creditors for fraudulent conveyance. Furthermore, because the insurance would otherwise be for no more than the fair market value of the Property or the stated amount of insurance, whichever is less, it may be necessary to have a special endorsement that the agreed value of the real estate shall be the replacement cost amount, that is actually expended by the Lender, rather than the value based on a cash flow analysis, which could be much less. Lastly, the Lender's policy will not insure the mortgagee as owner until the mortgage is discharged. Paragraph 2(a) of the conditions and stipulations of the 1987 ALTA loan policy provides in part: "The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or

8.3.3 Title Easements. Borrower shall execute and deliver in recordable form such covenants, conditions, restrictions and easements as Lender may require for the future operation of the Property.

8.3.4 Lender Expenses. Borrower shall have paid or reimbursed Lender for all costs and expenses incurred in connection with this Agreement including, without limitation, all Title Company charges and recording costs and the legal fees and disbursements of Lender's counsel in connection with this Agreement.

9. Conditions.

9.1 Conditions Precedent. The obligations of Lender hereunder are subject to the fulfillment of the following conditions prior to or on the Closing Date (any one of which may be waived in whole or in part by Lender at or prior to the Closing) and in the event any of the conditions are not complied with, Lender may terminate this Agreement by notifying the Borrower and thereafter this Agreement shall be null and void:

9.1.1 Due Representation. The warranties and representations made by Borrower in this Agreement shall be true in all material respects on the Closing Date as though such representations and warranties were made on the Closing Date (except for changes in the Leases permitted under the terms of this Agreement).

9.1.2 Due Performance. Borrower shall have performed and complied with all of the material terms and conditions required by this Agreement to be performed and complied with by it prior to or on the Closing Date.

9.1.3 Due Diligence. Lender shall be satisfied with the results of its inspection of the Property (including, without limitation, structural and environmental conditions,<sup>339</sup> and title and survey conditions), Borrower's books and records, and such other information which the Lender may deem pertinent in respect to the Property. Borrower agrees to allow Lender and Lender's agents, employees and representatives to inspect the Property, including taking measurements of and samples of materials from the Property, and copy the books, records and documents of Borrower and the Property, from time to time, at reasonable times during business hours. Borrower shall make the Property all such books, records and documents of Borrower available to Lender, Lender's agents, employees and representatives from time to time at reasonable times during business hours after request by Lender. Borrower agrees that Lender and Lender's agents and employees shall, at such times, have the right to inspect and measure the Property and interview the maintenance employees, project manager and construction manager or general contractor concerning the Property.

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interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation...."

<sup>339</sup> Environmental audits to qualify for the "innocent land owner" exclusion for CERCLA liability [CITE] should be obtained. The mortgagee should be aware that this does not necessarily insulate the lender from liability under state laws, such as Pennsylvania HSCA [CITE].

9.1.4 Casualty. In the case of damage or destruction to the Property before the Closing Date, Borrower shall promptly give Lender written notice of that damage or destruction, together with such reasonable details of which Borrower may have knowledge, including, without limitation, an estimate of the reasonable and necessary cost of restoration of the Property as nearly as practicable to its condition immediately before that damage or destruction. After Borrower's notice is given, Lender at its option may terminate this Agreement by giving written notice of termination to Borrower on or before the Closing Date without further obligation under this Agreement, or if Lender shall elect not to so terminate this Agreement, the parties to this Agreement shall close the transaction contemplated by this Agreement in accordance with the terms of this Agreement and shall receive from Borrower an assignment by Borrower of all insurance proceeds, including rental loss insurance proceeds for the period from and after the Closing Date until the Property is fully restored, for such damage or destruction.

9.1.5 Condemnation. If before the Closing Date written notice shall be received by Borrower of any action, suit, or proceeding to condemn or take all other or any part of the Property under the powers of an eminent domain, Borrower shall promptly send written notice thereof to Lender, and Lender shall have the right to terminate its obligations under this Agreement by notice in writing to Borrower given on or before the Closing Date. If the Lender shall not elect to terminate its obligations under this Agreement under this Paragraph, Lender shall receive an absolute assignment on the Closing Date of the entire proceeds of or right to the condemnation award. Borrower shall convey the Property less that part so taken or subject to the condemnation proceeding, as the case may be.

9.2 Conditions Subsequent. The Covenant Not to Sue will at Lender's election be void *ab initio* and will be of no force or effect and the Borrower [and the Guarantors] will be jointly and severally and personally obligated to repay to the Lender the Indebtedness if any one or more of the matters described below in this Section occurs. The reinstatement of the obligations of the Borrower [and the Guarantors] to pay the Indebtedness and the abrogation of the Covenant Not to Sue will not operate to affect or to alter the provisions agreed to by the Borrower [and the Guarantors] for the benefit of Lender pursuant to Section [ ] of this Agreement. The conditions subsequent are as follows:

9.2.1 Litigation. The Borrower[, the Guarantors], or any person claiming by or through the Borrower[ or the Guarantors] ever commence, join in, assist, cooperate in or participate as an adverse party or as an adverse witness (subject to compulsory legal process which requires testimony) in any suit or other proceeding against any Released Parties (defined in Section [ ] below) relating to the Loan, the Loan Documents, the Indebtedness the Property including in the event of foreclosure of the Property, or which challenges the validity of the Deed, the Bill of Sale or the Assignment, the transfer of the Property to Lender or its assignee, the adequacy or sufficiency of the consideration for such transfer, or Lender's or its assignee's title to the Property, the Borrower [or the Guarantors] opposing, defending, or committing any act whatsoever which may delay, impede, or prohibit said foreclosure action.

9.2.2 Avoidance.<sup>340</sup> The deed or any other document evidencing a conveyance of the Property to the Lender is ever rendered void or is rescinded by operation of law, or by order of any state or federal court, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the Borrower[, the Guarantors] or any person claiming by or through the Borrower [or the Guarantors] or any of their respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

9.2.3 Breach. The warranties contained in the deed or any other document evidencing a conveyance of the Property to the Lender are breached.

9.2.4 Access. The Borrower[, the Guarantors] or any person claiming by or through the Borrower or the Guarantors deny the Lender, or the Lender's representatives, the right to inspect the Property, or to inspect, audit and transcribe the books, records, contracts, and insurance policies maintained by the Borrower[, the Guarantors] or any person claiming by or through the Borrower or the Guarantors in connection with the construction, operation or maintenance of the Property.

9.2.5 No Release. The release of the Released Parties set forth in Section [ ] of this Agreement is ever rendered void, is rescinded or adjudicated unenforceable by operation of law or by order of any state or federal court of competent jurisdiction, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the Borrower, the Guarantors or any person claiming by or through the Borrower or the Guarantors or any of their respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

9.2.6 Insolvency or Bankruptcy. The Borrower[ or Guarantors] are the subject of a bankruptcy proceeding or insolvency or receivership proceeding after the Closing.

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<sup>340</sup> The bankruptcy of the mortgagor raises the risk to the mortgagee of the voiding of the deed-in-lieu as a fraudulent conveyance. Broadly speaking, a fraudulent conveyance is a transfer that is either (i) made with actual intent to hinder, delay or defraud a creditor, or (ii) is for less than a reasonably equivalent value and the borrower/transferor was insolvent at the time of the transfer, became insolvent as a result of such transfer, was left with an unreasonably small amount of capital, or intended to incur debts beyond its ability to pay. The fact that the mortgagor is the one to approach the mortgagee with the proposal for a deed-in-lieu is additional evidence of mortgagee's good faith. The analysis of fraudulent conveyance can have different scope under state law and under the Bankruptcy Code. With a deed-in-lieu, this "reasonably equivalent value" requirement translates into the issue of whether the transfer provides the mortgagor with an equivalent value. Thus, if the fair market value (which is not necessarily the actual value received from a foreclosure sale but rather a calculated or appraised value) of the real estate is less than the antecedent debt, then the estate receives an equivalent value. But if the value of the property is greater than the debt, the transfer could be subject to avoidance as a fraudulent conveyance. Though previously much ink and sentiment was spent on whether if the debt forgiven is less than 70 % of the property value, then the mortgagor's estate did not receive equivalent value. Now most jurisdictions conclude the deed can be rescinded only if the requirements are not strictly met for a proper foreclosure conducted in a commercially reasonable manner to achieve the best possible results.

10. Covenant Not to Sue Borrower Parties.<sup>341</sup>

10.1 Covenant Not to Sue. Effective on the Closing Date and only if the transactions contemplated by this Agreement are consummated in accordance with the terms of this Agreement, the Lender does hereby Covenant Not to Sue the Borrower [and the Guarantors], their shareholders, directors, partners, agents, trustees, beneficiaries and employees, as well as the respective heirs, personal representatives, successors and assigns of any and all of them (hereafter collectively called the "Borrower Parties") for up to an amount equal to in aggregate the Covenant Consideration or any deficiency judgment liability or any personal liability which relates to, in whole or in part, directly or indirectly: (a) the Loan; (b) the Loan Documents; or (c) any agreement of the Borrower [or the Guarantors] relating to the Property or the Indebtedness as reduced by a credit for the Covenant Consideration; EXCEPTING ONLY the obligations of the Borrower [and the Guarantors] to perform the terms of this Agreement and the documents delivered pursuant to this Agreement which survive the Closing Date and liabilities, including the Indebtedness and New Value to the extent in excess of the Covenant Consideration, such Covenant Not to Sue to be treated as a credit against liabilities due from Borrower [and Guarantors] in such order and among such liabilities as Lender may determine in its sole, unfettered discretion including, without limitation, to be applied as a credit only after all Indebtedness, except the Covenant Consideration, has been paid in full.

10.2 Other Loans. It is expressly understood and agreed that nothing contained in this Agreement shall, in any way, release Borrower Affiliates [or Guarantors] from any obligation, duty or liability arising with respect to that certain loan from Lender to [ ] ("Other Borrower") (the "Other Loan") and the Other Loan Documents (as hereinafter defined). Further, nothing contained in this Agreement shall, in any way, release the Borrower [and the Guarantors] from any obligation or duty arising pursuant to any documents or agreements executed contemporaneously herewith or hereafter. For the purposes hereof, the term "Other Loan Documents" shall mean that certain Note from Other Borrower to Lender dated [ ] in the original principal amount of \$[ ] evidencing the Other Loan, that certain Construction Mortgage and Security Agreement from Other Borrower to Lender dated [ ] and such other documents evidencing or securing the Other Loan.

11. Absolute Conveyance. The Borrower [and the Guarantors] acknowledge and agree that: (a) the conveyance of the Property to the Lender, or its assignee or nominee, pursuant

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<sup>341</sup> Under the doctrine of extinguishment, the mortgagee risks losing the benefit of the real estate collateral if the mortgagee, in exchange for the deed, releases the mortgagor from liability under the loan. If the mortgagor is released from liability, the obligation may be deemed satisfied and, concomitantly, the mortgage extinguished. To avoid the application of the doctrine of extinguishment of the mortgage, the mortgagee should covenant not to sue the mortgagor for any deficiency judgment, and expressly disclaim any intent to release. If the conveyance is later set aside, the mortgagee has not extinguished the position originally held. The mortgagor would want the covenant to be without condition, but a mortgagee should qualify the covenant as not precluding claims based on breach of the warranties and other terms of the settlement documents, especially as to mortgagor's authority, the quality of title, and the financial and physical conditions of the property on which the mortgagee is relying. The mortgagee might also seek to reserve all claims against any persons other than the mortgagor, so that the liability of the guarantor and general partner, if any, are not unintentionally released where the mortgagor-partnership is being preserved from liability. The mortgagee might also condition the covenant upon no insolvency proceeding being filed with respect to the mortgagor, though its enforceability may be questionable.

to the terms of this Agreement is an absolute conveyance of all of the Borrower's [and all of the Guarantors'], right, title and interest in and to the Property in fact as well as in form and the deed, bill of sale and other conveyance documents are not intended to be a mortgage, trust conveyance, deed of trust or security instrument of any kind; (b) the consideration for such conveyance is exactly as recited in this Agreement; (c) after the Closing Date the Borrower [and the Guarantors] will have no further interest (including rights of redemption) or claims in, to or against the Property or to the proceeds or profits that might be derived therefrom except for the accounting of Covenant Consideration after the Closing Date, (d) the conveyance herein is in consideration of the Lender's covenants and releases contained in this Agreement, (e) the conveyance is not intended to secure in any way whatsoever either the Indebtedness or the performance of any other obligation by Borrower [or Guarantors] and (f) the negotiations which led to the consummation of this Agreement were conducted in good faith and purely from the standpoint of the Lender or its nominee or assignee holding title to the Property from Borrower for a good and adequate consideration, with the intent to take and continue to hold full and complete possession of the Property as its new owner.

12. No Merger. The Parties acknowledge and agree that notwithstanding the Covenant Not to Sue contemplated by this Agreement, all of the Loan Documents will remain in full force and effect after the transactions contemplated by this Agreement have been consummated. The parties further acknowledge and agree that the interest of the Lender, its nominee or assignee, in the Property created by all of the conveyances provided for herein will not merge with the interests of the Lender in the Property under the Loan Documents. Since the interests of the Lender under the Loan Documents are necessary to protect the Lender from intervening claims and junior liens of third persons, it is the express intention of each of the parties (and all of the conveyances provided for herein will so recite) that such interests of the Lender in the Property will not merge, but be and remain at all times separate and distinct, notwithstanding any union of said interest in the Lender at any time by purchase, termination or otherwise and that the liens held by the Lender against the Property created by certain of the Loan Documents will remain at all times valid and continuous liens against the Property.

13. Lien Priority.<sup>342</sup> If it is determined that any other person or entity other than the Lender shall have a lien, encumbrance, or claim of any type which has a legal priority over any term of this Agreement, then the original terms of the Loan Documents shall be deemed severed from this Agreement and separately enforceable from the terms thereof as modified hereby in accordance with their original terms, and Lender shall retain all legal or equitable priorities which were in existence before the date of execution of this Agreement. It is understood by and is the intention of the parties hereto that any legal or equitable priorities of the Lender over any party which were in existence before the date of execution of this Agreement shall remain in effect after the execution of this Agreement.

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<sup>342</sup> The Lender seeks to avoid the effect of impairing an intervening lienor that holds a lien which is subordinate to the mortgage loan before it is amended by the Agreement, because the lienor may be able to claim it is senior to the modification created by this Agreement and to the extent impaired by the modification, can void the Agreement or all of the Loan as modified by the Agreement.



14. Guarantor Liability Limited to Collateral Agreement. Provided that, and for so long as, neither Borrower nor any Guarantor is in violation this Agreement, Lender hereby agrees that:

14.1 Guarantor Interest in Collateral Agreement. The Guarantors' liability with respect to Guarantors' Obligations and the Deficiency shall be limited to Guarantor's interest in the Collateral Agreement, plus an amount equal to any Collateral Agreement Proceeds which are received by Guarantors, or their successors and assigns, and not paid to Lender.

14.2 No Forbearance from Collateral Agreement. Prior to the date which is one year after the date of this Agreement (the "Forbearance Date"), Lender shall forbear from exercising any rights and remedies available to Lender in order to collect the Deficiency (including, without limitation, Lender's right to execute upon assets of the Guarantor Group pursuant to the Judgment) other than such rights as Lender may have pursuant to the Security Agreement between Lender and Guarantors of even date herewith with respect to the Collateral Agreement.

14.3 Collateral Agreement Proceeds Recovery. From and after the Forbearance Date, Lender may exercise any rights and remedies available to Lender in order to collect the Deficiency (including, without limitation, causing writs of execution to be issued pursuant to the Judgment upon the assets of any of the Guarantors) provided, however, that Lender's recovery pursuant thereto shall be limited to an amount equal to any Collateral Agreement Proceeds theretofore received by the Guarantors or their successors or assigns and not paid to Lender.

14.4 Right to Friendly Foreclosure. Nothing contained in this Agreement shall be construed to prohibit Lender from exercising its rights and remedies pursuant to the Mortgage, the other Loan Documents or the Judgment in order to execute upon the Property and other collateral securing the Loan (excluding the Guaranty). By way of example, and not limitation, the parties acknowledge that Lender may cause the Property to be sold at sheriff's sale upon writ of execution issued pursuant to the Judgment.

14.5 Survival of Collateral Agreement. Lender shall not be obligated to cause the Judgment to be marked settled, discontinued and ended as against the Guarantors until the earliest to occur of (i) the expiration of the Collateral Agreement without any Collateral Agreement Proceeds being payable to the Guarantors and the delivery of a release of [Borrower] from any liability under the Collateral Agreement executed by the Guarantors and in form and substance satisfactory to Borrower, (ii) the Guarantors' payment to Lender of the entire Deficiency, or (iii) after Guarantors have received payment of a sales commission by [Borrower] pursuant to the Collateral Agreement, the Guarantors' payment to Lender of all of the Collateral Agreement Proceeds theretofore received by the Guarantors or their successors or assigns.

15. Reaffirmation of Guarantor.

15.1 Guaranty Reaffirmation. In consideration of the agreements and amendments made by Lender in this Agreement and to induce Lender to take such action (acknowledging that Lender would not do so without this reaffirmation and consent), Guarantor

hereby ratifies, reaffirms, and continues in full force and effect the Guaranty. The Guaranty shall continue for all purposes notwithstanding the amendments, modifications, and other actions embodied in the foregoing Agreement.

15.2 Guaranties Valid. The Guaranty constitutes the valid, legal and binding obligation of the Guarantor, enforceable against Guarantor in accordance with its terms.

15.3 Waiver of Indemnity and Contribution. Notwithstanding any provisions of the Guaranty to the contrary, until the Loan has been paid in full to Lender, Guarantor hereby irrevocably waives any claims or other rights which it may now have or hereafter acquire against any other guarantor of the guaranteed obligations under the Loan that arise from the existence, payment, performance, or enforcement of Guarantor's obligations under the Guaranty, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution, indemnification, any right to participate in any claim or remedy of Lender against such other guarantor of the guaranteed obligations under the Loan or any collateral which Lender now has or hereafter acquires, whether or not such right, claims or remedy arises in equity or under contract, statute, or common law, including, without limitation, the right to take or receive from any other guarantor, directly or indirectly, in cash or other property or by setoff or in any other manner, payment or security on account of such right, claim, or remedy. If any amount shall be paid to Guarantor in violation of the preceding sentence and the guaranteed obligations under the Loan shall not have been paid in full, such amount shall be deemed to have been paid to Guarantor, as the case may be, for the benefit, and held in trust for the benefit, of Lender and shall forthwith be paid to Lender to be credited and applied upon the guaranteed obligations under the Loan whether matured or unmatured, in accordance with the terms of the Loan Documents between Borrower and Lender. Guarantor acknowledges that it will receive direct and indirect benefits from the Loan, this Agreement and the other transactions evidenced by and contemplated in the Loan Documents, and that the waiver set forth in this paragraph is knowingly made in contemplation of such benefits.

16. No Bankruptcy Intent; Voidable Transfers.<sup>343</sup>

16.1 No Bankruptcy Intent. Borrower represents and warrants that it does not have any intent to (i) file any voluntary petition under any Chapter of the Bankruptcy Code, Title 11, U.S.C.A. ("Bankruptcy Code"), or in any manner to seek any proceeding for relief, protection, reorganization, liquidation, dissolution or similar relief for debtors under any local, state, federal or other insolvency law or laws providing relief for debtors ("Debtor Proceeding"), or (ii) directly or indirectly to cause or permit any involuntary petition under any Chapter of the Bankruptcy Code to be filed against Borrower, or (iii) directly or indirectly to cause or permit the Property or any portion or any interest of Borrower in the Property to become the property of any bankrupt estate or the subject of any Debtor Proceeding. Borrower acknowledges that the filing of any petition or the seeking of any relief in a Debtor Proceeding by Borrower, whether directly or indirectly, would be in bad faith and solely for purposes of delaying, inhibiting or otherwise impeding the exercise by Lender of Lender's rights and remedies upon the occurrence of an

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<sup>343</sup> Provisions like this seeking to contractually circumvent the automatic stay may not be enforceable. Bankruptcy counsel should be consulted prior to including such provisions.

event of default hereunder against Borrower and the Property pursuant to the Loan Documents. Without limiting the foregoing, Lender shall be and is entitled to and Borrower hereby consents to, relief from the stay imposed by Section 362 of the Bankruptcy Code, as amended, in any bankruptcy proceedings.

16.2 Voidable Transfers. Without limiting any of the foregoing, if any payments of money (including Payment Amounts) or other transfers made to Lender by the Borrower pursuant to this Agreement shall for any reason subsequently be declared to be “fraudulent” (within the meaning of any state or federal law relating to fraudulent conveyances), preferential, or otherwise voidable or recoverable, in whole or in part for any reason, under the Bankruptcy Code or any other state or federal law (collectively referred to as “Voidable Transfers”) and Lender is required to repay or restore the amount of any such Voidable Transfers or any portion thereof, then, as to the amount repaid or restored (including all costs, expenses and attorneys’ fees paid by Lender related thereto), the liability of Borrower shall automatically be revived, reinstated and restored in such amount or amounts, and shall exist as though such Voidable Transfers had never been made to Lender. Borrower expressly acknowledges and agrees that Lender may rely upon advice of counsel and, if so advised by counsel, may settle, without defending, any action to void any alleged Voidable Transfers, and that upon such settlement Borrower shall again be liable for any deficiency resulting from such settlement as provided in this Agreement

17. Pre-existing Conditions and Claims.<sup>344</sup>

17.1 Ratification and Warranty.<sup>345</sup> (i) All of Borrower’s [and Guarantor’s] Obligations to the Lender as set forth in the Loan Documents are in full force and effect, (ii) the Loan Documents to which it is [they are] a party were all properly and duly executed and delivered, (iii) the Loan Documents to which it is [they are] a party are now, and at all times have been, in full force and effect in accordance with their terms and (iv) there are no amendments, waivers or modifications of the Documents, except for those made in writing and signed by the Lender and the Borrower [and Guarantor], and identified in the Recitals, and (iv) Lender has complied properly performed and satisfied in a timely manner with all of its obligations under the Loan Documents, including delivery of notice and time for Borrower [and Guarantor] to cure its [their] defaults, if any.

17.2 Waiver.<sup>346</sup> Borrower [and Guarantor] for itself [themselves] and its [their respective] successors and assigns, and by its [their] execution hereof hereby acknowledge[s], admit[s] and agree[s] that, as of the date of execution and delivery of this Agreement, the Borrower [and Guarantor] (i) have no defenses, counterclaims or offsets relating to its [their] obligations under or in respect of the Loan Documents or to the enforcement or exercise by Lender of any of its rights, powers or remedies under or in respect of the Loan Documents, or (ii) alternatively, hereby irrevocably waive[s], and relinquish[es], any and all such objections,

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<sup>344</sup> A Lender would typically seek the protections of the various releases and waivers contained in this Section 18 at each instance the Borrower seeks an accommodation or relief from the then current Loan Documents Provisions.

<sup>345</sup> The Lender seeks to pre-empt a Borrower challenge against the enforceability of the Loan Documents.

<sup>346</sup> The Lender seeks to extinguish any defenses Borrower may have to enforcement of the Loan Documents.

claims, defenses, counterclaims or offsets, that may exist as of the date hereof including, without limitation, any and all such objections, claims, defenses, counterclaims or offsets that are unknown, unsuspected, unanticipated or undisclosed as of such date.

17.3 Release.<sup>347</sup> Although Lender regards its conduct as proper and does not believe Borrower [or Guarantors] have any claim, cause of action, offset, or defense against Lender, its participating lenders, co-lenders, subsidiaries, affiliates, parents, predecessors in interest, nominees, assignees, officers, directors, agents, employees, servants, attorneys and representatives, as well as their respective heirs, personal representatives, successors and assigns, or any and all of them (hereinafter collectively called the “Released Parties”), Lender wishes and Borrower and Guarantors agree to eliminate any possibility that any conditions, acts, omissions, events, circumstances, or matters which occurred prior to the effective Date could impair or otherwise subject Lender or any of the other Released Parties to any liability other than is expressly stated in this Agreement and the Loan Documents. Borrower [and Guarantor] on behalf of itself [themselves] and its [their respective] successors and assigns (collectively the “Releasing Parties”) remise[s], release[s], acquit[s], satisfy[ies] and forever discharge[s] the Released Parties from any and all manner of debts, accounts, bonds, warranties, representations, covenants, promises, contracts, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands and causes of action of any nature whatsoever, which existed, arose, or occurred at any time prior to or concurrently with the date hereof of any character whatsoever whether known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, including without implied limitation, such claims and defenses as fraud, mistake, duress and usury, which Borrower [or Guarantors] ever had or now has against the Released Parties, jointly or severally, for or by reason of any matter, cause or thing whatsoever occurring prior to the date hereof, which relates to, in whole or in part, directly or indirectly: (i) the Loan, including the administration or funding thereof, (ii) the Loan Documents, (iii) the Obligations, (iv) the Property, including the financing and operation of same, and (v) any other agreement or transaction between any of Releasing Parties and any of Lender Parties concerning matters arising out of or relating to the items set forth in subsections (i) and (iv) above.]

17.4 Acknowledgments.<sup>348</sup> Each Borrower and Guarantor hereby acknowledges that it is or is owned by sophisticated and experienced real estate developers and investors, each of whom has a full understanding of the terms and conditions of this Agreement and the risks involved in entering into this Agreement, that this Agreement has been fully negotiated and that compromises on the part of Lender and Borrower were made before agreement was reached on the final terms hereof, that at all times each Borrower [and Guarantor] has [have] been represented by its [their] own attorneys and such other competent counsel as it [each of them] has [have] chosen to engage in the negotiation of the terms and the preparation and execution of all documents, and has relied solely on the advice and instruction of its own attorney who has had the opportunity to review and analyze all of the documents for a reasonable period of time prior to the execution by the Borrower [and Guarantor]; that Borrower [and

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<sup>347</sup> The Lender seeks to extinguish any claims the Borrower may have for Lender liabilities.

<sup>348</sup> The Lender seeks to extinguish any common law or equitable claims that could be asserted as voiding the Loan Documents.

Guarantor] is entering into this Agreement with the conviction that it is a fair agreement and that it represents an equitable compromise of the competing interests of the parties hereto and that, in addition, it was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any party, and that Borrower [and Guarantor] acknowledges this Agreement shall constitute a complete defense to any claim, cause of action, defense, liability or obligation released under this Agreement, and agrees that after the execution and delivery of this Agreement on the date hereof, the only claims or causes of action which it and/or he could possibly have against any of the Released Parties would be those arising under this Agreement, or a written contract hereafter executed by Lender in favor of Borrower and/or Guarantor those arising from conduct occurring after the execution and delivery of this Agreement. Neither Borrower nor Guarantor shall institute or prosecute (or, except to the extent required by law, in any way, assist or cooperate with the institution or prosecution of) any action, suit, hearing, or other proceeding of any kind, nature, or character at law or in equity against Released Parties in order to collect, enforce, declare, assert, establish, or otherwise raise any defense, claim, cause of action, contract, liability, indebtedness, or obligation which is within the scope of those released in this Section or which arise out of any fact, contract, condition, claim, cause of action, indebtedness, liability, obligation, event, action, omission, circumstance, or other matter or reason of any kind which is the basis for any such defense, claim, cause of action, liability, indebtedness or obligation which is released hereunder.

17.5 No Admission.<sup>349</sup> Nothing in this Agreement shall be construed as (or shall be admissible in any legal action or proceeding as) any admission by Released Parties that any defense, indebtedness, obligation, liability, contract, claim, or cause of action exists which is within the scope of those released within this Section, because Lender denies that any such matters exist and regards this release as unnecessary except to confirm its understanding of the position of the Parties.

17.6 Indemnification.<sup>350</sup> Borrower hereby indemnifies, defends, and holds harmless Released Parties and all persons, firms, corporations, and organizations on their behalf (collectively, the "Indemnified Parties") of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever that any third party may now have or claim to have against such Indemnified Parties, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way touching, concerning, relating to, arising out of or founded upon the [ADDITIONAL BORROWER LANGUAGE: The Borrower's interest in and acts or omissions taken with respect to] the Loan, the Obligations or any of the Loan Documents, including all such loss or damage of any kind heretofore sustained, or that may arise as a consequence of the dealings between the Parties up to and including the Effective Date. [ADDITIONAL BORROWER LANGUAGE: except to the extent due to Lender's [gross] negligence or intentional misconduct].

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<sup>349</sup> The Lender seeks to prevent the claim that the act of seeking these protections under Section 18 Pre-Existing Conditions and Claims is due to the existence of the bad acts for which the Lender is being protected.

<sup>350</sup> The Lender seeks Borrower's protection against claims by third parties.

17.7 No Waiver.<sup>351</sup> Borrower acknowledges and confirms that by not exercising the rights, remedies and privileges available to Lender, for any reason whatsoever, including the negotiation and execution of this Agreement, Lender is not waiving and has not waived any of its rights to exercise them in accordance with the Loan Documents and this Agreement.

17.8 No Course of Conduct.<sup>352</sup> Borrower acknowledges and agrees that by negotiating and entering into this Agreement, Lender is not establishing a course of conduct nor a pattern of operation nor an implicit or explicit understanding that Lender may or will ever further revise or modify any term or condition of the Loan Documents or this Agreement or agree to forbear at any time in the future if an event of default should occur under and pursuant to the Loan Documents, this Agreement and/or any document or instrument contemplated or referred to herein.

17.9 No Cure.<sup>353</sup> Borrower hereby acknowledges and agrees that except as specifically set forth herein, neither this Agreement nor any actions pursuant to this Agreement nor any negotiations or discussions (including the Discussions) among Borrower, [Guarantor] any of [their respective] agents, officers or principals and any of the Lender Parties, shall be deemed or construed to cure any existing defaults under the Loan Documents, constitute a reinstatement, novation or release of the Loan or the Loan Documents or an extension of the maturity date of the Loan, or constitute a modification, amendment or waiver of the Loan or Loan Documents. In addition and not in limitation of the foregoing, it is expressly understood and agreed that Borrower's default(s) under the Loan Documents is/are not cured or waived by the acceptance of any funds paid by or on behalf of Borrower pursuant to this Agreement, including, without limitation, any Collateral Payment Amounts received hereunder.

17.10 Future Negotiations.<sup>354</sup> Borrower [and Guarantor] acknowledge[s] and agree[s] that Lender has no obligation whatsoever to discuss, negotiate or to agree to any restructuring of the Loan, or any modification, amendment, restructuring or reinstatement of the Loan Documents or to forbear from exercising its rights and remedies under the Loan Documents, except as expressly provided in this Agreement.

17. [BORROWER SUBSTITUTE LANGUAGE – No Change Of Position.<sup>355</sup> Borrower, [Guarantor] and Lender each acknowledge and agree that except as specifically set forth herein, none of Borrower, Guarantor[, Guarantor] nor Lender shall be deemed to have

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<sup>351</sup> The Lender seeks to prevent the claim that the act of seeking to settle claims with Borrower is due to Lender's waiver of rights.

<sup>352</sup> The Lender seeks to pre-empt any claim of a non-verbal modification of the obligations whether arising by performance or course of conduct.

<sup>353</sup> The Lender seeks to confirm that its undertaking the performance of the Agreement is not deemed to cure Borrower Defaults.

<sup>354</sup> The Lender seeks to reaffirm that by entering into this Agreement it has not obligation to enter into other settlements.

<sup>355</sup> The Borrower would seek to preserve the status quo as to its potential rights and remedies in exchange for the extra consideration it is providing, such as fees, surviving liability for limited claims, cooperation in providing a consensual deed, or refraining from filing bankruptcy.

amended or waived any rights, remedies or obligations contained in any of the Loan Documents or otherwise at law or in equity nor shall any of Borrower[, Guarantor] or Lender be deemed to have released or discharged any claim, counterclaim or defense that any of them ever had, may now have or may hereafter have arising out of or relating to the Loan or the Loan Documents, or the administration thereof, all of which are hereby expressly reserved. This Agreement shall not operate as a waiver by either Party of its right to demand full and timely performance of all obligations under the Loan Documents. Neither the execution of this Agreement nor any conduct shall operate to toll any time period which otherwise might be applicable, including without limitation any time periods which may be provided for in the Loan Documents or by statute upon the issuance or filing of a notice of default or a notice of sale under the Loan Documents, unless specifically agreed in writing in a document signed by the Parties. Nothing contained in this Agreement is intended (i) to limit either Party in initiating, continuing or otherwise proceeding to exercise any rights or remedies it may have before, during or after this Agreement, including, but not limited to, giving notices of default or, in the case of Lender, initiating foreclosure proceedings; or (ii) to relieve Borrower of any obligations it has under the Loan Documents (including the Obligations).]

## 18. Incorporation.

18.1 Incorporation of Recitals and Exhibits. Borrower [and Guarantor] acknowledge[s] that each of the Recitals is true and accurate, and each is incorporated herein by this reference as though fully set forth in the body of this Agreement [BORROWER SUBSTITUTE LANGUAGE: The foregoing Recitals are statements of estoppel made by Borrower [and Guarantor] and are to the actual knowledge of the individual signing below for [each of] the Borrower [and Guarantor] solely as its authorized officer, who hereby states that such officer would by custom and practice ordinarily be apprised of the information stated, has submitted this estoppel after reviewing the current files and materials ordinarily in the possession or reasonably available to the undersigned but without taking any further investigation, or other measures which are out of the ordinary business activity of the undersigned]<sup>356</sup>

18.2 Incorporated Documents. The documents referred to in the Recitals and the exhibits attached hereto are incorporated herein by reference and made a part hereof with the

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<sup>356</sup> Borrowers prefer to grant a certification/estoppel instead because there is no remedy of a statement in an estoppel is wrong, only if its is repudiated by the maker. Consequently, the Borrower may also prefer broad language limiting its liability, such as:

“The Borrower’s liability for the statements contained herein shall be limited to estoppel and it shall not be liable for any actual or purported negligence or inadvertent misstatement, omission or incomplete certification. The certifications shall not be deemed representations, warranties or covenants. Neither Borrower, nor any owner, partner, officer, agent, consultant, employee, director, or other party providing advice or services to Borrower shall be liable for the statements contained in this estoppel. This estoppel shall not act as a waiver, release, acquiescence, consent, acknowledgment, subordination or subjection by Borrower to any right, title, interest, lien, claim, covenant, restriction, duty or indemnification held or owed to any other party, including, without limitation, any rights relating to financing, collateral, sale, purchase or other disposition of the Property. This Borrower shall not act to waive any current or future requirement for consent to any such action or any other action required of the Lender. The sole purpose, intent, and effect of this estoppel is to estop the undersigned Borrower from making any statement, claim or assertion that is contrary to the statements contained in this estoppel.”

same force and effect as if herein restated in full. However, the following provisions of this Agreement shall prevail over any inconsistent provisions contained in the materials incorporated herein:

18.2.1 Modification Paramount. In the event that any term or provision of any of the Loan Documents is inconsistent or contrary to a specific and express term or provision of this Agreement, the explicit and express term or provision of this Agreement shall apply and shall be paramount. To the extent that no such express inconsistency exists, the terms and provisions of the Loan Documents, as amended, shall continue in full force and effect.

18.2.2 No Novation; Continuing Validity. This Agreement is not intended to be nor shall it constitute a novation of the Loan Documents or the indebtedness and obligations evidenced or secured thereby, as the case may be.

18.2.3 Further Compliance with Loan Documents. Borrower hereby ratifies, reaffirms and agrees to all terms, conditions and remedies of and contained in the Loan Documents and the indebtedness and obligations evidenced and/or secured thereby, and warrants and agrees that Borrower shall fully and strictly comply with all such terms and provisions, with time being strictly of the essence.

## 19. Miscellaneous.

19.1 No Enterprise. The relationship between Borrower and Lender is that of debtor and creditor. Nothing in this Agreement shall be deemed to create a partnership, joint venture or other association between Borrower and Lender or between Lender and any other party, or cause Lender to be liable or responsible in any way for the actions, liabilities, debts or obligations of Borrower or any other party.

19.2 Counterparts. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which shall collectively constitute a single agreement, fully binding upon and enforceable against the parties hereto. No amendment or supplement to this Agreement shall be valid or binding unless made in writing and executed by all the parties hereto.

19.3 Binding Effect. This Agreement shall be binding upon the Borrower[, Guarantor] and Lender and their respective heirs, successors, and assigns.

19.4 Choice of Law. This Agreement shall be governed by the laws of the [State/Commonwealth] of \_\_\_\_\_, without giving effect to principles of conflicts of laws.

19.5 Jurisdiction. The state and federal courts located in the [State/Commonwealth] of [\_\_\_\_\_] shall have exclusive jurisdiction to hear and determine any claims or disputes between Borrower and Lender, pertaining to this Agreement. Borrower expressly submits and consents in advance to such exclusive jurisdiction in any action or proceeding commenced in such courts.



19.6 No Third Party Beneficiaries. The Borrower [and the Guarantors] acknowledge[s] and agree[s] that the acceptance by the Lender of the terms of this Agreement and the assignment to the Lender of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender to third parties which might have claims of any kind whatsoever against the Borrower[, or the Guarantor] or the Property and that the Lender does not assume or agree to discharge any liabilities pertaining to the Property now or hereafter arising. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

19.7 Time of Essence. Time is of the essence of this Agreement and each provision of this Agreement.

19.8 No Brokerage. The Parties represent and warrant each to the other that the transactions hereby contemplated are made without liability for any finder's, realtor's, broker's, agent's or other similar commission. The Parties mutually agree to indemnify and hold each the harmless from claims for commissions asserted by any party as a result of dealings claimed to give rise to such commissions.

19.9 Lender's Expenses. In addition to payments at Closing under Section 3, within thirty (30) days of receipt of an invoice therefor, Borrower shall pay to Lender all of its costs and expenses incurred in connection with this Agreement and any other matters related to the Property, [including, but not limited to, the review and approval of any lease with respect to the Property and any related subordination, non-disturbance and attornment agreements,] all of which costs and expenses, shall include, but not be limited to, outside and in-house attorney's fees and disbursements.<sup>357</sup>

19.10 Additional Documents; Appointment of Lender As Attorney-In-Fact. At all times following the execution of this Agreement, Borrower [and Guarantor] shall execute and deliver to Lender, or shall cause to be executed and delivered to Lender, and shall do or cause to be done, all such other instruments, documents and actions as Lender may reasonably deem necessary or desirable to assure Lender of the benefit of this Agreement and the other Loan Documents. In the event Borrower [or Guarantor] fails to execute and deliver any such instrument or document within ten (10) days of the request therefor, Borrower [, Guarantor and each of them] hereby irrevocably appoints any officer of Lender as [his, her and/or its] attorney-in-fact (which appointment is durable, irrevocable and coupled with an interest) for the purpose of executing and delivering such instruments or documents.

19.11 Notices. All notices which may be given pursuant to this Agreement or the Loan Documents shall be in writing and shall be personally delivered or sent by first-class certified or registered United States mail, postage prepaid, return receipt requested, and sent to the party at its address appearing above or such other address as any party shall hereafter designate by notice to the other party given as aforesaid. All notices shall be deemed effective

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<sup>357</sup> If these expenses are material, and Borrower has cash flow issues (as is likely to be the case since the parties are discussing modification), Lender may consider adding these costs to the outstanding principal of the Loan, and giving them priority in respect of the order of application of payment amounts.

upon receipt or, if mailed, upon the expiration of the third day following the date of mailing, whichever occurs first.

19.12 Joint and Several Liability. The obligations, undertakings and agreements of each of the Borrower shall be joint and several.]

19.13 Severability. If any clause or provision of this Agreement is determined to be illegal, invalid or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Agreement will not be affected thereby if the essential terms of the Agreement upon which Lender relied remain in effect.<sup>358</sup> It is the intention of the parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar in terms to such provision as is possible and be legal, valid and enforceable.

19.14 Third Party Obligations. The Borrower and the Guarantors acknowledge and agree that the acceptance by the Lender, its nominee or assignee of ownership of the Property and the power of attorney to sell the Property pursuant to the terms of this Agreement and the assignment to the Lender, its nominee or assignee of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender, its nominee or assignee, to third parties which might have claims of any kind whatsoever against the Borrower or the Guarantors, Property, or the Property and that the Lender for itself and its nominee or assignee does not assume or agree to discharge any liabilities pertaining to the Property or Property which originated prior to the Closing Date, or undertake any obligation to complete the leasing or sale of the Property. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

19.15 Counsel; Voluntary Agreement. The Parties represent and warrant that each of them is represented by legal counsel of its choice, that each of them has consulted with counsel regarding this Agreement (and has been advised to consult independent counsel with respect to the upcoming Discussions as well), that each of them is fully aware of the terms of this Agreement and understands that this is a legally binding contract that may affect such party's rights, and each of them has entered into this Agreement voluntarily and without coercion or duress of any kind.

19.16 Confidentiality. It is important to the Parties to maintain a reasonable confidentiality regarding the subject matter hereof. Accordingly, no Party shall disclose the undertaking of the terms or conditions of this Agreement, any materials, information (written, oral or observed) or incidents related to this Agreement, or any document executed or prepared in connection herewith, including, without limitation, correspondence, electronic transmissions, voice recordings, notes, analyses based on confidential material, budgets and projections, except as may be required by applicable law, pursuant to a court order or subpoena, or to such Party's counsel or advisers a reasonably necessary to assist such Party in the conduct of any negotiations related to this Agreement, or to the extent such information could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such

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<sup>358</sup> Unlike most severability clauses, this recommends the Agreement be void if a material term is unenforceable.

evidence would otherwise be admissible, without regard to whether it was originally derived in the context of this Agreement.

19.17 JURY TRIAL WAIVER. BORROWER[, GUARANTOR,] AND LENDER SHALL NOT SEEK A JURY TRIAL IN ANY ACTION BASED UPON OR ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT OR THE LOAN. TO THE EXTENT PERMITTED BY APPLICABLE LAW, [EACH OF] BORROWER [,GUARANTOR] AND LENDER HEREBY IRREVOCABLY AND EXPRESSLY WAIVES ANY AND ALL RIGHT TO ANY SUCH JURY TRIAL AND AGREES THAT NO SUCH ACTION WITH RESPECT TO WHICH A JURY TRIAL HAS BEEN WAIVED SHALL BE SOUGHT TO BE CONSOLIDATED WITH ANY OTHER ACTION WITH RESPECT TO WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF BORROWER [,GUARANTOR] AND LENDER AND ITS COUNSEL, AND SHALL NOT BE SUBJECT TO ANY EXCEPTIONS.

**IN WITNESS WHEREOF**, the undersigned have caused this Agreement to be executed and delivered effective as of the Effective Date.

**BORROWER:**

By: \_\_\_\_\_  
Name:  
Title:

**LENDER:**

By: \_\_\_\_\_  
Name:  
Title:

**GUARANTOR:**

By: \_\_\_\_\_  
Name:  
Title:

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 : SS.

[Notarial Seal]  
My commission expires:

## CORPORATE ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :  
: SS.

COUNTY OF \_\_\_\_\_

On this, the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ before me, the undersigned officer, personally appeared \_\_\_\_\_ who acknowledged himself/herself to be the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ corporation, and that he/he, as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself/herself as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

[Notarial Seal]

My commission expires:

**PARTNERSHIP ACKNOWLEDGMENT**

COMMONWEALTH OF PENNSYLVANIA       :  
:  
:       SS.

COUNTY OF \_\_\_\_\_

On this, the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ before me, the undersigned officer, personally appeared \_\_\_\_\_ who acknowledged himself/herself to be a/the general partner of \_\_\_\_\_, a \_\_\_\_\_ general/limited partnership, and that he/she, as such general partner, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the partnership by himself/herself as such general partner.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

[Notarial Seal]

My commission expires:

**EXHIBIT A**  
**PROPERTY DESCRIPTION**



## **EXHIBIT B GLOSSARY**

- “Agreement” shall have the meaning set forth in the Introduction.
- “Assumed Liabilities” shall have the meaning set forth in Section 8.2.26.
- “Bankruptcy Code” shall have the meaning set forth in shall mean Title 11, U.S.C.A.
- “Borrower Parties” shall have the meaning set forth in Section 10.1.
- “Borrower” shall have the meaning set forth in the Introduction.
- “Broker” shall have the meaning set forth in Section 5.7.
- “Cash Flow Statement” shall have the meaning set forth in Section 8.1.10.
- “Closing Date” shall have the meaning set forth in Section 4.
- “Code” shall mean the Internal Revenue Code of 1986.
- “Collateral Agreement Proceeds” shall have the meaning set forth in Section 3.4.
- “Contractor Statements” shall have the meaning set forth in Section 8.1.9.
- “Contracts” shall have the meaning set forth in Section 6.2.3.
- “Covenant Consideration” shall have the meaning set forth in Recital E.
- “Covenant Not to Sue” shall have the meaning set forth in Section 3.
- “Debtor Proceeding” shall have the meaning set forth in Section 16.1.
- “Deficiency Contribution” shall have the meaning set forth in Section 3.4.
- “Effective Date” shall have the meaning set forth in the Introduction.
- “Employee Statement” shall have the meaning set forth in Section 8.1.14.
- “Expense Statement” shall have the meaning set forth in Section 8.1.11.
- “Forbearance Date” shall have the meaning set forth in Section 14.2.
- “Guarantor” shall have the meaning set forth in the Introduction.
- “Guaranty” shall have the meaning set forth in Recital A.
- “Indebtedness” shall have the meaning set forth in Section 6.2.22.

“Indemnified Parties” shall have the meaning set forth in Section 17.6.

“Inventory” shall have the meaning set forth in Section 8.1.13.

“Judgment” shall have the meaning set forth in Recital C.

“Leases” shall have the meaning set forth in Section 6.2.5.

“Lender” shall have the meaning set forth in the Introduction.

“Loan Agreement” shall have the meaning set forth in Recital B.

“Loan Documents” shall have the meaning set forth in Recital B.

“Loan” shall have the meaning set forth in Recital A.

“Manager/Leasing Agreement List” shall have the meaning set forth in Section 8.1.17.

“Mortgage” shall have the meaning set forth in Recital A.

“Net proceeds” shall have the meaning set forth in Section 5.7.

“New Value” shall have the meaning set forth in Recital D.

“Note” shall have the meaning set forth in Recital A.

“Obligations” shall have the meaning set forth in Recital B.

“Official Records” shall have the meaning set forth in Recital A.

“Other Borrower” shall have the meaning set forth in Section 10.2.

“Other Loan Documents” shall have the meaning set forth in Section 10.2.

“Other Loan” shall have the meaning set forth in Section 11.2.

“Party” and “Parties” shall have the meaning set forth in the Introduction.

“Payables” shall have the meaning set forth in Section 6.2.14.

“Payable Statement” shall have the meaning set forth in Section 8.1.12.

“Permits” shall have the meaning set forth in Section 6.2.8.

“Potential Tenant Statement” shall have the meaning set forth in Section 8.1.8.

“Property” shall have the meaning set forth in Recital A.

“Released Parties” shall have the meaning set forth in Section 17.3.

“Releasing Parties” shall have the meaning set forth in Section 17.3.

“Security Instrument” shall have the meaning set forth in Recital A.

“Service Contract Certification” shall have the meaning set forth in Section 8.1.16.

“Title Company” shall have the meaning set forth in Section 8.3.2.

“Title Policy” shall have the meaning set forth in Section 8.3.2.

“Total Credit Adjustment” shall have the meaning set forth in Recital F.

“Utility Account List” shall have the meaning set forth in Section 8.1.15

“Voidable Transfers” shall have the meaning set forth in Section 16.2.

**Exhibit 2.1.1**

**PROPERTY LIST**

**EXHIBIT 2.2**  
**SPECIAL POWER OF ATTORNEY**

KNOW ALL MEN BY THESE PRESENTS, that we, [ ], a New Jersey, do hereby irrevocably appoint, authorize and empower [ ], a [Pennsylvania corporation], our true and lawful attorney for us and on our behalf and in our name to (i) execute any and all agreements, documents, instruments, certificates, affidavits and deed necessary to auction or otherwise sell certain of our real property located in [ ] County, State of [ ], as more particularly described in Exhibits "A-1" and "A-2" attached hereto and made a part hereof (the "Property"), and (ii) take any and all other actions as may be necessary to auction or otherwise sell the Property.

Our attorney may delegate the foregoing powers to any person or entity whom our attorney may select.

This appointment is made for security for our obligations under that certain letter agreement dated this date between us and [ ], is coupled with an interest and is, therefore, irrevocable.

We hereby ratify and confirm all that our attorney shall do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, and intending to be legally bound, we have hereunto set our hand and seal this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

[ ]

By: \_\_\_\_\_

Name:

Title:

**EXHIBIT 3**  
**SECURED CLAIMS**

**EXHIBIT 6.2.3**  
**CONTRACTS**

**EXHIBIT 6.2.9**  
**COVENANTS, CONDITIONS, ENCUMBRANCES, EASEMENTS AND**  
**RESTRICTIONS**



**EXHIBIT 6.2.5**  
**ORAL OR WRITTEN LEASES, RIGHTS OF OCCUPANCY, GRANTS OR CLAIMS OF**  
**RIGHT, TITLE OR INTEREST**

**EXHIBIT 8.2.10**  
**MEMORANDUM OF AGREEMENT OF SALE**

**EXHIBIT 8.2.26**  
**ASSUMED LIABILITIES**

**EXHIBIT -6**  
**Page 54**

PBI Distressed Commercial Mortgage Loan Workout Forms  
Settlement Agreement

# **DISTRESSED COMMERCIAL MORTGAGE LOAN WORKOUTS: ANALYSIS AND FORMS**

**Gregory G. Gosfield, Esquire**

**KLEHR | HARRISON | HARVEY | BRANZBURG LLP**

**1835 Market Street • Philadelphia, PA 19103**

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## **INTRODUCTION TO CONSENSUAL RESOLUTION**

- **Kubler-Ross Model: Five Stages of Loss**
- **Essential Elements**
- **Borrower Advantage**
- **Lender Advantage.**

# INTRODUCTION TO CONSENSUAL RESOLUTION

- Negotiation Points.
- Diligencing Loan Underwriting
- Borrower Quality Assurances (“Quality Assurances”) – The unrecoverable warranties

# PRE-WORK-OUT ISSUES

- Default and Other Notices
- Answering Defaults.
- Commencement of Settlement Negotiations and the Confidentiality or Pre-Contractual Letter.

## LIFE DURING THE FORBEARANCE PERIOD

- No change of loan terms
- Blind trust - but cut the cards
- New defaults or Old Defaults
- Hoping for change of events

## DOCUMENTATION OF SETTLEMENT AND TRANSFER AGREEMENT: FORBEARANCE, MORTGAGE MODIFICATION, DEED-IN-LIEU, OR FORECLOSURE

- Mortgage Loan Modification
- Shorten Term, Increase/accrue Interest,  
Add Collateral
- Add collateral by taking collection of  
Rents

DOCUMENTATION OF SETTLEMENT AND  
TRANSFER AGREEMENT: FORBEARANCE,  
MORTGAGE MODIFICATION, DEED-IN-LIEU, OR  
FORECLOSURE

- Deed-in-Lieu
- Consensual Foreclosure
- Non-Consensual Foreclosure
- UCC Foreclosure

DOCUMENTATION OF SETTLEMENT AND  
TRANSFER AGREEMENT: FORBEARANCE,  
MORTGAGE MODIFICATION, DEED-IN-LIEU, OR  
FORECLOSURE

- Guaranties
- Confession of Judgment
- Deficiency Judgment
- Tax Issues

# REAL ESTATE FORECLOSURE PROCEDURES

- Procedural Timeline
- Suspension of Action
- Friendly Foreclosure
- Borrower or Joint Venture Investor  
Foreclosure Strategy
- REMIC Restrictions

# REAL ESTATE WORKOUT BANKRUPTCY ISSUES

- The Bankruptcy Filing
- Bankruptcy Issues That May Arise From  
Relationship Between Debtor And  
Lender
- Obtaining Relief From The Automatic  
Stay



# REAL ESTATE WORKOUT BANKRUPTCY ISSUES

- The Plan Of Reorganization or Liquidation
- The Sale Without A Plan

# TIMELINE FOR WORKOUT AND RECOVERY

- Default
- Forbearance
- Deed-in-Lieu
- Foreclosure
- Bankruptcy